ORIGINAL

SUPREME COURT ADVISORY BOARD MEETING

Held at 1414 Colorado
Austin, Texas 78701

Volume I of II

Taken on ~~October 31~~ November 1, 1985

By Mary Ann Vorwerk

AFFILIATED REPORTERS
Computer Aided Transcription
805 West 10th, Suite 301 · Austin, Texas 78701
(512) 478-2752

SUPREME COURT ADVISORY BOARD MEETING
Held at 1414 Colorado,
Austin, TExas 78701
November 1, 1985

APPEARANCES:

HONORABLE LUTHER H. SOULES, III, Chairman Supreme Court Advisory Committee, Soules & Cliffe, 800 Milam Building, San Antonio, Texas 78205

MR. GILBERT T. ADAMS, JR., Law Offices of Gilbert T. Adams, 1855 Calder Avenue, Beaumont, Texas 77701

MR. PAT BEARD, Beard & Kultgen, P.O. Box 529, Waco, Texas 76702-2117

MR. DAVID J. BECK, Law Offices of Fulbright & Jaworski, 800 Bank of Southwest Building, Houston, Texas 77002

PROFESSOR NEWELL BLAKELY, University of Houston Law Center, 4800 Calhoun Road, Houston, Texas 77004

MR. FRANK L. BRANSON, Law Offices of Frank L. Branson, P.C., 2178 Plaza of the Americas, North Tower, Dallas, Texas 75201-2871

HONORABLE HUME COFER, District Judge, 98th District Court, Travis County Court House, Austin, Texas

PROFESSOR WILLIAM V. DORSANEO, III, Southern Methodist University, Dallas, Texas 75275

CHIEF JUSTICE JOHN HILL, Chief Justice of the Supreme Court of Texas, Capitol Station, Austin, Texas 78711

MR. FRANKLIN JONES, JR., Jones, Jones, Baldwin, Curry & Roth, Inc., P.O. Drawer 1249, Marshall, Texas 75670

MR. RAY JUDICE, Administrative Director, Office of Court Administration, 1414 Colorado, Suite 602, Austin, Texas 78701

MR. GILBERT I. LOW, Orgain, Bell & Tucker, Beaumont Savings Building, Beaumont, Texas 77701

MR. STEVE McCONNICO, Scott, Douglass & Keeton, 12th Floor, First City Bank Building, Austin, Texas 78701-2494

MR. RUSSELL McMAINS, Edwards, McMains & Constant, P.O. Drawer 480, Corpus Christi, Texas 78403

MR. CHARLES MORRIS, Morris, Craven & Sulak, 1010 Brown Building, Austin, Texas 78701

MR. JOHN M. O'QUINN, O'Quinn, Hagans & Wettman, 3200 Texas Commerce Tower, Houston, Texas 77002

MR. TOM L. RAGLAND, Clark, Gorin, Ragland & Mangrum, P.O. Box 239, Waco, Texas 76703

MR. HARRY M. REASONER, Vinson & Elkins, 3000 1st City Tower, Houston, Texas 77002-6760

MR. SAM D. SPARKS, Webb, Stokes & Sparks, P.O. Box 1271, San Angelo, Texas 76902

MR. SAM SPARKS, Grambling, Mounce, Sims, Galatzan & Harris, P.O. Drawer 1977, El Paso, Texas 79950

MR. BROADUS A. SPIVEY, Spivey & Grigg, P.C., P.O. Box 2011, Austin, Texas 78768

MR. HARRY TINDALL, Tindall & Foster, 2801 Texas Commerce Tower, Houston, Texas 77002

HONORABLE BERT H. TUNKS, Abraham, Watkins, Nichols, Ballard Alstead & Friend, 800 Commerce Street, Houston, Texas 78284

PROFESSOR ORVILLE C. WALKER, St. Mary's University School of Law, One Camino Santa Maria, San Antonio, Texas 78284

HONORABLE JAMES P. WALLACE, Justice, The Supreme Court of Texas, Box 12248, Capitol Station, Austin, Texas 78711

MR. L.N.D. WELLS, JR., Mullinax, Wells, Mauzy & Baab, Inc., P.O. Box 47972, Dallas, Texas 75247

HONORABLE ALLEN WOOD, Wood & Burney, P.O. Box 2487, Corpus Christi, Texas 78403

ALSO PRESENT:
Clifford Brown
Honorable Clinton

SUPREME COURT ADVISORY COMMITTEE

INDEX TO TRANSCRIPT OF PROCEEDINGS

VOLUME 1: NOVEMBER 1, 1985

Subject	Page Number(s)
TRCE 103(a)(2)	178 - 205
TRCE 509, 510, 601, 610-614, 801, 803, 902, 1007	15 - 21
TRCE 801(e)(3)	17-18; 38 - 65
TRCE 804(b)(1)	17-18; 38-65
TRCE 1001	49
TRCE 1003	49
TRCP 11	65 - 66
TRCP 18a	66 - 79
TRCP 27a, b, c	79 - 92
TRCP 30a	170 - 175
TRCP 42(b)	178 - 205
TRCP 45(e)	92 - 98
TRCP 46	98
TRCP 47	98 - 103
TRCP 57a	103 - 104
TRCP 85	207 - 215
TRCP 85a	104 - 105
TRCP 87	107 - 155
TRCP 92	155 - 156
TRCP 205-206	47 - 49
TRCP 207	17 - 65
TRCP 277	215 - 292
TRCP 279	215 - 292

TRCP 354	169 - 175
TRCP 355	169 - 175
TRCP 364a	176 - 178
TRCP 373	178 - 205
TRCP 380	169 - 175

I N D E X

SUPREME COURT ADVISORY BOARD MEETING

ITEM	PAGE	LINE
October 31st Meeting convened at 10:00 o'clock		
Motion that the May 31, 1985 minutes be approved	5	16
Voted approved	5	22
Introductory speech by Chief Justice Hill	11	4
Motion to endorse the action of the Committee May 31 in rejecting 2 and approving 9 of the changes in the Rules of Evidence	16	13
Approved unanimously	17	15
Motion for approval of Alternative No. 1	19	15
Motion to approve changes to Rule 207 as written subject to getting a better statement of it later	37	10
Motion to table discussion on Rule 207 till after lunch for drafting purposes	38	1
Motion to approve change to Rule 207	56	25
Unanimous approval of Alternative No. 1 as Mr. Reasoner read on Page 58 and to recommend changes to the Supreme Court in Rules of Civil Procedure 207 and Rules of Evidence 801 and 804	60	2
Motion to approve Rule 11	66	10
Vote for approval carries	66	16
Motion that changes to Rule 18a not be approved	74	12
Voted 21 to 2 to reject changes to Rule 18a	78	9

I N D E X CONT.

ITEM	PAGE	LINE
Motion to table 27a until the Supreme Court has had a chance to complete its study	86	23
Vote to defer it to the task force	92	16
Motion to adopt 45(e)	96	1
Voted 11 to 3 to adopt 45(e)	98	5
Motion to not accept Rule 46	98	16
Unanimous rejection of Rule 46	98	22
Motion to reject Option One and Option Two of Rule 47	100	12
Unanimous rejection of Option One	103	13
Unanimous rejection of Option Two	103	16
Motion to reject proposed Rule 57a	104	5
Unanimous rejection of proposed Rule 57a	104	20
Motion to reject the adoption of Federal Rule 12	104	23
Unanimous rejection of adoption of Federal Rule 12	105	21
Motion to move the adoption of COAJ proposal for amending Paragraph 5 of Rule 87	141	6
Motion to table on Rule 87	153	1
Motion to adopt Rule 92	156	1
Speech by Clifford Brown	157	8
Speech by Judge Hume Cofer	159	9
Motion for adoption of COAJ recommendations to Rule 355	171	12
Passed unanimously	175	3
Move to not accept Rule 364(a)	176	4
Move to withdraw motion	177	24

I N D E X CONT.

ITEM	PAGE	LINE
Motion to take the phrase in Rule 364(a) "or was apparent from the context within which questions were asked" out and take the first sentence of Rule 42(b) out	190	24
Mr. Sparks restates motion	201	23
Vote on above motion; 8 for, 9 opposed	204	17
Voted in favor of consensus to go with Mr. McMains' proposition on Rule 85	215	6
Move to approve 5 basic changes submitted by Mr. Jones' committee	221	2
Vote on should the Court have the power to instruct the jury on the effect of the jury's answers; 13 for, 7 opposed	246	13
Vote of how many feel that the judge should have the mandatory duty to instruct the jury on the effect of its answers; 7 for, 10 against	262	15
Vote on should the trial court have the discretion to predicate the damage issue on affirmative findings of liability in a proper case; 18 for, 1 against	266	12
Move the subcommittee be directed to draft a rule that would follow existing federal rules on the effect of your answer as opposed to a rule that would be different	266	20
Rephrase motion. Move that the subcommittee should be charged to use the federal rules as a basis	280	6
Vote on that; 15 for, 5 opposed	283	10
Date for next meeting set on March 7 and morning of March 8	297	23

I N D E X CONT.

ITEM	PAGE	LINE
November 1 meeting convened at 9:30 a.m.	298	2
Move the adoption of the language in proposed Rule 32 for inclusion in the whole package as proposed Rule 32 or as a replacement of current Rule 385	302	13
Unanimously approved	302	20
Consensus whether the rules on damages for delays be essentially left as it is with a 10 percent cap and then speak to the problem of how to handle the judgment other than the liquidated amount	323	24
Vote pretty much even	324	4
Vote on how many feel that the present rules should be retained at 10 percent; 7	326	14
Vote on how many feel that just damages should be written into the rules as opposed to a percentage limitation; 5	326	16
Vote on how many feel there should be some percentage other than 10; 1	326	18
Vote on how many feel that a multiple of costs is an appropriate remedy for a case where there is not a liquidated judgment; 10	326	21
Vote on how many feel that the dual standards in the damages for delay rules should be retained; 9	331	23
Vote on how many feel that the proposed Rule 84 standard should be used instead; 4	331	25

I N D E X CONT.

ITEM	PAGE	LINE
Vote on how many feel that the Court should be permitted to just assess just damages in non-money damages; 6	335	5
Vote on how many feel that the answer is "some multiple of costs"; 9	335	7
Vote on how many feel that bite the lawyer is the answer; 1	335	22
Vote on how many understand that we're talking about all the costs of the case and all taxable costs; unanimous	337	11
Vote on how many feel that not to exceed 10 times is the appropriate multiple; 10	338	9
Vote on how many feel that there should be no ceiling on the multiple; 1	338	14
Move that the determination that an appeal is for delay only and not sufficient cause be made on the basis of the appellant's brief	341	21
Vote on how many feel that in the last sentence in proposed Rule 84 that "authorizing" should be changed to "requiring"; 6		
Vote on how many feel that "authorizing" should be left in; 3	342	24
Vote on how many feel it should say "that it shall not authorize the Appellate Court to reverse on allegations of error"; 14 for, 1 opposed	345	24
Revote; 14 for, 3 opposed	346	18

I N D E X CONT.

ITEM	PAGE	LINE
Vote on how many are in favor of proposed Rule 84 being redrafted and adopted by the Supreme Court as Professor Dorsaneo described; 11 for, 1 opposed	348	4
Move for adoption of suggested change to current Rule 440 and proposed Rule 85(b)	349	15
Vote on how many feel that the change to go to an abuse of discretion standard should be made; 8	357	25
Vote on how many feel that change should not be made; 4	358	1
Vote on how many are in favor of including a voluntary remittur paragraph; 10 for, none opposed	364	4
Vote on how many feel that there should be some overruling by a passage of time with regard to motion for rehearing in Court of Appeals; 1	369	1
Vote on how many feel there should not be such an overruling; 9	369	2
Speech by Judge Clinton	395	12
Vote on how many feel that the awkwardness of the "Monday next" language should be removed from Rule 101 and should be a specific number of days; 2	407	5
Vote on how many feel that it ought to be left as is; 6	407	9
Vote on how many feel that we should omit a reference to an attorney; 4	409	8

I N D E X CONT.

ITEM	PAGE	LINE
Recommend to change the word "may" to "shall if requested" in Rule 103	412	7
Vote unanimous for change	412	10
Vote on how many favor the change to allow the Court more latitude in using professional process servers in Rule 106	413	22
Vote unanimously for	413	25
Vote on how many feel that a condition of dismissal or non-suit should be the actual payment of costs; no one	418	16
Vote on how many feel that the clerk should be directed by a rule to automatically tax costs against the dismissing party at the time of the dismissal;		
Vote animously in favor	418	21
Motion to approve Rule 166C	427	25
Vote unanimously for	430	19
Motion to accept 204(4)	437	21
Move to adopt the first 204 by Mr. Haworth	438	10
Motion that changes to Rule 204 be made	445	9
Unanimously recommended	445	15
Move to reject the rule that says "Stipulation Regarding Discovery Proceedings"	448	6
Move to adopt 166-A	450	16
Move to reject Rule 166-A	451	8
Recommend change in Rule 166b	451	14
Unanimously approved	451	18

I N D E X CONT.

ITEM	PAGE	LINE
Move to reject Rule 200(2)(a)	452	20
Vote to reject Rule 200(2)(a)	453	2
Move to adopt Rule 215(a)	452	20
Move to reject Rule 215(a)	456	3
Vote on how many feel the first sentence of Rule 215(a) should be incorporated into the rule	462	6
Unanimously recommended	462	9
With regard to the second sentence in Rule 215(a)	462	10
Vote 3 for, 5 opposed	462	14
Move to adopt Rule 208	464	15
Vote 5 for, 1 opposed	466	24
Motion to adopt changes to Rule 207	475	9
Unanimous recommendation	475	15
207 has not been approved by the Committee	486	20
Adjournment	487	12

CHAIRMAN SOULES: We'll call the meeting to order. It's 10:00 o'clock. We're in session. I'm very pleased that as many of you are here as we see. It's a good attendance. We may have some others coming in. The weather may have delayed some in arriving.

I had a call yesterday, this is for your information, from Hadley Edgar. His mother has had, apparently, a stroke and is not expected to survive even the weekend, so you may want to drop him a line. He, of course, in view of that, can't be here today.

Justice Wallace, welcome and thank you for being here, sir. Do you have any remarks?

JUSTICE WALLACE: No, nothing. Just appreciate all the work these subcommittees have been doing and all this committee is doing.

CHAIRMAN SOULES: Justice Wallace told me that Pat Beard will be here this afternoon; had some emergency over in Bryan. I guess they called him over to help get ready for the SMU game. That certainly is an emergency problem, for those of us with loyalties on the other side.

Dorsaneo, don't speak.

I circulated Minutes of the last meeting, of

the May 31 meeting, and Newell -- of course, most action that was taken of any final nature had to do with the Rules of Evidence. Newell sent me some suggestions for amendments, which I've incorporated.

Did anyone else have any changes or additions to the Minutes that were circulated of our May 31 meeting?

Chief Justice Hill, welcome to you, sir.

CHIEF JUSTICE HILL: How is everybody this morning?

CHAIRMAN SOULES: Fine, thank you.

Is there a motion, then, that the Minutes be approved as written and circulated with the changes that Newell suggested and now are incorporated?

MR. JONES: I so move.

CHAIRMAN SOULES: Franklin Jones so moves. Second?

MR. LOW: Second.

CHAIRMAN SOULES: All in favor? Opposed? Okay. The Minutes of the May 31 meeting then are approved. In those Minutes there is an item where I was to apply --

Chief Justice Hill, let me recognize you, sir, for any comments that you may have at this

point in time.

CHIEF JUSTICE HILL: I don't have anything. Thank you. I want to try to work with you today as much as I can. And I know you've got a real full agenda. We just always want to let you know that we appreciate you, and we know that this is an extremely important committee for our court and for the people in this state, and we appreciate all that you do.

I have seen these reports. I've challenged Judge Wallace when we visited earlier about it. I thought there might be more in there than I really cared to know today, but it is -- represents an awful lot of work and, of course, it's important work and I know that y'all have got your day pretty full. So I won't transgress on your time. I'm going to be here as much as I can in and out from the courts during the day to be available for any help and assistance that I could give to you.

But I mainly just want to thank you for the work you did. I particularly thank Luke. And I just want to encourage all of you who have maybe not been able because of your own schedules to do as much as you want to do. I know all of you want to make a contribution on this committee and you

desire to help and pitch in and do your part. Sometimes some are able to do more than others in a given year because of the way things break for them that year in their practice. But if you haven't had a chance to really get in and do your full share, well, try to do so because we need everybody pulling on this team. We've got so many things coming at us right now and we're going to be getting into this Court Administration Act pretty hot and heavy here pretty soon and we're going to need a lot of you on that.

So, don't -- I know you got so much talent on this committee that sometimes it's easy when you've got a Dorsaneo sitting there and say, you know, "You go on and do it," or Newell Blakely, "You go on and do it." But, you know, we just all need to know that there's plenty of work there for everybody. And when you're on these subcommittees, well, try to pull your fair share of the load.

Thank you a lot for letting me be over here and I do appreciate what you're doing and hope everything goes well.

CHAIRMAN SOULES: Thank you for coming to see us. We certainly appreciate your being here to help us get our work done, you and Justice Wallace.

We'll proceed accordingly.

I have -- there is an item in the Minutes that -- where I received a directive to apply to the Texas Bar Foundation, which I did by making application to David Beck and his group for financial support for this committee. I asked for $25,000.00 which was broken out in terms of travel expenses and support expenses such as the expense of printing and distributing the materials in advance of meetings and the keeping of the court reporter's transcript so that the exact proceedings of this committee can be referred to later in the event of any research pertaining to rules or other matters that we address. That really hasn't been done before, that I know of, on the committee. There have been recordings, as I understand it, of most of the proceedings, but not a written record.

It was -- and I was in trial on the Friday that the Foundation met and in that regard did not provide the representation that this committee was entitled to before the Foundation. And part of the reason, I think, that we were turned down, which was the action taken, may have been due to my absence. Another part of it was simply that the Bar Foundation has limited funds for distribution

and had already committed a sizable amount of those funds to the work of the Supreme Court in a different area.

There was feeling that the service on this committee was one of high honor and distinction and the out-of-pocket costs to each of us for travel should be something we would be willing to bear as a -- in support of the work of this committee, and I certainly don't disagree with that. Many of us have been doing that for sometime.

Finally, David and I have talked about the just dollar expense of the transcript of the proceedings and cost of printing and distribution of materials, and he has suggested that a reapplication be made and that I again make the effort to attend, and hopefully won't have a trial conflict on the next occasion, to get a smaller amount of money just to pay those direct expenses. And if it's your pleasure, I will go ahead and make that application for, I guess, something in the neighborhood of $5,000.00 to $8,000.00 to cover the cost, which up to now I've borne. And it's no problem, but it runs about, to date, somewhere in the range of about $3,000.00.

So unless I hear somebody object, I'll ask

the Foundation to support the dollars that go into the transcript and the cost of preparing materials and distributing them to try to get enough money there to take us through the year and reimburse us for what we've got in the first two meetings. No objection, I'll make that effort.

I believe the -- let's see. Judge Casseb -- I also heard from Judge Casseb. He will not be able to attend today. He's got the first report on the agenda. I don't know what color of bean he drew, but he -- some of you may know that Judge Ferris in Houston, distinguished district judge of long service there, is terminally ill with cancer and not able to continue, at least now, the trial of the Pennzoil versus Texaco case. Judge Casseb has been assigned through the administrative judges' system to take that case to final judgment unless by some fine stroke Judge Ferris becomes able to resume his bench. So, Judge Casseb is in trial today in Houston in that case -- I believe the next item on the agenda -- and will not be able to make a report.

Is there anyone who may want to give us any progress report on the work of Judge Casseb's committee dealing with House Bill 1658, the Court

Administration Bill? I think he's about the only one that could really update us.

Judge, do you want to speak to that?

CHIEF JUSTICE HILL: Well, only that the -- we will be circulating -- Judge Wallace and his committee will be coming in on the 16th, and the working draft of the rules will be sent out to that committee. Some of you are on that committee. And be prepared to work on them and try to get something out to the bar and to the judges for their comment and circulation. That's the road map that we're on in the hopes of -- I like what I've seen so far and I think we're making some real progress and if everybody --

I just ask you to do two things. I ask people to be patient and not anticipate what's going to be in these rules. They just cause themselves a lot of consternation and a lot of trouble and a lot of agitation which may not be necessary. Let's wait and see what we really have when it comes out. No one is going to just edict it overnight. It will be sent out and there will be plenty of time for people to digest it and to have comment and input into the process. That's number one.

I ask you to get that word around and I think when they see these rules, that they're going to realize that they are headed in the right direction and for the right goals and that we're trying to meet in a reasonable way the -- really the mandate that we have from the Legislature to get this job done. That's the second thing that needs to be stressed.

We're not writing on a clean sheet of paper. We have a statute that's been passed that says that this is what the Legislature wants us to do. Of course, how we go about it, we've got flexability. But whether we go about it, I don't see that we have any flexability unless we just want to have a confrontation with a branch of government that I don't think would be good for anybody. So, that's the two things that I want to make clear.

And then the third thing is about those that are serving on the task force. Try to help us convey the message of how that task force was made up. It was made of volunteers from this committee. If you're not on that task force, those of you here who might want to be on it, if you'll remember we asked -- came right here in this same room -- and asked for volunteers. And those that are on the

committee from this committee or on that task force from this committee were those that volunteered.

Now, there have been some others that have later been appointed, but again we weren't writing on a clean sheet of paper when it came time to put this task force together. We had volunteers from this committee. We had volunteers from the Administration of Justice Committee who were acquired the same way. We went before them, I did, and said -- Judge Wallace did -- "Come on and help work on this." You don't ask people to volunteer for something and then when it gets to be a popular notion, ask those people to step aside. That's not the way things are suppose to be done. And so, this isn't a popularity contest for this task force. We're just trying to get a job done with people that are willing to work on it. Now the other part of the committee was put together by the presiding judges in the same way.

Now, we have gone back because of some criticism of not being a balanced committee and we've tried to include others. We have some of the GADC lawyers. We have some Foundation lawyers, and I think we could fairly say that we've done our best to see that this committee is a fair and

balanced committee. I just choose to believe that anybody that's working on these problems have the best interests of the bar at heart, the best interest of the public at heart, and that's all we're trying to do. And I think when these rules come out, that people are going to be pretty pleased with them. And to the extent that they can be improved, well, that will be what the process will be about.

And that's generally where we are, and I look to Judge Wallace, whose leadership, I think, is just the absolute best, to get this job done.

CHAIRMAN SOULES: I see that Ray Judice has joined us.

And welcome here, we appreciate your coming today, Ray. And that reminds me. I may have omitted to send you an announcement that we're going to have a reception this afternoon at 5:30 for this committee and several members of the various courts and we would enjoy having you there, too. I think I've omitted to send that to you, and my apologies.

I think you all probably got in your materials the statement that we will have a reception this afternoon at 5:30, just across the

building here, as we did last time. Our guests will be the members and staff of the Supreme Court of Texas, the members of the Court of Criminal Appeals, the members of the Austin Court of Appeals and the district judges of Austin and some others that we put on the guest list. But all of those people have been invited. I don't know how many of them will come, but that's at 5:30 across the way in this same building.

I believe that brings us, Newell, to your report, if you're ready to go forward with that.

I do have some extra sets of the materials that were mailed in case someone was unable to bring theirs. Is there anyone that needs a set of the materials? Okay.

MR. BLAKELY: Mr. Chairman, this is a small handout entitled Report on Standing Subcommittee on Rules of Evidence. Behind the first cover letter are nine pages numbered 1 through 9. In those nine pages are 11 proposed changes in the Rules of Evidence. All of those proposals were considered at our May 31 meeting. We discussed them. We voted on them tentatively. We rejected 2 of the 11. We approved 9 of the 11 with a couple of small amendments.

The only thing that has occurred since the May 31 meeting is that they have now been put in the form that Luther wanted them in for presentation to the court. And the comment on each one has been changed up a little bit so that it now represents a communication from this committee to the Supreme Court.

At the head of each one of these I have indicated whether we approved it or disapproved it May 31. So it seems to me they're now in shape for final action by this committee. And subject to the desire of the committee to take them up one by one in some fashion, I move generally that we endorse the action of the committee May 31 in rejecting the 2 and in approving the 9.

MR. REASONER: Second.

CHAIRMAN SOULES: Because the Supreme Court wants as much comment as this -- any one of the members of this committee feels should be made on any rules changed for the court's guidance even though the motion has been made and seconded to approve these as a total package, the chair would entertain any comments that anyone has either as to the rules individually or to the group of rules. They were thoroughly discussed on May the 31st, but

if anyone has any additional comment to make, to spread on the record at this time, I would like to hear it.

All right. The motion has been made and seconded then to recommend to the Supreme Court of Texas -- for this committee to recommend to the Supreme Court of Texas that the Report on the Standing Subcommittee on Rules of Evidence chaired by Professor Newell Blakely be approved as written and that the recommendation contained therein be adopted by the Supreme Court as changes to the Texas Rules of Evidence.

It's been made and seconded. All in favor, please say aye. Any opposed? Okay. The action is unanimous that the report be approved and that the recommendation is so made.

PROFESSOR BLAKELY: Luther, I haven't quite finished.

CHAIRMAN SOULES: I'm sorry. Okay.

PROFESSOR BLAKELY: Behind the second cover letter dated September 30th are recommended changes on two Rules of Evidence and Rule 207 of the Rules of Civil Procedure. At the May 31 meeting these two proposed -- there were two proposed changes on the Rules of Evidence,

801(e)(3) and 804(b)(1). All this relates to depositions. The committee discussed it and referred it for further study. And I sent out a proposal for change on those two Evidence Rules and on Civil Procedure 207 to the Evidence Subcommittee, and I got Sam Sparks' permission to send out to his committee -- subcommittee -- this proposal. The reaction -- and this is Alternative No. 1 that I have set up back there. The reaction was from 12 addressees silence on part 10, which of course the chairman interpreted as overwhelming and enthusiastic support for the proposal.

Mr. L. N. D. Wells, Jr. said he understood that we had approved the State Bar proposal at the meeting and that there was no need for any further study. And so, I included that as Alternative No. 2, back here, which would just contain two changes in the Evidence Rules.

John O'Quinn reacted, suggesting a minor matter, and I, in essence, have incorporated that.

I must say that I personally am in favor of Alternative No. 1, which makes clear by this language, these language changes in 207, that if the deposition is taken in the same proceeding, we're offering it in the same proceeding in which

it was taken, that the unavailability of the deponent is not required as a condition for admissibility and that this wide open admission of depositions taken in the same proceeding. And this rewording that's suggested in Rule 207 also makes clear, I think, the broader meaning of "same proceeding," clarifies the meaning of "same proceeding." And if it was not taken in the same proceeding, then it would require unavailability of the deponent. It would have to come in under Rule 804 of the Rules of Evidence.

So, I think this represents a report of our subcommittee and maybe to some extent Sam Sparks' subcommittee. And so, it's an open question, and I guess procedurally I'll just move approval of Alternative No. 1 on pages 1, 2 and 3 behind the second cover letter.

CHAIRMAN SOULES: All right. Let me -- I'll receive that motion.

I want to be sure the record is clear on our last action. The last action to vote pertained to Texas Rules of Evidence 509, 510, 601, 610, 611, 612, 613, 614, 801 and 803 and 902. Let's see -- and 1007.

Is that correct, Newell? That list of rules --

PROFESSOR BLAKELY: I have to say you caught me by surprise. I was late catching up with you.

CHAIRMAN SOULES: Would you then state for the record the numbers of rules that were covered by our last affirmative vote so that we get those segregated from the matter that's now on the table, please, sir?

PROFESSOR BLAKELY: Oh, all right. Well, we're beginning back behind the first cover letter, and we have now approved Rule -- a change in Rule 509, Rules of Evidence 509(d)(4). On page 2, 509(d)(5). Beginning at the bottom of page 2, 510(d)(5). On page 3, Rule 601(a)(2). On page 4, 610, which also results in a change in numbering of 611 -- well, how shall I state this? It inserts a new 610 and bumps up then 610 to 611, 611 to 612, 612 to 613 and 613 to 614.

On page 5, 610, Rule 610(c), we rejected the change in 611(2). We rejected, at the bottom of page 6 and top of 7 -- we rejected Rule -- the change in 801(e)(1). We approved, at the bottom of page 7, Rule 803(6). Continuing at the top of 8. We approved the change in Rule 902(d), affidavit. Let's see, that's the Notary Jurat, yes. We

changed the Notary Jurat in Rule 902(10)(b). And then beginning at the bottom of page 8 we approved the change in Rule 1007, 1-0-0-7. And that's the end of that motion then.

CHAIRMAN SOULES: Okay. And the chair acknowledges that those were -- those rules were the subject of our last affirmative vote.

We are now on the second part of the subcommittee's report. There's been a motion made by Professor Blakley that we approve the Alternative No. 1 contained in that report. Is there a second? And then I'll entertain discussion.

MR. O'QUINN: I would like to second.

CHAIRMAN SOULES: All right. John O'Quinn seconds. And we're now open for discussion from anyone.

Bill Dorsaneo.

PROFESSOR DORSANEO: I would like to speak in support of the proposal. I think that Professor Blakely's draft harmonizes the Rules of Evidence with the Rules of Procedure and that the modification to Texas Rule of Civil Procedure 207 is a very good modification consistent with prior practice and our prior understanding of the use of

depositions being restricted to the same proceeding.

I would make an additional comment. I note in the second packet the "Report on Standing Committee on Pretrial and Discovery Rules," that there is an additional proposal from Dean Barrow concerning what is Paragraph B of proposed Rule 207, the subject matter of the subcommittee report chaired by Professor Blakley. And it seems to me that the suggestion made by Dean Barrow, which is toward the end, is a good suggestion as well. I do not know whether a substitute motion or something like that would be the appropriate mechanism, but I'd suggest that we take up both recommendations together at this time rather than coming back to it.

CHAIRMAN SOULES: Sam, does that satisfy you, Sam Sparks?

MR. SPARKS: Sure, take them all up.

CHAIRMAN SOULES: Okay. Show us again where that is in Sparks' report.

PROFESSOR DORSANEO: It's not numbered, but it's about two-thirds of the way through. And --

MR. WELLS: Which volume?

CHAIRMAN SOULES: It would be the one

that's entitled "Report on Standing Subcommittee on Pretrial and Discovery Rules."

PROFESSOR DORSANEO: It's Rule 207 at the top of the page, and you can find it that way, by paging forward to Rule 207.

MR. SPARKS: It's the eighth page from the back.

PROFESSOR DORSANEO: Of your report, but there are additional pages.

MR. SPARKS: Oh, yeah, that's right.

PROFESSOR BLAKELY: Bill, I haven't found it yet, but I saw it and I do not recall that it would be inconsistent.

PROFESSOR DORSANEO: Well, I can read it because the changes are minimal. In paragraph (b) of Alternative No. 1 there is one suggested change from the current language which is indicated, the removal of the language "and duly filed." That is consistent with current practice in that in many circumstances depositions are not filed. But the paragraph (1)(b) proposal requires that the suit brought in another court, in a different jurisdiction, be dismissed before the deposition lawfully taken in that former suit may be used in the suit in question.

Dean Barrow's proposal, if you haven't found it yet, is a broadening of that idea. And it simply says, "when suit has been brought in a court of the United States or of this or any other state and another action involving the same subject matter is brought between the same parties ...or successors in interest, all depositions lawfully taken [and duly filed] in the former suit may be used in the latter..."

So, in lieu of imposing a requirement that the first suit be dismissed, the permission to use the deposition in another suit is broadened to other suits involving the same subject matter, the same parties or their successors in interest. It seems to me that that's a sensible proposal.

MR. O'QUINN: Question. Under this proposal, would the declarant have to be unavailable?

PROFESSOR BLAKELY: He would not have to be, no.

PROFESSOR DORSANEO: No.

PROFESSOR BLAKELY: This is the same proceeding.

MR. O'QUINN: Well, that language is found in Paragraph 2, right?

PROFESSOR BLAKELY: Or (1)(a) -- I mean (1)(b), if under Alternative No. 1.

MR. O'QUINN: I'm looking at the page in the report. The page in the report has Paragraph 2 and has comment under it by Judge -- or Dean Barrow.

MR. SPARKS: Yeah, but what has happened is that the proposal by Blakely has changed 2 to (b).

MR. O'QUINN: Oh, so 2 will be (b)?

MR. SPARKS: Yes.

PROFESSOR BLAKELY: (1)(b).

MR. O'QUINN: Then the caption of that is in different proceedings whereas -- Okay. It doesn't have that. So you're -- y'all are recommending substituting what's on that page that starts with No. 2, changing 2 to (b) and bringing it over and plugging it into the prior two pages?

PROFESSOR DORSANEO: Well, I recommend that in addition to recommending that we take that matter up now.

MR. O'QUINN: Okay. Can I say something?

CHAIRMAN SOULES: Sure.

MR. O'QUINN: I want to tell you that I'm very much in favor of that. And I just had a bad

experience where I had a case in federal court and state court at the same time. We took the depositions. The court reporter did not file them because the practice in federal court in Houston, at least, is you do not file any deposition. So she didn't -- we had an agreement among the lawyers that the depositions would be taken and would be used in both cases. The court reporter did not file them in either case because she captioned it with the federal one first. I went to trial first in the state court and the judge would not let me use the depositions because they were not filed in court, which was a silly ruling, but it was a ruling that was legally correct under the rules that we now have to work with.

The judge's feeling was it was my responsibility for not having caught the fact they weren't filed. I guess in a very technical sense that was true. I could have gone down and reviewed the file before trial. But like most trial lawyers, you just assume the court reporter did her job and filed it with the court. It caused me a lot of grief, and I didn't see how it was promoting justice to do that.

