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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

SEPTEMBER 19, 1997

(AFTERNOON SESSION)

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Taken before D'Lois L. Jones, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 19th day of September, A.D., 1997, between the hours of 1:10 o'clock p.m. and 5:20 p.m. at the Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78701.

SEPTEMBER 19, 1997

MEMBERS PRESENT:

Professor Alex Albright
Pamela Staton Baron
Hon. Scott Brister
Prof. Elaine Carlson
Prof. William V. Dorsaneo
Charles F. Herring
Tommy Jacks
Gilbert I. Low
John H. Marks Jr.
Russell H. McMain
Robert Meadows
Richard R. Orsinger
Hon. David Peeples
Luther H. Soules III
Paula Sweeney

MEMBERS ABSENT:

Alejandro Acosta, Jr.
Charles L. Babcock
David J. Beck
Ann T. Cochran
Hon. Sarah B. Duncan
Michael T. Gallagher
Anne L. Gardner
Hon. Clarence A. Guittard
Michael A. Hatchell
Donald M. Hunt
Franklin Jones Jr.
David E. Keltner
Joseph Latting
Thomas S. Leatherbury
Hon. F. Scott McCown
Anne McNamara
David L. Perry
Anthony J. Sadberry
Stephen D. Susman
Stephen Yelenosky

EX-OFFICIO MEMBERS PRESENT:

Carl Hamilton
Hon. Nathan L. Hecht
David B. Jackson
Doris Lange
Mark K. Sales
Bonnie Wolbrueck
Paul Womack

EX-OFFICIO MEMBERS ABSENT:

Hon. William J. Cornelius
W. Kenneth Law
Paul N. Gold
Hon. Paul Heath Till

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Doc #11907

INDEX OF VOTES

Votes taken by the Supreme Court Advisory Committee during this session are reflected on the following pages:

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CHAIRMAN SOULES: Okay. Cost rules. Now, Bill has just informed me that you can literally trace these rules back to 1879 because no one has ever wanted to mess with them, and he appreciates the reason why nobody has ever wanted to mess with them and that as a matter of reality we have somewhere in the hundred plus years interval totally lost contact with them, with these rules, but all the better reason to get them behind us, so we don't have to hate them very long maybe. We appreciate Bonnie and Doris assisting with this part of it, too. Bill, are you ready to go on these?

PROFESSOR DORSANEO: I think so, and one little introduction, one sentence maybe points this out. In Rule 129, our current rule, about in the middle it says, "All taxes imposed on law proceedings shall be included in the bill of costs." Now, I don't know what that means now. I don't know what it meant when it was written down in 1879 or whether somebody copied it wrong then, but I don't know of any taxes on law proceedings

that would be included in the bill of costs, and maybe I am just misinformed. Okay.

CHAIRMAN SOULES: Taxable costs are taxed. Not?

PROFESSOR DORSANEO: I don't know. "Taxes imposed." But what is done here is that this system has been self-consciously changed in these redrafted rules to be a pay-as-you-go system rather than a credit system. The original system appears to have been a credit system more or less as of right, unless somebody was ruled for costs, and we have gone away from in practice a credit system as of right to perhaps no credit system at all in a given county if the clerk doesn't want to extend any credit. Isn't that right, Bonnie?

MS. WOLBRUECK: Pretty well.

PROFESSOR DORSANEO: And that's a fundamental change. The second fundamental change is the elimination of a number of rules from the rule book altogether, and I think maybe it would be better to talk about that first, and to completely follow you would need your current rule book, but maybe not to

understand.

Rule 133, which is entitled now "Costs of Motion" says, "The court may give or refuse costs on motions at its discretion, except where otherwise provided by law or these rules." That is eliminated from this draft as unnecessary. If it's meaningful at all, unnecessary because of the general rule about costs being taxable in favor of the winning party or at the, you know, discretion of the court, if the discretion is set out.

134 does not exist in the rule book and 135 was also repealed in the earlier time rule. 136 says, "Where the plaintiff's demand is reduced by payment to an amount which would not have been within the jurisdiction of the court the defendant shall recover his costs." For the same reason that 133 is eliminated in this draft, that rule is eliminated. It's covered by a more general rule about the successful party recovering costs except where otherwise provided in the court's discretion, as reflected in the determination itself.

Rule 137 is a special rule for assault and battery. "In civil actions for assault

and battery" -- "assault and battery, et cetera." "In civil actions for assault and battery, slander, and defamation of character if the verdict or judgment shall be for the plaintiff but for less than $20, the plaintiff shall not recover his costs." Bye-bye.

138, costs of new trials. "The cost of new trials may either abide the result of the suit or may be taxed against the party to whom the new trial is granted, as the court may adjudge when he grants such new trial." I'm not sure what abiding the result of the suit exactly means, but this appears to be something that ought to be covered by a more general rule.

More significantly, though, there is a Rule 139 in the rule book, which is a complicated rule, somewhat complicated, that talks about a variety of appellate situations. "When a case is appealed, if the judgment of the higher court be against the appellant but for less amount than the original judgment, such party shall recover the costs of the higher court but shall be adjudged to pay the costs of the court below."

It's a rule that engineers how costs will be allocated by the appellate court and restricts the appellate court from doing it in some other way on its face. This rule, although it's not in the appellate rules, either the 1986 version or the 1997 version, has been applied to appellate courts as the higher courts in the rule. I eliminated it from this draft because it's not a trial court rule and it wasn't carried forward into the appellate rules, and if it should go anywhere it should go in the appellate rules, and I don't think it should go in the appellate rules either.

So, you know, those are the deletions from 133 through 139. There is another deletion, 143a, which is costs on appeal to county court. "If the appellant fails to pay the costs on appeal from a judgment of a justice of the peace or a small claims court within 20 days after being notified to do so by the county clerk, the appeal shall be deemed not perfected, and the county clerk shall return all papers in said cause to the justice of the peace having original

jurisdiction."

And frankly, I'm not now so sure whether this should be eliminated altogether, and it may be something that just showed up in the disposition table when Jeffrey went through it. I now remember that there was a reason for adding it and, you know, I might recommend adding it back in, if not here, to the justice court rules, which parenthetically will exist as a separate rule book if we do all of the rest of this work because they will be the only Texas Rules of Civil Procedure left, okay, in this book. So I'm going to suspend a recommendation on 143a and leave it on the table with the Chair's permission.

CHAIRMAN SOULES: Granted.

PROFESSOR DORSANEO: 147 and 148 are also deleted. 147 says, "The foregoing rules as to security and rule for costs shall apply to any party who seeks a judgment against any other party," and that could be added to the rule for cost rule, 143, but it seems to me the fundamental purpose of the rule for cost rule, you know, has been changed, and I don't recommend it.

148 is removed, secured by other bond. "No further security shall be required if the costs are secured by the provisions of an attachment or other bond," et cetera. We had a rule in the Rules of Civil Procedure or have a rule in the Rules of Civil Procedure which covers that subject, 14(c), and that is carried forward into this draft in 147(b). I believe -- and, Bonnie, correct me if I'm wrong -- that it does the same job.

MS. WOLBRUECK: Yes. Yes.

PROFESSOR DORSANEO: Okay. But better, by talking about cash or cashier's check payable; with leave of court, a negotiable obligation of the federal government; and that also conforms with our appellate rule change. Okay. So there are a number of deletions.

Beyond that, the rules talk about both court clerks and sheriffs getting paid in advance, and I think on the court clerks thing, you know, that's already been approved by this committee when a suggested change to current Rule 142 was discussed at some earlier meeting; is that right?

MS. WOLBRUECK: That's right.

MS. LANGE: That's right.

PROFESSOR DORSANEO: And basically the way this rule works is court clerks get paid in advance or have the right to be paid in advance, although presumably they can extend credit. The same thing for sheriffs and constables, which is made clear. In both circumstances the rules are modified a little bit by saying "unless a contest is filed and sustained as provided in rule," blank.

So it's a pay-as-you-go system unless you can proceed under rule "blank," which would be Rule 148, under an affidavit of indigency. That's the general plan. All right? And the collection of unpaid costs provision in (c) really doesn't have that much to do, okay, and doesn't have anything to do in a county where credit is not extended, but if credit is extended and the party responsible for costs fails or refuses to pay the same when they are due, whenever that is, okay, then the collection mechanism of execution is available to the officials. Okay.

MR. JACKS: That's kind of harsh.

PROFESSOR DORSANEO: Yeah, well, we obviously don't mean that kind of execution, Tommy, but writ of execution; and you know, that's really 146, which is otherwise, you know, based on the language of the rules listed. The rules listed were drafted at a time when it seems obvious to someone who, you know, wasn't around that the way the matter was handled was a credit system rather than a pay-as-you-go system. So those modifications are made. Security for costs, I retained the rule for costs rule. Somebody seeking affirmative relief may be ruled to give security for costs. Does 123 say that now?

CHAIRMAN SOULES: Yes. Yes.

PROFESSOR DORSANEO: Well, I guess that's the main reason why I took out the rule later which says the same thing. Okay? All right. As unnecessary.

CHAIRMAN SOULES: 147.

PROFESSOR DORSANEO: Yeah. Current Rule 147 applies to any party. (B),

again, is what it is, and the judgment on the bond comes from Rule 144 in substantially if not verbatim form. I think it actually is verbatim because when I was drafting this I hewed more closely to the language than is my habit because of the number of other changes.

48 is the affidavit of indigency, which we worked on before. Now, I think Bonnie has something else to say about that.

MS. WOLBRUECK: Yes. I had suggested --

CHAIRMAN SOULES: Okay. Where is 48?

PROFESSOR DORSANEO: 148.

CHAIRMAN SOULES: 148. Okay.

MS. WOLBRUECK: 148. I have a suggested change under (d), the contest. This is the same language that's in the current rule, and the change here only added the clerk and then accompanied it by the IOLTA certificate, but this requires that after service of citation is the only time that the clerk can contest the affidavit.

The current rule, of course, says that because of the defendant being able to contest

it -- and I'm wondering if it couldn't be changed to say, "The clerk upon the filing of the affidavit may contest the affidavit, or the defendant after service," and that would be my recommendation.

MR. ORSINGER: Why don't we just take out "after service of citation" because it's obvious the defendant won't contest it before service?

PROFESSOR DORSANEO: Yeah, he does.

HONORABLE SCOTT BRISTER: He does sometimes.

MR. ORSINGER: Some people do contest it before? Well, why does it have to be after service?

PROFESSOR DORSANEO: I don't know why.

MR. ORSINGER: Why not let him make a general appearance before service and contest it?

CHAIRMAN SOULES: Or take out "or the clerk." Diehard.

MS. WOLBRUECK: I don't think so.

CHAIRMAN SOULES: I know. I know. I got voted down on that anyway. Does that contribute anything, "after service of citation," that parenthetical?

MR. ORSINGER: No.

CHAIRMAN SOULES: Anybody see that that contributes anything? Delete it? It's gone. "The defendant."

All right. You want to go back to 146? Has this all been approved, Bill, before?

PROFESSOR DORSANEO: No.

MR. ORSINGER: No, no.

PROFESSOR DORSANEO: None of it. I'm just giving the overall picture and then we can maybe go back. Let me do 149. 149 is 131 and 141, and really, 149 is the main rule when we are talking about, you know, after judgment basically. Okay?

"The successful party to a suit shall recover" -- now, obviously you want to take out the "of his," you know, but I've left the language, "of an adversary all costs incurred, except where otherwise provided." So the general rule is still the same, successful party. The "otherwise provided" has been

generalized. Okay? Most of those rules that were taken out were successful party recovers anyway. Huh? Okay. But maybe more detail than I found tasteful.

"The court may, for good cause to be stated on the record, adjudge the costs otherwise as provided by law or these rules." This really is the main rule on recovery of costs.

150 is a new rule. We don't have a rule that says which costs are taxable. All right? And that's, you know, semi-known, and this is an effort by me to write such a rule to say what's taxable and what's not taxable so that we have something to go by. We didn't, perhaps, need something to go by until the responsibility was put on counsel to do the bill of costs, and God knows what the clerks went by when it was their responsibility.

MS. WOLBRUECK: It's very difficult.

MR. ORSINGER: But, Bill, what about the Civil Practice and Remedies Code provision that purports to define those?

PROFESSOR DORSANEO: What is

it?

HONORABLE SCOTT BRISTER: What rule?

MR. McMAINS: Well, you have the citation to it.

MR. ORSINGER: I don't have the Civil Practice and Remedies Code here.

PROFESSOR DORSANEO: I have it here.

MR. McMAINS: It's on page two. The citation to the statute is on page two. I think he's asking what it is.

MR. ORSINGER: No. What I'm saying is that there is a list in the Civil Practice and Remedies Code; and is this an amplification of it, a "rulification" of it, or is this just a repudiation of it?

PROFESSOR DORSANEO: I am unfamiliar with this list, at this moment at least.

CHAIRMAN SOULES: Where is a list?

MR. McMAINS: 31.007(b).

CHAIRMAN SOULES: What are you-all looking at?

MR. ORSINGER: The Civil Practice and Remedies Code section on court costs, and we are looking at Rule 150, taxable costs.

PROFESSOR DORSANEO: Okay. It does. It overlaps.

MR. ORSINGER: Does it add to, do you think, or not?

HONORABLE SCOTT BRISTER: Oh, yeah.

PROFESSOR DORSANEO: Yes.

HONORABLE SCOTT BRISTER: You want me to read it?

MS. SWEENEY: Yeah. Someone read it.

HONORABLE SCOTT BRISTER: It's, "A judge of any court may include in any order or judgment all costs including the following: (1), fees of the clerk and service fees due the county; (2), fees of the court reporter for the original of stenographic transcripts necessarily obtained for use in the suit; (3), masters, interpreters, and guardians ad litem appointed pursuant to these rules and state statutes; and, (4), such other costs and fees

as may be permitted by these rules and state statutes."

PROFESSOR DORSANEO: What rules?

MR. ORSINGER: "By these rules"?

HONORABLE SCOTT BRISTER: That's what it says. I'm just reading it.

MR. ORSINGER: They must have picked that up out of a rule and stuck it in a statute.

PROFESSOR DORSANEO: Well, I took -- you know, apparently at some point had some nodding acquaintance with the existence of this.

MR. McMAINS: Yeah. Well, it's noted in your --

PROFESSOR DORSANEO: Because it's in the comment.

MR. McMAINS: That's what I'm saying.

PROFESSOR DORSANEO: But, you know, I'm getting older every day.

MR. LOW: Not back before the civil war, though.

PROFESSOR DORSANEO: And this comes, really, mainly from the recent cases that talk about this subject, both what is and what isn't, and we're trying to make a reliable list. Maybe it needs more work.

MR. McMAINS: Can I ask you a question here? What is this "fees paid to court-appointed experts" in terms of -- I mean, did we --

HONORABLE SCOTT BRISTER: We don't have any of those.

MR. McMAINS: I thought we had debated this entire issue about court-appointed experts.

MR. ORSINGER: Well, you do have them in family law proceedings under the authority of the Family Code.

MR. McMAINS: Does the Family Code say how you treat their fees?

MR. ORSINGER: It sure does.

CHAIRMAN SOULES: You also have masters and auditors.

MS. SWEENEY: And IME's.

MR. McMAINS: What does it say?

MR. ORSINGER: That they can be

taxed as costs, and I would also point out --

MR. McMAINS: Then why do you need to --

MR. ORSINGER: -- in custody litigation you can tax attorneys' fees as costs, so that's contra to 150(b)(2).

MR. HAMILTON: Bill, this may only occur in Starr County, but I learned the other day the clerk there has been for umpteen years charging the parties with the fees that are paid to the jurors to serve on the jury, and he's trying to collect $39,000 from some Houston lawyers that had a six or eight-week trial there, and that's how much they had to pay the jury.

HONORABLE SCOTT BRISTER: I think that's a great idea.

MR. ORSINGER: Does that include food and lodging?

PROFESSOR DORSANEO: If the clerk is doing that, he's probably going to try to get his electric bill next.

HONORABLE SCOTT BRISTER: I'm going to talk to our clerk about it.

MR. HAMILTON: I'm wondering if

we ought to put that in there that the cost is not taxable.

MR. ORSINGER: Well, is it the person that requested the jury that has to pay?

MR. HAMILTON: No. It's whoever loses.

MS. WOLBRUECK: That's a good idea.

PROFESSOR DORSANEO: Well, in my own mind I don't know whether it's a good idea to say what's not taxable because it's going to obviously be too short a list.

MR. McMAINS: Well, yeah, the other problem is your first list says, "Taxable costs include but are not limited to," so then you list all of those and then apparently the (b) list is -- well, that obviously can't be in the "but not limited to" up here, but whatever else is probably in the (a) list.

PROFESSOR DORSANEO: Uh-huh.

MR. McMAINS: That's not in the (b) list.

PROFESSOR DORSANEO: Well, you

know, you may say it's not a good idea to try to draft such a rule, but I was instructed to try to draft it at some point in time, and I tried, and there it is.

MR. ORSINGER: It's a good job, but it proves why this hasn't been done since 1879.

PROFESSOR DORSANEO: I'm happy to put this in the Texas Litigation Guide and let it be read there. I don't care.

CHAIRMAN SOULES: This is a week's work of pouring through cases since the 1850's, so we've got to give this a little bit of deference.

MS. SWEENEY: I would suggest a fix might be to delete part (b).

MR. MARKS: Nah.

MS. SWEENEY: Oh, never mind. John persuaded me.

MR. LOW: Like, for instance, attorneys' fees, except for authorized by a rule, a specific rule or statute, I mean, they wouldn't be -- ordinarily attorneys' fees wouldn't be included unless authorized by a statute or rule. On deposition costs you

would need to clarify here. You say "deposition expenses" and then you say "cost of taking depositions," but it's the original copy and the court reporter, not copies that parties get that are a cost.

CHAIRMAN SOULES: That varies.

PROFESSOR DORSANEO: Except in Lubbock.

MR. ORSINGER: Yeah. That depends on your local area.

MR. LOW: Copies of a deposition?

PROFESSOR DORSANEO: I once made the usual agreement in Lubbock with a young lawyer.

MR. LOW: Oh, no. I'm excluding the usual agreement or --

MR. ORSINGER: In San Antonio, Buddy, the court reporters file a certificate that includes the original and one copy.

MR. McMAINS: Yes.

MR. ORSINGER: But in Dallas it's just the original.

MR. LOW: In Beaumont it's just the original. The judge says the copy is

yours and you pay for it. It's not the court. The court doesn't need but the original, and I'm just wondering.

HONORABLE SCOTT BRISTER: Court costs ought not to be different in different parts of the state.

CHAIRMAN SOULES: David Jackson, you had your hand up.

HONORABLE SCOTT BRISTER: It ought to be the same thing everywhere.

MR. JACKSON: In Dallas it does include the copy.

MR. ORSINGER: Oh, it does?

MR. JACKSSON: Yeah.

MR. ORSINGER: Oh, excuse me.

MR. JACKSON: We just give -- if you take the deposition, you are entitled to a copy of what's being filed with the court.

MR. McMAINS: You get a copy free.

MR. JACKSON: You don't pay for that. You just pay for the original and then you get a copy.

MR. ORSINGER: The rates are a

little higher per page but the copy is free.

MR. MARKS: The good news is you get a free copy. The bad news is...

MR. JACKS: You pay for it.

CHAIRMAN SOULES: Okay. Let's get through this entire package and then go back and start knocking them out.

PROFESSOR DORSANEO: And then 151 is just pretty much verbatim, you know, collection of costs after judgment. So that's how it's organized.

CHAIRMAN SOULES: Okay.

MR. LOW: Can I ask a question?

PROFESSOR DORSANEO: No pride of authorship in any of this, really.

MR. LOW: Can I ask you a question about 151 when you talk about "clerk or a justice of the court," and in another one up here you say "clerk or justice of the peace." The second line of 151, "justice of the court," did you mean "justice of the peace," or the other one, did you mean to strike it out because these JP rules don't apply here or what? On Rule 145(c) one, two, three, four, five lines down you have got

"payment to clerk or justice of the peace." See, on 145.

PROFESSOR DORSANEO: Well, 149 in it's current form says "justice of the court," and that's why it says it here in this draft.

MR. LOW: Oh, okay. I would be confused if I read the original, too, then.

PROFESSOR DORSANEO: Maybe it shouldn't say "justice of the court." Who is that?

MR. LOW: Yeah. That's what I -- most courts don't have justice.

MR. McMAINS: I don't think other than a JP that anybody else issues a execution writ.

PROFESSOR DORSANEO: No. It should say justice of the -- that's what "justice of the court" means, justice of the peace.

MR. ORSINGER: Bill, your Rule 151 about collecting costs after judgment and your Rule 146(c), second paragraph, appear to be covering the same thing.

PROFESSOR DORSANEO: Yeah. And

the only reason I put 146(c) up there is that I tried to make it -- you know, I tried to describe it. I tried to have it be like a clerk's mechanism before a judgment. Kind of go, "I said you could file this if you -- or I extended you credit and you promised to bring the money in and you didn't bring it in and now I want it."

CHAIRMAN SOULES: So it's different. It's different. There are differences.

MR. ORSINGER: Well, the 146(c) is not limited to pretrial.

PROFESSOR DORSANEO: Okay.

MR. ORSINGER: So it appears to overlap.

PROFESSOR DORSANEO: It is in its title. Okay. All right. It's not in its title but --

MR. ORSINGER: Prejudgment. 146(c) is supposed to be prejudgment and 151 is supposed to be postjudgment; is that right?

PROFESSOR DORSANEO: Yeah. Although I think, you know, the clerks could probably wait. I mean, this is like when

nobody paid, and the collection of costs after judgment is kind of like when somebody paid, but they are supposed to get reimbursed by the loser.

MR. ORSINGER: Well, as long as they don't have inconsistent procedures I guess it doesn't matter if they overlap.

MR. HAMILTON: Well, they are a little bit different, too, aren't they, in that 146 doesn't even require an execution, but 151 does?

PROFESSOR DORSANEO: Maybe 151 does need more work on that, because it does -- "When costs have been adjudged against a party and are not paid the clerk" -- I mean, that kind of assumes that they weren't paid already.

MR. ORSINGER: Well, no. It could be were not paid by the party against whom they were taxed, but at that point you have a judgment to get execution on. Earlier on in the case somebody files something and they don't pay the costs, the clerk should be able to go out and execute on it without -- they don't have a final judgment to execute

on, so you've got to execute on a cost bill. So I see the logic in allowing the clerk prejudgment to get a writ of execution out on a cost bill, but you don't need that procedure if you have a judgment because the costs should be taxed in the judgment.

PROFESSOR DORSANEO: I think you're right.

MR. ORSINGER: You just get a plain old writ of execution on the judgment, even if it's only for costs.

PROFESSOR DORSANEO: And what does it mean in 151, current Rule 149, "This rule shall not apply to executors, administrators, or guardians"?

MR. ORSINGER: You have to go to the probate court to collect them.

MR. McMAINS: Well, because it's specifically in the code that they aren't liable for costs.

MR. ORSINGER: Oh.

CHAIRMAN SOULES: The estate is liable but the representatives are not.

MR. McMAINS: Right. Representatives are not. I mean, they don't

have to file bonds. They don't have to --

PROFESSOR DORSANEO: That's all kind of screwy when you read the Probate Code and the Civil Practice and Remedies Code.

MR. McMAINS: Trust Code.

PROFESSOR DORSANEO: You are not sure what the rules are for these people, and this kind of suggests that they don't have to pay. Bonnie, do you charge these people costs?

MS. WOLBRUECK: Well, I don't handle those types of cases, so ask Doris.

MR. McMAINS: Well, you probably do, but you may not get any argument about it.

MS. LANGE: They are charged to the estate rather than to the individual, the administrator, or the executor.

PROFESSOR DORSANEO: Well, Doris, do you issue citation?

MS. LANGE: And the estate would have to be responsible for it when they get it probated.

MR. ORSINGER: In other words, you try to collect out of the estate?

MS. LANGE: If they are further down where they can pay, but if they have just died and just started then you couldn't collect because it's in that posting period.

CHAIRMAN SOULES: This is really strange.

MS. LANGE: But, yes, we would charge the estate.

CHAIRMAN SOULES: But the estate is not a party.

PROFESSOR DORSANEO: Yeah.

