SUPREME COURT ADVISORY BOARD MEETING
Held at 1414 Colorado,
Austin, Texas 78701

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By Mary Ann Vorwerk

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Certified Shorthand Reporter
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MORNING SESSION

CHAIRMAN SOULES: Good morning to you. Our meeting is convened. Thank you all for being here. I want to say that we appreciate Justice Wallace being here this morning from the Supreme Court, who is our liaison with the court, and he has some welcoming remarks.

JUSTICE WALLACE: Thank you, Luke. Along with Luke, I want to welcome all of you here, tell you how much we, as the court, appreciate the time and effort that you have put in on this committee and are going to put in. As someone said, here's what we're going to do today. So everybody, I'm sure, has reviewed it and is ready to go to work now. It means so much to us because we are, as you know, charged with the responsibility of promulgating rules. And without the people in this room and your counterparts around the state, without the input from you and the work that you do, we would never get the rules promulgated and amendments made that are needed. So, we appreciate your time and effort and hopefully we're going to have a very productive day and hopefully we can get it done today.

Does everybody have a copy of the -- if you don't have one of these, there is some here on the table.

CHAIRMAN SOULES: There is some down at the other end also, Judge.

JUSTICE WALLACE: So, just help yourself to one, and we'll be following the agenda in there, pretty closely anyway, won't we, Luke?

CHAIRMAN SOULES: Yes, we will. Thank you, Justice Wallace.

We'll take up two things before we start this agenda. The first item off will be the proposed joint appellate rules for the criminal and civil process and then the Rules of Evidence that have been distributed and then we'll get to the things that are in this binder which I've called Miscellaneous Rules, for lack of a better term. That simply is rules that don't relate to the Rules of Evidence or to appellate procedure, at least this big project that we've undertaken.

We have arranged for this meeting, and I believe for the first time, to have court reporters here to transcribe and then create a record of the meeting. So, if you could say your name as you speak, I know that will help them. We do have name

tags out there, but they may not be able to see them as clearly.

With that, Justice -- Chief Justice Frank Evans from Houston has some remarks to make about the appellate rules, and he is on a tight schedule. And then Chief Justice Guittard also is in the same situation, and I appreciate it if we would indulge them to speak first and then we'll get to the committee.

CHIEF JUSTICE EVANS: Thank you, Mr. Chairman, Judge Wallace.

The message I have is in the nature of a request, and Judge Guittard and I are over in opinion writing school at the University of Texas, you'll be glad to know and -- at least in my part. And so we will have to leave you. Judge Guittard is going to be here a few minutes more than I.

But the request I had -- I have -- and I speak not only on my behalf but on the behalf of the chief justices of the courts of appeals, is that we and the judges on the intermediate appellate courts have some opportunity to review proposed rules and to have some input. We've already had this, through work with Judge Wallace and Judge Guittard, who has sort of been our point

man and advisor and leader in this area. But I think it's important for obvious reasons, to be assured that we have the cooperation and the support of all of the appellate judges of the intermediate appellate court. They have had the opportunity in the past to review most of the proposed rules, but there are changes that we're undergoing on a day-to-day basis. And so it's a matter of a time schedule of working out how that could be effectively done without any hindrance to your combined effort. So, that is our number one request, the opportunity for review and input in any way that you all work it out.

Second thing I'd like to mention is that Judge Wallace has encouraged us to try to develop statewide rules for our intermediate appellate courts, so that lawyers going from one jurisdiction to the other and within the jurisdiction will have some idea of what they need to do to effectively prosecute their appeal or defendant in a particular court. That would leave us, as I understand it, open to set some scheduling in our rules according to our local needs and decisions, but we are all committed to this, Mr. Chairman, and our staff attorneys have already begun to work on a statewide

basis to try and effect this. So I think we can do it. They tell us we can do it, and we're encouraged by your efforts.

The final thing, and this is just a matter of -- it's the deepest philosophical question that I can see in any proposed rule. We would like to do something about the court reporter situation that would take the burden off of the lawyer, so far as the preparation of the appellate record. I think more and more judges that I've talked to, at least on appellate level, consider it a court responsibility rather than a lawyer responsibility to see that the record is prepared, both civil and criminal. The rules are unclear about whose, in my opinion, responsibility it is for the preparation of the record, whether it is the trial judges or the appellate court judges. We're equally somewhat vague about what sanctions are available to the various courts to see that the record is promptly prepared.

With new technology and new cooperative efforts between the trial judges and the appellate court judges, I think we could make some -- save a lot of lawyer time and a lot of clients' money, in that respect. That ends my remarks, and thank you

very much.

CHAIRMAN SOULES: Thank you, Chief Justice Evans. We will certainly want to have your input and the input of the other court of appeals judges on these new appellate rules, the harmonized rules because the courts of appeals are one of the central focuses of these rules. An effort to try to get your courts one set of rules, with whatever variations, may have to be made to accommodate the differences between the civil and criminal practice. But essentially, rules that are harmonious and don't have differences that are not explained, other than -- well, those were in a court of -- the Code of Criminal Procedure and the others evolved through the Rules of Civil Procedure, but there's no real necessity.

Secondly, we have been addressing, at least at the COAJ, and will to some extent today, be addressing the problems with local rules in the district courts and in the courts of appeals, differences that also simply, perhaps through evolution, through independent processes, are different, but don't have any real reason to be different. They could be made uniform throughout the state. So, we will appreciate very much the

efforts of you and your committees towards helping us deal with the court of appeals' aspect of that at least. And we do have a proposal from Frank Baker of San Antonio to deal with the court reporter problem that you've addressed. Whether his proposal or some other will be the one that we ultimately work out, your suggestions in all those respects are appreciated and we will try to keep you informed and hope to get information from you as well.

CHIEF JUSTICE EVANS: Thank you very much.

CHAIRMAN SOULES: Thank you, Chief Justice. Chief Justice John Hill has come in, and I know that he has some welcoming remarks as well, and I'd like to welcome him to our meeting.

CHIEF JUSTICE HILL: Thank you, Luke. Good morning to all of you, friends all, nice to see all of you. Hope to get to visit with you at the break.

We're going to be calling on this committee as never before. This is a very important committee, under utilized, and we want to really bring it forward and make it very meaningful because we need your help desperately. We have

been given now, under the new Court Administration Act, new and far-reaching administrative responsibilities. We have been mandated by the new Administration Act, which I encourage all of you to get a copy of and really get into it because it's heavy and it can't be just a quick once over. You've really got to get into it and see what it does. It carries a new number, and I'll have to rely on Ray Judice or someone to help me. I think it's House Bill 1186 but --

MR. ADAMS: 1658.

CHIEF JUSTICE HILL: 1658. It's kind of interesting how all that happened. The Legislature works in mysterious ways, and we really -- we beat our opponents, but we sure didn't beat the system. And the system just ate us up in the last stages, but this was one place where the system didn't eat us up. We were able to use the system and salvage this bill which had originally been Senate Bill 586. And somebody lost their two appellate courts, I don't want any responsibility for that because I wasn't in that fight, but in that --

CHIEF JUSTICE GUITTARD: We were hoping that you were.

CHIEF JUSTICE HILL: I know you were,

Judge, and I was trying my best, too. I was trying to fight so hard for 331 and some other things that I kind of left that over on your plate. And you were successful with it. And out of that -- when those two bills went down, they had it on the calendar. So we are able to virtually just substitute our Court Administration Bill under that banner and bring it on in for a vote and get it passed. So, to say everything seems to work in mysterious ways the last two or three days of the Legislature. So you were successful and we were successful.

This bill is there and I'm sure will be signed by the Governor and we'll be in business, whether we want to be or not. We're going to be heavily involved in the administration of the courts as never before at the Supreme Court level. And that means that's where we need you badly, because these rules just can't just jump out and be done, as you know. We've got to work out these new rules that are mandated in that act for the administration of our courts. Does anyone happen to have a copy of that handy?

CHIEF JUSTICE WALLACE: Gay Curry, Senator Glasgow's administrative assistant back at

the back has some.

MR. WELLS: I have a question. Senator Glasgow circulated that through the committee Senate Bill 354.

CHAIRMAN SOULES: That's essentially it.

MR. WELLS: Was it passed in that form?

CHIEF JUSTICE HILL: This is a different bill than I'm referring to. This is the one that's dealing with other matters. The Court Administration Bill -- I'm not prepared, I've just gotten back in town, and I'm not prepared. I'll tell you frankly, I am not. So, I'm simply saying to you I'm not prepared in the sense that I can't give you chapter and verse right now of what's in this bill. I do know that it mandates us to set up, what do you call them, Rules of Governess or Rules of Administration?

Good morning, Justice Pope. How are you, Chief?

And we will, through these rules, be more in charge -- the courts themselves will be more in charge of their dockets. Whether you operate in a county where you have central dockets, or whether you operated in a county where you have individualized dockets, these rules will bring us

into a new era. It's going to be popular with some people and not so popular with others. If you're a lawyer that's operated under lawyer diligence all your life, as most of you have, you're probably not going to like it all that much. It's directed at the courts being in charge of their dockets.

Judicial passivity is over. We won't be just working in terms of the lawyer that's done the best job of getting the case ready and getting the case prepared will be the one that will get to trial. The court's going to be in charge of trying to marshal the cases on their docket and to bring them through the system in some sort of orderly way, much like the federal system. And we'll have tough rules about dismissal dockets probably every couple of years. We'll have settlement -- more settlement conferences provided. We'll have more opportunities for cases to be disposed of and face-to-face confrontations that the courts will arrange. We will have tougher continuance policies. Motions for continuance will not be very favored. We will be in the business of trying to see that pretrials are carried forward and actually done in these cases. We'll be trying to see that when a case is set, that something happens and that

it triggers some other event. And there will be time schedules that will be cranked into the rules.

So, you can see that it means that in our Civil Rules of Procedure, really, are an additional group of rules known as Rules of Administration. We're going to be heavily involved in saying we're going to try to bring some uniformity, if you please, that's done under the name of efficiency, of moving these cases, unclogging these dockets. And obviously if it's overdone, we'll rush people to judgment and people will be abused by the very system we put in place, if we're not careful. On the other hand, if we don't do it, we're not going to be doing what the Legislature has mandated us to do.

One of the reasons that we're not more successful, in my opinion, in the Legislature, in getting what we need, badly need, for our trial courts in the way of administrative help and increased salaries and computer-aided transcription and all of the things that we've contended for is that there's still this lingering feeling in the Legislature on the part of some that we're not doing a good enough job, that we're not administering the courts as heavily and properly as

we ought to be and that until we do that, until we, as they say, clean up our act and get our show on the road in terms of the Supreme Court being heavily involved in seeing that our courts are administered more efficiently and that the trial judges are more in charge of their work -- and you still hear the recurring complaint of the dockets not being equal or work loads not being equal and some of the judges not doing their fair share. I've just been living over there a lot this last Legislative session, and I'm just here to report to you, not that any of that's necessarily true, but that those are the kind of problems that we're contending with in our efforts to get for our courts what we need. So, they have loaded up our boat.

In addition to this, we have judicial redistricting that will be voted on in November, first time in, I guess, ever that we've really bitten the bullet; and it looks like it may happen. I'm going to get on the program and do all I can to see that we have it passed. And so, if we will do our good work now over the next year and implement these new initiatives that are being placed on us, that should buy us additional credibility, for one

thing. It should add to what we've been trying to do, and that's to precondition the Legislature for the fact that our courts are in trouble and we need help. And we must build the kind of political force here at this committee level, on the courts, among our judges, among our lawyers throughout this state, with citizen input where we can go over there and be real contenders next time for the things that we just simply desperately need to move the system of justice forward.

But in the meantime, they're saying to us, "Get this job done." And maybe that means we'll be more receptive, but only time will tell. But that's where we are, gentlemen, and you can see that this is major business we're talking about. This is no nonsense stuff. This is get your coat off and roll up your sleeves and let's work it out. I got nothing to tell and nothing to sell, I'm just down here trying to get a job done that needs doing. I'm willing to provide all the leadership that I'm capable of providing to get this job done, but we cannot do it alone. You have got to get in here and help us work this out, and I know that you will.

Thank you very much and welcome.

CHAIRMAN SOULES: Mr. Chief Justice, thank you for those remarks, and I feel sure that you'll have all the support that energies -- individual energies and joint energies you can get behind that effort.

I'll have some general matters to attend to in a little while, but I want to be sure that we get Judge Guittard accommodated on his time schedule. I do want to welcome Justice Ray and Chief Justice Pope to our meeting. They have both come in.

A committee chaired by Chief Justice Guittard, which had as its reporters Bill Dorsaneo and Judge Daley -- Bill essentially having major input from the civil side and Judge Daley having principal input from the criminal side. But those two working together, with Chief Justice Guittard as chairman, served an interim Senate committee that was appointed by Senator Glasgow; and his right-hand person, Gay Curry, is here with us today and has helped in making distribution of those materials.

And, Gay, we welcome you and thank you for being with us.

That committee had as its responsibility the

production of a harmonized set of rules to accommodate both the criminal and civil appellate systems, if such a harmonized set of rules could be produced.

The purpose for that was to underpin the legislative effort headed by Senator Glasgow to give the courts -- the Court of Criminal Appeals rule making authority at least to the extent of its own appellate rules and to get those out of the Code of Criminal Procedure so that that court, together with the Supreme Court of Texas could try to harmonize their rules. And the Legislature, at least the sponsors of the bill, didn't seem convinced that without a set of rules in place or proposed that appeared to be workable and substantially so, that the bill to give the Court of Criminal Appeals that rule making authority would have a great deal of success. Why I'm not sure. But at any rate, that's what we were given to understand. So, over a period of a few months and several Saturdays, we -- and several weekdays as well, the committee met. And I can't really imagine, but many, many more hours by the reporters Bill Dorsaneo and Judge Daley had produced this work product that you see bound in legal size or

stapled together in legal size.

I want Chief Justice Guittard first to speak, so that he can go and make his next speech over to the opinion writing seminar being held for the courts of appeals. And then Bill Dorsaneo, and then we'll have whatever discussion and extensive discussion to the extent that you all wish to have input about this effort.

Chief Justice Guittard.

CHIEF JUSTICE GUITTARD: Thank you Mr. Chairman.

Perhaps most of you have read the statement that was -- the three statements that were published in the January Bar Journal by me and Mr. Soules and Clifford Brown, concerning these proposed uniform, or rather harmonized, appellate rules, and the proposed rules themselves were published in the February Bar Journal.

The origin of this project, as the chairman stated, was -- came from Senator Glasgow, for whom I have conceived a very great respect. When he was appointed chairman of the Subcommittee on Criminal Matters of the Select Committee on the -- Interim Select Committee on the Judiciary, he circulated all the judges and asked for suggestions about what

their committee might be working on. And some of us appellate judges who had gone through the throes of trying to get adjusted to two systems of appellate procedure suggested that there should be an effort to eliminate the unnecessary discrepancies between the two systems and to bring criminal rules in line with the more efficient civil rules of appellate procedure. And so, Senator Glasgow took off on that, and he liked that idea so well that he conveyed the idea to the Court of Criminal Appeals and the Supreme Court that if they didn't get together and work out some appellate rules, harmonize appellate rules, the Legislature was apt to take over the whole project and prescribe a uniform code. And that didn't set. That got the attention of both the Supreme Court and the Court of Criminal Appeals.

And so, as a result of this suggestion, and at the request of the Subcommittee on Criminal Matters, the Supreme Court and the Court of Criminal Appeals adopted a joint -- appointed a joint advisory committee to draw up a tentative draft of the proposed rules with the idea, as Luke indicated, that if we're going to go to the Legislature, they're going to want to see what the

project's all about.

So, on that committee, Luke served as one member and Rusty McMains and Bill Dorsaneo among your members. There were also both appellate and trial judges, lawyers from both the civil and criminal practice. And so, this is what we've -- after meeting, I forget how many meetings during the summer and early fall, I think it was seven or eight meetings I think we had. And amazingly we didn't have a single time where we didn't have a quorum during the middle of the summer. But we came up with these proposed draft of appellate rules, and we were under this constraint.

The court -- the Supreme Court had already gone through the process of some rather extensive recent amendments to the civil appellate rules, as this committee knows as well as anybody, and they were -- they indicated to us that they were very reluctant to make any changes, that the Bar wouldn't stand for any more. And so, one of our objectives in preparing these rules was to -- not to change the practice, not to unsettle the lawyers by some more changes. So, we have adopted that as our guide post. And although we have proposed to rearrange the rules, and in some cases restate them

in language that we thought was a little clearer, we have not attempted to make a substantial change in the practice.

The principal change has been on the criminal side, and that would require a -- that did require amendments, repeals of certain provisions of the Code of Criminal Procedure. And those amendments did finally pass on the last day of the session. So, now the Court of Criminal Appeals, as well as the Supreme Court, has rule making power with respect to appellate procedure.

Now, the changes that were in the civil side are really minor. One of them is -- you're familiar with Rules 435 and 438 that has to do with penalties. Well, we just thought that a 10 percent penalty, 10 percent of the amount in controversy, was meaningless in lots of cases. And we really needed to expand that penalty. So, we've essentially adopted the federal standard while keeping our standard as to when penalties apply, to give the court a little more leeway in assessing penalties in cases of where the appeals really have -- probably have no merit nor taken for delay. I believe there's also a limit on the -- well, I'm not sure about that, I forget all these details.

On this criminal side, the main problem has been the preparation of the record. The court of -- the Code of Criminal Procedure has had provisions which have long since been considered obsolete and have been eliminated in the civil practice, particularly the requirement that the record be approved by the trial court and certified by the trial judge before it's filed in the appellate court. So, there's a whole series of steps in the Code of Criminal Procedure, Article 4009, that caused us on the Appellate Court a great deal of trouble if we had any -- if we felt any responsibility for accelerating the process.

Inefficiency is built into the system, and there were various kinds of things that had to be done and there were, in many cases, no time limit specified as to when they should be done. And as a result the trial judges, who after having tried a case, naturally don't find these appellate matters a matter of high priority. They tended to shove these matters aside, and long delays occurred for which there's no justification. So, what's the remedy for that? Obviously, adopt the Rules of Civil Procedure, which are essentially just as applicable in criminal cases in principle as they

are to civil cases. That has been our primary approach.

Now, I'm not going to go into the details of the rules. Bill Dorsaneo can do that with you. I would leave you with this thought. One of the reasons why there's been such a discrepancy between the civil and criminal appellate rules, heretofore, has been that the Supreme Court had authority over the civil rules, and the Legislature was the only agency that could change the criminal rules. Now that's changed to the extent that the Court of Criminal Appeals has authority over these criminal rules. But as long as the Court of Criminal Appeals and the Supreme Court function separately, there will still be lots of occasions, it seems to me, where there will be a lack of harmony. And the value of our committee was that we had a committee appointed by both courts.

Now the Court of Criminal Appeals is going to have to adopt the rules, promulgate the rules insofar as they apply to criminal cases. The Supreme Court will have to adopt them by way of amendments to their present Rules of Civil Procedure insofar as they apply to civil cases. They will, of course, rely upon their advisory

committees.

The Supreme Court has this committee, the Court of Criminal Appeals has an advisory committee, which Clifford Brown of Lubbock is the chairman. He was a member of this joint drafting committee. Now, if these committees work separately, without consultation between each other, then I'm afraid this is going to lead us down a road that will defeat the objective of harmonizing the appellate rules and give us appellate judges, as well as the Bar, will perpetuate the differences and the confusions that we've been laboring under. So, I hope that there will be some way of working out some liaison between this committee and the Court of Criminal Appeal's Committee, so as to avoid that problem.

I want to say particularly before I leave you, that this work could not have been done without the help of Bill Dorsaneo and Carl Daley. Bill is really the one that organized the rules. So, if you have any concern about the organization and the way they're numbered and all that sort of thing, well, talk to Bill about that. He's done an excellent job. I commend him for it.

Now, if there's any questions that any of you

would like to raise with me, I'm available here for a few minutes and will respond to your inquiries.

CHAIRMAN SOULES: Questions for Chief Justice Guittard?

Mr. Chief Justice, thank you for a portion of your morning and at a critical time, too. We really appreciate your coming.

CHIEF JUSTICE GUITTARD: Thank you, Luke.

CHAIRMAN SOULES: I think all the schedules that really had to be accommodated, other than everyone here, of course, is busy as they could possibly be, have been accommodated. And I just wanted to say a few things about where we get our work and what our work is because we have a lot of new members here and perhaps that would give them a little bit of guidance about what we're going to be doing for the balance of the day and maybe some reminder to ourselves as well.

This committee functions and has functioned since -- I believe it was 1939. Initially it was pulled together as the Advisory Committee to the Supreme Court of Texas to draft the "New Rules" that became effective in 1941. It has been continuously in existence since that time, meeting and convening to advise the Supreme Court of Texas

about amendments to those rules. And we had, as you know, a series of some -- over a hundred rules that became effective in 1984 alone. So, there has been a constant observance and effort to keep those rules responsive to the needs of the judicial system. How well they've worked I guess is anyone's view, but they seem to have worked pretty well, and I know that they've had an awful lot of attention from a lot of people.

Our work comes from many sources. This committee, I understand, at one point may have limited its concerns to matters that have been submitted here from the Committee on Administration of Justice of the State Bar of Texas. That is certainly not the case at this time. We do take work from the Committee on Administration of Justice, and actually some of the best information that we get to support our work comes from that committee because it functions more frequently, meets several times every year. Its principal purpose is to consider proposed rule changes to the civil rules. It occasionally also addresses criminal problems and occasionally also addresses Legislative problems that bear on procedural matters in the court system. But its primary focus

is on rules. So, when we get matters from the COAJ and the State Bar, we usually get something that has had a lot of study and is supported by some information, some reasoning, maybe even some case authorities and is addressed to -- usually focused at specific problems.

However, for reasons known only perhaps to that committee, many things go there and really don't get addressed. Some get addressed very thoroughly, and some don't. And this committee takes matters referred directly to it from members of the public, from district clerks, from members of the Bar, including judges, from every source and, of course, from the Legislature. We have -- basically our first item on our agenda comes as a result of Legislative action. The second item on the agenda, the Rules of Evidence, comes from a different committee of the State Bar, the State Bar Committee on Rules of Evidence.

So, whatever matters may be addressed by the Supreme Court of Texas in its rule making authority come through here from whatever source. Now, we don't always get the benefit of input in the Supreme Court before rules are made or changed. But we almost always do. And only in cases of

emergency, in my experience, has the Supreme Court made changes that at least this committee has not addressed. That's not to say --

CHIEF JUSTICE HILL: If you would like, Luke, to bat a hundred percent, which is all I can say, I don't know that anyone can say that you're not going to have a special situation. But we want to work with this committee, and I want that very clear. I know I speak for the court in that regard, that we want to work with this committee. We want to have your input before rule changes are made. I know there's been some thought in the past that maybe that has not been our attitude, but it is our attitude.

CHAIRMAN SOULES: Well, we appreciate that, Chief Justice Hill. And the only thing that I attempted to reserve in that remark was that occasionally there are emergency situations, the rules or the courts rules. And if it has to speak, it has to speak; and to convene this committee may just be impossible in the time required. But they are -- those instances have been, in my judgment, very rare. That's not to say that the Supreme Court agrees with this committee or agrees with sometimes a lot of work that's been done on matters

before coming to this committee. In some instances the proposed rules from this committee are taken pretty much as they're recommended or altogether as they are recommended and adopted by the court. I think that, for example, happened in connection with the extraordinary writ remedies that were extensively redone after Fuentes vs. Shevin and the cases declaring certain aspects of prejudged procedure unconstitutional.

On the other hand, to distinguish that, the Committee on Administration of Justice spent hours debating how sanctions should be conducted in civil trials for discovery abuse, and a good bit of meeting of this committee was spent on that. And it was the conclusion of the COAJ and of this committee that sanctions should be imposed on a two-step level, that discovery should be initiated and responded to by the lawyers, that if there was an effort by a defending lawyer in his discovery to try to avoid that discovery, he would file a motion and seek sanctions; or if he felt that what he had gotten -- the party seeking discovery felt what he got was not adequate or needed to be compelled, he could file a motion to compel. But that at that level, the only sanction to be imposed would be

attorneys' fees and expenses. And the rule went to the Supreme Court that way and then only whenever there had been an order entered that had been violated, would the extensive sanctions of dismissal, default judgment, that sort of thing, be imposed. And the Supreme Court flatly disagreed with that and put the most severe sanctions in effect for the first trip. And so, they don't always do what we say even after we've spent a lot of time resolving among ourselves what we feel should be done because they disagreed. And there, like that -- what is it, 12 thousand-pound gorilla, Mr. Kronzer, he sleeps wherever he wants to sleep. Whenever they disagree, and they've given it a lot of thought I'm sure. Of course, it comes down in the rules that way, as did that particular aspect.

Because this committee has worked so diligently over the years, we don't meet but about once a year, sometimes twice, but still our work is intense when we do. And because we hear from so many sources, and because the Supreme Court, essentially, listens to us, the Rules of Civil Procedure, we feel, do stay modernized. And the best example of how that has worked in contrast to another system, in my view, comes from the

committee that we had, the Joint Committee to Harmonize the Appellate Rules.

There was a great deal of background and understanding and reasoning for the Appellate Civil Rules. Some of the reasoning some of you may disagree with, but at least they had been worked on over the years at every session of this committee that I've ever attended. And this committee has been a form for suggestions from every source as to how those rules can be kept modernized.

On the other hand, the appellate rules that are in the Code of Criminal Procedure, there's really no forum other than the Legislature, and that's only when it's in session with lots of other things to do, for people to have input into that system. When it was put in place, it was -- it adopted many things that were somewhat archaic that we'd already put aside when the Code of Criminal Procedure came along. So, in that committee, although we had criminal lawyers and trial judges who essentially try criminal cases, and judges on the Court of Criminal Appeals all on that committee, the reasoning behind the civil way of doing things, whenever there was no real reason to have a difference between the civil and the

criminal, almost uniformly prevailed.

So, that gives you an example of how ours have been kept modern, readable, and doable, and are even readily accepted by people who have been practicing almost altogether in a different system for many years now. That, I think, is a credit to this committee over the years and to our court that we serve.

That's my speech. Thank you all for being here. Particularly welcome all the new members. We'll have coffee after awhile and shake hands with them. At this time --

Gay, did you have any message to bring to us from Senator Glasgow?

MS. CURRY: Well, none other than he sends his apologies for not being able to be with you, but when they finally adjourned after the session -- special session, he said that there was a banker knocking at his door and he needed to get home and practice his law. He had a lot of court cases and a lot of clients that were waiting for him to come home so he had to return to Stephenville. But he felt very good that we were finally able, in the last few hours, to pass the legislation and to give a product that he was very

proud of to you all for your scrutiny and your advice.

CHIEF JUSTICE HILL: I would appreciate it if you would convey to Senator Glasgow my personal thanks and the thanks of the Court for his steadfast help throughout the session on all matters relating to the welfare of the judicial system of Texas. He is a true friend, a proven friend of the judiciary. We need more of them, and I want to be sure that you express that. I'll write him, of course, but I wanted to convey that through you to him.

MS. CURRY: Thank you very much, he was trying to the bitter end.

CHAIRMAN SOULES: Tell him we appreciate it so much. As a matter of fact, he had to miss the bill that had been carried through and finally was not going to get on the calendar at the last minute and voted on, acted on, so he managed to get it on to another bill that was going to get acted on; otherwise, this effort to harmonize rules would be sitting around for another session of the Legislature, so he was a true shepherd.

Give him our thanks, too, Gay. And thank you for being here.

Okay. Bill, we'll get down to the business, to the specifics. Bill Dorsaneo, if you'd make a report on the harmonized rules, please.

PROFESSOR DORSANEO: How specific do you want me to be, Mr. Chairman?

