

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

5 (VOLUME II)  
6 (Afternoon Session)

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1                    June 26, 1987  
2                    (Afternoon Session)

3                    CHAIRMAN SOULES: Okay. Sam, let's  
4 proceed.

5                    MR. SPARKS (EL PASO): We were asked  
6 to monitor all the legislative acts with regard to  
7 private process servers, and my expert on  
8 legislature, Harry, tells me none of them passed  
9 -- so we can skip 106.

10                    And we go to 127, which is on page 98. And  
11 this also primarily comes from several of the  
12 district clerks and also comes, I think, from the  
13 administrative judges or Counsel on Administrative  
14 Judges. And the purpose of this proposed Rule 127  
15 is to make -- they say the party, but, of course,  
16 the lawyer -- responsible for the recordation of  
17 all costs and then responsible for the  
18 presentation of the bill of cost at the time that  
19 it's to be assessed. And so you need to look at  
20 Rule 127.

21                    This is going to be particularly important  
22 when we're not filing a lot of documents like  
23 depositions and that type of thing. There's going  
24 to be more responsibility on the lawyers. We've  
25 always kind of left it up to the court reporters

1 in our part of the country to put in the  
2 deposition cost and whatnot. But you ought to  
3 look at 127 if you haven't read it and very  
4 briefly read it.

5 The purpose of this request is to make it the  
6 party and, therefore, the lawyer's, responsibility  
7 to make sure the costs are accurately recorded.  
8 And then when a judgment or bill of cost is to be  
9 prepared, then the clerk, of course, I'm sure will  
10 still draw it, but the lawyer will be representing  
11 that it's accurate at the time of the assessment.  
12 That's the proposed Rule 127.

13 MR. RAGLAND: I move that it be  
14 rejected.

15 CHAIRMAN SOULES: Motion was made that  
16 it be rejected. Is there a second to that  
17 motion?

18 MR. BRANSON: Second.

19 CHAIRMAN SOULES: Moved and seconded.  
20 Any discussion? It's a pretty simple rule. Does  
21 the clerk keep track of the court costs or do the  
22 lawyers keep track of the court costs? We don't  
23 need a lot of discussion. The motion has been  
24 made and seconded that it be rejected. In favor  
25 of rejection, say "I." Opposed? That is

1           unanimously rejected.

2                   MR. SPARKS (EL PASO): And then on  
3 page 100 -- and this is one that you've thrown  
4 back in our court several times. And what I have  
5 done here is go through the various local rules  
6 using Bexar County and others to try to come up  
7 with some sort of consensus for dismissal rules at  
8 the committee's request.

9                   There's no authorship or pride or anything  
10 here. But this is the best that I have been able  
11 to come up with and I've sent it to several  
12 members of the committee for input, and we've had  
13 very little of it. I've tried to condense as best  
14 we could, make it as simple as we could, and you  
15 ought to look at it for discussion.

16                   The request has been made several times that  
17 we have a uniform dismissal for want of  
18 prosecution. And it takes not only the local  
19 rules, but some of the discussion that we've had  
20 in minutes when the generic problem has been  
21 presented.

22                   MR. LOW: I have a question. Would  
23 there still be room for local rules, the Court  
24 would want it 24 a month or something like that?

25                   MR. SPARKS (EL PASO): Yes. This is

1 not to replace local rules.

2 MR. TINDALL: Well, how do we get a --  
3 I was just going to go the opposite tack, if we  
4 add a sentence that says this supersedes local  
5 rules so we don't have a hodgepodge of 18 months  
6 here and 48 months there.

7 MR. JONES: 36 months and you're going  
8 to dismiss every case in Harris County, aren't  
9 you?

10 MR. SPARKS (EL PASO): Well, actually,  
11 Harris County local rules, this extends theirs. I  
12 don't know how they operate down there, but  
13 they've got a lot less than 36 on this. But it's  
14 not a dismissal. It's placed on the dismissal  
15 docket. This was kind of the -- Bexar County the  
16 way they have done it. And then you can respond  
17 to it.

18 CHAIRMAN SOULES: Sam?

19 MR. SPARKS (EL PASO): Yes.

20 CHAIRMAN SOULES: To make one  
21 observation here, this time period is so at  
22 variance with the February 4, 1987 administrative  
23 order that I would be highly surprised if the  
24 Supreme Court would entertain this rule as it's  
25 written.



1           What we're seeing now and indications are  
2           that new rules dealing with dismissal docket are  
3           going to say so as to achieve the quality with the  
4           standards of the administrative order. In other  
5           words, you set on dismissal docket so as to  
6           achieve conformity with the February 4 order,  
7           because they've told us what they want us to do,  
8           the standards.

9           MR. SPARKS (EL PASO): The time  
10          duration, Luke, is just -- I just arbitrarily  
11          picked it out of a consensus of the local rules.  
12          So, that's no --

13          CHAIRMAN SOULES: But those are  
14          superceded. Now, that's --

15          MR. BEARD: Who wants verified  
16          pleading at that stage? Where does that come  
17          from?

18          MR. TINDALL: Verified motion, you  
19          really mean, don't you, Sam?

20          MR. BEARD: He said pleading.

21          MR. SPARKS (EL PASO): Yes, verified  
22          that as a motion.

23          MR. BRANSON: Don't you want to give  
24          the trial court some discretion too, Sam, in case  
25          there is a reason he doesn't want to have a

1 hearing, make it a "may" instead of a "shall"?  
2 The trial court may know why the case hasn't been  
3 moving. It may be a good reason to make them go  
4 have a hearing and verify pleadings in some  
5 instances.

6 MR. BEARD: Well, you're talking about  
7 a verified motion, not going back and verifying  
8 the pleading.

9 MR. SPARKS (EL PASO): That's right.  
10 That's exactly right. "May" is fine with me. I'm  
11 not going to stand up here and defend much of this  
12 rule.

13 MR. TINDALL: Luke, I think the rule  
14 has got some merit to it. I'm not married to any  
15 date or time or language, but it certainly seems  
16 to me that if we have deadlines for everything in  
17 this state, that dismissal is something that we  
18 could have some uniformity on. Our county has  
19 every -- different courts have different rules in  
20 our county. It's impossible to keep up with it.

21 JUSTICE WALLACE: Well, here's one big  
22 problem: Out in San Angelo there's probably not  
23 three cases out there right now that have been  
24 there for three years. In Houston you can't get a  
25 trial in three years. And it's going to be

1 impossible really for anybody to set a uniform  
2 time for this dismissal for want of prosecution, I  
3 think, and make it work.

4 MR. LOW: Don't you think, Judge,  
5 that's mostly the local? Each one has it, and the  
6 power the judge has over his own docket just has  
7 to govern there. Because right in Orange and  
8 Beaumont there's a difference. And if the judge  
9 is interested in moving his docket, he'll call --  
10 you know, set them for dismissal at different  
11 times, you know.

12 CHAIRMAN SOULES: Of course, part of  
13 the February 4, '87 administrative order is to try  
14 to bring the courts more into conformity with the  
15 volume of disposition of cases. This maybe we  
16 ought to factor in: One of the major undertakings  
17 of our model local rules study, which will start  
18 as soon as the Supreme Court says we can -- help  
19 the Supreme Court get through this last rule  
20 making effort for the January 1, '88 effective  
21 date.

22 Then this committee is going to turn the big  
23 undertaking of working with the Counsel of  
24 Administrative Judges on model local rules. And  
25 we will generate what we think a local rule in

1 every jurisdiction of the state of Texas ought to  
2 be. We may have like a checklist or some options  
3 about central dockets versus individual dockets.  
4 It's going to be a very large undertaking.

5 But in that, in the course of that, setting  
6 up a model local rule for dismissal for want of  
7 prosecution so as to achieve conformity with the  
8 time standards will be a part -- a big part of the  
9 model local rules undertaking. And I don't know  
10 how that plays on what we do with this rule, but  
11 it may be that it's -- that we table to that  
12 effort. I'm not suggesting that; I'm just saying  
13 we might want to do that. But we should discuss  
14 whatever.

15 MR. SPARKS (EL PASO): There's no  
16 magic in the 36 months. I'm trying to remember  
17 why I selected that. I think it was the longest  
18 period of time in any of the local rules that I  
19 had. I think that's the reason I put 36. But the  
20 point was that at some point in time the rule is  
21 designed -- at some point in time something has to  
22 be done with the case. It's on a docket and if  
23 it's going to be continued, then a pretrial order,  
24 and if we go by that rule, it will take place and  
25 something is going to happen to the case at that

1 point.

2 JUDGE CASSEB: The thing is the  
3 administrative rules are going to handle this  
4 under the Supreme Court's order, and I don't think  
5 it should be in this.

6 CHAIRMAN SOULES: Yes, I was trying to  
7 see where my --

8 MR. LOW: Luke, don't you think if  
9 you're going to put something in here, you would  
10 put -- go at the other end and say that they  
11 wouldn't hold dismissal docket any earlier than  
12 such and such time, but each court would have its  
13 own rules or something. In other words, I don't  
14 think we ought to say it ought to be a certain  
15 time, but you wouldn't want to dismiss a case for,  
16 you know, dismissal for want of prosecution  
17 earlier than a year or something, and then let  
18 each court set its own administrative rules.

19 MR. SPARKS (EL PASO): Well, if you're  
20 going to do that, why do we need --

21 JUDGE CASSEB: You're going to have --  
22 the administrative rules are going to take care of  
23 your procedures for dismissal of cases. And it's  
24 going to have to then be -- and each county is  
25 going to be different. That's what it's going to

1 be.

2 And for you to try to put in this rule here,  
3 any time period at all, it's going to be contrary  
4 to what you're going to find in your  
5 administrative rules. Because as I see it, you're  
6 working diametrically opposed. And I would be in  
7 favor of just leaving it as you had it and leave  
8 this alone until you get your Supreme Court rules  
9 coordinated with your local administrative rules.  
10 And we put in the administrative rules, adopted by  
11 the Supreme Court, a provision in there that it  
12 should contain rules for the governing of  
13 dismissal docket, specifically spelled out.

14 JUSTICE WALLACE: The Counsel of  
15 Administrative Judges, each one of them is now  
16 working with their local judges in their district  
17 on their local rules. One requirement is that  
18 they leave out everything that belongs in the  
19 rules of civil procedure. Number two is they all  
20 follow a uniform statewide numbering system.

21 Now, I've gotten one -- I think two courts  
22 down in Fort Bend County -- but anyway, a couple  
23 of them have come in already, and all of them are  
24 working on them. So, this is not something that,  
25 well, we'll do this next year, next year. It is

1 in the process right now. And so it's not going  
2 to be all that long before we have enough local  
3 rules and they're going begin to gel and we can  
4 make sense out of this.

5 So, I don't know what we could do really to  
6 say, okay, we're going to have, say, a two-year  
7 rule. Well, that's going to be impractical in  
8 Harris County; it just won't work. In two years,  
9 even in some localities, it's too long a time.  
10 The lawyers don't like it that much but the judges  
11 out there have got it running and they're  
12 disposing of the cases in less period of time than  
13 that. And I don't think anybody wants to say that  
14 we're going to slow down the process.

15 MR. RAGLAND: Judge, may I direct a  
16 question to you?

17 JUSTICE WALLACE: Yes.

18 MR. RAGLAND: I never have understood  
19 the apparent urgency for dismissing a case that's  
20 on the docket that no one is taking any interest  
21 in. Maybe I'm missing something. I sat through  
22 all this on the task force and everything, that it  
23 just seemed like it's crucial. But it's still on  
24 the docket and still takes the same amount of file  
25 space. I just missed the urgency of it. I'd like

1 someone to explain that to me.

2 JUSTICE WALLACE: The best I can  
3 understand, the strongest argument for having a  
4 dismissal docket is that the judge has the tools  
5 there to make some lawyer -- you've got one side  
6 that wants to get to trial and the other one  
7 dragging his feet -- that he can say, "Okay.  
8 You're going to either try it or I'm going to  
9 dismiss it." And that gives the judge the  
10 authority to get the case disposed of when at  
11 least one side wants it disposed of. And it also  
12 gives him the discretion if he says, "Okay.  
13 Nobody complaining, the parties are not  
14 complaining, the lawyers are not complaining.  
15 I'll just continue it again instead of dismissing  
16 it." But it leaves it up to the judge to do that,  
17 local control on it.

18 MR. RAGLAND: Well, shouldn't that be  
19 a local rule?

20 JUSTICE WALLACE: Well, that's what  
21 we're talking about, leave that time up to the  
22 local jurisdiction because we just can't have -- I  
23 don't know how we can set one time that's going to  
24 work statewide.

25 MR. TINDALL: What about this, Judge:



1 The time I can understand. We seem to also have a  
2 crazy quilt that I see as to the period of a year,  
3 if you could somehow know that, you know, blank --  
4 you know, first day of the month, this time of the  
5 year, you'd better go look at all your files and  
6 see if they're not going to be up for dismissal.  
7 As it is now, we seem to be -- a different month  
8 and a different, you know, time of the year.

9 CHAIRMAN SOULES: That would have to  
10 be an ongoing process, Harry. Dismissal for want  
11 of prosecution would have to be an ongoing process  
12 in every jurisdiction, particularly city  
13 jurisdictions. That's the only way they can keep  
14 up.

15 Tom, to respond to you, there was more to  
16 that that I heard in the task force. The part of  
17 the -- part of the foundation effort in the task  
18 force was to get accountability for judge's work.  
19 Whether we needed that or not, I don't know. But  
20 that was very much a part of the fabric of the  
21 task force. We want to see trial judges at work  
22 and we want them to be accountable for their  
23 work.

24 Now, one of the things that it was felt  
25 needed to be done was to get cases disposed of

1           instead of letting them pile up. Because if they  
2           were piling up -- there was not some uniformity  
3           about how judges were disposing of their dockets.  
4           There wasn't a benchmark to measure them against  
5           to determine whether or not they were accountable,  
6           whether they were working. Apparently in some  
7           jurisdictions there were judges who were not.

8           So, the idea was we're going to set  
9           standards. You're going to have to just get your  
10          old cases dismissed. You're going to have to keep  
11          your old cases dismissed. And you're going to  
12          have to try your current cases to meet these  
13          standards. And those who don't are going to be  
14          found not accounting as well as they should be,  
15          and those who do will be accounting as well as  
16          they should be. And that was a part of the --  
17          that was sort of the time standards concept.

18          But if you don't put dismissal for want of  
19          prosecution into that in a heavy way -- and, of  
20          course, it's always through the February 4 order  
21          -- then you just get nowhere with the  
22          accountability issue, and that's the underpinning  
23          point.

24                   MR. LOW: And it gives you a better  
25          current picture of what the real docket is,

1 because some divorce cases, the parties will go  
2 back together, and they don't take the time to  
3 have a lawyer dismiss it. Somebody is not  
4 interested in prosecuting the case anymore. So  
5 disinterested -- he doesn't even prepare a motion  
6 to dismiss. So it let's the courts know exactly  
7 what cases are really cases in controversy, and it  
8 gets rid of cases that lawyers just wouldn't take  
9 time to get rid of and it gives you an accurate  
10 count.

11 CHAIRMAN SOULES: And the last point  
12 is that if the Harris County --

13 MR. RAGLAND: The point that I'm  
14 making, what are you getting rid of? I mean, what  
15 does that do? It just takes it out of one column  
16 and --

17 MR. LOW: Getting rid of a case that  
18 people -- that is no longer a case.

19 CHAIRMAN SOULES: It takes them out of  
20 another big issue, and that is, we can't work  
21 because we're overwhelmed. Now, San Antonio  
22 reduced its overall case load in its district  
23 courts last year by 12,000 cases. We have 12,000  
24 cases fewer now than we had a year ago. And the  
25 volume of filing cases hasn't changed. We've just

1       been able to keep up with the current cases and  
2       get rid of 12,000 old cases, and we're still  
3       dismissing them.

4               We're now up to where we're setting cases.  
5       All pre '84 cases have been set on a dismissal  
6       docket. Pre '83 cases cases have all been heard  
7       and disposed of except rare exceptions, and we're  
8       current. And if you want to know where the San  
9       Antonio courts stand on disposition of their  
10      cases, they can tell you, and it's not overwhelmed  
11      and can't work.

12             But if you go to Harris County, it's  
13      overwhelmed and can't work. And you can't really  
14      dig through that mire because there are so many  
15      old cases over there you can't get there from  
16      here. What the Court wants to do is get rid of  
17      those cases and get the dockets current. And this  
18      -- I mean, this is the thinking behind it. I'm  
19      not trying to sell it. I'm just trying to say the  
20      history about it.

21             MR. RAGLAND: I want to make one more  
22      statement and I'm going to shut up.

23             CHAIRMAN SOULES: Okay.

24             MR. RAGLAND: It seems like to me that  
25      this committee is spending a lot of time as well

1 as imposing a lot more duties on the district  
2 judges keeping statistics. Now, if the judges are  
3 getting paid by the cases they dispose of, that's  
4 one thing, but they're going to make the same  
5 amount whether they try one case a year or one  
6 case a week. And with the resources that are  
7 available, it looks like to me that we could be  
8 devoting our efforts somewhere else to a lot  
9 better benefit. And that's the end of my  
10 statement.

11 CHAIRMAN SOULES: Frank Branson.

12 MR. BRANSON: Well, as I understood  
13 it, the task force was formed as a result of the  
14 legislative mandate. After the task force met and  
15 several of us spent a lot of hours with it, this  
16 committee overwhelmingly rejected the task force  
17 proposal. And after that, the legislature  
18 withdrew their mandate at the last session. So,  
19 it looks to me like we're going back to a pond  
20 that has since dried up.

21 CHAIRMAN SOULES: It hadn't dried up  
22 because the February 4, 1987 administrative order  
23 was recommended by the task force unanimous and  
24 was adopted by the Supreme Court. There was no  
25 dissent on that. So, we have that order.

1 MR. BRANSON: Well, that's just  
2 speaking to it as it's dried up. I move that we  
3 defeat the proposal on 165, see what the committee  
4 says.

5 MR. RAGLAND: I second it.

6 MR. SPARKS (EL PASO): Okay. Well,  
7 I'd like to have some discussion.

8 CHAIRMAN SOULES: Does that have to do  
9 with the task -- with the February 4, '87 order?

10 MR. BRANSON: No. But the concept  
11 behind perpetuating dismissal of lawsuits was a  
12 driving force in that task force.

13 CHAIRMAN SOULES: It's the law now by  
14 order of the Supreme Court dated February 4th,  
15 1987.

16 MR. BRANSON: What's before this  
17 committee is not currently the law, though.

18 CHAIRMAN SOULES: That's right. Now  
19 we're going back to this rule.

20 MR. SPARKS (EL PASO): Let me tell you  
21 that if -- you know, if the motion is going to  
22 carry, that's fine. I just want to get it off of  
23 our docket. I've spent a lot of time and a lot of  
24 people have been spending a lot of time. Let me  
25 just go through it and tell you the concept of

1 it. Because I don't -- I see them as totally  
2 different.

3 We were asked to go through several of the  
4 local rules on how cases were disposed of and try  
5 to come up, for discussion purposes with something  
6 that you could discuss. The 36 months was just  
7 selected in there. That sentence could read, "Any  
8 case designated for dismissal docket shall be," or  
9 whatnot. That's not the important thing.

10 The procedure that was to be in this rule  
11 would be that at some point in time under some  
12 circumstance the Court will have a dismissal  
13 docket. The parties or their attorneys are  
14 notified and then it requires a response, a  
15 motion. I'm almost certain every one of the local  
16 rules requires some sort of a verified motion,  
17 but, in any event, a motion setting out why it  
18 should not be dismissed.

19 And then there were various ways that it was  
20 handled. Most of them had a docket call of some  
21 nature. Then at that point, the responsibility  
22 was sort of switched to the Court to do  
23 something. And in most instances, it appeared to  
24 me that the presiding judges would take it like  
25 you asked for a pretrial conference and they put

1 out some deadlines and try to get you a setting or  
2 that type of thing. And that's what they at least  
3 had proposed.

4 So, if it's going to stay on the docket, then  
5 there's an order and that older case would be in  
6 line for trial after discovery. And there would  
7 be deadlines on it when supplemental answers would  
8 be filed. Then your expert witness could be  
9 deposed, you know, the same thing that we do  
10 frequently. And if the case then was thereafter  
11 continued, it had to be for a valid reason as  
12 found.

13 And then I noticed that most of them had some  
14 sort -- I don't know if this works or not, Luke --  
15 you're going to have to tell me -- in San  
16 Antonio. They would have something that you only  
17 have "X" number of days in which it would be tried  
18 or dismissed. I thought it was a little strong.  
19 I always -- in my first draft or second draft when  
20 I talked with someone about it. And after the  
21 90-day period it's either dismissed or the Court  
22 has to enter another appropriate order or  
23 something.

24 But this was proposed -- this rule was  
25 proposed simply to have some uniformity to where



1           there would be notice given, an opportunity given  
2           to keep it on and then some individual attention  
3           on a case that should have already been disposed  
4           of and get it disposed of.

5                       CHAIRMAN SOULES: The concept of the  
6           rule -- this particular rule to me is pretty all  
7           encompassing. It says, you know, if you keep it  
8           there you've got to set it. You've got to set a  
9           pretrial schedule. You've got to keep that except  
10          for compelling reasons. And if you don't, you've  
11          got to reset all that.

12                      In other words, once a case is on a dismissal  
13          docket, then it becomes very structured in terms  
14          of how -- from that point, it's either dismissed  
15          then or it's going to become scheduled for  
16          disposition. And it's safe to say your case is  
17          either going to be dismissed or scheduled for  
18          disposition, and this is fairly broad. It doesn't  
19          say exactly how each jurisdiction is going to  
20          schedule for disposition; it just says they will.

21                      MR. SPARKS (EL PASO): We drew it for  
22          that reason.

23                      CHAIRMAN SOULES: And to me, the only  
24          difficulty with it is that somehow the period  
25          should say in an "effort to comply with time

1 standards as may be recommended by the Supreme  
2 Court of Texas cases shall be placed on the  
3 dismissal docket."

4 MR. SPARKS (EL PASO): I don't even  
5 know if you have to go that far. You might just  
6 say "any case designated on a dismissal docket."

7 CHAIRMAN SOULES: Any case may be  
8 placed on a dismissal docket.

9 MR. SPARKS (EL PASO): Even in El  
10 Paso, different judges have different dismissal  
11 dockets.

12 CHAIRMAN SOULES: If we had put there  
13 -- instead of pending for 36 months, if we just  
14 said any case may be placed on a dismissal docket,  
15 and then under what circumstances it's placed  
16 would be up to the local judge or whatever the  
17 Supreme Court may order administratively or  
18 otherwise. Notice of courts intention to dismiss  
19 -- and with that change, this really becomes a  
20 general directive to the courts that any case may  
21 be placed on there and once they are placed,  
22 they're either going to be dismissed or scheduled  
23 for disposition. And, Judge Rivera, you've had  
24 more experience with this probably than any trial  
25 judge in the state of Texas.

1                   JUDGE RIVERA: I had my hand up. Let  
2 me tell you what happened to the trial court.  
3 When Chief Justice Hill came in, we had an expert  
4 come in from out of state and tell us we didn't  
5 know how to count. They said you count from the  
6 day you file the lawsuit until the day it's  
7 disposed. So, in Bexar County, even though you  
8 can get a trial in three months, that's no good  
9 because you've had cases on file for 10 years.  
10 So, I said, "Okay. We'll do it your way. We'll  
11 show you we can still do it and come out better."

12                   The idea of the expert and the move that  
13 started in the trial courts to improve the  
14 administration of justice and to get rid of the  
15 criticism that it takes too long to get a trial,  
16 that it takes too long to get justice, was to have  
17 the courts control the cases. And we were going  
18 to get started with some rules and said, "Okay.  
19 30 days after you file an answer you do this and  
20 45 days later you got to do this. And, Mr.  
21 Lawyer, you're going to have to do this in 90  
22 days. And, Mr. Lawyer, you're going to do this  
23 and that and the other." And that, of course,  
24 didn't sit very well. We got complaints not only  
25 from the lawyers, but also from the trial judges.

1 They said, "Wait a minute. We can't do it that  
2 way. We're going to spend more time  
3 administrating and less time hearing cases."

4 And we can do it our way like we have in  
5 Bexar County. We did set up our dismissal  
6 docket. We cranked it up to full speed. We  
7 tightened up the loose ends. We set up a  
8 systematic system that worked, and we saw the  
9 results that came in.

10 And what it was was a compromise that some  
11 lawyers like to work one hour a day to prepare for  
12 a trial that's coming next month. Most lawyers  
13 like to work 24 hours before the trial starts day  
14 and night to get ready for Monday. The dismissal  
15 docket will give the lawyer the option to work one  
16 hour a day or 24 hours before the trial date. We  
17 don't do anything unless we reach that point,  
18 either the trial date or the dismissal docket.  
19 The lawyers will have a little control. They will  
20 have some leeway. They will have something to say  
21 about how they try the lawsuit, how they prepare,  
22 you know, just the way they're suited. And I  
23 think that will be a better practice for the  
24 lawyers.

25 But in order to do that, we've got to have a

1 dismissal docket procedure that works, that's  
2 effective and that produces the results that we  
3 got in Bexar County in the last year. We're down  
4 to what the expert says we needed to be down to,  
5 you know, just a year's pending cases, and that's  
6 what we've got now.

7 MR. BRANSON: Judge, you-all did that  
8 without the rules proposed now, didn't you?

9 JUDGE RIVERA: Without the rules that  
10 are proposed now and without the rules that the  
11 expert had proposed with a dismissal docket  
12 control rule prepared by Judge Casseb and a few  
13 others that were put into effect.

14 MR. BRANSON: Judge, don't you-all  
15 figure it will be better off to let the local  
16 trial judges deal with that rather than us?

17 JUDGE RIVERA: Let me tell you what  
18 the problem is. "There's nothing in the rules  
19 about a dismissal. It's all within your  
20 discretion. You have plenary power to do it so  
21 you ought to reinstate it. You ought to leave it  
22 on the docket because there's nothing that states  
23 that you have to dismiss it." And we hear that  
24 argument over and over again.

25 "I know that I haven't done anything in 11

1 months, but I'm going to do it tomorrow. And  
2 there's nothing in the rules that says you have to  
3 dismiss it so you should leave it on the docket.  
4 I know that we should have answered the admissions  
5 and the interrogatories six months ago, but  
6 nothing has been done by the other side for  
7 sanctions, so you ought to leave it on the  
8 docket. You know, let the rules provide for  
9 dismissal." We have those arguments all the  
10 time. And if the rule says it ought to be  
11 dismissed, it will be dismissed. And if a lawyer  
12 knows it's going to be dismissed, they'll probably  
13 do something about it.

14 CHAIRMAN SOULES: Frank, on page 190,  
15 191, 192, 193, 194, 195, 196, 197, 198, 199 and  
16 200, for 11 pages you see the specifics of the  
17 joint order of the Bexar County courts. Now, that  
18 is far more specific than what's proposed here.  
19 But what is proposed in this 165(a), in the  
20 broadest sense, permits these 12 pages of specific  
21 orders to be written by the local judges saying  
22 exactly how it's going to be done.

23 165(a) says you're going to set it. It's  
24 either going to be dismissed or scheduled for  
25 disposition. Now, what this Bexar County order

1 does is schedule it for disposition. It  
2 implements what this broad 165(a) says you can  
3 implement. And you can -- in effect, directing  
4 that you should. The rules of civil procedure  
5 right now don't give real indication to the bar on  
6 what the administrative order requires. And that  
7 is that the administrative judge, such as Judge  
8 Rivera, and then the administrative region judge,  
9 such as Judge Clawson or Judge Kelly, are now  
10 mandated to set up dismissal dockets. The Supreme  
11 Court has mandated that.

12 This tells all the judges in a general way  
13 how to approach conceptually the dismissal  
14 docket. And that, I think, is what we're trying  
15 to get, is a uniform conceptual approach to the  
16 dismissal docket without saying strict time  
17 guidelines in the general order.

18 MR. BRANSON: My problem is when you  
19 go to court, that may place any case on a  
20 dismissal docket. And I've certainly been in  
21 courts of law with fair trial judges. But you  
22 occasionally get an unusual individual on the  
23 trial bench, and we've all been before them, and  
24 if you don't give them any guidelines, you may  
25 find a case dismissed within a very short period

1 of time or an unreasonable period of time. And  
2 you're going to find yourself in the system  
3 alleging abuse of discretion and going up on  
4 appeal before you even get to try your lawsuit.

5 MR. SPARKS (EL PASO): So, you're  
6 speaking in favor of the rule?

7 MR. BRANSON: No, I'm speaking in  
8 favor of the time limits if you're going to have  
9 the rule. But I'm not -- I think Rule 165 now is  
10 broad enough to encompass what Bexar County did.

11 CHAIRMAN SOULES: Well, then what if  
12 we said any court -- any case may be placed on a  
13 dismissal docket if not disposed of within the  
14 time standards provided by the Supreme Court? If  
15 it's within the time standards, it's not placed.  
16 If it's outside the time standards, it could be  
17 placed.

18 JUDGE RIVERA: The thing is if it's  
19 placed on the dismissal docket, it does not mean  
20 it's got to be dismissed.

21 CHAIRMAN SOULES: That's right.

22 JUDGE RIVERA: It means the rule has  
23 to -- it has to be determined. And we would have  
24 a docket control order or a scheduling order or a  
25 time limit order or, you know, something.



1           MR. BEARD: Well, Luke, is it going to  
2 have to be formal, a verified motion -- most of  
3 these -- a lot of these matters are handled by  
4 calling the judge and saying, "We haven't found  
5 the defendant yet. We can't -- we haven't got him  
6 served." And pass that, you know. We're still  
7 trying to serve the defendant. Or, you know, the  
8 bank is closed and the FDIC receiver says they are  
9 going to file against you. So, you haven't filed  
10 your -- you just sit there until it's done.

11           CHAIRMAN SOULES: I think that level  
12 of detail is baggage in this rule, to verify a  
13 motion and say what happens, unless a verified  
14 motion -- I think that all can be done at the  
15 local level like San Antonio did. I think that's  
16 excess baggage.

