

1 SUPREME COURT ADVISORY BOARD MEETING
2 Held at 1414 Colorado
3 Austin, Texas 78701
4 November 8, 1986

(VOLUME III)

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TRANSCRIPT OF PROCEEDINGS

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1 SUPREME COURT ADIVISORY

2 BOARD MEETING

3 November 8, 1986

4

5

6 CHAIRMAN SOULES: We just handed out a
7 handout. This first item, 685, we've talked about
8 this before. The reason it's coming back again is
9 that it was sent here and to the COAJ. We have
10 acted on it and rejected it. That doesn't mean we
11 can't take it up again. And then they acted on it
12 -- or at least it's come back again from them.
13 Does anyone have any feeling we need to reconsider
14 our former action of rejecting this suggestion?

14

MR. RAGLAND: I move we reject it.

15

CHAIRMAN SOULES: Okay. Moved.

16

Seconded?

17

JUDGE TUNKS: Second.

18

19 CHAIRMAN SOULES: All in favor show by
20 hand of rejecting it. Opposed? Okay. That's --
21 let me see the hands again wanting to reject.
22 There is a vote against. Those who reject.
23 Five. And those who want the rule. One.

23

PROFESSOR EDGAR: Luke, attached to

24

the back of that --

25

CHAIRMAN SOULES: The next --

1 PROFESSOR EDGAR: Go ahead.

2 CHAIRMAN SOULES: The next thing we
3 have is Jerry Wicker's suggestion on changing --

4 PROFESSOR DORSANEO: We pick them
5 anyway. We just file them first.

6 MR. BRANSON: He was teasing Dorsaneo
7 about being the majority of one.

8 CHAIRMAN SOULES: Oh, in San Antonio
9 it doesn't make any difference because every judge
10 sits in every court, so it makes no difference
11 where you file.

12 MR. TINDALL: No, but he's talking
13 about the practice of going straight to the judge
14 before you file it.

15 CHAIRMAN SOULES: It still doesn't
16 make any difference in San Antonio.

17 PROFESSOR DORSANEO: Nobody does that
18 anywhere, do they?

19 MR. TINDALL: Well, that's what he's
20 talking about in his letter.

21 PROFESSOR DORSANEO: I know. But that
22 doesn't happen anywhere. That's why he wants to
23 have the rule say what happens.

24 CHAIRMAN SOULES: Actually a judge
25 shouldn't grant a TRO until the clerk's filed it,

1 but that trial court can handle that. They can if
2 they want to.

3 MR. TINDALL: The practice is commonly
4 done. It's -- you find the Judge wherever you
5 find him and get him to grant it and then you file
6 it later.

7 CHAIRMAN SOULES: The Judge can file
8 too. The clerk doesn't have to file.

9 Okay. On these suggestions of Jeremy Wicker
10 for 621 --

11 MR. RAGLAND: What page are you on,
12 Luke?

13 PROFESSOR EDGAR: Look at the very
14 last page of the handout.

15 CHAIRMAN SOULES: The last page of
16 this handout, page 18. It was 18 of his letter
17 but, this is 621 and it just changes a cite in our
18 rule from a Civil Statute to a Civil Practice
19 Remedies Code. Any opposition to that?

20 PROFESSOR DORSANEO: May I take a look
21 at 621(a), please?

22 CHAIRMAN SOULES: Okay.

23 PROFESSOR DORSANEO: Because there are
24 two statutes.

25 PROFESSOR EDGAR: 3773 is the only one

1 referred to in 621.

2 PROFESSOR DORSANEO: I know, but there
3 are two statutes that deal with this problem of
4 dormancy. And I want to make sure that, in fact,
5 the current rule makes the right reference.

6 PROFESSOR SOULES: It's on page 226 of
7 your purple book.

8 MR. TINDALL: That 3773 is simply that
9 10-year statute, isn't it? Vitality of a
10 judgment.

11 PROFESSOR DORSANEO: Uh-huh. I think
12 it will be all right.

13 CHAIRMAN SOULES: Okay. No
14 opposition? That's unanimously approved. Now,
15 let's go to 169 and the matter that we were
16 talking about yesterday, which is the -- what page
17 is that?

18 PROFESSOR EDGAR: 160 -- oh.

19 CHAIRMAN SOULES: In the materials.

20 PROFESSOR EDGAR: I don't know.

21 CHAIRMAN SOULES: Page 148 in the
22 agenda materials. Mr. Sulak, Lefty's -- I don't
23 know how to say his partner's name. I've been
24 mispronouncing it. And Tom Ragland, where is he?

25 MR. RAGLAND: Right here.

1 CHAIRMAN SOULES: Tom, excuse me, I
2 didn't see you there. You changed seats from
3 yesterday. You had comments you wanted to make
4 about Mr. Sulak's suggestion. Those are in order
5 now.

6 MR. RAGLAND: All right. It seems to
7 me -- I've got two complaints about the method of
8 placing the burden of proof and the burden of
9 proof itself. Those are my two complaints. In
10 the first place, as the rule is presently written,
11 there's practically no burden on the person who is
12 trying to withdraw the admission. The rule states
13 that it may be withdrawn or permit -- the Court
14 may permit withdrawal when the presentation of the
15 merits of the action will be subserved thereby.

16 Now, I can't think of any argument that
17 wouldn't meet that burden of proof. You just say,
18 you know, I want to because I need to. And then
19 it goes on and places a very difficult burden on
20 the person who has been relying on these
21 admissions for any given length of time by stating
22 that the party who obtained admission fails to
23 satisfy the Court that withdrawal or amendment
24 would prejudice him in maintaining his action of
25 the merit.

1 Fails to satisfy the Court is probably a
2 burden that can't be met if the Court just says
3 I'm not satisfied. I mean, there is just no rule
4 for appellate review or anything else there that I
5 can see. It just looks like to me those two
6 things ought to be re-worded to place the burden
7 on the person who is seeking to withdraw the
8 admission to show some good grounds for it and
9 then go further to show that the person who has
10 been relying on these admissions won't be
11 prejudiced in some fashion and not put the burden
12 on the person who has been relying on them.

13 I don't have any specific language that I'm
14 going to suggest, but that's my complaint about
15 that portion of the rule.

16 MR. MCMAINS: Luke, we adopted
17 yesterday, did we not, the provision with relation
18 to 166(b)?

19 CHAIRMAN SOULES: Yes, that's
20 already --

21 MR. MCMAINS: Time limits. So, we
22 fixed that problem.

23 CHAIRMAN SOULES: That's taken care
24 of.

25 MR. MCMAINS: I suggest that we shift

1 the burden of proof to the movant, which I think
2 under 166(b), is where it generally is for any
3 kind of delay in supplementation.

4 What's the provision with regards to the
5 experts within 30 days? Don't we have a --

6 CHAIRMAN SOULES: It's 30 days.

7 MR. MCMAINS: No, no. But, I mean,
8 isn't there a provision in there for allowance of
9 doing it otherwise within the 30-day period, but
10 you've got a higher burden?

11 CHAIRMAN SOULES: Right.

12 MR. MCMAINS: It's a pretty
13 substantial burden, I think, according to Judge
14 Guittard's opinion.

15 CHAIRMAN SOULES: It is. And I'm not
16 even sure it's all in the rules --

17 MR. TINDALL: Well, this puts the
18 burden on the party seeking to change it.

19 MR. MCMAINS: It doesn't. It says the
20 burden on the party seeking to change the rules,
21 merely that the merits will be subserved. And
22 then it -- the burden then shifts to the other
23 side to show that it used prejudice.

24 MR. TINDALL: Well, I understand, but
25 you've got a heavy burden going in to show that

1 the admission was in error. You've got to
2 demonstrate that to the Court or he won't let you
3 amend.

4 MR. MCMAINS: No, I'm not -- I don't
5 read the rule as being all that restricted.

6 MR. BRANSON: Here's what happens so
7 many times in practice. One side gets a request
8 for admissions in, and rather than take the time
9 to adequately investigate in order to answer the
10 questions, they just give it to a paralegal and
11 sit down and answer them. And then they start
12 preparing their case a year from then and realize
13 that they didn't do their investigation at the
14 time they answered the requests for admissions.
15 And the other party has been relying on them.

16 And I think if you strengthen up the rule and
17 put some teeth into it, it will require the
18 parties to do their investigation at the time they
19 receive the requests for admission so that you
20 don't get nonbased reliance which is what seems to
21 have distressed Tim. And certainly anybody that's
22 been in practice a long time has been down at the
23 courthouse where his opponent did just that to
24 him.

25 And it's really, if you relied on it, quite

1 an inconvenience. I move we change the burden to
2 the movant and strengthen it some, and Tim's
3 recommendation looks pretty good to me.

4 CHAIRMAN SOULES: What we've got right
5 now, though, is that admissions may be
6 supplemented by a party seasonably, I believe, is
7 the word.

8 MR. MORRIS: Well, really you can't
9 supplement an admission. You either admit it or
10 deny it.

11 CHAIRMAN SOULES: Well, there's a lot
12 more to it than that. 169 puts a lot of burden on
13 explaining why you can't admit or deny --

14 MR. RAGLAND: Well, but they've
15 already admitted it, Luke.

16 MR. MORRIS: But if you admitted or
17 denied it, there's really no way to supplement
18 that.

19 CHAIRMAN SOULES: Well, you could
20 admit part and deny part. You can --

21 MR. RAGLAND: But that's a withdrawal
22 of the admissions that's already been made and
23 then coming back under the rule to either admit or
24 explain why they can't. And that's a problem.

25 CHAIRMAN SOULES: That's the statement

1 that I'm trying to make right now, that there are
2 circumstances under which an admission is subject
3 to being supplemented. And that is taken care of
4 in 166b(5). But there is no -- there's nothing on
5 withdrawal other than in 169(2). And what I'm --
6 do we need this "or amendment," because isn't
7 amendment and supplement -- is that -- are those
8 the same or are they different?

9 PROFESSOR DORSANEO: As I can see,
10 "withdrawal" is eliminating the admission and
11 "amendment" would be replacing it with a denial.

12 CHAIRMAN SOULES: So, "amendment"
13 would have a meaning different from
14 "supplementation."

15 PROFESSOR DORSANEO: As I've always
16 understood it, "withdrawal" leaves you with no
17 response and "amendment" is changing an admission
18 to a denial or a denial to an admission.

19 CHAIRMAN SOULES: That makes sense.
20 Okay. So, may permit withdrawal or amendment --

21 MR. BRANSON: Now, wait a minute. I
22 don't understand why the duties to supplement
23 changes Tim's problem. I mean --

24 CHAIRMAN SOULES: It probably doesn't.

25 MR. BRANSON: I mean, I don't -- I

1 think you're taking us off on a rabbit trail
2 there, Luke. I don't -- I think just because they
3 supplement it, it doesn't change the burden on
4 them. I mean, as far as I'm concerned, they had a
5 duty to supplement or answer it right in the first
6 place.

7 CHAIRMAN SOULES: Well, I'm not
8 attempting to take you on a rabbit trail. I'm
9 trying to determine whether the word "amendment"
10 -- I'm going to -- I'm in agreement that we need
11 to do something about the situation for parties
12 attempting to withdraw an admission, and that was
13 Tim's problem.

14 MR. BRANSON: Right.

15 CHAIRMAN SOULES: I'm there with you.
16 I'm trying now to determine whether we also need
17 to do something about a situation different from
18 his where there is an amendment, or is that the
19 same as a supplement?

20 Bill has convinced me that the amendment and
21 supplement are not the same. And we're fixing to
22 write a rule that not only speaks to Sulak's
23 problem, but is also going to speak to thousands
24 of other problems faced in the practice. And
25 that's what I'm trying to do. I'm not trying to

1 go on a rabbit trial. I'm trying to put a
2 complete fix, if we can.

3 MR. BRANSON: The only place we
4 encounter amend and supplement, or that I do, is
5 in pleadings. And, that is, you have supplemental
6 pleadings which merely add to existing pleadings
7 or amended pleadings which replace it.

8 CHAIRMAN SOULES: 166b(5) is a very
9 broad rule. And it's been the subject of a lot of
10 appellate work lately open supplementing --

11 MR. BRANSON: But would you deal with
12 supplement as a term of art as it's been used in
13 pleadings historically?

14 CHAIRMAN SOULES: No. That's not what
15 it means.

16 MR. BRANSON: How do we know that's
17 not what it means?

18 CHAIRMAN SOULES: What?

19 MR. BRANSON: How do we know that's
20 not what it means?

21 CHAIRMAN SOULES: Because, for
22 example, in the HEB case, a witness was refused
23 the right to testify because the party who had
24 answered interrogatories and named that individual
25 and said he was somewhere in Missouri had the

1 party in the courthouse in San Antonio to testify
2 for trial and had never supplemented his
3 interrogatory answers to show that, in fact, that
4 party had been in Dallas and they knew it for the
5 past six months. That's what they're talking
6 about supplementing discovery responses. I mean,
7 that's one case. And the judge held that that
8 individual could not testify. That was a plain
9 fact witness that was not an expert.

10 In other words, everything you can find out
11 that's different from your discovery responses
12 prior to trial you must disclose by
13 supplementation. You've got to do it for
14 depositions. You've got to do it for admissions.
15 You've got to do it for documents. You've got to
16 do it for interrogatories. Before '84, you only
17 had to supplement interrogatories. Since '84, you
18 had to supplement all discovery.

19 MR. BRANSON: But in that -- in that
20 Lefty's right. You're not asked to give
21 dissertations in requests for admissions. You're
22 asked either to answer "yes" or "no."

23 CHAIRMAN SOULES: That's not right.

24 MR. BRANSON: Well, certainly, there
25 can be circumstances in which you will need an

1 explanation. But ordinarily, a request for
2 admission is an admit or deny position.

3 CHAIRMAN SOULES: Well, you do what
4 the rule says, and the rule says a lot more than
5 that. And the reason that you -- that the rule
6 says a lot more is that everybody used to read
7 them so technically that every admission got
8 denied for one reason or another. And the rule
9 says you can't deny, but you can explain if you're
10 in these circumstances. That's what made them a
11 lot more useful tool.

12 MR. RAGLAND: I think, as I understand
13 it, they can only explain why they can either
14 admit or deny.

15 MR. BRANSON: Admit or deny. And once
16 they've taken a position, gotten off the fence and
17 either admitted or denied, any change of that
18 position from an admit to deny or vice versa has
19 to be an amendment.

20 CHAIRMAN SOULES: Okay, I'm with you
21 now. After the discussion we had on whether
22 admission and supplementation was the same, I
23 agree that it's not the same. And when we talk
24 about withdrawal or amendment of the admission,
25 we're talking about something that's not under the

1 purview of 166b(5).

2 MR. BRANSON: Right.

3 CHAIRMAN SOULES: And we do need to
4 fix it here. If we're going to do anything -- I
5 mean, it has to be addressed here. It is
6 addressed here. We're talking now about changing
7 it.

8 MR. BRANSON: What's wrong with the
9 suggestion Tim makes? What would be wrong with
10 the suggestion he makes on 149?

11 CHAIRMAN SOULES: Well, let's see.

12 MR. TINDALL: Do you want the same
13 amendment, Frank, on interrogatories? You relied
14 on an answer to an interrogatory. They can amend
15 those without those heavy burdens.

16 MR. BRANSON: Well, in
17 interrogatories, you're not generally dealing with
18 a "yes" or "no" position. And, generally, you're
19 dealing with tell me an answer to something. The
20 answers need to be supplemented periodically and
21 on occasion to supplement active changes of
22 interrogatories.

23 MR. TINDALL: But, you can amend and
24 really be caught short. I mean, if we're going to
25 get tough on letting people change any of these

1 answers to all forms of discovery, I'm just
2 saying, then we ought to apply the same burden on
3 interrogatories. They're not going to let you
4 change your interrog.

5 MR. MCMAINS: That is in the rule.

6 MR. MORRIS: It requires a showing of
7 good cause.

8 MR. TINDALL: It's not the same burden
9 we're talking about putting on admissions.

10 MR. MCMAINS: The burden is greater in
11 my judgment.

12 MR. TINDALL: Pardon?

13 MR. MCMAINS: The burden is greater on
14 interrogatories right now.

15 MR. TINDALL: It is right now, but
16 we're going to make it even tougher on
17 admissions --

18 MR. BRANSON: Well, but shouldn't it
19 really be when you're asking someone under oath
20 whether the answer to a question is "yes" or "no,"
21 and they give you a direct answer under oath that
22 it's one --

23 PROFESSOR DORSANEO: Not under oath.

24 MR. BRANSON: -- and they attempt to
25 change it, I think it ought to be a heavy burden.

1 MR. MCMAINS: The interrogatory rule,
2 right now, in terms of the compliance Rule 215 on
3 Abuse of Discovery in Section 5 which deals with a
4 failure to supplement has the burden now, which
5 says that you shall not be entitled to present
6 evidence on the issue unless the Court finds that
7 good cause sufficient to require admission
8 exists.

9 Now, that's a hell of a lesser burden than on
10 the admission practice. And the admission
11 practice is much more pernicious because with that
12 admission in place, even 30 days prior to trial,
13 it has discouraged you from conducting any
14 discovery at all on that issue. It's been
15 unnecessary.

16 Now, it is absurd to take the position, in my
17 judgment, that that is not a more gregious
18 result. If somebody wants to answer an evasive
19 interrogatory or whatever, you know that you're
20 going to have to prove that issue. It has not
21 taken the issue out of the case. Now, you have
22 the issue out of the case until 30 days before
23 trial and you're operating under a pretrial order
24 or just the general parameters of discovery, all
25 of a sudden you've got this request to put this

1 issue back in the case and you don't have any time
2 to do any kind of other discovery.

3 CHAIRMAN SOULES: Lefty.

4 MR. MORRIS: Let me give you an
5 example in the case that Tim was involved in that
6 led up to this letter.

7 He had a litigation where these people had
8 admitted that they were in a partnership. Well,
9 as a result of that, he didn't get the records,
10 their books, their bank accounts, I mean, because
11 he was dealing with a partnership. And he gets up
12 at trial and they say, this was wrong, we really
13 weren't partners, and we want to change this
14 admission. And a request for admission, when you
15 have that in place, then that obviates the need
16 for proof. Very often in interrogatories it's
17 used for proof. You'll read it into evidence.

18 So, to me, the distinction is that these are
19 so much more compelling and have such greater
20 significance that you should have a heavy burden
21 to change. You're, in essence, changing a theory
22 in your case when you change an admission.

23 CHAIRMAN SOULES: Tom, I know you're
24 speaking the same way, so let's try to balance
25 this back. Does anybody feel differently?

1 MR. RAGLAND: Well, I understand, but
2 I want to voice a distinction I think we're
3 overlooking, and that's the role of the two
4 discovery tools here. One is interrogatories on
5 the one hand and requests for admissions on the
6 other, and as I understand they play an entirely
7 different roles.

8 Interrogatory is basically a discovery
9 mechanism which may or may not be admissible. It
10 may or may not be considered by the Court, but
11 only if it is properly introduced.

12 Now, a request for admission, as I view it,
13 is -- the role of that is to fix the issues in the
14 case. And those admissions are relied on not only
15 by the party who received them, but the Court. As
16 I understand the cases, a Court can take judicial
17 notice of that and make rulings based on those
18 admissions that are on file.

19 And, therefore, I think that anyone who wants
20 to change those ought to be able to convince not
21 only the party who received the admission, but the
22 Court who is not playing pass with the rules. And
23 it ought to be a more strenuous burden on other
24 discovery matters.

25 CHAIRMAN SOULES: Well, we've had --

1 it comes back and we've discussed this matter, I
2 think -- Bill, maybe you recall with me that we've
3 discussed something about this burden of escape on
4 requests to admit before. And part of the ease of
5 it was to try to get parties to respond to
6 admissions with admissions.

7 So, without the fear that they were
8 absolutely entrapped when they did so if they
9 found out later that they had made a mistake. And
10 I don't care what the test is, but we ought to
11 keep in mind that a broader use of admissions does
12 help the trial practice if we can encourage that
13 they be used instead of suppressed for fear of
14 real terrible consequences, inescapable
15 consequences. We probably need to give that some
16 consideration.

17 MR. BRANSON: You've got that escape
18 clause which it says, basically, as I interpret
19 the merits would be subserved is that an unjust
20 result would be reached.

21 CHAIRMAN SOULES: If that's good
22 enough. I just want to be sure that we have the
23 other side of it in mind when we draw whatever the
24 test is and we're going to use wherever we place
25 the burden.

1 MR. BRANSON: Is there some definition
2 of art for subserviating the merits of the case
3 other than unjust results? And that's what I've
4 always assumed it meant.

5 PROFESSOR EDGAR: How would you
6 propose, Lefty, to what -- by what standard would
7 you require the party attempting to withdraw to
8 meet?

9 MR. MORRIS: Well, you know, I haven't
10 thought this out nearly as much as Tim, and I'm
11 just reading his letter. Of course, I discussed
12 it with him briefly. But I think what he proposed
13 is excellent, and that is, that the person who
14 wants to make the change in the admission, should
15 be able to show -- should show that, you know, go
16 ahead and keep it; the merits will be subserved,
17 but also show that the other side will not be
18 prejudiced and that good cause exists for the
19 amendment or withdrawal.

20 It seems to me like it's not too heavy a
21 burden to show that I have good cause to change
22 this. This has happened since we made this
23 admission. We've discovered this additional
24 information that we didn't know then or something,
25 you know. In other words, set up some burden.

1 PROFESSOR EDGAR: To me, I agree with
2 what you said that the purpose of an admission is
3 to eliminate issues for trial. And parties have a
4 right to rely upon that and that distinguishes it
5 clearly from the other types of discovery
6 devices. And for that reason, perhaps we should
7 impose a more onerous burden on the party seeking
8 to withdraw.

9 Would it be, perhaps, in taking up what
10 Timothy said here, to say that the opposing
11 parties will not be prejudiced at trial by such
12 because that's really what we're focusing on;
13 whether or not the presentation of his case will
14 be prejudiced. Obviously, he can say he's
15 prejudiced in some genuine, although, intangible
16 way. But what we're really trying to do is to
17 find out if the trial of his case on his part is
18 going to be prejudiced, which would certainly
19 cover your partner's situation.

20 CHAIRMAN SOULES: Well, I don't think
21 that will do. That limits it to a situation.
22 Suppose a lawyer has really made a mistake that
23 neither he nor his client finds until the eve of
24 trial and they're in there to get it changed and
25 it may produce a continuance. But, I mean, it's a

1 serious matter. And these things are very
2 serious. Justice Wallace.

3 JUSTICE WALLACE: If I hear what
4 you're saying, shouldn't these admissions be
5 treated like pleadings?

6 PROFESSOR DORSANEO: That's really
7 what they are.

8 MR. MCMAINS: Well, no. The problem
9 right now, Judge, is that that really is what they
10 are treated as under the rule, which is too
11 liberal. I mean, our attitude toward pleadings
12 has been liberal, but the problem is that these
13 take issues out of the case. Your entire
14 discovery and preparation strategy is affected by
15 what has been admitted so that you don't have to
16 worry about the proof on that issue. And, you
17 know, frankly, I think that as a matter of law,
18 you are prejudiced upon the withdrawal if they
19 have been in place for any significant period of
20 time, virtually.

21 I think that perhaps there should be some
22 escape valve in the sense that since there is
23 always some prejudice, that perhaps it should say
24 "unduly prejudiced" or something -- some modifier
25 of prejudice. But the rule, itself, provides and

1 encourages admissions because if you -- if you
2 denied it just for the sake of denying it, and
3 it's actually well established and you're able to
4 establish it, virtually, beyond a shadow of a
5 doubt and they put you to the discovery to require
6 it, the judge has a perfect right to tax all the
7 costs of that discovery against him for their
8 improper denial.

9 CHAIRMAN SOULES: Now, there are some
10 other peculiarities about this rule. If you give
11 an incomplete answer, or whatever the rule is,
12 then the Court can deem them admitted. If you
13 deny them, the Court can't deem them admitted. He
14 can just charge you with cost.

15 MR. MCMAINS: That's right.

16 CHAIRMAN SOULES: I mean, it's an
17 unusual thing that really you get in deeper
18 trouble if you try to admit and make a mistake
19 than if you just blatantly deny something you know
20 is true. But what -- it seems if we're going to
21 change the burden, why don't we do it Sulak's
22 way? Make it this burden that he has in here, the
23 last two lines of his letter and see how that
24 works. Because we're going to get another look at
25 this -- all of this discovery in two years as a

1 result of the discovery subcommittee's work. Tom
2 Ragland.