CHAIRMAN SOULES: Well, by way of scheduling, I thought we might spend as much as all morning on the harmonized rules, if we have that much interest and attention and input from you. It's a good work product. Bill, I think perhaps you need to point out the problems that you see with it and the vacancies that are in it, so that we can do that. If we're through with this early, we'll try to get the rules of evidence done as well before the noon break and then take this miscellaneous agenda this afternoon through our 5:00 o'clock cocktail hour. And we are going to be honored by the Supreme Court of Texas at a reception at 5:00, which will be right across on the other side of this first floor of the Bar Building.

MR. O'QUINN: Bill, when you go through it, I'd appreciate it if you would highlight for us anything that would represent a change in the way we do appeals on the civil side, anything that

would involve something, not just mere form, so I could understand what things are different.

CHAIRMAN SOULES: I think just be as extensive as you can be, Bill.

MR. O'QUINN: Whatever you feel would result in any kind of substantial change in the way we currently handle appeals that would protect the appeals or perfect them or anything like that.

CHAIRMAN SOULES: For purpose of dealing with this, I, as Chair, will just yield to Bill. So that, as we go along, if you have questions at a particular point, why don't you go ahead and raise your hand and address it to Bill, so that he can make those explanations or make notes to address those problems. And if that takes the balance of the morning, of course, it will be time well spent, no doubt.

Thank you, Bill. Bill Dorsaneo.

PROFESSOR DORSANEO: Thank you, Mr. Chairman.

As Chief Justice Guittard indicated, the major change, if you could even call it a change, is organizational or structural. You may want to turn to the one page sheet with the lable "Plan" on it, which follows the table of contents, in order

for me to give you an idea of the structure.

The principal difficulty in harmonizing the Civil Appellate and the Criminal Appellate Rules that we encountered at the outset was somewhat of a surprise to me, but it basically involved the fact that although our Texas Appellate Rules have been redrafted, modernized, made more workable over the years, the structure of the rule book has not had its integrity preserved since the time that the Rules of Procedure were adopted initially. By way of amendments over a period of years, things kind of got put in odd places, such that if someone sat down to read our Rules of Appellate Procedure today, without any prior knowledge of how things work, you would end up with a lot of confusion in your mind. A few little minor examples.

We all know how important Rule 21c is. 21c is not even in the appellate rules. Moreover, it is not in the general rules for the Texas Rules of Civil Procedure. It happens to be in the part of the rule book that deals with the rules for district and county courts.

Rule 18b, Refusal of Justices of Courts of Appeals. The Supreme Court, where is that? It's up in the front of the rule book, also, not even in

the general rules.

If you would go and take a look at the appellate rules in part three of the Rules of Procedure, you would find a very large section dealing with proceedings in the courts of appeals. That section does not appear to me today to have any particular coherency or order, primarily as a result of amendments, repeals, changes. That has caused us some problems in the past. You probably remember the revisions to Rules 386 and 387. It just so happened that there was a Rule 437 some distance away in the rule book. It took the Supreme Court and the rest of us some time to recognize the inconsistency and decide what rule would be the appropriate one to choose.

So, the first thing that we had to do, because it would be quite difficult to mesh in criminal appellate practice with disorganized civil appellate practice, was to develop a structure.

The structure is in this plan, and it really is fairly simple. Section 1, Applicability of Rules is just a general section. It probably could be reworked some, but it basically doesn't need to be gone into.

Section 2, General Provisions, this follows

the pattern of the Federal Rules of Appellate Procedure by having a set of general provisions that don't necessarily fit into a particular place. Virtually all of those general provisions rules are verbatim copies of existing Rules of Civil Procedure, with a very few changes that wouldn't affect civil cases; adding in information dealing with criminal cases, such as terminology, definitions, uniform terminology. There is some of that in criminal cases.

There really isn't anything, in my recollection at this point, in Section 2 that you haven't seen before with the possible exception of Rule 5, which relates to a difficult problem area and what is currently Rule 306a. The rule -- if I had to pick something in Section 2, and I think it would be the only thing that I would pick, Rule 5 would be something that deserves study and additional work primarily because I think Rule 306a still needs it. And it is a very difficult problem that we didn't really attempt to resolve in this reorganization.

CHAIRMAN SOULES: Generally, what's the nature of that problem, Bill?

PROFESSOR DORSANEO: Luke, I really would

rather not get into it because I don't think there is a way into it and out of it with any kind of dispatch.

CHAIRMAN SOULES: All right.

PROFESSOR DORSANEO: One thing about Section 2, we didn't put all of this business on a computer to go through and check and double check to see whether there are any other things that ought to be in the General Provisions. Undoubtedly, there are things that ought to be added. There are other rules in this book that haven't found their way into Section 2 that probably ought to go there. That would be especially true in the rules in the early -- the late 200s and the early 300s where some of that information is going to need to be put in Section 2. But the general provisions don't require a lot of conversation either.

Sections 3 and 4 are really the main sections, substantively. And if you'll look, perhaps now, at the Table of Contents, you will note that there is, or I hope there is logic in the organization of Sections 3 and 4.

We talk first about how the appeal is filed or perfected. There is a special rule for appeal

by writ of error in civil cases. Basically, Section 3 attracts, perhaps not always verbatim, existing Rules of Civil Procedure, but tries to organize them in a more logical fashion. And if I had to pick one rule in Section 3, and I would pick it, that is, it deals with a difficult problem area that will require, I think, additional work and discussion, it would be Rule 32. Now, let me talk about that for a minute.

You are familiar with Rules 372 -- existing Rules 372, 3, whether you know their numbers or not. I'll talk about it in a minute. 372 and 373 and also 3 -- a little bit of 376, these are the rules that deal with bills of exception. 372 deals primarily with form of bills of exception. 373 is the rule that says that exceptions are not necessary. A rule which provided useful information to a lawyer who practiced in the 1940s, probably provides us with interesting historical information.

What Rules 372 and 373 do not currently do and what the Rules of Evidence also do not do, is set up a procedure to tell the lawyer how to make a bill of exception, I'll call it an informal bill of exception. We have the Rule of Evidence 103,

Professor Blakely can correct me if I'm wrong, and I would hope he would, that says, "Offer approved. Okay. Unless somebody complains, then question and answer bill of exceptions." But the Rules of Evidence don't tell us how to do that. The Rules of Procedure don't tell us how to do it either, it kind of falls between the rule books. Principally, under the handy work of Carl Daley, we attempted to deal with that problem, so a lot of Rule 32 is new, whereas most of the rest of Section 3 is not new, with a few little exceptions.

JUDGE HITTNER: Bill, let me ask you a question. The Chairman's letter, which we received, referred to a new proposed Rule 364(a), the Stay of Enforcement of Judgments Pending Appeal in Rules of Supersedeas Bond. I notice your Rule 27, looking through it, deals with Supersedeas Bond. I guess you didn't touch the proposed new Rule 364(a) in your draft, is that correct?

PROFESSOR DORSANEO: No, Judge, we didn't have that at the time. I don't know what we would have given our charge, which was to harmonize and make as few changes as possible. We probably wouldn't have put that in there anyway.

CHAIRMAN SOULES: Judge Hittner, that

rule came up through the Committee on Administration of Justice at about the same -- in about the same time frame that the appellate rules were being developed. That rule clearly contemplates a change, the proposed 364(a). There are changes in them, but that was not the principal purpose of the appellate effort.

Rusty?

MR. McMAINS: Point of fact, Luke, I think. There were some rules changes that came out in March that are also not in -- not reflected in these because this document was done before then.

CHAIRMAN SOULES: Thank you.

PROFESSOR DORSANEO: A few other comments about Section 3, and I'll try to be brief. Some of the other little changes, to give you an idea, are really of this kind of nature. In the rule for perfecting an ordinary appeal, when we went and studied the matter, we noticed that under those rare circumstances when an appellant perfects an appeal by giving notice of appeal, that although the rules provide for a motive, if you're perfecting an appeal by posting security, that you can reasonably explain late filing. Am I getting my point across? Someone who had to perfect an

appeal by posting a bond or making a cash deposit, could, under existing rules, not do that on time if they filed a motion within 15 days and reasonably explained why the appeal hadn't been perfected on time.

If you were in a position of having to perfect an appeal by giving notice of appeal, under our current rules, you don't have that opportunity to file a motion for an extension of time. It just doesn't -- the extension procedure in existing Rules 355 and 356, really 356, doesn't deal with someone who perfects an appeal by giving notice of appeal. When we reworked the appellate rules before, obviously we weren't thinking about those people, because -- well, I know from my perspective they are never meek. So, those little kinds of things that you notice years later come up, and that's one of them. Another type of thing you'll notice, there's, in Section 3, a provision called Involuntary Dismissal, Rule 40.

Well, sometimes we change the title of rules, in fact, frequently. The Involuntary Dismissal Rule, I think, is current rule, without change, 387, which is entitled Dismissal or Affirmance on Notice. The title doesn't really communicate very

much to me, and part of our idea was to have -- in the organization was to have a structure and a table of contents that someone could use, rather than having you be in a position of knowing that Rule 387 is the rule that deals with this problem. I can't remember what the title is, but it's some odd title; that kind of thing we tried to resolve as well. We didn't change any of the components of appellate practice. We didn't change any of the timetables. I may -- I think those statements are accurate. It's been a little while. We certainly didn't plan to do it.

So, Section 3, with the exception of Rule 32, I would say, shouldn't give practicing lawyers very much trouble. They don't know the rules' numbers anyway, very many of them. And it basically is the same as it was, with some cleaning up.

MR. O'QUINN: Even as to Rule 32, I briefly looked at it. It doesn't seem like it's changed the practice.

PROFESSOR DORSANEO: Well, it depends on what part of the state you're from, actually. And a lot of times the practice doesn't conform to any known law.

MR. O'QUINN: But as far as making the

bill is concerned.

MR. McMAINS: Well, except for -- there is, bills made, a specific difference between this and 103(a)(2) in the Rules of Evidence in that this appears to authorize the judge to allow an offer of proof by narration by counsel unilaterally, regardless of whether the other side objects or not. That's what this particular rule authorizes. Now, was that -- I was not at the committee meeting when that was done. Was that a conscious decision or was it --

PROFESSOR DORSANEO: We recognized that Rule 32 would probably need additional work and input. And I know from my own perspective, my attitude was, "Well now, we have a pretty good start." But that's one of those rules that I think may need some committee work or some additional input along the way.

MR. McMAINS: That is a different --

PROFESSOR DORSANEO: Yes. Section 4, dealing with -- consisting of three parts, dealing with motions, briefs, arguments, admissions, has some changes. I don't think that they're of particular consequence, most of them, but I'll mention a few of them anyway.

Rule 50, a rule on motions, is basically a new provision. It doesn't suffer from the same kind of problems as Rule 32 might. The reason why it was added in is that we have no rule on motions at all. We all know what a motion is supposed to look like and what it's supposed to contain and what it is, but there is no such rule in our Rules of Procedure. So, we thought that the Federal Appellate Rule 27, a pretty good rule, with some provisions added which are in our Rules of Procedure now, concerning notice of motions and determination of motions. I don't think anybody would be offended by the fairly innocuous provisions of Rule 50, which tends to deal with practices anyway, what the form book raised following their form draft.

Rule 56 is also new. It is not new in a -- in one sense, that is to say, this subject is ordinarily covered by local rules, how is your motion for extension of time to be prepared, what does it need to contain. But there is no rule like that in the big rule book. So, some -- and this one is fairly similiar, not surprisingly, considering we panned it out to the Dallas Motion for Extension Rule.

Rule 57, getting into briefs and arguments -- turn to that for a second. There are some definite changes there, although only some of them are of real consequence. To give you, the best I remember, the details of that, Rule 57(b) -- this is modeled on current rule -- what is it, Rusty? 4 -- 414.

MR. McMAINS: It used to be --

PROFESSOR DORSANEO: 414 now. 414 and old 418 said that you have a Subject Index at the beginning of your brief. And, of course, that's a Table of Contents, and we just thought that we ought to call it a Table of Contents because the Subject Index -- whoever did that initially, got confused about what goes at the back of the book and what goes at the beginning of the book. So that kind of thing is changed.

MR. McMAINS: Actually it says both.

PROFESSOR DORSANEO: Well, I know. I didn't want -- thinking there may be some logic to this.

The Points of Error Provision, a very important provision of the rule, also has been changed. My recollection is that what the committee would recommend is to go back to what was

and now repealed Rule 418, which didn't find its way into the new brief Rule 414, probably as a result of the fact that we had so much to do, it dropped through the cracks, but I really don't know why; and add in to the points of error provisions of this proposed rule language allowing points to combine several complaints. The language is meant to be verbatim what was in Rule 418, which is something this committee talked about some years back and it disappeared on April 1, 1984. If there was some reason why that disappeared, we didn't know about it. And that is an important change. Let me see if there is anything else on that.

There are so many things that you discuss, and my memory gets foggy on this. I don't think we changed anything in terms of page limits from existing law, and those are the things that I remember about the -- about the brief rules. But I guess it's another one of those that ought to be looked at because there were a lot of -- this is more than just a verbatim reorganization kind of thing.

The Argument Rule is basically the same. The submission in the courts of appeals rules, one made the most important change there, I think, involves

the addition of Rule 62, Panel En Banc Submission. We have no such rule in the big rule book for civil cases dealing with that. There is either -- there is a criminal appellate rule that deals with that problem, and we like it and basically revised and changed it and put it in this proposal. That's the major change.

Section 5 is not changed at all, except for the fact that the rules concerning mandamus. Other original procedings in the intermediate appellate courts are now there. Those were revised, as you all remember not too long ago, by Chief Justice Pope. And there is nothing wrong with those rules, basically, and they are incorporated there.

Section 6, the Certified Questions Rules, which you may recall, had themselves been revised recently, principally by Chief Justice Guittard, are contained in this package without change.

Section 7, Judgments, Opinions and Rehearing. These rules, I recall, seem to me to be the most clumsily worded rules in the appellate rules as they exist today. And without getting into the details, we tried to take the clumsiness out of them and have them make sense. I would suggest that they be looked at with some care because

although major substantive changes were not intended, there was a lot of rewording going on in trying to get the sense of what the rule was trying to say. And it's possible to make a mistake, it's possible to -- I don't think that happened, but I would really want someone to look at those carefully to be certain that something wasn't done inadvertently.

Rule 9 -- which one is it now? Chief Justice Guittard mentioned the Damages for Delay Provision, Rule 94. That's a major change, taking the 435 and 438 and basically substituting, as he said, the federal approach for that.

JUDGE HITTNER: Would that knock out both of those rules?

PROFESSOR DORSANEO: Yes.

JUDGE HITTNER: Because some of the appellate courts now are issuing -- what do you call it, damages for delay on their own motion. I had a couple of cases where they did it on their own motion. Will they be able to do that, as you see it, under Rule 94? Is there any change in the case law or is this just broadening it out, the authority of an appellate court to give damages for frivolous appeals? It's on Page 120 --

PROFESSOR DORSANEO: First of all, it's broadening it out, yes. Now, on the question of the judge being able to do it on his own motion --

JUDGE HITTNER: A number of appellate court opinions that I've seen on their own motion have assessed a 10 percent penalty.

PROFESSOR DORSANEO: That's beyond what I can say anything about. The main change from the text of Rule 438 is the last part which authorizes the court of appeals to award just damages in single or double cost to the appellee. Are you talking about trial judges?

JUDGE HITTNER: No, appellate judges on the appellate court. When you use the word "and" in there, meaning that they can assess damages not necessarily restricted to 10 percent plus single or double cost, is that your understanding on that? The "and" in there? The very last line.

PROFESSOR DORSANEO: Yes, just damages.

JUDGE HITTNER: All right. Your feeling is that this is stronger than the present rule as we have it.

PROFESSOR DORSANEO: I think so, yes. Don't you think so, Rusty?

JUDGE HITTNER: I would agree. I just

wanted to make sure that was your interpretation, also.

PROFESSOR DORSANEO: That is one of those policy decisions, very few of which were made by the members of the committee.

MR. McMAINS: It actually weakens the existing standard, in my judgment, actually. It's now required to be frivolous. That language is in there, it says, "taken without just cause."

MR. BRANSON: Bill, was it the committee's intention that there be --

MR. O'QUINN: No, I think it's substantive.

CHAIRMAN SOULES: Frank Branson has the floor.

MR. BRANSON: Was it the committee's intention that there be any limits on the appellate courts' ability to award damages?

MR. O'QUINN: No remittitur.

PROFESSOR DORSANEO: I don't know how to deal with that. Let's pass by later.

JUDGE HITTNER: For whatever it's worth, it's my feeling that the appellate courts are just getting flooded with frivolous appeals. And I'm all for something like this, where they can really

tighten up on it. If someone has really got a gripe, let them take it up; but if not, it really ought to end at the trial court.

MR. McMAINS: I think the question is: Is there any upward limit and where do you go if the court of appeals decides that this is really frivolous.

JUDGE HITTNER: I guess you go to the Supreme Court.

MR. McMAINS: You get hit for a thousand and they assess a million. I think that's unlikely, but there are no restrictions on it at this point.

JUDGE HITTNER: I'm not sure we need a restriction, but I'm pleased to see that it broadens that out.

MR. O'QUINN: So am I.

MR. McMAINS: And I know that it's intended. I believe that the rule was, in fact, intended to authorize the assessment of more damages than there were awarded. Because it was in small cases that were being appealed that were a real problem.

JUDGE HITTNER: 10 percent of a thousand dollars, you know, an extra hundred dollars,

meanwhile the man's waiting for his money down below.

MR. McMAINS: That's right.

MR. O'QUINN: Great change.

PROFESSOR DORSANEO: Can I get through the end of this?

MR. BRANSON: I vote for that.

MR. O'QUINN: I'm ready to vote on that rule.

MR. BRANSON: May I get a response from my question?

PROFESSOR DORSANEO: I didn't understand you, Frank.

MR. BRANSON: My question is, was there any intention to having a limit of any kind, and is it, I assume, reviewable by the Supreme Court?

MR. O'QUINN: Sure.

PROFESSOR DORSANEO: The intention was to eliminate 435 and 438, which themselves were somewhat inconsistent, and to take out this 10 percent figure that's in both of them, although dealing with a different thing, and to substitute the practice in the federal system, which was thought to be more liberal and flexible, and would require judicial interpretation as to what that

means, "just damages."

CHAIRMAN SOULES: No arbitrary limit, Frank.

MR. BRANSON: That's all I was asking.

CHAIRMAN SOULES: No arbitrary limit.

MR. McMAINS: There is no limit.

MR. O'QUINN: It would have to be just.

PROFESSOR DORSANEO: On the balance of it, Rule 100, Opinion Publication and Citation, I don't remember the citation part. It's something you may want to look at. The rules on publication of opinions have been somewhat controversial. And the rules themselves in this area were different. Let me back up one second.

In many instances, there are no criminal rules dealing with particular types of problems or subjects. In this instance, there were complex and detailed rules concerning publication of opinions and things of that character in the Code of Criminal Procedure, I believe. So, Rule 100 borrows some from that and retains some of Rule 452, I think. It's a combination thing, and that may be something you want to look at with care.

JUDGE HITTNER: Has any thought ever been given to attorneys' input as to whether or not a

case should be published or not?

PROFESSOR DORSANEO: I don't know.

MR. McMAINS: It depends on whether you're a winner or loser.

MR. TINDALL: You can wage a campaign with a bunch of lawyers --

MR. McMAINS: Luke, my principal concern with the entire concept of non-published opinions is that -- in spite of the fact I realize it shouldn't be published, I mean, we try and not clog the books with unnecessary opinions -- there needs to be some, in my judgment, centralized identifiable location of where opinions and judgments affecting particular parties may be indexed and found, particularly with the advent in continuing decision making in collateral estoppel areas, for instance, and that sort of thing in which it doesn't matter whether it's important to the jurisprudence. It may be important to determine a collateral issue that's involving a piece of property or another party or something else. And I don't have any great recommendations as to where to do that, and I realize that means keeping more paper than one wants to do. But there should be, it seems to me, an availability of being

able to find out where those opinions and judgments are.

JUDGE HITTNER: Of course, isn't it California -- the Supreme Court of California can order an opinion unpublished? I believe the Supreme Court in California can order a published opinion unpublished.

MR. McMAINS: I have also heard input from the -- from other people in the Bar that they consider the non-publication of their opinions a deprivation, as it were, of some rights to an otherwise convent in a subsequent case. They may have a case in which they got one decision that was unpublished and a second case in which it is published, and now these rules say you can't cite the prior case which would give you Supreme Court jurisdiction under Article 1728, Section 2.

And there -- I know a number of lawyers that actually raised that complaint and gotten it through, but they still tend to ignore it. But I think it is not just enough to say we're going to allow people not to publish opinions, just kind of hide them out in the closet. There really needs to be some more input, I think, into that rule.

CHAIRMAN SOULES: To that end --

CHIEF JUSTICE POPE: May I comment?

CHAIRMAN SOULES: Chief Justice Pope.

CHIEF JUSTICE POPE: This is a rule that has been discussed and debated on the National scales. Texas is very late in coming through with a rule that limits publication. Put a pencil to it. I don't know what it is now, but 10 years ago it cost $200. Every time a judge writes an opinion, he's sending a collect telegram to the lawyers of Texas, collectively, for about $300 a page.

This last week I took up a challenge and read a letter -- and wrote a letter to a friend of mine calling his attention to an opinion that was written by one court of appeals in Texas that had one sentence that had 347 words in it. One sentence. Of course, that's not the record. The record is in excess of 800 words. Now that type of thing just is costly to the lawyers. It's destroying the profession and it's a matter that has been thoroughly discussed and debated on by the Appellate Judges Conference of the American Bar. This limitation of the citation of cases is almost unanimously accepted over the United States. Now, of course, on collateral estoppel or something like

that, that's a matter that is a matter of proof, not a matter of precedent. But if we start -- if we have a rule, I mean this is a thing that's been thoroughly discussed by this committee two or three times before we ever came around to doing this. It's a policy matter.

The question that you raised, Rusty, I know is out there. Of course, all of these decisions are available. You can find extracts from them in the trial of this new publication or you can find the briefs of them in all of the -- in the Weekly Digest of cases. But it's just a policy thing that's either one way or the other. But the alternative is we're making dinosaurs of our law libraries, and we're going to perish.

MR. McMAINS: I'm not suggesting that we provide that -- I am in favor by any means of requiring publication in all cases or even authorizing any kind of review of the decision to publish or anything like that. All I'm saying is that I think it is important to the legal community in a number of different contexts to have access to some system to get to the unpublished opinions. I believe, frankly, that probably a private publisher would be willing to do it, you know, without any

kind of state funds or anything else, if he were encouraged to get something together. And people could send their unpublished opinions to him and then forget it. And, you know, they could do a private indexing and private charges.

But there are a number of different relevant reasons, I think, why general access by the lawyers in the state to knowing the parties involved and results of judgments that they may know occurred and they just can't figure out what happened. There are a lot of times trial court records are sealed. There are all kind of ways.

CHIEF JUSTICE POPE: I have no question. As a matter of fact, I rather suspect that that's being done today. Just don't cite them to the court. That's the only thing --

MR. McMAINS: I don't have any problem with that, but that's all I'm saying, though, is I think that there needs to be some -- we need to figure out some way that we can get these things indexed and centralized. Whether or not we do it or get it done --

CHIEF JUSTICE POPE: Is that the function of this committee? I would think not. I would think that if they want to do that just as a matter

of general knowledge and information, it's all right. But the reason the court says don't publish this thing is that it's already been tread 150 times.

CHAIRMAN SOULES: Judge, that's not the standard for not publishing.

MR. McMAINS: Let me suggest something though, Judge. The one problem that we have is that there are some judges that don't publish opinions because they don't want to be embarrassed by the result, or at least that is the general suspicion as to why they don't. They may be going out on a limb to accomplish a particular result; and by not publishing it, they figure they have a better chance of getting it in.

And I merely mentioned that, and with no reviewing ability, no standard or no place to go on the publication decision, then all those things in the closet basically just stay in the closet and you've got only one person that's got the key. And I suppose that's my basic concern. It's both legal, it's political and it's practical because there are -- I realize we've now done away with the venue practice, appeal-wise, but there were a number of times when I saw lots of very strange

decisions on venue cases that were unpublished and they were designed largely to accomplish a result.

CHAIRMAN SOULES: Harry Reasoner.

MR. REASONER: Well, I think one difficulty with Rusty's suggestion is that the tendency of all of us as lawyers is to try to collect unpublished opinions and cite them, use them, whether the courts publish them or not. And I think the great difficulty they've had is the Ninth Circuit, which is one of the earlier circuits to really start a lot of unpublished opinions, is the continuing attempt of the Bar to rely on them.

And I would suggest that any practice of centralization and indexing is first. We're all going to buy them and have them in our libraries, so we want to accomplish the economies involved there.

And secondly, you just encourage the Bar to continue to try to rely on them and use them in the appellate courts, whether the appellate courts say not to or not.

And I have the same instinct that I suspect Rusty does, if the judge doesn't publish it, I might say I'll use it if it's ever useful to me.

CHAIRMAN SOULES: Frank Branson.

MR. BRANSON: By not addressing the matter in some format though, aren't you really encouraging the abusive system that Rusty described?

MR. REASONER: I'm not sure I understand what the abuses are. Collateral estoppel, I agree with Judge Pope, is a matter of proof. And in any case where you're litigating, where you suspect the possibility of collateral estoppel, you'll get it on discovery of proof.

JUDGE HITTNER: I think what Rusty is saying is that in marginal opinions, the marginal reasons of things that a lot of people wouldn't agree on if it got published, it's unpublished, and it's literally buried, but it sure hurts those folks that get stuck with it.

CHAIRMAN SOULES: To that end -- and I don't know whether this has ever been addressed -- given Rusty's example, where conflict is the only ground that that party has for asserting jurisdiction in the Supreme Court of Texas, without that ground, there is none. And a rule that says that the parties seeking jurisdiction can't cite the unpublished case where there is a conflict in the courts of appeals, then that conflict statute

doesn't say "in published opinions", that I know of. He can't cite that case, therefore he's denied access to the highest court in the state. To me that reaches constitutional proportions.

Even, in my judgment, to say that you cannot cite an unpublished opinion -- now that is a public record of the state -- that you cannot cite it to a higher court -- I realize they've got the right to make their rules, but I don't believe that's constitutional and I don't know whether that's ever been looked at.

And apparently all of the big courts have the policy of precluding citations, so I suppose if the issue of constitutionality is addressed by those courts, they're going to find out -- they're going to rule that it's all right. But I'm just not so sure that it is, that we can be tongue-tied by a rule of court from citing a public record that is precedent, that supports our client's position. I'm on a soap box.

CHIEF JUSTICE POPE: Luke, I'm taking too much of your time.

CHAIRMAN SOULES: No, you're not, Judge.

CHIEF JUSTICE POPE: You raised the question of constitutionality. I'm not sure that

there is any constitutional requirement that there be a written opinion by any appellate court. The English precedent was that the judges ruled from the bench and the people wrote it down in longhand and that came to be the common law. But now on this matter about there must be a conflict expressed on the face of the opinion, which you're aware that a smart court of appeals judge can write an opinion and dispose of it without raising this conflict thing at all, but that doesn't keep the Supreme Court from looking at it.

Now, the requirement that the conflict must appear on the face of the opinion, I don't think that has anything to do with the publication of the opinion or not, because the judge who's reviewing it, he's got that written opinion before him. And it's either a conflict on the face of the opinion or not. What I'm saying is I don't see where publication enters into that problem.

CHAIRMAN SOULES: Well, can they -- is it permissible to cite the unpublished case for purpose of establishing a conflict to get jurisdiction or is that an exception to the rule prohibiting citation, is my point. I don't know.

