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SUPREME COURT ADVISORY BOARD MEETING
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Austin, Texas 78701
November 7, 1986

(VOLUME II)

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SUPREME COURT ADVISORY COMMITTEE

TRANSCRIPT OF PROCEEDINGS

NOVEMBER 7, 1986

VOLUME II

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1 SUPREME COURT ADVISORY
2 BOARD MEETING
3 November 7, 1986
4 (Afternoon Session)
5
6 CHAIRMAN SOULES: What is the 99?
7 MR. TINDALL: Okay. If you'll turn in
8 your -- if you've got your rule book, turn to page
9 144 and look at Rules 99, 100 and 101. And when I
10 circulated the first draft, you know, I started
11 with 103, but it kind of spilled over to 102. And
12 then someone suggested that we combine Rule 99,
13 which is sort of the content -- the issuance of
14 content to citation into one rule.
15 And so, if you'll see what I did on page 37
16 on your handout, part of it, in combining it, I
17 took inspiration from the Federal Rule 4, but it's
18 no substantive change.
19 CHAIRMAN SOULES: Okay. Do you have
20 any -- is there anything troubling about this?
21 MR. TINDALL: No, I thought it was --
22 I think it was Bill who suggested that we combine,
23 and I have no pride in authorship. Rule 99 starts
24 out -- well, you can read what it is and I just --
25 that's a point really -- the citation issuance,

1 and then you go to the form of the citation and
2 the other one about other -- Rule 100 didn't seem
3 to say much. And then you have the requisite,
4 which I said form the citation. The rest of it
5 seemed to be a redundancy.
6 CHAIRMAN SOULES: Okay. Does anyone
7 have any --
8 PROFESSOR EDGAR: I'm just looking at
9 Rule 101, current Rule 101. And it just says the
10 citation shall be styled "The State of Texas," and
11 I don't see that in here.
12 MR. TINDALL: No. And I'll tell you
13 why. That got back to what Tom Ragland pointed
14 out, I think, that you go to Rule 15. And it
15 says, "The style of all writs and process shall be
16 'The State of Texas.'". So, it was already covered
17 by Rule 15.
18 CHAIRMAN SOULES: Writs and process.
19 Why don't we --
20 MR. TINDALL: See, when you go to Rule
21 15, which we're not tampering with today, it says
22 that it will be styled "The State of Texas."
23 CHAIRMAN SOULES: But it doesn't say
24 anything about citation.
25 MR. TINDALL: Well, not -- writ or

1 process, and a citation would be a form of
2 process. So, it was -- I didn't put it into 99.
3 CHAIRMAN SOULES: It wouldn't be -- it
4 wouldn't take much to put the citation, "shall be
5 styled 'The State of Texas' and be signed by the
6 clerk."
7 MR. TINDALL: Oh, no, certainly not.
8 It's just conceptual -- if you want the issuance
9 and the content of the citation in one rule, then
10 we would combine 99, 100 and 101 into one rule.
11 CHAIRMAN SOULES: Do you see anything
12 else major or minor, Hadley?
13 PROFESSOR EDGAR: Well, it just -- 101
14 continues on it. It says, "It shall date the
15 filing of the petition, it's file number," and I
16 don't see that in here. And I think it ought to
17 have that in it.
18 MR. TINDALL: Well, let's see.
19 PROFESSOR EDGAR: And the style of the
20 case, I think that ought to be in there.
21 MR. TINDALL: Why don't I pull this
22 one down?
23 PROFESSOR EDGAR: And it also says
24 that it shall be accompanied by the copy of the
25 plaintiff's petition, and I don't see that in

1 here.
2 MR. RAGLAND: It's got the 90 days --
3 MR. TINDALL: Let's pull it down,
4 Luke.
5 CHAIRMAN SOULES: Okay.
6 MR. TINDALL: I don't want to rewrite
7 it here.
8 CHAIRMAN SOULES: We'll just table and
9 --
10 MR. TINDALL: But if you want to, I'll
11 continue to combine that into one rule.
12 PROFESSOR DORSANEO: Uh-huh.
13 CHAIRMAN SOULES: We'll table this
14 until the next agenda -- until the next meeting.
15 MR. TINDALL: Now, have we finished
16 102 to 107, Luke? Because that's what I had
17 worked on.
18 CHAIRMAN SOULES: Yes.
19 MR. TINDALL: I got your mailer this
20 week.
21 CHAIRMAN SOULES: Yes.
22 MR. TINDALL: Now, life was going
23 along relatively smooth until we got this
24 Committee on Administration proposal.
25 CHAIRMAN SOULES: Incidentally, Pat

1 Hazel, a friend of all of us, is here. Pat is the
2 chairman of the Committee on Administration of
3 Justice, and he's got them moving effectively
4 hearing -- working on new rules.
5 And they did have a meeting recently and
6 approved some things for us, which that's what
7 Harry is saying here. He got some things late,
8 but that's good because we want to get them all
9 reviewed.
10 Pat, we're going to report on one of the
11 rules that you had on your committee. Now, Harry
12 is going to report on the citation rules.
13 MR. TINDALL: Pat, I'm sorry I missed
14 your calls. I did call you on this. Let's
15 assume, because this gets a little intricate --
16 let's assume 102 through 107 is as we voted here
17 today, and then overlay those changes with what I
18 have just handed you. And I'm sorry, I gave away
19 my only -- do you have one, Luke?
20 CHAIRMAN SOULES: I've got two, thank
21 you.
22 MR. TINDALL: All right. First of
23 all, the committee -- if you will look back now,
24 to sort of tell you where we're going -- look on
25 Rule 103. Assume that the changes on 103 that

1 I've got here have the changes the we voted today
2 so that it would say, "Citation and other notice
3 may be served by any sheriff or constable or other
4 person authorized by law." That would be our
5 change.
6 The key change is that the Committee on
7 Administration of Justice informs us that you
8 cannot have restricted delivery of -- restricted
9 delivery of certified or registered mail to the
10 addressee only. So that, really, we do not have
11 an effective way of serving someone by mail and
12 getting a green card back.
13 PROFESSOR DORSANEO: Getting a
14 green --
15 MR. TINDALL: What?
16 PROFESSOR DORSANEO: That's just not
17 delivery of restricted addressee only, now, right?
18 MR. TINDALL: That's right. You don't
19 get that any longer.
20 CHAIRMAN SOULES: So, you cannot serve
21 by mail. You cannot serve by mail.
22 MR. TINDALL: You could get lucky and
23 get the defendant to sign it, I suppose.
24 CHAIRMAN SOULES: Yes.
25 MR. TINDALL: But you can't restrict

1 it to the addressee only.

2 CHAIRMAN SOULES: If that gets the job

3 done, if he signs it. I guess it does. I mean,

4 it sounds silly but service has been pretty

5 technical.

6 MR. TINDALL: That's right.

7 CHAIRMAN SOULES: And if you don't

8 mail with restricted to addressee only, certified,

9 you have not literally complied with the rules and

10 you cannot restrict addressee only -- post office

11 -- with no -- its notice available.

12 PROFESSOR EDGAR: When did they quit

13 that?

14 MR. TINDALL: The Committee on

15 Administration of Justice says about a year and a

16 half ago.

17 PROFESSOR DORSANEO: Yeah, a long time

18 ago.

19 MR. HAZEL: It was quite awhile ago.

20 MR. TINDALL: So, what we have here,

21 then, is 103 purged of the provision that service

22 by registered or certified mail is deleted. So

23 that you simply say, "service of citation by

24 publication."

25 We purged 103, as we voted on it before

1 lunch, of any reference to service by mail.
2 That's the only change that would be done to 103.
3 We voted on it before lunch to incorporate what
4 the Committee on Administration of Justice has
5 proposed.
6 PROFESSOR DORSANEO: There still is
7 certified mail and registered mail.
8 MR. TINDALL: Yes. But it's
9 restricted delivery only, not addressee only.
10 PROFESSOR DORSANEO: Well, I don't see
11 why we can't use service by mail and just use the
12 service by mail that's available even though it's
13 different.
14 MR. TINDALL: Well, we come to that in
15 the next rule.
16 PROFESSOR EDGAR: What you're
17 suggesting, then, is on page 39 that we just
18 simply delete "service by registered or certified
19 mail." Is that what you're saying?
20 MR. TINDALL: That's right. "Service
21 by registered or certified mail and" would be
22 stricken so that it would say, "citation by
23 publication," you see.
24 PROFESSOR EDGAR: Well, "service by
25 citation." You would strike out "registered or

1 certified mail and" --
2 MR. TINDALL: That's correct.
3 PROFESSOR EDGAR: Okay. I just wanted
4 to know what you're proposing.
5 MR. TINDALL: Okay. So that it would
6 read "Service of citation by publication shall, if
7 requested."
8 CHAIRMAN SOULES: Then we're going to
9 come up with a new way to serve by mail.
10 MR. TINDALL: Yes. Now, that's the
11 only change on 103, if you want to go with what
12 the Committee on Administration of Justice had
13 done.
14 Now, turn, if you will, your attentions to
15 106. And let me tell you what this long --
16 because it's a long, long proposal. It goes on
17 for two and a half pages.
18 PROFESSOR DORSANEO: It's a copy of
19 Federal Rule 4, basically.
20 MR. TINDALL: It's exactly Federal
21 Rule 4 with about the only changes using the words
22 "citation" instead of "summons" and using the word
23 "petition" instead of "complaint." And what it
24 would mean is that under 106, you either serve
25 them in person or, in the alternative, you can

1 mail it to them and they have 20 days to -- well,
2 read what it is. You'll see.
3 You mail it to them, and if they get it and
4 they want to accept that kind of service, they can
5 and they mail you back the return. If they don't
6 cooperate with you and you have proof of service
7 on them and you have to serve them by sheriff or
8 constable, then the Court will tax the cost which
9 you go through against the defendant unless for
10 good cause shown.
11 PROFESSOR DORSANEO: So, if they don't
12 send you back the acknowledgment, you're back to
13 go.
14 MR. TINDALL: That's right.
15 PROFESSOR DORSANEO: If I advise my
16 clients to throw away the notice and
17 acknowledgment and we have no alternative other
18 than some court order mechanism or something like
19 that.
20 MR. TINDALL: That's right.
21 PROFESSOR DORSANEO: That's what I
22 don't like about the federal rule because if they
23 don't send back the damned acknowledgment, then
24 you haven't accomplished anything.
25 MR. TINDALL: Except this, and this is

1 where I'm open to it: You have thousands of debt
2 cases and you have thousands of tax cases. And I
3 don't know if it would be an economic alternative
4 in those hundreds of thousands of cases if they
5 couldn't mail them out. If they mailed out a
6 thousand of them, they got four or 500 of those
7 defendants to sign receipt of the papers, that
8 they have avoided a lot of expensive service.
9 Department stores suing on their accounts.
10 The one thing I changed from the Committee on
11 Administration, Pat, after talking to Luke, was it
12 would be an alternative method of service, not --
13 the federal rules mandate, as I read them, that
14 you go with the mailing before you can go to the
15 marshall.
16 PROFESSOR DORSANEO: No. The federal
17 rules don't do that. The federal rules say you
18 follow the state rules or you do this notice and
19 acknowledgment.
20 MR. TINDALL: Okay.
21 PROFESSOR DORSANEO: All right.
22 MR. TINDALL: Now, I'm not that -- I
23 don't practice in those courts that much.
24 PROFESOSR DORSANEO: And really
25 that's --

1 MR. TINDALL: That's about what we've
2 done here. If we authorize a sheriff or constable
3 or other persons by law, appointed person, or by
4 this mailing method, we've got a pretty close
5 match to the federal method.
6 PROFESSOR DORSANEO: Okay. But the
7 federal method is supplemented by the state
8 method, and we kind of --
9 MR. TINDALL: If we have our method
10 and the mail method, you see --
11 PROFESSOR DORSANEO: Federal Rule 4 is
12 not a great rule. And the main problem is that if
13 they don't send back the acknowledgment, then you
14 basically have accomplished nothing whatsoever.
15 MR. TINDALL: Well, I talked to people
16 that do more federal practice. I do nil, so I
17 can't comment upon its efficiency other than it
18 hadn't appealed to me for people who file hundreds
19 of lawsuits. To me, it delays your citation by 20
20 days because if I have a rush, I'm going to hire
21 someone to go serve the papers. I don't have to
22 wait 20 days to do it. So, I made that -- that's
23 what I didn't like about it.
24 MR. HAZEL: I know there's -- one of
25 the problems the federal has had, there are two

1 lines of cases in the circuit courts on whether
2 they get actual notice, and you can prove that
3 even though it didn't whether that's still good or
4 not. One line is saying "yeah" and the other is
5 saying "no." You've got to go back and serve
6 them.
7 One of the things that this does, you don't
8 have to -- if this doesn't succeed, you don't get
9 it back in the 20 days, you can immediately go to
10 the Court for a substituted motion. You don't
11 have that problem, and so you can get -- have the
12 other kind of process served.
13 MR. TINDALL: But, Pat, we cured that
14 this morning. We've authorized --
15 MR. HAZEL: Oh, you're going to cure
16 that.
17 MR. TINDALL: We're going to eliminate
18 all of those affidavits that you've attempted
19 service and so forth. So, the question is, if the
20 rules would allow service by a sheriff, a
21 constable, anyone authorized by the Court or
22 anyone authorized by law in the event the
23 legislature creates a regulated scheme, would the
24 Committee on Administration of Justice still want
25 this mail method? To me, it's not --

1 MR. HAZEL: I think -- all the
2 committee on the Administration of Justice was
3 trying to do, I think, was trying to get rid of
4 the addressee only problem, still providing some
5 way of doing it by mail and trying to use the
6 federal as a model for it, and using it rather
7 than going immediately to having a court order,
8 let it trigger the -- you know, the unsuccessful
9 so that the Court can go ahead and order it.
10 But if you've done away with the need to show
11 some other unsuccessful, you may not need it. I
12 thought one of the things, also, that we had
13 provided -- I thought it was in Rule 103 that the
14 lawyers could mail this. I thought that was --
15 CHAIRMAN SOULES: Yes.
16 MR. TINDALL: That's right.
17 MR. HAZEL: I don't see it on this
18 alternate method. Maybe I'm looking --
19 MR. TINDALL: Maybe I -- no, it would
20 be 106a(1)(2). I tried to take exactly what the
21 Committee on Administration of Justice did.
22 MR. HAZEL: Well, I thought we had put
23 it in 103, saying that the lawyers could do it
24 pursuant to 106. But it doesn't provide --
25 MR. TINDALL: Well, I didn't -- I

1 didn't -- I changed it a little bit, not trying to
2 change the content of what you did. My federal --
3 my federal friends -- friends of mine that
4 practice in the federal courthouse tell me they
5 don't like service by mail. It's awkward, it
6 delays getting papers done, and they just don't do
7 it. They use private process.
8 JUSTICE WALLACE: Does the clerk
9 charge for that citation which you have to send by
10 mail?
11 MR. TINDALL: Yes, you see --
12 JUSTICE WALLACE: And then you would
13 have to go back and pay again to get another
14 citation if that one is not returned?
15 MR. TINDALL: I think that's right.
16 You couldn't just Xerox it and give it to your
17 process server. Isn't that right, Pat?
18 MR. HAZEL: I'm not following what
19 you're --
20 JUSTICE WALLACE: In other words, if
21 you send one out by mail, you're going to have to
22 pay the clerk to issue that citation. If it
23 doesn't come back, then you've got to go down and
24 pay again to get another one by some other
25 method.

1 MR. HAZEL: Yeah, the provision is in
2 there just like it is in the federal rule. If
3 they don't return it, they have got it by mail but
4 won't return it, then you can have the cost
5 charged against them. Now, that sounds more like
6 it's a problem more lawyers aren't going to fool
7 with.
8 MR. TINDALL: That's right.
9 MR. HAZEL: Hell, who's going to go
10 down for a hearing to get $35 or something?
11 PROFESSOR EDGAR: The time expended in
12 that would not be cost effective.
13 MR. HAZEL: That sounds like a
14 ridiculous kind of provision to me. I really
15 don't think the Administration of Justice
16 Committee is at all, you know, enamored of this
17 other than we've got to get rid of that old
18 addressee only because it just doesn't work except
19 unless it just happens to work, if somebody just
20 happens to sign it.
21 PROFESSOR DORSANEO: Well, somebody is
22 going to send back something if it's certified
23 mail, right? Somebody is going to send back some
24 kind of a green card. It's going to come back.
25 Something is --

1 MR. HAZEL: You'll know somebody
2 got --
3 PROFESSOR DORSANEO: There's some
4 return.
5 CHAIRMAN SOULES: No. 106a(2) is
6 dead. Texas has no mail service. You cannot
7 serve by mail in Texas at all because 106a(2) says
8 the only way you can do it is to restrict delivery
9 to addressee only and that is not available.
10 PROFESSOR DORSANEO: Okay.
11 CHAIRMAN SOULES: So, you can -- and
12 service of citation is a very technical thing.
13 PROFESSOR DORSANEO: What is
14 available?
15 CHAIRMAN SOULES: Just because you
16 send it certified mail and you get a green card
17 back signed by agent, you have not complied with
18 the substitute service rule, and if you don't,
19 then you don't have service.
20 PROFESSOR DORSANEO: All right. But
21 we're changing the rule, though.
22 CHAIRMAN SOULES: Now, this -- what
23 this does -- you know, just speaking for it here,
24 I think it does not make sense to mail a copy of
25 the citation, to have to mail a copy of the

1 citation.

2 PROFESSOR DORSANEO: It doesn't. It

3 doesn't at the federal level either because the

4 summons tells you the same thing that this notice

5 tells you.

6 CHAIRMAN SOULES: So, what I think you

7 should do is mail a copy of the petition with this

8 thing on it. Now, why does that help? If, for

9 example, in family law practice, if you represent

10 the petitioner and you send this to the

11 respondent, the respondent and petitioner probably

12 have communications and you can communicate to the

13 respondent that if he doesn't send this

14 acknowledgment back, he's going to have to pay

15 some court costs. There is some motivation.

16 There is some reason for them to take action --

17 that they're going to have to pay the cost of

18 issuing a citation and I think we put in here

19 attorney's fees. Is that in here now, Harry? We

20 talked about that.

21 MR. TINDALL: No, I didn't get that.

22 I didn't have time to incorporate how that would

23 be done, the taxing of it, and just -- what's

24 provided is down at the bottom on the alternate

25 proposal page is that however and unless for good

1 cause -- "Unless good cause is shown for not doing
2 so the Court may order the payment of cost of
3 other methods of personal service by the person
4 served if such person did not complete returning
5 of it."
6 CHAIRMAN SOULES: The cost including
7 reasonable attorney's fees and --
8 PROFESSOR DORSANEO: You would have to
9 change the form then.
10 CHAIRMAN SOULES: What?
11 PROFESSOR DORSANEO: Change the form.
12 And I'm prepared to vote for this if you -- notice
13 an acknowledgment -- if you take out, as you
14 suggested, the citation because that's stupid in
15 the federal rule, too. Because there are
16 alternate ways to provide someone with the
17 information they need to have in order to know
18 what to do after they receive a copy of the
19 petition complaint. Federal rule shouldn't say
20 send the summons either. That's just dumb in it.
21 CHAIRMAN SOULES: Yeah.
22 PROFESSOR DORSANEO: Okay. So, we
23 shouldn't copy what the federal rule has that is
24 silly in that respect. But I don't think the
25 people are going to send back the acknowledgment.

1 I just don't think that they're going to. So, I
2 think we end up with a nice superstructure that's
3 going to accomplish really nothing.
4 MR. TINDALL: Well, that's what my
5 federal -- lawyers in the federal courthouse say
6 it's just not used. Does anyone here have an
7 experience otherwise?
8 CHAIRMAN SOULES: I wouldn't have any
9 hesitation at all using the family law case -- TRO
10 -- saving money.
11 MR. TINDALL: Right. Well, what
12 happens in those is you just write the defendant
13 and tell him to go get a lawyer and you'll serve
14 him.
15 CHAIRMAN SOULES: Yeah, but now he's
16 coasting. He's got the walk. But there is no
17 sanction.
18 MR. TINDALL: That's right.
19 CHAIRMAN SOULES: There is nothing to
20 cause him to send it back.
21 MR. TINDALL: Embarrassment at work.
22 CHAIRMAN SOULES: Yeah, you can say
23 that. But here --
24 PROFESSOR DORSANEO: I mean, this
25 would be fine. It will work when it works, if

1 you're fixing to take that citation part out of
2 it.
3 CHAIRMAN SOULES: Then why not give it
4 a try? I mean -- David.
5 MR. BECK: Well, I just have a
6 question, Bill. When you say take the citation
7 part of it out, you would just be sending them a
8 copy of the petition?
9 CHAIRMAN SOULES: That's right, but
10 see they acknowledge --
11 MR. TINDALL: No, you would send --
12 PROFESSOR DORSANEO: Read this.
13 MR. BECK: Pardon me?
14 PROFESSOR DORSANEO: Read what this
15 letter says.
16 MR. BECK: That's the acknowledgment.
17 PROFESSOR DORSANEO: The notice says
18 -- it says, "You must complete the acknowledgment
19 part of this form and return one copy of the
20 completed form to the sender within 20 days." All
21 right. "If you do not complete and return the
22 form to the sender within 20 days, you may be
23 required to pay any expenses incurred in serving a
24 citation. If you do complete and return this
25 form, you must answer the petition as required by

1 the provisions of the citation." We have to
2 change reference to the citation to say you must
3 answer the petition at a certain interval.
4 MR. BECK: That's what was bothering
5 me because it was a citation telling us what they
6 have to do.
7 PROFESSOR DORSANEO: I didn't read
8 this. I assume it was the same as the federal
9 form. It's a little bit model from being
10 changed --
11 MR. HAZEL: I still want to mention
12 something, though. If you adopt this, it seems to
13 me the only person allowed by these rules to mail
14 this is the sheriff or constable.
15 PROFESSOR DORSANEO: That's right.
16 MR. TINDALL: No.
17 MR. HAZEL: And that's not what I
18 think -- that's not what we intended. We intended
19 for lawyers --
20 MR. TINDALL: I didn't intend -- Pat,
21 I did not intend that in drafting this. I simply
22 took 106 --
23 MR. HAZEL: Well, it doesn't say
24 anywhere in 106, that I see, who can mail it, but
25 103 says who can serve and that's only the sheriff

1 or constable.

2 PROFESSOR DORSANEO: Or authorized

3 person.

4 MR. TINDALL: Well, except for -- all

5 right. I understand what you're saying. But I

6 intended for the attorney to go down, if we

7 adopted this, file the suit, get the citation,

8 bring it back to his office and mail it to the

9 defendant.

10 CHAIRMAN SOULES: I think this ought

11 to be in a different rule, something like "notice

12 of petition," not really "service." This doesn't

13 get service.

14 MR. TINDALL: It really doesn't. It

15 delays it.

16 PROFESSOR DORSANEO: It supposedly

17 works in California. That's where it was copied

18 from. That's where the feds got it, the notice

19 and acknowledgment procedure.

20 CHAIRMAN SOULES: Notice of suit. And

21 I frankly think -- I think there is something

22 unfair about requiring a party who's acknowledged

23 service to answer. I think this ought to be when

24 it's filed by the -- plaintiff's attorney ought to

25 constitute it.

1 MR. TINDALL: Could I propose this,
2 Pat, if this wouldn't do violence to your
3 committee's work? We just voted this morning to
4 make substantial changes in the way the papers can
5 be served that we not adopt this mailing process
6 at this time and let's see how the new provisions
7 for court appointed persons or anyone else
8 works.
9 MR. HAZEL: Well --
10 MR. TINDALL: I'm not trying to fight
11 the Committee on Administration of Justice.
12 MR. HAZEL: No, I understand. I don't
13 think you're going to fight. We set this up
14 primarily trying to handle that addressee only
15 problem. That was the problem.
16 PROFESSOR EDGAR: It's obvious, Pat,
17 and you're right, that 106a(2), as it is now in
18 our rules, is no longer effective. I mean, we
19 can't serve that way any longer and we've got to
20 do something with that.
21 MR. HAZEL: Yeah, that's got to be
22 gotten rid of.
23 PROFESSOR EDGAR: And I --
24 MR. TINDALL: That's a separate issue,
25 though.

1 MR. HAZEL: And we were trying to come
2 up with a federal method if we want a mail
3 method. Now, if you revamp it entirely so you've
4 got -- our big problem we were having, I remember
5 -- because Luke was there -- with getting the
6 private process servers is we didn't want to get
7 the Texas Supreme Court in the having to get in
8 the business of regulating those folks. The
9 legislature is going to have to do that sort of
10 thing. And that's why we wanted to leave some
11 room that that could be put in because we didn't
12 want to put it in.
13 PROFESSOR EDGAR: Well, if we deal
14 with the problem that we know we have, that is,
15 deleting the restriction addressee only, then we
16 kind of get into the problem, though, that you
17 have presented in your alternative here to Rule
18 106.
19 I mean, it seems to me that simply deleting
20 the term "with delivery restricted to addressee
21 only" creates more problems than it solves. I
22 mean, we've got to go further. Am I right about
23 that or --
24 MR. TINDALL: You're right.
25 CHAIRMAN SOULES: You know, when this

1 rule was first adopted -- or recommended by this
2 committee and sent to the Supreme Court, that
3 business with delivery restricted to addressee
4 only was, in my judgment, unnecessary. And I
5 argued against it in this meeting whenever it was,
6 six, seven years ago. Because it was my feeling
7 that if you got a green card back, just an
8 everyday certified return receipt green card back,
9 that appeared to have a signature on the
10 addressee, or if it's not, it's a signature of
11 somebody purporting to be his agent, that that was
12 enough due process. It's probably barely enough,
13 if it is enough.
14 But if it is enough, then you've got him for
15 a default judgment. And I could never see this
16 addressee only working because, you know, as soon
17 as you get to that point in getting the green card
18 signed, you've got somebody's attention and he
19 ain't going to claim it. And that's why it hadn't
20 worked particularly well.
21 PROFESSOR EDGAR: What happens, then,
22 if the defendant's name is John Smith and it comes
23 back signed by Pete Jones?
24 CHAIRMAN SOULES: He can always -- I
25 believe a defendant can prove that you never got

1 personal service and get a judgment voided in the
2 bill of review. Isn't that right?
3 PROFESSOR EDGAR: Yeah.
4 CHAIRMAN SOULES: At any time. So, he
5 comes in, you've got a default judgment, you send
6 notice of judgment. You've got whatever his name
7 is -- John Jones signed on for Sam Smith and it
8 says, "agent of addressee." "John Jones, agent of
9 addressee," that's printed on the form.
10 You take a default judgment, send out notice
11 of default judgment. He either gets it and comes
12 in or doesn't get it and never comes in until
13 execution comes. But even whenever the sheriff
14 shows up on his door, if he can come and show that
15 it wasn't his agent, he doesn't know anything
16 about this, then that default judgment -- and he
17 never had personal service -- that default
18 judgment is voided for lack of personal service.
19 And I always felt that somehow that all played out
20 if you just plain certified return receipt -- is
21 the registered mail still -- does that still
22 exist?
23 MR. TINDALL: Uh-huh.
24 CHAIRMAN SOULES: Okay.
25 PROFESSOR DORSANEO: You still get a

1 green card back, it just doesn't --

2 CHAIRMAN SOULES: It's not addressee

3 only.

4 PROFESSOR DORSANEO: But that never

5 worked anyway. I mean, as you say -- I mean, the

6 postman never did that.

7 CHAIRMAN SOULES: It never did -- no

8 they -- they just take it like a regular green

9 card and you get John Smith or whoever -- whatever

10 names I've been using.

11 MR. HAZEL: That's why they dropped it

12 because the postman --

13 CHAIRMAN SOULES: And it's never been

14 used. Probably if we took out "delivery

15 restricted to the addressee only," the Texas

16 process as it all plays out in all the rights that

17 a judgment debtor has access to probably protect

18 us from the due process challenge.

19 JUSTICE WALLACE: We've got another

20 problem here. If the green card comes back with

21 the addressee's name on it, there's no way you can

22 tell whether he signed it, his kid signed the

23 card, or his wife signed it for him or who.

24 Right now on our bar there's a stack of green

25 cards, about four or five of them. The mailman

1 leaves them there and says, "Sign a couple of
2 these and put it under the mat. When I've got a
3 letter for you, I'll pick it up and I'll leave
4 this for you."
5 And so you don't have the safety of the
6 mailman saying,okay, so and so must sign this so I
7 give it to you." And if our mailman does it --
8 we've had about three in the last month and every
9 one of them follow the same procedure. I assume
10 the entire postal service in Austin is delivering
11 that mail on that same basis. All they want is a
12 card signed and they've done their thing. And
13 you're just begging for problems on default
14 judgments and you try to get one based upon
15 somebody's name being on that green card.
16 PROFESSOR DORSANEO: I think I'm
17 convinced that the notice and acknowledgment
18 procedure, as defective as it might be, is going
19 to work a little bit better than nothing at all,
20 which is what we have if we use certified or
21 registered mail and erase the words "delivery
22 restricted to the addressee only."
23 MR. TINDALL: Well, that gets us back
24 then, you see. If we go that route, Bill, look at
25 the alternate proposal then. 103 sanitizes the

1 reference to mail. And 106 deletes that
2 restriction. 106a(2) is deleted, and substituted
3 in its place is this acknowledgment procedure.
4 CHAIRMAN SOULES: And this needs to be
5 a completely separate rule, though, this thing
6 what we've got here. Because 106 says how people
7 authorized by 103 can effect service, the 106 that
8 we talked about before lunch.
9 Now, we're talking about how lawyers and
10 parties can give notice of suit to others and
11 invite them to acknowledge that they have notice
12 of suit. It seems to me those are -- Hadley, I
13 think you were pointing out, and someone else,
14 that the 106 is restricted to people described in
15 103.
16 PROFESSOR DORSANEO: Although that
17 would be easy to change by modifying (a) -- the
18 introductory language part A -- cover only (a)1.
19 MR. TINDALL: Pat, I did not --
20 CHAIRMAN SOULES: What about this
21 situation, though? Shouldn't -- if a party is
22 going to cooperate to the extent of returning an
23 acknowledgment of notice of suit, when that's
24 filed by the plaintiff, shouldn't that constitute
25 an answer? Why?

