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SUPREME COURT ADVISORY COMMITTEE
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1 NOVEMBER 2, 1985

2 CHAIRMAN SOULES: It's 9:30 and we're
3 going to go ahead and convene.

4 For purposes of your planning -- and I don't
5 know whether you'll be able to -- how many of you
6 will be able to stay, but I'm committed to Sam
7 Sparks and Bill Dorsaneo to complete review of
8 their rules today, and we'll stay until that's
9 done. I will and I guess they will. So that's
10 what we're going to do. Sam has several rules to
11 speak to and then Bill has those items --
12 particular items that he raised yesterday as well
13 as trying to wrap his package up.

14 Judge Clinton has joined us I believe. Is he
15 here?

16 HONORABLE CLINTON: Right here.

17 CHAIRMAN SOULES: Your Honor, we're
18 pleased to have you this morning to confer with us
19 on these harmonized appellate rules.

20 And, Judge Cofer, welcome back, too. We
21 appreciate your being here this morning.

22 Because we have Judge Cofer and Judge Clinton
23 here, I think it would be appropriate to take the
24 appellate rules first so that if they would like to
25 stay for the balance of the session, they are

1 certainly welcome, but if not, then they would be
2 free to go about the rest of their day wherever
3 else.

4 So, Bill, if you would resume. If you have
5 any thoughts you need to go back and gather up from
6 yesterday, well, just take over.

7 We're now in this Joint Report of the
8 Standing Subcommittee on Court of Civil Appeals
9 Rules & Supreme Court Rules.

10 Judge Clinton, do you need a set of those
11 materials or do you have a set?

12 PROFESSOR DORSANEO: All right. I'm
13 going to try to go through this in the same manner
14 as yesterday. And I think we can proceed fairly
15 quickly.

16 To refresh your recollection, yesterday we
17 finished, aside from our discussion of the
18 remittitur rules, with the consideration of old
19 Rule -- or current Rule 373 and proposed Rule
20 42(b). Remember that 42(b) dealt with offers of
21 proof and bills of exception in question and answer
22 form, the problem of Texas Rule of Evidence 103.
23 And please also note that this is the one
24 substantive area that will have to be worked out
25 with the Advisory Committee for the Court of

1 Criminal Appeals. This is one area where we appear
2 to have some further work to do.

3 But at any rate, I think we got through that
4 42(b) for our purposes yesterday. If you'll look
5 at the little memoranda and if we follow the items
6 along, 376a, that particular proposal by Jeremy
7 Wicker (Phon.) has already been taken care of, I
8 believe.

9 377 -- is Ray Judice here? That problem has
10 always also been taken care of, I believe, by the
11 Supreme Court by its order of December 19th.

12 385. This little memoranda says that this
13 change had also been made in Rule 385, and that's
14 accurate. The change that the memoranda is about
15 concerns a proposal, I think, that was made
16 initially to the Supreme Court by this Advisory
17 Committee November 11th and 12, 1982, and finally
18 got put into the rules December -- by the Supreme
19 Court's order of December 19th of this year.

20 But there is one other matter with respect to
21 accelerated appeals that we could take up now. If
22 you look in the Table of Contents for the proposed
23 rules, accelerated appeals are now on Rule 32, and
24 that begins on page 44 of the text. At the
25 suggestion of one of the Houston Court of Appeals,

1 I forget which one now, what is currently Rule 385
2 has been modified in this draft such that
3 accelerated appeals are divided into two types.
4 The one type is the type we have now, the type that
5 are accelerated appeals as a result of the
6 mandatory provisions of the rule, that is to say,
7 "Appeals in quo warranto proceedings" and "Appeals
8 from interlocutory orders (when allowed by law)"...

9 At the suggestion of one of the courts of
10 appeals a new sanction has been added, Section (b)
11 which indicates simply that the court of appeals on
12 motion of any party or on order of the court may
13 advance any appeal and give it priority over other
14 cases.

15 Now, Justice Guittard and I talked about what
16 this proposal would mean and debated about whether
17 the matter should be defined further as to what it
18 means that an appeal may be advanced and decided
19 that the matter was clear enough, that it simply
20 means nothing more than that this appeal can be
21 taken out of its regular order and dealt with
22 before other cases, not that the timetable could be
23 changed or anything like that for filing a record,
24 et cetera, et cetera. So that's the idea. The
25 note indicates that I, at least at an earlier

1 point, would have preferred to have the term
2 advanced, defined a little more. My interpretation
3 of this is that it would not authorize a court of
4 appeals to impose an accelerated appeal, in the old
5 sense, timetable on a regular appeal that is
6 advanced. Understand what I'm saying? But there
7 is that problem.

8 So, I guess the issue is whether you want to
9 change Rule 385 or not with respect to giving the
10 courts of appeals additional authority to what they
11 already have, I presume, to give some cases
12 priority.

13 For our purposes I'll move the adoption of
14 this language that's in proposed Rule 32 either for
15 inclusion in the whole package as proposed Rule 32
16 or as a replacement of current Rule 385.

17 MR. ADAMS: Second.

18 CHAIRMAN SOULES: Discussion? Those in
19 favor of the motion, then please say I. Opposed?
20 It's a unanimous approval.

21 PROFESSOR DORSANEO: All right. Moving
22 along back to the memo which will be pretty -- be
23 through with pretty soon. All right. Now, current
24 Rule 438 you will recall, whether you do or you
25 don't, we have two rules in our current Rules of

1 Civil Procedure that deal with the subject, in
2 effect, of damages for delay.

3 CHAIRMAN SOULES: I don't know if the
4 record properly reflects, that last action dealt
5 with the materials on page 44 of the committee's
6 report, styled Rule 32.

7 PROFESSOR DORSANEO: The current rules on
8 damages for delay are Rules 438 and a part of Rule
9 435. Now, one of the things that our subcommittee,
10 going back to the whole subcommittee appointed by
11 both courts and the Legislature, decided was that
12 we ought to have one rule for damages for delay.
13 That rule is now embodied -- or the proposal is
14 embodied in Rule 84 which begins on page 117 of
15 this text.

16 The second thing, at the suggestion of, I
17 think, mainly Chief Justice Guittard and, I think,
18 Justice Shannon of the Austin court was that the
19 current rules don't provide strong enough medicine
20 in terms of the problem of persons taking appeals
21 for delay purposes. And the proposed rule contains
22 in its first sentence different language from both
23 current rules -- both current Rule 435 and current
24 Rule 438. Look at the first sentence of proposed
25 Rule 84, please. "Where the court shall find that

1 there was no sufficient cause for taking an appeal
2 or writ of error, then the court of appeals may
3 award just damages and single or double costs to
4 the appellee." That language, as the note reflects,
5 is patterned upon language in Federal Rule of
6 Appellate Procedure 38 and gives the -- in our view
7 it gives the court of appeals more discretion to
8 punish, quite frankly, punish someone who makes a
9 frivolous appeal.

10 MR. WELLS: Couldn't -- previously
11 couldn't they apply a 10 percent --

12 PROFESSOR DORSANEO: 10 percent. A 10
13 percent limit.

14 MR. WELLS: Why is that out of there?
15 Are they just wholly unlimited in whatever is just?

16 PROFESSOR DORSANEO: Yes, yes. Limited
17 by justice, not limited by an arbitrary percentage.

18 MR. SPIVEY: What has been the complaint
19 from the appellate judges in the bar about the
20 extent of this abuse?

21 PROFESSOR DORSANEO: Well, I don't have
22 any report from the appellate judges. All I know
23 is that Judge Guittard thought that both Rules 435
24 and 438 weren't very good and that they didn't
25 provide enough flexibility. I don't think that his

1 attitude expressed -- or any of the other judges on
2 our committee that they had an attitude that they
3 were going to immediately start awarding large sums
4 of just damages. But --

5 MR. SPIVEY: I'm concerned about the
6 chilling effect on that because I've had both sides
7 of the case where an appeal was taken and there was
8 a white horse civil appeals' opinion directly in
9 point against the appellate and the Supreme Court
10 ultimately granted writ and reversed. And it seems
11 to me that it is -- unless there's some clear abuse
12 present that it has such a detrimental effect to
13 discretion to appeal, that it's not warranted. It
14 doesn't seem to me that it's particularly one side
15 of the bar or the other is affected, but it seems
16 to me that we ought not to just look for ways to
17 close the door to the courthouse, trial or
18 appellate.

19 CHAIRMAN SOULES: Justice Wallace.

20 CHIEF JUSTICE WALLACE: One problem with
21 the 10 percent is where you have a case and
22 somebody -- it's just so clear all the way up that
23 they had no hopes of getting anything reversed, but
24 there's no -- there's not a liquidated damage
25 situation where you don't have any amount to assess

1 a 10 percent on and that would give the court
2 flexibility to assess a reasonable penalty for
3 frivolous appeals.

4 MR. McMains: Plus there are cases where
5 their 10 percent is not very much money. I mean --

6 PROFESSOR DORSANEO: There still has to
7 be no sufficient cause for taking an appeal. I
8 mean, that's a pretty tough standard.

9 MR. SPIVEY: Maybe Justice Wallace can
10 answer that. I just am not that aware of an abuse,
11 and I know that the judge has obviously seen more
12 than the practicing lawyers do. But I have no
13 hesitancy in considering it if it generally is a
14 problem of abuse, but I'd rather see us attack the
15 specific problem of those instances where no relief
16 is available now, rather than just open it up to
17 everybody.

18 CHAIRMAN SOULES: Buddy.

19 MR. LOW: I think what Broadus is mainly
20 concerned with is it discourages somebody from
21 attempting to improve the law or change the law.

22 Isn't that what you're saying? That is, if
23 you feel the law is a certain way and should be
24 changed by the appellate court, it discourages one.
25 You might have a situation -- in Turner the law was

1 fairly clear. And I'm not saying there might not
2 be other points, so it would be a dampening factor
3 on somebody that just had a strong belief that we
4 should change the law on a particular point. And
5 it would give the appellate court the right to say,
6 "Well, look, he has no Texas case that supports
7 this." That would encourage him then to look for a
8 whole bunch of other points whereas he may want to
9 take it up on one clean point where he can argue
10 the philosophy of the law, but has no cases to
11 support him. And it would discourage that, I
12 think.

13 MR. SPIVEY: I was thinking specifically
14 the case of Patton versus Shamberger (Phon.). It's
15 a Supreme Court case. And they granted a writ in
16 that case and reversed the court of appeals when
17 there was a two-year old court of appeals opinion --
18 at that time the court of civil appeals -- directly
19 against the petitioner, the appellate. And we just
20 thought we were right and the court was wrong and,
21 you know, the Supreme Court agreed with us. And,
22 of course, you would have no problem if the court
23 granted relief, but it seems to me that you're
24 running a mighty big risk to appeal with the case
25 in directly on point.

1 We just filed an amicus brief in a case this
2 week or last week that there's a two-year old
3 Supreme Court opinion, with all deference to Judge
4 Wallace, that we think is just absolutely wrong,
5 and I was glad to see the appellate lawyer have the
6 guts to challenge it because he had a case that, I
7 think, showed that the -- the Supreme Court case
8 was white horse, directly on point. It just had
9 such disastrous results in his fact situation, and
10 the facts were a little different, but the
11 application of the law would have been the same.

12 MR. BEARD: Shouldn't it be more bad
13 faith than anything else? A couple of years ago we
14 had a canon in the Supreme Court that you can't
15 even appeal a divorce case on the ground that, of
16 course, they didn't have jurisdiction in the
17 divorce, but the parties -- one of the parties
18 didn't believe in divorce, their religion didn't
19 allow it. I would think that's kind of frivolous
20 myself, but I don't know that the man should be
21 assessed damages for it. I really think it ought
22 to be bad faith.

23 MR. SPARKS: You know, we rejected
24 yesterday a rule under the federal rules of
25 Representative Hill. It was, in effect, a

1 frivolous lawsuit rule. So we're doing something
2 in the appellate courts that we're not doing in the
3 trial courts. That doesn't make a whole lot of
4 sense to me.

5 PROFESSOR DORSANEO: Well, it makes sense
6 to me to have this kind of rule because it is
7 fairly clear to me that a lot of lawyers continue
8 with a case and appeal it because they've had it so
9 far, and they just continue to do the appeal and
10 maybe if they had a rule that they could show their
11 clients, say, "Well, we may run into a problem if
12 we continue this bad adventure," maybe they
13 wouldn't proceed.

14 MR. SPIVEY: You know, I wouldn't have
15 any problem with a bad faith requirement because I
16 agree that if somebody is just appealing for the
17 purposes of delay, then they ought to be struck.
18 But it seems to me the interest on judgment would
19 take care of much of that.

20 PROFESSOR DORSANEO: Let me point out one
21 other thing, Broadus, that I didn't mention. Rule
22 438 also is a little bit different in another
23 respect. It says, "where the court shall find that
24 an appeal has been taken for delay and that there
25 was no sufficient cause." This draft says, "where

1 the court shall find there was no sufficient
2 cause." Now, the reason in our meetings why that
3 was cut down eludes my memory.

4 MR. McMains: Well, the reason actually
5 is that the interpretation the courts should put on
6 the delay only penalty is that it had to be that
7 there was the bifurcated or dual test that you had
8 to find both that it was frivolous and that it was
9 taken for delay only before you could impose the
10 mandatory penalty. And the way the courts have
11 always gotten around that, the ones that do impose
12 the penalty, and there aren't that many, probably a
13 dozen in the last 20 years, but the way they got
14 around it was to apply the just damages rule, which
15 was the other rule. And that one you couldn't
16 exceed the 10 percent but you could award somewhat
17 less.

18 PROFESSOR DORSANEO: Yeah, I think that's
19 right, Rusty, right. Now, but to put this in
20 context, too, I personally, I do, you know, some
21 appellate work and I am not afraid of courts of
22 appeals punishing a lawyer who is acting in good
23 faith if this is put into play. I'm not worried
24 about that. I would be a lot more worried about
25 trial judges doing a Rule 11 number on me than I

1 would be worried about the courts of appeals, you
2 know, assessing damages against people or just
3 trying to do their job.

4 MR. McMAINS: Would you feel more
5 comfortable if you put a limit on it? I mean, is
6 that your problem?

7 MR. SPIVEY: Well, I think it just needs
8 a little bit more identification of a specific
9 problem that's addressed to without being
10 subjective. We would never had the -- perhaps if
11 we hadn't had Judge Tunks on the trial bench,
12 Shamrock versus Tunks might never have come up
13 because poor Kronzer would have been afraid he was
14 going to bankrupt him.

15 PROFESSOR DORSANEO: Well, what should we
16 do?

17 CHAIRMAN SOULES: Well, I haven't heard
18 anyone make remarks about the courts, but it
19 doesn't seem to me that we've seen a lot of
20 appellate court, appellate judge persuasion that an
21 attempt to change the law is just going to get
22 squelched. I mean, it may be overruled, but the
23 lawyer who feels he's got a cause like you have
24 had, Broadus, and told us about and we knew about,
25 who really feels that, I don't believe is going to

1 run afoul of a court finding that there was no
2 sufficient cause for taking an appeal where it's
3 clear in your brief. You say, "There's the law.
4 It's against me, but I'm -- it's not right. It
5 should be changed." And that's your shot.

6 MR. McMAINS: If you file it.

7 MR. SPIVEY: But the best example given
8 over here -- and I'm just guessing that Pat was
9 talking about the Shelby Sharpe (Phon.) case. You
10 know, I think a lawyer ought to have the right to
11 challenge something -- the unconstitutionality of
12 something no matter how absurd it may seem to
13 others. You know, I've been accused of being
14 absurd before and the jury would agree with me and
15 occasionally a judge would agree with me. And it
16 seems to me that's part of what the process of law
17 is about.

18 Now, on the other hand, if we have somebody
19 that's creating a specific abuse or you can build
20 in some constraints so that it doesn't have that
21 chilling effect, I see nothing wrong with
22 occasional examples of bad faith or just pure
23 delay, because -- but you ought to have something
24 in there that it would at least place the lawyer on
25 notice that he's fixing to get zapped. Let him

1 brief the point and show the court why there's not
2 an absence of good faith there.

3 MR. SPARKS: Or at least advise his
4 client of what just damages are.

5 CHAIRMAN SOULES: Tom. And then I think --
6 David Beck, do you still have some comments
7 you want to make, too?

8 MR. BECK: I had a question to ask. I
9 mean, the courts have a rule now that they can
10 impose for what they believe are frivolous appeals,
11 and I would be curious to know how many times that
12 rule has been invoked, say, in the last year. I
13 mean are we talking about --

14 MR. McMAINS: Three times.

15 MR. BECK: I'm sorry?

16 MR. McMAINS: Three times that I know of.

17 MR. BECK: That's all? Just three times?
18 And so what -- Bill, what are we trying to do, just
19 put more teeth in the rule?

20 MR. McMAINS: Yes, that's -- the real
21 problem is that a lot of them simply say on their
22 face -- "we can't even" -- "it is true that they
23 don't have" -- "didn't have any reasonable basis
24 upon which to appeal, but we're not going to hold
25 that it was for delay only."

1 MR. BECK: Well, were any of those cases
2 the type cases that Broadus is concerned about?

3 PROFESSOR DORSANEO: No, they're cases
4 where there really is no -- where there's stupid
5 appeals. I mean, that's just -- that's just where
6 somebody is appealing because -- well, the ones --
7 my opinion of them is somebody is appealing because
8 we're still fighting. We've been fighting all this
9 time and we don't want to quit.

10 CHAIRMAN SOULES: Okay. Tom Ragland.

11 MR. RAGLAND: Under this proposed wording
12 of this Rule 84, what is the standard of review by
13 the Supreme Court or does the Supreme Court have
14 jurisdiction to review a finding or an assessment
15 of damage by the court of appeals?

16 JUSTICE WALLACE: Where the court of
17 appeals has assessed the penalty?

18 MR. RAGLAND: Yes, sir.

19 CHAIRMAN SOULES: They've applied a legal
20 standard. It says there was no sufficient cause of
21 taking the appeal.

22 MR. RAGLAND: Sufficient cause, is that
23 the --

24 MR. McMANS: Well, I would assume that
25 your position was that there was no just cause. I

1 mean --

2 MR. RAGLAND: That's the question. I
3 don't know the answer.

4 MR. McMANS: No, I'm saying, but the
5 court of appeals is having to make that
6 determination and the just cause is probably a
7 legal issue, a legal standard, and therefore,
8 reviewable on writ, would be my opinion. Now, we
9 might ought to put that in the rule.

10 MR. LOW: What? The Supreme Court, in
11 other words, could affirm the case but find that
12 the court -- that there was just cause? Is there a
13 procedure for that now that that can be done, the
14 appellate steps can properly be taken? That's a
15 new point.

16 MR. McMANS: Well, you would be offended
17 by the judgment, so I would think you would have a
18 right to file an application for writ because the
19 only way they can get to you is by judgment.

20 MR. LOW: Yeah, but's a new point to the
21 Supreme Court, right?

22 MR. McMANS: Right.

23 MR. LOW: I just wondered if the present
24 practice is the rules are sufficient to preserve
25 that point so that the Supreme Court would have

1 that right. That was the question I have.

2 CHAIRMAN SOULES: Okay. Specifically
3 what does someone suggest we do with proposed Rule
4 84?

5 MR. BEARD: Well, I'm opposed to anything
6 that has a chilling effect on what a lawyer thinks
7 he ought to do. When the Legislature put that
8 penalty on doctors' cases, a lot of lawyers are not
9 going to start against the doctor looking for that
10 evidence because if they don't find it, they get
11 burned, personally, in the process. I just think
12 it's bad to have a chilling effect on what lawyers
13 are going to do.

14 PROFESSOR DORSANEO: Well, I think when
15 you call it a chilling effect, that you -- and just
16 to characterize it, I think that lawyers perhaps
17 take appeals without sitting down and analyzing
18 beforehand whether they really have an appeal. And
19 I think the rule ought to encourage lawyers to
20 function in a lawyer like manner and not to do
21 something without getting into due consideration.

22 MR. SPIVEY: But what do you do about --

23 PROFESSOR DORSANEO: That's not a
24 chilling effect.

25 MR. SPIVEY: What do you do about the

1 case where you -- there's a case on point all
2 right. But it's directly against you and it's
3 fresh, it's Supreme Court and yet you generally
4 think the Supreme court is wrong and you want to
5 exercise your right to challenge the Supreme Court
6 because you've got a set of facts you say are
7 different.

8 CHAIRMAN SOULES: We've got a 10 percent
9 penalty now which doesn't work in unliquidated
10 damage judgments.

11 PROFESSOR DORSANEO: Or when cases don't
12 have damages.

13 CHAIRMAN SOULES: What?

14 PROFESSOR DORSANEO: Or non-damage cases.

15 CHAIRMAN SOULES: Or a non-damage case.
16 So we -- we've got a -- at least a ten percent
17 penalty and liquidated damage awards. And we don't
18 have anything -- Judge Wallace pointed out to take
19 care of awards -- judgments for other than
20 liquidated damage amounts.

21 MR. BEARD: If we've only had three cases
22 out of all the appeals and everything -- I think
23 it's kind of like the guilty that we turn loose
24 because of their constitutional rights. And I
25 would rather just leave it alone.

1 CHAIRMAN SOULES: Okay. But we do have
2 one point here that Justice Wallace wants to speak
3 to and it's this last sentence, which is an
4 important change and probably a real needed change
5 as far as the appellate court's burden would be
6 concerned.

7 Justice Wallace, do you want to speak to
8 that?

9 JUSTICE WALLACE: My impression is that
10 more often than not the appellate court is more
11 prone to want to assess this penalty when somebody
12 just screwed up his appeal, I mean it should never
13 even be in appellate court from the brief they
14 write.

15 And with that on us, on the appellate court,
16 okay, if you're going to assess a 10 percent
17 penalty, then you're going to have to brief the
18 case for him from the word go and make sure there's
19 no point there upon which he could appeal. Now, if
20 the -- if the judge is so upset with a lawyer he's
21 willing to do that, then maybe we ought to let it
22 be. But if we take away that burden, just say,
23 "The guy just screwed up and he doesn't know enough
24 to be in the appellate court, so we're going to
25 slap a penalty on him," I think that is that

1 chilling effect we've been talking about. So I
2 have questions about this last sentence, that you
3 don't -- that the court doesn't have to look for
4 non-preserved errors. In other words, you don't
5 have to do the briefing for him, you don't have to
6 check into the case to all that extent. Every
7 appellate judge I know is so busy right now I don't
8 think he wants to take on a briefing job for some
9 lawyer who screwed up his brief.

10 CHAIRMAN SOULES: Are you suggesting,
11 Judge, that that change be made or not be made?

12 JUSTICE WALLACE: Not be made.

13 CHAIRMAN SOULES: Well, there's the quid
14 pro quo to the court. The way it is now if the
15 judge is going to try to find for delay only and no
16 sufficient cause, he has to go through the entire
17 record and find out if there is any other reason
18 than what's been presented, basis on which that
19 appeal can be taken.

20 MR. SPIVEY: Well, why not put the burden
21 on the lawyers to raise this issue? I don't want
22 somebody taking just a meritless appeal against me,
23 but I guarantee you if you stick All State or TEIA,
24 for instance, in a property damage or a small case,
25 they're going to appeal anyhow. I'm not for

1 sticking TEIA and All State either, because they're
2 litigants, generally, in this judicial system. And
3 I just don't like the concept of discouraging them
4 from appealing unless they're -- you know, if you
5 have a clear abuse, if it's a clear abuse, bad
6 faith, but you ought to have a finding like that
7 rather than just leaving it discretionary, because --

8 MR. McMAINS: It's always been.

9 MR. SPIVEY: I'm not sure that the
10 appellate court's discretion is a heck of a lot
11 better than mine sometimes.

12 CHAIRMAN SOULES: Well, what if this were
13 changed to say that the appeal was taken in bad
14 faith and that there was no sufficient cause for
15 taking the appeal?

16 MR. McMAINS: That would suggest that bad
17 faith is something different. And what I'm trying
18 to get at -- what is it?

19 PROFESSOR DORSANEO: It's subjective. We
20 want an objective standard, I think.

21 MR. McMAINS: As long as you change
22 anything -- I mean, if you change anything from
23 where we are, you're still creating a standard
24 uninterpreted which is going to be discretionary
25 with the court of appeals. And that's what the

1 function of it is.

2 CHAIRMAN SOULES: Other than the point
3 made by Justice Wallace --

4 MR. McMAINS: No matter what you call it.

5 CHAIRMAN SOULES: -- that there's no
6 avenue for punishment other than cost for frivolous
7 appeal in a case other than liquidated damage
8 award, what's wrong with what we've got? It's got
9 a ten percent cap, it's got some standards in it
10 that have been used -- the "for delay only" has
11 caused the court some problems. They can't seem to
12 really find the evidence that, you know, that's
13 what's in the other guy's mind. Those are the
14 problems with it. But do we need to change it or
15 are we willing to live with it?

