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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JULY 11, 1997

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Taken before D'Lois L. Jones, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 11th day of July, A.D., 1997, between the hours of 9:00 o'clock a.m. and 3:50 p.m. at the Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78701.

JULY 11, 1997

MEMBERS PRESENT:

Professor Elaine A. Carlson
Professor William V. Dorsaneo III
Donald M. Hunt
David E. Keltner
John H. Marks, Jr.
Russell H. McMains
Anne McNamara
Richard R. Orsinger
Honorable David Peeples
David L. Perry
Luther H. Soules III
Stephen D. Susman

MEMBERS ABSENT:

Alejandro Acosta, Jr.
Prof. Alexandra Albright
Charles L. Babcock
Pamela Stanton Baron
David J. Beck
Honorable Scott A. Brister
Honorable Anne T. Cochran
Honorable Sarah B. Duncan
Michael T. Gallagher
Anne L. Gardner
Hon. Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring
Tommy Jacks
Franklin Jones, Jr.
Joseph Latting
Thomas S. Leatherbury
Gilbert I. Low
Honorable F. Scott McCown
Robert E. Meadows
Anthony J. Sadberry
Paula Sweeney
Steven Yelenosky

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Honorable William Cornelius
O.C. Hamilton
Doris Lange

EX-OFFICIO MEMBERS ABSENT:

Honorable Paul Womack
Paul N. Gold
David B. Jackson
W. Kenneth Law
Mark Sales
Honorable Paul Heath Till
Bonnie Wolbrueck

JULY 11
~~MAY 16~~, 1997
AFTERNOON SESSION

Doc #11907

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CHAIRMAN SOULES: I do appreciate the attendance, and I'm sure that we are going to be able to get done today. We may work all the way to 5:30, and since we are short of people today I hope that those of you who are here will stay as long as you possibly can. What we plan to do is cover this agenda, unless we get bogged down somewhere along the way because Bill definitely -- Bill Dorsaneo definitely needs some time for his report.

I believe that we will finish our work at the September meeting. We may need both days, but unless we get something back from the Court to consider or we get the justice court rules, something of that nature occurs, we probably will recess after the September meeting subject to call and won't have any further scheduled meetings after that until we need to have one.

MR. McMAINS: Well, since we are all lame ducks don't we just disband?

CHAIRMAN SOULES: Well, I haven't been told what to do.

MR. MARKS: We just don't exist

anymore.

CHAIRMAN SOULES: I did inquire about that, and I was told to keep on keeping on despite the fact that all of our terms had expired.

MR. McMAINS: Well, they are looking for a bulletproof shield, is what they are trying to find.

CHAIRMAN SOULES: I want to welcome Rene Mouledoux who is here. He's counsel for Exxon. He is a vice-chair for Rules of Evidence. Right up there on the corner with his hand up there. Please introduce yourself to Rene. He is here to represent the State Bar Rules of Evidence Committee. Mark Sales was not able to be here, so welcome Rene and also John Gray, who is a second-year law student at SMU who has been working with Bill on the rewrite of the Rules of Civil Procedure, and we appreciate all of your good work, John, in that regard.

Let's start with -- John Marks is going to give the report on the Rules of Evidence 706 and 702. John, so let's start with you.

MR. MARKS: Okay. Why don't I

start with 702 first because that's not going to take very long. Buddy told me that we were waiting for two things: No. 1, to have a decision come down. It's come down, and what we probably need to do is to look at what Professor Sutton has done in light of what the Havenor decision said, and also I think somebody else is working on a rule, and I forgot who it was, but maybe Richard Orsinger's group had some draft that they were working on for them.

So at this point there is really not anything to report on Rule 702 unless you want to talk about Professor Sutton's recommendations with respect to comments. He recommended, and I think the Rules of Evidence Committee recommended, no change to Rule 702, but just to give the parameters of what a court would need to look at within the body of the comment. So that's all I have to say about that at this point, unless somebody else has a comment.

CHAIRMAN SOULES: Any comments on 702? So what are we going to do with that, John? Where are we headed with that?

MR. MARKS: Well, I think Buddy wanted to table it until the Havenor decision came out and then look at it in light of Havenor and then take it up maybe in September.

CHAIRMAN SOULES: Okay. Havenor came down yesterday.

MR. MARKS: Yes.

CHAIRMAN SOULES: I understand you have a copy of it. Judge Peeples was looking at it. Some 60 pages in, I guess, the majority opinion, and there is some concurrences. No dissent?

MR. McMAINS: None. Yeah.

CHAIRMAN SOULES: Right. Well, let's be ready to get something up or down in September.

MR. MARKS: Okay.

CHAIRMAN SOULES: If it's recommend no change to 702 or if you are going to have a change, to try to get as much thought into it, reasoning into it, as possible so that we can have a presentation on a written proposition and --

MR. McMAINS: Luke, what is our

September date?

CHAIRMAN SOULES: Holly will get it for you right here.

MR. McMAINS: The reason I ask is that obviously there will be motion for rehearing in Havenor, and I would say the likelihood is that it won't be acted upon by the time of our September meeting.

CHAIRMAN SOULES: Yeah. Maybe not for a year. So...

MR. McMAINS: I understand. But I just say that -- you know, I mean, I don't have any problem with going ahead and taking up the issue based on the existing Havenor opinion, but I think that if that's our sole polestar that we have some risk that it might be modified on rehearing.

CHAIRMAN SOULES: I understand, and I'm assuming that what we send up there to the Supreme Court, that it's probably going to linger until at least the rehearing on Havenor is behind them and be modified accordingly, with or without our subsequent review.

September 19th and 20th are the dates.

MR. McMAINS: Okay.

CHAIRMAN SOULES: 8:30 to 5:30 on the 19th and 8:00 to noon on the 20th. If the work looks like it's going to be enough, we may work the afternoon of Saturday the 20th, if that would alleviate a November meeting, for example; but I think we are far enough down the line now that one more meeting is going to get us through the wickets.

MR. MARKS: Okay.

CHAIRMAN SOULES: Okay. John.

MR. MARKS: All right. The next item is Rule 706, and this is the rule that we were asked to draft that would give the court the discretion to retain an expert to assist him in his Rule 702 considerations if there is a challenge to an expert's testimony. The subcommittee redrafted its rule, which is Item No. 1 in Buddy's letter, and then made the changes that we talked about in the Rules of Evidence Committee version, which is Item No. 2, and then Item No. 3 is just a very simple, short version which generally tracks the discretion of the court to hire a lawyer to give him assistance in certain situations.

This would just enable him to hire an expert to consult with him, give him advice, but it wouldn't be part of the record. It wouldn't be anything. It would just be something that he could utilize as a resource in making his decisions. I guess, though, really the first question is -- and I know that the Rules of Evidence Committee when they considered this issue were unanimous in saying they didn't think we should have one, and I think that what Buddy had in mind is that we discuss first whether a rule like this is necessary and ought to be done.

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: Are we talking about court authority to hire or retain an expert on a Daubert/Robinson question or on a jury question?

MR. MARKS: Daubert/Robinson. Yes.

CHAIRMAN SOULES: Rene, do you have any input on this?

MR. MOULEDOUX: Yes. Mr. Marks is correct that the State Bar Evidence

Committee strongly opposes the court appointment of experts for Robinson decisions, and it was unanimous in its decision. We are a bipartisan group. There was absolutely no support for an appointment of an expert, and I would be happy to state the committee's reasons if you would like.

CHAIRMAN SOULES: Please.

MR. MOULEDOUX: Among the members it was felt that the admissibility of evidence is a legal question for the court and not a fact question for an outside expert, that trial judges are competent. In fact, they have the duty under Rule 104 to make the admissibility determination without resorting to an outside expert.

There is a fear that it may be unnecessarily invoked by some judges who may be too lazy to go through the process of making their own Daubert determinations. In addition, it will be difficult to identify a truly qualified gatekeeper expert who is impartial and can render an unbiased opinion. Similarly, it will be difficult for the appointed expert to limit his opinions solely

to reliability without getting into the validity, accuracy, or credibility of the underlying opinion.

In addition, it was noted that most experts in significant cases tend to be very expensive; therefore, it would be expensive for a court to find a qualified expert who could pass on methodology or principles used by the offered expert; and therefore, only lesser qualified experts may be willing to accept the post at a lower fee. So, in fact, you may have flies trying to render opinions on giants in the field.

In addition, there was concern that the cost of a court-appointed expert may be imposed upon the parties to the litigation. This is a judicial function. It's the court doing it on its own motion; and therefore, the parties should not be charged with the cost of an expert; and if such a rule were passed, the cost should be born by the county in which the case is pending. Those are the reasons discussed by the committee as to why we strongly oppose court appointment of a Daubert expert.

CHAIRMAN SOULES: Comments from the members?

MR. MARKS: Well, I will say that the evidence subcommittee, there was not a lot of enthusiasm for the rule except for Judge Brister, and I personally can see possibly some situations where it might be helpful to a court, but by the same token I don't have any real strong feelings about it one way or the other.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: I think it's a bad idea primarily for the reason that it will shift the inquiry from whether this is acceptable science, which is kind of a broad kind of thing that a layman ought to be able to listen -- you know, has this been peer-reviewed, has it been tested, et cetera, et cetera, the kind of questions that Daubert asks. It will shift the inquiry from that to whether the expert's opinions are right or wrong, hiring independent experts, which is not supposed to be a Robinson/Daubert issue, and I think you shouldn't routinely have an expert in this case.

CHAIRMAN SOULES: Any other comments? Rene.

MR. MOULEDOUX: The Rules of Evidence Committee, however, did draft a proposed rule in the event the Court were to decide to create that rule; and in our rule we tried to address some, but not all, of the concerns that the committee members had.

I have looked at the draft the Supreme Court Advisory Committee has been studying. There are some changes or differences between the State Bar Evidence Committee proposed rule and that of the Supreme Court Advisory Committee. The State Bar evidence committee does feel strongly that there should be a right to cross-examine any court-appointed Daubert expert and filing response with the court to keep the expert from being automatically accepted by the court if under the facts he truly is not qualified to render a reliability opinion or if the expert has gone beyond his charge and has given an opinion on credibility and other aspects of the substance of the opinion.

CHAIRMAN SOULES: Judge

Peeples.

HONORABLE DAVID PEEPLES: A couple of comments. I don't have strong feelings one way or the other about it. I think an additional reason against doing such a rule would be I can envision judges having the hearing and thinking, "Ooh, gosh, this is a tough question. I think I will punt it and delay ruling and hire an expert," and then four months later you are still going to have a ruling, and I think that might happen.

But I'm a little bit puzzled. I think I heard Rene say that everybody thinks judges are competent to do all of this Daubert thing. I thought that we were being criticized for just the opposite. Why do we have Daubert/Robinson? Because juries ought to do this and not judges, but I'm glad to know that there is this resounding vote of confidence in the judiciary's ability to handle all of these scientific questions. Thank you.

MR. MOULEDOUX: You're welcome.

CHAIRMAN SOULES: Did the committee have a recommendation, the subcommittee have a recommendation for the

committee as a whole?

MR. MARKS: Actually, no. We have three different versions of a rule. The first version is the Advisory Committee's rule, which we have already looked at. The second one is the Rules of Evidence Committee's version, which we looked at last time and made changes, and Exhibit No. 1 to Item 2 are the changes and comments on the changes to the Rules of Evidence rule. So I guess our recommendation would be that if the committee wants to have a rule or propose a rule of this nature to the Supreme Court, we have got three versions for you to look at.

CHAIRMAN SOULES: All right. You have no recommendation one way or the other as to whether there should be such a rule; is that right?

MR. MARKS: No. I got the sense from the committee that -- subcommittee, that people really weren't very enthusiastic about it, but there is not a recommendation.

CHAIRMAN SOULES: Okay. Do we have a motion?

MR. McMAINS: I move that we

reject the notion of a rule authorizing the appointment of court-appointed experts.

MR. SUSMAN: Second.

CHAIRMAN SOULES: Moved by Rusty, seconded by Steve Susman that there be no such rule. Any further debate?

Those in favor of the motion show by hands. No rule. Ten. Those opposed to the motion, who think we should have a rule? None. Ten to none. No rule.

MR. MARKS: That is my report.

CHAIRMAN SOULES: That is the Rules of Evidence report. All right. And as I understand it, John, as far as the Rules of Evidence subcommittee work is concerned that leaves only 702 on your docket.

MR. MARKS: I think that's right.

CHAIRMAN SOULES: Everything else is clear, right?

MR. MARKS: Right.

MR. MOULEDOUX: Mr. Chairman, may I be excused?

CHAIRMAN SOULES: Yes, Rene, you may, or you are welcome to stay. You are

certainly welcome to stay.

MR. McMAINS: Go pop the champagne corks.

CHAIRMAN SOULES: Richard Orsinger is not here, but Bill is going to -- I don't have any information as to whether or not he is coming, but Bill is able to talk about two of these, so why don't we go ahead and go forward and present?

PROFESSOR DORSANEO: Well, this is for information purposes only. Item B, Civil Procedure Rule 165a was not studied or to the extent it was studied it was not ultimately incorporated in Don Hunt's report on the 300 series of rules, particularly the successor to Rule 329b. Rule 165a is currently incorporated in the form that it appears in the current rule book in Section 6 of the recodification draft that you will be receiving as soon as it's copied by the State Bar staff this morning or perhaps early this afternoon.

That rule needs to be coordinated and made compatible with the successor to Rule 329b in the Hunt report. Don Hunt has been

working on drafts, which he has sent to Lee Parsley and to me in an effort to coordinate and to make compatible the timetable provisions in what is now 165a with the ultimate successor to 329b, and I think the only thing, subject to what Don has to say, that the Orsinger committee would ask is whether the committee as a whole wants the rules to be compatible, and it's obvious to me that the answer to that question would be "yes."

CHAIRMAN SOULES: Everybody agree with that? No disagreement.

PROFESSOR DORSANEO: C, comparison of the appellate rules to the trial rules and recommendations on conformity of same, this is a larger project than it might first appear. We have done this to some extent. For example, the committee as a whole at the last meeting voted for a coordination of the appellate rules with the trial rules concerning, you know, proof of mailing in connection with Civil Procedure Rule 5, and there is a lot of this kind of work to do, and I don't know whether it doesn't make sense. I

think it, in fact, does make sense to do that when we ultimately finalize the recodification report.

There are some issues, though, that are troublesome issues. The appellate rules provide, for example, in Appellate Rule 9.5 for service of papers, and 9.5 appears to be about papers filed in the appellate court, although it's a little bit ambiguous, on other counsel by regular mail. Of course, our Civil Procedure rules, particularly Civil Procedure Rule 21a does not authorize that method of service.

In working on the appellate rules and my own books, it is a little bit unclear to me whether a notice of appeal, which is filed in the trial court, would be served on other parties by regular mail or whether certified mail would be required. I think the way the rules are worded now probably the prudent practitioner would use certified mail, you know, rather than the 9.5 regular mail; but this involves looking at the appellate rules and deciding, you know, what we are going to do with them and then looking at the

recodification draft and deciding what we are going to do with them. So beyond saying that things ought to be compatible to the extent they can be compatible and that requires, you know, careful study, I don't think there is that much to do about it, and that concludes my report.

CHAIRMAN SOULES: On C?

PROFESSOR DORSANEO: C.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Well, in that regard, I mean, are we going to be kind of anchored in concrete as of September 1 with the effective date of the appellate rules so that if coordination of the two might mean that you would change both of them in some way or might prefer to change one to adopt the practice that's in the trial rules, you know, you're kind of hamstrung of doing that if the appellate rules have already gone into effect, aren't you?

PROFESSOR DORSANEO: Well, but as Judge Pope said years ago, this rule making process is an ongoing process, and I don't think we are ever anchored in concrete. We

just adjust when the problem becomes apparent.

CHAIRMAN SOULES: Well, I think there is probably a justification for moving to first class mail only at the appellate level.

PROFESSOR DORSANEO: And I have talked to Lee about this, and what we would do would be to change the notice of appeal rule that talks about serving the notice of appeal on all parties to the trial court's judgment by saying in that rule "in accordance with Appellate Rule 9.5," you know, to make it clear that it's not in accordance with Civil Procedure Rule 21a, unless you want to.

CHAIRMAN SOULES: I would rather say "in accordance with Rule 21a" since that's still going in the trial court rules.

PROFESSOR DORSANEO: Well, that's the issue.

CHAIRMAN SOULES: Oh. I thought the issue was what do we -- and we have already voted to have certified mail in the trial process. I thought maybe you were revisiting that.

PROFESSOR DORSANEO: No. But

for the notice of appeal.

MR. McMAINS: No. The problem is appellate matters that are actually done at the trial court, in the trial court. I mean, that's one of the problems.

PROFESSOR DORSANEO: The only one that I think ought to be served 9.5, by regular mail, is a notice of appeal, and I could change my mind on that. Motions that are mentioned in the appellate rules that are trial court motions ought to be dealt with like other trial court motions, it seems to me. You know, like motions for original exhibits. There is no reason to treat that trial court motion differently from, you know, any other motion that you would file in the trial court. I think this creates too much confusion.

CHAIRMAN SOULES: Okay. Help me, because so many of these things I have lost. Do we still have the rule that if -- well, we don't. Every party has to perfect their own appeal by filing a notice of appeal on time, right?

PROFESSOR DORSANEO: Uh-huh.

You get 14 days if the other side perfects the appeal and you didn't perfect your appeal, although you have to perfect your appeal to alter the trial court's judgment. You have 14 more days after the first notice of appeal is filed.

CHAIRMAN SOULES: Well, do we want that trigger to be pulled by certified mail or regular mail, the 14-day trigger for other people to get on board? That's the issue. It's an important trigger.

PROFESSOR DORSANEO: You know, you may think certified mail is better, but I'm more likely to get regular mail than I am to get certified mail. You know, I get some thing that says, "Go to the post office."

MR. HAMILTON: Well, what if you don't get the notice and 14 days goes by? Do you have any recourse?

CHAIRMAN SOULES: I guess you have 15 days of recourse. That rule is still in there, isn't it?

MR. HAMILTON: But if you don't ever get the notice for whatever reason, can you go to the court of appeals and say, "Look,

I didn't get any notice, and you ought to give me some more time to perfect my appeal"?

CHAIRMAN SOULES: Well, if you don't get notice of an overruling of a motion for rehearing in the court of appeals, you're out. The Supreme Court has just passed on that without saying anything other than WOJ. That's a shocker to me, but the clerk didn't send notice, there wasn't even a written order in the court of appeals, just a docket entry, "motion for rehearing overruled." The party winning in the court of appeals knew about it and didn't say anything to the party losing in the court of appeals. The party losing in the court of appeals after time to file a petition for writ of error discovered it, filed a bill of review, did all kinds of things to no avail. So I guess if you can have that kind of a consequence, you can certainly have a consequence of 14 days and you're out.

MR. MARKS: I guess you need certified mail then.

MR. PARSLEY: You will get a notice from the court that a notice of appeal has been filed.

CHAIRMAN SOULES: But if you don't --

MR. PARSLEY: And you are supposed to get served. So there is supposed to be two things that happen. If you don't, then you have got a 15-day extension of time. If that goes by, I don't know what happens. All Bill was asking me was does the clerk give you notice, and the answer is "yes," you are still supposed to get a notice from the clerk.

CHAIRMAN SOULES: You are supposed to get a notice from the clerk that your motion for rehearing was overruled, too.

MR. ORSINGER: There is a new TRAP 2 that permits the court of appeals to make exceptions to all deadlines except for perfecting an appeal.

CHAIRMAN SOULES: Okay. Those in favor of certified mail show by hands.

MR. McMAINS: Yeah, but notice of appeal is perfecting appeal, and that's what we are talking about.

CHAIRMAN SOULES: Show by hands, certified mail or first class mail. Certified mail for a notice of appeal? Six.

Regular mail for notice of appeal? Three. Six to three certified mail. So that rule should stay in accordance with Rule 21a.

Richard, are you ready to go forward now on 98a and 165a?

MR. ORSINGER: Luke, we don't have an offer of judgment rule to present yet, and on the matching of the appellate rules with the trial rules I don't have Bill's final draft of the early trial rules, but if I can get them today I will work on that during the day.

PROFESSOR DORSANEO: You will get them.

MR. ORSINGER: Do you have them here with you?

MR. McMAINS: They are being copied.

PROFESSOR DORSANEO: Yeah. The whole package.

MR. ORSINGER: Okay. Let me work on that during the day, Luke, and I will report back toward the end of the day.

CHAIRMAN SOULES: Okay. We are going to set 98a on the docket for September

19th, up or down. That will probably be our last meeting, and if it gets bogged down, it just won't get done this time.

MR. ORSINGER: Yeah.

CHAIRMAN SOULES: How about 165a?

MR. ORSINGER: I saw that on the agenda, and I'm sorry, I don't know what the issue was that was before us. It was a perfection of error on the DWOP.

MR. McMAINS: It was a coordination of timing with what formerly was 329b's timing, make sure they are coordinated, whether they are the same.

MR. ORSINGER: Well, Bill, we looked at that several meetings ago.

PROFESSOR DORSANEO: Don Hunt is working on that right now.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: Where are you, Don? You're working on it.

MR. HUNT: We're done as far as I'm concerned. If Bill thinks what I have done is good, well, that's fine. If there is a problem, well, I don't know it.

CHAIRMAN SOULES: What's been done?

PROFESSOR DORSANEO: I planned to get to that on Monday, but it took me until today to get what's being handed out done.

CHAIRMAN SOULES: Oh, it's coming. Okay. We will delay that until we get the papers.

PROFESSOR DORSANEO: Put that on the agenda for September.

CHAIRMAN SOULES: Okay. Let's go to Judge Brister's report, which is -- does everybody have one of these? If you haven't picked one up it's up here, on 76a. It looks to me like his write-up here is pretty much what we voted on last time. I'll give everybody a chance to read this.

The essence of it is that records not on file with the court are not subject to 76a, but the court can order documents such as depositions, discovery, what have you, that are not on file, the court can order them filed, at which time they would become court records and subject to a 76a process. Now, we have voted in favor of that last time. Is

there any further discussion on this? Yeah.

MR. HAMILTON: Luke, I had a letter from a lawyer, I forget his name, that did a lot of the trademark and trade name and trade secrets type litigation, and he said that there was a problem in that the -- when you have such a case you go in for an injunction to stop someone from using a trade secret, and that by reason of the rule that requires you to set out in detail in the injunction the reasons and so forth, that that order then contains the very trade secrets you are trying to protect and that there is no rule that provides for the sealing of that particular order. You can seal discovery but not the order, and I don't know whether this rule addresses that problem or not.

CHAIRMAN SOULES: It doesn't.

MR. HAMILTON: He was asking Court Rules to take a look at that, and we haven't gotten to that yet.

CHAIRMAN SOULES: It's probably a worthwhile endeavor, but we probably can't do it today.

MR. McMAINS: It's never done.

I mean, when we wrote this rule the first time there was never any protection for orders.

CHAIRMAN SOULES: That's true.

MR. McMAINS: Never has been.

CHAIRMAN SOULES: We have not analyzed in this committee the extent to which you can constitutionally seal from the press an order. Obviously you can do so because criminal courts issue orders under seal to law enforcement officers after some kind of hearing, but we have never set that line where we think it should be constitutionally, and I think that's an analysis that's just a fresh, new one that we could look at, but we can't start it here today.

So that would be great if Court Rules would undertake that and give us an opportunity to look at it. Surely if you can do it in criminal cases there must be some compelling -- some similar compelling reasons why it could be done in some civil context, I would think.

Okay. Those in favor of 76a as proposed by Judge Brister show by hands.

MR. McMAINS: Can we have some

further discussion?

CHAIRMAN SOULES: Sure.

MR. McMAINS: I apologize that I wasn't here last time, but the idea that -- I gather that the notion was particularly related to the discovery, that the other rule just automatically covered the discovery as a court record that was subject to 76a, and he's kind of trying to take that out as automatically required, although you can bring it back in by moving to file it.

CHAIRMAN SOULES: Right.

MR. McMAINS: Okay. Well, because of the -- having put this in now and say, well, we substitute an ability for an intervening party to move to file the discovery, that also is an order that is subject to being appealed under there, which means that we have now created an entire appellate procedure for, you know, whether or not something is filed, which seems to me awfully -- an awfully cumbersome thing to be fighting about. The press may well be willing to fight about it. It seems to me to be an awful burden on the parties.

CHAIRMAN SOULES: Well, Chip didn't -- he wasn't enthusiastic about this because he wanted to have the information available.

MR. McMAINS: Uh-huh.

CHAIRMAN SOULES: But he also recognized that constitutionally these changes are okay.

MR. McMAINS: Oh, I'm not suggesting it's unconstitutional, but now under the appeal provisions because of his revision it says, "Any order relating to filing, sealing, or unsealing court records shall be deemed to be severed from the case, and a final judgment, which may be appealed by any party who participated in the hearing preceding issuance of such order."

What I'm saying is that by giving an ability to appeal the filing order you look like you're trying to apply the same standard you are to any other sealing order, and it seems to me that there is a different -- may be a different standard applicable to whether or not something should be in the court's records as opposed to what is in the court's

records being disclosable.

CHAIRMAN SOULES: So you're suggesting that the filing in new paragraph 9 -- I guess it's now, right? Would it be paragraph 9?

MR. McMAINS: Well, I just raise the question of whether or not anybody -- it just seems to me that it takes it one step further; and, I mean, it used to be a sealing order -- I mean, I can understand why a sealing order should be appealable or a decision to not seal and the party wants to take it up that opposes the opening up; but whether or not discovery should be filed in the condition it is in a lot of people's office, which is probably not in any condition to be filed --

CHAIRMAN SOULES: Rusty, are you suggesting that filing -- new paragraph 9 be deleted?

MR. McMAINS: I think it would be prudent, frankly.

CHAIRMAN SOULES: Is there a second?

MR. HUNT: I will second that

motion.

CHAIRMAN SOULES: Moved and seconded. Any further debate? Those in favor show by hands. Three.

Those opposed? Five.

MR. McMAINS: Okay.

CHAIRMAN SOULES: Okay. Stays in. Anything else on 76a as proposed by Judge Brister?

Those in favor show by hands. Ten. Those opposed? To one. Ten to one it passes, and we will recommend that to the Supreme Court then, these changes, for the reasons demonstrated in our last meeting's debate, primarily contained in the last meeting's debate.

Okay. That takes us to 329b. David is not here. Where is his report? Do we have that?

You're writing a 329b, aren't you?

PROFESSOR DORSANEO: No. I mean, I'm rewriting it, but we did that before. I mean, I'm renumbering it.

CHAIRMAN SOULES: Is there anything that anyone feels needs to be done on

329b other than David Beck?

MR. McMAINS: What is it that Beck was doing?

CHAIRMAN SOULES: I don't remember.

MR. HUNT: Does anyone know whether Beck has seen what we have done in this committee and sent to the Court?

CHAIRMAN SOULES: He should have seen it because it's all been distributed.

PROFESSOR DORSANEO: He's a member.

CHAIRMAN SOULES: Okay. That item is deleted from the docket for failure of a report and will not be redocketed unless I receive something in writing to act on, the text of which is complete and --

MR. HAMILTON: Well, wasn't it that he was going to look at the question of whether or not granting a motion for new trial should be appealable?

PROFESSOR DORSANEO: We voted on that last time.

HONORABLE DAVID PEEPLES:

That's on page 286 of the supplement.

CHAIRMAN SOULES: We voted that down, did we not? Okay. Well, we will just drop this unless I get something in writing that's subject to being acted on in a single meeting for the September meeting, and I'm not going to put it on the docket at all. He will have to come in new.

Steve Susman. A report on --

MR. SUSMAN: Got it, but it's being Xeroxed.

CHAIRMAN SOULES: All right. So -- and here it comes. Okay. Steve.

MR. SUSMAN: Here is a disposition chart that the subcommittee prepared based upon our review of the items in the third supplemental agenda. The first item on the first page, page No. 173 to 182 of the supplemental agenda, is simply a proposed summary judgment rule put forth by the Court Rules Committee in December 1995. The subcommittee's recommendation is that we reject this proposal based upon the fact that it was clearly before the Court when it promulgated its proposed summary judgment rule

and was fully considered, so...

CHAIRMAN SOULES: Any opposition? Okay. That will stand approved.

MR. SUSMAN: The second, 183 to 184 is again proposed changes made in the summary judgment rule proposed by Scott Brister. Again, the date indicates that this proposal was also, dated November 1995, before the entire SCAC and the Supreme Court at the time the various rules were promulgated and should be rejected accordingly.

CHAIRMAN SOULES: Any opposition? It will stand approved.

MR. SUSMAN: 185 to 187 makes -- a proposal by Dean Schaner makes two suggestions, that the same standard should apply, regardless of when the motion is heard, and I think that clearly should be rejected because even in the Court's proposal there is a suggestion that the standard would be different if a motion is made before the adequate time for completion of discovery and after an adequate time for completion of discovery.

The Court makes that distinction,

although the subcommittee in its proposal to the Court I think would have made a brighter line distinction based upon the completion of the discovery period. Obviously the Court used the term, "after adequate time for discovery," so there is clearly in the current rule before the Court that the Court has proposed a different standard applied at a different time.

CHAIRMAN SOULES: And that's No. 1?