17           But to say cases falling outside the time  
18 standards may be placed on a dismissal docket.  
19 When they're called they're either dismissed or  
20 scheduled for trial -- is a good directive, in my  
21 judgment, to give the trial judges and the bar in  
22 the rules of civil procedure. And then how you  
23 implement that at what level of detail in the  
24 local rules is something else. But I agree with  
25 you, verified and that sort of thing here is

1 excessive baggage for a general rule.

2 But can't we go through this line by line and  
3 pick out the best parts of it and eliminate the  
4 worst parts of it in the next, say, 10 minutes and  
5 then vote it up or down?

6 PROFESSOR DORSANEO: To keep the ball  
7 rolling, I would move the modification of that  
8 first sentence beginning, "Any case pending on the  
9 docket for 36 months," to incorporate the language  
10 that you dictated into the record without  
11 compliance with the Supreme Court's time  
12 standards.

13 JUDGE CASSEB: There's a motion and  
14 second made to table it.

15 PROFESSOR DORSANEO: Oh, I'm sorry. I  
16 forgot that.

17 CHAIRMAN SOULES: Well, let's vote on  
18 that. Should we table it or keep on with it for a  
19 few minutes? Those in favor of tabling it, show  
20 by hands. Okay. We won't table it. We'll work  
21 on it a little more.

22 MR. RAGLAND: Luke, I think the motion  
23 was to reject it outright rather than table it.

24 MR. BRANSON: Not to change the  
25 original -- not to change the original ruling,

1 we've got Rule 165 --

2 CHAIRMAN SOULES: Okay. Well, then  
3 that motion deserves discussion and that's where  
4 we are. Okay. Let's start off here, the first  
5 sentence is okay; is that right? I realize we're  
6 not voting for it. But languagewise, is there any  
7 problem with it?

8 PROFESSOR EDGAR: I really think that  
9 any time we are looking at a rule and are going to  
10 make some revision, we should make an effort to  
11 make it gender neutral.

12 CHAIRMAN SOULES: Make it what?

13 PROFESSOR EDGAR: Gender neutral.

14 CHAIRMAN SOULES: Okay, yes.

15 MR. BRANSON: Are you going to do that  
16 by changing "his" to "its"?

17 CHAIRMAN SOULES: "Their," just  
18 pluralizing them even though it's grammatically  
19 awkward.

20  
21 (Off the record discussion  
22 ensued.)

23 CHAIRMAN SOULES: That just comes out  
24 after "had notice," period. Then you strike the  
25 rest of that sentence. Then you pick up about

1 dismissal. "Any case may be placed" --

2 JUDGE RIVERA: Mr. Chairman, I suggest  
3 we entertain some language that might get  
4 everybody out of a bind that after a case is  
5 pending 36 months, upon motion of any party or the  
6 Court's own motion, it may be placed on a  
7 dismissal docket.

8 CHAIRMAN SOULES: We were going to  
9 say, Judge, that "Any case may be placed on the  
10 dismissal docket that had not been disposed of  
11 within the time standards provided by the Supreme  
12 Court."

13 JUDGE RIVERA: That's okay.

14 MR. BRANSON: Luke, we've been through  
15 so many discussions, I'm not sure I know what --  
16 what are the current time standards?

17 CHAIRMAN SOULES: They may be in here,  
18 Frank. Let me get these thoughts down and then  
19 I'll address that. "Any case may be placed on a  
20 dismissal docket" -- "Any case not disposed of  
21 within the time standards provided by the Supreme  
22 Court may be placed on a dismissal docket. Notice  
23 of the court's intention to dismiss and the date  
24 and place of the docket hearing shall be sent by  
25 the clerk to each attorney of record and to each

1 party that is not represented by a lawyer and a  
2 whose address is shown on the docket or in the  
3 papers on file by posting same in the United  
4 States postal service. At the docket hearing the  
5 Court shall dismiss for want of prosecution any  
6 case" --

7 MR. SPARKS (EL PASO): Why don't you  
8 change that after "prosecution" to say "unless,"  
9 and then knock out the rest of that line and say  
10 "unless the Court determines there is good cause  
11 for the case to be maintained" --

12 CHAIRMAN SOULES: "Unless there is  
13 good cause for the case to be maintained on the  
14 docket. If the Court determines to maintain the  
15 case on the docket, it shall enter a pretrial  
16 order specifying the reasons why the case was not  
17 dismissed." I don't think that ought to have to  
18 -- I think just enter a pretrial order assigning a  
19 trial date and not specifying why.

20 So "enter a pretrial order assigning a trial  
21 date for the case," and I don't think time period  
22 should be in there frankly, in this particular  
23 one, within six months -- I guess that could go  
24 either way.

25 JUDGE CASSEB: I don't think we should

1 put it in there.

2 CHAIRMAN SOULES: "Trial date for the  
3 case and setting deadlines for the making of new  
4 parties, all discovery, filing of all pleadings  
5 and the filing of responses or supplemental  
6 responses to discovery and other pretrial  
7 matters. The case may be continued thereafter  
8 only for valid and compelling reasons as  
9 established" -- "as specifically determined by the  
10 Court." I'd strike "established in verified  
11 pleadings and" -- "compelling reasons as  
12 specifically determined by court order but  
13 thereafter the Court must try the case within 90  
14 days of the entry of an order of continuance" --  
15 I'd say "valid and compelling reasons as  
16 specifically determined by court order." That  
17 means there's got to be reasons in that next court  
18 order, and then stop there, and notice of the  
19 signing of the order shall be given and failure to  
20 mail notices. That makes the rule a general  
21 directive rule. We wanted to to not -- we've  
22 taken the specifics out. Elaine.

23 PROFESSOR CARLSON: What if the case  
24 was dismissed or there was a motion to dismiss  
25 because the lawyer or his attorney did not appear

1 for a hearing of which they had notice? Maybe it  
2 was a discovery hearing in a state antitrust case  
3 that was three years away from trial. Does that  
4 mean that the court is to docket that case or is  
5 to now order a pretrial order setting a firm trial  
6 date?

7 CHAIRMAN SOULES: If it's set on --  
8 well, now, if you come under this first sentence,  
9 you dismiss it when the lawyer fails to show for  
10 discovery motion. The Court has the power to do  
11 that. He doesn't have to set it for dismissal.

12 PROFESSOR CARLSON: What if he does  
13 set it for dismissal? Then is the best you're  
14 going to get for relief going to trial in six  
15 months?

16 CHAIRMAN SOULES: No. We took the six  
17 months out.

18 MR. SPARKS (EL PASO): Plus you've got  
19 the sanctions rule.

20 (Off the record discussion  
21 ensued.)

22  
23 MR. LOW: Luke, I don't want to bog  
24 down, but could I -- and maybe this is over  
25 simplifying it. But really it sounds like to me

1 all we're trying to get to is just give the trial  
2 courts the tools to provide administrative rules  
3 that were within the guidelines of the Supreme  
4 Court. So, if I were doing that, I would just  
5 start out with 165 like it is and say, "Within the  
6 guidelines under administrative rules the case may  
7 be dismissed," and not change anything else that's  
8 been working. It gives them the tool.

9 CHAIRMAN SOULES: But this does tell  
10 the trial court that he's got to set a pretrial  
11 schedule, which is conflicting.

12 MR. RAGLAND: I think that's foolish,  
13 just quite frankly.

14 JUSTICE WALLACE: Well, let me mention  
15 one aspect. Ray Judice this morning -- the  
16 legislature decided they were going to step in and  
17 make everything in those administrative rules  
18 permissive and all that. Now, they didn't touch  
19 the rules of procedure. They knocked those out  
20 completely in their little fit of pique (phonetic)  
21 that's going on now. At least we've got these  
22 rules of procedure here and all this can be done  
23 pursuant to the rules of procedure which they  
24 haven't touched.

25 MR. LOW: But it can be done now under



1 Rule 165, can't it, Judge?

2 JUSTICE WALLACE: Well, that's -- as I  
3 understood what we're trying to do is get some  
4 broad general guidelines now for us to do it.

5 MR. LOW: Okay. I'll withdraw.

6 JUSTICE WALLACE: But that is one  
7 advantage to having something in the rules of  
8 procedure on it.

9 MR. RAGLAND: But, Judge, we're not  
10 looking, I don't think -- as I perceive and  
11 understand this discussion, we're not looking past  
12 the end of our nose here because with this  
13 underlined portion here on 100, now that may very  
14 well require setting a hearing and filing a  
15 verified motion and pretrial order and this and  
16 this and this which is going to take some kind of  
17 conference and all like that.

18 Now, that may ultimately accomplish what I  
19 think the problem is and that's to get rid of  
20 these old cases. But what it also does is it's  
21 going to penalize the competent and diligent  
22 lawyers who have these cases set for trial within  
23 this six-month period of time and it's going to  
24 get bumped by a case that's been on the docket for  
25 two years that nobody is interested in.

1           It looks like to me the simplest thing to do  
2 here is to just tell -- if we're going to tinker  
3 with this rule, is just to say that it's been on  
4 here on the docket in excess of the court's  
5 guidelines. The trial court is set for trial.  
6 And if that doesn't smoke them out then nothing  
7 will. If it comes up to trial date and they don't  
8 show up, just dismiss that thing. They have the  
9 authority to do that now.

10           CHAIRMAN SOULES: There's no bump in  
11 this 165(a) proposal. There is no time limit the  
12 way it's -- let me read --

13           MR. RAGLAND: What it says is it sets  
14 the case to trial within six months --

15           CHAIRMAN SOULES: Let me read it  
16 through now again now that we've cleaned out the  
17 specifics. "A case may be dismissed for want of  
18 prosecution on the failure of any party seeking  
19 affirmative relief or their attorney to appear for  
20 any hearing or trial of which the party or  
21 attorney had notice."

22           Then you strike from that point all the way  
23 to the word "notice" and insert where you've made  
24 that strike this: "Any case not disposed of  
25 within the time standards provided by the Supreme

1 Court in its administrative rules may be placed on  
2 a dismissal docket."

3 Then you pick up, "Notice of the court's  
4 intention to dismiss and the date and place of the  
5 docket hearing shall be sent by the clerk to each  
6 attorney of record and to each party not  
7 represented by an attorney whose address is shown  
8 on the docket or in the papers on file by posting  
9 same in the United States Postal Service. At the  
10 docket hearing the Court shall dismiss for want of  
11 prosecution" -- strike "any case" -- "unless" --  
12 strike "verified pleadings are filed and the court  
13 determines" -- so that sentence reads: "At the  
14 docket hearing the Court shall dismiss for want of  
15 prosecution unless there is good cause for the  
16 case to be maintained on the docket."

17 MR. BRANSON: We changed that to  
18 "may," didn't we?

19 CHAIRMAN SOULES: No, he shall unless  
20 there's good cause to maintain. "If the Court  
21 determines to maintain the case on the docket, it  
22 shall enter a pretrial order," and strike all the  
23 next line out. Then "assigning a trial date for  
24 the case" and strike "within six months from the  
25 docket date," and pick up -- so, "if the Court

1 determines to maintain the case on the docket, it  
2 shall enter a pretrial order assigning a trial  
3 date for the case and setting deadlines for the  
4 making of new parties, all discovery, filing all  
5 pleadings and the filing of responses or  
6 supplemental responses to discovery and other  
7 pretrial matters. The case may be continued  
8 thereafter only for valid and compelling reasons  
9 as" -- "reasons" -- strike down to  
10 "specifically."

11 MR. BRANSON: Does that suggest that  
12 it's been continued for other reasons before?

13 CHAIRMAN SOULES: Pardon me?

14 MR. BRANSON: Isn't that the only way  
15 you can get a case continued anyway?

16 CHAIRMAN SOULES: The case may be  
17 continued thereafter, after it's been set off the  
18 dismissal docket for a trial setting. Now after  
19 that, the case may be continued thereafter only  
20 for valid and compelling reasons specifically  
21 determined in the court order. This time the  
22 Court has got to say why. Coming off the  
23 dismissal docket he doesn't even have to say why.  
24 And then strike down to, "notice of the signing of  
25 the order of dismissal." And now you've just got

1 a general guidelines type rule, bare bones type  
2 rule.

3 JUSTICE WALLACE: Let me make a  
4 suggestion.

5 CHAIRMAN SOULES: And Judge Wallace  
6 has a couple thoughts on it.

7 JUDGE RIVERA: You might want to  
8 strike out six months from the docket date, you  
9 know, for Houston. If they get one dismissed for  
10 sanctions, you know --

11 CHAIRMAN SOULES: Judge, I took out  
12 the six months. That's out.

13 JUDGE RIVERA: Okay.

14 JUDGE CASSEB: That's out. Just  
15 enough to know that you've got authority here to  
16 do like what we did.

17 JUDGE RIVERA: Okay.

18 JUDGE CASSEB: And then to get away  
19 from what the legislature just amended the Court  
20 Administrative Act.

21  
22 (Off the record discussion  
(ensued.

23

24 CHAIRMAN SOULES: Judge Wallace says  
25 like in the third line take out "or his attorney"

1 because if the attorney appears then the party  
2 appears, and the same thing in the fourth line.  
3 Just say, "the failure of the party seeking  
4 affirmative relief to appear for any hearing or  
5 trial which the party had notice of."

6  
7 (Off the record discussion  
8 (ensued.

9 CHAIRMAN SOULES: Okay. The changes  
10 were to change "provided" to "promulgated" because  
11 that's what the Supreme Court does when it makes  
12 the administrative rules and change "making of new  
13 parties" to "joining of new parties." Are there  
14 any other thoughts on this? Okay. Now that we've  
15 made it a general rule, does anybody have a motion  
16 about it?

17 MR. BRANSON: Before we get to that,  
18 Judge Wallace, do you think --

19 CHAIRMAN SOULES: Wait a minute. The  
20 motion is that we reject it. I guess that's what  
21 we have to vote on.

22 MR. BRANSON: But before we vote on  
23 it, do you think the proposed rules are necessary  
24 on 165? Would that help you-all? I mean, that's  
25 what we're here to do.

1 JUSTICE WALLACE: I would be very  
2 reluctant to not have something in the rules.  
3 Now, how much better these proposed changes would  
4 be over what's in Rule 165 now is debatable. But  
5 I certainly would not want to just be hanging our  
6 entire authority on those administrative rules.  
7 That's what the legislature had done. They pretty  
8 well -- pushes them.

9 MR. BRANSON: Do we need to go set out  
10 the things we've set out about the pretrial  
11 order?

12 JUSTICE WALLACE: Well, I think Judge  
13 Rivera made a very good point there. At least the  
14 lawyers come in and argue, "Well, now the rules  
15 don't say they'll give you this authority,  
16 therefore, you can't do it." And you say, "Well,  
17 here's a broad mandate. We can use my discretion  
18 and move the docket."

19 MR. BRANSON: So you would generally  
20 recommend --

21 JUSTICE WALLACE: I would generally  
22 recommend.

23 JUDGE CASSEB: We would need it  
24 because as he says under this amendment that the  
25 legislature has watered down the Supreme Court's

1 binding effect of administrative rules.

2 MR. BRANSON: I withdraw the motion.

3 JUDGE CASSEB: You can do it on that  
4 rule-making power.

5 CHAIRMAN SOULES: Frank has withdrawn  
6 his motion. Is there a substitute motion?

7 MR. RAGLAND: I have a statement to  
8 make.

9 CHAIRMAN SOULES: Well, we don't have  
10 a motion now on the thing. Does anybody want to  
11 move anything?

12 MR. SPARKS (EL PASO): I move that we  
13 approve 165(a) as amended and written.

14 CHAIRMAN SOULES: Okay. Is there a  
15 second?

16 PROFESSOR DORSANEO: Second.

17 CHAIRMAN SOULES: Okay. Any further  
18 discussion? And by that, I mean is there anything  
19 new?

20 PROFESSOR DORSANEO: I have one --

21 MR. RAGLAND: Yes, sir.

22 CHAIRMAN SOULES: Either one.

23 MR. RAGLAND: You know, this has been  
24 my position all the way through the task force  
25 consideration of administrative rules and still



1 here again. We are talking about rules that  
2 apparently address problem judges and problem  
3 counties. Well, don't shake your head, Luke,  
4 because that's all I've heard is Harris County,  
5 Harris County, Harris County.

6 CHAIRMAN SOULES: Well, you heard  
7 Bexar County. We didn't have any problem judges.  
8 We were not a problem county but it worked.

9 MR. RAGLAND: All right. It worked in  
10 Bexar County and I propose -- it was your efforts  
11 and everything. But we don't have a problem in  
12 McClennan County on the currency of the docket.  
13 If you adopt this rule we will have a problem in  
14 McClennan County because our judges who are now  
15 trying lawsuits are going to be hearing motions  
16 and filling out little orders that nobody is going  
17 to pay any attention to. And I just urge you vote  
18 against it.

19 PROFESSOR DORSANEO: I have one  
20 suggestion that is an organizational one, and you  
21 can tell me that it's not worth going into and  
22 I'll be quiet. But I suggest making this  
23 paragraph one into two paragraphs with the title  
24 of the first paragraph being instead of  
25 "Dismissal," "Failure to Attend a Hearing or

1 Trial," and then having the second part of it pick  
2 up with the new language that's underlined  
3 beginning any case and have that be 2 or (b)  
4 "Dismissal" or "Schedule" as a subtitle. Because  
5 really the first sentence talks about failure to  
6 attend the hearing or a trial, and the rest of it  
7 talks about either dismissal at a dismissal docket  
8 or a scheduling order.

9 CHAIRMAN SOULES: Let me ask you  
10 this: If we just left the title there, we put one  
11 and struck "dismissal" and then before "any case"  
12 just put a two, because really it is -- the whole  
13 thing is dismissal for want of prosecution.  
14 You've got a motion on file seeking affirmative  
15 relief. You don't show up --

16 PROFESSOR DORSANEO: As I said, I  
17 don't really care, but --

18 CHAIRMAN SOULES: We'll do something  
19 along those lines. Motion has been made and  
20 seconded that this be approved as is now before  
21 us. Is there any new discussion? Those in favor  
22 show by hands. Ten. Those opposed? Okay.  
23 That's house to one.

24 MR. SPARKS (EL PASO): The next to  
25 last one is this rule --

1                   CHAIRMAN SOULES: Good piece of work,  
2 Sam.

3                   PROFESSOR DORSANEO: It really will  
4 work.

5                   CHAIRMAN SOULES: You bet.

6                   MR. SPARKS (EL PASO): -- Rule 170,  
7 pretrial motions. I have -- with Luke's  
8 assistance and minutes, I have tried to rewrite  
9 that in light of our last response. It's been on  
10 for two agendas. Reject it, pass it or take it  
11 off, whichever one you like.

12                   CHAIRMAN SOULES: What does it do,  
13 Sam?

14                   MR. SPARKS (EL PASO): Well, this is  
15 -- it has several intents, you'll recall. One is  
16 to try to provide in the rules a disposition of  
17 motions without having to go to hearings. It is  
18 to set a submission date that -- it allows a  
19 hearing on the request of any party -- or the  
20 Court can request a hearing. And it expressly  
21 authorizes a telephone hearing. We've had two  
22 drafts of this before, and each time we've come up  
23 with something else and we've put it back in the  
24 rules. This is a new rule.

25                   MR. McMANS: What did we do with the

1 three-day notice rule that you can have a hearing  
2 in three days?

3 CHAIRMAN SOULES: That's a hearing.  
4 Yes, this is submission without a hearing. In  
5 other words, if nobody asks for a hearing within  
6 15 days, the Court would consider the motion to  
7 submit it in writing. This is a way to get  
8 motions disposed of without ever having a  
9 hearing. And there are some -- Harris County does  
10 it now. And so it will give notice that unless a  
11 party requests a hearing, it will be submitted to  
12 the court within 15 days -- or at 15 days. It's  
13 not unlike the federal practice except we may get  
14 things decided a little quicker. This really  
15 doesn't change -- anybody can get a hearing that  
16 wants a hearing, but it tells the Court to dispose  
17 of something in 15 days if the parties don't set a  
18 hearing.

19 MR. SPARKS (EL PASO): But there is  
20 one thing and I move to just get on the table to  
21 approve it. In (d) you'll notice that I've got,  
22 "The Court shall grant the request for oral  
23 argument or hearing." We made that change.  
24 Particularly, I think Broadus and others made a  
25 valid point that it ought to be a matter of right

1 for anybody to have a hearing.

2 CHAIRMAN SOULES: I agree. I think if  
3 somebody asks for it you get it. If not, it gets  
4 submitted if writing.

5 JUDGE CASSEB: And if you go to  
6 Houston, always make a request to have an oral  
7 hearing, otherwise you'll find some retired judge  
8 going through all those things and automatically  
9 dismissing them all.

10 CHAIRMAN SOULES: Does the response --

11 MR. BRANSON: We're not encouraging  
12 that, Judge.

13 CHAIRMAN SOULES: Does the response --

14 JUDGE CASSEB: That's right. I  
15 wouldn't either.

16 CHAIRMAN SOULES: Does the responding  
17 party -- does he have a duty to submit an order as  
18 well?

19 MR. SPARKS (EL PASO): We took that  
20 out.

21 CHAIRMAN SOULES: It should.

22 MR. SPARKS (EL PASO): It seemed like  
23 it was in the original draft.

24 CHAIRMAN SOULES: Both sides should  
25 submit an order, I think. Do you have any

1 objection to including that?

2 MR. SPARKS (EL PASO): No. It was in  
3 the original. It was one of the things that --  
4 somebody said it was too much like the federal  
5 court so I took it out.

6 CHAIRMAN SOULES: Because if the judge  
7 is going to take the -- take it on written  
8 submission, they ought to have the option to sign  
9 one order or the other or to do his own. Then he  
10 can clearly see what both parties -- where they  
11 really are competing when he looks at the text in  
12 two orders.

13 JUSTICE WALLACE: A lot of judges  
14 don't have anybody to prepare orders for them.  
15 So, if you want one signed you'd better send him  
16 one to sign.

17 MR. SPARKS (EL PASO): There is one  
18 thing that I didn't like about the draft. In  
19 paragraph (c) it will say, "Responses to any  
20 motion may be in writing." They didn't want to  
21 have to put it, but then I've got it "and shall be  
22 filed." And then I don't know how you file a  
23 nonwritten --

24 CHAIRMAN SOULES: Why should we make  
25 it "shall be"? I realize we said that last time.

1 But the response may be "I want to hear it" and  
2 that's all, but it ought to have to be in  
3 writing.

4 MR. SPARKS (EL PASO): Okay.

5 MR. McMAINS: Well, you've got this  
6 parenthetical here. Is that in the rule or not in  
7 the rule?

8 MR. SPARKS (EL PASO): Right. Now  
9 it's in the proposal.

10 MR. McMAINS: "Failure to file a  
11 response is" --

12 MR. SPARKS (EL PASO): Oh, no, that  
13 was voted out last time. And I put it in  
14 parentheses so you'll know it's out.

15 MR. McMAINS: That's what I was trying  
16 to figure out.

17 CHAIRMAN SOULES: I think we ought to  
18 take that out.

19 MR. SPARKS (EL PASO): We voted last  
20 time to take it out and that's why I put it in  
21 parentheses.

22 CHAIRMAN SOULES: Okay. It's been  
23 moved. Is there a second? Let's see, now, what  
24 do we have in parentheses -- "in writing" back  
25 here. "Any party requesting a record of a

1 telephone conference or hearing must advise the  
2 Court in writing" -- does that stay in or out on  
3 the back page?

4 MR. SPARKS (EL PASO): That was also  
5 in last time, and I think it should be in writing  
6 in the response, whatever you want to do. I think  
7 it should be in writing.

8 CHAIRMAN SOULES: You're asking that  
9 there be a reporter to hear the motion on the  
10 phone, aren't you?

11 MR. SPARKS (EL PASO): Correct.

12 CHAIRMAN SOULES: The Court has to  
13 make -- it may be a long distance call. The Court  
14 has got to make some arrangements. You want to be  
15 clear that the request has been made. Is that the  
16 point?

17 MR. SPARKS (EL PASO): But it was also  
18 voted to take it out last time.

19 CHAIRMAN SOULES: Lefty, did you have  
20 your hand up?

21 MR. MORRIS: Yes. I have a problem  
22 here in (d) on page -- it's on page two, 103. It  
23 says, "the Court shall determine the mode of  
24 hearing absent an agreement of the parties." If I  
25 want to have a hearing in a courtroom -- and this



1 is what I remember us discussing last time this  
2 came up. If I want to go in a courtroom and look  
3 a judge in the eye and make an argument and make  
4 damn sure he's looking at me and not sitting there  
5 reading some advance sheet, I ought to have that  
6 right.

7 It seems to me like if I feel strongly about  
8 a motion or opposing a motion, I want to be sure  
9 I've got that judge's attention, that he's  
10 thinking only about my problem. I ought to have  
11 that right. I shouldn't have the judge say, "No,  
12 we're going to have a telephone conference and you  
13 can't come to my courtroom or chambers." That  
14 just -- to me, that is not giving my client their  
15 day in court. And I'm opposed to that portion of  
16 it.

17 CHAIRMAN SOULES: I'd be willing to  
18 take that out, but I wouldn't want to say it the  
19 way you did there. Because if you're in Austin  
20 and I'm in Del Rio and the judge sets a hearing  
21 and I can't get here, I don't want you to have the  
22 absolute right to win because I can't get here. I  
23 think the judge ought to be able to say we're  
24 going to hear it by phone.

25 MR. MORRIS: I don't think that should

1           happen either. But it seems to me like if one of  
2           the parties is wanting to be heard in court, they  
3           could have the right to take this matter before a  
4           judge and make their presentation.

5                   CHAIRMAN SOULES: Unless the only way  
6           you can get everybody together is on the phone.  
7           That's what this is addressing. The Court can  
8           determine -- decide to do it by phone if that's  
9           the only way he can get everybody together. Now,  
10          we can strike the sentence and leave that to the  
11          judge's ingenuity. But it's still got to be  
12          within the judge's discretion to have that kind of  
13          procedure.

14                   MR. BRANSON: Do you reckon it might  
15          be appropriate in (d) to change the word "date"  
16          preceding to "day" preceding?

17                   CHAIRMAN SOULES: Okay. I don't have  
18          any problem with that. Lefty, do you want to take  
19          that sentence out, "the Court shall determine a  
20          mode of hearing absent" --

21                   MR. MORRIS: Yes, I wanted to take it  
22          out.

23                   JUSTICE WALLACE: Lefty, do you think  
24          that would prohibit you from being there at the  
25          judge's office and you and the judge listening to

1 the same speaker and the other guy being out of  
2 town to take care of this situation?

3 CHAIRMAN SOULES: The judge has got to  
4 have a pretty broad discretion on how he hears the  
5 parties.

6 JUSTICE WALLACE: In other words, if  
7 he says "I want a telephone conversation." And  
8 you say, "Well, Judge, I want to be down there in  
9 the office. You and I will be there and the other  
10 guy will be on the telephone." And my question is  
11 do you think this would prevent -- give the judge  
12 the grounds to say, "well, no"?

13 MR. MORRIS: Yes. I think this would  
14 prevent -- I guess what I'm trying to say -- let  
15 me state it a little bit better -- is that if one  
16 of the lawyers or both lawyers want to be in the  
17 court looking at the judge at the time the motion  
18 is urged, they should both have that right.

19 Now, if I want to -- because I'm tied up in  
20 Del Rio I want to waive that right and say,  
21 "Judge, I'm too busy. I'll just agree to be on  
22 the phone," that's one thing. But I don't want to  
23 be told just, "We're doing to have a telephone  
24 conference, and you don't have an option about  
25 that, Mr. Morris." That really bothers me to urge

1 a motion where I can't look the judge in the eye.  
2 I felt a lot of times if you're in there in the  
3 room, you could be much more effective.

4 MR. BRANSON: Lefty, do you want to  
5 make it broad enough that you can move that you be  
6 in their office and the other guy be in Del Rio?

7 MR. BEARD: -- go over and argue with  
8 that judge all you want to. I'm not coming. You  
9 can do that. You're not required to appear. I've  
10 had lots of hearings where I've said you can go  
11 over there and argue all you want to. The motion  
12 is ridiculous. You don't have to go. I want that  
13 to be clear.

14 MR. LOW: If you've ever been on the  
15 telephone when the other guy is sitting in the  
16 office, I can tell you how you come out in a  
17 two-way lawsuit. And Governor Hobby knows about  
18 it --

19 CHAIRMAN SOULES: Let's see how hard a  
20 problem this is because we've got to look at  
21 this. You know, we've got a long way to go. And  
22 how much time do we spend on -- what do we do with  
23 this rule?

24 MR. MORRIS: Help me just a minute,  
25 because I think I've been here when this has been

1 debated before. But I never have figured out just  
2 exactly for sure what the pressing problem is  
3 we're trying to solve.

4 CHAIRMAN SOULES: Well, the main one  
5 was to get motions decided on written submission  
6 if neither party particularly cares for a  
7 hearing. That was fixed early on. And then there  
8 was oral argument by telephone. And there was --  
9 as I remember, there was a letter from -- it  
10 started out from a rural lawyer saying, "Why can't  
11 we request conferences by phones so we don't have  
12 to travel so much just to get over there for a  
13 shorts hearing?" And we said that makes sense.  
14 Let's give those guys some help on that by putting  
15 it in the rules so it can either be done by  
16 writing or it can be done by telephone. This was  
17 to expedite parties getting their motions  
18 decided.

19 MR. MORRIS: I guess if a party wants  
20 to waive their right to personally appear and make  
21 an appearance by telephone, that should be their  
22 prerogative. But, on the other hand, I'm  
23 interested in protecting a person who wants to be  
24 in the courtroom and wants to look at that judge  
25 in the eye. Because I think if they want that,

1 our client should be entitled to have that right  
2 of their appearance in the courtroom.

3 MR. TINDALL: Lefty's right. I think  
4 we shouldn't chill the right of a lawyer to take  
5 his time to go down there and be in court and look  
6 the judge in the eye.

7 MR. MORRIS: I mean, it's kind of hard  
8 to tell your client, "Well, I was on the phone and  
9 he told me we lost and I tried to get in the  
10 courtroom but I couldn't." I don't know what kind  
11 of system that is.

12 CHAIRMAN SOULES: Let's read it:  
13 "Oral argument may be made by telephone conference  
14 with all parties in the court." I don't  
15 understand that. If they're all in the court, why  
16 are they on the phone?