3 MR. RAGLAND: I have some language
4 here that I just scribbled out that you-all can
5 pick and choose on that might address these
6 questions here. "Rule 169, paragraph 2, subject
7 to the provision of Rule 166 governing amendment
8 pretrial orders, the Court may permit withdrawal
9 or amendment upon a showing of good cause for such
10 withdrawal or amendment, and that the parties
11 relying upon the admissions will not be unduly
12 prejudiced thereby and that the trial of the cause
13 will not be delayed."

14 CHAIRMAN SOULES: No. I don't believe
15 that will -- that last part is -- I would never
16 admit an admission again, period. I would give my
17 paralegals instructions when they come in, deny
18 them all, and bring them to me for signature

19 MR. RAGLAND: Why?

20 CHAIRMAN SOULES: Because if I can't
21 -- if I don't have an escape from an admission,
22 even when it may delay the trial, at least I want
23 the Court to have discretion to let me out, even
24 when it delays trial. It's just too risky.

25 MR. RAGLAND: That's what I was saying

1 "may permit withdrawal." That's the language that
2 is in the rule.

3 CHAIRMAN SOULES: No, you -- but I
4 have to show that it won't delay the trial.

5 MR. BRANSON: Why not go through the
6 homework before you answer the questions? I mean,
7 why not just go ahead and find out whether you
8 admit it or deny it and then you don't have to
9 worry about it?

10 CHAIRMAN SOULES: Because things
11 change. And if you're really trying to go along
12 with what this rule is trying to get you to do, if
13 you believe that you can admit something, you
14 admit it.

15 MR. BRANSON: Well, but frequently --
16 I mean, there may be an occasional piece of
17 information the defendant's discovered -- where we
18 frequently encounter in practice is where you're
19 taking a corporate representative. You have
20 before you some requests for admissions and you go
21 down them and the corporate representative takes
22 an entirely different position than his lawyers
23 took, and says nobody ever asked me those
24 questions. Now, that happens on a pretty regular
25 basis around our place. And its's not right, and

1 it's time somebody put some teeth in the damned
2 rule.

3 CHAIRMAN SOULES: Well, I can say
4 this: When you get involved in litigation like
5 the nuclear power plant litigation in Bay City,
6 you think that you know something and everybody
7 around you thinks that you know something, but
8 there are literally hundreds of people involved,
9 who have been involved. And as the matter goes on
10 and the issue changes from what seemed to be a
11 small issue to a huge issue and then begins to get
12 everyone's attention, you realize that there was a
13 lot there that you didn't know. And you've now
14 made an admission. And you need it -- to change
15 it.

16 You know these have to work not only in car
17 accidents, malpractice cases, but in the biggest
18 cases that are tried in Texas, and the most
19 complicated. And to me, whenever you say that you
20 get all of what Tom had down there to delay.
21 Delay is a part of undue prejudice, but it's just
22 a part of it. It's not something else, as well.
23 So, I don't think it ought to be another
24 standard.

25 MR. RAGLAND: Well, what I'm trying to

1 address is this: This may not be the language,
2 understand. I'm just scribbling out early here in
3 the morning. But if a party is permitted to
4 withdraw the admission, then that casts the burden
5 on -- even though he has the burden to prove that,
6 he is entitled to withdraw it. Then that casts
7 the burden on the person relying on the admission
8 to either take it as it is or request a
9 continuance. He has the burden of showing. He
10 uses up his first continuance and he's got -- you
11 know, there's a difficult problem.

12 CHAIRMAN SOULES: Well, look at this
13 language that's right here on the last two lines
14 of Sulak's letter. We've all got the language in
15 front of us. Can we work with that, or from
16 that? Let's take a look at it.

17 MR. TINDALL: That will lock you in,
18 though. Because you can always demonstrate
19 prejudice. Well, that's going to require cost.
20 That's going to require time and delay. So, you
21 can always --

22 MR. MCMAINS: Besides that, you might
23 lose.

24 MR. TINDALL: You might lose, yeah.
25 So, that will never allow an amendment.

1 MR. MCMAINS: That's why I say I think
2 some modifier like "undue prejudice" or --

3 MR. TINDALL: Well, that's what he's
4 saying.

5 CHAIRMAN SOULES: How about, "the
6 merits of the action will be subserved and good
7 cause for the withdrawal or amendment exists"?

8 MR. TINDALL: "Presentation of the
9 merits" is what would be effective. It's really
10 the test, isn't it? It's what Hadley was
11 suggesting.

12 PROFESSOR EDGAR: What I was
13 suggesting, it's the trial of the case is going to
14 be unduly prejudiced, not the result of some other
15 factor.

16 MR. TINDALL: Take Frank's example of
17 a partnership. You relied for a year there was a
18 partnership and then suddenly they deny
19 partnership. Well, you've got to go -- I mean,
20 you see at that point, they're going to go to the
21 judge and say, Judge, the truth is we're not
22 partners and that -- you know, everyone would say,
23 okay, they weren't partners, but that was their
24 admission.

25 But what's the real prejudice to the opposing

1 party? Well, they haven't really developed that
2 part of the case in reliance on the admission.
3 But the danger is at the presentation of trial.
4 So that ought to be the test.

5 PROFESSOR DORSANEO: Mr. Chairman?

6 CHAIRMAN SOULES: Let's here what Tom
7 wrote again.

8 MR. RAGLAND: "May permit withdrawal
9 or amendment upon a showing of good cause and for
10 -- good cause for such withdrawal or amendment and
11 that the parties relying upon the admission will
12 not be unduly prejudiced thereby and that the
13 trial of the cause will not be delayed."

14 CHAIRMAN SOULES: If you take out "and
15 the trial of the cause will not be delayed" and
16 let that be a part of undue prejudice, I don't
17 have any problem with that language that you've
18 written.

19 MR. BRANSON: Why do you want that
20 out? I mean, do you --

21 CHAIRMAN SOULES: I've said why. I
22 can't say it any better.

23 MR. SPIVEY: But, Luke, you're not
24 anticipating the fact that a guy occasionally does
25 admit things intentionally and then wants to set

1 it aside. And that's happened in my experience.

2 MR. RAGLAND: Let me give you an
3 example that occurs frequently in worker's
4 compensation cases. It's not precisely the same,
5 but the effect is the same. Under Rule 93(n),
6 there's certain things that are established as a
7 matter of law or deemed admitted, whatever you
8 want to call it, if they're not denied under oath
9 by the defendant. And routinely the defendants
10 who's answering a comp case, they'll file a
11 general denial and then seven days before trial,
12 that's the amendment limit, they come in and they
13 deny wage rates.

14 Now, the first two or three times that
15 happened, you know, well, it through me into a
16 tailspin so, consequently, you know, I do all my
17 discovery now on wage rate regardless of what kind
18 of answer they file. But, for some who may not
19 have been burned by that procedure, it's an undue
20 prejudice on them. They've got to request a
21 continuance because they've got to go back and
22 prove up wage rate or they've got to scurry around
23 and find some way to make the proof at the trial
24 when they were relying on the rule which says it's
25 admitted for all practical purposes.

1 And what I would like to see us do is to
2 draft this rule that will give the admitter, who
3 in good faith has a reason to withdraw it, an
4 opportunity to do so, but attach some jeopardy to
5 those who want to play games with the time
6 limits. I don't know exactly how to do it, but
7 that's what I would like to see us do.

8 CHAIRMAN SOULES: Well, I feel you got
9 it done before you got to the delay clause, and I
10 guess I'm in agreement with where you're headed,
11 but I think you got it done before you got to your
12 last clause.

13 MR. BRANSON: I don't.

14 CHAIRMAN SOULES: Because that is a
15 part of undue to me.

16 MR. BRANSON: That's very
17 significant. I mean, why can't you find that out
18 before it's going to delay the trial? Why wait --
19 all this is doing is taking care of the people who
20 come in just like Tom said, with less 30 days and
21 change their requests for admissions.

22 CHAIRMAN SOULES: Well, let's just get
23 a consensus on it. I mean, we're beating a dead
24 horse. How many feel that we ought to expressly
25 say that a judge has no discretion to grant

1 amendment or withdrawal on an admission if it will
2 delay the trial? How many feel that? One. How
3 many feel that a judge should have the discretion
4 to grant an amendment or withdrawal even if it
5 would delay the trial? Show by hands. Okay. So,
6 delay is going to not be a part of the test.

7 PROFESSOR DORSANEO: Could we go back
8 to the 30-day thing? I'm having difficulty.

9 CHAIRMAN SOULES: I'm sorry, Bill,
10 we'll try. Now, let's write the test.

11 What's wrong with what Tom has written except
12 if he omits the last clause? Read it again, Tom.

13 MR. RAGLAND: "May permit withdrawal
14 or amendment upon a showing of good cause for such
15 withdrawal or amendment and that the parties
16 relying upon admissions will not be unduly
17 prejudiced thereby." And then the last hanger
18 I've got there, "and the trial of the cause will
19 not be delayed."

20 CHAIRMAN SOULES: Okay. That last
21 part has been voted down.

22 MR. SPIVEY: No, that last part has
23 not been voted down.

24 CHAIRMAN SOULES: It has been.

25 MR. SPIVEY: No, that was not your

1 tone of order, Mr. Chairman. With all due
2 respect, that was not the vote that was had.

3 CHAIRMAN SOULES: Well, if that's in
4 there, that says a trial judge does not have the
5 discretion to grant an amendment or withdrawal if
6 it's going to delay the trial. That's what it
7 says.

8 MR. SPIVEY: I've got a suggestion
9 that instead of taking --

10 CHAIRMAN SOULES: And that's what we
11 voted on.

12 MR. SPIVEY: That was not my
13 understanding of the precise way we --

14 CHAIRMAN SOULES: Is there a motion to
15 reconsider?

16 MR. BRANSON: Minority is going to
17 double its position if we vote.

18 MR. SPIVEY: I guarantee you're fixing
19 to lose on this.

20 CHAIRMAN SOULES: Okay. We've got to
21 move on. We may not get this fixed because we've
22 got other things to do, so when we take a vote
23 we've got to be listening and we've got to go --
24 or maybe I misstated it.

25 All those -- now we're talking now about the

1 issue of withdraw or amendment of admissions.

2 MR. RAGLAND: May I just put it in the
3 form of a motion, Luke and --

4 CHAIRMAN SOULES: When delay will be
5 the result, should the trial court have discretion
6 to do that, to grant that or not?

7 MR. SPIVEY: That's the nexus of your
8 statement, discretion. But then you're assuming
9 that discretion does not include delay.

10 CHAIRMAN SOULES: No, the way that
11 rule is written, Broadus, the trial judge does not
12 have discretion to grant an amendment or
13 withdrawal if it's going to delay the trial.

14 MR. SPIVEY: I'm just saying there are
15 other discretions other than delay of trial.

16 CHAIRMAN SOULES: No. Well, we're
17 going to back up and get to all the rest of it in
18 a minute. We're just talking about that part.
19 Should the judge be precluded from granting
20 withdrawal or amendments to admissions if it's
21 going to delay the trial? That's what we we're
22 going to take a consensus vote on right now.

23 Does everybody understand what we're going to
24 do? Okay. How many feel that the judge should
25 have discretion to grant amendments or withdrawals

1 when delay of the trial may result? Five. How
2 many feel that the judge should not have
3 discretion to grant withdrawal or amendment if
4 delay of the trial may result? The vote is five
5 to two that the judge will have discretion to do
6 that. Accordingly, the last clause will not be in
7 the rule.

8 MR. RAGLAND: May I put that in the
9 form of a motion?

10 CHAIRMAN SOULES: Yes.

11 MR. RAGLAND: I move that we amend
12 paragraph 2, Rule 169, second sentence as
13 follows: "Subject to provisions of Rule 166," and
14 if we put 166(b) in there yesterday, include that,
15 "Governing amendment of a pretrial order, the
16 Court may permit withdrawal or amendment upon a
17 showing of good cause for such" --

18 PROFESSOR EDGAR: Go kind of slow,
19 Tom. Upon what?

20 MR. RAGLAND: "Upon a showing of good
21 cause for such withdrawal or amendment and that
22 the parties relying," that's plural, "the parties
23 relying upon the" --

24 PROFESSOR EDGAR: Just a minute.

25 MR. RAGLAND: -- "parties relying upon

1 the admissions will not be unduly prejudiced
2 thereby."

3 MR. SPIVEY: I can vote for that.

4 CHAIRMAN SOULES: Can we just stop
5 after "prejudiced"?

6 MR. RAGLAND: That's my motion.

7 MR. MCMAINS: You mean without a
8 "thereby"?

9 CHAIRMAN SOULES: Yeah, without the
10 "thereby," just stop. Okay. That motion has been
11 made. Will you accept the amendment to drop
12 "thereby" at the end?

13 MR. RAGLAND: Yeah.

14 CHAIRMAN SOULES: Okay. That motion
15 has been made. And second? Is there a second?

16 MR. MCMAINS: Second.

17 CHAIRMAN SOULES: Any further
18 discussion? Any new discussion? All in favor --
19 Bill, new discussion?

20 PROFESSOR DORSANEO: The only comment
21 I would have is it seems that the difficulty
22 involves the harshness of the procedural penalty.
23 If someone in a significant matrimonial property
24 case admits that a particular piece of property is
25 separate or community, and that property is worth

1 a million dollars or so, they might change their
2 characterization of it later. That might cause
3 expense and other difficulties, but the penalty
4 shouldn't be a million-dollar penalty. The
5 penalty should be commensurate with the delay
6 that's caused or the expense or whatever.

7 MR. RAGLAND: Well, doesn't that come
8 under the sanctions rule? Wouldn't that come
9 under the sanctions rule?

10 PROFESSOR DORSANEO: I'm not sure that
11 it does at all. I think that the difficulty in
12 trying to be fair to both sides in this is that
13 either a tis or t isn't proposition. It would be
14 either let somebody withdraw it and that causes
15 problem, or we make them stick with that
16 admission, which they presumably made in good
17 faith. Why else make an admission?

18 MR. BRANSON: You've got crawfishing
19 room with the ability to explain your answer.

20 CHAIRMAN SOULES: This is not new.
21 Anything new? Okay. All in favor of the
22 amendment proposed by Tom Ragland, show by hands.
23 Opposed? That's unanimous.

24 Does this escape valve apply to matters
25 deemed admitted as well as to admissions made in

1 writing?

2 PROFESSOR DORSANEO: There is no
3 difference in the rule between -- the rule makes
4 it plain that a matter -- it was drafted
5 purposefully to make it plain that there is no
6 distinction between a so-called "deemed" admission
7 and "admission" admission. The matter is admitted
8 without necessity of a court order unless within
9 30 days after service of the request, the party
10 for whom the request is directed, serves upon the
11 requesting party a written answer. And this
12 concept of deemed admissions, as distinguished
13 from a real admission, is a concept that's never
14 been a sensible concept.

15 In my practice, if I get admission -- if I
16 get a request for admissions and I have to admit
17 all of them, my thought is that I do not need to
18 write out a piece of paper saying that I admit all
19 those. I just let the time run, and then I've
20 admitted them. I've done what the rule required;
21 nothing, if I admit them.

22 MR. TINDALL: And then you should be
23 allowed to --

24 PROFESSOR DORSANEO: I should be
25 allowed to withdraw that admission if I can

1 satisfy the requirements of paragraph 2. It's
2 practice across the country --

3 MR. BRANSON: Why put the original
4 time limit in there anyway if you're going to let
5 somebody ignore it and have it deemed admitted and
6 then come in and supplement it? That doesn't make
7 sense to me.

8 CHAIRMAN SOULES: You don't supplement
9 it, Frank. You come in and ask to amend or
10 withdraw on the same basis as if you had made that
11 admission.

12 PROFESSOR DORSANEO: Because that's
13 what I've done. I've made it by not denying it.

14 MR. BRANSON: But, basically, the
15 admission is punitive in nature. It is given
16 because you didn't do what, under the rules, you
17 are required to do. And that is, either admit or
18 deny. So, you have failed your obligation as an
19 attorney in the first place. The Court takes
20 punitive action, deems them admitted. Now, you
21 want the right to come in and supplement at a
22 later date. I think that's crap.

23 CHAIRMAN SOULES: Well, let me be sure
24 I understand what you're saying is crap. If a
25 lawyer drops a ball, there is no discretion in the

1 trial court to bail him out because there is no
2 rule that permits withdrawal or amendment of
3 deemed admissions. That's what you're saying is
4 the law.

5 MR. BRANSON: Isn't his time to argue
6 that, though, at the time the motion is made to
7 deem them admitted?

8 CHAIRMAN SOULES: There is no motion,
9 Frank. When the 30 days goes, bam, it's done.
10 It's over.

11 MR. MCMAINS: It's self-executed.

12 CHAIRMAN SOULES: Now, shouldn't that
13 lawyer be able to come in and show on the 31st
14 day, when he wakes up, that his deemed admissions
15 -- and this is, you know, way early in the trial.

16 MR. BRANSON: No, I agree with that,
17 Luke. I withdraw. That was crap with a small
18 "c."

19 I believe if we're going to move the time
20 limit back to the time of the deeming process and
21 not the time of trial --

22 CHAIRMAN SOULES: Well --

23 MR. BRANSON: If you're going to do
24 that --

25 CHAIRMAN SOULES: Well, it's the same

1 test whether they're deemed admitted or made in
2 writing. It's the same test. That's the way the
3 rule was written. But some judges have not
4 followed it that way. Some judges have held that
5 the trial court has no discretion to permit escape
6 from deemed admissions.

7 PROFESSOR DORSANEO: I don't even
8 think this rule uses the word "deemed."

9 CHAIRMAN SOULES: Well, it says
10 "deemed admitted."

11 PROFESSOR EDGAR: Well, that's what
12 writs of mandamus are for.

13 CHAIRMAN SOULES: Well, can we clarify
14 this and that's what I'm --

15 MR. SPIVEY: Judge Wallace really
16 likes to hear you say that, Hadley.

17 CHAIRMAN SOULES: Can we clarify
18 this? Can we do this: Can we say "permit
19 withdrawal or amendment of admissions or matters
20 deemed admitted"? Now, that's what they're called
21 up in the rule, "matters deemed admitted."

22 PROFESSOR DORSANEO: Where? I don't
23 see that in this rule.

24 PROFESSOR EDGAR: What paragraph are
25 you on?

1 CHAIRMAN SOULES: Each matter -- right
2 up -- we're going right straight up from two to
3 the top of the immediately preceding paragraph.

4 PROFESSOR EDGAR: But, what page are
5 you on?

6 CHAIRMAN SOULES: Oh, on page 166.

7 PROFESSOR EDGAR: What? Now, what
8 paragraph?

9 CHAIRMAN SOULES: Okay. The paragraph
10 that precedes two, where we're working.

11 PROFESSOR EDGAR: First full
12 paragraph.

13 CHAIRMAN SOULES: First full
14 paragraph. The matter -- it's the second
15 sentence, "The matter is admitted without
16 necessity," and so forth. So, we're talking about
17 admitted matters and made admissions. Can we say
18 that the Court may permit in order to make that
19 clear, what has been thought to be the law, except
20 in some circles. The Court may permit withdrawal
21 or amendment of admissions and matters deemed
22 admitted.

23 PROFESSOR EDGAR: I don't know where
24 you're trying to insert that.

25 CHAIRMAN SOULES: Right above Tom's

1 language. Okay.

2 Now, come down to two with me. "Subject to
3 the provisions of Rule 166 governing amendment of
4 the pretrial order and 166(b)(5) governing duty to
5 supplement discovery responses," then pick up,
6 "the Court may permit withdrawal or amendment of
7 admissions and matters deemed admitted upon a
8 showing of good cause for such withdrawal or
9 amendment and that the parties relying upon the
10 admission will not be unduly prejudiced."

11 MR. BRANSON: Mr. Chairman, would you
12 accept --

13 MR. MORRIS: I like that.

14 MR. BRANSON: -- an amendment to that,
15 which would require on the "deemed admitted" that,
16 if they're going to be done, it be done within 45
17 days of the answer date or due date for
18 admissions?

19 CHAIRMAN SOULES: Well, I wouldn't
20 because I happened to have gotten a file late that
21 had some deemed admissions and found them in the
22 transcript. And, you know, I think as long as you
23 can show that the parties -- that good cause
24 exists for the withdrawal and the party upon --
25 relying upon the admissions will not be unduly

1 prejudiced, that you shouldn't be stuck with any
2 heavier burden or time than if you got a file that
3 had the admissions admitted.

4 MR. TINDALL: Luke, your proposal may
5 be resurrecting the old practice of moving the
6 deemed requests admitted.

7 CHAIRMAN SOULES: No, it's not. This
8 is permitting withdrawal.

9 MR. TINDALL: I know, but you're
10 resurrecting what Bill points out is not in here,
11 deemed admissions.

12 CHAIRMAN SOULES: They are in here.
13 The matter is admitted without necessity of --

14 MR. TINDALL: That's right. So, we
15 don't have the old motion of going down and moving
16 that they be admitted. That's been slayed. Now,
17 you come along and put that language back in down
18 here under admission -- under withdrawal, it's
19 certainly implying that somehow they've been
20 deemed.

21 PROFESSOR DORSANEO: But, there's a
22 difference between admissions --

23 MR. TINDALL: Something that was
24 unanswered and something that was deemed. Now,
25 they should be the same. And there is no

1 deeming.

2 PROFESSOR DORSANEO: In 169, the word
3 "deemed" --

4 MR. TINDALL: These have been left
5 unanswered and not --

6 PROFESSOR EDGAR: What you're trying
7 to do, Luke, is cure a problem that's created by a
8 judge that doesn't understand the rule. And I
9 don't think that we ought to try and solve those
10 kinds of problems here. I think the Judge ought
11 to be told what the rule means and then that will
12 take care of it. That's why I say I think a writ
13 of mandamus is the way to solve that problem, and
14 I'm serious about it. Because I think you're
15 going to create a problem when you insert
16 something that we've tried to eliminate.

17 MR. RAGLAND: Luke, I have a question
18 while we're continuing with this thing, if it's in
19 order.

20 CHAIRMAN SOULES: Okay. Can we say
21 "permit withdrawal or amendment of matters
22 admitted upon a showing"? Then that picks up with
23 the language that is there, and it would cover all
24 matters admitted.

25 MR. BRANSON: What if the matters were

1 denied, and you now were wanting to admit them?

2 MR. MCMAINS: You ain't got a problem
3 with that.

4 MR. RAGLAND: Oh, you might.

5 MR. MCMAINS: No, you don't.

6 MR. RAGLAND: If I deny that the
7 entity is a partnership in good faith, I deny
8 that, and I later learn that it is a partnership,
9 and I want to avoid the hazard of having sanctions
10 imposed against me for the other side proving that
11 it is a partnership, I may want to come back in
12 and amend that and say I was mistaken; this was
13 actually a partnership.

14 MR. MCMAINS: Yes, but I'm saying you
15 can always do that in open court.

16 MR. TINDALL: Luke, I think that it's
17 written right.

18 CHAIRMAN SOULES: Well, it's not
19 written right. And mine is not the only
20 jurisdiction where -- someone else has got the
21 same problem. It says that --

22 PROFESSOR DORSANEO: There's a judge
23 in Dallas who does that -- makes that same
24 interpretation, but then he doesn't get much
25 right. I mean, he's got a lot of problems. We

1 need to change a lot of rules for him.

2 PROFESSOR EDGAR: I don't think we
3 ought to change the rules because the judges don't
4 understand the law.

5 PROFESSOR DORSANEO: Now, the deemed
6 admission concept is in Rule 215 still, Luke.

7 MR. MCMAINS: Yes, it is.

8 CHAIRMAN SOULES: Where does it say
9 that?

10 PROFESSOR DORSANEO: In 215, paragraph
11 4(a). The concept of a deemed admission is
12 retained. Now, to me, we would be better off
13 eliminating the entire concept of a deemed
14 admission as being a distinct thing from an
15 admission that's made affirmatively in written
16 form. Because there isn't any distinction --
17 shouldn't be any distinction between those two.
18 Certainly there shouldn't be a distinction that
19 treats an admission that's not made affirmatively
20 as more binding on one that is made
21 affirmatively. If anything, it should cut in the
22 other direction.

23 MR. MCMAINS: Well, that rule, though,
24 does make the distinction that an evasive answer
25 may be treated by the judge --

1 PROFESSOR DORSANEO: Yes.

2 MR. MCMAINS: -- as an admission. So,
3 just like the failure to answer, in which we --
4 even without the necessity of a motion, you can
5 clarify that with a judge. But if you go to trial
6 with evasive answers on file, you run the risk
7 that the judge will unilaterally hold. That is
8 deemed because you filed an evasive answer.

9 PROFESSOR DORSANEO: To fix this
10 problem entirely, what I would recommend, and you,
11 perhaps, don't want to do it here today, maybe we
12 can't, is that I would modify paragraph 4 of Rule
13 215 by changing it to -- its title from "deemed
14 admission" to "evasive or incomplete answer," and
15 make it plain that that's what it's about.

