

1 SUPREME COURT ADVISORY BOARD MEETING
2 Held at 1414 Colorado,
3 Austin, Texas 78701
4 June 26, 1987

5 (VOLUME I)
6 (Morning Session)

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1 June 26, 1987

2 (Morning Session)

3
4 CHAIRMAN SOULES: Why don't we go
5 ahead and go into session. I want to particularly
6 welcome Ken Fuller and Elaine Carlson, our new
7 members. We also have Diane Marshall and Judge
8 Raul Rivera; I think they will be here later on
9 joining us as new members. Orville Walker has
10 resigned, and we certainly wish him well and thank
11 him for all the work he has done.

12 We are now getting together a list of all of
13 the former members of this committee, and we're
14 going to work up some sort of a certificate to
15 present to them for their service. And I know
16 that the committee is unanimous that they should
17 be commended for their service, and we're working
18 on that project and will keep you informed about
19 that.

20 We have Ray Judice here who has brought this
21 morning this Court Administration Act which he can
22 -- part of what he will be telling you is the
23 shocking way in which it came through the
24 legislature and the closing moments without much
25 notice to anybody, and without much notice from

1 anybody or much reading by anybody, apparently.
2 But it's here, before we start the regular
3 business on our agenda, since Ray is here as a
4 favor to us, I would like to get him maybe to
5 report on this so that we can become informed
6 about it. Ray Judice.

7 MR. JUDICE: Thank you. You have two
8 documents, the Conference Committee Report and a
9 Summary of the Provisions. And the Summary of the
10 Provisions is just our attempt to go through this
11 bill after it was a fait accompli and try to
12 determine what was in the bill itself.

13 Now, to prevent any confusion as you go
14 through the bill, you will see the first portion
15 of the bill does a lot of amending to 200a-1.
16 200a-1 is the same article as the old 200a from
17 the last session. You may recall during the last
18 -- not this immediate past session, but the
19 session before last -- the same thing happened on
20 the last day of the session. A Court
21 Administration Act was drafted upon a bill that
22 would have created a Court of Appeals in Edinburg,
23 and passed out of both the House and the Senate at
24 the same time. And that became the amendments to
25 200a.

1 In the meantime, the legislative counsel has
2 been codifying the rules in this particular area
3 and moving it into the government code. So the
4 first portion of this document makes amendments to
5 200a-1; the second portion of the document repeats
6 the same amendments making the amendments to the
7 provisions that are in the government code. In
8 other words, it is in the process of being moved
9 from a Statute 200a-1 and putting it into the
10 government code. So don't get too confused when
11 it appears that it's duplicative; many of the
12 provisions, it is in fact duplicative. They are
13 just amending the two areas.

14 There was a fairly simple bill that was
15 passing through the legislature to make some
16 amendments -- clean up amendments to what the
17 legislature had done to 200a-1 in the last
18 session. It passed the House, went to the Senate.
19 The Senate made some amendments and sent it back
20 to the House. The House refused to concur. It
21 was sent to a conference committee. On Sunday,
22 the conference committee put together this bill
23 that you see which really bears very little
24 relationship to the bill that was pending before,
25 or that had been considered by both Houses. What

1 it is is just a whole series of amendments that
2 were tacked on. They used the bill number 687.

3 Now you will recall that during the last
4 session -- when I say the last session I'm talking
5 about the prior session -- the legislature posed a
6 constitutional amendment which was adopted which
7 removed the caption provision. In other words, no
8 longer is the legislature required, except by its
9 own rules, to provide notice to the general public
10 as to the subject matter of a bill by the caption.
11 They do have a rule that says the subject matter
12 of the bill must be described in the caption, but
13 then it goes further -- the constitutional
14 amendment goes further and says you cannot
15 question the validity of a bill on that particular
16 aspect, other than in either of the two Houses of
17 the legislature. So this is one of the reasons
18 why this bill is quite extensive.

19 Now what does it do? Generally speaking, it
20 removes the directives to the Supreme Court to
21 adopt the rules of that administration as a
22 mandatory directive and makes it a "may." In
23 other words, it removes it from a "shall" to a
24 "may." It then puts in before each one of the
25 elements the word "nonbinding." So when the

1 Supreme Court may promulgate rules dealing with
2 time standards then the word "nonbinding" is
3 included at the very beginning of that phrase, so
4 it's nonbinding rules -- I mean rules relating to
5 time standards, things of that nature.

6 It deleted all provisions recommending the
7 Supreme Court consider rules for a monthly
8 statewide information reporting system. I never
9 could understand why they put it in 200a in the
10 first place because that's embodied in the bill
11 that creates the Texas Judicial Council, and since
12 1929 the council has been -- has had that
13 responsibility and it's still in that particular
14 aspect of the state rules.

15 It specifically provides that any rule
16 adopted by the Supreme Court may be disapproved by
17 the legislature. In other words, it statutorily
18 gives the legislature a veto over any rules
19 adopted by the Supreme Court. Now, you will
20 recall in the provision in Article 5 of the Texas
21 Constitution, it provides that the Supreme Court
22 may adopt rules of administration as well as rules
23 of procedure provided that they conform to law.
24 So the legislature had always had that authority
25 embodied in the Constitution but hadn't used it --

1 as far as I know, has never used it. But now it
2 is working it into this particular statute.

3 It provides that before the Supreme Court may
4 promulgate any rules, a copy of any new rule or
5 amendment to any rule must be mailed to each
6 member of the bar, and they must be -- I think 120
7 days before they go into effect -- and they must
8 be given 60 days for comments. We did a
9 calculation to judge that if you mailed it -- use
10 U.S. Postage and mailed it at 22 cents -- it would
11 cost approximately \$15 to \$18,000 on each mailing.

12 It also provides that the Clerk of the
13 Supreme Court is to submit to each member of the
14 bar a copy of any proposed rule or any rule that
15 was adopted as a matter of fact or any amendment
16 thereto to each member of the legislature by
17 December the 1st of the year preceding any regular
18 session. The other matters deal with primarily
19 administrative matters such as education programs.
20 The one change there was that there was some
21 difference in the requirements that the retired
22 judges had to fulfill as far as requirement as
23 opposed to the acting judges, and they now require
24 the same type of continuing legal education.

25 They made some changes relating to the

1 salaries of the presiding judges. A presiding
2 judge who is an active judge now receives a
3 stipend of \$5,000 in addition to his regular
4 salary. This increases the salary -- that
5 particular salary to \$10,000. Now, this does not
6 do anything to the salary received as a presiding
7 judge by a retired judge. That is still either
8 15, 25 or \$30,000 per year based on the number of
9 courts within his administrative region.

10 This is one thing that you might want to
11 consider. It is apparent in reading the statute
12 that a presiding judge may now assign a judge
13 serving on a county court at law to a district
14 court bench within the county in which he serves.
15 Now it's kind of backwards because what it says --
16 what the law now says is that the presiding judge
17 may not assign a judge of a county court at law to
18 a district court outside of the county of his
19 residence. So it would appear to give the
20 authority for the first time to the presiding
21 judge to assign a county court at law to serve on
22 -- as a visiting judge, that is -- to serve on a
23 district bench within, but solely within, the
24 county in which he serves.

25 I think the other things are pretty well

1 inclined to -- there's a whole series on masters
2 that is fairly new law that you may want to
3 review. I'm not too familiar with that particular
4 aspect. I frankly did not go into it and review
5 it for this particular purpose, but there is some
6 extensive language relating to the appointment of
7 masters and the use of masters by district -- in
8 district courts or trial courts.

9 The reason why I was talking about the county
10 courts at law serving on the district bench, the
11 previous law had a provision in it that said that
12 a judge -- a visiting judge assigned to another
13 court, or assigned to a court, could not hear
14 matters which his court did not have jurisdiction
15 over. I hope I've said that correctly. In other
16 words, if Judge Jones was assigned to go from this
17 county to another county, then he could hear only
18 those matters over which his particular court had
19 jurisdiction. This new law removes or deletes
20 that provision so that if a judge is now assigned
21 by a presiding judge to a court, he can hear and
22 preside over any matter over which that particular
23 court -- the court to which he is assigned -- has
24 jurisdiction.

25 It establishes the State Board of Regional

1 Judges. This is a new entity. We've previously
2 had the Council of Presiding Judges and that is
3 still in operation under another provision. But
4 now there is a new entity that says its the State
5 Board of Regional Judges is created to administer
6 the newly created District Court Support Fund. So
7 the District Court Support Fund is embodied as a
8 concept in the law, but they have provided zero
9 money for that particular provision. And, you
10 know, so the legislature, of course, did help the
11 trial courts by providing the -- I mean, assigned
12 the District Court Support Fund but there is no
13 money in it.

14 CHAIRMAN SOULES: Not much of a fund,
15 it it?

16 MR. JUDICE: No fund whatsoever.
17 That's generally, I think, one of the major
18 provisions of this particular bill. I would be
19 happy to try to answer any particular questions if
20 you have any questions that you may want to ask
21 about it.

22 CHAIRMAN SOULES: The notice
23 requirements for rules and the rules that are
24 contemplated by this bill are administrative
25 rules; is that correct?

1 MR. JUDICE: Yes.

2 CHAIRMAN SOULES: And not rules of
3 civil procedure?

4 MR. JUDICE: No, administrative rules.

5 CHAIRMAN SOULES: Okay.

6 MR. JUDICE: Administrative rules are
7 what they are referring to here.

8 CHAIRMAN SOULES: How much attention
9 do you understand this bill got from the
10 legislature? Tell me again how it was that this
11 logistically got done?

12 MR. JUDICE: Well, there was one bill.
13 It was very, very -- it would have provided some
14 of these, but very few of the provisions that are
15 included in this bill that had passed the House
16 and gone to the Senate. The Senate had made some
17 amendments, the House refused the Senate
18 amendments and asked for a conference committee.

19 At that time -- now, there were about five or
20 six different bills that had been -- that were in
21 various stages of consideration by the
22 legislature. Most of them were still in
23 committee, had never been voted out of committee
24 -- most of which had never been actually debated
25 by committee. Those bills were pulled out and

1 drafted onto the bill that was pending, in
2 addition to which there were a number of other
3 aspects that I had not been able to find that were
4 in any bill that had been considered that were
5 placed in this particular bill.

6 So it was just a series of amendments that
7 were developed by the conference committee and
8 reported back, and they were -- the bill was then
9 adopted without debate in both Houses. They just
10 concurred in the -- and that's usually -- of
11 course, that's not that unusual on the last day of
12 the session because if you have ever sat down in
13 the hour of the last day of the session, you will
14 find that they will do 500 bills on the last day
15 of the session. I'm exaggerating a little,
16 obviously, but they will do a tremendous amount of
17 bills with never any debate, it's just vote -- I
18 mean, I move to concur the -- in the conference
19 committee and they'll just pass it pro forma.

20 CHAIRMAN SOULES: Where did the
21 impetus for these provisions come from? Was this
22 something the Supreme Court was seeking to have
23 the legislature do, Judge?

24 JUSTICE WALLACE: This was sponsored
25 by Representative Betty Denton in Waco. Frankly,

1 I think it was an anti-Chief Justice move on her
2 part and in response to those administrative rules
3 that the Chief was -- you know, we fought over for
4 about a year and a half. And I think that --
5 wasn't that the main impetus behind these -- most
6 of these changes, Ray?

7 MR. JUDICE: Well, one aspect, Judge,
8 there's a lot of other aspects in there, and she's
9 -- Betty has certainly got her provisions written
10 into this bill. Primarily her major -- the major
11 provision in this bill is the deal where there is
12 a statement that the legislature did not intend to
13 mandate additional funding by the local county
14 governments to fund any aspect of the Court
15 Administration Act. There were a number of other
16 representatives that had bills that were drafted
17 onto this, also.

18 CHAIRMAN SOULES: Well, the
19 administrative rules that became effective by
20 order of the Court of February 4, 1987 were
21 recommended to the Supreme Court without dissent
22 from the task force. But was Ms. Denton not aware
23 that -- I realize there was a great deal of
24 controversy over a 2-year period before February
25 4th -- before the February 4th order was signed.

1 But at the last task force, the wrinkles were all
2 ironed out, as it were -- the disagreements were
3 ironed out -- the time standards became standards.
4 In other words, there were a lot of -- a lot of
5 the controversy that had come up was addressed in
6 those rules and the sensitivities of the task
7 force and the Court to those are shown on the face
8 of those rules, and not one person on the task
9 force dissented from that final work product. But
10 we still have this controversy in the legislature;
11 is that right?

12 JUSTICE WALLACE: I think an awful lot
13 of those people are not even aware of the rules
14 that were finally promulgated. And it's just a
15 matter of the idea that, you know, there was a
16 movement to do it and they were heading off any
17 future movement was the impression I got out of
18 it.

19 CHAIRMAN SOULES: And since February
20 4th -- although I hear some agonizing over how do
21 we get to compliance with the time standards, and
22 that's agonizing -- but I do not hear controversy,
23 as such, over those rules. Some jurisdictions
24 have problems and some districts are going to have
25 problems getting there or getting even close for a

1 while. But do you and your office hear a lot of
2 controversy about the February 4th work product
3 that the Supreme Court finally promulgated?

4 MR. JUDICE: No, because remember that
5 what was finally promulgated had, in effect, been
6 in operation for over 2 years. Those rules had
7 been promulgated by the Supreme Court, what, about
8 2 years previous, wasn't it, Judge?

9 JUSTICE WALLACE: December of '84.

10 CHAIRMAN SOULES: In December of '84
11 there was a very close set of rules, but the
12 February 4th '87 rules were a little bit more
13 explicit, and had a few more items in there. But
14 essentially, they did derive from the December '84
15 start at administrative rules; is that right?

16 MR. JUDICE: Uh-huh.

17 CHAIRMAN SOULES: What are we going to
18 have to do to -- if anything -- I realize you've
19 just got this on your plate, Ray. What does the
20 Supreme Court Advisory Committee and the task
21 force, and ultimately the Supreme Court, need to
22 do to these rules, if you have had a chance to
23 determine, to bring them into conformity with this
24 bill? Do we have to make any changes in them?

25 MR. JUDICE: As far as I see, the

1 rules fit right into the pattern that they require
2 now except for the fact, of course, that when they
3 say nonbinding and -- but the rules, if I remember
4 correctly -- and I have not checked this
5 specifically, and I will just as soon as I get to
6 the office -- the rules that were adopted that
7 went through this committee then made it a
8 directive rather than mandatory. I mean, made it
9 a "should" instead of "shall" even on the time
10 standards. So the time standards, if I remember
11 correctly -- Judge, do you remember correctly as I
12 do -- that time standards were not made absolutely
13 mandatory on any particular session.

14 JUSTICE WALLACE: Right. And maybe
15 there is something along the end of this bill, but
16 this is all prospective the way it starts out at
17 the first. Is there anything on the back
18 repealing any administrative rules that you found?

19 MR. JUDICE: No, sir.

20 JUSTICE WALLACE: So this has to do
21 with the administrative rules that are going to be
22 promulgated in the future. And I know of none in
23 the making, so I don't think there is any
24 immediate concern about them.

25 MR. JUDICE: I may report to you, Mr.

1 Chairman, and the other members of the committee,
2 that since those rules have been adopted, my
3 office has been working on developing the software
4 for careful management systems. And we're making
5 it available to any and all trial courts
6 throughout the state, if they want, which would
7 save them tremendous amounts of money, that would
8 help them keep abreast of their dockets at any one
9 time so that it would fit in with the rules. The
10 only expense to the trial court would be the
11 purchase of a personal computer.

12 And we've checked out and we've worked with
13 many of the courts, and in every aspect it was
14 well under \$5,000. We are talking about between
15 3,500 and about \$4,500 for the hardware. We'll
16 provide them with the software and the what little
17 training is needed to place this in operation.

18 We've had over 700 trial judges, clerks,
19 coordinators, court reporters, judge's
20 secretaries, whoever the local courts wanted to
21 bring, to come in, sit in in this room in a one
22 day session -- we bring them in about 30 at a time
23 -- and go over this software that we're
24 developing. And we're making the adjustments so
25 that it will fit each individual situation. And

1 that's why we bring them in and have a full day's
2 development.

3 Judge Wallace has addressed several of these
4 -- of the careful management seminars that we have
5 had in this area. And those who are using it seem
6 to feel that it meets the needs as required both
7 by the -- by this statute in the rules of
8 administration. So the mechanic part of following
9 the rules is out there for those who want to use
10 it.

11 Now in the much larger counties that are
12 using mainframes, we have not been able to address
13 that because we just don't have the personnel to
14 go into the larger counties that are using
15 mainframes. But we do have available the Dallas
16 -- some of the Dallas judges have gone out on
17 their own and bought personal computers and are
18 using our system, even though the Dallas County
19 provides them with a mainframe capability.

20 CHAIRMAN SOULES: Any questions for
21 Ray? Ray, thank you very much for bringing us
22 that information. Good luck to you.

23 Okay. Now as I hear that, then, there is no
24 need to be concerned on our part that we have to
25 take any action on the administrative rules, no

1 mandate that anything be changed. We'll go
2 forward based on the February 4th order, Judge, of
3 '87?

4 JUSTICE WALLACE: Yes, sir.

5 CHAIRMAN SOULES: So any of the rules
6 of civil procedure that we may address and will
7 key to this case disposition and so forth, we can
8 have in mind the February 4, '87 order is going to
9 govern; is that right?

10 JUSTICE WALLACE: Yes.

11 CHAIRMAN SOULES: Thank you. Judge
12 Raul Rivera is here now. I want to welcome him to
13 our committee. Judge, welcome.

14 JUDGE RIVERA: Thank you. I'm glad to
15 be here.

16 CHAIRMAN SOULES: Our local
17 administrative judge in San Antonio, and of course
18 I'm particularly pleased to have him join the
19 committee and pleased that the Supreme Court saw
20 fit to appoint him as well as Ken Fuller and
21 Elaine Carlson and Diane Marshall. We have the --
22 the minutes of the last meeting are right inside
23 the supplement. And they've been circulated
24 before. They have not changed from the time they
25 were circulated except that we did try to get

1 everyone's input. Does anyone have any
2 recommendations that these minutes be changed any
3 further? There being no recommendation for
4 change, then they stand approved as noted here in
5 the supplement.

6 You should have two booklets. One that I
7 mailed out -- and if you didn't bring yours today
8 there are some extras over here on that two-wheel
9 dolly -- it's got a plastic cover. And then
10 another one that's got a manilla cover -- it's a
11 supplement -- and there are some of those over
12 there too. If you have these two books then you
13 have the agenda that the Chairman provided. In
14 addition to that, we have the proposed Rule 47
15 which is going to be Item No. 1. It's on
16 legal-sized paper. Does everyone have this?
17 Steve McConnico is the special subcommittee chair
18 of that and he's got some copies.

19 In conjunction with this legal-size handout,
20 on Page 1, which is a bunch of series of 0's and
21 then finally a 1 in the supplement, you see it
22 starts with a letter from Scott, Douglas and
23 Luton, that's Steve's firm and signed by him.
24 Second is the act of the -- or the resolution of
25 the legislature that they are going to get into

1 the supersedeas business if we don't, I guess, is
2 the essence of it. They are going to study it for
3 two years. Those materials may also bear on
4 Steve's report and I just wanted to get them
5 before you. And Steve, you have the floor, then,
6 to report on your supersedeas committee's work and
7 whatever recommendations you may have.

8 MR. McCONNICO: Well, because of the
9 recent legislative activity, Luke appointed a
10 subcommittee and asked us to look at supersedeas
11 bonds. We did and we have come out with a
12 proposal. I think we passed that out to each of
13 you now. We're going to start with Rule 47 and
14 and then go to Rule 49. There are some other
15 rules that will be affected by this, but these are
16 the two main rules. The other rules mainly, if we
17 adopt anything, will be clerical. We can clear
18 those up pretty quickly.

19 We had two purposes when we started to look
20 at this. The subcommittee was Bill Dorsaneo,
21 Elaine Carlson, myself, Pat Beard; the ones that
22 worked on this felt that something should be done,
23 and there were two purposes. First, we wanted to
24 make sure that the judgment creditor was fully
25 protected and he wasn't going to lose his

1 judgment. Second, we felt like there should be
2 some discretion given to the trial court where
3 they could protect the judgment debtor where the
4 judgment debtor could have a meaningful appeal if
5 he couldn't put up a supersedeas bond.

6 So the question, is how do we balance those
7 two interests? I'm going to summarize this, but
8 if you look at Rule 47, if you look at the part
9 starting "Money Judgment," within this we have
10 kept the general rule that when someone gets a
11 money judgment they must put up a bond which is
12 equal to that judgment and its interest and its
13 cost.

14 Now, we have stated that the trial court can
15 deviate from this general rule after he gives
16 notice to all parties and has a hearing. The
17 question is what are going to be the grounds for
18 deviation. We came up with two alternatives. We
19 didn't have -- the subcommittee wasn't unanimous.
20 Alternative No. 1 was that simply the posting of
21 the amount -- if he can show the judgment -- the
22 debtor can show that posting the amount of the
23 bond or deposit could cause him irreparable harm
24 and also show that not posting such bond or
25 deposit will cause no substantial harm to the

1 judgment creditor, then there could be some
2 deviation from the general rule. That's
3 Alternative 1.

4 Now under that alternative, if you take the
5 fact situation that you have a judgment against,
6 for example, Southern Pacific, Aetna, Texas
7 Commerce Bank -- any deep pocket -- for \$800,000,
8 that particular deep pocket is not going to be
9 able to show that it will cause me irreparable
10 harm to come up with this bond. Consequently,
11 he's got to conform with the general rule we have
12 today and he's got to put up the money for the
13 bond.

14 Now, the second alternative is a little bit
15 different. Both of these alternatives were taken
16 from the federal case laws. And the federal case
17 laws come out in two different ways on this. In
18 the second alternative, the judgment creditor, if
19 he shows -- the judgment debtor shows that the
20 judgment creditor will be adequately protected for
21 any loss or damage occasioned by the delay on
22 appeal by order of alternate security or
23 alternative security then that covers it. Now
24 there are federal cases that have this type of
25 language. Under this hypothetical, for example if

1 Ford loses a case for \$160,000, Ford says, "I've
2 got plenty of assets." They're always going to be
3 able to get \$160,000 from me; there's no reason
4 for me to put up a bond. Under that alternative,
5 that might punt. Under the first alternative,
6 that wouldn't punt. Now that's really the basis
7 and the guts of Rule 47.

8 You then get to the problem which Rule 49
9 addresses: Well, how are you going to appeal
10 this? Suppose we adopt this and all of a sudden
11 you're going to go to the Court of Appeals.
12 You're the judgment creditor and you're going to
13 say to the Court of Appeals, "Look, we don't like
14 what the trial court did." The problem we had is
15 we didn't want the appeal -- and this was Bill
16 Dorsaneo's idea to begin with -- with all the
17 baggage of a mandamus hearing. We thought it
18 would take too long so consequently what we put in
19 is that the trial court's order could be reviewed
20 on a special motion to the Court of Appeals. We
21 file a motion to the Court of Appeals.

22 Now we might have to change the Rule of
23 Appellate Procedure 43 to state that such motion
24 is not an interlocutory appeal. Bill doesn't
25 think it is an interlocutory appeal anyway. But

1 if people here feel that it is, we might have to
2 change Rule 43. I do not think it is after
3 reviewing the case law.

4 Then we also state well, if you go up to the
5 Court of Appeals, you don't want it to sit there
6 and then have your judgment in limbo, so we put in
7 the language that such motion shall be heard at
8 the earliest practical time. Then we also put
9 that the appellate court may issue such temporary
10 orders as it finds necessary to preserve the
11 rights of the parties. That language is taken out
12 of Rule 43.

13 Basically, those are the two big changes in
14 these rules that we are proposing. There are a
15 lot of smaller changes. We've always substituted
16 appellate. We've used the word judgment debtor;
17 we think that clarifies it, clears it up. We
18 think using -- instead of appellee, using judgment
19 creditor is a better word. These are small
20 changes. Rule 615 of the Rules of Appellate
21 Procedure would have to be changed for post
22 judgment discovery, but those are minor changes.
23 These are the two big changes. I leave it open.

24 CHAIRMAN SOULES: Comments?

25 MR. TINDALL: Which one is your

1 committee recommending? Alternate 1 or Alternate
2 2?

