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(VOLUME III)
(Morning Session)

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I N D E X

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CHAIRMAN SOULES: Does everybody have their materials? We have some extras if anyone needs any.

PROFESSOR EDGAR: All right. We were on page 319 yesterday looking at Rule 239(a). This was first called to our attention by Justice Spears by a memo from one of his briefing attorneys, Todd Clements. And then subsequent to that, we got a lot of correspondence. I've already gone into the postcard problem with those various clerks that have computer capacity. And we tried to solve that problem by simply providing for written notice. And to overcome the problem between the clerk saying that it was mailed and the recipient denying receipt, we have provided for certified mail, return receipt requested.

And in Todd's memo to Judge Spears, he had done some research with the postal people and obtained some information on the cost of various methods of proving receipt. And so what we suggest is the return receipt become a part of the

court's file. And that the cost of the certified mailing is to be paid by the party obtaining the judgment, but to be taxed as a cost of court. And those changes are reflected in the recommended rule that you see on page 319. And the committee moves its adoption.

CHAIRMAN SOULES: Second?

PROFESSOR BLAKELY: Second.

MR. JONES: Second.

CHAIRMAN SOULES: Is there any discussion?

MR. RAGLAND: I oppose that part requiring the plaintiff to pay and notify the defendant after he has already been notified.

CHAIRMAN SOULES: It seems --

MR. RAGLAND: I go along with giving him written notice in lieu of a postcard, but there is a presumption in law that a public official performs a duty. And if he says he mailed it out, well then that is a default on the defendant to overcome that presumption.

CHAIRMAN SOULES: There is no question we need to change the postcard to some other kind of mail. The next issue, though, is whether it's just first class mail that gets it or something

else. This certified mail will require extra work in the clerk's office, extra record keeping, the green card and so forth, and there is no due process requirement to do that. It isn't just first class mail -- it's first class mail, and then make a note on the docket "adequate" -- is my question.

MR. TINDALL: And if it comes back unsigned or refused?

CHAIRMAN SOULES: They do come back unsigned. They don't have to keep track of it, throw it in the trash.

PROFESSOR EDGAR: Well, the court had a case before it recently that gave rise to this problem. And as Judge Spears stated in his letter to us which we have back here somewhere --

CHAIRMAN SOULES: It's page 342, I believe, Hadley.

PROFESSOR EDGAR: Okay. He just suggested, as many others suggested, that this might be a way to solve the problem.

MR. RAGLAND: You just have another problem because if you have a green card in there, the defendant is going to come in and say, "Well, I didn't sign for it; it was a neighbor that

signed for it," and you've just got more rigamarole.

MR. TINDALL: And you can't restrict who signs for it any more.

MR. RAGLAND: That's right. You can't get restricted delivery.

MR. TINDALL: And you run into those problems. It could be signed by a spouse or a child or a neighbor.

CHAIRMAN SOULES: Judge Spears says -- where is it?

PROFESSOR EDGAR: It's at the bottom of page 342.

CHAIRMAN SOULES: "I suggest that there would be fewer defaults and fewer attacks on defaults if a better method were devised to prove notice of default had been given. It occurs to me" --

PROFESSOR EDGAR: And of course just --

CHAIRMAN SOULES: -- "that your committee might consider making Rule 239(a) to require that notice of default judgment be sent by certified mail or some form of notice more effective than a postcard."

I wonder if we tried it just first class mail at this juncture, see if that solves the problem in part.

MR. RAGLAND: Luke, why don't we just say "written notice"? And if the clerk wants to go to the trouble of sending it certified mail, let them do it. If you put first class in there, then there may be -- I may want the clerk to use certified mail. If I do, I'm going to fix it up and take it over there and give it to them. But why restrict it other than just to say "written notice by U.S. Mail"? That would be good enough.

PROFESSOR EDGAR: What's that? I'm sorry. I was talking to Frank. What was your -- what was the question?

MR. McMAINS: He was just talking about notice.

MR. RAGLAND: Well, I said why restrict it to first class when in some instances an attorney may want certified mail? And if you've got first class in there some of these clerks are going to say, "Well, the rule says first class and that's what we're going to do."

CHAIRMAN SOULES: Well, certified is first class. I mean, friends, that's just an

additional -- that's an overlay on the first class.

MR. RAGLAND: Well, it doesn't mean that to, you know, a $900 a month clerk up there.

CHAIRMAN SOULES: Okay. Rusty?

MR. McMAINS: Well, that really doesn't make any difference anyway because the only way that the absence of the notice makes any difference is if people come in and take a position they didn't get notice. And you can -- the lawyers can solve that problem anyway in terms of the plaintiff's lawyers. They can pick up the phone and call the people, or they can do their own notice for that matter in terms of building a record that they gave notice of the default. They can send it themselves.

I frankly don't think that the certified mail, return receipt establishes per se or eliminates the problem, because as I read the cases, the presumption of mailing -- I mean of receipt from mailing comes from the testimony of mailing, whether you've got the green card or not. And the fact that you don't have the green card is merely evidentiary.

And so the whole question is still going to

be up to the trial judge when somebody comes in and says "I didn't get the receipt" -- I mean, "I didn't get the stuff that was mailed." Then, there is also an inference it's permissible under the cases that it wasn't mailed. And basically, it's just an issue for the trial judge. And the trial judge just believes whichever -- whichever one he wants to believe and can either set it aside or not, and there isn't anything basically you can do about it on appeal. And it doesn't matter in my judgment whether there is a green card or not.

PROFESSOR EDGAR: Well, I think that was implicit in what Judge Spears said. He didn't say that it would solve all the problems, he just suggested that there would be fewer attacks on default judgments on that basis.

CHAIRMAN SOULES: Tom, are you suggesting an amendment then that we just -- we delete "a postcard notice thereof," insert "written notice only" --

JUDGE RIVERA: Have "written notice by mail"?

CHAIRMAN SOULES: Well, it says "the clerk shall mail written notice," and leave it at

that?

MR. RAGLAND: Right. Strike out all after "notice."

CHAIRMAN SOULES: Is there a second to the motion to amend?

MR. TINDALL: I second that.

CHAIRMAN SOULES: Okay. Is the amendment acceptable or not to the committee? Should we vote on it or -- Hadley, it's up to you.

PROFESSOR EDGAR: I don't want to stand on any formalities. If it's the consensus of the group that we should not have certified mail, well I will certainly abide by that although I think it's preferable to have certified mail, return receipt requested.

CHAIRMAN SOULES: Let's get a show of hands on that. First class or certified. How many feel that first class should be the requirement? Eight.

How many feel that certified should be the requirement? Seven. It's eight to seven. It's a close vote. Rusty?

MR. McMAINS: Luke, I was just going to say in terms -- in lieu of the written notice argument, though, I think in 306(a) we already

have a first class mail requirement on notice. Where is the rule book? It's under 306 --

PROFESSOR DORSANEO: It should be 306(a)(3).

MR. McMAINS: So I mean we ought to be consistent because it's the same document. That's talking about any appealable order.

CHAIRMAN SOULES: Yeah, it says first class mail.

MR. McMAINS: Yeah. So I mean, I'm just saying we already require them to send it first class mail so we might as well --

CHAIRMAN SOULES: Why don't we -- all we've got to do is say "written notice" and that gets it here because 306(a) says what kind; is that right?

PROFESSOR EDGAR: 306(a)(3), it says by first-class mail.

CHAIRMAN SOULES: I thought we had this fixed some time ago and that's where we did it, but we didn't get it done in 239(a). That's what happened.

MR. McMAINS: I think that's just a --

PROFESSOR EDGAR: I guess you want to say then "shall, by first class mail"?

CHAIRMAN SOULES: No. Just "shall mail written notice." 306(a) says how, unless you want to say it twice.

PROFESSOR EDGAR: Okay.

CHAIRMAN SOULES: And it doesn't matter to me. What do you suggest, Hadley?

PROFESSOR EDGAR: I don't care. "Shall mail by written notice"?

CHAIRMAN SOULES: "Shall mail written notice thereof to the party." And then the part about the other addition would not be made if we go that way.

Let me read, then. In the beginning and in the sixth line, starting with the sentence, it starts with the word "immediately" -- this would be the only change. We'll vote as to whether or not this will be the only change.

"Immediately upon the signing of the judgment, the clerk shall mail written notice thereof to the party against whom the judgment was rendered at the address shown in the certificate, and note the fact of such mailing on the docket." And there will be no other changes to Rule 239(a) as it is currently written. Those in favor say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Opposed?

PROFESSOR EDGAR: No.

CHAIRMAN SOULES: Okay. That's the House to one.

PROFESSOR EDGAR: All right. Rule 267 -- apparently there has been some confusion between the COAJ and our committee on exactly where Rule 267 belongs. If you'll recall, at one point we were going to abolish it and it was going to go into the rules of evidence, and then the rules of evidence said no, it ought to belong here and we just really didn't know where it was.

Well finally at the last meeting, we recommended, and the Court has now included Rule 267 in our rules rather than the Rules of Evidence. But as Professor Wicker pointed out to us in our letter, we also needed to conform it to the manner in which the rules of -- in which it had read. There is really no substantive change here at all between the rules of evidence provision and this rule, but it does need to be amended.

CHAIRMAN SOULES: Any objection? Okay. All in favor of this change to Rule 267, please say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Opposed?

PROFESSOR BLAKELY: Mr. Chairman, excuse me.

CHAIRMAN SOULES: Newell. Excuse me. I didn't realize there was discussion.

PROFESSOR BLAKELY: I just want to intervene and take care of a housekeeping thing.

CHAIRMAN SOULES: Good.

PROFESSOR BLAKELY: If you will turn all the way to the hard cover at the back, you will see another suggestion by Wicker on this rule pointing out that -- that the rule --

MR. TINDALL: What page?

PROFESSOR BLAKELY: Right here at the back.

CHAIRMAN SOULES: Page 487, the very last page.

PROFESSOR BLAKELY: It says "witnesses, when placed under Rule 613," -- Rule of Evidence 613 has been changed to 614, so that ought to be placed --

PROFESSOR EDGAR: That's right.

PROFESSOR BLAKELY: That change ought to occur in the Rules of Civil Procedure, 267.

And it also says "of the Texas Rules of Evidence," and that's been changed to Texas Rules of Civil Evidence, and that change ought to be made on page 320.

PROFESSOR EDGAR: Yes.

CHAIRMAN SOULES: Where would you put that on page 320? Is there a place --

PROFESSOR EDGAR: Yes, right after subsection (d), it says "witnesses, when placed under the rule" -- it should be under Rule 614.

CHAIRMAN SOULES: Capitalize the "R."

PROFESSOR EDGAR: Yes. Strike out the "the."

CHAIRMAN SOULES: "Placed under Rule 614" -- okay.

PROFESSOR EDGAR: 614.

PROFESSOR BLAKELY: "Of the Texas Rules of Civil Evidence."

MR. TINDALL: Has that name been adopted, Newell?

PROFESSOR BLAKELY: The Texas -- Rule 267 has already been amended by the court and is going into effect January 1 of '88.

MR. TINDALL: No, but do we have now -- bear me out -- the Texas Rules of Civil

Evidence? Is that a name that we have formally adopted?

PROFESSOR BLAKELY: We have, and the Court has promulgated it and it goes into effect January 1 of '88.

MR. McMAINS: Yeah. It's in the April order.

MR. TINDALL: That we go by Rules of Civil Evidence?

MR. McMAINS: Right.

PROFESSOR EDGAR: So this should read -- subsection (d) should now read, "witnesses, when placed under" -- strike "the," capital R -- "Rule 614 of the Texas Rules of Civil Evidence, shall be instructed by the court"; is that correct, Newell?

PROFESSOR BLAKELY: Yes.

CHAIRMAN SOULES: Those in favor, please say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Opposed? Okay. That's unanimously approved then.

PROFESSOR EDGAR: All right. Now then --

MR. SPIVEY: Are we getting off that

rule right now? Before we do, under Section (1) there "a party who is a natural person," why don't we clear up a problem that has existed in a number of courts? I have had courts exclude the wife of a party. I think there is a case holding that the spouse of a party is entitled to be there, but occasionally I've had just real problems with the court trying to exclude a spouse.

MR. BRANSON: Are they unnatural?

MR. SPIVEY: No, they are fairly natural; one of them was good looking and the judge had no reason to. But it's -- I never can find that case, but I read it one time.

MR. TINDALL: I concur with Broadus. That's a good change to put in. There is a case that says you can't exclude a spouse but it's hard to find it.

PROFESSOR DORSANEO: No, it's not hard to find. Look in my case book; it's right there.

MR. SPIVEY: I'm sorry, Dorsaneo, I don't have that. I better get that.

PROFESSOR DORSANEO: But it depends on what the action is about, you know, the nature of the recovery.

CHAIRMAN SOULES: Well, is this going

to require that we -- we're changing this to make it consistent with 614 of the Rules of Civil Evidence. If we make that change, would we also have to change 614 of the Rules of Civil Evidence?

MR. SPIVEY: I think you should to be consistent, but --

CHAIRMAN SOULES: If it depends on the nature of the case as to whether or not the spouse is -- may be excluded, we ought to do some study on that.

MR. SPIVEY: Wait a minute. How in the world could it depend on the type of case because it's a community recovery.

CHAIRMAN SOULES: Bill Dorsaneo just said it did, I don't --

PROFESSOR DORSANEO: If the recovery is not -- if the non-named spouse is not a real party in interest in terms of the recovery, then it's a different deal.

MR. SPIVEY: The real named spouse would have an interest in recovery regardless of whether it was community or separate.

MR. BRANSON: I would agree with Broadus.

JUDGE RIVERA: It would depend on

whether the defendant is an individual and they are suing the corporate employer. Then they're always excluded.

MR. SPIVEY: No, but I'm saying that, number one, "a party who is a natural person," there's a place that ought to be inserted.

CHAIRMAN SOULES: Broadus, I think -- I don't think we've given it enough study, if you'll permit me. Let's study that the next time.

MR. BRANSON: Why don't we test the water on that, Luke, because I think we have.

MR. TINDALL: I think it's an outrage to keep those spouses out. I've had that hardship all the time, Luke, and it's wrong.

CHAIRMAN SOULES: All right.

MR. BRANSON: I've seen that problem too, and there is a case on it.

MR. SPIVEY: A good example is a custody case, and I had a judge apply it one time in a custody case. I can't imagine them being more of a party at interest, although they are not a legal party at interest. The wife was damn sure interested in the outcome because it affected them.

MR. BRANSON: Besides that, it is

ludicrous to make the lady sit out in the hall for three weeks during the trial, and that's what they do.

MR. TINDALL: And what you end up doing is you have the new spouse of the other party and you keep them out, and it's silly.

CHAIRMAN SOULES: Write it up and we'll put it on the agenda. Next item -- and we'll put it on there today.

PROFESSOR EDGAR: All right. I'm really -- well, I guess I must say I'm embarrassed by what I'm about to talk about now. Rules 273, 4, 5 and 8, I did the very best I could to try and -- when we amended these rules -- to eliminate certain words in order to be consistent, like special issues. But when you roll your own cigarettes, sometimes these things happen.

And right after the court promulgated these rules and they appeared in the April 14 advance sheet, I started getting a bunch of phone calls about "Well, you didn't eliminate the word charges in some rules and you did in others," and, "You have 'issues' instead of 'questions' in some of them," and I said, "That's right, and we'll try and correct it as soon as we can." These are

simply trying to correct the errors that I regret we didn't pick up the first time. And that's all we have done.

CHAIRMAN SOULES: Well let's -- everybody look at these. Which are they, 273 --

PROFESSOR EDGAR: Beginning on page 321, Luke, 322, 323, 324 and 325.

CHAIRMAN SOULES: Okay. Let's take a minute and look at them and see.

PROFESSOR EDGAR: And Tina and I did our best to pick them all up, but I take the responsibility for it and I just missed some of them.

MR. BRANSON: I move the adoption of 321 through 325 as corrected.

MR. JONES: I second the motion.

PROFESSOR EDGAR: I hope I've got them all. I may not have.

CHAIRMAN SOULES: Well, this is housekeeping in Rules 273, 274, 275, 276 and 278 as they appeared in the Court's March 1987 order.

PROFESSOR EDGAR: Yes.

CHAIRMAN SOULES: And we're suggesting that the Court do these housekeeping items before they become effective?

PROFESSOR EDGAR: Yes. And I don't really know what, Justice Wallace, the Court's timetable is going to be on the rules that we are recommending at this meeting. But as far as these rules are concerned, if we could ask the Court to perhaps give them some expedited handling so that they would -- the changes would be effective on January 1 of '88 so that we won't have to go through this problem with a bunch of lawyers and judges when the new rules become effective. I don't know whether that's possible.

JUSTICE WALLACE: We have a conference scheduled for a week from Tuesday to consider these, providing Luke can get them in the final form in time for us to do it because we have to have them over to the Bar Journal by the first of August to get them printed in time to become effective on January 1. So we are going to try to get them all out.

CHAIRMAN SOULES: We can do that. Let me -- in response to the timing, we're going to prepare the Court's conference agenda in my office next week. And we will Federal Express that agenda to all members of this committee on Thursday evening and to the Court. Now I had

planned on having another week, but it doesn't really make any difference. What I was going to do was ask you all to get back to me -- read them over the weekend and get them back to me the following Tuesday -- get your input and get them to the Court a week from Thursday. But --

JUSTICE WALLACE: We can handle that.

CHAIRMAN SOULES: But I can call the Court with your changes. I can call you, Judge, with what I get back from them.

JUSTICE WALLACE: I think it would work out better if you go ahead and do that. Let's just take the extra week. We discussed it on -- whether to have it a week from Tuesday or the following week and said "Well, the sooner the better," but we can do it that way.

CHAIRMAN SOULES: Well, it's very helpful to me to get that proposed conference agenda to you all for a flip-through, at least, and get your feedback because I don't get everything.

PROFESSOR EDGAR: That extra week would be extremely helpful because next Thursday is going to be the 4th of July weekend and it might be difficult for some people to --

MR. BRANSON: And I had planned to do nothing but read those rules, but people like Hadley and Buddy Low probably wouldn't.

CHAIRMAN SOULES: We're going to have to get that Fed Ex'd by Wednesday so that you will have it in your offices Thursday, and we'll just somehow do that. But we'll have it in your offices on Thursday morning. I will need your feedback in San Antonio by Tuesday morning. So if you're going to be word processing, you'll need to do it Monday and get it out Federal Express, or you can call us. Of course, you all know Tina, who does all this detail work for me in my office, and you can just call her and read her any insertions or errors and she'll correct them while you're on the phone.

MR. BRANSON: Can we just communicate with you electronically?

CHAIRMAN SOULES: Yes, sir. You can.

MR. BRANSON: Electronic transfer?

CHAIRMAN SOULES: You can file it electronically if you want to. But that's the plan. Will that work?

JUSTICE WALLACE: Yes, sir.

CHAIRMAN SOULES: Okay. And then all

these rules will have gone through the Court's process pursuant to a January 1, '88 effective date if they are promulgated by the Court.

Yes, sir. Bill Dorsaneo.

PROFESSOR DORSANEO: On this Rule 276 on page 324, I have been concerned for some time about whether it's advisable to keep this modification language in the rule. I personally am not aware of that being a proper method to preserve the right to complain if you submit an instruction or an issue question, and it's modified and you get this notation done. I'd ask Professor Edgar what he thinks about that.

PROFESSOR EDGAR: Well, I think if the Court modifies it, I think you're still going to have to object and go through the process again -- and I agree with you. But when I amended these rules originally, I was -- because of all the other problems we had, I was not trying to make any substantive changes except as under Rule 277, 279. And I suggest what we do, Bill, is go ahead and approve this and then let's take a look at Rule 276 for some further study with the view in mind of correcting the problem you're raising.

CHAIRMAN SOULES: Any further

discussion on Rules 273, 274, 275, 276 and 278? Those in favor of these changes say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Opposed? It's unanimously approved.

MR. JONES: Hadley, does that conclude your report?

PROFESSOR EDGAR: Yes. Have we formally approved these changes?

CHAIRMAN SOULES: Yes, sir.

PROFESSOR EDGAR: Okay. I'm sorry. That concludes our report.

MR. JONES: Mr. Chairman?

CHAIRMAN SOULES: Franklin Jones.

MR. JONES: I have noticed what rare instances I have been in the room yesterday that we have kind of skipped around on the agenda from time to time, and I want to make a motion that we do so again. We have one matter that I know of on our agenda -- there could be many others -- but there's one that I'm peculiarly aware of, and that's Item 12 which the recommendation of that subcommittee is, in my judgment, highly controversial.

And I want to -- you know, I want to oppose

some of those recommendations and I've been told by a number of people in the room that they are going to be leaving throughout the day and they may not be available to vote when that matter is reached. Now I'm not one of them; I intend to be here until you gavel the meeting to a close.

