SUPREME COURT ADVISORY BOARD MEETING
Held at 1414 Colorado
Austin, Texas 78701
November 7, 1986

(VOLUME I)

APPEARANCES

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

MR. PAT BEARD, Beard & Kultgen, P.O. Box 529, Waco, Texas 78703

MR. DAVID BECK, Fulbright & Jaworski, 1301 McKinney Street, Houston, Texas 77002

MR. FRANK BRANSON, Allianz Financial Centre, LB 133, Dallas, Texas 75201

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

PROFESSOR J. H. EDGAR, School of Law, Texas Tech University, P.O. Box 4030, Lubbock, Texas 79409

MR. RUSSELL (RUSTY) H. MCMAINS, Edwards, McMains, Constant & Terry, 1400 Texas Commerce Plaza, P.O. Drawer 480, Corpus Christi, Texas 78403

MR. CHARLES (LEFTY) MORRIS, Morris, Craven & Sulak, 600 Congress Avenue #2350, Austin, Texas 78701

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

MR. SAM SPARKS, Grambling & Mounce, 8th Floor, Texas Commerce Bank Building, P.O. Drawer 1977, El Paso, Texas 79950-1977

MR. SAM D. SPARKS, Webb, Stokes, Sparks, Parker, Junell & Choate, 314 W. Harris Street, P.O. Box 1271, San Angelo, Texas 76902-1271

MR. BROADUS A. SPIVEY, Spivey, Grigg, Kelly & Knisely, A P.C., 812 W. 11th Street, P.O. Box 2011, Austin, Texas 78768-2011

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

HONORABLE BERT H. TUNKS, Abraham, Watkins, Nichols, Ballard, Onstad & Friend, 800 Commerce Street, Houston, Texas 77002

HONORABLE JAMES P. WALLACE, Justice, Supreme Court, Supreme Court Bldg., P.O. Box 12248 Capitol Station, Austin, Texas 78767

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

CHAVELA V. BATES
Certified Shorthand Reporter
and Notary Public

VICKI THOMAS
Certified Shorthand Reporter
and Notary Public

SUPREME COURT ADVISORY COMMITTEE

TRANSCRIPT OF PROCEEDINGS

NOVEMBER 7, 1986

VOLUME I

SUPREME COURT ADVISORY

BOARD MEETING

November 7, 1986

(Morning Session)

CHAIRMAN SOULES: We will now come to order. It's 10 minutes to 9:00 on November the 7th, which was our next agreed scheduled meeting.

First order of business, does anyone have any suggestions to change the minutes? Are there any changes to the minutes as they appear on page 3 and following pertaining to our September 12-13, 1986 meeting? If not, then the minutes will stand as written and published in these materials, which are, of course, the materials for this meeting. And all of you should have one of these booklets that's letter-sized bound at the left-hand side. That will be our agenda.

You don't need this now, but before this session adjourns, you will also need a legal-sized booklet that's bound at the top, because the legal-sized one contains what I think are the completed rules, although they still need your critical review. And I appreciate the input that I've had on the phone already saving me some

errors in this -- in the so-called completed rules.

But we'll take up the remainder of our agenda first and start, since we're a little bit short on manpower at this point, on some of the perhaps more controversial matters with Bill Dorsaneo, whose materials begin on page 13 and also are the subject of the recent handout.

Bill, this handout starts with page 115; is that right, at the bottom of what's been handed out?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: Briefs and Argument in the Court of Appeals?

PROFESSOR DORSANEO: Yes, Luke. Really, in the booklet we would really be on page 71, 71 of the booklet.

CHAIRMAN SOULES: All right. Let's start, then, on 71, page 71 of the agenda booklet and these paper clipped materials that Bill just handed out.

PROFESSOR DORSANEO: And I'll be addressing agenda item No. 3 concerning the Rules of Appellate Procedure 74, 80(a), 90(a), 131, 136(a).

PROFESSOR EDGAR: Bill, is that included in this material?

PROFESSOR DORSANEO: Yes.

PROFESSOR EDGAR: Okay. This is all we need in front of us, then, in addition to the agenda on page 71?

PROFESSOR DORSANEO: I'll direct you to particular pages in the book as appropriate. The handout document is the draft of the Texas Rules of Appellate Procedure as it exists on various computers. That explains the numbering system at the bottom of each page.

The first rule is Rule 74 which deals with briefs in the Courts of Appeals. The suggestion is to amend paragraph H of the rule on page 118 of this handout to prescribe a limitation on the length of briefs filed in the Courts of Appeals.

If you look in the booklet on pages 72 and 73, you'll see a letter from Justice Wallace to Luke Soules concerning this particular problem. Unfortunately, at the time I drafted the language in proposed paragraph H for Rule 74 appearing on page 118 of the handout, I did not have Justice Wallace's letter before me.

I used as a model the Federal Rule of

Appellate Procedure dealing with the length of briefs. And it prescribes a different length of principal briefs and respect briefs. So, I guess the question is how many pages, and what is to be included in the computation of pages.

I see, basically, three alternatives. The first alternative would be to select a number, a specific number, whatever that number would be, and say that all briefs filed in the Courts of Appeals will not exceed that number without permission of the Court. Thirty or fifty or some other number could be used.

Another alternative is to differentiate between principal briefs and respect briefs. Principal briefs are meant to mean both the appellant's brief and the appellee's brief. A respect brief would be another brief, perhaps the appellant's brief in respect to the appellee's brief.

The federal rule takes that approach and uses the 50 page, 25 page lengths.

(Off the record discussion ensued.

CHAIRMAN SOULES: Sam, did you have --

MR. SPARKS (EL PASO): I was asking about an intervenor, what an intervenor would brief for.

PROFESSOR DORSANEO: I'm sure he would be 50 -- it would be a principal brief; it would be 50 pages. You know, I'm fairly sure. So, that really is it.

PROFESSOR WALKER: What about amicus curiae?

PROFESSOR DORSANEO: Amicus curiae, those briefs are not filed. They would be dealt with in -- they're dealt with in Rule 20 of the Texas Rules of Appellate Procedure. The subject of amicus curiae briefs is dealt with. And if we wanted to put a specific page limitation for the amicus curiae, we could put it there, or we could do what Texas Rule of Appellate Procedure 20 now does, which is send us back to this rule, and I would suppose it would be 50, unless the amicus curiae files a respect. In that event, it would be 25.

I debated with myself about whether it was appropriate to go and put a number in Texas Rule of Appellate Procedure 20 or just simply continue the practice of cross-referring back to the

briefing rules. I have no particular recommendation on the number of pages, just to get this on the table. I borrowed from another rule book. That seemed to be an appropriate place to do borrowing.

There is one other issue: How you count the pages. I borrowed from the federal, which says you exclude the table of contents and the table of authorities or index of authorities and any addendum containing statutes, rules, regulations, et cetera. That is federal language from the Federal Appellate Rules.

I toyed with the idea about excluding other things, like perhaps points of error. But that gets you into -- once you start thinking in those terms, you start getting into real problems of computation. You exclude points of error. Do you then exclude the restatement of the points of error when the points of error are restated, if they are restated?

And what I basically decided was this would be a good starting point if we picked 50 pages rather than 30 pages. Most of the time that wouldn't be a problem. But we wouldn't have these exceedingly long briefs, and at least the lawyers

would think about the length of briefs when they're preparing them rather than putting in long-stream citations and a lot of stream of consciousness dictation without any particular point to it.

This same concept is embodied in the Supreme Court's brief rule, which is Rule 131 for the application. And if you will turn and look at page 176 of this handout, you will see how I did that. "Except by permission of the Court, an application and any brief in support thereof shall not exceed a total of 50 pages in length."

I retained the idea of talking about an application and a separate brief because that was easy -- the easiest thing to do, but imposed a total 50-page limitation in the aggregate on the applicant.

MR. MCMAINS: Bill, when we rewrote the Appellate Rules, did we keep the provisions that allow the filing of an additional brief when the application is granted?

PROFESSOR DORSANEO: Yes.

MR. MCMAINS: Okay. I mean, I couldn't remember whether we kept it.

PROFESSOR DORSANEO: Not -- we didn't

eliminate it.

MR. MCMAINS: We didn't do it intentionally. I just don't know.

PROFESSOR DORSANEO: And the last place where this would come up would be in Rule 136, "Briefs of Respondents and Others. Length of Briefs. Except by permission of the Court, a brief in response to the application, a brief of an amicus curiae is provided in Rule 20 and any other principal brief shall not exceed 50 pages in length, exclusive of pages containing the table of contents, index of authorities and any addendum."

So that this page limitation issue is in those three rules: 74, 131 and 136. And I don't suppose we need to be consistent from rule to rule. The Supreme Court could have more or less than the Courts of Appeals. I just put it on the floor to see what you think.

MR. BEARD: Procedurewise, how would that permission be obtained? You just file this brief this long or this application this long and say I had permission to file it --

MR. MCMAINS: You file a motion.

MR. BEARD: -- and give the reason why, or do you have to file a motion first before

-- you get down to the last day and you're ready to -- you find out your brief is longer.

PROFESSOR EDGAR: Bill, I think in response to that, that the Court's recommendation in their letter requiring a motion is better than talking about permission. I mean, everybody knows what a motion is. And the first thing somebody is going to do is say, well, what kind of permission? Oral permission? Written permission? Can I just call one of the judges, or something like that. And I would suggest that if we adopt this, that we think about thinking in terms of a motion practice rather than the term "permission."

PROFESSOR DORSANEO: All right.

PROFESSOR EDGAR: Now, that doesn't answer the question, but that's one concern I see with it.

MR. MCMAINS: Can I -- I guess we don't have a chairman here right now. You're the chairman now, Bill, the acting chairman. Was the Court's rule itself -- I mean, the suggestion on the page limitation directed more at the applications? I mean, is it -- that, obviously, is the Supreme Court's concern.

JUSTICE WALLACE: I think the applications probably cover 99 percent of the abuses.

MR. MCMAINS: Okay. What I'm getting at is, why mess with the Court of Appeals? Leave it to them -- because a lot of Court of Appeals have local rules on the numbers of pages that they have, and some don't have any local rules, you know, and will accept the kitchen sink, but --

PROFESSOR DORSANEO: Well, the Supreme Court may have to read those briefs, I guess, would be the response.

MR. MCMAINS: Well, but they're going to have to do that anyway. I mean, the Court of Appeals -- if some Courts of Appeals are inclined to look at any length of brief anybody wants to file, then that's going to be a problem they have anyway. I mean, you know, whatever the Court finds acceptable now, and they have the power and prerogative now under their local rule practice.

I guess, my basic concern being there tends to be a stronger and longer treatment of facts in making of a number of arguments at the Court of Appeals level, that when you get to the Supreme Court, theoretically, it should be distilled in

some manner. They aren't always, but if you have a page limitation in the Supreme Court, then you may coerce the distilling it ought to take.

But I have more comfort level if we don't mess with the Supreme -- with the Court of Appeals page length rules on an arbitrary -- you know, just setting it here from a committee's standpoint.

PROFESSOR EDGAR: Have we had any complaints from the Courts of Appeals concerning the lengths of briefs? I mean, is this a stated problem with the Courts, Judge Wallace?

JUSTICE WALLACE: I'm not -- I haven't -- I'm not advised on that, I guess, is the best way to put it.

PROFESSOR EDGAR: Well, then if --

MR. MCMAINS: Some of them have problems, but they used to -- Corpus just strikes the brief and sends it back.

PROFESSOR EDGAR: If they are sufficiently concerned to raise the question imposing a limitation, would we be served by imposing one for them?

MR. MCMAINS: I mean, the way the -- for instance, the Corpus court, they don't really

have a pronounced expressed local rule, but if you file a brief that they think is too long, they send it back and strike it. Then you have to call them up and find out what's wrong with it. And they tell you, well, it's too long or it's got too many points of error. But, I mean, you'd be surprised how promptly the other side responds to that activity.

So, they don't seem to have a -- I don't think any of the courts that are concerned about this, as you, had any problem enforcing it.

PROFESSOR DORSANEO: Let me -- so I can get this drafting job done, let me stop. I think -- and back up, because we just got to a second issue.

I think that Professor Edgar's comment and Pat Beard's comment referring me back to Justice Wallace's letter, both of those comments are well taken. And I propose to change all of the places where length of briefs language appears to eliminate the phrase "by permission of the Court" and to substitute the sentence "the Court may, upon motion, permit a longer brief" in lieu of that.

Does anybody have a problem with me doing

that so we can get that issue out of the way?

MR. BEARD: I still -- you've got a brief that's longer and your time is up. Do you file a motion with the longer brief and ask permission to file that? If they don't grant it, then you've got to -- what do you do about about your time frame? That's really --

MR. MCMAINS: The problem, of course, is --

MR. BEARD: Filing it in advance to the time that you finish the brief is difficult.

MR. MCMAINS: Yes. If you take this with the federal practice -- the federal practice, of course, is that they will not allow you to file a longer brief without permission having been granted in advance.

MR. SPARKS (EL PASO): But it's by the clerk, isn't it, Rusty? I always get it by the clerk.

MR. MCMAINS: Well, as a general rule, yes. They have a delegation of -- a general rule that has delegated authority to grant various motions or permissions by the clerks. And they just arbitrarily do it. In fact, you can call them up on the telephone and send a confirming

letter.

MR. SPARKS (EL PASO): That's why you don't have the problem that Pat's raised.

MR. MCMAINS: That's right. That's why you don't have quite as much of a problem. But I'm just saying that is -- the federal rule has been interpreted that they will not file it unless you had had permission in advance and that permission -- you know, a motion requesting that has got to be filed in advance to filing the brief and acted on or else you're not entitled to file it.

That's why I hesitate -- like you, you may be on the last day and you say, oops, I've got 10 pages here. I've got to --

PROFESSOR EDGAR: Well, frequently you are on the last day and you don't know how long the brief is until the thing is due the next day.

PROFESSOR DORSANEO: Well, my response would be that we probably could spend all morning on that working out all of the mechanics of it, and I'm sufficiently comfortable with "The Court may, upon motion, permit a longer brief." And some -- the Eastland court is going to be more flexible about that than will some of the other

courts. And that's just part of what you have to know to get along in the world.

MR. SPARKS (EL PASO): But, you know, I disagree with Rusty. I like a uniform rule on the lengths of briefs, if we're going to be looking at lengths. And in the past, I know the Courts of Appeals have complained about that and proposed new rules.

I like it that you have at least a minimum standard because, you know, a lot of times in our day of jurisprudence, you may be thinking you're going to file a brief with the Court of Appeals in El Paso, but it ends up being heard by the Texarkana. And I would just as soon have one rule statewide for the Courts of Appeals, too.

CHAIRMAN SOULES: On that point --

PROFESSOR DORSANEO: That's getting to another issue again. That's not --

MR. SPARKS (EL PASO): I understand.

PROFESSOR DORSANEO: All right. Could we get this motion thing out of the way? I propose to use Justice Wallace's language rather than "by permission of the Court."

MR. SPARKS (EL PASO): I second it.

CHAIRMAN SOULES: All in favor show by

hands. Opposed? That's unanimous.

PROFESSOR DORSANEO: All right. So, if you're looking at page 118, the language would be, as changed, "Except as specified by local rule of the Court of Appeals," continuing through "et cetera," and then a sentence added after "et cetera" saying the following: "The Court may, upon motion, permit a longer brief."

Without taking up the committee's time, I would propose to make corresponding changes in Rules 131 and 136.

CHAIRMAN SOULES: Okay. Now, what did you do with the opening sentence of paragraph H at the top of 118 where it says "except by permission of the Court"?

PROFESSOR DORSANEO: I struck "by permission of the Court, or."

CHAIRMAN SOULES: Except as specified by the local rule?

PROFESSOR DORSANEO: Uh-huh. Now, I guess we get to the next issue. That is, should we have a length of briefs rule for both of the Appellate Courts?

Let me back up, please. I'm going to add in the words "in civil cases" before "except." I

think that needs to be there, too. I'm not -- I don't think anybody needs to vote on that.

CHAIRMAN SOULES: Any objection to that? That's unanimous.

PROFESSOR EDGAR: How is that going to read now? Rather than putting it after "principal brief," just say "Principal briefs in civil cases as specified by local rule. Principal briefs in civil cases shall not exceed 50 pages," so on and so forth.

CHAIRMAN SOULES: I think that's the best place for it.

PROFESSOR EDGAR: I think it's better than putting it at the beginning.

PROFESSOR DORSANEO: I'll accept that. Do we need "in civil cases" after "respect briefs," too?

PROFESSOR EDGAR: Well, why don't you entitle this -- well, that won't work either.

CHAIRMAN SOULES: I don't think so, Bill. It's pretty apparent that's what you're talking about.

PROFESSOR DORSANEO: Yeah.

MR. MCMAINS: Do you want to say "principal" or "initial"? I don't know.

PROFESSOR DORSANEO: "Principal," I think, is a better word. Although, I admit that I had to think about what it meant when I looked at the federal rule.

MR. MCMAINS: Well, the problem in making the distinction between principal and respect briefs right now is there isn't any rule authorizing respect briefs in Texas at either level, meaning it's just done. And it's always done theoretically by permission of the Court. But as a matter of practice, in my experience, every Court of Appeals in the state, they will accept any supplementary material prior to oral argument or at some specified time prior to oral argument without motion or leave.

So, I mean, we don't have any control or provisions or anything with regards to the number of briefs in total. And, of course, because some of our Courts of Appeals sit on cases for a year or two before you even argue them, to put any kind of an arbitrary limitation on how many respect briefs you can file or whatever, doesn't necessarily make sense either.

But we don't have anything in our rules that authorize or prohibit, either way, respect

briefs. I assure you in the Supreme Court, as well. They just -- they either file them or send them back. I guess they can, but I doubt that they do. They probably just file them in the back.

PROFESSOR DORSANEO: I agree with you, but the more you get into fooling with these -- with the briefing rules, you run into all of these kinds of problems, including whether points of error should be restated, because it talks about grouping earlier on, and we're never going to get finished unless we stick to the particular task at hand, and that's length.

CHAIRMAN SOULES: May I ask a question as to whether or not this would -- the respect brief concerns me that that could be construed by the Court to mean the appellee's brief.

The way I would suggest that be solved, just for discussion purposes, would be that where we say -- "principal briefs of appellants and appellees in civil cases shall not exceed 50 pages." That makes it clear that both sides get a 50-page brief.

PROFESSOR DORSANEO: But then we run into the intervenor. He's going to be an

appellant or an appellee probably.

CHAIRMAN SOULES: By then.

PROFESSOR EDGAR: Why don't you say "the party"?

CHAIRMAN SOULES: I thought about that but I wasn't as comfortable with it.

MR. TINDALL: Why don't we allow respect briefs, Bill? Why don't we --

CHAIRMAN SOULES: I can't tell you why not.

MR. TINDALL: Is there a reason why we don't go ahead and allow -- like the federal rules -- I'm just looking here -- some -- that you can file a respect brief.

PROFESSOR DORSANEO: Well, as Rusty said, we do allow it, but our rules just never talked about it.

MR. TINDALL: There's no reference to it in the rules, I know. You certainly see them flying back and forth, no reference to them in the rule. It seems to me the real world is we all file respect briefs.

CHAIRMAN SOULES: Rule 74 says the parties in civil cases in the Court of Appeals are appellant and appellee. It doesn't say anything

about anybody else.

PROFESSOR DORSANEO: All right. So, what's your language, Luke?

CHAIRMAN SOULES: In view of that --

PROFESSOR EDGAR: Parties ought to do it.

CHAIRMAN SOULES: -- parties ought to do it, unless you want to be more specific, which, at this juncture, my comfort level is equalizing.

PROFESSOR DORSANEO: What do you want me to put down here? "The parties"?

CHAIRMAN SOULES: Either "the parties" plural, "principal briefs of the parties" or "principal briefs of appellants and appellees." And the reason "parties," I guess, doesn't make me quite that comfortable is you might have multiple appellants.