CHAIRMAN SOULES: It can't be a party. For litigation purposes it doesn't exist.

MR. McMAINS: Well, it's a nonentity, but it appears --

CHAIRMAN SOULES: The representative in his representative capacity.

MR. McMAINS: That's right. But representatives in representative capacities don't pay bonds. They don't post bonds. They are exempt.

MR. ORSINGER: Well, what about costs, though? Bonds and costs are not the same thing, are they?

MR. McMAINS: Well, I think the same statute provides for the costs. I think so.

CHAIRMAN SOULES: Okay. Well, somebody look that up, and let's start on 146 and go through this.

146(a), unless there is objection, that's approved.

MR. ORSINGER: Well, I just want to comment that "before performing any other services," which is new language, does not mean accepting for filing, correct? If the document is tendered even without a filing fee, the clerk is required to accept for filing but they are not --

CHAIRMAN SOULES: Under 146(a)?

MR. ORSINGER: Yes. Or I'm sorry. 146(b).

CHAIRMAN SOULES: Okay. (A) is approved. (B)(1).

MS. WOLBRUECK: Luke, this was approved once before by this committee. This is the language that was approved once before.

CHAIRMAN SOULES: Okay. It's still approved. That's 146(b), and I guess --

I know there is some kind of numbering here, Bill.

PROFESSOR DORSANEO: What?

CHAIRMAN SOULES: That's capital I, and that's two little i's.

MR. ORSINGER: The word processor automatically puts a capital I for a single I, and there is nothing you can do about it. Word Perfect has a --

HONORABLE DAVID PEEPLES: Isn't that horrible?

MS. BARON: You have to go back and highlight it.

MR. ORSINGER: You have to type a capital I and then a small i and then back space off the capital I and then it will leave the small i.

CHAIRMAN SOULES: All right. I'm glad that's on the record, because I don't understand it.

PROFESSOR DORSANEO: But I am glad to know it was done to me and not by me.

CHAIRMAN SOULES: Did we approve (c), Bonnie?

MS. WOLBRUECK: (C), I don't

know about. That's something that Bill did.

PROFESSOR DORSANEO: No. And (ii) -- and Rusty has bit onto the rule book. Little (ii) is right pretty much out of 126, isn't it?

MS. WOLBRUECK: Yes, but I think there were some changes in it, and we have already approved that.

CHAIRMAN SOULES: We have approved it. Still approved unless somebody objects. Okay. Still approved.

(C). Any problem with (c)? Stands approved.

PROFESSOR DORSANEO: Now, I did take out, "All taxes imposed on law proceedings shall be included in the bill of costs," because I don't know what that means. That's in the current rule.

MR. ORSINGER: Okay. It's gone.

CHAIRMAN SOULES: Okay. Then the second paragraph, "Upon demand..."

PROFESSOR DORSANEO: That comes from 130, but it's shortened a little bit. I took out, "Where such party is not a resident

of the county where such suit is pending the payment of such costs may be demanded of his attorney of record, and neither the clerk nor justice of the peace shall be allowed to charge any fee for making out such certified bill of costs unless he is compelled to make a levy." Is that okay?

MS. WOLBRUECK: That's okay. You took it out, right?

PROFESSOR DORSANEO: Yeah.

MS. WOLBRUECK: Yes. That's fine.

PROFESSOR DORSANEO: And then that "The removal of a case by appeal shall not prevent the issuance of an execution for costs" was at the end of what became (c), was at the end of Rule 129.

MR. LOW: What if it's removed to Federal court? You would still be able to get your costs? Sometimes you can remove, because like a person has filed within a year, you know, so it would be substantial costs, and it's removed. That wouldn't prevent them. So "removal by appeal or otherwise."

PROFESSOR DORSANEO: I don't

know why it says "by appeal," quite frankly. I don't even know if when I was reading it I was reading it that close to the page.

MR. LOW: I don't know. I just raise that question because ordinarily it would be removed to Federal court soon, but for diversity you can remove it up to a year, so you can have certain costs and they just remove it and then the clerk should be able to get out execution to cover their costs.

MR. ORSINGER: But doesn't that mean removal by appeal from a JP court to a county court or maybe in the old days from a county court to the district court?

MR. LOW: No. I'm talking about --

MR. ORSINGER: That's what this is supposed to be. This is not removal to Federal court.

PROFESSOR DORSANEO: Right.

MR. ORSINGER: I don't know that we have a removal of appeals from county court to district court anymore, do we?

PROFESSOR DORSANEO: No. Not unless a special statute provides for it

somewhere.

MR. ORSINGER: What about appeals from JP court to county court for a de novo trial?

PROFESSOR DORSANEO: We do certainly have that. I don't call it a removal, but, you know.

MR. ORSINGER: Well, it used to be called removal, I think, in the old wordage. It's been so long ago. I haven't done an FB&D in 20 years, but it was -- I think that's what it referred to.

MR. LOW: Richard, wouldn't you be able to recover, I mean, your costs if it's removed to Federal court? What statute -- in here which one of these rules allows that?

MR. ORSINGER: I don't think this relates to Federal court.

MR. LOW: Well, it relates to costs incurred in the trial court, doesn't it? There are going to be costs incurred in the trial court before it's removed to Federal court, isn't there?

MR. ORSINGER: But the word "removal" I don't think refers to removing it.

MR. LOW: I don't care what it refers to in this here. I'm just saying would this rule cover that situation? Just forget there was anything written here, and we just said, okay, we are going to -- only where there is an appeal and then the clerk can get out execution for the costs. Are we going to allow the clerk to get out execution for their costs if it's not appealed but it's removed to a different court, court system, Federal court?

PROFESSOR DORSANEO: I recommend leaving this sentence out.

MR. LOW: Okay.

PROFESSOR DORSANEO: Because it's like saying, you know, rainstorms. You know, rainstorms shall not prevent the issuance of execution or costs, you know.

MR. LOW: Right. I second that. I agree.

PROFESSOR DORSANEO: Maybe removal does prevent the court from doing anything. I don't know. I'd take a look at 28 U.S. Code 1447 to know, or 1448.

MR. LOW: The way it's drawn

it's broad enough that it's not prevented from doing it if you don't take that sentence out, so it looks like it would cover everything that way.

CHAIRMAN SOULES: What this means, I think, is collection of costs shall not be affected by the absence of jurisdiction of the court.

MR. LOW: Right. If it removes it. Yeah.

CHAIRMAN SOULES: In other words, if the clerk hasn't been paid, it doesn't make any difference whether the court had jurisdiction or still has jurisdiction, the clerk can get paid. Collection, I recommend that we change that last sentence to say, "Collection of costs shall not be affected by absence of jurisdiction of the court."

PROFESSOR DORSANEO: Yeah.

CHAIRMAN SOULES: If you want to write it in a little better language, that's fine. Other than that is that paragraph, second paragraph of (c), okay?

No objection? It's approved.

MR. ORSINGER: Before we go on, liability for costs, Bill has omitted two rules that I think at least one for sure is worth talking about.

Rule 138, costs for new trial. Judges frequently have charged the cost of a default judgment against a party as a condition to granting the new trial; and this is the authority to do that; and I think that it's appropriate to do that; and if we delete that then I think we may have taken away from the trial judge the authority to say, "I grant the new trial conditioned on your paying for the cost of the default judgment"; and I don't think we should change the law that way.

CHAIRMAN SOULES: What costs?

MR. ORSINGER: Attorneys' fees. My experience has been -- we have got two district judges here. My experience has been that sometimes judges in granting a new trial on a default judgment will condition that on paying $1,200 or $2,500 or whatever for the fees incurred in the plaintiff taking the default judgment; and, in fact, the case law suggests that you need to tender that payment

as a condition to getting a Craddock motion for new trial; and I don't know if you guys do that in your experience or not, but I have had it done.

HONORABLE SCOTT BRISTER: All the time.

HONORABLE DAVID PEEPLES: Sometimes.

MR. ORSINGER: I don't think we should change that practice without -- I don't think we should change it at all, but certainly not without recognizing that this changes -- if I understand what's happening, this changes the practice

CHAIRMAN SOULES: Okay. You are saying 138 covers attorneys' fees?

MR. ORSINGER: I don't have my rules in front of me, but the costs on new trial, I can tell you for 20 years I have been seeing judges including attorneys' fees in it.

CHAIRMAN SOULES: Absolutely, but that's because I think the party -- you can't prejudice the other party.

PROFESSOR DORSANEO: Right. I don't think it has anything to do with costs.

I think it has to do with Craddock prejudice problems.

CHAIRMAN SOULES: I don't think that's a 138 issue. This is talking about costs, court costs.

MR. ORSINGER: Well, maybe it is. Maybe I'm wrong, but I always thought that Rule 138 was your authority to assess the fees and that the costs in that situation were interpreted to include fees.

PROFESSOR DORSANEO: Well, what does it mean, Richard?

CHAIRMAN SOULES: Well, this is taxable costs. Costs "may be taxed." I mean, here it is.

MR. ORSINGER: Well, okay. Forget it then. If we can still do it then I don't care if we get rid of the rule.

PROFESSOR DORSANEO: Well, what does Rule 138 mean now when it says, "The costs of new trials may either abide the result of the suit or may be taxed against the party to whom the new trial is granted."

MR. ORSINGER: What that means is, is that if a new trial is granted, you can

carry the costs along with the case and then whoever gets costs assessed upon retrial pays; or you can say, "I'm going to tax the cost of the new trial against the defendant right now as a condition of granting the new trial." That's what I always thought that rule meant.

PROFESSOR DORSANEO: Well, it should say "the costs of old trials" then, not "the costs of new trials."

MR. ORSINGER: Well, the cost of the default judgment. If I'm the only guy here that thinks that and if the practice doesn't change, I don't care. I always thought the rule --

MR. McMAINS: No. I think that's right.

MR. LOW: Can you interpret that to mean attorneys' fees? Craddock says you have to -- there are other things you have to do. You know, not delay the trial, do other things, but I never interpret that to mean attorneys' fees.

MR. McMAINS: Well, one of the requisites basically in the Craddock motion is that you must --

MR. JACKS: Yeah.

MR. McMAINS: -- tender or offer to tender to make the other party hold, and that would include the cost of obtaining and that includes attorneys' fees expressly in the cases.

MR. JACKS: Sure.

MR. McMAINS: The cost of obtaining the default judgment.

MR. JACKS: Sure.

MR. LOW: Okay.

MR. McMAINS: Okay. And so you have to make that offer as a condition precedent. If you don't make that offer, you have screwed up.

MR. LOW: I understand. I have made that offer.

MR. ORSINGER: I don't mind deleting this rule if there is an assurance in the record that no one can argue that this eliminates that process, but if deleting this rule eliminates recovery of fees on a default then I'm against it.

MR. JACKS: I don't know that assurance in this record is worth anything, so

I'm against it.

PROFESSOR DORSANEO: Wait a minute. This in English assumes there is some cost that's charged to the person that gets a new trial. You know, like you have to pay to get on the ride.

MR. ORSINGER: Yes.

PROFESSOR DORSANEO: Is there such a cost?

MR. ORSINGER: Yes.

PROFESSOR DORSANEO: How much is it?

MR. ORSINGER: It's whatever they prove up as the cost of taking the default judgment. We have got two district judges here. I bet they have done it before.

HONORABLE SCOTT BRISTER: Not necessarily under this rule, though.

PROFESSOR DORSANEO: Yeah, but that's not the cost of the new trial.

MR. ORSINGER: Okay. Well, maybe not.

HONORABLE DAVID PEEPLES: There's a lot of case law.

MR. McMAINS: I mean, as a

practical matter I think that it's been established case law for so long nobody knows where the genesis of it was.

PROFESSOR DORSANEO: And I'm sure this is not a -- is there a cost for a new trial?

MS. WOLBRUECK: There is a cost for filing a motion for new trial by statute.

PROFESSOR DORSANEO: Okay. So there is no cost --

MR. McMAINS: Yeah. It just went up, I think.

MS. WOLBRUECK: Yes.

PROFESSOR DORSANEO: -- for a new trial. If this means the cost of the former trial, why would you tax it against the party to whom the new trial is granted?

MR. ORSINGER: Because it was written in 1875.

PROFESSOR DORSANEO: Well, why would you tax the person who got the new trial with the costs of the old trial?

CHAIRMAN SOULES: Because they --

MR. McMAINS: Because they were

getting a new one.

MR. ORSINGER: No. Bill, through their neglect they caused the plaintiff to go to the expense of taking a default judgment, and now they want equity to let them out of the default judgment, so they have to make the other party hold. That's the logic.

PROFESSOR DORSANEO: See, I am still refusing to believe that that is what this rule is about.

MR. LOW: I mean, I can serve your yardman, and about a week later the yardman says, "Well, the sheriff gave me" -- or sometime, you know, after you can still file. A motion for default was taken and he doesn't know the yardman has the papers. Am I at fault because I didn't ask my yardman if I got papers, and I get a new trial? I mean, that doesn't sound right. I mean, because you don't have to -- to get a new trial you don't have to have actually had it placed in your hand in order to be effective. I mean, somebody could not even come close to getting served and go in and show the judge, well,

yeah, they were served, and that's my thought.

PROFESSOR DORSANEO: And those costs don't abide the new trial anyway. They get paid --

MR. McMAINS: No. They do. They get paid immediately.

PROFESSOR DORSANEO: Huh?

MR. McMAINS: Well, not necessarily paid, but they get offered to be paid.

MR. ORSINGER: Well, first of all they get charged, but they may not get paid, because if the motion for new trial comes in without the fee they still have to file it; but then there is a question as to whether that preserves anything for appeal; and so far as I can tell under the rules that we have adopted, accepting something for filing is not performing an additional service that's conditioned upon payment.

CHAIRMAN SOULES: Craddock says "provided the motion for new trial sets a meritorious defense as filed at the time of the granting of, will occasion no delay or otherwise work an injury to the plaintiff."

MR. LOW: Right.

CHAIRMAN SOULES: And I think it's the "otherwise work an injury to the plaintiff" the court is using to say --

MR. JACKS: Uh-huh.

MR. McMAINS: Yes.

CHAIRMAN SOULES: -- plaintiff came over here, spent a bunch of money, and granting this new trial is going to work an injury as to those costs, and you are going to have to reimburse them.

MR. ORSINGER: And there is even cases that say if you don't tender you haven't met your Craddock standards, so whenever I have filed one I always tender the fees for the default.

PROFESSOR DORSANEO: I am confident that whatever this was about, and we don't know what it's about, it's not about that. It's about some cost for a new trial which you had to pay, and the question was do you pay it at the beginning or at the end, and it says that's up to the judge, and I don't know of any such cost that exists, any more than taxes on law proceedings.

CHAIRMAN SOULES: Okay. 138, in or out?

PROFESSOR DORSANEO: Out.

CHAIRMAN SOULES: Show by hands.

HONORABLE DAVID PEEPLES: Which one?

CHAIRMAN SOULES: 138.

HONORABLE DAVID PEEPLES: Do you raise your hand if you're for it or against it? That's what I don't know.

CHAIRMAN SOULES: I have got a double negative here. Excuse me, Judge. You have never been guilty of that. I do it all the time.

Rule 138, those in favor of repeal show by hands. 13. Those opposed to repeal show by hands. Two. 13 to 2 it's gone.

PROFESSOR DORSANEO: Those two are not sure what it means and if it means something they like --

MR. ORSINGER: I'd like to mention we have silently repealed 133 about costs of motion.

PROFESSOR DORSANEO: Yeah.

MR. ORSINGER: I'll have to say I've never understood what was included in that, but I presume that would include witness fees or subpoena expense or something. I don't know whether it's ever included attorneys' fees. I have argued that and sometimes won it and sometimes lost it, but we are getting rid of it right now.

PROFESSOR DORSANEO: Well, as long as it hangs around in here somebody will try to give it some meaning.

MR. ORSINGER: I know, and it's been useful.

PROFESSOR DORSANEO: I don't think whatever meaning it has --

CHAIRMAN SOULES: Hold it. Okay. Bill, go ahead and reply.

PROFESSOR DORSANEO: I left it out because I think it's meaningless. 133.

CHAIRMAN SOULES: 133. Any other discussion about 133? On the question of repeal of 123 --

MR. ORSINGER: 33.

CHAIRMAN SOULES: 133, those who vote to repeal it show by hands.

MR. McMAINS: Wait. Can we ask something? I mean, what do you think it means, as to why you took it out?

PROFESSOR DORSANEO: I just am speculating so I really can't say, but my speculation would be that there were some kind of costs on motions that I don't know about.

MR. McMAINS: All I'm trying to figure out is that we have got rules with regards to discovery, with regards to assessing costs on discovery motions and whatever, and I'm just wondering is this a rule that kind of applies to all other motions? Or has it ever been used for that purpose?

CHAIRMAN SOULES: This rule dates from a time when there was no discovery.

MR. McMAINS: I know.

CHAIRMAN SOULES: It dates from a time when there was no Chapter 10.

MR. McMAINS: I understand. I'm just trying to figure out what it was for.

CHAIRMAN SOULES: It may have been a filing fee for filing a motion at the time that would be a part of the taxable

costs, but I guess my curiosity is this, does Rule 133 add anything to Chapter 10.0215, whatever that is?

HONORABLE SCOTT BRISTER: In my opinion it's much better to have the rule saying that the loser pays but the judge can adjust things rather than a whole bunch of rules where I get to go back through the whole case and pick out each motion and assess the costs. That way, this way, that way, this way, that way. Nobody wants to do that.

CHAIRMAN SOULES: And we have a general rule that the judge can tax costs --

HONORABLE SCOTT BRISTER: Fair for reasons stated --

CHAIRMAN SOULES: -- subject to abuse of discretion.

HONORABLE SCOTT BRISTER: Fair for reasons stated in the record.

CHAIRMAN SOULES: Okay. So if 133 adds anything to all of that then fine. Okay.

On the question of repeal of 133 those who support repeal show by hands. 12. Those against repeal? To one. It's gone.

And then I guess while we are on inadvertent repeals or intentional, we might just go ahead and take 143a at the same time. If an appeal is taken from a justice court to the county court and the party doesn't pay the fees, the county clerk sends the case back to the JP. That is probably a rule we should preserve for this reason. Sometimes people will take the appeal from the JP just for delay and then they never do go pay the 20 bucks, and somebody has got to have jurisdiction. This sends the jurisdiction back from the county court to the JP court to do whatever the JP wants to do if the costs aren't timely paid.

Anybody object to keeping that one? Now, Richard, you should fight me on this.

MR. ORSINGER: No. No. These little rules take care of areas of justice that are ignored when the elephants are fighting.

PROFESSOR DORSANEO: That should be put at the end of 146, I believe. Yeah. Make it (d) of 146.

CHAIRMAN SOULES: Okay. Lee

has got an AG opinion on this rule. I don't know what in the world it may say, apparently something very important, so he's going to go look at it and see if it's anything else we ought to think about before we keep it. Maybe it's the idea that you can't appeal if you don't pay your deposit for your ad valorem taxes or some of that constitutional stuff, but we will see it in a few minutes.

MR. MARKS: I think it's a pretty new rule.

PROFESSOR DORSANEO: Yes. Yes. I don't think it should be left out.

CHAIRMAN SOULES: I think what I said was the reason that we passed that rule. How long ago is it?

MR. McMAINS: No. '76.

CHAIRMAN SOULES: It could be. That's been a long time.

PROFESSOR DORSANEO: We were on the committee at that time.

CHAIRMAN SOULES: Yeah. That's right. Maybe that's where the idea came from.

Okay. Now, we are going to take up 147. Is that where we are now? Or, no, wait a

minute. Did we finished 146?

PROFESSOR DORSANEO: Yeah. I think so. 147, the biggest issue there to me is whether we need the rule for costs rule. You know, that seems to be in there because of the credit system to me, but I don't think it hurts to keep it in there, and some people move to rule other people for costs.

MS. WOLBRUECK: I would prefer that it remain.

CHAIRMAN SOULES: Any objection? Okay. 147(a) is approved. Any change in the language? It's approved as written.

MR. McMAINS: Wait.

CHAIRMAN SOULES: (B).

MR. McMAINS: Is this the new rule?

CHAIRMAN SOULES: New rule.

MR. ORSINGER: 147(a) is on the second page of 146.

MR. McMAINS: Oh, okay.

CHAIRMAN SOULES: 147(b), and I will come back to it, Rusty, if you want to look at (a) again.

MR. McMAINS: No. The only thing I mention, I just point it out to Bill, I mean, the state doesn't ever have to pay costs.

PROFESSOR DORSANEO: And some others may not, too.

MR. McMAINS: Yeah. You can't --

PROFESSOR DORSANEO: So that would be in 146 to put in there in the clerks one and then the sheriffs one "except as otherwise provided by law."

MR. LOW: "Exempt by law."

MR. McMAINS: Yeah.

MR. LOW: Or "as exempt by statute."

MS. WOLBRUECK: The statute already states that. The exceptions are in the statute.

MR. McMAINS: Well, that's right, but the rules say "any party" seeking affirmative relief.

MR. LOW: "Except as exempt by statute or law."

CHAIRMAN SOULES: But even -- I

don't know what the appellate rules are. I better learn that, but even 47 and 49, file for supersedeas, they don't except government, do they? Isn't that just all done by statute?

MR. ORSINGER: I think they say something about when a party is permitted to appeal without giving security.

MR. McMAINS: Yeah.

MR. ORSINGER: It used to be when you were able to appeal by notice, but now everybody can appeal by notice. I will get the language.

MR. McMAINS: Well, it's actually in the -- the supersedeas rule basically says that if a party may appeal without a supersedeas then this has the effect of suspending the judgment.

PROFESSOR DORSANEO: It should go in 46, Bonnie.

MS. WOLBRUECK: Okay.

PROFESSOR DORSANEO: You know, I think it's in 46(b) for the sheriff, but there should be an "or" added in there. Okay. And, you know, when an affidavit of indigency is filed or in (b)(2) "or as provided by law

or these rules." All right. And at the end of the court clerks one I would add "or as provided by law." Maybe "or these rules" is unnecessary in (b)(2)

MR. McMAINS: Yeah.

PROFESSOR DORSANEO: Some more cleaning up. Take out "or these rules" because the only thing is affidavit of indigency and add "except as provided by law" there at the beginning.

MR. LOW: Under (a) you couldn't rule the state for costs either if they are suing you on something.

CHAIRMAN SOULES: Can't the state be required to pay costs if they lose a judgment?

PROFESSOR DORSANEO: Yeah.

MR. McMAINS: I don't know. That's not -- that portion is not in his book, but there is a specific provision of the Civil Practice and Remedies Code that says the state is exempt from paying costs or filing fees under such --

CHAIRMAN SOULES: Is that under costs taxed by the judge?

MR. ORSINGER: I don't believe so. I think if you have a judgment you can get your costs with the judgment. What they are talking about is paying filing fees or posting a bond for supersedeas.

PROFESSOR DORSANEO: Well, probably on the theory that they have the money. They are good for it.

MR. McMAINS: No. I think they are exempt, though, from paying filing fees.

MR. ORSINGER: But they might have costs assessed against them if they lose the case and a judgment is entered against them.

MR. McMAINS: I don't think -- not for filing fees.

MR. ORSINGER: Huh?

CHAIRMAN SOULES: I don't know whether I am wasting my time here. Maybe Bill has already got this fixed. What I am trying to do is write a 147(a) rule for costs, "A party seeking affirmative relief" and then add "and who may be required to pay costs," if that's ambiguous, does that mean pay costs as you go or pay costs at the end? The state

could be required to pay costs at the end, and they may be required to pay costs, so that doesn't work. Have you got this fixed?

PROFESSOR DORSANEO: No. But Bonnie is saying that it works when it's needed to be used. They are not going to use it against the state.

MS. WOLBRUECK: It has worked, and I hate to lose it because I believe that we will still need it. Although we will have Rule 146, I think the rule for costs is still going to be necessary.

CHAIRMAN SOULES: All right. Do we need to make these exceptions explicit in the rule? Anyone feel we need to make the exceptions explicit in the rule?

HONORABLE DAVID PEEPLES: No.

CHAIRMAN SOULES: No one does. We will not. 147(a) approved as written? Any objection? It's approved.

147(b). This tracks the TRAPs.