MR. SUSMAN: Right. And No. 2 is that the nonmovant should be required to present admissible evidence to create a fact issue. Again, I think that should be rejected. The Court as well as this subcommittee -- as the Supreme Court Advisory Committee talks about the introduction of summary judgment evidence, which historically has been -- it can be an affidavit, but it can be pleadings and other things that are not verified, so I don't think there is any requirement under current practice or the Supreme Court Advisory Committee's rule or the Supreme Court's rule that would require that

summary judgment evidence be admissible evidence. Accordingly, the subcommittee recommends rejection of this proposal.

CHAIRMAN SOULES: Any objection to either of the committee's recommendations? They both stand approved.

And so that the record is clear, and I think everybody is in agreement on this, the Advisory Committee is not retreating from what it recommended to the Court to be the changes in Rule 166a.

MR. SUSMAN: Right.

CHAIRMAN SOULES: But in light of the Court's --

MR. SUSMAN: Reality has overtaken us.

CHAIRMAN SOULES: -- action already this seems to be the appropriate disposition of these particular requests, regardless of our sentiment as to their merit; is that right?

MR. SUSMAN: I think that's right. 187.1 to 187.2, opposes any change in summary judgment rule on the ground that it will vastly increase summary judgment motions

filed and granted. The subcommittee's view is that that is definitely true, but the Court must have been aware of that at the time it promulgated the new rule. Therefore, we recommend rejecting that. It's not really a suggestion. It's just --

CHAIRMAN SOULES: Reality.

MR. SUSMAN: Reality.

CHAIRMAN SOULES: All right. Same committee vote.

MR. SUSMAN: 187.3 favors conforming the state rules to the federal rule. Again, this was something that both this committee and the Court considered and in neither case was the decision made to make our rule exactly like the federal rule, so we recommend rejecting this proposal.

CHAIRMAN SOULES: All in agreement? All agreed.

MR. SUSMAN: 188 to 190. Paul Gold suggests we should change the present practice where appellate court affirms sustaining objections to discovery if any objection, whether or not relied on by the trial court, has merit. Paul points out that

this encourages multifarious objections, since regardless of what the trial court says or doesn't say, if an appellate court thinks that any of those objections have merit, the discovery ruling stands.

We recommend rejecting Paul's proposal simply because the proposed rule goes as far as the Supreme Court Advisory Committee thought appropriate to discourage multifarious objections by saying they should not be made, but nevertheless, not imposing any penalty if they are.

CHAIRMAN SOULES: So the committee recommends rejection. Any disagreement with that? Okay. That recommendation stands approved.

MR. SUSMAN: 191 to 202 is a completely new rule to govern request for production of documents and to replace Supreme Court Advisory Committee recommended discovery Rule 11. It is recommended by the Court Rules Committee. The discovery subcommittee thought that the current rule regarding request for production was working rather well, that document discovery was one of the most useful

forms of discovery and should not be unduly restricted by changes. So we made some minor changes in the rule governing request but not a whole lot.

Since the time of the discovery subcommittee's recommendation and the Supreme Court Advisory Committee's recommendation to the Court various members of the subcommittee have heard various people state that maybe we should do something more on the subject of document request. The subcommittee feels that if the Court feels compelled that something more should be done on the subject of document request, the rule proposed by the Court Rules Committee is probably as good as any. We question the need for it, but no one sees any terrible adverse consequences in adopting the rule proposed by the Court Rules Committee.

So I don't know what we say on this, and maybe we should get some guidance from Justice Hecht or someone as to whether they want us to do anything like this. I mean, it is a huge area, but we have -- no one has given it the kind of time and attention that maybe it deserves, I mean, which is the truth; and if

you want us to go back to the drawing board between now and the next meeting simply on this discovery request issue, we could, but we haven't thus far.

JUSTICE HECHT: Let me see what my colleagues think.

MR. SUSMAN: Okay. I mean, that's really the issue. I mean, it is a whole area that we had so much work to do that we basically said, you know, this is working okay. Let's not mess with it. We didn't get a lot of complaints about abuses, and that was our attitude, and I think it was the attitude of the Supreme Court Advisory Committee in recommending a rule.

Since that time various of us have heard, well, there is an outcry for more regulation of abusive document discovery, and I just think that if the Court wants something more, this is a good starting point, but we probably ought to look at it a little more carefully.

CHAIRMAN SOULES: Carl Hamilton.

MR. HAMILTON: Luke, one of the purposes of the Court Rules Committee in doing

this was to try to eliminate the problems of vast document production that exist and who pays for it and so forth and the time that's consumed in doing that and the disputes. It didn't really get that far because we really weren't able to solve the real problems that exist.

This is what we turned out, but I really think that it does need some more work and especially in the massive document production cases, but this is what we were able to turn out after several months of working on it, but I don't think it does the job that I understand the Court really wanted to address in it. It helps a little bit, but I don't think it goes far enough.

CHAIRMAN SOULES: What is the balance on that Court Rules Committee now between defendant and plaintiff, defense and plaintiffs lawyers?

MR. HAMILTON: It's about half and half.

CHAIRMAN SOULES: About half and half? Was there any strong partisanship one way or the other on this rule as drafted?

MR. HAMILTON: No. There was no partisanship at all. It's just a difficult problem of how to deal with massive document production cases.

CHAIRMAN SOULES: Steve.

MR. SUSMAN: You know, I read it, and it's a long rule, and the reason -- I mean, I don't oppose it because I don't think it's going to unduly restrict document production. I mean, I don't think it means a hell of a lot. It defines some terms, what terms are, and generally what the time period is, two years before the event in question unless the court rules otherwise.

So there doesn't seem to be -- I mean, it doesn't seem to do a lot in dealing with what a perceived problem is, which is people requiring to produce too many documents. I don't think it's going to cut it down. I don't think it should be cut down because I have always believed that the cost of looking, reviewing, selecting, and reading documents that you request is greater than the cost of producing them, and so lawyers who request a warehouse full of documents pay the price, and

the marketplace is going to eventually teach them that they shouldn't be doing that, and they will begin shooting with a rifle.

And I think a lot of discovery requests that you first get are outrageous because they are designed as document preservation orders, not real discovery requests. I would say in 98 percent, 99 percent of the cases I'm in, maybe 100 percent, we always negotiate something less than what is asked for the first time. What is ended up with is usually acceptable and not outrageous. Yes, I mean, to look at the request as it first comes in, it's outrageous, but it's never complied with on its terms.

So that's kind of my reaction to the rule, and I mean, we can convene another meeting of the discovery subcommittee between now and September, but I think before we take on additional work, particularly since this committee has decided that what we recommended was enough, I mean, that was our last -- we should get some indication that the Court wants us to do more, if that's a fair request.

CHAIRMAN SOULES: In addition

to that, Steve, it looks to me like there is a lot of duplication or redundancy in this rule from the general discovery rules that we have already sent up there.

MR. SUSMAN: Yeah. There is.

CHAIRMAN SOULES: To the Court.

MR. SUSMAN: Let me look. Let me turn to -- if I can, go on to 206-297, Item No. 2 on page three.

CHAIRMAN SOULES: Well, the reason I raised that is if we do get a request from the Court for more work on this particular area, I think we should excise the redundancy that's in this long rule that's already covered by other things we have sent up there.

MR. SUSMAN: Well, like what?

CHAIRMAN SOULES: Like possession, custody, and control means what it means in 166b. Why do we need to say that? That rule is a general rule that covers all discovery. Abbreviations and pronouns, conjunctives and disjunctives, gender neutral.

MR. SUSMAN: Well, again, I agree with you, Luke.

CHAIRMAN SOULES: Privilege logs, routine exempt documents. We have got routine exempt discovery. We have got a rule that discusses that, and it's before the Court.

MR. SUSMAN: I mean, I did think the Court Rules Committee in promulgating this rule did not take a position that's inconsistent with anything in the Supreme Court Advisory Committee.

CHAIRMAN SOULES: It appears. I agree.

MR. SUSMAN: They tried even on asserting a privilege to adopt -- I read it fairly carefully. They tried to use the same thing we have in asserting a privilege. They are much more explicit, for example, in what a privilege log must require than we were, which is fine. We just didn't see much need for it because people usually figure -- I don't see there are many disputes about what privilege logs should require. It's just -- but I don't find the rule inconsistent with what we have done.

CHAIRMAN SOULES: The way that

it's inconsistent is that we have tried to say one thing in one place and not repeat it over the panorama of the discovery rules; and now, if we come with this rule we have got one rule that seems to almost be a self-activating rule notwithstanding the general rules that we have already written; and that is inconsistent with the overall approach that we took through the -- so that's the only thing.

I just request that if you do -- we are asked to do this that the redundancy in this rule be stripped out because then why didn't we put the redundancy in request for admissions or someplace else? In depositions? When we said it once we said it and that was the end of it. So and I probably won't get much of a chance to talk to you except on the phone if the Court wants us to do something.

Isn't that generally the way we approached the discovery rules? Does anyone feel differently than I do about having this bare bones as it applies to documents and pick up the general rules where they are already written? Everybody in agreement with that?

MR. SUSMAN: Agree.

CHAIRMAN SOULES: John Marks.

MR. MARKS: I would just have the question that we don't know what the Court is going to do, if they are going to adopt our version or the Rules Committee version; and as I sit here I can't judge whether this is consistent with what the Rules Committee has done on the overall rules; and if it is, that would be a reason why we ought to look at it in that context.

CHAIRMAN SOULES: Of course, we can't act on what we don't know.

MR. MARKS: Well, we have had the Rules Committee version before us.

CHAIRMAN SOULES: And I'm not following you, John. Give it to me again, please.

MR. MARKS: Well, the Rules Committee has sort of come with its own version of discovery and, you know, the whole thing; and part of what they have done here is consistent, I guess, I don't know, might be consistent with their overall approach to all of this.

CHAIRMAN SOULES: Right.

MR. MARKS: And in that sense we ought to look at it in that context because we don't know what the Court is going to do. We don't know if they are going to adopt the Rules Committee version or the Advisory Committee version or some combination of the two.

CHAIRMAN SOULES: I think if this committee did a 167 we should send a 167 that's consistent with the recommendations that we have made to the Court unless we hear that the Court has done something to those recommendations. Because we have already got that up there, our work product is there. What we should send should key into that.

MR. MARKS: Okay.

CHAIRMAN SOULES: But they have got the Court Rules version up there also, but Court Rules could send something that's consistent with theirs as an alternative. Is there any disagreement with that?

MR. MARKS: And having said that, the Court did send this back down to us to look at, I think, because it first went to Judge Phillips.

CHAIRMAN SOULES: That is standard SOP. When they get something from Court Rules they send it to us.

MR. MARKS: Yes, sir.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: My only comment is that there are ideas -- I mean, I think the question of whether we want to go further on request for production of documents exists whether you are talking about the overall approach of the Court Rules Committee or the approach of the Supreme Court Advisory Committee. I mean, it's very easy to take the substance of what the Court Rules Committee recommended and put it in a style and form of our existing recommendation. We just go back to the request for production rule and put in some more meat on the potatoes, without the redundancy and the repetitiveness. We can do that. I mean, the only question is whether it's worth it.

CHAIRMAN SOULES: The only reason I'm having this discussion is we are not six meetings away from done.

MR. SUSMAN: Right.

CHAIRMAN SOULES: We are, I think, one meeting away from being done unless we get something back from the Court that causes us to work on something new, and I know that what I'm saying has more to do with form than substance, but what we look at next time may be the last look we look at anything, and I think the form needs to be consistent with the rules we have sent to the Court. That's the only reason for bringing it up.

MR. SUSMAN: Shall I go on?

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: Luke, I think the issue of document production is far too massive for us to deal with today and at the next meeting. I really do, and I think it would be a mistake to try to hurry it through just because we seem to be finishing up. If the Court wants something done, they can tell us, and let us go back to the drawing board or if there is a new committee later on to do it, but this is a major part of the law, and I hate to hurry through it.

CHAIRMAN SOULES: Well, the

chair says if we are going to do it, get a rule we can act on, we may decide that Judge Peeples is correct and we can't do it, or others may decide that it's something we can do and we can get to the Court. I understand that that could be an issue in September, and if it is then we will have to deal with it.

MR. SUSMAN: I mean, I bet that if all we do is recommend the Court Rules Committee rule there is not going to be a lot of controversy. I mean, I haven't generally seen eye-to-eye with the Court Rules Committee on their recommendations, but on this one I don't have any big problem with it. It just isn't necessary. I don't think anybody is going to have a big problem with it when you read it carefully.

The real fight is going to be if someone says, "Well, we ought to go beyond what the Court Rules Committee did in limiting or restricting or regulating document production." Then we are going to have -- then that could not be done in another meeting, but it will be just a matter of do we like the Court Rules Committee, can we put it

in the format of our rules. Do we like their proposal, can we put it in our format, that certainly can be done by us.

CHAIRMAN SOULES: I'm going to docket this for September, and if the Court says that they feel there is no need to do it -- and I will hear from you so that I can give direction, Judge, to Steve?

MR. SUSMAN: Good.

CHAIRMAN SOULES: However you send the message is fine. We will not work unless we get some direction from the Court that we should do so. Okay?

JUSTICE HECHT: Yeah.

MR. SUSMAN: Page 203 and 205 of the third agenda, again, from Bob Gwinn, wants further restriction of document request abuses. This is the top of page three of the disposition chart. Same comments as I have already said. I mean, the proposed rules that we just talked about would do the job for Mr. Gwinn. It's basically what he's talking about.

CHAIRMAN SOULES: Again, I will put "September" with a question mark.

MR. SUSMAN: 297 is a proposal by Richard Tulk. We put it down as accepted. He wants to require the party serving discovery requests to provide a computer disk so the responding party need not retype requests. Great minds think in the same way. We have already proposed this in our proposed rules, so the proposed rules require that if you want the questions listed before the answers on discovery requests, you must provide a computer readable disk. So I don't know whether -- I guess it's accepted or it's rejected, but it's done.

CHAIRMAN SOULES: It's already proposed to the Supreme Court and stands, I guess, approved by us.

MR. SUSMAN: Right.

CHAIRMAN SOULES: And we go forward with the same proposal, which is consistent with this inquiry, correct?

MR. SUSMAN: Right.

MR. HAMILTON: Can I ask a question about that?

CHAIRMAN SOULES: Carl Hamilton.

MR. HAMILTON: We have had a discussion about that, and how does that work insofar as what program you send? I mean, maybe the program on the computer of the recipient is not compatible with the sender, so what good does it do to send a disk that one can't use?

CHAIRMAN SOULES: I think our discussion on that was you send what the sender has.

MR. HAMILTON: That's it?

CHAIRMAN SOULES: And that's what the sender has to do.

MR. HAMILTON: Whether it works or not.

CHAIRMAN SOULES: They do it the best to make it work, and if it doesn't work, they have to retype; but we can't -- you can't be required to have a dozen systems of word processing software so that you can fit the other side's, and there is conversion programs --

MR. SUSMAN: Pretty good.

CHAIRMAN SOULES: -- available anyway at little cost.

MR. SUSMAN: Page 208 to 211, Steve Amis makes two suggestions. First, a party may call as a witness any person identified by the opposing party in a discovery response. The second is that only those interrogatory answers to which the party has personal knowledge need to be verified by the party. As to the first request the subcommittee recommends rejection. Stating this explicitly is probably unnecessary since under our proposed Rule 6 it would be extremely difficult for a party to claim surprise if the other side calls as a witness someone whom that party had identified as having knowledge of relevant facts.

CHAIRMAN SOULES: Opposing party.

MR. SUSMAN: Yeah. Too many parties there, but the idea is that we have -- and you will recall, we have a provision of our discovery rules that say that the consequence of a failure to timely supplement and disclose witnesses may be exclusion, but that the court is required -- the court can relieve a party of that if the

party can demonstrate that it didn't surprise the other side, which to me seems to be unfairly -- there is some words in there like that. It seems to me fairly easy to demonstrate that where the other side has himself indicated an intention to call a particular person as a witness.

CHAIRMAN SOULES: So you recommend that be rejected?

MR. SUSMAN: Yes.

CHAIRMAN SOULES: Any opposition to that? That will stand approved.

MR. SUSMAN: The second is something that seems like a good idea, although it's not in our current Rule 12. In the letter Mr. Amis points out that there are two kinds of interrogatory answers, those as to which a party should have personal knowledge because they are facts within a party's knowledge and other interrogatories that call for contentions or the identification of experts or the identification of persons with knowledge of facts, and that frequently we require our clients to verify those answers when the

clients in truth have no business verifying because they don't know. These are lawyers' decisions, not a client's decision.

Our current Rule 12 does not distinguish between the types of answers, but requires personal verification in all cases by the party. The committee thought it might be a pretty good idea to make that distinction.

CHAIRMAN SOULES: Discussion? Richard Orsinger.

MR. ORSINGER: I would be troubled if we have a sentence as general as this stuck in there because you will never be able to determine what was sworn to and what was not. It seems to me if we are going to say that repeating what persons with knowledge of relevant facts know need not be sworn or repeating what your hired expert's opinions are need not be sworn, I would feel much better about that because that would mean the non-sworn part of it would be specifically targeted. If you just have a sentence in there and saying, "The party only has to swear to what they have personal knowledge of" then you are going to get an affidavit that says,

"I swear to only what I have personal knowledge of," and you're never going to know what's sworn to.

MR. MARKS: Well, I think we should either swear to everything or nothing, just from the standpoint of simplicity.

CHAIRMAN SOULES: Just in trying to think through this because of the way the old rule was written, it would seem to me like that a party swearing to persons with knowledge of relevant facts is not that big of deal because the lawyer is advising the party that these are the people or these are the contentions or these are whatever they seem to be that are the lawyer's work may be something more than really lodged historically in the client's mind, and we are not really doing that much violence to a verification of everything, to have a verification of everything.

Now, maybe it is hearsay because the client heard it from the client's lawyer, but the client's lawyer is the client's agent, so what? And is it a big deal anyway? It doesn't seem to be.

MR. SUSMAN: I think it's not a big deal.

CHAIRMAN SOULES: You recommend accepting this.

MR. SUSMAN: But a mild, lukewarm recommendation. I mean, we didn't want to be negative on everything.

CHAIRMAN SOULES: Since it's a committee recommendation there doesn't need to be a second. Any further discussion?

Bill Dorsaneo.

PROFESSOR DORSANEO: I don't want to belabor this, but why isn't an information and belief affidavit good enough for interrogatories?

MR. MARKS: Yeah. Right.

PROFESSOR DORSANEO: I mean, ordinarily we don't like information and belief affidavits for, you know, summary judgment or for some purpose where we want the person to have personal knowledge, but for interrogatories, unless you bend personal knowledge into that by saying, "I have personal knowledge of what my answer is, which is based on information I got from somebody

else," why isn't information and belief good enough?

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: Well, information and belief is not an affidavit, so we shouldn't dilute ourselves into thinking that anything is being said under oath. There are a number of cases saying that you can't assign perjury for an information and belief affidavit, and it won't support summary judgment affidavits, it won't support temporary restraining orders. So if you say that you are going to have an information and belief affidavit, just pretend like you don't have an affidavit, because that's what it is.

MR. MARKS: But aren't these interrogatory answers -- aren't those judicial admissions of some kind? I mean, it's different from filing an affidavit that you want to support a motion for summary judgment or some other motion where you need to have personal knowledge. This is just responses to interrogatories.

PROFESSOR DORSANEO: And there

is never going to be a perjury conviction or an effort to --

JUSTICE HECHT: Has there ever been?

PROFESSOR DORSANEO: -- charge somebody with perjury for answering an interrogatory.

MR. ORSINGER: Well, is there in sworn testimony in court? I mean, how many perjury convictions have you ever heard of people lying in court?

PROFESSOR DORSANEO: The only reason why you -- I'm not being responsive, but the only reason why you would want somebody to verify interrogatory answers is so you can impeach them. Say, "Didn't you swear to this?" They say, "Well, yeah, I swore to it, but I only swore to it on information and belief," and that's not going to get somebody away from their oath and from being impeached. Huh?

But it is strictly a technical matter because, quite frankly, that's what personal knowledge means now, the reality of it, for most interrogatory answers, and how a

corporation has personal knowledge of anything I don't know.

CHAIRMAN SOULES: Are we ready to vote? Richard.

MR. ORSINGER: No. I would speak against making the change. First of all, I have never heard of a problem with this. Second of all, if you have a problem, especially if it has to do with third parties, you can say, "I understand that they say this" or "I believe that they say this."

An answer to interrogatory is not just limited to what you personally saw with your own eyes or your own ears. So if they say this person with knowledge of relevant facts in areas of knowledge that they are familiar with, there is no reason that can't be based on hearsay, and so I don't feel like anyone is ever in a trap being forced to swear to something that they don't know; and, you know, on the debate of whether interrogatories ought to be sworn or not, I can tell you that as a lawyer I'm probably more conscientious with any document that's going to be sworn to with my client than I would be if it wasn't.

I mean, if interrogatories are not going to be sworn to then they are really no different from pleadings, and so I like this practice as it exists now. I don't think that people are forced to lie under oath, and I think that it does make people more cautious about what they put in the interrogatories.

MR. MARKS: Well, the only issue I would raise there, Richard, is not a big one, and that is, affidavits from the lawyer as opposed to from the client, an information and belief affidavit. I think that's the way it used to be. A lawyer could sign for his client on the interrogatories.

MR. ORSINGER: There is a rule, though, that says that you can't sign -- a lawyer can't sign for the client on answers to interrogatories.

MR. MARKS: I know, but that's not always been the rule.

MR. ORSINGER: No. I see what you're saying.

CHAIRMAN SOULES: We went through that when we -- we have had that discussion already whenever we went through

the discovery rules to change it back so that the lawyer could sign the interrogatories and voted it down.

Anything else? Those in favor of the proposed rule change from Steve Amis show by hands. One -- or two. Those opposed? Eight. Eight to two against it.

MR. SUSMAN: The next proposal, 212-213, comes from Pat Hazel, proposing a rule covering appointment of guardians ad litem. The Supreme Court Advisory Committee didn't consider this rule, to my recollection, but it kind of -- the reasons for it, as suggested by Professor Hazel, make sense. Someone who knows more about this subject than people on the subcommittee will have to address whether we should make these changes or not.

MR. HAMILTON: Luke?

CHAIRMAN SOULES: Carl Hamilton.

MR. HAMILTON: These next three rules are Court Rules Committee rules that somehow got to you-all in draft form. They are still being worked on and should be put in

final form at our next meeting, but these are just preliminary drafts, but the purpose of the guardian ad litem rule is going to be to require that the courts actually hold a hearing and make a determination -- in the absence of an agreement between the parties and make a determination that there is a conflict and enter that in an order, rather than just appointing somebody because the judge thinks there ought to be a guardian ad litem.

The other, the second rule, is to authorize a notice type of a subpoena for trial for a party rather than having to spend the 90 bucks and have them served by the sheriff. A notice to the lawyer, just like you do on a deposition, would suffice to require the presence of a party or a production of documents at trial, and then the third rule is -- I think it's to make it consistent with the change in the other one, but those are just still in the draft stages.

MR. SUSMAN: I would certainly say when we thought these were acceptable changes we had no idea that the Court Rules

Committee was working on them, but you can see our view is that they are fine, basically. I mean, it was just something we didn't work on, and I would suggest that we defer action on these until our September meeting and see if we can get --

PROFESSOR DORSANEO: Can you have something by September, Carl?

MR. SUSMAN: Can we get anything from the Court Rules Committee?

MR. HAMILTON: We are supposed to finalize it at our next meeting, which is next month.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: I mean, these things -- I mean, the last two, I don't know anything about guardian ad litems, but the last two certainly seem to make good sense. I mean, they point out that you can get a party or an agent of a party or someone under a party's control to a deposition by simply noticing it without subpoenaing them. Why should it be more difficult to get that same person to testify at trial? I can't think of why it should be more difficult, and the

second rule is obvious, too.

CHAIRMAN SOULES: We are taking them one at a time. 173, we are going to docket that for September?

MR. SUSMAN: Right.

MR. ORSINGER: Can I make a comment on that?

CHAIRMAN SOULES: Yes, sir.

MR. ORSINGER: There are independent -- Carl, independent provisions in the Texas Family Code relating to the appointment of guardian ad litems in parent-child relationship suits, and I presume that your committee is not concerned with those at all.

MR. HAMILTON: No.

MR. ORSINGER: Then at least at the comment stage or in our committee discussion we ought to be sure that this is not going to indirectly operate as some kind of repealer of that, and maybe it doesn't need to be more than just said here in this committee.

CHAIRMAN SOULES: I think any rule we pass doesn't repeal a statute unless

the Supreme Court expressly says so under their Rules Enabling Act, so...

PROFESSOR DORSANEO: Well, that's not what the statute says.

MR. ORSINGER: Well, as long the record is clear. I would be comfortable as long as the record is clear at the committee level that that's not happening then that will eliminate any doubt.

CHAIRMAN SOULES: That's fine, and that would not be the intent. So we are going to put this -- and Court Rules, I know they are working on a lot of things, but we are going to need to have that pretty early, say by first of September, in order to get it distributed to -- you're going to meet sometime in August? When?

MR. HAMILTON: Our meeting is the fourth Friday in August.

CHAIRMAN SOULES: Oh. And our meeting is the 19th.

MR. HAMILTON: I think we can get it to you by then. By about the 10th of September.

CHAIRMAN SOULES: All right.

If you will get it to us by the 10th, get it to me by the 10th, I will immediately distribute it so that everybody will have it in advance of the meeting, and hopefully we can plow through it, but whatever, and I don't think we are going to reconsider discovery, for example, but rules such as this that are not inconsistent with what we have already approved and sent to the Court we would certainly need those and want them.

We had a gap in meetings of this committee that was more than two years. I think closer to three years, before we started these meetings two years ago, so it may be awhile, and of course, the Supreme Court doesn't have to -- the committee is a lame duck committee anyway, but the Court can proceed with the Court Rules recommendations if they choose, but typically has not, traditionally has not. They have come through our committee first before the Court acts on them, and I'm just saying that as a courtesy to the committee. We want your input, and we want to act on it, but we are getting towards the end of this session.

PROFESSOR DORSANEO: These rules, it's kind of an accident of organization that these rules are in the discovery subcommittee because they are not discovery rules. They are in the evidence part of depositions, and they are not in the recodification draft contained in the discovery part of the draft. They are contained either in the parties part of 173 or in the trial part for trial subpoenas and subpoenas generally. So, Carl, if you could even send those to me so I can have them in the event that they are voted up, it will facilitate things.

MR. HAMILTON: Yeah.

CHAIRMAN SOULES: Because that codification is also going to be wrapped up, we think, in September. Okay. So 173 is on for September. 177b?

MR. SUSMAN: Same situation.

CHAIRMAN SOULES: Same. On for September.

MR. SUSMAN: And 181 is same situation.

CHAIRMAN SOULES: 181, same.

MR. SUSMAN: On new Rule 182, 218 to 220, deals with the --

CHAIRMAN SOULES: This first one, 177b, looks pretty broad. Proposed new rule requiring a party or his agent, that's one thing, or one subject to his control? What if I don't want to bring an expert?

MR. HAMILTON: That's been deleted in the final draft.

CHAIRMAN SOULES: Has it?

MR. HAMILTON: It's going to be restricted to the party or the lawyer representing the party.

MR. SUSMAN: As I understood, they want to make it coextensive with what you can require in a deposition notice. I think that's the point.

MR. ORSINGER: And can I ask, if the party is a corporation does that include --

CHAIRMAN SOULES: Well, I liked what he said better because we may be compelled to bring an expert.

MR. MARKS: Into a deposition.

CHAIRMAN SOULES: Into a

deposition. You're saying the party or the party's agent, and that's restricted to that?

MR. HAMILTON: Right.

CHAIRMAN SOULES: Okay. 182, is that what's next?

MR. SUSMAN: 182 deals with the explosive issues of firearms.

PROFESSOR DORSANEO: 181 is --

CHAIRMAN SOULES: 181 is on for September.

MR. SUSMAN: This is a very, very interesting rule that I didn't even know there was a problem for it. The committee recommends rejecting this rule unless someone thinks there is a big problem.

PROFESSOR DORSANEO: Careful.

MR. SUSMAN: I don't want to write a letter to this guy telling him that's our decision. Someone else can.

JUSTICE HECHT: Will the rejection be taken to be provable?

CHAIRMAN SOULES: If you bring a firearm in as evidence, you've got to be sure it's unloaded, you can't point it at anybody. I mean, it's not a laughing matter,

actually.

JUSTICE HECHT: It just happened the other day.

CHAIRMAN SOULES: Pardon?

JUSTICE HECHT: It just happened the other day.

MR. ORSINGER: A defense lawyer pointed a gun at a jury or something?

JUSTICE HECHT: Yeah. Down in Houston. He pulled the trigger.

PROFESSOR DORSANEO: That's a good way to impress the jury.

MR. ORSINGER: Did he lose the verdict?

JUSTICE HECHT: Well, not only did he lose the verdict, but they all filed downstairs and initiated suit against him.

PROFESSOR DORSANEO: Criminal proceeding, I take it.

CHAIRMAN SOULES: Well, the recommendation is that the rule be rejected, and this, I think, is the fourth vote. Three previous votes have rejected this, although you weren't aware of that and I wasn't aware of it, either. Lee is advising me on this,

and the reason, I guess, is that if you take the Texas Disciplinary Rules of Professional Conduct and put all of that together, this would be outrageous conduct anyway. Maybe it doesn't need a special rule.