CHIEF JUSTICE POPE: No, I don't think

you can cite that unpublished account.

CHAIRMAN SOULES: Then how do you show the conflict, Judge?

This is Orville Walker, Professor Orville Walker.

PROFESSOR WALKER: This case has been decided 150 times. You don't need that case to have a conflict. You've got 150 other cases or 149 to show the conflict. Why would you have to have that one?

CHAIRMAN SOULES: If the court of appeals --

PROFESSOR WALKER: It's already been decided so many times, it's repetitious, adds nothing to the jurisprudence of the state. You don't need it to show conflict.

MR. McMAINS: The point I'm making is not in the dominant number of cases in which there is a fairly standard non-controversial appellate point or substantive point or wholly factual point. There's no significance to the jurisprudence of the State. There are cases coming down virtually every week, in my judgment.

The courts of appeals in this state, on controversial subjects with controversial holdings, where they published that would be controversial

that are buried in the back room and appear only on the desk of the Supreme Court, who gets no help on the controversy because nobody knows it's there. It gets to them before anybody in the Bar, apart from lawyers involved immediately in that case, know anything about. And it has a way of finding its distribution among certain people, whoever it favors in a certain class of that type of practitioners, and is not widely disseminated, not widely debated, and it is a suppression of certain very controversial areas by procedural trick, as it were.

And I wish that that weren't going on. I know it does go on. I've seen it in cases on both sides. And I have also, when the publication rule first came in, I had a court of appeals in Houston that wrote on what I felt was a very unique point. I actually won, so I didn't care whether it was published or not, but it was 28 pages long. And it's the only decision in the state that I could find because I was making an extension order on a very controversial issue and it doesn't appear anywhere in the books. And the reason was it was somewhat embarrassing to the lawyer on the other side, I think. And as a matter of politics, they

decided they were already pouring them out. There was no reason to make it worse by publishing it. But if that practice did not go on, I don't have a problem. But that's my concern, and I don't know what the answer to it is because I also realize the paper concerns.

CHAIRMAN SOULES: I think we've got the issue pretty well drawn between Rusty and Justice Pope and the other comments that are here.

And, Justice Pope, would you like a rejoinder? I want to take a consensus as to whether or not we feel that this needs to be reviewed in any way or whether we're pretty well going to go along with it like it is for now.

CHIEF JUSTICE POPE: No, I don't. As a matter of fact, my only point is that this is not a new matter. It has been frequently debated. And unless there is some public emergency of some kind, I think that it's a fair system and that our system just has to simplify itself.

CHAIRMAN SOULES: Let me get a consensus on this because I know the committee's going to need some guidance. How many feel that we're -- put it this way, we're going to have to live with what we have and we don't need to try to reorganize

the unpublished opinion practice, or we are going to have to live with it like it is now?

JUDGE HITTNER: Mr. Chairman, I've got one question in my mind.

CHAIRMAN SOULES: All right. Judge Hittner.

JUDGE HITTNER: I just talked to Professor Dorsaneo. Apparently the policy is or the rules are, that unless a writ of error -- is it true that unless a writ of error is granted, the Supreme Court cannot or will not order an opinion published? Is that -- Justice Wallace?

CHIEF JUSTICE WALLACE: Say that again, David.

JUDGE HITTNER: In other words, if an unpublished opinion comes up to the Supreme Court, whether you grant writ or not, can the Supreme Court order something published that's not published?

CHIEF JUSTICE HILL: Yes, we did that just the other day.

JUDGE HITTNER: I remember reading.

CHIEF JUSTICE HILL: But to send a message out in the discovery area, we've been -- this was a dismissal.

JUDGE HITTNER: Was that the writ refused case?

CHIEF JUSTICE HILL: It dismissed the plaintiff's cause in a malpractice case because plaintiff persistently refused to comply with the discovery. And the sanction was, of course, a harsh one, the harshest of all, and that was to dismiss the case. And we ordered it published and writ refused it, which both is unusual.

As you know, we probably have a reputation as being maybe too much of an NRE court, but certainly when we say "writ refused", that is a clear message, the clearest sort that we knew to send. And we did order it published so that the Bar would know that not only are there sanctions to be employed in the violation of the spirit of our discovery rules, but there is severe penalties. So, yes, we did that and we would do it in a situation where we felt there was some overriding reason, but it would have to be a strong one.

CHAIRMAN SOULES: Frank Branson.

MR. BRANSON: Mr. Chief Justice, is there a mechanism by which the trial lawyer can request the court overrule the civil appeals court and have the opinion published without regard to the effect

on the appeal to the Supreme Court? Let's assume that it's an opinion, as Rusty described. It is not one that has come down hundreds of times before. And in order to avoid the injustice of having a unique point buried in smokey-filled back rooms of some intermediary court of appeals, would it be possible to create, if the mechanism is not present, another review in those extraordinary circumstances?

CHIEF JUSTICE HILL: Oh, sure. You can create whatever you want to create out of that. We make the rules. The thing that we've got to keep in mind is that we're basically talking about the integrity of the Court of Appeals of Texas. Because if the integrity factor is there and it's complied with as intended, I don't think we get into those kind of problems.

I think what -- the thing that's painful is that the point that's being made is, you can't spell it out any other way and make it smell any different then that some judges are being thought to have failed to publish opinions for the wrong reasons. And I don't know, I'd like to think that isn't true, but I'm not naive. And if it is, I guess the one thing to do is for us to try to see

that we get the message out at judicial conferences and around that let's do this thing the way it's intended, and truly not publish when it falls within the Judge Pope 150 times it's been written, no need to junk up the place with it. But not do it for other reasons. That's certainly one way to approach the problem.

I don't know what we would do, frankly, Frank, with your suggestion. That would be a court policy, a court decision, and we've never discussed it. I'd like to keep where we are if we can and solve the problems that are being discussed. I think there is some merit to the points that are being brought forward, but I certainly share Judge Pope's view that we can't go back over this ground totally again because we've just been over it too many times.

Why don't we just -- let us work with it this year. I've heard the discussion and see what we can do in terms of trying to investigate and see really how prevalent the matter of abuse is. And then we'll talk about it at the conference in September and certainly get it out in a workshop atmosphere and dust it off. And then if anybody's got any suggestions about what we might do in a

given case -- that sure would be hard to implement, it sure would be difficult. I guess I'm just not looking for any new work right now.

CHAIRMAN SOULES: Well, these rules do provide that upon the grant or refusal, regardless of what notations are made pursuant to the refusal, that the Supreme Court may order an opinion published. Now, these proposed rules --

CHIEF JUSTICE HILL: You can correct me. I don't remember seeing a request from the participants in the litigation. I'm sure there would be nothing to foreclose that. But I -- have you seen any?

MR. BRANSON: So, you're saying that the rules are sufficiently broad to allow that currently?

CHAIRMAN SOULES: Well, the rules that are being proposed now, the harmonized rules, have this -- let's see, it's on Page 132.

JUDGE HITTNER: Isn't it H?

CHAIRMAN SOULES: It's part of Rule 100 that starts on 131 and it's Subsection H of that rule that appears towards the bottom of 132 and says, "Upon the grant or refusal of an application for writ of error whether by outright refusal or by

refusal of no reversible error an opinion previously unpublished, shall forthwith be released for publication if the Supreme Court so orders." If that stays in, it would be a signal. I don't know why "want of jurisdiction" and all the other notations that they can put on refusals is not a part of that. There may be a reason for it or there may not, if so, they may get included. That is suggested and, of course, it is the practice, as we know, and you recently did it. So, it properly should be in the rules if it is in practice.

CHIEF JUSTICE HILL: It should be. And with nothing foreclosed, you're doing what Frank Branson has suggested in a given case. Maybe we need a little bit of a signal. Some lawyer in the case feels that it should be published and sets out some reasons for it. I don't know that that would make any difference with us, but they might try it.

CHAIRMAN SOULES: How many feel that a lawyer, not intending to appeal the result of a case, or party, should have some new procedure not -- that does not now exist, because we would have to create a new procedure to seek that the Supreme Court order that the court of appeals' opinion be published? How many feel that that's --

MR. ADAMS: You're talking about something broader than Rule H.

CHAIRMAN SOULES: I think that's what Frank Branson is talking about. I'm not complaining of the judgment, but I want my opinion published.

MR. BRANSON: I'll be honest with you, Luke. I wasn't aware of the provisions in Section H, but I'm --

CHAIRMAN SOULES: You're satisfied with that?

MR. BRANSON: Yes, I am.

CHAIRMAN SOULES: If we put maybe WOJ I don't know what other notations should be in there, but there are other notations behind refusal that might should be considered. Would that satisfy you if we go that far?

MR. BRANSON: Yeah, I think provision Rule H, now that I have analyzed it, is broad enough to cover the problems that I had. And any of the true inequities that Rusty is talking about should be addressed.

CHAIRMAN SOULES: That seems like a consensus. If there's any objection, just let me hear it now. All right.

How many then feel that with that Subdivision H in the proposed rules, and should it be adopted by the Supreme Court, that we'll just have to live with it as it is beyond that? Show me by a show of hands so I can see a consensus. Okay.

How many feel that there should be changes beyond that on the unpublished opinion practice? Jim Kronzer.

MR. KRONZER: I've always felt that the court should order the publication of any opinion of a court of appeals upon which they place their imprimatur refused. Because that still means that that is their opinion. And this still gives them discretion to do it or not to do it. And I don't think they should have the discretion where they are outright refusing it. They may say they'll always exercise it for publication, but I don't think they should have that discretion.

CHIEF JUSTICE HILL: I agree with that. I think the Court would agree with that.

CHIEF JUSTICE POPE: I can't think of an instance where we refused. As a matter of fact, it's real difficult to remember an instance when we refused a case. But I can't think of an instance where we ever refused a case where we didn't order

it published if it were unpublished.

CHAIRMAN SOULES: Bill, can you write that in at the back?

MR. KRONZER: Another instance, I feel that when the Court grants and writes an opinion, then I, at least in my judgment, I feel that the opinion of the court of appeals should be published, and I believe that for two reasons. One, it gives you a chance to fully flush out what the court is meaning and doing with its activity. And the other is it makes court of appeals' justices be a little more careful about what they're writing, doing and saying.

CHAIRMAN SOULES: Maybe that's a safety valve.

CHIEF JUSTICE POPE: May I disagree with that?

CHAIRMAN SOULES: Yes, Judge.

MR. KRONZER: Certainly.

CHIEF JUSTICE POPE: A court of appeals writes an opinion that's wrong and supposedly the Supreme Court is going to give a fair statement of what the facts are and what the arguments are and going to reverse it. What does it contribute to the law to have a 32-page opinion? I can give you

the case for that. That has been reversed where the reasons have been stated why it's reversed. Which one is the law? It's the Supreme Court that's the law and so, we are just charging the lawyers for the cost of a non opinion.

CHAIRMAN SOULES: Mr. Kronzer, a rejoinder?

MR. KRONZER: Only in this respect. When the Supreme Court speaks from Mount Olympus, sometimes they speak more cryptically, particularly in Rule 483 cases, than people would like for them to do. And if you're trying to get meaning out of action by the Supreme Court, I believe that you very often can get syntax, context and meaning out of what they have done through that court of appeals. That's what I believe.

CHAIRMAN SOULES: In order to have guidance for the draftsmen, how many feel that we should at least explore the --

MR. KRONZER: I'm only talking about where there has been a grant and an opinion.

CHAIRMAN SOULES: Okay. In order to get guidance for the draftsmen who will be bringing these proposed rules back, let's get a consensus on that. How many feel that the draftsmen should at

least approach and attempt to draft, whether we adopt it or not, not only that refused writs have to include the publishing of an unpublished opinion, but that writs granted and opinions written should carry with that the responsibility of publishing the lower court's opinion? How many feel that way? Let's see a consensus. Or they should at least draft it? Ten. How many feel the other way about that? Eight. It's about even.

So my ruling is that we draft that in so we'll have another look at it whenever we meet again to really pass on these in a final way. And whether it's our judgment then to recommend it or not, at least we'll have it before us. I think the vote was ten in favor and nine against. But that's too narrow of a majority rule to make it for sure one way or the other, in my judgment, at this meeting.

Yes, Harry Tindall.

MR. TINDALL: Could I ask about Rule 32? That's a long complicated rule, and I've not had the opportunity --

CHAIRMAN SOULES: Bill, have you finished going through them and then we'll go back. Bill?

MR. TINDALL: Okay. I'm just asking,

structurally, though, is this a rule that even belongs in what we're reviewing? It seems to me, as I read through this, that it almost deals entirely with the trial of the case and what you're doing at the trial level and more goes into the Rules of Evidence. Because once the judgment's signed, your deal is done. Then you can start looking at the Rules of Appellate Procedure. And I know you can -- a lot of things can jurisdictionally fall into either set of rules, but this seems to fall more heavily into the Rules of Evidence more than the Rules of Appellate Procedure.

CHAIRMAN SOULES: Let me set that aside because I do want to give Bill a chance to get all the way through the rules now instead of going back to 32.

Bill, have you been pretty well through these or do you have some --

PROFESSOR DORSANEO: Well, I have a few.

CHAIRMAN SOULES: We'll go back to anything anybody wants to raise here. Since we're past that, I'd like to -- well, we're back into Rule 100 now.

Are you not there?

PROFESSOR DORSANEO: In this Section 7, while listening to the discussion -- basically, much of Section 7 involves a lot of reorganization, rewording, it's not intended to be a substantive change. My recollection is that a lot of it was done at the committee meetings. I did a lot of the drafting without benefit of a lot of input, and I would say that virtually all of Section 7 needs to be looked at with some care. It is not verbatim what the current rules are. A lot of it is, but some of it isn't.

My last comment is that the rehearing rule, obviously an important rule, is one that underwent a lot of language change, principally, as a result of harmonization. Apparently, the Court of -- in criminal practice you file a motion for rehearing, there is an actual rehearing, and then there is a judgment, as opposed to our more normal practice of filing a motion for rehearing and there not being any resubmission or anything like that. So, the rule was drafted to kind of segment that out logically. So, you have a judgment, a motion for rehearing. If the motion's granted, there is a resubmission which may involve argument or may not involve argument and then there's another judgment.

Nothing would change the civil practice, but the language of the rule now seems to make a bit more sense, as the criminal rules do, in this area. It's unusual for them to make more sense than the civil rules, but they sometimes do.

A few other comments. Where do these rules begin and end? This is an important problem area. These rules -- I'll talk about the end first. These rules do not cover proceedings in the Supreme Court. They do not cover proceedings in the Court of Criminal Appeals. Some minor work will need to be done with respect to the Supreme Court rules. Nothing of any major import would have to be done, maybe just some changing numbers where there are cross-references and things like that. I don't know what would have to be done to the rules for the Court of Criminal Appeals. Some of that would need to be taken care of.

The harder part is the beginning. At our initial meeting we had a hard time deciding what the charge of the committee was. Where does appellate practice really begin and where does it -- where does it begin? Does it begin with a motion for new trial or are we meant to redo suggestion, revision, reorganization of the motion for new

trial rules? Basically the decision was made that this project would begin at the time the appeal was perfected. You have to go back and figure when you count from and that kind of business. But stated simply, these rules do not -- these proposed rules do not contain revisions or verbatim copies of 329b, 324.

Many of the rules, not too many, in the early 300s and some of the late 200s, will need to be looked at.

It's similiar to what you're saying, Harry, really, on rule -- this proposed Rule 32.

Why is it in there? Well, it's in there because it has been in the preceding court of appeals section of the rule book heretofore. Now, maybe it shouldn't be in there, and there are some things in the early 300s which are more appellate oriented. And there are some rules in the early 300s which are going to need to be reworded even if they stay there, because the rule deals with not only activities in the trial court, but deals with activities in the courts of appeals. Some rules look in both directions, they look back to the trial court and they look forward to the court of appeals, and that needs work. And that's a fair

amount of work, and quite frankly, Carl and I were not sure we wanted to do that until we knew whether anything would come of anything. And that part of the job still needs to be done.

My own view is that's probably the largest part of the job remaining and frequently the most difficult part because, if I can give my own opinion, is that some of those rules in the early 300s really do need a little help. Even though they have been -- some of them have been revised recently, some of them haven't been dealt with much.

MR. McMAINS: I notice in some of the rules in the remittitur of practice, and that kind of stuff that is discussed, used terminology that does not appear anywhere else in the civil practice. And it probably was because there was some criminal input. But you talk, for instance, when a case goes to the appellate -- is removed to the appellate court before a remittitur is filed, that language of removal to the appellate court indicating mutual exclusivity of jurisdiction doesn't appear anywhere in Texas civil practice anywhere. It's in the remittitur rules that are in there. I'm just -- is there anyplace else where

you're trying to suggest that once you get -- if you go into the court of appeals book, you can somehow terminate a trial court jurisdiction? Because I don't think that was the intent of these rules, but the implication is that once you get to the court of appeals, anything you're going to do, you've got to do there, you can't do it in the trial court.

PROFESSOR DORSANEO: Well, this is a problem in review. Rule 439 uses that term "removed." And I didn't know that when you said that until I looked, and it said "removed," that I put that in there.

MR. McMAINS: It's inconsistent with all the revisions we did with 329b.

PROFESSOR DORSANEO: Well, it happens to be in the rules right now, and goodness knows what it means in the existing rules.

MR. McMAINS: I was just curious. Is there anything strange about criminal practice that say --

PROFESSOR DORSANEO: No, they don't have remittiturs.

MR. McMAINS: I understand that. What I mean as to when, if you do something too early,

your premature appeal or something, if you do something too early in the criminal practice, does that terminate trial court jurisdiction there, whereas it might not in a civil suit?

PROFESSOR DORSANEO: I really can't answer that. There are undoubtedly other rules that I should have mentioned that have had provision changes made to them. Probably the best way to deal with my inability to remember this from beginning to end, especially since I didn't know that I was going to make this presentation today, is to look at the comments under each of the rules.

Now, where the proposed rule is a verbatim reproduction or is intended to be a verbatim reproduction of an existing rule, that's stated. Where the comment says, "This rule is based on," that means we changed it in some respect or another. The change might be a deletion of a phrase or a clause. It might be a change in grammar. It might be a change in punctuation or something like that.

Obviously, where rules are based -- proposed rules are based on existing civil rules, existing criminal appellate rules or statutes and perhaps also where they're modeled on Federal Rules of

Appellate Procedure, that needs to be looked at carefully. And the comments should provide you with that information. They're intended to indicate the source of everything, not only by many rule numbers, but by subparagraph.

And those are really the only remarks that I have, except that if anybody is interested, I personally was ambivalent about whether or not it was a good idea to change all of this structure and move these numbers around, et cetera. But after working through it, it has nothing to do with the fact that -- it may have something to do with the fact that we were working and invested some time and effort in this. That's really not the important thing. The important thing is this structure is one heck of a lot better; and I think it will be a real improvement, even without regard to the major thrust of harmonization. This is looking at it from the civil side. I think it's something that hadn't been done in terms of structure. There have been a lot of changes, a lot of improvements, certainly, but in terms of structure, that really needed to be done, I think, and this was an opportunity to do that. Thank you.

CHAIRMAN SOULES: Before we start taking

questions, let me tell you what I feel like we're going to be doing with these rules, and we want to hear everybody's suggestions so that they'll have input to the process that I do anticipate.

Bill Dorsaneo has agreed to be the chairman of a subcommittee of this committee to continue to work on these rules for presentation at our next session, which I guess will be sometime in September or October, depending on your wishes for the final action. The subcommittee will need to hear from Justice Frank Evan's group, and I feel also to interface with the Advisory Committee of the Court of Criminal Appeals. So, that when we make a recommendation to our court, it will be something that the Advisory Committee of the Court of Criminal Appeals is going to also be recommending to their court. And we won't have two completely separate courses being taken.

I've asked that Bill select several people that he wants to participate with him on that committee, and I'm sure that anyone who wants to join a committee, in addition to those, would be very welcome.

So, with that in mind, it will be a committee with a lot of work to do between now and September

or October. Please give us your input as fully as you can, and we'll go on and work at least till about 12:30 and then see who needs to take a break at that point for lunch or otherwise. If we are not through with our discussion of these rules by that point in time, I think we will go ahead and recess for lunch and then come back. The balance of our schedule is to work until 5:00 today for the reception, and we will not work tomorrow. As far as this agenda is concerned, we're going to push through it quickly and make assignments to subcommittees from this for reporting our next meeting as well.

MR. WELLS: Just a general question.

CHAIRMAN SOULES: Yes, sir. Mr. Wells.

MR. WELLS: What kind of feedback has there been from the publication in the Bar Journal of the proposed rules?

CHAIRMAN SOULES: There's been none, and that caused me some question about why we may not have heard from the courts of appeals yet. I hope they are working on it. Obviously they are putting together a committee to work on it. I guess we'll get some feedback, but so far nothing.

CHIEF JUSTICE WALLACE: We expected more

from those people who practice in the criminal area; and perhaps Sam Houston Clinton, who is the liaison from the Court of Criminal Appeals on this committee, might have heard more, but we've heard nothing.

CHAIRMAN SOULES: One further thing on that. Every Chief Justice was invited to this meeting, and all of the judges on the Court of Criminal Appeals were invited to this meeting by a letter telling them that this was going to be item number one, so that they wouldn't have to be detained to hear matters they might not have an interest in. And so we're certainly not excluding them, we're inviting them in.

CHIEF JUSTICE HILL: Before you start on your input, if I might, Gilbert has been kind enough to get some copies of House Bill No. 1658, and we will just simply pass them around and maybe there will be some time on the agenda later on. I don't want to jump in the middle of what's already a very full agenda, but at least to have this to take home with you.

And, Bill, the only thing -- you're such an enormous resource for the state, people like you. There are others here in this room that are just

such valuable resources to us in these kind of efforts, that I don't know what we're going to do when we're facing having to get this group of rules together at some reasonable time. We can't wait two years to do it. We can't even really wait a year to do it. I guess we could wait six months or so to do it. And I'm just concerned as I see the volume of work that you're taking on. What are we going to do to get a work group together as we need to, to start trying to get on this matter also. So, I don't need any answer at that right now.

Go right ahead, Luke, with your very able agenda handling as you are doing, but please take this home with you and be thinking with it, and let's discuss sometime today before we break off who's going to man this ship, who's going to take the initiative and try to start pulling together these rules of administration.

And if you will notice on Page 3, we'll just take this moment to say that they're talking about "time standards for pleading, discovery, motions, and dispositions; dismissal of inactive cases; judicial accountability, incentives to avoid delay; penalities for filing frivolous motions; firm trial dates with a strict continuance policy; restrictive

devices on discovery; a uniform dockets policy; formalization of mandatory settlement conferences; standards for selection and management of nonjudicial personnel; monthly statewide information reporting system," and on and on and on. It's a big order. So, that's what we're passing around and maybe we'll find 10 or 15 minutes before the day is over to at least start focusing on this. If you'll give us some sort of small subcommittee to start the initial work on it, we would appreciate it.

CHAIRMAN SOULES: Well, we certainly will do that, Judge, as part of the assignments on our general agenda. We will get a subcommittee to work on that and to start work right away.

Bill, have you some choices? I guess the amount of work you've done almost entitles you to a draft, at least to name persons who can decline, if they wish, or accept, if they wish, your effort.

PROFESSOR DORSANEO: Well, I'd be willing to have anybody help, but I guess I would really like to have Rusty help.

CHAIRMAN SOULES: Rusty, will you help with it?

MR. McMAINS: Sure.

CHAIRMAN SOULES: How about volunteers?

PROFESSOR DORSANEO: And John O'Quinn, if he could, especially in the area of those rules in the early 300s, that area.

MR. O'QUINN: Okay.

CHAIRMAN SOULES: Harry, you have a special interest in those that are covered by 32. Will you help with input on that?

MR. TINDALL: Okay.

CHAIRMAN SOULES: Harry Tindall, Rusty McMains, John O'Quinn. Are there any other drafts you want to make, Bill, or do you want to take volunteers?

MR. McCONNICO: I'll help you, Bill.

CHAIRMAN SOULES: Okay. That's Steve McConnico.

PROFESSOR DORSANEO: Really, I don't want to make it too large by naming any names, suggest anything. Anybody who wants to help and really wants to work on it -- and that's the main criterion. You all know better than anyone else whether you're in a position to really do that.

CHAIRMAN SOULES: There are a lot of other jobs, and we're going to need everybody on subcommittees. So, the floor is now open for

volunteers to help with this effort because of a special interest in these rules or related rules. If anyone else would like to do that.

MR. ADAMS: I'd be glad to help, if you need some more people.

CHAIRMAN SOULES: Gilbert Adams. And I'm sure there are going to be some overlap between committees. Anyone else? That's probably a large enough committee.

Bill, are you satisfied with that, unless there are other volunteers?

PROFESSOR DORSANEO: That ought to be sufficient. We may need additional help, but I have in my mind a way to go about this from this point forward and --

MR. O'QUINN: Yeah.

CHAIRMAN SOULES: All right. That would be assigned then to a subcommittee chaired by Bill Dorsaneo with additional members, Rusty McMains, John O'Quinn, Harry Tindall, Steve McConnico and Gilbert Adams, Jr. Okay.

Now that the people know that they're going to be on the committee, let's take a few minutes to discuss any matters that you feel this committee definitely needs to take into consideration as it

proceeds.

Pat Beard.

MR. BEARD: I think that unpublished opinions should be cited in cases involving substantially the same parties, substantially the same facts, because you get the same cases coming up, particularly over in the federal court where they don't publish an opinion in the Fifth Circuit and you're back in the state court with the same facts and arguments. And I believe that where they are the same parties and the same facts, you should be able to cite them.

CHAIRMAN SOULES: Does that need discussion or can we get a consensus on it without discussion? First, I'm going to ask for a consensus without discussion. How many feel that Pat's thought there should at least be explored in these rules? Raise your hands, please.

JUDGE TUNKS: I'm sorry, I didn't understand you.

CHAIRMAN SOULES: His point was that parties should be entitled to cite unpublished opinions whenever the case on appeal involves the same subject matter and the same parties as the prior case that they're trying to cite. How many

feel that that should be permitted? Fourteen.

How many feel it should not be permitted? All right.

Bill, that should be drafted in then, at least for our next discussion, that that be permitted. That's a vote of 14 to 3, as I counted it.

Are there any other matters that you feel this committee should seriously consider or even lightly consider, give consideration to as it produces these rules for our final adoption or recommendation to the Supreme Court for adoption?

All right. If we -- Rusty?

MR. McMAINS: I just have one question and that is from a format standpoint. It's obviously anticipated that this is going to be jointly done by the Court of Criminal Appeals and the Supreme Court. And am I correct that they are just now appointing an Advisory Committee for their --

CHAIRMAN SOULES: The Court of Criminal Appeals has an Advisory Committee that functions in fairly narrow territory because most of the rules that govern criminal appeals are in the Code of Criminal Procedure. Now, whether that same committee will have the responsibility for this

effort or whether a different committee, we just don't know.

MR. McMAINS: That's what I'm getting at, Luke. Before we launch into a so-called final work product, shouldn't we get the premitter of the Court of Criminal Appeals Advisory Group? At least an invitation to participate rather than just to check our papers or something. I mean, I don't want to get in a situation where, because I think you saw it at the meeting over there where the Court of Criminal Appeals feels like they're the stepchild.

CHAIRMAN SOULES: Well, I have had a direct meeting with Chief Judge Onion on this subject and he has told me that they are very much behind this, that at least the overwhelming majority of the judges are behind this, and they've read these rules and don't have any serious problems with them. They understand the problems of the courts of appeals. They want support from us. We've been at this for years and I think -- from our court, that is, really, is the Supreme Court going to be willing to yield to accommodate in a joint set of rules the criminal process?