MR. TINDALL: That's still their principal brief.

PROFESSOR EDGAR: They're still parties, though. I mean, if you've got five plaintiffs, each one of them have a right to file a brief.

CHAIRMAN SOULES: That's right, each one. But you "parties" might be held to mean

parties appellant, plural appellants. And respect brief might be still misconstrued to mean the appellee's brief.

PROFESSOR DORSANEO: All right. Let's make it perfect --

CHAIRMAN SOULES: We call the appellee's brief in many cases the appellee's respect brief. And that's got to be a word that is used all the time on appeal.

PROFESSOR EDGAR: But it's not in the rules. I was looking, and I thought it was, but it's not. Rusty was right. There's no reference in the rule.

PROFESSOR WALKER: Why don't we just have appellate briefs?

MR. TINDALL: Why don't we have respect briefs allowed?

PROFESSOR WALKER: Appellate briefs shall not exceed 50 pages.

PROFESSOR DORSANEO: That will be the other fix, is that would be -- if we had all the briefs of the same length, then we wouldn't have to differentiate. If we said all appellate briefs 50 pages, that would take care of it.

PROFESSOR WALKER: Appellate briefs.

CHAIRMAN SOULES: Well, why don't we take a quick consensus on that? How many feel that we should just give a flat 50 pages to every appellate brief?

PROFESSOR EDGAR: That includes respect briefs and principal briefs?

CHAIRMAN SOULES: All briefs. Just any brief can be 50 pages. If it's 50 pages or less, it gets filed without leave of court. How many feel that way? Show by hands. How many feel that there should be a shorter page limit for respect briefs or subsequent briefs? Okay. It's unanimous that they all be at some number. Is that now 50? How many feel that 50 is the right number? Show by hands.

MR. MCMAINS: Okay. Now, are we voting on both number and what you're excluding, because --

CHAIRMAN SOULES: I'm just talking about number right now. I didn't know what I was excluding, so I can't be talking about that.

MR. MCMAINS: That makes a difference in terms of what the number is.

CHAIRMAN SOULES: Oh, 50 -- exclusive of the pages containing -- just the way this is

written.

MR. MCMAINS: I understand that. That's what I'm saying. We haven't talked about that aspect of it.

PROFESSOR EDGAR: I think he's really concerned --

MR. MCMAINS: And they are related issues.

PROFESSOR EDGAR: He's really concerned about whether you should include the points of error --

MR. MCMAINS: That's right.

PROFESSOR EDGAR: -- and the restated points. I think that's what Rusty is concerned with.

CHAIRMAN SOULES: Okay. Then can we take that up? We'll say, vote on -- well, you can't take that up first -- I guess, we have to take that up first.

MR. MCMAINS: Well, no, all I'm saying is it makes a difference on what the number is.

PROFESSOR DORSANEO: We ought to talk about it first anyway.

CHAIRMAN SOULES: Yes. We've got to talk about that first because we don't know what

is going to be included in the 50. And I appreciate your raising that. I'm tuning in maybe.

PROFESSOR DORSANEO: My idea of taking 50 is that I looked at my last 10 appellate briefs, and 50 makes me okay, even if it's an appeal of a bench trial where I have lots of points of error because of the findings of fact and conclusions of law. Fifty --

MR. MCMAINS: Of course, you ain't in the Texaco case either.

CHAIRMAN SOULES: We didn't have any trouble getting an extension on that, though.

PROFESSOR EDGAR: Incidentally, Rusty, the brief you gave me this morning, the United States Supreme Court, Pennzoil versus Texaco, is 50 pages.

MR. MCMAINS: Yes. But that's not on the merits.

PROFESSOR EDGAR: Well, I understand that, but it is 50 pages.

CHAIRMAN SOULES: How many feel that the points of error -- the points of error should be included in the 50-page limit?

MR. MCMAINS: Can we speak to it

first?

CHAIRMAN SOULES: Sure.

MR. MCMAINS: You're trying to take a vote here. I'm not sure everybody --

CHAIRMAN SOULES: I want to hear what you have to say obviously, Rusty. Please speak to it.

MR. MCMAINS: All I'm saying is that the problem is that we keep having the Courts of Appeals opinions that are criticizing -- some courts still continue to criticize the points of error. If you combine them, they criticize them as being multifarious. If you -- and so they encourage, in essence, a multiplication of the points of error.

So long as we have a points of error practice in our historical frame of reference, it is not safe -- lawyers who are trying to do it safely are going to have more points of error stated in more ways than probably is necessary, but they've got to be cautious about it.

And as a consequence, you tend to be -- you tend to have sometimes 10, 15, 25 points of error when probably 5 do, in terms of subject matter. But you don't reach the comfort level that most

lawyers have in some of the courts.

I can identify the courts if you like, but there are some -- Corpus is not one of them. But one of the courts in Houston -- Beaumont has done it. El Paso has done it. And they -- at times, they get some solace from some dicta that appears in the Supreme Court's opinions, as well, even though the Supreme Court in the Poole case backed off of that problem.

That problem, nonetheless, has arisen continuously in the Houston First. And if you've got a case -- you've got a judge that continues to submit 15, 20, 30, 40 issues in spite of any broad issues submission, as there will be, then you've got factual sufficiency against the great weight, no evidence points on all of those before you ever get to the other issues that the people are going to be raising.

And my concern is, you know, it penalizes lawyers who are trying to be safe in protecting their clients. And, frankly, I don't think it encumbers the Court because they probably don't read the points of error all that closely anyway.

CHAIRMAN SOULES: How many feel that the points of error initially stated should be

excluded from the 50-page limit? Show by hands. How many feel that they should be included in the 50-page limit? Okay. It's unanimous to include the initially stated points of error -- or to exclude the initially stated points of error.

So, that would be the table of contents, index of authorities, points of error -- does that go right there?

PROFESSOR EDGAR: You're going to exclude the initial statements of the points of error or the initial and the restatement of the points of error?

CHAIRMAN SOULES: I don't think that the restated points of error should be excluded. I think they ought to be restated, frankly. But there's no rule that makes you restate them. You don't have to say them twice.

PROFESSOR DORSANEO: Well, there is -- they say you have -- there is -- I thought that was so, but there is this language about grouping in the argument, brief of the argument, that says --

PROFESSOR EDGAR: 130(e), isn't it?

PROFESSOR DORSANEO: I'm getting at 74. "A brief of the argument shall present" -- on

page 117 of this thing. "A brief of the argument shall present separately or grouped the points relied upon for reversal." And I'll -- if you want to bounce that sentence, that will be all right with me.

It suggests that this practice that's grown up over the years and that is written down in some form books, perhaps even my own --

MR. MCMAINS: It is in yours.

PROFESSOR DORSANEO: -- is the way you do it. I don't, personally, do it that way. I don't restate points of error in my briefs, at least very often.

JUSTICE WALLACE: You refer to the number?

MR. TINDALL: What do you do, just put a Roman numeral without a point?

PROFESSOR DORSANEO: Well, I have other ways of -- I use headings, other headings that have other ways to deal with it. So, it looks more like a federal brief rather than the old-fashioned state briefs.

MR. SPARKS (EL PASO): But you say argument under points 1382 --

PROFESSOR DORSANEO: Yes, otherwise

make that clear.

CHAIRMAN SOULES: What if you just change "shall" to "may" so that you are given the option -- expressing the option that the points may be presented separately or grouped, because that's really, I think, what that sentence means. "A brief of the argument may present separately or grouped the points relied upon for reversal."

PROFESSOR EDGAR: That's what it reads now.

CHAIRMAN SOULES: No, it says "shall."

PROFESSOR EDGAR: Rule 130(f) --

PROFESSOR DORSANEO: Well, you're in a different rule, the Court of Appeals.

PROFESSOR EDGAR: Appellate Rule 130(f).

MR. SPARKS (EL PASO): Yeah, but he's talking about the way it is --

PROFESSOR DORSANEO: Court of Appeals Rule 74. Turn back.

PROFESSOR EDGAR: I was looking in the application. The application for writ of error says "may present separately."

CHAIRMAN SOULES: Let's just change the word --

PROFESSOR EDGAR: I don't know what -- I haven't looked at the Court of Appeals rule.

CHAIRMAN SOULES: Well, that's 74(f) and it says "shall."

PROFESSOR DORSANEO: That's probably explained by the redraft of 414 and 418 sometime back. Somebody changed it to -- Judge Pope changed it to "shall."

PROFESSOR EDGAR: It's all Judge Pope's fault.

CHAIRMAN SOULES: Okay. Can we -- how many are in favor of changing "shall" to "may" in 74(f) on page 117 as affixed for that? Show by hands. Opposed? That's unanimous.

MR. BEARD: Luke, let me make a statement. I think our practice of assigning points of error is bad. I think what we really ought to have is questions presented which can cover so many things. We don't have to go through all of what Rusty is talking about. That's an entirely different matter.

CHAIRMAN SOULES: We're going to have to do that another year, Pat.

MR. MCMAINS: I think that requires a lot more drafting.

CHAIRMAN SOULES: We're going to have to do that another year. I may agree with you but we can't do it today.

MR. BEARD: I agree that's a poor time to raise that issue, but it would save a lot of the points -- the worries you have about restating over and over again these points of error. And Frank Wilson brought Baylor lawyers out over in all those years by telling them they had to protect themselves by making all these various assignments of error.

CHAIRMAN SOULES: Okay. Back to H, then, index of authorities, points of error. And now that we have voted to exclude the initial statement of points of error from the 50-page limit, how many favor all briefs having 50-page limits? Show by hands. Opposed? Okay. That's unanimous.

PROFESSOR DORSANEO: All right. So, let me think -- so, the rule would read, "Except as specified by local rule of the Court of Appeals, appellate briefs in civil cases shall not exceed 50 pages, exclusive of pages containing the table of contents, index of authorities, points of error and any addendum containing statutes, rules,

regulations, et cetera."

CHAIRMAN SOULES: All in favor, show by hands. Opposed? That writing is unanimously approved.

PROFESSOR DORSANEO: Let me stop here.

CHAIRMAN SOULES: Then that will be followed by the sentence, "The Court may, upon motion, permit" --

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: -- "a longer brief." And then the balance is as --

PROFESSOR DORSANEO: All right.

MR. MCMAINS: What are we drafting on the last sentence?

MR. TINDALL: What do they do in criminal cases, Luke? Why are we -- I mean, I don't know anything about criminal practice. Why is it --

CHAIRMAN SOULES: We are going to have to run these rules by the --

MR. TINDALL: I mean, are we going to go over and get them?

CHAIRMAN SOULES: Yes. We're going to have to go by -- we're going to have to run this

by the Court of Appeals -- the Court of Criminal Appeals, I would think, to make changes on them.

MR. MCMAINS: Well, the Court of Criminal Appeals has its own briefing rule on its briefs.

JUSTICE WALLACE: Well, on that, it's like this: We have a very firm understanding. Sam Clinton, rules as to them (phonetic), and anything that is restricted to civil cases, say, amino alamo (phonetic), and it's vice versa (phonetic) as far as us on things having to do with criminal matters. And so far, everything is working fine.

CHAIRMAN SOULES: So, since this will be presented to the Court of Criminal Appeals before it becomes promulgated by the Supreme Court, they will have a chance to look at it and have their advisory committee look at it and decide whether they want the civil case limitation taken out of it. And if they do, that would be okay, I guess, in the Supreme Court, too.

So, they will have their chance, Rusty.

MR. MCMAINS: Yeah. What I was getting at is, do we have another briefing rule on criminal cases in the Courts of Appeals? We

don't, do we?

CHAIRMAN SOULES: I don't think so.

PROFESSOR DORSANEO: No. That's it.

MR. MCMAINS: This is the only brief rule applicable to the court --

PROFESSOR DORSANEO: That's right.

MR. MCMAINS: -- to the Court of Appeals.

CHAIRMAN SOULES: And they may want --

MR. MCMAINS: So, we don't have any length provisions with regards to criminal cases.

PROFESSOR EDGAR: That's right.

CHAIRMAN SOULES: And that's the way that they promulgated these rules.

MR. MCMAINS: Oh, I understand.

CHAIRMAN SOULES: So, they may want to change it like we want to change it. And if they do --

MR. MCMAINS: Well, what I'm saying is the caption of this is "Length of Briefs." It's talking about the Court of Appeals. And that sentence that we just talked about deals only with civil cases.

PROFESSOR EDGAR: That's right.

MR. MCMAINS: And now the next

question is, what do we say about criminal cases?

PROFESSOR EDGAR: That would be covered by the last sentence in that paragraph.

MR. MCMAINS: Okay.

CHAIRMAN SOULES: That makes sense.

MR. MCMAINS: That was the other thing I was going to suggest is that the last sentence is more than length --

PROFESSOR DORSANEO: It is.

MR. MCMAINS: -- even though the caption is just length.

PROFESSOR DORSANEO: Yeah, but I think that's just too picky.

PROFESSOR EDGAR: I agree.

PROFESSOR DORSANEO: All right. Let me suggest that you take a look at page -- for the corresponding briefing rules, page 176, which is the last part of Rule 131, requisite -- which is styled "Requisites of Applications."

I would suggest that the draft be changed by eliminating "Except by permission of the court," capitalizing "an," such that the sentence begins "An application" and continues "and any brief in support thereof shall not exceed a total of 50 pages in length, exclusive of pages contained in

the table of contents, index of authorities, points of error and any addendum containing statutes, rules, regulations, et cetera. The Court may, upon motion, permit a longer brief."

JUSTICE WALLACE: Is that initial points of error or did we drop "initial"?

CHAIRMAN SOULES: Well, we didn't say initially stated in the other rule, either. We just said points of error. And hopefully anyone that wants to look at the history in this rule change will see that we're talking about not just --

PROFESSOR EDGAR: Bill, you redrew all these rules, you and Rusty, but as I read Rule 131, and the way I've always understood it, is that the brief is part of the application and must be a part of the application after the rule was constructed as it is now.

PROFESSOR DORSANEO: It didn't ever really get that completely done. I think that that -- this language is in the rule as it exists.

PROFESSOR EDGAR: Well, Rule 131, the last sentence of the first paragraph says, "The application shall contain the following: A, B, C,

D, E, F, brief of the argument." So, it seems to me that the brief is a part of the application, and you cannot -- no longer can you submit an application and then follow it with a supplemental brief as the prior practice allowed you to do.

PROFESSOR DORSANEO: Look at H, Hadley. Maybe we want to change H. "The application or brief in support thereof may be amended at any time".

PROFESSOR EDGAR: Well, that doesn't really deal with the question I just raised.

PROFESSOR DORSANEO: But it still suggests that you can do a brief in support of the application in addition to the application.

PROFESSOR EDGAR: Well, then, yes, that's right. Yeah, I see what you're saying.

PROFESSOR DORSANEO: Now, I would prefer just to say the application is the brief, that's the only brief, and that's it.

PROFESSOR EDGAR: I would just strike "or brief in support thereof" and just say "The application may be amended at any time."

PROFESSOR DORSANEO: Okay. That would require a change in H, strike the word -- which is on page 175 at the bottom -- strike the words "or

brief in support thereof" from H. And I suppose we could look through this rule from top to bottom to see if that offending language appears anywhere else. We could strike -- and take it out of proposed "I" such that it says "An application shall not exceed a total of 50 pages in length -- which shall not exceed 50 pages in length."

CHAIRMAN SOULES: Okay. Can we back up just a moment to page 173, Rule 131, where it says "Requisites of Applications"? Put into that part of the rule that the brief of the applicant shall be contained in the application.

PROFESSOR EDGAR: It says that. That's the last sentence of that paragraph. "The application shall contain the following," colon, A, B, C, D, E and F. And F is briefs. So, the application shall contain the brief of the argument. It's already there.

PROFESSOR DORSANEO: I think it is.

CHAIRMAN SOULES: It is. It's there. Okay.

PROFESSOR DORSANEO: So, I move that we change H by striking the words "or brief in support thereof," first of all.

CHAIRMAN SOULES: Okay. Any objection

to that? There is no objection to that. That will be done.

PROFESSOR EDGAR: I think that language was just a carryover from the earlier practice and was not deleted at that time.

PROFESSOR DORSANEO: That's right. And that's why I wrote "I" that way because H was right next to it. An application -- then "I" would be, "An application shall not exceed 50 pages in length."

PROFESSOR EDGAR: Right.

CHAIRMAN SOULES: Any objection to that? Okay. That's unanimously approved.

PROFESSOR EDGAR: I would like to just ask Judge Wallace a question, if I might. Do you think that the Court would be comfortable with 50 pages? Apparently -- well, I ask that question because apparently the Court feels that 30 pages should be the maximum length.

JUSTICE WALLACE: Well, I'll fess up to making the mistake on the 30 pages. I had briefly looked at it. We were in argument one day and someone had about a 150-page brief and complained about it. And I guess I looked at the wrong rule. I thought the federal rule was 30

pages, but that was the respect brief. And that's where the 30 came from. I think the Court would be very comfortable with 50.

PROFESSOR EDGAR: Fine.

PROFESSOR DORSANEO: Are we ready to vote on proposed "I" in 131?

CHAIRMAN SOULES: We can. We voted on all the parts of it. Taken as a whole, is everybody in favor of the suggested changes? Please show by hands in favor. Opposed? That's unanimously approved.

PROFESSOR DORSANEO: Please look at page 183 for Rule 136, proposed new paragraph E. Strike the words "Except by permission of the Court," and capitalize "a" in the second line. Strike the word "principal" in the fourth line, and add the words, on page 184, "either points of error or respect and cross points" between the words "authorities" and "and."

Such that the thing would read like this: "A brief in response to the application, a brief of an amicus curiae as provided in Rule 20 and any other briefs shall not exceed 50 pages in length, exclusive of pages contained in the table of contents, index of authorities, points of error

and any addendum containing statutes, rules, regulations, et cetera. The Court may, upon motion, permit a longer brief."

PROFESSOR EDGAR: You mentioned earlier, though, the term "respect points or cross points."

PROFESSOR DORSANEO: Well --

PROFESSOR EDGAR: You didn't include that in what you just read.

PROFESSOR DORSANEO: No, I'm just saying, I think points of error is sufficient rather than going back and using the language that's used in D, where it says "Respondent shall confine his brief to respect points that answer the points in the application or that provide independent grounds of affirmance cross points." I think -- they're all points of error, so I think it would be sufficient --

CHAIRMAN SOULES: Those in favor of the way Bill read it the first time, show by hands. That is, adding just points of error and not the other types.

PROFESSOR DORSANEO: All right. The next thing --

CHAIRMAN SOULES: Opposed? That's

unanimously approved.

PROFESSOR DORSANEO: The next thing ought to be easy. And I've got all this drafted, Luke, on this copy.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: The next thing ought to be easy rather than more difficult new matter. Please turn to page 132, and also lay alongside of it page 149. This was the problem we talked about at the last advisory committee meeting. Justice Wallace raised the matter, and the Committee on Administration of Justice came up with these suggestions for giving direction to the Courts of Appeals to rule on all points of error in rendering judgment and to write about all of those things in its opinion.

The suggestion is that we add paragraph C to Rule 80 indicating a definition of final judgment for the first time in these rules. And that would correspond with the provisions of rule --

CHAIRMAN SOULES: 130(a), I believe it is.

PROFESSOR DORSANEO: -- yeah, 130, which indicates that an application is taken from a final judgment of the Courts of Appeals. That

takes care of the problem insofar the judgment having a ruling on every point of error.

Rule 90(a), which goes together with it indicates, that the Court of Appeals shall hand down a written opinion which shall be as brief as practicable but which shall address every issue which would be dispositive of the appeal. And then this alternative language: Or raised and necessary to final disposition of the appeal.

All right. So, we either say hand down a written opinion which shall be as brief as practicable but which shall address every issue which will be dispositive of the appeal or every issue raised and necessary to final disposition of the appeal.

I recommend and move the adoption of either of those alternatives together with the addition of paragraph C to Rule 80.