17 PROFESSOR EDGAR: I've got a problem  
18 to move --

19 CHAIRMAN SOULES: Let me get this --  
20 is this on this sentence?

21 PROFESSOR EDGAR: Well, it's part of  
22 the concept of subsection (d).

23 CHAIRMAN SOULES: Okay.

24 PROFESSOR EDGAR: And that is, the  
25 first time at the trial level injecting the term

1 "oral argument" which is considered really an  
2 appellate vehicle. And I'm just wondering what  
3 the difference between "oral argument" and a  
4 "hearing" is. Apparently there must be or we  
5 wouldn't be using both terms.

6 JUSTICE WALLACE: It really should be  
7 "hearing" and not "oral argument", shouldn't it?

8 PROFESSOR EDGAR: I would think so,  
9 Your Honor.

10 CHAIRMAN SOULES: (d) should be  
11 captioned "hearing"?

12 PROFESSOR EDGAR: Well, I think that's  
13 what we're talking about, isn't it?

14 CHAIRMAN SOULES: Okay. "The motion  
15 or response shall include a request for oral  
16 argument or hearing if a party deems it  
17 necessary. The Court shall grant the request for  
18 oral argument or hearing and may order oral  
19 argument or hearing on its own motion. Oral  
20 argument may be made by telephone," how's that,  
21 period? "Any party may request a telephone  
22 conference argument in a motion or response."

23 (Off the record discussion  
24 ensued.)  
25

1                   CHAIRMAN SOULES: How about this,  
2 Lefty: "The hearing may be made by telephone but  
3 any party may appear in court rather than by  
4 telephone"?

5                   MR. McMAINS: Most courts don't have  
6 telephones in the courtroom. A lot of them when  
7 they conduct them, they conduct them from  
8 chambers. Well, I've got a right to be in the  
9 judge's chambers.

10                  MR. MORRIS: I guess I'd rather say,  
11 "Any party has the right to be present" -- I mean,  
12 I think it's --

13                  CHAIRMAN SOULES: Okay. Tell me what  
14 you want to say and I'll write it in here.

15                  JUDGE RIVERA: Why don't you just  
16 change it "a party may appear by telephone"?

17                  MR. TINDALL: That's an unintended  
18 consequence. You call the case and then about  
19 that time the clerk is getting a call from the  
20 lawyer in Harlingen that he's not going to show  
21 but he wants to be present by phone.

22                  JUDGE RIVERA: It says you've got to  
23 notify them a day ahead of time. The rule says  
24 you've got to notify them a day ahead of time so  
25 they'll know.



1                   MR. McMAINS: That's when they request  
2 a record.

3   (Off the record discussion  
4   (ensued.

5  
6                   PROFESSOR EDGAR: Luke, what if you  
7 said "The hearing may be conducted either in  
8 person or telephonically at the option of the  
9 party or the attorney," if that's what you're  
10 trying to accomplish?

11                   CHAIRMAN SOULES: Okay. What I'm  
12 trying to say is that the Court can conduct a  
13 hearing by telephone, but he can't keep anybody  
14 from coming personally. In other words, he can  
15 say, "We're going to have a hearing. It's going  
16 to be by telephone. If any of you-all want to  
17 come personally you can." Then you've got  
18 everybody covered.

19                   MR. TINDALL: But that doesn't give  
20 the lawyer the option of just calling in a minute  
21 before the court hearing and saying, "I'm going to  
22 appear by phone. Call me when you get to my  
23 case."

24                   CHAIRMAN SOULES: Our docket is sure  
25 not going to permit that. I don't know if anybody

1 else's docket is, but Bexar County sure is not  
2 going to permit that.

3 PROFESSOR CARLSON: Why are we doing  
4 this? I mean, really, looking at Rule 21, what --

5 CHAIRMAN SOULES: For the reason I  
6 said earlier. Someone came in and said, "We want  
7 some specific rules authorizing telephone hearings  
8 so we don't have to drive 300 miles for a hearing  
9 on a" --

10 PROFESSOR CARLSON: Well, Luke, why  
11 don't we just add a sentence to Rule 21 on  
12 motions, what you just said?

13 MR. TINDALL: Couldn't we -- "The  
14 judge in its discretion can authorize a conference  
15 call to conduct a hearing," something very --

16 CHAIRMAN SOULES: That gets to Lefty's  
17 problem, you see. He doesn't want the judge to  
18 have discretion to do it by phone.

19 MR. MORRIS: Absolutely not.

20 PROFESSOR BLAKELY: What was wrong  
21 with your last sentence that you dictated, "but  
22 any party may appear before the judge"?

23 CHAIRMAN SOULES: I don't know what's  
24 wrong with it. What's wrong with this? "The  
25 hearing may be by telephone, but no party can be

1 precluded from appearing in court for the  
2 hearing."

3 MR. TINDALL: But, Luke, that gets  
4 right back to the same problem. The way that's  
5 proposed you can just call and say, "I'm available  
6 by phone when you have the hearing." The judge  
7 would have a speaker phone? How's he going to --  
8 you know, you're down there in court. Like Lefty  
9 says, he has a right to be there to urge his side  
10 of the case. Most judges don't have speaker  
11 phones.

12 CHAIRMAN SOULES: "The court may  
13 authorize a hearing by telephone" -- "The court  
14 may authorize a hearing by telephone, but no party  
15 can be precluded from appearing in court for the  
16 hearing."

17 JUSTICE WALLACE: "Hearing may be by  
18 telephone but no party may be precluded from  
19 personal appearance," period.

20 JUDGE RIVERA: Luke, why don't you  
21 change that to "telephone hearing may not be  
22 constituted as a waiver of a party's right to  
23 appear in court"?

24 CHAIRMAN SOULES: Well, I guess I've  
25 got a fragment sentence here. I'm trying to both

1 authorize a telephone hearing and not preclude  
2 somebody from showing up. I'd write it in two  
3 sentences and it may be better. But "The Court  
4 may authorize a hearing by telephone" -- and then  
5 what was yours? "But no party can be precluded  
6 from appearing" --

7 JUSTICE WALLACE: "From personal  
8 attendance."

9 CHAIRMAN SOULES: "From appearing" --

10 PROFESSOR DORSANEO: In person.

11 CHAIRMAN SOULES: But that's party in  
12 person. Is that party through person or party?

13 JUSTICE WALLACE: From attendance.

14 CHAIRMAN SOULES: "May be precluded  
15 from attending the hearing in court"?

16 MR. RAGLAND: Luke, why don't you just  
17 say that "A party may appear at the hearing by  
18 telephone after notifying the court in advance,"  
19 period, and let it go at that.

20 MR. TINDALL: Tom, some lawyers will  
21 never go to court. They'll call and say, "I'm  
22 available by phone." That's what we're really  
23 inviting is that --

24 CHAIRMAN SOULES: No. "The Court may  
25 authorize a hearing by telephone." It's got to be

1 authorized by the Court.

2 JUDGE RIVERA: The parties still have  
3 a right to appear in person.

4 CHAIRMAN SOULES: "But the party still  
5 has a right to appear in person."

6 MR. BRANSON: Are you going to leave  
7 that "any party requesting a record of a  
8 telephone" --

9 CHAIRMAN SOULES: Well, I had that in  
10 here, Judge, the way I had it written. "But no  
11 party can be precluded from appearing in court at  
12 the hearing." The party appearing personally or  
13 through counsel whatever in the court -- that's in  
14 the court for the hearing.

15 MR. BRANSON: But you're still going  
16 to require it be a day ahead of time that the  
17 request --

18 CHAIRMAN SOULES: Yes. I'm not going  
19 to change the day's notice.

20 MR. BRANSON: Okay. And that will be  
21 by the "day" preceding?

22 CHAIRMAN SOULES: "Day," right.

23 MR. BRANSON: I know the judges can  
24 get a day preceding but the parties might have  
25 trouble.

1                   CHAIRMAN SOULES: Okay. What we're  
2 trying to do here -- and once this is typed and I  
3 read it, I may break it into a couple of  
4 sentences. But as long as we get into this  
5 concept that, first, the telephone hearing has to  
6 be authorized in advance by the Court and there  
7 has to be a day's notice of it and the lawyer --  
8 any lawyer or party who wants to appear can appear  
9 -- can't be precluded from looking the judge in  
10 the eye at that hearing, even though everybody  
11 else shows up by telephone.

12                   PROFESSOR EDGAR: All right. So,  
13 you're not going to have this 15-day requirement?

14                   CHAIRMAN SOULES: The 15 day  
15 requirement is no hearing. The 15 days is  
16 submission on written instruments, period.

17                   PROFESSOR EDGAR: That isn't what it  
18 says.

19                   MR. McMAINS: That's not what it  
20 says.

21                   CHAIRMAN SOULES: All right. Now come  
22 help me with it. Where is it?

23                   PROFESSOR CARLSON: In (b).

24                   CHAIRMAN SOULES: (b)?

25                   PROFESSOR EDGAR: (b).

1                   CHAIRMAN SOULES: D, dog?

2                   PROFESSOR EDGAR: No, B, Baker.

3                   That's the motion.

4                   CHAIRMAN SOULES: The motion shall be  
5                   submitted in writing. In other words, there is  
6                   now a -- if no party requests a hearing, 15 days  
7                   after it's filed, it's submitted to the court in  
8                   writing for determination.

9                   PROFESSOR EDGAR: That isn't what it  
10                   says.

11                   MR. McMAINS: That's not what it  
12                   says.

13                   PROFESSOR EDGAR: Read it, Luke. If  
14                   that's what is intended, then you need to change  
15                   the wording. I'm not sure what it means, but  
16                   that's not what it says.

17                   CHAIRMAN SOULES: Well, what it means  
18                   is -- in the practice in Harris County -- and this  
19                   may be where some of this language comes from --  
20                   you say on the face of your motion unless a  
21                   hearing is requested by you, Respondent, this  
22                   motion shall be submitted for determination by the  
23                   Court after 15 days. And that's in writing. And  
24                   unless somebody asks a question when 15 days has  
25                   expired, it is submitted. It's like submission

1 day in the Supreme Court. You don't necessarily  
2 have to have oral argument -- I mean normally you  
3 do. But it's submitted for determination.  
4 Submitted simply means it's right for  
5 determination. And that's what this really is  
6 directed at.

7 PROFESSOR EDGAR: You're going to  
8 reword it then to reflect what you just said?

9 CHAIRMAN SOULES: Well, how? What  
10 else does it need?

11 PROFESSOR EDGAR: Well, this just says  
12 that the motion -- my copy says that the motions  
13 will state a date of submission which shall be at  
14 least 15 days from the date of filing.

15 CHAIRMAN SOULES: All right. But that  
16 doesn't mean a hearing. That's not a date for  
17 hearing. This is date for submission and that's  
18 two completely different concepts. Submission is  
19 right for hearing -- heard, but submitted.

20 MR. McMains: There is no definition  
21 of submission anywhere. Submission in terms of  
22 oral submission is defined in the appellate rules  
23 and it means a hearing. It means when you go up  
24 there and bench orally. And what this says is  
25 each motion shall state a date of submission. And



1 even if you mean determination, it says "which  
2 shall be at least 15 days." Now, how do you  
3 reconcile that with the three-day rule?

4 CHAIRMAN SOULES: Well, the way you go  
5 at it is submission and hearing mean two  
6 completely different things and the three-day rule  
7 is a hearing rule --

8 MR. McMAINS: If submission means  
9 anything, it means determination. You've got to  
10 have at least two weeks where it's determined and  
11 it doesn't do you any good to have it heard  
12 earlier if you can't get it in.

13 CHAIRMAN SOULES: Unless shortened by  
14 the court.

15 MR. McMAINS: You need another order  
16 shortening it?

17 CHAIRMAN SOULES: No, you don't have  
18 to have an order. That's one thing about  
19 shortening, in the history of shortening is that  
20 shortening does not require an order.

21 MR. McMAINS: It says unless  
22 shortening or extended by order of court.

23 PROFESSOR EDGAR: I'm just simply  
24 suggesting it needs some more work.

25 CHAIRMAN SOULES: Okay. Well, let's

1 work on it because we're close. Let's get it  
2 done.

3 PROFESSOR CARLSON: What if we took  
4 (d) and said one of two things. Either, one, each  
5 motion proposed to be determined on written  
6 submission. Now, that's one option. Let the  
7 lawyer say I propose that this be determined on  
8 written motion, shall be determined by the Court  
9 within 15 days from the date of its filing.

10 CHAIRMAN SOULES: Say it again. Each  
11 motion response has to be determined on written  
12 motion --

13 PROFESSOR CARLSON: On written  
14 submission.

15 CHAIRMAN SOULES: On written  
16 submission -- shall state a what?

17 PROFESSOR CARLSON: No, shall be  
18 determined by the trial court.

19 CHAIRMAN SOULES: Okay. What next?

20 PROFESSOR CARLSON: Within 15 days of  
21 the date of its filing.

22 CHAIRMAN SOULES: Trial court -- what  
23 was the next word? Shall be determined by the  
24 trial court.

25 JUDGE CASSEB: Yes, within 15 days

1 from the date of the filing.

2 CHAIRMAN SOULES: No, that's not  
3 right.

4 CHAIRMAN SOULES: "Within" won't  
5 work.

6 PROFESSOR EDGAR: That's what she  
7 said, though.

8 PROFESSOR CARLSON: Oh, no later than  
9 15 days.

10 CHAIRMAN SOULES: No, it has to be no  
11 sooner than.

12 PROFESSOR CARLSON: All right.

13 CHAIRMAN SOULES: That's the concept  
14 that's here.

15  
16 (Off the record discussion  
17 (ensued.

18 CHAIRMAN SOULES: Okay. How's that?  
19 It sounds good to me.

20 PROFESSOR CARLSON: Was that the  
21 intent?

22 CHAIRMAN SOULES: Sounds good -- yes,  
23 I think so. "The motion may be determined by the  
24 court" -- we don't even need that last sentence  
25 then, do we, Elaine?

1 PROFESSOR CARLSON: No.

2 CHAIRMAN SOULES: That gets taken care  
3 of by your language that you just gave us. All  
4 right.

5 PROFESSOR EDGAR: Are you going to  
6 retain (a)?

7 CHAIRMAN SOULES: Yes. Except I'll  
8 change it if you've got a problem with it,  
9 Hadley.

10 PROFESSOR EDGAR: Well, I was just  
11 going to suggest --

12 CHAIRMAN SOULES: It shall be  
13 accompanied by a proposed order. This should be a  
14 "shall" here.

15 MR. TINDALL: "May be," I thought.

16 CHAIRMAN SOULES: No. And then the  
17 response is "shall" too. Okay. "All motions  
18 shall be in writing and shall be accompanied by a  
19 proposed order granting the relief sought as a  
20 separate attached instrument to the motion. (b),  
21 submission. Each motion proposed to be determined  
22 on written submission shall be determined by the  
23 trial court no sooner than 15 days from the date  
24 of the filing unless a written request for hearing  
25 is filed before that time. (c), responses to any

1 motion shall be in writing and shall be filed  
2 before the date of submission or on the date set  
3 by the court and shall include a proposed order."

4 MR. TINDALL: Why are we requiring a  
5 proposed order, Luke? In my practice, that's  
6 impossible -- to submit a proposed order on  
7 temporary orders in a case.

8 CHAIRMAN SOULES: Well, you're going  
9 to have them heard on -- you're going to propose  
10 that it be heard without a hearing -- be  
11 determined without a hearing?

12 MR. TINDALL: If you're saying that's  
13 only for those in which you're waiving the  
14 hearing?

15 CHAIRMAN SOULES: Yes, that's all it  
16 is.

17 JUDGE CASSEB: Yes, it's on written  
18 submission.

19 MR. TINDALL: All right.

20 PROFESSOR EDGAR: I would suggest that  
21 it be sent back for further study and drafting,  
22 Luke, rather than the committee trying to spend  
23 all its time --

24 CHAIRMAN SOULES: We are down to one  
25 issue, and that is isolating this to motions that

1 are proposed for determination without a hearing.  
2 That's all we've got to do. Once we put that  
3 concept in here, then we've got this wrapped up.  
4 We've spent hours on it before. Let's spend 10  
5 more minutes.

6 "The pretrial motions proposed to be  
7 determined on written submission which do not  
8 require," so forth, "the following procedure shall  
9 apply." Now, we've isolated to --

10 PROFESSOR DORSANEO: So forth.

11 CHAIRMAN SOULES: What?

12 PROFESSOR DORSANEO: Is the so forth  
13 including "except those filed pursuant to the  
14 rules"?

15 CHAIRMAN SOULES: Yes. Do we need  
16 that?

17 PROFESSOR DORSANEO: Well, I think if  
18 we're going to have that enumeration as specific  
19 rules we need to look through --

20 CHAIRMAN SOULES: Okay. Let's take a  
21 minute. "In pretrial motions proposed to be  
22 determined on written submission that do not  
23 require the presentation of evidence at a hearing"  
24 -- and then strike the "except" -- "the following  
25 procedure shall apply." And we'll caption it

1 "Pretrial Motions on Written Submission."

2 "Pretrial Motions on Written Submissions. In  
3 pretrial motions proposed by a party to be  
4 determined on written submission that do not  
5 require the presentation of evidence at a hearing,  
6 the following procedure shall apply" -- and then  
7 in writing with an order not -- determined not  
8 sooner than 15 days unless a written request.  
9 Response shall be in writing with an order. You  
10 can request a hearing. It can be a telephone  
11 hearing but nobody can be precluded from coming to  
12 court for the hearing. And the court shall enter  
13 its order on any motion -- the court shall render  
14 its order on any motion after the --

15 (Off the record discussion  
16 (ensued.

17  
18 CHAIRMAN SOULES: Now that isolates it  
19 to something that somebody proposes to be  
20 determined on written submission, gives notice to  
21 that effect, requests a hearing, you must respond  
22 in writing. You can have a telephone hearing and  
23 anybody can come that wants to come. Does that  
24 fix all the problems that we had and still address  
25 this request that came in?

1 MR. McMAINS: What do you do with the  
2 "except"?

3 CHAIRMAN SOULES: Just struck it out  
4 completely.

5 MR. McMAINS: Meaning that you can  
6 propose --

7 JUDGE CASSEB: No, he's talking about  
8 up at the beginning.

9 CHAIRMAN SOULES: Yes.

10 MR. McMAINS: So, you're saying that  
11 you can be able to propose to determine any of  
12 these without a hearing?

13 CHAIRMAN SOULES: Yes. So, we're  
14 saying, "Pretrial motions proposed by a party to  
15 be determined on written submission which do not  
16 require the presentation of evidence at a  
17 hearing," no exceptions, "the following procedure  
18 shall apply."

19 MR. SPARKS (EL PASO): I don't think  
20 we can do that, Luke, because those other rules  
21 have a specific time requirement.

22 JUDGE RIVERA: Yes, the 21 days.

23 CHAIRMAN SOULES: This just says no  
24 sooner than 15. You can do them any time, but you  
25 can't do them earlier than 15. 21 is not sooner



1 than 15.

2 (Off the record discussion  
3 (ensued.  
4

5 CHAIRMAN SOULES: Okay. Now that  
6 we've done that, did you move, Sam --

7 MR. SPARKS (EL PASO): No, I didn't  
8 move on this one. I moved slowly the last two  
9 times on this, as a matter of fact, as you can  
10 see.

11 MR. BRANSON: We ought to get it,  
12 before I move -- approval of the rule as rewritten  
13 by Luke.

14 CHAIRMAN SOULES: Is there a second to  
15 that? Okay. There's not a second to the motion  
16 to approve 170 as rewritten? Okay. Motion dies  
17 for lack of a second.

18 MR. SPARKS (EL PASO): Luke, the only  
19 other thing that we had is -- and I don't know if  
20 you want to go into it, but it's one that you just  
21 sent me on -- since we're going to look at 21(a)  
22 anyway, we probably could just keep it down -- and  
23 that was to change 21(a) and 72, eliminating the  
24 term "first class mail" and stuff, but if we're  
25 going to be doing that in 21(a), let's just wait

1           until we get to the revision of 21(a).

2                   CHAIRMAN SOULES:   What page are you  
3           on, Sam?

4                   MR. SPARKS (EL PASO):   It's not.  You  
5           just asked me to give an oral report on -- June  
6           the 8th sent me something from Don Baker.

7                   MR. TINDALL:   There's something on  
8           page 114.

9                   CHAIRMAN SOULES:   Okay.  It's on page  
10          134, Sam.  It's Don Baker's letter.

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

12                   CHAIRMAN SOULES:   What he wants to do  
13          is have 21(a) serve to be accomplished by first  
14          class mail rather than certified return receipt.  
15          We've dealt with that over and over again and  
16          we've always said we want certified mail and we  
17          want a green card because service -- rather than  
18          go to the federal practice of just mailing.  And  
19          the statement of service that we have to state  
20          that becomes prima facie evidence from service and  
21          so forth is keyed to that.  Does anybody want to  
22          bring this up again or do we want to consider it  
23          disposed of by our previous work?

24                   PROFESSOR EDGAR:   I so move.

25                   MR. SPARKS (EL PASO):   Second.

1                   CHAIRMAN SOULES: It's disposed of by  
2 previous work to retain the present practice.  
3 Sam, did I have anything else on your plate?

4                   MR. SPARKS (EL PASO): No, I think  
5 that does it, thank you.

6                   CHAIRMAN SOULES: Rick Keeney wrote us  
7 again asking us to figure out some way to  
8 authorize -- authorize private process. I think  
9 we hashed that. I think we beat that horse to  
10 death. We've said if they can get authorization,  
11 they can serve. And we're going to get to  
12 something that has to do with constables later  
13 today or tomorrow.

14                   MR. SPARKS (EL PASO): But the rule we  
15 amended embraces the change that the legislature  
16 didn't make anyway so it's all right.

17                   CHAIRMAN SOULES: The legislature  
18 wouldn't do it so we can't do much more with  
19 that. We might as well take that up right now.  
20 And then, Broadus, we'll get to you, since we're  
21 talking about process serving. Page 54 in the  
22 supplement is a repealer. And it goes to which  
23 are -- where's the statute that proposed the  
24 repeal? Is it in here, too, Tina?

25                   PROFESSOR EDGAR: It's on page 58.

1                   CHAIRMAN SOULES: Page 58 of the  
2 supplement. We amended 103 to permit sheriffs and  
3 constables to serve throughout the State of  
4 Texas. Walter Rankin of Houston who has a lot of  
5 political influence caused this HB386 to get  
6 filed. Now, 386 doesn't say that a constable  
7 cannot serve outside his county and his contiguous  
8 counties. But it says he can serve in his county  
9 and in contiguous counties.

10                   So, our rule only gives the constable broader  
11 jurisdiction than he gets here. And 386 does not  
12 preclude broader jurisdiction to the constable on  
13 its face. It gives him this county and the next  
14 county. And we say, yes, and the rest of the  
15 State of Texas.

16                   The intent of this, as we understand it, was  
17 to restrict the constable to his county and his  
18 contiguous counties but it doesn't say that. We  
19 can do several things. We can -- under 20 --  
20 we're going to get to this with Broadus in a  
21 minute. In 22.006 the Supreme Court has repealing  
22 power where it has rules that cover the subject  
23 matter of the statute.

24                   Now, should we leave well enough alone here  
25 and just say this doesn't hurt what we did because

1           it's not inconsistent with -- it gets his county  
2           and the next county and the rest of the State of  
3           Texas. That's one option. The other is to  
4           perceive that the legislature changed our rule and  
5           made it by passing a restrictive statute which  
6           probably the history of this will indicate that's  
7           what they intended to do but that's not what they  
8           did by this language. And then the last one is to  
9           recommend to the Supreme Court that they enter an  
10          order as proposed on page 54 repealing this  
11          statute. And, Judge, did you have some thoughts  
12          on this? I know you brought this to my  
13          attention.

14                           JUSTICE WALLACE: Yes. Gene Green  
15          carried this in the Senate for Walter Rankin.  
16          Gene, Walter Rankin and a couple other constables  
17          were in my office last week, and they're still  
18          checking into this. They want the constables to  
19          have the first shot of serving all those process  
20          -- private process servers, a red flag in front of  
21          any constable. They've got their little play  
22          house and they definitely want to keep it that  
23          way. That's their viewpoint.

24                           They were very effective in killing any  
25          private process serving bill in the legislature

1 this time. This got by me. I didn't realize this  
2 was in the mill at all. Gene had carried a half a  
3 dozen different bills. Rankin and Ray Hardy and  
4 all the rest of them have called and talked to him  
5 about it and they got it taken care of, but that  
6 one got through. I suppose Gene -- Terrell Smith  
7 carried this in the House and -- in the Senate.

8 My thought on taking care of this possible  
9 conflict on jurisdiction is to let us with your  
10 acquiescence, go ahead and repeal that statute and  
11 then everything is okay. And he said, "Well,  
12 that's fine with me but I'll have to check." And  
13 he said Bob Glasco (phonetic) has a big problem.  
14 Bob has some problem with giving constables  
15 statewide jurisdiction to serve papers. And he  
16 called me back and relayed that information to  
17 me.

18 And Glasco is one of the few friends we have  
19 in the Senate this time. And that would be the  
20 only thing that would make me stop and think about  
21 saying, "The hell with what you-all did. This is  
22 the way we're going to do it." Terrell Smith says  
23 he has no problem with going statewide. Gene  
24 Green didn't have -- but Gene said Glasco did have  
25 some serious problems with it.

1           MR. TINDALL: Certainly I was involved  
2           in that, Judge Wallace, very much. My  
3           understanding is this statute was -- or the bill  
4           was drawn without knowledge of what we did to  
5           103.

6           JUSTICE WALLACE: Well, I had  
7           explained to those people over there that we had  
8           done that. As a matter of fact, earlier in the  
9           session, the same group of constables came by and  
10          I gave them a copy of the bill. And the guy from  
11          Dallas, the deputy constable out in Oakcliff,  
12          James somebody, was the one who was hung up  
13          because he says there was one particular judge in  
14          Dallas who was just signing any order for private  
15          process that came by and they were opposed to  
16          that.

17          I talked to Walter Rankin later and he said,  
18          "Our business in Harris County is fine and I don't  
19          care what you do with that. You ought to make  
20          Dallas decide to get their act together." And  
21          Walter fell in line with him and came back again.  
22          Now, that -- Dallas is the only area that has any  
23          problem. And I told him we had already acted and  
24          signed the bill on that and I didn't see a whole  
25          lot of likelihood that the committee would change

1 this, that is, to be let the judge -- if the judge  
2 wants to let somebody else serve the process, he  
3 has the charge to -- he wouldn't have to go to the  
4 constable first. But it's before the committee  
5 now.

6 CHAIRMAN SOULES: That's a different  
7 issue. This is --

8 JUSTICE WALLACE: That's two different  
9 issues in the same bill.

10 CHAIRMAN SOULES: What was that?

11 JUSTICE WALLACE: It's the same bill.

12 CHAIRMAN SOULES: To go to the judge  
13 first is not a part of this HB386, is it?

14 JUSTICE WALLACE: Yes, the second part  
15 of it. It's not 386 but it's part of our rule.

16 CHAIRMAN SOULES: Okay. So the "goes  
17 to the constable first" is out. That doesn't have  
18 to happen anymore and our rule changed that.  
19 There's no issue in the legislature on that part  
20 of it. You don't go to the constable -- you don't  
21 have to go to the constable first. The judge can  
22 sign the order without doing that.

23 But look at this page 58. If -- I say that  
24 the history of our rule and the subsequent review  
25 of our rule says that this does not restrict our



1 rule and we've still given constables statewide  
2 authority and we don't need to do anything. And  
3 if you read this statute -- as I read it, it  
4 doesn't say they can only stay home and go next  
5 door but they can't go to the next door.

6 MR. TINDALL: There is an implication  
7 they don't go statewide.

8 CHAIRMAN SOULES: But it's not said.

9 MR. TINDALL: I understand that.

10 JUSTICE WALLACE: If you get to the  
11 legislative intent, Gene said when they were  
12 discussing it on the floor, there was a question  
13 he remembers specifically from Glasco. They  
14 asked, "Does this give them statewide  
15 jurisdiction?" And they said no. So, whatever --  
16 what those legislative hearings -- the words are  
17 intended are worded and how you interpret these  
18 rules, that, I understand, is in the legislative  
19 record.

20 CHAIRMAN SOULES: This statute does  
21 not, but our rule does. And this statute does not  
22 preclude it, Rule 103.

23 PROFESSOR EDGAR: It seems to me that  
24 simply because a response is made that this  
25 statute does not give the constable statewide

1 jurisdiction, does not in and of itself in any way  
2 preclude us from giving the constable statewide  
3 jurisdiction, therefore, our rule is not in  
4 conflict with House Bill 386. And I would be  
5 inclined just to go ahead and go on like we are  
6 without raising a red flag by going through the  
7 process of a repealer.

8 CHAIRMAN SOULES: With the expectation  
9 that the bench and bar will go ahead and use  
10 constables and sheriffs statewide under Rule 103  
11 as we've authorized; is that right? Is that in  
12 the form of a motion?

13 PROFESSOR EDGAR: Yes.

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

15 CHAIRMAN SOULES: Moved and seconded.  
16 Any further discussion?

17 PROFESSOR BLAKELY: Well, this -- it  
18 may not make any difference. Is the litigant  
19 going to risk -- when he becomes aware of this  
20 bill here on page 58 -- is the litigant going to  
21 risk letting a constable serve outside his --

22 PROFESSOR EDGAR: Of course, if the  
23 answer is filed, it's a moot question, Newell.

24 MR. SPARKS (EL PASO): The defendant  
25 isn't going to risk.

1                   MR. LOW: But you don't know if an  
2 answer is going to be filed. So that is the  
3 problem.

4                   PROFESSOR EDGAR: There's going to be  
5 if there -- a potential default judgment then you  
6 might have some question about it. And then you  
7 might want to go ahead and effect service under  
8 386.

9                   MR. LOW: But to be safe, aren't you,  
10 just as practical matter -- you're going to deal  
11 with the one that's most restrictive because  
12 you're not going to want to get out and serve his  
13 clients. You've got to presume, and in safety,  
14 the effect of it is it's going to be restrictive.

15                   PROFESSOR EDGAR: I imagine most  
16 parties will follow Rule 103 and never know about  
17 386.

18                   JUSTICE WALLACE: It was promulgated  
19 in the first place to cover places where Houston,  
20 Dallas -- Amarillo, for instance, where you've got  
21 a canyon right south, where the constable will  
22 have a paper, maybe the person has a Houston  
23 address, but he's over Fort Bend County line or  
24 Chambers County line or Montgomery County line,  
25 and the constable gets it and takes it out and

1 serves it. So, the contiguous county provision is  
2 going to cover about 99 percent of this anyway.