They're pleased to know that we've had the

support of the court at the joint committee effort, and they are very positive to go forward with this. And it would by my plan, subject to being otherwise instructed by the court, to report back to Chief Judge Onion the results of this and ask him to give me whatever instructions he may want to give me on interfacing with his committee, if he wants us to interface with them, and I think that will produce an interface.

CHIEF JUSTICE HILL: I'd like to say one word on that if I might. Rusty raises a very valid point. I would certainly urge the committee to sit down with their Advisory Committee and with the court and get a sign off, get it out of generalizations, or it looks pretty good, get it down and really get it agreed on, get it signed off on so that we know precisely if there are any specific disagreements with us on any particular rule in here at all. Let's get it out on the table and draft it out and strike an accord on it, because otherwise you can, even with the best of intentions, have a misunderstanding about it.

MR. McMAINS: I think there's been good communication between Bill and Judge Daley. And probably Judge Daley would serve as the proper

liaison.

PROFESSOR DORSANEO: Maybe Clifford Brown.

MR. McMAINS: Maybe. Okay.

PROFESSOR DORSANEO: I've done some thinking about that already, and that shouldn't be a problem.

CHIEF JUSTICE HILL: You couldn't be working with a better person; and that's not my point, but you're working with a full court. And you need the decision of the court, final and agreed on, because that's the way they like to work. And that's fine.

But I'm glad you raised the point, and we just need to crank in real close with them and be sure that we're on the same wavelength and have the discussion specific, so that you don't say, "Well, I thought we had an understanding." And they'll say, "Well, no, in rule so and so, we really didn't quite understand it that way and we're going to do it a little bit differently." Let's get all of those kind of matters out of the way.

MR. WELLS: I have a question --

CHAIRMAN SOULES: Yes, sir. Mr. Wells.

MR. WELLS: -- that I'm not sure I can

formulate very well. I'm impressed with the plan that Dorsaneo lists at the front end here. It -- and I'm obviously not really familiar with the specifics of the rules, but it seems pretty clear to me that the plan is a substantial departure from what the Texas Bar is used to working under now, and that there are going to be some grammatical changes and also maybe some changes that may affect substance. And is this court and is this committee -- it seems to me that we have to understand that there are those changes, and I want to be sure that this committee is committed to that kind of a program. I think there are a lot of lawyers out there that are going to figure they didn't understand that we're starting from scratch on something brand new.

CHAIRMAN SOULES: Well, let's get a consensus on that point. How many members of this committee feel that you will ultimately be disposed to recommend to the Supreme Court of Texas that they adopt some form of harmonized rules agreeable to us, as they are harmonized, and also agreeable to the Court of Criminal Appeals, if we can get to that point? How many so feel? I believe that's -- How many do not feel that way? How many feel

opposed to that effort?

MR. WELLS: Well, at the most, I have some slight doubt. I think you're going to get a lot of lawyers yelling at you, but I just wanted to -- I think clearly the consensus wants to do it that way. That's fine.

CHAIRMAN SOULES: The consensus would be then that that be our goal and that we attempt to get that done.

Frank Branson.

MR. BRANSON: Mr. Chairman, at the risk of being one of the new kids on the block and not being aware of the discussion of this committee in the past, one of the exciting things to me about having the opportunity to serve on this committee is looking at some of the rules that, throughout my practice, have perhaps given me the most difficulty, one of them being the remittitur rule. Is there a way to look at that rule philosophically at this time as to whether or not there is a need for a dual remittitur provision?

CHAIRMAN SOULES: I think so.

MR. McMAINS: Are you talking about in the context of this document or are you talking about --

CHAIRMAN SOULES: I think so. We may want to do that after lunch or you may -- would you like to serve on the --

MR. BRANSON: No, after lunch would be fine. I was just wondering if this would be the appropriate time.

CHAIRMAN SOULES: Let me ask you if you would be willing to function with that committee, Frank, at least on that subject?

MR. BRANSON: I would be more than happy to.

CHAIRMAN SOULES: Okay. State, Frank, if you will, what your concern is or your difficulty with that is, and maybe we can get that done before we break.

MR. BRANSON: I've always had some reservation about the trial court being able to take money away that the jury has awarded. In addition to that, when you give the defendants a double bite of the apple, then allow the court of appeals to make the same decision that the trial court has previously ruled on, it gives me additional philosophical problems. And occasionally more than philosophical problems.

MR. TINDALL: Financial.

MR. BRANSON: Well, particularly in light of the fact there appears to be no goose and gander rule. That is, there's no additur allowed either at the trial level or at the appellate level. And coming from a county where juries can occasionally get carried away for the defendants, it seems appropriate if you're going to have a rule allowing reviewing the appropriateness of the jury's award on damages, you certainly ought to allow it to run both ways.

CHAIRMAN SOULES: How many feel that the question of additur, as well as remittitur, should be addressed by the committee then, at least for purposes of formulating their idea and their drafts for the next time? Hold your hands up, please.

MR. McMAINS: You mean just considered? I mean, we're going to need to talk about it.

CHAIRMAN SOULES: Be a part of the draft, I guess. How many opposed? Well, the consensus is that it ought to be considered and reported back by the subcommittee at least. Okay. Frank Branson is added to the subcommittee then on the appellate rules.

Are there any other matters that you want to have input on right now, before the next session of

this committee as a whole, so that the subcommittee can have your guidance as it functions?

MR. KRONZER: Mr. Chairman, I would only like -- the part of the remittitur practice that I would object to and I ask the committee to consider is the holdings of Flannigan versus Carswell (Phon.), which I do consider to be unfair, that is, the trial court can cut the verdict and the prevailing party can still appeal or you can appeal from that action if you're the affected party and you have to show the trial court abused its discretion. And yet the party to have the benefit of that cut work can still appeal as a matter of first impression. And I think that the tail ought to go with the hide. Flannigan, to my mind, works unfairly. And if they want to appeal, still complaining about the size of the verdict, they ought to face it in the court of appeals as a matter of initial impression.

CHAIRMAN SOULES: Would the committee consider that then, that proposition, as well?

MR. KRONZER: I do consider that as an element of unfairness.

CHAIRMAN SOULES: Now give us all the guidance that you can give us because we're looking

at this kind of proposed schedule, and that would be that there be this committee functioning. And assuming the Court of Criminal Appeals functions as well in the same timeframe, that somewhere in September or October we're going to be recommending to our court a list of rules. They will then meet in session, and the rule making function of the Supreme Court of Texas is a public function. It's an administrative function. It's not the same as holding conferences on opinions. Their conferences on rules are public conferences.

They will then meet and decide what to do with our recommendations. And then whatever they do with them, if they adopt rules, those rules must be published in the Bar Journal -- I believe it's 30 days in advance, but it may be 60 days -- in advance of their effective date. And we're -- we once had a goal of perhaps January 1, 1986. That's just not realistic in view of Justice Evan's request to have input. But our work on these rules will be done in the interim and our recommendation will be made to the court in September or October.

So, if anyone not on a committee has anything now to submit, let's get it. And if you have anything in the interim that you want to submit,

please address that to Bill Dorsaneo, and if you will, please, copy me and Justice Wallace.

Are there any other recommendations now? Rusty?

MR. McMAINS: All I'm going to say is I don't think that what has been suggested by Jim and Frank is a fairly complicated drafting procedure, so I don't think that's going to present any kind of a time bind.

CHAIRMAN SOULES: I'm more interested in getting all the input that we can get now, because we don't have literally years to work on this. We have months to work on it, but not an inordinate amount of time.

Does that get everybody's thoughts on the table then on this subject?

Okay. Let's stand adjourned until 1:30.

(Proceeding recessed until 1:30.)

AFTERNOON SESSION

CHAIRMAN SOULES: The materials that we're going to talk about now have been sent out twice, once in this book and once earlier. So, if you didn't bring your materials that were distributed earlier, these will be the Evidence Rules and they're about in the middle of the very last group of materials. They start with a letter on State Bar of Texas stationery that is signed by Newell Blakely. And it is a letter of transmittal for certain proposed changes in Rules of Evidence.

MR. NIX: One more time, Luke, what portion of the book?

CHAIRMAN SOULES: All right. If you go all the way to the back, it's a supplement that we sent out. And each topic that we're going to address is separated by a blue sheet. So, between the last blue sheet and the back cover, about halfway, you find a letter on State Bar of Texas stationery, and behind that are the proposed Rule of Evidence changes. And -- well, before Newell starts, we have so few people here, I hate to do that to him. Let me make a different -- take a different position on the agenda.

I will take volunteers now for persons who are willing to serve on the Trial Court Administration Committee to deal with this Court Administration Bill and the mandates thereunder.

MR. NIX: I'd like to work on that one.

CHAIRMAN SOULES: All right. Let me -- Jim Kronzer, Sam Sparks.

Steve, were you one of the volunteers on that or who -- let's see.

MR. NIX: Tom Ragland.

CHAIRMAN SOULES: Judge Thomas, Judge Linda Thomas.

MR. NIX: Tom Ragland.

CHAIRMAN SOULES: Tom Ragland. Who else would like to serve on this committee to address the Legislature's mandate and the Court Administration Bill? All right. I would think Judge Hittner would be helpful on that. He's not here.

JUDGE HITTNER: I'll serve on the committee.

CHAIRMAN SOULES: Okay. Judge, I'm sorry, I didn't see where you were sitting. I didn't see you in view. But would you help on that?

JUDGE HITTNER: Yes, sir.

CHAIRMAN SOULES: I think your experience would be very helpful.

Okay. That gives us two district judges. Let's put Pat Beard -- my view -- what is the feeling of the people here about the size of that committee? It seems to me like that committee is dealing with so many fundamental concepts, that the size of it should be large at first and then maybe be revised later, but try to get as much as a cross section as we can for input. How does that suit you all?

Jim, how do you feel about that?

MR. KRONZER: I think that you ought to try to get as many people from different parts of the state, too. Because the practice is so dissimiliar in different parts of the state. And those rules, as I quickly looked at that act, don't really apply to all parts of the state.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: I really agree with that. I think we need to have some people from Dallas and some from San Antonio and not a preponderance of people from Houston because that's a bad place.

CHAIRMAN SOULES: We've got Pat Beard from Waco. I'm going to ask Judge Casseb to serve on that because he was so instrumental in what is now the San Antonio practice. That gives us a judge from San Antonio, a judge from Houston, a judge from Dallas. We're going to need very much to interface with the Committee on Administration of Justice Subcommittee that's handling this. And Judge Thurmond from Del Rio is the spearhead of that. And that will give us a rural judge. Then Sam from El Paso. Tom Ragland from Waco. I would say Hadley Edgar to get a professor, plus another West Texan from Lubbock. And I'm listening. I want to hear any suggestions that ya'll have.

MR. KROZNER: Well, Luke, I'm satisfied from talking with Judge Hill during the noon hour that he's going to be very actively interested in the almost a day by day progress of all of the work of that committee. And that probably is going to necessitate some breakdown into subcommittees dealing with court administration, power of the chief under it to unitize the judicial system, and a lot of different aspects of it, the visiting judges and all the other things. And so, I think it ought to be large enough to where it can be

broken off into those subcommittees also if he wants to study those sections, too.

CHAIRMAN SOULES: Is that the consensus here? It seems to me that we need a large committee because there are so many topics to be addressed.

JUDGE HITTNER: Mr. Chairman, if it's that complex and I don't doubt what Mr. Kronzer says is correct, maybe we ought to just have a committee as a whole. It seems to be that way the more we talk about it.

CHAIRMAN SOULES: Let me say this by way of trying to organize it. We're probably not going to be able to have another meeting of this committee until September or October. What I would like to do is appoint maybe eight or ten, at least, to meet, divide up the subjects, each of them become the designee to head up a second tier of subcommittee. Let me know what that report is and any suggestions that you may have for drafting people to help on the second tiered subcommittees, and I will assign not only those you request, but also additional people to help until we have used the entire personnel.

Now, who will -- this is going to be a big

undertaking. Who will be a second tiered committee chairman? I'm going to assume everybody that has volunteered so forth is interested enough to do that. So --

JUDGE KRONZER: Make it Sam Sparks. Make him come all the way from El Paso.

CHAIRMAN SOULES: Jim Kronzer, Sam Sparks, Judge Linda Thomas, Tom Ragland.

MR. NIX: Put me on, Harold Nix from Daingerfield, I want to serve on that committee and take care of my piece of Texas.

CHAIRMAN SOULES: Harold Nix. Okay.

MR. KRONZER: Reasoners gone. Why don't you put him on it?

PROFESSOR WALKER: He's not here.

MR. KRONZER: Make him the chairman. He's good at that.

CHAIRMAN SOULES: Lefty? Is he here? Do you want to be a second tier subcommittee chairman for part of this effort?

MR. MORRIS: We're going to have to be reporting back when?

CHAIRMAN SOULES: Well, I'd like for ya'll to either meet by telephone or what have you, after you have a chance to review this bill and

divide it into sections and let me know which section each of you is going to take and who you want on your team. And I'd say I'd like to hear that by the end of June.

MR. MORRIS: I'll do it.

CHAIRMAN SOULES: Are there any other people then -- we're now talking about the Court Administration Bill; and, of course, it's very diverse and has many subjects.

MR. CASSEB: I'd like to serve on that.

CHAIRMAN SOULES: Good, because you got drafted while you were gone, Judge, with the compliment of what you did in San Antonio organizing that.

MR. KRONZER: He organized Houston, too.

CHAIRMAN SOULES: Well, I meant the court system, Judge, I didn't mean the rest of the City.

I have then people who are willing to take a part of that and then work with the subcommittee to be subsequently appointed; Jim Kronzer, Sam Sparks, Judge Linda Thomas, Tom Ragland, Judge David Hittner, Pat Beard, Judge Casseb, Hadley Edgar, Harold Nix, is that right?

MR. NIX: Yes.

CHAIRMAN SOULES: And Lefty Morris.

Now, this is going to be critically important to how the administration of justice proceeds from this point forward in this state and as Judge Hill's lead horse as far as administrative revision. So, if anybody else wants to have a subcommittee, let me know now. All right. Would you all meet on a coffee break, those 11 people -- Hadley's not here -- and decide among yourselves who you'd like to have to be the overall chairman of this effort and let me know. And in that same organizational meeting, try to pick a date that ya'll will meet and divvy up the projects under this bill. And then I'll know who's the chairman and what day you're supposed to meet. We'll probably take a coffee break around 3:30.

All right. We will then proceed with Newell Blakely. Did someone else --

MR. SPARKS: It looks to me like -- I don't know what the rules of the committee are, but it looks to me like we might ought to try to solicit a couple of lawyers who practice in the criminal field to be on that committee. And I can certainly speak for myself, the only criminal things I do are appointed; and I try to get out of that best I can. But we're going to need some

insight in that area, obviously, from what I've read of it.

CHAIRMAN SOULES: Well, we certainly are. And I think that the subcommittee chairman -- I'll declare that you're free to consult all available sources for input into what we should do. And if you can solicit help from someone active in the criminal practice, then your subcommittee, if you need that, should pursue that.

Mr. Chief Justice, we just named a committee who will meet on the coffee break and pick their chairman and pick a date when they will meet. It's Jim Kronzer, Sam Sparks, Judge Linda Thomas, Tom Ragland, Judge David Hittner, Pat Beard, Judge Sol Casseb, Professor Hadley Edgar, Harold Nix and Lefty Morris.

MR. JONES: Mr. Chairman.

CHAIRMAN SOULES: And they are going to meet and divvy up the subjects that are covered by that bill and become second tier subcommittee chairmen and then we'll appoint people to fill out their committees and go to work on this with your permission.

CHIEF JUSTICE HILL: Oh, absolutely. I'm going to look to Judge Wallace, of course, on this.

I want to be personally involved in it, but he is our person on rules and he is -- I can't tell you -- I can't lay enough good words on my colleague. He's a marvelous person, a great judge, and he's done a real good piece of work in this rules area. And he knows a lot of my thinking and I think shares most of it. And so, let's start trying to flesh it out. And there's some rules in Ohio, I believe, that might be helpful to look through. I really don't know. This is going -- it puts us really on the cutting edge of being right out in front. I'm not even sure any state has the detail of rules for administration that we contemplate coming out of it.

And, again, I recognize that the lawyers who tend to their business, who take care of their business and get their cases ready and get them to trial, have very little involved. And I just hope that they will not, though, be an opposition force, because it's here. And we need to be as true to what they're saying to us, in my judgment, as possible, without being ridiculous, without getting to the point where lawyers can't live with it. And it may be a little unfair to -- Houston, of course, is our number one area of concern. You can go out

to San Angelo and they'll say, "Hey, we -- just everybody's current." A lot of people will tell you they're current. And what they don't tell you is they're current if the lawyers want to get the cases to trial.

The one thing that has to be appreciated for this thing to make any sense is the concept is that every litigant who files a case is entitled for the court to take responsibility for it. And that's the concept. If you can't buy that, we're in trouble going out of the blocks. It's a custodial sort of thing. A ward -- a litigant is kind of a ward of that court, and it's that court's responsibility, with the lawyer that's not getting their job done, to see that that case moves along to some sort of disposition. And so, we're then to be the guardians here of saying "Now here's the way you can get that job done. Here are the kind of rules that if you utilize them and be true to them and be faithful to them, they'll work." They won't hurt the people in San Angelo. If they're already doing all that anyway or don't need them, it's there.

But in the area -- I don't think that -- Lefty, for example, might not share this, being in

practice up here in Austin. My experience in Austin, when I practiced here, was not as good as a lot of the people are telling me it is. Maybe I just got jinxed.

MR. MORRIS: Well, It's gotten better. Harley Clark has really gotten after it over there. We went through a real sag, John, but it's gotten a lot better.

CHIEF JUSTICE HILL: I'm delighted to hear that. David can testify that Houston is moving now. A lot of things are happening. Maybe this is all a part of the tide that we're catching in anticipation of this or maybe trying to forestall it. I don't know. But there are some good -- Dallas, for example, was very inconsistent the way I found it, Frank. It depended on kind of which court you were in. What sayeth thou about Dallas today?

MR. BRANSON: Well, I think that's pretty accurate, John. There were some really progressive judges there who run the docket real well. And then there was basic intellectual pockets of poverty among the Dallas trial bench, some of which have been recently cured by the electorate.

CHIEF JUSTICE HILL: Over Sols way --

every time I mention anything about dockets, anyone from San Antonio -- and I'll direct this to Sol, they just say, "Please leave us alone. We are just doing super in San Antonio. We just love our dockets and nothing could work better." But the few times I went over there, it just looked like -- I don't know, just absolute bedlam. Maybe I was just in the wrong -- maybe I just, you know, was in the wrong court, wrong place. But what sayeth thou, Sol Casseb, about San Antonio? Are ya'll really doing all that good?

MR. CASSEB: As far as the jury dockets, we are doing exceptionally well. If you want a trial, you get a trial within four to five months. Our difficulty now, which needs to be brought current and I'm hoping that it can be done, is we have all of the cases, domestic cases as well as any other type of case all go to one judge, and it needs to be segregated out because of the influx of more divorce cases that you have now. And that's why you see it so crowded every morning because you have got 150 divorce cases that shouldn't be mingled in with the other type of cases; that that needs to be straightened out locally and if it cannot be done locally, you got the vehicle right

here to do it.

CHIEF JUSTICE HILL: But, Sam, you know what I'm talking about.

MR. SPARKS: We have eight different sets.

CHIEF JUSTICE HILL: They kind of want somebody to say, "This is the way it's going to be." Now I don't know that you share that. What do you say about El Paso?

MR. SPARKS: No, no. I think all the lawyers that try lawsuits on the both sides of docket would encourage that. Because we do. We have eight separate sets of district court rules.

JUDGE HITTNER: You ought to try in Harris County. We have 25 different sets.

MR. O'QUINN: I'm glad you're the one that said that, Judge.

JUDGE HITTNER: Well, I'll say it, because it's the truth. We have one general set of rules, and every other court is doing it differently. Monday dockets now are still Monday morning and a bunch of them Friday afternoon, Friday morning. I mean literally 25 different set of rules.

CHAIRMAN SOULES: Judge Hittner?

JUDGE HITTNER: Yes, sir.

CHAIRMAN SOULES: I just conferred with Judge Wallace. He said you don't have 25. They haven't been approved, and they're not going to be.

MR. O'QUINN: Thank you, thank you.

JUDGE HITTNER: What I'm talking about, of course, are the individual court rules when we have Monday dockets versus Friday dockets on motions and everybody does it differently and it's a real problem for the practicing lawyer.

CHIEF JUSTICE HILL: The home town of lawyers that get their cases dismissed because of rules they don't even know about, they're not even in writing, and other things that happen, have got to stop. We've got to have uniformity about our local rules as much as possible. And we need to approach this task with a feeling that it can be done is all I'm saying. And let's don't go into it with "Oh, that's a bunch of hogwash." Let's just take off our coats and get down with it and see if we can't come up with something that would really be a fresh new day for moving our dockets in this state.

Now, I've been all over Texas and I'm fully aware that Texas has tremendous variety and you

can't put a blanket over it and say it's this way here. Because things are different and we've got to take that into account. There's got to be some flexibility here.

But at the same time I think the message has got to go out just like we did in that writ refused case. The docket -- we just got to say -- that the public is demanding that we do a better job of getting our whole docket moved out in a reasonable length of time. That's the basic message. No case should be withheld from trial that needs to go to trial for justice sake. One day it should not be delayed, whatever, if it's been on file two months. If justice demands that the case be tried and litigated, we ought to work to produce a system that will not deny justice to people because of the system itself.

JUDGE HITTNER: Well, Mr. Chief Justice, let me add one thing to that. That's assuming you've got competent judges down below, and that's a real problem we have throughout the state.

CHIEF JUSTICE HILL: Well, you're going to help us with that one because we've got mandatory judicial education now. We've just received the funding for it. That is one piece of

good news about this session. And Judge Gonzales will be our liaison on the Supreme Court for the program. And we need the David Hittners to get the program design and make it substantive and meaningful. I don't hear anything about corrupt judges.

JUDGE HITTNER: No, sir.

CHIEF JUSTICE HILL: That ought to be a given that we don't have corrupt judges. We ought not to even have to discuss it or debate it. I do hear questions of competency raised in occasional places. And we need to address that just like we need to with lawyers while we're on that subject.

I tell you very frankly that I intend to plug for mandatory CLE, and don't turn me off until you've given me a hearing. Don't throw me out until you've heard me out. It's a signal. Even if we don't need it, it's a signal. We need to start sending these strong signals that we're serious about competency of our professional brethren and sisters and we're serious about competency of judges. I didn't mean to get into my bar foundation speech. But, yes, I hear you.

And there's a lot of exciting things right now in the judiciary. There's a time for

everything in public affairs. And we may be very close to the time when the administration of justice is going to come to the forefront. If we'll work hard these next two years, it's very possible that we could emerge as the highest priority in the next legislative session. It's just possible. We need to raise up a few more friends. We need to get our homework done a little bit better. We need to precondition the Legislature. We need to politic a little heavier. We need to get our judges more involved and our lawyers more involved. But it's out there. We want to go for it, in my opinion. The climate is just about right. Maybe we had to go through this session this time and take a few lumps to buy some credibility, to learn all over again what I knew from seven years ago. And the time just sort of erased it from my mind. You have to politic.

I said I was going to set an apolitical tone for this court and I definitely mean that in terms of the court, itself and its processes and our work. We would not want it any other way. But I'll tell you, I'm going to be very political when it comes to working with that Legislature in trying to get this ball across the goal line that we need.

This is -- we'll never have a better time in our state, in our time to really improve the administration of justice for all of our people, than we'll have over the next five or ten years, in my opinion. This is just part of it. It's being thought out, see. We're not just talking smoke anymore. We're not just talking generalities. We're talking specifics now. Just like this bill is very specific. And education of judges is mandatory, that's very specific. Our new rules of discipline are very specific. Our new judicial conduct code is very specific. Our commission is not a mirage, it's very much real. Our court reporter problems are getting identified. They're very real. But they're very specific. The Board of Law Examiners -- Judge Kilgarlin did his yeomanship work over there this time. We're keeping them in business. We almost lost. The law schools -- we're getting very specific about the curriculum and what we can do to make better lawyers. The admissions committees are more at work out there. They're really taking their jobs seriously.

So, there's just a multitude of things that we've got emerging along this course. So, we can

do better. We've got a good thing going. We've got a good profession. We've got a good system. But we just need to -- care, nurture and guidance, just a little care, nurture and guidance is what -- that's the era that we're in right now. And it will happen if we want it to happen. We won't agree on everything and I'll get out ahead of you on some things and you're going to have to pull me back sometimes and say, "No, that's not the way we want to move." But let's do move and address these problems while we've got a chance.

I really thank you for the opportunity of serving in this office.

CHAIRMAN SOULES: Judge, I think that certainly sets the tone for our committee, and we've got the bill -- several copies of the bill here. And when we take our coffee break, if you people who are on the committee will pick up a copy of it so that you can see it and study it before you meet again, I would appreciate it.

Franklin, did you have something?

MR. JONES: I walked in about halfway through this discussion and I think you had already appointed this committee. And my friend Sam Sparks punched me and said, "Volunteer to serve on it." I

don't know what he's getting me into. But I'd do anything he asked me to even if I thought it was wrong. So, what I'm saying is put me on there, if you don't mind.

CHAIRMAN SOULES: Thank you. I appreciate that.

MR. JONES: Now that I've got you interrupted, Mr. Chairman, I wanted to speak up before the noon hour when you were asking if there were any other issues or questions which also should be assigned to what I'm going to call the Branson Committee or the Bill Dorsaneo Committee that you appointed just before lunch to study this -- these rules.

There was something I wanted to speak about at that point, but I wanted first to be sure I wasn't getting out on a point where the court didn't want me. And so I didn't say anything about it. But at this point in time, I'd like to bring it up because I'm satisfied that I'm not going to be going against the wishes of the court. And that is I think that committee should be charged -- or subcommittee should be charged to also study the question, the overall question, of blindfolding of juries in civil trials in Texas. And by that I

mean the prohibition, if it still exists, I'm not sure it really does under the new rules. But if it does still exist, I think this subcommittee ought to study where Texas is with respect to the main stream of the jurisprudence of this country on the question of telling a jury they're not allowed to know the effects of their answers. And telling lawyers that you're not allowed to tell them the effect of their answers or telling the judges you're not allowed to tell them the effect of their answers. And I would like to see that issue referred to that subcommittee for their consideration along with the other matters you've got them charged with.

CHAIRMAN SOULES: Are you not talking about -- you're not talking about the Appellate Rules Committee or is that the one you do have in mind?

MR. JONES: I don't see why they couldn't do just as well as anybody else.

CHAIRMAN SOULES: I think we're going to -- we will take up new matters in a little while, Franklin, and let me put that down to assign a subcommittee to it.

MR. JONES: Would the chair like a

motion?

CHAIRMAN SOULES: I will assign that out. Why don't you be thinking about who else you want on your committee.

MR. O'QUINN: He's going to make you the chairman of that.

MR. JONES: I like that committee you already had and I'm not on.

CHAIRMAN SOULES: I know, but that's really not an appellate issue, Franklin, in my judgment. And that committee is really going to be saddled with a lot of work, and I don't want to assign something, in addition to their appellate work, to them. I'd rather have that be a smaller committee of one or two or three to report back.

Yes, Rusty.