3 MR. McCONNICO: I personally support
4 Alternate 1. Elaine Carlson felt that Alternate 2
5 was better and she can give her reasons for that.
6 I'll just say that she felt that Alternate 2 came
7 more under the Open Courts Division of the Texas
8 Constitution. It wouldn't be any problem with
9 Alternate 2 violating it. And I didn't mean to
10 get into your bailiwick.

11 PROFESSOR CARLSON: No. I think that
12 succinctly states it.

13 MR. LOW: What is the standard of
14 review?

15 MR. McCONNICO: Well, that's something
16 that we also -- because at first we were
17 discussing whether it should be abuse of
18 discretion. But we did put abuse of discretion
19 because under the present rule, if you look at
20 present Rule 47 --

21 PROFESSOR DORSANEO: 49.

22 MR. McCONNICO: Yeah, 49. I'm sorry.
23 It just says it will be reviewed and it doesn't
24 give the standard. So we kept the standard that
25 is in the present rule.

1 MR. LOW: But the problem is in
2 determining whether it's proper or improper. You
3 have to have some standard to go by or the judge
4 could just say, "Okay. I find he won't be
5 protected." When it's just -- that's just not the
6 way it is, and what are you going to do about it?
7 I mean I don't know what standards you would
8 follow, but I'm concerned about the fact that
9 there is no particular standard.

10 MR. McCONNICO: Well, I think in the
11 rule -- if we go with Alternate 1, we've got the
12 standard in the rule that it must be that it was
13 going to cause irreparable harm to the judgment
14 debtor and not posting such bond would cause no
15 substantial harm to the judgment creditor.

16 MR. LOW: Well, the judge makes that
17 finding but then what do you say? I mean, if he
18 makes that finding does the Court of Appeals, do
19 they say, "Okay, we'll review that under this
20 standard"? Or do we just take it to you and say,
21 "well then, you make the determination"? Is it a
22 new determination? Is it like a trial de novo?
23 What is the standard?

24 MR. McCONNICO: Well, we've also put
25 in there it could be a trial de novo -- well, it's

1 not going to be a trial de novo, obviously, at the
2 Court of Appeals because we have said that the
3 Court of Appeals may remand to the trial court for
4 findings of fact or the taking of evidence. And
5 they might need more facts and they might need
6 more evidence.

7 But we felt like with these rules, and
8 especially Rule 49, it was better not to say and
9 not to give them a standard as we have done in
10 Rule 49 now. We have given the Court of Appeals a
11 standard to review any of these matters on appeal
12 because we thought the only alternative was abuse
13 of discretion and I thought that was too strict --
14 could be too strict.

15 MR. TINDALL: The federal courts are
16 going in both ways around the country. Is that
17 what you're --

18 MR. McCONNICO: No. The Federal
19 courts -- the Federal rule is silent to this.
20 There is nothing -- if you look at the rule, it
21 doesn't address this. So then you've got to look
22 at the Federal case law. There seems -- more of
23 the Federal courts state that to get a reduction
24 in the supersedeas bond -- and it appears they are
25 pretty stingy in allowing people to do it -- most

1 of the courts to me -- and the folks that have
2 been involved in the Texaco-Pennzoil litigation
3 will know this better because they have probably
4 briefed it a lot closer -- but from my review of
5 the cases it appears that most of the Federal
6 courts state the only time you can reduce the
7 supersedeas bond is if you show it's going to cost
8 the judgment debtor irreparable harm, and it's not
9 going to cause any harm to the judgment creditor
10 if it's reduced. And they may add the language on
11 "it serves the end of justice."

12 But there are some Federal courts which in
13 actuality what they've done is said, "Okay. Ford
14 Motor Company, they might be able to make this
15 bond, making this bond is not going to hurt them
16 but they've always had the assets so why do we
17 make them? Why is it important that they make the
18 bond?" And that's Alternative 2.

19 MR. LOW: So your Federal court also
20 -- I mean, you don't -- their rules are a little
21 bit different in that you have moved your peril if
22 you require them to put it up because if you're
23 wrong then you have to end up paying for it. But
24 we don't have a provision like that so when you're
25 applying Federal law to this you've got a

1 different foundation than the foundation that
2 we're placing this on because people don't, in big
3 judgments, unless you're pretty sure -- you don't
4 ask them to put up one because you don't want to
5 end up having to pay for it.

6 MR. McMAINS: That's right. A
7 supersedeas bond is the cost of appeal to be taxed
8 in the Court of Appeals in the Fifth Circuit. So
9 if you've got somebody paying a \$200,000 premium,
10 you had better be certain that you're going to be
11 able to get it affirmed.

12 MR. SPARKS (EL PASO): Well actually
13 the district that they remand the case take back
14 to, the district court decides whether the premium
15 is to be paid or not. But most of the time they
16 say yes, and they are substantial.

17 MR. LOW: That's right.

18 CHAIRMAN SOULES: Most of the time
19 they do tax the premium as cost?

20 MR. McMAINS: Yes. If it's been lost.

21 CHAIRMAN SOULES: Elaine, what do we
22 hear from you on your alternative view? What is
23 are your reasons for supporting the other
24 alternative?

25 PROFESSOR CARLSON: I would just like

1 to say that in deference to our fine subcommittee,
2 I think Alternate 1 is more desirable from an
3 administrative point of view. My concern was
4 whether or not the first alternate would be
5 sufficient to comply with the Open Courts
6 Provision of the Constitution.

7 And my concern emanates particularly from two
8 cases, one of which is Evets (phonetic) vs. Luce
9 (phonetic) which was a U.S. Supreme Court case
10 which went so far as to suggest that a defendant's
11 right to an appeal as guaranteed by a state had
12 been denied when his privately retained lawyer
13 failed to file a statement of facts. In my mind,
14 that is a very, very broad reading of the
15 guarantee of appeal if a state's Open Courts --
16 Constitution has an Open Courts Provision which
17 Texas does.

18 My second concern is out of the Texas Supreme
19 Court case of LeCroy (phonetic) vs. Hanlon
20 (phonetic) -- and perhaps Judge Wallace and
21 Professor Dorsaneo could give us their insight as
22 well -- wherein our Supreme Court held that the
23 denial of access to the trial court level to open
24 court was accomplished when a litigant was
25 required to file a filing fee at the district

1 court level which went to the general revenue
2 part. And it was not a question, as I read the
3 opinion, of the litigant being able to pay the
4 filing fee, just that it was an unreasonable
5 denial of access to the Court.

6 So I'm reading the case law to suggest that
7 if a state goes beyond the U.S. Supreme Court and
8 the Constitutional guarantee and guarantees its
9 citizens the open court access, then the state
10 cannot through rules or other case law deny
11 unreasonable access. And I'm afraid if our
12 standard is -- if you can only waive the posting,
13 the mandatory posting, and the supersedeas bond by
14 irreparable harm showing, that that could still be
15 a denial of access to the litigant and show it's
16 unreasonable and that he should have been allowed
17 to post some alternate security.

18 MR. LOW: But doesn't that go to the
19 appellate --

20 CHAIRMAN SOULES: Rusty, why don't we
21 hear from you? I know you've got some feelings
22 about any changes.

23 MR. McMAINS: Well, one of the
24 problems I have with Alternate 2 is that it
25 assumes that the only thing that you would

1 evaluate a bond or its desirability to be posted
2 is for the delay. And that's just not true
3 particularly in Texas which is pretty much of a
4 haven for debtors -- much more so than most other
5 states, in fact -- such that, you know, quite
6 frankly I think the banks and a lot of the regular
7 credit folks would be very upset if the only thing
8 they thought they were concerned about on a bond
9 was whether or not there was a -- you know, how
10 much time it was going to take. There's an awful
11 lot of default judgments, and then sometimes they
12 get involved in appeal practices.

13 If that would just result in delay, I think
14 it would just clog up the courts. A lot of times
15 it's cheaper to pay a lawyer to appeal a case than
16 it is to pay the numbers. And in fact, I think
17 that's going on right now in a lot of cases. It
18 bothers me that -- you know, that at least
19 Alternative 1 looks to me to have a rational
20 basis. That is, it is suggested that there is an
21 exceptional circumstance that the trial judge
22 should have the ability to determine. And much
23 like -- it looks to me like the standard of
24 irreparable harm is very much like an injunction
25 standard.

1 So I'm not sure that the courts won't choose
2 a discretionary review standard anyway whether we
3 do it or not simply because the question of
4 irreparable harm is kind of akin to this
5 injunction issue. So I guess the only real
6 question is whether or not we're doing something
7 indirectly that we don't know that we're doing
8 from the standpoint of what the appellate court
9 should want to treat this as.

10 The second thing is -- which you didn't talk
11 about, I think -- Scott is the continuing trial
12 court jurisdiction aspect of it which is also
13 strange to me. It's a different issue, but I
14 would support Alternative 1 from the first part of
15 his standpoint as distinguished from Alternate 2
16 because I think that for one thing Alternate 2 is
17 just going to be filed in every case. Alternate
18 1, at least, you don't clog the motion practice as
19 much as we keep doing with various hearings.

20 CHAIRMAN SOULES: Philosophically --
21 of course, this is just some background on this
22 rule, anyway, that goes back some -- I sense a
23 problem with the very first insert at the bottom
24 of A because it does not address the issue that
25 the COAJ has always wanted addressed and that this

1 committee has always emphasized and that is the
2 preservation of the effectiveness of the judgment,
3 whatever it is. If you've got a billion dollar
4 judgment against a \$10,000 corporation, the
5 effectiveness of that judgment is \$10,000; it's
6 not a billion dollars. I mean I don't know what
7 the effectiveness of it is, but the effectiveness
8 of the judgment is what the plaintiff is entitled
9 to have protected by dollars or by other security.
10 And this just talks about delay damage on appeal.

11 One argument, folks, is that that just means
12 the interest that would run on appeal, not the
13 judgment itself. And I believe that in the first
14 insertion we need to put -- read with me here, if
15 you will -- "The trial court may enter such orders
16 which adequately" -- insert this -- "preserve the
17 effectiveness of the judgment and" -- and then run
18 the rest of the sentence.

19 MR. McCONNICO: Luke, I don't
20 understand where you want us to put it down.

21 CHAIRMAN SOULES: Okay. Start in (A)
22 in the last sentence: "The trial court may enter
23 such orders which adequately preserve the
24 effectiveness of the judgment."

25 MR. BRANSON: So at your hearing you

1 would basically try the assets of the corporation?

2 CHAIRMAN SOULES: You could. Preserve
3 the effectiveness of the judgment and then protect
4 the judgment creditor -- I think that's against
5 any loss rather than for any loss, but that's --

6 MR. BRANSON: Aren't you really asking
7 for more trouble than you're curing there? You're
8 going to end up with some hearings on bonds that
9 are going to last for months.

10 CHAIRMAN SOULES: That's right. And
11 there's no doubt about it, but we're there in the
12 practice.

13 MR. JONES: Mr. Chairmann --

14 CHAIRMAN SOULES: Yes, sir. Franklin
15 Jones.

16 MR. JONES: I need a little
17 enlightenment. Of course my philosophy is that if
18 it ain't broke, don't fix it. But I understand
19 that the legislature has mandated or suggested to
20 us that we have messed with this rule.

21 CHAIRMAN SOULES: The legislature has
22 set up a study committee to change the -- to study
23 and recommend statutory changes in the supersedeas
24 practice in Texas. And if we don't do something,
25 presumably they will. That --

1 MR. JONES: Is that the result of the
2 Texaco litigation?

3 CHAIRMAN SOULES: It was.

4 MR. JONES: So what we're pondering
5 here today is changing our rules to satisfy the
6 legislature and Texaco.

7 CHAIRMAN SOULES: No.

8 MR. McMAINS: No.

9 MR. BRANSON: Just Texaco.

10 CHAIRMAN SOULES: No.

11 MR. BRANSON: The legislature hasn't
12 spoken yet.

13 CHAIRMAN SOULES: If you go back
14 historically what we're still talking about is a
15 request that the committee on Administration of
16 Justice put to this committee two years ago.

17 MR. JONES: Well, I remember that and
18 of course we had to vote two years ago to -- so
19 strong we didn't even consider it.

20 MR. BEARD: It wasn't like this,
21 though, Franklin.

22 CHAIRMAN SOULES: Well, I don't think
23 the record will bear that out, Franklin. It will
24 not bear that out, the record.

25 MR. BRANSON: It certainly will, Mr.

1 Chairman, because I made the motion and it
2 carried, not in one meeting but two meetings.

3 CHAIRMAN SOULES: No, that's not true,
4 Frank. One meeting was to table and the next
5 meeting was different. And --

6 MR. BRANSON: Well what did Franklin
7 just say? Not to consider it, just table it.
8 Isn't that what you do?

9 CHAIRMAN SOULES: Well, I thought he
10 said defeated it.

11 MR. JONES: Well, that's not really --
12 I'm just bringing that up as a matter of inquiry.
13 I think that the committee ought to consider why
14 this is before us and, you know, we've had I don't
15 know how many years of supersedeas practice that
16 nobody has complained about until Texaco committed
17 such a gross wrong that they got hung for \$11
18 billion dollars.

19 MR. BEARD: Well, I disagree with
20 Franklin's statement. There have been a number of
21 defendants who have settled their cases when they
22 have wanted to appeal because they could not post
23 a supersedeas bond and couldn't take the
24 catastrophe that occurred if they started
25 executing it. So it has been a recurring

1 undercurrent all over the state and we are not
2 giving them access to appeal, so I disagree with
3 Franklin. That problem has always been there and
4 we should have some way to provide that appeal.

5 At the same time, let me say, Luke, that I
6 think that last sentence under (A) takes care of
7 the problem you're talking about. It adequately
8 protects the judgment creditor. If they only have
9 \$10,000 worth of assets, the court may enter an
10 order that states that they stay in the same
11 position. They use the word status quo in other
12 drafts and -- but it's the same thing they do in
13 bankruptcy court. They come in and they want to
14 use cash collateral. They've just got to
15 demonstrate if they use the bank's -- the cash
16 that they are not going to get any worse off. And
17 it's a lot of problems because, you know, a lot of
18 times they spend the bank's money. But I think
19 that language gives the court all sorts of leeway
20 to face problems we can't even think of --
21 contingencies. So I don't think -- I think it
22 ought to stay just like that.

23 CHAIRMAN SOULES: Well, Pat, let me
24 ask you -- maybe I'm just not seeing a problem --
25 but you say protect the judgment creditor but you

1 stop there. This doesn't stop there. This says a
2 limited protection. This is a very limited
3 protection for the judgment creditor that's
4 written in this last sentence. It's not much
5 protection.

6 MR. BEARD: I disagree with you there.

7 I think that it --

8 CHAIRMAN SOULES: It says --

9 MR. BEARD: If you look and see well,
10 you know, there is no way the judgment creditor --
11 this corporation has only got \$10,000. How is he
12 going to pay it?

13 CHAIRMAN SOULES: Well that's not the
14 issue that's here in this sentence that I'm
15 seeing, and that's why I'm trying to get you and I
16 to see the same issue.

17 MR. BEARD: Well that's what it means
18 to me. It's just like a bankruptcy issue. It
19 adequately protects the judgment creditor if
20 that's all he's going to get.

21 CHAIRMAN SOULES: Against what?

22 MR. BEARD: Any loss or damage that he
23 suffers by -- as long as his \$10,000 is going to
24 be there.

25 CHAIRMAN SOULES: But that's the

1 effectiveness of the judgment, not the interest on
2 appeal. The only thing that this protects if you
3 read it literally is the delay damage on appeal.

4 MR. McCONNICO: Luke, may I add
5 something?

6 MR. BEARD: Well, the damage on appeal
7 could be the loss of your whole principal.

8 MR. McMANS: Luke, my personal
9 reading of that, I think maybe that language may
10 have started out possibly for that purpose. But
11 if, in fact, you adopt Alternate 1 and leave the
12 rest of the money judgment rule in there, you
13 don't have a problem because the rule is you've
14 got to secure the whole judgment "unless" -- and
15 this is the only exception -- and then you deal
16 with the unless. So, I mean, whether you amend
17 (A) or not really doesn't make any difference as I
18 see it.

19 MR. BEARD: Well, just strike the
20 "occasioned by delay or appeal," just any loss or
21 damage.

22 MR. McCONNICO: I agree with that, and
23 I think if there's any confusion --

24 CHAIRMAN SOULES: That's fine.

25 MR. McCONNICO: -- takes care of it.

1 CHAIRMAN SOULES: Done. I mean if
2 that's the sense, then I don't have any problem
3 with it as long as we don't have a limitation of
4 what we're protecting. Sam Sparks of El Paso.

5 MR. SPARKS (EL PASO): You know we're
6 talking about the standard on irreparable harm. I
7 don't -- I would favor Alternative 1 for some of
8 the reasons stated, but we're also not looking at
9 "not posting such bond or deposit would cause no
10 substantial harm to the judgment creditor." To
11 me, that's the phrase.

12 I don't know how you're going to generally
13 convince anybody of that in most of the cases that
14 we're thinking about. I think that is the harder
15 of the two standards to obtain any relief from the
16 trial court. And this gives some improvement over
17 the existing system, but as a practical matter I
18 don't see that it's going to do --

19 MR. McCONNICO: Do a whole lot?

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

21 MR. McCONNICO: I agree. And as the
22 Federal courts have applied it, it really hasn't
23 been that different than our practice. It's a
24 very strict practice.

25 MR. BRANSON: Mr. Chairman, I'm going

1 to move again to table this matter, and I'm going
2 to ask the lawyers in the room who are retained by
3 either --

4 CHAIRMAN SOULES: I haven't recognized
5 it for that purpose.

6 MR. BRANSON: -- by either side not to
7 vote on the issue, and that this matter be tabled
8 until the Court has decided the Texaco case.
9 Thereafter, I think it's an appropriate matter of
10 study for this committee. Until then, I think
11 it's inappropriate and it offends my consideration
12 of what the appropriate ethics of this committee
13 are.

14 CHAIRMAN SOULES: Further debate?

15 MR. BEARD: Well, it's not supposed to
16 be debatable but I oppose that. I think this
17 is --

18 CHAIRMAN SOULES: Well I haven't
19 recognized him for the motion.

20 MR. BEARD: -- a matter to be taken
21 up. I think this is a matter we ought to act
22 on --

23 CHAIRMAN SOULES: We will act on it.

24 MR. BEARD: -- and not wait for the
25 committee from the legislature to come up with

1 something.

2 CHAIRMAN SOULES: One way or another,
3 we'll act on it.

4 MR. BRANSON: In that the Chair is one
5 of the attorneys retained by one of the parties in
6 that litigation, I would ask that a temporary
7 Chair be appointed.

8 CHAIRMAN SOULES: That issue is moot.

9 MR. BRANSON: Well since it's been
10 adopted on at least one, and I believe two prior
11 occasions by this committee, Mr. Chairman -- and
12 incidently I would like for you to look up in the
13 record those occasions because the last fellow
14 that called me a liar was a little younger than
15 you are and he got an opportunity to whip my ass
16 when it was over with -- because I did make that
17 motion and it was passed by this committee.

18 CHAIRMAN SOULES: I've read the motion
19 and reviewed the motion, but we need to debate
20 this. We've got -- the Supreme Court has taken a
21 pounding in the legislature this last time. And
22 if you -- we're going to see it again and again in
23 these materials. We need to address issues before
24 they get there. We will not have another
25 opportunity to promulgate a rule change before the

1 legislature meets again.

2 MR. BRANSON: How do you know that?

3 MR. JONES: That was the point of my
4 inquiry, Mr. Chairman. I don't know what the
5 legislature did and I --

6 CHAIRMAN SOULES: Well this book is
7 full of those materials.

8 MR. JONES: -- and I apologize for my
9 ignorance but I'm -- you know, maybe it wouldn't
10 be entirely unfair for you to tell me, would it?

11 CHAIRMAN SOULES: All right. If you
12 will look at page 3 of the Supplement, there is
13 the Senate resolution.

14 MR. BRANSON: While you're looking at
15 that, Mr. Chairman, let me ask you a question. Do
16 you think we're going to assist the Court in their
17 current problems when the majority of this
18 committee is retained by the litigants in that
19 case if we make a recommendation to them? Do you
20 think that is really going to enhance the Court's
21 position when you --

22 CHAIRMAN SOULES: Let me make this
23 announcement.

24 MR. BRANSON: -- have a group of
25 lawyers who are on retainer make the

1 recommendation?

2 CHAIRMAN SOULES: The supersedeas
3 issue in the Pennzoil-Texaco litigation is a dead
4 issue. There is nobody -- no lawyer in that
5 litigation is representing any party that has
6 anything to do with supersedeas. It's over.

7 MR. BRANSON: And you're going to
8 suggest that the actions of this committee will
9 not be presented to the Court when arguments are
10 made --

11 CHAIRMAN SOULES: Absolutely.

12 MR. BRANSON: -- as encouragement for
13 the Court to act?

14 CHAIRMAN SOULES: Absolutely. Both
15 sides say that. It's a dead issue.

16 MR. McMains: There isn't any issue,
17 Frank.

18 CHAIRMAN SOULES: It's over.

19 MR. McMains: I'm just saying -- I
20 mean there isn't anything. It's done, dead
21 letter. There isn't anything we're going to do
22 that would affect the litigation. That was not
23 true the last time. But the U.S. Supreme Court
24 has made that decision, and then the bankruptcy
25 subsequent filing -- I mean basically that's it.

1 It's all moot from a standpoint of the merits.

2 MR. BRANSON: In that case I withdraw
3 my motion to table.

4 MR. McMAINS: And there isn't any
5 issue in the appeal anywhere -- I mean in the
6 application for writ. And I assume that they are
7 not going to raise it on response, so I --

8 CHAIRMAN SOULES: No.

9 MR. McMAINS: -- we don't -- all of
10 that is immaterial, frankly, from a standpoint of
11 the advisability. And I -- frankly, I feel very
12 strongly along with Luke that I would prefer that
13 this committee and the Court speak to this issue
14 before the legislature gets a hold of it and rides
15 off on a wild ride. That's all I'm --

16 MR. JONES: I agree with that. I
17 think all of us in this room want the Court to
18 preserve its rule-making authority. I mean I
19 thought that's why we had -- that's why I got my
20 Senator to vote against what I call the Texaco
21 rule because to me its just repulsive for a
22 goddamned litigant to go over to the legislature
23 and get a law passed. And that's what they tried
24 to do.

25 And, you know, I don't like for this

1 committee to be blackmailed by that litigant, and
2 I kind of perceive that that's what's happening.
3 Now maybe we ought -- maybe we've got to knuckle
4 under; and if we do, I'm willing to knuckle
5 under. But if that's what happening, I want to
6 know about it.

7 CHAIRMAN SOULES: Well, it is. And
8 we're going to see more of it if we get into the
9 papers, Franklin. And the thing about it is, we
10 do a better job when we address these because we
11 understand the issues better. And here at this
12 table, we can talk about the real problems and we
13 can narrow it down if we can tell the Court what
14 we feel. And in almost every case -- as a matter
15 of fact, I think in every case where the Court
16 considered our work product after the last
17 sessions, they did what we asked -- what we
18 suggested be done.

19 But if we leave that as something to happen
20 over at the legislature --

21 MR. JONES: The only real problem with
22 that -- Mr. Chairman, what I have a problem with
23 is whether or not we are adopting a rule here
24 under pressure from all of these idiots over here
25 across the street.

1 CHAIRMAN SOULES: We are. And it's
2 just like we changed the special issue practice
3 because of that pressure. This committee has, at
4 times, responded to legislative pressures.

5 MR. JONES: No, the legislative
6 practice we changed because it was a goddamned
7 inanity.

8 CHAIRMAN SOULES: Well there was a lot
9 of pressure from the legislature too. Anyway,
10 let's get to the text of this proposal 47. Is
11 there a suggested amendment that we delete the
12 words "occasioned by the delay on appeal" at the
13 very end of (A)?

14 MR. McCONNICO: I so move.

15 MR. BEARD: Second.

16 CHAIRMAN SOULES: All right. Any
17 discussion? In favor say aye.

18 COMMITTEE MEMBERS: Aye.

19 CHAIRMAN SOULES: Okay. So that takes
20 care of paragraph A. Should the word be protect
21 the judgment creditor "for any loss" or "against
22 any loss"?

23 MR. BEARD: "From," shouldn't it?

24 MR. McCONNICO: I'd say "against."

25 CHAIRMAN SOULES: And that -- we'll

1 make that textual change. Okay. That takes us to
2 (B).