MS. WOLBRUECK: It tracks the TRAP rules.

CHAIRMAN SOULES: Any objection? It stands approved.

147(c), any objection to that? It stands approved.

HONORABLE DAVID PEEPLES: Luke, I notice -- Bill, you changed in Rule 147(a) the very last "may be dismissed." The existing rule says "shall be dismissed." I was under the impression we were just voting to keep the same rule. I don't think that makes that --

PROFESSOR DORSANEO: David, I don't know why it's changed in this draft. I have no recollection of intentionally changing it.

HONORABLE DAVID PEEPLES: Existing Rule 143.

PROFESSOR DORSANEO: Unless, the only thing I can imagine is that I wondered whether "shall" means "must" when I read it.

MR. MARKS: So just go in between and put "may."

CHAIRMAN SOULES: Okay. Are you saying we should make it a "must"?

HONORABLE DAVID PEEPLES: I would say leave it "shall," the way it is.

CHAIRMAN SOULES: "Shall." Okay.

PROFESSOR DORSANEO: Yeah. "Shall."

CHAIRMAN SOULES: Okay. "Shall" it is unless somebody objects. Okay. So that completes 147.

I guess it's our understanding that 147(a) and (b) do not apply to someone who's filed an affidavit of indigency; is that correct? Everybody agree with that? Nobody disagrees.

Okay. 148, affidavit of indigency.

PROFESSOR DORSANEO: You know, that we have already voted on.

MR. LOW: Yeah.

CHAIRMAN SOULES: I'm going to ask you to make an addition to that just so it picks up 147. "In lieu of paying or giving security for costs," and I'm saying "giving security" because 147 says "rule to give security." Any objection to that? Okay. That stands approved unless there is objection. No objection. It's approved.

148 is approved in its entirety. With

that change in (a) and the change in (d), "after service of citation" being deleted.

149(a). Why don't we combine these?

PROFESSOR DORSANEO: The only reason it's in (a) and (b) now is just because they are two different rules, and I just didn't put them in one thing.

CHAIRMAN SOULES: "Except where otherwise provided" really just picks up (b), doesn't it?

PROFESSOR DORSANEO: Uh-huh. You could just say, you know, "except for good cause to be stated on the record."

CHAIRMAN SOULES: "Except the court may for good cause"?

HONORABLE DAVID PEEPLES: Can I raise a question on that?

CHAIRMAN SOULES: Yes, sir.

HONORABLE DAVID PEEPLES: I had a case about a year ago where the defendant had offered about $65,000, and the plaintiff turned it down, and the jury gave them 3,000. It was little bitty. Obviously a victory for the defendant, but they showed me some law at judgment time saying that the plaintiff was

the successful party because they recovered some judgment.

MR. McMAINS: That's right.

HONORABLE DAVID PEEPLES: And to anybody on the street they would say that was a big defense victory, and I don't think that ought to be the law. I think you ought to have discretion to tax costs against the party who really lost the case.

MR. McMAINS: But there is, in fact, case law which says the judge must tax the cost in favor of the successful party.

HONORABLE DAVID PEEPLES: My question is whether we ought to make it clear that in cases like that the successful party really was the defendant who held them to $3,000 when they had offered 65,000.

CHAIRMAN SOULES: Richard has got that on the docket here today, don't you, Federal Rule 68 equivalent?

MR. ORSINGER: Oh, yeah, but I don't think that it's going to get done there, so when is good cause if it isn't --

HONORABLE DAVID PEEPLES: The case law said that that wasn't good cause, and

I reluctantly followed it.

PROFESSOR DORSANEO: I don't believe it.

MR. ORSINGER: What is good cause?

HONORABLE DAVID PEEPLES: You don't believe it?

PROFESSOR DORSANEO: I don't believe that that's not good cause. You have to follow case law, but the case law shouldn't say that.

HONORABLE DAVID PEEPLES: No, it shouldn't.

MR. HAMILTON: Well, that raises a concern as to whether we want to repeal 136 and 137 because 136 says if they recover below the jurisdictional amount. That's getting close to saying if they don't recover a substantial amount and the defendant really wins, well, maybe you ought to judge costs against the plaintiff.

MR. McMAINS: Just let me give you an example. Rule 302, which is on the counterclaim, says, "If the defendant establishes a demand against the plaintiff

upon a counterclaim exceeding that established against him by the plaintiff, the court shall render judgment for defendant for such excess" and then the next rule says, "On counterclaim for costs. When a counterclaim is pleaded, the party in whose favor final judgment is rendered shall also recover the costs unless it be made to appear on trial the counterclaim was acquired after the commencement of the suit."

I mean, we have actually provisions which basically -- and there are cases directly on that point which say if you recover more on your counterclaim than me, you have to get your costs.

HONORABLE DAVID PEEPLES: I'm not talking about the counterclaim situation, just one where the offer was a lot more than the ultimate recovery and it just -- everybody knows that's a victory for the defendant in that case and I just thought it was very unjust for the plaintiff not to recover his costs.

MR. LOW: But there is a lot of Federal law on that, civil rights. You know,

I think one case I was involved in where we recovered one dollar, but what they held was they were seeking other relief, you know, I mean, that they didn't get and so forth. So if it had just been the one dollar, they would have been the prevailing party, but there was other relief they sought, and where would you draw the line? What if it had been 20,000?

HONORABLE DAVID PEEPLES: It ought to be discretionary.

MR. LOW: Huh?

MR. ORSINGER: What you are proposing is a version of Federal Rule 68 that has no balancing mechanisms, and we have considered several times at this committee an offer of judgment rule that would require a written offer and give a certain period of response time and then if all of those conditions are met then costs would be transferred.

So in the context of the discussion of this good cause rule you are really invoking the very same policies that we are considering on that offer of judgment rule, although the current proposal we will talk about later

today has to do with transferring the cost of fees as well as costs, but the Federal rule alone is transferring costs. So we have debated that here before and we are going to debate it here again today, I think.

CHAIRMAN SOULES: The law looks mixed on this. Supreme Court, 1988, Martinez vs. Pierce, "Taxing costs to the successful party in the trial court is contrary to Rule 131."

MR. McMAINS: Yeah.

CHAIRMAN SOULES: And then here is a case, trial court -- this is Supreme Court, 1985, "Trial court did not err in assessing one half of guardian ad litem fees of the minor plaintiff against the successful defendant because the defendant had unnecessarily prolonged the trial." It looks like that's just contrary to what I just said.

MR. LOW: That was because of --

CHAIRMAN SOULES: Jones vs. Strahorn, 1959, "Trial court has discretion to tax the costs of a receiver to a successful party if circumstances warrant," another

Supreme Court case that seems contrary to what the annotation under 131 says. Looks like you have got authority both ways on it, Judge.

MR. LOW: Yeah, but those cases, Luke, were not like -- the receiver, somebody may have requested it. It's not just like a plain money thing, and the other case to me is where it's plain money and the money was less, and there is nothing else involved.

I just don't know of a case that's done that. I mean, I just can't find it. It may be, you know, because of other situations, you prolong the case, but not because you didn't get as much money as you thought you were going to get. You invoke the guardian, not because -- what we are talking about now is an apple and what you read is an orange.

CHAIRMAN SOULES: All right. Let me see if this is another good reason for combining these rules. Okay. We are looking at 149(a) and (b). All right. If we combine these rules to take out the words "where otherwise provided" at the end of (a) and then just pick up there with (b), "The successful party to a suit shall recover of his adversary

all costs incurred therein, except the court may for good cause to be stated in the record adjudge the costs otherwise," period.

Now you have got it all in one sentence. You don't have a 131 that ends with a period. You have got an exception to it in the rule.

MR. LOW: And then if there is case law that allows it in the case, well, you go to the cases.

CHAIRMAN SOULES: Well, you have now got an exception --

MR. LOW: I understand.

CHAIRMAN SOULES:

-- specifically stated in the old Rule 131.

MR. ORSINGER: Well, I can tell you one area where the "except as otherwise provided" would be in the family law arena because there is case law that a parent can recover costs even if they have lost custody of a child. It's not Supreme Court case law, but you do occasionally see it where somebody loses custody and then they recover costs or even recover fees, and that's a special application, and it's under the authority of the Family Code, but it still would be except

where otherwise provided.

CHAIRMAN SOULES: Well, it ought to be good cause, too.

MR. ORSINGER: Well, I think that some of the cases do look at Rule 133 and some of them just ignore it and talk only about the Family Code. Most of the cases that I have seen that are reversed are because the trial judge didn't state the good cause in the record. It's not because there was no good cause.

PROFESSOR DORSANEO: Uh-huh. That's right.

HONORABLE DAVID PEEPLES: I'm telling you there are cases that say if you recover trifling damages, you are the successful party, and it doesn't matter if you turned down an offer in the six digits, you are the successful party. You get your costs, and that's just a bad way to run a railroad.

CHAIRMAN SOULES: Okay. I have sat through hours of debate in this committee about a Rule 168 -- I mean, Federal Rule 68, which is an assessment of costs against a successful party. That's all it is, pretty

toothless, and couldn't even get that passed, and we have even talked about it somewhere over this four-year period without success. What I'm attempting to do is get something down here that could be used in the right circumstances by combining these two sentences and then let's start over again litigating the meaning of them.

HONORABLE DAVID PEEPLES: Sort of wipe those cases off and start over?

CHAIRMAN SOULES: Well --

HONORABLE DAVID PEEPLES: By amending the rule to change those cases and set the clock back to zero with some different language?

CHAIRMAN SOULES: We are really combining 131 and 130 -- I guess 131 and -- we are now writing -- what is it?

PROFESSOR DORSANEO: 131 and 141 together.

CHAIRMAN SOULES: 141 into 131.

MR. ORSINGER: Luke, is it your intention to write a Federal Rule 68 into this, only without any of the surrounding procedures? Because at least there has to be

an offer on the record and all this other stuff, and under the proposal we are talking about now if David's interpretation is applied --

CHAIRMAN SOULES: Okay. I think this is a way to do it. I don't know whether it's what we should do, but this is a way to do -- to give the trial judge basically the determination, the right to determine whether good cause exists to otherwise tax costs, subject to, I guess, an abuse of discretion or to a subjective or objective review of whether there was good cause. If we do this. If we do it. I don't advocate it. At least we are -- maybe we have something now we can vote on, either up or down and go forward. Okay?

MR. McMAINS: Are you on Rule 149?

CHAIRMAN SOULES: I am looking at 149 and the debate is approve that as it is, sections (a) and (b) as written, or whether to combine them so that the exception is clearly engrafted on paragraph (a).

MR. HAMILTON: I have a

question.

CHAIRMAN SOULES: Old 131. Yes, sir.

MR. HAMILTON: By doing this are we stating on the record that this language makes 136 and Rule 137 unnecessary?

CHAIRMAN SOULES: Well, 136 looks to me like you have got a liquidated demand, but over the course of whatever happens it gets paid down to the point where it's no longer within the jurisdiction of the court. It says "gets reduced by payment." If the demand -- "the plaintiff's demand is reduced by payment to an amount which would not have been within the jurisdiction of the court." I don't know why we need that. Are we doing away with that? I guess. 136, and which was the other one, Carl?

MR. HAMILTON: 137.

CHAIRMAN SOULES: Yes. Or 137.

MR. McMAINS: We already voted to take that one out.

CHAIRMAN SOULES: Okay. Those in favor of 149(a) and (b) separately show by hands, separated.

MR. McMAINS: Can we have some conversation first?

CHAIRMAN SOULES: Yes, sir. Absolutely.

MR. McMAINS: Well, specifically I am troubled by -- we haven't voted on the -- obviously, 150 is after. We haven't voted on the costs, what costs mean. I am extremely concerned about the idea that we can just willy-nilly talk about costs and especially if we don't have a rule that specifically excludes attorneys' fees as costs, because then there will be the ability for people that make this argument about shifting the costs of litigation. To just allow a judge to allocate costs under this rule we don't have an adequate definition. So how I would vote on this depends upon defining costs to not mean attorneys' fees, to be candid with you.

MR. ORSINGER: Boy, I agree with that.

MR. LOW: And, Rusty, one other thing. Even in Federal court when you tender, it's the costs even -- that's after you have

tendered and so forth. It's not just go back and include attorneys' fees if the case started ten years ago. Even the Federal court hadn't even gone that far, and they have gone further than I would.

CHAIRMAN SOULES: Except in states where the states permit that.

MR. LOW: Yeah, but it's not this one.

CHAIRMAN SOULES: Not this one.

MR. LOW: That's why I live here.

CHAIRMAN SOULES: You know, the Federal court will allow a state court remedy for cost-shifting, and that's been approved on appeal. Florida has got a big cost-shifting statute and the Federal courts use their state statute to shift costs.

MR. LOW: Are you talking about procedural?

CHAIRMAN SOULES: They call it substantive.

MR. McMAINS: No. They call it substantive, substantive right of the state.

CHAIRMAN SOULES: Okay. Well,

we have to move on, and I'm trying to get a way to do that in a fair way that addresses everybody's concerns.

MR. McMAINS: I understand. You understand I'm just saying that I don't think I can vote on this rule?

MR. LOW: May I make a motion that, like you said --

CHAIRMAN SOULES: We have debated again for hours in this committee what costs are and never gotten anywhere very successfully in the context of a Federal Rule 68 type issue. So what do you want to do, go to 150?

HONORABLE DAVID PEEPLES: The suggestion I made could open up more problems than it would solve, and it ought to wait until a later date probably.

MR. LOW: Luke, can I make a suggestion that what we do is combine, subject to if we do agree to list, you know, and somebody is not satisfied with the list or something they can, you know, revoke the issue of combining, but I think we ought to combine and probably just put -- not say what is

taxable costs, just rely on the statute and what the existing law is.

CHAIRMAN SOULES: All right. Let's go to 150. Maybe that's going to alleviate it. I recommend we have no such rule.

MR. LOW: I second that.

CHAIRMAN SOULES: I don't think -- and this is our last meeting. I don't think we have got time to get all the concepts together. Just leave this to the case law and whatever statutes apply and the codes. Anybody object to that? Okay. So 150 is rejected.

MR. LOW: And I move we combine (a) and (b) in 149.

CHAIRMAN SOULES: We have rejected 150. Go back to 149. If we leave them separate, we may carry forward the case law under 131. If we combine them, we may change that case law to give the judge discretion that that case law may impede. So is it fair to just vote on whether to combine them or leave them separate?

MR. LOW: Luke, but if you

combine them you can put a note. You know, I mean, that would show that we are not changing anything. We are just intending to combine them for clarity in one rule.

CHAIRMAN SOULES: Why combine them? I don't think that combining them is consistent with what you are saying.

MR. LOW: Well --

CHAIRMAN SOULES: Because we are making a direct exception in the same sentence. Grammatically it doesn't.

MR. LOW: I understand, but that's what -- Rule 141 does make an exception.

CHAIRMAN SOULES: Well, not according to one Supreme Court case, if they raise 141.

MR. LOW: But there are just ten rules difference, ten between them.

MR. MARKS: Why couldn't this be taken care of with an offer of judgment rule and just leave these like this?

CHAIRMAN SOULES: Because we probably can't get an offer of judgment rule done.

MR. ORSINGER: This is a way to get an offer of judgment rule, not calling it an offer of judgment rule, really. We are debating an offer of judgment rule under a different name.

MR. MARKS: Well, I kind of have a funny feeling about combining these.

CHAIRMAN SOULES: Okay. Combined or not combined?

MR. McMAINS: I'm not sure I understand how it's going to read. Are you talking about (a) and (b)?

CHAIRMAN SOULES: (A) and (b). It would just -- (a) would stop after the word "except" and then pick up "the court may for good cause."

MR. HAMILTON: Can we put the word "taxable" in front of the word "costs" in both of these?

CHAIRMAN SOULES: We haven't done that anyplace else.

HONORABLE DAVID PEEPLES: It's understood.

CHAIRMAN SOULES: Combined, not combined?

MR. LOW: If you did combine them, you would have to take out the after stuff.

CHAIRMAN SOULES: Yeah. We can do the drafting. And understand if we combine that it's going to give an argument of the shifting of costs, costs being a work of art that is what we think of as court costs.

MR. McMAINS: That we can't define.

MS. SWEENEY: But I agree with the suggestion that we say "court costs."

MR. McMAINS: It says "taxable costs" up here at the top of the rule.

MS. SWEENEY: In the title.

MR. McMAINS: Yeah.

PROFESSOR DORSANEO: 149, where did I get that title? Well, you know, a lot of times I'd make these titles up because the current titles are, you know, terrible.

MR. ORSINGER: Luke, under your language would you leave good cause as the standard for when you should tax costs differently?

CHAIRMAN SOULES: I'm just

talking about combining these or not combining them, so yes. The answer to that is "yes." We can't do much tinkering with this and get done what Bill needs to get done. So the answer to that is "yes."

PROFESSOR DORSANEO: I made up a title.

CHAIRMAN SOULES: Okay. Title is made up. Let's see the hands of those who would combine 149(a) and (b) to -- and this is not precise because it's going to have to be written. To drop the words, in effect, to drop the words "where otherwise provided in (a)."

MR. McMAINS: Why do you do that?

CHAIRMAN SOULES: Because the exception is going to be, "The court may for good cause to be stated on the record adjudge the costs," in effect the exception is (b). I don't care whether we do it or don't do it.

MR. McMAINS: No, no. All I'm saying is it doesn't change the meaning to leave it in, right?

MS. SWEENEY: I vote we leave

it alone.

MR. ORSINGER: Well, that's what Luke is trying to get a vote on, but let me point out that there are more reasons to except than (b). There are codes around here that have exceptions in them --

MR. McMAINS: Yes.

MR. ORSINGER: -- that we will be ignoring if we take "otherwise provided" out.

CHAIRMAN SOULES: All right. Leave "otherwise provided" in. "Except where otherwise provided the court may for good cause to be stated in the record adjudge costs otherwise," period. And I guess you could say "where otherwise provided by law or these rules."

MS. SWEENEY: Luke, why don't we just leave it alone? I mean, the --

CHAIRMAN SOULES: Well, we are going to take a vote on that. Anybody else want to talk about it?

MS. SWEENEY: I was trying to.

CHAIRMAN SOULES: Okay. Go ahead.

MS. SWEENEY: It just -- it seems sort of a wimpy thing to do to blend these, merge them together without actually addressing what we don't want to address and I don't think we should address, which is the offer of judgment and cost shifting.

I mean, this is sort of a little half step that's going to, as Gib Lewis used to say, open up a whole box full of Pandoras, but we are not addressing anything about how we're -- what we mean by it or anything else, and I think it's not a good idea. We should either leave it alone or develop the institution and will of this committee to go the whole road, and that will is not here.

CHAIRMAN SOULES: Okay. If we combine them, and I am not advocating that, they would read approximately as follows. "A successful party to a suit shall recover of his adversary all costs incurred therein except where otherwise provided by law or these rules. The court may for good cause to be stated in the record adjudge the costs otherwise." Period. Okay. Those in favor of combining them show by hands. One.

Those who do not favor combining them show by hands. Five.

All right. Now then, any other -- are there any changes to 149 as presented by Bill? There are none. It stands approved.

PROFESSOR DORSANEO: Contradictory, though, it may be.

CHAIRMAN SOULES: Contradictory, though, it may be. What?

PROFESSOR DORSANEO: It can't be because they are separated by ten rules. Or could it?

MR. LOW: Luke changed my mind when he said people would try to say we are changing the law, and I don't want to change anything, so...

MR. MARKS: Not unless you get away with it.

MR. LOW: You're right, and I don't disagree.

CHAIRMAN SOULES: People say, "What are we going to do with all these new appellate rules?" I say, "Well, you know, my memory only goes back about a week anyway, so new rules don't bother me." I've just got to

look at them. I look at what's the rule. You know, I can't remember.

MR. LOW: If you can convince them as easy as you did me, you would win.

CHAIRMAN SOULES: All right. 150 is gone. 151, collection of costs after judgment.

PROFESSOR DORSANEO: Where is that?

CHAIRMAN SOULES: Right here. And I guess we are going to change "court" in the second line to "peace"?

PROFESSOR DORSANEO: Yeah.

CHAIRMAN SOULES: Is this the way this works? The clerk or justice may issue execution?

PROFESSOR DORSANEO: See, that first sentence assumes that nobody paid the clerk.

MR. ORSINGER: No. No. That's not right. The clerk can collect -- where the costs have been assessed against the loser, the clerk issues a writ of execution against the loser for the costs.

PROFESSOR CARLSON: Right.

CHAIRMAN SOULES: And you-all voted that out of indigency. This committee voted, no, we are not going to let the clerk collect costs against any party that would have been paid by the indigent who's in court on affidavit, which used to be there, but it came out; and this one says the clerk can do that. If the losing party can't pay, they can collect the costs from anybody else. Of course, they are already deposited anyway.

Here's my question. Doesn't this really work -- I don't know. If the judgment awards costs and permits execution does the judgment winner pursue the execution? This rule says the clerk pursues the execution, not the judgment winner.

PROFESSOR DORSANEO: Presumably the clerk does so on request.

MR. ORSINGER: I mean, I can tell you as a practical matter they are not going to issue a writ unless you ask them to.

CHAIRMAN SOULES: But do you have to have two writs?

MR. ORSINGER: No.

CHAIRMAN SOULES: The clerk's

writ for costs and my writ on the judgment.

MR. ORSINGER: No. Now, the clerk can issue a writ for costs even if the winner doesn't request it, but if the winner requests an execution on the judgment, the execution automatically includes the amount stated in the judgment as well as the costs as well as the cost of execution. Is that not right, Bonnie?

MS. WOLBRUECK: That's correct.

PROFESSOR DORSANEO: And the bill of costs is prepared by the winning party now.

MR. HAMILTON: This rule assumes that the costs have not been paid to the clerk.

PROFESSOR DORSANEO: It does. I think as originally -- because I think that was the original game. It was a free system unless you got money. So it needs to at least say "on request" to make it clear.

MR. HAMILTON: But as long as the clerk is being paid, I don't think the clerk has the authority --

CHAIRMAN SOULES: Well, the

clerk may not.

MR. HAMILTON: -- to collect anything unless the judgment tells them to.

CHAIRMAN SOULES: But the clerk may not have been paid. I mean, not everybody is as careful as Bonnie and Doris. Sometimes there is probably some unpaid costs out there.

MR. ORSINGER: Well, I mean, the truth is, is that we probably permit somebody to file something without paying the costs.

CHAIRMAN SOULES: What about the unpaid court reporter? That's a taxable cost. The clerk can issue an execution for that court reporter's pay, right?

MR. ORSINGER: Yes. That's a court cost. The only time I am aware of that is -- well, in San Antonio they now make you pay $15 for every pretrial hearing and then they usually charge the voir dire and the closing argument if you request it. It's not part of your filing fee.

PROFESSOR DORSANEO: These rules do not act like the court reporter is on the scene. Probably because there was no

court reporter when they were written.

MR. JACKSON: There has always been a court reporter.

MR. ORSINGER: Well, I can tell you that in San Antonio that if you incur a bill by requesting a court reporter for a pretrial hearing, you will get a bill in the mail for $15, and if you request a voir dire, you are going to get billed for that, too.

CHAIRMAN SOULES: Any reason to change this? Why not just leave it alone? Because the clerk can go do whatever they need to collect costs when somebody asks.

MR. LOW: Even if you went to the judge, the clerk is the one that would issue the --

MR. ORSINGER: Always.

MR. LOW: Issue it, so, I mean, that's where it comes from, the clerk's office. Why change it?

MS. WOLBRUECK: The clerk used to be paid by the costs that they -- the fees that they collected, also. That was their salary.

MR. LOW: I'm sorry, Bonnie?

MS. WOLBRUECK: I said the clerk used to be paid by the fees or the court costs collected. That was the salary of the clerk.

MR. LOW: Oh, really?

MR. ORSINGER: Did the clerk have to pay for the employees out of that revenue?

MS. WOLBRUECK: Yes.

MR. ORSINGER: So it was just a little business enterprise, wasn't it?

MS. SWEENEY: The original contingent fee.

MR. ORSINGER: I bet it was hard to find somebody to run for district clerk in those days. You could lose money at the end of the year.

CHAIRMAN SOULES: Let me try to change a couple of things here. Okay. I think it says, "When costs have been adjudged against a party and are not paid." Shouldn't it say "by that party"?