CHAIRMAN SOULES: This speaks to -- I was at the meeting and, I guess, have a little bit of history with it. What this gets to, we draft trial court judgments and we know that we need to put in a paragraph -- the last sentence that says, "All relief not specifically granted herein is denied," so that it's very clear that in a complex

case you don't have an interlocutory judgment; you've got a final judgment.

This is telling the Court of Appeals in its judgment, not in its opinion. It could still write its opinion pretty much the way they've done it, I guess. But in the judgment, which is a little short item that comes out in the transcript of the record when it gets to the Supreme Court, that it needs a tag that says what it's done with all the other points, that they're overruled or whatever.

Now, a briefing attorney, then, in preparing his work on an application for writ of error that goes to the justice that's going to report on that in commerce, always puts a little jurisdictional statement. And in that, that briefing attorney can certainly look at that judgment to determine whether or not the Court of Appeals had disposed of all the points, and if it hasn't, then the judges know from the start that they're dealing with a situation where the Court has not done so.

Whether the opinion does so or not, that was proposed as a way to get around the problem that the Supreme Court has about whether to assume or not assume that all the points have been

overruled. Because what we were -- what was before this committee previously was whether we should recommend to the Supreme Court that the Supreme Court assume that all the points not addressed by the Court of Appeals have been overruled.

This gives the Supreme Court a lever to send the application back before it ever goes to the court as a whole to get at least in the judgment -- not asking it to rewrite its opinion -- but at least get in the judgment a statement about what it's done with all the points that it has not expressly addressed before the Supreme Court wastes its time, if that's a waste of time, in considering an application when it's not there.

Now, that's the purpose of it. Sam Sparks.

MR. SPARKS (EL PASO): I like the latter recommendation because -- and I don't have a large appellate practice. Fortunately, we have lawyers that do that who are a lot smarter than us who go down and make the errors in the trial court.

But I have a funny practice from the standpoint that every appellate case that I've personally handled where the Court of Appeals has

not addressed specifically a point of error has ultimately been dispositive of the case even after an opinion has been rendered by the Supreme Court.

So, I like the requirement that they must hand down a written opinion which shall be as brief as practicable but which shall address every issue which is raised and necessary to final disposition of the appeal. And I so move that we accept that alternative.

CHAIRMAN SOULES: All right. Is there a second?

PROFESSOR DORSANEO: I'll accept that.

MR. MCMAINS: It needs more discussion.

CHAIRMAN SOULES: Okay. Bill seconded it, and more discussion. David Beck.

MR. BECK: Yeah, with respect to that, I noticed that what we've done with Rule 90(a) is add another alternative for the Court. And if you look at the first alternative, the Court can write a written opinion on an issue which is not even raised by any of the parties to the appeal. And that is something that I don't particularly care for.

I don't want a court deciding my case when I haven't raised an issue, the other lawyer hadn't raised an issue, and the Court, out of the clear blue sky, grabs an issue and decides the lawsuit. So, I would --

PROFESSOR DORSANEO: Where do you see that?

MR. BECK: Pardon me?

PROFESSOR DORSANEO: I'm missing the point.

MR. BECK: If you look under 90(a), it says "The Court of Appeals shall hand down a written opinion which shall be brief as practicable but which shall address every issue which will be dispositive of the appeal."

PROFESSOR DORSANEO: Oh, well at this --

MR. BECK: You can have an issue which is dispositive of the appeal, but which is not raised by any of the parties.

CHAIRMAN SOULES: He's agreeing with Sam.

PROFESSOR DORSANEO: Oh, okay.

PROFESSOR EDGAR: These are alternative. We're going to strike one or the

other.

MR. SPARKS (EL PASO): We're striking that portion, David. That's my move.

CHAIRMAN SOULES: Sam's motion is to strike "would be dispositive of the appeal or" and the "shall address every issue which is raised and necessary."

MR. BECK: Okay. Okay.

PROFESSOR DORSANEO: I think that's very good, too, because, frankly, I had a case where one of the judges of the Courts of Appeals decided an issue which wasn't raised by anybody and caused a lot of trouble.

PROFESSOR EDGAR: Naturally.

CHAIRMAN SOULES: Sam Sparks.

MR. SPARKS (SAN ANGELO): Are we, in fact, though, increasing the length of the Court of Appeals' opinions because there have been a lot of opinions that I've read that say, you know, we write on this and that disposes of the case and we're not writing on the others.

CHAIRMAN SOULES: They have that option under this rule. They say this is every issue that's dispositive.

PROFESSOR EDGAR: In other words,

assume that there are alternate grounds of defense, statute of limitations and res judicata, and the trial court decides both of those issues against the defendant, and the case has been appealed to the Court of Appeals. Why require the Court of Appeals to write on both of them if either one of them would be sufficient for reversal?

If you require them to write on every issue that's presented, Sam, then --

MR. SPARKS (SAN ANGELO): Well, then it goes to the Supreme Court and you assume that the other one is overruled.

PROFESSOR EDGAR: Right.

MR. SPARKS (SAN ANGELO): Well, under the practice we have now, there's no such assumption. The Supreme Court overrules the Court of Appeals and sends it back to write on the other point.

PROFESSOR EDGAR: No. What they do is render the judgment the trial -- the Court of Appeals should have rendered.

MR. MCMAINS: If they have jurisdiction.

PROFESSOR EDGAR: If they have

jurisdiction, yeah. But in that case they would.

CHAIRMAN SOULES: Rusty.

MR. MCMAINS: Are these two rules interconnected? I mean, when you're talking about taking a vote.

CHAIRMAN SOULES: Not really.

MR. MCMAINS: I mean, are you really talking about --

CHAIRMAN SOULES: Not really.

MR. MCMAINS: -- 90(a) being different -- I mean, yeah, 90(a) being different from 80(c)?

CHAIRMAN SOULES: Not really.

MR. MCMAINS: Because I have a problem on 80(c) or a question on 80(c).

CHAIRMAN SOULES: They're only connected in that previously there was no direction to the Court of Appeals on how it was to address points of error that were before it except over here in its opinion telling us how to decide the case in 90(a).

And, no, there was no definition -- so, whenever we looked at 90(a) to see what kind of disposition the Court of Appeals might be able to make to tell the Supreme Court what it's done with

the points of error instead of how the Supreme Court presumed that the points are overruled, that was the initial reference point.

It wound up back over here in 80(c) under "judgment" because that seems more of a place for it if you're going to talk about the Court of Appeals doing something in its judgment as opposed to in its opinion. So, that's how they're connected, which is not anything for purposes of whether one or the other gets enacted. They can be enacted separately or not.

MR. MCMAINS: Yeah, but what I am curious about is, is this at all designed to deal with the problem of when the Court of Appeals renders -- or not necessarily a problem, but the fact of life where the Court of Appeals renders a decision that would dispose of the appeal in terms of it reversing render, or as I read Rule 90 -- I mean, 80(c) -- and I'm not sure that Rule 90(a) can be read that way but certainly 80(c) can -- they've got to rule on all on the remand points as well --

PROFESSOR EDGAR: That's my question, too.

MR. MCMAINS: -- even though they

don't -- even though they render it.

PROFESSOR EDGAR: And also --

MR. MCMAINS: 90(a), in the abstract, looks to me like it doesn't require them to do that. But if you read it in conjunction with 80(c) --

PROFESSOR DORSANEO: Which is the way I read them.

MR. MCMAINS: I know. It may well require you -- require the Court of Appeals to address every single evidentiary error point even though they're reversing and rendering saying there's no cause of action. And I don't consider that necessarily to be a desirable practice simply because we have trouble getting opinions out of the Court of Appeals now.

MR. SPARKS (EL PASO): They usually deal with that in one sentence, though. It's not really that tough.

MR. BECK: We're going to end up with opinion with an awful lot of dicta. I mean, is that what we want?

CHAIRMAN SOULES: No. 90(a) doesn't have anything to do with opinions.

MR. BECK: I'm talking about 80(c).

CHAIRMAN SOULES: 80(c) has nothing to do with opinions.

PROFESSOR EDGAR: That's just the judgment of the Court of Appeals.

CHAIRMAN SOULES: That's the judgment of the Court of Appeals.

MR. TINDALL: It's usually a one-page document.

PROFESSOR EDGAR: One page.

MR. MCMAINS: I understand. But 80(c) requires them to have determined every point of error.

PROFESSOR EDGAR: It says shall contain a ruling on every point, not only remand points, but also rendition points of whether the Court is going to reverse or remand. If both points are presented, it's got to contain a ruling on all of them. So, even if you have alternate grounds, some of which are not going to be necessary to the decision because of Rule 90(a), they're going to have to pass on those too in their judgment. And I think that's going to be confusing.

MR. MCMAINS: The problem I have is what -- you know, a lot of times you get there and

they say, well, that point was waived. You know, if they're writing an opinion on it, they'll deal with it in terms of waiver.

If they just overrule it in the judgment, you don't know why they overruled. I mean, you assume it's on the merits, but suppose that the reply brief says, well, that point has been waived because of X, Y and Z. Do you now, as the petitioner, have to just guess and speculate as to what the -- why the Court overruled the point of error? Do you have to address a point of error to the waiver finding and the waiver holdings that are raised by the other side or to any waiver holdings that might be raised in speculating on what the Court's opinion is?

You know, we don't require them to write an opinion on them, but we require them to rule on them.

CHAIRMAN SOULES: Well, they have to rule on everything that's not disposed of. The Court has got -- let me see if this gets to the point that seems to be the concern -- well, maybe it doesn't, is my perception of it.

What if the Court of Appeals in its final judgment shall contain a ruling on every point of

error before the Court or an expressed reservation of ruling on every point of error not ruled on by the Court as a result -- well, because other rulings of the Court are dispositive.

That's awkwardly stated but -- in other words, in its judgment the Court of Appeals has got to say what it's done with everything. And then the Supreme Court -- if we don't, what the Supreme Court has asked us to do is give it guidance on input on its inclination to deem everything overruled that's not written on.

Now, what we're doing here is giving the Court of Appeals some direction that it needs to tend to that business itself. Because my perception of what's going to happen is if we don't give that direction to the Court of Appeals or do something in the rules, we may be confronted with the situation which we have all been concerned adversely about.

What I hear about is we really don't want the Supreme Court deeming points of error overruled that were not addressed by other Court of Appeals. But they want to do something about having to remand. The Court of Appeals if, in its judgment, will either dispose of every point or

say that rulings on the remainder are not necessary, then the Supreme Court has been given some direction when the case gets there in the very abbreviated form.

So, that's what we're trying to get to if we can get there. Hadley Edgar.

PROFESSOR EDGAR: Would this satisfy the -- I think this would satisfy my concern, and maybe Rusty's, if we said the -- I'm at Rule 80(c). "The final judgment of the Court of Appeals shall contain a ruling on all points of error before the Court which are essential to its decision."

MR. SPARKS (EL PASO): That just puts us right back --

CHAIRMAN SOULES: No, that doesn't get it. That doesn't do it. What the Court needs is the Court of Appeals to say we're not ruling because it's not necessary or to say we are ruling and here's what we're ruling. So, if the Supreme --

MR. BECK: Wait a minute now, Luke. The problem -- if the purpose of this is to avoid unnecessary delay, are we, by requiring this, forcing the Court of Appeals to do things which is

going to cause unnecessary delay at that level?

CHAIRMAN SOULES: No, because they've already decided that. In writing their opinions, they've decided which points are dispositive and which are not. It doesn't take a judge a lot of work to explain why he regards all the other points as waived or whatever.

MR. BECK: Let me give you a fact situation and you tell me what your understanding is.

CHAIRMAN SOULES: All right.

MR. BECK: If there are four points of error on appeal, one of which deals with the doctrine of pre-emption, which is a law matter which may result in a rendition, and the remaining three are evidentiary points, you know, say, three hearsay points, the Court goes with the rendition, reverses and renders. Now, what is your understanding of what happens to the three evidentiary points?

CHAIRMAN SOULES: Well, the Court of Appeals should -- and the Supreme Court, I'm sure, is going to lecture them hard that they ought to read them and pass on them so they don't have to remand. That's what the Supreme Court is going to

tell them to do.

MR. SPARKS (EL PASO): That's what's in the rules now.

PROFESSOR DORSANEO: That's the law right this second.

CHAIRMAN SOULES: But they're not doing it.

MR. SPARKS (EL PASO): That's right.

CHAIRMAN SOULES: And the Supreme Court never has defined what is -- of course, the Supreme Court in its opinion can do this, too. But all this does is tell the Court of Appeals, first of all, what we mean in Rule 130(a) by the term "final judgment." The Court of Appeals, it means that you passed on all the points, or you've explained why you didn't pass on all the points, and you can do it in your judgment; you don't have to write an opinion about it.

MR. SPARKS (EL PASO): Let me give you an example. I've got a case right now, and not to get in the merits of it, it's a major case. It involves an awful lot of money and an awful lot of school districts and city governments and whatnot, and the Court of Appeals reversed the trial court on three grounds, did not write on really what was

the major grounds that was argued primarily.

It went up. The Supreme Court has reversed and remanded, and we're not even back to the Court of Appeals because we've got a bunch of briefs with intervenors and the parties, half of whom want the Supreme Court to go ahead and, I guess, have second oral arguments on the points that have never been addressed in the Courts of Appeals. And all of that could have been eliminated if we had had this rule. And all the lawyers would have known that at least that issue would be in the Supreme Court.

And that would be a quicker way to get the case decided than if we go back and come -- and half of everybody wants to go back to the Court of Appeals and half of everybody wants the Supreme Court to do it. And it's just -- it's delaying everything in that case.

CHAIRMAN SOULES: Justice Wallace.

JUSTICE WALLACE: The way the rule now reads the Court of Appeals shall decide every substantial issue raised and necessary to disposition.

Now, most of the Courts of Appeals have interpreted that to mean -- that meaning necessary

to disposition -- meaning if it can be decided on one dispositive issue, we're going to write on that issue and forget the rest. And it comes on up to us. We determine they were wrong on that dispositive issue.

So, it's got to be remanded back to the Court of Appeals to take care of -- if they are points on which we don't have jurisdiction, we've got to remand it. So, either the Supreme Court must do the Court of Civil Appeal's work on all these other points or send it back to the Court of Appeals and have them do it.

And still they've got those certain points in there in some cases. Insufficiency evidence is one that occurs most frequently. The Court of Appeals won't write on that; they would say there is no evidence, period.

Recent case, there were 50 pages in the statement of facts, all sorts of evidence, no evidence. Well, that whole thing has got to go back to the Court of Appeals again on the evidentiary point.

Now, the rule says they shall write on all those points. And what we are concerned about is some way to get across when you're writing that

opinion, you've done your research, you've heard oral arguments, and this stuff is taking a whole lot more time for that judge who's writing that brief -- that opinion.

To go ahead and include those points I don't think will outweigh the time it takes waiting for us to hear it and send it back and them getting it back on their docket and hearing it -- and writing it again.

MR. MCMAINS: Now, Judge Wallace, the problem I have with that, again, is much larger. First of all, if somebody is going to hold that there is no evidence to support a particular issue, they obviously are going to hold that there is insufficient evidence.

JUSTICE WALLACE: Well, surprisingly, that doesn't happen all the time.

MR. MCMAINS: Well, no, I understand that when you remand it because they didn't look at it in the same way. But the point is this, opinion in Poole tells them to explain what they are doing on the insufficiency points. This opinion -- the opinion rule does not require them to write an opinion on the insufficiency points. The judgment rule requires them, however, to act

on them.

Now, it would be stupid to overrule the insufficiency point having sustained a no evidence point. But, by the same token, when they grant the insufficiency point, they ain't going to be explaining anything because they can do that in the judgment. The opinion says whatever is necessary to dispose of it.

It does not solve the problem of knowing what the Court of Appeals' reasoning is. Because the reasoning on their insufficiency, generally, would be tied to their reasoning on the no evidence, which you already held them to be wrong on. That's the only reason they change their mind when they go back they say, well, we didn't understand it that way. And so then they review it. Maybe they will or maybe they won't.

But this does not, in my judgment -- the combination of rules does not solve the insufficiency problem, per se, and it creates some additional problems, particularly in the area of waiver that I have a problem with.

CHAIRMAN SOULES: What we are trying to do is solve that, Rusty. And the worst solution is to have the points not addressed by

the Court of Appeals deemed overruled. That's what we're trying to speak to.

Now, here, try this: "Shall contain a decision on every point before the Court or a ruling that points not decided are reserved for later decision of the Court of Appeals and any reason for such reservation."

MR. MCMAINS: Well, but that doesn't change the practice then.

CHAIRMAN SOULES: It does.

MR. MCMAINS: No, what I'm saying is --

CHAIRMAN SOULES: Rusty.

MR. MCMAINS: -- all they've got to do is the same thing they say now is -- and that is, since we reversed and rendered, we're reserving -- we don't have to deal with any of the remand points.

CHAIRMAN SOULES: No. That's not what this is intended to say. And if that's what you're hearing, then I'm not saying it right.

PROFESSOR EDGAR: Well, then --

CHAIRMAN SOULES: What I'm saying here -- what I'm trying to say is that they have to decide every point or say they're not deciding.

They just can't decide the no evidence point and not address the insufficient evidence point. Because if there are insufficiency evidence points in the Court of Appeals, the briefing attorney gets a record and sees they're there, and there are no evidence points before the Supreme Court, the briefing attorney can advise the judge that the Court of Appeals did not dispose of the insufficiency points.

And that record, then, can be sent back to the Court of Appeals to complete its judgment before the Supreme Court takes the case.

PROFESSOR EDGAR: Well, then, Luke --

CHAIRMAN SOULES: Yes, sir, Hadley Edgar.

PROFESSOR EDGAR: Couldn't you solve that problem, then, in going back to Rule 90(a) and just requiring the Court of Appeals to address every issue which is properly before the Court?

CHAIRMAN SOULES: That will not work. The Courts of Appeals will not write an opinion on all the issues. But the Supreme Court could force the Courts of Appeals to write a judgment because they don't have to write much to write a judgment. And then --

PROFESSOR EDGAR: Couldn't they just say that all points that have not been -- all other points have been considered and overruled in their opinion?

CHAIRMAN SOULES: That's what -- they can say -- well, actually the opinion --

PROFESSOR EDGAR: Then that takes care of the problem, though.

CHAIRMAN SOULES: The opinion of the Court, while it is informational to the Supreme Court of Texas, is about that. The judgment of the Court of Appeals is what controls. If there is an inconsistency between the last paragraph and the opinion of the Court of Appeals, and that little thing that most of us hardly -- at least, I ever hardly ever look at, used to look at -- the little bobtailed one sentence thing that comes from the Court that's its judgment, the judgment controls.

PROFESSOR EDGAR: That's a critical part. Sure it is.

CHAIRMAN SOULES: And that's where these rulings should be contained, in the judgment, and not in the opinion. And 90(a) is an opinion rule.

MR. BEARD: Well, Luke, Jack Tyre (phonetic) --

CHAIRMAN SOULES: And 80 is the judgment rule. I'm sorry, Pat.

MR. BEARD: Jake Tyre (phonetic) on the Waco Court of Appeals used to -- when he made a finding of no evidence, he followed it up and said the Court's in error, it was against the overwhelming weight and preponderance. He covered his no evidence by making that same finding and following it up.

Is that what the Court is asking the Court of Appeals to do?

CHAIRMAN SOULES: That's what this says -- tells the Court to do. It says rule on those points.

MR. BEARD: Because if they're going to find no evidence, they surely are going to find --

CHAIRMAN SOULES: Well, they may find that certain evidence is inadmissible. And that may be a big fight between the parties. But -- in having found that it was inadmissible, hold that there was no evidence and reserve the insufficiency evidence points in light of that.

Because if that was admissible, if they're wrong about that, then there is some evidence and the jury verdict stands. But they can go through the thought process and let the Supreme Court know they did so.