But I would like to move that we now go to Item 12 for discussion and disposition.

MR. BRANSON: Second the motion.

CHAIRMAN SOULES: There's no problem with that except that I've got -- Hadley, I've got another item on the agenda for you and I don't know whether it's going to take any time to just try to finish it. On page 353, is there something -- 355, these are old COAJ items, Rules 247, 247(a) and 250. And we just need to dispose of them.

PROFESSOR EDGAR: I'm sorry. I don't know what page --

CHAIRMAN SOULES: Okay. Page 355 of the main materials and following.

MR. TINDALL: This rule is almost nonsensical. Are we talking about Rule 247?

CHAIRMAN SOULES: Yes. This has been on our agenda for a long time. We just need to --

PROFESSOR EDGAR: Well, I'm sorry. I didn't -- I didn't have it in the material. Well, oh, yes, I'm sorry. We did consider it, if you'll look at item number four in my letter to you. It's on page 317.

CHAIRMAN SOULES: Okay.

PROFESSOR EDGAR: We considered -- our subcommittee considered it, and we do not recommend the amendments to Rule 247 and 250, nor the adoption of 247(a).

CHAIRMAN SOULES: All right, sir. Would you enlighten us just a little bit with discussion on that?

PROFESSOR EDGAR: Well, I don't know.

CHAIRMAN SOULES: That's putting somebody unfairly on the spot.

PROFESSOR EDGAR: Well, let's see. All right, 247(a) which you will find on-- my page is numbered blank, it's 00 -- it's 356, I guess -- we saw as part of trying to incorporate in the rules some standardization on how to handle motions for continuance, in trying to utilize some type of uniform docket control and --

MR. JONES: We've perceived that, Hadley, as a resurrection of the ill-famed

administrative rules of the Chief Justice.

PROFESSOR EDGAR: The subcommittee was -- at this meeting, was composed of David Beck, Gilbert Low, Franklin Jones and myself. And the four of us unanimously concluded that this should be rejected.

MR. JONES: And I so move, Mr. Chairman.

CHAIRMAN SOULES: It's been moved and seconded that -- I'm saying that Hadley has moved and Franklin seconded it that the proposals to change Rule 247 and 250 and to add a new rule 247(a) may be rejected. Any further discussion? Those voting to reject, please say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Opposed? Okay. It's unanimously rejected.

PROFESSOR EDGAR: And I think that then concludes our report.

CHAIRMAN SOULES: Okay. And then, Newell, they are looking to you now wanting to hear your report, I believe. That's what you're talking about, the evidence report?

PROFESSOR BLAKELY: Mr. Chairman, this will be the report of the Evidence Subcommittee

and it begins on page 468, and there are now five items to be reported on. If you'll turn to 469, the first problem, problem number one, comes from a San Antonio lawyer named Soules, the Texas Rule of Civil Procedure 172 provides for auditors. The court can appoint an auditor. And it provides that the auditor's report shall be admissible in evidence.

Luke Soules reports that trial judges, despite that mandate of 172, are excluding them. It may be that one trial judge would exclude on one ground, and another, another. But Luke seems to feel, I gather, that Article 7 dealing with opinions, apparently, is most frequently the problem.

So I submitted the matter to the Evidence Committee, suggesting three possible approaches. One of these was the solution which I've got numbered 1A on page 469, and that would be simply to take 172 and stick in the amendment "despite any evidence rule to the contrary," because the feeling is 172 intends to override anything in the rules of evidence. So that was one approach. The vote on that was five for that solution.

Solution 1B was favored by two members of the

committee, and this is -- it's at the bottom of 469 and top of 470 -- and this is the solution that Luke had recommended which would be to add a completely new rule. And it would be 706 over the rules of evidence which would -- let's see. Well, you can see it there at the bottom: "Verified reports of auditors appointed pursuant to Texas Rule of Civil Procedure 172, whether in the form of summaries, opinions, or otherwise, shall be admitted in evidence when offered by any party whether or not the facts or data in the reports are otherwise admissible and whether or not the reports embrace the ultimate issues to be decided by the trier of fact. Where exceptions to the reports have been filed, a party may contradict the reports by evidence supporting the exceptions."

And then he would amend, here at the top of page 470, Texas Rule of Civil Procedure 172, by striking the evidence aspects of it, striking "said report shall be admitted into evidence," because, see, that would be taken care of over in the evidence rule. That should be "but may be contradicted by evidence from either party where exceptions to such report or any item thereof may

be" -- striking "have been" -- "may be filed within 30 days of the filing of such report," and so forth.

So that is Luther's suggestion and there were two members of the Evidence Committee for that.

A possible solution that I had submitted to the subcommittee and that no one was for, was to go through all of the rules of evidence and anticipate possible objections that somebody might raise on the basis of this, that or the other rule of evidence and try to frame language in connection with each specific rule that would take care of the matter. In other words, it would let in the audit report. No one seemed to be in favor of that.

I've got here Solution 1C. Judge Pope reacted ambiguously. In essence, he said he didn't see any objection to putting the same thing in the rules of civil procedure and the rules of evidence -- identical wording. He didn't say what language, so I just picked -- I just picked this Solution 1C which would amend the rules of civil procedure by the one addition, "despite any evidence rule to the contrary," and then precisely copy 172 over in the rules of evidence. So that's

Solution 1C.

And because there was more support for Solution 1A than for any other solution, I guess as chairman of the subcommittee I move approval of Solution 1A.

PROFESSOR DORSANEO: Second.

MR. JONES: I second the motion, Mr. Chairman.

MR. TINDALL: Can we have some discussion on that because I have dealt with these audit reports and I think Luke has got a preferable solution. If you've been on the hard side of trying to keep one out, they may come in over your most vigorous objection even though the report will have matters that you view as totally extraneous to what the appointment of the auditor was for. It seems to me that if that's your fear, then you ought to have an opportunity to file exceptions and try to keep that out before it comes in over your objection. This is a very powerful weapon in matrimonial cases if you're not very careful.

And 172, which just simply says that the judge -- say he appoints Arthur Anderson, then the Arthur Anderson report comes in and you're stuck

with it. And I don't think that's right.

CHAIRMAN SOULES: Well, the 1B that is there, I drafted it, so I don't -- I'm not trying to be particularly emphasizing words -- but it addresses the very problems that you have with the judge. He appoints this auditor. It's a court's auditor; it's not a party's auditor. It has to be independent. It should not be related to any party. It can't be the particular party's own auditor. I mean, this is independent.

MR. TINDALL: Sure.

CHAIRMAN SOULES: So it is powerful when it goes to the jury. But then when the judge gets that report back and sees how powerful it is, then they begin to squirm about its weight and the fact that it -- well, it concludes ultimate issues to be tried by the trier of fact. Well, it can. Obviously, the Texas Rules of Evidence permit experts to put those kinds of things forward. But judges, for some reason, become reluctant about these reports.

So the ultimate issue and the fact that data in the reports may otherwise be inadmissible -- which, of course, can still get in an expert report under the rules of evidence, we've already

permitted all these things to be admitted into evidence under the expert rule -- but still when confronted with that, those seem to be the two hangups. One, it's got the ultimate issue, and two, it's got material in there that is not otherwise admissible into evidence, even though under the 700 series it is.

So this Rule 706 that's at the bottom specifically addresses the two problems and tells the trial court "Get through those problems and permit it to come into evidence." Then it also does have, as Harry pointed out, the specific language about objections and putting in evidence to support those objections.

Finally, it separates the evidence admissibility aspect of it out of the rules of civil procedure -- which have to do with appointing the auditor and getting the verified report filed and that sort of thing -- and then fixes up over in the evidence rules, then, how it's handled in the evidence stage of the trial.

Now that was the reason I did it that way, and I'm only saying that so everyone knows what the reason was. I'm not necessarily trying to sell it. Newell.

PROFESSOR BLAKELY: I just wanted to respond to Harry. Harry is trying to keep it out, filing exceptions and then an opportunity to argue that it shouldn't be in in the first place.

MR. TINDALL: That's right. Under Luke's proposal --

PROFESSOR BLAKELY: I don't think that occurs under Luke's proposal or any of these proposals. They come in; auditor reports come in.

CHAIRMAN SOULES: It comes in, period. But you --

PROFESSOR BLAKELY: And then if you file exceptions, then you may contradict.

CHAIRMAN SOULES: That's right.

MR. McCONNICO: But you can't contradict unless you do.

CHAIRMAN SOULES: Rusty?

MR. McMAINS: Not being involved in this practice very much -- at least not until my wife files -- I'm curious, if you don't file exceptions is the auditor's report absolutely binding?

MR. TINDALL: Yes. Despite any evidence rule to the contrary, it's a proposal.

MR. McMAINS: I mean like judicial

admissions.

MR. TINDALL: Virtually. But that rule is ambiguously used by the courts. If they don't much like it, they can sort of keep it out themselves.

MR. McMAINS: Well, I mean if the fact of not filing exceptions is that you can't contradict, why is it the same as being binding? And I'm just -- just from a question of the substantive aspect of the procedural law.

MR. TINDALL: The rule doesn't tell you what happens though, Rusty. Now it says -- the current rule says: "The report shall be admitted into evidence, but may be contradicted by evidence from either party where exceptions to the report have been filed before trial."

MR. McMAINS: That's right. But what I'm saying is the effect of that, then, is that you can't controvert portions of the report unless you except to it.

MR. TINDALL: That's right.

MR. McMAINS: So that all I'm trying to figure out is -- what you're effectively doing is the same thing then as admitting a judicial admission and a denial of the admission, in

effect.

CHAIRMAN SOULES: It doesn't go as far as a judicial admission; it's only evidentiary. But then the cases, when you look at them, if the auditor's report is not controverted, it becomes noncontroverted evidence. You can't -- nobody can put any evidence in to controvert it.

MR. McMAINS: All I'm trying to figure out is if you're -- obviously, you're concerned about this in a jury trial context.

CHAIRMAN SOULES: Right. I think that --

MR. McMAINS: And I don't know where you get the authority to submit issues of fact that are not disputed. I mean that's --

CHAIRMAN SOULES: Well you wouldn't. You may raise --

MR. McMAINS: That's why I'm saying I don't know what its function is.

CHAIRMAN SOULES: You may raise a fact issue, Rusty, from evidence extraneous to the auditor's report. The auditor may report, but the jury issue may not be all together based on that. A fraud issue, for example, the Herman estates case would be where we had a big problem with

this. It's not just in matrimonial cases; it's in any case involving a lot of business transactions. And even though you get the conclusions of an auditor, you may still have other issues that are collateral to the determination of liability or maybe even the amount of it.

I think the word "appointed" -- and I'm changing my own -- I think, you know, that ought to be "prepared" in the first line of what I've got under 706 -- and for this reason: If the auditor's report goes beyond what the auditor has been instructed by the court to do, there is an objection that you can make. This report does not conform to the court's order under Rule 172. And if we change verified reports of auditors "prepared" pursuant to Rule 172, then the court could look at that report and determine whether it was prepared pursuant to his order. If it is, then it's admissible. If it's not, then it would not be. It would have to be conformed -- adjusted to conform. Rather than just say any report prepared by an appointed auditor is admissible, say any report prepared pursuant to the court's order is admissible.

MR. TINDALL: I like that.

CHAIRMAN SOULES: That, then, gets your problem.

MR. TINDALL: They're wandering off and rendering opinions on values and things that --

CHAIRMAN SOULES: So whenever you go and you want a court-appointed auditor, you want to be sure that that order tells him to do what you think he needs to do in order to get you through the wicket to help you with these series of transactions.

Okay. If we change that word "appointed" to "prepared," now what? Does that -- and I, again, I'm not trying to sell this format. I have some concerns with the shorthand way of doing it in 1A because I don't think it specifically addresses the several problems, whereas 1B does. Newell?

PROFESSOR BLAKELY: Now, Mr. Chairman, suppose we adopt your proposal there and put an evidence rule in 706 and some opposing attorney objects under the hearsay rule, or objects under authentication that this is inadequately authenticated, and you say, "Yeah, but 706 here says that it is admissible."

Well, that's so. But that's just dealing

with opinions; that's in Article 7 dealing with opinions. That doesn't touch authentication and doesn't touch the hearsay rule, and so on. What does that -- does that -- doesn't that give the trial judge maybe a little bit of: "Well, I'm going to exclude that." "I think maybe you're right. I'm going to exclude that."

CHAIRMAN SOULES: I'd like to put --

PROFESSOR BLAKELY: While if you buy Solution 1A, here this thing is that sweeps across all of the rules of evidence and this thing is admissible despite any evidence rule that comes in.

CHAIRMAN SOULES: Well can we say -- start out 1B with the language "despite any other evidence rule to the contrary,"?

MR. TINDALL: Of course you deal with the hearsay and authentication -- you deal with that now in every form of evidence. As I've worked through those rules of evidence, you have to move around like a computer to make certain you've covered all the bases anyway. So I don't think that's a unique problem with an auditor's report.

CHAIRMAN SOULES: But if we put that

in there "despite any other evidence rule to the contrary," then that would make this dominant.

MR. BEARD: Mr. Chairman, can we vote on the motion to see how we stand?

CHAIRMAN SOULES: Okay. The motion is that we take Solution 1A; we're discussing it really, I guess. How many favor generally the approach to 1A versus the approach to 1B, I guess we can get a consensus on that. 1A? Seven. 1B? Five. Okay. That's seven to five.

Well, I guess the motion is -- is there any other discussion? Rusty?

MR. McMAINS: I'm not sure, however, that the committee has spoken to your suggested amendment to 1B which I think could be put in 1A in terms of said report when prepared pursuant to the order.

MR. BRANSON: Why don't you reask the question, Luke? How many would like 1B with that statement added to it?

CHAIRMAN SOULES: Okay. If 1B reads this way: "Despite any other evidence rule to the contrary, verified reports of auditors prepared pursuant to Texas Rule of Civil Procedure 172" -- and then to the end. If that was the structure of

1B, how many would prefer that to the other alternatives? Twelve. That's the majority of the House. Would you accept that as a substitute motion?

PROFESSOR BLAKELY: I hear Robert out there screaming, but that's all right with me.

CHAIRMAN SOULES: All right. The substitute motion is then that we amend -- that we add a Rule 706 to the Texas Rules of Evidence as I just read it, and that we amend Rule 172 as it appears on page 470.

PROFESSOR EDGAR: Now, would you repeat how that lead into 706 is going to read?

CHAIRMAN SOULES: Yes, sir. It will say "Despite any other evidence rule to the contrary, verified reports of auditors prepared pursuant to Texas Rule of Civil Procedure 172" -- and then complete --

PROFESSOR EDGAR: And appointed pursuant to Rule 172?

CHAIRMAN SOULES: No. "Verified reports of auditors prepared pursuant to." Strike "appointed" because 172 takes care of the "appointed."

PROFESSOR EDGAR: All right.

CHAIRMAN SOULES: Further discussion?

PROFESSOR DORSANEO: Mr. Chairman, on this Rule 172 proposal, the sentence that has been modified "exceptions to such report or any item thereof may be filed," do you think that that conveys the meaning that exceptions are necessary before the report can be contradicted?

CHAIRMAN SOULES: If it doesn't, that message should be in the rules.

MR. TINDALL: Unless exceptions to the report have been filed within 30 days, a party may not contradict. Isn't that what you're attempting to say, Luke? You give at least 30 days.

CHAIRMAN SOULES: Well why would you change "may" to "must"? Exceptions must be filed to tell everybody you've got as 30-day fuse running. If you don't, you're going to waive it. Just change "may" to "must."

MR. TINDALL: But I think the question is if you don't file exceptions, is it clear under the rule that your lips are sealed to contradict?

CHAIRMAN SOULES: I'm comfortable with leaving that in the evidence rule once you say you've got 30 days in which you must file objections in 172 because that's procedural.

MR. TINDALL: Yeah.

CHAIRMAN SOULES: And then pass on to what happens if you don't in the rule of evidence. Any further discussion? Those in favor say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Opposed? That's unanimously recommended.

The next item then, Newell?

PROFESSOR BLAKELY: Mr. Chairman, the Texas State Bar Committee on Rules of Evidence passed four changes in the rules of evidence, recommended them to the Supreme Court, and that's been referred to this committee. And that begins with problem number two on page 471.

The Texas Rules of Appellate Procedure say that "When the court hears objections to offered evidence out of the presence of the jury and the rules, that such evidence be admitted -- that such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections." That's presently in the Texas Rules of Appellate Procedure.

Some member of the rules committee, Evidence Rules Committee, recommended that that be brought

into the rules of evidence. And he recommended it as an amendment to 103(a)(2), Offer of Proof, and the Evidence Rules Committee approved that; there was some thought that it wasn't necessary and perhaps inappropriate to try to bring everything in. But at any rate, the committee approved it. And I submitted it to the subcommittee, and the subcommittee approved it six to two; there you see the votes right under Solution IIA, six to two approved that.

I did not submit and should have, I now realize, a suggestion that had been made by Mike Sharlot who is chairman of that committee now, that it's not proper to put that amendment in 103(a)(2) because (2) is from the proponent side, the offering side, and this amendment is really from the viewpoint of the objecting side. So I have put over here in Solution IIB precisely the same thing, except put it in from the standpoint of the objecting side as an amendment to 103(a)(1). And I'm sure that anyone who voted for Solution IIA would vote for Solution IIB as preferable. And on all of those assumptions, I move approval of Solution IIB at the top of page 472.

MR. JONES: I second the motion, Mr. Chairman.

MR. BRANSON: I notice that Tom Ragland and Franklin Jones were on that committee and you all voted against it.

MR. JONES: We voted against IIA.

PROFESSOR EDGAR: But not against IIB?

MR. TINDALL: Not against IIB, was that --

MR. JONES: Not against IIB.

PROFESSOR EDGAR: So that, in effect, this is a unanimous recommendation of the committee then at this point, I take it.

MR. JONES: And I have seconded the motion.

CHAIRMAN SOULES: The motion has been moved and made, and seconded that Solution IIB, amendment to Rule 103(a)(1) as it appears on page 472 of our materials be recommended to the Supreme Court. Any further discussion? Elaine.

PROFESSOR CARLSON: I wonder if it wouldn't be just a little bit clearer -- and I'm sorry, Newell, I didn't raise this earlier -- if, in the amendment it read "when the court hears objections to the offered evidence out of the

presence of the jury in rules on the record."

MR. JONES: On the record?

PROFESSOR CARLSON: Uh-huh.

MR. JONES: I would go out and accept that.

CHAIRMAN SOULES: Elaine, I'm sorry. I didn't quite hear you. Would you say it again?

PROFESSOR CARLSON: My suggestion is in the underlying language on page 472, the amendment in IIB. "When the court hears objections to offered evidence out of the presence of the jury in rules on the record", -- "on the record" would be --

MR. JONES: Insert "on the record" between "rules" and "that", Luke.

PROFESSOR BLAKELY: May I give one warning, Mr. Chairman.

CHAIRMAN SOULES: Yes, sir. Newell.

PROFESSOR BLAKELY: What we're doing here is simply bringing the exact language from the appellate rules into the trial rules. And if you change it, then there is some query as to what does that mean. If you add something, is it completely consistent with the appellate rules or does it give someone a basis for argument in that,

"Oh, no, it says here" -- and so forth.

PROFESSOR DORSANEO: Doesn't the court always rule on the record? I mean you don't rule off the record.

PROFESSOR EDGAR: If it ain't on the record, it isn't there.

MR. McMAINS: It ain't a ruling if it ain't on the record.

MR. TINDALL: Professor Newell, what about the flip side where the judge hears evidence outside of the jury and decides not to let it in. Do you have to retender it to preserve the -- I mean the flip side is preserving the old bill of exceptions. This seems to say that you don't have to renew the objections --

MR. McMAINS: Well that is the case.

MR. TINDALL: -- if the judge out of the hearing of the jury decides to let it in, right?

MR. McMAINS: Yeah, that is the law.

MR. TINDALL: You have preserved your objection. But the flip side has never been the rule, has it? You present evidence about a bill of exception, and the judge says "I'm not going to let it in." If you don't come back into the

courtroom and remember all those little tricks and say, "Judge, I offer that evidence" -- and if he, you know, doesn't -- then says "I refuse it," your bill of exceptions is no good.

MR. BRANSON: Now you're not -- well, you're properly outside of the presence of the jury.

MR. TINDALL: No.

PROFESSOR BLAKELY: The judge has already -- you've already -- in the courtroom --

MR. TINDALL: You've got to offer it again on the record.

MR. BRANSON: Well, but you take the record with you. I mean the record is going in the bill of exceptions.

PROFESSOR DORSANEO: Not under T.R.A.P. 52 you don't.

MR. McMAINS: No.

PROFESSOR DORSANEO: See that's the problem. This is only, you know, one -- taking one loose sentence from 52 and putting it in 103 and there is a lot more in 52 that could go in 103. And it's a larger problem. I think you just have to read 103 and 52 together.