MR. ORSINGER: Yes.

CHAIRMAN SOULES: And then "This rule should not apply to executors when

costs are adjudged against the estate."

PROFESSOR DORSANEO: To me that must have meant before that they didn't have to pay, and you didn't pay at the front end. You paid at the back end. So they just didn't have to pay, period. Now, that's covered somewhere else now and should be taken out of this rule possibly. It's covered in Probate Code Section 29, unless Probate Code Section 29 does not make that clear. It's no longer dealt with in Civil Practice and Remedies Code 6.002 because executors, et cetera, have been taken out of that rule, and my recollection is this is all kind of puzzling.

CHAIRMAN SOULES: Okay. I went too far. "Itemized bill of costs, against the party to be levied and collected as in other cases; and said officer, upon demand of" -- can we say "any person to whom such costs are due"? That would pick up the court reporter. Instead of "a party."

PROFESSOR DORSANEO: Yeah. Yeah. I think that would be better.

CHAIRMAN SOULES: It's not a

party. It's a person to whom such costs are due. "Shall issue execution for costs at once," and this rule, skip that sentence, "No execution shall issue in any case for costs until after judgment rendered therefor by the court."

That's okay because you are not issuing execution prejudgment. You just render a bill of costs and give it to the sheriff, and he goes out, grabs that car and sells it, brings the money to the clerk. You don't have an execution.

MR. ORSINGER: It seems like we are missing the "is" out of that sentence.

CHAIRMAN SOULES: Where does it go?

MR. ORSINGER: After "judgment."

CHAIRMAN SOULES: Is that an "is"?

MR. ORSINGER: Wouldn't there be a verb in there somewhere?

CHAIRMAN SOULES: Maybe. Probably should be. Now then, do we leave this last sentence in here? "If the costs

cannot be collected from the party against whom they have been judged, execution may issue against any party in such suit for the amount of costs incurred by such party, but no more."

MR. ORSINGER: Your maximum exposure as a winner is to pay the costs that you incur, which you should have been paying as you went along anyway, right?

CHAIRMAN SOULES: If you paid the court reporter. That's probably okay. It's the costs incurred by that party, but no more. Okay. And we just have "This rule shall not apply to executors, administrators, guardians."

MR. LOW: "In their individual capacity"?

CHAIRMAN SOULES: "In," strike "cases" and say "in their..."

MR. LOW: "Individual capacity." Not them, but --

CHAIRMAN SOULES: "Capacity where costs are adjudged against the estate," against them as representatives, "of an estate of a deceased person or a ward." That's what

that really means, isn't it?

MR. LOW: Right.

PROFESSOR DORSANEO: I doubt it.

CHAIRMAN SOULES: Huh? You doubt it?

PROFESSOR DORSANEO: I think it just really meant this rule shall not apply to executors, administrators, or guardians, and I just think all of the rest of it was just surplusage.

MR. ORSINGER: If I may, and I could be wrong, but I think all this means is that if you are going to collect something from the estate you have to go to the probate court and get it approved as a proper bill against the estate, rather than running out and executing on assets of the estate. This doesn't mean that you don't ever pay costs. This means that you don't pay costs without the probate court deciding what costs get paid out of what property.

MR. LOW: Right.

PROFESSOR DORSANEO: Well, let me ask this question to the clerks. If a

personal representative in an estate comes in and wants to file a lawsuit and have citation issued, do you charge them or not?

MS. LANGE: Yes.

PROFESSOR DORSANEO: Right. So --

MR. LOW: Well, Richard, let me ask you this. What --

PROFESSOR DORSANEO: So this to me said in the before time they were not charged. Huh?

MS. LANGE: That's right.

CHAIRMAN SOULES: Just where they were adjudged against the estate. You sue an estate in district court for something, a tort.

MR. LOW: But what if I am appointed guardian ad litem or attorney ad litem by this court, district court? Am I going to then get taxed with costs in my individual, as a person? There is no probate court involved there.

MR. ORSINGER: That wouldn't apply to a guardian ad litem.

MR. LOW: Well, there is some

distinction about whether an attorney ad litem --

MR. ORSINGER: No. No. It doesn't apply to a guardian unless it's a guardian of an estate.

MR. LOW: Well, there are guardians of the person, guardian of the estate, but I am just telling you there is language in the case law confusing, and we had a week argument whether a guy was really attorney ad litem or guardian ad litem appointed by the court.

MR. ORSINGER: That's not the distinction I'm making. I'm making an ad litem is somebody that's appointed to represent a minor or an incapacitated person in one lawsuit. I think this is talking about where a probate court has appointed someone --

MR. LOW: Where does it say that?

MR. ORSINGER: -- and has opened up a guardianship of the person.

CHAIRMAN SOULES: Let me get at it this way. I propose we delete this sentence because if the suit is by or against

a representative in that person's representative capacity then it is in that capacity only that they can be charged with costs anyway.

MR. LOW: That's right.

CHAIRMAN SOULES: So we don't need this sentence. Any objection to that?

MR. MARKS: I don't think we should delete it unless we know exactly why it was in there, and I don't think we do.

PROFESSOR DORSANEO: My belief and, you know, you could check this for a long time and maybe not be certain, is that this is a system where you pay on the back end, and these people were not charged because they are doing a favor.

MR. MARKS: Well, should it be in there or not be in there now?

PROFESSOR DORSANEO: I think the clerks told us now they are charged. Now, the collection is another matter.

CHAIRMAN SOULES: They are actually charging costs, so...

MR. MARKS: Well, but they are charging -- they are making the executor pay,

but the executor is probably paying out of the estate.

MS. LANGE: That's right.

MS. WOLBRUECK: That's right.

CHAIRMAN SOULES: Okay. That sentence, in or out? Those who say in show by hands. One. Those who say out show by hands. Three. Out.

CHAIRMAN SOULES: Clerks votes count double on all of these votes anyway.

MR. ORSINGER: The clerks win. The clerks have it.

MR. MARKS: Boy, that's a hot issue around this table.

CHAIRMAN SOULES: Okay. We are going to change "court" to "peace" in the second line. We are going to add "by that party" after "paid" in the first line. We are going to change "party" to "person" in the fourth line. We are going to delete the second sentence that begins with "this rule" and ends with "person or a ward."

Otherwise, any objection to 151? No objection. It's approved in that form.

Okay. Next?

PROFESSOR DORSANEO: That's it. That's the rule book.

CHAIRMAN SOULES: No?

MR. ORSINGER: You want to take up these?

CHAIRMAN SOULES: Okay. Richard has got something to take up. Do you have a handout on that?

MR. ORSINGER: Yeah. I have a handout that's entitled "Changes to Rules 140 through 144 to conform to the new TRAPs," and it's a 15-page packet or something like that.

MR. MARKS: Richard, before you get into that, could I do just one housecleaning thing?

CHAIRMAN SOULES: Yes, sir. John, you had something that you wanted to look at?

MR. MARKS: Yeah. That's on Rule 72.

CHAIRMAN SOULES: This is your Rule 72.

MR. MARKS: I believe, and I'm not sure about that.

CHAIRMAN SOULES: Or is it old

Rule 72? No. It's new Rule 72.

MR. MARKS: It's new Rule 72.

PROFESSOR DORSANEO: The order of trial, John?

MR. MARKS: No. Just a minute. It's the continuance rule. Gee, I thought I had it right here. Yeah. Here it is.

Our Rule 71 and the subtitle under (a) is "Good Cause Standard," but in the body it says "for sufficient cause." Rule 71.

CHAIRMAN SOULES: Title says "Good Cause," and the text says --

MR. MARKS: Says "sufficient."

CHAIRMAN SOULES: "Sufficient cause." Make them the same.

PROFESSOR DORSANEO: Okay.

CHAIRMAN SOULES: And I think we have -- are we going to go with "sufficient cause"?

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN SOULES: Is that what we voted on before? It's in the title that it says "Good Cause." Change that.

Okay. We have got Richard's handout. Richard tells us that this is nothing more

than language changes to conform to the TRAPs and that there are no substantive changes. Five minutes from now we are going to vote -- I am going to hear comments from people who feel that something is a substantive change, so let's read them.

MR. ORSINGER: You want me to discuss them?

CHAIRMAN SOULES: I don't think -- unless you feel uncomfortable about something I don't think -- I would like for us to run through them, get comments from everybody here, and you tell us where you are uncomfortable, if you are, at any place.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: Okay? So we can expedite this.

MR. ORSINGER: And we are going to read it quietly.

(Off-the-record.)

CHAIRMAN SOULES: Everybody had a fair opportunity to look at these rules? Anybody see anything you want to talk about in our previously approved rules to these redlined rules? Alex.

PROFESSOR ALBRIGHT: This is not a substantive change at all, but on 140(b) it says, "The trial court must help insure the court reporter's work" and then in (c) it talks about aiding the judge in setting priorities. Shouldn't it be the trial judge should help insure that the court reporter's work is timely accomplished, instead of the court insuring the work, since Judge Guittard isn't here to bring up the --

CHAIRMAN SOULES: Garner likes "the court."

MR. ORSINGER: Yeah. And "court" is in (a) and (b).

CHAIRMAN SOULES: More importantly, Hecht likes "court."

MR. ORSINGER: And "court" is in (a) and (b) anyway.

PROFESSOR ALBRIGHT: Then should (c) be "the court" instead of "judge"?

MR. ORSINGER: It should be.

CHAIRMAN SOULES: As the billboard said, "Hecht yes." Remember that?

MR. LOW: Yeah. I do.

MR. ORSINGER: So it ought to

say "trial court" like (a) and (b) do, and that's in the first and second line of (c).

HONORABLE DAVID PEEPLES: First and second?

MR. ORSINGER: First and second line.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: And then as Judge Peeples pointed out, there is a typo on the second line of (b). It ought to say "insure that the court reporter's work." The word "the" should be included.

CHAIRMAN SOULES: Okay. Anybody see anything else?

MR. JACKSON: Luke, I have a question.

CHAIRMAN SOULES: Yes. David Jackson.

MR. JACKSON: When I read this, we used to have to report in writing, and I see that it's stricken, the report in writing part. Then you come on down it says, "A copy of this report must be filed." So do we do it in writing or not?

MR. ORSINGER: Well, the

appellate rule doesn't say that, but I don't know how you would send a copy of an oral report.

MR. JACKSON: That's my question. You are scratching out that it has to be in writing.

CHAIRMAN SOULES: You "give the trial court a monthly report showing." That's what the appellate rule says?

MR. ORSINGER: That would be 13.4, "must give the judge a monthly written report," and I apologize.

CHAIRMAN SOULES: "Written report."

MR. ORSINGER: A monthly -- thank you, David.

HONORABLE DAVID PEEPLES: Shouldn't the title say something like "Work of Court Reporter" instead of just "Work"? That seems unlawyerly.

MS. SWEENEY: You want to add some words?

HONORABLE DAVID PEEPLES: Yeah.

CHAIRMAN SOULES: "Work of Court Reporters." Okay. "Work of Court

Reporter."

MR. ORSINGER: Well, in the appellate rules they call it "Duties of Court Reporters and Recorders." We could call it, "Duties of Court Reporters and Recorders," just like the appellate rules.

CHAIRMAN SOULES: Okay. Let's do. Do that. Carl Hamilton.

MR. HAMILTON: Rule 142, third line down where it talks about the certified photo, there should be a comma after "certified" according to the original rule. It's not a certified photo. It's a "certified," comma, "photo or other reproduced copy."

PROFESSOR DORSANEO: Yep.

CHAIRMAN SOULES: The comma is in the wrong place.

MR. HAMILTON: No.

MR. ORSINGER: That grammatically doesn't make any sense to me.

MR. HAMILTON: It's a comma after "certified" and no comma after "photo."

PROFESSOR DORSANEO: "Photo" is kind of an extra word in there we don't need.

MR. HAMILTON: Well, there is a comma after it in the original rule, but there probably shouldn't be.

HONORABLE DAVID PEEPLES: Richard, back to duties, the court reporters have a lot of duties other than just filing reports, and I just question whether that is the right word. I just didn't like "Work" out there by itself.

MR. ORSINGER: Well --

HONORABLE DAVID PEEPLES: "Reports" maybe.

PROFESSOR DORSANEO: "Some duties."

MR. ORSINGER: "Report of reporters." Do you want to call it --

MR. JACKSON: How about if you call it "Workload Status" or something like that? I mean, what you are trying to find out is how far behind the reporter is and where he is on his appeals.

HONORABLE DAVID PEEPLES: "Status reports."

MR. ORSINGER: Well, I mean, the sections of the appellate rules that this

correlates to, one is called "Priorities of Reporters," and one is called "Report of Reporters."

CHAIRMAN SOULES: Okay. In the TRAP rule it's called "The Court Reporter's Work," so why don't we just call it "Court Reporter's Work"?

MS. SWEENEY: Second.

MR. ORSINGER: Which one is that, Luke?

CHAIRMAN SOULES: Right here. "Court Reporter's Work," Rule 140. The title of it will be "Court Reporter's Work."

MR. JACKSON: Do we do it in writing? I mean, is that clear?

MR. ORSINGER: Yeah. We added that.

CHAIRMAN SOULES: Yes, sir. David, for your -- you probably couldn't hear the discussion up here at the head table. In (c) in the third line that begins "monthly," right?

MR. JACKSON: All right.

CHAIRMAN SOULES: "Basis" is stricken out. We are going to insert before

"report," "written report showing," and you can tell us whether or not that satisfies your concern. Does it?

MR. JACKSON: Sure. I wasn't clear whether we could just, you know, tell the judge and he could tell the clerk or how it would be done.

CHAIRMAN SOULES: It will be "a written report showing," which is what the TRAP rule says, too.

MR. ORSINGER: Luke, on Rule 142 it seems to me if we are going to put a comma after "certified" then we ought to say "photographic." So it says, "certified, photographic, or other reproduced copy of such exhibit."

CHAIRMAN SOULES: "Certified, photographic, or other reduced copy of such exhibit." Okay. Done.

MR. HAMILTON: You need a comma after "photographic."

MR. ORSINGER: Yeah. He said so.

CHAIRMAN SOULES: "Certified, photographic, or other reproduced copy of such

exhibit.

Okay. Richard, are you uncertain about any of these changes that you want to bring to our attention?

MR. ORSINGER: Well, the only thing is that on page five I have added a paragraph (c) which did not exist in exact counterpart in the trial rules which has to do with the trial court's end of sending originals up to the appellate court, and so I just borrowed that language and put it in here.

CHAIRMAN SOULES: That's right out of the TRAPs?

MR. ORSINGER: Yeah. So (b) now permits the court reporter to withdraw the exhibits and copy them and return them to the court clerk. (C) now permits the trial court to send the originals to the appellate court.

CHAIRMAN SOULES: I guess we passed the policy on that, on (b). If I were a clerk I would prefer to have it done on court order, but it's done on the court reporter's request, so there it is. It's in the TRAP rules that way. So be it, I guess.

Anything else? All right. 140 through 144 as modified on the record here today, is there any disagreement? No disagreement. That's approved.

Okay. What's next? Let's see.

MR. ORSINGER: We haven't done Item 3.

CHAIRMAN SOULES: Item 3, I don't want to get hung up on that right now.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: Carl, you are going to do Steve Susman's report?

MR. HAMILTON: Yes, sir.

CHAIRMAN SOULES: And you are on. Where do you want to start?

MR. HAMILTON: I would like to start with Rule 177b.

CHAIRMAN SOULES: Okay. Do we have that?

MR. HAMILTON: It's in the fourth supplement. Page 033 in the fourth supplement.

MS. SWEENEY: Page what?

MR. HAMILTON: 033.

MS. SWEENEY: Thank you.

MR. HAMILTON: The purpose of this change is just to eliminate the necessity of having to serve a party with a subpoena to require them to appear at trial or an evidentiary hearing so that you can accomplish the same thing that you do like on oral depositions, just a notice serves the same purpose as a subpoena.

This rule authorizes the notice to serve the same purpose as a subpoena, and it is conditioned that the party being subpoenaed has to be within the subpoena range of the court, so you can't just subpoena anybody. It works the same way as any subpoena except it's a notice and you don't have to pay the 90 bucks. You don't have to have the subpoena issued. That cuts down on some of the court cost expenses.

MR. MARKS: Well, can you subpoena them anyway?

MR. HAMILTON: You can subpoena them anyway. Yes. This doesn't preclude you from subpoenaing, and that's Rule 177a.

MR. MARKS: All I was interested in was that.

MR. HAMILTON: Rule 177a provides for that and then 177b would be the new rule that if you don't want to subpoena them you just serve them with a notice.

CHAIRMAN SOULES: Richard.

MR. ORSINGER: For deposition purposes you are not limited to a subpoena power from the courthouse, 150 miles, are you?

PROFESSOR DORSANEO: No.

MR. ORSINGER: So why shouldn't you be able to subpoena a party for more than 150 miles to come to trial? I mean, I don't think we have ever discussed that, this.

MR. HAMILTON: Well, the argument is that if you have a corporate representative in Chicago and he doesn't want to come down for the trial, they are going to have some other corporate representative at the trial, that you can force him to come by simply giving notice to the party.

MR. ORSINGER: Okay.

MR. HAMILTON: If it's not within the subpoena range, you can't compel him to come to the trial or to a hearing. You may be able to on a deposition, and that rule

was discussed by Court Rules Committee and was voted on in this form and sent to the Supreme Court.

CHAIRMAN SOULES: I tell you what bothers me about the way this is set up. For a deposition there has to be reasonable notice. You can't take it except on reasonable notice. I'm concerned that the day before a hearing I'm going to get served with a notice to have somebody at a hearing.

MR. HAMILTON: Well, you could get served with a subpoena right now. It's no different.

CHAIRMAN SOULES: I can get served with a subpoena, but my party hasn't been served.

MR. HAMILTON: Beg your pardon?

CHAIRMAN SOULES: My party hasn't been served.

MR. HAMILTON: That's right, and that's what this is, to avoid having to serve the party because sometimes you can't serve the party with the subpoena.

MS. SWEENEY: You-all are not communicating. Luke is talking about you have

got a hearing set. The other side decides they want to subpoena your party, and they do it the day before. Boom. Right?

CHAIRMAN SOULES: Okay. I guess I'm mixing apples and oranges, but I think I have got a problem that's twofold. Somebody is talking about, well, you can compel a party to come to a deposition in the jurisdiction of the court on reasonable notice, and that's regardless of subpoena range. Do we want to say you can compel a party to come to a hearing on reasonable notice without regard to the subpoena range or do we -- and then if you are going to have one of these middle of the night things, you've got to use a subpoena?

Or maybe that's not even worth talking about. I am concerned about showing up in my office at 8:00 o'clock before an 8:30 hearing and having some kind of notice to get my party there.

MS. SWEENEY: You want to distinguish between a hearing and a trial. That might help.

MR. ORSINGER: Well, it's the

same problem, though. If your client gets served with a subpoena, your client knows about it, but if you get it when you show up at the office an hour before trial, you might not even be able to reach your client.

CHAIRMAN SOULES: Yeah. That's right. And unless that subpoena is actually physically delivered to my client, my client doesn't have to be there.

MR. LOW: What if it's delivered to him just an hour or so -- I mean, just in time for him to get there? You would have to move to strike the subpoena, and so if he delivers it to you the same time, you would have to move to strike the notice, I guess.

So you would still have the same problem if they are just waiting to serve him because they know where he works and they are just going to serve him. He's in Houston, and he's got to come to Beaumont. Three hours before they are going to serve him.

MR. MEADOWS: Yeah. But I think with the notice concept you have got two problems, Buddy. You have got the problem of inconvenience and the short notice and the

motion to strike, and you have also got the problem of getting in contact with the person who is compelled to be there.

MR. MARKS: That's right.

MR. MEADOWS: He may be out of town or --

MR. LOW: Well, but if they notify me, I'm the one that's going to ask the court for relief. I would rather know it three hours before than my client know it and him not be able to get in touch with me maybe an hour before. So if they serve me, I'm going to know it, and I am just assuming hypothetically it was three hours before. So you could argue it's better to tell the lawyer if he's going to have to do something about it, but I am not for just being able to get somebody on a reasonable notice. I am not arguing for that. I am just saying there is some loophole in the subpoena law, and we just move for emergency telephone hearing. "Judge, he can't be here and we move to strike it." We don't always give the same notice the rules call for.

MR. HAMILTON: Well, you would

have the same rights under this rule that you would have if you got served by a subpoena.

MR. LOW: That's what I'm saying.

MR. ORSINGER: Yeah.

MR. LOW: That's what I'm saying.

MR. HAMILTON: If the notice was so short that you couldn't produce anyone or any documents or whatever was asked for, you file a motion --

MR. LOW: That's right.

MR. HAMILTON: -- for protection. It's not designed to change anything except to eliminate the cost and the inconvenience of serving a subpoena, issuance and service.

MR. LOW: The only difference is a lawyer -- it's pretty easy for a lawyer to give notice. It's a little more trouble for him to go through getting a subpoena and somebody to serve it and so forth. You can just sit there at your office and fax a notice. That's a little bit easier. Lawyers will be more invited to do that than they

would be to go and -- I mean, you know, that's one --

CHAIRMAN SOULES: Let me try to get at it this way. This I think would take care of my concern, the one, and that would be in the third line where it says, "Attorney requesting appearance, documents, or tangible things may serve notice a reasonable time before the trial or evidentiary hearing on the party's attorney."

MR. LOW: That's right.

MR. HAMILTON: Well, the problem with that, Luke, is you may have a hearing that starts or a trial that starts and a party appears and you think, "Well, I need some more documents that I didn't get in discovery," so you want to serve an instanter subpoena on the party.

CHAIRMAN SOULES: Then you have to use a subpoena.

MR. HAMILTON: Huh?

CHAIRMAN SOULES: Then you have to use a subpoena.

MR. HAMILTON: That's what we are trying to get away from, is avoiding the

cost of that. Just write out a notice and hand it to the lawyer.

CHAIRMAN SOULES: I think if you are going to load the lawyer with that responsibility the lawyer ought to be given a reasonable time to comply.

MR. HAMILTON: Well, why don't we add a sentence that would say that the lawyer served has the same rights to complain about the notice that they would if the party was served with a subpoena?

HONORABLE DAVID PEEPLES: Can I ask, from the lawyers' point of view how common is it for you to really need the adverse party at a hearing and he wouldn't otherwise be there?

MS. SWEENEY: As opposed to a trial?

HONORABLE DAVID PEEPLES: Yeah. It's kind of hard for me to imagine a trial that a party doesn't show up for.

MR. LOW: You've got to get -- take the Wal-Mart situation. Sometimes I agree with you.

MR. HAMILTON: I understand

what the problem is, is that in simple cases where you don't do discovery, you don't take depositions, you go to trial, and then you figure out you need some documents or income tax returns or something at trial, so you want to subpoena the party at that time.

HONORABLE DAVID PEEPLES: Of course, if you are in trial already, in trial, can't you just talk about it with the judge and get a ruling from the judge as opposed to doing it this way? I don't know.

CHAIRMAN SOULES: To me the rule would be more useful if we took out the subpoena range and put in a reasonable time before.

MR. ORSINGER: I agree.

CHAIRMAN SOULES: And then --

MR. MARKS: Well, I don't like the idea of taking out the subpoena range.

MS. SWEENEY: Because you don't want your corporate rep from Chicago to get hauled in.

MR. MARKS: Dad-gum right.

CHAIRMAN SOULES: Well, that's built in to reasonable time.

MR. MARKS: That's changing the rule. I mean, you can't subpoena somebody from Chicago now.

HONORABLE DAVID PEEPLES: To tell you from the judge's point of view, I don't want parties at hearings very often. I would rather talk to lawyers and let them do the talking for their clients. Now, documents, of course, sometimes you need those.

MR. ORSINGER: John, you could address your problem by changing that to "a party who is within the state," couldn't you?

CHAIRMAN SOULES: Where is --

MR. ORSINGER: He's worried about people who are --

MR. MARKS: I think his suggestion was just to make the same rules apply to a notice as you would a subpoena, and nobody has really ever talked about changing the subpoena range.

MR. LOW: Right.

MR. MARKS: And so I think it's a little bit beyond what we ought to be talking about today.