And that's what the Supreme Court is faced with now, is they don't know whether they've ever -- if I'm hearing you, Justice Wallace, about whether that thought process had ever gone -- been gone through. Rusty.

MR. MCMAINS: Now, you see, you've got two different problems, in my judgment. One is you've got a rendition point that's dispositive. The other one, result is a remand point. And then you have multiple different types of remand points as well.

One of my concerns is that the only way we will now be able to identify the stare decisis import of a particular decision is by looking at the God damned judgment --

MR. BECK: That's exactly right.

MR. MCMAINS: -- because nine times out of 10, in a remand -- in a case in which they're bitching about something in terms of admission of evidence or the charge or whatever,

they've got a bunch of other issues in relation to, well, we were entitled to this instruction, we were entitled to that instruction, we were entitled to that instruction, or this issue is wrong and our objections were here. They raise all of those points.

Now, these rules taken in combination or otherwise do not require them to articulate why they are holding that. But if they say -- the Court of Appeals says, well, we sustain points 27 through 36, as well, on what the Court should do in terms of the instruction, you are entitled to these instructions.

Then even if I am sitting there as the appellate lawyer saying, well, I can't reverse the Court of Appeals on their remand because they're probably right on the particular point that they really reversed on in the opinion. But for Christ's sakes, they are not entitled to be arguing all these damned instructions and things on a remand in this case. And it's not just controlling in that case. It would have precedential value, and we don't have any publication of the judgment.

So, that the parties to that case now have

precedent that they can establish but they have to produce certified copies of the judgment and the briefs of the parties to show the points of errors that are identified, and they say, this Court tells me you are entitled to this instruction. And here's this judgment which says give it on remand. And it makes me go to the Supreme Court in cases that I might otherwise be advising people not to go to the Supreme Court or vice versa.

CHAIRMAN SOULES: David Beck.

MR. BECK: Luke, it goes even farther than the case that Rusty is talking about. I mean, does this mean, for example, that we've got to start getting copies of final judgments in all cases? For example, in the illustration I gave, if the Court of Appeals reverses and renders and there are three evidentiary points and the Court sustains two of them, I mean, don't I have to somehow start getting copies of all these final judgments to keep up with the Court of Appeals that are ruling on evidentiary matters.

CHAIRMAN SOULES: That's not new. What you are saying is not a new problem.

MR. BECK: I think it is new.

CHAIRMAN SOULES: No, it's not a new

problem. Whatever is in that judgment, the Court of Appeals has always controlled its opinion.

MR. BECK: Yeah, but I think the practice is that the Court of Appeals are not going to rule on evidentiary matters if they've already reversed and rendered on a totally different issue.

MR. MCMAINS: Now, Luke, you know as well as I do that the judgments of the Courts of Appeals, which nine times out of ten or more are drafted by the clerk, say that the case is reversed, remanded, it's affirmed, it's reformed or it's rendered, and they don't say anything else. And that's not what this is talking about. We're expanding the role of the judgment in the stare decisis and specifically in the law of the case.

But you remand the case to try it again, and with opinions by the Court that you have to submit X, Y and Z issues. And if the parties don't take that up, that's it; they don't get a chance to do that again. That's the law of the case on the remand. And the next time it goes around when it's submitted, they don't get a chance to go up and bitch about its submission. They've got to go

on up to the Supreme Court right then and there on that issue. And that broadens the scope of both the law of the case and stare decisis in any particular case.

CHAIRMAN SOULES: I don't see that, but it may be right. Sam.

MR. SPARKS (EL PASO): You know, I see that we're all talking about the same thing. And it seems to me that we're going back to the difficult point that the Courts of Appeals are simply not following their responsibility that's in the rules now. And, that is, in many cases they are not deciding every substantial point of error which would be dispositive of the case.

I like what you have suggested, but I'm wondering if they are not going to resolve every issue that's dispositive of the case as briefed and argued by the parties, whether they will go ahead and say, but we're reserving on this particular question. I mean, we're asking them to go through a thought process which they should under the existing rules have already gone through and made dispositive rulings.

I don't know that that would work. I agree with what Rusty says. I don't know if we can

draft a rule to require the Courts of Appeals simply to do what they are supposed to do anyway, if this rule that is in operation right now is not being followed. I don't know.

But it sure gives you a problem when you're going to the Supreme Court as to whether or not you bring up all of the points that you think are strong that were not touched on unless maybe either overruled by the judgment or just in one sentence. But at least what you have suggested is more definitive the Court of Appeals what they're supposed to be doing.

CHAIRMAN SOULES: What -- Judge Tunks.

JUDGE TUNKS: Here's what's bothering me about this Rule 80(c): Suppose the Court has written and published an opinion which rules on every point raised. Do those rulings have to be repeated in the judgment? The final judgment, according to the rule, subdivision C, the final judgment of the Court of Appeals shall contain a ruling of every point of error.

Well, suppose you blew it on some of those points of error in your opinion. Do they have to be repeated in the judgment?

CHAIRMAN SOULES: Yes, in this, I think they would. In short form, points of error 1, 5, 9 and 12 are sustained and the judgment affirmed. Points 2, 3 and 9 are reserved because they're unnecessary to the proceeding. And it would change the form of the judgment of the Court of Appeals, but it would make it clear that it is a final judgment.

JUDGE TUNKS: If the judgment complies with the rulings of the opinion, does the judge have to repeat the holdings?

CHAIRMAN SOULES: No.

JUDGE TUNKS: It says every final judgment of the Court of Appeals shall contain a ruling.

CHAIRMAN SOULES: But not an explanation.

JUDGE TUNKS: What?

CHAIRMAN SOULES: But not an explanation such as you find in the opinion. That's not --

JUDGE TUNKS: Well, that's true but the opinion is not only giving an explanation but it contains the Court's rulings on that point of error.

CHAIRMAN SOULES: Yes, sir.

JUDGE TUNKS: And it has to be ruled on again and in preparation of judgment.

CHAIRMAN SOULES: Judge, the way this is written -- well I'm not -- other than responding to your question, the way this is written -- and the intention of it from the Committee on Administration of Justice was that, yes, to the extent that language might be in the opinion that says point of error 20 is sustained, that much of that language would also be in the judgment, the point of error 20 is sustained. But not any other language about point of error 20 would be in the judgment. No further explanation, no nothing. You would say points of error 20.

JUDGE TUNKS: Even though you have a ruling on it and an opinion and an explanation of the ruling, you've still got to repeat the ruling in the judgment.

CHAIRMAN SOULES: That would be necessary corollary to have in the rule, the Court also rule on all of the points that are not written in its opinion, and it would be a burden if this were adopted.

JUDGE TUNKS: Let me raise a more

difficult point with you. In your judgment, there not only is a ruling on the point of error, but there is an explanation of the reason for your ruling. If that judgment, if that -- I mean, in the opinion there's not only a ruling, but there is an explanation of the ruling.

If in preparation of the judgment you change the effect of some of that ruling or explain it -- for instance, I recently worked on a case in which there were 13 contracts to be construed. I wrote an opinion, and the trial court had held those contracts to be ambiguous, so as to justify the introduction of oral testimony and explanation of them.

In the opinion, I not only held those contracts to be unambiguous, but held that they meant something different from what the trial court has held and explained that in the opinion.

On the -- after the judgment was published, was mailed to the parties, they raised a question that there was some conflict between the opinion and the judgment. They filed a motion to correct the judgment. So, I did not concede that there was a conflict. I corrected and changed the judgment to eliminate the possibility of a

conflict. In this case, there were more far-fetched proposals made than that.

And I was bothered by the proposition that if we wrote a new opinion, the party could file another motion for rehearing, and I didn't want to do that in this case. It took me a year to write the opinion, and I didn't want to go through another year working on their wild suggestions.

I undertook to amend the judgment to remove that conflict. Does that amendment of the judgment to remove the conflict entitle them to file another motion for rehearing?

CHAIRMAN SOULES: I don't know the answer to that.

PROFESSOR EDGAR: I would think so, Judge Tunks, because the motion for rehearing is directed to judgments. Opinions are just simply explanations, but the appeal is from the judgment of the Court. And it would seem to me that if you have amended that judgment in any way, then they are entitled to a motion for rehearing attacking that judgment.

JUDGE TUNKS: Suppose they were in error in contending there was conflict.

PROFESSOR EDGAR: Well, now, then, of

course, you are going to overrule their motion for rehearing.

JUDGE TUNKS: Their second motion or the first one?

PROFESSOR EDGAR: Their second one.

JUDGE TUNKS: They still have a right to file a motion for rehearing?

PROFESSOR EDGAR: I would think so because you have changed the judgment.

JUDGE TUNKS: No. I have conceded that their contention of conflict is conceivable, but I do not contest -- I do not agree that there is a conflict. In reality I don't think there is.

PROFESSOR EDGAR: Well, you haven't changed the judgment from reversal and remand to reversal -- reversal and rendition in that sense --

JUDGE TUNKS: No.

PROFESSOR EDGAR: -- but you have changed the judgment in another respect, apparently.

JUDGE TUNKS: That's right. I changed the judgment -- the judgment recites a change -- recites a recitation which is calculated to remove any possibility of conflict. And I can't see why

you would have to write an opinion in which you state your ruling, not only your rulings, but your reason for your rulings. I also have to write a judgment in which you restate your rulings which are contained in your opinion. That looks to me to be foolish.

CHAIRMAN SOULES: Judge, I think the pivotal question there would be whether or not -- which you did modify the judgment, because under Rule 100(d), if on rehearing the Court of Appeals modifies a judgment, then the party is entitled to a second motion for rehearing. So, it would just be a question now how the word "modify" plays in that.

PROFESSOR EDGAR: Or whether or not judgment encompasses any part of the judgment or the actual "what the Court did" part of the judgment.

CHAIRMAN SOULES: Right.

PROFESSOR EDGAR: And I think it means any of it. Well, I come back, though, to what Rusty said a minute ago, and this bothered me a lot, about trying to incorporate some of these things into the judgment. Because what we're doing here is expanding what the concept of the

judgment is. That is, the judgment of the Court is what the Court does, not why it does it.

CHAIRMAN SOULES: That's right.

PROFESSOR EDGAR: And if you do that, you're going to give rise to a lot of law of the case problems, just a lot of them. And I think that's going to be very critical. And the content of the judgment now is going to be far more prominent and far more important than it's ever been before. And I think you're going to be creating a lot of traps for a lot of lawyers.

MR. MCMAINS: The other problem we have is that in terms of just the length of necessity on those courts that are hellbent and determined to reverse, but really only for one reason. I mean, they are convinced to reverse for X reasons. They're going to choose their reasons -- reason or reasons to reverse and write an opinion.

But if they're held back reverse, then they can cover their ass pretty good by just granting all the other points that are there. And that then puts you in the position as the petitioner to have to raise and brief every one of the points however spurious they may be so that -- and we at

the same time try to cut down the length of the God damned application.

And no more can I completely complain if they have sustained an insufficiency point in the judgment without talking about it in the opinion. Now, what do I do with Poole? And what do I do with -- well, they didn't explain why they did this in the opinion.

MR. SPARKS (EL PASO): Well, I don't know that I disagree at all with what Hadley and Rusty are saying, but I thought we were still on a motion on Rule 90 on the opinion. Isn't that where we are?

CHAIRMAN SOULES: Yes.

PROFESSOR EDGAR: I thought we were looking at Rule 80(c).

CHAIRMAN SOULES: Well, we --

MR. MCMAINS: That's why I was asking of lengthage.

CHAIRMAN SOULES: The only motion that's on the floor right now is whether we change 90(a) as suggested. It's been moved and seconded. And I'm going to, at this time, just set 80(c) aside and see if we can get a vote on the suggested change to 90(a).

MR. MCMAINS: Well --

CHAIRMAN SOULES: And that's what I'm going to do. So, if we can't, then I want to entertain a motion to table it and let the Supreme Court do whatever it wants to on this problem because we've got way too much work to do than to spend a whole lot more time on this.

So, the motion has been moved and seconded. Does anybody -- those in favor of the suggested change to Rule 90(a), show by hands. Those opposed? Two to -- five are opposed. That suggestion fails by a vote of five to two. Is there any motion concerning 80(c)?

MR. TINDALL: I move that we table it.

CHAIRMAN SOULES: A motion has been made to table 80(c). Is there a second or does that require a second?

JUDGE TUNKS: I second it.

CHAIRMAN SOULES: Those in favor, show by hands. Opposed? That's tabled.

PROFESSOR DORSANEO: I have one last thing which I am reluctant to say is not going to be controversial.

MR. TINDALL: These housekeeping amendments of yours we've gone over so quickly.

PROFESSOR DORSANEO: It has to do with Rule 136, Paragraph A.

JUDGE TUNKS: What page is that on?

PROFESSOR DORSANEO: It's on page 183.

CHAIRMAN SOULES: Say it again.

PROFESSOR DORSANEO: 183. Page 183, Rule 136, paragraph A. Due primarily to an oversight, paragraph A of Rule 136 doesn't say from what time you compute the 15-day period for filing a brief in response. Because the application is filed in the Court of Appeals and then filed again in the Supreme Court, this 15-day problem is one that makes lawyers nervous.

The Supreme Court takes the view at this point that the brief in response is due within 15 days after filing of the application in the Supreme Court, and the rule should say that.

CHAIRMAN SOULES: Those in favor show by hands. Opposed? That's unanimously approved.

MR. MCMAINS: Luke, can I raise one other question? In terms of the length requirement with regards to the briefing that we did, we changed that to appellate briefs, right?

PROFESSOR DORSANEO: Yes.

MR. MCMAINS: The Court of Appeals stuff.

PROFESSOR DORSANEO: Yes.

MR. MCMAINS: Do we have any similar length or any description of the briefing in regards to mandamus?

PROFESSOR DORSANEO: No.

MR. MCMAINS: I mean, we don't have --

PROFESSOR DORSANEO: We have no briefing rules whatsoever with respect to original proceedings --

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: -- other than the original proceeding rules themselves.

CHAIRMAN SOULES: And that's going to have to stay that way this year. Okay.

MR. MCMAINS: Well, I was just curious if there was -- if that was intended to be fixed.

PROFESSOR DORSANEO: Do you want me to go and do this evidence thing or --

CHAIRMAN SOULES: Give that some thought a minute. I want to be sure that we give Sam Sparks an opportunity. He can't be here this afternoon because he has a court setting to be present at. We'll go to what he has now and then

I'll come right back to you, Bill.

PROFESSOR DORSANEO: This doesn't have to be done now.

CHAIRMAN SOULES: Can I interrupt you to that extent?

PROFESSOR DORSANEO: Yeah, fine.

MR. BRANSON: Luke, I'll bet you a good part of the committee is still flying around. Southwest couldn't get on the ground.

CHAIRMAN SOULES: I'm sorry to hear that. That's a problem, Frank.

Sam Sparks, El Paso, to report on -- what page in our materials?

MR. SPARKS (EL PASO): It's the handout.

CHAIRMAN SOULES: Oh, the handout. There it is.

MR. SPARKS (EL PASO): I think everybody should have one.

CHAIRMAN SOULES: Has it gone around? It says "Rule 170, Pretrial Motions."

MR. SPARKS (EL PASO): The reason we selected Rule 170 is it's a repealed rule, and this would be a new rule. We were asked to draft a rule which would do two things. It would allow

pretrial motions to be determined by the Court without any argument and it would -- oral argument -- and it would allow telephone hearings or conferences.

There is no pride in the authorship. What I tried to do was to exclude pretrial motions which was specifically the subject matter of several specific rules, summary judgment, special appearance, and I've got those listed 18(a), 86, 120(a), 165(a) and 207(3).

MR. MCMAINS: What section -- what page of the agenda is that on?

CHAIRMAN SOULES: It's a handout, Rusty.

MR. SPARKS (EL PASO): This is a handout, Rusty. I gave it to you. Let me just briefly tell you what the purpose was. We had several -- we've had many letters but nobody has drafted a rule. So, Luke wanted me to draft one that we could talk about. And I used a very simple rule that the district courts in Harris County used but we enlarged upon it.

Let me just go through it very briefly. On the -- I tried to exclude those rules that are in the first paragraph because there are specific

rules that apply to those motions. And, of course, we state that the motion should be in writing.

All of the suggestions -- now many of them came from the administrative judges, but it's similar to the federal rule where, when you file a motion, the consensus was that you should attach a proposed order to the motion for the Court if the Court wishes to use it. That's always done in the federal courts that I practice in anyway.

On submission, the theory is that you will file a motion and state a submission date and the -- I guess the clerk is the one who will present it to the Court on a submission date or thereafter. There is no -- most of the suggestions were 10 days. I put in 15. That's one of the things that you need to look at, is to the number of days which, without leave of Court, you would have from the date of filing to a submission date to the Court.

In paragraph C it will require or not require, depending upon how we adopt the rule, a written response. I do not like the last sentence in C, but that is the primary emphasis on most of the suggestions. It curtails, I know, the western

district of the federal court. I don't like it. If you don't act, you are consenting to it or that type of thing. So, I put that in parentheses because that's one thing that we need to discuss.

In "D" I have drafted it that if any party wants oral argument or a hearing, they can obtain it. In parentheses is the word "may," which would allow, if you wish, the Judge to decide whether or not there should be any oral argument or hearing. That's a consideration you need to look at in D.

The "D" portion also has the telephone conference. It seems to be fairly plain vanilla. The only requirement there is, that if you want a record, you need to advise the Court at least on the day before the telephone conference so an arrangement for a court reporter can be made.

I'm requiring that any order -- excuse me, on that, I also put in parentheses that you had to advise in writing. That may be something that you want to strike and just say "must advise the Court."

And then final "E" is that all parties must get a copy of the order. I don't think there is anything -- apparently, this is going on in all of the jurisdictions, but those are -- the three

things that I think you ought to look at is the day requirement, whether it be 10, 15 or more without leave of Court, whether or not there is a requirement to file a response if you have any option, three, whether the Court on its own can rule that there is no necessity for oral argument if the parties want it, and four, whether you need to advise the Court in writing of the record.

Other than that, I think it pretty well complies with several of the local rules throughout the state. And it does allow the telephone conferences. I'm advised -- in El Paso there's no problem about this. But I'm advised that throughout the state there are some judges who just don't -- say that there is no authority under the rules to have a telephone conference and they just don't permit it. I don't know if it's facility or not. I've never had any real problem with that. But, apparently, there is a problem because we've had many, many requests for some authorization in the rules for a telephone conference to suffice for an oral argument.

So, that's Rule 170. There's no magic in the number. I just selected it because it goes right in that area, and there is no Rule 170 currently.

MR. TINDALL: Sam, this wouldn't work in a family law practice at all. How could you -- for example, a motion to modify temporary orders, something is not working while a complicated divorce is pending, this would -- basically, you would have to give 15 days notice. Is that the way I understand this? You would have to send a proposed order which -- I mean, I see it being very, very awkward to use in family law cases.

MR. SPARKS (EL PASO): And it may be, Harry, but most of the local rules have 10. And, of course, you always have the option of going in and filing a motion just like we're doing now and having a Court set a hearing, which is what you would do in those cases. These are -- this rule, as far as I can see from the request, is intended to be more of the, oh, motion for continuance, discovery, sanctions and that type of thing.

MR. TINDALL: Sure.

PROFESSOR DORSANEO: Things that don't require the taking of evidence.

MR. SPARKS (EL PASO): Yeah. This would in no way limit you from going in with a motion and asking for a hearing and setting it just like you are doing now, or it wasn't intended

to do it.

PROFESSOR EDGAR: Well, that isn't what it starts out saying, though. It seems to be a little broader than that, Sam. It says in all pretrial motions except those the following procedures shall apply. And I think that someone could well argue that Harry is not entitled to do what he is doing, and that will be kind of clumsy.

MR. SPARKS (EL PASO): That was not the intent so we could --

PROFESSOR DORSANEO: Well, I would suggest you change it to deal with a situation where the testimony is not needed in order to support the Court's decision. Of course, that would mean that Rule 86 wouldn't have a hearing because there's no testimony there. But I don't know why we have venue hearings anyway, to tell you the truth. Why not just do them all in the written record?