Is that the feeling of the committee, we don't need a special rule on this, that there are governances in the structure already that should take care of this problem? Anyone disagree?

Okay. The committee's recommendation that the rule as such will be rejected, although the practice we feel is already covered elsewhere. That will stand approved.

MR. SUSMAN: Rule 200, page 221 to 226, is a proposal from the Court Rules Committee that would require -- part of it would require that the party who presents an expert, a retained expert, for his deposition pays that expert for the time getting ready and during the deposition, correcting the deposition. That is a provision that this Supreme Court Advisory Committee adopted and sent on as an amendment to our discovery rules to the Texas Supreme Court to codify the

practice that the party who retains the expert pays the expert for the time involved in depositions.

The Court Rules Committee goes a large step beyond that and also suggests that if there is a nonretained expert deposed, the party taking the deposition must pay the fees of the nonretained experts. I think this was a matter which we discussed in connection with the amendment we sent to the Court, and I would urge that it be rejected.

CHAIRMAN SOULES: That was the vote last time, too. We didn't inform you. I think we did act on this last time. Any change in vote? The rejection will stand approved then.

Okay. Steve.

MR. SUSMAN: Thank you.

CHAIRMAN SOULES: Thank you very much, and we have got then two items on September with question marks relative to Rule 167 and three items on your agenda for next time, 173, 177b, and 181, which we anticipate receiving from Court Rules in time to get distributed.

JUSTICE HECHT: Luke?

CHAIRMAN SOULES: Justice Hecht.

JUSTICE HECHT: If I could go back up to 166a, I'm sorry I missed the May meeting. I was at the American Law Institute, which has its annual meeting at that time each year, and unfortunately it just conflicted; but I would like to say that the Court was very grateful for the proposal that Judge Peeples worked on and that so many members of the committee participated in; but we don't decide these things in a vacuum; and we have a group of people across the street who have an interest in our business, sometimes an overly instrusive interest in our business, we think; but that's not their view; and so we have to be mindful of their reactions to it, too.

The Court, frankly, was of the view -- we have not made this public, but it was an administrative matter, so there is no reason not to say it -- that the whole issue would be better addressed if we gave it some more time, time for the feelings to kind of sort out on -- the views to sort out on the proposal,

and time over in the legislature, but that was not the case.

The Court waited until the night before the bill that was in the House was to be voted out of the calendars committee to the floor before we acted, and we felt like what we did do was prudent for a lot of reasons. Since then Joe Jamail has written us a good letter and Sarah Duncan and Mike Young and Chip Babcock of this committee and then we have gotten our usual spade of letters on both sides saying "Way to go," "It's about time," and "We wish you-all were dead," and so we are used to that and we don't pay much attention to those letters.

But we have gotten at least four and maybe more very substantive letters raising some good issues that were part of the discussions in the committee's proposal, and we intend to look at those before September and try to accommodate them as best we can, but I don't want the committee to think that the communication just runs one way here, so while it's too much to say that I'm willing to submit to cross-examination, I am willing to

try to answer any questions because obviously some feelings ran fairly high on this issue. That's not always a good thing.

I will be happy to -- the Court was unanimous. We thought about it a long number of hours, which is unusual to spend on one rule, but it was an important -- it's an important change. We do want it to work, and we don't want the sky to fall, as some people are saying it's going to, and we are not -- we don't think that all of the problems are exaggerated.

We think there will be some, and we are concerned about that, but by the same token, the Court and this committee have not been looked on favorably by the legislature since Chapter 9 of the Civil Practice and Remedies Code was repealed by the Court in 1987 or '88, and we are paying the price, and we continue to pay the price, and it's unthinkable to me and it was to the Court that the Supreme Court should seed the summary judgment rule to the legislature.

We have seeded -- some of you know this, but we have already seeded a dozen or so rules

to the legislature in statutes that provide that the Court can't change them, no matter what; and this is now the standard language that's put in every bill ever since Chapter 9 was repealed; and we have asked Governor Bullock and Speaker Laney to take it out, and they politely told us "no." So that's part of the concern.

Maybe it could have been negotiated differently. I don't know, but I mean, the Court has to concern itself and this committee, too, with that reality more and more, and I don't think it's a question of relationships. We have offered to put legislators on the committee, either as members or as ex officio or whatever they want. They are not interested in that. They are more interested in you coming over and talking to their committee. So that's fine.

Our Court has more power over rule making than, we think, any other court in the United States, and so there was a good reason for that 55 years ago, 57 years ago, and we want the legislature to continue to believe that, but I would be happy to talk to you, and the

Court is anxious for you to know that we value the advice very greatly. We did not disregard it. We had not made up our minds ahead of time, particularly on the no reasonable -- a reasonable time for discovery,. We are very sensitive to the trial judges' comments that this is not a good thing, that it leaves too much ambiguity in it, but out in the country judges don't always set deadlines, and for people who are involved in the process on the other side of us this was not an acceptable alternative.

So we will try to make it clear that we do mean that, and if judges do set deadlines then that will be presumptively reasonable time for discovery, but -- and if the discovery rules pass with such a period in there then I think it makes a lot more sense to go back in and tie that up, but again, we didn't pick the timing on this. We were responding to other people's agendas.

CHAIRMAN SOULES: Well, as Chair I think maybe I will lead off here and maybe no one else wants to participate. The repeal of Chapter 9 has been seized upon by

the legislature unfairly; and in fact, what this committee and the Court did was an accommodation or a recognition of the legislature's desire because what this committee recommended to the Court and what the Court adopted was verbatim the statute that had been passed.

The only thing that -- the only event of significance was that the Supreme Court decided to put it in its rules and to take it out of the statutes, but there was no change. So there was not an in-your-face issue with the legislature, and they have seized on that, I think unfairly, to -- and I'm not sure that what I have just said hasn't been lost somewhere in the process of dealing internal at least in the minds of the legislature.

We told the legislature before they passed that rule -- that statute, that the Court was going to pass a frivolous pleadings rule. They went ahead and did it; and I went to the committee; and Pat Hill was the representative; and she said, "I don't believe you. You have had your chance. I don't believe that you will do it, and we are going

to go forward with this." Then the Court did it and felt that that was responsive to what the legislature had mandated and that the rule ought to be in the rules and not someplace else, and that was the only issue, and if we had been permitted time beyond that particular legislature, the rule would have been in the books anyway. That's the facts of that.

Second, the committee certainly felt, as the Court did, that the summary judgment rule should be adjusted in the rules and worked a lot of hours in session and subcommittee hours and Judge Peeples and others a lot of hours outside of the session to present a rule that over the broad experiences of the committee seem to take care of a lot of problems that the present rule does not seem to address and to get it to the Court on a timely basis so that the timing of it would not fall a victim of what happened in Chapter 9; that is, the legislature says, "We don't believe you" and does something before the Court had a chance to act. Of course, the Court did act and the legislature didn't this time, and that was good.

I think really the differences felt by the committee members had to do really with the substance of it more than timing. Particularly the comments that I have heard have to do with this type of motion for summary judgment having to be supported by summary judgment evidence, evidence that qualifies as summary judgment evidence, and the impact that that's going to have on the discovery process, because to develop summary judgment evidence outside the control -- or outside of the personal knowledge, given the nature of the affidavits that have to be given to support summary judgments, outside of the personal knowledge of persons under the control of the party resisting the summary judgment, defensively in contemplation that there will be these kinds of motions filed -- and "defensively" meaning the plaintiff defending a motion for summary judgment, the respondent to a summary judgment.

Perhaps we are going to now have to anticipate that these motions are coming and do discovery where not previously necessary when we had the previous standards of 166a.

So the impact on discovery and the already vocalized in CLE sessions feeling that the failure to file a 166b(e) motion for summary judgment upon the enactment -- the effective date, following the effective date of that rule, is as tantamount to malpractice as not asking standard interrogatories is now considered to be. I mean, I don't want -- I will be a pig in a barrel and just say those things first. I think it's somewhat my responsibility as the Chair here to respond to your remarks, and I think you were inviting them.

JUSTICE HECHT: Uh-huh.

CHAIRMAN SOULES: And it's not confrontational at all. There is disagreement, but that was evident in our work product that we sent there. There is disagreement that is evidenced in the rule that the Court brought about, but we all understand where the decisions are made, and we would not be your -- appropriately, your servants on this committee if we did not give that appropriate deference, and we do.

JUSTICE HECHT: Well --

CHAIRMAN SOULES: As a committee.

JUSTICE HECHT: Yes, and we are very appreciative of that, but let me say, what our view of what happened 10 years ago is is irrelevant. We don't make those rules, and so we are in large part at the mercy of the -- I hope and continue to believe, the considered and deliberate judgment of the legislature, and I don't mean to paint them as vindictive. I don't think they are. I think they are legitimately concerned about what they see is the best course for the people of this state, but when they see that then we all have to -- they and we both have to consider how we are going to proceed, because, again, we don't want to be crosswise with them unnecessarily, and I hope that they feel the same way, although you can't always tell when they are in session, but that's what we hope.

But anyway, and as to the substance, the Court remains concerned about this. We don't want this to be something that won't work or something that causes more problems than it solves, but again, we felt like at the time

those problems would have to be worked out a different way, either in some comments -- we will change the comments to try to reflect the concerns that have been expressed -- or in subsequent changes. The one good thing about our process, the rule making process, is that it's easier to change it through us, I think, than it is through the legislature. To try and get the legislature to reconsider the summary judgment practice every two years is not a very attractive possibility.

So I think I want to say that the Court hears this. I mean, we have all seen the letters. We have all read them and talked about them already, and we will talk about them some more, but again, there are other considerations. We are trying to be mindful of all of them, just as we have been with discovery, but I think a lot of the concerns will be assuaged by the changes in the comments, but if they are not, there is still time left to fix it.

CHAIRMAN SOULES: John Marks.

MR. MARKS: I would just like to say that the Chairman's views about it are

not the unanimous views of the committee because there are many of us who --

CHAIRMAN SOULES: I said those were comments earlier.

MR. MARKS: -- support what the Court did; and secondly, I think it's appropriate to comment on the CLE, the comments that have been made at CLE. I get the impression, although I have haven't been to them, that a lot of them are made by people who have a position with respect to the rules. They don't like the summary judgment rule; and so in a sense I think a lot of that is crying "wolf" and anticipating things that won't happen; but having said that, I don't know. I don't think anybody knows really what's going to occur.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: Well, I mean, as I understand, the "wolf" crying is based upon the fear that it will -- summary judgment will be filed routinely in every case. You don't have to do any guessing on that. You just have to go to the federal system and ask the question, and as I understand it from the

federal judges, there is not a case now, civil case pending, certainly in the Southern District, in which a summary judgment as a dispositive motion is not filed.

So, I mean, they are being inundated, the federal judges, with dispositive motions; and they have a bunch of law clerks to help them deal with it; and I mean, the real question is have we put too big of a burden on trial judges who don't have law clerks, the state trial judges, by now encouraging -- and I think you are absolutely right. It's going to be routine in every case, and I don't think you have to guess at what's going to happen. You just look at the federal rule, which this is close enough to, to see that.

So I would like to ask -- I mean, I would like to ask one other question, if I can, while Justice Hecht is here, and that is, what is the timetable do you think on the discovery rules because -- the reason I ask the question is not out of curiosity. If you will recall, last year or year before whenever these rules were hot there was a lot of continuing legal education organized around the expectation

that the rules were coming out pretty soon.

No one exactly knew when, and a lot of lawyers came out and heard presentations about the rules. Therapeutic, I believe. They were all therapeutic, these discussions about discovery abuse; and now, of course, people are talking about the fall line-up of CLE programs during the spring line-up, and I'm just curious what we can tell them about whether this is a hot topic or a dead topic insofar as arranging CLE programs, you know, next fall.

JUSTICE HECHT: It's very much alive, and the Court is going to do something about -- it's going to adopt the rules that have been sent to us in some form. Now, the big controversy or the principal controversy is over Rule 1, but there is some other controversies along through there; but 85 percent of what this committee sent to the Court, the Court Rules Committee, and I think everybody, most of the lawyers I have talked to and judges I have talked to, are in favor of; and so I don't think there is much question that we will adopt that. For

example, the elucidation of privileges, the attempts to limit prophylactic requests and objections, assertions of privilege, the whole process that was set up with the limits on depositions.

MR. SUSMAN: What do you think the timing would be? It's more the timing I'm interested in than what you are going to do.

JUSTICE HECHT: Right. Well, I think the Court wants to meet in September. We have not set arguments on cases in September in anticipation that we would work on the rules. So barring any unforeseen circumstances, I am scheduled to give a presentation at the state judicial conference at the end of September on the new rules, so --

MR. SUSMAN: Well, that's a pretty good --

JUSTICE HECHT: I'm hopeful that I will have something to say, and I anticipate that I will. So, again, on timing, I guess we had thought that the chances of the redo of the civil rules being anywhere close to being done by the time we got to discovery

was not very realistic, but now it looks like we are a lot closer than we thought, but I think that we are still -- given that we have to go through the editing process and Brian adds another six months onto the process, we will probably go ahead and do discovery before we do the rest of them.

People feel differently on the Court about that, but that's my sense of it. But I look forward to us -- we are bolstered by the Rand study. We have got a lot more under our belts than we had before, so I think we are ready to do something.

CHAIRMAN SOULES: Anyone else have remarks to address to Justice Hecht on either of these issues?

MR. ORSINGER: Well, I would just like to say in passing that while I think the burden will be increased for the trial judges I anticipate that they will pass part of that burden on to the court of appeals to the extent that they are granted. Because it may be worse in Bexar County than in other counties because in other counties if you only want to hear one summary judgment in a week

you only set it; but in Bexar County we assign them out randomly; and so it's possible that a judge in Bexar County might get two or three summary judgment motions in one week in the period of time between 8:30 and 9:30 in the morning, which is when the judges who are handling jury trials help the trial docket do the nonjury stuff.

And I think that what's going to happen if a lot of these get filed is that they are going to start stacking up, it's going to be unrealistic for a judge to look at anything because whoever is defending is going to file three feet of papers in hopes that they are going to have some kind of fact established, and that the trial judges, unassisted by magistrates or anybody else, are just going to make a decision based on the summary of the arguments that the lawyers give them in 30 or 45 minutes; and if the motion is granted it's going to go to the court of appeals where the court of appeals probably will be the first judicial step where somebody actually sits down and synthesizes the real written record.

Now, I may be being unfair, and I don't

know. Judge Peeples may disagree with me entirely, but I anticipate that a lot of the additional work on the summary judgment analysis is going to get offloaded onto the courts of appeals, and maybe that's a good place for it because it's a quieter environment, and they have plenty of staff there, and maybe the staff there is going to decide whether it should or shouldn't have been granted, but as a practical matter that's what I think is going to happen.

JUSTICE HECHT: Well, in response to that, I hear what Steve says, but the difference -- one difference between the federal courts and the state courts is they are supposed to write it on every motion that they get or most of them, and we certainly don't expect our trial judges to do that, and so there is one difference.

No. 2, you still can't get reversed for denying a motion for summary judgment. So I assume the trial judges are aware of that, and No. 3, the federal courts have had a huge volume of motions for sanctions. As I understand from lawyers who practice in

federal court, hardly a case goes by that you don't have two or three motions for sanctions against each other in the court pretrial, and we don't have anything like that in the state system.

We have a lot of them, and it might be too many of them, but we don't have one in every case. A busy trial judge in Dallas has 1,200 cases on the docket, and maybe 100 or 150 of them will have motions for sanctions filed. Now, that's a lot, but it's not anywhere close to what I think the federal experience is. So I guess I say all of that to say I hope it doesn't turn out to be that way, but if it does then we will have to see what needs to be changed.

CHAIRMAN SOULES: Don Hunt.

MR. HUNT: Mr. Chairman, I want to direct an informational question to Justice Hecht to be certain I heard what I thought I heard. Is it the Court's intention to, No. 1, redo some comments; and No. 2, is there a possibility that you will tinker with the substance?

JUSTICE HECHT: I doubt we will

tinker with the substance. Again, we haven't finally decided this, but none of my colleagues have expressed any interest in changing the black letter rule, but they have all expressed some interest in clarifying in the comments, if it needs to be clarified, that you can't appeal by mandamus or otherwise from denial of summary judgment under 166a any more than you can under any other section of the rules unless the legislature gives you the right to do that.

We will try to explain what we think "a reasonable time for discovery" means so to take the trial judges out of the crunch of having to litigate that in every case until we get the discovery rules finalized, one or the other. Clarify that we think Chapter 10 applies to motions for summary judgment just like it applies to all other motions, and if they are filed, if the motion is filed without ground or in bad faith then it's subject to the sanctions that the statute provides for, and I think there was one other issue. What summary judgment evidence is. Again, that's a little harder issue, but we are trying to say

something about it in comment.

CHAIRMAN SOULES: We have got GTE vs. Tanner on frivolous motion for summary judgment, and so I don't know whether that -- are you going to overrule that in comment or --

JUSTICE HECHT: Well, no, but the -- I think it's a lot harder to file a frivolous motion for summary judgment under the rest of the rule than it is under 166a(i) because to come in and say, "We think we disproved this this way and this way and these are our grounds," I mean, there are probably some frivolous motions filed, but I think it's kind of been the thought, at least I've heard people express this view, that you are kind of entitled to file a 166a motion, not a(i), but the rest of the motion any time you feel like it.

And it's kind of unusual to think of sanctioning, but whether that's true or not -- and I'm not sure it is, but whether it's true or not, I think that if it is anywhere near true, that these will just be routinely filed when it is possible to pick up the first

deposition in the case or the deposition of the other party and show on page 10 a fact issue on negligence or whatever the cause of action is and say, "Judge, here is why this is not a 166a(i) motion," then I think -- I would think you are treading on pretty dangerous territory myself, but I guess the courts have to wrestle with that, but I would be -- I would have some -- if I were practicing I would have some reluctance going in on a hard fought, hard discovered case that was almost clearly going to go to the jury and say, "Judge, we don't think there is any evidence. We think this is a directed verdict case."

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Well, I just wanted to make two observations, one of which is clearly echoing sentiments already been made. I believe that the natural effect of this rule will be to increase discovery in areas where we didn't worry about doing it a lot before. Just as a classic example, as the discovery comes to a close frequently a lot of times the plaintiff or defendant, depending on what the particular issue is, they may have

their witnesses lined up. The other side may know more or less what they are going to say. They don't have to depose them. They don't have to put affidavits on about what they are going to say about something in particular, but now all of the sudden they will be confronted with summary judgment motions in which they have got to get this in admissible form.

Like, for instance, on plaintiff's damages, and some aspects of his damages, which are frequently -- in a standard PI case they know who his doctor is, may have talked to his doctor, you know, may have deposed the doctor, didn't take down everything that they were going to do at trial, but don't need to. Now somebody comes and says, "You haven't proved causation or damages or whatever in flyspeck," what little discovery there is on the subject.

And it seems to me that there is going to be a lot of discovery done in a formal fashion that was either done informally or not worried about before, because out of sheer self-protection by both parties -- and that's

the second observation, that I think there is a general view that was taken, certainly in the debate that we had before the committee, that this was an anti-plaintiff move on the rule; and while there might be some support for that kind of argument with regards to motivation, the fact of the matter is that it depends on the judge, the trial judge, because this can easily be an anti-defendant rule, as the Court is well aware, depending upon what forum you are in.

And I will guarantee you that there will be motions filed in South Texas from the plaintiff's perspective that would not have been filed under the existing rule, and some will be granted with defendants who have not prepared themselves for the assault on their affirmative defenses on a piecemeal basis after a period for discovery has passed. So it is -- I think there are a number of unintended consequences left to come as a result of this what I consider to be a fairly major change in our practice, and I do think it's going to create a lot of otherwise unnecessary paperwork, but c'est la vie.

JUSTICE HECHT: If I could say a word in response to that, just to the first part I have already said that the Court is concerned, but we will see what happens. But on the second part, everybody has got to do this these days because this is the in thing about whose side you are on and whether it's anti-plaintiff and anti-defendant or whatever, and I must say I grow weary of hearing it, but I could do something about that obviously, but it is a little wearisome over time to hear that argument.

But one interesting aspect to it is when Daubert was decided by Justice Blackmon, that known fascist right wing judge, everybody said, "This is an anti-plaintiff change in the rules"; but as the press is making clear, if our cases are being tried, that rule cuts both ways; and the real point, the real question is what is scientific evidence and what should be admissible; and not only does it cut both ways on the civil side but it has a profound effect on the criminal side; and so hopefully that's what all the rules will do.

They just sort of establish the

boundaries for the game to be played, but there were people who were involved in this process of trying to force a change in the rule who view this rule very much as being against plaintiffs and an effort to weed out frivolous lawsuits; and, you know, they are free to say that just as freely as the people on the other side who want to scream about it are free to do that, too; but it doesn't -- it's not very constructive in trying to set what the rules ought to be to do that.

And so we -- as I said, I have talked to Joe Jamail about his comments. I'm going to meet with him next week, I hope, and talk with him some more about that, and all of the comments we have gotten we are listening to, because it will not do us any good or the committee any good or the legislature any good if this fails, if this turns out to be as unworkable as people feared it was. So it's in all of our interests to hit the ball rather than strike out.

CHAIRMAN SOULES: Anyone else? Why don't we take about ten minutes and be back here about five minutes until 11:00? I

have got 10:45.

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

CHAIRMAN SOULES: Okay. Pick up tabs and materials behind the Chair here, and we will start with Bill. Between Bill and Richard they have got the rest of the agenda until we get done with that, and then Judge Cornelius wants to address some of the appellate rules with us in session, and we will be done. Okay. Bill.

PROFESSOR DORSANEO: All right. At the last meeting I told you that I would try to have a complete draft of the work we have done over the last several years on the Texas Rules of Civil Procedure prepared, and that is what we almost have accomplished at this point. What I have for you and what each of you, I believe, has picked up is a nine-part recodification of the Texas Rules of Civil Procedure together with an organizer. What you need to do for the September meeting is to take this and organize the individual parts, and actually, the first two parts or

the first part would not be under a tab, but organize the various sections of the proposed rules under the individual tabs.

You have here now a Section 1, which doesn't have a heading in this draft, but it does in the table of contents, the general rules which we have passed upon for the purpose of recommending adoption to the Supreme Court already; a Section 2, commencement of the action, service of process, pleadings, motions, and orders, that we have been through completely and voted on already; Section 3, pleadings and motions, which has one important remaining segment to be completed in proposed Rule 25 concerning venue; and Section 4 on claims and parties that we have already worked through as well over the course of the last year or so.

We may need to do a little bit of additional work on each of these sections and particularly in Section 4, parties, concerning proposed Rule 38, derivative suits, because I understand the legislature changed the Business Corporation Act at the last session with respect to derivative suits.

Section 5 is proposed to be the discovery section of this recodification, and it is not included here in the table of contents or otherwise. I think it would be a good idea to have Section 5 done in a side-by-side comparison for the Court's use in what the Court is doing right now and also for inclusion in this package, and we will plan to do that and probably send it to you before the next meeting.

Section 6, scheduling and pretrial conferences, probably will be renamed "Pretrial" rather than "Scheduling and Pretrial Conferences," and much of it has been considered, but I will come back to it with respect to the default judgment item that's on the agenda and one or two other respects.

Section 7 is the trial section, consisting of a number of parts, scheduling the case for trial, jury selection, the jury charge, jury deliberations. It is something we have already considered in large measure, although there is one important additional item in (b), jury selection, in Rule 79. 79(b) is an attempt at a Batson/Edmonson

paragraph that's based largely on the Texas Supreme Court's recent decision in Goode vs. Shoukfeh, if I'm pronouncing the appellee or the respondent's name correctly.

Section 8 and, actually, part E of Section 7 is based on and incorporates Don Hunt's report that we have already acted on and sent to the Supreme Court for final action. Sections 9 and 10 have not been drafted yet in final form. They are designed to be the sections that cover the parts of our rule book covering ancillary proceedings and special proceedings. The ancillary proceedings are now in our rule book beginning in the late 500's and running through the 600's.

The current rule book organizes these ancillary proceedings in alphabetical order, attachment, distress warrants, garnishment, sequestration, receivers, et cetera. We would propose to modify the form of those rules, but not to change even very much of the wording of those rules and to build them into this process, and I plan on having a draft of that done and plan on having that sent out before

the September meeting as well.

All of you will remember that we worked on execution, the execution rules, to some extent about a year ago in connection with the appellate work, and that will be -- what we did then will be built into the execution rules, and that perhaps will not be that big of a deal to digest because we are largely talking about reorganization by virtue of reducing one sentence or one paragraph individual rules to subdivisions of larger rules.

I also believe that I'm going to suggest that the organization not be alphabetical but that it be in some more sensible manner involving subject areas, like perhaps the federal rules do where the first ancillary proceeding rule involves seizure of persons or property, attachment, garnishment, sequestration. Distress warrant would be talking about seizure of property.

Then the next one is Federal Rule 65, injunctions. Our injunctions rules are based on the federal injunction rule except Roy McDonald took it apart back in the late

Thirties or early Fourties and sent it around, and I propose to put it back together rather than to leave it the way we have it and some other little things like that.

The special proceedings are not numerous, forcible detainer, and assuming we are not going to have any justice court rule book or assuming that's not a known item, those special proceedings can readily be incorporated in Section 10 without a great deal of difficulty, including ones that I would like to see abolished altogether like trespass to try title, but that is a drafting job and not a large job. Quite frankly, that job could be left to some other drafter and could be done by any professional drafter probably better than I would do it.

Section 11 is the back of the book section, a number of C's. The parts that we haven't dealt with in any kind of a detailed way are part A, counsel. Part B, courts, we have dealt with in a number of respects such as, for example, recusal and disqualification, and that's, you know, largely what's in the court section.

The section on clerks was run through this committee and worked on in every respect, and this particular draft has been studied and suggestions have been made which have been incorporated in this draft by District Clerk Bonnie Wolbrueck, whose reports formed the basis of the action taken by this committee.

Court reporters, that probably needs another look just to make sure, if nothing else, that it corresponds with the appellate rules as promulgated; and court records is going to need a change based upon what we did today and perhaps in other respects to 76a, which is recodified as 146.

Part F of Section 11, court costs, could probably stand to be put on the agenda wholesale, although Bonnie Wolbrueck made a number of significant suggestions concerning it.

So what you have is the sections that I just talked about in a side-by-side comparison format; and the proposed rule which has already been for the most part recommended for adoption to the Court, although perhaps not formally transmitted yet, is on the left; and

the rules from which the proposed rule is derived are on the right. The purpose is to facilitate a comparison so that nothing is lost inadvertently.

We will need to do some further work to make certain that all of the current rules, some of which we have decided to leave out altogether, are listed in yet another package, which I believe we would call, you know, Section X, rules proposed for repeal. You know, we did that every now and again when we dealt with individual sections, and we need to make sure that that is something that doesn't inadvertently lead to the omission of a rule that should be retained.

That's the overall package with respect to the individual sections. I have made a mental note on things that perhaps need to be done and might be placed on the agenda or that individual members of the committee might want to take a look at in the event that they want to recommend some further action or some change, and I will just go through that briefly on a section-by-section basis.

Section 2, which deals with service of

citation, commencement of the action, and service of pleadings, motions, and orders, contains the rules on a service of citation in proposed Rule 7 for regular citation, in proposed Rules 8 and 9 for a citation by publication, with the principal citation by publication rule being Rule 8.

We voted to change the answer day to the 30 days after service standard from the Monday next after the expiration of 20 days. We did that in connection with an analysis of Section 3, pleadings and motions; and I went back and changed the citation rule, the general citation rule, in Rule 7 such that the warning or the notice says, you know, you are required to file an answer within 30 days of service of this citation or a judgment by default will be rendered against you for the relief demanded in the complaint. That's a technical adjustment to make our vote on Section 3 compatible in Section 2.

Bonnie Wolbrueck pointed out to me -- when I sent her Section 2 for review to make certain that her clerk's report was incorporated accurately and completely, Bonnie

Wolbrueck pointed out to me that the publication rules still speak about answer day being on Monday after the expiration of -- normally not 20 days, but 42 days, and somebody might want to go back and say, well, why don't we just pitch the Monday next concept in the publication context as well, and somebody might want to say why don't we just fiddle with those days in there to make them more sensible. You know, one could make it 50 days or 60 days rather than 42 days after -- the Monday next after the expiration of 42 days and still accommodate the publication requirements of it having to be published for so many weeks that discussed. So that could stand a little further work.

CHAIRMAN SOULES: Where is that?

PROFESSOR DORSANEO: That's in Rules 8 and 9, both Rules 8 and 9, and the individual paragraphs I don't have committed to memory.

CHAIRMAN SOULES: All right. Any opposition to 60-day answer following citation by publication?

No opposition. Change it to 60 days.

MR. McMAINS: Well, Luke, the only question I have is, are there any statutes involved with regards to publication, like in the ad valorem tax area?

PROFESSOR DORSANEO: There are statutes involved. Yes.

MR. ORSINGER: Family Code, too.

PROFESSOR DORSANEO: Family Code.

MR. McMAINS: And Family Code, too.