MR. MEADOWS: But what is the problem we are trying to fix here, just the cost and inconvenience of issuing subpoenas?

CHAIRMAN SOULES: Yes.

MR. ORSINGER: And difficulty of getting them served, for that matter.

MR. MEADOWS: So we are going to put the burden on the lawyer who is representing the party who is --

CHAIRMAN SOULES: We voted on that, which is really -- I guess we can rescind it, but that was at our last meeting, a pretty strong vote that you would be able to get a party to a hearing by notice rather than by a subpoena.

MR. MEADOWS: Well, I certainly don't think there ought to be any lesser protection with a notice than there is with a subpoena.

MR. HAMILTON: Shouldn't be.

CHAIRMAN SOULES: Okay. Well, let's just vote this. I mean, there is some significant changes from what we --

PROFESSOR ALBRIGHT: What rule are you-all talking about?

CHAIRMAN SOULES: We are talking about Rule 177b on page 033 of the fourth supplement, and so just as written we will take a vote. Go ahead.

MR. McMAINS: Am I correct that this authorizes then to prosecute for contempt a party who doesn't show up after his attorney is notified?

CHAIRMAN SOULES: I suppose.

MR. ORSINGER: You can't get a conviction on that, or at least you can writ them out if they do.

CHAIRMAN SOULES: Yeah. You can probably writ them out, but, I mean, I don't see much activity in terms of debate on this, so I will just take a vote.

MR. ORSINGER: I would like to --

CHAIRMAN SOULES: Okay, Richard.

MR. ORSINGER: Several things. No. 1, I like this. In family law frequently we are scrambling to get documents for our temporary hearing which occurs before we have time to do any written discovery, and this

will probably save a lot of trouble in a lot of cases.

However, what bothers me about this is the title of this rule makes it appear to me that this is the exclusive way to force a party to bring records. It doesn't say that this is in addition to ordinary subpoena power. This says that if you want to compel the appearance of a party and the production of their documents that you may issue this and then at the end it says you can only require things that have not been produced by that party, and I would like it a lot better if there was some provision saying "in addition to an ordinary subpoena" or "in addition to Rule 176" or something to indicate that this is an available alternative but not a replacement for subpoenas for parties. Also, I think it ought to be 176(a) rather than 177. 176(b) rather than 177b, but we can handle that when we renumber it.

PROFESSOR DORSANEO: The subpoena rule that we talked about earlier bears no resemblance to these rules. So that would just be the concept.

MR. ORSINGER: Well, I feel strongly that the wording of the title suggests that this is the way that you compel appearance, and I would like some assurance that the ordinary subpoena procedure is still available for a party.

MR. MARKS: Well, we have got "may" in here, "may serve notice on the parties."

MR. MEADOWS: And as long as we are studying strong feelings, unless it runs against the vote taken last time I really do think this should provide for reasonable notice.

You know, if a hearing has been scheduled three days out then perhaps the day before is reasonable notice, but if you have had a hearing set for 20 days, it's not reasonable for the lawyer to get notice the day before the hearing to have to pull together documents or produce someone for the hearing, particularly if you are representing a large company where things are going on, people are busy.

MR. ORSINGER: Well, since you

are entitled to three days notice of a hearing anyway, at the very least we could require this to be delivered to the lawyer at least three days before the hearing. There is no harm done there because you can be giving them notice three days before the hearing, why don't you give them this subpoena three days before the hearing?

MR. MARKS: Well, if you want a party to appear, why wouldn't you say in here "give notice seven days before"?

MR. McMAINS: Yeah, but it may not be your hearing.

CHAIRMAN SOULES: That's right.

MR. ORSINGER: Oh, so you may be getting it out after you get notice of their hearing. I see what you're saying.

CHAIRMAN SOULES: Yeah. I got notice at 4:50 after I left the office maybe on a hearing three days hence.

MR. ORSINGER: Okay. So you don't find out until -- on Tuesday morning at 9:00 a.m. and you really find out about it Monday at 8:30.

CHAIRMAN SOULES: Yeah.

MR. ORSINGER: Okay. I see what you mean.

CHAIRMAN SOULES: Well, then why don't we just vote on this as-is? You can vote it up or down.

MR. ORSINGER: Gosh, I hate to do that. I like the rule, but I just don't like the fact that this appears to encroach on subpoena authority.

MR. HAMILTON: Where does it do that, Richard? You still have 176 and 177a.

MR. ORSINGER: In my view, this suggests it replaces 176 because 176 just talks about subpoenaing generally, and this one is a special rule that applies to subpoenaing parties.

MR. MARKS: It says you may serve notice on the party's attorney. It doesn't say you shall.

CHAIRMAN SOULES: Because I so hate this rule I hesitate to do this, but I can fix your problem, Richard.

MR. LOW: Don't do it.

CHAIRMAN SOULES: I think this is going to be awful if we don't put

reasonable notice in here, but "may" -- or in the third line, "Attorney requesting appearance, documents, or tangible things may in lieu of a subpoena serve notice." So that will take care of that.

MR. ORSINGER: It sure does.

CHAIRMAN SOULES: It doesn't take care of reasonable notice, but I only vote to break a tie.

MR. ORSINGER: Where does it say that?

CHAIRMAN SOULES: I think that's -- well, we don't exactly follow Robert's Rules.

MR. ORSINGER: No, we sure don't.

CHAIRMAN SOULES: But we get our business done. That's the most important thing.

Okay. Those in favor? Did anybody object to that, adding "in lieu of a subpoena"? Okay. No objection to that, so that amendment is done, and other than that I guess we are going to vote on the rule as-is.

Those in favor show by hands. Those

opposed? Eight against, and how many for? One.

HONORABLE SCOTT BRISTER: Just me.

CHAIRMAN SOULES: One for it. Eight against it.

MR. ORSINGER: Well, I would like to propose we put reasonable notice in there and then run the rule by, because I think it's a good rule if we get notice.

PROFESSOR DORSANEO: Just in case I ever have to be a trial lawyer again I'm voting against it.

MR. ORSINGER: This is going to save a lot of money. You have got to get private process served on the subpoena. This is going to save lots of money across the state.

PROFESSOR DORSANEO: But I have to get a whole better class of clients than the ones that I had.

MR. MARKS: How much money?

MR. ORSINGER: You are going to save the $8 on the subpoena, the $10 on the tender, and about $45 on private process

servers.

MR. MARKS: How often does this come up?

MR. ORSINGER: I don't know. I can't say that it comes up all the time, but it's money we're wasting. We can do it this way just as well.

CHAIRMAN SOULES: We have got Judge Brister and Judge Peeples here. What happens in these circumstances? I get served with a notice of a hearing, a notice of an evidentiary. This doesn't really apply that much to trial. You've got to have 45 days notice of a trial anyway. Of course, if it's a reset it might not be that way, but it's not as critical at trial.

It's more probably a problem at evidentiary hearings, but I get served with three days notice of an evidentiary hearing. I immediately send a notice to the lawyer making the setting to have someone, have a party there with papers, and we go over, and the party that gets the setting says, "I didn't get reasonable notice and so I didn't bring my party and I didn't bring my papers,"

and I guess then the process is that the lawyer who makes the request does some sort of a showing that the party or the papers are material to the hearing, and if they are and the judge agrees that I didn't get reasonable notice then the party making the setting loses that setting and gets another setting. Is that the way a fair judge would handle it?

HONORABLE DAVID PEEPLES: That sounds right to me.

CHAIRMAN SOULES: I'm really trying to see this through. What do you think, Judge Brister?

HONORABLE SCOTT BRISTER: Say again. I lost you in there.

CHAIRMAN SOULES: Well, I get three days notice of an evidentiary hearing. I pop back a notice to have -- I get notice from Rusty of a three-day hearing. I pop back to Rusty a notice that he's to have his party there with some papers. He shows up, says, "That's not reasonable notice." Maybe I do it the day before the hearing so that it's not reasonable notice because I want a continuance or something. Whatever. And then we show up

in your court and he says, "I didn't get reasonable notice to have my party here and to bring the papers, so I didn't. They are not here," and then would I make some showing that what I asked for is material to the merits of the hearing and --

HONORABLE SCOTT BRISTER: I guess. I mean, it's evidentiary hearings. Making the other side's party show up and bring certain documents, I mean, some people do that for trial, but other than that we just don't have it. I don't have it.

MR. MEADOWS: Luke, take your scenario, and you don't have a good fair judge, and you get notice, and you show up, and you say, "Well, I didn't get reasonable notice," and the judge looks at 177b and says, "Well, it doesn't say anything about reasonable notice. I'm not going to get in that fight." Then the other side wants and gets sanctions.

CHAIRMAN SOULES: Well, I'm assuming that we put reasonable notice in. We have already voted it down without it there.

MR. MEADOWS: Oh. All right.

I just wanted to state a point.

HONORABLE DAVID PEEPLES: As I respect Carl and that committee, the way I look at this, if it's reasonable lawyers issuing the notice and so forth I like to make it easier for them, but this is a tool in the hands of every lawyer in Texas to just inflict pain on the other lawyer. I just don't think we ought to give this additional weapon to some of the -- a lot of the lawyers we have got out there.

PROFESSOR DORSANEO: About half of them.

MR. LOW: Amen.

HONORABLE DAVID PEEPLES: I just think we would get more -- this would be used more than the subpoena of the person is used now because it's so much easier to just fax it.

MR. ORSINGER: Sure.

HONORABLE SCOTT BRISTER: That would be true, but I mean, there is games on both sides. I mean, there are plenty of defendants that don't have their doctor, for instance, in a med-mal case show up at the end

of opening statement because they don't want him put on first. So he goes down to the coffee room, and he doesn't accept at his office subpoenas. I mean, sure, that's all a game, but that ought not be that game. You know, so you have to subpoena the doctor to show up if you want to call him first at trial, and that's a pain, and why in the world -- why would we be fooling with this? For crying outloud, he's the party and he's going to be there unless his attorney orders him not to be.

HONORABLE DAVID PEEPLES: In that instance, though, if you think that's going to happen, can't you just tell the judge, "I think this is going to happen"?

HONORABLE SCOTT BRISTER: You can never guess which defense attorneys are going to do that.

HONORABLE DAVID PEEPLES: Well, then how do you know when to issue the subpoena or the notice?

MS. SWEENEY: You always do it.

HONORABLE SCOTT BRISTER: You do it for all trials. If you want to call --

if you're a plaintiff's attorney on med-mal you better subpoena the defendant in every trial.

MS. SWEENEY: Yeah. If you want the doc and you want him on the stand, you subpoena him as a matter of course.

HONORABLE SCOTT BRISTER: And this, you know --

MS. SWEENEY: You have to.

HONORABLE SCOTT BRISTER: There is no reason to keep process servers in business for all of this and certainly not constables. They have got better things to do. For the party. Third party witnesses and all of that other stuff is different. This is the party that's going to be there or due process, for crying outloud.

HONORABLE DAVID PEEPLES: I am not worried about trials. I think if this passes, we will have a lot more subpoenaed people and documents at hearings than we have now, and we really don't need it.

MR. MARKS: I think it might be abused at trials, too.

MR. LOW: The cost of subpoena

is pretty small compared to the cost of most of these trials these days. I mean, you know, I realize it's a cost, too, but it's not that great.

CHAIRMAN SOULES: Actually, I think when we talked last time we were talking about trial. If we take out -- if we limit this to trial and we put in a reasonable time before the trial for the notice, would votes change?

MR. ORSINGER: Sure. Mine would.

MR. McMAINS: Well, the only problem is that, again, you are to the point of trial on the merits.

CHAIRMAN SOULES: Yes.

MR. McMAINS: Well, but what I'm saying is the word "trial" has been used and is frequently interpreted. Motions for summary judgment, obviously that's not an evidentiary hearing. You don't need that, but, you know, you have the trial of a venue issue arguably. You have a temporary injunction hearing, which is, in fact, a trial on a separate discrete notion.

So, I mean, I guess I have a problem with the idea that that's a real great limitation, of a trial or evidentiary hearing, because you may well have what we don't consider to be full-blown trials on the merits that would be considered trials if you just had the word "trial" in there, because I think temporary injunction would clearly qualify.

CHAIRMAN SOULES: Well, under Bill's Rule 70, and that's former Rule 245, 45 days of the first setting for trial.

MR. LOW: Regardless of where you live, 250 miles, too.

CHAIRMAN SOULES: Well, I mean, this is setting the trial. That's the trial we are talking about here, not summary judgment trial. That's 21 days.

MR. MARKS: Well, what would keep a lawyer from noticing the president, vice-president, secretary, treasurer, just to be mean?

CHAIRMAN SOULES: It says "a party."

MR. MARKS: Well, isn't that a party?

MR. McMAINS: No.

MR. MARKS: What is a party of a corporation? How far down does it go?

CHAIRMAN SOULES: Corporate rep.

MR. MARKS: A representative is one person?

MR. McMAINS: Of course, if you haven't designated one, how does it apply to corporations?

CHAIRMAN SOULES: You do then.

MR. ORSINGER: I'm not sure, Luke, that you have to designate a representative for a trial subpoena, just for a deposition subpoena. I don't think you can subpoena General Motors to come to trial, can you? I haven't seen the General in a long time.

CHAIRMAN SOULES: That's another real distinction between the deposition practice and the trial practice.

MR. McMAINS: Yeah.

CHAIRMAN SOULES: When you have a corporate dep notice you designate what the topics are going to be, and they designate the

witness.

MR. LOW: And there are a number of cases that hold that the president and the officers are parties for purposes of --

MR. MARKS: That's right.

MR. LOW: They can't talk to the adverse party. They are called parties in other senses.

HONORABLE SCOTT BRISTER: Well, but that's not the problem with this notice versus subpoena. You could subpoena all of those people, too; but I have cases, you know, the pro se's subpoena the county commissioners and everybody else and want them to show up at some ridiculous hearing, and the first thing you do is move to quash. Granted.

MR. MARKS: But they have got to go to the trouble of getting out the subpoena. All you have to do here is just hand those notices to the lawyer.

HONORABLE SCOTT BRISTER: Pro se's, they are free.

CHAIRMAN SOULES: If we made the favorite change that you have in your mind

to this rule, would you vote for it?

MR. ORSINGER: Yes, I would. Yeah. I would.

CHAIRMAN SOULES: Let me just put that up so that we can find out whether this rule is going to fail anyway, and we can stop talking about it or if it's got enough merit that we need to continue to talk about it, and certainly we need to do the right thing between those alternatives.

Okay. So I'm just going to put it to you that way. If what's in your mind is your favorite change that you would make to this rule, if we made it, would you vote for the rule? Those who would. Two. Those who would not. Eight. Looks like a dead issue.

MR. ORSINGER: We are beating a dead horse.

CHAIRMAN SOULES: That's rejected eight to three. Next is what, Carl?

MR. HAMILTON: Rule 173.

CHAIRMAN SOULES: What page is that on? Page 24.

MR. HAMILTON: This rule is a rule that the committee was working on and

then Judge Mike Wood from Houston I think talked to Judge Hecht one day about the same problem, and he got involved in it, and it ended up with this suggested change.

Judge Wood thinks that there is a lot of confusion about the role of guardian ad litems that have been appointed in cases and that they are often appointed at the beginning of a lawsuit, which is improper. Guardian ad litems then participate in depositions and other hearings and charge big fees, that they should only be appointed in the case of an (a)(2) situation, which is where you have a conflict between the minor and the representative.

They should only be appointed after a settlement has been reached in the case. They should then have a very limited role of advising the court on the conflict of whether or not the apportionment of the settlement proceeds is appropriate, and there should be very little time spent by the guardian ad litem.

So there shouldn't be much of a fee, but there are instances where guardian ad litems

are appointed when they shouldn't be appointed. Hence, the rule ought to provide that upon request the court order should specify why the guardian was appointed, the basis for it, and let's see, where does it say in the order the -- "if requested, recite the court's findings regarding the necessity of the guardian ad litem and the qualifications of the person appointed."

So the rule has been fashioned to provide two instances where a guardian should be appointed and then the procedure is on the court's own initiative, by agreement of the parties, or on motion. The duties are to participate in settlement negotiations, if requested, and advise the court on the appropriateness of the apportionment; and upon conclusion the order should discharge the guardian, state the amount of fees, basis for the award, and who's to pay the guardian.

The other thing was that there are some court decisions that have stated that the guardian is a fiduciary and has some kind of obligation with respect to the settlement proceedings. That shouldn't be. The minor

child involved has a lawyer, and that lawyer ought to be responsible for the settlement proceeds and the disbursement of those, not the guardian ad litem. The guardian ad litem does not become the minor's lawyer. He's nobody's lawyer in the case. He's a representative appointed by the court to look into the conflict and the apportion of the settlement, and that's all.

So what we are trying to do here is eliminate some confusion in some courts of appeals cases as to the roles of the guardian ad litem and state what they ought to be, at least what Judge Wood feels they ought to be, and some of the members of the committee have done some research on this, into some of these cases.

CHAIRMAN SOULES: Okay. Discussion? Rusty.

MR. McMAINS: Well, the idea that a guardian ad litem is only necessary for settlement is ridiculous.

MR. LOW: Right.

MR. McMAINS: Because whenever there is a conflict or a potential conflict

between the next friend, in a just classic minor adult, that can be because there are limited policy limits. It can be because there are differences with regards to the amount of damages that they would each seek or the type of damages they seek. All of those things raise potential issues of conflicts.

The purpose of the guardian ad litem is actually as an officer of the court and is designed to protect, really, the defendant with regards to the integrity of the proceedings. Otherwise, they have due process concerns. It does not arise only in the context of settlement, and settlement can arise sometimes all of the sudden while a case is being hotly contested and litigated and then you have to stop and break off and go find somebody who by definition is going to be ill-informed and not particularly functional.

I think this is a vastly narrow view of what the role of a guardian ad litem is supposed to do and is supposed to be, and I do think they have a fiduciary role. Now, that's not to say that they are the ones that would take control over the settlement, but they do

have fiduciary roles as guardian ad litem. Their obligation is solely with the regards to the minors that they are appointed for.

CHAIRMAN SOULES: Well, there is a recent case, I can't see it here, where they held that the guardian ad litem had judicial immunity.

MS. SWEENEY: Yeah.

MR. McMAINS: Yes. There are cases like that.

MR. ORSINGER: The Texas Supreme Court, though, has ruled that protections are limited in certain ways, about a year ago. They had permitted one to be sued for negligence for postjudgment malpractice.

HONORABLE SCOTT BRISTER: It's a fiduciary duty, but not legal malpractice.

MR. McMAINS: Right. Right. Because they didn't represent them. Because they were officers of the court as far as their legal work is concerned, but that doesn't authorize them to steal. Even judges are not authorized to steal.

PROFESSOR DORSANEO: Well, Mr. Chairman?

CHAIRMAN SOULES: Yes. Bill.

PROFESSOR DORSANEO: Carl, does this "and" in (a)(2) between the two little i's, does that mean "and"?

MR. McMAINS: Yes.

PROFESSOR DORSANEO: Or does your committee mean for that to mean "or," because, frankly, that "and" looks to me --

MR. HAMILTON: It means "and" because the theory is that there is no conflict until the settlement is reached.

PROFESSOR DORSANEO: Well, that is silly.

HONORABLE DAVID PEEPLES: The question I have, and this happens a lot in San Antonio, if there really is a conflict of interest between the mother and the child, let's say, why shouldn't they go out and get a lawyer in the marketplace instead of having the court appoint one for them? You know, a court-appointed lawyer there basically advocating for a party during a trial? That's pretty extraordinary, isn't it?

HONORABLE SCOTT BRISTER: This would change that.

HONORABLE DAVID PEEPLES: I know it would change that.

CHAIRMAN SOULES: I think this scheme was put in place, Judge Peeples, for that reason, that the parents bring the suit in the name of the parents and as next friend of the child, and they hire a lawyer to do that and then there is not anybody to hire another lawyer. The lawyer has been hired. The parents are the next friend, and they say, "Okay, but if there appears to be a conflict between the next friend and -- the parents in their capacity as next friend and the parents in their individual capacities then this mechanism is in the rules to resolve that problem," and it's just the way that Texas has approached the resolution of that particular problem.

MR. MARKS: But there is another problem, Luke, and that problem is who pays that guardian's fee, and if the guardian is going to be in there representing that child then that guardian should get his money out of the contingent fee recovery and not recover additional money from a party, and

that's the whole problem we have got.

CHAIRMAN SOULES: I know that's some of what's driving this. No question about it. Judge Brister.

HONORABLE SCOTT BRISTER: I mean, this seems to me a big deal. I mean, they had a task force that did a hundred-page report on this. I am very nervous about, you know, just voting this rule with 30 minutes of discussion because I haven't looked back through that thing, but they had a whole bunch of recommendations, and this is an important deal.

CHAIRMAN SOULES: Let me see if we are in more or less agreement on this proposition. This rule as drafted is much too narrow in terms of the authority of a guardian ad litem.

HONORABLE SCOTT BRISTER: I don't know. I think there is a strong argument to limit it just to this, but I'd have to think about that and look back through that before I am ready to vote on that today.

MR. LOW: Well, you can only get a guardian ad litem by applying with the

court. The court has the protection of not appointing one. The court can say, okay, and they can set forth their duties. Their duty is they are not to do certain things; but during the trial the guardian ad litem may see some reason they think it ought to be settled; and the mother may think, "Well, no, I just want to prove they killed my husband intentionally," and that's not -- so there can be conflicts that arise.

The guardian ad litem, the judge can maybe not pay him to take depositions and all that, but if you wait until settlement and you have a case you've got a hundred depositions, you might have to wait a month before the guardian ad litem can say, "Well, it's a reasonable settlement." He should keep abreast. Now, I'm not arguing taxing costs of it. I mean, I understand, and I know a lot of these guardian ad litem fees have gotten out of hand, but the court can kind of control that, and the trial courts can control when they appoint. They say, "Well, it's premature. We don't see the conflict now" and then they can set forth the duties. I just

don't see you need a specific rule like this.

HONORABLE DAVID PEEPLES: Can I ask those of you that agree with Rusty's criticisms of this proposed rule, would you say it's okay for there to be, you know, one, two, three, four plaintiffs in conflicts; the judge to appoint a guardian ad litem to represent the children; and for that guardian ad litem to take an active part in a jury trial and then have the defendant pay that guardian ad litem's fees? That's happening right now.

CHAIRMAN SOULES: No.

MR. LOW: I'm not -- when you say an active part --

HONORABLE DAVID PEEPLES: I'm talking about cross-examining witnesses and --

MR. LOW: No. I don't go that far. I don't want that kind of guardian ad litem.

HONORABLE DAVID PEEPLES: This is starting to happen.

CHAIRMAN SOULES: Carl Hamilton.

MR. HAMILTON: I think Judge

Wood's theory is that if you have that kind of a conflict early on in the case, that's a situation where there needs to be a court-appointed lawyer to represent that minor, either through motion or through Legal Aid or through something, but not a guardian ad litem. That would be a court-appointed lawyer for that.

HONORABLE SCOTT BRISTER: Well, the guardian can hire a lawyer.

MR. HAMILTON: Or the guardian can hire a lawyer.

HONORABLE DAVID PEEPLES: Well, you are talking about ousting the plaintiff lawyer who has gotten the case, kicking him or her off that case for the minor.

MS. SWEENEY: That's happened.

HONORABLE SCOTT BRISTER: Guardian can order them -- can ask the court to fire them as far as my client or the guardian can cram down a settlement that the plaintiff's attorney doesn't want because it's in the best interest of the minor, but the guardian is a guardian, not an attorney; and a lot of guardians don't know that and then when

they come into me with a 20,000-dollar bill, you know, you are in a spot because, you know, I mean, I have got to tell them, "Sorry you did all of that work for free. Thanks for accepting an appointment out of my court," because and the reason is it's what guardians do is different in every court, and I have a very restricted view. They are a representative of the child, not an attorney.

HONORABLE DAVID PEEPLES: Luke, I just want to second what Judge Brister said a minute ago. This is an enormous issue, and we cannot do this right with the time we have got.

MS. SWEENEY: I agree.

HONORABLE DAVID PEEPLES: The discussion we have had already has been an eye-opener for me on a lot of matters, but there is no way we can get this right, this big incorporation, in the time we have got. I don't think we can.