3 Nobody, unless they're having extreme trouble  
4 getting service, is going to pay somebody from one  
5 county to go four or five counties away to serve a  
6 paper. And I understand from what these people  
7 are telling me when they do that, they always  
8 check with their local constable up there anyway  
9 and usually both go out and serve it so you've got  
10 no problems.

11 MR. BEARD: Judge, I think unless  
12 you-all have some strong reasons for doing it, I'd  
13 ignore it. I wouldn't throw the gauntlet down to  
14 the legislature.

15 JUSTICE WALLACE: I think it would be  
16 bad public relations to do it.

17 MR. BEARD: Wait a couple of years and  
18 then --

19 CHAIRMAN SOULES: Those in favor of  
20 Hadley's motion say "I." Opposed? Okay.  
21 Unanimous. Now, Rule 13. Broadus Spivey and  
22 Gilbert Adams.

23 JUSTICE WALLACE: What page are we  
24 on?

25 MR. ADAMS: That's on pages 7 through

1 19 in the supplement.

2 CHAIRMAN SOULES: Seven through 19 in  
3 the supplement. Do you want to -- and Lefty  
4 Morris, those people who have done yeoman service  
5 trying to sell the legislature to stay out of our  
6 business. I'll turn it over to you.

7 MR. ADAMS: Let me give a little bit  
8 of -- you asked the committee -- you asked Broadus  
9 and I to serve as co-chairmen of the committee and  
10 appointed us, and I think we got a letter in late  
11 March -- it seemed like March the 29th or  
12 something. David Beck, Elaine Carlson, Buddy Low,  
13 Lefty Morris and Tom Ragland were on that  
14 committee.

15 And one of the charges was to observe what  
16 was going on in the legislature and to propose a  
17 rule and have a rule for this meeting with regard  
18 to Rule 11, modeling after Rule 11 of the federal  
19 rules and amending our Rule 13. Of course, the  
20 political involvement was such in the legislature  
21 at that time that we were faced with a -- you  
22 know, part of the nationwide tort reform movement  
23 that had been begun by the insurance industry in  
24 '84 and involved a nationwide multimillion dollar  
25 public relations campaign.

1           It was originally designed to get the  
2 attention away from the dramatic increases in  
3 insurance premiums that the insurance industry was  
4 making across the country. And in every state of  
5 the nation this campaign was going on and built to  
6 such a fervor that the legislation -- you know, it  
7 was designed to stampede the legislatures into  
8 making some dramatic changes in our civil justice  
9 system. This was unlike anything that  
10 historically we had seen here in Texas or even the  
11 nation had seen with regard to attack on the civil  
12 justice system, the judges, the juries, the law in  
13 general.

14           But in Texas, Texas was one of the -- about  
15 one of the five targeted states throughout the  
16 nation. And we were -- and our legislature was  
17 met here with a bombardment of not only a public  
18 media campaign, but a grass roots campaign too  
19 that involved mayors and city councilmen and  
20 counties and county commissioners and county  
21 judges and school districts -- about 60,000  
22 nonprofits in this state, and it included  
23 everything from the junior league, to the YMCA, to  
24 the girl scouts, all of business, of course, the  
25 industry and manufacturers, railroads.

1           And one of the target items that they had on  
2 their agenda was the so-called frivolous lawsuit.  
3 So, the legislature was motivated by this  
4 campaign, and it literally was something that no  
5 legislator could go home and say that they voted  
6 against any kind of a frivolous lawsuit  
7 legislation. I mean, that would just be writing  
8 their death warrant.

9           So, the legislature -- you charged us to have  
10 some responsibility in that regard. But there was  
11 not anything that literally could be done to stop  
12 the impingement of the legislature on the  
13 rule-making authority that they had previously  
14 delegated to the courts. And, of course, they did  
15 pass some legislation. And that legislation was  
16 passed on the 13th of -- the 3rd of June and has  
17 been signed by the Governor. It's going to be  
18 effective about the 2nd of September.

19           The other rules that are applicable to this  
20 same subject matter that exists is the Texas Rules  
21 of Professional Conduct, Rule 3.01. It provides  
22 that a lawyer shall not bring or defend or assert  
23 or controvert an issue unless that lawyer believes  
24 there is a basis for doing so that is not  
25 frivolous.

1           The existing Rule 13, which is in your book  
2 there, prohibits the -- a lawyer from filing an  
3 experimental lawsuit and from a statement -- or  
4 making statements that he knows in the pleading or  
5 before the Court, as I understand it, because that  
6 would be groundless or false for the purpose of  
7 delay. The penalty is contempt against the lawyer  
8 only. And it, of course, can be begun by a motion  
9 of any party. I want to review just briefly the  
10 highlights of the frivolous pleading, not lawsuit,  
11 but frivolous pleading legislation that was  
12 passed. It's section 9.01 through 9.014.

13           CHAIRMAN SOULES: Gilbert, that's at  
14 page 13 of the supplemental materials?

15           MR. ADAMS: Right. It applies -- and  
16 this is particularly interesting to the committee,  
17 because I know the committee is going to be  
18 interested in a rule that would apply across the  
19 board and not just to legislation which is  
20 personal injury, property damage, death,  
21 intentional tort, negligence, strict tort  
22 liability, breach of warranty, libel, slander, or  
23 tortuous interference with contract or other  
24 business relationships.

25           The legislation specifically exempts DPTA in



1 Chapter 21 of the insurance code. And, of course,  
2 it does not apply to any other type of  
3 litigation. It provides that on the signing --  
4 and that is the triggering event, is the signing  
5 of a pleading -- constitutes a certificate by the  
6 -- either the party or the lawyer who signs the  
7 pleading that to the best of his knowledge the  
8 information and belief the pleading is not -- and  
9 there's three particular certifications that he  
10 makes.

11 Number one, that it's not groundless and  
12 brought in bad faith; that it's not groundless and  
13 brought for the purposes of harrassment; and that  
14 it's not groundless and interposed for an improper  
15 purpose, such as an unnecessary delay. The  
16 triggering event can be a motion by the Court or a  
17 party, and there has to be a notice and hearing  
18 before the Court can take an action on the  
19 frivolous pleadings provision.

20 The Court is to consider certain factors  
21 that are specifically enumerated in the  
22 legislation and those are: The multiplicity of  
23 the parties, the complexity of the claim or  
24 defenses, the length of time to investigate and  
25 conduct discovery that was available to the party

1 or his attorney. And the court can consider  
2 affidavits and depositions in regard to the  
3 evidence for the determination of the frivolous  
4 nature of the pleading.

5 The rule provides that no sanctions can take  
6 place within 90 days of the time that the Court  
7 rules that the pleading is frivolous. And that  
8 90-day period is designed for the party or lawyer  
9 to either withdraw or amend that pleading to  
10 remove the improper aspect of the pleading. The  
11 sanction that the Court may thereafter take, if  
12 the lawyer does not withdraw or amend, is to  
13 strike the pleading, dismissal, pay attorney fees,  
14 expert fees, witness fees, et cetera. The Court  
15 has discretion there in the nature of that  
16 sanction and the extent of it.

17 The Court may not order the sanction if the  
18 offending -- or the offended party has likewise  
19 been sanctioned under this rule. And the rule  
20 provides that an attorney who consistently  
21 violates the rule is to be reported to the  
22 grievance committee, and then the rule provides  
23 that a general denial or -- and the amount that is  
24 requested in a pleading for damages are  
25 specifically excluded from a basis for the

1 frivolous pleading.

2 Now, I'd like to go to the authority of the  
3 Supreme Court with regard to the rule making and  
4 with regard to the existence of this present  
5 legislation.

6 PROFESSOR EDGAR: Gilbert, excuse me.  
7 You're referring us now to the rule -- proposed  
8 Rule 13?

9 MR. ADAMS: I just reviewed -- I just  
10 reviewed with you the legislation.

11 PROFESSOR EDGAR: The legislation or  
12 the proposed Rule 13?

13 MR. ADAMS: Just the legislation, the  
14 existing legislation.

15 PROFESSOR EDGAR: Okay. I thought you  
16 said the rule. Okay, I'm sorry, go ahead.

17 MR. ADAMS: Just what I reviewed with  
18 you was the legislation that's just been passed by  
19 the legislature.

20 Now, with regard to the authority for the  
21 Supreme Court to act in a situation where we are  
22 at this point, Article 5 Section 30, of course,  
23 provides the Court with the rule-making authority  
24 and the duty to pass rules that are not  
25 inconsistent with law and that are for the

1 efficient uniform administration of justice.

2 The Government Code, Section 22.03 and 22.04,  
3 are also applicable and deal with the procedures  
4 of the Court in rule-making authority. And the  
5 Court is to -- under 22.03, the rule making  
6 authority is for the Court to pass rules that are  
7 necessary, that are not inconsistent, therefore,  
8 all the courts, and they're to expedite the  
9 dispatch of business of the courts.

10 And under 22.004 these rules may not abridge  
11 or enlarge or modify substantive rights. And they  
12 must be expedient and in the interest of proper  
13 administration of justice, and the passage of the  
14 rule will repeal all conflicting laws that are not  
15 substantive in nature. The committee, of course,  
16 was awaiting to see -- and trying to deal with the  
17 legislature during the legislative time and before  
18 they adjourned on June the 3rd. After that, of  
19 course, we had the law and the Governor signed  
20 it. And so the committee has really not had a  
21 great deal of time to really sit down and evaluate  
22 and formulate everything that might have been  
23 otherwise if we hadn't been in such a time crunch  
24 to have this presentation before the committee  
25 today.

1           David Beck is on the committee. And he wrote  
2 a letter and it's in the materials. He points out  
3 a couple of things. But I guess we ought to look  
4 at the proposed rule which is for discussion. It  
5 is a rule that you should look at. It's one that  
6 basically provides that the -- let me turn to my  
7 notes on that. The triggering event is the  
8 signature by the attorney or party. That  
9 signature represents a certification that the  
10 pleading is not groundless and brought in bad  
11 faith or groundless and brought for the purposes  
12 of harrassment. It is a certification that the  
13 lawyer has made a -- the party or both have --

14           PROFESSOR BLAKELY: Excuse me,  
15 Gilbert. What page is that on?

16           CHAIRMAN SOULES: Page seven of the  
17 supplement.

18           MR. ADAMS: Page seven. That the  
19 lawyer who has signed it, whoever signs it, has  
20 knowledge, information and belief, that's to the  
21 best of his knowledge information and belief, and  
22 after reasonable inquiry, that has -- some of the  
23 considerations, of course, in that are the fact  
24 that sometimes your client comes in to you very  
25 late in the statutory period of time in which you

1 must file the action and there is some concern  
2 with regard to the unfairness that might result in  
3 that event.

4 The sanctions mention Rule 215, those that  
5 are set out in Rule 215. And David Beck points  
6 out that he feels -- he couldn't be here today  
7 because he's in Europe. But he feels like that  
8 215 -- that merely reference in 215 is going to  
9 lead to some confusion. He feels that it should  
10 expressly state, for example, that attorneys' fees  
11 or other related costs would be appropriate.

12 He also felt like that the Court should have  
13 the discretion rather than the language in the  
14 rule that says the Court shall presume that the  
15 pleadings -- no, that the Court shall impose  
16 sanctions. That should be a discretionary act  
17 depending upon the facts and circumstances as they  
18 appear.

19 He also felt like that the imposition of  
20 sanctions under the current draft is predicated on  
21 a bad faith good cause standard which is similar  
22 to the pre 1983 Federal Rule 11 standard. And he  
23 points out that bad faith has caused considerable  
24 problems in the federal courts and is the subject  
25 of considerable criticism and that since it has

1 not worked well there, that we should be cautioned  
2 about using that standard here on the Texas  
3 practice.

4 MR. TINDALL: It's hard for me to  
5 match the statute against your proposed rule.  
6 Where is the key difference in the standard of the  
7 statute, Gilbert?

8 MR. ADAMS: Well, I think that the  
9 first main difference is the fact that the statute  
10 applies only to a few types of cases that the  
11 courts are faced with.

12 MR. TINDALL: Okay.

13 MR. ADAMS: The triggering event, of  
14 course, is the signing of -- that triggers it and  
15 it's the certification. That's the same thing as  
16 the statute provides.

17 MR. TINDALL: Let's assume it's a  
18 contract dispute. And it's an allegation of  
19 whether it's frivolous. What's the standard?

20 CHAIRMAN SOULES: Standards are  
21 common.

22 MR. TINDALL: The standards are the  
23 same?

24 CHAIRMAN SOULES: Yes.

25 MR. ADAMS: The standard is -- under

1 the proposal you'll see it's groundless and  
2 brought in bad faith or groundless and brought for  
3 the purposes of harrassment. Now, the statute  
4 says groundless and brought in bad faith,  
5 groundless and brought for the purposes of  
6 harrassment or groundless and interposed for an  
7 improper purpose such as unnecessary delay or  
8 needless increased cost of litigation. So, there  
9 is one additional ground that's set forth in the  
10 legislation.

11 MR. TINDALL: Is there some reason  
12 that wasn't in your proposal, the last one?

13 MR. ADAMS: No, not really. This  
14 proposal is one that Luke actually sent to us and  
15 wanted us to use as a draft for the purposes of  
16 this meeting.

17 MR. LOW: Gilbert, let me see if I've  
18 got it. As I understand it, the one that we're  
19 proposing -- there are two situations. Somebody  
20 brings a lawsuit that's for experiment or delay or  
21 something like that or just to get a fictitious  
22 ruling is held guilty for contempt, and that's not  
23 a change. That's already been in there. Now,  
24 we're really addressing what the legislature did  
25 and we're talking about a frivolous lawsuit. And



1 as I understand it --

2 MR. ADAMS: It's a pleading.

3 MR. LOW: Yes.

4 MR. ADAMS: Any pleading.

5 MR. LOW: Right. So, the first phase  
6 of it we're not changing the law in the sense of  
7 bringing it to get an experimental decision or  
8 something like that. That's not changed. So,  
9 we're really dealing -- and as I read it, I think  
10 what we've done here is a more reasonable approach  
11 and not the approach the legislature took. I  
12 think they took a harder approach because  
13 everybody is down on lawyers and so forth. And I  
14 personally favor a watered down version because I  
15 don't think there's all that much that goes on  
16 in --

17 CHAIRMAN SOULES: A fairer version?

18 MR. LOW: Pardon?

19 CHAIRMAN SOULES: A fairer version.

20 MR. LOW: Yes, a fairer version. I  
21 didn't mean watered down. Strike that from the  
22 record. And I think we've done that. And I think  
23 we've -- and I think this proposed language change  
24 may be made or something. But I think that's  
25 basically the difference.

1           MR. ADAMS: I personally think there  
2 is some language in the statute that the committee  
3 ought to consider. I think that the sanctions  
4 portion of the statute, that language is a  
5 reasonable type of language. It might satisfy  
6 some of the -- it might make it just a little bit  
7 clearer about what the Court should consider. And  
8 it would solve the complaint that David Beck had  
9 raised about just having it reference to Rule 215  
10 because Rule 215 is pretty broad. And that  
11 language in the -- legislative language isn't bad  
12 language.

13           PROFESSOR EDGAR: I don't have a  
14 problem with the language of the legislation. But  
15 yet we have referenced other sanctions and other  
16 rules to Rule 215.

17           CHAIRMAN SOULES: The work of this  
18 committee since --

19           PROFESSOR EDGAR: And I don't know why  
20 we need to single a sanction reference under Rule  
21 13 to any different standard than we've done in  
22 any other rule, to me.

23           CHAIRMAN SOULES: Since 1984 this  
24 committee has been attempting to key sanctions to  
25 215 so that anybody wants to know what kind of

1 sanctions are in the Texas practice, there it is  
2 in one place. And even the February 4, '87  
3 administrative rules pick up Rule 215. The whole  
4 civil procedure gammit now focuses on 215 for  
5 sanctions. And all other sanctions that used to  
6 be isolated are being changed to direct to 215.  
7 That's the reason --

8 PROFESSOR EDGAR: That doesn't offend  
9 me at all.

10 CHAIRMAN SOULES: It's easier.

11 PROFESSOR EDGAR: Much easier and  
12 consistent.

13 CHAIRMAN SOULES: And consistent.

14 PROFESSOR EDGAR: There's one thing  
15 though I noticed, one difference, that there is  
16 reference to referral to the grievance committee  
17 in the statute and not here. And that's not in  
18 215 either.

19 CHAIRMAN SOULES: But that's in the  
20 court -- Judge, where is that elsewhere in the  
21 court order? You mentioned it to me.

22 JUSTICE WALLACE: That's a violation  
23 of the -- and I told you I was going to look that  
24 up. But, Judge Rivera, is there a provision in  
25 the Code of Judicial Conduct that says you shall

1 report an offense that occurs before the Court to  
2 the grievance committee?

3 JUDGE RIVERA: I think there is. It  
4 doesn't exactly tell you that, but there is some  
5 reference to that.

6 JUSTICE WALLACE: That, I'm quite  
7 sure, is covered in the Code of Judicial Conduct.

8 CHAIRMAN SOULES: Where a lawyer is  
9 guilty of misconduct before the Court on a  
10 continuing basis.

11 JUDGE RIVERA: Code of conduct for the  
12 attorneys.

13 JUDGE CASSEB: Professional conduct.

14 CHAIRMAN SOULES: So as elsewhere --  
15 either in the code of professional responsibility  
16 or ethical considerations of the code of judicial  
17 conduct that says that if a lawyer continually  
18 abuses a process, the judge is supposed to report  
19 it to the grievance committee. So, that's taken  
20 care of some place outside of the rules of civil  
21 procedure by an order of the Supreme Court  
22 already. Repealing that will not -- to repeal  
23 that is not to repeal something that's not spoken  
24 to by the Supreme Court in another place.

25 I had some concerns about that when I

1 discussed this with Judge Wallace because that was  
2 the one concept that the rule does not address.  
3 And then we realized that, however, codes that are  
4 part of the Supreme Court's order and judicial  
5 context do address that very same problem. So,  
6 there's a mandate for that anyway that takes care  
7 of that. There would not be a gap.

8 MR. McMAINS: 3B3 is --

9 JUDGE RIVERA: 3B3, code of  
10 professional conduct by a lawyer.

11 MR. McMAINS: -- appropriate  
12 disciplinary measures against a lawyer for  
13 unprofessional conduct of which the judge may  
14 become aware.

15 CHAIRMAN SOULES: So, that speaks to  
16 this problem.

17 JUDGE RIVERA: Now, that is also the  
18 law now.

19 PROFESSOR EDGAR: Well, the  
20 legislation also makes reference to the State Bar  
21 Act too, Article 328-1.

22 MR. BEARD: Luke, you know, I'm very  
23 much opposed to anything that has a chilling  
24 effect on anyone who wants to come in with new  
25 theories and all and take up popular sides to

1 litigation. Is there anything that keeps us from  
2 imposing sanctions or costs against the party  
3 urging that it is a frivolous lawsuit or a  
4 frivolous defense and loses? Because we get in --  
5 you know, Deceptive Trade Practices Act, you've  
6 got lawyers whose every answer has a standard  
7 pleading, frivolous cause of action. Can we  
8 punish the people who try to make it -- to go  
9 through this and then lose?

10 CHAIRMAN SOULES: Let me ask you  
11 this: Can we get through this Rule 13 and then  
12 try to overlay that concept on it without --

13 MR. SPARKS (EL PASO): Rule 11 is what  
14 he's talking about.

15 CHAIRMAN SOULES: What's that?

16 MR. BEARD: It's part of the whole  
17 same thing.

18 MR. ADAMS: That's not in this. I  
19 don't think what you're talking about is a concern  
20 with regard to the proposed rules as reported.

21 JUDGE RIVERA: I thought it was.

22 CHAIRMAN SOULES: Well, either side  
23 can attack, as frivolous, a pleading filed by the  
24 other side. This is not a defendant's or a  
25 plaintiff's rule. This is a mutual rule.

1 MR. BEARD: But my view of it is  
2 whoever files that and fails to get the Court to  
3 make that finding pays for all of the costs  
4 involved in defending it.

5 PROFESSOR DORSANEO: Even if they file  
6 in good faith.

7 MR. BEARD: Even if they file in good  
8 faith.

9 MR. ADAMS: No. This -- I think that  
10 the Court could interpret someone filing -- if  
11 they file a motion to sanction a party, if that's  
12 what you're talking about, and that motion itself  
13 was a frivolous motion, I think the Court would be  
14 appropriately --

15 MR. BEARD: But what I want --  
16 regardless of whether it's in good faith or  
17 whatever it is, if they fail on this, they pay.

18 CHAIRMAN SOULES: No. That's not part  
19 of this.

20 MR. ADAMS: Oh, I see. You're talking  
21 about making it an automatic --

22 CHAIRMAN SOULES: In other words, if  
23 you say my pleading is frivolous, you filed a  
24 motion -- my pleading is frivolous, I respond his  
25 motion is frivolous. Whoever loses can be

1 sanctioned under this rule the way it's written  
2 right now.

3 MR. BEARD: No. It's frivolous -- I  
4 don't have to do anything. And if he doesn't  
5 succeed, then he pays the cost involved in all  
6 that.

7 CHAIRMAN SOULES: That's not a part of  
8 this concept. Maybe it should be but it's not.

9 MR. BEARD: Can it be part of it?

10 CHAIRMAN SOULES: I'm trying to work  
11 through this. I'll get to that after we've dealt  
12 with whether we want this much of it. And we've  
13 got a statute. We've got to do something to  
14 supplant that statute or concede now that we've  
15 let the legislature get in the rule-making  
16 business.

17 And this is an effort to pull together most  
18 of what was in the statute that -- and there were  
19 some good things. For example, the 90-day out was  
20 never a part of the COAJ discussions on Rule --  
21 what is it 68? Rule 11. It got into the  
22 legislative concept. I think it's a good  
23 concept. Because you may file something that you  
24 need to take discovery on, and you may feel like  
25 you need to inject that into the subject matter of



1 the lawsuit long enough to get a deposition. You  
2 may be hit with "That's a frivolous pleading."  
3 You get a couple of depositions. You recognize  
4 that it is without merit. You can withdraw that  
5 pleading, and you cannot be sanctioned for having  
6 filed it. And I think that's good. So, we gained  
7 something from that process. I'm not going to say  
8 it was all bad. It was mostly bad. But now  
9 that's in this rule and it wouldn't be there  
10 otherwise. And is that a fair assessment of that  
11 situation, Gilbert?

12 MR. ADAMS: It certainly is.

13 CHAIRMAN SOULES: But the best of the  
14 statute --

15 MR. ADAMS: Let me say there were some  
16 people who thought that was too short a period of  
17 time, that 90 days. And, of course, there were  
18 some proposals to make it 30 days. And it was --  
19 so, that 90 day is a compromise period of time  
20 that was arrived at.

21 CHAIRMAN SOULES: Broadus, you were  
22 there. Give us your view.

23 MR. SPIVEY: I'd like to reabide  
24 (phonetic) by the rule if what you were addressing  
25 there was that the attempt of the legislature is

1 not just a use of the court's function, but at the  
2 same time it is an attempt to use discretion of  
3 the court's function. And I think we ought to be  
4 a little bit careful not just to react on that  
5 basis, number one. Number two, not to make it  
6 appear that we're reacting on that basis.

7 But I thought at the time it was being  
8 considered -- and told the key members of both  
9 houses, and I thought it was unconstitutional. I  
10 think it flies right in the face of Section 31 of  
11 the constitution that you attached. I was aware  
12 at that time and discussed it with them in the  
13 committee hearing. But it was very much like  
14 talking with my wife when I get home late, I  
15 think. There was one thing that was going to  
16 happen and it was going to be a frivolous pleading  
17 bill, period.

18 And, you know, in discussing it with them, I  
19 felt very candidly the goal wasn't a bad goal. It  
20 wasn't a bad idea. If you don't get at what  
21 they're talking about, it's a chilling effect as  
22 long as it remains procedure of which it should  
23 be. And I think that's the second thing. I think  
24 it is unconstitutional. The statute itself is  
25 unconstitutional because it violates the open

1 courts act. And, again, I made that comment. And  
2 one of our efforts in trying to negotiate was we  
3 didn't want to be involved in something that --  
4 try to hide behind the log and create something  
5 that's unconstitutional. But that's just one area  
6 where we didn't even get to that consideration.  
7 Here I am saying that and Judge Wallace knows --  
8 has a better idea than anybody does whether it is  
9 or is not a guess, but it seems to me that, you  
10 know, we can -- by clear reading of the attachment  
11 that you've got attached -- that 22.003, which was  
12 in the Government Code passed by the legislature,  
13 that the Supreme Court -- Section C says so that  
14 the Supreme Court has full rule-making power in  
15 civil actions. A rule adopted by the Supreme  
16 Court repeals all conflicting laws and parts of  
17 law governing practices and procedures in civil  
18 action. But subsequently that law is not  
19 repealed. This includes procedure. All you've  
20 got to do is pass one rule and it's gone. And it  
21 was awful hard to communicate that to the  
22 committee.

23 Then you had to -- many of you weren't  
24 there. But Luke made a special trip when he  
25 shouldn't have had to to come up before the House

1 Committee and made what I thought was a very good  
2 presentation. And Patricia Hill, whom I consider  
3 one of the more serious members of the committee,  
4 was genuinely interested not in dismantelling of  
5 the laws, but interested in getting some frivolous  
6 litigation through, really challenged Luke head on  
7 and very seriously and commented directly and  
8 indirectly that the Supreme Court hasn't taken any  
9 action on this. And it was a matter of real  
10 concern to her.

11 I guess that gets around to saying that maybe  
12 we ought to give them either an invitation to  
13 appear or some discussion with them because, you  
14 know, in my mind there's just absolutely no  
15 question that this act is unconstitutional,  
16 period.

17 CHAIRMAN SOULES: I wrote Pat Hill a  
18 letter 10 days ago inviting her to be at this  
19 meeting, sent her a copy of this proposed rule, a  
20 copy of the constitutional provision and a copy of  
21 Article 22.006 of the Government Code, which is in  
22 these materials at page 52 of the main materials,  
23 and told her if she would like to speak to us on  
24 this proposal, which is on page 13, that she would  
25 be welcome and courteously received. And so she

1 is, to my knowledge, not here at this meeting. I  
2 haven't seen her, and I've looked for her. But  
3 she was invited to be here. And that's exactly  
4 the way --

5 MR. SPIVEY: She hasn't responded to  
6 your letter?

7 CHAIRMAN SOULES: She has not  
8 responded to my letter.

9 MR. SPIVEY: I feel like we should  
10 discharge -- we've given her the courtesy of  
11 notice. And I think she genuinely was -- there  
12 was almost nothing else she would talk to you  
13 about in the whole tort reform package other than  
14 frivolous lawsuits. That was the big thing.

15 CHAIRMAN SOULES: Of course, that was  
16 the purpose of my talk to her. But what she  
17 basically told me was that -- the way I perceived  
18 it was that she said that -- she was telling me  
19 that I was falsely representing to her that this  
20 committee seriously had under consideration  
21 something like rule -- Federal Rule 11. And I  
22 told her flatly that we did and that it would  
23 becoming before this meeting, and that while I  
24 couldn't say what this committee was going to do,  
25 that I assumed it was going to meet with some

1 favorable response. And she told me that we  
2 considered it before and voted it down and that  
3 there wasn't -- in effect, there wasn't anything  
4 pending, and that I was stating to her false  
5 information, which, obviously, she misperceived.

6 MR. ADAMS: Well, obviously the  
7 legislation is inadequate to address the concerns  
8 that the Supreme Court has for all types of causes  
9 of action. And it is something that is  
10 appropriate for this committee to address so that  
11 all causes of action will be included and tested  
12 by the same standard and not some particular  
13 portion of the litigation.

14 CHAIRMAN SOULES: Well, doesn't the  
15 committee as a whole have a recommendation on the  
16 Rule 13 as it appears on page seven of the  
17 supplemental materials? And then we can go into  
18 its language.

19 MR. ADAMS: Our recommendation is that  
20 the proposal -- and it is there for the purposes  
21 of discussion and adoption amendment or whatever  
22 the committee's will is.

23 CHAIRMAN SOULES: The motion is then  
24 that we adopt Rule 13 as it appears on pages seven  
25 and eight of the supplemental materials. And I

1 know that's going to be discussed. Is there a  
2 second?

3 MR. LOW: I second it.

4 CHAIRMAN SOULES: Buddy seconds it.  
5 And now we're ready for discussion of this as  
6 such.

7 MR. TINDALL: Why do you broaden it?  
8 The legislature seems to narrow it down to  
9 pleadings. It seems to me that your proposal is  
10 going to expand this monster. Am I reading it  
11 wrong?

12 CHAIRMAN SOULES: Yes. Let me try to  
13 find --

14 MR. TINDALL: The legislation refers  
15 only to what we'll call frivolous pleadings.

16 PROFESSOR CARLSON: Yes, but on page  
17 14 in the supplement, pleading includes a motion.

18 CHAIRMAN SOULES: But then -- pleading  
19 includes a motion. That's item four down there.

20 MR. ADAMS: You're talking about the  
21 paper. It says pleading motion or other papers.  
22 Is that what you're referring to, that language?

23 CHAIRMAN SOULES: At page 13 the  
24 statute appears.

25 MR. TINDALL: What is the other

1 paper? What were you getting at on that?

2 CHAIRMAN SOULES: Anything filed in  
3 court is frivolous.

4 MR. ADAMS: Sometimes you might file a  
5 paper signed by --

6 MR. TINDALL: Discovery -- answers to  
7 discovery requests, they're evasive.

8 PROFESSOR EDGAR: Affidavits.

9 MR. ADAMS: Oh, yes, that would be a  
10 pleading. If you answer requests for admissions  
11 or requests for production --

12 MR. TINDALL: Interrogatories or  
13 anything that's evasive in nature would be --

14 CHAIRMAN SOULES: Yes. And the  
15 sanctions are under 215 just like they are  
16 anyway.

17 MR. SPIVEY: I think that's the  
18 unfortunate part of this statute that was passed  
19 by the legislature. It's going to impact the  
20 defense practice and the defense bar, I think,  
21 more than the plaintiff's bar.