MR. SPARKS (EL PASO): I'm never sure what Rule 86 is. We're amending it every time. That's why I threw 86 in there.

MR. MCMAINS: Well, I thought you had said that you were also trying to exclude motions for summary judgment.

MR. SPARKS (EL PASO): That's true.

PROFESSOR EDGAR: That's 166(a) instead of 165.

MR. SPARKS (EL PASO): Oh, well, that's a typographical error.

MR. MCMAINS: 165(a) is a dismissal for want of prosecution rule.

MR. SPARKS (EL PASO): It should be 166(a). And the reason I did on 86 is there's in there a 45-day requirement or something. There's a day specified in the rule that you --

MR. MCMAINS: Is a dismissal for want of prosecution a pretrial or -- what about the motion to retain?

PROFESSOR EDGAR: It has specific time limits in it, too.

MR. SPARKS (EL PASO): Okay. 165 and 166.

PROFESSOR EDGAR: You need to have 165(a) and 166(a), I think.

PROFESSOR DORSANEO: I suggest we just say in all pretrial motions that do not require the taking of live testimony.

MR. TINDALL: Nonevidentiary.

PROFESSOR DORSANEO: The presentation

of live testimony.

CHAIRMAN SOULES: What about supplementary, it would include that?

PROFESSOR DORSANEO: I would have been just as happy not to go out to West Texas and argue that summary judgment motion for two hours two weeks ago.

PROFESSOR EDGAR: You probably were on the wrong side of it, too, weren't you.

MR. SPARKS (EL PASO): The only reason that -- well, summary judgment has its own time requirements, is the reason that it was excluded from this proposal.

MR. MCMAINS: That's right. So does the venue rule.

MR. SPARKS (EL PASO): That's why it was excluded.

MR. MCMAINS: I mean, Rule 86 requires 45 days.

MR. SPARKS (EL PASO): I tried to knock out every rule -- every other motion that would be in a rule that had time requirements.

PROFESSOR EDGAR: There might be some more, too, Sam.

MR. MCMAINS: See, the other thing is

that 207(3), which is only the deposition -- I mean, only the --

PROFESSOR DORSANEO: Motion to suppress deposition.

MR. MCMAINS: Right. And there may be other types of protective orders which may be either preliminary orders, modifications or whatever, but you have the same time problem. So, straight requiring 15 days doesn't get you any protection if you've got --

CHAIRMAN SOULES: How many feel that we need an order such -- a rule such as this at all, now that it's been presented? I mean, we always try to get on this table a way that will permit us to deliberate every suggestion. Sometimes we fail, but we try to do that.

Should we take this up further or table it and go on with it? How many feel -- what is the consensus on it?

PROFESSOR DORSANEO: I think we could take it up later if it's going to take a lot of time. But this type of rule is something that is an important thing for us to have. It's tiresome to go down to the courthouse and spend three hours to make a 10-minute argument.

MR. MORRIS: Well, you can always do it by agreement, but I think my client is entitled to a hearing. And you have discovery matters where the Court has been telling us that where people are saying things that are privileged, you have to bring things up and put it on the -- let the Court see it and review it in camera.

And I think it's just a bad decision to say that maybe the Court is not going to grant you a hearing. I think my client ought to be entitled to a hearing on motion or be heard in opposition of a motion. And that's what I get hired for, is to go down to the damned courthouse.

MR. SPARKS (EL PASO): Lefty, that's why we put the word "shall" in there.

CHAIRMAN SOULES: I promised Sam Sparks, San Angelo, I would recognize him next.

MR. SPARKS (SAN ANGELO): Well, if the problem is that the El Paso judges don't believe they have permission to have telephone conferences, why don't you just have a little rule that says upon agreement of the parties to a motion it can be done by telephone?

CHAIRMAN SOULES: Sam Sparks, El Paso.

MR. SPARKS (EL PASO): To answer Lefty, we drafted the word "shall" so that any party could have a hearing at any time on that. Secondly, let me correct Sam for the record since we're making up the minutes. There is no problem in El Paso on this. All of our judges allow telephone conferences. But apparently there must be a substantial problem someplace else. We do telephone conferences almost daily in El Paso.

PROFESSOR DORSANEO: I think we have the habit of doing everything at the courthouse because I suspect that in the days of yore that's where everything was done, and nothing was done by paperwork, and the lawyers went down to the courthouse and spent a good deal of their time there. We waste too much time at the courthouse hanging around and waiting for something to happen. We need to do something about it.

MR. MORRIS: We'll get board certified telephone lawyers.

MR. SPIVEY: Luke, did that get on the record?

CHAIRMAN SOULES: I'm sure Chavela has got it on there. If it didn't, Broadus, you can put it there right now.

MR. SPIVEY: We're going to have board certified telephone lawyers.

CHAIRMAN SOULES: I see some specifics, if we're going to take it up in detail. I think maybe in response to Harry that the A should -- maybe should suggest the accompaniment of the proposed order but should be made optional by putting "may" instead of "shall" --

MR. TINDALL: I think a good lawyer may do that anyway.

CHAIRMAN SOULES: -- so that it's at least suggested.

JUSTICE WALLACE: If he wants it signed, he'd better submit it.

MR. TINDALL: That's right.

CHAIRMAN SOULES: On submission, we've got Rule 21 that's working. It puts us in a press a lot of times, but maybe it's because the other side needs to put us in a press. It deals with time periods that run after service. Service by mail extends the time period by three days.

So, if service by mail is made, six days would be the earliest a matter could be submitted. If not, if it's hand delivered, you

can get it on three days. But the three-day rule is working. And instead of having a new time period of 15 days running from filing, I think we ought to stick to the three-day rule running from service.

Again, this is all for discussion. And the last sentence of "B" I think should say the motion may be submitted to the Court or set for hearing on the submission date or later, so that it's clear that the setting for hearing interrupts the submission of the Court, if it's going to be mandatory, if we get down and use "may" in D.

Again in C, the response should be served. And I would suggest there that we also flag an order denying the relief may be -- may accompany a response.

MR. TINDALL: I think a response to any motion ought to be discretionary. If you don't want to file one, so what.

CHAIRMAN SOULES: Well, may be served by the -- yeah, that's right. And may be served --

MR. TINDALL: May be --

CHAIRMAN SOULES: -- before the date of submission or on a date set by the Court.

PROFESSOR EDGAR: Well, but if you're going to file a response, though, it should be in writing. I mean, that's what this says. It doesn't say that you have to file a response. It just says a response shall be in writing.

MR. TINDALL: Well, if you just show up and say I disagree with their motion, nothing is --

CHAIRMAN SOULES: That's what we usually do.

MR. TINDALL: That's right.

MR. SPARKS (EL PASO): That's what the practice is now.

MR. TINDALL: It avoids a lot of paper shuffling to have to file by opposition to a motion that you're going to have to be down there on anyway.

MR. SPARKS (EL PASO): Let me just say, Harry, that what I tried to do was put every single recommendation we've made in mail -- that we've received in mail over the last six months. And we've received a lot of these, for rule on -- this is really -- what I need is some guidance on what the consensus is so we can redraft it. And I've tried to put in parentheses every area that I

thought was controversial. But you've helped me out on that.

For example, you know, it might be the most innocuous rule in the books. We may change the word "shall" to "may" in the preamble of the rule and just give an option for the lawyers to do.

MR. TINDALL: I think what's needed is the option for the movant to be able to request that his motion be heard on submission as opposed to having his motion set, waiting around, and then, you know, he goes down there and he goes down to court and he gets the call, and the other lawyer called and said there was no opposition to his motion. That's crazy practice that we've got in most courts now, right? And you would allow -- I think what we're getting at is, the courts are reluctant to submission motions, at least they are in our county.

MR. SPARKS (EL PASO): I took -- is it Houston?

MR. TINDALL: Yes.

MR. SPARKS (EL PASO): I took it from the Houston -- you-all must not follow the rule because this is from the Harris County district.

MR. TINDALL: I don't know what's -- I

don't think submission practice is the prevailing norm in this state; maybe I'm wrong.

PROFESSOR DORSANEO: It is in our -- we go -- it depends on the court you're in. But we go and spend the morning waiting.

MR. TINDALL: No, no. The submission practice of where you just mail it in and it will be considered by the Court after 15 days is not the norm.

PROFESSOR DORSANEO: No.

MR. TINDALL: Norm is notice of hearing. And I think to have a rule that would permit a movant to have his motion heard by submission to the Court after 15 days is needed.

CHAIRMAN SOULES: David Beck.

MR. BECK: I think in the Harris County civil district courts you really have an option. You submit on written papers unless one or two of the parties requests an oral hearing, so that you really have the option. Somebody just submits their papers and say the hearing is not necessary, the respondent still has the right to request a hearing at which time it automatically goes on the hearing docket.

PROFESSOR DORSANEO: My view, the

worst way to decide something that doesn't require the taking of evidence -- the worst way to decide a legal question is by two lawyers getting up and arguing about what these pieces of paper called "cases" say. And it's better -- anybody can make a better argument in writing than they can make standing up on their feet in terms of legal issues, I would think, and it would be easier to follow.

So, our practice of having a hearing all the time to argue things that don't require the taking of evidence is really just a stupid way of doing it.

MR. SPARKS (SAN ANGELO): You've got a lot of trial lawyer --

MR. BRANSON: On behalf of Rusty McMains, I take objection to that. I've read some of Rusty's briefs and he argues much better.

CHAIRMAN SOULES: That was Branson. Anything else on this? Anybody want to make a motion? Rusty.

MR. MCMAINS: I really think that it needs some more study in terms of what isn't going to be included. My real concern is a lot of the discovery motions now are controlling the

disposition of the merits of the case with the additional sanctions practice and such. It's just hard to explain to your client when you just get an order in that says you've lost. You don't get a hearing and, you know, there's just a written submission. And all of a sudden the Court comes in and finds you in violation of the discovery requests for order and you lose. So, now we will proceed with the post trial procedures.

One would certainly like to get -- and I think most the people here -- at least to get a sense of what the Court's doing when you're at a hearing. Usually they haven't prepared for it, as a practical matter, and so it does take a little longer time.

Most of the time, my experience has been that the trial courts don't -- if it's a real complex issue that is adversarial, they may require written submissions, thereafter may identify some problems that nobody knew anything about before. But a lot of times the Judge can just grimace at the proper time and you can immediately go out and settle the matter in dispute.

If it looks like he's leaning one way or the other, you start making a give. You don't get

that in the written practice where you get no input from the Court. I think it takes some of the humanity out of evaluation of where you are. Bill probably likes that.

PROFESSOR DORSANEO: Yes. The humanity part of it is not particularly -- it's not easy to spot, grimacing at the right time.

MR. MCMAINS: It is if you're paying attention.

PROFESSOR DORSANEO: Well, I have trouble spotting it. I make a -- you know, I don't just sit in the office. I make quite a large number of arguments.

MR. BRANSON: I would submit, Bill, though, that for every lawyer that comes out of law school with writing abilities you get three who have oral capacity that exceeds it. And you're really taking away something from the bar and the bench both, because many of the trial judges respond better to oral presentations than they do presentations in writing.

PROFESSOR DORSANEO: That's a point well taken.

MR. SPARKS (EL PASO): This was simply meant, as I understand most of the requests, as an

option in the rules and it will -- you know, it doesn't affect me one way or the other, if we want to just deny it and go on about our business. But if we want something in here, we need a little bit more guidance.

PROFESSOR DORSANEO: I'd make one suggestion. Maybe you-all want to consider motions that are dispositive of the case in a separate category. I think if someone is going to really cancel your claim, that they ought to speak that to your face, or at least to have spoken to you at some point in time directly. That much humanity, I think, is important to obtain.

MR. SPARKS (SAN ANGELO): But what evidence is admissible or not, that can be dispositive of the case a lot of times.

CHAIRMAN SOULES: Does anyone want to make a motion in connection with proposed Rule 170? Okay. We'll move on for lack of a motion. Bill, do you want to pick up 186?

MR. TINDALL: What are we going to?

CHAIRMAN SOULES: I believe it's 182 Bill has got. Sam, I really do appreciate your effort.

MR. SPARKS (EL PASO): That's all

right. We don't need to redraft it then. Just drop it.

CHAIRMAN SOULES: I don't think so. This will be our last session unless legislature does something to us that we have to address.

MR. SPARKS (EL PASO): That's fine.

CHAIRMAN SOULES: I would appreciate your continuing thought about this when we get together, whenever that may be. We might put something back on the table.

Is that the total consensus of the committee, that we are just not ready to do this now but to keep it alive and give it consideration in whatever interim period?

MR. MCMAINS: I would move to table it and just reconsider it.

MR. SPARKS (EL PASO): Well, let's don't do that, Rusty. Let me just respond to any of the persons who send Luke or Luke sends me that they present their draft in the ordinary course of things and we'll take them up as they come.

MR. MCMAINS: Oh, okay.

CHAIRMAN SOULES: At least we'll be able to reply to all the people that we've heard from and say that this matter has been tabled for

the time. Those in favor of that action and that response, please show by hands. Opposed? That's unanimously then agreed that we table this. So respond and keep an open mind. Sam, thank you. Good luck for your hearing.

I believe Bill still may be getting some organizational things out of the way. Who would like to get a slot here and make a report on something? Harry, do you want to take up your materials?

MR. TINDALL: Okay.

CHAIRMAN SOULES: Where do we begin with yours now?

MR. TINDALL: Well, let's see. Some of them, I think, we have concluded, but let me -- on page 10, Rule 329. I think this one was disposed of at our last meeting. This dealt with this motion for new trial following a judgment on citation by publication. I think that was -- if we've got our long book here -- I think that had been continued. I think we either put it in 324 or 329.

CHAIRMAN SOULES: That's 329. It's most of the way back. And 306a(7) --

MR. TINDALL: That's right. It was

Hadley's suggestion last time. This dealt with a glitch in the rules because we can't get service on a motion for new trial within the time and have a hearing on it. So, I think we have -- this one has been resolved, Charles Childress' problem.

CHAIRMAN SOULES: Okay. Thank you. Sorry to have missed that.

MR. TINDALL: So, I think that one is done. The next one -- let's see, the way you've got it in this book here -- dealt with -- it will be page 13. There's some correspondence between Bill and myself involving Rules 296 to Rules 299. They are not entirely a coherent set of rules. Let me show you what David Beck and I worked on with these rules. Let me pass these out and around.

If all of you will look at what we have here Rules 315 to 331, which was what I reviewed, contain a lot of disparate subjects. But remittitur is Rule 315 and you will see what David and I reviewed and have as our suggestion. We have one discussion item with you, and that is, if you do a remittitur, the old rule had you -- they referred to it being in vacation. As I see this, there is one part of this that is not correctly

done the way David and I had officially done it.

Rule -- if you are looking at 315(b) in the handout, David, I think we had this written to say "By executing and filing with the clerk, a written release signed by him or his attorney of record and acknowledged by a notary public." Okay. I'm sorry. We just did not do the strike out. There is one -- if you will strike the phrase "and attested by the clerk, with his official seal." So that the way --

PROFESSOR DORSANEO: He doesn't even have a seal.

MR. TINDALL: -- the new way it was written is, you have a remittitur, you execute and file with the clerk a written release signed by your client or by you, and then the option is, do you want it acknowledged by the party or the party's attorney. We could not think of any instance in which the clerk of the court takes the acknowledgment on a release or a remittitur. It just -- no one does it that way.

PROFESSOR EDGAR: Do you want to make it acknowledgment or sworn and subscribed?

MR. TINDALL: Well, that's where David said -- you know, oftentimes, you have releases

that are just signed by the parties without it being acknowledged. An acknowledgment would be --

PROFESSOR EDGAR: Do you want an acknowledgment?

MR. TINDALL: Well, it wouldn't be a verification. It would be signed for the purpose of consideration stated therein. It would be an acknowledgment.

PROFESSOR DORSANEO: It would just be the signature.

MR. TINDALL: Yes.

MR. BECK: The issue -- I think we thought that requiring the clerk of the court to put an official seal was kind of archaic. It's never done that way. So, the question is, well, how do you want to do it? Do you want to just have the attorney sign it? Do you want to have the client sign it? If that's the case, do you also want an acknowledgment on it? And I think that's the issue, to decide how we want to mechanically do it.

MR. TINDALL: If you want it acknowledged more in the form of -- one argument for the acknowledgment would be that if you have a release of judgment, those are acknowledged and

filed in court records. So, if you view a remittitur more in the nature of a release of judgment, then I think it should be acknowledged. If you view remittitur more as a creature of being a release, then, you know, those are signed and that's it. A settlement.

JUSTICE WALLACE: If you file it with the clerk it's certainly remission, and it's not valid anymore.

MR. TINDALL: That's right. So, do you need it acknowledged?

CHAIRMAN SOULES: Broadus.

MR. SPIVEY: I don't know the answer to that question, but I've got a question about why we are concerned on this committee with the remittitur rule. It's not a creature of statute of rule. It's simply an order by the Court, isn't it?

MR. BECK: No, this is a rule.

PROFESSOR EDGAR: Rule 315.

CHAIRMAN SOULES: Broadus, you usually don't reduce your verdicts by agreement. I can tell that.

MR. SPIVEY: I wish Judge Wallace would close his ears because I don't want to get

him prejudiced on this, but I'm going to bring it before the Court the first time I can get it properly raised about the unconstitutionality of the remittitur rule when we don't have any additur. I've been entitled to additurs much more often than not. You talk about lack of equal protection of the law.

PROFESSOR DORSANEO: If he had these hearings in writing, it wouldn't happen like that.

MR. SPARKS (EL PASO): I want the record to show that I'm shocked at his attitude.

MR. SPIVEY: I really am interested why we ought to be involved in fooling with the remittitur rule, because isn't that almost an ex parte pronouncement by a wise court that decides the jury didn't know as much as they knew about damages? I'm serious about that.

MR. TINDALL: Broadus, I'm not here to defend substantively --

MR. SPIVEY: No, no. I don't mean --

MR. TINDALL: -- remittitur for sure or additur. I mean, that's an issue that's, you know --

CHAIRMAN SOULES: Yeah, that's not on the agenda.

MR. TINDALL: David and I took on only the rewrite of the rule to conform it with existing practice and cure the --

MR. SPIVEY: But my point --

CHAIRMAN SOULES: And that's all we've got before the committee, Broadus. I'm sorry. We really have -- we have a duty to a bunch of people here to finish this agenda. If you want to take on a whole remittitur of practice, submit it for our next agenda.

MR. SPIVEY: I slipped in a joke, and you took me too seriously. Okay.

CHAIRMAN SOULES: Where is it in the rules that the release of judgment is required to be acknowledged?

PROFESSOR DORSANEO: It's not

MR. SPARKS (EL PASO): It's not.

MR. MCMAINS: It's not.

PROFESSOR DORSANEO: I don't see why we need to have it acknowledged. If it can be done in open court, why not just have it signed?

MR. BECK: The only thing it does say, though, in existing Rule 315, it says it must be attested to by the clerk with his official seal.

CHAIRMAN SOULES: It's pretty clear

that needs to be taken out. I'm just concerned about whether something should be acknowledged. I know that, for example, an assignment of a piece of a pending cause of action, if it gets filed, has to be acknowledged. There are some things that are filed in the district clerk's office that have to be acknowledged.

MR. BECK: Well, I guess --

PROFESSOR DORSANEO: This isn't going to be filed in the district clerk's office.

CHAIRMAN SOULES: Pardon me?

PROFESSOR DORSANEO: This isn't going to be filed in the district clerk's office, I mean, in the D record part of it anyway. Are you talking about district clerk?

CHAIRMAN SOULES: To the district clerk.

MR. SPIVEY: Luke, you're missing my point. Isn't the remittitur ordered by the Court? If it is, we don't need a rule --

MR. MCMAINS: No, not necessarily. We don't have to accept remittitur.