CHAIRMAN SOULES: Okay. Let me see if we can fix one problem without -- look at the old rule, which is up at the top in the next to the last line, "The court shall

appoint guardian ad litem for such a person and shall allow him a reasonable fee for services to be taxed as part of the costs."

Change that to say, "The court shall appoint a guardian ad litem for such a person and prescribe the duties of the guardian ad litem and shall allow him a reasonable fee for his prescribed services to be taxed as part of the costs." So the judge tells the guardian ad litem up front, "These are your duties," and the guardian ad litem can always come back and say "Modify them. These plaintiffs lawyers are out of line between the parents and the next friend. I need to hire a lawyer." "I want to be the lawyer," whatever they might say. I don't know. But what it seems to me like is the guardian ad litems, they just go do whatever the hell they want to do and then they come in with a bill at the end of the case.

HONORABLE SCOTT BRISTER: They make a comp plea, and I've got to either up or down it.

CHAIRMAN SOULES: And it's up or down, and if we prescribe those duties up

front and the rule says that's what they are going to get paid for, that might be a big help in a small way.

MR. MARKS: Well, that will work okay with these judges, but there are some judges that will make their duties as broad as you can make them.

CHAIRMAN SOULES: But at least that's reviewable on abuse of discretion. There is no standard here today. There is no -- the guardian ad litem has no guidance.

Paula Sweeney.

MS. SWEENEY: I hate to mire in some cement, Luke, but I would disfavor going in and doing one little surgical change here when there is such a huge area that this rule opens up. It is a giant area.

CHAIRMAN SOULES: Okay. Richard.

MR. ORSINGER: If and when we ever rewrite this rule I wish we could find something better than lunatic and idiot to describe these people.

MR. YELENOSKY: Here, here. I've heard better than that.

PROFESSOR DORSANEO: We have done that already.

MR. YELENOSKY: It's already in there?

MR. ORSINGER: We have? Okay.

MR. MARKS: Well, isn't that describing the guardian? No, I'm sorry.

CHAIRMAN SOULES: That's why I need a guardian at trial.

MR. McMAINS: I thought it was the defendants.

MR. MARKS: Luke, are you saying that if we don't do anything, let's at least do that today?

CHAIRMAN SOULES: I'm suggesting that. Yeah. You know, that lunatic or idiot, there is a lawyer in San Antonio that went over to defend a traffic ticket and pled insanity and said, "It's per se insanity. I'm a lawyer."

MR. ORSINGER: Did that work?

MS. SWEENEY: How did he do?

CHAIRMAN SOULES: I think he did all right. I think the humor was persuading.

MS. LANGE: The law says that you can't use those words anymore, but it's incapacitated.

HONORABLE DAVID PEEPLES: I am intrigued by the suggestion of a distinction between an actual guardian as opposed to an attorney ad litem. I have got no problem with guardians who are to speak up for the child. What I've heard about is just another attorney, and I just think for the court to appoint an attorney for one side of the case and then make the other side pay for it, just bothers me.

MR. LOW: That was the argument we got into when the court wanted to appoint this lawyer as guardian ad litem. He said, "I can't be. I'm an attorney. I'm an attorney ad litem." I said, "No, the statute," so we just finally just said, "All right. Call yourself whatever you want to. There are other names in the rule."

CHAIRMAN SOULES: Okay. Let's first vote on 173 as proposed by the Court Rules. Those in favor show by hands. One. Those opposed?

MR. MARKS: I'm sorry. I didn't hear the question.

CHAIRMAN SOULES: 173 as proposed by the Court Rules Committee.

MR. MARKS: Oh, you are voting on it now?

CHAIRMAN SOULES: Yes.

HONORABLE SCOTT BRISTER: I might be. You know, I know we don't have motions to table, but basically I'm --

MR. ORSINGER: Especially since this is our last meeting.

CHAIRMAN SOULES: Well, we are not going to table. We are going to have to give the Supreme Court some indication of our sentiment towards this rule.

MR. MARKS: I'm sorry. I didn't understand.

CHAIRMAN SOULES: Well, 173 as proposed by the Court Rules Committee.

HONORABLE SCOTT BRISTER: But we haven't even looked at -- there was a task force that met for a year and did a hundred-page report. None of us -- was anybody on it? Any of us know anything about

what they recommended?

MR. ORSINGER: Vote against it, like everybody else is going to do.

HONORABLE SCOTT BRISTER: But I'm not against it. I think it's a great improvement over the current rule, but I --

HONORABLE DAVID PEEPLES: I think it just needs to be understood that --

MR. ORSINGER: Why don't you make the motion if you are on the committee in January?

MR. MEADOWS: Well, if we are going to vote on it, let's discuss it for a minute.

CHAIRMAN SOULES: As written. We have been talking about it. Anybody else have anything to say about 173 as proposed?

MS. SWEENEY: If we are going to vote on it then --

CHAIRMAN SOULES: Paula.

MS. SWEENEY: All right. Here are some of the problems that I see with this rule. No. 1, you have got a situation where you have got defendants who are requesting the ad litem. As Rusty pointed out, they are

requested overwhelmingly currently by the defendants, although in some instances otherwise; and in the instance that it is a defendant who requests the ad litem then it is the defendant who ought to pay for the ad litem, not the hapless victim who needs an ad litem. That's not clear throughout this rule as far as I can tell.

The reasons for when an appointment is necessary are not adequately spelled out in the rule. There are other times when an ad litem may be necessary than as spelled out here, and I think that you have got a limited set of triggering events listed in the rule that inadequately reflects the realities of practice and the realities of the circumstances under which an ad litem might be required, and so that needs to be rephrased.

Under the duties of the guardian ad litem, under current practice ad litems do things other than listed here under "duties of," and whether that is or is not correct, there are circumstances under which it's necessary for them to.

For instance, there have been

circumstances where ad litems have come in and have decided that there was a conflict, that a settlement is inadequate, that a settlement is inadequate and the lawyer is unable to handle it.

The settlement is inadequate and there is no lawyer, the parties are pro se, and the judge has appointed an ad litem to see if the child is being taken care of. The ad litem says, "This is terrible. This insurance company is taking horrible advantage of these people because they don't have a lawyer. Judge, no, don't accept the settlement. I'm going to try it." That's not provided for in this rule.

So there are a whole host of things that are not in this rule that need to be, and conversely, there are things in the rule that should not be. I don't think we are ready to vote on it without a considerable amount of work. I agree it needs to be addressed, but it's the first time we have ever seen it, is presented to us this morning.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Can't we just say that and isn't there a precedent for us saying that we don't have adequate information to provide any direction to the Court other than what the information is provided -- other than the information provided here. I mean, I don't know that there is any -- well, I guess you could refer to the report that none of us have read and indicate that we haven't read it. I mean, that's the truth of the matter.

MS. SWEENEY: And I'm unwilling to be sort of a rubber stamp. If this committee is to be disbanded, fine. Let a new committee look at it. If we are to be reconstituted, fine, but the Court has already indicated a certain approach to our work product, and I'm unwilling to send things up there that presume to have our imprimatur of some kind on them when, in fact, they haven't been adequately studied in the 45 minutes left or whatever it is today. I object.

HONORABLE SCOTT BRISTER: Sustained.

MS. SWEENEY: Thank you.

CHAIRMAN SOULES: Anything

else? Those in favor of 173 as proposed by Court Rules show by hands. Three. Those opposed? Nine to three it's rejected.

HONORABLE DAVID PEEPLES: Luke, can the record show that if a future committee wants to consider this it's not res judicata?

MR. McMAINS: I don't think anything is, even our own rulings.

MR. LOW: Never been res judicata.

CHAIRMAN SOULES: We are only passing on this rule as written. We are not passing on whether modifications should be made regarding the ad litem. There is a task force. I have no idea where it stands in terms of its progress, but --

HONORABLE SCOTT BRISTER: It's over.

CHAIRMAN SOULES: Maybe so.

MR. YELENOSKY: Luke, do we need to do anything in order to make the noncontroversial change of referring to people as incapacitated persons rather than the language that's here? Will that happen regardless of what happens with this rule?

CHAIRMAN SOULES: Probably. Probably.

PROFESSOR ALBRIGHT: That's already done.

MR. YELENOSKY: It's already done?

PROFESSOR ALBRIGHT: Bill, isn't that already done?

MR. YELENOSKY: Bill referred to something being done, but in what way is that done?

CHAIRMAN SOULES: Changing these words, "minor, lunatic, idiot, or non compos mentis," that's not going to make it through your recodification, I would assume.

PROFESSOR DORSANEO: No.

MR. YELENOSKY: Okay.

MR. McMAINS: Other than as author.

MR. MARKS: I think we would object to changing --

PROFESSOR DORSANEO: Okay. I may be insecure, but not incompetent.

CHAIRMAN SOULES: All right. Anything else, Carl?

MR. HAMILTON: Rule 226a and 281. Those are on page 259.3 in the third supplement.

CHAIRMAN SOULES: Carl, would you permit me to interrupt your presentation to get to Alex, who is our host this evening, so that she may need to leave early?

PROFESSOR ALBRIGHT: I do. I have to go cook. Everybody laughs. Why?

PROFESSOR CARLSON: You're scaring us, Alex.

PROFESSOR ALBRIGHT: No. I am not cooking.

CHAIRMAN SOULES: All right. You have a disposition chart for the third supplemental agenda, right, Alex?

PROFESSOR ALBRIGHT: Right.

CHAIRMAN SOULES: All right. Everybody got a copy of that?

PROFESSOR ALBRIGHT: I think I can take care of it pretty quickly.

CHAIRMAN SOULES: All right. Let's go through it.

PROFESSOR ALBRIGHT: Luke, these are all letters that are either

criticizing the Advisory Committee's report on discovery or the Court Rules Committee report on discovery or saying that they -- a lot of them are somewhat of a form TDAC letter that says they prefer Court Rules' proposal over Advisory Committee proposal.

My feeling is that that has been debated in this committee for many months, and the response to every single one of these letters were that we have no recommended action because both of those proposals are up to the Supreme Court, and it doesn't make any sense for us to do anything until we get further direction from the Supreme Court, if the Supreme Court wants us to do anything.

I do know that the Supreme Court has copies of all of these letters and are taking them seriously, and my report from Justice Spector this morning was that the Supreme Court has been looking at discovery this week and have made substantial changes to what we sent up there. So these are all very fine letters that merit being looked at. I believe the Supreme Court has looked at them, but I don't believe it behooves us to take any time

to go through them individually here.

CHAIRMAN SOULES: Okay. Let's take an opportunity to look through them just briefly and see. What these letters -- is it correct that these letters represent responses to the proposed rules that this committee sent forward or comments either on those rules or the Court Rules'?

PROFESSOR ALBRIGHT: Right. Because our rules were sent up more than two years ago, these letters were all written after that when a number of us were going to various CLE conferences and talking about them and trying to get responses like this, and we did get some, and they have been sent to the Supreme Court, and I know the Supreme Court is working on them.

CHAIRMAN SOULES: All of these letters have been sent to the Court because they are all in our agenda, and everything I receive that goes into our agenda goes also -- copies goes to the Court and back to Court Rules as well. You found nothing in these letters that were other than comments or criticisms?

PROFESSOR ALBRIGHT: No, sir.

CHAIRMAN SOULES: And by that I mean legitimately --

PROFESSOR ALBRIGHT: Many of them are very legitimate, and I think -- you know, but to take any action we would need to see what the court comes back with, if we want to make suggestions to the Court. I would imagine that many of these suggestions are taken into account in whatever the Supreme Court is doing.

CHAIRMAN SOULES: So we are going to leave these matters in the hands of the Court where they have already been lodged and advise these persons who have submitted them to that effect; is that right? That's what your recommendation is?

PROFESSOR ALBRIGHT: Right. And I suppose, you know, once again, as with the last letter or with the Court Rules proposals, if the next committee, if there is a committee, meets and is discussing discovery, perhaps some of these issues should be looked at then, but I don't think that's for us to -- we can't do anything about that.

CHAIRMAN SOULES: Well, I think if we get new discovery rules then the persons are going to have to --

PROFESSOR ALBRIGHT: Write new letters.

CHAIRMAN SOULES: -- bring up their problems or complaints about the new rules and then that would fall in the jurisdiction of this committee, however they constitute it. Anyone disagree with that resolution of this list of items?

I don't want to shortchange any of the persons who made comments, but given that we have forwarded these, unless they were sent -- well, even if they went to the Court as a matter of primary addressee, they were again sent to the Court by me when I got them. So they are all there for the Court's consideration and how the Court reacts to our work product and how the Court then proceeds to promulgate its own rules, right?

PROFESSOR ALBRIGHT: Right.

CHAIRMAN SOULES: Okay. Anyone disagree with so advising these individuals? Okay. And you don't see any exceptions

particularly to that?

PROFESSOR ALBRIGHT: No exceptions whatsoever.

CHAIRMAN SOULES: All right. And everybody agrees that's what we do? Okay. That's what we will do. Thank you very much for that report.

PROFESSOR ALBRIGHT: If I can make an announcement, I hope everybody comes to my house. There is a map back there, and it's very, very casual, so go home and put on shorts.

CHAIRMAN SOULES: We look forward to being with you tonight. Thank you.

Carl, let's resume with your report.

MR. HAMILTON: 226a is on 259.6. This is a rule that allows the jury to take notes, take their notes into the jury room for deliberations. This rule was worked on mainly by Judge Hart, who has used this in his court for some time and says he finds it to be very helpful.

So we have provided in Rule 226a that the court in its discretion may allow the jurors to take notes for refreshing their memory

during deliberation. The court has to see to it simple materials are provided. The court retains custody of those and admonishes the jury that they are not considered as evidence, could not be considered any more accurate than the memory of a juror who does not take notes. Note-taking should not interfere with their ability to pay attention to the evidence.

They are not to remove the notes from the courtroom, and it states what they do with their notes. The bailiff picks them up, and then that's on the written instructions, and then on the oral instructions it advises the jury what they can do again, and then Rule 281, which is the counterpart to that, papers taken to the jury room, we have added that --

CHAIRMAN SOULES: Is this all on -- oh, this is 259.6.

MR. McMAINS: 259.6 and 259.8.

CHAIRMAN SOULES: Okay.

MR. HAMILTON: We have added to Rule 281 that "The jury may on request take into their deliberations the following: originals and copies provided by the court of charges." That's additional because the

original rule doesn't say anything except about taking the charge with them. He likes to give each juror a copy of the charge, so that this makes it clear they can take the original charge and their copies, and they can take with them any notes made by them during the trial pursuant to the court's instructions, and any exhibits admitted into evidence, which takes care of part of the old rule, which says where part of a paper has been read in evidence, the jury can't take the whole thing, but has to detach it.

So the rule as proposed would allow them to take exhibits admitted into evidence, so if a part of it is admitted, they only take part of it with them to the jury room. So basically it is a rule that allows the jurors to take notes.

CHAIRMAN SOULES: And to take their notes into the jury room.

MR. HAMILTON: Take their notes into the jury room with them.

CHAIRMAN SOULES: Discussion? Judge Brister.

HONORABLE SCOTT BRISTER: Yeah.

Again, there is a jury task force that made several proposals, one of which is this one, but a couple of others, but the final draft hasn't even been written yet. So, you know, we either need to table this or if it's the same rule as the last one, we need to vote it down without prejudice to reconsidering it when we get the task force. Either that or we need to tell the Court, "Stop appointing task forces because we are not going to pay any attention to what they do," because this is ridiculous that we should vote on this without even looking at the task force that's working on it at this very moment.

CHAIRMAN SOULES: Okay. Any other discussion?

MR. McMAINS: Well, I had one question. The proposed rule, the source of it is what? Source of it?

MR. HAMILTON: Judge Hart.

MR. McMAINS: Okay. And who does he say that's to take custody of the notes? What's that part say?

MR. HAMILTON: It says, "Do not remove the notes from the courtroom at any

time during the trial or from your jury room during the deliberations. During any morning or afternoon breaks you may leave your notes on your chair, but at the noon break and at the end of the day please hand your notes to the bailiff for safekeeping. No one will look at your notes during the breaks. At the end of the trial leave your notes with the bailiff, and they will be destroyed."

MS. SWEENEY: And I think, Rusty, your question was to the earlier paragraph, "The court shall see that simple materials are provided for the purpose and shall retain custody and insure confidentiality of notes during the trial."

MR. McMAINS: Yeah.

CHAIRMAN SOULES: This is actually a pretty thorough piece of work, looks to me like. Richard.

MR. ORSINGER: I don't have a copy of the paperwork. Is this built into the rule or is this part of the administrative or miscellaneous order that the court issues pursuant to a rule?

CHAIRMAN SOULES: It's Rule

266a.

MR. ORSINGER: It's built into the rule?

CHAIRMAN SOULES: Yes.

MR. ORSINGER: Okay. I would make a proposal that if we vote this up that it ought to be in the form of an order of the Supreme Court that can be amended at will, just like the other instructions to the jury are. The existing instructions to the jury are not part of a Rule of Procedure. They are pursuant to the authority of a Rule of Procedure, but they are a miscellaneous order of the court, and it's easily amended, and if we vote this up as such an order, they can change it when the task force recommendations come in. If you put it in the rules, it makes it much more difficult to amend. I don't know whether you consider that a hostile amendment or not, but I would propose that all of your language be put into a proposed order under that rule, rather than --

MR. McMAINS: Right there on 226a.

MR. ORSINGER: Like 226a is,

all the other jury instructions are Supreme Court orders pursuant to a rule. They are not actually built into the rule.

MR. McMAINS: No. But it is in the rule. The admonitory instructions are in 226a.

PROFESSOR DORSANEO: No, they are not. They are not, Rusty. Look at it carefully.

MR. ORSINGER: I think the Supreme Court prefers this because they have some flexibility, whereas in the rule process it's much more cumbersome to make changes.

CHAIRMAN SOULES: So you are suggesting that these be -- if we vote to approve these proposed rules, that they be made a part of the -- let me see. Let me make the record right on this.

MR. McMAINS: Oh, just where it says "approved instructions"? Somehow that's a separate order?

CHAIRMAN SOULES: Of the approved instructions under what is now Rule 226a.

MR. ORSINGER: Exactly. That's

consistent with the current approach, and that also gives the Supreme Court more flexibility to tinker with it as needed.

CHAIRMAN SOULES: Okay.

MR. HAMILTON: We are not intending to change that concept, just the instructions.

PROFESSOR DORSANEO: I don't think it gives them any more flexibility than any rule they do, whether they call it a rule or a writ or act.

MR. ORSINGER: Well, I'll offer that as a friendly amendment or I'll offer that as a separate motion after yours is voted on if you want.

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: A couple of observations. We ought to at least let the Supreme Court know that we are aware of the jury task force, which did almost exactly this, which is almost exactly out of Arizona, what they did, oh, three years ago or so. I see no harm in letting the Supreme Court know that we like this idea, but they do

have a task force that dealt specifically with this, and we need to try to be consistent with the task force.

CHAIRMAN SOULES: Well, the Chair is going to take a vote in just a moment on the will of the committee to recommend or not recommend these proposed changes as to be adopted by the Supreme Court as a part of their administrative order under Rule 226a.

HONORABLE SCOTT BRISTER: Why is it we have to do that today, Luke?

CHAIRMAN SOULES: Because we are going to tell the Court how we feel about this. This is a pretty thorough piece of work. If it's going to be done --

HONORABLE SCOTT BRISTER: You have no idea how many hours in the last six months I have sat in a committee, none of whom are in this room, discussing this; and you don't want to hear from us, that's fine.

CHAIRMAN SOULES: We do want to hear from you.

HONORABLE SCOTT BRISTER: But I'm tired of serving on these task forces if this committee is not even going to listen.

Why do we have to vote on this today, Luke? Have to? The task force is not even final yet.

CHAIRMAN SOULES: I understand. We may never meet again. I don't know what's going to be -- what's coming up, and to me it seems harmless to tell the Court how this committee as presently constituted feels about these words on these papers, and the Supreme Court, if it formed that task force, will probably listen to what it has to say. It may even send that task force report to this committee for review. I don't know what's going to happen, but this we have now.

HONORABLE SCOTT BRISTER: Then we will be faced with a "We have already voted on this."

MR. McMAINS: We won't.

MS. SWEENEY: That's true.

CHAIRMAN SOULES: All right. Any further discussion on this?

HONORABLE SCOTT BRISTER: Yeah. I don't like -- my position on the task force briefly has been I don't like these instructions. I don't like telling jurors --

I don't like treating jurors like children. We do that more than enough already, and when you tell jurors things like, "Your handwritten notes are not evidence," we may as well tell them, "We think you-all are all stupid," and I think instructing them on obvious things is insulting to them, and so I do object to these particular instructions because they know it's not evidence. They know the difference without going to law school. I think they need some instruction, but not this.

CHAIRMAN SOULES: Anyone else?

MR. MARKS: I move that this be tabled until the task force finishes its work.

HONORABLE SCOTT BRISTER: Second.

CHAIRMAN SOULES: In favor show by hands.

MR. ORSINGER: When have we ever had a motion on a table motion? That defeats the merits and the purpose of this committee to develop a record and forward recommendations that are split --

HONORABLE SCOTT BRISTER: No, no, no. The purpose of this committee is not

just to vote things up or down. The purpose is to discuss, and we are trying to discuss something which you have not seen.

MR. ORSINGER: In my opinion, the vote to table is not a vote about discussion. It's a vote to preclude discussion. Now, the Supreme Court is not bound by our recommendation, and we all know full well that they are going to read the task force recommendations. I have never heard of a vote to table being even voted on in this committee in the three years I have been on it.

HONORABLE SCOTT BRISTER: We have never been at a last meeting before, Richard.

MR. ORSINGER: Well, I don't think it's --

HONORABLE SCOTT BRISTER: There is only about a million things we put off for two or more months, which is what we ought to do with this until we have a chance to read what a Texas Supreme Court has gone to the effort to have a task force chaired by the State Bar president and issue a report to the

Court on exactly this issue, and the newspaper reports on it last week about the draft report focus on this issue.

MS. SWEENEY: Call the question.

CHAIRMAN SOULES: Okay. Those who want to table show by hands. Five. Those who want to vote on it show by hands. Three. Don't want to vote, no vote.

MR. ORSINGER: Note my exception to an irregular procedure.

CHAIRMAN SOULES: Well, what's next, Carl?

MR. HAMILTON: That's all I have.

CHAIRMAN SOULES: That's it. Okay. Elaine on 79b.

PROFESSOR CARLSON: Holly is passing it out right now.

CHAIRMAN SOULES: Okay.

PROFESSOR CARLSON: Let me just give you an overview of the scheme we have come up with to assert and rule upon Batson challenges, an overview and then we will look at the specific language. Two major concerns

that our subcommittee had on Batson challenges, the major ones, were that there was an ability to mischievously use Batson challenges to try and get an entire panel dismissed and at another level that dismissing an entire panel because of a Batson challenge was not the best use of judidicial resources.

And so the procedures that we have created will allow the court to rule on Batson challenges and the propriety of strikes before the juries actually see them, and if a strike is improper, it will be removed and then as usual, the first 12, or 6 in JP and county court, will be called.

Taking it section by section, the first paragraph defines what an improper peremptory challenge is and is necessarily left open-ended. We have specified that a peremptory challenge is improper if it is motivated by race, ethnicity, or gender. We know from the U.S. Supreme Court decisions those are constitutionally infirm bases for exercising a peremptory strike.

We don't know under the equal protection law whether there are other impermissible

grounds for peremptory strikes. We think there are. I think there are, as I read equal protection jurisprudence. For instance, the U.S. Supreme Court and the Texas Supreme Court, neither of those courts have ruled upon or have been faced with the issue of whether or not a religious-based peremptory strike is improper. Under traditional equal protection jurisprudence decided in other contexts it is arguable, a very strong argument, that it is an improper basis for a strike.

The Texas Court of Criminal Appeals originally held in Cesarez vs. State that religious-based strikes were improper on a five-four vote and then a year later withdrew the opinion and ultimately held in the new five-four decision that religious-based strikes do not violate Batson, and so because we do not feel that we could enumerate all of the potential grounds upon which peremptory strikes might be improper, we simply used that broad language at the end, "A strike is improper if it's based upon race, ethnicity, gender, or other unconstitutional basis." So we purposely left it open.