MR. McMAINS: Luke, I've been out of the room for a minute, so I really don't know exactly where you are and maybe I'm out of order as I usually am. But I've been in the Supreme Court Advisory Committee a couple of times, at least, by appointment. And it seems to me that we spent a lot of time frequently at these meetings talking about, you know, appointments of ad hoc subcommittees with regards to particular rule

situations. It would seem to me to be a better use of manpower if -- because right now most of the communications of recommendations, either from administration of justice, or wherever, will go to Judge Wallace and then to you. And then you have to basically or seem to be basically having to wait until we have a full meeting before we do any work on it. It seemed to me that if we had some more formal standing subcommittees, as it were, in the areas, for instance, one on discovery, one on appellate rules, one, you know, in that specific area, rather than all of us having to go through and volunteer for where we're going to put any of these things, then any requests or recommendations could be channeled through Judge Wallace and to you for your assignment to a particular standing subcommittee, which in my judgment should be regional. I mean, basically, pick out three lawyers on this committee that are on a subcommittee that are more or less in the same vicinity, that they can get together periodically and hammer something out and cull through them and the ones that aren't worth a darn. I mean, they can show them to the rest of committee or be responsible for communicating with the rest of the

committee, but their position is, "It ain't worth working on." And it would seem to me to be a more efficient use of personnel rather than an ad hoc subcommittee bases.

I just throw that out. It may be, as I say, out of order, but otherwise you're talking about trying to, I think, assign all of these evaluations to that same type of thing. And in light of what Justice Hill indicated, we've got a lot of work that needs to be done in a lot of areas, and I think that we need to streamline this committee as well as we need to do anything.

CHAIRMAN SOULES: This committee has typically met once a year or less frequently.

MR. McMAINS: Right.

CHAIRMAN SOULES: It has not had standing subcommittees. It hasn't had subcommittees except in rare instances.

MR. McMAINS: I understand that.

CHAIRMAN SOULES: This year, in 1985, we're going to meet twice. Normally it meets with no preparation except in a few instances where large matters have been assigned previously. The second time it meets in 1985, it will meet prepared because all of the matters before us will have been

assigned to committees for study.

Now, we have an awful lot of matters before us and whenever -- at the COAJ, as you know, we did establish standing committees. Maybe that's the right way to go about organizing it. But, essentially, today's meeting is going to be an input and organizational meeting looking towards really getting some work done in September.

As things have gone and since -- for the most part since I've been on this committee, we would wind up today and we wouldn't meet again for another year. And we would simply have to pass on these rules just as we see them and as fast as we can get through them today whether we're going to recommend them or not. And I don't feel like that's really the best approach.

We did decide on this meeting on a bit of a short order and I got the agenda to you late. I confess that. But for the next meeting, we would have had -- this will be the agenda for the next meeting with a few additional items that may come in in the interim.

MR. McMAINS: Well, I wasn't being critical or anything in terms of this committee, you know, of it's being handled or the necessity

for everybody's total input.

CHAIRMAN SOULES: I'm not being defensive about that either. We had one extremely organized meeting that had an agenda that went out ahead of time. And it was really the last meeting. We never could have gotten all that work done without it, but we didn't have very active subcommittees before that meeting. And it was the best organized meeting, I think, that we'd had since I was on the committee. And I'm trying to take that one step beyond now and not only have a booklet before everybody with all the rules in them in the order we're going to address them, but also have reports that have been assigned out to various people for our September, October meeting. I think it is a good idea to establish standing committees. But are you suggesting that we do that now and then as these rules may fall, they'll be assigned to those particular committees?

MR. McMAINS: The way we were proceeding, it appeared that you were basically asking for volunteers on an ad hoc basis. It would seem to me that if, as a committee, we could come up with what would probably be logic components of standing subcommittees and members to be assigned, then it

would be a fairly clerical job to go through here and send these things to those people and maybe even conceivably have time for the subcommittees together -- to get together and start dividing up the work themselves today.

CHAIRMAN SOULES: Well, let's -- let me --

MR. McMAINS: I throw that out, but --

CHAIRMAN SOULES: Let me ponder on that a bit while we hear Newell's report on the Rules of Evidence and see if I can adjust to do it that way and see if that's a better way to do what I was going to do. It may be.

PROFESSOR BLAKELY: May I be recognized?

CHAIRMAN SOULES: Yes, sir, please. Mr. Blakely.

PROFESSOR BLAKELY: Judge Wallace's office sent out an envelope with two documents. One of these is entitled "Agenda for Meeting April 12, 1985." That was the meeting of the State Bar Committee on the Administration of Rules of Evidence in Civil Cases. And obviously not everything in there is before this committee. A bunch of those proposals were rejected. And I passed it along to the Supreme Court simply as background and so on. But nevertheless, it was

sent out to you. And to avoid confusion, if you've got that document, you may want to put it under something, so that you won't be confused by it.

He also sent in that same envelope a document entitled "The 1984, '85 State Bar Committee on the Administration of Rules of Evidence of Civil Cases recommends to the Supreme Court of Texas the following changes in the Rules of Evidence." And that's dated May 1, 1985. There are 13 proposed changes here. They came from that State Bar Committee on the Rules of Evidence from our April 12 meeting.

Now, in your hard bound book that was passed out this morning, you find a cover letter from me to Chief Justice Hill. Right behind that you find 11 pages, numbered 1 through 11, and those are the proposals that we're now going to consider. Beginning immediately after that, you have a number of unnumbered pages without a title to it. And I can see, because of my familiarity with it, that it's a part of that agenda. A few pages are missing there at the first, one or two. Somebody ought to take a black crayola and go through and mark out those pages. Either that or put in the missing pages, so you'd have a packet. I'm scared

to death that the Supreme Court may go back there and pick up something and enact it and promulgate it, thinking that they're getting proposals from the Evidence Committee.

All right. So I'm looking now at an 11-page document, that the pages are numbered 1 through 11. These are the proposed changes in the Rules of Evidence. Rule 509, of course, is the Physician/Patient Privilege. And 510 is the mental health privilege, the Psychiatrist/Patient Privilege. Both of those, of course, have a list of exceptions. Both have an exception that might be referred to as the litigation exception. And our committee considered those two together. This would be on Page 1 of your document. That would be 509(d)(4). The litigation exception to the Physician/Patient Privilege. And on Page 3, 510(d)(5) -- you have to skip a proposal on Page 2. 510(d)(5) is the litigation exception to the Psychiatrist/Patient Privilege. And we're recommending changes in both beginning here on 509(d)(4) on Page 1. And by the by, we adopted the convention of bracketing deletions and underlining new language.

And looking at the bracketed language there,

we recommend elimination of that second sentence "Any information is discoverable in any court or administrative proceeding," so forth, so forth, so forth. That sentence really simply refers you to the Rules of Civil Procedure. And the Rules of Evidence, as presently written, are pretty well clear of discovery matters. We've tried to stay out of discovery, and this reference really is a reference for discovery purposes. It would change nothing to delete that sentence. It will simply clean it up. And we don't have that sentence, you see, in all the other privileges. And, of course, you look to the Rules of Civil Procedure for discovery. So, that's one reason we want to change that.

Now, the first sentence we would strike also. For one thing, the -- as presently written, 509 is more protective of the Physician/Patient Privilege than 510 is of the Psychiatrist/Patient. And that shouldn't be so. They either ought to be the same or the Psychiatrist/Patient should be the more protective. We are going to recommend, do recommend, that they be exactly the same.

A problem arose -- Jim Parsons, up at Palestine, got involved in a will contest case, and

he was claiming that the testator was incompetent and he was met -- the person representing him asserted the Patient/Physician Privilege. Here's the person, person's representative, who is apt to benefit the most in our not getting at the truth in a situation like that. He felt that some change ought to be made, and this change would accommodate his grievance in that particular case.

There is something to be said for uniformity between the litigation exception on Physician/Patient and the litigation exception on Psychiatrist/Patient. It's confusing to have them different. Sometimes it's difficult to decide which really is involved, Physician/Patient or Psychiatrist/Patient. So, this proposed change would make them uniform.

We propose that it read as you see underlined there on Page 1. The condition of the patient, physical, mental or emotional, would have to be an element of the cause of action or defense. In other words, it would have to be central to the case. If it is, there would be no privilege. If it's simply relevant in the case, some other issue, then it would be privileged. That is the effect of it.

So, Luke, I don't know whether I'm going to run till somebody objects, or whether you want to have a motion on each one of these.

CHAIRMAN SOULES: As you proceed to finish any grouping, let's go ahead and debate.

PROFESSOR BLAKELY: All right. I'll move approval of the proposed change on Page 1, 509(d)(4) as recommended by the Evidence Committee and approval on Page 3 of 510(d)(5).

MR. McMAINS: Seconded.

CHAIRMAN SOULES: Okay. That motion has been made by Newell Blakely and seconded by Rusty McMains and we're now open for discussion of those changes. Bill Dorsaneo.

PROFESSOR DORSANEO: Why are the three words "an issue of" located in the second line looking at Page 1, the language there?

PROFESSOR BLAKELY: Probably a historical explanation. It may have -- I don't know where it came from. It could have come from the original statute or some prior wording. I see it is in the -- it was in the Psychiatrist/Patient Exception 510(d)(5) as presently written. So, it probably came from the original statute. It may not be necessary.

PROFESSOR DORSANEO: My question would be does it mean anything? I can think of various things it could mean. And I don't see any reason to have that word -- those words in there, any good reason.

MR. FRANK BRANSON: May I address this for a moment? One way to deal with it is becoming relevant in the practitioner area is the tort litigation. The insurance carriers are using this provision as carte blanche to talk to the plaintiff's doctors other than merely getting written records from them. And I think perhaps that provision regarding discoverability may be the basis of that current conflict within the trial law, because plaintiff's lawyers don't generally take too kindly to that.

MR. McMAINS: But he's just talking about the word, the issue.

MR. O'QUINN: He's just talking --

PROFESSOR DORSANEO: The relevant issue of physical, mental or emotional.

MR. BRANSTON: I'm sorry. I thought he was --

MR. McMAINS: No, he's not talking about the first part.

CHAIRMAN SOULES: He's talking about just deleting "an issue of" so that the language would be "as to a communication or record relevant to the physical, mental or emotional condition." What's the necessity for those three words, "relevant to an issue of the physical," and so forth.

MR. BRANSON: I was addressing the discoverability portion.

MR. McMAINS: I suppose if there were to be an argument made, it would probably be the -- if the condition, is itself, undisputed in one form or another, then there might be no reason for the discoverability of it. That is, it is an issue when it is drawn as an issue. Whereas, the other way it would always be relevant to the condition as to what that condition was. But the fact that that condition exists is -- it may not be an issuable for either for purposes of discovery or trial, if it's undisputed. So, why embarrass the patient with a particular revelation of a communication with a doctor that isn't disputed by anybody. I don't know if that's the reason for it, but that may be.

PROFESSOR BLAKELY: I can't explain it other than just the history of the words.

MR. TINDALL: Can we move the question on this one?

CHAIRMAN SOULES: If there's no further discussion. Is there any other -- Frank.

MR. BRANSON: Could we -- could I just ask Dean Blakely -- I missed the Rules of Evidence meeting where this particular provision came out originally. Was there a discussion as to whether or not it was intended to be used in discovery for the purposes I previously addressed?

PROFESSOR BLAKELY: The intent is simply leave it to the discovery rules in the Rules of Civil Procedure. The evidence rules are not answering the question, they're simply referring you to the Rules of Civil Procedure. Of course, if it's privileged, then it's not discoverable.

MR. BRANSON: I think it's as you addressed earlier, by leaving the word "discovery" in the rule, it is being used on a regular basis to allow open communication between the adverse attorney and the doctor. Was that the intention of the rule?

PROFESSOR BLAKELY: No, no. The intention there is simply to refer to the Rules of Civil Procedure, it seems to me.

JUSTICE WALLACE: And your recommendation is that any information that is discoverable will be taken out and will no longer be in the rules.

PROFESSOR BLAKELY: Yes. And then you go to the Rules of Civil Procedure. And, of course, it's privileged. It's not discoverable. It's kind of a run for it there. It's kind of a blindfold there, but it shapes it up.

PROFESSOR DORSANEO: These communications would clearly be discoverable under the discovery rules unless these privileges makes it nondiscoverable.

PROFESSOR BLAKELY: That's right.

CHAIRMAN SOULES: Any further discussion on this? Sam Sparks.

MR. SPARKS: I have one question that may be -- it appears to me that you can read the amended or the proposed rule in such a way that you can enlarge upon the old rule because it is "of a patient in any proceeding in which any party relies," where the patient can be a witness rather than a party. I'm not opposed to that. I'm sure Frank might be, but I'm not. But is there -- was there any thought in the committee that perhaps we're enlarging upon in the rule that we're looking

at, to change "the patient was the party." In the proposed change, "the patient," as I read it, is not necessarily the party.

PROFESSOR BLAKELY: I think that's right. A party has got to rely upon the condition. It's got to be a material proposition in the case. But it need not be the patient who is relying on it.

PROFESSOR DORSANEO: The patient could be a witness, like a bus driver who can't see.

PROFESSOR BLAKELY: Could be.

MR. SPARKS: Doctor who can't see.

CHAIRMAN SOULES: Any other question or discussion?

PROFESSOR DORSANEO: This condition would have to be put in issue somehow.

PROFESSOR BLAKELY: Yes. Under the substantive law governing the case, it would have to be an element of the cause of action or an element of the defense. Material proposition. In other words, it would have to be central in the case and not merely evidentiary.

CHAIRMAN SOULES: Any other discussion? Any other questions?

Bill, are you making any suggestion as to those three words?

PROFESSOR DORSANEO: Not really, Luke. I have trouble with the words "to an issue of." I understood -- that's what Rusty said is what I was thinking. It seems to me that if we're going to require somebody to do something to put this in issue -- this condition in issue, I have a little trouble with -- I understand the concept of it being important to the case, but "relies upon the condition as an element of his claim or defense" I have a little trouble with that language, but I can't improve on it.

MR. O'QUINN: Why should it be where the condition is relevant -- where the condition is relevant to an issue in the case?

PROFESSOR DORSANEO: That's what I would think. They obviously --

MR. O'QUINN: All it has to be is relevant to the case.

PROFESSOR BLAKELY: Then you might as well throw the whole thing out. You're simply down to a question of relevancy. If it's relevant, it comes in. You have no privilege at all. Obviously, these changes would shrink the coverage of the privilege, but it's still there to some extent. And if you just want to say it's

admissible if it's relevant, then there is no privilege at all. And that may be your position.

PROFESSOR DORSANEO: I guess I'll file something that says this condition is an issue in the discovery content. This condition is an issue in the case because if I rely on the condition as an element of my claim of defense, and then what does somebody say back?

PROFESSOR BLAKELY: What somebody would say back -- look -- outline your cause of action there or outline your defense. What are the elements of it. And you don't have the say so. The substantive law gives the answer to that, substantive law in your pleadings. What are the elements of respondeat superior? What are the elements of negligent entrustment? You don't have any say so, the substantive law answers that for you.

PROFESSOR DORSANEO: Not as to factual theories that -- look up -- I wonder if this means anything different from "relevant to an issue in the case." I can see that it's trying to be narrower than that, but I can't identify its contours by reading it. That's probably okay because it's a very difficult thing to resolve.

MR. O'QUINN: Let me take his example of the bus driver with bad eyesight. Where are you going to be if you're met with an objection that his eyesight is not an element of the case? The element of the case is, was the bus driver's negligence in lookout. I don't know what the element of the case is. Did he negligently drive the bus that day? Dorsaneo wants to argue, "Yeah, the reason he did bad is because he can't see," or whatever. He's got bad eyesight, I guess, is what you're talking about.

PROFESSOR DORSANEO: That's right. I said that's relevant to negligence.

MR. O'QUINN: Why shouldn't the jury know about that?

PROFESSOR DORSANEO: But -- no. But I can't see where you ever stopped it. If it's not relevant to an issue in the case seems to be what he's getting at, but he's trying not to get that far.

MR. O'QUINN: But what you're saying -- if I hear you right, you're saying, Professor, that even though it's relevant to the case, there can be occasions in which you can't get it in because somehow it doesn't meet this test of being the

central issue.

PROFESSOR BLAKELY: Yes, it's not an element of the cause of action. Not an element of defense.

PROFESSOR DORSANEO: Well, somebody's physical condition never is an element of defense unless it's negligence.

MR. O'QUINN: How can it be relevant unless it's raised by the pleadings, is what I don't understand. And pleadings raise the defense is then cause of action.

PROFESSOR BLAKELY: Well, all kinds of evidence becomes pertinent to prove some material proposition, and you didn't have to plead your evidence.

MR. BRANSON: Would a general denial be sufficient to allow the defense to use this provision since there really are not many elements to it?

PROFESSOR BLAKELY: I don't know. It doesn't sound like it.

PROFESSOR WALKER: All of the evidence is admissible under a general denial.

PROFESSOR BLAKELY: But just take the lack of competency of the testator. I take it that

might put his mental condition -- make his mental condition of material proposition in a will contest.

MR. TINDALL: I see what you --

PROFESSOR BLAKELY: There would be no privilege there, you see.

MR. TINDALL: This rule has always created problems in divorce cases where a party's claiming they cannot work and they want a greater division of the marital estate. And yet because the rule is now limited to damage suits, you can't get to the evidence.

MR. O'QUINN: I don't conceive of -- you probably have one, but I don't conceive of the example where something could be relevant, which means in my mind has to be raised by the pleadings and yet not be an issue in the case.

MR. TINDALL: If it's relevant it's going to be discoverable and admissible.

CHAIRMAN SOULES: Unless it's privileged.

MR. O'QUINN: Yeah, but we're saying if it's relevant, it's no longer --

PROFESSOR BLAKELY: You've got all kinds of lawsuits where there is no material proposition in there consisting of a person's mental, physical

or emotional condition.

MR. O'QUINN: Sure. Contract.

PROFESSOR BLAKELY: And even if a person's mental, emotional or physical condition might tend to prove something in the case, it might be relevant, nevertheless it would not be a material proposition in the case. It would not be an element of the party's cause of action or defense.

MR. O'QUINN: My problem is I don't conceive of a case where it would be relevant to prove something and it wasn't raised as an issue in the case.

PROFESSOR BLAKELY: It's not enough that --

MR. O'QUINN: If it's not an issue in the case, how can it be --

PROFESSOR BLAKELY: It's not enough that the party's condition is relevant to an issue in the case. The issue has to be his condition. That has to be a material proposition.

MR. O'QUINN: What you're saying in his bad eyesight case, that if somebody alleges the bus company negligently hired this man with bad eyesight, it comes into evidence. But if somebody just claims that he had a bad driving day and one

of the reasons he had a bad driving day is because he's got terrible eyes, is not going to come in.

PROFESSOR BLAKELY: You tell me the substantive law in the area and maybe I can --

MR. O'QUINN: The issue is, did he negligently drive the bus in the second example. The issue in the first example, did they negligently hire him with bad eyesight.

PROFESSOR BLAKELY: Outline the elements of the cause of action. State what the material proposition is. Not your evidence, but your --

MR. O'QUINN: Did the bus company negligently hire him with bad eyesight? Was that a proximate cause of the accident? That's the first case. The second case: Did the bus driver negligently drive the bus? Is that a proximate cause of the accident?

MR. KRONZER: So, John, on your supposed example, his eyesight has still got to be causing it.

MR. O'QUINN: You mean either way?

MR. KRONZER: Either way.

MR. O'QUINN: You're right. I left out issues. Did they negligently hire him with bad eyesight? Secondly -- well, he had a proximate

cause. But I don't see why it should come in one case and not come in the other. I don't understand the difference there.

PROFESSOR DORSANEO: I think saying that the substantive law provides us with the answer makes us avoid deciding the issue, because the substantive law probably doesn't provide us with the answer. We spend a lot of time thinking about causes of action, elements, but it's a lot more complicated than that. I suppose one could read this to say that the only time that the party relies on a condition as an element of his claim of defense, with respect to the claim, I suppose, would be -- what element, damages.

MR. O'QUINN: Physical condition, incompetency.

PROFESSOR DORSANEO: Yeah, or something like that. Or defense. When does somebody rely upon the condition, physical or mental, of the person as an element of his defense read in a very strict sense.

MR. ADAMS: What so the plaintiff?

CHAIRMAN SOULES: Avoidance of a contractual obligation.

PROFESSOR DORSANEO: I guess. And I see

this could either be read as broadly as an issue in the case or in some narrow way that is unknowable.

MR. O'QUINN: You might have the defense, I think, in a tort case. Maybe the defense was that the plaintiff was intoxicated. Somebody wants to get at the medical records of him immediately after to prove that the records of the treating doctor showed he was intoxicated.

PROFESSOR BLAKELY: Suppose somebody pleads statute of limitation on a cause of action.

MR. O'QUINN: All right.

PROFESSOR BLAKELY: And then the plaintiff alleges that the plaintiff was non compos mentis during a period. And thus toll the -- the statute was tolled during that period. Would that -- I don't know whether that's -- I guess that's an offensive use in a sense. That might be considered part of her cause of action.

MR. O'QUINN: What I'm having a hard time --

MR. KRONZER: That wouldn't be, Dean, that only arises if it's pled defensively. And that's an avoidance of defensive plea. It's not part of the --

PROFESSOR BLAKELY: We should perhaps -- should have put in a rebuttal, element of rebuttal.

MR. KRONZER: That's what that would be.

PROFESSOR BLAKELY: You could argue that it's an element of cause of action if it's a rebuttal element, technical rebuttal. Surely our choice is not to abolish the privilege altogether or have it -- have no exceptions to it, no litigation exception to it. Surely those are not our options.

MR. REASONER: Dean, I think it might have helped me if you would indicate what is it that you wish to avoid by putting in this last phrase "which any party relies on upon the condition as an element of his claim or defense." What are you worried about coming in if you simply say, "relevant to an issue of the physical, mental, emotional condition of a patient in any proceeding?"

PROFESSOR BLAKELY: Well, it seemed that that issue is broad. I suppose we offer A to prove, B to prove, C to prove, D maybe. And we saw this as the ultimate -- as the end of the line. The condition would have to be the end of the line in that chain of proof material proposition.

MR. REASONER: I guess my problem is that our jurisprudence is so murky on what a cause --

what the elements of a cause of action are, that that's still not really much guidance, it seems to me.

PROFESSOR DORSANEO: That's what I was trying to say.

PROFESSOR BLAKELY: And it wouldn't -- you would say then it doesn't improve it in the set of conditions we said. A material proposition relies upon the condition as a material proposition of his claim or defense. That would be a synonymous term.

MR. O'QUINN: It's getting worse.

MR. REASONER: I'm not familiar with any cases defining what a material proposition is.

MR. O'QUINN: That's only part of an element of a cause of action.

MR. ADAMS: Something like relevance. You just have to say relevance.

MR. SPARKS: Yeah, what if you change "as" and then you -- instead of saying, "an element of," are you talking about as evidentiary to a claim or defense?

PROFESSOR BLAKELY: No. It's not merely evidentiary. It's got to be --

MR. SPARKS: So you're talking about

something more broad, more limited?

PROFESSOR BLAKELY: Yes. It doesn't do -- it's simply circumstantial evidence in the case. It's got to be -- if you outline your cause of action, or outline your defense -- and I think of substantive law in those terms, over in the criminal law field, it's fairly easy to see the elements of crime or the elements of the defensive theory. It's more difficult, I suppose, in civil cases, but I still think in terms of cause of action or --

MR. REASONER: Well, would this be designed to prevent you from using it for impeachment purposes?

PROFESSOR BLAKELY: Yeah, it wouldn't be useable for impeachment purposes, no.

MR. O'QUINN: What if the testate -- what if somebody came in and said the testator was competent, you couldn't get the record to impeach that. What if a doctor got on the stand and said that the testator was --

PROFESSOR BLAKELY: Well, then --

MR. O'QUINN: Could I get his records to impeach him?

PROFESSOR BLAKELY: If there was an issue

of competency, it really wouldn't be an element of issue. This is one of the requirements of substantive law, that he be competent.

MR. O'QUINN: Okay. But you could use it -- so really you're back to whether it's a crucial issue in the lawsuit.

PROFESSOR BLAKELY: Yeah.

MR. O'QUINN: To me, just here thinking about it -- to me the thing about information that my doctor has, or things of that nature, mainly I don't want that out. I don't want somebody discovering it. That to me is the point of that privilege. That's personally between he and I, what we've talked about. And that should not be discoverable.

Leaving aside this, I think once it's discoverable, I don't see what the big policy argument is about not letting the jury hear it. I mean, it's already discovered. It's out. It's known. And to me it's -- the privilege is a public policy. We're excluding the truth. And any time you exclude the truth, it seems like to me you've got to have a counter weight of public policy. And to me the public policy is, don't let anybody discover my medical record because that's a

personal thing between me and the doctor. But if there's some issue in the case that warrants discovery of that information, I don't see why it shouldn't then come on in, assuming that it still is relevant to the lawsuit. But I'm just saying that the lawsuit -- that's irrelevant.

CHAIRMAN SOULES: Dean, the concept of waiver of a privilege by an issue injection is one that we saw recently in a Supreme Court case where they got the woman's mental records.

PROFESSOR BLAKELY: Ginsberg (Phon.)

CHAIRMAN SOULES: Ginsberg. Discovering privileged matter, of course, is prohibited unless there's been a waiver. Does that law -- does that new case take care of this rewrite? Do we need the writing in view of Ginsberg? Are we going to say --

PROFESSOR BLAKELY: You probably don't from the plaintiff's standpoint. She was going to use it, the court said, as a sword.

CHAIRMAN SOULES: That's a waiver by the party who could claim the privilege by injecting the issue. Either side, defense or plaintiff, either as a sword or as a shield, if they put that issue in evidence under Ginsberg, they waive it. And the waiver takes care of the discoverability of

it, it seems to me, at that juncture. I don't know whether we still need a rewrite, which obviously is difficult, or whether we think we can rely on that. And what I'm really headed to here is, do we believe that today, around this table, we're going to be able to make an informed vote on whether to recommend these changes to the Supreme Court or do we feel they need further study by people like O'Quinn and Branson and Newell.

MR. O'QUINN: I'm already staying.

CHAIRMAN SOULES: A lot of these things -- see, this committee has not met for -- didn't meet in all of 1984 and probably hasn't met in 18 months. And so we've got a lot of backlog, but things that need study, we should study, I feel. And I don't know whether this is one of them. Let me get a consensus on that.

How many feel that we're going to get this resolved if we keep working on it here? On the other hand, I'm going to say how many feel it should be referred for further analysis and report next time? How many feel we should continue to work on it now? Raise your hands. Seven. All right. How many feel it should be referred to committee? Okay. Well, we'll keep working on it

then. What further discussion do we have?

MR. BEARD: Why should we not be able to have discovery to impeach a witness? He says he saw or he heard, the medical record showed that he was 2500 or couldn't hear. Why shouldn't that be disclosed?

JUDGE HITTNER: And usable.

MR. BEARD: And usable.

CHAIRMAN SOULES: Does that go to the issue of whether there should be a privilege at all? Your question, Pat.

MR. BEARD: Well --

MR. KRONZER: But it depends what the issue is.

MR. BEARD: I don't think discovery should completely go on the relevancy issue, but I don't see why you should not be able to impeach a witness to show he couldn't see or hear what he was claiming he was.

CHAIRMAN SOULES: What's your input, Mr. Kronzer?

MR. KRONZER: What is an issue in Texas? Does it have to be the elements of a substantive cause of action or are you talking about something like Pat's talking about? And that does pretty

much away with the whole privilege, if you're talking about that.

PROFESSOR BLAKELY: You're two poles, of course, are no privilege, one pole. The other is complete blanket privilege, no exceptions.

MR. BRANSON: Dean, didn't that privilege come out 4590(i), originally?

PROFESSOR BLAKELY: Yes.

MR. BRANSON: Had the Legislature already addressed the issue? The chairman asked us whether we need to deal with the privilege.

PROFESSOR BLAKELY: Well, the Supreme Court, when it promulgated the Rules of Evidence, repealed that statute insofar as the civil cases are concerned. So this is it. This is the controlling -- this is the control.

PROFESSOR DORSANEO: Isn't there a middle pole like the one that's used for trade secrets? Granted, it's a little bit sloppy.