MR. WELLS: I have a question.

CHAIRMAN SOULES: Ned.

MR. WELLS: Dorsaneo, as you read Rule 207(b), you read "lawfully taken," and "duly filed." But what I have before me has "and duly filed," is right.

PROFESSOR DORSANEO: Well --

MR. WELLS: Which is meant?

PROFESSOR DORSANEO: I think the "and duly filed" ought to come out, whether or not that's in Dean Barrow's suggestion or not, for the reasons basically expressed by John O'Quinn.

MR. WELLS: Well, I agree with that, but Dean Barrow's draft seems to have it in.

MR. SPARKS: That's correct, it does.

CHAIRMAN SOULES: That's right.

PROFESSOR DORSANEO: Well, I would suggest that we help him out and take it out.

CHAIRMAN SOULES: Actually what we're discussing now is the -- if you start on -- look at Alternative No. 1 that Newell has before us and Rule 207 of Dean Barrow's recommendation and just move -- use Newell's as the road map, move this language "has been brought" to the right place in Newell's rule, which is in the third line of (1)(b). You insert after the word "suit" the words

"has been brought," and then the balance of Dean Barrow's suggestion is satisfied. If you look at that same Alternative No. 1, in the very next line of (1)(b) at the end, the last word, and strike "has" and then the next two words "been dismissed," and when you've done that, you've merged the two onto Newell's suggestion. And what Ned is saying there comes out because of what Newell has put together. "Duly filed" is excised in Newell's recommendation.

Now doesn't that put the two of them together, Bill?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: Does that satisfy you, Newell?

PROFESSOR BLAKELY: Yes, I think that that's not inconsistent at all.

CHAIRMAN SOULES: Is there any other comment or questioning about --

JUDGE WOOD: It just occurs to me what is the significance of the words in the next to the last line, "former suit"? Let's assume the two suits were between the same parties or otherwise qualified and one of them was filed later but depositions were taken. But couldn't it still be

used in the first suit?

CHAIRMAN SOULES: Well, should we say --

MR. TINDALL: Other suit.

MR. O'QUINN: Others.

CHAIRMAN SOULES: -- "all depositions lawfully taken in one suit may be used in another."

MR. O'QUINN: That would be good.

CHAIRMAN SOULES: There may be a dozen suits on file.

MR. ADAMS: Just "all depositions lawfully taken may be used," rather than "in the former suit."

MR. O'QUINN: "May be used in either suit," or --

CHAIRMAN SOULES: Well, I -- "lawfully taken in one suit and may be used in any other suit" -- "in that or any other suit," makes it clearer.

HONORABLE WOOD: That would be my suggestion, Luke.

CHAIRMAN SOULES: Okay. See if I can write that. "All depositions lawfully taken in one suit may be used in that or any other suit." Well, "in any other suit as if originally taken, therefore."

Is it "therefor" or "therefore," Newell? We've got a misspelling on the last word.

PROFESSOR BLAKELY: Yes, "therefor."

CHAIRMAN SOULES: See if this language, then, reads the way you all are thinking. After we drop the words "and duly filed," it reads "in" -- delete "the former" and substitute "one." "In one suit may be used in" -- at "any other suit." Strike "the latter." Pick up "as if originally taken, therefor." "Depositions lawfully taken in one suit may be used in any other suit as if originally taken therefor."

Does that get it, Judge Wood --

HONORABLE WOOD: I think so, yes.

CHAIRMAN SOULES: -- as you see it?

Newell, does that satisfy you written that way?

PROFESSOR BLAKELY: You're comfortable that there's no implication by that "any other suit," that it could be treated as a different proceeding? We are still thinking in terms of the same proceeding defined very, very broadly.

CHAIRMAN SOULES: Right.

PROFESSOR BLAKELY: Is there any way to state "any other suit" without the implication that

it's a different proceeding?

MR. ADAMS: Why don't you just say "may be used"? If you just strike out "the latter" and just say "may be used as if originally taken therefor," then that use would refer back to the usage permitted.

MR. TINDALL: Aren't we saying, Luke -- "therefor" -- we talked about that word down here at this end of the table. It seems like "as if originally taken therein."

HONORABLE WOOD: We could say "in the former" or "a later suit they may be used in" -- "they may be used as if originally taken therefor," which would certainly get away from any ambiguity as to the qualifications as to the type of lawsuit it would be admissible in, I believe.

CHIEF JUSTICE HILL: Have you suggested "in a later suit," is that what you're --

HONORABLE WOOD: "Former or later," either one.

CHAIRMAN SOULES: They're concerned that any other suit broadens this beyond the intent of the other language in it.

MR. SPARKS: How about this language? Look at the -- start with "all depositions," and

say "all depositions lawfully taken therein may be used as if originally taken." You're already talking about the other lawsuit in that sentence. And that seems simpler to me. "All depositions lawfully taken therein may be used as if originally taken."

PROFESSOR BLAKELY: How about saying "all depositions lawfully taken in the one suit may be taken in the other," as in -- "taken in the one may be used in the other." And suppose you've got three or four. That would be included in that language.

CHARIMAN SOULES: Well, we could do that or we could just repeat the language. It would be redundant, but it would be clearer if we just say "in any other suit involving the same subject matter brought between the same parties," and repeat it again.

MR. O'QUINN: That would be fine.

CHAIRMAN SOULES: It is redundant, but we're struggling on how to do it any other way. We just repeat that language?

MR. O'QUINN: That would be fine.

CHAIRMAN SOULES: All right. "In other suit involving the same subject matter brought between the same parties."

HONORABLE WOOD: Adding "or their representatives in interest."

CHAIRMAN SOULES: Okay.

HONORABLE WOOD: "Or successors in interest."

CHAIRMAN SOULES: Often as these proceedings go along, someone will recall that something we've written is going to have a collateral problem that we didn't address. If any of you have such a notion as we go along here and want to go back to any point in our discussion, please let us know because we do want to try to avoid mistakes, even if we have to backtrack some.

Frank.

MR. BRANSON: Mr. Chairman, along those lines, when we were dealing with Rule 509 earlier today --

CHAIRMAN SOULES: Yes, sir.

MR. BRANSON: It's come to my attention recently, unfortunately as being the brunt of what I considered a joke, that some defendants are interpreting Rule 509 to allow the representatives of the defendants in a medical negligence suit to personally visit with and discuss the plaintiff with all other health care providers. Now, I was

on Dean Blakely's committee. It's entirely possible I missed that discussion, but I am unaware of the rule providing that.

Dean, was that discussed at a meeting that I, perhaps, missed on the committee?

PROFESSOR BLAKELY: I can't recall, Frank.

MR. BRANSON: Is it your interpretation that -- when that Malpractice Act was passed, that was not contemplated at the Legislative hearings that I attended. Is there some way we can address that problem in 509 if, in fact, it's a problem? And I perceive it to be one.

JUSTICE WALLACE: In the Rules of Evidence, Frank?

MR. BRANSON: Yes, Your Honor.

CHAIRMAN SOULES: Frank, does that deal with -- that apparently deals with a section different than 509(d) or is it in that same --

MR. BRANSON: I'm sorry, I don't have the rule before me. I was just looking at the section we dealt with on Page 1 of the handout.

Yes, I would think it deals with both the general privilege under (b) and the exceptions under (d), particularly (d)(1).

CHAIRMAN SOULES: Frank, with our agenda the way it is, let me ask you this. And I want to provide you with every form to make a statement. But I think we're going to have to meet again in March, six months away or so. We have so many things to cover and so many things that are important, and I don't believe we're going to get everything resolved today. And some people may want some time with Franklin's work, and I just --

MR. BRANSON: Could we put that on the agenda for the March meeting?

CHAIRMAN SOULES: If you could verbalize your thoughts on that and submit them to the standing subcommittee, to Professor Blakely's subcommittee, and participate to whatever extent you may feel you would like to in that with him and his committee to get us something in writing for the next meeting.

MR. BRANSON: Thank you, Mr. Chairman.

CHAIRMAN SOULES: Okay. Thank you very much.

All right. Are there any other matters to be addressed in connection with the suggestion of Professor Blakely's committee pertaining to Rule 207, Texas Rules of Evidence?

PROFESSOR BLAKELY: Mr. Chairman, could we have a restatement on where we stand now on this wording?

CHAIRMAN SOULES: All right, sir. I'll just read (b). That's the only thing we've worked on that would change any of the typewritten matters. "(b) Included Within Meaning Of 'Same proceeding.' Substitution of parties pursuant to these rules does not affect the right to use depositions previously taken; and, when a suit [has been brought] in a court of the United States or of this or any other state ... and another suit involving the same subject matter is brought between the same parties or their representatives or successors in interest, all depositions lawfully taken in one suit may be used in any other suit involving the same subject matter brought between the same parties or their representatives or successors in interest as if originally taken therefor."

Other than that, the proposal, Professor Blakely, of your committee is in intact --

PROFESSOR BLAKELY: Yes.

CHAIRMAN SOULES: -- at the time of this action?

MR. REASONER: Mr. Chairman, I have difficulty in believing there is not a more eloquent way to say that. I wonder if it wouldn't be worthwhile to have somebody attempt to do that over the lunch hour. Drafting in this large a group has been impossible.

CHAIRMAN SOULES: Can we approve it then as written subject to getting a better statement of it, maybe, later in the day or tomorrow?

MR. O'QUINN: Yes, I move that.

MR. ADAMS: So moved.

MR. SPARKS: I think it could be interpreted that you're narrowing Section 1, "the same parties may concern." See, you're trying to requote the language down here, but it's broader up in Section 1 than it is in what they were.

CHIEF JUSTICE HILL: I'm sure Judge Wallace and I are comforted to learn that we're not the only ones plagued with these kinds of problems and that right and good lawyers have the same difficulties that we do in trying to use the right word and to say what we mean in the best way.

CHAIRMAN SOULES: Would it be helpful to just maybe table this til after lunch for drafting purposes?

MR. WELLS: So moved.

MR. O'QUINN: So moved.

CHAIRMAN SOULES: Okay. We'll take it up right after lunch. And subject, however, to drafting so that we state a better way, is it the consensus that we want to approve this rule as changed?

MR. O'QUINN: Who's going to do it?

CHAIRMAN SOULES: I think Reasoner volunteered.

Didn't you volunteer, Harry?

MR. REASONER: That was just an affirmation of my faith that somebody else could do it.

CHAIRMAN SOULES: All right. Is it the consensus that we'll table it until after lunch for drafting by Reasoner?

MR. O'QUINN: Right.

CHAIRMAN SOULES: Okay.

MR. REASONER: Is this an effort to suppress debate?

MR. ADAMS: Mr. Chairman, I've got a question about Rule 801. Under the (e)(3) it says "depositions." And if the committee is going to -- the committee of one, Harry Reasoner, is going to

consider -- is he going to consider just this 207(b) --

CHAIRMAN SOULES: Newell, do you want to take up 801 now?

MR. ADAMS: -- or is he going to consider 801, too? Is that -- I wasn't sure whether that was included in the tabling.

PROFESSOR BLAKELY: Well, I have been discussing not only 207, but 801 and 804. I thought our discussion covered this whole package Alternative No. 1.

MR. ADAMS: So is that entire package Alternative 1 tabled or is it -- was it just --

CHAIRMAN SOULES: Well, let's go ahead and talk about 801 and 804 if you have any input on that so that we can get all the drafting done at one time.

MR. ADAMS: My suggestion was that in anticipation -- and that may be, and I'm sure it is just an anticipation, but I was impressed with Tom Ragland's committee report with regard to a rule which would not require the filing of a lot of discovery matters that we're going to take up. My question would be, is whether or not in the use of depositions, whether we could use original

certified copies, if that would be included within the deposition definition so that we would not be confined to an original which might be destroyed within six months or some period of time in another proceeding, but would be able to use an original certified copy as -- in a subsequent or other proceeding. And so, my suggestion was that the definition of deposition be broadened or specifically worded so it would include a certified copy of a deposition.

PROFESSOR BLAKELY: Gilbert, is this the place to do that? We're talking about what is hearsay and then exceptions to the Hearsay Rule and so on. You're talking about a Best Evidence Rule problem, I guess, using a certified copy in lieu of an original.

MR. ADAMS: Okay. It may not even need to be -- if we review the -- review that rule with that in mind. But it was something that came to mind in view of Tom Ragland's report that he's going to make. We might pass that over, but it's something we need to be thinking about. In other words, do -- I think typically when we say depositions, we're talking about an original and -- or at least that could certainly be the

interpretation that would be placed on that.

MR. BRANSON: Well, Dean, are we really talking about a Best Evidence Rule or are we saying that if it's not the original, it's still hearsay? Wouldn't those be really crossover areas?

MR. O'QUINN: We're talking about what does the word "deposition" mean.

MR. BRANSON: Right, and if it's not the original, as I understand what Gilbert's saying, that it would still be classified as hearsay even though it were a certified copy of the original deposition since the deposition by definition was an original.

MR. O'QUINN: I think it seems more logical to me if we want to worry with the definition of deposition, we ought to do that under Rule 207 and not clutter up the Hearsay Rules of Evidence with trying to define that.

PROFESSOR BLAKELY: Well, how does the law treat a deposition today? The court reporter types up two copies.

MR. O'QUINN: One original.

PROFESSOR BLAKELY: Is there an original?

MR. O'QUINN: Yes, sir.

PROFESSOR BLAKELY: All right. Then if

you're talking about something else, the Best Evidence Rule problem instead of whether it is or is not hearsay, a copy is --

MR. BRANSON: Well, is a copy of a deposition, Dean, hearsay?

PROFESSOR BLAKELY: Depends on whether the deposition is hearsay. If it's not, the copy is not. If it is, if the deposition is hearsay, the copy is, it seems to me. And it's simply the Best Evidence Rule problem. Do you insist on the original or will you take something else in lieu of the original. It's not so.

MR. O'QUINN: I disagree. Newell, I think the situation is that Rule 207 defines the circumstances under which you can use depositions. It also in Paragraph 3 provides for motions to supress if you have a problem with a deposition that causes a trial judge to think you're not trustworthy.

I think these types of problems, frankly, ought to be handled under Rule 207, which will define whether you have to have the original, whether you can use something less than the original, if so, under what circumstances you can. And I think if -- rather than put that in the Rules

of Evidence, Frank, that's my feelings about it because we already have a mechanism in Rule 207 for the trial judge to suppress a deposition if he thinks there's something wrong with it. And maybe we might want to have a procedure in there whereby he could allow something less than the original if you felt under the circumstances that's what should happen. That would be my suggestion.

PROFESSOR BLAKELY: It's a possibility. The Best Evidence Rule at the present time has a revision or so over there in public records. 1005 permits the use of a certified copy of the record.

MR. O'QUINN: Right.

PROFESSOR BLAKELY: Now, if you think this present problem is the same sort of thing, why, it's possible to put it over there somewhere under the Best Evidence Rule. If you think it's something else, why, you can put it in 207.

MR. RAGLAND: Gilbert, wouldn't having the court reporter certify more than one original at the time the depositions are certified, wouldn't that solve it? You can have duplicate originals.

MR. O'QUINN: Yes.

MR. ADAMS: They don't normally call them duplicate originals now. If lawyers requested

those, well, that would be one thing. But what I'm saying is we get to the point where we're not filing that original, then -- and then within six months the original is gone, it's no longer required to be kept, but a certified copy that was in the hands, maybe, of another party was available, then we want to be able to use that without being precluded simply because we didn't have technically an original.

MR. O'QUINN: I don't see why we can't do that right now. If the original got lost sometime in the clerk's office, I don't see why the lawyers could not go to the court reporter and get them to recertify another deposition, why that wouldn't be "the deposition." I don't see why that can't be done right now.

JUSTICE WALLACE: Is there a definition of deposition in these rules anywhere?

MR. O'QUINN: No, Your Honor.

JUSTICE WALLACE: Why not a one sentence in 207 here "depositions shall include the original or any certified copy thereof."

MR. O'QUINN: I think it's an excellent solution.

MR. ADAMS: I think that would solve it.

MR. REASONER: One problem and I'll try -- suppose that in one case you file corrections to the depositions but you don't file them in -- you know, how do you handle the --

MR. O'QUINN: I think it would be part of the certification. I mean, say for example you had an original in one proceeding that had been corrected and then some lawyers went to the court reporter and got another one certified to use in a different proceeding and didn't get the corrections in there, I think -- I don't see why you couldn't file some kind of motion or -- if somebody tried to offer it against you, I think you still have a right to correct it every time it gets recertified.

MR. WELLS: Would it be certified by the court reporter? The original comes to the deponent who signs it and makes some changes.

MR. O'QUINN: That's true, you're correct.

MR. WELLS: And the copy that the lawyer has doesn't get changed.

MR. O'QUINN: That's correct.

MR. WELLS: How can the court reporter certify the changes that the deponent makes?

MR. O'QUINN: Well, I think you put your

finger on it. I think the second time they do it, they're going to have to let the deponent sign it again. I think -- so there's the problem.

MR. WELLS: You mean the reporter would not certify the copy until the deponent had had a chance to make his changes again?

MR. O'QUINN: I think that should be part of the rule; otherwise, you loose a valuable right.

HONORABLE WOOD: If the deponent is dead, the deponent's dead.

MR. LOW: Or it's usually an admission against interest and the man you're going to use it against sure is not going to say, "That's what I said." So you can get him to say, "Yeah, tell the court reporter to" -- he says, "Yeah, I'll sign."

MR. O'QUINN: But what do you do right now, Buddy, if the guy won't sign it? If the guy won't sign it, we have a procedure already whereby the court reporter can certify it and file it. I would just simply suggest that the deposition be defined as any copy signed or certified in accordance with these rules -- according to the rules, whether it's the first one that got signed by the witness and certified and filed or if that one got lost -- why can't we just say a deposition

is something that's been signed? It can be done more than once.

MR. LOW: The only people that can certify it are the clerk who's saying that was filed here or the court reporter. So if you say "certified," it would have to be certified by them.

MR. O'QUINN: Well, what I meant by certified is we already have a procedure whereby if the witness will not sign the deposition, the court reporter can "certify it as being accurate," file it without a signature. That's what I mean by certification. Keep the same procedure.

MR. REASONER: Mr. Chairman, it sounds like to me that what John has outlined sounds very reasonable. I would like to see that in writing. I'm sure Mr. O'Quinn was volunteering to put it in writing.

MR. O'QUINN: I'll work on it during lunch.

CHAIRMAN SOULES: That needs to be keyed into Rules 205 and 206 of the Rules of Civil Procedure, too, because there the 206 is the rule that states what the court reporter does, and "certification" and "certify" are the words in that rule. And Rule 205 deals with the witness and

making changes and signing and the failure to sign.

As I see Rule 205, it contemplates that there really is not an original of the deposition because if the court reporter sends what's stamped "original" to the witness and the witness doesn't sign it, the court reporter is to certify it, the deposition, for filing. How can they certify something that's gone? The only thing he's got is a copy or makes a new original or substitutes a new first page or something along those lines.

A deposition really is the testimony, maybe, but I'm not sure about that. That's kind of what I envision, but the rules are not clear about that either. So to me "copy" or "not copy" ought to be resolved by saying that every transcript of the testimony is a deposition.

But, anyway, is this a problem that's beyond what's written here before us? Should it be deferred to another occasion or should we go ahead and try to work on it during the noon hour?

What's your feeling on that, John?

MR. ADAMS: I thought Judge Wallace's suggestion pretty well --

MR. O'QUINN: I think Judge Wallace's suggestion --

MR. ADAMS: -- cured what I thought was the problem.

MR. O'QUINN: In light of what Mr. Reasoner, what Harry said, why don't you do that? Let me take a whack at it during lunch and tell you what I think.

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN SOULES: Yes, sir.

PROFESSOR DORSANEO: I'd also suggest that somebody take a look at the Rules of Evidence, particularly Rule 1001 and Rule 1003. Those rules talk about duplicates. It seems to me that they may be helpful in solving the wording problem.

MR. O'QUINN: Okay.

CHAIRMAN SOULES: 1003 and what, Bill?

MR. O'QUINN: 1001.

CHAIRMAN SOULES: Is there any other discussion on proposed Alternative No. 1 dealing with Texas Rules of Procedure 207 and Rules of Evidence 801 and 804?

MR. LOW: Luke, I'm not clear on one thing. Maybe I missed out, but when we're talking about the rules, Rule 207, they talk about as long as it meets the provisional requirements of 804(a) and (b). Did we also encompass 801(e)(1)?

Because, see, you might be using it as admission against interest and yet it may not meet the requirements of 804, but may meet the requirements of 801. Follow what I mean? It says "prior statement." We're talking about, you know, inconsistent statements.

CHAIRMAN SOULES: What about that, Newell?

MR. LOW: You follow what I mean? In other words, see, the 804 requires that the parties have a common interest in everything. It may be an automobile case and a guy testifies, you know, "I haven't made a defective product." It may be a statement against interest and yet they may not have a common interest, but it's a statement against interest. Now, you can impeach him with it, but he says, "I didn't say it," then you need to offer the deposition. So, you might need to encompass. You might look to see that 207 should perhaps also refer to Rule 801(e)(1).

PROFESSOR BLAKELY: Well, what's the story right now? Suppose a deposition is taken in a different proceeding.

MR. LOW: Yeah.

PROFESSOR BLAKELY: Clearly a different

proceeding and you offer it against the deponent who's a party, offer it against him as an admission by a party opponent.

MR. LOW: All right.

PROFESSOR BLAKELY: It has the same status as if it were a letter to his Aunt Eloise, is that true?

MR. LOW: No. See, right here, understand 804 it talks about requirement with a similar interest and opportunity, motive and so forth. What if it didn't meet that? What if it just meets 801 and it's an inconsistent statement? Then you don't want to be caught --

PROFESSOR BLAKELY: What is present practice? Do you just ignore the fact that he made the statement on a former occasion, deposition, and treat it as if it was a letter to his Aunt Elouise? But in it he talked against himself and you're offering it.

MR. LOW: I know, but what if he denies all that? Then you need to offer the instrument, offer the letter from Aunt Eloise, offer the deposition, and you can't offer it because it doesn't -- the Rule 207 doesn't bring it within that.

MR. REASONER: I'm not -- are we reading the right thing? Doesn't 801 -- I mean 801(e)(1), doesn't it now --

MR. LOW: They said it's not hearsay.

PROFESSOR BLAKELY: Yeah, if it's the same proceeding.

MR. LOW: I know, but right up here, when we talk about that's what the Rule 207 is is to get in certain things that are not hearsay. And I'm saying 207 refers only as long as it meets the requirement of 804. 804 says they've got to have a common interest and motive. What if there's no common interest, it's just a plain declaration against interest? Then under Rule 207 you couldn't get in it.

MR. REASONER: But where on this is -- why do you need the usual Rule 207 when 801(e)(1) now says it's not hearsay? Why isn't that sufficient to make it admissible?

MR. LOW: Well, simply because Rule 207 talks about -- I don't have it right before me now -- but Rule 207 talks about these are admissible as long as informant -- informant testimony as long as it meets the requirements of Rules of Evidence 804.

MR. REASONER: But that's when you're not

offering it as an admission against interest, but you're trying -- you can't qualify it that way, you're trying to get it into evidence.

MR. LOW: That's right, but 801 talks about -- it merely states that that is admissible. But it does not talk about the deposition itself, whether you could admit it.

MR. REASONER: Well, it says or in a deposition you could admit at least the inconsistent portions of the deposition.

MR. LOW: Well, okay, 207 then -- 207 specifically refers back to 804 and doesn't refer to that. And I'm merely -- I'm not saying that it doesn't say that, I'm just saying that they might say, "Well, this deposition 207 refers to prior depositions, therefore, it doesn't meet 804, because that's all they refer to. They might ought to refer to 801." You might want to think about it. It doesn't make me any difference.

CHAIRMAN SOULES: Yes, sir, Bill.

PROFESSOR DORSANEO: Well, I was taking a look at the companion federal rule, which is Rule 32 on use of depositions during our discussion, and it has -- that rule has a sentence in it which basically says that if it's okay under the Rules of

Evidence, it's okay. And maybe that would be better than anything else.

MR. LOW: Because there might be some other Rule of Evidence that may apply that we've overlooked.

PROFESSOR DORSANEO: Now, that's not very informative to someone who doesn't know the Rules of Evidence as well as the professor does. But I at least throw it out as something else to consider at lunchtime.

MR. LOW: But most lawyers see the Rules of Procedure as being the starting point, you know. They look, you know, they -- and then that only refers to 804. And they say, "Well, it doesn't meet the requirements of 804, therefore, no depositions are admissible."

MR. SPARKS: Buddy, 804 is for an unavailable witness.

MR. LOW: That's right. And 207 talks about all depositions. It doesn't -- it's broader. It encompasses the whole thing.

MR. SPARKS: I understand that, but are you going to impeach an unavailable witness by depositions? I mean, I guess it theoretically can be done.

MR. LOW: Well, say the guy's deposition were read or something.

CHAIRMAN SOULES: While we're all grumbling about that here, let me get a show of hands. How many would like to go over to the Quorum Club? We'll call and make a reservation if there's an availability of space over there for the number that would like to go.

(Off-the-record discussion.)

CHAIRMAN SOULES: All right. What do you suggest we do about the matter, then, that's been raised?

Buddy.

MR. LOW: A lot of people have studied it more than I have. I raised the question, so I might have overlooked something that's obvious or there might be an answer. I just raised the question.

MR. RAGLAND: I suggest that we just make it subject to the provisions and requirements of the Texas Rules of Evidence and let the judge call balls and strikes.

CHAIRMAN SOULES: In other words, your suggestion is that the language that's proposed for Rule 207, the new (2), in the last and next to the

last lines we would delete the language "Rules 804(a) and 804(b)(1), so it just reads "subject to the provisions and requirements of the Texas Rules of Evidence"?

MR. RAGLAND: Correct.

MR. REASONER: Yeah.

CHAIRMAN SOULES: Does that work?

PROFESSOR BLAKELY: And that would give the advantage, that would give you the option if you were -- it was taken in a different proceeding and you're offering it against the deponent as a party, that it come in as an admission.

MR. LOW: Right.

MR. RAGLAND: Well, conceivably it could be a non-party. It could be a disinterested -- so-called disinterested witness.

PROFESSOR BLAKELY: For an impeachment.

MR. LOW: For impeachment. So it would take -- it would come within one of the other rules or there may be some other rule we've overlooked. But if we just refer to the Rules of Evidence, that's what 207 is intended to do, is to make it available so long as it's admissible under our general rules, under Rules of Evidence.

MR. REASONER: I move we approve that

change.

PROFESSOR DORSANEO: Second.

CHAIRMAN SOULES: Does that meet your approval, Professor?

PROFESSOR BLAKELY: It does right now. Wednesday night at midnight I will wake up and say, "Oh, my goodness."

CHAIRMAN SOULES: Subject to the noon hour. All right. Do we have any --

MR. REASONER: Call Buddy, would you?

PROFESSSOR BLAKLEY: I think that's good, Mr. Chairman, I do.

CHARIMAN SOULES: All right. Good suggestion then.

MR. BRANSON: Dean, Mr. Kronzer would suggest some libations on Wednesday evening that would prevent that.

CHAIRMAN SOULES: Is there any other discussion, before we move to another subject, concerning Alternative No. 1 proposed by Professor Blakely's Standing Subcommittee concerning Rules 207 of the Rules of Civil Procedure and Texas Rules of Evidence 801 and 804? Okay. We'll come back after lunch with O'Quinn and Reasoner's report.

MR. REASONER: Mr. Chairman, if you want

to -- and I must give Professor Dorsaneo full credit for this, but he's made a suggestion which seems to me may solve the problem, so let me read it real quick and make it fresh on everybody's mind.

CHAIRMAN SOULES: Sure.

MR. REASONER: It would read "Substitution of parties pursuant to these rules does not affect the right to use depositions previously taken; and, when suit has been brought in a court of the United States or of this or any other state and another suit involving the same subject matter is brought between the same parties or their representatives or successors in interest," and now we come to the critical part, "all depositions lawfully taken in each suit may be used in the other suit as if originally taken therein."

PROFESSOR DORSANEO: Second.

PROFESSOR BLAKELY: Sounds good, Mr. Chairman.

CHAIRMAN SOULES: "May be used in the other suit"?

MR. REASONER: Yes. If we want to be hypertechnical, I guess we could put bracketed

[S's] on the end of them in case you had three or four, but --

CHAIRMAN SOULES: Does that meet your approval?

And then that just leaves O'Quinn's concern about substitute depositions for after lunch?

PROFESSOR BLAKELY: Could we have that read once more?

CHAIRMAN SOULES: Go ahead, Harry.

MR. REASONER: Well, shall I just start towards the end?

PROFESSOR BLAKELY: Yeah, there at the end. "All depositions" --

MR. REASONER: All right. "All depositions lawfully taken in each suit may be used in the other suit as if originally taken therein."

CHAIRMAN SOULES: Any further discussion other than what O'Quinn may bring us about use of copies of depositions?

All right. Are we ready for a vote on these? Those in favor of approving Alternative No. 1 as Harry has just read it, to incorporate changes or recommend changes to the Supreme Court in Rules of Civil Procedure 207 and Rules of Evidence 801 and 804, please indicate by saying aye. Opposed?

All right. With those changes, Newell, that's unanimous.

PROFESSOR BLAKELY: Mr. Chairman, Tom has realized that under 207, new (2), the way he amended it, it's now redundant. Because the early part of the rule says, "At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition taken in a different proceeding, insofar as admissible under the Rules of Evidence ..."

Well, but that -- well, "under the Rules of Evidence applied as though the witness were then present and testifying ..." I'm sure the Rules of Evidence there is modified by "as though the witness were then present and testifying." Or you could object to this that and the other and so on. So maybe you do need to repeat "subject to the provisions of the requirements of Texas Rules." But it struck Tom here that this was redundant. We've stated it twice.

MR. REASONER: I think what struck him is probably right.

PROFESSOR BLAKELY: That we've said it -- if we say "admissible under the Rules of Evidence implied as though the witness were then present and

testifying may be used."

CHARIMAN SOULES: "Any part or all of a deposition taken in a different proceeding may be used." I guess you -- can you move that language to there? "Insofar as admissible under the Rules of Evidence applied as though the witness were then present and testifying."

MR. REASONER: Well, you know, Mr. Chairman, I wonder if you shouldn't just shorten the whole thing, say "may be used subject to the provisions and requirements of the Texas Rules of Evidence."

MR. LOW: Yeah, take out the first part of it.

MR. RAGLAND: It's not going to make it divine salvation to leave it like that.

MR. REASONER: Well, but yet what confuses me is you say "as though the witness were then present and testifying." I don't know what that adds, but I'm sure if I want to create confusion, I would try to figure out it meant something.

PROFESSOR BLAKELY: Well, we set it up in (1)(a). This comes from old 207. And we've said it in (1)(a). If we say it in (1)(a), don't we

need to also repeat it in (2) because we're dealing with different proceedings? If you don't, why, then someone will reason that this -- there's some significance to this, including it in (1)(a) and not in (2).

MR. TINDALL: Luke, can we send this back to the Evidence Committee? It's getting --

CHAIRMAN SOULES: Well, I think we're close. We're getting so close to having it resolved, Harry, if we can -- it seems to me we are. What's the consensus? I'll take a consensus on that if -- how many feel that we should return it to Professor Blakely for further study? Indicate by a show of hands.

MR. TINDALL: Well, don't we have already two matters that are going to be dusted over at lunch on this very rule or have those become moot?

CHAIRMAN SOULES: Well, Harry, I think, has got his resolved.

MR. LOW: Yeah, but only one matter really, and that's just defining a deposition. That's all O'Quinn is going to go to do, basically.

CHAIRMAN SOULES: It really doesn't affect -- may not affect the language, what O'Quinn is going to do.

MR. LOW: That's right.

PROFESSOR BLAKELY: Mr. Chairman, let's leave it redundant except --

PROFESSOR DORSANEO: I don't think it's redundant. Pardon me for popping up.

MR. CHAIRMAN: All right.

PROFESSOR BLAKELY: Let's leave the apparent redundancy there and go ahead and strike 804(a) and 804(b)(1) as we had planned to do a moment ago.

CHAIRMAN SOULES: And substitute the articles (e)?

MR. REASONER: Let me ask -- let me tell you my problem and maybe the -- our distinguished professors can think about it over lunch. I agree it's not redundant. There are evidentiary rules that apply when the witness is there live and testifying, which that parenthetical phrase appears to reference. There's also evidentiary standards to be applied to the admission of the deposition itself. The way this is now structured, seems to me you kind of overlap and confuse the two, and you really ought to break it out and make it clear that you're applying those two different standards.

PROFESSOR DORSANEO: I think we're back

to 804(a) and 804(b)(1) then.

CHAIRMAN SOULES: Bill, what is your --

PROFESSOR DORSANEO: We're back to go. Let's think about it over lunch.

CHARIMAN SOULES: All right. Well, we'll delay action on this until after lunch then and let --

Professor, if you'll confer with Harry and Bill.

And anyone else that wants to address Newell over the lunch hour about this, and maybe we can pick it up and get it resolved then.

All right. And you're offering that in lieu of Alternative No. 2, are you, Newell?

MR. WELLS: I think I raised the No. 2 on the understanding that the -- it had been acted on last time. It was my point it was merely procedural. It was not substantive.

CHAIRMAN SOULES: Do we need, then --

MR. WELLS: We don't need to look at No. 2.

CHARIMAN SOULES: Then you feel we do not need to do that.