I put "solely" in bold language here because we did have a discussion on whether or not, in fact, the current state of the law would allow for a peremptory strike that is in part motivated by race, ethnicity, or gender but when a litigant can convince the court that there is a neutral explanation that is not constitutionally infirm.

My reading of the case law is that if counsel can show that there is a neutral explanation for their peremptory strike, even though the court is otherwise aware that there was consideration of race, ethnicity, or gender, maybe by looking at counsel's notes, which we will get to in a moment, the court can see that next to every prospective member of that jury there was "male," "female," let's say, written on it. Even though the court is aware that that was a factor or appears to be a factor, that does not in my view make the exercise of the strike per se improper under Batson principles.

I believe that's the position the Texas Supreme Court took when they in a per curium decision denial in the case of Benevides vs.

American Chrome and Chemical expressly disapproved of the Corpus Christi Court of Appeals' language in an opinion that suggested that Texas equal protection rights were greater than those guaranteed by the Federal Constitution, and in that case the Supreme Court expressly said, "We disapprove of this language that suggests that in Texas a strike that is based in part upon" -- in that case I believe it was race, "is constitutionally infirm, per se."

However, as Professor Dorsaneo correctly pointed out to me the other day in our phone conversation, that the most recent pronouncement by the Texas Supreme Court in Goode vs. Shoukfeh, which did not address this issue squarely, only inferentially, did make this statement, "A neutral explanation means the challenge was based on something other than the juror's race." I don't read that myself in the context of the opinion, of the court saying, "We are shifting gears." I think the court is saying, "Yes, you have got to come up with a neutral, plausible, credible explanation of something other than race,

ethnicity, or gender."

So that is -- and, Bill, I don't know where you finally came out on that. You sort of deferred to me on the phone the other day, and I think it was a bona fide observation on your part.

PROFESSOR DORSANEO: I don't come out anywhere. I say, "Isn't that interesting."

PROFESSOR CARLSON: Okay. Good. Do you want to take this paragraph by paragraph, Luke?

CHAIRMAN SOULES: Why don't we do the whole rule?

PROFESSOR CARLSON: The second paragraph is reflective of our attempt to get around having to dismiss the entire panel when a Batson challenge is sustained; and it provides, as you see, "Any party outside the hearing of the panel, but before the jurors' names are announced, can object to another party's improper exercise of peremptory challenges"; and plus, of course, in that is that each party would have the opportunity to view the other party's proposed strikes

outside the hearing of the jury.

Now, we will tie that back in a moment, but let me go to the proof of violation paragraph. The first paragraph under proof of violation is simply parroting the burden of proof in a Batson challenge as annunciated by the United States Supreme Court in Percat vs. Ella, and I think we necessarily have to track that approach because of that pronouncement.

The second paragraph under "Proof of Violation" is my attempt to embody what the Texas Supreme Court held in Goode vs. Shoukfeh in April of this year on proper evidence in support of a Batson challenge. I tried to be true to the language of the opinion as closely as possible. Now, arguably this doesn't have to be in there, but I think it is helpful to the Bar at this point because there is such an uncertainty on how Batson challenges are to proceed.

The next paragraph entitled "Trial Court Action Upon Sustaining Objection to Peremptory Challenge" directs the trial court if it sustains the peremptory challenge after applying the appropriate burden of -- excuse

me, sustains an objection to the peremptory challenge, then that challenge is in effect erased. It's disallowed, and the prospective juror's name is reinstated on the list.

It further states, and the committee felt strongly about this, that a party who improperly exercises the peremptory challenge waives the right to a replacement peremptory challenge. If your peremptory challenge is determined to be improper because it is motivated by race, ethnicity, or gender or other improper constitutional ground then you don't get another one. You have used your peremptory challenge unwisely, and you are in a waiver posture in getting any further ones; and finally, the last paragraph on the page really is, I think, almost exactly what we currently have in our rule; and it directs the trial court to return to the clerk the list of prospective jurors reflecting the court's ruling on objections to peremptory challenges and that the clerk then, of course, then calls the jury to be seated, the first 12 not stricken in district court, and 6, of course, in county or JP court. So that is our scheme,

and I guess I would just open it up to discussion.

CHAIRMAN SOULES: Okay. I know you-all have worked on this a long time, and you have got a pretty comprehensive rule here.

Richard.

MR. ORSINGER: I have got several comments, but first, Elaine, the use of ethnicity here, is that supported by case law?

PROFESSOR CARLSON: Yeah. Hernandez vs. U.S.

MR. ORSINGER: Okay. And then under "Proof of Violation," second paragraph, we use the term "transcript," which we obviously would need to change to "clerk's record," but I would suggest that it shouldn't be in the clerk's record anyway. If it's going to be tendered into evidence, by definition it's part of the reporter's record, so my suggestion would be maybe just "part of the record."

PROFESSOR DORSANEO: Richard, I read that Goode case as saying that it doesn't have to be done by having it marked.

MR. ORSINGER: It can be just --

PROFESSOR DORSANEO: It's just kind of stuck in the clerk's records.

CHAIRMAN SOULES: It's either-or.

MR. ORSINGER: Okay.

PROFESSOR DORSANEO: I think in Goode they relaxed it.

MR. ORSINGER: Okay. Then you're saying you can go either with the clerk's record or with the reporter's record?

PROFESSOR DORSANEO: Yeah.

CHAIRMAN SOULES: Yes.

PROFESSOR CARLSON: Yes.

MR. ORSINGER: Okay. Then in the next sentence where it says, "Proffered explanations can be tested through cross-examination," is that going to be unsworn cross-examination since it was unsworn direct, or is it sworn?

PROFESSOR CARLSON: The case does not address that.

MR. ORSINGER: I think we ought to say, because it's clear that unsworn

statements can be offered initially, but it's unclear to me whether your cross has to be unsworn or sworn; and if it's going to be unsworn, I would say maybe "tested through unsworn cross-examination." If it's going to be sworn, I think we ought to say it's going to be sworn.

PROFESSOR DORSANEO: I think it means sworn.

MR. ORSINGER: It does mean sworn?

PROFESSOR DORSANEO: That's what I think it means.

MR. ORSINGER: So your direct is not under oath, but your cross is under oath?

PROFESSOR DORSANEO: Well, I'm not going to answer you if I'm not under oath.

MR. McMAINS: Why not? That is when you should answer him.

MR. ORSINGER: I think we should specify, because I think it's unclear. Since the original justification can be unsworn, it at least would lead someone to think maybe that the cross-examination would

be unsworn.

PROFESSOR DORSANEO: I think it's a good point you make.

CHAIRMAN SOULES: Okay. So we say "cross-examination under oath."

MR. MEADOWS: Isn't a lawyer already under oath?

MR. ORSINGER: No.

MS. SWEENEY: Well, as an officer of the court there is considerable authority to the effect that lawyers don't need to be sworn.

MR. MEADOWS: This is going to be testimony of a lawyer.

MR. McMAINS: Yeah.

MR. ORSINGER: It's an unsworn statement, according to the first word in that paragraph.

MR. McMAINS: Well, that's straight out of the case.

CHAIRMAN SOULES: That's right.

MR. McMAINS: It's straight out of Goode. That's what it says.

MR. ORSINGER: Okay. So then --

MR. McMAINS: Now, it doesn't say what --

MR. ORSINGER: We can't be running around here saying that it's automatically sworn when the first word says that it's unsworn.

MS. SWEENEY: No.

MR. McMAINS: Well, we are talking about --

MS. SWEENEY: Sworn without benefit of swearing the oath.

MR. ORSINGER: Well, if it says "unsworn," I think it's not sworn even without the benefit of the oath.

MR. McMAINS: That's right.

MR. MEADOWS: Well, you can't abandon the oath that you have already taken.

MR. ORSINGER: If the first word right here says "unsworn statements of counsel may be" --

CHAIRMAN SOULES: Okay. I want to take a consensus in a minute about deleting "unsworn" and just say "statements of counsel may be offered" and then putting "under oath" or not putting "under oath" at the end of

"cross-examination."

MR. ORSINGER: Okay. Then in the next paragraph on the last line I'm concerned about the way it's phrased, "waives the right to make additional peremptory challenges." Elaine explained it as replacement challenges. "Additional" may mean that if you get nailed on one of them, you lose the rest of them.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: And I would rewrite that to say, "A party determined to have improperly exercised a peremptory challenge forfeits that peremptory challenge."

PROFESSOR CARLSON: That would be true to the spirit of the subcommittee vote I think.

MR. ORSINGER: Okay. And then in the last one about the court returning to the clerk the list of jurors and reflecting the rulings, in my opinion the rulings should be able to be in the reporter's record orally rather than requiring that they be in writing, and the appellate rules now say that you can preserve error on a ruling by getting it

anywhere in the record, and I really question if we shouldn't -- why are we requiring that the ruling be written on the strike list instead of orally from the court?

PROFESSOR CARLSON: Luke, can I respond to that?

CHAIRMAN SOULES: Yes.

MR. ORSINGER: Yeah.

PROFESSOR CARLSON: Originally, and, Judge Peeples, correct me if I'm wrong on this, but I think originally we had the court removing the strike when it sustained the objection to the peremptory strike, and this was wording that we just thought, I think as a subcommittee, sounded better; but obviously if it's leading you to believe that that's necessary for preservation purposes then our language is not sufficiently specific. It was simply a matter of practice so that the clerk would know that the strike is not good and then would call that prospective juror if they fell in the range of the top 12 or 6.

HONORABLE DAVID PEEPLES: Richard, I think what we had in mind was maybe just a notation by the judge outside that

juror's name, "Strike disallowed," something like that. We certainly didn't think in terms of you've got to type it up and so forth.

MR. ORSINGER: Well, what if it's overruled? What if the court rules that it's overruled orally but he didn't note that on the strike list? Then you are not in compliance with the rule and someone may argue, "Hey, I don't care about the rules generally. We have a specific rule that requires the ruling to be on the strike list. No error preserved."

HONORABLE DAVID PEEPLES: Well, if it's on the record that ought to be good enough.

PROFESSOR CARLSON: Well, the problem, though, is there is still going to be the strike through the list.

MR. ORSINGER: Well, and it may be sustained. The ruling may be that the strike is valid. The ruling is not always to disallow the strike. The ruling might be to permit the strike to stand.

CHAIRMAN SOULES: Let me see if this fixes that. You know, the clerk is going

to have to get a list that's got the jury players on it because the clerk calls their names. So the clerk is going to have to be given some piece of paper in order to use to call the jurors to the box.

MR. ORSINGER: Well, but the clerk has an unmarked list, and she lays a list on each side and strikes across until she has got her combined list, is the way I have seen it.

CHAIRMAN SOULES: The trial court, though, is reviewing the strikes. If we say, "The trial court is to return to the clerk the list of prospective jurors reflecting the sustained objections," so that they are back on the list when the clerk calls the list.

MR. HAMILTON: The list we are talking about is the final typed up list.

MR. ORSINGER: The clerk's combined list.

MR. HAMILTON: The combined list. Yeah.

MR. ORSINGER: But in my practice it's a typed list. It's identical to

each lawyer's list, and they pick the peremptories off, and what's left are the ones that are not in, and then the trial judge is going to come along and say, "No, no. No. 4 is not out. No. 4 is in. That was an improper strike," and then they are going to write that on the clerk's list and then you ignore it and go ahead and impanel the jury. That's what you're saying?

CHAIRMAN SOULES: The judge gives the clerk a list where if the judge has sustained objections, that strike is no good.

MR. ORSINGER: Ignored and not replaced.

HONORABLE DAVID PEEPLES: Don't we mean to say the judge shall notify the clerk about the rulings and the clerk reconstructs the list or whatever?

PROFESSOR CARLSON: That was the bottom line, Judge Peeples.

MS. SWEENEY: Yeah.

MR. LOW: Luke, as a practical matter, it's not done in a vacuum. There is going to be a hearing; and there is going to be a record, I guarantee you; and I mean, I

don't know how you make a record without showing and the judge says, "Okay. I exclude it."

Well, you don't have to just tell the clerk where that name -- I mean, you know, if that's excluded, it states right here and then they are back on there. I don't think you ought to have to write on there "back on there" if the record shows they are back on there. The clerk is going to have sense enough to know how to read the first 12 names, and the clerk is going to know that one's included, and they can count to 12.

CHAIRMAN SOULES: Maybe we don't need (c) at all.

MR. LOW: I just don't see the problem.

CHAIRMAN SOULES: Just let him get a handle on his -- the court and its staff handles the problem.

MR. ORSINGER: Well, that happens to be the only place we tell them how to call the jury. Of course, they all know that.

CHAIRMAN SOULES: They know

that anyway, and this says, "Call the first 12 names on the list not stricken." Well, that person was stricken but got reinstated. So it's going to be hard to rewrite (c) in this committee, and it doesn't seem to me like it's too important to have a (c). That's up to you. Robert Meadows.

MR. MEADOWS: Couldn't you accomplish it by simply saying that the trial court shall notify the clerk of the court's rulings on any objections and then leave the rest the same? However the notification takes place, we all know that the clerk has to call the jury to the box.

MR. ORSINGER: The only problem I have with it is that this is the only place where we tell the clerk how to put the jury together. Now, they know how to do that, but that's because they have been following a rule. Now we take the rule away and --

MR. MEADOWS: But the rule says that the clerk shall follow the court's instructions on its rulings, his or her rulings.

MR. ORSINGER: Yeah, but if we

take (c) out, where in the rules do we tell them you call the first 12 that haven't been struck?

HONORABLE DAVID PEEPLES: (C) is a rewrite of existing Rule 234.

MR. McMAINS: Yes. That's right.

MR. ORSINGER: So if we take (c) out, we have taken away the instructions on how you impanel the jury. It seems to me like we ought to leave that on there but just eliminate all this writing.

MR. MEADOWS: I'm saying you leave it. You just change the first sentence to say, "The trial court shall notify the clerk of the court's rulings." All right. "With that information the clerk shall call the first 12 in district court and the first 6 in county court."

MR. ORSINGER: I like it.

MR. McMAINS: Fine.

PROFESSOR CARLSON: That will work.

MR. McMAINS: He doesn't have to tell the parties. He just tells the clerk.

MR. MEADOWS: I guess you could add "party" to "the clerk."

HONORABLE DAVID PEEPLES: Do we need the first sentence of (c)?

MR. McMAINS: Well, I think the concern is that because of physically the way it's done the name actually will be stricken, but which is why you have the judge say -- why the first sentence says ignore the fact that that name is stricken.

MR. ORSINGER: Could you say "not validly stricken"? Or "not invalidly stricken."

MR. McMAINS: Well, no, but it says, "Call the first 12 names on the list not stricken," and we haven't tried to evaluate that in terms of a valid versus an invalid strike except in the previous sentence.

MR. MEADOWS: Yeah, but isn't the case that they are either stricken or not stricken by virtue of the court's rulings, which are communicated to the clerk?

MR. McMAINS: Yes.

CHAIRMAN SOULES: How about this? If we take out the first sentence of

(c) and put the word "properly" before both "stricken's."

MR. ORSINGER: Yes.

MS. SWEENEY: Yeah. That gets it.

HONORABLE DAVID PEEPLES: That gets it.

MR. ORSINGER: Yeah.

CHAIRMAN SOULES: The clerk has got to be informed of what names are left not properly stricken and let that be handled however the trial judge handles it.

PROFESSOR CARLSON: That will work.

MR. ORSINGER: I like it.

CHAIRMAN SOULES: Okay.

HONORABLE SCOTT BRISTER: Question on second paragraph of (b), "before the jurors' names are announced"? Because usually I get the Batson objections after the names are announced because that's the first time they realize that all the whatever are gone.

CHAIRMAN SOULES: Well, that's by design. That means the Batson challenge

has got to come -- the court has to show the strikes to both sides, say, "Anybody got any Batson challenges?" And then if you do --

HONORABLE SCOTT BRISTER: So then you have to write down in your notes who's black and who's not because you are going to have to look at the list and be able to match them up, but then of course, you will be in trouble if somebody sees those notes.

MR. McMAINS: Well, your notes are not discoverable anyway.

MR. LOW: He means the lawyer puts, you know, "Two, black," you know, so on and so forth so he knows, "Wait a minute."

MR. ORSINGER: If you let the panel go before you entertain the Batson challenge, you have lost your opportunity to cure by reinstating because --

HONORABLE DAVID PEEPLES: You have also told the 12th juror that he or she is on the jury and then, "Whoa, let's go back and redo it," and one of the 12 gets bumped, and somebody else replaces them. It's kind of embarrassing.

The way I envisioned this, Luke, a judge

doesn't say, "Here it is. Make your Batson challenges if you have them." It's just, "Here's the jury," and if they suspect a Batson situation they say, "Judge, can I look at this before you call the list? Whoa, just a minute here," something like that. But we can't have them -- Scott, we can't have them announce it in court and then you make your challenges.

CHAIRMAN SOULES: This means that the judge is going to have to give the other side strikes.

MS. SWEENEY: Well, that's true, but what Judge Brister said just raised a light bulb in my head for the first time. He's right. This is going to mandate that you put in your notes, you know, "black male," "white female," "Hispanic male," so that when you see the other guy's list you can look at it and compare it because the folks aren't going to be there for you to tell.

CHAIRMAN SOULES: Well, the lawyer does that, but those notes are privileged under this rule.

HONORABLE SCOTT BRISTER: Not

in some circumstances.

MR. MEADOWS: If you use them to testify, they are not privileged, but otherwise they are.

CHAIRMAN SOULES: That's right. That's right.

HONORABLE SCOTT BRISTER: And is that a court of appeals case?

PROFESSOR CARLSON: That's Supreme Court.

CHAIRMAN SOULES: How do you do that anyway? I mean, if you have got race, ethnicity, or gender if you are going to raise a Batson challenge, you've got to track that. You don't have to just do that from memory.

MR. ORSINGER: Well, that's the reason that you explain that you wrote all of this down, all of this improper information is written down not for you to use but to stop them from using it.

CHAIRMAN SOULES: That's right. And what makes it improper? It is a proper way to challenge --

MR. ORSINGER: Your state of mind when you are doing it is what makes it

improper.

MR. MEADOWS: And if you are trying to protect certain jurors, you are going to know who they are. If you are interested in a certain juror being missing from the jury, you are going to know who they are.

CHAIRMAN SOULES: Well, maybe we wish that Batson had never come up so that we don't have to keep track of race, ethnicity, or gender; and maybe we ignore it, just don't worry about it; but if we are going to use that law, we are going to have to keep the facts straight that underpin the use of that law.

MS. SWEENEY: Yeah. That's right.

CHAIRMAN SOULES: And to do that can't be improper. It might be offensive, but it's got to be proper because it's a part of the process, and that's just there because Batson is there.

HONORABLE SCOTT BRISTER: I am not necessarily objecting, and I am just -- for discussion, this will mean I won't ever

have any Batson challenges because nobody -- I mean, they can look at the list, but nobody ever makes these until they see the jurors in the box.

CHAIRMAN SOULES: Too late.

HONORABLE DAVID PEEPLES: They waive it.

HONORABLE SCOTT BRISTER: And I don't mind saying they are too late, but understand, they are going to disappear, and No. 2, then there is going to be an objection we are not enforcing Batson because we are making everybody waive it.

HONORABLE DAVID PEEPLES: This makes it possible for people to enforce Batson if they want to.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: Luke, are we going to be running into a problem, I realized, with timing that as a practical matter what happens in most of the courts I go to is, I mean, you really don't think about it. I mean, maybe you should and then they call. They don't tell you the names. The judges just don't do that, tell you, "Well, you-all look at the

list." They just come in and the clerk just calls them out. It's like opening a Christmas gift and you see what you got.

MS. SWEENEY: That's right.

HONORABLE SCOTT BRISTER: Or see what's left out.

MR. LOW: Yeah. So, therefore, then you see it, and I am not arguing for this position, but should there be something to call to the attention of the judges, because the lawyers might not think of it, that the lawyer should have an opportunity to inspect the strike list before the names are called or something? Or maybe a way -- if we don't do that, the lawyer is going to say, "Well, look, I had no idea of this. It's unconstitutional, and the procedure is unconstitutional because I wasn't given a right to see that."

HONORABLE SCOTT BRISTER: That's a good point.

MR. LOW: So if we are talking about something constitutionally then we have got to outline a procedure that's going to be constitutional.

HONORABLE DAVID PEEPLES:

Buddy, if the lawyer asks to see the list and the judge denies it, that sounds like a violation.

MR. LOW: Oh, no question.

HONORABLE DAVID PEEPLES: But if the lawyer doesn't ask and just lets it go by, isn't that aware?

MR. LOW: Well, now, wait just a minute, though. Is that necessarily due process if the rules don't require or say that you have a right? And the judge I have out of habit routinely always just calls them out. I mean, that's his procedure. That's the way -- I just raise the question. I mean, you know, it's a question I have in my mind.

CHAIRMAN SOULES: Parties waive their constitutional rights and the lawyers waive their clients' constitutional rights all the time, and it may not be right, but the appellate courts say they are gone.

MR. LOW: I know, but if the procedure is not right.

CHAIRMAN SOULES: Well, we say here that "Any party may outside the hearing of the panel and before the jurors' names are

announced object to another party's improper exercise of peremptory challenges."

We do that for a reason, because if it's not done at that point in time you lose the venire, and you may lose your entire venire or at worst you are going to have this shuffling of somebody highlighting the issue, and there is a good reason for that, and this is the point where that constitutional challenge must take place or it's not exercised.

MR. LOW: I understand that, but the rule does not provide that. It says you shall do it. The court doesn't -- there is no rule that says you have the opportunity and the court shall see you have the opportunity or --

MS. SWEENEY: He's got a point.

MR. LOW: So I just raise the question.

MR. McMAINS: Well, the problem is the rule doesn't say that as to challenges for cause either and yet the law is and has been in terms of the common law and waiver that if you wait until the jury is impaneled, you are too late.

MR. LOW: I know, but you know that, Rusty. For cause, you know that when you've got the panel there, and you usually do that right after. You don't --

MS. SWEENEY: Buddy's problem is a practical one. He's saying how are you going to know they are improper challenges before they get called to the box?

MR. McMAINS: Well, but the point is when you challenge somebody for cause you don't know they are going to be on the jury until they are actually called, even if you failed.

MR. LOW: I know.

MR. McMAINS: You don't know what the other side may not have used a peremptory on it. You've got to show an objectionable juror sat as a result of that or as a result of the misallocation of strikes. Any one of those things has to be done before the jury is impaneled or else it's waived.

MR. LOW: I know, but you do that as you go, when you know right then that that -- you know then that person you've got grounds, but you don't know on a Batson until

you see the list.

PROFESSOR CARLSON: Is your suggestion, Buddy, that we include in paragraph 2 something that says, "Any party may view another party's strike list"?

MR. LOW: No. Not that. I haven't come up with the language. I'm troubled. I'll vote for the rule. I'm troubled that there can be a complaint and I realize that you can waive constitutional rights, but when you follow a rule and the rule does not say that the trial judge will, the trial judge did not. He called the names out, and you had suspicion at that time. So is that sufficient notice for you or should the judge say that the parties have a right to request to see each other's strikes or however you say it, to see what would be the purported panel prior to their names being read?

CHAIRMAN SOULES: Let me try to get at that right now. Okay. "Timing of objection to exercise peremptory challenges." Maybe that's not exactly what the -- but follow these words. "After the parties make their peremptory challenges, upon request any

party may, outside the hearing of the panel and before the jurors' names are announced, review all parties' peremptory challenges and object to another party's improper exercise of peremptory challenges."

MR. LOW: And must do so prior to -- yeah. I agree.

CHAIRMAN SOULES: And object.

MS. SWEENEY: Yeah. That works.

CHAIRMAN SOULES: So after the strikes are done they are closed.

MR. LOW: Yeah.

CHAIRMAN SOULES: You can make a request to see the other side's strikes and get at it right then.

MR. LOW: That gives them a vehicle to do that if they don't do it.

HONORABLE SCOTT BRISTER: I like that better.

CHAIRMAN SOULES: Okay.

HONORABLE SCOTT BRISTER: It's definitely better to do it before their names are announced because there is nothing worse than pulling somebody off and putting a

minority face back on or something. It's just "ooh."