16 David Beck.

17 MR. BECK: I have another question aside
18 from the philosophical concerns that Pat and
19 Broadus have. I don't know what "just damages"
20 means. I mean, does that mean that a court of
21 appeals in its discretion can just arbitrarily
22 assess any damage sum they want? I mean there's
23 going to be no evidentiary hearing, obviously, and
24 I'm just not sure I want them to have that much
25 discretion.

1 CHAIRMAN SOULES: That's the difference
2 between just damages and 10 percent.

3 Harry Reasoner.

4 MR. BECK: Maybe the way to handle the
5 non-money judgment problem is just to come up with
6 some multiple of costs rather than just to have
7 this open-ended just damage provision in here.

8 CHAIRMAN SOULES: Harry. P MR. REASONER:
9 Well, I see from the notes that the just damages,
10 as I understand it, was adopted from the Federal
11 Appellate Rules, and I've just been curious whether
12 there's any learning on that. You know, my
13 impression would be that this is something that the
14 court is going to very rarely apply. I am
15 concerned about eliminating delay and injecting
16 sufficient cause standing alone, because I don't
17 think you ought to sock people for stupidity,
18 having done some stupid things myself in practice.
19 And the way it's written now, delay implies bad
20 faith to me. Now, of course, that does make the
21 courts very reluctant to apply it.

22 CHAIRMAN SOULES: How many feel just on a
23 quick show of hands that we can take care of the
24 unliquidated judgment by some multiple of costs?
25 All right. How many feel that that should not be

1 the answer to that problem? Well, it's pretty --

2 MR. ADAMS: I think there's an
3 alternative, and that is you can put a percentage,
4 like 10 or 15 percent -- or not to exceed -- just
5 damages not to exceed 10 or 15 percent.

6 CHAIRMAN SOULES: Well, I'm talking about
7 the -- where the judgment does not have a
8 liquidated amount. It's for -- it's an injunction
9 proceeding or something where there is not any
10 liquidated amount.

11 MR. REASONER: Well, does anybody know
12 what the federal courts do in this area?

13 MR. McMAINS: Yeah, not much.

14 MR. LOW: They also have a procedure
15 where sometimes they interview -- you know, they --
16 they're now starting to arbitrate, you know, and
17 get to talk to the lawyers after the appeal is
18 filed and that kind of stuff. They got a lot of
19 things they do that we don't want to get into.

20 MR. McMAINS: If the truth be known, the
21 5th Circuit has penalized less than the state
22 courts have.

23 CHAIRMAN SOULES: Let's get a consensus.
24 How many feel that the rule ought to be essentially
25 left as it is with a 10 percent cap and then speak

1 to the problem of how to handle the judgment other
2 than liquidated amount? How many feel that that's
3 what we ought to do? Okay. How many feel that it
4 shouldn't be changed at all? That's pretty much an
5 even division.

6 MR. REASONER: What about in the
7 unliquidated cases putting a "such multiple of cost
8 as the court shall find just?"

9 MR. McMAINS: Well, that's about 300.

10 MR. REASONER: Well, let me say, you
11 know, that the places that I think you'll find
12 abuse are in the unliquidated cases where somebody
13 is trying to create an uncertainty or something to
14 prevent a deal from closing.

15 MR. McMAINS: Cloud title or whatever.

16 MR. REASONER: Typical abuse is in tender
17 offer cases where law firms really ought to be
18 assessed. They just use the courts until the
19 investment bankers can cut deals.

20 MR. LOW: But the thing is, do you want
21 to close the courthouse doors to people because
22 there's been only a slight problem? The problem
23 just doesn't seem to have been that great. And
24 then --

25 PROFESSOR DORSANEO: Why do you distrust

1 the judges so much that that's what they're going
2 to do? They're not going to do that. They
3 haven't.

4 MR. SPIVEY: Bill, let me test your good
5 faith. Instead of penalizing the client who's
6 incapable, we assume, presuming a good lawyer is
7 making this decision, why not address the penalty
8 to the lawyer? That's us. Because that's who
9 really makes the decision on the recommendation of
10 the client and doesn't have to accept employment
11 for appeal.

12 MR. LOW: Well, you've started meddling
13 now.

14 MR. SPIVEY: That's right.

15 CHAIRMAN SOULES: Okay. Does anyone have
16 anything new on this now? We need to move on with
17 our agenda.

18 PROFESSOR DORSANEO: Let's vote.

19 CHAIRMAN SOULES: Does anyone have
20 anything new on this?

21 MR. RAGLAND: I have one.

22 CHAIRMAN SOULES: All right. Tom.

23 MR. RAGLAND: Just a question. If the
24 rule is adopted substantially as worded here where
25 it says that "the damages be assessed to the

1 appellee," how is this going to be apportioned in
2 the event of multiple appellees?

3 MR. SPIVEY: That's a frivolous
4 statement. Let's penalize him.

5 CHAIRMAN SOULES: All right. I'm going
6 to break this down in order to give Bill some
7 guidance. How many feel that the percent
8 limitation of the present rule should be retained
9 at 10 percent? Hold your hands up.

10 MR. McCONNICO: Liquidated cases --

11 CHAIRMAN SOULES: On liquidated cases.
12 Of course, it doesn't apply to anything else.

13 MR. McCONNICO: Yeah.

14 CHAIRMAN SOULES: Seven. How many feel
15 that just damages should be written into the rule
16 as opposed to a percentage limitation? Five. I
17 guess -- how many feel that there should be some
18 percentage other than 10? One.

19 All right. How many feel that a multiple of
20 costs is an appropriate remedy for a case where
21 there is not a liquidated judgment? Ten. How many
22 feel that some other way to handle that would be a
23 better way?

24 MR. LOW: I do, but I don't know what it
25 is.

1 CHAIRMAN SOULES: And if so, what is your
2 way. Here's Harry.

3 Finally --

4 MR. McMAINS: Luke, if I may add
5 something on that. If you're really talking about
6 costs, what you're really talking about are the
7 attorney's fees. No, what --

8 CHAIRMAN SOULES: Are they talking about
9 costs from the trial court and on appeal and so
10 forth?

11 MR. McMAINS: No, no, I mean -- what I'm
12 saying is, if you're really talking about trying to
13 do or undo the wrong of the frivolous appeal that
14 Harry is talking about, then -- you know, rather
15 than the -- if you don't have any money damages to
16 do it, shouldn't it be some form of a fee schedule.
17 Isn't that really what the damage is?

18 JUSTICE WALLACE: But aren't you getting
19 into an entirely new fact finding duty on the part
20 of the court of appeals to determine what
21 reasonable attorney's fees would be?

22 MR. McMAINS: The question is whether or
23 not you want to -- at the Motion for New Trial
24 stage you should know whether or not the guy has a
25 reasonable basis for complaint, and you could prove

1 up the attorney's fees at that time.

2 MR. REASONER: Or you could remand it for
3 finding of attorney's fees.

4 PROFESSOR DORSANEO: That would be nice
5 if we rewrite that. Why don't you move that? Make
6 them pay the appellee's attorney's fees.

7 MR. REASONER: Well, I would permit a
8 multiple of them.

9 PROFESSOR DORSANEO: At some rates you
10 wouldn't need to do that.

11 MR. REASONER: No, I guarantee you, if
12 it's a matter that's worth appealing, they'll sit
13 and calculate "Well, hell, we'll just throw in the
14 other side's attorney's fees." I mean to achieve
15 delay.

16 CHAIRMAN SOULES: How many feel that the
17 -- some arrangements should be written into the
18 rule for the court to either assess or remand for
19 assessment of the prevailing party's attorney's
20 fees in a frivolous appeal?

21 MR. BECK: What do you do about a
22 contingent fee, Harry? These guys make a lot of
23 money.

24 MR. REASONER: That's a good point, but
25 Rusty has tricked me again.

1 MR. ADAMS: Not with frivolous appeals
2 you don't.

3 MR. BECK: You would be the appellee.

4 CHAIRMAN SOULES: Or limited to fees on
5 appeal.

6 MR. McMains: No, but you're really
7 talking about limited to a situation where there
8 wasn't liquidated damage. I mean, you've already,
9 as I understand the vote, has already kept the 10
10 percent ceiling.

11 CHAIRMAN SOULES: Well, not necessarily.

12 MR. BECK: I think it's broader than
13 that, Rusty.

14 MR. BEARD: As I understand you go from a
15 third to 40 percent you get a big judgment. Lay
16 about seven percent on that other party, that would
17 be some penalty from a big judgment.

18 MR. McMains: Well, you can go 10 percent
19 now for frivolous appeal against an appellee under
20 the current rule.

21 MR. SPARKS: So, you get 20 percent, at
22 least, on a judgment, plus a possible multiple cost
23 if we go into it. That's not a bad deal.

24 MR. McMains: My suggestion was to cover
25 only the problem of what -- when you don't have a

1 liquidated damage. I mean, my understanding of
2 where the committee was and the context in which I
3 made the proposal was if you've got a damage number
4 which is affirmed -- and obviously I think you
5 would require an affirmance before you could
6 penalize the other the side for having taken an
7 appeal, which corrected or modified, anyway it
8 wouldn't be appropriate.

9 HONORABLE WOOD: Of course, also you've
10 got a number of cases where you'll have some
11 liquidated damages and some recovery of specific
12 property, like a trespass to try title case
13 sometimes.

14 MR. McMANS: Right.

15 HONORABLE WOOD: I beg your pardon?

16 MR. McMANS: Right. Of course, assuming
17 that there was a supersedeas bond filed, and you
18 know, what that -- there's been an assessment of
19 some kind.

20 MR. SPIVEY: You know, I'm concerned that
21 we don't consider the unwritten portion of the rule
22 and the effect of it. I really think this is a
23 basic philosophical argument and it's something
24 that we're -- it seems to me that we're -- if we've
25 got a specific problem, let's address the specific

1 problem. And it seems to me that there ought to be
2 some fact finding, not just the amount of the
3 damages, but there should be a standard in the rule
4 that the court has got to find were violated before
5 they oppose a sanction.

6 CHAIRMAN SOULES: Well, it's in there.
7 It's in 358.

8 MR. SPIVEY: It seems to me that no
9 sufficient cause is just like that's a pretty girl
10 or handsome man.

11 CHAIRMAN SOULES: No, we've already voted
12 not to use that. Well, as I understand it, we
13 voted to -- well, we haven't really, I'm sorry.
14 I'm in error. Are we going to maintain the
15 standard in the present rule that -- for "delay
16 only" and "frivolous"? How many feel that those
17 standards should be retained?

18 MR. BECK: Wait a minute. I thought --
19 the present rule talks about delay and not
20 sufficient cause.

21 CHAIRMAN SOULES: Okay. "Delay and not
22 sufficient cause." How many feel that that dual
23 standard should be retained? Nine. All right.
24 How many feel that the proposed Rule 84 standard
25 should be used instead? That's four. The

1 consensus seems to be to keep the old rule. We've
2 got one problem with it and that is that it doesn't
3 speak to cases where there's an unliquidated award.

4 Steve.

5 MR. McCONNICO: Luke, I propose we keep
6 the old rule and then with "unliquidated rewards"
7 we just say "just damages for the penalty." And I'm
8 going to support that by saying -- you know, we've
9 kind of crossed this barrier on sanctions and we're
10 sure not giving our trial courts any guidance on
11 pretrial discovery sanctions, just whatever the
12 court feels is appropriate, and I don't see that
13 that's been abused. We've had some cases that have
14 come up on it now, and I don't think it's been
15 abused by any trial courts and I don't think it's
16 going to be abused by the appellate courts.

17 CHAIRMAN SOULES: What's the consensus on
18 that? How many feel that what Steve proposes would
19 be appropriate?

20 MR. REASONER: I guess I would wonder,
21 Steve, what you had in mind for the mechanics. Are
22 you going to remand it for the assessment of just
23 damages or are you going to have the court of
24 appeals get into making a finding like that one?

25 MR. McCONNICO: I think let the court of

1 appeals make the finding of just damages.

2 CHAIRMAN SOULES: Okay. I'm going to
3 take a vote on three things. Just damages,
4 multiple of cost or something else. That's the
5 only way I know to handle it. How many feel that --

6 MR. ADAMS: When you say "just damages,"
7 are you talking about the federal rule?

8 MR. McCONNICO: Only unliquidated.

9 CHAIRMAN SOULES: This is on unliquidated
10 judgments. Judgments for something other than a
11 liquidated sum is the only thing we're talking
12 about.

13 MR. McMANS: Which would include a take
14 nothing judgment or a judgment for something that
15 isn't money.

16 CHAIRMAN SOULES: That's right. And I
17 guess if it's mixed, the court would be able to
18 decide that 10 percent of the award and then --
19 that's liquidated could be appropriate in addition
20 to that something more because part of it's not
21 liquidated.

22 PROFESSOR DORSANEO: Who's going to draft
23 -- tell me the difference between liquidated and
24 unliquidated? I do not know the difference. I know
25 how to spell the words differently, but I do not

1 know in hard cases when it's unliquidated or
2 whether it's --

3 MR. McMAINS: No, what he means is there
4 is not a money damage award.

5 MR. McCONNICO: Not a sum certain.

6 MR. McMAINS: He's talking about when
7 you're appealing a judgment without a money damage
8 award.

9 CHAIRMAN SOULES: That's what I'm trying
10 to describe.

11 MR. McMAINS: That's what he's talking
12 about. You're not talking about unliquidated and
13 liquidated claim.

14 CHAIRMAN SOULES: Okay. I'll call it
15 money damage, then. Is that term acceptable, Bill?
16 Do you understand what I'm talking about?

17 PROFESSOR DORSANEO: Yeah.

18 MR. McMAINS: In other words, the problem
19 is that 10 percent of nothing is still nothing.

20 CHAIRMAN SOULES: Okay. In a -- where
21 the award that's been addressed by the appellate
22 court is not a money damage award, and we're using
23 the standard that we talked about regarding -- said
24 we were going to maintain, that is the former
25 standard, how many feel that the court should be

1 permitted to just assess just damages whatever that
2 may mean?

3 MR. McCONNICO: In unliquidated?

4 CHAIRMAN SOULES: Yes, in non-money
5 damages. Six. How many feel that the answer is
6 "some multiple of costs," that that should be the
7 approach? Nine. And how many feel that another
8 answer is appropriate and have something to
9 propose?

10 Broadus, what do you propose?

11 MR. SPIVEY: I sincerely propose --
12 because it seems to me that what we're talking
13 about is a variety of contemptuous conduct against
14 the court. And if there is a meretricious appeal
15 or a bad faith appeal, the lawyer had to have some
16 role in it. Now, I ain't for sticking lawyers, but
17 if you're going to put some teeth in this thing,
18 let's put the teeth -- or let the teeth bite who
19 the violator is, and that's -- that got to be the
20 lawyer.

21 CHAIRMAN SOULES: All right. How many
22 feel that bite the lawyer is the answer? Broadus
23 is the only vote on that. All right. So --

24 All right. Now that there's -- there's a
25 consensus nine to seven that the percentage -- that

1 a multiple of cost is the answer. What multiple do
2 we use? Ten, 20? Somebody make a bid.

3 MR. WELLS: You've already tied the
4 appellate court to a multiple, and we can't imagine
5 what various factors are coming up in a case.

6 MR. McMains: How about not to exceed ten
7 times the cost?

8 MR. WELLS: The most would be sometimes
9 10 or even 50 times, could be.

10 CHAIRMAN SOULES: Multiple not to exceed
11 what? Because if you -- if it -- if there's --
12 what?

13 MR. BECK: Not to exceed ten times cost.

14 CHAIRMAN SOULES: All right. How many
15 feel that a multiple not to exceed ten is the
16 answer?

17 MR. REASONER: Well now, wait. We're
18 talking about a few thousand dollars.

19 MR. WELLS: Yeah, you're not talking
20 about anything.

21 PROFESSOR DORSANEO: Well, what's
22 "costs"? Statement of facts' costs?

23 MR. McMains: Yeah, I think you should
24 probably say --

25 PROFESSOR DORSANEO: But, of course, if

1 you're really taking it for a delay, you're not
2 going to get a statement of facts.

3 CHAIRMAN SOULES: Well, all costs, trial
4 court costs, Bill, are we --

5 Are we including in costs all the costs in a
6 trial court as well as all the costs on appeal? Is
7 that what we're -- how many understand that we're
8 talking about all the costs of the case and all
9 taxable costs, hold your hands up so that we can
10 indicate. Okay.

11 Everybody believes what we're talking about,
12 Bill, are all the costs in the trial in an
13 appellate court.

14 Ned, what I'm concerned about and what I
15 think the -- I feel the others are concerned about
16 if you say "any multiple of cost," then you're back
17 to just damages, which we voted out. That's

18 MR. WELLS: At least you've tied them to
19 something, though.

20 JUSTICE WALLACE: Rusty, there isn't any
21 cost bill in your transcript, is there? Ordinarily
22 you don't find the cost bill in the transcript, do
23 you?

24 MR. McMAINS: Supposed to. But a lot of
25 times they don't put them in there. They put the

1 cost, of course, of the transcript. And the
2 statement of facts is supposed to show the cost on
3 it.

4 CHAIRMAN SOULES: How many feel ten times
5 the multiple? How many feel ten times multiple is
6 the appropriate multiple?

7 MR. SPARKS: Not to exceed --

8 CHAIRMAN SOULES: Not to exceed ten
9 percent -- Ten times, I'm sorry. There are ten
10 votes for that. And how many feel some other
11 multiple would be appropriate? I know Ned feels
12 that there probably should not be a ceiling on a
13 multiple. How many feel that there should be no
14 ceiling on the multiple? One. Does anyone want to
15 suggest another multiple?

16 Okay. 10 percent seems to be the consensus
17 on that, Bill.

18 MR. McMAINS: Ten times.

19 CHAIRMAN SOULES: Now, do we have
20 anything else that we need to address on this in
21 order to give you guidance, Bill, on how to --

22 PROFESSOR DORSANEO: No, except we need
23 to take a vote on this last sentence.

24 CHAIRMAN SOULES: Oh, yeah, the last
25 sentence. At the present time in order for a judge

1 to make a determination that the appeal is for
2 delay only and that there is no sufficient cause,
3 he has to review the entire record and go into
4 things that have not even been raised on appeal.

5 MR. McCONNICO: Luke, I don't see that in
6 the present rule. Is that 483?

7 CHAIRMAN SOULES: That's just the way it
8 works.

9 PROFESSOR DORSANEO: That was a lawyer by
10 the name of Michael Remme wrote a letter and said
11 that he wanted to tag somebody for taking an appeal
12 when all of the points raised in the appellant's
13 brief had not been preserved below or hadn't been
14 raised on appeal --

15 HONORABLE TUNKS: By point of error.

16 PROFESSOR DORSANEO: -- by point of
17 error, you know, to begin with. And he said that
18 he was afraid to -- I didn't exactly completely
19 understand, but he was afraid to try to get the
20 damages for delay because he thought that would
21 open up the entire case and that there would be a
22 reversal.

23 MR. REASONER: I didn't understand that.

24 MR. McMANS: Bill, if I could explain?
25 The case law -- and it's case law, it's an

1 interpretation of the rule which requires that the
2 appeal be frivolous and for delay only. In
3 interpreting that, the courts say, "Therefore the
4 time that you make that determination is at the
5 conclusion of the trial." You don't talk about
6 whether he screwed up on a motion for new trial or
7 how he briefed it. The time is when the judgment --
8 when the appeal is -- actually it used to be when
9 the appeal was perfected, which was by notice of
10 appeal, which is actually where those cases came
11 from.

12 So at that time the question was, was there a
13 reasonable basis for the appeal, and that was the
14 focal point that you were supposed to look at.
15 Then the court went one step further and said when
16 an appellee raises that issue, which was the way it
17 always has been addressed by the appellate courts,
18 then it opens up the entire record for inspection.
19 And if the court finds reversible error, whether
20 preserved or not appropriate, subsequently, they
21 have the jurisdiction to reverse. So that in order
22 to assert the point of a non-meritorious appeal,
23 you were opening yourself up to a scrutiny of the
24 entire record and may suffer reversal on that basis
25 because you, by the appellee's assertion of this

1 affirmative claim, have waived all of the
2 predicates that were otherwise necessary for
3 appellate complaint.

4 CHAIRMAN SOULES: And the addition of
5 this last sentence would remove that problem or is
6 designed to remove the problem that Rusty has just
7 addressed.

8 MR. BECK: The appellate court doesn't
9 have to do that, though.

10 MR. McMAINS: Doesn't have to, but you
11 open yourself -- I mean, the problem you're seeing
12 here is suppose he's got a golden point which he
13 has waived at the motion for new trial status and
14 all of a sudden you, being greedy and asking for
15 the assessment of the frivolous appeal costs
16 because his brief stinks and the court says, "Aha,
17 we're going to reverse that because you have
18 assented now to our inspection of the entire
19 record," and --

20 CHAIRMAN SOULES: Sam Sparks.

21 MR. SPARKS: I move that that
22 determination be made on the basis of the
23 appellant's brief.

24 MR. LOW: Couldn't we do that by saying,
25 "not have the effect of requiring the appellate

1 court to consider," and then they don't have to do
2 it? You don't say they don't have to consider it.
3 Instead of putting the effect of authorizing it, if
4 that's what we're trying to get to.

5 CHAIRMAN SOULES: That doesn't really
6 solve your problem, does it, Rusty? Because the
7 court still could do it.

8 MR. McMANS: Well, you're talking about
9 a chilling effect, and the problem is that it's a
10 chilling effect on claiming a non-meritorious
11 appeal.

12 MR. SPIVEY: I've never alleged that and
13 I guess that's why. I'm so myopic and don't see a
14 problem with it.

15 CHAIRMAN SOULES: How many feel if we
16 kept the last sentence in the rule at it's
17 proposed, that the word "authorizing" should be
18 changed to "requiring"? Let's see hands on that.
19 Five. How many feel that --

20 PROFESSOR DORSANEO: I'm going to vote
21 for that, too.

22 CHAIRMAN SOULES: Six. How many feel
23 that "authorizing" should be left in here as it is
24 proposed? Three. Okay.

25 MR. REASONER: Well, if you change it to

1 "not requiring," it doesn't really change the law,
2 does it?

3 MR. McMAINS: It's still a risk.

4 MR. O'QUINN: It doesn't change.

5 CHAIRMAN SOULES: You still have the same
6 -- the problem that Rusty is talking about if you
7 change it to "requiring," that does not --

8 MR. LOW: Well, what Rusty is saying is
9 that the court feels that they are required to do
10 that. This doesn't tie the court's hands and say
11 that they can't do it, but it doesn't clear the air
12 that they're not required to do that.

13 CHAIRMAN SOULES: But it does not remove
14 the risk to the lawyer.

15 MR. LOW: It does not remove the risk
16 that that's --

17 CHAIRMAN SOULES: -- who asked for
18 damages because of delay and no merit.

19 MR. LOW: Yeah, that's absolutely true.

20 MR. RAGLAND: It seemed like a pretty
21 strong penalty if you're limiting the penalty at 10
22 percent on money damages for frivolous appeal. On
23 the other side, if he raises the frivolous appeal
24 point and is reversed, it gets wiped out
25 completely. That doesn't seem like to be in

1 balance to me.

2 MR. REASONER: I agree with that.

3 PROFESSOR DORSANEO: It's not in balance,
4 but it does have kind of a backyard fairness to it.
5 If it's not the client's fault that the appeal has
6 turned out to be frivolous because the lawyer
7 messed up, then why should the client have to pay
8 any amount as a penalty?

9 MR. RAGLAND: But on the other hand, if
10 it is reversed, it's the client's judgment that's
11 reversed.

12 MR. REASONER: Well, let me say that now
13 that Rusty has explained the law to me, I'm never
14 going to challenge anybody for having filed a
15 frivolous appeal.

16 HONORABLE WOOD: What about this
17 language, "shall not have the effect of" -- I had
18 it, now I've gone and lost it. "Permitting the
19 appellate court to consider allegations of error
20 that have not been preserved"?

21 CHAIRMAN SOULES: All right.

22 PROFESSOR DORSANEO: Now we're back to
23 authorizing.

24 CHAIRMAN SOULES: That's pretty much the
25 same as --

1 MR. McMAINS: What if we say -- I don't
2 care if the court considers it for purposes of
3 determining the merits of the decision to appeal,
4 what I'm concerned about is that you ought not to
5 have waived all of the appellate predicates under
6 those circumstances. What you ought to say, in my
7 judgment, is "that it shall not have the" -- "shall
8 not authorize the appellate court to reverse on
9 allegations of error."