22 MR. TINDALL: The second question is  
23 what was the thought of the committee on deleting  
24 this phrase, "groundless and interposed for any  
25 improper purpose such as to cause unnecessary



1 delay or needless increase in the cost of the  
2 litigation"?

3 MR. ADAMS: That's just -- felt like  
4 that was included in one or two.

5 PROFESSOR DORSANEO: Well, I really  
6 doubt it is included in one or two, especially  
7 after you read Federal Rule 11. Now, whether it's  
8 advisable to put that in there, I think it's  
9 inadvisable. But to be candid, the rule is a  
10 fairer version to borrowed language used earlier  
11 than the statute.

12 CHAIRMAN SOULES: It's a fairer  
13 version. The Federal Rule 11 has drawn some  
14 criticism for heavy handedness from the bench.  
15 This does not permit as much heavy handedness from  
16 the bench as Federal Rule 11 from the federal  
17 bench. And that has always been a feeling of this  
18 committee that the hand ought not to be quite as  
19 heavy.

20 MR. ADAMS: Yet it provides the  
21 protection for the litigants.

22 CHAIRMAN SOULES: But it still  
23 provides the protection for the litigants.

24 MR. JONES: That's what's hard to  
25 explain to Patricia Hill because since her

1 (inaudible) --

2 CHAIRMAN SOULES: Harry, does that  
3 respond to your question?

4 MR. TINDALL: Well, we all have horror  
5 stories of where we had to go to Pampa, Texas and  
6 you get up there and the other party then says  
7 "Well, okay, we're withdrawing our motion or," you  
8 know, "conceding our motion," and we spent a day  
9 out of the office. If that's what three is trying  
10 to get at --

11 CHAIRMAN SOULES: We're trying to  
12 write a rule that will take care of --

13 MR. ADAMS: Well, that would be  
14 included in one.

15 MR. TINDALL: Is that included in  
16 one?

17 MR. ADAMS: That's groundless and  
18 brought in bad faith.

19 MR. TINDALL: Well, but, boy, that's  
20 so subjective.

21 PROFESSOR DORSANEO: Bad faith is  
22 never going to get anywhere.

23 MR. TINDALL: You'll never get it that  
24 you've gone to Pampa all day long and spent a  
25 night up there and then he withdraws a motion, or,

1 you know, I mean --

2 CHAIRMAN SOULES: Groundless and  
3 brought for the purposes of harrassment. He  
4 harrassed you up there and then gave up. That's  
5 the second standard, groundless or -- that's  
6 disjunctive -- groundless and brought for the  
7 purpose of harrassment. That's an independent  
8 ground for sanction.

9 MR. TINDALL: That number three, we've  
10 all been the butt of that deal where you thought  
11 the other side was causing unnecessary delay or  
12 needless increase in the cost of litigation.

13 PROFESSOR DORSANEO: We always think  
14 that.

15 CHAIRMAN SOULES: You can file a  
16 motion for a pretrial order under Rule 166 and  
17 thrash that out with the Court under Rule 166. Or  
18 you can go ahead and go as heavy handed as the  
19 federal judges go. You've got your choice. But  
20 166, that valuable tool is very unutilized in  
21 those kind of circumstances.

22 MR. MORRIS: Luke, I want to bring up  
23 something Gilbert mentioned a little earlier. I  
24 think that the horror stories I keep hearing are  
25 excessive amounts of fines and things of that

1 nature. For that reason, I'm really concerned  
2 about leaving 215 in here. I know that our thrust  
3 has been direct everyone to 215, but I'm more  
4 concerned about the overall chilling effect on  
5 litigation. And for that reason, I like the  
6 sanctions that are available under the statute and  
7 think it would be wise to limit our sanction under  
8 the rule similarly.

9 CHAIRMAN SOULES: One thing at a  
10 time. Let's start with the groundless. Harry,  
11 are you suggesting that we amend to include the  
12 third area?

13 MR. TINDALL: Well, sir, I would. I  
14 think those three may -- to me, you're never going  
15 to prove bad faith, as Bill says. Two,  
16 harrassment is difficult. But three really gets  
17 at some real abuse. And I'm not chilling  
18 litigation. That goes without saying.

19 MR. SPIVEY: Say three over again.

20 MR. TINDALL: Pardon?

21 MR. SPIVEY: Say three over again.

22 MR. TINDALL: Number three under the  
23 statute is ground -- this is any pleading or  
24 motion: "Groundless and interposed for any  
25 improper purpose such as to cause unnecessary

1 delay or needless increase in the cost of  
2 litigation." Now, that's --

3 MR. ADAMS: What's the difference in  
4 harrassment and improper purpose?

5 MR. TINDALL: Well, I would like to  
6 keep that. I mean, to me, that is --

7 MR. ADAMS: Isn't harrassment and  
8 improper purpose the same thing?

9 MR. TINDALL: I don't know if it is.  
10 This is so alien to me to get into chilling people  
11 out of the courthouse.

12 CHAIRMAN SOULES: Any improper purpose  
13 is a problem with the federal judges.

14 MR. SPIVEY: I've got a real problem  
15 with Harry's proposition and that part of the  
16 statute and I want to cite you a case. The case  
17 is Patton versus Hamburger (phonetic) back in  
18 1968. And I sent to get a copy of this case  
19 because it's a classic example of what happens if  
20 you enact what the legislature did and what Harry  
21 is suggesting there.

22 That was a case where -- it was a worker's  
23 compensation case. And the child of the parties  
24 had been adopted by the subsequent husband of the  
25 mother of the children. The father of the

1 children had given his consent in the children  
2 being adopted out. The father -- the natural  
3 father, who was no longer the legal father of the  
4 children, was killed in an accident -- and a  
5 dispute between the parents of the decedent and  
6 the children who had been adopted out of the  
7 decedent.

8 David Scarbrough (phonetic) was on one side  
9 representing the children who had been adopted  
10 out. Bob Huff (phonetic) was on the other side  
11 representing the parents of the decedent.

12 And Bob said, "Let's try to settle this."  
13 And David said, "Well, Bob, I'd like to but, you  
14 know, a few years ago I had exactly this case and  
15 I was on the other side. And I tried that case  
16 and it went up to the appellate court and the  
17 Eastland Court of Appeals held -- and ruled  
18 directedly in point Thompson versus Dolye  
19 (phonetic) case decided 1948 that you're wrong and  
20 I'm right." And and he says, "Now for the first  
21 time in my life I've been hired in a case -- and I  
22 have a white horse case and it's my case. And  
23 it's directly against your point and I'm not going  
24 to settle with you at all." And Huff said, "Well,  
25 why don't you just pay me a \$1000?" And

1 Scarbrough said, "I wouldn't pay you a penny,  
2 Bob. It would be unethical for me to do that."  
3 And Bob said, "Well, I'll send my pup," and I was  
4 his pup. And it wasn't skill or ability on my  
5 part. It was just direct orders from Bob Huff  
6 that I file the claim.

7 Of course, it was turned down by the Odessa  
8 Court following Davis' case right on point. They  
9 said don't -- the parents of the adopted out  
10 children don't pay. So, I appealed it to the  
11 Court of Appeals in El Paso. They cited the --  
12 Judge Grissam (phonetic) cited the Eastland court  
13 case on point and didn't say something nice. He  
14 said, "We are in debted for both parties for  
15 excellent briefs." That was part of the holding.  
16 But it says, "We conclude as asserted by appellee  
17 that the cases relied upon by appellants -- and  
18 that was us -- are distinguishable, and that in  
19 all other jurisdictions from which authorities  
20 have been cited, adopted children have been  
21 allowed to recover such benefits unless excluded  
22 by statute."

23 But what we had to do is cite all other  
24 jurisdictions. The other side had the Texas case  
25 on point and the constitution of the state of

1 Texas. The Supreme Court granted the writ, and  
2 Davis couldn't believe it. But we came down here  
3 and argued it. And this was -- that was in 1968.  
4 And it was decided by the Supreme Court of Texas  
5 on a five to four decision the opinion by Judge  
6 Greenhill -- the defending judges were Smith,  
7 Grisham, Hamilton and Stacy -- to reverse the El  
8 Paso court. And they reversed and Davis couldn't  
9 believe it. He had lost the case from both  
10 sides.

11 Well, under Harry's proposition, I think  
12 there is no question that I could have been  
13 disbarred because I had no Texas case. In fact, I  
14 had a Texas case directly against me. The only  
15 thing I could cite was out of state cases and  
16 everybody knows that that's not -- you know,  
17 you're fighting an uphill battle. And nobody  
18 believed us except the Supreme Court of Texas.

19 And I'm concerned that if you have that  
20 proposition in there, that this is the kind of  
21 case that a lawyer who believes his client is  
22 right and knows the law is against him, dang it,  
23 it's just not right, and it ought to be reversed  
24 because it's not right even though the law is  
25 otherwise. You also have the right to advocate



1 that cause in a court of law. And I think that's  
2 what the legislature could not perceive. They  
3 could not understand that you ought to change the  
4 law sometime. Now, this was a court that was  
5 never once accused of being -- except this one  
6 time, I think -- of changing the law.

7 CHAIRMAN SOULES: Let's get  
8 straight --

9 MR. TINDALL: Well, I don't want to  
10 get cornered in the position, Broadus, of saying I  
11 want to chill what you did, but either three has  
12 meaning here that's separate from one and two, or  
13 it's harmless to add it.

14 CHAIRMAN SOULES: It does have  
15 meaning, heavy handedness. Let's look --  
16 everybody, if you will, turn to page 15 of the  
17 supplemental materials and we'll look at the  
18 specific language. And we'll get a consensus of  
19 whether we're going to add that as a ground or not  
20 add that as a ground to paragraph one of proposed  
21 Rule 13. We'll get right to what we're talked  
22 about.

23 On page 15 of the supplemental materials,  
24 right here, counting up six lines from the bottom,  
25 is the ground that's under debate. It's not in

1 the rule, proposed rule. Harry is suggesting that  
2 maybe it should be included. And it says,  
3 "Groundless and interposed for any improper  
4 purpose such as to cause unnecessary delay or  
5 needless increase in the cost of litigation."

6 Now, let me just see by show of hands a  
7 consensus. How many feel that there should be  
8 another ground in addition to "groundless and  
9 brought in bad faith" and "groundless and brought  
10 for the purpose of harrassment" in the rule? Show  
11 by hands.

12 PROFESSOR EDGAR: Well, I'd like to  
13 comment on it. Before you discuss that -- before  
14 you draw the line here, I'd just like to make a  
15 comment.

16 CHAIRMAN SOULES: Okay.

17 PROFESSOR EDGAR: We recognize now  
18 under the discovery sanctions that a purpose for  
19 delay can invoke a sanction. And it seems  
20 somewhat inconsistent to me to recognize a  
21 sanction for purposes of delay in the discovery  
22 area where you don't do it here.

23 CHAIRMAN SOULES: Okay. There's the  
24 language. What's the consensus? Do we add that  
25 ground or not add that ground in the proposed Rule

1 13? How many say we add the ground that shows up  
2 on page 15? The Chair is going to call for a  
3 consensus. If it's a very one-sided thing,  
4 there's no sense in continuing to debate it. If  
5 it's a close issue, we're going to debate it until  
6 we get it resolved. But somehow we've got to keep  
7 moving.

8 Okay. How many feel that this number three,  
9 "Groundless and interposed for any improper  
10 purpose such as to cause unnecessary delay or  
11 needless increase in the cost of litigation,"  
12 should be added to Rule 13 as proposed? Four.  
13 How many feel that it should not be added? Nine.  
14 Okay. In my judgment, we should go on to another  
15 issue and consider that one resolved. Now, I  
16 don't want to chill, but we do have to move on.

17 MR. SPIVEY: He's about to explode  
18 over here. He's not getting chilly; he's get  
19 hot. I want to hear him. He's got something good  
20 to say.

21 CHAIRMAN SOULES: Well, he's won.  
22 He's that you'd-better-stop-talking-you're-  
23 liable-to-lose. Okay. Well, now, we'll leave  
24 that out. We still haven't passed the rule, the  
25 recommended rule. Now we go on to sanctions. Do

1 we have sanctions keyed to Rule 215 as is the  
2 uniform practice outside of this rule, or do we  
3 put special sanctions in Rule 13? How many feel  
4 that we should use Rule 215 sanctions in this  
5 rule? Show by hands.

6 PROFESSOR EDGAR: I'm sorry, what was  
7 the question?

8 CHAIRMAN SOULES: How many feel that  
9 we should use the format of Rule 215 for the  
10 sanctions in this rule? Show by hands, please.  
11 Eight. How many feel that we should have the  
12 sanctions that the statute suggests? Okay.  
13 That's six to four.

14 MR. TINDALL: Can we discuss that  
15 matter? That's a big remedy and I think Lefty may  
16 have a point here. I would like to hear more on  
17 that.

18 CHAIRMAN SOULES: We have discussed  
19 it. Does somebody have anything new to add to the  
20 discussion than we've had before? Otherwise,  
21 let's get on to some additional issues.

22 MR. MORRIS: Well, I think this is  
23 new. We are kind of creating a new animal or  
24 creature here. And I think that we need to go  
25 carefully about what we allow a judge to do with

1 regards to the sanctions. That can get out hand  
2 quickly and be very unfair and be very damn  
3 depressive. And I think that we know that judges  
4 just like lawyers -- there are lawyers all over  
5 this state that have their own proclivities. They  
6 have people that they don't like, and some of them  
7 sure don't like me, and that's fine. But I don't  
8 want to go in there and get unnecessarily strapped  
9 with a bunch of sanctions. And I think if we're  
10 creating a new creature here, that it's not asking  
11 too much of this committee to set out some  
12 reasonable guidelines for the courts to follow in  
13 this state so our litigants don't get unfairly  
14 strapped by some oppressive decisions.

15 CHAIRMAN SOULES: Okay. Anything else  
16 new? Anybody want to change a vote?

17 MR. LOW: Am I sure that on page seven  
18 there are three sanctions? That's all -- that's  
19 all -- is that top of the page added on? Is that  
20 the only sanctions?

21 CHAIRMAN SOULES: I'm sorry, what?

22 MR. LOW: Page seven -- 17, I'm  
23 sorry. Those three sanctions, are those the only  
24 statutory sanctions?

25 CHAIRMAN SOULES: Yes.

1           MR. LOW: The thing that bothers me,  
2 three is really Rule 11 in the Federal Rules, kind  
3 of. And that's what bothers me, because Rule 11  
4 has created some bad situations.

5           CHAIRMAN SOULES: Does anybody want to  
6 change their vote on sanctions?

7           MR. MORRIS: Well, how would you  
8 distinguish -- I'd like to discuss it, Luke. I  
9 may want to change my mind.

10          CHAIRMAN SOULES: Well, if you do,  
11 you're on the losing side, so it doesn't matter.  
12 We've got to move on.

13          MR. LOW: I affirm my vote.

14          CHAIRMAN SOULES: Does anybody want to  
15 change their vote? Does anybody have anything new  
16 to say?

17          MR. MORRIS: I want to know something  
18 and surely I can find out. I want to know how you  
19 -- what the different distinction is between 215  
20 in your mind, Buddy, since you wrote this.

21          MR. LOW: No, wait --

22          CHAIRMAN SOULES: Okay. Now, we're  
23 moving to the next paragraph. Is there anything  
24 in the last paragraph of the rule as proposed?

25          JUSTICE WALLACE: Can I get one thing

1 said about it, because I'm going to have to  
2 present this to the Court? And I'm not at all  
3 clear. I've been going here and reading over the  
4 sanctions in 215, and I'm not sure of any sanction  
5 in here that would apply to this type of action.  
6 Would you clear that up for me?

7 MR. ADAMS: Well, I think I stated  
8 that was -- I thought was a -- was just confusing  
9 to try to wade through 215 and figure out what to  
10 do.

11 JUSTICE WALLACE: 215 is broken down  
12 to sanctions for different actions.

13 MR. ADAMS: That's right.

14 JUSTICE WALLACE: And none of them --  
15 at least I have not been able to understand how  
16 any one of these is going to apply to this  
17 offense.

18 MR. ADAMS: The sanctions by 215 may  
19 narrow the available sanctions of the court.  
20 Because I think 215 wasn't written with the  
21 probable concept in mind of dealing with all types  
22 of pleadings. It was designed to deal with  
23 specific types of pleading problems and discovery  
24 problems.

25 So it could be -- but you'd have

1 consistency. If you're looking for consistency,  
2 you're definitely going to have consistency by  
3 referring it to 215, because the Court is going to  
4 have to use the same standard. Say if it's a  
5 frivolous -- the frivolous pleading is an improper  
6 response to production, say, or to answers to  
7 interrogatories. Well, I guess there could be  
8 some confusion about which rule you're applying.  
9 Can you file your motion under frivolous pleadings  
10 as well as some of your other rules. Or if you  
11 file under one or the other, could the Court have  
12 greater discretion?

13 So, if you tie at all to 215, then the Court  
14 has got to do the same thing in any type of motion  
15 that a lawyer files with regard to discovery.  
16 But, on the other hand, if he files it with regard  
17 to some other aspect of some other type of  
18 pleading maybe not covered by 215, then it might  
19 present a problem.

20 CHAIRMAN SOULES: Well, in 215(3) the  
21 Court -- the rule assembles all the various  
22 available sanctions.

23 JUSTICE WALLACE: But it refers back  
24 to 215(2). 1, 2, 3, 4, 5 and 8.

25 CHAIRMAN SOULES: Sanctions



1 available. You could say "may" -- "shall impose  
2 any sanction," and just use that language right  
3 out of 215, "any sanction authorized by" --

4 JUSTICE WALLACE: The only thing  
5 you've got there, though, is disallowing any  
6 further discovery, order charging expenses,  
7 designated facts shall be taken, five is striking  
8 pleadings, and eight, avoiding to pay expenses.

9 CHAIRMAN SOULES: That covers it.

10 PROFESSOR DORSANEO: I don't see the  
11 difference between the two provisions myself,  
12 except in wording.

13 CHAIRMAN SOULES: Except that we have  
14 cases that construe with 215.

15 MR. ADAMS: But I mean you're not  
16 going to have the problem with inconsistency that  
17 you will -- as long as you leave the reference  
18 with 215, I think you're going to have more  
19 consistency with the sanctions.

20 MR. McCONNICO: I think what the judge  
21 is saying, so much of 215 is specific for  
22 discovery where this isn't.

23 JUSTICE WALLACE: If I understand, the  
24 object of the bill is to get away from filing  
25 frivolous lawsuits, period, or frivolous answers,

1 you don't get into discovery of the motion -- of  
2 course, it covers motions.

3 MR. ADAMS: I think it's going to  
4 cover. The way this is drawn, you're going to  
5 have a remedy under this rule, Rule 13, for  
6 discovery abuse.

7 JUSTICE WALLACE: You can't find the  
8 lawyer, sanction him by so much money because it's  
9 not provided for in here.

10 MR. ADAMS: That's right.

11 JUSTICE WALLACE: So, you've got  
12 pretty doggone limited sanctions, nothing about  
13 reporting him to any grievance committee.

14 CHAIRMAN SOULES: Well, there's not a  
15 fine but there are expenses. In other words, if a  
16 person files a frivolous pleading, it's attacked,  
17 the judge agrees, what can he do? He can cut off  
18 discovery. That's one sanction. Because it's a  
19 frivolous pleading, he can sure cut off  
20 discovery. He can charge the -- any expenses of  
21 prior discovery as taxable court costs. He can  
22 order that facts be established.

23 JUDGE CASSEB: Could you order the  
24 lawyer for contempt?

25 CHAIRMAN SOULES: Only if he's filed

1 an experimental lawsuit.

2 MR. LOW: That's right.

3 CHAIRMAN SOULES: Now, this is the  
4 first order. He can refuse to allow the party to  
5 proceed with -- strike pleadings. He can -- well,  
6 he can treat it as contempt of court under six.  
7 He can charge the costs. Now, those are the  
8 215(2)(b) sanctions.

9 JUSTICE WALLACE: The only contempt  
10 though is for failure to obey any orders.

11 CHAIRMAN SOULES: Okay.

12 MR. ADAMS: Does it have to be  
13 rejected -- it would have to be interpreted that  
14 these sanctions will be the type that the Court  
15 can impose, because it would be a type of  
16 sanctions.

17 CHAIRMAN SOULES: So, the Supreme  
18 Court's history of sanctions cases is going to  
19 overlay on this without starting over again if we  
20 use this. I don't know whether that responds to  
21 you, Judge, but that's the concept that is  
22 intended to be here.

23 PROFESSOR DORSANEO: There's a little  
24 bit of a problem in some of these we should have  
25 fixed. Like 2(b)(8) talks about an award of

1 expenses but it uses the term "unfortunately" from  
2 the prior version of the rule caused by the  
3 failure. And really there are some problems that  
4 don't make 2(b) as flexible sanction-wise as it  
5 ought to be when it was changed from a two-step to  
6 a one-step business. See the language here,  
7 "caused by the failure," well, that really is a  
8 troublesome language because it suggests only  
9 violation of court order.

10 JUSTICE WALLACE: Did I direct that --  
11 maybe -- to go with 215(3) -- that is 1, 2, 3, 4,  
12 5 and 8 of 2(b). That's correct, that's what  
13 we're going to.

14 CHAIRMAN SOULES: Except I think six  
15 -- well, six has to do with the order. That's  
16 right. It would be the same ones that are  
17 referred to in 166(b)(3).

18 JUSTICE WALLACE: That one there is a  
19 whole lot -- the one we're looking at.

20 CHAIRMAN SOULES: It's available under  
21 Rule 215(b). 215(3).

22 PROFESSOR DORSANEO: 215(3).

23 CHAIRMAN SOULES: 215(3), yes.

24 PROFESSOR DORSANEO: We have to  
25 recognize that (a) has that problem within it.

1 It's hard to get from 3 back to 2.

2 CHAIRMAN SOULES: Right. We can fix  
3 that in the next couple years. We'll know that  
4 that's there.

5 JUSTICE WALLACE: At least we know  
6 what we're looking at.

7 CHAIRMAN SOULES: So is that  
8 responsive to your question, Judge?

9 JUSTICE WALLACE: Yes.

10 CHAIRMAN SOULES: Okay. Now, going to  
11 the last paragraph. It shows that the burden is  
12 on the moving party. The presumption is that  
13 pleadings and motions and other papers are filed  
14 in good faith.

15 MR. LOW: Where is the definition of  
16 "groundless"?

17 CHAIRMAN SOULES: That's out of the  
18 statute which was a pretty good -- I thought, that  
19 the lawyers were able to get. And let me see if I  
20 can find it.

21 MR. McMANS: That's out of the  
22 repealed statutes.

23 CHAIRMAN SOULES: The repealed  
24 statutes.

25 MR. LOW: This "groundless in law,"

1 that could hit on a lot of cases that --

2 CHAIRMAN SOULES: Groundless means no  
3 basis in law or fact.

4 MR. ADAMS: The sentence says -- as I  
5 recall, the Senate's version of this said  
6 groundless meant there was no basis in law and in  
7 fact. In the final version it ended up with an  
8 "or" in there.

9 JUDGE CASSEB: Under (a)?

10 MR. ADAMS: Add under the definition  
11 of groundless, right at the bottom of the rules,  
12 it should be groundless -- groundless would be  
13 defined as -- for the purposes of this rule would  
14 be no basis in law and fact.

15 JUDGE CASSEB: "And"?

16 MR. ADAMS: Yes. This or -- that's  
17 the way the Senate passed it. And then it went to  
18 the conference committee and came out with or.

19 CHAIRMAN SOULES: Which do you think  
20 is fairer?

21 MR. ADAMS: The problem is, as Buddy  
22 just pointed out, the fact that the lawyers that  
23 are on -- that are presenting issues that have not  
24 been, you know, pushing back some of the clouds of  
25 darkness, in a sense. And if they lose on that

1 push, they may not have any -- they may be  
2 groundless because there was no basis in law for  
3 them to do what they -- strict liability, the  
4 first strict liability suit or the first -- maybe  
5 some of these cancer cases, or they might come  
6 back and say, well, there was no basis in fact for  
7 somebody contending that asbestos causes cancer.  
8 They lost the case. So then they might get  
9 charged with not having -- the suit was groundless  
10 because it wasn't enough medical testimony or it  
11 wasn't supported.

12 MR. MORRIS: The thing is, even if  
13 it's groundless -- even if it's found to be  
14 groundless, it still has to be brought in bad  
15 faith or brought for the purpose of harrassment.  
16 To me, that's the double protection against that  
17 exact problem in the proposal.

18 MR. ADAMS: But in the discussions,  
19 that was a major concern whether that ought to be  
20 an "or" or an "and."

21 MR. LOW: But where you take no basis  
22 in law or in fact, I'm thinking of an indemnity  
23 agreement. I was just as right as rain, and I  
24 would accuse the other side of being just  
25 completely wrong because the facts were clearly --

1           it was an employee. The law was clear. And low  
2           and behold, it ain't anymore.

3           I mean, you know, they changed the law, and  
4           I'm not saying they shouldn't have. But the facts  
5           in the law, I was just as right as I could be.  
6           The other side -- the judge just, I mean,  
7           ridiculed them for contesting it, it was so  
8           clear. Unfortunately somebody else took it to the  
9           Supreme Court and got the Supreme Court to change  
10          the law before we got there and I ended up  
11          losing. But that's what bothers me. They don't  
12          have a right to change the law.

13                   CHAIRMAN SOULES: Well, you can bring  
14          a suit that's groundless, that is, there's no  
15          basis in law or fact, as long as you don't bring  
16          it in bad faith or for purposes of harrassment.  
17          That's Lefty's point.

18                   MR. MORRIS: This thing goes in  
19          circles though. A number of years ago I tried a  
20          case over here where -- back when the statute was  
21          that -- transfer the homestead. The wife had to  
22          be taken separate and apart. Do you remember  
23          that?

24                   CHAIRMAN SOULES: Yes.

25                   MR. MORRIS: And I went over and Judge



1 Meyers threw me out on my ear. The lady hadn't  
2 been taken separate and apart, I believe it was,  
3 and the Court of Appeals also threw me out on my  
4 ear. And the Supreme Court of Texas nine zip  
5 said, no, that old law is bad. And that was  
6 probably not only groundless but could have been  
7 presumed to have been brought for purposes of  
8 harrassment.

9 CHAIRMAN SOULES: Well, at some point  
10 a novel lawsuit is a frivolous lawsuit. That's  
11 what this is all about. And that's what we're  
12 trying to do, is try to draw that line at a fair  
13 point. And, unfortunately, we've got to do it  
14 with words.

15 PROFESSOR EDGAR: There's a  
16 presumption that it's in good faith, though,  
17 Luke. There's a presumption of good faith.

18 CHAIRMAN SOULES: And that presumption  
19 was written in there so that you -- to say that  
20 there is a presumption that it was brought in good  
21 faith.

22 MR. LOW: When we get on down to it,  
23 I've got a sentence to add.

24 CHAIRMAN SOULES: All right. Then,  
25 the Court may not impose sanctions. We've got a

1 90-day escape. General denial does not constitute  
2 a violation of the rule and amount requested for  
3 damages does not constitute a violation of the  
4 rule.

5 MR. LOW: I would add the sentence  
6 that a plea in good faith could change the  
7 existing law. I would put something like that. I  
8 don't know how to word it, but -- I haven't really  
9 drawn it out, but something that would take care  
10 of the problem where a plea -- and it might open a  
11 can of worms and might nullify everything that's  
12 done. It might not can be done. But I was  
13 thinking about a plea to -- a good faith plea to  
14 change existing law.

15 PROFESSOR CARLSON: But, you know, you  
16 don't need that. You really don't need that.

17 MR. BRANSON: The statute had that in  
18 there, Buddy.

19 MR. LOW: All right, go ahead.

20 CHAIRMAN SOULES: Buddy, if it's in  
21 good faith --

22 MR. BRANSON: The statutes read  
23 "warranted by existing law" or "good faith  
24 argument for extension, modification or reversal  
25 of existing law."

1                   CHAIRMAN SOULES: Buddy, just said  
2 "good faith extension." If it's in good faith,  
3 that's it. There's no bad faith. You've already  
4 got that covered in the other language.

5                   MR. LOW: Okay. I just -- when you  
6 said general denial, you know, that's pretty clear  
7 also and everybody -- nobody ever thought, you  
8 know, denial would be in bad faith too but they  
9 put it in there.

10                  CHAIRMAN SOULES: Any further  
11 discussion?

12                  MR. ADAMS: Yes. The committee might  
13 want to consider the language in the statute that  
14 says, "The Court may not order an offending party  
15 to pay the incurred expenses of a party who stands  
16 in opposition to the offending pleadings if the  
17 Court had the effect of the same subject matter  
18 imposed to sanctions on the party who now stands  
19 in opposition to the offended pleading." That's  
20 not in there. We discussed it -- I mean, I  
21 mentioned that when I discussed the statute. But  
22 it's not in this proposed rule.

23                  PROFESSOR DORSANEO: That's a terrible  
24 provision.

25                  MR. ADAMS: What?

1                   PROFESSOR DORSANEO: That's a terrible  
2 provision in the statute.

3                   MR. ADAMS: I think the Court ought to  
4 apply the standard however the chips fall, is my  
5 personal thought about it. And if you thought  
6 somebody did somebody five dollars worth of  
7 damage, then a wrong doesn't mean that they might  
8 not need to be sanctioned 100 dollars. And so  
9 however the sanctions fall, they ought to fall.

10                   And the way this rule is presented to the  
11 committee, that's the way it will be, and I think  
12 that's a fair rule to have rather than just  
13 completely prevent any type of benefit of the rule  
14 by virtue of some small offense.

15                   PROFESSOR EDGAR: I'd like to ask  
16 Gilbert a question.

17                   CHAIRMAN SOULES: Hadley, yes, sir.

18                   PROFESSOR EDGAR: In the very first  
19 paragraph, second sentence, you had deleted "or  
20 party." May I ask why?

21                   CHAIRMAN SOULES: Added.

22                   PROFESSOR EDGAR: But it's in  
23 brackets.

24                   CHAIRMAN SOULES: But it's  
25 underscored.

1 PROFESSOR EDGAR: Okay. All right.

2 MR. ADAMS: Are you ready to move the  
3 question?

4 PROFESSOR EDGAR: I would like to  
5 change the masculine in the second line to read  
6 "The certificate by the signatory."