16 And I might, for safety sake, add a sentence
17 at the bottom of paragraph 2 of 169 that says to
18 these few trial judges who have the problem, well,
19 they should make a distinction for the purpose of
20 withdrawal or amendment between admissions that
21 are affirmatively made in a written response and
22 admissions that result from the operation of the
23 rule.

24 The problem with that sentence that I just
25 suggested is that I think it says too much. There

1 probably should be a difference between admissions
2 that are made affirmatively and ones that happen
3 just as a consequence of the passing of time. It
4 should run in favor of letting someone withdraw
5 when they have inadvertently admitted when
6 something fell behind the credenza.

7 CHAIRMAN SOULES: Well, can't we fix
8 it by saying, since we're talking about admissions
9 -- we've got deemed admissions as over there in
10 215. Can we say that "The Court may permit
11 withdrawal or amendment of responses and deemed
12 admissions upon showing," and then use Tom's
13 language? Because you're either going to have
14 responses or deemed admissions. The responses can
15 be the whole list of responses that you're
16 entitled to make under 169. And if you don't
17 respond, you have deemed admissions under Rule
18 215. Is that all right?

19 PROFESSOR DORSANEO: I give up.

20 MR. RAGLAND: "Responses are" or
21 "responses and"?

22 CHAIRMAN SOULES: "Responses and
23 deemed admissions may permit withdrawal or
24 amendment of responses and deemed admissions."

25 MR. MCMAINS: What's wrong with

1 Hadley's concept that that's something to be done
2 by mandamus?

3 CHAIRMAN SOULES: Well, because it's
4 expensive. We've got some judges already gone
5 astray on it, and if they're having trouble -- if
6 some judges are having trouble understanding the
7 rule to mean what it's always been thought to
8 mean, we've tried to -- consistently tried on this
9 committee to straighten that out. And this
10 doesn't change anything. It's -- all it does is
11 announce the practice.

12 MR. BRANSON: If we spent all our time
13 trying to straighten out the misunderstandings of
14 trial --

15 CHAIRMAN SOULES: Frank, just vote
16 against it, will you?

17 MR. BRANSON: I submit the committee
18 wouldn't get anything done. I move the question
19 on the outside --

20 CHAIRMAN SOULES: Will you accept that
21 amendment, Tom?

22 MR. RAGLAND: Yes.

23 CHAIRMAN SOULES: Okay. That
24 amendment has been accepted by the proposer. Is
25 there a second to the proposition?

1 MR. RAGLAND: May I read it into the
2 record in its entirety?

3 CHAIRMAN SOULES: Yes, sir.

4 MR. RAGLAND: Rule 169, paragraph 2,
5 "Subject to provision of Rule 166 and 166(b),
6 amendment to pretrial order" --

7 PROFESSOR EDGAR: I can't hear you,
8 Tom, I'm sorry.

9 MR. RAGLAND: "The Court may permit
10 withdrawal or amendment of responses and deemed
11 admissions for good cause for such withdrawal or
12 amendment" -- excuse me. "May permit" -- let me
13 start over. "May permit withdrawal or amendment of
14 responses and deemed admissions upon a showing of
15 good cause for such withdrawal or amendment and
16 that the parties relying upon the responses and
17 admissions would not be unduly prejudiced,"
18 period.

19 MR. BRANSON: A point of order, Mr.
20 Chairman. Don't we have to vote on the amendment
21 before we vote on the motion?

22 CHAIRMAN SOULES: Not if the movant
23 agrees to it. Okay. Is there a second to that?

24 MR. MORRIS: I'll second it.

25 CHAIRMAN SOULES: Those in favor show

1 by hands. Five. Opposed? To one. It passes
2 five to one.

3 MR. BRANSON: Two.

4 CHAIRMAN SOULES: Five to two, excuse
5 me.

6 MR. TINDALL: Mr. Chairman, can we
7 bring up a point that Frank mentioned that I see
8 frequently happen? That is, these administrations
9 are later asserted by the party to be something he
10 didn't know anything about. What's the logic of
11 not making parties sign answers to admissions,
12 like we do interrogatories?

13 MR. MCMAINS: Because there is a
14 shorter time fuse.

15 MR. TINDALL: 30 days.

16 CHAIRMAN SOULES: Not anymore.

17 MR. TINDALL: Not anymore. And I
18 always thought the dignity of admitting was
19 somewhat diminished if we don't make them sign
20 those responses.

21 CHAIRMAN SOULES: Well, there are
22 consequences now that are going to be pretty
23 tough. But let's do put that into the
24 consideration.

25 MR. TINDALL: I mean, I really -- is

1 there any objection to making parties sign
2 admissions?

3 PROFESSOR DORSANEO: It's a
4 conceptual --

5 MR. TINDALL: I mean, because it
6 really gets at the point of, hey, you signed them
7 six months ago or a year and a half ago, and now
8 you want to come in and change.

9 PROFESSOR DORSANEO: Well, it's a
10 conceptual thing. We don't have parties sign
11 pleadings.

12 MR. MORRIS: Well, another thing is --

13 MR. TINDALL: Well, I know, but this
14 is in the nature of discovery, now.

15 PROFESSOR DORSANEO: This is in the
16 nature of pleadings. It's exactly what it is.
17 It's not discovery.

18 MR. TINDALL: Well, we really treat
19 them like --

20 MR. MORRIS: The difference is the
21 lawyer needs to sign the admission because very
22 often you're getting admissions regarding legal
23 points, whereas with interrogatories you're asking
24 fact questions.

25 MR. BRANSON: Let's have both of them

1 sign, so the witness -- because what happens in
2 depositions or at trial is the witness turns to
3 his lawyer and says, "I didn't say that." The
4 lawyer says, "Well, I did it for legal reasons."
5 And you're sitting there with something you
6 shouldn't be, a very impeachable point, and the
7 impeachment part is lost on the jury.

8 MR. MORRIS: That's wrong.

9 MR. RAGLAND: -- admissions that's not
10 in the case.

11 PROFESSOR DORSANEO: Yeah, they're not
12 allowed to even be talking about it.

13 MR. MORRIS: You can't even bring it
14 up.

15 MR. RAGLAND: It's out of the case.

16 CHAIRMAN SOULES: Okay. We are now at
17 184 on page 151. Jeremy Wicker says that there
18 are changes here. And, Newell, I guess we can use
19 your help on this, these next several points:
20 184, 184(a), those two, that Wicker says we need
21 to make those changes in order to conform those
22 rules to the Rules of Evidence.

23 PROFESSOR BLAKELY: Luke, if he's
24 right about it, why, I see no objection to it.
25 But the chronology in my mind is so mixed up on

1 all that. I cannot help you.

2 CHAIRMAN SOULES: Okay. Is there any
3 objection to -- will you check for me? Do you
4 mind checking the Rules of Evidence that he cites
5 on these changes to 184 and 184(a) and let me know
6 if he's correct?

7 PROFESSOR BLAKELY: I can do that
8 right away.

9 MR. MCMAINS: What page did you say
10 you were on?

11 CHAIRMAN SOULES: On page 152. And
12 subject to Newell's check, as our subcommittee
13 chairman on the Rules of Evidence, that these are
14 necessary to conform to the Rules of Evidence, do
15 I hear a motion that these changes be approved?

16 PROFESSOR EDGAR: So moved.

17 MR. TINDALL: Well, I'm not certain --

18 PROFESSOR EDGAR: Wait a minute.
19 Newell is going to check them and make sure that
20 they conform.

21 MR. TINDALL: Well, why do we keep
22 them in the rules, Newell? It's the same as we
23 did yesterday on, oh, one --

24 PROFESSOR BLAKELY: It may be that
25 both -- that we've already voted to recommend to

1 the Court that these two be dropped.

2 MR. TINDALL: I thought we did it at
3 our last meeting.

4 PROFESSOR DORSANEO: I thought we did
5 that.

6 MR. SADBERRY: Mr. Chairman, I think
7 that's correct. I looked at it very briefly.

8 MR. TINDALL: We tried to get all the
9 evidentiary rules, unless they were, you know,
10 uniquely procedural odd rules of procedure.

11 PROFESSOR BLAKELY: That's a little
12 overbroad, but --

13 MR. TINDALL: Well, I'm saying it
14 hastily, but --

15 CHAIRMAN SOULES: We have not dealt
16 with these two rules according to my records. My
17 records may not be correct, but as far as
18 repealing these, we have not. And we have had
19 some discussion that these particular matters may
20 belong in both places.

21 PROFESSOR DORSANEO: Well, we've dealt
22 with 182 --

23 CHAIRMAN SOULES: We did. We repealed
24 this.

25 PROFESSOR DORSANEO: -- and 182(a),

1 according to this blue book.

2 JUSTICE WALLACE: The last meeting of
3 this committee about a month ago, Judge Pope sat
4 right over there about where Bill Dorsaneo is now
5 and explained to the Court that I was handling the
6 Rules of Evidence and he was handling the Rules of
7 Procedure, and this came up and we were very
8 careful to exactly track the Rules of Evidence and
9 the Rule 184 and 184(a). This committee decided
10 to leave them alone after Judge Pope spoke. That
11 was about a month ago.

12 CHAIRMAN SOULES: Okay, Judge. Your
13 memory is quite a lot better than mine.

14 PROFESSOR EDGAR: At our last meeting
15 he was sitting right over there.

16 MR. BRANSON: We're in trouble, now,
17 if the committee has a memory.

18 MR. TINDALL: But why would we -- is
19 there some plausible explanation as to why we have
20 duplicate rules?

21 JUSTICE WALLACE: As I understand, the
22 reason was that the lawyers who are accustomed to
23 finding things have been there all along. They
24 know to look at it there, and it wouldn't hurt
25 anything to leave them in since they're there

1 now.

2 CHAIRMAN SOULES: Okay. Since we
3 voted already to leave these in, subject to --
4 leave it to Newell to see if we need these
5 housekeeping matters as Jeremy Wicker suggests.

6 JUSTICE WALLACE: We need one change
7 right here 184(a), the first line, "The Court,
8 upon its own motion may, or upon the motion of a
9 party, shall take judicial notice."

10 CHAIRMAN SOULES: "May" should be
11 "shall."

12 JUSTICE WALLACE: Now, the Rules of
13 Evidence that we passed Thursday, as has been
14 approved by this committee, put "shall" for "may,"
15 and that was the only change in that rule.

16 CHAIRMAN SOULES: Well, we'll -- these
17 are matters -- okay. Any objection to these
18 changes if Newell says that this is what's needed
19 to make them track, the new Rules of Evidence?

20 MR. BRANSON: The "may" should be a
21 "shall," Your Honor.

22 JUSTICE WALLACE: Yes.

23 CHAIRMAN SOULES: That's what he said,
24 yes.

25 PROFESSOR BLAKELY: And we're

1 including the action the Court took, or will take
2 Monday.

3 CHAIRMAN SOULES: Did take.

4 JUSTICE WALLACE: Yes. We've already
5 taken action. The order will be signed Monday.

6 CHAIRMAN SOULES: Okay. There being
7 no objection to those, then, Newell, if you'll let
8 me know how these need to be rewritten so that
9 there is no diversion -- diversity with the Rules
10 of Evidence. We will make them conform. Now,
11 we're going to go to page 161.

12 PROFESSOR EDGAR: Wait just a minute.
13 You haven't finished 151 yet.

14 CHAIRMAN SOULES: I haven't finished
15 151, okay.

16 MR. TINDALL: There's a housekeeping
17 on --

18 PROFESSOR EDGAR: On the second
19 paragraph, he said Rule 329 should delete
20 reference to Rule 364, and including TRAP -- and
21 substitute TRAP 47.

22 CHAIRMAN SOULES: I believe we took
23 care of that.

24 PROFESSOR EDGAR: Did we?

25 CHAIRMAN SOULES: Let's see. It's not

1 in here. It's not in here, so we need to put it
2 in here if we did --

3 MR. TINDALL: Is that the proper
4 citation for it, Bill, Appellate Rule 46?

5 PROFESSOR DORSANEO: Yeah, I think
6 that --

7 MR. TINDALL: I was trying to see if
8 you had --

9 PROFESSOR DORSANEO: That's a standard
10 way to do it.

11 MR. TINDALL: Okay.

12 PROFESSOR EDGAR: But is that the
13 right rule?

14 PROFESSOR DORSANEO: That is the right
15 rule.

16 CHAIRMAN SOULES: All right. Any
17 opposition to the second paragraph of Mr. Wicker's
18 October 13 letter? That's unanimously approved.
19 Thanks for helping me there, Hadley.

20 MR. BRANSON: Before we move on to any
21 other business, I had great difficulty sleeping
22 last night, and at about 3 o'clock realized it was
23 because I had missed the justice of the peace
24 rules report yesterday. Do you think it would be
25 possible to pick that up today to help my

1 insomnia?

2 CHAIRMAN SOULES: I think I can work
3 that over. Well, it certainly would help your
4 insomnia to go back to them. You could probably
5 -- 30-minute nap -- we could probably address
6 them.

7 Okay. What's next? Let's see. There's some
8 writing about needing to change 202. It's on
9 pages 159 and then again on page 161. And that
10 will finish this part of the report. Oh, yeah,
11 there's something more on 206.

12 Okay. So, Jack Gullledge, is that the way you
13 say it? It says -- I guess it's just the second
14 part of that that's directed to us. Is my
15 understanding of that right? And he says that 202
16 ought to permit nonstenographic depositions
17 without a court order. Well, it's that way now.

18 MR. TINDALL: Are you talking about
19 without the necessity to dispense -- without the
20 necessity of getting a court order to dispense the
21 necessity of a stenographic --

22 CHAIRMAN SOULES: Oh --

23 MR. TINDALL: See, (e) is what he
24 wants to take out. I think he's got a good
25 point.

1 MR. RAGLAND: Well, isn't that covered
2 in Rule 11, the stipulation rule?

3 CHAIRMAN SOULES: I think so. The
4 parties can agree. They just have to agree.

5 MR. TINDALL: Yeah, but he's saying if
6 you don't want to have a stenographic
7 transcription, you've got to go get an order
8 waiving that. And he is saying --

9 MR. MCMAINS: Yeah, but he can't --

10 MR. BRANSON: But you don't want to
11 get to where someone takes their secretary to a
12 deposition and transcribes it and that's what is
13 occurring.

14 CHAIRMAN SOULES: I think delay could
15 occur because somebody notices a deposition and we
16 show up and they've got a tape recorder on the
17 table, and there's no court reporter scheduled and
18 you can't find one, so then you've just lost
19 that --

20 MR. BRANSON: I don't like it where
21 you go to New York and both sides take their own
22 court reporters, but I think the necessity of one
23 of them is obvious.

24 MR. TINDALL: Well, what is he --

25 CHAIRMAN SOULES: We've got a rule

1 that permits lawyers to agree on anything to make
2 a record of it, and we can even make agreements on
3 the record of the depositions. So, you can turn a
4 tape recorder on and, under our new rule,
5 agreements can be made, put on deposition. Isn't
6 that right, Hadley?

7 PROFESSOR EDGAR: I think so.

8 MR. TINDALL: Well, the Court has held
9 -- I think it's a Supreme Court case -- a lawyer's
10 secretary can serve as a person who swears the
11 witness and transcribes the -- I forgot the style
12 of the case.

13 PROFESSOR DORSANEO: The difficulty
14 I've always had with 202(e) is that I don't know
15 about this requirement of the stenographic
16 transcription. I don't think that there is any
17 such requirement anywhere, except by implication,
18 as a result of what paragraph 1(e) of Rule 202
19 says.

20 CHAIRMAN SOULES: How many feel that
21 this rule needs further debate? How many feel
22 that this section -- how many feel that Gullede's
23 recommendation should be adopted?

24 MR. TINDALL: I do.

25 MR. RAGLAND: Let me ask a question.

1 CHAIRMAN SOULES: Yes, sir.

2 MR. RAGLAND: Should 202 be reviewed
3 in light of this 166(c) which was previously
4 adopted which says you can agree to anything with
5 regard to -- I mean, I haven't compared the two of
6 them there, but --

7 MR. TINDALL: Tom, you can always
8 agree. I think it is real clear. But he's saying
9 if you have a video deposition, it's crazy that
10 you have the requirement to have a court reporter
11 there.

12 CHAIRMAN SOULES: It's not crazy to
13 me, because it's a lot quicker to read that
14 transcript when you're trying to find something
15 than it is to go play a video.

16 MR. RAGLAND: You can read through
17 that part of the material and skip over the live
18 history.

19 CHAIRMAN SOULES: Well, let's just get
20 a consensus. How many are convinced that an
21 absolute agreement of the parties court order
22 should be required to dispense with these
23 nonstenographic -- with these stenographic
24 transcriptions? Show by hands. That would be in
25 opposition to this change.

1 MR. RAGLAND: In other words, leave
2 202 like it is.

3 CHAIRMAN SOULES: How many feel 202
4 ought to be left alone? Six. How many feel that
5 this change is in order? Six to one. That's
6 rejected.

7 PROFESSOR EDGAR: The reason I didn't
8 vote either way is because I think perhaps it
9 might need some more study. And the way the
10 question was posed, I wasn't given that option.

11 CHAIRMAN SOULES: Okay. Well, we're
12 going to be studying everything.

13 PROFESSOR EDGAR: Okay.

14 MR. SPIVEY: Soules does that to us
15 all the time, doesn't he, Hadley?

16 PROFESSOR EDGAR: I didn't say that,
17 Broadus.

18 MR. TINDALL: Why don't we send it to
19 Texas Tech law school to make a deep study of
20 this?

21 CHAIRMAN SOULES: I realize I am
22 moving rapidly. I apologize for it. If there is
23 anything unfair about what I'm doing --

24 PROFESSOR EDGAR: No. I didn't mean
25 it that way. I'm just saying that maybe the point

1 might be worthy of consideration.

2 CHAIRMAN SOULES: I think that should
3 be taken up when we review the discovery rules as
4 a whole, which I think some subcommittee -- Tony's
5 subcommittee will be doing in the interim, working
6 with Bill and Rusty and Hadley and anybody else if
7 they want to. Tony, good to see you. Tony
8 Sadberry here.

9 MR. SADBERRY: Good to see you, Mr.
10 Chairman. I'm sorry I haven't been able to get
11 here earlier. And on that point, if I may, maybe
12 I've missed it, I'm not certain, but if the Chair
13 cares, I believe at some point it's appropriate to
14 get a subcommittee appointed.

15 CHAIRMAN SOULES: We're going to do
16 that today.

17 MR. SADBERRY: I appreciate it. I'm
18 not sure, because I haven't been here, whether
19 that's been done before.

20 CHAIRMAN SOULES: We haven't done it
21 yet, but we will. The next rule we're going to
22 work on is rule -- has to do with Rule 206 on page
23 163. We have voted several times in the past not
24 to get the rules involved in how reporters collect
25 their money. Anybody want to change that? All

1 right. Is there a consensus to reject the quoted
2 language at the bottom of 163? Is there any
3 opposition to rejecting that? That is rejected
4 unanimously.

5 JUSTICE WALLACE: Court reporters
6 shouldn't get stuck by lawyers more than once.

7 CHAIRMAN SOULES: Justice Wallace said
8 that -- did you get Justice Wallace's comment?

9 JUSTICE WALLACE: They know who hasn't
10 paid.

11 CHAIRMAN SOULES: All right. Is there
12 something on the -- Rule 354(e)?

13 MR. TINDALL: What page are you on,
14 Luke?

15 CHAIRMAN SOULES: I'm on page 164,
16 same thing.

17 PROFESSOR EDGAR: We don't have a Rule
18 354 in the rules, do we?

19 MR. TINDALL: No.

20 PROFESSOR EDGAR: I don't know what
21 TRAP rule that is. What is it, Bill?

22 PROFESSOR DORSANEO: Well, that's
23 341.

24 CHAIRMAN SOULES: Any change in the
25 voting on that? All right. The entire letter of

1 June 5, then, the recommendations are rejected by
2 this committee. The information will be sent to
3 the Supreme Court to collect their own bills.

4 Okay. The next following material on page
5 165 --

6 PROFESSOR BLAKELY: Luke, would you
7 let me interrupt and go back to those judicial
8 notice rules and make one point?

9 CHAIRMAN SOULES: Yes. Okay.

10 PROFESSOR BLAKELY: On page 152,
11 determination of laws of other states, the
12 evidence rules, according to the Court's action
13 this week, in the second line, "or upon motion of
14 a party," instead of "may," it should read
15 "shall." Otherwise, your book is correct.

16 CHAIRMAN SOULES: Okay. So, that's
17 ready for redraft, ready to be -- we've approved
18 that then. It's unanimous. Okay. Have you
19 checked 184(a) yet?

20 PROFESSOR BLAKELY: Yes.

21 CHAIRMAN SOULES: You have it the same
22 for 184?

23 PROFESSOR BLAKELY: No. It's all --
24 it's already correct.

25 CHAIRMAN SOULES: Okay. So, 184 and

1 184(a) are correct as proposed by Professor
2 Wicker --

3 PROFESSOR BLAKELY: With this one
4 change.

5 CHAIRMAN SOULES: -- with that one
6 change, yes.

7 MR. RAGLAND: Take out the second
8 "may"?

9 PROFESSOR BLAKELY: It's on 152 --
10 page 152 of today's book, second line, the word
11 "may" should be "shall."

12 CHAIRMAN SOULES: After where it says
13 "or upon the motion of the party" --

14 PROFESSOR BLAKELY: "Shall."

15 CHAIRMAN SOULES: -- "shall take
16 judicial notice." Okay. We've got a few rules
17 here starting on page 165 and it will go on to the
18 next blue divider page.

19 PROFESSOR EDGAR: Just as a matter of
20 curiosity, do you ask the Court that you want to
21 take judicial notice of laws of California, or do
22 you have to go further and furnish the Court with
23 those laws of which you want the Court to take
24 judicial notice of in California? The rule really
25 doesn't address that issue and I don't know -- I

1 just --

2 CHAIRMAN SOULES: Do you mind if we
3 don't try to do that today?

4 PROFESSOR EDGAR: Well, it's a
5 question, though.

6 CHAIRMAN SOULES: I know it is. But
7 we've got this series of questions that people
8 have sent us, and we have got two hours to finish
9 this, and we haven't even started on the submitted
10 rules. Okay. And I've got to use the part of
11 that time, no question.

12 Is there any opposition, or are there
13 comments on proposed Rule 216(a) change -- from
14 Rule 216 changes as they appear on 166, page 166
15 of the materials? Now, this is a redraft that
16 Bill Dorsaneo has done for us.

17 PROFESSOR DORSANEO: I don't even
18 remember doing this.

19 CHAIRMAN SOULES: Well, you must have
20 done it before July the 30th of 1985 because
21 that's the date of your letter.

22 PROFESSOR DORSANEO: Somebody asked me
23 to do this.

24 MR. RAGLAND: I move we adopt the
25 amendment to Rule 216 -- 216 as it appears on

1 166.

2 MR. BRANSON: Second.

3 CHAIRMAN SOULES: A motion has been
4 made and seconded. Any further discussion? Those
5 in favor show by hands. Opposed? That's
6 unanimously adopted.

7 PROFESSOR EDGAR: All right. This is
8 the first time I've had a chance to look at this,
9 Luke. I assume, then, that if you do not ask for
10 a jury fee, make a request within 30 days, the
11 trial court has no discretion to give you one
12 subsequent thereto. Is that right?

13 MR. RAGLAND: I think the trial court
14 has inherent power to control the docket the way
15 he wants to. I don't think that that precludes
16 him from granting a jury trial.

17 MR. BRANSON: What would happen,
18 Hadley, is if the Judge got put in that box, he
19 would grant a continuance and then give it to them
20 for 30 days before the next trial.

21 CHAIRMAN SOULES: There's no
22 discretion in Rule 216 as it stands right now.

23 PROFESSOR EDGAR: I know it does now,
24 but I was just wondering as a result of this rule
25 whether that was intended to eliminate discretion

1 of the trial judge. That was really the basis of
2 my question.

3 CHAIRMAN SOULES: I don't think it
4 is. I don't think it is intended to change that.
5 Does anyone perceive that that is the intended
6 change to limit the Court's discretion? Okay.
7 It's the consensus that this is not to change the
8 Court's discretion or limit it in any way as it
9 stood before the amendment made.

10 PROFESSOR DORSANEO: Mr. Chairman, I
11 have one suggestion now that I look at it. I
12 think maybe we ought to have it be paragraphs 1
13 and 2 rather than A and B.

14 CHAIRMAN SOULES: All right.

15 PROFESSOR DORSANEO: Our rule book is
16 schizophrenic on that, but in the part of the rule
17 book where Rule 216 is, the paragraphing is by
18 number rather than by letter.