PROFESSOR DORSANEO: There is a provision that deals with the statute that says the statutes control.

MR. ORSINGER: But I don't know that the Family Code gives you an answer day. It just gives you the citation, the contents of the citation.

PROFESSOR DORSANEO: It's 20 days after it's published.

MR. ORSINGER: That's in the statute, too?

PROFESSOR DORSANEO: No. It's

in the -- the form of the citation by publication is in the statute.

MR. ORSINGER: Oh, so that's driving our deadline then, isn't it?

CHAIRMAN SOULES: No.

MR. McMAINS: Yes.

CHAIRMAN SOULES: Well, we can have any rule here. If you guys want a different rule, that's up to you to go to the legislature and get it.

MR. ORSINGER: No, but I mean it's -- well, okay.

CHAIRMAN SOULES: I mean, we have done that in so many places, why worry about it here?

MR. ORSINGER: Well, I'm not sure I was part of that fight, but at any rate...

CHAIRMAN SOULES: Well, you have your own rules.

MR. ORSINGER: If the prescription of what's in the citation is in the Family Code, do we have the authority to change that or not, and should we or should we not?

CHAIRMAN SOULES: We don't intend to change that.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: It's a statute, but for the purposes of these rules is there a problem with 60 days instead of Monday next after 42 days?

MR. McMAINS: Again, my problem is that it seems to me that the whole purpose of this reorganization process is to make the rules simple and easy to find and consistent, and it just seems to me that if we are going to have -- if statutes are going to trump the rules and we don't have any references to them, you know, if our rules now accommodate the statutes then I would be loathed to just automatically change them, because I assume the 42 days --

PROFESSOR DORSANEO: There is no consistency now.

MR. McMAINS: Okay. Oh, there is no consistency in what you have done, either, right?

PROFESSOR DORSANEO: It's more consistent. The Family Code is drafted in an

incompetent manner when it gives the citation. You can't tell when answer day is. My best guess is it's on the Monday next after the expiration of 20 days after the citation is published one time, but whoever drafted it copied it from the wrong rule. He copied it from the regular citation rule, not from the publication rules.

MR. McMAINS: Right.

PROFESSOR DORSANEO: Right? So that's its own problem.

CHAIRMAN SOULES: Well, as far as the Family Code is concerned, this committee for decades attempted to accommodate the family lawyers. They decided to go to the legislature and get their own deal, and they did, and we cannot worry about that. It's been worried about for years without any success, and they got their own deal. That's their deal. That's what they want. They got it.

We have got to work on a statewide system of rules that functions for the people that don't want to go to the legislature and get their own deal; and if anybody disagrees with

that, you can; but I mean, this is decades of history; and I see no reason to revisit it. Now, if we have got citation by publication in tax suits or something like that --

PROFESSOR DORSANEO: The citation by publication in tax suit rule is Rule 9. We can make it the 60 days in Rule 8.

CHAIRMAN SOULES: Is there a statute on it?

PROFESSOR DORSANEO: I don't think there is a statute on it. I think it's just all in the rule, but the tax suit people are separate people, and we would probably like to convince them to be the same, and they probably don't really want to be different.

What I would recommend is we do Rule 7 to 60 days, leaving the rest of it alone as to the number of days of publication. It will still work, and examine the feasibility of getting that done in Rule 9, which involves tax suits; and the Family Code is just out there on its own. But there is a rule that says if a statute covers this, the statute controls. If you want to do that, that's easily done. That's, frankly, what Bonnie

recommended to do with respect to it.

CHAIRMAN SOULES: For now go ahead and change to 60 days in the tax, too, and I will ask Holly to call over to Oliver and find out if it's a problem.

PROFESSOR DORSANEO: Okay.

CHAIRMAN SOULES: And if it is, we will tell you; and if not, it's done. Any objection to 60 days? No objections.

PROFESSOR DORSANEO: In pleadings and motions the only thing really left to do -- unless I overlooked something, which, of course, is possible -- is venue; and this draft that you have is my effort at finalizing the action we have already taken on venue. Venue needs to be on the agenda. It needs to be assigned to somebody. Somebody needs to go through and read the minutes of our debates and the votes that were taken and to take charge of getting venue done in September. I will be glad to do that. I will be glad to have somebody else to do it.

CHAIRMAN SOULES: Do it.

PROFESSOR DORSANEO: All right.

CHAIRMAN SOULES: We have had

that on the agenda twice; and for, I'm sure, unavoidable reason the person responsible couldn't be here. So let's reassign it so it's here in September.

PROFESSOR DORSANEO: All right.

JUSTICE HECHT: There is another matter.

CHAIRMAN SOULES: Justice Hecht.

JUSTICE HECHT: There are members of the Court who would like the committee to consider whether to do away with the general denial. Particularly in light of the summary judgment change, why shouldn't the defendant have to specifically respond to the allegations in the complaint? I think the committee has talked about that, but it was several years ago, as I recall, the last time. So the query is should we do that?

CHAIRMAN SOULES: Well, the debate on that in the past has been, Judge, you can't get a default in federal court without a motion and you can here, so that just plugs a hole.

JUSTICE HECHT: But query, to

put a little finer point on it, should you have to file something more than a general denial in 60 days or 90, some point in the process, even if you can file a general denial first cracker out of the box?

As I understand, the insurance defense Bar says, "Well, we can't even find out -- we don't even know what the deal is for the first six weeks, so we just trot down there and file a general denial and we are in the clear; but if you make us file a specific denial within 30 days we are just going to have to get an extension every time because we are not going to be able to find out the facts"; but shouldn't they have to say at some point in the pleading process "yes" or "no"?

CHAIRMAN SOULES: What do we have that took the place of special exceptions?

PROFESSOR DORSANEO: Special exceptions.

MR. McMAINS: No. We have special exceptions.

CHAIRMAN SOULES: Can we put that in the special exception rule that it's

mandatory to answer a la federal rules if a special exception is made to a general denial?

JUSTICE HECHT: We could do that. I think the Court wants the sense of the committee on that.

CHAIRMAN SOULES: Would that be responsive, though, to your approach?

JUSTICE HECHT: Yeah. Well, I mean, I think we just kind of want your thinking on it because one of the criticisms of the summary judgment rule, which several members of the Court think is valid, is that you have more -- somewhat more detailed pleadings in federal court. Now, I'm not clear how much more detailed; but query, is that a valid criticism and should it be addressed by some change like that?

CHAIRMAN SOULES: Who wants to respond to Justice Hecht?

Well, if there are some members of the Court that are concerned, that seems to me to be very easily fixed in the special exceptions.

JUSTICE HECHT: We are concerned. We just don't know if it's a good

idea or not.

CHAIRMAN SOULES: Okay. Rusty.

MR. McMAINS: Well, I mean, I sympathize. I've been in practice a number of years with an insurance docket, and it's not infrequent that you get the petition on Friday to answer on Monday, and you've got no way -- you don't even know if this is really the right party or the right name of the party. You are struggling just to make sure you don't waive anything in that regard.

So I think the notion that you should have a specific denial practice, because of the breadth of practice we have in Texas as opposed to limited jurisdiction in federal court, is probably -- I mean, what happens in federal court by and large is they file -- and correct me if I'm wrong, Steve, but a lot of times they will file their motion practices, which basically stay their obligation to file any kind of special denial.

MR. SUSMAN: Sure.

MR. McMAINS: Of anything. So as a practical matter they are just filing some of the 12(b) various motions and until

those are decided, which frequently may be six months or a year later, there is not even an obligation to make an answer. So I'm not sure that the federal practice really supplies that much more, you know, specificity, with regards to pleadings, at least in terms of getting into court or, for that matter, in terms of avoiding default, which seems to me is most everybody's interest, is let's not get defaulted here right away just because we put something in.

CHAIRMAN SOULES: Really the federal practice is inverted to the state practice. We answer and then move for special exceptions. In state court you move for multiple -- you file a motion for more definite statement and then answer when you get a ruling on that.

MR. McMAINS: Yeah. They have various motion practices under 12, any one of which will basically defer the obligation to file an answer until a certain period of time after there is a ruling on those motions, so I think it's a little deceptive to think that the federal practice really requires much more

specificity at the outset.

JUSTICE HECHT: Well, it's more work.

MR. McMAINS: Right.

JUSTICE HECHT: One party now is going to have to go through and spend a bunch of hours, and so the question is, is that productive or not?

MR. McMAINS: The problem is a lot of the rules we have drafted, too. On the general denial, for instance, what happens with regards to cross-claims and counterclaims? I mean, we have treated -- if you are responding in certain fashions, we have treated -- if you didn't have to actually file something, it's deemed a general denial. I mean, we have a lot of rewriting to do if we were to try and incorporate any kind of a specific denial practice in there.

PROFESSOR DORSANEO: It wouldn't be that big of a deal, because we just -- we are like the federal practice in most respects, is that we don't require a reply to an answer, you know.

MR. McMAINS: Uh-huh.

PROFESSOR DORSANEO: In fact, we do require a reply to an answer more than the federal system does. A reply to an answer is not necessary unless it's a counterclaim denominated as such or denials or matters of avoidance, but these adjustments are not difficult drafting adjustments to make. They may follow as a matter of course, if we do this then we have to do that. You know, we could draft it either way, frankly, and have alternative proposals if the Court would like that.

JUSTICE HECHT: Well, I think we just want a sense of the committee whether this is a good idea or not, because we honestly don't know, and it's been raised that this would tend to define the issues earlier on and make the eventual adjudication of the case either quicker or less expensive, but it occurs to us that it may just be make-work for the defendant, and we don't want there to be make-work for anybody.

So if it will help, and it seems to work in the federal system, then there is no reason not to do it and a lot of reasons to do it;

but if it's not going to help, if it's just going to tell you stuff you already know, then there is no point in changing it.

CHAIRMAN SOULES: Carl Hamilton.

MR. HAMILTON: I agree with the judge that it may just be extra work. If you don't have the answers, you are just going to get an answer that says, "We can't admit or deny it because we don't have the information"; but if you will recall, Court Rules Committee has submitted to the Court the mandatory disclosures; and to some extent the Supreme Court Advisory Committee has the same thing, although in a more limited fashion; but if those are utilized, those should require the basic disclosures that identify the claims and the defenses in place of the pleadings.

PROFESSOR DORSANEO: That's right.

MR. HAMILTON: So it seems to me that that approach is a little better than just to make-work on answers on every allegation.

PROFESSOR DORSANEO: Judge

Hughes, who was a member of our task force, is a federal judge in Houston and was dealing with both state and federal practice, was steadfastly of the view, although he usually is of strong views, that the federal practice is really not anything but technically different from the state practice because you get a list of specific denials, and it just is more work. Now, that's a sample of one, and I'm sure that he's in a minority, otherwise the federal rules wouldn't be worded the way they are.

JUSTICE HECHT: Well, they are worded the way they are because of what people thought a long time ago, and I suppose they have revisited it since, but the limitations on discovery are in some conflict with notice pleading, because the less you know from the pleadings the more you have to find out some way, but there doesn't seem to be a whole lot of principal distinction between notice pleading and back the whole other way where you have to plead everything in detail, and I don't think anybody wants to go back there, at least there doesn't seem to be much consensus

for that. So if we stayed kind of where we are on that, query, should we make this change? I know the committee has talked about it before and not thought it was good, but...

PROFESSOR DORSANEO: As a philosophical matter it makes sense under modern thinking to require somebody to admit something that shouldn't be in controversy rather than to require the aggressor to make proof of that matter in order to prevail on a just claim. As a practical matter, though, I don't know if it ends up making any difference.

JUSTICE HECHT: Yeah.

PROFESSOR DORSANEO: And it may just be better to let somebody file a general denial in order to indicate general opposition to the claim, and let the remainder of the procedures sort that out.

CHAIRMAN SOULES: I don't know. This is just chasing the same rabbit, but I haven't really thought of special exceptions being a tool to use against a general denial. I don't know whether other people use it that way.

MR. McMAINS: No. In fact, I don't think it is.

MR. ORSINGER: You can't.

MR. McMAINS: I don't think you can use a special exception for that.

CHAIRMAN SOULES: But if we change the rule to say that it could be so used then it would be available for that use. Is that a way to solve a problem if the plaintiff wants it solved? Richard.

MR. ORSINGER: Well, rather than saying that the special exception could negate the general denial maybe what we ought to do is be more -- give the court more authority to make someone break down the general denial into specific responses. I hate to think that by filing a pleading that I can negate a general denial.

CHAIRMAN SOULES: I don't mean negate. I mean force an amendment to the answer, to answer in federal fashion.

MR. ORSINGER: Well, would we leave the general denial in place?

CHAIRMAN SOULES: Sure.

MR. ORSINGER: Meaning that if

you omitted to deny something it's not therefore conceded. If we leave the general denial in place but just force people to specify what their position is on specific allegations, that's not a lot different from our current special exception practice.

I mean, normally special exceptions are against the plaintiff's pleadings, normally, but we could take the same standards that we are all familiar with in making a plaintiff state their claims more specifically and just say that those same standards can be applied against a defendant on a plaintiff's motion, and the plaintiff can come in and say their allegations are -- "We want more specific responses to our specific allegations."

CHAIRMAN SOULES: That's what I'm proposing.

MR. ORSINGER: And so in a sense you now have special exceptions running against the defendant's plea as opposed to just the plaintiff's plea.

CHAIRMAN SOULES: Answer.

MR. ORSINGER: Yeah.

PROFESSOR DORSANEO: But you

don't want more specific responses to general allegations that are now made permissible by our changes in how you plead a claim. For example, something more customary under our current practice of a plaintiff in a contract case can just aver generally that all conditions precedent have been performed or have occurred, and that puts the onus on the defendant to specify individual conditions that have not been satisfied.

Now, that is the reverse practice, making the plaintiff's claim the general statement and the defendant's response the specific speed-brakes-lookout kind of detail, and if you want to do that -- and I don't think you want to, and frankly, if you want to do anything other than monkey see Federal Rule 8(b) then you may be creating problems for me because I have to create something without guidance.

CHAIRMAN SOULES: Any other comments? Okay. How should the proposition be placed up for consensus?

I guess, should there be any change to the general denial practice from the way it is

today? The time it's filed, whatever you may be able to use today to get it more specific, whatever it is, leave it alone; or should there be some change; and if there should be some change then we can get into what that should be. Okay?

JUSTICE HECHT: That's good.

CHAIRMAN SOULES: How many favor no change? Eight.

How many favor some change? Two.

JUSTICE HECHT: Thank you.

CHAIRMAN SOULES: Satisfactory?

JUSTICE HECHT: Yes, sir.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: Section 4, we have already mentioned the guardian ad litem issue that is currently in Rule 173 that in the recodification draft is located at Rule 30(c)(2). So that should be on the agenda both ways, Holly, 173 and proposed Rule 30(c)(2), in case we approach the agenda by reference to the recodification draft rather than the other rules.

In addition, Bonnie Wolbrueck has pointed out to me --

CHAIRMAN SOULES: Let me interrupt you just a second there. Carl, will you take proposed Rule 30(c) to the Court Rules Committee so that it is factored into your consideration of 173?

MR. HAMILTON: Yes, sir.

CHAIRMAN SOULES: It will be a new Rule 30(c), I suppose, wherever it comes from, either Court Rules 173 or ours; is that correct, Bill?

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN SOULES: Okay. Now go ahead and go forward.

PROFESSOR DORSANEO: Then as I mentioned in the introduction, proposed Rule 38, which comes from current Rule 42, derivative suits, which is on page 14 of Section 4, needs to be looked at in light of what Professor Bromberg told me the legislature did to the Business Corporation Act. That should be on the agenda as well, and I suppose that's something that I could do, too.

CHAIRMAN SOULES: Proposed Rule 38?

PROFESSOR DORSANEO: Yes. And finally, the part of proposed Rule 41 dealing with the requisites of citation, so-called scire facias needs to be looked at, and I'd ask that to be put on the agenda under my name and Bonnie Wolbrueck's name since it's really her suggestion that she doesn't like how that works now and has some questions about the language of the draft that we have already discussed in the full committee.

CHAIRMAN SOULES: That's proposed Rule 41.

And what's the venue rule, proposed rule?

MS. DUDERSTADT: 86.

CHAIRMAN SOULES: 86.

PROFESSOR DORSANEO: And I believe that's really all in Section 4. Section 6 I'll ask you to take a look at. That's the section or part of the section that is on the agenda, and I want to work through the entire section, which is not long, and get to the agenda item in a second.

Proposed Rule 60 is a verbatim reproduction of current Rule 166, but we understand that the discovery subcommittee

prepared a pretrial rule and that that's been submitted to the Court already, and I suppose also the Court Rules draft is before the Court, too. So we would anticipate changing this part of the recodification draft to reflect whatever the Court does on those two proposals. So this rule, proposed Rule 60, is going to be changed.

CHAIRMAN SOULES: No. This is what we sent to the Court. We didn't change it.

PROFESSOR DORSANEO: Oh, it is? Okay. I'm sorry. No. This is the current one, isn't it, John, from the current rule book?

MR. MARKS: Looks like it.

CHAIRMAN SOULES: Did we change Rule 60 at all?

PROFESSOR DORSANEO: It was in the discovery package, and I think we changed some.

CHAIRMAN SOULES: No. It came later. It was done later, and I think we voted no change.

MR. SUSMAN: Uh-huh.

CHAIRMAN SOULES: So that's done.

PROFESSOR DORSANEO: All right. I stand corrected.

MR. HAMILTON: Unless the Court adopts the Court Rules version.

CHAIRMAN SOULES: Unless they do the Court Rules. That's right. For our committee this is done.

PROFESSOR DORSANEO: Dismissal for want of prosecution is proposed Rule 61, and current Rule 165a, and that's already been placed on the agenda under 165a.

Proposed Rule 62 is a verbatim reproduction of current Rules 171 and 172, which you can see in the side-by-side comparison. I'm not even going to ask for anybody to vote on it. I will just point it out to you that it hasn't been, strictly speaking, voted on yet. It is virtually identical, except for the combination of Rules 171 and 172 into one rule with those current rules, aside from gender changes, taking out "his" and putting in something else.

CHAIRMAN SOULES: Any

opposition to 62? Okay. That's passed.

PROFESSOR DORSANEO: 63 is the summary judgment rule as ordered by the Court, including subdivision (i), the no evidence motion.

64, default judgment, is on the agenda. We went through this last time, and there was just a little bit of cleanup work, and if you look on page 11 of this Section 6 draft, you can both see how the side-by-side comparison will work in other contexts, and we can deal with this particular issue.

Current Rule 237a is brought forward into proposed Rule 64 in only one respect; that is, the last sentence of current Rule 237a is added to subdivision (a) of proposed Rule 64. The balance of 237a doesn't look to me like it needs to be brought forward, but it could be brought forward and probably located in Section 2 rather than in this Section 6, and let's just ask you to read it. "When any causes are moved to the federal court and is afterwards remanded to the state court, the plaintiff shall file a certified copy of the order of remand with the clerk of the state

court and shall forthwith give written notice of such filing to the attorneys of record for all adverse parties."

You know, no big deal for that to be done or for the rules to say that, but wouldn't that be taken care of already by the notices received in the federal court proceeding? Maybe not, maybe so, maybe it's not a big deal. "All such adverse parties shall have 15 days from the receipt of such notice within which to file an answer." Well, they already will have filed an answer in federal court, won't they?

MR. McMAINS: No.

CHAIRMAN SOULES: No.

PROFESSOR DORSANEO: Sometimes it gets remanded before there is an answer?

MR. McMAINS: Yes.

PROFESSOR DORSANEO: Okay. Well, if that's all true then probably I would recommend adding this beginning part of 237 into the rule book somewhere, probably in Section 2, which is the place where you are given information about answering. Maybe in Section 3, pleadings and motions. Maybe it

would go in Section 3 in Rule 25.

So that's not carried forward. If it's the sense of the committee that it needs to be carried forward, I will put it in here in the place where it seems most appropriate. That is probably not going to be over here in pretrial. It is probably going to be in the pleadings and motions section that talks about when you answer, or in the citation section, which covers the same subject matter. Perhaps a separate rule for removal of cases would be appropriate dealing with the removal issue, but I will carry it forward if that's the sense.

MR. McMAINS: Why doesn't this last sentence appear in 64 in the default judgment rule?

PROFESSOR DORSANEO: It does.

CHAIRMAN SOULES: He moved the very last sentence of 64.

MR. McMAINS: Oh, you did move it? Okay.

PROFESSOR DORSANEO: Yeah.

MR. McMAINS: So you already put that in there?

PROFESSOR DORSANEO: Yeah.

MR. McMAINS: So you're only talking about the first --

PROFESSOR DORSANEO: Two sentences.

MR. McMAINS: The first two sentences.

PROFESSOR DORSANEO: Should they go in and --

MR. McMAINS: Not there, but at the answer place.

PROFESSOR DORSANEO: Yeah.

CHAIRMAN SOULES: Those who think they belong in here show by hands. Anybody opposed? No one opposed.

PROFESSOR DORSANEO: Put them where somebody can find them.

CHAIRMAN SOULES: Let me ask for a show of hands on two other -- well, first, I think the first one is easy, to give written notice and so forth, that ought to be served.

PROFESSOR DORSANEO: Okay.

CHAIRMAN SOULES: However you write it, because that's what we talk about

all through here, service.

Time to answer, any problem with 30 days? I mean, this 15 is just an oddball number of days that somebody can get trapped on.

PROFESSOR DORSANEO: Yeah.

CHAIRMAN SOULES: It's not anyplace else in the rules. 30 days okay? 30 days.

MR. McMAINS: It's 30 days in addition to the fact you have already been fooling around for six months in federal court?

CHAIRMAN SOULES: Well, if the order to remand were something else, you would have 30 days in federal court.

MR. McMAINS: I don't understand.

CHAIRMAN SOULES: In an order, for example, denying a plea to the jurisdiction, denying a plea to the venue, another 12(b) motion, whenever that's over with you would have 30 days in federal court.

MR. McMAINS: Oh, I understand. Ten.

CHAIRMAN SOULES: Ten. Okay.

MR. McMAINS: A very short period of time.

PROFESSOR DORSANEO: But the federal judge always changes that, in my experience.

MR. McMAINS: Well, that also doesn't count weekends and whatever, since it's less than 12.

CHAIRMAN SOULES: Anybody got a problem with 30 days?

PROFESSOR DORSANEO: Huh-uh.

CHAIRMAN SOULES: 30 days it is.

PROFESSOR DORSANEO: All right. Other than that, in looking at the remainder of the current default judgment rules -- and this is subject to your own individual review because I certainly could make a mistake -- I ultimately decided, based on the recommendation last time to go back and double-check, to bring forward the parts that were not brought forward in the last draft, such as the balance of Rule 239a beginning with the word "immediately" in about the seventh line, and the remainder of Rule 244,

not all of which was contained in the prior draft. So I just ask --

CHAIRMAN SOULES: So Section 6 is ready except you want to revisit 61, dismiss for want of prosecution?

PROFESSOR DORSANEO: Yes. And -- yes. That's right.

CHAIRMAN SOULES: And you are going to move -- you are going to put this 237a language someplace, but you will find out where it is as modified.

All right. All in favor of Section 6, other than we are not voting on Rule 61 at this time, dismissal for want of prosecution. Any opposition to Section 6 with that reservation? No opposition. Oh, Don Hunt.

MR. HUNT: No. I vote for it.

MR. McMAINS: He was trying to vote for it.

CHAIRMAN SOULES: No opposition. It's passed except for Rule 61, which we will, I guess, talk about later in the day or now, as you choose.

MR. McMAINS: September, actually. Didn't you put 165a on the

September docket?

CHAIRMAN SOULES: All right. Very good.

PROFESSOR DORSANEO: Section 7 is a redraft of what we did last time with a few little modifications.

CHAIRMAN SOULES: Let me get a tally of this right quick where we are. We have passed Rule 1 and Rule 2 and Rule 3 except for venue and Rule 4 except for derivative suits and Rule 5 except possibly for 167.

PROFESSOR DORSANEO: You mean sections?

CHAIRMAN SOULES: I'm sorry. These are sections. All sections up to now. Section 6 except for No. 61, and now we are to Section 7, right?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: Is that where we are?

PROFESSOR DORSANEO: And we have done seven.

HONORABLE DAVID PEEPLES: Luke, could I ask a question?

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: Some of these rules are verbatim the way they were before with different numbers, but some of them have been rewritten and I think improved, but has the committee signed off on those total rewrites?

PROFESSOR DORSANEO: Yes.

HONORABLE DAVID PEEPLES: We have done that in the past?

CHAIRMAN SOULES: Up to now. I know up to seven, and that's where I was trying to get clarified.

PROFESSOR DORSANEO: With two caveats. Gender references have been removed even if the committee did not remove them in the voting on various drafts by changing "he" to "the master," and the word "shall" has been worked on and taken out and replaced with "will" or "must" usually, although sometimes the word "shall" is used in the rule book in just a formal manner when it doesn't mean "will" or "must." It means "can" or "is," so some of that little bit of tinkering has been

done, but if all of this goes to a review process, you know, that would be done anyway.

CHAIRMAN SOULES: Okay. Section 7.

PROFESSOR DORSANEO: Section 7 is based largely on Paula Sweeney's report or other reports. I will go backwards. Section 7(E) is -- and E deals with nonjury trials, comes from Don Hunt's report, and that's been approved completely. Skipping D, section C, the jury charge, is verbatim what the Court sent back to us and not what we sent back to the Court. Got that, Mr. Chairman?

CHAIRMAN SOULES: We didn't send anything back. You mean not what we sent originally to the Court?

PROFESSOR DORSANEO: We sent originally to the Court and then we sent back a suggestion on proposed rule, in the Court's draft, 278, I guess, and I'm just assuming that we will hear from the Court in some reasonable time about the jury charge, and whatever they do, it will go in here.

CHAIRMAN SOULES: Okay.

MR. HAMILTON: Luke, the Court

Rules Committee sent to the Court some changes on jury charges, which is on page 259.6 of the third supplement. Judge Hart of Austin here brought these up, and we have put it in a rule authorizing the jury to be instructed about taking notes and what they do with the notes, and I'd like to see this committee consider that before it goes into your final draft.

CHAIRMAN SOULES: Okay. Is that in the third supplement?

MR. HAMILTON: It's in the third supplement, page 259.6. It deals with current Rule 226 and 281, papers to be taken to the jury room and instructions to the jury panel.

CHAIRMAN SOULES: Give me the page numbers again, the third supplement.

MR. HAMILTON: 259.6 over to 259.8.

JUSTICE HECHT: This is further complicated by the fact that the Court has a jury task force that is chaired, I think, by Dean President or President Dean Newton, however you say it, and they have reported -- they have made a report. I think it's -- I'm

not sure it's final, but they address some of these issues, too, about note taking, papers in the jury room, and asking questions and a lot of good discussion.

CHAIRMAN SOULES: Okay. So this is existing Rule 281?

MR. HAMILTON: 259.6 is the instruction to the jury, and 259.8 is 281.

CHAIRMAN SOULES: Okay. Now, let me turn through these pages. On 259.3 Court Rules has no changes to it.

MR. HAMILTON: That's the existing rule.

CHAIRMAN SOULES: Okay. And the changes start where?

MR. HAMILTON: 259.6.

CHAIRMAN SOULES: Holly has indicated that we voted at the last meeting to defer this until we had the task force results.

JUSTICE HECHT: We should send you their report, and we will do that.

CHAIRMAN SOULES: Has the report come in?

JUSTICE HECHT: Yes. I can't

remember whether it's just preliminary or not, but about maybe two weeks ago or a week, ten days, they reported it. A couple, three weeks ago, sometime within fairly short --

CHAIRMAN SOULES: Do you think we will have their report for September?

JUSTICE HECHT: Yeah. Well, you can look at what we have got.

CHAIRMAN SOULES: Of course, if it's preliminary -- why don't we get that in here before we take this up, if that's all right, Carl.

JUSTICE HECHT: It's a thick report.

PROFESSOR DORSANEO: Well, Carl hasn't read that report either, right? You haven't seen the report?

MR. HAMILTON: I haven't seen that.

PROFESSOR DORSANEO: If we want to put that on the agenda and let him take a labor in war on that.

CHAIRMAN SOULES: Okay. Well, let's get it in here, and we will come back to the jury. At the present time, though, we

will leave that question open whether additional instructions and so forth come out of the task force or the Court Rules regarding note taking and the like, reserving that then and reserving, I guess, the change that we sent to the Court subsequently. Do you remember what that change was? I can't get it in my mind, the change we sent after we had the Court's charge.

PROFESSOR DORSANEO: The part about the request and objections giving reasonable guidance by persons having the burden to plead; isn't that right, Judge Peeples?

HONORABLE DAVID PEEPLES: I'm sorry?

PROFESSOR DORSANEO: Your 278a change awhile back had to do with --

CHAIRMAN SOULES: Yeah. Here it is. "An objection" was in there. Inserted, "which gives the Court reasonable guidance."

MR. McMAINS: Right.

CHAIRMAN SOULES: Those were the words that were added in.

PROFESSOR DORSANEO: But that's for the person having the burden to plead rather than all objectors.

CHAIRMAN SOULES: "Requests must be sufficient."

"After the closeing of -- before or at the time of objecting or at such earlier time as the court may require, a party shall submit to the court in writing the questions, definitions, and instructions requested to be included in the charge on any contention that party was required to plead.