7 CHAIRMAN SOULES: We just -- we've  
8 been pluralizing which makes it awkward, but that  
9 seems to be the practice. That -- "by them that  
10 they have read."

11 PROFESSOR EDGAR: Well, then you have  
12 to say attorneys or parties then up above. You're  
13 in the singular.

14 CHAIRMAN SOULES: "The signature of  
15 attorneys or parties constitutes" -- "The  
16 signatures of attorneys or parties constitute a  
17 certificates by them that they have read and to  
18 the best of their knowledge" -- if you find  
19 anymore of those, Hadley, will you help me?

20 PROFESSOR EDGAR: On the very next  
21 line, the very next word, we'll have to say  
22 "attorneys or parties who bring," because then  
23 down there you talk about "he."

24 CHAIRMAN SOULES: Can I give you my  
25 draft and can you clean that up for me and we'll

1 make those changes --

2 PROFESSOR EDGAR: All right.

3 CHAIRMAN SOULES: -- so that it won't  
4 be masculine or feminine.

5 PROFESSOR EDGAR: All right.

6 CHAIRMAN SOULES: Okay. Those in  
7 favor then of Rule 13 as -- Rusty, yes, sir,  
8 excuse me.

9 MR. McMAINS: I would like to add  
10 something about the operation of the rule, and it  
11 is one that comes in the statute as well. Bill,  
12 did this come through you as well? The rule has  
13 this thing -- that before the 90th day after the  
14 Court makes determination. The rule, I think,  
15 also basically follows the statute that says a  
16 hearing -- when is it we're supposed to do this?  
17 Because I know that the statute deals with it even  
18 at the trial.

19 JUDGE RIVERA: Before the 90th day.

20 MR. McMAINS: It just says they make a  
21 determination.

22 MR. ADAMS: You have 90 days --

23 MR. McMAINS: Upon motion or upon its  
24 own remission. What I'm getting at is, you've got  
25 this thing about 90 days. And under the statute,

1 you can do it at the trial. You can do it at the  
2 trial. You go to the trial and say, well, there's  
3 just no basis for this. And you can do whatever  
4 sanctions you're supposed to do, except you've got  
5 your 90-day grace period which, theoretically, may  
6 be after the judgment. It conflicts with the  
7 plenary jurisdiction rules that we have under  
8 329(b) anyway, and besides which the entire  
9 imposition of Rule 215 talks about things like  
10 striking pleadings. And, of course, even the  
11 statute talks about things like striking  
12 pleadings, which if you make the determination  
13 after trial in a separate hearing --

14 CHAIRMAN SOULES: You can still strike  
15 pleadings and enter a default judgment but not  
16 after the plenary power exists.

17 MR. McMANS: Well, but you're doing  
18 it after the trial. That's all I'm saying.

19 CHAIRMAN SOULES: Court of Civil  
20 Appeals Case, Chick Smith (phonetic).

21 MR. McMANS: I understand the Chick  
22 Smith case. And I'm just saying, now you're  
23 saying that they've got basically 90 days and  
24 you're going to extend the plenary power as well?

25 CHAIRMAN SOULES: No, not extend the

1 plenary -- that's a problem with the 90 days. If  
2 you're going to have an escape valve, it does run  
3 into some trial -- it runs afoul with some  
4 scheduling problems in the other trial processes.  
5 Or you cannot have an escape valve. You can just  
6 say the Court does it when it has a hearing.

7 MR. McMAINS: I mean, you go try your  
8 case and you get a verdict and you win ten million  
9 dollars, and three months later you get a decision  
10 by the Court that says that, "I'm striking your  
11 pleadings and finding your lawsuit is frivolous."

12 MR. ADAMS: No. Let me say, the  
13 thought was about the mechanics of it -- and that  
14 may not be the way it works and maybe you've found  
15 something, but let's think about it from this  
16 standpoint: That the lawyer has 90 days after the  
17 judge rules that it's frivolous to take action.  
18 If the judge doesn't rule before 90 days before  
19 trial, then you -- then your option is not  
20 available. So, if you're going to file something  
21 under this rule, I would think that you're going  
22 to have to do it in advance -- you're going to  
23 have to get a ruling from the court.

24 CHAIRMAN SOULES: It says 90 days  
25 after determination.



1 MR. ADAMS: You're going to have to --  
2 the practicalities are you're going to have to get  
3 a ruling by the Court 90 days before you start the  
4 trial on the case because the plaintiff -- or the  
5 offending party or the defendant, whatever the  
6 offending party is, is going to have 90 days to  
7 withdraw it.

8 MR. LOW: And if you want that, you'd  
9 better get the trial put off.

10 MR. ADAMS: That's right.

11 MR. BRANSON: But there's nothing that  
12 would prevent this from applying to trial motions  
13 such as motion in limine, for example.

14 MR. McMains: There's also nothing  
15 that prevents the Court from not doing it on his  
16 own initiative at any time when he has  
17 jurisdiction, even after the trial. There is  
18 nothing in this rule to limit that.

19 CHAIRMAN SOULES: That's right.

20 JUDGE RIVERA: In deceptive trade we  
21 give it to the jury, is it frivolous? What if  
22 they say "yes"?

23 MR. TINDALL: Yes, the rule needs to  
24 exclude -- DTPA cases like the statutes because  
25 it's got its own frivolous lawsuit standards.

1                   CHAIRMAN SOULES: Okay. The Court  
2 doesn't have to do anything under this rule.

3                   MR. ADAMS: That's the reason that  
4 exception existed.

5                   MR. TINDALL: I know. So, if we're  
6 going to knock out this statute and have this  
7 rule, shouldn't it -- either we need to tinker  
8 with the DTPA frivolous thing or exclude it from  
9 this rule?

10                  CHAIRMAN SOULES: The Court doesn't  
11 have to do anything under this rule if there is  
12 another frivolous finding that imposes sanctions  
13 or does something else. But the Court can, under  
14 this rule, go beyond attorneys' fees under -- for  
15 frivolous under the DTPA, and probably -- and may  
16 -- in some cases maybe should.

17                  MR. ADAMS: I think he's probably  
18 right, though. I think it ought to exclude DTPA  
19 in Chapter 21, because they've got their own  
20 provisions and the Court deals with it and the  
21 tryer of facts deal with it and so on, covered by  
22 those statutes. And this rule probably ought to  
23 exclude those.

24                  MR. LOW: Yes. But what about the  
25 DTPA case where the pleading is not as such, but

1 just a routine type pleading, it doesn't include  
2 deceptive trade practice but something else, just  
3 common variety thing and it's not deceptive trade  
4 practice except -- do you just exclude that, all  
5 deceptive trade practice cases, from this  
6 regardless of what the --

7 MR. ADAMS: Maybe you could say  
8 pleadings that are based upon DTPA or Chapter --

9 MR. TINDALL: Insurance cases and --

10 MR. ADAMS: Because the other  
11 statutory benefits already exist. And the whole  
12 scheme is set up and the case law is done and all  
13 for the benefits provided by Chapter 21 and DTPA.

14 MR. LOW: File a motion that if you  
15 know it's frivolous to strike something in the  
16 pleading, just any case. The fact that it's a  
17 DTPA wouldn't make any difference.

18 CHAIRMAN SOULES: This is a different  
19 standard, isn't it, than the DTPA statute? Under  
20 the DTPA statute there can be the fact finder  
21 findings that kick in certain statutory  
22 penalties. But the judge has power over that case  
23 beyond just what the jury and the statute says  
24 happens from the jury. He's still got the power  
25 to rule over that DTPA case in the general purview

1 of the rules of civil procedure. And if the  
2 parties have gone so far as to violate this Rule  
3 13, he can bring sanctions under this Rule 13 as  
4 well in any case, no exceptions, whether there are  
5 other types of things in the statute or not.

6 MR. TINDALL: Why should the DTPA have  
7 a double whammy thing?

8 CHAIRMAN SOULES: Because the  
9 legislature put that whammy in. We shouldn't be  
10 excepting any case in the general rule of civil  
11 procedures. If they want to take that out, that's  
12 fine. But a rule of civil procedure should apply  
13 to every case, because the judge is going to  
14 control them just like in every case. And this is  
15 the court's decision. This is not something that  
16 the jury does. And it's on a different standard,  
17 on a different definition.

18 PROFESSOR BLAKELY: Why should he have  
19 90 days to withdraw? Why not immediately or he's  
20 in trouble?

21 MR. ADAMS: You need discovery.

22 CHAIRMAN SOULES: To do discovery.  
23 And maybe he needs to file something that puts the  
24 subject matter at issue for discovery purposes and  
25 take a doctor's deposition or do something in

1 order to satisfy himself. Now, how long a period  
2 should it be? That 90 days was a negotiated  
3 period. Frank.

4 MR. BRANSON: Mr. Chairman, wouldn't  
5 it be more consistent if after the 90 days you put  
6 in "or 30 days after entry of judgment," whichever  
7 came first? Because you've got some trial  
8 motions, and even post-trial motions, that could  
9 be held frivolous. And you don't want the time  
10 running after the Court loses jurisdiction.

11 PROFESSOR CARLSON: What if it said  
12 "but in any event, within the time the Court has  
13 plenary power of it"?

14 MR. BRANSON: Something. You've got  
15 to cover that problem someplace. We've been  
16 dealing with this problem as pleadings and  
17 pretrial motions, and our rule really doesn't  
18 limit itself.

19 CHAIRMAN SOULES: Okay. After it says  
20 -- "before the 90th day after the court makes a  
21 determination of such violation or before the  
22 trial court loses its plenary jurisdiction."

23 MR. ADAMS: Or say "in no event".

24 CHAIRMAN SOULES: Whichever first  
25 occurs, that's the concept of it.

1           MR. BRANSON: I think there might be  
2 some merit to including something like this in the  
3 appellate rule.

4           CHAIRMAN SOULES: That makes sense, it  
5 does for me.

6           MR. BRANSON: I mean, we haven't  
7 addressed that issue, but we certainly  
8 encounter --

9           CHAIRMAN SOULES: I don't mean put it  
10 in the appellate rules, but put something here  
11 that you've got to get it withdrawn before the  
12 trial court loses plenary jurisdiction or you're  
13 stuck with it.

14          MR. BRANSON: That certainly seems  
15 consistent. I wondered if there might be  
16 occasionally some groundless motions made on  
17 appeal that might need to be addressed.

18          CHAIRMAN SOULES: You know, I think  
19 the date should be prior to the time the trial  
20 court enters judgment, because how do those  
21 sanctions get enforced if the Court has already  
22 lost its plenary jurisdiction and you haven't  
23 withdrawn it until the moment it -- in other  
24 words, 90 days after the Court makes the  
25 determination that it's frivolous or prior to the

1 time that the Court enters judgment. Then that  
2 court still has 30 days after that to enforce  
3 those sanctions for your nonwithdrawal.

4 MR. BRANSON: Well, but how about  
5 frivolous motions that were made post verdict?  
6 And certainly we've all seen some of those.

7 CHAIRMAN SOULES: But still you've got  
8 to do it before judgment is entered. It's either  
9 at the point of judgment or at the point of loss  
10 of plenary jurisdiction. And I'm trying to get a  
11 period there where the Court still has some  
12 authority to do something about these sanctions  
13 that haven't been -- for pleadings that haven't  
14 been withdrawn. I'm just trying to create a  
15 period there if we need it. I don't know if we  
16 do. If we do, then the last thing that happens is  
17 -- of course, I guess you could have a frivolous  
18 motion for new trial.

19 MR. SADBERRY: A trial court retains  
20 some jurisdiction even after judgment such as in  
21 post judgment discovery. So, that's something --  
22 I don't know if this would be the same type of  
23 issue that's covered by that type  
24 of --

25 JUSTICE WALLACE: There's a strong

1 argument to be made by some of these 400 page post  
2 discovery interrogatories, frivolous and bad faith  
3 and a lot of other things, and that goes on.

4 PROFESSOR EDGAR: But they're subject  
5 though to the sanctions under Rule 215(b).

6 CHAIRMAN SOULES: That's true.

7 PROFESSOR EDGAR: You see, all the  
8 post trial -- all the post trial discovery devices  
9 are subject to the same sanctions that the  
10 pretrial discovery are. So, that's covered. I  
11 think -- but you're right. But those are covered  
12 now.

13 MR. SADBERRY: But couldn't this rule  
14 continue within the court's jurisdiction such as  
15 the post judgment discovery sanctions power of the  
16 court?

17 CHAIRMAN SOULES: Of course, if the  
18 Court has imposed sanctions at the determination  
19 hearing and you've got 90 days to withdraw them  
20 and they're not, then they just become subject to  
21 writ of execution, don't they? You have standards  
22 penalties, so that at the expiration of the  
23 plenary power would be a date that could be used.

24 MR. BRANSON: I'm more comfortable  
25 with that than any that we've talked about.



1                   CHAIRMAN SOULES: Okay. With that  
2 change, are we ready to vote?

3                   MR. McMAINS: Luke, can you tell me  
4 where there is a rule in our rules that allows us  
5 to amend pleadings after judgment?

6                   CHAIRMAN SOULES: Amend pleadings,  
7 no. But file frivolous motions --

8                   MR. McMAINS: You cannot amend  
9 pleadings after judgment under our --

10                  CHAIRMAN SOULES: But you can file  
11 frivolous motions and real motions.

12                  MR. TINDALL: Luke, Frank asked an  
13 issue that I don't know that was answered or not.  
14 Why are we not using this language about "not  
15 warranted by existing law or a good faith  
16 argument, extension of modification or reversal of  
17 existing law" -- why aren't we using that  
18 definition of groundless? I think it's a good  
19 definition.

20                  MR. BRANSON: I thought it was. I  
21 think Luke was right. One of the few things that  
22 actually appeared to be thought through.

23                  CHAIRMAN SOULES: What?

24                  MR. BRANSON: One of the few things  
25 that actually appeared to thoroughly thought

1 through.

2 CHAIRMAN SOULES: Well, the way this  
3 is written is a good faith bad faith. And if you  
4 bring a good faith -- the good faith effort to  
5 extend existing law, I believe, embraces that.  
6 Maybe it doesn't.

7 MR. TINDALL: Well, good faith is in  
8 this definition of groundless in the statute.  
9 It's not warranted by existing law or good faith  
10 -- you can catch it either way.

11 CHAIRMAN SOULES: We sort of got this  
12 around the table earlier. Groundless -- you can  
13 bring a groundless lawsuit as long as you bring it  
14 in good faith. You've got to bring -- in order to  
15 be sanctioned under here --

16 MR. TINDALL: But we have no  
17 definition of groundless.

18 CHAIRMAN SOULES: Yes, we do, no basis  
19 in law or fact. You can bring a case that has no  
20 basis in law or fact as long as you do it in good  
21 faith. Because to get sanctioned here, it would  
22 have to be both groundless and either brought for  
23 harrassment or brought in bad faith.

24 MR. TINDALL: Well, that depends on  
25 where that "or" -- you know, maybe we're in the

1 rules of grammer here.

2 CHAIRMAN SOULES: Are you looking at  
3 the statute or the rules?

4 MR. TINDALL: I'm looking at the  
5 proposed Rule 13 we're about to vote on.

6 CHAIRMAN SOULES: Okay.

7 MR. TINDALL: And it says groundless  
8 and brought for the purpose of harrassment. Now,  
9 what is the definition of "groundless"?

10 CHAIRMAN SOULES: It's down there on  
11 the bottom, two lines from the bottom.

12 MR. TINDALL: Means no basis in law or  
13 in fact. But what if you're -- what is wrong with  
14 the suggestion, "or an extension modification  
15 reversal of existing law"?

16 MR. BRANSON: Okay. You could add  
17 right there, Luke, "and is not a good faith  
18 argument for extension, modification or reversal  
19 of existing law," and I think you've built in an  
20 additional safeguard that the legislature  
21 appropriately intended to build.

22 CHAIRMAN SOULES: I regarded that as a  
23 limitation. I felt that does not -- I think  
24 that --

25 MR. TINDALL: Explain why -- to me,

1 that opens it for you to test the law.

2 MR. BRANSON: Yes, it did me too. You  
3 can make it an "and" provision. You could make it  
4 an "or" provision, I mean.

5 JUDGE CASSEB: I think you can put an  
6 "or" in there, Luke, and see how it sounds. I  
7 think with an "or" in there it may do it.

8 CHAIRMAN SOULES: Say that again. I'm  
9 lost, I'm sorry.

10 MR. BRANSON: At the end of  
11 "Groundless for purposes of this rule means no  
12 basis in law or in fact or is not a good faith  
13 argument for extension, modification or reversal  
14 of existing law." Just take it out of section  
15 3(b).

16 JUDGE CASSEB: Take it can out of the  
17 Section 3(b) of the statute.

18 CHAIRMAN SOULES: Okay. "Not  
19 warranted by a good faith argument for the  
20 extension" --

21 JUDGE CASSEB: "For the extension  
22 modification or reversal of existing law."

23 MR. TINDALL: How did you view those  
24 as words of limitation, Luke?

25 CHAIRMAN SOULES: Just a minute. When

1 I got to the point where they had to find that I  
2 had no basis in law or fact and they had to prove  
3 that even the case that I brought that had no  
4 basis in law or in fact had to have been brought  
5 in bad faith and for purposes of harrassment, I  
6 felt I was in safe harbor and I didn't need  
7 something else for the court to stop testing me  
8 against.

9 I felt like this -- but, you know, I  
10 equivocate about it. I'm not saying that I feel  
11 firmly about it. I do feel equivocal about it.  
12 But at that point, I thought I'm in safe harbor,  
13 I'm not going to bring anything this far out.

14 MR. BRANSON: Luke, in retrospect,  
15 that's going to have to read "and is not" instead  
16 of "or is not," because you make it inclusive.

17 PROFESSOR EDGAR: It should be "law  
18 fact or."

19 MR. BRANSON: Right. It should be  
20 "Groundless for purposes of this rule means no  
21 basis in law or in fact and is not" -- whatever  
22 that statute says.

23 CHAIRMAN SOULES: I've got it. That's  
24 fine. I've got it in. I've no problem. I had it  
25 out and I didn't have any problem. Okay. Those

1 in favor of the rule as now set forth before the  
2 committee, show by hands. Opposed?

3 MR. SPARKS (EL PASO): I'd like to  
4 state in the record that I am opposed to the rule  
5 because I think it is an absolute mistake to  
6 attempt to repeal the statute under 22.004.

7 CHAIRMAN SOULES: That's 15 to two.  
8 Okay. Who's next?

9 MR. LOW: Luke, there was, you know,  
10 one thing you had asked me to mention earlier back  
11 when we were on citation, and you were talking  
12 about applying maybe the same rule to the JP  
13 courts 534 and 535, you know, citation telling  
14 those people that they might have a judgment  
15 against them in a separate section of citation for  
16 JPs.

17 CHAIRMAN SOULES: Buddy, would you put  
18 that in a motion for me? And I'm going to write  
19 it here on a piece of yellow pad.

20 MR. LOW: Yes. I would move that the  
21 changes we made with regard to citation under  
22 other civil suits -- and I've forgotten the rule  
23 -- would apply to 534 regarding citations for JP  
24 cases and 535 with exception -- there's 10 days  
25 there instead of 20 -- but the same principles

1 would apply, you know, telling them that they have  
2 a default against them and all that.

3 CHAIRMAN SOULES: Let me find the  
4 rules and let me look at them just a second.  
5 Okay. To amend -- or to add the legend from 103.  
6 And then we'll have a caveat and that is they are  
7 10 days -- are they both 10 day rules?

8 MR. LOW: Yes, JP is 10 days -- or the  
9 Monday after 10 days, I think. So, you know, it  
10 would state -- but basically it would be the  
11 same.

12 CHAIRMAN SOULES: 10 days instead of  
13 20 days?

14 MR. LOW: Yes. And there may be some  
15 distinction. I think in the JP courts you can  
16 plead oral, I believe. So that would have to be  
17 considered. I'm just talking about the citation.  
18 I think JP courts, you can come in and just -- you  
19 can come to a judge and tell him "I'm here" and  
20 you've made your appearance.

21 PROFESSOR DORSANEO: On the phone.

22 MR. LOW: Yes.

23 PROFESSOR EDGAR: You don't have to  
24 worry about frivolous pleadings, do you?

25 MR. LOW: No.

1  
2 (Off the record discussion  
3 (ensued.

4 CHAIRMAN SOULES: So he's going to --  
5 the business about written --

6 MR. LOW: In writing.

7 CHAIRMAN SOULES: Instead of answer --  
8 the answer really does mean something different  
9 there, doesn't it?

10 MR. LOW: Yes, it does, so it would  
11 have to be modified to the extent -- unless if he  
12 appears or answers. He can make an appearance.

13 CHAIRMAN SOULES: Let me ask you  
14 this: Would you mind writing us a legend and  
15 mailing it to me?

16 MR. LOW: Okay.

17 JUDGE RIVERA: Those citations might  
18 vary from county to county. I know in Bexar  
19 County the citation has a form attached that says  
20 you may answer by appearance by sending in this  
21 form or by calling this number from 8:00 to 5:00  
22 Monday through Friday.

23 MR. LOW: Well, maybe we don't want to  
24 even deal with it. I just thought we might want  
25 to be consistent. If you think that we shouldn't



1 deal with it, then we don't want to --

2 JUDGE CASSEB: Send it in and sign it,  
3 mail it in or call.

4 JUDGE RIVERA: That's what Bexar  
5 County does.

6 CHAIRMAN SOULES: Do you want to leave  
7 it alone?

8 MR. LOW: Yes, let's just leave it  
9 alone. I just thought it would be a housekeeping  
10 chore, but if it's more than that, let's go to  
11 something else.

12 CHAIRMAN SOULES: Harry, why don't we  
13 hear from you about your combination of the  
14 service we've talked about, the constables and all  
15 that. And if -- we could probably go to that and  
16 it's sort of in context without trying to  
17 completely change horses here.

18 MR. TINDALL: Turn to page 374, if you  
19 will. Previously we've worked through Rules 102  
20 to 107. And I was asked to look at possibly  
21 combining into a single rule remaining Rules 99,  
22 100 and 101. And so this is my effort at trying  
23 to do that.

24 Some of the changes we voted here today would  
25 obviously be required to be incorporated into

1 that, particularly the suggestion that if you  
2 don't answer, that default judgment may be  
3 rendered against you. I had put that one  
4 suggestion in here, but it would need to be  
5 rewritten a little bit to incorporate the exact  
6 language. And the alternate down at the bottom  
7 about 20 to 30 days was just a suggestion from the  
8 COAJ and we voted that down.

9 So, taking that apart, the way we have it now  
10 is we have three rules which are issuance -- if  
11 you've got the rule book in front of you -- which  
12 is issuance, and then it's other process, and then  
13 there are requisites. So, I started with one  
14 called issuance, which is -- and I've kind of  
15 tracked a little bit the federal rule here. That  
16 is, "Upon filing of the petition, the clerk will  
17 issue a citation and deliver the citation to  
18 plaintiff or the plaintiff's attorney who shall be  
19 responsible for service and a copy of the  
20 petition." And then "Upon request, separate or  
21 additional citations shall issue against any  
22 defendants."

23 That's very close to the federal rule. It  
24 does one thing that we talked about here before,  
25 and that is somewhat of a proprietary right that

1 the plaintiff's lawyer has to that citation and  
2 that you can get from the clerk as many citations  
3 as you want. Because I know we have that problem  
4 in our county that the clerk will only let you  
5 have one citation per defendant. And until that  
6 expires, he won't issue a pluries or an alias  
7 citation. So, it sort of kills off that problem.

8 And then (b) on form, the only thing I've  
9 taken out is that the citation shall be styled the  
10 "State of Texas" because that's already covered  
11 under Rule 15 about "all writs and process shall  
12 be styled the State of Texas." I just simply  
13 deleted a redundancy there. And then it's signed  
14 by the clerk under seal, contain the name, the  
15 date of the filing, the date of issuance of the  
16 citation. File number and names of the parties  
17 will be directed to defendant and shall state the  
18 name and address of plaintiff's attorney, if any,  
19 otherwise the plaintiff's address and the time  
20 within these rules to require the defendant to  
21 appear and defend and shall notify him that in  
22 case -- which may be exactly what we voted except  
23 for the same language, and then the return date.

24 And the other part I took out, it seemed to  
25 be sort of buying shoes for your feet to say that,

1 "The party filing any plaintiff shall furnish the  
2 clerk with a sufficient number of copies thereof  
3 for use in serving the parties to be served." And  
4 "When copies are so furnished the clerk shall make  
5 no charge therefor." Well, it seemed unnecessary  
6 to say that, so I just editorally took that out.  
7 With that, you have one rule being for issuance  
8 and form of citation, and it keeps the next Monday  
9 after the expiration of 20 days.

10 MR. LOW: Are there any substantive  
11 changes other than just combining --

12 MR. TINDALL: No, it combines those  
13 into one rule so that we would then have --  
14 effectively we would have Rule 99. We would have  
15 Rule 103, because we've already repealed 102. We  
16 would have Rule 103. Let me get my rule book  
17 here. I have to get the rule amendments.

18 PROFESSOR EDGAR: I've got it, 105 and  
19 then 106.

20 MR. TINDALL: That's right.

21 PROFESSOR EDGAR: And 107.

22 MR. TINDALL: Those are the only rules  
23 we would have then. And I think it's a good thing  
24 to combine them and incorporating your language.  
25 It would be the expressed language, Luke, about if

1 you don't answer you lose. "You have been sued"  
2 -- put that "each citation shall contain"  
3 language.

4 CHAIRMAN SOULES: Judge Casseb just  
5 made a point here that who shall be responsible  
6 for prompt service of the citation? What I'm  
7 concerned about is, is some public official going  
8 to read that as discharging that public official  
9 of his responsibility for prompt service? And we  
10 certainly need to avoid that.

11 MR. TINDALL: Well, certainly that's  
12 not the intended consequence of that.

13 CHAIRMAN SOULES: So, we need to make  
14 it clear that what we intend is not that, I  
15 guess.

16 PROFESSOR EDGAR: What's your concern,  
17 Luke?

18 CHAIRMAN SOULES: That we're supposed  
19 to somehow accomplish service -- it says the  
20 plaintiff's attorney is responsible for service.

21 MR. TINDALL: Well, I don't know how  
22 -- that, to me, is really a strange construction  
23 when you look at the new Rule 103 about who's to  
24 serve papers, I mean, that would really be --  
25 Judge Casseb, 103 makes it very clear who may

1 serve. I think what I -- in fact, I kind of like  
2 99 because it makes it clear the party filing the  
3 lawsuit should have the responsibility of seeing  
4 that the papers get to the appropriate officer in  
5 Oklahoma or Pampa or wherever it is.

6 JUDGE CASSEB: That may be all right  
7 when you have an out-of-county citation. But  
8 within the county -- in our county it's done  
9 automatically by the district clerk.

10 MR. TINDALL: Sure.

11 PROFESSOR EDGAR: Would you be more  
12 comfortable, Judge Casseb, with saying "shall be  
13 responsible for obtaining prompt service"?

14 CHAIRMAN SOULES: Yes.

15 JUDGE CASSEB: Yes.

16 PROFESSOR EDGAR: I see what you're  
17 saying and I'm -- would "obtaining prompt service"  
18 perhaps clarify that just a little bit?

19 CHAIRMAN SOULES: It does for me.

20 MR. TINDALL: He shall be responsible  
21 for obtaining.

22 MR. LOW: See, the clerk doesn't even  
23 -- what Judge Casseb is getting at --

24 MR. TINDALL: Oh, I know, they go  
25 directly to the constable.

1 MR. LOW: I just tell them -- say,  
2 "Look, send this down to Frank Rollins (phonetic)  
3 and he'll get it out," you know, and that's it.  
4 Now, they're going to say "Wait a minute, I've got  
5 to get it to you and you get it to him. Why do  
6 that? He's 10 doors down from you." Well, it's  
7 not my duty anymore.

8 CHAIRMAN SOULES: And the plaintiff or  
9 the plaintiffs -- citation is not always used.  
10 You have the third party action. Can we just say  
11 "deliver the citation to the requesting party or  
12 attorney"?

13 MR. TINDALL: Well, I thought about  
14 that. Right now --

15 CHAIRMAN SOULES: That's the way it  
16 is.

17 MR. TINDALL: We've sort of done --  
18 the flip side of that is to -- "to issue the  
19 citation for the defendant. The defendant is  
20 requested by any party or his attorney." We could  
21 say "to the requesting party."

22 CHAIRMAN SOULES: "Or attorney."

23 MR. TINDALL: Sure.

24 MR. LOW: Luke, what do you do in  
25 those situations where the judge has ordered the

1 clerk to serve by certified mail or something? He  
2 isn't going to deliver it to the lawyer.

3 CHAIRMAN SOULES: Well, in effect  
4 it's --

5 MR. TINDALL: I think you want to  
6 preserve the right of a lawyer to get that  
7 citation though.

8 MR. RAGLAND: Why couldn't we just put  
9 in there "as directed by the plaintiff's attorney"  
10 -- deliver it as directed by the plaintiff's  
11 attorney or the person putting --

12 MR. TINDALL: That gets it back to my  
13 office or back over across the street to the  
14 sheriff, sure.

15 MR. LOW: Or mail it out certified  
16 mail as the judge ordered.

17 MR. TINDALL: "And shall deliver the  
18 citation to the plaintiff" --

19 CHAIRMAN SOULES: "To the requesting  
20 party or attorney."

21 MR. RAGLAND: No, "as directed by the  
22 requesting party."

23 MR. TINDALL: Yes.

24 CHAIRMAN SOULES: Read that again, I'm  
25 sorry. "Upon the filing of the petition the clerk



1 shall forthwith issue a citation" -- and do what  
2 with it?

3 MR. RAGLAND: Deliver it as directed  
4 by the requesting party.

5 CHAIRMAN SOULES: "As directed by the  
6 requesting party or attorney." Then what?

7 MR. TINDALL: The party requesting  
8 citation shall be responsible -- I think it breaks  
9 that sentence. "The party requesting citation  
10 shall be responsible for obtaining prompt service  
11 of the citation and a copy of the petition."

12 MR. SPIVEY: Do you want to say prompt  
13 -- "shall be responsible for making prompt  
14 service" or just "service," because if you say  
15 prompt service, you may just be forcing an  
16 impossibility on them.