3 PROFESSOR BLAKELY: How will that
4 sound to read again?

5 CHAIRMAN SOULES: The last sentence,
6 then, of (A) will read, "The trial court may enter
7 such orders which adequately protect the judgment
8 creditor against any loss or damage."

9 MR. LOW: Luke, I still wonder why
10 don't you protect him not just from any loss or
11 damage but occasioned by the appeal, really. But
12 I guess that's the same.

13 PROFESSOR EDGAR: In the context of
14 the sentence, I don't think there is any problem
15 there.

16 MR. FULLER: You want to protect him
17 against loss as occasioned by the appeal not loss
18 of business opportunities and everything else.

19 MR. LOW: That's right.

20 MR. FULLER: You know, if I had
21 \$100,000, I might tell you to invest in something
22 that made a lot of money.

23 MR. LOW: But that might be a
24 different loss, not what you're really protecting
25 from a loss occasioned by the appeal. That's what

1 the whole thing is about and not just any loss of
2 "they may suffer." What, from the judgment or
3 what?

4 CHAIRMAN SOULES: Well, we could put
5 back in "occasioned by the appeal" and leave
6 "delay" out so that your just not talking about
7 the delay aspect of it.

8 MR. FULLER: Yeah, leave out delay and
9 leave in "occasioned by the appeal."

10 PROFESSOR EDGAR: Yeah, I think that
11 makes better sense.

12 MR. LOW: And then that would make
13 better sense and would tie it in with what you're
14 talking about.

15 CHAIRMAN SOULES: I see. Ken, I thank
16 you. That was Ken Fuller that made that
17 suggestion.

18 MR. JONES: Is there a motion, Mr.
19 Chairman, on the floor as to Alternative 1 or 2?

20 MR. SPARKS (EL PASO): Not yet.

21 MR. McCONNICO: Not yet.

22 CHAIRMAN SOULES: Let me see if I have
23 this right now, and instead of "which" -- which I
24 got hung up reading a moment ago -- I'm going to
25 read "as will." "The trial court may enter such

1 orders as will adequately protect the judgment
2 creditor against any loss or damage occasioned by
3 the appeal." Any further discussion on that?
4 Okay. All in favor of that change now say aye.

5 COMMITTEE MEMBERS: Aye.

6 CHAIRMAN SOULES: Okay. Now we'll
7 move to paragraph (B) and the discussion of
8 whether to use Alternative 1 or 2 or something
9 else.

10 MR. JONES: Mr. Chairman, I move the
11 adoption of Alternative 1.

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

13 MR. LOW: I second that.

14 CHAIRMAN SOULES: Moved and seconded
15 that Alternative 1 be -- is there any further
16 discussion on that?

17 MR. FULLER: I think that's ill
18 advised.

19 CHAIRMAN SOULES: Ken Fuller.

20 MR. FULLER: I think this is a really
21 big show, gang, and I think -- it may be that it
22 should be adopted -- but I really feel that we
23 ought to have more discussion. We're making a
24 major change in the law. There's some strong
25 feelings around this table and I don't -- I'm not

1 really knowledgeable in this area, but I'm smart
2 enough to see a roman candle go off when I see it
3 and I think we better talk about this some more.
4 And it may be that that's what we want on this,
5 hopefully.

6 CHAIRMAN SOULES: Well that's where
7 we're about now is talking about which
8 Alternative --

9 MR. FULLER: I don't want to vote on
10 it but let's discuss it.

11 CHAIRMAN SOULES: Yeah. We want it
12 fully discussed, no question. Okay. What
13 discussion -- the motion has been made and
14 seconded that we use Alternative 1. That simply
15 gets it on the table for discussion. It's been
16 discussed to some extent before, but just because
17 you've said your peace once, you can say it again
18 because we now have that issue squarely before us.
19 Who would like to speak?

20 MR. TINDALL: Luke, I'm in the dark on
21 these issues. I don't know how most states deal
22 with these issues. I know all the press we had
23 this Spring over the Texaco case, but our --

24 CHAIRMAN SOULES: Most states pretty
25 much follow the Federal practice of Rule 62. And

1 many --

2 MR. TINDALL: But I'm told that's
3 silent.

4 MR. McCONNICO: It is silent, but the
5 Federal case law has set up these standards and
6 they say the appellate court can change the
7 supersedeas bond on appeal. Now that is pretty
8 widespread in every circuit of the country.

9 What we did here -- and I'll talk a little
10 bit more about Alternate 1 -- we first went back
11 and looked at the Committee on the Administration
12 of Justice and their proposal. They had a
13 proposal that it was to keep the status quo. We
14 didn't know what the status quo was or what it
15 meant. Okay? That didn't make any sense to me
16 and you always got into the problem of really what
17 is the status quo.

18 We then looked at the Federal cases. This
19 was the strictest standard that was in any of the
20 Federal cases. And it's rarely used because
21 you've got two things you've got to meet, and both
22 of them are pretty high hurdles. And I think to
23 protect the judgment creditor -- and that's
24 something you've got to have right up at the front
25 -- this is as strong a standard as I have seen in

1 any of the Federal cases. We have not gone and
2 looked -- I know the people in the Pennzoil-Texaco
3 litigation probably did -- I did not go look at
4 what New York, California, Illinois and other
5 states did.

6 I know there is a division in other states.
7 A lot of states like Luke's states -- I've got the
8 New York, California law here -- but their codes
9 are silent to it, then the courts fill it in.
10 Some states, their codes aren't silent to it.
11 There are even some states that have the old Texas
12 rule that the supersedeas bond has to be twice the
13 judgment. But there is a division; there is no
14 uniformity across the country that I saw.

15 And Rusty would know this better than I, but
16 just going through this and trying to get a handle
17 on it, I went back -- we went back and looked at
18 the Federal law. This was as strict a standard as
19 I could pull out of any of the Federal cases and I
20 thought it would satisfy both of the policies that
21 we wanted to protect. Make sure a judgment debtor
22 -- and I didn't even think about Texaco -- but if
23 it's the Mobil station across the street and if
24 they get hit because a gas pump goes off for
25 \$80,000, they're not going to be able to put up

1 the bond. But they might have assets over there
2 of 120, so I wanted those guys to be able to be
3 protected.

4 And that's how we wrote this in because then
5 a court could say: "You're not going to get rid
6 of any of your assets. You're going to keep all
7 of your assets in place so the judgment creditor
8 can collect." But then the Mobil station could
9 come in and say: "I'm never going to make this
10 bond. There's no way." "The only way I'm going
11 to make this bond is to go into bankruptcy or go
12 out of business," and you protect the judgment
13 debtor.

14 MR. BRANSON: Mr. Chairman, I've got a
15 question before we --

16 CHAIRMAN SOULES: Yes, sir. Frank
17 Branson.

18 MR. BRANSON: -- vote on Alternative 1
19 or 2. Sometimes the amount of the judgment
20 interest of the cost is not adequate to protect
21 the judgment debtor particularly where you've got
22 cross appeals and matters that have been NOV'd.

23 MR. McCONNICO: Well, we pulled that
24 right out of the language of the existing rule.
25 That's the rule we have.

1 MR. BRANSON: Whether it was there or
2 not, it is still not adequate if we're dealing
3 with the law in the field. You could easily have
4 some treble damage issues NOV'd by the trial court
5 which could require substantially higher bonds for
6 protection than your actual judgment. But
7 couldn't you include cross appeals -- the amount
8 of judgment and/or cross appeals?

9 CHAIRMAN SOULES: Frank, help me get
10 to the language you're looking at so I'm not --

11 MR. BRANSON: (B) --

12 CHAIRMAN SOULES: (B), let's see.

13 MR. BRANSON: -- "The amount of
14 deposit."

15 MR. McCONNICO: The first sentence.
16 That language we underlined, that language should
17 not be underlined because it's not a change. But
18 you're right, that's -- if it's a problem, it's a
19 problem with the existing rule.

20 CHAIRMAN SOULES: The first sentence
21 should not be underlined?

22 MR. McCONNICO: It should not because
23 that's the way the rule reads now.

24 MR. BRANSON: Well, if we're dealing
25 with the rule anyway, why don't we go ahead and

1 address the problems that exist? If you're going
2 to protect the judgment creditor and debtor you
3 need to do it to the potential full judgment.

4 MR. BEARD: That would change all of
5 our practice in Texas --

6 PROFESSOR EDGAR: Well then you don't
7 have a judgment, Frank. See --

8 MR. BEARD: -- levee attachments
9 before you even filed your lawsuit.

10 MR. BRANSON: You've got a cross
11 appeal for definition.

12 PROFESSOR EDGAR: Pardon?

13 MR. BRANSON: You've got a cross
14 appeal for -- a cross point for definition. If
15 you can define the amount of the bond by looking
16 at the cross points as well as the judgments.

17 PROFESSOR EDGAR: Well, you've got to
18 look at the judgment, not the points that are
19 raised on appeal. It's not what judgment you
20 might ultimately obtain, you're trying to protect
21 the judgment that's been entered by the trial
22 court.

23 MR. BRANSON: Well, but aren't you
24 really -- right now we are addressing the total
25 rule as I understand it. Aren't you really trying

1 to ensure that whatever judgment is ultimately
2 entered there are assets to --

3 PROFESSOR EDGAR: Only the judgment
4 entered by the trial court.

5 MR. BRANSON: Philosophically, why not
6 protect the entire matter?

7 PROFESSOR EDGAR: Now that's another
8 question entirely.

9 MR. BRANSON: We have a rule here
10 that's broad enough to do that.

11 CHAIRMAN SOULES: Let's see. Sam
12 Sparks of El Paso.

13 MR. SPARKS (EL PASO): I want to ask a
14 question of the subcommittee and I'm -- I'm going
15 to jump over Frank's thought for a minute. On
16 Alternative 1, would it be within the spirit of
17 Alternative 1 if you entered into -- or the judge
18 entered an order "no requirement of the bond
19 shall" -- but the judgment debtor each year would
20 have to pay \$50,000 on the judgment until the
21 appeal was held. Now that's the kind of thing I'm
22 looking at when you look at whether or not the
23 judgment creditor will suffer substantial harm
24 during that appeal.

25 MR. BEARD: Sam, what we're trying to

1 do is leave that to the court that has to devise
2 that order.

3 MR. SPARKS (EL PASO): No, I
4 understand that. I'm just asking is that
5 something that the court could do under this rule?

6 MR. McCONNICO: Well, the last
7 sentence might give them that much leeway because
8 the last sentence of (B) states that in such case
9 the trial court may stay enforcement of the
10 judgment based upon an order which adequately
11 protects the judgment creditor for any loss or
12 damage occasioned by -- and I think we need to
13 take out "delay" again -- by the appeal. Now that
14 gives a lot of leeway.

15 CHAIRMAN SOULES: It seems to me in
16 the Alternatives -- in Alternative 1 you've got to
17 find irreparable injury to the debtor and no harm
18 to the creditor. The other case, the second
19 really picks up what we did in (A) and says you
20 must -- "The trial court must enter an order that
21 will protect the judgment creditor from any loss
22 occasioned by the appeal," and gives a trial court
23 latitude to make the decision as to what is
24 protective, without having to also find that
25 whatever might be protective is required because

1 anything else would do irreparable harm to the
2 creditor and so forth.

3 MR. JONES: Mr. Chairman, my motion is
4 on the floor --

5 CHAIRMAN SOULES: Yes, sir.

6 MR. JONES: -- and I would like, I
7 think, with the consensus of the committee to
8 amend it to strike out the word "delay" in the
9 last line of Paragraph (B).

10 MR. McCONNICO: I second.

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

12 PROFESSOR EDGAR: Do you want to be
13 consistent, though, and change the "which"
14 preceding "adequately" to read "as will"? Mr.
15 Chairman?

16 CHAIRMAN SOULES: I'm sorry. Hadley
17 Edgar.

18 PROFESSOR EDGAR: Do you want to be
19 consistent in that last sentence as we were in the
20 last sentence in the first paragraph by saying "as
21 will adequately" rather than "which adequately"?

22 CHAIRMAN SOULES: Yes. Where is that?

23 PROFESSOR EDGAR: It's the third line
24 from the bottom.

25 MR. JONES: Is that your motion,

1 Hadley?

2 PROFESSOR EDGAR: Yes. If that's all
3 right with you.

4 MR. JONES: That's fine.

5 MR. McCONNICO: And also we need to
6 make it consistent to change "for any," to
7 "against any."

8 CHAIRMAN SOULES: Let me see, I was
9 writing and I didn't hear the last comment. What
10 was it?

11 MR. McCONNICO: To make it consistent
12 with our prior sentence at the end of (A), we need
13 to change "for any loss to judgment creditor" --
14 "for any loss," to change the "for" to "against"
15 -- "against any loss."

16 PROFESSOR EDGAR: And also change
17 "protects" to "protect."

18 CHAIRMAN SOULES: Can we just get a
19 consensus, sort of a show of hands, how many feel
20 that -- mainly I'm trying to find out now the
21 extent to which the discussion has now progressed
22 to see if we're close -- ready for a vote. And
23 there was some sensitivity to what Ken was saying
24 here.

25 How many feel that the strict standards of 1

1 are preferable to the -- just providing that it
2 must be adequately protected which is in 2?

3
4 (At this time the vote was
5 (taken by a show of hands,
6 (after which time the
7 (meeting continued as
8 (follows:

9 CHAIRMAN SOULES: Okay. It seems to be
10 a fairly strong consensus that the stricter
11 standards would apply. Is that why there's not
12 much discussion on 2? Now I know that Elaine has
13 discussed it but if we're there, well -- does
14 anyone else want to discuss number 2? Or Elaine,
15 do you want to speak your peace one more time
16 before we vote?

17 PROFESSOR CARLSON: No, I just wanted
18 to caution the committee on that possible problem
19 down the road. I would like to respond a little
20 bit further to Mr. Tindall's inquiry a little bit
21 earlier and to some remarks Steve made about the
22 Federal rule. And I'd like to also say I'm not
23 retained in the Texaco-Pennzoil judgment. This is
24 my independent judgment.

25 The Federal rule -- cases that I read
interpreting the Federal rule are not saying it's

1 a matter of a court's inherent power of the trial
2 court to provide for alternate security. The
3 predecessor to the Federal rule expressly gave the
4 Federal trial court the power to provide for the
5 ultimate security. The Federal appellate rule
6 continues to give the Federal appellate courts the
7 review of the trial court's order of alternate
8 security.

9 And so it's a matter of rule interpretation
10 and not inherent power of the court. And that is
11 why I think that we need a change in the Texas
12 rule -- whatever it might be, Alternative 1 or 2
13 -- to Rule 47 to really fill the gap that's a part
14 of our Open Courts Provision.

15 MR. TINDALL: What about the issue of
16 the bond fee? In my one supersedeas, the only
17 person who made any money was the insurance
18 company that extracted a king's ransom. I mean I
19 always thought that was offensive. I mean if we
20 go with Alternate 1, do we need to also deal with
21 the bond fee because Steve's example of a \$120,000
22 judgment against Exxon, if you hold their feet to
23 the fire, they've got to put it up. It's a
24 ridiculous bond fee.

25 MR. McMANS: But they don't have to

1 buy a surety bond. I mean one of the problems is
2 that Exxon and a lot of the other big companies,
3 they just get a sister company or somebody else to
4 sign on as a surety --

5 MR. JONES: All they have to do is put
6 a CD up.

7 MR. McMAINS: That's right.

8 MR. BEARD: Well we shouldn't try to
9 cover any details of what -- just leave that to
10 the trial courts.

11 MR. TINDALL: Well, but is cost an
12 issue that we should -- I'm talking from a point
13 of inquiry. This is so radical a change that if
14 we go this route and you give the judge the
15 discretion, then what about the bond fee? They
16 say the Federal courts evidently have a rule on
17 this, right?

18 CHAIRMAN SOULES: Sam Sparks.

19 MR. SPARKS (EL PASO): Let me just say
20 that a lot of these decisions don't have any
21 practical effect on where we practice. The
22 Western District blanket will not give any orders,
23 period. You either put up a supersedeas or not.
24 I'm in some rather large cases that I sure have
25 gotten funded in, have offered to put up CD's, and

1 of course it's not acceptable because of the
2 negotiations between the parties at that point and
3 the court won't enter an order on that type of
4 thing.

5 And a lot of times it's because you can't get
6 a bond. I mean it doesn't make any difference
7 what it is, you just can't purchase one. And I
8 also want the record to reflect I'm not in the
9 Texaco case either. But Luke's statement of
10 number 2, by inference, being not as restrictive
11 as Alternate 1, in my judgment, is not correct
12 because number 2 doesn't really go to the problem
13 we're talking about. Number 2 just allows a
14 judgment debtor that has the assets to avoid the
15 payment of a bond in my judgment. So I really --
16 on 1 if we're talking about making any change for
17 the "betterment" or to respond to the legislative
18 pressure, we're looking at Alternative 1, I think.

19 CHAIRMAN SOULES: Well, let me read
20 the (B) now with Alternative 1 in there as I
21 understand it, and then we can get a vote.

22 "When the judgment is a sum of money, the
23 amount of the bond or deposit shall be at least
24 the amount of the judgment interest and costs.
25 The trial court may deviate from this general rule

1 if, after notice to all parties and a hearing, the
2 trial court finds that posting the amount of the
3 bond or deposit will cause irreparable harm to the
4 judgment debtor, and not posting such bond or
5 deposit will cause no substantial harm to the
6 judgment creditor. In such a case, the trial
7 court may stay enforcement of the judgment based
8 upon an order which adequately protects" --

9 PROFESSOR EDGAR: "As will."

10 CHAIRMAN SOULES: Well, that doesn't
11 fit there.

12 MR. McCONNICO: "Which" might be
13 better.

14 CHAIRMAN SOULES: "Which" is better.
15 We'll leave it -- "which adequately protects the
16 judgment creditor against any loss or damage
17 occasioned by the appeal."

18 MR. JONES: Are you going to change
19 "for" to "against"?

20 CHAIRMAN SOULES: Yes. I've read it.
21 Are we ready to vote?

22 MR. BRANSON: Mr. Chairman, before we
23 do that, I didn't mind Sam jumping over my
24 question but I'd like for the committee to address
25 it, if we could, and that is the question of where

1 you have a verdict by a jury that is different
2 from --

3 CHAIRMAN SOULES: Frank, please.

4 Let's vote this first and then--

5 MR. BRANSON: Well, but we're voting
6 on language and all you'd have to do is add
7 "judgment", make that "potential judgment" or
8 "verdict."

9 CHAIRMAN SOULES: Well, while we've
10 got this much before us, I'd like to get a vote,
11 and then if you want to look at that we'll go to
12 it. But just as a matter of organization -- those
13 in favor as read, please show by hands.

14 MR. JONES: This is Alternate 1, my
15 motion?

16 CHAIRMAN SOULES: Yes, sir. Okay.
17 Opposed? That's unanimously recommended, then.

18 MR. McMAINS: No, Elaine had her hand
19 up.

20 CHAIRMAN SOULES: Oh, I'm sorry. I
21 didn't see your hand. I looked for it but it must
22 have been over there behind Tony somewhere.
23 Elaine registered a dissent.

24 Now Frank, tell me what -- express your
25 point.

1 MR. BRANSON: Well, my question is if
2 we're attempting to protect the litigants in their
3 various positions after the jury comes back and
4 you have some NOV'd issue which if the appellate
5 court finds were improperly NOV'd, they would
6 reform the trial judgment. Then you need to
7 protect the judgment creditor's ability to collect
8 what the jury attempted to award them. And all
9 you would have to do is change the word "judgment"
10 in (B) to put "potential judgment based on the
11 jury verdict."

12 CHAIRMAN SOULES: Let's take a
13 consensus. Who's for discussing that and who's
14 not? Who wants to discuss Frank's suggestion,
15 hold up your hand?

16 MR. JONES: Well, I think we ought to
17 discuss any suggestion.

18 MR. LOW: Yes, I think so too.

19 CHAIRMAN SOULES: All right. Let's
20 discuss it. I don't mean to say --

21 MR. BEARD: Well, Frank, why don't you
22 have summary judgment issues in there too?

23 MR. BRANSON: Well, if you're making
24 them post a bond and the issues that were NOV'd
25 are three times in some instances, and in some

1 instances more than that -- the original judgment
2 that's entered -- and if you had a trial court
3 that improperly NOV'd it, the judgment creditor
4 has got no protection on appeal under the existing
5 law. If we're addressing the rule, let's see if
6 we can get them some protection too.

7 MR. McMAINS: Yes, but Frank the point
8 is he's not a judgment creditor. He really
9 doesn't have a judgment. I mean you're talking
10 about him being a verdict creditor and --

11 MR. BRANSON: Well, I understand that.

12 MR. McMAINS: -- there is no such
13 animal. But you don't have to post a supersedeas
14 bond because what happens if you don't? Nobody is
15 going to execute on a verdict when the judgment
16 is --

17 MR. BRANSON: But heretofore you had
18 to post supersedeas bonds in all cases. We've now
19 changed that if the Court adopts our rule. I'm
20 suggesting that we address the underlying
21 potential problem along the way.

22 CHAIRMAN SOULES: Frank, put it in the
23 form of a motion so we'll know --

24 MR. LOW: But if you did that, Luke --

25 CHAIRMAN SOULES: -- we can see what

1 we're talking about, know what we're discussing,
2 if you wish.

3 MR. BRANSON: Okay. I would -- all
4 right I would move that (B) be amended to read as
5 follows: "When a judgment is a sum of money, the
6 amount of bond or deposit shall be at least the
7 amount of the judgment and/or the amount of the
8 judgment sought on cross appeal, interest and
9 cost."

10 CHAIRMAN SOULES: It's moved. Is
11 there a second? Motion dies for lack of a second.

12 Now let's go on to (C) and carry through with
13 the text of the proposed 47. And then I guess the
14 next point, really, of discussion is going to be
15 the review or continuing trial court jurisdiction,
16 Rusty, that you raised. But we need to get
17 through the textual changes anyway. Steve,
18 explain what follows then in (C) and (D) and so
19 forth.

20 MR. McCONNICO: Well, these changes
21 are really just following through with land and
22 property with the money judgment. What we need to
23 change in each of these is they all repeat the
24 language "by the delay on appeal." We need to say
25 "by the appeal."

1 CHAIRMAN SOULES: So drop out "delay
2 on" in each place?

3 MR. McCONNICO: Yes.

4 CHAIRMAN SOULES: And you're accepting
5 that amendment, then, your committee is, to drop
6 out the "delay on"? Bill?

7 PROFESSOR DORSANEO: That's fine with
8 me.

9 PROFESSOR EDGAR: Well, where does
10 that language appear at?

11 CHAIRMAN SOULES: In the top line of
12 page 2 is the first time I see it.

13 PROFESSOR EDGAR: Yes, but he said it
14 appeared in all of the rest of them.

15 PROFESSOR DORSANEO: Not many of them.

16 MR. McCONNICO: Well, it appeared in
17 (C) --

18 MR. McMAINS: I think that's the only
19 one it appears in.

20 MR. McCONNICO: That's the only one.
21 I'm sorry. That was a misstatement.

22 Well, basically what we've done in each of
23 these again, in (D) and (E), we've given the trial
24 court the discretion to suspend enforcement of the
25 money judgment with or without the appropriate

1 additional security. But that's just trying to
2 make each of these consistent with (B). We've
3 added that to each one.

4 Now we've also marked out language that --
5 because we had to do this so quickly -- well, not
6 that -- we've done it in the last couple of weeks
7 -- there are some provisions in Rule 47 that do
8 not appear in this because they are no longer
9 applicable to this. And we might need to go back
10 and you might need to look at Rule 47. Well let
11 me see if I could bring out some of that language.
12 It's not so much in Rule 47, as we did leave out a
13 lot of language in Rule 49. And when we get to
14 Rule 49, there's been a lot of language in Rule 49
15 that no longer appears in the new rule.

16 Now I think the big problem is going to come
17 up -- well, hopefully it's not going to be a big
18 problem, but it's something we need to take notice
19 of -- in (K) under the continuing trial court
20 jurisdiction because this provision is not in Rule
21 47 as it's written now. This is an addition. And
22 previously when we've discussed this rule, most of
23 the changes have been proposed to occur in a new
24 paragraph sub (K); in fact, that's where the
25 Committee on Administration of Justice proposed

1 that the rule be changed to begin with. I will
2 give you a minute to read paragraph (K). I think
3 it's self-explanatory, but it is a new addition
4 that doesn't appear in our existing rule.

