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BEFORE THE
SUPREME COURT ADVISORY COMMITTEE
AUSTIN, TEXAS

SUPREME COURT ADVISORY COMMITTEE

BE IT REMEMBERED that the
above entitled matter came on for hearing on
the 15th day of July, 1989, beginning at 8:30
o'clock a.m. at the Texas Law Center,
Austin, Texas, and the following meeting was
reported by ANNA L. RENKEN, Certified
Shorthand Reporter and Notary Public in and
for Travis County, Texas.

COPY

SUPREME COURT ADVISORY COMMITTEE

TRANSCRIPT OF PROCEEDINGS

JULY 15, 1989 MEETING

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(Saturday July 15, 1989 Hearing.)

MR. SOULES: Let's be in order, and we'll go ahead and get started. I want to thank everyone for being here on a Saturday morning. I believe we have an agenda that we can finish in a day, maybe even a short day depending on the needs of each of these suggestions for debate and maybe some changing as we go along, but I don't think there's going to be any problem getting our agenda done today.

I want to welcome the new members, Justice McCloud who is here representing the chief justices, and Justice David Peeples who is here, a new member representing the State Bar of Texas Committee on Administration of Justice, and Doak Bishop, who is here as representative of the State Bar's Rules of Evidence Committee. So welcome to you new members. We appreciate your being here to contribute today.

Our last agenda which we managed to complete in a two-day session was these materials (indicating), which ran about

1 1200 pages; and our agenda today which
2 includes the suggestions, the minutes of the
3 last meeting and the red line versions of all
4 the rules that we're going to recommend
5 changing is about half the size of one of
6 those volumes. So to have done all that you
7 did last time was really amazing and a great
8 accomplishment.

9 I think to start with
10 today I'd like to recognize Elaine Carlson to
11 tell us about the local rules project, and in
12 recognizing her I need to tell you that she
13 has now read every published local rule in the
14 State of Texas.

15 JUDGE CASSEB: She ought
16 to really be confused.

17 MR. SOULES: As Mr. Casseb
18 said, she ought to really be confused. In the
19 local rules effort, we did gather up all of
20 the local rules that are printed in the State
21 of Texas, and we did that by just hounding
22 every district clerk and local administrative
23 judge until they either sent us their rules or
24 told us that they had no written rules, one or
25 the other. They either had to tell us they

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1 didn't have them or send them to us. And
2 Holly spent about three months in that
3 effort. And as a matter of fact, there were
4 203 that have them or 201.

5 MS. HALFACRE: 203, I
6 believe.

7 MR. SOULES: 203 counties
8 have written local rules, and 51 do not. They
9 were all collected in volumes that were about
10 two -- they were actually thicker than this
11 (indicating), two volumes thicker than this;
12 and in a uniform numbering system some of
13 which was done by the local administrative
14 judges together with their judges, which is
15 the way we preferred to have it so that we
16 didn't get their rules in a category they
17 weren't pleased with. But there were a lot of
18 them that came in and we had to re-number them
19 and get them into a uniform numbering system
20 that's now mandated by the February 4, 1987,
21 Supreme Court Administrative Order and the
22 various rules of the regional judges.

23 But we've made a lot of
24 progress. Elaine then volunteered for an
25 enormous task, and that was to read all those

1 rules as they are numbered in the uniform
2 numbering system so that all the rules on a
3 certain number would be collected together, to
4 read all of those and to eliminate
5 duplications and inconsistencies with the
6 Texas Rules of Civil Procedure, which the
7 local rules, of course, are not supposed to
8 have any inconsistencies, and she has done
9 that and sent that work product back to my
10 office.

11 So I can't -- I don't know
12 how you can recognize that size of piece of
13 work other than just to say a "thank you."
14 That's the biggest word I can come up with,
15 Elaine. That's an amazing piece of work, and
16 we are forever indebted to you for that. That
17 advances this project certainly beyond what
18 anyone ever thought it would get to, and maybe
19 we're on the right track now.

20 MR. DAVIS: Are you
21 checking that over now to make sure it's
22 right?

23 MR. SOULES: Tom, if
24 Elaine Carlson did a job, would you re-check
25 it? Of course not.

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1 MR. DAVIS: That and other
2 reasons.

3 MR. SOULES: But if you
4 would like to form a committee and be its
5 chair. So, Elaine, give us --

6 MR. DAVIS: I thought the
7 chairman ought to check it. That's all.

8 MR. SOULES: Tell us about
9 your experience. I'm sure we are really -- at
10 least I know I am and I think the rest of the
11 committee are very curious to hear what you
12 found in that collection of rules and your
13 view of it and your view of how the project
14 can go forward from here.

15 PROFESSOR CARLSON: One
16 thing I concluded was that I think we found
17 the solution to repeat felony crimes and we
18 should make convicted felons read the local
19 rules. But beyond that, it was a very
20 interesting project and gave insight into a
21 lot of regional variations.

22 There are some problems
23 that remain, and as Luke suggested, what we've
24 done is gone through and try to eliminate what
25 were duplicating one another, to make the time

1 periods consistent with the Rules of Civil
2 Procedure, and third, to eliminate those rules
3 that are in conflict with the Rules of Civil
4 Procedure. I have set forth a very extensive
5 letter to Luke. I have tried to do my best to
6 edit any conflict, to amend a conflict of a
7 given rule, but I think what we have left is
8 still a pretty bulky project. I don't know
9 how many pages it's going to come down to. I
10 suspect it will have to be, Luke, a fifteen
11 some hundred pages, probably still probably a
12 thousand-page effort my best guess. And we
13 still have a problem that I think we need
14 another run-through for inconsistencies with
15 substantive law. I tried to do it as I went
16 through the phenomenal project.

17 For example, in the Family
18 Law area local rules that said doesn't comply
19 with certain requirements your divorce decree
20 could be dismissed with prejudice. I suspect
21 the State of Texas can't require people to
22 stay married because the lawyer didn't comply
23 with the local rules. There were a few of
24 those blatant errors that I caught going
25 through, but we need another run through.

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1 The rules have not been
2 amended at all to conform with what might come
3 out of the work product from 1989 in this
4 committee. So that's another run-through on
5 those rules that the Supreme Court promulgates
6 this year effective 1990. They'll have to,
7 you know, cull through some of the local rules
8 as well. And some of the local rules in
9 counties don't have any local rules as Luke
10 suggested, and the major area of concern I
11 have left is whether or not the State of Texas
12 Supreme Court by the Regional Rules of
13 Judicial Administration mean to suggest that
14 courts do have to have some local rules on
15 certain subjects like docketing procedures and
16 trial settings. So whether that conclusion is
17 correct remains to be seen. But other than
18 that, the project is coming along, and we've
19 got one pass-through and suspect probably to
20 have several passes through before it's
21 finished.

22 MR. SOULES: Does anyone
23 have questions or comments for Elaine? Thank
24 you, Elaine.

25 Next on page -- beginning

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1 on page two are the minutes of our last
2 meeting, and I mailed these out, and I
3 appreciate the responses I got by phone and by
4 letter, and I attempted to make corrections
5 responsive to those suggested corrections, and
6 I don't know if I got them all made, but we
7 tried to. And if there are others of you that
8 may now have suggestions for the minutes, I'd
9 like to hear corrections to the minutes that
10 appear on pages one through ten, if there are
11 any corrections. If there are no corrections,
12 those in favor of approval of the minutes as
13 presented here, say "Aye."

14 COMMITTEE MEMBERS: Aye.

15 MR. SOULES: Opposed?

16 COMMITTEE MEMBERS: (No
17 response.)

18 MR. SOULES: If someone
19 finds an inaccuracy in these during the day,
20 please let me know, because we still can
21 correct them before they're sent to the
22 Supreme Court.

23 Next on page 12, the
24 Senate Bill 874 was a bill that passed both
25 houses of the legislature. When I finally

1 caught on to the bill, it was in the House on
2 the third reading on the local and consent
3 calendar, and had already passed the Senate
4 unanimously. There was no inconsistency with
5 the House version, so there wasn't going to be
6 a conference committee, and in order to stop
7 the bill we would have had to have a
8 two-thirds no vote on third reading on the
9 local and consent calendar with no one having
10 made an objection yet.

11 So obviously that wasn't
12 doable in spite of the fact that a number of
13 San Antonio legislators indicated that they
14 would help but for the status of the bill, and
15 they did help on the Rule 13, which I'll talk
16 about in just a minute. The Chief Justice and
17 Justice Hecht and many of you -- I know John
18 O'Quinn wrote a letter to the governor, and
19 Tony Sadberry and several others to veto that
20 bill, and the governor did veto it. But SB874
21 essentially said that the Supreme Court of
22 Texas couldn't make rules inconsistent with
23 the statutes, and put the legislature back
24 into the rule-making business; whenever they
25 decided they wanted to change a practice, they

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1 could pass a statute and that's the end of
2 it.

3 Well, that got vetoed.
4 And if we watch for it next time coming back,
5 if it does come back, and start out early
6 enough, I think we can probably keep it from
7 getting as far as it did, because just as a
8 matter of reason it shouldn't. That type of
9 legislation I think is not necessary. I
10 believe maybe we'll have some support in the
11 legislature, because on page 12 is a letter
12 that I got from Senator Glasgow. I went up
13 and testified on SB1013, which was a statute
14 for frivolous pleadings and suits, and ate
15 crow for about an hour, and just because
16 probably I did not communicate as well with
17 the legislature as I should have after we
18 passed Rule 13 to cover all cases and not just
19 tort cases, and with this SB1013 it got
20 stopped and never did pass out of House
21 Committee or the Senate Committee, I believe.
22 I think it never got out of either committee.

23 But the important thing, I
24 think, in this letter from Senator Glasgow
25 talking about that hearing and the letter that

1 was submitted and then this paragraph, "As we
2 discussed during the hearing, it appears that
3 part of the solution to this question
4 regarding sanctions for frivolous lawsuits
5 would be to have better lines of communication
6 opened up between the legislature and the
7 Supreme Court." I think that's part of our
8 job, maybe largely our job, especially on
9 rule-making.

10 And Senator Glasgow and I
11 really talked about better communications on a
12 broader basis than just frivolous lawsuits, so
13 I think perhaps maybe we should resolve here
14 to communicate as fully as we possibly can
15 with the Senate and the House in order to keep
16 them advised of the efforts that we are making
17 towards the improvement of the administration
18 of justice and the fact that we want to be
19 cooperative and work in cooperation with the
20 legislature to improve Texas administration of
21 justice in all ways.

22 Do we have a motion to so
23 resolve?

24 PROFESSOR EDGAR: So
25 moved.

1 MR. SOULES: Seconded?

2 JUDGE CASSEB: Seconded.

3 MR. SOULES: All in favor
4 say "Aye."

5 COMMITTEE MEMBERS: Aye.

6 MR. SOULES: That's
7 unanimous. I'll prepare a resolution of this
8 committee and submit it to Senator Glasgow,
9 who of course is the chair of the Senate
10 Jurisprudence Committee.

11 There were then other
12 letters back about our legislative efforts,
13 and I think -- I put these here just to show
14 that there is legislative response. So I will
15 try to do a better job about picking up early
16 on legislation of interest to us in the next
17 session and try to get that information to you
18 as early as I possibly can for any action that
19 we may chose.

20 Justice Hecht, 'good
21 morning to you, sir.

22 JUSTICE HECHT: Good
23 morning.

24 MR. SOULES: Do you have
25 remarks for the committee this morning?

1 JUSTICE HECHT: No. Once
2 again, we appreciate all the good work since
3 the last meeting and thank you for coming.

4 MR. SOULES: Next is a red
5 line version of the rules that we did last
6 time. That starts on page 17 and concludes at
7 page -- it looks like 120. I did get written
8 input from several of you, and I made the
9 changes that I felt were -- there were some
10 new suggestions, some thoughts for some maybe
11 some additions to what we had done, and those
12 I put in the new materials beginning at 121
13 and going back into the rest of the book for
14 action today. The suggestions that I got back
15 which were corrective to my original red-line
16 work product, I made or tried to make all of
17 those.

18 Does anyone see anything
19 in these pages from 17 to 120 now that's
20 inconsistent with the resolutions of the
21 committee in our last session?

22 MR. TINDALL: Luke, I have
23 one. I think it's really just a cleanup. On
24 page 46 when we added the psychologist, Rule
25 167(a) --

1 MR. SOULES: Right.

2 MR. TINDALL: -- I think.

3 On the next page, subpart two of that rule
4 needs to be changed also. There are two
5 references to physicians in the existing rule
6 where we need to also across-reference to
7 psychologists.

8 MR. SOULES: All right.

9 We need a rule book to look at that, don't
10 we? That's not on this. 166(a).

11 MR. TINDALL: 167(b)(2).
12 There are two references about physicians. It
13 needs to say "or psychologists."

14 MR. SOULES: 167. That's
15 Rule 167(a), paragraph (b) parenthesis (2).

16 MR. TINDALL: Parentheses
17 (2).

18 MR. SOULES: Paragraph
19 (2).

20 MR. SADBERRY: Add
21 psychologist.

22 MR. TINDALL: It talks
23 about the report of an examining physician or
24 the taking of a deposition of a physician in
25 both cases.

1 MR. SOULES: After the
2 words physician appearing twice in the last
3 sentence we should add "or psychologist"?

4 MR. TINDALL: Right.

5 MR. SOULES: All right.
6 If there's no objection, that will be accepted
7 as a corrective -- correction to the rule as
8 written and will go in to the Supreme Court
9 with those two additions. Being no objection,
10 that stands done unanimously. Any others?

11 JUSTICE MCCLOUD: I think
12 you ought to make a talk about that.

13 MR. SOULES: That's going
14 to be on the agenda.

15 JUSTICE MCCLOUD: Okay.

16 MR. SOULES: We've got
17 that redlined, Judge McCloud.

18 JUSTICE MCCLOUD: That's
19 good.

20 MR. SOULES: Okay. There
21 being no further comment, these then will be
22 submitted to the Supreme Court as written.
23 Again, however, if any of you see matters in
24 these rules that need correction, if you'll
25 let me know during the day today or as soon as

1 possible, I will make them conform and as soon
2 as possible and send the Supreme Court a
3 corrected version. I know there's nothing
4 about the timing here intended to stop your
5 helping me get these right if they're not
6 completely right now.

7 Okay. Well, that gets us
8 to today's business, I believe. The
9 legislature, I think, passed a resolution.
10 I'm told they passed a resolution. I haven't
11 really seen it -- that says that the Supreme
12 Court is to promulgate guidelines or rules of
13 some kind to -- regarding sealed records, when
14 records can be sealed and when they cannot.

15 JUSTICE HECHT: It's a
16 statute, right.

17 MR. SOULES: To conform
18 with the statute.

19 PROFESSOR EDGAR: What
20 page are you on?

21 MR. SOULES: This is page
22 121. Is Ken Fuller here today?

23 MR. FULLER: Yes.

24 MR. SOULES: Ken, sure.

25 There you are. Good. So we need to respond

1 to that and get that done as soon as we can,
2 but I'm somewhat impressed that that is going
3 to take a while to really resolve the
4 differences of view. John MacElhany, who is
5 with Locke, Purnell in Dallas and they
6 represent the Dallas Morning News, has sent in
7 an extensive work.

8 From the Donnybrook in
9 Dallas because -- I forwarded it because
10 someone contacted me. It doesn't necessarily
11 reflect my view. It's going to be really
12 volatile. Reserve time to hear from them.

13 JUSTICE HECHT: The
14 statute says, "The Supreme Court shall adopt
15 rules establishing guidelines for the courts
16 of this state to use in determining whether in
17 the interest of justice the records in a civil
18 case including settlement should be sealed."

19 MR. SOULES: Okay. So
20 we've got a mandate from the legislature, and
21 I'm satisfied, Justice Hecht, that that has
22 been assigned to our committee for
23 resolution. Is that right.

24 JUSTICE HECHT: That's
25 right.

1 MR. SOULES: "That's a
2 right," he says. But there has been
3 apparently a lot of negotiation between the
4 lawyers at Locke Purnell, lawyers for the
5 press and the lawyers for the District Clerk
6 of Dallas County on trying to set out some
7 guidelines for Dallas County; and at least in
8 one case it seems that they reached an
9 agreement.

10 MR. FULLER: Uh-huh.

11 MR. SOULES: And this is
12 McElhaney's work product that he sent to me.
13 He called me and has submitted this and
14 apparently has a lot more. And the letter
15 from McElhaney is at page 402 of these
16 materials.

17 MR. FULLER: 402?

18 MR. SOULES: 402, right.

19 It came in kind of late, so we stuck it to the
20 back. He gives a lot of parameters, so
21 there's a lot of thought process gone into
22 this already. We won't be just beginning with
23 no concepts at all. Okay. That by way of
24 asking for volunteers, persons who might be
25 interested in this project to where there is

1 someone who will chair or be willing to
2 co-chair the project as an ad hoc subcommittee
3 chair? Is there anyone?

4 MR. FULLER: I'll serve on
5 it. I don't want to chair it. I don't have
6 time for that.

7 JUDGE CASSEB: If Judge
8 Peeples will serve on it, I will, too.

9 MR. SOULES: Lefty, will
10 you chair it?

11 MR. MORRIS: Yes.

12 MR. SOULES: I think it
13 might be helpful for you and maybe Charlie,
14 someone who has good interaction with the
15 legislature, to chair this so that if there's
16 criticism in the legislature next time, of
17 whatever work product we come up with, there
18 will be some rapport from the work group that
19 can go over and tell the people what we did.
20 And there's obviously going to be an open ear
21 to everyone who wants input into this that we
22 did hear and we resolved it as fairly as we
23 could to everybody and give the background.
24 And that's why I think --

25 MR. HERRING: I'll serve

1 on it as long as Lefty chairs it, so that if
2 there is criticism from the legislature, it's
3 directed to him.

4 MR. MORRIS: I'll be vice
5 chair and blame him.

6 MR. SOULES: Lefty, would
7 you share the chair with Charlie? Charlie
8 would you share the chair with Lefty?

9 MR. MORRIS: However you
10 want to do it.

11 MR. SOULES: Okay. Lefty
12 and Charles Herring will be the co-chairs, and
13 Ken Fuller; and Judge Casseb volunteered Judge
14 Peeples. Is that all right, Judge Peeples?

15 JUDGE PEEPLES: I guess
16 so.

17 MR. SOULES: And your
18 having accepted, just as a suggestion that
19 captures him, too, because he volunteered
20 conditionally.

21 JUDGE CASSEB: That's
22 okay.

23 MR. SOULES: Okay. Are
24 there any other volunteers? Anybody else
25 sufficiently interested in this to want to

1 work on it? Okay. Let see if we've got --
2 Harry, is there any interest in this in Harris
3 County?

4 MR. TINDALL: There is
5 just no written rule on it. No, I haven't
6 seen a lot. I was in the legislature when all
7 that was presented, and evidently it grew out
8 of a case in San Antonio where a member of the
9 clergy was charged with sex abuse or something
10 and the records were all sealed. It was
11 anti-sealing sentiment is what was expressed
12 in the legislature.

13 MR. SOULES: Okay. All
14 right. We will start then with those five.
15 And if you, Lefty or Charlie feel you need
16 additional help, call me and I'll see if I can
17 get additional people on board; and if you
18 would, keep me advised, because I may get
19 telephone calls, too. I'll just be on your
20 committee as well. If that's okay with you,
21 I'll help. I'll serve as a subcommittee
22 person.

23 MR. MORRIS: (Nods
24 affirmatively.)

25 MR. SOULES: Okay. Whose

1 bill is that, Judge? Do you know?

2 JUSTICE HECHT: That's --
3 I don't have it. House Bill 1637.

4 MR. TINDALL: Orlando
5 Garcia.

6 MR. SOULES: Orlando
7 Garcia. I will advise Orlando that we have
8 appointed a committee to comply with that
9 statute. Any objection to my so doing?
10 Okay.

11 I guess then in concluding
12 that, Lefty and Charlie, I think that I don't
13 see any reason not to include on the committee
14 for purposes of the committee work someone
15 like McElhaney, who is not on this committee
16 and his counterpart, whoever that may be in
17 the original work as it develops into what we
18 propose, because they've done so much work on
19 it already. He did ask to be heard -- to be
20 able to make a presentation to this committee
21 whenever we act to adopt those rules, and I
22 told him that was fine. But does anyone see
23 any reason not to include someone like
24 McElhaney, who is a lawyer for the press and
25 then some counterpart of his of mutual stature

1 or even others as well on the committee in
2 developing these rules or public members, as
3 it were, to help us work it out?

4 MR. MORRIS: I think it
5 would be good, Luke. I think he should be
6 there and feel like he's got input and be
7 heard and we should really consider everything
8 he has to say. I don't see how it can hurt.

9 MR. SOULES: Will you
10 contact him and tell him the committee as a
11 whole invites him to participate at a
12 subcommittee level?

13 MR. MORRIS: Yes.

14 MR. SOULES: And get from
15 him or Ken Fuller or someone a counterpart of
16 equal standing, equivalent standing?

17 MR. MORRIS: What do you
18 mean by counterpart?

19 MR. SOULES: Someone who
20 wants to unseal records, see. McElhaney wants
21 to -- no, unsealed -- I'm sorry. He wants
22 them unsealed. Find someone who has an
23 interest in sealing them. I don't know
24 exactly who that is.

25 MR. MORRIS: I don't know

1 what group that would be, unless you're
2 talking about adoption agencies or something.

3 MR. SOULES: Well, it may
4 be. I don't know who it would. But there was
5 a lot of resistance to --

6 MR. FULLER: Criminal
7 defense lawyers may have an interest.

8 MR. SOULES: Might be
9 criminal defense or some family lawyer in big
10 estates.

11 MR. FULLER: I'll qualify
12 in the family law area on certain kinds of
13 cases. I really do think someone on the
14 criminal defense side should have some input.

15 MR. MORRIS: All right.
16 Let's get it.

17 JUSTICE HECHT: Pereeny
18 has got a letter in here.

19 MR. SOULES: B. Pereeny
20 might be the right person.

21 MR. MORRIS: What if I
22 just contact the president of the criminal
23 defense bar and ask them to appoint someone to
24 work on the subcommittee with us, Luke?

25 MR. SOULES: Okay. If

1 you'll let me know how that works out --

2 MR. MORRIS: I'll do it.

3 MR. SOULES: I'll write a
4 letter to them as well as you and welcome them
5 to the board.

6 MR. MORRIS: All right.

7 MR. SOULES: Okay. Next,
8 I guess is just to discuss whether or not
9 there ought to be an effort in the upcoming
10 interim to reorganize the Rules of Appellate
11 Procedure. This was Sarah's suggestion.
12 There appear to be some rules that are not
13 really where they ought to be. And Rusty, is
14 Mike Hatchell here today?

15 MR. MCMAINS: Mike was
16 unable to come today.

17 MR. SOULES: Rusty, have
18 you had a chance to --

19 MR. MCMAINS: We need to
20 talk about the request for reorganization in
21 light of the resolution by the Supreme Court.
22 And Justice Hecht, I'm trying to find out.
23 This resolution to consider the Federal Rules
24 that the Supreme Court passed, does it apply
25 to the appellate rules as well? I really

1 didn't -- I had a chance to talk to Justice
2 Phillips about that in Austin at the bar
3 conference or San Antonio bar conference, but
4 only briefly when I met.

5 JUSTICE HECHT: Have you
6 seen our letter?

7 MR. MCMAINS: I have not
8 seen it.

9 JUSTICE HECHT: Well, if I
10 can take just a second. Somebody in the House
11 sponsored a resolution at the special session
12 that said basically -- I don't think I have it
13 here. But by a certain date in the future,
14 1991 or 1992, the Supreme Court would make
15 every effort to move as much as possible
16 toward the Federal Rules of Civil Procedure.
17 Representative Uher introduced that
18 resolution, and he and the chairman of the
19 committee, Patricia Hill, called the chief and
20 said they wanted a statement from the court,
21 yes or no. So we sent them over about a
22 six-page letter signed by all of us that said
23 "maybe."

24 And we said we were
25 already studying that and we had been studying

1 it for a long time and there were a whole lot
2 of problems with it. It wasn't just as simple
3 as saying, "Do it," and certainly we were
4 interested in any positive suggestions. And
5 we appreciated their input, and if they had
6 any further suggestions on how to do it, we
7 certainly would put them on the committee or
8 do whatever they wanted to do. But otherwise,
9 we were doing the best we could and we could
10 certainly get back with them. And that
11 resolution on the first reading passed, about
12 90 or so to a few votes against.

13 On the second reading it
14 failed, about 120, 130 votes to a few
15 against -- to a few for. And I'm not not sure
16 what happened to it on the third reading. But
17 I think it's fair to say that the sentiment in
18 the House of Representatives is mixed on that
19 subject. And all the -- the only expression
20 that we have made is that organizationally and
21 for simplicity and trying to unify the
22 practice in all the courts of Texas, we're
23 certainly going to look at that and see what
24 can be done in that area, but it's not just as
25 simple as up and adopting the Federal Rules.

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1 So really we have not made
2 a resolution to take any specific action other
3 than continue looking at it.

4 MR. MCMAINS: Okay.

5 PROFESSOR BLAKELY: Luke,
6 without any expertise on this, let me suggest
7 that the Appellate Rules have only been in
8 effect, what, six years, something like that.
9 We're lined up with the criminal side. If we
10 reorganize the Civil Appellate Rules, you have
11 to -- we're out of whack with the criminal, or
12 the criminal has got to do something. If the
13 only real motivation here, reason for
14 reorganization is that we've got a few
15 Appellate Rules that don't seem to be in the
16 right place, could we just tolerate that?
17 Particularly since, if we do get into the
18 business of the Rules of Civil Procedure,
19 reorganizing that, that's going to be a
20 monumental task, it seems to me. Working on
21 the appellate rules would have surely caused
22 the plate to overflow. Just a sentiment on
23 that side of this case.

24 MR. BEARD: I second it.

25 MR. SOULES: Bill Dorsaneo

1 has his hand up. Did you have a comment?

2 PROFESSOR DORSANEO: I had
3 one or two comments. It is true that as a
4 result of the fact that it was relatively late
5 in the game that the direction was given to
6 actually include the Supreme Court Rules into
7 the work product that we were working on, and
8 that the organization is not exactly what it
9 probably would have been had we known what the
10 overall scope was going to be from the outset
11 of the project.

12 Nonetheless, I don't see
13 any large problems with the current
14 organization that have to do with an overall
15 renumbering. I think renumbering could
16 improve things. And this reorganization as
17 suggested in the June 13, 1989, memorandum
18 beginning on page 128 prepared by Sarah Duncan
19 does make a good deal of sense.

20 But I end up concluding
21 that it probably is not something that really
22 needs to be done right now. The last comment
23 in terms of how our Appellate Rules match up
24 with the Federal Rules of Appellate Procedure,
25 we did look carefully for a model that we

1 could use in having an organized set of
2 appellate rules. And the Federal Rules of
3 Appellate Procedure were in general terms used
4 as a model, and you would see a lot of
5 organizational similarities if you went and
6 looked. Some things were decided to do
7 differently from the Federal Rules: Put the
8 general rules, for example, at the beginning
9 rather than at the end as a matter of taste.
10 But in many ways as far as our rule book is
11 concerned except for the Rules of Civil
12 Evidence, the Rules of Appellate Procedure are
13 more likely to be organized like the federal
14 counterpart than are Rules of Civil
15 Procedure.

16 The bottom line, I kind of
17 tend to agree that a major renumbering would
18 not be something that would be worthwhile now
19 for reasons that have been expressed, and also
20 because I don't think there really is any real
21 problem or any disorganization. It's just not
22 exactly in the order that we would have
23 followed had we known at the beginning what
24 the scope of the project was going to end up
25 being.

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1 Let me make one other
2 comment. From the standpoint of -- and I
3 don't know whether this is meaningful, but
4 I'll put it on the table. There is a lot of
5 commentary written about rules that's
6 published and sold to lawyers, and a numbering
7 scheme change requires it to be done all over
8 again. That is from the standpoint of
9 booksellers not an undesirable thing to
10 occur, but it's not probably a very good thing
11 for lawyers unless we are really accomplishing
12 something by a new numbering scheme. Texas
13 lawyers have experienced a renumbering of
14 everything in the past several years, and it
15 has created a lot of problems up and down the
16 line, and I have resistance to renumbering as
17 an overall proposition on that basis alone.

18 MR. SOULES: Tom.

19 MR. DAVIS: Do you have
20 any idea how far back the files or records of
21 the committee goes? Back in early -- I want
22 to say 1970 -- you know, it could have been in
23 that area -- I chaired a five-person
24 subcommittee that recommended that we adopt
25 the Federal Rules of Discovery and only

1 discovery, and with the help of Gus Hodges we
2 redrafted the Texas Rules in line with that
3 and numbered them. Now, whether that -- if
4 that document still exists somewhere back in
5 the archives or if it would be of any help, at
6 least at that time we thought that we had it
7 worded and numbered to fit.

8 Of course, lots has
9 happened since then. It may not be of any
10 value. If it could be found, it might be a
11 good starting point.

12 MR. SOULES: Let me just
13 get a consensus. Is there a consensus to
14 leave the TRAP as presently numbered, at least
15 for the time being? Is that the consensus of
16 the committee? Is anyone opposed to that?

17 ADVISORY COMMITTEE: (No
18 response.)

19 MR. SOULES: We will leave
20 them as numbered presently and maybe carry
21 this suggestion. I do think that we might
22 carry this suggestion, because if we
23 reorganize the Rules of Civil Procedure into
24 the Federal Rules of Civil Procedure format,
25 there's going to be so much renumbering in

1 that that a little renumbering in the TRAP
2 rules isn't going to make any difference.
3 It's just going to be carried with the rest,
4 and everybody in the State of Texas is going
5 to be living with renumbering. So suddenly
6 there's going to be enormous renumbering done
7 that everybody is going to have to adjust to.
8 A little flex with these rules is not going to
9 be much more adjustment than trying to deal
10 with the others.

11 So is it acceptable for
12 the committee to carry this suggestion as sort
13 of an appendage of the consideration whether
14 to renumber the Rules of Civil Procedure to
15 fit the federal format? I see heads nodding.
16 So we will do that. And the TRAP standing
17 subcommittee should have that in mind, if you
18 will, please.

19 All right. Next, Rusty, a
20 report on -- let's see. It's the suggestion
21 for TRAP Rule 4.

22 JUSTICE HECHT: We've got
23 Judge Clinton.

24 MR. SOULES: Well, maybe
25 I've skipped something. On page 131 is --

1 okay, Judge. Pardon me. I certainly
2 apologize passing that over. This comes from
3 Judge Clinton. Judge Clinton, will you give
4 us your position on this?

5 JUDGE CLINTON: I just
6 read through those rules from pages 77 to 120;
7 and unless I'm mistaken they've already been
8 adopted.

9 MR. SOULES: Well --

10 JUDGE CLINTON: I simply
11 thought that in Rule 1 where you-all were
12 proposing that every time a case is docketed a
13 copy of the local rules of the Court of
14 Appeals be sent to all counsel was going to
15 end up with district attorneys especially
16 having stacks of them in their office and
17 wondering what to do with them, and suggested
18 that you just add "to who requested it." And
19 as I have read Rule 1 back there on way back
20 on page 77, I think that's been done.

21 And Rule 20, on the civil
22 side you want to restrict briefs to 50 pages.
23 We struggled around with that and have
24 struggled around with that on our court for
25 years, 50 at one time and taking it off, and

1 we finally decided especially in light of the
2 number of points of error that are included in
3 death penalty cases especially that we could
4 live without a 50-page rule, and so we have
5 now for some time. And therefore to carry
6 that forward I just suggested Rule 20 begin
7 with "In civil cases" so and so and so and so
8 leaving it open then for us to not have a
9 limitation, and to change the comment to that
10 rule to allude to amicus briefs as provided
11 for in some of these other rules, 74(h) and
12 136(e) that relate just to as I read your
13 proposed amendment there, that was adopted
14 earlier I think that was added to the comment
15 too.

16 MR. SOULES: That's
17 right. I did adjust these rules for these
18 comments, and --

19 JUDGE CLINTON: We
20 appreciate it.

21 MR. SOULES: -- in the
22 edit process. And now that that's been
23 presented by Judge Clinton, are we still of
24 the same view that these rules go as now
25 adjusted in keeping with his request?

1 ADVISORY COMMITTEE: Yes.

2 MR. SOULES: Okay. That
3 is the case. Now, Judge, would it be
4 consistent to put in those rules, to put in
5 the comment on page 89, "To provide for
6 maximum length in amicus briefs in civil
7 cases"?

8 MR. FULLER: What page are
9 you reading? Page 89?

10 MR. SOULES: Page 89.
11 Actually, the comment then should be adjusted
12 to say it's only in civil cases, shouldn't
13 it?

14 JUDGE CLINTON: Well, I
15 guess.

16 MR. SOULES: Okay. Any
17 objection to that?

18 ADVISORY COMMITTEE: (No
19 response.)

20 MR. SOULES: That will be
21 done. Next is the suggested changes to TRAP
22 Rule 4 found on page 131 of the materials.
23 Rusty, do you have a report on that? Page
24 133.

25 MR. MCMAINS: It's actually

1 Judge McCloud's suggestion.

2 MR. SOULES: Judge
3 McCloud, will you give us a report on this?

4 JUDGE MCCLOUD: Well, the
5 thing that I noticed when I first read that is
6 that the committee had elected to strike, I
7 suppose, the last phrase up there in Paragraph
8 A on the signing where it said, "And shall
9 state that a copy of the paper has been
10 delivered or mailed to each group of opposite
11 party or their counsel." And I think that is
12 a good suggestion, because over here -- I have
13 forgotten -- in another one of the
14 sub-paragraphs it seems to be taken care of.
15 Then it says, "A party who is not represented
16 by an attorney shall sign his brief and give
17 his address and telephone number."

18 I feel that this last
19 statement -- I mean this last sentence should
20 be struck. The rule now provides that the
21 statement of service on opposite parties by
22 one who is not a licensed attorney shall be
23 verified by affidavit. And I discussed this
24 with, I guess, Mike Hatchell and a couple of
25 other people, and of course on the Court of

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1 Appeals then the only appellate court -- well,
2 we have both civil and criminal jurisdiction
3 in appellate matters. I think certainly from
4 the standpoint of the criminal side of the
5 docket that this would be wholesale
6 noncompliance with that provision: that all
7 of the matters that we get from people in the
8 penitentiary and elsewhere that it would have
9 to be verified by an affidavit.

10 I can just tell you I
11 think simply as a practical matter we're not
12 -- we don't now pay any attention to that, and
13 I don't think we ever will, because we get
14 hundreds of these matters all of the time and
15 we don't -- we don't care.

16 I don't know how Judge
17 Clinton feels on their court, but we don't
18 want to get into a lot of mailing back and
19 saying, you know, you don't have -- "This is
20 not verified by an affidavit." We don't have
21 enough clerks to have all this correspondence
22 with all these people. I don't know why it's
23 there. I don't know the history of it.
24 Secondly, on the civil side too when we're
25 dealing with pro se litigants we usually want

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1 to get the matter to a conclusion, get it
2 before the court and not be concerned about
3 whether somebody is filing an affidavit if he
4 is sending a copy to somebody.

5 The other thing that
6 struck me is that normally when we deal with a
7 pro se situation we like to say that they'll
8 be treated the same as if they had an
9 attorney. And they usually lose as a result
10 of that statement. They frequently do. And
11 here for some reason we have elected to place
12 a greater burden than we normally place upon
13 someone represented by an attorney in saying:
14 if they're not represented by an attorney, you
15 have got to put in any of these motions,
16 briefs, statements, letters, whatever you're
17 sending to the clerk has to be verified by
18 affidavit. I just think it ought to be
19 struck.

20 MR. SOULES: Those in
21 favor say, "Aye."

22 ADVISORY COMMITTEE: Aye.

23 MR. SOULES: Opposed?

24 ADVISORY COMMITTEE: That
25 will be unanimously recommended to the

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1 Supreme Court as a rule change for TRAP 4.
2 And with that change, did you have any other
3 changes to TRAP 4, Judge McCloud or Rusty?

4 MR. MCMAINS: No.

5 JUDGE MCCLOUD: No.

6 MR. SOULES: Then those
7 pages 133 and 134 will be substituted into the
8 finished work product for pages 83 and 84, the
9 only change being the change that Judge
10 McCloud just reported on. Otherwise, the
11 pages are the same.

12 Okay. The next item is
13 Rusty, TRAP Rule 9. That comes up on 136(a),
14 Justice Hecht.

15 MR. MCMAINS: Justice
16 Hecht has made the comment on substitution of
17 parties, particularly in light of recent
18 adverse banking developments in the state that
19 sometimes it ain't the bank that's appearing,
20 and he was talking about that the only
21 substituting party rule that we actually have
22 is one talking about no abatement and so on
23 regarding the death of a party that continues,
24 whether or not that rule might ought to be
25 expanded.

1 MR. SOULES: Some of those
2 banks are pretty dead, aren't they?

3 MR. MCMAINS: Some of them
4 are pretty dead. They're technically talking
5 about organic death. And they're financially
6 dead. There is no proposed rule at this
7 point. I do think it's something that we
8 should study, but we have this problem a lot.
9 And I mean, it's much more than just the
10 FDIC. I mean, with all the takeovers and
11 mergers, changes and stuff, we have changes in
12 names all the name. Frankly, we have never
13 had a problem in substantive law in
14 determining who the real party was in spite of
15 the fact they may have changed form or
16 ownership during the interim. And I think
17 there is some serious discussion that needs to
18 go on whether or not this is -- exactly what
19 the scope of the fix is.

20 Now, fixing it as to the
21 FDIC or the FSLIC, whatever alone I think is
22 something that could be done on a reasonably
23 short order, but to try and do it on a broad
24 basis I think we have a lot more implications
25 than we have an opportunity to explore and

1 certainly before getting into a rule by 1990.
2 And so I'm not in essence recommending that we
3 change anything for the 1990 rules. I do
4 think we need to study and get input from the
5 Court whether or not they are having any
6 problems other than in this area.

7 Is this the primary area,
8 Judge?

9 JUSTICE HECHT: It's the
10 only area that it's come up in.

11 MR. MCMAINS: Yes. We
12 have parties change all the time in simple
13 judgments. They just kind of show up
14 differently.

15 JUSTICE HECHT: Yeah. But
16 a lot of times in the appellate process I just
17 think the name doesn't change.

18 MR. MCMAINS: That never
19 changes on the style. That's true.

20 JUSTICE HECHT: There's an
21 old case that says -- there's an old Court of
22 Appeals case that says, questions whether the
23 Appellate Court has any authority to
24 substitute parties.

25 MR. MCMAINS: Uh-huh.

1 JUSTICE HECHT: There's a
2 Federal Rule of Appellate Procedure 43 says,
3 "If substitution of a party in the Court of
4 Appeals is necessary for any reason other than
5 death, substitution shall be effected in
6 accordance with the procedures prescribed in
7 the preceding section," which has to do with
8 death. And I'm really not sure anything much
9 more -- we're thinking of anything much more
10 extensive than that.

11 MR. MCMAINS: Okay.

12 MR. SOULES: Let's do it.

13 JUSTICE HECHT: In fact,
14 along the lines of what we had in mind
15 following that language was if substitution of
16 a party in the Appellate Court is necessary
17 for any reason other than death, the Appellate
18 Court may order such substitution upon motion
19 of any party at any time.