MR. McMAINS: 103 really deals with --

I mean the problem is -- I think Newell had in the beginning is that the civil rules of evidence are things that a trial judge concerns himself with. He doesn't have to worry about it from the appellate court's angle. The appellate court is going to say that that's sufficient.

MR. BEARD: Well, Bill, you don't have to read off on your bill of exceptions.

PROFESSOR DORSANEO: Not now. Under 52 you don't.

MR. TINDALL: But you formerly did, right?

PROFESSOR DORSANEO: Yeah, I think you did.

MR. McMAINS: Arguably.

CHAIRMAN SOULES: There was some authority, though, that when you got the jury back in the box, you had to get up there and tell the judge, "I offered what I just offered," and he had to exclude it before the jury which was silly. But that's been eliminated entirely now, hasn't it, to preserve your error?

MR. TINDALL: And this is eliminated, too, so --

CHAIRMAN SOULES: Any further

discussion? Those in favor of Solution IIB -- well, do we put on -- do we want to insert "on the record" -- which would be different from 52 or not? Those in favor of that insertion, show by hands. Opposed -- I'm sorry. I didn't see that. And those opposed show by hands. Okay. It seems to be opposed, Elaine. And then without inserting "on the record" at that point, now looking just as the text appears on 472 at Solution IIB, those in favor of amending Rule 103 as indicated, say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Opposed? That's unanimously recommended.

PROFESSOR BLAKELY: Mr. Chairman, problem number three --

PROFESSOR EDGAR: Well, while we're on Rule 52, I just called to our collective attention that there are two remarkable typographical errors in the rule as it now appears. I'm looking at T.R.A.P. 52(c)(5). It states: "The judgment shall submit such bill to the adverse party." I think that means "The court shall submit."

PROFESSOR DORSANEO: I move the deletion of that sentence all together.

PROFESSOR EDGAR: Well, I'm just

simply stating that that is a typographical error, obviously.

PROFESSOR DORSANEO: Yes.

PROFESSOR BLAKELY: Are we bringing the typographical error into the evidence rules? Is that what you're --

PROFESSOR EDGAR: No. I'm just simply -- because I'll forget this if I don't say it now, but I've noted in my rules of evidence book that that is -- there is a typographical error there. And then, again, in Rule 52(c)(10) the sentence reads "anything occurring in open court or in chambers that is reported and so certified by the court reporter may be included in the statement of facts rather than in formal bills of exception, providing that in a civil case the party requesting that all or part of the jury arguments 'of' the voir dire examination," and that should be "or."

MR. McMAINS: No, it says "on" but it should be "or."

PROFESSOR EDGAR: Oh, okay. I've x'd it out, but anyhow that's also a typographical error. I simply call those to the committee's attention.

PROFESSOR DORSANEO: Why don't you move the correction?

PROFESSOR EDGAR: I move the correction.

PROFESSOR DORSANEO: Second.

CHAIRMAN SOULES: Okay. I've got changing "on" to "or" in 52(c)(10), but I feel like there was more conversation about 52(c)(5) and the suggestion was made that it should be deleted.

MR. McMAINS: Well, he was --

PROFESSOR DORSANEO: No.

MR. McMAINS: That's all right.

CHAIRMAN SOULES: Okay. So what are we saying? "The court shall submit"?

PROFESSOR EDGAR: Yes.

CHAIRMAN SOULES: Those in favor of those two changes say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Opposed?

JUSTICE WALLACE: Are we deleting (5) all together?

CHAIRMAN SOULES: Opposed?

JUSTICE WALLACE: Are we deleting (5) all together?

CHAIRMAN SOULES: No. Judge, what we're doing here, the word "judgment", the second word in (5) would be changed to "court." And that would be the only change in (5). And in (10) "on" to "or."

JUSTICE WALLACE: Okay.

CHAIRMAN SOULES: Next, Newell?

PROFESSOR BLAKELY: Mr. Chairman, on page 472 under the problem number three, Solution IIIA, this is the same song, second verse except from the offering party's side. This brings into the rules of evidence some language from 52(b), and you had the same vote for that. By the by, I should add McConnico; that vote came in late. Add that to "for."

MR. McCONNICO: Thanks, Newell.

PROFESSOR BLAKELY: And, belatedly, I should have said on the previous problem, he also joined the majority. But there it is, "The offering party shall as soon as practicable, but before the court's charge is read to the jury, be allowed to make, in the absence of the jury, its offer of proof." And then reading on what's the existing language in the rules of evidence. Move approval, Mr. Chairman.

CHAIRMAN SOULES: Motion has been made to amend Rule 103(b) as indicated on page 472. Second?

MR. LOW: Second.

CHAIRMAN SOULES: Discussion?

PROFESSOR EDGAR: Tom, what were your and Franklin's objections to that?

MR. RAGLAND: That's what we are trying to figure out.

MR. JONES: Newell, are you sure Ragland and I voted against that?

PROFESSOR BLAKELY: Beg your pardon?

MR. JONES: I said are you sure that Ragland and I voted against that?

PROFESSOR BLAKELY: I can go back and check, but I don't notice --

MR. JONES: Well, did I tell you why? Because I can't now --

PROFESSOR BLAKELY: I may have just put that in there to make it up.

MR. JONES: You probably put it in there so it would carry.

CHAIRMAN SOULES: Further discussion? Those in favor say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Opposed? That's unanimously recommended.

PROFESSOR BLAKELY: Mr. Chairman, on page 473 where I've got problem number four, the Texas Rules of Evidence Committee recommended that Rule 407 Subsequent Remedial Measures, be amended by striking the sentence "Nothing in this rule shall preclude admissibility in products liability cases based on strict liability."

The vote -- I'm orally amending the vote up there -- McConnico and O'Quinn responded after I had shut down the voting. So actually the subcommittee vote is a vote against this proposal, but the State Bar Evidence Committee recommended it. And you pretty well know the arguments for and against. I think one of the arguments for is that trial judges read that sentence and they say "Well, that means that we cannot admit subsequent" -- I mean that subsequent remedial measures come in in strict liability cases, and that's that -- the products liability cases.

An argument that that should be struck is that 403 then would emerge as the controlling rule. And in some cases, the probative value of the subsequent remedial measure in products

liability cases is very minimal and prejudicial impact extremely heavy. But trial judges: "Well, but no, there is that sentence over there in 407." And they should be thinking in terms of 403, and may do so if that sentence is struck. That's one of the arguments for striking it. But you people know what's lurking in your minds on this particular sentence and the arguments that were made back in the liaison committee on that.

You know that the Fifth Circuit, of course, lets -- or rejects in products liability cases subsequent remedial measures and a number of Federal circuits do -- one or two do admit them. So that's about the size of it. And I, now representing the vote of the subcommittee, move disapproval of this recommendation.

MR. JONES: I second the motion, Mr. Chairman.

CHAIRMAN SOULES: Any further discussion?

MR. MORRIS: I move the question.

CHAIRMAN SOULES: Those in favor of the motion that no change be made to Rule 407 say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Opposed?

PROFESSOR BLAKELY: Opposed.

CHAIRMAN SOULES: Okay. You think they should change it.

PROFESSOR BLAKELY: Yes.

CHAIRMAN SOULES: Okay. So that's House to one. No change.

Next.

PROFESSOR BLAKELY: Beginning on page 473, problem number five dealing with Rule 705, we're going to let the expert testify, but let's explore the basis for his opinions out of the presence of the jury to be sure that a bunch of this inadmissible -- evidence inadmissible save as a basis, won't taint the jury if it is found that the basis is inadequate to support the opinion.

This is presently the language on the criminal side, and someone had recommended in the evidence committee -- the State Bar Evidence Committee -- that (d), subsection (d), be put in the civil rules. But the thought was, "Well, if we're going to get into that, let's just bring the whole rule over," and so the Bar Committee recommended that importation of the criminal language to the civil side.

The vote up there must be amended to -- with Jones and Ragland against, add McConnico and O'Quinn against. So the vote is five to four in favor of this change. And I move approval of this change.

CHAIRMAN SOULES: Second?

MR. LOW: I vote with you. I second it.

MR. TINDALL: I'll second.

MR. BRANSON: Let's discuss that if we could, Mr. Chairman.

CHAIRMAN SOULES: Now. Discussion. Franklin Jones.

MR. JONES: Mr. Chairman, I vigorously oppose this change, and I confess that it's only come up in my practice in the rare instances in which I try condemnation cases. And we have a condemnation lawyer up in Marshall who if obnoxious counted, he would be world champion.

PROFESSOR EDGAR: Could you speak up just a little, Franklin?

MR. JONES: I say we've got a condemnation lawyer up in Marshall that if obnoxious counted, he would be world champion. But he uses this rule, and it would be available

to every litigant and every cantankerous lawyer either on the north or the south side of the docket.

And whenever you trot your expert witness into the courtroom and by the time -- you ask him his name, and then the lawyer jumps up and says I want the witness on voir dire. He disrupts the presentation of your case; it's an obstructionist tactic is what it is. And I don't think we ought to give the -- or the trial court, of course, can always determine whether or not a witness is qualified. But to allow an obstructionist lawyer to be able to destroy the continuity of a trial is a bad mistake. And I think we ought to reject this change.

CHAIRMAN SOULES: Frank Branson.

MR. BRANSON: Along the same -- in support of Franklin's position, I have tried a case or two where my adversary has used this rule in the same manner that Franklin described. And basically what they did is cross examination before direct examination. In addition to that, anything provided by the additions to Rule 705 can currently be covered by taking a deposition of the experts. So it's not only adding fuel to those

obstructionists, but it's absolutely unnecessary, and I vehemently oppose the addition.

CHAIRMAN SOULES: Newell.

PROFESSOR BLAKELY: Mr. Chairman, responding to the two points that have been made here, a party opposing an expert can ask for permission to go into his qualifications before he gives his expert opinion. Whether or not this change is made, you will note the comment right at the end of it, this rule does not preclude a party from conducting a voir dire examination into the qualifications of the expert. The qualifications of the expert -- the opponent can make a contest on that before you finish your direct examination. And that's so with or without this particular rule.

MR. BRANSON: Judge, if they haven't -- I mean, Professor, if they haven't taken his deposition, the court is not going to grant that because --

MR. JONES: Well why pass the rule if it --

MR. BRANSON: Well, if they've taken his deposition, they don't need it.

PROFESSOR BLAKELY: Well, the

arguments for the rule, the qualifications point aside, is that this very well qualified expert may nevertheless have an inadequate basis for the opinion that he is going to give. And if he gives that opinion and then it's found out that his basis is inadequate and it is all struck, the jury is tainted.

Now Frank says well, you're going to discover that all on pretrial discovery --

MR. BRANSON: If a lawyer is diligent, he's asked interrogatories, he's got the name of the expert, he's then taken their deposition. He makes a motion to strike before the expert gets up. If he's not diligent, I don't see giving him the opportunity to come in the back door of the courthouse, and that's all this does.

MR. JONES: And if he's -- the expert is not qualified, all he's got to do is object to his opinion.

PROFESSOR BLAKELY: It's not a question of qualifications.

CHAIRMAN SOULES: Rusty, you had your hand up? Rusty McMains.

MR. McMAINS: Right. Well I agree with the Dean that it is not a qualification

issue. My concern is that the rule as it is stated basically makes a condition precedent to any expert opinion. You know, that you allow this voir dire examination. It doesn't matter whether or not it's a real significant contest or not, it just is a protracting, interfering mechanism in the trial. It's dilatory, disruptive.

Now, I can understand -- and I don't frankly have as much of a problem with the concept of a balancing instruction or balancing test being put in in terms of if the proponent of the expert is offering treatises and stuff and stick him in front of the jury -- of having some kind of instruction power. I frankly think he's got that now. I don't think there is any real doubt that -- you can do anything that's under the (c) part of the balancing test now without the necessity of it being in this part of the rule.

But the main thrust of the change is just a mandatory voir dire which I think is just an extremely disruptive practice and uncalled for.

CHAIRMAN SOULES: Steve McConnico.

MR. McCONNICO: Well, I agree it does allow mandatory voir dire which I think is used to slow down the trial. Plus, even if the courts do

have the power now that Rusty is talking about, this is going to highlight it. This is going to make it very clear that they have that power, and we're going to see the trial courts determining whether or not someone is qualified to give testimony instead of juries.

MR. McMAINS: Oh, don't get me wrong. I'm not suggesting that they have the power to do what's in (b) and (c) now.

MR. McCONNICO: Yeah.

MR. McMAINS: I mean arguably -- obviously, if the judge wants to let somebody interrupt you, you're not going to be able to do anything about it anyway as a practical matter. But I mean what I'm talking about is the limiting instruction part of --

MR. McCONNICO: Of (d).

MR. McMAINS: Of (d), yes. Right.

MR. McCONNICO: What I'm trying to say is if the court does have that power, this just highlights it and it's going to be giving the trial court a lot more power and determination on who is qualified to testify as an expert, instead of a jury. And if a person isn't qualified to testify as an expert, you can handle that in cross

examination and the jury can make that decision.

CHAIRMAN SOULES: Any further discussion?

PROFESSOR EDGAR: I just have a question. Newell, under the rules as they currently exist, doesn't the court have the power to properly allow voir dire examination to determine the qualifications of an expert?

PROFESSOR BLAKELY: Yes. And that will be so after this, and this rule has got nothing to do with examining the qualifications of an expert.

PROFESSOR EDGAR: Well then --

PROFESSOR BLAKELY: This rule has to do with examining the basis of his opinion.

MR. McMAINS: That's right.

MR. McCONNICO: That opens up that whole area as to his basis of getting in --

MR. McMAINS: It has to do with undermining the ultimate issue opinion stuff that we did in the first place.

PROFESSOR EDGAR: Well, but doesn't the court have that power now?

MR. TINDALL: Newell, why are we taking a criminal practice where there are very

limited discovery procedures, depositions are almost unheard of, and importing it into a civil practice where you can do anything?

MR. BRANSON: I could see if you didn't have depositions why this would be relevant. But if you've got depositions, all you're doing is encouraging sloppy legal work, and I don't think you ought to do it.

CHAIRMAN SOULES: Elaine Carlson?

PROFESSOR CARLSON: In listening to the comments, I wonder if we couldn't compromise by modifying some of the proposed language again. What if instead this (b) read "prior to the expert giving his opinion" -- then, "instruct or disclosing the underlying facts or data, a party against whom the opinion is offered" -- and we'd pick up that language again -- "shall upon request be permitted to conduct a voir dire examination directed to the underlying facts or data upon which the opinion is based when such disclosure has not been made."

MR. BRANSON: Well -- but then you still encourage them not to take depositions and do it all at the trial.

PROFESSOR CARLSON: Well I think

strategically most attorneys in a large case are going to do that anyway.

MR. JONES: Where is the criticism of the present rule coming from? Who is making a case that this rule ought to be changed?

MR. BRANSON: This came from the criminal lawyers.

PROFESSOR BLAKELY: Yeah, this came from the State Bar Committee.

MR. JONES: Well, I know that's where it came from, but what --

PROFESSOR BLAKELY: I don't remember who.

MR. JONES: -- what evidence do they have that we need to change this rule?

MR. TINDALL: Mr. Chairman, may I withdraw my second and maybe it will die at that point.

MR. BRANSON: You can't do that.

CHAIRMAN SOULES: All right. The Chair --

MR. LOW: I say that we go ahead. I've already seconded it. The Professor and I are going down together.

CHAIRMAN SOULES: It's been moved and

seconded by -- moved by Blakely and seconded by Low -- let's take a consensus. How many are inclined to make this change? If it's heavily resisted, we may just go on. Let's just get a consensus on the change to Rule 705. This is not a final vote, but how many feel that we should make such a change or a similar change? Three. How many feel we should not? Okay. How many feel we should continue to discuss it? There are no hands up on that.

Let's vote then. How -- those --

PROFESSOR BLAKELY: This is serious this time then, Mr. Chairman?

CHAIRMAN SOULES: I wanted everybody to see where it stood and if we want to go on and discuss it, we can.

PROFESSOR DORSANEO: I like paragraph (d). It seems to be a separate issue.

MR. RAGLAND: To make it official I move that we reject proposed amendment 705.

COMMITTEE MEMBER: Second.

CHAIRMAN SOULES: The motion has been made and seconded, and everybody agrees that we have fully discussed it, that the proposed change to Rule 705 be made. That's the motion, that it

be made. Those in favor show by hand.

MR. RAGLAND: Just a second. What was the motion?

CHAIRMAN SOULES: The motion is that Rule 705 be amended as indicated here because there was a motion on the floor before yours, Tom.

MR. RAGLAND: Okay.

PROFESSOR CARLSON: As it now appears on page 473?

CHAIRMAN SOULES: Yes. Well first, Elaine, do you want to offer your amendment? If so --

PROFESSOR CARLSON: No. I didn't seem to garner much support so -- in which case --

CHAIRMAN SOULES: I want to be sure that you're given every opportunity to get it on the record. Okay.

Those in favor of the changes proposed to Rule 705 on page 474 of the materials, show by hands. That's two. And opposed? Looks like 12.

MR. BEARD: As I was saying, I think everybody should have noted that in the Cullen Davis trial that they just had a hung jury on, there were two expert witnesses testifying in there, and their expert opinion was that Cullen

Davis committed the murders. So I don't think we have any rules about expert witnesses up there, you know.

CHAIRMAN SOULES: I didn't think so when I read the rules of evidence. When they came out, it was all over. Newell?

PROFESSOR BLAKELY: Mr. Chairman, when I solicited the subcommittee -- Buddy?

MR. McMAINS: Buddy?

MR. LOW: Yeah. I'm sorry.

PROFESSOR BLAKELY: Yeah, when I sent out to the subcommittee, Buddy reacted by return mail, and I want to nominate him for committee member of the year.

PROFESSOR DORSANEO: I'll second that.

PROFESSOR EDGAR: I second.

CHAIRMAN SOULES: Does that conclude your report, Newell?

PROFESSOR BLAKELY: Yes, it does. We took care of the Wicker thing a moment ago.

CHAIRMAN SOULES: Thank you very much for that. That's always a well organized and well presented report, Newell.

What's the pleasure? We have the discovery types of rules and Bill Dorsaneo's bit. Rusty,

you've got a -- yours will probably be short, won't it?

MR. McMAINS: Yes.

CHAIRMAN SOULES: Tony, Steve, Elaine -- which of these are going to be the most important changes as you see them? I think maybe Dorsaneo's.

MR. McMAINS: Yes, I think so.

CHAIRMAN SOULES: And the reason I'm putting those forward is I want the maximum number of people here when we talk about the most important changes, and I'm sure that some people are going to have to leave later in the day. Should we just take up Bill's report now?

MR. McCONNICO: I say we do.

CHAIRMAN SOULES: Okay. This is category five on your agenda.

PROFESSOR DORSANEO: Okay. If you will each turn to page 210. The easiest way to deal with the particular suggestions made by people who have written in and made suggestions is to look at the report of the standing committee on Rules 166(b)-215. First of all, there was a proposal made to amend Rules 167 and 168 to permit discovery before the defendant's answer day. The

committee, I think, unanimously -- well actually, it says divided, I don't know who voted against it -- but fairly close to unanimously decided that this committee should consider the matter. And we drafted Rules 167 and 168 as reflected on pages 218 and 220 through 221 to provide for discovery and production of documents and interrogatories before answer day.

The specific language was modeled fairly closely on the companion Federal rule such that a written response and objections, if any, would be required within 30 days after service of the request in terms of Rule 167, and within 45 days after service of the citation and petition upon a defendant so that there is a little bit more time involved if what you have is the request served with the petition. That is in both 167 and 168, and again it fairly well tracks the exact language in the companion Federal rules. Basically the suggestion is to go to the Federal practice on these devices.

CHAIRMAN SOULES: Is it so moved?

PROFESSOR DORSANEO: Yes. The committee moves adoption of those changes.

CHAIRMAN SOULES: Any second?

MR. McCONNICO: What --

CHAIRMAN SOULES: Before we discuss, do I hear a second?

MR. BEARD: Second.

CHAIRMAN SOULES: Pat Beard seconds. Now, discussion? Steve McConnico.

MR. McCONNICO: Luke, I opposed this in the subcommittee. And the reason I opposed it is because under the recent Fort Worth Court of Appeals case of Insulated Glass and the recent Supreme Court case of Gutierrez vs. Dallas Independent School District, if the person who receives the discovery does not respond to it, object to it, or ask for an extension within 30 days, he waives it. He has to respond to it.

And as I see it under this rule, if someone is served with -- if the attorney gets the petition on the day that the answer is due along with the discovery, he then has 25 days within which to respond to such discovery request. He doesn't have any type of relationship with the person generally that he's representing. He doesn't know anything about the case. He then has to get into it and try to respond to that discovery in 25 days. In a big case, that's not

enough time.