Does anyone feel we need to look at Alternative No. 2 in view of what we've done heretofore? All right. Then we'll consider that

resolved by the earlier discussions.

Newell, does that complete the report of your standing subcommittee?

PROFESSOR BLAKELY: It does.

CHAIRMAN SOULES: Thank you very much for that good work.

Sam Sparks. Is he here? You've got the laboring oar. What I would like to do here is turn it over to you.

MR. SPARKS: I think we can get through a lot of these in a fairly good time because there's not a lot of substantive changes. I'll try to bring up the ones that do have some real substance. Rule 11 we start you out with very, very controversial. It says, "unless otherwise provided in these rules." That's the addition that is recommended, and it does make sense in light of some of the other recommendations that we'll get to in a minute, most of which -- most of the correspondence I have gotten, received, has been objections to lawyers to have to object to nonresponsiveness of answers and the form of the questions. And you'll see, if you haven't read your packet, that there are several suggestions on that.

So it appears -- I don't see how we can be hurt by adding that to Rule 11, and it makes sense if we're going to make some other changes. So, Rule 11, that's the only thing that -- on the first one is just the addition to the rule is that one phrase.

CHAIRMAN SOULES: Does anyone feel we need discussion on this or is -- if not, the chair will entertain a motion to approve it as written.

MR. TINDALL: So moved.

CHAIRMAN SOULES: Been moved and seconded that the language in Rule 11 -- that Rule 11 be amended to provide at the start of it "unless otherwise provided in these rules," and "otherwise remain intact." In favor say aye. Opposed? That carries.

MR. SPARKS: We're going to go chronologically, and the next one is Rule 18a. This request, basically, comes from Judge Douthitt. He indicates that many judges who have more than one county, catch a motion to recuse at the last minute and there is no available substitution of a judge. And his suggestion was to add the first phrase that's underlined "or prior to any pretrial conference or preliminary hearing." I don't know

that that's adding anything because we already have "set for trial or other hearing." And then he has broadened the rule by the addition of that long sentence.

There has been a sort of companion request by several lawyers, Mr. Green of San Antonio, to include in the recusal "but included in a canon." And I just didn't feel like that was probably within the purview of this committee, so I have left that out. But the one sentence as underlined is the judge's request.

There is another -- in the last page, on Page 3, another long sentence, also.

CHAIRMAN SOULES: If -- I don't know how many of you got the materials that were sent out the time before, but there is a rule change drafted to change the Code of Judicial Conduct to separate grounds for disqualification and grounds for recusal. Right now Canon (3)(c) puts the two together and calls them disqualification. That's a problem in this state because disqualification is a constitutional concept in Texas.

Recusal is another concept that's been emplaced on the jurisprudence by the adoption of the Supreme Court of Canon (3)(c). And also it's

been engrafted by 200A, Article 200A, which is a product of the Legislature. So, recusal is here, but it's not the same as disqualification.

And what is spelled out in this second part is really probably something that should be addressed by the court as it separates recusal from disqualification in Canon (3)(c) by way of --

That's just by way of updating you on that -- the status of that as well, Sam.

MR. SPARKS: That's correct. And they've got a new Canon (3)(c) that actually says "disqualification and recusal," but I don't know where it is.

MR. WELLS: May I ask a question? What if a litigant learns less than ten days before the trial of some basis for recusal? Is he foreclosed from raising it?

CHAIRMAN SOULES: Yes, sir.

MR. WELLS: He's got to know about it? Or what if something develops during the trial or he learns even during the trial, he's foreclosed from raising it?

CHAIRMAN SOULES: A disqualification or recusal?

MR. SPARKS: A disqualification is --

cannot be waived by the rules. This is one of the few instances, it seems to me -- Luke and I have both written articles on this. But it seems to me this is where the rules have really kind of overstepped the law. We have more procedural rights than we really do have substantive. On a recusal I think the rule would apply, and you might be in bad shape except that if you just learned it. Who knows what the court might say. On a disqualification it really does -- it voids almost everything that any -- well, it voids everything if you can prove disqualification.

CHAIRMAN SOULES: Fundamental error.

MR. SPARKS: So, I don't think the rule would apply one way or the other.

MR. LOW: Sam, isn't there a specific statute? Does this dovetail with the language of the statute on disqualification, as, what, 1911, or something like that? What's the statute on it? How does it read? Are we inconsistent with the statute?

MR. SPARKS: No, the Constitution has --

MR. LOW: No, I'm talking about the statute.

MR. SPARKS: Well, I don't -- if it

tracks the Constitution, maybe. I don't know.

MR. LOW: There is a statute, specific statute on this.

MR. SPARKS: My experience as a practical matter on recusal is such that the trial judge on any kind of -- most of the trial judges on any kind of apparent impropriety of any nature or knowledge currently being represented by a lawyer, that type of thing, I don't have any problems with it. I don't know that we're helping by putting down pretrial conference or preliminary hearing, but the remainder of the recommendation appeared to be --

MR. McCONNICO: Sam, could I speak to that?

MR. SPARKS: Surely.

MR. McCONNICO: Well, I tried some cases in rural counties, and I never have any idea which of the judges for that court is going to be sitting until I walk into the courthouse. And like yesterday I walked into the courthouse and both judges were there. One judge heard one motion on the matter, another judge heard another motion on the same matter. And so consequently, you know, that really puts somebody in my situation in a real difficult position because we don't know who's

going to be sitting in a pretrial matter.

CHAIRMAN SOULES: Well, you've got (e), 18a(e) was drafted to speak to the problem of discovering that your judge, the judge you would recuse, had you known he was going to be there, has just shown up. "If within ten days of the date set for trial or other hearing a judge is assigned to a case, the motion shall be filed at the earliest practicable time prior to the commencement of the trial or other hearing." That's what that's there for.

MR. McCONNICO: But doesn't that create confusion just to put in the sentence "or prior to any pretrial conference or preliminary hearing"?

CHAIRMAN SOULES: It really does. For your purpose, it does because it would put a time limit at an earlier point in the pretrial that would be the final cutoff for a motion, and it would move that to an earlier point in the pretrial than 18a(e) was drafted to address. And how do you know to file a motion until you know who your judge is? That's --

MR. SPARKS: Besides that, I don't think it adds anything to the rule.

CHAIRMAN SOULES: David Beck.

MR. BECK: I have a question about (f), Sam. What is the purpose of (f)? And I don't really understand what the purpose is of the word "summarily" in there means. Does that mean if the judge does not summarily refuse the motion, whatever summarily means, that the case cannot be -- or the motion cannot be immediately transferred? What does that mean?

MR. SPARKS: Well, the -- as I understood the judge's letter, he put that one in because he said there may be a judge who would be so arbitrarily just to summarily refuse the motion and tell you to proceed to trial. And he put that sentence in to make sure that you had a remedy there. But the remedy really is --

MR. ADAMS: Well, it hinges -- the remedy hinges on whatever summarily means.

MR. SPARKS: Well, his meaning of summarily -- His meaning of summarily, though, was if it wasn't in proper form, wasn't --

MR. O'QUINN: Yeah, it ties back to (a). Maybe it needs to be clearer that you're tied back to (a).

CHAIRMAN SOULES: Sam, does your committee feel that any of these changes need to be

made?

MR. SPARKS: I don't think that it enlarges upon the existing rule. Now, our committee was very lax because I didn't get the report out until October. But the -- but I haven't had any ground swell for this rule.

CHAIRMAN SOULES: To give y'all some idea -- and then I'm going to recognize Bill Dorsaneo. But the work that's in these folders is a tremendous amount of work, some of which is not going to bear fruit in this committee because the standing subcommittee chairmen were requested to draft rules that met the objections or requests from anywhere, however silly we might think they might be or unnecessary, so that when this committee met, we would have language to act on either to accept or reject. So, the fact that Sam's committee has generated language doesn't mean that they necessarily support it. It's just so that the committee as a whole can consider a request from another lawyer or a member of the public that was before us.

MR. SPARKS: That's right. As a matter of fact, we weeded out a few that just were ridiculous. But most of them here are just -- we

conformed them to the form, best we could, from the letters. A lot of people just write letters.

CHARIMAN SOULES: Bill, did you have something?

PROFESSOR DORSANEO: I just wanted to tell you that this member of Sam's committee doesn't think that any of these changes are worthwhile.

CHAIRMAN SOULES: Is that a motion?

MR. SPARKS: I'll second Bill's motion.

CHAIRMAN SOULES: Motion is made and seconded that these changes not be approved.

MR. O'QUINN: I want to say something.

CHAIRMAN SOULES: O'Quinn.

MR. O'QUINN: There is a practice going on of people using -- trying to use Rule 18a to get a continuance, yet that does occur. I've had it happen in a case of mine where they would just file a Recusal Motion. And the way 18a presently reads, the trial judge is paralyzed at that point, even though the motion on it's face does not state a constitutional ground. They'll just put in there something that's not a constitutional ground, whatever it is, and that paralyzes the trial judge, at least that's the way the trial judges are

reading 18a right now. And they think they have to go through the procedure of bundling all these papers up, finding some administrative judge somewhere who may be off where he can't do anything.

And I think this is what's bothering Judge Douthitt, although I have not personally talked to him about it. What he would like to have is some kind of procedure whereby if on the face of the motion it does not state a constitutional ground or oath -- you know, when somebody takes an oath, that's a serious matter. They're going to be careful about doing that unless they've got grounds. It is my understanding of the law that you can't assert any ground other than the grounds in the Constitution. And so, he's trying to make it serious, make these motions serious, where people have to be serious about stating the right grounds under oath. And if they haven't, the trial judge is not paralyzed. He can proceed with -- apparently with the one exception being that when he summarily decides the motion does not on it's face state a constitutional ground, he's got to send these papers to the -- immediately to the administrative judge.

But anyway, this -- I'm not saying this is a crisis problem, all right, or an epidemic, but it's something that's happening out in the real world. And I think that's what's bothering Judge Douthitt that -- I've personally seen it happen where a judge has got cases set, he's got a jury panel sitting there, and some guy waltzs in there, he's got his Motion for Continuance overruled and the next move is Motion to Recuse. I mean -- now he's done made that judge mad as a hornet, I know, and the judge can punish him in all kinds of things. When some guys want a continuance desperately enough, they'll do that. And that really upsets these judges, particularly in rural areas. You know, if you're in a big city, nobody there sitting down in the jury panel is going to get mad at any judge because the docket cratered. There's always a docket somewhere in the big city. But those judges call those jurors in, and they have to tell them to go home. I know that judges are very sensitive about that, particularly those that have to run for election every once in awhile. And they always tell the lawyers, "Be sure and let me know if you're not going to go to trial so I can call this jury off." And it's something that's eating on

the trial judges in some of these rural areas. I think that was what you were getting from Judge Douthitt.

MR. SPARKS: There's no question that the automatic continuance -- you know, we discussed that before the rule was ever implemented, and it does allow for grounds much larger than the constitutional grounds, however, on the basis of a motion. And it may be that it's -- at some time we're going to have to address it. I have not seen it as much as I thought I was going to see, but really the amendment doesn't speak to any elimination of that. You still have the procedure that you have to go through the administrative judge.

MR. RAGLAND: I move we refer this for further study.

CHAIRMAN SOULES: I think we're just going to -- do you want a further study?

All right. Is there any other discussion? The motion is made and seconded that these suggested changes be rejected. Any other discussion on that subject? All in favor of rejecting these, say aye, please. Those opposed or wanting these changes made, say aye.

MR. O'QUINN: Aye.

CHAIRMAN SOULES: And who was that?

MR. O'QUINN: Me.

CHAIRMAN SOULES: Okay. O'Quinn wants to change it. So aside from O'Quinn, the committee voted, I guess, 21 to reject these, to one wanting the changes.

MR. BRANSON: Make that two.

CHAIRMAN SOULES: Two wanting the changes.

Bill.

PROFESSOR DORSANEO: For the record, I just have one comment that Paragraph G of current Rule 18a refers, I believe, to Article 200A of the Revised Civil Statutes. That article has been repealed and replaced by the statute that would have been the subject matter of Judge Casseb's report.

CHAIRMAN SOULES: 1658, House Bill 1658. I don't think it's got an article number yet.

MR. SPARKS: That's right.

CHAIRMAN SOULES: A part of the committee's report will be to call the court's attention to the fact that Article 200A is going to be renumbered in the new statutory code, in the

code setup, and we'll -- when it comes out, I'm sure the court will want to take care of that housekeeping matter.

Any further comment?

All right. Next, Sam.

MR. SPARKS: Next is 27a. It's one of many that has been requested by the Council of Administrative Judges. There wasn't a whole lot of emotion either side of any of our members as far as I know on this one.

MR. LOW: What does it change?

MR. SPARKS: It's the new rules.

MR. LOW: Okay.

MR. SPARKS: Basically I thought it was good. I don't know that it changes anything, but it does help in the instance where you have a Bill of Review or subsequent proceedings. It makes it go back to the original court. Sometimes that's a problem when you have multiple judges.

MR. McCONNICO: Sam, can I speak to that?

MR. SPARKS: Yes.

MR. McCONNICO: I like the Bill of Review section. I think that's right. I don't -- I have a little bit of problem with the first sentence where it says, "Except as provided in this rule,

all cases filed in counties having two or more district courts shall be filed in random order, in a manner prescribed by the judges of those courts." Now, the thing I don't like about that, it might not be a problem, is the reality of the practice is where you have two or more courts, you usually have one judge trying more cases than another judge. And if you're going to say the judge that has not tried as many cases is going to get stuck with 50 percent of all the cases, then the docket is not going to move as quickly.

The other problem I have is in reality the way that the rural counties are working, at least in my experience, where you have a judge from one county and then you have a suit that is filed in a different county within the district and the suit might be a political hot potato, they will generally give it to the judge from a different county that doesn't reside in that county. Well, that's going to avoid that safety mechanism.

MR. SPARKS: He can still transfer the case.

MR. McCONNICO: Still can transfer. So maybe it won't. I don't know.

MR. SPARKS: Most of these

recommendations by the Council of Administrative Judges appear to be improvements. I didn't find anything in this particular rule that --

MR. ADAMS: Let me ask a question on this.

MR. SPARKS: Yes, sir.

MR. ADAMS: Would this rule by implication prohibit the courts from adjusting the dockets?

MR. McCONNICO: I think that's my concern.

MR. LOW: It just talks about where they may be filed. About filing. I don't think it at all addresses that.

CHAIRMAN SOULES: Frank Branson.

MR. BRANSON: One of Steve's problems we aren't really addressing, and it's a real world problem, there are several counties where you've got one or more district judges, and if you happen to draw that district judge, you can sit on that case until the cows come home and never get a trial. It doesn't make sense to me to totally alleviate that right as proposed in Rule 27a because you can leave some litigants really without recourse, particularly in some of the rural areas.

MR. LOW: How does that 27 do that?

MR. BRANSON: Well, it says, "Except as provided in this rule," unless y'all -- you really don't have any option at all.

MR. LOW: But filing it.

MR. O'QUINN: Yes, that's where it's going to stay, though.

MR. McCONNICO: That's what we're worried about.

MR. O'QUINN: Say you've got two judges, one judge, for personal reasons, health reasons or otherwise, just isn't taking care of his business, so you go -- you want to go file with Judge Quick. You can't. You get Judge Slow, and you can't do anything about it.

MR. BRANSON: And you're just stuck. There are some courts -- there was one in Dallas County until recently that you could ride the dockets for forever and not ever get up.

MR. ADAMS: This doesn't say you won't know what court you're filing in.

MR. BRANSON: It says you can't do it. You don't have any option.

MR. O'QUINN: You're stuck there. You're stuck in Judge Slow's court. If you've not suited

and refiled to try to get Judge Quick, they put you back in Judge Slow.

MR. LOW: Yeah, but what it says, "in a manner prescribed by the judges." What are you doing now? The judges are prescribing the manner to allow you to do it now.

MR. BRANSON: Well, the judges are not going to acknowledge the existence of Judge Slow in their rulings. They don't generally in the counties that I practice. Judge Slow is just a black mark on the record, and he sits there. No one acknowledges he exists.

MR. O'QUINN: Right now, Buddy, it's being handled by local practice. In other words, obviously the judges in any county can set up this very same rule. What we're being asked to do is impose this rule on every county, whether the judges working in that county want it or not.

MR. SPARKS: Well, let me do -- let me point out that all of the problems from the district benches, of course, go to these administrative judges, so I think we ought to get some pretty good looking at their request. They're the ones that have these problems.

If you're not getting to trial in a certain

court, Frank, he's the only person that you can go to, is that administrator.

MR. BRANSON: But can't that administrative judge handle it now, Sam? I mean, doesn't he have that power without us imposing it on those judges that don't want it?

MR. SPARKS: In the hearings on the task force that Judge Wallace and several of us have been listening, that's been their biggest complaint is saying, "You know, you want us to monitor the dockets, but we want things in writing where we can show these judges, who really are our peers, they're district judges also, that they have to do these things. So, I think you're going to see more and more requests for the administrative judges.

MR. SAM D. SPARKS: Sam, my problem is from -- my office is in Tom Green County, if you've had the exprience to be there. It doesn't matter which of the three district courts you filed in. You know, on Monday morning you'll go there and pick a jury and you may be assigned any one of the three judges. This ties in not only with 27 but also with 18a. You can't file a Motion to Preclude because you don't know which judge you're going to get until you go to trial. There's no ten day

period at all. I understand disqualification is controlled by the Constitution.

Under 27a what you're proposing here -- my question is, I happen to like the system that I got. I can't recuse a judge. But I think we have -- we move more cases per capita out there than any county in the State of Texas. And I don't want a rule that makes it where they cannot continue the administration of that Tom Green County courts like they're doing. In other words, it ramdomly gets assigned to a judge. I must try it in front of that judge. I'm throwing that out for a comment.

MR. REASONER: I don't read it as saying that.

MR. RAGLAND: I would like to speak to that, also.

MR. SAM D. SPARKS: I wish the whole state would go to the system we have. We're moving more cases than you can believe.

CHAIRMAN SOULES: Well, if we added a sentence that says, "After such filing, any case may be transferred between the district courts in any manner prescribed by the judges of those courts," does that alleviate any problem?

MR. BRANSON: Mr. Chairman, why are we

messing with the administrative judge's personal prerogotives now?

CHAIRMAN SOULES: Because we've been asked to look at it.

MR. SPARKS: That's in the next rule. They've requested that in 27b.

CHAIRMAN SOULES: All right. Does that -- David Beck.

MR. BECK: One of my concerns is more basic. I guess I don't have as much trouble with these suggestions as others because we handle a lot of these problems by local rule in Harris County. But my question really is more basic. My recollection is that this task force that the Supreme Court has just appointed is going to be looking at ways to streamline the dockets, and I would presume that this is going to be one of the subjects that they're going to be addressing. If that's the case, and there's going to be a very formal study done on it, why are we amending our rules now and then look at a study a year from now, and then have to do it again?

I would suggest, therefore, that we table this thing until such time as the Supreme Court has had a chance to complete its study, assuming I'm

correct on that, Judge Wallace.

MR. BRANSON: Second the motion.

MR. SAM D. SPARKS: I like that very well. Could we provide some way for me to reluse a judge if necessary?

MR. SPARKS: If you don't get one special one.

CHARIMAN SOULES: Well, maybe that's what we're going to want to do is --

MR. BRANSON: Sam, just get a special bill in there.

MR. SAM D. SPARKS: Well, it's been going so good, I hate to even think about that, but it could be necessary.

CHAIRMAN SOULES: That may be the case with this group of rules that Sam is talking about right now that we'll want to defer them to the task force committee that's been appointed and ask them to advise us when they're through or at any point.

But let's hear the rest of it, Sam, from you and then -- or do you feel that we need to go through these?

MR. SPARKS: Of course 27a, b and c are certainly related. Let me speak for Rule 27c. I really think that this is a good rule. I think

it's true in every community where you have multiple courts, there are some judges who will sign presiding order and enjoin the movement of the world for a hundred dollar bond. And I can see where the administrative judges are coming from on this particular one. It really says that you have to file your case first and go that court unless there are circumstances that justify an immediate or temporary relief. I personally thought this was good.

I think the whole purpose of these series of rules is what we're going to have. I think David's suggestion was good, but I think the judges are saying, "We want a random selection. We want the filings so that every district court is getting equal number of cases," so that then we evaluate under this new act and decide how things are going. But I really thought that 27c was a good rule.

CHAIRMAN SOULES: Harry.

MR. REASONER: Let me say that reading 27a and b together, I read 27a as merely relating to the filing and 27b as meaning that the local judges have full discretion to handle their dockets, and I really don't see any reason to defer to the task force. I mean, it seems to me that the

Council of Administrative Judges has, in effect, asked for the endorsement of this committee; and it seems to me they have a very sensible proposal, and I would urge we go ahead and approve it.

CHAIRMAN SOULES: Justice Wallace has just informed me that all nine of the administrative judges are on the task force for whatever that may -- information that may be to you.

MR. REASONER: Well, I assume at the time they referred it to us, they were well aware of the fact that they were on the task force, were asking for --

PROFESSOR DORSANEO: I don't think so.

CHAIRMAN SOULES: What's the date of that referral?

Do you have that, Sam?

MR. SPARKS: Yes. Well, no, they don't put a date on it, but it's -- it had to be May. They were not appointed to the task force at that point.

MR. WALLACE: The task force didn't even exist then.

MR. SPARKS: The one thing that I have been impressed with, though, is -- I feel kind of

like Harry does. I think these are good rules; we ought to rule on them. But these administrative judges are asking for written rules to help them do their work, and I've been impressed with the fact they're trying to do their work.

CHAIRMAN SOULES: Tom.

MR. RAGLAND: I would like to speak against this 27a. And I can relate it only to my personal experience, but in McLennan County we have four district courts. We do not have a criminal district court. But by local rule or agreement among the judges, all indictments are returned to one district court. Something like this means every fourth civil case is going to be filed in that court and here's criminal cases are going to get bumped and the Speedy Trial Act and everything else. And you talk about slowing down action in McLennan County, this rule will do it. There is no delay in McLennan County.

There was a jury verdict on a complex personal injury case yesterday that was returned six months after the thing was filed. So we don't have that problem there, and I sure would hate to see us get saddled with a broad, heavy burden that solves some problems somewhere else, perhaps, but

creates some equally as bad.

MR. LOW: Could we either eliminate the first sentence, if the judges are asking for guidelines, either eliminate that or substitute, therefore. And I think this would be something novel to make a suggestion in the rules, but something that each district court, unless they have their own system, then it would be random unless -- and then the other rules, I don't think there's been any objection to the Bill of Review and things of that nature.

The first sentence appears to be the one that's most objectionable, and that can either be eliminated or corrected to refer it back to the local judges. And I point out that in that rule, the word "file" is used twice, but it's not -- they don't prohibit transferring on it. It just talks to filing. And I understand -- I hear some real bad objections to that and --

MR. O'QUINN: Is there a motion to redo that sentence?

MR. BRANSON: Mr. Chairman, procedurally don't we have a motion on the floor to table?

CHAIRMAN SOULES: We do have a motion to defer it to the task force, and Harry has spoken to

that. The task force is going to be looking at adminstrative problems as opposed to trial procedure problems.

MR. BRANSON: Could I call a question on the motion?

CHAIRMAN SOULES: Okay. Question. Those in favor of deferring the recommendations in 27a, b and c to the task force for its study and report back, say aye. Opposed?

MR. REASONER: Aye.

CHAIRMAN SOULES: Reasoner objects to that.

MR. SPARKS: I oppose that, too.

CHAIRMAN SOULES: And Sam Sparks.

MR. SPARKS: Okay. The next one is --

CHAIRMAN SOULES: The vote is about 20 to 2.

MR. SPARKS: One of our guesses -- and Bill Dorsaneo wanted me to tell you that we've guessed wrong on some of these as to where to put some suggestions. But one of the attorneys -- I had two or three correspondence clerks making this to have all pleadings 8 1/2 x 11. One of the attorneys I thought had a unique approach. He wanted pleadings that way because he had been going

to the State Bar seminars and he had now learned how to do his own trial notebook and he wanted the pleadings to be of the same size, then, as the trial notebook. The suggestion is made that he was sure that the Federal Government did a lot of study and it would cut down the cost. But the main thing that is to require all pleadings to be 8 1/2 x 11. Our committee has no comment on that.

MR. RAGLAND: Which rule are we on?

MR. SPARKS: We've put 45(e) because we think that's where it would be fought.

MR. O'QUINN: You have to turn some more. It's out of order.

CHAIRMAN SOULES: I guess I've dropped it in the copy process.

MR. TINDALL: It's after 46 -- 47. It follows 47.

MR. O'QUINN: It's after 47.

MR. TINDALL: Luke, there is a state law effective September 1 of '86 that you may be aware of that prohibits state agencies from buying file cabinets that will accommodate anything greater than 8 1/2 x 11 or you can't buy paper that's larger than 8 1/2 x 11 and the computer paper that will tear down to 8 1/2 x 11. So it seems like to

to me that we're walking into a mandate anyway to do that.

CHAIRMAN SOULES: How many feel this committee should address the issue of the paper size for pleadings? Should we address it or leave it to whatever the statute is? How many feel we need to address paper size in pleadings?

MR. LOW: Who else is going to address it?

MR. ADAMS: Who's going to address it if we don't?

MR. SPARKS: The statute will bind the clerk, but the court clerk is going to have 10,000 lawyers coming --

MR. TINDALL: Yeah, if we don't help the clerk.

CHARIMAN SOULES: All right. Well, we will discuss it.

I think Chief Justice Hill has got some lunch arrangements.

(Off-the-record discussion.)

CHAIRMAN SOULES: Shall we adjourn now and to go lunch?

MR. O'QUINN: Yes.

CHAIRMAN SOULES: Okay. We stand

adjourned and resume after lunch.

(Lunch recess.)

AFTERNOON SESSION

CHAIRMAN SOULES: It's 1:30. We're back in session. If you didn't sit where your name tag is, please get your name tag in front of you so that the court reporter can identify you when you speak.

And, Sam, we'll have a guest here in about an hour, Clifford Brown, who is head of the Advisory Committee of the Court of Criminal Appeals. And if we're not through with these pretrial rules in about an hour, I'm going to need to interrupt while Clifford Brown is here to get the report on the appellate rules and to hear from him on what that court is doing with regard to the same rules. So why don't you proceed. We'll get as far as we can in an hour, maybe even through with your report.

MR. SPARKS: On 45(e) the consensus of the lawyers I've talked to are in favor of a rule setting out the small rather than legal paper for all pleadings. And so, that's what's before us on that one.

CHARIMAN SOULES: That's pretty straightforward.

MR. TINDALL: I move that we adopt 45(e).

MR. BECK: Second.

CHAIRMAN SOULES: Moved and seconded. Is there any discussion?

Bill Dorsaneo.

PROFESSOR DORSANEO: I am opposed to any rule that will talk about the size of paper for filing things in the trial court. My experience with the federal courts has been very unsatisfactory. Filing things on the wrong size paper or not on green paper as opposed to white paper and it gets sent back to me.

CHAIRMAN SOULES: Not filed.

PROFESSOR DORSANEO: Well, you know what I mean. I just don't like the whole idea of it. Now, what happens if somebody sends in an original answer that's not on 8 1/2 x 11 inch size paper? What happens to it? Is that a pleading defect that has to be specially excepted to? What's going on? Does it get thrown away? I would rather just not get into the problem of size of paper because I don't know what happens if the rule is violated, and it might be that it comes back. I at least want that spelled out. Failure to use the right size paper is not a defect which renders the

instrument filed null. Something like that. So let's just stay away from the size of paper. We never had to talk about legal size paper before. Why bother putting this in the rules?

MR. TINDALL: Bill, the state clerks, you understand, by September 1 can't buy file cabinets to accommodate the paper.

PROFESSOR DORSANEO: I don't care.

MR. BECK: Good point, Bill.

MR. O'QUINN: Obviously a university professor.

MR. RAGLAND: This is the first I've heard about this filing cabinet business. What's the authority?

CHAIRMAN SOULES: There's a statute, if it stands up. If the legislature reverses it.

MR. TINDALL: And the real estate folks are moving to letter sized Deeds and Deeds of Trust. It's just -- it hasn't been a problem in Federal Court.

CHAIRMAN SOULES: Not to the clerks of the court, but it could be a -- any further discussion? Those in favor of adopting this proposal to add Subsection E to Rule 45, signify by saying aye. Opposed?

PROFESSOR DORSANEO: No.

CHAIRMAN SOULES: All right. Let me get a show of hands on that. I can't hear it enough to divide it. Those in favor, please hold your hands up. 11. 11 for. Opposed? Three opposed. All right.

MR. SPARKS: On rule 46 -- I put -- proposed Rule 46 I put in your packet just as an example of sometimes what we get on this committee. I don't know what happened to Attorney Richard Evans the day he wrote us.

MR. LOW: That's an ordinary day.

MR. SPARKS: But he was tired of going down on special exception hearings. And the committee recommends that we do not accept that.

MR. BECK: So moved.

MR. TINDALL: Seconded.

MR. O'QUINN: Seconded.

CHAIRMAN SOULES: Any discussion? In favor of rejecting this or those who want to reject this, say aye. Those who want it approved, say aye. Unanimous rejection.

MR. SPARKS: You know we got several Rule 47 requests, and I think there is, what, three of them in your packets. Yeah.

MR. TINDALL: Two.

MR. SPARKS: Two. Yeah, okay. I'm trying to remember which one -- the first one really just eliminates the last phrase in -- eliminates (b), puts in the -- and then eliminates the last phrase. But the main thing that they're trying -- that the first one is trying to do is require -- I guess to go back to the -- one of the -- oh, okay. Rule 47 --

Let's look at the second one, if you will. Rule 47, really they wanted to specify in writing, and the proposal of this rule -- the proposer of this rule says it doesn't have to be in a pleading, that you can do it in writing. I don't know exactly how that works. I guess if you write a letter, you're bound by it. But he wanted the rule to specify in writing the maximum amount claimed, where you wouldn't have to go through all the special exception hearings. There must be a track history on this that I'm not aware of. Mr. Kronzer and Mr. Green have a lot of correspondence on this about whether or not it's ethical for the lawyers to violate these rules.

And so those two proposals are there primarily to -- it looked to me like one of them

was trying to go back to the old practice and one is trying to keep a lawyer from, I guess, advising a jury sued for 18 trillion dollars. But the second one of Rule 47 is the one that I think you ought to look at.

MR. O'QUINN: Option Two?

MR. SPARKS: Option Two, yes. I really don't have any support for either of these.

CHAIRMAN SOULES: You've got -- 45(e) is between the two options.

MR. BECK: Mr. Chairman, I move that this proposal be rejected.

MR. O'QUINN: I second it.

CHAIRMAN SOULES: Both options?

MR. BECK: Yes, both options be rejected. I think we ought to go with what we've got. I think what Mr. Kronzer is primarily objecting to is -- what he perceives is some attorneys stating very large ad damnums in their pleadings and generating publicity for it. In looking at it from our side of the docket, because of excess coverage and so on, it's imperative that we know the amount in controversy. And I just think it's silly to impose sanctions on the Plaintiff's bar for stating the amount in controversy when two weeks later, I may

be filing a special exception requiring them to do so. I just don't think it makes any sense.

MR. O'QUINN: Vote. Let's go.

CHAIRMAN SOULES: Is there any other discussion?

PROFESSOR DORSANEO: Just one comment, Mr. Chairman.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: At the last meeting of the committee on Administration of Justice that I attended, there was a specific recommendation to go back to old Rule 47 requiring the amount claimed to be specified in an original claim. There was substantial sentiment, if I recall correctly, for going back to the old way, and I just point that out to this committee.

CHAIRMAN SOULES: We're going to get a recommendation from the COAJ. I believe that we will anyway, that the amount in controversy be required to be stated.

PROFESSOR DORSANEO: Except -- that would be so except in medical malpractice cases because specific statutory provisions in Article 4590(i) would control the Rule of Procedure, presumably.

MR. SPARKS: That really is the first of

the intent of Mr. Weber on the first one, if you'll look at it. Because he is suggesting eliminating the just in excess of minimum jurisdiction of the court, and then specifically have to make a demand for judgment in your relief. That was the intent of the first one that we're rejecting. But I found no support for either of these in the lawyers we've contacted.

MR. O'QUINN: Question.

CHAIRMAN SOULES: Okay. Question's been moved so we are addressing two issues. Number one, are we going to require that an amount be stated in a pleading. That's what Option One speaks to, isn't it, Sam?

MR. SAM SPARKS: Yes, sir.

CHAIRMAN SOULES: Okay. Let's take the votes separately. Those who want to reject Option One that proposes the required statement of damages.

MR. O'QUINN: It really doesn't do that, Mr. Chairman.

MR. LOW: No, it doesn't.

MR. O'QUINN: Neither of them does that.

MR. LOW: Neither of them does that. I don't -- the way I read them, it provides an

exception -- I mean, I would be for that. You could have something where -- let them plead what they want. If you're worried about telling the jury, that could be taken care of. But I defend cases and represent Plaintiffs, too, and in both sides I like to see what you're suing for. Whether I'm a Defendant or a Plaintiff, I like to tell them what I'm suing for or find out what they're suing for.

CHAIRMAN SOULES: Those who want to reject the Option One, please say aye. Those who want to adopt Option One, same sign. This is unanimous.

Those who want to reject Option Two, please say aye. Those who want to adopt Option Two, please say same sign. Again unanimous rejection.