20 MR. MCMAINS: Well, but
21 that -- I just think that there is -- there
22 are implications for something that is
23 quite -- that broad, to give the court
24 discretion to just pull some party in who may
25 for whatever reason not want their name there

1 and it may not be necessary to be there. I'm
2 talking about the takeover situation and
3 things like that. It may be that name is one
4 way. They need to be one way for one purpose;
5 and for purposes of internal contracts I'm not
6 sure the appellate courts really ought to get
7 embroiled in the battle as to whose name ought
8 to be in the cases. And as a substantive
9 matter I don't think we have a problem
10 determining who it is going to be responsible
11 to respond to the judgment, whatever those
12 things are subject to being amended at some
13 other times. I don't like to see that
14 substantive fight being converted into
15 procedure.

16 MR. SOULES: Justice
17 Hecht, what is the Federal Rule of Appellate
18 Procedure?

19 JUSTICE HECHT: Appellate
20 Rule 43(b). It's in the --

21 MR. FULLER: On motion of
22 party, doesn't it?

23 JUSTICE HECHT: It says
24 essentially what I said, except it does not
25 refer to the procedure that's used if there's

1 a death.

2 MR. SOULES: Justice
3 Hecht, would you read your proposed language
4 one more time?

5 JUSTICE HECHT: "If
6 substitution of a party in the Appellate Court
7 is necessary for any reason other than death,
8 the Appellate Court may order such
9 substitution upon motion of any party at any
10 time."

11 MR. SOULES: Would you
12 object to adding "or as the Court shall
13 otherwise determine"? That seems to be
14 limited to motions of parties.

15 JUSTICE HECHT: No. I
16 have no objection to that.

17 MR. SOULES: This is short
18 then. Get Justice Hecht to mark up there.
19 I'll read it. Here's the language. It would
20 be a new Paragraph D to TRAP Rule 9. It would
21 read as follows. The caption would be
22 "Substitution for Other Causes."

23 MR. FULLER: What about
24 public officer cause of death?

25 MR. SOULES: Well, C is

1 whenever a public officer is replaced.

2 MR. FULLER: Okay.

3 MR. SOULES: The operative
4 language is this: "If substitution of a party
5 in the Appellate Court is necessary for any
6 reason other than death, the Appellate Court
7 may order such substitution upon motion of any
8 party at any time or as the Court may
9 otherwise determine."

10 MR. FULLER: It's a
11 possibility.

12 MR. SOULES: What about
13 death or separation of office, since that's
14 already covered a different way? Let me get
15 the rule book.

16 JUSTICE HECHT: I've got
17 it.

18 MR. SOULES: You've got a
19 rule book?

20 JUSTICE HECHT: Yeah.

21 MR. FULLER: It looks --
22 sounds to me like on the filing of the motion
23 that the Court could do that without the
24 necessity of a hearing. I don't think that's
25 what the people here have in mind doing if

1 someone should cause to object, make reference
2 to having a motion and hearing.

3 MR. SOULES: That's not --

4 JUSTICE HECHT: The
5 Court's concern is very limited. I mean, they
6 don't have any interest as far as I know in
7 changing the parties at any time. But as I
8 say, there is one old case that says that the
9 appellate court doesn't have any power to
10 substitute parties, because it doesn't have a
11 rule allowing it to do so, and obviously there
12 is not a rule allowing it to do so. So I
13 think as a practical matter when the parties
14 need to be changed for obvious reasons like
15 FSLIC has been substituted in as the real
16 party in interest, they now own XYZ Bank and
17 they want to be substituted in and the other
18 side doesn't care, probably they're going to
19 be substituted in. But it's a query that we
20 need clarification on.

21 PROFESSOR DORSANEO: One
22 overall puzzlement that I have is that the
23 federal system has a rule that says that
24 actions are meant to be prosecuted and
25 defended in terms of the name of the real

1 party in interest. We have no such rule and
2 don't follow that practice as a matter of a
3 formal requirement. You can proceed in the
4 name of some other person in particular
5 instances, and that's recognized. The Federal
6 Real Party in Interest Rule has been
7 criticized on occasion as creating as much
8 mischief as it prevents, and it seems to me
9 that this is potentially a larger kind of a
10 question that maybe is not reflected
11 completely in this FSLIC, FDIC kind of
12 analysis.

13 I suppose I would be
14 thinking in terms of someone being substituted
15 in as Rusty was suggesting who really is
16 saying that they're not a party and don't want
17 to be a party. They may have some interest in
18 the controversy, but it's a different kind of
19 an interest than the interest to be named as a
20 party in the style of the case.

21 I'm troubled by it. I
22 would like to know before going forward when
23 that provision got in the Federal Rules of
24 Appellate Procedure, what the commentary is.
25 And I can certainly look myself. I understand

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1 that. What the commentary is and the
2 background of it, and whether it's related to
3 this overall semi-philosophical notion about
4 how litigation ought to be prosecuted in the
5 name of the real party at interest in a formal
6 requirement or just in accordance with our
7 prior practice.

8 MR. SOULES: Let me see if
9 I can narrow this suggestion, and this is
10 being suggested without first conferring with
11 Justice Hecht. But if we said, "If
12 substitution of a successor to a party in the
13 Appellate Court is necessary for any reason,"
14 that's not going to reach out and grab new
15 parties, different parties, unrelated
16 parties. That's only going to get a successor
17 substituted in.

18 JUDGE MCCLOUD: That's
19 much better.

20 MR. SOULES: "If
21 substitution of a successor to a party in the
22 Appellate Court is necessary for any reason
23 other than death or separation for public
24 office, the Appellate Court may order such
25 substitution upon motion of any party at any

1 time or as the Court may otherwise determine."

2 MR. FULLER: I like that
3 better.

4 JUDGE CASSEB: You're
5 going to need that. Otherwise the Court is
6 going to determine on the motion.

7 MR. SOULES: But there
8 might be no motion. That's what that's
9 directed to.

10 JUDGE CASSEB: The Court
11 may do it. It's an awful lot better, because
12 otherwise you're going to get confused as to
13 what you could do in the trial court.

14 MR. SOULES: Let me get a
15 consensus if that's okay, since it's not
16 written up. I'll pass this sheet around. Is
17 there a consensus that this will be do-able?
18 No objection. I'm going to pass this around
19 so everybody has a chance to look at it
20 written down, and remind me and I'll get back
21 to this before we leave today.

22 JUDGE CASSEB: Do you want
23 us to initial that?

24 MR. SOULES: I'll just
25 take a vote later, Judge. I just don't want

1 to if we can avoid passing on something that
2 they haven't looked at in writing. I would
3 like to avoid that.

4 JUDGE CASSEB: All right.

5 MR. SOULES: Now we go to
6 20 on page 137; 137, we've probably already
7 done that.

8 MS. HALFACRE: Yes.

9 MR. SOULES: Okay. I
10 guess we've covered this point on TRAP 20; and
11 now we are to a report from Elaine. This
12 arises. Not to get anything from Elaine's
13 thunder, but we had a statute passed. It was
14 introduced by Senator Parker, and it doesn't
15 vary much from our rule, but my charge to
16 Elaine as chairman of this subcommittee and
17 Elaine is chairman of the special subcommittee
18 on these supersedeas rules was to review the
19 statute to try to make our rule conform to
20 that statute so that there would be no
21 inconsistencies, so that there wouldn't be two
22 places where people might look for supersedeas
23 information; that they could look at the
24 statute and what they found would not be
25 inconsistent with the rule, and they could

1 also look at the rule, same result but the
2 rule is a lot more extensive than the
3 statute. The statute is narrower and just
4 doesn't cover as many of the situations, as I
5 understand it.

6 And Elaine has done that,
7 plus she has considered a lengthy writing that
8 had been before us at our last session which
9 we tabled until this meeting. So that's what
10 this report is about. It does include
11 response to recent legislation out of the
12 current legislature. Elaine, could you
13 report, please?

14 PROFESSOR CARLSON: What
15 Senate Bill 134 does as far as your focus this
16 morning -- it will become effective in
17 September -- it modifies the period for
18 waiving a mandatory supersedeous bond to
19 forestall execution of money judgment in
20 certain kinds of cases. The legislature has
21 modified slightly the standard for that change
22 in security. So one of the questions that we
23 have, of course, this morning is whether or
24 not it is prudent for us to modify the
25 standard in Appellate Rule 47 to comply with

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1 the legislative mandate of the standard in
2 other or certain kinds of cases and if that
3 consistency is desirable.

4 Another question that was
5 raised in Senate Bill 134 dealt with an
6 inquiry that Justice Kilgarland addressed to
7 the committee previously, and that is whether
8 or not the amended TRAP Rule 47 continues --
9 in 49 continues to allow the Texas Supreme
10 Court to review for excessive enough or
11 insufficient security that might be ordered
12 now by the trial court or Court of Appeals for
13 partial execution on a money judgment pending
14 appeal.

15 I do want to note in
16 fairness to the Committee for Administration
17 of Justice, and I included in the materials --
18 I believe they were on page 174 -- a notation
19 that the Committee on Administration of
20 Justice at some point, and I really don't know
21 the date -- I just found it in the material
22 that I had from the last meeting -- had
23 disapproved of that suggestion. But Senate
24 Bill 134 does specifically set forth that the
25 Texas Supreme Court have the power of review

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CERTIFIED COURT REPORTING

1 of excessiveness and inadequacy on the order
2 of security in those kinds of cases also
3 described in Senate Bill 134. And so I went
4 ahead at Luke's request and put the draft
5 before the committee's consideration amending
6 the Rule 49, which will give the Supreme Court
7 that power.

8 The long and short of it
9 is and the key documents I think you want to
10 look at is on page 140, proposed amended Rule
11 47. On page 158 is your proposed amended Rule
12 49. And on Rule 149 is the bill analysis,
13 more or less.

14 PROFESSOR EDGAR: Elaine,
15 are you also recommending an amendment to Rule
16 49?

17 PROFESSOR CARLSON: Yes.

18 PROFESSOR EDGAR: Where is
19 that?

20 PROFESSOR CARLSON: Page
21 168.

22 PROFESSOR EDGAR: Okay.

23 PROFESSOR CARLSON: The
24 proposed amendments for this morning are 140
25 and 168, in this area.

1 PROFESSOR EDGAR: Okay.

2 MR. MCMAINS: Elaine, are
3 you proposing that we go further than the
4 bill, basically.

5 PROFESSOR CARLSON: No.
6 That was not my charge.

7 MR. SOULES: Elaine, what
8 was your remark, your comment? That was
9 not --

10 PROFESSOR CARLSON: That
11 was not the intent.

12 MR. SOULES: Okay.

13 MR. MCMAINS: All I'm
14 saying is that the bill was limited to
15 particular classifications of cases.

16 PROFESSOR CARLSON: That
17 is true.

18 MR. SOULES: Yes.

19 MR. MCMAINS: This
20 amendment is universal?

21 MR. SOULES: That's
22 right. And we have tried to set universal
23 standards in all cases.

24 MR. MCMAINS: I understand
25 that. But I'm just saying the only reason

1 that bill passed I am reasonably confident is
2 because of what was left out of it. Now, all
3 I'm trying to figure out is, are we going to
4 stick it back in which is going to get in the
5 same problem we had with the legislature
6 before with Higgins and others of doing things
7 here that could not get done in the
8 legislature and would not have gotten done the
9 way they were done if a compromise hadn't been
10 struck?

11 PROFESSOR CARLSON: I'm
12 just the draftsman. I'm the proponent of
13 either version.

14 MR. MCMAINS: I
15 understand. It looks like we need Lefty
16 again, Luke.

17 MR. SOULES: Well, the
18 Senate Jurisprudence Committee was receptive
19 to, once the explanation was given, to the
20 fact that Rule 13 had been drafted to cover
21 privileged pleadings in all Texas litigation,
22 not just in tort litigation as had been the
23 case in Chapter 9 of the Texas Practice &
24 Remedies Code, which was a portion of the tort
25 reform; and the Committee essentially reacted

1 to -- the reaction of the Committee
2 essentially was, "Well, we ought to amend our
3 statute to cover all cases. We shouldn't just
4 limit that to tort cases."

5 Of course, they were
6 territorial about having a statute. They
7 didn't want to concede the statutory process
8 to us, but the fact that we had made a
9 universal rule for all cases out of the
10 frivolous pleadings part of the tort reform
11 statute was not objectionable certainly to
12 Senator Glasgow and to the Committee people
13 that were present when I was there in this
14 session talking about that expansion of
15 frivolous pleadings points.

16 MR. MCMAINS: I'm not
17 talking about frivolous pleadings. I'm
18 talking about the bond rule.

19 MR. SOULES: Right.

20 MR. MCMAINS: I'm talking
21 about authorizing less than supersedeous on
22 any basis of money judgment case on what, in
23 essence, your interest is. That bill would
24 not have gotten where it was or had any
25 consideration at all had it been universal.

1 Parker knows that, and Parker cut that deal;
2 and I'm saying that if you try and make this
3 universally applicable, including to insurance
4 cases, that is directly in defiance of the
5 deal that was cut.

6 JUSTICE HECHT: And the
7 language of the statute.

8 MR. MCMAINS: And the
9 language of the statute, that's right, which
10 does not authorize that and might well be
11 construed to be just the opposite. The
12 statute says: To the extent there's any
13 conflict, then the statute controls.

14 MR. SOULES: Let's see.

15 JUSTICE HECHT: The
16 statute also says notwithstanding the
17 rule-making provisions.

18 MR. MCMAINS: That's
19 right.

20 JUSTICE HECHT: The code,
21 "The Supreme Court may not adopt rules in
22 conflict with this chapter."

23 MR. FULLER: They
24 discovered that language and used it several
25 times.

1 JUSTICE HECHT: Finally
2 found it.

3 MR. FULLER: Found the
4 Golden Rule.

5 JUDGE RIVERA: I think if
6 you divided it into two parts and --

7 PROFESSOR DORSANEO: That
8 provides for page 140.

9 JUDGE RIVERA: -- you can
10 identify --

11 MR. SOULES: I recognize
12 Judge Rivera for his remarks.

13 JUDGE RIVERA: I think if
14 you divide that just into two parts, and the
15 person will be that identifies the type of
16 judgment in wrongful death, workman's comp and
17 so forth if the statute shall be; and then the
18 other section, all other judgments, and leave
19 it like we had it. And that --

20 MR. SOULES: Elaine, are
21 you getting this suggestion; that is, that we,
22 what, Judge, take B as it now is in 47(b) and
23 put that, limit that to the cases that are
24 excluded from coverage by the statute; and as
25 to cases that are covered by the statute, use

1 the statutory language?

2 JUDGE RIVERA: I think
3 so. You might have to reverse and put the
4 statutory language first and say, "all other
5 judgments."

6 MR. SOULES: And that
7 would square the rule and the statute
8 together.

9 JUDGE RIVERA: The statute
10 wouldn't go against that.

11 PROFESSOR CARLSON: We
12 could. I don't have strong feelings one way
13 or the other. What we end up with then is the
14 standard for waiving supersedeas in certain
15 kinds of judgments based on a showing of
16 irreparable bond, and the rules now read not
17 posting the bond with cause for substantial
18 harm to the judgment to the creditor. And in
19 other kinds of cases the standard the
20 legislature sets forth it would say you can
21 waive -- the trial court can waive the right
22 to a supersedeas bond showing the judgment of
23 creditor still irreparable harm. And now a
24 standard to that setting security of a lesser
25 amount would not substantially decrease the

1 degree to which the judgment the creditor
2 recovered would be secured.

3 The standard is pretty
4 darn close, but there's not quite --

5 MR. MCMAINS: No. There's
6 a big difference actually.

7 PROFESSOR CARLSON: How
8 far of a difference there is I guess would
9 depend on initial interpretation; put it that
10 way.

11 MR. SOULES: As I get the
12 sentiment of the committee all we want to do
13 now is document the rule the way the law is,
14 which is we've got this rule already on all
15 cases and we've got a statute to take some
16 cases out of the rule, and we'd like to make
17 the rule reach the cases that have now been
18 taken away from it by statute by putting that
19 into the rule.

20 PROFESSOR CARLSON: All
21 right. Then I think Judge Rivera's suggestion
22 is a very good one.

23 JUDGE BEARD: Judge, the
24 Section 52.0011 takes away that real property
25 lien. See, when we adopted the rule

1 originally that was one of the questions: How
2 do you keep from abstracting a judgment under
3 the statute and establishing a lien which
4 gives them priority after 90 days perhaps in
5 bankruptcy? We ought not to do anything.
6 This adds to our rules, because you can keep
7 the lien from attaching under that section.
8 So we don't --

9 MR. SOULES: We're not
10 attempting to do anything with 52.0011. That
11 statute is going to be in the Property Code
12 and lawyers are going to have to go there to
13 look for that. We're not talking about
14 putting that in the rule at all.

15 JUDGE BEARD: Like I say,
16 if you want to modify that rule so that the
17 rights which we have under our rule are
18 limited to these particular cases. That's all
19 I'm saying.

20 MR. SOULES: That was
21 done. The suggestion now is that we maybe add
22 a (b) which tracks the statute for the cases
23 that the statute controls and then renumber
24 all of the rest of these parts of 47, one
25 letter later in the alphabet and change the

1 (b) to say: In cases not covered by (b), then
2 (c), and follow the same -- in all other money
3 judgments, follow this language.

4 JUDGE RIVERA: Maybe (b)1
5 and (b)2 if you don't want to change all of
6 them.

7 MR. SOULES: Well, we
8 could do that. (b)1 ask (b)2; let's do that.

9 MR. TINDALL: Does Senator
10 Parker not care about the others? You know,
11 we're getting into --

12 MR. SOULES: We've already
13 got a rule, and didn't repeal our rule.

14 MR. TINDALL: I understand
15 that. Are we going to get into another
16 legislative tiff?

17 MR. SOULES: No. I don't
18 think so. Senator Parker I don't think
19 intended to walk on our rule, but he wanted it
20 passed and he got it passed, and it's
21 different from our rule, and we need to meet
22 it.

23 Okay. Let's see what the
24 consensus is, and we'll try to get something
25 written up. Is there a consensus that we make

1 47(b) now two matters, (1) to cover the cases
2 that are embraced by the statute and use the
3 statutory standard for those cases and (2),
4 then, for other cases, to leave the rule as it
5 is? Is that a consensus? Those in favor say,
6 "Aye."

7 ADVISORY COMMITTEE: Aye.

8 MR. SOULES: Opposed?

9 ADVISORY COMMITTEE: (No
10 response.)

11 MR. SOULES: Do some
12 writing and try to get it on the table for
13 later discussion even if it's handwritten.
14 Tom Davis.

15 MR. DAVIS: Since we seem
16 to be concerned with the public relations with
17 the legislature, is there any reason why when
18 we get our amendment worded the way we want
19 it, that someone would maybe present it to
20 Senator Parker in case he does have any
21 objection?

22 MR. SOULES: I'll be happy
23 to do that if that's the consensus of the
24 Committee. I think it's a very good
25 suggestion.

1 PROFESSOR DORSANEO: I
2 don't know if you want to start that policy or
3 not, but that's certainly one way to avoid
4 getting crosswise.

5 MR. SOULES: Well, I think
6 if that's the consensus of the committee, I
7 will do that. I have recently had dialogue
8 with Senator Parker. Is that the consensus of
9 the Committee? Any objection to me passing
10 this by Senator Parker?

11 ADVISORY COMMITTEE: (No
12 response.)

13 MR. SOULES: All right.
14 Elaine, could you maybe write something, even
15 in longhand, and we can get it copied, several
16 copies made and distributed later in the day?

17 PROFESSOR CARLSON: Sure.

18 MR. SOULES: You had
19 something then on -- does that take care of
20 the suggestions for 47?

21 PROFESSOR CARLSON: That
22 takes care of the suggestions for 47. I'd
23 like the Committee's input on 49.

24 MR. SOULES: Now we'll go
25 to page 168 and look at TRAP 49.

1 MR. MCMAINS: What I wa
2 privately trying to ascertain is I think th
3 are two things we're doing.

4 PROFESSOR CARLSON: TRA
5 49 as suggested on page 168 addresses three
6 things really. One is Senate Bill 134,
7 includes this power and certain kinds of ca
8 for the Supreme Court to review for
9 excessiveness, and to enter order
10 accordingly. Secondly, Justice Kilgarlin p
11 forth to the Committee in his letter the
12 Supreme Court query on whether they retain
13 that power after the '88 amendment to TRAP
14 49. I guess that letter again on page 149
15 the materials.

16 And then thirdly, I wan
17 to point out that we did have the materials
18 from last time and COAJ may want to express
19 On page 174 the COAJ had previously
20 recommended that the change expressly
21 providing for excessiveness review of the
22 security penalty by the Supreme Court not b
23 included in an amended Rule 49. And again,
24 am the draftsman on this and was asked to p
25 the materials together and put it forward f

1 the Committee,
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1 constitutionally to make this kind of review,
2 and there was just -- there were several
3 questions about the change, and I think the
4 questions won out. They were not answered.
5 There were just a lot of questions and finally
6 the Commission said, "Well, just disapprove
7 it," not in a refusal to discharge
8 responsibility, but they felt first that there
9 were questions about it and second, that it
10 was unnecessary. That's how it kind of
11 failed.

12 I don't think there were
13 any strong statements being made by the COAJ
14 that they did not want the changes. It's just
15 that they couldn't decide to warrant them.

16 MR. BISHOP: I think
17 that's fair. I think there was strong
18 sentiment it was unnecessary, that the power
19 was already there. But I think there wasn't a
20 strong sentiment against it either.

21 MR. SOULES: Bill, you are
22 recognized.

23 PROFESSOR DORSANEO: Yes.
24 I see a couple of issues here. I think Rusty
25 probably was going to say what I'm going to

1 say. The first one doesn't really relate to
2 the question of what court we're talking
3 about. It relates to what I think is a more
4 important issue, and that's whether any
5 appellate court under our current rule has the
6 power to determine that the amount of the
7 security is excessive and to reduce the
8 security accordingly.

9 As the memo on page 171
10 indicates the previous version of Section (b)
11 of Rule 49 clearly provided, "In like manner
12 the Appellate Court may review for
13 excessiveness the amount of the bond or
14 deposit fixed by the trial court." If you
15 look at 49(b) now, it is at least unclear on
16 that question as to whether the appropriate
17 appellate court, the one we are talking about,
18 has the power in like manner to review for
19 excessiveness the amount of the bond, and I
20 really think that the reinstatement in clear
21 terms of that power for whatever appellate
22 court is appropriate makes good sense; and
23 likely my recollection of our discussion of
24 this, in the absence of any discussion of
25 taking away that power, indicates that really

1 we didn't recommend to the Supreme Court the
2 last time to actually remove that power from
3 the Court of Appeals. It's just a language
4 change.

5 MR. SOULES: How many feel
6 that last sentence proposed, the addition of
7 the last sentence to Rule 49(a) on page 168,
8 that we should add that -- the Supreme Court
9 should add that sentence?

10 PROFESSOR DORSANEO: But
11 there's another question. That's whether "the
12 appellate court" should be "the court of
13 appeals."

14 MR. SOULES: Without
15 passing on whether we use appellate court or
16 "the court of appeals."

17 JUDGE RIVERA: That's what
18 the statute says, "appellate court."

19 MR. SOULES: How many feel
20 that we should add a sentence that expresses
21 in words that the review for excessiveness is
22 appropriate? Those in favor say, "Aye."

23 ADVISORY COMMITTEE: Aye.

24 MR. SOULES: Opposed?

25 ADVISORY COMMITTEE: (No

1 reponse.)

2 MR. SOULES: That then
3 we'll do. Now, what's the next point?.

4 PROFESSOR DORSANEO: Well,
5 the next point is going back again --

6 MR. O'QUINN: Pardon me.
7 In effect, did we pass something or agree to
8 work on it?

9 MR. SOULES: Well, we are
10 not -- we're going to add language that
11 expresses that some appellate court can review
12 for excessiveness. And now we're going to
13 look at which court, I guess, is the next
14 question. Is that right? That's where I
15 think we are, John. And if we've advanced too
16 far, then we'll go back.

17 MR. O'QUINN: Lefty looked
18 at me, and we weren't clear. Does this apply
19 in a money judgment in just a basic tort case
20 with a general rule you have to put up the
21 money?

22 MR. SOULES: It would
23 apply to every case, that the court can review
24 both for insufficiency and for excessiveness,
25 both ways.

1 JUDGE MCCLOUD: That's not
2 clear here. You need something in here about
3 excessiveness, I think.

4 MR. SOULES: Right.
5 That's what we're deciding now is do we want
6 the court to be able to review for
7 excessiveness as well as insufficiency?

8 JUDGE MCCLOUD: A while
9 ago when two voted yes -- make it three.

10 PROFESSOR DORSANEO: The
11 issue of maybe what John and Lefty are
12 thinking about is before the standard was
13 changed giving trial courts more latitude to
14 reduce the money judgment under certain
15 restrictive circumstances bond to less than
16 the amount of the judgment interest and costs,
17 that was a much smaller issue than it is now.
18 Someone might say that they don't mind having
19 the trial court have restricted authority to
20 change that number, but they don't want the
21 appellate court having independent authority
22 to do so if it wasn't done in the trial
23 court. And that is -- I can see someone could
24 say that enough of this is just enough. So my
25 remarks about well, just reinstating things

1 were really probably overly simplistic,
2 because the context has changed.

3 MR. SOULES: Discussion.

4 MR. FULLER: Now that I
5 understand it, I have something to say, but
6 I'll wait my turn.

7 MR. SOULES: Rusty, you
8 had your hand up.

9 MR. MCMAINS: There is
10 another issue in this, Parker's bill, for that
11 matter. There is whole kinds of procedural
12 morass, which I'm sure that Elaine decided to
13 duck.

14 MR. SOULES: I doubt
15 that.

16 MR. MCMAINS: And properly
17 so. I mean, there's all kinds. There's
18 purported vesting of continuing jurisdiction
19 in the trial court to review a lot of things
20 that it's doing; and once it does it, then
21 something becomes automatically done. I mean,
22 they file something, and it has the effect of
23 removing an abstract, and then you unfile it
24 or file a revocation of it, and it renews it
25 again. And I mean, there are a lot of

1 procedural problems just in terms of who's
2 doing what to whom in terms of the appellate,
3 whether you're doing it in the trial court or
4 whether you're reviewing the trial court's
5 doing it or whether you're actually doing it
6 for the first time in the appellate court.
7 And if you do it the first time in the
8 appellate court, who is doing the rest of it?
9 And the Parker bill purports to give that
10 continuing authority to the trial court, to my
11 recollection.

12 PROFESSOR CARLSON: Are
13 you talking about --

14 MR. MCMAINS: That is the
15 third problem. It's all tied up with the bond
16 issue too, because once they set the security
17 at a different level on that basis, then they
18 also start suspending enforcement of the lien
19 and then you go back to all kinds of
20 procedures. I mean, the listings in that bill
21 for having further hearings and making further
22 motions before the trial court.

23 PROFESSOR CARLSON: We
24 have --.

25 MR. MCMAINS: And I'm

1 trying to figure out what -- we're creating a
2 lot of bills, creating a lot of competition
3 between the trial court and the appellate
4 court as to who is doing what to whom.

5 MR. SOULES: Let's look at
6 page 143 together for a moment and see if we
7 have really much choice here about the
8 question of review for excessiveness. On page
9 143 in Section 52.004 it's captioned, "Review
10 for Excessiveness." This is a statute now
11 that's been signed by the governor. "In a
12 manner similar to appellate review under Rule
13 49 of the sufficiency of the amount of
14 security set by a trial court, an appellate
15 court may review for excessiveness the amount
16 of security set by the trial court under this
17 statute or under the rules." I mean, that's
18 the law. Shouldn't our rule conform?

19 MR. FULLER: It's settled,
20 it looks like to me.

21 JUDGE MCCLOUD: Yes.

22 MR. SOULES: John O'Quinn,
23 you have your hand up.

24 MR. O'QUINN: I may be
25 looking for a little information. I

1 understand what we've done is we've got a
2 two-sentence rule at the trial court level.
3 One sentence is to track what this statute
4 says and therefore this, as an example, would
5 not apply to the personal injury case. In the
6 second sentence of our rule for trial courts,
7 it's much larger of a standard. It would have
8 to cause irreparable harm, all types of
9 things.

10 MR. SOULES: Right.

11 MR. O'QUINN: Are we going
12 to overlay that, this Rule 49 on page 168 to
13 say you would have appellate review of both
14 sentences under that trial court rule?

15 MR. SOULES: Yes.

16 MR. O'QUINN: That's the
17 intent. Okay. And we are doing that because
18 the statute in -- the legislative statute said
19 that they wanted appellate review of what is,
20 in effect, the first sentence of our trial
21 court rule. They wanted appellate review of
22 whatever his legislation wanted the trial
23 courts to be doing. Now we're going to have
24 appellate review of the substantive.

25 MR. SOULES: John, it's

1 already there. It's in the statute. Both
2 reviews are in the statute.

3 MR. O'QUINN: I got lost
4 on that statement. Where are the other
5 reviews? The statute is limited to
6 non-personal injury cases.

7 MR. SOULES: I just read
8 it, 52.004, and that is review for
9 excessiveness of security set either under
10 this statute or under the Rules of Appellate
11 Procedure both. It's on page 143.

12 MR. O'QUINN: I see your
13 point, Luke.

14 PROFESSOR DORSANEO: Am I
15 reading this wrong, or does 52.004(a) restrict
16 itself to security set by the trial court,
17 that is to say a trial court order as
18 distinguished from security set by a
19 procedural rule that could be varied by a
20 trial court order?

21 As I understand it, if
22 it's the judgment interest and costs and it's
23 not varied, that's not set by the trial
24 court. That's automatic unless unset by the
25 trial court. If what they were intending to

1 do with this 52.004 is to reach both
2 situations, then I'd have to do further study
3 to see whether the legislative history says
4 that, because the statute on its face
5 doesn't.

6 JUDGE RIVERA: Section C
7 at the bottom, 52.005, says it does not
8 apply.

9 MR. FULLER: Yes.

10 JUDGE RIVERA: It says
11 this in only for those causes of action
12 pertaining to Section 52.004 does not apply.
13 They put it in and take it out.

14 MR. FULLER: That's right.
15 They sure do.

16 JUDGE RIVERA: Is that
17 what it says?

18 MR. O'QUINN: That's what
19 it says.

20 PROFESSOR DORSANEO: I
21 don't understand. It doesn't say anything
22 else.

23 MR. SOULES: Well, you
24 read the heading in that, though, Judge;
25 52.005 says, "to the extent this chapter

1 conflicts."

2 JUDGE RIVERA: Yes. This
3 chapter governs.

4 JUDGE CASSEB: Read C.

5 MR. SOULES: "This chapter
6 controls."

7 JUDGE RIVERA: They say
8 "chapter," not "section," because it means the
9 whole thing.

10 MR. FULLER: Come on,
11 gang. I don't think we really have any
12 disagreement of what they were trying to do.

13 MR. SOULES: Well, does
14 anyone want to change their prior vote? We
15 will put in a sentence about, it says review
16 for excessiveness. And now we're to the
17 question of what court.

18 PROFESSOR DORSANEIO: The
19 only thing I was going to say is that when
20 49(b) started out being in the 300s, I guess
21 it was Rule 377 of the Texas Rules of Civil
22 Procedure, it was in the part of the rule book
23 that dealt with the court of appeals, and I
24 frankly think it's not so clear that the
25 Supreme Court ever had authority to review for

1 excessiveness and am dubious about which
2 jurisdictions do so. I think when the rule
3 said "Court of Appeals," that was a conscious
4 choice with that problem in mind, and I don't
5 have any particular feeling about it one way
6 or the other, but I think that's the
7 background.

8 MR. SOULES: Yes. When
9 the Rules of the Appellate Procedure Joint
10 Committee of legislators, practitioners, Court
11 of Criminal Appeals and Supreme Court
12 representatives drafted, put these rules
13 together, they -- this was carried forward,
14 and it was just the Court of Appeals that had
15 review authority, as I recall it. And I may
16 be going on forward to the time whenever we
17 were in committee sessions on 47 and 49, but
18 it was discussed that this review required
19 fact-finding. Maybe it doesn't, but that was
20 the discussion. And the fact-finding
21 constitutionally stopped in the Court of
22 Appeals and did not move to the Supreme Court,
23 and that's why the Court of Appeals was used
24 where it was used. Maybe that's wrong, but it
25 was not inadvertent. It was for that reason.

1 MR. FULLER: That's what
2 bothers me about this whole thing. It sounds
3 like the appellate court is put in the
4 position of having evidenciary hearing.

5 MR. SOULES: The Court of
6 Appeals can, but the Supreme Court can't.

7 MR. FULLER: I mean taking
8 testimony. They sent it back to the trial
9 court to develop evidence and bring up again,
10 throwing the damn ball back and forth. We
11 don't have any choice. The statute is here.
12 But they're going to be taking testimony.

13 PROFESSOR EDGAR: Bill,
14 are you suggesting then -- I guess you are --
15 that 52.003 and .004 are an unconstitutional
16 delegation of fact-finding for the Supreme
17 Court? Well, I mean we're talking about the
18 statute. Let's forget about the rule and talk
19 about the statute. Wouldn't that necessarily
20 follow?

21 PROFESSOR DORSANEO: I
22 think it would follow, but I'm not going to
23 say that.

24 PROFESSOR EDGAR: I know.

25 PROFESSOR DORSANEO: My

1 own belief is the Supreme Court can decide
2 whether it wants to write "Court of Appeals"
3 or "Appellate Court" in that 49 sentence and
4 bite that bullet. I don't know if we can
5 profitably do any -- accomplish anything by
6 debating the Supreme Court's constitutional
7 authority at this committee level.

8 JUDGE MCCLOUD: That's a
9 great point.

10 MR. SOULES: What's your
11 view, having read these proposed rules?
12 Obviously, the substitution would be the words
13 "appellate court," which is all Texas
14 appellate courts, in the place of "Court of
15 Appeals" everywhere there is review of these
16 supersedeas matters. What's your view about
17 doing that or not doing that?

18 PROFESSOR DORSANEO: The
19 safest thing would be to substitute "Court of
20 Appeals." We know about that for the
21 appellate court, and that would be consistent
22 with all of the other votes we've taken on 47
23 and 49 including that one that came from the
24 -- disapproved by COAJ that Elaine mentioned.

25 If it just was put in

1 there the appellate court, there would be some
2 who would contend that that even though this
3 is in Section 4 of the TRAP rules that that
4 gives the Supreme Court the same authority as
5 the Court of Appeals and the appellate court
6 means the Supreme Court. Frankly, that
7 wouldn't bother me so much either. We'd just
8 leave the same degree of controversy that we
9 have now.

10 MR. SOULES: Let's look at
11 this. If we carry this through, though, we go
12 to the last line of 49(b) and we say the
13 Supreme Court can't find facts, but the last
14 line of 49(b) takes care of that
15 constitutional problem, because it says if we
16 use the words appellate court may remand to
17 the trial court for findings of fact for the
18 taking of evidence. So the Supreme Court, if
19 it decides that it doesn't have the
20 constitutional authority to consider
21 affidavits as factual and make a fact
22 decision, the Supreme Court could remand to
23 the trial court for the trial court to find
24 certain facts, send it back to the Supreme
25 Court, and the Supreme Court accept those

1 facts as they are presented and pass on them
2 as a legal matter.

3 So there is a mechanism
4 here for the Supreme Court to act within the
5 constitution, its constitutional authority.

6 MR. BEARD: Not for
7 excessiveness as it stands now. No evidence
8 is one thing, but --

9 MR. SOULES: Let's take a
10 show of hands. Is there any further
11 discussion on whether the "Court of Appeals"
12 or "appellate court" should be the term used
13 in TRAP 49?

14 ADVISORY COMMITTEE: (No
15 response.)

16 MR. SOULES: There being
17 none, I'd like get a show of hands. How many
18 feel that "appellate court" should be the term
19 used? Show by hands, please. 16. How many
20 feel otherwise? Well, that's unanimous.
21 Okay. So we are going to use "appellate
22 court." Now, let's vote on the text as it
23 appears on 168, or discuss it. Is there any
24 further discussion on the -- before we vote on
25 the text exactly as it appears on page 168?

1 MR. MCMAINS: What I'm
2 concerned about is the procedure that you're
3 talking about. You're talking about the
4 insertion of this language right there in (a),
5 right?

6 MR. O'QUINN: The last
7 sentence.

8 MR. MCMAINS: The last
9 sentence.

10 MR. SOULES: That's the
11 language that's on the table.

12 MR. MCMAINS: Right. The
13 statute itself talks about it in terms of
14 review of the trial court decision.

15 MR. O'QUINN: That's
16 right.

17 MR. MCMAINS: And this
18 whole rule on (a) talks about deficiency in
19 general as you go before the "appellate
20 court." I'm trying to figure out, can you
21 raise it for the first time in the Supreme
22 Court? You have never raised it before. You
23 just do it the first time in the Supreme
24 Court. It looks to me if that's what you use,
25 this rule, you can go to the Supreme Court the

1 first time and say that.

2 MR. SOULES: That is
3 right, because you can now go to the Court of
4 Appeals for the first time for a review. The
5 rules were designed to have supersedeas review
6 power both in the trial court and Court of
7 Appeals.

8 MR. MCMAINS: I
9 understand.

10 MR. SOULES: First
11 impression. So if we put the appellate court
12 in the Court of Appeals position mainly then
13 we're going to have --

14 MR. MCMAINS: We're
15 talking about you can just go there. They can
16 do it and never have any, there were no
17 provisions for hearing or notice. I mean, you
18 don't have hearings in the Supreme Court where
19 the parties show up and do anything. I mean,
20 I don't understand procedurally what it is
21 that we're contemplating, because I don't
22 think that was contemplated under our current
23 Rule 49.

24 We have very significant
25 -- under our current Rule 49 we do have

1 provisions where you can issue temporary
2 orders and then if you do something, you can
3 send it back to the trial courts for
4 development of new testimony or whatever, but
5 we are not constraining them all in that.

6 I mean (b) talks about
7 appellate review of expenses. And all of a
8 sudden up here in (a) we're talking about
9 sufficiency. I guess the title would have to
10 be sufficiency or excessiveness, but I mean,
11 we have a fairly definitive idea of what the
12 appellate review issue is on the expenses of
13 the enforcement. I'm not comfortable with the
14 notion that the Court of Appeals or the
15 Supreme Court either one is just going to haul
16 off on its own and make any determination with
17 absolutely no provisions as to what the
18 procedure is by which they accomplish that
19 other than file motion.

20 MR. SOULES: 49(a) was
21 designed and does provide that the Court of
22 Appeals initially can make an initial review
23 of a bond. It does not have to come there
24 from the trial court. Either the Court of
25 Appeals or the trial court can review a bond

1 pending appeal. When we put the appellate
2 court, the words "appellate court" in the
3 place of the Court of Appeals, then that power
4 is expressly stated in the rules to go also to
5 the Supreme Court, the initial review of the
6 trial court. John O'Quinn, you have your hand
7 up.

8 MR. O'QUINN: Here's my
9 problem, Luke. The statute we were trying to
10 work with severely limits the authority of the
11 trial court to change what otherwise would be
12 the amount of the bond. And secondly, the
13 statute says in (a), 52.004(a), it says that
14 "the appellate court may review for
15 excessiveness the amount of security set by
16 the trial court." To me that contemplates the
17 idea that the trial court has first done it
18 and the appellate court is coming in and doing
19 a review. And to me what we've got now in
20 Rule 49 is misunderstood as a device that
21 says: whether the trial court has done
22 anything or not, the appellate court can reach
23 out and change it on its own. It doesn't
24 say: if the appellate court finds the amount
25 of the security set by the trial court is

1 excessive. It says: if they think it's
2 excessive for any reason. That's the first
3 problem.