In most cases what he's going to do is he's going to file a motion to extend time and we're going to have another discovery motion in the trial court. But I don't think we should be doing anything that adds to additional discovery motions in the trial court. I think we've bogged our trial courts down too much with all of these discovery motions that every time we go to the courthouse that's what's on the docket. That's what the trial courts are telling me; judges are telling me they are taking up a lot of their time. For that reason, I oppose it.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: Luke, what are they talking about? What -- I don't see a proposed rule on 210. Is he just generally --

MR. McMAINS: It's on 218.

MR. LOW: Oh. Okay. Well now --

MR. McMAINS: 218 is the proposed rule on Rule 167. And 168 is on 220.

PROFESSOR DORSANEO: 220 and 221.

CHAIRMAN SOULES: 167, 168, those two rules -- is it just those two, Bill?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: As they appear on pages 218 through 222.

MR. LOW: Okay. Go to Hadley. I may have further questions now that I know where we are.

CHAIRMAN SOULES: Hadley Edgar.

PROFESSOR EDGAR: To carry on with what Steve said just a moment ago, not only does this place the lawyer attempting to answer this under, I think, real undue time constraints, but I'm also wondering what's wrong with the present practice? I mean, is there something -- some reason why our current practice is not working adequately? Because unless there is some compelling reason, I would be reluctant to force this change and bring up all the problems that Steve has, I think, properly raised. And I'd like to hear some comment --

CHAIRMAN SOULES: Rusty McMains.

MR. McMAINS: Well, I was in the -- even though I'm not on the committee, I was involved in the discussion about this, and Paul Gold, I think, was one of the people who -- with Branson's office that spoke for it. And the basic thesis was simply that right now the way the

rules --

PROFESSOR DORSANEO: You are on the committee.

MR. McMAINS: Oh, all right. I am on the committee.

PROFESSOR EDGAR: You are on the committee.

MR. McMAINS: I thought I was an interloper. But at any rate, one of the reasons that they are proposing this is that right now essentially just because of the order of practice, what happens is that a lot of people -- particularly in your personal injury type practice where they use form interrogatories and form requests for production, and now I'm getting fairly standard 175 requests for production in order to avoid the interrogatory rule on limitation of the number of questions -- the discovery is all initiated by the defendant.

The defendant files an answer and then immediately begins initiating discovery. And you're on the defensive particularly with the sanctions practice as it currently is. And that is really not a very fair procedure in terms of plaintiff is initiating the lawsuit, sometimes in

the dark, can't talk with the defendant's witnesses who frequently have the sufficiency of the information. You get back special exceptions, you get back requests for production, you get back interrogatories, requests for admissions and all kinds of things. So that in my judgment, it does not increase the number of motions that have to be filed, it's just a question of who has to file them.

At least if you have the ability to initiate and inaugurate the discovery, then when the defendant gets it and he's under the gun, then maybe you can have a little bit better leverage to work out some kind of an agreeable scheduling for orderly discovery. And I think that's one of the basic --

PROFESSOR EDGAR: Well it seems to me, though, that the plaintiff -- the plaintiff's attorney that is in the position to initiate discovery simultaneously with the filing of the petition is equally in the capacity -- or has the ability to initiate that discovery immediately upon the filing of an answer. And in all probability, he is going to file that prior -- the defendant is not going to initiate discovery

simultaneously with the filing of the answer.

MR. McMAINS: That's not true though. I mean that by and large --

MR. JONES: There's one point that ought to be made here, Mr. Chairman.

MR. McMAINS: -- in the personal injury practice, 90 percent of the time I get discovery requests, interrogatories --

PROFESSOR BLAKELY: Notice --

MR. McMAINS: -- requests for admissions, notice of depositions --

CHAIRMAN SOULES: We've got too many talking. We're not on the record now.

MR. McMAINS: I'm sorry.

CHAIRMAN SOULES: Hadley had the floor. Did you finish expressing yourself?

PROFESSOR EDGAR: Well, okay. All right.

MR. McMAINS: I mean I'm just saying it's my experience in the practice of personal injury litigation, products litigation, and things that have very standard form interrogatories that are computer generated, that you get those.

MR. LOW: Well, I didn't realize you couldn't do this. I've been doing it.

MR. McMAINS: Well, you're supposed to have a motion with the court to do it.

MR. LOW: Well, because sometimes I'll file a lawsuit and it's kind of getting close to limitation and I have the sheriff serve the interrogatories. And when they get it, you know, I work out something. I tell the other lawyer that, you know, if he's got a time problem or something, I tell him what my time problem is, but I didn't know that I couldn't do that.

CHAIRMAN SOULES: Current practice does not permit that.

MR. McMAINS: Well, under Gutierrez, however, I think there is a good possibility that if they don't object, they may have a problem.

MR. JONES: Are you telling us, Rusty, that the rules provide for a motion --

MR. McMAINS: The rule provides right now that you could initiate discovery before answer date only with leave of the court. That's the way I --

MR. TINDALL: It doesn't seem like there's much sentiment for change, Luke. Can we leave it alone?

CHAIRMAN SOULES: Well, I want to make

sure everybody gets heard on this. Pat.

MR. BEARD: Mr. Chairman, this is a practice that is laid on us in all of the litigation pretty well in the other states. You get a petition served on you, you get a request for admissions, interrogatories. And I don't know why we can't live with it just like there is an extended period of time beyond the answer date to answer. And while the plaintiff is preparing his lawsuit, why shouldn't he prepare his basic request, interrogatories --

MR. McMAINS: He should.

MR. BEARD: -- and get it on rather than in another time frame.

MR. McMAINS: Let me say one other thing that I think is a salutary benefit to the rule, Franklin, and that is that if you serve this by the sheriff on the party, at least the party knows that there is something out there. And frequently you will have -- at least I have the problem of lawyers that have the tendency to let the interrogatories that you send to their office kind of lay around for awhile before they ever manage to even get it to the party. And I think there is actually a salutary benefit to the party

seeing that there are questions that need to be asked and you to focus on in the beginning.

CHAIRMAN SOULES: Tony Sadberry.

MR. SADBERRY: Mr. Chairman, I would like to go back to Steve's question, if I may, with authority, the cites concerning the waiving of objections -- I wonder if that would be cured by a provision that in 45 days or 30 days -- 45 days of service or 30 days after appeal, the discovery requests are gone. Would that solve the problem?

MR. McCONNICO: I don't think so because the defense attorney gets the interrogatory requests on the 20th day. Under this rule, he has 25 days to respond to it. If he doesn't respond to it in 25 days, under that Fort Worth Insulated Glass case and then Gutierrez from the Supreme Court, he can't file any objections. He's waived them.

MR. SADBERRY: I agree with that interpretation, but if the rule provided that, he still has 30 days after the receipt of request for discovery.

CHAIRMAN SOULES: What I'm sensitive to here is the timing of the answers. What would

be wrong with saying that the answers -- responses to this type of discovery are due 30 days after the answer is filed?

MR. JONES: Well, suppose you've got a limitation problem.

JUDGE RIVERA: They're going to object to that more than what we have now because now you can get it earlier with leave from the courts.

MR. SADBERRY: I think the problem is created by 45 days after service of citation. You might not serve the discovery requests contemporaneously with the petition until sometime in the period after service. And the 45 days would require a response to discovery request. Not -- that might not provide 30 days from the time of the discovery requests.

MR. BRANSON: I tell you what. With the new frivolous statute that the Legislature has passed, we really ought to look at something like a John Doe statute to allow a vehicle for discovery before the actual parties are named. I mean particularly in the medical negligence field where you've got a record that many times doesn't reflect what actually occurred and you're trying to figure out who needs to be sued. If you have

to go out and sue them now for the statute of limitation purposes, there are going to be a lot of cross actions and frivolous lawsuits filed.

CHAIRMAN SOULES: We'll put it on the agenda, Frank, as soon as you get it prepared.

MR. BRANSON: Okay. I'll prepare one and send it to you.

CHAIRMAN SOULES: Thank you. And I agree that that needs to be looked at. Rusty.

MR. McMAINS: I do foresee, I think, based on the last comment -- and I'm not sure whether this would necessarily solve Steve's problem -- but it seems to me that the ability -- what we should do is to be able to initiate the discovery contemporaneous with service.

CHAIRMAN SOULES: Yes.

MR. McMAINS: And it may be that we don't need to actually allow service, you know, of discovery requests on the person after service and before answer. But if you have them served by the party -- served on the party where they are all in one packet, then they are going to get to the lawyer, and I think the 45 days is sufficient, frankly, from that standpoint.

I would have a concern if -- in terms of if

you were going to serve them one day with a petition and a week later with the interrogatories, or whatever, then I could foresee that being a problem. But I think we can fix that in the drafting.

CHAIRMAN SOULES: Judge Rivera, I didn't quite follow what you were suggesting there that people would object --

JUDGE RIVERA: Well right now, we have a procedure where they can go and get not only discovery before answer date, but expedited discovery.

CHAIRMAN SOULES: Yes, sir.

JUDGE RIVERA: And we can issue an order for them to even go look at the premises or get hold of some property or some evidence and hold it -- which is when it is more important than answering questions -- and we permit that. But this says, you know, not to consult the court and open it for everybody all the time.

MR. McCONNICO: I think what Judge Rivera is saying is important because we already have the motion for leave to file that allows it when you need to do it. You can do it under our present rule. Where if we go to this rule, we

might be just creating some new problems.

JUDGE RIVERA: Yes, we've done it in three, four or five days already, when there is an explosion or a crash.

MR. McMAINS: But that doesn't eliminate the motion practice problem.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: Luke, I think you could accomplish both purposes. I don't think it would be the intent to repeal that and take away what they have, that right. If you need shorter discovery then go to the court and get an order, but why -- where a lot of times this is routinely done -- why have to go to court every time and get an order? Why not just allow a vehicle for them to serve the interrogatories or requests along with the lawsuit without taking away the rights. You still have this other right.

JUDGE RIVERA: Judges feel very uneasy when there is litigation with no attorney on one side.

MR. LOW: Well, all right. Well, the judge may not would do that. But all I'm saying is --

JUDGE RIVERA: There's always a

tendency to take advantage of somebody that is pro se.

MR. LOW: I understand. But the proposal here would allow you time. They've been served with it, they've got time to answer and so forth, but if you have a specific situation then -- that you can explain to the judge and convince him, he could even shorten it from that. But they are not inconsistent. You could have both of them exist. They are not exclusive of each other.

PROFESSOR DORSANEO: The more I thought about it, I think that the plaintiff ought to be in charge of establishing the discovery scheme. I just think that makes more sense in terms of our litigation. And I don't know whether 45 days after service of citation and petition is the appropriate time period, but I represented defendants for a lot of years and it really doesn't make that much difference to me when 30 days begins to run with respect to my preparation. I don't even understand Steve's point, frankly.

MR. McCONNICO: You don't. Okay.

MR. McMAINS: If you're concerned about 30 full days or something even at the outset, then make it 50 days.

CHAIRMAN SOULES: Why not say 30 days after the answer date? Just start the 30-day period -- we can always keep 30 days, don't have different variations of days, just say we start it at some other time. What bothers me --

MR. BEARD: Well, it shouldn't be 30 days after the answer date. It should be service of citation because of that variation we have in the answer date.

CHAIRMAN SOULES: Okay. Sixty days? I mean I see your point.

MR. McCONNICO: I think 60 would solve the problem because what I'm worried about is the time crunch --

CHAIRMAN SOULES: Sixty days after service of citation, that helps, doesn't it?

MR. McMAINS: But then again the problem is that you're still talking about who is initiating it from the standpoint of whose are due first. What if a defendant serves them on you contemporaneous with his answer, then you've got less time than he does.

MR. McCONNICO: And it depends -- that's right.

MR. McMAINS: And I think the reason

for the 45 days -- and I think you could probably push it to 50 and it would be about the same.

MR. McCONNICO: If it was 30 days from the answer date then it would fall the same for each side possibly.

MR. McMAINS: Well, if you say 30 days of answer date or the date answer is due.

PROFESSOR DORSANEO: The date answer was filed?

MR. McMAINS: I mean date the answer was filed. In other words -- but then you see you would be varying it, you wouldn't be giving him a specific date at the time that you serve him because he doesn't have -- the party does not have any control over when the answer is filed if he sends it on to his attorney. In order to give specific notice of the dates that he's supposed to file the answers to interrogatories or response to requests for production, it needs to run from the date of service of the citation.

MR. McCONNICO: But you know under what Luke said, the defendant could still initiate discovery if he gets it -- say you served him immediately, if he gets it to his attorney and his attorney gets the answer on file and hits you with

the interrogatories, request for production, whatever, and you've only got 30 days to respond and he still has an extra 15.

MR. McMAINS: Well, I'll take that risk.

PROFESSOR DORSANEO: They're not going to be that fast.

CHAIRMAN SOULES: Well, we need to make this period a fair period. Maybe somebody does run in the door and get the jump on you, but I think short of 60 days is not fair.

MR. McCONNICO: I think what Luke is saying is right. I think that solves the problem of when they come in on the 20th day to the defense counsel's office after they have been served, which happens a lot. And they say, "Here. I've got these interrogatories. I've got these requests for production." And the requests for production are very voluminous, the attorney goes to enter the court to ask for extra time to file these, the court doesn't give it to him. He's got 25 days to go up to Michigan or wherever else to look at records --

MR. McMAINS: Well, you've only got 30 days under the rules now --

MR. McCONNICO: -- if he doesn't give it to you.

MR. McMAINS: So -- yeah. So all I'm saying is what's wrong with 50 days? You keep talking about 60 days, but 50 days still gives you by and large -- well, generally gives you at least 30 days after the answer is due.

CHAIRMAN SOULES: How many are for 60 and how many are for 50? Let's get that out of the way. How many think that the period should be 50?

MR. JONES: Have we moved off of the 45?

CHAIRMAN SOULES: Yes, sir. How many think it should be 60? Okay. Well there's -- I don't know. It's easier for me to remember thirties and sixties. And I think it's going to be easier for a lot of other lawyers to do that -- I guess because I hate these unusual numbers in the rules and that's why I favor something more like --

MR. JONES: Are you going to count the votes, Mr. Chairman?

CHAIRMAN SOULES: I think the vote was for 50. Okay. Fifty is what the number is then.

Now that doesn't mean that we have accepted the approval.

Now one thing we do need to be sure, Bill, and I think it's important we look at these to see if Judge Rivera's problem is -- his perceived problem is here. Does this preclude the court ordering answers short of these standard time periods?

MR. McMAINS: No.

CHAIRMAN SOULES: Because that's necessary. The court has got to be able to order discovery responses quicker than this if a party can get an expedited discovery motion ready.

PROFESSOR DORSANEO: Well both of the rules -- unless I'm off beam here -- 168 in paragraph four, the last sentence says: "The court, on motion and notice for good cause shown, may enlarge or shorten the time for serving answers or objections."

And in 167, there's a similar sentence at the end of paragraph two: "The time for making a response may be shortened or lengthened by the court." So I think the court has control over the time frame ultimately.

CHAIRMAN SOULES: Does that give you

some comfort, Judge Rivera?

JUDGE RIVERA: We've had that all along.

CHAIRMAN SOULES: So as long as we don't change that -- that's what you want to be sure doesn't get changed in this --

JUDGE RIVERA: Well to me it doesn't make any difference; they come in from time to time. But I'm saying that we've done that, you know, without this rule. The only thing is this rule would do it without bringing it to the court's attention.

CHAIRMAN SOULES: Right. Okay. Those in favor of the proposed change in Rule 167 say aye -- oh, Tony, you had your hand up. I'm sorry, I didn't see any other hands up.

MR. SADBERRY: Mr. Chairman, I'm not sure I'm reading this right, but before it goes to the subcommittee, shouldn't the word under paragraph two --

CHAIRMAN SOULES: Tony, I can't hear you. I'm sorry. If you're going to have outside conversations, please have them outside of the room.

MR. SADBERRY: -- second line,

shouldn't that say --

PROFESSOR EDGAR: What page are you on?

MR. SADBERRY: On page 218, that's Rule 167. Is that where we are?

PROFESSOR EDGAR: Yes.

CHAIRMAN SOULES: Tony, I was so distracted, I haven't followed a word you've said. Would you please start over again for my benefit, and I apologize.

MR. SADBERRY: That's all right. On page 218, the proposed change to Rule 167, shouldn't that be "defendant" second line to the amended portion?

PROFESSOR DORSANEO: I'm not seeing where you are.

PROFESSOR EDGAR: Be served upon the defendant rather than the plaintiff.

CHAIRMAN SOULES: Well, yeah. The plaintiff is going to be serving --

MR. McMAINS: Served upon the defendant, yes.

PROFESSOR DORSANEO: Thank you.

PROFESSOR EDGAR: Very good, Tony.

CHAIRMAN SOULES: Okay. With that

change, those in favor of Rule 167 say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Opposed?

MR. LOW: Let me ask a question. Where is it in the rules now that gives the right -- I don't see it where the judge has the right to shorten it.

PROFESSOR EDGAR: Last sentence of Rule 167(2), for one thing. And then in Rule 168, the last sentence of number four.

MR. LOW: Okay. So that sentence still remains. Okay.

CHAIRMAN SOULES: Okay. Those in favor of the changes to Rule 168 that appear on pages 220 and 221 of the materials say aye. Yes, sir. Tom Ragland.

PROFESSOR DORSANEO: I don't know if that's right. Can I see the Federal Rule Book?

MR. RAGLAND: Did we resolve about how that change was applied to both sides of the docket?

PROFESSOR DORSANEO: That should say plaintiff.

CHAIRMAN SOULES: Yes. We've discussed it and the mechanics of how it would

work, and that was discussed.

MR. McCONNICO: Did we decide which day period we were going to use?

CHAIRMAN SOULES: Fifty days. Those in favor of the suggested changes to Rule 168 --

PROFESSOR EDGAR: Wait just a minute.

MR. SADBERRY: We've got the same question here. Bill thinks it should be plaintiff.

PROFESSOR DORSANEO: Let's look -- it's copied from the Federal rule. Let's look at that.

CHAIRMAN SOULES: Why not say: "The request may, without leave of court, be served upon a party"?

MR. McMAINS: Well, that's what it did say before we changed it.

CHAIRMAN SOULES: A party after the commencement of action. Either side can start discovery after the commencement of the action.

MR. TINDALL: Well, the Federal rule reads, Luke, "Any party may serve upon any other party written interrogatories" -- et cetera, et cetera.

PROFESSOR DORSANEO: Well, that's one

-- we're looking at Federal Rule 34.

MR. TINDALL: 34?

PROFESSOR DORSANEO: (b) says: "The request may, with leave of court, be served" -- "without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service or summons and complaint."

CHAIRMAN SOULES: Our rules are not designed to give anybody a jump that the other side doesn't have.

PROFESSOR DORSANEO: No, I think it should say plaintiff.

CHAIRMAN SOULES: Why don't we say the request --

MR. TINDALL: Well, that would imply that you formally needed leave of court.

CHAIRMAN SOULES: "The request may, without leave of court, be served upon" -- excuse me. Let's see if I can get this thought across. "The request may, without leave of court, be served upon a party after commencement of the action." What we're attempting to do here, isn't it, is permit discovery to start as soon as the action is commenced by anybody who wants to start

discovery after the action has been commenced.

PROFESSOR DORSANEO: But it's commenced by the filing of the petition and this rule is designed to say that you cannot serve on the defendant until there is service of citation. I mean, it's commencement of the action and then service. And service is after commencement of the action. If you say it that way, you could --

CHAIRMAN SOULES: Oh, I see.

PROFESSOR DORSANEO: -- send somebody interrogatories before they are served.

CHAIRMAN SOULES: I've got you. Plaintiff is the correct word. As printed, it's right.

MR. McCONNICO: How can you serve a plaintiff -- who's going to serve them if the defendant hasn't answered?

CHAIRMAN SOULES: The defendant knows he's been sued.

MR. TINDALL: Well why should we allow defendant to serve interrogatories if he won't come into court?

MR. McMAINS: Well if you serve interrogatories, I think he has to appear.

PROFESSOR EDGAR: The action has been

commenced but he has not yet been served with process.

MR. TINDALL: Well why should we --

PROFESSOR EDGAR: This simply permits -- what this does is permit either party after the commencement of the action to initiate discovery.

MR. TINDALL: So you know a lawsuit is coming, you can go ahead and notice the plaintiff for deposition even though you have never answered the lawsuit?

MR. BRANSON: But you've sent -- but you're actually making an appearance when you do.

CHAIRMAN SOULES: Which is the Federal law. That's the Federal rule.

MR. SADBERRY: If I may, I think that's correct. I withdraw that comment and think it should remain plaintiff, and it should be as written.

CHAIRMAN SOULES: Okay. Those in favor say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Opposed? Rule 168 --

MR. TINDALL: Luke, can I ask a question about 167? I wasn't around when it was

adopted. Why do we have it -- it's always been an oddball ruled the way it's --

CHAIRMAN SOULES: The vote has been taken.