17 MR. TINDALL: I don't care.

18 MR. SPIVEY: Or "shall promptly seek  
19 service."

20 MR. TINDALL: He just shall be  
21 responsible for obtaining service.

22 MR. SPIVEY: Yes. How about that?

23 CHAIRMAN SOULES: Obtaining service,  
24 okay.

25 JUDGE RIVERA: Luke, I have a

1 question.

2 CHAIRMAN SOULES: Yes, sir, Judge.

3 JUDGE RIVERA: On the first sentence,  
4 "Upon the filing of the petition," you know, a lot  
5 of cases are waiver or they're noncitation, and  
6 the clerk doesn't issue a citation.

7 MR. TINDALL: It wouldn't come into  
8 effect if you didn't --

9 PROFESSOR EDGAR: Rule 99 wouldn't be  
10 applicable.

11 JUDGE RIVERA: It says "Upon the  
12 filing of a petition."

13 PROFESSOR EDGAR: The issuance -- see,  
14 this is all under citation.

15 MR. TINDALL: Serving is not a  
16 mandatory issuance of the citation. If you don't  
17 pay for it, you're not going to --

18 PROFESSOR EDGAR: This whole section,  
19 beginning with Rule 99, Section 5, which is  
20 citation --

21 JUDGE RIVERA: Yes.

22 PROFESSOR EDGAR: And none of this is  
23 -- if you have a waiver, then you're never even  
24 going to be involved with Section 5.

25 CHAIRMAN SOULES: What Judge Rivera's

1 pointing -- let's see.

2 PROFESSOR EDGAR: Well, you see, Rule  
3 99 as it now reads says when a petition is filed  
4 you shall promptly issue citation. We don't do  
5 that. We never have done that.

6 MR. ADAMS: It says "as shall be  
7 requested," and it used not to say that and it  
8 used to be automatic. And you're making it  
9 automatic again.

10 CHAIRMAN SOULES: That's right. And  
11 what I was going to say, as Judge Rivera is  
12 pointing out, "Upon the filing of the petition,  
13 the clerk when requested shall forthwith issue a  
14 citation."

15 PROFESSOR EDGAR: There you go.

16 CHAIRMAN SOULES: Harry, where does  
17 that leave us now on that first paragraph?

18 MR. TINDALL: I think -- do you want  
19 to read your notes? You may be a little bit --

20 CHAIRMAN SOULES: "Upon the filing of  
21 the petition, the clerk when requested shall  
22 forthwith issue a citation and deliver the  
23 citation as directed by the requesting party. The  
24 party requesting citation shall be responsible for  
25 service of the citation" -- "for obtaining service

1 of the citation."

2 MR. TINDALL: Yes. I think that reads  
3 fine.

4 CHAIRMAN SOULES: "Upon request of the  
5 plaintiffs, separate additional citations shall  
6 issue" -- and then we've got a new concept,  
7 "against any defendants" -- "shall be issued by  
8 the clerk." How about that? "Separate or  
9 additional citations shall be issued by the  
10 clerk." Any problem with that?

11 MR. TINDALL: Are you saying "Upon  
12 request of plaintiffs separate or additional  
13 citations shall be" --

14 CHAIRMAN SOULES: "Upon request,"  
15 period. "Upon request separate or additional  
16 citations shall be issued by the clerk" -- "shall  
17 be issued by the clerk."

18 MR. TINDALL: That's good.

19 CHAIRMAN SOULES: Okay. Then I guess  
20 -- I never have quite understood what writs,  
21 process and citations really are. Bill, you  
22 probably know. Is a citation a process -- do we  
23 need to say again "The citation shall be styled  
24 the State of Texas"? Or does Rule 15 where it  
25 says "All processes shall be styled the State of

1 Texas" take care of that?

2 PROFESSOR EDGAR: Well, you've got  
3 writs of garnishment, writs of sequestration.  
4 Those aren't processes.

5 CHAIRMAN SOULES: Well, but it says  
6 all writs and process. Is citation a process? I  
7 guess it is. I'm just asking because I don't  
8 know.

9 MR. TINDALL: Tom Ragland is the one  
10 that discovered that last time. The style of all  
11 writs and process -- certainly the service of  
12 process would include a citation. I can't  
13 conceive of it --

14 MR. RAGLAND: I'm not sure that  
15 service of citation, as we have it here, would  
16 apply to something else because you may not  
17 necessarily have an answer to be filed the first  
18 Monday after the 20 days.

19 MR. TINDALL: See, that writs and  
20 process are answerable on the next Monday after 20  
21 under Rule 15.

22 CHAIRMAN SOULES: I just don't want to  
23 drop something out -- if it seems like it's  
24 surplusage, I find that we have over the years  
25 determined that and dropped them out only to find

1 out that it was important to somebody later.

2 MR. TINDALL: Well, certainly, Luke,  
3 if there was any -- I mean, to me, Rule 15 talking  
4 about these general things back over here should  
5 be "The style of all writs, process and citations"  
6 almost would be a better place to put that so that  
7 we know that everything that's issued out of a  
8 clerk's office has got in big bold letters "State  
9 of Texas" on it.

10 MR. RAGLAND: Then you've got Rule  
11 105. It seems to me to be including some of Rule  
12 16. I think it is.

13 CHAIRMAN SOULES: I guess process is  
14 used interchangeably with citation in these very  
15 -- Rule 99 and so forth.

16 MR. TINDALL: Yes. That's the reason  
17 I took it out.

18 CHAIRMAN SOULES: Okay. Well, we  
19 don't mean to say that citation does not have to  
20 be styled the State of Texas. We are assuming --  
21 our conclusion is to believe that Rule 15 takes  
22 care of that. So we're simply eliminating  
23 surplusage. Is that the history on that?

24 MR. TINDALL: That's right.

25 CHAIRMAN SOULES: Okay. Then we go to

1 (b).

2 MR. TINDALL: (b) is the form,  
3 somewhat hopefully improved language from what we  
4 have under requisites. And rather than -- of  
5 course, the State of Texas issue we talked about  
6 and rather than the answer date first, I thought,  
7 it would logically -- in my mind would be the  
8 content of it which would be -- it would be  
9 "signed by the clerk under his seal, contain" --  
10 and then you pick up -- hopefully I got every one  
11 of these, "the name of the court, the date of the  
12 filing, the date of the issuance of the citation,  
13 file number, names of the parties and directed to  
14 the defendant shall state" -- I did not put in --  
15 someone mentioned this earlier. I did not put in  
16 the 90-day limitation. I don't know what you want  
17 to do about that. Do we want to put an expiration  
18 of citation after 90 days?

19 CHAIRMAN SOULES: Does the statute  
20 give it a 90-day life?

21 MR. TINDALL: I thought it came, you  
22 know -- I don't have -- is it from the CPRC or is  
23 it in the government?

24 CHAIRMAN SOULES: I don't know if  
25 there's anything in there about it.

1                   PROFESSOR EDGAR: You'd better find  
2 out.

3                   CHAIRMAN SOULES: That's right.

4                   MR. TINDALL: I have no strong  
5 feelings about the 90 days. Certainly I can  
6 understand from the sheriff's perspective that  
7 they don't want to -- but they're not limited  
8 anymore. You see, we sort of got away from the  
9 idea that you pay them four dollars or eight  
10 dollars and they've got to go try for 90  
11 successive days. Now, they get to charge you the  
12 actual cost and mileage of service anyway. So,  
13 why do we limit it to 90 days any longer?

14                   CHAIRMAN SOULES: Well, we don't but  
15 the statute does.

16                   MR. TINDALL: Pardon?

17                   CHAIRMAN SOULES: The question is  
18 does, the statute limit the life?

19                   MR. TINDALL: Well, if I -- no one  
20 here would have -- is it going to be in the Civil  
21 Practice and Remedies Code or is it going to be in  
22 the Government Code?

23                   PROFESSOR EDGAR: The general counsels  
24 office --

25                   MR. TINDALL: I could certainly go up



1           there.

2                   CHAIRMAN SOULES:  If it's got a 90-day  
3           fuse by statute, then we ought to say so.

4                   MR. TINDALL:  Well, obviously we don't  
5           want to tinker with that.  But if it's not a  
6           90-day fuse, I don't see any reason to keep it in  
7           there.  Particularly we're getting off on this  
8           idea of you can get additional citations.  You can  
9           have -- I want seven of them because I'm going to  
10          try to get him served seven different ways, you  
11          know.

12                   CHAIRMAN SOULES:  That's important.  I  
13          have used the 90 days down in your home to tell  
14          those guys, "You've got to get with it because  
15          it's expired," and gotten some results with it.  
16          Now, I don't know whether that's got any value or  
17          not.

18                   MR. TINDALL:  It never provided any  
19          expeditious service in my territory at all.

20                   CHAIRMAN SOULES:  Some of those  
21          constables, we've gotten their attention, and I  
22          don't know which ones.

23                   MR. TINDALL:  For me, it's served no  
24          purpose unless it's by statutory --

25                   CHAIRMAN SOULES:  Let's check.  If

1 there's not a statutory 90-day fuse, what is the  
2 consensus? That we omit it? Is there anyone --  
3 anyone that is in disagreement with that, speak  
4 up. Okay. So, if there is a 90-day fuse by  
5 statute, we'll include it. If there's not a  
6 90-day fuse by statute, then the omission is  
7 agreeable to the committee.

8 MR. TINDALL: The only other little  
9 stylistic change I made was -- it seems like we  
10 are getting away from the reference -- Buddy, if I  
11 could look at yours for one minute here. This 10  
12 o'clock a.m., I simply said the defendant -- "the  
13 citation, shall file an answer on or before 10  
14 a.m.," minor little phraseology, but that seems to  
15 be more consistent with the current speech. Well,  
16 the rule now says that you must file an answer at  
17 or before 10 -- 10 o'clock a.m. of the Monday  
18 next, and I just said on or before 10 a.m. on the  
19 Monday next.

20 CHAIRMAN SOULES: No problem with  
21 that. All right. Backing up to the fifth line,  
22 judgment by default, should that say "may be" --

23 MR. TINDALL: Yes.

24 CHAIRMAN SOULES: -- instead of "will  
25 be"?

1           MR. TINDALL: And then I would suggest  
2 as a (c) -- or somewhere in there, Luke, would be  
3 your language, "Every citation shall contain the  
4 following warning."

5           CHAIRMAN SOULES: Okay. That's the  
6 legend from 103 earlier. We can turn it back to  
7 where we were. 101? Where was it?

8           JUDGE CASSEB: 101, I thought.

9           CHAIRMAN SOULES: Yes, it's 101,  
10 Judge. Over here on page 96. Now we've got 374  
11 -- page 374 and page 96. We're going to use the  
12 legend that we composed on page 96 regardless.  
13 Which version do we go forward with? We talked  
14 about textural changes in 101 earlier today. If  
15 we just fixed 101, we would stay with our action  
16 on Rule 96. If we modernize and cure these  
17 problems that Harry has worked on here as reported  
18 on for us, we would do 99, which is over on 374.  
19 And, Harry, as you read what we've worked on on  
20 96, is there anything that we've put into that  
21 that you have not carried forward in your work?

22           MR. TINDALL: The one thing that I'm  
23 not certain is did I include -- the way we had it  
24 was to file an answer with the clerk of the court  
25 who issued -- you may have better notes on that

1 than I did. It seemed like we said that it shall  
2 direct the defendant -- I had to appear and to  
3 defend, which is sort of the old language. We  
4 took that out. So that should come out -- "within  
5 these rules to require the defendant" --

6 CHAIRMAN SOULES: To file a written  
7 answer.

8 MR. TINDALL: That language should be  
9 carried forward into this rework.

10 CHAIRMAN SOULES: Okay. Let's do it  
11 right now. Let's see, "to file a written  
12 answer" --

13 MR. TINDALL: "With the clerk of the  
14 court who issued the citation."

15 PROFESSOR CARLSON: Wasn't that at the  
16 bottom?

17 MR. TINDALL: No, that's a separate --

18 CHAIRMAN SOULES: I'm up in the text  
19 of --

20 MR. TINDALL: In the text of what's in  
21 the form of the citation.

22 MR. RAGLAND: Harry, why is it  
23 necessary to have it in both places?

24 MR. TINDALL: Well, it shouldn't be.

25 CHAIRMAN SOULES: You mean in the

1 legend and in the rule?

2 MR. SPARKS (EL PASO): No, in the  
3 101 --

4 CHAIRMAN SOULES: If we do what Harry  
5 is talking about, 101 won't exist anymore.

6 MR. TINDALL: 99 will encompass 101.

7 CHAIRMAN SOULES: Harry has  
8 consolidated a couple of rules into one rule that  
9 covers it all in a more modern language.

10 PROFESSOR EDGAR: That language was  
11 "with the clerk" -- what?

12 MR. TINDALL: "That issued citation,"  
13 I believe was the language, wasn't it, Luke?

14 PROFESSOR EDGAR: That issued this  
15 citation?

16 CHAIRMAN SOULES: "File a written  
17 answer with the clerk who issued the citation."  
18 How about the location of the court?

19 MR. TINDALL: I have that.

20 CHAIRMAN SOULES: You've got that?

21 MR. TINDALL: Yes.

22 CHAIRMAN SOULES: Where is that?

23 MR. TINDALL: Maybe I don't. We've  
24 got the signature and seal, the name, date, the  
25 date of issuance.

1 PROFESSOR CARLSON: I thought it said  
2 contain the name and location.

3 MR. TINDALL: Name and location.

4 CHAIRMAN SOULES: Contain the name of  
5 the court -- all we've got to do it put location.

6 MR. TINDALL: Name and location of the  
7 court.

8 CHAIRMAN SOULES: So really in 101 we  
9 said -- instead of change -- we changed "appear"  
10 to make it say "file a written answer." We added  
11 the location of the court and we said service of  
12 the citation and petition. Have you got that in  
13 here?

14 MR. TINDALL: Yes.

15 CHAIRMAN SOULES: So the textural  
16 changes in the first paragraph of 101 all carry  
17 into your 99?

18 MR. TINDALL: Right.

19 JUDGE CASSEB: But we eliminated the  
20 "before," did we not?

21 MR. TINDALL: You eliminated what,  
22 Judge?

23 JUDGE CASSEB: "Before" in 101.

24 CHAIRMAN SOULES: Instead of "at or  
25 before," we used "on or before." Okay. Then is

1 your motion that we substitute your report on Rule  
2 99 for the action on Rule 101 and repeal 101 and  
3 repeal 100, but we carry the legend that we worked  
4 on from 101 into this Rule 99?

5 MR. TINDALL: That would be my  
6 motion.

7 CHAIRMAN SOULES: Is there a second?

8 PROFESSOR EDGAR: Just texturally, I  
9 know that it was very difficult to pick up all  
10 these rules and put them in here and have them in  
11 form. I just suggest that -- let's look at (b)  
12 for a minute, "Form, the citation shall be signed  
13 by the clerk," comma -- I would suggest that we  
14 strike the word "be" because we've already said  
15 "shall be." So, I say "under seal of the  
16 court," comma "contain the name and location of  
17 the court," comma, "the date of filing the  
18 petition," comma, "date of issuance of citation,"  
19 comma, "file number," comma, and then strike the  
20 next "and" because we haven't gotten to the end of  
21 the sentence yet. "The names of the parties,"  
22 comma, strike the next "and," "be directed to the  
23 defendant," comma -- we've already said "shall"  
24 before, so we don't have to say that again so  
25 strike that. So it says, "state the name and the

1 address of the plaintiff's attorney, if any,  
2 otherwise the plaintiff's address and the time  
3 within which these rules require the defendant to  
4 appear and defend," comma, "file a written answer  
5 in the court who issued the citation," wherever  
6 that goes, "and notify the defendant," rather than  
7 "him," "that in case of defendant's failure,"  
8 instead of "his," "to do so, judgment by a default  
9 may be rendered," and I don't think you have to  
10 say "against him." You've already said "judgment  
11 is going to be rendered for relief demanded in the  
12 petition."

13 MR. TINDALL: That's good.

14 CHAIRMAN SOULES: Okay. Read it for  
15 me again. I'll tell you where I got lost was  
16 "state the name and address of plaintiff's  
17 attorney if any otherwise the plaintiff's  
18 address." I don't know why we left -- didn't put  
19 a comma and strike "and" right there. That's  
20 probably just because I couldn't follow it quite  
21 quickly enough. Should that be?

22 PROFESSOR EDGAR: Well, otherwise  
23 plaintiff's address -- yes, you're right. "After  
24 address," comma --

25 CHAIRMAN SOULES: Comma, strike "and."



1 PROFESSOR EDGAR: "The time within  
2 which these rules require the defendant to appear  
3 and defend," comma.

4 CHAIRMAN SOULES: "File written answer  
5 with the clerk who issued" --

6 PROFESSOR EDGAR: Yes, and "shall  
7 notify the defendant," -- "in case of defendant's  
8 failure to do so, judgment by default may be  
9 rendered for the relief demanded in the  
10 petition."

11 CHAIRMAN SOULES: Okay. Can I read it  
12 to you again just to be sure? "The citation shall  
13 be signed by the clerk," comma, "under seal of the  
14 court," comma, "contain the name and location of  
15 the court," comma, "the date of the filing of the  
16 petition," comma, "date of issuance of citation,"  
17 comma, "file number," comma, "the names of the  
18 parties," comma, "be directed to the defendant,"  
19 comma, "state the name and address of defendant's  
20 attorney" --

21 PROFESSOR EDGAR: Plaintiff's.

22 CHAIRMAN SOULES: -- "of plaintiff's  
23 attorney," comma, "if any," comma, "otherwise the  
24 plaintiff's address," comma, "the time within  
25 which these rules require the defendant to file a

1 written answer with the clerk" --

2 PROFESSOR EDGAR: To appear and  
3 defend.

4 MR. TINDALL: No, no.

5 CHAIRMAN SOULES: No -- "to file a  
6 written answer with the clerk who issued the  
7 citation," comma -- no, "with the clerk who  
8 issued" because the clerk issues. "The clerk who  
9 issues," comma, "and shall notify the defendant  
10 that in case of the defendant's failure to do  
11 so" --

12 PROFESSOR EDGAR: Yes, just file  
13 written answer with the court.

14 CHAIRMAN SOULES: -- "judgment by  
15 default may be rendered against him for the relief  
16 demanded in the petition."

17 MR. TINDALL: Strike "against him."

18 PROFESSOR EDGAR: Strike "against  
19 him."

20 CHAIRMAN SOULES: Okay, rendered --  
21 okay, now I've got it. Thanks for your patience.

22 PROFESSOR EDGAR: I know it was  
23 difficult picking up all that stuff but it seemed  
24 to be kind of -- it seems to be kind of cleaning  
25 that up, Harry.

1 MR. TINDALL: No, I accept all of  
2 those improvements.

3 (Off the record discussion  
4 (ensued.

5  
6 CHAIRMAN SOULES: Well, I'll tell you,  
7 it's real easy. All you've got to do is add where  
8 it says "the time within which these rules require  
9 the defendant to file a written answer with the  
10 clerk who issued the citation," comma, "the  
11 address of the clerk."

12 MR. TINDALL: That's fine, sure.

13 JUSTICE WALLACE: There may be some  
14 areas -- some counties have three or four  
15 different courthouses.

16 PROFESSOR EDGAR: You're going to add  
17 "the address of the clerk" thereafter?

18 CHAIRMAN SOULES: Yes. Is that okay?

19 PROFESSOR EDGAR: Yes.

20 CHAIRMAN SOULES: Okay. Any further  
21 discussion? Moved and seconded that Rule 99 as  
22 we've now worked on it be substituted for our  
23 action on Rule 101, that Rule 101 then be repealed  
24 and Rule 100 be repealed because of the  
25 consolidation of those three rules into a single

1 Rule 99. All in favor say "I." Opposed? It's  
2 unanimously recommended. Good job, Harry.

3 MR. TINDALL: Luke, one other thing.  
4 If we move over to 107 for a minute -- and I did  
5 it because it was suggested by the Committee on  
6 Administration of Justice, while we're plowing  
7 through this once more. And that is, do we want  
8 to require -- this is 107 as we've already amended  
9 it as you see here from the court's order. The  
10 question is, do we -- the COAJ suggests getting  
11 rid of the 10-day requirement that the citation be  
12 on file. I'm not making a recommendation on it  
13 because I am not learned as to the reasons  
14 historically for requiring the citation to be on  
15 file for 10 days.

16 MR. LOW: Let me tell you why.

17 MR. TINDALL: Is there a reason?

18 MR. LOW: Yes, there's a good reason.  
19 I use it all the time. I've got a case where a  
20 truck driver sued -- the trucking company sued.  
21 Okay. I get the citation to the trucking  
22 company. They're going to owe a defense to the  
23 truck driver. All right. I can't just  
24 automatically file an answer for the truck driver  
25 because he hadn't really requested it. He's been

1 served and so I check -- I check every -- I think  
2 he's been served, rather so I have my secretary  
3 call every nine days to see what I mean -- you  
4 know, to see -- because I know they can't default  
5 him if he's been served -- to see if the return  
6 has been filed.

7 All right. Now, that way I can keep up with  
8 if he's actually been served. I don't want to  
9 file an answer until he's been -- that I know he's  
10 been served because then I voluntarily placed him  
11 in court and I might have increased his limits  
12 because I've answered for him. Whereas if he has  
13 been served, I'm at liberty to answer. And I'd  
14 have to call every day to see if he's been served  
15 to keep the default. So that 10 days I just --  
16 that's what I use it for. That's the only reason  
17 I know.

18 But you take somebody in a situation like  
19 that, and then you know no default is going to be  
20 taken and I check. I know they can't take a  
21 default then for 10 days. So then I tell my  
22 secretary to call in nine days again. But I don't  
23 know if others use it like that or not.

24 MR. TINDALL: Well, if that's the  
25 historical, then that's a very valid, you know,

1 policy of --

2 CHAIRMAN SOULES: Tom Ragland.

3 MR. RAGLAND: I was glad to hear that  
4 explanation. I also wondered why it was in there,  
5 and I don't have any problem with it. But before  
6 we move off this topic, I want to point out that  
7 there are three other rules that deal with the  
8 same subject matter as 107. That's 105, 16 and  
9 17. 105 and 16 seem to be -- 105 seems to be a  
10 shorter version of 16.

11 It just seems like to me that if we're  
12 tidying up these rules -- those portions of Rule  
13 16, 17 and 105 that are not addressed elsewhere  
14 ought to be maybe tacked into a separate part of  
15 Rule 107 as has been previously mentioned and get  
16 it all in one place.

17 MR. LOW: Sam, do you have -- what  
18 about this 10 days? Do you ever have a problem  
19 with --

20 MR. SPARKS (EL PASO): There's a  
21 practical problem in that is it generally takes at  
22 least that for the citation to get to the file  
23 because its docketed and then it goes to  
24 microfilming. And if you're going to take a  
25 default, as a practical matter, I like the 10

1 days, because too many times you pick up a file  
2 and there's no citation there. It may be on the  
3 docket sheet.

4 MR. TINDALL: We talked about it some  
5 when we adopted the change that we did to 107 and  
6 there wasn't any strong push forward to change  
7 then. I didn't -- I just carried it forward  
8 because that's what the COAJ had come forth with.

9 CHAIRMAN SOULES: Their deliberations  
10 were this: They felt that it was make work to get  
11 that citation in and have to send somebody over  
12 there to file it, then serve many times -- of  
13 course, particularly in out-of-town service, the  
14 out-of-town clerk gives me the citation for the  
15 Bexar County case. I send it to wherever, Conroe,  
16 to get it served and then then the sheriff of  
17 Conroe sends it back to me and I have to file it.  
18 I just put it in my file until the Monday next  
19 after expiration of 20 days and then I take it  
20 over there with me when I go to get my default and  
21 file it at the same time.

22 Why make work by filing twice? Maybe Buddy  
23 has got a good point. But that was the substance  
24 of their deliberation that it was a make-work step  
25 that didn't really serve a function on the whole.

1           MR. LOW: But you can see where you  
2 know somebody has been sued and you know you're  
3 going to end up answering for them. But if you  
4 answer before they've been served, you've placed  
5 them in court and you might have increased the  
6 limits. You know, you just -- they haven't been  
7 served. You don't know that, so you call the  
8 clerk every 10 days, say, and then once -- they  
9 can't get a default during that period of time  
10 rather than call them every day. And then once  
11 they have been served and you know it, then you  
12 can file an answer because you owe them a  
13 defense. And you haven't voluntarily placed them  
14 in court by filing an answer without service. And  
15 you don't have to worry about getting a default  
16 every day. That's how I --

17           CHAIRMAN SOULES: You don't have  
18 enough contact with this party to know that --

19           MR. LOW: The truck driver and, you  
20 know, he -- you could say, yes, that he didn't  
21 cooperate. Well, used to, the insured had to  
22 promptly give you citation. Now all you've got to  
23 do is know about it -- the insurance lawyer just  
24 has to know about it. But it doesn't take into  
25 consideration the dilemma that you can't just file



1 answer for him until he's been served. So you're  
2 in a quandry.

3 MR. TINDALL: Mr. Chairman, in view of  
4 that, I think, sensible explanation, I move that  
5 we table the proposed change to 107.

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

7 CHAIRMAN SOULES: Why don't we just  
8 reject it and get it disposed of?

9 MR. TINDALL: I move we reject the  
10 change to Rule 107.

11 MR. LOW: I would second that.

12 CHAIRMAN SOULES: It's been moved and  
13 seconded that this proposal be rejected. Those in  
14 favor say "I." Opposed? It's unanimously  
15 rejected.

16 PROFESSOR EDGAR: Luke.

17 CHAIRMAN SOULES: Yes, sir, Hadley.

18 PROFESSOR EDGAR: Going back and just  
19 briefly looking at Rule 99, which we've just  
20 approved --

21 CHAIRMAN SOULES: Yes, sir.

22 PROFESSOR EDGAR: If we don't put in  
23 there that the citation shall be styled the State  
24 of Texas, we're going to wind up with some forms  
25 that don't have it in there.

1           CHAIRMAN SOULES: I wouldn't doubt  
2 it.

3           PROFESSOR EDGAR: And nobody is going  
4 to go back and look at Rule 15. And to eliminate  
5 that and all the attendant problems, I would  
6 suggest that we just simply insert it even though  
7 it's redundant.

8           MR. TINDALL: I certainly will exceed  
9 to that wisdom, because we all know cross  
10 referencing sometimes doesn't achieve its  
11 purpose.

12           CHAIRMAN SOULES: Okay, back in then.  
13 The vote is -- the consensus is to go ahead and  
14 leave that in. Okay. It will be in there.  
15 Harry, what else do you have?

16           MR. TINDALL: For this area, we've got  
17 the appellate rules, if you want to deal with  
18 those at this time. Rule 320 --

19           CHAIRMAN SOULES: Why don't we take a  
20 five-minute break.

21  
22           (Brief recess.)

23  
24           MR. TINDALL: Luke, at your request, I  
25 direct the committee to look at Rule 328 in the

1 Rules of Civil Procedure right now. And it's got  
2 a caption "if not equitable." And the lead  
3 sentence says, "New trials may be granted when  
4 damages are manifestly too small or too large."  
5 Taking that language exactly per the suggestion is  
6 that that would be put over in Rule 320 which  
7 deals with the action of the court on a motion for  
8 new trial.

9 CHAIRMAN SOULES: In other words, 328  
10 has got language that tells the court what it can  
11 do on a motion for new trial. We're not changing  
12 what the court can do on a motion for new trial.

13 MR. TINDALL: No, we're preserving it,  
14 putting it over in --

15 CHAIRMAN SOULES: We're just putting  
16 it over there where it talks about --

17 MR. TINDALL: About new trials. If  
18 the judge thinks the damages are too small or too  
19 large, he can grant a new trial, period. That  
20 preserved over in the motion -- the action of the  
21 court granting a new trial.

22 The balance of 328, as Luke and I talked  
23 about it, really has nothing to do with new  
24 trials. What it deals with is the right to  
25 preserve and cross point the issue of remittitur

1 if the other side appeals. And as we thought  
2 through, it was illogical that that be part of the  
3 Rules of Civil Procedure, which really stop at the  
4 loss of the plenary power of the court.

5 Now, Bill, you've worked on this a lot. But  
6 we suggested then that the cross point on  
7 remittitur is logically something that belongs  
8 over in Rule 85 of T.R.A.P., and so that's where  
9 we placed it. If you've got T.R.A.P. in front of  
10 you, Rule 85 is remittitur in civil cases, but it  
11 does not deal with the preservation of -- the  
12 judge has crammed a remitter down on you and then  
13 the other side appeals. How do you preserve by  
14 cross point the right that the judge was wrong in  
15 cramming -- or ordering remittitur? And that  
16 should be over in the Rules of Appellate  
17 Procedure. So, we would take the same language,  
18 starting with -- on 328, put it in Rule 85(a) as a  
19 cross point on remittitur and just renumber the  
20 succeeding sections.

21 MR. ADAMS: What page are you on?

22 MR. TINDALL: In the handout it's page  
23 76, 377.

24 PROFESSOR DORSANEO: Well, I think 85  
25 -- my comment would be that 85 has some other

1 problems that relate to this cross point on  
2 remittitur, and I just would leave it at that. I  
3 need to give it some more study. I'm not prepared  
4 to even talk about it.

5 MR. TINDALL: You think there are  
6 other major issues to deal with?

7 PROFESSOR DORSANEO: Yes, obviously.  
8 I'll just leave it at that.

9 CHAIRMAN SOULES: 85 has some  
10 problems, but just in taking 328 -- 328 and try to  
11 put it where it belongs. 328 is just a -- put  
12 together someplace where neither one of them  
13 belongs.

14 MR. TINDALL: That's all we were  
15 doing, no substantive change.

16 CHAIRMAN SOULES: The new trial really  
17 belongs over there where the court is passing on  
18 the new trial motions. And then the rest of it is  
19 over there -- Court of Appeals if you don't like  
20 it. It ought to be put --

21 PROFESSOR DORSANEO: This is verbatim  
22 from 228?

23 MR. TINDALL: Exactly. That's all  
24 we're doing, Bill.

25 PROFESSOR EDGAR: Just splitting it

1 out and putting it where it belongs?

2 MR. TINDALL: Yes.

3 CHAIRMAN SOULES: When the judge is  
4 thinking, "What can I do for a new trial," it's  
5 right there all of it, and then the Court of  
6 Appeals review is right there, all of it. It  
7 doesn't change anything.