4 The second problem is the
5 way --

6 MR. SOULES: That first
7 problem is in the law the way it is right
8 now.

9 MR. O'QUINN: I disagree.
10 I think that we could read the law
11 differently. I see (b), which is where we got
12 the sentence. (b) is part of 52.004, and I
13 think (b) has to be read in context with (a).
14 (a) says that the appellate court may review
15 for excessiveness the amount of security. And
16 (b) in my judgment means -- I'm looking at the
17 statute -- if that review of what the trial
18 court has done leads to the conclusion of
19 excessive, then the appellate court here can
20 remedy. First you have the right and then you
21 have the remedy. You can't separate (b) and
22 say it stands on its own weight. That's part
23 and parcel of the same thing.

24 MR. SOULES: Maybe.

25 MR. O'QUINN: That's the

1 way I read it. My second problem is that I
2 believe the intent of it was more or less the
3 appellate court to be in a reviewing situation
4 rather than a de novo situation. And I think
5 it ought to be bent back toward the idea that
6 if the appellate court determines that the
7 trial court has the duty or discretion in
8 doing its job and setting security, then it
9 can do something, but not just de novo where
10 the trial court says it should be this way and
11 three guys on the Court of Appeals say, "Well,
12 we see it differently." He's on great weight
13 if the appellate court doesn't get to put
14 these back, said, "We don't like what you
15 did."

16 We have got to go back. I
17 frankly just see the way this sentence sits
18 now in Rule 49 goes well beyond what the
19 statute tells me it was intended and creates a
20 situation where all the limitations that are
21 imposed upon the trial court about changing
22 security can be disregarded at the appellate
23 court level, and the appellate court could
24 just -- there is no standard.

25 What standard does the

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1 appellate court determine it was excessive?
2 Just because they don't like it or they think
3 it's too much? That's not what Parker was
4 saying. Certainly in personal injury cases
5 what we're saying in sentence number two, we
6 are saying that that's already in the rules
7 at the trial court level. The trial court
8 makes a very strong finding, judgment to
9 debtor, no harm to the creditor, things like
10 that. Are we going to bypass all the
11 standards? If that's the intent of Rule 49,
12 I'm going to be hollering and voting "no,"
13 because I think those standards are crucial
14 and must be respected by the appellate court.
15 And Rule 49 must be tied to the standards in
16 some way in order for me to go along with
17 that.

18 MR. BEARD: We decided
19 that question a couple of years ago. That's
20 just starting all over again.

21 JUDGE MCCLOUD: Let me say
22 this: I think what you've just said makes a
23 lot of sense from the standpoint of certainly
24 the Court of Appeals. I haven't studied the
25 statute that we're referring to and really

1 determined how that statute fits in with the
2 existing rule, but from the standpoint, I
3 think, of judges on the Court of Appeals, they
4 would feel much more comfortable and seem like
5 a more proper place for the Court of Appeals
6 to be would be to be reviewing a decision
7 that's been made by a trial court after there
8 has been evidence presented on the matter and
9 then it comes up to the appellate court, and
10 it seems to me like the appellate court
11 probably should at that point say, "Well, we
12 think maybe abuse of discretion is the right
13 standard, that from this record which has been
14 presented the trial court has abused its
15 discretion or you have failed to show that the
16 trial court has abused its discretion."

17 It would seem very
18 strange, I think, for a court of appeals to be
19 there with three judges and start taking
20 evidence. We don't have court reporters, and
21 we don't have a lot of other things. It
22 doesn't quite fit, to me. It seems much more
23 consistent that the Court of Appeals would be
24 reviewing what a trial court has done, which
25 is we do this all the time to determine

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1 whether or not we reach a decision that there
2 has been an abuse of discretion there.

3 MR. SOULES: Let me see if
4 I can --

5 JUDGE MCCLOUD: I feel
6 certain that that's probably the intent of
7 this if we really study the statutes which I
8 don't feel that I'm in a position to say too
9 much about, because I haven't studied it that
10 closely, but it really does strike me as
11 strange that you would be presenting an
12 excessive point or an insufficiency point to
13 an appellate court for the first time and that
14 court would be out there saying, "All right.
15 You testify," and "That's hearsay," and
16 et cetera and so forth. It seems to me like
17 it ought to come up from the trial court and
18 then the appellate court then ought to rule
19 what -- and it should go on to the Supreme
20 Court.

21 MR. SOULES: Okay.

22 JUDGE MCCLOUD: But the
23 mechanics of it, I think you've raised a very
24 good point. I think the mechanics are real
25 important, and I don't know exactly how this

1 rule is being interpreted, but I think we
2 should give that some serious thought.

3 MR. SOULES: Here's the
4 way the rule read before, and it was a review
5 only. It in the gray book. This is the 1988
6 rule pamphlet. It says right under (a) there
7 was a (b).

8 PROFESSOR DORSANEO: Page
9 168.

10 MR. SOULES: And it said,
11 "In like manner the appellate court may review
12 for excessiveness the amount of the bond or
13 deposit fixed by the trial court and may reduce
14 the amount if found to be excessive." Now
15 that is a review function only.

16 MR. FULLER: 52.004, the
17 statute almost tracks that language.

18 MR. SOULES: There are two
19 ways to get to excessiveness on a review basis
20 only. One would be to go into the text of
21 49(a) and everywhere you see "sufficiency"
22 just add a word "or excessiveness," so either
23 way you've got the same operative words, or to
24 add this sentence back that was taken away,
25 which I thought was taken away because it was

1 considered redundant, but maybe not.

2 PROFESSOR DORSANEO: If
3 all of what Justice McCloud and John O'Quinn
4 have said is the consensus, I don't know why
5 all of that is not already contained in
6 current 49(b). When it says, "The trial
7 court's order is subject to review by motion
8 to the court of appeals or appellate court,"
9 it's a little bit terse. You could say the
10 trial court's order pursuant to Rule 47 is
11 subject to review for insufficiency or
12 excessiveness by motion to an appellate court,
13 but it just seems to me that if it is a review
14 kind of situation and if the trial court is
15 meant to deal with the problem in the first
16 instance, the trial court is going to deal
17 with it by making some sort of an order
18 granting relief or denying relief, and that
19 that's subject to review on motion. I thought
20 that's what this all meant all along and I
21 haven't really frankly understood what this
22 tempest is about.

23 MR. O'QUINN: Luke, if I
24 may add. Why don't we pull that sentence down
25 into (b) and say something like trial court

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1 order pursuant to Rule 47 is subject to review
2 and if the appellate court by such review find
3 it to be excessive, then such and so.

4 MR. SOULES: Okay. John,
5 since we have operative language in 49(a), and
6 this is just a question --

7 JUSTICE MCCLOUD: The last
8 sentence bothers me.

9 MR. SOULES: If we don't
10 add the last sentence, say we don't add the
11 last sentence and we just say where every
12 place in the existing language of 49(a)
13 "insufficiency" should probably be changed to
14 "sufficiency," so I'm passing that, "shall be
15 reviewable by the appellate court for
16 sufficiency or excessiveness," add those words
17 "or excessiveness" after "sufficiency" each
18 time it appears so that it just indicates that
19 you have the same review process both ways.

20 MR. O'QUINN: That's
21 fine.

22 JUDGE RIVERA: I think
23 that will do it.

24 MR. SOULES: Then if you
25 will work with me through 49(a) as it appears

1 on page 168 as I'm hearing the suggestion, we
2 would not add the underscored sentence at the
3 end. And what I'm trying to put on the table
4 as a possible solution to our discussion here
5 is that beginning with 49(a) with
6 "sufficiency," with "sufficiency of a cost or
7 supersedeas bond or deposit or sureties
8 thereon or of any other bond or deposit under
9 Rule 47 shall be reviewable by the appellate
10 court for sufficiency or excessiveness of the
11 amount or the sureties or the securities
12 deposited, whether arising from the initial
13 sufficiency or excessiveness or from any
14 subsequent condition which may arise affecting
15 the sufficiency or excessiveness of the bond
16 or deposit."

17 PROFESSOR EDGAR: Should
18 not you also have "or excessiveness" in the
19 very first line, "sufficiency or
20 excessiveness"?

21 MR. SOULES: Yes. And
22 then the next sentence would read -- Hadley, I
23 think that's very much needed. "The court in
24 which the appeal is pending shall upon motion
25 showing insufficiency or excessiveness" --

1 MR. FULLER: Why don't you
2 just substitute "appropriate" next, "requiring
3 appropriate bond or deposit be filed with."

4 MR. SOULES: All right.

5 MR. MCMAINS: That's not
6 what we're talking about. We're talking about
7 a review. I've been trying to figure out, why
8 are we dealing with (a) at all?

9 MR. SOULES: Well, let me
10 try to get through this. You can vote it
11 down.

12 PROFESSOR DORSANEO: Move
13 that second sentence to (b).

14 MR. SOULES: The second
15 sentence should be moved to (b)?

16 PROFESSOR DORSANEO: I
17 think so.

18 MR. SOULES: What I'm
19 trying to do now is make the second sentence
20 neutral is all I'm trying to do. "The court
21 in which the appeal is pending shall upon
22 motion showing insufficiency or excessiveness
23 require" --

24 MR. FULLER: Appropriate
25 bond instead.

1 JUDGE RIVERA: Delete that
2 whole sentence out and put the one that was
3 proposed to add it and that would replace it.

4 MR. SOULES: John, go
5 ahead and talk. What is your suggestion?

6 MR. O'QUINN: Here's what
7 I perceive to be the difficulty. I read (a)
8 as being the device where somebody can say,
9 "Look, by law the appellant was supposed to
10 put up a certain amount of security. He
11 didn't do it. He didn't get his security up.
12 I want you to do something about it." I don't
13 see (a) as being a device to review whether
14 the trial court made the right decision or not
15 about how much security to put up. I see it
16 more as a ministerial thing. Did whatever was
17 proposed to be put up, did it get put up? And
18 if not, make them do it or do something to
19 them.

20 But this other subject
21 we're talking about is a matter of reviewing
22 fact findings or for discretionary decisions
23 or things of that nature. And for example,
24 the rule says basically a money judgment you
25 have got to put up the amount of judgment plus

1 interest. I see (a) as being a device saying,
2 "Hey, he didn't put up the amount of money
3 judgment plus interest." It's a ministerial
4 decision or mathematical decision. We're not
5 talking about those kinds of problems. We're
6 talking about what to do when somebody has
7 asked the trial court to change that amount
8 and how to review that decision.

9 MR. SOULES: Well, the
10 second sentence of (a) has been in the rules
11 from 1939.

12 MR. O'QUINN: Even when
13 you have --

14 MR. SOULES: Because
15 that's when subsequent really was designed and
16 you had subsequent facts, passage of time that
17 made the bond insufficient to cover principal,
18 interest and costs. A motion would be made to
19 the Court of Appeals and they would order the
20 bonds such.

21 MR. O'QUINN: That's more
22 of the mathematical case, where the case has
23 been laying around for years where the amount
24 of interest -- briefly, interest may put more
25 interest on that.

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1 MR. SOULES: So it needs
2 to be there. Maybe it just shouldn't be
3 changed and change the first sentence to deal
4 with excessiveness, leave the second sentence
5 of (a) the way it is, and then write something
6 new, what the court does if it finds
7 excessiveness, as a third sentence in that
8 49(a).

9 JUSTICE HECHT: As I hear
10 what John is saying, and it makes some sense,
11 (a), nobody is going to voluntarily put up too
12 much security ordinarily.

13 MR. SOULES: Right.

14 JUSTICE HECHT: And
15 certainly if they put up too much, they're not
16 going to be then heard to complain about it,
17 and that's what (a) is dealing with. The only
18 thing (a) has to do with is if somebody
19 doesn't put up enough and somebody else wants
20 to complain about it because the sureties are
21 not sufficient or bond not sufficient or
22 something changed in the meantime.

23 (b), as I hear John's
24 comment, is where the court either raises it
25 up or lowers it down different from the

1 ordinary rules, and the power to review even
2 insufficiency or the excessiveness comes in
3 Paragraph (b). Is that --

4 MR. O'QUINN: Well put,
5 Your Honor.

6 MR. SOULES: Okay. What
7 do we do now?

8 PROFESSOR DORSANEO: Just
9 let that sentence alone.

10 MR. FULLER: Leave that
11 alone.

12 MR. SOULES: Leave that
13 alone entirely and change (b) how? I have got
14 to write it down.

15 PROFESSOR CARLSON: (b),
16 appellate court, and add "for insufficiency or
17 excessiveness."

18 JUSTICE MCCLOUD: Yes.

19 MR. SOULES: Okay.
20 Elaine, give me that language again and where
21 it would go.

22 PROFESSOR CARLSON: Let it
23 be at the end of the first sentence, "the
24 trial court order pursuant to Rule 47 is
25 subject to review by a motion to the appellate

1 court," and then add these words, "for
2 insufficiency and excessiveness," period.

3 MR. O'QUINN: That will
4 take us back to Rule 47 and standard of
5 review.

6 (At this time there was a
7 brief discussion off the record, after which
8 time the hearing continued as follows:)

9 MR. SOULES: We need to
10 provide that if the trial court's order is
11 entered either under Rule 47 or the statute,
12 somehow get that reached. I don't want to put
13 the statute -- cite the statute in here
14 particularly.

15 MR. O'QUINN: The trial
16 court's order could be pursuant to the
17 statute.

18 JUSTICE MCCLOUD: Doesn't
19 the statute have the same type of language
20 about the review of the order, the trial court
21 order? And so if you were coming under the
22 statute, I think it would be consistent, the
23 language would probably be consistent with
24 this language about reviewing the trial
25 court's order. I believe that's the way I

1 remember that statute.

2 MR. SOULES: Yes, that's
3 right.

4 JUSTICE MCCLOUD: I think
5 that's right, and so I think you could just
6 let it go and trial counsel would be bringing
7 you something under 47, or it might be
8 bringing you something under the statute. Is
9 that right?

10 MR. SOULES: What do you
11 suggest? We need to provide a procedure in
12 the rules for this, trial court's order
13 pursuant to Rule 47 or Article -- Chapter 52
14 of the Texas Practice and Remedies Code?

15 JUSTICE MCCLOUD: That
16 would be all right.

17 MR. SOULES: Or could we
18 just say the trial court's order?

19 MR. FULLER: Is there
20 anywhere else in the rule that refers to
21 statutes?

22 MR. SOULES: A few places,
23 but we try to to avoid that.

24 MR. FULLER: Could you not
25 just say, "in compliance with the statutory

1 law," or something like that?

2 MR. SOULES: How about the
3 trial court's order setting security?

4 MR. FULLER: There you
5 go.

6 JUSTICE MCCLOUD: Yes.

7 MR. FULLER: That's good.

8 MR. SOULES: The statute
9 says setting security. Let's see what the --
10 where is the operative language?

11 JUSTICE MCCLOUD: What
12 page in the book, Luke, is that statute?

13 MR. SOULES: It's on page
14 142.

15 MR. FULLER: Applicable
16 force, I believe, on 143, isn't it what we
17 were talking about?

18 MR. SOULES: Right.

19 MR. FULLER: Yes, force of
20 it.

21 MR. SOULES: Actually the
22 trial court's order does two things. It sets
23 security and it stays enforcement.

24 JUSTICE MCCLOUD: Under
25 both the statute and 47.

1 MR. SOULES: The statute
2 doesn't say that, but that's what 47 does.
3 But if you combine the concepts --

4 JUSTICE MCCLOUD: That's
5 got to be what you're doing.

6 MR. SOULES: -- it sets
7 security and stays enforcement. So if we took
8 looking at 49(b) on 168 it says the trial
9 court's order setting security and setting --
10 and staying enforcement of a judgment. Then
11 it's subject to review and so forth.

12 MR. FULLER: Little typo
13 there.

14 MR. MCMAINS: I'm not sure
15 about the "and" in the sense that really what
16 you're -- it sets the security for staying
17 enforcement.

18 MR. SOULES: Not under
19 Rule 47. It says, "The trial court may stay
20 enforcement of the judgment based upon an
21 order which adequately protects"... and so
22 forth.

23 MR. MCMAINS: I understand
24 that. But the point is that what may be, in
25 fact, the topic that they're trying to review

1 is the fact that they can't meet the order of
2 the court, so I mean, they're looking at the
3 order setting it. Maybe the "and" can get us
4 there. But I'm just saying that's really what
5 you're talking about, what it is that the
6 court has determined is necessary that one or
7 the other parties is complaining about, either
8 too little or too much, and/or genetic within
9 some other format. And you want, I gather,
10 basically to have the reviewing capability as
11 to any of those matters. But it's the actual
12 decision that they make with regards to
13 setting of security pursuant to the authority
14 under Rule 47 for the stay of enforcement that
15 is, in fact, at issue in all of the cases. It
16 was not that they stayed the enforcement.
17 That's done once they have determined on what
18 basis it can be done.

19 MR. SOULES: How is it
20 done? It's not automatic.

21 MR. MCMAINS: Upon posting
22 of the bonds it is.

23 MR. SOULES: No. Not
24 unless the trial courts sign an order to that
25 effect.

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1 MR. MCMAINS: Are you
2 suggesting that you can't supersede a money
3 judgment with the money by filing it with the
4 district clerk without an order of the court?
5 I don't believe that's true.

6 MR. SOULES: Yeah.

7 MR. FULLER: You can't
8 review it without an order, is what you're
9 saying.

10 PROFESSOR DORSANEO: Yes.

11 MR. SOULES: I think
12 that's right. I think that you don't. But
13 the trial court --

14 MR. MCMAINS: That's all
15 I've been saying. I mean, it's --

16 MR. SOULES: Well, let me
17 finish, please, and consider this response to
18 your suggestion, because I'm really trying to
19 respond. It is the order setting security and
20 staying enforcement that gets reviewed. The
21 court doesn't review this; and (b) is, that is
22 not directed to the automatic uptake of bond
23 because time passes. This is talking about
24 the review of a special arrangement, and the
25 special arrangement requires under 47(b) --

1 MR. FULLER: An order.

2 MR. SOULES: -- an order
3 staying enforcement based upon the setting of
4 a different security than would automatically
5 obtain the stay.

6 MR. MCMAINS: I understand
7 that. What I'm trying to get at is you can
8 capture review limited to situations in which
9 they both set the security and stay. That
10 assumes compliance. What I'm saying is that
11 you don't want to say that they have to do
12 both in order to get reviewed, because one of
13 the parties may be saying, "Wait a minute. I
14 can't do that. It hasn't been stayed." And
15 then the other party is saying, "Well, then
16 you don't get to have any review unless you
17 have complied."

18 MR. SOULES: How about if
19 we say, "The trial court's order staying
20 security" -- I mean -- let me start over --
21 "The trial court's order setting security or
22 staying enforcement of a judgment is subject
23 to review."

24 MR. MCMAINS: That's
25 fine.

1 MR. SOULES: Okay.

2 MR. MCMAINS: I was just
3 worried about the discussion --

4 MR. SOULES: I thank you.

5 MR. MCMAINS: -- because
6 it may not come to fruition.

7 MR. SOULES: I appreciate
8 the input very much, and the Court I'm sure
9 does.

10 Okay. So the proposal now
11 on the table is that there will be no change
12 to 49(a) of any kind and that 49(b), as I have
13 it in my notes, would be changed this way:
14 "The trial court's order setting security or
15 staying enforcement of a judgment is subject
16 to review by a motion to the appellate court
17 for insufficiency or excessiveness. Such
18 motions shall be heard at the earliest
19 practical time." That should be capital "S"
20 there. "The appellate court may issue such
21 temporary orders as it finds necessary to
22 preserve the rights of the parties."

23 MR. BEARD: You've got to
24 change the caption on it.

25 MR. SOULES: I'll get to

1 the caption in a moment. Be thinking about
2 what you think we ought to do with it, Pat.

3 And then the second
4 paragraph on number paragraph 49(b) would be
5 changed to the appellate court review of the
6 trial court's order. It would be just like it
7 is here in typewritten form on page 168.
8 Before we get to the caption change, please
9 don't pass. We need to change that. Before
10 we get to the caption change, is there any
11 further discussion about these words that I
12 have in my notes as changes to the Rule
13 49(b)?

14 MR. MCMAINS: What
15 happened to your "Pursuant to Rule 47"?

16 MR. SOULES: We're picking
17 up the statute and the rule by using the words
18 "setting security or staying enforcement of a
19 judgment." That's the order that gets
20 reviewed, whether it's done under statute or
21 whether it's done under rule. That was the
22 purpose of working on that language.

23 Okay. Being no further
24 discussion, those in favor say, "aye."

25 ADVISORY COMMITTEE: Aye.

1 PROFESSOR BLAKELY: Change
2 the "by" to "on."

3 MR. SOULES: There's a
4 text change that I'll take up with Newell in
5 just a minute. Which is that, Newell? Go
6 ahead.

7 PROFESSOR BLAKELY: For
8 review "by a motion" to "on a motion."

9 MR. SOULES: Where is that
10 in 49(b)?

11 PROFESSOR BLAKELY: Break
12 in the sentence.

13 MR. FULLER: Subject to
14 review "by" change to "on."

15 MR. SOULES: Okay. Change
16 that to what, Newell?

17 PROFESSOR BLAKELY: "On."

18 MR. SOULES: Thank you.
19 That's acceptable to me. Those in favor say,
20 "aye."

21 ADVISORY COMMITTEE: Aye.

22 MR. SOULES: Opposed?

23 ADVISORY COMMITTEE: (No
24 response.)

25 MR. SOULES: That's

1 unanimously recommended. What should we do
2 with the caption, Pat?

3 JUDGE BEARD: Just say
4 appellate review of the order setting security
5 or suspending enforcement of the judgment.

6 MR. SOULES: Any
7 opposition to that? That can be done by
8 unanimity. Thank you very much. Thank you,
9 Elaine, for your work on this.

10 The subject -- we're
11 looking at the re-write then of 47(b), divided
12 into two paragraphs that we've talked about
13 earlier and voted on. I believe that --
14 Elaine, does that take care of the supersedeas
15 issues before the Committee?

16 PROFESSOR CARLSON: There
17 was one other minor thing on page 141, and I'm
18 not sure who brought this to the attention of
19 the Committee, but it suggests that the
20 reference in Rule 47(a) needs to properly
21 refer to Rule 41 as opposed to 40.

22 PROFESSOR DORSANEO:
23 That's right.

24 MR. SOULES: Is that
25 right?

1 JUSTICE HECHT: We've
2 already done that.

3 MR. SOULES: Let's see if
4 we did that already. Yes, we did. That's on
5 page 93 and done. Is that the way you
6 understood, Judge?

7 JUSTICE HECHT: That's
8 right.

9 PROFESSOR CARLSON: All
10 right.

11 MR. SOULES: Does that
12 take care then of the supersedeas report,
13 Elaine?

14 PROFESSOR CARLSON: Yes.

15 MR. SOULES: That gets
16 back to you on review of your text on 47 a
17 little bit later, 47(b).

18 Let's see. I guess the
19 next item is TRAP Rule 40, and that will be
20 found on page 175. This was the big job that
21 as I remember -- Rusty, do you have a report
22 on one side?

23 MR. MCMAINS: There has
24 been a fortunate intervening occurrence. The
25 Supreme Court has said more or less what we

1 thought the rules said with regard to two
2 parties, that there is no necessity to
3 independently perfect appeal in two-party
4 cases, at least as I understand generally what
5 is supposed to have been said. It may not be
6 totally without doubt. The real issue however
7 which I don't believe has been really
8 addressed in the cases the Supreme Court
9 decided and it is the real open question at
10 this juncture is how it is, whether we are
11 going to allow, in essence, piggy-back appeals
12 when you have more than two parties in the
13 case.

14 I mean, there is a
15 breaking point in my -- I discussed this with
16 Hatchell and unfortunately time and geography
17 has not permitted Justice McCloud and Hatchell
18 and I to be in the same place at the same time
19 to discuss it. But I know that Mike has had
20 some conversation with Judge McCloud and I in
21 turn with Mike. Mike is of the view frankly
22 and is of the opinion and sentiment shared by
23 Roger Townsend's letter on 175 that in essence
24 there not be just helter skelter, everybody
25 gets for appeal the whole judgment is up

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1 before the court if anybody perfects.

2 PROFESSOR DORSANEO: I'm
3 in favor of simple reply rather than
4 execution.

5 MR. MCMAINS: Means
6 everybody ought to be perfect an appeal. If
7 anybody perfects an appeal ought not to be
8 anything else. Now there is a middle ground.
9 Ironically enough I probably am at the middle
10 ground and that is that, and this is an
11 example, that we have examples of those two
12 extremes independently. The middle ground we
13 don't have an example of as of yet. And we
14 need to get a sense of what the committee feels
15 ought to be the route we want to go. It makes
16 considerable sense to me that a party that
17 essentially wins or maybe doesn't lose too bad
18 has a derivative claim, that is to say such
19 contribution endemny is a classic
20 contribution in a standard tort case is
21 content in which it's been addressed expressly
22 by the court in plaintiff's account in a
23 derivative claim situation like that if one
24 party is not dissatisfied with the result, has
25 a cross-claim against another party but only

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1 really personally affected, if the result that
2 he's obtained so far gets changed, there's
3 much logic and policy to me would suggest that
4 he not be required to go on appealing a
5 judgment that he's perfectly happy with if it
6 doesn't change.

7 Now, how it is that you
8 segregate that out from any other type of
9 cross claim in the influence you have do with
10 a then and there in terms of being derivative
11 claims or just specifically reference
12 contribution or endemnity type notions, that's
13 the drafting problem we have.

14 If the Committee is of the
15 view that neither of the extremes should be
16 taken but agrees with me that at least this
17 one has serious problem, Roger Townsend's
18 proposed change on 175 as I say is the extreme
19 of letting nobody -- everybody that wants
20 anything other than what they got in the trial
21 court has got to appeal, which means that even
22 if you're denied relief against for a party
23 that you don't relieve against until somebody
24 hits you that you have got to go ahead and
25 appeal.

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1 PROFESSOR DORSANEO: I
2 don't think he means for that to mean it
3 though.

4 MR. MCMAINS: That's the
5 Townsend approach, and that's the extreme
6 approach with regard for, and frankly Hatchell
7 subscribes to that approach. If anybody wants
8 any more relief, he needs to let everybody
9 know it, because otherwise you're just kind of
10 lying behind the log filing documents, and all
11 of a sudden something changes and you're in
12 the soup again.

13 MR. SOULES: Let me see if
14 I understand what we're going to do here
15 agenda-wise today. Is there anything that we
16 can act on?

17 MR. MCMAINS: Well, that's
18 what I tried to get that --

19 MR. SOULES: It has to be
20 written for us to act.

21 MR. MCMAINS: The rule on
22 the two extremes has been written. If there
23 is a compromise, that ain't been written.

24 MR. SOULES: Where are
25 the --

1 PROFESSOR DORSANEO: Page
2 190 would be a place to look.

3 MR. SOULES: So we are
4 looking at 175 and 190 on the two rules.

5 MR. MCMAINS: That's
6 right. Those are the two rules.

7 PROFESSOR DORSANEO: I
8 would make one adjustment on 190 based on
9 something I think Rusty said last time. In
10 that Paragraph 4(c) I would take out "who has
11 been aggrieved by the judgment."

12 MR. SOULES: Where is that
13 now?

14 PROFESSOR DORSANEO:
15 190(c). Rusty, do you recall why you
16 criticized that language last time? All I can
17 remember is that I agreed with what you said
18 last time, and the fix is to take that
19 language out.

20 MR. MCMAINS: I wasn't
21 sure we agreed on the fix. The reason I
22 disagreed with the language is because a party
23 who has a "take nothing" judgment in his
24 favor, it is not an agreed judgment, but if
25 that changes on appeal where it becomes an

1 aggrieved party later on in some manner, he
2 hasn't perfected his appeal. If he is looking
3 to cross claim against somebody else, he's got
4 no reason to appeal again. But all of a
5 sudden if he's going to be back in trial
6 court, he wants to take the other parties back
7 with him that he had in the first place so
8 that the aggrieved by the judgment --

9 MR. SOULES: The
10 words --

11 MR. MCMAINS: That's where
12 part of that problem came in, is trying to
13 tell where you are an aggrieved by the
14 judgment.

15 MR. SOULES: The words
16 "who has been aggrieved by the judgment,"
17 those words would be dropped in what you're
18 proposing now, Bill?

19 PROFESSOR DORSANEO: Yes.

20 MR. SOULES: And it would
21 simply say, "Any other party may seek."

22 PROFESSOR DORSANEO: And
23 the idea -- and I'll tell you there's a bit
24 more to making this one way or the other
25 choice, from my perspective -- that has to do

1 with the structure of our appellate rules.
2 Our appellate process does not contemplate
3 cross appeals. It doesn't really structure
4 itself for two parties being the appellant,
5 because you have provisions for getting the
6 record that are written with the view toward
7 one side being the appellant who makes the
8 request, and the other people are the
9 appellees, and they act in response.

10 I have a case now that
11 happens to be a two-party case, but I think
12 the same problem would arise in a three-party
13 case where there are two appellants, and it's
14 very difficult to figure out how you go about
15 getting the statement of facts, whether you
16 need one, whether you need two. The Court of
17 Appeals only wants one. One is filed. You
18 don't know whether the other side is going to
19 file the statement of facts within the time,
20 so you get your own.

21 It just doesn't lend
22 itself to a functional process of two appeals
23 operating side by side, our overall scheme. I
24 think that the Court of Appeals -- I mean the
25 Supreme Court opinion and the companion

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1 opinion that says we should look at this up
2 and down the line and decide which way we're
3 going to have it, one way or the other, the
4 same in both courts, the Court of Appeals and
5 the Supreme Court, makes a good deal of sense,
6 but if we are going to have it the other way
7 where we are going to have cross appeals, then
8 a lot more needs to be done than just to say
9 that somebody needs to post -- somebody else
10 needs to post bond.

11 MR. MCMAINS: Right. I
12 agree.

13 PROFESSOR DORSANEO: We
14 have to change the system in a more radical,
15 and I don't mean to use a loaded term, but in
16 a more substantial manner. And I don't think
17 we are equipped to do that. So without regard
18 to an abstract question of what would be the
19 better way to have a system, our system does
20 not lend itself to two appellants, and I don't
21 think it lends itself to two appellants in
22 three-party cases any more than it does in
23 two-party cases.

24 I think the simple way is
25 to do what I've suggested. It is a simple

1 way, but it's not simple because it refuses to
2 face up to problems. It just simply wants to
3 cancel those issues out and just say, No.
4 We're going to do it one simple way and not
5 get involved in different levels of complexity
6 for different types of cases, because it's not
7 worth the trouble.

8 Now, the ones who would
9 say, "Well, I want a bond to be filed by
10 somebody else," what are they really saying to
11 us? What are they really saying, that they
12 want somebody else to perfect an appeal, the
13 potential appellees who are saying they're not
14 appellees? What do they want? Why should
15 they be entitled to it? What harm befalls
16 them that is of any consequence whatsoever? I
17 don't really understand that. Perhaps Mike
18 and Roger could enlighten me, and probably
19 Rusty could express that point of view, but I
20 don't think it's a problem.

21 MR. SOULES: How does your
22 corrective proposal operate?

23 MR. MCMAINS: If
24 anybody --

25 PROFESSOR DORSANELO: If

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1 anybody appeals, then for jurisdictional
2 purposes that case, that entire case, the case
3 that was in the trial court is up for review.
4 And what that is going to mean is that the
5 appellant will file a brief and it will
6 contain points. The appellee will file a
7 brief. The points in the appellee's brief
8 might affect somebody else other than the
9 named appellant in a three-party case. That
10 somebody else presumably would have to get
11 notice. They would have gotten a copy perhaps
12 of the bond. I don't know about that. I'm
13 assuming that they would have. And certainly
14 they would get a copy of this brief that is
15 making a complaint against them and they would
16 have time to take action.

17 MR. SOULES: Under your
18 proposal then a party first receiving
19 information that appellant -- relief was
20 sought against that party --

21 PROFESSOR DORSANEO: Well,
22 this appellant -- relief was sought would be
23 on notice that maybe that judgment is going to
24 change.

25 MR. SOULES: And when that

1 party receives that notice even if it's in a
2 brief, that party would have an opportunity to
3 respond and raise points on appeal; is that
4 right?

5 PROFESSOR DORSANEO: I
6 don't know if I'm expressing myself clearly
7 enough, and I guess I have a little trouble.
8 I'm assuming. I'm making an assumption, and
9 this may be contrary to reality, that the bond
10 will be provided to all of the parties who are
11 parties in the trial court.

12 MR. MCMAINS: No. That is
13 not true.

14 PROFESSOR DORSANEO: Maybe
15 something needs to be done there.

16 MR. MCMAINS: No. I'm
17 just saying it could be. What happens is, of
18 course, that the bond rules authorize you to
19 make payable either to the party against who
20 you have the appeal, which is where some of
21 these questions about have you listed an
22 appeal comes in, or it can be made payable to
23 the clerk in which case that appears to be a
24 little bit clearer in that it's to everybody's
25 benefit.

1 PROFESSOR DORSANE0: Well,
2 I think what's the facts? The bonds are made
3 payable to the clerk?

4 MR. MCMAINS: Well, that
5 depends on who is doing it. Frankly, 75
6 percent of the bonds I get are made to the
7 parties and usually not all of them -- not all
8 of them have anything to bond. The ones that
9 lost, that the appellant won against, he
10 doesn't appeal against anyway. So a lot of
11 times their names just aren't in the bond
12 protecting it one way or the other.

13 JUSTICE MCCLOUD: This
14 seems to me to be a very complex problem, and
15 also it seemed to me that we've already heard
16 two views from the co-chairman of this
17 committee and one in here, and then we have
18 sort of an inside view. We have a middle
19 ground, and that's not really been reduced to
20 writing, and I think it would take me two or
21 three days to understand it if reduced to
22 writing, so I'm not sure. What I'm suggesting
23 is, could we table this? I'm not sure that
24 I'm ready to vote. I don't feel adequate --
25 that I'm adequate at this point to really give

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1 this the type of decision it ought to be
2 given.

3 MR. SOULES: The reason
4 that I'm struggling with the assignment is
5 that we tabled this in May, and apparently we
6 haven't produced much in the interrum to act
7 on, and it is a problem we've been asked to
8 act on. And if we don't get it done today, it
9 probably will not be a rule that can become
10 effective before 1992, instead of becoming
11 effective in 1990. We are running out of
12 time. These rules have got to be passed on by
13 the Supreme Court of Texas, and then they go
14 through a --

15 JUSTUCE MCCLOUD: I read
16 the decision of the Supreme Court I think last
17 week. And, you know, I read it and I thought
18 it was rather interesting, but when I read it
19 I didn't realize how interesting it really
20 was. I didn't realize that this committee had
21 been into this problem in depth. And I don't
22 know exactly how to analyze what was said
23 there as to what the court would say and with
24 reference to what these people are saying here
25 who have been studying this problem for

1 months.

2 MR. SOULES: But the
3 chair, if the sense of the committee is to
4 table it, that is fine. I'm trying to advance
5 it because it's here and it's been in the
6 file.

7 JUSTICE MCCLOUD: Sure. I
8 understand.

9 MR. TINDALL: I really
10 share Justice McCloud's view for a lot of
11 reasons. I mean, before we have Bill Dorsaneo
12 and Rusty McMains and Mike Hatchell and Roger
13 Townsend, all of whom spend 100 percent of
14 their time on appellate work working with
15 these rules, and what I would like is a
16 recommendation from them. All we're hearing
17 is this view and middle ground and another
18 view, and I'm not sure we can resolve that
19 today when they can't even resolve it among
20 themselves, and they spend all their time
21 working with this rule.

22 JUSTICE MCCLOUD: The
23 thing that keeps bothering me is I hear these
24 experts speak, and they are experts. But each
25 one of them says, "This is a simplistic view,"

1 and then all of a sudden he starts creating
2 very complex problems out here that are going
3 to result from this simplistic view, and that
4 bothers me a lot, because normally I would
5 immediately say I like the simplistic view and
6 would move certainly in that direction, but
7 then all of a sudden I start seeing problems
8 that you just mentioned that I hadn't even
9 thought about.

10 PROFESSOR EDGAR: At least
11 the court in its opinions a couple of weeks
12 ago -- I've forgotten when it was -- cured the
13 problem of the -- that has arisen among some
14 of the courts of appeals concerning the
15 two-party situation. Now, admittedly in the
16 multi-party situation that problem still
17 persists, and that gives rise to the problem
18 that Rusty has raised and that Bill is
19 struggling with. I share David and Judge
20 McCloud's concern that this is a complicated
21 subject; in fact, the concurring opinion in
22 that case by Justice Ray Hecht and I've
23 forgotten, somebody else, recognized that it
24 was a complex subject; and I don't think we
25 can solve it today.

1 And that raises another
2 question, though; and that is how are we
3 going -- should we do anything in trying to
4 resolve the dichotomy between parties who are
5 aggrieved out of the trial court to the Court
6 of Appeals on the one hand and out of the
7 Court of Appeals to the Supreme Court on the
8 other? Because they've got another set of
9 rules. And all of this is raised in
10 concurring opinion. And it seems to me that
11 we should take a look at both of these
12 problems and try and make some recommendation
13 to the court when we have had time to really
14 seriously consider them.

15 MR. MCMAINS: Rusty, we
16 need this to be seriously considered. And
17 when can you make -- when can your committee
18 make a full report? And I will reschedule a
19 full meeting of this committee. Can you do so
20 in 30 days?

21 MR. MCMAINS: Yes. But
22 what I was going to ask, and I was trying to
23 get this in the last time, and I realize
24 people don't want to vote. All I want is a
25 sense of the committee. We will wrestle with

1 these problems, or maybe what I need is
2 actually a sense of the Supreme Court. If
3 Justice Hecht wants to report back to me.

4 The real question is, do
5 you want people who are really -- you know,
6 this is the question: Do you want the whole
7 case up there with these things being made by
8 court points, or do you want to know what the
9 position is going to be having been pretty
10 well established before you get to the
11 appellate court? That's the critical issue to
12 this is who is going to be fighting who
13 depending upon what happens later on?

14 MR. SOULES: Let me see if
15 I understand maybe the differences. One would
16 be that any party contemplating an appeal even
17 if it's conditional on something that may
18 happen in the future, but if the party at the
19 conclusion of the trial contemplates an appeal
20 either absolutely or in the event something
21 else is done by one of the other parties in
22 the trial court, do we put those parties to
23 independent perfection of appeal from the
24 outset? That's one side of it, isn't it?

25 MR. MCMAINS: Yes.

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1 MR. SOULES: And then the
2 other side is, do we not do that and let, I
3 guess, everybody keep their options open until
4 someone perfects an appeal and shows what that
5 someone is going to appeal? And then as the
6 appeal progresses and the issues on appeal
7 become defined, other parties then make their
8 decision whether to appeal, and can do so
9 regardless of a separate earlier perfection of
10 appeal.

11 MR. MCMAINS: Yes.

12 MR. SOULES: That's the
13 contrast of the two positions, isn't it?

14 MR. MCMAINS: Yes. I
15 mean, there is very much divergency of path.

16 MR. SOULES: I'm going to
17 call the first one "independent perfection of
18 appeal" and the other "cross points without
19 independent perfection." Are those terms --
20 will they work for purposes of consensus? Let
21 me derive that first.

22 MR. MCMAINS: There is
23 kind of a third route, but that's the
24 in-between. There are some cases --

25 MR. SOULES: Then between

1 those let me take a straw vote. Then we'll
2 overlay the next one to see if we think that's
3 a better. Trying to get something that we'll
4 have before the Committee. Okay, John.

5 MR. O'QUINN: If you had a
6 subcommittee look at it, will somebody tell me
7 whether the subcommittee tended to lean
8 towards one option or the other or all broken
9 down, no real consensus?