MR. BECK: Supposing the trial court says, Broadus, if you don't remit $500,000, I'm going to grant a new trial.

MR. SPIVEY: Yeah, but in that case it's irrelevant also. It's irrelevant either way is what I'm arguing.

PROFESSOR DORSANEO: Why?

MR. SPIVEY: Because the Court orders the remittitur.

PROFESSOR DORSANEO: No, they suggest it to you.

MR. TINDALL: The judgment is already entered.

MR. SPIVEY: All right. They suggest it. Then if you comply with it, all you're doing is complying with an order of the Court. It's not a contract. There's no consideration. There's no need for an acknowledgment.

PROFESSOR DORSANEO: Oh, I see what you're saying.

CHAIRMAN SOULES: Harry, release of judgment does not have to be acknowledged?

MR. TINDALL: I thought it did. If I sued --

MR. SPIVEY: It's not a release. You're just acknowledging -- you're just accepting the Court's --

CHAIRMAN SOULES: I understand that,

Broadus. I've got a question I'm trying to get answered.

MR. TINDALL: David and I are very open to removing the requirement that it be duly acknowledged.

MR. BECK: I don't think it has to be acknowledged, but I think the better practice would be to acknowledge it.

CHAIRMAN SOULES: I do and here's why: Because then you have an officer of the state, albeit a notary. We all decide what we think the office is. At least saying that a person known by that officer has appeared and signed and acknowledged that he did so for the purposes therein expressed -- it's not a jurat. It's not under oath, but it has some authenticity on its face. And that makes sense to me, but it may not be necessary. Sam Sparks.

MR. SPARKS (EL PASO): I agree, but I think it makes sense to have the client do it, not the lawyer do it. I know that you-all just took it from the old rule, but I think that the rule ought to be limited to the litigant rather than have the lawyer do it.

CHAIRMAN SOULES: Okay. Let me take

it in pieces. How many feel that a remittitur should at least have on its face the authenticity that an acknowledgment provides it? All right. How many are opposed to that? Let me see the hands again because it's not a clear-cut.

How many are -- how many believe that an acknowledgment should be required? Six. And how many are opposed? Four. So, that's the vote on that. The committee favors --

PROFESSOR DORSANEO: What happens if it's not acknowledged, is what I want to know?

CHAIRMAN SOULES: The committee favors the acknowledgment six to four. Now, then, how many feel that the remittitur should -- we should require that a remittitur be signed by the party as opposed to permitting it be either the party or his attorney? How many feel that the party only should be --

MR. MCMAINS: May I speak to that?

CHAIRMAN SOULES: Okay. Yes, sir.

MR. MCMAINS: Well, I mean, I realize that Sam probably only represents people that are local and that are easily conveniently attained, but if you do any significant substantial out-of-county practice, and these things sometimes

get done at a very late time in the game in terms of motion for new trial is going to be granted, and if you've got a client that you can't get a hold of or -- and you may be able to discuss it by telephone, but you may not be able to get the documents that actually execute it are done. I guess maybe you can sit there in open court and try and do it. If you can do it in open court, which we are changing, it makes no sense to me to require that you have only the party do it if you do it otherwise.

CHAIRMAN SOULES: Is there a contrary? Does anybody want to speak contrary to Rusty on that? Okay. How many feel that both parties -- how many feel that only the party should be permitted to sign the remittitur? That's one. How many feel that the party or his attorney should be permitted? Nine. And it was two votes. I missed Orville's vote. So, that's nine to two that both be permitted to sign the remittitur.

PROFESSOR DORSANEO: Could we change "him" to "the party"?

CHAIRMAN SOULES: Yes.

PROFESSOR DORSANEO: Because it refers

back to the clerk.

CHAIRMAN SOULES: It will say "be signed by the party or the attorney of record of the party."

PROFESSOR EDGAR: "Of the party's." "Of the party's attorney of record."

CHAIRMAN SOULES: We don't have many possessives in the rule, apostrophe "S's". Anyway. Okay. All in favor now of Rule 315 --

PROFESSOR EDGAR: Just a second. I've got a problem with the way the thing is constructed.

CHAIRMAN SOULES: All right.

PROFESSOR EDGAR: We start off "permit any party of A in open court or B." Why don't we put all that in one paragraph? And -- or maybe not have any A, B's and C's, and just have it all one paragraph.

MR. TINDALL: I think stylewise, he's right.

PROFESSOR EDGAR: I mean stylewise A, B and C are not of equal rank. And that just seems to be kind of clumsy.

CHAIRMAN SOULES: All right.

PROFESSOR DORSANEO: I think we could

repeal the whole rule, frankly.

PROFESSOR EDGAR: Just combine all of it into one without any subparts.

MR. TINDALL: I think Hadley has got a good point. Just making it into one cogent rule.

PROFESSOR EDGAR: Yes.

CHAIRMAN SOULES: Why do we use release there? Why don't we say a written remittitur signed by the party, because we're really not -- release to me is --

MR. TINDALL: That's right.

CHAIRMAN SOULES: What?

MR. TINDALL: That's right.

CHAIRMAN SOULES: Written remittitur signed by the party.

PROFESSOR DORSANEO: You know, Mr. Chairman, I'm not really sure that this Rule 315 remittitur is about what the other remittitur rules are about at all. I've always kind of looked at this and wondered what is this about stuck here. It may not be remittitur. This really maybe should be called release.

MR. TINDALL: Well, the real world is there's never a written judgment. The Judge just says I'm going to grant a new trial unless --

PROFESSOR DORSANEO: Well, this paper judgment has been rendered. Maybe this is about -- I don't know what this rule is about, to tell you the truth. I don't know necessarily that it's about the remittitur practice or it may be about God knows what.

MR. TINDALL: Sure, it's about a remittitur practice, but it envisioned the Judge signing the judgment and then granting the remittitur, which I've never seen done. The one I've been involved in, the Judge just indicated verbally from the bench.

MR. MCMAINS: Oh, I've seen it done.

MR. TINDALL: Sign the judgment and then grant a remittitur or they just --

PROFESSOR EDGAR: No, no, no. This is where judgment has been rendered, not when judgment has been signed. There's a difference. The Court pronounces its judgment.

MR. TINDALL: I understand that.

PROFESSOR EDGAR: And then the Court says, I'm going to effect that judgment by signing one if you don't enter into a remittitur. And then subsequently, the Court's going to grant a new trial, or if you remit part of the judgment

the Court will then sign the judgment thus remit -- less that part remitted.

MR. SPARKS (EL PASO): I've seen it done in default judgments just like this and the judge -- and the parties want some confirmation as to an amount or they're going to grant a new trial. And they want it in the record some way or the other so that they don't enter that last order on the last day.

MR. MCMAINS: I'm not sure I understand what your concern is, Bill.

CHAIRMAN SOULES: Can we move on or do we need more on this?

PROFESSOR EDGAR: Are you going to say then in the second -- are you going to say then such remittitur shall be a part of the record or continue with the word "release?"

CHAIRMAN SOULES: Yes, remittitur. Sure do. Thank you.

Okay. With those changes, those in favor of the proposed amendment to Rule 315, please show by hands. Five. Those opposed? Five to one. Okay. Corrected judgment or decree. Are you ready for that one, Harry?

MR. TINDALL: Yes. The next Rules 316

to 319 deal with what we loosely refer to as a judgment nunc pro tunc. Actually, 316 encompasses what I think is everything that you really do. I deal with corrected judgments quite frequently. If there's a mistake in it, you file a motion. You give notice to the other side. The Judge corrects it according to the truth or justice of the case. Isn't that really the core of the remittitur practice?

The other rules, Misrecitals 317 appear to David and I, 18 and 19, to be total redundancies. We've -- I have attached to it the old rule. You can read through them. There doesn't seem to be anything added so that we would have, then, one rule, correction of judgments, which you see would be -- if there is any mistake, obviously, the case law would still remain in effect. That's clerical or statistical or typographical-type mistakes, not judicial errors.

And the only other substantive change was that the notice -- it may be done this way now, that you can give notice of the -- we changed it from an application to a motion because that appears to be the way we're changing all these rules.

MR. BECK: Harry, there's another typo. Shouldn't that second paragraph also read "a motion" instead of "an application" since you changed it in the first paragraph?

MR. TINDALL: Where is that?

MR. BECK: The second paragraph.

MR. TINDALL: Oh, you're absolutely right.

CHAIRMAN SOULES: I didn't catch that.

MR. TINDALL: On the second paragraph on Rule 16, "The opposite party shall have reasonable notice of an application," it should be "a motion."

PROFESSOR EDGAR: "Of the motion."

MR. TINDALL: "Of the motion," that's right. I don't know if we even need that sentence. We just said up above "after notice of the motion therefor has been given to the parties interested" --

MR. BECK: I thought that sentence was cut out, Harry, because once you add the reference to Rule 21(a), that sets forth the requisites of the motion in the time periods.

MR. TINDALL: That's right. Except

one sentence. Now, we couldn't find anything in Rule 317, 18 or 19 added to the corrected judgment practice.

CHAIRMAN SOULES: Before we go past 316, can we substitute the word "corrected" for "amended," mistakes may be corrected by the Judge?

MR. TINDALL: I'm sorry, what is your suggestion?

CHAIRMAN SOULES: It's right there, to substitute "corrected" for the word "amended" in the second line, beginning the first word in the second line.

MR. TINDALL: May be "corrected," sure.

PROFESSOR EDGAR: Yeah, because that's really what a nunc pro tunc is.

MR. TINDALL: He's not amending the judgment.

PROFESSOR EDGAR: He's correcting the mistakes. He's not amending anything.

MR. TINDALL: That's right.

PROFESSOR EDGAR: He's correcting mistakes.

CHAIRMAN SOULES: And I think that you

have now -- I'm trying to go along with you into the next rules.

PROFESSOR EDGAR: I tell you what, nunc pro tuncs have caused a lot of problems. And rather than just trying to hit on this quickly right here, I'd kind of look through all of these and make sure I've got it clear in my head before we vote things up and down.

CHAIRMAN SOULES: I think that's fair.

PROFESSOR EDGAR: Because this is a tricky area, friends.

CHAIRMAN SOULES: We have struggled with --

MR. TINDALL: And you've got to clarify it. We're not certainly -- but basically our thought was that we need one rule as opposed to -- you might take a second and tell us what you see that Rules 17, 18 and 19 -- not that we want to vote on them today, but maybe give David and I some guidance -- what you see in those rules that are not covered by Rule 316.

CHAIRMAN SOULES: Well, 317 requires that there be in the record of the cause --

MR. TINDALL: Well, when you go back,

though, you see --

CHAIRMAN SOULES: -- the evidence --

MR. TINDALL: -- according to the truth or justice of the case, which would obviously encompass the record.

PROFESSOR DORSANEO: We're really better off, I think, staying with the Texas Supreme Court opinions on clerical errors, judicial errors, than all of this old rigmarole. The language in Rule 317 has caused problems --

MR. TINDALL: Sure.

PROFESSOR DORSANEO: -- because it suggests that certain errors are nunc pro tuncable clerical, when they really are judicial. And I think that your suggestion eliminating that nothing else is necessary other than Rule 316 is probably sound.

MR. TINDALL: Well, for example, Rule 60 in the federal courts say "Clerical mistakes in judgments or orders or other parts of the record, errors therein arising from oversight or omission, may be corrected by the Court at any time on its own admission or on the motion of any party after such notice, if any" -- that is the entire subject. So, I'm not sure what -- 318 appears to

be archaic and that -- you see, all of these rules --

MR. MCMAINS: Well, it is, except that it is pursuant to Rule 318, and the old concept of determination of plenary jurisdiction of the Court, which was --

MR. TINDALL: Well, sure now that we have --

MR. MCMAINS: -- in the expiration of its term, that gives the Court the power to render nunc pro tunc when it's plenary jurisdiction expires. There is no other rule other than a suggestion in 329(b) that that power exists, but it is a power that relates back to 316 and 317. It does not even refer to 318. I mean, all I'm saying is that 318 right now, it is the -- by historical application -- and I think we probably should update it. But it needs to be -- the whole function of this was there is an inherent power of the Court to change the record of its judgment to reflect what it actually renders, assuming that it is a clerical as opposed to judicial error. Whether or not you are -- whether the Court has jurisdiction in terms of plenary jurisdiction or not, it never loses jurisdiction over the records

of its judgment.

PROFESSOR DORSANEO: But, 329(b) says that now. And the problem we get into with 318 is that there is a split of authority on whether or not a party is entitled to receive notice of the nunc pro tunc. Because if you look at Rule 318 and you say inherent authority, then we have one line of cases saying the Judge can just go ahead and do it.

MR. MCMAINS: Yeah. I don't have any disagreement that we need to inform the practice so that it is made clear. All I'm saying is that right now there is nothing in 316.

PROFESSOR DORSANEO: But it's in 329(b) saying that you can do 316 even after the expiration of plenary power. I think it also cross-refers to 317, and we're getting into a larger problem here. I'm looking at the index -- table of contents, rather, for Rules 315 through 331. And this little package here, 315 through 319, is entitled as a subtitle "Remittitur and Corrections."

Now, what was bothering me a little bit earlier, we were talking about remittitur, 315 is entitled "remittitur" but what we would think of

as the remittitur rule is Rule 320(a) "If Not Equitable" damages too small or too large. So we have a kind of a crazy structure here. It gets even crazier if we eliminate 317, 318 and 319 and leave 316 as "Correction of Mistakes" and that ends up cross-referring down below to 329(b), which is entitled "Time For Filing Motions," when it's really about a whole bunch of other things now.

I think that this area is in need of total consideration. But as a good first step, I don't think we need 317, 318 or 319. We need a one simple "correction of mistakes" rule that would key into the plenary power Rule 329(b).

And I think in addition to that we need one remittitur rule rather than a remittitur rule denominated as such that may or may not be about the remittitur practice coupled with another rule called "If Not Equitable," which you have to go read it to be sure that that's really about remittitur, given the title. I had to look -- that's how I got to look at this, where is the remittitur rule?

I would suggest we do eliminate or consider recommending to the subcommittee the rewriting of

this section "I," "Remittitur and Correction." We do eliminate 317, 318 and 319, develop one "correction of mistakes" rule, and develop one "remittitur" rule that combines "If Not Equitable" 328 with the method of making the remittitur which is apparently what 315 is about. And those would be two steps forward in fixing this area.

MR. TINDALL: Well, Luke, what if we can get that -- I think there's legitimate concerns about plunging in and trying to write this on a hasty basis here. If you can give us direction that we're going to have one Rule 316, whatever it may be denominated as, and one Rule 315, and unless someone sees --

MR. MCMAINS: Well, the remittitur -- if you're going to write a composite remittitur rule denominating both why it's granted and what the practice is, it ought to be under the new trial section because we continually --

MR. TINDALL: I think you're right.

MR. MCMAINS: -- separate motions for remittitur for motions for new trial.

MR. TINDALL: It really should be incorporated in what you're saying to --

MR. MCMAINS: I'm agreeing with Bill

that it belongs --

MR. TINDALL: In 329.

MR. MCMAINS: -- in Rule 328. I mean, in terms of where it's presently located, why you grant a remittitur.

PROFESSOR DORSANEO: It ought to be called "remittitur," too, rather than "If Not Equitable."

MR. MCMAINS: That's right.

MR. TINDALL: It should be incorporated in Rule 328?

MR. MCMAINS: Yes. Except that Rule 328 also deals with -- though it doesn't have additur component, it does deal with the fact that new trials are going to be granted when the damages are too small. So, it's not purely a remittitur rule. I mean, it is a rule that is related to a problem with damages.

CHAIRMAN SOULES: They don't have to be in 328. We've got some numbers there that have been repealed. So, they can just be grouped together.

PROFESSOR DORSANEO: Could be attached to each other, yeah.

MR. MCMAINS: I don't have any problem

with that.

CHAIRMAN SOULES: Okay. We passed Rule 315. And that may be in the interim, between now and our next meeting. Harry, we would like for you to consider combining that with 328 or moving it adjacent to 328 so that the concept of remittitur is all in one section of the rules anyway. Second, that you look at 317 and the rest of these rules 317, 18 and 19 and determine whether those can be repealed without affecting some established point.

MR. TINDALL: Well, at this time they add nothing. And I think that's the consensus here, that we have one corrected judgment decree rule.

CHAIRMAN SOULES: Let me get that. Are we ready right now to recommend to the Supreme Court that 317, 18 and 19 be repealed without further study? Those who believe we are ready to do that, show by hands. Ten. Okay. Those who feel we're not. Okay. So, we're ready, then, to take up the suggestion that we modify Rule 316 and repeal 317, 318 and 319.

PROFESSOR EDGAR: Before we do that, would it be helpful if Rule 316 started out by

saying "clerical mistakes in the record" as distinguished from just "mistakes in the record"?

MR. TINDALL: I think that's good because the federal rule certainly refers to it as clerical mistakes.

PROFESSOR EDGAR: Well, that gets away from the problem that the Court has perpetually had in trying to tell people the difference between a judgment nunc pro tunc and one that's not a judgment nunc pro tunc.

PROFESSOR DORSANEO: That would be acceptable to me, although I --

MR. MCMAINS: Well, the only question I have about that is how this jives with the general new trial practice which we injected pursuant to Judge Guittard's concerns, which now has identified a motion to reform or correct the judgment.

In our plenary jurisdiction rule you're talking about -- well, there's a clerical mistake, you go back under this rule and you have an application and a hearing. Whereas Rule 329(b), in describing the plenary jurisdiction of the Court, says "has plenary power to grant a new trial or to vacate, modify, correct or reform the

judgment."

MR. TINDALL: That's talking about substantive reform, isn't it? Isn't that really what --

MR. MCMAINS: No, that's not what plenary power means under TransAmerica Leasing versus Three Bears (phonetic). The Judge, if he says, "I screwed up," can do a new judgment on his own without any motion or application. Then there isn't any way you can attack for lack of hearing on it. Your relief then is to say, no, you didn't make a mistake, if you filed a motion back again to reform or correct it from the time that he makes that. But you cannot, under our existing rule scheme, during a period of his plenary power require application and notice.

PROFESSOR EDGAR: That's right.

MR. MCMAINS: I'm just --

PROFESSOR EDGAR: That's right.

MR. MCMAINS: That's inconsistent with the judicial interpretation of the trial court's plenary power.

PROFESSOR EDGAR: But that's not what we're talking about here as far as judgments nunc pro tunc are concerned.

MR. MCMAINS: Well, except that what this is -- well, 329(b) has merged a nunc pro tunc practice in reality. In times when the trial court still --

MR. TINDALL: Still have got plenary power, but beyond that --

MR. MCMAINS: What I'm getting at is shouldn't we have a rule which talks about -- because that's really where the 316, 17, et cetera come in now with our current scheme of what happens when he has lost plenary jurisdiction as opposed to any other time. And anything else that you want to do should be controlled by 329(b).

MR. SPARKS (EL PASO): Rusty, isn't that --

MR. MCMAINS: Or 324.

MR. SPARKS (EL PASO): Look at 306a(6) 6 and see if that doesn't --

MR. MCMAINS: It says when a corrected judgment has been signed after expiration of the Court's plenary power.

PROFESSOR DORSANEO: See, that would take you back to 316.

MR. MCMAINS: Yeah. So, I mean, it doesn't change any -- all I'm saying is there is

no -- we don't really -- there never has been any real necessity for a nunc pro tunc practice as long as the Court has jurisdiction.

PROFESSOR EDGAR: That's right.

MR. MCMAINS: But there is necessity for a nunc pro tunc practice when the Court has lost jurisdiction.

PROFESSOR EDGAR: That's right.

MR. MCMAINS: And so why don't we draft a nunc pro tunc rule to deal precisely with the issue of when the Court has lost its jurisdiction.

PROFESSOR EDGAR: Otherwise, you're --

MR. MCMAINS: Otherwise, you don't ever need it. And it makes no sense if a judge looks at it and says, oops, I put in an extra zero. For him to go through any kind of remittitur or anything else, he can just change it. It doesn't reflect the verdict. That's just silly to call him up and say, wait a minute, my secretary typed in an extra zero. Pure clerical mistake on my part.