5 What we came down to in paragraph (K) is that
6 there could be a change in the judgment creditor's
7 or the judgment debtor's situation. And if the
8 judgment debtor's situation changed, we had to
9 have some type of authority in the trial court to
10 go back and redo the security that it can put up
11 by the judgment debtor. That's why we put in
12 paragraph (K), to give the trial court continuing
13 jurisdiction to correct anything that might occur
14 while the appeal is ongoing and after the trial
15 court loses its plenary power.

16 MR. LOW: You kind of have a dual
17 jurisdiction.

18 MR. McCONNICO: Sometimes you are
19 going to have dual jurisdiction. And, in fact, we
20 probably do right now just like Rusty said. That
21 was our conclusion. But this makes it express.

22 MR. LOW: I don't see anything wrong
23 with it.

24 CHAIRMAN SOULES: Rusty --

25 MR. McCONNICO: I mean it's stated

1 now.

2 CHAIRMAN SOULES: Rusty, you had some
3 sensitivity to this earlier expressed. How do you
4 see this (K)?

5 MR. McMAINS: The only real comment I
6 have, I do think that based on case law that we
7 have right now, there is a suggestion that you can
8 make such a motion -- that is, any motion that
9 relates to the right to supersedeas -- for
10 instance, in nonmoney judgments -- even after
11 appellate jurisdiction is attached to the court of
12 appeals. So I'm not sure this is anything but a
13 codification insofar as the recognition of plenary
14 jurisdiction.

15 But the question I do have, it appears that
16 it doesn't really give you any encouragement to do
17 it early. And the only question I have is:
18 Should there be -- I can understand why you want
19 to give them jurisdiction with regards to changed
20 circumstances, or someone contending that there
21 are changed circumstances. My question is: Do
22 you want to essentially encourage people just not
23 to worry about it until the subject comes up. I
24 mean under this rule, basically you don't have to
25 initiate anything until six months into the appeal

1 if one so desires. I mean should you have any,
2 you know, for good cause? I mean should there be
3 any limitation on your ability to go to the trial
4 court? I don't know.

5 MR. McCONNICO: I don't think so.

6 MR. LOW: Limitation is based on a
7 change and you don't know when that would occur.

8 MR. McCONNICO: That's right.

9 MR. McMAINS: No. No, this is not
10 limited. This gives the trial court jurisdiction
11 to mess with that order or to entertain the
12 request for the first time made after the case is
13 pending on appeal.

14 CHAIRMAN SOULES: Well, the judgment
15 creditor may not -- may be reluctant to delay and
16 execute.

17 MR. McMAINS: Oh, I understand. I
18 understand.

19 CHAIRMAN SOULES: And so as long as
20 that's the status, the judgment debtor will be
21 moving to get help.

22 MR. McMAINS: Don't get me wrong, I'm
23 not urging --

24 CHAIRMAN SOULES: Nothing is changed
25 really until somebody decides to execute --

1 MR. McMAINS: I'm not urging that
2 there should be one, necessarily. All I'm saying
3 is that there is no either restriction or even
4 encouragement to have done it earlier.

5 CHAIRMAN SOULES: I'm not trying to
6 argue that there should be. I'm simply trying to
7 put that concept out there that maybe there is no
8 need for anybody to seek until -- really nothing
9 has changed as far as the relationship of the
10 parties except somebody six months later decides
11 that they've got the courage to start executing
12 it.

13 MR. BEARD: Well, what we're doing is
14 just eliminating a question as to the trial lawyer
15 as to where does he go to try to modify that
16 order.

17 CHAIRMAN SOULES: Sam Sparks. That's
18 right.

19 MR. SPARKS (EL PASO): Well, we're
20 doing something more, though, and I think it is a
21 good -- and that is telling the trial judge,
22 whoever or wherever the trial judge is, that they
23 can do it. A lot of them -- you know, sometimes
24 you can't get Rusty on the phone to tell the judge
25 that he can do that, and I think it's a good

1 provision.

2 MR. LOW: No, you could end up though
3 with -- you've got it on appeal. You could end up
4 -- if it's not limited to how many motions you can
5 file in a trial court, you can end up where you've
6 got a hearing on this in the trial court at 9:00,
7 court of appeals at 9:30 -- I mean I can see the
8 dual jurisdiction thing. It could be some play,
9 and I don't know how you would deal with it.

10 MR. McMAINS: One question that I have
11 is whether or not we should be essentially
12 encouraging them to go to the trial court first
13 because our Rule 48 -- and maybe that's where we
14 need to make the amendment is in the appellate
15 rule -- is suggest that what you can do in the
16 appellate rule is to review a trial court's
17 determination under this rule because really and
18 truly the appellate courts don't have really any
19 fact-finding jurisdiction, and really has no
20 business entertaining testimony or affidavits when
21 the trial court hasn't had a chance to make a
22 decision.

23 PROFESSOR CARLSON: Isn't that really
24 what Rule 49 says?

25 MR. BEARD: Well, Rusty, you can have

1 a delayed appeal and this will supersede -- as
2 long as it's not sufficient -- the court of
3 appeals will simply raze it. That's just an
4 administrative act, it doesn't require any
5 hearing.

6 CHAIRMAN SOULES: Elaine Carlson says
7 isn't that really what Rule 49 does is make the
8 court of appeals a review court after the trial
9 court has been addressed under (K).

10 MR. BEARD: I don't really think,
11 though, in those instances where people have
12 posted a supersedeas bond that the passage of time
13 has caused the interest to exceed the amount of
14 the supersedeas bond.

15 CHAIRMAN SOULES: As a matter of rules
16 history that we're making here, is it the intent
17 of the proposal from the committee to require a
18 litigant to go first to the trial court for relief
19 and then have the court of appeals be a review
20 court for whatever the trial court has done?
21 Moving first to 47(K) and the trial court, and
22 then to 48. I mean, have I got the numbers right?
23 Number 47(K) and the trial court, subject to 49
24 review.

25 MR. TINDALL: Luke, I think that's a

1 good approach. The dual jurisdiction is an issue
2 we have in divorce cases a lot. And we got the
3 legislature to overrule that Boniface (phonetic)
4 case that said you couldn't enforce by contempt in
5 the trial court when the case was on appeal. And
6 that's the law we have now is you can still
7 enforce the judgment in the trial court even
8 though it's in the Supreme Court of Texas so --
9 because the appellate courts aren't equipped to
10 have these evidentiary hearings.

11 CHAIRMAN SOULES: Let's see, as I'm
12 reading 47(K) and 49, the way that they are on the
13 table right now, we go first to the trial court
14 under 47(K), and only after that then we go to the
15 court of appeals under 49. If that's the intent
16 of the committee, that's the way it seems to me to
17 read.

18 PROFESSOR DORSANEO: Well really we go
19 under 49(B), and then (K) would give jurisdiction
20 to do (B) after plenary power, right?

21 CHAIRMAN SOULES: Right.

22 PROFESSOR DORSANEO: But it is a
23 little bit -- it's not completely clear in 49(A)
24 when it says "the trial court's order" that we're
25 talking about what takes place after the first

1 sentence of 49(B).

2 CHAIRMAN SOULES: How can we make that
3 clear?

4 PROFESSOR DORSANEO: I think we could
5 change the second sentence of 47(B) to say that
6 the trial court may make an order deviating from
7 this general rule, or order a deviation from this
8 general rule.

9 CHAIRMAN SOULES: Judge Raul Rivera,
10 you had you hand up, please, sir?

11 JUDGE RIVERA: I had a comment. It
12 might be a lot simpler and a lot more direct if we
13 just say that the trial court will have power and
14 continue jurisdiction to modify its orders under
15 this rule during the pendency of the appeal,
16 period. Then it wouldn't conflict or intervene or
17 overlap with Rule 49. And I think that's
18 consistent with other rules that we could modify
19 our own orders.

20 CHAIRMAN SOULES: Bill.

21 PROFESSOR DORSANEO: My inclination is
22 to discourage a requirement that somebody would go
23 to the trial court in every case in order to
24 preserve the right to go back later. And I like
25 the idea of letting someone wait until a problem

1 comes up and then going to the court and seeking
2 relief, rather than going at the threshold,
3 getting some kind of an order so they could come
4 back later and seek a modification of that order.

5 CHAIRMAN SOULES: You see, Judge, what
6 he's saying is, is that there's not any order.

7 JUDGE RIVERA: Well, we can say enter
8 or modify. Entertain, enter and/or modify.

9 CHAIRMAN SOULES: Well I think that's
10 what Bill was getting at. I'm sorry.

11 JUSTICE WALLACE: I think I can
12 guarantee you every appellate judge in the State
13 would druther the trial court take care of those
14 matters.

15 MR. TINDALL: That's right.

16 JUDGE RIVERA: If it's going to be a
17 hearing where evidence is going to be required to
18 hear an appraisal or a financial statement or look
19 at a CD or something, its got to be done in the
20 trial court so I'm sure they would like that.

21 MR. SPARKS (EL PASO): Well, they have
22 it in the proposed Rule 49.

23 MR. McCONNICO: Well, that's where we
24 are. That's why we drafted it this way.

25 CHAIRMAN SOULES: Bill has a propose

1 to fix here. If we go back into 47(B) where we
2 say the trial court may deviate from this order
3 and we say the trial court may order a deviation
4 from this general rule, now that is the order.
5 Now we've called it an order instead of -- may
6 order a deviation. And then it's that order that
7 becomes reviewable under 49 and you're tracking
8 something from 47(A) -- or 47(B) into 49; is that
9 right, Bill? Explain that to the committee, if
10 you will.

11 PROFESSOR DORSANEO: Well, as I see
12 it, for money judgments which is what we're really
13 addressing, you have first of all as the main rule
14 an amount of supersedeas set by a rule not set by
15 court order, but the trial court may make an order
16 deviating from the amounts set by the rule subject
17 to the standard in 49(B). The trial court may
18 take that action pursuant to paragraph (K) of 47
19 -- I think I may be saying 49, I mean 47 -- after
20 the period of plenary power under Rule 329(b)
21 would ordinarily have expired. That's probably
22 the law anyway. And all of that is subject --
23 that is to say the trial court's order either
24 within the plenary power period or thereafter is
25 subject to review in accordance with paragraph (A)

1 of 49 which speaks about reviewing the trial
2 court's order.

3 CHAIRMAN SOULES: Pursuant to Rule 47.

4 PROFESSOR DORSANEO: Yeah, pursuant to
5 Rule 47. So that would in effect require someone
6 to go to the trial court first.

7 CHAIRMAN SOULES: Are you comfortable
8 with that approach, Rusty?

9 MR. McMAINS: Yes. Except that do all
10 of the other exceptions have an order in them with
11 regards to the supersedeas? I mean these things
12 talk about bonds and divisions.

13 CHAIRMAN SOULES: Does it say order or
14 suspension like in (B), instead of suspend?

15 PROFESSOR DORSANEO: I think it says
16 "determined." It could say "ordered" instead of
17 "determined."

18 CHAIRMAN SOULES: Where is that?

19 PROFESSOR DORSANEO: Like you take
20 (D). (D) uses the word "determined"; (E) uses the
21 word "determined"; (F) uses the word "determined";
22 and all of those could say "ordered," I suppose.

23 CHAIRMAN SOULES: It says -- how about
24 the trial court may, within its discretion, order
25 a suspension instead of suspend? That's the

1 order, is it not? And then order a suspension?
2 (F)?

3 MR. McCONNICO: Right.

4 CHAIRMAN SOULES: And then (G) has got
5 "ordered" in it.

6 PROFESSOR DORSANEO: (H) has got
7 "determined" again.

8 CHAIRMAN SOULES: Okay. We'll clean
9 up the subparagraphs here to be sure that we're
10 talking about orders in every one of the
11 subparagraphs of 47 so that the word "order" in 49
12 will pick that up for review. Ken, you had your
13 hand up. Thank you.

14 MR. FULLER: This may not be the
15 appropriate time but any time you give a judge --
16 the court a lot of discretion, it worries me that
17 it doesn't have any guidelines. We have to deal
18 with that in our business all the time. I wonder
19 about the practicality of in the event of a
20 deviation from the form where they are just set
21 out, you know -- you've got to have it in the
22 amount of the judgment -- what is wrong with
23 requiring that judge to state in specificity the
24 reasons for the deviation to avoid these remands
25 for more evidentiary hearings? In other words, if

1 you're going to deviate, you've got to say in
2 there why you're deviating.

3 CHAIRMAN SOULES: Pat Beard.

4 MR. BEARD: The subcommittee predicted
5 that this was an issue that would be coming up
6 today. But I'll just say once again that I don't
7 want the trial court doing anything but saying
8 "granted" or "denied" or "overruled." He hasn't
9 got time to do all these things. The prevailing
10 party drafts them all up in the first place, and I
11 don't think we ought to have anything saying --
12 that says any findings of facts. It just has to
13 be supported by the record going up.

14 CHAIRMAN SOULES: Well, and having
15 gone for Alternative No. 1, we know he has got to
16 make two very direct findings, irreparable injury
17 and no harm.

18 JUDGE CASSEB: Are you talking about
19 the trial judge that actually had the hearing or
20 just any trial judge?

21 CHAIRMAN SOULES: Well, the trial
22 judge that signs the order. The order has to be
23 based on these findings, doesn't it, Judge? Maybe
24 I'm not following your question, Judge Casseb.

25 JUDGE CASSEB: I'm talking about if

1 one trial judge said something and you go to
2 another trial judge who says, "I want this
3 reviewed. I want this reduced." Do you go to the
4 same trial judge that said it originally or not?

5 CHAIRMAN SOULES: Well, you have to go
6 back to the same court but it may not be the same
7 judge sitting on the court, unfortunately.

8 JUDGE CASSEB: I'm afraid that's going
9 to cause some confusion.

10 CHAIRMAN SOULES: Tony SADBERRY.

11 MR. SADBERRY: Mr. Chairman, on that
12 point I would like to address the subcommittee as
13 to whether you could consider the right of the
14 judgment creditor to request the findings of facts
15 by the trial court on that issue as opposed to it
16 being mandatory.

17 MR. BEARD: Well, we did not discuss
18 it in the committee, but if you don't have any
19 authority to get it out of the trial court, I
20 don't know of any way you could make those
21 findings of fact.

22 MR. SADBERRY: Well, would that be
23 against the spirit of what you propose to have
24 that provision written in? It can be the result
25 of an appeal that the court of appeals remands it

1 for such a finding. I'm wondering if it would be
2 advisable to allow for the request to maybe avoid
3 one step in the appeal process.

4 MR. BEARD: Well, without findings of
5 facts, if there is anything to support the trial
6 court's order, they're going to affirm it. I
7 would rather stay away from it.

8 MR. McCONNICO: I think the way it is
9 now that the judgment debtor has got to have a
10 record of the hearing. Obviously, he isn't going
11 to have anything to appeal unless he makes a
12 record. The record, I mean, just goes without
13 saying. The record has to reflect evidence on
14 each of those two standards that we have put in,
15 that we have to show that it will irreparably harm
16 the judgment debtor to put up the bond and it will
17 not harm the judgment creditor if he gives some
18 alternative method of security.

19 I think that's the simplest way to do it, is
20 to let it go up like our discovery hearings are
21 going up now just based upon the record in front
22 of the trial court. I think if we add any more
23 baggage to -- we were concerned about adding any
24 baggage to the appeal that would make the appeal
25 any more difficult. And we wanted to keep it as

1 simple as possible, but make the standards strict.

2 MR. BEARD: If you have to have
3 findings of facts, how long is it going to take to
4 get those drafted up? This appeal should be
5 able --

6 MR. McCONNICO: Quick.

7 MR. BEARD: -- to hit that Appellate
8 Court just like that and -- for relief.

9 MR. McCONNICO: We didn't want to
10 slow --

11 MR. BEARD: One way or another.

12 MR. McCONNICO: We didn't want to slow
13 down the appeal where the judgment debtor could
14 waste the assets if he doesn't like it.

15 CHAIRMAN SOULES: Bill Dorsaneo.

16 PROFESSOR DORSANEO: You really have
17 two choices. If you require findings, you can
18 either reverse the order and go back to a definite
19 amount if the judge doesn't make the right kind of
20 order, doesn't prepare it properly, you reverse
21 and require a bond in the full amount. Or
22 probably, more sensibly, send it back to the trial
23 judge to go through that process again of
24 redrafting the order like we do when findings are
25 not made when you have a right to request them.

1 And that really does get you into a lot of going
2 back and forth to no purpose, I think.

3 MR. SADBERRY: Well, I think that's
4 the point. And I agree with Alternative 1
5 requiring essentially two major findings, we
6 wonder what the court of appeals might address as
7 far as additional findings that may be required in
8 the Rule 49(A) provisions.

9 CHAIRMAN SOULES: Does anyone have any
10 suggestions for further changes to 47 or 49 other
11 than those that we've talked about?

12 PROFESSOR EDGAR: Yes, I have a
13 question.

14 CHAIRMAN SOULES: Yes, sir. Hadley
15 Edgar.

16 PROFESSOR EDGAR: In looking at
17 subsections (D) and (E) and in comparing those
18 with 47(D) and (E) as they currently exist, the
19 current provisions provide that the appellee shall
20 have his execution against any other property of
21 the appellant. And apparently the subcommittee is
22 eliminating that provision which reduces the
23 security currently afforded a judgment creditor.
24 And I would like for them to comment on that.

25 CHARMAN SOULES: Let's see, Hadley.

1 Are you reading the current rule book?

2 PROFESSOR EDGAR: 47(D) and (E),
3 foreclosure on real estate and foreclosure on
4 personal property.

5 CHAIRMAN SOULES: Okay.

6 PROFESSOR EDGAR: And there might be
7 some others. I really haven't had an opportunity
8 to examine it. You see, we don't know exactly
9 what has been eliminated.

10 MR. McCONNICO: We don't.

11 PROFESSOR EDGAR: And I know that
12 because -- I know the problem because of the time
13 crunch you are working under. But I just noticed
14 that those were deleted, and I would just like a
15 comment.

16 MR. McCONNICO: The deletion is we
17 didn't want to get into the fight -- and this -- I
18 should have brought this up. We didn't want to
19 get up into the fight on the priority of the liens
20 in our new rule because we have a situation now as
21 to priority of liens. And we didn't want to bring
22 that back up because looking at the Federal
23 experience and the other states' experience,
24 that's created a lot of problem on foreclosure of
25 real estate, foreclosure of personal property.

1 But, I don't know if anyone on the subcommittee
2 feels strongly, really strongly, about that or
3 not.

4 That was -- and I don't know if that's
5 something -- basically, I think that is something
6 we should discuss here. And I don't know if it's
7 something that should be eliminated here because
8 we didn't reach a consensus on that. Our feeling
9 was that we didn't want to get into the fighting
10 of the priority of the lien between the judgment
11 debtor -- or the judgment creditor and the other
12 creditors of the debtor.

13 PROFESSOR EDGAR: Well, this certainly
14 is a change and --

15 MR. McCONNICO: It's a change.

16 PROFESSOR EDGAR: -- and I was
17 concerned about the committee's reason for
18 deleting it.

19 MR. McCONNICO: Right.

20 PROFESSOR EDGAR: That was the only
21 thing I wanted to raise.

22 CHAIRMAN SOULES: Can you speak to
23 that Bill Dorsaneo?

24 PROFESSOR DORSANEO: From my
25 involvement with the committee, that language more

1 or less kind of went away without a lot of
2 consideration.

3 MR. McCONNICO: It did.

4 PROFESSOR DORSANEO: I would suggest
5 we put it back in.

6 CHAIRMAN SOULES: Well, let's put it
7 back. Let's try to pull it back up through the
8 cracks and put it back were it was.

9 MR. McCONNICO: Yeah.

10 CHAIRMAN SOULES: What do we have to
11 do to do that?

12 MR. McCONNICO: What I said was the
13 only discussion that was had, and that didn't have
14 a lot of discussion.

15 PROFESSOR CARLSON: I guess I just
16 felt from reading it that it was giving the trial
17 court consistent discretionary authority and
18 security. But really it's not -- the standard is
19 not even mentioned, Hadley, in (D) and (E) that we
20 see in (B), but perhaps it's not desirable.

21 CHAIRMAN SOULES: Let me ask the
22 committee to restore that language back in --

23 MR. McCONNICO: Sure.

24 CHAIRMAN SOULES: -- and then assume
25 that that is going to get done in edit. Any

1 further discussion?

2 JUSTICE WALLACE: One comment on 49.

3 Now there was some question about the standard and
4 review by the court of appeals. It's going to be
5 an abuse of discretion unless it is specified
6 otherwise. And if we're going to make this
7 consistent with the way the system is working,
8 it's going to end up being abuse of discretion
9 anyway. I don't know how else an appellate court
10 would look at what the trial court does as to
11 whether they have abused the discretion, whether
12 they followed the principles and rules of law that
13 they had to work under.

14 These are the rules that trial courts are
15 going to be working under, he's going to use his
16 discretion in setting this bond and I don't know
17 how -- I don't think you'll find a court of
18 appeals anywhere that's going to overturn one. So
19 I just wanted the committee to know that when you
20 start appealing one of these, you're going to be
21 using an abuse of discretion standard. And if the
22 committee thinks it ought to be different, you
23 ought to discuss it. If you don't think it
24 should, then that's fine.

25 MR. BEARD: How would we make it

1 different?

2 JUSTICE WALLACE: What?

3 MR. BEARD: Judge Wallace, what other
4 standards --

5 JUSTICE WALLACE: That's what I'm
6 saying. There was some discussion earlier about
7 maybe abuse of discretion was not the proper
8 standard, but I'm saying that's what we've got.

9 MR. BEARD: I don't think it is a
10 proper standard. But what other standard--

11 JUSTICE WALLACE: I don't know of any
12 other. We're going to have to change our entire
13 concept because -- or trial and appellate
14 procedure if we get away from that abuse of
15 discretion.

16 MR. BEARD: No. We would have, I
17 think, preferred that the appellate court could
18 substitute it's judgment for the trial court but I
19 don't know how we can do that. See, we had the
20 other issue of how do we get to the Supreme Court
21 to straighten out the court of appeals? That's
22 going to take a mandamus, as far as I know. We
23 don't know of any way the appeal can go on to the
24 Supreme Court at that stage.

25 CHAIRMAN SOULES: Assuming the edit to

1 put back in the language that Hadley addressed --
2 and, Hadley, would you work with the committee on
3 that edit sometime during the day just to -- in
4 effect, just suggest -- tell them exactly what you
5 want back in and where? And then sometime during
6 the day, I'll get mine --

7 PROFESSOR EDGAR: Well, I just raised
8 the question. I noticed that it was deleted and
9 it wasn't a change, I noticed, and I was just
10 curious about why it had been deleted.

11 CHAIRMAN SOULES: Well, the consensus
12 is that it should go back in --

13 MR. McCONNICO: Right.

14 CHAIRMAN SOULES: -- and I think we're
15 going to vote on it assuming that that's been
16 done. And would you help locate the places to put
17 it back in?

18 PROFESSOR EDGAR: Yes.

19 MR. TINDALL: Luke, I have one
20 suggestion on (G).

21 CHAIRMAN SOULES: Harry Tindall.

22 MR. TINDALL: Our Family Code has
23 tended over the last ten years to get rid of the
24 word "custody."

25 CHAIRMAN SOULES: All right.

1 MR. TINDALL: And (G) ought to be -- I
2 can work with the subcommittee if they're going to
3 meet this afternoon and change the phrasing. No
4 substantive change, just --

5 CHAIRMAN SOULES: What word should we
6 use?

7 MR. TINDALL: I would say
8 "Conservatorship" or "Custody" should be the
9 caption of (G), and then there are two places in
10 the rules where the word "care" is. Strike the
11 word "care" and put "conservatorship."

12 CHAIRMAN SOULES: But do we continue
13 to use the word "custody"?

14 MR. TINDALL: Yes, because there are
15 references in the Family Code to the Uniform Child
16 Custody Jurisdiction Act, so we probably ought to
17 keep the term in there but make it subordinate to
18 the term conservatorship or custody.

19 CHAIRMAN SOULES: The caption is
20 "Conservatorship" --

21 MR. TINDALL: Or "Custody." And then
22 where it says "care or custody," change it to
23 "conservatorship or custody" in the two places
24 where -- line 2 and 4, and that's it.