1 PROFESSOR DORSANEO: I want to have
2 more -- I want to have the time to answer. See, I
3 want to --
4 CHAIRMAN SOULES: I mean to prevent a
5 default judgment. See, this says if you don't do
6 something else -- and I don't know whether a lay
7 person really is going to read all that or not.
8 He just says oh, I'm just acknowledging the suit.
9 He sends it back. It doesn't really sink in that
10 he's got to do something else.
11 Why isn't this an appearance? Stop calling
12 it an answer. When this is filed, why should it
13 not be the appearance of the person who has
14 cooperated in acknowledging suit? What -- then at
15 least you've got a contact if you want to try to
16 start discovery. He's in the lawsuit. You don't
17 have to serve the citation. And you've got 21(a)
18 and all the alternative methods.
19 PROFESSOR DORSANEO: What you're
20 saying is the notice and acknowledgment procedure
21 that may work reasonably well in the federal court
22 system because of the nature of the cases and the
23 parties may not work so well down in the county
24 court at law where some poor schnook has been sued
25 for, you know, a couple thousand dollars.

1 MR. HAZEL: Well, you've raised
2 another interesting point. If you file one of
3 these things, have you made an appearance and have
4 you waived venue?
5 MR. TINDALL: I know. Venue pleas to
6 the jurisdiction, I mean --
7 MR. MCMAINS: Venue in 120(a). I
8 mean, what do you do with all -- if you treat it
9 as an appearance, then there's a lot of things
10 that are going to go by the board before a lawyer
11 gets in.
12 MR. HAZEL: Yeah, you better not --
13 you better not call it an appearance. This has to
14 be some kind of an acknowledgment of notice.
15 MR. TINDALL: Well, that's all that's
16 in the --
17 MR. HAZEL: It would have no other
18 function except --
19 CHAIRMAN SOULES: Okay.
20 PROFESSOR DORSANEO: Do we want to
21 surrender to the problem that mail service is a
22 real problem and just eliminate a(2) from Rule 106
23 for now?
24 CHAIRMAN SOULES: I'd rather eliminate
25 "restricted to addressee only" and let people try

1 it.

2 PROFESSOR EDGAR: See if it works.

3 CHAIRMAN SOULES: And see if it

4 works. And if somebody wants to try it and take a

5 default judgment, why --

6 MR. TINDALL: I'd go with Luke.

7 CHAIRMAN SOULES: -- power to them.

8 MR. TINDALL: Let's eliminate that.

9 PROFESSOR DORSANEO: And put this

10 notice and acknowledgment thing on for further

11 study?

12 CHAIRMAN SOULES: Put it on our next

13 agenda. I think it's got some -- it really needs

14 some study.

15 PROFESSOR DORSANEO: Maybe check to

16 see how it really is working in California where

17 it apparently is in use in the state superior

18 courts.

19 CHAIRMAN SOULES: See, if it takes

20 another motion to get a default judgment in

21 California, like it does in federal court, then

22 you don't have the same problem with going and

23 filing an acknowledgment of suit that this

24 raises. And, that is, the next thing the guy

25 knows he's got a judgment against him. He thought

1 he was cooperating. That doesn't seem quite
2 cricket (phonetic) to me. Shall we table?
3 MR. MCMAINS: Have you already done
4 the 106 thing you were talking about?
5 CHAIRMAN SOULES: No.
6 MR. TINDALL: We need to go back and
7 amend --
8 CHAIRMAN SOULES: The other thing
9 would be to go to page 42 and 106a(2), line two.
10 Delete only the words "delivery restricted to
11 addressee" only. We've talked about it. Are we
12 ready to vote on that? Those in favor show by
13 hands. Opposed? That's unanimous.
14 Then we'll -- Harry, can we -- of course,
15 we're all in your report but you're get a lot of
16 work. Can you give this some study to the mail
17 out?
18 MR. TINDALL: The other part -- I
19 don't want to delay the change in 106 that we
20 voted on today.
21 CHAIRMAN SOULES: Exactly. No, that's
22 done.
23 MR. TINDALL: Okay.
24 CHAIRMAN SOULES: But as far as
25 referring to --

1 MR. TINDALL: Sure. I'm very
2 interested in this area.
3 CHAIRMAN SOULES: Okay.
4 MR. MCMAINS: What about the default
5 judgment rule?
6 MR. TINDALL: I want to bring -- Bill,
7 I know we talked about it otherwise. Look on 107
8 for a minute, you-all. I want to do something
9 that's always seemed an anomaly to me. Last line
10 about default judgment being on file for 10 days,
11 there's an odd way of computing that. It says,
12 "exclusive of the day of filing and the day of
13 judgment." There's no other rule where you
14 compute excluding the day of the hearing.
15 Everything else, you know, you always exclude the
16 day of filing but you can include the day of
17 hearing.
18 PROFESSOR DORSANEO: Well, actually,
19 the computation rule only works in one type of
20 computation. We have problems with the
21 computation rule, generally, is that it doesn't
22 cover all of the computations that one has to
23 make. For example, it doesn't cover a computation
24 of the time period when you have to take action
25 within a certain number of days before a hearing.

1 The computation rule will not tell you how to make
2 that computation.
3 CHAIRMAN SOULES: It doesn't count
4 backwards.
5 PROFESSOR DORSANEO: It doesn't count
6 backwards.
7 MR. MCMAINS: The fact of the matter
8 is that really and truly this isn't a change in
9 the computation of the matter because it's not a
10 question of the day of hearing. It's -- this says
11 it's got to be on file 10 days. All this is
12 saying is that means 10 days before the hearing.
13 PROFESSOR DORSANEO: 10 full days.
14 MR. MCMAINS: Yeah. Because if you
15 have the hearing on the 10th day, it hadn't been
16 on file 10 days, because a day is defined as an
17 entire business day.
18 MR. TINDALL: Okay. I'm not -- well,
19 when you compute, though, under Rule 4 --
20 MR. MCMAINS: But under Rule 4 you
21 always exclude the day of filing. You know, the
22 day -- the first day is excluded.
23 CHAIRMAN SOULES: That's right.
24 MR. MCMAINS: And the last day --
25 MR. TINDALL: Is included.

1 MR. MCMAINS: -- is included.
2 MR. TINDALL: But this excludes the
3 last.
4 MR. MCMAINS: That means you have it
5 -- but that's when you have to do an act. That
6 means you have until the end of the business day
7 to do the act.
8 MR. TINDALL: You're right.
9 MR. MCMAINS: This is really a rule --
10 one of the backward-looking rules like Luke was
11 talking about.
12 MR. TINDALL: That's right. This is
13 not a within rule; this is a without.
14 MR. MCMAINS: It's got to be filed 10
15 days before you get to hearing.
16 MR. TINDALL: This is a without rule,
17 not a within rule. I'm going to withdraw my
18 suggestion.
19 CHAIRMAN SOULES: Leave it like it is?
20 MR. TINDALL: Yeah. Unless you-all --
21 MR. RAGLAND: Mr. Chairman.
22 CHAIRMAN SOULES: Tom Ragland.
23 MR. RAGLAND: I see absolutely no need
24 for the last paragraph of Rule 107, and I move
25 that we just strike it in its entirety, and that

1 will eliminate all this counting.

2 PROFESSOR DORSANEO: Does anybody have

3 any idea why that is in there?

4 MR. RAGLAND: Absolutely no reason

5 whatsoever.

6 PROFESSOR DORSANEO: But it's not the

7 kind of thing that just would have occurred --

8 would have appeared. There must have been a

9 reason for it sometime.

10 MR. MCMAINS: I strongly suspect that

11 the reason may be of the delay of the citation

12 having been filed and having -- actually getting

13 to the file.

14 MR. RAGLAND: It would make no

15 difference, though. I mean, the citation is

16 timely served and the answer date has not yet come

17 about, you can't get a default judgment. If it

18 has, there's no need to give them another 10

19 days. If the defendant is served on the 1st day

20 of the month and his answer is due on the 21st, it

21 makes no difference when the sheriff's return is

22 filed. He still has the same amount of notice.

23 CHAIRMAN SOULES: I really don't

24 know. I know it's saved my bacon twice and I love

25 it.

1 PROFESSOR EDGAR: I wonder maybe,
2 though, Tom, if the reason for it, though, might
3 be that if the rule were otherwise, the Judge
4 would probably have to rely upon some oral
5 representation that was made by somebody that
6 citation had, in fact, been perfected. Thus, this
7 case was now ripe for judgment, when, in fact, it
8 may not be. And that's why we require --
9 MR. RAGLAND: The trial judge is going
10 to grant a default judgment unless he has the
11 sheriff's return properly executed and in the
12 court papers.
13 MR. MCMAINS: As long as it's clear,
14 why should it make any difference?
15 PROFESSOR EDGAR: If this entire rule
16 is eliminated, there is nothing in the rules that
17 would require that.
18 CHAIRMAN SOULES: Tom, I will
19 entertain any suggestion you would like to make
20 for our next agenda on 107. We really do have a
21 lot of work to do, though. And I think that
22 that's going to take us some time to talk about
23 whether that's right or wrong to have that on
24 file, and we really -- we've got other people that
25 are appealing to us. I mean, at least delay it to

1 the end of the day and see if we have time then.
2 Does that complete your report, Harry?
3 MR. TINDALL: I believe we've done 102
4 to 107; it's the mandate. And 99 to 101 I'm going
5 to replow again. And I believe that completes my
6 work.
7 PROFESSOR DORSANEO: You thought you
8 were finished, didn't you?
9 CHAIRMAN SOULES: Harry, thanks a
10 lot.
11 MR. RAGLAND: Can I make just a
12 clarification on the 103?
13 CHAIRMAN SOULES: Yes.
14 MR. RAGLAND: As we talked about
15 earlier here, where it refers to an order for
16 substituting service or another person to serve
17 other than the sheriff or constable, does that
18 contemplate that in each individual case if you
19 want someone other than the sheriff or constable
20 to serve the paper that you must get a court
21 order, or may the district courts enter a blanket
22 order, as they do in the federal court, which
23 says, John Smith is hereby authorized to serve
24 citations.
25 MR. TINDALL: I think we -- that

1 indicated that it would have to be an order of the
2 court in that case.
3 CHAIRMAN SOULES: No, that hasn't been
4 done.
5 PROFESSOR EDGAR: That's not what the
6 rule says.
7 CHAIRMAN SOULES: That has not been
8 discussed. And what difference does it really
9 make if the Judge decides that he is going to
10 let --
11 MR. TINDALL: If the judge let's Bill
12 Smith serve all the papers in his court, who
13 cares?
14 MR. RAGLAND: Well, I'm in favor of
15 it. I would like for the Judge to be able to
16 designate a certain person in that county and you
17 not have to go over there and get an order in
18 every individual case. I want to short circuit
19 the sheriff and the constable, quite frankly,
20 because they're incompetent.
21 MR. TINDALL: This doesn't preclude
22 that, the way we've written it.
23 CHAIRMAN SOULES: It doesn't. And --
24 PROFESSOR DORSANEO: I would want to
25 get that order filed in this case file, if it's

1 going to be a default judgment situation, before I
2 would be confident that the record --
3 MR. RAGLAND: The point I'm making is
4 the courts can enter general orders on the minutes
5 there that says that so and so is, you know,
6 authorized to serve papers in this cause, and it's
7 there until its revoked.
8 MR. MCMAINS: Yes. But how -- if you
9 do that, how does it get to this file?
10 MR. RAGLAND: Well, if you need it, I
11 guess you can go get a certified copy.
12 MR. MCMAINS: No. I understand. I'm
13 just saying, though -- but what Bill is talking
14 about, you've got to be able to show that the
15 service was properly completed on the face of the
16 record of the papers in the cause.
17 MR. RAGLAND: Well, I assume that the
18 Court is going to take judicial notice in the
19 orders he signs in his own court.
20 PROFESSOR EDGAR: Yes, the trial court
21 can, but the appellate court can't.
22 MR. MCMAINS: You have to get it done
23 then or it won't support your default.
24 CHAIRMAN SOULES: Judge -- a judge can
25 take judicial notice of anything that's in the

1 clerk file whether it's in his file or not.
2 PROFESSOR EDGAR: Yes. The trial
3 judge can, but the appellate court can't in
4 reviewing that judgment.
5 MR. MCMAINS: The point is he has to
6 do it in order for it to appear of record so that
7 the appellate court can see that it was done.
8 MR. RAGLAND: Well, obviously, if
9 you're going to have that issue in the case, if
10 the plaintiff's lawyer hasn't got enough sense to
11 go get a certified copy of it and put it in the
12 record, he ought to have his license lifted.
13 CHAIRMAN SOULES: Or at least he can
14 get it in the appellate record.
15 MR. TINDALL: That's right.
16 PROFESSOR EDGAR: All I'm saying is
17 that you can't rely upon the judicial notice
18 provision of the trial judge in the appellate
19 court. You've got to do something else.
20 CHAIRMAN SOULES: Unless you put in
21 the transcript.
22 PROFESSOR EDGAR: That's all I'm
23 trying to say.
24 CHAIRMAN SOULES: Okay. You're right.
25 PROFESSOR EDGAR: You can't just say

1 judicial notice will take care of it, because it
2 won't.
3 CHAIRMAN SOULES: That's right.
4 PROFESSOR DORSANEO: I don't think we
5 need to add anything. I think lawyers can figure
6 out what to do.
7 MR. TINDALL: One thing for our
8 minutes. Luke, on 103 --
9 CHAIRMAN SOULES: Okay. Harry, you
10 have the floor.
11 MR. TINDALL: Since lunch, I think we
12 did -- for housekeeping, we are going to take out
13 of 103 by -- well, no -- we were to leave 103
14 unchanged as we voted on before lunch. We'll
15 still leave in "service by registered or certified
16 mail."
17 CHAIRMAN SOULES: That's right.
18 MR. TINDALL: That stays in. I'm
19 sorry.
20 PROFESSOR EDGAR: But that now reads
21 "citation and other notices," though --
22 MR. TINDALL: That's correct.
23 PROFESSOR EDGAR: -- rather than
24 "citation and process."
25 MR. TINDALL: That's right.

1 CHAIRMAN SOULES: It does.

2 MR. TINDALL: And the other change on

3 106 is "restricted delivery." That completes my

4 report.

5 CHAIRMAN SOULES: Thank you, Harry. A

6 job well done. Bill, did you have something now

7 on --

8 PROFESSOR DORSANEO: Well, I have

9 this. It will probably go pretty quickly. Rule

10 182. And I've passed --

11 CHAIRMAN SOULES: Does anybody need

12 182 that doesn't have a rule book?

13 PROFESSOR DORSANEO: Well, I made

14 Xerox copies of these three pieces of rule book,

15 and they were handed out earlier, I believe. And

16 there are more of them here if you didn't --

17 anybody else need these? All right.

18 The issue is a simple one, and it's whether

19 Rule 182 of the Texas Rules of Civil Procedure

20 "Testimony of Adverse Parties in Civil Suits"

21 should be repealed because of coverage of the same

22 matter in a different way in Rule 607 and 610 of

23 the Texas Rules of Evidence.

24 Now, Rule 607 very cryptically did away with

25 the voucher rule that existed before. You now can

1 attack the credibility of any witness even if
2 you've called that witness. All right. That
3 makes Rule 182 unnecessary to the extent that Rule
4 182 says that you're not bound by the testimony of
5 an adverse party or other person covered by Rule
6 182.
7 Rule 610 of the Texas Rules of Evidence talks
8 about the nature of examination. It is now going
9 to become Rule 611, according to Justice Wallace.
10 Well, Justice Wallace showed me a change by
11 amendment effective January 1, 1988, basically
12 saying the same with a slight modification to
13 paragraph C. "Leading questions should not be
14 used on the direct examination of a witness," and
15 then it goes on in this amended version, "except
16 as may be necessary to develop the testimony of
17 the witness."
18 All right. The long and short of it is that
19 607 and 610 do everything that's done in 182 and
20 do it better, except for this language at the very
21 end of Rule 182 that's underlined on this page
22 that I've handed out. 610 does not go on to say,
23 all right, after saying, "When a party calls a
24 hostile witness, an adverse party" -- and I'm
25 reading from 610(c) which will become 611. "When

1 a party calls a hostile witness, an adverse party,
2 or a witness identified with an adverse party,
3 interrogation may be by leading questions."
4 It doesn't go on to say, "but opposing
5 counsel shall not be permitted to ask such witness
6 leading questions or in any manner lead such
7 witness." Okay. It doesn't go on to say that.
8 Some members of the Evidence Subcommittee, chaired
9 by Professor Blakely, thought that they liked that
10 language and wanted Rule 182 retained because it
11 included it. Other members thought it was kind of
12 unnecessary. I basically agree with the other
13 members, don't think that it's necessary, and
14 don't frankly think that it's a good idea to have
15 a blanket prohibition against using leading
16 questions on cross examination of your own party
17 who was called as an adverse party by the
18 opponent. I just think it's unnecessary.
19 I think Rule 182 is unnecessary from top to
20 bottom. It has been since the Texas Rules of
21 Evidence were promulgated. I think it's
22 inconsistent. We should throw it out, and I so
23 move.
24 MR. BRANSON: Well, what if we write
25 the Evidence Committee and suggest that they add

1 that language to 610?

2 PROFESSOR DORSANEO: All right. Let's

3 stop there. I don't think that language is a good

4 idea insofar as it's a blanket prohibition.

5 MR. BRANSON: Well, I disagree with

6 you. If I call an adverse doctor to the stand

7 who's a party, I don't expect his attorney to be

8 able to lead him when he takes him on direct.

9 PROFESSOR DORSANEO: All right. I

10 don't think there's anything that -- I see what

11 you're saying, but let's look at 6 -- see if

12 that's really a problem in terms of --

13 PROFESSOR EDGAR: It could be --

14 MR. MCMAINS: How does it define cross

15 examination, is the critical question?

16 MR. BECK: Yeah, I mean it could be

17 controlled. Bill, why don't we --

18 PROFESSOR EDGAR: It could be

19 controlled. Frank, it could be controlled by the

20 Court under Rule 610(a) if the Court wanted to

21 prohibit the doctor's attorney from asking him

22 leading questions on quote, "cross examination,"

23 unquote. But, on the other hand, the Court in its

24 discretion may decide to allow it, too.

25 MR. MCMAINS: But it's not cross

1 examination.

2 PROFESSOR EDGAR: Well, I put it in

3 quotes.

4 MR. BRANSON: It's direct of an

5 adverse witness.

6 MR. MCMAINS: What I'm saying is I

7 don't have any problem with not having a blanket

8 prohibition against leading questions. There

9 shouldn't be anymore -- if we're expanding the

10 discretion of the trial court to permit leading

11 questions, you know, even when you're on direct

12 examination, as I understand this rule to do --

13 then I don't have a problem keeping that, but you

14 should define out of cross examination in an

15 automatic assumption of the right to ask leading

16 questions because this is not cross examination.

17 PROFESSOR DORSANEO: Well, the Rule

18 611(c) is proposed in 610(c) as is currently in

19 existence -- this may not be good enough for you.

20 It says, "ordinarily leading questions should be

21 permitted on cross examination." It doesn't --

22 MR. MCMAINS: I know, but is there a

23 definition of "cross examination"?

24 PROFESSOR DORSANEO: Well, probably

25 you'd find cross examination defined in the -- in

1 various ways in the cases. I don't think there's
2 a definition in the rule book.
3 MR. BRANSON: Under what circumstances
4 would you not permit leading questions on cross
5 examination? I don't know why -- I'm on that
6 evidence committee. I must have missed that
7 meeting. I don't know why we put "ordinarily" in
8 there.
9 MR. TINDALL: This is straight from
10 the federal rule, Frank.
11 PROFESSOR DORSANEO: I think it
12 probably contemplates this situation. What else
13 could it be? Your doctor.
14 MR. BRANSON: You could have a hostile
15 trial judge that just didn't want cross
16 examination.
17 PROFESSOR DORSANEO: Maybe a child.
18 MR. BRANSON: Yeah. I can see that.
19 Maybe an infirmed witness.
20 MR. MCMAINS: A dummy.
21 MR. BRANSON: I just would hate to do
22 anything to encourage the trial courts to allow a
23 party called as an adverse witness to be led by
24 their counsel when they took over what is truly
25 direct examination.

1 MR. TINDALL: Frank, I agree with you
2 if it's a party. I just concluded four days in a
3 trial, though, where the other side called my
4 client's accountant and ragged him around for a
5 day. It's very hard when you've got your case
6 topsy-turvy to then be restricted in trying to
7 move along in the trial to not asking some leading
8 questions to clarify a lot of tough cross
9 examination. If you have --
10 MR. BRANSON: Leading questions,
11 really, have always been discretionary, depending
12 on the witness, on the case law. At least that's
13 the way I've interpreted the case law. If the
14 trial judge really felt the witness needed to be
15 led to make his testimony comprehensible, he had
16 that discretion with the rule.
17 MR. MCMAINS: I, frankly, am not
18 aware, and Bill may have looked at it before, of
19 any case that's ever reversed on either the
20 allowance or disallowance.
21 PROFESSOR DORSANEO: The ones that --
22 the thing that would satisfy Frank's problem would
23 be to take that underlined language from Rule 182,
24 "but opposing counsel shall not be permitted," to
25 modify it with an "ordinarily" or something like

1 that, and suggest that that be considered for
2 inclusion in this Rule 611(c) that's going to be
3 changed anyway.
4 JUSTICE WALLACE: It was changed
5 Thursday afternoon by order of the Court. We
6 followed exactly the recommendations of the Rules
7 of Evidence committee and this committee. I
8 double-checked with Newell Blakely word for word,
9 taking what Luke had sent me of this committee's
10 action, and the Court approved it Thursday. And
11 we didn't operate on 182. That was strictly on
12 the 610 and 611.
13 PROFESSOR DORSANEO: And I do think --
14 MR. BRANSON: Tell me again, Your
15 Honor, what you added to 610 and 611.
16 PROFESSOR DORSANEO: I'll show you,
17 Frank.
18 JUSTICE WALLACE: It did not get into
19 cross examination, adverse witness, leading
20 questions in order to develop a witness's
21 testimony.
22 PROFESSOR DORSANEO: I think the worst
23 thing we could have is to retain this Rule 182, or
24 even retain an odd sentence from it that is
25 supplementary to what's talked about principally

1 in the Rules of Evidence rule book at Rule 610. I
2 don't think the problem is a large enough problem
3 to have that kind of a crazy quilt rule book.
4 CHAIRMAN SOULES: Isn't it pretty
5 fundamentally understood that when you're
6 examining your own party, you're not on cross
7 examination?
8 MR. BRANSON: It is, but it's been
9 that way because it's been in the rules.
10 CHAIRMAN SOULES: Well, I don't see
11 any rule that says that, Frank.
12 MR. BRANSON: Well, isn't that
13 basically what the last sentence of 182 says?
14 CHAIRMAN SOULES: It doesn't say a
15 thing about cross examination or direct.
16 MR. BRANSON: It says you can't lead
17 him. About the only advantage is being on
18 direct.
19 PROFESSOR EDGAR: How about -- Judge
20 Wallace made reference to a change in Rule 611(c)
21 and I --
22 PROFESSOR DORSANEO: That's 610.
23 JUSTICE WALLACE: 610(c). We put in a
24 610 and moved 610, 11 and 12 on up to the next
25 numbers. So, they now correspond with the federal

1 rules.

2 PROFESSOR EDGAR: I see. May I see,

3 then, what the change -- I've forgotten it.

4 MR. BECK: Bill, there's more in 182

5 than just that reference to leading questions.

6 Did you check to make sure that all the other

7 items in 182 are somewhere in the Rules of

8 Evidence --

9 PROFESSOR DORSANEO: Yes.

10 MR. BECK: -- like calling a managing

11 officer or director of a corporation?

12 MR. MCMAINS: It's actually much more

13 liberal.

14 PROFESSOR DORSANEO: It's much more

15 liberal than 182.

16 MR. MCMAINS: It says anybody

17 identified or possibly --

18 MR. BECK: I just wanted to make sure.

19 PROFESSOR DORSANEO: I think the

20 professors are in the agreement that the only

21 thing that the Rules of Evidence don't deal with

22 expressly is dealt with in Rule 182 is that "but"

23 language.

24 CHAIRMAN SOULES: Any new discussion?

25 Or let's see, did anyone second Bill's motion to

1 repeal 182?

2 MR. BRANSON: I would like to offer an

3 amendment that we write the Rules of Evidence

4 Committee and tell them that we recognize the

5 conflict between 610 and 182, and tell them that

6 we would like to repeal 182 but need to add the

7 last sentence, or the last phrase picking up with

8 "but" on Rule 182.

9 CHAIRMAN SOULES: Does anybody second

10 Bill's motion, first?

11 MR. TINDALL: I do.

12 CHAIRMAN SOULES: Okay. Bill moved

13 and Harry seconded it. The amendment here is that

14 we add a letter to it. And anything new?

15 MR. MCMAINS: Well, I was going to

16 suggest a different amendment. And that was a

17 commentary, when we repeal it, saying the subject

18 is covered in the Rules of Evidence but that it

19 doesn't change the fact that, ordinarily,

20 examining your own witness is not cross

21 examination.

22 MR. BRANSON: That's fine. I'll

23 accept that.

24 MR. MCMAINS: I mean, if you just put

25 it in a commentary that --

1 MR. TINDALL: Yeah. That's a -- the
2 federal commentary on that very point directs the
3 discretion of the judge to stop that. It's real
4 clear. I don't -- if you read the federal rule --
5 MR. MCMAINS: Doesn't it accomplish it
6 that way? That's a patchwork fix until the next
7 amendment.
8 PROFESSOR DORSANEO: Commentary to
9 what is no longer Rule 182.
10 MR. MCMAINS: That's right.
11 MR. BRANSON: It, procedurely -- in
12 going through the rules of evidence --
13 JUSTICE WALLACE: Nothing says you
14 can't.
15 MR. TINDALL: This is stronger,
16 though.
17 MR. BECK: We're repealing a rule and
18 at the same time referring this to the committee
19 on the Rules of Evidence?
20 MR. BRANSON: No. What we were going
21 to do was write to the Rules of Evidence Committee
22 and say subject to them making that correction
23 we'll repeal the rule.
24 PROFESSOR DORSANEO: But the Supreme
25 Court has just dealt with these rules, and they're

1 not going to want to go back and deal with it all
2 over again.
3 MR. BRANSON: I agree with Rusty,
4 procedurely adding that commentary to the repealed
5 rule would be easier than going through the Rules
6 of Evidence Committee.
7 MR. TINDALL: Why don't we just repeal
8 it? Anyone who really gets to this serious point
9 can very readily look at the commentary to the
10 Federal Rule 611, and it's very clear that the
11 trial judge has discretion to deny that type of
12 leading questioning of your own witness or party.
13 MR. MCMAINS: Let me suggest this --
14 MR. BRANSON: Except if you inevitably
15 get out in someplace like Tulia, Texas and be
16 trying to convince some trial judge that the rules
17 really haven't changed, you will need something to
18 point to.
19 MR. MCMAINS: It may satisfy some of
20 this problem. You have passed the rule. You
21 really don't -- the Court really doesn't pass the
22 commentaries, right?
23 JUSTICE WALLACE: Well, we put
24 commentaries on a couple of rules to verify it.
25 One, on this particular rule, we already put a

1 commentary there.
2 MR. MCMAINS: What I'm getting at is,
3 does it require the same procedure? Can we just
4 fix the commentary to the rule?
5 JUSTICE WALLACE: I strongly suspect
6 that we could.
7 MR. MCMAINS: And just put the same
8 basic caveat that is in the federal rule that's --
9 PROFESSOR EDGAR: In rule 610.
10 MR. MCMAINS: Yes, where it belongs.
11 But just in the commentary, just to say
12 ordinarily --
13 JUSTICE WALLACE: I think that could
14 be done.
15 MR. MCMAINS: I mean, it would seem to
16 me that does it. You don't have to promulgate the
17 commentaries. So, we can fix the commentary
18 before it has to go to the printer and it leaves
19 it all in one place. And then with the repeal you
20 can just say, "see amended rule of evidence" --
21 you know, this -- it has been replaced by the
22 rule.
23 JUSTICE WALLACE: Let me make sure
24 that's what you want in, if this will do it.
25 "This rule conforms with tradition in making the

1 use of leading questions on cross examination a
2 matter of right. Purpose of the qualification,
3 ordinarily, is to furnish a basis for denying the
4 use of leading questions when the cross
5 examination is cross examination in form only and
6 not in fact as, for example, with cross
7 examination of a party by his own counsel after
8 being called by the opponent or of an insured
9 defendant who proves to be friendly with the
10 plaintiff."