MR. SPARKS: The next proposal, is one of several from Patricia Hill, in effect is a new rule. It's a pretty much Rule 11 of the federal procedure. Well, it's not -- it is Rule 11 of the federal procedure. And nobody has indicated that there's anything wrong with it. A lot of people have supported it. A lot of people just don't have feelings one way or the other. I think this is probably an effort on behalf of Representative

Hill. I think she's introduced a frivolous lawsuit statute once or twice, and I think this may be a part of it. But there have been several requests for the adoption of a similar rule to Rule 11.

MR. LOW: I move we reject it. We don't need another rule on that.

MR. SAM D. SPARKS: I second.

CHAIRMAN SOULES: Motion has been made and seconded to reject proposed Rule 57a. Any discussion?

PROFESSOR WALKER: 57a?

CHARIMAN SOULES: That's right. New Rule 57a, Orville.

Any discussion?

PROFESSOR WALKER: I missed it. Oh, I see.

CHAIRMAN SOULES: Those who favor rejection of proposed Rule 57a, please say aye. Those who support Rule 57a, please same sign. Again that's a unanimous rejection.

MR. SPARKS: The next one is Rule 85a. This is also from Representative Hill wanting the adoption of Federal Rule 12. And I'd like to call your attention -- it would change a little bit, for example, the second ground of "lack of jurisdiction

over the person" would have the special appearance.

MR. O'QUINN: Mr. Chairman, I would like to move rejection.

MR. LOW: I second that motion.

MR. O'QUINN: Basically I'm opposed to adopting something just because the Federal Courts do it.

MR. LOW: Well, not only that, the rule would not dovetail with some of our other rules and it would dovetail with other federal rules. And this goes to substance because some of the things you waive in there and you get into that. I think you're just mixing some bad whiskey with some good. So you just wouldn't want to do that.

PROFESSOR DORSANEO: Question.

CHAIRMAN SOULES: You want to pass on it? Any further discussion on this? All right. Those who favor rejecting proposed Rule 85a, please say aye. And those who favor adopting proposed Rule 85a, same sign. Okay. That's another unanimous rejection.

Broadus, do you have these materials? There are extra sets and I thought I saw you looking over somebody's shoulder.

Is there anybody who doesn't --

MR. SPIVEY: No, I was just seeing if I was on the right page. If --

CHAIRMAN SOULES: Okay. Does everbody have a set of materials? If you don't, I've got some extras. Okay.

MR. SPARKS: It's just amazing what a full meal will do to discussion.

MR. O'QUINN: We've got our energy back, Sam. We're ready to go.

MR. SPARKS: Well, I would be uncomfortable in either the Administration of Justice Committee or this committee without having venue. And I've said it many times, "If you can't hit El Paso, then you ought not to be out there." And I don't know anything about venue. I read all of the letters and I'll just defer -- I put down what we think everybody has suggested, and it's several things. I just turn it over to anybody that's interested. I really don't have any personal involvement. I really don't do enough practice. I removed a couple of cases from Houston because Southwest Airlines stops three times before it gets there, but other than that --

The one thing that is well motivated is trying to bring the rules in line with the statute.

I call your attention to the first Rule 87 adoption. We have inserted the word -- and I'm not recommending this -- "primary defendant" because -- and I offer no definition as to what a primary defendant is. But apparently there is a very big problem in a multi-party lawsuit of one party filing a good motion to transfer and the trial court not exactly knowing -- does he transfer the case when other defendants have filed a general denial? Does he transfer the whole case? And I've not had that personal experience, but apparently many of you have and many other lawyers have. And so, I'm going to sit down and let y'all debate what you want to do on these.

CHAIRMAN SOULES: Bill Dorsaneo is involved in these already.

And why don't you give us your views, Bill, and then we'll come -- get comments from the other people.

PROFESSOR DORSANEO: Why don't we expedite? Why don't we take them in chronological order? And that would take us to suggested amendments, to Paragraph 2(b) of Rule 87. You have three options suggested in this packet. My recollection is that Option Three is the one that

was voted up affirmatively, which is a little redundant, I suppose, by the Committee on Administration of Justice.

MR. SPARKS: That's right, yes, sir.

PROFESSOR DORSANEO: All right? Now, first let me try to identify the perceived problem in Paragraph 2(b). As you will recall, these venue rules had to be drafted very quickly because of the timetable that we had back when the venue statute was passed. It is believed that Paragraph 2(b) of current Rule 87 is unclear in this respect. It is believed that Paragraph 2(b) could be read under the current rule as requiring a Plaintiff to make prima facie proof of the merits of a cause of action when the motion to transfer contains specific denials of the allegation that the cause of action accrued in the county of suit.

Doak Bishop suggested that we change the language in Paragraph 2(b) for clarification purposes to try to make it plainer that when there is a denial of the venue facts in the petition concerning the place where the cause of action arose or accrued, that the prima facie proof is related to that particular matter. Frankly, when I look at this language, I think the language could

be better, and it also occurs to me that there may be some additional problems being dealt with. Rusty is shaking his head up and down on this, but that's the idea. The problem is trying to clean up what should have been done better back earlier. This seems to be an improvement, although perhaps it could be improved more.

The other two options on this point are just variations on wording, I would submit. And I think that this particular matter involving Rule 87 is really very separate from the other maters and should be taken up separately.

CHAIRMAN SOULES: You mean separately later or separately now?

PROFESSOR DORSANEO: Separately now.

CHAIRMAN SOULES: Now. Okay. Let's do.

PROFESSOR DORSANEO: I think that this Paragraph 2(b) thing needs to be dealt with first because it's not a package.

CHAIRMAN SOULES: All right.

MR. O'QUINN: Question. I'm not calling for it, I want to ask Bill a question. Is what you're trying to do is where a challenge is made by the Defendant to say that the Plaintiff only has to show the county where it happened as versus show he

actually has a cause of action?

PROFESSOR DORSANEO: Thank you, John, for restating what I didn't state very well. Yes.

MR. McMAINS: I don't think you did.

MR. O'QUINN: I don't think you've accomplished that by what you've done here.

PROFESSOR DORSANEO: Don't blame -- I didn't do that. I didn't write this language. I'm just presenting it.

MR. O'QUINN: Well, I'm sorry, I don't think whoever wrote it -- I don't think they've accomplished that.

PROFESSOR DORSANEO: I think that's the objective. As I said, there may be an additional objective that I don't understand. But I think that's the objective, and I agree to that. I don't think it necessarily does do it. I think it gets one step closer to that.

MR. O'QUINN: Well, the question -- but you're going to have to prove something happened in that county. If it's a quibble over which county -- you got to do more than name a county, you got to show something happened. I guess -- would it be something like the event or the incident or the injury or -- I don't know, you're going to have to

show something happened in the county. You might not show a cause of action happened, but you're going to have to show something happened.

PROFESSOR DORSANEO: I think you're showing that some part of the cause of action arose or accrued in the county of suit.

MR. O'QUINN: But I don't think it's so much -- that's the concern, that once you say "cause of action," people are going to say, "You're now going to have to show an event like an incident or an occurrence." You're going to have to then show the elements of a cause of action.

MR. BRANSON: Or something related to cause of action.

PROFESSOR DORSANEO: That's the problem. The old law was this, under the interpretation of old Subdivision 23 of old Article 1995, if someone relied upon the language in that provision saying that they could maintain venue in a particular county because all or part of the cause of action arose there, the old cases said in order to prove that something arose anywhere, you had to prove that it arose; that is to say, you had a cause of action.

MR. O'QUINN: Right.

PROFESSOR DORSANEO: In addition to proving that some part of it arose in the county selected. And when we drafted the original rule, original Paragraph 2(b), we kind of forgot about those cases, which puts an odd construction on the language anyway. And --

MR. O'QUINN: Can I make a suggestion?

PROFESSOR DORSANEO: What?

MR. O'QUINN: Just shoot at this language. Why shouldn't the language be that part or all of the events giving rise to the alleged cause of action occured in that county?

MR. LOW: Or if a party dispute that it wasn't in a particular county. You know, they're trying to do away with having to try your case or a venue and all that, take care of it by an affidavit or something. Somebody swears the wrong affidavit, you got trouble, and, you know, he might have.

MR. MORRIS: Bill. I worked on that a lot with Judge Pope during that session, and we didn't leave that out accidently. It was on purpose and it was agreed across the board that we left that out because we wanted to get away from having to prove up your whole case. And Judge Pope, as you know, was trying to make it easier on

the courts, and he led us in this direction.

PROFESSOR DORSANEO: Well, I don't think there's any question that --

MR. O'QUINN: Nobody's retreating.

PROFESSOR DORSANEO: -- that everybody tried to have the current rule say that a Plaintiff never needs to make proof of the merits of the cause of action, prima facie proof or otherwise. I don't think there's any question that that's what the rule was meant to mean right now. But the difficulty is in having it say that.

MR. O'QUINN: Here's the problem. Let's say you allege that the cause of action arose in Travis County. The Defendant says, "No, it arose in Bexar County." Okay. So you -- now the judge has to resolve that. We want to have some vehicle for resolving it without making you prove a cause of action. If y'all just show up in front of the judge on a venue hearing or by affidavits, he's got to know, one, that -- something had to happen, either in Bexar County or Travis County for him to resolve that. And what I'm trying to suggest is rather than say that the judge has to figure out where the cause of action arose, just if part or all of the event, whatever the event is --

MR. MORRIS: I understood what you said.

MR. O'QUINN: It maybe a house burned down. It may be a product blew up or somebody was treated in the hospital somewhere or something. We're not getting into negligence and all, just that the event or events made the basis of the Plaintiff's suit occurred in whole or part. That's all you have to show the judge. Show the judge the events happened in Travis County. That's where the house burned down or whatever, not in Bexar County. And that's the end of it. I'm trying to pick up some language there. I'm not necessarily saying that's the language to use, but get away from talking about proving a cause of action. But you've got to prove something or you'll never resolve that little argument.

MR. MORRIS: I know that we discussed this very thing when we were all sitting around up in Judge Pope's office trying to put some of this together. And exactly what's the defect as it exists right now? I heard what you just said, but doesn't the rule provide or isn't there a provision in there that takes care of that?

MR. McMAINS: Tried to.

MR. O'QUINN: Dorsaneo says the problem

is this. If the Defendant controverts your allegation that the cause of action arose in Travis County, he says it happened in Bexar County, the rule suggests at that point you have to proof that the cause of action arose in Travis County, which means you may have to prove a cause of action.

PROFESSOR DORSANEO: Prima facie proof. Which I don't think is --

MR. McMAINS: It wasn't intended to be that way.

PROFESSOR DORSANEO: It wasn't intended to mean that. We had one week to do these rules.

MR. O'QUINN: We don't have the statute in the room, we just have a rule.

MR. LOW: There's a real problem now. There are a lost of cases --

PROFESSOR DORSANEO: I know what the statute says. We do have the statute in the room, John.

MR. O'QUINN: We do? He wants to look at it.

MR. MORRIS: Let me see that statute.

PROFESSOR DORSANEO: The statute, the old 4(d)(1) just says, "No proof of the merits -- no proof of the merits of a cause of action shall be

required," something like that. It's now in the Civil Practice and Remedies Code, Chapter 15, which is 959 of that thing, Lefty.

MR. MORRIS: Okay.

CHARIMAN SOULES: Do any of these options handle the problem satisfactorily?

PROFESSOR DORSANEO: No, no. The third one is a better shot at it, but I -- than any of them. But John says if we can eliminate the word "cause of action" and replace it with something else, event or events, acts or omissions, but it's very hard to figure out what it is you could use.

CHAIRMAN SOULES: Transactions or occurrences.

MR. O'QUINN: I don't see what's wrong with "the occurrence" and just have it -- and maybe just to make it real clear "provided, however, you don't have to prove the cause of action," just the occurrence or whatever it is.

MR. REASONER: When you get outside the personal injury field, what the occurrence is might be tricky.

MR. MORRIS: Right.

MR. O'QUINN: It might be a contract. Whether it was a contract.

MR. BRANSON: How about transaction or event?

PROFESSOR DORSANEO: Alliance. Alliance in a representation case.

MR. BRANSON: How about transaction or event? Transaction would cover all of it.

MR. REASONER: A lot of commercial transactions don't occur one place or another.

MR. O'QUINN: That's fine. If it occurred in both Travis County and in Harris County, then you file either place.

CHAIRMAN SOULES: Some or all the transactions or occurrences.

MR. McMAINS: Let's say part.

MR. O'QUINN: Part or all? In any county where part or all occurs.

MR. McMAINS: Theoretically, I would assume, in a contract case wherever the offer is made might also be where part of the cause of action arose.

MR. REASONER: I wouldn't always concede that but --

MR. O'QUINN: He doesn't want to get on the record.

PROFESSOR DORSANEO: And I'm throwing out

language. You could say maybe something like that the fact, act or event that gave rise to the alleged cause of action or part thereof arose or accrued in the county of suit. And that's very clumsy.

MR. SPIVEY: How about making it, you know, something -- just say where -- that any part of the cause of action arose or accrued in the county of suit, period.

PROFESSOR DORSANEO: That, Broadus, gets us back to those old cases saying that that means that you have to prove that it occurred at all before you can prove where it happen. In other words, you have to prove that there was a rabbit before you can prove the rabbit lives in Detroit.

MR. SPIVEY: You're saying there's a difference between part or any part on the one hand and any part of on the other?

PROFESSOR DORSANEO: The old cases have a simple syllogistic reasoning. In order to prove that the cause of action arose or accrued in Travis County, you have to prove as a first step that there is a cause of action. That means you have to prove act, omission, negligence, proximate cause and some damage.

MR. BRANSON: How about just adding to that that, "except in no event shall there be a requirement that the cause of action be proven."

MR. O'QUINN: Fine.

PROFESSOR DORSANEO: That might work.

MR. MORRIS: The rule says that the court shall determine venue questions from the pleadings and affidavits.

MR. LOW: That's right. That's the whole --

MR. MORRIS: And then it goes a step further. We did that to get away with all this stuff that we're fixing to get back into. We went a step further and put the burden on the Plaintiff by saying, "it shall in no event be harmless error and shall be revisable if at trial it's found otherwise." And the reason -- this is coming back to me now to some extent -- the reason we did it just under this scheme right here -- and I can remember sitting in Judge Pope's office because he wanted to be certain that this was not something that was taken advantage of -- was that, okay, you Plaintiffs, we're going to let you have a pleading and an affidavit and it -- and the court will have to determine it based upon your pleading and affidavit. But if you're wrong, it's reversible

error.

PROFESSOR DORSANEO: What's the first sentence of 1506(1) say?

MR. MORRIS: This is under joinder. It says "when two or more parties are joined" --

PROFESSOR DORSANEO: No, I'm in the wrong place. I meant 1506(2). I'm having trouble remembering the new numbers.

MR. MORRIS: I think you're 1506(4) "in all venue hearings no facts or proof concerning the merits of this case shall be required to establish venue."

PROFESSOR DORSANEO: Okay. That's what this is about, what this sentence means.

MR. MORRIS: Yeah, but based on the next sentence "the court shall determine venue questions from the pleadings and affidavits." Again, as I say, under Judge Pope's suggestion, we made it reversible error. And the whole reason for that scheme -- I'm not saying it shouldn't be changed perhaps, but we shouldn't venture into this thing carelessly. It was to get away from taking up the court's time on this kind of matter, and saying "You Plaintiffs, if you don't do it right, you're going to end up back down here a few years from

now."

MR. O'QUINN: Well, the problem, Lefty, and I don't disagree with anything you said, in fact, I'm 100 percent in favor. The problem is there's some people who are concerned about some loose language in Rule 87 Paragraph 2(b). It could be misconstrued to be contrary to what your position is. They're worried about that loose language. They want to get it out of there or modify so there's no misunderstanding.

MR. MORRIS: John, what loose language?

MR. O'QUINN: The loose language of the question is the language says, "If the Defendant denies that the cause of action arose in the county in which you file the suit, then it becomes your burden" -- Lefty -- "to support your pleading that the cause of action did, in fact, occur in that county." And there is some concern that that means that the rule puts a burden on you beyond the statute. Do you understand what I'm saying?

MR. MORRIS: I hear you.

MR. O'QUINN: We're not trying to go back to the old system, believe us, nor is Bill. Bill says some people were worried that the statute could be misconstrued and all we want to do is kind

of get that language out of there.

MR. REASONER: You know, one thing that worries me about your transaction -- part of the transaction approach, you know, the reason I represented a widow in Laredo and the insurance company has file a declaratory judgment action against her in Dallas to try to keep her from suing them in Laredo, and under your language, I guess the insurance company is okay.

MR. O'QUINN: Well, that's something else that needs to be talked about some other day. Glenda's forum shopping. We'll get y'all later. They're doing that more and more nowadays.

PROFESSOR DORSANEO: I don't think we can draft that right here and now. We may have to work work on it tonight, Luke.

MR. MORRIS: We don't have time.

PROFESSOR DORSANEO: I don't have the ability, personally, to draft this here in a way that I would find satisfactory to myself. And if nobody else has a suggestion on the right language, why don't we leave it til tomorrow?

MR. WELLS: I have a suggestion that -- it seems to me that about the sixth line down in (b) of the present rule "but when the claimant's

venue allegations, are specifically denied, the pleader is required to support his pleading that an act or omission material to the cause of action pled accrued."

MR. O'QUINN: I think it's good one in that county.

PROFESSOR DORSANEO: Occurred.

CHAIRMAN SOULES: Where is that, Ned?

MR. WELLS: "Pleader is required to support his pleading that an act or omission material to the cause of action pled occurred in the county," et cetera.

MR. LOW: The problem is you want to be certain you're not saying it has to be proven in the courthouse. The idea is to stay away by affidavit or something.

MR. MORRIS: The idea was to do it by pleadings instead of an affidavit.

MR. LOW: That's right.

MR. McMAINS: Well, it still says as required by Rule 3.

MR. O'QUINN: As required by Rule 3. And Rule 3 --

MR. McMAINS: Paragraph 3.

MR. LOW: Okay. But you just want to

eliminate the problem, because if lawyers think they can go back to the courthouse, defense lawyer is going to be going back. We'll be right back where we were.

MR. SPARKS: What we need is -- we've got a rule of law here that says it doesn't matter if they deny it under the rules or anything else, it's determined from affidavit pleadings. But now we're trying to change it by rule. We're trying to change the law by rule that says if they deny it, then we've got to prove something.

MR. O'QUINN: No, Sam, all you have to do is file an affidavit. Of course, if you plead in your original petition the lawsuit happened in Travis County, that's not under oath. Then the Defendant files a pleading under oath it happened in Bexar County. All you got to do at that point is file something under oath that it happened in Travis County and that's the end of it. And what we're trying to figure out is what is it you have to put in your affidavit that you have to swear to. Do you have to allege -- or put all the elements of a cause of action or would it be sufficient to say that the event or part of the event giving rise to my case happened?

MR. MORRIS: Or you may be under one of those other exceptions, see.

MR. O'QUINN: Well, something else. It could be a lot of things. I understand that.

MR. MORRIS: You just have to make your affidavit comply with the portion of the statute or what you're coming under.

MR. McMAINS: Well, this is just talking about the cause of action.

MR. O'QUINN: The issue is obviously if the defendant denies under oath, what are we going to have to put in our affidavit? That's all we're talking about. Are we going to have to put a cause of action in here? Are we going to have to put an act in here? Well, then put in the rule what it is you want to put in the affidavit. That's all you need to do.

CHAIRMAN SOULES: What's wrong with what Ned suggested?

PROFESSOR DORSANEO: Well, the difficulty I would have with this, it may not be broad enough because with act or omission, that speaks about, well, conduct, I suppose. You could have an element of a cause of action that doesn't relate to the defendant's conduct. Could relate, perhaps to,

where something was relied upon.

HONORABLE WOOD: Act, omission or event.

MR. MORRIS: Luke, I think this needs to be studied further and I'm not ready to instruct us about it. I feel like that we're really not ready to make an intelligent decision at this time.

CHAIRMAN SOULES: I think that's pretty good.

MR. REASONER: I can testify to that on my part.

MR. WELLS: I would suggest that --

CHARIMAN SOULES: But it helps, I think, Lefty, if we do -- if this goes back to subcommittee to have gotten as many ideas here today so that whenever they come back next time, they're not in the face of something that was already occurring to us today and is uncured. That's all I'm trying to do is get everybody's thinking on the table so that when Sam and Bill or whoever it is that works on this, that they've had the benefit of everything we can come up with today, so when it comes back, it has the maximum opportunity to be ruled on without further study.

MR. MORRIS: I would like to suggest that, you know, that the subcommittee looking at it

really try to make it comply with the intent of that statute under the scheme that was set up. But that shouldn't be that hard once it's gone through.

CHAIRMAN SOULES: David.

MR. BECK: If that's true, why don't we put Lefty on that subcommittee because Lefty was involved in that.

MR. MORRIS: I would rather be a critic.

PROFESSOR DORSANEO: Well, we can try to draft it tonight.

MR. McMAINS: I think we can.

PROFESSOR DORSANEO: Why don't you let Rusty and I draft it tonight, try to.

CHAIRMAN SOULES: Okay. Let me hear Ned's language one more time and where it goes so I can make a note of it. Pleader is required to what, Ned?

MR. WELLS: "To support his pleading that an act, omission or event material to the cause of action pled occurred" -- and you go on from there.

CHAIRMAN SOULES: Okay. And as I understand it, one of the real concerns is the use of the word "cause of action" anywhere in the text. They're trying to avoid that.

MR. REASONER: You know, just a thought

about that. It seems to me if you're going to prove materiality -- before you can prove materiality, you have to show what the cause of action is in the same way you do now.

PROFESSOR DORSANEO: See, Harry, you're just too smart.

MR. WELLS: But if it's a cause of action pled rather than the cause of action proven.

MR. REASONER: That might make a difference. I'm just not sure how you can prove materiality.

CHAIRMAN SOULES: Materiality is a problem. Maybe "an act, omission or event related to the suit."

MR. REASONER: And I guess you could say "alleged cause of action."

CHAIRMAN SOULES: Alleged in the pleadings.

MR. MORRIS: And you're allegation had better be accurate or you're going to be back. If you're a plaintiff, are you going to be back in the trial court a few years from now?

CHAIRMAN SOULES: Say something that's alleged in the pleadings occurred, then you're not -- you're just talking about an allegation. It's

in the pleadings.

MR. MORRIS: Sworn allegation is what it really is.

MR. O'QUINN: Well, it has to be sworn to by somebody with personal knowledge, probably.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Can't you also solve some of the concern about having to prove the totality of the cause of action? If instead of when you say it shall not be necessary at the beginning of (b), you say it shall never be necessary. And that pretty much puts a finality on you don't have to prove the merits of cause of action. And then you can talk down here about what it is you are going to have to prove.

MR. O'QUINN: Yeah, but some defense story things you meet even in the trial of the merits, Rusty. You got to prove something, Rusty, to get the money.

CHAIRMAN SOULES: Does anyone else have any suggestions or does anyone have any further suggestions for the draftsmen as they go to try to do their work maybe later on this evening?

MR. RAGLAND: I have one. I don't know that it's really material, but I noticed all the

way through this, going back to Rule 45 to 47, that someplaces rules used "pleading" and "claim" and other places they say "cause of action" and they're used interchangeably. And as I understand the cases, they're not interchanable. The cause of action has certain elements. Fraud has, you know, seven, eight or nine. Negligence has three or four. When the claims say fraud, you know what the claim is. Maybe looking at it from the standpoint of using element proposed to cause of action, you might shed some light on this.

MR. SPARKS: But the problem with that is is the statute uses claims or causes or action.

PROFESSOR DORSANEO: That might work, though, you might could use claim.

MR. SPARKS: But the statute provides for both.

CHAIRMAN SOULES: Any further suggestions on this, Sam? You got something else on this?

MR. SPARKS: No, no, I just wanted to suggest that you suggest in writing.

CHAIRMAN SOULES: That we what?

MR. SPARKS: Suggest in writing to the subcommittee.

CHAIRMAN SOULES: Oh, yeah. Well I think

they're going to try to maybe do something -- we'll hear something tomorrow and then it may turn to further written. What about this No. 6?

PROFESSOR DORSANEO: Let's do 5.

CHAIRMAN SOULES: 5? Okay.

PROFESSOR DORSANEO: 5 is on the next -- in our sequence 5 is on the next page. That part of the current rule is now entitled "No Rehearing." There's been some debate about whether it actually means that, the way it's worded. There are two things that I think are of importance as I look at this with respect to the proposal. The first one is the last paragraph which speaks pretty much for itself. "Nothing in this rule shall prevent the trial court from reconsidering an order overruling a motion to transfer." There has been some controversy as to whether the trial court has the authority to do that.

Now, the Committee on Administration of Justice recommended that the trial court have that authority. The rest of it, which I think is clearly severable, the rest of it speaks about the procedures -- I think mostly it's clarification and principally dealing with problems that subsequently joint parties have and what they have to do in

order to complain. And I don't -- this is a long time ago from the COAJ, and I don't really have any more to add than that just being the presenter of this.

MR. REASONER: Let me ask a question. What -- it looks like to me that if you limit the rights of the subsequent joined party, a sophisticated plaintiff might wait until you joined parties that had good objections so that he could preclude them from raising legitimate objections.

CHAIRMAN SOULES: I believe there is a Court of Appeals case that holds what you just have a fear of is the law. It's what Blackie -- I had a case on that that you wait until you've got the motion for the challenge to venue decided then you put in a guy that had a good motion, that he can't complain.

MR. McMAINS: Well, Luke, the purpose of the rule, when this was added to the rules initially, was specifically to try and do what it was not 100 percent clear was done by the statute but everybody knew was intended to be done, and that was to keep the damn thing together, so that you didn't go off around the countryside one way or the other unless you were in violation of a

mandatory venue statute. So that -- I mean what you're suggesting could be accomplished anyway because you only have to maintain venue against one and you've got them all anyway. You don't have to prove anything against anybody else. That doesn't make any difference. The function of it was to give a time for when venue was to be determined initially, because once it's determined proper as to any defendant under 4 in the statute, it's proper as to everybody because you're properly joined.

MR. REASONER: You're saying you can leave this language out, then?

MR. McMAINS: What language out?

MR. REASONER: You said this language is surplus, that you don't need it.

MR. McMAINS: No, I didn't say that. What I said is it was an attempt by the committee to do what the statute wasn't totally clear that it was intended to do because the statute was drawn with the idea that you kept the case together. That was the purpose of Section 4 of the statute.

MR. REASONER: Well then, if that's what the law is, then you don't need to limit the rights of the subsequently joined defendant.

MR. McMAINS: If there's no provision in the statute as to the procedure for making the determination, the question is how many times do we have to litigate the venue issue. Do we have an initial venue determination by Defendant 1? Do we have a new venue determination by Defendant 2? Do you bring in a third party, Defendant 3? We have another venue determination. Do we then have rehearings on behalf of 1 and 2?

And the question was to decide it expeditiously early in the litigation; and once it is determined to be proper as to anybody, any other proper party subsequently joined is going to be bound by the initial venue determination. And we're not going to be relitigating venue throughout the entire time because we weren't supposed to be splitting it up anyway. That was one of the objectives of the original statute which I think is accomplished in Section 4, but the procedure isn't as to how many times do you have to have a hearing. How many hearings do we have to traipse to and how many rehearings do we have the traipse to?

MR. SPARKS: Rusty, you're just talking about a subsequently added party. Because if --

MR. McMAINS: No, we're talking about

both things because of his suggestion. One is rehearing, okay? That could be the same party that's had it all along. It could be on your 17th motion for rehearing. We're also talking about the additional parties who are added later. Those are the two -- those are two elements when they don't quite get in the lawsuit at the same time for one reason or another, frequently because you didn't find out about them at the same time, if you're the plaintiff or a defendant who's joining a third party defendant.

MR. BRANSON: Rusty, wasn't part of the purpose of the original statute to be able to take care of venue at one time?

MR. McMAINS: Yeah.

MR. MORRIS: And it says in here, the statute that Rusty has been referring to, "when two or more parties are joined as defendants in the same action or two or more claims of cause of action properly joined in one action and the court has venue of an action or claim against any one defendant, the court also has venue of all claims or actions against all defendants unless one or more of the claims or cause of action is governed by one of the provisions of Subchapter B," which is

the mandatory.

MR. BRANSON: Well, if you give the trial judge the right to rehear it and rehear it, aren't you really just creating a class of animal that can never be killed even with a silver bullet?

MR. REASONER: I don't think anybody is talking about rehearing. The part that troubles me --

MR. BRANSON: It's in the proposal, though.

MR. REASONER: Well, I have no problem with it. The part that troubles me is I don't understand why this language is in here that says that when you join somebody, that the only motion they can make is that an impartial trial can't be had.

PROFESSOR DORSANEO: They can do a mandatory one too.

MR. REASONER: Well, a mandatory too.

MR. MORRIS: Because if you have a proper party and all they've got is another permissive type venue, then it's proper and they don't have a good plea.

MR. REASONER: Well look, let me say if that's true, then this language is unnecessary.

MR. MORRIS: Well, Harry, it probably is.

MR. SPARKS: It's a transfer. You might move to transfer the case because you can't get a fair trial. You ought not to preclude that.

MR. REASONER: Well, you haven't precluded that. On a fair trial I can understand that you're still moot. What troubles me is I don't know whether there are other circumstances that I can't envision. I don't see why you cut off the person's rights. I don't see what the objective is.

MR. McMAINS: The statute cuts them off.

MR. REASONER: If it does, then you don't need this language.

MR. McMAINS: Doesn't talk about what the procedure is. Now, I think that perhaps Rule 5 needs to be amended insofar as providing that a motion may be filed, but shall be deemed overruled or controlled by the earlier ruling. You see, the price paid by the plaintiffs in venue situations if they have somehow falsely manufactured venue by affidavit or otherwise, it's automatic reversal. Now, that's a heavy price to pay. And the price was particularly bartered for with the idea that it was going to keep all the case together and it was going to be determined early in the litigation and

you weren't going to have to have a continuous fight over that subject. And that's the reason the price is so high.

MR. REASONER: Look, if the law is as you say, you sue A then you add B and B has grounds for transfer that would have otherwise been good -- if the law is as you say, then all you have to do when he tries to have a hearing is to say, "You're bound because I have proper venue."

MR. McMAINS: That is what the law says.

MR. REASONER: Well, then you don't need this language.

MR. McMAINS: So what I ask is what is your gripe? The question is what's the procedure? Why should we go hear it again?

MR. REASONER: You won't have to have a hearing. All you have to do is file a one page response saying you're bound.

MR. McMAINS: That's what they do in Houston.

MR. REASONER: What troubles me is that I don't know whether -- I don't know why -- that whoever drafted this is going to be troubled, precluded them from raising other defenses -- I mean other grounds for transfer.

MR. McMAINS: What do you mean "grounds for transfer"?

MR. REASONER: Well, it says the only grounds they can raise are impartial trial or mandatory venue exceptions.

MR. McMAINS: Okay. Well, you've already had a determination by the court that venue is proper as to the defendant.

MR. REASONER: Not when I was joined you hadn't.

MR. McMAINS: So what?

MR. REASONER: Why are you bothering to cut off my rights?

MR. McMAINS: What right do you have? You have no right to transfer under the statute.

MR. REASONER: Well, fine.

MR. MORRIS: If you can find one -- if you have mandatory, then even though there's been a ruling that it was proper, of course your motions to transfer would be good.

MR. REASONER: That's right.

MR. MORRIS: And you can do that.

MR. REASONER: Okay.

MR. McMAINS: You can't get a fair trial.

MR. MORRIS: But if it's proper, the

statute already has taken care of that.

MR. REASONER: Fine, we don't need the language in the rule.

MR. McMAINS: Well, obviously it concerns you because you're going to do something otherwise. The point is why encourage the doing something that's meaningless.

MR. REASONER: Once I have assured myself it is meaningless, I won't do it.

MR. McMAINS: You mean you don't charge on an hourly rate anymore?

MR. REASONER: So far I don't need any manufactured meaningless motions. They may come.

MR. McMAINS: But that's the function of the rule is to initially determine it was the reason for the language in -- was to implement the provisions of Rule -- of Section 4 of the statute which says that if venue is proper as to anybody who's properly joined, then that's it. It's all over.

Now, if you want to claim improper joinder, this doesn't cut you off in my judgment. If it does, then maybe we need to modify it for that purpose. But, frankly, I think in most cases, if you join anybody, it's going to be on claim of

joint and several liability, as a plaintiff where it's going to be plaintiff contribution or indemnity.

PROFESSOR DORSANEO: Mr. Chairman, in deference to the Committee on Administration of Justice, I move the adoption of their proposal for amending paragraph 5 of present Rule 87 as indicated on what is numbered Page 8 in option -- or after Option Three. I personally think the last sentence is just fine although there is substantial disagreement in the room on that. I do not see why the trial judge cannot reconsider a ruling, no matter what the ruling is, if in the trial judge's view the ruling was wrong while there is still jurisdiction over the case.

MR. BRANSON: Bill, you can't ever get a ruling if do you that. You may as well just say, "We're going to continue to hear this till the cows come home," and not ever try to make cause of action.

PROFESSOR DORSANEO: Well, in my experience that's not the way things work. It doesn't get reheard every time you ask for it.

MR. BRANSON: It depends on who's asking and who they ask it to.

MR. McMAINS: The problem --

PROFESSOR DORSANEO: Let me finish. With respect to this subsequently joined party, there is some significant policy questions involved. And I think on -- on balance, it's fair enough to the subsequently joined person, given the policy considerations. I think the COAJ amendment is pretty balanced, because in one place it says we're not going to rehear this to beat all just because there's a subsequently joined party. But in another place it says, well, this entire matter could be reconsidered if -- presumably if the decision was wrong in the first instance.