10 CHAIRMAN SOULES: All right. Let's see a
11 show of hands on that approach.

12 MR. McMAINS: "Reverse the judgment on
13 the allegations of error not preserved for
14 appellate review."

15 CHAIRMAN SOULES: Let see a show of hands
16 on that approach and then Rusty will have to do
17 some drafting with Bill. How many feel that what
18 Rusty has proposed is the proper approach?

19 PROFESSOR DORSANEO: I do.

20 CHAIRMAN SOULES: Okay. How many feel
21 differently? How many are opposed to that? One.
22 So it's about 14 to one in favor of what Rusty has
23 proposed. Do we have any more matters on this
24 rule?

25 MR. REASONER: As I understand the way

1 Rusty is going to draft it, it will also make clear
2 that the appellate court is not required to do it.

3 CHAIRMAN SOULES: As I understand what
4 Rusty has said, he's going to write the rule so
5 that the judge can consider error, whether assigned
6 or unassigned, in determining whether the appeal
7 was frivolous.

8 MR. REASONER: If he wants to.

9 CHAIRMAN SOULES: If he wants to. But he
10 cannot -- the judge, other than for that
11 consideration, cannot give consideration to
12 unassigned error in reaching his judgment.

13 PROFESSOR DORSANEO: I think that takes
14 care of Justice Wallace's point, too, doesn't it,
15 that approach?

16 CHAIRMAN SOULES: All right. Any changes
17 of votes after that explanation? Okay. The vote
18 then stands at 14 to three.

19 PROFESSOR DORSANEO: Okay. Shall I say
20 how I understand it or do we not dare to try to
21 recapitulate?

22 CHAIRMAN SOULES: Go ahead and say it.

23 PROFESSOR DORSANEO: What you want me to
24 do is to go back and take a look at current Rule
25 438 and add back into the introductory language

1 "taken for delay." To add -- to build back in the
2 10 percent on the amount in dispute as damages in a
3 damage case --

4 CHAIRMAN SOULES: Money judgment.

5 PROFESSOR DORSANEO: -- and to add to
6 that -- how much was it?

7 CHAIRMAN SOULES: Multiple of cost not to
8 exceed ten.

9 PROFESSOR DORSANEO: For other cases.

10 CHAIRMAN SOULES: That's right.

11 PROFESSOR DORSANEO: And to modify that
12 last sentence in the matter that we just discussed.

13 MR. REASONER: And "cost" is to be
14 defined to include trial court costs?

15 CHAIRMAN SOULES: Yes.

16 PROFESSOR DORSANEO: Trial court costs
17 only?

18 CHAIRMAN SOULES: Oh, no, sir, trial and
19 appellate courts.

20 MR. McMANS: All taxable costs.

21 CHAIRMAN SOULES: All taxable costs.

22 MR. LOW: All taxable costs in the
23 lawsuit.

24 PROFESSOR DORSANEO: Okay.

25 CHAIRMAN SOULES: All right. Now, let's

1 take a vote. Do we have a -- how many now are in
2 favor of the rule being redrafted and adopted by
3 the Supreme Court as Bill has just described it?
4 Let's take a vote on that. 11. And how many
5 oppose that? One opposed. All right.

6 MR. REASONER: Broadus, I want you to
7 note that I voted with the majority on that.

8 MR. SPIVEY: All right.

9 PROFESSOR DORSANEO: I want to thank you
10 for all that, Broadus. That was very helpful. I
11 think we can go briefly over the remittitur
12 business. This was taken up yesterday.

13 The proposal was made by Justice -- well, I'm
14 not going to go and reiterate what Rusty said
15 yesterday. I think the part we didn't really talk
16 about -- did we take a vote on this yesterday, on
17 any of it?

18 MR. McMAINS: We took a vote on the
19 philosophy.

20 Which page is it on?

21 PROFESSOR DORSANEO: All right. You can
22 look at either page 3 of the memoranda or --

23 MR. McCONNICO: 118.

24 PROFESSOR DORSANEO: 118. Page 118?

25 MR. McCONNICO: Yep.

1 PROFESSOR DORSANEO: All right. This
2 Rule 85 is a combination of current rules.
3 Paragraph (b) is, I guess --

4 MR. McMAINS: It's the only change.

5 PROFESSOR DORSANEO: Rule 440, currently,
6 and the change is underlined in the little
7 memoranda on page three. The current thing says,
8 "In civil cases appealed to a Court of Appeals, if
9 such court is of the opinion the verdict and
10 judgment of the trial court is excessive." Rather
11 than our suggestion "if such court is of the
12 opinion that the trial court abused its discretion
13 in refusing to suggest a remittitur." Just change
14 -- what Rusty said yesterday, replaces one standard
15 with another. I move the adoption of that
16 suggested change to current Rule 440 and proposed
17 Rule 85(b).

18 CHAIRMAN SOULES: Second?

19 MR. McMAINS: I second.

20 CHAIRMAN SOULES: Discussion?

21 MR. WELLS: Isn't that what we voted on
22 yesterday?

23 CHAIRMAN SOULES: We had a consensus to
24 go ahead and go this way, but as far as getting the
25 specifics, we didn't really get into the specifics.

1 MR. McMains: What happened to the
2 voluntary remittitur language which is supposed to
3 be in here?

4 PROFESSOR DORSANEO: It's in there,
5 Rusty. It's --

6 MR. SPIVEY: Page 3.

7 PROFESSOR DORSANEO: Isn't it? Where is
8 it?

9 MR. McMains: It's not in the book that I
10 have. That's why I asked.

11 MR. SPIVEY: It's listed on page 3 of
12 number (d). But it sure is not on page 119.

13 MR. McMains: It's in the memo, but it's
14 not in the book.

15 PROFESSOR DORSANEO: It got lost. All
16 right. We'll add it in.

17 MR. McMains: With that exception. I
18 mean --

19 PROFESSOR DORSANEO: We may need to talk
20 about that, too. Judge Tunks raised a bit of a
21 problem with the language yesterday.

22 CHAIRMAN SOULES: With the language on
23 page 3 that's under (d), "voluntary remittitur,"
24 did Judge Tunks have something on that?

25 PROFESSOR DORSANEO: Well, he pointed out

1 to me yesterday that the language in the first
2 sentence is a bit clumsy.

3 CHAIRMAN SOULES: Are you going to do
4 some rewrite on that?

5 PROFESSOR DORSANEO: Well, I can talk --
6 we're going to talk about it. Are we going to vote
7 on the first part or have we already voted?

8 CHAIRMAN SOULES: David.
9 We haven't voted.

10 MR. BECK: I have a question. I want to
11 make sure I'm clear on what I'm voting on. By
12 replacing the current standard with the abuse of
13 discretion standard, does that mean that that issue
14 can then go up to the Supreme Court?

15 MR. McMAINS: We debated about that
16 yesterday. An argument can be made, I suppose,
17 that it could be an issue in the Supreme Court.
18 Either way.

19 MR. BECK: Because you're dealing
20 primarily with the law.

21 MR. McMAINS: That's right.

22 MR. BECK: So, one effect this may have
23 is allowing that issue to be appealed further to
24 the Texas Supreme Court, where arguably you can't
25 take it up now.

1 MR. McMAINS: No, but you can take it up
2 now anyway. I mean, on the same issue, no. On the
3 same issue --

4 MR. BECK: Not on the factual -- not on
5 the evidentiary determination.

6 MR. McMAINS: But you can still take the
7 position of abuse of discretion in an application
8 if the remittitur occurs in the court of appeals,
9 the other side goes up. I mean, it hasn't really
10 changed any of that procedure. There are express
11 procedures for going all the way up.

12 MR. BECK: Well, I -- then I ask the same
13 question Harry asked yesterday, why do we need to
14 change it if the effect is no change?

15 MR. McMAINS: Well, it's not that there --
16 it is not -- in my judgment it is a change. Judge
17 Guittard said he didn't think it would change what
18 the courts do.

19 CHAIRMAN SOULES: Sam Sparks.

20 MR. SPARKS: Is the current rule that the
21 court of appeals can make its own factual
22 determination on the record on remittitur a rule or
23 is that --

24 PROFESSOR DORSANEO: It's Flannigan
25 versus Carswell.

1 MR. McMains: No, what it -- it is the
2 rule.

3 MR. Sparks: Is it a constitutional base?

4 MR. McMains: No, that Flannigan is
5 interpreting the court's power under the rule.

6 PROFESSOR DORSANEO: All right. I don't
7 know, that's different.

8 MR. Sparks: Is the factual
9 determination, though, based on the Constitution or
10 is it by rule?

11 MR. McMains: Remittitur has always been
12 a rule or a statute prior to the rule.

13 MR. McConnico: No, remittitur started in
14 Texas with common law. It didn't start in the
15 Constitution. It's not found within the
16 Constitution.

17 JUSTICE WALLACE: Well, isn't the one
18 issue we need to decide is whether or not if it
19 comes to the Supreme Court, the Supreme Court looks
20 at the abuse of discretion by the trial judge as
21 opposed to abuse of discretion by the court of
22 appeals in reviewing the trial judge's discretion.
23 Because if we're looking at abuse of discretion and
24 only abuse of discretion, then you might as well
25 not pay any attention to it. That's impossible.

1 MR. McMAINS: I think that the -- my
2 personal view is that the question of whether the
3 trial court abused its discretion is a law
4 question. And that is the question that is
5 reviewable.

6 JUSTICE WALLACE: That goes to the
7 Supreme Court.

8 MR. McMAINS: If there is a question
9 that's reviewable right now.

10 JUSTICE WALLACE: I didn't get that from
11 the rule and that's -- that maybe should be
12 clarified. How, I'm not sure.

13 MR. BEARD: If we're going to vote, we
14 need to state this again. I came in right at sort
15 of the middle, I guess, and y'all have got me lost.
16 Is the court of appeals not -- if it finds abuse of
17 discretion, it cannot make a suggested remittitur?

18 MR. McMAINS: Yes. If it finds an abuse
19 of discretion by the trial court in refusing to
20 remit it, then suggest remittitur itself.

21 MR. BEARD: And then when it goes to the
22 Supreme Court, it's only whether the trial court
23 abused, not --

24 MR. McMAINS: That's right. It's whether
25 the court of appeals was correct in concluding that

1 the trial court abused its discretion. Because
2 that -- that is a legal standard applied by the
3 court of appeals in regards to the trial court's
4 judgment.

5 JUSTICE WALLACE: So, in effect, what
6 you're doing is saying if the Supreme Court wants
7 to substitute its review for the trial -- for the
8 CA review --

9 MR. LOW: Yeah, because otherwise you
10 have presumption -- you add discretion -- on
11 violation of discretion and you -- just couldn't
12 never be any such thing.

13 MR. McMAINS: Well, in addition to which
14 I think that's -- the other situation, of course,
15 is you're remitting. I mean, if -- you aren't in
16 the position unless you refuse to remit. And you
17 don't get to go up unless you have remitted, and
18 the other side goes up anyway. So, from that
19 standpoint, it's not something that's just going to
20 be routinely done, I don't think.

21 MR. REASONER: I take it the purpose of
22 this change is to limit the power of the court of
23 appeals to order remittitur.

24 MR. McMAINS: Yes, in my judgment. Judge
25 Guittard, as I say, says that he doesn't think

1 that's going to make any difference. It's limit in
2 the sense that the trial courts are the one that
3 sits there as -- throughout all of the evidence and
4 the question is, is an appellate court the
5 appropriate body to threshold review against that
6 decision or should it be looking at the trial
7 court's action, whether it abused its discretion,
8 which is really the federal standard, if you will,
9 on excessiveness and on remittitur. That's whether
10 the trial court has messed up in not cutting the
11 damages.

12 CHAIRMAN SOULES: Bill, why don't you
13 restate where we are and let's see if we're ready
14 to take a vote.

15 PROFESSOR DORSANEO: Well, under the
16 current rule according -- the court of appeals
17 decides the remittitur issue itself and is not
18 deciding whether the trial court did the right
19 thing or the wrong thing. That's extraordinary --
20 an extraordinary thing for a court of appeals to
21 do. And the proposal is made to have this thing be
22 like every other thing.

23 MR. McMANS: Right.

24 PROFESSOR DORSANEO: And Judge Guittard
25 says that it doesn't make any difference, that he

1 will find it's an abuse of discretion if he has to.

2 MR. McMAINS: That's right.

3 MR. McCONNICO: Can I just add something?

4 CHAIRMAN SOULES: Steve.

5 MR. McCONNICO: I don't agree with Judge

6 Guittard on that. I was at the subcommittee

7 meeting. And right now, as I read the rule --

8 PROFESSOR DORSANEO: Is it fair to

9 characterize his position, actually? Maybe we

10 shouldn't.

11 MR. McCONNICO: Yeah. It's just -- all

12 the court of appeals does is decide if the trial

13 court judgment is excessive. That's the only

14 decision they make. If they decide it's excessive,

15 you can have remittitur. Under the proposal they

16 now have to review the trial court judgment to see

17 if it was an abuse of discretion for the trial

18 court not to give a remittitur. That's as simple

19 as I can make it.

20 CHAIRMAN SOULES: Okay. The change would

21 be to go to an abuse of discretion standard. How

22 many feel that that change should be made?

23 MR. McMAINS: We already voted on that

24 yesterday.

25 CHAIRMAN SOULES: I know. Eight. How

1 many feel it should not be made? Four. Well,
2 that's the same -- essentially, the same consensus
3 we had yesterday, that it should be made.

4 MR. McCONNICO: I will add one thing to
5 that because I looked at this a little bit and I
6 had a briefing attorney at our firm to look and see
7 how other states handle this before I went up to
8 the subcommittee meeting. We looked at Illinois,
9 Massachusetts, New York, California. We didn't
10 look at all the states. I think we looked at the
11 five most populous states. And it's not clear in
12 most of the states how they handle the review. But
13 from the states that we did see, it is an abuse of
14 discretion review like in all other appellate
15 reviews of trial courts where it's stated.

16 CHAIRMAN SOULES: Like we've just voted
17 for.

18 PROFESSOR DORSANEO: In my teaching, too,
19 in the torts area you get into this question.
20 There usually is some sort of standard, too, that
21 involves the highest amount that you could imagine
22 or something like that.

23 CHAIRMAN SOULES: Well, do we have any
24 more business on Rule 85 as proposed?

25 MR. McMANS: May I make one comment,

1 please?

2 CHAIRMAN SOULES: Yes.

3 MR. McMains: The other thrust of this --
4 remember we changed Rule 324 last time to require a
5 motion for new trial, whereas the remittitur point
6 is waived, which is already controlled. The court
7 -- I mean, you've already -- requires presentment
8 to the trial court anyway as a prerequisite for
9 appellate review. And all this is is just putting
10 it back.

11 PROFESSOR DORSANEO: And to that extent,
12 Rule -- current Rule 440 is misleading because it
13 suggests that you don't have to do anything in the
14 trial court to raise the excessiveness complaint in
15 the court of appeals.

16 CHAIRMAN SOULES: Is that cured by your
17 current verbage?

18 PROFESSOR DORSANEO: Yes.

19 CHAIRMAN SOULES: Do we have any more
20 business, now, Bill or anyone else, on proposed
21 Rule 85?

22 PROFESSOR DORSANEO: Yes, we have this
23 voluntary remittitur. Pardon us for not putting
24 (d) in the back. I have a question that --

25 Rusty, I think you drafted this language,

1 didn't you?

2 MR. McMAINS: Rather hurriedly, I'm
3 afraid.

4 PROFESSOR DORSANEO: I know. But would
5 it be okay to change this first sentence to say
6 "effects only part of the judgment"? Do we have to
7 say "effects only part of the damages or judgment,"
8 or are we talking about the judgment only anyway?
9 The idea here is to let somebody voluntarily remit
10 in order to avoid a reversal.

11 MR. McMAINS: But -- yes. The problem, I
12 suppose, is that the reason that I put "damages or
13 judgment" in there, you might have a situation in
14 which the argument is made that -- let's suppose
15 you submit items of damages listed as elements, but
16 you come out with a bottom line number, but -- and
17 there is -- but the evidence, arguments, everything
18 else shows that the damages for that element for
19 "X" and the error that you're talking about affects
20 only that amount.

21 The question is, can you remit -- can you
22 tender a remittitur as to that portion of the
23 damages which is the max that it would affect or do
24 you have to suffer reversal because of the fact
25 that you only have one answer line?

1 PROFESSOR DORSANEO: Okay. You're
2 reading "judgment" to say judgment, this piece of
3 paper, as opposed to the judgment including
4 everything that is in that number?

5 MR. McMAINS: Yes.

6 CHAIRMAN SOULES: Judge Tunks, did you
7 have something, some concerns about this?

8 HONORABLE TUNKS: What? I didn't
9 understand it at first. But what Rusty says clears
10 it up for me.

11 MR. REASONER: What if you have punitive?

12 MR. McMAINS: What do you mean? Well, I
13 think you've -- I think if you've got something
14 that affects the punitive damage recovery, then
15 your choice is to tender remittitur all the
16 punitive damages. You can affect part of the
17 punitive. What I'm trying to deal with is a
18 situation where supposedly there's error in
19 admitting a piece of evidence that affects only one
20 aspect of the claim, but you don't have a separate
21 answer line for it.

22 I really think the case law would support the
23 fact that you could remit. The court could order a
24 remittitur now in order to cure that error of the
25 maximum amount that the jury could have included

1 under the evidence or that number, but shouldn't
2 have because of the evidentiary problem.

3 JUSTICE WALLACE: That's done quite often
4 now, isn't it?

5 MR. McMains: Uh-huh.

6 JUSTICE WALLACE: If you're talking about
7 medical expense, just reduce it by the amount of
8 medical expense.

9 MR. McMains: Right.

10 CHAIRMAN SOULES: Sam Sparks.

11 MR. SPARKS: I just want to ask a
12 question. Pat raises a good point back here. It
13 doesn't affect the court of appeals on finding that
14 the damage findings are against the greater weight?

15 MR. McMains: Don't know.

16 MR. SPARKS: Thanks.

17 MR. McMains: No, no. I'm just telling
18 you I don't know under the current case law. There
19 are -- my view of the case law is that there is a
20 difference between making a factual sufficiency or
21 against the great weight point as to amount, which
22 in my judgment is an excessiveness complaint as
23 opposed to --

24 PROFESSOR DORSANEO: Any.

25 MR. McMains: As to the existence of

1 damage.

2 PROFESSOR DORSANEO: Right, that's great
3 weight. Any number.

4 MR. McMAINS: Really and truly,
5 excessiveness is an amount issue, and that's not
6 something that is appropriate for an independent
7 factual sufficiency review, in my judgment.

8 MR. BEARD: You say the law is certain in
9 that respect?

10 MR. McMAINS: No, that's why I said it
11 was my view. I'm not sure the courts are in total
12 agreement, because it's basically, you know, you're
13 talking about courts of appeals who may say a
14 number of things about it.

15 MR. BEARD: So the issue still is
16 floating?

17 MR. McMAINS: Oh, I think the defendant
18 will probably try and take positions that it's --
19 that the evidence is insufficient, period, and then
20 try and avoid arguing the abuse of discretion. And
21 that may be something that ultimately that has to
22 be resolved, but that's a different issue.

23 PROFESSOR DORSANEO: Should we go to the
24 next one?

25 CHAIRMAN SOULES: Does the writing on

1 this subparagraph (d) now satisfy you if we are
2 going to have a voluntary remittitur paragraph?
3 All right. How many are in favor of including a
4 voluntary remittitur paragraph? Ten. And how many
5 are opposed? None.

6 MR. BECK: Just out of curiosity, have
7 any of the members of the claims bar ever made a
8 voluntary remittitur?

9 MR. MCMAINS: Well, is the question is
10 whether you get to keep --

11 CHAIRMAN SOULES: Do we have any more
12 business on Rule -- proposed Rule 85?

13 PROFESSOR DORSANEO: All right. I'm
14 going to slide over Rule 452 in the interest of not
15 spending the rest of the year on this matter and go
16 to Judge Casseb's suggestion, to Rule 458. This
17 particular suggestion which has been drafted into
18 proposed paragraph (f) of proposed Rule 100 is that
19 a time be imposed upon the courts of appeals for
20 ruling on motions for rehearing. The language in
21 this paragraph (f) which appears on page 4 of the
22 little memo and which I hope appears in the text of
23 Rule 100 -- what page?

24 MR. LOW: 131.

25 PROFESSOR DORSANEO: Yeah, 131. You've

1 got me gun-shy here now. Speaks for itself. "In
2 the event a motion or second motion for rehearing
3 is not determined by written order made within
4 sixty days after the same is filed, it shall be
5 overruled by operation of law on the expiration of
6 that period." There is no time period within which
7 the motion is overruled by operation of law at the
8 present time. And Judge Casseb -- what was the
9 problem with that? It had to do with appealing
10 further, I suppose, to the Supreme Court, just
11 stuck on stop.

12 CHAIRMAN SOULES: Any discussion on
13 proposed paragraph (f)?

14 Judge Tunks.

15 HONORABLE TUNKS: There are some
16 instances, not many, in which it isn't necessary
17 for the -- or advisable for an appellate court to
18 hold a motion for rehearing for more than sixty
19 days. For instance, if a similar case has been
20 decided by another court and the Writ of Error has
21 been granted in that case, the courts of appeals
22 are inclined to hold the case in which it will be
23 controlled by what the Supreme Court does in that
24 Writ of Error, therefore, that they ought to hold a
25 motion for rehearing in their own court until the

1 Supreme Court has passed on that case in which it
2 has granted the Writ of Error. I wanted you to be
3 aware of that before you decide on it whether to be
4 included or not.

5 PROFESSOR DORSANEO: Well, what would
6 that -- would that mean we should lengthen the
7 time? I mean, it could be the case that the
8 Supreme Court takes a long time, too.

9 HONORABLE TUNKS: The Supreme Court is
10 not limited to six months deciding a case.

11 MR. McMAINS: Judge Guittard also made
12 the observation that this was -- if the court of
13 appeals wanted to sit on it, all they had to do was
14 withdraw their opinion. And then they can issue a
15 new opinion later. I mean, if the court wants to
16 delay it, there is nothing you can do about it as
17 long as they're within their jurisdiction. So I'm
18 not sure that it really accomplishes anything if
19 the court is hell bent and determined to delay
20 something.

21 The function of it, as I understood it,
22 however, from Sol's letter was that one of the
23 problems you have is that you kind of feel like a
24 motion may get lost up there, you don't know what's
25 happening. And there are examples that have

1 occurred within the last three years where the
2 court of appeals has inadvertently not notified the
3 parties of the overruling of a motion for rehearing
4 which has created considerably havoc later on. And --

5 JUSTICE WALLACE: I think the real
6 impetus behind this was Judge Casseb's own court
7 down there that got so far behind, they were
8 sitting on a motion for rehearing sometimes two
9 years for no reason really. And that was the
10 impetus behind this. And I think Judge Tunks is
11 absolutely right. There needs to be some escape
12 valve in for the situation he mentioned.

13 CHAIRMAN SOULES: Harry.

14 I'm sorry, Judge.

15 JUSTICE WALLACE: Some notation, perhaps,
16 by the court of appeals as to why it's being held
17 longer than sixty days. We had an instance or two
18 in Houston where some people say for -- because one
19 particular justice is up for reelection, he
20 wouldn't decide a controversial case until after
21 November, that sort of stuff.

22 CHAIRMAN SOULES: Harry.

23 MR. REASONER: Well, I guess, you know,
24 while -- what Justice Wallace points out is a very
25 troubling thing. It seems to me that this does

1 kind of demean the rehearing process. Certainly my
2 experience with federal agencies, for example,
3 where you have automatic overruling, that's what is
4 resulted is that there just is no more rehearing
5 process. Everything is just -- you know, they
6 ignore it and it's all treated as automatically
7 overruled. And my impression is that the way some
8 of our courts of civil appeals operate --

9 MR. McMANS: They may just decide not to
10 rule on anything.

11 MR. REASONER: Well, or -- I think that
12 they do take -- that their first opinion is one
13 that they do feel compelled to take a hard look at.
14 And if it's a hard case, sixty days is not a lot of
15 time for the appellate court to act.

16 CHAIRMAN SOULES: Anything else on this
17 rule before we vote on whether to have automatic
18 overruling of a motion for rehearing in the court
19 of appeals? Okay. Whether it's sixty days or
20 otherwise is not really the issue on the table
21 right now. It's whether we have it or don't have
22 it. So let's vote to see how many feel that there
23 should be some overruling by a passage of time with
24 regard to motion for rehearing in court of appeals.
25 How many feel there should be such an overruling by

1 passage of time? One. How many feel there should
2 not be such an overruling? Nine. There are nine.
3 That's nine to one against having an automatic
4 overruling by passage of time. So that would be
5 the consensus of the committee.