11 PROFESSOR DORSANEO: Bull's-eye.

12 MR. TINDALL: That's a bull's-eye.

13 MR. MCMAINS: That's it. That's
14 fine.

15 MR. BRANSON: Now, wait a minute. An
16 insured defendant that proves to be friendly with
17 the plaintiff, I'm not sure I like that.

18 CHAIRMAN SOULES: Okay. We would,
19 then, resolve that the language that Justice
20 Wallace just read be appended as a comment to the
21 newly promulgated Rule of Evidence 611. And we
22 ask for the Court to do that, and if it chooses to
23 do so, we urge them to do it.

24 And with that request, then, to the Court for
25 that action, those in favor of the repeal of Rule

1 182, please show by hands. Opposed? Okay. Let
2 me see the count of hands again because there is a
3 -- nine. And against? One. Okay.
4 PROFESSOR EDGAR: Now, have we also
5 tied into the repeal of Rule 182 a relationship
6 over to Rule 611 that the reason we're repealing
7 it is because it's now covered by Rule 611?
8 CHAIRMAN SOULES: Comment right.
9 PROFESSOR DORSANEO: It's covered
10 really by 607 and 611.
11 PROFESSOR EDGAR: Whatever. Whatever
12 it is. But we're going to tie that repeal in to
13 refer the reader to those rules.
14 CHAIRMAN SOULES: Say -- which numbers
15 again? 607 and 611?
16 PROFESSOR DORSANEO: Uh-huh. Unless
17 607 moved up to be 608.
18 JUSTICE WALLACE: No. We had left
19 Federal Rule 610 in the Rules of Evidence having
20 to do with the religion of witness's power. We
21 put that back in the same place you find it in
22 Rule 610 of the federal rules. Therefore, we need
23 to move 11, 12 and 13, I believe, forward so that
24 now the numbers in our Rules of Evidence will
25 correspond with the rules -- numbers in the

1 Federal Rules of Evidence.

2 CHAIRMAN SOULES: Okay. Hadley, are

3 you ready to do 205? Does that complete your

4 work, Bill?

5 PROFESSOR DORSANEO: Yes, sir.

6 CHAIRMAN SOULES: Thank you a lot.

7 PROFESSOR DORSANEO: Thank you.

8 CHAIRMAN SOULES: I appreciate it.

9 PROFESSOR EDGAR: You mean 209?

10 CHAIRMAN SOULES: 205 to 209?

11 PROFESSOR EDGAR: I didn't do 205.

12 CHAIRMAN SOULES: 209. Page 64.

13 MR. TINDALL: Rule 209?

14 CHAIRMAN SOULES: Page 64.

15 PROFESSOR EDGAR: I'm sorry. Yes, it

16 is. It is -- what I did -- you asked me to

17 specifically work on Rule 209, but there was the

18 housekeeping chores that needed to be implemented

19 with respect to 205 and 208. So, the only -- the

20 first thing we need to look at, I think, is Rule

21 209, which appears on page 69 of your agenda

22 book. And if you recall, this was a subject of

23 several prior meetings concerning the concern that

24 many clerks had that -- well, I think that Sam

25 Sparks suggested -- El Paso Sam -- that there

1 wasn't any policy. And some clerks were keeping
2 things ad infinitum and other clerks were throwing
3 them away. And this was an effort to try and
4 standardize the procedure.
5 So, what we had approved at our last meeting
6 was Rule 209. The problem was the order -- the
7 Supreme Court order which appears on page 70 and
8 how to solve that problem. And based upon the
9 discussion and recommendations at the prior
10 meeting, I have tried to comply with those in a
11 redraft of the order which appears on page 70.
12 One thing we did in the second paragraph,
13 Judge Pope pointed out we needed to think about
14 citations by publication, and that motions for new
15 trial could be filed within two years after
16 judgment. So, we wanted to retain those records,
17 and I have attempted to include those as well.
18 MR. MCMAINS: Do you want to say
19 judgment "rendered" or "signed" there, Hadley? I
20 mean, doesn't that motion for new trial rule
21 relate to signing?
22 PROFESSOR EDGAR: Just a minute. I
23 think if we look -- let's look at Rule 329. I
24 think it speaks in terms of rendition.
25 MR. MCMAINS: Okay.

1 PROFESSOR EDGAR: Just a minute.
2 Let's take a look at Rule 329. Yes. See, Rule
3 329, the citation by application rule, talks about
4 judgments rendered, not judgments signed. That's
5 why I used that term.
6 MR. MCMAINS: Of course, we have
7 another rule, though, that says -- 306 is where
8 our rule says it's the date it's signed.
9 CHAIRMAN SOULES: 329 should be
10 signed.
11 PROFESSOR EDGAR: Well, I know, but
12 I'm saying that's why I used the word "rendered."
13 MR. MCMAINS: I mean, if you're trying
14 to make this an admininstrative rule it would seem
15 to me that we ought to have -- it ought to be some
16 way that there would be some ease of
17 administration, rather than trying to figure out
18 whether it is --
19 PROFESSOR EDGAR: I apologize to you.
20 Rule 329 subparagraph (b) -- no (a) talks about
21 two years after the judgment is signed. So, I
22 just misread that. You're right. It should be
23 "signed."
24 Now, the second provision, though, relates to
25 the entry of judgment rather than the signing of

1 judgment. Okay.

2 CHAIRMAN SOULES: Where was that,

3 Hadley?

4 PROFESSOR EDGAR: Still in the second

5 paragraph on page 70.

6 CHAIRMAN SOULES: Okay.

7 PROFESSOR EDGAR: But here we're

8 talking about entry of the date judgment was

9 entered, rather than the date judgment was

10 signed. Now, do you want to make that entry on

11 two years after judgment on service by

12 publication, as well? In other words, do we want

13 these times of disposition to run from the date of

14 entry of judgment as distinguished from the

15 signing of judgment? And that's just a question

16 for the committee.

17 CHAIRMAN SOULES: Why do we even need

18 the words "rendition of"? "Order of dismissal or

19 final judgment."

20 PROFESSOR EDGAR: Pardon?

21 CHAIRMAN SOULES: Do we need the words

22 "rendition of"?

23 PROFESSOR EDGAR: Well, no. Before we

24 get to that, though, I think that's another

25 issue. The question is --

1 CHAIRMAN SOULES: I apologize.
2 PROFESSOR EDGAR: This paragraph is
3 talking about which orders will be subject to
4 destruction or disposition by the clerk.
5 CHAIRMAN SOULES: Okay.
6 PROFESSOR EDGAR: Now, should that run
7 from two years after the judgment was entered or
8 180 days after other types of judgments were
9 entered, as distinguished from the time period
10 commencing upon the date the judgment was signed?
11 And my thought -- I was trying to use the
12 later date because, theoretically, you have the
13 rendition, signing and then entry. Entry occurs
14 last. And since we're talking about "disposition
15 of records by the clerk," if we gave them the
16 authority to dispose of those after the last date,
17 then that would be more than the time allowed for
18 appeal by motion -- for the disposition on the
19 appeal with respect to signing.
20 CHAIRMAN SOULES: Do we know what date
21 the clerk enters the judgment in its minutes? Is
22 that something made?
23 PROFESSOR EDGAR: Well, the clerk
24 should know. The clerk will know.
25 CHAIRMAN SOULES: Is a record made of

1 that, what day he actually --

2 PROFESSOR EDGAR: Yes. It's a date.

3 CHAIRMAN SOULES: What?

4 PROFESSOR EDGAR: Judgment entered and

5 there's a date. There should be.

6 CHAIRMAN SOULES: I just I haven't

7 looked for that.

8 MR. MCMAINS: There's an entry on the

9 minutes.

10 PROFESSOR DORSANEO: I think "entry"

11 would be fine. "Signed" would be fine in both

12 places if you made it --

13 PROFESSOR EDGAR: Presuming they

14 occurred on the same day. But, you see,

15 theoretically, entry can occur subsequent to

16 signing.

17 PROFESSOR DORSANEO: Uh-huh.

18 PROFESSOR EDGAR: And it does, in

19 fact, but, I mean, it could be a day or two

20 later.

21 PROFESSOR DORSANEO: Well --

22 PROFESSOR EDGAR: And I was just

23 trying to give the outside period of time rather

24 than the inside period of time. And that's why I

25 used the term "entry."

1 PROFESSOR DORSANEO: Well, "entered"
2 would be fine. I wonder really -- this 180 days,
3 I presume, has to do with writ of error appeal
4 time frame.
5 PROFESSOR EDGAR: And trying to tie it
6 in with giving outside times under Rule 329(b).
7 PROFESSOR DORSANEO: And the problem I
8 guess I have is -- we should probably have talked
9 about this before -- is that six months could be
10 more than a hundred -- could be more than 180 days
11 during certain periods of the year.
12 CHAIRMAN SOULES: You start counting
13 31 January back, you're going to be more than --
14 yes.
15 PROFESSOR DORSANEO: So, I would
16 suggest we could use either "signed" or "entered,"
17 but change it to 190 days and that would require
18 crossing out the 8 in the parenthetical rather
19 than the 9 in the parenthetical, which says --
20 PROFESSOR EDGAR: I didn't see that
21 typo. Sorry about that. All right. You want to
22 make it, then, to run from date of signing?
23 PROFESSOR DORSANEO: Yeah, but make it
24 190 days -- or 185.
25 PROFESSOR EDGAR: Or what about two

1 years, though?

2 MR. MCMAINS: Well, but we're really

3 referring to a motion for new trial having been

4 filed within the times prescribed by the rules and

5 those rules run from signing.

6 PROFESSOR DORSANEO: Those rules run

7 from signing, yeah. I would prefer "signing"

8 because I don't guess lawyers are going to be

9 involved. This only has to do with the clerks.

10 PROFESSOR EDGAR: That's right.

11 PROFESSOR DORSANEO: So, I would just

12 prefer "signing."

13 MR. MCMAINS: You are if you're

14 looking for a deposition.

15 PROFESSOR DORSANEO: Well, if they've

16 thrown it away, you're just too late.

17 PROFESSOR EDGAR: Okay. You want to

18 say "signing" and then "190 days"?

19 PROFESSOR DORSANEO: If there is any

20 magic of king, it is this to the writ of error

21 timetable.

22 PROFESSOR EDGAR: Well, that's why I

23 did it.

24 PROFESSOR DORSANEO: That would make

25 me happy, if that's important. I don't guess it

1 is.

2 CHAIRMAN SOULES: How are we going to

3 rewrite that second alternative? "In all other

4 cases in which judgment has been signed."

5 PROFESSOR EDGAR: "By the Court."

6 CHAIRMAN SOULES: I guess just

7 "signed" is enough.

8 PROFESSOR EDGAR: "Signed by the

9 Court."

10 CHAIRMAN SOULES: Just "signed for."

11 PROFESSOR EDGAR: "For 180 days" --

12 "190 days."

13 JUSTICE WALLACE: Would there not be

14 any need to keep these around until he can talk to

15 him for bill of review is passed, writ of review?

16 PROFESSOR EDGAR: Well, the only

17 problem with that is that, theoretically, a bill

18 of review could be filed at any time.

19 JUSTICE WALLACE: Well, two years --

20 PROFESSOR DORSANEO: Four.

21 MR. MCMAINS: Governed by the

22 four-year statute.

23 PROFESSOR DORSANEO: Governed by Civil

24 Practice of Remedies Code 16051, I think. Unless

25 it's a probate case. If we're going to keep it

1 around that long in order to protect those few
2 people, we're really not accomplishing the old
3 objective.
4 PROFESSOR EDGAR: Well, it seems to
5 me, then, that isn't that the -- let's think
6 through that a minute. We have a default
7 judgment, and if the -- wouldn't the plaintiff
8 have an interest in wanting to keep those papers
9 available, or would he have an interest in wanting
10 them destroyed?
11 MR. RAGLAND: What papers? There's
12 not going to be a deposition in a default
13 judgment.
14 PROFESSOR DORSANEO: Not very likely.
15 PROFESSOR EDGAR: Well, there could
16 be. Judge Pope pointed out that you might have a
17 situation in which you have some heirs -- and this
18 is a problem he raised that might not have been
19 properly cited -- or were not given notice, and
20 other people had. So, you might have actually had
21 -- you might have actually had some assemblance of
22 trial as to some people but not as to others. And
23 he suggested that we might have more than just the
24 bare minimum papers on file in some cases.
25 JUSTICE WALLACE: And there are some

1 cases where you would want the deposition of a
2 witness you couldn't get there in person that
3 would make your case.
4 PROFESSOR EDGAR: Yes.
5 PROFESSOR DORSANEO: And now under the
6 proposed rules for use of depositions -- useable.
7 JUSTICE WALLACE: The question is, on
8 a bill of review you've got to show there is no
9 negligence on your part, and not being there that
10 you had a meritorious defense and a couple
11 others. Is there anything connected with that
12 that would show up in that deposition? That would
13 be the question.
14 MR. MCMAINS: Well, the problem is,
15 though, in the bill of review you have to try the
16 merits as well as the bill of review points.
17 JUSTICE WALLACE: Yeah.
18 MR. MCMAINS: And if you are in a
19 situation where the -- for instance, you don't get
20 notice, don't know that there is a judgment out
21 there, and the clerk hasn't complied with their
22 obligations, there are cases holding that the bill
23 of review is an appropriate remedy to treat that
24 as misconduct on the part of the court personnel.
25 PROFESSOR EDGAR: Official misconduct.

1 MR. MCMAINS: And, therefore,
2 something that you can use a bill of review to set
3 aside.
4 PROFESSOR EDGAR: But that won't
5 appear in any of the papers, though, that this is
6 designed to eliminate from the clerk's file.
7 MR. MCMAINS: No, you're talking about
8 eliminating depositions. If you try a bill of
9 review -- I mean, if a case is -- you know, if a
10 case gets set for trial or determined on a
11 sanctions order or something else, if you don't
12 get notice of the judgment, you -- when you
13 finally do get notice of the judgment, you may be
14 outside the six-month period, but you still have a
15 writ by bill of review. But when you go try the
16 bill of review, you have to try both issues. One,
17 as to whether or not you're entitled to reveal
18 setting aside the judgment; and, two, the merits.
19 And if you've destroyed all the depositions
20 -- I'm not just talking about a default. It could
21 happen any number of ways. Dismissal for want of
22 prosecution is the most likely mess-up in terms of
23 that.
24 PROFESSOR DORSANEO: But I'd say if we
25 go to the bill of review and wait that long, then

1 really you're saying that nothing gets destroyed
2 until four years after the judgment is signed --
3 MR. MCMAINS: I understand the
4 problem. I'm not suggesting that --
5 PROFESSOR DORSANEO: -- in every
6 case. And I -- this bill of review is a new
7 proceeding. How likely is it going to be that
8 that deposition that was on file, that was taken
9 by the original plaintiff, would be useful in the
10 later bill of review case?
11 CHAIRMAN SOULES: Could be.
12 PROFESSOR DORSANEO: Could be, but --
13 MR. MCMAINS: Well, it would be. I
14 mean, you've got to try the merits.
15 PROFESSOR DORSANEO: Well, yes.
16 MR. MCMAINS: In the bill of review
17 you've got to show that there was a merits issue
18 that -- you have, in fact, have to show in order
19 to even get to the point of trying the merits make
20 prima facie showing that you have a merits issue.
21 PROFESSOR DORSANEO: But, look at it
22 this way: If it was a default case, all right --
23 as you said, there probably wasn't any
24 deposition. If it was not a default case, then
25 probably you have your own copy at your own

1 lawyer's office of the deposition and you don't
2 need the deposition that was on file. All right.
3 And I can see that there will be cases when you
4 don't have your own copy and you can't get a copy
5 anywhere else and it's just gone, and you're just
6 in the soup. But that's the way the world is now.
7 PROFESSOR EDGAR: But you're also
8 assuming, though, that you could not obtain that
9 evidence independently at this time. I mean, you
10 could develop that evidence on the case on the
11 merits. So you're narrowing further, it seems to
12 me, the likelihood that the destruction of the
13 deposition is going to be critical. Now, that's
14 all I'm saying. It may still be critical, but
15 it's going to be even less so.
16 PROFESSOR DORSANEO: I think it's too
17 small a problem to make the clerks wait four years
18 from the date of judgment to start destroying
19 things or sending out notices.
20 MR. MCMAINS: Okay.
21 CHAIRMAN SOULES: And he's got to give
22 notice to all attorneys of record. So, if you've
23 got a case --
24 MR. MCMAINS: I suppose if they send
25 notice they're going to destroy your depositions,

1 you'd better figure out something happened to
2 them.
3 CHAIRMAN SOULES: Maybe you better go
4 over and get them.
5 MR. MCMAINS: No, I mean, if you
6 didn't know you had a judgment against you or that
7 --
8 CHAIRMAN SOULES: Well, the party
9 that's going to want to use that deposition, isn't
10 it most likely be the party who's wanting to
11 protect the judgment?
12 PROFESSOR EDGAR: Well, that's what I
13 was trying to think through awhile ago. It may
14 not be. Maybe it's the party who is trying to
15 attack the judgment. But I think the risk is --
16 if this is really a serious clerical problem, and
17 from what I've understood at these meetings it is
18 in some counties, then I think this is a risk
19 worth taking.
20 CHAIRMAN SOULES: Okay. Anything
21 new?
22 MR. MCMAINS: Yes.
23 CHAIRMAN SOULES: Rusty.
24 MR. MCMAINS: The time, even at 190
25 days, under Rule 106(a) -- 306(a), where we come

1 down is that you've got to -- actually, if
2 somebody didn't get notice of the judgment within
3 20 days, then the times don't start to run until
4 they get notice, not to exceed 90 days.
5 So, in reality, you have to start the time
6 for signing a judgment 90 days down the road and
7 then compute your plenary jurisdiction period
8 there. That plenary jurisdiction period is at
9 least a 105 days from that day.
10 CHAIRMAN SOULES: Why don't we make it
11 one year?
12 PROFESSOR DORSANEO: Sold.
13 CHAIRMAN SOULES: Any opposition to
14 that? Okay. 180, now 190. It's going to be one
15 year there. I thought you-all may have created a
16 new bar exam question, "What period in the rules
17 is 190 days?"
18 MR. MCMAINS: 195.
19 CHAIRMAN SOULES: 195. Now, it's one
20 year. All right. Anything new on this? Those in
21 favor, then, of 209 on the proposed order, please
22 show by hands. Opposed? That's unanimous. And
23 then we have, in light of that, some housekeeping
24 to do, don't we, Hadley, back at 205?
25 PROFESSOR EDGAR: Yes. All I did was

1 205 and 6 and 7 -- 6, 7 and 8. Let's see, 205 --
2 yes, 206 is at the bottom of page 65. It's simply
3 to try and make clear that the document that we
4 always refer to as a deposition is really a
5 deposition transcript, that a deposition is really
6 the act of taking a deposition. And that's all
7 I've done here is try and change those terms.
8 CHAIRMAN SOULES: And it's about time.
9 PROFESSOR DORSANEO: Mr. Chairman.
10 CHAIRMAN SOULES: Bill.
11 PROFESSOR DORSANEO: I have a
12 question. In this -- Professor, do you have this
13 blue thing?
14 PROFESSOR EDGAR: I'm looking at the
15 agenda. I've got a blue one. What page is it?
16 PROFESSOR DORSANEO: On page --
17 CHAIRMAN SOULES: They're not
18 numbered.
19 PROFESSOR DORSANEO: There is a Rule
20 205 in here.
21 PROFESSOR EDGAR: Rule 205. I don't
22 know. I haven't looked at it. I did. I called
23 in a change or two maybe. I don't know. I've got
24 it right here. I didn't -- I did not make the
25 changes that appear in this book, Bill. I didn't

1 make these changes.

2 PROFESSOR DORSANEO: Well, that's all

3 I was just pointing out.

4 PROFESSOR EDGAR: I don't know. I

5 haven't seen this. I was just looking at the

6 agenda book. I don't know who made these

7 changes. I'm not familiar with them.

8 CHAIRMAN SOULES: It may have been Sam

9 Sparks.

10 MR. MCMAINS: Yeah, I think it was.

11 PROFESSOR EDGAR: I don't know.

12 PROFESSOR DORSANEO: Well, this says

13 here it was unanimously approved by the committee.

14 CHAIRMAN SOULES: This is one earlier

15 this year.

16 PROFESSOR DORSANEO: Yeah. So, we're

17 going to have to do an overlay.

18 PROFESSOR EDGAR: Right.

19 CHAIRMAN SOULES: Well, see, this was

20 -- part of 205 change was to tell us what a

21 transcript was. The original deposition.

22 MR. MCMAINS: That's in there.

23 CHAIRMAN SOULES: Pardon me?

24 MR. MCMAINS: The deposition

25 transcript changes are already in the one that's

1 in our book.

2 PROFESSOR EDGAR: No, that's not

3 right. Look at Rule 206, for example. It's in

4 205, but it's not in 206.

5 MR. MCMAINS: Yeah, but I was just

6 talking about 5.

7 PROFESSOR EDGAR: I was just looking

8 at all of them here. And, also, Rule 206, you

9 need to incorporate those changes with respect to

10 the paragraphs numbers 2, 3, 4 and 5. See, he

11 says "no change" on his. Look at 206, Luke. See,

12 he says "no change."

13 CHAIRMAN SOULES: All right.

14 PROFESSOR EDGAR: But changes do need

15 to be made to make these housekeeping changes.

16 CHAIRMAN SOULES: Okay. Yeah, sure

17 do. Okay.

18 PROFESSOR EDGAR: And also -- 207 also

19 needs to take those housekeeping changes into

20 consideration as does -- and then 209 is a new

21 rule.

22 I don't know why -- if we have already

23 approved the material that we have in this book,

24 then I don't know why the committee can't just go

25 ahead and approve these with the instructions that

1 the housekeeping changes reflected in our agenda
2 book be made, rather than sitting here spending
3 all the time to go through it, if that meets the
4 committee's approval.
5 CHAIRMAN SOULES: All right. Is that
6 a motion?
7 PROFESSOR EDGAR: Yes.
8 CHAIRMAN SOULES: Second?
9 MR. MCMAINS: Second. May I make a
10 comment first?
11 CHAIRMAN SOULES: Yes, sir. Rusty.
12 MR. MCMAINS: His Rule 205 in his
13 agenda is different in terms of it deals with
14 exhibits. That's not in the 205 in the book.
15 PROFESSOR DORSANEO: Look at the
16 bottom of the page.
17 PROFESSOR EDGAR: My suggestion -- you
18 see --
19 PROFESSOR DORSANEO: That's 206.
20 PROFESSOR EDGAR: -- this material.
21 Rusty, this material right here has substantive
22 changes in it which the committee has already
23 approved.
24 MR. MCMAINS: Yes, I agree.
25 PROFESSOR EDGAR: I was playing with

1 another deck of cards and I was making simply
2 housekeeping changes to include transcripts and
3 things like that. And since we've already
4 approved this, I'm just suggesting that we go
5 ahead and allow --
6 MR. MCMAINS: I'm not disagreeing with
7 that. What I'm saying is that 205 in the agenda,
8 though, has an exhibit section that's not --
9 PROFESSOR DORSANEO: No, it doesn't.
10 MR. MCMAINS: Where is it?
11 PROFESSOR DORSANEO: 205 in the agenda
12 ends on page 65.
13 MR. MCMAINS: That's right. That is
14 206.
15 PROFESSOR EDGAR: Yeah, that's 206.
16 It's at the bottom of the page.
17 MR. MCMAINS: Put it this way then:
18 Then those changes are not in it, you're right.
19 So, we're not really dealing with 205. But the
20 exhibits portion of 206 in the agenda are not in
21 the 206 that's in the book.
22 PROFESSOR EDGAR: That's right. You
23 see, he said there was not -- when he prepared his
24 206, he said there wasn't any change.
25 MR. MCMAINS: Okay.

1 PROFESSOR EDGAR: But there is a
2 change because we're adding "transcript."
3 PROFESSOR DORSANEO: There's a change
4 for 2 and 3 and 4 and 5 as well as 1 of 206.
5 PROFESSOR EDGAR: That's correct.
6 CHAIRMAN SOULES: We'll make those
7 changes. The editing committee will make those
8 changes.
9 PROFESSOR DORSANEO: You move over
10 into the light down there.
11 CHAIRMAN SOULES: Okay. Is the
12 consensus, then, that we make these changes and
13 the updated version of the completed Rules 205
14 through 209, and then as the local adjustments are
15 made, that they be recommended to the Supreme
16 Court, these rules, for promulgation.
17 PROFESSOR EDGAR: I move.
18 PROFESSOR DORSANEO: Second.
19 CHAIRMAN SOULES: Bill Dorsaneo,
20 second. All in favor, show by hands. Opposed?
21 That will be unanimous. Thank you, Hadley.
22 PROFESSOR EDGAR: One thing. Look at
23 your Rule 207, also, Luke.
24 CHAIRMAN SOULES: Okay.
25 PROFESSOR EDGAR: Yeah, right there,

1 Rule 207. It indicates that paragraph No. 3 --
2 flip the page, no change. There is a change.
3 CHAIRMAN SOULES: Okay.
4 PROFESSOR EDGAR: Page 68 of the
5 agenda book.
6 CHAIRMAN SOULES: Thank you.
7 PROFESSOR DORSANEO: Since you
8 mentioned 207, why did this committee -- oh, never
9 mind. Strike that. I'm misreading. Never mind.
10 CHAIRMAN SOULES: Hadley, does that
11 wrap up your report then?
12 PROFESSOR EDGAR: Yes. Let me just
13 double-check one more thing.
14 CHAIRMAN SOULES: Sure.
15 PROFESSOR EDGAR: Look on your agenda
16 -- I mean, on your final book there on 208. There
17 will be no change in 208, paragraph 2, 3 and 4,
18 but there will be in paragraph 5 as it appears in
19 the agenda book on page 68 and 69.
20 CHAIRMAN SOULES: That helps a bunch.
21 PROFESSOR EDGAR: Okay.
22 CHAIRMAN SOULES: Thank you, Hadley,
23 very much. Broadus, on page 2, then, we've got
24 some justice court rules. Is he here? He skipped
25 out.

1 MR. MORRIS: Do you want me to go out
2 and see if I can find him?
3 CHAIRMAN SOULES: Lefty, you might let
4 him know that --
5 MR. BRANSON: Pat Beard said to tell
6 you that he had an emergency arise. He said some
7 emergency came up. He had to leave.
8 CHAIRMAN SOULES: Does anyone have
9 something short we can --
10 PROFESSOR EDGAR: Do you want to take
11 up those housekeeping chores back there in the
12 stuff that you sent me on Kronzer?
13 CHAIRMAN SOULES: Yes, we could do
14 that. Let's see. Well, why don't we just go
15 ahead and take these rules, then, because we've
16 got to do them. We'll just start on page 211 and
17 then we'll go to those, Hadley.
18 PROFESSOR EDGAR: Okay. Page 211? I
19 can't find anything in this book anymore.
20 CHAIRMAN SOULES: It should be in
21 numerical order. I can't either.
22 PROFESSOR WALKER: Nobody else can
23 either.
24 PROFESSOR EDGAR: We go from the
25 district court rules to ancillary proceedings, and

1 then we jump over to Rules of Evidence and then we
2 go to the Rules of Appellate Procedure, and maybe
3 there's some assemblance in all that, but I can't
4 figure it out yet.
5 PROFESSOR WALKER: No order at all.
6
7 (Off the record
(discussion ensued.
8
9
10 CHAIRMAN SOULES: On Page 210 of your
11 purple book.
12 PROFESSOR EDGAR: 211.
13 CHAIRMAN SOULES: 211, okay.
14 PROFESSOR EDGAR: See, it's now before
15 Rule 5 -- between 527 and 528, and it really
16 belongs right before 24 and 25.
17 CHAIRMAN SOULES: Any objection to
18 that? That stands as done. Next, I think we
19 ought to just strike "supported by affidavit" and
20 not put in compliance with Rule 568 because Rule
21 568 doesn't apply to every case.
22 PROFESSOR DORSANEO: We'll strike Rule
23 568 while we're at it.
24 CHAIRMAN SOULES: In other words, if
25 they're trying to set aside judgment for other

1 than -- other than based on legal authorities, new
2 evidence or something like that, it ought to be
3 supported by affidavit. I guess that's what the
4 -- if you're going to say there's new evidence of
5 something other than a legal argument, that you
6 would support it by affidavit.
7 PROFESSOR EDGAR: Would there ever be
8 a ground other than the verdict or judgment is
9 contrary to the law of the evidence? Could you
10 have any type of contrary to the facts? That's
11 the evidence.
12 CHAIRMAN SOULES: That's just to set
13 aside judgment. He might also grant a motion for
14 new trial. It doesn't say that he does anything
15 but set aside his judgment.
16 PROFESSOR EDGAR: Maybe this is
17 default judgment. We're talking here about
18 judgment by default, though, see, under 566. But
19 yet Section 5 is talking about new trials.
20 CHAIRMAN SOULES: At any rate, it
21 looks to me like what their complaint is, is that
22 not every 566 motion needs to be sworn. Only in
23 circumstances described by 568 do those kinds of
24 motions have to be sworn. But 566, the way it's
25 written, says they all have to be supported by

1 affidavit. So, what they're trying to do is work
2 it out so that if it's just a plain 566 motion,
3 you don't have to have an affidavit unless it's
4 within the ambient of 568.
5 PROFESSOR EDGAR: Well, I'm not sure
6 that's the comment, though. It seems to me that
7 what they're saying is that they just want -- not
8 that it has to be -- I mean, I don't read this
9 amendment to require that it be sworn, but rather
10 simply refers to the basis for setting aside the
11 default judgment. So, I really don't know. Do
12 you see what I'm saying, Luke?
13 CHAIRMAN SOULES: Well, 568 is a
14 narrow -- I mean, it's a small universe. It's not
15 the whole universe. 566 is a whole universe.
16 Under 566 you've got to have it supported by
17 affidavit in the whole universe. And I think
18 they're trying to eliminate that, and say only the
19 small part of the universe is other than -- you
20 know, 568 shouldn't have an affidavit.
21 PROFESSOR EDGAR: That's one
22 construction.
23 CHAIRMAN SOULES: Okay. Now, I didn't
24 follow yours. I apologize.
25 PROFESSOR EDGAR: Well, I think maybe

1 this is susceptible of being interpreted to mean
2 that -- not that you have to -- not that the
3 motion has to be sworn to, but that it has to be
4 based upon the fact that the verdict or judgment
5 is contrary to the law of the evidence or the
6 Court erred in some matter of law. I think it's
7 capable of that construction. When I read the
8 comment, that's kind of what I thought they were
9 driving at.
10 PROFESSOR DORSANEO: Why don't we just
11 take "supported by affidavit" out of Rule 566 and
12 don't put anything in 566 to replace it. This 568
13 matter probably is going to cover equitable
14 motions for new trial, cratic motions, because, as
15 you point out, what else could it be about?
16 PROFESSOR EDGAR: I don't know.
17 PROFESSOR DORSANEO: And if that's all
18 that it's about, we can just let it be, without
19 cross-referring to it in 566.
20 CHAIRMAN SOULES: That's what I think.
21 PROFESSOR EDGAR: Well, but there's
22 just one other problem.
23 CHAIRMAN SOULES: Okay.
24 PROFESSOR EDGAR: 566 talks about
25 motions to set aside default, right?