8 PROFESSOR DORSANEO: The question is  
9 whether this cross point on remittitur cross to  
10 that broader application.

11 MR. TINDALL: Well, I would reserve  
12 that for -- I'm willing to reserve on that to  
13 another day, Bill, but I think logically this  
14 suggestion that came in to split that rule is  
15 good, and I would urge its adoption.

16 CHAIRMAN SOULES: Why don't we do this  
17 now and the other later? Say what you feel about  
18 it.

19 MR. TINDALL: I'd go ahead and move  
20 that we do this, Luke, on 328, repeal it and  
21 placing 320 in Rule 85 of T.R.A.P.

22 CHAIRMAN SOULES: Second?

23 PROFESSOR EDGAR: Second.

24 CHAIRMAN SOULES: Any further  
25 discussion? All in favor say "I." Opposed?

1       Okay.

2                   PROFESSOR EDGAR: Well, that calls for  
3 a relettering then of 85(a), (b) and (c) and (d)  
4 to (b), (c), (d) and (e).

5                   MR. TINDALL: Yes, succeeding  
6 sections, I've noted that to be relettered.

7                   PROFESSOR EDGAR: Well, but that's not  
8 in the motion and I want that in the motion.

9                   MR. TINDALL: The next two pages are  
10 repeats, and that concludes my report. Tom  
11 Alexander sent in a letter about dismissal, but I  
12 think we plowed through plenty of that -- and I  
13 think his reference to 330, I never could tie it  
14 into anything. And I talked to Tom about it and  
15 he couldn't remember what it dealt with. And so  
16 I'm going to pass on that suggestion.

17                   CHAIRMAN SOULES: Let me get caught up  
18 with you.

19                   MR. TINDALL: Okay.

20                   CHAIRMAN SOULES: What page are you  
21 looking at?

22                   MR. TINDALL: Tom wrote a letter --

23                   JUDGE CASSEB: His letter is on 384.

24                   MR. TINDALL: Right. But I cannot  
25 find how that ties back into Rule 330. His entire

1 -- he says "Remedy: Revoke 165(a) and amended  
2 Rule 330." Well, for the life of me, what does  
3 Rule 330 have to do with dismissal of cases for  
4 want of prosecution?

5 MR. SPARKS (EL PASO): I thought it  
6 was an awful good suggestion because it moved it  
7 out of my subcommittee.

8 CHAIRMAN SOULES: So what -- are we  
9 going to wait to hear more from Tom on this?

10 MR. TINDALL: Tom said he would review  
11 it and call me, and that's where it is. And I  
12 don't have anything else to suggest on it at this  
13 time. There were some other additional changes to  
14 Rule 103 which has sort of been my special  
15 project.

16 CHAIRMAN SOULES: Well, for purposes  
17 of our docket, since Tom is going to resubmit --  
18 and I'm trying not to carry agenda forward from  
19 this meeting.

20 MR. SPARKS (EL PASO): I move that we  
21 reject Tom's suggestion.

22 MR. LOW: I second.

23 CHAIRMAN SOULES: And then if he wants  
24 to resubmit, we'll hear it.

25 MR. TINDALL: That's fine.



1                   CHAIRMAN SOULES: Okay. All in favor  
2 say "I." Unanimously rejected.

3                   MR. TINDALL: All right. One final  
4 thing, I guess that's going to clear me up, is  
5 that Royce Coleman from Denton wrote about 103  
6 changes. I think we've been through as much on  
7 Rule 103 as we want to deal with at this time.  
8 And I would move that his suggestion on Rule 103  
9 be rejected.

10                  MR. LOW: Second.

11                  CHAIRMAN SOULES: These have all been  
12 -- these ideas have all been thoroughly discussed  
13 by this committee, have they not?

14                  MR. TINDALL: This would be full  
15 service by anyone. And I think we have rejected  
16 that.

17                  CHAIRMAN SOULES: Because we feel that  
18 there should be authorized and supervised people  
19 doing the job, and we have provided by rule that  
20 anybody who is authorized and supervised can do  
21 it, but we don't just want to open it to people  
22 that are not supervised. Is that essentially it?

23                  MR. TINDALL: That's essentially it,  
24 yes.

25                  CHAIRMAN SOULES: All right. The

1 motion has been made to reject this suggestion.  
2 Is there a second?

3 MR. LOW: I second it.

4 CHAIRMAN SOULES: All in favor say  
5 "I." Opposed? That's unanimously rejected.

6 MR. TINDALL: I think with that, Luke,  
7 that concludes my work on 315 to 330 as well as  
8 the special projects on 99 to 101.

9 CHAIRMAN SOULES: It looks like we  
10 might have something on 395 that's in your  
11 bailiwick.

12 MR. TINDALL: 395?

13 CHAIRMAN SOULES: Page 395.

14 MR. TINDALL: Excuse me.

15 CHAIRMAN SOULES: This was to -- let  
16 me say what this is right quick. Harry, I don't  
17 know whether you had -- I sent this to you so  
18 late. Judge Schattman wants us to provide by rule  
19 that someone connected with the Court can go  
20 through the files and strip out extraneous matters  
21 that are filed in the files. He calls it his  
22 stripper rule. That's his rule -- his word.

23 MR. TINDALL: We dealt with that, I  
24 think, Luke, in terms of preservation of records  
25 by the clerk and the destruction of records. And

1 I'm going to move that we reject his Gypsy Rose  
2 Lee rule.

3 MR. LOW: I second that.

4 CHAIRMAN SOULES: Harry, that's  
5 everything that I had noted on the agenda. That  
6 wraps it up.

7 MR. MORRIS: Luke?

8 CHAIRMAN SOULES: Lefty.

9 MR. MORRIS: I'd like to -- just kind  
10 of stepping back. I know you don't want to. But  
11 I'd like an explanation on this Rule 13 of what  
12 kind of battle between the Supreme Court and the  
13 legislature we may be contributing to. I'm very  
14 concerned, I guess, about -- since the rule-making  
15 power of the Supreme Court, as I understand it,  
16 comes from the legislature anyway, they could just  
17 take away the rule-making power.

18 CHAIRMAN SOULES: They can't do that.

19 MR. MORRIS: Because it constitutes --

20 MR. McMains: They can't do that.

21 CHAIRMAN SOULES: I gave you a  
22 constitutional provision in the materials that  
23 says the Supreme Court runs the courts. I realize  
24 that historically -- the Supreme Court and the  
25 legislature worked together in the '30s. There is

1 a school that believes that was never necessary.  
2 But I don't believe there is a serious school  
3 today that says that the legislature could assert  
4 this power at this juncture.

5 MR. TINDALL: And in November of '85 a  
6 constitutional amendment --

7 MR. BRANSON: I would argue that there  
8 probably isn't a serious school in that  
9 legislative body, though.

10 MR. LOW: They've been wrong before  
11 though.

12 MR. BRANSON: But I just wonder, in  
13 Lefty's support, whether we might -- by attempting  
14 to change the action you'd not be drawing the line  
15 and saying for the Court.

16 CHAIRMAN SOULES: A motion to  
17 reconsider can be brought by someone who voted.  
18 Who wants to change their vote, if you want to  
19 consider the vote?

20 JUSTICE WALLACE: Let me state this,  
21 Frank. I think I can assure you the Court is not  
22 going to repeal that before we sit down and talk  
23 with the sponsors in both the House and Senate of  
24 this particular section of that tort reform and  
25 see if we can't come to a common agreement on how

1 this should be handled.

2 MR. BRANSON: I think that was what  
3 Lefty said and that was our only concern.

4 CHAIRMAN SOULES: Does that speak to  
5 the issue?

6 MR. MORRIS: Yes.

7 CHAIRMAN SOULES: Thank you very  
8 much.

9 PROFESSOR DORSANEO: Mr. Chairman?

10 CHAIRMAN SOULES: Yes, sir, Bill.

11 PROFESSOR DORSANEO: I wanted to  
12 mention, just for the record, that when we voted  
13 on this particular proposal, although I listened  
14 to Gilbert -- and when I ultimately heard Sam  
15 mention the bracketed information, I noticed it  
16 for the first time. And I don't believe there's a  
17 need to change my vote, but I do not think this  
18 repealer provision is very sensible.

19 MR. SADBERRY: What page is that?

20 MR. TINDALL: That's back in 13 of the  
21 supplement.

22 CHAIRMAN SOULES: The statute exist --  
23 and that's given us the power to give it to us.  
24 This legislature is the first legislature that has  
25 ever intruded on the Supreme Court's rule-making

1 power, and there are a lot of reasons for that.  
2 And next time if we get started on the right foot,  
3 maybe it won't happen. But every legislature up  
4 to now since 1939 has listened to the Court --  
5 members of the Court say, "You may have a valid  
6 point. We're going to take it up in our rule  
7 making work. If we don't get something done --  
8 we're going to keep you informed. If we don't get  
9 something done, there's another legislature and  
10 we'll have to answer to you." And never before  
11 has the Court been repudiated to that end, but it  
12 happened this time. And there is some feeling  
13 also that the Court should not simply say "Well,  
14 okay." The Court needs to go on and do its  
15 business too.

16 MR. BRANSON: Judge Wallace answered  
17 the problem that you and I would have with that, I  
18 think. And it's just a problem of not creating a  
19 conflict where there are some underlying  
20 disagreements already. But just because we make  
21 the recommendation, the Court's obviously got a  
22 lot better sense than we do anyway, they're going  
23 to take it and smooth the edges off of it.

24 CHAIRMAN SOULES: Is there anyone who  
25 has a report left that is going to have serious

1 difficulty being here tomorrow that would like to  
2 try to get their report out of the way in the  
3 balance of this afternoon? Good. Who's got a  
4 short report that we could maybe wrap up here in  
5 the next 15, 20 minutes?

6 PROFESSOR BLAKELY: Mr. Chairman,  
7 would you give us instructions on moving  
8 downstairs? Should we leave things here or should  
9 we move downstairs?

10 MR. TINDALL: I think we're reserved  
11 here tomorrow.

12 (Off the record discussion  
13 ensued.)

14  
15 PROFESSOR EDGAR: Luke, I think our  
16 report will be relatively short.

17 CHAIRMAN SOULES: Okay. They have  
18 indicated we need to take our things with us. We  
19 may be able to put them in 104 and leave them  
20 overnight but we need to take them from this  
21 room.

22 (Off the record discussion  
23 ensued.)

24  
25 CHAIRMAN SOULES: At 6 o'clock we've

1 got be -- get the cars out of the parking lot so  
2 we've got to leave here in no more than 20  
3 minutes. Okay. Hadley, why don't you go ahead  
4 and --

5 PROFESSOR EDGAR: I think I can.

6 CHAIRMAN SOULES: Why don't you do  
7 it?

8 PROFESSOR EDGAR: All right. Let's go  
9 to page 317. Our committee has met -- and I'm now  
10 looking at page 317. A request came to us from  
11 someone in Ray Hardy's office concerned that some  
12 of the district courts were ordering the clerk to  
13 file facsimile signatures for the Court on various  
14 judgments and orders. There's a letter back here  
15 that accompanies that requesting Ray to seek an  
16 Attorney General's opinion on whether or not that  
17 was proper.

18 Putting all of that aside, your committee has  
19 recommended on page 317 a new Rule 20(a) which  
20 requires that, "All judgments and orders be  
21 promptly prepared by the prevailing party and  
22 submitted to the trial court for signature and all  
23 other counsel of record. If the nonprevailing  
24 party opposes the instrument proffered to the  
25 court, such party shall, within seven days



1 following receipt thereof, request the Court to  
2 set such matter for hearing as soon as  
3 practicable. The Court shall read and sign the  
4 original of all such documents." I think that  
5 speaks for itself, and we move its adoption.

6 MR. McCONNICO: I second it.

7 JUSTICE WALLACE: Are we really going  
8 to tell the Court they have to read those things  
9 before they sign them?

10 PROFESSOR EDGAR: We simply suggested  
11 that the Court read and sign the original of all  
12 such documents.

13 MR. BEARD: Well, does this mean that  
14 the Court can't just -- some courts enter a  
15 judgment the day that the jury returns a verdict.  
16 Does this mean they can't do that anymore?

17 CHAIRMAN SOULES: That's the problem I  
18 see with it. Suppose you take our order in your  
19 hip pocket and it's about that long, and the judge  
20 rules and you put it up there on the table.

21 MR. BRANSON: He can't read it?

22 CHAIRMAN SOULES: He can read it  
23 maybe.

24 MR. BEARD: Jury returns a verdict and  
25 you --

1                   PROFESSOR EDGAR: This is our  
2 proposal.

3                   CHAIRMAN SOULES: Okay. The motion  
4 has been made that this be adopted. Is there a  
5 second?

6                   MR. JONES: I second it.

7                   CHAIRMAN SOULES: Discussion?

8                   MR. SPARKS (EL PASO): I've got one  
9 question. Maybe it's just late in the day. But  
10 it says it "shall read and sign the original of  
11 all such documents." What are "all such  
12 documents"?

13                  PROFESSOR EDGAR: The documents that  
14 are prepared and submitted to the trial court --  
15 the judgments and orders submitted to the trial  
16 court for signature. That's the very first  
17 sentence.

18                  MR. BEARD: Well, does it stop the  
19 Judge from signing it immediately? Does this rule  
20 do that?

21                  PROFESSOR EDGAR: It's whatever the  
22 Court -- look, the rule says that the Court shall  
23 read and sign all such documents. Now, that's  
24 what it says. Now, what the judge does, hell, we  
25 don't know.

1 MR. BEARD: No, I'm not talking about  
2 does he have to -- does he have to wait seven  
3 days?

4 CHAIRMAN SOULES: That's the point.  
5 That's the problem that I see with it.

6 MR. McMAINS: It says if the losing  
7 party opposes the instrument.

8 PROFESSOR EDGAR: Yes.

9 MR. BRANSON: It doesn't say that.

10 CHAIRMAN SOULES: And have another  
11 hearing.

12 PROFESSOR EDGAR: -- seven days  
13 request a hearing. I'm sorry, I didn't understand  
14 your question.

15 MR. McMAINS: I understand the general  
16 principle on judgments. Maybe there is a reason  
17 for rush for judgment. But orders, of course,  
18 would include -- I mean, you're there on a hearing  
19 with an order and then you've got to have seven  
20 days to approve the order. I mean, that just --

21 MR. LOW: What about a temporary  
22 restraining order?

23 MR. SPARKS (EL PASO): What I think  
24 about if somebody -- the way it reads is that at  
25 the end of seven days and no objection, the

1 Court's ordered by this rule to sign the  
2 documents.

3 PROFESSOR EDGAR: Change it any way  
4 you want to.

5 MR. SPARKS (EL PASO): What if the  
6 Court doesn't want to sign it?

7 PROFESSOR EDGAR: Simply delete the  
8 second sentence if you want to.

9 MR. LOW: What if you go down there  
10 and you've got a custody case or something and you  
11 need something signed and that judge is going to  
12 just sign it right there. I mean, you've got a  
13 situation where both lawyers are down there and  
14 you need immediate action. You can't wait seven  
15 days to give somebody rights to object.

16 MR. BRANSON: Well, I move we delete  
17 the second sentence.

18 PROFESSOR EDGAR: I'll accept it.

19 PROFESSOR DORSANEO: I don't like any  
20 of it as written. Orders -- a lot of orders -- as  
21 Rusty said, a lot of orders are not going to be  
22 written. I don't know -- or requirement that  
23 judgments be written in written form.

24 MR. TINDALL: A lot of notices of  
25 hearings contained within motions are signed by

1 the clerks.

2 PROFESSOR EDGAR: You've got to sign  
3 it --

4 PROFESSOR DORSANEO: Only if you want  
5 to appeal it.

6 MR. TINDALL: Hadley, Judge Casseb and  
7 I have noticed that a lot of orders setting  
8 hearings and trials are done by rubber stamp  
9 either over the judges signature or the clerk of  
10 the court.

11 JUDGE CASSEB: That's right.

12 MR. TINDALL: How would you deal with  
13 that?

14 PROFESSOR EDGAR: Well, if it's -- our  
15 proposal was that if it is something that requires  
16 a judicial signature, a signature of the judge,  
17 that the original be signed by the Court.

18 MR. TINDALL: All right. You file a  
19 motion for "X" relief and you have at the bottom  
20 notice of hearing. And some counties the judge  
21 signs meticulously each one and it's set for  
22 Monday at 9 o'clock and in some counties it's done  
23 by the clerk.

24 PROFESSOR CARLSON: Does the judge  
25 have to sign every order?

1 MR. TINDALL: Every order and --

2 JUDGE CASSEB: It's a physical  
3 impossibility, I'll tell you right now, to sign  
4 every order.

5 MR. TINDALL: That's a notice of a  
6 hearing.

7 JUDGE CASSEB: That's correct. It's a  
8 physical impossibility. And it's impossible in  
9 Houston and in San Antonio. Notices, orders of  
10 settings and all that, we use a stamp with our  
11 signature.

12 MR. TINDALL: Aren't you -- isn't the  
13 Court -- the problem is that judges are using  
14 rubber stamps on judgments?

15 PROFESSOR EDGAR: No. The problem as  
16 it originated was that the -- some of the courts  
17 were apparently directing the clerk to affix a  
18 rubber stamp or some other facsimilile signature  
19 to judgments, in addition to everything else.

20 MR. TINDALL: That's what I'm saying.  
21 The judgment is a frightening thing, isn't it?

22 PROFESSOR EDGAR: Well, I think some  
23 orders sometimes might rise to the dignity of the  
24 judgment. And I don't know how you're going to  
25 distinguish between one order and another order.

1 But anyhow, the problem was that of judgments,  
2 Harry.

3 MR. TINDALL: Yes.

4 MR. LOW: But if the judge is doing  
5 that, I mean, he's authorizing somebody to.

6 PROFESSOR EDGAR: I don't think the  
7 Judge has the authority to authorize anybody to  
8 sign his judgment.

9 MR. BRANSON: Hadley, could we change  
10 it to --

11 JUDGE CASSEB: I don't think he does.

12 PROFESSOR EDGAR: Sir?

13 JUDGE CASSEB: He does not.

14 PROFESSOR EDGAR: I don't think he  
15 does either, Judge Casseb. Judges sign  
16 judgments.

17 MR. McCONNICO: Why don't we just  
18 leave out orders?

19 CHAIRMAN SOULES: Does the judge have  
20 the power to authorize his clerk to use his rubber  
21 stamp to stamp notices of hearings and thereby  
22 become an order of the judge? Then why can't he  
23 let the clerk stamp a judgment? What's the  
24 difference?

25 JUDGE CASSEB: Well, I think a

1 judgment has a greater dignity.

2 CHAIRMAN SOULES: I agree. But I mean  
3 legally --

4 MR. LOW: What statute or constitution  
5 says that? What says that? What's the authority  
6 for it that says that he has to sign the judgment  
7 but he doesn't have to -- but he can stamp an  
8 order?

9 PROFESSOR DORSANEO: The idea must be  
10 that if he's not -- if he doesn't sign the  
11 judgment, then he's not really rendering the  
12 judgment, that he's not making the judgment,  
13 although he could have somebody else sign it.

14 MR. LOW: What if he makes -- if he  
15 declares his judgment in open court?

16 MR. BRANSON: Some orders like an  
17 order to dismiss and an order for contempt to rise  
18 for the dignity of the judgment --

19 PROFESSOR EDGAR: That's right. It's  
20 difficult -- we kind of hashed some of this out.  
21 Where's Gilbert?

22 MR. TINDALL: He went to the --

23 PROFESSOR EDGAR: No wonder I don't  
24 have any help because none of my committee is  
25 here.



1                   PROFESSOR CARLSON: How about if it  
2 read something like this: "All judgments and  
3 orders of the court which finally dispose of the  
4 controversy before the Court shall be promptly  
5 prepared" -- "The Court shall read and sign the  
6 original of all such documents which reflect the  
7 Court's rendition or ruling."

8                   PROFESSOR EDGAR: What are you going  
9 to do about habeas corpus -- or about contempt?

10                  MR. LOW: Temporary restraining order  
11 doesn't --

12                  MR. McMAINS: Actually I think that's  
13 just as much susceptible to saying that that's the  
14 controversy, is the TRO or whatever. But I'm not  
15 sure that does anything --

16                  MR. TINDALL: New trial.

17                  CHAIRMAN SOULES: What do we really  
18 need of this rule besides the first sentence?  
19 Submit to the trial court for signature. Why  
20 don't we --

21                  JUDGE CASSEB: What does it say now?  
22 Does it say anything now?

23                  MR. TINDALL: Rule 305 covers  
24 submitting a draft of judgment.

25                  JUSTICE WALLACE: The day of the

1 session the minutes shall be read and signed in  
2 open court for the judge.

3 CHAIRMAN SOULES: This is Rule 28.

4 (Off the record discussion  
5 ensued.)

6  
7 JUDGE CASSEB: What's the rule that  
8 you say?

9 MR. TINDALL: 305 is the "counsel  
10 shall submit a draft." 306(a) -- 306(a)(2) says  
11 it shall be signed by the judge. Personally  
12 signed by the judge? If that's --

13 MR. McMAINS: It just says to use  
14 their best efforts, though. Their best efforts --  
15 all judgments procedures and orders of any kind to  
16 be reduced to writing and signed by the trial  
17 judge with the date of signing the statement  
18 thereon. But then it goes on --

19 MR. TINDALL: Well, that more or less  
20 gets at the date problem.

21 MR. McMAINS: That's right.

22 MR. BEARD: Well, why do we have to  
23 tell the prevailing party to prepare the  
24 judgment?

25 MR. TINDALL: 305 says that.

1 MR. BRANSON: -- incorporate that  
2 concept in 20(a), "All judgments and orders shall  
3 be promptly prepared by the prevailing party and  
4 submitted to the trial court for his best effort  
5 at signature."

6 MR. TINDALL: But look a 305, Frank.  
7 305 says that the prevailing party will submit a  
8 draft of the judgment.

9 CHAIRMAN SOULES: That's right.

10 MR. RAGLAND: I move we reject  
11 proposed Rule 20(a).

12 CHAIRMAN SOULES: Well, we've got a  
13 motion to approve it.

14 PROFESSOR EDGAR: I have no problem  
15 with that, Tom, but how are we going to deal with  
16 the situation where the Court directs the clerk to  
17 put a facsimile signature on the judgment?

18  
19 (Off the record discussion  
20 ensued.)

21 JUDGE CASSEB: I'd like to know where  
22 it came from?

23 PROFESSOR EDGAR: Houston.

24 JUDGE CASSEB: From Ray Hardy?

25 PROFESSOR EDGAR: Yes -- well, it came

1 from his deputy clerk.

2 JUDGE CASSEB: That's the lawyer. He  
3 hired a lawyer to write all these things for him.

4 JUSTICE WALLACE: No, she's not a  
5 lawyer.

6 PROFESSOR EDGAR: But that's how this  
7 originated, Judge Casseb.

8 JUDGE CASSEB: Well, I have been  
9 holding court in Houston and just got back there  
10 from two weeks of holding court, and I don't know  
11 of a judge over there that let's the clerk sign  
12 his name or put a stamp on the judgment. I'll  
13 tell you that right now. Now, everywhere I go,  
14 the procedure is that the prevailing party  
15 prepares a draft, submits it to the other side for  
16 approval as to form. And if he's got approval as  
17 to form, the judge will sign that order or that  
18 judgment.

19 PROFESSOR EDGAR: The origin appears  
20 on page 328.

21 JUDGE CASSEB: 300 and what?

22 PROFESSOR EDGAR: Page 328. That's  
23 the letter that we had that originated this  
24 question.

25 CHAIRMAN SOULES: It's an expression

1 of concern that there may be practice or is --

2 JUSTICE WALLACE: The criminal judge  
3 doesn't sign judgments anyway.

4 MR. BRANSON: Well, it says judges of  
5 the district bench --

6 MR. TINDALL: This is not a civil  
7 problem then, right? The whole letter seems to be  
8 directed to what they're doing in the criminal  
9 practice.

10 MR. McCONNICO: Then they cite the  
11 Code of Criminal Procedure.

12 MR. BRANSON: I think they sent it to  
13 the wrong person.

14 CHAIRMAN SOULES: Any further  
15 discussion?

16 JUDGE CASSEB: I think it ought to go  
17 down the drain.

18 MR. SPARKS (EL PASO): I agree but for  
19 a different reason. A lot of times you have  
20 different prevailing parties or more than one  
21 prevailing party, and the reading of this rule is  
22 that you may have several judgments.

23 CHAIRMAN SOULES: Those in favor of  
24 Rule 20(a) say "I." Opposed? It's unanimously  
25 rejected. What's the next one?

1           PROFESSOR EDGAR: All right. Rule 216  
2           arose in somewhat of an oblique way.

3           MR. SPIVEY: What page is that on?

4           PROFESSOR EDGAR: We're on page 318.

5           CHAIRMAN SOULES: That's just raising  
6           the jury fee, is all it is, isn't it?

7           PROFESSOR EDGAR: That's right.

8           CHAIRMAN SOULES: Okay. Any  
9           opposition to raising the jury fee?

10          MR. BRANSON: Where does the money go  
11          from jury fees?

12          JUDGE CASSEB: I think it's been  
13          done.

14          PROFESSOR DORSANEO: It happened on  
15          page 332.

16          JUDGE CASSEB: It's been done.

17          PROFESSOR EDGAR: Well, but, you see,  
18          that was five dollars in the district court and  
19          five dollars in the county court. And this is 10  
20          dollars in the district court and five in the  
21          county court.

22          MR. BRANSON: Where does the money go  
23          from the jury fee? Who gets it?

24          JUDGE CASSEB: General funds.

25          MR. TINDALL: No, I thought it went to

1 a constitutional fund for juries only. Isn't that  
2 a constitutional fund?

3 JUDGE CASSEB: I don't think so.

4 CHAIRMAN SOULES: No, it's not a  
5 constitutional fund because they were going to use  
6 it to run the state there at one point.

7 JUDGE CASSEB: That's right.

8 CHAIRMAN SOULES: They were going to  
9 use jury fees to run the State of Texas.

10 MR. TINDALL: Our dear old county has  
11 got a special bill passed that raises our jury fee  
12 to \$25.

13 CHAIRMAN SOULES: Any objection to the  
14 recommendation on Rule 216 to raise the jury fee  
15 in district court to ten dollars and the county  
16 court to five dollars?

17 MR. RAGLAND: Wait just a minute.  
18 That's already been amended.

19 CHAIRMAN SOULES: Now where is --

20 PROFESSOR DORSANEO: This is working  
21 from the rule -- the current rule, not the one --

22 CHAIRMAN SOULES: Tom, did we do  
23 that?

24 MR. RAGLAND: Yes.

25 CHAIRMAN SOULES: What are the dollars

1 in there?

2 MR. RAGLAND: It's still three-five.

3 CHAIRMAN SOULES: Well, this is  
4 ten-five.

5 PROFESSOR EDGAR: You're right. We  
6 need to make the insertion though under 216 as  
7 amended effective March 4. Look at me, Luke.

8 CHAIRMAN SOULES: I'm sorry.

9 PROFESSOR EDGAR: We need to use this  
10 form though to change it rather than the form on  
11 page 318.

12 MR. TINDALL: Now, what we put was a  
13 30 day --

14 CHAIRMAN SOULES: I'm confused, I'm  
15 sorry to say. I stay that way most the time.

16 PROFESSOR EDGAR: We have already  
17 amended Rule 216. We did that effective -- the  
18 Court did that effective March 4. If we're going  
19 to increase the jury fee, we need to do it within  
20 the format of the new amended rule rather than the  
21 form that I have here on page 318.

22 CHAIRMAN SOULES: So, we would use the  
23 March 4, '87 order, the text from that?

24 PROFESSOR EDGAR: Yes. We reorganized  
25 all of of that but we didn't change the amount of



1 the fee in it.

2 CHAIRMAN SOULES: Okay. Using the  
3 text that the Supreme Court has already adopted,  
4 to become effective January 1, 1988, as the text  
5 of Rule 216, how many favor raising the fee in  
6 district court to 10 and in county court to five  
7 dollars for jury fee? Show by hands. Opposed?  
8 Okay. It looks like it's about 10 to two.

9 PROFESSOR EDGAR: Rule 239 appearing  
10 on page 319 -- 239(a) engendered more  
11 correspondence than anything we received.

12 CHAIRMAN SOULES: Now, where is it,  
13 Hadley?

14 PROFESSOR EDGAR: We're on page 319.

15 CHAIRMAN SOULES: Okay.

16 PROFESSOR EDGAR: The concern -- of  
17 course, there's been a recent Supreme Court case  
18 where one -- there are really a couple of  
19 problems. One, the recipient swears under oath  
20 that he or she did not receive the notice of the  
21 default judgment. The clerk swears it was sent.  
22 Under our current rule, there is really no way to  
23 resolve that factual insufficiency other than the  
24 presumption that it was mailed.

25 The other problem is that our current rule

1 requires the clerk to mail a postcard notice.  
2 Because of those institutions that utilize  
3 computers, a postcard is far more expensive, that  
4 almost prohibitive, than simply requiring some  
5 written notice.

6 So, what we had done, we recommended that we  
7 delete the requirement of a postcard notice but  
8 rather require written notice. We also added to  
9 it "by certified mail return receipt requested."  
10 This then would overcome most of the problems that  
11 arise when there is a swearing match between the  
12 clerk's office and the recipient.

13 MR. BRANSON: I move the adoption.

14 PROFESSOR EDGAR: We then dealt with  
15 the question -- and if you will notice there, Todd  
16 Clements, who is Judge Spears' clerk, wrote a --  
17 did a little research for us on this, and you will  
18 find it back on page --

19 CHAIRMAN SOULES: Hadley, we are going  
20 to have to adjourn. And I really hate to  
21 interrupt you in midstream. I see 10 minutes to  
22 get this stuff from here downstairs and see if we  
23 can get -- these materials, and then get our cars  
24 out of hock. I'm afraid to go any longer. Will  
25 you forgive me for interrupting?

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(Recessed until 8 o'clock  
(in the morning.

REPORTER'S CERTIFICATE

THE STATE OF TEXAS X  
COUNTY OF TRAVIS X

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

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

I further certify that my charge for preparation of the statement of facts is \$\_\_\_\_\_.

WITNESS MY HAND AND SEAL OF OFFICE this, the \_\_\_\_\_ day of \_\_\_\_\_, 1987.

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

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

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