6 MR. REASONER: I think that we should
7 refer the problem of such courts that are delaying
8 for two years to the task force on Administration
9 of Justice and let them --

10 PROFESSOR DORSANEO: Okay. So we're
11 going to take that out.

12 CHAIRMAN SOULES: Paragraph (f) is -- the
13 committee is against that by a vote of nine to one.

14 PROFESSOR DORSANEO: All right. Let me
15 move on. That concludes all of the proposals for
16 change to the current rules that were made over the
17 past several years that we tried to build into this
18 proposed package. Please take a look at the plan
19 which is on page 1 of Arabic No. 1 of this packet,
20 which is about page 6 after the table of contents.
21 And I'll go over briefly with you the structure of
22 these proposed appellate rules and in the process
23 of doing that explain kind of what we did.

24 "Applicability of Rules." There is nothing
25 particularly important about that. It's just a

1 general statement as to what courts these rules --
2 proposed rules would be applicable.

3 The "General Provisions," Section Two is an
4 important section. It includes a large number of
5 things including such things as communication with
6 courts, filing, service, notice, amicus briefs,
7 duties of clerks of courts of appeals, duties of
8 court reporters. Much of what is now in the
9 "General Provisions" has been sprinkled in the
10 current rules throughout the rules of procedure.
11 And in addition to that, there has been a lot of
12 redundancy and inconsistency. For example, many of
13 the rules repeat that information about the number
14 of copies and about sending one of those copies to
15 opposing counsel. There is no need to have so much
16 prolixity in the rules and have the same thing
17 repeated over and over again when one general
18 provision is -- can accomplish the same thing.

19 So, one of the things that we have, the
20 "General Provisions" eliminated the need for a lot
21 of language in the rules, a lot of redundancy and
22 basically simplify for that reason.

23 Section Three doesn't have a great many
24 modifications in it from the current rules and it
25 basically deals with how you take an appeal, how it

1 is perfected or filed, how the record is gotten to
2 the court of appeals.

3 Section Four, "Motions, Briefs and
4 Submission" more or less speaks for itself.

5 Five, that speaks for itself.

6 Section Six. Now, in the original draft
7 developed by the committee appointed by the Supreme
8 Court, the Court of Criminal Appeals and the
9 Legislature, we had two -- we had one section
10 called "Original Proceedings in Courts of Appeals,"
11 because at that stage of the game the Supreme Court
12 Rules were not in this package. At our last
13 meeting in May when we were asked to add in the
14 Supreme Court Rules, we did that by adding a
15 separate section for Original Proceedings in the
16 Supreme Court. I think that that is the draft that
17 was used in making recommendations to the Court of
18 Criminal Appeals, if I'm not mistaken.

19 Since that time we decided that it would make
20 a great deal of sense to have one section called
21 "Original Proceedings in Appellate Courts,"
22 because, quite frankly, the rules of procedure for
23 courts of appeals and the Supreme Court in the
24 current rule book are virtually identical. So it
25 was a simple matter of collapsing, basically, four

1 rules into two with some modification in wording.
2 And so that was done.

3 With the certified questions, in our current
4 rule book some of the certified question material
5 is in the court of appeals' part of the rule book
6 and some of it is in the Supreme Court part,
7 depending upon where the action is to take place,
8 whether it's the certification part or the response
9 part. That's all collapsed into one place, in
10 "Certified Questions."

11 Basically after that Eight, Nine, Ten,
12 Eleven, Twelve and Thirteen more or less, and
13 virtually always more, track the language of the
14 current rules in the Supreme Court of Texas part of
15 the rule book. There are some modifications there,
16 but I would characterize them as more or less minor
17 things.

18 So that's -- you know, that's the overall
19 plan and that's the road map that we have followed
20 from -- as modified in terms of this plan from a
21 very early stage in this process of trying to draft
22 combined rules.

23 Now, with respect to rules that are of
24 particular importance or ones that you may want to
25 look at carefully, I'm going to try to go through

1 those quickly. Rule 4 -- I think you would find
2 nothing remarkable about either Rules 1, 2 or 3.
3 Rule 4 is one of those rules that's picked up from
4 various places throughout the rule book and it's
5 meant to be a general purpose rule dealing with the
6 "Signing, Filing and Service" of everything that's
7 signed, filed and served in the appellate courts.
8 It is taken from a variety of places throughout the
9 rule book, but the point is that all of the
10 information is now located in this one Rule 4,
11 whether you're talking about a brief filed in the
12 Court of Appeals, a motion or any other paper
13 required by these rules to be filed.

14 An appellate court, again is defined broadly
15 in the rules of procedure definitional section,
16 which is Rule 3, to include all the appellate
17 courts. Let's see, "'Appellate court' includes the
18 Court of Appeals, the Supreme Court and the Court
19 of Criminal Appeals." Now, this rule replaces a lot
20 of things here hither and yon. You look in Rule
21 414 you'll see a number of copies for briefs. You
22 look in whatever, there's probably a number of
23 copies. There is probably something that says this
24 is meant to be served in accordance with Rule
25 21(a). We think that this is an improvement more

1 or less modeled along the way the federal rules
2 have done things.

3 Now Rule 5 --

4 MR. REASONER: Can I ask one question?
5 Do the rules make clear what happens if something
6 is received more than ten days tardily? I take it
7 it says if I mail it and that the court doesn't get
8 it? What happens then, if I can proof I mailed it,
9 but he didn't get it for 12 days?

10 PROFESSOR DORSANEO: If you can prove you
11 mailed it one day beforehand, but he didn't get it --

12 MR. REASONER: Yeah.

13 PROFESSOR DORSANEO: -- within the ten
14 days?

15 MR. REASONER: Yeah.

16 PROFESSOR DORSANEO: Well then, you
17 didn't file it. Right?

18 MR. REASONER: Well, given the state of
19 U.S. mails, I --

20 MR. McMains: No, there are cases and
21 that's the reason that we amended the rule to
22 authorize as well a certificate of mailing in
23 addition to the instrument itself bearing a legible
24 postmark. The procedure that you follow now and
25 that has been recognized -- basically it's all case

1 law because there really isn't a rule provision for
2 what happens if it don't get there -- is that you
3 then file -- you do need to check to find out, and
4 if it doesn't, in fact, get there, then you file
5 your extension motion. Because if it isn't there
6 within ten days, then -- you have 15 days to extend
7 anything in the appellate court. And so, then
8 basically you extend or file a motion for extension
9 along with your proof that you mailed it. And the
10 Supreme Court has even said that an affidavit that
11 it was, in fact, mailed is sufficient to justify,
12 you know, the granting of the extension of time.
13 Now, what happens after the 15 day period I don't
14 know.

15 MR. REASONER: So what you contemplate is
16 that everybody is going to call the clerk and see
17 if it got there?

18 MR. McMains: Well, you're supposed to
19 get notice by the clerk, of course, that it did get
20 there. If you don't get such notice within ten
21 days, you ought to be looking.

22 CHAIRMAN SOULES: That's right.

23 MR. McMains: That's a hiatus in the
24 existing rules. None of these are changes.

25 MR. REASONER: I understand that. I

1 mean, one approach is to say that mailing is
2 filing, but this requires actual physical receipt.

3 MR. McMAINS: Yes.

4 PROFESSOR DORSANEO: Where did we make
5 that improvement, Rusty?

6 MR. McMAINS: Well, it's in the rule
7 itself on service by mailing.

8 MR. WELLS: On page 5 and 6.

9 MR. McMAINS: It says, "Service may be
10 personal or by mail." That's on the bottom of page
11 6. "Personal service includes delivery of the copy
12 to a clerk or other responsible person at the
13 office of counsel. Service by mail is complete on
14 mailing." You see, so we do have the provision that
15 it's complete on mailing. And then you've got the
16 proof of service problem.

17 MR. REASONER: Well now, that means
18 service is complete.

19 MR. McMAINS: That's the reason that --

20 MR. REASONER: That's service on counsel.
21 That's not filing.

22 PROFESSOR DORSANEO: Yeah.

23 CHAIRMAN SOULES: That's right.

24 MR. McMAINS: "Papers presented for
25 filing shall contain an acknowledgement" and so on.

1 It says "Proof of service may appear" --

2 MR. WELLS: Back on 5 is where we should
3 be.

4 MR. McMAINS: Where is the rule? I'm
5 sorry, it's on page 5. "If received by the clerk
6 not more than ten days...shall be filed by the
7 clerk and be deemed as filed in time; provided,
8 however, that a certificate of mailing by the U.S.
9 Postal Service" -- which is something you get when
10 you mail it. It cost you the cost of a postage
11 stamp -- "or a legible postmark affixed by the
12 United States Postal Service shall be prima facie
13 evidence of the date of mailing," which in turn is
14 proof of service.

15 MR. REASONER: But not filing.

16 MR. McCONNICO: Well, see, that -- are we
17 varying 21(a) in any of these?

18 MR. McMAINS: Only with that. Only by
19 the certificate of mailing provision.

20 MR. McCONNICO: Because I like 21(a) as
21 it's written. I probably should have picked this
22 up before because as 21(a) is written, it says,
23 "service by mail shall be complete upon deposit of
24 the paper enclosed in a post-paid properly
25 addressed wrapper at a post office or official

1 depository under the care and custody of United
2 States Postal Service."

3 PROFESSOR DORSANEO: But that's not
4 filing.

5 MR. WELLS: That's service.

6 MR. McCONNICO: That's service.

7 MR. McMAINS: Yeah, but we're not talking
8 about that. He's talking about filing.

9 MR. McCONNICO: I know. Why can't we do
10 this with filing?

11 MR. REASONER: Well, I guess that's
12 really my question.

13 CHAIRMAN SOULES: Well, that's never been
14 done. There are no rules in Texas that make
15 deposit in the mail the same as filing.

16 MR. McMAINS: The rule on filing has
17 always been what is now 4(b).

18 CHAIRMAN SOULES: Filing means stamped by
19 the clerk. It can be deemed filed at some other
20 time once it becomes filed by the clerk, by the
21 rules here if it's received ten days -- if it's
22 deposited in the mail one day before it's due and
23 received sometime in the next ten days. When it is
24 filed, it's filed the same day it's received, but
25 deemed filed earlier, by operation of the rules.

1 But we don't have any rules that say that deposit
2 in the mail constitutes filing. The clerk has to
3 actually do something before something is filed
4 under all the rules that we have in Texas.

5 PROFESSOR DORSANEO: Now, maybe this ten
6 days is no longer -- what you're saying, Harry, is
7 that ten days isn't good enough time any more. I
8 think in the old days ten days was probably thought
9 of as a long time. If not received more than 20
10 days?

11 CHAIRMAN SOULES: Well, there are ways to
12 handle that. I mean, it's risky business to file
13 by mail. We've known that for some time.

14 MR. REASONER: I'm afraid that's true. I
15 guess I don't --

16 CHAIRMAN SOULES: So we have to call and
17 find out if they got it, is what I think cautious
18 lawyers do. And the failure to receive means that
19 you start a different avenue of getting it filed
20 and hopefully the mails will accommodate you, but
21 if they don't, then you've got -- you're going to
22 be out some inconvenience.

23 MR. McMains: The problem with changing
24 the times to go much more than ten days is that it
25 dovetails right now with our 15 days extension

1 times. I mean, if you mail it a day ahead of time,
2 then you've got actually 16 days in which to file a
3 Motion For Extension. So --

4 PROFESSOR DORSANEO: So why don't we not --

5 MR. McMAINS: Huh?

6 PROFESSOR DORSANEO: We did improve it on
7 the legible -- on the certificate from the Postal
8 Service as opposed to you not being able to prove --
9 you can't prove when you mail it because you can't
10 show a legible postmark because it's illegible. So
11 now you can get a certificate.

12 MR. REASONER: That's the purpose of the
13 proviso?

14 CHAIRMAN SOULES: But you get a
15 certificate at the time you mail it. And the
16 Supreme Court has held that an affidavit that it
17 was mailed is sufficient.

18 MR. McMAINS: That's right.

19 CHAIRMAN SOULES: Well, why don't we put
20 that in the rule? That seems to me to be
21 critically important.

22 MR. McCONNICO: I'm sorry, Luke, I didn't
23 hear the last comment.

24 CHAIRMAN SOULES: Is it ending with that?
25 The Supreme Court has held that a legible postmark

1 is not required, even though the rule says it is.
2 And we're saying -- and that an affidavit that the
3 thing was mailed is enough.

4 MR. McMAINS: Let me -- what is -- the
5 situation is this.

6 CHAIRMAN SOULES: Okay.

7 MR. McMAINS: We were trying not to
8 encourage people who let the times go by and are
9 just prepared to send an affidavit and say "By the
10 way, I mailed it."

11 CHAIRMAN SOULES: I understand.

12 MR. McMAINS: Well, let me get along.
13 This rule merely says that this is prima facie
14 proof that this is sufficient. They've got to
15 accept it if you've done any one of these things.
16 Now, anything else that you do is basically
17 provable, as our rules provide, by an affidavit in
18 the court of appeals, okay? And the court of
19 appeals determines what's been done factually from
20 a standpoint of its jurisdiction by rule which is
21 how the Supreme Court and the courts of appeals
22 have handled the problem when you have something
23 that's been misfiled either by the clerk or by the
24 Postal Service or something else that has gone
25 beyond this, and frankly has not really proved to

1 be a problem.

2 CHAIRMAN SOULES: Well, we -- of course,
3 litigants are losing their rights under CLICK and
4 even with the 15 day extension. It seems to me
5 like the risk of a false affidavit in ten days may
6 be used. I mean, maybe there are going to be a lot
7 of those. But why shouldn't we accommodate the --

8 MR. REASONER: One thing about the
9 present statement, Luke, is I think any prudent
10 lawyer who reads this will get a certificate. If
11 you put "or affidavit," I don't know that they
12 will.

13 CHAIRMAN SOULES: Well, it's -- but why
14 -- I guess what I'm saying is why do you have to go
15 to the extra trouble of getting a certificate? Why
16 don't we just say an affidavit is enough if you're
17 in ten days? Why can't we just depend on lawyers
18 as officers of the court to say, "I mailed it and
19 I'm within ten days." What's ten days? You know,
20 big deal. Why do we have to go through extra
21 paperwork at the post office, whatever the cost may
22 be, more paper to keep in the files?

23 MR. McMAINS: The basic problem is how
24 long are you going to give them. I mean, there
25 must be a time limit.

1 CHAIRMAN SOULES: Ten days.

2 MR. McMAINS: No, you -- you're not
3 giving them ten days. You're saying an affidavit.
4 You haven't put any time limits, we have no
5 mechanism -- I mean, basically two months later
6 they find out. "Hey, we haven't got a brief.
7 We're getting ready to dismiss your appeal." And
8 you say, "Hey I mailed it." And they just come in,
9 you know, two months later.

10 CHAIRMAN SOULES: Maybe it's a bad idea.
11 Sam Sparks.

12 MR. SPARKS: Luke, I'm sure this is all
13 interesting. I've got two or three rules that I
14 would like -- we're losing members quickly that are
15 really ready to come out of the discovery -- that I
16 sure would like to discuss before we're going to
17 break, and it's already 11:10, or 11:15.

18 MR. REASONER: I thought you would be
19 interested in this discussion, Sam.

20 CHAIRMAN SOULES: My principal remark to
21 that is that on May the 31st we called a two day
22 meeting to last until 4:30 this afternoon, and I --
23 Bill has done as much work as anybody else has and
24 we need to get these rules -- we need to get them
25 all out, and I hope that people will stay and

1 attend and participate.

2 PROFESSOR DORSANEO: I'll try to go
3 quickly. Maybe -- you know, some of this we're
4 talking about what the old -- I'm really just going
5 to point out the changes from current law, now.
6 All right?

7 CHAIRMAN SOULES: Okay. Let's quickly go
8 through the changes from current law and --

9 PROFESSOR DORSANEO: Okay. The
10 "Computation of Time Rule" is basically the same as
11 the current rule with the exception of the last
12 sentence of paragraph (a), and I'm going to let
13 Rusty explain the problem. It's a tricky little
14 problem and it has to do with the situation where
15 something was due to be filed on a --

16 What is it, a Monday, Rusty?

17 MR. McMANS: Yeah.

18 PROFESSOR DORSANEO: And Monday is a
19 legal holiday.

20 MR. McMANS: All right. Let me start.

21 PROFESSOR DORSANEO: I'll let him
22 explain.

23 MR. McMANS: There are, interestingly
24 enough, on these little sophisticated problems a
25 split in the two courts of appeals. Unfortunately,

1 I think one of them is no writ and one of them is
2 NRE. The question -- the rules provide that when
3 you dovetail all the computation and extension
4 rules, that if you mail something a day before its
5 due, then that's good enough for all of the things
6 connected with the appeal.

7 On the other hand, there is also the rule
8 that says that when you -- when something is to be
9 filed or you're supposed to do something and the
10 day that you're supposed to do it is a Saturday or
11 a Sunday or a legal holiday, then you get till the
12 next business day, okay, that is not a Saturday,
13 Sunday or legal holiday. The thing that arises all
14 the time is if your motion or whatever is due on
15 Saturday, Sunday or a legal holiday, then you are
16 supposed to, under the rule, mail it the day
17 before. Well, if it's Sunday the day before is
18 Saturday, that's also a Saturday. Therefore, the
19 question is, can you mail it on Monday or must you
20 mail it on Friday, which is actually two days
21 before it's due.

22 And surprisingly enough the courts have
23 applied those rules differently. One has said
24 filing it on -- serving it, that is, mailing it on
25 Monday is good enough even though it's due on

1 Monday and even though you're actually sending it
2 the day it's due. The day you were supposed to
3 mail it is Sunday and you can't mail it on Sunday,
4 so you mail it on Monday and that's good enough.
5 The court recently -- I believe it was Corpus --

6 CHAIRMAN SOULES: How is this written?

7 MR. McMANS: This is written to give you
8 the Monday.

9 CHAIRMAN SOULES: How many favor that?
10 Show of hands.

11 MR. McMANS: It gives you the extra
12 time.

13 CHAIRMAN SOULES: All right. How many
14 opposed? Okay. That's fine.

15 PROFESSOR DORSANEO: Okay. Look at --
16 I'll just point out that the Rule 19, "Motions in
17 the Appellate Courts" -- this is another tricky
18 area. The current rules of appellate procedure for
19 the courts of appeals have or contain no one rule
20 about motions. There are rules about these
21 motions, those motions. There is no general rule
22 saying even what a motion is or what it should
23 contain, what it should look like. This contains --
24 this has that, copied basically from the federal
25 rules. There are other provisions that are taken

1 from the current rules incorporated in here, such
2 as "Docketing Motions," "Notice of Motions,"
3 "Evidence on Motions," "Determination," et cetera.

4 Perversely, paragraph (g) of this rule,
5 "Number of Copies" should have been crossed out
6 because, of course, that's now covered by the
7 general rule on "Signing, filing," et cetera. So
8 that's just an oversight on my part, a clerical
9 error, if you like. So (g) should go.

10 Secondly, the rules about motion practice in
11 the Supreme Court are even really more obscure.
12 There's a rule that says that the rules of
13 procedure applicable in the courts of appeals apply
14 in the Supreme Court when there isn't any guidance
15 in the rules for the Supreme Court. And I presume
16 that means that rules on motions apply in the
17 Supreme Court, but I don't -- for example, I don't
18 know what the motion practice is in the Supreme
19 Court, what its requirements are, et cetera. This
20 rule would take care of that as well.

21 MR. McCONNICO: What rule are we talking
22 about, Bill?

23 PROFESSOR DORSANEO: Proposed Rule 19.

24 CHAIRMAN SOULES: It's on page 33 of the
25 materials.

1 PROFESSOR DORSANEO: Page 33. Well, as
2 far as the court is concerned, what we now have is
3 a rule about motion practice in the appellate
4 courts. It's an all purpose rule that is pretty
5 much a procedural thing rather than having obscure
6 references to motion practices without knowing much
7 about it.

8 Now, there are specific rules about specific
9 motions later. This Rule 19 at the beginning says,
10 "Unless another form is elsewhere prescribed by
11 these rules," and there are other circumstances --
12 situations where there are other rules.

13 Now, I can go quickly through the other
14 changes because there really aren't that many.
15 We've talked about most of them. One of them is in
16 ordinary appeal, how -- when perfected, okay? We
17 have a provision now in the rules of procedure or
18 we have basically several ways to perfect an
19 appeal, bond, cash deposit, notice of appeal when
20 you don't have to post security affidavits. The
21 current rules kind of inadvertently do not give you
22 a 15 day extension --

23 MR. McMANS: On notice of appeal.

24 PROFESSOR DORSANEO: -- when you are the
25 kind of appellant who appeals by giving notice of

1 appeal. That, undoubtedly, was an oversight, and
2 that's been built in to treat that type of
3 appellant the same as all other appellants, giving
4 this 15 day period to cure screwups.

5 We've already talked about the change in the
6 accelerated appeal rule. We've talked about the
7 supersedeas thing. We've talked about preservation
8 of appellate complaints.

9 Please take a brief look at Rule 63. This is
10 more or less again in the nature of reporting. We
11 have no rule in the rules of procedure now dealing
12 with the important subject of the form and content
13 of motions for extension of time. There are many
14 courts of appeals that have local rules requiring a
15 motion to fulfill certain prescribed requirements.
16 We thought that there ought to be a rule in the big
17 rule book that explains that because it is so
18 important and this Rule 63 does it. It is
19 patterned on the Dallas local rule which is a
20 representative local rule in this problem area.
21 There is a companion rule in the Supreme Court part
22 of the rule book which deals with the form and
23 content of a motion for extension of time in the
24 Supreme Court and that it is the same kind of idea.

25 CHAIRMAN SOULES: And criminal appeals.

1 It was also patterned on something that's in the
2 Court of Criminal Appeals.

3 PROFESSOR DORSANEO: Yeah, that's right.
4 That's right. And we also borrowed again, as we
5 have in many instances, from good provisions. And
6 I'm going to talk about another one of those that
7 are currently applicable criminal cases, but we
8 don't have anything like that in the civil area.
9 Another one of those is Rule 69, "Panel and En Banc
10 Submission" on page 108.

11 As far as the civil rules are concerned,
12 there is no rule in the big rule book about panel
13 and en banc submission.

14 On my goodness. Make a note to check whether
15 1812(b) of the revised civil statute -- that that's
16 still right. There may be a change this session.
17 I doubt it. It's probably still --

18 CHAIRMAN SOULES: We're now on page 108
19 of the materials.

20 PROFESSOR DORSANEO: Page 108. And
21 basically now we have a rule about a panel and en
22 banc submission that was worked out by the
23 appellate -- principally the appellate judges on
24 our committees, and that's been added in. It is
25 modeled on criminal appellate Rule 206.

1 Yes, Your Honor?

2 HONORABLE CLINTON: Let me answer your
3 question. It's no longer 1812(b), it's Government
4 Code Section 22.223.

5 PROFESSOR DORSANEO: Thank you, Your
6 Honor. I thought it might be sneaking around
7 there.

8 HONORABLE CLINTON: You'll find that in a
9 couple of places in the rules. You need to change
10 it to the government code.

11 PROFESSOR DORSANEO: I think we did it in
12 the other -- in 1738. I caught that, but I didn't --
13 1728 -- but I didn't catch it on this one. Thanks.

14 CHAIRMAN SOULES: Thank you, Judge.

15 PROFESSOR DORSANEO: Really -- I think
16 I'm really about through. I'm sure that there is a
17 lot more that could be said about this overall
18 package from top to bottom, but I think those are
19 the important changes. I'll probably think of
20 something else of importance, and I would ask any
21 of the committee members to -- or anyone else to
22 raise something.

23 MR. WELLS: Where have you got anything
24 about mandamus proceedings?

25 MR. McMANS: It's in here.

1 PROFESSOR DORSANEO: It would be Original
2 Proceedings in Appellate Courts.

3 MR. McMAINS: Basically modeled after the
4 existing rule.

5 PROFESSOR DORSANEO: Rule 121, "Mandamus,
6 Prohibition and Injunction in Civil Cases" on page
7 141.

8 MR. WELLS: When you tie that in -- does
9 that tie into your Rule 42 motion? Can a single
10 judge decide those things?