1 CHAIRMAN SOULES: Uh-huh.

2 PROFESSOR EDGAR: 567 talks about
3 motions for new trial generally. Now, then 568
4 says it's the ground of the motion. Now, is that
5 a 566 motion or a 567 motion?

6 PROFESSOR DORSANEO: I see what they
7 did.

8 PROFESSOR EDGAR: Do you see what I'm
9 saying, Luke? So, I would suggest that what we
10 would do is eliminate 568 and leave 566 alone.

11 PROFESSOR DORSANEO: No, but this
12 doesn't even say motion for new trial.

13 PROFESSOR EDGAR: On a motion in
14 writing. See, it is talking about a motion for
15 new trial.

16 PROFESSOR DORSANEO: Okay.

17 PROFESSOR EDGAR: Both of them pertain
18 to motions, but they're different motions. So,
19 566 is about the same thing that 568 is about, or
20 is it? And I think that's really what they're
21 trying to say here because they say the purpose of
22 this proposed amendment is to bring 566 into
23 compliance with Rule 568 and eliminate the
24 possible conflict between the requirements under
25 the two rules.

1 CHAIRMAN SOULES: See, 567 motion
2 might be on new discovery evidence.
3 PROFESSOR EDGAR: That's right.
4 CHAIRMAN SOULES: And you don't have
5 to have all these hearings. They're just all
6 trial de novo anyway, and things are done a lot
7 less formally than what they're saying here. I
8 guess you wouldn't bring anybody in. You wouldn't
9 need a witness. You just need an affidavit that
10 you did a discovery evidence -- judgment
11 discretion be granted. But you can't just recite
12 new discovery evidence without having some kind of
13 an affidavit.
14 PROFESSOR DORSANEO: The problem with
15 these rules is that we never ever find out what
16 they do mean because the cases never get to --
17 CHAIRMAN SOULES: They never come up.
18 JUSTICE WALLACE: I guess in some
19 instances we can appeal from the county court.
20 You can appeal -- the appeal is taken to the
21 county court, isn't it?
22 PROFESSOR DORSANEO: Yes. But this
23 has already probably gone away by then.
24 PROFESSOR EDGAR: This would have all
25 sifted out by then, though.

1 PROFESSOR DORSANEO: It's de novo.
2 JUSTICE WALLACE: That's what I say --
3 trying to figure out. Now, what difference does
4 it make? We've got about 25 to 30 lawyers who are
5 JP's out -- and we can't understand what these
6 rules say. I would like to be listening when they
7 try to figure them out.
8 PROFESSOR EDGAR: Let me just ask a
9 question. If we just eliminated Rule 568, wherein
10 are we any worse off? Because under 566 we are
11 already saying that the motion has to be supported
12 by affidavit. We've already said that. Whatever
13 the ground for setting aside the default judgment
14 it has to be supported by affidavit.
15 Then, on a 567 motion for new trial, which is
16 just a plain vanilla motion for new trial in the
17 JP court, leave it like it is. I don't really see
18 where 566 adds anything -- I mean, 568 adds
19 anything. It aside a little. It has a negative
20 attitude, but it doesn't have much positive value
21 to it.
22 PROFESSOR DORSANEO: I agree with
23 Professor Edgar. It seems to me to add proplexity
24 only.
25 PROFESSOR EDGAR: So, I would move

1 that 568 be deleted. And I'm saying that, really,
2 with some hesitancy because I don't really know
3 that much about the area.
4 PROFESSOR DORSANEO: Well, what would
5 the conflict be? I guess the conflict would be
6 that if it's a judgment by default and what you're
7 doing is setting aside the judgment by default
8 because the evidence was unsatisfactory rather
9 than on cratic grounds, then there could be a
10 conflict between supported by affidavit in 566 and
11 the first part and the last part of 568.
12 PROFESSOR EDGAR: I think that's
13 right. But don't you solve all that by
14 eliminating 568?
15 PROFESSOR DORSANEO: One or the
16 other. You never need supported by affidavit or
17 you always do.
18 PROFESSOR EDGAR: Well, a judgment by
19 default, under this version, would be have to be
20 supported by affidavit.
21 PROFESSOR DORSANEO: Even if the
22 grounds for setting it aside were not cratic
23 grounds --
24 PROFESSOR EDGAR: That's right.
25 PROFESSOR DORSANEO: -- but they were

1 because there wasn't sufficient evidence presented
2 at the default hearing.
3 CHAIRMAN SOULES: If you want to read
4 these in harmony for the way they're set out, you
5 would say judgment by default -- in a case where
6 there's a judgment by default, every motion for
7 new trial is sworn. Second, in a judgment
8 rendered after trial, Rule 567 motions do not have
9 to be sworn unless they're 568 type-567 motions,
10 and 568 only applies to 567.
11 Now, if you read them that way, you don't
12 need to change anything. Because 566, which
13 applies to default, is not in conflict with 568
14 because that would apply only to trials, and that
15 doesn't say that.
16 PROFESSOR EDGAR: But 568 does not
17 delineate between 566 and 567 motions.
18 CHAIRMAN SOULES: The only way that
19 you can delineate is -- the requirement for
20 affidavits is different. 566 has an expressed
21 self-contained requirement for affidavit. It has
22 to be there every time. So, you don't need a
23 special 568 for that. The only time you need a
24 568 is if you have a 567 post trial motion for new
25 trial where you've got to have some something

1 special.

2 PROFESSOR EDGAR: Then, if that's the

3 intent, then what you should do, then -- the Rule

4 568 "sworn motion" caption should be deleted, and

5 the body of 568 should be added as a second

6 sentence to Rule 567.

7 CHAIRMAN SOULES: That's right.

8 PROFESSOR EDGAR: And then you've

9 eliminated the problem, if that's what all that's

10 intended to do.

11 CHAIRMAN SOULES: But you can read

12 them so that there is not any conflict between

13 them.

14 PROFESSOR EDGAR: If 568 pertains only

15 to 567, then just simply strike that out and move

16 it right up there.

17 CHAIRMAN SOULES: Then you've got an

18 affidavit requirement of post trial motions

19 different from the affidavit requirement of

20 default, but they're in separate rules, so it

21 doesn't matter.

22 PROFESSOR DORSANEO: My preference,

23 just for the sake of simplicity, would be to

24 eliminate all requirements that any of these

25 motions be supported by affidavit or that they be

1 verified or any other thing. I do not think that
2 that would tell JP's that they have to grant
3 motions to set aside default judgments whenever
4 they're filed, even if they're not supported by
5 anything.
6 If this is JP court practice, why shouldn't
7 somebody be able to go in there and say, woops, I
8 didn't comply with your timetable because I
9 screwed up without having a lot of formalized
10 technical requirements?
11 JUSTICE WALLACE: Well, on the other
12 hand, if you're trying to set aside a judgment,
13 even though it is a JP court judgment, the JP
14 should be able to at least know, well, this guy is
15 serious enough about what he's telling me he made
16 himself subject to perjury, before I'm going to go
17 through all the trouble of setting this aside and
18 get the parties back in and rehearing this
19 nonsense.
20 CHAIRMAN SOULES: Now, these can be,
21 you know, multimillion dollar cases.
22 PROFESSOR EDGAR: You bet. Forcible
23 entry detainer cases.
24 CHAIRMAN SOULES: You can have a big
25 shopping center location where a guy is badly in

1 default. You've got a tenant waiting in the wings
2 to take it and you can't get the old one out, and
3 you need him out because you've got a big deal
4 coming. There you are down there in JP court.
5 PROFESSOR EDGAR: Why don't we go
6 ahead and delete the caption to 568 and include it
7 as a second paragraph in 567?
8 CHAIRMAN SOULES: So, every default
9 motion would need to be under affidavit and post
10 trial motions --
11 PROFESSOR EDGAR: That fit the
12 category of 568 would also have to be supported by
13 affidavit.
14 CHAIRMAN SOULES: We can do that. Is
15 there a great deal of controversy on this? So,
16 we're just going to merge 567 and 568. That's
17 what we're doing to do.
18 PROFESSOR DORSANEO: Before we amend
19 it, do we want to desex this thing?
20 CHAIRMAN SOULES: Why don't we not do
21 that? Okay.
22 PROFESSOR DORSANEO: I don't want to
23 talk about these JP rules anymore.
24 CHAIRMAN SOULES: We've managed to
25 avoid them up to now, but I guess we can't any

1 longer.

2 PROFESSOR EDGAR: Now, we're on page

3 213.

4 CHAIRMAN SOULES: Okay. Let's see,

5 525. 749, okay. We're on page 250 of the purple

6 book.

7 PROFESSOR EDGAR: All right. Let me

8 tell you what's involved here in part. And this

9 is some stuff I got that you sent me, Luke.

10 CHAIRMAN SOULES: Okay.

11 PROFESSOR EDGAR: Let me get -- just a

12 second. Let me get the materials here. One of

13 the problems that was presented was since no

14 pleadings are required to be filed in the justice

15 court -- let's assume that we have a trial and the

16 defendant prevails, okay? Now, the plaintiff

17 wants to appeal that on a trial de novo. Rule 7

18 -- I think it's 753. Just a minute.

19 PROFESSOR EDGAR: All right. The

20 appeal, though, from the JP court does not

21 currently require that notice be given to the

22 prevailing party. So, the prevailing party, then,

23 not having notice, is not aware that the appeal

24 has been taken. And since he didn't have to file

25 anything in writing in the JP court, the

1 plaintiff, then, upon appeal, takes a default
2 judgment against him in the county court at law
3 because he didn't have a pleading on file.
4 And I think part of this is intended to
5 require that a notice of appeal be given the
6 prevailing defendant so that he can then file an
7 answer and protect himself from the default
8 judgment.
9 CHAIRMAN SOULES: That's right. And
10 they gave an example --
11 PROFESSOR EDGAR: And I don't know
12 that that's set out here, but --
13 CHAIRMAN SOULES: They gave an example
14 and I saw that example.
15 PROFESSOR EDGAR: Here it is on page
16 214.
17 CHAIRMAN SOULES: Plaintiff won -- I
18 mean, the defendant won -- no, the plaintiff won
19 -- the defendant on oral pleadings.
20 PROFESSOR EDGAR: Well, it can happen
21 either way. The one that was sent to Kronzer,
22 though, was just the other way around. It can
23 happen either way. And this is in the letter to
24 you, Luke, from Ken Coffman dated July 9, 1985.
25 PROFESSOR DORSANEO: Second the

1 motion.

2 CHAIRMAN SOULES: Just do this.

3 PROFESSOR EDGAR: Yes. And the only

4 thing I'd suggest is that on page 214 rather than

5 having this say "without first showing that this

6 rule has been substantially complied with," I

7 would say "without first showing a substantial

8 compliance with the rule." I just hate to end

9 sentences with prepositions.

10 CHAIRMAN SOULES: "Without showing

11 substantial compliance with this rule."

12 PROFESSOR EDGAR: Yes. That's the

13 purpose of that.

14 CHAIRMAN SOULES: Okay. Unanimous

15 approval on that; no dissent.

16 PROFESSOR EDGAR: Then --

17 CHAIRMAN SOULES: Where's this grand

18 swell of interest in the justice courtroom?

19 PROFESSOR EDGAR: All right. Then

20 page 216 simply is an additional built-in

21 mechanism, apparently, to require that the clerk

22 in docketing the trial de novo -- let's see, this

23 is to pro se defendants. This requires the county

24 clerk to notify the parties. And then, also, the

25 necessity for the defendant to file a written

1 answer.

2 CHAIRMAN SOULES: Okay. Any objection

3 to that, Rule 751? Okay. That's unanimously

4 okayed. He wants to change five days to eight

5 days, which gets into one of my pet peeves. I

6 think we always ought to make them a week so that

7 anything not on a weekday comes back on a weekday.

8 I don't care whether it's 7 or 14, but I would

9 like to make it one or the other.

10 PROFESSOR EDGAR: All right. Now,

11 this -- just a minute. I've just picked up on

12 this this morning so this is really the first time

13 I've had a chance to read this. Give me just a

14 minute.

15 CHAIRMAN SOULES: Here is where he

16 writes us. He was a defendant in an FE & D and

17 won. The landlord appealed and he didn't know

18 it. And since his pleadings in justice court were

19 oral, he had no pleadings on file in the justice

20 court. For a pleading in a justice court to

21 constitute an appearance in a county court, it has

22 to be in writing. So, without notice that the

23 landlord had appealed and having no -- nothing but

24 oral pleadings on file in a justice court, he's

25 defaulted, then, in a county court and that

1 judgment goes final. So, instead of winning, as
2 he had done in the justice court where he
3 appeared, he has now lost by default in the county
4 court for lack of pleadings.
5 PROFESSOR EDGAR: But we've already
6 taken care of that.
7 CHAIRMAN SOULES: We've taken care of
8 that, but that obviously needed cured.
9 PROFESSOR EDGAR: That will take care
10 of that. Now, the second problem -- are you
11 looking down here at the letter from Ken Coffman?
12 CHAIRMAN SOULES: Right.
13 PROFESSOR EDGAR: All right. He
14 points out that -- no, there was one, though,
15 where because of the time requirements -- and I
16 think that's what this is dealing with -- he was
17 cut off from his right to appeal before he knew
18 that the appeal had been perfected, and there's a
19 letter in here that deals with that.
20 PROFESSOR DORSANEO: Well, if you're
21 going to get five days notice -- if they give five
22 days to give you notice that they perfected the
23 appeal, then you've got to have a little bit more
24 time. It does seem to fit together. If we go
25 back over here and say that within five days --

1 "over here" being 749 -- "Within five days
2 following the filing of such bond, the party
3 appealing should give notice as provided in Rule
4 21(a)."
5 Then you've got to have, "Said cause shall be
6 subject to trial any time after expiration of,"
7 something more than five days in this other
8 place. But I think eight is kind of a peculiar
9 number to pick. I mean, why not say 10 or --
10 PROFESSOR EDGAR: All right. Here it
11 is.
12 CHAIRMAN SOULES: We just change the
13 TRO's to 14 so they would all come up on a
14 weekday.
15 PROFESSOR EDGAR: It's a letter dated
16 December 13, 1983 from Judge Wallace to you, Luke.
17 CHAIRMAN SOULES: Okay. Let's see
18 where that is.
19 PROFESSOR EDGAR: It's the second page
20 of that letter from him to you.
21 CHAIRMAN SOULES: Judge, do you
22 remember all of these letters?
23 JUSTICE WALLACE: Instant recall.
24 PROFESSOR EDGAR: Okay. Have you
25 found it yet?

1 CHAIRMAN SOULES: What page is that
2 on?
3 PROFESSOR EDGAR: It's on page 2 of a
4 letter from Judge Wallace to you dated December
5 13, 1983. It was in the material you sent me of
6 the Kronzer letter.
7 CHAIRMAN SOULES: I don't have it here
8 but read it. Oh, okay, I've got it.
9 PROFESSOR EDGAR: Now, the second
10 page, Rule 749 requires -- and we've just approved
11 that one back here on page 213 --
12 CHAIRMAN SOULES: Right.
13 PROFESSOR EDGAR: -- requires that
14 within five days after the judgment is signed, the
15 bond has to be filed. Okay. Within five days.
16 CHAIRMAN SOULES: Okay.
17 PROFESSOR EDGAR: Then he points out
18 that Rule 569 provides five days for the filing of
19 a motion for new trial in the justice court. And
20 567 provides that the justice court has 10 days to
21 act on the motion for new trial. And a recent
22 motion for leave to file a petition for writ of
23 mandamus, we were presented with a situation where
24 the defendant filed a motion for new trial five
25 days after the judgment, which the rule provided

1 him to do. The next day the justice of the peace
2 overruled the motion but it was too late to file
3 his appeal bond under Rule 749.
4 PROFESSOR DORSANEO: What's that got
5 to do with this over here?
6 PROFESSOR EDGAR: Well, but it all
7 ties in together, though, because in looking at
8 Rule 749, it -- you can actually be denied the
9 right to appeal because the way that these rules
10 have not been related one to the other. And
11 that's why it's important to consider that because
12 we're talking about 749 which has that five-day
13 period in it.
14 JUSTICE WALLACE: The only way you can
15 -- well, if you wait until your judgment becomes
16 final before you file your appeal bond and --
17 PROFESSOR EDGAR: It's too late.
18 JUSTICE WALLACE: It's too late.
19 PROFESSOR EDGAR: And you're really in
20 a Catch-22.
21 PROFESSOR DORSANEO: But this 753 is
22 about a default in the county court, right? This
23 is about the appeal.
24 PROFESSOR EDGAR: Well, yeah, that's
25 right.

1 PROFESSOR DORSANEO: This has to be --
2 this has to be related to this other five-day
3 thing.
4 PROFESSOR EDGAR: Well, I think it
5 does but it seems to me that this creates a
6 problem right here. And I just happen to remember
7 it because I read this this morning and into any
8 sense of perpetuating a problem. If this five
9 days right here is a problem, then we ought to
10 correct it now.
11 JUSTICE WALLACE: Five days final
12 judgment as opposed to five days overruling the
13 motion for new trial.
14 PROFESSOR EDGAR: Within five days
15 after the overruling of the motion for new trial
16 or something like that. That seems like that
17 would solve the problem.
18 PROFESSOR DORSANEO: Up here judgment
19 is signed or -- in the event a motion for new
20 trial is filed and then five days after the motion
21 for new trial is overruled.
22 JUSTICE WALLACE: Lefty, you're a
23 justice court expert. Get up here and help us.
24 MR. MORRIS: You don't want me. I
25 appreciate these people laboring over it, though.

1 CHAIRMAN SOULES: How do we solve
2 that, Hadley?
3 PROFESSOR EDGAR: Well --
4 CHAIRMAN SOULES: We don't even have
5 749 in these materials. I realize they wrote us
6 about it, but what does he suggest we can do?
7 PROFESSOR EDGAR: Well, he didn't. He
8 just said -- Judge Wallace, the question presented
9 is whether forcible retainer actions should be an
10 expressed exception to the rules of practice in
11 justice courts so as to clarify the procedural
12 steps such as occurred in the above case.
13 PROFESSOR DORSANEO: Well, you know,
14 the thing is, I think you ought to be smart enough
15 to read Rule 749 where it says -- it says that you
16 do perfect this appeal within five days after the
17 judgment is signed. I mean, it says that right
18 there on the face of it. Why would anybody think
19 that the dependency of a motion for new trial
20 would alter that if they read it?
21 Now, maybe they would -- maybe they would
22 remember the old practice where bonds were keyed
23 into overruling motions for new trial, but I don't
24 see that as a problem.
25 PROFESSOR EDGAR: But in the normal

1 course of events, though, you would file a motion
2 for new trial. And until the motion for new trial
3 is acted upon, you wouldn't think that there would
4 be any finality to that judgment. But there is if
5 you fail to file your appeal bond within five days
6 after it was signed.
7 PROFESSOR DORSANEO: Here is what I
8 think.
9 PROFESSOR EDGAR: I mean, that was the
10 problem the Court was confronted with in this
11 case.
12 PROFESSOR DORSANEO: Okay.
13 CHAIRMAN SOULES: How long do you have
14 to file a motion for new trial? What is the total
15 length of time?
16 PROFESSOR EDGAR: In Rule 749, the
17 bond has to be filed within five days.
18 PROFESSOR DORSANEO: And the motion
19 for new trial is back in the five hundreds.
20 PROFESSOR EDGAR: Yes. That's Rule
21 567.
22 PROFESSOR DORSANEO: And when is an
23 appeal perfectable in a not FE & D case.
24 CHAIRMAN SOULES: Okay. He's only got
25 10 days to grant a new trial. That means 13,

1 because it winds up on Saturday and that's a legal
2 -- that's a Saturday and a Sunday, and Monday is a
3 legal holiday and so it could be as far as 13 days
4 -- 10 days here. So, if we give 14 days to
5 perfect the appeal, they ought to know from the
6 judgment.
7 PROFESSOR DORSANEO: But this is
8 supposed to be a speedy remedy. This five-day
9 time period for perfecting the appeal in 749 is a
10 shorter time period than the time period for de
11 novo appeals of county courts generally in JP
12 court under 571, which does key from -- within 10
13 days after a judgment or order overruling a motion
14 for new trial is signed.
15 See, there's a -- the old non FE & D rules in
16 the JP court are like our old perfection of appeal
17 rules, in that you file the bond within a period
18 of time after the motion for new trial is
19 overruled. But the FE & D part of that is
20 entirely different suggesting that, you know,
21 somebody made a conscious choice that the FE & D
22 is supposed to be speedy and this trial de novo
23 extending time periods business ought to be as
24 short as possible given the possessory nature of
25 the writ.

1 CHAIRMAN SOULES: Well, I guess with
2 that, then, we just have to try to make some
3 assumptions about what these practitioners want as
4 a matter of policy. Do they want to be at risk?
5 I don't know why a five-day cutoff -- they can
6 file it in five and be in safe harbor for 14.
7 I would think they would want to have 14 days
8 of jurisdiction rather than have the problems that
9 are raised -- that were raised in this mandamus
10 that the Supreme Court dealt with back in 1982 or
11 '83 that Justice Wallace wrote us about. How do
12 we guess, if we're guessing? Do we want to give
13 these guys 14 to keep them out of kind of trouble,
14 or leave it at five and try to force them --
15 PROFESSOR DORSANEO: The safest thing
16 to do would be to not have two appellate time
17 tables in the JP court.
18 CHAIRMAN SOULES: We don't have time
19 to do that. Or make them both 10.
20 PROFESSOR EDGAR: Maybe we shouldn't
21 do anything with that right now. I just wanted to
22 call it to your attention.
23 CHAIRMAN SOULES: Well, it's been
24 around since December of '83. Let's do something
25 with it. Either decide to do nothing because

1 that's the right thing to do or make it 10 or --
2 because that's what the other justice court rules
3 are or make it something else. Why don't we make
4 it 10?
5 PROFESSOR DORSANEO: I see two
6 alternatives. I say we change 749 to say -- in
7 the first sentence say, "No motion for new trial
8 shall be permitted in an FE & D case," and then
9 maybe change five to 10. All right. Or we make
10 the time for perfecting the appeal like Rule 571
11 for ordinary FE & d cases which would --
12 CHAIRMAN SOULES: 10 days.
13 PROFESSOR DORSANEO: -- Which would be
14 10 days for overruling motion for new trial if one
15 is filed. My preference to preserve speed would
16 be to not allow a motion for new trial in an
17 FE & D case in the JP court because I think that's
18 probably a waste of energy anyway.
19 JUSTICE WALLACE: You've got -- with a
20 trial de novo as opposed to a regular appellate
21 review -- and you're not competent to hold out
22 probably by your motion for new trial.
23 PROFESSOR DORSANEO: That is a motion
24 for new trial different -- perhaps more congenial
25 environment.

1 CHAIRMAN SOULES: So, what we would do
2 is --
3 JUSTICE WALLACE: Eliminate the motion
4 for new trial in FE & D cases.
5 CHAIRMAN SOULES: Rule 749 --
6 JUSTICE WALLACE: If this guy hadn't
7 come up with the bright idea of filing a motion
8 for new trial he wouldn't have gotten into trouble
9 in the first place.
10 PROFESSOR EDGAR: That's right.
11 CHAIRMAN SOULES: Rule 749 we're going
12 to say, "no motion for new trial" --
13 PROFESSOR EDGAR: "Shall be
14 permitted."
15 PROFESSOR DORSANEO: We've got a rule
16 like that for accelerated appeals.
17 CHAIRMAN SOULES: -- "shall be
18 permitted," period. And then the balance is no
19 change, or do we want to change it to 10 days?
20 JUSTICE WALLACE: You've got a quick
21 appeal there to get that guy out of possession
22 that doesn't belong in there and they're all
23 accustomed. These JP's -- old boys are trying to
24 -- the school for JP's is pretty much on -- well,
25 they've got their desk books all up and here's

1 what you do in this case and down the line and go
2 through all the trouble of changing that. Those
3 that bother to learn it -- changing their
4 learning, then I'd say leave the timetable the way
5 it is.
6 PROFESSOR DORSANEO: In the TRAP Rule
7 42, the sentence reads, "In appeals from
8 interlocutory orders, no motion for new trial
9 shall be filed." So, we have that kind of
10 language for a different type of comparable
11 situation.
12 CHAIRMAN SOULES: Appeals in forcible
13 detainer cases, no motion for new trial shall be
14 filed.
15 PROFESSOR EDGAR: Rule 749 pertains
16 only to forcible entry, doesn't it?
17 PROFESSOR DORSANEO: Yes.
18 CHAIRMAN SOULES: All right.
19 PROFESSOR DORSANEO: I remember from
20 my younger days working in some of these, that
21 somebody did get screwed up because they got the 5
22 day, 10 day trial moved and went down the tubes.
23 CHAIRMAN SOULES: Okay. Let's look at
24 this 753, then. Does that time period --
25 PROFESSOR EDGAR: Don't run off,

1 Dorsaneo.

2 CHAIRMAN SOULES: Bill, we need you.

3 I don't want to leave this loose-ended here. The

4 next one was 753 on page 218. Does that -- do

5 those time periods need to be changed?

6 PROFESSOR DORSANEO: I think so. I

7 would say 10. Subject to trial at any time after

8 expiration of -- five full days after the day the

9 transcript is filed. I guess -- when does a

10 transcript get filed? The appeal is perfected and

11 then the JP is meant to package this up and send

12 it to the --

13 PROFESSOR EDGAR: To the clerk.

14 PROFESSOR DORSANEO: -- clerk. If

15 we're giving -- if somebody gets notice of this

16 appeal by getting notice that the bond has been

17 filed within five days following the filing of the

18 bond, then they could be --

19 PROFESSOR EDGAR: Well, the purpose of

20 this change --

21 PROFESSOR DORSANEO: -- defaulted in

22 the county court before they -- almost

23 simultaneously with receiving the notice, as I

24 read it.

25 PROFESSOR EDGAR: It says the

1 extension from eight to five -- from five to eight
2 is required for due process considerations in
3 order to give the pro se defendant the opportunity
4 to receive notice and follow written answer where
5 he or she has pleaded orally in the justice court.
6 PROFESSOR DORSANEO: That doesn't seem
7 like a lot of due process there, about 10 more
8 minutes.
9 CHAIRMAN SOULES: Why don't we say
10 14? Is that a problem? What kind of problem --
11 are we talking about -- this is not an FE&D case.
12 This is an everyday case and that's accelerated --
13 PROFESSOR DORSANEO: No, I think it's
14 an FE&D case. It's another fast track item.
15 CHAIRMAN SOULES: It sure is.
16 PROFESSOR EDGAR: In Rule 751, we've
17 just required the clerk to notify the parties,
18 too, and that's going to take a day or two in the
19 mail. And if that's to make sure that they get
20 notice, then if you give them five days from that
21 point, between then and trial, then that's going
22 to be a total of about eight days because you've
23 got some mailing time in there and maybe a
24 weekend, too.
25 CHAIRMAN SOULES: Okay. How many

1 days?

2 PROFESSOR EDGAR: So, eight days might

3 be a reasonable compromise. That might be what

4 they had in mind.

5 CHAIRMAN SOULES: I guess give them

6 what they ask for.

7 PROFESSOR EDGAR: I've made mistakes

8 like that before in my life, too, getting exactly

9 what I asked for.

10 PROFESSOR DORSANEO: If they knew they

11 had a chance to get 10, they wouldn't have written

12 eight there, you know it?

13 PROFESSOR EDGAR: Does that take care

14 of that then?

15 CHAIRMAN SOULES: I think it does.

16 And I think that takes care of Ken Coffman's

17 complaints.

18 PROFESSOR EDGAR: Now, while we're

19 going through some other material, Luke, look on

20 page 223. There's an old letter there to Mike

21 Hatchell back in '83. And I, frankly, think that

22 involves a policy problem on filing the abstract

23 within 30 days, because part of that problem is

24 manifested in the next letter on page 225.