"The requests must be sufficient to provide the court reasonable guidance in fashioning the charge. Failure to comply with this paragraph shall not preclude the party from assigning error in the charge if an objection is made pursuant to paragraph (b)."

We suggested the Court change that to say, "Failure to comply with this paragraph shall not preclude the party from assigning error in the charge if an objection for which gives the Court reasonable guidance is made pursuant to paragraph (b)." Do you anticipate a problem with that with the Court? Should we

put that in Bill's draft?

PROFESSOR DORSANEO: It's in there. I will put it in there.

CHAIRMAN SOULES: Okay. Justice Hecht said he doesn't anticipate a problem with it, so let's just go ahead and put it in.

PROFESSOR DORSANEO: Yeah. 83(a), last sentence.

CHAIRMAN SOULES: Into what? 83(a)?

PROFESSOR DORSANEO: Yes. Last sentence.

CHAIRMAN SOULES: Is that in Section 8?

MR. McMAINS: Seven.

HONORABLE DAVID PEEPLES: Page 30.

CHAIRMAN SOULES: Okay. 83(a). Make an objection, right there. You want to see the language?

PROFESSOR DORSANEO: I have it. I have file cabinets full of everything we have ever done.

CHAIRMAN SOULES: If you don't,

come down to my place.

PROFESSOR DORSANEO: I'm sure you have warehouses full.

CHAIRMAN SOULES: All right. What's next?

PROFESSOR DORSANEO: Well, in 7, really, the part that we can go through probably pretty quickly that has been discussed the least is A. 70, paragraph A is, you know, verbatim. B -- and we may have discussed this at some point. I have trouble remembering whether we discussed it at subcommittee or full committee or whatever, but Rule 246 you will see begins differently than subdivision (b) of proposed Rule 70.

Rule 246, which annotates the current version of Rule 245, provides that the clerk will send the nonresident attorney, presumably someone from a different county, a notice of a setting if the nonresident attorney gives the clerk a stamped envelope.

That annotates the requirement that's now in Rule 245 that the clerk give notice or that the court, whoever that is, give notice to everybody of settings. Okay. So this

paragraph (b) expands the notion in Rule 246 in one sense and puts the responsibility on the opposing parties in another sense by saying any party setting a case for trial must immediately notify all other parties of the trial setting by written notice and must file a copy of such notice with the clerk of the court.

We may have already voted on this, Mr. Chairman, and then if the court on its own initiative sets the case for trial, the clerk of the court must notify all parties of the setting by first class mail.

CHAIRMAN SOULES: Yeah. We voted on this.

PROFESSOR DORSANEO: Okay. It looked familiar to me.

CHAIRMAN SOULES: You might want to change it and say "any party requesting the setting." The party doesn't set a case.

PROFESSOR DORSANEO: I want to go back and check the transcript to see whose language that was. It might be yours.

CHAIRMAN SOULES: It might be

mine. If I did, I withdraw it. Judges don't let me set cases.

MR. HAMILTON: Bill, is there a provision somewhere that says any of these notices have to be by certified mail? A general provision? Does that apply to that first class mail of the clerk?

MR. McMAINS: No. No. Clerks never have to send by certified mail.

CHAIRMAN SOULES: That's right.

MR. McMAINS: In our rules ever.

PROFESSOR DORSANEO: It's an ambiguity in our current rules, and it says "every notice" in 21a, but I don't think it applies to clerks. It applies to us.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: 70(c) is just an amalgamation of 263 and 264, and we may want to unamalgamate it, and that might happen in the redrafting; but 71, there is an issue that needs to be addressed that I need to disclose.

If you look at our current continuance rules we have four major rules. One of them

is very short, 251, "No application for a continuance shall be heard," blah-blah, but it does have the standard "except for sufficient cause supported by affidavit." So we have Rule 251, which could be viewed as a general rule authorizing continuances for sufficient cause supported by affidavit in a variety of different circumstances. A good example would be absence of a party. Okay?

The reason that's a good example, because the specific rules that follow Rule 251 are about specific circumstances. 252 is about one of testimony. 253 is about absence of counsel, and 254 is attendance on legislature.

This form of drafting is meant to make it plain that those specific circumstances involve additional requirements. In other words, those are specific cases provided for specifically in detailed provisions of the rule; but that there might be an entitlement to a continuance for some other sufficient cause; and the best example is absence of a party; and the case law on that, I think, is perhaps a little bit mixed involving a circumstance where somebody says, "I need a

continuance because my client can't be here to help me try the case," but they don't fit it into one of testimony. They don't say, "and he would testify" blah-blah-blah; and it just seemed to me the better reason cases would authorize continuances under additional circumstances; but they are too numerous to mention; and that's how this is drafted.

CHAIRMAN SOULES: Any opposition to 71 as drafted? To 70 as drafted? None. 70 and 71 are approved.

PROFESSOR DORSANEO: 72 is a combination of 265 and 266 and 269 with, frankly, fewer changes than would be desirable. In other words, it's more verbatim than it should be. These rules need further work, but I just didn't do it.

CHAIRMAN SOULES: Any opposition to 72?

PROFESSOR DORSANEO: I will mention with respect to 72 that the balance of 269 that isn't carried forward in 72(c) as listed over here in the right-hand column on page seven is carried forward into the counsel part of Section 11. In other words, this (d),

(e), (f), and (g) material -- (d), (e), (f), (g), and (h) material is not being omitted from the rule book. It is being moved to a section dealing with the behavior of counsel.

CHAIRMAN SOULES: Any opposition to 72? None. It will stand approved.

MR. McMAINS: Luke, I just have one question, and maybe it's in the rule that we have. That's what I was trying to see. We actually appear to require that intervenors and others be permitted to participate. It says "will" or "must" and I'm just wondering, is that what's in the current rule?

PROFESSOR DORSANEO: Well, that's an issue. Look right next to it, Rusty. Look at the side-by-side. That's one of those calls. "Counsel for an intervenor shall occupy the position in the argument assigned by the court." What does "shall" mean there?

MR. McMAINS: Oh, I see.

PROFESSOR DORSANEO: "Will," "must," "can," "may"?

CHAIRMAN SOULES: You said

what, "must"?

PROFESSOR DORSANEO: "Must," but, you know...

CHAIRMAN SOULES: All right. Anything else on 72? Okay. It stands approved.

PROFESSOR DORSANEO: 73 needs to be back on the agenda to match up with Carl's suggestions, Carl's committee's suggestions, that are already on the agenda in 177b.

CHAIRMAN SOULES: Okay. We will put that on the September agenda, Rule 73, and --

PROFESSOR DORSANEO: There is an additional matter here. The subpoena rules are rules that will probably need some further work because of two additional issues. One is whether the Court -- or actually, one issue, and I'm correcting myself. One is whether the Court embraces something like what the discovery subcommittee sent to it on subpoenas, which amalgamates deposition subpoenas and trial subpoenas in the manner of Federal Rule 45 into one rule.

The rule as sent to the Court is not drafted -- not really quite finished, but if the Court decides to have one subpoena rule then that needs to go in here, and we need to consider that in connection with Carl's suggestion that Steve Susman mentioned about notices rather than spending $90, and then the issue would be -- I guess there are two issues, whether it goes over here in the trial part of the book or whether it's in the discovery part of the book or whether it's split.

My inclination would be to want to put it in the trial part of the book because that's where it is in the companion rule book, and people kind of get used to that. In other words, Federal Rule 45 is in the trial part of the book and not in some other part. So all of that needs to be done.

CHAIRMAN SOULES: Okay. Leave it in trial or put it in discovery? Leave it in the trial show by hands. Okay. Discovery?

Everybody says put it in the trial rule. And so that logistic piece is done and then we will in September see language on being able

to get a party to trial without a subpoena or a party's agent, and what else?

PROFESSOR DORSANEO: That's it.

CHAIRMAN SOULES: Okay. Other than that is there any opposition to 73? There is none. It passes with that remaining.

PROFESSOR DORSANEO: 74 comes from Paula Sweeney's report, as do 75 and 76 and 77 and the admonitory instructions, taking us all the way up to page 23.

CHAIRMAN SOULES: Okay. 74 has been approved.

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: 75 has been approved. 76 has been approved. 77 has been approved.

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: We are going to leave those open for Carl's input and the task force input. Where is that now? What rule did we look at while ago when we were -- that was the charge rules.

MR. HAMILTON: 281 on --

CHAIRMAN SOULES: Oh, this is the same rules.

MR. HAMILTON: Same rules.

CHAIRMAN SOULES: Okay. Rule 77 is still open for Carl's additions. Other than that it's approved, has been approved, and we are to 78, right?

PROFESSOR DORSANEO: 78, and look at the comment on the right-hand side. "WVD" is me. Just from the task force report and in reviewing this I combined Rules 227, 228, 229, and 231, which I don't think I left anything out, and I ask somebody to look at that carefully and give me guidance. We have already decided to omit Rule 230, and that comes from Paula Sweeney's report.

CHAIRMAN SOULES: Yeah. So 78 combines 227, 228, 229, and 231.

PROFESSOR DORSANEO: Yeah. And that's the purpose of the side-by-side comparison, to see when it's different, if it's any different, or just written differently.

CHAIRMAN SOULES: Elaine, do you see any problem with this?

PROFESSOR CARLSON: I'm sorry?

CHAIRMAN SOULES: With the

consolidation of 227, 228, 229, and 231 as Bill has done it in 78?

PROFESSOR CARLSON: No.

MR. HAMILTON: And why is 230 omitted?

CHAIRMAN SOULES: We voted it out, to repeal it, because of some problems that occurred in the practice and one reversal because there was a felon on the jury.

Okay. Any opposition to 78? No opposition. It passes.

PROFESSOR DORSANEO: 79(b) is a Batson/Edmonson procedure. The little boldface discussion in the right-hand column on pages 25 and 26 explain. Quite frankly, the Supreme Court's opinion is so clear about the procedure that help is actually not required. I mean, they say there are three steps, and they say the standard of review is abuse of discretion rather than clearly erroneous.

CHAIRMAN SOULES: Do you see any problem with this, Elaine?

PROFESSOR CARLSON: Luke, we had voted and the subcommittee recommendation

was to defer to the jury task force and, of course, we were also awaiting the Goode decision. Bill, refresh my memory. Does Goode vs. Shoukfeh say that the remedy is either to strike the jury or call a new panel? Has our Supreme Court said that?

PROFESSOR DORSANEO: No.

MR. McMAINS: Huh-uh.

PROFESSOR CARLSON: If we are going to go with Bill's proposal --

PROFESSOR DORSANEO: That's the one problematic one.

PROFESSOR CARLSON: That is problematic, and also, Bill, just a matter of cleanup work, at the top of page 26 in the first full sentence you limit -- I know you took it right out of Goode. It's limited to on the basis of race, but really it has to be --

PROFESSOR DORSANEO: Yeah. I don't mean to do that.

PROFESSOR CARLSON: -- race, gender, or ethnicity.

PROFESSOR DORSANEO: Yeah. Well, I would say "on an improper basis."

PROFESSOR CARLSON: That would work, too.

MR. ORSINGER: Maybe you ought to say "constitutionally improper."

PROFESSOR CARLSON: We have -- by the way, the task force had a draft Batson rule, but we just didn't carry it forward because we felt it had been -- the matter had been taken out of our hands by virtue of the appointment of the task force.

CHAIRMAN SOULES: Is that a part of the task force report that we are going to get?

MR. PARSLEY: I don't know. I haven't seen the report.

CHAIRMAN SOULES: You haven't seen it and don't have it. Okay.

HONORABLE DAVID PEEPLES: Luke, I have seen it, and I don't think that's in there, but I could be wrong.

PROFESSOR DORSANEO: Well, the point of it is I may not have done this exactly right, but the problems that we had before about not knowing what to say in most respects are now gone because the Goode case

is very clear. Now we have a case that covers it, so maybe we don't need a rule, but maybe we ought to have a rule. That's where 233 came from, which is now in -- it came from Patterson vs. Dunn with the paragraph or subdivision (a) of 279.

CHAIRMAN SOULES: I think we are going to turn to debate. First, are we going to debate first do we need a rule? How do you want to approach it?

PROFESSOR DORSANEO: That's fine with me.

CHAIRMAN SOULES: Do we need 79(b) at all, anything on Batson in the rules? Anyone care to speak to that? Richard.

MR. ORSINGER: I feel like we do, and I feel like we do particularly on the issue of what the remedy is for an improper strike, because the Code of Criminal Procedure does what I think is an irrational thing, which is to destroy the whole panel rather than to cure the problem, which is to put the improperly disqualified juror back on. If we take the entire rule out then we don't know from the Supreme Court what the remedy is, and

we only have one statute that's not a good remedy, and I think that we have really lost an opportunity.

CHAIRMAN SOULES: Okay. Let's think about that for the next half hour while we have lunch. Be back in session at about 1:00 o'clock.

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

CHAIRMAN SOULES: Justice Hecht has something to bring to our attention.

JUSTICE HECHT: I forgot to mention this earlier, but the Texas Commission on Judicial Efficiency, which the legislature commissioned and funded not this session but the one before and Herb McReynolds chaired, they reported back, and a lot of their recommendations were effectual this past -- meaning past session, in getting some laws changed, but some of them weren't, but one of their recommendations is on recusal.

It's phrased as disqualification, but it is this: that a judge who accepts campaign contributions from a party to a lawsuit or

from counsel to the party that exceed the limits in the Judicial Campaign Fairness Act, which was passed session before this last, should be subject to automatic disqualification on motion of the opposing party, and the Court would like to know whether that should be added to the TRAP rules before they become effective in September.

CHAIRMAN SOULES: That's a new statute?

JUSTICE HECHT: Which?

CHAIRMAN SOULES: Is that a statute or just a recommendation?

JUSTICE HECHT: No. It's just a recommendation. It was not introduced. It didn't pass -- well, it wasn't introduced.

MR. McMAINS: What's the amount in the Campaign Fairness?

JUSTICE HECHT: Well, it's different. It's like 5,000 for an individual and 25,000 for a law firm and --

MR. McMAINS: I mean, does it matter how many people are in the law firm?

JUSTICE HECHT: I think not. I think it's 25,000 per law firm, and I can't

remember it exactly because I've never run under it, but it's about what --

CHAIRMAN SOULES: This is off the record.

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

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Well, I support the current political structure and selection process as well, and I do think that there are a lot of people that pay a lot of money or, even more importantly, spend a lot of time campaigning for what they consider to be good people to be in the government; but I don't, frankly, think that this kind of rule is a penalty to that kind of support.

I think it may actually discourage people thinking that they can just go in and helter-skelter -- and probably more importantly, parties than lawyers, the, you know, big moguls in the world who think that they might well be able to buy influence by slipping 50 grand or a hundred grand here; and whether they can or not, it may just

discourage them thinking about it; and so I think it does have some deterrent benefit; and I think it's a workable rule so long as -- the one objection that I have, that we can expand the notion of what a party is when a party is an entity other than an individual, that there are certain controlling individuals that need to be embraced within the name, the term "party."

MR. SUSMAN: It's so rare that I agree with him a hundred percent I simply want to say I agree a hundred percent with what Rusty has said, and let the record reflect that as my comment.

CHAIRMAN SOULES: Anyone else? Anne McNamara.

MS. McNAMARA: I would just like to address the issue of perception. I agree with Steve Susman's comment. Really we are dealing a great deal with perception, and however much we all feel that we have a process and a judicial selection system that may work, a lot of the rest of the country has some concern about justice in Texas, and there is the feeling in some corners that you can't

get a fair trial if you are not a Texan, if you come to Texas, because of the contribution alignment. To the extent we have a rule like this, I think it might well give people some sense that there is a mechanism to deal with that, which I think would be good for the perception of Texas justice overall.

CHAIRMAN SOULES: It sounds like most of the comments have been in favor of such a rule. Anyone else want to say anything? Richard Orsinger.

MR. ORSINGER: I would like to go on record saying that I don't think this is advisable. This seems to me like a legislative decision to make, not a rule of procedure decision. I think that the enforcement mechanism is private litigants and lawyers rather than the Attorney General's office or someone who is a government official who has the resources and the official responsibility to see that the law is obeyed, and I think that it's going to lead to a denigration of the litigation process.

Maybe all it does is make something more concrete that's perhaps not as specific, but I

think it's demeaning to the judicial system generally and to the judges in particular to file motions to say that they are not qualified or capable of hearing a case because they received a political contribution, because that inherently carries with it a perception that they're influenced in their decision-making by who they receive contributions from, and while there may be some judges that are that way it's been my personal experience that most judges are not, and I don't have any sacred cow I'm trying to save here because at the level that I practice law I'm not going to reach any of these limits. It's more likely that my opponents would reach these limits than I would.

So my attitude on it is that we are acting like a legislature, that we are making private lawyers and litigants Attorney Generals, and that we are demeaning the stature of the judiciary by formalizing this procedure as an automatic recusal or disqualification in the rule.

CHAIRMAN SOULES: Anyone else? Okay. Those in favor of this contribution

levels being a ground for automatic recusal show by hands. Eight.

Those opposed? Three. Eight to three in favor of this as being automatic recusal.

Since we have tried to scrupulously divide disqualification and recusal along constitutional lines, I'm assuming this would be a recusal ground because it is not a Texas constitutional ground for disqualification.

MR. McMAINS: Right. Nor do we want it to have the same voidness effects that disqualification has.

CHAIRMAN SOULES: Follow-up to that -- Bill.

PROFESSOR DORSANEO: What would happen if a court of appeals justice on a three justice court ran afoul of this? What would happen to the case?

JUSTICE HECHT: Assign another judge.

PROFESSOR DORSANEO: Assign another judge?

MR. ORSINGER: Yeah. Retired judge in. And this only applies during the current election cycle? In other words, well,

like a judge on the court of appeals is elected to a six-year term. If my adversary has contributed an excess amount four and a half years ago to get the judge elected, is he disqualified during the whole current term?

CHAIRMAN SOULES: Or forever?

MR. ORSINGER: Or for the whole rest of his professional career or what? I mean, you can't just say it's only while the contribution periods are open. That's not enough time, so I guess if you contributed to the race that got the judge elected then during that whole term of office this recusal is available.

MR. McMAINS: I don't think that was the recommendation. I understood it to say basically that if you -- you didn't aggregate the amount of money you gave over the periods of the elections or anything, but if you are just talking about the immediate, last contested election cycle.

MR. ORSINGER: So it would cut off.

MR. McMAINS: And, yes, if it took -- yeah. If for whatever reason if it

was three and a half years ago, yes, it would basically -- if you gave or if somebody gave $100,000 then, yes, you would be subject to being recused any time during that cycle.

CHAIRMAN SOULES: During that term of office.

MR. McMAINS: Right. Well, until he ran again.

CHAIRMAN SOULES: Until he ran again or until that term expires.

MR. McMAINS: Yeah. I mean, if he runs again, of course, then you are going to be giving even more money or maybe it will be that you will give more money.

CHAIRMAN SOULES: From the moment the contribution is given until the ensuing term concludes, term of office.

MR. McMAINS: For which the contribution was given. Yeah.

MR. ORSINGER: Okay. And it wouldn't follow over if I contribute on the district bench and somebody is appointed to the court of appeals, that doesn't taint him on the court of appeals?

MR. McMAINS: No. I mean,

personally, if it's within the limits, I don't think that -- no, I don't think that's a problem if it's a different office.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: As someone who voted against it, I'm a little bit concerned that we don't know exactly what we voted on, and let me make sure that we understand what we have done. We have basically said that -- your Honor, and I'm not sure what the name of the group was.

JUSTICE HECHT: Texas Commission on Judicial Efficiency.

MR. KELTNER: That we accepted their interpretation that if you --

MR. McMAINS: They made a recommendation.

MR. KELTNER: Their recommendation that if a judge took more from an individual lawyer or party or law firm the amount allowed or the amount recommended to be -- or the limit recommended by that group, then that would automatically recuse the judge for that election cycle. Is that right?

MR. McMAINS: Well, first of all, it had to be in violation of the standards.

JUSTICE CORNELIUS: It wouldn't automatically recuse him. It would give the lawyers an automatic strike.

MR. McMAINS: The opposing party or attorney.

JUSTICE CORNELIUS: Right.

MR. McMAINS: You don't get to do it by just giving him money and then you move to recuse him.

MR. KELTNER: No. The other side has to --

MR. McMAINS: It's the other side that has the option.

CHAIRMAN SOULES: Why not?

MR. KELTNER: Quite frankly, I was hoping otherwise, but, no, no, seriously.

CHAIRMAN SOULES: For a few bucks we could fix a few problems.

MR. KELTNER: All right. I just want to make sure now. There are two recommendations that group has, as I understand it. One, total amount for a race,

which is very high, the 2 million, $250,000 we have been talking about, and then separately, individual contributions by parties, lawyers, and law firms, separated out for those groups; isn't that correct?

JUSTICE HECHT: That's what the statute does.

MS. McNAMARA: It's statutory. It's not that group.

MR. McMAINS: That's in the statute.

MR. KELTNER: That's right.

MR. ORSINGER: Now, nothing happens if you get more than two and a quarter million, or are you recused from everything?

MR. KELTNER: No. That's where I was headed and that --

MR. McMAINS: That part of the limit didn't make any difference, doesn't have any application to this.

MR. ORSINGER: I'm not sure I see any reason less for that than the other, but --

MR. McMAINS: Oh, you mean he's not entitled to sit at all if he raised more

than --

MR. ORSINGER: Well, if you're serious --

CHAIRMAN SOULES: He doesn't need to.

MR. McMAINS: That's right. Retire.

MR. KELTNER: All right. Let me ask a couple of --

CHAIRMAN SOULES: Go ahead, David.

MR. KELTNER: -- questions about making PAC contributions. How is a lawyer's contribution to a PAC going to make a difference? For example, if I'm a Vinson & Elkins partner, I contribute to the Vinson & Elkins PAC which contributes to a judge, how is that counted? I don't know, and I don't think that commission --

JUSTICE HECHT: I think the statute counts that as part of the law firm. I think under the statute there is no way for a law firm to avoid the cap.

MR. KELTNER: So if that's the case then Vinson & Elkins is going to have to

keep track of what all of its lawyers do.

JUSTICE HECHT: Well, the candidate does. Usually the firm doesn't pay any attention to it, but the candidate who suffers the consequences and his opponent, as Judge Peeples pointed out, follow these things very closely.

MR. ORSINGER: But now the law firm is going to have to keep track of it because they may get disqualified inadvertently from four years' worth of judicial decisions in front of that judge. If they inadvertently aggregate more, then they can quit practicing in that court basically, because everybody will recuse them.

MR. McMAINS: Well, of course, the rationale being if they didn't violate the rule, they might not have been elected in the first place. They still wouldn't have been able to practice before him.

CHAIRMAN SOULES: Should the judge be required to disclose this information?

MR. ORSINGER: They have to. They file it with the secretary of state.

CHAIRMAN SOULES: I mean in a contested case.

MR. ORSINGER: How is a court going to know that?

CHAIRMAN SOULES: They keep track of it.

MR. ORSINGER: Well, you put down the names of the contributors, but people move from law firm to law firm, and -- well, that's another thing. What if you contribute as a member of one law firm and you move to another law firm? Does your contribution follow you?

MR. SUSMAN: You-all are just dreaming up all these hypothetical clever ways of evading the limits, you know. Suppose you're an offshore PC that's a member of a partnership. I mean, Jesus.

CHAIRMAN SOULES: Doris, I'm sorry. I didn't see your hand up.

MS. LANGE: Another thing that compounds the problem, you are saying in that term, just like this next year you have to announce during December or the first Monday in January. You're still in office the whole

year until November or the primaries and then November. So you're in office and getting contributions in election.

MR. ORSINGER: Well, if you don't have the case finished by the time you get sworn in then you have got to get out of it, apparently. If somebody were to violate the contributions --

MS. LANGE: But I'm saying you're collecting contributions and you're running the whole -- almost a year.

MR. ORSINGER: I know.

MS. LANGE: While you're in office, if you're the officeholder.

MR. McMAINS: Right. But the point is that if you haven't violated the limits previously then that doesn't have any effect, so if you don't violate them during this --

MS. LANGE: That's true.

CHAIRMAN SOULES: That's not my suggestion. My suggestion is that from the moment you exceed the limit you're disqualified in this term until the end of the term for which you got the contribution.

MR. ORSINGER: See, Doris' suggestion is what's the logic in saying that you can get the benefit of an excessive contribution for 11 months and then magically all of the sudden the price is paid.

MR. McMAINS: I don't understand.

MR. ORSINGER: Well, if you make a contribution in February for a race that occurs in November for an oath that occurs on January 2nd, you have got 11 months' worth of mileage out of your contribution where recusal is not available.

HONORABLE DAVID PEEPLES: You shouldn't.

MR. McMAINS: No. You shouldn't.

MR. ORSINGER: Well, if we do it on a term-by-term basis, you do.

HONORABLE DAVID PEEPLES: From the moment you exceed the limits until the term for which the judge is running expires. That would get your 11 months plus the four-year term.

MR. McMAINS: Right. Which is

what I had assumed we were talking about anyway.

HONORABLE DAVID PEEPLES: Me, too.

MR. ORSINGER: I thought we were just disqualifying him for the term.

MR. McMAINS: No. It's not a question of the extent of the disqualification. The question is -- I thought the more important question was whether you aggregated the amounts, and first of all, I don't think you want to be -- you can't be retroactive anyway with these suggestions, so you're basically talking about violate these limits in any given election cycle because it only applies to a given election cycle. The limits only apply to a given election cycle.

HONORABLE DAVID PEEPLES: Luke, can I suggest this? I question whether we are going to draft very much here today in this committee. The Supreme Court I think was just interested in whether we thought it was a good idea, wasn't it?

JUSTICE HECHT: Well, we wanted

to get as much input as you can give us.

HONORABLE DAVID PEEPLES: Language?

JUSTICE HECHT: No, no. Not language. Language is fine, but this has been very helpful to me, and I have made a list of all of your comments.

HONORABLE DAVID PEEPLES: Does the Court know that the committee agrees with what Rusty said about parties and officers and, you know, whatever.

JUSTICE HECHT: They don't, but they will.

HONORABLE DAVID PEEPLES: I assume everybody is on board with that.

CHAIRMAN SOULES: I would like to throw on the table that the judge be required to disclose the information at the time the parties appear in his court and that unless that disclosure is made, you know, it wouldn't be waived.

HONORABLE DAVID PEEPLES: I think that sounds fine.

CHAIRMAN SOULES: By the parties.

HONORABLE DAVID PEEPLES: A judge ought to know if he or she got these amounts of money. You've got to file reports, and if it means you have got to figure out who works at Vinson & Elkins, I say go ahead and figure it out.

MR. ORSINGER: Well, is a Supreme Court judge going to know this?

JUSTICE HECHT: Yes.

MR. ORSINGER: Okay. I mean, if you say, because you're running all over the state and you never know if somebody is going to sign on an amended brief or a supplemental brief and then all of the sudden you have got to calculate new numbers and --

JUSTICE HECHT: Well, I mean, not on Carl's problem of who's practicing. That is very difficult. In fact, I don't know of any way to do that. For example, in our court, I mean, I don't have -- you know, if we have 500 cases pending at any one time I don't have any idea who's in all of them, or, you know, it changes from day-to-day. It could get dismissed one day and meanwhile people are filing stuff. So we never have been able to

figure out a way of identifying who gave what to the Court, but in the course of a campaign since this act has been passed judges -- the candidates on our court basically hire accountants to make sure that they don't violate the act.

MR. ORSINGER: Okay. Well, but if someone did, if we adopt the rule that the court must disclose, then even at the appellate level theoretically the appellate court would need to be sure that they are searching -- that they look on the briefs or motions for rehearing or whatever to be sure that there was no one on there that's in that excessive category.

JUSTICE HECHT: Well, I think Judge Peeples' point is there shouldn't be more than a handful. I mean, if you just wholesale violated the act, you've got problems.

MR. McMAINS: You probably didn't get elected.

JUSTICE HECHT: You've got problems anyway. If you just took one or two contributions that were excessive, there is no

way you are not going to know who they are.

MR. HAMILTON: Judge, when you record an individual contribution from a lawyer do you also record the firm that he is with at that time?

JUSTICE HECHT: The campaign does.

MR. HAMILTON: So why couldn't it be the status as of the time of the contribution?

MR. McMAINS: Yeah. I think it's a reporting period in dealing with the question of moving lawyers and stuff.

MR. HAMILTON: The time that the contribution is made would determine it.

JUSTICE HECHT: Yeah. We tried doing this voluntarily before this act passed, but now this act makes it basically essential for the candidate to keep track of this information.

CHAIRMAN SOULES: Anything else on this?

HONORABLE DAVID PEEPLES: But, Luke, your point was that the burden ought to be on the judge. The lawyers walk in and the

judge ought to tell them somehow, "You need to know that I received $27,000 from opposing lawyer."

CHAIRMAN SOULES: From Vinson & Elkins or $27,000 from Coastal or Oscar White.

MR. ORSINGER: And does everyone agree that this is just going to be a few people in the category and the judge will have that information in their head?

HONORABLE DAVID PEEPLES: Richard, I have gotten -- in four elections I have gotten a greater than 5,000-dollar contribution once. Now, that's just me in San Antonio. Supreme Court, it's different.