19 CHAIRMAN SOULES: Any overwhelming
20 opposition to that?

21 MR. MCMAINS: Why don't we do 1
22 and B?

23 CHAIRMAN SOULES: One and B? McMains,
24 that will probably make you rich. You'll probably
25 find a way to get an appeal out of that.

1 All right. McGowan and McGowan, let's see,
2 wrote George McCleskey in September of '83 for
3 something that may not have been addressed by us.
4 What does it say?

5 PROFESSOR DORSANEO: It depends on
6 whether we copied the rule from the federal rules
7 or we made it up ourselves as to whether it's A
8 or 1.

9 CHAIRMAN SOULES: Okay. This is all
10 Franklin Jones' subcommittees material since 277,
11 8 and 9 are out.

12 PROFESSOR EDGAR: Well, he's wanting
13 to have -- pay the jury fee at any time within six
14 months from the date the case is filed. And we've
15 just said that it may be filed not less than 30
16 days in advance.

17 CHAIRMAN SOULES: Okay. So, this is
18 unanimously rejected in favor of Bill's draft.

19 PROFESSOR EDGAR: If we approved
20 Bill's draft, I think that's the effect of it.

21 CHAIRMAN SOULES: Any opposition -- is
22 anyone in support of Brad Moore's suggestion since
23 we've already taken action on rule -- changing 216
24 as Bill suggested? Okay.

25 JUSTICE WALLACE: We've recently

1 upheld a rule that you must not only pay the fee,
2 you must also make a request. One won't work
3 without the other one.

4 PROFESSOR DORSANEO: Uh-huh. I think
5 that's what this proposed draft tries to make
6 clear, too.

7 MR. BRANSON: It was nice of George to
8 send us a letter, though.

9 MR. TINDALL: We're responding so
10 promptly to it.

11 MR. MCMAINS: It's only three years
12 old.

13 CHAIRMAN SOULES: Well, this was
14 actually addressed to George when he was the
15 chairman of this committee by Brad Moore. So,
16 that's -- well, you may have noticed yesterday in
17 our materials, one of the appointed persons who
18 was requesting a rule change opened by
19 congratulating Chief Justice Pope on his recent
20 appointment as Chief Justice. That's how behind
21 we've gotten, but we're catching up.

22 MR. MCMAINS: I distinctly suspect
23 some of these letters are from people who have
24 probably died.

25 CHAIRMAN SOULES: If we let that

1 happen, that would really be a bad thing.

2 PROFESSOR DORSANEO: They've probably
3 suspected we have, too.

4 CHAIRMAN SOULES: Hadley, you've done
5 work on these depositions. Is this -- is Charles
6 Haworth's matter --

7 PROFESSOR EDGAR: I have not -- the
8 only work I did was on the charge rules. I
9 haven't seen this material at all.

10 CHAIRMAN SOULES: Rule 216.

11 PROFESSOR EDGAR: Rule 216 really
12 doesn't refer to what he says it refers to, I
13 don't think.

14 MR. RAGLAND: That's included in
15 166(b) that's already been adopted.

16 PROFESSOR DORSANEO: That's in your
17 blue book already, Luke, in 166(c).

18 PROFESSOR EDGAR: Oh, okay.

19 CHAIRMAN SOULES: Okay. So, this was
20 done earlier.

21 MR. RAGLAND: 166(c) in the long
22 book.

23 CHAIRMAN SOULES: I thought we had
24 done that. Okay. And does that also reach what
25 he raises on page 170 as well?

1 PROFESSOR DORSANEO: In effect, we've
2 been over this, plowed this ground already.

3 MR. RAGLAND: That's 202 that we just
4 discussed a few minutes ago.

5 CHAIRMAN SOULES: All right. That's
6 just comment anyway. So, that doesn't need any
7 further talk. We can go now to page 172.

8 MR. TINDALL: He also mentions another
9 one down here in the third paragraph. Are you
10 talking about Judge Casseb's letter?

11 CHAIRMAN SOULES: Yes.

12 PROFESSOR DORSANEO: The rehearing
13 thing we dealt with in the Appellate Rule context.

14 MR. MCMAINS: Yes. We voted it down.

15 PROFESSOR DORSANEO: Yes. We
16 considered that and voted it down.

17 CHAIRMAN SOULES: So, this committee
18 has actually voted down the third paragraph at an
19 earlier time, and cured the problems of the first
20 two by other actions. Okay. This is Rule 224.

21 PROFESSOR EDGAR: What he's wanting --
22 look on page 176. He apparently wants us to
23 approve a uniform jury information card, or
24 something.

25 CHAIRMAN SOULES: Aren't the counties

1 getting along pretty well with that, using their
2 own forms, or do we need a uniform one? How many
3 feel that we need a uniform jury information card
4 like the one in Tarrant County, to be made a part
5 of the Rules of Civil Procedure? How many feel
6 that this suggestion, then, should be rejected?
7 Opposed? That's unanimously rejected in favor of
8 permitting the local practice to control that.

9 Okay. This is here for Rule 247, and the
10 suggestion appears on page 180.

11 PROFESSOR EDGAR: Well, he refers to
12 Rule 247(a) for which we don't have a rule.

13 PROFESSOR DORSANEO: It's over here on
14 184.

15 PROFESSOR EDGAR: Oh, okay.

16 CHAIRMAN SOULES: And then new Rule
17 250 is on 180. It's a two-rule package. So, you
18 have to look at 180, 184 and 188.

19 PROFESSOR EDGAR: Look at what? Oh,
20 pages.

21 CHAIRMAN SOULES: Pages 180 --

22 PROFESSOR EDGAR: Yeah, yeah. Okay.

23 MR. RAGLAND: Aren't these included in
24 those proposed administrative rules that are still
25 floating around?

1 CHAIRMAN SOULES: I don't know if
2 they're still floating. They may have sunk.

3 MR. RAGLAND: Well, depending on who
4 you talk to, they may be taking on water, but --

5 MR. MCMAINS: Let the record reflect
6 the fifth amendment.

7 CHAIRMAN SOULES: If these actions are
8 needed to cure some problems with our practice, it
9 might be well to do them here. It might avoid
10 having them done somewhere else. I don't know
11 that they need it.

12 MR. TINDALL: What is the evil sought
13 to be cured here? I can't tell. I mean, it's a
14 lot of writing, but --

15 CHAIRMAN SOULES: Well, it's to make
16 uniform how cases are called, I think, and how
17 they're then tried.

18 MR. RAGLAND: Well, I think that's
19 what that concept is, what is torpedoed in the
20 Administrative Rules because there's just not any
21 legal basis to make the things uniform.

22 MR. BRANSON: Let me ask a question to
23 Justice Wallace. We recently had a report from
24 the district judges in Dallas about some proposed
25 local rules which they are currently proposing.

1 During the process of drafting the local rules,
2 our judiciary in Dallas, which these days is
3 rather young in age, totally ignored the Rules of
4 Civil Procedure and did such things -- and also
5 the case law of Texas -- and did such things as
6 again require witness lists, which I understand
7 our Court has said is not even a thing of
8 existence in Texas.

9 It required that expert witnesses be named 90
10 days in advance of trial, and also said that if
11 judgments weren't in within a short period of time
12 following a settlement, that the trial court had
13 the authority to either call the case for trial
14 immediately or dismiss with prejudice, depending
15 on who was responsible for payment.

16 Does the Court have an opportunity to pass on
17 the local rules?

18 JUSTICE WALLACE: Rule 3(a) says that
19 no local rule is effective until approved by the
20 Supreme Court, and we have not approved any local
21 rules in the last two years and don't plan to
22 approve any in the near future. So, those rules,
23 if they conflict with the Rules of Procedure,
24 they're just flat wrong.

25 MR. BRANSON: Okay.

1 JUSTICE WALLACE: These rules here, it
2 was part of a package before the Chief suggested
3 these Administrative Rules and everybody got going
4 that direction. The idea was to cut out all these
5 local rules that not only conflict with the Rules
6 of Procedure, but conflict with adjoining county
7 and the courtroom next door in some counties and
8 put the burden on the administrative judges to
9 have uniform rules throughout their region where
10 at all possible and to cut out everything that
11 should be handled in the Rules of Procedure,
12 period, where you have only the absolute necessary
13 local rules and they be, so far as possible,
14 uniform throughout the county -- throughout the
15 region -- and that we wouldn't prove anything
16 until the regional judge had done that and
17 approved them and sent them to us. That's the
18 next push through those regional administrative
19 judges as soon as we get over this
20 administrative --

21 MR. BRANSON: But the Supreme Court
22 could, in fact, point out to a judge in Dallas
23 County where there are conflicts with the Rules of
24 Procedure?

25 JUSTICE WALLACE: If a case comes up,

1 I'm sure that will be pointed out.

2 CHAIRMAN SOULES: We are probably
3 derelict in not having the subcommittee report on
4 these rules. But I see it -- these rules don't --
5 they've got some problems in writing. For
6 example, are there terms of court now?

7 MR. TINDALL: No.

8 CHAIRMAN SOULES: And proposed new
9 Rule 250 talks about carrying a case over to the
10 succeeding term.

11 MR. TINDALL: Luke, I move we pass on
12 all these. I don't see any grand swell of support
13 for any of these.

14 MR. BRANSON: Do we have a standing
15 committee of this committee on local rules?

16 CHAIRMAN SOULES: We have a standing
17 committee that could have addressed them but did
18 not address these.

19 PROFESSOR EDGAR: You and I are on the
20 committee, Frank.

21 CHAIRMAN SOULES: What I'm saying is
22 let's not -- we'll study these rules. We'll table
23 them for the next session, if that's agreeable. I
24 don't think we should ignore them because it looks
25 like somebody thinks it's a serious problem here

1 and they've spent a lot of work, committee work,
2 not just some guy who's been aggrieved, but a
3 committee has met and made suggestions to us.

4 JUSTICE WALLACE: Just to give you an
5 indication of the problems in this area, our first
6 move when we started on this program was to get
7 copies of all the local rules. And it took us 18
8 months, mind you, to get the ones -- we think
9 we've got all of them that are in writing, but it
10 took us 18 months just to get them. And that's
11 how screwed up the local rule situation is.

12 CHAIRMAN SOULES: Just think how a
13 lawyer trying to practice in that kind -- sent
14 them in the eighteenth month to Chief, what a time
15 he's had getting them set up.

16 PROFESSOR DORSANEO: I always like the
17 counties where the clerk sends you the local rules
18 and says, "Well, we don't follow these."

19 MR. TINDALL: Or "We have local rules,
20 but we're out of print."

21 CHAIRMAN SOULES: Let's see. Let's go
22 now to page 189.

23 MR. BRANSON: Would it be of help to
24 the Court for this committee to assist in
25 screening some of those?

1 JUSTICE WALLACE: Yeah, you're
2 welcome. There's a stack like that, and you're
3 welcome to --

4 MR. BRANSON: I'm not suggesting that
5 it's necessarily something we are jumping for joy
6 to take on, but it sounds like an ominous task and
7 that's what this committee is for, to assist the
8 Court.

9 JUSTICE WALLACE: We do -- the Office
10 of Court Administrations has attempted to go
11 through those and see what, if any, uniformity
12 there is. But if we get a committee on local
13 rules, I'll see that you get copies of those and
14 you can at least see the magnitude of the
15 problem.

16 CHAIRMAN SOULES: Okay. The rule on
17 page 189, the Committee on the Administration of
18 Justice has suggested that we repeal what's there
19 and use that number for a new -- I don't
20 understand the 264 location.

21 PROFESSOR EDGAR: Well, it's just in
22 the trial sections. See the trial --

23 PROFESSOR DORSANEO: And that 264 is a
24 pretty -- well, you look at it and say, "How about
25 that?"

1 CHAIRMAN SOULES: Say what, Bill?

2 "How about that?"

3 PROFESSOR DORSANEO: Yeah. Cases
4 brought up from inferior courts shall be tried de
5 novo.

6 CHAIRMAN SOULES: In district and
7 county courts.

8 PROFESSOR DORSANEO: We don't need
9 that there.

10 CHAIRMAN SOULES: That doesn't need to
11 be said. It doesn't need to be said at all.

12 PROFESSOR DORSANEO: Well, it said in
13 the context of appeals to county courts from
14 justice courts. That's the only context in
15 which --

16 PROFESSOR EDGAR: -- it could arise.

17 PROFESSOR DORSANEO: -- it could
18 arise.

19 MR. TINDALL: County to district.

20 PROFESSOR EDGAR: We don't have it.

21 CHAIRMAN SOULES: Okay. So, we could
22 repeal that and -- should we put in its place this
23 language: "By agreement of the parties, the trial
24 court may allow that all testimony and such other
25 evidence as may be appropriate be presented at

1 trial by videotape"?

2 PROFESSOR DORSANEO: It's trial by a
3 movie.

4 MR. MCMAINS: We could cease being
5 lawyers and become directors.

6 MR. TINDALL: You know, they're doing
7 that -- they're having those 90-minute trials in
8 the Houston federal court.

9 PROFESSOR EDGAR: That's mini trials,
10 though.

11 MR. TINDALL: Mini trials.

12 PROFESSOR EDGAR: That's not this,
13 though.

14 CHAIRMAN SOULES: This was to permit
15 lawyers who want to get a case tried to go produce
16 the trial outside the courtroom while the Judge is
17 trying another case and then go put it on by
18 videotape. That's what this is for. I remember
19 the discussion.

20 MR. RAGLAND: Do we really need that
21 in light of Rule 11 and Rule 166(c) that we just
22 adopted?

23 CHAIRMAN SOULES: This is not --

24 MR. MCMAINS: I don't think you can do
25 that under that rule.

1 CHAIRMAN SOULES: Yeah. Well, the
2 discussion -- where this comes from on the
3 Committee on Administration of Justice, it would
4 permit the parties to go to someplace where the
5 videotaping could be done and put on a trial, make
6 a trial, stage a trial, while a judge is in trial
7 in another case, and then come up and say, "Judge,
8 everything we want to do is on videotape. We
9 would like to pick a jury and it takes a total of
10 20 hours to run this."

11 And you pick a jury, put them in the box, and
12 away it goes. They can make objections. The
13 Judge will rule on those. If so, they've got --
14 they know how many clicks it's got to move forward
15 before they get to the evidence that wasn't
16 objected to. You just put on the evidence that
17 was objected to when an objection is made. That's
18 what this is for. And the idea is that you can
19 get cases that could be done this way, maybe suits
20 on notes or something where -- you probably
21 wouldn't want to do it in a malpractice case,
22 although you might. It could be tried a lot
23 quicker if you had this rule. I don't know how
24 much it would be used, but what harm does it do?

25 PROFESSOR EDGAR: If the parties agree

1 to it, why shouldn't the rules permit it?

2 CHAIRMAN SOULES: Witnesses haven't
3 been sworn, you know, or they might be.

4 MR. BRANSON: We're going to take up
5 more time debating it in this committee than it
6 will be taken up being done because you're not
7 going to get people to agree to it.

8 PROFESSOR EDGAR: Well, I move we
9 adopt it.

10 PROFESSOR DORSANEO: I second the
11 motion.

12 CHAIRMAN SOULES: Made and seconded.
13 Anything else? Those in favor show by hands.

14 MR. RAGLAND: I think it is covered
15 under Rule 11 and Rule 166(c).

16 CHAIRMAN SOULES: Those opposed?
17 Okay. Let me see the hands again. Those in favor
18 of permitting this type of trial, show by hands.
19 Six. Those opposed? Six to four approved.

20 PROFESSOR EDGAR: See, it didn't take
21 that long to debate that, Frank.

22 MR. MCMAINS: It requires everybody to
23 agree, right? So, I mean, it requires the
24 agreements of everybody.

25 CHAIRMAN SOULES: Here's 265(a).

1 We've got a suggestion here on 265(a) from Judge
2 Onion.

3 MR. MCMAINS: I move it be rejected.

4 CHAIRMAN SOULES: What is it? What is
5 it about, Rusty?

6 MR. MCMAINS: It just says that
7 lawyers are abusing voir dire, basically -- or
8 opening statements.

9 MR. TINDALL: Opening statements.

10 MR. MCMAINS: That is, that they're
11 not --

12 PROFESSOR DORSANEO: They're not being
13 succinct enough.

14 MR. MCMAINS: It says that they don't
15 summarize their pleadings, summarize what they
16 have to prove.

17 CHAIRMAN SOULES: Oh, I see.

18 MR. MCMAINS: That's not going to
19 change the practitioners -- cure the problem.

20 PROFESSOR EDGAR: I think the problem
21 that Judge Onion raises is covered by Rule 265,
22 and he wanted to enforce it.

23 CHAIRMAN SOULES: Is there a motion?
24 A motion has been made to reject it. Is there a
25 second?

1 MR. BRANSON: Second.

2 CHAIRMAN SOULES: Those who support
3 rejection, show your hands. Opposed? Okay.
4 That's unanimously rejected. Would somebody
5 please write Judge Onion and give him this
6 information besides me?

7 PROFESSOR EDGAR: You're going to be
8 in San Antonio. Why don't you just go by his
9 office, Luke?

10 MR. TINDALL: Take him to dinner and
11 explain it to him.

12 CHAIRMAN SOULES: All right. He's
13 very understanding. He's one of our best judges.

14 MR. MCMAINS: If Dorsaneo's
15 recommendation is next, I move it be rejected.

16 PROFESSOR DORSANEO: This is an
17 assignment. This is an assignment.

18 CHAIRMAN SOULES: Bill, do you want to
19 move that this be adopted and explain why?

20 PROFESSOR DORSANEO: I'm against it.
21 I was assigned to do this. And I think that we
22 just -- you know, we're changing it back and forth
23 and back and forth. Just leave it the way it is,
24 is my attitude about it now. I mean, lawyers have
25 now gotten to the point where they know the

1 timetable for findings of fact and conclusions of
2 law.

3 MR. MCMAINS: Well, it has an inherent
4 problem in it, Luke, and that is, that it's --
5 that the time for filing requests for findings,
6 initial time for filing them, is five days after
7 the transcript is due. I mean --

8 CHAIRMAN SOULES: If we made this
9 change?

10 MR. MCMAINS: Yes.

11 CHAIRMAN SOULES: Oh, I see. Well,
12 the motion has been made to reject the request.
13 Is there a second?

14 MR. MCMAINS: Second.

15 CHAIRMAN SOULES: Those who want to
16 reject the request show by hands. Those who
17 support the request show by hands. It's
18 unanimously rejected.

19 PROFESSOR DORSANEO: 306(c) is a
20 separate problem.

21 CHAIRMAN SOULES: That goes for 297 --
22 296 and 297?

23 PROFESSOR DORSANEO: Uh-huh. 306(c)
24 is a separate problem.

25 PROFESSOR EDGAR: That's on page 202?

1 PROFESSOR DORSANEO: Uh-huh -- 195.

2 CHAIRMAN SOULES: On page 195 we have
3 Rule 306(c). Sometimes these are in there twice.
4 But I'm looking at 195. Is that where you are,
5 Bill?

6 PROFESSOR DORSANEO: Uh-huh.

7 CHAIRMAN SOULES: What is this
8 problem, Bill?

9 PROFESSOR DORSANEO: Well, let me
10 check. It has to do with when prematurely filed
11 document is deemed filed. I'm trying to refresh
12 my recollection now. All right.

13 Under current appellate practices, the text
14 says in the comment, "The times for perfecting
15 appeals, limiting the scope of an appeal, are not
16 keyed to the overruling of motions for new
17 trial." Maybe this is a package. And the current
18 rule says that a prematurely filed document --
19 maybe it's not a problem.

20 PROFESSOR EDGAR: It's not a problem
21 unless you adopt Rules 296 and 297, which we just
22 rejected.

23 PROFESSOR DORSANEO: I think I already
24 changed it. Pardon me, it's already been fixed in
25 the comment, last paragraph. When Rule 306(c) was

1 amended last by the Supreme Court, the problem
2 that I'm thinking about was fixed.

3 CHAIRMAN SOULES: So, we don't need
4 this 306(c) changed since we're not doing 296 and
5 297?

6 MR. MCMAINS: That's right.

7 PROFESSOR DORSANEO: And the other
8 problem has already been taken care of.

9 CHAIRMAN SOULES: So, these are
10 unanimously rejected since we already have a
11 partial fix on what we think needed fixing, and we
12 don't want to fix the balance of it. Is that the
13 consensus? Okay. That's unanimous. Okay.

14 Now we get to David Bickel's letter to the
15 COAJ which appears to Rule 197 -- I mean, page
16 197, Rule 296. That was then referred to the COAJ
17 subcommittee.

18 PROFESSOR DORSANEO: This is the
19 statute -- the statute of limitations has run on
20 this letter. I think this is old.

21 CHAIRMAN SOULES: What is that?

22 PROFESSOR DORSANEO: This is -- when
23 Rule 296 was changed, when the timetable was
24 changed, it didn't get published that way
25 everywhere, and it causes a lot of confusion,

1 especially since West had the wrong rule in its
2 pamphlet supplement. I think it's the right rule
3 in the 1986 pamphlet supplement. But there was a
4 lot of confusion generated because of the change
5 and because of the way the publishing company had
6 mishandled it.

7 JUSTICE WALLACE: Unfortunately, the
8 duty falls on my secretary to proofread everything
9 that West publishes on these rules, and there are
10 a number of errors we find that we just notify
11 them of and the next time they print it they
12 correct it. I don't know -- there's not any way
13 we have of making sure West is going to correctly
14 print what we send them.

15 CHAIRMAN SOULES: Okay. The COAJ,
16 I've got -- the notes that I have on pages 200,
17 201 and 202 are wrong. The COAJ recommended these
18 changes and those are the ones we just rejected;
19 is that right? And then when you got over to --

20 PROFESSOR EDGAR: Now, we didn't talk
21 about 306(a), did we?

22 PROFESSOR DORSANEO: That's been
23 done. I did that.

24 PROFESSOR EDGAR: Okay. We've already
25 done it, though.

1 PROFESSOR DORSANEO: Yes. That fix
2 has been made and the Appellate Rules -- Texas
3 Rule of Appellate Procedure 5(b)(1) does what the
4 COAJ recommended with respect to old Rule 306(a),
5 I think. Let me take a second to make sure that
6 -- since this rule was not just an appellate
7 rule. We had the same rule on 306(a) in the Texas
8 Rule of Civil Procedure as we have in Rule 5.
9 Let's see.

10 PROFESSOR EDGAR: No. The material in
11 which he has underlined here on page 201 does not
12 appear in 5(b)(1).

13 PROFESSOR DORSANEO: All right.
14 Pardon me. It's in 306(a)(1), not in so many
15 words but -- not in these precise words.

16 CHAIRMAN SOULES: Does it get the same
17 job done?

18 PROFESSOR DORSANEO: Yes, I believe it
19 does.

20 CHAIRMAN SOULES: Are you satisfied
21 with that, too, Hadley?

22 PROFESSOR EDGAR: I haven't looked at
23 it.

24 CHAIRMAN SOULES: Okay. What are you
25 looking at, Bill?

1 PROFESSOR DORSANEO: 306(a), paragraph
2 1.

3 CHAIRMAN SOULES: And you're saying
4 that some of that appears in 165(a)?

5 PROFESSOR EDGAR: Yeah, he's added
6 motions to reinstate, for dismissal of want of
7 prosecution and requests for findings of fact and
8 conclusions of law, and they're both in
9 306(a)(1).

10 PROFESSOR DORSANEO: Yes.

11 PROFESSOR EDGAR: Yes, they're both
12 there.

13 CHAIRMAN SOULES: So, this is done; is
14 that right?

15 PROFESSOR DORSANEO: Yes, done.

16 PROFESSOR EDGAR: It's included in
17 306(a)(1) and 5(b).

18 PROFESSOR DORSANEO: When the Court
19 amended the Rules of Civil Procedure at the time
20 it promulgated the Appellate Rules, this problem
21 was resolved.

22 CHAIRMAN SOULES: Okay. And the
23 306(c) that's on page 202, is that the same as the
24 last one?

25 PROFESSOR DORSANEO: The same

1 information on that.

2 CHAIRMAN SOULES: And that's rejected
3 -- or wait a minute. Same information?

4 PROFESSOR DORSANEO: That's been taken
5 care of as well as a result of the amendment to
6 306(c) that was promulgated when the Appellate
7 Rules were promulgated.

8 CHAIRMAN SOULES: Okay. That was done
9 with TRAP. And what is on page 200 is what we
10 just voted down earlier, isn't it? It's the same
11 as page 193. Are 200 and 193 the same pages?