MR. MORRIS: Well, how do you reconsider just an affidavit that's sworn? I guess the problem I am having is that, you know, we're all officers of the court, without regard to which side of the docket we may be on. The thrust has been to simplify this and move these cases. Plaintiffs have a high price to pay if they're wrong. That was done with the great deal of work. I haven't seen it failing; perhaps I'm living in the wrong part of the state. But why should we go tinkering with it when we basically have, in effect, the thrust that supposedly was intended?

PROFESSOR DORSANEO: Well, the no additional -- the no rehearing part of the rule was put in very late in the game. I think that it would be fair to say that the persons who wrote the language did not anticipate that Rule 87 would be adopted as quickly as it was required to be adopted by the timetable. And I think it's been a paragraph of the rule that you can't say that this is something that was drafted with a lot of detailed consideration and care to match the statute. I just don't think those are the facts.

MR. BRANSON: In deference to the Legislature, I would like to oppose the adoption of Rule 5 and move the question.

MR. WELLS: May I suggest a substitute motion that -- the substitute would be merely to add to the present rule the last paragraph of the proposal; namely, "nothing in this rule shall prevent the trial court from reconsidering in order to overrule the motion to transfer."

PROFESSOR DORSANEO: That's fine.

MR. WELLS: That's going to leave the judge free to do it if something develops, but it's going to -- it seems to me that Mr. Reasoner is right that there's really no necessity for the

earlier part.

MR. MORRIS: I'm probably a victim of having to spend so much time on it. When it was in the Legislature I was working with Judge Pope. But the idea was that you don't keep bringing this up before courts and taking their time with it. And that the penalty is so strong that you do come back for a trial if the plaintiff was wrong. Now, how are you going to say an affidavit is wrong when all he has to do is file a sworn affidavit that his cause of action is in the correct or proper county? How in the world are you going to keep having hearings that his affidavit is wrong when it takes no proof? You can make no proof.

PROFESSOR DORSANEO: About what he says in his deposition just the opposite later.

MR. MORRIS: You've got an affidavit that governs that is what I'm telling you. And this plaintiff's lawyer is a fool, in addition to probably being guilty of malpractice himself. You know, we're probably arguing over something that wouldn't take much time one way or the other in our litigation, but my concern is we're getting away from the direction that I thought was the correct way to go, and not just me, but the members --

Judge Pope, when he put this together, what he wanted.

PROFESSOR DORSANEO: It is my understanding that there isn't any Legislative history on the statute, that the statute had no debate and that all this, what Judge Pope had done, and with due respect to a great man, I don't consider to be Legislative history.

MR. MORRIS: Well, how are you going to have a hearing on an affidavit? I mean, there can be no evidentiary hearing. It says so right here.

CHAIRMAN SOULES: Okay. Rusty.

MR. McMAINS: The -- again, I'm -- there's nothing magic, I don't think, about the way the rule is worded at the moment. But the concern, in part, that I had was we had just spent, when we were drafting the rules, a great period of time trying to make it very obvious that when the plaintiff did this and the defendant did that, then the plaintiff had to do this. And if the defendant didn't do that, the plaintiff didn't have to do that, saying that it had to be done, it had to be done at that time. You know, you don't wait, it has to be done then or it's waived. Even the statute itself says it's got to be first or it's

waived, apart from a jurisdictional plea, perhaps.

So, there were timing sequences specifically required to be followed. Now, if you're going to go into a rehearing practice, we have no procedure in here for that. I mean, we have nothing saying, "Well, that of course is curable by rehearing." I mean, let's do it again and let me get it right this time. Let me now specifically deny something. There's no authorization for it in the rule or in the motion practice or in the procedure. We don't know how it's done. We just now all of a sudden are importing a new rehearing practice with no description of what it is and exactly how it works. And we have no time frame works. It just can happen when it feels necessary to be happening.

Now, I have agreed that there may be a reason at some point where the facts develop contrary to the basis upon which the case was kept. And maybe there should be something provided for that, but you should not have a grandiose blanket rehearing when we have set up very specific timetables to be followed or waivers occur.

JUSTICE WALLACE: Are we talking about a motion for rehearing as such that the judge is changing his mind when he thinks about it after the

lawyers leave the courtroom? Are we talking about two different situations there?

MR. McMAINS: Yes, I think we're talking about whether or not the defendant -- I think if the judge changes his mind, said, "I made a mistake or something," I'm not sure that there's anything you can do about that.

PROFESSOR DORSANEO: That's all this says, Rusty. It says no -- it's no additional motions, but nothing in the rule prevents the trial court from reconsidering or overruling.

MR. BRANSON: Your Honor, I thought we were talking about a case where the judge ruled and two days later the defendant thought he had another reason that might sound better to the judge than the last one he presented, so he wanted another bite at the apple.

JUSTICE WALLACE: Well, that's why I asked the question. I got the feeling there was two different animals we were discussing here.

MR. McMAINS: Well, you see, again, you can say all you want to. I don't think that we can effectively draw a rule to prohibit somebody from filing a motion. Now, we may draw a rule that says don't listen to it. On the other hand, you can do

-- you can do what it asks you to. Well now, most judges don't operate unless somebody asks them. And so, when a defendant or anybody who wants a transfer sees this rule, he's going to move for it. I don't care what it says about that, you can't file any further motions. The clerk is going to file it; the judge is going to get it. And all I'm saying is that is -- that we're therefore -- we have no practice set up for that. It doesn't contemplate it in any way whatsoever. And if we're going to build in some kind of a practice to deal with subsequent developing facts that invalidates some prior proof, then, number one, I guess we got to go back to the Legislature because reversible error under that circumstance is not something that we're going to be willing to suffer. We just say, "Hey, Judge, we made a mistake."

You can always agree to transfer, and if the judge -- presented with that situation where you have lied on an affidavit or the plaintiff has and then he has told the opposite on deposition and you present that to the court and the court says, "You will never get a verdict in this court. I'm going to grant a new trial and then we're going to transfer," or "I'm going to render it or whatever

I'm going to do with it," and "You're never going to get there, you might as well agree to transfer it right here and now." And you see, you got plenty -- I mean, there's plenty of judicial power and discretion to remedy the single abuse that we're talking about.

CHARIMAN SOULES: Well, there are two other problems that are before us on Rule 87 about this. Well, one in particular about the second hearing comes out of this Hendrick Medical Center versus Howe (Phon.) case. This is a case where -- let me -- I'm just trying to get this out because we're going to need to give this to someone for study. And this is a case where plaintiff filed a lawsuit, sued everybody. The relator in this motion -- petition for writ of mandamus objected to venue and got it moved. Then the plaintiff dismissed that case and refiled and left the relator out till the venue decision was made and kept it where he wanted it. Then he joined relator, and the relator said, "I had" -- "This case has already been determined. He sued me before, and I won my change of venue." And judge said, "Well, if you'd been here the second time we had the venue hearing, I probably would have heard

you, but I can't have but one hearing, so you're now here. You don't get to go." The suit was filed in Jefferson County. Later filed a motion to move it to Jones County and won. Suit dismissed. Suit refiled in Jefferson County without the relator there. Venue determined good in Jefferson County. Relator is then joined in Jefferson County. Judge says, "One hearing" -- "You're now in Jefferson County. Too bad about your first hearing over in Jones County. They've got you moved to Jones County because we can only have one hearing, and I've already had it in this the second filing, so you're out." That's this case. That's the Court of Appeal's opinion.

MR. SPARKS: But they -- the courts --

CHAIRMAN SOULES: The second problem is one that Justice Wallace himself has submitted to our committee. Plaintiff sues three defendants, one of them files a motion to transfer to a mandatory county. Can the plaintiff ask that the whole case go there intact or do the first -- and the other two defendants don't file any motion to transfer, they're happy with it in the first county. Can the plaintiff say, "Well, if it's going to be mandatory as to that one, please move

the whole case." That apparently is not addressed or should it be?

PROFESSOR DORSANEO: That's proposed paragraph 6, right, the first sentence?

CHAIRMAN SOULES: That's No. 6.

MR. REASONER: Let me add one other problem that I think needs to be addressed by this committee.

The way this is written now if you sue A and A raises a mandatory exception and looses, then you join B who has a good mandatory exception. By the literal language of this rule he can't even raise it because it has been previously raised by A.

CHAIRMAN SOULES: For those of you who were not here when they --

MR. McMAINS: Same one.

MR. O'QUINN: Same ground.

MR. McMAINS: Same one.

CHAIRMAN SOULES: For those of you who were not here when Rule 87 was adopted, we had a very short fuse on the effective date of new 1995. For awhile we didn't know which 1995 was going to be the law, because the same year that the Legislature adopted the current venue statute, they also adopted another venue statute in the civil

code. And until the governor vetoed the civil code, we had two venue statutes coming up, not knowing which would apply. But that happened, so we only had one. But by the time it became clear that was going to be it, it was a very short fuse to effective date.

We had a Committee on Administration of Justice meeting and had about ten days, didn't we, Bill, to get that thing drafted? The very next weekend we had the second Committee on Administration of Justice meeting and got the rule drafted pretty much like it is right now. It went to the -- I don't think the Advisory Committee ever met on it. And it went to the Supreme Court and the Supreme Court had to enact it because otherwise -- or had to adopt something because otherwise, the old venue rules were inconsistent with the new statute, and it was a flurry of activity.

So, to come back now and look at this carefully is certainly in order. Now, whether we change it or not is something altogether different, but it is -- this is the first real good look that the Advisory Committee of the Supreme Court has ever taken at Rule 87. Today is the first time.

MR. REASONER: That's right.

MR. SAM D. SPARKS: Can we make a motion to table on this?

CHAIRMAN SOULES: All right. Have we heard all the problems that anyone envisions, either you disagree that there is a problem or you think you have identified a problem? Have we heard from everybody?

Bill, I don't know whether you need this case citation, but it's 690 Southwest 2nd 42 and it's the Dallas court.

MR. SPARKS: We better not let anybody be guilty of malpractice, though, because the court did hold the first determination was res judicata.

CHAIRMAN SOULES: And held it to permit the mandamus action was tantamount to an appeal of a venue hearing which you couldn't have, that's right.

PROFESSOR DORSANEO: Is that the same one that deals with the non-suit, appeal of non-suit Rule 2?

MR. O'QUINN: No, that's a different case. I mean, the one you're thinking of is out of Bell County.

CHAIRMAN SOULES: It doesn't deal with a non-suit rule. I mean, it was a non-suit. It was

a non-suit.

MR. McMAINS: But it is somewhat the same issue.

CHAIRMAN SOULES: Okay. Any other problems on 87? That covers the sixth -- Item 6, too.

MR. MORRIS: Are we going to study this one some more?

CHAIRMAN SOULES: Yeah. And what I would like to do is refer --

Sam, if you can give this some more study.

Bill, will you participate on that? At least -- I know you've got these appellate rules, but maybe we'll get them out of the way today. Will you assist on that?

PROFESSOR DORSANEO: Yeah, I will be glad to help.

CHAIRMAN SOULES: Rusty, do you want to be a part of this consideration?

MR. McMAINS: I guess. Since we're going to talk about the other one anyway I guess.

CHAIRMAN SOULES: All right. And, Lefty, you don't want to participate in it?

MR. MORRIS: No, I will.

CHAIRMAN SOULES: Okay. And Lefty.

So, Sam, for your --

Frank, do you want to be involved?

MR. BRANSON: No, when I was -- well, I left the room, but I thought I had called the question on No. 5 before I left.

MR. MORRIS: We're going to study it.

MR. O'QUINN: Let's study it.

MR. BRANSON: Was there a motion to table, Lefty?

CHAIRMAN SOULES: The chair is going to exercise prerogative to refer this for further study. And I -- well, there were motions -- there were a lot of motions going and emotions going by at the same time and I never did quite get all of it straight.

Sam, if you will then accept Rusty and Bill and Lefty, at least for purposes of Rule 87, on your team, I'd appreciate it.

And does anyone else want to be involved?

Okay. Next rule. 92.

Thanks, Sam.

MR. SPARKS: Okay. On 92 if y'all can get discussion on this, we're going to be here forever. It's changing plea of privilege to a motion to transfer venue.

MR. TINDALL: So moved, we adopt.

PROFESSOR DORSANEO: We're late. It's already been done.

MR. SPARKS: There are a couple of them that haven't been done.

Has this one been done?

PROFESSOR DORSANEO: Yes. It was done by the Supreme Court by order December 19, 1984.

MR. SPARKS: Well, let it be recorded we agreed with the court.

CHAIRMAN SOULES: So be it.

Now, Sam, I'm going to have to interrupt here and take up the appellate rules, because we have Clifford Brown -- is Clifford here now?

MR. BROWN: Yes, Luke, I'm here and I have Judge Hume Cofer from Austin, who is on my committee, here also.

CHAIRMAN SOULES: Clifford, we welcome you.

Judge, we welcome you here with us today. I understand that the two of you and your committee have worked on these rules from the point of view of the Court of Criminal Appeals. And we appreciate your being here and we want to accommodate your schedules now by taking up these

appellate rules so that we can have the benefit of your views, because if they are adopted, they'll be joint rules of both courts as we understand it.

MR. BROWN: That's good.

CHAIRMAN SOULES: Clifford, would you like to make some remarks, you or Judge either one, at this point?

MR. BROWN: The only thing I would say is that our Advisory Committee has functioned and we have presented to the Court of Criminal Appeals our proposal for new post trial and appellate rules of procedure. And it was our thought -- of course they're working on them now, reviewing them, revising them, modifying them, doing what is necessary. We have told them we stand ready to go forward and work further if they disagree strongly with anything we've done. But it was the thought of our committee that there would come a time, maybe before January the 1st, when it would be necessary for us to have maybe a conference committee between the two committees in order to correlate and try to integrate these rules, which I think was the avowed intention of the committee that Judge Guittard chaired.

I think that is what we were charged with

doing, trying to integrate the civil and criminal rules of post trial and appellate procedure as much as possible. And we thought that there might be a necessity between now and January the 1st for maybe a conference committee from each to get together and talk about it to resolve any conflicts that might have surfaced and to see what we could do to integrate both the civil and criminal rules into a single document.

And so, we're here to say that if the time comes when you feel likewise, we'll be glad to cooperate with you.

CHAIRMAN SOULES: Thank you, Clifford.

I know that Clifford was on the committee that set out to harmonize the rules, the appellate rules in criminal and civil cases. The court of appeals in particular were having problems because they had two sets of rules, and the differences were not necessary in many cases. It was just that the practices had grown up independent of one another. And Clifford had played a big role in getting the initial work product that we saw here, together with Judge Guittard and Bill Dorsaneo and others.

We'll stand ready to meet with you and

accommodate your schedule in a joint committee meeting if you would like.

MR. BROWN: I would like for Judge Cofer to have an opportunity to say something, too, because he is here and has been an important part of our committee.

CHAIRMAN SOULES: Judge, we would love to hear from you.

HON. JUDGE COFER: Well, there's some late breaking news that I've not even had an oppotunity to discuss with Clifford, for which I apologize, or with Professor Dorsaneo, whom I haven't met in person but only over the telephone.

After I talked to each of those, I talked to Judge Clinton. The Court of Criminal Appeals is up against this statutory deadline. The statute requires that in order to accomplish the purpose of the Court of Criminal Appeals, in order to give the Court of Criminal Appeals an opportunity to take over the rule making power, that court must complete its task and elect to confirm the Legislative action with respect to the repeal of existing statutes in the Code of Criminal Procedure. That is to say, if the court takes over the rule making power and authority under the

statute, promulgates these new rules by January 1st and lists the statutes to be repealed, and those can only be among the ones that the Legislature designated, then those statutes will be repealed at a certain time in the future, I've forgotten the date, and the court's rules will take effect.

Now, the problem with that is that the court is faced with a deadline two months from now. And so they set a deadline for our committee of October 1st, which we made by the skin of our teeth. Now, the way we did that was to take one of your previous drafts and to work through that and to make some changes which our committee thought were appropriate with respect to criminal cases. Now, since then Professor Dorsaneo has given me the benefit of a later draft which has in it a lot of things which were not in our -- the one delivered to us and certainly were not in the one we delivered to the Court of Criminal Appeals.

The problem is -- and what I haven't reported to Mr. Brown and the professor -- is that Judge Clinton tells me that the Court of Criminal Appeals has taken action, has made a few changes with respect to the committee and that they're not going to have an opportunity to get back to this before

the end of the year because they also have the end of the year deadline with respect to their rules of evidence.

And so, the problem of coordinating between now and the end of the year is a very difficult one. And I suggest that now before you start to devote a lot of time to it because I'm concerned about the mechanics of reconsideration by the Court of Criminal Appeals of the product of your effort since the draft we had in August.

MR. McMAINS: Bill, have you seen --

HON. JUDGE COFER: And I don't know how to deal with that, but I wanted to bring it to your attention, so that you could base your scheduling plans on that.

CHAIRMAN SOULES: Well, we certainly have to address that problem.

JUSTICE WALLACE: Judge, I'm not that familiar with that statute, the exact wording. It does permit the Court of Criminal Appeals, I would think, to amend -- make subsequent amendments as they see necessary.

HON. JUDGE COFER: Yes, I'm pretty sure you're right about that. Once they get started after the first of the year, they'll have the

continuing authority with respect to those rules.

JUSTICE WALLACE: So as long as they sign a set of rules by January the 1st, then we can work out differences later on if necessary.

HON. JUDGE COFER: Good point. It's a sort of a desperate deadline in order to have the right to say, "Yes, the statutes are now repealed" January 1st, they have to have something that they can say, "This is promulgate," but that will not preclude, as I understand the law, reconsideration by them and reconciliation with what the Supreme Court does.

JUSTICE WALLACE: That takes a lot of pressure off then.

CHAIRMAN SOULES: Judge, thank you for that observation, and we want to try to accommodate you. Hopefully -- I don't know how much at variance from the criminal practice point of view our updated version is from the one you all worked on. Does it seem to be substantially at variance, from your point of view?

HON. JUDGE COFER: Well, there are two or three -- only two or three, I think, substantive things. Only one that comes to mind, motion for rehearing. And the problem is that the draft that

the Court of Criminal Appeals is about to sign off on or has just signed off on has in it a lot of civil rules, but their order is going to say that do not presume to promulgate civil rules, that this is just done pursuant to this effort to have one joint set of rules. Well now, their body -- the civil rules in their draft, which they say are not really -- they don't presume to promulgate, they're very different from what -- from the point of -- that you've reached by now.

MR. McMAINS: Judge, do you have a copy of what the court is about to sign off on to?

HON. JUDGE COFER: Yes. Well, not up to date, only what we gave them. And Judge Clinton told me a week ago -- I guess right after we talked, Professor -- that there had been a few changes made in our draft. But I only have the committee's recommendation.

MR. McMAINS: So I can assume, then, that Bill Dorsaneo also doesn't have a copy.

PROFESSOR DORSANEO: That's right.

HON. JUDGE COFER: That's right. I think -- I'm sure he has our draft.

PROFESSOR DORSANEO: No, he doesn't even have that.

HON. JUDGE COFER: Well, I apologize for that. It got wide distribution at -- among the judges, but I'm afraid not -- oh, I know, Judge Guittard -- that's why I thought -- Judge Guittard got a draft. That's why I thought that it had gone on to you folks.

CHAIRMAN SOULES: I perceive that what we're going to need to do, particularly the work product that Bill and Rusty and their respective standing subcommittees have done will certainly want -- will want to be able to give the Supreme Court the benefit of all that work when we make our recommendation.

We don't have -- the Supreme Court obviously doesn't have any deadline, so perhaps, Judge, give us your thought -- yours and Clifford's, too -- and I'll work with you to -- if there's any way to get our work product finished and to the court and ready for January the 1st and they find some opening in their schedule, you know, that would be fine. I don't know how long the Supreme Court will work on these after we make a recommendation, because they normally do give things a lot of consideration even after they come out of this committee. So it could well be into next calendar

year before the Supreme Court decides that they have a product that they're settled with, from their point of view, and it may or may not be exactly what comes from this committee. So, if we can continue to work with one another into next year and hope we don't create too much confusion in the practicing bar by having changes and then more changes in short order thereafter, that may be the only logistical way to do it, but I'll work with you all to try to accommodate anyway we can.

HON. JUDGE COFER: That certainly seems reasonable. I have had in mind all along that it will be necessary to have something in the nature of a conference committee, like the Legislature does, and to hope that we can put together -- I suppose now it cannot be done in this year -- hope that we can put together next year a volume of rules that will meet -- that will satisfy the needs of each court.

CHAIRMAN SOULES: I was just conferring with Justice Wallace along these lines. Somewhere, then, after this work product is done, this committee is through with it's work product -- maybe today is the day, if not, I'm sure that we're going to be done in March -- this committee's work

will be done in our March meeting if we don't get it done today. And Bill says it's going to be done today. Perhaps we could then meet with some or all of the judges of your court -- or the Court of Criminal Appeals and some or all of the judges of the Supreme Court, some members of your Advisory Committee and some members of ours to try to resolve any language or substantive differences that we have to a single product.

HON. JUDGE COFER: I think that's the only practical way to do it. Each court would designate conference representatives to try to reconcile the two.

CHAIRMAN SOULES: Members of its Advisory Committee as well as its judiciary.

HON. JUDGE COFER: As members of the court perhaps. Judge Clinton has been the most active but now he tells me that he has gone over the whole thing with the other members of the court.

CHAIRMAN SOULES: Well, any suggestions that you have we'll certainly receive and follow.

Okay. Bill, are you ready to report on the rules?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: These rules are embodied in materials that says, "Joint Report on Standing Subcommittee on Court of Civil Appeals Rules and Supreme Court Rules." This is Rusty and Bill together.

Rusty, wherever you need to join Bill, y'all work it out.

HON. JUDGE COFER: I did get the one --

CHAIRMAN SOULES: Do you have a copy of these, Judge, you and Clifford, of the most recent rules?

HON. JUDGE COFER: I got the one with the penciled draft on it, the red lining on it sent on October 22nd.

PROFESSOR DORSANEO: They don't have the red lined interlined copy, Judge. This committee doesn't have it. That was just for you.

CHAIRMAN SOULES: There are copies of the very latest work product coming to you right now.

PROFESSOR DORSANEO: By way of a tiny bit of background, sometime back the Supreme Court, the Court of Criminal Appeals and the Legislature appointed a committee to consider the project of developing a set of uniform appellate rules for civil and criminal cases in the courts of appeals.

That committee consisted of lawyers, judges, and I was going to say law professors, not to consider any of those particular groups to be separate groups or -- including members of the Supreme Court, Justice Wallace; courts of appeals justices, Justice Guittard, Justice Shannon, Justice McCloud from Eastland; including trial judges, Don Metcalf, just to name one from Dallas; members of the civil bar, Rusty McMains; members of the criminal bar, criminal defense bar, Clifford Brown.

We met approximately ten times, and in the process of doing that developed an initial draft which tried to take the best from the Civil Appellate Rules and the Criminal Appellate Rules and the Code of Criminal Procedure and come up with one product. Since that time, as members of this committee know, we had been directed by the Supreme Court to add in the rules of practice in the Texas Supreme Court, and that entailed basically making modifications in the general provisions and adding some additional sections to the back end of the plan. In addition to that since our last meeting of the Advisory Committee, we took into account recommendations that had been made concerning principally the current appellate rules, and our

subcommittee considered particular proposals concerning the current rules, voted them up or down, redrafted them and incorporated that or those matters into this overall draft.

What I would propose to do is to take the subcommittee report and to go through it item by item with some dispatch, I hope, and then to go and explain the overall plan that this booklet follows or attempts to follow and then to point out particular rules which have been changed from what the current rules say that aren't mentioned explicitly in the cover memorandum.

All right. Now, with respect to the proposals concerning the current rules, a proposal was made by the Committee on Administration of Justice concerning current Rules 354, 355 and 380. The recommendation, as indicated in the first paragraph of the little report, involved a requirement that notice be given of a pauper's affidavit to the official court reporter. Currently Rule 355 does not require the official court reporter to be notified. And the second modification involved modifying slightly the trial court's timetable for determining contest affidavits. Basically the table was made a bit --

timetable was made a bit more flexible.

If you'll turn to rule -- not roll -- Rule 30 -- proposed Rule 30(a)(3), which should be found at approximately Page 36 of this draft, you can see what I -- see what I mean. Okay. 30(a)(3) is now Rule 355. And remember the COAJ proposal is -- or relates to Rule 355. Basically all that's been done is to modify (B) by adding language. First of all, "The appellant or his attorney shall give notice of the filing of the affidavit to the opposing party or his attorney" -- and this language has been added -- "and to the court reporter of the court where the case was tried..." All right. That language has been added or suggested for addition by the COAJ.

(E) of this on page 38 corresponds to (E) of Rule 355 except that everything after the first sentence has been added and the first sentence has been modified slightly. The idea is to make the timetable a little bit different. The current rule says, "If no contest is filed in the allotted time," or "If no ruling is made within ten days, the allegations of the affidavit shall be taken as true." The second sentence in this proposed (E) and the balance of it makes things a little more

flexible. "If a contest is filed, the court shall hear the same within ten days" unless there is an extension of time, "for hearing and determining" ... "made within the ten day period." And that extension cannot be, "for more than 20 additional days." So, it just adds some more flexibility into the timetable for ruling with -- the reason for that is that under (E) currently unless there is a ruling within ten days, the allegations of the affidavit are taken as true. And that just was thought to be too short a time.

I move adoption of the COAJ's recommendations to Rule -- current Rule 355 which is in our package of proposed rules at Rule 30 (A)(3)(B) and (E).

JUSTICE WALLACE: Luke had to make a telephone call, so I'll fill in for him while he's gone.

Are there comments or questions about it?

Sam.

MR. SPARKS: I have one question. I know it's always been there, but, Bill, why do you have to object by sworn pleading? That's always bothered me. A lot of times -- if we're going to do it in civil cases, of course -- a lot of times you have no real idea and it's kind of a formality

-- the clerk has the forms -- where you contest the affidavit and it always has to be by sworn pleadings. And it seems to me we've gotten away from a lot of the -- I don't want to say "false swearing," but "form swearing." Is there any reason for that? I'm looking at paragraph (C) on Page 37. Because those of us who are trying lawsuits -- you know, in the civil case you don't have any idea as to the wealth of the plaintiff or the defendant or third party defendant.

MR. McMAINS: I'm not even sure what that means because it doesn't say what you have to swear to.

PROFESSOR DORSANEO: I think that's right.

MR. McMAINS: It says, "Any interested officer of the court or the party may by sworn pleading contest the affidavit."

MR. SPARKS: I assume you're going to contest it.

MR. McMAINS: Yeah, I know, but I mean I'm not sure what -- it doesn't say that you have to call him a liar. I'm not sure what it --

PROFESSOR DORSANEO: It wouldn't make me unhappy to cross "sworn" -- the word "sworn" out.

MR. McMAINS: Just say I intend to contest and I swear to it.

MR. SPARKS: I would like to remove the word "sworn" because if we're doing it in civil cases, a lot of times you just don't have any idea.

MR. McMAINS: He's already getting the benefit of the short time. And if there's no ruling, he gets it anyway. I don't have any problem with that per se.

PROFESSOR DORSANEO: Is somebody going to second my motion?

MR. SPARKS: I'll second the motion if you'll take out the word "sworn."

MR. O'QUINN: Is that a friendly or unfriendly amendment?

PROFESSOR DORSANEO: Okay. That would involve, then, (C) on Page 37 making this change. "Any interested officer of the court or party to the suit may contest the affidavit." I don't even know whether we need to say "made by pleading." Do you think we need to say "made by pleading"?

MR. McMAINS: No, I think --

PROFESSOR DORSANEO: "May file a contest to the affidavit."

MR. McMAINS: Yeah, I think that would

probably work better.

PROFESSOR DORSANEO: Okay. We'll change it. "May file a contest to the affidavit"?

MR. BECK: Just "may contest."

MR. McMAINS: Well, the question is how do you contest? I mean, do you just call up the clerk and say, "I contest in writing"?

PROFESSOR DORSANEO: Well, file. I guess it would have to be in writing to be filed, I would say.

MR. McMAINS: Yeah, right.

MR. SPARKS: "May file a contest."

MR. BRANSON: "A written unverified contest"?

MR. LOW: If you don't say that, they're going to -- people are going be saying --

PROFESSOR DORSANEO: Should I go on to the next one? Is everybody in favor of this one?

MR. McMAINS: "File a contest with the affidavit," I think.

JUSTICE WALLACE: Do you want to take these and vote on them one at a time?

PROFESSOR DORSANEO: I think so, Your Honor.

JUSTICE WALLACE: Motion has been made

and seconded that this be adopted as amended. Any further comment? All in favor, say aye. All opposed the same sign. Passed unanimously.

PROFESSOR DORSANEO: The second one is proposed Rule 364(a). This proposal came out of the Administration of Justice Committee. It speaks for itself. The basic idea is to permit somebody to stay enforcement of a judgment without filing a supersedeas bond as in accordance with current Rule 364.

Although there was substantial sentiment in favor of a stay of enforcement of judgment rule in the committee on Administration of Justice at the meetings that I attended, because of problems that defendants have when large money judgments are taken against them and they are not institutional defendents, for example, our committee of this committee -- our subcommittee of this committee voted unanimously not to recommend adoption of such a rule.

MR. JONES: Bill, is that the rule that caught my eye the last time when we had our meeting, which in effect stays execution of a -- you know, gives a district judge the authority to stay the execution of a judgment without a

supersedeas bond?

PROFESSOR DORSANEO: Yes.

MR. McMAINS: Yes.

MR. JONES: I move that we accept the recommendation of Mr. Dorsaneo's subcommittee and not accept that rule.

MR. O'QUINN: Second.

MR. ADAMS: Second.

JUSTICE WALLACE: On page 56, any questions or comments on this motion?

MR. REASONER: Let me -- I would like to -- let me disclose on the front end that I have a personal interest in this because in the South Texas Nuclear litigation, Phinus (Phon.) always told me he would get a billion dollar judgment; it didn't matter how "screwed" up it was, I couldn't appeal it.

And on the other hand, I recognize that -- that in the -- I mean, I wonder if there's a way -- it seems to me that we shouldn't have a rule where you can deprive defendants of an appeal in large commercial cases or, you know, commercial cases. I'm -- it seems to me this is not -- shouldn't be a problem in your ordinary personal injury or products liability case and I wonder if there is a

way to derive a rule that would permit that.

The Federal Court's have had such a rule for a long time, Franklin, and I'm not aware -- let me say I'm not familiar with the practice, but I'm not aware of real problems from the federal rule. Are you?

MR. LOW: What that federal, as I understand it, you -- if you make them put it up, you might end up paying the cost of it. You have to kind of fish or cut bait one and -- but then the plaintiff's lawyer has got a problem sometimes if he doesn't make them put it up. I know one that got sued for malpractice because later the company went broke and he didn't make them put up one. So, there's more to it than just the little bit.

MR. REASONER: Let me ask this. I'm not really knowledgeable myself enough to discuss it, but I know that Kronzer who has the same vested interest that I do from having been involved in the South Texas litigation, my impression is I feel strongly that we ought to modify the rule in some way. And I wonder if we could defer it until the next meeting where he's present.

MR. JONES: I will withdraw my motion, Judge Wallace, in deference to Harry's request.

MR. LOW: I would second his request.

MR. JONES: That ain't saying I ain't going to be against it.

MR. REASONER: No, no, I wasn't under any misapprehensions as to how far your concession went, Franklin.

JUSTICE WALLACE: Sam.

MR. SPARKS: And since we are recording this, Harry, I've got a question to you. I assume that was a direct quote in quotations.

MR. REASONER: That was an ancient English jurisprudential term that I trust the court reporter will modify it appropriately.

JUSTICE WALLACE: If there's no objection then, action on this rule will be deferred until next meeting. All right. Why don't we get the thin man in?

PROFESSOR DORSANEO: Rule 373. Now, Rule 373 is as close a rule as we have currently to a rule that says that you're meant to make an objection or complaint at or about the time when the thing you're complaining about happens, but that you don't need to make an exception if your objection is overruled. Professor Blakely, as the memo points out, pointed out that in an earlier

draft that tried to improve on current Rule 373 in these proposed combined appellate rules, that inconsistency between what was said in the earlier draft in Texas Rule of Evidence 103 appeared. Judge Wallace has also pointed out that Rule 373 as it exists currently also is probably incompatible with Texas Rule of Evidence 103. We considered this matter, decided to adopt, Professor -- suggest that Professor Blakely's suggestion be adopted. Part of that involves, frankly, an interpretation of Texas Rule of Evidence 103.

If you'll turn to the part of these proposed rules where Rule 42 appears, and that begins on Page 67, you can see what I'm talking about and really talking about paragraph (b). Now, taking it sentence by sentence is probably the best way to go. "When the court excludes evidence, no offer is necessary to preserve error if the substance of the evidence is apparent from the context within which questions were asked." Now this separate concept would indicate that no Bill of Exceptions or offer of proof is required under circumstances when "the substance of the evidence is apparent from the context within which questions were asked." Now, you have to read "evidence" -- you have to

understand the word "evidence" in that sentence doesn't mean evidence but when the substance of what would have been the evidence or the answer is apparent from the context.

Correct me if I'm wrong, Professor Blakely, on that.

PROFESSOR BLAKELY: Yes, correct.

PROFESSOR DORSANEO: Now, within Texas Rule of Evidence 103 our committee thought in interpreting it that it might say that in English or it might say something else currently. And our committee thought that that was a big -- that that was the big issue here.