11 MR. McCONNICO: That's a good question.

12 PROFESSOR DORSANEO: No, I wouldn't think
13 that that's motions.

14 MR. McMAINS: It's not a motion. That's
15 an original -- application for original proceedings
16 then.

17 CHAIRMAN SOULES: You file a motion for
18 leave to file.

19 MR. McCONNICO: You do file a motion for
20 leave to file. So, why couldn't a single judge
21 hear --

22 PROFESSOR DORSANEO: That's a good
23 question.

24 CHAIRMAN SOULES: Can y'all straighten
25 that out? I'm sure the consensus is that one judge

1 should not be able to decide a mandamus.

2 MR. McMAINS: You want to put an
3 exception in the motion thing that says except --

4 MR. McCONNICO: Motions for leave to file
5 mandamus.

6 MR. McMAINS: Leave to file original
7 proceedings.

8 CHAIRMAN SOULES: Original proceedings.

9 PROFESSOR DORSANEO: Yeah, that motion
10 thing does -- did have a large exception on
11 deciding -- well, deciding cases, didn't it, for
12 rehearings?

13 JUSTICE WALLACE: You're talking about
14 granting motion to file the petition as opposed to
15 granting the mandamus. Now, that's --

16 MR. McMAINS: Right. It's clear that
17 they can't grant a mandamus for --

18 CHAIRMAN SOULES: How many judges act on
19 motion for leave to file?

20 JUSTICE WALLACE: We require three.

21 CHAIRMAN SOULES: That's what I thought.

22 PROFESSOR DORSANEO: Yeah, that needs to
23 be put in there.

24 JUSTICE WALLACE: Those things have a bad
25 habit of coming in at 5:00 o'clock on Friday. And

1 everybody who's there -- we require at least three.
2 If not, hold it over till Monday.

3 CHAIRMAN SOULES: I guess it would be
4 "except in conjunction with motion for leave to
5 file original proceedings."

6 Harry, did you have something on that?

7 MR. REASONER: Was there consideration
8 given to limiting the length of briefs unless
9 changed by motion?

10 PROFESSOR DORSANEO: Justice Hill raised
11 that yesterday. There was consideration given to
12 it and -- at all committee levels. I think Judge
13 Clinton mentioned that that was not a problem on
14 the criminal side any more since one of the judges
15 on the current quota was elective or something like
16 that. But we basically decided not to add in a 50
17 page limitation.

18 MR. McMAINS: We essentially, I think,
19 decided to defer to the courts of appeals if they
20 wanted to impose their own. I assume subject to
21 review of their local practice.

22 PROFESSOR DORSANEO: It was considered
23 and this was decided not to do it.

24 MR. McCONNICO: Have any of the courts
25 done it?

1 MR. McMAINS: Yeah.

2 MR. McCONNICO: Who?

3 MR. McMAINS: Houston and Corpus.

4 CHAIRMAN SOULES: Anything further, Bill?

5 PROFESSOR DORSANEO: No.

6 CHAIRMAN SOULES: Judge Clinton, I would
7 like to invite you now to make any remarks you have
8 about this work product and what you've heard today
9 and whatever considerations you've given us before.
10 If you have any remarks to make, we would be
11 pleased to hear them.

12 HONORABLE CLINTON: The only thing I have
13 to say -- I understand you kind of plowed this
14 ground yesterday -- the only thing I want to say
15 about the court and its rules -- our court and its
16 rules -- I need to emphasize to you that the
17 Legislature has put us under a bind. And if we're
18 going to have to act by January 1 to adopt rules,
19 what the Legislature calls a comprehensive body of
20 rules of procedure and post-trial appellate and
21 review at the same time we have the authority to
22 adopt rules of evidence in criminal cases, we're
23 under the same time constraints.

24 So we're going to get out -- and the
25 importance of that is if we don't do it by January

1 1, we lose the authority to do it, number 1. And
2 number 2, there are certain articles in the code of
3 criminal procedure that are repealable under that
4 act by virtue of adopting the rule. So if we don't
5 adopt a rule that covers the provision in the Code
6 of Criminal Procedures, it's not repealed. We want
7 to do that.

8 Substantially the same situation exists on
9 rules of evidence. What I'm getting ready to say
10 is because of those things, we're going to turn out
11 a product. And when you look at it, you may not
12 like it. I'm sorry. But we just don't have the
13 time to go through all of this again. We've been
14 through it once, what we had. We don't have the
15 time to go through it again between now and January
16 1. And I'm sorry if you don't like it, but we're
17 under that -- we feel -- obligation to do it for
18 very good sound policy and practical reasons. That
19 is for us to get that authority and keep it and run
20 with it.

21 So the point is even though you don't like
22 what we turn out, and we may not like it either,
23 we're going to put an effective date -- we're not
24 under any limitation on when they become effective.
25 We'll put an effective date down the road and then

1 with patience and care and tender loving kindness
2 we will go through all of this and other things and
3 eventually come up, as I've told Justice Wallace,
4 with that great desired one book.

5 And unless somebody has some questions about
6 any of this, well, that's all I have to say. And I
7 think that's about all that needs to be said on the
8 subject.

9 CHAIRMAN SOULES: I know this committee
10 certainly understands your time constraints and
11 appreciates them. And furthermore, we also very
12 much appreciate your willingness after that January
13 1 deadline, very important deadline, to work with
14 us, conference committees or what have you, between
15 the court, whose committee this is, and your
16 committee and your court and us, to get a work
17 product out finally that is harmonious. As you
18 said, the one great book. And we'll work, Judge,
19 with you at your convenience and at your direction
20 as well.

21 Rusty.

22 MR. McMAINS: I just want to make one
23 addition to the stuff that we really didn't --
24 there is one other change of significance, that is
25 the extension of time that was put into the rules

1 in 306(a) as to the trial courts, has been added to
2 the appellate courts which means, basically, that
3 if you don't get notice of a motion for rehearing
4 as required by the rules, then you get an extension
5 by proving by affidavit or whatever or petitioning
6 the appellate court, saying that you didn't get the
7 notice and you didn't acquire actual notice. Now,
8 there's an outer parameter there, just like the
9 other rule, 306(a), of ninety days.

10 So if you have not gotten, for instance, the
11 notice of overruling or motion for rehearing, but
12 it was, in fact, done, you got, in essence, a
13 ninety day grace period in which to -- your times
14 for filing a motion for extension doesn't run until
15 that motion is granted. So --

16 CHAIRMAN SOULES: Okay. Let's see if we
17 can wrap this up.

18 MR. McMANS: That's in Rule 5, I
19 believe, isn't it?

20 PROFESSOR DORSANEO: Yes, it would be in
21 paragraph (e) of Rule 5 on pages 10 and 11.

22 CHAIRMAN SOULES: Okay. Let's see if we
23 can wrap this up.

24 First of all, I know that the committee is
25 very appreciative, Rusty, of your work, and, Bill,

1 of your work in getting this report to us in the
2 shape it is in and with the relatively few number
3 of changes, I think, that have been suggested here
4 yesterday and today. You must feel substantial
5 feelings of accomplishment that you've got this
6 work product where it is. I know I certainly do
7 feel so.

8 I would like to get now a consensus from the
9 committee if you're now prepared to, with the
10 change that we've suggested over the last two days
11 in session, to recommend to the Supreme Court --
12 this is for Bill's guidance in putting out a final
13 product that we will act on in March, as we did
14 these evidence rules yesterday. They were, in
15 essence, passed on on May the 31st and then brought
16 up yesterday just in a clear text, final text. And
17 that's essentially what I, as chair, expect us to
18 do on these appellate rules next time, is a very
19 final approach to recommending to the Supreme Court
20 the adoption of these rules without a major combing
21 through them again. We'll be looking at other
22 major problems next time. This will be just a
23 small part of our agenda.

24 Well, now that you understand how I perceive
25 this, I want to ask that the committee, in that

1 same vein is prepared to, with the changes we have
2 suggested, recommend to the Supreme Court of Texas
3 that this report be adopted and be prepared to
4 finalize that on -- in our March 7th meeting. How
5 many so feel?

6 HONORABLE WOOD: I hate to say a thing in
7 the world, but I had, on page 10, noticed this
8 subparagraph (d) before.

9 Is Mr. Tindall here?

10 Well, he had a problem, I guess, is the word
11 for (d) there. And I'm on the subcommittee, and I
12 think I know what it is. He points out that,
13 looking at paragraph (d), you take a judgment in a
14 case where you have published service. Then the
15 rule says that you have two years to file a motion
16 for a new trial. All right. You file that motion,
17 say, in a year and a half or something of that
18 sort. Then he says if it's been filed more than 30
19 days, the motion, it shall be presumed then that
20 the judgment was signed 30 days before that motion
21 was filed. Now, the motion is filed, say, a year
22 and a half, more than 30 days. The rule then says --
23 and it may be changed in here. Y'all can tell me --
24 the rule then says that you shall serve the parties
25 affected by it with service. You shall serve them

1 the citation. And they shall then come in -- and
2 the motion will be right for hearing, the motion
3 for rehearing. Okay. Now what it is is a motion
4 for new trial. And when you file it, why then your
5 30 days has already run. Okay. You get service by
6 citation to serve these people, why you're looking
7 at 20 odd additional days. That's, say, 50
8 something. It's got to be ruled on within 45.

9 MR. McMAINS: It's actually -- you
10 actually have 105 from the date of judgment --

11 HONORABLE WOOD: All right. So --

12 MR. McMAINS: -- within whatever
13 jurisdiction it arises. So you're -- actually
14 you've got 75 days from the date you file your
15 motion if you're -- given the way this rule reads.

16 HONORABLE WOOD: All right. Now, Tindall
17 points out, then, that you've got 30 days plus time
18 to get service, that's 50, maybe, maybe 55 --

19 MR. McMAINS: Maybe longer.

20 HONORABLE WOOD: -- maybe longer than
21 that. And you're cutting it pretty fine then to
22 get a hearing on your motion under those
23 circumstances. Now, I think I told somebody that
24 some people have achieved -- some people are born
25 great, some have it -- achieve it, some have it

1 thrust upon them. As a -- I myself, in looking at
2 his problem, drafted something. And if --

3 Russell, if it's not handled in what you've
4 got here, I will be glad to read what I wrote.
5 Short, of course.

6 CHAIRMAN SOULES: Why don't we hear what
7 you've written there, Judge.

8 HONORABLE WOOD: I sent this around to a
9 few people, but not to the entire committee -- I
10 mean not to the lawyers committee, because I
11 assumed that somebody -- one of our chairman would
12 be here.

13 MR. McMAINS: Can I ask you this
14 question? Would it solve his problem, at least
15 give you an initial 30 days, if it says that it's
16 deemed -- the judgment is deemed signed the date
17 that the motion is filed? Because that gives you
18 the extra 30 days that we just took away from you.

19 HONORABLE WOOD: I would think that would
20 be all right, because that would have him then --
21 he could get his --

22 MR. McMAINS: Why don't we do that?

23 Do we have a real good reason for not doing
24 that, Bill?

25 PROFESSOR DORSANEO: No, and quite

1 frankly --

2 MR. McMAINS: In fact, there probably
3 should be -- in fact, there is a good reason to do
4 it, because you don't know -- you may have left
5 something out or something that you might get
6 special exceptions on, and you don't have the --
7 outside the 30 days you don't have the power to
8 amend it.

9 CHAIRMAN SOULES: Let's look at --

10 PROFESSOR DORSANEO: This problem here
11 that is now embodied in this proposed Rule 5 is a --
12 basically a Rule 306(c) problem, and that rule is a
13 problem, current rule. I mean, that's part -- what
14 you're pointing out, Your Honor, is really just
15 already there in paragraph 7 of 306(a) -- pardon
16 me, current Rule 306(a). And that rule could be --
17 could take up a whole two days, in and of itself,
18 and I think did a couple of years ago and still
19 could.

20 MR. McMAINS: He's talking about (d).
21 He's not talking about (e). He's talking about in
22 the situation where you got process served by
23 publication.

24 PROFESSOR DORSANEO: Yes, right. Well,
25 I'm saying that particular language is verbatim out

1 of current Rule 306(a).

2 HONORABLE WOOD: Well, that's what he was
3 complaining about, current Rule 306.

4 MR. McMAINS: What I'm saying is you --
5 but if you just change -- his particular problem is
6 just the time. We've taken 30 days off his -- off
7 the trial court's disciplinary power, even though
8 they have various and sundry obligations to do
9 service and stuff that are not typical of a motion
10 for new trial.

11 CHAIRMAN SOULES: Well, are you going to
12 just strike "30 days before" out of the text?

13 MR. McMAINS: As if the judgment were
14 signed on the date of filing of the motion.

15 CHAIRMAN SOULES: Okay. So you just
16 strike out "30 days before," those three words and
17 leave it otherwise intact?

18 MR. McMAINS: Except you put "on" --
19 strike out "30 days before" and put "on the date of
20 filing the motion."

21 CHAIRMAN SOULES: All right. How many
22 feel that should be done? Opposed? All right.

23 PROFESSOR DORSANEO: I don't know why
24 Clarence put -- I don't know why he put that in
25 there, so I have no way of knowing what in the

1 world it's about.

2 CHAIRMAN SOULES: Well, if it -- will you
3 please check with him and if it is something
4 important, give it some consideration -- some
5 additional consideration?

6 HONORABLE WOOD: I think we know why he
7 put it in. If you key it into the rules about the
8 steps going from the judgment, I don't see that
9 that would do violence to it, but it might.

10 CHAIRMAN SOULES: With that additional
11 change, then, how many feel that -- and subject, of
12 course, to conference committees with the Court of
13 Criminal Appeals, how many feel that these rules,
14 when they incorporate these changes, will be ready
15 for recommendation to the Supreme Court of Texas
16 for adoption, please raise your hands. And how
17 many opposed? That's unanimous.

18 All right. Sam, sorry we don't have a bigger
19 audience for you, but --

20 MR. SPARKS: An audience is an
21 unimportant quality or perserverance, one of the
22 two.

23 I think I'll just try to bring the ones that
24 have given most of the lawyers concerns. If you
25 turn first to page -- well, I don't have them

1 numbered, but rule -- we stopped at Rule 101. Rule
2 101, it's been suggested, removed the "Monday next
3 after twenty days" and make it "twenty days." Most
4 everybody that I have talked to are not in favor of
5 that. They like the seldom call from New York or
6 California to explain to those lawyers what it
7 means. But, the part of the rule that has been
8 suggested reads "The citation shall include a
9 simple statement to the defendant to inform the
10 defendant that he has been sued, has the right to
11 employ an attorney, and that, if a written answer
12 is not filed with the appropriate court within
13 twenty days after service of citation and petition,
14 a default judgment may be taken against the
15 defendant." And we think that's a good inclusion in
16 this particular rule because all of us have run
17 across that poor fellow who was served and was
18 walking from court to court on a Monday trying to
19 find out where he's supposed to appear. But not a
20 major significance on Rule 101, so that seems, to
21 me, an easy one to decide what you want to do
22 there.

23 There are two changes in it, to make it
24 "twenty days" and to have the citation read as
25 indicated.

1 CHAIRMAN SOULES: Okay. How many feel
2 that the awkwardness of the "Monday next" language
3 should be removed from the rule and should be a
4 specific number of days after service, raise your
5 hands please? One. How many feel that the rule --

6 I'm sorry, Ned, excuse me. My apologies to
7 you. Two.

8 How many feel otherwise that we ought to just
9 leave it like it is? Six. And that --

10 We don't need to change that, Sam. If you'll
11 leave that part of it as is.

12 How many feel that we should have a plain
13 English statement, such as the other suggestion
14 that advises a party served with citation, as this
15 does advise them? How many feel that? How many
16 feel otherwise? Okay. That's unanimous. So the
17 language in that advisory should incorporate
18 "Monday next after 20 days," which we're going to
19 maintain that awkwardness. But the rest of it, I
20 guess, will be in plain language.

21 MR. McMAINS: I have one question,
22 though. If the wording is exactly, it says, "you
23 have a right to retain an attorney."

24 MR. SPARKS: And it says, "has to inform
25 him that he has been sued and has the right to

1 employ an attorney."

2 MR. McMAINS: I'm only concerned in this
3 day and age of civil rights if they think that
4 they've got a right for somebody to pay for a
5 lawyer. I mean, I don't know whether that language
6 is ambiguous in that regard, but there are, of
7 course, cases pending in the Supreme Court on
8 whether or not -- in the United States Supreme
9 Court, the circuits on the rights of indigents to
10 counsel in civil cases.

11 MR. BEARD: Well, I don't see language
12 about an attorney in any other states. And telling
13 them that a default judgment will be taken against
14 them is sort of routine on citations out of other
15 states. But I have never seen the language which
16 says you have the right to an attorney.

17 MR. McMAINS: All I'm saying is do you
18 want to say, "his right to retain an attorney" or
19 say, "may wish to contact an attorney" or "may wish
20 to hire an attorney" or something? Something that
21 would suggest that we aren't -- the county is not
22 suggesting we're going to pick up the tab, is all
23 I'm saying.

24 CHAIRMAN SOULES: How many feel that
25 there should be any information in this advisory

1 concerning an attorney?

2 MR. McCONNICO: Say that again, Luke.
3 I'm sorry.

4 CHAIRMAN SOULES: What I'm saying is
5 should we just limit it to, "You've been sued and a
6 default judgment is going to be taken," and omit
7 any reference to an attorney? How many feel we
8 should omit a reference to an attorney? That's
9 four. How many feel that there should be a
10 reference in the advisory to an attorney? Six.
11 Okay. We should have a reference -- is this the
12 one we want to use? Does anyone have a --

13 MR. SPARKS: I'll go ahead and draft
14 another one that just simply says "you may" or
15 something along those lines.

16 MR. McMANS: Yeah, "you may hire an
17 attorney" or "you may consult an attorney." I just --

18 CHAIRMAN SOULES: "You may employ an
19 attorney," something along those lines. Okay.

20 MR. SPARKS: Yeah, I've got to redo it
21 anyway, so I'll redo it that way.

22 MR. RAGLAND: Let me ask a question here.

23 CHAIRMAN SOULES: Yes, sir.

24 MR. RAGLAND: What is the anticipated
25 effective date of this rule?

1 CHAIRMAN SOULES: We don't have any
2 control over that, really. The Supreme Court really
3 promulgates these rules, sets an effective date.
4 What is the concern?

5 MR. RAGLAND: Well, the concern is you've
6 got 254 counties that have to buy these printed
7 citations up and they may need more lead time on
8 something of a change of this magnitude, than
9 otherwise, because I'm sure that some of them got a
10 years supply already and want to use them up. But
11 the logistics of getting them printed and in hand
12 probably ought to be considered.

13 MR. McMAINS: We might consider modifying
14 in some way the citations rule that would authorize
15 the use of a stamp.

16 CHAIRMAN SOULES: What about saying, "the
17 citation shall include or be accompanied by" a
18 simple statement?

19 MR. McMAINS: Yeah.

20 MR. SPARKS: Okay.

21 CHAIRMAN SOULES: Or something. That may
22 be an awkward way of saying it, but you could
23 staple an advisory on the citations that they're
24 already using, if we did it that way. We want to
25 be able to accommodate a clerk just stapling or

1 somehow attaching the advisory to a current form,
2 Sam.

3 MR. SPARKS: Okay. I'll do that.

4 CHAIRMAN SOULES: Okay. If we do that,
5 then -- as I understand it, the committee is
6 unanimous that such an advisory should be afforded
7 a party to serve the citation.

8 MR. McMAINS: I personally think you have
9 less problems if, in fact, you stamp it. It will
10 cost a whole lot less for a rubber stamp. You're
11 going to otherwise have the problem of what happens
12 if that notice -- if they deny that they got that
13 notice. I mean, you know, if you're stapling and
14 putting separate documents and --

15 MR. BEARD: It's not going to affect what
16 happens, at all, if it's left off, is that it?

17 MR. McMAINS: Well, I'm not sure that's
18 true, though, with the strictness of compliance
19 with the citation rule in order to sustain a
20 default.

21 MR. SPARKS: The next rule is 103, and we
22 had a lot of input on that. It changes that if the
23 lawyer wants the clerk to mail a registered
24 certified mail, the rule would change to where the
25 clerk must do it. And apparently this has been a

1 problem everywhere. I know it has been in our part
2 of the world. The clerk just won't do it. You
3 have to go down and try to find a deputy sheriff,
4 and sometimes they're not too reliable. The
5 constables are less reliable sometimes. This looks
6 like a good rule and I certainly recommend it. It
7 changes the world "may" to "shall if requested."

8 MR. McMANS: Second.

9 CHAIRMAN SOULES: Discussion? In favor?
10 Hold up your hands. Opposed? It's unanimous for
11 the change.

12 MR. SPARKS: Rule 106 is the next one and
13 this is to make service more easy. And it changes
14 -- adding a "good cause therefor," but allows the
15 court more latitude in using, I assume,
16 professional process servers. I had several
17 letters on this. Apparently it's a good rule or a
18 good recommendation.

19 CHAIRMAN SOULES: What it does is permits
20 any interested adult or disinterested adult to
21 serve a citation, but only on order of the court
22 permitting substitute service, is that right?

23 MR. SPARKS: That's right.

24 CHAIRMAN SOULES: So, you've got to have
25 a court order permitting substitute service. Now --

1 MR. SPARKS: But you can do it by motion
2 rather than -- you know, technically you're
3 supposed to go down and try it one time and then --
4 apparently in the divorce area this has been
5 requested a lot, so that you don't have to go
6 through the getting an affidavit from the deputy
7 that they've tried it and that type of thing. It
8 appears to be a good rule.

9 CHAIRMAN SOULES: Well, it's the first
10 step to -- prior to this you had to go attempt
11 service before you could go to the court and ask
12 for substitute service. This just eliminates the
13 necessity for attempted service prior to asking for
14 substitute service, is that correct?

15 MR. SPARKS: Yeah, and it's my
16 understanding and I've sure seen it in El Paso.
17 People are doing this anyway, they're just going
18 and getting a court order on a motion on doing
19 service that way. I don't know if it's been
20 challenged or not, but I think it's one that we
21 ought to accept.

22 CHAIRMAN SOULES: How many favor the
23 suggested change, please show it by hands? Those
24 opposed? Again, that's -- the committee is
25 unanimously for the change.

1 MR. SPARKS: The next one is Rule 162.
2 What we have tried to do in 162 is we had a couple
3 of letters from district judges who had questions
4 as to whether or not they had to sign an order of
5 dismissal on non-suits. Then we had several
6 letters from lawyers -- and I'll have to admit, I
7 didn't know that you could go down there and just
8 file a notice of dismissal under the existing
9 rules, but you can. I think the problem is that
10 most of us who practice don't realize we could.

11 What we've tried to do in 162 is combine a
12 lot of suggestions allowing a dismissal and
13 preserve the same precautions that a dismissal has
14 no effect on any pending motion for sanctions and
15 that it's suppose to be accompanied by the payment
16 of the court costs. But it allows it from any time
17 up and through introduction of all the evidence
18 other than rebuttal evidence. But this is a
19 change, and we're combining a couple of rules.

20 MR. McMAINS: Sam, the only question I
21 have is in the second part of the underlying it
22 says, "any dismissal...shall not prejudice the
23 right of an adverse party to be heard on a claim
24 for affirmative relief." What I'm wondering is
25 shouldn't there be some kind of requirement that

1 that claim has been pending at the time? I mean,
2 that would appear to say that if the other party
3 comes in and says, "Hey, I've got a claim here. I
4 just haven't had a chance to file it yet."

5 MR. SPARKS: After it's dismissed?

6 MR. McMAINS: Yeah.

7 CHAIRMAN SOULES: Start a new lawsuit.

8 MR. McMAINS: Well, I understand that,
9 but it may be -- I mean, what you're really talking
10 about are venue situations a lot of times, choices
11 or -- maybe pending service someplace.

12 PROFESSOR BLAKELY: Put the word
13 "pending" in there. "Heard on a pending claim."

14 MR. McMAINS: "Be heard on a pending
15 claim." How about that?

16 MR. SPARKS: That's fine.

17 PROFESSOR BLAKELY: That's what you've
18 got in the next sentence anyway.

19 MR. McMAINS: Right. And I think that it
20 says -- it says, "or the payment of all costs taxed
21 by the clerk." I personally think that if it's
22 effective on the notice filing, that they ought to
23 be taxed with the cost. I mean, if you're going to
24 non-suit, you get taxed by the cost by order
25 anyway. Why --

1 MR. SPARKS: A lot of the orders, they
2 neglect to do that. And, of course, there's not --
3 they're just filing a notice. Now, it would be
4 just --

5 MR. McMains: Why -- I understand that --
6 but when I say -- what I'm saying is shouldn't the
7 rule provide that upon filing of the notice,
8 dismissal is effective and costs shall be taxed
9 against the dismissing party?

10 MR. SPARKS: Yeah, I think that's a good
11 point.

12 JUSTICE WALLACE: As I recall, the last
13 case or two we've looked, the only thing they
14 questioned was when that dismissal was effective.