MR. ORSINGER: But how characteristic is that of judges in other parties?

HONORABLE DAVID PEEPLES: I don't know. This is an easy one for me.

MR. ORSINGER: Okay. Well, I know, but on the other hand, there have been judges that ran in Bexar County that did get contributions, and maybe they only get three or four of them and they know who they are, but if that's not true, and I don't know how

it is anywhere else --

HONORABLE DAVID PEEPLES: They know who they are.

MR. ORSINGER: They know who they are. Okay.

HONORABLE DAVID PEEPLES: The whole purpose is so they will know who they are.

MR. ORSINGER: All right. Okay. Then it's not a burden on them.

MR. HAMILTON: I think the rule is going to single out the lawyers and the law firms more than it is the judges that give the excessive contributions.

MR. ORSINGER: Yeah, but Luke has said the judge has the duty to spot the lawyer coming in the room or I guess signing on the pleadings, even if they don't show up for oral argument or to argue a motion. They are going to have to -- if the judge has to disclose it, like in Bexar County when you get random assignment and you might get three cases in one hour at the beginning of the day, you are going to have to know who signed the pleadings as well as who comes in to argue the

motion in order to comply with the requirement.

CHAIRMAN SOULES: I do agree with Steve on this. I think it's going to be a major deterrent. You take firm XYZ who really wants to support Judge A because they want that judge to be a judge and they want to be in that judge's court, they are going to be pretty scrupulous about giving too much money, so it will have some self-policing.

MR. ORSINGER: So there won't be any recusals.

CHAIRMAN SOULES: Maybe not. Maybe not.

HONORABLE DAVID PEEPLES: Because of all the sharp teeth we are putting in it.

CHAIRMAN SOULES: But we have all seen candidates get desperate at the end and do things or take financial contributions to pay for the last -- or at least get calls for financial contributions for that last essential round of TV because the polls are close and so forth, so it could be. David.

MR. KELTNER: One last thing,

and I do worry about this and I know the statute already does this, but I worry that both the statute and what we have just suggested forces a judge to think about who gave him or her money, and the whole purpose of a good system would be for a judge not to consider that.

And I realize the pragmatic parts of this, but that is very troubling to me, and I wish -- and I know this isn't a perfect world, but I wish we could go to a world where a judge wouldn't consider who gave him or her money and how their campaign went, and I guess that's -- I think we are inadvertently taking a step towards making a judge concentrate on that more, and it may be that we gain a better good. I'm not saying that, but that is a troubling matter that we all ought to take pause of.

CHAIRMAN SOULES: Well, it's been used in my own experience as a fund-raising positive strategy for the candidate. A candidate calls and says, "I need some money," and you know the limit is $5,000, so he can't take more than that.

MR. KELTNER: Oh, I very much agree.

CHAIRMAN SOULES: I mean, I guess everybody around this table has had a call like that.

MR. ORSINGER: Yeah, but my limit is a lot lower than $5,000.

CHAIRMAN SOULES: I don't know. I'm not sure what happens to your limit.

JUSTICE HECHT: It's clear to me that Richard hasn't participated as fully as he should have.

MR. ORSINGER: Well, I'm just a sole practitioner.

MR. McMAINS: You have just made a disclosure to Judge Hecht you might worry about.

JUSTICE HECHT: I have got you on my list now, Richard.

MR. McMAINS: You ain't on anybody on the Supreme Court's list, and that ain't good.

CHAIRMAN SOULES: Okay. Anything else on this? Judge, do you feel like you have the guidance that you need?

JUSTICE HECHT: Yes, I do. Thank you very much.

CHAIRMAN SOULES: Back to then, I guess, Rule 79. Is that where we were? There is a (c) here that should be a (b) that Carl caught, I think.

PROFESSOR DORSANEO: Whoops.

CHAIRMAN SOULES: So we were going to think about 79(b) and what to do with it at this meeting. Any suggestion? Elaine.

PROFESSOR CARLSON: I want to mention one thing further with respect to the policy the subcommittee considered. We were not excited about either of the remedies of reinstating a juror who had been seated because of Batson violation or calling an entire new panel.

And the last draft of our proposal, which we then tabled because of the task force appointment, was that parties would exercise the peremptory strikes, and they would be proposed peremptory strikes, and the other side would be given an opportunity to levy a Batson challenge. The court would rule on the Batson challenge outside the presence of the

jury and then after the completion of the Batson hearing those jurors who -- the first 12 that were properly not struck would be seated in district court and six otherwise. So it's a little different procedure, and it kind of is a cleaner remedy.

CHAIRMAN SOULES: It sounds better. In other words, the strikes would be -- instead of having the clerk call the jurors blind to the lawyers, and you watch them march to their chairs, before that happens, the strikes are laid on the table and the lawyers look at them and decide.

PROFESSOR CARLSON: And I have a copy of that last draft we worked on.

CHAIRMAN SOULES: That's really not strange to a lot of jurisdictions. I think I've said this once. We picked a jury in Florida and took turns making strikes on a list in open court. The jury wasn't there, but I would strike and then you get to strike and then you could back strike. I couldn't follow it.

You have to have a local lawyer, because you could go out here and strike thinking that

they are going to strike one back here that you don't like, but if they don't take them, it's not seriate. You can go back and say, "Well, I will take this one." "First I will take No. 5 off" because they are going to take 2. Well, they didn't take 2. "Well, I will take 7." You leave 2 on there until its your last strike and say, "Well, now I have got to take 2 because they haven't taken them," but it's all going on with everybody watching so for the parties to know before the jury knows who has been stricken; and, of course, in that process you can see the development of a Batson issue because it's happening right in front of you in open court. Judge Peeples.

HONORABLE DAVID PEEPLES: I think you are talking about a totally new different way of doing strikes, which is the way they do it in capital murder cases, I think, in Texas.

CHAIRMAN SOULES: Well, I'm not talking about going to the Florida process. I'm just talking about once you've got your six marks. I've got to give you mine, and you give me yours, and we find out we've got a

Batson issue before the clerk gets up and starts calling the names for jurors to march to the --

HONORABLE DAVID PEEPLES: But under Bill's draft, if you will look at the first sentence, it does that. "After the clerk has announced to the parties the composition of the jury," but before the jury panel is dismissed, basically before you announce it in court, you have got to make your strikes; and so if I'm a lawyer and I'm looking, I know who I struck; and the other people that didn't get on the jury, I know that the other side struck them; and if I have a Batson problem right then, I need to raise it before they go out in court and call the names of the 12. I think the way Bill has it here solves that problem, doesn't it?

MR. McMAINS: Yeah.

MR. ORSINGER: But as a practical matter, doesn't the clerk call the names one at a time, and they start heading toward the jury box?

MR. HAMILTON: You do the strikes first and then you see what is left

and you get the list before they ever call them.

MR. ORSINGER: Well, that's not the way it is when I practice.

HONORABLE DAVID PEEPLES: It can happen a bunch of ways and --

CHAIRMAN SOULES: Not always.

HONORABLE DAVID PEEPLES: -- if the lawyers are content to just go out in court and wait and hear the names called, I think they waive it under this. But if a lawyer has a Batson suspicion, why wouldn't he or she say, "Before you call the names can I take a look at the final list?" There is nothing secret about it then, and you see if you have got a Batson problem.

CHAIRMAN SOULES: I think I've probably got this a little out of order, too. Elaine has reminded me that we decided to table this last issue until such time as we heard from the jury task force. Now we have taken it up with Paula not even here. I don't know how to deal with that logistically to try to get this done in September, but I do think it's fair to try to give everybody some notice

that this is going to come up.

MR. McMAINS: I'm just curious about one thing. If the idea is -- and as I understand it, your alternative idea was to decide whether there was a Batson violation before you impanel the jury?

PROFESSOR CARLSON: Before the jurors are seated.

MR. McMAINS: So that you are never really kind of reinstating the person because they never got there in the first place.

CHAIRMAN SOULES: Right.

PROFESSOR CARLSON: And they didn't know you didn't like them.

MR. McMAINS: Okay. But the question I have, which I think is perhaps the most intriguing if you are talking about actually somebody sustaining a Batson challenge is, have you lost your strike?

HONORABLE DAVID PEEPLES: You should.

PROFESSOR CARLSON: I think you should.

MR. McMAINS: So, I mean, if

that person comes back on, the question is, could you strike somebody else?

PROFESSOR CARLSON: No. I think it's fair to say, isn't it, Judge Peeples, the sense of our subcommittee is no?

HONORABLE DAVID PEEPLES: Yeah. You've lost a strike, and the person is put back on the list, and you count from the beginning, and the first 12 are on the jury. That means somebody who otherwise would have been on it, No. 13, I guess --

MR. McMAINS: Okay.

PROFESSOR CARLSON: Yeah.

CHAIRMAN SOULES: That's the way the cases read. There is not anything like what you are saying in any of the cases I have ever read.

MR. McMAINS: Well, all I'm getting at, though, is that the problem is, if that's true, then the current case law is as well since you have been deprived of the strike if the Batson ruling is erroneous; that is, if you are striking -- use of peremptory was not maliciously done or not done in violation of Batson then you basically have

automatic reversible error because you have taken the position that you have an objectionable juror sitting. It's one that you have struck and that you found to be objectionable for reasons that were race neutral.

CHAIRMAN SOULES: I think you are right about that, too.

MR. McMAINS: So that basically the judge is kind of damned if you do and damned if you don't on the Batson decision. You are either forever right or you are forever wrong, and the case is going to be reversed on appeal either way, whichever way you do it. I just find that to be a little strange that it's -- that there is kind of no NRE or harmful error anywhere in there. It's just kind of automatic.

CHAIRMAN SOULES: Well, Paula's committee has done a lot of work on this, right?

PROFESSOR CARLSON: Uh-huh.

CHAIRMAN SOULES: Let's get a report from that committee, either her or you. Elaine, will you be available as far as you

know on the 19th?

PROFESSOR CARLSON: I think some of the people on the subcommittee don't like this, but I would think that since we have done so much work in this area that the task force might be forwarded to our committee to compare to ours.

CHAIRMAN SOULES: Let's put this on the agenda. Rule 79(b) will be on the agenda for final disposition on the 19th and 20th.

PROFESSOR CARLSON: Okay.

CHAIRMAN SOULES: I guess first -- I don't know if there are enough people here to even take a consensus of whether we should or shouldn't have it. Bring it, and we will resolve that, whether we do or don't, and if so, what.

PROFESSOR CARLSON: All right.

CHAIRMAN SOULES: Regardless of whether you have the task force guidance because we will have to move on.

PROFESSOR CARLSON: Okay.

CHAIRMAN SOULES: Anything else on this? Okay. Bill, what's next?

Other than that is 79 approved, 79(a)? Any opposition to 79(a)? That's passed.

Okay. What's next?

PROFESSOR DORSANEO: The rest of these in part (b) are things that came from Paula Sweeney's report.

CHAIRMAN SOULES: That we approved.

PROFESSOR DORSANEO: That we approved.

CHAIRMAN SOULES: So 80 has already been approved?

PROFESSOR DORSANEO: 80 has already been approved.

CHAIRMAN SOULES: Now we are to Section C.

PROFESSOR DORSANEO: C is the --

CHAIRMAN SOULES: All of C has been approved.

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: And you are going to put in Judge Peeples' insertion?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: So that takes

care of C. D?

PROFESSOR DORSANEO: D has either been approved insofar as there are any changes from the current rules, based upon Paula Sweeney's report, or there are no changes from the current rules.

CHAIRMAN SOULES: So that's approved. Richard Orsinger.

MR. ORSINGER: Why is preservation of complaints stuck right in the middle of jury rules?

CHAIRMAN SOULES: What rule are you looking at, Richard?

MR. ORSINGER: Well, I may be confused, but Rule 83 is a general rule.

PROFESSOR DORSANEO: I don't know where that title came from.

MR. ORSINGER: That belongs in Section 8. Okay. I see. It just so happens that --

MR. McMAINS: It's at the charge stage is where it --

PROFESSOR DORSANEO: Yeah.

MR. McMAINS: I mean, these were -- that's what they are. They are the

charge rules.

MR. ORSINGER: I'm with you.

MR. McMAINS: And that's the preservation of complaints in the charge.

MR. ORSINGER: All right. Okay. I'm with you.

CHAIRMAN SOULES: Why don't we say "Preservation of charge error"?

MR. ORSINGER: Because we have another section later on that's generic preservation.

PROFESSOR DORSANEO: I don't know what the Supreme Court -- I think this title came from us.

MR. McMAINS: It did.

CHAIRMAN SOULES: Okay. Let's change it to "charge error" in your draft.

PROFESSOR DORSANEO: Okay.

MR. ORSINGER: Rule 103 is generically entitled "Preservation of Complaints."

MR. McMAINS: Yeah, but this is talking about, though, the preservation of appellate complaints to the charge.

MR. ORSINGER: Let's add that

then.

PROFESSOR DORSANEO: Judge Guittard is always fond of saying that we don't really want to preserve error. We want to preserve complaint. Say "Preservation of Charge Complaints" or "Complaints Concerning the Charge."

MR. McMAINS: Well, I'm just saying the whole thing is under the jury charge section, Section C. I don't see how it's going to be confusing to people that there is another section talking generally about the preservation of appellate complaints otherwise, but --

MR. ORSINGER: Okay.

CHAIRMAN SOULES: Okay. No change to the title to 83. D has been approved. Section 7, part E.

PROFESSOR DORSANEO: E has been approved.

CHAIRMAN SOULES: It's been approved.

PROFESSOR DORSANEO: Section 8 has been approved in its entirety, but, you know, I would ask Don Hunt to take a special

look at 7(E) and 8 to make sure I am absolutely 100 percent positive that there is no discrepancy and people --

CHAIRMAN SOULES: What rule?

PROFESSOR DORSANEO: 7(E), but section -- it's part E of Section 7, which comes from Don Hunt's report, and Section 8 in its entirety.

MR. ORSINGER: You are talking about the whole next section?

PROFESSOR DORSANEO: Yes.

MR. ORSINGER: I've got some comments on that before we do that by acclamation.

CHAIRMAN SOULES: Well, it's already been done.

PROFESSOR DORSANEO: It's already been done.

CHAIRMAN SOULES: But we will hear you in the interest of being perfect.

MR. ORSINGER: Okay. On the bottom of page seven under Rule 101(d) we have a typo there on the reference to the rule. It says, "Rule 302."

CHAIRMAN SOULES: Page what?

MR. ORSINGER: Page seven, under Section 8, 101(d), the very bottom line on the left-hand side should say "Rule 102."

MR. McMAINS: He's already moved to Section 8.

MR. ORSINGER: Yeah. I'm sorry. Bill was asking us to acclaim Section 8, so I'm on page seven of Section 8.

MR. McMAINS: Okay.

CHAIRMAN SOULES: He says "302" should be "102."

PROFESSOR DORSANEO: Yes.

MR. ORSINGER: And then we have some parallelisms with the appellate rules that we need to consider, and we are going to revisit that. We are going to do that privately, or should we --

PROFESSOR DORSANEO: Well, I think you ought to do that up and down this draft and put that on the agenda.

MR. ORSINGER: Okay. Well, let me ask something then I need guidance on, because is our operating rule going to be that for parallel language we will follow the TRAPs?

CHAIRMAN SOULES: We have said that.

MR. ORSINGER: Okay. You don't like that?

PROFESSOR DORSANEO: Well, sometimes I don't like the TRAPs, not because of what they say but because of what they left out. You know, just to pick an example, we have in the TRAP rules -- it doesn't really say that a complaint can be preserved by a ruling in the statement of facts, now called the reporter's record, or in a separate order or in the judgment or a bill of exceptions.

MR. ORSINGER: It just says "in the record."

PROFESSOR DORSANEO: After you recommend it, it says --

MR. ORSINGER: The appellate rules say "in the record."

PROFESSOR DORSANEO: But it doesn't say how in the record.

MR. ORSINGER: And you like to specify? Okay.

PROFESSOR DORSANEO: I like it a little clearer, and I would like it a little

clearer in the trial court rules, but it's not a little clearer in the appellate rules.

MR. ORSINGER: What you would like us to do then is to come back and say, "These are the disparities, and we recommend either that we mimic the appellate rules or we don't" and then have a reason for it? Is that what you would like us to do?

CHAIRMAN SOULES: That would be fine.

PROFESSOR DORSANEO: And I think we need to be consistent. We need to have no inconsistencies.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: Yes.

MR. ORSINGER: Let me raise then on the bottom of page --

CHAIRMAN SOULES: Well, I want to hear what rules you want to look at. Give me the number so Holly can put them on the agenda.

MR. ORSINGER: Well, there is Rule 102, subdivision (f), on partial new trial.

CHAIRMAN SOULES: 102(f) will

be on for September.

MR. ORSINGER: Okay. And you don't care about the subject, just the name?

CHAIRMAN SOULES: That's right.

MR. ORSINGER: The next one is 103(c). Can we stop on that for just a second?

CHAIRMAN SOULES: If Bill wants to hear for his purposes what your input is, that's fine.

MR. ORSINGER: Well, he and I can talk privately.

PROFESSOR DORSANEO: Yeah. We can talk.

MR. ORSINGER: But this one I would like to put on the table. On page 15 on Rule 103(c), when we sent our appellate rules to the Supreme Court there was a subdivision that had to do with not having to preserve error on challenging the sufficiency of the evidence in nonjury trials. It's been in the rules since 1985, I believe '80 -- or shortly after they were enacted but not in the original rules.

There was a big debate about whether you

had to preserve error in the trial court on nonjury, different lines of authority. An amendment came down. Subsection (d) was added in there and said you don't. The Supreme Court took that out of our rules, and they are no longer in the TRAPs that have been promulgated to be effective September 1.

PROFESSOR DORSANEO: But the last sentence of the notes and comments appended to appellate Rule 33 says it was taken out because it's unnecessary.

MR. ORSINGER: Right. Okay.

PROFESSOR DORSANEO: And that's why it's in this draft, because it is unnecessary if it's here.

MR. HUNT: Yeah.

MR. McMAINS: Right.

MR. ORSINGER: Well, I agree with that, but I just wanted everyone to know that the Supreme Court cut this out of the appellate rules, and we have it right here in the trial rules.

MR. McMAINS: But that's the reason they cut it out, because it belonged in the trial rules.

MR. ORSINGER: Okay. All right. That's fine. Then Rule 103 --

CHAIRMAN SOULES: So we do not need --

PROFESSOR DORSANEO: And that's why they took out that other section.

CHAIRMAN SOULES: We do not need 103(c) on the September agenda because we are going to leave it like it is, so take that off. Next?

MR. ORSINGER: Then 103(d) is, perhaps, the same argument, that this is in offers of proof on excluded evidence, and it's covered in the Rules of Evidence already about making an offer of proof on excluded evidence.

The Supreme Court has removed that from our appellate rules, so it now is going to repose in this Rule of Procedure and in the Rules of Evidence. Now, you could as a matter of logic say the Rules of Evidence are sufficient on the offer of proof and let's take it out of the Rules of Procedure, or you could leave it here and you will have double coverage at the trial level and no coverage at the appellate rule.

CHAIRMAN SOULES: Anybody want to take it out of the Rules of Civil Procedure?

MR. McMAINS: Which one are we talking about?

MR. ORSINGER: This is 103 on offers of proof on excluded evidence. Page 16.

CHAIRMAN SOULES: Both places. Any opposition to both places? Both places it stays.

MR. ORSINGER: Okay. And then 103(e) on formal bills is going to have to be --

PROFESSOR DORSANEO: Conformed.

MR. ORSINGER: -- conformed throughout, because it's a virtual matching treatment written in different language.

PROFESSOR DORSANEO: That one should be identical.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: So 103(e), you are saying it should be identical to the appellate rule?

PROFESSOR DORSANEO: Yeah.

CHAIRMAN SOULES: No reason why it should be different.

PROFESSOR DORSANEO: Right.

CHAIRMAN SOULES: Any opposition to that?

MR. McMAINS: No.

CHAIRMAN SOULES: 103(e) will be the text of the appellate rule. It does not need to be brought back.

MR. ORSINGER: Oh, okay.

CHAIRMAN SOULES: 103(e), you fix. We don't have to look at it.

MR. McMAINS: Now, there are references in there to statement of facts again.

PROFESSOR DORSANEO: Well, that's part of the --

MR. McMAINS: Yeah.

MR. ORSINGER: And the timetable is wrong, too. There is no delayed timetable anymore on formal bills under the appellate rules.

Okay. And then on 105 on plenary power of the trial court --

CHAIRMAN SOULES: I'm going to

just put down 103(e) is going to be identical to TRAP what?

MR. ORSINGER: TRAP 30 --

PROFESSOR DORSANEO: It's 33.

MR. ORSINGER: TRAP 33, but there are subdivisions, and I have them all.

PROFESSOR DORSANEO: It's 33(b), I'm sure.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: Well, it's 33.2(a) and (b) and (c)(1), (c)(2), (c)(3), (2)(3), (2)(d), (2)(b). It's no reason to put this in the record.

CHAIRMAN SOULES: I'm just going to say it's been approved by the committee to be identical to TRAP 33, so we have action on that.

MR. ORSINGER: Okay. On Rule 105 --

MR. HUNT: Richard, before we get to 105 could I mention that we need to take a look at 104(e)(8). 104(e)(8).

CHAIRMAN SOULES: Page 23.

MR. HUNT: The premature filing rule may or may not be in conflict with TRAP

27.

CHAIRMAN SOULES: How so?

MR. HUNT: We just need to put that on the the agenda and be certain.

CHAIRMAN SOULES: Okay. Do we want to fix that now or just put it on the agenda?

MR. HUNT: Put it on the agenda, because we are probably bound by whatever was put in the TRAP rules.

PROFESSOR DORSANEO: Yeah.

CHAIRMAN SOULES: Okay. Do you want to pursue that?

PROFESSOR DORSANEO: Yeah. I think, Mr. Chairman, just informally for the record, you ought to appoint Don Hunt, Richard Orsinger, and --

CHAIRMAN SOULES: You.

PROFESSOR DORSANEO: -- me, if you want, to coordinate this part (8) so three people can look at it.

MR. ORSINGER: If we can --

PROFESSOR DORSANEO: And I will rely on them a lot.

MR. ORSINGER: If we can arrive

at a consensus, we can probably do that.

MR. McMAINS: I thought we had decided that there was no premature motion in the TRAP rules, didn't we not? That it didn't have any --

MR. ORSINGER: Rule 27 of the TRAPs is right here. It's entitled "Premature filings," and it discusses it in there.

CHAIRMAN SOULES: Okay. We are going to docket 104(e)(8) for September and assign Dorsaneo, Orsinger, and Hunt to make that report. Next?

MR. ORSINGER: If Don is finished, 105(b), as in boy, it's not identical, but it's parallel; and it has to do with the description of the effect of certain -- well, this is the plenary power description; but it's parallel in concept to the deadline for perfecting the appeal; and the important difference, by the way, is that the Supreme Court added in this request for findings of fact and conclusions of law a new concept that's consistent with the new case they handed down.

PROFESSOR DORSANEO: IKB?

MR. ORSINGER: Yeah. If findings and conclusions either -- pardon me. The request for findings and conclusions will delay the deadline for perfecting appeal and, therefore, logically is going to extend plenary power. "If findings and conclusions either are required by the Rules of Procedure or, if not required, could properly be considered by the appellate court." The Supreme Court wrote that into the TRAPs, and we ought to write it into these so that plenary power is running along with the same concept as deadline for perfecting, or so it seems to me.

CHAIRMAN SOULES: Okay. 105 in that regard is on the docket for September. Same team. Don Hunt.

MR. HUNT: Luke, let me move back to (a), 105(a). There may or may not be an Eikelberger problem with respect to (a). I would raise that with Bill Dorsaneo and ask him to look and see if we need to say anything in (a) about either inherent power or implied power, which right now is proposed only in the cases, and that may be where we want to leave

them, but at least (a) was an attempt to give a definition of trial court plenary power which we never had before. We might or might not wish to put in one more sentence in (a) with respect to the other two kinds of power. I don't know.

MR. McMAINS: You mean to distinguish inherent power from plenary?

MR. ORSINGER: No. To add it. This limits. This last sentence in (a) says you don't have any power except express power, which is what you get under a statute, but then you have implied power, which would be implied from a statute, or inherent power, which is implied from the Constitution, right?

PROFESSOR DORSANEO: Yeah.

MR. ORSINGER: And we purport to say that you only have expressed power, not implied or inherent power.

MR. McMAINS: What power is it that you expect that they have after the expiration of plenary power?

MR. ORSINGER: Well, I don't know.

MR. McMAINS: That isn't

authorized by a statute.

PROFESSOR DORSANEO: I don't think we ought to talk about it. Even if it makes sense, it's like telling anybody they can consider their common knowledge and then they start wondering what that is.

MR. HUNT: Okay.

MR. McMAINS: I don't think it's anything different.

CHAIRMAN SOULES: Well, do we want to take out the word "express"?

MR. ORSINGER: That would certainly include implied if you took "express" out.

PROFESSOR DORSANEO: Expressly is probably a bit strong.

MR. ORSINGER: Let's take it out. You could drop a Constitution in there, too, since that, in fact, is the superior law.

CHAIRMAN SOULES: "Is authorized by law."

MR. ORSINGER: What's wrong with that?

MR. HUNT: Not anything.

MR. ORSINGER: That's even

better.

CHAIRMAN SOULES: "Power as is authorized by law."

MR. HUNT: That cures that problem.

MR. McMAINS: Yes. We just made it vague.

CHAIRMAN SOULES: Made it a "quien sabe." All right. Except for those then, those carryovers that we have identified here now on the record, is there any opposition to Section 8?

There is none. It's approved, with those reservations to be revisited.

MR. HAMILTON: Let me ask one question.

CHAIRMAN SOULES: Carl Hamilton.

MR. HAMILTON: Rule 104, the motion for new trial is overruled by operation of law and start the 75 days and 105, and the court really has up to 105 days to vacate the judgment anyway. Is that in there for a reason or is it just been --

MR. McMAINS: It's been that

way for 60 years.

MR. HAMILTON: I know, but shouldn't it be consistent?

MR. McMAINS: What do you mean?

MR. HAMILTON: Well, if we are going to overrule the operation of law why don't we just overrule it in 105 days instead of having that 75 days and then you have a period of uncertainty for the next 30 days because you don't know whether the judge is going to back up and vacate the judgment anyway.

MR. McMAINS: Well, the rule has always been that the court has 30 days after motion for new -- the notion basically being that you don't want the judge to perform an act that immediately deprives him of power to do something with, which is what the 30 days is afforded for.

If he signs the order by mistake, you change it to where that order terminates his jurisdiction. He can't correct the mistake, and that -- we never operated that way. That's why we have always had -- our times have always run 30 days after the motion for

new trial is overruled by operation of law.

CHAIRMAN SOULES: I guess you could pick up the phone and get your adverse counsel on the phone, and say, "Judge, do you realize this thing was overruled by operation of law yesterday, and we expected you to act?" He said, "Oh, my God. I didn't know that. What can I do?" Well, you have got 30 days to act.

MR. McMAINS: Yeah. You do under our rules, but you don't under what he's proposed.

CHAIRMAN SOULES: It could be an inadvertent oversight.

MR. McMAINS: Sure.

MR. ORSINGER: But, no, Carl isn't saying that it's overruled on the 75th day. He said it's overruled on the 105th day, so you get your extra 30 days.

MR. HAMILTON: Yeah.

MR. McMAINS: Well, but the point is that it -- the whole point of all of it is that it needs to be overruled and then there needs to be a period in which the judge can do something about it if he did it for the

wrong reason, didn't know what he was doing or whatever. Because under his rule it's overruled by operation of law the 106th day. I mean 105th day, and on the 106th day the judge signs an order granting it, and it's void. I mean, all you have done is just moved the judge's -- you know, when he's supposed to make the counting, and you still don't give him any kind of leeway.

CHAIRMAN SOULES: Does anyone other than Carl have a concern about the 75 plus 30 rather than absolute 105?

Okay. Then I guess it will stay as-is unless you want to make another appeal.

MR. HAMILTON: No.

CHAIRMAN SOULES: Okay. Does that get us to 11?

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN SOULES: Section 11.

PROFESSOR DORSANEO: Now, 11, Richard, has some -- well, you knew this already probably. It has some conformity issues.

MR. ORSINGER: Yeah. Like on lead counsel and all of that business.

PROFESSOR DORSANEO: Yeah.

MR. ORSINGER: Can we just put this whole section on the agenda for matching up with the TRAPs?

PROFESSOR DORSANEO: Yes. All of "counsel"?

MR. ORSINGER: Well, okay. Then that's going to be --

PROFESSOR DORSANEO: Just put Rule 130. Put 130 on there to match with the TRAPs.

CHAIRMAN SOULES: Okay. We have 130 on the September agenda for paralleling to the TRAP rules.

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: Other than that, substantively they are approved, right?

PROFESSOR DORSANEO: Uh-huh.

MR. ORSINGER: If that's true, Luke, we don't even need them on the agenda then, do we? We just conform them, or do you want them discussed?

CHAIRMAN SOULES: I'm concerned that running the parallels you may hit a substantive issue, and you may want to bring

it back.

MR. ORSINGER: Okay. That's fine.

CHAIRMAN SOULES: If in making them parallel you find a substantive difference, we have only approved the substance of 130, so we have got to come back to that.