CHAIRMAN SOULES: Or left one out, Rusty.

PROFESSOR DORSANEO: Lawyers in cases

will still -- we have -- If we're going to do it like that, I think we have to be very clear, because lawyers in cases will still call a plenary power period correction or reformation a nunc pro tunc order.

MR. MCMAINS: But, see, I don't consider that to be a problem.

PROFESSOR DORSANEO: Well, it is a problem if they start going and thinking about the restrictions on nunc pro tunc changes outside of the plenary power period. I think we're going to need to -- I agree with you, this -- but I think what I end up concluding is that the nunc pro tunc rule needs to be closer to 329(b), and it needs to correlate better such that the lawyers know which rule they're using at the particular time that they are seeking relief.

What was done back in 1981 probably wasn't done quite well enough on this -- in this area. So, I would recommend to Harry's committee that they deal with what you're talking about in the contours of the correction of misrecitals or whatever we want to call that rule.

MR. MCMAINS: Well, my real concern is that there are cases, and they are generally cases

where you're dealing with a pure nunc pro tunc. But the cases do say that if you don't comply with the application of notice, that it's void order. And it doesn't do any good. You've got to go back and do it again. You're entitled to a hearing; it's reversible error.

PROFESSOR DORSANEO: I think you ought to get a hearing if it's outside the plenary power period.

MR. MCMAINS: I agree. I don't have any problem with that. That's what I'm saying.

PROFESSOR DORSANEO: That's kind of what we're talking about; why it needs to be dealt with separately because it makes -- different procedural requirements ought to be imposed on a judge who's going to go and change a judgment a year later.

MR. MCMAINS: Correct. Because if the Judge refuses it, that is also an appealable order.

MR. TINDALL: So, is it the guidance of the committee that we try to put 316 --

PROFESSOR EDGAR: Closer to 329(b).

MR. TINDALL: -- near the conclusion of 329(b)? It would seem to me --

PROFESSOR DORSANEO: Yeah. I think after. It's really -- it's in the wrong places before. It should be after.

MR. TINDALL: 329(c) is logically where --

PROFESSOR EDGAR: Prologically in point in time, it occurs after the expiration --

MR. TINDALL: Of everything, that's right.

PROFESSOR EDGAR: It would be after 329(b) time.

MR. TINDALL: And if you'll notice, 329(b) right now is the very last rule we have until we get over to all the ancillary rules. Everything else up to that has been repealed.

MR. MCMAINS: Bill, are you really talking about moving the nunc pro tunc rule into the new trial rules?

MR. TINDALL: There's a succeeding rule following it.

MR. MCMAINS: No, I understand that. What I'm saying is right now, again, looking at the overall categorization, H in the rule book is called "judgments," and that's why this rule is in there because you're scurrying around with

judgments.

The next group -- the next category is J which is "New Trials," which deals with -- and where 329(b) is. And while it is talking about plenary jurisdiction, it in part -- this is not a new trial issue especially after the Court's have lost plenary jurisdiction. I mean, it doesn't have any place being in the new trial area.

PROFESSOR DORSANEO: Really this --

MR. MCMAINS: The truth of the matter is, the plenary jurisdiction rule doesn't have any place in the new trial area.

PROFESSOR DORSANEO: That's right. This whole thing needs to be done. It needs to be reorganized. But as first steps, we can eliminate what can be thrown out and then reorganize thereafter, and then come up with --

MR. TINDALL: Could we do this? I mean, I see us taking on a city hall if we're not careful here. And we're not -- so we don't get this forever delayed. I think we were happy with 315 on remittitur and just --

CHAIRMAN SOULES: That's been passed.

MR. TINDALL: Pardon?

CHAIRMAN SOULES: That's been passed.

MR. TINDALL: Yes, sir. And on 316, let's leave it there for now. I acknowledge readily that it may logically belong some other place. But it would seem to me that if we say "clerical mistakes in the record," we have identified what we are intending 316 to be. It's clerical mistakes. In or out of plenary power, it's a clerical mistake. You can follow 316.

CHAIRMAN SOULES: Okay. So --

MR. BECK: Luke, let me ask a question.

CHAIRMAN SOULES: David Beck.

MR. BECK: I'm not that familiar with the substantive law under Rule 316. By adding the word "clerical," are we making any change at all in the substantive law?

MR. TINDALL: No.

PROFESSOR EDGAR: We're trying to codify it.

PROFESSOR DORSANEO: No, we're not. I would say no.

MR. TINDALL: It's not a clarification, and it is not a plenary modification.

MR. BECK: So, the clear intent of

this committee is to merely codify existing law as far as interpretation of Rule 316.

MR. TINDALL: That's right.

MR. BECK: By adding the word, "clerical."

MR. TINDALL: That's right.

PROFESSOR DORSANEO: And it's one of the easiest places to do that and be relatively sure that that's all that's happening.

CHAIRMAN SOULES: What is the caption of Rule 316 going to be?

MR. TINDALL: Well, that's what I thought about when I had this typed up. One thought I had was it was "correction of mistakes." And I changed it to "corrected judgment." But frankly, I don't like that the more I think about it.

The federal rule calls it "clerical mistakes." And that may be what we're really dealing with is a clerical mistake. I see this all the time in my practice. People don't identify the automobiles or the land that they're getting in decrees.

MR. MCMAINS: What you're doing, really, is you are correcting clerical mistakes in

the judgment record.

PROFESSOR DORSANEO: It's correcting the record, really, yeah.

MR. TINDALL: That's right. So it should be --

MR. MCMAINS: You are correcting the record. You are not correcting the judgment.

MR. TINDALL: Clerical mistakes would be --

PROFESSOR EDGAR: I would say "correction of clerical mistakes in the record."

MR. MCMAINS: "In the judgment record."

PROFESSOR EDGAR: "In the judgment record."

MR. TINDALL: What is the judgment record if that's not the judgment?

PROFESSOR DORSANEO: Well, that's what's wrong. See, that's not the judgment.

PROFESSOR EDGAR: You see, what I just -- you see, Harry, what you just told me a minute ago is really not the subject of a judgment nunc pro tunc. If the Court didn't name that automobile --

MR. TINDALL: Oh, I know that. They

put the wrong vehicle vehicle ID number, they misdescribe the property.

PROFESSOR EDGAR: If the judgment -- if the Judge made that mistake, that's not a judgment nunc pro tunc.

MR. TINDALL: No, the lawyers typed it up wrong.

PROFESSOR EDGAR: That's still not a judgment nunc pro tunc.

CHAIRMAN SOULES: We can't get the record here.

PROFESSOR EDGAR: If the Court makes a mistake in reducing it from the judgment to the judgment record, that's the subject of a judgment nunc pro tunc.

PROFESSOR DORSANEO: Correction of record of judgment.

PROFESSOR EDGAR: That's right. You see that's the problem. And lawyers don't understand.

MR. MCMAINS: After loss of jurisdiction.

MR. TINDALL: Well, I've learned --

PROFESSOR EDGAR: Do you see what I'm saying to you?

CHAIRMAN SOULES: All right. How about "correction of judgment of record"?

PROFESSOR EDGAR: "Of judgment record." "Correction of mistakes in judgment record."

MR. BECK: Harry, why did you insert "decree" in there? Is that because of some anomaly in the family law courts?

MR. TINDALL: Well, we have decrees; we don't have judgments.

PROFESSOR DORSANEO: They think you're having the anomalies in your court.

MR. TINDALL: It encompasses it.

CHAIRMAN SOULES: Judgments is meant to be --

MR. TINDALL: It does. Yeah, we don't have to put decree. And although it had in 316 -- I think it initially said in the substance of it in the judgment or decree. You see, the first sentence is "mistakes in the record of any judgment or decree." So I just -- but we're going to drop that caption and say it's "correction of record of judgment."

PROFESSOR EDGAR: That's fine.

MR. TINDALL: No clerical --

CHAIRMAN SOULES: It's going to be "correction of clerical mistakes in judgment record." Now, that's what this deals with, isn't it, Rusty?

MR. MCMAINS: Right.

CHAIRMAN SOULES: "Correction of clerical mistakes in judgment record." And then we start out the sentence "Clerical mistakes in the record of any judgment" --

MR. TINDALL: That's right.

CHAIRMAN SOULES: -- "may be corrected." And the only thing I have some concern about after that is Rule 21(a) -- Rusty, Rule 21(a) deals with how parties serve notice, not how courts serve notice. Is this the kind of a thing that might come up on the courts on motion, and if so, do we want the Court bound to give certified mail notice?

MR. TINDALL: It's going to be upon application, is the way the rule speaks now. So it's going to be upon some --

CHAIRMAN SOULES: I heard Rusty speak to that a moment ago about how there had to be an application or it was reversible error and --

MR. MCMAINS: There's no application

-- if there is no motion service in notice or hearing in the -- in a classic nunc pro tunc post plenary jurisdiction, that's reversible error.

PROFESSOR DORSANEO: Split of authority.

MR. MCMAINS: What?

PROFESSOR DORSANEO: Split of authority.

MR. MCMAINS: I understand. I understand. If you were entitled to it. I mean, if you --

CHAIRMAN SOULES: Does this come up on the courts on motion or is that something that's too remote to --

MR. MCMAINS: The courts usually don't ever look at their judgments after they've signed them unless somebody asks them to.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: They may not ask them with a motion, though.

CHAIRMAN SOULES: Okay. Well, then the motion is that we amend Rule 316 by changing its caption as previously indicated, and it will read "Clerical mistakes in the record of any judgment may be corrected by the Judge in open

court according to the truth of justice," and then continue as Harry has it here proposed.

MR. TINDALL: If we're going to drop "decree" on the first -- were you dropping "decree"?

CHAIRMAN SOULES: That's right. And drop "decree."

MR. TINDALL: Then we ought to drop it on the last one also. I just made the two sentences consistent.

CHAIRMAN SOULES: Those in favor show by hands. Opposed? That's unanimous.

MR. TINDALL: And then we're going to knock out 317, 18 and 19.

CHAIRMAN SOULES: Yeah. We took a vote on that a while ago and I believe that was unanimous.

MR. TINDALL: Okay. One thing that Bill --

PROFESSOR DORSANEO: Before we get on with that, we need to take in 329(b) from the first unnumbered paragraph in the parenthetical the words "and 317" away.

MR. TINDALL: Right. And there's another place over in 324. I spotted that.

PROFESSOR DORSANEO: And in 329b(h) --

MR. TINDALL: Right.

PROFESSOR DORSANEO: -- there is another reference to Rule 317.

CHAIRMAN SOULES: Hold it now. Your scribblers are not keeping up with you. I know we should be but 329(b) --

MR. TINDALL: Refers to in G and H. No, the lead-in in three places.

CHAIRMAN SOULES: Okay.

MR. TINDALL: We need reference to 17.

CHAIRMAN SOULES: And then what's the other rule?

MR. TINDALL: I thought we spotted it over in --

PROFESSOR EDGAR: It's F, G and H.

PROFESSOR DORSANEO: F, G and H in 329(b). Nowhere else.

PROFESSOR EDGAR: 329(b) F, G and H you should delete and 317, as well as the lead-in paragraph to Rule 329(b).

MR. TINDALL: And in 306(a). I knew there was another place. In the nunc pro tunc 317 comes out. That's it.

CHAIRMAN SOULES: If anybody has got these things on a computer, these rules, and you can spot other deletions, please do so and let me know so that we can --

PROFESSOR DORSANEO: Texas Rule of Appellate Procedure 5 would have that same language in it.

CHAIRMAN SOULES: Okay.

MR. TINDALL: The last -- excuse me. I didn't mean to --

PROFESSOR EDGAR: It's Rule 306(a), paragraph number 6. Did you get that?

CHAIRMAN SOULES: Does anybody got the Texas Rules of Civil Procedure on computer?

PROFESSOR DORSANEO: We're working on that.

CHAIRMAN SOULES: Are you? Okay. All right.

PROFESSOR DORSANEO: I think those would be all the places 317 will be referenced. If there are any more, we'll tell you.

CHAIRMAN SOULES: Will you let me know, because we're going to try to get these finalized here pretty quick?

PROFESSOR DORSANEO: In TRAP -- it's

TRAP Rule 5(c).

MR. MCMAINS: That's a good name for it.

MR. TINDALL: One final discussion. Bill brought up, K is the tag end of this so that there is nothing -- in our last meeting, subdivision K on Page 204 of the Rules of Civil Procedure called certain district courts -- last time we voted to repeal 331 and the question was raised, what does Rule 330 do in our practice? And I still don't see what Rule 330 does. It appears to me to be something that's entirely covered by rule -- Article 199(a). But if you-all see something here --

CHAIRMAN SOULES: Bill, you gave that some review, didn't you?

PROFESSOR DORSANEO: I didn't -- I'd have to go back and read the Court Administration Act and look to see whether it's been covered. This comes from the old Rules of Practice Act of, I guess, 18 something or other, and goodness knows whether there's any of it that hasn't been reenacted in the Court Administration Act or elsewhere.

PROFESSOR EDGAR: Well, may I make a

suggestion, then? In the economy of time, why don't we just table that? It's not going to do any harm sitting there and let's go on to some other matters, if I may.

MR. TINDALL: That's fine. I will concur with that because we've got better things to do than to worry about it. But it does seem like it's dead-letter law.

CHAIRMAN SOULES: Have we -- do I understand your note here that we have already voted to repeal 331?

MR. TINDALL: Yes, that was last time, and I think just, you know, while we're cleaning up these rules, if 330 could come out in the foreseeable future our rules would then end with the "Motion for New Trial," which makes some sense to it.

CHAIRMAN SOULES: When you -- if you do decide to move 316 to 330, why don't we just also propose to repeal 330 when we have our next meeting where we can -- we will identify that -- tag it and it would be for review.

MR. TINDALL: Okay. The next packet. Luke, did you get in here -- let me see, Rules 103 and 106? Are they -- what page are they on?

CHAIRMAN SOULES: 36?

MR. TINDALL: Okay. Let me show you what -- if you will, turn to page 36 for a minute. All of you -- I circulated this, I believe. Let me kind of review with you. Turn, if you will, to 103 for a minute on page 39 of the handout.

PROFESSOR DORSANEO: The handout?

MR. TINDALL: I mean, of the left-hand bound volume.

CHAIRMAN SOULES: The agenda.

MR. TINDALL: Yes. This gets a little tricky, but let me take you through the way I tried to do it. Rule 103, I believe, incorporates the decision of the committee last time. I've circulated it to you. And what it does is -- we've had this, I think, just about like this each time. It's any sheriff or constable that are not precinct or county limitations and anyone authorized by the Court over 18, and then we mandate service by mail, if requested, and then there is no requirement of a written motion and no fee for -- authorized for a person to serve. That's 103.

Then skip 104 for a minute and go to 106.

That's the next one we discussed last time. And that is the method of service and we changed two little points to conform with 103. The citation shall be served by any person authorized by 103. And then subpart B we delete the provision by an officer or disinterested adult in the Court's order because 103 tells you who can serve papers.

And then 107, on 43 conforms the change so that it's "The return of the officer or authorized person," and we said if it's going to be an authorized person that their return had to be verified.

Now, those were the way I believe we left it last time and I was to get them cleaned up like this. Now, I circulated that and the following comments have come back:

First of all, go back to page 37 for a minute. Tom Ragland and Bill wrote me and suggested that Rules 99 to 101, dealing with the contents of the citation and the preparation of it by the clerk, be in one rule.

Now, let me skip over a minute. That would take 99 to 101. 102 was suggested that we repeal it. It says that service is effective within the State of Texas. Well, that's certainly not the

real world that I live in. We mail them to Pennsylvania and California frequently.

PROFESSOR DORSANEO: Let me make one comment about that. That, I think, is common. I don't disagree with you on repealing Rule 102 but the idea, which has kind of gone away, is that Rule 108 was meant to deal with nonresident notice and that Rule 108 is not service; it is notice.

MR. TINDALL: Yes.

PROFESSOR DORSANEO: And this is old styled Pennoyer versus Neff conceptualism that is still going to be partly in this rule book even though not everyone may see it. If you look at Rule 108, it doesn't say that this is the service of citation. It's serving a thing that looks like a citation. All right.

MR. TINDALL: But we --

PROFESSOR DORSANEO: So, I think we would be all right to take 102 out.

MR. TINDALL: I agree because we really are serving people outside Texas. That's what we're doing.

CHAIRMAN SOULES: Serving them with notice.

PROFESSOR DORSANEO: Serving them with

-- usually Rule 106 kind of would do that, even though technically you would be doing it through 108. You would be using 108 and it would be saying that you can do outside the state what you can do inside the state under Rule 106.

MR. TINDALL: That's right.

PROFESSOR DORSANEO: It would work.

MR. TINDALL: Let me just -- then 103 -- I'm sorry, 104 was Hadley's suggestion last time, I believe, that because we expand to conserve under 103, 104 is unnecessary. That's if the sheriffs were disqualified. Now, then 105 was strictly housekeeping on the duty of the officer.

Now, that's where the world was left. So, the question is, assuming 103, 106 and 107 -- that's right. If 103, 106 and 107 are written correct, and I'm going to assume that they are, the question is, do we repeal 102? I think that's kind of an easy one -- and 104 -- and make the conforming change in 105. And I thought my world was pretty simple that we would discuss Rule 99 in whether we want to put into one rule "process" in the contents of it.

CHAIRMAN SOULES: Let's get 102 through 107 first. Can we do that?

MR. TINDALL: Sure.

PROFESSOR DORSANEO: I have --

CHAIRMAN SOULES: In that group of rules, does anyone have any housekeeping changes?

JUSTICE WALLACE: I have.

CHAIRMAN SOULES: Okay, Judge Wallace.

JUSTICE WALLACE: Now, we can change 103 to permit constable -- sheriffs, constables or any other person authorized by law or by the Court or the legislature is going to do it. And I suggest that we do it because private process servers are well organized. They've got their lobbyists hired and lobbyists are working. And either we include those private processers too -- as authorized by law, which when you get down to it is substantive matter as opposed to procedure, I think -- or the legislature is going to do it for us.

So, I urge you to look very closely at that. All we have to do is say, "sheriff, constable or other person authorized by law or person authorized by the Court." Not unless the Court tells your secretary if she wants to she can serve, or your investigator or whoever.

CHAIRMAN SOULES: That's a good suggestion. Thank you. Let's look at Rule 103 just a minute. It's on page 39. In the fifth line, "or (2) by any person authorized by" -- subject to Justice Wallace's suggestion there, I think it ought to be "by law or by written order of," and then continue the sentence to "age" in the next line and then strike "who is authorized by written order," because that's got some redundancy in it anyway.

MR. TINDALL: Luke, let me suggest this. Would this not say the same thing: "All process may be served by any sheriff or constable or other person allowed by law," period. I mean, "or (2) any person authorized by the Court." And then if the laws change the rules conform.

CHAIRMAN SOULES: Well, we wanted -- well, we wanted the authorization of the Court to be limited to a written order. That's been debated here and settled.

MR. TINDALL: No, I agree.

PROFESSOR DORSANEO: That doesn't change it. He's just putting the authorized by law person in one along with the other authorized by law people, sheriffs and constable.

MR. MCMAINS: That's right.

JUSTICE WALLACE: Any sheriff or constable or other person authorized by law, and then down to "(2)."

MR. TINDALL: That's right.

PROFESSOR EDGAR: Any "sheriff," comma "constable," comma --

MR. TINDALL: -- "or other person authorized by law," and then if we have the legislature authorize the bonded servers, the rule is consistent. That's what you were getting at.

PROFESSOR DORSANEO: Because they're probably going to regulate them, too, and all that.

MR. TINDALL: That's right.