Now, the rest of it merely more or less follows what Rule of Evidence 103 seems to say clearly. When the substance of the evidence is not apparent from the context, then "the party offering same shall...be allowed to make...an offer of proof in the form of a concise statement," as opposed to a question and answer Bill of Exception. Then "The court may, or at the request of a party shall, direct the making of the offer in question and answer form." And that is what current rule of Evidence 103 says. And the rest of it --

Is there anything I should say about the rest

of it, Rusty?

MR. McMAINS: No, I'm not sure --

PROFESSOR DORSANEO: Professor Blakely? I mean that -- those seem to me to be the things that are what we consider to be problems. So, basically what our committee did was to make the substitute for what is current Rule 373 correspond with Texas Rule of Evidence 103, and we interpreted Texas Rule of Evidence 103 in such a way that the first sentence of this proposal is part of the rules of the game at the threshold. I'm sure I could be clearer, but I'm personally incapable of being clearer.

MR. McMAINS: I would like to ask Dean Blakely because I -- we may have discussed it last time, but --

Is it your view that when the committee did the rules of evidence and the thing went pass, that there were -- there was this exception for when the so-called substance of the evidence became clear that you did not have to make the offer of proof despite the fact that the rule does say "shall" and was specifically, in fact, amended, as I recall, to say "shall produce the" -- or "reduce the offer to question and answer form upon the request of any

party"?

PROFESSOR BLAKELY: The rule follows word for word the federal rule.

MR. McMAINS: Right.

PROFESSOR BLAKELY: And -- I'll modify that in just a minute. 103(a) where it says that "error" -- well, "error may not be predicated upon a ruling which excludes evidence unless in case the ruling is one excluding evidence. The substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." So, that part came directly from the federal rules.

Now, coming on down to the offer situation, "the court may" -- and I'm reading the 103(b) of the evidence rules -- "the court may at any other" or "further statement which shows the character of the evidence, the form in which it was offered, the objection made and the ruling thereon." "It may" -- that is the court may -- at which point Jim Kronzer began to dictate -- "or at the request of counsel shall" --

MR. McMAINS: Right.

PROFESSOR BLAKELY: -- "shall direct the making of an offer in question and answer form." In

the '84 amendment we changed "counsel" to "a party," but it's quite clear then that -- from the general format -- that the offer would have been made by a concise statement unless either the court decided it was going to be made question and answer or the offering party decided it was going to be made question and answer or the objecting party decided it was going to be made by a question and answer. So, anyone of those three entities can insist on Q and A.

MR. McMAINS: That was my understanding, but the way Bill presented it, it sounded like that he has -- that you perceived this exception to the necessity to even make an offer if there is such an animal as if you can tell the substance of the evidence without the necessity of offer.

Is it your understanding that that is -- that we are not creating something here where if a party says, "I want to see what the evidence would be that you're offering," you can't get that done?

PROFESSOR BLAKELY: Anybody can insist that that all come clear even to the extent of --

MR. McMAINS: That's what I'm having --

PROFESSOR DORSANEO: Let me ask this question. Newell, is this the draft that you sent?

It is, right?

PROFESSOR BLAKELY: Yes.

PROFESSOR DORSANEO: Okay. Well, it doesn't say what you just said that it says. It says in English that you don't have to make any kind of Bill of Exception or offer of proof or anything if the substance of the evidence is apparent from the context in which the questions are asked.

MR. McMAINS: It says no offer is necessary and then this talks about what the record of the offer is.

PROFESSOR BLAKELY: I'm sure that the original meaning of that language -- and maybe it isn't clear as drafted by the federal drafters -- is that any party has got a right to make his offer. But suppose he fails to, things are rushing along and he fails to, and now he wants to appeal because his evidence was excluded. "Well, but you didn't make an offer." Well, for goodness sake, everyone can see what it would have been because it's sitting there in the record. It was kind of a fall-back position.

MR. McMAINS: Well, that's what I'm getting at. Is it your position that that is part

of our rules or isn't?

PROFESSOR BLAKELY: I think it is, yes.

MR. SPARKS: But it's sure part of the proposed rule if you read the next sentence.

MR. McMAINS: Yeah, that's what I'm saying. I think that it can be argued that it is not part of the existing Rules of Evidence, but I think that -- Huh?

PROFESSOR DORSANEO: So do I.

MR. McMAINS: Yeah. On the other hand, I think that if you amend the rule -- all I'm saying is is I understood what Bill was saying. He wants to import that meaning specifically here; that is, no offer at all is necessary whether anybody asks for it. If the substance of the excluded evidence is paid, supposedly. My problem is it may only be clear to the offering party and hopefully the Court of Appeals.

MR. O'QUINN: We better make it clear to the Court of Appeals or it won't be any good.

MR. McMAINS: Well, but the problem is that suppose they're asking a witness a question about "Haven't you been convicted of wife beating"? No answer. Now, the substance of what you're talking about is clear, but the answer isn't.

MR. O'QUINN: Rusty, you exercise your right to require Q and A at that point.

MR. McMAINS: But the rule says the substance is clear, and all I'm saying is it's not clear to me what "substance is clear" means.

MR. O'QUINN: No, Rusty, it's really not saying where it's clear, you loose your right to insist on Q and A. You never loose that right.

Am I not correct?

PROFESSOR DORSANEO: That's right.

MR. O'QUINN: You always retain the right to insist on Q and A whether it's clear or not at that point.

MR. SPARKS: The problem I have is where you asked for a Q and A, the court says give a Q and A -- well, the court and the objecting party and the offering party says, "No, I'm not going to do it." And it's excluded and then it goes up on appeal. By this if it's clear, you still got his opinion.

PROFESSOR DORSANEO: I think that's right. That's what it says in English.

MR. SPARKS: That's what I think it says.

MR. REASONER: But I'm more troubled by Rusty's point, too. Suppose it's clear to the guy

who's asking, but it's not clear to me and I don't demand that he go forward. Could you give us an example of something that's clear from the context?

PROFESSOR DORSANEO: No.

MR. McMAINS: That's what I mean.

CHAIRMAN SOULES: Judge?

HON. JUDGE COFER: Our committee had this same struggle with what might appear from the context, left out that sentence, left in the requirement that either lawyer had the right to insist on Q and A. On those two substantive points that's the way we went. I just report that to you. We couldn't decide what the first sentence -- we couldn't think of an example that might fall under the first sentence and so we left it out.

PROFESSOR DORSANEO: The way to do that, I guess -- Judge Cofer, the way you did it was to take out the first sentence and "otherwise," right, and capitalize "when"?

HON. JUDGE COFER: Well, we reworded the whole thing. But on substance we did leave out that "apparent from the context" provision.

MR. SPARKS: If you did that, you would have to change the rule --

MR. McMAINS: We need to change the rule

of evidence.

MR. SPARKS: -- on the first 103.

PROFESSOR DORSANEO: No you wouldn't.

MR. McMAINS: I agree that you can argue that you don't, but in order to be perfectly clear, it would be --

MR. SPARKS: You just create a trap.

PROFESSOR DORSANEO: You should change the rule of evidence.

MR. McMAINS: If that's what you're going to do, you ought to not entrap people into thinking they have it preserved or to entrap people, for that matter, who don't insist on it thinking that it's not preserved.

PROFESSOR DORSANEO: So which way do y'all want it?

MR. O'QUINN: Well, I think we first have to decide which way to -- what do we want to do about people that don't make offers of proof? Do we give them a fall-back position on it? I think it's a policy issue that has first to be resolved.

PROFESSOR DORSANEO: Well, I'll speak to that. I think we give them a fall-back position, because you're not --

MR. O'QUINN: Let me add some reasoning

to that. What if you marked an exhibit and you proved up an exhibit and offered it. You proved up and somebody made an objection. Somehow you never did make a formal offer, but it's right there, everybody knows what it was, it's in the record or maybe the question was -- you ask a question that was clearly not hearsay, you said, "Did you admit at the scene that you were drunk," or something like that and there's an objection on hearsay ground which is not proper, but the question contains the comment that you're trying to get an agreement to, you ask it in a leading form -- I mean, it's there in the record, they could tell -- you could think up some examples where that could happen.

MR. REASONER: You're going to assume whether the answer is yes or no. It's clear from the context.

MR. O'QUINN: That's what you make -- when you make an offer of proof, that's what you do. If the judge says, "Well, that's sustained." You say, "Well, Judge, my offer of proof is that he's going to say yes."

MR. REASONER: Oh, you mean it's as to my own witness and you're going to take my word for

what my witness would say.

MR. O'QUINN: As far as I'm concerned, as a party who doesn't appeal that much, I wish you guys would come up with a rule where everybody had to jump through ten hoops to get a right of appeal. I would be willing to vote for a rule where a guy gets no fall-back position as a matter of personal help for me. But I thought the policy we had adopted was we were going to give these guys these fall-back positions.

MR. McMAINS: All I was saying, Bill, is that I thought -- as I think Dean Blakely described with Krozner's insertion of the -- when counsel shall, you know, or at the request of counsel shall. The function of that was to allow a lawyer opponent of evidence to demand that the offer be made in Q and A form. I don't care how clear anybody thinks it's supposed to be. And if that was the intent of that language and since nobody can really, in my judgment, as yet has come up with something that is so obvious from the substance, that you don't have to make an offer anyway, why don't we take it out of both places?

MR. SPARKS: I move that we take the phrase in Rule 103(a)(2) "or was apparent from the

context within which questions were asked" out and we take the first sentence of Rule 42(b) out.

MR. McMAINS: "And otherwise" and start with capital "W" for "when"?

MR. SPARKS: Yes, sir.

MR. JONES: I second that motion.

CHAIRMAN SOULES: Moved and seconded, then, that 42(b) as proposed be changed by deleting the first sentence and the first word of the second sentence. Pick up then in the forth line of the proposal by capitalizing the "W" in "when" and then follow from there as proposed. Is that the motion?

MR. SPARKS: Right.

CHAIRMAN SOULES: Second?

PROFESSOR BLAKELY: Mr. Chairman, the motion also includes the amendment to the rules of evidence.

MR. McMAINS: Correct. Which I think is necessary. If we're going to amend it in one place, we ought to amend it in both places.

PROFESSOR BLAKELY: Amend Rule 103(a)(2) by striking the last phrase -- well, by putting a period after the word "offer."

MR. SPARKS: Yes, sir, that's right.

PROFESSOR BLAKELY: And striking the

words "or was apparent from the context within which questions were asked."

MR. O'QUINN: Yeah, taking that out.

MR. REASONER: In your example of an exhibit, if I offer the exhibit and it's excluded, that's -- you don't have to do anything more.

MR. O'QUINN: Yeah, you make an offer of proof.

MR. McMAINS: Sure. You could even say what's in the exhibit unless somebody requires you don't.

CHAIRMAN SOULES: What is your view of that, Newell, as the chair of the Subcommittee on Evidence?

PROFESSOR BLAKELY: I'm really neutral. It's a policy question and you people know the practice. And so I'm neutral on it.

MR. REASONER: Do you need to change (b) to make it clear that the offer of an exhibit is -- the offer and exclusion of an exhibit is sufficient or is it?

MR. McMAINS: It says it is. It says "unless the substance of the evidence was made known to the court by offer," and then it tells you what the offer is later.

MR. SPARKS: Dave Beck has also brought -- it appears to me we would have to remove the phrase in 103(a)(1) also.

PROFESSOR BLAKELY: Yes.

MR. SPARKS: "If the specific ground was not apparent from the context," and then you've got it removed everywhere. And end 103(a)(1) with the word "objection."

MR. McMAINS: Now, wait a minute. What -- that's a different issue, though.

MR. BECK: Yeah, but you have the same fall-back concept in (1) as you do in (2). And if the policy is going to be to do away with the fall-back concept, then why are we taking it out in one place and not another?

MR. McMAINS: Well, because the difference is the admitted evidence is there, you know what it is. I mean, what we're talking about in the one case is admitting evidence, in which case here you're talking about if you make -- you're talking here about a bad specifics, good specifics.

MR. BECK: But you're talking about the ground for objection not the evidence there, Rusty.

MR. McMAINS: That's right. That's what

I'm saying. That's the whole point.

MR. BECK: Well, why shouldn't you require someone to state the specific ground of objection? If they do that, why do you need to get into the question whether or not it appears in the context or not?

MR. McMAINS: Because sometimes you can say "I object" and the judge knows already and goes ahead and excludes it.

MR. BECK: Yeah, but does the appellate court know the judge knows?

MR. McMAINS: It doesn't matter as long as it's a non-obviable objection.

MR. BECK: It matters if you hadn't preserved your error.

MR. REASONER: I think Rusty has a good point, David. A lot of judges don't want to hear it.

MR. McMAINS: I mean, when the evidence is admitted, you know what it is.

PROFESSOR BLAKELY: I would just say it's a separate question. It does not follow from striking the fall-back position from the offer.

MR. SPARKS: And I'm sorry. I brought it up. I erase it.

PROFESSOR BLAKELY: That you must amend (a)(1). It does not follow. It may well be you want to.

MR. REASONER: But is the amendment you're proposing to (2) merely the last part of the disjunctive phrase "or was apparent from the context within which questions were asked"? That's all you're --

MR. SPARKS: That's the motion, yes.

MR. McMAINS: That one has been seconded.

MR. SPARKS: You can't get anything better than my motion seconded by Franklin.

MR. McMAINS: Move the question.

PROFESSOR DORSANEO: I like the fall-back position. I don't see why -- you know, it seems to me it's hard enough to get along in this world without -- when something is obvious -- when something is obvious to everyone, including the courts that are going to have to pass on this question, why shouldn't it be treated as obvious?

MR. REASONER: Yeah, I think I might be persuaded if you would give me an example.

PROFESSOR WALKER: It's obvious, but I can't give an example.

MR. McMAINS: The problem is the first

example is going to be a case that he has.

PROFESSOR DORSANEO: Well, it may be your exhibit that you're worried about.

MR. REASONER: Well, I don't read this as applying to exhibits. If I offer an exhibit and the court rules on it, it's in the transcript.

PROFESSOR DORSANEO: Well, exhibit is evidence, isn't it?

MR. REASONER: Well, that was my question. The way I read this, exhibits are still covered.

PROFESSOR DORSANEO: Well, you've convinced me that it does cover exhibits.

PROFESSOR BLAKELY: Mr. Chairman?

CHAIRMAN SOULES: All right, Newell. Yes, sir?

PROFESSOR BLAKELY: Here's an example. The question is asked, the question is answered, then there's a Motion to Strike and the court upholds the Motion to Strike.

CHAIRMAN SOULES: You have to offer it again.

PROFESSOR BLAKELY: Now he fails to reoffer --

MR. O'QUINN: Tough.

PROFESSSOR BLAKLEY: -- in any form.

MR. McMAINS: I don't -- I just know that that's --

PROFESSOR BLAKELY: Well, read -- I don't know whether you've got the evidence rules there, but you see it includes the Motion to Strike.

PROFESSOR DORSANEO: I do think John O'Quinn's leading question to your own witness would cover it, too.

MR. McMAINS: Although ironically enough, (B) actually only talks about excluding the evidence in the first instance.

MR. O'QUINN: You might argue it's a res jestae statement, but the judge might say, "I don't think it's a res jestae and take it up.

MR. REASONER: But then you've got the answer.

MR. O'QUINN: Sir?

MR. REASONER: Do you have the answer?

MR. O'QUINN: I think you have to have the answer.

MR. REASONER: I mean, I confess my witnesses don't always answer leading questions properly.

MR. O'QUINN: Well, you've got to learn

how to coach them better then.

MR. REASONER: I've known it for years. Get a better class of witnesses.

PROFESSOR DORSANEO: What's the big harm of allowing this fall-back position?

MR. McMAINS: Well, the harm is I don't know what it means, which scares me as to what a court's going to do with it. We already are being --

MR. O'QUINN: Why does that scare you, Rusty? If you're confused about it, why don't you just ask to put it in Q and A form?

MR. McMAINS: That's the reason I'm -- That's what I'm saying. I don't -- under this rule, you do not have that right. Under this rule you do not have the right to require Q and A.

MR. SPARKS: Which book you looking at?

MR. McMAINS: Page 67 of the proposed rule. The Supreme Court -- the Court of Appeals -- the Supreme Court Rules.

PROFESSOR BLAKELY: This is the federal --

CHAIRMAN SOULES: Is that it, John?

MR. O'QUINN: Right.

PROFESSOR BLAKELY: This is the federal language. If Judge Parker were here, we could ask "Has this given you any trouble in the federal

court," and he would say, "No, it hasn't given me any trouble."

PROFESSOR DORSANEO: I'm more concerned about courts cutting off somebody, making a technical argument to cut somebody off than I am about them bending over backwards to reverse the trial judge on a ruling on evidence.

CHAIRMAN SOULES: Suppose the answer given by the witness is not responsive and moot, the motion is made, stricken, later you come back to get the question. You ask the question and objection is made and the judge excludes it. You've got a situation there where the witness has given testimony that's been stricken, but everybody knows what it would be.

MR. REASONER: Yeah, I think the Dean had a good example. I think it is a waste of time after a Motion to Strike is granted to make somebody go through a formal bill in addition to having a Motion to Strike. I agree with that.

CHAIRMAN SOULES: David.

MR. BECK: Bill, the only concern I have about introducing this concept is the fact -- you know, you have enough problems in the heat of battle trying a lawsuit and I guess I feel like

John O'Quinn. I think most trial lawyers know you have to object to certain things and if it deals with certain proof that you're trying to get in and they keep it out, you've got to make an offer of proof. And the trouble is if you introduce a whole new concept about, you know, whether or not it's apparent from the record as it is, you run the risk of -- a lot of lawyers are going to make that judgment erroneously and they have not preserved any error. I don't feel that strongly about it.

MR. McMAINS: Frankly, in terms of the Motion to Strike, I don't think there's any court anywhere that's not going to hold that you have failed to make an offer under those circumstances.

CHAIRMAN SOULES: Well, I don't know what we're introducing. Isn't it already in the Rules of Evidence? So we're taking --

MR. O'QUINN: Talking about taking something out.

CHAIRMAN SOULES: Yeah, so we're not introducing anything by this committee. If we vote to eliminate this, we're going to be excising something instead of introducing something.

MR. McMAINS: Bill, of course, made the point earlier. Our rule is very clear -- the rule

we drafted is very clear to allow it and not require the insistence on it. The evidence rules you can actually make the argument that you have the insistence right now, that you have the right to insist on the record.

MR. O'QUINN: You definitely have that right.

MR. McMAINS: Well, but what I'm saying is the proposed rule takes it away in that first example.

MR. O'QUINN: You just provide it, however. Right at the end of that sentence they provide, "however, if anybody" -- you know.

MR. SAM D. SPARKS: The court or any party?

MR. O'QUINN: Well, if any party --

MR. McMAINS: It says --

CHAIRMAN SOULES: Anything new on this? Okay. Sam, state your motion that you were able to get Franklin Jones to second and see if he withdraws his second.

MR. JONES: Did you withdraw your motion?

MR. SPARKS: My motion is that we eliminate from Rule 103 of the Rules of Evidence in Rule 103(a)(2) the phrase "or was apparent from the

context within which questions were asked." And that we eliminate from the proposed Rule 42 in 42(b) the words "when the court excludes evidence, no offer is necessary to preserve error if the substance of the evidence is apparent from the context within which questions were asked. Otherwise" -- and start the sentence with a capital "W," "when."

CHAIRMAN SOULES: All right. Now, do we also need to address something in 103(a)(1), the last part of that or do we leave that like it is?

MR. SPARKS: No.

MR. REASONER: Well, you know, I am concerned the way you've amended 42, then you're going to have to make a Bill of Exceptions on excluding exhibits.

MR. SPARKS: On excluding what?

MR. REASONER: On excluded exhibits.

MR. O'QUINN: Why can't you just make an offer of proof?

MR. McMAINS: It says you can do it by statement.

MR. O'QUINN: Why can't you just say, "Well, Judge, I offer Exhibit 1"?

MR. SPARKS: Which shows?

MR. O'QUINN: It shows what it shows. You don't even have to say that probably.

MR. REASONER: You have to do it twice.

MR. O'QUINN: You could.

MR. SAM D. SPARKS: Which is somehow better than --

CHAIRMAN SOULES: Well, if we're talking about preserving -- not having to make a bill on running the risk that the court would construe this as having to make a bill on excluded exhibits --

MR. REASONER: I'm now persuaded to change. It's not worth the effort.

PROFESSOR DORSANEO: I agree.

MR. BRANSON: I didn't hear what he said.

CHAIRMAN SOULES: You may have to anyway because the only thing that the first sentence says is "evidence that's apparent from the questions asked." Should that be -- "if the evidence is otherwise apparent in the record"?

PROFESSOR DORSANEO: Well, it says from the context --

CHAIRMAN SOULES: Well, should it say, "if the" -- "if the substance of the evidence is otherwise apparent in the record"?

MR. BRANSON: Most people are going to be

paranoid enough in the heat of battle to go ahead and get sufficient evidence in the record that they have -- the appellate courts have something to rule on without us tampering with the rule. If they're not that paranoid, they probably ought not to be in the courtroom.

PROFESSOR DORSANEO: Let's just do it. We're going to have to deal with the Criminal Appellate Committe anyway. They didn't put it in. Either way, it doesn't matter. Vote.

MR. O'QUINN: Vote.

CHAIRMAN SOULES: Those in favor of Sparks' motion, say aye. Opposed? I'm going to have to get a show of hands on this.

Those in favor, please hold your hand up so I can count. In favor of Sparks' motion. That's eight in favor.

PROFESSOR DORSANEO: I watched Clifford Brown and Judge Cofer. They didn't vote in favor.

CHAIRMAN SOULES: Those opposed, which would mean that we would leave 103(a)(2) alone and leave this language in. Those opposed to the motion show your hands. Nine. So, it's a split of eight to nine, which principally indicates, of course, to the Supreme Court that this is something

that we have a division about and they're going to have to resolve it.

MR. O'QUINN: Now, what are we going to do about Rule 353?

PROFESSOR DORSANEO: Pardon me?

MR. O'QUINN: What are we going to do about Rule 353, though? Are we going to vote on it? Rule 42.

PROFESSOR DORSANEO: Oh, 373 then, right?

MR. O'QUINN: Yes, sir.

PROFESSOR DORSANEO: All right.

MR. SPARKS: Just a second. Before we get off of that, should the Court go the other way. Are they aware that there is a suggestion to put -- leave the sentence in there and after the word "as" you put "provided, however, any party" --

MR. O'QUINN: Yeah.

(Short break.)

CHAIRMAN SOULES: All right. We're going to reconvene now. We're going to reconvene. Okay. Bill has advised me that he has one more matter that dovetails with the criminal practice, which he'll take up now. Well, he and Judge Cofer resolved that, so I guess --

Are you going to give us a list of the

considerations?

In order to get our thinking going so that we may be able to resolve the balacnce of this tomorrow, Bill wants to give us some indicators here and then we're going to recess from the discussion of the appellate rules and take up the suggested changes to Rules 277 and 279, which are Franklin Jones' committee, as soon as this -- Bill concludes this business at hand right now.

PROFESSOR DORSANEO: What I'm going to do since we need to switch gears is to ask you to turn to the Table of Contents of these proposed rules. And I'm going tell you, to the best of my ability, which of these rules is, in effect, a new rule or a substantial modification of an old rule so you don't have to read through the whole package from beginning to end in order to find out that an existing Rule 403 is now proposed Rule "X". I'm just going to renumber it. Mark "X's" next to them and read them if you don't have anything else that you need to do between now and the next time we get back. Rule 4, Rule 5, Rule 18, Rule 19, Rule 30, Rule 32, Rule 63, Rule 84, Rule 85, and Rule 100.

To the best of my recollection most all of the other rules in this package do not involve

substantial departures from what the current Rules of Civil Procedure say. I'm quite sure that I missed one or two in giving you that list, but it was a nice try anyway.

I'll give it back to Luke.

CHAIRMAN SOULES: Okay. We'll resume, Bill, with your report tomorrow.

MR. McMAINS: Luke, may I ask one favor? Apparently there are a number of folks that ain't going to be back tomorrow. And some of them are, in fact, I think Plaintiff's personal injury lawyers who probably are going to be interested in the one rule in the appellate rules of which there is a substantive change on the remittitur practice which is Rule 85. And I don't think it's going to take very long because Kronzer is the one that brought it up the last time. And the only real change -- I mean, just from a philosophical standpoint -- that's not the exact wording, because I'm not sure the wording is -- there's 100 percent commitment to the committee. But the concept that Jim Kronzer had raised last time was the problem of Flanningan versus Carswell; that is, where the Supreme Court has said that you cannot in the Court of Appeals, or in the Supreme Court for that

matter, reverse a grant of a remittitur without a showing of abuse of discretion by the trial court.

On the other hand, in the Court of Appeals the question of remittitur is presented as if the Court of Appeals sat there the same way as the trial court. And the question was posed shouldn't abuse of discretion be the standard for determining the issue on remittitur, be it whether it's granted or denied.

In other words, whatever the trial judge does, if he abuses his discretion, then the Court of Appeals has the power to make a determination of abuse and to remit accordingly.

That was a rule that we discussed. It was -- it basically went through the subcommittee more or less. I'm not sure whether there were any dissents or whatever. There was substantial discussion. Judge Guittard seemed to think that that might not be much of a change in the existing practice; that is, if the Court of Appeals wanted to remit, they can do so anyway, they just call it abuse of discretion of the trial court.

HONORABLE WOOD: Rusty, what rule, if any -- I've never been in a case where there was a remittitur. What does the judge consider in -- the

trial judge consider in deciding whether or not there would be a remittitur and how much?

MR. McMAINS: Well, the trial judge has -- he can do it for any reason he wants to. Of course, the penalty for remittitur, if you do not accede to it, is new trial, which, of course, at the trial level if the judge orders it and you don't do it, is an unappealable thing. And that's a jurisdictional issue, so there isn't any way to get that up. He can abuse his discretion all he wants to and that's not something you can complain about.

But the -- so you have to accept it and then you don't have a right to appeal until the other side appeals. And then if they appeal, then you have the right to appeal. All that practice is kept the same. The only difference is the imposition of the abuse of discretion appellate review standard, and therefore, making, basically, Flannigan versus Carswell equal for both sides. You're going to live with what the trial judge does absent of showing abuse of discretion.

And this rule is rewritten to provide that and additionally provide that if the -- it also provides for a voluntary remittitur in the event

that the error found by the Court of Appeals affects only a part of a particular claim for the damages that can be cured by remittitur if that party voluntarily remits it. Then, that also is the second office of remittitur. Now --

MR. ADAMS: For instance, the jury awarded some damages for some medical expenses that weren't proved up, you're talking about, Rusty?

MR. McMAINS: Yes. If the error is in future medical, if the error is in lost earnings or specific numbers, if there -- you know, if it's lost profits in a commercial case, there's an issue there, you waive the finding, then you don't suffer reversal automatically.

The proposal that was actually before the subcommittee was to do away with remittitur altogether and which, frankly, we very quickly dismissed because it didn't do away with the errors. So, if there was excessiveness found, then the only remedy at the appellate court level would be to reverse and remand, and that didn't make much sense.

So not -- we changed the focus of it merely to make Flannigan versus Carswell two-sided. And what you review and rely principally on threshold

is the discretion of the trial court who was, in fact, there and did see all the witnesses and is in the same position as the jury as distinguished from the Court of Appeals who is not there and all they've got is the bare record.

But that's the office -- that's basically the office of the change, and all I'm asking is if we can vote on the philosophy of whether the court -- whether the committee wants to do that and then we can work on the language, specific language, if it needs to be cleaned up. But that's the real philosophical change in the rule.

CHAIRMAN SOULES: Well, let's take a consensus on that. How many feel that that change just discussed by Rusty should be the way the rule is written?

MR. REASONER: Could we have a succinct statement of the philosophy?

CHAIRMAN SOULES: Okay. Please do that before we vote.

MR. McMAINS: A succinct statement of what?

CHAIRMAN SOULES: Of the philosophy.

MR. O'QUINN: Just tell him you want to follow federal practice.

MR. O'QUINN: That's what it is.

MR. McMAINS: That's basically what it is. It's Flannigan versus -- it's if -- the philosophy is that a trial court's decision on remittitur as to --

MR. O'QUINN: Up or down.

MR. McMAINS: -- up or down, is reviewable on appeal by abuse of discretion standard. That applies whether it's a denial of the remittitur or a grant of the remittitur. We have not changed the fact that a party who accepts a remittitur in the trial court doesn't have a right to appeal unless the other side does. That's still the same. The only philosophical change is the Court of Appeals does not get the right to look at the record for the first time and determine what they would have done if they were the trial court, without regard to what the trial court did. That's the philosophical difference is that it provides a mutually -- a mutual standard of abuse of discretion for the appellate review. I'm not sure that's succinct, but that's --

MR. BRANSON: Rusty, there was also a discussion in the whole committee last time of making additur if you're going to continue

remittitur.

MR. O'QUINN: No, we didn't discuss that.

MR. BRANSON: Sure, I brought it up.

MR. O'QUINN: Frank brought it up.

CHARIMAN SOULES: Let's get a consensus on this first and then -- because if we start that, we're going to really run into Franklin's and he can't be here tomorrow and --

JUSTICE WALLACE: Could I ask one question?

CHAIRMAN SOULES: Okay.

JUSTICE WALLACE: In other words, the abuse of discussion becomes a matter of law and it would then be reviewable by the Supreme Court since it's a matter of law and not a matter of fact, which is fine with the Court of Appeals.

MR. McMAINS: I think that's true.

MR. O'QUINN: That's true also, Your Honor.

MR. McMAINS: I think it's true now.

PROFESSOR DORSANEO: As to the Court of Appeals -- is that what the Court of Appeals -- must be abuse of discretion of Court of Appeals.

MR. McMAINS: I think that's true.

MR. LOW: Is that the language they

express it in now, Rusty? I mean, that's what it ends up being. I would personally favor allowing the plaintiff to take it in appeal. You know, I think that --

MR. McMAINS: There is no --

MR. LOW: I know there's not now.

MR. McMAINS: Flannigan versus Carswell specifically says that a Court of Appeals has the independent power to decide on its own whether in its judgment the damages are excessive and to determine what the maximum amount to award is, which is contrary, basically, in my judgment, to the seminal philosophy that the Court of Appeals has no fact finding power, but only unfinding power.

The problem, therefore, is, though, before they can remit to a number, they have to find what that number is. And that's the only situation in the appellate practice in which the Court of Appeals engages in the role of fact finding, which, I think, is really contrary to their constitutional prerogatives, but we still have the Supreme Court opinion, basically.

MR. O'QUINN: That's a different issue, though.

MR. McMAINS: Right.

CHAIRMAN SOULES: How many feel that the proposition that Rusty has put is the consensus that we ought to go that way? Hold your hand if you feel we should go that way. Okay. Those opposed? Okay. Well, it's pretty strongly that we ought to go Rusty's way.

So there's your guidance for drafting, Rusty.

MR. O'QUINN: The old way we was unconstitutional.

CHAIRMAN SOULES: Okay.

MR. McMAINS: Thank you, Luke. I appreciate it.

CHAIRMAN SOULES: Yes, sir. Thank you, Rusty, for raising that at that point.

At this juncture we'll hear from Franklin on his committee's activities on Rules 277 and 279. In that connection, while he makes his report, if you'll permit me so I don't -- I'll try not to distract. There was a jury issue submission seminar that was given in ten cities just recently -- and the state bar has given us complimentary copies of the book that accompanied that seminar and they're back there on that table -- which is all directed towards "broad issue submission." Every

speaker was to emphasize broad issue submission in whatever type of case he spoke about or in drafting a business charge or personal injury charge or DTPA charge or what have you. And it was ramrodded an awful lot by Justice Pope -- Chief Justice Pope. And those books are back there. I'll walk around with some in case you haven't already picked them up.

Okay. Does everybody have a copy of that now? If you don't, why don't you hold up your hand and Broadus can give that.

Thanks, Broadus.

The State Bar has made these and given these to us on a complimentary basis, and we apreciate that.

Okay. Franklin, the floor is yours. Thank you, sir.

MR. JONES: All right, Mr. Chairman. I have a very mundane report to make today. I think I should start out by saying that I'm at a distinct disadvantage. I know all of y'all probably have heard this Jerry Clower (Phon.) story about the professor that went around making speeches to all of the universities and he got so good that they hired him a chauffeur to go with him, and they put

him in one of these black suits with boots and a hard-bill cap and everything.

And the chauffeur would sit in the back of the room while they were making the speeches, you know, and he finally got to where he could make the speech about as good as the professor, so he told him, "You know, I can do that good as you can." The fellow said, "No, you can't." He said, "Well, I'll tell you what, we'll change clothes. And I'll get up there and do the speech and you sit in the back of the room." And he did that about three times and just had everybody clapping and going on and the forth time that he did it, well, just about the time he got through with his speech, well, a student rose up in the back of the room and asked him a question that took about five minutes to ask. And the old boy says, "You know, I'm just ashamed of you asking such a stupid question. You ought to be ashamed of yourself." He says, "Just to show you how dumb it is, I'm going to have my chauffeur stand up back there in the back of the room and answer it."

My chauffeur is not here today. Hadley Edgar has worked so closely with our committee and has been so helpful and is, if anything, much, much

more supportive of these rules than, perhaps, myself or anybody else on the committee, and you've already heard the chairman tell you why Hadley can't be here to share his knowledge with us.

I want to give the committee a brief historical background of how we -- where we are today. At our last meeting I cornered the Chief Justice and said "Chief, I want to ask this committee to study the question of simplifying jury submission in civil cases in Texas. I want to try to get this committee to adopt the federal rule of a general charge, but I don't want to do any of this unless I know that I'm not going against your desires or your wishes or your philosophy."