10 PROFESSOR DORSANEO:
11 There's not going to be a consensus. We're
12 going to come back, and it's going to be the
13 same. One group of appellate lawyers thinks
14 it ought to be this way, and another group
15 thinks it ought to be the other way, and then
16 somebody thinks maybe there's some other way.

17 MR. SOULES: How many feel
18 that every party should be required from the
19 outset in the times provided by the rules to
20 perfect an independent appeal or waive appeal
21 regardless of what subsequently happens in the
22 case on appeal?

23 MR. O'QUINN: What does
24 "perfect" mean? File a bond?

25 MR. SOULES: Your own

1 bond. Just like the rules say, perfection of
2 appeal. How many feel that should be the law?
3 How many feel on the other hand that it would
4 be better and since we're going to have a
5 third position I'm not going to vote to rule
6 that out yet, how many feel it would be better
7 to give parties in the trial court in effect
8 if one party perfects an appeal, that other
9 parties can assert their points on appeal
10 later without having perfected initially their
11 appeal? How many feel that should be the law?

12 JUSTICE MCCLOUD: In the
13 simple case I sure feel that way. It's just
14 the complex case.

15 MR. SOULES: 14 voted in
16 favor of that and none voted in favor of the
17 first proposition. Now, what is the other
18 one?

19 MR. MCMAINS: As I say, as
20 Judge McCloud noted, I think the sense of the
21 Committee is that in most cases they would
22 like to post on the election, and I don't
23 disagree. There is no real sentiment against
24 that, but there are some cases where it seems
25 to be unfair, and that's where the question is

1 can we draw middle ground?

2 MR. SOULES: So in some
3 cases it's unfair for everyone to be able to
4 piggy-back on the initial perfection.

5 PROFESSOR DORSANEO:
6 Somewhat.

7 MR. MCMAINS: Right.

8 MR. SOULES: But in most
9 cases it's unfair -- becomes unfair not to let
10 someone piggy-back because they were only
11 conditionally considering appeal.

12 MR. MCMAINS: Let me
13 crystallize --

14 MR. SOULES: So isn't that
15 what we're really trying to do, is resolve the
16 most unfair situation even if it leaves
17 something slightly unfair in a few cases?

18 MR. O'QUINN: We can
19 handle slight unfairness.

20 MR. MCMAINS: No. The
21 other ground is really that you can tackle the
22 limitation of appeal rules perhaps more
23 directly by allowing a broader limitation of
24 the appeal than is now allowed. That's how
25 you basically will attack on the third ground,

1 and that is to say basically that if the party
2 who really wants to appeal says, "I want to
3 appeal as the Party A," right now you can't
4 even do that if the other claims are not
5 severable, and so you can broaden perhaps
6 consistent with the federal practice the
7 ability to limit the appeal as to the claims
8 between A and B and leave Party C out of it.
9 You can eliminate. That gives you the notice
10 thing. It does put you on notice that you've
11 got to go ahead and go up if you want to
12 complain about something as to somebody else.

13 That will solve the
14 contribution stuff and some of the other
15 things that otherwise people were coming up on
16 and are getting embroiled in the situation of
17 whether or not they have managed to perfect
18 the appeal and say, "Well, I didn't know I had
19 a complaint. I didn't know I had to."

20 That's just an alteration
21 giving more power to limiting people and that
22 also brings in it the question of should the
23 courts have more power to deal with the case
24 on a piecemeal basis, which is a fairly
25 fundamental change.

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1 MR. SOULES: Okay.
2 Question, Rusty. Is that -- if everyone gets
3 the right to assert their appellate points as
4 a result of the perfection of appeal by one
5 party you're saying that if that's the case an
6 appealing party should have broad powers to
7 limit the appeal so as to keep that from
8 occurring?

9 MR. MCMAINS: What I'm
10 saying is that answers the question of whether
11 or not you have to perfect the appeal in the
12 other case. The question is though and it can
13 go further, is should there be a greater power
14 to limit the appeal? I mean, let's suppose
15 for instance --

16 MR. SOULES: Let Hadley
17 speak to that, and then we'll take a consensus
18 on it.

19 PROFESSOR EDGAR: This
20 brings up what I wanted to say. Basically I'm
21 inclined towards Bill's view that I think we
22 ought to do everything we can to keep the
23 appeal as simple as possible, and it might be
24 that Rusty's concern might fit as well, but
25 I'm concerned about whether or not trying to

1 articulate Rusty's proposal would unduly
2 complicate the process; and therefore, I would
3 like to see a proposal come forward so that we
4 can sit down and actually look at what Rusty
5 is proposing as an alternative, along with
6 what I presume to be the Committee's view that
7 we ought to keep it simple, which is Bill's
8 proposal, and we could have both of them side
9 by side and study them, and therefore we can
10 go on to something else today, because I think
11 this is really a little too complicated for us
12 to try and discuss in the abstract.

13 MR. SOULES: Let me get a
14 consensus. If the right to appeal was
15 broadened so that each party in the trial
16 court could ride on the perfection of appeal
17 by a single party, how many feel that it would
18 also be a good idea to give broader powers to
19 that appellant to attempt to limit the
20 appeal? One, two, three (counting).

21 PROFESSOR EDGAR: I can't
22 vote on that. I want to see what it looks
23 like, and I want to see how the practitioner
24 can interpret it and use it, because it might
25 not be functional.

1 MR. SOULES: Anybody can
2 not vote that doesn't want to vote. I want to
3 get a consensus so that I can try to give the
4 Committee some guidance, if we are going to
5 broaden, who gets to ride the single
6 perfection of appeal. We also want them to
7 work on given that single perfecter some
8 additional horsepower to try to contain that
9 appeal if it wants to; and then, of course,
10 anybody else that perfects an appeal, I guess
11 they're the basis of the effort to limit of
12 course then that brings everybody in anyway,
13 because any total perfection of the appeal
14 perfects the appeal as to the total case.

15 How many feel that a
16 single appellant, first appellant upon
17 attempting to limit appeal should be given
18 much latitude as compared to other parties to
19 try to limit that appeal? Six.

20 How many feel otherwise?
21 Three.

22 So write something that
23 would also give that power. If I can get your
24 attention to two rules that are here now. One
25 is 46(d), which is the notice of filing of the

1 cost bond. I did not realize until this
2 discussion that that notice could be limited,
3 and what I'm going --

4 MR. MCMAINS: It's not
5 supposed to. But there are some cases that
6 have not been overruled.

7 MR. SOULES: That's what
8 I'm trying to fix right now. In the fourth
9 line of the text of the rule it says, "by
10 mailing a copy thereof to counsel of record or
11 each party other than the appellant." And
12 since there seems to be some question about
13 who the counsel of record are and each party
14 other than the appellant, insert after the
15 words "counsel of record," "in the trial
16 court" and then after "or each party other
17 than the appellant," "in the trial court" so
18 that we're talking about every party in the
19 trial court gets notice of the cost bonds.

20 MR. MCMAINS: Right.

21 MR. SOULES: Any objection
22 to that? Now, the next thing -- and I guess
23 this is just not on the agenda. I'm just
24 trying to -- I didn't realize there was a
25 problem, but those amendments would be made to

1 Rule 46(d) just to say that we are talking
2 about notice to all. Every party in the trial
3 court gets notice of cost bond. Now that's
4 unanimously recommended then.

5 Then over in 40, Rule 40,
6 this is 40(a)4, Notice of Limitation of
7 Appeal, again amending that to make it clear
8 that the notice of limited appeal is to be
9 given to all parties in the trial court so
10 that --

11 PROFESSOR EDGAR: Where
12 are you going to include?

13 MR. SOULES: Well, I was
14 going to put it, "not attempt to limit the
15 scope of appeal shall be effective as to a
16 party adverse to the appellant unless several
17 portion of judgment from the appeal is taken
18 and is designated and notice served." And it
19 says "served on the adverse party." And
20 that's not really what we want.

21 PROFESSOR DORSANEO: In my
22 draft.

23 MR. SOULES: Well, but it
24 does in the Rules today.

25 PROFESSOR DORSANEO: I

1 know.

2 MR. SOULES: So not
3 "served on the adverse party," but "served on
4 all other parties in the trial court."

5 PROFESSOR DORSANEO:
6 Please look at page 190 and see the text of
7 that and the draft of that.

8 MR. SOULES: We are not
9 going to pass on that today. I'm just trying
10 to get notice done today unless you-all are
11 going to pass on that today. Any objection to
12 deleting "served on the adverse" -- the words
13 "on the adverse party" and inserting "all
14 other parties in the trial court"? That will
15 be unanimously recommended to the Supreme
16 Court for a change in Rule 40(a)4.

17 So now we are going to
18 have notice of limited appeal and notice of
19 the cost bond going to all parties in the
20 trial court. You can then springboard in your
21 work knowing that all parties in the trial
22 court are going to be given notice. The Rules
23 at least are going to require it.

24 Now, can we advance work
25 on Rule 40 any further today than what we've

1 done? I get the consensus then it is to
2 permit all parties to raise points based on a
3 single general perfection of appeal, but to
4 give a party perfecting an appeal broad rights
5 to attempt to limit that appeal to the extent
6 fair to other parties? Is that the consensus
7 of the committee?

8 MR. BECK: I don't think
9 the last part is the consensus of the
10 committee, because I think you had a majority
11 of the committee not voting.

12 PROFESSOR EDGAR: I want
13 to see both of them in writing, Luke, before I
14 think I can effectively --

15 MR. SOULES: All right.
16 The consensus of the committee is that we
17 would like to see drafting along those lines
18 for the next meeting. Is that the consensus
19 of the committee? Anyone opposed to that?

20 Okay. That's the drafting
21 that we want to see. We will if you can check
22 your calendar during the noon hour, we will
23 meet again on that one -- I guess, just on
24 that unless something else shows up in the
25 interim, and it will be sometime in August.

1 If we don't get it to the
2 Supreme Court by August, they can't get it to
3 the Bar Journal and get it passed. Okay.
4 Now, the next point is -- again, it will be a
5 day in August beyond 30 days, because Rusty
6 says he can get the work done and to this
7 committee within 30 days. So it will be
8 sometime around the 15th of August, I guess,
9 unless this committee -- I'll get your views
10 on a day in August after the 15th.

11 (At this time there was a
12 brief recess, after which time the hearing
13 continued as follows:)

14 MR. SOULES: Report on
15 TRAP Rule 51 and 53, let's see, those will be
16 found on 210.

17 MR. MCMAINS: These are
18 not really controversial. Sarah had proposed,
19 and they're not controversial among the
20 committee anyway. One is the written
21 designation basically shouldn't be an excuse
22 for the clerk not preparing the transcript as
23 it's required to be done under the Rule. So
24 all this is, is making clear that the failure
25 to make the designation doesn't relieve the

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1 clerk of the obligation to prepare the
2 transcript, which is why we made the
3 transcript the duty of the clerk to prepare in
4 the first place.

5 MR. SOULES: How many in
6 favor of the change to proposed Rule 51(b)?
7 Those opposed? That will be unanimously
8 recommended to the Supreme Court.

9 MR. MCMAINS: 53(a) is to
10 say -- is to deal with this bizarre situation
11 occurring in the San Antonio court where
12 basically the record was ready in time to file
13 but hadn't been requested prior to the
14 perfection of the appeal either because they
15 filed the bond early or because it wasn't a
16 long record. They didn't have any trouble
17 getting it done. And the court still held
18 that somehow that there was a problem in the
19 fact that they even though they had the record
20 to file in time, having not requested it in
21 time, that the failure to request it in time
22 was some problem, which is perfectly silly
23 from most of our perspectives and has since
24 been backed off of, I might add. But
25 nonetheless there may be some confusion, and

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1 the underlying suggested language merely says
2 failure to timely request shall not preclude
3 you from filing it within the time seems to be
4 perfectly the intent of everybody; and I move
5 its adoption as well.

6 MR. SOULES: Discussion?
7 All in favor say, "aye."

8 ADVISORY COMMITTEE: Aye.

9 MR. SOULES: Opposed?
10 That's unanimously approved.

11 JUSTICE HECHT: Luke, I
12 have one other matter.

13 MR. SOULES: Yes, sir,
14 Justice Hecht.

15 JUSTICE HECHT: On Rule 51
16 I can't seem to find my notes, but Justice
17 Kilgarlin, I believe, made a note of a case
18 involving the first sentence of 51(c), and I
19 have forgotten -- I don't have the case here,
20 and I can't seem to put my finger on it. In
21 the first sentence of 51(c) I believe the
22 phrase "designated by the appellant" is
23 mislocated in the sentence. It says, "Upon
24 perfection of the appeal the clerk of the
25 trial court shall prepare under his hand and

1 seal and to the court immediately transmit the
2 transcript to the appellate court designated
3 by the appellant." So one party took the
4 position in a case on appeal that they could
5 designate the court of appeals that this was
6 going to.

7 MR. MCMAINS: We did do
8 that.

9 PROFESSOR EDGAR: That was
10 the intent I think.

11 MR. MCMAINS: Pick your
12 own judge.

13 MR. SOULES: Sounds like
14 we slided that one by.

15 PROFESSOR DORSANEO: That
16 was the intent. Concurrent jurisdictions.
17 That was, yes.

18 JUDGE BEARD: Bryan has
19 got three Courts of Appeal.

20 JUSTICE HECHT: Designated
21 by the appellant? There's an appellate case
22 that says they're not going to let you do
23 that.

24 MR. MCMAINS: Who said
25 that?

1 JUSTICE HECHT: Well, not
2 Houston or Dallas or San Antonio.

3 MR. MCMAINS: Bryan goes
4 to Waco or Houston. There are several that go
5 to several -- can go to several different
6 courts, and the historic practice of course
7 when you filed the transcript was you'd go
8 take it to any court you want that had
9 jurisdiction and file it. Now the modern
10 practice at least in Houston and as I
11 understand Bryan is that they just draw a bean
12 out or whatever and that's where you go, go on
13 a rotating basis. That's what they do,
14 because they get to file the transcript.
15 There isn't a rule. They just do it randomly.

16 PROFESSOR DORSANEO: There
17 is a rule. It says, "designated by the
18 appellant."

19 MR. MCMAINS: No. You
20 find that.

21 MR. SOULES: Hold on.
22 Justice Hecht is suggesting that there is an
23 appellate opinion that says that the appellant
24 is not going to get the benefit of this rule.

25 JUSTICE HECHT: That's

1 true.

2 MR. SOULES: Is that a
3 Supreme Court case?

4 JUSTICE HECHT: No. Judge
5 Kilgarlin sent it up maybe a year or so ago,
6 but I don't remember.

7 MR. SOULES: Let me see if
8 I can find it in our previous agenda. While
9 we are looking for it let's discuss --

10 JUSTICE MCCLOUD: Let me
11 just say one thing. This has always bothered
12 me a lot, but I'm not going to get into that
13 battle. I got into this battle 15 years ago.
14 It's going to stay dead. But we're putting --
15 we are telling this clerk who frequently
16 doesn't -- particularly in the rural areas
17 doesn't know all that much about what's going
18 on. We're telling the clerk that the clerk
19 has the responsibility to do this and to do it
20 timely and immediately and et cetera and so
21 forth. Well, if we have all that much
22 confidence in the clerk we might say that
23 instead of saying "the transcript to the
24 appellate court designated by the appellant."
25 Maybe to say "to the proper appellate court."

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1 I mean, if that's of some
2 concern about "designated by the
3 appellant" --

4 JUSTICE HECHT: Well, it's
5 in the old agenda at page 259, and the case is
6 Cole against the State of Texas. Per curiam
7 opinion of the Waco court, isn't it? No.

8 MR. SOULES: It's the
9 First District.

10 JUSTICE HECHT: Yes.

11 MR. MCMAINS: Did we vote
12 it down the last time?

13 MR. SOULES: No, Rusty.
14 It wasn't reported on, I don't think.

15 MR. MCMAINS: Did we just
16 forget it?

17 MR. SOULES: What's that?

18 MR. MCMAINS: Did we just
19 forget it?

20 MR. SOULES: Yeah, I think
21 so.

22 MR. MCMAINS: I just
23 didn't remember it being in there at all.

24 MR. SOULES: It was
25 forwarded to --

1 MR. MCMAINS: I didn't
2 report on it.

3 MR. SOULES: It was
4 forward to the TRAP subcommittee in May of
5 1988.

6 MR. MCMAINS: Yeah. I'm
7 just saying I don't remember reporting on it.

8 MR. SOULES: No, it was
9 not reported on. The First Court held that
10 Brazos County being uniquely situated in three
11 appellate districts, the clerk's having sent
12 the transcript I guess to the court next on
13 rotation after having been directed to send it
14 to a different court, that the clerk in effect
15 had done the right thing and the appellant was
16 not going to be given the relief that the
17 appellant wanted, which was to transfer from
18 the I guess 1st Court of Appeals to the 10th
19 Court of Appeals. It says the designation
20 language found does not empower the appellant
21 to choose his court. Under the appellant's
22 logic it would give Brazos County appellants
23 but no others in Texas the right to forum
24 shop, and that's not the intent of the rule,
25 and Justices Warren, Duggin and Levi so ruled

1 per curiam.

2 Apparently the discussion
3 here is that that was the intent of the rule
4 to permit an appellate to pick his court
5 because previously the appellant carried his
6 own transcript to the clerk and could make any
7 turn in the road he chose.

8 MR. BEARD: I think in
9 Bryan they still pick their courts and the
10 clerk sends it wherever they send it.

11 MR. MCCLOUD: Wherever the
12 appellant requests is where it goes?

13 MR. BEARD: It's my
14 understanding.

15 (Inaudible).

16 MR. SOULES: Wait a
17 minute. The court reporter cannot get
18 discussion that's not one at a time, and I
19 apologize for interrupting.

20 What is the sense of the
21 committee on this rule, proposed rule to
22 change in 51(c) to I guess delete the
23 language?

24 JUSTICE MCCLOUD: Just say
25 "to the appellate court."

1 MR. MCMAINS: If you just
2 stopped with "appellate court."

3 PROFESSOR EDGAR: Just put
4 a period there.

5 JUSTICE MCCLOUD: "To the
6 appellate court."

7 MR. SOULES: "To the
8 appellate court," and take out "designated by
9 the appellant."

10 MR. BISHOP: You can
11 transfer that language right after transcript,
12 "transcript designated by the appellant."

13 MR. SOULES: Right. But
14 you have transcript designation by multiple
15 parties.

16 MR. MCMAINS: Not really.
17 I'm reasonably confident that was to be
18 preserved.

19 MR. SOULES: All right.
20 Discussion on deleting from at the end of the
21 first sentence of 51(c) these words,
22 "designated by the appellant," and then
23 placing a period after the word "court"? Any
24 discussion?

25 PROFESSOR DORSANEO:

1 Judge, does that opinion say what would happen
2 or what the decisionmaker who decides in the
3 case of concurrent jurisdiction where the case
4 would be docketed?

5 JUSTICE HECHT: There's a
6 statute on the two Houston courts, and I don't
7 know --

8 MR. MCMAINS: There is no
9 statute.

10 JUSTICE HECHT: -- what
11 the procedure is in Van Zandt county, half of
12 Dallas and half of Texarkana and Tyler.

13 PROFESSOR DORSANEO: My
14 biggest concern would be that if I had to
15 choose between all of the persons who could
16 decide this question, I might not choose the
17 appellant, but I certainly wouldn't choose the
18 clerk.

19 JUSTICE HECHT: Well, the
20 statute pertaining to Houston provides for
21 random selection.

22 MR. MCMAINS: Right.

23 JUSTICE HECHT: Which is
24 conducted by the clerk.

25 MR. BEARD: We don't have

1 any statute telling the clerk of Brazos County
2 what to do.

3 JUSTICE HECHT: Right.

4 MR. BEARD: I concur with
5 Bill.

6 MR. MCMAINS: You can
7 insert a sentence requiring random selection
8 in cases where a current jurisdiction if
9 you're concerned, and that's something that is
10 going on and nobody knows anything about.

11 MR. SOULES: That to me if
12 you're going to take away from an appellant
13 the right to choose his court, which he had
14 before these TRAP rules were ever adopted and
15 the change in the way the transcript is
16 handled, if you're going to take that away,
17 then we need to put in how the clerk is to
18 handle it, and I don't know of any way other
19 than random sampling. I don't say we should
20 take it away, but if we're going to delete
21 that language, we should probably write
22 something that the appellate districts and
23 whatever, something "where there's concurrent
24 jurisdiction, the court shall send the cases
25 to the courts on a random sample basis."

1 I don't know exactly what
2 words to use. Somebody could write them up
3 while we are working here. I guess don't we
4 need to do one or the other, either leave it
5 up to the appellant or instruct the clerk to
6 random select?

7 MR. MCMAINS: If we want
8 to do it that way, take the language out of
9 the Houston statute and use with regard to
10 whatever the random selection.

11 MR. SOULES: Do we have
12 that statutory text anywhere?

13 JUSTICE HECHT: Unless
14 changes.

15 MR. SOULES: Is it in here
16 (indicating)?

17 JUSTICE MCCLOUD: Luke,
18 let me and you. It would occur to me that if
19 you have these counties or these jurisdictions
20 where they can choose or they go to different
21 courts, I'm not familiar with that, but -- I
22 mean, I know it happens, but I don't know the
23 mechanics of it. I can't conceive they don't
24 have some -- that each of those courts must
25 have some sort of statutory provision set up.

1 MR. SOULES: No, they
2 don't.

3 JUSTICE MCCLOUD: They
4 don't?

5 MR. SOULES: They don't.
6 Here's what the statute in Houston says. So
7 Rusty, what we're going to vote on I guess for
8 the moment is leave it the way it is or take
9 the choice from the appellant and do it as in
10 Houston, and this is what the government code
11 provides for Houston. "The trial clerk shall
12 write the numbers of the two courts of appeals
13 on an identical slips of paper and place the
14 slips in a container. When a notice of appeal
15 or appeal bond is filed, the trial court clerk
16 shall draw a number from the container at
17 random in a public place and shall assign the
18 case and any companion cases to the Court of
19 Appeals for the corresponding number drawn."
20 So we have can either use that language or
21 leave it the way it is.

22 How many feel that we
23 should use this language?

24 PROFESSOR EDGAR: Can you
25 simplify that language a little bit? Can't we

1 just say in the event of concurrent appellate
2 jurisdiction that the clerk shall use a random
3 selection or something like that?

4 MR. SOULES: Why not tell
5 them exactly how to do it?

6 MR. FULLER: I was going
7 to say, one guy's random --

8 MR. MCMAINS: Yeah, but
9 there's three.

10 MR. SOULES: Okay. We can
11 say "several." It doesn't have to be two,
12 write number on several courts of appeals.

13 Okay. Those in favor of
14 leaving it the way it is --

15 JUSTICE CLINTON: Wait
16 just a minute there. This is a criminal case
17 I've now learned, and I do not want to hasten
18 into this. I have some recollection and I've
19 tried to look here through the rules but can't
20 find it that there either used to be or still
21 is a requirement that when the appellant gives
22 his notice of appeal he specifies the court to
23 which he's going to appeal, and I don't want
24 to rush through here and somehow go afoul of
25 that. Now, that may have been changed when

1 the new rules were adopted. They may have
2 dropped that specification, but that used to
3 be the way it was. And if the notice wasn't
4 specified, the court wasn't specified, the
5 notice of appeal wasn't any good.

6 MR. FULLER: Just in
7 criminal cases?

8 JUDGE CLINTON: Yeah.
9 That's what I said. The whole preface was on
10 the fact that this was a criminal case, so
11 that then in turn relates to this business
12 about designated by the appellant. It's not
13 the appellant that's designated the transcript
14 go there. It's the appellant designated to
15 which court he was appealing, and that was a
16 prerequisite in the past. Don't you have some
17 recollection of that?

18 MR. BEARD: I think on
19 every notice of appeal I've seen, it
20 designated the court.

21 JUSTICE MCCLOUD: Both
22 civil and criminal, bond, too.

23 JUSTICE CLINTON: I don't
24 know about that. I'm just talking about the
25 criminal aspect of it.

1 JUSTICE MCCLOUD: I think
2 we better leave this alone.

3 MR. SOULES: Maybe we
4 should. That's a position that we're going to
5 vote on. Is there a notice of appeal in
6 criminal cases?

7 JUSTICE CLINTON: Of
8 course. Oh, God, jurisdiction. That's
9 exactly why I'm raising this question.

10 MR. SOULES: Where is
11 that, judge? What rule of evidence?

12 JUSTICE CLINTON: I don't
13 know if it's in the rule here. It's damn sure
14 in all the case law and everything else.

15 MR. BEARD: Your notice of
16 appeal, that designates the court that you're
17 appealing to as a routine matter.

18 JUSTICE CLINTON: Don't
19 misunderstand. I'm not saying ultimately, you
20 know, there might not be something to do
21 here. But all I'm saying is right now at this
22 very moment it raises an alarm and I'd like be
23 able to cut the alarm off before we go any
24 farther.

25 MR. SOULES: The content

1 of notice of appeal in criminal cases is in
2 40, small (b).

3 JUSTICE CLINTON: That's
4 right. It says notice will be in writing and
5 all like that. But what I'm trying to tell
6 you is that either it is still a rule of
7 decision or isn't, and I don't know. That the
8 notice must specify the court to which you
9 intend to take the appeal.

10 JUSTICE MCCLOUD: Yeah,
11 because they send like to our court. That's
12 the first thing we get in a criminal case is
13 the notice of appeal which is sent after the
14 trial and physically sent to our court. I
15 mean, we get word that notice of appeal has
16 been filed, that they give notice, they're
17 going to appeal to the 11th Court of Appeals,
18 and that's when everything starts ticking as
19 far as the criminal side is concerned.

20 MR. SOULES: And then this
21 case goes to the 11th?

22 JUSTICE MCCLOUD: It goes
23 to the 11th.

24 MR. SOULES: It is I guess
25 the legal judgment of this committee and

1 Justice Clinton that that case probably on
2 that point is incorrect.

3 JUSTICE CLINTON: I
4 haven't even reviewed it. I'm not going to
5 say one way or another.

6 MR. BEARD: The form book
7 says where you appeal it.

8 MR. SOULES: But you can
9 say it and yet you don't get it.

10 MR. BEARD: You may not
11 get it.

12 MR. MCMAINS: That Rule
13 40(b) does say on there, it says the clerk of
14 the trial court shall note on top of the
15 notice of the appeal the number of the cause
16 and the day it's filed and shall immediately
17 send one copy to the clerk of the appropriate
18 Court of Appeals, I mean, as if there is an
19 appropriate court of appeals.

20 JUSTICE CLINTON: Up until
21 this rule was adopted the appropriate court
22 was the one designated by the appellant.

23 MR. MCMAINS: I know.
24 That's what I'm saying. I'm concerned that
25 maybe that didn't change, because this is the

1 clerk of the trial court. He's got to know
2 where to send it right now.

3 MR. SOULES: How many feel
4 that 51(c) should be changed in any manner in
5 response to the Cole case or Judge Kilgarlin's
6 observations or for any other reason? How
7 many feel that 51(c) should be left alone as
8 it is? That's unanimous.

9 The unanimous vote of this
10 committee is to leave TRAP 51(c) exactly as it
11 is, and the minutes will so reflect.

12 (At this time there was
13 lunch recess, after which time the hearing
14 continued as follows:)

15 MR. SOULES: Resume. All
16 right. Maybe we can do it. It would probably
17 be easier to get with fewer here. How many
18 can meet on August the 12th? August the 12th,
19 that's not quite 30.

20 MR. MCMAINS: What day is
21 it?

22 MR. SOULES: It's
23 Saturday.

24 MR. MCMAINES: Okay.

25 MR. SOULES: Saturday,

1 August the 12th. Any objection to Saturday,
2 August the 12th?

3 MR. TINDALL: One day
4 only.

5 MR. SOULES: One day only.
6 Probably one morning. It's just going to be
7 on this one topic. It may take a while.
8 Well, I think Justice Hecht may have some
9 other agenda. Okay. Saturday, August the 12th
10 8:30 to 6:30. There being no objection, that
11 will be the date and time of our next
12 meeting.

13 Let's see. Rusty, let's
14 just skip 52, since that's Hadley's rule and
15 go to 82 and come back to 52 so he can address
16 that. TRAP 82 -- Hadley, you want to make
17 some comments, don't you, on TRAP 52? That's
18 your -- isn't that your suggestion?

19 PROFESSOR EDGAR: I'm sure
20 I have some comments to make. What page is it
21 on?

22 MR. SOULES: Hadley, it's
23 on 221. And we're told that it's your
24 suggestion.

25 PROFESSOR EDGAR: 299, all

1 right.

2 MR. SOULES: No. TRAP 52.

3 MR. MCMAINS: Page 222 is
4 your letter.

5 MR. SOULES: 299, 52.

6 PROFESSOR EDGAR: All
7 right.

8 MR. SOULES: Shouldn't
9 these all be taken together?

10 PROFESSOR EDGAR: They
11 really should. Do you want to look at all of
12 them?

13 MR. SOULES: Let's look at
14 them together if they relate.

15 PROFESSOR EDGAR: All
16 right. Let me back up.

17 MR. SOULES: Okay. Get
18 the page numbers, and maybe we could get
19 our --

20 PROFESSOR EDGAR: Let me
21 make some preliminary statements first, if I
22 might.

23 MR. SOULES: Okay. Sure.

24 PROFESSOR EDGAR: At the
25 Appellate Advocacy Seminar in Corpus Christi

1 several weeks ago Richard Orsinger made a talk
2 that pointed out some problems that we frankly
3 had not considered when we recommended the
4 changes to Rule 299 that we adopted at our
5 last meeting concerning bench trials. And in
6 the process of talking -- and then at the bar
7 convention I went by Richard's office and
8 visited with him; and it is as a result of
9 that meeting with him that we recommended that
10 the Rule 299 might be changed a little bit and
11 that we include a new Rule 299(a). That also
12 requires that we do something with Appellate
13 Rule 52, so you need to look at all three of
14 them at the same time. And because of the
15 short time fuse under which we were working I
16 simply went by your office and left these for
17 Holly to include in our agenda.

18 Now, after I've said that,
19 let me say that I really haven't had a chance
20 to think about them since that time, but so
21 let's just start with Rule 299 and 299(a).

22 MR. SOULES: All right.
23 The pages on these, you need to put one mark
24 in at 342 and one mark in at 221. The TRAP
25 Rule is on 221, and the Rules of Civil

1 Procedure are on pages 342 through 345. 342,
2 page 342 and page 221.

3 PROFESSOR EDGAR: Okay.

4 Part of the problem that confronts many
5 lawyers who engage in bench trials, and this
6 certainly involves most lawyers involved in
7 domestic cases, are the types of situations
8 where the trial judge sometime includes
9 findings of fact in the judgment, and those
10 findings of fact may conflict with or be
11 separate and distinct from findings of fact
12 which are in the conventional findings of fact
13 under Rule 297 through 299, and what Rules 299
14 as we see here on page 342 and 299(a) on page
15 344 do is attempt to deal with that problem.

16 299 provides that if we
17 have a situation in which no element of a
18 ground of recovery or defense has been
19 included in findings of fact, for example, the
20 judgment may not be supported on appeal by a
21 presumption of finding upon any ground of
22 recovery or defense no element of which has
23 been included in the findings of fact, but
24 when one or more elements has been found so
25 and so and so forth which kind of tracks our

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1 jury trial rules, and so we've felt that that
2 needed to be included to make it clear that
3 you are pretty well tracking the same implied
4 finding rule that we have in jury trial.

5 All right. And this is
6 simply a matter of philosophy which Richard and
7 I agreed upon, and others here might disagree;
8 and this is Rule 299(a). "Findings of fact
9 and conclusions of law shall be filed with the
10 clerk as a document or documents separate and
11 apart from the judgment. Upon appeal if there
12 is a conflict between the judgment and any
13 findings of fact and conclusions of law, the
14 findings and conclusions will control."

15 There are some
16 intermediate appellate court decisions which
17 conflict with one another on that ground. The
18 reason for that is that under Rule 306 or
19 306(a) -- I've forgotten which -- up until
20 about 10 years ago there was a reference in
21 those rules to findings of fact, and it
22 literally said that the judgment should be
23 supported by among other things, findings of
24 fact. Some of the intermediate courts even
25 though that term was excised from the rules

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1 several years ago continue to recognize that
2 findings of fact in the judgment may control
3 over findings of fact which are under -- which
4 have been filed under Rule 297 and 299,
5 conflicts in some cases; and one of the
6 purposes of 299(a) is to attempt to eliminate
7 that conflict among the decisions.

8 JUSTICE MCCLOUD: I have
9 one question as far as the language. You
10 know, immediately it bothers me when you say,
11 "upon appeal if there's a conflict between the
12 judgment" as opposed to saying "a conflict
13 between findings of fact and conclusions of
14 law contained in the judgment." If I just
15 picked that up and I said "if there's a
16 conflict between a judgment, findings of fact
17 and conclusions of law," that the findings of
18 fact and conclusions of law would control.

19 MR. SOULES: For all
20 things. Not just on appeal.

21 JUSTICE MCCLOUD: That
22 would bother me. The fact 299(a) and 299, of
23 course, is talking about, strictly about
24 findings of fact someone reading that may not
25 not know that you're talking about that

1 particular trial judge who improperly in my
2 opinion puts his findings of fact in the
3 judgment. You see, it's separate and apart
4 from the judgment. That bothers me.

5 PROFESSOR EDGAR: Conflict
6 between findings contained in the judgment and
7 any findings of fact and conclusions of law.

8 JUSTICE MCCLOUD: Yeah. I
9 just wouldn't want it to say if some findings
10 of fact and that conflict with a judgment that
11 may not even have any findings of fact in it,
12 that the findings of fact would control. I
13 think we do not need get into that problem.

14 MR. BECK: Hadley, what if
15 the trial judge doesn't put in it in the
16 judgment, writes a short opinion or writes a
17 letter for the letters saying that is the
18 basis for decision and includes facts there?

19 PROFESSOR EDGAR: I don't
20 know.

21 MR. BECK: They're not
22 necessarily always put in the judgment. I
23 know judges write letters saying, "This is my
24 ruling and this is the basis."

25 MR. BISHOP: Trial judge's

1 actual written opinion.

2 JUSTICE MCCLOUD: As a
3 judge on the Court of Appeals I know this,
4 David: We have taken the position if the trial
5 judge has written you a letter that has
6 several things in it, we disregard it. If
7 it's not in a finding of fact, proper finding
8 of fact, and there are some cases that say you
9 can make those findings in the judgment, but
10 just if there is a letter, it may not be
11 right, but I know through the years
12 historically we have just said, "That's not a
13 finding of fact. That's a letter. He may
14 change. We don't know why."

15 But I see what you're
16 saying. You're saying if that judge puts
17 findings of fact in a judgment, then you
18 want -- I can't imagine one doing it both
19 ways.

20 MR. EDGARD: Strange
21 enough, those things do happen once in a
22 while.

23 JUSTICE MCCLOUD: In
24 saying if he's got findings of fact in his
25 judgment and he's properly filed findings of

1 fact under the rule, then those findings of
2 fact under the rule control.

3 PROFESSOR EDGAR: That was
4 the philosophy I suggested be included in
5 299(a).

6 JUSTICE MCCLOUD: It may
7 not be a problem. It just bothered me when I
8 first saw it when it said the judgment
9 findings of fact would control over a
10 judgment. It bothered me technically
11 hypothetically.

12 MR. BEARD: Findings of
13 fact and conclusions of law made at the
14 request of the party or this -- some of them
15 just file everything in there.

16 PROFESSOR EDGAR: That's
17 right. And that's exactly what we're trying
18 to say, that where a party goes through the
19 process of having the court recite findings of
20 fact and conclusions of law, then those
21 findings of fact and conclusions of law will
22 contain
23 over -- control over anything that's contrary
24 to that judgment.

25 MR. SOULES: Can we

1 discuss that right there? As far as I'm
2 aware, that would be the only places in the
3 rules where if something outside the trial
4 court's judgment controls the judgment, and
5 Judge Casseb has probably been on the trial
6 bench as much as anybody else in this room,
7 and it was my understanding that the judgment
8 was the termination of the trial by the trial
9 judge, and that judgment controls
10 inconsistencies elsewhere in the record and
11 that doesn't mean there's not error in the
12 record, but that the judgment should control
13 and not the findings and conclusions when
14 they're in conflict. And I think that's the
15 threshold problem with me with this, which
16 does control, and I thought the judgment was
17 the most controlling instrument in the trial
18 court process.

19 PROFESSOR EDGAR: If you
20 adopt that philosophy then, then if findings
21 of fact can be contained in the judgment or if
22 there are conflicts between the findings
23 contained in the judgment and those that are
24 individually contained in the record, where
25 are you? You've got to have -- I mean --

1 MR. SOULES: One of them
2 has got to control.

3 PROFESSOR EDGAR: What's
4 the purpose of having findings of fact and
5 conclusions of law if they're not going to
6 control over something that's contrary
7 somewhere else?

8 MR. SOULES: What's the
9 purpose of having a judgment if it's not going
10 to control?

11 JUSTICE MCCLOUD: But
12 these things are not supposed to be in the
13 judgment.

14 MR. TINDALL: Then let's
15 put that statement in that a judgment should
16 not contain findings of fact and conclusions
17 of law.

18 PROFESSOR EDGAR: That's
19 what the first sentence says, Harry.

20 MR. SOULES: This is the
21 penalty for doing something wrong.

22 JUSTICE MCCLOUD: Yeah.

23 MR. SOULES: Your judgment
24 doesn't control.

25 JUSTICE MCCLOUD: I'm not

1 saying it's wrong, but I mean, you have a
2 whole procedure for making findings of fact
3 and conclusions of law, and obviously with
4 that procedure that contemplates that you
5 don't put all of those things in the
6 judgment. The judgment is just so and so wins
7 how much money, and out here I'm going to set
8 out why all of these findings. I may have
9 many, many of them, and they really shouldn't
10 be in the judgment. Most judgments, and I've
11 seen it and probably did it, but most times
12 when you find a trial court putting findings
13 of fact in the judgment, they would be very
14 few. You may find four or five little things,
15 but I've never yet seen a judge who would do
16 it both ways. But you're telling me it does
17 happen, and I can see it does happen, you've
18 got a problem. And I agree that findings of
19 fact and conclusions of law ought to prevail
20 as to the findings of fact that might be in
21 the judgment, not the judgment itself insofar
22 as what the court who rules for and anything
23 like that.

24 MR. SOULES: Is it
25 analagous to like a jury verdict, if the judge

1 recites in his judgment the jury questions and
2 answers and does that wrong, the verdict still
3 controls?

4 JUSTICE MCCLOUD: I'd sure
5 think so.

6 MR. SOULES: Is that an
7 analagous situation? Maybe that is the case.
8 I don't know. I'm trying to get their thought
9 in my thought process.

10 JUSTICE MCCLOUD: I think
11 what we're trying to do here is just to take
12 care of that situation that should never come
13 up, but if it does, then we'd know that if he
14 filed the proper findings of fact and
15 conclusions of law you must base your theory
16 of recovery upon those findings that are found
17 properly at the request of the party it seems
18 to me.

19 MR. BEARD: Luke, I think
20 you can ignore the findings of fact in the
21 judgment.

22 JUSTICE MCCLOUD: I used
23 to think that, but you can't.

24 JUDGE BEARD: Otherwise
25 that part of judgment you're going to enforce

1 the control.

2 MR. SOULES: Well, let's
3 rewrite the second sentence. Should the
4 sentence be in 299(a) or 299? It doesn't have
5 anything to do with filing.