JUSTICE WALLACE: Well, what they've worked out and the plan is to let this commission on whoever is licensed -- private detectives also certified or whatever they do, those individuals, private process servers. As I understand, there will be some bond required and that sort of thing. Now, Bill Clayton is representing them and, as I understand, that's pretty much what they've got the skids greased for.

MR. TINDALL: We have a new governor.

PROFESSOR DORSANEO: Okay.

MR. TINDALL: The old former governor-to-be vetoed what they pushed through.

JUSTICE WALLACE: Well, they vetoed it at the request of the Court subsequent to -- we told them we would take care of it by the rules.

MR. TINDALL: Oh, okay.

CHAIRMAN SOULES: And we're doing it.

MR. TINDALL: And we're doing it. Okay.

CHAIRMAN SOULES: Okay. So, thank you for that suggestion, Justice Wallace.

PROFESSOR DORSANEO: Can we go back to 102, 103? Are you ready for that one?

MR. RAGLAND: May I ask a question on 103 before we get off on it, Luke?

CHAIRMAN SOULES: Yes, sir. Tom Ragland.

MR. RAGLAND: I have some concern that the old rules -- the proposed rule makes a distinction between citation on the one hand and other process on the other hand. They're entirely different. They serve an entirely different function at different time frames. And I figure that if we don't add under the proposed 103 here

to say "all citation and other process," you're going to have some deputy constable in Oglesby, Texas who is not going to serve anything but citations or he's not going to serve the citation.

CHAIRMAN SOULES: Any objection to inserting the words, "citations and others" between "all" and "process" in order to make that very clear?

PROFESSOR DORSANEO: Second.

CHAIRMAN SOULES: No objection. That's unanimously, then, accepted as a suggestion.

PROFESSOR EDGAR: That's going to be "all citations and process"?

CHAIRMAN SOULES: "And other process." Is it "other process," Tom, or is it just "citations and process"?

MR. RAGLAND: Yeah.

CHAIRMAN SOULES: Citation one kind of process.

MR. RAGLAND: Luke, in our county -- it's probably the same or similar in other counties. In addition to the regular citation where you initiate an original lawsuit, they have

15 different forms that they're required to serve. Family law codes, for example, have some specified forms that you serve notice of different fashions on. And so I think all --

PROFESSOR EDGAR: Well, that should be plural. Shouldn't it be "processes" instead of "process"?

MR. RAGLAND: Yeah.

CHAIRMAN SOULES: No.

PROFESSOR EDGAR: Well, say citations. Is "process" singular or plural? I'm just asking.

MR. TINDALL: It should be "citations." No, "citation and other process."

PROFESSOR EDGAR: I don't want to say "all."

CHAIRMAN SOULES: Just strike the word "all" and say "citation and other process."

MR. MCMAINS: How about "any citation or other process"?

CHAIRMAN SOULES: "Any citation or other process."

PROFESSOR EDGAR: Just say, "citation and process may be served."

MR. TINDALL: That's it.

PROFESSOR DORSANEO: Yeah. Avoid the English problem.

CHAIRMAN SOULES: How about "other process," -- no.

MR. TINDALL: "Citation and other process."

CHAIRMAN SOULES: "Citation and other process."

MR. MCMAINS: We say "may." Do we want to say "may" or do we want to say "shall"? Is there any other vehicle other than provided --

MR. RAGLAND: Well, the statute requires sheriffs or constables specifically to execute the --

CHAIRMAN SOULES: Tom, would you want "shall" to be inserted for "may" there?

MR. MCMAINS: No, it says "all process may be served."

MR. RAGLAND: Well, the problem with that is --

CHAIRMAN SOULES: Okay.

MR. RAGLAND: If you leave it optional there, of course, there's a statute that requires the sheriff or constable to execute papers of the court, but it doesn't require individuals to do

it. I don't think you can require it.

MR. MCMAINS: It infers that there's some other ways. That's all.

CHAIRMAN SOULES: Okay. How many -- what was the 102 now? We're going to go back to 102 before we vote on that. Apparently somebody wanted to do that.

MR. TINDALL: Well, 102 was Bill's suggestion that we don't need that.

PROFESSOR DORSANEO: I have one question about 103. I thought I heard you say that the sheriffs or constables would have statewide jurisdiction under 103. Is that what you intend?

MR. TINDALL: That's right.

PROFESSOR DORSANEO: I don't think 103 says that at all.

MR. TINDALL: Well, we deleted that it would be in the county in which the party is to be served -- or the constable of the county in which the party to be served or found. Take that out. Now as the real world --

PROFESSOR DORSANEO: Well, yeah, but that's one of those things -- you take that out, it's no longer there -- if you were at this

meeting, you would kind of know what that means but otherwise you don't.

JUSTICE WALLACE: Adding the word "any" there in front of sheriff or constable will take care of that.

MR. TINDALL: That's right. The real world is you're not going to have a sheriff in Travis County serving someone in San Antonio. I mean, that's just not going to happen. But we don't want to get into a problem where a constable in one precinct can't serve someone in another precinct, or in a Dallas/Fort Worth metroplex, it's awful trying to serve someone around D.F.W.

CHAIRMAN SOULES: That's not necessarily so. I may be able get the sheriff of Floresville to drive down to McAllen and serve somebody for me if I need him to do that.

MR. TINDALL: You may. But I'm saying that --

PROFESSOR DORSANEO: But I think he's going to need to know that he can.

CHAIRMAN SOULES: Well, let's try it this way to see if it works before we put more language in there because it says "any."

PROFESSOR DORSANEO: All right.

CHAIRMAN SOULES: Verbally, it's correct. Rusty.

MR. MCMAINS: Well, except that -- read the stuff which it says "authorized by law." I mean, when we put the "authorized by law" we know why we did it. But if you say "any sheriff or constable or any other person authorized by law," if somebody -- if the sheriffs and constables read that, the "authorized by law," as modifying all of them, they may take the position, well, under the law, I don't have jurisdiction outside my county.

MR. TINDALL: Well, look at that --

PROFESSOR DORSANEO: Throughout the state somewhere --

MR. TINDALL: How can we put the comment that's down below -- I don't know how we put comments into the rules, Luke. See the change down below? Do we -- can we --

CHAIRMAN SOULES: It will be in the rule book.

MR. TINDALL: We can make that as a comment as part of the rule, then I think it's very clear, Rusty, the change at the bottom becomes -- do they call them note?

JUSTICE WALLACE: I believe it says comment.

MR. TINDALL: Comment, that's right. If we can make that as part of our proposal, comment --

MR. RAGLAND: Well, the duty of sheriffs and constables to serve papers is statutory. That's not a rule. I mean, there's a specific statute that says they shall serve. It's Article 6873.

PROFESSOR DORSANEO: Probably not anymore. Probably somewhere in the government code.

MR. RAGLAND: No. It's still in the same place.

PROFESSOR DORSANEO: Could you change your comment, if that's going to be part of it, further sheriffs or constables are not restricted to service in their counties or precincts?

MR. TINDALL: Sure.

PROFESSOR DORSANEO: Or something like that.

PROFESSOR EDGAR: In their respective counties or precincts.

MR. TINDALL: Are not restricted to

service in their respective counties or precincts.

PROFESSOR DORSANEO: That's probably a pretty good way to go about it.

CHAIRMAN SOULES: Okay. What about, now, 102?

MR. TINDALL: 102 was the one that is the old Pennoyer versus Neff legacy, I guess, that territorial service is limited -- or is affected statewide.

CHAIRMAN SOULES: It's really affected beyond that.

MR. TINDALL: That's right.

CHAIRMAN SOULES: All in favor of repealing 102, show by hands. Opposed? That's unanimous. Did I see a hand go up in opposition?

MR. SPIVEY: No, I was voting late.

PROFESSOR DORSANEO: Slow voter.

CHAIRMAN SOULES: It's unanimous that we repeal 102. Those in favor of 103 as it's been restated together with the expanded comments, show by hands. Opposed? That's unanimous. Those favoring the repeal of Rule 104, show by hands. Opposed? That's unanimous. Those in favor of the change to Rule 105, show by hands.

MR. RAGLAND: May I speak to that?

CHAIRMAN SOULES: Yes, sir. Tom Ragland.

MR. RAGLAND: Luke, in connection with 105, I think we ought to look also at Rules 15, 16 and 17 that is stuck over here in an out-of-the-way place that address the same issues as some of these rules. I see no need in having rules dealing with service and the duties of the officers over here under the general rules, 15, 16 and 17.

MR. MCMAINS: You're in the old rule book.

MR. RAGLAND: Yes.

PROFESSOR DORSANEO: Well, I end up coming from the other direction. I think maybe Rule 103 belongs in the general rules about all writs and processes rather than over here in citation.

MR. RAGLAND: Well, wherever it belongs, it all belongs in the same place.

PROFESSOR DORSANEO: I agree with that.

MR. RAGLAND: I mean, if you put them in the index --

CHAIRMAN SOULES: Let's give Harry another job to reorganize these for our next --

MR. TINDALL: 15, 16 and 17?

CHAIRMAN SOULES: And this series of 100 rules.

PROFESSOR EDGAR: They seem to relate one to the other.

MR. TINDALL: Well, yes and no. I see problems. The courts in our county can issue a writ of attachment to go pick up a child. That is -- you know, that's a different creature from a citation advising someone --

MR. MCMAINS: It's process.

PROFESSOR DORSANEO: See, we're screwing up again here on the overall scheme of things because this part of the book is citation, Section 5 Citation. We have Rule 103 that talks about citation and other process. You've got to be -- you've got to ignore the organization in order to find that rule when you're talking about writs of injunction or something like that.

MR. TINDALL: Let me --

CHAIRMAN SOULES: There may be a rule that tells you to ignore the organization.

MR. TINDALL: Let me -- I plowed

through this 14, 15 -- I mean 15, 16, and 17. But there's a lot of other rules that deal with sheriffs and constables serving. What about an attachment as a form of process?

MR. MCMAINS: It's a writ.

MR. TINDALL: It's a writ, but it's a process. Anything issued by the Court, you've got injunctions, maybe you want that people can serve injunctions, but what before an execution. I don't want all this to -- I don't think we want persons other than sheriffs and constables out seizing property or taking children. I don't. So, I'm saying, we're going to get -- we're going to open up more -- you see?

PROFESSOR EDGAR: Well, the fact that 15, 16, and 17 relate to process and that there are other rules relating to process does not, to me, indicate that they ought to be in the same place. Now, I don't -- functionally, I don't see any problem with 15 and 16 being where they are and what we're now talking about being up over here somewhere else.

MR. TINDALL: Yeah, but citation --

PROFESSOR EDGAR: That doesn't offend me.

MR. TINDALL: We're dealing with citation and the associated orders that go with citations, which are typically restraining orders, show cause matters and other typical papers that we want served incident to preliminary hearings.

JUSTICE WALLACE: Notices.

MR. TINDALL: Notices, that's right. Not the taking of people or property or the --

MR. RAGLAND: Well, that emphasizes exactly the point I'm making. There are so many variable -- various types of writs or processes; whatever label you want to put on them that there ought to be some effort to put at all in one location.

MR. MCMAINS: Well, except I don't -- I'm not sure that conceptually, though, that we are prepared as a committee to say that we want a sheriff in Harris County going and executing on property or attaching property or sequestering property and trying to be responsible for storing it in El Paso.

MR. TINDALL: I don't. I agree with with Rusty.

MR. RAGLAND: If you get one of them to do it, I'd like to see it.

CHAIRMAN SOULES: All I'm suggesting is that the discussion that we're having be reduced to some study at whatever level by Harry's committee, if you can.

MR. TINDALL: Well, I will take on a further study because I struggled with what you do with a -- do you want a court authorizing the service of a garnishment on a bank by a non-sheriff? Yeah, that doesn't offend me to tell a bank they can't discharge release of money.

But do I want a non-sheriff or nonconstable taking a boat out of someone's yard on the execution of judgment? I don't think so. I mean, it seems to me if it's notice-type court papers that we want individuals authorized to do that.

MR. RAGLAND: Harry, I agree. The only point I'm trying to make is that whatever procedure, if this committee comes up with a procedure for these special writs, execution and that sort of thing, that it seems to me that for the convenience of the lawyers and the bench, that it ought to be in the same -- you know, within the same section of the rule book rather than have to skip around here, there and yonder for it.

MR. TINDALL: Well, the problem with

that, Tom, is -- I went through all those ancillary writs in the back. There's, you know, trespass to try title -- all those specifically zero right in on a sheriff or constable, and I didn't want to tamper with those rules. And if we delete 14, 15 and -- 15, 16 and 17 over -- we're beyond what I want to do, which was to allow that citation and the restraining orders to be served by people authorized by the Court or by law.

CHAIRMAN SOULES: Harry, if you will take on the job of trying to study for reorganization and resubmission, great. But we've got -- we'll move on. Right now we're just on these rules.

MR. SPARKS (SAN ANGELO): One problem is, as he reorganizes it, you do have a problem because it says, "citation and other process." And I'm telling you as private investigators, I've had a few of those around me, and it says "other processes," by God they will go levy on the car or -- you know, I'm telling you, if you don't have it somewhere delineated that they can't, they are going to think they can.

PROFESSOR DORSANEO: I'm beginning to think we ought to take that process out.

MR. SPARKS (SAN ANGELO): Harry, that's just a point for you.

MR. TINDALL: I would -- well, you see when we get to the next complication which is the Committee on Administration of Justice, the way I had drafted is "citation." That's really what we're dealing with. And, to me, the restraining order is the subspecies of the citation, frankly. So that sort of goes away.

I would urge us to reconsider that it be "citation may be served by." 103. That's what we're dealing with in this whole thrust of the rules. And I would urge that as a reconsideration.

MR. RAGLAND: Harry, would it address -- I think what you're saying has merit, of course, as usual. But on 103, would it answer that to say "citation and other notices"?

PROFESSOR DORSANEO: That might work, too. I was thinking about that.

MR. TINDALL: Sure.

MR. RAGLAND: That gets it out of the --

MR. TINDALL: Taking of property or people. Yeah, citations and other notices.

Sure.

CHAIRMAN SOULES: That makes sense.

MR. TINDALL: I'll accept that.

PROFESSOR DORSANEO: Good suggestion, Tom.

CHAIRMAN SOULES: That's a good suggestion.

PROFESSOR DORSANEO: Does anybody actually supervise service anymore? I mean, anybody in this room. I mean, do you --

CHAIRMAN SOULES: My help does.

MR. TINDALL: Yeah, I struggled with it.

PROFESSOR DORSANEO: Because I had a question. We're probably not there yet on whether there is still delivery restricted to addressee only.

CHAIRMAN SOULES: No, there's not. That's coming up.

MR. TINDALL: That's coming up.

CHAIRMAN SOULES: Okay. Let's get through these -- this bunch, and then we're going to talk about a special problem that may make sense, but we'll see.

We're going to repeal 104. We're going to do

103 except we're going to say "citation under notices." 105 is -- that suggestion is unanimous. 106 is, again, housekeeping, isn't it?

MR. TINDALL: Yes.

CHAIRMAN SOULES: Those in favor of the suggested changes to 106, show by hands. Opposed? That's unanimous. 107, again, that's housekeeping as well, isn't it?

MR. TINDALL: Yes.

CHAIRMAN SOULES: All in favor of the 107 suggestion, show by hands. Opposed? Again, that's unanimous.

MR. TINDALL: Okay. Look, if I can --

MR. SPIVEY: We've got lunch out there and I'm hungry, and it's 10 after 12:00.

CHAIRMAN SOULES: We've got to do two things. This next thing is so connected. All it says -- and Harry is going to report on it. Oliver Heard wanted to tell us one thing about the Administrative Rules -- something of the new proposals that have come back from the COAJ. And I advised Oliver that we have not expressed a lot of interest in pushing the Administrative Rules to reality, but he still wanted to address us on a minor point -- an important point but not a real

broad point. So let's get the citation here finished and then get to that.

MR. TINDALL: We didn't do 99 to 102 incorporating that into one rule. That's what Bill had suggested.

CHAIRMAN SOULES: Well, do you want do interrupt this and hear Oliver and come back to citations after we eat? Maybe that's a good idea.

MR. TINDALL: Yes.

CHAIRMAN SOULES: Okay. Oliver, why don't you take a few minutes? This is Oliver Heard. Oliver is interested in the -- of course, all of you know Oliver from my own town of San Antonio. He's interested in the collection -- debt collection aspects of the new Administrative Rules and some of the suggestions that have come for changing that part of those rules, which suggestions have come from the committee on Administration of Justice and the State Bar concerning it. Oliver, please give us your views on that. Thank you.

MR. OLIVER: I don't want to take more than a minute or two. I was contacted this morning to the effect that the committee on Administration of Justice had taken the

declaration rule that they had some subcommittee that made some kind of recommendation that I've never seen and it was sent on to here.

I don't want to deal with the question of whether the Administrative Rules ought to be passed or not passed or any of that. I was asked, because my law firm does a lot of collection, primarily of taxes, to write that rule. And we've spent a lot of time working on it, had several lawyers on it and met with a professor from California and all this sort of thing and back and forth and knocked it around.

And I think we got a pretty good workable rule there if you ever want to do the whole thing. If you don't, you know that dies with the rest of it. That's fine, too. But I wouldn't like to see that thing greatly tampered with without some opportunity for the people who drafted it to tell you why they did it. And that's really all I've got to say.

Really, all it is -- all that rule is, is it divides -- it identifies collection cases as cases in which there are no factual or -- no factual or legal disputes. Simply, you know, are going through the process. The second anybody certifies

that there is a bona fide factual or legal dispute, it goes into the civil trial docket.

But it's to try to take out of the docket the one-third or one-fourth or one-half of the cases that are collection cases in various stages of settlement and in bankruptcy where necessary parties haven't been served and that sort on thing.

And basically the way it works is when a collection case is filed, it goes on the suit pending docket. When all necessary parties have been served, it goes to the active docket. If it's in the process of being settled and a written settlement agreement is made, it goes to the settlement docket. If one or more of the defendants take bankruptcy, an action is stayed, and it goes to the bankruptcy docket.

Then from a numerical standpoint, the only thing that reflects is active trial of business of the cases on the active docket. And I want to say one other thing about it, and that is, that these four dockets don't change, from the clerks standpoint, the chronological method by which the -- by which the cases are filed. You just separately identify them and you file -- which

they're doing now, by and large -- and you file them, you know, by the order in which they come in.

You maintain these four dockets either in the docket book or on a computer. And those counties that want to do it by computer, there was discussion that it's going to cost a lot of money. Let me tell you, this is a 3 or $4,000 total problem in terms of software, hardware and everything else. There's nothing to it.

So, I just wanted you to know that and if you ever get to considering this thing -- I don't mean to waste your time. If you ever get to considering it, I sure would like to be heard on the merits of the rule, the way it's constructed, because there was a lot of time and energy that went into it and we think it's a good rule in the context of the overall.

CHAIRMAN SOULES: Oliver, thank you for your interest. We appreciate it. Broadus says he wants to break for lunch. Since we had that interruption, why we might as well break. What do you think Broadus?

MR. SPIVEY: I think I like that.

CHAIRMAN SOULES: Will you second

that? Will you second your own motion for that?

MR. SPIVEY: I'll be easier to get along with after lunch.

(Recess - lunch.

(End of Volume I.

REPORTER'S CERTIFICATE

THE STATE OF TEXAS X
COUNTY OF TRAVIS X

I, Chavela V. Bates, Court Reporter for the State of Texas, do hereby certify that the above and foregoing typewritten pages contain a true and correct transcription of all the proceedings directed by counsel to be included in the statement of facts in SUPREME COURT ADVISORY BOARD MEETING, and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

I further certify that my charge for preparation of the statement of facts is $_____.

WITNESS MY HAND AND SEAL OF OFFICE this, the _____ day of _____, 1986.

_____

Chavela V. Bates, Court Reporter
316 W. 12th Street, Suite 315
Austin, Texas 78701 512-474-5427

Notary Public expires 09-30-89
CSR #3064 Expires 12-31-87

Job No._____