12 PROFESSOR DORSANEO: You really can
13 turn forward to 203.

14 PROFESSOR EDGAR: Yes. We can go to
15 page 211 I think, can't we?

16 PROFESSOR DORSANEO: Uh-huh. Go to
17 211. The rest we've already dealt with. All of
18 that, throw out those pages.

19 CHAIRMAN SOULES: Those are duplicates
20 from 203 on; is that right? And we've already
21 done page 211. Let's see what we have not done.

22 PROFESSOR DORSANEO: Do you want to go
23 to the justice court rules again?

24 CHAIRMAN SOULES: Yeah. Let's do
25 those. Frank, the justice court rules, we're back

1 over there again. Do you have any motion you
2 would like to make?

3 MR. BRANSON: I wanted to hear
4 Broadus's sweet voice on the justice of the peace
5 rule.

6 PROFESSOR EDGAR: Well, we needed his
7 leadership yesterday afternoon.

8 MR. BRANSON: We got there and there
9 was just something -- I could not find homeostasis
10 after the meeting yesterday.

11 MR. SPIVEY: Well, I'm against letting
12 Frank practice in the justice court. He screwed
13 up so much in the district courts.

14 CHAIRMAN SOULES: Okay. Let's go to
15 page 127 and we are --

16 MR. MCMAINS: 127?

17 CHAIRMAN SOULES: Page 127. That's
18 Judge Thomas's material and she's not here.

19 PROFESSOR EDGAR: Go back to 127?

20 CHAIRMAN SOULES: Yeah. I skipped in
21 sections. That begins a section right behind the
22 blue page. And then when we get done with that,
23 we have a recent handout, the most controversial
24 part of which we have voted on already. Okay.
25 Then again to these --

1 PROFESSOR EDGAR: Page 127 is not
2 Linda Thomas.

3 CHAIRMAN SOULES: Well, I'm sorry.
4 This -- all the materials from this blue page to
5 the next blue page were assigned, I think, to
6 Judge Thomas for review. And maybe I assigned
7 them erroneously. I thought this was in the
8 purview of her rules.

9 PROFESSOR EDGAR: You're on page 127?

10 CHAIRMAN SOULES: Yes, which is a
11 letter to her from me.

12 PROFESSOR EDGAR: Okay. All right.

13 CHAIRMAN SOULES: Did I send that to
14 the wrong place?

15 PROFESSOR EDGAR: No.

16 CHAIRMAN SOULES: All right. Then
17 that's Justice Wallace's letter to me, and then we
18 get to Judge Schattman's letter to Judge Murray
19 which is the substance of it. And she was going
20 to write something for us.

21 MR. TINDALL: Luke, I don't know how
22 this -- I mean, I'm not trying to sweep this
23 problem under the rug, but it seems to me, the
24 Rules of Civil Procedure, which we are on today,
25 really are not the area we're to deal with the

1 problem of a lawyer who abandons a client. To me,
2 that lawyer is clearly subject to a disciplinary
3 action. I mean, we cover that clearly in our Code
4 of Professional Responsibility. You are to
5 zealously represent and prosecute your client's
6 cases.

7 CHAIRMAN SOULES: Why don't we just
8 leave that one? Judge, do we want to just reject
9 this as saying it needs to be addressed to a
10 different forum, a grievance committee?

11 MR. TINDALL: A grievance committee is
12 who the client should turn to.

13 CHAIRMAN SOULES: What's the motion,
14 then, on the June 12 letter of Judge Schattman
15 appearing on page 129?

16 PROFESSOR EDGAR: I move we are
17 without jurisdiction to consider it.

18 CHAIRMAN SOULES: How many feel that
19 way?

20 MR. RAGLAND: I didn't hear.

21 CHAIRMAN SOULES: He's moving to --
22 that we're without jurisdiction, really, to deal
23 with Judge Schattman's --

24 PROFESSOR EDGAR: The Rules of Civil
25 Procedure should not be directed to the problems

1 of a client that is abandoned by the lawyer.

2 MR. RAGLAND: I agree. I think it
3 ought to come under the State Bar rules or
4 something like that.

5 PROFESSOR EDGAR: That's what I'm
6 saying. That's not within our purview.

7 CHAIRMAN SOULES: Okay. There's a
8 motion to reject the suggestion of Judge Schattman
9 appearing on page 129. All in favor show by
10 hands. Opposed? That's unanimously rejected.
11 The next item is on page 132, a letter from John
12 Cochran.

13 MR. BRANSON: -- become disabled.

14 CHAIRMAN SOULES: What? I'm sorry,
15 Frank?

16 MR. BRANSON: Judge Schattman gives an
17 example of a lawyer who has become disabled. I
18 was just noting that as a surprise to me.

19 CHAIRMAN SOULES: John Cochran's
20 suggestion on -- is that Rule 13 --

21 MR. RAGLAND: Excuse me, Luke. What
22 page again?

23 CHAIRMAN SOULES: It's on page 132 --
24 that we add to the penalty for fictitious suits a
25 pleading -- a penalty for frivolous suits and

1 seems to me that if we don't -- if we do not
2 expand Rule 13 to include other types of lawsuits
3 other than fictitious suits, which I don't think
4 are a problem, I don't think anybody does that,
5 that there's no need to add anything more to it,
6 because Rule 13, basically, is of no consequence.

7 MR. MORRIS: Luke, we can't get off
8 into that. I mean, that's a hot political issue
9 right now. The legislature is going to deal with
10 it. Every time the issue has come up in the
11 legislature in recent years to strap somebody with
12 a lawsuit that's frivolous, we always put an
13 amendment on it that what is good for the goose is
14 good for the gander and frivolous defense be also
15 included, and it dies. And it's going to be a hot
16 issue in the legislature this session. I move
17 that we reject the proposal by Cochran.

18 MR. BRANSON: Second.

19 JUDGE TUNKS: I second the motion.

20 CHAIRMAN SOULES: Well, just to make
21 sure the record is clear, I don't want us to
22 reject something because the legislature is going
23 to deal with it, because I don't want to give them
24 -- make it appear to them that we're licensing
25 them to deal with this problem. Is the motion to

1 motions, and that 215(a) sanctions could be made
2 applicable.

3 PROFESSOR EDGAR: Rather than
4 contempt, as is now provided by Rule 13?

5 CHAIRMAN SOULES: It will be added. I
6 think he may --

7 MR. MCMAINS: He's talking about
8 frivolous lawsuit nonsense.

9 PROFESSOR EDGAR: My question, though,
10 is, would he include the filing of a frivolous
11 lawsuit -- would he include that -- a sanction for
12 that to be contempt also, or only the sanctions
13 provided by Rule 215?

14 PROFESSOR DORSANEO: Which includes
15 contempt.

16 CHAIRMAN SOULES: Well, I can't read
17 his letter and tell you what he was thinking on
18 that. We can debate that either way.

19 PROFESSOR DORSANEO: He wants to make
20 Rule 13 a rule that people will know about by
21 including -- making some definition of frivolous
22 lawsuits includable within the contours of 13, and
23 then composing the procedural penalties of Rule
24 215 on basically someone who brings this frivolous
25 lawsuit, whatever that might end up being. It

1 reject this suggestion on its merits?

2 MR. MORRIS: Yes, on its merits. I
3 mean, it's just -- may I explain that it is
4 something that gets dealt with at the legislature,
5 and you get into the frivolous defense. It
6 becomes very subjective. In the states where
7 they've had it, they tend to have more frivolous
8 defense penalties than you do frivolous lawsuit
9 penalties.

10 PROFESSOR DORSANEO: Well, we have a
11 Federal Rule 11 which deals with the same problem,
12 perhaps not very well, addressed in the letter
13 from John H. Cochran. And basically, the federal
14 approach is to impose sanctions like discovery
15 sanctions, et cetera, on counsel when they bring
16 frivolous claims or defenses. And it is being
17 used, and it is being used against the claimants
18 and it's subject to a lot of criticism on a
19 national level.

20 MR. MCMAINS: There are several people
21 in Houston that have been hit for six-figure
22 penalties.

23 MR. MORRIS: It's very subject to
24 abuse.

25 PROFESSOR DORSANEO: It may be

1 something that a subcommittee should study in
2 detail by reference to what has happened at the
3 federal level across the country. But it's not
4 something that can be dealt with on Saturday
5 morning.

6 PROFESSOR EDGAR: I would move that
7 this be referred to the appropriate subcommittee
8 for study in light of Federal Rule 11 and the
9 effects thereon.

10 JUSTICE WALLACE: Subcommittee to be
11 appointed at some future date.

12 CHAIRMAN SOULES: And then we need to
13 look at Federal Rule 68 on that, too, I think,
14 Federal Rule 68 about costs to a losing party.

15 MR. BRANSON: Can we call a question
16 on the motion and get this one out of the way and
17 then if we want to do something later, go ahead?

18 CHAIRMAN SOULES: Well, I'm trying to
19 get direction on how to charge the pending
20 subcommittee. All right. I guess the motion is
21 that we reject it altogether, and then there was a
22 motion to table and study it. So, we vote first
23 on the motion to reject. How many feel that this
24 proposal should be rejected on its merits without
25 further study?

1 PROFESSOR EDGAR: Without further
2 study?

3 CHAIRMAN SOULES: That's right.
4 Three.

5 MR. MCMAINS: We don't ever -- I don't
6 think we usually ever vote to never study
7 something.

8 CHAIRMAN SOULES: Well, then, let me
9 change it. How many are in favor of tabling --
10 how many are in favor of tabling this for
11 assignment to a subcommittee and a report next
12 session? Five. How many are against tabling it
13 and in favor of rejecting it in total? Okay.
14 Five to four, and it gets tabled to the next
15 session and assigned.

16 And this is the last item, is it not? The
17 last item is a handout that was in the front of
18 your book when we started. We only have to deal
19 with one item because one of them we have
20 thoroughly debated and acted on at an earlier '86
21 meeting, 1986 meeting. We rejected this --

22 PROFESSOR BLAKELY: Would you identify
23 the handout?

24 CHAIRMAN SOULES: It looks like --
25 it's under a letter to me from Pat Hazel dated

1 November the 3rd from Judge Wallace. And it was
2 -- it's right in front of your book. Of course,
3 everybody has been using these books. It's a
4 matter from Allen Odum. We have addressed and
5 rejected it. The matter on Rule 121(h) Appellate
6 Rules, I don't know whether we dealt with it or
7 not. What is the -- Rusty and Bill, what is the
8 situation on that?

9 PROFESSOR DORSANEO: Well, let me look
10 at it. I didn't look at this.

11 CHAIRMAN SOULES: It's the second rule
12 on the -- second page.

13 MR. MCMAINS: Is this an attempt to
14 allow filing an application for writ of error
15 directly to the Supreme Court?

16 PROFESSOR EDGAR: I don't think that's
17 what 121(h) deals with, is it? This is habeas
18 corpus -- no, mandamus, extraordinary remedies.

19 CHAIRMAN SOULES: Does anybody have a
20 purple book page for me?

21 PROFESSOR EDGAR: Page 415.

22 CHAIRMAN SOULES: Page 415, thank
23 you.

24 PROFESSOR EDGAR: I can't find
25 anything in here either.

1 CHAIRMAN SOULES: I can't; I'm lost.

2 JUSTICE WALLACE: This one is merely
3 -- the rule says they only file -- want to file 12
4 copies of the application. There's a response --
5 brief in the Supreme Court. The rules say -- only
6 require three to be filed, as I understand what
7 this is all about.

8 PROFESSOR EDGAR: I'm sorry, Judge, I
9 didn't follow you. Rule 121 is talking about
10 extraordinary remedies.

11 PROFESSOR DORSANEO: And it works for
12 both -- it's meant to work in the Court of Appeals
13 and in the Supreme Court.

14 CHAIRMAN SOULES: Now, this is just to
15 add a paragraph.

16 PROFESSOR DORSANEO: This is just --
17 this looks -- if you want 12 copies.

18 JUSTICE WALLACE: It's all right with
19 us. We want everybody to have a copy. The
20 appellate clerk should have one. Twelve copies is
21 the number.

22 PROFESSOR DORSANEO: I move the
23 adoption of this suggestion.

24 PROFESSOR EDGAR: I see what they --
25 he just wants to make it clear that the Court of

1 Civil Appeals should file three copies and the
2 Supreme Court should file 12, that's all.

3 JUSTICE WALLACE: Yes. That's all.

4 PROFESSOR EDGAR: That's all, and
5 apparently that wasn't covered.

6 CHAIRMAN SOULES: Okay. This is
7 121(a).

8 PROFESSOR EDGAR: 121(h).

9 CHAIRMAN SOULES: No, it's not.

10 PROFESSOR DORSANEO: It's (a)(1)(h).

11 CHAIRMAN SOULES: It's 121(a) --

12 PROFESSOR DORSANEO: No, it's
13 (a)(2)(h).

14 CHAIRMAN SOULES: -- (2)(h). 121(a),
15 parens "a", parens "2", cap -- parens cap "h."
16 And we would -- is there any opposition to that?

17 PROFESSOR DORSANEO: Except I would
18 change the word "civil." I would take the word
19 "civil" out of this proposal so it just says the
20 "Court of Appeals."

21 MR. BRANSON: Where is Rule 121(a)?
22 Lefty's rule book doesn't have it.

23 MR. MCMAINS: Rules of Appellate
24 Procedure.

25 CHAIRMAN SOULES: It's one of those

1 TRAP rules.

2 JUSTICE WALLACE: "Civil" should not
3 be in it.

4 MR. MCMAINS: Luke?

5 CHAIRMAN SOULES: Yes, sir.

6 MR. MCMAINS: While we're at that
7 precise point, as I understand the practice,
8 basically, on mandamus is -- certainly in the
9 Supreme Court and basically in the Court of
10 Appeals, too -- is that the appended materials,
11 sometimes which are somewhat voluminous in a
12 mandamus, do, in fact, comprise or substitute for
13 the record, but they are not really identified as
14 a separate entity in this rule. And we shouldn't
15 have to file but one copy of that. And the Court
16 doesn't want but one copy of it, is my basic
17 understanding, from my experience.

18 MR. TINDALL: It would be kind of hard
19 to read much from the application itself, Rusty,
20 without seeing the underlying documents, though,
21 if you were a justice.

22 CHAIRMAN SOULES: There's only one
23 statement of facts and there's only one transcript
24 that's filed with the application for writ of
25 error, but 12 copies of the application go.

1 MR. MCMAINS: Right. You're supposed
2 to be stating the reasons and stuff there. If
3 anybody wants to see the record, they can go look
4 in the record. By I've been told by the clerk of
5 the Supreme Court before in filing a mandamus that
6 if I've got a separate exhibit volume, that they
7 don't need but one of those. In fact, she maybe
8 took some of them back before. And there's no
9 provision in the rule for that. That's not
10 identified as to how many copies.

11 PROFESSOR EDGAR: Well, you see, the
12 problem is that the rule really gives you,
13 correctly, I think, the concept that the exhibits
14 are a part of the petition, and that's right. But
15 what Rusty is saying is --

16 CHAIRMAN SOULES: No, it doesn't say
17 that.

18 PROFESSOR EDGAR: Well, yes, it does.
19 Look at 2(c).

20 CHAIRMAN SOULES: It says the petition
21 shall be accompanied by something else. And if
22 the something else that we're talking about is due
23 at one time --

24 PROFESSOR EDGAR: Well, but if you
25 accompany the petition and if you are supposed to

1 send three petitions, that means you are supposed
2 to have three accompaniments. That's the
3 problem.

4 CHAIRMAN SOULES: Why don't we say the
5 "certified or sworn copy of the order complained
6 of and other relevant" -- "only one copy shall be
7 filed of the" -- that's awkwardly worded, but how
8 do we say that?

9 PROFESSOR EDGAR: It seems to me that
10 maybe we can handle that in subsection 2(c) by
11 saying, "The petition shall be accompanied by a
12 single certified or sworn copy of the order
13 complained of and other relevant exhibits," or
14 something like that, because I could see why it
15 would be a mess.

16 MR. MCMAINS: Or at the end of that,
17 you can just say, "the certified order and
18 accompanying exhibits" -- that only one copy of
19 the certified order or accompanied exhibits need
20 to be filed.

21 PROFESSOR EDGAR: Yeah, something like
22 that.

23 PROFESSOR DORSANEO: I would move the
24 second sentence of (a)(2)(c) out of (c) altogether
25 and perhaps include it in a modified (a)(2)(h) or

1 perhaps just deal with it separately. I think
2 making the suggestion in (a)(2)(c) that these are
3 all of the piece comes from just proposing those
4 sentences one adjacent to the other.

5 PROFESSOR EDGAR: You could actually
6 make that second sentence -- change it a little
7 bit and make it (2)(d), because it really needs to
8 fit right underneath the petition and just say
9 that "A single certified or sworn copy of the
10 order complained of and other relevant exhibits
11 shall accompany the petition."

12 MR. MCMAINS: I would put it after (d)
13 because the (d) --

14 PROFESSOR DORSANEO: I would put it
15 after -- I would put it as (h). Because, look,
16 all of those say the petition, the petition, the
17 petition.

18 MR. MCMAINS: Yeah.

19 CHAIRMAN SOULES: Why not put it (i)?
20 When you're done with the petition, you're all the
21 way through, including how many copies of the
22 petition should be filed, and then make an (i) and
23 say what to file with the 12 copies.

24 PROFESSOR DORSANEO: Alphabet soup
25 here, but I would suggest that we make the second

1 sentence of "(a)(2)(c)" "(h)" saying this: "The
2 petition shall be accompanied by a certified or
3 sworn copy of the order complained of," et
4 cetera.

5 PROFESSOR EDGAR: I would say "by a
6 single" or "by one."

7 PROFESSOR DORSANEO: And then I would
8 make "(h)" "(i)" and say in (i) one copy of the
9 whatever.

10 CHAIRMAN SOULES: Why file a copy if
11 you file the original?

12 MR. MCMAINS: Wait. Luke?

13 CHAIRMAN SOULES: That's why you put
14 three copies of the petition and motion and then
15 you come down and you say --

16 PROFESSOR EDGAR: One copy --

17 CHAIRMAN SOULES: -- the clerk -- "A
18 party shall file any certified or sworn copy of
19 the order complained of and other relevant
20 exhibits."

21 MR. MCMAINS: Luke, the rule itself
22 is disorganized in the sense that (h) deals with
23 both the motion, which is in (1). This is all in
24 (2) which is petition.

25 PROFESSOR DORSANEO: This is true.

1 MR. MCMAINS: And then (3) is the
2 deposit of cost. Why don't we put a -- either put
3 it as (3) or put it as (4) in terms of number of
4 copies.

5 PROFESSOR EDGAR: Yes.

6 CHAIRMAN SOULES: Or "filing." Just
7 call it "filing."

8 MR. MCMAINS: But, I mean, you can get
9 two different things. You, first of all, need to
10 have that in addition to the petition and the
11 motion. It could be part of the petition, but it
12 needs to be done.

13 CHAIRMAN SOULES: Why don't we make
14 this 121(a)(3)? And that would -- what we would
15 do is move -- well, what is proposed as (h) would
16 be 121 -- should the filing fee be the last thing
17 to make "(3)" "(4)," or it does it make any
18 difference? I don't know.

19 PROFESSOR EDGAR: Well, I was just
20 thinking that you ought to -- to the petition, you
21 ought to talk about the certified or sworn copy
22 and the other relevant exhibits. And then after
23 that, you talk about the number of copies of the
24 motion and the brief. And then the next thing
25 would be the deposit for cost.

1 PROFESSOR DORSANEO: One additional
2 comment, we do have a rule talking about the
3 number of copies generally in the general rules,
4 and it is a bit odd that we have specific
5 information on the number of copies in the
6 original preceding rule rather than placing
7 reliance on the general rule that deals with
8 signing, filing and service and the number of
9 copies of things to be filed in the appellate
10 courts, generally. But it, by the way, does say
11 there will be 12 of whatever they are filed.

12 PROFESSOR EDGAR: Yeah, but those are
13 Appellate Rules, and this is an original
14 proceeding. I guess that's probably why it was
15 done that way. Because the general rules pertain
16 only to appeals.

17 PROFESSOR DORSANEO: No, the general
18 rules pertain to the Texas Rules of Appellate
19 Procedure. I guess maybe we could say that these
20 aren't Rules of Appellate Procedure. But I think
21 they are rules of activity in an appellate court,
22 so I think of them as appellate rules,
23 generically.

24 CHAIRMAN SOULES: Well, this is the
25 way the schematic works: The original proceeding

1 is commenced by delivery, not by filing. So, we
2 deliver the motion for leave and we deliver the
3 petition. And I think in (3) we ought to deliver
4 a certified or sworn copy. And that's all you
5 have to say. You don't have to put what you do
6 with it because in (a) it says, "by delivering to
7 the clerk the following." Take out of (c) and
8 just make that a (3) "a certified or sworn copy."

9 PROFESSOR EDGAR: Yes.

10 CHAIRMAN SOULES: And then -- let's
11 just -- through exhibits. And then make --

12 PROFESSOR EDGAR: What are you going
13 to nominate that paragraph?

14 CHAIRMAN SOULES: I'm not going to
15 nominate anything because it's number (3).

16 PROFESSOR EDGAR: Okay.

17 CHAIRMAN SOULES: (1) is a motion for
18 leave, (2) is petition, (3) is the ordering of
19 exhibits, and (4) is pay your costs.

20 PROFESSOR EDGAR: But you're not going
21 to nominate it as anything like the "motion" or
22 "petition"?

23 CHAIRMAN SOULES: No, I'm going to do
24 it just like (3), which really doesn't have a
25 caption because they're combined as one thing.

1 PROFESSOR EDGAR: And then (4) will be
2 your copies?

3 CHAIRMAN SOULES: No, because (h)
4 needs to be -- this needs to be (h), what Justice
5 Wallace has shown us here, because that tells what
6 means -- what you deliver when you deliver the
7 petition. You deliver 12 copies to the Supreme
8 Court and three copies to the Court of Appeals.
9 And the word "file" that's used in this proposal
10 is wrong; it's "deliver."

11 So, all I'm going to -- let me just -- first
12 let's clean up (2). One thing comes out of (2).
13 That's the second sentence in (c). I'll put it
14 someplace else in a minute. (h), then, gets
15 changed. And it says, "Three copies of the
16 motion, petition and brief shall be delivered to
17 the clerk of the Court of Appeals when the
18 petition is delivered to that clerk."

19 MR. MCMAINS: But, Luke, you're
20 leaving under the petition how many of the motions
21 are to be delivered. That's all I'm saying.

22 PROFESSOR EDGAR: It really ought to
23 be separate because, as you now have it, you have
24 it under petition but actually you're talking
25 about the motion, petition and the brief. That's

1 why I thought it ought to be a separate number.

2 CHAIRMAN SOULES: Yes. Okay. So,
3 that would be a -- that would become a (3).

4 121(a) --

5 PROFESSOR EDGAR: (4), because (3) is
6 the sentence, you have already taken out in (c).

7 CHAIRMAN SOULES: Yes, except -- but I
8 think this one becomes (3). This one is (3) and
9 it says, "Three copies of the motion, petition and
10 brief shall be delivered to the clerk of the Court
11 of Appeals when the petition is delivered to that
12 clerk. If the petition is delivered to the clerk
13 of the Supreme Court" -- "when the petition," is
14 that better? "When the petition is delivered to
15 the clerk of the Supreme Court."

16 PROFESSOR EDGAR: Either one.

17 CHAIRMAN SOULES: "Twelve copies of
18 the petition shall be delivered to the clerk of
19 that court."

20 PROFESSOR DORSANEO: Just say 12
21 copies.

22 CHAIRMAN SOULES: "Twelve copies shall
23 be delivered"?

24 PROFESSOR DORSANEO: Uh-huh. It has
25 to be clear.

1 CHAIRMAN SOULES: "Shall be
2 delivered," period. That's (3). (4), then, would
3 be, without any italics -- I guess you could
4 italicize "the record." Would that be helpful?

5 PROFESSOR EDGAR: Oh, I don't know
6 that it would.

7 PROFESSOR DORSANEO: I think it would,
8 you know.

9 CHAIRMAN SOULES: What?

10 PROFESSOR DORSANEO: I think it would
11 be a good idea, "the record."

12 CHAIRMAN SOULES: Okay. (4), then,
13 would say "record."

14 PROFESSOR DORSANEO: Or exhibits.

15 PROFESSOR EDGAR: But, you see, you're
16 talking about certified or sworn copies of orders
17 and other relative exhibits.

18 CHAIRMAN SOULES: But that's what the
19 record is looked at -- what if we call --

20 PROFESSOR DORSANEO: Documents.

21 CHAIRMAN SOULES: -- if we call the
22 certified or sworn copy of the order complained of
23 and other relevant exhibits "records" for purposes
24 of identifying it as something? Would that be a
25 mischaracterization of what it is?