MR. TINDALL: No, no. I'm not changing that. I'm just asking this as a point of inquiry. Rule 167 has all of these "request" and "response" in all caps. Is there some -- what are we trying to do there?

CHAIRMAN SOULES: We are going to be working on some discovery cleanup in the interim. I don't know. But let's get -- we've got a big agenda --

MR. TINDALL: All right.

CHAIRMAN SOULES: -- and we're going to start losing our committee on some very important things. Particularly, I think, the deposition filing rule we need to get on the table while we've got as many people here as possible.

PROFESSOR DORSANEO: Are we ready for number two?

CHAIRMAN SOULES: I want to get a vote on Rule 168. How many are in favor of the proposed changes to Rule 168 shown on page 220 and 221 say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Opposed?

MR. LOW: Wait a minute. I've got a question. Are you saying here on Section 6 on 221 --

PROFESSOR DORSANEO: No. We haven't done that one yet. That's next.

CHAIRMAN SOULES: Okay.

MR. LOW: Okay. I'll vote till we get to this.

CHAIRMAN SOULES: Okay. Now then we're going to move to -- okay. We've approved the changes on 220 to 168, but we have not yet approved the changes on 221; is that right, Bill?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: Okay. Now let's take those up.

PROFESSOR DORSANEO: Well, the next one does involve basically paragraph six of the interrogatory rule which is, as Buddy pointed out, on page 221. A proposal was made to have the rule provide explicitly that late objections are waived unless good cause is shown for the failure to object on time basically.

The language that was placed in proposed

amended paragraph six to Rule 168 on page 221 of this draft is taken literally from the Court's opinion in Independent Insulating Glass vs. Street. It doesn't provide exactly that objections are waived. It provides that they are waived unless an extension of time has been obtained or good cause is shown for the failure to object within the time period which would either be 30 or 40 or 50 days.

CHAIRMAN SOULES: Codifies into the rule the Independent Insulating Glass holding.

PROFESSOR DORSANEO: And perhaps more importantly, it codifies the Gutierrez vs. D.I.S.D. Case. I think some of the committee members, especially Steve and I, concur on this and believe that it is not necessarily a good idea to codify the opinions of courts of appeals, but the Supreme Court is a different matter.

CHAIRMAN SOULES: Well we have where we've seen that rulings of the Supreme Court have not maybe given full notice to the Bar in the rules, tried to make the rules give notice of that to the practitioner so that they would have a place to look and see where the problems may arise in one spot. So this would be consistent if we

want to do it. Buddy Low.

MR. LOW: Okay. I've got a question. Does that case hold that under Rule 11 that another lawyer and I can't agree -- I don't care if I'm representing a plaintiff or a defendant -- I say, "Look. I need about 10 or 12 days, confirm it in writing." I don't get an order to the court; I don't have to go down and get the judge now to sign that. And we do that all the time on both sides of the docket. And this looks like I've got to go down and get an order of the court.

Now I realize that under Rule 11 agreements between lawyers that that would eliminate that right, and I bet you I haven't made interrogatories on time in 10 years or the other side either. You know, not dragging your feet but the discovery is pretty extensive and sometimes you say, "Well, give me another 10 days." "Sure, confirm it in writing" -- or they'll do the same with me. And that eliminates that factor. Does the Supreme Court say we can't do that?

MR. BEARD: I don't think so, Buddy. That's a good cause if the other lawyer is going to say I didn't give you the -- and that's showing good cause.

MR. LOW: I just think it ought to be by agreement between attorneys in writing or something. I just don't think you ought to have to go down and get an order of the court expressly so stating.

PROFESSOR DORSANEO: It can be changed to say "unless" --

CHAIRMAN SOULES: "An extension of time has been obtained by agreement"?

MR. LOW: "By written agreement."

CHAIRMAN SOULES: No, "by agreement."

MR. LOW: All right.

CHAIRMAN SOULES: Because Rule 11 says what kind of an agreement you have to have to have an agreement.

MR. TINDALL: But that's that old deal about the State of Texas citation back over in another rule. You better say here that it's by written agreement.

CHAIRMAN SOULES: Well, we've tried to change -- we've tried to make Rule 11 more important by not saying what kind of agreement elsewhere in the rules. In other words, we have tried to focus back in this last year, focus back to Rule 11 and say that's what agreement means and

we're not going to have all kinds of agreements depending on whether they appear somewhere else in the rules. I mean, that was an effort of this committee during this very series of sessions. But if we put in "unless an extension of time has been obtained by agreement or by order of the court"?

MR. LOW: Yeah. Would that violate the Supreme Court ruling? I mean I'm not --

PROFESSOR DORSANEO: No.

CHAIRMAN SOULES: "Or good cause as shown for failure"? Why do we have to say in accordance with paragraph four? Just say it's been obtained by agreement or order of the court or good cause is shown for the failure?

MR. LOW: That's fine with me.

CHAIRMAN SOULES: Let me read it the way I have it in my notes here. "Objection served after the date on which answers are to be served are waived unless an extension of time has been obtained by agreement or order of the court, or good cause is shown for the failure to object within such period." Any problem with that, Bill?

PROFESSOR DORSANEO: No.

CHAIRMAN SOULES: Any further

discussion on that? Those in favor say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Opposed? That will be unanimously approved.

PROFESSOR DORSANEO: Now Clyde Jackson had another suggestion that the committee decided not to put in a written draft. That suggestion involved having --

CHAIRMAN SOULES: That's on page 234.

PROFESSOR DORSANEO: -- a 329(b) type of activity concerning objections. Really on page 236 if you look at Mr. Jackson's language, it says: "In the event that a written order is not signed by the court sustaining any such objections within 75 days after interrogatories are served, it shall be considered overruled by operation of law on expiration of that period." And the committee decided that that was not a good idea.

CHAIRMAN SOULES: Motion?

PROFESSOR DORSANEO: We -- the committee moves the rejection of that suggestion.

CHAIRMAN SOULES: Second?

MR. BRANSON: Second.

CHAIRMAN SOULES: Discussion? Those who vote to reject say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Otherwise? That's unanimously rejected.

PROFESSOR DORSANEO: Now the next problem involves Rule 166(b) and --

PROFESSOR EDGAR: I noticed, Bill, that you deleted, in Rule 168 on page 227, the last sentence of paragraph number five. Look on page 227.

CHAIRMAN SOULES: Hadley, go with me to page 221. It was printed in two places and we have been referring to 221.

PROFESSOR EDGAR: Oh, okay. All right.

CHAIRMAN SOULES: If you don't mind.

PROFESSOR EDGAR: No problem.

CHAIRMAN SOULES: Thank you.

PROFESSOR EDGAR: I assume that you're recommending that material be deleted?

PROFESSOR DORSANEO: Well actually, that was already deleted in the -- I'm glad you mentioned that. That, in the last Supreme Court order, dropped out of the rule, at least in the one printed in the Advocate section report of the litigation section. And frankly, it does pick

that up that that disappeared, and maybe we ought to just take a look at it and see whether it disappeared inadvertently or on purpose.

MR. McMAINS: The reason I think it disappeared was because of the nonfiling of a lot of paper now that is supposed to be taken for the exception.

PROFESSOR EDGAR: I see that it's been dropped out, but we didn't recommend that it be dropped out. And I'm just wondering -- and certainly the Court can do that, I'm just wondering what happened. I'm wondering of the circumstance.

PROFESSOR DORSANEO: Well that's why I --

PROFESSOR EDGAR: Yeah, I understand. I know.

MR. McMAINS: Are interrogatories and answers still filed now under the new rules?

CHAIRMAN SOULES: No.

MR. McMAINS: See, that's what I think -- that's the reason I think that was dropped out. Was that a conforming change trying to drop out the stuff about filing interrogatories, Judge?

JUSTICE WALLACE: You got me. I'm in

the cold here.

PROFESSOR EDGAR: Well, but that sentence -- the sentence that has been deleted first talks about copies and also then about promptly filing them. There are two matters. If you're just concerned about the filing aspect then the first clause should remain.

PROFESSOR DORSANEO: Yes.

PROFESSOR EDGAR: Now I'm just raising the question. I didn't know we had done that.

MR. McMAINS: Where is the report? Where are our minutes from the last time? Are they reflected --

PROFESSOR EDGAR: I don't know. I didn't bring my minutes.

PROFESSOR BLAKELY: At the beginning of the supplement, this book right here.

PROFESSOR EDGAR: Yes. It's in the beginning of the supplement. That's right.

MR. BEARD: Well isn't it service that is really -- you've got to serve as true copies --

PROFESSOR DORSANEO: On somebody.

MR. BEARD: -- on somebody in answer --

PROFESSOR DORSANEO: If it's not the

court, it has to be the other side, I guess.

MR. BEARD: I think it really doesn't make any difference if it's in there. The court probably dropped it as being not material.

PROFESSOR DORSANEO: The thing in the Advocate, the litigation section before that brought this to our attention, is that it's dropped out, but it's not indicated as being dropped out on purpose by being crossed out. See, it's just kind of not there.

CHAIRMAN SOULES: It fell off.

PROFESSOR EDGAR: Pat, let's assume that plaintiff files the lawsuit and wants to serve interrogatories on defendant A. Now, under the rules is he required to also serve copies of those interrogatories on defendants B and C?

MR. BEARD: Yeah, they have to have an opportunity.

PROFESSOR EDGAR: All right. The only way you're going to do that is to include this first clause in what has been deleted because that's what it says. It says you serve copies of interrogatories on all other parties.

PROFESSOR CARLSON: But that's what subsection (7) says now in -- I'm looking at the

court rules.

PROFESSOR EDGAR: Well, all right. Let's look --

CHAIRMAN SOULES: Yeah, that's it. That's where it went. I knew we did something with --

PROFESSOR EDGAR: Okay. It's in (7). Then that's where it is. Okay.

CHAIRMAN SOULES: I couldn't find it, but that's where it is. Thanks, Elaine.

PROFESSOR DORSANEO: For the sake of clarity, though, I move that this -- if it's not reflected in one of the Supreme Court orders as being taken out on purpose, I would move that the Supreme Court be advised to explain that clearly to the Bar.

CHAIRMAN SOULES: What, Bill?

PROFESSOR CARLSON: Well, Bill, in looking at the court rules it says in the comments, "These changes permit serving responses and objections simultaneously and delete the requirement for filing interrogatories, responses and objections."

PROFESSOR DORSANEO: But is it crossed?

PROFESSOR CARLSON: It's not crossed, but it's in the comments.

CHAIRMAN SOULES: Well, Bill, we are really talking about something -- when the logistics of developing this Supreme Court order -- ultimately what the Court wants is something that doesn't have any strike-overs, just plain text and material and that's what they get finally.

And number (7), of course, gives notice to the parties and the comment says why. But this other -- this work that we do in preliminary drafts is not in the Court's order at all. It's got to be cleaned up. And I realize that somewhere along in the word processor.

MR. McMAINS: That's what they did do, Luke. They did knock out the filing requirements.

CHAIRMAN SOULES: And they moved the service to (7).

PROFESSOR EDGAR: To (7).

CHAIRMAN SOULES: That's right. Okay. And that's been done.

PROFESSOR EDGAR: Okay. Those then in favor of -- well, we've voted now on 168.

MR. RAGLAND: Luke, I have a question.

CHAIRMAN SOULES: Okay, sir.

MR. RAGLAND: What does the nonfiling of interrogatories rule do to what we just did about filing interrogatories simultaneously with the filing of the petition? Is the clerk going to accept --

CHAIRMAN SOULES: Service.

PROFESSOR EDGAR: It's just service.

CHAIRMAN SOULES: Service of interrogatories simultaneously with filing. You do not file them. You can serve them, but you don't file them.

MR. RAGLAND: I understand that. But didn't we just address a rule that would allow the plaintiff to attach interrogatories to the original petition --

CHAIRMAN SOULES: No.

MR. RAGLAND: -- and get it served?

CHAIRMAN SOULES: No.

MR. RAGLAND: We didn't do that?

CHAIRMAN SOULES: No. You can attach interrogatories to a citation and get them served, but you don't file them.

MR. RAGLAND: Well how are you going to -- how is the clerk -- how are you going to get

a clerk to attach something to a citation that hasn't been filed?

CHAIRMAN SOULES: We've got too much agenda. I'm sorry. That's something that we'll just have to work out, I guess.

Okay. Next issue, Bill? What's your next point?

PROFESSOR DORSANEO: Well, the next one involves a larger problem. Basically --

CHAIRMAN SOULES: That's page what?

PROFESSOR DORSANEO: -- it's concerned with Rule 166(b) which begins on page 213 and ends on 216.

Let me approach the matter this way. We were advised by you, Mr. Chairman, that objections and complaints had been leveled at Rule 166(b) because of the fact that it did not address burdens imposed upon the trial judge or the party resisting discovery. Particularly in this packet, a letter by David Chamberlain on pages 244 and 245 makes mention of a perceived problem with the rule -- silence on what Chamberlain calls "an extraordinary burden upon the trial judge to wade through documents," et cetera.

We concluded that in order to address this

problem clearly, a new paragraph four was needed concerning burdens in the discovery process. And I think probably at my suggestion -- but I believe the committee members virtually all concurred in this -- the issue of burdens uncovered or involved a problem in paragraph three which does not contain very much guidance concerning the contours of the particular exemptions covered.

So this draft basically involves two distinct but closely related problems and proposed solutions. First the draft attempts to provide guidance to the lawyers about the particular content of exemptions that are not now defined such as, for example, work product and witness statements. And it also attempts to codify in clearer terms, in fairer terms if you like, the Supreme Court's holdings involving burdens imposed upon the discovering party and the party resisting discovery in paragraph four. Those two items are related but they are distinct one from the other and could be taken up separately if the Chairman wishes to do that.

My own view is that some of these items are a lot less controversial than others and it could be dealt with that way as well.

CHAIRMAN SOULES: Why don't you just take them up any way you are comfortable with.

PROFESSOR DORSANEO: All right. Well the first question, a policy question, I suppose, is whether we should have a better definition of the contours of exemptions. If I could direct your attention to page 214 -- particularly paragraph (d) which, I believe, would be a less controversial item than any of the others -- you can ascertain my meaning.

Paragraph (d) now in the rule that's proposed to go into effect January 1, 1988, covers witness statements, but all it provides is that the written statements of potential witnesses and parties are not discoverable. The rule doesn't tell us what a witness statement is or have any anticipation of litigation language limiting the exemptions. But when we look at Allen vs. Humphreys, a case decided by the Supreme Court in 1977 which spelled out the contours of the witness statement exemption in old Rule 167, it is quite clear that only witness statements, in effect, in anticipation of litigation are exempt from discovery, not just any old witness statement.

So it's my view that we need to spell that

out in order to have the rules say what the Supreme Court has said on witness statements. And that that's only fair to the lawyers in the state to have them advised about the exact content of the witness statement exemption.

Second, as a matter of clarity, the last part of this paragraph (d) which talks about "The term 'written statements' includes," et cetera, attempts to do the same kind of thing by reference to language that appears in paragraph two of 166(b). Basically, bottom line the idea is to explain to the lawyers and to the judges what is meant by a written statement of a potential witness and a party.

MR. SPIVEY: Doesn't your comment there on (d), though, conflict with the recent Supreme Court decision where you say "or defense" -- right at the last of the underlined portion of (d) there -- "or the defense of the particular suit"? If you had a period there rather than "in connection with the particular circumstances out of which it arose," I thought that was the distinction that the Court made.

PROFESSOR DORSANEO: No, I think that this is exactly Allen vs. Humphreys language.

MR. SPIVEY: Okay. That's the language. I'm just going by my recollection.

MR. McCONNICO: I think what Broadus is saying, if I could agree, I think to satisfy Stringer, Turbodyne and those cases that came after Allen v Humphreys, what we might need to say -- and I haven't reviewed the cases recently -- "or in connection with the particular circumstances out of which it arose in anticipation of litigation." I think we need that language in there on that phrase.

PROFESSOR DORSANEO: Well, I chose this language carefully, and it is consistent with my reading of those cases. And basically it extends from the exact language that appears on one of the pages in Allen vs. Humphreys.

Now I will grant you that the next page in Allen vs. Humphreys could be construed more narrowly, but this is how I read those cases. Now there is obviously room for disagreement on what those cases mean, and part of this attempt is to try to address that.

MR. SPIVEY: I'm not arguing which is the better policy. I'm just arguing to try to bring the rule consistent with the Supreme Court

because it is not our role to second guess the Supreme Court on what they meant, but try to codify what they meant.

PROFESSOR DORSANEO: That was my attempt.

JUSTICE WALLACE: For whatever it's worth, the point that Steve made has really been the stickler on that because that phrase hanging out there all along is what has caused the confusion. "Or arising out of the appearance upon which it is based," there is at least -- a lot of people interpret that as saying an adjuster goes out as soon as he is notified of an accident then he's -- it is arising out of the occurrence on which actually the claim is based so therefore it is privileged. And that has really been a problem for us.

MR. SPIVEY: Well, and I think that's what gives the trial courts a problem and gives the lawyers a problem. In fact, you know, you could be helping the defendant to set out the blueprint for distinction here and that's not my concern. My real concern is along with -- exactly what you're saying -- what's giving the courts problems because it ought to be clear. And there

is still a confusion in my mind as a lawyer reading that what I can claim is privileged and not privileged. It may just be that maybe we need to address the verbage to clarify that a little bit more.

CHAIRMAN SOULES: There are two problems here. One is witness statements and the other is party communications. The cases are really party communications cases that the Supreme Court has been struggling with. We dealt with that when we worked on this rule the last time. And the Supreme Court amended party communications -- that's Turbodyne, Stringer and those ones -- by putting in that for those to be privileged they must be made in anticipation of the prosecution or defense of claims, made a part of the case of the pending litigation.

Now we did not transfer that problem that the Court was having with party communications over to witness statements, and I haven't seen it come up in a witness statement context. It may be the same problem. What we're looking at here in (d) on page --

PROFESSOR DORSANEO: It's the same thing.

CHAIRMAN SOULES: Pardon me?

PROFESSOR DORSANEO: I say it is the same thing.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: It will be fine to take that language and --

CHAIRMAN SOULES: What we're looking at on (d) at witness statement, we can transfer -- if you'll work with me just a second here -- if you go down to the next to the last line on that page where it says "and" -- and then start, "in anticipation of the prosecution or defense of the claims made in the pending litigation" -- take that language which we developed in this committee in earlier sessions and substitute it for --

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: Now put your finger up here with me on the sixth line from the top, substitute our developed language for this: "connection with the particular circumstances out of which it arose." Then we have fixed it in both places the same way. And we spent a lot of time working out that fix in a previous session. Does that speak to the problem and get it resolved?

PROFESSOR DORSANEO: Yes.

MR. McCONNICO: I believe it does.

MR. BRANSON: Justice Wallace, would that help the Court?

JUSTICE WALLACE: Yes.

CHAIRMAN SOULES: Okay. Will you accept that as a --

PROFESSOR DORSANEO: Yes. That's fine. The language used in (d) was taken exactly from the Supreme Court's opinion in Allen vs. Humphreys, but if the Supreme Court prefers this other language, that's fine.

PROFESSOR EDGAR: All right. Now exactly what are we going to transfer?

CHAIRMAN SOULES: Okay. Let me --

PROFESSOR EDGAR: Or duplicate?

CHAIRMAN SOULES: I'm going to read the sixth line from the top. We're going to leave "in" where it says "in." We're going to strike the following words: "connection with the particular circumstances out of which it arose." After the "in" -- which we left in -- we're going to insert: "anticipation of the prosecution or defense of the claims made in the pending litigation."

PROFESSOR EDGAR: We're going to

strike "connection" out then.

CHAIRMAN SOULES: Yes.

PROFESSOR EDGAR: Okay.

CHAIRMAN SOULES: From "in" forward and then we'll have the same language consistent in both places. Tom, we'll get to you in just a second. Tom Ragland will have the floor first when everybody gets caught up. Are we ready for Tom? Okay, Tom. Thank you.

MR. RAGLAND: This obviously addresses some of the many problems, but it also has created some problems. This type of language here in worker's compensation cases, where the insurance carrier is the defendant, and they hide behind this type of language to keep you from getting from them material that is essential to the prosecution of the case. They contend, you know, that they are representatives of the company and the basis of the cause of action arose on the date of the injury. And the most frequent one is like wage statements, for example, where they have access from the employer, the wage data. And I have found on several occasions where they request a wage statement from the employee and they get it and they don't like it and they ask them to send

them another one. And then they give you the one they want.

I don't know if we can write a rule that is going to cover every contingency, but I want to point out that this is creating some problems for those of us who practice worker's compensation. Getting something from the insurance carrier that they don't want to give you is practically an impossibility without having a motion to compel in a hearing and an order. Or the alternative is to take a separate deposition of an employer -- which you've got to incur the time, trouble and expense of that -- and sometimes the employer is even out of state.