And the Chief Justice told me, "No, you're absolutely right, we ought to do this and you go ahead and start your move to get your subcommittee appointed." Whereupon, I brought the matter up at our last meeting and Luke Soules appointed the subcommittee to make these studies.

All of you have received or should have mailouts containing all of the philosophical background to the dispute between the special issue charge and the general charge.

A narrow majority of our subcommittee on each

occasion when we met favored the purer general charge. However, just before the last meeting of our subcommittee David Beck who was the articulate minority spokesman in the committee got ahold of me and said, "Franklin, we ought to compromise this thing." Then I said, "Well, David, I'm always willing to do that." And as a result of David's and my discussions at our last meeting, which David could not attend, the subcommittee struck a compromise which is the subject matter of the rules that have been distributed to each of you for consideration.

Now, what I would like to do is go through the general changes, the general basic changes which we have made in submission of jury cases. And then I would like to identify what I consider or what I am advised are really the only two philosophical changes of where David, as a minority member of our committee, had a problem. And I would like for the committee to consider these philosophical changes this afternoon and resolve that issue for us and then, if it's considered necessary to send our subcommittee back to clean up the housekeeping measures in the rules, if there are any, and David has some which all of us are

ready to agree to, we will be happy to do that. But I feel like it's time for us to discuss the philosophical problems and get that resolved.

Now, the recommendations that we are making to the change in submission of jury issues in Texas are, basically, five. We are going to what Hadley refers to as a mandated, broad form Lemos/Montes submission of civil jury cases. With that proposition David Beck has no problem. We are eliminating entirely from the court's charge inferential rebuttal instructions, with which David has no problem.

We are permitting the jury to be informed of the effects of their answers on the outcome of the case. David Beck has a problem.

We are imposing the harmless error rule on the party complaining of the court's charge on appeal, of which David Beck has a problem.

We are simplifying the perfection of appellate jurisdiction of the trial court's denial of requested charges, issues or interrogatories or instructions. David Beck has no problem.

In the interest of time, Mr. Chairman, without going through and parroting all of the philosophical reasons that the committee has seen

in the literature which has been submitted to it, I would move the committee to approve the basic five changes which I have outlined and which are reflected in the rules which are under submission to you; to approve these rules in substance and to recommend their adoption by the Supreme Court.

MR. BRANSON: Second.

CHAIRMAN SOULES: David, do you want to speak at this point?

MR. BECK: As Franklin has said, I really have two main objections to the proposal. I support the proposal, in part, as Franklin has correctly stated, but I have two main objections, both of which are basically philosophical in nature. I would like to set them forth for the record and for the committee's consideration.

The first one has to do with telling the jury the effect, the legal effect, of their answers. Now, obviously that is a marked departure from what we have and from what we've had, at least since I've been practicing law, and for a long period of time prior to that. And I think the answer to that question, that is whether we should tell the jury the legal effect of their answers or not tell them, really basically depends upon what we believe the

role of our jurors are.

If on the one hand we believe that the role of the jury is to decide facts and only facts, then I would submit to you that there is no reason why the jury should know the legal effect of their answers. On the other hand, if the purpose of our juries are to decide the case, then I would submit to you that a compelling argument can be made that the jury should know the legal effect of their answers.

I come down on the former side. I think that a jury should be in the position of deciding facts, that's what we've been doing in Texas for a substantial period of time. Moreover, I think that if you tell the jury the legal effect of their answers, there's a very serious risk that a jury may decide the issues, not so much on the basis of the evidence as they're instructed to do by the trial court, but really on the basis of matters which are above and beyond the evidence, and I would submit to you that that is wrong.

But there's another reason that I've got some concern about this. If we are going to tell the jury the legal effect of their answers, what does that mean? Does that mean, for example, that we

tell the jury that the damage award is not subject to federal income tax? That's certainly a legal effect or an effect of their answers. Do we tell the jury that in a deceptive trade practices act case that the award they make may be trebled by the trial judge? Now that's certainly a legal effect of some of their answers. Do we tell the jury that the medical bills which are awarded may have already been paid by some collateral source? That is certainly a legal effect of their answers. In a products liability case where you have one solvent defendant who is determined to be 10 percent at fault or having caused the accident and the insolvent defendant is 90 percent, does that mean that the jury is entitled to know that the 10 percent responsible defendant may end up picking up the whole tab?

What does this mean when we say that the jury is entitled to know the legal effect of their answers? I think these are all questions we need to resolve before we cross this philosophical threshold and decide, "Yes, let's tell the jury the legal effect of their answers."

Also, I would say that in the small amount of time I've spent trying to find out what other

jurisdictions are doing, I have -- and I don't want to represent to this group that a majority of jurisdictions don't allow this, because I don't know the answer to that. But I do know that a large number of jurisdictions that use the broad form submission do not tell the jury the effect of their answers, and indeed it's determined to be reversible error for much of the same reasons that I've already tried to represent to the group.

So, that really is -- are the bases of my objections to telling the jury the legal effect of their answers. And at bottom I think we really have to determine what the purpose of our jury is. That's the objection to the first part. You may want to take them one at a time, Mr. Chairman.

MR. O'QUINN: Can I ask a question?

CHAIRMAN SOULES: All right, John.

MR. O'QUINN: David, they've been doing it in federal court's a long time. How do you feel about that? Why should -- in Houston, Texas, why should I go down to one building and have -- and be able to tell the jury and the -- an empire doesn't fall, but I can't go down to state court and do it? I'm not trying to be argumentative. I mean --

MR. BECK: No, I think it's a valid

question.

MR. O'QUINN: And have you toyed with that in your mind? How do you reason all that out?

MR. BECK: Well, John, to be honest with you, in some of the federal court's that I've been in, I haven't really had that much of a problem with it. Is -- you know, and I'll be the first to admit, a good plaintiff's lawyer, even under Texas procedure, can go pretty far in suggesting to the jury what the legal effect of their answers is. And if that's the case, I don't know why we need to change the rule. But I really haven't had that much of a problem with lawyers in federal court telling the jury the legal effect of their answers, and that may be because of an outgrowth of the state procedure.

CHAIRMAN SOULES: Buddy.

MR. LOW: Luke, may I add something? I think the role of our court's and jurors is changing. I think it's not like it use to be. And our system is going to have to change to meet the demands of the docket and everything. I try cases for both sides, mostly defendant, but let's face it, we've been trying to devise schemes to get around telling them the effect and then you can

come up and say, "Well, you find this and this and this and then you can give them their money." There's no reason to do that. Jurors decide who they -- I mean, and maybe that's part of our system to merge it all into one so that the jury should be able to decide who they think should win and lose under certain guidelines. And I've favored that for sometime. And I favor this submission.

I might add that in connection with the first one, there was some expression of the general charge. But we still do have interrogatories. There will be broad interrogatories or the court may submit -- and for years we've had certain type cases, intentional tort and so forth that were submitted, just general charge.

So, I think that in that way we're behind the federal courts. Now, I don't speak for the majority of the defense lawyers, but that's my own personal view. And I would favor it, because I think it's a step forward. I don't disagree with what David says and he raises a point I haven't thought of. On treble damages, I'm not so sure but what I wouldn't -- on something like that, I would go ahead and tell the jury that. And I think income tax is going a little far, but I think --

MR. BRANSON: How is that handled in the federal court now, Buddy, the treble damages?

MR. LOW: The judge discharges, said that "This is not taxable, you shall not" --

MR. BRANSON: I was talking about treble damages.

MR. LOW: Treble damages they can't tell them the effect of it. You can't tell them the effect.

MR. BRANSON: Why couldn't we make a proposal we adopt in the same manner the federal rules have been adopted?

MR. LOW: And so, I'm saying I'm not -- David has raised a point, and I think that's --

MR. BECK: Well, it's a two-way street. For example, if you tell the jury -- are we entitled -- is the jury entitled to know that the plaintiff's attorney has a contingent fee contract and the plaintiff is going to lose -- doesn't actually get all the money. You know, I just want to make sure we think through this thing.

PROFESSOR DORSANEO: It doesn't have to do with the judgment, all of these things about taxation and all of that, because what the judgment says -- that doesn't have anything about taxation.

MR. LOW: But see, the only thing that bothers me is the treble damage; that does have to do with judgment. Other things I have no problem with. And I completely and 100 percent endorse what Franklin said and the one point David has raised that I haven't thought of.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: I suppose I will be labeled a traitor to the cause in some respects. I have a different concern on the particular thing about informing the effect of their answers, and it is partly a difference because of the way the federal system and state system is set up, because the federal judges usually have one or two very high paid associates running around doing research for them, which is also why general charge is probably more palatable in federal court, because very seldom do the lawyers actually get what they submit to the judge anyway. It gets modified. They got somebody to do the briefing for them.

The same thing, though, is a problem with me. Unfortunately we have a lot of substantive questions unanswered in this state on the underlying liability rights between the parties, I mean, in a lot of different causes of actions. And

basically what we have been telling and have been getting done on the plaintiff's side sometimes -- or the defense side, either one, is to talk the judge into submitting the question, not knowing whether it's going to impact the judgment or not. We're taking the position that it is going to have "X" impact, but we don't know, because we ain't got any case law to support us one way or the other. Which how the law gets changed is we get that answer. And then we go up, without having to worry about a remand just because the judge won't give it to you. Because he always ignores it, NOV it afterwards and whatever, and you get the advantage of getting the argument. And then, if you get an answer to it and it results in something that you claim alters the judgment, then you get to take that proposition to the appellate court.

The problem is I'm not sure you're going to get an agreement -- and a lot of complicated litigation that's going on right now, particularly when you're dealing with liability theories on products liability, deceptive trade practices, negligence, intentional torts, et cetera, as to what the effect of the answers are. And so, then you've raised a new specter of appellate review.

What happens when the judge has told them what the effect is and that wasn't what it was? Do you have reversible error there, because the judge has told them that it would affect the judgment this way and then he changes his mind later on? And I just -- I have -- I just see a specter of that problem, in that I'm not really confident, completely, that the trial judges or the parties altogether know what the effect is going to be on the judgment because a lot of times the answers come back a little strange and you get different arguments as to what affect it has on the judgment.

But to tell the judge that he's got to do it, just seems to me to require the judge to figure out in advance if Question A is answered this way, what does that do to the judgment.

CHAIRMAN SOULES: Bill.

PROFESSOR DORSANEO: I agree with everything that everybody said. Now, it seems to me that it's the wrong way to go about it. The way it's done in this last paragraph on page 16 is to say that "Upon the request of either party, the court shall instruct the jury to the effect their answers will have on the judgment." It seems to me that's the wrong way to do it. When you talk

about, you know, tort cases, no matter how complex you think tort cases are, in business cases the situation is worse in terms of knowing the effect of the answers.

MR. McMAINS: I understand that.

PROFESSOR DORSANEO: But I don't see why a lawyer can't, in argument, say, "If you don't answer this question this way, then we might as well all go home." If he gets the -- if that's, you know, a stupid thing to say, it turns out to be a stupid thing to say. But to have the judge do it I find troublesome because of the problems you point out.

The other comment I would have is that I have thought for a long time, in response to what David said to thinking about it a lot, is that you can't really answer a question unless you know how important the question is. I mean, you have to know the effect of your answer in many situations in order for you to know -- in order for you to know what the answer is. In order to answer the question you have to know what the question is and what it's about.

So, I think as a general proposition the jury shouldn't be kept in the dark on matters that are

really important.

MR. McMAINS: What you're suggesting, then, is the rule change that the lawyers be entitled to argue the effect of the answers.

MR. LOW: Rusty, wouldn't -- what you're talking about wouldn't -- say the judge tells them the wrong thing about what's the effect of their answer. You're going to have a reversal and have to retry it anyway because he's going to base his judgment on that. You're just saying there might be a situation where it could be judgment entered on the basis of it but then you might be error because he's told them the wrong thing?

MR. McMAINS: Yes. No, what I'm saying is if the judge says, "That if you answer Special Issue No. 1" -- which may be an entirely new theory --

MR. LOW: That's right.

MR. McMAINS: -- that "this party is going to recover money," and then he changes his mind on that.

MR. LOW: Well, no, then the judge -- and he enters a judgment based on something else?

MR. McMAINS: No, but then he -- then he decides that that's wrong. That issue does not give --

MR. LOW: Well, he just should have thought of that because if he's in error, he's got to give a new trial.

MR. McMAINS: But the point is -- that's not the whole problem, Buddy. What I'm saying is doesn't that discourage the judge from what we have been trying to encourage the judge to do? When in doubt submit and decide it later as to what the impact of it is.

MR. SAM D. SPARKS: Rusty, I hear you but how have the federal courts been getting along all this time?

MR. McMAINS: Because they have clerks, number one.

MR. SAM D. SPARKS: Well, that doesn't solve the problem.

MR. McMAINS: And number two, they also have the ability to comment on the weight of the evidence, which also gives them a little more control or power as well. I mean, it's not just one thing in the dark. I mean, they get to illumine the entire thing from their attitude. We, so far, have not gone that far, not even suggested it.

PROFESSOR DORSANEO: Plus they do have

general charges.

MR. LOW: I know, but they even -- they submit a lot of them on interrogatories. Most of them really don't comment on the evidence. They give a standard charge with regards to what you think my opinion is and everything. So, let's talk about the practical world in federal court, the way it really is. And it hasn't been a real problem.

MR. REASONER: If I might ask Franklin, what are your -- what of your concerns, Franklin, are not answered by permitting the lawyers to argue what they think the effect of the answers are?

MR. JONES: Basically, Harry, I'm afraid the jury might not believe the lawyer.

MR. SPARKS: You're going to lose anyway.

MR. JONES: Now, these problems were all discussed in our subcommittee meeting, the last one. David -- in due reference to David, he wasn't there. And I started making notes here about the issues that he raised and about income tax and all, that -- it wouldn't be charged on there.

MR. BECK: Not the way this is written.

MR. JONES: On treble damages, yes. On collateral source, no. On solvency and strict liability, no -- I mean, on the solvency of the --

MR. BECK: Wouldn't that affect the judgment?

MR. JONES: No, the judgment is going to be in the same no matter --

MR. O'QUINN: How about joint and several liability?

MR. JONES: Well, that would solve it not.

MR. O'QUINN: David, would the judge tell them that you're going to be jointly liable for the whole thing?

CHAIRMAN SOULES: Speak one at a time now. We've got a court reporter transcribing this and we want to try to get as much as we can.

MR. JONES: In that rare instance where the judge really doesn't know what the effect of his answers are going to be, no, he wouldn't instruct them, of course not.

We presume that it would -- that the judge would have sufficient knowledge to know whether or not the law was settled on any particular fact situation and if it was not. If it was not settled, well he certainly ought not to tell them what he thinks the effect is going to be. He doesn't know.

MR. McMAINS: Of course the rule says "shall," as presently proposed.

MR. JONES: Well, if he knows. We assume that, you know, he wouldn't instruct them on the effects if he did not know.

CHAIRMAN SOULES: In business cases -- excuse me, Harry, go ahead.

MR. REASONER: Go ahead.

CHAIRMAN SOULES: Well, I know I have filed Motions for Judgment in business cases that were different from what I thought I was going to be asking before I saw what the jury's answers were because I had to go back and figure out when you stack all those answers together, do I just have a new theory now of what kind of judgment that I'm going to go looking for? I thought I knew it all before I saw these answers, but they're strange and they still look like I'm entitled to something and you go back and you put it together as best you can, but now you have the answers. I don't know whether that occurs. I don't do bodily injury practice, but the business practice that happens and it's not real infrequent that that happens.

MR. McCONNICO: That came up in the subcommittee. I was a member of the subcommittee.

And I was late in coming to this, and the argument that was brought up on that is a jury tries to know what the effect of their answers are going to be anyway.

Maybe the reason we have the confusion is the jury is in the dark and they're guessing. And maybe if we told them what the effects are actually going to be, you wouldn't have as many confused verdicts. In the commercial cases I've been involved in I really believe that a jury might not be giving us the judgments or the verdicts they're giving us if they would have, in fact, known what those answers -- the effects of the answers they did give. And that was how that was answered in the committee.

CHAIRMAN SOULES: Harry, you were about to make a remark.

MR. REASONER: Well, my remarks were going to be much along the lines of Lukes. I know that in many times in commercial cases with multiple defendants that there are permutations that, just certainly don't occur to me before the verdict comes in and we're allowed to brief it and argue what kind of judgment should be based on it. I'm not -- of course, my guess is that most federal

judges you couldn't persuaded into giving a dialogue on what they thought various permutations would be. And, you know, if we're going -- if it's going to be mandatory, Franklin, we're going to have big arguments about what the judge ought to instruct. And there are going to be a lot of demands that he instruct on this and instruct on that, and I assume that his refusal -- I don't want to talk about these to death, but I assume that you're saying that his refusals to instruct on the effect would be grounds for error.

MR. JONES: Well, I think he would be mandated to instruct where it was clear as to what the effect was.

MR. BRANSON: Let me ask a question.

Buddy, you try a lot of federal cases, and in joint and several liability, the effect of that, told to federal juries? I don't belive --

MR. LOW: No.

MR. BRANSON: They also don't tell them treble damages. I don't know why we can't adopt your --

MR. ADAMS: Securities -- they don't tell the jury in securities cases that's it's going to be treble.

CHARIMAN SOULES: David, could you speak, maybe, from your point of view on the -- what you feel about permitting the lawyers to argue what they believe to be the effect of the answers of the jury so that there is a -- probably there will be some argument differences about that in making jury argument, too, but at least it would be the lawyers arguing and not the judge setting it out in the way it is and then being wrong.

MR. BECK: I think that would solve Rusty's comment, which is that if the judge ties himself to a particular legal theory, he's locked in and the chances of that case being reversed are pretty great. And I think that solves Rusty's concern.

But I think we've got two basic questions that are raised by my concern. One is the basic philosophical question of what do we want our juries to do. And I think that Franklin needs some guidance on that so that we can go back to the committee and decide how we're going to be drafting these rules. And then the second thing is is do we really know what we mean when we say the jury, whether it's the judge or the lawyer telling them, what the legal effect of their answers are going to

be. And I just want to make sure that we know exactly what it is -- what box we're opening. We've already had some questions raised here that I think some people have some very serious differences of opinion on as to what the jury can and cannot be told.

MR. SPIVEY: Davis, would it solve your problem if you eliminated the first two phrases there down to "effect" and say, "the parties may argue to the jury as to their interpretation of the probable effect of their answers to interrogatories"?

MR. BECK: That would be better. It wouldn't solve my objection, but it would be better.

MR. SPARKS: What are you going to do when you get up and you object and say, "Your Honor, that's not the law." And the court's going to have to make a ruling.

MR. LOW: No, he's not. He's going to say, "Under the rules, he's entitled to give his interpretation." Go ahead.

MR. McMAINS: A pretty sorry lawyer who doesn't pretty well leave an impression of what answers are going to result in his favor anyway.

MR. JONES: Turn it around the other way.

MR. SAM D. SPARKS: You take a simple Workers' Compensation case and you get up and you tell the jury this word "permanent" doesn't mean permanent, it covers -- and the other lawyer gets up and he says, "Permanent, it means permanent." And, you know, the judge is going to say, "Well, you know, he's entitled to argue his opinion."

MR. SAM D. SPARKS: You've got a definition there.

MR. ADAMS: Franklin was about to say something there.

MR. JONES: I was going to just turn the shoe on the other foot. You know, 95 percent of every case that is tried I think it's cut and dried what the effect of their answers are going to be. It certainly is in my area of litigation.

MR. O'QUINN: Right.

MR. JONES: And, you know, I'm perfectly willing to -- I'm a compromiser, but I am not willing -- and I would like this committee to take a position here today on whether or not this state ought to continue this ludicrous, ridiculous, antiquated, hopelessly minority view of trying to blindfold the jury. Now, I think we need to

resolve that question.

MR. SPIVEY: Can we vote on a simple issue, shall we, the jury be instructed as to the effects of their answers and let's see how that committee stands on this?

CHAIRMAN SOULES: By the court.

MR. SPIVEY: And how, you know, the courts can wrestle with what that means.

MR. BECK: Just generally.

MR. SPIVEY: Just, generally, on that basis.

MR. REASONER: Is the issue you're posing it's within a court's discretion?

MR. O'QUINN: No.

MR. McMAINS: No, "shall."

MR. REASONER: It's mandatory that the court has to fully instruct.

MR. BRANSON: Are we defining "instruct" as they do in the federal courts or are we taking into consideration all that David --

MR. SPIVEY: That's just on that one issue, "shall the jury be instructed."

MR. BEARD: Let's get a consensus.

CHAIRMAN SOULES: As I understand what Pat wants is a consensus now of whether the jury

should be informed of the effect of its answers by the lawyers, by the Court or by anybody.

Is that the first question?

MR. McMAINS: I thought you were talking about by the court.

CHAIRMAN SOULES: No, well, I clarified that. He said -- he said it -- either way.

MR. BEARD: Of course, I said by the court, but I -- you know, I'd rather go right straight "shall the" -- you know, "shall the court instruct the effect of their answers."

CHAIRMAN SOULES: Is that the question? I want to get a consensus.

MR. BEARD: Get a consensus on that because we -- you know, have a vote that's substantial one way or the other.

MR. McMAINS: Really your question is should the court ever instruct on the effect of their answer. And then if -- then the next question is shall they always or should there be discretion or whatever.

MR. LOW: I have a question about his proposal. Are you talking about the effect in the sense of what judgment will be entered or -- you know, because, see, the effect --

MR. BECK: We don't know the answer to that question.

MR. BEARD: It's just that if we go to the detail, that's the general idea shall they be instructed the effect of their answers. I mean that's the basic issue.

CHAIRMAN SOULES: I want to be sure everybody has said it. What we're going to take a vote on is should the court instruct the jury not -- whether it's mandatory or not, but how many feel that the court should instruct a jury on the effect of their answers?

Is that the question?

MR. BEARD: Yes.

CHAIRMAN SOULES: Has everybody said pretty much what they want to say about that?

MR. SPIVEY: No, but let's get a vote on it first and see how --

CHAIRMAN SOULES: Well, I -- that's why I'm -- I want to -- before we take a consensus, I want to be fair to everybody and I don't want to rehear anything, but I want -- if there's anything new to be said, let's say it before we take a vote and get a consensus because that may give us some direction, it may not, but if it does, well, we

ought to be -- everybody ought to be heard before we take off in some direction, I feel.

MR. REASONER: Let me -- I guess this question -- I mean, as best as I would understand the federal system, a federal judge has enormous discretion as to how much he wants to say to the jury about the effect or non-effect of their interrogatories. And I can argue about what I think ought to be in the charge and he can charge them the way he wants to. Now, if that's the proposition, that, to me, is very different than creating a mandatory system where the judge is obligated to try to figure out the full legal effect of their answers and instruct them.

CHAIRMAN SOULES: We're not taking about mandatory, we're just questioning is -- in any case should the court instruct the jury on the effect of its answers. And we'll start with that threshold of question.

Frank.

MR. BRANSON: Luke, can we follow this general question with a special interrogatories of the committee as to the areas that David brought up, as to which of those we think would be appropriate to instruct the jury?

CHAIRMAN SOULES: Well, I think we're probably going to have issues of should it be mandatory and what are the criteria and if we get to that point, okay? All right. We'll take a consensus, then. In any case --

MR. O'QUINN: Whether they should ever do it?

MR. ADAMS: Whether the court has the power.

CHAIRMAN SOULES: Should the court have the power to instruct the jury on the effect of the jury's answers. How many feel the court should have that power? 13. I count 13 for. How many are opposed to that? Six -- seven, excuse me. Okay.

How many feel that the -- an instruction by the court to all juries in all cases as to the effect of their answers, that that should be mandatory? Raise your hands.

MR. O'QUINN: Can I ask a question?

CHAIRMAN SOULES: Yes, sir.

MR. O'QUINN: What's bothering me when -- I know you're putting it all -- in all. I don't understand what this instruction is like.

CHAIRMAN SOULES: I don't either.

MR. McMAINS: We don't know that yet. The question is should in every case the judge tell the jury, in some manner, the effect of their answers upon the judgment. That's what the current proposed rule provides. Then if you want to back off of that, then that's a different issue. That's --

MR. ADAMS: That's upon the request of a party.

MR. McMAINS: That's true. That's true.

MR. ADAMS: And that party is going to be bound by that.

MR. O'QUINN: Does this instruction take the form of something like "If you've answered Special Issues 1 and 2, then you get the money," or is it something more complicated than that?

MR. JONES: Mr. Chairman, I --

CHAIRMAN SOULES: Franklin.

MR. JONES: There's something we ought to be talking about right now while we're talking about these things, because it's in this rule and it's part of this same concept, and that is that we provided that the court is required to predicate --

MR. O'QUINN: Damages.

MR. JONES: -- the juries decision or determination on the issue of damages upon

affirmative findings of liability.

MR. O'QUINN: Right.

MR. JONES: Which, of course, is routinely done in the federal court. And that would also be, in effect, an instruction on the effect of their answers, because they're going to be told, you know, "If you don't find liability, don't worry about answering the damage question."

The same arguments could be made opposing that proposition, if we assume the judge is going -- when he really doesn't know what the effect of the answers are going to be whether or not to predicate.

MR. McMAINS: Of course, it actually says "shall be predicated."

MR. JONES: That's right.

MR. McMAINS: I mean -- so, you are still required under the proposed rule.

MR. REASONER: Are we going to discuss that?

MR. JONES: Candidly, let me -- can I tell you where the subcommittee is coming from on this?

CHAIRMAN SOULES: Yes, sir.

MR. JONES: I suppose that it's primarily

this tremendous 60-odd year-old or 70 year-old concept of blindfolding the juries that is so deeply entrenched in the minds of all of our state judges.

MR. O'QUINN: That's right.

MR. JONES: You know, we feel like we got to grab those fellows up and shake their cage. You know, that's just -- that's where we're coming from when we put this thing in mandatory form. Because -- you know, the judges right now have full and complete authority to go to this global submission. But you can't get this fearless --

MR. O'QUINN: Spineless.

MR. JONES: I mean, you can't get them to have the courage to do it. And it's that problem that we were addressing when we came to these mandatory provisions. And I'm willing to do any -- I'm willing to compromise that any way that this committee can conceive of doing it, but still shaking these fellows to the point where they simplify our submission and remove these blindfolds from our juries. Now, that's where this subcommittee was coming from. I perceive that the majority of this committee feels the same way. And we would be willing to go back and try to address

these problems which you're raising here and any attitude of compromise that can be mandated to us from this full committee.

CHAIRMAN SOULES: Harry, I think you -- do you have something you want to add to that point?

MR. REASONER: Well, I wanted to ask about the predicating the damage interrogatories. But are we going to discuss that later?

MR. JONES: Well, it doesn't matter to me. I just thought that --

MR. REASONER: Well, I was just saying, you know, from the viewpoint of the Administration of Justice, it seems like to me you're going to require unnecessary retrial. Why not let the jury find damages and if the judge is wrong on liability, doesn't award damages, then you can render rather than remand.

MR. JONES: Well, in the case where -- in this intersection collision case and the -- if the question is whether there was negligence on the part of the defendant and whether the plaintiff was 51 percent negligent or not, you're going to make the jury find damages if they find the plaintiff 51 percent?

MR. REASONER: Am I going to do that?

MR. JONES: That's what we do now.

MR. REASONER: Why not?

MR. JONES: I don't want -- I would want them to know if --

MR. REASONER: You would rather get them back to find more later?

MR. JONES: No, if they strap that 51 percent on me and, heck, I'm going to get some money, I want them to know better.

MR. REASONER: Well, but the judge is going to tell them. I mean, the judge is already going to tell them if they hold 51 percent against you, you lose.

MR. SPIVEY: Harry, one of the objections I have to your proposition is that if we keep a jury in there three hours -- I had a jury stay out one time two days on damages that had already poured me out on liability. And that is a terrible waste of the jury's time.

MR. REASONER: You don't think there would be that many cases where you reverse liability on appeal and have it rendered, and then you don't think it saves --

MR. BRANSON: Haven't you really solved

that, though, Franklin, when you tell them the effect of their answers? Why predicate down. I think Harry has got a point. Why -- let's say the appellate court finds -- or that the findings on contrib were not supported by the evidence.

MR. LOW: But, Frank, what -- it's going to be clear you would follow with some kind of instruction like they do in federal court, you know, and then let them base a verdict and not waste their time on -- I mean, let them know completely, just don't hide anything. I mean, just don't have them finding something -- if there were a lot of cases where that would be true, that you might could say, "Well, we found damages and now we'll reverse this," there's probably going to be enough of an error you have to reverse it anyway. It's really not going to save any time. You're going to waste more time in most cases because the jury knows what they're doing, and they know they want to find against you.

MR. BECK: Yeah, but, Buddy, isn't the question, though, whether you're making it mandatory. I mean, in the example that Franklin gave, you may want to predicate it. But in the case that Harry is talking about, you may not want

to predicate it, because you want a rendition situation if it goes up on appeal. And the only way to reconcile those two is to allow the court the discretion to judge the case on a case by case basis, if you will, and make the appropriate decision, and you don't do that if you make it mandatory.

MR. LOW: That could be right.

MR. BEARD: If you don't make it mandatory, most of the judges are going to exercise their discretion and not do it.

MR. SPIVEY: I back off of my suggestion, Pat, you've lost a semi-supporter.

MR. JONES: What we need to resolve is how to handle the case where the judge really don't know. Now that's -- I perceive that as a problem.

MR. BRANSON: The judge knows he doesn't know, but the lawyers know the judge doesn't know.

MR. JONES: Where the law is unsettled.

MR. McMAINS: That's where the lawyers also don't know.

MR. JONES: I can see --

MR. ADAMS: He doesn't do it unless he's requested by one of the lawyers.

CHAIRMAN SOULES: Again, please, let's

speak one at a time. The dialogue across the table is fine, but take it one at a time so we can get the information on the record.

Who wants to go first?

MR. BECK: What is the question?

CHAIRMAN SOULES: I think you all were talking about how to resolve -- how do we approach resolution of the situation where the case is one where the judge really can't know, may not know.

MR. BEARD: Well, can the judge tell them he doesn't know and then can he tell them the effect of their answers?

MR. BECK: Isn't that a matter of education of --

CHAIRMAN SOULES: It would be an unusual judge, Pat.

MR. BRANSON: Sure would be a nice fellow, too.

HONORABLE WOOD: Mr. Chairman --

CHAIRMAN SOULES: Excuse me, Judge Allen Wood here.

HONORABLE WOOD: What troubles me about the thing, Franklin, is that -- of course, I'm an old fellow and been practicing -- I tried my first case at least 50 years ago. And I don't understand

some of the amplifications and problems that this is getting into. Now, I don't like the term "blindfolding a jury." I really can't believe that juries in Texas are blindfolded under our system actually. To me I've heard that expression for years and years and years and I've never thought it was anything, when you get right down to it, except kind of a code word.

Now, in nearly all the cases that I ever tried, and I'm still trying them, the jury knows the effect of their answers. I mean -- and the lawyers are able to explain it to them, they don't say, "Now, if you don't answer this this way, I don't recover." They can't say that, but juries aren't that dumb. If a good lawyer gets up and says, "Now this is an important issue," and argues the heck out of it, a jury is bound to know that an answer is in his favor if they answer it like he's arguing they should answer. So, I don't think the jury is blindfolded.

Now, let's assume here's a judge and he's going to instruct them on the effects of their answers and he's going to submit every issue that he thinks should be submitted, say, including some that he don't know whether the evidence -- or

doesn't know, let me get my grammar correct -- whether that is raised by any evidence or sufficient evidence to justify that submission.

Now, here's another issue that there's no doubt about, point blank, raised by the evidence, good and strong. Now then, can he tell the jury "Now, gentlemen, I'm submitting this Issue No. 1 and I don't know that's a close one. Their may not be any evidence on that. If you find it, why, it may or may not mean anything. So to be -- if you want this plaintiff to recover, now, you better go ahead and be sure and answer this, the gear that I know is supportive in his favor, in this way." I just feel like -- and maybe my concerns are not valid and maybe there's answers to every one of them. But I just don't know what we're getting into when we say the judge "shall" or he may give them the effect of their answers.

MR. JONES: Mr. Chairman?

CHAIRMAN SOULES: Yes, sir.

MR. JONES: Might I respond to that? And at the same time I will restructure my motion and maybe we can get this matter moving. I don't think we're going to resolve it today by any means.

So, first, Judge Wood, it's very difficult

for me to argue with you. I just would hate to have to do it. I'm glad it's in here in this committee and not in a courtroom somewhere.

HONORABLE WOOD: You wouldn't have any trouble. I'm easy.

MR. JONES: But all I can say is that evidently you never have tried a personal injury case and have a jury go out and find negligence on the defendant and then negligence on the plaintiff and write in hundreds of thousands of dollars and come in and find out that the plaintiff hasn't recovered and that they have done exactly the opposite of what they intended to do.

HONORABLE WOOD: Franklin, I haven't tried a personal injury case probably in 15 years and I never had that happen.

MR. JONES: But I've had that happen to me, I don't like to tell you how many times. And it's wrong and it's been wrong for however many years that we've had this judicial philosophy that a jury ought not to be trusted. And that's what I want to stamp out and that's what I have heard today is the consensus of this committee that they want to stamp out.

Now, I would be willing, given that basic

mandate by this committee, to take my subcommittee back and see if there is a way that we can meet the objections that we have heard raised here today. I've got only two other members -- three members of our subcommittee are here today and -- besides myself. Now, would that be agreeable to you, David?