25 CHAIRMAN SOULES: Thank you for that

1 suggestion. Any further discussion on 47 and 49?
2 Rusty.

3 MR. McMAINS: Luke, I -- 49 has
4 obviously three subparts, (A), (B), (C). Now
5 we've got (A) and (B) in the new Rule 49. One of
6 the things I was curious about, (A) is labeled
7 Appellate Review of Suspension of Enforcement of
8 Judgment Pending Appeal. And it appears to me --
9 and maybe I'm wrong -- it is a limitation,
10 probably, of the court of appeals jurisdiction to
11 review that issue. Is that intended as a
12 restriction?

13 MR. McCONNICO: It's not intended --
14 explain to me how you see that as a limitation,
15 Rusty.

16 MR. McMAINS: Well, it just says "the
17 trial court's order pursuant to Rule 47" -- you
18 don't need a trial court order to permit the
19 posting of a bond, okay, in terms of that purports
20 to be for the amount of the cost. The sufficiency
21 of the sureties is a very serious problem. If you
22 go get two deadbeats on the street -- and there's
23 no district clerk that I have ever seen that
24 refuses to file a bond that has two people's names
25 on it without regards to anything.

1 And you can ask Clinton Mangus about whether
2 or not that's been successful in San Antonio. But
3 -- I mean the review of the sufficiency of the
4 sureties, there is no real prescribed procedure at
5 all in Rule 47 for where to contest in the trial
6 courts. And the assumption that the clerk
7 approves it is just hogwash because it is not --
8 it doesn't happen.

9 MR. BEARD: Well, Rusty, I think your
10 point is well taken. How would you just say --

11 MR. McMAINS: Well, right now to be
12 perfectly honest with you, our review of the
13 sufficiency of the sureties in the appellate court
14 ain't worth nothing. It's -- what I'm saying is,
15 we need to give the trial court jurisdiction to
16 review the sufficiency of the sureties, I guess is
17 what --

18 MR. BEARD: Well, shouldn't you file a
19 motion in the trial court and contest the
20 insufficiency of the sureties and bring it up that
21 way? Won't that give you relief?

22 MR. McMAINS: But we don't have any
23 place in Rule 47 that authorizes us to do that.
24 That's what I'm saying.

25 PROFESSOR CARLSON: What if with Rule

1 47 --

2 CHAIRMAN SOULES: Well, Rusty, if you
3 read that broad enough, type of security, it could
4 include the security of -- meaning better sureties
5 than what you have, that type of -- I'm looking
6 now at 47(K).

7 MR. McMANS: There is no order in the
8 trial court that is reviewable by the court of
9 appeals now in 49. That's the number one problem.

10 MR. McCONNICO: So you don't like to
11 put "order" in 49(A).

12 MR. McMANS: Well, no, all I'm saying
13 is when you put trial court order in then you have
14 taken out --

15 MR. McCONNICO: You eliminate the --

16 MR. McMANS: -- the sufficiency of
17 the sureties as even being a reviewable issue.

18 MR. McCONNICO: All right.

19 CHAIRMAN SOULES: I think --

20 MR. BEARD: But Rusty, you've got to
21 have that hearing in the trial court. I mean how
22 is the appellate court going to determine the
23 sufficiency of the sureties.

24 MR. McMANS: That's the whole problem
25 we have now.

1 CHAIRMAN SOULES: Under 47(K) --

2 MR. McMAINS: Because we have
3 situations where they didn't post the security
4 until you got to the appellate court.

5 CHAIRMAN SOULES: Under 47(K), you can
6 move to have the sufficiency of the sureties
7 reviewed in the trial court -- under 47(K).
8 That's where you move in the trial court to have
9 the sufficiency of the sureties reviewed.

10 MR. BEARD: Well, it is not our
11 intention to leave a gap on all of these --

12 CHAIRMAN SOULES: The type of
13 sureties.

14 MR. BEARD: I'm really thinking a
15 better (K) would take care of it.

16 MR. McMAINS: I'm telling you that I
17 just --

18 CHAIRMAN SOULES: Now we've made a
19 record that it was so intended.

20 MR. McMAINS: Well, I'm just telling
21 you the sufficiency of surety language appears now
22 only in Rule 49; it doesn't appear in Rule 47.
23 And 47 really doesn't talk about -- it talks about
24 a proper supersedeas bond, but it doesn't say what
25 that means.

1 MR. McCONNICO: Well, would it help
2 you if we state the sufficiency of the supersedeas
3 bond or the trial court's order pursuant to Rule
4 47 is subject to review by motion to the court of
5 appeals? Go back to Rule 49 as it is now written
6 and substitute in the first part of that sentence.

7 MR. FULLER: Where would we put that
8 in? I'm sorry, I lost where you were talking
9 about.

10 MR. McMAINS: See, this one --

11 MR. McCONNICO: The way it's written
12 now we have the Appellate Review of Suspension of
13 Enforcement of Judgment Pending Appeal. And Rusty
14 says in our new change we're leaving out the
15 sufficiency of the supersedeas bond or the surety.

16 MR. McMAINS: Or the surety. Or the
17 securities deposited, or --

18 CHAIRMAN SOULES: Bill Dorsaneo
19 suggested we should leave (A), the current 49(A)
20 in there, and then make the new 49 -- and make
21 that (B) and (C) and don't -- just leave (A) in
22 there.

23 MR. McMAINS: I don't have a problem
24 with that.

25 CHAIRMAN SOULES: Does that fix it?

1 MR. McCONNICO: Well it solves Rusty's
2 problem.

3 MR. McMANS: Well it solves the
4 problem with no appellate review of the
5 sufficiency of the sureties. I'm not sure it
6 solves the intrinsic problem of trying to get a
7 review on the sufficiency of the sureties.

8 MR. McCONNICO: I think --

9 JUSTICE WALLACE: I'm not sure what
10 authority we use, but I can recall at least two
11 instances where we have granted a motion to
12 increase a bond because the interest had
13 accumulated --

14 MR. McMANS: Correct.

15 JUSTICE WALLACE: -- to such an
16 extent.

17 MR. McMANS: Correct.

18 JUSTICE WALLACE: But now, again, I
19 don't -- but we have done it at least twice in
20 recent months so there is an appellate review of
21 it right now, maybe without any authority other
22 than under our own power.

23 MR. McMANS: Well that's in terms of
24 the amount of the bond, Judge, and I agree with
25 that. That needs to be something, too, that has

1 to be addressed in terms of the Supreme Court's
2 power.

3 CHAIRMAN SOULES: Well does -- if we
4 leave 49(A) in there and make the proposal (B) and
5 (C), does that fix the immediate problem that
6 you're raising, Rusty?

7 MR. McMAINS: I guess there is nothing
8 specific in the trial court rules authorizing
9 review of the sufficiency of the sureties.

10 CHAIRMAN SOULES: Okay. Well let me
11 get -- can I get back to that? What if we put in
12 (K) "to order the amount and type of security" --
13 let me see, "the trial court shall have continuing
14 jurisdiction during the pendency of the appeal
15 from the judgment even after the expression of its
16 plenary power to order the amount and the type of
17 security, to review the sufficiency of sureties"
18 -- and put it in there somewhere right there.

19 PROFESSOR EDGAR: That's during the
20 pendency of the appeal, though.

21 MR. McCONNICO: That's right.

22 PROFESSOR EDGAR: I think Rusty is
23 concerned with a review bel non of the quality of
24 the surety. Isn't that what I -- and that would
25 not be covered by that, nor would it be covered by

1 49(A) because that's talking about the appellate
2 court. He's talking about some provision by which
3 the trial court will determine the adequacy of the
4 surety as an entity prior to the time of the
5 supersedeas bond.

6 CHAIRMAN SOULES: Okay. How about --

7 MR. McMAINS: -- Texaco provision, we
8 know insurance sureties are okay. They are
9 provided for by statute.

10 CHAIRMAN SOULES: Let me see if I can
11 get it here. In the fourth line of the first
12 page: "good and sufficient bond to be approved by
13 the clerk subject to review by the court." And
14 just --

15 JUDGE CASSEB: Okay, right at the
16 beginning?

17 CHAIRMAN SOULES: Right at the
18 beginning. Subject to review by the court.

19 MR. McCONNICO: I'm sorry, Luke, I'm
20 not understanding.

21 CHAIRMAN SOULES: Okay. In the fourth
22 line of 47(A).

23 MR. McCONNICO: Okay.

24 CHAIRMAN SOULES: Start reading in the
25 third line: "Execution of the judgment by filing

1 a good and sufficient bond to be approved by the
2 clerk subject to review by the court."

3 PROFESSOR CARLSON: So it's the
4 position now that the clerk has the absolute
5 authority on sufficiency?

6 MR. McMANS: Yeah. See, that's the
7 basic problem. The clerk always just files it and
8 once it's filed, that's it.

9 CHAIRMAN SOULES: Subject to review by
10 the court upon making a deposit. Of course,
11 that's not reviewed by the court. And that fixes
12 a problem we hadn't thought about until you raised
13 it.

14 MR. SPARKS (EL PASO): Shouldn't we
15 have "on application" or something? That way it
16 would be just subject to review. It seems like
17 it's kind of automatically the responsibility of
18 the judge to go in there and review each of the
19 approvals of the clerk, subject to review --

20 MR. McMANS: Upon motion of hearing?

21 CHAIRMAN SOULES: All you have to say
22 is "hearing" because "hearing" picks up motion and
23 notice and all the other things.

24 JUDGE CASSEB: Subject to review --

25 CHAIRMAN SOULES: By the court on

1 hearing?

2 JUDGE CASSEB: Yes.

3 MR. McMAINS: Or after hearing. I
4 don't care.

5 JUDGE RIVERA: The sufficiency of
6 which may be reviewed upon motion -- may be
7 reviewed by the court upon motion by either party.

8 CHAIRMAN SOULES: Hearing is a pretty
9 formal thing when you get to looking at the case
10 law of what's meant by hearing. You've got to
11 have motion of notice to the parties and setting.

12 MR. McCONNICO: You want to just say
13 "upon motion" and leave out "hearing"?

14 CHAIRMAN SOULES: No, because you
15 might have to have a hearing. If you have a
16 hearing -- a hearing requires a motion, but a
17 motion does not require a hearing.

18 MR. McCONNICO: Exactly. That's what
19 I'm saying.

20 CHAIRMAN SOULES: No, I think they're
21 wanting to have a hearing. I think the judgment
22 creditor wants to have a hearing before he finds
23 out his bond has been cancelled.

24 MR. McCONNICO: Right. I don't think
25 that would happen with the other provisions.

1 MR. BEARD: We've got that problem all
2 through the rules that the clerk has that power to
3 approve that bond and we don't have, you know,
4 garnishment and all of that. We don't have any
5 provision --

6 CHAIRMAN SOULES: But this is what's
7 done. We might as well say so. I mean if we can
8 fix it here, because we don't have time.

9 In the next two years, we're going to have
10 subcommittees that study blocks of rules to try to
11 bring them together maybe in a more orderly way
12 than they are. And on January 1 of 1990 maybe we
13 will have some reorganization in the rules as a
14 whole, but we can't do that at this time. So
15 let's try that. Any further discussion on 47 and
16 49?

17 JUDGE CASSEB: Why don't you read what
18 you have.

19 CHAIRMAN SOULES: Okay. The
20 parenthetical that I put in there was "subject to
21 review by the court on hearing."

22 JUDGE CASSEB: Okay. But I mean on
23 the other one.

24 CHAIRMAN SOULES: Okay. And then on
25 49 we would put (A) back in as it is in the

1 current T.R.A.P. Rules, and then change the
2 proposal to (B) and (C).

3 MR. McCONNICO: But we don't need all
4 of the language which is insufficiency now in (A)
5 in the current rule if we put it back in with the
6 amendment.

7 CHAIRMAN SOULES: Would you? And add
8 it on that, then, and give that to me.

9 MR. McCONNICO: Yes.

10 PROFESSOR CARLSON: Then the name of
11 the Rule 49 needs to go back to Appellate Review
12 of Bonds.

13 CHAIRMAN SOULES: I'm sorry, Elaine?

14 PROFESSOR CARLSON: Then I think the
15 title of 49 needs to go back to Appellate Review
16 of Bonds because Subsection (A) of 49 deals not
17 only with security or supersedeas, but the review
18 of cost bonds as well.

19 MR. McCONNICO: Well, the problem is
20 security -- doesn't security include cost bonds?

21 PROFESSOR CARLSON: I don't know.

22 MR. McCONNICO: Leave it. I think it
23 does.

24 CHAIRMAN SOULES: You can have -- post
25 a bond or security for costs. How about Appellate

1 Review of Bond or Security in civil cases?

2 PROFESSOR DORSANEO: Actually when we
3 did the appellate rules we changed Rule 41, for
4 example, and other rules to speak about security
5 for costs or security rather than bond. We took
6 the language "bond" out in other places.

7 CHAIRMAN SOULES: Just assuming a bond
8 was a type of security?

9 PROFESSOR DORSANEO: Yes.

10 CHAIRMAN SOULES: All right. Well,
11 let's leave it then consistent with the rewrite.

12 PROFESSOR DORSANEO: Yes.

13 JUDGE CASSEB: That would be better,
14 then, to just leave it there.

15 CHAIRMAN SOULES: Are we ready to
16 vote?

17 MR. LOW: Luke, could I ask Justice
18 Wallace one question? Are you -- would you
19 suggest or think it would be better if the
20 appellate court could exercise its own discretion
21 without having to find an abuse, or are you
22 suggesting that because it could be done? In
23 other words, you are right, the appellate court is
24 never going to reverse, and you could just have a
25 sentence in there that review by appellate court

1 shall be -- shall not require a finding of abuse
2 of discretion but maybe the appellate court can
3 independently exercise its own discretion. Are
4 you suggesting this?

5 JUSTICE WALLACE: I think, Buddy,
6 that's contrary to the entire concept of an
7 appellate court being a fact finder.

8 MR. LOW: I understand that.

9 JUSTICE WALLACE: And the fact finding
10 ought to be done down in the trial court.

11 MR. LOW: Right.

12 JUSTICE WALLACE: And I would leave it
13 that way.

14 MR. LOW: Okay. Well, I don't
15 disagree with that, I was just wondering if I had
16 adequately flagged your concern.

17 CHAIRMAN SOULES: Are you saying this
18 is what the court would be looking for the way it
19 is now?

20 JUSTICE WALLACE: Right.

21 CHAIRMAN SOULES: Any further
22 discussion? Okay. Those in favor of the --
23 recommend to the Supreme Court that they adopt
24 T.R.A.P. 47 and 49 as now amended and before the
25 committee show by hands?

1 JUDGE CASSEB: With the inclusion.

2 CHAIRMAN SOULES: And those opposed?
3 Okay. That's unanimous by the committee; that
4 includes the changes.

5 JUDGE CASSEB: Okay.

6 CHAIRMAN SOULES: Thank you for that
7 report and for that work that was done -- an awful
8 lot of work done in a short period of time, Steve.

9 Gilbert, is Broadus going to be here?

10 PROFESSOR EDGAR: No.

11 CHAIRMAN SOULES: Okay.

12 PROFESSOR EDGAR: There's a note here.
13 I don't know where it came from. It just said
14 that Broadus is in oral argument at the moment and
15 will attend the meeting after 1 p.m.

16 CHAIRMAN SOULES: Should we wait for
17 Broadus to talk about Rule 13, or what's your
18 pleasure on that? It doesn't make a bit of
19 difference to me. I know that you and he have
20 fought the battles of the legislature diligently
21 over this issue and he may want to have a say.
22 How do you feel about it?

23 MR. ADAMS: Well is he -- does that
24 note say he's going to be in later this afternoon?

25 PROFESSOR EDGAR: I don't even know

1 where this came from. It just says he's in a
2 meeting today at ten o'clock, that he is in oral
3 argument at the moment and will attend the meeting
4 after 1 p.m.

5 MR. ADAMS: He's been in trial in
6 Houston all week, so that's probably what he's --
7 they're probably having jury summation.

8 MR. SPARKS (EL PASO): A lady just
9 brought that in so obviously he called.

10 CHAIRMAN SOULES: Okay. Well, why
11 don't we wait until 1 and give Broadus a shot at
12 this because you're going to be hearing about the
13 lambasting that we've been taking over there from
14 Gilbert and Broadus. And no one has taken more
15 than they have, I guess, in this session, for the
16 benefit of so many.

17 MR. ADAMS: Well, Lefty here, he ought
18 to get a little credit too.

19 CHAIRMAN SOULES: And Lefty. Yeah, I
20 saw Lefty over there a time or two.

21 Well, why don't we pass over that 13 for
22 now and go to the next subject.

23 MR. TINDALL: Are we still on the
24 supplement, Luke?

25 CHAIRMAN SOULES: Let me try to get

1 organized; just a second. That's hard for me. I
2 guess we can go to Rules 1 through 14. I don't
3 think Diana is here, but they would be in the main
4 book at page 66 and just start at the beginning.
5 The local rules we're not going to do until the
6 interim. So page 79 would be the next point in
7 the book where we would have something.

8 And I don't know what this new statute
9 that Ray Judice told us about -- Judge Schattman
10 who gives us a lot of good input read Rule 3a and
11 realized that it talks about administrative
12 judicial district and there's not any more
13 district, it's region now. And does this new
14 administrative act change that, Judge? Are they
15 still called regions?

16 JUSTICE WALLACE: They are still
17 regions, right.

18 CHAIRMAN SOULES: That's just a word
19 change in 3a to make it comply with the language
20 that's used in the statute. Any opposition to
21 that?

22 MR. McCONNICO: Move it's adoption.

23 MR. FULLER: Second.

24 CHAIRMAN SOULES: Voice vote. Those
25 in favor say aye.

1 COMMITTEE MEMBERS: Aye.

2 CHAIRMAN SOULES: Opposed? That's
3 unanimately adopted. And page 83, the next page
4 over, this is actually just a rewrite.

5 JUDGE CASSEB: Pardon me, Luke.
6 What page?

7 CHAIRMAN SOULES: This is on page 83
8 and 84. Just turn the page over to page 83 and 84
9 of the notes. This was given to Judge Thomas to
10 rewrite after the meeting before last meeting.
11 She was not at the last meeting. She is not at
12 this meeting.

13 I rewrote it according to my notes, and I
14 believe that this is an accurate rewrite of what
15 the committee did. It's very simple. In order to
16 get the exhibits out of the clerk's offices and
17 provide for some way to do it, we just changed 14b
18 to "clerk shall dispose of them as the Supreme
19 Court may order."

20 PROFESSOR EDGAR: That's the way we
21 handled the disposition of depositions.

22 CHAIRMAN SOULES: Exactly, which
23 Hadley did. And then we proposed an order which
24 attracts what Hadley did for depositions. And --

25 PROFESSOR EDGAR: And we approved

1 that, as I recall.

2 CHAIRMAN SOULES: And we approved
3 that, and that's already been promulgated by the
4 Supreme Court to become effective.

5 JUDGE CASSEB: And this is just doing
6 it on exhibits?

7 CHAIRMAN SOULES: This is just doing
8 the same thing on exhibits. Any motion on this?

9 MR. FULLER: Move adoption.

10 CHAIRMAN SOULES: Move adoption.
11 Second?

12 PROFESSOR EDGAR: Second.

13 CHAIRMAN SOULES: Any discussion?
14 Those in favor say aye.

15 COMMITTEE MEMBERS: Aye.

16 CHAIRMAN SOULES: Opposed?
17 Then that's unanimously adopted.

18 Sam, your subcommittee on rules 15-166a
19 again had a heavy laboring oar to pull to get a
20 lot of work to us. That report begins with
21 page --

22 MR. SPARKS (EL PASO): I owe an
23 apology to my subcommittee. I had the wrong list.
24 I sent to several people our subcommittee's
25 initial report, and none of them sent answers back

1 which didn't surprise me. Then I found out when I
2 got down here and read your book I sent it to the
3 wrong people.

4 If you'll go to page 99, I think we can
5 get some of these out of the way very quickly.
6 The Administration of Justice has recommended the
7 deletion of Rule 57, everybody who has written has
8 recommended deletion. I couldn't find anybody who
9 could tell me why it shouldn't be deleted, so I
10 move that we delete Rule 57.

11 MR. TINDALL: I so move -- or second.

12 CHAIRMAN SOULES: Moved and seconded.
13 Any discussion? Those in favor say aye.

14 COMMITTEE MEMBERS: Aye.

15 CHAIRMAN SOULES: Opposed? That's
16 unanimously recommended.

17 MR. SPARKS (EL PASO): Okay. And then
18 if we go to -- I'm going to try to take the ones I
19 don't think there's much controversy on. Let's go
20 to Rule 142 which would be in the big book, it's
21 on 93. This was a suggestion by, I think, one of
22 the Harris County people to conform Rule 142 as it
23 is now to the statutes to eliminate "security for
24 costs" to the term "fees for services rendered."

25 There were two things involved in this

1 request. One was just to simply change the term
2 "fees for services rendered" to comply with what
3 the statute says. And then secondly, apparently
4 there is a real problem -- and it's going to come
5 up in some of these other rules -- as to when
6 things are to be filed. The request wanted a rule
7 that the filing will be done when the fees for
8 services are rendered.

9 The only change I made to the proposed rule
10 was to incorporate Rule 145 that we passed some
11 time ago -- which is the affidavit of inability,
12 pauper's oath, whatever we call it -- I don't know
13 what we call it now -- but it appears to me to be
14 a good proposal and there's not much complexity
15 about it.

16 CHAIRMAN SOULES: You move the -- you
17 recommend the Supreme Court amend Rule 142 as
18 indicated on page 93?

19 MR. SPARKS (EL PASO): Yes, sir.

20 CHAIRMAN SOULES: Second?

21 MR. NIX: Second.

22 JUSTICE WALLACE: Luke, on this --

23 CHAIRMAN SOULES: Justice Wallace.

24 JUSTICE WALLACE: -- affidavit in lieu
25 of cost, 145, I think I've had two or three

1 letters on that, all of which have come from
2 family law judges urging that the county clerk
3 should -- someone should be able to contest
4 those. And I just wondered if the family law
5 practitioners on the committee have had any
6 problem with that?

7 MR. TINDALL: I have not heard
8 anything.

9 MR. SPARKS (EL PASO): Well, the way
10 -- the rule that we have recommended to the Court
11 has an application for any party to contest the
12 costs as well as the clerk.

13 CHAIRMAN SOULES: No, not the clerk.

14 MR. SPARKS (EL PASO): That's right.
15 We did take the clerk out. You're right.

16 CHAIRMAN SOULES: Because Ray Hardy
17 felt like if he had the authority, he had the duty
18 as a fiduciary to his counsel to file a contest of
19 every affidavit and was doing so.

20 MR. SPARKS (EL PASO): And that was
21 the problem that the folks had because in the
22 interim, during the contest, nothing was happening
23 and people were getting beat and that -- you're
24 right.

25 JUSTICE WALLACE: As I recall, Judge

1 Robinson, Mary Lou Robinson, and -- no, Barbara
2 Culver, Mary Lou is on the Federal bench. Judge
3 Barbara Culver and some other judge, and I can't
4 remember his name -- those two -- about the county
5 going to pay additional costs, and I just wondered
6 if in family law cases -- that's what they were
7 addressing -- and I was wondering if anybody had
8 run into that problem from any other source.

9 CHAIRMAN SOULES: Apparently it was if
10 the husband and wife couldn't get along on
11 anything else, at least they could get along on
12 not paying costs. I don't think it's a very
13 pervasive problem. It hasn't raised a lot of
14 interest here. But, Judge, I appreciate your
15 making that inquiry.

16 Okay, so 142 was unanimously recommended.
17 Next, Sam?

18 MR. SPARKS (EL PASO): Then let's go
19 to the next one that doesn't really have a whole
20 lot of meat to it, I don't think, and that's Rule
21 71 --

22 MR. TINDALL: What page?

23 MR. SPARKS (EL PASO): I'm looking.

24 MR. TINDALL: Oh.

25 MR. SPARKS (EL PASO): It's on page

1 92. And I never have had this problem until I was
2 trying a case the last couple of weeks in which
3 the plaintiff had four first amended original
4 petitions. And all this is supposed to do -- and
5 I drafted it in response to some letters -- in
6 some different places, apparently, the clerks will
7 change a pleading -- if you send in a second
8 amended petition, and if you misnomer it first
9 amended, they just write it second amended.