CHAIRMAN SOULES: Okay. With that change in (d) --

PROFESSOR EDGAR: All right. Now what we're talking about, Luke, then the witness statement will not be discoverable if it's made subsequent to the occurrence and in connection with prosecution and investigation of the defense or in anticipation of prosecution of the defense of pending litigation, right? One or the other?

CHAIRMAN SOULES: Yes, sir.

PROFESSOR EDGAR: Okay. That's fine.

MR. McMAINS: Now, let me -- Luke, can I ask you a question about that?

CHAIRMAN SOULES: Rusty. Yes, sir.

MR. McMAINS: And I don't anticipate this to be a problem, but I have had rather variant rulings from trial courts. What happens when the witness statement is used by the witness who is in fact deposed?

CHAIRMAN SOULES: To refresh his recollection?

MR. McMAINS: I mean I understand that under the evidence rule that's supposed to be something that's admissible, but this says you can't get it. I mean we have just added -- it now says unqualifiedly that it's not discoverable. Now a lot of times --

CHAIRMAN SOULES: It's a privilege that is waived is what this law is. It's a privilege but it's waived whenever he prepares himself for a deposition.

MR. McMAINS: Well, I understand the argument about waiver of privilege, but waiver of privilege again is common law stuff that's not really in here. I mean it's not in the -- we don't -- there is nothing here in the rule talking

about waiver. This just says very specifically it is not discoverable.

Now when a witness has in fact used a statement -- and this is more often what happens -- and denies that he has, then you have no mechanism by which to test that. I mean in terms of an in camera inspection. And I don't know --

MR. LOW: There's not much you can do about it.

CHAIRMAN SOULES: I don't know how we can fix that today anyway.

MR. McCONNICO: We haven't changed that. That's the existing problem today.

MR. McMAINS: No, I'm saying -- that's what I'm saying. It is a problem. I'm just curious as to whether or not when we make just a blanket statement that it is not discoverable.

CHAIRMAN SOULES: Well --

MR. McMAINS: You see, what I'm saying is we've taken out the statement that it's privileged and we put in a statement that it's not discoverable. So what I'm getting at is have you affected the waiver arguments? That's --

CHAIRMAN SOULES: 166(b) which has been in effect since 1984 says, "the following

matters are not discoverable." And they are discoverable if there's waiver of those matters. And the law is there and I don't think we can fix that here today without bogging down.

PROFESSOR EDGAR: The only thing you could do is maybe precede that by saying "unless waived, the following matters are not discoverable." But that opens up another --

CHAIRMAN SOULES: I don't know where it's going to take us. I think we ought to spend time considering that that we don't have today. I'll yield and we can spend our time on it, but we've got a lot of matters that have been submitted.

Okay. Those in favor of -- is it just (d) or are we ready to talk about --

PROFESSOR DORSANEO: I think it would be better to do them just one at a time.

CHAIRMAN SOULES: Okay. -- of (d) on page 214 say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Opposed? And of course that's as we've changed it. Next, Bill?

PROFESSOR DORSANEO: Now if I can go to (b) on page 213, an attempted a definition of

work product. The current rule says the work product of an attorney. The language in the current rule -- the term "work product," according to my research, was added to the procedural rule in 1973 for the first time. Prior to that time, the Supreme Court recognized the work product doctrine and the United States Supreme Court's opinion in Hickman vs. Taylor and a case called Leonard vs. Moore which was authored by Justice Pope. But we don't have in the rule a definition of work product of an attorney that the lawyers can use in determining whether or not the exemption is applicable.

This particular language is taken from a court of appeals opinion of the Houston 1st District Court in Evans vs. State Farm Mutual Automobile Insurance Company as reflected on page 217 of this book. The language may not be exactly the same as the Evans case because I also used in formulating a work product definition the United States Supreme Court's opinion in Hickman vs. Taylor and the language of Federal Rule 26, paragraph (b).

To me, the central -- one central issue, probably the most important central issue, is

whether or not we are going to define work product in terms at all. I mean I think -- I hope we're going to do that -- but whether or not work product ought to include what is termed "ordinary work product" as well as what is termed "opinion work product."

The draft covers both, which is conventional from state to state and in the Federal rules. Now what I mean by that is this. If you look at the draft, it talks about "The mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party," and that would be opinion work product.

And then it goes on to say "as well as any notes, memoranda, briefs, communications and other written" -- "and other writings prepared by an attorney or an attorney's agents in anticipation of litigation." Now that might or might not be opinion work product. It might just be factual information that does not involve the mental impressions, conclusions, opinions or legal theories of an attorney, if you can at least conceptually imagine that when a lawyer is writing factual information down that he is not also indicating his or her mental impressions. That is

a significant issue.

Another issue is whether when it says "the work product of an attorney" in our rule do we want to include within the definition of the term "attorney," agents of the attorney or other representatives of parties, or is it just you have to have a law license to be involved in the creation or production of work product? I don't mean to complicate things but I don't want to mislead the committee into thinking that this is an easy thing to define because it is not an easy thing to define. This definition does come from what I perceive to be the majority definition, the conventional definition of the term "work product" in our Texas court opinions and at the Federal level and of course our Texas court of opinions borrow from the Federal definitions.

MR. LOW: Bill, I see one possible conflict. Where you say "in anticipation of litigation" or "preparation for trial", now it can't be a comp suit. It's got to be "in anticipation of the litigation in question" because you know you can get their comp file even though an attorney was representing them. And I think it should be confined to anticipation of the

litigation in question, or anticipation of the trial of that case. I think other litigation or proposed litigation, it may under some circumstances be discoverable. The court has specifically held that if you prepare something in anticipation of a comp suit, that same insurance carrier can't claim that it's a privilege in connection with a third party suit.

PROFESSOR DORSANEO: Well the question is whether -- another issue -- and again I think it's good that you raise that is whether this paragraph 3(b) ought to be broader than the party communication exemption because of the fact that we are talking about us, I guess.

CHAIRMAN SOULES: Now we're talking about the work product of the lawyer. We've said the pending litigation for communications, we've said the pending litigation for witness statements, now we're talking about a lawyer's work product. Is that protected even if it's not in pending litigation? I favor protecting it. At that point, I think we've got something more sacrosanct. This is a lawyer's own work product.

MR. LOW: Yeah, but it might be his agents. Or the insurance adjuster.

MR. McMAINS: In fact, I've already been advised by defense lawyers as they were reading the opinions of the Supreme Court that they are now basically making specific requests to insurance adjusters for their investigation claiming them to be their agents in order to try and broaden and get around the party communication limitations that have been made.

PROFESSOR DORSANEO: But it's my view we need to -- it would be nice to define work product. And some of these dodges, I would hope, could be dealt with by judicial decision saying that this is not really -- you know, you can't just make somebody your agent by saying, "Here, wear this red hat."

MR. BRANSON: Luke, you're not suggesting where you have similar litigation -- let's say you've got a lawsuit of one type that is disposed of in some manner, and then you've got a second piece of similar litigation, many times involving the same party -- that the work product from the former by way of the attorney's work product is not discoverable in the second, are you?

CHAIRMAN SOULES: Yes. The attorney's

work product.

MR. BRANSON: That's what I thought you said.

CHAIRMAN SOULES: Now I'm not talking about the communications. That's not discoverable now. This is the lawyer's file. This is not the witness statements or the party communications. This is the lawyer's work product file.

MR. BRANSON: It's not work product in the pending litigation though.

CHAIRMAN SOULES: That's correct. It's work product in a former litigation where he allowed himself to run amok in thought processes and made notes, his own notes, and put his own mental impressions down, and those --

MR. BRANSON: But why should that not be discoverable in separate litigation? I mean we're not talking now about litigation --

CHAIRMAN SOULES: I don't want him to see my notes. I guess is why not.

MR. LOW: Well, what if you've got a Kelly case, it's Stowered (phonetic), are you going to protect it? You've got a Kelly case, you've got Stowers, where are you then? The lawyers, most of them --

CHAIRMAN SOULES: Buddy, say that again. I'm sorry. I didn't hear you.

MR. LOW: What if you've got a Kelly case, a Stowers situation, the whole subject of a lawsuit is the lawyer's work. Now how are you going to protect that?

CHAIRMAN SOULES: It's not protected because that's what's at issue. That's issue injection.

MR. McMAINS: Where is that in here? That's not in here.

CHAIRMAN SOULES: Rusty, that's a part of the waiver concept and it's in the common law. Issue injection waiver is waiver.

PROFESSOR EDGAR: Do what now, Luke?

CHAIRMAN SOULES: That's Ginsberg (phonetic). It's not nonsense. It's Supreme Court law.

PROFESSOR EDGAR: Well, no, Ginsberg --

MR. McMAINS: We don't have this right now anyway. We don't have any attempt at broadening work product.

PROFESSOR EDGAR: Ginsberg just says -- as I recall Ginsberg, it just says that you

cannot use privilege offensively.

MR. McMAINS: That's right.

PROFGESSOR EDGAR: In Kelly, the carrier is not using it offensively, it's using it defensively.

MR. McMAINS: That's exactly right.

PROFESSOR EDGAR: So Ginsberg is not authority for that proposition.

CHAIRMAN SOULES: That's when you waive -- you even waive attorney/client privilege whenever you say, "I relied on my lawyer for the good faith." You issue -- you inject it -- issue injection is a waiver issue as a waiver basis.

PROFESSOR EDGAR: What I'm saying, Luke, is that Ginsberg is not authority for the proposition that you just stated, as I read it.

MR. McMAINS: It's not an issue injection voluntarily. It's a voluntary injection by the plaintiff when the plaintiff said that you have messed with my lawsuit --

PROFESSOR EDGAR: I really --

MR. McMAINS: -- Mr. Insurance Company, and I'm entitled.

PROFESSOR EDGAR: I'm not sure the answer you gave is adequate. And I think Rusty

and Buddy have a good point here that we really need to think about very carefully.

PROFESSOR DORSANEO: Well let me say this, this draft really does not address -- and on purpose it doesn't address -- the related litigation or the durational aspect of the work product exemption. I didn't want to deal with that this time because that is a problem that will derail any attempts to define this term.

MR. BRANSON: But we certainly don't want to leave the impression that we've dealt with it, Bill. And that's --

PROFESSOR DORSANEO: Well, I don't think it does though.

MR. McMAINS: Yes, it does.

PROFESSOR DORSANEO: It does?

MR. McMAINS: Yes.

MR. LOW: You could have litigation where the same attorney has represented a company. I've got some now over a period, and we discovered it showing a pattern of conduct of how this company has acted on advice of attorney in other related cases. I think you're just walking into quicksand.

MR. McMAINS: You've also got -- see,

right now one of the things as I see it, there's a problem with the way (b) is --

CHAIRMAN SOULES: Hadley, I think you're right -- go ahead.

MR. McMAINS: -- is "the anticipation of litigation or in preparation for trial" is just out there hanging. It's of any litigation or preparation for any trial. Whereas when we've got party communications and witness statements, we're dealing with a particular subject matter of the pending claims.

CHAIRMAN SOULES: That's right.

MR. McMAINS: Now when you start expanding a work product privilege which is definitively different in terms of its scope than the scope in the other two by implication, I do not believe that the courts will have any difficulty believing that the committee intentionally made this broader such that when the lawyer for the insurance company tells them they ought to pay this claim because otherwise they are committing a tort of bad faith. We can't get that material. And there are a lot of judges, at least in my district, that will not give it to him under that interpretation. I will guarantee it.

CHAIRMAN SOULES: I do not think that "or other representative" in the third line of the new text -- "or other representative of a party" should be included in this.

MR. McMAINS: Yes, that's a different issue though. Right now --

CHAIRMAN SOULES: Well it makes this issue we're talking about an easier one for me.

PROFESSOR EDGAR: I think it does.

CHAIRMAN SOULES: Once that comes out, it makes this issue easier because -- for me.

The way (b) is now, it says "The work product of an attorney" -- let's leave it at that. Now if we want to say the attorney's agents or the attorney, okay. But that's further down in this text. Let's take out this "or other representative of a party" because that's going to be a witness or it's going to come under party communications. To me, that is out of place in (b), the words "or other representatives of a party."

MR. McMAINS: Yes.

CHAIRMAN SOULES: And should be deleted.

MR. McMAINS: That's one of the

problems. I agree.

CHAIRMAN SOULES: Now we're talking about the lawyer and the paralegals, I think. That's the way I read "or an attorney's agent."

PROFESSOR DORSANEO: Or an investigator.

CHAIRMAN SOULES: Pardon me?

PROFESSOR DORSANEO: Or an investigator.

CHAIRMAN SOULES: Or an investigator. Now do we want attorney work product to attach to that class of people or not? Or do we want them to be communications and witnesses, and fall under that type?

MR. BRANSON: Well, I think in the original litigation, everyone at the table could agree we want it not discoverable.

MR. McMAINS: Yes. Right.

MR. BRANSON: But in non -- in related litigation, not that litigation, I think you have the majority of this committee who would think that the attorney's work product is discoverable.

CHAIRMAN SOULES: Well, first, Frank, we've already said that in other litigation, representatives are discoverable. Their

communications are discoverable. That's kind of what we did in (d) and (e). Now we're inside the law office, and I think an investigator is a (d) or an (e). I don't think he's an attorney.

PROFESSOR DORSANEO: Okay.

CHAIRMAN SOULES: That's what I say. But I think a paralegal is an attorney.

PROFESSOR DORSANEO: Well, I was thinking of an investigator that's working for the law firm.

CHAIRMAN SOULES: I still think --

PROFESSOR DORSANEO: You still think so?

CHAIRMAN SOULES: I still think he's an investigator, a (d) or an (e).

JUSTICE WALLACE: I don't want to complicate it, but how about somebody who designates their general counsel as their "safety officer" and on the table of operations, he's in charge of all investigation and all safety maintenance.

MR. McMAINS: That's right. And that's happening. They are being advised to do it.

MR. BRANSON: And they also designate

their insurance carrier as their safety representative. We've had some truck cases where that -- the only safety the trucking company had was what their insurance company provided.

CHAIRMAN SOULES: I would favor taking out "or an attorney's agent or representative" and let the court handle just who the attorney is and whether the paralegal is in fact an attorney because everything that's there is the attorney's work product. It's not something specially generated by somebody else. And then I would insulate the attorney's work product, that is his file, more than I would the party communications and witnesses. And there's where Frank and I are finally, I think -- draws the line.

MR. BRANSON: Could we get a feel for this committee's feeling on that issue because I --

CHAIRMAN SOULES: Well I'm trying to get it boiled down to just that, Frank. That's what I'm trying to get to.

MR. BRANSON: Well, what if we just started out there and then worked back trying to make the rule reflect the committee's opinion.

CHAIRMAN SOULES: Frank, with this

baggage in here there are going to be people who are not going to understand that same issue. And what I'm trying to do is get the baggage off of it and just say we're talking about the lawyer's file. Nothing else. His mental impressions.

MR. BRANSON: In related litigation.

CHAIRMAN SOULES: How many feel that the lawyer's mental impressions and his own file -- not that of his representatives, investigators or anything, eliminate all of that -- we're just now talking about the lawyer's own file and his mental impressions, his notes should be discoverable in subsequent litigation? Eight.

How many feel that it should not be discoverable in any subsequent litigation, the notes of the lawyers? Okay --

PROFESSOR DORSANEO: "Any" is too broad for me.

CHAIRMAN SOULES: Well, the Kelly case, there's a problem, but --

MR. McCONNICO: Kelly and Ranger Mutual, that's the problem.

PROFESSOR EDGAR: Those are problems.

MR. McCONNICO: That's the cases it should be in to. It shouldn't be into any other

case.

CHAIRMAN SOULES: Okay.

PROFESSOR EDGAR: That's right.

CHAIRMAN SOULES: Kelly and Ranger Mutual -- outside of Kelly and Ranger Mutual --

PROFESSOR DORSANEO: You should be able to get your comp file in a products case. That's next.

CHAIRMAN SOULES: How many feel that except where --

MR. BRANSON: That's should not be able to.

PROFESSOR DORSANEO: Should not.

PROFESSOR EDGAR: That's right.

MR. McCONNICO: But it should be if you're going to say that the vote is that it should be discoverable in Kelly Ranger Mutual.

CHAIRMAN SOULES: If the legal work is an issue in the subsequent litigation -- all right, say that -- how many people feel that the lawyer's own file should not be discoverable in subsequent litigation unless the legal work is an issue in that litigation?

MR. McCONNICO: I agree with that.

PROFESSOR BLAKELY: It's not in your

question.

CHAIRMAN SOULES: It's not discoverable because it's not an issue in the subsequent litigation.

PROFESSOR EDGAR: What you have is an in camera inspection and have the court make that determination. That's the way you do it, or that's the way you should do it.

MR. BRANSON: Okay. Well let me give you another example. Let me --

CHAIRMAN SOULES: Let me test the water -- I think we've it got here -- and then get a consensus. All right. The lawyer's file, its subsequent litigation -- and in that subsequent litigation the legal work is not at issue -- how many feel that the work product should not be discoverable?

MR. LOW: Luke, wait. When you say not at issue, you mean it's not the subject matter? Because if it's not at issue, it won't be the subject of discovery.

MR. McMAINS: It won't be relevant.

CHAIRMAN SOULES: The legal work is not in issue.

MR. BRANSON: It might lead to

discoverable --

MR. McCONNICO: Why don't we say "legal work and opinions"?

CHAIRMAN SOULES: Okay. The legal work and opinions are not in issue. It's just trying to fish around -- never mind. That's argumentative. The legal work and opinions done in the former case were not in issue in this case. It's the lawyer's own file. How many feel that the file should be discoverable? If you can state it better than I can, Rusty, that would be great.

MR. McMAINS: What I'm trying to ask, Luke -- and all I'm trying to get you to notice is that if we have focused at this juncture on (b), okay?

CHAIRMAN SOULES: (b). Yes.

MR. McMAINS: All I'm saying is your concern about the fact that the attorney/client relationship may generate a privileged communication in some manner --

CHAIRMAN SOULES: No. I'm not on attorney/client.

MR. McMAINS: Well, it's roughly the same thing. That's what I'm saying is I think there is a difference, arguably, between work

product in terms of discoverability in the particular litigation, and then a broader question of whether or not your file should be discoverable at all because of some other rule of privilege.

CHAIRMAN SOULES: Please, I've not mentioned attorney/client privilege. I'm talking about work product, mental impressions. If you've got another --

MR. McMAINS: You cannot distinguish that.

MR. SPIVEY: But, Luke, don't we have to talk about them together because of the interrelation?

CHAIRMAN SOULES: Well, maybe. But a part of the lawyer's file -- say you've got a file that's all work product. Some of it is attorney/client communications. That "some" has two bases for privilege, not just one. I'm just talking about one. I haven't gotten to two. Just say there is no two in there. There is no attorney/client privilege in there, in the files.

MR. McMAINS: You can't do that.

CHAIRMAN SOULES: Well of course you can. You've just got the lawyer, he's researched, he's made all his notes, he's theorized about what

his case might be, what the defenses might be, he's exposed his client, whatever. Anyway --

MR. BRANSON: Let me give you two examples and see if this is what you're talking about.

CHAIRMAN SOULES: Well, I want to get this vote and then we'll discuss it again. This is what you asked me to do.

MR. BRANSON: But I think it will help --

CHAIRMAN SOULES: We've got this situation. We've just got work product, not attorney/client privilege. It's the file. It's subsequent litigation and the legal work and opinions of the prior litigation are not in issue in this subsequent litigation. How many say that lawyer's file is discoverable? How many want it discoverable?

MR. BRANSON: Before you take --

CHAIRMAN SOULES: How many want it not discoverable? All right. Now there's a consensus of the House. Now talk away.

MR. SPIVEY: Now, Luke, let me make a statement.

CHAIRMAN SOULES: Sir?

MR. SPIVEY: Tom just verbalized what I've been concerned about and that is here we are making rules saying things are and are not discoverable. And they -- really that issue, that determination should be made in the light of the facts of a particular case. Because you've got one thing entirely when you've got a Stowers case perhaps dealing with a propriety of the conduct in not taking an offer or not making an offer, and you do in just a multitude of other situations where somebody would want to get into an attorney's file. And I'm concerned that we can draft such a broad rule, that's why I voted against it, and that's why I'm concerned about not putting that in perspective.

CHAIRMAN SOULES: Let me -- so that we can move on, I want to read (b) which I think will state what the committee just voted on. I'm not saying that it does, I may be wrong. I'm saying I think it does. If we take (b) -- if we take out in the third line "or other representative of a party" and then we take out in the fifth line "or an attorney's agents or representatives" then we say that "the mental impressions, conclusions or opinions or legal theories of an attorney as well

as any notes, memoranda, briefs, communications and other writings prepared by an attorney in anticipation of litigation or in preparation for trial are not discoverable." Now that to me is what the committee consensus showed a moment ago.