1 MR. MCMAINS: No. That is what it
2 is.

3 PROFESSOR DORSANEO: Let's call it
4 "record" and instead of saying exhibits call --
5 say something else. Say "documents" or "matters"
6 or "items."

7 PROFESSOR EDGAR: "Relevant
8 documents."

9 PROFESSOR DORSANEO: Do we ever have
10 anything other than documents, Judge, on
11 mandamus?

12 MR. MCMAINS: Well, you sometimes have
13 a -- well, I don't know what you think of a
14 document as -- but you include in that a
15 transcription of testimony or whatever.

16 PROFESSOR EDGAR: That would be a
17 document.

18 CHAIRMAN SOULES: Because exhibits
19 might be a narrow word for adoption. We're
20 talking about changing "order complained of and
21 other relevant exhibits" to "order complained of
22 and other relevant documents."

23 PROFESSOR DORSANEO: Exhibits
24 suggested, it's flat gone to something.

25 MR. MCMAINS: Well, it can be

1 actually, but it --

2 CHAIRMAN SOULES: And the exhibits
3 should be bound, shouldn't they?

4 MR. MCMAINS: Well, now we are getting
5 into another problem. Here's our file, Judge.

6 CHAIRMAN SOULES: And other relevant
7 exhibits, okay. And then (5) will be what is now
8 (3). I guess we can italicize "deposit." And
9 then we will have it uniformity, if that's
10 important.

11 MR. TINDALL: Don't we have the same
12 problem, Luke, over in habeas corpus?

13 PROFESSOR DORSANEO: Well, let me
14 stop. I have two things to suggest.

15 CHAIRMAN SOULES: Okay. Now, that
16 will be a general scheme. Let's shoot at it.

17 PROFESSOR DORSANEO: One thing that we
18 could do, instead of getting into binding and all
19 of that, we could say together with table of
20 contents on the record that contains these
21 documents, if the Court wants one. I imagine good
22 lawyers are going to --

23 CHAIRMAN SOULES: Let's don't even
24 start on that.

25 PROFESSOR DORSANEO: All right.

1 Forget that. Second suggestion, what about
2 service? Do we want to have the other party, the
3 real party in interest, to get a copy of the
4 record?

5 CHAIRMAN SOULES: Well, how do you do
6 that, Rusty? You do that more than probably some
7 of you say. Do you send a copy on the record to
8 the opposite party?

9 MR. MCMAINS: As what practical matter
10 I do. I don't think there is any requirement of
11 it anymore than there is a requirement of the
12 service of the record of the statement of facts or
13 a transcript.

14 CHAIRMAN SOULES: Should we make it a
15 requirement here because we can? We're going to
16 be changing something. We could just say where it
17 says "service (b)," "shall properly serve upon
18 respondent each real party a copy of the motion,
19 petition and brief." Shall we say "motion,
20 petition, brief and record"? I imagine you would
21 want it if it's coming at you.

22 MR. MCMAINS: Yeah, because you're
23 dealing with such a quick action.

24 CHAIRMAN SOULES: Yeah, petition,
25 brief and record. That's a good suggestion.

1 Okay. Anything else on this? Do we hear a motion
2 that it be -- and I'm going to rewrite this and
3 send this to everybody. And thank goodness Hadley
4 saved me from a lot of bad stuff that would have
5 been in this blue book, giving me his comments on
6 some earlier stuff. So, this will be coming out.
7 Everybody can review it before it ever goes to the
8 Supreme Court. But anyway, if I can get it as
9 I've stated it, all in favor show by hands. Those
10 opposed? Okay. That's unanimously approved.

11 PROFESSOR DORSANEO: What about habeas
12 corpus? I don't want to go --

13 MR. TINDALL: We're going to do the
14 same change on habeas corpus.

15 PROFESSOR DORSANEO: But I don't see
16 anything in habeas corpus about --

17 PROFESSOR EDGAR: But it doesn't have
18 the same thing in it, though, Harry.

19 CHAIRMAN SOULES: Where are the
20 rules?

21 PROFESSOR DORSANEO: 120.

22 PROFESSOR EDGAR: 120, TRAP 120.

23 CHAIRMAN SOULES: Harry, if you will
24 make a fix on that as you think it should be and
25 send it to me, I'll send it out to everybody and

1 ask that they tell me if they're opposed.

2 MR. TINDALL: Well, it's just the same
3 thing in terms of all these exhibits. You only
4 want one copy, right, as opposed to 12 copies?

5 CHAIRMAN SOULES: Okay. Will you help
6 me by writing it up and sending it to me?

7 MR. TINDALL: Yes. If I can get --
8 I'm not sure what we finally voted on here today
9 in terms of 121. But it would be the same
10 problem, and the Court is hit with a ton of them.

11 CHAIRMAN SOULES: As soon as this is
12 drafted -- and Tina is going to start drafting on
13 this right away. As soon as we can get it drafted
14 up, I'll send it to you.

15 PROFESSOR DORSANEO: We need to find
16 out the practice from the courts, too. I mean,
17 what copies does the Court require? As I read
18 Rule 120, it doesn't say anything about the
19 copies.

20 PROFESSOR EDGAR: I don't see anything
21 in here.

22 PROFESSOR DORSANEO: So, it must be
23 dealt with either by rule --

24 CHAIRMAN SOULES: You don't see them
25 in habeas corpus.

1 PROFESSOR DORSANEO: -- by Rule 4 --

2 MR. TINDALL: You don't?

3 PROFESSOR DORSANEO: -- or not at
4 all.

5 PROFESSOR EDGAR: Yeah, you do see
6 habeas corpus. There's no numerical requirement
7 here in either of the Court of Appeals or the
8 Supreme Court on habeas corpus.

9 PROFESSOR DORSANEO: I guess habeas
10 corpus a writ of right. Maybe they somehow feel
11 that they shouldn't be penalized by not having the
12 right number of copies.

13 CHAIRMAN SOULES: If you send
14 something back to me, I'll start circulating it
15 anyway.

16 MR. TINDALL: It's no burning issue.

17 JUSTICE WALLACE: The problem -- the
18 clerk just got -- came up with this because she
19 said they had a couple people come in here that
20 bring us three copies and we need 12 to circulate
21 to everybody. I know it's no problem -- there's
22 the application for writ of habeas corpus. They
23 send 12 copies up and they submit it to everybody
24 on the Court.

25 MR. TINDALL: Well, I will withdraw

1 trying to plow through something that is not a
2 problem.

3 PROFESSOR BLAKELY: If you're about to
4 adjourn --

5 CHAIRMAN SOULES: No, I'm not about to
6 adjourn.

7 PROFESSOR BLAKELY: All right. I've
8 got a item.

9 CHAIRMAN SOULES: Is it a new item, a
10 change that we need to make?

11 PROFESSOR BLAKELY: Unless you covered
12 it yesterday, and stop me if you did, this would
13 be a motion to delete a Rule of Civil Procedure.

14 At our last meeting, you will recall, on the
15 dead man -- the Court's instruction regarding the
16 dead man, which is contained in 182(a) Rules of
17 Civil Procedure, we voted to put the essence of
18 that over in the Rules of Evidence at the end of
19 601(b), Rules of Evidence 601(b), and the Court
20 has just done that this week. So, 182(a) Rules of
21 Civil Procedure is now completely excess baggage,
22 and I move to delete 182(a), "The Court shall
23 instruct the jury on effect of Article 3716."
24 Strike that.

25 MR. TINDALL: I second that.

1 PROFESSOR DORSANEO: It's already in
2 the blue book, Newell.

3 CHAIRMAN SOULES: That is in the long
4 form book and that action has been taken. And I
5 appreciate, though, your -- it's in this book here
6 and we've already taken action to repeal it.

7 PROFESSOR BLAKELY: To repeal it, all
8 right.

9 CHAIRMAN SOULES: In reliance -- that
10 we would see that.

11 MR. TINDALL: Well, Luke, I'm going to
12 renew it again. We have at this meeting today --
13 yesterday and today -- we've taken out 182 and
14 182(a), two very important Rules of Evidence, and
15 I think properly so. They don't belong in these
16 rules. Why are we retaining 184 and 184(a)
17 amended in identical form that they are now over
18 in the Rules of Evidence?

19 CHAIRMAN SOULES: Well, we're going to
20 go to this book and we will be through here in an
21 hour and ten minutes. So, we can clean that up
22 later, Harry, and I can go into the new rules and
23 those basic rules. There are probably some reason
24 to leave them there another couple years. They
25 are redundant. There's no question about it. But

1 we really do have important business here.

2 First I want to, before we go to that,
3 announce that we have now completely reviewed the
4 entire docket of this committee that it has
5 accumulated over at least three years and disposed
6 of every pending matter that we did not feel
7 needed to be referred and was subject to being
8 referred to a later meeting. And those are very
9 few items.

10 And I thank every one of you as seriously as
11 I can for -- it is an understatement to say thanks
12 and commend the work of you people on these
13 rules. I can't thank you enough for the support
14 that you've given us. I appreciate it. Tom
15 Ragland.

16 MR. RAGLAND: A point of
17 clarification, procedurally, do I understand that
18 except for those rules which have been
19 specifically tabled or referred for further study,
20 that we're not going to rehash anything else, or
21 if anybody wants to propose a rule, they have to
22 start from scratch?

23 CHAIRMAN SOULES: Start over again,
24 that's right. Our docket is current. We will go
25 through the transcript and identify every matter

1 that was referred to a subcommittee to an interim
2 subcommittee. We will package those items and
3 send them to the head of that interim
4 subcommittee, and it will be only those that were
5 specifically tabled.

6 MR. RAGLAND: Would it be feasible,
7 Luke, to make some suggestion as to the format
8 that people make these requests in? For example,
9 some of this stuff comes in on these little
10 reduced things that have been copied six times and
11 are practically impossible to read. You can't
12 control how it's going to come in, but if word got
13 out to, you know, people who are interested in
14 making suggestions, that if we could have some
15 uniform format, suggested format, it sure might
16 make it easier on old people like me whose eyes
17 are failing.

18 CHAIRMAN SOULES: When it comes
19 through the COAJ they use the right form. When
20 they come from everywhere, we really can't control
21 the form they come in. But my first action when I
22 get a request is to send it to a subcommittee -- a
23 standing subcommittee chairman with instructions
24 to reduce the request for a proposed rule change,
25 whether they like it or not, and get it in the

1 form that you saw Bill's rules.

2 So, from now on, if the subcommittee chairmen
3 follow instructions and do what they're asked to
4 do, by the time a matter hits this table, there
5 will be a proposed rule drafted in form.

6 MR. RAGLAND: Well, maybe that's the
7 solution, then, is to have an internal format that
8 when it's redrafted that it comes in -- I would
9 like to know, for example, when a rule comes in as
10 proposed by a subcommittee chairman -- I would
11 like to know where it came from and some basis for
12 the rule than just having a piece of paper with
13 the proposed rule changes on it.

14 CHAIRMAN SOULES: Well, you've got
15 everything that has ever been received by this
16 committee in the interim in your book. I don't
17 have anything else. You've got all the letters,
18 everything, the reports of the subcommittees.
19 Now, the more we get the more you'll get.

20 MR. BRANSON: What Tom is suggesting,
21 if we're going to take it up, what if you had just
22 a standard form that says "origin of request,
23 problem addressed, recommendation"?

24 MR. RAGLAND: Yes. If the
25 subcommittee chairmen could be suggested to do

1 that, it may be too much -- you know, it may be
2 too much of an administrative problem and I don't
3 think we ought to be subject to sanctions if they
4 don't, but just in the interest of uniformity --

5 CHAIRMAN SOULES: I'll see if we can't
6 -- well, we'll produce a proposed form. We've
7 done that. All the subcommittee chairmen that we
8 have were sent an example of how rules were to be
9 prepared for our consideration. About half of
10 them got done that way.

11 MR. MCMAINS: Luke?

12 CHAIRMAN SOULES: Rusty.

13 MR. MCMAINS: Can I make a
14 recommendation that we, in essence, adopt for an
15 internal operating procedure, which I think will
16 perhaps expedite our business solutions, which is
17 that we -- and I think it's probably the
18 subcommittees chairman's respondent, because what
19 they should do -- what we should be doing is
20 distilling the request, seeing if we think they
21 have merit. And we're enforcing a position to
22 either recommend or reject or recognize there's a
23 problem and attempt to do something about it.

24 It would seem to me to facilitate it. And
25 this committee should act first on those in which

1 the subcommittee chairmen believe there is
2 something that should be done. And if the
3 subcommittee determines that probably there isn't
4 any problem, or the problem has been fixed, or it
5 shouldn't be done, if that were contained in a
6 separate docket of that subcommittee -- in other
7 words, either one has to --

8 MR. RAGLAND: There's a checklist on
9 the bottom down there, you know, of priority.

10 MR. MCMAINS: But the point is that
11 you can do it by priority that way. When the
12 subcommittee people have reviewed it and
13 determined that there is a problem, and then the
14 people have determined that there isn't a problem,
15 and the primary responsibility of the other
16 members of the committee should be when you --
17 when the subcommittee has acted and said, well,
18 this isn't a problem. They've got to docket those
19 and you get that out with sufficient notice.
20 Unless somebody else on the committee thinks that
21 there really is a problem there, you ought to just
22 go through and unanimously reject or not take up
23 those issues that have already been filtered
24 through and deal with the ones people perceive to
25 be a problem area.

1 CHAIRMAN SOULES: I'll do something
2 like that, but I think you probably already
3 perceive the response we feel -- everybody feels
4 to the people that send them in. I do not want to
5 reduce to second-class requests -- requests that a
6 subcommittee be rejected. I want them to be on
7 equal footing with the requests that the
8 subcommittee feels should be approved when they
9 hit our table so that the full committee gets
10 everything on full footing, but also has the
11 benefit of the recommendation of the subcommittee
12 and its reasoning.

13 Okay. I need to appoint subcommittees for
14 the interim and to get on with this blue book. We
15 have new members, and Justice Wallace can announce
16 who they are. Regrettably, Jim Kronzer has
17 resigned, and Nat Wells has resigned. And I know
18 that we want to have some resolution recognizing
19 their service, as well as Judge Woods who resigned
20 some time ago.

21 MR. MCMAINS: Are they just too busy,
22 Luke?

23 CHAIRMAN SOULES: I think they are
24 just too busy and maybe not as energetic towards
25 doing so many things as they used to be.

1 MR. BRANSON: Kronzer didn't have any
2 problems, though, just too busy.

3 CHAIRMAN SOULES: No one expressed any
4 particular -- any dissatisfaction with the
5 committee that had any bearing on their
6 resignation. So, that's all I can say about it.
7 But I know we're going to miss all three of those
8 people. They've done a lot of contributing over
9 the years.

10 PROFESSOR BLAKELY: Luke, Garland
11 Smith --

12 CHAIRMAN SOULES: And Garland Smith.

13 PROFESSOR BLAKELY: -- has been trying
14 to resign and he did not want to participate in
15 the Evidence Subcommittee any longer.

16 CHAIRMAN SOULES: I believe his
17 resignation was accepted with Judge Brown's.
18 Judge Brown was really on the committee a very
19 short time. But Garland Smith was the fourth one
20 who was -- has been on that a long time. So, I
21 will attempt to prepare some kind of a resolution
22 and circulate it to you-all recognizing their
23 service.

24 PROFESSOR DORSANEO: I think Mr. Wells
25 may have been on the committee since the time it

1 was reconstituted in 1941.

2 CHAIRMAN SOULES: Yeah.

3 PROFESSOR DORSANEO: He may have been
4 the longest serving member.

5 JUSTICE WALLACE: The Court has
6 appointed three new members. They are Elaine
7 Carlson, who teaches procedure at South Texas;
8 Diana Marshall, a lawyer in Houston; and Ken
9 Fuller, who is a family law practitioner in
10 Dallas.

11 CHAIRMAN SOULES: Okay. I need a
12 subcommittee chairman for rules 1 through 14.
13 Judge Thomas -- you know, I'm just going to say it
14 like it is on and off the record -- has had little
15 attendance and has not been responsive in drafting
16 what we need. I need some help there. Who do you
17 suggest?

18 PROFESSOR DORSANEO: Frank Branson.

19 CHAIRMAN SOULES: Pardon me?

20 PROFESSOR DORSANEO: Frank Branson.

21 CHAIRMAN SOULES: I'll find us
22 somebody, then, on that. Obviously, Sam Sparks
23 has done yeoman (phonetic) service. Tony is a new
24 member. I want to continue that. We need a new
25 chairman in the 216 to 314 area. Those are the

1 trial rules.

2 Hadley, I've asked you to take over the work
3 of Kronzer, and you haven't told me one way or the
4 other whether you were willing to do that. But
5 would you be willing, in lieu of that, to take
6 over Franklin Jones' work on trial rules?

7 PROFESSOR EDGAR: Well, I thought I
8 told you yesterday I would do that work. I
9 thought I did yesterday morning, but I will,
10 either one. It doesn't make any difference.

11 CHAIRMAN SOULES: Which would you be
12 more interested in?

13 PROFESSOR EDGAR: I don't care.
14 Whatever.

15 CHAIRMAN SOULES: Well, these are
16 those extraordinary rules.

17 PROFESSOR EDGAR: I'll do whatever.

18 CHAIRMAN SOULES: You ought to have
19 your choice since you've got some seniority.

20 PROFESSOR EDGAR: Well, I would rather
21 have the trial rules, but I don't know anything
22 about any -- I looked through those rules that
23 Kronzer was responsible for and I've never had any
24 experience except teaching them. But probably a
25 lot of other people are in the same boat.

1 MR. MCMAINS: What rules are those?

2 CHAIRMAN SOULES: 737 to 813.

3 PROFESSOR EDGAR: They're all forcible
4 entry, detainer, justice of the peace.

5 CHAIRMAN SOULES: I'm going to assign
6 those to Elaine Carlson since she teaches them,
7 too, and ask her if she will take that on.

8 PROFESSOR EDGAR: I really think we're
9 up to date anyhow, because based on what we've
10 done the last two days and what you sent me from
11 Kronzer, I don't think there is anything left
12 pending.

13 CHAIRMAN SOULES: There is nothing
14 left pending now. Harry has got a big job with a
15 bunch of assignments, but we can substitute
16 several -- we can cast different subcommittees, if
17 you wish.

18 MR. TINDALL: Whatever. We're pretty
19 current on items 315, or whatever, to 330. Those
20 are sort of, I would think, put to bed for a
21 while. But that left all those Rules 14, 15, 16
22 to merge around with those service rules. I
23 started this work with Sam on the service rule,
24 but it ended up writing them --

25 CHAIRMAN SOULES: Okay. Let's see

1 here. Now, Rusty -- no, Bill you had 342 to 472.
2 And where are those now? They're in the Appellate
3 Rules.

4 PROFESSOR DORSANEO: Appellate Rules.

5 MR. MCMAINS: They're in the Appellate
6 Rules.

7 CHAIRMAN SOULES: Is that all the
8 Appellate Rules? No, that's -- they were split
9 between -- Rusty, you had 474 to 515.

10 MR. MCMAINS: I had the Supreme Court
11 and he had the Court of Appeals.

12 CHAIRMAN SOULES: Can we -- are the
13 TRAP rules divided?

14 MR. MCMAINS: They're divided,
15 actually, into three sections, if you leave out
16 original proceedings. I mean, they have general
17 rules and then they have Courts of Appeals and
18 Supreme Court, which are really both, essentially,
19 similar rules, similar types of rules.

20 PROFESSOR DORSANEO: You know,
21 surprisingly, we've had relatively few problems
22 with them. And I think we've fixed most of them,
23 or have some other things we can work on. I'm
24 saying if you wanted to put me on something else,
25 I think that job is more or less done for the

1 foreseeable future.

2 CHAIRMAN SOULES: Well, Rusty, you
3 were telling me that the rules probably needed
4 some fine tuning.

5 MR. MCMAINS: Yeah. There are some
6 problems, which I'm sure that Judge Wallace is
7 familiar with. He may get inquiries
8 periodically. There are still some problems in
9 the wording as well as the thrust of some of the
10 computation time rules that are both in the
11 Appellate Rules and in the Civil Rules.

12 PROFESSOR DORSANEO: We've got
13 computation problems that are in both rule books,
14 notice problems. We've always had that problem.
15 Even 21(a) is not really a very good notice rule.

16 MR. MCMAINS: We have some problems
17 there in terms -- in a lot of respects because
18 some of our rules that require things to be done
19 before some time. And our computation rules don't
20 really deal at all with how you count backwards.

21 PROFESSOR DORSANEO: And how you deal
22 with holidays and things of that type. It's very
23 difficult to get this worked out because it's
24 almost like mathematics, higher mathematics.
25 Calculus problems, it seems like to me. They're

1 very intractable problems, but they're not just
2 appellate problems.

3 CHAIRMAN SOULES: Rusty, will you take
4 the TRAP group of rules as a whole?

5 MR. MCMAINS: Sure.

6 CHAIRMAN SOULES: And, Bill, will you
7 take over the discovery rules in the interim? And
8 I'll assign -- I know you're interested in that.
9 You told me, didn't you, that you wanted to look
10 at those rules as a whole?

11 PROFESSOR DORSANEO: Yes.

12 CHAIRMAN SOULES: And I'll have Tony
13 Sadberry take something else.

14 MR. MCMAINS: In that -- yeah, in that
15 vein, a lot of things that I would be looking at
16 in the TRAP rules will probably apply in the early
17 rules, which may be Branson's area.

18 PROFESSOR DORSANEO: Yeah, 1 through
19 -- that 1 through 14 includes the computation
20 rule.

21 MR. MCMAINS: Yeah. Well, 21(c) is
22 gone, sort of.

23 PROFESSOR DORSANEO: Well, somewhat
24 curiously 21(a) is -- I mean, 21(a), that notice
25 rule is up in the next section in the general

1 rules. Well, not too curious, but -- it's almost
2 like Rules 1 through -- not 1 through 14, but 1
3 through 21(a), those general rules are almost a
4 package. Because sometimes you look and you say,
5 wait a minute, this one ought to be moved from --
6 back to the preceding section.

7 CHAIRMAN SOULES: Well, we can all
8 communicate with ourselves where we think
9 reorganization ought to take place. Let's see.
10 So, it will be Branson on 1 to 14; Sparks on 15 to
11 166(a); Dorsaneo on 166(b) to 215(a); Edgar, 216
12 to 314; Harry Tindall 315 to 331; and then Rusty
13 will take all of what used to be 342 to 515. I'll
14 get Tony Sadberry to do the 523 and 591.

15 I need somebody to work on extraordinary writ
16 rules, execution and all that sort of thing, 592
17 to 734. Have we got another law teacher on the
18 committee?

19 PROFESSOR DORSANEO: Where did you put
20 Elaine?

21 CHAIRMAN SOULES: She's the next
22 bunch.

23 MR. TINDALL: Ken Fuller is interested
24 in those rules because we have some problem in
25 family law. You might -- he's not even a member

1 yet but --

2 CHAIRMAN SOULES: These extraordinary
3 writ rules tend to be very important when people
4 need them and not very interesting unless you have
5 to use them.

6 PROFESSOR EDGAR: Who else is on the
7 committee?

8 PROFESSOR DORSANEO: I recommend you
9 give those to Elaine.

10 CHAIRMAN SOULES: Give these to Elaine
11 Carlson? Who's going to deal with those trespass
12 to try title and all those rules? If we don't get
13 a law teacher on those -- and your hands are
14 full.

15 PROFESSOR DORSANEO: Well, I have a
16 simple solution to that.

17 CHAIRMAN SOULES: Abolish them?

18 PROFESSOR DORSANEO: Abolish them.

19 MR. BRANSON: Is it my understanding,
20 Luke, that my subcommittee has responsibility for
21 Rule 1?

22 PROFESSOR DORSANEO: I think Texas is
23 the only jurisdiction that still let's you plead
24 the common law general issue in that one form of
25 action.

1 MR. BRANSON: Was it my understanding
2 you appointed me to chair a subcommittee of Rules
3 1 through 14?

4 CHAIRMAN SOULES: You volunteered for
5 that, didn't you?

6 MR. BRANSON: Dorsaneo volunteered
7 me. Was that an appointment?

8 CHAIRMAN SOULES: Sir?

9 MR. BRANSON: Was that an
10 appointment?

11 MR. MCMAINS: It was made by
12 acclamation.

13 CHAIRMAN SOULES: Are you willing to
14 do that, Frank?

15 MR. BRANSON: I've always liked Rule 1
16 anyway.

17 MR. TINDALL: If all else fails, you
18 cite that rule, right?

19 CHAIRMAN SOULES: Okay. I need
20 somebody to work on these last rules. I guess no
21 one has any suggestions to who that might be.
22 I'll just try to get someone.