MR. BECK: To go back and --

MR. JONES: And try to structure a rule that would permit, in any cases where it's practical, for the jury to know what they're doing.

MR. BECK: If that's what we're instructed by the committee to do, I think we ought to do it.

CHAIRMAN SOULES: Well, let's get a consensus from the committee. Now, we had -- first, the consensus last time was should the judge be permitted in any case to give an instruction. And there was quite a cross-section of legal representation voting in the 13 majority on that, and I'm sure they -- some of them had reasons different from the one you just stated and then others had exactly that same reason in mind, Franklin. We may see the same vote or may not whenever we take a consensus on should the

instruction from the court to the jury on the effect of its answers be mandatory, setting aside the case where the judges can't tell. And that, of course, is a special problem that we've all recognized. But setting that aside and eliminating it from this test -- vote, how many feel that the judge should in every case have the mandatory duty to instruct the jury on the effects of its answers, how many feel that way?

MR. SAM D. SPARKS: Can I ask one question? If you don't mind voting on that, can we also vote on the broad proposition? How many people feel like -- Judge Wood, I'm sorry -- that juries are blindfolded and we shouldn't do that? Well, that's the broader, broader question that's never been asked. Lawyers can inform jurors of the effect of the answers. The one we heard awhile ago was just the court.

CHAIRMAN SOULES: And that's all we're voting on now is just the court. We're going to take --

There's a different issue which I imagine you want an answer to today, Franklin, is should it be done by -- permitted in argument as opposed to instruction from the court. And we've got a -- we

should take a consensus on that today, too. But right now it's -- setting aside the case where the judge just can't tell until the answers are in what the effect may be, leaving that out, how many feel that a judge should be required mandatorily to instruct a jury on the effect of its answers in every case?

MR. ADAMS: Luke, that's not the recommendation. That's not the recommendation --

MR. McMAINS: Upon the request of either party.

MR. ADAMS: -- as I read it. It said "upon the request of either party."

CHAIRMAN SOULES: All right. "Upon the request of either party," then.

MR. WELLS: My question was going to be implicit in this vote is that a litigant has proposed an instruction to the judge which the judge looks at and the judge decides that, yes, that is a proper instruction with respect to the effect of the answers. Should he then be required to give it? Is that your question?

CHAIRMAN SOULES: Well, no, it's really not.

MR. REASONER: Well, is that your

proposal, Franklin?

CHAIRMAN SOULES: That's not the question I heard.

MR. JONES: I'm sorry, I --

MR. WELLS: That's the way it's read. It says, "upon the request of either party."

MR. JONES: "At the request of either party the court shall do it."

PROFESSOR DORSANEO: It doesn't say that the request has to be like a request in the charge.

CHAIRMAN SOULES: That's -- Ned's question is does a lawyer -- what he's added to the discussion right now is does the instruction that the judge is to give, is that to be proposed by the lawyer.

MR. McMAINS: In other words, the same way that you submit any other instruction, under 274.

MR. JONES: I would think as a practical matter that's -- that, you know, the state court judges always make the lawyers draw their charges, and the federal court judges don't. But it would be -- my interpretation would be the lawyer would submit a request with that instruction just like he would for any other instruction.

MR. SPIVEY: That's something the subcommittee could take up.

CHAIRMAN SOULES: Okay. Let me break that up into two questions, then. I'll ask this first one, should the judge be required in every case when he's requested to instruct the jury on the effect of its answers. And then I'll say should the instructions be imposed -- should the duty to request instructions be imposed on the lawyers.

But anyway, the first one first. Upon request by any party should a judge have the mandatory duty to instruct the jury on the effect of its answers, how many feel that should be? That's seven. Seven for that. And how many feel that that should not be? Let me count them again. I'm not sure I saw them all. Ten. Okay. Ten against. If --

All right. Now should the -- if the judge is given the power by a rule to instruct the jury as to the effect of its answers, should the burden be on the lawyers to request the instruction in substantially correct form and then you live with the same appellate burdens after that that you have on requested issues and instructions the way they

are right now? Should the form of the instruction be imposed upon the request of the party? How many feel that? Well, is anyone opposed to that proposition, if we give the court that power?

MR. REASONER: I'm having trouble conceptualizing how you think that's going to work, Franklin. I personally don't have any trouble if you're going to say -- I'd rather go to the federal system. But now I don't understand that I have the right to submit requested instructions as to the effect on the federal judge, make him deny them and then take him up if he doesn't want to do it.

You know, I mean, my impression is that the judge gives what he thinks justice requires on the law, and can instruct them erroneously on the law, but in a lot of cases, he instructs them pretty clearly how it's going to come out if they answer the other way. Other cases, the complex cases, he instructs them generally as to the law and asks them special interrogatories. And I don't know whether the jury understands the meaning of all their answers or not, and I don't think he's obligated to go through them one, two, three, four and tell them.

MR. LOW: What you're saying is in some

cases the judge may choose, and they do sometimes in the federal court, to submit special interrogatories and they don't really tell, you know, they don't tell the effect of the answers, they -- you know, in some instances there have been that, and I don't know in federal court that he would be reversed for doing that.

MR. REASONER: I don't think he would have a prayer complaining in federal court.

MR. LOW: But could it be taken care of by a compromise between the last two votes that the rule would encourage the judge to instruct him of the effect in all cases wherein he could encourage the judge to do it.

CHAIRMAN SOULES: I didn't hear your comment there, John O'Quinn.

MR. O'QUINN: Kind of like the normal rule now you give instructions whenever they're proper. Is that what you're saying?

MR. LOW: Yeah.

MR. O'QUINN: I think like the rule we have now --

CHAIRMAN SOULES: Excuse me, let John finish.

MR. BRANSON: Frank, I have some problem

-- Mr. Chairman, are we talking about instructing the jury along the lines currently in the federal courts, because that is one way of doing it. The way that David suggested that you could instruct the jury on all legal effects of their answers is an entirely different way of doing it. I'm in favor of one and I'm entirely opposed to the other. And I don't think we've addressed that issue yet, nor whether or not you can have the lawyer tell the jury the effect of their answer even though the court elects in his discretion to not tell them. And that's a -- those are variables, but they certainly make a difference in my position on the issue.

CHAIRMAN SOULES: Franklin.

MR. JONES: I was wanting some guidance on the feeling of the committee on the principle of predicating damage issues on affirmative findings of liability. I think that there is every case in the world in favor of that approach unless there is a genuine question of whether or not what the findings would be, what impact the findings would have on liability.

CHAIRMAN SOULES: State the question and I'll take a consensus on it for and against.

MR. JONES: Will the committee charge the subcommittee, to give the trial court discretion to predicate the damage issue on affirmative findings of liability in a proper case.

MR. REASONER: I'm sorry, Franklin, mandatory legal discretionary --

MR. O'QUINN: Discretionary.

MR. BRANSON: That's different.

CHARIMAN SOULES: Okay. That's the question asking whether the trial court should have that discretion. How many feel that the trial court should have that discretion? That's 18 for. How many against? Hold your hands up, please. One. Okay.

MR. BRANSON: In that I'm on that subcommittee I would like to move that the committee direct the subcommittee to draft a rule which would, in fact, follow the existing federal rules on the effect of your answer as opposed to a rule that would be different. I so move.

CHAIRMAN SOULES: That's been moved. Is there a second?

MR. LOW: I second that --

MR. ADAMS: Second.

MR. REASONER: Federal rule on what?

MR. LOW: Submission.

CHARIMAN SOULES: I think what Frank is saying is that there are some lines already drawn in the federal cases as to what a jury can be instructed on as to the effect of its answers. I believe that they cannot be instructed that there will be trebling, for example.

The problem that I see with this, and I would like to get some discussion on it -- I'm not trying to discuss it, but the causes of action in the state court are different in many respects from the causes of action in a federal court. Do we not instruct on trebling in DTPA simply because the federal -- the feds won't allow instructions on trebling in antitrust cases? Are they -- do we have exactly the same situation? And I -- one way we were going to get to this, I think, was Franklin's suggestion that we start taking topically things that we might consider to be instructed, federal income tax, trebling and so forth, other things that have been raised here.

But we do need some discussion on that. Who would like to start it?

Harry Tindall.

MR. TINDALL: One thing I don't like

about the federal practice is that you argue the case and then the judge reads his charge to the court. It seems like to me we're comparing apples and oranges, and I don't think this committee wants to reverse that procedure. And so, fundamentally, in a jury case in a federal court you can get up and ramble all over the court. Now, I anticipate that the judge is going to ask you this and urge you to find no on that. And to me the right of a lawyer to comment is much greater in the federal system by reversing it, which I don't know if we want to go to that, so I'm hesitant to back you if we went to the federal charge, because it's -- to me it's backwards.

MR. BRANSON: We're not talking about doing it backwards.

MR. ADAMS: And no opening if you don't it backwards.

MR. TINDALL: But then if you don't do it backwards, then you get to this question which we're avoiding is do you want the lawyers telling the jury the effect of an answer that's already been read to them?

CHAIRMAN SOULES: Buddy first and then David Beck.

MR. LOW: All right. First, the federal court is not obligated to do that. The last cases I tried we've done -- we've charged the jury and then let the lawyers argue. A lot of federal judges let you do it that way. The ones that don't generally will give you the charge and you have a charge conference and everything, but I've not had one yet where I told them that we wanted it the other way around and wouldn't do it. So, the federal court is not obligated to do it that way. The federal court can do it just the way that I prefer it and you do to.

MR. TINDALL: Can you tell the jury the direct effect of their answers?

MR. LOW: That's right.

MR. BRANSON: On who wins or loses, yes.

MR. TINDALL: Yes.

MR. LOW: And they don't do just like the court -- federal courts used to, just that you would argue and then they would charge, but a lot of federal courts are getting away from that. The federal system has a system of where if the judge wants to because the law is complicated, and he needed certain -- needs certain findings, he can submit interrogatories, and then he has discretion

as to what he's going to tell the jury. If he wants to, he can say, "You answered these and the judgment will be based upon these answers. I'll take care of that." Or if he wants to he can put down, "We find this, that and the other. Now, if you found this, you will return your verdict for the defendant or plaintiff or what," so they have broad discretion. And what it sounds like to me here most of the problems that we've raised can be taken care of by following the federal system with the option of the court to allow you to argue the case just as we do now. You can argue it after the judge has charged the jury.

CHARIMAN SOULES: David Beck.

MR. BECK: I was just going to say in the interest of time -- I'm on Franklin's subcommittee, as is Frank, and I'm speaking against Frank's motion, which as I understand it, would compel Franklin's subcommittee to adopt the federal approach. I'm not sure I know all the nuances or recall all the nuances in the federal approach, so I would hate to see this subcommittee bind by whatever the federal courts do because I think what that we have now and what this committee has already given a consensus on in some respects may

be a little bit different. So I -- we have no objection to us considering the federal rule on the subcommittee, but I would hate to be bind by it until I know exactly what all the nuances are.

MR. BRANSON: May I address that momentarily? We at least in the federal system, David, have some guidelines to follow which would save this committee a substantial amount of time and the subcommittee in hassling out new territories such as federal income tax and such as --

MR. BECK: I'm not opposed to that, Frank. All I'm saying is I want to know what all those guidelines are before this committee obligates the subcommittee to follow that.

MR. JONES: Well, correct me if I'm wrong, David, but my recollection was what we tried to do was to get as close to federal rule 49(a) and (b) as we could.

MR. BECK: 49(a).

MR. JONES: Well, both of them, really.

MR. BECK: Well, we started out with the (b), which is the general charge and then we backed off of it and went to the broad form submission.

MR. JONES: Well, we still have (a) and (b) in the rule. And the basic difference between

the federal rules and our rules is this business about instructing the juries to the effects of their answers.

MR. TINDALL: Frank, would you accept a friendly amendment that the committee work it around where the charge is read to the jury -- I would hate to ever get crept into our system that we have an argument before the charge.

MR. BRANSON: I thought we had addressed that long ago.

MR. TINDALL: I mean, that when your committee comes back --

MR. BRANSON: But I think we addressed that when we drafted the original. I certainly would.

MR. JONES: Nobody on the committee wants the jury charge after arguments.

CHAIRMAN SOULES: Okay. Harry Reasoner.

MR. REASONER: Let me say that I think that a broad philosophical discussion is of some utility, but I really think the guts of this are in the mechanics. I have a lot of specific questions I want to ask about the specific proposal. And it's quite -- to me, quite one thing for me to envision the kind of charges that federal judges do

and quite another what you might get out of some of the specific words you suggested here. And I -- I think that we should look to the federal practice for guidance. I think in many ways the state practice is superior to the practice of most federal judges.

MR. JONES: I would have no problem with adopting the federal rule.

MR. REASONER: That's all right with me.

MR. LOW: The federal rule with regard to submission of cases with just reversing the argument, I would go for that one hundred percent.

MR. REASONER: Well, you know, I say that -- I don't -- you know, I -- Franklin, I really believe that good federal judges use special interrogatories in complex cases without exception. I really think Rusty is onto some very serious problems as to what we would get into with state court judges, many of whom have no assistance and have just developed the habit of taking whatever is given to them by one side or the other. To me that's a very different game than the one you play in federal court.

MR. LOW: But, Harry, the truth is that a lot of federal judges do the charge -- I mean, they

take yours and kind of work it in like the state judges do. And, you know, they're going to have some guidelines because we've got the federal cases that, you know, show federal rules and interpret federal rules, and it would be not starting out from scratch, you know. We would have some pretty good -- and would answer your problem of interrogatories because under the rules, they have a right to do that, and you wouldn't suffer from that.

MR. REASONER: Well, that's one of the specific things I want to talk about. I think the way this is worded, it either deliberately encourages general charges or creates a heavy bias in front of it, which I think would be a big mistake. I think that -- you know, I think that you can charge -- you ought to be able to charge the jury, but then I think our judges ought to be basically either required or encouraged to use special interrogatories.

MR. BRANSON: Following a general charge?

MR. REASONER: Well, that's one thing I'm really -- it's not clear to me whether Franklin is envisioning a full or general-type federal charge or what.

Is that what you have in mind, Franklin?

MR. BRANSON: Many times in the Houston district the judges will give you a general charge and then follow it with special interrogatories.

MR. REASONER: Yeah, but -- is that what we're talking about?

MR. O'QUINN: The rule on the table right now, the general rule is to have interrogatories and to have a general charge only in a very exceptional case. So, that's what the rule --

MR. McCONNICO: No.

MR. O'QUINN: Yes, sir.

MR. McCONNICO: Harry, if I could respond to that, because I was a member of that subcommittee and I really had a problem. I think our broad form submission practice in Texas -- I think it's taken a long time for it to get there, but my experience is we're in a good position right now. I've been trying fraud cases, oral gift of land cases, all types of things with one issue that I think is the way they should be tried. I didn't want a general charge. I wanted -- and I think the first sentence says, "in all jury cases the court shall submit the cause using broad form interrogatories." And then it says, "however, in a

proper case, the court may submit the case upon a general charge upon interrogatories by limiting instructions or upon interrogatories in a checklist form. So --

MR. REASONER: I have a problem with that specific language. In the first place, it's inconsistent on its face. I mean, first you instruct them for doing broad interrogatories, then --

MR. JONES: Harry, it's just like the state court rule is now.

MR. REASONER: Yeah, well, I don't regard the present formulation as holy writ, Frank. I mean, there are a lot of inconsistencies.

MR. JONES: What we have done is put the -- we've put the broad form interrogatory submission up there where the special issue submission was mandated in present Rule 277 and pulled those other three forms of submission down and put them in the illegitmate child's position where the general charge is now in the state rules.

MR. REASONER: Well, I mean, you give no guidance as to what a proper case is.

MR. JONES: Well, the rule today says you can use a general charge in a proper case subject to review.

PROFESSOR DORSANEO: It says, "for good cause."

MR. REASONER: It says, "tor good cause," which --

PROFESSOR DORSANEO: We don't know what that means.

MR. REASONER: But, you know, my impression is, Franklin, that under the status quo, you basically don't get general charges in state court.

MR. O'QUINN: That's right. They never found a case where a good cause existed.

MR. REASONER: When you abandon a good cause requirement, it seems to me that you're inviting judges to -- if that's their predilection just to give general charges on everything.

CHAIRMAN SOULES: Let me get a couple more -- get one more consensus before we go today because I think --

Franklin, you're not going to be able to be here tomorrow, is that right?

MR. JONES: No.

MR. ADAMS: You've got a motion on the floor, though, Mr. Chairman.

CHAIRMAN SOULES: Well, it's never been

seconded.

MR. LOW: I would second.

MR. ADAMS: Second.

CHAIRMAN SOULES: Okay. A motion has been made and seconded that we adopt the federal practice for instructions of -- as to effect of answers.

PROFESSOR DORSANEO: Is that all it is? Harry is talking about the whole federal practice, somebody else is talking about something else.

CHAIRMAN SOULES: The motion was on instructions, as I understood it.

Is that correct, Frank?

MR. BRANSON: On effect of the -- effect of the answers. If we adopt the federal practice on effect of the answers.

CHAIRMAN SOULES: Those in favor?

MR. REASONER: Well, let me ask one time -- I mean, in other words, I want to talk about Rule -- I want to talk about these rule by rule. Are we --

MR. BRANSON: I think -- Buddy Low has got an amendment.

MR. LOW: Let me add an amendment to that, that we instruct the committee, not just with regard to that, but to go back and we recommend

adoption of the federal rules with regard to submission of the case to a jury. And --

CHAIRMAN SOULES: Is that amendment acceptable?

MR. ADAMS: Yes.

MR. BRANSON: Yes, as long as we keep the language in on the proper sequence of order.

MR. SPIVEY: Does that leave the committee free to consider and incorporate it or not because I want them to be able to recommend to us after thorough study that we should or should not adopt it.

CHARIMAN SOULES: That's what David asked and it was not acceptable, and so now it is -- the answer, as I perceive it, is no to your question. David suggested that the committee be left free to consider all of the federal practice as it continued to draft. That was not acceptable and a motion now is that the committee be --

MR. O'QUINN: Must.

CHAIRMAN SOULES: Must.

MR. BRANSON: David, that's not what I understood you ask.

MR. BECK: What I was saying was I interpreted your motion as instructing Franklin's

subcommittee to adopt the federal rule. And my position is that I think we ought to be permitted to consider that as we have, but I'm concerned about --

MR. BRANSON: Let me rephrase my motion. My motion is the subcommittee should be charged to use the federal rules as a basis.

MR. LOW: I would second that. Because if we're adopting, there's no need to send it back to the subcommittee.

MR. BRANSON: Use the federal rules as a basis, but propose our own rule.

MR. LOW: I would second that.

MR. BRANSON: But in the guideline of the federal rules.

MR. REASONER: You know, I guess -- I mean, it seems to me we're going over many points. I think our Rule -- what is it, 276 you know, on the submission refusal issues -- I think it's a hell of a lot clearer of what happens in state courts than it is in federal courts. A hell of a lot clearer to tell what's happening on the record. And to throw the baby out with the bath like that, I just don't see any sense.

MR. SPIVEY: That's exactly, Harry, what

I think the subcommittee ought to have the freedom to consider those things. I don't think we ought to bind their hands. I feel real strongly that we ought not to bing the subcommittee's hands because they ought to study the problem, not just come back and draft something that we're telling them off the top of the head we want done. I agree with you on that.

PROFESSOR DORSANEO: Shouldn't bind their hands or give them the knife to cut their own throats either.

CHAIRMAN SOULES: Okay. Do we want to vote on the last motion?

Yes, sir. Sam Sparks.

MR. SAM D. SPARKS: From San Angelo.

CHAIRMAN SOULES: San Angelo Sam.

MR. SAM D. SPARKS: I agree with McConnico. He's talking awhile ago that the court's have come a long way with broad form submission. The problem is it's error for the court, the lawyers or anybody else to inform the jury of the effect of their answers. I perceive this committee as that is the big overall vote, and I've asked you three times a real broad question. Is that what we're trying to do or not?

MR. BRANSON: May I address that, Sam? I think the motion --

CHAIRMAN SOULES: Well, first of all, I want to be clear I understand. Ask me the question again.

MR. SAM D. SPARKS: Well, the discussion I hear and that we listen to is that the courts have come a long way, and in many respects our state court system is better than the federal system, right? The problem is we're getting better on the submission of cases but the jury is still kept in the dark. Can the jury -- is it this committee's feeling that the jury should be informed as to the effect of their answers?

MR. BECK: I think we already voted on that, didn't we? I thought we voted, Sam, 14 to 7?

MR. SAM D. SPARKS: Well, I haven't heard that. I've heard "the court shall instruct" --

MR. JONES: We got a clear mandate on that.

MR. BRANSON: This motion, Sam, basically says that the subcommittee who's in charge of that should go back within the current guidelines of the federal rule, not limited to that, but using it as a basis, and come back with a --

MR. LOW: New proposal.

MR. SPARKS: Let's vote on that.

MR. BRANSON: Okay. Could come back with a proposal on the effect of the answers.

CHAIRMAN SOULES: Okay. How many feel that the committee -- subcommittee should be so charged, just like Frank stated it right there? Hands are up and down. I need them -- get them up and hold them up, because they keep changing. 15 for. And those opposed? Those opposed? 15 for. Any opposed? Five opposed.

PROFESSOR DORSANEO: It may be a little late, but that was just on the effect of the answers, right, not on all the rest of it?

CHAIRMAN SOULES: Tonight --

Well, Franklin, you won't be able to be here.

But in the first article in this book is a 32 page article written by Justice Wallace, the title of which is "Broad Issues Are Here To Stay." And it tracks from the whole history of special issue submission right up to where it is today. And that may give you some guidance, too.

MR. JONES: May I make an inquiry of the chair, Mr. Chairman?

CHAIRMAN SOULES: Yes, sir. And David

Beck said he had one more substantive difference with you that we need to get on the table before we adjourn.

MR. BECK: Mr. Chairman, I was so persuasive on my first objection, I thought I would raise another one here. And this has to do with applying the harmless error rule to any errors in the dealing with the legal or factual sufficiency of the evidence or any instruction or definition or charge which is improper.

Now, let me just say very briefly that under the present status of the Texas law, if you have, for example, just take an automobile accident case where issues -- or a general charge is submitted or broad form submission and the jury is instructed on brakes, lookout and speed, but there is no evidence of speed at all and the jury answers "we do." Then you've got a real question about what did the jury use as a basis for "we do find." Under the present status of the Texas law at least as illustrated by this Haney Electric (Phon.), Dallas Court of Civil Appeals cases, the appellate court will reverse and remand that case because they are unable to determine whether or not the error was used as a basis for the jury's verdict in the case, so you've

got an almost automatic reversal and remand.

That is also the present status of the federal law. If you have a similar situation in the federal court, if the 5th Circuit is going to reverse and remand.

Now, as I understand the purpose of this provision, what this does it places squarely on the burden of the party complaining on appeal the obligation to show that somehow that jury based its decision on the brakes and the look out and not the speed. And the problem I have with it is that is an almost impossible burden because there's a well settled body of law is you can't put the jury on the witness stand and ask them what the basis for their decision was, you can't probe the mind of the decision makers, so you're in the position where you cannot reverse the case on that basis. Now, maybe that's what we ought to be going to. I don't know. But that's the concern I've got.

MR. JONES: Mr. Chairman, I would like to respond if I could.

CHARIMAN SOULES: Yes, sir.

MR. JONES: I think Sam may have further criticisms, but if he does, I'll kill both of these right now.

CHAIRMAN SOULES: We'll let you and Beck get it started by a headon like we did the first time. But go ahead, Franklin, you're entitled to rebuttal at this junction and then we'll talk.

MR. JONES: Okay. Our idea -- I wish the chief were here right now because he is clearly on my side on this issue. And that is he's saying that we're sitting over here with cases that are seven years old with insignificant errors in the court's charge that we're going to have to send back. And that shouldn't be, gentlemen. It's just wrong. We're in the 20th century now. I can't quite follow David's parallel of his example, because as I perceive the case you're talking about, David, if you've got issues on look out, speed and brakes, are you -- and the jury finds on -- are you saying they're all lumped in one issue?

MR. BECK: Yeah, what I'm saying is the jury has asked, "Is the defendant negligent?" And they considered lookout, brakes and speed, which is the situation in that Haney Electric case. Obviously if they were asked special issues -- if the court could affirm on the basis of the lookout and the brakes, but I'm talking about when they're all lumped together.

MR. JONES: Well, I have no problem with imposing the harmless error rule there because all that rule requires them to show is that it probably -- how does the rule read? "That it was calculated to and probably did result in an improper judgment." And I don't think our appellate courts will have any problem separating that wheat from the shaft. And, you know, we've -- we are living in an age where we are being groundly criticised for technicalities and failure to get to substantial justice. And I think we ought to --

MR. REASONER: Well, Franklin, how would you show that speed -- if there's no evidence of speed or insufficient evidence of speed, how would you show that -- how would you show that that probably caused error?

MR. O'QUINN: He shouldn't have to show error.

MR. ADAMS: He doesn't have to. If you don't have the evidence, it's going to be reversed. It's going to be reversed in federal or state court.

MR. REASONER: I thought Franklin was going to change the rule so that it was the defendant's burden.

MR. ADAMS: He doen't need to change that.

CHAIRMAN SOULES: John O'Quinn. John O'Quinn has got the floor.

MR. O'QUINN: I disagree with Brother Beck about what happens in federal court. I think in federal court if you have a case based on negligence of the, say, the operation of an automobile and the jury finds negligence, it doesn't make that much difference as to whether it's brakes, speed or lookout. I think the problem you get into in federal court is if you have a theory of strict liability and you have a negligence theory and you don't know which one the jury based on whether it was negligence or strict liability, then you can get a problem of getting reversed. But I don't believe the federal court's reverse in a case you mentioned. I agree the Dallas Court reversed. I think that's crazy, that's absolute insanity. I think if a jury hears about an automobile wreck and decides that somebody was negligent concerning the operation of the automobile, there's no need to worry about whether it was brakes, speed or lookout because if you're going to worry about that, you're going to gut the

whole system of broad issue. You're going to require issues be granulated so we can identify -- we're going to get right back where we were to cross-examine the jury about why did you think somebody drove their car bad on that day?

And so, consequently, if that's bothering you, David, I say the solution is we ought to write a rule so it's real clear, and the rule out to say you just ask whether they were negligent, don't put down brakes, speed, lookout or nothing, you don't get that any more. If that's going to be a basis for reversing a case on appeal, then we can't use broad form issues, we're going to lose the whole thing in the Lemos case.

So I submit to you that it ought to be a broad form issue on negligence. If the defendant insists upon a listing of acts of negligence, which he is going to be the one insisting on that, then -- and if the trial judge gives that, then the defendant is stuck with the answer. The jury says, "yes, they were negligent," he can't appeal and start quibbling about which basis it was based on because otherwise we're going to be back to granulated issues. I feel, obviously, very strongly.

MR. BECK: John, take a look at the Ratner (Phon.) case. It's September '85, 5th Circuit case. It wasn't an automobile accident. It was a case where the plaintiff submitted a fraud case on six theories but the issue was very general in nature, very global. And the 5th Circuit reversed, saying there was no evidence to support one of the fraud theories and the court should not have mentioned the six fraud theories and since we can't tell which one the jury decided upon, we're reversing and remanding the whole thing.

MR. O'QUINN: Well, if that's the law in the 5th Circuit, the 5th Circuit is a fool. And I say let's don't adopt that.

MR. LOW: That just depends on the particular panel because as a general rule, the 5th Circuit has followed that if you look at the overall submission and the overall charge and if it's a fair submission, you know, they don't just reverse it because one thing is incorrect. Now, you mind find some 5th Circuit cases that because of the number of people on the panel and so forth, but the greater body of law is not that. They look to see whether the overall submission was a fair submission. And that's the way it should be, not

whether one thing was incorrect or something else or not whether you can prove that this is the reason the jury ruled this way, but look to see whether the overall submission is a fair submission of the case to the jury. And that's the way --

MR. REASONER: Well, Buddy, I think that's a right statement of the general proposition, but not when you have independent grounds for recovery like they had in Ratner. Any case where you have independent grounds, they'll reverse if one of them is wrong and you've gone, in effect --

MR. O'QUINN: Do you consider brake, speed and lookout independent grounds?

MR. REASONER: You know, I tell you one of the problems I have, frankly, is that the rules that you think could be clearly applied in personal injury cases of a simpler kind, which are the examples you give, do great mischief in securities cases and fraud cases and commercial cases. You know like Ratner, none of those theories were worth a damn except maybe one of them. But the plaintiff is going to lump them all in, you can get one juror on one of them and one on another, you know. And --

MR. O'QUINN: Well, why couldn't the

court say that was harmful?

MR. REASONER: They did.

MR. O'QUINN: Well, then that's fine, we can have -- the harmless error rule does allow, on occasions, for a court to say, it's harmful --

MR. REASONER: You then say, "I've got to prove that it's harmful." I have no mechanism.

MR. O'QUINN: But the other rule, Harry, is that you reverse --

MR. REASONER: The law provides no mechanism.

MR. O'QUINN: The other rule is you reverse every one.

MR. REASONER: No, you don't reverse every one, you just make the plaintiff submit the one he has evidence for.

Mr. Chairman, I would like to make another suggestion. You know, I do -- I think that -- I think the mechanics of this are very important, and I -- in my limited tenure I've never seen a proposal that the bar at large was so interested in. And I would like to suggest that we also ask for input from the Committee on Administration of Justice on this proposal.

CHAIRMAN SOULES: I would like to get --

when do you think you'll have --

MR. JONES: Mr. Chairman, I am adamantly opposed to that.

MR. REASONER: Why is that?

CHAIRMAN SOULES: Well, we don't have any choice about that if we -- the court submits changes suggested to the court to the COAJ as well as to this committee.

MR. JONES: Well, that's fine for them to have whatever input they want out of -- in their arena, but please don't tie our hands or this committee's hand to the process of that committee.

CHAIRMAN SOULES: Well, we're not tied to the process of that committee, but we do systematically send the recommendations that come here also there.

MR. SPIVEY: Yeah, but the Supreme Court has that, don't they?

CHAIRMAN SOULES: Well, Judge Wallace does it now and sometimes when they come to me, I send them to him. Suggestions come in many, many ways. Some of them go to the COAJ and then they distribute them. Some of them come to me and I distribute them. Some of them come to Judge Wallace and he distributes them. But they always

go to all the places. The court's got a set, we've got a set and the COAJ has a set of those.

Now, let me do some -- we're going to be adjourning here in a minute and one thing we need to do is set a new -- set a date for our next meeting. The date that I have targeted, although I do want a consensus from the committee because we need as big attendance as we can possibly get.

MR. JONES: Luke, can I interrupt you a minute? I know you're getting -- I don't mean to be disrupting your procedures, but let me be sure that I've got a clear understanding of what our charge is now. The consensus of the committee is that the jury -- that there's no problem informing the jury the effects of their answers. There is no problem in predicating damages on liability. And you want us to look at the federal rules on submission of cases. And that's what y'all want us to do.

CHARIMAN SOULES: The first two propositions being discretionary and -- that's right, that you have some consensus from this committee to do those things.

Sam, before we set another date, did you have something else?

MR. SPARKS: Yeah, I just want to make a comment of a concern I have expressed a little bit by Franklin saying that he doesn't want the Committee on the Administration of Justice interfering with our work. I don't think they do. I think we should share it, but I do have this concern and I throw it out. You know, we -- I speak from the defense side of the docket. More are here on the other side of the docket and I'm worried about words like "mandate" from the committee and that we don't have concern because I have a concern. One of my biggest concerns is, you know, I think we ought to look at the realism of today's legal practice. There are a large number of competent, good, influential attorneys who think that system is out of balance. Substantive law, damages, exemplary damages, prejudgment interests, I'm not going to give you a speech, but there are a lot of people that think that.

And yet most of the lawyers I know are trying to work, as Franklin is, for change within the system. But I think that we ought to because of the emotional part of this, maybe even more than the legal part, have a very careful study because the one thing I do not wish is for lawyers to start

working outside of our system for change. And I think we're at a point that that's close. I think we find it in Legislative years for certain and non-legislative years we go through this, too. But I think this is a very, very serious step that we're taking at an emotional time, and I would like for us to go as cautious as we can to improve the system internally. I think that it's very important for the State Bar Committee of Administration of Justice to either draft their own proposals for the court or work off of a form that we have or whatnot. But it's a serious step and I hope they take it that way.

CHAIRMAN SOULES: The broad issues -- that part of this -- some of this writing is the law now, and some of you -- I'm sure most of you have read the charge and the suggested issue in Lemos vs. Montes, "whose negligence, if any, do you find from a preponderance of the evidence proximately caused the collision made the basis of this suit." Pretty broad. And that was specifically approved by a unanimous court written by Chief Justice Pope, Lemos vs. Montes. Another -- Sir?

PROFESSOR WALKER: Muckelroy (Phon.),

too.

CHAIRMAN SOULES: Well, and Lemos came after Muckelroy because the bench wasn't paying much attention to Muckelroy, so they came up with this. And then in a business case, another issue was, "Do you find that the party charged with performance performed all of his duties under the contract?" Broad issue. Yes or no.

So those things are written about in this book by a lot of -- and given a lot of attention by the judges and by the lawyers, and that may help you.

We reconvene in the morning at 9:30, but before we adjourn, is March the 7th the date that is going to be objectionable to many of you -- or any of you, as far as you know at at this time?

Okay. We'll meet then on March the 7th. That's a Friday. We'll convene at 10:00 like we did so that you can fly in that morning and get plane connections.

And we'll probably meet in another day and a half session, because this is going to take some time. We're going to meet the day of the 7th and the morning of the 8th.