MR. ORSINGER: Okay. I understand.

PROFESSOR DORSANEO: Let me jump to 132. 132 also needs to be made parallel if we are going to make it parallel. We have a withdrawal of counsel rule in the TRAPs.

CHAIRMAN SOULES: Okay. Same for 132. On for paralleling to the TRAP rules.

PROFESSOR DORSANEO: Frankly, that's also true for 133, but I think they are probably already parallel.

MR. PARSLEY: Huh-uh.

PROFESSOR DORSANEO: They are not?

MR. PARSLEY: The TRAPs don't

require you to file. This does. It's parallel by case law.

PROFESSOR DORSANEO: Uh-huh. Okay.

MR. ORSINGER: The appellate rule requires the grievance to be filed, though, doesn't it?

MR. McMAINS: Huh-uh.

CHAIRMAN SOULES: How does the court know about it if it's not filed?

MR. ORSINGER: I swear it does.

PROFESSOR DORSANEO: It's going to be filed, but there is never going to be any argument about it. It has to be filed, but they aren't going to be talking about it.

MR. ORSINGER: I will find it in a minute.

MR. HUNT: 6.6.

PROFESSOR DORSANEO: I mean, you are filing whenever the rule is discussed.

MR. ORSINGER: Yeah. It must be in writing and signed by the parties.

MR. HUNT: But not filed.

MR. ORSINGER: Nothing says about filing it.

PROFESSOR DORSANEO: When you're going to enforce it you're going to have to -- if you need to enforce it, you are going to have to file it.

MR. ORSINGER: At least if you are going to enforce it through the court.

PROFESSOR DORSANEO: Yeah.

MR. McMAINS: Yeah, but you can -- the point in the appellate court, though, is you can make an agreement that doesn't have to be in an open -- in a public record and then you can make a motion with regards just to articulating that you have an agreement that includes you are doing this particular thing; whereas in the trial court our case law at least thus far is unless you have the agreement itself in writing and filed then it's not enforceable. I mean, I think there is a difference. Now, whether or not there was intended to be a difference I don't know.

MR. ORSINGER: We cannot abandon the requirement of filing the agreement in the record in the trial court.

PROFESSOR DORSANEO: It's too

essential.

CHAIRMAN SOULES: Do we have this "unless it be made in open court and entered of record" in the TRAP rule?

MR. ORSINGER: It says, "To be enforceable an agreement of the parties or their counsel concerning an appellate court proceeding must be in writing and signed by the parties or their counsel."

CHAIRMAN SOULES: Okay.

MR. ORSINGER: Now, the only other opportunity would be to do it during oral argument, because you don't have anything but oral argument and written filings in the appellate court.

MR. McMAINS: But the point is that this is -- under the TRAP rule you do not have to articulate the terms of your agreement in order for them to be enforceable. You have to acknowledge that there is an agreement, but the agreement itself does not have to be before the court under this rule, which I think is, frankly, consistent with some of the cases that have come out recently suggesting that you do not --

CHAIRMAN SOULES: No, not trial.

MR. McMAINS: I understand. Not in the trial court, but in the appellate courts it is not unusual that the parties do not want their agreement published, but they do want the court to take action based on their agreement for a disposition in a particular way and the only --

MR. ORSINGER: Settlement, you mean?

MR. McMAINS: Yes. And the only thing the rule requires is that that disposition be acknowledged as agreed to, but the agreement itself does not have to be, and that's one of the reasons that was exempted from the sealing rule as well.

CHAIRMAN SOULES: Well, we are not going to change the TRAP rule. The question is do we need additional language in the trial rule?

MR. McMAINS: I support the notion that it should be filed in the trial court.

MR. ORSINGER: Okay. Then

there is no debate.

MR. McMAINS: But it is different. I mean, it's not a conformity -- it is a nonconformity, but I think there is a reason for it.

MR. ORSINGER: We can pick up the TRAP grammatical structure and leave in the requirement that the writing be filed very easily.

CHAIRMAN SOULES: Suit you?

PROFESSOR DORSANEO: Very good.

CHAIRMAN SOULES: Okay. 133. I think "entered" is the wrong word in 133.

MR. McMAINS: Do we do any entering anymore?

CHAIRMAN SOULES: The clerk is supposed to enter.

MR. McMAINS: You punch the button that says "enter."

MR. ORSINGER: Well, "of record," I think that what that means, "entered of record" means that it's put into the court reporter's notes. In other words, you have filing in the previous clause, or you have something stated orally in open court

recorded by the court reporter. Those are your two ways, and I think that's what that means. So maybe we ought to just say, "unless it is made in open court and recorded by the reporter" or something like that.

MR. HAMILTON: "Made in open court on the record."

PROFESSOR DORSANEO: "On the record."

MR. McMAINS: Yeah. I think that's probably better.

CHAIRMAN SOULES: "And on the record" instead of "entered of." Okay. So what else do we need to do with this?

MR. ORSINGER: Just make it grammatically parallel. If we are not going to take out the requirement of filing then we just make it grammatically similar to this other one.

CHAIRMAN SOULES: And it's not?

MR. ORSINGER: No. The other one, he's allergic to "unless" clauses and he won't start anything with an "unless," so he starts out with a positive assertion and then a bunch of exceptions to it.

CHAIRMAN SOULES: Okay. So 133 is on for September.

PROFESSOR DORSANEO: You mean Brian?

MR. ORSINGER: Brian I'm talking about.

CHAIRMAN SOULES: For parallelism. That's all. Anything else on Section 11?

PROFESSOR DORSANEO: Yes. Attorney conduct during argument, 131, is taken verbatim from Rule 269. This is kind of in not maybe the best place in the rule book. In our current rule book we have nothing about jury argument. We have one rule on argument that's kind of stuck right there at the beginning of the trial rules. I think this is better. We could stick this over there in trial in a section called "jury argument." This is fine, but it's not perfect, but it is verbatim, (d), (e), (f), (g), and the (g)'s other brother (g).

CHAIRMAN SOULES: Anybody have a problem with placement of this at 131? No problem. Judge Peeples.

HONORABLE DAVID PEEPLES: No. And doesn't a lot of this apply to beyond argument, Bill? Side bar remarks, stand up when you object.

PROFESSOR DORSANEO: Yeah. I guess that's right. It's about all kinds of arguments, so it is better here.

HONORABLE DAVID PEEPLES: You might just say "attorney conduct" and drop the --

MR. McMAINS: "During trial."

HONORABLE DAVID PEEPLES: -- "during trial."

MR. McMAINS: Or "during proceedings," I guess, maybe. "During trial court proceedings."

HONORABLE DAVID PEEPLES: It does refer to argument once or twice, like in (d), objections.

MR. ORSINGER: But, David, it also refers to examining the witness.

HONORABLE DAVID PEEPLES: Yeah. This has always been out of place in Rule 269.

PROFESSOR DORSANEO: Yeah.

HONORABLE DAVID PEEPLES: And

I'm glad you have done this to it.

MR. ORSINGER: "Attorney conduct in court"?

PROFESSOR DORSANEO: "Proceedings" would be good enough, wouldn't it?

MR. ORSINGER: "During proceedings."

CHAIRMAN SOULES: "During trial."

MR. McMAINS: Well, the problem is that this is applicable to pretrial as well as the motion practice in many respects.

CHAIRMAN SOULES: "Attorney conduct in court."

HONORABLE DAVID PEEPLES: "In court."

PROFESSOR DORSANEO: That's good.

HONORABLE DAVID PEEPLES: That's fine.

PROFESSOR DORSANEO: Side bar remarks out of court, but not in court.

MR. ORSINGER: You can make them in recess, too.

MR. McMAINS: Chambers.

MR. ORSINGER: In the hallway, in the men's room.

CHAIRMAN SOULES: Well, that's it for the section. That's good. This section needs that kind of a look.

CHAIRMAN SOULES: Anything else on Section 11?

PROFESSOR DORSANEO: Well, B.

HONORABLE DAVID PEEPLES: Yes.

PROFESSOR DORSANEO: Let's go to B, and I think we don't need Rule 134 or Rule 18.

HONORABLE DAVID PEEPLES: I have just been looking at it, and I agree. I was trying to rewrite 134. This is not necessary.

PROFESSOR DORSANEO: You see I rewrote it?

HONORABLE DAVID PEEPLES: I know.

PROFESSOR DORSANEO: I finally said, "What's the point of saying that?"

So I really move to get rid of it. What's it say that's not already said by

something else?

HONORABLE DAVID PEEPLES: Yes.

MR. McMAINS: What is that?

MR. ORSINGER: Rule 134.

HONORABLE DAVID PEEPLES: Office becomes vacant, everything doesn't get flushed and have to start again.

PROFESSOR DORSANEO: Apparently in the before time if you get to the end of the term then you threw everything away, and we don't have that.

MR. ORSINGER: Our committee has -- the full committee has already considered a proposal that would be more like the federal rule which requires the judge to certify that he's read all of the proceedings before he can continue on, and we decided that it was a nonproblem, so I mean, it's really such a nonproblem that we can just let it go.

PROFESSOR DORSANEO: Out?

HONORABLE DAVID PEEPLES: I agree.

MR. ORSINGER: I move to strike it.

CHAIRMAN SOULES: Any

opposition?

134 is deleted, as is old Rule 18. So we have --

MS. LANGE: And the other rules need to be renumbered.

CHAIRMAN SOULES: Next?

HONORABLE DAVID PEEPLES: Luke, could we go back to 131 just briefly? (d), objections, on the third line the word "arguments" is there because this did come from the jury argument rule, but I kind of think that everything that's said in there applies also to examination of witnesses, opening statements -- well, actually maybe not. The first sentence may be. You're right. I take it back.

PROFESSOR DORSANEO: 135 is recusal/disqualification.

CHAIRMAN SOULES: That's been approved.

PROFESSOR DORSANEO: 136, interpreters.

CHAIRMAN SOULES: That's been approved, hasn't it?

PROFESSOR DORSANEO: Well, I

don't think it has been approved, and I would like to see.

CHAIRMAN SOULES: Okay. Interpreters, 136.

PROFESSOR DORSANEO: It's in there now, and I have always recommended putting it in the Rules of Evidence and taking it out of here, but I am happy for it to be here in the back of the book.

CHAIRMAN SOULES: Any opposition to 136 as written?

No opposition. It's approved. Next?

PROFESSOR DORSANEO: Recording and broadcasting court proceedings, just as it is.

CHAIRMAN SOULES: Just as it is. No objection to that?

No objection. It's approved.

MR. ORSINGER: Well, I would like the record to reflect that the committee has forwarded a minority report. We have earlier voted that the Supreme Court would receive a minority report in conjunction with this rule, and I don't know if it's gone over, Lee, or do you know if --

MR. PARSLEY: I don't recall it either.

MR. ORSINGER: When this goes over we need to be sure that the subcommittee's minority report that has been approved to be forwarded to the Supreme Court is also forwarded.

CHAIRMAN SOULES: Okay. Holly, make a note of that.

MR. McMAINS: Who authored that? You?

MR. ORSINGER: No. But the subcommittee -- well, it was a committee work product, but it was originally drafted by Chip Babcock --

MR. McMAINS: Okay.

MR. ORSINGER: -- as a consolidation of the Houston and Dallas rules, but then one Saturday morning when most everybody had gone Joe Latting and John Marks decided that you would have to have consent from both sides in order to have electronic media and so everything went down in flames, but the Supreme Court has already adopted equivalent language for the TRAPs, so we

figured that if it's good enough for the TRAPs it might be good enough for the trial court, and so we voted to send it over as a minority report.

PROFESSOR DORSANEO: You don't want to try again on the parallel with the TRAPs?

CHAIRMAN SOULES: No.

MR. ORSINGER: Well, neither Joe nor John is here right now. I would move we make this rule conform to the appellate rules.

PROFESSOR DORSANEO: Chairman rules it out.

CHAIRMAN SOULES: We have approved Rule 137, and we had a lot of debate about it, not just on that one occasion. 137.

Anything else in Section 11?

MS. LANGE: 135 through 138 need to be renumbered.

MR. McMAINS: Because we did away with one.

CHAIRMAN SOULES: We dropped 134, so the numbers change. The duties of the clerk, that's all been approved.

PROFESSOR DORSANEO: Yes. I ran this by --

CHAIRMAN SOULES: Thanks to Doris and Bonnie for that and then we get to 190.

PROFESSOR DORSANEO: Which that's the same thing. That was also the clerks' project.

CHAIRMAN SOULES: 139. It's not 119, right?

PROFESSOR DORSANEO: Yeah.

CHAIRMAN SOULES: Now it will be 138. That's been approved, right?

PROFESSOR DORSANEO: Uh-huh.

MR. HAMILTON: Luke, back on 137, are there any guidelines promulgated by the Supreme Court?

CHAIRMAN SOULES: To my knowledge not yet.

MR. McMAINS: No.

MR. HAMILTON: There aren't?

MR. ORSINGER: What has happened is I believe the Supreme Court has approved local rules on a county-by-county basis; isn't that right? So the Supreme Court

has never promulgated uniform ones, but they have approved uniform rules in a county.

CHAIRMAN SOULES: Yeah. And this rule permits them to do that without violating Rule 3, which they don't pay any attention to anyway. Okay. Anything else now? D, court reporters.

PROFESSOR DORSANEO: That could stand an Orsinger conformity look, and maybe we let David Jackson -- he should be in favor of it.

CHAIRMAN SOULES: As far as the list of duties are concerned, we have been through that in session, I think.

PROFESSOR DORSANEO: It's a little bit different in the TRAP rules. It's worded a little bit differently.

CHAIRMAN SOULES: Okay. On 140, we will put that on the September agenda for parallelism to the TRAP rules.

MR. ORSINGER: TRAP 13.

CHAIRMAN SOULES: TRAP what?

MR. ORSINGER: TRAP 13 is the duties of court reporters and recorders.

PROFESSOR DORSANEO: This

really needs to be conformed. For example, the court reporter should make "a full record of jury arguments and voir dire when requested," that's not the way it is now. You don't have to request them to do that.

MR. ORSINGER: Furthermore, there is an earlier -- well, yes, you do. They won't record it unless you --

PROFESSOR DORSANEO: Not if they are following the TRAP rules. The TRAP rule says they have to, unless they are told not to.

MR. ORSINGER: Well, there is an earlier rule -- I forget where it is -- that you have to request it, and if you do, it gets assessed as a separate court cost, if you do voir dire and argument. I don't have the rule number in my head, but there is a separate rule in here that specifically assesses the cost.

CHAIRMAN SOULES: In these rules?

MR. ORSINGER: Yeah.

CHAIRMAN SOULES: Let's find it so we can get that resolved.

MR. ORSINGER: Okay. I think it's probably in Section 7.

JUSTICE CORNELIUS: We just wrote a case on it the other day. I can't remember the rule, but it was a case where -- it was a criminal case where a defendant complained because the voir dire was not recorded, and he didn't request it. He orally requested it, but he didn't request it in writing and file it with the clerk, and we held that he waived it because of that. That was according to the rule, but I can't remember the rule.

CHAIRMAN SOULES: That's probably in the Code of Criminal Procedure.

JUSTICE CORNELIUS: Well, it may be the Code of Criminal Procedure.

PROFESSOR DORSANEO: Richard, I don't know whether you will find it. You may find it if you look --

MR. ORSINGER: I was reading it just about an hour and a half ago, but I can't remember where I was reading it.

CHAIRMAN SOULES: Where is voir dire?

MR. ORSINGER: Well, I guess it could have been in voir dire.

MR. McMAINS: Can I ask you, in this Rule 140 -- is that what you-all are talking about?

PROFESSOR DORSANEO: Well, we are talking about something specific right now because we have got inconsistencies in two places and maybe three, and we are trying to locate it.

MR. ORSINGER: I will look. If I can find it. I'm sorry.

MR. McMAINS: Rule 142 says, "making a full record of jury arguments when requested by the judge or any party to a case."

CHAIRMAN SOULES: But Bill says the TRAP rules require that the court reporter do that regardless of the request.

HONORABLE DAVID PEEPLES: New or old TRAP rules?

CHAIRMAN SOULES: New.

PROFESSOR DORSANEO: The new TRAP rules say "make a full record of the proceedings."

MR. ORSINGER: "Unless excused by agreement of the parties." Rule 13.1.

CHAIRMAN SOULES: Right.

MR. McMAINS: Of course, I guess one might say the question is, what are the proceedings?

PROFESSOR DORSANEO: Well, one might say that if it said "make a full record of the trial," but I think proceedings -- I think that the jury selection and the jury argument would be part of the proceedings under almost any arguable interpretation.

MR. McMAINS: What about pretrial motion?

CHAIRMAN SOULES: That's included.

MR. McMAINS: See, that's what I say. You can't even agree amongst yourselves.

MR. ORSINGER: Well, is it our view that Rule 13 of the TRAPs would require the court reporter to record pretrial hearings?

CHAIRMAN SOULES: Right.

MR. ORSINGER: Unless by

agreement of the parties?

CHAIRMAN SOULES: Right.

MR. ORSINGER: Whoa. That's one of the ten biggest changes, and I didn't even realize it until right now.

MR. McMAINS: I don't think that's right.

CHAIRMAN SOULES: Well, some do, some don't think it's right.

MR. McMAINS: No. I mean, I don't think that's a correct interpretation of the rule.

CHAIRMAN SOULES: I understand that, and I think it is.

MR. ORSINGER: That's a big change.

PROFESSOR DORSANEO: It's unknowable at this point, but that came from the Court.

MR. McMAINS: I understand.

CHAIRMAN SOULES: Okay. You didn't find what you were looking for?

MR. ORSINGER: No. But I will continue to look.

CHAIRMAN SOULES: Okay. We may

come back then to 140.

PROFESSOR DORSANEO: There is one part of 140 that I want to mention, (d). When I sent this to Bonnie Wolbrueck she said this doesn't happen, and if she got the notes and gave them to a different court reporter, that it would be jibberish and recommends its removal. I don't know where this came from.

MR. McMAINS: What?

PROFESSOR DORSANEO: "When a defendant is convicted and sentenced to a term" -- or why it's even in here.

MR. McMAINS: Why are we dealing with criminal procedure? That was one of the things I was curious about. Why is that in there at all?

PROFESSOR DORSANEO: It's in there because it's --

MR. ORSINGER: Court reporter's obligation.

PROFESSOR DORSANEO: Where does it come from?

MR. McMAINS: There is nothing in there that says --

PROFESSOR DORSANEO: It's not

side-by-side with anything.

MR. McMAINS: It says it comes from TRAP Rule 12.

PROFESSOR DORSANEO: No.

MR. McMAINS: Well, that's what it says on -- well, 141, I guess is what -- it's TRAP Rule 11, and the reason it's in TRAP Rule 11, because they apply to both criminal and civil. It has no business being in there.

PROFESSOR DORSANEO: Let's take it out of here.

MR. ORSINGER: Well, TRAP Rule 11 is amicus curiae briefs, so that's the new TRAP Rule 11.

PROFESSOR DORSANEO: Take it out of here.

CHAIRMAN SOULES: Why take it out?

PROFESSOR DORSANEO: It has nothing to do with anything.

MR. McMAINS: There is no criminal work in the civil rules, in the civil trial rules. It's talking about a record taken in a criminal trial.

PROFESSOR DORSANEO: And Bonnie

says it doesn't even happen in criminal cases. It sure doesn't happen in civil cases.

CHAIRMAN SOULES: I was reading it when the court reporter is convicted she's got to turn in her stuff so it doesn't get lost. I'm going cross-eyed here.

Okay. (d) is out. Any objection to deleting (d)?

PROFESSOR DORSANEO: You have got conformity, Richard, in 141 as well.

CHAIRMAN SOULES: Wait. Now back to 140 as a whole. What are we going to do with this, conform it to --

MS. LANGE: Luke, back to (d).

CHAIRMAN SOULES: To (d). Yes, Doris.

MS. LANGE: That's the one you-all had quite a discussion, several hours' worth, saying that you wanted to be able to find the notes or the transcripts if the court reporter moved to Maryland or whatever, that they be filed with the clerk. It doesn't matter to me, but that was a previous --

PROFESSOR DORSANEO: Was that made applicable under the new TRAPs to civil

cases, too?

MR. ORSINGER: You're talking about the retention requirement?

MS. LANGE: Certainly "defendant is convicted" needs to be out, but you-all were saying that they should file their notes with the clerk so that you-all would know where to find them after awhile.

MR. ORSINGER: TRAP 13.6, filing of notes when defendant convicted.

CHAIRMAN SOULES: Is there a parallel rule for civil procedure in there?

MR. ORSINGER: No.

MR. PARSLEY: No.

MR. ORSINGER: But this is virtually identical to what we just struck.

MR. McMAINS: Well, yeah, but the TRAP rules apply to criminal proceedings.

MR. ORSINGER: I know, so we don't need them here because we have got a TRAP rule that --

CHAIRMAN SOULES: Doris' point, though, is that she thinks that we -- she remembers that we had some parallel rule that if the court reporter was going to, what,

remove herself from the jurisdiction that the notes had to be somehow filed with the clerk; is that right, Doris?

MS. LANGE: That's my recollection, but that's been months ago; and if you want to take it out, fine, but you know, you-all were talking about a court reporter moving out of state or whatever and where would you find them if you needed a transcript.

CHAIRMAN SOULES: I think that's a problem we probably couldn't fix.

Okay. Do we want to put some sort of retention of a court reporter's notes in a civil case?

PROFESSOR DORSANEO: Well, there is a statute that requires them to keep their notes for three years, and we could be parallel to statute. Isn't that right? They keep them for three years, and you are supposed to ask them.

MR. ORSINGER: There is a Supreme Court case two years ago, I believe, where someone failed to get a pretrial hearing transcribed before the three years and then

they eventually took the case up, and they tried to get it reversed on the grounds there was no statement of facts anymore, and they said, "Sorry, you should have got to them before they were permitted to destroy them."

CHAIRMAN SOULES: Can't we just rely on that statute and not have a rule?

MR. ORSINGER: Sure. Yeah. And the case also puts the burden on the party who wants the record to get in there and get it before they are destroyed.

CHAIRMAN SOULES: All right. Any rule? No rule.

MR. HAMILTON: What rule are we looking at?

CHAIRMAN SOULES: We are looking at 140(d), which we decided to delete because it doesn't apply to civil cases. We then revisited something that Doris remembers where we were going to have some sort of rule for retention of court reporters' notes in civil cases, which we don't have, and what I'm asking, is anyone opposed to having no rule on retention of notes in a civil case other than the statute?

MR. HAMILTON: What about a case where you have had a motion for new trial granted and the case sits there then for two or three or four years before it's retried? Shouldn't the court reporter be required to keep those notes?

CHAIRMAN SOULES: Court reporter is required to keep those notes for three years under statute.

MR. HAMILTON: In any case, huh?

CHAIRMAN SOULES: In any case.

MR. McMAINS: If you don't get it tried in three years, you are in trouble anyway.

MR. ORSINGER: Not that you need the notes from the first trial for anything but impeachment purposes anyway.

CHAIRMAN SOULES: Or direct evidence.

MR. ORSINGER: Yeah. If somebody died.

CHAIRMAN SOULES: Okay. No rule on this, right? Correct?

All right. The consensus is no rule on

this for civil cases.

Okay. Now, on 140 then what we are doing is setting it -- putting it on the docket for September for parallelism to the TRAP rules, conforming.

PROFESSOR DORSANEO: And we really should do that for 142 and 143. I mean, all of those are dealt with in the TRAP rules.

CHAIRMAN SOULES: Okay. 142, September for TRAP conformity. Now, on 140, 142, and 143, are they approved in substance to the extent that you-all can conform them to the TRAP rules without substantive changes? They are approved. You just do the writing, the drafting. If there is any substantive change, you will bring it to our attention. Is that agreeable with the committee?

No opposition. That's what we will do.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: And so when we call those rules in September if you say, "We conformed them to the TRAP rules and there were no substantive changes," that will be all we need to hear.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: Now we are to 141.

PROFESSOR DORSANEO: No. 145, actually.

CHAIRMAN SOULES: I didn't hear --

PROFESSOR DORSANEO: We skipped 144, but I think that's part of the whole thing. It's not going to be out of conformity, but --

MR. ORSINGER: I think they call it "lead attorney" in the appellate rules.

CHAIRMAN SOULES: I didn't hear us talk about 141. Has 141 been approved?

PROFESSOR DORSANEO: Oh, that's another one of these conformity.

MR. ORSINGER: Yeah. You said that, Bill. You said to conform 141, 142, and 143.

CHAIRMAN SOULES: I guess I'm getting cross-eared, too. Okay. So same thing will apply to 141. Now we are to where?

CHAIRMAN SOULES: Put 144 on

that list, too. I'm sure that's in the TRAPs, too.

CHAIRMAN SOULES: Same for 144.

PROFESSOR DORSANEO: And now 145 is sealing court records, and we just messed with that a little bit. That needs to be conformed with what we did today.

CHAIRMAN SOULES: And 145 will be what we passed today.

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN SOULES: Okay. It has a substitute that's been approved, so nothing left to do on that.

MR. ORSINGER: We don't need to conform that to the appellate rules because the Supreme Court deleted the equivalent provision from the appellate rules.

CHAIRMAN SOULES: 146.

PROFESSOR DORSANEO: That's the darnedest thing. I didn't even know that was in there.

CHAIRMAN SOULES: There are things that are in your computer that are not in your head.

PROFESSOR DORSANEO: No. I

mean, this is an example of how our current rule book is organized in an odd way. Remember when we were discussing the appellate rules we had a little trouble locating Rule 75a, 75b, because they are just kind of stuck there in the middle, and we put them in the appellate rules in the right place. Look at this "Lost records and papers" which is never mentioned in those cases that are -- where there are lost part of the record. We changed our appellate rule to be similar to this, and I think it needs to be conformed, checked to make sure that it does conform. This does give the trial judge -- and it's the current rule -- ability to substitute.

MR. McMAINS: Uh-huh.

PROFESSOR DORSANEO: And the other rules were interpreted that it didn't.

MR. ORSINGER: Well, our definition of plenary power probably would cut this off after the court loses plenary power.

PROFESSOR DORSANEO: Yeah. I guess that's right. You had to hurry.

MR. McMAINS: Well, that's right. It's during the pendency of the suit,

which is why it never came up on the appellate point, because it's not usable there.

MR. ORSINGER: Can I ask a related question?

MR. HAMILTON: It ought to be in the trial section, shouldn't it?

CHAIRMAN SOULES: Just a minute. Let me read this. Well, this has got words in here that don't fit. "Or brief statement" doesn't fit anything else in this rule in (b). This rule is to let the judge substitute copies or anything the parties agree to, which is fine.

MR. ORSINGER: This might well be left over from before the day they had copy machines.

CHAIRMAN SOULES: But those words "or brief statement" --

MR. McMAINS: Well, because it involves the possibility of a destroyed thing that isn't reproduced anywhere.

CHAIRMAN SOULES: Well, it says, "If upon hearing the court is satisfied that there are substantial copies of the original, a court order must be made

substituting...or brief statement..."

MR. McMAINS: Well, it's not "there." If you will look at the other one, the other parallel, the "there" is a mistypo. It was that they are substantial copies of the original. See, 77(b), it's "they are" as opposed to -- the (b) in his 146 is "there," t-h-e-r-e, which is not right.

CHAIRMAN SOULES: Well, "or brief statement" is contrary to appellate law. I mean, the judge can just say, "I'm going to make a brief statement of what was in the record," and that becomes the record? That's not what the cases held. A judge can substitute copies but not a brief statement of what the evidence would have been or what he remembers, what the judge remembers the evidence to have been.

MR. ORSINGER: Well, I think it's an interpretive issue as to whether the brief statement requires an agreement in writing. Because under the first clause of the rule before subdivision (a) it says, "The parties may, with the approval of the judge, agree in writing on a brief statement." So if

you have that predicate then the question arises, does (b) permit the court to force a brief statement or is that --

CHAIRMAN SOULES: Okay. Then just put in "or agreed brief statement," "a brief statement agreed to by the parties," or something like that.

MR. ORSINGER: What's wrong with just saying "agreed brief statement"?

CHAIRMAN SOULES: That's fine with me.

MR. ORSINGER: That eliminates any argument that a judge can force that on someone over their objection.

CHAIRMAN SOULES: Right. Is that okay? I believe Richard is correct. That's what it means.

PROFESSOR DORSANEO: Well, I want to look at the -- you know, this is Article 2289 of the revised civil statutes of 1925, unchanged except for that amendment effective December 31, 1943.

MR. ORSINGER: Both of them predate Xerox machines.

MR. McMAINS: Yes.

PROFESSOR DORSANEO: I have no idea what that amendment with respect to December 31, 1943, changed this (b) from.

MR. ORSINGER: Only you would be concerned with that, Bill.

CHAIRMAN SOULES: Okay. We are going to put "agreed" in (b). Other than that is there any opposition to 146, or with that is there any opposition to 146?

No opposition. That's approved.

PROFESSOR DORSANEO: I presume the agreed statement doesn't need to be brief.

MR. McMAINS: Would you make that "they are" as opposed to "there are"?

PROFESSOR DORSANEO: Yes, I did.

CHAIRMAN SOULES: And take "brief" out of the lead in? Why does it have to be brief?

MR. ORSINGER: It doesn't.