23 PROFESSOR EDGAR: Well, Spivey has
24 been involved in a lot of oil and gas litigation
25 lately. He ought to know a lot about trespass to

1 try title.

2 MR. SPIVEY: No.

3 CHAIRMAN SOULES: All right. Now, I'm
4 going to identify the errors that I know of in
5 here so I can get you-all current with me. On
6 Rule 8 in the -- from the bottom, counting four
7 lines up, the reference to "and 21(b)" should be
8 deleted, not of 21(b).

9 PROFESSOR EDGAR: What did we delete?

10 CHAIRMAN SOULES: You stop at 21(a) --

11 PROFESSOR EDGAR: Oh, okay.

12 CHAIRMAN SOULES: -- and drop and
13 21(b).

14 PROFESSOR EDGAR: Just with Rule
15 21(a).

16 CHAIRMAN SOULES: That's right. And
17 then on 10 --

18 MR. TINDALL: Luke, did you get that
19 error on 7?

20 PROFESSOR DORSANEO: Seven,
21 "withdrawal," -- "Appearance and withdrawal."

22 CHAIRMAN SOULES: Okay.

23 MR. TINDALL: The rule doesn't even
24 talk about that. Remember we --

25 CHAIRMAN SOULES: Yeah, I see that's

1 where it was to be a rewrite and we didn't get the
2 rewrite because we didn't get a response from the
3 chairman.

4 PROFESSOR EDGAR: There just is no
5 change then.

6 MR. TINDALL: We need to not make that
7 change at all.

8 CHAIRMAN SOULES: So, we're just not
9 going to have a change in that at all.

10 PROFESSOR EDGAR: So, we will just
11 delete that page?

12 CHAIRMAN SOULES: Yes, we will just
13 delete that page. On Rule 10 we've got that same
14 deletion of 21(b) from the last line. And then
15 counting up from the bottom where it says, seven,
16 where it says "state bar," cap those, initial
17 caps, and add a "Texas."

18 PROFESSOR EDGAR: "State Bar of Texas
19 number."

20 CHAIRMAN SOULES: And add the word
21 "identification," which is the way we've used it
22 in other places. "State Bar of Texas
23 identification number."

24 MR. BRANSON: How should it read,
25 Luke?

1 CHAIRMAN SOULES: "State Bar of Texas
2 identification number." And then go on down to
3 three lines from the bottom. This really deals
4 with different circumstances than the first
5 sentence. This has to do with when not everybody
6 withdraws. This is when just the lead attorney
7 withdraws, but it doesn't say that. So, insert
8 the following: "If the attorney in charge
9 withdraws" before the comma, "and other counsel
10 remain or become substituted."

11 PROFESSOR EDGAR: "And other counsel
12 remain"?

13 CHAIRMAN SOULES: Right. "Or become
14 substituted." Under those circumstances another
15 counsel must be designated as attorney in charge.
16 It plays out. You see, you made -- the ambiguity
17 there was that the lawyer couldn't withdraw unless
18 another lawyer took his place, and we wanted to
19 straighten that out.

20 Okay. The next one on Rule 11, just
21 capitalize the "n" in "no" at the beginning of the
22 sentence. Then in Rule 16 --

23 PROFESSOR EDGAR: Just a minute. What
24 did you capitalize?

25 CHAIRMAN SOULES: The "no."

1 PROFESSOR EDGAR: But you start out
2 "unless otherwise provided by these rules."

3 MR. TINDALL: That's being taken out.

4 PROFESSOR EDGAR: That's being added,
5 not stricken.

6 CHAIRMAN SOULES: That's no change.

7 PROFESSOR DORSANEO: That's added. No
8 change.

9 PROFESSOR EDGAR: Once you strike it
10 out, those little dash lines, see, in Rule 10 --

11 CHAIRMAN SOULES: I'm sorry. Yeah,
12 that's right. On Rule 16, "every officer," we
13 should insert there "or authorized person." That
14 is intended for the record to include persons
15 authorized by court order and persons authorized
16 by the law.

17 PROFESSOR DORSANEO: Do we need "and
18 precepts"?

19 MR. TINDALL: No.

20 MR. RAGLAND: That's in the statute
21 that requires sheriffs and constables to serve all
22 writs and process. That's the only reason that's
23 in here that I can find. That's statutory
24 language.

25 MR. TINDALL: But "precept" is a

1 subspecies of "process."

2 MR. RAGLAND: I don't know what it
3 says but it's in there.

4 CHAIRMAN SOULES: Okay. Let's just
5 straighten up these problems. Okay. And I don't
6 have them -- that gets -- I'm just going to flip
7 quickly through and see if I have anything else
8 else. I think I may have one or two more.

9 PROFESSOR DORSANEO: What, what?

10 CHAIRMAN SOULES: There's another one
11 back here.

12 PROFESSOR DORSANEO: I've got a lot of
13 comments.

14 CHAIRMAN SOULES: Everybody --

15 PROFESSOR EDGAR: Wait, wait wait.

16 PROFESSOR DORSANEO: I've got a whole
17 bunch of comments.

18 PROFESSOR EDGAR: He's got a bunch of
19 comments.

20 CHAIRMAN SOULES: Okay. Everybody
21 start marking because I think those are the end of
22 mine.

23 PROFESSOR EDGAR: I've already
24 marked. I've got some. Go ahead, Bill. You go
25 first.

1 CHAIRMAN SOULES: Let's just start
2 with the first -- does anybody -- what's the
3 earliest rule somebody has got a problem with?

4 PROFESSOR DORSANE0: 18(a).

5 CHAIRMAN SOULES: 18(a). Does anyone
6 have one before that? Okay. Let's go to 18(a).

7 PROFESSOR DORSANE0: Spell
8 "admissible" correctly.

9 PROFESSOR EDGAR: Where are you?

10 PROFESSOR DORSANE0: Page --

11 PROFESSOR EDGAR: What paragraph?

12 PROFESSOR DORSANE0: First paragraph
13 in the additional language, "such facts as would
14 be admissible," I-B-L-E. And I think the word
15 "based" can go in the next line, can't it?

16 CHAIRMAN SOULES: Yes. Okay.
17 Anything else? Who's got another rule?

18 PROFESSOR DORSANE0: I've got more.

19 CHAIRMAN SOULES: Okay.

20 PROFESSOR DORSANE0: In (g) I do not
21 believe that these government code
22 cross-references are accurate, because I think the
23 Court Administration Act is in the revised Civil
24 Statutes of 200a-1.

25 CHAIRMAN SOULES: 200a-1 is spread all

1 over the world. And if you want to find some old
2 language from it, you may be very lucky to find it
3 at all. It is just fragmented. So, I think we
4 ought to just put "pursuant to statute."

5 PROFESSOR DORSANEO: I would suggest
6 this: How about say "pursuant to the Court
7 Administration Act"? That's where it would be.

8 CHAIRMAN SOULES: I'm not sure -- is
9 all of 200a there?

10 PROFESSOR DORSANEO: It's 200a-1.

11 CHAIRMAN SOULES: I know, but there's
12 a paragraph about that long that's been stricken.

13 PROFESSOR DORSANEO: It hasn't.

14 CHAIRMAN SOULES: You say no?

15 PROFESSOR DORSANEO: No. That was
16 enacted in --

17 MR. MCMAINS: It was enacted after the
18 code.

19 PROFESSOR DORSANEO: -- after the code
20 was written. And it will be put in the code I
21 suspect.

22 MR. MCMAINS: It is part of the code
23 by statute, but you don't know where it goes.

24 CHAIRMAN SOULES: Is all of the --
25 okay.

1 PROFESSOR DORSANEO: All of this stuff
2 -- this is --

3 CHAIRMAN SOULES: To the Court
4 Administration Act.

5 PROFESSOR DORSANEO: The Court
6 Administration Act. That's the --

7 CHAIRMAN SOULES: To the Court
8 Administration Act.

9 MR. TINDALL: But there are rules in
10 the government code that --

11 PROFESSOR DORSANEO: They're in there
12 but they don't mean anything because the Court
13 Administration Act takes care of it.

14 CHAIRMAN SOULES: Well, how about in
15 the Government Code, in case we're missing
16 something here? "Pursuant to the Court
17 Administration Act and the Government Code."

18 PROFESSOR DORSANEO: Well --

19 CHAIRMAN SOULES: Or does he have any
20 powers under the Government Code?

21 MR. TINDALL: The Court Administration
22 Act I assure you --

23 PROFESSOR DORSANEO: The Court
24 Administration Act is going to undoubtedly be put
25 in the Government Code and not call 200a-1, that's

1 going to be sections this and that.

2 CHAIRMAN SOULES: Okay.

3 PROFESSOR DORSANEO: I'm sure that's
4 going to be how it's done.

5 PROFESSOR EDGAR: What do you propose
6 we do?

7 PROFESSOR DORSANEO: That we use the
8 words "the Court Administration Act."

9 PROFESSOR EDGAR: And make no
10 reference to the Government Code?

11 PROFESSOR DORSANEO: No numbers.

12 PROFESSOR EDGAR: And make no
13 reference to the Government Code?

14 PROFESSOR DORSANEO: Uh-huh.

15 CHAIRMAN SOULES: What else?

16 PROFESSOR DORSANEO: Rule 30.

17 CHAIRMAN SOULES: Rule 30, okay.

18 PROFESSOR DORSANEO: Signers,
19 endorsers -- all right. First of all, I would
20 strike "title" and say "chapter" because the
21 Business and Commerce Code is divided into
22 chapters.

23 CHAIRMAN SOULES: Okay.

24 PROFESSOR EDGAR: Should we say
25 "chapters" singular or plural?

1 PROFESSOR DORSANEO: What?

2 PROFESSOR EDGAR: Singular or plural
3 "chapter"? "Chapter" or "chapters"?

4 PROFESSOR DORSANEO: Chapter.

5 MR. MCMAINS: There's only one chapter
6 dealing with a negotiable instrument.

7 CHAIRMAN SOULES: Okay.

8 PROFESSOR DORSANEO: And I think that
9 we either -- I wish I had my UCC here. But I
10 think, instead of talking about bills and notes,
11 we should talk about commercial paper, whatever
12 Chapter 3 of the UCC Business and Commerce Code
13 entitles itself.

14 CHAIRMAN SOULES: Okay.

15 PROFESSOR DORSANEO: Then the other
16 problem that comes up is that this reference to
17 Section 17.001 of the Civil Practice and Remedies
18 Code -- and by the way, I would recommend
19 throughout these rules that we do not need to say
20 "Texas Civil Practice and Remedies Code." I think
21 it is sufficient to say "Civil Practice and
22 Remedies Code" without using the word "Texas" as
23 we did with the Government Code.

24 But I would recommend that we say in the
25 cases provided for by law or by statute rather

1 than cross-referencing Section 17.001, because it
2 is only one of many statutes dealing with this
3 problem.

4 For example, to point it up, Section 17.001
5 is not a provision that was moved from the
6 Business and Commerce Code to the Civil Practice
7 and Remedies Code. It is a provision that was
8 moved from the revised civil statutes dealing with
9 the same subject matter as the subject matter
10 dealt with by the UCC -- I can't finish this
11 sentence.

12 But I'm saying it is provided for by statute
13 or by law because there are more than one statute
14 that deals with this question. Some are in the
15 UCC.

16 CHAIRMAN SOULES: So, you say
17 "provided for by law" and strike the section
18 references.

19 PROFESSOR DORSANEO: Uh-huh.

20 CHAIRMAN SOULES: All right. What
21 else?

22 MR. MCMAINS: Do you want to say "of
23 law" or "of statute"?

24 CHAIRMAN SOULES: Well, are codes
25 statutes? I guess they are.

1 PROFESSOR DORSANEO: Yeah, I'd say
2 "statutes."

3 CHAIRMAN SOULES: "Statute"?

4 PROFESSOR DORSANEO: "Statute."

5 PROFESSOR EDGAR: Now, do you want to
6 put Texas in front of Business and Commerce Code?
7 You see, you --

8 PROFESSOR DORSANEO: No. I don't
9 think we need to say "Texas" in front of
10 anything.

11 CHAIRMAN SOULES: Okay. What else?

12 PROFESSOR DORSANEO: On Rule 45, spell
13 "approximately" right.

14 CHAIRMAN SOULES: Where?

15 PROFESSOR EDGAR: Where?

16 PROFESSOR DORSANEO: Just turn the
17 page, the next page.

18 PROFESSOR EDGAR: Where, though, on
19 the next page?

20 PROFESSOR DORSANEO: "On paper
21 measuring approximately."

22 MR. MCMAINS: It's the underlined.

23 PROFESSOR DORSANEO: Yeah, I'm always
24 -- I'm really only looking at the -- I'm sorry, I
25 will make it clearer.

1 CHAIRMAN SOULES: Reverse the "L" and
2 the "E"?

3 MR. TINDALL: That's it.

4 CHAIRMAN SOULES: Okay. What's next?

5 PROFESSOR DORSANEO: Now, on Rule 86
6 -- pardon me, 87.

7 CHAIRMAN SOULES: Okay.

8 PROFESSOR DORSANEO: You can rule me
9 out of order on this, but a number of times Rusty
10 and I volunteered to redraft paragraph (b) of Rule
11 87. We were directed to do it over and over
12 again. I think there is a simple way to solve the
13 problem, at least to improve the situation, by
14 doing these things: Putting a period after "cause
15 of action."

16 CHAIRMAN SOULES: In the second line.

17 PROFESSOR DORSANEO: In the second
18 line. Striking the word "but," capitalizing
19 "the," and having that sentence beginning with
20 "the," as capitalized, end with "pleadings,"
21 period, striking "by" in the fourth line and
22 capitalizing "when," such that the first two
23 sentences read as follows:

24 "It shall not be necessary for a claimant to
25 prove the merits of a cause of action," period.

1 "The existence of a cause of action when pleaded
2 properly shall be taken as established as alleged
3 by the pleadings," period.

4 Then the next sentence, "When the claimant's
5 venue allegations are," and I would reverse
6 "specifically" and "denied" and say "are denied
7 specifically," comma, "the pleader is required to
8 support his," and I suggest this: Delete the
9 words "pleading that the cause of action or a part
10 thereof accrued in the county of suit," and
11 substitute for those words "venue allegations."
12 Such the sentence reads this way: "When the
13 claimant's venue allegations are denied
14 specifically," comma, "the pleader is required to
15 support his venue allegations by prima facie proof
16 as provided in paragraph (3) of this rule."

17 I think that eliminates what we have been
18 trying to eliminate in terms of an ambiguity on
19 this issue for a period of about two years.

20 CHAIRMAN SOULES: If that takes
21 discussion, we're not going to be able to spend
22 much time on it. If it's okay -- does that
23 require discussion?

24 MR. MCMAINS: I'm not -- it's not a
25 substantive change. I'm not confident that it

1 fixes the problem, but it probably improves it.

2 CHAIRMAN SOULES: Okay. We'll do
3 those changes.

4 PROFESSOR EDGAR: How are you going to
5 do that except -- unless you make it plural?

6 PROFESSOR DORSANEO: "The."

7 PROFESSOR EDGAR: Everything else has
8 been singular.

9 PROFESSOR DORSANEO: "The."

10 CHAIRMAN SOULES: The venue
11 allegations. Okay. What's next?

12 PROFESSOR EDGAR: "The venue
13 allegations"?

14 CHAIRMAN SOULES: Uh-huh.

15 PROFESSOR EDGAR: And then you pick
16 up --

17 MR. MCMAINS: Wait a minute. Do you
18 want --

19 PROFESSOR EDGAR: What have you
20 deleted then?

21 MR. MCMAINS: Do you want "the" or
22 "such"?

23 PROFESSOR EDGAR: Yeah, "the" can be
24 either.

25 MR. MCMAINS: Well, because you don't

1 want to say that if they deny "X," you have to
2 prove "X" and "Y."

3 PROFESSOR DORSANEO: "The claimant's."

4 CHAIRMAN SOULES: In that same
5 sentence we talk about the claimant.

6 MR. MCMAINS: No, "When the claimant's
7 venue allegations are specifically denied, pleader
8 is required to support such venue allegations."

9 PROFESSOR DORSANEO: I don't like
10 "such" but let's use it.

11 CHAIRMAN SOULES: One minute here.
12 Let's go.

13 PROFESSOR EDGAR: Now, what have we
14 deleted now, "such venue allegations," and then
15 we've struck --

16 CHAIRMAN SOULES: "By prima facie
17 proven." Go right to "by prima facie proven" in
18 the next line. Okay. Anybody that's got a note
19 as we're turning, just raise them as we go.

20 PROFESSOR DORSANEO: The next one I
21 have is Rule 145.

22 CHAIRMAN SOULES: Anybody got one
23 between where we were and 145? Okay, 145.

24 PROFESSOR DORSANEO: And I have,
25 really, just stylistic things here, and I don't

1 know, maybe I missed a meeting or whatever.

2 MR. MCMAINS: You have the "Texas" in
3 the Rule 113 again, Civil Practice Remedies Code.

4 PROFESSOR DORSANEO: Yeah, that's
5 everywhere. All of Jeremy Wicker's suggestions
6 include the word "Texas."

7 CHAIRMAN SOULES: Okay. This is on a
8 word processor. We'll look for "Texas" and cap
9 "T" in the style of the code and delete it
10 wherever it appears.

11 PROFESSOR DORSANEO: I can go through
12 this quickly, Luke, 145, if you want to.

13 CHAIRMAN SOULES: Okay.

14 PROFESSOR DORSANEO: The second
15 sentence in the new matter, "The party who is
16 unable to afford cost is defined as a person" --
17 do we want to say -- we obviously don't want to
18 say "who was presenting receiving." I would
19 suggest deleting the word "presenting."

20 CHAIRMAN SOULES: It's supposed to be
21 "presently." It's "presently receiving" it.

22 PROFESSOR DORSANEO: It's unnecessary
23 to say "presently receiving" it. If you're
24 receiving it you're receiving it presently.
25 You're not receiving it later.

1 CHAIRMAN SOULES: All right.

2 PROFESSOR DORSANEO: And I would
3 change the word "government" to "governmental."
4 That's just a grammarian's notes.

5 CHAIRMAN SOULES: All right.

6 PROFESSOR DORSANEO: And then the last
7 sentence on that first paragraph, I would suggest
8 saying "in the manner prescribed by this rule"
9 rather than "in the herein prescribed procedure."

10 CHAIRMAN SOULES: In the manner --

11 PROFESSOR DORSANEO: "Prescribed by
12 this rule." And that's the next --

13 PROFESSOR EDGAR: "Prescribed" or
14 "described," did you just say?

15 CHAIRMAN SOULES: Prescribed.

16 PROFESSOR EDGAR: "In the manner
17 prescribed by this rule"?

18 PROFESSOR DORSANEO: Uh-huh.

19 CHAIRMAN SOULES: All right. What's
20 next?

21 PROFESSOR DORSANEO: In the second
22 line of procedure, could we change the word
23 "accord" to "provide"? "Upon the filing of the
24 affidavit, the clerk shall docket the action,
25 issue citation and provide such other customary

1 services." Fourth line, "the" needs to be spelled
2 correctly.

3 CHAIRMAN SOULES: Okay.

4 PROFESSOR DORSANEO: In the next
5 sentence I'm having trouble. "If the Court shall
6 find at the first regular hearing in the course of
7 the action," why does that -- why is language -- I
8 suggest we strike that language.

9 PROFESSOR EDGAR: But you say "if the
10 Court finds." Just "if the Court finds at the
11 first regular hearing."

12 PROFESSOR DORSANEO: And, again,
13 "governmental." And "governmental" throughout. I
14 don't know whether -- I may have gotten tired of
15 editing this by the time I got to the next page.
16 I think those are the major problems.

17 CHAIRMAN SOULES: "If the Court shall
18 find that the party is able to afford cost, the
19 party shall pay the cost." Okay.

20 PROFESSOR EDGAR: How is the sentence
21 going to read now, Luke?

22 CHAIRMAN SOULES: "If the Court shall
23 find that the party is able to afford cost, the
24 party shall pay the cost in the action."

25 MR. RAGLAND: Isn't the point of this

1 rule trying to avoid having a special hearing on
2 inability to pay costs and trying to get it at the
3 first regular hearing in the case? Isn't that
4 what -- the reason for this language here.

5 CHAIRMAN SOULES: I don't know. See,
6 I think the reason at the first regular hearing in
7 the course of the action, that that's -- that was
8 made to be punitive. Because what follows is that
9 that party who filed an affidavit of inability has
10 been found to be lying, then he's stuck with the
11 cost. That takes away the Judge's discretion to
12 charge the cost of the action to another party
13 even if that party wins. That's what this says.

14 I think that's why that was tagged. It had
15 to be done at the first regular hearing. After
16 that, the cost would be assessed wherever.

17 MR. RAGLAND: Well, if we take out the
18 language about the first regular hearing, do we
19 reverse back to the old practice of where they
20 contested the pauper's oath before you can do
21 anything?

22 CHAIRMAN SOULES: No, just anywhere
23 along the line that the Court finds that the party
24 can pay costs, he gets stuck. So, if he gets to
25 where he can pay costs, he better withdraw, I

1 guess, his affidavit.

2 MR. MCMAINS: Did you find on the last
3 sentence in that Rule 145 -- did you-all fix that
4 "or"? I don't know what it's there for. "Except
5 with leave of court, no further steps in the
6 action or will be taken" -- I don't --

7 CHAIRMAN SOULES: I'm inclined just to
8 to leave that sentence "If the Court shall find"
9 the way it is, because that's been given some
10 study. It's got a set point in time and we don't
11 have time to redo it. We're changing it
12 substantively at this point with Bill's
13 suggestion. So, I want to leave that alone if
14 that's okay.

15 PROFESSOR DORSANEO: It's crazy,
16 though.

17 CHAIRMAN SOULES: Well, I know, but
18 you can't understand it. Okay. What's next?

19 MR. MCMAINS: Do you see what I'm
20 saying, Luke?

21 CHAIRMAN SOULES: I'm sorry.

22 MR. MCMAINS: Is the "or" out? What
23 did we do?

24 CHAIRMAN SOULES: Where?

25 MR. MCMAINS: 145, the last sentence

1 on that page that begins with "except." It says
2 "no further steps in the action or will be
3 taken." That "or" --

4 CHAIRMAN SOULES: That's not supposed
5 to be there. "Will be taken." Thank you. Okay.
6 What's next?

7 PROFESSOR DORSANEO: Rule 161 has that
8 same problem that 1701 had in the other place.

9 PROFESSOR EDGAR: We just said there
10 "by statute."

11 PROFESSOR DORSANEO: "Provided by
12 statute." Whenever we have principal obligor and
13 secondary obligor, we implicate a lot of statutes,
14 not just this one.

15 CHAIRMAN SOULES: Okay.

16 PROFESSOR DORSANEO: All right.
17 That's the same problem again in Rule 163.

18 CHAIRMAN SOULES: Okay. "Provided for
19 by statute." Okay.

20 PROFESSOR DORSANEO: And if the Court
21 wants, we could write comments to say -- you can
22 drive yourself crazy because it starts to list all
23 the statutes to deal with it, so I'm going to take
24 that back.

25 CHAIRMAN SOULES: Okay.

1 MR. MCMAINS: I don't think 165(a) was
2 supposed to change anything. If the underlined
3 portion doesn't have an error in it, we don't have
4 to worry about it? I was just curious.

5 CHAIRMAN SOULES: That's right.

6 MR. MCMAINS: Okay.

7 MR. RAGLAND: I have a question about
8 168 paragraph 7, the last phrase, the last
9 paragraph, "true copy of each shall be promptly
10 filed in the clerk's office together with proof of
11 service." Does that still require the originater
12 of interrogatories to file those blank
13 interrogatories with the clerk and then responses
14 coming back be filed also? You had a lot of
15 discussion about --

16 MR. MCMAINS: That's not a change,
17 though.

18 MR. RAGLAND: Well, it's not a change,
19 but we had a lot of discussion about the necessity
20 of filing interrogatories and then the rule
21 requiring that the answers be made right under the
22 questions in filing those, too.

23 CHAIRMAN SOULES: Well, we voted not
24 to change it.

25 MR. RAGLAND: Okay.

1 CHAIRMAN SOULES: Okay. Next?

2 PROFESSOR DORSANEO: I don't have
3 anything until 215.

4 MR. RAGLAND: There's a typo on 205.

5 CHAIRMAN SOULES: Is there a typo on
6 205? Where is it, Tom? Thanks.

7 MR. RAGLAND: Five lines from the
8 bottom, "sued," I think it should be "used."

9 CHAIRMAN SOULES: It looks like it,
10 doesn't it? Thank you. Okay. Then the next one
11 is 215, Bill?

12 PROFESSOR DORSANEO: Uh-huh.

13 CHAIRMAN SOULES: I've got one on
14 206.

15 PROFESSOR DORSANEO: Okay.

16 CHAIRMAN SOULES: We've got -- let's
17 see. In the underlined portion, the last line of
18 the underlined portion, where it says "copy," that
19 word should come out.