15 MR. McMains: That's right.

16 MR. McConnico: That's exactly what, I
17 think, Rusty is saying.

18 MR. McMains: That's what I'm trying to
19 do is let's find out when -- yeah, if it's going to
20 be effective immediately, let's go ahead and tell
21 the clerk that upon the filing of the notice, that
22 they get to go get the money from them.

23 MR. McConnico: Yeah, but it's still --

24 MR. McMains: That's the final judgment,
25 then, from that standpoint, or at least terminated

1 that litigation.

2 CHAIRMAN SOULES: Are you suggesting that
3 the last sentence be deleted or changed then?

4 MR. McMANS: No.

5 CHAIRMAN SOULES: Well, is the dismissal
6 effective if the costs are not paid cash money?

7 JUSTICE WALLACE: According to the
8 decision it is.

9 MR. McMANS: It's effective, it just is
10 -- the problem is that if you don't have an order
11 taxing costs, then the clerk has got to figure out
12 how it is that it's entitled to get it.

13 MR. SPARKS: Well, how about changing the
14 last sentence to read "any dismissal pursuant to
15 this rule shall be accompanied by the payment of
16 court costs as taxed by the clerk to be effective"?
17 Too simple?

18 CHAIRMAN SOULES: That's, in effect, what
19 it says.

20 JUSTICE WALLACE: I think that's a pretty
21 radical change to say that the case cannot be -- if
22 the case is not dismissed until the cost is paid,
23 is that what you were -- is that the intent of --

24 MR. McCONNICO: That's not what I want,
25 no.

1 CHAIRMAN SOULES: That's what's written
2 here, though, see.

3 MR. McCONNICO: That's what -- I agree.

4 CHAIRMAN SOULES: What we ought to be
5 doing is saying that as soon as it's dismissed, the
6 clerk taxes cost. "The clerk taxes cost and
7 execution" -- "shall issue" or something like that
8 rather than -- because the way this reads, it's all
9 -- you could say it's a condition of a dismissal
10 that the costs be paid.

11 MR. SPARKS: That's true and that's part
12 of one of the suggestions.

13 CHAIRMAN SOULES: That is a suggestion?
14 How many feel that that -- that a condition of
15 dismissal or non-suit should be the actual payment
16 of costs? No one. All right. There -- the
17 committee is opposed to that unanimously. How many
18 feel that the clerk should be directed by a rule to
19 automatically tax costs against the dismissing
20 party at the time of the dismissal? Those opposed?
21 Okay. The committee is unanimously in favor of
22 taxing the costs automatically against the
23 dismissing party at the time of the dismissal.

24 JUSTICE WALLACE: Now, are you talking
25 about all costs incurred, period?

1 CHAIRMAN SOULES: That's the way I
2 understand it.

3 JUSTICE WALLACE: In other words, we're
4 not attempting to change the -- listing of costs by
5 this rule, are we?

6 CHAIRMAN SOULES: I understand that we
7 are.

8 MR. McMAINS: What do you mean?

9 CHAIRMAN SOULES: That all costs would be
10 taxed against the dismissing party?

11 MR. McMAINS: That's what I'm trying to
12 get.

13 MR. SPARKS: That's the way it is now.

14 JUSTICE WALLACE: Is that it?

15 MR. McMAINS: Yeah. I mean basically now
16 if you want to non-suit, you've got --

17 MR. McCONNICO: Pay everything.

18 MR. McMAINS: You've got to pay all the
19 costs.

20 MR. RAGLAND: Well, that's up to the
21 judge.

22 MR. McMAINS: Except that the judge
23 could, I suppose, if there is something done by the
24 other -- there is some discretion. We have a cost
25 rule is, I guess, the problem. It gives the court

1 the power not to tax costs.

2 JUSTICE WALLACE: And my point is are we
3 changing the cost rule here? That's the only
4 reason for the question.

5 CHAIRMAN SOULES: Why don't we say,
6 "unless otherwise ordered by the court, the clerk
7 needs to automatically" -- then that would
8 recognize that the court still has discretion to
9 order those costs. And "the dismissal may be made
10 in open court and requests that costs be assessed
11 against the non-dismissing party," for whatever
12 reason. There may be some reasons, maybe abuse of
13 discovery.

14 MR. SPARKS: We could say "any dismissal
15 in accordance with this rule shall authorize the
16 clerk to tax costs against the dismissing party
17 unless otherwise ordered by the court."

18 MR. McMANS: That's fine.

19 CHAIRMAN SOULES: Dorsaneo.

20 PROFESSOR DORSANEO: I think that there
21 has been an inconsistency or at least some
22 puzzlement in these rules, 162, 3 and 4. But we
23 are changing 164 -- this proposal of changes, as I
24 understand it, 164 which authorizes the taking of a
25 non-suit, without telling you how you do that, to

1 indicate that, in effect, you take a non-suit by
2 filing a notice of dismissal, and that's the only
3 way you do it, right?

4 MR. McMANS: Yes. That's authorized now
5 is the problem.

6 PROFESSOR DORSANEO: Right. Now you take
7 non-suits, not only as to whole cases, but as to
8 parts of cases, that is to say as to -- take a
9 non-suit as to one defendant by amending your
10 pleadings and not including that defendant in the
11 petition. Right?

12 MR. McMANS: I see what you're saying.
13 You're saying what about a partial dismissal?

14 PROFESSOR DORSANEO: What about a partial
15 case?

16 MR. SPARKS: It does not address that.
17 That's a good point.

18 PROFESSOR DORSANEO: I mean two issues.
19 Do we want a partial case -- a partial non-suit to
20 require a notice of dismissal? And secondly, do we
21 want something about the costs?

22 MR. McMANS: Yes, I think the notice of
23 -- my position is notice of dismissal should be
24 accomplished -- should accomplish it. But secondly
25 what you should probably do is to assess all costs

1 paid by the dismissed party or otherwise taxable to
2 the dismissed party. Those are the costs you
3 really want to pay at that time. You shouldn't
4 have to pay all the costs accrued. You should have
5 to pay -- if you have not dismissed the whole case,
6 you should have to pay the costs that the dismissed
7 party has incurred.

8 CHAIRMAN SOULES: Sam, can we just defer
9 that back to you for handling that problem and
10 we'll look at the language next time in March?

11 (Short break.)

12 CHAIRMAN SOULES: Sam, could we maybe
13 skip over to that 207(1)(b) or do you want to take
14 up something else first? That was the thing that
15 we --

16 MR. SPARKS: Let me take up 166c and 204.

17 CHAIRMAN SOULES: All right.

18 MR. SPARKS: Because we got -- we have
19 received more letters, complaints than anything on
20 those particular rules. The two requests probably
21 are best exemplified by Mr. Haworth's
22 recommendation on 166c. They want depositions to
23 be taken before any person, at any time or place,
24 upon any notice, and in any manner. And what
25 really the recommendation is is to go back to allow

1 the attorneys to stipulate that a deposition can be
2 taken without waiving the form of the question and
3 nonresponsiveness of the answer.

4 There are two proposals. One would go back
5 to the old practice and two would continue, unless
6 there is an agreement of the parties, the form of
7 the question and the nonresponsiveness of the
8 answer to still be as they are today. And so, I
9 think we need to --

10 Luke, we need to decide, one, do we want to
11 allow the lawyers to make agreements and change the
12 rule, and if so, then do we want to continue the
13 existing rule as to objections to the form of the
14 question and nonresponsiveness of the answer if
15 there is no agreement. I think those are the two
16 factors we need to decide, and then we can draft
17 the rule pretty easily. And, of course, that goes
18 to both 166c and 204.

19 PROFESSOR DORSANEO: I move the adoption
20 of proposed Rule 166c as drafted.

21 CHAIRMAN SOULES: Okay. But --

22 MR. WELLS: That's the one that begins
23 "Unless the court orders otherwise...?"

24 MR. SPARKS: Yes, sir.

25 CHAIRMAN SOULES: It says unless the

1 court orders otherwise, a party can make agreements
2 in writing.

3 MR. McMains: You say may be taken before
4 any person, you mean can you use the secretary, is
5 that what you're saying?

6 MR. McConnico: That's what they're
7 saying.

8 MR. McMains: You don't need a shorthand
9 reporter or --

10 MR. McConnico: Tape recorder or
11 anything?

12 MR. McMains: -- anybody else?

13 MR. Morris: They're against that.

14 MR. Sparks: That's being done now,
15 though.

16 MR. Morris: Well, let me ask you, what --
17 maybe I've just got it too easy down here, but we
18 haven't had any problems, and I practice a good bit
19 around the state. What's the problem that creates
20 this need?

21 CHAIRMAN SOULES: Well, Lefty, the
22 problem that gave rise to the interest that's
23 demonstrated here was much narrower than what's
24 written here. And that was a statement in a speech
25 given by Justice, now Dean, Barrow, shortly after

1 the adoption of 166 -- well, whatever the rule is
2 that says that you -- 204, that you can't waive
3 objections to form -- I mean, that you must make
4 objections to form and responsiveness at the time
5 of the deposition, when that new rule came in.
6 Actually it wasn't new law. That's what the law
7 was, but it was written into the rules.

8 Justice, now Dean, Barrow, in making a
9 speech, early after the adoption of those rules,
10 stated in his speech that that could not be waived
11 by agreement of the parties. And that view
12 prevails in some areas and in the minds of some
13 judges, that you cannot waive the necessity at the
14 time of the deposition to make objections to the
15 form of the questions and the responsiveness of the
16 answers. Now, that was never discussed at the
17 COAJ. It was never discussed in the Advisory
18 Committee and it was never the intent of that
19 addition to that rule that that be non-waivable by
20 agreement. But since -- and I think maybe judge --
21 that part of -- that that part of Justice Barrow's
22 speech eventually got published in a law review or
23 advanced civil trial court or something. So some
24 people believe that.

25 MR. McMAINS: Are you saying it is

1 non-waivable even by agreement?

2 CHAIRMAN SOULES: That's right.

3 MR. McMains: That's what his position
4 is?

5 CHAIRMAN SOULES: That's what Judge
6 Barrow's position is, and it prevails, in some
7 areas, some people's thinking.

8 PROFESSOR DORSANEO: It's an "F" in my
9 course.

10 CHAIRMAN SOULES: Everybody here say -- I
11 mean, everybody believes -- I've never heard anyone
12 dissent from the proposition that we now need to
13 make it clear that that's waivable. If the parties
14 want to waive objections to form and
15 responsiveness, they can. They better say when
16 they waive them to, do they waive them to the day
17 before trial, is that still a part of the form of
18 the deposition, which was the whole problem to
19 begin with? Or do you waive them until the time of
20 trial, which means that you don't know until you
21 offer the testimony whether or not the other side
22 is going to say you led the witness and now you're
23 calling him as your own and you're out of -- you're
24 out of luck, you can't use those questions.

25 But anyway, it's a serious proposition to

1 waive it. You really need to know what you're
2 doing, but everybody believes that I talk to that
3 it should be waivable. Now, that's where this all
4 began, and then whenever they started talking about
5 -- well, if the parties can agree to waive that,
6 why don't we say they can agree to do anything
7 unless they're precluded by order of the court.
8 And that was how this 166c came into being.

9 But the problem that really needs to be
10 addressed is to state that objections to form and
11 responsiveness can be waived. How much beyond that
12 we go --

13 MR. SPARKS: But that's handled in 204.
14 Well, let me -- Lefty, I don't know why, but
15 California lawyers and Arizona lawyers that we
16 depose out in our part of the country, every
17 question that's asked, they simply say, "object to
18 the form of the question." I mean, it's just that
19 that's their practice. And -- "object to the
20 nonresponsiveness of the answer." I mean, "what's
21 your name?" "Object." You know, and depositions get
22 to be 400 pages. Well, it's remarkably true.

23 But, in any event, we recommend Rule 166c
24 that -- did we approve that or is that before the --

25 CHAIRMAN SOULES: A motion has been made

1 to approve.

2 MR. SPARKS: I second it.

3 CHAIRMAN SOULES: And seconded.

4 MR. McMAINS: I have one question.

5 CHAIRMAN SOULES: Rusty.

6 MR. McMAINS: Yeah, the only problem I
7 have is that if your intent is to, in essence,
8 convince the judges that these are effective, when
9 you say, "unless the court orders otherwise," is
10 that a little broad? I mean, suppose the court --
11 you do it, you do the agreement and then the court
12 decides later on that they're not going to enforce
13 the agreement, then what do you do? There's no
14 procedure for the court ordering otherwise. I'm
15 not sure --

16 PROFESSOR DORSANEO: The language itself
17 was taken verbatim from existing Federal Rule 29.
18 It begins that way, and I don't know why it begins
19 that way.

20 MR. SPARKS: We could start it "The
21 parties may." I think you're right. I don't know
22 why in the world it's there.

23 MR. McMAINS: I mean, frankly, if the
24 parties agree to it, what business is it of the
25 court?

1 MR. SPARKS: Well, when you tie it into
2 204, the court becomes involved. But, sure, we
3 could eliminate that phrase. It's just a carryover
4 from the federal rule.

5 CHAIRMAN SOULES: You're including
6 waiving the oath, too?

7 MR. SPARKS: The way this is written, I
8 think you could do almost anything.

9 CHAIRMAN SOULES: A deposition is a
10 deposition. Q and A -- transcript of the Q and A
11 without an oath, is that a deposition?

12 Tom.

13 MR. RAGLAND: I agree with the concept of
14 proposed Rule 166c. My question is why not include
15 it under Rule 11 which is referred to as
16 stipulations and not lend it just to depositions or
17 discovery matters here, but anything that the
18 parties are wanting to agree to, with the exception
19 of conferring jurisdiction on the court, which they
20 couldn't do.

21 MR. McMANS: Well, there is another rule
22 on stipulations, I think, is there not?

23 MR. RAGLAND: Rule 11, yeah.

24 MR. McMANS: No, there's another rule in
25 here, proposed, on stipulations.

1 CHAIRMAN SOULES: There was some talking
2 about the -- quite a bit of talk about the
3 placement of this rule. And because it deals so
4 directly with discovery, they wanted to put it
5 right behind 166b, which is the discovery scope
6 rule.

7 PROFESSOR DORSANEO: In fact, I might
8 want to put it in 166b, which is the discovery
9 general provision.

10 CHAIRMAN SOULES: There was talk about
11 putting it in 166b, as a part of 166b, which is the
12 general discovery provisions, as Bill has said.

13 PROFESSOR DORSANEO: But it's not in
14 Federal Rule 26.

15 CHAIRMAN SOULES: But that was the reason
16 for the placement of it.

17 MR. BEARD: I move the question.

18 CHAIRMAN SOULES: All in favor, say aye.
19 Oppose? That's unanimously for.

20 MR. SPARKS: Then if we go -- switch over
21 to 204. 204 preserves the right on non-waiver
22 unless it's by agreement. And we just added the
23 phrase "unless otherwise agreed between the parties
24 or attorneys by agreements recorded by the officer"
25 taking the deposition of course. So, if you don't

1 agree and you're not waiving the -- you know, you
2 said it's a statement by Judge Barrow, but this
3 rule says that, Luke, in my judgment.

4 MR. McCONNICO: In defense of Judge
5 Barrow he said that in a lawyer review article --
6 he said he sees that the rule could be interpreted
7 to say that. He didn't say that felt that -- he
8 says he feels that, you know, the rule could be
9 interpreted to say that.

10 MR. SPARKS: But in all the state bar
11 seminars everybody has been instructed that they
12 are not -- that, you know, you can't waive them.
13 So we need to --

14 CHAIRMAN SOULES: Not in all of them,
15 because I speak at some of them. And I believe
16 that's wrong.

17 MR. SPARKS: But anyway, we recommend
18 that modification to Rule 204.

19 PROFESSOR DORSANEO: Which one is it,
20 though, Sam, that you're -- the language? Is it
21 the -- I have a couple of them in here, Rule 204.

22 MR. SPARKS: Yeah, you're right.
23 Haworth's was accompanying the one we did, Judge
24 Barrow and Luke's. I don't see any difference in
25 either of them.

1 CHAIRMAN SOULES: Let me see. Where is
2 Haworth's?

3 MR. WELLS: It's just one ahead of yours.

4 MR. SPARKS: They're back by --

5 MR. McMAINS: The second one looks better
6 to me. I just -- the 204(4).

7 MR. SPARKS: Yeah, it's more traced on
8 the older Rule 204. I don't think it makes any
9 difference.

10 MR. McMAINS: Well, one thing is that it
11 talks about recorded by the officer, which I'm not
12 sure what -- the first one talks about an agreement
13 to waive anything almost.

14 MR. BEARD: But he starts off "The
15 officer taking an oral deposition." I think it's
16 clearer.

17 MR. McMAINS: So does the next one.
18 Should we change that to "officer" or "person"?
19 Should we change it to "person"?

20 MR. SPARKS: Well, I'm not -- we can do
21 anything we want to, but the -- we didn't change
22 that part of the rule. That's the existing rule.

23 PROFESSOR DORSANEO: I have one question
24 about this second one. All right. We clearly want
25 to say that parties or their counsel -- that

1 lawyers can agree that objections to the form of
2 questions or nonresponsiveness of answers can be
3 made for the first time at trial. We want to
4 permit that agreement. Do we want to let lawyers
5 agree at a deposition that all objections must be
6 made at the deposition?

7 CHAIRMAN SOULES: Well, you've got that
8 from the one we just passed.

9 MR. McCONNICO: Yes, 166c.

10 PROFESSOR DORSANEO: Well, look at this.
11 "The court shall not otherwise be confined to
12 objections made at the taking of the testimony."

13 MR. SPARKS: Well, but that's in the rule
14 now.

15 PROFESSOR DORSANEO: I know. But -- I
16 mean, I'm trying to get this concept down. Do we
17 want to let them have -- make an agreement upside,
18 downside, every way?

19 MR. McMANS: What he's saying is should
20 you put in "absent agreement the court shall not
21 otherwise."

22 MR. RAGLAND: I think this third
23 alternative, is better; just take out that phrase
24 altogether. And we got this new 166b that allows
25 them to stipulate to anything they can agree to.

1 MR. SPARKS: That goes back to the
2 original. That's the original rule that we changed
3 two years ago.

4 CHAIRMAN SOULES: The problem with that,
5 Tom, is that the law is that these objections,
6 they're formal, so a party can come in prior to the
7 time the trial starts, object to the form of the
8 questions and the responsiveness of the answers and
9 destroy that deposition for use in court unless
10 there is an expressed waiver made to all the
11 requirement of objecting to form of questions and
12 responsiveness of answers. And that's what's
13 written into the rule. That just lets all the bar
14 know what the law really is, the court of appeal
15 cases that hold those.

16 MR. RAGLAND: I don't really have any
17 problem with that. I think if someone goes to take
18 a deposition, if he's not smart enough to know the
19 form of his questions, that they're not going to be
20 admissible, he ought not to be there.

21 CHAIRMAN SOULES: But see Harris wants to
22 take that back out and just leave it in ambush.
23 That's why the --

24 MR. RAGLAND: My point being we've
25 already tentatively approved 166c which allows the

1 lawyers to agree to practically anything in the
2 taking of a deposition. And if objections to the
3 form of the question and responsiveness of answers
4 is something that is important to the people taking
5 the deposition, let them stipulate and agree to it.

6 CHAIRMAN SOULES: That's right. And
7 that's what the 2044 that we've got -- now what --
8 my proposal, if you want to call it that, the
9 Barrow, Soules and Hyde Proposal, omits -- it's
10 important -- and this has come up in the COAJ which
11 is present in the Haworth suggestion is that the
12 stipulation be recorded in the deposition. That's
13 usually where it's made. It's not really -- you
14 don't -- what you don't want to do is fall into the
15 trap of Rule 11 that you've got to have a signed
16 agreement or one made in open court in order for it
17 to be enforceable. Now, what this --

18 MR. McMANS: Of course, if it's in a
19 deposition and filed, it probably complies with
20 Rule 11 anyway.

21 CHAIRMAN SOULES: What's that? How so?

22 MR. McMANS: Because the deposition is
23 filed.

24 MR. McCONNICO: It's not a written
25 agreement.

1 CHAIRMAN SOULES: Not signed by the
2 parties.

3 MR. McMAINS: But it's not signed by the
4 attorney.

5 CHAIRMAN SOULES: Not signed. It doesn't
6 really meet it.

7 MR. McMAINS: But I'm not sure that it's
8 not -- but, that doesn't make it in open court
9 either.

10 CHAIRMAN SOULES: Well, a lot of
11 argument. I mean, we can go around about that.
12 But if we said "absent express agreement recorded
13 in the deposition" and inserted those words to the
14 contrary in the Barrow, Soules and Hyde, it would
15 meet that omission. It would give the parties the
16 clear right to waive those objections, but it would
17 put parties on notice who are not waiving them that
18 they need to make them.

19 So it really hits all three of the issues
20 that I see, Tom. You may see some more.

21 MR. RAGLAND: No, I have a question.
22 You're proposal here then requires that an
23 agreement be made that objections must be made at
24 the time of the deposition?

25 CHAIRMAN SOULES: No, the rule requires

1 the objections to be made at the time of the
2 deposition.

3 MR. RAGLAND: Well, see, I'm talking
4 about your proposed amendment here.

5 CHAIRMAN SOULES: Would still require
6 that unless waived.

7 MR. SPARKS: The important thing here is
8 that on 204 when you're going to present deposition
9 testimony, the rule says that the -- you're not
10 bound by the only objections made in the record
11 except to -- you make additional objections except
12 to the form of the question, nonresponsiveness of
13 the answer unless it has been waived.

14 MR. RAGLAND: That's the part I don't
15 like.

16 MR. SPARKS: Well, that's the way it has
17 always been.

18 CHAIRMAN SOULES: That's the law, whether
19 we like it or not. The courts held.

20 MR. SPARKS: I move that -- in deference
21 to Luke, I'll move that we accept 204(4)
22 recommended by Dean Barrow, Luke and Hyde with that
23 insert "absent express agreement recorded in the
24 deposition."

25 I don't know if I like that or not.

1 CHAIRMAN SOULES: Well, that's where you
2 make the stipulation.

3 MR. SPARKS: Yeah, I know. I mean I just
4 don't like the -- I kind of like Haworth's. It
5 says "unless otherwise agreed between the parties
6 or attorneys by agreement recorded by the officer."
7 I kind of like the wording on that.

8 MR. BEARD: I do to.

9 MR. SPARKS: I move we adopt the first
10 204 presented by Mr. Haworth.

11 MR. MORRIS: Second.

12 MR. McMAINS: Except that that still
13 doesn't solve Bill's problem. I mean, 166c appears
14 to say you can agree to waive all objections, and
15 this rule doesn't.

16 CHAIRMAN SOULES: Well, I don't see any
17 difference in Haworth's and mine except the way the
18 words are set in order. And, you know, I -- if his
19 English is better than mine, that's fine. Are you
20 seeing a substantive difference, though, in
21 Haworth's and mine?

22 MR. McMAINS: The substantive problem is
23 the same in both.

24 PROFESSOR DORSANEO: That is that, you
25 know, lawyers could make an agreement that --

1 "Okay. Let's have all bar objections now. This is
2 now trial."

3 MR. McMAINS: Well, like, for instance,
4 you got a party on a deathbed, any objection you
5 want to make, substance, anything, got to be made
6 now or it's waived.

7 PROFESSOR DORSANEO: They should be
8 entitled -- they should be allowed to make that
9 agreement and make it stick. Under both of these
10 drafts that question is uncertain as to whether
11 they can make such an agreement. Now, it would be
12 rare when they would make it, but why not let them.

13 CHAIRMAN SOULES: How do we solve it?

14 PROFESSOR DORSANEO: Well, you would have
15 to have "unless otherwise agreed" applied to both
16 parts of that sentence.

17 MR. McMAINS: Right. You can do it
18 easier, it seems to me, in your proposal, Luke, by
19 using the "absent express agreement" preface to the
20 last sentence.

21 PROFESSOR DORSANEO: Or by doing "absent
22 express agreement" and then one, objections to the
23 form of questions, blah, blah, blah and two.

24 CHAIRMAN SOULES: Yeah, that's exactly
25 what I was doing there. If you pick up after the

1 word "counsel" in the underscored, put "one" and
2 then after the word "deposition" coma "and two" and
3 change the cap "T" to a small "t."

4 MR. RAGLAND: Which one are you on?

5 CHAIRMAN SOULES: On the Barrow, Soules
6 and Hyde. And, you know, it's not any pride of
7 authorship, it's just that it starts out with the
8 condition "absent express agreement," and we're
9 using that to modify both the objections to the
10 form. And then "the court shall not otherwise be
11 confined." So you can leave it -- you're making it
12 clear that you could agree on both of those.