MR. LOW: Luke, let me raise one question.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: Now when you speak in terms of privilege and you define what's privileged, the traditional rules are that privileges are waived and you can obtain information that's privileged. But when you go a step further and you just say it's not discoverable, you're not just saying it's privileged, and -- but there are other ways you can get it. You're just saying that it's not discoverable.

CHAIRMAN SOULES: Let me see if this gets to where you are. Suppose we just stop in the -- if we start at exemptions, "the following matters are protected from disclosure by privilege" and then list them.

MR. LOW: That would be better.

CHAIRMAN SOULES: Okay. "The following matters are protected from

disclosure" --

MR. McCONNICO: Where are we writing this, Luke?

CHAIRMAN SOULES: Right at three, in the heading.

MR. McCONNICO: The problem is there are a lot of other privileges that protect discovery besides what are here, like Article 5, traditionally. Those things that are privileged aren't discoverable.

PROFESSOR DORSANEO: Well but that's supposedly what (a) is about, 3(a).

CHAIRMAN SOULES: If we say: Exemptions. "The following matters are protected from disclosure by privilege," and then we say (a) -- and that's just a repeat. That may need a little something. But then (b) -- and we say work product and we take out the "are not discoverable" at the tag of it and we do that all the way through.

PROFESSOR EDGAR: But that doesn't cover the Ranger case or the Kelly case.

MR. McCONNICO: No, it doesn't.

PROFESSOR EDGAR: We haven't dealt with that --

CHAIRMAN SOULES: Yes.

PROFESSOR EDGAR: -- and as long as we recognize we haven't dealt with it, well that's all right.

CHAIRMAN SOULES: How do we deal with that? By saying --

MR. McMAINS: You see what I was getting at is you are definitively using a different standard than they are using in party communications --

CHAIRMAN SOULES: Yes.

MR. McMAINS: -- and witness statements.

CHAIRMAN SOULES: Yes.

MR. McMAINS: If you're going to take out that, at least where they inject, where the attorney work is an issue in the litigation, there is a proper issue in the litigation and otherwise protect the work product of the attorney, then I think you've got to write that in there, in addition to what we have.

CHAIRMAN SOULES: Yes. So write "in subsequent litigation where the work product is an issue"?

MR. McCONNICO: "The attorney work

product is an issue."

MR. BRANSON: Well, do you want to put it that way or do you want to express it in terms of "form a part of the basis of a cause of action" --

MR. McMAINS: Or defense.

MR. BRANSON: -- or defense.

MR. McMAINS: If you say "form the basis of a cause of action or defense", that gets you the estoppel argument you were talking about in Ginsberg, and it gets you Ranger vs. Guinn and All State vs. Kelly.

CHAIRMAN SOULES: Okay. It sure does. "Provided that in subsequent litigation where the attorney work product forms the basis" -- help me, Rusty.

PROFESSOR DORSANEO: You could say "attorney conduct."

MR. BRANSON: In whole or in part? Because it may not be the whole basis, but it may be part of it.

MR. TINDALL: Bill suggests conduct of the attorney. I think that's what you're --

MR. BRANSON: Well, but it's not really conduct, it's opinion.

MR. McMAINS: It's not just the attorney's conduct, it may be his opinion and what it generates to the other side.

PROFESSOR EDGAR: It may be both.

MR. BRANSON: Right.

PROFESSOR EDGAR: It may be his conduct as a result of his opinion.

MR. BRANSON: And it may be conduct contrary to his opinion. I mean we've certainly seen that from time to time. An attorney says one thing and they do another.

MR. LOW: But in some cases, the crime fraud exception is a way to get attorneys. If somebody commits a fraud through the lawyer, Frank's amendment would catch that.

MR. BEARD: Well, Rusty, as a procedural matter, you get a discovery, you answer everything, you know, communications, everything under the sun. Now do you answer in that work product, "I claim the privilege under work product," generally, or do you say, "In a letter dated April 2nd" -- on down the line?

MR. McMAINS: Well I think there are other provisions of the rule that deal with how you claim the specific exemptions. We haven't

gotten to those yet, but they are consistent.

CHAIRMAN SOULES: Okay. Let me run this through. Now, we'll do it just like we had -- "The mental impressions, conclusions, opinions or legal theories of an attorney as well as any notes, memoranda, briefs, communications and other writings prepared by an attorney in anticipation of litigation or in preparation for trial, provided that in subsequent litigation where the attorney work product forms a part of the cause of action or defense, the work product is not protected from disclosure."

MR. BRANSON: That would work.

MR. McMAINS: The question is though is it limited to subsequent litigation?

CHAIRMAN SOULES: This is.

MR. McMAINS: No. See, I'm not sure that's true.

CHAIRMAN SOULES: All right. "In other litigation."

PROFESSOR EDGAR: "Other" litigation rather than "subsequent."

CHAIRMAN SOULES: That's right. Because they can -- I'll agree with that. Other litigation where it's in issue.

PROFESSOR DORSANEO: Why did you take out the representatives of an attorney?

CHAIRMAN SOULES: Because I don't want them making the investigator a representative or the guilty driver a representative, all the charades that you have to face when you see that. And I think that's --

PROFESSOR EDGAR: Leave that up to the court to determine how far the attorney privilege goes.

PROFESSOR DORSANEO: Well, but aren't we suggesting that you have to have a law license?

MR. McCONNICO: Didn't we say their agents, though?

CHAIRMAN SOULES: No.

MR. McCONNICO: We need to protect our paralegals.

CHAIRMAN SOULES: I think that a court will protect the paralegals because he will say that that's not an independent mental impression, that's the lawyer's mental impression shared with that individual in his office.

MR. McCONNICO: What have they done in Federal cases?

PROFESSOR EDGAR: Well, I can see a

briefing attorney, you know a briefing clerk --

MR. McMAINS: What about employee, attorney -- well, I don't know about employee.

CHAIRMAN SOULES: In other words, I'm opting for having the courts throw out everybody that we can't protect, in effect, under our own mental impressions in order to avoid the charades. I would rather take on the burden of establishing that, really, the paralegal's impression is mine.

MR. BRANSON: Now do we want to say "form the basis of," or "form the basis of in whole or in part"? I mean it's not necessarily the entire basis of --

CHAIRMAN SOULES: "Forms a part of a cause of action of defense" --

MR. BRANSON: Okay.

CHAIRMAN SOULES: -- is what I've written here.

MR. BRANSON: Okay.

MR. McCONNICO: I think we need to be more expressive in protecting the paralegals because the way this is written now, there are going to be some courts that are going to order that the paralegals' opinions have to be produced.

CHAIRMAN SOULES: Those two views are

on the table. How many feel that we should be more expressive about protecting the paralegals? Six. How many feel we should not? I mean it's -- once you start adding people behind the attorney, you start into the charade. And that's the problem that's before us.

PROFESSOR DORSANEO: Well I know that in my case --

MR. BEARD: If you do one then, of course, you construe that's the only one.

MR. BRANSON: And I think you might ought to put a "may form the basis" instead of "forms the basis" because you'll get some courts that say I don't believe it does even in a Ranger case or a Kelly case.

PROFESSOR DORSANEO: Well I know in my case Suzanne ought to be covered by this thing. I mean that's what it boils down to, and that's not some guy I don't even know.

MR. BRANSON: Well, let's just write in there that Suzanne is covered.

CHAIRMAN SOULES: Well how do you describe that? You can't call it an attorney's agent because he will make everybody his agent. So what words do we use?

MR. TINDALL: Well the Federal rule uses the word -- if it's any help -- "representative."

MR. McCONNICO: That's worse.

CHAIRMAN SOULES: Same thing.

MR. McMAINS: What about his support staff?

MR. McCONNICO: Support staff will become insurance agents.

PROFESSOR DORSANEO: I think the court can deal with that.

MR. McMAINS: I think as long as you're --

MR. McCONNICO: I do too. I agree with that. I think we should put it "his office support staff." Put it like it's the people that work in his office.

MR. McMAINS: Right. I just think that if you say that you get -- you put a little more gloss on what it is you are trying to do and eliminate some of the artificiality.

CHAIRMAN SOULES: "Prepared by an attorney or an attorney's office support staff"?

MR. McCONNICO: I support that.

CHAIRMAN SOULES: That's what we want

to use? Okay.

PROFESSOR EDGAR: "Office support staff." I'm comfortable with that.

MR. McMAINS: Yeah. I think it -- at least it conveys a better impression of what we mean.

PROFESSOR DORSANEO: I guess -- suppose somebody is at a different office?

MR. McCONNICO: It's going to be hard to say in-house counsel for Exxon is the attorney's office support staff.

CHAIRMAN SOULES: Okay. Let me read it now. "The following matters are protected from disclosure by privilege: (a) any matter protected from disclosure by privilege, (b) work product. The mental impressions, conclusions, opinions or legal theories of an attorney as well as any notes" --

PROFESSOR EDGAR: Or office support staff.

CHAIRMAN SOULES: -- "of an attorney or an attorney's office support staff."

"The mental impressions, conclusions, opinions or legal theories" -- strike "of an attorney" and go right down to "as well as." "The

mental impressions, conclusions, opinions or legal theories, as well as any notes, memoranda, briefs, communications and other writings prepared by an attorney or an attorney's office support staff in anticipation of litigation or in preparation for trial provided that in other litigation where the attorney work product forms a part of the cause of action or defense, the work product is not protected from disclosure."

MR. BRANSON: "May form."

MR. McMAINS: "May form a part."

CHAIRMAN SOULES: I'm almost ready to vote on that except for this. I believe that the attorney's work product is discoverable in the pending litigation if it forms a part of the cause of action or defense.

MR. McMAINS: That's right. That's what I was talking about.

CHAIRMAN SOULES: So we don't have to differentiate between current and subsequent if provided that "where the attorney work product may form a part of the cause of action or defense the work product is not protected from disclosure." That's the way it is.

MR. RAGLAND: I have a question.

CHAIRMAN SOULES: Yes, sir. Tom Ragland.

MR. RAGLAND: Has anyone considered this proposed amendment that we've talked about for the last hour in light of evidence Rule 503 and whether it has any effect, and aren't we just getting tangled up in our own underwear trying to write something that possibly creates more problems than we're solving?

CHAIRMAN SOULES: Well, that's attorney/client privilege. And that's -- again, that's a different --

MR. RAGLAND: I know it is. But you've got language that is slopping from one rule to the other over there, Luke, and I think we're just creating more problems than we're solving.

CHAIRMAN SOULES: Any further discussion? All right. Let me read it now. And this -- I'm not going to read it from the beginning, I'm just going to read the (b) part of it. "Work Product. The mental impressions, conclusions, opinions or legal theories as well as any notes, memoranda, briefs, communications and other writings prepared by an attorney or an attorney's office support staff in anticipation of

litigation or in preparation for trial provided that where the attorney work product may form a part of the cause of action or defense, the work product is not protected from disclosure."

MR. McCONNICO: Luke, I hate to ask you to do that, but would you read the first part of that again? The very first two or three sentences.

CHAIRMAN SOULES: "The mental impressions, conclusions, opinions or legal theories as well as any notes" -- and so forth.

MR. McMAINS: -- "memoranda, briefs, communications" --

MR. McCONNICO: Okay. And then we put "of the attorney and his office support staff."

CHAIRMAN SOULES: I just want it to say that once instead of twice.

MR. McCONNICO: Okay.

CHAIRMAN SOULES: Those in favor say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Opposed?

PROFESSOR DORSANEO: Well, I still don't like the office support staff.

MR. McCONNICO: Can you have a Kelly

case without waiving the lawyer's rights?

CHAIRMAN SOULES: Bill, do I count you as a negative or positive? I know you don't like that part of --

PROFESSOR DORSANEO: I think you ought to count me as a negative. I think, you know, a bona fide agent of an attorney ought to be covered whether he is in the same office or not. I mean I just believe that and I think the courts can deal with games and we have plenty of games and the courts --

MR. TINDALL: "Person employed by an attorney," would that cover it?

CHAIRMAN SOULES: I think if you just stopped at attorney, you've got that argument. Now we have made it plain that you don't have that argument. That's why --

PROFESSOR EDGAR: There may not be any privilege in a Kelly case -- in a Stowers case.

PROFESSOR DORSANEO: I've got cases right now where the paralegal is not an office support staff person and, by God, I think it ought to be work product. I mean, you know --

CHAIRMAN SOULES: I think if you stop at attorney, you avoid the charade and you give

the court the opportunity to extend the attorney to his true extension and no further. And I think an attorney's true extension is his paralegal. And if you just say "attorney," I think you're all right. See, that's where I'm coming from. But once you add anything beyond that, then you're talking about something besides the attorney.

PROFESSOR DORSANEO: Well, then, what do you do with these litigation support systems that people, you know, make contracts with? Are they just out? Is that always discoverable? I mean this looks like a small town -- small, little old office operation where everybody, everything is in-house and that's just not the modern reality of litigation.

PROFESSOR EDGAR: It's not.

MR. BRANSON: Let me give you an example. I've got all of my support staff incorporated in a separate investigative corporation. You've got nurses, doctors, investigators, video tape operators, are they technically support staff?

(Please see attached handwritten (explanation of the preceding (statement.

MR. SPIVEY: Not in your case because it's a separate entity. Old buddy, you just got discovered.

CHAIRMAN SOULES: Newell Blakely.

MR. BRANSON: Well why would they not be? Functionally, that's the way they operate.

CHAIRMAN SOULES: Newell Blakely.

PROFESSOR BLAKELY: Luke, you've got litigation A and litigation B. In litigation B, an issue in the case is the lawyer's file in litigation A. And you think that the lawyer's file in litigation A is discoverable in litigation B. Do I have that straight?

CHAIRMAN SOULES: Uh-huh.

PROFESSOR BLAKELY: All right. Suppose the lawyer in litigation B says open your briefcase in litigation B. "No, no. That's not an issue." I understand. But the language as you've got it, since you no longer distinguish between prior litigation and subsequent litigation, the language that you just drew lets either attorney get into the other attorney's litigation B file. Am I wrong about that?

CHAIRMAN SOULES: You're right about

that.

PROFESSOR BLAKELY: That's an ugly, and I sure hate to say it because it messes things up.

CHAIRMAN SOULES: Now one thing that -- we've spent a lot of time working on this. If it's not straight, Bill, in your judgment, the one thing we can do is leave it just like it is, the work product of an attorney and not change it and leave the law to develop.

PROFESSOR DORSANEO: Well maybe we're not ready.

PROFESSOR EDGAR: Well let me just raise the question, and I looked at Rule 503(d)(3) a moment ago. And the thing we're most concerned about here -- at least I am -- are the Tilly (phonetic) cases, or Kelly cases. And is it proper to say that under 503(d)(3) that in that type of situation, the communication is not privileged, thus therefore it is subject to discovery?

MR. McMAINS: Well actually you can do it under (d)(5). In the All State and Tilly analysis, it's (d)(5). The lawyer represents both under Ranger vs. Guinn.

PROFESSOR EDGAR: Well, but also you have a breach of duty by a lawyer to the client too in the Tilly case and so --

MR. McMAINS: Well I -- yeah, I understand, but you don't have to have malpractice and you don't have to have a breach of duty at all in order to form the basis of part of the cause of action or defense. Whereas you would have to have, you know, an allegation of breach of duty by the lawyer, whereas what takes it out of privilege is communications to joint clients. And insureds and insurance companies are joint clients under both the DR's and Ranger vs. Guinn.

MR. McCONNICO: Well, I didn't see how you could have this privilege or could claim this privilege on a Ranger, Mutual or a Tilly situation.

MR. McMAINS: I've had lawyers do it. I've requested lawyer's files who supposedly represented the insured, when I was representing the insured suing them, and they claimed the attorney-client privilege.

PROFESSOR EDGAR: I'm coming back to what Tom Ragland said a moment ago that maybe Rule 503 takes care of the problem for which we were

trying to carve an exception to take care of the problem on the work product.

MR. McMAINS: Let me say this, Luke, that I agree that once we convert the nondiscoverability to a privilege insofar as if you can relate it back somehow to 503, then you can probably get around at least the Kelly problem, arguably. On the other hand, it does not exactly get around other things such as just the general Ginsberg problem or the fraud problem.

PROFESSOR EDGAR: That's true.

MR. McMAINS: I mean if -- basically, an attorney is an agent of fraud if it is his office that is basically utilized as a fraud in the action. In the very action you're in, if you say "other action," you can't get to it. I mean if the attorney on an antitrust case has written his client and said, "Hey, you do this," and that's a violation of the antitrust laws, should you be -- but if you're going to do it, then let's do it this way because we can cover it up better. I mean should that be discoverable or not? And I just think that it should be.

CHAIRMAN SOULES: Yeah. And we've gotten past that point. The uncertainty I feel

about doing anything right now, and I feel Bill feels too, maybe we ought to take a show of hands on whether we stick with our last vote or whether we just leave work product the way it is and leave it for further study.

Bill, do you want to go on with what we've got and vote it out, or do you want to take it for further study? You're the person that's labored with this, and I think we ought to defer to you on that. We've gotten as far as we can get with it today. We either take what we've got or we give it back to you for further study.

PROFESSOR DORSANEO: Well, I don't think it's quite ready frankly.

CHAIRMAN SOULES: You want us to --

PROFESSOR DORSANEO: I think it's --

CHAIRMAN SOULES: We'll leave (3)(b) -- your preference would be to leave (3)(b) as is and give it some more study?

PROFESSOR DORSANEO: That would be my preference. I mean that's just a hard problem, and there aren't many of us here.

CHAIRMAN SOULES: Shall we not defer to Bill on that?

MR. McCONNICO: Yes.

PROFESSOR EDGAR: Yes, let's do that.

CHAIRMAN SOULES: Okay. Let's defer to Bill on that.

PROFESSOR EDGAR: On (3)(b).

CHAIRMAN SOULES: We'll table that. And, Bill, you have labored and I know you will more on it. And we'll get it right.

PROFESSOR EDGAR: But then we're not going to change the wording of (3), though.

CHAIRMAN SOULES: (3)(b). I guess --

PROFESSOR EDGAR: You see the following matters aren't -- we're going to leave that: "The following matters are not discoverable."

CHAIRMAN SOULES: Okay.

MR. McMAINS: What? Now --

PROFESSOR DORSANEO: It doesn't matter.

PROFESSOR EDGAR: Well, the reason for that is that we've already have a protection by privilege, and this goes back to what either you or Buddy were saying awhile ago. It's one thing to say that something is not privileged; it's another thing to say it's not discoverable. And I'm -- until we can resolve this problem that

we've just wrestled with, I feel more comfortable by leaving the rule as it now says "The following are not discoverable," rather than starting to talk about privilege.

MR. McMAINS: Yeah, but now what you're doing is you're saying that the mere --

PROFESSOR EDGAR: I would feel more comfortable by utilizing Rule 503 in determining privilege and looking to 166(b) to determine discoverability.

MR. McMAINS: But 166(b) doesn't talk about privilege. That's what you're just now saying.

PROFESSOR EDGAR: That's right.

MR. McMAINS: And so the problem I have is when I say I want the attorney's file in a Kelly case, I'm entitled to it under 503. Where do I get it under 166?

PROFESSOR EDGAR: You don't. You don't unless you -- all right. You're right.

MR. McMAINS: Where do I get it?

PROFESSOR EDGAR: You can't.

CHAIRMAN SOULES: Okay. We want to go to the next item of written agenda because --

PROFESSOR EDGAR: No, wait a minute.

He's right. You can't get it.

MR. McMAINS: You can't get it now.

PROFESSOR EDGAR: Because it's not discoverable.

CHAIRMAN SOULES: Well that's the way the rule is written, and it's not -- we're going to have to go on. It's almost noon. We have about 40 items on the agenda and to change the question of not discoverable is not before the committee and it will not be changed at this session. So let's go forward.

MR. McMAINS: We already voted on it.

PROFESSOR EDGAR: We voted on it a minute ago.

CHAIRMAN SOULES: We voted on that in connection with the change to (b). We've decided to table that and give it back to Bill. And, Rusty, I'll put it at the end of the agenda, if you like, but we have to go forward with our other work.

PROFESSOR DORSANEO: Well, I've got one other thing that I need to mention. This is proposed paragraph 4 to be substituted in the order of the rule --

CHAIRMAN SOULES: Rusty, I'm going to

put that at the end of the agenda.

PROFESSOR DORSANEO: The current paragraph 4, I'd ask you to read, please, on page 215 and 216, this Presentation of Objections business. It is meant to deal with this issue of burdens. And the way I understand the problem is this. We have a general problem of who has the responsibility of raising an objection and how the objection is presented. And secondly, we have a specific problem involving documents and in camera examinations of documents.