25 PROFESSOR DORSANEO: This is the Hunt

1 versus Heaton problem, basically.

2 PROFESSOR EDGAR: Yes, and 227.

3 PROFESSOR DORSANEO: I move the repeal

4 of the trespass to try title rules top to bottom,

5 and I'm serious.

6 CHAIRMAN SOULES: We can put that on

7 next year's agenda. There's a problem with that.

8 PROFESSOR EDGAR: Yes.

9 CHAIRMAN SOULES: And these rules --

10 JUSTICE WALLACE: I'm going to direct

11 all those old land lawyers across the state to

12 communicate with you not to me, because you talk

13 about some irrational, set in their ways,

14 nothing-should-ever-be-changed-people. It's

15 unbelievabe. You know what I'm talking about.

16 PROFESSOR EDGAR: I know exactly what

17 you're talking about, Judge Wallace. Exactly.

18 They are set in their ways.

19 PROFESSOR DORSANEO: Well, maybe we

20 can do it by providing everything that can be done

21 and give them credit for whatever you like.

22 PROFESSOR EDGAR: Grandfather them

23 out.

24 PROFESSOR DORSANEO: You don't have to

25 use these rules if you don't want to.

1 CHAIRMAN SOULES: What Williamson is
2 saying here is that failure to file this abstract
3 defaults --
4 PROFESSOR EDGAR: Yes.
5 CHAIRMAN SOULES: -- you in a trespass
6 to try title case.
7 PROFESSOR DORSANEO: It does unless
8 you ask --
9 JUSTICE WALLACE: It prevents you from
10 putting on any evidence.
11 PROFESSOR EDGAR: That's a pretty
12 effective deterrent right there.
13 CHAIRMAN SOULES: Yes. The Williamson
14 wants that not be automatic like failure --
15 failure to answer requests to admit. He wants you
16 to have to be a --
17 PROFESSOR DORSANEO: He wants to
18 overrule Hunt versus Heaton is what he wants.
19 CHAIRMAN SOULES: Yes. And so let's
20 just pass on that. How do we want to --
21 PROFESSOR EDGAR: Well, I think it is
22 certainly harsh where you can't leave it to the
23 discretion of the trial judge whether or not there
24 are certain circumstances under which the abstract
25 should be permitted to be tardily filed or not.

1 That's just my view. I don't know why.

2 JUSTICE WALLACE: When I first got

3 started back in law, I got caught up. I dismissed

4 my lawsuit and turned around and filed another

5 one, the way I got around it.

6 CHAIRMAN SOULES: I guess you didn't

7 have a limitation problem.

8 PROFESSOR EDGAR: If you had a

9 limitation problem, that would have certainly hurt

10 you badly.

11 CHAIRMAN SOULES: He's got a rule

12 drafted here on page 226 that we can act on and it

13 it does meet his problems. And probably if we're

14 going to keep these rules it is fairly well

15 stated. I guess it's either vote that up or down,

16 really, isn't it?

17 PROFESSOR EDGAR: Yeah. If we're

18 going to do it -- if we're going to vote it,

19 though, I would suggest that the addition be after

20 the word, "The Court may," comma, "after notice

21 and hearing prior to the beginning of trial,"

22 comma, "order that no evidence of the claim," so

23 and so. Do you see what I'm saying?

24 CHAIRMAN SOULES: Yeah. "And in

25 default thereof," comma, "the Court may, after

1 notice of hearing prior to beginning of trial
2 order" --
3 PROFESSOR EDGAR: Well, just "in
4 default thereof, the Court." I think you need a
5 comma after that.
6 CHAIRMAN SOULES: Okay.
7 PROFESSOR EDGAR: "The Court may,"
8 comma, "after notice and hearing prior to the
9 beginning of trial," comma, "order that no
10 evidence of the claim," and so and so, "be given
11 on trial."
12 CHAIRMAN SOULES: All right.
13 PROFESSOR DORSANEO: Does that really
14 solve his problem?
15 CHAIRMAN SOULES: Solves his problem.
16 PROFESSOR DORSANEO: It just offers a
17 separate hearing.
18 PROFESSOR EDGAR: But at least it's
19 discretionary, though. It's not automatic.
20 CHAIRMAN SOULES: The Court can't
21 permit.
22 PROFESSOR EDGAR: See, now the Court
23 doesn't have any option.
24 CHAIRMAN SOULES: Under Hunt versus
25 Heaton you're dead.

1 PROFESSOR DORSANEO: Okay.
2 CHAIRMAN SOULES: All in favor of this
3 as restated by Hadley, otherwise the way it is on
4 226, show by hands. Opposed? That's
5 unanimously --
6 PROFESSOR DORSANEO: I'm going to vote
7 against it.
8 CHAIRMAN SOULES: Okay. Let's see
9 that's a vote of -- everybody else to one.
10 PROFESSOR DORSANEO: My reason for
11 voting against it is that I don't think that this
12 practice can be repaired to the point where it is
13 a useful practice in modern Texas.
14 CHAIRMAN SOULES: Okay. 92, the same
15 thing over here. This is Karl Hoppess talking
16 about the same problem.
17 PROFESSOR EDGAR: You're on page 233?
18 CHAIRMAN SOULES: I'm on 229 now.
19 PROFESSOR EDGAR: 233 is, again, the
20 same 749 problem with which we have just dealt.
21 CHAIRMAN SOULES: So, we've done that.
22 PROFESSOR EDGAR: So, we've taken care
23 of that.
24 CHAIRMAN SOULES: And then the next
25 stuff is Jeremy Wicker's --

1 PROFESSOR EDGAR: There might be one
2 other thing here.
3 CHAIRMAN SOULES: I'm sorry.
4 PROFESSOR EDGAR: Just let me check.
5 Yes. Rule 758 refers to Rules 114, 15 and 16.
6 Now, haven't we done something to those rules?
7 Haven't we deleted -- I just want to make sure,
8 because if we're not careful, we're going to be
9 referring to some rules that are no longer in
10 existence.
11 CHAIRMAN SOULES: See if Jeremy --
12 PROFESSOR EDGAR: Okay, we haven't.
13 CHAIRMAN SOULES: See if Jeremy Wicker
14 on page 235 identifies the problem you're thinking
15 about there, Hadley. He says Rule 109 was amended
16 to delete the proviso that 758 refers to.
17 PROFESSOR DORSANEO: Oh, yeah. That's
18 good. That was that proviso about somebody being
19 outside of the United States but not being in the
20 Army.
21 CHAIRMAN SOULES: I see. What about
22 the Air Force, Marines, Navy? Is that what you
23 were thinking about, Hadley?
24 PROFESSOR EDGAR: I guess so.
25 JUSTICE WALLACE: State guard on duty

1 in Nicaragua.

2 CHAIRMAN SOULES: Any objection to

3 deleting Rule 758, the reference to Rule 109?

4 PROFESSOR EDGAR: Rule 758 doesn't say

5 that, does it?

6 CHAIRMAN SOULES: I'm trying to find

7 it.

8 PROFESSOR EDGAR: I'm looking at Rule

9 758 on page 252. I don't see any reference to the

10 proviso on 109. That's already been done.

11 PROFESSOR DORSANEO: Changed by the

12 amendment effective April 1, 1985.

13 PROFESSOR EDGAR: We did that last

14 year.

15 PROFESSOR DORSANEO: It was just such

16 a good idea last year we'll do it again this year.

17 CHAIRMAN SOULES: Okay, done last

18 year.

19 PROFESSOR EDGAR: I think that may be

20 what those check marks mean.

21 CHAIRMAN SOULES: Okay. Then here's

22 some January 2, 1986 changes in the rules proposed

23 by -- that are proposed by him, by Wicker, where

24 he's using possession instead of restitution in

25 several places.

1 PROFESSOR EDGAR: Now, I notice that
2 in some other material we've got here, the
3 committee on the Administration of Justice
4 disagreed with that. Somebody did. This is the
5 material you sent me, Luke.
6 CHAIRMAN SOULES: Yes.
7 PROFESSOR EDGAR: And I'm looking back
8 here where somebody -- this says "recommended by
9 COAJ 2/8/86 except last clause."
10 CHAIRMAN SOULES: Right. I went to
11 the meeting. That's my writing. And his letter
12 starts on 238. And the only -- no, let's see.
13 Well, that's a part of it. Isn't that all a part
14 of the same thing? Anyway -- oh, it is exactly
15 the same thing. Okay. So, we've just looked at
16 242, page 242.
17 PROFESSOR EDGAR: Yes.
18 PROFESSOR DORSANEO: Is this that one
19 where it was recommended to delete the "unless"
20 because somebody doesn't like what Section 24.0061
21 of the Property Code says?
22 Well, Mr. Chairman, I recommend that we
23 change the word "restitution" to "possession" if
24 that's what the Property Code does on this
25 "unless" part. In the absence of somebody

1 establishing to me that that is what the Property
2 Code requires, I would think it would be okay for
3 us to leave it out. Even if the Property Code
4 requires it and we leave it out, we haven't done
5 any damage to what the Property Code requires.
6 CHAIRMAN SOULES: Okay. Are we, then,
7 in unanimous approval of Rule 748 deleting the
8 last clause as the COAJ recommended? No dissent
9 on that, so that's unanimously approved.
10 And then 755, I do remember the discussion on
11 that because even multi-family -- he used
12 milti-family apartments -- he used for residential
13 purposes and that's not really what this was
14 directed to. So, something used as a principle
15 residence of a party is what everybody thought was
16 intended by this "for residential purposes only"
17 and that that did meet the statute. Any problem
18 with amending Rule 755 as shown here?
19 PROFESSOR EDGAR: As recommended by
20 the COAJ.
21 CHAIRMAN SOULES: As the COAJ
22 recommended. Then we've got housekeeping rules of
23 Jeremy Wicker. And that's it; we're through with
24 justice court rules, too.
25 PROFESSOR EDGAR: I move that all of

1 the housekeeping changes reflected on agenda pages
2 246, 247 and 248 be adopted.
3 MR. BRANSON: Second.
4 CHAIRMAN SOULES: Second. That's
5 Branson.
6 MR. BRANSON: Yes.
7 CHAIRMAN SOULES: Okay. Do you do
8 much practice in justice court, Branson?
9 MR. BRANSON: Occasionally the juries
10 inform me that's where I ought to be, but I don't
11 start out there.
12 CHAIRMAN SOULES: Okay. Any dissent
13 on that? That's unanimous then. Now, we've got a
14 controversial one coming up, unless somebody wants
15 to volunteer for something not controversial.
16 Well, let me -- Bill, will you, or somebody,
17 look at these problems that have been raised by
18 Frank Baker on how to try to get the court
19 reporters of the courts responsible for getting
20 the records up, as opposed to parties filing
21 motions and all that. It's on page 249. I don't
22 know if you've ever had a chance to look at it.
23 PROFESSOR DORSANEO: I didn't look at
24 that. That is a major modification from the way
25 we now do business. I assumed that that was the

1 kind of item that would be put on the table.
2 CHAIRMAN SOULES: It would be to table
3 for next time?
4 PROFESSOR DORSANEO: Yeah. I don't
5 think we can make those changes without giving
6 them a lot of careful thought before a larger
7 group.
8 CHAIRMAN SOULES: Okay. We're going
9 to table that, then, to the next session. But
10 Frank has been -- Frank is a very distinguished
11 member of the State Bar. You-all may know him.
12 He's a fine trial practitioner and fellow
13 practitioner from San Antonio. He's been
14 concerned about this for a long time, and not
15 without justification. So, if we can -- that will
16 go to the proper subcommittee for work in the
17 interim.
18 MR. BRANSON: Didn't a case just come
19 down -- I haven't seen it but I've heard about it
20 -- holding the court reporters now to no longer
21 require the posting of some advanced payment
22 before they start the record, or did I just dream
23 that?
24 PROFESSOR DORSANEO: The rule has said
25 that for a while. They can't require advanced

1 payment, but you have to make -- for them to start
2 preparing it, you have to make arrangements to pay
3 them before you can get it.
4 MR. BRANSON: I don't know about the
5 rest of you but -- and I'm not sure I know where
6 we address it in the rules -- but I have
7 literally, on occasion, been held hostage by court
8 reporters, during trial and after the judgment,
9 trying to get documents out of them, particularly
10 when you want some transcript typed up during
11 trial or some testimony typed up during trial.
12 The court reporter's fees are not really
13 based on anything relative to any other method of
14 determining the price of court reporting duties.
15 If you get trial transcripts, you really pay -- I
16 tried one a few years ago, and when I got through
17 I had 20 grand or so in that type of testimony.
18 And it really was a long trial, about a six-week
19 trial.
20 But there was no -- the court reporter was
21 very friendly with the trial judge and there was
22 no way to complain about it at the time. And
23 there ought to be some relief for the trial
24 practitioner who is asking for additional -- who
25 feels the need for the testimony.

1 PROFESSOR DORSANEO: You're wanting
2 daily copy and they're just charging you what they
3 can get by with.
4 MR. BRANSON: Well, sometimes -- in
5 that particular incidence I was wanting daily
6 copy. And what I finally had to do was bring in
7 an outside court reporter. But I had been there
8 where the trial practitioner is really at the
9 mercy of the court reporter, both in terms of fees
10 that are charged and in terms of everything else.
11 I tried one one time where the court reporter
12 would stop the lawyer in the middle of the
13 questioning of a witness. And, generally, he
14 would wait until you were just about to lower the
15 boom on somebody and say, "How do you spell that?"
16 CHAIRMAN SOULES: Okay. Well, we'll
17 put that in the hopper with the study we're going
18 to make and see what can be done. Let's see. On
19 page 257, have we taken care of that now? And the
20 letter is on 258, a letter from Judge Schattman,
21 conflict between Rule 267 of Civil Procedure and
22 613.
23 PROFESSOR DORSANEO: I don't think we
24 have taken care of that, have we? And the two do
25 conflict because the Rule of Evidence -- do you

1 want to take a fast look at it?
2 CHAIRMAN SOULES: Yeah. We're not
3 going to change the Rules of Evidence, though,
4 Judge.
5 PROFESSOR DORSANEO: Rule 613 says,
6 "At the request of a party" -- we're talking about
7 the rule. "At the request of the party, the Court
8 shall order witnesses excluded so that they cannot
9 hear the testimony of other witnesses."
10 The first sentence conflicts with Rule 267
11 because that Rule 267 is not mandatory. It says,
12 "At the request of either party, the witnesses on
13 both sides may be sworn and removed out of the
14 courtroom to some other place." In other words,
15 what Rule 613 requires, Rule 267 leaves to the
16 Court's discretion.
17 CHAIRMAN SOULES: Should we not --
18 PROFESSOR DORSANEO: And there are
19 other things, too.
20 CHAIRMAN SOULES: Okay.
21 PROFESSOR DORSANEO: The second part
22 of Rule 613 of the Rules of Evidence speaks about
23 a class-3 person who is not authorized to be
24 excluded under the subnumber 3. "A person whose
25 presence is shown by a party to be essential to

1 the presentation of his case," and 267 isn't that
2 strict. It, again, is more discretionary in
3 character.
4 If we're -- to resolve the conflict and not
5 to change Rule 613 of the Rules of Evidence, if
6 that's the plan, then Rule 267 has to go.
7 CHAIRMAN SOULES: You mean that be
8 completely repealed?
9 PROFESSOR DORSANEO: Well, no, at
10 least the part up through "witnesses."
11 CHAIRMAN SOULES: Does 613 speak to
12 corporations?
13 PROFESSOR DORSANEO: Not -- well, "an
14 officer or an employee of a defendant which is not
15 a natural person."
16 CHAIRMAN SOULES: So, up through
17 represent -- let me see, down to "if any party be
18 absent," or is that covered, too?
19 PROFESSOR DORSANEO: That's covered,
20 too, by 613. The part that says, "Witnesses, when
21 placed under the rule, shall be instructed," the
22 information about how they are instructed is not
23 in 613.
24 CHAIRMAN SOULES: So, we would repeal
25 down to the word "witnesses." Are we going to

1 just let 613 control?

2 PROFESSOR EDGAR: I remember when

3 Judge Pope -- this question has arisen before.

4 And Newell pointed this out to us one time in a

5 meeting, and we questioned whether or not we

6 should have this general subject matter both in

7 the Rules of Civil Procedure and in the Rules of

8 Evidence.

9 And I remember somebody commenting -- and it

10 might have been Judge Pope, but I thought it was a

11 member of the judiciary -- stated that the reason

12 that they left it in here is because it was a rule

13 of evidence but it was also kind of a trial

14 practice rule. And as a matter of policy, they

15 thought it best to have it in both places, which

16 it really doesn't hurt anything, I don't suppose.

17 PROFESSOR DORSANEO: But it ought not

18 to be inconsistent.

19 PROFESSOR EDGAR: But certainly, in

20 keeping with that, if we want to continue that

21 policy, I would move that we take the language

22 that is now contained in Rule 613 and substitute

23 it for the first five or six sentences in what is

24 now Rule 267 down to beginning with "witnesses

25 when placed under this rule."

1 CHAIRMAN SOULES: What if we just
2 said, "Witnesses when placed under Texas Rule of
3 Evidence 613 shall be instructed by the Court,"
4 instead of doing the whole rewrite there? And
5 that will take them there. And change the
6 caption --
7 PROFESSOR EDGAR: Presuming they know
8 what Rule 613 is.
9 CHAIRMAN SOULES: Well, put the
10 caption, "Witnesses Placed Under Texas Rules of
11 Evidence 613," in the caption of 267.
12 PROFESSOR EDGAR: That would be the
13 caption then. Oh, okay. Yeah.
14 CHAIRMAN SOULES: And then strike all
15 the language down to the word "witnesses," and
16 then say, "Witnesses when placed under Texas Rule
17 of Evidence 613," and then we would have at least
18 consistent language. Would that take care of it,
19 Bill?
20 PROFESSOR DORSANEO: I think so. But
21 I don't think that -- I think that everybody is
22 going to learn in law school what the rule is,
23 what it was in common law and will still use the
24 term "placing witnesses under the rule" in just
25 conventional language. I would imagine that there

1 are a lot of people that don't know that the rule
2 is 267, for example.
3 So, I would suggest, perhaps, retaining the
4 title "Witnesses Placed Under the Rule" and maybe
5 beginning that "witnesses" sentence like this:
6 "Witnesses who are placed under Rule 613 of the
7 Texas Rules of Evidence," or, you know, something
8 like that.
9 CHAIRMAN SOULES: Okay.
10 PROFESSOR DORSANEO: "Witnesses when
11 placed under Rule 613 of the Texas Rules of
12 Evidence."
13 CHAIRMAN SOULES: "Shall be
14 instructed." Okay. How many feel -- and let's
15 not vote on the caption right now -- but that the
16 substantive change that we've talked about should
17 be recommended to the Supreme Court for adoption?
18 Show by hands. Opposed? Okay. That's
19 unanimous. How many feel that the caption should
20 have a reference to Texas Rule of Evidence 613?
21 Show by hands.
22 MR. BECK: The caption?
23 CHAIRMAN SOULES: Right. Okay. There
24 are no hands up on that, so nobody is for that.
25 That takes care of that. Now, we've got a --

1 let's see, where is 166(b)? I guess that got in
2 here.
3 PROFESSOR DORSANEO: That's in here
4 too, isn't it?
5 CHAIRMAN SOULES: It couldn't be
6 finished with, not what I'm talking about, because
7 it just came out. Supreme Court wants to us drop
8 the investigative privilege. At least their
9 sentiment is that it should be abolished.
10 166(b).
11 JUSTICE WALLACE: On that, we've got
12 about three or four applications now pending
13 before us that the Court hadn't come down any way
14 at all on.
15 CHAIRMAN SOULES: Bill, on page 133,
16 this is Turbodyne. There's a couple of new
17 mandamus cases on it.
18 JUSTICE WALLACE: Stringer and
19 Turbodyne.
20 CHAIRMAN SOULES: Stringer and
21 Turbodyne, yeah. 133, is that where it is?
22 PROFESSOR DORSANEO: Stringer,
23 Turbodyne, and then there is another.
24 JUSTICE WALLACE: Harkness. Motion
25 for rehearing has been overruled in Harkness.

1 Turbodyne and Stringer is still alive.

2 PROFESSOR DORSANEO: The history on

3 this is really interesting if anybody -- and it's

4 helpful to understand the history, too, as to

5 where these things came from.

6 CHAIRMAN SOULES: Why don't you give

7 us a rundown on it?

8 PROFESSOR DORSANEO: Initially, in

9 Rule 167, which was the first rule in the new

10 rules of 1941, copied from the Federal Rules of

11 Civil Procedure. Roy McDonald, at the request of

12 the Court, added a work product proviso that

13 didn't use the term "work product" for four or

14 five years before Hickman versus Taylor at this

15 time. And that proviso is basically like the

16 proviso that was put in Rule 186(a) in 1957 when

17 it was adopted, except in 1957, somewhat

18 perniciously, that information obtained in the

19 course of an investigation by a person employed to

20 make the investigation was added to the 186

21 proviso.

22 Then in -- so, we had two provisos in 1957.

23 One, the original proviso in 167; the other, a

24 broadened proviso exempting investigative

25 information in addition to communications in

1 186(a). Ultimately in 1981 we eliminated the
2 proviso from 167 and cross-referred to 186(a).
3 Then in 1984 we took the proviso from 186(a) that
4 was repealed and put it in as an exemption to
5 166(b) and eliminated the investigative
6 information business.
7 The only other thing that's somewhat
8 interesting is that in either 1971 or 1973 the
9 words "work product" were added to Rule 186(a) for
10 the first time, and work product was never
11 defined, see. So, it boils down to this: This
12 proviso that we asked Roy McDonald to draft before
13 work product principles were well-developed has
14 carried through in our rules of procedure, even
15 after the time when a work product exemption, in
16 so many words, denominated as such, was added into
17 the procedural rules.
18 So, we have a general work product exemption
19 plus a specific tailored Texas-developed work
20 product proviso that antedates the development of
21 work-product law. And it is possible to read
22 these exemptions as having different scopes,
23 leaving us with somewhat of a weird situation
24 where it's possible that the party communication
25 privilege would be broader than work product or

1 vice versa. It's just kind of really messy.
2 Now, the reason why the proviso was -- why
3 the Supreme Court, as I understand it, in 1940
4 wanted a specific work product proviso is that
5 they didn't want a loose and unknown, unspecified
6 work product doctrine as a loose cannon on deck.
7 They wanted a specific thing that could be
8 interpreted by trial judges word by word rather
9 than some policy-based exemption that would
10 require Supreme Court authority to flesh out.
11 I think that's really the history of it. It
12 started out as a work product proviso homemade in
13 Texas before work product law developed. And
14 since that time, we kind of forgot that and added
15 work product in too, and now we have both of
16 them.
17 JUSTICE WALLACE: Also, that 1984
18 amendment provided for an exemption for the
19 investigation of the incident out of which the
20 claim arose. Now, that was new in 1984, and yet,
21 surprisingly, the Court decisions have not
22 recognized it.
23 PROFESSOR DORSANEO: Well, that is a
24 separate problem. When I attempted to reword, as
25 reporter, the provisions of 186(a), I,

1 inadvertently, did not focus on the way it had
2 been interpreted in Allen versus Humphries and
3 wrote it more broadly than the Supreme Court had
4 construed the prior proviso in 167, and that was
5 just my mistake.
6 We weren't meaning to change anything, but
7 nobody noticed it. I do remember now that Richard
8 Clarkson said, "What about Allen versus
9 Humphries?" But I didn't hear him.
10 CHAIRMAN SOULES: Jim Kronzer, who
11 regretfully has resigned from our committee here
12 just in recent days, calls this one the Texas
13 kicker. It's unique in Texas that these --
14 there's this breadth of investigative privilege
15 material. I mean, it cuts both ways. It doesn't
16 help either side. It does open up the
17 communications made in the connection with an
18 investigation which have been pretty much
19 protected in Texas, not as broadly as this, but
20 the Court -- as you can see, Justice Wallace's
21 letter to me dated October the 16th.
22 PROFESSOR DORSANEO: What page is that
23 on?
24 CHAIRMAN SOULES: It's on page 134.
25 This was just a couple weeks ago. It says, "The

1 Court's problem is that a majority of the Court
2 seems to disapprove of the above quoted portion of
3 the rule and prefer that it be changed as soon as
4 possible." That is the language which says --
5 it's in 166b(3)(d). With exception of
6 discoverable material from experts, any
7 communication may pass between agents or
8 representatives, employees to the action or
9 communication between any party and its agents --
10 employees, where made subsequent to the occurence
11 or transaction upon which the suit is based and
12 made in connection with the prosecution,
13 investigation or defense of the claim or the
14 investigation of the occurence or transaction out
15 of which the claim has arisen.
16 PROFESSOR DORSANEO: Mr. Chairman, the
17 problem with that, that's so-called lack of
18 clarity in my draft. Some Courts of Appeals have
19 said that this language could be read very, very
20 broadly. It wasn't meant to be read very, very
21 broadly. It was meant to be read in view of an
22 anticipation of litigation concept. All right.
23 That post occurence communications made in
24 anticipation of litigation ought to be within the
25 exemption.

1 Now, there's a second level of refinement to
2 that which these recent Supreme Court opinions
3 have pointed out and which is evidenced in Allen
4 versus Humphries. Does the person who made the
5 communication have to be anticipating the lawsuit
6 in which the claim is subsequently asserted? That
7 is to say, Mrs. Allen's lawsuit, as opposed to
8 lawsuits coming about as the result of cutting
9 polyvinyl chloride with a hot wire, you see.
10 Allen versus Humphries said the particular
11 circumstances, all right, is what we're talking
12 about, the particular lawsuit, as I understand
13 it. So, the exemption would only cover a
14 communication made in anticipation of a particular
15 lawsuit rather than just any old lawsuit that
16 might subsequently be brought by someone at some
17 point in the future against a product
18 manufacturer, for example.
19 PROFESSOR EDGAR: May I give you an
20 example? Let's assume that the railroad decides
21 that it's going to make an investigation to
22 determine whether this particular crossing is
23 extra hazardous and should have further types of
24 guards. And it does make an investigation and it
25 makes a report. Subsequently, an accident

1 happens. Now, the question is, is that
2 investigation exempt from discovery under this
3 proviso?
4 PROFESSOR DORSANEO: Well, it depends
5 on how you would define "occurrence" in that
6 hypothetical.
7 PROFESSOR EDGAR: I understand that,
8 but that is part of the problem, it seems to me.
9 CHAIRMAN SOULES: Isn't what the Court
10 wants to substitute for this language is "and in
11 anticipation of the pending litigation"? They're
12 not even talking about different litigation.
13 PROFESSOR DORSANEO: That would be
14 what these recent opinions say.
15 CHAIRMAN SOULES: That's what the
16 recent opinions start telling us. And I think
17 that's what we really need to nail down and give
18 the Court our feelings about, isn't it?
19 PROFESSOR EDGAR: I think that's a
20 good rule because, for example, in my example, I
21 do not think that that investigation should be
22 imune from discovery.
23 PROFESSOR DORSANEO: Now --
24 MR. BECK: Let me raise kind of a lone
25 voice of dissent.

1 CHAIRMAN SOULES: No, you're not the
2 lone voice.
3 PROFESSOR DORSANEO: I'm going do
4 dissent with you.
5 MR. BECK: Looking at these two
6 opinions, if all we're talking about is a matter
7 of proof, that's one thing. You know, if the
8 railroad failed to introduce sufficient proof to
9 show that there was good cause to believe that a
10 claim would be made, and in the other case, if
11 they simply failed to state in an affidavit
12 virtually the same thing, that's one thing. That
13 can be handled. The lawyer, you know, can make
14 sure the next time the requisite proof is
15 submitted. But the way these two -- three
16 opinions -- there's another opinion by the Court
17 -- are being interpreted, is that there's no such
18 thing as anticipation of litigation immunity --
19 investigation immunity at all.
20 So, what that means is that Frank Branson,
21 who does medical malpractice work, has somebody
22 walk into his office who believes they have a
23 medical malpractice claim, and Frank, the careful
24 lawyer that he is, is going to conduct an
25 investigation to determine whether or not he's

1 even got a cause of action; I can get that.
2 That's what -- that's the way I read these
3 opinions. I can file a motion to produce and get
4 his file, and I don't think that's right.
5 PROFESSOR DORSANEO: I think the three
6 opinions are having trouble figuring out what they
7 mean to say, and Allen versus Humphries had that
8 problem. And I think that if you read the three
9 opinions carefully, they end up saying not -- not
10 more than this. That if a communication is made
11 in anticipation of a particular lawsuit, then that
12 communication is within the exemption. They could
13 be read if you read certain sentences in them as
14 narrowing the exemption more than that.
15 MR. BECK: Yes. For example, there's
16 a statement in each of these opinions about how --
17 where is it -- the mere fact that --
18 PROFESSOR DORSANEO: That same
19 statement, yeah.
20 MR. BECK: Nobody quarrels with that.
21 PROFESSOR DORSANEO: The mere fact
22 that an accident has happened does not close
23 all --
24 MR. BECK: Correct. Nobody quarrels
25 with that. But I think these opinions -- these

1 three opinions are being read much -- as going
2 much further than that. And the result is that I
3 think that it's really almost emasculating the
4 work product immunity.
5 PROFESSOR DORSANEO: Well, this is a
6 separate thing. Work product, you see, we don't
7 know what work product is. That's the -- as I see
8 it, the main historical problem we have, is that
9 work product was added into these rules, I
10 believe, for the first time in 1973. Those words,
11 "work product," added in and made a
12 nondiscoverable item. Until then, this was work
13 product, what we're talking about, this proviso.
14 Now, if we're going to have a work product
15 exemption and a separate proviso here, we're going
16 to have to think about both of them because even
17 if this doesn't cover it, if work product does,
18 then what's the point, you see?
19 CHAIRMAN SOULES: Work product is --
20 this is talking about communications between the
21 party and his agents or agents of parties. It's
22 really not talking about talking to the lawyer.
23 PROFESSOR DORSANEO: It used to be,
24 though. It would include the lawyer.
25 CHAIRMAN SOULES: It might include

1 that. But it's much broader. Work product of a
2 lawyer is --
3 MR. BECK: I understand.
4 CHAIRMAN SOULES: -- not here.
5 MR. BECK: As broad as this is, it
6 will include what the lawyer does.
7 MR. BRANSON: They are going to have
8 to make you haul my ass down to jail if some judge
9 makes those rulings -- report from my nurse or
10 doctor or whatever.
11 PROFESSOR DORSANEO: See, I don't know
12 why these investigative reports talk about these
13 cases, why they're not work product -- why aren't
14 there work product arguments made in these cases?
15 CHAIRMAN SOULES: Well --
16 PROFESSOR DORSANEO: I mean, these are
17 investigators. I mean, why -- I mean, in some of
18 these cases --
19 MR. BECK: Well, then, what you're
20 going to -- All right. Let's assume you make a
21 distinction about -- between whether the attorney
22 does it or --
23 PROFESSOR DORSANEO: Or his paralegal
24 or an investigator employed by the attorney.
25 MR. BECK: That's right.