10 And they wanted some consistency throughout
11 the state, so what the purpose of the change is
12 that the pleadings will be docketed as filed and
13 as named, and they will remain as such unless the
14 court orders redesignation. And I don't have any
15 feeling one way or the other, but I didn't see any
16 objection to it. I think a court could order it
17 redesignated, but I --

18 CHAIRMAN SOULES: Is there any motion
19 on it? You move that it be adopted?

20 MR. SPARKS (EL PASO): I move that we
21 amend 71 for that purpose.

22 CHAIRMAN SOULES: Is there a second?

23 PROFESSOR EDGAR: Second.

24 CHAIRMAN SOULES: Hadley. Any
25 discussion on that rule? Bill Dorsaneo.

1 PROFESSOR DORSANEO: This may be a bit
2 picky, but "the pleadings shall be docketed as
3 originally filed"? What does that mean in
4 English? Does that mean somebody will write on
5 the docket sheet what they say they are?

6 PROFESSOR EDGAR: Shall not be
7 docketed as originally denominated is what he --

8 MR. SPARKS (EL PASO): Or named.

9 PROFESSOR EDGAR: Or named is what is
10 meant.

11 MR. TINDALL: Well, what is a
12 docketing of a pleading, though, that's raising --
13 Bill has got a point. How do you docket a
14 pleading? You file them. They are not docketed.

15 MR. LOW: You write it on the docket
16 sheet.

17 PROFESSOR DORSANEO: That's written on
18 the docket sheet. That's right.

19 MR. TINDALL: Well our county doesn't
20 docket it. It just goes in the file.

21 PROFESSOR DORSANEO: You're kidding
22 me.

23 MR. TINDALL: What? No. The docket
24 sheet is only the judge's notes for the rulings.

25 PROFESSOR EDGAR: You're talking about

1 the clerk's docket. We're not talking about --

2 MR. FULLER: Well, that's the law in
3 Harris County. That doesn't matter.

4 CHAIRMAN SOULES: Really it means
5 originally denominated is what you're saying
6 there, isn't it?

7 MR. SPARKS (EL PASO): And I'm not so
8 sure we ought to use "denominated" since we have
9 used the word "identified." How about as
10 "originally identified"?

11 MR. FULLER: There you go.

12 MR. SPARKS (EL PASO): Titled, that's
13 a good one.

14 CHAIRMAN SOULES: As originally
15 titled?

16 PROFESSOR EDGAR: As originally
17 entitled?

18 MR. BEARD: I don't really think that
19 amendment is necessary. You can take care of that
20 without the amendment and these rules are
21 eventually going to be thousands of pages long.

22 MR. MORRIS: Amen.

23 PROFESSOR DORSANEO: I think
24 designated would be a better word to use
25 uniformly.

1 MR. BEARD: You already have it. You
2 have it in there.

3 PROFESSOR DORSANEO: "Pleadings shall
4 be docketed as originally designated and to remain
5 identified as designated unless the court orders
6 redesignation."

7 JUDGE CASSEB: You've got a
8 consistency.

9 MR. SPARKS (EL PASO): Okay. I think
10 that's good.

11 CHAIRMAN SOULES: So the committee
12 accepts that amendment?

13 MR. SPARKS (EL PASO): Sure.

14 CHAIRMAN SOULES: Are we ready to
15 vote? Those in favor of it with the committee's
16 accepted amendments say aye.

17 COMMITTEE MEMBERS: Aye.

18 CHAIRMAN SOULES: Opposed?

19 COMMITTEE MEMBER: No.

20 CHAIRMAN SOULES: It's the House to
21 one.

22 MR. SPARKS (EL PASO): Then we go to
23 Rule 8 which should be on page 87. And we really
24 got a lot of information on this and lots of
25 different kinds of suggestions and what not.

1 CHAIRMAN SOULES: What page?

2 MR. SPARKS (EL PASO): Page 87.

3 And what I tried to do was to go through all of
4 these wonderful suggestions to the most simple
5 thing that we could and that's what I've come up
6 with, Rule 8. I don't know how you can embrace
7 all of the circumstances where one lawyer or firm
8 files a lawsuit, they don't get an order
9 withdrawing, another one comes in with another
10 amendment or what not, all across the area where I
11 guess local rules are not in effect or are not
12 being enforced where you designate a leading
13 counsel.

14 This proposal just simply says that the
15 attorney who files -- I dropped out the word
16 "first employed." I don't know how -- that's been
17 in there for a long time. I don't know how they
18 ever figured that one out. But we just said: "The
19 attorney who places his signature on the initial
20 pleadings for any party shall be considered
21 leading counsel unless formal pleadings are filed
22 subsequently." And that gives enough direction to
23 the court and the clerk for notice.

24 MR. LOW: What happens in a situation
25 where -- a lot of times we file and three lawyers

1 sign -- I mean me and Franklin, Jr. and then, you
2 know, somebody else. Now, are you saying that the
3 one whose signature -- or are we all three --
4 well, we've all three signed it now. What happens
5 there?

6 MR. SPARKS (EL PASO): Well, that rule
7 doesn't speak to that. Maybe we ought to.

8 CHAIRMAN SOULES: May I suggest this?
9 "The attorney whose signature first appears on the
10 initial pleadings."

11 MR. LOW: Yeah, that's what I would
12 say.

13 MR. SPARKS (EL PASO): So get your
14 signature first so you can control the litigation.

15 MR. McMAINS: Which controls, right or
16 left?

17 MR. SPARKS (EL PASO): You're not
18 going to be able to designate on what part of the
19 page because we're coming to a rule that -- in a
20 minute. But we'll save the fun for later.

21 CHAIRMAN SOULES: That's a motion. Is
22 there a second on this change, this Rule 8 change?

23 MR. FULLER: So move and second.

24 MR. BRANSON: Excuse me, could I have
25 some discussion? Is there any merit to letting

1 lead counsel make the change as well as the
2 parties? It says it. All right.

3 MR. SPARKS (EL PASO): It says "made
4 by party or attorney upon pleading." Most of them
5 will be lawyers. And most local rules that I'm
6 aware of, you're supposed to certify the lead
7 counsel anyway. But I don't think the clerks ever
8 looked that far anyway.

9 CHAIRMAN SOULES: Bill Dorsaneo.

10 PROFESSOR DORSANEO: This rule talks
11 in ownership kind of terms. Would it be better in
12 light of what we're trying to accomplish here to
13 say that the attorney shall be responsible for the
14 management of the cause rather than we shall have
15 control of the management of the cause? It's not
16 a big point, but it seems that the rule as it is
17 evolving is a different kind of animal than it was
18 designed to be originally.

19 MR. SPARKS (EL PASO): I don't have
20 any objection to that, Bill. That phrase I took
21 from most of the consensus of the local rules that
22 we had. But I don't -- that's what it means,
23 you're responsible.

24 CHAIRMAN SOULES: Is that an
25 acceptable amendment?

1 MR. LOW: That's not really true. All
2 three have a professional responsibility --

3 MR. FULLER: I'll accept it on behalf
4 of whoever seconded it first.

5 MR. RAGLAND: Is that really the only
6 problem is who gets notice to the clerk's office?
7 Isn't that what the problem is, Sam?

8 MR. SPARKS (EL PASO): Well, most of
9 the comment was who is to be notified. But then
10 there is also an element we're going to get into
11 in the next -- in this motion's rule proposed on
12 21 -- it's when three lawyers are signing one
13 petition and the other side only sends notice to
14 one. So, it's not just the clerk, it's --

15 MR. ADAMS: What about the motion for
16 continuance, too? I mean you've got three or four
17 lawyers on the case. The court really ought to
18 know which one is the one that's going to be
19 important with regard to the motion for
20 continuance without being unavailable.

21 MR. BRANSON: I think under the
22 changes to Rule 13 the legislature just amended,
23 you're also going to have some problems there.

24 MR. SPARKS (EL PASO): I'm not aware
25 of what that is.

1 MR. BRANSON: They basically adopted
2 Rule 11 of the Federal rules.

3 CHAIRMAN SOULES: That will be coming
4 up with Broadus and Gilbert in a minute.

5 MR. BRANSON: But I'm wondering if
6 it's not really going to apply here because lead
7 counsel is going to be -- I assume -- assigned to
8 all the pleadings.

9 Speaking of that, when you say "or attorney
10 by formal pleadings," is that too broad, maybe,
11 for what we're talking about? Does it make any
12 difference what attorney amends that? Would you
13 want the lead counsel to personally change lead
14 counsels?

15 MR. RAGLAND: He may be fired; he may
16 not want to sign something. It looks like to me
17 Rule 8 ought to just say that the clerk should be
18 required to send all notices to the person
19 designated as lead counsel by the party, period.

20 MR. SPARKS (EL PASO): But that's the
21 problem. And then there's no designation as to
22 who is lead counsel, and they call the clerk or
23 they call the lawyer and they say you have to
24 notify --

25 MR. RAGLAND: Well, in the absence of

1 designation, then, the first attorney's name and
2 address that appears on the pleading.

3 MR. SPARKS (EL PASO): I really think
4 the idea is good. I think it will help -- if
5 everybody followed their own local rules, you
6 wouldn't have the problem. But nobody is doing
7 that, apparently.

8 MR. LOW: Sam, I agree. This deals
9 only with notice but it doesn't say that. Maybe
10 it's technical to somebody. A lot of lawyers have
11 the responsibility --

12 CHAIRMAN SOULES: Buddy, I'm sorry.
13 We can't hear with all this noise going on back
14 here.

15 MR. LOW: I'm saying that the lawyers
16 have a responsibility -- Sam says this only deals
17 with notice, okay, or to -- what?

18 MR. SPARKS (EL PASO): This is just
19 really a rule that defines who the leading counsel
20 is. Now the effect of it is not.

21 MR. LOW: I know. For purpose, the
22 effect is notice. But if you put a rule in there
23 and you don't say that and you say "shall have
24 responsibility" -- I mean all lawyers have a
25 professional responsibility if your name appears

1 on the pleadings. I would object to the
2 Professor's designation of responsibility. I
3 think it might be misleading.

4 MR. SPARKS (EL PASO): Well maybe
5 that's why they use the word "leading."

6 PROFESSOR DORSANEO: After hearing the
7 comments, I would at least say "primarily
8 responsible."

9 MR. LOW: Yeah.

10 MR. TINDALL: It's really "lead
11 counsel" not "leading counsel," isn't it?

12 CHAIRMAN SOULES: Our rules use the
13 word "leading." Well, let's see if we've got
14 this.

15 "The attorney whose signature first appears on
16 the initial pleadings for any party shall be
17 considered leading counsel in the case and shall
18 have control in the management of the cause unless
19 a change is made by the party or attorney by
20 formal pleadings filed with the clerk." Now
21 that's the recommendation. Is there a second?

22 PROFESSOR EDGAR: Well, I come back to
23 what Buddy said --

24 CHAIRMAN SOULES: Let me get -- let's
25 see, was that already moved and seconded?

1 MR. FULLER: It was.

2 CHAIRMAN SOULES: Okay. And we're now
3 in discussion and Hadley, did you have --

4 PROFESSOR EDGAR: Just coming back to
5 what Buddy said, it seems to me that the insertion
6 of the clause "and shall have control of the
7 management of the case" really is beyond the scope
8 of the rule. And I would suggest that we consider
9 just eliminating that clause so that it reads:
10 "The attorney whose signature first appears on the
11 initial pleadings for any party shall be
12 considered leading counsel in the case and shall
13 so continue unless a change is made by the party
14 or attorney by formal pleadings filed with the
15 clerk."

16 Now, that's what you're intending to do. And
17 then you eliminate the problem that Buddy has
18 raised because that's just a red herring, it's not
19 intended, and I don't think it serves any useful
20 purpose.

21 MR. BRANSON: I second the motion.

22 CHAIRMAN SOULES: Is that acceptable?

23 MR. LOW: Yes, sir.

24 CHAIRMAN SOULES: All right. Let me
25 read it again then. "The attorney whose signature

1 first appears on the initial pleadings for any
2 party shall be considered leading counsel in the
3 case for that party and shall so continue unless a
4 change is made by the party or attorney by formal
5 pleadings filed with the clerk."

6 MR. SPARKS (EL PASO): Let me say I am
7 personally in favor of that change because I think
8 that's what this rule should say only because of
9 the heading on it. But that really doesn't speak
10 to some of the reasons behind the suggestions by
11 some lawyers, many clerks and some judges; they
12 want that responsibility. And I like the way it's
13 amended, but I think I'm obligated to tell you
14 that we have gotten correspondence where they want
15 a person designated who has that responsibility by
16 rule.

17 CHAIRMAN SOULES: I believe the way
18 this rule now reads -- the way Hadley has it,
19 though, it carries with it -- what the courts have
20 been wanting to know and what has been fuzzy is,
21 if we want to command that a party be here and
22 they've got multiple counsel, who do we go to?
23 And that was one of Ray Hardy's complaints too,
24 "Who do I give notice as a clerk to?" And now
25 they can say leading counsel. And we know now who

1 that is unless -- I mean we know who it is by
2 definition. So maybe it does speak some to those
3 complaints that you and I have read.

4 MR. SPARKS (EL PASO): It's an
5 improvement.

6 CHAIRMAN SOULES: An improvement.
7 Okay. Those in favor say aye.

8 JUDGE CASSEB: Would you mind reading
9 it back?

10 CHAIRMAN SOULES: Okay. I'll read it
11 back again. "The attorney whose signature first
12 appears on the initial pleadings for any party
13 shall be considered leading counsel in the case
14 for that party and shall so continue unless a
15 change is made by the attorney" --

16 PROFESSOR EDGAR: Do you have "for
17 that party" or -- this says "for any party."
18 Start over again.

19 CHAIRMAN SOULES: I put "for that
20 party" after the word "case." Start over again.

21 "The attorney whose signature first appears on
22 the initial pleadings for any party shall be
23 considered leading counsel in the case for that
24 party and shall so continue unless a change is
25 made by the party or attorney by formal pleadings

1 with the clerk."

2 MR. LOW: Luke, I have just one
3 technical --

4 CHAIRMAN SOULES: Buddy Low.

5 MR. LOW: -- one technical point. I
6 realize the rules have always said "leading
7 counsel," but for a long time I have not heard
8 anything other than just "lead counsel." That's
9 kind of what we speak of. I guess it doesn't make
10 any difference, but that's the term the courts
11 usually talk about. People who lead -- leading
12 counsel --

13 CHAIRMAN SOULES: Okay. What's the
14 consensus? Do we change "leading" to "lead" or
15 leave it the same?

16 MR. LOW: It's no big deal --

17 MR. TINDALL: Yes.

18 MR. NIX: Yes.

19 MR. ADAMS: Does it appear in any
20 other rules?

21 MR. TINDALL: No, I just checked the
22 index.

23 JUDGE RIVERA: I have one more
24 suggestion.

25 CHAIRMAN SOULES: Yes, sir, Judge

1 Rivera.

2 JUDGE RIVERA: Can we remove the word
3 "considered"? It would be more direct.

4 CHAIRMAN SOULES: Yes, sir. Any
5 objection to that?

6 PROFESSOR EDGAR: No. That's a good
7 idea.

8 MR. LOW: Yes. That's right. Luke,
9 the caption should be changed too. Lead counsel
10 instead of leading counsel.

11 CHAIRMAN SOULES: Okay. That's good.

12 Okay. As it's written now, those in favor
13 say aye.

14 COMMITTEE MEMBERS: Aye.

15 CHAIRMAN SOULES: Opposed? That's
16 unanimously recommended.

17 MR. SPARKS (EL PASO): If you go right
18 across the page to Rule 88 --

19 MR. McMains: Rule 21.

20 MR. SPARKS (EL PASO): Rule 21. This
21 is changing the notice from three to five days.
22 Apparently, in central Texas, a lawyer will mail a
23 notice to Dallas or to San Antonio or Austin about
24 a hearing in Houston, and if it's over the weekend
25 -- and with the mail, it is, a lot of times --

1 according to the correspondence we get, they'll
2 get notice of the hearing on a Friday for a Monday
3 or a Tuesday or what not.

4 They have requested several alternatives.
5 Most of the suggestions went to five because
6 apparently that's -- I don't know why, but they've
7 got five -- and they wanted excluding Saturdays,
8 Sundays and legal holidays. I can speak for the
9 rule in El Paso -- just like tomorrow there's only
10 one airplane I can get back from Austin to El Paso
11 on -- and if you mail me a letter, it now takes
12 four days to get to El Paso. Why, I don't know.
13 And I expect it's similar to Lubbock and everybody
14 else. So I thought that was a good one. And I
15 move that we amend Rule 21 to five days, inserting
16 a phrase "excluding Saturdays, Sundays and legal
17 holidays."

18 CHAIRMAN SOULES: Ken Fuller.

19 MR. FULLER: I think you're
20 overkilling it. If you've got a special problem
21 dealing with mail notice, let's write a mail
22 notice rule. But I tell you in our practice, this
23 would be a total disaster in family law because we
24 have to have hurry-up hearings and you're talking
25 about a week to get some of this stuff.

1 Now, if we've got a mailing problem, let's
2 write a special rule for mail notice, but let's
3 get a shorter fuse for hand-delivered notices.

4 CHAIRMAN SOULES: The rule right now
5 on mail notice is six days unless shortened by the
6 court because you get three days on any time
7 period if service is by mail. That's whatever, 21
8 or someplace up there.

9 MR. TINDALL: Yes, but if you -- right
10 now, the rule is if you need a hearing on Monday
11 and this were Friday, you could get a hearing
12 today and send it by messenger to the other side.
13 But this proposal would mean you could not get a
14 hearing before next Friday.

15 CHAIRMAN SOULES: I think there are
16 two issues and I'd like this Chair to separate
17 them. Three or five is one issue; and then
18 include counting or not counting Saturdays and
19 Sundays and legal holidays, I think, is a
20 different issue.

21 MR. SPARKS (EL PASO): Well I --

22 CHAIRMAN SOULES: And then the mail is
23 still another issue because you get -- certified
24 mail adds three days to any period. And that's
25 under, what, 21a or --

1 JUDGE CASSEB: 21a.

2 PROFESSOR DORSANEO: This is not going
3 to be completely responsive, but I have thought
4 for some time that our Rule 21a is in need of
5 review and careful revision. It wasn't drafted
6 very well the last time that we drafted it.

7 And all of these problems about days and mail
8 notice and whether you do, in fact, get three
9 additional days after the hearing is set are
10 located in a poorly drafted Rule 21a.

11 CHAIRMAN SOULES: Yeah.

12 PROFESSOR DORSANEO: And I think that
13 that needs to be -- these problems need to be
14 taken care of there so they are resolved wherever
15 they come up on this business of notice.

16 CHAIRMAN SOULES: Changing from three
17 to five is going to slow down a lot of dockets
18 dramatically. And now whether you count the
19 weekends, I have seen that problem. You know, you
20 get noticed on Friday for a hearing on Monday and
21 that's three days.

22 MR. FULLER: Hasn't it also been your
23 experience, though, that if you've really got a
24 heavy-duty motion you're going to hear, you can go
25 to court and tell them that; that's just a minimum

1 notice.

2 CHAIRMAN SOULES: But you get the
3 hearing and you get it at five o'clock on Friday
4 when the court is out and it's set for nine
5 o'clock on Monday, that is really a problem. And
6 that is there, there may be some unfairness in
7 that, I don't know. Maybe there's not.

8 MR. FULLER: That ain't three days.

9 MR. TINDALL: Yes it is.

10 CHAIRMAN SOULES: Yes, it is.

11 MR. FULLER: Friday until Monday? I
12 thought you were entitled to three full days.

13 CHAIRMAN SOULES: No. You don't count
14 Friday, but you do count Saturday, Sunday and
15 Monday. How many feel that -- we voted on this
16 one in our meeting last year. How many reject the
17 five? How many feel that we should retain the
18 three day notice first? Those in favor of
19 retaining the three days say aye.

20 COMMITTEE MEMBERS: Aye.

21 CHAIRMAN SOULES: Those in favor of
22 five? Okay. So we're going to retain three. Now
23 then we'll vote on whether we count or don't count
24 Saturday, Sundays and legal holidays. How many
25 say count them in the three?

1 MR. TINDALL: Let me speak on that
2 first.

3 CHAIRMAN SOULES: Okay.

4 MR. TINDALL: I think the way it's
5 drafted here, we're going to be doing violence to
6 21a which attempts, I think generally, to combine
7 all computations under one rule. This would be
8 creating a special computation rule.

9 PROFESSOR DORSANEO: And four and
10 five, I don't think this is the place to do this
11 numerology.

12 MR. TINDALL: And I would urge we
13 continue this computation we have now until we
14 look at computation in general.

15 CHAIRMAN SOULES: Okay. Any further
16 discussion?

17 MR. BRANSON: Let me ask a question.
18 In the family law cases -- in most of my
19 litigations, excluding the holidays wouldn't make
20 any difference. In the family law litigation,
21 would it make a big difference?

22 MR. TINDALL: It sure would. We
23 couldn't get to court for a week.

24 MR. FULLER: That's short fuse stuff.

25 MR. TINDALL: You couldn't get to

1 court -- if you exclude Saturdays, Sundays and
2 holidays, it would mean if you had a client with
3 you today, you couldn't get to court on Monday, it
4 would have to be at least Thursday.

5 JUSTICE WALLACE: As a matter of
6 information, how do you handle a situation where a
7 guy gets out of his office an hour early on
8 Friday, and at 4:30 he gets a notice that he is
9 supposed to be in court on Monday morning and he
10 goes directly down to a hearing previously set and
11 he doesn't even know about it? How -- doesn't
12 that present a problem, or does it?

13 MR. SPARKS (EL PASO): Well, that's
14 what these letters say.

15 MR. FULLER: Well what usually happens
16 there is they announce they haven't had time to
17 obtain counsel and they get a continuance.

18 MR. TINDALL: Yeah, it's continued but
19 if it's a situation with another lawyer --

20 CHAIRMAN SOULES: You don't even know
21 that the notice is in your office.

22 MR. BRANSON: I think Judge Wallace is
23 asking about where you've got a lawyer and the
24 lawyer doesn't get it until after he has already
25 gone from his office.

1 CHAIRMAN SOULES: And it's a Monday
2 hearing, 9:00 they call the docket, the lawyer
3 doesn't even know he's supposed to be someplace.

4 PROFESSOR EDGAR: That really isn't
5 three days, Luke.

6 CHAIRMAN SOULES: Pardon me?

7 PROFESSOR EDGAR: That really isn't
8 three days.

9 PROFESSOR DORSANEO: It's not three
10 days by the right channels because it's three full
11 days --

12 PROFESSOR EDGAR: Because you don't
13 count the day of service under computation time.

14 MR. TINDALL: Okay. But you don't --
15 that's right. So you have Saturday, Sunday and
16 Monday --

17 CHAIRMAN SOULES: But you do count --

18 MR. TINDALL: -- which you do count
19 the last day.

20 MR. McMAINS: Yes, but you've got
21 three days notice before the hearing. And that's
22 what Bill is saying. The problem is what does
23 "before" mean? That's what is ill defined.

24 CHAIRMAN SOULES: Yeah.

25 MR. McMAINS: There is case authority

1 for the proposition that three full days means
2 that you get the entire day of Monday and you
3 can't have it heard until Tuesday.

4 PROFESSOR DORSANEO: But admittedly
5 the cases are all over the ballpark.

6 MR. McMANS: But it's because it is
7 an ill definition in the computation of time rule
8 of what the "before" means. You know, we have
9 different times when we say you can't have a
10 hearing before --

11 MR. TINDALL: Not less than three days
12 before. Yes, I see the glitch.

13 CHAIRMAN SOULES: But if you read 21a,
14 you can count the day that the action is supposed
15 to happen. You can count that day.

16 MR. McMANS: You can't possibly count
17 the day that it happens as being before.

18 CHAIRMAN SOULES: But you do. In
19 interrogatories and discovery responses.

20 MR. FULLER: Well, I think that this
21 points out the idea that carries in 21a, not here.

22 CHAIRMAN SOULES: I think that's
23 right, and I agree with Bill --

24 PROFESSOR DORSANEO: Mr. Chairman,
25 regardless of what we do on this I move that

1 either this subcommittee or a special subcommittee
2 be appointed to study computation problems
3 involving rule -- at least Rule 21, 21a, Rule 4
4 and Rule 5 of the civil procedure rules.