The Supreme Court has struggled with this matter in the first Peeples opinion, in the second Peeples opinion and the Weisel case, and recently in a writ refused in the Glanz (phonetic) case. And what I have attempted to do is to draft something that I can follow in handling discovery objections in my practice. And frankly, I don't understand exactly what I meant to do from the Supreme Court opinions themselves. This is an effort to improve upon that, to be candid.

PROFESSOR EDGAR: I think you've done a real fine job.

MR. McCONNICO: I'll third that. I think it's a real good job.

PROFESSOR EDGAR: Are you moving its adoption?

PROFESSOR DORSANEO: I move its adoption.

PROFESSOR EDGAR: I second the motion.

CHAIRMAN SOULES: Moved and seconded. Any further discussion?

MR. RAGLAND: Luke, I have a question.

MR. BEARD: Let me ask this.

CHAIRMAN SOULES: Tom Ragland and then Pat Beard.

MR. RAGLAND: The third line at the bottom of page 215, "such as attorney-client or attorney work product," is that attorney-client privilege or client's work product or attorney-client work product?

PROFESSOR DORSANEO: Yes. That's language right out of Weisel. But that's what is meant, specific privilege or exemption such as attorney -- we could change it, you know, to clean it up such as the attorney-client privilege or the attorney work product exemption instead.

MR. RAGLAND: Well, that answers my question. I wasn't objecting to it. I was just questioning it.

MR. BEARD: Bill, let's go back to what we talked about in our subcommittee conversation. You get a general request on all documents. Now the client has got all the correspondence from the lawyer's side. If -- do you have to come in and claim that privilege and list all of those documents and claim that generally? Should a general request for all documents be construed to include what would normally be privileged communication so that you have to go object to it? Should you have to object unless they specifically are asking for attorney's communications and all? We really shouldn't have the burden to say you can have everything except these privileged communications.

PROFESSOR DORSANEO: Well the draft does not get to the issue of the sufficiency of the request at the threshold; it doesn't reach that. And I didn't -- I mean except to the -- it says "In responding to an appropriate discovery request directly addressed to the matter" -- it tries to deal with it that way. That's the best I could do. If I'm understanding you correctly, if somebody said "I want everything."

MR. BEARD: That's what they ask me.

PROFESSOR DORSANEO: "I want everything" -- then I would object to that on the basis that the request is inappropriate because it is not sufficiently specific in terms of identifying the specific items or categories as required by Rule 167 of the Texas Rules of Civil Procedure. But beyond that, I haven't gone.

MR. BEARD: Well, can we say that a general request does not include a request for attorney-client communications?

MR. TINDALL: I think we can say that.

MR. BEARD: Well, that's the issue we raise -- they raised. You know, you waive it if you have attorney privilege and they'll produce it. You don't produce it now. You don't object and you don't produce it, which is the sort of a routine.

But this says you've got to object to claim your privilege, and I don't think we should have that burden because that's not the way we generally practice. We don't claim the privilege because we just, you know, assume that the privilege is there. And that was one of the issues we talked about.

PROFESSOR DORSANEO: We could add

language saying --

MR. BEARD: If you waived it, you did not claim it because you never even thought about it.

PROFESSOR DORSANEO: We could add language saying that a general request --

PROFESSOR EDGAR: But under Rule 167, don't you have to request something specific in order for it to be -- isn't that what Rule 167 says?

MR. BEARD: Well, all documents -- they are very general with regard to a specific accident or a specific contract.

PROFESSOR EDGAR: Well, maybe that's because the request is improper, though. And it seems to me that your objection at that point is that the request is overly broad.

MR. BEARD: Well you can't really specify until you know what you're going to get. If you've got a contract dispute, we want everything involving that contract dispute.

CHAIRMAN SOULES: Some of the teachers in these seminars are, you know, giving the imaginary horribles, now, after this Gutierrez and the Glass case, that when you get a broad request

like that, you have to start -- you have to list all of the immunities right away. You just get the checklist out here that we're going down -- work product and communication and all -- and you better file that right away because if you don't and you subsequently get to the point where you realize: "They meant my file; I didn't know that it meant my file" --

MR. BEARD: That's what I want to eliminate.

CHAIRMAN SOULES: -- and the 30 days are gone, and they say "Well, you've waived your file.

And so it's a way -- it's sort of where the Court's opinions have taken us with the heavy-handed sanctions. And I think they had to do that in order to get discovery off of high center, and they've accomplished that. But now they've taken us to the point where it's generating all kinds of boilerplate paperwork because of some overreaction, maybe, to it. But that's where you're coming from, isn't it, Pat?

MR. BEARD: Yeah, you've got these people out on these seminars saying you -- you claim all that or else you've waived it subject to

sanctions and all of that.

CHAIRMAN SOULES: And the second problem that I --

MR. BEARD: And we don't really practice law that way. We just don't produce it in response to a general request.

CHAIRMAN SOULES: Another problem, Bill, that I worry with is the Supreme Court hasn't said it in a long time -- they did in what, Touche (phonetic) and Lawrence, that the party seeking discovery has the burden to show relevance within the scope of 166(b). That was the essence of Lawrence and Touche. But since that time they've talked about immunities and what you have to do under Peeples, and it looks like, if you read the cases literally, they never do go through the relevance aspect. They just say if you are resisting discovery, you've got to show you're entitled to resist. So I've got to show -- if I'm a resisting party -- an absence of relevance if you read literally what those -- although they're not dealing with relevance, they're dealing with privilege, but they say broadly that a resisting party has the burden to show that he's entitled to resist discovery.

I think that 4 ought to include the concept that a party seeking discovery has the burden to show that the discovery is relevant in the discovery sense. Thereafter, a party resisting discovery has the burden to show a privilege or immunity because that's really the way, if you read all of the cases, the old ones and the new ones, that's the whole scheme.

MR. TINDALL: We got rid of that. That's almost a good cause, though, Luke, and that used to be the rule for documents.

CHAIRMAN SOULES: No. I'm talking about relevant in the relevant sense -- broadest sense of discovery. He's asked me for something that has to do with a ranch in Argentina and this is a cow that died on a ranch in Atascosa County and they never saw each other in their lives, you know. I mean it's just absolutely out of bounds. And that's, you know, why -- that's the difference between Lawrence and Touche.

MR. LOW: Luke, it doesn't have to be something that's relevant, but it has to maybe lead to something.

MR. McCONNICO: Right.

CHAIRMAN SOULES: No, I'm saying

relevant in the 166(b) sense. Relevant in the discovery sense.

MR. McCONNICO: And it leads to admissibility.

CHAIRMAN SOULES: It leads to admissibility. I mean, to get within the purview of the scope of discovery and say, "I'm in the scope of discovery where I'm entitled to have information," is the moving party's burden.

MR. LOW: Well, isn't that always true that under anything you are seeking, you've got to show that it in some way relates to, or may lead to something?

CHAIRMAN SOULES: But if you read Weisel and Peeples and all that, they ignore that. The -- Jordan -- the Court has ignored that since Touche and Lawrence.

PROFESSOR EDGAR: Well, I'm not sure it has ignored it, rather it really hasn't been necessary to the decision so they haven't been called upon to discuss it.

CHAIRMAN SOULES: But they would say it by writing so broadly.

PROFESSOR EDGAR: Well, but I think you've got to read the cases within the context of

the questions presented to the Court.

CHAIRMAN SOULES: All right.

PROFESSOR EDGAR: I agree with you that I have no problem with emphasizing that relevance is a threshold requirement.

CHAIRMAN SOULES: All right. Let's go right to the language of four. "In responding to an appropriate discovery request directly addressed to the matter, a party who seeks to exclude any matter from discovery" -- on what basis? Relevance. I want to exclude that from discovery because it's not relevant in the discovery sense.

This rule, the way it's written, changes Lawrence and Touche because it does not require -- if you want to say it's not relevant, you've got to prove it's not relevant because you are seeking to exclude it from discovery.

MR. BEARD: The Federal rule puts the burden on you to show it's relevant if you want to make somebody testify -- compel them to testify.

CHAIRMAN SOULES: You've got to show it's relevant. Well, this rule changes Touche and Lawrence.

MR. McCONNICO: I don't agree with

that because I think what Bill has done here is just shown the process of how you present your objections. And I think the language at the first of 166(b) states the same, that the only thing that's discoverable is something that leads to admissible evidence.

This, I see, is a mechanical section that says, "this is what you've got to do," and it has codified Peeples and Weisel and Insulated Glass.

CHAIRMAN SOULES: But it doesn't tell you what you've got to do because it doesn't start with Step 1, it starts with Step 3, which is where Peeples and Weisel start. They don't start with Step 1. Step 1 is the party seeking discovery has to show what it seeks is relevant.

MR. McCONNICO: But after Jampole (phonetic) maybe there isn't a Step 1 because Jampole came after Lawrence. And in Jampole, the Court was saying -- and I haven't read this recently , so I might not should be discussing it -- but as I remember what Jampole said is that we're going to assume that it is.

CHAIRMAN SOULES: No. The Jampole discovery request set up the reasons why the seeking party contended that the discovery was

relevant, and they've got all of those kinds of cars and vehicles. In Lawrence, the seeking party did not set up relevance properly, and they did not get the discovery.

And those two cases are very teaching in the way of how you need to explain that what you're trying to get will bear on your case, because if you do, there is no question that you get it. That's what Jampole says. Once you set it up, show that it's relevant, you get that discovery unless it's immune.

And I think -- of course I'm on the record by filings that somebody needs to say -- to go back before Peeples and set out what really is supposed to happen from one end to the other of a discovery hearing, and the first thing is the party seeking -- if it's an issue, if relevance is an issue -- the party seeking discovery has got to carry that burden before privilege even comes up.

MR. BEARD: Well, attorney-client privilege should not be waived unless you actually produce evidence. Some evidence has to come in and you shouldn't waive it just because you failed to timely object to something you weren't even considering.

CHAIRMAN SOULES: Oh, I agree with that.

MR. BEARD: So I really think we need a rule that says there is no waiver unless there is the production of evidence -- of the attorney-client privilege.

CHAIRMAN SOULES: We're talking about two different things.

MR. McCONNICO: I think in doing that, Luke, the point I'll make is we're going to have to be darn careful on how we do that because how can the plaintiff say how this can lead up to admissible evidence when he has never seen this and had the right to do discovery to begin with.

CHAIRMAN SOULES: The same way he did in Jampole. He did a good job.

MR. McCONNICO: We're going to have to be very careful not to restrict his ability to get to it because that's why he's doing discovery. He doesn't know how it's going to lead to admissibility.

CHAIRMAN SOULES: Reasonably calculated to lead. And that's -- that lawyer did a good job. He's a Houston lawyer, and I should be able to recall his name. Buddy Low.

MR. LOW: But Luke, the person with the document is in a better position to show --

CHAIRMAN SOULES: Doug Mathews was the lawyer.

MR. LOW: -- by presenting it to the court or something. And if it's a document, they just might have described it to you, and you might not can really show that. But that person can show the court in camera; it's not an unreasonable thing.

Now if the plaintiff is asking for just a whole bunch of stuff, and it's real burdensome and everything, you can face that issue. But sometimes the other party that doesn't have the document is not really able to show. The man with the document is in a better position to do something and present it to the court and take care of it, than the man without the document.

MR. BEARD: Buddy, the question -- the description of the abilities of the court that you're going to try -- whether you're in the Federal court or state court -- is sometimes described vividly to the client before or after litigation.

Now if you're put where you have to give that

to the judge in camera to inspect and you've just said a lot of bad things about him --

MR. LOW: Oh, I would presume the lawyers don't use good discretion.

MR. BEARD: Well in California they don't like to write anything because of the discovery question.

CHAIRMAN SOULES: It would help me if we put "In responding to an appropriate discovery request within the scope of paragraph two directly addressed to the matter, a party who seeks to exclude any matter from discovery, on the basis of any exemption or immunity from discovery" -- then it separates those burdens and sets them up the way all the cases read together sets them up.

MR. TINDALL: What do you mean by "immunity"?

CHAIRMAN SOULES: Well, that's what the cases use. They use the word "immunity" essentially to mean any reason why it's not discoverable. But if you read Peeples and Weisel, you can read that immunity means not relevant. That's where you get to the problem. That's the word -- that's the loose writing that's causing the problem.

MR. TINDALL: Or we say not relevant nor calculated to lead to any --

CHAIRMAN SOULES: Well, now that's why I put "within the scope of paragraph two," which is the whole scope.

MR. TINDALL: Oh, okay.

CHAIRMAN SOULES: So, "In responding to an appropriate discovery request within the scope of paragraph two directly addressed to the matter, a party who seeks to exclude any matter from discovery on the basis of exemption or immunity" -- and those words now have meaning in the cases --

MR. TINDALL: I hate to see it perpetuate the word "immunity." That sort of has --

CHAIRMAN SOULES: Exemption or privilege. Well, exemption.

MR. BRANSON: There's actually another category, Luke.

MR. TINDALL: Exemption or privilege.

CHAIRMAN SOULES: Exemption is what we use in this 166(b).

MR. TINDALL: I know, but not immunity.

MR. BRANSON: There is actually another category besides those two. And the only place I've encountered it is in Article 4447(b)(3), a little-used section of the Health Code, that has been interpreted to prevent the discovery of hospital minutes, minutes of records, in a case called Wadley (phonetic) Hospital vs. Dow Jones.

The court, in that opinion, talks about that statute almost as a prohibition statute, not a privilege which is waiverable, but -- and it may be that it fits within the immunity provision -- but in that particular case it was not discussed in that light. But it was even stronger than a privilege.

CHAIRMAN SOULES: Well, exemption or immunity. I mean that's there. We are not going to extend the use of the term; it's in the cases.

PROFESSOR EDGAR: All right. How would you propose, then, that that --

CHAIRMAN SOULES: "In responding to an appropriate discovery request within the scope of paragraph two directly addressed to the matter, a party who seeks to exclude any matter from discovery, on the basis of exemption or immunity

from discovery, must specifically plead the particular exemption or immunity" --

MR. McCONNICO: Well, what about Article 5 where you had --

CHAIRMAN SOULES: -- "from discovery relied upon," and so forth. Now that would be my change.

Bill, did you have -- I mean, Steve, did you have a question about this?

MR. McCONNICO: I'm sorry I interrupted, Luke.

CHAIRMAN SOULES: Okay.

MR. McCONNICO: I think we need to put in there also "privilege" because we have stated in -- before that any matter under Article 5 --

CHAIRMAN SOULES: Okay. "Exemptions" -- three -- as it is now written by the Supreme Court of Texas, it says: "The following matters are not discoverable: (a) Any matter protected from disclosure by privilege."

So in our rule, "exemption" includes any matter protected from disclosure by privilege, and that's why I used exemption.

MR. McCONNICO: Okay.

MR. TINDALL: Okay. What if the

request is "Give me the report of your experts that you don't plan to call at trial"? Now what -- then that's clearly privilege and you file a motion for protection, right?

CHAIRMAN SOULES: That's right. If you don't, you waive it.

MR. TINDALL: Why not key back, then, to privilege?

MR. McCONNICO: No. You key back to --

CHAIRMAN SOULES: You key back to exemption because that's --

MR. TINDALL: But we're over here now in the mechanics of filing the protection. And you say, "Well, it's privileged.

MR. McCONNICO: Well, no, it's exempt under three, paragraph three, of 166(b) which is exemptions.

CHAIRMAN SOULES: Sometimes you use a word we're already using in the rule, except for immunity which has got a broad meaning in the cases.

MR. TINDALL: So in keying it back, an exemption includes all privileges.

CHAIRMAN SOULES: Every privilege is

an exemption under the language of the rule.

MR. TINDALL: All right.

CHAIRMAN SOULES: Lefty.

MR. MORRIS: Luke, I just have a real quick question, kind of a threshold thing, but it seems like we're writing a seminar paper here rather than the rules of civil procedure. And I think that's what the case law is all about. I don't know that we can sit and just take every Supreme Court case and get it drafted annually on the rules of civil procedure and really have a -- we have to have flexibility. And I just really, seriously question this type of seminar paper being in the rules of procedure.

CHAIRMAN SOULES: There is an outcry for a paragraph four. The judges -- the district judges and the Bar, they are wanting this spelled out. We are getting a lot of inquiry. This needs to be done because you have to read a lot of cases and worry about a lot of in-between to really perceive how that discovery hearing is supposed to take place. But it's very plain. I mean, this is the way it takes place. And Bill has it succinctly stated.

MR. MORRIS: I'm not being critical of

the way it's written. I'm being critical of -- or at least I have a serious doubt about our role in taking these cases and drafting them into the rules regularly because a new case is going to come along --

MR. RAGLAND: Amen.

MR. MORRIS: -- and then we're going to be back doing it again next year. And that's what the common law is all about.

CHAIRMAN SOULES: But if the Supreme Court adopts this procedure, then it will have a procedure and it won't need to continue to write cases. Where if the procedure is not done, it can say "Read the rule," instead of "We're going to grade your papers whenever you do it some other way."

MR. McCONNICO: Lefty, I generally agree with you that we can't take care of every case. But now when we have a request for production and we respond to that request for production, you have to look at at least six different cases. And that's too confusing to most members of the Bar. We have to get it consistent in one paragraph where they'll know what to do. It's inviting too much malpractice the way the

system is now, and it's not the lawyer's fault if they commit malpractice.

CHAIRMAN SOULES: Let me read through this, Bill, and I've gotten down to "When a party's objection concerns the discoverability of documents and is based on a specific" -- can we continue to use immunity or exemption and just strike "privilege" because that is an exemption in an earlier part of the rule -- "such as" -- and the "such as," I think, is still okay -- "attorney-client privilege or attorney work product," if we want to leave -- "the party's objection may be supported by an affidavit," and so forth, saying how you set up the proof. "The court's order concerning the need for an inspection shall specify a reasonable time, place and manner" -- "When a party seeks to exclude documents from discovery and the basis for objection is lack of relevancy, is burdensome" -- it's not lack of relevancy, it's burdensomeness or harassment is really what that case is, Bill.

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN SOULES: Strike "lack of relevancy" -- "basis for objection is burdensomeness or harassment, rather than a

specific immunity or exemption, it is not necessary for the court to conduct an inspection of the individual documents before ruling on the objection."

PROFESSOR DORSANEO: See, the theory there is if it's a pain -- if nobody should have to look through these, then the judge shouldn't have to, either.

CHAIRMAN SOULES: Would you accept my suggestions as friendly amendments or not? I mean it's up to you.

PROFESSOR DORSANEO: Yes, I think they are fine. I think ultimately, obviously this is going to be for the Supreme Court to see if they like this notion of putting some of the burden on the trial judge to decide what kind of an in camera inspection is necessary or appropriate. I think that's the key to it because right now we don't know whether you have to bring everything to the courthouse and say, "Here, Judge. Look at this, or tell me you don't want to."

MR. McCONNICO: In fact, we have two court of appeals opinions that probably conflict with what to rule.

CHAIRMAN SOULES: As reread and as now

before the committee, how many are in favor? Say aye.

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Opposed?

MR. MORRIS: I'm opposed.

CHAIRMAN SOULES: Okay. That takes of four.

MR. LOW: I'm not positive every provision -- does it have in there -- did you exclude the part, or did you put in there the part about the person making the request must show it's relevant or --

CHAIRMAN SOULES: Yes.

MR. LOW: I'm opposed.

MR. MORRIS: I'm opposed too.

CHAIRMAN SOULES: It says "In responding to an appropriate discovery request within the scope of paragraph two directly addressed to the matter, a party who seeks to exclude any matter from discovery on the basis of exemption or immunity must specifically plead," and so forth. It doesn't --

PROFESSOR EDGAR: It doesn't use the word "relevant," it just keys back to paragraph two.

CHAIRMAN SOULES: Keys back to paragraph two.

Okay. Lunch is served. And why don't we just get our sandwiches and come back in and eat and work at the same time to get through the day.

(Lunch recess.

REPORTER'S CERTIFICATE

THE STATE OF TEXAS X
COUNTY OF TRAVIS X

I, Priscilla Judge, Court Reporter for the State of Texas, do hereby certify that the above and foregoing typewritten pages contain a true and correct transcription of all the proceedings directed by counsel to be included in the statement of facts in SUPREME COURT ADVISORY BOARD MEETING, and were reported by me.

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

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

WITNESS MY HAND AND SEAL OF OFFICE this, the _____ day of _____, 1987.

_____

Priscilla Judge, Court Reporter
316 W. 12th Street, Suite 315
Austin, Texas 78701 512-474-5427

Notary Public expires 08-05-90
CSR #2844 Expires 12-31-88

Job No. 1566

During the discussions in the Sat. morning meeting intending to use as example of an attorney who set up a separate investigative Corp including investigator, nurses, Drs., medical illustrators, and video operators - I mis spoke myself and made a reference to my Special staff. —

The record should state that as a hypothetical Attorney rather than my counsel, at the Corporation —

The discussion came during the discussion of privileges — —

Thank you

Frank L Jones