1 PROFESSOR DORSANEO: Or by the
2 insurance company.
3 CHAIRMAN SOULES: Well, what it looks
4 to me -- like --
5 MR. BRANSON: That's different in the
6 federal rule. Every time I get over there I -- I
7 forgot what the federal rule is on this, but it is
8 broader than ours.
9 PROFESSOR DORSANEO: It's one concept
10 of anticipation of litigation that replaces the
11 words "work product" and replaces all of this crap
12 and tries to codify Hickman versus Taylor. And it
13 would exempt, I think, all of these things that
14 our cases would not exempt -- these recent cases
15 wouldn't exempt. I think it would, but it
16 wouldn't be a blanket exemption.
17 MR. BECK: Except when there's
18 exceptional need.
19 MR. TINDALL: Rule 26.
20 MR. BRANSON: I know you can get to a
21 lot things in the federal court you have not
22 historically been able to get to --
23 CHAIRMAN SOULES: You can get to any
24 work product in federal court by showing
25 exceptional need. No work product, not anything

1 in your file, is protected under the federal rule
2 and I don't want to go there. Some may want to,
3 but I don't want to.
4 PROFESSOR DORSANEO: At the federal
5 level, the key is whether this thing is made in
6 anticipation of litigation --
7 CHAIRMAN SOULES: Right.
8 PROFESSOR DORSANEO: -- not a question
9 of who makes it. And whether it's -- and the
10 dichotomy is between something made in
11 anticipation of litigation and something that's
12 made in the ordinary course of business.
13 CHAIRMAN SOULES: That's right.
14 PROFESSOR DORSANEO: And when you
15 start saying "anticipation of litigation" and
16 refine it even further and say "anticipation of
17 what litigation," then you're getting beyond
18 where, I think, the federal courts have gone and
19 you're getting into just Texas thinking.
20 MR. BRANSON: Well, let's take it one
21 step -- where you historically run into in the
22 malpractice area is the incident report. You've
23 got by foul (phonetic) on the hospital that says
24 any time negligence occurs on the premises where a
25 patient is injured by an accident, a report must

1 be filed with the hospital. Now, that's not
2 really done in anticipation of litigation.
3 PROFESSOR DORSANEO: Right. Nor is it
4 done in investigation of the occurrence. It's
5 done in the ordinary course of business.
6 MR. BRANSON: But it has historically
7 been nondiscoverable.
8 PROFESSOR DORSANEO: Well, it was
9 meant to be discoverable under this redrafted
10 166(b). And the way it was meant to be
11 discoverable is to say that that ordinary course
12 of business incident report is not an
13 investigative report. It's not an investigation
14 of the occurrence. Investigation --
15 MR. BRANSON: For lawsuit purposes.
16 PROFESSOR DORSANEO: Yeah, right. But
17 the word "investigation" was meant to be a word of
18 art that incorporated anticipation of litigation
19 concepts like in Federal Rule 26(b). The
20 difficulty is that that never seemed to be how the
21 Courts of Appeals read it.
22 MR. BRANSON: No, I --
23 CHAIRMAN SOULES: There's a recent
24 case where there was a worker's comp case and then
25 there was another case that arose that related to

1 it. I can't remember exactly.

2 JUSTICE WALLACE: That was the

3 Harkness case. The husband filed a comp case

4 which the railroad detective had investigated, and

5 later on the wife filed a personal injury suit

6 alleging that the husband was driving the truck

7 and not her. The husband then disappeared. She

8 remembered nothing from the accident, had a total

9 blank, and the husband ran off and couldn't be

10 found.

11 So, the only way she could prove that he was

12 the driver was his statement to this railroad

13 detective in connection with his comp claim that

14 he was driving the truck, and the question was

15 whether that was discoverable.

16 MR. BRANSON: And was the comp case

17 still open?

18 JUSTICE WALLACE: The comp case had

19 long been settled.

20 CHAIRMAN SOULES: So -- and that was

21 held to be discoverable --

22 MR. BRANSON: Now, let me ask you a

23 question.

24 CHAIRMAN SOULES: -- because that was

25 different.

1 MR. BRANSON: Had the comp case still
2 been open --
3 JUSTICE WALLACE: Again, it would be
4 in what context, I suppose, that detective was
5 taking that statement from him. Strictly as far
6 as his comp case was concerned, then you've got
7 one question. If he was just investigating the
8 accident because he knew -- or maybe her case had
9 already been filed and could have been both of
10 them.
11 PROFESSOR EDGAR: Wouldn't that answer
12 depend upon whether or not it was discoverable at
13 that particular point in time in the comp case?
14 PROFESSOR DORSANEO: Yes.
15 PROFESSOR EDGAR: I mean, if it was
16 discoverable in the comp case then it would be
17 subject to discovery by her. If for one reason or
18 another it was not discoverable in the comp case,
19 then it would retain its cloak of immunity.
20 CHAIRMAN SOULES: We hope.
21 PROFESSOR EDGAR: Well, but I think
22 that's the way that the cases have kind of
23 developed.
24 But, Bill, coming back to the question you
25 raised, I think there are some federal cases that

1 would hold that Frank's incident report is a
2 business record and subject to discovery under the
3 federal rules.
4 PROFESSOR DORSANEO: I think it is.
5 That's what I think. I think it's not in
6 anticipation of litigation. Now, of course,
7 somebody is going to try to say that everything
8 that they do is in anticipation of litigation and
9 the courts are just going to have to pierce that
10 when it's baloney.
11 CHAIRMAN SOULES: That's why we've got
12 a problem.
13 JUSTICE WALLACE: Well, that's the
14 Stringer case. As I said, a railroad accident of
15 this magnitude, we know there's going to be a
16 lawsuit. So, everything we do is in anticipation
17 of litigation. And on that Turbodyne case, this
18 is a subrogation claim and you've got another fact
19 situation.
20 MR. BRANSON: Judge --
21 CHAIRMAN SOULES: Let me try this
22 language out.
23 MR. BRANSON: Would you tell me
24 specifically what prompted your letter to Luke and
25 what you feel the majority of the Court would like

1 for us to address?

2 JUSTICE WALLACE: Well, this

3 investigation of the claim or incident out of

4 which the suit arose, if you look at that literal

5 meaning, that means almost down to your incident

6 report in the hospital. And I think it's obvious

7 from the opinions the Courts' have been writing,

8 that's not the way they look at it. But, yes,

9 that's in our rule. And we're faced with a

10 problem, we've got a rule that we've promulgated

11 which the Court doesn't seem to want to follow.

12 CHAIRMAN SOULES: Let me try some

13 specific language here. Instead of that that we

14 see as being narrowed down, saying that the test

15 is not that communications occur when the

16 investigation of occurrence or transaction out of

17 which the claim has arisen, but that those

18 communications occur in anticipation of the

19 prosecution or defense of the claims made a part

20 of the pending litigation. Is that too many words

21 to pick up? That's broader than just

22 "investigating for the pending litigation."

23 That's "investigating the prosecution or defense

24 of the claims that are made a party."

25 MR. BRANSON: In other words, an

1 incident report would not fit in there.
2 CHAIRMAN SOULES: No, it would not.
3 What I'm trying to do is write something that's
4 broad enough to take care of a catastrophe where
5 there's a lot of lawsuits. You can't say I was
6 looking to Jane Doe's lawsuit. You were looking
7 at the possibility of 100 lawsuits.
8 PROFESSOR DORSANEO: You want the
9 exemption to cover that, right?
10 CHAIRMAN SOULES: Yes, I guess I am.
11 Where you know you're prepared for litigation --
12 this litigation. You know, not the subrogation
13 claim.
14 PROFESSOR DORSANEO: If you take this
15 back and say this is "work product," that this is
16 really what this is, that's work product problems
17 -- the policy behind work product as I see it --
18 there are several policies behind it. One is that
19 we don't want people to start altering their
20 behavior because they anticipate litigation when
21 they're working on a problem that really needs to
22 be solved. That's one policy. We don't want the
23 tricking up their incident reports and engaging in
24 bad medical behavior because they're afraid that
25 the report is going to come back to bite them

1 later.

2 JUSTICE WALLACE: And another problem

3 we've got in the -- federal hardship rule would

4 take care of it, although the feds say they have

5 more problem with that than any other part of the

6 rule -- is -- take the Houston ship channel, for

7 instance. An accident occurs in one of those

8 plants and the plaintiff is not going to get in

9 there and find anything. They won't even let him

10 in the plant. So, how are you going to find out

11 what happened unless you do get the investigation

12 report of the defendant?

13 MR. BRANSON: But, Your Honor, you're

14 really confronted with that every time you have an

15 incident on the operating table. The plaintiff is

16 unconscious and everybody at the table has masks

17 on and they cut the wrong leg off or leave a

18 sponge in, and there's no way, unless you can get

19 what they said at that time, if they lie to you,

20 to prove what happened, and that occurs

21 frequently.

22 PROFESSOR DORSANEO: What I would

23 recommend is to go back and redraft, using the

24 federal model, a work product -- do what Roy

25 McDonald did in 1941 with the benefit of what has

1 happened since then and what's in the federal rule
2 book with the anticipation of litigation concept
3 and the escape valve on necessity. The reason why
4 that's a hard problem is it is a hard problem, not
5 because it's a bad concept.
6 MR. TINDALL: Luke, in the refinery
7 case, the Court in its discretion --
8 MR. BRANSON: I know that necessity
9 really cuts both ways and can cut deep, but there
10 really are times on both sides of these cases
11 where there needs to be an exception to get to
12 documents that you know are there and you know
13 will tell you what actually occurred, and that's
14 the only way you can get to them, is to get to the
15 documents.
16 PROFESSOR DORSANEO: Including -- I
17 would even go so far as to say including witness
18 statements. Witness statements are the
19 communication in anticipation of litigation.
20 Hickman versus Taylor was about witness
21 statements. And I think our Texas work product
22 approach ought now to be abandoned and we ought to
23 take the approach that other courts are taking.
24 The anticipation of litigation, have that be
25 the basic thing and let the courts decide what's

1 in anticipation of litigation and what isn't,
2 rather than crossing this out and saying "work
3 product" without even defining what "work product"
4 is.
5 MR. BRANSON: Luke, would you be
6 willing to let Dorsaneo and Hadley and I work on
7 that problem and report back to you?
8 CHAIRMAN SOULES: Sure. No question
9 about it.
10 PROFESSOR DORSANEO: Now, if we're
11 wanting to make a quick fix, I would suggest
12 striking this "or the investigation of the
13 occurrence or transaction out of which the claim
14 has arisen" and just put "or in anticipation of
15 litigation."
16 MR. TINDALL: Bill, that would have
17 the unintended effect, would it not, of broadening
18 D? As I read D the "and" on the last line there,
19 qualifies all those communications passing between
20 agents for the defendant or between the defendant
21 or the party and his agents. If they're made then
22 "and" should be "if made." That's not the way
23 that's --
24 PROFESSOR EDGAR: I'm sorry, the last
25 "and" --

1 MR. TINDALL: The last "and," it says
2 "made in connection with prosecution
3 investigation," et cetera. That is a qualifier on
4 the exemption for communications.
5 PROFESSOR DORSANEO: Right.
6 MR. TINDALL: If you delete the
7 qualifier, then the exemption is broadened more.
8 That's not what you're wanting.
9 PROFESSOR DORSANEO: No, I don't think
10 it does broaden it. See, we have to look at the
11 whole thing. See, there's three requirements. It
12 has to be between the right people, all right? It
13 has to be post occurrence or transaction, whatever
14 you define that as being. And it has to be, as I
15 see it, in anticipation of litigation.
16 CHAIRMAN SOULES: Of the pending
17 litigation.
18 PROFESSOR DORSANEO: Of the litigation
19 in which the claim is asserted subsequently.
20 MR. BRANSON: Yeah, that's what --
21 CHAIRMAN SOULES: That's what I wrote
22 here.
23 MR. BRANSON: That's what bothers me
24 on Bill's proposed amendment. Let's say you have
25 a problem out here that causes an injury. It is

1 investigated as soon as filed. It is settled or
2 tried to conclusion. The problem continues and a
3 subsequent lawsuit arises.
4 Now, as I understood your proposed amendment,
5 since the investigation of the prior claim was
6 done in anticipation of litigation, it would be
7 arguably excludable. I don't think that's the
8 intention of the Court or these rulings. At that
9 point, I think it becomes free game. So, when
10 that lawsuit is concluded, all that investigation,
11 I have been assuming, is discoverable.
12 JUSTICE WALLACE: Or being held that
13 attorney/client privilege being discoverable in
14 that situation.
15 CHAIRMAN SOULES: See, if you've got a
16 work product, you're consulting experts are
17 discoverable, too, and that's -- you know, that's
18 tender.
19 PROFESSOR DORSANEO: Now, I would
20 leave the experts alone.
21 CHAIRMAN SOULES: Well, you reach that
22 by going to -- in federal courts you reach
23 consulting experts.
24 MR. BRANSON: You sure do.
25 CHAIRMAN SOULES: If we say -- if we

1 limit good cause to penetrate a privilege to
2 166(b)(3)(d) investigations and we also narrow
3 substantially what investigations are privileged,
4 then I think we get to maybe what the Supreme
5 Court's concern is. First of all, we're saying
6 only narrow types of investigations are
7 privileged, and you can get those if you show good
8 cause. But let's don't open up one product in
9 that --
10 PROFESSOR DORSANEO: Well, I firmly
11 now believe that we end up -- we end up with --
12 and we didn't see it until we segmented the rule
13 in 1984. We didn't see that we have a series of
14 overlapping exemptions with possibly different
15 reaches covering the same thing. A work product
16 might not cover all the same things that are --
17 but would cover some of them, okay, as this party
18 communication. It's just a mess, really. It
19 needs to be worked on and unified.
20 There shouldn't be a greater -- why should
21 there be a blanket, if there is, exemption for
22 discovering witness statements from prior case and
23 not -- and not from party communications or
24 whatever. It's all work product.
25 CHAIRMAN SOULES: Look at B and D on

1 your exemptions, written statements of witnesses
2 and so forth, and then D is the investigation. I
3 can understand why you ought to be able to get
4 those for good cause. But when you talk about
5 work product of attorney, other than that, what
6 are you talking about, his briefing? That's the
7 whole work product of an attorney.
8 MR. TINDALL: The federal rule makes
9 that pretty clear.
10 CHAIRMAN SOULES: And two, the
11 consulting experts, which is under C, I think A
12 and C should be absolutely private, and (b) should
13 be accessible for good cause. D should be
14 narrowed substantially. And what you have left of
15 it after your narrowing should be available on
16 good cause. And then we've got a rule which
17 spells out what -- I think what the federal law
18 is --
19 MR. BRANSON: Let me give you an
20 example.
21 CHAIRMAN SOULES: -- except for
22 consulting experts, which I think ought to be
23 better protected.
24 MR. BRANSON: You've got an expert
25 witness that you're preparing for trial and you

1 send him an outline of the deposition. Now is
2 that A?
3 CHAIRMAN SOULES: That's discoverable
4 under -- helped him prepare for deposition.
5 MR. BRANSON: I understand. Let's
6 talk about strictly under work product.
7 CHAIRMAN SOULES: You've outlined
8 depositions and highlighted your depositions and
9 you want to talk to your witness about it.
10 MR. BRANSON: I mean, that's all
11 you've given him to prepare for the deposition.
12 You look at an outline as opposed to the
13 deposition itself.
14 CHAIRMAN SOULES: It's privileged and
15 you've waived it, so it's open.
16 PROFESSOR DORSANEO: Why?
17 CHAIRMAN SOULES: If you haven't shown
18 it to him --
19 PROFESSOR DORSANEO: How do you know
20 that?
21 CHAIRMAN SOULES: What?
22 PROFESSOR DORSANEO: How do you know
23 that?
24 CHAIRMAN SOULES: Well --
25 PROFESSOR DORSANEO: What's privileged

1 and what's open?

2 CHAIRMAN SOULES: A deposition that I
3 have highlighted is privileged because it's got my
4 work product. I've gone through and identified
5 things that are important to me. I don't have to
6 show that to you in that form. But if I've shown
7 it to my expert in that form, now I've got to show
8 it to you in that form because I've waived the
9 privilege that is attached to it when I've put my
10 work product into it.

11 PROFESSOR DORSANEO: Maybe. See, the
12 point is, I don't know what our work product
13 doctrine is. I don't know what it covers; when it
14 begins, when it ends, how I waive it or anything
15 very much about it. We don't have any
16 interpretation of it at all. It only -- it's only
17 -- it's not an adult yet, right, in terms of the
18 number of years it's been in existence? It's only
19 15 or 13.

20 And what I think we need to do is to -- we
21 never needed to deal with it, probably because of
22 the investigative information thing that we used
23 to have in there, that you never got to having any
24 of these arguments at all because of the
25 information obtained in the course of an

1 investigation was not discoverable. That -- the
2 defendants won there right away. The game was
3 over before you got to play. But now it's opened
4 up. Now, it's opened up and I think we need to
5 deal with it.
6 MR. BRANSON: I'll tell you where we
7 encounter a real problem with directing in expert
8 depositions, is where one side or the other goes
9 in with an expert and shows him a bunch of
10 documents, pictures, drawings, reports, any number
11 of things, and then takes them out of the expert's
12 file before the expert is deposed and explains to
13 the expert that these things really didn't happen
14 because they were work product. That's not right
15 and it's happening on a regular basis and I don't
16 know if it needs to be addressed. I don't know
17 where you address it. I'm sure when it's
18 presented to the Court in the right manner, they
19 will address it. But it is regularly being told
20 to these experts witnesses by my adversaries that
21 these documents really don't exist.
22 CHAIRMAN SOULES: You need to go to
23 the district attorney about that, if you can prove
24 it, and fast, because that's perjury and
25 subordination of perjury and they ought to be

1 indicted.

2 PROFESSOR DORSANEO: See Luke, what

3 we're going to get to, though, we're going to have

4 to deal with what is work product at some point or

5 another.

6 CHAIRMAN SOULES: There is a waiver.

7 MR. BRANSON: Now, wait a minute.

8 Until this doctrine is defined, you're not going

9 to get that prosecution in the D.A.'s office.

10 CHAIRMAN SOULES: It is defined.

11 PROFESSOR DORSANEO: And once we start

12 working on work product, where are we going to

13 look? Where is the most logical place to look?

14 It's going to be -- it's going to go Hickman

15 versus Taylor, but then right away we'll say,

16 "Well, what did they do with Hickman versus Taylor

17 after 1945?" They'll say, "Oh, they put it in

18 Rule 26(b) of the Federal Rules of Civil

19 Procedure." Once we start looking there, we're

20 doing what Roy McDonald attempted to do in 1940

21 all over again and it takes us right back to this

22 damned proviso.

23 CHAIRMAN SOULES: Well, but see, you

24 and Frank are talking about two completely

25 different things. And what Frank's talking about,

1 we don't need to weaken any rule about because
2 that's waiver. And we're talking about a problem
3 over here being a problem that is really not a
4 problem with the rule. It's a problem with
5 enforcing waiver.
6 MR. BRANSON: Well, when you don't
7 have a definition of "work product" is what I'm
8 saying.
9 CHAIRMAN SOULES: It doesn't make any
10 difference because you waive it, whatever it is.
11 You've waived it if you've shown it.
12 MR. BRANSON: Well, I understand,
13 technically, yes. But I'm saying there's no real
14 -- there's been a lot of problem, in our
15 perspective, in enforcing these opinions when the
16 truth on the matter is you've asked the witness
17 the witness says, "Hey, it doesn't exist." And
18 the reason he's saying it doesn't exist is he's
19 been informed this is work product and therefore
20 it doesn't exist, it's not defined.
21 And I don't -- it's very difficult, kind of
22 like chasing the wind. It's kind of hard to
23 catch, but you know it's there because you see it
24 happening.
25 PROFESSOR DORSANEO: Even if he said,

1 "I did look at some things Counsel showed me, and
2 Counsel instructed me not to talk about it because
3 it's work product," then you're going to go down
4 to the courthouse and say they waived this expert
5 and the judge is going to say, "Well, how do you
6 waive work product?" And say, "Well, you waive it
7 by showing it to your experts." And I'm not so
8 sure that that's -- that I know that that's Texas
9 work product law.
10 CHAIRMAN SOULES: That's Texas waiver
11 law.
12 MR. TINDALL: Even to an expert you're
13 not going to call?
14 CHAIRMAN SOULES: That's -- well, you
15 may --
16 MR. BRANSON: The defendant -- he
17 never defines that.
18 CHAIRMAN SOULES: Preparation of
19 testimony, that's what I'm talking about. That's
20 when you waive it when he looks at it to prepare
21 for testimony.
22 MR. TINDALL: I think Bill is right.
23 I have a lot of cases where people shop for
24 experts and they go to one real estate appraiser
25 and they don't like what they find. They go to

1 expert two, three, four, five and finally bingo,
2 and you suspected that. The federal rules would
3 say that's an exceptional case, but we ought to be
4 able to find out what those other experts told
5 them they didn't want to hear. But that ought to
6 be a discretionary matter with the judge and we
7 don't deal with that in our rules.
8 CHAIRMAN SOULES: The Supreme Court
9 dealt with it in 1984. They've done some changes
10 since then. But in 1984 this committee
11 recommended to the Supreme Court that we be able
12 to discover the identity of consulting experts so
13 that we can take their testimony and find out
14 whether they talked to the testifying experts so
15 that we could enforce what helped the testifier
16 get ready. And the Supreme Court knocked that out
17 when the rule was passed and made -- you can't
18 even discover the identity of the nontestifying
19 expert. They may have changed their minds by now,
20 but they protected those people more than we
21 wanted them protected at that time.
22 MR. BRANSON: The Court was right.
23 CHAIRMAN SOULES: They were right.
24 PROFESSOR DORSANEO: I will say two
25 more things and then be quiet.

1 CHAIRMAN SOULES: Let's try to get
2 really down to what we need to do and that is --
3 this is our last meeting. We're five hours from
4 recess, and we will not meet again before these
5 rules are promulgated. If we can speak to the
6 last clause of 166(b)(3)(d), specifically on what
7 we would suggest the Court do right now on the
8 very problem that it has in focus, then we can
9 look at this some more before we recommend changes
10 again two years from now.
11 MR. BRANSON: Give me the wording you
12 recommend.
13 CHAIRMAN SOULES: All right. Now,
14 this as it -- it would start "Made in connection
15 with" -- wait a minute. "Were made subsequent to
16 the occurrence or transaction upon which the suit
17 is based," and then I would add "and in
18 anticipation of the prosecution or defense of the
19 claims made a part of the pending litigation."
20 Let's get that written down and then shoot at it.
21 I would also suggest that the Court adopt the
22 federal approach to permit the discovery of 3a(b)
23 and 3a(d) as limited on showing of good cause, but
24 that not reach -- I'm sorry, 3(b) and 3(d), but
25 not reach 3(a) and 3(c). But you could reach for

1 good cause 3(b) and 3(d) but not 3(a) and 3(c).
2 If we do that now, that's going to, I think,
3 speak to the specific problem the Court's got now,
4 whether I've said it right or not. That's what
5 the Court's trying to deal with right now, I
6 think. Is that right, Judge, as you see it?
7 JUSTICE WALLACE: Well, I see that
8 last sentence that you're talking about there as a
9 big obstacle for the Court -- what some people are
10 probably going to call interpreting -- liberal
11 interpretation of maybe other parts of the rules.
12 But that last sentence down there just seems to
13 the tired hands who typed it, you don't get
14 anything under the circumstances. And I think
15 this escape valve -- this hardship rule in the
16 federal rules is certainly going to have to --
17 we're going to have to have some form of that
18 sooner or later.
19 There are going to be situations where one
20 party just follows up everything, and you might as
21 well forget about it no matter how mangled the
22 person is and how just a cause he has, you're not
23 going to get any evidence.
24 PROFESSOR DORSANEO: The Boston Court
25 of Appeals interpreted the Supreme Court's prior

1 opinion in ex parte Sheppard (phonetic) as
2 developing by case law a -- an escape valve for
3 good cause exception.
4 CHAIRMAN SOULES: Now, see, what this
5 does is, whatever is evidence -- and now we're
6 talking about witness statements and that sort of
7 thing. We're talking about what's been produced
8 in the investigation. That all may be evidence.
9 You get all that. What you don't get is work
10 product of consulting experts.
11 PROFESSOR DORSANEO: Right.
12 CHAIRMAN SOULES: That's not
13 evidence. That's something else. So, 3(b) and
14 (d) do protect evidence. 3(a) and (c) really
15 protect work product.
16 MR. BRANSON: I understand that, but
17 we get right back to where Bill was, until we know
18 what work product is we don't know what's
19 protected.
20 CHAIRMAN SOULES: Well, it won't be
21 3(b) and (d) --
22 MR. BRANSON: I understand that.
23 CHAIRMAN SOULES: -- because we know
24 that that's now out in the open for good cause.
25 PROFESSOR DORSANEO: Well, I don't --

1 see, that's where I run into real difficulty.
2 Because I think if this investigation is done by
3 -- you know, by a law firm, all right, or by
4 something amounting to that, that, by God, by
5 definition it is in anticipation of litigation.
6 JUSTICE WALLACE: In other words,
7 if --
8 CHAIRMAN SOULES: But you can get it
9 for good cause under what I'm proposing, even so.
10 PROFESSOR DORSANEO: As work product?
11 See, that will --
12 CHAIRMAN SOULES: You can't get work
13 product of an attorney, but you can get the
14 communications of --
15 JUSTICE WALLACE: What if -- let's say
16 Stringer, for instance. That's one of them. If,
17 whoever the law firm is representing -- I think it
18 was Southern Pacific, I'm not sure -- said,
19 "Okay. We'll transfer our railroad detectives
20 over to your payroll," and, therefore, you've got
21 attorney/client privilege on everything that guy
22 does.
23 PROFESSOR DORSANEO: That's the other
24 thing: The attorney/client privilege is going to
25 get into this, too. Three layers. You have this

1 party communication, one line of defense, the next
2 line of defense is work product, and the other
3 line of defense is attorney/client privilege.
4 JUSTICE WALLACE: And we had one case
5 -- I don't remember the style offhand -- but the
6 company said, "Okay. We're going to make our
7 lawyer our safety engineer," this company did.
8 So, everything that's done after investigation as
9 far as safety matters are concerned, it's under
10 the supervision of our lawyer. Therefore, it's
11 work product. Now, that actually came to court.
12 PROFESSOR DORSANEO: Now, none of
13 these doctrines are meant to protect the
14 information anymore, just the product, the
15 communication, all right. The product --
16 JUSTICE WALLACE: The only thing
17 there, though, is that report that has been made,
18 that's a communication. And it's mighty
19 conveniently -- as far as memories when you're
20 asking what is in it.
21 MR. BRANSON: What the Court did then
22 to me in the Nowell versus Wadley Hotwell
23 (phonetic) case on admittance of hospital records,
24 they said, yes, that the section of public health
25 code, the actual minutes are privileged, but what

1 we said in the meeting is not. Well, I go back to
2 depose everyone's meetings and a lot of them had
3 no memory and some of them had memory that I knew
4 was different than what occurred. So, you really
5 -- you've got to get at the heart of the coconut
6 as well as the shell.
7 JUSTICE WALLACE: Lefty has been
8 trying to say something for a long time.
9 MR. MORRIS: I would like to ask you a
10 question, Judge. Is it the Court's desire for us
11 to just delete the wording after -- beginning with
12 "and made in connection"?
13 JUSTICE WALLACE: Well, that is a big
14 obstacle. What the Court would like to have is
15 some -- is some input from the committee on this
16 whole rule, this whole area.
17 PROFESSOR DORSANEO: The anticipation
18 of litigation concept, I think, if we want -- is a
19 good one, if we want any kind of work product
20 protection. If it makes sense to say that we
21 don't want people to be worrying about whether
22 this is going to come back to bite them when
23 they're trying to solve this problem, then they
24 also get into litigation, you know, in the
25 ordinary course of business.