20 MR. MCMAINS: Do you want to put in
21 there "transcripts"?

22 PROFESSOR EDGAR: That should be
23 "deposition transcripts."

24 MR. TINDALL: In both places.

25 CHAIRMAN SOULES: "The original of the

1 deposition transcript."

2 MR. MCMAINS: Why don't we just say
3 "preparing the original deposition transcript."
4 We don't need any other --

5 CHAIRMAN SOULES: "The original of the
6 deposition transcript," that's good. Okay. What
7 else on that? Something else?

8 PROFESSOR EDGAR: Well, 206 really
9 should start off by "certification of the officer
10 shall certify on the deposition transcript."

11 CHAIRMAN SOULES: Okay.

12 MR. TINDALL: That bleeds through
13 every sentence.

14 PROFESSOR EDGAR: That's right.

15 PROFESSOR DORSANEO: They just have to
16 get your thing out of the other book and compare.

17 CHAIRMAN SOULES: We'll do that.

18 PROFESSOR EDGAR: I would say that it
19 is a true record. I wouldn't repeat that
20 deposition again.

21 CHAIRMAN SOULES: Okay.

22 PROFESSOR EDGAR: And the same thing
23 is true on 207. We should be using "deposition
24 transcripts in court proceedings."

25 CHAIRMAN SOULES: Okay.

1 PROFESSOR DORSANEO: Do we want to say
2 in that sentence that begins "further," the
3 bracketed underlined sentence at the bottom of
4 (a), "the evidence rules" -- "further the evidence
5 rules shall be applied." Is that the way we want
6 to say it? For some reason that bothers me.

7 PROFESSOR EDGAR: The rules of
8 evidence.

9 PROFESSOR DORSANEO: I like "rules of
10 evidence" better.

11 PROFESSOR EDGAR: Yeah, I do, too.

12 CHAIRMAN SOULES: Okay. Should we cap
13 them?

14 PROFESSOR EDGAR: Yeah.

15 CHAIRMAN SOULES: Are we talking about
16 the rules of evidence capped or rules of evidence
17 inclusive of any that are not in the Texas Rules
18 of Evidence? I guess small letters.

19 PROFESSOR DORSANEO: I'm happy with
20 the small letters.

21 CHAIRMAN SOULES: Okay.

22 PROFESSOR DORSANEO: Although big
23 letters are used in (2) on the next page.

24 CHAIRMAN SOULES: Okay.

25 PROFESSOR BLAKELY: Let me stop you.

1 CHAIRMAN SOULES: Okay, stop me.

2 PROFESSOR BLAKELY: I believe those
3 are going to be the Texas Rules of Civil
4 Evidence.

5 CHAIRMAN SOULES: Why don't we just
6 say the little "r" rules of little "e" evidence
7 and let somebody else figure out what they are?

8 PROFESSOR DORSANEO: They might be
9 called Irish Schwartz (phonetic) next year.

10 CHAIRMAN SOULES: We'll delete that,
11 okay.

12 PROFESSOR DORSANEO: Are we on 215?

13 CHAIRMAN SOULES: 207. Now, we've got
14 some changes that we're going to incorporate from
15 today's meeting. We've gotten a lot of good input
16 from Hadley there. And 208 as well. Okay, 215.

17 PROFESSOR DORSANEO: I don't know
18 whether that says "offeror" there or not, but I
19 would suggest saying "party offering" or some such
20 words rather than "offeror." It seems clumsy.

21 CHAIRMAN SOULES: "The party offering
22 the evidence," okay.

23 PROFESSOR EDGAR: "The party offering
24 the evidence"?

25 CHAIRMAN SOULES: Yes.

1 PROFESSOR DORSANEO: I don't have
2 anything until Rule 274.

3 PROFESSOR EDGAR: "Objectionable" is
4 spelled wrong.

5 CHAIRMAN SOULES: And where is that?

6 PROFESSOR DORSANEO: We went to 274,
7 but does anybody have anything in between?

8 MR. RAGLAND: Typo on 273.

9 CHAIRMAN SOULES: Where is that, Tom?

10 MR. RAGLAND: The second from the
11 bottom, "apart from."

12 CHAIRMAN SOULES: Thank you.

13 PROFESSOR EDGAR: 274, second line
14 should be "objectionable" rather than
15 "objectional."

16 CHAIRMAN SOULES: Objection, A-B-L-E.
17 Right. Or is that an "i"?

18 PROFESSOR DORSANEO: "A".

19 PROFESSOR EDGAR: 275 caption should
20 be "Charge" rather than "Special Submission." In
21 other words, that charge read before argument.

22 PROFESSOR DORSANEO: Could we back up
23 to 274 one second? Would it be all right with
24 everyone to take the words "shall be deemed"
25 before the word "waived" and just substitute

1 "is"? "Any complaint as to a question, charge,
2 definition or instruction on account of any
3 defect, omission or fault in pleading," do we want
4 to retain the old language "shall be deemed
5 waived," or should we just say "is waived unless
6 specifically included in the objections"?

7 CHAIRMAN SOULES: "Is" is a more
8 direct word. Rusty, do you see any problem with
9 that? Okay. Strike "shall be deemed" and insert
10 "is." Okay.

11 PROFESSOR EDGAR: Then 275 we change
12 that -- now, somehow Rule 276 fell through the
13 cracks here.

14 CHAIRMAN SOULES: Where did it go?

15 PROFESSOR EDGAR: Well, I sent it to
16 you. I don't know what you did -- in fact, I
17 pointed out when I sent it back to you that it
18 wasn't included and it still isn't in here.

19 CHAIRMAN SOULES: Well, I didn't know
20 what we did with it.

21 PROFESSOR DORSANEO: You screwed up
22 twice.

23 CHAIRMAN SOULES: It will be in there
24 next time. I'll send it to you right away.

25 PROFESSOR EDGAR: Just make a note.

1 You've got it somewhere because -- but it needs to
2 be included here. And the next one, then, I
3 have --

4 MR. TINDALL: Luke, you've got the one
5 I proposed on 277.

6 CHAIRMAN SOULES: Yes.

7 MR. TINDALL: The caption being --

8 CHAIRMAN SOULES: The caption should
9 be "Submission to the Jury" instead of "Special
10 Issues to the Jury" -- or "Interrogatories to the
11 Jury."

12 PROFESSOR EDGAR: Yeah.

13 CHAIRMAN SOULES: "Submission to the
14 Jury," and that's what you-all said. We messed up
15 when we typed it.

16 PROFESSOR EDGAR: Okay.

17 CHAIRMAN SOULES: Okay.

18 PROFESSOR EDGAR: And then --

19 CHAIRMAN SOULES: Hadley was very
20 gracious in giving me a lot of input on here. I
21 didn't have it exactly right. I thank you for
22 that.

23 PROFESSOR EDGAR: That's all right.

24 On 295 --

25 CHAIRMAN SOULES: Did we get

1 everything in there?

2 PROFESSOR EDGAR: Well, I just glanced
3 at it quickly this morning. When I have time I'll
4 look at it in more detail. But 295, the words --
5 third line, "not responsive" should not have been
6 deleted. No, no. That's right. We substituted
7 "incomplete" with "not responsive," didn't we? Or
8 did we?

9 MR. TINDALL: I thought we took out
10 the words "at the bar." We didn't know what that
11 meant. We didn't know what it meant.

12 CHAIRMAN SOULES: Is "at the bar" in
13 the current rules?

14 MR. MCMAINS: Yes, I think so.

15 MR. TINDALL: We took that out.

16 PROFESSOR DORSANEO: It's really to be
17 at the bench.

18 MR. TINDALL: It's just that "it shall
19 be directed to be reformed," period. That's the
20 way --

21 PROFESSOR EDGAR: We decided, though,
22 and I don't know why -- but we decided to put in
23 "at the bar."

24 CHAIRMAN SOULES: Well, it's there,
25 isn't it?

1 PROFESSOR EDGAR: Yeah, but somebody
2 just said it shouldn't be there.

3 MR. TINDALL: We voted to take it
4 out. We didn't know what it meant.

5 PROFESSOR DORSANEO: It means after
6 the case is over and we go to the bar.

7 CHAIRMAN SOULES: Do we leave it in or
8 take it out?

9 MR. TINDALL: Take it out.

10 PROFESSOR DORSANEO: Take it out.

11 CHAIRMAN SOULES: Okay.

12 MR. RAGLAND: We're taking out "at the
13 bar"?

14 MR. TINDALL: Yes.

15 PROFESSOR EDGAR: We're taking out "at
16 the bar."

17 CHAIRMAN SOULES: "If it is incomplete
18 to the questions contained."

19 MR. RAGLAND: That doesn't make sense
20 to me.

21 CHAIRMAN SOULES: The second sentence
22 doesn't make any sense now. "If it is incomplete
23 to the questions contained in the Court's
24 charge." "If it is incomplete or not
25 responsive."

1 PROFESSOR EDGAR: I think that's what
2 we said, "If it is incomplete or not responsive to
3 the questions contained in the charge or the
4 answers to the questions are in conflict, the
5 Court shall."

6 CHAIRMAN SOULES: Okay. I got that
7 straight now. Thank you. What's next?

8 PROFESSOR EDGAR: Just a second. Rule
9 301, now this was not part of our work. This was
10 over in Harry's section, but since it -- we
11 changed the special issue jury finding. But also
12 we need to make a change in Rule 324, and that
13 likewise fell through the cracks.

14 CHAIRMAN SOULES: Okay.

15 PROFESSOR EDGAR: And I think you got
16 that.

17 CHAIRMAN SOULES: Is 301 okay?

18 PROFESSOR EDGAR: What?

19 CHAIRMAN SOULES: Is 301 okay the way
20 it is?

21 PROFESSOR EDGAR: Yes, but when you
22 originally sent this material to me the other day,
23 you didn't include 321, nor did you include 324.
24 And somehow 324 still hadn't gotten in the
25 pipeline.

1 PROFESSOR DORSANEO: There probably
2 are a lot of rules that talk about special issues.

3 PROFESSOR EDGAR: There might be but
4 I've tried to find them, as many as I could, and
5 those are the only ones that I found.

6 PROFESSOR DORSANEO: We're going to
7 try to get this -- I'm going to try to get this
8 business on computer from West, and if I can get
9 it on our computer with the word search program, I
10 can search for it. Otherwise, it's law clerk --
11 one of the times.

12 CHAIRMAN SOULES: Well, if you can get
13 it -- I've got a machine that's big enough to hold
14 the rules, I'm sure, but I sure would like to get
15 it. If we can get it on a Displaywriter diskette
16 or several Displaywriter diskettes in that form.
17 We could all use them. We may have to get the
18 Court to request to send the rules down on
19 diskette form.

20 JUSTICE WALLACE: I had a talk with
21 the editor and Bill has been in touch with him.
22 Did you call him?

23 PROFESSOR DORSANEO: I didn't call him
24 yet. I've been too busy.

25 JUSTICE WALLACE: He said it would

1 take two, three weeks for him to get his
2 preliminary investigation done. I said I know
3 we've got a data processing department to my
4 knowledge. But we will cooperate with you in any
5 way we can and I told him that Bill would be in
6 touch with him on it.

7 CHAIRMAN SOULES: Will you see if you
8 can get that in Displaywriter diskette form or IBM
9 PC diskette form?

10 PROFESSOR DORSANEO: Okay.

11 PROFESSOR EDGAR: Specifically, that's
12 the first sentence of Rule 324(c). The words
13 "special issue" should be changed to "questions."
14 It's the first sentence in Rule 324(c).

15 CHAIRMAN SOULES: Okay. What's next?
16 Thank you. I had a call from a lawyer who is
17 doing a paper, Tom Cross, telling me that this was
18 a problem, 329, last week. And I said, well, let
19 me tell you what we're doing about it.

20 MR. TINDALL: On the citation by
21 publication judgments?

22 CHAIRMAN SOULES: Uh-huh. That's
23 exactly what we fixed. Okay. And we're taking
24 "Texas" out. What's the next rule with a problem
25 that you see?

1 MR. TINDALL: Where are you now?

2 CHAIRMAN SOULES: I'm back to -- I'm
3 just rolling. I'm through. I don't have any
4 more.

5 MR. TINDALL: Luke, one thing,
6 stylistically, on some of these, Jeremy Wicker has
7 done a score of these things where he's citing
8 various codes. You may look at the Government
9 Code. They have a preferred way to cite these
10 things instead of putting "of the" between the
11 section and the code. Just put it like they've
12 done on 621(a). That's the preferred method of
13 style on these.

14 CHAIRMAN SOULES: You don't put "of
15 the."

16 MR. TINDALL: Don't put "of the."
17 Just put a comma. It just should be "Section
18 34.001," comma, "Civil Practice and Remedies
19 Code." That's the way --

20 CHAIRMAN SOULES: I've got you.
21 Okay. What's next?

22 PROFESSOR DORSANEO: I don't have any
23 more.

24 CHAIRMAN SOULES: Does anybody have
25 any more suggestions?

1 PROFESSOR EDGAR: Let me just -- I'm
2 just looking at Texas Rule of Evidence 801. And
3 there is reference here to Rule 207 Texas Rules of
4 Civil Procedure. Now, should we delete the word
5 "Texas" and is it now Civil Procedure or the Texas
6 Rules of Procedure since we have both civil and
7 criminal rules.

8 CHAIRMAN SOULES: Well, these rules
9 have been passed. They've already been enacted,
10 the Rules of Evidence.

11 JUSTICE WALLACE: Oh, yes. The Rules
12 of Evidence, yes.

13 PROFESSOR EDGAR: We're just talking
14 about the way to cite them.

15 CHAIRMAN SOULES: Well, next time we
16 probably --

17 MR. TINDALL: It's just on code that
18 you do that.

19 JUSTICE WALLACE: The blue book is
20 still TRCP.

21 PROFESSOR EDGAR: Well, I was just
22 asking.

23 CHAIRMAN SOULES: Okay. Was there any
24 change on these Appellate Rules then? And these
25 evidence rules have already been acted on by the

1 Court. Does anybody have any other business?

2 PROFESSOR EDGAR: I'd like to ask
3 Judge Wallace, when does -- I was just wondering
4 when we might anticipate the effective date of
5 these rules.

6 PROFESSOR BLAKELY: He's got an answer
7 if you can get his attention.

8 CHAIRMAN SOULES: Let me say that I
9 anticipate this committee will have a scheduled
10 meeting in May. And also, we will go ahead and
11 schedule a meeting in October. That's on both
12 ends of the summer vacation and we might
13 reschedule the October meeting to earlier if I
14 find out we -- I've got to have the publication
15 dates. When do we have to be in the Bar Journal
16 in order to get rules effective the first of the
17 year?

18 JUSTICE WALLACE: To be effective the
19 first of the year, it's got to be in the December
20 Bar Journal, which comes out when, Bill, about the
21 first week of December?

22 MR. WHITEHURST: That's right, but you
23 have a two-month lee time.

24 JUSTICE WALLACE: So, it means it must
25 be presented --

1 MR. WHITEHURST: October.

2 JUSTICE WALLACE: It's got to be in
3 the October journal -- presented in October, and,
4 therefore, it's got to be to them by mid August.

5 MR. WHITEHURST: Do you want it
6 printed in the October journal or the December?

7 JUSTICE WALLACE: Well, it's got to be
8 printed 60 days before they take effect. So, that
9 means they have to be printed in the October
10 journal. That means 60 days would be, oh, early
11 in December. It will be past December the 1st.
12 So, it's got to be in the October journal. They
13 need about 45 days lee time.

14 MR. WHITEHURST: That's right, 45 to
15 60 days.

16 JUSTICE WALLACE: So, we're talking
17 about the early part of August to get something
18 effective January 1.

19 PROFESSOR EDGAR: Well, my question,
20 though, was, when does the Court anticipate that
21 the rules that we now have might be adopted?

22 JUSTICE WALLACE: As soon as these are
23 presented to us in final form, we can get
24 reasonably quick action. We can get them -- if
25 they get to us by January the 1st, I imagine by

1 the 1st of February we'll have them taken care of.

2 PROFESSOR BLAKELY: What you want is
3 an effective date.

4 PROFESSOR EDGAR: Yes. I'm going to
5 have to write a law review article, to be very
6 selfish about this, and I was just wondering how
7 much time I'm going to have.

8 JUSTICE WALLACE: Okay. When --

9 PROFESSOR EDGAR: I just want to know
10 what time I've got. I don't really care.

11 JUSTICE WALLACE: Well --

12 PROFESSOR EDGAR: I was just trying to
13 get an idea, Judge Wallace.

14 JUSTICE WALLACE: When do you think we
15 will have the final form, Luke?

16 CHAIRMAN SOULES: I think you will
17 have the final form -- I believe they will be out
18 of our office, let's see, certainly by Friday
19 week. It may not take us that long.

20 JUSTICE WALLACE: Are you talking
21 about the 1st of December?

22 CHAIRMAN SOULES: And then I want to
23 send them out to you-all. How long does the
24 committee want for feedback? No need in having
25 more than two weeks. You can't get them read and

1 call me in two weeks, if you're not going to read
2 them --

3 PROFESSOR EDGAR: I think that's
4 fine. Two weeks is fine.

5 CHAIRMAN SOULES: So, I'll have them
6 out. Friday was the 7th. We'll have them out by
7 the 21st, 28th --

8 MR. MCMAINS: How about December 5?

9 CHAIRMAN SOULES: By December the 5th
10 -- no later than mid December so you-all will have
11 them for consideration certainly by the time you
12 return from the Christmas holidays, probably
13 before you leave.

14 JUSTICE WALLACE: I would say March
15 1st at the latest we should have final action on
16 them. Likely by February 1st.

17 PROFESSOR EDGAR: So, we're thinking,
18 then, that perhaps these rules might become
19 effective by September 1st?

20 JUSTICE WALLACE: No. They will be
21 effective January 1, '88.

22 PROFESSOR EDGAR: Oh, okay.

23 PROFESSOR DORSANEO: The new rules,
24 when they do go into effect, will go into effect
25 on January 1 of even years.

1 JUSTICE WALLACE: What the Court will
2 do is -- January 1 of even years will be all rule
3 changes. The lawyers and the judges and everybody
4 interested out there know that there's not going
5 to be any more changes. We've got two years to
6 learn these changes, and then on January 1, 1990,
7 those changes will be effective.

8 CHAIRMAN SOULES: And you're not
9 interested in enacting these for effective dates
10 before that?

11 JUSTICE WALLACE: No. I think it's
12 just started -- and this is our program so let's
13 get on with it. It will also give us time to look
14 at what legislature does. As soon as we get a
15 meeting, as soon as they're through -- it would
16 probably be June or July.

17 PROFESSOR DORSANEO: It really is a
18 good thing to pick a particular date to try and
19 stick with it from year to year because all book
20 publishers and other people can then accommodate
21 their schedules to the Court's schedule.

22 CHAIRMAN SOULES: When does the
23 legislature recess? It's 140 days after the first
24 Monday in January.

25 MR. TINDALL: Memorial Day.

1 JUSTICE WALLACE: They convene early
2 this year, don't they, on about the --

3 MR. WHITEHURST: Yeah, I would just
4 figure Memorial Day for your planning purposes.

5 CHAIRMAN SOULES: May 30th, is that
6 what it is?

7 MR. WHITEHURST: Yeah.

8 CHAIRMAN SOULES: We'll have a meeting
9 then the second --

10 MR. MCMAINS: Wait a minute. When is
11 the State Bar Convention this year?

12 MR. WHITEHURST: 12th, 13th and 14th.

13 CHAIRMAN SOULES: Of June?

14 MR. MCMAINS: Yeah.

15 MR. WHITEHURST: You can have it at
16 the Bar Convention. It's going to be in Corpus.

17 CHAIRMAN SOULES: I don't think we can
18 have a meeting of this kind at the Bar
19 Convention.

20 MR. WHITEHURST: Is it going to be a
21 day and a half?

22 MR. TINDALL: Early May.

23 CHAIRMAN SOULES: Well, but the
24 legislature won't be done.

25 MR. WHITEHURST: Let us know if you

1 want it at the Bar Convention and we will make
2 arrangements.

3 CHAIRMAN SOULES: And, Bill, welcome.
4 We appreciate your coming in and visiting with
5 us.

6 MR. WHITEHURST: It's always nice to
7 come in and see the frightening process of
8 rulemaking.

9 JUSTICE WALLACE: I think everybody
10 realizes that sometime after legislature adjourns
11 -- unless you've got someone birdogging that
12 daily journal, to know what has been done over
13 there for some time. Because session -- of
14 course, you don't get -- who knows when they're
15 going to come out. And most the damage is usually
16 done that last week of the session anyway.

17 MR. MCMAINS: Why don't we do it the
18 last week in June?

19 CHAIRMAN SOULES: That's fine with
20 me. That means the week before July the 4th
21 holiday, but that's fine.

22 MR. MCMAINS: I mean, I don't know
23 when the July 4th -- I mean, what --

24 MR. TINDALL: June 26th, 27th.

25 CHAIRMAN SOULES: Is that going to be

1 -- what day of week does July the 4th fall on?

2 MR. TINDALL: July the 4th is the
3 following Saturday. The 4th is on a Saturday next
4 year.

5 CHAIRMAN SOULES: Is that okay, then,
6 to set it on Friday -- what's the date?

7 MR. TINDALL: June 26th, June 27th.

8 CHAIRMAN SOULES: I'll schedule two
9 full days, and we'll only have one meeting. At
10 that meeting, any interim committees that are
11 ready to report on what has been tabled here can
12 report. And we'll address any new issues that
13 have been raised from the legislature. We'll have
14 to watch those early and get subcommittee reports,
15 and we'll state that we exhaust our agenda,
16 rewrite those rules and get them to you, Judge,
17 right away so that you could, if possible, if you
18 wish, act on those and get them in the rule books,
19 too.

20 JUSTICE WALLACE: Yeah, because --
21 that's going to cut it short because our members
22 start breaking the middle of July.

23 MR. WHITEHURST: Let me mention that
24 for the first time we'll be on tap with a computer
25 to the legislature this year. So, I mean, we

1 might be able to alert Lou Lou Flores (phonetic)
2 to particularly look for bills that might concern
3 your task.

4 MR. MCMAINS: I really think, Luke, if
5 you assume that you get the legislative stuff
6 immediately, you've got to have a little bit of
7 time to assimilate it and see what it means, and
8 then some time to get it to the committee. I
9 don't see a meeting any earlier than June 26th.

10 JUSTICE WALLACE: I don't either.

11 CHAIRMAN SOULES: That means that the
12 Court would have to act on that in time to get
13 those rules to the Bar Journal by the middle of
14 August.

15 JUSTICE WALLACE: Yes. We would
16 almost have to have it by July 15th.

17 CHAIRMAN SOULES: We can do that.

18 MR. MCMAINS: I think we can get that
19 done.

20 CHAIRMAN SOULES: We'll have to
21 understand that when we look at it next time, it
22 has to be carefully drafted so when it gets back
23 to our office we can get it right on out.

24 PROFESSOR EDGAR: Well, you mentioned
25 two full days. Are you just going to deviate from

1 our current practice and be all day Friday and all
2 day Saturday?

3 CHAIRMAN SOULES: I'd like you to
4 reserve that just in case we need it.

5 PROFESSOR EDGAR: I just wanted to
6 know.

7 CHAIRMAN SOULES: Yes. I'm asking
8 that we go ahead and reserve two full days, and we
9 might even just have an edit committee Saturday
10 afternoon.

11 PROFESSOR DORSANEO: Like this one we
12 had today.

13 CHAIRMAN SOULES: Does anyone feel
14 like -- I'm going to send the proposed rules to
15 everybody and give you two weeks to look at them.
16 Does anyone feel that we need an edit committee?
17 I can take your suggestions on the phone, in mail
18 in writing. If we have a problem, what should I
19 do? Maybe get Bill and Rusty and Hadley. Anybody
20 else want me to call you and get you on a
21 telephone conference if we really run into a
22 problem? Okay. Well, if I just can't understand
23 something or it's a departure of suggestion, I'll
24 talk to the three of you-all.

25 Okay. Thank you very much. We're done,

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caught up and adjourned.

(End of proceeding.)

REPORTER'S CERTIFICATE

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THE STATE OF TEXAS X
COUNTY OF TRAVIS X

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

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

I further certify that my charge for preparation of the statement of facts is \$_____.

WITNESS MY HAND AND SEAL OF OFFICE this, the _____ day of _____, 1986.

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

Notary Public expires 09-30-89
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