PROFESSOR BLAKELY: Well, in that case --

PROFESSOR DORSANEO: If the allowance and the privilege will not tend to conceal fraud or otherwise work injustice involve the balancing conflict.

PROFESSOR BLAKELY: Now or otherwise work

injustice.

MR. O'QUINN: I love that.

PROFESSOR BLAKELY: You want to say element of a cause of action is vague, how about injustice.

MR. O'QUINN: Well, we deal with that all the time. We know how to handle that.

MR. McMAINS: Justice is losing.

PROFESSOR DORSANEO: Listen to me here for a minute. It seems to me that this is the kind of thing -- we're going to have it not be absolutely privileged and it's just not going to be absolutely privileged. Then this is going to -- why wouldn't it be a good idea to have it decided on an individual case basis as to whether this is just the kind of thing that ought not to be discoverable because its relevance as to an issue in the case is marginal and disclosure of it would be really harmful? Is that adding too much procedure in this?

MR. McMAINS: Let me ask you this. Use of the term "records". Use the term "relevance" that is here, but carry forward the relevance that is in terms of the legal relevance that's used in the code.

PROFESSOR BLAKELY: If your only limitation is relevancy, then you have no privilege.

MR. KRONZER: That's right. We're already subject to that.

MR. BRANSON: Bill, read that language again down in the trade secrets.

MR. McMAINS: No, you know what I'm talking about, the section in the Rules of Relevance that says --

PROFESSOR BLAKELY: 401.

MR. KRONZER: I'm not sure in some of my cases I want to limit this.

MR. McMAINS: The relevance is so slight, it can't cause harm or whatever.

PROFESSOR BLAKELY: 403.

MR. McMAINS: That's admissibility.

JUDGE HITTNER: Excuse me. I know the problem the court reporter's facing because they get this every day in trial. When they start throwing their hands up, that means everybody's talking at the same time. So really, if we want to get it down --

I gather that was your position, right?

They can only take one at a time. I have

nothing else to say.

CHAIRMAN SOULES: All right. What language are we going to use? Are we going to vote on this language or does somebody have a change in language or are we going to refer it to the committee? I either want a change in language or vote on this language or refer it to a committee.

JUDGE HITTNER: Mr. Chairman, can we have -- sum it up -- a couple of sentences to each side?

CHAIRMAN SOULES: Fine. Who wants to -- Newell, why don't you speak for the proposition.

PROFESSOR BLAKELY: Probably it's not necessary. I'd simply repeat -- I sit here thinking of causes of action being made up of elements. I'm thinking about "Prosser on Torts" or something and defenses being made up of elements And the substantive law as pled in the case. So, the pleading might -- the pleading selects the particular cause of action or the theory of the cause of action. And the condition of the patient would have to be an element, either the cause of action or the defense for the privilege to go. Otherwise it would be privileged. It's merely evidentiary, merely logically relevant for something in the case. That wouldn't do.

CHAIRMAN SOULES: All right. Let's have the counter of that.

MR. O'QUINN: Let me ask Bill something. What word would you remove, Bill? Because I don't want to speak against the issue generally, because I think the privilege ought to be straightened out anyway. I agree with the basic premise, I'm saying whether you have a counter proposal.

PROFESSOR DORSANEO: I'm not going to make a counter proposal. I think different wording could be used, but I think this is a difficult area and I'm just going to defer to the evidence, Professor, on it. I mean, I'd like to ask him is it not true that in many modern codes of evidence they treat this on a balancing kind of basis, rather than trying to make some sort of a rule oriented -- take some sort of a rule oriented approach?

PROFESSOR BLAKELY: I'd hesitate to say so. I know very often the clergy privilege is on the balancing sort of thing and the trade secrets on a balancing sort of thing and so forth. I don't know if it's Physician/Patient, Psychiatrist/Patient. It may be their jurisdiction.

PROFESSOR DORSANEO: The difficulty that I have is knowing what is the better policy choice either from a personal perspective. And I do think this is -- that this coordination of 509 and 510 and the elimination of the discovery language, I think this is a definite improvement over what we have now. And I'd be reluctant to be too critical of it because I can't suggest how it could be improved and I don't necessarily think that the balancing approach is the appropriate one. But I'm not certain about it.

MR. O'QUINN: Let me ask this question, Bill. To me the problem is what Harry Reasoner kind of mentioned is trying to figure out what these elements are. Why don't we just say "as a part of the claim of defense?" We don't get caught up in the legalism about what are elements or not. Would that be a problem?

PROFESSOR BLAKELY: Well, does part mean more to you than elements of cause of action?

CHAIRMAN SOULES: Steve McConnico, do you have a question?

MR. McCONNICO: I just didn't understand what his "part" was?

MR. O'QUINN: "Part of a claim of the

defendant."

PROFESSOR DORSANEO: I like that better myself because the term "cause of action" has so many cases. I could talk for about a half an hour about all the different definitions of all the various professors over the years, defined in one way or the another. You could read Page Keeton's early article on this subject. And we would probably be better off to stay the heck away from all that. And I think it would be no great damage done to the principal by saying "part of", and I don't think saying "an element" solves any problems for us. I think it sends us off into a lot of technicalities that don't really have much to do with the thrust of the proposal.

CHAIRMAN SOULES: Is there a Motion to Amend to change "an element" to "a part"?

MR. O'QUINN: I move.

CHAIRMAN SOULES: Second?

PROFESSOR DORSANEO: Second.

MR. KRONZER: What's the Motion? Excuse me.

MR. McMAINS: Motion is to change the word "element," basically, "an element" to "a part."

MR. KRONZER: Well, I know that -- if I may speak -- I know that Professor Dorsaneo has blessed it with there being some perceptable distinction between the two, however, I need an explanation of that. The difficulty following how you can counsel these angels standing on different pinpoints.

MR. McMAINS: I think he said there is an imperceptible distinction.

MR. O'QUINN: What he's saying -- as I understand what he's saying is, that we don't get caught up in esoteric arguments about what are the elements of the cause of action. In other words, if the matter involves part of somebody's claim or somebody's defense, then it's involved in their claim or defense, then the condition -- information about the condition should be told to the jury.

MR. BRANSON: But then aren't you really bringing it back to relevancy and doing away with the frivilous?

MR. O'QUINN: No, not entirely, because one thing he was concerned about is if somebody was testifying and somebody wanted to find out if a person was even a competent witness, go get all his medical record and see if he's got degenerative

brain disease where he maybe can't recall events correctly. He didn't want all this type of stuff coming in.

MR. KRONZER: But you're not going to let the bar down for that. That would get me.

CHAIRMAN SOULES: All right. We have other matters here that we have to deal with and there are a lot of them. So, I'm going to split the vote three ways. Those in favor of the proposition -- well, first of all those in favor of the amendment? And unopposed? And then with -- without the amendment as that vote goes. Those in favor of the recommendations, those against recommendations and those in favor of further study. So, those in favor of the amendment to substitute "a part" in the place of "an element," please raise your hands. That looks like 13. Those opposed -- there are 6. Those in favor of the recommendations, please raise your hands.

MR. TINDALL: As amended?

CHAIRMAN SOULES: As amended.

MR. TINDALL: One question here before we vote. I notice we seem to be dissecting this code. Should we put by any chance "to the party's claim or defense"?

CHAIRMAN SOULES: In favor of that, say aye. Opposed? With those two amendments, those in favor of the recommendation, please show your hands.

PROFESSOR BLAKELY: I thought we were still discussing. He asked a question.

MR. TINDALL: I asked a question. Should we use "the parties claim or defense."

PROFESSOR BLAKELY: Now, "the party" would refer back to the party with the condition. And as it's worded, any party relies.

MR. O'QUINN: Let's don't get caught up in dissecting.

MR. TINDALL: I thought you were trying to get rid of his and hers through this.

MR. O'QUINN: Well, an occasional his --

MR. TINDALL: I'm not going to play those language games, but later on we vote on one like that.

MR. O'QUINN: How about a claim?

MR. TINDALL: The claim or defense.

MR. O'QUINN: Okay. The claim.

MR. REASONER: I don't understand the problem using party, you've already used party in the phrase.

MR. SPARKS: You used patient earlier.

MR. O'QUINN: So, what do you want to say, "of the party"?

MR. TINDALL: Parties claim for defense.

MR. McMAINS: You want "the" or "a"? It should be "a".

MR. BRANSON: Does the party there refer to the party of litigation or the party of the condition?

PROFESSOR BLAKELY: Party in the litigation.

MR. O'QUINN: That's right.

MR. BRANSON: So, if you had a witness who's competence came into being, this would not apply?

MR. O'QUINN: Right. Would not apply. Because it's not a part of a claim or defense.

MR. BRANSON: But just out of curiosity, why not? If you've got someone who alleges to have seen something, that's blind as a bat.

MR. O'QUINN: If I understand what Professor Blakely says, we're not going to let the bars down entirely. We're not going to let everything come in just because it's relevant to something. We're going to have to kind of let the

bar down a little bit.

MR. KRONZER: He didn't inject the issue, Frank. The party or the witness didn't inject, he was drug in there.

MR. BRANSON: Sometimes he's drug in early enough, you can find out about his record.

MR. KRONZER: That's true.

MR. O'QUINN: Did you move to change "his" to "a party"?

MR. TINDALL: "A party" or "the party's" claim or -- it would be "a party's."

JUDGE HITTNER: P-A-R-T-Y-'-S?

CHAIRMAN SOULES: All right. Those in favor of changing "his" to "a party" or "the party."

MR. TINDALL: "A party's" apostrophe S.

CHAIRMAN SOULES: "A party's" apostrophe S, say Aye. Opposed? Okay. With those two changes, those in favor of the recommendations for changes to Rule 509(d)(4) and 510(d)(5), please hold your hands up. 17 in favor. Those opposed? One. Does anyone -- that's a majority. That makes a majority without taking a third count. All right.

Dean, if you'll go forward then with the next

recommendation.

PROFESSOR BLAKELY: If you'll turn back to Page 2. If you'll turn back to Page 2, we're back on Physician/Patient again and a different exception, 509(d)(5). And as that reads presently, a doctors done something wrong and hears an investigation under the Medical Practice Act and so on. The privilege has to give way there, the present rule says. You have the same problem on the investigation of a nurse. And as the reporter's note says down there, that problem was brought to the attention of the committee by counsel to the Board of Nurse Examiners. And there's the same need to provide an exception when you're investigating a nurse. So, I recommend the approval of that new language underlined at the bottom of Page 2. So moved.

PROFESSOR DORSANEO: Second.

CHAIRMAN SOULES: Was that Bill Dorsaneo?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: Does this need discussion? Okay. We're ready to vote. Those in favor, say aye. Opposed? There are none. That carries.

PROFESSOR BLAKELY: On Page 4 is a

competency problem. We set up in 601 incompetency -- certain incompetency provisions with respect to children -- (a)(2), 601(a)(2), "children or other persons who, after being examined by the court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated." That came from the Code of Criminal Procedure, and the Code of Criminal Procedure also had provided "or who do not understand the obligation of an oath."

A bill was dropped into the Legislature by Representative Mike Toomey to provide -- let me see here where I -- that would amend our evidence rule as well as the Code of Criminal Procedure. "However, no child nine years of age or younger may be excluded from giving testimony for the sole reason that such child does not understand the obligation of an oath."

Well, the liaison committee that originally proposed the Rules of Evidence started to do away with this competency thing altogether. The federal rules do away with it and simply leave it to the attorney. If he wants to put the person on, all right, and leave it to the jury to evaluate the testimony. But our committee decided, the liaison

committee, the Supreme Court promulgated the Code of Criminal Procedure provision.

But in the light of this proposal by Representative Toomey raising the problem, we decided it wouldn't cost anything to throw out "or who do not understand the obligation of an oath." If a child has sufficient intellect to grasp the situation and say something sensible about it, the jury wouldn't be misled. In all likelihood he has some elementary grasp of the difference between truth and a story. And if he likes one, he would like the other. So, it probably is not costly to eliminate that, and the committee just decided to go ahead and make that change. So, we would eliminate that bracketed language "or who do not understand the obligation of an oath."

Move for approval, Mr. Chairman.

MR. CASSEB: I second it.

CHAIRMAN SOULES: Judge Casseb seconds. Does this need discussion? Those in favor, say aye. Opposed? There are none. That carries.

PROFESSOR BLAKELY: On Page 5 here is Rule 610. This was recommended to the Supreme Court by the original liaison committee. It's copied from the federal rules. "Evidence of the

beliefs or opinions of a witness on the matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced." This really had come to be the common law practice. Here we are, a small community, let's say of Baptist, and we want to show this witness is a Catholic because we hold Catholics in our little community in low esteem and whatever they would say would be unreliable, and so on. That has felony disuse of common law, and the federal rules prohibit it and we so recommended to the Supreme Court. The Supreme Court dropped it. And did not promulgate it. I do not know why. So, at our meeting of the Evidence Committee, it was recommended that once again we try with the court to put in 610.

It may be that the court thought that the constitutional provision, which provides, "No person shall be disqualified to give evidence in any of the courts of this state on account of his religious opinions or for want of any religious beliefs." Thought that that had covered it. But it does not. That constitutional provision simply provides that no person shall be incompetent, it doesn't say about impeachment.

Also there's a Statute 3717, "No person shall be incompetent to testify," so forth, so forth. That, too, deals with incompetency. It does not deal with impeachment. The way the rule is worded -- proposed rule is worded, it would allow you to impeach to show bias or prejudice. This plaintiff is -- here comes a witness, testifies favorable to the plaintiff, very favorable. Shouldn't the jury know that both of them are on the Board of Deacons down at the 142nd Baptist Church. Sure. A member of the same little group.

And so you could use it to show bias. You would not be using it to show that by reason of the nature of their particular religious belief that their credibility is impaired or enhanced. So, the committee decided to try the court once again on this. It would mean renumbering 611, 12, 13 and 14, and that would put it back in sync with the federal rules. We got out of number alignment with the federal rules when the court dropped 610. So, it would mean renumbering those.

I recommend approval, Mr. Chairman.

CHAIRMAN SOULES: Frank Branson.

MR. BRANSON: Dean, I understand the reasoning behind the recommendation for the

standard organized religions and the regional differences. But the definition of religion has occasionally caused the court some problems. Let's assume you have a rather unorthodox religious organization. Is that not the type of thing that would be reasonable to question the witness about, such as the airline pilots who set up a church to avoid paying taxes?

JUDGE HITTNER: I think this is only geared toward credibility, though, isn't that correct?

PROFESSOR BLAKELY: Yes.

JUDGE HITTNER: Am I correct in saying if there's any other reason to go into this, it would not be prohibited? You're talking just about basic credibility as a human being testifying from the witness stand?

PROFESSOR BLAKELY: Yes.

MR. BRANSON: Well, let's assume the organized religion that believes in human sacrifice.

MR. ADAMS: So what?

MR. BRANSON: Is that contradicting religion?

PROFESSOR WALKER: That's your religion.

MR. BRANSON: But the problem that I had with it is not the general proposition that you gave, but there are a lot of potential exceptions and a lot of legal opinions that are going to have to be written, I suspect, to define religion.

MR. TINDALL: It's been in the federal rules how many years, ten?

PROFESSOR BLAKELY: Well, I think it's been -- in the federal rules? Oh, yes, since '75. ten years.

MR. TINDALL: Has it created any cases in ten years, that you know of?

PROFESSOR BLAKELY: Not that I know of. And it's conceivable that the absence of it wouldn't change the question very much. Nevertheless, the sponsors of it, before our committee, felt very strongly about it.

PROFESSOR DORSANEO: Why did they feel that?

PROFESSOR BLAKELY: Some of them are school teachers and they find it uncomfortable to have to keep on saying Federal Rule 11 -- Texas Rule 11, Federal Rule 12, you know.

PROFESSOR DORSANEO: That's what I thought.

PROFESSOR BLAKELY: That's part of it.

CHAIRMAN SOULES: There's a motion. Is there a second?

MR. ADAMS: Second.

CHAIRMAN SOULES: Okay. It's been moved and seconded that we adopt this change. Any discussion of these changes, that is, to add 610 and to renumber the rest of the six hundred series accordingly? Those in favor, say aye. Opposed? There are none. That carries.

PROFESSOR BLAKELY: On Page 6, Rule 610(c). We are recommending that we add to 610(c) "except as may be necessary to develop his testimony." The federal rule reads "Leading questions should not be used on the direct examination of a witness, except as may be necessary to develop his testimony." The reason the federal rule has that additional language, and that additional language, by the by, was recommended to the Supreme Court, originally, is to take care of those situations where the -- if you're dealing with a child, you've asked the question six different ways. You cannot elicit the testimony. You know he knows. You need to lead him. You ask the Court's permission. Or you come at an adult

witness six different questions. You know he knows. You've been unable to elicit. You need to refresh his memory. You get the court's permission. Someone who has difficulty with the language, he's a farmer, so forth, so forth. There are those situations where you need to lead, they're exceptional, you get the court's permission.

I would say that under our present language the Texas court does not have the discretion to permit leading in those situations. You say, "Why, yes, it does." Where does he get it? Here's a flat prohibition against leading questions on direct. But the common law practice permitted leading in those special situations, and I think we ought to bring forward the common law practice with that amendment.

I so recommend -- or I so move.

MR. BRANSON: Second.

CHAIRMAN SOULES: Okay. That's been with regard to Rule --

MR. KRONZER: You can't ask questions without leading language. You've got to have something.

CHAIRMAN SOULES: Okay. That's with

regard to --

PROFESSOR BLAKELY: 610(c).

CHAIRMAN SOULES: Is that going to still have -- will that be numbered 610(c) after the last change?

PROFESSOR BLAKELY: No, it would have to be renumbered accordingly.

CHAIRMAN SOULES: Renumbered 611(c).

PROFESSOR BLAKELY: But I do not want to assume that the court had bought our 610.

CHAIRMAN SOULES: That's proposal on 610(c), which if the other change was made, it would be 611(c). Just trying to keep my notes straight. Moved by Dean Blakely. And who was the second on it? Frank Branson. Okay. Those in favor, say aye. Opposed?

MR. SPARKS: Opposed.

CHAIRMAN SOULES: One opposed. Jim Kronzer's opposed.

MR. KRONZER: No, I did not oppose that. Let's get the record straight, Mr. Chairman.

CHAIRMAN SOULES: I'm sorry. Who was it? Sam Spark's opposed.

MR. SPARKS: Just changed one rule to the other.

CHAIRMAN SOULES: Pardon me for that. Incidentally, for the record too, it was Gilbert Adams that seconded the change of 610 and renumbering the subsequent numbers on the last motion.

PROFESSOR BLAKELY: Mr. Chairman, on Page 7, Rule 611 on refusing writing to refresh memory, this followed the federal rule. The language that you see without the amendment is a witness who's refreshed his memory, maybe in court, maybe before testifying, but he did it before testifying for the purpose -- refreshed his memory for the purpose of testifying. The other party is entitled to have the writing, to look at it, to cross-examine from it. The federal rule reads "and to introduce into evidence those portions which relate to the testimony of the witness."

One member of our committee, Murl Larkin from Texas Tech, recommended that we put this limitation on it, that it's -- that the other side can introduce the balance for the purpose of impeaching the testimony of the witness. Suppose he just -- suppose somebody argues, the other side, "Well, I'm entitled under this to get in the balance." What does he mean by "balance"? First part hasn't been

offered. The witness has simply used it to refresh his memory. So, the rule option of completeness really doesn't apply here, because the first part hasn't been introduced. "I'm entitled to get this in." "Yes, but that contains hearsay." Well, it says "and to introduce in evidence those portions which relate to the testimony of the witness."

Probably the intent of the language was simply to permit the other party to introduce any part that seems to be in conflict with what he's saying or what he said after he's refreshed his memory. And if it means something more, it shouldn't. It's just too broad. So, the evidence committee recommends to the court that we limit it, this introduction of the balance, for the purpose of impeaching the testimony of the witness.

And I so move.

JUDGE TUNKS: I second.

CHAIRMAN SOULES: Moved by Dean Blakely and seconded by Judge Tunks.

MR. KRONZER: Mr. Chairman, I'd like to be heard on that.

CHAIRMAN SOULES: Mr. Kronzer.

MR. KRONZER: Judge, you know this is one of the rules that we adopted verbatim from the

federal practice. And the -- in recent times without deviation, the federal courts have interpreted that rule to mean that if a witness has examined any document preparatory to his testimony, whether he admits to refreshing or not, he must come forward with it. Now, the federal courts -- those cases that so hold, some do speak of it in terms of impeachment and without reference to Rule 106, the rule option completeness. But you must bear in mind that we did not follow the federal practice with respect to the limitation of the subjects of the direct examination and expressly rejected that and retained our wide open rule.

So that when you are making available for these purposes that document, then you've given it to the examiner, he then develops from that document truly probative evidence, I think it's wrong to seek to limit it. But perhaps an even more logical ground, or at least I thought it was when I argued against changing it, I think it's wrong for us to take a nonparallel path when the federal rule is working, working fine and we ought not to engraft the exceptions where they don't appear to me to be necessary on the federal rule.

And what this seems to me to be doing is

limiting the development under our broader cross-examination of the rule. The purpose for which you can get any testimony in that you develop in that manner, from what the witness has used to refresh his memory. And I think it's going to create more -- the only real principles or arguments offered at our hearing for the Rules of Evidence Committee was some of the district judges are not understanding this rule correctly. Well, none of us can control that until the court, itself, interprets these rules. And the federal court should not interpret it as is suggested. This change will cause -- in my opinion, unnecessary changes are not suggested by anything that's happened under the federal practice. And I suggest it not be adopted.

CHAIRMAN SOULES: Dean Blakely.

PROFESSOR BLAKELY: Jim's point on our scope of cross being broader than federal, really doesn't carry into the conclusion that he's reached. The cross-examining side can cross-examine and can cross-examine as widely as it cares to if it's relevant in the case. This limitation simply is -- this -- what would be a new limitation would be a limitation on the purpose for

which the actual writing is admissible. And for goodness sake, it might contain all kinds of objectionable matter, and you'd be getting it in despite those objections or whatever they might be. It might be a copy. It might be a false instrument. You can even use an instrument known not to be so to refresh somebody's memory.

MR. KRONZER: We're talking about two different things, Dean.

PROFESSOR BLAKELY: Well, we're talking about the purpose for which the writing would be admissible.

MR. KRONZER: But if that writing comes forth as an otherwise admissible document that's generated through this device that you've got because the witness used it for --

PROFESSOR BLAKELY: Well, if it's otherwise admissible, there is no objection to it.

MR. KRONZER: No, no.

PROFESSOR BLAKELY: He wouldn't have to have --

MR. KRONZER: No, sir. These cases hold that even if it was a privileged attorney/client protected document, and you've used it for purposes of refreshment, that comes forward, and for the

first time it becomes probative in the case -- I'm talking about the federal cases interpreting the very rule we're talking about -- you just let your, I'll say, drawers down when you've done that.

Now, a lot of times the witness says, "I didn't look at the document." That's something else. But we've seen this in the last three and a half years in many, many ways. What I'm saying an attempt to prescribe the usability of a document that comes forward is a dangerous game to play or to impose upon the federal practice that we're trying to adopt wherever we can. And that was my objection then and it is now.

CHAIRMAN SOULES: Frank Branson.

MR. BRANSON: Dean, isn't there some merit in the way the rule reads now in letting the lawyer who is giving material to the witness to review, make the decision and take the good with the bad if he's going to give the witness the document? Which is really, as I understand it, what the federal rules have historically done, rather than having --

PROFESSOR BLAKELY: Well, you can make the argument, but isn't the right to cross-examine from the document a sufficient offsetting feature?

Why do you have to go so far as to say the document, itself, which no one has put in and which may have objectional matter in it, why should the document, itself, be admissible except for impeachment?

MR. KRONZER: I'm not suggesting that if the document is otherwise subject and debilitated for other reasons, Dean, that it doesn't fail.

PROFESSOR BLAKELY: Jim, I think you're arguing unless you put this limitation. And, see, the rule presently says you can get in the writing -- the opposing side can get in the writing without limitation. He can put it in as substantive evidence to prove what he says.

MR. KRONZER: No, it doesn't say so.

CHAIRMAN SOULES: Dean, it doesn't -- it says, unless there's something that was failed -- that was not underscored or not bracketed. It says "those portions which relate to the testimony of the witness." That's the only thing that's admissible.

PROFESSOR BLAKELY: Yes.

MR. KRONZER: And it doesn't say it's probative evidence. I'm not --

PROFESSOR BLAKELY: Well, fine.

MR. KRONZER: -- saying to expand it or to limit it or to change any other rule. I'm merely saying that when the discovery of that documentation, what he's looked at, leads you in that document, itself, or into the documents he's looked at, to those, otherwise are usable and would not have been otherwise usable, then they are probative evidence and should not be limited to impeachment value. And they are not in the federal practice. Once you get them out of that lawyers pocketbook, you got you some evidence.

PROFESSOR BLAKELY: Now, Jim, when you say is otherwise admissible, you mean if -- suppose we just struck altogether -- you read -- this would read "and to cross-examine thereon" period. Now, if you stopped right there and eliminated all the balance, would that change the law? Would that let in the writing? The writing wouldn't come in, would it?

MR. KRONZER: Because of the rule if it didn't otherwise more than impeachment value, it wouldn't.

PROFESSOR BLAKELY: So, this must be -- this must intend when it says "and to introduce in evidence those portions which relate to the

testimony of the witness," must mean here is permission to override what would otherwise be objectionable matter.

MR. KRONZER: Are you then -- take the contrary to that, the converse. Are you suggesting that we should limit any testimony so received and so developed to only having impeachment value?

PROFESSOR BLAKELY: No, the writing. Limit the writing.

MR. KRONZER: I'm saying the writing.

PROFESSOR BLAKELY: To impeachment, yeah.

MR. KRONZER: And regardless of whether it, itself, as a matter of original impression, would have probative value?

PROFESSOR BLAKELY: If without reference to whether it had been used to refresh and so on, is admissible anyway. If there's no objection to it, then you don't need this.

MR. KRONZER: If the lawyer has not -- either by foolishness or whatever the reason, did give him that, it might be privileged, but whatever the reason, but it has now become open game, I'm saying to you it is then admissible and introducible in evidence in the federal practice and under the federal rule. And you want to limit

that by this change.

MR. McMAINS: But privilege -- the Texas practice, as I understand it, does not make it non-probative. It may make it non-discoverable, but it's not going to make it non-probative.

MR. KRONZER: But he's saying it would, Rusty.

MR. McMAINS: No, I don't think so. He's saying if it's probative, it's probative. All he's suggesting is that you don't toss in the writing just for the fun of it.

MR. KRONZER: Well, I didn't understand that to be the case. He's saying it's impeachment only and comes from that source.

JUDGE HITTNER: I believe what Mr. Kronzer is saying, that once you bring your witness into trial and if he doesn't have it up in his head, you're going to hand it to this person, then it's fair game.

MR. KRONZER: No, the federal -- Judge Hittner, the federal cases are uniformly holding that it does not make any difference at which time you refreshed your memory. You could have done it back in your office.

PROFESSOR DORSANEO: That's what it says.

MR. KRONZER: The old state rule is gone. It's gone now in Texas. And that you have to bring those documents forward. Now I'm saying that the federal practice that we are purporting to adopt says those documents are admissible when you bring them forward. And they don't purport to classify them as probative or impeachment value. That is for the court to do depending on other rules, but not by prescribing or limiting them in this rule. And that's my objection. And we ought not to be just lollygaging around with the federal rules just every time we think we're going to adopt some new things in the state practice.

MR. REASONER: Dean, are there any examples that have been problems in the federal practice?

PROFESSOR BLAKELY: I cannot give you examples. I do not say there are none.