1 PROFESSOR EDGAR: Let me ask a
2 question.
3 PROFESSOR DORSANEO: Then we want to
4 have an exemption.
5 PROFESSOR EDGAR: You represent -- you
6 have a car-truck collision and you represent the
7 passenger and the driver. You send the
8 investigator out to investigate. You then settle
9 the driver's claim and now you're representing
10 just the passenger. The trucking company wants
11 the investigative file as it pertains to the
12 settled driver's claim. Now, should he be
13 entitled to it?
14 MR. BRANSON: No, I did the
15 investigation of what was left.
16 PROFESSOR EDGAR: But that's part of
17 the problem. I mean, this -- the point I'm trying
18 to make is this really cuts both ways.
19 MR. BRANSON: I understand that. And
20 probably in our office it cuts probably deeper
21 than it does in a lot of plaintiff's offices,
22 investigative staff. And we get around a lot of
23 problems that a lot of lawyers are able to that
24 way, but I don't have to deal with it and I know
25 the courts are confronted, obviously, because of

1 those requests with some major areas. The reason
2 I suggested that maybe we spend some more time and
3 get back -- but the time constraints may not allow
4 that.
5 JUSTICE WALLACE: We would like input
6 as soon as we can get it.
7 MR. BRANSON: Since we're not going to
8 have a regularly scheduled committee meeting,
9 would it be possible to appoint a subcommittee and
10 let the subcommittee make some recommendations for
11 the Court?
12 JUSTICE WALLACE: Well, I know we
13 would appreciate it. The posture we're in, we've
14 got these two cases on motion for rehearing and --
15 MR. BRANSON: I know there's some time
16 constraints.
17 JUSTICE WALLACE: -- and the Court
18 feels the need that things need to be jelled on
19 this and we need to come to a decision of what are
20 we going to allow and not going to allow. And you
21 sit up there around that table so long a time, you
22 get out of touch with a whole lot that's going on
23 in the courtroom. And we need to hear from you on
24 it.
25 MR. BRANSON: I would be more than

1 happy to take the time, and I know some other
2 members of the committee would, to sit down and
3 wrestle with the problem rather than trying to
4 give the Court a just off-the-cuff response. So
5 many of our members, really, are not here today.
6 PROFESSOR EDGAR: Of course, if the
7 Court is sitting on two motions for rehearing,
8 though, I'm sure they're anxious to dispose of
9 them, too, as the litigants in those cases. And I
10 don't know whether they really have the luxury of
11 additional time, Frank, from what I'm sensing
12 Judge Wallace is saying.
13 PROFESSOR DORSANEO: There's hardly
14 anybody here, though. In terms of the language of
15 the rule as it currently is drafted, what the
16 committee people had in mind, at least some of
17 them, was that the word "investigation" would be a
18 really significant word, that that wouldn't be
19 just any kind of a review by anyone, that it would
20 be an anticipation of litigation idea, that that
21 would be a word of art that would mean
22 investigating the occurrence or transaction in
23 anticipation of litigation.
24 Now, whether the Court would want to read in
25 as a gloss not only that idea, but investigation

1 of the particular occurrence or particular
2 transaction, and that's supportable by some of the
3 language in Allen versus Humphries, that would be,
4 in terms of the wording of the current rule, a way
5 to read it narrowly. But it is, I agree, worded
6 in a way that it could be interpreted much more
7 broadly than anybody expected.
8 MR. MORRIS: You know, I think an
9 example is where you have some kind of a
10 negligence lawsuit, let's say, and for one reason
11 or another the insurance company decides they're
12 not going to defend it and they have a reservation
13 of rights. You end up, then, with a subsequent
14 lawsuit against the insurance carrier; bad faith.
15 It seems to me like, clearly, that anything
16 regarding their investigation of the wreck would
17 be discoverable in the bad faith lawsuit. But I'm
18 not sure, under this reading, as I read this, that
19 you would be able to get to it. Do you know what
20 I'm saying? It seems to me like what you're
21 saying -- the specific claim that you're dealing
22 with, those communications are not discoverable.
23 PROFESSOR DORSANEO: The problem that
24 I'm having difficulty expressing is that my idea,
25 policywise, is this: When somebody makes this

1 communication, we don't want them to make it
2 differently than they would otherwise make it for
3 fear of this litigation. We don't want the --
4 from looking at it from the standpoint of a
5 regular employee, we don't want them falsifying a
6 report because they're afraid of it's going to be
7 discoverable later.
8 MR. BRANSON: We run into it in
9 hospital environments.
10 PROFESSOR EDGAR: Or they know it's
11 going to be discoverable so they deliberately
12 falsify it.
13 PROFESSOR DORSANEO: And we don't want
14 lawyers or their legal assistants, who go out to
15 investigate particular occurrences, to do a poor
16 job or to not write things down or to somehow lie
17 or whatever words you want to use --
18 PROFESSOR EDGAR: Be less than
19 truthful.
20 PROFESSOR DORSANEO: -- be less than
21 truthful, because that is not something that is
22 going to be exempt under work product principles,
23 et cetera. So, the focus ought to be on
24 encouraging people to do the right thing at the
25 time they make these communications, rather than

1 to do something else because of discoverability
2 problems.
3 The only reason they have the exemption is to
4 encourage behavior that we like better than
5 discovery.
6 JUSTICE WALLACE: We don't want the
7 insurance companies handling two investigators
8 like they have two sets of books.
9 MR. BRANSON: But then, Bill, you
10 you've left right where Judge Wallace says they
11 are, and, that is, you're going to have to have
12 some good cause or unusual exception to the
13 general rule because there are going to be
14 instances where you work a hardship if you don't
15 allow it to be discovered.
16 PROFESSOR DORSANEO: Oh, I think
17 that's right. I think we do need an exception and
18 I've been saying for years that the Supreme Court
19 created one, an ex parte Sheppard (phonetic), and
20 it really is there, even though some professors
21 say otherwise, not Professor Edgar.
22 MR. TINDALL: The federal rule sure
23 does seem to bridge this problem somewhat
24 effectively by saying that a party may obtain
25 discovery of documents. Let's say it's a

1 communication between the railroad detective and
2 the --
3 PROFESSOR DORSANEO: Or a witness
4 statement.
5 MR. TINDALL: -- or witness
6 statement. Well, witness statements are treated
7 separately. Okay. A witness statement, prepared
8 in anticipation of litigation of the trial by or
9 for another party, or by or for that other party's
10 representative, including his attorney,
11 consultant, surety, indemnitor, insuror agent only
12 -- but, see, they put a kicker -- only upon
13 showing that the party seeking the discovery has
14 substantial need in the materials in preparation
15 of his case. So, we can't get it anywhere else.
16 And that he is unable, without undue hardship, to
17 obtain the substantial equivalent of materials by
18 other means.
19 So, that sort of gives the judge a balancing
20 to do it, but then they back out. At the end they
21 say in ordering the discovery of such materials
22 when the required showing has been made, the Court
23 shall protect against disclosure, mental
24 impressions, conclusions, opinions or legal
25 theories of an attorney or other representative of

1 a party concerning the litigation.

2 PROFESSOR DORSANEO: So, the other

3 kind of work product that involves your thoughts

4 is safer than the information you took down.

5 MR. TINDALL: That's right.

6 PROFESSOR DORSANEO: Or the picture

7 you took, I guess, which was even a

8 communication. It's a nice question as to whether

9 it's work product.

10 JUSTICE WALLACE: We know it's not

11 communication.

12 PROFESSOR DORSANEO: I think the

13 federal rule has been interpreted different ways,

14 and it's arguably more conservative than this

15 Court wants to be. But --

16 MR. TINDALL: Well, work product, the

17 way the rule is written now, can be anything,

18 right? It's a freight train that emasculates the

19 rule, it seems to me. We're back to 372; are we

20 not?

21 MR. MCMAINS: Until recently we had

22 problems with photographs.

23 MR. TINDALL: Yeah, work product.

24 PROFESSOR DORSANEO: See, the words

25 "work product" were not -- there were massive

1 changes in 1971 and 1973. And "work product" was
2 added in then as an additional barrier. It didn't
3 appear in the Rules of Procedure as an exemption
4 before that. But because of the investigative
5 information thing, I don't think it ever
6 particularly received interpretation as a separate
7 concept, separate from these provisos we're
8 talking about.
9 MR. BRANSON: What if you just put
10 "except for good cause shown"? Would that get
11 give the Court --
12 MR. TINDALL: Where?
13 MR. BRANSON: 4(d).
14 PROFESSOR EDGAR: If you're going to
15 do it, though, it seems to me that the federal
16 concept of substantial need and manifest hardship
17 still leaves you a safety valve whether there's a
18 more stringent requirement than for good cause. I
19 mean, to me, those are more identified -- you have
20 a greater burden of showing, it seems to me, that
21 you're going to be able to discover it if you have
22 to show substantial need and hardship than just
23 good cause.
24 MR. BRANSON: What's wrong with doing
25 it for just good cause?

1 PROFESSOR EDGAR: Well, it kind of
2 comes back to what Bill was saying earlier. I
3 guess I just have a feeling that discovery should
4 be just a little more restrictive.
5 PROFESSOR DORSANEO: You shouldn't be
6 able to get it just because you want it. You
7 should have to get it because you need it, because
8 you can't get the substantial equivalent
9 elsewhere, like the case you're describing.
10 MR. BRANSON: But for good cause,
11 though, really is more than I wanted. I mean,
12 good cause, generally, is required more than just
13 coming in and saying I want it and, say, ignore
14 the existence of it.
15 MR. TINDALL: Well, good cause may be
16 "It will help settle the case, Judge, if we got
17 this," and I think you want more than that.
18 PROFESSOR EDGAR: That's good cause
19 all right.
20 MR. TINDALL: So, I'm saying that
21 wouldn't apply.
22 JUSTICE WALLACE: Well, the Stringer
23 case, for instance, the question of whether the
24 plaintiff is going to go to Sweetwater and depose
25 92 witnesses or get -- and that's sort of middle

1 of the road; you can call that either way. Take
2 the ship channel case, for instance, and I don't
3 think there is any question, because it's the only
4 way you're going to get it is under the --
5 PROFESSOR EDGAR: That would fit the
6 criteria certainly. But substantial need and
7 undue hardship, to me, still retains a policy
8 behind nondiscoverability and at the same time
9 gives the litigant an opportunity, if he can show
10 those things, to obtain it.
11 MR. BRANSON: Well, would you let that
12 apply for A through E, Hadley, or would you say
13 the following matters are not -- with except for
14 manifest hardship? Or would you limit -- would
15 you take out A and take out C?
16 PROFESSOR EDGAR: Well, the only thing
17 the Court is apparently concerned with now is D.
18 JUSTICE WALLACE: That's the big
19 concern. Now, what the Court would like to do is
20 to try to settle this question of what is going to
21 be discoverable and what is not going to be
22 discoverable and entitle it to the rest, so that
23 lawyers and judges out there will know what to
24 do.
25 PROFESSOR EDGAR: Corral this wild

1 horse.

2 MR. BRANSON: And certainly adding an

3 exception to it is not going to do that.

4 JUSTICE WALLACE: No.

5 PROFESSOR DORSANEO: Luke's suggested

6 language comes pretty close to the most reasonable

7 reading of these three recent opinions. Defining

8 "reasonable reading" as the reading that I'm

9 placing on them.

10 CHAIRMAN SOULES: That's where I was

11 coming from.

12 PROFESSOR DORSANEO: But it doesn't

13 solve the bigger problem. And the next problem

14 you're going to have is, "How about work product,

15 if that didn't work?"

16 JUSTICE WALLACE: We really need a

17 description or definition of work product. Are we

18 talking about attorney/client privilege? That's a

19 very narrow description of work product, and just

20 how much of an investigator's work or how much of

21 an investigator's product is included in work

22 product.

23 PROFESSOR DORSANEO: I think we need a

24 definition of "witness statement," too, quite

25 frankly. You'd be in the -- everybody thinks they

1 know what a witness statement is until they start
2 thinking about it. What about a witness statement
3 from a long time ago? There could have been some
4 other case before this occurrence even if it ever
5 occurred, and say, well, what could that witness
6 statement be about? It might be about something.
7 It had something to do with this case. You can
8 tell it's a witness statement because it says it
9 is statement of witness.
10 CHAIRMAN SOULES: Well, there's
11 another -- you know, we've got E here, too, which
12 is not discoverable, some by statute, of
13 attorney/client privilege. That's where that
14 comes in.
15 MR. BRANSON: Judge, would Luke's,
16 recommended verbage assist the Court?
17 JUSTICE WALLACE: It would.
18 MR. BRANSON: Read it one more time.
19 CHAIRMAN SOULES: Well, it would say
20 -- reading 3(d) after the language, "subsequent to
21 the occurrence or transaction upon which the suit
22 is based," and then insert this, which would be
23 all the remaining language: "And in anticipation
24 of the prosecution or defense of the claims made a
25 part of the pending litigation."

1 PROFESSOR DORSANEO: Let me see.
2 JUSTICE WALLACE: And have the federal
3 provision 3(b) and (d) on it.
4 CHAIRMAN SOULES: And not to 3(a), (c)
5 or (e).
6 MR. BRANSON: Then you would add in
7 the exception that we talked about.
8 CHAIRMAN SOULES: That for good cause
9 -- you can get --
10 MR. BRANSON: Not for good cause.
11 PROFESSOR EDGAR: It seems to me that
12 the concept of substantial need and hardship --
13 the language out of the federal rule is more
14 restrictive, I think, than good cause.
15 CHAIRMAN SOULES: And it should be
16 that way, should be hardship.
17 PROFESSOR EDGAR: And, to me --
18 because as Harry mentioned a minute ago, good
19 cause could be that this would help me settle this
20 lawsuit, Judge.
21 CHAIRMAN SOULES: Substantial need and
22 hardship should be the test, and I really meant
23 the federal test. I'm sorry, I wasn't giving that
24 feeling.
25 MR. BRANSON: I will move that we

1 adopt that language, and also, if it will assist
2 the Court, ask the Chair to appoint a committee to
3 further investigate this prior to the next
4 meeting.
5 PROFESSOR DORSANEO: There's other
6 ways you can say it.
7 CHAIRMAN SOULES: And this will be
8 referred to -- Tony Sadberry has agreed to chair
9 the interim standing subcommittee on discovery
10 rules. And I would like to, of course, have you,
11 Frank, and anybody, Bill, Hadley, participate in
12 it.
13 PROFESSOR DORSANEO: Now, Luke, let me
14 ask you this: Luke, I think it's clear from your
15 language, but your language would not mean, would
16 it, that there would have to be a claim made
17 before the communication -- it's still a post
18 occurrence communication rather than a post claim
19 communication, right?
20 CHAIRMAN SOULES: It does not mean
21 that there is a claim already made. But it's in
22 anticipation that a claim will be made. It says,
23 "in anticipation of the prosecution or defense of
24 the claims."
25 PROFESSOR DORSANEO: So, in other

1 words, in anticipation of litigation in which the
2 privilege is asserted.
3 CHAIRMAN SOULES: That's right.
4 PROFESSOR DORSANEO: Anticipation of a
5 litigation --
6 CHAIRMAN SOULES: That's right.
7 Anticipation that these very claims are going to
8 be made.
9 PROFESSOR DORSANEO: Each one is a
10 slightly different thing.
11 MR. MCMAINS: Reread your first --
12 your predicate entry, the first preparatory words.
13 CHAIRMAN SOULES: Okay. Have you got
14 3(d) in front of you?
15 MR. MCMAINS: Yeah.
16 CHAIRMAN SOULES: Okay. It's all the
17 language in the rule down to "made subsequent to
18 the appearance or transaction upon which suit is
19 based." Do you want to read that for a minute?
20 MR. MCMAINS: Yeah.
21 CHAIRMAN SOULES: "Where made
22 subsequent to the occurrence or transaction upon
23 which the suit is based," and this would be all
24 the remaining language: "And in anticipation of
25 the prosecution or defense of the claims made a

1 part of the pending litigation."

2 PROFESSOR EDGAR: "Made a part of the

3 pending litigation"?

4 CHAIRMAN SOULES: Right. So, if the

5 pending litigation is broader in scope, if these

6 claims -- that they're a part of it, the

7 anticipation of those claims, you don't waive it

8 just because they're not all there is in the

9 pending litigation. I believe this language goes

10 as far as the current cases go.

11 CHAIRMAN SOULES: See, the current

12 cases don't get down to the question, though; they

13 start trying to draw distinctions. Obviously,

14 you're going to be talking -- you want to limit it

15 and say, not any possible thing that could occur,

16 but it's almost like negligent misrepresentation.

17 We want to limit it to a limited group of claims

18 that are going to occur in the future, almost the

19 claims or claims like these claims. I don't think

20 we want -- do you want to require the party

21 involved to anticipate who the exact litigants are

22 going to be?

23 CHAIRMAN SOULES: No.

24 PROFESSOR DORSANEO: That's too far.

25 CHAIRMAN SOULES: That's too far, but

1 this is -- well, I don't know how to say it any
2 better. It doesn't say "claims made by the
3 parties in this lawsuit." It doesn't say "similar
4 claims," either. I think the courts are going to
5 have to massage where it draws the line of when
6 claims are made in anticipation of the pending
7 litigation.
8 MR. TINDALL: But, you see, that gets
9 back to the federal rule Bill was advocating. The
10 determined defendant can always meet the exception
11 in discovery, unless you give the trial courts
12 discretion and make him cough it up in the worst
13 case possible, which is getting back to hardship
14 and substantial need.
15 CHAIRMAN SOULES: And that's where the
16 trial court really gets -- escapes potential
17 mandamus. He's got two safety valves. One, he
18 can say that he doesn't think that this material
19 meets the privilege test, but even if it does, he
20 thinks that hardships have been shown and he's
21 going to open it up. So, in those close issues,
22 in the gray area, he's got some room to make --
23 MR. TINDALL: The way I read the last
24 way you've proposed change in D here, you can
25 still always claim that you fit within that

1 exception.

2 CHAIRMAN SOULES: Right. You could

3 claim --

4 MR. TINDALL: You could draw your

5 circle tight enough that you're going to get all

6 your protective material --

7 CHAIRMAN SOULES: You didn't even have

8 to be expecting claims or litigation under the

9 rules -- the rule the way it's written now. All

10 you have to have been doing was investigating the

11 transaction or the occurrence, period, later, not

12 anticipated, not if we think --

13 PROFESSOR DORSANEO: But that's not

14 how it was meant to be read, you see. At least in

15 my mind, "investigation" meant you weren't just

16 out there looking around.

17 MR. TINDALL: Any defendant -- well,

18 the lawyers are going to say, of course, they were

19 anticipating possible litigation. So, you haven't

20 cured anything unless you give the judge,

21 ultimately, the right to make them give you the

22 material.

23 CHAIRMAN SOULES: Harry, remarkably,

24 the recent cases don't bear you out. There are

25 cases -- the cases -- for example, the worker's

1 comp and then subsequently suit by the wife. The
2 investigation of the insurance carrier of the
3 worker's comp claim clearly was not in
4 anticipation that the wife was going to file a
5 lawsuit for personal injuries against her
6 husband. They admitted it, and that opened up
7 that investigation. The worker's comp
8 investigation got opened up, because it was not in
9 anticipation of the claims that were made in the
10 wife's pending litigation. It does, in fact, open
11 investigation.
12 PROFESSOR DORSANEO: The thing I have
13 trouble with is, why if it's -- if what we're
14 concerned about is somebody writing down the
15 information in some sort of an inappropriate,
16 inaccurate manner, then why should they have to --
17 I guess, if they're anticipating this type of
18 lawsuit, then they would do a different type of
19 changing the information than if they are
20 anticipating that kind of lawsuit.
21 But the problem I have is that I don't want
22 them to be worrying when they're doing their job
23 about the fact that this information is going to
24 come back to haunt me later. So, why should they
25 have to anticipate it that much? That bothers

1 me. I think --

2 PROFESSOR EDGAR: Luke, is the one --

3 the case involving the railroad investigator, was

4 that Stringer?

5 JUSTICE WALLACE: Stringer and

6 Harkness were both railroads.

7 PROFESSOR EDGAR: I'm talking about

8 the one where the wreck occurred and the

9 investigator went out and investigated but no

10 lawsuit had, at that point in time, been filed.

11 JUSTICE WALLACE: Right.

12 PROFESSOR EDGAR: All right. Now,

13 under your wording, that would not be subject to

14 discovery, would it?

15 CHAIRMAN SOULES: It would be. It

16 would be subject to discovery because the courts

17 are holding that this anticipation of litigation,

18 that that means -- I want to exaggerate just a

19 little bit when I say this, but it's not a lot --

20 but that means solely in anticipation of

21 litigation. In other words, if you prove that

22 railroads typically investigate their accidents

23 the way this one was investigated, you get that

24 report because it's not purely for -- in

25 anticipation of this litigation.

1 There is some case law that -- so, if you
2 prove that whenever there is this kind of wing
3 failure on an airplane, they always do this big
4 series of tests because they want to find out what
5 happened, you know, metal fatigue, you know, just
6 scientific investigation made of the problem. You
7 get that even though somebody got killed in that
8 plane crash.
9 MR. BRANSON: It's not in the ordinary
10 course of business in addition to being for --
11 CHAIRMAN SOULES: You don't have to
12 prove ordinary course of business. What you've
13 got to prove to get your privilege established is
14 solely in anticipation of the claims that are made
15 part of the litigation. That's a lot of words,
16 but you've got to -- if you've done it for any
17 other purpose -- for example, "I went to the
18 doctor because I wanted to consult with him and I
19 also got some treatment," and there's a case on
20 that, you see. And they say this patient went and
21 got treated as well as had a consultation. If
22 there is anything else besides anticipation of
23 litigation or consultation in terms of an expert
24 -- if there is anything pertaining in any way,
25 it's discoverable.

1 PROFESSOR DORSANEO: I hope that's not
2 the law.
3 CHAIRMAN SOULES: That's the way it
4 reads to me. At least the Court of Appeals and
5 now the Supreme Court is writing about it. So,
6 the anticipation of litigation is exclusive as
7 well as --
8 MR. BRANSON: How about just putting
9 in the rules, "solely for anticipation of
10 litigation"?
11 CHAIRMAN SOULES: Well, I said I lied
12 a little bit. I can't tell you just how much, but
13 it's not much. There is a gray area, I guess, of
14 when something was tainted or when it's almost
15 tainted.
16 MR. BRANSON: Would that help or
17 hinder the court if we added Luke's
18 recommendation, "solely for the anticipation of
19 litigation"?
20 JUSTICE WALLACE: Well, it's hard to
21 say because -- I'll tell you again what we want
22 out of you. I think probably every member of the
23 Court has some inkling, well, here's my idea on
24 how it should be treated. And as I said before,
25 we sat around that table up there for two, three,

1 four, eight, ten years, and you lose touch. And
2 that's why this committee's recommendations are so
3 critically important to us on these rules in the
4 opinions we write interpreting the rule after we
5 promulgate them. So, I can't give you really --
6 MR. MCMAINS: The problem in the
7 railroad accidents you're talking about, hell,
8 they're required to investigate the railroad by
9 federal statute. They're also, you know -- I
10 mean, so you could never make a "solely" argument
11 anyway. The same thing is true with regards to
12 air crashes. The same thing is probably true
13 under the Magnison law (phonetic) with regard to
14 warning on problems.
15 MR. BRANSON: The same thing would
16 also be true for the hospital --
17 MR. MCMAINS: Various reports in
18 regards to any kind of consumer product.
19 CHAIRMAN SOULES: There's already a
20 Texas case on that that gives you a right to those
21 reports. You're getting -- I just don't know
22 whether -- I don't know whether the case law has
23 drawn the line as "solely" yet. And I'm more
24 inclined to listen to the cases that come up a
25 little bit and be sure that we're -- you know,

1 that we're seeing a line of D-1 -- Frank, that's
2 my only resistance to that.
3 MR. BRANSON: Well, if Justice Wallace
4 indicates that it would help them to have the
5 language, and it's my understanding of the Court,
6 then I move we adopt the language of Luke's
7 proposal and adopt the wording of the federal
8 exception.
9 CHAIRMAN SOULES: As to 3(c) and --
10 MR. BRANSON: As to 3(b) and (d).
11 CHAIRMAN SOULES: (b) and (d).
12 Second?
13 MR. MORRIS: In your motion, is the
14 word "solely" in there, Frank?
15 MR. BRANSON: No. It's broader than
16 what you've got now, but if you look at it --
17 MR. MORRIS: The thing I like about
18 the word "solely" is that the direction where
19 we're going, it makes it real plain what the line
20 is.
21 MR. BRANSON: As I perceive Justice
22 Wallace, though, there seems to be a difference
23 pending on the Court as to whether that --
24 MR. MORRIS: Well, they're asking us
25 for our ideas. They're not asking us to try to

1 figure out what the hell they want.

2 CHAIRMAN SOULES: Why don't we vote on

3 it this way, and then vote on whether or not to

4 put "solely" in? I'm not -- this vote does not

5 exclude the inclusion of "solely."

6 MR. MCMAINS: One last question about

7 the (b), what are you talking about putting

8 putting in (b)?

9 CHAIRMAN SOULES: That (b) and (d)

10 would be subject to discovery if the Court, as in

11 the federal system, finds hardship and substantial

12 need. But you would not be able to get (a), (c)

13 on that.

14 MR. MCMAINS: I have a visceral

15 reaction to the concept of being able to pull a

16 party's statement from the attorney's file.

17 CHAIRMAN SOULES: Well, but that's

18 evidence. Okay. How many want to --

19 MR. MCMAINS: Well, I mean, has there

20 been any discussion, I mean, that you ought to be

21 able to do that? You take notes on what your

22 client tells you, that ought to be --

23 PROFESSOR DORSANEO: That's

24 different. That's not the witness statement.

25 MR. MCMAINS: Well, the witness, as a

1 matter of course, and they do it in a lot of
2 offices, writes down his description of the
3 attorney.
4 CHAIRMAN SOULES: That would be a
5 witness statement.
6 MR. BRANSON: That would be
7 attorney/client privilege.
8 MR. MCMAINS: It's done in connection
9 with your taking the lawsuit. You're going to
10 tell me that everything I've got in my file that
11 is a communication from him, that could be
12 classified as a statement of what happened?
13 PROFESSOR DORSANEO: I think we need a
14 definition of "witness statement," as, again, it's
15 a problem. Hickman versus Taylor is about
16 attorney's notes and about witness statements.
17 MR. BRANSON: Why doesn't the
18 attorney/client privilege protect us? If he gives
19 a statement to you or your agent --
20 MR. MORRIS: Because we changed the
21 wording in (b). If we change (b) and we put it --
22 CHAIRMAN SOULES: All we're doing is
23 saying that --
24 MR. BRANSON: You're leaving (a).
25 CHAIRMAN SOULES: All we're saying is

1 that (b) cases -- (b) and (d), that on a showing
2 of hardship and substantial need, as under the
3 federal rules, those areas of protected material
4 could be penetrated. But otherwise, attorney work
5 product, attorney/client privilege, and consulting
6 experts could not be reached, even for hardship
7 and substantial need. We talked about that quite
8 a bit here, Rusty. Okay. Let's vote.
9 MR. BRANSON: You could handle
10 Rusty's problem by putting in there a provision
11 that this does not affect the statements made by
12 client to an attorney.
13 PROFESSOR EDGAR: You can just say
14 "the written statements of potential witnesses and
15 parties, other than those given to their
16 attorneys," comma, "except," so on and so forth.
17 PROFESSOR DORSANEO: If you put
18 "attorneys," you better put "agents of attorneys,"
19 too.
20 MR. BRANSON: "To their attorneys and
21 attorneys' agents."
22 CHAIRMAN SOULES: Well, let's let the
23 lawyers argue that that's attorney/client
24 privileged as protected under (e) and you can't
25 get that under (a).

1 PROFESSOR DORSANEO: It's protected
2 under (a). It's work product.
3 CHAIRMAN SOULES: And (a).
4 PROFESSOR DORSANEO: You get back to
5 go again.
6 MR. BRANSON: So, let me ask you a
7 question. Every time -- under the standard area
8 of admissions policy, an insured is required to to
9 report to the company what it occurs, where do you
10 see that fits?
11 CHAIRMAN SOULES: Well, you can -- it
12 depends on whether that -- it just depends on
13 where the line is drawn on how much that's in
14 anticipation of things, how it fits in
15 anticipation of the claims and how to approach the
16 -- fits the litigation rules. That's where I draw
17 that line.
18 MR. BRANSON: So, when the insured
19 reports to its carrier what occurred under this,
20 conceivably, that's discovery.
21 CHAIRMAN SOULES: It's either
22 absolutely discoverable or it's discoverable on
23 showing of extreme hardship and substantial need.
24 PROFESSOR DORSANEO: Now, what's that
25 going to cause? Is that the kind of thing we want

1 to promote? When that's reported, that now the --
2 there's either uncertainty or clear
3 discoverability for people going out and
4 investigating or taking -- engaging in behavior.
5 CHAIRMAN SOULES: They've got that.
6 That's the worker's comp case. That's already the
7 Texas law.
8 PROFESSOR DORSANEO: I don't care what
9 the decided cases are.
10 CHAIRMAN SOULES: Okay.
11 PROFESSOR DORSANEO: I mean, I care
12 what they are, but just for the sake of discussing
13 this, is that -- what kind of behavior is that
14 going to promote? Is that going to be good
15 behavior or bad behavior?
16 CHAIRMAN SOULES: I think -- well, you
17 mean, they're going to fudge on their statements?
18 PROFESSOR DORSANEO: Are they going to
19 fudge? Are they not even going to take
20 statements? Are they going to not tell you they
21 took statements when they took statements?
22 MR. BRANSON: Well, the other side of
23 that, I've seen cases, in fact, I've had them,
24 where for some reason the defendant, the insurance
25 carrier, mailed me that very statement by accident

1 and then all discovery they mailed me was the
2 original statements from the doctor of what
3 happened. And it happened to be diametrically
4 different from what he testified at trial. Now,
5 that's what's occurring now in many instances.
6 They're saying to their carrier one thing and then
7 they're saying it at the courthouse differently.
8 So, it might promote the truth at the courthouse,
9 is what it might do.
10 PROFESSOR DORSANEO: Or would it do --
11 in the language of Hickman versus Taylor, incur
12 sharp practices and poor investigation and bad
13 case preparation?
14 MR. BRANSON: I would urge, perhaps,
15 making it discoverable is encouraging sharp
16 practice -- I mean, making it not discoverable.
17 It may be that the counter balance --
18 PROFESSOR DORSANEO: It's contrary to
19 me that something is reported to an entity that
20 exists for the purpose of defending claims, then
21 it would seem that the communications that they
22 generate, the reports they make are, by
23 definition, in anticipation of litigation. And
24 then you start playing games and you say "Aah, but
25 did they anticipate this exact lawsuit that

1 ultimately developed"?