HONORABLE DAVID PEEPLES: Why?

MR. ORSINGER: I think the idea of brief is that they were going to say, "Well, what was lost was 400 invoices of charges on this open account, which totaled to

$23,000" or something. I think that's what they were thinking. I mean, 1925 thinking, I don't know what they were thinking.

PROFESSOR DORSANEO: 1943.

MR. ORSINGER: Well, we don't know if it was '25 or '43.

CHAIRMAN SOULES: But if the parties have to agree on the statement, maybe it has to be an extensive statement, a brief statement doesn't get it done.

MR. ORSINGER: Yeah. Take "brief" out.

PROFESSOR DORSANEO: No doubt if it was in 1925 it was also in 1911 and 1879.

CHAIRMAN SOULES: Take "brief" out of the lead-in paragraph, "brief" out of (b). Insert "agreed" before "statement" in (b), and is there any other change to 146?

MR. ORSINGER: Yeah. There is a "brief" in (c) also.

CHAIRMAN SOULES: "Brief" in (c). Take it out of (c) as well.

MR. ORSINGER: And I don't think we use the word "cause" anymore, do we,

Bill?

PROFESSOR DORSANEO: No. But that's going to have to be --

CHAIRMAN SOULES: Other than that --

HONORABLE DAVID PEEPLES: You don't agree to the statement in (c)? "Agreed." Just to be careful.

CHAIRMAN SOULES: "Or agreed statement." Okay. Substitute "agreed" for "brief" in (c) as well. Okay. Any opposition to 146 as changed here?

No opposition. It's approved.

147. What's next?

PROFESSOR DORSANEO: Court costs. This is a bad part of the book.

MR. McMAINS: Yes.

PROFESSOR DORSANEO: When you read this, even as improved when you read these rules --

MR. McMAINS: Well, (b) is not improved. (B) is -- you may have done this intentionally. Did you do that intentionally?

PROFESSOR DORSANEO: What?

MR. McMAINS: It says, "Each

party will be liable for all of its costs. If costs cannot be collected from the party against whom they have been judged, execution may be issued against any other party for the uncollected amount."

PROFESSOR DORSANEO: Look at 127 beside it.

MR. McMAINS: 127 does not say that.

PROFESSOR DORSANEO: It does, too.

MR. McMAINS: No. It says if they cannot be collected from the party, "execution may issue against any party in such suit for the amount of costs incurred by such party."

MR. ORSINGER: Meaning the other party.

CHAIRMAN SOULES: But no more.

MR. McMAINS: But no more. In other words, you don't get to assess me for costs that were incurred by Carl just because Carl refuses to pay them, and you did it the other way.

PROFESSOR DORSANEO: Bottom

line, Mr. Chairman, this is at the very back of the book here, and these rules, you know, from beginning to end probably need another careful look.

There is a Rule 142 -- if you read this, I mean, even when you read them to begin with you get dissatisfied with them. There is a Rule 142 that was modified and adjusted at the clerks' request that says you are supposed to pay for things when you request them.

Now, the rules ought to be written kind of like that. You are supposed to pay for things when you request, and you are supposed to pay for the things you request, and that the costs can be -- you can ultimately recover your costs from the other side if you prevail, and this just needs to be redrafted. The task force attempt to redraft is an effort to redraft, and I think we need to put this back on the agenda. I will take a stab at redrafting it with the clerks, and why don't we just try to make sense out of it?

CHAIRMAN SOULES: What task force has been working on this?

PROFESSOR DORSANEO: The

recodification task force years ago. A subcommittee of that task force worked on these rules.

CHAIRMAN SOULES: Okay. 147 then is September for everything.

PROFESSOR DORSANEO: Let's say 147, 148, 149. It's not going to be that big of a deal.

MR. McMAINS: No.

PROFESSOR DORSANEO: 147 through --

MR. McMAINS: Why don't you just say F?

PROFESSOR DORSANEO: Through 152.

MR. McMAINS: Yeah. That's F, isn't it, that you have labeled "Court Costs"?

PROFESSOR DORSANEO: Well, some of F we have already done, like the affidavit of indigency, 153.

CHAIRMAN SOULES: Well, let's take them one at a time. 147 is September. 148 is September. 149 is September. 150 is September, right? 151, September. 152, also September?

PROFESSOR DORSANEO: Yeah.

CHAIRMAN SOULES: 152. Then we go to 131?

PROFESSOR DORSANEO: No. 153. That's a mistake up there at the top.

CHAIRMAN SOULES: 153, too, is September and then 153 has been approved.

PROFESSOR DORSANEO: Yeah. And, now, some of this has been -- you know, like 152(d) has already been conformed to the appellate rules.

CHAIRMAN SOULES: 152.

PROFESSOR DORSANEO: (d).

CHAIRMAN SOULES: 152(d).

PROFESSOR DORSANEO: Yeah. But now I'm looking at this today, and I can see that 152(d) probably supplants 152(b) and 152(c). Probably we don't need 152(b) and (c) if we have 152(d).

CHAIRMAN SOULES: Well, 152 is on for September in its entirety, and 153 is approved.

PROFESSOR DORSANEO: And I want to work with the two clerks and anybody else who wants to work on this. Is that all right,

Doris?

MS. LANGE: Yes.

CHAIRMAN SOULES: Rusty, do you want to review this as well?

Judge Cornelius.

JUSTICE CORNELIUS: Could I take my concerns out of order here? I'm going to have to slip out at 4:00 for another appointment.

CHAIRMAN SOULES: We're done with this.

PROFESSOR DORSANEO: We are done, Judge.

JUSTICE CORNELIUS: Oh, you're done?

CHAIRMAN SOULES: You're on the docket. You have the floor, Judge, and Judge Cornelius has some concerns about the appellate rules, the TRAP rules, and we want to get to those now.

JUSTICE CORNELIUS: I'm not sure anything can be done about my concerns, if the TRAP rules are already set in concrete. Possibly nothing can be done, but I would like for the Court to be aware of the problems that

I see in these two rules, and perhaps they would make a change in them.

The first is the new Rule 40 TRAP. No. I beg your pardon. It is 39.9 of the TRAP rules. It provides that the clerk must send to the parties at least 21 days before the date the case is set for argument, or submission without argument, a notice telling the parties when it's going to be argued and so on and so forth.

Now, we have close to one half of our appeals where the argument is waived, and we are able to pick up those waived cases and get them decided very quickly, and as you know, the legislature has been yapping at our heels lately about disposing of our appeals quickly and expeditiously, and we try to do that, but this rule provides that even when argument is waived you have to give the parties 21 days notice before you submit the case.

I submit that there is no reason whatsoever for such a rule as that. It only delays matters. It doesn't help anybody, and I think that ought to be removed, and that notice should be given only when the case is

going to be set for argument.

CHAIRMAN SOULES: The Supreme Court PC's cases all the time without telling anybody they are going to render a decision. I don't know why they wouldn't accommodate the courts of appeals, at least to the extent you have requested.

JUSTICE CORNELIUS: There is another problem. Not only is this unnecessary --

CHAIRMAN SOULES: Lee, can you bring that to the Court's attention? I mean, that seems to me to be --

JUSTICE CORNELIUS: Not only is this unnecessary in my opinion, it is subject to varying interpretations. There is a difference among the courts of appeals as to what constitutes submission. For example, in our court we consider a waived case submitted when the opinion is issued, and that gives us a real good time frame because there is no time left between submission and decision.

MR. ORSINGER: Makes your stats look good.

JUSTICE CORNELIUS: It makes

our stats look good.

MR. McMAINS: Especially the averages.

JUSTICE CORNELIUS: Yeah. Now, some of the courts consider a waived case submitted when it is at issue; that is, when the briefs are all filed. Others consider it submitted a certain number of days after it comes at issue, and so there is no way really to tell. If you are going to give the lawyers notice of when a waived case is going to be submitted, that time is going to vary among the courts of appeals.

I would -- there is another problem with submission that I want to talk about in just a minute, but I would urge that this rule be changed to delete the requirement for notice when a case is not going to be argued. Then there is another rule --

CHAIRMAN SOULES: And, now, Lee is going to carry that message to the Court right away, I think, so that we can get that fixed.

MR. PARSLEY: That's right.

CHAIRMAN SOULES: That's almost

a technical point that doesn't need any debate by us. We all agree with it. Anyone disagree with that? Okay.

MR. PARSLEY: Let me say that it used to be submission was more important than it is now because you could amend your record up to submission under a different standard than after submission, so knowing the date of submission was important to you. Under the new rules they don't really differentiate there, so that eliminates any need for a distinction, as far as I know, for the need to know when submission is in a case where argument has been waived. So I agree, and I will take it to the Court.

JUSTICE CORNELIUS: But having looked at these rules, I have come to the conclusion that we probably need to define when a case is submitted. If you will look at Rule 41.1, "Submission to the panel," that rule requires, and the statute also requires, that a case on original submission in a court of appeals must be submitted to a panel of not less than three justices, but the rule goes on to say that if for any reason after an

original submission only two justices participate in deciding the case, both justices must concur or the chief justice must appoint another member of the panel, or if it's a three-judge court then the chief justice of the Supreme Court appoints another member on the panel.

That rule seems to presuppose that there is a different time between original submission and decision, and in a waived case that would go against what my court does, but I think the real problem here is in a waived case we don't know when it is submitted. At least we don't consistently know when it is submitted.

So I would propose that we define "submission," and I suppose a good way to define it as sort of a compromise between what the courts are doing now is to say that an argued case is submitted when it is argued, but a waived case is submitted, say, ten days after it comes at issue; that is, when the briefs, the appellant and the appellee's briefs have been filed. Would anyone have any objection to that?

CHAIRMAN SOULES: I wouldn't have any objection to saying it's submitted when it's decided.

MR. McMAINS: No, but the problem is that there is a distinction in the rule as to whether or not you have got to have -- what happens if you have lost a judge.

JUSTICE CORNELIUS: Yeah. See, that would make --

MR. McMAINS: So you need to move that earlier. You need to move the definition of submission as early in the process.

JUSTICE CORNELIUS: So there can be a distinction between original submission and disposition.

MR. McMAINS: Right. Correct.

JUSTICE CORNELIUS: As we have been doing it now on waived cases, if one of my judges is disqualified or has recused himself, we have been just going ahead and submitting it and deciding it with two judges; but it looks like here if that's considered original submission, we would have to have three judges; and that would require me to

bring in a senior judge, we being a three-judge court, on every waived case that one of my judges was disqualified in.

CHAIRMAN SOULES: I see. I wonder if this would drive some of the decision here. What is a comfortable period of time after the appellee's briefs are all filed for the court to assign the case to a panel?

JUSTICE CORNELIUS: Well, since we have only one panel, I don't know how that's done in the other courts.

MR. ORSINGER: That's not trouble for him.

CHAIRMAN SOULES: Because the --

JUSTICE CORNELIUS: I can find out. We are going to have a meeting of the chief justices in a couple of weeks.

CHAIRMAN SOULES: The original submission goes to three. So you have to have a panel at that time, and that's why I'm saying if -- I would get the clerk to pick the panel. Does the clerk pick the panel or how is it --

MR. ORSINGER: Each court does it differently.

JUSTICE CORNELIUS: Three-judge courts, you know.

MR. ORSINGER: But a lot of courts have panels mapped out for the whole year so people can plan their vacation time; and some courts, for example, an appellate justice will have motions only for that whole month, they will have no oral arguments, and they try to schedule a vacation. It just varies from court of appeals to court of appeals.

MR. McMAINS: Let me suggest that since the rule that you are trying to modify says give at least 21 days notice of the submission date or whatever --

JUSTICE CORNELIUS: Right.

MR. McMAINS: -- why don't you use the same 21 days and just basically say that when oral argument has not been requested or has been expressly waived the case shall be deemed submitted 21 days after the appellee's brief has been filed?

CHAIRMAN SOULES: Well, but at

the time of that submission there has to be a constituted panel.

MR. McMAINS: Right. But that's early in the game.

CHAIRMAN SOULES: Some places that might not be so early, though.

JUSTICE CORNELIUS: That would be good for consistency, but it would delay us. There is no reason for us -- if we are current with our docket, there is no reason for us to sit around and wait 21 days to decide a waived case. I would like to decide it immediately, but I would say ten days wouldn't be bad, but if you went 21 days that would --

MR. McMAINS: Well, you are by and large not going to decide it until the briefs are filed, are you?

JUSTICE CORNELIUS: Oh, no. But I mean say it's submitted so many days after the brief is filed.

CHAIRMAN SOULES: That means you have got to have a panel on that day.

JUSTICE CORNELIUS: And here is another thing that's happening in the courts

of appeals right now. Some of them, my court included up until now, have been doing this. When they have a panel and one of them is not participating, they will show on the cover sheet of the opinion, "Before Doe, Row, and Poe. Judge Poe not participating," and what they are trying to do when they do that is to show that it was originally submitted to three judges, but only two participated, but I don't think that is a legitimate way to do it in view of this rule.

MR. McMAINS: Right.

JUSTICE CORNELIUS: That's why I think we are going to have to make a distinction between what is original submission and what is decision.

MR. ORSINGER: Would it be burdensome to you to decide yourself when to submit it and to give notice? So could you, for example, say it's submitted when you give notice that it's submitted, or is that too much trouble to try to give notice of submission?

MR. McMAINS: Well, the problem is they don't know whether or not argument has

been waived until they get the brief.

MR. ORSINGER: That's right, but if they decide to take a case up the day that the appellee's brief was filed and there is no oral argument, all you have to do is have your clerk send a letter, "The case was submitted today."

CHAIRMAN SOULES: That was Problem No. 1 that he wanted to get away from, is having to give notice.

MR. ORSINGER: You don't want a letter to go out in each case?

JUSTICE CORNELIUS: Oh, I don't think we need to give notice if they waive argument. When they waive argument they know it's going to be submitted, so why give them any kind of notice?

MR. ORSINGER: So you want some kind of default rule as to --

JUSTICE CORNELIUS: But that would not solve the problem with the three-judge panel because in order to make that rule workable we have got to decide when a case is submitted, even a waived case.

MR. McMAINS: Well, if we do it

most extreme your way, you could then simply say that in a case in which no argument was requested or in which argument was expressly waived then submission shall be deemed to have occurred when the appellee's brief was filed. Why give them any time?

CHAIRMAN SOULES: Because of the two versus three problem that he's got.

MR. McMAINS: No, but you don't have a problem.

MR. ORSINGER: You have an opportunity to file a reply brief, too.

JUSTICE CORNELIUS: Well, but that's only with leave of the court, so...

MR. ORSINGER: Not under the new rules.

MR. McMAINS: It doesn't make any difference. Your request has got to be in your first brief, if you don't request oral argument in your first brief.

MR. ORSINGER: No. Under the new TRAPs you are entitled to file a reply brief I think within 20 days after the appellee's brief is filed. This is a matter of right now, not a matter of privilege.

JUSTICE CORNELIUS: Okay. You have to include the reply brief then, if any.

MR. ORSINGER: I think that's true. Is it 20 days?

MR. PARSLEY: Yes.

CHAIRMAN SOULES: Then why not make this an extra 30 days? I realize you don't want to wait 30 days to decide a case, but you can write it and, I guess, put it in your drawer.

MR. McMAINS: But the request for argument must be in the initial brief.

CHAIRMAN SOULES: Right. But that didn't happen, so --

JUSTICE CORNELIUS: You mean 30 days after it is at issue, after all the briefs are filed?

CHAIRMAN SOULES: After all the appellee's reply briefs are filed.

JUSTICE CORNELIUS: I would rather it not be that long.

CHAIRMAN SOULES: But they have 20 days to file a reply brief, so 20 of that 30 is being used by the period for reply briefs.

MR. McMAINS: He's talking about the initial reply brief.

CHAIRMAN SOULES: Appellant's brief, appellee's brief, appellant's reply brief. I'm saying start the clock when the appellee's brief is filed. 20 days of that clock are going to burn on the appellant's right to a reply brief. That would be ten more days beyond that until it's submitted, or just have it on the 20th day. Am I understanding this?

MR. ORSINGER: Yeah. And not only that, but it's complicated by the fact that you can file a motion to extend the time to file a brief up to 15 days after the deadline, I believe.

JUSTICE CORNELIUS: Yeah. That's why you are going to have to provide not a specific number of days unless it is a specific number of days after all briefs have been filed, because they keep asking for extensions of time to file the briefs, you see.

Now, the Fort Worth court, I understand, tries to guess when the briefs ought to be in,

and they send that 21-day notice and tell the litigants, "Your case is going to be submitted on a certain day and because it is going to be a certain day we will not entertain any motions to extend the time to file briefs," but I don't think that's a very good way to handle it because a lot of times the lawyers need more time to file their briefs.

CHAIRMAN SOULES: But that's with leave? I mean, the right expires 20 days after the appellee's brief.

JUSTICE CORNELIUS: Right. Right. It's all with leave.

CHAIRMAN SOULES: Then the case, either on that day or some number of days after that, is submitted; and under submission the court can grant leave to file briefs --

JUSTICE CORNELIUS: I would like to say X number of days after the case is fully briefed or all briefs have been filed. All -- well, no, you don't want to say "all briefs" because that might get amicus and everybody involved in it.

CHAIRMAN SOULES: That's why

I'm saying "appellee's briefs."

JUSTICE CORNELIUS: Appellee's brief. Okay. So many days after appellee's brief is filed.

CHAIRMAN SOULES: And if that's 30, then 20 of that is the period of right in which the appellant can file a reply brief.

JUSTICE CORNELIUS: Well, I would rather cut it back to 20 to expedite matters.

CHAIRMAN SOULES: Okay. On the day the appellant's brief is due, the appellant's reply brief is due, the case is under submission.

JUSTICE CORNELIUS: Not due, but filed. I would recommend that it run from the date it's actually filed to give the court the flexibility to grant extensions of time if necessary.

MR. ORSINGER: But they have to file their reply brief within 20 days or else they are going to have to get your permission to file a reply brief.

JUSTICE CORNELIUS: Okay.

MR. ORSINGER: So if you

submitted it on the 21st day or the 20th day, they either have a brief in --

JUSTICE CORNELIUS: Appellee's original brief has been filed.

MR. ORSINGER: No. After --

CHAIRMAN SOULES: Yes.

JUSTICE CORNELIUS: Okay. That would work.

MR. ORSINGER: Yeah.

JUSTICE CORNELIUS: Don't tie it to the reply brief because there may not be one filed.

MR. ORSINGER: Yeah, but it's the timetable for the reply brief. They have got 20 days. You are going to give it to them. You will submit it at the end of the 20th day. If they want more time, they better file a motion before you submit.

JUSTICE CORNELIUS: Make it 21 days after appellee's original brief has been filed the case will be committed -- is submitted.

CHAIRMAN SOULES: And pitch it out for different reasons.

JUSTICE CORNELIUS: Cut out the

requirement that we notify them when it's going to be submitted because the rules will notify them when it's going to be submitted if it's not argued. They will know by the rules.

CHAIRMAN SOULES: If no request for oral argument is requested or is made, the case will be submitted 21 days after the appellee's briefs are filed. Now, that would mean that any extension to file the appellee's briefs would automatically extend the time for submission.

JUSTICE CORNELIUS: Right. It would, but the court will be in control of that, and it will just have to control it as best it can.

MR. ORSINGER: An alternative to this is to permit each court to make its own decision on how, because we are making a decision now that may be at variance from the practice in El Paso and Fort Worth and Austin.

CHAIRMAN SOULES: This does mean that on the 21st day there has to be an assigned panel.

JUSTICE CORNELIUS: Yes.

CHAIRMAN SOULES: So the courts

would have to adjust their assignment practices, those who have multiple panel courts. Multiple panel courts would have to adjust their assignment practices to have a panel constituted for that case by the 21st day, because it's going to be submitted to a panel.

JUSTICE CORNELIUS: Right. And I will have to get a senior judge on every waived case where one of my other judges is recusing.

MR. McMAINS: Right. I think that's right.

CHAIRMAN SOULES: Well, why is that?

JUSTICE CORNELIUS: Well, because this says on original submission there must be at least three judges on the panel.

CHAIRMAN SOULES: At the time of original submission.

JUSTICE CORNELIUS: At the time of original submission. It implies that after that time one of the judges can drop out and you don't have to replace him.

MR. McMAINS: That's right.

MR. ORSINGER: Why don't you just have your judges recuse after the briefs are filed?

JUSTICE CORNELIUS: Well, I have been thinking about that.

CHAIRMAN SOULES: "I didn't realize it until the appellee's brief got filed, until the 21st day after the appellee's brief got filed."

MR. McMAINS: "I was gone for three weeks after that."

PROFESSOR DORSANEO: Or you could put somebody on retainer.

JUSTICE CORNELIUS: Nobody could really complain about that because a judge is not going to do anything at original submission except maybe vote on a motion or something.

MR. ORSINGER: Does that mean that when one of your justices is on vacation that you can't have any of these no oral argument submissions?

JUSTICE CORNELIUS: No. That's not the way we are operating now, but when he's on vacation that doesn't mean he's not

participating. That just means he's not working.

PROFESSOR DORSANEO: A lot of subtle differences there.

JUSTICE CORNELIUS: That's a lot of difference.

CHAIRMAN SOULES: Well, there is apparently a great deal of accommodation on that court. If somebody is on vacation, two judges can decide the case without bothering the judge who's on vacation.

JUSTICE CORNELIUS: Yeah. It used to be that statutorily we could use a two-judge panel, but the statute now provides that by original submission, whatever that is, we have got to have three.

CHAIRMAN SOULES: Okay. Well, then to conform to that statute, Lee, we need that in --

JUSTICE CORNELIUS: Well, the rule conforms with it now, but it just goes on and presupposes that after -- that there is a time lapse between original submission and decision.

MR. McMAINS: What he's getting

at, there is no provision in the rule right now as to when there is a submission in a case that isn't argued.

CHAIRMAN SOULES: No, now I'm trying to get this down to words for Lee, how we articulate that.

MR. ORSINGER: Can't we add a section in there that says, "In the event oral argument has been waived by all parties the court will determine when submission occurs," and then let everybody do whatever they want, because the practice might be different from court to court.

JUSTICE CORNELIUS: Well, I really think we need some standardization. The courts are jealous about the average time between submission and disposition, you know, and there has been a lot of argument about how we handle it. It looks to me like we ought to have some consistency.

CHAIRMAN SOULES: So the section would say, "When oral argument has been waived by all parties the case will be submitted 21 days after the filing of all appellee's briefs."

MR. ORSINGER: And you need to add the clause on there "or if no brief was filed when the brief was due" or whatever. There is existing language in there for that.

CHAIRMAN SOULES: "After the time for filing" --

MR. McMAINS: "Has expired."

CHAIRMAN SOULES: "21 days after the expiration of the time for filing" -- I don't know. I know that in order to get this done we are probably going to need to give Lee some words to take to the Court because this is going to have to be done pretty quick.

MR. PARSLEY: We are going to do an order August the 4th. The Court will do an order August the 4th, picking up the problems that the Supreme Court has noted and some of the Court of Criminal Appeals has noted and a lot of practitioners have written us, or some practitioners have written us and noted some problems, and so August 4th is supposed to be when. I'm supposed to meet with the Council of Chief Justices on the 30th; is that right?

JUSTICE CORNELIUS: Right.

MR. PARSLEY: Here in Austin. So I will have something for you then.

JUSTICE CORNELIUS: Okay.

MR. PARSLEY: And you and I and the Council of Chief Justices can look at it then and see if what I have done is satisfactory. That will give us a few days before August 4th.

JUSTICE CORNELIUS: Okay. You might use the -- you might prepare an alternate using the language that Richard proposes --

MR. PARSLEY: Right. That's what I've got here.

JUSTICE CORNELIUS: -- about submitted when the court determines.

MR. McMAINS: In case you can't agree.

JUSTICE CORNELIUS: Because I suspect that the chief justices might not be able to agree.

CHAIRMAN SOULES: Then if it says "as the court may determine" then that could include either a notice or a local rule.

JUSTICE CORNELIUS: Right.

CHAIRMAN SOULES: Or could determine that by local rule, in which event you could accommodate --

JUSTICE CORNELIUS: That would be good. That might be more valuable than consistency.

CHAIRMAN SOULES: In terms of getting consensus, at least, it would be more valuable.

MR. ORSINGER: And it's consistent in your court, and does it really matter if it's inconsistent between Dallas and Fort Worth?

JUSTICE CORNELIUS: The only thing that matters is this statistics game that we are playing. When a court like mine considers a waived case submitted on the day it's decided, your time between submission and disposition is very short, and your statistics look good.

MR. ORSINGER: Well, it seems to me that's the problem of the courts whose statistics look bad.

JUSTICE CORNELIUS: Well, I

don't know.

MR. ORSINGER: So if they don't mind their statistics looking bad, then let them look bad.

CHAIRMAN SOULES: Will this accommodate you then? We are going to have two alternatives, "as the court may determine" or "21 days after all appellee's briefs are due."

MR. HAMILTON: And all the local rules will say "submission date is the day before decision."

MR. McMAINS: So it would be a minus.

CHAIRMAN SOULES: Do we have anything else for this meeting now? Bill.

PROFESSOR DORSANEO: I'm going to propose a definition of submission, if I get around the time.

Judge, doesn't it strike you that when the statute says that there must be three justices on original submission that that probably was meant to mean more than assignment of the case?

MR. McMAINS: Yeah.

JUSTICE CORNELIUS: I think obviously it was contemplating argued cases, but I don't think it took into consideration cases that are submitted without argument.

PROFESSOR DORSANEO: But I'm just troubled by this. Maybe this was what your comment was, if some courts are having people not participate but who are there on original submission but not on the real submission.

JUSTICE CORNELIUS: Well, they justify that by taking the position that being on the panel and participating are two different things.

PROFESSOR DORSANEO: Those are two different things, but the most important thing is participation.

JUSTICE CORNELIUS: Right. But they say that you can be on the panel and still recuse yourself from participating in the case and that that does not violate the statute that says it must be submitted to a panel of three.

CHAIRMAN SOULES: Well, does the judge who recused sit in the oral

argument?

JUSTICE CORNELIUS: No.

CHAIRMAN SOULES: During submission?

JUSTICE CORNELIUS: No.

CHAIRMAN SOULES: So then you are submitting it to two if there is, in fact, an argument.

MR. McMAINS: That's because he wasn't participating, though.

JUSTICE CORNELIUS: He's on the the panel, but he's just not participating.

PROFESSOR DORSANEO: Does anybody get down to one?

JUSTICE CORNELIUS: Oh, no. You can't get down to one

MR. PARSLEY: You can get to two, but only if they concur.

JUSTICE CORNELIUS: Two judges must concur.

MR. PARSLEY: Which deprives a party of a dissent, for some of the Supreme Court jurisdictions based on whether there is a dissent; and that's all, I know, mostly mooted by the Section 6 of the Supreme Court's

jurisdiction, paragraph 6; and it's all jurisprudence of the state anyway. But arguably, this is all tied to entitlement of a dissent; that is, you ought to have three judges on the panel, two of them decide the case and you are entitled to a third one dissenting, so that you invoke Supreme Court jurisdiction in some instances.

So there are philosophical reasons for why you want to submit to three judges and you are entitled to have three judges there hear your argument and consider the merits and decide it.

MR. McMAINS: Well, in addition, in interlocutory appeals that is the only basis for appellate jurisdiction. I mean, that's one of the two bases for appellate jurisdiction.

MR. PARSLEY: So there is something more philosophical than just having the judges say, "Well, we are here," meaning that, "We are here at submission, but we are not participating in the case," because that does have a detrimental effect to the party, because there can be no dissent.

JUSTICE CORNELIUS: If that is the reason behind the rule then a simple way to solve that is just make the rule say that three judges must participate, but the rule now says there must be three on the panel, but only two can participate and make the decision.

CHAIRMAN SOULES: And a statute covers that; is that right?

JUSTICE CORNELIUS: Beg your pardon?

CHAIRMAN SOULES: Didn't you say a statute covers that?

JUSTICE CORNELIUS: Now, all the statute says is it must be on original submission submitted to a panel of at least three justices.

MR. PARSLEY: I will be prepared for us to talk about it with the Council of the Chief Judges in detail, and maybe I will ask Justice Hecht to come along, because he worked on this himself some, and there are reasons that this is more important than maybe you would think just right off the top of your head, that you would want to have

three judges there deciding the case. So I will be prepared, and I will have some alternatives.

JUSTICE CORNELIUS: Okay. That's good.

MR. HAMILTON: Is there another submission, Judge, besides the original submission?

JUSTICE CORNELIUS: I don't know.

MR. PARSLEY: There may be submission on rehearing --

JUSTICE CORNELIUS: That's why that --

MR. PARSLEY: -- involved for reconsideration.

JUSTICE CORNELIUS: That rule seems to imply that there is a difference between original submission and disposition, which I guess we have all always figured there was some difference, but there has not always been a time lag between the two.

MR. PARSLEY: Okay.

CHAIRMAN SOULES: Okay. Do we need anything else on this? Is there anything

else to come before this meeting?

Okay. The 19th and 20th of September we will have a pretty extensive meeting.

(Proceedings adjourned.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on July 11, 1997, and the same were therafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $1,633.50.

CHARGED TO: Luther H. Soules, III.

Given under my hand and seal of office on this the 18th day of July, 1997.

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