6 PROFESSOR EDGAR: It
7 doesn't have anything to do with 299 either.

8 JUSTICE CASSEB: It sure
9 doesn't.

10 PROFESSOR EDGAR: I
11 scratched my head and tried to figure out
12 whether I could put either one of these in one
13 or the other rulings, but they really don't
14 seem to fit anywhere else, because -- and we
15 now have the amended, the rules which we
16 passed at our last meeting. They're in here
17 somewhere. Just a minute. I saw them
18 earlier. Beginning on page 69. You see, Rule
19 296 deals with requests for findings. Rule
20 297 is the time to file. 298 are additional
21 or amended findings, and then we have Rule 299
22 which are omitted findings, and I'm open to
23 suggestion.

24 JUSTICE MCCLOUD: Let me
25 make another point here that bothers me a

1 little bit. I think what we're dealing with
2 here in 299 is this whole body of law that we
3 have once you get into the area of findings of
4 fact where, you know, you can only recover
5 upon the theory that you have within your
6 findings and things of this nature.

7 I know in appellate court
8 I don't think the appellate court is bound by
9 the court's conclusions of law. In other
10 words, even if the court fails to find a
11 conclusion of law or the court makes some sort
12 of improper conclusion of law, but the finding
13 of fact is very significant as far as the
14 appellate level is concerned, and even if the
15 finding of fact is improperly designated as a
16 conclusion of law if it's truly a finding of
17 fact.

18 PROFESSOR EDGAR: Rule 299
19 contains only the finding of fact.

20 JUSTICE MCCLOUD: What I
21 was thinking about is in this 299(a) where you
22 say, "Upon appeal if there's a conflict
23 between the judgment and any findings of fact
24 and conclusions of law" off the top of my
25 head, but I'm wondering if it would be just as

1 effective to say if on appeal if there's a
2 conflict between findings of fact and the
3 judgment and any findings of fact made. It
4 doesn't say on the record the conclusions of
5 law part is what I'm saying.

6 PROFESSOR EDGAR: I don't
7 have any problem with that personally; and
8 again, I'm having to rely upon the fairly
9 extensive conversation I had with Orsinger,
10 and for some reason I feel that we concluded
11 that that should be in there, although I
12 certainly agree with what you said. Here
13 we're talking about whether or not there is a
14 conflict, not whether the appellate court can
15 overturn a conclusion of law which it
16 certainly has the power to do, but whether or
17 not there is a conflict between a conclusion
18 of law that is contained in the judgment and a
19 conclusion of law that's contained in the
20 conclusion of law. Which will control? And
21 that's what this is directed to rather than
22 the appellate review of those matters.

23 JUSTICE MCCLOUD: I don't
24 think a conclusion of law makes that much
25 difference. I hadn't thought about this, but

1 it seems to me a conclusion of law is out
2 there and it enables the trial judge to render
3 a judgment for a certain party, and I think
4 the law is that that trial judge can
5 completely miss the conclusion of law, but if
6 he had findings of fact which will support the
7 judgment for plaintiff or a judgment for the
8 defendant even though he has incorrectly used
9 a conclusions of law, I think it's all right,
10 and I'm just wondering how all that fits into
11 this.

12 But I see what you're
13 concerned about, and that is the judge who
14 does put two sets of findings of fact out
15 there, what are you going to do, because the
16 judgment -- it has to be supported. The
17 theory of recovery has to be supported by
18 findings. You have got to use one or the
19 other, and what you're saying is, "What if
20 they're inconsistent?"

21 MR. MCMAINS: If you
22 re-draft that sentence, since you're talking
23 about -- you're obviously trying to make
24 reference to the first part. But if you say
25 that if there is conflict between findings of

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1 fact inserted in the judgment in violation of
2 the preceding sentence and separately filed
3 finding of fact and conclusions of law, then
4 the separately filed finding will be deemed
5 controlling for appellate purposes, for
6 appellate review purposes.

7 Number one, taking out the
8 issue of whether it's applicable for any other
9 purpose, such as you know, go out and say,
10 "Well, I can execute because this -- just for
11 reviewing purposes," and secondly, "I think
12 it's the conflict between a finding of fact,
13 whatever that is, and then that -- any
14 conceivable other finding whether it is
15 labeled a finding of fact or conclusion of
16 law." In other words, you don't have to put
17 findings of fact and conclusions as condemning
18 those in the judgment. The only thing really
19 condemned is the findings of fact.

20 PROFESSOR EDGAR: That's
21 what Justice McCloud was saying.

22 MR. MCMAINS: Can't you do
23 it that way? I mean, because you're making
24 clear that what you're trying to limit this to
25 is situations where the judge hasn't done what

1 he was supposed to do.

2 PROFESSOR EDGAR: True.

3 MR. MCMAINS: Does that
4 solve it?

5 PROFESSOR EDGAR: Yes.

6 Again, the only reservation I have is that I
7 remember we deliberated to some extent in his
8 office about this very matter, and he
9 convinced me that perhaps conclusions of law
10 should be inserted; and I'm sorry. I can't
11 recall the basis for that discussion.

12 MR. MCMAINS: But it's not
13 a conflict between the judgment. It's a
14 conflict between findings contained in the
15 judgment. They're not supposed to be there.
16 You're not really talking about the conflict
17 between the judgment. You're talking about it
18 between findings contained in the judgment.

19 PROFESSOR EDGAR: That
20 point is well taken. I think that's agreed on
21 that.

22 JUSTICE MCCLOUD: That's
23 real important.

24 PROFESSOR EDGAR: We've
25 agreed on that. And since I can't defend the

1 insertion of the conclusions of law --

2 JUSTICE MCCLOUD: Just
3 leave them in there. I don't think it does
4 any harm at all. Maybe it's the right thing.

5 MR. BECK: If you have an
6 agreed party on appeal, I mean, you have to
7 have some basis for appeal. Which conclusion
8 of law do they attach on appeal, the one in
9 the findings of fact and conclusions of law or
10 the one in the judgment? The reason you want
11 that in there is so the practitioner knows
12 what they're going to attack.

13 PROFESSOR EDGAR: That's
14 right. But the question is, should you put
15 conclusions of law?

16 MR. BECK: Well, you'll be
17 attacking conclusions of law as well as the
18 findings of fact in some instances.

19 JUSTICE MCCLOUD: The
20 judge if he has put it in his judgment, then
21 he's probably got findings of fact and
22 conclusions of law, and I think probably the
23 right thing to do is leave both findings of
24 fact and conclusions of law in there, make
25 sure we are talking about findings within the

1 judgment. I wouldn't want to get into the
2 position to say that a conclusion of law might
3 some way conflict with a judgment, that a
4 conclusion of law would prevail over the
5 judgment. That's the only thing.

6 PROFESSOR EDGAR: I look
7 at the judgment as who wins and what relief is
8 to be granted.

9 MR. SOULES: That's true.

10 PROFESSOR EDGAR: And the
11 findings of fact and conclusions of law seem
12 to track the legal bases upon which the
13 judgment from the trial court, so that really
14 doesn't bother me very much.

15 JUSTICE MCCLOUD: It only
16 becomes important in one sense, and that is
17 unless there are sufficient findings on a
18 sufficient theory to support that judgment,
19 then the appellant can reverse it. That's the
20 only reason it becomes important, and that has
21 to do with findings of fact and not
22 conclusions of law, but I think I'd leave them
23 both in there, because if the judge -- then
24 you're telling the appellant and the parties
25 that if both of them are out here or either

1 one out here in the judgment and he later
2 files proper findings of fact and conclusions
3 of law, we need to only have one set, and so
4 we're going to go with the set that properly
5 finds according to 297, urge on appeal, not to
6 argue conclusions of law evidence.

7 PROFESSOR EDGAR: I'm
8 trying to pick up what Rusty said a minute
9 ago. And as I reconstruct it this last
10 sentence of 299(a), and we're not -- where we
11 put it is another issue. But "If there is
12 conflict between findings of fact contained in
13 the judgment and any findings of fact and
14 conclusions of law, the findings and
15 conclusions will control for appellate
16 purposes." Is that?

17 MR. MCMAINS: Yes.

18 JUDGE BEARD: Voluntary
19 findings of fact and conclusions of law, or
20 only those that are mandated by request?

21 PROFESSOR EDGAR: Well --

22 JUDGE BEARD: Some judges
23 will file findings of fact and conclusions of
24 law without being forced to do so.

25 PROFESSOR EDGAR: Is that

1 right?

2 JUDGE BEARD: Some judges
3 voluntarily find findings of fact and
4 conclusions of law. The question is, are the
5 ones that are mandated by request or where the
6 judge just files it? And he sometimes put
7 letters in there that you could construe to be
8 findings of fact and conclusions of law.

9 PROFESSOR EDGAR: Maybe
10 I'm wrong. I don't think that letters that
11 happen to wind up in the record have any part
12 of the judgment or anything else, and I think
13 they're complete surplus and ought to be
14 disregarded. But if the court goes through
15 the formality of filing findings and
16 conclusions even though not having been
17 requested to do so and they're filed among the
18 papers as such, I'm not -- I would suppose
19 they should be given the same respect and
20 legal deference as those that had been
21 requested by a litigant.

22 JUSTICE MCCLOUD: I would
23 think so.

24 PROFESSOR EDGAR: We
25 haven't purported to deal with that. I don't

1 guess we could deal with every conceivable --

2 JUDGE BEARD: Well, I've
3 got one right now where they filed a letter
4 and informal request for findings of fact and
5 conclusions of law, and they're different from
6 the letter he wrote.

7 PROFESSOR EDGAR: Why
8 don't we if that is of sufficient concern to
9 the Committee, why don't we refer then to
10 findings of fact and conclusions of law filed
11 pursuant to Rule 296.

12 MR. BECK: I don't think
13 you ought to make that initial distinction,
14 because suppose you have ones that are
15 voluntarily by the judge. You're creating a
16 whole new set of problems.

17 PROFESSOR EDGAR: I'm
18 trying to talk about letters, I guess.

19 MR. BECK: Letters.

20 MR. TINDALL: Those would
21 predate the judgment generally. Can you make
22 a distinction between the ones that are made
23 before and after the signing of the judgment,
24 because you may have verbal rules from the
25 bench, letters, docket sheets?

1 PROFESSOR EDGAR: Harry,
2 Ken isn't here right now, but you deal in this
3 area a lot. Try and help us here.

4 MR. TINDALL: That's what
5 I'm saying. Anything that predates the
6 signing of the judgment is controlled by the
7 judgment. Anything after the signing of the
8 judgment in the event of an inconsistency be
9 ruled control of the judgment.

10 PROFESSOR EDGAR:
11 Certainly a letter contained in the court
12 papers even though it predates the judgment
13 shouldn't control.

14 MR. TINDALL: Anything
15 predating the judgment is controlled by the
16 judgment. Anything signed by the judge after
17 the judgment should govern in the event of an
18 inconsistency whether it's voluntary like Pat
19 said I can't foresee that in my county, but
20 maybe it does.

21 HONORABLE RIVERA: Luke, I
22 don't think we can ever qualify or limit or
23 contain the judgment. The judgment is the
24 order of the court, and that's it, period.

25 JUDGE CASSEB: Why are we

1 worrying about changing 299 and 298? That is
2 to make it fit into TRAP 52? Is this what it
3 is? Is that the reason for it?

4 MR. SOULES: I'm not
5 sure. We've got -- I see a problem here that
6 I don't think we intended. Under Rule 297 and
7 298, under 298 we've got a situation where a
8 judge can make findings of fact and
9 conclusions of law within so many days of a
10 request, but it doesn't say that those have to
11 be grounded on a request. And 297 though the
12 way we've got it written, we say, "when a
13 timely request is filed" and so forth. I
14 think that probably needs to be fixed. If a
15 judge can voluntarily make findings, he
16 doesn't have to do that after a request is
17 filed. And initial findings of fact and
18 conclusions of law our rules as they're now
19 written --

20 JUSTICE MCCLOUD: Luke,
21 297 orders the judge to do it. He's required
22 to do it under 297. That's not to say he
23 couldn't voluntarily do it.

24 MR. SOULES: Where does it
25 say that, though?

1 JUSTICE MCCLOUD: It says,
2 "when demand is made therefor."

3 MR. SOULES: What I'm
4 talking about doing on page 70 is strike "when
5 a timely request is filed," and just start
6 with "the court shall make and file its
7 findings of fact and conclusions of law within
8 20 days after a timely request is filed." If
9 he makes them voluntarily he's going to make
10 them within that time. If no request is
11 filed, it's within that number of days,
12 because that's the language that we have in
13 298, "The Court shall make and file any
14 additional or amended findings within 10
15 days," and don't predicate the initial
16 findings on a request being filed. Just give
17 the time. He's got to do it within a number
18 of days.

19 PROFESSOR EDGAR: "Within
20 20 days after a timely request is filed."

21 MR. SOULES: Yes. "The
22 Court shall make and file its findings," that
23 helps the language of 297, 298 fit voluntary
24 findings.

25 JUSTICE MCCLOUD: We're

1 moving a little fast here. I want to be
2 sure. In other words, my experience has been
3 that maybe I've seen one time in 27 years
4 where a judge has voluntarily filed findings
5 of fact. I sat as a trial judge for a number
6 of years, and I'm going to tell you that would
7 have been absolutely the last think I would
8 have ever done, and I don't know many -- in
9 other words, I don't want us to mess all of
10 this up to take care of a problem that may not
11 exist.

12 MR. SOULES: This doesn't
13 change the meaning of 297(a)

14 JUSTICE MCCLLOUD: All
15 right. 297, of course, is down there for the
16 very specific purpose of requiring that trial
17 judge, that reluctant trial judge as I was,
18 requiring me to file those, because I can just
19 rule for so and so, but now all of a sudden
20 that appellant is going to say, "All right.
21 I'm going to tie you to a theory now. I'm
22 going to go in there and find those things,
23 and I'll have something to argue on appeal,"
24 and he can.

25 Of course, the appellee

1 doesn't ever want any findings of fact or
2 conclusions of law, and the appellant
3 frequently doesn't request them, but if he
4 does request them timely, then these rules say
5 that trial judge has got to comply with that.

6 MR. SOULES: This doesn't
7 change that.

8 JUSTICE MCCLOUD: This
9 doesn't change it. That's the main problem.
10 That's the main thing we want to have is have
11 a handle on the trial judge who doesn't file
12 them when timely requested.

13 MR. SOULES: To force them
14 to be done within a period of time.

15 JUSTICE MCCLOUD: Correct.

16 PROFESSOR EDGAR: All
17 right. Now, we're going to change then 297(a)
18 on page 70 to read (a), "The court shall make
19 and file its findings of fact and conclusions
20 of law 20 days after a timely request is
21 filed."

22 MR. SOULES: That's right.

23 PROFESSOR EDGAR: That's
24 correct. Okay, now, we are going to leave 299
25 on page 342 as it is recommended, or I'm

1 trying to figuring out where we are.

2 MR. SOULES: That's what
3 is proposed, yes.

4 PROFESSOR EDGAR: All
5 right. Then I gather the sentiment here then
6 is to leave this last sentence of 299(a), the
7 new rule to read, "If there is a conflict
8 between findings of fact contained in the
9 judgment and any findings of fact and
10 conclusions of law, the findings and
11 conclusions if there is conflict between
12 findings of fact contained in the judgment in
13 violation of this rule and any findings of
14 fact and conclusions of law, the findings and
15 conclusions will control for appellate
16 purposes."

17 MR. SOULES: I think that
18 gets the general concept, but let me ask
19 this: Shouldn't we say when? We've been
20 trying to use "when" instead of "where" or
21 "if" in most texts. "When there is a conflict
22 between finding of fact contained in the
23 judgment and findings of fact," I think that
24 should. We could say findings of fact made
25 pursuant to Rule 297 and 298, because what --

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1 you've got to say what kinds of findings of
2 fact the second type are. They're not in the
3 judgment. Where are they, 297, 298 findings?
4 Meaning either the original findings or
5 additional findings.

6 I think the conclusions of
7 law part ought to come out. I think if you've
8 got a conclusion of law outside the judgment,
9 the judgment does conclude law, so we're
10 really only talking about fact disagreement,
11 fact finding disagreement, but that needs to
12 be debated. I'm just running through what are
13 my reactions to this sentence. And that's all
14 of them. "When there is conflict between
15 findings of fact contained in the judgment and
16 any findings of fact made pursuant to Rule 297
17 and 298, the findings" --

18 PROFESSOR EDGAR: Latter
19 findings.

20 MR. SOULES: -- "the Rule
21 297 and 298 findings will control for
22 appellate purposes."

23 PROFESSOR EDGAR: You
24 could say the latter finding rather than
25 having to repeat 297 and 298.

1 MR. SOULES: I don't know
2 which comes first in time and whether that
3 might be the way that ought to be construed.
4 I don't know.

5 MR. TINDALL: I think that
6 latter findings.

7 MR. SOULES: The latter
8 findings.

9 MR. TINDALL: So if you
10 have these letters that predate it, anything
11 like that it will be clear you're only talking
12 about matters after the judgment.

13 MR. SOULES: So if the
14 judgment contains findings later, then the
15 Rule 297 and 298 findings in time, the
16 judgment finding would control?

17 MR. TINDALL: Absolutely.
18 That's the last act that we know.

19 JUSTICE MCCLOUD: I think
20 a real good way to do this if we're really
21 into this is just not -- findings of fact or
22 conclusions of law found in the judgment just
23 don't mean anything. Just say something like
24 "The Court shall not make findings of fact and
25 conclusions of law in the judgment."

1 PROFESSOR DORSANEO: I
2 agree with that, because I think anything
3 else, then you're just doing (c).

4 JUSTICE MCCLOUD: I don't
5 know where you end it.

6 JUSTICE MCCLOUD: And then
7 if the judge did do it and then he later came
8 along and made findings of facts, then the
9 Court would look at that and say, "Well,
10 you're directed not to have found those in the
11 judgment and you have subsequently properly
12 found findings of fact and conclusions of
13 law. Therefore, the latter will prevail."
14 You don't think the Court would do that?

15 MR. SOULES: I think,
16 judge, the way you've got the right about
17 waiver all the time I think if the findings of
18 fact are in the judgment and nobody complains,
19 that they're going to control on appeal.
20 There not going to be nullities.

21 JUSTICE MCCLOUD: They are
22 right now.

23 MR. SOULES: They're not
24 going to be ignored on appeal.

25 PROFESSOR EDGAR: Luke, we

1 are just talking about where there are
2 findings of fact and conclusions of law. If
3 no findings or conclusions have been requested
4 in this, then the judgment whatever it recites
5 is the judgment whether it contains findings
6 of fact, contains conclusions of law. Then we
7 don't have this problem. It's only when
8 there's a conflict.

9 MR. SOULES: That's
10 right. But not what was being said here, that
11 we're just going to say, "Well, if you find
12 facts in the judgment, they don't count for
13 anything." That was something that followed
14 up, and that's what I was trying to react to.

15 JUSTICE MCCLOUD: There's
16 no provision for it. The provisions are if
17 you want findings of fact, you're supposed to
18 go to 297. You're supposed to make a
19 request. It's supposed to be a separate
20 instrument. We have got all the rules for it,
21 and then we're saying, "Yeah, but those trial
22 judges are not going to do it that way and so
23 we're going to have another procedure down
24 here to take care of all the trial judges who
25 don't read the rule and don't do it that

1 way."

2 MR. SOULES: Try this:
3 Start this rule with this sentence: "Findings
4 of fact shall not be recited in a judgment,"
5 just say it.

6 JUSTICE MCCLOUD: Yeah.

7 MR. SOULES: The second
8 sentence, "When there is a conflict between
9 findings of fact recited in a judgment" --

10 PROFESSOR EDGAR: In
11 violation of the rule.

12 JUSTICE MCCLOUD: I think
13 you're getting -- I think we're solving the
14 problem. I think trial judges will --

15 MR. SOULES: In violation
16 of this rule.

17 PROFESSOR EDGAR: Did you
18 say "when" or "if"?

19 MR. SOULES: "When."

20 PROFESSOR EDGAR: I'd say
21 "if," because you don't want to say -- you're
22 assuming there's going to be.

23 MR. SOULES: "If there is
24 a conflict between findings of fact recited in
25 a judgment in violation of this rule and any

1 findings of fact made pursuant to Rule 297 and
2 298, the Rule 297 and 298 findings will
3 control for appellate purposes. And I'd like
4 to move the first sentence that you've got
5 here in 299(a) to a different place." That
6 would be all there is, and we could rename
7 this something else.

8 JUSTICE MCCLOUD: Let me
9 tell you really why I do not like findings in
10 the judgment, and I've thought about it for a
11 long time, is frequently it's not well thought
12 out. Sometimes the attorney, the winning side
13 hasn't really looked at it that closely, and
14 the judge or someone may just put in a couple
15 of findings; and you've got another rule in
16 this whole business of findings of fact and
17 conclusions of law, and that is that that
18 judgment has to rest upon those findings. And
19 if there is no finding which supports that
20 theory of recovery, then that judgment can be
21 reversed.

22 So if you have got a
23 sloppily done finding, one or two little
24 findings up there and it may not suffice to
25 support a theory of recovery, you could have a

1 problem. And that's always bugged me, because
2 you might have a couple of findings in a
3 judgment and somebody say, "Well, that's the
4 findings of fact." That's fine and dandy if
5 he has enough findings to support a theory of
6 recovery.

7 MR. SOULES: Let me run it
8 by. If we say Rule 299(a) and the caption is
9 Findings of Fact Not to be Recited in a
10 Judgment, that's the caption, and then the
11 first sentence says, "Findings of fact shall
12 not be recited in a judgment." The second
13 sentence, "If there is a conflict between
14 findings of fact recited in a judgment in
15 violation of this rule and findings of fact
16 made pursuant to Rule 297 and 298" --

17 MR. TINDALL: Subsequent
18 to the judgment.

19 MR. SOULES: No. "Rule
20 297 and 298 findings will control for
21 appellate purposes." That's the whole thing.
22 It doesn't make any difference when the 297
23 and 298 --

24 MR. TINDALL: Luke
25 change --

1 MR. SOULES: Just a
2 second. I'll give you a chance to talk. But
3 I'm telling you what I'm putting on the table
4 is it doesn't make any difference when they're
5 made. If they're made under 297 and 298, they
6 control because the judgment is not supposed
7 to have anything in there anyway.

8 MR. TINDALL: What is
9 going to keep you from arguing that the letter
10 the judge sent out was not his finding of fact
11 and conclusions of law, the letter to the
12 lawyer is what his ruling is if you don't make
13 it subsequent in time, because there's all
14 that whole body of case law that anything he
15 does and if he puts his name on the judgment
16 is subsumed into the judgment, and if you
17 don't make it clear that the findings of fact
18 that you want to control the judgment are the
19 ones made subsequent in time, I think you're
20 just inviting --

21 PROFESSOR EDGAR: But the
22 requests aren't made in the 20-day date. The
23 judgment is signed. Look under 297.

24 MR. TINDALL: I understand
25 that.

1 MR. SOULES: Now, that's
2 something that I had not tuned in on until
3 right now because I've been listening to these
4 other things. The point in time with 297 and
5 298 findings would occur if they are to be
6 elevated to control the judgment. Should it
7 be -- should the point in time be only if
8 they're made after judgment that they
9 control?

10 MR. TINDALL: Sure.

11 MR. SOULES: Harry says
12 yes. Anyone have a contrary view?

13 PROFESSOR DORSANEO: The
14 problem that you would run into, as you can
15 see, you start with one judgment and then end
16 up with a different judgment, and I'm kind of
17 inclined to think that the findings should
18 control whether they're before or after that
19 judgment if they're really findings of fact
20 that are in a document separate and apart from
21 the judgment, that at least if it's --

22 MR. SOULES: If you're
23 analogizing to a jury verdict which finds the
24 facts in a jury case, the conclusions that the
25 findings of fact by the judge are the findings

1 of fact in a non-jury case, then the judge
2 enters a judgment, renders a judgment based on
3 the facts found by the jury in advance
4 rendition of that judgment, and I suppose if
5 you found facts in advance of -- in a non-jury
6 case in advance of the judgment, he should
7 have to render, either amend those findings,
8 or his judgment would be controlled by those
9 findings as far as the factual basis for the
10 judgment is concerned. If that's the case,
11 then whether the findings are made before or
12 after, the fact finding would still control
13 just like a verdict would control. Just
14 couldn't deviate from a verdict just because
15 he may recite a conflict in the judgment.

16 MR. TINDALL: There are
17 hundreds of cases where the actual judgment
18 didn't match the docket sheet, and they went
19 up on appeal and said, "Well, the judgment
20 controls." And I don't think you want to get
21 rid of that body of law.

22 JUSTICE MCCLOUD: If we're
23 getting rid of that body of law, we don't want
24 to.

25 MR. SOULES: Well, we're

1 just talking about 297, 298, findings of fact
2 and conclusions of law. We're not talking
3 about a docket sheet. I don't know. This is
4 a problem that's first surfaced to me.

5 MR. TINDALL: Or the
6 ruling from the bench on the record, what is
7 that?

8 MR. SOULES: Well, it's
9 not a 297 or 298 finding. It's sure not
10 that.

11 PROFESSOR BLAKELY: Is
12 your phrase in violation of this rule, you
13 want it to modify that are conclusions in the
14 judgment? That's what is in violation of the
15 rules, and it seems to be slipped over and
16 modified the fact that there's a conflict. I
17 didn't write your words down. As close as you
18 can to your fact that there are findings in
19 the judgment.

20 MR. SOULES: I got you.
21 The word of phrase is "conflict between
22 findings of fact recited in the judgment in
23 violation of this rule."

24 PROFESSOR BLAKELY: Well,
25 you say. You're looking at it. You can tell.

1 MR. SOULES: Yes, sir.

2 PROFESSOR BLAKELY: It's
3 clear to you that it modifies findings in the
4 judgment.

5 MR. SOULES: It says
6 findings of fact recited in the judgment in
7 violation of the rule. I can't snag it much
8 closer than that. How many feel findings of
9 fact made before the judgment should still
10 control the judgment? Five.

11 How many feel that the
12 findings of fact made before should not
13 control the judgment? Five. Let's vote
14 again, because this is too important for
15 people not to vote. Surely we have got
16 thought processes of the Committee going.

17 JUSTICE MCCLOUD: I think
18 findings of fact made pursuant to 297 control
19 whenever they're made.

20 MR. SOULES: Whenever they
21 are made. We're talking about findings of
22 fact that are made under 297 and 298.

23 JUSTICE MCCLOUD: There
24 won't be any findings of fact made prior to
25 the judgment. That won't be done once in

1 5,000 years.

2 PROFESSOR DORSANEO: Just
3 will be modified --

4 MR. TINDALL: Judge --

5 MR. SOULES: Just a
6 minute. One at a time. Hadley, you had the
7 floor, and then I'll get Harry, and then I'll
8 get Bill. Excuse me, please. We're trying to
9 make a record here.

10 PROFESSOR EDGAR: It seems
11 to me that if the Court enters findings and
12 conclusions and then sits down and redrafts
13 and enters a new judgment, then what a party
14 should do then perhaps is come back and seek
15 additional findings and conclusions. That's
16 what I'd do. I don't think it would be a
17 problem.

18 MR. SOULES: We're talking
19 about Rule 297 and 298 findings of fact. The
20 formal process has been exercised and a
21 judgment has been rendered afterwards.

22 JUSTICE MCCLOUD: After
23 the finding.

24 MR. SOULES: After the
25 findings of fact and conclusions of law. The

1 request was made before the judgment was
2 signed, which is possible. How many feel that
3 when that formal process has been gone through
4 and the judge has found facts formally that
5 those facts should control the judgment on
6 appeal? 14.

7 How many feel that Rule
8 297 and 298 findings of fact should control a
9 judgment only if they are made after the
10 judgment is signed? One.

11 MR. MORRIS: Luke, let me
12 tell you why. Because I think the later
13 pronouncement by a judge should be given
14 tremendous weight in our process. I think the
15 last pronouncement by a judge, and I hadn't
16 spoken out. I didn't think the vote was going
17 to be heavy in this direction. Having a judge
18 doing something later disregarding what his
19 last pronouncement is seems to me like a
20 dangerous precedent.

21 MR. SOULES: Let's now go
22 to try to get the language on the table to
23 vote. It was 14 to 1. Rusty.

24 MR. MCMAINS: I want to
25 ask you this one question. Is this an attempt

1 to recognize that there -- to ratify a process
2 of actually requesting findings and going
3 through the whole process before the
4 judgment?

5 JUSTICE MCCLOUD: No.

6 MR. MCMAINS: The reason I
7 ask is our prematurely filed documents rule
8 which we have deals with the efficacy of a
9 premature request. It doesn't deal with
10 premature findings. We don't have a rule that
11 deals with efficacy for premature findings
12 until right now if you make this change; and
13 that's all I'm trying --

14 MR. SOULES: Okay. We are
15 going to vote this change up or down and move
16 on with the agenda.

17 MR. MORRIS: Luke, let me
18 ask you one more thing.

19 MR. SOULES: Okay.

20 MR. MORRIS: In determine
21 on this, how do you now have 297 worded?

22 PROFESSOR EDGAR: Look on
23 page --

24 MR. SOULES: We have got
25 to keep up everybody.

1 MR. MORRIS: But Luke has
2 made further changes today.

3 PROFESSOR EDGAR: Look on
4 page seven.

5 MR. SOULES: You will
6 strike "when timely request is filed."

7 PROFESSOR EDGAR: Strike
8 "when timely request is filed." Start
9 beginning with "the Court," and then the third
10 line will be 20 days after a timely, strike
11 "such" and insert "a timely request." It
12 doesn't change the meaning at all.

13 MR. SOULES: Okay. Now
14 we're going to move on with this, to vote on
15 this whether we adopt this 299(a); and I want
16 to leave this first sentence out simply
17 because I think we could relocate it to a
18 better place.

19 The proposition that I
20 have tried to collect here is this: Rule
21 299(a), caption, Findings of Fact not to be
22 Recited in a Judgment, text, "Findings of fact
23 shall not be recited in a judgment," first
24 sentence. The second sentence, "If there is a
25 conflict between findings of fact recited in a

1 judgment in violation of this rule and
2 findings of fact made pursuant to Rule 297 and
3 298, the Rule 297 and 298 findings will
4 control for appellate purposes." Now that's
5 the proposition, to recommend to the Supreme
6 Court the adoption of that rule.

7 Now discussions on that.
8 Being no further discussion, those in favor of
9 recommending those changes to the Supreme
10 Court of Texas say aye.

11 ADVISORY COMMITTEE: Aye.

12 MR. SOULES: Opposed? Let
13 me see hands, because there is some dissent.
14 Those in favor? 13. Those opposed? Two.
15 Now on the first sentence --

16 PROFESSOR EDGAR: Luke,
17 I've kind of looked over the other rules that
18 we have, and they merely -- if you look at
19 those rules that we've already adopted, this
20 sentence really doesn't fit any of them; and I
21 would suggest that what we do is --

22 MR. SOULES: If you'll put
23 it between (a) and (b) on Rule 297 and relabel
24 (b) to (c) it will fit, and that's --

25 PROFESSOR EDGAR: That's

1 on Page 70?

2 MR. SOULES: On page 70.

3 PROFESSOR EDGAR: Well,
4 but Rule 297 is talking about time to make and
5 file finding. You see. That's the way we've
6 got it headed. This is talking about where
7 you file it and what it's to contain. And I
8 was going to suggest that what we do is let
9 this first sentence be Rule 299(a) and then
10 what we just voted on as 299(a), let that be
11 299(b).

12 MR. SOULES: Okay. Well,
13 the reason that I thought it fit there was
14 because the last sentence of (a) says, "The
15 Court shall cause a copy of the findings and
16 conclusions to be mailed to each party to the
17 suit." And to me the next logical concept to
18 follow that would be that the clerk shall file
19 them separately, but it seems to fit there,
20 but if it doesn't fit, it doesn't fit. So it
21 sort of tells what the Court is supposed to do
22 with its findings and conclusions. That's
23 already in (a), and then what does the clerk
24 do with them. But if it's your recommendation
25 it be made a separate rule, that's fine with

1 me.

2 PROFESSOR EDGAR: I so

3 move.

4 MR. BECK: Second.

5 MR. SOULES: The first

6 sentence.

7 PROFESSOR EDGAR: First

8 sentence, 299(a).

9 MR. SOULES: 299(a), "The
10 findings of fact and conclusions of law shall
11 be filed with the clerk of the court as a
12 document or documents separate and apart from
13 the judgment," period. In favor say aye.

14 ADVISORY COMMITTEE: Aye.

15 MR. SOULES: Opposed? The
16 next would be Rule 299(b), which is what we
17 just voted on.

18 Okay. Hadley, now go to
19 Rule 52.

20 PROFESSOR EDGAR: What
21 page is that on?

22 MR. SOULES: It's on 221.

23 PROFESSOR EDGAR: All
24 right. Now, in continuing my discussion with
25 Richard Orsinger he pointed out that when you

1 look at Appellate Rule 52, the general rule,
2 "In order to preserve a complaint for
3 appellate review a party must have presented
4 to the trial court a timely request," so on,
5 so on and so forth.

6 Now, in a non-jury case
7 what does that do to a complaint concerning
8 factual insufficiency or against the great
9 weight and preponderance? If you go back and
10 look at Rule 324 of the Rules of Civil
11 Procedure one would conclude that a motion for
12 new trial is not required, and that's really
13 kind of been what I've always labored under,
14 that impression, but there are some courts
15 that have taken the position that because of
16 Appellate Rule 52(a) if you have not made a
17 complaint somewhere in the trial court about
18 factual sufficiency in a bench trial you've
19 waived your right to complain, and I think
20 when you look at 52(a) and completely ignore
21 Rule 324(b) or (a) and (b) one could make that
22 argument, although I am troubled by it.

23 So what I'm trying to do
24 here and the purpose of 52(d) is to make it
25 clear that in a non-jury case you're

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1 complaining of factual sufficiency or against
2 the great weight, you do not need to comply
3 with 52(a), that is, you do not have to
4 complain in the trial court under 52(a) in
5 order to complain in these matters. That's
6 the purpose of it.

7 MR. SOULES: All right.
8 Why do we put in there in non-jury case?

9 329 --

10 JUSTICE MCCLOUD: It says
11 that in there.

12 MR. SOULES: Rule 324(a)
13 says appoint in a motion for new trial if not
14 a prerequisite to complain on appeal, either a
15 jury or a non-jury case and so forth.

16 PROFESSOR EDGAR: That's
17 right.

18 MR. SOULES: Why shouldn't
19 this rule be both jury and non-jury.

20 MR. MCMAINS: Because it's
21 different. Because the (b) sections do
22 require motion for new trial.

23 JUSTICE MCCLOUD: 224(b)
24 requires a motion for new trial on factual
25 insufficiency, greater weight and

1 preponderance. And all we're trying to say
2 here is we're trying to eliminate the apparent
3 confusion between 324 and Appellate Rule
4 52(a). That's what it's for.

5 MR. SOULES: Thank you,
6 Hadley. Now I understand.

7 JUSTICE MCCLOUD: I don't
8 quite follow that. You said 324 requires a
9 motion for new trial?

10 PROFESSOR EDGAR: In a
11 jury case involving factual insufficiency,
12 greater weight, yes, sir.

13 JUSTICE MCCLOUD: All
14 right.

15 MR. SOULES: Okay. Those
16 in favor of the proposed change to 52(d),
17 first is there further discussion?

18 PROFESSOR DORSANEO: We
19 already have some language under the letter
20 (d) in Rule 52. I don't know whether this is
21 meant to be added to that or whether it's
22 meant to be (e). What it says now is a
23 necessity for motion for new trial, the
24 subheading is Necessity for Motion for New
25 Trial in Civil Cases. And then it says a

1 point in a motion for new trial is a
2 prerequisite to appellate complaint in those
3 instances provided in Paragraph B of Rule 324
4 of the Texas Rules of Civil Procedure. All of
5 this could be rolled together in there, but
6 I'm basically taking it as a cross reference
7 ought to be adequate as it is stated now, but
8 I would never be opposed to clarification.

9 PROFESSOR EDGAR: I agree
10 with you that -- I don't have a problem with
11 this personally, Bill, but there are some
12 courts that are troubled by it, and they're
13 taking the position that by failing to include
14 a factual sufficiency point in a motion for new
15 trial waives an appellate complaint because of
16 the mandate of 52(a) in spite of 52(d).

17 PROFESSOR DORSANEO: What
18 I would recommend, Hadley, think about this:
19 Changing the current 52(d) by deleting the
20 words "necessity for" such that the subheading
21 of 52(d) is simply Motion for new Trial in
22 Civil Cases, and I'm not even wedded to that
23 at all, having it say what it says now, and
24 then "a party desiring to complain on appeal
25 in a non-jury case," which is further

1 amplification of what it says by indirection
2 now.

3 PROFESSOR EDGAR: I have
4 no problem with that.

5 JUSTICE MCCLOUD: Let me
6 ask this question: I remember this to be --
7 under 324, a motion for new trial required,
8 and I know this has been written on, it seems
9 to me like -- it seems like I might have
10 written an opinion on it on the Supreme
11 Court. I can't remember. But it says, "A
12 complaint of factual insufficiency the
13 evidence to support a jury finding."

14 MR. MCMAINS: That's
15 right.

16 JUSTICE MCCLOUD: If you
17 don't have a jury case, if you're in a
18 non-jury case, then this 324 obviously says
19 you have to find a motion for new trial if you
20 want to complain about factual insufficiency
21 in a jury finding or if you want to complain
22 against the greater weight of the evidence in
23 a jury finding. I believe that --

24 PROFESSOR EDGAR: The
25 problem is Appellate Rule 52(a), if you'll

1 look at Appellate Rule 52(a), it basically
2 says that you can't complain on appeal of
3 anything that you haven't caused to file
4 judgment attention in the court below. Well,
5 if you're going to complain of factual
6 insufficiency in a bench trial --

7 JUSTICE MCCLOUD: 324

8 doesn't require it.

9 PROFESSOR DORSANEO: 52(a)
10 might.

11 PROFESSOR EDGAR: 52(a)
12 there are courts that say that that does
13 require you to complain by motion for new
14 trial. That's what we're trying to clear up.

15 JUSTICE MCCLOUD: Okay.

16 PROFESSOR DORSANEO: I
17 think you did write the opinion, Howell vs.
18 Coca-Cola Bottling.

19 JUSTICE MCCLOUD: It seems
20 real familiar to me.

21 MR. SOULES: This gets the
22 job done. Are we ready to vote on this? How
23 many are in favor of the proposed change
24 to --

25 PROFESSOR EDGAR: Bill

1 made some suggestion, didn't he, that we tie
2 in the first sentence of what is now 52(d)
3 with my recommendation? Didn't he suggest
4 that we tie those in in some way?

5 MR. SOULES: Yes. But the
6 Chair has not gotten the message in words yet,
7 and I'm trying to get it to a vote.

8 PROFESSOR EDGAR: I move
9 the recommendation on page 221.

10 MR. SOULES: Can we do
11 that as a second sentence rather than another
12 paragraph?

13 PROFESSOR EDGAR: That's
14 the way I had suggested it.

15 MR. SOULES: The motion is
16 that we amend Rule 52(d) by adding another
17 sentence at the end, the text of which is
18 found on page 221 of the written agenda.
19 Those in favor say aye.

20 ADVISORY COMMITTEE: Aye.

21 MR. SOULES: Opposed?
22 That's unanimously recommended. Okay. That
23 takes care of that report. I think maybe
24 we'll divert from the TRAP rules for a moment,
25 if we can. Let's see.

1 Let's go ahead and take
2 TRAP Rule 90, which is publication rule. It
3 says automatically when the Supreme Court
4 grants a writ, the Court Appeals shall cause
5 an opinion to be published, page 224.