2 And I think at that point you start to get

3 outside of what this privilege -- this exemption

4 was meant to be about at the threshold, and all

5 you're saying is it's not fair that the plaintiff

6 can't get this because it contains good stuff.

7 And --

8 MR. BRANSON: I think if you limited

9 to --

10 PROFESSOR DORSANEO: -- that goes too

11 far.

12 MR. BRANSON: If you put the exception

13 Rusty suggested in and, that is, still make

14 privileged statements to the attorney or the

15 attorney's assistants, you are okay, but if you

16 protect it as much as you can --

17 PROFESSOR DORSANEO: Well, maybe the

18 federal approach isn't the best approach, but

19 cases have nothing to do -- these ones we have.

20 Is the problem that we don't have an escape

21 valve? Is that really the problem, or is the

22 problem that -- I mean, do we have to read the

23 exemption really thoroughly because of the fact

24 that it is very -- all right -- when the

25 information is not otherwise attainable.

1 JUSTICE WALLACE: I think the problem
2 is not that -- so much not having an escape
3 valve. The problem is that nobody is really
4 certain the correct approach to take on these
5 things. That's the real problem. And we've got
6 the problem same as the members of the committee
7 have discussed around here. You can't get a
8 consensus on the best approach.
9 PROFESSOR DORSANEO: Probably the
10 thing is from industry to industry some people are
11 different -- you know, probably, maybe for
12 hospitals, they do one thing. They may be
13 accurate anyway because of their training. And
14 another kind of business might go about it
15 differently. I don't guess bus drivers may be
16 particularly smart enough to falsify their reports
17 in anticipation of litigation if it happens later,
18 unless they have their lawyers with them at the
19 time.
20 CHAIRMAN SOULES: Incident reports
21 wouldn't be protected at all.
22 MR. BRANSON: Well, but incident
23 reports -- there's an awfully good argument that
24 incident reports shouldn't have been protected.
25 CHAIRMAN SOULES: That's right. The

1 motion is on the floor that we -- let's just take
2 it a step at a time.
3 MR. BRANSON: I would accept an
4 amendment to the motion that would add into (b)
5 and (d) -- or into (b) "except for statements made
6 to the attorney or its agent" -- to the party's
7 attorney or its agent."
8 CHAIRMAN SOULES: Who is the
9 attorney's agent? How far does that go? Does
10 that go to the investigator that the attorney
11 sends out, gets a statement from the eyewitness?
12 MR. MCMAINS: It's not the eyewitness
13 he's talking about.
14 MR. BRANSON: I'm talking about the
15 party.
16 MR. MCMAINS: He's talking about the
17 statement of the party to the lawyer.
18 PROFESSOR EDGAR: The party comes up
19 and gives a statement to the attorney at the time
20 the employment is initiated.
21 MR. BRANSON: It certainly would not
22 include the supervisor at the hospital that took
23 the incident report. That's not --
24 CHAIRMAN SOULES: Who is the
25 employer? Who is the client, the hospital? Who

1 is the hospital? Is nobody in the corporation the
2 party, or is everybody the party?
3 MR. BRANSON: Well, it's only
4 statements made to his lawyer or his agent, and
5 innerhospital memorandums certainly don't fit in
6 that category.
7 CHAIRMAN SOULES: Doesn't (e), which
8 is attorney/client privilege, and (a), which is
9 attorney work product -- don't those give us all
10 the room we need to argue that those
11 communications are otherwise privileged and not
12 discoverable because of the other privileges that
13 drown down?
14 MR. BRANSON: Well, my understanding
15 is what Justice Wallace is attempting to do is get
16 some additional delineation from the rules. If
17 you leave it any other privilege without making
18 that communication, you haven't helped.
19 CHAIRMAN SOULES: Well, you have to --
20 you leave (e) there, you mean?
21 MR. BRANSON: Leave (e) and try to
22 protect the attorney/client privilege, as Rusty is
23 suggesting, I'm not sure you're given much
24 direction.
25 CHAIRMAN SOULES: Then we've got to

1 get into the writing of the whole body of law
2 about who is the client when the attorney's
3 representing the corporation. I mean, that's
4 that's a law review article.
5 MR. BRANSON: It probably needs to be
6 written.
7 CHAIRMAN SOULES: If that's what the
8 committee wants to do, that's fine. I don't know
9 what --
10 MR. TINDALL: Luke, could we -- I'm
11 very reluctant to vote on this. I know the Court
12 wants our help, and I think we ought to give it.
13 CHAIRMAN SOULES: We're going to make
14 a consensus. If you please to vote with them --
15 I've been asked by Justice Wallace --
16 MR. TINDALL: Could we have it written
17 up and Xeroxed so we could see it? Because it's a
18 serious issue --
19 CHAIRMAN SOULES: Yes. This book is
20 going to be sent to every member, as soon as I can
21 get it out, based on everything we do. And this
22 is -- we're going to go over this tomorrow and
23 revise it and everything we do here. But tell me
24 something to write. Let's get a consensus on how
25 it's to be written and I'll write it. And if we

1 want to put it in there, Frank -- I'm not trying
2 to be argumentative. I don't really care, as long
3 as we know what we're doing.
4 MR. MCMAINS: Luke, my only concern --
5 concern is the way we truncated the exceptions. I
6 mean, we have basically said everything is
7 discoverable except -- and then we've got A, (b),
8 C, D. When you have a specific rule dealing with
9 written statements by the parties, and then you've
10 got a general rule on attorney/client and work
11 product, I can easily see an argument to be made.
12 Well, obviously to the extent you're talking being
13 anything written statements and parties ain't in
14 these other two because it's right there.
15 Now, you can say that's a stupid argument. I
16 guarantee it will be made.
17 CHAIRMAN SOULES: I know. I see
18 that. I don't think it's a stupid argument.
19 MR. MCMAINS: Much dumber arguments
20 than that are made every day at the courthouse.
21 And all I'm trying to do is say that when you say
22 statements -- you know, written statements by a
23 party are going to be discoverable under this,
24 without apparent limitation, you've treated these
25 as being independent entities and with no

1 reference to the other -- to either A or E. I'm
2 just concerned, somebody is going to say it's
3 either E or it's nowhere. You don't have an
4 exclusion. Maybe everybody thinks, you know,
5 statements by parties ought to be just outright
6 discoverable but --
7 PROFESSOR EDGAR: It seems to me that
8 if this is a sufficient concern, if we just stated
9 3(b) to say "Excluding statements made to their
10 attorneys," comma, "the written statements of
11 potential witnesses and parties except," so and
12 so.
13 Now, we can talk about agents and we can talk
14 about how many people dance on the head of a pin,
15 but the Court can then determine whether or not
16 the statement made by -- to an agent of an
17 attorney is a statement to an attorney. We can't
18 solve every problem that can conceivably arise.
19 MR. BRANSON: I will accept that
20 amendment to the motion.
21 PROFESSOR DORSANEO: Well, if we're
22 going to do this, and if we had more time and
23 wanted to be faithful to Allen versus Humphries,
24 which is what the Supreme Court said wasn't
25 changed by this, what we would do is take (b) and

1 D and recombine them such that we define what a
2 witness statement is, in the same way we define
3 what kind of party communication is not subject to
4 discovery. That is to say, a statement made after
5 the occurrence or transaction --
6 MR. BRANSON: Isn't that the type of
7 thing we could do in the committee appointed to
8 work on it, due to time constraints of our meeting
9 today?
10 CHAIRMAN SOULES: Okay. Let's say if
11 we put in "except for written statements made to
12 their attorney's," comma, we put that in as a
13 preface to be --
14 PROFESSOR EDGAR: I say "excluding"
15 because you've already said "except" in the next
16 --
17 CHAIRMAN SOULES: Okay. "Excluding
18 written statements," okay. And then, otherwise
19 the motion would be as stated. Is there a
20 second?
21 PROFESSOR EDGAR: I second it.
22 CHAIRMAN SOULES: Made and seconded.
23 Those in favor show by hands. Four. Those
24 opposed? One.
25 PROFESSOR DORSANEO: I'm going to vote

1 against that. And I really wanted to vote
2 almost --
3 CHAIRMAN SOULES: Four to two.
4 PROFESSOR DORSANEO: -- against
5 anything other than sitting down and redrafting
6 this. I mean, you know --
7 PROFESSOR EDGAR: Well, I'm trying to
8 get us off the pot right now. And then I think it
9 does need to be redrafted.
10 CHAIRMAN SOULES: Our scheduling is
11 this: We're going to meet tomorrow, and then
12 we're going to send -- I'll get all these rules
13 drafted and back to you on a short fuse. There
14 won't be a lot of time for you to give me your
15 comments. You can call Tina or me. It will be at
16 least two weeks. Maybe I'll have 30 days,
17 depending on what the Court wants to do, and then
18 we're done. This goes to the Court.
19 I'm going to write the Court a letter and
20 suggest that -- well, I think probably there are
21 so many things in here that we've done that the
22 Court is going to want to go ahead and pass on
23 that they'll probably go to work on them. As soon
24 as they're done, they will probably promulgate
25 these rules, unless in the interim the legislature

1 has really messed something up and they want us to
2 get one set of rules in and do everything at one
3 time, after which point we would have a May or
4 June meeting.
5 Before we leave here I want to schedule a May
6 meeting for late May or early June so that we've
7 got a date fixed -- a date set to fix anything the
8 legislature messes up. We may not need to have
9 that meeting, but at least we'll have a date.
10 MR. BRANSON: They're not going to be
11 through until August, are they?
12 CHAIRMAN SOULES: They've got 140 days
13 from January.
14 PROFESSOR EDGAR: There's something
15 else, back about two meetings ago --
16 CHAIRMAN SOULES: But after that, we
17 won't -- the Court is not going to be inclined to
18 promulgate any more rules until rules that would
19 have an effective date of something like January 1
20 of 1989.
21 JUSTICE WALLACE: 1990.
22 CHAIRMAN SOULES: 1990. That's right
23 1990. So, that's why we've got to press and got
24 to have time. But let's read the cases in the
25 interim and work on these rules and we'll look at

1 them.

2 PROFESSOR DORSANEO: I'll tell you why

3 I feel a little bit -- I think this exemption rule

4 -- and I played a large part in organizing it

5 along with several other people. I think it is

6 very badly drafted from top to bottom and was not

7 well thought out. I feel partly responsible for

8 that, not being smart enough at the time to see

9 what I see now.

10 So, I'm kind of involved with this on a

11 different basis. And I really think we could --

12 if we need to do it now, we could do it now. We

13 can just sit down and just fix it and not just fix

14 two lines of it or perpetuate the problem by more

15 tinkering.

16 CHAIRMAN SOULES: This is only the

17 problem the Court is going to struggle with. You

18 know, we've got Peeples, but that talks about

19 things that are not -- I mean, this rule has

20 worked except for the Texas kicker. It's been

21 working now for three years.

22 PROFESSOR DORSANEO: Well, as I see

23 it, though, we're just starting to get into what

24 the arguments are going to be. This is the first

25 round.

1 Now, if you wanted to just fix the Texas
2 kicker, just fix it the way you fixed it. But
3 don't go messing around with the -- if we're going
4 to do more than make a minor fix, where do you
5 draw the line? I agree with that.
6 CHAIRMAN SOULES: Let's go to page 145
7 and try to finish the discovery rules today.
8 PROFESSOR EDGAR: I want to make sure
9 what we've done, though.
10 CHAIRMAN SOULES: Okay.
11 PROFESSOR EDGAR: A couple of meetings
12 ago -- and if you will look at this page right
13 here, on Rule 166(b).
14 CHAIRMAN SOULES: I've got that.
15 PROFESSOR EDGAR: We've added
16 something in the last paragraph, and I want to
17 make sure that's there because I was the one that
18 suggested it.
19 PROFESSOR DORSENEO: It's in there,
20 Hadley.
21 PROFESSOR EDGAR: I want to make sure,
22 though, that the change we have made today is a
23 change made in light of the changes that are in
24 here. That's the only point I'm making.
25 CHAIRMAN SOULES: These would stand.

1 PROFESSOR EDGAR: All right. I just
2 wanted to make sure.
3 CHAIRMAN SOULES: Okay. Oh, yes.
4 PROFESSOR EDGAR: Now, how are you
5 going to add, though, the federal exception to (b)
6 and (d)?
7 CHAIRMAN SOULES: Probably by an (f)
8 that refers back up there. You know, I'll get the
9 drafting done and you-all can shoot at it all you
10 want.
11 PROFESSOR EDGAR: May I just make a
12 suggestion?
13 CHAIRMAN SOULES: Make a suggestion.
14 I'd love it.
15 PROFESSOR EDGAR: You might try and
16 incorporate (b) and (c) into one subheading and
17 then have that proviso apply only to it in that
18 same paragraph rather than have a subparagraph
19 (f).
20 CHAIRMAN SOULES: Put (b) and (d)
21 together?
22 PROFESSOR EDGAR: No -- yes, yes.
23 CHAIRMAN SOULES: (b) and (d)
24 together.
25 PROFESSOR EDGAR: Put (b) and (d)

1 together, at least in order, and then have a
2 paragraph --
3 CHAIRMAN SOULES: And add the
4 federal --
5 PROFESSOR EDGAR: Just -- as it
6 pertains to that particular thing. That's just a
7 suggestion, Luke.
8 CHAIRMAN SOULES: That's great.
9 That's a good one.
10 PROFESSOR DORSANEO: Yes. And that's
11 what Allen versus Humphries does.
12 CHAIRMAN SOULES: And I'll do it that
13 way. I probably won't do it well, but --
14 Okay. Now, we're going to go to page 145 or
15 we can quit. What's the pleasure? It's 5:30.
16 MR. BRANSON: It's lock-up time, isn't
17 it?
18 CHAIRMAN SOULES: At 6:00 they lock us
19 up. See if there is anything we can do here for
20 15 minutes before we take off. I think when we
21 serve requests --
22 PROFESSOR DORSANEO: What page now?
23 CHAIRMAN SOULES: We need to look at,
24 probably, when any of the discovery can be
25 commenced. That really wasn't the focus of the

1 '84 changes.

2 PROFESSOR EDGAR: What page are you

3 on?

4 CHAIRMAN SOULES: I'm on page 145.

5 Windle Turley wants to start service of 167 and

6 168 as soon as the commencement of the action has

7 taken place. And I don't have any problem with

8 that. I think it's the way it ought to be if you

9 want to, without leave of Court. But we say with

10 leave of the Court you can do it that way now.

11 But let's table this until our next meeting.

12 PROFESSOR DORSANEO: In fact, we have

13 it going in the opposite direction on that for the

14 written depositions, you know, in this book.

15 CHAIRMAN SOULES: I think -- I would

16 love to be able to serve requests to admit with a

17 petition on dead beat debtors. Then I wouldn't

18 have any proof problems. I prove it when I serve

19 them.

20 MR. TINDALL: Yeah, but the old rule

21 was when you got served you got 95 interrogatories

22 served with a petition. Do you want to go back to

23 that practice?

24 CHAIRMAN SOULES: Well, there's a

25 limitation on that. It can only be 30.

1 MR. TINDALL: I understand that. But
2 that was the reason they put that in. When you
3 got served a petition, stapled to it was --
4 CHAIRMAN SOULES: Anyway, let's table
5 that.
6 PROFESSOR DORSANEO: It's like a bill
7 in equity.
8 MR. TINDALL: Exactly.
9 MR. MORRIS: Luke, are we going to go
10 back to that discussion on "solely"? I thought
11 you said that we would.
12 CHAIRMAN SOULES: Okay. How many feel
13 that the word "solely" should be put into that
14 language "in anticipation of litigation"?
15 MR. MORRIS: I do.
16 CHAIRMAN SOULES: Two. How many feel
17 that it should not be there? Raise your hands.
18 Okay. That's three to two. "Solely" is rejected
19 three to two.
20 MR. MCMAINS: What about a middle
21 course?
22 CHAIRMAN SOULES: We've got to go on.
23 You-all can shoot at what I write, but let's go
24 on. Timothy Sulak, 169. This is on page 148.
25 The problem here is that Sulak thinks that in

1 order to withdraw admissions, a party should have
2 to carry these burdens. Of course, withdrawing
3 admissions is a little different. That comes --
4 you have to show why you're late in modifying
5 interrogatories, but you don't have to show that
6 outside of 30 days. 169, like interrogatories,
7 has to be amended outside of 30 days, if at all.
8 Does anybody have any strong feelings about
9 Sulak's suggestion? Seems to me like --
10 PROFESSOR EDGAR: Well, the only
11 problem I have with it is that you're imposing the
12 burden on someone to show -- to prove a negative.
13 MR. MORRIS: Yeah, but they're the
14 ones that's fixing to falsify it.
15 PROFESSOR EDGAR: No, no, I'm just
16 talking about conceptually that the -- it's
17 extremely difficult for someone to show a
18 negative. That is, it's a whole lot easier for
19 the party who is seeking to amend the admission --
20 the party that's seeking to rely upon the
21 admission to show that he is going to be
22 prejudiced than it is the other party to show that
23 he's not not being prejudiced.
24 MR. RAGLAND: I don't agree with
25 that.

1 MR. MCMAINS: Of course, the problem
2 is you've always been prejudiced because you've
3 got to prove something that you shouldn't have to
4 prove.
5 PROFESSOR EDGAR: Well, that's not the
6 kind of prejudice I'm talking about.
7 CHAIRMAN SOULES: Right now a party
8 who wants to amend or withdraw a 169 admission has
9 a heavier burden than a party who wants to
10 supplement an interrogatory. Because the party
11 who wants to supplement an interrogatory, if he's
12 earlier than 30 days prior to trial and within a
13 reasonable period -- that can be more than 30 days
14 -- all he does is zing it. He does it. It's
15 over.
16 But in order to amend or withdraw a 169
17 admission, a party, even a reasonable time before
18 trial and more than 30 days before trial, has to
19 show the Court that the presentation of the merits
20 of the action will be subserved thereby. He's got
21 to do that. That's the heaviest burden on any
22 such admission of discovery already.
23 PROFESSOR DORSANEO: What's the
24 practice, though? I don't know what the practice
25 is in your neck of the woods. But if somebody

1 goes in there and says, oh, you know, sore toe --

2 CHAIRMAN SOULES: In Neonazi Kendall

3 County (phonetic) you don't get any help.

4 MR. TINDALL: I don't think we ought

5 to amend that.

6 CHAIRMAN SOULES: Okay. How many are

7 in agreement? Those in agreement to leave this

8 alone please show by hands. Those who think it

9 should be amended show.

10 MR. RAGLAND: I think it ought to be

11 amended.

12 CHAIRMAN SOULES: Amended Sulak's

13 way?

14 MR. RAGLAND: Yeah. Well, he didn't

15 propose any language here, but I just think it's

16 unfair to place the burden on someone who has

17 relied on the admission different from

18 interrogatory. The interrogatory is not binding

19 on anyone except the person that makes it anyway.

20 It can't be used against that person. But

21 admission may affect a lot of other parties and

22 may be relying on that.

23 CHAIRMAN SOULES: Let me see the hands

24 again. Those who feel this proposal should be

25 rejected show your hands. Four.

1 MR. BRANSON: Let me ask you this:
2 Could there be a way to require that if an
3 admission is going to be withdrawn, it will be
4 withdrawn far enough in advance of trial --
5 CHAIRMAN SOULES: It's already there.
6 166(b)(5).
7 MR. BRANSON: What is that?
8 CHAIRMAN SOULES: It says you have to
9 supplement discovery reasonable time not less than
10 30 days prior to trial. Judge Onion in San
11 Antonio has already held that expert witnesses
12 designated earlier than 30 days prior to trial
13 cannot testify.
14 MR. BRANSON: What Lefty is saying,
15 though, in the incidents where Sulak got combined,
16 the admission wasn't withdrawn until the
17 courthouse.
18 CHAIRMAN SOULES: Well, you missed the
19 rule because he had the benefit of yelling out if
20 he had argued it.
21 MR. MORRIS: Well, he did. He -- I'm
22 staying out of this because Tim is my partner, but
23 he really felt like he got a rook. You know, he
24 wrote this in good faith.
25 MR. BRANSON: Luke, you really

1 shouldn't be able -- and I've seen trial judges in
2 Dallas -- it happens in comp cases more than
3 anything else, because plaintiff goes in and
4 proves up a lot of unnecessary crap with requests
5 for admissions in a comp case.
6 MR. MCMAINS: This does not say that
7 it is subject to 166(b) tantalant (phonetic).
8 169(2) says "Subject to the provisions of Rule 166
9 governing amendment of a pretrial, the Court may
10 permit withdrawal or amendment when the
11 presentation of the merits of the action will be
12 subserved thereby and the party who obtained the
13 admission fails to satisfy the Court that
14 withdrawal or amendment will prejudice him in
15 maintaining his action." It depends on the
16 practice. No time limit reference in that rule,
17 on the amendment of 169.
18 MR. BRANSON: I think if they're going
19 to withdraw admissions under any set of
20 circumstances, it needs to be done at least
21 subject to 166 time limit. Because you get down
22 there and you've busted your behind getting the
23 lawsuit ready and you've relied on the admissions,
24 and all of a sudden the trial court, who feels
25 sorry for the defense lawyer, who didn't read his

1 file when he made the requests for admissions,
2 let's him out of the box and the plaintiff doesn't
3 have a way to get there or vice versa.
4 CHAIRMAN SOULES: 166(b)(5) covers
5 requests to admit, duty to supplement. That's in
6 the history of that rule from the beginning --
7 from '84 forward.
8 PROFESSOR DORSANEO: It wouldn't hurt
9 to say that.
10 CHAIRMAN SOULES: What?
11 PROFESSOR DORSANEO: It wouldn't hurt
12 to say it.
13 CHAIRMAN SOULES: What are you going
14 to say "interrogatory"? It says a party who has
15 responded to a request for discovery, and request
16 for discovery was held to be any kind of request
17 for discovery; documents, depositions,
18 interrogatories, requests to admit, requests for
19 examination. It was every request, and that's why
20 is we didn't go into listing them all.
21 PROFESSOR DORSANEO: I think that's
22 right.
23 CHAIRMAN SOULES: That's absolutely
24 right.
25 MR. BRANSON: We've obviously got one

1 trial lawyer who was aware of the cases, cited
2 them to the judge and the judge ignored them. Why
3 not put it in this rule? Why not put subject to
4 166 time limit?
5 PROFESSOR DORSANEO: I'll tell you why
6 that probably is unnecessary to put that. I agree
7 with Luke because of 166(b)(1) and (5). Requests
8 for admission are identified as a form of
9 discovery in paragraph one, the duty to supplement
10 to paragraph five.
11 MR. MCMAINS: This talks about
12 withdrawal, Goddamn it. And I'm telling you the
13 courts don't treat withdrawal and supplementation
14 as the same thing. I don't disagree with you that
15 it probably should be.
16 PROFESSOR DORSANEO: But I was going
17 to say I wouldn't see why we couldn't substitute
18 the reference to the pretrial rule with a
19 reference to one that's in there now, copied from
20 the federal rules, with reference to 166(b) for
21 the sake of clarity.
22 And I don't see any big problem of changing
23 the language of 169, which was copied verbatim in
24 1984 from the federal rule, to say "Subject to
25 provisions of paragraph 5 of Rule 166(b)," rather

1 than "subject to provisions of Rule 166 governing
2 any amendment of the pretrial order," which is
3 just kind of interesting language but probably of
4 no real importance in Texas practice, at least in
5 my county.
6 MR. MCMAINS: Well, it is in Corpus.
7 We have discovery deadlines that are imposed.
8 MR. BRANSON: We don't have a bunch of
9 young Republican judges.
10 MR. MCMAINS: We've got a bunch of
11 dumb Democrats. We will have if any of them
12 resign.
13 CHAIRMAN SOULES: Subject to
14 provisions of Rule 166(b).
15 PROFESSOR EDGAR: It's not apparent.
16 It's just 166(b), period, five period.
17 MR. TINDALL: I wouldn't eliminate the
18 pretrial. It may be the Judge --
19 CHAIRMAN SOULES: Oh, no, we're not
20 going to.
21 PROFESSOR DORSANEO: No, do both.
22 CHAIRMAN SOULES: Subject to
23 provisions of Rule 166 and governing amendment of
24 pretrial order and Rule 166(b)(5) governing --
25 PROFESSOR EDGAR: Why don't you say in

1 the time limits provided in 166b(5)?

2 CHAIRMAN SOULES: Well, but the time

3 limits are --

4 MR. MCMAINS: That's not all that's

5 dealt with.

6 CHAIRMAN SOULES: -- seasonably

7 governing duty to supplement discovery responses.

8 MR. BRANSON: That's not likely to be

9 interpreted, I take it, by the trial courts that

10 you can ignore requests for admissions if you do

11 it 30 days before trial.

12 MR. MORRIS: That's what I'm afraid of

13 with this reference that a court may say, well, at

14 any time up to 30 days before trial you can change

15 your response to the requests for admissions. As

16 you know, we've been relying on that, and this

17 cuts on both sides of the docket. I mean, this is

18 just a real problem. But if you're relying on

19 someone's admission, then you don't go out and

20 start trying to prove up all that line. If you

21 get down to 30 days before trial and they feel

22 like it was matter of right, they can change their

23 response for request. For admission, or if the

24 Court interprets it that way, then we've done as

25 much damage as what we've cleared up.

1 CHAIRMAN SOULES: Well, the duty to
2 seasonably supplement is not governed by the
3 30-day rule. That's just the last day that you
4 can seasonably supplement.
5 MR. MCMAINS: That's right. I mean,
6 you can say, theoretically, provisions of 166b(5),
7 in general, apply. You can take the position,
8 well, he knew this 10 weeks ago and hadn't done a
9 damned thing.
10 CHAIRMAN SOULES: Don't let him
11 withdraw. His supplement should not be
12 permitted. Judge' Onion, district judge in San
13 Antonio, appointed defense --
14 MR. MORRIS: Well, he got in the
15 situation where they changed attorneys real late
16 in the game.
17 MR. MCMAINS: The fact of the matter
18 is the only time I've ever been faced with
19 withdrawal of requests for admissions have been
20 parties who didn't realize they hadn't answered
21 admissions, and they had them the week before
22 trial.
23 CHAIRMAN SOULES: Okay. Well, let's
24 do -- well these Wicker -- is the rest of it
25 housekeeping?

1 MR. RAGLAND: Did we finish with that
2 rule?
3 CHAIRMAN SOULES: Yes. Let's go get
4 our cars and see you in the morning. What time,
5 8:30?
6 MR. BRANSON: What happened to that
7 rule? Did we do anything to it?
8 CHAIRMAN SOULES: Nothing. The vote
9 was to do nothing. Do we want to do anything?
10 Oh, no, to -- I'm sorry. I'm tired; I'll admit
11 it.
12 Do you want to put in that -- into 169 the
13 language suggested by Hadley where we say "subject
14 to" -- in paragraph two, number two, second
15 sentence, "Subject to the provisions of Rule
16 166(b) governing the amendment of pretrial order,"
17 and then insert "166(b)(5) governing duty to
18 supplement discovery responses," comma, "the Court
19 may permit." How many are in favor of that?
20 MR. RAGLAND: I don't have any problem
21 with that, but I've got some problems with the
22 burden of proof part here.
23 CHAIRMAN SOULES: How many are
24 opposed?
25 MR. RAGLAND: We can talk about it

1 tomorrow.

2 CHAIRMAN SOULES: Yes, I guess so.

3 8:30?

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5 (Recess until 8:30
(in the morning.

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1 REPORTER'S CERTIFICATE

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THE STATE OF TEXAS X
3 COUNTY OF TRAVIS X

4 I, Chavela V. Bates, Court Reporter for the State of Texas, do hereby certify that the above
5 and foregoing typewritten pages contain a true and correct transcription of all the proceedings
6 directed by counsel to be included in the statement of facts were reported by me.

7 I further certify that this transcription of
8 the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the
9 respective parties.

10 I further certify that my charge for preparation of the statement of facts is $______.

11 WITNESS MY HAND AND SEAL OF OFFICE this,
12 the ________ day of ________________________, 1986.

13

____
14 Chavela V. Bates, Court Reporter
316 W. 12th Street, Suite 315
15 Austin, Texas 78701 512-474-5427

16 Notary Public expires 09-30-89
CSR #3064 Expires 12-31-87

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