MR. REASONER: I understand. But it does seem to me that there is merit in keeping our rules congruent with the federal practice unless we have a good reason to change it.

MR. WELLS: I move we reject this proposal.

CHAIRMAN SOULES: I have one other

question before we went to that. Since the rule has been held to apply to the deposition practice, too. So, for example, if an attorney has done a memorandum of the facts, turns that over to his -- foolishly or otherwise, as Jim said, shows that work product to his client or to a witness, or to his client for purposes of preparing the client for deposition, that work product then is discoverable. Because --

MR. BRANSON: And is admissible.

CHAIRMAN SOULES: What? Pardon me?

MR. BRANSON: And is admissible.

CHAIRMAN SOULES: And admissible. Now, if we change this to limit the admissibility to impeachment -- there is some rationale in the cases that impeachment -- matters discovered for impeachment only are not relevant to the subject matter. Therefore, they're not discoverable because discovery is based on -- is limited -- the scope of discovery is limited to matters that are relevant to the subject matter. Would the addition of this language protect that work product that's been shown for purposes of preparing the witness to testify, from discovery, since it would then be used only for impeachment? That's just a thought.

I don't know whether it's worth even talking about.

MR. McMAINS: The cat's already out of the bag by the time you get to this decision.

CHAIRMAN SOULES: Well, not if it's only impeachment, it may not be discoverable because --

MR. McMAINS: No, but I mean the rule of admissibility doesn't come into play until it's produced and physically there. So you've got it under either change.

CHAIRMAN SOULES: Well, I'm talking about discoverability, though. It's discoverable if the witness admits that he looked at his lawyer's memorandum before he testified in order to refresh his recollection. I thought his memorandum was indiscoverable. I'm saying if the use of that memorandum is limited to impeachment, it may not be discoverable.

All right. The motion was made by Dean Blakely and seconded, I believe, by Judge Tunks that this recommendation be received. And obviously there is some opposition to it. Are we ready for a vote on the subject? All right. Those in favor, say aye. Opposed? All right. I'm going to need a show of hands on that, please. Those in favor, raise your hands, please. Four. Opposed?

12. 12 opposed. That then failed.

PROFESSOR BLAKELY: Mr. Chairman, beginning at the bottom of Page 7 and running on over to the top of Page 8 is a proposed change on 801. 801 defines hearsay, and as we know (a), (b), (c), and (d), in Texas, define hearsay, but then when you come to (e), you begin taking out statements that otherwise would be hearsay. So, you start taking them out. And at the top of page 8, (e) starts taking out -- (e) "A statement is not hearsay if-- (1) prior statement by witness. The declarant testifies at the trial or hearing --" so he's there live. "-- And is subject to cross-examination concerning the statement --" He's made a prior statement, you see. "-- And the statement is inconsistent with his testimony..."

The proposal would be to stop right there and delete a limitation that's found under federal rules. The federal rules are "(A) inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding." Now, this is not a use of a prior inconsistent statement to impeach. It's the use of a prior inconsistent statement as substantive evidence on a theory that the reasons

for the hearsay rule there are weak. This fellow's on the stand. He's made this prior inconsistent statement. You can ask him which one is true. You now can cross-examine him, although it's stale cross. His statement was made six months ago, a year ago. You can now observe his demeanor and he's now under oath and so on.

The rule, as we're proposing the change, was adopted by the U.S. Supreme Court originally, but Congress put the limit on it "and was given under oath subject to the penalty of perjury at a trial, hearing, or proceeding." But our committee felt that this should come in as substantive evidence even though it was made on a street corner. A few states have adopted that position. It, of course, is contrary to the majority position in the country. So, we're recommending that the bracketed language be deleted. And I so move.

CHAIRMAN SOULES: Is there a second?

MR. CASSEB: Seconded.

MR. TINDALL: Why are we -- what's the push for deviating, again, from the federal rule?

CHAIRMAN SOULES: That was moved by Dean Blakely and seconded by Judge Casseb. All right. Discussion?

MR. TINDALL: What's been the push to change, again, from the federal rule? I asked the same question as Jim Kronzer.

PROFESSOR BLAKELY: Well, you see, in the reporter's note, that is explained. It says that Congress added that limitation for criminal case purposes. The federal rules, of course, control criminal cases as well. And the person who recommended this change -- our rules, which apply only to civil cases, should permit this substantive use of prior inconsistent statements and so forth. That this is a position -- well, let me read this last sentence. "There is absolutely no reason in civil cases not to implement fully this reform of the common law that was avidly supported by Wigmore, Morgan, McCormick, Holmes, Learned Hand and, so far as we know, every other reputable authority on the law of evidence."

CHAIRMAN SOULES: Harry Reasoner.

MR. REASONER: Dean, this would apply to an oral statement that anybody else claimed they heard on the street corner?

PROFESSOR BLAKELY: Yes, yes.

CHAIRMAN SOULES: Jim Kronzer.

MR. KRONZER: Mr. Chairman, I -- they put

that same argument on me then, the reputable authority argument. And I don't fall in the category of reputable authority. And I opposed it vigorously then and I do now. Even though it would basically be more helpful to plaintiffs, I suppose, than defendants. But it has not been the common law of Texas prior to the promulgation of our new rules. An out of court statement not signed, not under oath, has never been probative in Texas unless the witness admitted to the truth of that statement while on the stand. If he disavowed it or denied it, it was impeached, impeachment value and all. Now, what this purports to do is to let a statement, taken anywhere, under any circumstances, from a witness, whatever his pressures may have been and to then have him called as a witness when those pressures may have changed for whatever reason. I don't need to get in -- everybody here who's a litigator knows how those things happen. And yet that evidence, that statement, that is unsworn to, unverified, at a place and time where you had nothing to say about it, becomes substantive, probative evidence in that lawsuit.

Now, that is not the common law of Texas. And I read McCormick's book again. I don't find

that in McCormick. I don't find it in McCleary on McCormick. So, I'm not the reputable authority, but I don't agree with Professor Walker that it's all that clear.

But what is also important, the federal rules never adopted that. The judicial conference didn't and the Congress didn't. And the Congress didn't. I say that's letting the bars down to let in pure ex parte statements taken under questionable circumstances become proof to support findings and elements in any case. I think that's wrong, whoever it helps or hurts.

MR. TINDALL: Now in federal civil cases this is not permitted, right, these out of court statements?

PROFESSOR BLAKELY: That's right. The Congress put the limitation on there for the federal rules, whether civil or criminal.

MR. TINDALL: That's right. But it applies clearly to civil and criminal in a case.

PROFESSOR BLAKELY: Yes.

JUSTICE WALLACE: Dean, I have one question working toward these Uniform Rules of Evidence. In fact, I already got a draft out between us and the Court of Criminal Appeals.

Would that have any effect on this, you think?

PROFESSOR BLAKELY: Well, the draft -- of course, it went to the Court of Criminal Appeals -- followed the federal rule. It had the limitation on there, the requirement that the prior statement be given under oath subject to penalty of perjury at the trial, hearing, or other proceeding. If this committee buys this limitation, I mean this change, and the Supreme Court buys it, then, of course, it would be some -- the Court of Criminal Appeals would be apprised of that. They might or might not buy it.

CHAIRMAN SOULES: Orville Walker.

PROFESSOR WALKER: All right. Now, first, I don't think we're changing anything unless I'm missing something. Statements which are not hearsay is a prior inconsistent statement. It's never been hearsay. It is not hearsay. It's offered for impeachment and not for it's truth. So, that statement is -- it makes no change in the common law. A statement is not hearsay if it's a prior statement and it's -- the defendant testified at trial and is subject to cross-examination and it's inconsistent. It's impeachment and not hearsay. So, there's no change.

PROFESSOR BLAKELY: Could I speak to that, Orville?

PROFESSOR WALKER: All right.

PROFESSOR BLAKELY: That was the commom law practice. It was limited to impeachment.

PROFESSOR WALKER: So, it's not hearsay?

PROFESSOR BLAKELY: But under -- under the new rules -- under the federal rules and our present rules, this prior statement is -- would be hearsay but for this language. It's not offered merely for impeachment, but for it's truth.

MR. McMAINS: And it's probative.

PROFESSOR BLAKELY: The prior inconsistent statement is being offered for it's truth as probative evidence and would be hearsay, but for the rule taking it out of the definition of hearsay.

PROFESSOR WALKER: Also I want to add, Jim Kronzer, what about laying your predicate? Hears an on-the-street statement that you're offering it for its truth, not under oath. Do you have to lay a predicate for it like you do for impeachment? Apparently not. What do you say?

MR. KRONZER: If the guy admits to the truth of the statement, then you don't have a

problem. You never had one. But if he disavows it on the stand, this would make it still probative value.

PROFESSOR WALKER: And no predicate would be required.

MR. KRONZER: That's correct.

PROFESSOR WALKER: Just put words in his mouth and he's not even there to defend himself.

MR. KRONZER: He comes out of chute No. 5 on a cyclone. And then you got in evidence with the court some finding that you want. And it's a two-way street. This is a double cutter.

CHAIRMAN SOULES: Any further discussion? Those in favor, say aye. Opposed? Well, the no's have it. But let me take a vote on it anyway because I think the Supreme Court is often interested in the weighing of that. Those in favor, please show your hands. One hand. I thought I heard more than one voice. Those opposed? Okay. That's the rest of the house. Thank you.

PROFESSOR BLAKELY: I want the record to show that I read eloquently Guy Wellburn's reporter's note down here. I didn't get to vote in the committee.

CHAIRMAN SOULES: We'll vouch that you were a vigorous advocate.

PROFESSOR DORSANEO: Next time use the quote.

PROFESSOR BLAKELY: Now, at the bottom of Page 8 is the provision that relates to the admissibility of depositions. I think we want to consider this proposal 801(e)(3) together with the proposal at the bottom of Page 9, 804(b)(1), the "Hearsay Exception" for former testimony.

Now, if you go back to the time the Liaison Committee was working on the rules, we came to depositions. And under Texas practice then, a deposition taken and offered in a given lawsuit was admissible even though the deponent was available. No requirement of unavailability. And we did not want to disturb that practice. And the device that the committee used not to disturb that practice was to take out of the definition of hearsay depositions taken and -- taken and offered in accordance with the Texas Rules of Civil Procedure. The Texas Rules of Civil Procedure then were old 213, old Rule 213, which said in part "Depositions may be read in evidence from the trial of or upon the hearing of a motion or other interlocutory

proceeding in the suit in which they were taken" and so forth and so forth. And the rule had been construed by the cases as not requiring unavailability. Even though the deponent was there, it would come in.

Now, 213, old 213 has disappeared into new 207; and this committee considered that two and a half years ago or whenever it was that the committee met. And a reporter's comment to new 207 included the statement that there was no intent to change the practice on unavailability. They would continue to let in depositions even though the deponent was available at the trial. All right.

Well, what about depositions that were taken in different lawsuits, that were taken in one lawsuit and offered in another, or perhaps taken in another jurisdiction and not in accordance with the Texas Rules of Civil Procedure?

We contemplated when the rules were originally enacted that they would be hearsay, but would come in under the exception to the hearsay Rule 804(b)(1), former testimony. And that would require that the deponent be unavailable. All right.

There has been some confusion on all that.

And so, when our committee met April 12, we thought to -- we thought to clarify, not change -- not change anything, but just to help try to clarify. And so, we're recommending that 8 -- here at the bottom of Page 8, 801(e)(3) we strike the word "offered" and insert the word "used." Some members of the committee thought that somehow was more illuminating, that we add the comment -- comment: "See Rule 207 Texas Rules of Civil Procedure regarding use of depositions." And then over on 804(b)(1) we add the comment, at the top of Page 10, comment: "A deposition in some circumstances may be admissible without regard to unavailability of the deponent. See Rule 801(e)(3) and comment thereto." And so, where all that would leave us is where we were before.

An attorney would first look at -- if this thing is admissible under Texas Rules of Civil Procedure, then there is no requirement of unavailability. If it's not, then you'd have to go over to 804(b)(1) and try to get in over there. And that, of course, would require unavailability.

Now, this amendment, this insertion of the Rules of Civil Procedure 207 enlarges on prior practice. Prior practice, the deposition was

admissible only in the same lawsuit as a deposition. This thing enlarges 207, and it's admissible -- may be used by any person for any purpose against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof. So, there's no requirement that the offering party have been a party to that prior lawsuit.

So, the effect of that and the interplay between the Evidence Rules and the Rules of Civil Procedure is to mean -- that means that depositions are now admissible though the deponent is available where they wouldn't have been admissible if you go back several years. But at any rate, the whole effort by the Evidence Rules and the Evidence Committee is to leave it to the Rules of Civil Procedure in essence.

I move approval of these comments and this one change, delete "offered" and insert the word "used."

CHAIRMAN SOULES: Is there a second?

MR. ADAMS: Second.

CHAIRMAN SOULES: Okay. Seconded by Gilbert Adams for the suggested changes to 801(e)(3) and 804(b)(1). Is there discussion?

Bill Dorsaneo.

PROFESSOR DORSANEO: This is one of those areas where we're dealing with the two sets of rules which, if you'll go back in time to drafting stage, were being drafted independently, one from the other by two separate and distinct committees. My basic comment is that we need to have a subcommittee to actually work out the interrelationship between the Rules of Procedure and the Rules of Evidence with respect to depositions and perhaps some other matters as well. The reason why I say that is that unless we deal with the two things together at some point, the procedural rule people will say, "Well, this admissibility question is for the Rules of Evidence people." And the Rules of Evidence people will say, "This is for the Rules of Procedure." And nobody will ever deal with it adequately.

By way of example, Rule 207, Paragraph One, which is entitled, "Use of Depositions," and Professor Blakely talked about, was not intended to broaden anything, by me at least, when I wrote down that language. That was a mistake by me in my judgment. Maybe the Supreme Court agrees with the mistake. But that just happened. Some of those

things happen. I don't believe it has been construed, so we don't know whether it means what it says literally or not. The assumption of the Evidence Committee that something was going on there other than that is not necessarily supported by any foundation. The foundation would have to be bound by what happened in the Supreme Court because in all of the committees that proceeded the adoption of Rule 207 of the Rules of Procedure by the Supreme Court, this matter never was discussed. It essentially is worded the way it is through, in my judgment, a drafting mistake committed by me.

PROFESSOR BLAKELY: Well, the Evidence Committee didn't seem to have any problem with that. It was discussed. They were aware because Tom Black had proposed, "Look here, we adopted this thing originally, proposed it originally on the assumption that it had to be in the same lawsuit to dispense with the requirement of unavailability." But Tom's -- and Tom proposed that we reword to retain that limitation, but the committee didn't go with that. Rather it decided to do what you see here before you today.

JUDGE HITTNER: You mean refer to -- back to the rules, back to 207?

PROFESSOR BLAKELY: Yeah, yeah.

JUDGE HITTNER: Is this the only comment -- or would this be the only comment in the Rules of Evidence referring back to Rules of Civil Procedure? Anybody recall any others?

PROFESSOR BLAKELY: Yes. I can't point to it. I can turn some pages and find it, but there are one or two instances where that's so --

PROFESSOR DORSANEO: Reference to Rule 207.

JUDGE HITTNER: Well, does this, in effect by putting a comment in, pull the rug out from No. 3? It just, in effect -- the comment -- is it a comment just to 3, is that correct?

PROFESSOR BLAKELY: In essence, yes. In essence it's a reference to 207. If it fits 207, fine. It's not hearsay and therefore no requirement of unavailability.

JUDGE HITTNER: I'm not sure, for interpretation purposes, it might not be best just to leave it the way it is. Just to leave it with 3 without comment. Because now you're going from the Rules of Evidence going back now to a long rule on depositions. Runs about half a page, doesn't it, 207?

PROFESSOR BLAKELY: Well, Judge, you presently are referring there to Texas Rules of Civil Procedure without mentioning a number.

MR. ADAMS: You're just helping the reader, directing it back to the book.

PROFESSOR BLAKELY: So, we're just being more specific. Where in the Texas Rules of Civil Procedure?

MR. REASONER: Dean, I'm puzzled. You say that the view of the Evidence Committee that "offered" is synonymous with "use", that you're not making a substantive change?

PROFESSOR BLAKELY: No, they thought it was more illuminating.

MR. REASONER: Well, it also seems much broader to me.

PROFESSOR DORSANEO: It is.

MR. McMAINS: I think it is.

MR. REASONER: That's the way it seems to me, but I understood Dean to be saying the contrary.

PROFESSOR BLAKELY: At any rate, that's what we recommend.

MR. BRANSON: Dean, how did the Evidence Committee define "used"? So, the trial lawyer used

it to assist him in getting ready for trial, but never offered it. It was intended that it be usable as long as it had been taken in accordance with the rules?

PROFESSOR BLAKELY: Jim, were you there when that was being discussed?

MR. KRONZER: No, sir.

PROFESSOR BLAKELY: Gilbert?

MR. ADAMS: I was just trying to recall, Dean. I think we thought that offered was not applicable. It was sort of a -- that a person -- that you really need to be using it in accordance with the Texas Rules of Civil Procedure and not necessarily offering it. Because I don't know that the rule -- the rule did -- the caption of the Rule 207, Paragraph One, is "Use of Depositions". And it deals with the use of depositions and not the offering of them. And it was sort of just a misleading type of --

PROFESSOR BLAKELY: It may be that's where we picked up --

PROFESSOR DORSANEO: That must be the case.

MR. ADAMS: It wasn't -- it wasn't meant to be anything more than to try to conform to the

same type of language that the Rules of Civil Procedure used. And, see, Rule 207 says, "use of depositions in court proceedings," and not offering of them. It's use of them. And that really is cosmetic more than any kind of substantive --

MR. BRANSON: Isn't it possible that the committee was addressing the problem of in a subsequent trial, having to go back to the transcript of the trial to see whether or not the previously taken deposition was, in fact, offered in trial?

MR. ADAMS: I don't recall that discussion at all.

MR. BRANSON: That certainly is currently a potential problem. It is eliminated by the use of the word "used" as opposed to "offered." It can become technically, extremely difficult. You've got a trial that occurred in Florida. You're attempting to use depositions of the same expert. You go back to the trial transcript and determine whether the deposition was actually offered in trial. Whereas, I assume it can be presumed if it was taken, it was used for some purpose.

MR. ADAMS: I really think, as I recall, my recollection is that it was more of a cosmetic

thing, that was the thought of the committee at that time. That the rule says, "use of deposition," it ought to be consistent with the -- with our language in this Rule 801.

PROFESSOR BLAKELY: I'm comfortable, Mr. Chairman, with changing "offered" to "used" and adding the two comments. Did I move for approval?

CHAIRMAN SOULES: Yes, sir.

MR. McMAINS: It was seconded.

CHAIRMAN SOULES: It was seconded. Is there further discussion? Bill Dorsaneo.

PROFESSOR DORSANEO: Well, I think that would be fine for now. But I do think we need to address the hidden policy question in paragraph one of Rule 207 of the Texas Rules of Civil Procedure. Because it really had not been addressed when these rules were amended April 1, 1984.

PROFESSOR BLAKELY: We just stumbled fortuitously.

PROFESSOR DORSANEO: That's right. And I know exactly how it happened. But the only other thing I could say is that -- that comment to 804 -- I don't really like the way it's worded, Dean, because it doesn't seem to me to -- I guess I don't think it's finished yet. I think this is a problem

area that is definitely improved by the suggestions and changes that you've proposed, but I don't think it's finished sufficiently for us to think that we're done in dealing with the procedural rules and the evidence rules in the area of depositions. And there are about four or five other things I could say about it. I won't. Those are basically my comments.

JUDGE HITTNER: May I direct a question to Professor Dorsaneo? Do you think there's a necessity for the comments to either rule that we're talking about?

PROFESSOR DORSANEO: Yes, I do. I think that -- professor didn't talk about some of the problem language in 804. The depositions -- on the unavailability requirement for depositions in the same case.

JUDGE HITTNER: So, what is -- I didn't understand your position then. You were opposing the comment -- one of the comments?

PROFESSOR DORSANEO: The comments are better, but they don't -- by virtue of the fact that even -- you're commenting on what is the need for the comments. The comments aren't good enough. Because it would be apparent if the comments were

worded more clearly to indicate what the problems are that are being addressed.

MR. McMAINS: I have one question. Is there any real need in the comment -- in the second comment, the one in 804, for the words "in some circumstances"? I mean "may" means that anyway. If you just say "a deposition may be admissible without regard to unavailability" you see that? Why do you need to say "in some circumstances"? That seems to think that maybe there are some circumstances where you qualify under 801(3), that it still isn't admissible. Which isn't true.

PROFESSOR BLAKELY: Well, it elaborates a little on the word "may". If you just say "may". A deposition may be admissible without regard. You see "may" as meaning, well, if it complies with the other. But one -- and that's the intent, of course. But one might quickly read it as thinking, yeah, it is, anytime. You can go to 801 and it comes in without regard --

MR. McMAINS: Well, then you go to 801(e)(3) and it says only if it's taken in accordance with Texas rules. So, you're never here unless -- unless you aren't there. I mean, so I don't --

PROFESSOR BLAKELY: If it would change your vote let's strike "in some circumstances."

MR. McMAINS: I think it's redundant is all. That it may hinder --

JUDGE HITTNER: Well, I'm not sure I agree it's redundant, but I do agree with your position that it would be more comfortable without it.

PROFESSOR BLAKELY: I would accept that as the moving party --

CHAIRMAN SOULES: All right.

PROFESSOR BLAKELY: -- for my whole committee.

CHAIRMAN SOULES: Harry Reasoner.

MR. REASONER: Luke, I guess I'm -- I don't know what the time pressures are for us to come to some position on this, but it does seem to me to say that this is a major change in the rule and maybe one entirely meritable, but I'm really more taken with Bill Dorsaneo's suggestion that there ought to be more in-depth study given to this to be sure that we know what we're doing. I mean, be sure not -- to me, I can't see courts interpreting "offered" and "used" as being the same. I think this is a major change in the rule.

Maybe it's one entirely desirable, but if we're going to recommend it, I'd like to have an in-depth explanation of why it should be done.

CHAIRMAN SOULES: Tom.

MR. RAGLAND: Well, we have a joint question back here. It escapes me the significance of having the phrase "and used" when really the -- it seems to me the key to it is if the deposition was taken -- the prior deposition was taken in accordance with the Rules of Civil Procedure, why place an additional burden on having to prove it was used?

PROFESSOR DORSANEO: It makes sense.

MR. McCONNICO: If we study it, why don't we just consider knocking out both "offered" and "used." And just say, "It is a deposition taken in accordance with Texas Rules of Civil Procedure."

CHAIRMAN SOULES: All right. Those are the suggestions of Tom Ragland and Steve McConnico.

Steve, would you say again what your suggestion is.

MR. McCONNICO: We're saying just state "It is a deposition taken in accordance with the Texas Rules of Civil Procedure."

MR. McMAINS: Yeah, but if it's another

case, another Texas case, it's going to be taken in accordance with the Texas Rules.

MR. McCONNICO: Well --

MR. McMAINS: And that doesn't make it non-hearsay in another case.

MR. McCONNICO: Then you have to go back --

MR. McMAINS: Case A in Harris County does not become automatically admissible in Case B in Harris County simply because Case A was taken -- a deposition was taken in Case A.

MR. KRONZER: Depending on which court you're in.

PROFESSOR DORSANEO: But the current language doesn't deal with that problem either.

MR. McCONNICO: We're not going to avoid that problem because we still have our Rules of Civil Procedure to 207 to talk about that. We're not going to avoid that. I think all we're saying is let's avoid trying to get into what is "used" and "offered." Just avoid the whole problem of what is "used"? "Used" is, maybe I read it. We took it and read it, but never offered it at the courthouse. Just avoid every bit of that.

MR. BRANSON: I have one other concern in that regard. In light of the fact that we're going

to be dealing in this rule many times with depositions taken in other states, since we're really attempting to track a rule that's been in use in federal courts for sometime, don't we run into some difficulty by saying that the depositions have to be taken in accordance with the Texas Rules? Couldn't we broaden that and make it, "Or in accordance with the rules of the state in which they were taken"? It accomplishes the same purpose in that there may be some states that don't have quite the technicalities we do in some regards to depositions.

MR. McMAINS: Well, that's true, but usually you're still taking them in accordance under our rules if it's a Texas case.

MR. BRANSON: No, we're trying a Texas case, but a deposition has been taken in New York, but not in a Texas manner, in a New York manner, and you want to use it. As I understand the federal rules, it's contemplated as usable if we make that prior deposition be taken in -- pursuant to our -- it's not usable, Rusty? You're shaking your head.

MR. McMAINS: I'm not sure that it is. I'm not going to say that it's not.

MR. BRANSON: What is it about these rules that would prevent that?

MR. KRONZER: If you have unavailability, it's usable.

MR. McMAINS: Yes.

PROFESSOR DORSANEO: Assuming that everything else is usable.

MR. BRANSON: But you've added another -- you've added another requisite by requiring that out of state depositions, before it's usable, to have been taken in accordance with our deposition practice, which may be an unreasonable burden on the party attempting to offer it.

PROFESSOR BLAKELY: Of course, if it's federal and used federally, you'd have to show unavailability. It would have to come in under 804(b)(1).

MR. BRANSON: Yes, sir.

PROFESSOR BLAKELY: Now, do you want to -- do you want that federal deposition admissible in Texas without regard to unavailability?

MR. BRANSON: Well, let's assume since it's out of state, unavailability is going to be easy to show, Dean. All I'm saying is, are we adding an unnecessary requisite, that if you've got

a witness who was taken originally in Michigan or Florida, it's unlikely he's going to be traveling through Texas at the time of trial.

PROFESSOR DORSANEO: But he's not unavailable if his deposition could have been taken in this case, under our case law, under the wording of 804, if I'm right, which I'm sure I am.

MR. BRANSON: All right. Let's make it a deposition taken when the man's dead. Is that out of state testimony still going to have to --

MR. McMAINS: You don't have a problem if you go to --

CHAIRMAN SOULES: I think -- let me see if -- just an indication of how many feel that we're going to be able to work through this today or whether it should be referred to a later report -- referred to a committee for a report next time?

MR. TINDALL: I think -- I believe we've come close to hammering it out.

CHAIRMAN SOULES: Well, let me see what the feeling is. How many feel that we are about to get it straightened out and we need to act on it, please show your hands.

MR. ADAMS: I don't understand the vote.

CHAIRMAN SOULES: I'm trying to get a

consensus as to whether or not we feel this is something that we can work out today and get behind us or whether it's something we need to refer to a committee since we need to get down the road a little bit further with the agenda, if possible. I'm not trying to cut this off. If we can get finished with it, we can go on and work with it. How many feel that we can get through if we continue here for awhile on this subject?

MR. JONES: Can I make a point of inquiry, Mr. Chairman?

CHAIRMAN SOULES: Yes, sir. Mr. Jones.

MR. JONES: I noticed when we called this meeting we said we were not going to meet tomorrow, we were going to quit at 5:00.

CHAIRMAN SOULES: That's right.

MR. JONES: That gives us 45 minutes. I don't know how far we are on the agenda, but I sure think --

PROFESSOR BLAKELY: I have three more quick evidence rules, and I believe they'll be passed in a hurry. I believe they will be non-controversial.

CHAIRMAN SOULES: And then we're going to need to at least get --

MR. CASSEB: Why don't you jump to the three that he's got that are non-controversial and let's come back to this thing, in the interest of time, and see where we're at?

CHAIRMAN SOULES: I'm going to finish responding to Franklin Jones, and then I'm going to do that. After we get through with these evidence rules, we're going to at least need to appoint subcommittee heads and divide up the balance of this work for the next session. So, we've got that ahead of us, and that's going to be the rest of our agenda today. We won't be able to get to anything else substantively that I see.