6 MR. MCMAINS: We already
7 discussed this the last time, and it is
8 already recommended.

9 MR. SOULES: Okay.

10 MR. MCMAINS: In one
11 respect the question is whether or not the
12 Supreme Court is willing to pass on the issue
13 of publication.

14 MR. SOULES: That's
15 right. This says that they --

16 MR. MCMAINS: Or whether
17 or not it's going to be automatic.

18 MR. SOULES: This rule is
19 that it be automatic.

20 MR. MCMAINS: This
21 proposed rule or suggestion is that it be
22 automatically done.

23 MR. SOULES: Those in
24 favor say aye.

25 ADVISORY COMMITTEE: Aye.

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CERTIFIED COURT REPORTING

1 MR. SOULES: Opposed?

2 JUSTICE MCCLOUD: Wait a
3 minute. I have got to ask a question. I'm
4 looking down here at (h). That's what we're
5 talking about on the existing rule?

6 MR. SOULES: Yes, sir.

7 JUSTICE MCCLOUD: If I'm
8 reading that, and apparently I'm not reading
9 it right, it says "order the Supreme Court
10 upon the grant or refusal of an application
11 for writ of error," either grant or refusal,
12 outright refusal or just by --

13 MR. MCMAINS: It's on page
14 104. Page 104 is what we have passed, and
15 actually what is reproduced, re-put in here,
16 they didn't make the change we made earlier in
17 the rule.

18 JUSTICE MCCLOUD: The way
19 that reads, you know, you can have the NRE
20 case and it's just published.

21 MR. MCMAINS: That's
22 right.

23 JUSTICE MCCLOUD: And God
24 knows if that's got to have all of those
25 issues.

1 MR. MCMAINS: That's
2 exactly what the issue is. That's what we
3 passed on last time.

4 JUSTICE MCCLOUD: You want
5 all that junk published? I'd like to have a
6 minute or two. A lot of stuff out there.
7 There are 7,000 opinions or 7,000 cases a year
8 disposed of by the Courts of Appeals in
9 Texas. And if they're all published, there's
10 not enough people in this -- you couldn't get
11 enough law book space.

12 MR. SOULES: This is only
13 if an application for writ of error is acted
14 on by the Supreme Court.

15 JUSTICE MCCLOUD: Is
16 granted?

17 MR. SOULES: Acted on.

18 PROFESSOR EDGAR: I
19 thought our concern was that if it was
20 granted. That's what we wanted to
21 accomplish.

22 JUSTICE MCCLOUD: What I'm
23 reading says whether it's granted or whether
24 it's refused.

25 MR. SOULES: Hold on just

1 a minute. Let me get the Committee to order.
2 What is on 224 has been erroneously reproduced
3 in my office, and I apologize. What we should
4 be looking at is page 104. And does that on
5 page 104 correctly state the vote of the
6 Committee last time?

7 MR. MCMAINS: It was the
8 last phrase. That's what we don't know. What
9 I think there's a dispute over is whether the
10 last phrase was in there.

11 MR. SOULES: Whether it
12 would be automatic?

13 MR. MCMAINS: Apply for it
14 or whether or not it happens automatically,
15 and that's the issue. And I don't recollect
16 what the vote was.

17 MR. SOULES: We voted
18 after you left.

19 MR. BECK: Let me
20 understand. Are you proposing that we drop
21 the last phrase, quote, "if the Supreme Court
22 so order," and make it mandatory?

23 MR. MCMAINS: Yes. I
24 mean, that I think is what I thought that we
25 had actually decided on.

1 MR. SOULES: That's
2 right.

3 MR. BECK: That's the
4 issue.

5 MR. MCMAINS: The issue is
6 whether or not that is in fact what we decided
7 on.

8 JUSTICE MCCLOUD: The
9 issue is if it's granted, if application for
10 writ is granted or if application is refused
11 or --

12 MR. MCMAINS: Or denied.

13 JUSTICE MCCLOUD: Denied?

14 MR. MCMAINS: Yes.

15 JUSTICE MCCLOUD: Not
16 denied.

17 MR. MCMAINS: Yes.

18 Denied.

19 MR. SOULES: We voted on
20 that, and we carried it the last meeting. The
21 issue to be carried over was --

22 MR. MCMAINS: The last --

23 MR. SOULES: -- "an
24 opinion previously unpublished shall forthwith
25 be released by the clerk for publication,"

1 which would be automatic or if we left "by the
2 clerk of the Court of Appeals," and delete --
3 whether we would delete "if the Supreme Court
4 so orders." Is the vote of the Committee
5 that -- just take a vote.

6 MR. TINDALL: Can we
7 discuss it?

8 MR. SOULES: Shall the
9 publication be automatic or only if the
10 Supreme Court so orders? How many vote that
11 it should be automatic?

12 PROFESSOR EDGAR: There's
13 bound to be a middle ground here we can
14 discuss, Luke. For example, it seems to me
15 that if the Supreme Court wants to order
16 anything published, it ought to be able to do
17 so regardless of the action, grant, denial or
18 refusal.

19 MR. SOULES: Right.

20 PROFESSOR EDGAR: But it
21 seems to me that if the court grants an
22 application, then it ought to be published,
23 because then the reader will have something to
24 fall back on by a published opinion of the
25 Court of Appeals.

1 MR. SOULES: The Chair is
2 going to call the Committee to order. The
3 grant or refusal of an application, I believe
4 the Committee has voted to cause that to
5 automatically be published if the Supreme
6 Court so orders.

7 I'm going to take this a
8 piece at a time. If there's an outright
9 refusal, then that opinion is like the opinion
10 of the Supreme Court of Texas, or if there is
11 a grant, is it the vote of this Committee that
12 under those circumstances the opinion is to be
13 automatically delivered for publication by the
14 clerk of the Court of Appeals? Those in favor
15 show by hands. Okay. That's unanimous.

16 Now, is there someone who
17 voted at the last meeting to include denial in
18 this text who would like to move for
19 reconsideration of that. There being no
20 motion, then --

21 PROFESSOR DORSANEO: I
22 don't remember, but I'll move for
23 reconsideration.

24 JUSTICE MCCLOUD: I'd like
25 to be heard on that as a representative of the

1 Court of Appeals. If I understand what you're
2 saying is that every opinion that is written
3 in this state by the 14 Courts of Appeals any
4 time they're appealed, and hundreds of
5 thousands are, that even if it's what we call
6 an NRE, they're either going to be granted,
7 they're going to be refused, or they're going
8 to be refused NRE. And what you're telling me
9 is every opinion is going to be published.
10 It's either going to be granted published,
11 it's going to be refused published, or it's
12 going to be denied published. So just take
13 all that junk out and say every case is going
14 to be published.

15 MR. SOULES: No, judge.
16 Only a small percentage of the cases decided
17 in the courts of appeals go to the Supreme
18 Court on appeal. This is only in the case --

19 MR. TINDALL: That wasn't
20 the vote in May, was it?

21 MR. SOULES: Yes.

22 MR. TINDALL: That's not
23 what the minutes reflect.

24 JUSTICE MCCLOUD: Are you
25 talking about an application being filed or --

1 MR. TINDALL: Page 104 --

2 MR. SOULES: Hold

3 everything.

4 (At this time the
5 Committee was cautioned to speak one at a time
6 by the court reporter.)

7 MR. TINDALL: 104 just
8 talks like it was purely -- the comments was a
9 textural corrective change only, which
10 obviously meant you put "denial" in place of
11 "NRE," and that would make it at the option of
12 the court.

13 JUSTICE MCCLOUD: Yes.

14 MR. TINDALL: Now to say
15 that you're going to mandate the publication
16 of every Court of Appeals opinion when they
17 deny a writ is unheard of.

18 JUSTICE CLINTON: Let's
19 all go buy some stock in a publishing
20 company.

21 PROFESSOR DORSANEO: I
22 don't think we ever voted on this --

23 MR. BECK: The only issue
24 remaining as I understand it is whether or not
25 the Supreme Court is going to -- must publish

1 the order, publish the opinions when there's
2 been a denial.

3 MR. SOULES: Yes.

4 MR. BECK: Or whether or
5 not they have discretion to so order. That to
6 me is the only remaining issue.

7 MR. SOULES: How many feel
8 that if the writ is denied, that when a writ
9 is denied the Court of Appeals opinion should
10 be automatically published? Show by hands.
11 None.

12 MR. MCMAINS: When the
13 application is acted on on merit.

14 MR. SOULES: Yes. None.
15 No one feels that way. So we'll take out
16 denial.

17 JUSTICE MCCLOUD: Thank
18 you.

19 PROFESSOR EDGAR: Look,
20 Luke, here is what we've done. At our meeting
21 at page 104 we voted in May to make the change
22 that appears here under subdivision (h).

23 MR. SOULES: Yes.

24 PROFESSOR EDGAR: Which if
25 the Supreme Court so orders it, it can order

1 any of these Courts of Appeals opinions to be
2 published. That's what this says.

3 MR. SOULES: Okay.

4 PROFESSOR EDGAR: And I
5 think that's what we want to do. We haven't
6 voted to change that. If the Supreme Court
7 wants them published, then the Supreme Court
8 can do so. However, we have just voted
9 earlier that we are recommending to the court
10 that if the Court grants or refuses an
11 application, then it be mandatorily
12 published. Now, that's what I thought we were
13 doing.

14 JUSTICE MCCLOUD: That's
15 all right.

16 MR. BECK: That's what we
17 agreed on.

18 PROFESSOR EDGAR: That's
19 it.

20 MR. SOULES: How do we fix
21 the text here? Do I take out "denial"?

22 PROFESSOR EDGAR: You have
23 to have two sentences.

24 MR. BECK: Two sentences.

25 PROFESSOR EDGAR: You're

1 going to have first "Upon the grant or refusal
2 of an application for writ of error an opinion
3 previously unpublished shall forthwith be
4 released for publication," period. Then
5 you'll have another sentence reading just as
6 it reads here on page 104.

7 JUSTICE MCCLOUD: "Upon
8 denial the opinion previously unpublished" --

9 MR. TINDALL: -- "may be
10 released for the publication."

11 MR. SOULES: Let me put it
12 in the record here so that Holly can get it.
13 She'll be having to get this out pretty
14 quick. (h) then will say, "Order of the
15 Supreme Court. Upon the grant or refusal of
16 an application for writ of error an opinion
17 previously unpublished shall forthwith be
18 released by the clerk of the court of appeals
19 for publication," period. The second
20 sentence, "Upon the denial of an application
21 for writ of error an opinion previously
22 unpublished shall forthwith be released for
23 publication if the Supreme Court so orders."

24 MR. BEARD: Luke, let me
25 suggest upon the denial or dismissal, WLJ in

1 there that might need to be published, denial
2 or dismissal.

3 MR. SOULES: Or
4 dismissal.

5 MR. BEARD: And the
6 petition might dismiss one if the court
7 decides.

8 MR. SOULES: Be released.

9 JUSTICE MCCLOUD:
10 Dismissal that they want it published.

11 MR. SOULES: Those in
12 favor say aye.

13 ADVISORY COMMITTEE: Aye.

14 MR. SOULES: Opposed?
15 Okay. That carries unanimously. That changes
16 TRAP 90, what will be two sentences under
17 (h).

18 Okay. David, we need to
19 get to your report. Why don't we go ahead and
20 get to the items that you are here to report
21 on.

22 MR. BECK: Let me start
23 first on the suggestion by Justice Hecht with
24 respect to Rules 99 through 107. I don't know
25 where they are in the notebook, Holly. Do you

1 know, the proposal that he made on May 25th,
2 1989?

3 PROFESSOR CARLSON: It's
4 on the last page.

5 MR. BECK: Basically what
6 Justice Hecht points out is a local Justice of
7 the Peace complained that there are
8 inconsistencies in the requirements for
9 service of citations under Rules 99
10 through 107 and Rule 533 through 536 through
11 the Texas Rules of Civil Procedure. We had
12 recently rewritten and amended rules 99
13 through 107. So the recommendation of our
14 committee is that the subcommittee of the
15 Supreme Court Advisory Committee that deals
16 with Rule 533 through 536 look at those rules,
17 because they haven't been amended in 40 years,
18 to try to bring them in line with the
19 amendments we made with the service rules in
20 Rules 99 through 107. So they really need to
21 look at the Justice of the Peace rules. We
22 don't need to look at Rules 99 through 107,
23 because we just did that last year. That is
24 our recommendation.

25 MR. SOULES: We need to

1 assign to the proper standing subcommittee
2 Rule 533 through 536 to be conformed to the
3 changes made to Rule 99 and 107; is that
4 right?

5 MR. BECK: Yes.

6 MR. SOULES: They are so
7 assigned.

8 MR. BECK: The next
9 proposal is item agenda Item Number 10, and
10 this was a special subcommittee point with
11 respect to Rules 38(c) and 51(b). I want to
12 make clear that I have not conferred at length
13 with Broadus Spivey, so I'm just going to say
14 I'm talking for myself.

15 PROFESSOR EDGAR: What
16 page?

17 MR. BECK: It's a
18 carry-over from our last meeting.

19 MS. HALFACRE: It starts
20 at 243.

21 MR. SOULES: Page 243. It
22 starts "Direct Actions."

23 MR. BECK: Basically what
24 this proposal does is allow for the filing of
25 direct actions against either of the insurance

1 companies. Rule 38(c) contains the
2 prohibition against that, the joiner insurance
3 company tort action. Rule 51(b) contains an
4 identical sentence which also contains the
5 same prohibition. It's my understanding the
6 Administration of Justice Committee had a
7 similar proposal before it. In the past year
8 a subcommittee was appointed to consider the
9 proposal, and no recommendation was ever
10 forthcoming.

11 I personally am unaware of
12 what the impetus is for this proposed rule
13 change, so I really don't have any
14 recommendation. I guess what I need is a
15 reading from this committee as to what they
16 feel about the concept before we start trying
17 to amend our rules.

18 MR. SOULES: Broadus
19 Spivey in the 1987 session of this committee
20 moved that a special committee be appointed to
21 study whether to change these rules to permit
22 direct actions. And that's when I made the
23 assignment. It was his.

24 MR. MCMAINS: Actually you
25 were asked to do it, I think, by Justice

1 Kilgarlin.

2 MR. SOULES: I don't
3 remember it that way. But that doesn't mean
4 that's not the way it came up. I thought
5 Broadus raised it. But anyway, because
6 Broadus spoke about it he was one of the
7 chairs of the committee appointed, and I felt
8 that David would be helpful also. I don't
9 think there's been any real study done since
10 the suggestion was made, but I would like to
11 get it -- I would like to deal with it as an
12 agenda item. It's been here for two years,
13 and it hasn't caught enough interest to move.
14 That really originated here. I'd like for
15 someone to suggest how we deal with it as an
16 agenda item.

17 PROFESSOR DORSANEO: I
18 spoke with Doak earlier. Apparently the
19 amendment, it just died a natural death in the
20 Administration of Justice Committee, and there
21 apparently is not a real ground swelling
22 enthusiasm there either.

23 MR. BISHOP: It originated
24 in this committee, and we were asked to take a
25 look at it, and there were no reports made on

1 it.

2 MR. SOULES: Does anyone
3 have a recommendation on whether to amend
4 these rules to permit direct actions in
5 Texas?

6 MR. TINDALL: I move we
7 table it.

8 MR. SOULES: I don't want
9 to table. I want to act on it.

10 MR. MCMAINS: Motion to
11 reject.

12 JUSTICE MCCLOUD:
13 Seconded.

14 MR. SOULES: The motion is
15 made to reject the change to permit direct
16 actions. Those in favor of rejecting say
17 aye.

18 ADVISORY COMMITTEE: Aye.

19 MR. SOULES: Opposed?

20 MR. MORRIS: No.

21 MR. SOULES: One no. The
22 ayes have it.

23 MR. BECK: The next rule
24 is Rule 57 on page 316 of the notebook; and
25 basically what this proposal does is require

1 attorneys to list their telecopier numbers
2 whenever they file a pleading in the lawsuit,
3 because we're now required to list our phone
4 numbers and addresses and so on. You'll also
5 recall the last meeting we agreed to amend
6 Rule 21(a) to allow for the giving of notice
7 by the telecopier, so it seems logical that if
8 we're going to permit that we ought to at
9 least make it easier mechanically for parties
10 to learn what the telecopier numbers are of
11 opposing counsel. So our subcommittee
12 recommends this rule be changed and be
13 adopted.

14 MR. SOULES: Let's see.
15 The text appears where?

16 MR. TINDALL: Page 318.

17 MR. SOULES: 318.

18 MR. SOULES: Any

19 discussion?

20 PROFESSOR DORSANEO: I'm
21 against that.

22 MR. SOULES: Any

23 discussion? Those in favor say aye.

24 ADVISORY COMMITTEE: Aye.

25 MR. SOULES: Opposed. The

1 ayes have it.

2 MR. BECK: The next
3 proposal is the special appearance rule, Rule
4 120(a), which I believe is on page 319. At
5 our last meeting I was asked to try to put
6 into writing the substance of a lot of the
7 conversation we had; and just so you'll know
8 what I have done, I went back and looked at
9 the venue rules in an effort to see what was
10 permitted under Rule 87. And I tried to make
11 it as consistent with that rule as possible so
12 we didn't have one set of proceedings for
13 venue and another set of proceedings for
14 jurisdictional hearings.

15 Basically what this change
16 does, it allows the use of affidavits in
17 hearings on special appearances. It does not
18 in any way and is not intended to alter in any
19 way the burden of proof in a special
20 appearance proceeding. And the reason for
21 this general interest in the proposal is
22 really to try to cut down on litigation
23 expenses. And so again, there's no
24 subcommittee that analyzed this. I was just
25 asked to put this in writing.

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1 So my view would be that
2 we adopt the change of this type for Rule
3 120(a) and we allow the use of affidavits in
4 venue proceedings, we allow the use of
5 affidavits in summary judgment proceedings,
6 and it seems to me logical to allow use of
7 affidavits in jurisdictional hearings.

8 JUDGE CASSEB: You're just
9 adding the paragraph then?

10 MR. BECK: Yes, sir.

11 PROFESSOR EDGAR: I notice
12 you're also still permitting oral testimony.

13 MR. BECK: That's right.

14 PROFESSOR EDGAR: So it
15 does differ from the venue.

16 MR. BECK: That's right.
17 In a jurisdictional hearing where a defendant
18 is coming in saying that you have no
19 jurisdiction, independent jurisdiction over
20 me, your witnesses are probably going to be
21 out of state or out of the country.

22 (At this time there was a
23 brief discussion off the record, after which
24 time the deposition continued as follows:)

25 MR. SOULES: Bill, your

1 concern is that, of course, you can't cross
2 examine an affidavit, and if affidavits are
3 used in a 128 special appearance hearing, then
4 you have some concern about that. What is
5 your concern?

6 PROFESSOR DORSANEO: My
7 concern is that somebody will bring an
8 affidavit instead of somebody to be cross
9 examined to the hearing, and that will either
10 cause delay or --

11 MR. BISHOP: The real
12 concern was timing.

13 PROFESSOR DORSANEO: It's
14 a timing concern.

15 MR. BECK: If you file
16 your affidavit a couple of days ahead so that
17 if somebody wants to take discovery of that
18 person, they can. This doesn't prohibit
19 discovery, so that's --

20 PROFESSOR DORSANEO: I
21 like the idea of doing this by affidavits if
22 feasible to do it, but I don't want that to
23 control normal concerns for testing statements
24 made under oath.

25 MR. BEARD: Or the Federal

1 court disposes of it all the time.

2 MR. HERRING: Last time
3 under Rule 166(b) we adopted the seven-day
4 requirement for affidavits that were going to
5 be prepared on discovery, which I think is on
6 page 43.

7 MR. SOULES: Let's look at
8 that, Charlie. Let's look at that together
9 here. Turn back to the materials on page 43.

10 MR. BEARD: This will
11 bring this in line with the Federal court
12 practice.

13 MR. SOULES: I think there
14 are maybe two things that can be said. You
15 know, we have got a provision in the summary
16 judgment rule that gives, cuts a party some
17 slack to do discovery. We have to look at the
18 test. But the time requirement for affidavits
19 and discovery hearings -- here it is. It's on
20 page 43.

21 MR. HERRING: Down in the
22 middle where it says, "shall be served at
23 least seven days before the hearing," add that
24 in on affidavits.

25 MR. SOULES: "The

1 affidavits if any shall be," and just use this
2 word, "shall be served at least seven days
3 before the hearing."

4 MR. BECK: I think that's
5 reasonable.

6 MR. HERRING: Gives you a
7 little protection.

8 MR. BECK: Good
9 suggestion.

10 MR. SOULES: "Shall be
11 made on personal knowledge, shall set forth"
12 and so forth. And then let me look just a
13 moment at Rule 166(a) for that language, just
14 run it by and see if it's got any merit to
15 think about putting this in there too.

16 JUDGE PEEPLES: How much
17 notice will both sides have on a 128?

18 MR. SOULES: Seven days.
19 There's not any notice time, is there? The
20 affidavits are going to be seven days before
21 the hearing.

22 JUDGE PEEPLES: Is it
23 possible the hearing can get scheduled too
24 quickly to get affidavits?

25 PROFESSOR EDGAR: Luke,

1 I've got a problem with the seven-day time
2 fuse on this.

3 MR. SOULES: What is that,
4 Hadley?

5 PROFESSOR EDGAR: It seems
6 to me that a party who is going to have --
7 that knows that there is going to be -- to
8 have to contest an affidavit ought to have
9 more than seven days in advance to utilize any
10 discovery process that he might want. It
11 seems to me that the 30-day provision in
12 motions to transfer venue would probably be
13 more of an adequate time provision than seven
14 days, because the seven-day provision that
15 you're talking about in Rule 166 is when
16 you've already been involved in the discovery
17 process, but here you don't really know that
18 you're going to have a -- you're going to have
19 to fight an affidavit until seven days before
20 the hearing as is now promulgated. And if you
21 have witnesses who are outside the state or
22 outside the country as many of them might be,
23 it just seems you need more time.

24 MR. SOULES: That may be,
25 and I think maybe that's one of Judge Peeples'

1 concerns. 166(a)(f) is the safety valve in
2 summary judgment proceedings. "Should it
3 appear from the affidavits of a party opposing
4 the motion that he cannot for reason" -- this
5 will fit summary judgment language, but the
6 concept is here -- "that he cannot for reasons
7 stated present by affidavits facts essential
8 to justify his opposition, the Court may
9 refuse the application or may order a
10 continuance to permit affidavits to be
11 obtained or depositions to be taken or
12 discovery to be had or may make such other
13 order as may be just."

14 The only reason that, and
15 I'm not -- I think that language could be used
16 or modified, but if we put in here this
17 special appearance rule an expression that a
18 party is to be given time to do discovery or
19 obtain affidavits, then we're putting right
20 there in that same rule information to the
21 judge that he's supposed to assist in causing
22 the hearing to be a hearing, that after full
23 development of the facts pertaining to it, and
24 that might be a good idea or it might not.
25 Just raised.

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CERTIFIED COURT REPORTING

1 MR. BECK: I agree with
2 that. I think that's fair. The question is
3 whether you just -- you want to be very
4 specific or whether you want to put some type
5 of a bottom time period on it that you've got
6 to file your affidavits or you're going to
7 leave them to the discretion of the Court, at
8 least some type of a safety valve. 30 days
9 would certainly be.

10 MR. BISHOP: I don't think
11 there would be any problem including the same
12 thing you have in Rule 87, give 45 days
13 notice, hearing 30 days, file affidavits 30
14 days in advance, although keep in mind that
15 the Court is required to hear the Rule 128
16 motion in advance of other motions. That's in
17 the rules, so that would be the only possible
18 concern. It could be a problem if you've got
19 a temporary injunction hearing which is on a
20 short fuse and you start putting these kinds
21 of things in there. It could be a problem.
22 But absent that, it's not going to be a
23 problem in most cases.

24 MR. SOULES: The concern I
25 have about lenthening this out, and maybe it's

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1 not very well thought through, but usually
2 these jurisdiction special appearance things,
3 I like to get them heard as soon as possible
4 regardless of which side I'm on, because if
5 you don't have jurisdiction, there's no sense
6 doing a bunch of work and discovery. And if
7 you're not under the jurisdiction of the
8 court, you sure don't want to have to pay to
9 attend a bunch of jurisdiction and discovery.

10 So to me to compress the
11 period down and to build in some kind of
12 safety valve is one approach that one might
13 take to get these things disposed of
14 expeditiously. Venue, of course, is all
15 together different. You can do discovery in a
16 case no matter where it's going to be tried.
17 It may get moved from San Antonio to Houston,
18 but the discovery is still good, so it's not a
19 matter of all of a sudden the slate is wiped
20 out.

21 I don't know. To me to
22 leave seven days on the affidavits is to put
23 something in here about if people can't get
24 ready in time to do discovery and get the
25 other affidavits more fits the special

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1 appearance concept, but that may not be what
2 you-all think. It's just what I think.

3 (At this time there was a
4 brief recess, after which time the deposition
5 continued as follows:)

6 MR. SOULES: Okay. We're
7 back on the record. Elaine Carlson.

8 PROFESSOR CARLSON:
9 Something you just said, you know, it seems to
10 me that this may result -- in trying to
11 appease all of the concerns may result in a
12 more expensive process, because if you have
13 your submissions by affidavits, it seems
14 they'd turn around in all likelihood and take
15 the deposition of the defendant who is a party
16 and be required to give his testimony.

17 It seems by providing for
18 the affidavit and then the discovery and then
19 the subsequent potential oral testimony that
20 by giving the best of all worlds we're really
21 increasing the cost of potential litigation
22 jurisdictionally.

23 MR. BECK: It depends what
24 you put in the affidavit. Sometimes you can
25 only get testimony very precise from one

1 witness that lives in Buffalo, New York, but
2 it's not the type of fact that people are
3 going to contest very much. If you have
4 somebody -- you're going to try to lay out
5 every conceivable argument in favor of
6 non-jurisdiction, that person is going to be
7 deposed. I think it really depends upon what
8 you're trying to prove by your affidavit.

9 PROFESSOR DORSANEQ: Well,
10 I think that we're going to get back to the
11 problem of who has what burden ultimately,
12 because that is what protracts, is what's
13 going to protract the affidavit: "I don't do
14 this; I don't that; I don't do that."

15 MR. BECK: Under current
16 law the defendant has the burden.

17 PROFESSOR DORSANEQ: It's
18 going to be a long affidavit. If you're
19 prudent I would suspect that most people would
20 not simply say, "I don't live in Texas; I'm
21 domiciled in Arizona."

22 MR. BECK: But see, you
23 may need to meet your burden with five or six
24 different witnesses, and you only want to call
25 one or two live, and the other four you just

1 want to use affidavits because the substance
2 of their testimony is really not very
3 controversial, but you have to have that to
4 meet your burden.

5 MR. SOULES: Okay. Well,
6 let's take this one at a time, I guess, then.
7 If we put in the language that affidavits have
8 to be served seven days before a hearing, how
9 many are in favor of permitting proof by
10 affidavits in 128 hearings along the line of
11 this proposed change on 319? Show by hands,
12 please. Those opposed? That's unanimous. I
13 recommend this language to be adopted by the
14 Supreme Court, but with a seven-day notice
15 provision on the affidavits. Does anyone have
16 any desire --

17 PROFESSOR EDGAR: I
18 thought you were also going to include in that
19 as you stated earlier perhaps some language
20 about delaying the hearing for purposes of
21 discovery. Is that to be included in this?

22 MR. SOULES: Let's just
23 take a vote on that. How many feel that
24 language conforming as much as possible to
25 that in 166(a)(f) should be tailored for

1 120(a) and be included as well to permit --
2 indicate to the trial judge that a party
3 having problems where responses be given some
4 time to get responsive evidence together and
5 if necessary to take discovery? How many
6 agree with that? Show by hands? Opposed?
7 That's also unanimous.

8 I'm going to give you some
9 language now for that, but when I write it it
10 may be slightly different in text. "Should it
11 appear that a party opposing an affidavit
12 cannot for reasons stated present by affidavit
13 facts essential to justify his opposition, the
14 Court may order a continuance to permit
15 affidavits to be obtained or depositions to be
16 taken or discovery to be had or make such
17 other order as is just." Is that generally
18 acceptable?

19 HONORABLE RIVERA: Luke,
20 is that what the rulebook says? It's in the
21 new proposed rule that we just passed last
22 month, "The Court may permit affidavits to be
23 supplemented or opposed by depositions or by
24 further affidavits." That's the language we
25 approved last month.

1 MR. SOULES: Where is that
2 now?

3 HONORABLE RIVERA: On page
4 38 of the agenda.

5 MR. SOULES: That would
6 also then need to be --

7 JUSTICE RIVERA: Page 38
8 it's the new (f) at the middle of the
9 paragraph, "the Court may permit."

10 MR. SOULES: Where is it,
11 judge? I'm sorry.

12 HONORABLE RIVERA: On page
13 38.

14 MR. SOULES: Page 38.

15 HONORABLE RIVERA: It's a
16 new (f). It was an (e) and been stricken off.
17 It's a new (f) in the middle of the paragraph
18 five or six lines from the bottom, "The Court
19 may permit affidavit to be supplemented or
20 opposed by deposition or by further
21 affidavit."

22 MR. SOULES: Okay. We'll
23 put that in there too. Okay. So we would
24 take that language from what was formerly (e)
25 and (f) of 166(a) that I gave and that that

1 Judge Rivera gave and add in here as a safety
2 valve. Is that the consensus of the
3 committee? Those in favor say aye.

4 ADVISORY COMMITTEE: Aye.

5 MR. SOULES: Opposed?

6 That's also unanimous.

7 PROFESSOR EDGAR: Luke, in
8 128 paragraph one, David, you say here "in the
9 use of discovery," and you're adding "and
10 related processes." What -- that kind of
11 bothers me a little.

12 MR. BECK: Yeah. And I'm
13 trying to remember why I put that in there.
14 Somebody at the last meeting requested that
15 phrase in there, and I don't know whether it
16 was because it contemplated suppoenaing
17 documents or subpoenaing witnesses.

18 HONORABLE RIVERA:
19 "Production of documents, interrogatories and
20 telephone depositions."

21 MR. BECK: Maybe that's
22 what it was.

23 PROFESSOR EDGAR: Is that
24 your suggestion?

25 HONORABLE RIVERA:

1 Somebody else said.

2 PROFESSOR EDGAR: Wouldn't
3 that be discovery? The think I'm concerned
4 with --

5 MR. BECK: The custodian
6 of records for a trial appearing, is that
7 discovery or what?

8 PROFESSOR EDGAR: I'm just
9 concerned about the use of "things related,"
10 because then you get into when do you invoke
11 the affirmative jurisdiction of waiver of
12 special appearance?

13 MR. BECK: Who ever
14 suggested that request, would they step
15 forward and defend?

16 MR. SOULES: That is --

17 PROFESSOR EDGAR: I think
18 that is a cause for concern. I'm just
19 concerned about it unless we know what we're
20 talking about.

21 MR. SOULES: That's a
22 change from the overall charge to the
23 Committee. The charge to the Committee was to
24 examine the burden of proof and to examine the
25 type of proof that could be used, and this is

1 an item that deals with when the special
2 appearance has been waived, and that's
3 completely different than what I've even --

4 MR. MCMAINS: Process of
5 witness is right there in the rule already
6 first thing. I don't know what "related
7 process" means.

8 MR. SOULES: How many feel
9 like these words "and related" should not be
10 in the change suggested to the Supreme Court?
11 Show by hands? And those who feel these words
12 "and related" should be included? Show by
13 hands. Okay. It's unanimously voted where
14 it's not to be recommened in number one.

15 Now as it's constituted
16 those in favor of recommending Rule 120(a)
17 amendments say aye, please.

18 ADVISORY COMMITTEE: Aye.

19 MR. SOULES: Opposed? It
20 will be recommended.

21 What's the next item,
22 David?

23 MR. BECK: Well, the last
24 item on my agenda really is something that
25 Frank Branson worked on. I don't know.

1 Frank's report, wait for him to give the
2 report.

3 MR. SOULES: Let's see
4 what that was.

5 MR. BECK: It's Rule 13.

6 MR. SOULES: What page is
7 it on? Page 238. Frank is suggesting that
8 the 90-day fuse for the 90-day safe harbor
9 from sanctions for frivolous pleadings be
10 deleted from our rule. I kind of like it. I
11 like the rule with a 90-day safe harbor.

12 How many feel that the
13 90-day safe harbor should be retained, show by
14 hands? Those that feel it should be deleted
15 show by hands? The majority vote the
16 Committee recommends the Supreme Court reject
17 change, the proposed changes to Rule 13.

18 (At this time there was a
19 brief discussion off the record, after which
20 time the deposition continued as follows:)

21 MR. SOULES: All right.
22 Does that take care of your reports, David?

23 MR. BECK: Yes, it does.

24 MR. SOULES: Let's go back
25 and finish the appellate procedure agenda,

1 which I guess is 82 on 223.

2 MR. MCMAINS: I thought we
3 voted this down, but apparently not. It has
4 surfaced again. That probably gives you a
5 clue of where I stand on the proposal.
6 Hatchell is of the same view.

7 This is question, and we
8 had some fairly protracted discussion last
9 time about an intermediate decision of the
10 appellate court somehow becoming an
11 enforceable judgement to the trial court for
12 enforcement purposes.

13 MR. SOULES: This is the
14 (Boscamp) situation.

15 MR. MCMAINS: This is the
16 proposed rule basically that --

17 MR. SOULES: This is page
18 223. Excuse me. Go ahead.

19 MR. MCMAINS: That somehow
20 that ought to be become enforceable. It
21 ignores frankly the historical station we've
22 always had in terms of what the mandate
23 actually is in the appellate process, which
24 the mandate which is the last act accomplished
25 to terminate the appeal is then the judgment

1 that the trial court enforces. If it's
2 different, then it replaces it. Up 'til that
3 time the trial court judgment is the judgment
4 and stays the judgment.

5 This change as proposed
6 here basically says whenever the court renders
7 an opinion changing that judgment, then all of
8 a sudden they notify the trial court and the
9 judgment becomes the Court of Appeal's
10 Judgment. And as far as this actual rule is
11 written that even includes even though a
12 motion for rehearing may be pending. I mean,
13 this is just immediately.

14 And I understand the
15 concern of, "Well, you've got somebody up here
16 that says that you are entitled to" -- for
17 instance, if you didn't get any money below.
18 You all of a sudden got entitled to some
19 money, and you want to keep it from wasting
20 assets or something, and you can't do that
21 with any of our practices, because you don't
22 have a judgment to do it with.

23 But I still feel -- I am
24 very troubled about a notion of treating
25 interlocutory, in essence non-final decisions

1 of the appellate court as being the final
2 decision when even that court can change its
3 mind. If you're having different things filed
4 and executed on, I don't see that.

5 PROFESSOR EDGAR: Who was
6 the author of this?

7 MR. SOULES: I did. It
8 was me.

9 PROFESSOR EDGAR: All
10 right. Luke, as you envisioned it, how can
11 the Court of Appeals direct the sheriff to go
12 out and levy execution?

13 MR. BEARD: File a new
14 supersedious bond down there, go through all
15 that.

16 PROFESSOR EDGAR: It seems
17 to me like you're asking the appellate court
18 to undertake a lot of direct supervision
19 that's been traditionally handled by the trial
20 courts with some degree of success.

21 MR. SOULES: Well, it
22 doesn't tell the sheriff to do anything. It
23 directs the clerk to permit an abstract to be
24 filed which creates a lien on the assets that
25 I now have a judgment on and for the clerk to

1 enforce the judgment, which means for the
2 clerk to issue writs of execution, writs of
3 garnishment, whatever writs or process I want
4 issued by the clerk in enforcement of the
5 judgment. That's all. It's just a
6 notification to the clerk to permit the
7 judgment of the Court of Appeals reversed and
8 rendered and now I've got a -- I have got a
9 six million dollar verdict from the jury. The
10 trial judge NOVed. The Court of Appeals
11 reverses the NOV and renders judgment in my
12 favor on a jury verdict. I now have a
13 judgment for six million dollars. I want that
14 judgment secured just like I could have had it
15 secured if the trial judge had not erroneously
16 NOVed my judgment, my verdict.

17 So I want the defendant
18 against whom I originally got a verdict and
19 against whom I now have a judgment out of the
20 Court of Appeals to have to either supersede
21 that judgment or I want to be permitted to at
22 least abstract that so that I can put liens on
23 the property of the judgment debtor, and I
24 would like also to have execution and other
25 writs of enforcement so that I can start

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1 collecting on this judgment that I was
2 entitled to but denied in the trial court.
3 That's the purpose of this.

4 HONORABLE RIVERA: Don't
5 you need a judgment to order this execution?

6 MR. SOULES: No. You
7 don't need that. It's automatically a right
8 to a judgment holder.

9 JUSTICE MCCLOUD: Well,
10 normally that's done later by mandate.

11 MR. SOULES: It is done
12 later. This is to move in point of time to
13 the moment where the Court of Appeals says I
14 am entitled to my judgment on a verdict my
15 right to have my judgment secure, not wait
16 until it goes all the way through re-hearing,
17 petition for writ of error, up to the Supreme
18 Court, and so forth, and waiting on that
19 mandate to come back, which can be months or
20 years later during which period of time the
21 assets have all left town.

22 JUSTICE MCCLOUD: Like if
23 it's an affirmance, this has to do with
24 reversal. You know, 82 has to do with
25 affirmance. You still follow the same mandate

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1 procedures under that, don't you? It seems to
2 me --

3 MR. SOULES: Well, on
4 affirmance if I had gotten my judgment in the
5 trial court --

6 JUSTICE MCCLOUD: Well, if
7 there's another side to the lawsuit.

8 MR. SOULES: I would have
9 been marching in the mean time or had a
10 supersedious. This just gives me the same
11 options after the Court of Appeals rules my
12 way that I would have had if the trial court
13 ruled my way.

14 MR. MCMAINS: I think
15 they're not the same option. This is an
16 extremely accelerated procedure in comparison
17 to what you have to work with in trial court.
18 If you get a judgment in the trial court,
19 you've got a long period of time before you
20 can enforce it. Granted, you can file the
21 lien. That's it. You can't do anything to
22 enforce the judgment. You can't go out and
23 execute while a motion for a new trial is
24 pending, et cetera.

25 MR. SOULES: But you can

1 garnish.

2 MR. MCMAINS: This rule
3 authorizes that you do immediately while
4 there's a motion for re-hearing pending. The
5 court may change its mind. It may change its
6 opinion and does it again. Execute the issues
7 on what? On the other judgment?

8 Now, what happens in the
9 interim with that? Where do you go for that
10 relief when you have to go back to the trial
11 court? All the Rule 47 rules and all of the
12 supersedious rules are geared to
13 determinations as we already made today to the
14 trial court level. And we are talking about
15 all of a sudden you have to go back to the
16 trial court with regard to all the issues,
17 which didn't have it before, but now they've
18 got to do it immediately, because your title
19 executes immediately in spite of the fact that
20 they've got 15 days to file a motion for
21 re-hearing.

22 MR. SOULES: That's
23 right.

24 MR. MCMAINS: And I find
25 that to be absurdly complicated.

1 MR. SOULES: It's pretty
2 simple.

3 MR. MCMAINS: Terribly
4 inconsistent. It is not simple. It is dumn.

5 MR. SOULES: Well, it may
6 be in your view. I think it's smart.

7 MR. MCMAINS: Every rule
8 that we have with regards to the way the court
9 operates by mandate.

10 MR. SOULES: Okay. John
11 O'Quinn, you have the floor.

12 MR. O'QUINN: It's been my
13 experience about when Russell is wrong he
14 starts using insulting language.

15 MR. SOULES: Did you have
16 anything else to say about that, John?

17 PROFESSOR EDGAR: Then in
18 that event the Defendant then would
19 immediately have an opportunity to attempt to
20 supersede the judgment.