MR. YELENOSKY: Why trigger it by a request?

CHAIRMAN SOULES: Now, this is going to extend jury selection, but Batson has to be accommodated. That's just part of law.

HONORABLE DAVID PEEPLES: You are just inviting people to make a Batson challenge.

MR. LOW: No. but if you say that the judge has got to give them the names, that's just automatically the rules inviting them to do it. This gives them a procedure that, you know, if they want to be careful, they better do it, but it's not -- I don't like Batson challenges myself.

CHAIRMAN SOULES: This is really a policy issue.

MR. LOW: Right.

CHAIRMAN SOULES: Do we wait until we see the jury in the box and have all the problems that come with that, or do we back up at some point and the lawyers know if they don't do something right then they are

going to waive it and so they are going to do it? And so we have got a policy in order to accommodate Batson and not get into the situation of the problems after the jury is in the box. We are probably going to have at least --

HONORABLE SCOTT BRISTER: It's going to be a small delay.

CHAIRMAN SOULES: -- in many cases some delay. It can be very short because if there is no evidence whenever I see the other side's strike list, it didn't take very long, but if there is, we handle it right then.

MR. LOW: Right.

CHAIRMAN SOULES: So it probably in most cases won't be a very long delay, but it's putting the burden in front of the jury getting in the box instead of dealing with the problems that come -- the different problems that come if they get in the box, and that policy was a policy that the committee recommended, and it's mischief one place or another. Where is the least mischief? And I don't mean to say that Batson -- to be trite

about Batson. Burdensome, I guess would be a better word than mischief.

Okay. If we do that to the second paragraph then I guess we don't need the word "unsworn" in the second paragraph of "Proof of Violation." It's just "statements of counsel." Any disagreement with that? Doris.

MS. LANGE: I guess I'm an oddball, but in our court both attorneys give the list to me, and I ask them do they want to either watch me put it down or check it after I have finished, and I think you do need to make sure that all the strikes have been done and give them to the clerk before they may see the other list.

CHAIRMAN SOULES: Well, that's what I said. After the parties make their peremptory challenges and present them to the court.

MS. LANGE: Right. But I do that automatically so that if I made a mistake or that they know in their own mind that this was the list.

CHAIRMAN SOULES: Okay. Well, say that then. "After the parties make their

peremptory challenges and present them to the court, upon request..."

MR. YELENOSKY: What's the rest of that sentence?

CHAIRMAN SOULES: "Upon request any party may, outside the hearing of the panel and before the jurors' names are announced, review all parties' peremptory challenges and object to another party's improperly exercised peremptory challenge."

Now going on down to the second paragraph, the proof of violation, any objection to taking out "unsworn" to start the statements?

HONORABLE SCOTT BRISTER: I'm concerned about that because I'm reading in the courts of appeals more and more that statements of counsel are just nothing.

CHAIRMAN SOULES: This makes them something.

HONORABLE SCOTT BRISTER: Well, I mean, unsworn statements, I think that's exactly right, but I'm concerned unless we say that. You know, I have gotten reversed recently on a sanctions case that I watched

the whole trial, listened to the whole evidence, warned them beforehand I was going to sanction them because it was frivolous, then sanctioned them and reversed because I didn't take testimony as to the attorney's intent. I just asked him what his intent was, but it wasn't sworn testimony and there is no evidence to support my sanctions.

CHAIRMAN SOULES: Okay. "Unsworn," in or out? Or did you have something else on that?

HONORABLE SCOTT BRISTER: Not on "unsworn."

CHAIRMAN SOULES: Okay. Let's just take a consensus on that. Leave "unsworn" in or take it out. Leave it in show by hands. Seven. Take it out? None. Seven to none it stays in.

HONORABLE SCOTT BRISTER: Same thing related to that is "may be tested by cross-examination." I was going to ask Elaine, do you have to do that? This is so unsavory.

PROFESSOR CARLSON: What do you mean? I'm sorry.

MR. McMAINS: This is straight out of the case.

HONORABLE SCOTT BRISTER: Well, that means I have to swear you in. I have to put you on the stand. I mean, if it's required, that's one thing, but if not, what's the attorney going to say, "Oh, you're right. I did it because I'm a racist." You are not going to get a thing out of this. It's just going to be acrimonious.

PROFESSOR CARLSON: Judge Brister, this is taken out of the Supreme Court case.

MR. McMAINS: It's out of the Supreme Court case. That's exactly what it says.

HONORABLE SCOTT BRISTER: You have to do it then. If you have to do it, you have to do it.

CHAIRMAN SOULES: Okay. After on the word "cross-examination" add "under oath" or not add "under oath"?

MS. SWEENEY: Do not.

MR. McMAINS: I don't think there is any reason to aggravate it. I mean,

if somebody is content with --

CHAIRMAN SOULES: Well, somebody had that idea. I'm trying to accommodate it.

MR. ORSINGER: My idea was to put "unsworn" before "cross-examination."

MR. McMAINS: I don't consider that to be very effectual cross-examination.

HONORABLE SCOTT BRISTER: Just as effectual as direct.

CHAIRMAN SOULES: To me that gets into side bar, almost, but anyway.

PROFESSOR CARLSON: Luke, let me just offer this for whatever assistance it might be. My recollection is that there is a statute in the Code of Criminal Procedure that provides that counsel shall not be placed under oath in a Batson challenge. That's my recollection. I have not looked at it in a while.

PROFESSOR DORSANEO: I think it's just for prosecutors.

PROFESSOR CARLSON: Maybe. Could be, Bill. Could be.

CHAIRMAN SOULES: Anyway, we

have got the issue pretty much in focus. Do we add or not add "under oath" under cross-examination? Not add show by hands. Eight.

HONORABLE SCOTT BRISTER: Not add "under oath"?

CHAIRMAN SOULES: Right. Eight. Add "under oath"? None. Eight to none, or one. Eight to one, not add "under oath."

MR. ORSINGER: I would like to move that we put "unsworn" before "cross-examination."

HONORABLE SCOTT BRISTER: Yeah. I think we need to state it, because doesn't cross-examination normally mean under oath?

MR. ORSINGER: Yes. It means normally under oath.

MS. SWEENEY: Well, the case is fuzzy, so the rule should be fuzzy.

PROFESSOR CARLSON: That's the way we drafted it.

MS. SWEENEY: I don't think we should be less fuzzy than the case.

CHAIRMAN SOULES: All right.

Before "cross-examination," add "unsworn" or not add "unsworn." Add "unsworn"? Two.

Not add "unsworn"? Five. Five to two don't add it.

MR. LOW: He doesn't really make statements. He's making testimony to the court, whether it's sworn or as an officer of the court. He's giving testimony. It's part of the record. Lawyers do that.

MR. McMAINS: This language is directly out of the case. The "unsworn statement of counsel" language is directly --

MR. LOW: Well, I know it is, because it says "an officer of the court" we will allow it, and you just say, "We waive the oath or something."

HONORABLE DAVID PEEPLES: This would allow a judge to require the lawyer to be sworn, don't you think?

CHAIRMAN SOULES: Sure.

HONORABLE DAVID PEEPLES: Sure.

CHAIRMAN SOULES: It says "may." Either way. Okay. And then in the last sentence of the paragraph that starts, "The trial court acts upon," you say, "A party

determined to have improperly exercised peremptory challenge forfeits that peremptory challenge." Anybody disagree with that change?

No disagreement. So that will be changed.

And in (c) we strike the first sentence and add in the second sentence the words "properly" in two places, the word "properly" in two places, before the "stricken" in two places.

MR. LOW: I hate to prolong, but if you forfeit it, it means you just lose it, but then you say, "Well, I have lost that one, but I can make another one. I mean, I have lost that one." I mean, the way they have said it here is you waive any right to any additional to take that one's place.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: No. "Forfeits that peremptory challenge" eliminates that concern, doesn't it?

MR. LOW: Well, if I forfeit that one then does it say then, okay, I am entitled to six, now I have just got five?

MS. SWEENEY: Yes.

MR. McMAINS: But you already exercised.

MR. LOW: Well, okay.

MR. McMAINS: I mean, you would never have been determined to have made an improper objection until after you had done it.

MR. LOW: I know, but what is wrong with stating what they did, that you have no right to make an additional one? Why not say it? That's what you are saying, isn't it? Why not say it?

PROFESSOR CARLSON: Uh-huh.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: What are you going to do, Buddy, if you have a judge that wants a peremptory strike as you go through it? Some of them do.

CHAIRMAN SOULES: Maybe we have too many words, but it doesn't seem to me to hurt anything. "A party determined to have a properly exercised peremptory challenge forfeits that peremptory challenge and waives any right to make any additional peremptory

challenges."

MR. LOW: Right.

CHAIRMAN SOULES: Okay. Doesn't hurt anything, does it?

HONORABLE DAVID PEEPLES: Well, but that gets us right back to if we don't want someone thinking you made one bad strike, therefore, you lose all of them.

MR. YELENOSKY: Right.

PROFESSOR CARLSON: What about "replacement"?

CHAIRMAN SOULES: "Any further peremptory challenge"?

HONORABLE DAVID PEEPLES: Does the word "replacement" help?

MR. ORSINGER: Luke, what if it's your first strike and it's a bad one? Does that mean that your other five strikes are forfeited?

CHAIRMAN SOULES: "Make a replacement peremptory challenge."

MR. ORSINGER: Okay.

CHAIRMAN SOULES: Okay. As modified --

MR. ORSINGER: Luke, can I ask

one thing? I would like to move at the end of the second paragraph of "Proof of Violation," to take "counsel" out of "voir dire notes" because you are going to have legal assistants' notes and you are going to have clients' notes, and I think they should all be considered work product.

MS. SWEENEY: Good point.

HONORABLE DAVID PEEPLES: Good.

CHAIRMAN SOULES: Where is that?

MR. ORSINGER: The last sentence of the second paragraph of "Proof of Violation."

CHAIRMAN SOULES: "Voir dire notes."

MR. ORSINGER: Just take "counsel" out.

CHAIRMAN SOULES: "Counsel or lead counsel." Any objection to that?

HONORABLE SCOTT BRISTER: Wait, wait, wait. Yeah. I mean, the jury consultant question to me is one that the courts ought to decide. I think there is a strong argument that your jury consultant, you

know, depending upon what their computer formula is, I mean, a lot of those things do end up being based on race, and you may not even know that as the attorney because, you know, they do these deals and the coefficients and all that, and it may be that it turns out that on your case race, for instance, makes a difference of .02 percent, and so they have their profiles, and they give you the scores of these folks after voir dire, and you may not even know that, but it may -- I think there is a serious question about that that you have to find out the jury consultant's formula, what race played in it, if you are going to be true to Batson.

MS. SWEENEY: How do you know there is a jury consultant? How do you know?

CHAIRMAN SOULES: Bob Gardner is sitting there.

HONORABLE SCOTT BRISTER: They have got somebody sitting there making input.

MS. SWEENEY: She's my paralegal.

HONORABLE SCOTT BRISTER: Well, if you want to cover up or hide them or

something.

MS. SWEENEY: She's part of my trial team, Judge.

HONORABLE SCOTT BRISTER: It's usually pretty obvious. Usually, actually, a lot of times they introduce them to the jury, but I'm just saying that to me that question is definitely unanswered and definitely may be a Batson problem, and with "legal counsel" you have got an easy -- you have got an easy rule already there on work product that you can say you are relying on, but jury consultant is a little tougher.

MS. SWEENEY: Well, then you get into discovering their model, their research, their focus group, and everything jury consultants get. Here comes Pandora again. I mean, once you open -- it's got to be protected by the same work product as the rest of the trial, too.

HONORABLE SCOTT BRISTER: Of course, work product is not absolute. Work product is going to yield in a moment to the Constitution is my guess. Don't you think?

CHAIRMAN SOULES: Okay.

"Counsel's," leave it in? Take it out?

MS. SWEENEY: What's that? Oh.

CHAIRMAN SOULES: The word "counsel's." Leave it in show by hands. Two.

Take it out show by hands. Seven. Seven to two take it out.

CHAIRMAN SOULES: Okay. Now, as modified by our record here today, those in favor of Rule 79 show by hands. Ten.

Those opposed? Ten to nothing it's approved.

Richard, are you going to be gone tomorrow?

MR. ORSINGER: No. I will be here.

CHAIRMAN SOULES: Good.

(Off-the-record.)

MS. SWEENEY: Mr. Chairman, before we adjourn, I am unable to be here tomorrow because I'm headed to Dallas, and I want to go on record as opposing the offer of judgment idea. I don't like the rule and I don't like the concept. I don't think this committee has discussed it enough. This committee will not have time to discuss it

tomorrow. The discussions we have had today have indicated that a huge number of the folks on this committee oppose it, and I don't know how many of those folks are going to be there tomorrow.

They are certainly not here now. There is very few folks who are able to attend the business of this committee under the present circumstances, and I think it would be very bad policy for a skeleton group, whoever it might be, to vote on something as important as offer of judgment which could then be taken as being indicative of the whole committee, which it would not be. Thank you for indulging me.

CHAIRMAN SOULES: I appreciate that, and in response I will say that this meeting has been noticed for almost a year.

MS. SWEENEY: Yes, sir.

CHAIRMAN SOULES: And those who are members of this committee should be here, and I regret that we don't have all of them here, but we will proceed on that with those who come to work.

MR. LOW: Could we argue that now?

CHAIRMAN SOULES: What?

MR. LOW: Tender of judgment.

HONORABLE SCOTT BRISTER: You don't think we can finish this afternoon?

CHAIRMAN SOULES: No. That won't get done today.

MR. LOW: Nor tomorrow either.

MR. ORSINGER: Unless we vote it down. I mean, we might just be able to take a straw vote on voting down any offer.

HONORABLE DAVID PEEPLES: With a small group like this we can get a lot done.

MR. LOW: I bet we can get pretty much direction on that issue.

MS. SWEENEY: That's a huge policy shift in the practice of this state.

MR. ORSINGER: Why don't we see how many people would vote for any version of an offer of judgment rule, because if we don't have enough to carry any version we don't need to debate which version is going to fail?

CHAIRMAN SOULES: Well, I think we ought to put the concept on the record and then after that maybe we could take a preemptive vote on whether there is any

interest in any cost-shifting or fee-shifting rule that we care to entertain. I mean, if you want to do that now, we can do that now or we can do it in the morning.

MR. LOW: I'm ready.

MS. SWEENEY: Let's do it.

CHAIRMAN SOULES: What's the concept?

MR. ORSINGER: Well, my subcommittee was assigned the responsibility of evaluating one of these, and I'm not sure that the number that we were told to evaluate, 98a, is the right one; but we have a Rule 15, 165a subcommittee on proposed offer of judgment rule; and the one we considered was submitted on January 17th, '97, over the signature of Shelby Sharpe from the Committee on Court Rules; and our subcommittee -- our full committee has voted this proposition down a number of times in the last three years; and our subcommittee has voted against it again, although there was one member of the committee that would be willing to consider a rule that shifted only costs after the offer was made and rejected.

The proposal that Shelby Sharpe's committee made shifts fees, and our subcommittee identified this, which Sharpe's supporting information said was adapted from Federal Judge Schwartzer's suggestion that was shot down at the Federal level. The subcommittee was concerned that a rule which imposes the payment of one party's attorneys' fees on the opposing party is a question of substantive law and not procedure, that it's really a matter to be reserved to the power of the legislature, which has passed fee shifting in some instances and has rejected fee shifting generally in civil litigation.

Now, the Deceptive Trade Practice there are instances in which they permit fee shifting. They are circumscribed. Those instances are circumscribed. They are not widely available. You have to have sometimes extraordinary showings.

This proposed rule, basically if they make the offer according to the procedure and you don't accept it and you roll the dice and you lose, then you pay the other side's fees. It's our view if the legislature hasn't been

willing to do this on their own and we tried to do it as a court, if the Supreme Court tried to do it, that the legislature might undo it in the next legislation with a little addendum on there saying, "Don't try to make any more rules on shifting of costs or fees."

So it has political overtones as well as constitutional overtones about whether or not this is a procedural rule or whether it's a substantive rule, and we don't believe that you can support that by the Court's inherent jurisdiction to regulate litigation, such as the Court supports sanctions. Where the litigation process is abused there is case law that says the courts have the inherent power to do that.

Now, if you bring a valid lawsuit but you just don't take an offer that you should have taken, is that the abuse of the legal process? It's not by any standard that is recognized so far, and so this doesn't appear to be supportable by the case law that supports sanctions for frivolous pleadings.

Also, this proposed Rule 70 goes beyond Rule 69, which shifts only costs. This shifts

attorneys' fees as well as costs, and there are practical differences between the way we litigate in Texas and the way that you litigate under the Federal rule that have heretofore persuaded most people to vote against adopting the Federal rule on costs alone, much less on costs and fees.

They have different pleading systems, different discovery systems. You have a more prevalent use of pretrial orders on the Federal side, more early development of the case, and then another comment is that the Rule 170, Shelby Sharpe's proposal, as written would appear to apply to family law litigation, which constitutes about half of the state court docket and none of the Federal docket. So it's not an issue they have to contend with under their Federal Rule 68, and cash demands do not fit well with property divisions, although arguably you could translate property divisions into cash demands, but certainly you couldn't turn parental rights into cash demands, except perhaps child support.

And fees in parent-child relationship are

governed by the Family Code anyway, and they can be shifted under the Family Code, and also in a divorce case, fees can be awarded as part of the property division. So for those reasons the committee voted against it, but one member of the committee, Michael Prince, who used to be an ex officio member of this committee wanted to go on record that he would support a cost-shifting rule like the Federal rule but is not supporting a fee-shifting rule at this time.

CHAIRMAN SOULES: Discussion?

HONORABLE SCOTT BRISTER: Does the rule -- the offer is made before when? When is it?

MR. ORSINGER: Well, under the proposed Shelby Sharpe rule, at any time after 60 days following the appearance of answer of the parties and not later than 120 days before the trial date they can make the offer, and then if the offer is rejected and the case doesn't pan out, you can pick up all of the costs and fees that postdate that. So if it came out as early as two months after the defendant appeared then the bulk of the

lawsuit fees could be shifted under this rule.

MR. McMAINS: How long is the offer of judgment supposed to be open?

MR. ORSINGER: Well, let's see. "An offer may state that the time period during which it remains open, which in no event shall be less than 60 days, any offer which does not state the period of time during which it remains open shall be deemed to remain open for only 60 days. The deadline for an offer to expire shall not be less than 60 days before the trial date," and then there is "Upon the motion of the offeree the court can for good cause extend the time in which the offer remains open."

There is a lot to this. We have all seen this before, so I didn't copy it to hand it out again because it's already been shot down, but for some reason this is back on the agenda again, and if you would like to read it, I have one copy. We can share it here.

HONORABLE SCOTT BRISTER: I guess my -- in this instance, unlike other instances, I would be finding reasonable and necessary fees rather than the jury.

MR. ORSINGER: I don't think it speaks to whether it's a jury question.

HONORABLE SCOTT BRISTER: It couldn't be, because you couldn't tell the jury there had been a settlement offer.

MR. ORSINGER: No, but you could try the issue of what reasonable fees are to a jury.

HONORABLE SCOTT BRISTER: In the second trial?

MR. ORSINGER: Well, in the only trial if this -- well, no, you're right.

MS. SWEENEY: Then you would end up trying it in every case.

MR. ORSINGER: You would have to have a bifurcated trial, I guess, wouldn't you, after the first verdict comes back?

HONORABLE SCOTT BRISTER: Which raises the question I just asked. Why is it the Feds don't ever try these to a jury, but we always do?

MR. ORSINGER: Well, first of all, the Fed rule only applies to court costs and not attorneys' fees.

HONORABLE SCOTT BRISTER: I

know, but I don't think they ever try attorneys' fees to the jury, do they?

MR. ORSINGER: No. I don't understand why.

MR. LOW: Most of the Federal courts have a local rule they offer, that tenders of judgment, and it does apply to attorneys' fees. I don't like it. Don't get me wrong. I shouldn't have even mentioned it, but they do. So it's not just -- the Federal rule itself doesn't, but the local rules, the Federal judges have put that in most of the local rules.

CHAIRMAN SOULES: I think the answer to Judge Brister's question is fear.

HONORABLE SCOTT BRISTER: Oh, it's just intimidation?

CHAIRMAN SOULES: Yeah. The local rules say you are going to try your attorneys' fees to the court after the jury verdict comes in, and you don't go say, "That's unconstitutional. That's a fact issue. I'm constitutionally entitled to have that issue tried to my jury," because you just don't do it.

MR. ORSINGER: Because you won't get fees even if you win.

MR. McMAINS: You won't even get your verdict.

HONORABLE SCOTT BRISTER: I have never understood why people wanted a jury on attorneys' fees. I have never seen a jury that awarded anywhere close to a hundred percent. They always -- more often than not they award zero. Then you have to redo it all over again.

MR. ORSINGER: I will tell you this, that in family law litigation if you have a jury in the box, we almost always try fees to the jury, and I'm not sure I can tell you why, but you know, you are thinking you are going to win that jury verdict and that you are going to get treated better by the jury than the judge would treat you, is probably the reason why, but in most instances if you have a jury in the box anyway in a family law case, you are going to go ahead and submit, because in Texas I think you may even have a constitutional right to it.

CHAIRMAN SOULES: You do.

MR. McMAINS: Yes.

MR. ORSINGER: Or in Texas you do have a constitutional right to it.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: I know I have spoken to this issue before in the committee. The problem with any kind of a fee-shifting notion based on who loses, you know, whatever kind of offer it is, although this is obviously only one-sided. This doesn't purport to say that if the person offers a paltry sum, that -- and they get hit for 20 times that, that there is anything that happens to them that wouldn't happen to them otherwise. I guess based on the notion that that's penalty enough, the fact that they were wrong.

The fact of the matter is that the English have been studying the problems with their loser pay rules for 30 years. They have been recommending changes over there for the last ten years, and the reason is because it has increased significantly the expense of litigation. One of the things that happens is if you threaten to go to court because of the

notion of law-shifting then what happens is the one party that is richer than the other can easily say, "You'd better be right in terms of litigating with me, because otherwise it's going to cost you three times what your attorneys' fees are going to cost you, because that's how much I can incur as a result of it. I can run that much up."

It is an intimidation factor that is acknowledged in the British system and is a flaw and a problem and is why that basically if you do not have an amount in controversy in the 50,000 pounds or more range, it is absolutely impossible to make any sense at all to participating in the litigation process over there. You have basically closed the courthouse.

When you get -- what small businessman can sue IBM or somebody else and the first thing that they have out of their hat is, "We are going to offer you some money. Otherwise, we are probably going to beat you, but in the meantime, we are going to -- if you do not accept our proposal with regards to whatever it is we want to do in regards to this

litigation then what we are going to do is to run up $10 million worth of fees, and that will put you out of business, and it doesn't matter. You know, you had best just better be right because if you are wrong, you are history, and you are out of business."

That type of coercion is what is at stake here and is what is intended. It is bad policy. It's bad where it's being used, and it's criticized locally in England by the English barristers themselves, and the idea that we throw that out as some ideal is absolutely absurd.

CHAIRMAN SOULES: Okay. Let's get a show of hands. Those who favor having some sort of expense-shifting rule, whether it's costs, fees, or whatever, as a result of an offer of judgment.

MS. SWEENEY: Is it true, Mr. Chairman, that we have already voted this?

Richard, did I hear you say that we voted that same question --

MR. ORSINGER: I believe this is the third time, at least, we have voted down Federal Rule 68, but I could be wrong.

Of course, over the years you've probably voted it down a dozen times.

CHAIRMAN SOULES: Those who favor that show by hands.

HONORABLE DAVID PEEPLES: Something.

CHAIRMAN SOULES: Something. Four.

Those who do not favor that show by hands. Eight. Eight to two or three? Eight to three the committee does not favor expense shifting.

I will see you -- you want to make it 8:30 tomorrow rather than 8:00? What do you want to do? 8:30?

MR. McMAINS: Yes.

CHAIRMAN SOULES: All right. 8:30.

(At this time the proceedings were adjourned until the following day, as reflected in the next volume.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

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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 September 19, 1997, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $1,346.00.

CHARGED TO: Luther H. Soules, III.

Given under my hand and seal of office on this the 1st day of October, 1997.

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