5 CHAIRMAN SOULES: Okay. That's
6 assigned to Sam. And we'll send you a memorandum
7 on that.

8 MR. SPARKS (EL PASO): That's why I'm
9 moving to just do 21 and quit. But I'll accept --

10 CHAIRMAN SOULES: Okay. Do we count
11 or not count Saturdays, Sundays and legal
12 holidays?

13 MR. SPARKS (EL PASO): Let me just --
14 if we're going to draft it, let me ask Harry and
15 the family law practitioners for a minute, because
16 they always dismiss the family law practitioners
17 by saying, "Well, it can be shortened by the
18 court." Give me a response for that.

19 MR. TINDALL: Well, the judge is not
20 there. You don't deal with the court. You deal
21 with the clerk.

22 MR. McMAINS: Well, but the more
23 important question is: Are you entitled to notice
24 of the motion to shorten it? I mean that's --

25 MR. TINDALL: That's a mirror, mirror

1 problem.

2 MR. SPARKS (EL PASO): But the rule
3 does say "unless shortened," and that's the flack
4 I get when we say that that may be sufficient.

5 CHAIRMAN SOULES: Let's try not to
6 raise too many new problems as we go through this
7 heavy docket or we'll be here Monday working.

8 MR. SPARKS (EL PASO): But we need to
9 know that if we're going to redraft these because
10 that generally is the exception that comes into
11 conflict with the family law practitioners.

12 MR. TINDALL: It might be -- and I'm
13 speaking just without consulting with my colleague
14 in arms here, Ken Fuller -- we could say five days
15 of the time and that would get rid of the four-day
16 glitch and would add one day to get around -- as
17 long as you included Saturdays, Sundays and
18 holidays. So if you got the 4:30 messenger run
19 and you've gone home, you couldn't be forced to
20 court before Tuesday. That would deal with that
21 if you had five days, but you would always include
22 Saturdays and Sundays and not do violence to the
23 computation under 21a.

24 CHAIRMAN SOULES: Ken Fuller.

25 MR. FULLER: One more time, this one

1 ain't broke, 21a is. This says "before"; but 21a
2 says "before" and doesn't mean "before." I think
3 this one is fine like it is and if you're going to
4 do something to look at the computation of the
5 days --

6 CHAIRMAN SOULES: Okay. Those in
7 favor of counting Saturdays, Sundays and legal
8 holidays say aye.

9 COMMITTEE MEMBERS: Aye.

10 CHAIRMAN SOULES: Those who want to
11 exclude them say aye.

12 COMMITTEE MEMBERS: Aye.

13 CHAIRMAN SOULES: Okay. I need a show
14 of hands on that, then. Those who will --

15 MR. RAGLAND: We've already decided on
16 the three days, haven't we?

17 CHAIRMAN SOULES: The three days is
18 voted on. We'll retain three. Okay. Those who
19 would count Saturdays, Sundays and legal holidays
20 show your hands, please? Okay. Hold them up for
21 a second. That's 12 I count.

22 Those who would exclude those days, show by
23 hands. Three. That's a vote of 12 to three to
24 retain the practice of counting those days; but
25 it's unanimous to retain three days instead of

1 five days as the time period. So there will be no
2 change.

3 MR. SPARKS (EL PASO): So 21 will stay
4 as written. But tell me what we want to do, we
5 want to look at 21a, 4 and 5, was that
6 the --

7 PROFESSOR DORSANEO: Yes.

8 MR. SPARKS (EL PASO): All right.

9 PROFESSOR DORSANEO: If I may say,
10 this problem comes up in the computation area in a
11 whole range of computations, including a situation
12 where you have to take action within a particular
13 period. And there the cases seem to say you're
14 counting full days for sure, and our computation
15 rule was just simply inadequate together with 21a
16 being in it.

17 MR. FULLER: Particularly in light of
18 the new emphasis on sanctions.

19 PROFESSOR DORSANEO: That's right.
20 And now it makes a very large difference in many
21 cases whether you miss it --

22 CHAIRMAN SOULES: Just one other
23 thing. We are going to send a transcript of this
24 to Sam, but if 21 said, "No hearing may be set on
25 less than three days notice," then it would key

1 into 21a the way it's written. And we don't have
2 many rules that have -- we don't have many
3 problems with 21a, at least I don't in my
4 practice.

5 This is the toughest one, and it's because
6 the language in 21 is out of step with 21a. Most
7 of the language in the rules is in step with 21a.
8 So if we said "No hearing on less than three days
9 notice," then you know how to count under 21a.
10 But you can't count before; it's using the word
11 "before" in this rule. It's got --

12 MR. FULLER: I wouldn't have any
13 problem with that.

14 MR. TINDALL: It should be "of the
15 time" at least as opposed to the word "before the
16 time."

17 CHAIRMAN SOULES: Just "No hearing can
18 be set on less than three days notice unless the
19 notice is shortened by the court." But either way
20 you fix it, I don't want to fix it here because
21 we're getting along okay with our practice. We've
22 got more important things to do.

23 But you could fix 21 and you wouldn't have to
24 change 21a. And I think if you change 21a, that's
25 going to start having ripple effects through some

1 discovery and some things that we've got that we
2 already know how to count and may not know how to
3 count after that. It's just an idea.

4 PROFESSOR DORSANEO: It may be more 4
5 -- 4 and 5 -- especially 5. The computation may be
6 more of the problem.

7 CHAIRMAN SOULES: But we need to look
8 at those in the interim -- in our interim study
9 committees.

10 Okay. We've got 21. What's the next item,
11 Sam?

12 MR. SPARKS (EL PASO): Well, now we go
13 to the ones that are a little more complex. Let's
14 go to Rule 22, and it starts here. And apparently
15 a lot of folks file by computer, and I don't know
16 -- I'm just going to present the problem from
17 these initial drafts and then we can go from here.

18 22 has been suggested -- most of these are,
19 of course, Harris County suggestions -- they want
20 filing by electronic transfer as well as hard copy
21 original by hand and mail, and, of course, to
22 comply with the statute -- with the exclusion of
23 Rule 145 that it's not filed until the statutory
24 fee is received.

25 So there are two changes in proposed Rule

1 22: One, filing when the statutory fee is
2 received; and two, that you can file by electronic
3 transfer. And that's -- we're going to go into
4 several subsequent rules with this electronic
5 transfer stuff. But those are the two changes on
6 22.

7 MR. FULLER: May I ask a question?

8 CHAIRMAN SOULES: Ken Fuller.

9 MR. FULLER: We found in drafting
10 legislation a lot of times we thought we had
11 bigger problems than we turned out to. How big is
12 the ground swell for the electronic parties? I
13 mean is it one or two people, or do we really have
14 a lot of folks out there that think it's a
15 problem?

16 MR. SPARKS (EL PASO): I can't answer
17 that. The correspondence all comes from Houston,
18 but apparently a lot of people are filing by
19 computer in Houston. But I --

20 MR. McMANS: Are these primarily tax
21 suits?

22 CHAIRMAN SOULES: It needs to be
23 accommodated. It does. It's the wave -- Judge?

24 JUSTICE WALLACE: It's the wave of the
25 future, probably.

1 CHAIRMAN SOULES: Yeah, it really is.
2 And -- Judge Wallace?

3 JUSTICE WALLACE: Just another
4 question of information. How do they handle that
5 signature of the lead counsel when they
6 electronically file it?

7 MR. LOW: Or sign any of it? You
8 certify by signing it. How do they do that?

9 MR. SPARKS (EL PASO): Well, there's a
10 rule proposed on the signing coming up because
11 apparently you take a large firm in Houston -- as
12 I understand it, they're tied into the district
13 clerk's computer and they just punch a button and
14 file a pleading and they'll have a number which
15 they want as a signature. We're going to get to
16 that in a minute.

17 MR. RAGLAND: How does the defendant
18 get served? Do they take the computer out to his
19 house?

20 MR. TINDALL: By modem.

21 MR. SPARKS (EL PASO): We might just
22 go through these so you'll have the whole breadth
23 of these wonderful ones.

24 CHAIRMAN SOULES: I guess so. Let's
25 just turn through the ones that deal with this

1 idea.

2 MR. SPARKS (EL PASO): Rule 22a is
3 requested to accommodate this, and that is to make
4 -- you can still file by written pleadings
5 apparently. But then you can transform the copy
6 to the records library medium approved by the
7 Supreme Court, and apparently there's a rule on
8 that already.

9 And then one of the things I didn't like
10 about this proposal -- you can read it right quick
11 -- it is suggested then that the electronically
12 transmitted instrument will be the original. And
13 apparently the clerks don't want the hard copy any
14 more; they want to give it back to the filing
15 party who is responsible to retain the instrument.
16 I didn't like that at all myself, but this is the
17 exact proposal they have requested.

18 MR. BRANSON: Let me ask you a
19 question. What happens when the computer crashes?

20 MR. SPARKS (EL PASO): Don't ask me
21 any questions. I don't do anything by computer.
22 I prefer going by longhand.

23 CHAIRMAN SOULES: That's a problem
24 about not retaining hard copies, no question.
25 Frank?

1 MR. BRANSON: I really hesitate to
2 give up the original being the hard copy filed
3 with the court. I can understand the need for
4 computer transfers, but all you have to do is to
5 have had a case on appeal where the day before
6 your brief was due, your brief got scrambled in
7 the computer crash and got lost. And that
8 happened in our office and it's really
9 frightening.

10 CHAIRMAN SOULES: Because then you are
11 depending on a clerk to back up his disks, and if
12 he fails to back up his disks, then a lot of
13 information gets lost and it's totally out of
14 everyone's control. Hadley Edgar.

15 PROFESSOR EDGAR: Being from Lubbock,
16 I don't understand a lot of this. And I would
17 just like for somebody to very clearly explain to
18 me the distinct difference between a hard copy
19 original and an electronic transfer.

20 MR. SPARKS (EL PASO): Okay. Well, I
21 called Houston because Lubbock isn't too far from
22 El Paso, and I was advised that a hard copy is
23 what we are used to. Hard copy is just a pleading
24 or something on paper. It can be a xerox, but
25 it's something that you can hold and feel and

1 read. And apparently, though, there's a lot of
2 practice -- and I don't know if it's in any other
3 city, although they're telling me they are doing
4 it in Dallas, too, and there's a Supreme Court
5 rule that authorizes this -- but the Houston
6 firms, particularly, and people who practice in
7 Houston directly tie in to the Houston computers
8 so they can prepare a pleading in their office,
9 punch the code, it appears in the clerk's office
10 as a medium somehow and it's in the files.

11 PROFESSOR CARLSON: Hadley, it's like
12 telling your computer to save it, but you don't
13 actually print it up so that is the medium --

14 PROFESSOR EDGAR: Well, where is it
15 then?

16 PROFESSOR CARLSON: It's in the
17 storage, and in your hard disk or copy disk.

18 PROFESSOR EDGAR: So it's not in the
19 file anywhere, it's simply in the storage bank of
20 the computer in Harris County in the district
21 clerk's office.

22 CHAIRMAN SOULES: Electronic memory.

23 PROFESSOR CARLSON: And they can order
24 it to be printed.

25 MR. SPARKS (EL PASO): Yes. And

1 there's no question that Harris County wants to do
2 away with any storage of hard copy.

3 PROFESSOR CARLSON: They have to
4 provide the backup if they're going to do away
5 with hard copy.

6 MR. LOW: Could this be accomplished
7 by leaving the rule as it is but allowing the
8 Supreme Court to -- you know, like we've done on
9 other rules, provide rules for those local people
10 that have that? You know, in other words, deal
11 with Houston and Dallas by the Supreme Court just
12 making a rule locally to accommodate those people?

13 MR. SPARKS (EL PASO): As far as I'm
14 concerned, it can be, but I don't know.

15 MR. BRANSON: Here's what bothers me.
16 Joe Blow out here in Pecos may not have a computer
17 that works with the one in Houston. They're not
18 all compatible as I understand it.

19 PROFESSOR EDGAR: Well, he would have
20 to file a hard copy original as I understand what
21 they are saying. It's only those people that --

22 MR. BRANSON: Well, isn't he being
23 placed at a substantial disadvantage when his
24 adversary -- I mean it's not going to make a lot
25 of people go out and buy computers that may be

1 compatible, but a lot of lawyers in the state
2 would be placed at a substantial disadvantage and
3 their clients would also.

4 PROFESSOR EDGAR: Well presumably,
5 though, the Houston firm would still be required
6 to send a copy to the Pecos lawyer as now required
7 by the rule. It's simply trying to do away with,
8 apparently, the filing storage problem that the
9 district clerks in these larger populated areas
10 now have.

11 MR. SPARKS (EL PASO): Well that's
12 part of it. But they also want this rule -- and
13 the main thing I think we could take out, and I
14 think we should take it out unless people know a
15 lot more about computers than I do -- the
16 safeguard of keeping the hard copy pleadings. But
17 they want the electronic-transferred document to
18 be considered an original pleading, and that's why
19 they are proposing this rule.

20 PROFESSOR CARLSON: Well let me just
21 say it's not just the larger firms.

22 MR. SPARKS (EL PASO): Oh, I
23 understand.

24 PROFESSOR CARLSON: Medium-sized firms
25 are using this also.

1 MR. SPARKS (EL PASO): When I spoke
2 with folks there in Houston, they seemed to tell
3 me if it's not a majority of the filing, it's a
4 substantial minority that aren't.

5 MR. BEARD: As far as I'm concerned,
6 if Harris County wants it, let's give it to them.
7 It ain't going to affect anybody else in the room.

8 MR. LOW: Well, again, couldn't that
9 be dealt with by those -- by Supreme Court rules
10 as we've stated before, allowing that --

11 MR. SPARKS (EL PASO): Let me ask
12 Judge Wallace because they told me that there was
13 a rule or rules already by the Supreme Court that
14 would permit this, but they needed the rule of
15 procedure for designation and that type of thing.
16 Do you know what they are -- I asked them for a
17 copy, but I haven't --

18 PROFESSOR CARLSON: You know where you
19 can find that, I think the Houston Bar Journal has
20 an article on this.

21 JUDGE RIVERA: There is a rule
22 permitting Dallas in a private project --

23 JUSTICE WALLACE: Was it in a local
24 rule that we had approved, is that where it's
25 found?

1 PROFESSOR CARLSON: I think that's it.

2 JUSTICE WALLACE: It could be a local
3 rule for Harris County that we approved back quite
4 some time ago.

5 JUDGE RIVERA: I know you approved a
6 rule for Dallas for electronic reporting.

7 CHAIRMAN SOULES: Let me see if we can
8 get to this if we -- let's just take the first
9 sentence of this and we change it to where he's
10 got to retain the hard copy, but we permit his
11 electronic medium copy to be a duplicate original.
12 Now we've got the hard copy and an electronic
13 duplicate original, and let them worry about using
14 which one was the original.

15 PROFESSOR EDGAR: Well, then, what
16 problem have we solved for them if they still have
17 to maintain those files?

18 CHAIRMAN SOULES: Then -- okay, then
19 the second part of this thought on my part is we
20 have -- we have gotten rid of discovery out of the
21 clerk's office. We're going to look at rules here
22 in a little while that are going to get rid -- if
23 we pass them -- that are going to get rid of the
24 need to file depositions. We're going to -- we've
25 told them they can get rid of the old depositions.

1 We've given them a way to get rid of exhibits. So
2 we've taken care of exhibits, old and new,
3 depositions, old -- we may get rid of the new --
4 all other discovery instruments except for request
5 for admissions. We have hugely relieved the
6 clerks' offices of paper storage.

7 Now we're just talking about storing what's
8 typically in the transcript for appeal and you're
9 not talking about any -- you know, by comparison,
10 near as much material. Let's leave the hard copy
11 pleadings in their responsibility for the time
12 being until we know a little bit more about this
13 electronic --

14 MR. SPARKS (EL PASO): I agree, but
15 that's not what Rule 22 seeks. If I'm going to be
16 involved in a lawsuit in Harris County, I'm going
17 to be sending hard copy because that's the way my
18 office practices.

19 CHAIRMAN SOULES: I'm talking about
20 22a.

21 MR. SPARKS (EL PASO): Okay.

22 CHAIRMAN SOULES: 22a. Let them file
23 electronically or any other way over there under
24 22, but they've got to keep --

25 MR. RAGLAND: Is that a motion or a

1 command from the Chair to table this --

2 CHAIRMAN SOULES: Well, it's not
3 anything. I'm just trying to focus in on is this
4 a way to get at this problem without a great deal
5 of time.

6 MR. RAGLAND: I move we table this
7 until we have a chance to study this a little
8 more.

9 PROFESSOR EDGAR: What we're going to
10 have it seems to me is a file -- and Sam just
11 reminded me of this -- some people not using
12 electronic transfer are going to file their
13 pleadings manually. So the clerk's office is
14 going to have to maintain a file on case number
15 so-and-so, and it's going to have in it only some
16 of the documents because if some of them are filed
17 by electronic transfer and some of them are filed
18 by hard copy original, the file is not going to be
19 complete. And there isn't any way for Hardy to
20 get around that.

21 PROFESSOR DORSANEO: No. He'll just
22 put it in the library and there won't even be a
23 physical file.

24 MR. SPARKS (EL PASO): That's exactly
25 the point.

1 PROFESSOR DORSANEO: There will be a
2 computer file and he will send you yours back.

3 PROFESSOR EDGAR: All right. Then he
4 will take it, then, and through his word processor
5 put it into the file.

6 PROFESSOR DORSANEO: And it will not
7 be a physical file, it will be a file in the
8 computer.

9 MR. FULLER: And it may get wiped out.

10 CHAIRMAN SOULES: Well, but this --
11 what I'm saying here is that a party can file
12 electronically and if he does, he's at his risk if
13 that electronic gadget breaks and he's lost. Or
14 he can file it by hard copy; if he does that, the
15 clerk has got to retain the hard copy. Now the
16 clerk can put it into his electronic memory if he
17 wants to, but he can't dispose of a hard copy that
18 you file.

19 JUDGE RIVERA: That's what this rule
20 says, though.

21 PROFESSOR EDGAR: Somebody just said,
22 though, that what happens is that Hardy puts it
23 into his computer and then returns it to you.

24 CHAIRMAN SOULES: But that's if we
25 retain the second two-thirds of 22a which I'm

1 saying I don't think we should retain. I think we
2 should make him keep any hard copy that's filed.

3 JUDGE CASSEB: That isn't what he
4 wants to do.

5 CHAIRMAN SOULES: I know that's not
6 what he wants to do.

7 JUDGE CASSEB: I move we do away with
8 22 and not even adopt it.

9 CHAIRMAN SOULES: They need this.

10 MR. FULLER: Luke, let me add this
11 comment. Sitting at the clerk's desk in there is
12 one thing; you've got all of the equipment. Let's
13 say you're trying this lawsuit, okay?

14 CHAIRMAN SOULES: Okay. Ken.

15 MR. FULLER: You're trying this
16 lawsuit. You need a hard copy to read to the
17 jury, to give them as an exhibit, for the Judge to
18 take judicial notice of. Now if he doesn't have
19 the file there with hard copies in it during the
20 trial of that lawsuit and you say, "Well, now wait
21 a minute, Judge. You entered an order about this
22 six months ago during the pretrial. Well, let's
23 see where that order" -- what's he going to do,
24 stop and go into the clerk's office and pull it up
25 on a monitor and let the jury go? I mean, this is

1 ridiculous.

2 CHAIRMAN SOULES: That's right.

3 MR. BRANSON: I think the time you're
4 saving the clerk on space, you're taking away from
5 the trial court.

6 CHAIRMAN SOULES: That's right.

7 MR. FULLER: I mean you've just got to
8 have hard copies, now, at this stage of technology
9 unless they've got something to show me.

10 CHAIRMAN SOULES: Well now they are
11 already filing electronically.

12 MR. SPARKS (EL PASO): Well I'm not
13 sure -- and I need help from the Houston lawyers
14 -- but I'm not sure they have hard copies now? I
15 don't think they do.

16 CHAIRMAN SOULES: They do if they are
17 filed.

18 MR. SPARKS (EL PASO): Oh, I see.

19 CHAIRMAN SOULES: But they don't have
20 to file hard copies. They can file by electronic
21 medium and are doing so.

22 MR. LOW: Well, they may not because I
23 heard somebody say they are putting them in on
24 computer and mailing them back, that they are not
25 keeping any hard copies.

1 MR. SPARKS (EL PASO): That's what
2 this rule --

3 CHAIRMAN SOULES: One more time. What
4 I'm suggesting here is that we permit electronic
5 filing under 22, but if a party files a hard copy,
6 the clerk has to keep that in his file and can't
7 send it back.

8 MR. FULLER: But what happens if he
9 files electronic? That's what I haven't grasped
10 yet.

11 CHAIRMAN SOULES: If he files
12 electronic, he's at his --

13 MR. FULLER: Well I'm at his risk,
14 too, if I'm standing there, though, and I don't
15 have a copy of it.

16 CHAIRMAN SOULES: Well the only way
17 you can get a copy of it is before trial and go --
18 and if you don't have your own transcript --

19 MR. FULLER: Okay. Well, then I'm
20 against that rule. You can move it, but I'm
21 against that rule.

22 MR. RAGLAND: I'm renewing my motion
23 to table Rule 22a.

24 JUDGE CASSEB: I second it.

25 CHAIRMAN SOULES: Motion has been

1 moved and seconded to table Rule 22a. Those in
2 favor show by hands. Opposed? Rule is tabled.

3 MR. SPARKS (EL PASO): Okay. Let the
4 record reflect I'm not going to work on it any
5 more. It's tabled.

6 I really wanted you all to look at 45e
7 because I wanted to know what the personal
8 identification number, PIN, code was. I asked
9 Reasoner but I haven't received a reply.

10 CHAIRMAN SOULES: Can I get a -- what
11 are we going to do about Rule 22 before we leave
12 that? We've talked about it. That permits
13 electronic filing. Are we going to permit or not
14 permit electronic filing?

15 MR. BRANSON: Can we leave that up to
16 the local rules? Isn't that the way to handle
17 that? Should we table 22 also?

18 CHAIRMAN SOULES: We can do anything
19 we want to with it.

20 JUDGE RIVERA: I think that would be
21 better because they're supposed to be promulgated
22 by the Supreme Court anyway, the local rules.

23 MR. BRANSON: Well, let's find out if
24 we can table it. I move to table Rule 22.

25 CHAIRMAN SOULES: Who seconds it?

1 PROFESSOR EDGAR: Second.

2 CHAIRMAN SOULES: Those in favor of
3 tabling 22?

4 JUDGE CASSEB: No. Why don't we leave
5 22 as it was?

6 MR. FULLER: Well that's what tabling
7 that means. That's what will happen if we table
8 it.

9 JUDGE CASSEB: Oh, you mean table this
10 thing?

11 MR. FULLER: Yes.

12 JUDGE CASSEB: I second.

13 CHAIRMAN SOULES: Okay. Anybody
14 opposed to that tabling?

15 MR. SPARKS (EL PASO): You have to
16 table all of these rules because if you allow them
17 to file, then you'll have to personalize it --

18 MR. BRANSON: I'll accept that
19 amendment.

20 CHAIRMAN SOULES: Well, now let me --
21 we need to say why we're doing these things, and I
22 think we have. But this transcript will be mailed
23 back to the party who requested this rule change,
24 verbatim. We xerox the copy of this transcript.
25 And the discussion that we give a rule request

1 goes back to the requesting party. And so it's
2 important that we address it fully and give our
3 reasons for tabling it. And I guess the reason is
4 we don't fully understand what they want and we're
5 not ready to move all the way in their direction
6 at this time. Is that the consensus of the
7 committee on this?

8 MR. RAGLAND: Nobody has explained to
9 me what this electronic filing is and how it's
10 going to work in Calvert, Texas, or Franklin,
11 Texas, you know, where they've got one clerk and
12 maybe a little Apple II computer there. And
13 they're going to try to cram all of that stuff --
14 see, nobody has explained this to me and I just
15 don't feel comfortable voting on something that
16 significant without having more information.

17 PROFESSOR DORSANEO: I think our
18 entire rule book is drafted on the assumption that
19 we'll have written drafts of pleadings and orders
20 and other documents filed with the clerk unless
21 there's an explicit direction to the contrary.
22 And you just can't go in and make a few little
23 changes to accommodate the computer generation
24 without making a mess.

25 MR. FULLER: It's going to take a

1 whole change.