All right. With that in mind, how many feel that we can continue with this until we get it concluded? Please hold your hands up. Five.

How many feel that this particular matter of use of depositions, I'll describe it that way, should be referred for further study?

Well, the latter votes have it, so it will be referred for further study to whoever heads up our discovery subcommittee. Well, I'll get your position on that. Should it be referred for further study to an Evidence Committee or to a committee that handles discovery rules under the

deposition practice?

MR. McMAINS: It's not a discovery issue. It's evidence.

CHAIRMAN SOULES: All right. It will be referred to the Evidence Committee.

PROFESSOR DORSANEO: Well, due to the fact that our rule books treat it as a discovery issue.

CHAIRMAN SOULES: All right. We'll go on then to the completion of the Rules of Evidence Report.

PROFESSOR BLAKELY: Mr. Chairman, on Page 9, in the middle of the page, Rule 803(6). This is the business records exception. As it presently reads, it says, "All these requirements can be shown by the testimony of the custodian or other qualified witness." We all know that you can get it in by affidavit, under 902(10). It was thought by the committee that we ought to sort of make that a little bit more clear, because that's not really testimony when it's coming in by affidavit, by adding the phrase "or by affidavit that complies with Rule 902(10)." Changes nothing, just makes it a little more clearly that 803(6) opens up to the affidavit.

CHAIRMAN SOULES: All right. So, you so move?

PROFESSOR BLAKELY: So move.

MR. ADAMS: Second.

CHAIRMAN SOULES: Okay. Gilbert Adams seconds. Those in favor, say aye. Opposed? It carries.

PROFESSOR BLAKELY: Over on Page 10 is Rule 902(10)(b). This is the notary's jurat at the end of that affidavit that gets in your business records. Certain statutes have changed the notary form. He's no longer limited to operating in and for the county of such and such. He can operate statewide. He's now supposed to put when his commission expires. He's supposed to print his name under there. So, the change here is simply to throw out our old notary's jurat and put in a new notary's jurat. And I so move.

MR. ADAMS: Second that.

CHAIRMAN SOULES: Moved and seconded. Any discussion? Those in favor, say aye. Opposed? That carries.

PROFESSOR BLAKELY: At the bottom of Page 10, with respect to Rule 1007 -- really over on Page 11 -- this is -- you're over under the Best

Evidence Rule.

In common law if a party admitted that a writing contained such and such, his admission sufficed. You could get around the Best Evidence Rule by using his admission. This rule relates to that. It, of course, narrows it to his written admission or his in-court admission.

The title to that thing is, 1007, "Testimony or Written Permission of Party." It's got nothing to do with anybody's permission. It's a typographical error. I don't know when it got in there, but we're just cleaning it up and changing it to "admission." That's the title of the federal rule and it was our title recommended. Move approval.

MR. ADAMS: Second.

CHAIRMAN SOULES: Seconds? It's been moved and seconded. Those in favor, say aye. Opposed? It's carried.

The rest of that packet is superfluous material, I guess.

PROFESSOR BLAKELY: If you're operating in the bound book, once you pass Page 11, that's just part of our committee's agenda and could be marked through.

CHAIRMAN SOULES: Rusty, in keeping with your suggestion, I tried to look through the rules here and separate them into categories using some of the separation that's already in the rules by sectioning; and then, of course, the long section on Rules of Practice in district and county courts has got to be broken up some.

What I have come up with is the first rules, Rules 1 to 14. That's not many rules, but it's got the bulk of this work concerning local rules in it, and so, it will be a major piece of work.

The next category will be Rule 15 to 215(a) and this is all the pleadings, parties, joinder causes of action, severance, separate trial, and on through discovery before picking a jury. I don't think we have an awful lot of work in that, but there are a lot of rules and that seems to be departmentalized into something that's manageable.

MR. McMAINS: It seems to me that really -- from a chronological standpoint, you're talking about two aspects of pretrial procedure. One is discovery and one is everything else.

CHAIRMAN SOULES: Right, but we don't have enough work to separate that into two parts. I think we can just put that altogether in our

agenda.

MR. McMAINS: Well, that's probably true right now on the pretrial non-discovery.

CHAIRMAN SOULES: Well, right now, yeah.

PROFESSOR DORSANEO: I think we have some clean-up work to do. We have done a lot, or the court has done a lot, in recent years. And we've had it for awhile, but I think there are some things that have occurred to people that didn't occur before.

That package would about cover those things we've just gone over that basically need a little work here and there, but not too much.

CHAIRMAN SOULES: That's right. And then, you know, the discovery. We need to address the whole concept of whether discovery matters should be filed or not filed in the state practice. We're getting a lot of agitation from district clerks and commissioner's courts, and so forth, to cut down on that because it's so little used and so much to store on a permanent basis. But anyway, we'll have some work in that area.

Then the rules from 216 to 314 which cover from picking a jury to the entry of judgment. And then Rules 315 to 331, which are the post-trial

rules, remittitur, motion for new trial and that sort of thing.

And then the courts of appeals' practice, which is already a subject of the first item on the agenda today, it covers Rule 352 to 472. The Supreme Court rules then that cover from 474 to 515. And then the currently very hot topic covered by 523 to 591, the justice court rules. And then the ancillary proceedings which have had a lot of work, may need some work. Well, actually receivership has never been addressed since we started revising rules; and our rules still provide, I believe, for an ex parte receiver. But if we're going to do some clean-up work, that could get to be more of a job than what's currently -- what we have to do would require.

And then, finally, 737 to 813, which is -- are the -- what we call special proceedings, bill of discovery and -- I don't know whether anything really needs to be done in those areas. Bill of discovery, F, E & D, real estate partition, quo warranto, trespass to try title. I don't see enough of that kind of litigation to know. I know that trespass to the forcible entry and detainer rules have been overhauled in view of some

constitutional objections.

So, those would be the separations that I see. And the reason that I raise them is to try to get some input from you as to where in that separation -- well, first of all, whether you feel that's logical and appropriate to separate along those lines; and if so, where your interest lies so that I can establish standing committees. I think Rusty's suggestion is a good one. Then I can proceed to go through this agenda, and by mail, assign projects. And where one group is significantly overloaded, maybe even call someone to take on special projects to relieve that overload.

So, as far as the general rules and dealing with the attempt to get uniform local rules, who in particular is interested in that area? All right. I'll assign --

MR. JONES: Mr. Chairman, are we at an appropriate point in your agenda now for me to move about the question of jury blindfolding which happens -- which I brought up earlier?

CHAIRMAN SOULES: What I was going to try to do, Franklin, was maybe get through the establishing of these committees and then open up

for discussion of any new matters that are not seen in any agenda now that the committee feels like we should address, so that we can add those for the next meeting and assign them to committees for study. And that probably will use the rest of our time.

Since I've got this division before the -- topics before the group now, I'd like to try to get -- at least get a chairman for each of those separate areas. And then I'd like to take your idea for any additional item that should be on the agenda.

MR. JONES: I don't want to interfere with your agenda. I just don't want to get away without passing on --

CHAIRMAN SOULES: I definitely want to hear -- I heard two or three suggestions for matters that were -- feelings that needed to be dealt with that are not in this book. And we want to get all those before us prior to adjournment. Thank you.

All right. I'm going to assign then the work on the harmonizing of the local rules to Judge Linda Thomas, who is not here, otherwise I'm sure she'd volunteer.

On pretrial and discovery, the Rules 15

through 215(a), is there a volunteer to chair that standing committee?

Absent a volunteer, will you do it, Sam Sparks?

MR. SPARKS: Okay. It's hard to chair from El Paso, but you say there's little work. So, that's what I work in. So, I'll do it.

CHAIRMAN SOULES: For Rules 216 through 314, the trial rules, do I have a volunteer on that?

MR. McMAINS: I have a suggestion. Why don't we put Franklin as chairman of the trial procedure rules, which has all the charge rules in it and all the stuff about comments on the weight and stuff. So, basically, he can submit his own suggestions without any problem as well, from a committee standpoint.

CHAIRMAN SOULES: Would you be willing to serve on that, Frank?

MR. JONES: I will if nobody wants me to give the trial judges a right to comment on the weight of the evidence. Talk about cross-examining in the federal courts.

MR. KRONZER: I thought that was by choice.

MR. SPARKS: Financial necessity.

CHAIRMAN SOULES: All right. For the post-trial -- Harry Tindall, I've already heard your interest in that. Where's Harry?

MR. McMAINS: Harry had to leave.

JUDGE HITTNER: He said he would be interested in that.

MR. KRONZER: He's going to a post-trial.

CHAIRMAN SOULES: Trying to lead into the court of appeals rules that -- well, he was talking about that. I'm going to assign him, unless someone else wants to volunteer for that, assign that to Harry to chair. Okay. That will be Harry Tindall for Rules 315 to 331.

And, Bill Dorsaneo, you've already got the new rules on the court of appeals. So, that's really logically assigned to you in conjunction with those rules, isn't it, Rules 352 to 472? 472 is the end of the court of appeals.

PROFESSOR DORSANEO: Well, you got me into the Supreme Court a little bit. But that's all right.

MR. McMAINS: Well, are you trying to limit it to the court of appeals and then move to the supreme court rules?

CHAIRMAN SOULES: Right. And I was going to ask, Rusty, that you take the supreme court rules.

So, that we've got -- Harry Tindall is interested in the part about perfecting the appeal. And Bill has already done so much work in the middle, as have you, Rusty. I know you worked on that committee, too.

PROFESSOR DORSANEO: We really need some guidance on the appellate rules as to whether or not we're supposed to consider whether the supreme court rules or the court of criminal appeals rules would be part of that numbering, or just let that be and don't worry about it or what?

MR. McMAINS: I'll be glad to, if you want, to call it a committee, but I think, basically, we've got enough working committee on the other thing.

CHAIRMAN SOULES: Well, they can be combined, but if we could take responsibility for individually reporting in those sections and y'all can meet combined and work combined. I have no problem with that.

MR. McMAINS: That's fine.

CHAIRMAN SOULES: Will that work out?

MR. McMAINS: Yeah.

CHIEF JUSTICE WALLACE: Was your question, Bill, just continue the appellate rules numbers on through the supreme court, is that what you were asking about?

PROFESSOR DORSANEO: Yes, Your Honor, whether the court wants us to think about that or --

CHIEF JUSTICE WALLACE: That would be fine with me, appellate rules all the way through.

CHIEF JUSTICE HILL: Oh, yeah, I don't think we need to be left out. Look at us.

CHAIRMAN SOULES: Well, I think that some of the supreme court rules are going to key to some of this harmonizing. And some changes are going to have to be made there really for housekeeping.

And we talked before whether the Supreme Court might be willing to listen to a suggestion that there be separate Texas Rules of Appellate Procedure, which would run numerically and sequentially from wherever they start in the process all the way through the Supreme Court of Texas.

CHIEF JUSTICE HILL: I would think they would be willing, because he's got the proxy.

CHAIRMAN SOULES: Judge Wallace is the

proxy and says he thinks that would be logical. Is that subject --

MR. McMAINS: Yes.

CHAIRMAN SOULES: Okay. Then I don't know if we need a committee on the justice courts. Is anyone very excited about that topic? Does anyone know of any problems?

MR. KRONZER: Mr. Reasoner and I --

PROFESSOR DORSANEO: Well, there are a lot of problems.

CHAIRMAN SOULES: They've got a great recusal rule. You challenge, he leaves.

MR. REASONER: That's all that's left to us, Bill.

MR. O'QUINN: They got to go for the biggest thing in Texas, the littlest small claims.

PROFESSOR DORSANEO: There are a lot of problems because we don't -- those are pretty much left alone forever. And there aren't many appellate court opinions about them. And a lot of them are essentially very mysterious. I'm forced to teach them every once in a while, and I think somebody ought to take a look at that at some point. Maybe we have enough to do without worrying about it.

MR. O'QUINN: I think we've got enough to do.

JUDGE HITTNER: We'll get Judge Wapner to deal with that.

MR. O'QUINN: Judge Wapner.

CHAIRMAN SOULES: Well, we'll omit that for now.

MR. McMAINS: I think you can wait until you see if you've got any ground swell of --

CHAIRMAN SOULES: We haven't had much yet.

MR. McMAINS: -- information and then you could appoint somebody then if you needed to.

CHAIRMAN SOULES: What about ancillary proceedings?

MR. McMAINS: Extraordinary remedies?

CHAIRMAN SOULES: Extraordinary remedies.

MR. BRANSON: Broadus is not here. You ought to put him on the JC's.

CHAIRMAN SOULES: All right. That would be Broadus Spivey.

CHIEF JUSTICE HILL: The last justice court I visited was out near Garner Park. And I had to go over there to try to help a young man who had been busted in the park for having a beer. And

you ought to see where that court was being held. It was a little old chicken coop in the back of this fellow's house. I continued my great record in the justice court, not doing any good for my client. It was the maximum. But, yeah, they've got some problems out there.

PROFESSOR DORSANEO: The courts are definitely misnamed.

CHIEF JUSTICE HILL: I would avoid them.

MR. KRONZER: Luke, I would like to serve on the relief committee, whatever you call it.

CHAIRMAN SOULES: Well, there was a lot of debate about whether or not non-lawyers should be allowed to represent corporations in justice courts. And part of the resolution to that was, "Well, if the judges don't have to be lawyers, why should the representatives have to be lawyers."

MR. O'QUINN: Why should the lawyers have to be lawyers.

CHAIRMAN SOULES: Is there anyone here who --

MR. McMAINS: Judge Kronzer just volunteered.

MR. KRONZER: I'd like to serve on the extraordinary remedies.

CHAIRMAN SOULES: Jim Kronzer.

MR. KRONZER: I've seen some real -- felt some of them.

MR. McMAINS: There're going to be really extraordinary next time.

CHAIRMAN SOULES: And then the special proceedings rules, at least we might take a look through those. Who would be willing to look at those, Bill of Discovery and so forth, these special proceedings, quo warranto?

MR. McMAINS: I really think that's --

MR. KRONZER: That's what I'm trying to say.

MR. McMAINS: -- really what's in his area.

CHAIRMAN SOULES: Oh, I see. I thought I understood you to say ancillary proceedings. I'm sorry.

MR. KRONZER: Mandamus, quo warranto, prohibition. I mean the real prohibition.

CHAIRMAN SOULES: What about attachments, sequestrations, receivership and that sort of thing?

MR. KRONZER: Oh, no, that's like that justice court stuff. Let's assign that to Broadus,

too.

CHAIRMAN SOULES: Pat, you did some work on this. Pat Beard did some work on this one time. Pat, would you take a look at those?

MR. BEARD: All right. I'll look at them. Matt Dawson wrote most of those things.

MR. KRONZER: That's why it's stayed under constitutional attack. Pat Beard and Matt Dawson did it.

CHAIRMAN SOULES: All right. Knowing now the breakdown and the respective chairman, does anyone want to volunteer to be put in a particular slot, because everybody's going to be on -- going to have to be on a committee.

MR. BRANSON: I'd like to be on Franklin's committee.

CHAIRMAN SOULES: Okay.

JUDGE HITTNER: I'll take the 115 to 215. Is that Sam Sparks' committee?

PROFESSOR DORSANEO: I'd like to be on that one, too.

CHAIRMAN SOULES: Okay. That's Judge Hittner and Bill Dorsaneo. In order to get some temperance into Jones and Branson, I think I'll assign David Beck to that group as well.

Yes, sir.

MR. RAGLAND: Sparks.

CHAIRMAN SOULES: And, Steve, would you -- Steve McConnico, would you serve on that trial group?

MR. McCONNICO: You bet.

CHAIRMAN SOULES: You've done a lot of work, particularly in special issues. I know you've written all in this area and that would be a big help.

Tom?

MR. RAGLAND: I would like to serve on Sam Sparks' committee.

CHAIRMAN SOULES: All right. Are there any other persons who are particularly interested in given areas? Pick a subject or pick your chairman or get assigned, I guess.

MR. KRONZER: How about Dean Blakely?

CHAIRMAN SOULES: Okay. Now for the evidence -- we do need an Evidence Subcommittee.

And, Newell, would you take on the responsibility to chair that for us?

PROFESSOR BLAKELY: All right, sir.

CHAIRMAN SOULES: And it was Dorsaneo's suggestion that we probably need a committee to

just oversee and interrelate Rules of Evidence problems and Rules of Civil Procedure problems. Do we want to do that or just --

MR. McMAINS: I think if you've got Dean Blakely that really is on both, that you almost have an overseeing effect, as it were, in that connection. I mean, any problems anybody has, if they are channeled to Dean Blakely, then he knows both ways as to which way, you know, whether it was a problem in the Evidence Committee or a problem here, or nobody's thought about it.

CHAIRMAN SOULES: Well, that satisfies me. I don't know whether Dean has got that --

John O'Quinn?

MR. O'QUINN: I'd like to work with Professor Blakely.

CHAIRMAN SOULES: On the evidence? All right.

Is there anyone else that would like to be assigned to evidence and work with Dean Blakely, in particular?

MR. O'QUINN: No, thanks. I said work with Dean, not work for him.

CHAIRMAN SOULES: Okay. Franklin, let's hear suggestions from you and then anyone else that

has any suggestions for additional topics for us to take up.

MR. JONES: I believe, if I heard you correctly, you put me on to chair the committee to study the question of trial procedure and the court's charge in that matter.

CHAIRMAN SOULES: Yes, sir.

MR. JONES: Well, I believe that will cover the point that I have brought up because I believe that's where that issue arises. It's in the charge. So, I don't think you need to consider it any further.

MR. McMAINS: I don't think we need to until we see something in writing anyway.

MR. KRONZER: Or in 269.

JUDGE HITTNER: Mr. Chairman, I'd like to bring up one point that apparently I'll be speaking with my subcommittee on, but it's something I've taken an interest in for quite awhile, summary judgments. It seems as though that one loophole, the only loophole left after the Clear Creek case, that you've got to make all of your objections known at the trial level in order to get a reversal under any grounds on the appellate level. The only one area left, the only one area left is

insufficiency as a matter of law. And it would be my point to show lawyer diligence down below where I've seen so many people mess up, not put a response in, and then come on the appellate courts screaming insufficiency as a matter of law. It would be a position that I would like to at least bring out at the next meeting.

And I will put this in writing that that one last loophole left in the Clear Creek case be closed, that all insufficiency, including insufficiency of matter of law, be brought to the court's attention down below or be precluded on appeal from bringing it up. That would be a point that I will be bringing up to my subcommittee.

CHAIRMAN SOULES: All right.

MR. O'QUINN: Judge, I don't want to make it easier for you guys to get summary judgments against me.

JUDGE HITTNER: Get out of here.

MR. O'QUINN: That's what you say, "Get out of here."

CHAIRMAN SOULES: What is the best time for you all for another meeting? We need to have a meeting.

Judge Wallace wants to speak for a moment.

JUSTICE WALLACE: One thing -- and I'm not sure which it would go in, the Court of Appeals or the Supreme Court, or maybe both, but this problem that we keep running into, the Court of Appeals are right on one point, which they say is positive, and comes on up to the Supreme Court, and they are reversed and yet their insufficiency points, or something like that. And so you've got to go through the entire process again. And I haven't thought this through to know what the answer is. But perhaps it would be a rule that says any point not raised before the Court of Appeals, not addressed by them is presumed to have been overruled by them. Maybe that would take care of it. But get away from remanding back and then come back up again. Do y'all all understand what I'm talking about?

MR. O'QUINN: Yes, sir. It's a good idea really.

CHAIRMAN SOULES: Would the --

MR. KRONZER: Of course, you can't do that on the facts sufficiency.

JUSTICE WALLACE: No.

JUDGE HITTNER: As far as the chairman goes, the only week that you might keep in mine is

that the Judicial Conference this year will be the week commencing September 30th through that Friday the 4th. That is the Judicial Conference in McAllen.

MR. McMAINS: Friday, October the 4th.

JUDGE HITTNER: September 30th through October the 4th. That week. I think really it begins on Tuesday or Wednesday, by the way.

MR. McMAINS: Luke, there's a serialized seminar by the State Bar on special issue submission. In fact, Justice Pope's engineering the thing all September -- I mean every Thursday and Friday in September. Under those circumstances, I think October is doing some better from a standpoint of a lot of people I know that are participating on it. They're also on this committee. Some of them aren't here.

CHAIRMAN SOULES: There was a suggestion from Justice Evans that they might have their reports, as far as their preferences about this harmonized rule effort, together for a meeting at the Judicial Conference so that the chief justices and other justices attending there could meet there and do that and, I guess, then pass to us their joint suggestions. If we have that promptly, we're

still going to need -- Bill, you're going to need until at least the end of October, aren't you --

PROFESSOR DORSANEO: That's right. We are.

CHAIRMAN SOULES: -- for time to digest whatever it is they send in, if it has much -- if there's much to it.

MR. McMAINS: It depends on how persuasive their arguments are.

CHAIRMAN SOULES: But if there is a lot of material, it's just going to take going through it.

JUDGE HITTNER: Are you looking at something around Friday, November 1st, something like that? That's right at the end of October.

MR. HUGHES: That or the 25th.

CHAIRMAN SOULES: Does that sound -- if we're shooting for effective dates of -- well, I think that's going to delay the effective dates of the appellate rules. Because unless we have by then gotten all the input we need from the Court of Criminal Appeals, it's going to be difficult. But if we have it by then I guess --

JUDGE HITTNER: That would be about one month after the Judicial Conference.

MR. BRANSON: Judge Hittner, November 1st, though, would interfere with trick or treating. It's the day after Halloween.

JUDGE HITTNER: That's right.

CHIEF JUSTICE WALLACE: That Court of Criminal Appeals, as far as their work on evidence, if they don't do it January 1st, they aren't going to get to do it. So, I'm sure they'll have it in by then, according to this Bill.

MR. McMAINS: I see.

CHAIRMAN SOULES: Well, let's -- is everybody, as far as you know, available on November 1st, Friday, November the 1st?

MR. O'QUINN: Terrible for me.

CHAIRMAN SOULES: Pardon?

MR. O'QUINN: If you're taking a head count, that's bad. If you're taking a head count, that's bad for me. But you've got a lot of things to accommodate. I know I'll be in trial. I know I'm going to be in trial that whole month.

CHAIRMAN SOULES: You're going to be in trial the entire month of November? Well, when will you start trial? That's a Friday.

MR. O'QUINN: What day of the month?

CHAIRMAN SOULES: November the 1st is a

Friday.

MR. McMAINS: Friday is the 1st.

MR. O'QUINN: I probably won't be in trial. I'll probably start the Monday after, the 3rd. The 3rd or the 4th, whenever it is.

CHAIRMAN SOULES: This still puts you in a bind that close to trial, of course.

MR. HUGHES: The 25th is the Friday before.

CHAIRMAN SOULES: All right. How about October the 25? Friday.

MR. ADAMS: That's no good for me.

JUDGE HITTNER: No good for me.

CHAIRMAN SOULES: Okay. November 1st and 2nd, we'll have a two day session. We'll probably go all day both days.

MR. JONES: What days of the week are those?

CHAIRMAN SOULES: Friday and Saturday. We can meet two weekdays if you prefer. Generally our attendance is better if we limit it to one weekday and a Saturday.

JUSTICE WALKER: Is there a football game that Saturday here?

CHAIRMAN SOULES: There may be. And if

so, just let me know, and I'll get you reservations for a hotel in San Antonio, I guess. I'll attend to that. Okay. November the 1st and 2nd then will be our meeting. And we will, at that point, act on the merits of the entire agenda. And I'll have the agenda to you -- well, let's see.

Bill, if we get the work product of the Judicial Conference --

MR. McMAINS: You need at least two weeks, if you can --

CHAIRMAN SOULES: I don't know whether we can wait for them to meet at that meeting and tell us one way or the other.

MR. McMAINS: -- to digest all that.

CHIEF JUSTICE HILL: If we could get a combined rules work group from the Committee on the Administration of Justice and this Committee for the purpose of trying to work with this new Court Administrator Act, if we can get our administrator office to give this their priority as a work force, follow-up force for the people, we might be able to get our business that I'm so concerned about in some kind of shape by November. It may be too much to hope for.

But, you see, I visited -- there is a lot of

things -- we have to try to all work together. I'm learning that this group here and this group here -- it's kind of like in disciplinary problems, you've got the Oversight Committee over here, you've got the Disciplinary Review Committee over here. One of them is our committee and one is the State Bar's Committee. And if you're not careful, you run the risk of somebody feeling like they got shortchanged or didn't get involved properly, and that creates problems for us. And I'd like to avoid that here by having those two committees --

Luke, if you and Mike Galliger (Phon.) could get together and form us some sort of a task force on this, and then Ray Judice and his group can be -- they can be available. And the Texas Judicial Counsel probably should feel a little bit left out if they don't get consulted. You might ask Judge Grant if he wants to participate.

Because I tell you, gentlemen, I hate to sound like a broken record. I know we've got a lot of problems and I'm more sensitive about this than any of the others because of all these "shalls" in here about what the Chief Justice has to do. I shall I'm sure, shall do this and shall do that. And so, if we could crank our business in there,

Luke, and maybe within the next 30 days or so have a group agree to "Okay. I have." And it's got to be people that know what they're doing and have the time to do it. And there's no hard feelings if somebody just flat doesn't have the time. I know how busy you all are right now. And it may be that you just have to end up with two or three that are willing to say "Yeah, I'm willing to take this home." Because it's going to take a heavy committment of time to work out these Rules of Administration and bring them back before this group and get them approved, get the Committee on Administration of Justice to approve them and then we'll implement them as a part of the Rules of Procedure of this state. And they're going to have to be harmonized with local rules, and it's a big, big order.

But anyway, I just want to get one more lick in, one more closing argument on the importance that we attach to this and the need for help. I just can't come over there and I don't want to cry on your shoulders, but, like, we get our work on Thursday. We have 32 applications next week and over 12 hard and heavy opinions to work through. So, we really need most of our time over there.

And we -- there's no one -- we can't delegate that. That's just our work. It's indispensable. So, we just need some help here to get the administrative part of our program in a little better shape. And anything any of you could do to help us on that, we will be ever grateful.

Sol, I sure wish you'd get your head way deep in this thing and start trying to get your fertile mind to work and see if you can't get aboard this thing. And you sure would be a lot of help if you could just -- because you've been there. You've been a trial judge and you're a practical person. And I'm really kind of fingering you right now because we need somebody to just say, "Hey, I'm willing to take three or four months and get this thing done."

CHAIRMAN SOULES: Thank you very much, Mr. Chief Justice.

I think then we'll use the last ten minutes to have a short meeting of this Court Administrative Bill Committee. And any of you that don't want to take a section as your own responsibility, can stay and hear what we resolve about it or can wait to be assigned. But let's see, so far the volunteers who are willing to take

sections of it are Jim Kronzer, who apparently had to leave, Sam Sparks, Judge Linda Thomas, Tom Ragland, Judge Hittner, Pat Beard, Franklin Jones, Judge Casseb, Harold Nix and Lefty Morris. The rest of you are certainly welcome to stay and are --

CHIEF JUSTICE HILL: What about our cocktail hour --

CHAIRMAN SOULES: Our cocktail hour is just on the other side of this same building. It will be this same room just through the hallway there, as I understand it, at 5:00 o'clock. Okay.

Then the committee as a whole stands adjourned until 10:00 o'clock.

(Proceedings recessed)

STATE OF TEXAS)
)
COUNTY OF TRAVIS)

I, Mary Ann Vorwerk, Certified Shorthand Reporter in and for the County of Travis, State of Texas, do hereby certify that the foregoing typewritten pages contain a true and correct transcription of my shorthand notes of the proceedings taken upon the occasion set forth in the caption hereof, as reduced to typewriting by computer-aided transcription under my direction.

WITNESS MY HAND this the 30th day of June, 1985.

Mary Ann Vorwerk

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