21 MR. SOULES: That's
22 right.

23 MR. O'QUINN: The problem
24 is that if the trial court judgment is strong
25 enough or important enough to require

1 supersedious to protect the right of the
2 plaintiff, why should not a Court of Appeals
3 judgment be so particularly based on a jury
4 verdict? And I really think there may
5 be -- some fine tuning may be needed with the
6 procedure we have here. I think there needs
7 to be some remedy for the Plaintiff who was
8 wrongfully denied a jury verdict because of an
9 NOV when the Court of Appeals agrees with the
10 plan.

11 JUSTICE MCCLOUD: My
12 questions wasn't talking in terms of NOV.
13 There are all kinds of cases that are reversed
14 that have nothing to do with NOVs. This is
15 just kind of an open deal. Any time if you
16 reverse one, well, you just enter this order
17 and tell the clerk of your court to get down
18 there and abstract that thing and enforce the
19 judgment.

20 MR. SOULES: As in other
21 cases. In other words, if not superseding.

22 MR. BEARD: Well, let's
23 suppose the court reverses it's judgment in
24 your favor. Does that destroy the
25 supersedious bond at that time?

1 MR. SOULES: There is no
2 supersedious bond.

3 MR. BEARD: You've got a
4 judgment. The Court takes it away from you.
5 You have a supersedious. Now, we drag down
6 the supersedious and run off with the money at
7 that point and then get it back at the Supreme
8 Court. So it just wiped it out.

9 JUSTICE MCCLOUD: It cuts
10 two or three different ways. I sure would
11 think that's got some things in it that don't
12 look too good to me. I mean, we've been
13 handling it through mandates all of these
14 years, and the only situation that really
15 comes to your mind probably is that NOV
16 situation or just any reversal.

17 MR. SOULES: Where the
18 plaintiff is denied a judgment in the trial
19 court and a Court of Appeal reverses that and
20 renders judgment, money judgment for the
21 plaintiff, in any circumstance where that
22 happens the purpose of this rule is to get
23 enforcement of that judgment from the Court of
24 Civil Appeals promptly or supersedious so that
25 that judgment is now protected just as it

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1 would have been if the trial judge had entered
2 the proper judgment to start with.

3 MR. TINDALL: Why not have
4 it the other way, though --

5 MR. BEARD: That first
6 supersedious if it --

7 MR. SOULES: I don't have
8 any problem with.

9 MR. TINDALL: Releasing
10 the supersedious if they get a reversal?

11 MR. SOULES: I don't have
12 any problem with that. At that point I think
13 the judgment has been withdrawn. It has been
14 reversed, and why should a company continue to
15 have millions of dollars of assets tied up
16 when the judgment of the trial court has been
17 found to be erroneous and has been reversed.

18 MR. MCCLOUD: That's been
19 reversed by an inferior intermediate appellate
20 court.

21 MR. O'QUINN: Inferior.
22 Less inferior than the trial court.

23 MR. SOULES: There's a
24 case where a party went into bankruptcy and
25 the Court of Appeals reversed the judgment of

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1 the trial court andd there still couldn't be
2 any relief granted so these people could come
3 out of bankruptcy, and there wasn't even -- at
4 that point there wasn't a judgment against
5 them. But they were still harbored in
6 bankruptcy court because they couldn't
7 supersede a judgment that had been found to be
8 erroneous. So I don't have any problem with
9 that side of it happening as well.

10 I think there are -- one
11 of the big injustices in the appellate process
12 is that you can't get relief pending appeal to
13 get out to either to get a judgment superseded
14 or executed on coming out of the Court of
15 Appeals or to get out of the problem the trial
16 court erroneously put you into. And to me at
17 any point where a party is positioned as they
18 would have been properly positioned if the
19 trial court had properly ruled, they ought to
20 have the same rights that they would have had
21 if the trial court and properly acted. And if
22 three judges on the Court of Appeals or two,
23 maybe one dissent, decide the trial judge was
24 wrong, to me that's a more current decision.

25 And that's what the

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1 purpose of this is. I'm not trying to sell
2 it. I think it's the right thing, but when
3 it's understood and voted on we'll put it to
4 the committee. Judge McCloud.

5 MR. MCCLOUD: Well, it may
6 be the right thing. I hadn't thought it out
7 as far as that is concerned. The thing that
8 would concern me is just the mechanics of it,
9 in that it's sort of abrupt. Let's suppose it
10 occurs and it says you go back to the district
11 clerk and he's to abstract and enforce the
12 judgment of the Court of Appeals as in other
13 cases. What do you envision happening at that
14 time? Would he go over here to Rule 47, or
15 what would he do?

16 MR. SOULES: What would
17 happen if --

18 MR. MCCLOUD: That's what
19 I'm interested in.

20 MR. SOULES: Okay. Here
21 is what would happen. Just like you can order
22 a district clerk to get a transcript on file
23 with your court, you have certain authority
24 over a district clerk.

25 MR. MCCLOUD: That's

1 true.

2 MR. SOULES: The Court of
3 Appeals has authority over the district clerks
4 in the State of Texas to some extent.

5 JUSTICE MCCLOUD:
6 Transcripts.

7 MR. SOULES: Transcripts.
8 All right. The Supreme Court says you've got
9 authority. If they adopt this rule they're
10 giving you authority to tell the clerk to go
11 ahead and commit execution on judgment that
12 you have rendered. If the Supreme Court tells
13 you've got that, you've got it.

14 JUSTICE MCCLOUD: To
15 permit execution? I mean, everybody else have
16 reasons and ways to prevent that execution.

17 MR. SOULES: Okay. Now,
18 mechanics.

19 JUSTICE MCCLOUD: That why
20 mechanics, you see.

21 MR. SOULES: As in other
22 cases.

23 JUSTICE MCCLOUD: Yes.

24 MR. SOULES: In other
25 cases the district clerk can issue writs of

1 execution, writs of garnishment, abstracts and
2 all that sort of thing and the parties can act
3 on those unless they're supersedious. Now,
4 one way to get supersedious is to file a
5 dollar-for-dollar supersedious bond. It's
6 automatic. If you put up enough money to
7 cover the principal interest and costs, the
8 supersedious is automatic. The other way they
9 get it under Rule 47 when they go to trial
10 court and say, "Give me some relief. Give me
11 another way to supersede this." And the trial
12 court can do virtually anything as long as it
13 meets the standards of Rule 47 that are set
14 forth, but that's as in other cases. In all
15 cases, in other cases it's either automatic
16 supersedious bond dollar-for-dollar posting of
17 the bond, or there is discretionary
18 supersedious under Rule 47. And if there is
19 no supersedious under one of those ways, then
20 the party with the judgment can at its peril
21 begin execution, and the protection to the
22 judgment debtor is that if the party is
23 pursuing execution that is subsequently proved
24 to be wrong, that party has to replace the
25 sold merchandise or sold goods at their market

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1 value, not at what they brought at the
2 sheriff's sale, and all these things come into
3 play that are the same rights.

4 Appellate judgment owners
5 or judgment -- the beneficiaries of appellate
6 judgments have no rights right now.

7 JUSTICE MCCLOUD: I agree
8 with you.

9 MR. SOULES: Whereas the
10 beneficiary of a trial court judgment has all
11 these right; and I can't understand why. I
12 mean, to me it's fair to give a person with a
13 judgment no matter what court gives them that
14 judgment the same rights both ways.

15 JUSTICE MCCLOUD: Well,
16 the thing that concerns me -- philosophically
17 you're correct, and there are certainly
18 some -- I'm not saying that there's not a lot
19 of merit to what you say. When I look at 47
20 and 49 and those rules it's obvious they're
21 speaking in terms of the trial court's
22 judgment. That's what I'm concerned about.
23 If we just up and pass something like this, it
24 seems to me like I don't believe it meshes
25 quite with all of the other rules that we have

1 out there. I'm not saying this shouldn't be
2 done some day, but I'm saying that if I just
3 ordered my clerk, said "Abstract this judgment
4 and do whatever you're supposed to," you know,
5 and then they turned over to 47 and 49 and
6 those rules are all talking about I think the
7 trial court's judgment, then all of a sudden
8 they've got the Court of Appeals judgment.
9 Mechanically I think you've got some
10 problems.

11 MR. SOULES: Suppose this
12 as a mental rule and then I'll take this.
13 Suppose this rule, new rule 82a did not say
14 "and enforce the judgment." It just said
15 "Notify the district clerk to abstract the
16 judgment of the Court of Appeals" so at least
17 the owner of the judgment from the Court of
18 Appeals could abstract that judgment and put a
19 lien on the assets of the judgment debtor for
20 the balance of the appeal.

21 JUSTICE MCCLOUD: Then
22 you've got a lot less problems.

23 MR. SOULES: Then you
24 don't even get into execution and all those.
25 And as a middle ground at least that's

1 something. And again --

2 JUSTICE MCCLOUD: When are
3 you going to take that abstract of judgment
4 off? I mean, later on you've got -- if he
5 abstracts that judgment and then later on it
6 goes to the Supreme Court and then they
7 reverse the Court of Appeals.

8 MR. SOULES: Then it would
9 be just like if the trial judge -- see, if
10 this had happened in the trial court, if your
11 judgment had been the judgment of the trial
12 court, that abstract would already be on file
13 during the entire process where the Supreme
14 Court reverses it and it come off --

15 JUSTICE MCCLOUD: By the
16 mandate.

17 MR. SOULES: -- by the
18 mandate.

19 JUSTICE MCCLOUD: Uh-huh.

20 MR. SOULES: And it would
21 still -- your abstracted judgment then if
22 reversed would come off --

23 JUSTICE MCCLOUD: By the
24 Supreme Court's mandate.

25 MR. SOULES: -- out of the

1 mandate. The same process.

2 HONORABLE RIVERA: If you
3 want to make it to where the Court of Appeals
4 decides on a case-by-case basis that they can
5 be authorized to render judgment and order
6 abstract and/or execution, and they can do
7 it. But that way it won't be automatic. You
8 can ask for it. And if you convince them, you
9 can get it.

10 MR. SOULES: And "May
11 order the clerk of Court of Appeals to notify
12 the district clerk to abstract" --

13 HONORABLE RIVERA: Or
14 enforce.

15 MR. SOULES: -- "or
16 enforce."

17 MR. BEARD: Well, Luke,
18 the condition of your supersedious bond would
19 have to be changed if your were going to give
20 relief off of that, because it's conditioned
21 to the final appeal.

22 MR. SOULES: I don't have
23 anything on the table to do that. I don't
24 have anything on the table to do that right
25 now, and I can't write it here. But I don't

1 oppose it in fairness.

2 MR. O'QUINN: You say you
3 don't oppose it?

4 MR. SOULES: I don't
5 oppose the melting of a requirement of a
6 supersedious between the Court of Appeals and
7 the Supreme Court if the Court of Appeals has
8 held that the trial court's judgment is not a
9 valid judgment. But I don't have anything
10 written here to put that forward. I would
11 want to go and think about the language to use
12 on it or have somebody here think about it for
13 the afternoon. But even if we make it
14 discretionary with the Court of Appeals to
15 permit just an abstract, at least that's some
16 help to a party that has a judgment. And
17 right now there is nothing to protect that
18 party, nothing at all.

19 MR. TINDALL: Luke, can we
20 bring this up in August when we can see how it
21 would work both ways, if you're the prevailing
22 party on appeal and put up a bond, you get
23 your money back; and if you've been denied a
24 judgment at trial court and you now win and
25 you want to execute? I mean, to

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1 me --

2 MR. SOULES: Who will
3 write that side of it? Somebody on the
4 defense side that would be suffering a
5 judgment, laboring under bankruptcy, or an
6 onerous supersedious has gotten a Court of
7 Appeals to reverse the trial court's judgment
8 and needs out of that problem. I mean,
9 there's bound to be somebody here. I've had
10 it both ways.

11 MR. TINDALL: The cost
12 may be substantial. Are you going to let a
13 party recover all their costs and immediately
14 seek taxing of those costs against the party
15 that otherwise has won the judgment in the
16 trial court?

17 MR. SOULES: Doak, do you
18 think you could write the other side of this?

19 MR. BISHOP: Yeah.

20 MR. SOULES: Okay. I'm
21 going to assign it to Doak then for drafting.
22 I'm going to leave this just like it is. I've
23 already indicated some flexibility in my mind
24 about how it ought to be done, whether it
25 ought to be discretionary with the Court of

1 Appeals, whether it ought to be limited to
2 abstract, or whether if it's discretionary go
3 ahead and do both, because the Court of
4 Appeals is going to be able to consider the
5 enforcement or not or the abstract or not.
6 But right now I think I'll leave it before the
7 Committee, but table it until the next meeting
8 just like the language is here, which is the
9 full load, which I'd rather have. But I do
10 have flexibility; and then Doak is going to
11 write the other side of it, and we'll put it
12 on our agenda for our August 12 meeting.
13 We're going to vote on it in August both
14 ways.

15 (At this time there was a
16 brief recess, after which time the deposition
17 continued as follows:)

18 MR. SOULES: You have
19 looked at Rule 9, substitution of parties that
20 I circulated around. Any objection to Rule
21 9? As I circulated it as rewritten by Justice
22 Hecht, there being no opposition to Rule 9
23 that text will be recommended to the Supreme
24 Court unanimously by the Committee.

25 Next we circulated a

1 handwritten, Elaine's handwritten effort as
2 this Rule 49 -- or 47 problem. Please be
3 looking at that so that we can discuss it
4 momentarily. I want to finish the TRAP rules
5 so that we can finish the items that directly
6 involve Judge Clinton's court, and then he is
7 welcome and requested if he likes to stay with
8 us, but he will at least then have given us a
9 long day of his patience in helping us get
10 these appellate rules reviewed.

11 I suppose then the next
12 item on the agenda will be Rule 90. We did
13 90. Rule 130, TRAP 130, which is at page 226,
14 225-226. And let's see. Do we have a text?

15 MS. HALFACRE: No. It was
16 just held over from the last meeting on
17 Justice Hecht's letter.

18 MR. SOULES: Oh, that's
19 the general multi -- what is this?

20 JUSTICE HECHT: This is --

21 MR. SOULES: This is that
22 question that you're going to submit to us
23 again. All right. We will reassign that to
24 the Committee, and I think Justice Hecht, I
25 believe, has text that he has drafted for

1 that, and I will get that to the Committee and
2 the Committee will report August the 12th on
3 that.

4 Okay. The next one is
5 then what?

6 MS. HALFACRE: Page 236.

7 MR. SOULES: In order to
8 have everybody informed, this is -- the Rule
9 130 problem is the case where a party before
10 the Court of Civil Appeals Court of Appeals
11 having lost his case in the Court of Appeals
12 filed an application for writ of error before
13 filing a motion for rehearing. The court held
14 that the filing of the application for writ of
15 error took away the jurisdiction of the Court
16 of Appeals, but since there was no motion the
17 motion for rehearing could not be filed, and
18 since there was no motion for rehearing filed
19 the Supreme Court had no jurisdiction for writ
20 of error. Zing. So we're going to work on
21 that a little bit. This was 225. Justice
22 Hecht has some language that we're going to
23 resubmit to the TRAP subcommittee for a report
24 on August the 12th for further consideration.
25 I just didn't want to leave it unsaid what

1 that was about and table it.

2 But that seems to be the
3 better action on that for today. The next
4 item is on page 236, and Judge Clinton wants
5 us to consider changing a heading on --

6 JUDGE CLINTON: Section 17
7 and the submission of oral arguments and
8 opinion and then add "in the Court of
9 Criminal." I'm just a messenger on this. I
10 won't waste my time.

11 MR. SOULES: Judge, since
12 you have come to us as a messenger for your
13 court, I gather, we certainly want to be
14 supportive in every way.

15 JUDGE CLINTON: It's to
16 make it symmetrical with one of the earlier
17 sections that says something like that in the
18 Supreme Court. That's all.

19 JUDGE CASSEB: I move we
20 admit.

21 PROFESSOR DORSANEQ:
22 Second.

23 MR. SOULES: It's been
24 made and seconded. All those in favor say.

25 ADVISORY COMMITTEE: Aye.

1 MR. SOULES: Opposed?

2 It's unanimous.

3 Okay. Next page 321,
4 well, that's been done.

5 MR. BEARD: We voted on
6 that.

7 MR. SOULES: That's been
8 done. I checked that a moment ago. I should
9 tell you for the record here what page. It's
10 in the completed work of this committee, that
11 is shown on page 35 of these materials.

12 Next I guess is 323.

13 MR. TINDALL: Didn't we
14 act on this in the earlier minutes, or is
15 there some change on 166(b) from --

16 MR. SOULES: Okay.
17 Here's -- the only point here is on page 325.
18 Well, it's throughout, but here's the point.
19 Allen versus Humphreys says that you cannot
20 discover the work product of a consultant who
21 is not going to be a witness. One very
22 serious hearing and others that were not so
23 serious have involved me where the contention
24 was that if a consultant was going to be a
25 fact witness, then his consultant work product

1 could be discovered. Now to give you that
2 example, suppose your consulting physician who
3 always helps you as a consultant but never
4 wants to give any kind of opinions anywhere
5 happens to observe an automobile accident.
6 The hurt victim comes to you. He's got
7 factual observations of the occurrence. He'll
8 consult with you on the injuries, but he will
9 not testify. So if you use him at all then
10 his consultation becomes discoverable. That's
11 a simple way to do it.

12 The more complex way is
13 the thing I got involved in, and I've been
14 meaning to bring this up and just keep
15 forgetting. We were in nuclear power plant
16 litigation. Our engineers were fact witnesses
17 because they helped design the plant, but they
18 were involved all together in trial
19 preparation. They helped us set trial
20 strategies. We didn't -- it was a fairly
21 complicated engineering and construction job
22 and we had to have these engineers as
23 consultants to us to help us through trial
24 strategies to plan for that trial; and that's
25 where the most serious confrontation about

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1 this came up.

2 San Antonio -- I was
3 representing Halliburton, Brown & Root.
4 San Antonio made a motion that the litigation
5 support work product of these inside engineers
6 be discovered by San Antonio because these
7 engineers were going to be fact witnesses in
8 the case. Judge Hardy overruled that motion
9 and ruled that their -- that if they were not
10 going to give opinion testimony and they were
11 not providing information to experts who were
12 going to give opinion testimony that their
13 litigation support work product if kept
14 separate from the work they did on the plant
15 up to the time they were terminated, that that
16 was kept separate, would not be discoverable.

17 So what we've got in this
18 rule, you see, is not clear either. What I
19 have written is to make this rule clear that
20 if a consultant is not going to be an expert
21 witness, then his litigation support
22 consultation work product cannot be discovered
23 even if he is going to be a fact witness. To
24 me it's important, but I'm not sure how you
25 feel about the discoverability of litigation

1 support work product if it's done by a person
2 who is going to be somehow a fact witness.

3 So that's the purpose of
4 it and here it is. All it does is add
5 "expert" before "witness" every place in this
6 expert exemption text of Rule 166(b). It's
7 the only new thing to 166(b). We've changed
8 all the other. Anybody have any discussion?

9 PROFESSOR EDGAR: It seems
10 to me, and I have not had a chance to read it
11 in detail, but just in glancing at it it cures
12 one problem that we now have, and I think this
13 case is presently before the Supreme Court on
14 mandamus where we had an oil field explosion
15 and some of the people who were designated as
16 consulting experts were in fact fact
17 witnesses, and they were designated consulting
18 experts only, and the party employing them
19 thus took the position that none of their
20 testimony was subject to discovery, and that
21 was upheld by the trial court. Now that's
22 before the Supreme Court on mandamus. But it
23 seems like this would at least cure that
24 problem.

25 MR. SOULES: So it really

1 cuts both ways to cure the problem.

2 PROFESSOR EDGAR: That's
3 right.

4 MR. SOULES: I think it
5 does. Any further dicussion on this?

6 PROFESSOR BLAKELY: I was
7 just going to ask you can you generalize about
8 what to deal with impeachment? Can you
9 impeach the discovery work product so far as a
10 fact witness? Not expert testimony but as a
11 fact witness. That's the purpose of getting
12 at the work product, I take it, is
13 impeachment.

14 MR. SOULES: Oh, no. The
15 purpose of getting their work product was just
16 to get our trial strategy.

17 PROFESSOR DORSANEO: The
18 usual reason.

19 MR. SOULES: The real
20 reason.

21 MR. BEARD: I'm inclined
22 to think that the courts ought to take up on a
23 case-by-case basis rather than trying to get a
24 hard and fast rule, because I see the mixing
25 up their facts and expert testimony in a

1 trial, and I'd be inclined to let the courts
2 take it up as it comes up.

3 MR. SOULES: You have to
4 identify the person with knowledge of relevant
5 facts if he's going to be a fact witness.

6 MR. BEARD: I understand
7 that, but I'm not sure that a rule that would
8 exclude the work product from that expert who
9 is actually a fact witness.

10 PROFESSOR DORSANEO: I
11 think what you've done by adding the words "an
12 expert" in before "witness" is to restrict the
13 expert provisions to persons who are experts
14 up and down the line, and it really kind of in
15 a way leaves the question open as to more
16 complicated situations. To me literally what
17 it says is that we're talking about expert as
18 experts and you have to look somewhere else in
19 the rules to find out that in these provisions
20 to find out about experts or persons in
21 multiple capacities. So I would even though I
22 may agree with what you said or would be
23 inclined to agree with it for the sake of
24 argument I don't have a problem with these
25 changes.

1 MR. SOULES: Any other
2 discussion on this? Those in favor show by
3 hands? Those opposed. It's approved by
4 majority vote.

5 Next is --

6 PROFESSOR DORSANEO: Tom
7 Davis' suggestion on 327.

8 MR. SOULES: Yes. On page
9 327 Tom Davis' suggestion is that we --

10 PROFESSOR DORSANEO: Can
11 we talk to this one?

12 MR. SOULES: Yes, please,
13 speak to this, Bill.

14 PROFESSOR DORSANEO: There
15 was a vote last time, I believe, to add if
16 you'll look at page 327 of the booklet, add
17 some language to Rule 215, and I think Tom
18 Davis is not here now.

19 MR. SOULES: No. He had a
20 funeral he had to go to.

21 PROFESSOR DORSANEO:
22 Properly suggests that that concept should be
23 dealt with in the first discovery rule rather
24 than in the sanction rule, and I agree with
25 that. 166(b) although we usually think of it

1 simply as a scope of discovery rule actually
2 is the general rule, and the logical place for
3 this idea is in that rule and not in the
4 discovery sanction rule.

5 MR. SOULES: Any further
6 discussion? All in favor say aye.

7 ADVISORY COMMITTEE: Aye.

8 MR. SOULES: Opposed?
9 That's unanimous. We'll move that language
10 from the place where we had first placed it in
11 215 to a new paragraph in 166(b).

12 Okay. The next is on page
13 332. And was this not -- Bill, this is your
14 suggestion. Was that to move that language to
15 someplace else?

16 PROFESSOR DORSANEO: And I
17 think last time we discussed where do we put
18 this particular sentence; and towards the end
19 of the meeting it moved to Rule 239, and I
20 thought that it would better go in 237(a)
21 because of the title of the rule, and actually
22 in many respects by making that suggestion I'm
23 making a suggestion that it was more of a
24 minority report at the time we discussed this
25 last time. I don't feel strongly about it one

1 way or the other. I just happen to think
2 237(a) would be a better place, and I think
3 others thought so too, but they can speak for
4 themselves.

5 MR. SOULES: I don't have
6 any problem, as long as it's in there, where
7 it is. Do you feel like logically it fits
8 better at 237(a).

9 PROFESSOR DORSANELO: I
10 think that's probably where I would go read if
11 I was thinking about this problem area.

12 MR. SOULES: So you would
13 move the language out of 239 into 237(a).

14 MR. BISHOP: Bill, do you
15 have a problem with taking out the last two
16 words "during removal" and ending the sentence
17 with Federal Court?

18 PROFESSOR DORSANELO: No.
19 But I think that it may mean something.

20 MR. BISHOP: What does it
21 add?

22 PROFESSOR DORSANELO: I
23 think if somebody files an answer in Federal
24 Court after remand, it might bother me,
25 probably wouldn't. I don't see how the

1 language -- I had a clerk one time who would
2 insist on -- an office clerk insist on people
3 filing things whether they were the right
4 place or not, once filed something for me in
5 the Court of Appeals that was properly filed
6 in the trial court. And upon his insistence
7 the clerk said,

8 "All right, Arthur, we'll file here. Thank
9 you very much."

10 MR. SOULES: All right.
11 Those in favor of moving this language out of
12 239 and into 237(a) say aye.

13 ADVISORY COMMITTEE: Aye.

14 MR. SOULES: Opposed?
15 Doak, are you wanting to make a motion on
16 that, or does it really matter?

17 MR. BISHOP: No. Not a
18 big point.

19 MR. SOULES: Okay. The
20 next item, I believe, is on page 333. And
21 let's see. This is your report, Hadley.

22 PROFESSOR EDGAR: To kind
23 of reconstruct where we were on this, last
24 time I suggested that at our previous meeting
25 that we do something with the last two

1 sentences of now Rule 278; and I took the most
2 conservative approach I knew and drafted a
3 change which appears on page 338. At that
4 meeting both Justice Hecht and Buddy Low
5 suggested that perhaps what we should do is
6 examine a method by which we could simplify
7 the concept embraced within those last two
8 sentences, and I was appointed the
9 subcommittee chair and Tom Ragland and Buddy
10 were appointed as members of the Committee;
11 and because of geographical and time
12 constraints I simply sat down and tried to
13 incorporate what I recall Justice Hecht to
14 have stated orally at that meeting and also
15 tried to incorporate what Buddy Low stated,
16 and Buddy also wrote a letter which appears
17 here somewhere.

18 What I'm really saying is
19 that I'll have to take full responsibility for
20 the suggestion that appears on pages 334 and
21 335, and I have not had time to discuss this
22 with either Justice Hecht or Buddy or Tom, so
23 basically what we have here is that "If a
24 question, including an element or an
25 instruction or definition pertaining thereto

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1 is omitted from the charge or is included
2 defectively, such omission and defect shall
3 not be grounds for reversal unless its
4 submission in substantially correct wording
5 has been requested in writing intended by the
6 party which relies upon it."

7 This is on page 334,
8 paragraph number two. Then "The trial court's
9 endorsement as required by Rule 276 will
10 preserve any error related thereto and no
11 further objection will be necessary" making it
12 clear that the party relying on it would not
13 have to tender and also object to the charge
14 but would tender only.

15 Then in number three if
16 it's not relied upon by the party, then
17 basically an objection will suffice. Now, I
18 have a question about that, but we would also
19 want to include giving the option to that
20 party of either objecting or tendering, but I
21 leave that in abeyance.

22 Then item paragraph number
23 four, if it's a matter of which is not relied
24 upon by either parties, such as a definition
25 instructions in the body of the charge that

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1 doesn't relate to a question, then it shall
2 not be deemed a ground unless it's been
3 requested and tendered by the party
4 complaining of the judgment and then making it
5 clear that having it endorsed is required by
6 Rule 276 will preserve an error rather than
7 having to object to the charge.

8 MR. TINDALL: Two is like
9 four.

10 PROFESSOR EDGAR: Yes.

11 MR. TINDALL: Hadley,
12 isn't this the present law except for three
13 where you're omitting the old -- and I think
14 disputed in the appellate court where you have
15 to tender the correct definition?

16 PROFESSOR EDGAR: Well,
17 actually the law is not as clear as one might
18 think. We all think we know what the law is,
19 but there are some cases that lend some doubt
20 to that. And the question is, do we want to
21 try and make it very clear about what we want
22 it to be rather than what some of the
23 appellate courts say it is.

24 MR. MCMAINS: Hadley, in
25 revising this you've left out all together --

1 or I was just trying to say. Oh, you put in
2 the "shall not be grounds for reversal" in
3 each one of these.

4 PROFESSOR EDGAR: That's
5 correct. And as usual, I have no pride of
6 authorship.

7 MR. MCMAINS: One of the
8 difficulties I have with this whole notion of
9 trying to segregate this way, one of the
10 difficulties we have under the current rule,
11 but I'm not sure it's very clear to me what
12 "matters relied upon by the party," and you're
13 saying in one instance you've got three
14 alternatives, either it is relied upon, it
15 isn't relied upon or we don't know.

16 PROFESSOR EDGAR: Let's
17 just assume that we have an instruction
18 concerning the definition of preponderance of
19 the evidence.

20 MR. O'QUINN: Number
21 three.

22 PROFESSOR EDGAR: That
23 would be number three, because I visualize
24 that as one that's relied upon by neither
25 party because normally you have theories of

1 recovery and theories of defense and both
2 parties need that instruction with respect to
3 their questions.

4 MR. MCMAINS: But what
5 you're saying is in that situation that you
6 have to submit.

7 PROFESSOR EDGAR: That's
8 right. You have to submit.

9 MR. MCMAINS: An objection
10 to the definition is just not good enough even
11 if the definition is -- even if there is a
12 definition given and it's wrong.

13 PROFESSOR EDGAR: That's
14 right.

15 MR. MCMAINS: That the
16 objection is not good enough.

17 PROFESSOR EDGAR: That's
18 right.

19 MR. O'QUINN: Isn't that
20 contrary to current law?

21 MR. MCMAINS: Yes. That's
22 correct. What you have done is put the burden
23 in those types of situations where the Court
24 if they decide to tinker with something if you
25 may not come to court with. It isn't

1 sufficient that you object. You have got to
2 anticipate that the Court is going to tinker
3 with it and then bring it right and be sure
4 that it's right, because that's where the
5 problem is. Most of the defects in the
6 preservation of error to the charge are in the
7 request error more often than in the
8 objection.

9 PROFESSOR EDGAR: (Nods
10 affirmatively.)

11 MR. MCMAINS: Not all
12 together. But it's a lot harder to do the
13 request right than it is to make clear what
14 the ground of your objection is.

15 PROFESSOR EDGAR: Well,
16 there are certain cases in which I might
17 disagree with that.

18 MR. MCMAINS: Of course,
19 you don't have any trouble screwing the
20 lawyers either way, but the appellate bench is
21 determined to do so. But all I'm saying -- so
22 you're really saying that the objection
23 practice is really very, very narrow. It's
24 only when the other side is relying on
25 something.

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PROFESSOR EDGAR: That's

right.

MR. O'QUINN: Hadley, how would you feel about category three that the procedure would be to object --

(At this time the court reporter cautioned the committee member to speak up.)

MR. O'QUINN: Yeah. How would you feel about in number three where nobody is relying, use the objection procedure?

PROFESSOR EDGAR: I have no problem with that. This is what I understood we're trying to do as a result of what was stated and the letter. I don't have any problem with that.

MR. MCMAINS: Because we've shifted now the question of how you do something from the somewhat troublesome question of whether it's there or it isn't there.

MR. O'QUINN: Yes.

MR. MCMAINS: Whether it's theirs or ours or nobody's. That's a total

1 change in the notion of what it is.

2 PROFESSOR EDGAR: I think
3 maybe one thing we ought to think about though
4 is that it is one thing to think about the
5 trial lawyer, but I think it's another thing
6 to think about the judge too. Now, there are
7 instances in which the judge has heretofore
8 been given two opportunities to correct, once
9 when the request was made and again when the
10 objection is made, and it seems to me that we
11 at least should consider whether if we're only
12 going to give the judge one opportunity to
13 correct the mistake whether we should require
14 the attorney to give it to the judge in
15 writing rather than simply an objection.

16 MR. MCMAINS: You mean
17 even if it's the other side?

18 PROFESSOR EDGAR: No. I'm
19 talking about under category number three if
20 neither.

21 MR. O'QUINN: That's why
22 you came on the side --

23 PROFESSOR EDGAR: Yes, I
24 did. But again, I'm not wedded to that, but I
25 think we ought to at least think about it.

1 MR. MCMAINS: If you're
2 shifting to whose burden is it, I mean whose
3 problems is it, if that's going to be shifting
4 of focus of exactly what you're supposed to be
5 doing, there are many instructions and
6 definitions that may well be applicable to
7 both claims and against.

8 PROFESSOR EDGAR:
9 Absolutely. That's why you have to include
10 the separate category.

11 MR. MCMAINS: And so if
12 you object -- for instance, if he gives you a
13 bum definition of negligence, you have a
14 criticism, a primary issue, then to the extent
15 you're concerned the printed answer you have
16 to do one thing. To the extent you're
17 concerned about the primary answer you've got
18 to do another.

19 PROFESSOR EDGAR: Well, I
20 assume you're going to have a -- you may not
21 have the same definition of negligence, for
22 example, in medical malpractice.

23 MR. MCMAINS: I understand
24 that. I'm just talking about even whether
25 it's just one.

1 PROFESSOR EDGAR: I think
2 we have to decide whether as a matter of
3 philosophy we want to recommend to the Court
4 that if it is one which is relied upon by
5 either party then whether we want to allow an
6 objection to suffice or whether we're going to
7 require a tender under Rule 276. And that's
8 the decision.

9 MR. O'QUINN: Hadley, I
10 thought we discussed this for an hour in the
11 May meeting or longer and we made a decision
12 as to what we were going to do. You were
13 simply going to try to get it on paper for
14 us.

15 PROFESSOR EDGAR: If you'll
16 go back and read the minutes, you will find
17 that there were many things about what we were
18 going to do, and it wasn't -- I was not given
19 a clear directive on how to draft this, simply
20 try and simplify it and simply have one
21 standard for these three instances or a single
22 standard even though they might be different.

23 MR. O'QUINN: I don't have
24 my notes from the last meeting, but maybe Luke
25 can test my memory, but didn't we have a

1 breakdown like one way, if it was in the
2 charge, you had to object to it. If it wasn't
3 in the charge you had to tender, and I
4 remember we had some lengthy arguments about
5 it.

6 PROFESSOR EDGAR: Well, we
7 had several --

8 MR. O'QUINN: We could
9 that it was almost never mandatory. We had
10 such a maze of editorial changes that somebody
11 said, Well, why don't we at least before we
12 take the final vote take all of these
13 editorial changes and take these votes and
14 write it out and let's go back and read them
15 and make sure.

16 PROFESSOR EDGAR: I was
17 not given the mandate to sit down and write
18 out all of the alternative suggestions. It
19 was my understanding that we were trying to
20 simplify.

21 MR. O'QUINN: Do you
22 remember, Luke, that we didn't actually vote
23 on how we wanted it the last time?

24 MR. SOULES: John, we
25 voted on a lot of pieces of it, and --

1 MR. O'QUINN: I do
2 remember we debated and took votes.

3 MR. SOULES: I've got the
4 transcript here. Of course, it went on for
5 about an hour.

6 MR. O'QUINN: I thought we
7 had decided.

8 MR. SOULES: No. We
9 finally got down to the end, and I think just
10 did generally refer it back.

11 PROFESSOR EDGAR:
12 Recommendation.

13 MR. SOULES: We generally
14 referred it back with the request that you
15 keep in mind the discussion that had been had
16 where we had been able to get definitive votes
17 or even close votes, expression of consensus,
18 but we never did get an overall resolution.
19 And is it pretty much in keeping with Buddy
20 Low's letter that's here?

21 PROFESSOR EDGAR: Well,
22 Buddy had some suggestions, and this pretty
23 well tracks it, but Buddy has left I think
24 something out, and I've forgotten what it is.
25 On what page is his letter?

1 MR. O'QUINN: 340.

2 MR. SOULES: It's on page
3 340, I guess.

4 PROFESSOR EDGAR: For
5 example, Buddy did not include the type of
6 situation included in element number three.
7 He was assuming that either a question,
8 instruction or definition was one relied upon
9 by a party or relied upon by the point, and
10 there are a lot of them that don't fit into
11 that.

12 MR. MCMAINS: You put
13 magic significance to this notion of relied
14 upon. I'm just saying that we're just
15 substituting here what the focus is, and I'm
16 not sure I understand precisely. It's not
17 defined what's relied upon by the parties.

18 MR. SOULES: Haven't we
19 historically used "party with the burden of
20 proof" on the question?

21 PROFESSOR EDGAR: No.

22 MR. O'QUINN: I think
23 Buddy Low states it pretty well on page 340
24 when he says in the third paragraph of his
25 letter when any element of a party's cause of

1 action or defense upon which the party has a
2 burden of proof and that properly includes
3 some question, instruction, definition, when
4 then those matter are matters upon which that
5 party relies.

6 MR. MCMAINS: I don't have
7 a problem with that.

8 PROFESSOR EDGAR: The
9 problem though if you'll look at Rule 278 as
10 it's now worded, it says "relied upon," and
11 that is a term I think that has been
12 sufficiently understood by practitioners ever
13 since -- this used to appear in Rule 279. It
14 says "relied upon," and that whole concept is
15 something that with which we're all familiar,
16 because that's the way the rule always read,
17 and I tried to keep that thought in this rule
18 so that parties wouldn't say, "Well, now, that
19 has never been in the rule before. Does that
20 indicate a change?"

21 MR. MCMAINS: But this is
22 talking about relied upon by the opposing
23 party, and I know you've got that.

24 PROFESSOR EDGAR: If it's
25 relied upon by the opposing party it's relied

1 upon by you, one of the two.

2 MR. MCMAINS: We'll,
3 that's fine if you want to do it in the total
4 disjunctive. The point is you have three
5 alternatives. You don't have opposing parties
6 in court, which is kind of the way you're
7 describing.

8 PROFESSOR EDGAR: Okay.

9 MR. MCMAINS: You've got
10 parties, matters not relied upon by a party
11 and then matters not relied upon by either
12 party.

13 PROFESSOR EDGAR: Okay.

14 MR. O'QUINN: Take your
15 concept of your definition of negligence which
16 I thought in your statement tends to come
17 under matters not relied upon by any party.

18 PROFESSOR EDGAR: I think
19 if you need --

20 MR. O'QUINN: I would
21 submit to you that the definition of
22 negligence is something I'm going to be
23 relying upon.

24 PROFESSOR EDGAR: If you
25 are the plaintiff in a negligence case and you

1 need the definition of negligence in order to
2 prevail, then that is one relied upon by you.

3 MR. O'QUINN: What if both
4 sides are relying upon it?

5 PROFESSOR EDGAR: Then
6 it's relied upon by both of them and it would
7 be under subdivision two.

8 MR. O'QUINN: Okay. I'm
9 with you.

10 MR. MCMAINS: Under (a).

11 PROFESSOR EDGAR: And you
12 might have a situation in which the defenant
13 is not asserting contributory negligence, so
14 then it would be under three.

15 MR. O'QUINN: He's to the
16 definitions in support of any case.

17 PROFESSOR EDGAR: Right.

18 MR. O'QUINN: So really,
19 the only kind of thing that's going to fall
20 under paragraph four are things like burden of
21 proof.

22 PROFESSOR EDGAR: That's
23 exactly unless it is a question including an
24 element thereof or instruction or definition
25 pertaining thereto. Then it's going to fall

1 under number four.

2 MR. O'QUINN: I

3 understand.

4 MR. TINDALL: Hadley, are
5 you overruling some cases under number three
6 where you're not relying on it, where not only
7 must you judge but you must tender?

8 PROFESSOR EDGAR: Yes.

9 MR. TINDALL: Should we
10 not slay that dragon by saying it is not
11 necessary as an affirmative, state that it is
12 not necessary to tender? I don't know if you
13 completed the ring of what you're saying.