2 CHAIRMAN SOULES: Say that again, Ken?

3 MR. FULLER: It's going to take an
4 overview of all the rules if you're going to start
5 doing electronic filing because it doesn't just
6 impact on whether or not they have got to get off
7 of their duff and go down to the courthouse and
8 file a piece of paper. It impacts on everything
9 about when you receive things, deadlines. We've
10 got all kinds of rules that require that certain
11 type things be in writing.

12 CHAIRMAN SOULES: I'll ask if Ray
13 Hardy or someone from his office, at a subsequent
14 meeting of this advisory committee, come and make
15 a presentation of their system so that we can
16 understand it and understand how it would impact
17 the rural practitioner as well because, after all,
18 you may or may not have cases pending in Houston
19 now, or you may have in the past or you may have
20 in the future. But --

21 MR. RAGLAND: Not if I can help it.

22 CHAIRMAN SOULES: But that's what I'll
23 do to try to get us better informed about this so
24 that we can undertake it again. But I'm not going
25 to ask that it be studied in the interim. I think

1 we first need their presentation. Judge Casseb.

2 JUDGE CASSEB: I just want to add a
3 suggestion that not only Ray Hardy, but also a
4 representative of the Harris County Bar.

5 CHAIRMAN SOULES: All right.

6 MR. SPARKS (EL PASO): That's what I
7 was going to suggest. And I think the record
8 ought to show they have supplied us with a lot of
9 information. I just may not have been up to
10 absorbing it all. But I think that it is the real
11 subject matter of local rules down there.

12 Now there may need to be some rules that we
13 need to study as to whether it can be considered
14 an original pleading. That may be something that
15 we would have to do, and we can do that after more
16 edification. But the main thing is, as far as I
17 know, it's just in Harris County. And it seems to
18 me that's a perfect area that Mr. Hardy might
19 should apply to his judges down there for a local
20 rule rather than our statewide rule.

21 MR. BRANSON: So should I expand my
22 motion to table Rule 22 to include all the
23 computer rules?

24 CHAIRMAN SOULES: No. I think we -- I
25 just wanted to get the discussion fully on the

1 record for the reasons. And I -- if anyone else
2 has anything else to say about it, well that's
3 fine.

4 MR. BRANSON: Why don't I expand my
5 motion to include all the rules dealing with the
6 electronic transfer?

7 MR. FULLER: Since this is going to go
8 to them, I think it needs to be said that we don't
9 recognize -- we do recognize this is the wave of
10 the future, but we just -- I personally do not
11 feel that I understand enough of what they want to
12 do, to do it at this time. And it's something
13 that we're going to have to address on down the
14 line and now is the time to start getting the
15 information, but don't go off half cocked.

16 CHAIRMAN SOULES: We hope by rules
17 effective January 1, 1990, that we can fully
18 understand and accommodate this practice. Is that
19 the consensus of the committee?

20 JUSTICE WALLACE: Let me suggest to
21 them that they work with this committee and give
22 us all the information instead of taking our time
23 trying to battle over in the legislature. That
24 belongs over here, and we can get a whole lot more
25 cooperation and get a better product out.

1 CHAIRMAN SOULES: Well said. All
2 right. Then, Sam, what rules in the same vein
3 would we table?

4 MR. SPARKS (EL PASO): 45e. 22, 22a,
5 45e --

6 CHAIRMAN SOULES: And this, then, will
7 go back to the requesting party with the
8 transcript and the request for full presentation
9 to the committee by the district clerk and by a
10 member of the Bar.

11 MR. SPARKS (EL PASO): Then the next
12 rule would be on page 90 --

13 PROFESSOR EDGAR: I don't think we
14 have voted on that yet.

15 MR. SPARKS (EL PASO): All right.

16 PROFESSOR EDGAR: I think it ought to
17 be in the form of some kind of motion.

18 CHAIRMAN SOULES: Those in favor of
19 tabling Rule 45e say aye.

20 COMMITTEE MEMBERS: Aye.

21 CHAIRMAN SOULES: Opposed? That's
22 tabled unanimously.

23 MR. SPARKS (EL PASO): Let me ask you,
24 Luke, what you want to do on 57. I think every
25 subcommittee has something to do with Rule 11 of

1 the Federal rules and --

2 CHAIRMAN SOULES: Let's wait -- let's
3 pass that and go to Rule 13 whenever Broadus gets
4 here because that's the committee that's given the
5 most attention to this problem.

6 MR. SPARKS (EL PASO): Okay. The next
7 one would be on page 95 --

8 CHAIRMAN SOULES: Sam, where was that?
9 Oh, here's 57. Excuse me.

10 JUDGE CASSEB: On page 95?

11 MR. SPARKS (EL PASO): Yes, sir. And
12 now we'll just go on like we're supposed to. On
13 page 95, this is a modification of -- and I read
14 somewhere in the newspaper that there may be a
15 legislative act to change the general denial and
16 that type of thing -- but this is one that came in
17 that says 120 days after the disposition of
18 motions numerated that you, in effect, will have
19 Federal pleadings, admit and deny, that type of
20 thing, and I just present it because the presentor
21 sent it in specifically.

22 CHAIRMAN SOULES: And is it the
23 recommendation that it be adopted or not adopted?

24 MR. SPARKS (EL PASO): I don't
25 recommend it be adopted.

1 CHAIRMAN SOULES: The motion is that
2 this suggestion to Rule 85 be rejected. Is there
3 a second?

4 MR. BEARD: I second.

5 MR. NIX: Second.

6 CHAIRMAN SOULES: Those in favor of
7 rejecting -- is there any discussion? Those in
8 favor of rejecting this change to Rule 85 say aye.

9 COMMITTEE MEMBERS: Aye.

10 CHAIRMAN SOULES: Opposed? That's
11 unanimously rejected.

12 MR. SPARKS (EL PASO): On the next
13 page is Rule 101, and I really thought that we had
14 passed this before, but maybe we have not. The
15 Administration of Justice has passed one similar,
16 but I didn't understand Pat Hazel's letter to
17 Luke. He says it was rejected, then he passed it
18 on and said it was passed unanimously.

19 What they did was they didn't like the next
20 -- Monday next after 20 days, and they recommended
21 a change of 30 days. This committee last year
22 voted to retain that language and to add the last
23 paragraph, and it was reformed after Rusty worked
24 on it a little bit, too. And, really, that's the
25 real change.

1 MR. TINDALL: Sam, I worked on this
2 one, too, because it was part of my mandate to
3 look at combining 99, 100 and 101 -- and I don't
4 know if it's time now, Luke -- on page 374 is my
5 effort at combining those three rules into one
6 rule. Page 374 of the page marker pages, and I've
7 picked up on the suggestion --

8 CHAIRMAN SOULES: Let's discuss 30
9 versus 20. That's really the only thing that's an
10 open issue here, Harry, if you will, and then
11 we'll get to your combined deal later.

12 MR. TINDALL: All right.

13 CHAIRMAN SOULES: We have discussed
14 this before. Does everybody have their view of
15 whether we should --

16 MR. SPARKS (EL PASO): Well, there are
17 really three things. Do we go to -- do we
18 eliminate the "of the Monday next after" and just
19 have a straight Federal rule? That's what the
20 suggestion is.

21 CHAIRMAN SOULES: The committee in
22 this session has rejected that concept.

23 MR. SPARKS (EL PASO): That's right.
24 We have done that before. Then you have the 20
25 versus 30 which comes from the Administration of

1 Justice. But you do have that statement at the
2 bottom of -- a simplified statement to the
3 defendant that apparently can be more informative
4 than what the citation is going to say.

5 CHAIRMAN SOULES: Okay. Let's vote on
6 20 versus 30 in the last paragraph. How many feel
7 we should retain 20 days answer period?

8 MR. FULLER: Are we going to talk on
9 this or just going to vote?

10 CHAIRMAN SOULES: Okay. How many feel
11 otherwise? Well, that's the House -- how many
12 feel that there should be a 30-day answer period?
13 Okay. It's unanimous to retain 20.

14 Now then, the last plain language notice to
15 the defendant, you can read that. How many feel
16 that it would be appropriate to put that sort of a
17 legend on a citation? Those opposed?

18 MR. McMANS: Can we --

19 CHAIRMAN SOULES: Do you want some
20 discussion on it?

21 MR. McMANS: Yeah, I would like --

22 CHAIRMAN SOULES: Sure.

23 MR. McMANS: Well, I just want one
24 consideration. Has there been -- and I don't know
25 what the cost of citation forms are in terms of

1 backlog or whatever we have, and what it costs to
2 reprint the forms of citations. That's one of the
3 reasons I think that we really did not want to
4 change the days that we talked about last time is
5 the cost factor that the county has had with
6 trying to manufacture new citation forms.

7 MR. RAGLAND: Rusty, couldn't this be
8 -- this last paragraph be dealt with just with a
9 rubber stamp?

10 CHAIRMAN SOULES: It could be.

11 JUDGE CASSEB: Just put a rubber stamp
12 on them or whatever.

13 CHAIRMAN SOULES: We changed the
14 notice, Pat and I did -- Pat and I were working on
15 all extraordinary writ things, tried to change
16 notices that were on those -- of course, they are
17 not used as frequently as citations, no question
18 about that -- to make them more modernized and
19 more informative. This kind of goes along with
20 that effort.

21 Of course, the Monday next after 20 days had
22 as lot of reasons for retention because the first
23 thing, it means something to just about everybody.
24 But this plain language, this is not going to go
25 into effect until January 1, 1988, and everybody

1 is going to have some notice to get their forms
2 retyped and reprinted and they can do it by rubber
3 stamp as has been pointed out.

4 MR. McMAINS: But it's a mandatory
5 "shall" is what I'm saying here.

6 CHAIRMAN SOULES: Yes.

7 PROFESSOR EDGAR: Yes, and the failure
8 to include that will certainly be a valid ground
9 on setting aside a default judgment.

10 MR. TINDALL: The State Bar is going
11 to start printing citations and selling them to
12 lawyers because the new state law is that lawyers
13 can type out their own citations and the clerks
14 can charge a fee for putting a seal or signature
15 on it. So the State Bar is gearing up to get into
16 the business of citations -- of selling citations
17 to lawyers anyway.

18 CHAIRMAN SOULES: Rusty, I may have
19 missed your point. I'm afraid I may have. I'm
20 not sure that I-- do you feel that I understood
21 your point about the -- are we talking about this
22 mandatory --

23 MR. McMAINS: Well, all I'm saying is
24 that you've got a "shall." It's a mandatory
25 language. And any defect in the citation, any

1 violation of the "shall" in the citation is a
2 basis for setting aside a default judgment.

3 PROFESSOR EDGAR: Yes.

4 MR. McMAINS: So I mean all I've got a
5 question is, is whether or not you want to put
6 this -- you know, just say --

7 PROFESSOR EDGAR: A "shall" or a
8 "may."

9 MR. TINDALL: "Shall." It would be
10 worthless if it --

11 MR. BEARD: As I understand it, to
12 have a serving of the citation, the plaintiff gets
13 the sheriff to serve it if it's on a local basis.
14 We don't ever see it. It's a trap in that respect
15 if the lawyer doesn't realize that the clerk
16 picked up the wrong form and doesn't do it. But I
17 don't -- whoever gets that kind of notice.

18 MR. McMAINS: What I'm saying is why
19 don't you put it in the petition or something. I
20 mean it makes more sense if you're going to put
21 the problem on the lawyer.

22 MR. TINDALL: Well, Rusty, I see a lot
23 of out-of-state citations from, not Federal
24 courts, from local courts where clients in my home
25 town get served. And they -- it's a prevailing

1 practice nationwide to say, "Hey, you've been
2 sued. If you don't file an answer, a judgment
3 will be taken against you." Some simple language
4 like that which is hardly revolutionary. And
5 that's not buried in the pleading, it's right
6 there on the --

7 MR. McMAINS: This doesn't say where
8 it goes; it just says it shall be included.

9 MR. BEARD: You know, the notice says
10 written notice after -- if not filed within 20
11 days. That's not really a correct statement.

12 PROFESSOR DORSANEO: It also says with
13 the appropriate court and that's really kind of
14 misleading. It's not going to be filed with the
15 court, per se.

16 MR. BEARD: First Monday next after 20
17 days, the defendant will never figure that out.

18 MR. FULLER: If you're going to make
19 this magic language, I suggest that you write the
20 exact language.

21 CHAIRMAN SOULES: That's exactly what
22 I'm doing right now just like we did in the writs.
23 We put a -- we gave a legend that had to be there
24 and that's what they used. And what I'm writing
25 here is, "You have been sued. You may employ an

1 attorney" -- I'm just going right down the -- "If
2 you or your attorney do not file a written answer
3 with the appropriate clerk within 20 days after
4 service of citation and petition, a default
5 judgment may be taken against you."

6 JUDGE CASSEB: That's good.

7 JUSTICE WALLACE: I think you can get
8 more specific there. With the "either district or
9 county clerk of so-and-so county."

10 MR. TINDALL: "Clerk of the court."

11 CHAIRMAN SOULES: "With the clerk of
12 the court"?

13 JUSTICE WALLACE: If you're going to
14 give Joe Blow out there a notice, he doesn't know
15 why each court has a separate clerk. But if you
16 file it with the county court -- or county clerk
17 or district clerk in that county, why don't you
18 just tell him that?

19 CHAIRMAN SOULES: With the --

20 JUDGE CASSEB: "Clerk issuing this
21 notice."

22 CHAIRMAN SOULES: With the --

23 JUDGE CASSEB: "Clerk of the court
24 issuing this notice."

25 MR. TINDALL: Yeah, that will cut it.

1 So that if it's civil, county or district, it
2 will --

3 JUDGE CASSEB: Yes, because it may be
4 a different county.

5 CHAIRMAN SOULES: "To the clerk of the
6 court" --

7 MR. TINDALL: "Issuing this citation."

8 CHAIRMAN SOULES: How about "with the
9 clerk of the court where you have been sued"?
10 We're trying to make a generic -- "the clerk of
11 the court where you have been sued"?

12 MR. McMAINS: Harris County at least
13 you can't do that because there isn't anybody that
14 will accept anything in the courtroom. Everything
15 goes through the --

16 MR. FULLER: See, I told you they do
17 it different in Harris County.

18 MR. TINDALL: That's right.

19 CHAIRMAN SOULES: And Ray Hardy is the
20 clerk of that court. He's the clerk of every
21 court.

22 MR. TINDALL: Yes, but you can't go to
23 that courtroom and file a general denial, but
24 they'll send you over.

25 CHAIRMAN SOULES: "With the clerk who

1 issued the citation."

2 PROFESSOR EDGAR: Issuing this
3 citation.

4 CHAIRMAN SOULES: "Clerk who issued
5 this citation."

6 Okay. So let me run through this again.
7 Citation shall include the following notice to the
8 defendant: "You have been sued. You may employ
9 an attorney. If you or your attorney do not file
10 a written answer with the clerk who issued this
11 citation" -- "who issued the citation within 20
12 days after service of the citation" --

13 MR. TINDALL: That's not correct
14 unless we go to the 20-day rule.

15 CHAIRMAN SOULES: "Within the Monday
16 next after 20 days."

17 MR. TINDALL: By 10:00 a.m. on the
18 Monday next after --

19 CHAIRMAN SOULES: Now this is going to
20 be on a citation so why don't we say "this
21 citation"?

22 PROFESSOR DORSANEO: Yes.

23 CHAIRMAN SOULES: Okay. One more
24 time. The citation shall include the following
25 notice to the defendant --

1 JUDGE CASSEB: To each defendant.

2 CHAIRMAN SOULES: No. Just to the
3 defendant that's been cited.

4 JUDGE CASSEB: Oh, it has to be served
5 separately. You're right.

6 CHAIRMAN SOULES: "You have been sued.
7 You may employ an attorney. If you or your
8 attorney do not file a written answer with the
9 clerk who issued this citation by 10:00 a.m. on
10 the Monday next following the expiration of 20
11 days after service of this citation and petition,
12 a default judgment may be taken against you."

13 JUSTICE WALLACE: "After you were
14 served with this citation."

15 CHAIRMAN SOULES: "After you were
16 served" -- yes, Judge. Thank you.

17 MR. FULLER: You don't make it too
18 easy because that won't work in a divorce
19 petition. Go ahead.

20 PROFESSOR DORSANEO: That's right. No
21 default judgments in divorce cases. You know,
22 there's an Alaska Supreme Court opinion called the
23 Olgachak (phonetic) case where they fashioned
24 language to go in citations to deal with this
25 problem. It may be worth looking at that.

1 CHAIRMAN SOULES: No. We can't.

2 PROFESSOR DORSANEO: We don't have
3 time?

4 CHAIRMAN SOULES: Yes. Okay. Those
5 in favor of that legend being required as a
6 mandatory part of the citation -- that means it's
7 defective if it's not on there -- hold up your
8 hands? Those otherwise? Okay. That's the House
9 to one.

10 MR. TINDALL: We're not through with
11 this rule, are we?

12 CHAIRMAN SOULES: I think so. What
13 else?

14 MR. TINDALL: Well, I --

15 CHAIRMAN SOULES: The only change
16 we're going to make in the rule is require a new
17 legend in 101.

18 MR. TINDALL: What about the
19 suggestion in 101? Are we adopting it as
20 proposed?

21 CHAIRMAN SOULES: No. We rejected
22 everything about it except the legend part, and
23 we've rewritten the legend.

24 MR. TINDALL: Well, there is one
25 important part in this rule that Sam has presented

1 and it is, rather than directing the defendant to
2 appear -- that's insane. It doesn't happen that
3 way. That's Hagadorn (phonetic). He went to
4 court, and it didn't do any good. And I mean it
5 should be that he's directed to file a written
6 answer.

7 MR. SPARKS (EL PASO): That's right.
8 I eliminated --

9 MR. TINDALL: And I think that is a
10 good suggestion.

11 MR. SPARKS (EL PASO): -- to appear by
12 filing.

13 CHAIRMAN SOULES: All right. Where is
14 that?

15 MR. TINDALL: The third line.

16 JUDGE CASSEB: I thought you left it
17 as he suggested.

18 MR. TINDALL: No. We weren't taking
19 any of the suggestions as I understood the Chair.

20 CHAIRMAN SOULES: All right. Let me
21 get caught up with you because I failed you here.

22 MR. TINDALL: All right.

23 CHAIRMAN SOULES: "Shall command the
24 defendant" --

25 JUDGE CASSEB: We took out "to appear

1 by filing."

2 MR. TINDALL: "To file a written
3 answer."

4 CHAIRMAN SOULES: "To file a written
5 answer on the plaintiff's petition at or before
6 10:00 a.m." -- and we're going to leave that in
7 there -- "on the Monday next" -- take out "before"
8 -- "the next following the expiration of 20 days
9 after date of service of the citation and petition
10 upon the defendant."

11 MR. SPARKS (EL PASO): And for the
12 record I'm going to second Harry's motion to drop
13 the words "to appear by filing" and substitute "to
14 file."

15 CHAIRMAN SOULES: Okay. "The citation
16 shall state the location of the court, the date
17 the filing" -- is the rest of that okay? Okay.
18 Now maybe I'm with you. Let me go back through it
19 again.

20 We're going to accept the subcommittee report
21 down to the -- okay. We're going to retain the
22 Monday next following the expiration of 20 days as
23 the date. Except for that, the first paragraph,
24 as I understand the motion, is that it be accepted
25 as recommended.

1 MR. BEARD: Is there any reason -- I
2 mean what is the reason for having the citation go
3 bad in 90 days?

4 PROFESSOR EDGAR: Revenue.

5 MR. TINDALL: Revenue. The sheriff
6 doesn't want to be required for five years to keep
7 trying to serve someone.

8 CHAIRMAN SOULES: That's a new
9 problem. Raise it next year.

10 MR. BEARD: Okay.

11 CHAIRMAN SOULES: Okay. The way we've
12 got it now is that we direct the defendant to file
13 an answer rather than to "appear." We leave the
14 time period the same. The rest of paragraph one
15 would be recommended to the Court, and then we'll
16 draft a legend that is exactly what has to go on
17 there. Those in favor -- is there another
18 question? Elaine.

19 PROFESSOR CARLSON: As long as we're
20 giving the defendant this remedial notice of what
21 he's supposed to do, why don't we just say "after
22 the Monday next on the expiration of 20 days from
23 the date of service, you may lose by a default,"
24 instead of "a default judgment may be taken
25 against the defendant." That really tells him he

1 needs to do something. He'll understand --

2 MR. LOW: What if he's served with
3 something that's not -- where they are asking
4 something against him, but where -- an
5 interpleader, you know, just has an interest.
6 You're not really going to enter a default against
7 him, but you could enter a judgment --

8 PROFESSOR CARLSON: The way it is now
9 stated, it's going to say to him a default
10 judgment may be taken against the defendant.

11 MR. LOW: Against you, yes.

12 PROFESSOR CARLSON: Why don't we just
13 say "you may lose by default" -- you may not, but
14 you may. And the word "lose" would kind of tell
15 him -- might help him to decide how fast he's
16 going to --

17 MR. ADAMS: It still creates sort of a
18 trap in that -- in the sense that you say file a
19 written answer, but it's not just a written
20 answer. He's got to file a written answer that's
21 in conformity with a general denial.

22 PROFESSOR CARLSON: That's true.

23 MR. ADAMS: Or he's in a trap.

24 MR. LOW: Or appropriate written
25 answer.

1 CHAIRMAN SOULES: Really, though,
2 anything he files, anything is an appearance and
3 you can't take a default against him once he's
4 appeared.

5 MR. LOW: That's right. Yeah.

6 CHAIRMAN SOULES: Anything he puts in
7 there prevents a default. Anything.

8 Elaine, there are some -- that is technical
9 to say that a default judgment may be taken
10 against you, but it does say what happens as a
11 matter of law, too. And I wonder if there is not
12 some advantage to just saying it -- even though
13 it's more technical -- say "default judgment may
14 be taken against you" because that's exactly what
15 happens under the law rather than losing by
16 default.

17 MR. SPARKS (EL PASO): If they can
18 read -- and they do read -- that alerts them more
19 than what goes on now and that's an improvement.

20 CHAIRMAN SOULES: Okay. Any further
21 discussion?

22 MR. SADBERRY: One thing, Mr.
23 Chairman.

24 CHAIRMAN SOULES: Yes, sir. Tony
25 Sadberry.

1 MR. SADBERRY: I agree with Harry that
2 some indication -- written pleading as opposed to
3 appearance --

4 MR. TINDALL: I think we agreed on
5 that. We took that out.

6 MR. SADBERRY: My question is: Now we
7 know Rule 85 allows the answer to include more
8 than just an answer, it may be a motion or
9 otherwise. Are we in any way causing a problem by
10 indicating that he has to file an answer as
11 opposed to a motion to transfer?

12 PROFESSOR DORSANEO: No. "Answer" is
13 a generic term. It means motions and answers,
14 yeah.

15 MR. SADBERRY: In this case. It
16 certainly is by Rule 85.

17 PROFESSOR DORSANEO: Answer doesn't
18 necessarily mean on the merits.

19 MR. TINDALL: Any kind of response,
20 special appearance --

21 PROFESSOR DORSANEO: Yes. Answer
22 means response.

23 JUSTICE WALLACE: Anybody that knows
24 the difference is going to be a lawyer in the
25 first place.

1 MR. TINDALL: That's right.

2 CHAIRMAN SOULES: How about a written
3 answer or a pleading to the -- I mean, does that
4 add anything?

5 MR. TINDALL: Written answer will
6 be --

7 CHAIRMAN SOULES: Okay. Any further
8 discussion? Okay. Those in favor of Rule 101 as
9 we now have it set before the committee show by --

10 MR. TINDALL: Subject to my merger
11 rule later.

12 CHAIRMAN SOULES: -- show by hands.
13 Subject to Harry's later work, show by hands?
14 Opposed? That's unanimous. And our lunch is out
15 in the hallway. Let's break for about 30 minutes.

16

17

18

19

(Recess - lunch.)

20

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REPORTER'S CERTIFICATE

1
2
3 THE STATE OF TEXAS X
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4

5 I, Priscilla Judge, Court Reporter for the
State of Texas, do hereby certify that the above
6 and foregoing typewritten pages contain a true and
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statement of facts in THE SUPREME COURT ADVISORY
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9 I further certify that this transcription of
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10 reflects the exhibits, if any, offered by the
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11 I further certify that my charge for
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13 WITNESS MY HAND AND SEAL OF OFFICE this,
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