13 MR. McMANS: I have one other question.
14 I have one other problem. This rule also
15 contemplates, it would appear, that in order for
16 that to be effective, it requires all counsel,
17 whether they're in attendance or not. Now, can you
18 defeat the rule by just staying away? And suppose
19 one of the parties doesn't come.

20 MR. SPARKS: I think that's right.

21 MR. McMANS: You defeat the rule then.
22 I mean, as to everybody.

23 MR. SPARKS: You have to have the
24 agreement, that's right.

25 MR. BEARD: Well, you ought to be able --

1 the parties that are present ought to be able to
2 agree.

3 CHAIRMAN SOULES: By all parties with
4 notice of the deposition or their counsel.

5 MR. McCONNICO: Well, why don't we just
6 say like it says up above "engaged in taking the
7 testimony" or "engaged in the deposition"? In the
8 first sentence.

9 MR. McMANS: It's one thing if you
10 haven't given anybody any notice or something else,
11 but --

12 PROFESSOR DORSANEO: Well, why should I
13 be bound by an agreement, whether I got notice or
14 not, that I didn't make?

15 MR. McMANS: I'm not even suggesting
16 that you should. I'm saying but isn't there a
17 policy question there. A, do you bind non-parties
18 to the agreement in the deposition. And B, should
19 parties to the agreement be able to escape it by
20 the absence of other parties. The latter, it seems
21 to me, clearly should not be the case. A party who
22 agrees to it should not have the right to go back
23 on the agreement because of the absence of a party.

24 MR. RAGLAND: A different party.

25 MR. McMANS: A different party.

1 MR. BEARD: It's just binding on the
2 parties who agree. The other parties can't object.
3 That's the way the rule ought to be.

4 MR. McCONNICO: I think the way it's
5 written now, that's the way it is.

6 MR. McMAINS: What?

7 MR. McCONNICO: That it binds the parties
8 that are at the deposition that agree, but the
9 parties that are not present at the deposition they
10 can still say, "I'm not bound by the agreement."

11 MR. McMAINS: That's not what it says.
12 It says, "absent expressed agreement to the
13 contrary by all parties."

14 MR. McCONNICO: No.

15 CHAIRMAN SOULES: How about changing
16 "all" to "the parties"?

17 MR. SPARKS: Well, you know, we're
18 talking about more than has been suggested, of
19 course, but -- which is a fatal error of thinkness.
20 But I don't think it's been proposed by anybody,
21 short of now. It's only the parties -- generally
22 you're taking a deposition, you want to take a
23 quicker deposition and have all of the garbage in
24 there. And it seems to me that we're worrying
25 about something that's -- you know, if you're not

1 present, you ought to be able to make any objection
2 you want.

3 PROFESSOR DORSANEO: Why don't we just
4 say "unless otherwise agreed" and leave out -- let
5 the normal rule apply, and that is, that you who
6 agreed to is bound by it and nobody else is?
7 What's wrong with that?

8 MR. McMAINS: I don't have a problem with
9 it. You know, if there's everybody there and -- if
10 you got 17 lawyers there and 16 of them were
11 willing to enter into the agreement, why shouldn't
12 they be entitled to do that?

13 MR. SPARKS: Because the 17th lawyer is
14 going to object to every question.

15 MR. McMAINS: Well, but that's fine.
16 That's better than 17 lawyers having to sit there
17 and adopt it. In the face of this rule, we can say
18 that that's the only way it becomes effective.

19 MR. SPARKS: Let me ask you a practical
20 question. Do you think that anybody is ever going
21 to agree on a death-bed witness or an expert
22 witness not -- to waive their right to make an
23 additional objection later on? I mean, I can't
24 imagine me doing it.

25 PROFESSOR DORSANEO: I had somebody ask

1 me to do that one time.

2 MR. SPARKS: Did you do it?

3 PROFESSOR DORSANEO: Not on a deathbed.
4 No, I never agree to anything.

5 CHAIRMAN SOULES: Okay. Let's see if
6 this -- if we take out "by all parties or their
7 counsel" and just say "absent express agreement
8 recorded in the deposition to the contrary," then
9 somebody who doesn't agree can say, "I never
10 agreed." You know, take out everything after --
11 "absent express agreement recorded in the
12 deposition to the contrary. One, objections to the
13 form of the questions are waived." And then it's
14 whoever agrees, agrees; and whoever doesn't agree,
15 doesn't have any agreement.

16 MR. McMAINS: You could -- if you want to
17 clarify it, you could say "by such agreeing
18 parties," I suppose.

19 MR. McCONNICO: I think it reads well the
20 way Luke has it. It simplifies it.

21 PROFESSOR DORSANEO: I think that would
22 work. I don't think we need to add any more.

23 CHAIRMAN SOULES: What is that?

24 PROFESSOR DORSANEO: I think, Luke, you
25 did fine, it seems to me.

1 CHAIRMAN SOULES: "Absent express
2 agreement recorded in the deposition to the
3 contrary. One, objections to the form of the
4 questions or the nonresponsiveness of the answers
5 are waived if not made at the taking of an oral
6 deposition, and, two, the court shall not otherwise
7 be confined to objections made at the taking of the
8 testimony." How many --

9 Is that your motion that those changes be
10 made, Bill?

11 PROFESSOR DORSANEO: So move.

12 CHAIRMAN SOULES: Is there a second.

13 MR. WELLS: Second.

14 CHAIRMAN SOULES: All in favor, say aye.
15 Opposed. It's unanimously recommended.

16 MR. SPARKS: Let me be the devil's
17 advocate. Because we may be just doing something
18 that we are not thinking out. It could be
19 construed that you're going to have to make an
20 agreement not to waive -- well, to reserve
21 nonresponsiveness form of question and that you
22 can't make other objections later, is the way
23 that's written.

24 PROFESSOR DORSANEO: Do you think so?

25 MR. SPARKS: Or maybe it's just late in

1 the day for me.

2 CHAIRMAN SOULES: Well, if so, will you
3 handle that by drafting clarification, if you feel
4 that that's a problem, Sam?

5 MR. SPARKS: Okay. I would rather just
6 write adopted, okay? All right. So we'll adopt
7 that one as done and we'll "X" those. Okay.

8 Now, the other thing that I wanted to bring
9 up right there is the proposed new rule. And it's
10 back in the packet, unfortunately. It should be
11 there. And it's a proposed new rule, again by
12 Haworth, on stipulations. And says, "Stipulations
13 Regarding Discovery Proceedings, if you can find
14 that.

15 MR. McMAINS: Where is it? What rule?

16 MR. SPARKS: Well, it's -- we didn't put
17 a number on it.

18 MR. McMAINS: Oh, okay. It's after Rule
19 188a.

20 MR. SPARKS: Okay.

21 MR. McMAINS: That's the one we did,
22 isn't it? Or that's similar to the 166c, isn't it?

23 MR. SPARKS: I don't know that it adds
24 anything. But what I was going to suggest is we
25 reject that one because I think 166c covers it.

1 MR. BEARD: I'll second that motion.

2 CHAIRMAN SOULES: I'm lost in the report.
3 I'm sorry, I didn't follow you. Which one?

4 MR. RAGLAND: After proposed new Rule
5 188a.

6 MR. McMains: The next rule is called
7 "New Proposed Rule." Is the only difference that
8 he's suggesting that you can modify any discovery
9 procedure?

10 MR. SPARKS: Well, that may have been his
11 intent, but that's not what it says.

12 MR. McMains: I think that was his
13 intent.

14 MR. SPARKS: Yeah, but it doesn't say,
15 and I just carried on his exact proposal.

16 MR. McMains: It says, "and modify the
17 procedures provided by these rules for other
18 methods of discovery."

19 MR. McCONNICO: I say stick with what
20 we've got.

21 PROFESSOR DORSANEO: Well, so does the
22 other one say that? The only difference between
23 166c and this one is the last sentence. "An
24 agreement effecting a deposition is enforceable if
25 the agreement is recorded in the transcript."

1 CHAIRMAN SOULES: Now where are we?

2 MR. SPARKS: And we've already provided
3 for that.

4 PROFESSOR DORSANEO: We've already done
5 that. We didn't have to do it now.

6 MR. SPARKS: That's right. So I move we
7 reject it.

8 MR. BEARD: I second.

9 MR. SPARKS: I can get it off the docket.

10 MR. McMANS: Okay. I got one other
11 observation. We already passed 166c, but it says,
12 "the parties may by written agreement." Do we want
13 to say "the counsel"?

14 CHAIRMAN SOULES: I think Rule 11 takes
15 care of that. No, it doesn't either.

16 MR. McCONNICO: This is different.

17 PROFESSOR DORSANEO: I think the law of
18 agency takes care of it.

19 MR. SPARKS: Well, but we have used the
20 term in 204 "the parties or their counsel," didn't
21 we?

22 PROFESSOR DORSANEO: I always wondered
23 why put in these rules -- we always say that, "the
24 parties or their counsel." "If represented by
25 counsel." I always wondered why we keep on saying

1 that.

2 MR. McCONNICO: Let's leave it the way it
3 is.

4 MR. MORRIS: "Counsel" would apply if you
5 don't have a lawyer.

6 MR. McMAINS: I'm saying the parties or
7 their counsel is the way that the federal court
8 goes.

9 MR. McCONNICO: Well, what Bill is
10 saying, by saying "the parties," it necessarily
11 includes their counsel under agency, just under the
12 pure laws of agency.

13 MR. McMAINS: Well, under the rules.

14 MR. McCONNICO: Yeah, under the rules,
15 too.

16 MR. McMAINS: Rule 12 or whatever.

17 MR. McCONNICO: Let's leave it is my
18 suggestion.

19 MR. SPARKS: I would like to get rid of
20 proposed Rule 200(2)(a), concerning a number of
21 days.

22 CHAIRMAN SOULES: I'm not sure -- what
23 rule were we just talking about? I know we were
24 talking about 166c. Have we talked about 166b and
25 d or did we skip through those?

1 MR. SPARKS: No, I'm just bringing it up,
2 I think, the ones that are the most sensitive
3 because of the time. So I've skipped --

4 CHAIRMAN SOULES: Okay. May I prevail on
5 you, Sam, to look at 166-A because Judge Hittner is
6 anxious about this one.

7 MR. SPARKS: Certainly.

8 PROFESSOR DORSANEO: He's got it in here
9 twice.

10 MR. SPARKS: This comes from when you're
11 preparing on October the 6th the September 30th
12 report.

13 CHAIRMAN SOULES: Is there any
14 controversy, really, over this change in 166-A?

15 MR. SPARKS: No, I don't think so, and I
16 think it ought to be adopted. I move that we adopt
17 it.

18 CHAIRMAN SOULES: Okay.

19 PROFESSOR DORSANEO: Well, I would like
20 to quote judge -- a remark made to me some years
21 ago -- Judge Fred Red Harris in Dallas. And he
22 said "If it's good enough for summary judgment,
23 it's good enough for trial." And I want to vote
24 against this. It's a suggestion by Judge Hittner.

25 CHAIRMAN SOULES: Why is that?

1 PROFESSOR DORSANEO: I think the
2 Clearcreek (Phon.) case is good enough. And I do
3 not perceive this to be a loophole.

4 CHAIRMAN SOULES: Okay. What's the
5 consensus of the committee? Those in favor of
6 Judge Hittner's proposal on 166-A please indicate
7 by showing hands. Those opposed?

8 The vote is to reject.

9 MR. SPARKS: Okay. I think we can move,
10 really, to 166b, really. The suggestion was
11 there's a court of appeals that holds that
12 photograph is non-discoverable as a work product.
13 If it is, I'm guilty of a lot of malpractice. And
14 I would like to recommend that we include in 166b
15 the phrase, "photographs and other discoverable
16 documents."

17 CHAIRMAN SOULES: Those in favor, say
18 aye. Opposed? Unanimously approved.

19 MR. SPARKS: Okay. And the next one --

20 MR. McMAINS: The court held the
21 photograph is communication.

22 MR. McCONNICO: Well, there's a mandamus --

23 PROFESSOR DORSANEO: Wasn't that argued
24 this week, Your Honor?

25 MR. McCONNICO: Yeah, here, Wednesday.

1 CHAIRMAN SOULES: If the court
2 straightens that out, we don't need a rule change
3 -- how is that? If the court straightens that out,
4 we don't need a change.

5 Okay. Sam, now where do you want to go?

6 MR. SPARKS: We certainly don't want to
7 prejudge that case.

8 CHIEF JUSTICE WALLACE: How did y'all
9 tell me to vote?

10 CHAIRMAN SOULES: Is suspect if it were
11 there wouldn't be a writ granted, but I don't know.

12 MR. SPARKS: Rule 200(2)(a), an attorney
13 wants to have a number of days as presumed
14 reasonable, as I told our committee, on a notice to
15 take the deposition. The smallest number of days
16 that we wanted to put in there was 200.

17 CHAIRMAN SOULES: Isn't this in the
18 category if it ain't broke don't fix it? Isn't
19 this working right now?

20 MR. SPARKS: We move to reject it.

21 MR. MORRIS: Second.

22 CHAIRMAN SOULES: The motion has been
23 made to reject a fixed number of days to be deemed
24 reasonable for a deposition. Those who favor
25 rejection -- those who want this rejected, please

1 say aye. Anyone who wants this in, say aye. Okay.
2 It's rejected.

3 MR. SPARKS: And I would like to go to
4 215. This was primarily motivated by Judge
5 Kilgarlin's paper "What To Do With The Unidentified
6 Expert," but several lawyers have written along
7 this. And basically what it says is if you haven't
8 notified within 30 days of your expert and you try
9 to bring in an expert, and the court allows it, the
10 court must state in the record what good cause was,
11 so that it will be before any appellate court.

12 MR. McMAINS: We don't have it. It's not
13 in the book. Is it in one of the letters?

14 CHAIRMAN SOULES: It's in 215. It's in
15 the book. It's about two-thirds of the way back,
16 styled "215, Failure To Make Supplementation Of
17 Discovery Response In Compliance With Rule 166b."

18 MR. McCONNICO: I like that because the
19 court of appeals cases are all screwed up right now
20 on what's good cause.

21 PROFESSOR DORSANEO: It doesn't appear to
22 be in all the books.

23 MR. SPARKS: Well, I'm sorry. Let me
24 read it to you. 215(a).

25 CHAIRMAN SOULES: Start with the 204 that

1 I gave you -- that we passed, and turn pages with
2 me. Start with the 204. If you can find the 204
3 that we passed, it will be the ninth page behind
4 that, if it's in your book. It's just in front of
5 306a(3). All right. It's omitted from some of the
6 books. My apologies.

7 MR. SPARKS: Let's me read it. It's an
8 additional paragraph to Rule 215(a), which is "The
9 Failure To Make Supplementation Of Discovery
10 Response In Compliance With Rule 166b." In the
11 sentence to be added in at the end of that rule it
12 says, "The burden of establishing good cause is
13 upon the offeror of the evidence. If the trial
14 court finds that good cause sufficient to require
15 admission exists, it must succinctly state the
16 reasons for the determination of good cause on the
17 record prior to admitting any such evidence." And I
18 think it's a good amendment. I move that we adopt
19 it.

20 MR. MORRIS: I second it.

21 CHAIRMAN SOULES: Will you accept an
22 amendment to delete "succinctly" and just state --

23 MR. SPARKS: Yeah, when I'm quoting from
24 a judge, I will -- just as long as it goes on the
25 record it was yours, I will certainly do that.

1 PROFESSOR DORSANEO: I don't --

2 CHAIRMAN SOULES: That was Dorsaneo
3 talking. I want the record to reflect that.

4 What, Bill?

5 PROFESSOR DORSANEO: Well, what happens
6 if the trial judge doesn't do that? The trial
7 judge says, "Oh, there's no big deal about this.
8 You weren't surprised. Good cause" -- "there's
9 good cause sufficient to require admission."
10 Doesn't -- states the reasons on the record, then
11 admits the evidence, then there is a judgment for
12 "X" then what happens? Reversed because the judge
13 didn't say something on the record before admitting
14 the evidence?

15 MR. BEARD: I agree with that I don't
16 think the trial courts should have that. They
17 offer the reasons, the trial court let's it in, and
18 if -- you know, it's not enough reason, appellate
19 court reviews it.

20 MR. RAGLAND: Furthermore, this
21 constitutes a finding of fact by the trial judge
22 right in the middle of the trial and it tinkers
23 with the presumption, as I understand the law, that
24 the trial judge rules for all the right reasons.
25 And I just don't think it ought to be --

1 MR. McMAINS: What if there is good cause
2 and he states the wrong reason?

3 MR. WELLS: I move we reject it.

4 CHAIRMAN SOULES: Was there a motion to
5 accept it?

6 MR. MORRIS: Yeah, there's already been a
7 motion to --

8 MR. McCONNICO: And a second.

9 MR. MORRIS: -- accept it.

10 CHAIRMAN SOULES: And a second.

11 MR. MORRIS: And it has been seconded.

12 MR. McCONNICO: I'll speak in favor of
13 the rule. I think that -- well, at least the
14 suggestion, because I've just now read it. But the
15 way the system is working now, it's not working,
16 because if you get a surprise expert, you have
17 first got to say, "I don't want him," and give your
18 reasons and then you've got to make a Motion for
19 Continuance. Your Motion for Continuance has to be
20 denied. And then they've got to put them in.

21 And there are court of appeals cases to that
22 effect. There is one out of Beaumont and I think
23 there's one out of Corpus. Well, that puts you in
24 a bad situation as the party that's surprised,
25 because all of a sudden the case is going okay for

1 you, the other party doesn't like the way it's
2 going, so he puts you in a situation where you're
3 either going to get the cause continued or you're
4 going to get a surprise expert. And that's the
5 reality of the practice today. And I think this
6 will avoid that reality.

7 PROFESSOR DORSANEO: Well, I think that
8 the case out of Beaumont -- I think that there was
9 a procureum opinion from -- isn't that the one
10 where there's a procureum opinion from the Supreme
11 Court where they seemed to validate this other way
12 of -- this burden? They seemed to validate putting
13 the burden on the one opposing the offer.

14 MR. McCONNICO: No, I think the first
15 Duncan (Phon.) opinion, out of -- well, when it was
16 in the Austin Court of Appeals, took care of all of
17 this.

18 PROFESSOR DORSANEO: But then Duncan
19 itself -- the second Duncan opinion goes the other
20 way.

21 MR. McCONNICO: Yeah, Smithson (Phon.).
22 That's right, it was Smithson.

23 PROFESSOR DORSANEO: Smithson goes the
24 other way. And then this Garza case, which, I
25 think, is the one out of Beaumont, seems to say

1 that the Smithson way is the right way, which I
2 personally don't like. But we're swimming too far
3 up stream at this point it seems.

4 MR. McCONNICO: I don't read it that way.
5 I don't like it like that. Basically, the system
6 today in what we've got with surprised experts is
7 not working. Because what happens is the trial
8 judge will say, "Well, you better move for a
9 continuance under some existing case law." Well,
10 why should I have to move for a continuance,
11 because I've been diligent, I've given the name of
12 my experts, I've taken the depositions of the
13 experts they've named and the trial is going good
14 for me. All of a sudden they bring in a sleeper
15 that can turn everything around and I'm the party
16 that's got to move for the continuance.

17 And I like this in that it will have a
18 chilling effect upon that happening. I'm still
19 saying it might still happen, but at least now a
20 trial judge has to give his reasons for why he's
21 letting this expert in.

22 PROFESSOR DORSANEO: Well, let me go back
23 and talk about -- I don't disagree with anything
24 you say, Steve. And let me go back and try to
25 refresh my recollection on this Garza case. I

1 think in Garza what happened is this, that the
2 trial judge allowed a supplementation of a
3 discovery response concerning a doctor in a comp
4 case.

5 MR. McCONNICO: That's the Beaumont case.

6 PROFESSOR DORSANEO: Right. Within 14
7 days prior to the date of trial, which was the time
8 frame under the preexisting Rule 168 paragraph 7,
9 supplementation, the Beaumont court held two
10 things. One is that there wasn't any need to show
11 good cause because of the fact that the trial judge
12 allowed the supplementation within the 14 day
13 period, hence the supplementation was timely
14 because it was allowed. All right.

15 Now the Supreme Court bounced that part of
16 the opinion, saying "No, that's not what timely
17 means. Timely means within the time prescribed by
18 the rules and not within some other time." But the
19 Supreme Court did affirm that case and they did
20 appear to validate the rest of the Beaumont
21 opinion, which concluded that there was good cause
22 for allowing the testimony to come in because the
23 opposing party had a lot of other things that it
24 could do, okay? And I think that's a different
25 issue than the good cause issue -- related issue.

1 So --

2 MR. McCONNICO: I don't. See, I think
3 what Judge Kilgarlin is suggesting here would take
4 care of that because then the trial court can state
5 all the findings that the Supreme Court made later,
6 where the Supreme Court said, "Well" -- or the
7 Beaumont Court of Appeals, they said, "Well, you
8 had 14 days, you could have taken the deposition,
9 you could have done all of this, so they're good
10 reasons to allow the expert."

11 But, you know, we have the other case out of
12 Madisonville (Phon.) where they brought in the
13 doctor -- and I've forgotten which court of appeals
14 it went to, I'm sure it went probably to Waco, I
15 would guess. But anyway, that case states that
16 where they brought in a doctor that nobody even
17 knew about and they said, "Well, you didn't find a
18 motion for continuance because you didn't have any
19 -- you didn't ask for a motion for continuance. If
20 you would have gotten the continuance, you could
21 have repaired your damage."

22 MR. BEARD: Well, I don't think that the
23 trial court should have a greater burden than
24 saying granted or denied.

25 MR. SPARKS: Well, but the problem is

1 that the requirement of good cause is in the rule.
2 And then you just say -- and that's what happens,
3 you call in an expert and you say, "Your Honor, I" --
4 you know, "I just found out about him" or whatnot,
5 and they allow it in there. I don't see how it
6 could possibly be anything but a better system of
7 justice to have the person who wants to put on the
8 expert show a reason and have the court state what
9 he thinks is good cause, so it's reviewable rather
10 than nothing -- nothing in the record.

11 MR. McCONNICO: Which is where we are.

12 PROFESSOR DORSANEO: Well, the first
13 sentence of the suggestion I like. But this little --
14 this technical way of handling it I don't like. I
15 mean to say -- you know, the burden ought to be on
16 the one who has broken the rules. That makes sense
17 to me. But then to say that if he convinces the
18 judge that there is an additional thing that has to
19 happen, the judge has to state succinctly or
20 otherwise, on the record, exactly why he was
21 convinced. Why? Why do that? I mean it's either
22 good cause or isn't good cause.

23 CHAIRMAN SOULES: Anything new, Lefty?

24 MR. MORRIS: Well, only, Luke, that I
25 think the rule as it presently exists is being

1 abused and this will stop it from being so dang
2 subjective. It ought to be something that trial
3 lawyers and parties can rely upon. And the current
4 state of the way it's handled, it's not.

5 CHAIRMAN SOULES: Okay. Let's take them
6 one sentence at a time. How many feel the first
7 sentence of the suggestion should be incorporated
8 into the rule? Say Aye. Opposed? Okay. The
9 first sentence is unanimously recommended.

10 Now, with regard to the second sentence that
11 deals with the good cause to be stated in the
12 record, I'll ask for a show of hands on that.
13 Those in favor of adding that language to the rule,
14 please raise your hands. Three. Now those
15 opposed? Five. In order, perhaps, to give Sam
16 some guidance, let me just ask for a show of hands.
17 How many feel like the rules should require that
18 the good cause appear of record, whether the judge
19 states what it is or not, that there be a record of
20 it? Okay. Those -- to put a good cause shown on
21 the record, in sentence number 1, in effect. How
22 many favor that part of it?

23 MR. RAGLAND: Well, let me ask you a
24 question.

25 CHAIRMAN SOULES: A lawyer has got to get

1 it on the record, he's got to put it in the court
2 reporter's transcript, file a motion. There's got
3 to be good cause appearing of record. If we're not
4 going to require the judge to state what his
5 reasons are, make the lawyers, at least, have their
6 reasons of record for review.

7 PROFESSOR DORSANEO: Yeah, make the
8 lawyer be a lawyer. That's fine.

9 MR. RAGLAND: Well, the burden is on
10 someone to establish that, and if it's not in the
11 record, he hasn't established it.

12 CHAIRMAN SOULES: Well, he may go back in
13 the court's chambers and there may not be a record
14 made of it. And then there -- you can't -- it's
15 hard to review. And at least this way there's
16 something there for Judge Wallace to look at.

17 How many feel that we should make the good
18 cause that the lawyer shows appear of record? Say
19 Aye. Opposed?

20 Okay. That way we can draw it that way, Sam.
21 Thank you.

22 MR. SPARKS: Let me go to Rule 208
23 because I think it's easy. Judge Barrow has
24 pointed out that we do not have the sentence on
25 deposition on written questions as we have on

1 deposition on oral -- for oral depositions, to
2 require a leave of court with or without notice
3 obtained before an appearance date.

4 PROFESSOR DORSANEO: Where is that?

5 MR. SPARKS: This is Rule 208. It should
6 be on the page right in front of that.

7 MR. McMANS: It's missing from all of
8 those that the other one is missing from.

9 MR. SPARKS: Well, this makes -- what
10 this does, Rusty, is requires leave of court if you
11 don't take a deposition by written questions before
12 appearance date as you have the requirement in the
13 oral deposition.

14 MR. McMANS: Okay.

15 MR. SPARKS: And I move that we adopt
16 that.

17 CHAIRMAN SOULES: Well, I think -- isn't
18 this the only written discovery device that's
19 available prior to answer date?

20 MR. SPARKS: Without leave of court.

21 CHAIRMAN SOULES: Without leave of court.

22 MR. SPARKS: I think that's right.

23 CHAIRMAN SOULES: I think it's important
24 for the collection lawyers to have some way to get
25 their proof when they serve a citation. You can't

1 -- I think request to admits except -- of course,
2 they're such loaded guns. But there ought to be
3 some way to get discovery served. There is just
4 one service on a deadbeat. If you can find him one
5 time, serve him with citation. And if you want to,
6 even serve him with a discovery request, so that at
7 least you've got motions for sanctions or whatever
8 you need to do to try to get your proof going.

9 MR. RAGLAND: Luke, can you do that
10 throughout your deposition, making the answers
11 returnable, say, in sixty days after service?

12 CHAIRMAN SOULES: You can't even start
13 discovery prior to answer date except through this
14 means or by leave of court.

15 MR. McMains: I mean, if you -- why can't
16 -- what's the problem with getting leave of court,
17 though?

18 CHAIRMAN SOULES: Getting leave of court.
19 Why have to go through the process. Anyway, that's
20 my view. I'm not sure that we should be precluded
21 from making --

22 MR. McMains: I would be concerned about
23 the problem if you simultaneous serve a citation
24 and then a deposition on written questions and --
25 you know, when he sends -- when the ordinary

1 defendant sends the papers up, maybe he sends one
2 of them and doesn't send the other one, or you're
3 sitting there and you've already got these things,
4 they're already defaulted. And you've already got
5 sanctions, potential and all kinds of things if you
6 don't have leave of court.

7 PROFESSOR DORSANEO: I'll tell what I
8 think about it. I think that if we're going to
9 give somebody a safety value, we give them the
10 interrogatories and not give them this one. And
11 the reason why the leave of court is not in there
12 now, at least from my perspective, is that when
13 this rule 208 was drafted, it was copied from the
14 federal rule, and leave of court isn't in the
15 federal rule. When I wrote it down, I didn't think
16 about it.

17 MR. McMains: Another drafting error.

18 PROFESSOR DORSANEO: So, I don't know
19 about the Supreme Court. They probably noticed it,
20 but I never noticed it.

21 CHAIRMAN SOULES: Those in favor of the
22 change, please signify by saying aye. Opposed?
23 Okay. Let me see a show of hands, then. Those in
24 favor of the change show hands please. Five.
25 Opposed. One.

1 MR. SPARKS: Okay. I've kind of hurried
2 through that. I think we're back to 207 and what
3 we wanted to do on that one from yesterday. And if
4 we have any more time, I've got one or two little
5 ones, but that mainly gets us through, I think,
6 most of the things that --

7 CHAIRMAN SOULES: Let me touch on Tom's
8 big project here.

9 Tom, if --

10 MR. SPARKS: One thing I would like to
11 mention that we have not drafted but we have
12 received a lot of comment on and suggestions, is to
13 eliminate filing of a lot of documents,
14 interrogatories, depositions, like the federal
15 court and other things, because of storage problems
16 or whatnot, and we'll bring that up at the next
17 meeting.

18 CHAIRMAN SOULES: That's exactly what --
19 because this last very substantial piece of work is
20 a good work product from Joe Johnson, Waco,
21 McLennan County District Clerk in conjunction with
22 Tom Ragland. This is a problem that we're going to
23 have to deal with, the cost of storing papers. You
24 know, we're just getting complaints from every
25 quarter.

1 And Tom --

2 MR. RAGLAND: I don't want to discuss
3 these rules. I just want to say that those
4 proposals are just something to generate some
5 discussion at a later time. But the significance
6 of the problem, I think, is emphasized by the fact
7 that the district clerks went to the Legislature
8 the last time and actually got a bill introduced
9 mandating about how filing and discovery stuff has
10 been done.

11 Now, I don't know if they have the authority
12 to do that, if that conflicts with the Supreme
13 Court's authority to make rules, but I perceive
14 that probably the court would like to avoid that
15 Legislative jurisdictional conflict and it's
16 something that ought to be addressed at some point.

17 CHAIRMAN SOULES: The only thing that I
18 would like to add to that is that I would ask, Sam,
19 that we have a good full report ready for committee
20 action at the March meeting on reducing the filing
21 of discovery materials. If you and Tom can address
22 that in your committee together because we're
23 already beginning to get agitation from the
24 Commissioners Courts and the district clerks as to
25 cost of space.

1 With that then we can go to 207. And as far
2 as I know that's the end of our current business,
3 but I will ask for indications about that.

4 Go ahead, then, on 207, what, (1)(b) or (2),
5 new (2)?

6 Harry was going to do some drafting on that,
7 Newell, and I think you and he did work on that
8 together and you're carrying his -- yours and his
9 report at this time, right?

10 PROFESSOR BLAKELY: Yes.

11 Yesterday we talked about 207 in connection
12 with a couple of changes in Evidence Rules 801 and
13 804. And you recall that one -- new, as we got it
14 proposed here, new (1)(b) was amended. And those
15 were -- there were a number of changes in there,
16 and those were approved.

17 Now, in (1)(a), "Use of Depositions in Same
18 Proceeding" and new (2), in different proceedings,
19 Harry was able to see that we were talking about
20 the application of the rules of evidence. We were
21 -- to depositions, that there is a considerable
22 ambiguity in the wording, because you've got the
23 problem is the deposition admissible, generally, so
24 far as the rules of evidence are concerned. And
25 then you've got the question of the application --

1 assume it is admissible, the application of the
2 rules of evidence to each question and answer as
3 the deposition is being put in.

4 And to clarify that, I suggest -- and Harry
5 approved that we set up a separate sentence both in
6 (1)(a) and new (2) referring to the application of
7 the rules of evidence at the trial itself. And
8 I'll read the sentence -- the new sentence, so you
9 can see that and then I'll indicate where I would
10 put it in. It would -- the separate sentence would
11 read "Further, the evidence rules shall be applied
12 to each question and answer as though the witness
13 were then present and testifying."

14 All right. Now, this would be done down in
15 (2), and I'll just start reading (2) as it would
16 read with this amendment. This new (2). "At the
17 trial or upon the hearing of a motion or an
18 interlocutory proceeding, any part or all of a
19 deposition taken in a different proceeding, insofar
20 as admissible under the rules of evidence." Period
21 right there "insofar as admissible under the rules
22 of evidence." Then would come this new sentence.
23 See, in the first sentence you would have dealt
24 with admissibility generally. New sentence
25 "Further, the rules of evidence shall be applied to

1 each question and answer as though the witness were
2 then present and testifying." And strike everything
3 else.

4 Then you would go back up into (1)(a) that
5 now we're dealing with this same problem in where
6 the deposition was taken in the same proceeding,
7 and it would read "At the trial or upon the hearing
8 of a motion or an interlocutory proceeding, any
9 part or all of a deposition taken in the same
10 proceeding, insofar as admissible under the rules
11 of evidence," strike "applied as though the witness
12 were then present and testifying." Pick up "may be
13 used by any party for any purpose against any party
14 who was present or represented at the taking of the
15 deposition or who have reasonable notice thereof."
16 Then you would pick up this new sentence, which
17 you've already got down in new (2), "Further, the
18 evidence rules shall be applied to each question
19 and answer as though the witness were then present
20 and testifying." Then the ending sentence
21 "Unavailability of deponent is not a requirement
22 for admissibility."

23 CHAIRMAN SOULES: Okay. You're reading
24 from "Alternative No. 1" in your Evidence
25 Subcommittee's report, are you?

1 PROFESSOR BLAKELY: That's right.

2 CHAIRMAN SOULES: And I was -- And I got
3 sidetracked because I was looking at the 207 that's
4 in Sam's. So if you could --

5 PROFESSOR BLAKELY: It's all right. I
6 think we're -- it's exactly --

7 CHAIRMAN SOULES: Are they the same?

8 PROFESSOR BLAKELY: Yeah.

9 CHAIRMAN SOULES: All right. Could you
10 then, if you will, just start with (1)(a), for my
11 benefit and perhaps for the benefit of the record,
12 although I'm sure you've got it pretty straight
13 already, and go through it straight through for me?

14 PROFESSOR BLAKELY: All right.

15 CHAIRMAN SOULES: Where the changes would
16 come and where they would be.

17 PROFESSOR BLAKELY: One, "Use of
18 Depositions in Same Proceeding, (a) Availability of
19 Deponent as a Witness does not Preclude
20 Admissibility of a Deposition Taken and Used in the
21 Same Proceeding. At the trial or upon the hearing
22 of a motion or an interlocutory proceeding, any
23 part or all of a deposition taken in the same
24 proceeding, insofar as admissible under the rules
25 of evidence" -- begin to strike -- strike "applied

1 as though the witness were then present and
2 testifying." Strike that. "May be used by any
3 party for any purpose against any party who was
4 present or represented at the taking of the
5 deposition or who had reasonable notice thereof."
6 Right there insert a new sentence.

7 CHAIRMAN SOULES: Okay. And go slowly,
8 if you will, there, so I can write it down.

9 PROFESSOR BLAKELY: "Further, the
10 evidence rules shall be applied to each question
11 and answer as though the witness were then present
12 and testifying." End of new sentence. Then finish
13 up "Unavailability of deponent is not a requirement
14 for admissibility remembering that (b) was already
15 amended yesterday. And now you've got those. We
16 would come on down to (2), New (2), "Use of
17 Depositions Taken in Different Proceeding. At the
18 trial or upon the hearing of a motion or an
19 interlocutory proceeding, any part or all of a
20 deposition taken in a different proceeding, insofar
21 as admissible under the rules of evidence." I've
22 got a period, but that's not a sentence, is it?

23 CHAIRMAN SOULES: No. Not yet.

24 PROFESSOR BLAKELY: "Any part or all of a
25 deposition taken in a different proceeding, shall

1 be admissible."

2 PROFESSOR DORSANEO: Just "is." "Is
3 admissible."

4 PROFESSOR BLAKELY: "Insofar as
5 admissible under the rules of evidence."

6 MR. McMAINS: "In accordance with the
7 rules."

8 PROFESSOR BLAKELY: A little bit awkward
9 there. "Shall be admissible insofar as admissible
10 under the rules of evidence." Now the new sentence.
11 "Further, the evidence rules" -- and this will be
12 the same as the one up there, Luke.

13 CHAIRMAN SOULES: Okay.

14 PROFESSOR BLAKELY: "Further, the
15 evidence rules shall be applied to each question
16 and answer as though the witness were then present
17 and testifying." And that does it.

18 CHAIRMAN SOULES: And then we strike
19 "applied as though..." and the balance of that
20 number (2)?

21 PROFESSOR BLAKELY: Yeah, you don't need
22 it. Yeah.

23 CHAIRMAN SOULES: So then we would strike
24 "applied as though the witness were then present
25 and testifying, may be used subject to the

1 provisions and requirements of rules...Texas Rules
2 of Evidence." That all comes out.

3 PROFESSOR BLAKELY: Yeah, all comes out.

4 CHAIRMAN SOULES: All right. We had a
5 consensus on this, but now that we've got the
6 language and maybe subject to working a little bit
7 on the awkwardness there of that last thing that
8 you've recognized, Newell, what --

9 Is there a motion, then, to adopt these
10 changes now as written?

11 PROFESSOR DORSANEO: I move.

12 CHAIRMAN SOULES: Second?

13 MR. MORRIS: Second.

14 CHAIRMAN SOULES: All in favor, please
15 say aye. Opposed? That's a unanimous
16 recommendation.

17 So that the record is clear now, I want to
18 append to the court reporter's transcript minutes
19 of the last meeting that were approved. There was
20 one deletion on page 4, which I have marked on the
21 official copy, as well as a copy of the "Report on
22 Standing Subcommittee on Rules of Evidence,
23 Professor Newell Blakely, Chairman." And the "Joint
24 Report on Standing Subcommittee on Court of Civil
25 Appeals Rules 342-472 & Supreme Court Rules

1 474-515, Bill Dorsaneo and Russell McMains,
2 Chairmen." And a "Report of Standing Subcommittee
3 on Trial Rules 216-314, Franklin Jones, Jr.,
4 Chairman." And the "Report on Standing Subcommittee
5 on Pretrial and Discovery Rules 15-215A, Sam
6 Sparks, Chairman."

7 These are the reports and the documents that
8 we've worked off of for the last two days and the
9 transcript of the proceedings of -- the references
10 to page numbers and other locators will be
11 references to those reports and documents.

12 Is there any further business?

13 Rusty.

14 MR. McMAINS: Luke, may I -- I assume
15 we're talking about acting on most of these rules
16 on March 31 -- March 7th, whatever. What is -- I
17 wanted to raise a question. It was just from Dean
18 Blakely's reading of Rule 207 now. I perceive that
19 maybe we have a problem. I'm not sure, but --
20 about the use of depositions against subsequently
21 joined parties. Maybe it's just there already and
22 we haven't done anything about it. But we seem to
23 be very specific now, the rules of evidence refer
24 to depositions taken in accordance with the rules
25 and rules refer to the rules of evidence. But now

1 we have limited it to people who were at the
2 deposition or who had notice of it.

3 PROFESSOR DORSANEO: Right.

4 MR. McMAINS: And the problem I have is
5 what if you've got a subsequently joined party
6 who's had access to the deposition, has no
7 complaint about anything. You read the evidence in
8 the record and then after trial all of a sudden
9 they say, "That ain't" -- "you don't use that
10 against me." And they make a hearsay objection at
11 some point or --

12 PROFESSOR DORSANEO: It is hearsay.

13 MR. McMAINS: And it is hearsay at that
14 point because it's not admissible under the rules.

15 PROFESSOR BLAKELY: It wouldn't be
16 admissible as a deposition taken in the same
17 proceedings.

18 MR. McMAINS: Right.

19 PROFESSOR BLAKELY: Now, he would then
20 have to slip over to Evidence Rule 804(b)(1),
21 former testimony, which will include depositions
22 taken in a different proceeding. Yeah, that's not
23 going to let it in either.

24 PROFESSOR DORSANEO: Did you change that
25 from "same or different" to "different"?

1 PROFESSOR BLAKELY: Yes.

2 PROFESSOR DORSANEO: Oh, that --
3 shouldn't have done that. That's what it was
4 about. It was about subsequently joined persons.

5 PROFESSOR BLAKELY: If you leave "the
6 same proceeding" in there, then you, in essence,
7 got that same proceeding dealt with in two
8 different places.

9 PROFESSOR DORSANEO: I know, but it's the
10 same proceeding -- but it finally occurred to me
11 that "the same proceeding" part of that had to do
12 with this subsequently joined person. And as to
13 that person, even though it's the same proceeding,
14 they weren't part of the deposition process. And
15 the unavailability rules ought to be the same for
16 whether it's an earlier case or an earlier time in
17 the same case and I wasn't there. So, yeah, you're
18 right, we do have to still work on this some more.

19 MR. McMANS: We might be able to fix it
20 in the -- included within the meaning of "same
21 proceeding." We kind of sort of start to talk about
22 it, but we don't really talk about it.

23 MR. BEARD: Are we saying that --

24 MR. McMANS: Because you're talking
25 about substitution of parties under the rule.

1 if it were taken in a different proceeding --

2 MR. McMAINS: It would be.

3 PROFESSOR BLAKELY: -- it would be
4 admissible under 804(b)(1), because 804(b)(1) --

5 MR. McMAINS: Former testimony. Doesn't
6 require unavailability.

7 PROFESSOR BLAKELY: -- does require
8 unavailability. 804(b)(1) --

9 MR. McMAINS: Oh, okay.

10 PROFESSOR BLAKELY: -- requires
11 unavailability. But who is it admissible against?
12 It's admissible against, under that rule, this
13 later joined person. Well, let's see, I've got it
14 right here. "If the party against whom the
15 testimony is now offered or a person with a similar
16 interest..."

17 MR. McMAINS: Right.

18 PROFESSOR BLAKELY: And that -- "had an
19 opportunity and similar motive to develop the
20 testimony" or something. And that was put in way
21 back in the liaison committee to take care of that
22 -- here, multi-parties, 15 on each side,
23 asbestosis, experts have been deposed extensively
24 and everybody had jumped on him and then way late
25 somebody else is added. Should he have had an

1 opportunity to jump on this deponent? The thought
2 was goodness, no, that deponent has been thoroughly
3 examined from both sides and those interests of the
4 new party are well -- has been well represented and
5 you shouldn't have to go back and depose again, you
6 see.

7 So that's taken care of over there if it were
8 a different proceeding. Now, do you want to -- if
9 you put back in 804(b)(1) -- we've just struck "the
10 same or," you see. If you put that back in, "taken
11 in the course of the same or another proceeding,"
12 you've taken care of that later joined party.

13 PROFESSOR DORSANEO: I want to make it
14 clear. I would say "the same as to subsequently
15 joined parties" or something like that.

16 PROFESSOR BLAKELY: Well, you see, that
17 language was in there and we just struck it, "the
18 same or."

19 PROFESSOR DORSANEO: "The same" caused
20 confusion.

21 PROFESSOR BLAKELY: What's wrong with
22 that? Well, because the plan was to take out of
23 the Hearsay Rule, 801(e)(3), to take out from under
24 hearsay definition "depositions taken in the same
25 proceeding."

1 MR. McMAINS: Right.

2 PROFESSOR BLAKELY: But we've restricted
3 admissibility there by 207 saying that it's
4 admissible against --

5 MR. McMAINS: Only parties who had --
6 that were there.

7 PROFESSOR BLAKELY: "May be used against
8 any party" -- "for any purpose against any party
9 who was present or represented." Now, do you want
10 the word "represented" -- do you want to say "or
11 person with a similar interest"? Do you want to go
12 to that problem in 207?

13 MR. McMAINS: I think what I would do, I
14 would amend in some way (b), because it says
15 "included within the meaning of same proceeding."
16 And I would put in a sentence specifically dealing
17 with "subsequently joined parties."

18 PROFESSOR DORSANEO: Well, the issue is
19 do we want to have an unavailability requirement at
20 all as to this person with a similar interest who
21 has joined later. I say "no."

22 MR. McMAINS: I don't think so.

23 PROFESSOR BLAKELY: Well then do -- are
24 you willing in (1)(a) --

25 MR. McMAINS: Because you've got

1 available discovery. If you want to rediscover
2 him, I think you could do that.

3 PROFESSOR BLAKELY: Is (1)(a) -- Rusty,
4 what you would want to do would be to amend (1)(a).
5 We're talking about against whom is it admissible.
6 Who -- "the person who was present or represented"
7 it now says. Do you want to broaden that to "or a
8 person with a similar interest who was present or
9 represented at the taking of the deposition." "Or a
10 person with a similar interest" -- "party with a
11 similar interest."

12 MR. BEARD: If you sue the poor one, go
13 through all that, he can't really defend, and then
14 you join the rich one and somebody died, that
15 shouldn't --

16 MR. McMANS: Well, if he has died, it's
17 admissible anyway. You have unavailability.

18 PROFESSOR BLAKELY: You're really
19 objecting to what we've gotten now over in the
20 unavailability list.

21 MR. McMANS: We've already got that.

22 MR. BEARD: I wasn't here yesterday, so I
23 can't complain.

24 PROFESSOR DORSANEO: Well, why don't we
25 work on that one some more.

1 CHAIRMAN SOULES: Why don't we entrust
2 that back to you for handling of that problem.

3 PROFESSOR BLAKELY: Well, can you decide?
4 It's a policy question and there it is.

5 MR. McMANS: I think we ought to vote on
6 it.

7 CHAIRMAN SOULES: All right. Those in
8 favor of having a deposition used in trial
9 regardless of unavailability as evidence against a
10 party whose interest is the same or similar to a
11 party who was present at the deposition, say aye.
12 Opposed?

13 MR. BEARD: I say "no" without further
14 qualification.

15 HONORABLE WOOD: I would, too.

16 MR. BEARD: I mean, somebody has got to
17 vigorously defend it for that to work.

18 HONORABLE WOOD: That's it. Where you
19 look at that deposition and the interrogation of
20 the witness --

21 CHAIRMAN SOULES: But, Judge, you can --
22 if that deposition is not good enough, that
23 subsequently joined party can redepose.

24 MR. BEARD: If they're alive.

25 CHAIRMAN SOULES: If they're alive. But

1 if they're not alive, then you're under a different
2 rule which makes it admissible anyway.

3 MR. McMANS: That's what I'm saying.
4 It's already admissible if you want to go ahead --

5 CHAIRMAN SOULES: Redepose him if you're
6 not satisfied. You can depose him during trial if
7 you're not satisfied.

8 MR. McMANS: The problem I'm talking
9 about is sandbagging. I mean, when you -- you
10 don't have any complaint about what's in the
11 deposition -- or the party wouldn't have any
12 complaint about what's in the deposition. They let
13 it in at trial, maybe with some kind of b.s.
14 objection which you don't understand at the time.
15 You go on and it turns out maybe you hit only that
16 party. Well, that -- you may not have any evidence
17 against him under these rules.

18 PROFESSOR BLAKELY: Now, this -- if would
19 be -- if you've got (1)(a) before you, it would
20 read "may be used by any party for any purpose
21 against any party who was present or represented at
22 the taking of the deposition, who had reasonable
23 notice thereof, or a person with a similar
24 interest" --

25 CHARIMAN SOULES: "Party."

1 PROFESSOR BLAKELY: "Party with a similar
2 interest."

3 MR. BEARD: I would just say that he
4 really ought to be adequately represented by his
5 class or whatever. That's all I'm saying.

6 MR. McCONNICO: How do the federal courts
7 handle that?

8 PROFESSOR DORSANEO: Well, I guess it's a
9 tricky thing because they have a whole different
10 way of looking at availability, unavailability to
11 begin with.

12 PROFESSOR BLAKELY: They're not that
13 broad. They're not that liberal. Jim Kronzer
14 dictated that.

15 CHAIRMAN SOULES: All right. We'll leave
16 that, Rusty, to you and Bill and Newell. And if
17 you think you've got it solved, why -- without much
18 controversy, fine. If not, let's get it with full
19 committee next time again.

20 PROFESSOR BLAKELY: In other words, we're
21 saying 207 has not been approved by the committee?

22 CHAIRMAN SOULES: I would say that the
23 reservations that have been shown here at the end
24 of the meeting would be reservations that should be
25 addressed and not just accept the committee's

1 earlier vote. I think we've engendered a new look
2 at that.

3 PROFESSOR BLAKELY: All right. I was
4 going to prepare the evidence rules. I think I
5 could go ahead and do that -- well, no, wait a
6 minute. 804(b) is pulled into this little
7 whirlpool, too, isn't it? See, it says -- we're
8 striking "same" -- the word "same proceeding" from
9 804(b)(1).

10 CHAIRMAN SOULES: We may need to look at
11 this again next time, afraid so.

12 We stand adjourned until 10:00 a.m. on March
13 the 7th of 1986, subject to call by the court for
14 any sort of an interim meeting.

15 And thank you very much everyone. We'll have
16 full reports from all of the committees, again, at
17 that time on the remaining matters.

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20
21
22 (Proceeding closed.)
23
24
25

1 STATE OF TEXAS)
2)
3 COUNTY OF TRAVIS)
4
5

6 I, Mary Ann Vorwerk, Certified Shorthand
7 Reporter in and for the County of Travis, State
8 of Texas, do hereby certify that the foregoing
9 typewritten pages contain a true and correct
10 transcription of my shorthand notes of the
11 proceedings taken upon the occasion set forth in
12 the caption hereof, as reduced to typewriting by
13 computer-aided transcription under my direction.

14 I further certify that the cost of the
15 preparation of this transcript is
16 _____.

17 WITNESS MY HAND this the 23rd day of
18 December, 1985.

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22
23
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25

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