14 PROFESSOR EDGAR: To me
15 that says it, but if the Committee wants to
16 change it in any way, I don't -- whatever.

17 MR. TINDALL: To add a
18 sentence "it is not necessary to tender a
19 correct definition if you're not relying upon
20 the definition, charge or instruction."

21 PROFESSOR EDGAR: All
22 right. Let's come back to that. You'll
23 recall that there is a case --

24 MR. TINDALL: A Supreme
25 Court case.

1 PROFESSOR EDGAR: There's
2 a Supreme Court case, and I cited it in my
3 letter at our last committee meeting, and I've
4 forgotten the style now, Morris vs. Holt, in
5 which the court held that if it is not one
6 relied upon by you, that you may either object
7 or tender.

8 MR. TINDALL: Okay.

9 PROFESSOR EDGAR: And
10 that's why I stated earlier that perhaps we
11 should in keeping with Morris vs. Holt add
12 here "such omission or defect shall not be a
13 grounds for reversal of a judgment unless an
14 objection thereto has been made by such party
15 or has been requested in writing and tendered
16 by that party," that is, either one with
17 preserving the error rather than just simply
18 relying on objection.

19 MR. TINDALL: Good.

20 PROFESSOR EDGAR: Maybe
21 that will clear up the problem that you're
22 having.

23 MR. MCMAINS: Hadley, a
24 lot of these are termed in terms of a grounds
25 for reversal of judgment, but we really mean

1 by a party seeking the reversal, right?

2 PROFESSOR EDGAR: Yes.

3 MR. MCMAINS: Well, what
4 you really mean is essentially omission or
5 defect shall not be a grounds for reversal of
6 a judgment unless an objection thereto has
7 been made by such party. And what's in the
8 other rule is out, is complaining of such
9 judgment, right?

10 PROFESSOR EDGAR: Right.

11 MR. MCMAINS: You just
12 left that out?

13 PROFESSOR EDGAR: Right.

14 MR. MCMAINS: I'm just
15 trying to get generally the question of
16 whether or not we've done anything or made at
17 least somewhat obscure what happens if
18 somebody else makes the objection.

19 MR. SOULES: That's not
20 addressed here, and I think it's a problem.

21 MR. O'QUINN: What kind of
22 example?

23 MR. MCMAINS:
24 Co-defendants. One defendant objects and the
25 other defendant doesn't. That defendant may

1 win and the other defendant loses.

2 MR. O'QUINN: What happens
3 under your rule in that example, Hadley?

4 PROFESSOR EDGAR: Well, I
5 think under the way that this is -- the way
6 that this is worded he would not prevail,
7 because he didn't object. He waived his
8 right.

9 JUSTICE MCCLOUD: It ought
10 to be.

11 PROFESSOR EDGAR: It
12 doesn't bother me.

13 JUSTICE MCCLOUD: It
14 doesn't bother me.

15 MR. MCMAINS: Matters not
16 relied upon by a party, and then it says --

17 PROFESSOR EDGAR: Unless
18 that objection has been made by such parties.

19 MR. MCMAINS: It says
20 "shall not be grounds for reversal unless
21 objections made by such party." Well, I say,
22 "Okay. It has been made by that party."

23 (At this time committee
24 members voiced opinions at the same time,
25 making transcription inaudible.)

1 MR. O'QUINN: Would it
2 solve it, Rusty, if entitled Matters not
3 Relied upon by the Complaining Party? Would
4 that solve your problem?

5 MR. MCMAINS: Yeah. Just
6 omission of the language of the party
7 complaining.

8 MR. O'QUINN: I think what
9 Rusty may be saying is if such party might be
10 incorrectly deemed to refer to the word
11 "party" in the caption as being the appealing
12 party. Is that what you're saying?

13 MR. MCMAINS: It's this
14 whole thing about not relied upon by a party.
15 It says, If a question not relied upon by a
16 party is omitted, such omission shall not be
17 grounds for reversal unless objected to by
18 such party.

19 PROFESSOR EDGAR: Secure
20 that by saying "not relied upon by a party
21 complaining of a judgment." Would that solve
22 the problem?

23 MR. MCMAINS: I think so.
24 I mean where I think it gets addressed in our
25 current. The party complaining of the

1 judgment is the party that has the burden to
2 satisfy this rule if it is the rule he's
3 trying to invoke. What I'm getting at is,
4 actually what happens is you may well be in a
5 different part of the rule. You could object
6 to avoid being findings to an issue relied
7 upon by you, like for instance, where you're
8 up here on two. And you don't want a deemed
9 finding so you're going to submit the proper
10 issue, but you win even under the defective
11 issue.

12 What this up here talks
13 about is, says it shall not be grounds for
14 reversal unless a submission has been
15 requested in writing and tendered by the party
16 relying upon it. The party relying upon it
17 did request it tendered, but he also won under
18 the defective submission. All I'm saying is
19 what's the burden of the other party? All it
20 says is it's not grounds for reversal. We
21 don't want a reversal now.

22 The other party says, "You
23 know, by God, you were right. That was the
24 wrong question. And the right question was
25 the one that you refused to submit by the

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1 party tendering." And he did that, and so
2 it's not an objection to reversing because he
3 did that. You're not entitled to the --

4 PROFESSOR EDGAR: You can
5 cure that by saying "by the parties
6 complaining of the judgment" in number three.

7 MR. MCMAINS: Not in
8 three. I would do it everywhere I think. In
9 other words, I just want to make it clear that
10 every party has the responsibility to do what
11 they're supposed to be doing with regard to
12 protecting their complaints on appeal; and as
13 to two, everything that applies to two, the
14 counterpart for that is really that the people
15 who were on the other side are going to have
16 to go to three. They're going to have to
17 object. I mean, if they agree, the judge is
18 just hell bent and determine to do something
19 that either party wants done, the party
20 relying upon the issue is going to be having
21 to submit and the party opposed to the issue
22 is going to have to be objected.

23 PROFESSOR EDGAR: That's
24 right.

25 MR. MCMAINS: And whoever

1 it is wins, the other one has got to have done
2 the right thing and can't rely on the other
3 one having done the right thing.

4 PROFESSOR EDGAR: That's
5 right.

6 MR. MCMAINS: And it
7 doesn't say that yet, and that's all I'm
8 trying to get in here.

9 PROFESSOR EDGAR: I think
10 it does say that. If it's something you have
11 relied upon, then you're going to have to
12 tender. If it's something that you have not
13 relied on, then you're going to have to
14 object. That's what two and three say.

15 MR. O'QUINN: I think it
16 solves it at the end of that paragraph number
17 three you say "by the complaining party." And
18 I'm agreeing with you, Hadley. I don't think
19 it has to be put in there to make it crystal
20 clear.

21 PROFESSOR EDGAR: When you
22 say in number three, though, after -- and on
23 the third line after the word "party," that
24 first word, you say relied upon -- "not relied
25 upon by a party complaining of the judgment,"

1 comma, "if omitted" so and so "shall not be a
2 ground unless objection has been made by such
3 party." And that's what I said 30 minutes
4 ago, doesn't that cure the problem?

5 MR. O'QUINN: I agree with
6 you. Going to put in the words after the word
7 "party" in line three?

8 PROFESSOR EDGAR: The
9 parties complaining of the judgment.

10 MR. MCMAINS: All I'm
11 saying is shouldn't the same change be made in
12 two?

13 PROFESSOR EDGAR: Where
14 would you put it, Rusty? And I don't have any
15 problem with that.

16 MR. MCMAINS: Well, the
17 one reference to party is --

18 PROFESSOR EDGAR: Party
19 relying upon.

20 MR. MCMAINS: -- parties
21 relying upon. You could put "and complaining
22 of the judgment."

23 PROFESSOR EDGAR: And
24 complaining of the judgment.

25 MR. O'QUINN: Hadley, I'm

1 going to give you a hypothetical in support of
2 an argument you should remove the words
3 "complaining party." What if you had a
4 situation where there was a defense submitted
5 by issues which the plaintiff thought were
6 defective and those issues were answered in
7 favor of the defendant, but the trial court
8 entered an NOV for the plaintiff. Okay. So
9 the defendant goes up, the plaintiff
10 cross-assigns saying that if an NOV is knocked
11 out, I want a new trial, because of the form
12 of the issues accorded the defense were
13 defective.

14 Now with that posture the
15 plaintiff is not complaining of the judgment.
16 So where does he stand when somebody says,
17 "Okay. This thing says, 'parties complaining
18 of the judgment.'" You're not relying on as a
19 plaintiff, but you're not the party
20 complaining of the judgment. The defendant
21 was the party complaining of the judgment. It
22 seems like to me just should be that if the
23 issues in question alleging the question is
24 not being relied upon by the parties
25 complaining about the issues, all he has to do

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1 is object and doesn't have to tender.

2 PROFESSOR EDGAR: All
3 right. In trying to analyze that question,
4 don't we have the same problem under our
5 current rules?

6 MR. O'QUINN: Could be. I
7 don't know.

8 PROFESSOR EDGAR: We do.

9 MR. MCMAINS: Probably do.

10 PROFESSOR EDGAR: And I'm
11 not sure that we can sit here and will solve
12 every possibly problem that could arise.

13 MR. O'QUINN: What's the
14 harm in just saying "an issue not being relied
15 upon by the complaining party"? Why does it
16 have to be of the judgment? Whatever party is
17 complaining about that issue, if he wasn't
18 relying upon it, voices complaint by an
19 object.

20 PROFESSOR EDGAR: I see.
21 All right. Not relied upon -- this is number
22 three.

23 MR. O'QUINN: Yes, sir.

24 PROFESSOR EDGAR: Not
25 relied upon by the complaining party.

1 MR. O'QUINN: The person
2 bitching about the issue wasn't relying upon
3 it. All he had to do is object.

4 PROFESSOR EDGAR: All
5 right.

6 MR. O'QUINN: It may be
7 applicable to two. I don't know.

8 MR. MCMAINS: Yes,
9 applicable if you have one in spite of having
10 been screwed on the charge and of course court
11 goes up and says you weren't entitled the one
12 under the charges given, you're going to be in
13 the position to win on cross, get a remand on
14 the charge of being wrong.

15 MR. O'QUINN: Where would
16 that go on number two? I don't see any place
17 where it would fit.

18 MR. MCMAINS: Same place
19 just say give me --

20 MR. O'QUINN: Well --

21 MR. MCMAINS: Determined
22 by the parties relying upon and complaining.

23 PROFESSOR EDGAR: I don't
24 think you need in there --

25 MR. O'QUINN: It doesn't

1 seem like. I don't see the point.

2 PROFESSOR EDGAR: I don't
3 think you need it.

4 MR. MCMAINS: Well, you
5 have to say "such omission or defect should
6 not be grounds for a reversal of a judgment in
7 favor of such party unless it's submission
8 can" -- substantially direct wording has
9 been -- well, or -- and so do you see what I'm
10 saying?

11 PROFESSOR EDGAR: Say it
12 all.

13 MR. MCMAINS: "Not be
14 grounds for reversal of a judgment in favor
15 of" --

16 MR. O'QUINN: You mean
17 judgment in favor of?

18 MR. MCMAINS: I meant
19 reversal.

20 MR. O'QUINN: "For
21 reversal in favor of the" something "of a
22 judgment."

23 MR. MCMAINS: Of the
24 complaining party in the submission.

25 MR. O'QUINN: I tend to

1 agree with Hadley. I'm not sure you need it.
2 I can't think of an example where it won't
3 work.

4 MR. MCMAINS: You request
5 submission of an issue. Request of submission
6 of the issue doesn't get it. I'll give you
7 another issue. Instead you've got to
8 substantially submit the correct one. You win
9 under the substituted issue.

10 MR. O'QUINN: All right.

11 MR. MCMAINS: It turns out
12 to be the wrong issue. The other party is
13 protected under the next subdivision or even
14 maybe there's no evidence to support evidence
15 that the judge did submit. So the judge
16 renders a judgment however for you ignoring
17 this little no evidence problem. The Court of
18 Appeals reverses and you want to get back.

19 MR. O'QUINN: And I want
20 to try to at least get a new trial.

21 MR. MCMAINS: Right.

22 MR. O'QUINN: But I didn't
23 get the right issue submitted.

24 MR. MCMAINS: Yes.

25 MR. O'QUINN: I'm not

1 complaining of the judgment at that point.

2 MR. MCMAINS: You're
3 complaining -- what will be the judgment of
4 the Court of Appeals.

5 MR. O'QUINN: That's not
6 what it said.

7 MR. MCMAINS: I know. Of
8 course, the way this rule is written, it says
9 that defect will not be a ground for reversal
10 of judgment. This rule does not allow that
11 defect to use cross-assignment.

12 PROFESSOR BLAKELY: Nor
13 should it.

14 MR. O'QUINN: What do you
15 do for this example where the plaintiff has
16 two liability theories, (a) and (b), the trial
17 court submits (a) but wouldn't submit (b)?
18 The plaintiff wins, but appeal determined (a)
19 was not a valid ground, and plaintiff seeks a
20 new trial on (b). Which one of these rules
21 does it come under?

22 PROFESSOR EDGAR: It
23 should be number two.

24 MR. SOULES: What? No.

25 MR. MCMAINS: I agree.

1 It should be two, but it ain't there.

2 MR. SOULES: Wait a
3 minute. That's one.

4 MR. MCMAINS: There is no
5 one.

6 MR. SOULES: Okay. Two.
7 May I ask a question? Don't we usually start
8 out when we're trying to tell people about a
9 preservation of charge error by saying a party
10 who has the burden of proof on a question must
11 do something to preserve error in the failure
12 to submit that question? Why don't we just
13 say it that way in the rule? And a party who
14 does not have the burden of proof on a
15 question -- I get lost in some of the language
16 and some of what I'm hearing here seems to me
17 language problems; and of course, Hadley has
18 worked hard to get this. I think the concepts
19 are here, but the way parties have to perfect
20 error is really based on who has the burden of
21 proof on the question on two and three.

22 MR. O'QUINN: Yeah.

23 MR. SOULES: And we don't
24 really say that, but we've talked about about
25 it.

1 PROFESSOR EDGAR: The
2 reason I didn't is because the current rule
3 doesn't talk about it. It talks about whether
4 it's relied upon. And it seems -- and I just
5 felt that the bench and the bar know what that
6 means. And then you start talking about
7 burden of proof, and then lawyers and judges
8 get paranoid, because you've changed
9 something. Now then they say, "Well, is that
10 different now because you don't talk about
11 relied upon anymore? You talk about burden of
12 proof. What does that mean?" And this is an
13 area where people are schizophrenic anyhow,
14 and I was thinking that it might be well to
15 retain as much of the language as we retained
16 to try and reduce or eliminate as much
17 paranoia as we can. That's why I did it.

18 MR. O'QUINN: My
19 suggestion about the thing, discussion before
20 Luke made his comments is to go to line four
21 of paragraph two and change the words to
22 reversal of judgment to be shall not be a
23 ground for appellate complaint. That would
24 allow it to come in as a cross-assigned
25 complaint, you know, because you can't raise

1 appellate complaint unless submission
2 substantial.

3 JUSTICE HECHT: Listening
4 to this discussion and larking back to the
5 discussion very lengthy as we noted we had
6 last time, I just wonder if we're really
7 extracting ourselves from what we all think is
8 a difficult area of the law at a particularly
9 difficult and pressured point of the trial.

10 If I might just think
11 through this a moment. Nobody knows exactly
12 what they have to do at this point in the
13 trial to preserve error. They're concerned
14 about it. The evidence is concluded. The
15 argument is getting ready to happen. It's not
16 an easy time for counsel, and we're making --
17 in the past had a lot of rules that were
18 complicated it seems to me by one factor; and
19 that is that because trial judges in this
20 state many times do not have, almost all the
21 time, do not have the clerical and legal staff
22 available to them to prepare the charge
23 themselves or to research aspects of it, they
24 have got to rely upon counsel to do some of
25 that for them. And the trial judge needs to

1 be protected from sandbagging by a lawyer who
2 does not like the way the trial has gone and
3 decides that he'll try to leave some error in
4 the charge and hope for a reversal later on
5 down the line.

6 Now, all the Federal Rule
7 requires is that objection be made and that it
8 be specifically made pointing out the defect
9 at the time. Otherwise, you cannot rely upon
10 that on appeal. And that's the same rule that
11 you have with respect to evidence and the same
12 rule that you have with respect to voir dire
13 and many other aspects of the trial.

14 If the problem is that we
15 want to provide assistance to the trial court
16 by requesting language in substantially direct
17 form, why can't we simply provide in the rule
18 that the trial judge may request a party to do
19 that and then if he either fails or refuses to
20 do so or the language that he requests is
21 wrong, that he can't base an appeal on that
22 rather than trying to decide in the abstract
23 when he's going to have to request language
24 and when he's not going to have to request
25 language.

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1 Is there some merit to an
2 approach where we put -- since this is to
3 benefit the trial judge we move the onus of
4 asking for an overall trial. If it's a comp
5 case if we still have comp cases, if it's a
6 comp case and he feels comfortable with a
7 pattern jury charge and he doesn't need a
8 whole lot else, there's no point really in
9 making somebody request a charge in
10 substantially correct wording and an objection
11 ought to suffice.

12 But if it's a very
13 complicated charge and a very complicated
14 products case with warranties and negligence,
15 then it might be he could ask for it. If a
16 party asks for it wrong and then later he
17 wants to appeal on that basis, it's going to
18 be in the record and he can't base an appeal
19 on that.

20 It's a totally different
21 approach to what we've taken so far, and I
22 agree with you. I think Hadley has done a
23 good job of trying to segregate out the
24 categories here. But have we really extracted
25 ourselves from the mire of a lawyer sitting

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1 there at the charge conference looking down at
2 this rule that now has four parts to it and
3 thinking "Where in the world am I on this
4 particular issue?"

5 PROFESSOR EDGAR: Just a
6 couple of observations that I'd like to make
7 to that. First, if the trial judge does not
8 have adequate support staff, and I agree with
9 you that that's the case, then it seems to me
10 that that would speak for requiring the lawyer
11 to aid the court in the preparation of the
12 charge which comes before the objection part,
13 and that it would seem to me to require the
14 lawyer whether one an issue relied upon by him
15 or not relied upon by him to make a tender.
16 Now that seems to help the judge who doesn't
17 have the proper staff.

18 On the other hand, in the
19 Federal practice theoretically you don't know
20 what the charge is until after the court gives
21 it, and in our practice you -- I mean, before
22 argument and in our practice you do. And so
23 it seems to me that what you're doing also is
24 requiring a lawyer who does not have the
25 burden open the question to perhaps under your

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1 scenario as I envision it to maybe in some
2 instances make a tender.

3 JUSTICE HECHT: Right.

4 PROFESSOR EDGAR: And it
5 seems to me that that philosophically maybe
6 imposes a greater burden on a party that does
7 not rely upon it than we should require,
8 because if it's not your question, then why
9 should you labor under the burden of having to
10 present a proper question to the court in
11 order to help the other party avoid a
12 reversal? I'm somehow philosophically opposed
13 to that.

14 JUSTICE HECHT: And I am
15 too, but in a general charge to which we are
16 moving more and more it's hard to tell which
17 is whose question and which is somebody else's
18 question, which is whose issue and which is
19 somebody else's issue.

20 HONORABLE RIVERA: Put
21 both of them together --

22 MR. MCMAINS: And that's
23 what Hadley has tried to address.

24 JUSTICE HECHT: With
25 respect to aiding the trial court, first of

1 all, a lawyer who wants to win is going to try
2 to give the judge, I would think, as much aid
3 as he can possibly give him including writing
4 the whole charge for him if the judge would
5 let him. "Judge, I'll just give you my issues
6 and everybody's issues."

7 MR. O'QUINN: We've done
8 that, haven't we, Luke?

9 MR. SOULES: I like to do
10 that. I sure try hard.

11 JUSTICE HECHT: And if a
12 lawyer isn't worried enough about his case to
13 do that, then I'm suggesting the trial judge
14 should certainly request him to do that. And
15 if he refused to do it or failed to do it, and
16 does not otherwise object to the charge, then
17 he's not going to be able to predicate an
18 appeal on that, on any error in the charge.

19 MR. BEARD: Hadley, as I
20 understand what you're saying that if there
21 are errors in the charge and you made a clear
22 objection to that error, that unless you
23 submit the correct one, you're out. We always
24 should be able to clearly --

25 PROFESSOR EDGAR: It

1 depends on whether you're or not --

2 MR. BEARD: It doesn't
3 make any difference which if you're pointing
4 out an error in a charge and make it clear to
5 the Court and the Court doesn't change it.

6 MR. O'QUINN: That's not
7 so.

8 MR. SOULES: Bill Dorsaneo
9 has his hand up.

10 MR. BEARD: You always
11 submit your issues.

12 MR. SOULES: Bill has got
13 the floor.

14 MR. BEARD: But whatever
15 the Court does if you get one and it's got an
16 error in it and it's --

17 MR. SOULES: Bill
18 Dorsaneo.

19 MR. BEARD: -- under our
20 present rules.

21 MR. SOULES: If you-all
22 want to debate off to the side, please leave
23 the room. Bill Dorsaneo has got the floor.

24 PROFESSOR DORSANEO: I'm
25 just sitting here listening this whole time

1 and I listened to the last discussion and went
2 through the excercise we went through last
3 time, and I end up thinking fairly much along
4 the lines of Justice Hecht, that the principal
5 mechanism for preserving a complaint ought to
6 be a clear objection to the charge regardless
7 of whether we're talking about a question, an
8 instruction or a definition and regardless of
9 who relies on it in some sense. If the
10 objection to the charge is that there is
11 something missing from a question, from the
12 definitions, from the instructions, then I
13 think most lawyers will want the charge to be
14 worded in a particular way, likely would be
15 inclined to accompany their objection with the
16 appropriate information that they want
17 included. That's the normal way people would
18 be expected to act, and it has struck me as
19 odd for some time that our practice in fact
20 says that that is inappropriate to combine
21 your objections and your requests; and I would
22 ask Justice Hecht if I understood him
23 correctly, would it be the case that the judge
24 is meant to ask for assistance basically in
25 that situation when there isn't something

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1 already on the table to shoot at from the
2 standpoint of an objection.

3 I think that approach
4 leaves our past behind us where it really is
5 appropriate for the past to be in light of our
6 modern scheme of combining everybody's
7 elements and causes of action together and by
8 not preserving distinctions between what
9 questions do and what definitions and
10 instructions do. The simplified approach
11 makes the most sense to me, and I think it
12 could be drafted up.

13 MR. SOULES: What's the
14 sense of the Committee?. Should we try to get
15 a revised Rule 278 that makes the objection
16 the operative error preserving vehicle and
17 doesn't really deal with requests of
18 particular requests and substantially correct
19 form language? I guess if we get -- if we're
20 going to be rewriting the old scheme, then
21 Hadley has got that to do. If we're going to
22 be writing towards a different scheme, then
23 Hadley has got that to do, or do we want to
24 adopt this? We can do that too. I'd like to
25 get some sense of the Committee whether we

1 should try to make -- get to the point where
2 an objection is at least for the most part if
3 not all together the operative preservation of
4 error vehicle.

5 JUDGE CASSEB: If your
6 primarily purpose is to help the trial judge,
7 then I think the objection should be made and
8 a suggested issue or instruction should be
9 submitted also in order for you to preserve
10 anything. I travel all over the state as you
11 know, and the courts in some areas frankly the
12 lawyers write the charge and bring it to the
13 Court and he looks at it. "Fine. That's the
14 end of it." So to do what Justice Hecht wants
15 to do, say that the court makes the request, I
16 think that's putting something on the Court
17 that he really is not even knowledgeable of at
18 the time. I say this: If it's raised to the
19 Court at that time, then the Court can say,
20 "Well, you bring me, in support of your
21 objection you bring me a suggested deal."
22 Now, that's if you're going to do that and
23 follow that type of concept, then in my
24 opinion you're really helping the trial judge
25 to get a correct charge.

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1 MR. SOULES: Newell
2 Blakely, then Elaine and then Rusty.

3 PROFESSOR BLAKELY: Before
4 I vote I'd kind of like to know how specific
5 an objection must be, an objection charge. If
6 it's fairly specific it's virtually synonymous
7 with the tenor.

8 MR. SOULES: It has to
9 suggest what the correct language would be in
10 order to be specific enough to make a good
11 objection.

12 PROFESSOR BLAKELY:
13 Specificity you're virtually tendering it.

14 MR. SOULES: I think
15 that's a good observation. Elaine, you're
16 next and then Rusty.

17 PROFESSOR CARLSON: There
18 are two points I want to bring up on the
19 subject. One is, in CLE on the charge where
20 the procedure says you ought to have the
21 charge before you begin your trial. Secondly,
22 in my hours of reading the local rules I
23 notice that a lot of courts had local rules
24 that require parties to tender at the pretrial
25 stage to court, at pretrial conference a

1 proposed tentative charge or at some time
2 later an announcement of ready for trial.
3 Maybe the thought should be move up the charge
4 or propose the charge earlier in the
5 proceeding and objections.

6 MR. SOULES: There's a
7 good idea. You're thinking about having a
8 rule that would say that the proposed issues,
9 questions and instructions have to be tendered
10 at some point earlier than at the charge
11 conference.

12 PROFESSOR CARLSON:
13 Address at some point to ask for tentative.

14 PROFESSOR EDGAR: I am
15 opposed to that. For example, the --

16 MR. SOULES: Okay. Rusty
17 is next and then Hadley.

18 MR. MCMAINS: That's
19 okay.

20 MR. SOULES: Rusty yields
21 to Hadley, so it's Hadley.

22 PROFESSOR EDGAR: I noted,
23 for example, the Dallas rules require that,
24 but the trial judges say they need only your
25 questions. They don't need your opponent's

1 questions, so you really haven't solved the
2 part of the problem that we are attempting to
3 address.

4 PROFESSOR CARLSON: You
5 still would leave the objection problem. We
6 can't address the objection problem until
7 it's --

8 PROFESSOR EDGAR: Until
9 you know what the evidence is.

10 MR. MCMAINS: I have a
11 problem. With an attempted unified approach
12 of saying you either only object or you only
13 request, which as I understand it is what you
14 were kind of leaning toward characterizing the
15 issue, Bill was talking about --

16 MR. SOULES: I'm not
17 leaning. I'm just inquiring.

18 MR. MCMAINS: In terms of
19 trying to fork off and see which way you can
20 solve it I really do have fundamentally a
21 philosophical problem with having to assume
22 the burden of preparing my opponent's
23 instructions. He may have a theory or in many
24 cases I'm the one asserting the theory. I'd
25 be delighted for him to prepare it if he could

1 figure out better what my theory was and then
2 I'll sit back and say, "Well, it's his
3 charge." So if I can win on that issue I can
4 live with it.

5 I mean, I really have a
6 problem with putting any burden on a party to
7 prepare somebody else's charge. On the other
8 hand, if you're in fact, if what you're trying
9 to get the Court to ask and want to formulate
10 and base the judgment on in some manner I
11 don't see how only an objection process you
12 don't go into the charge conference and tell
13 the judge after you've rested your automobile
14 intersection case, you just say, "Okay,
15 judge. What issues are you going to give me?"
16 And then just stand back and object. "Well,
17 I've got some other here. I have some other
18 ground, and let me tell you. I think I have
19 this, this and this" and let the judge prepare
20 it, because that puts a burden on the judge
21 that he really doesn't have under our current
22 practice and probably ought not to have. He
23 doesn't just get to listen to the evidence and
24 make up what he thinks is going to be there
25 and everyone just sits back and figures out

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1 what they're going to do by objecting to it.
2 So, I mean, there really
3 is in my judgment a good reason why this whole
4 notion of whose burden is it is in there,
5 because it's your case. And secondarily with
6 regards to this entire notion that somehow
7 you've got to request if you go any other way,
8 the problem then is that you've got to have a
9 way to object to something on having no
10 evidence to support it or no legal basis in
11 fact or whatever. You've got various and
12 sundry procedural rendition theories that you
13 can effectuate at the charge stage which a
14 mere submission practice or requesting
15 practice will not get you to. You've got to
16 say that question ought not to be there,
17 period, and you need to have a process to say
18 that by way of an objection. I don't think
19 you can eliminate philosophically or
20 pragmatically the dichotomy that we have
21 between objections and requests. I do think
22 we do need to simplify and we're working on
23 it. Hadley has worked toward that, of
24 simplifying when you have to do one or the
25 other, and that you should never have to do

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1 both, and I think he drafted this with that in
2 mind. Am I right?

3 PROFESSOR EDGAR: Right.

4 MR. MCMAINS: You should
5 know as clearly as you can when you have to do
6 one, when you have to do the other, and you
7 have to know that you don't ever do both of
8 them or have to do both of them. The careful
9 lawyers are always going to do both of them,
10 but and that practice is not probably going to
11 change, but I really think that going to some
12 kind of unified approach ignores a lot more of
13 the realities that have built up in our
14 practice, legitimately so, and I don't think
15 we can handle this by solely an objection or
16 solely a request. And so then the question
17 is, how do you distinguish where you do it?

18 PROFESSOR EDGAR: That
19 gets back, it seems to me, to the difference
20 between the federal judiciary and the state
21 judiciary, and I want to pick up on that. The
22 federal judge has two or three clerks that are
23 attorneys that are sitting there helping the
24 Court. And at the conclusion of the evidence
25 the Court is in the position to say, "All

1 right. This is the charge. I'm going to
2 submit."

3 The state judge doesn't
4 have that luxury. And I think it would be
5 unfair and I'm trying to pick up, I think, on
6 what Judge Casseb was saying a while ago, that
7 it would be extremely unfair to sit back and
8 say, "Okay. Judge, now you show me the charge
9 you're going to submit and I'm going to start
10 objecting to it." I think the lawyer has to
11 assume some responsibility in putting this
12 charge together, and I see a problem unless we
13 can give our state judges more help in trying
14 to implement a unified approach.

15 MR. MCMAINS: The problem
16 I think Hadley's has attempted to solve and
17 done a pretty good job of doing is the new
18 problem inserted by the advent of a more
19 general charge where alot of the elements of
20 the claim are not in the question, whereas now
21 our rules are constructed that your burden to
22 submit or object depends upon whether it's a
23 question or something else. He's changed that
24 focus to it depends on whether it's yours or
25 somebody else's.

1 PROFESSOR EDGAR: Or
2 nobody's.

3 MR. MCMAINS: Or the
4 Court's, and that is a movement and at least a
5 fair direction you ought to be responsible for
6 your case and you ought to be sensitive to the
7 fact that the other side is not going to be
8 terribly sensitive to your case, and so you
9 should be prepared to object, but you ought
10 not to have to be entitled or required to
11 prepare what the other side is doing, which a
12 lot of times you don't know about until it's
13 over; and I think the movement that Hadley has
14 made is a good movement. I think in terms of
15 the general charge I think it makes total
16 sense if you have got all kinds of theories,
17 however weird they are and the judge is
18 inclined to submit them, the other party ought
19 not to have the burden of trying to explain
20 what they are when you are actually taking the
21 position that they don't exist.

22 PROFESSOR DORSANEO: I
23 don't want to belabor this, but if you look at
24 -- we're talking about -- I don't know what
25 number we're talking about. We're talking

1 about objections in Rule 278. The other rules
2 before that talk about "either party may
3 present to the court requests, written
4 questions, definitions and instructions." It
5 strikes me that nothing much is going to be
6 altered about what happens before a proposed
7 charge is prepared by a procedure that says
8 you preserve your complaint by making it an
9 objection, and if your objection is there is
10 something missing, then in order to make your
11 point clear, if the judge asks you'd have to
12 tender something that would be the appropriate
13 thing you would want.

14 This business about
15 preparing the charge for somebody else and
16 doing all of that, I listened to all that, and
17 it's presented in an earnest fashion, and I'm
18 just not buying it.

19 MR. SOULES: Okay. The
20 Chair is going reset this for the August 12
21 meeting, and I would like to expand the
22 Committee to those poeple who have been most
23 active in today's discussion. Is that okay
24 with you, Hadley?

25 PROFESSOR EDGAR: Sure.

1 MR. MCMAINS: And that
2 would be Rusty, Bill, Pat Beard, Hadley Edgar,
3 John O'Quinn and anyone else who wants to put
4 their hand up right now; and when we come back
5 on August the 12th this Rule 278 will be the
6 first item on the agenda to be followed by
7 Rusty's work on the other major point, and
8 then we'll finish whatever else we have, but
9 try to get, capture all of these ideas.

10 PROFESSOR EDGAR: Before
11 we leave then, do you want me to chair the
12 committee?

13 MR. SOULES: Yes.

14 PROFESSOR EDGAR: Before
15 we leave I want to ask each member that's been
16 appointed to let me have in writing within one
17 week their suggested changes.

18 MR. SOULES: By next
19 Friday mail to Hadley what you think the
20 language of Rule 278 ought to be, and then at
21 least you'll start -- and copy to each other,
22 want to make a note of Rusty, O'Quinn, Hadley,
23 Beard, Dorsaneo. I'll serve. Does anyone
24 else want to serve on the committee? Okay.
25 That will be the committee.

1 MR. BEARD: We're talking
2 like we are preparing something for people
3 that have never been in the courtroom before,
4 don't know what they're doing? We're talking
5 about people coming to court to try cases that
6 haven't prepared their special issues or
7 charge?

8 MR. SOULES: That's the
9 assignment. The issue is passed to the first
10 item on the August 12 agenda.

11 Now we're going to go to
12 Rule 47. Elaine has written this in longhand,
13 but it's pretty easy to comprehend. She has
14 taken Paragraph B of TRAP 47 and divided it
15 into two subparts. The first subpart starts,
16 As to civil judgments rendered in a bond
17 forfeiture proceeding a personal injury or
18 wrongful death action, a claim covered by
19 liability insurance or a workers compensation
20 claim, those are the types of claims that are
21 excluded from the coverage of the new
22 statute. As to those then she tracks the
23 present rule. Those actions are already
24 governed by the present rule, so that is no
25 change to those kinds of actions.

1 MR. MCMAINS: Right.

2 MR. SOULES: Then she
3 says, As to civil judgments rendered other in
4 a bond forfeiture proceeding of personal
5 injury, wrongful death action, claim covered
6 by liability insuranace or workers
7 compensation claim, that means all the actions
8 that are now covered by the statute, she uses
9 the language of the statute. So what she's
10 done is take the cases that are covered by the
11 statute or governed by statutory standard
12 we've made that a part of our rule. The cases
13 that are not governed by the statutory
14 standard are made the subject of our present
15 rule which is the way the law is anyway.

16 It's pretty
17 straightforward and clean. I can type this as
18 it is. She's underscored the changes that she
19 has made. Is there any further discussion now
20 on this Rule 47 as she has written and
21 proposed?

22 JUDGE CASSEB: Move for
23 adoption.

24 MR. SOULES: Those in
25 favor say aye.

1 ADVISORY COMMITTEE: Aye.

2 MR. SOULES: Opposed?

3 This will be unanimously recommended to the
4 court. Thank you, Elaine.

5 (At this time there was a
6 brief recess, after which time the hearing
7 continued as follows:)

8 MR. SOULES: Rule 308 on
9 page 352.

10 PROFESSOR EDGAR: What
11 page?

12 MR. SOULES: Page 352.

13 PROFESSOR EDGAR: This is
14 one of mine, I think. This is one I received
15 late last week, and I think it came from
16 Harry Tindall.

17 MR. TINDALL: It did.

18 MR. SOULES: And I'm going
19 to let him explain because I haven't had a
20 chance to pass it to my subcommittee.

21 MR. TINDALL: We've kicked
22 this around in the Family Law section for
23 years. This is a rule that's been on the
24 books since 1950. The only way you used to be
25 able to enforce a divorce decree was by

1 getting a court to appoint a lawyer to go down
2 and file a contempt action; and its time has
3 sort of passed by, but because the code, the
4 Family Code has allowed many more remedies
5 about income withholding, judgments, bonds,
6 all kinds of things. And so this would simply
7 say that when the Court has ordered child
8 support with added issues of visitation, then
9 they can appoint a lawyer which is exactly
10 now. If he thinks that there is a violation,
11 then he can proceed for enforcement action
12 under Chapter 14; and if there is such a
13 violation, the Court can enforce under 14.
14 And that is the only change.

15 The old rule is poorly
16 written, talks about putting the burden on the
17 party with the show cause. You can't do that
18 constitutionally. It's limited to contempt,
19 and I have run this by Ken Fuller and other
20 members of our section. I think it's pretty
21 well agreed to by everyone.

22 PROFESSOR DORSANEO: Why
23 do you even want a Rule 308?

24 MR. TINDALL: Well,
25 because it is very much alive and well, Bill.

1 People wander into the courthouse to this day
2 in Houston, Texas and ask for a lawyer to help
3 them on their divorce decree, enforcement.
4 It's very much alive and well. Judge Casseb
5 can probably speak certainly.

6 JUDGE CASSEB: They come
7 out.

8 MR. TINDALL: They come to
9 you wanting a lawyer appointed, so it's very
10 alive. We'd like to get rid of it.

11 PROFESSOR DORSANEO: So
12 are fire ants.

13 MR. TINDALL: No. But, I
14 mean, it is so much alive and well and it's
15 very institutionalized in certain counties.

16 MR. SOULES: How does this
17 help you?

18 PROFESSOR EDGAR: What
19 this does is eliminate the problem of
20 enforcement of the decree and limits it to the
21 parent/child relationship.

22 MR. TINDALL: That's
23 right. Both for support and visitation, and
24 too, then you're given all of the remedies
25 under Chapter 14 which are far more better

1 than contempt, and you can get an income
2 withholding ordinance.

3 MR. SOULES: Okay. And
4 the Family Law section approved this?

5 MR. TINDALL: We're signed
6 off on it.

7 MR. SOULES: You're signed
8 off on it.

9 PROFESSOR EDGAR: I just
10 have one question. The last sentence says "a
11 fee may be collected as cost by judgment or
12 both."

13 MR. TINDALL: Yes.

14 PROFESSOR EDGAR: If it's
15 by judgment, then isn't it part of the cost?

16 MR. TINDALL: Well, the
17 old rule, Hadley, if you'll look in the
18 book --

19 MR. SOULES: The court
20 reporter can't get the transcript with the
21 side talking.

22 MR. TINDALL: The old
23 rules said that you could get -- your fee
24 shall be assessed against the party and
25 collected as cost, whatever that would mean.

1 That always seems strange that you would
2 collect your fee as cost to court. We kept it
3 to the extent that purportedly you can keep
4 them in jail until they pay court costs. But
5 we've also allowed it by judgment.

6 PROFESSOR EDGAR: My
7 question is what's the difference?

8 MR. TINDALL: Oh, you can
9 keep them in jail.

10 PROFESSOR EDGAR: No. No.
11 No. My question is, when you assess something
12 as costs, isn't that in the judgment? Doesn't
13 the judgment correct what the costs are and
14 require the costs be paid? I'm just concerned
15 about what the difference between as costs and
16 by judgments means.

17 MR. MCMAINS: Is this a
18 new judgment? Is the cost referred to I think
19 is what Hadley was questioning? Is the cost
20 referred to mainly somehow costs of the
21 original?

22 MR. TINDALL: No. No it
23 would only be the costs for enforcement.

24 PROFESSOR EDGAR: The
25 attorney fee, I presume in the preceding

1 sentence.

2 MR. TINDALL: That's
3 right. And if you have it taxable as cost,
4 then you can keep them incarcerated until it's
5 paid.

6 PROFESSOR EDGAR: Isn't
7 that in the judgment?

8 MR. TINDALL: Well, if you
9 only have a monetary judgment, then you don't
10 have the right of incarceration.

11 PROFESSOR EDGAR: We're
12 missing something.

13 MR. TINDALL: Okay.

14 PROFESSOR EDGAR: We're
15 talking about the fee.

16 MR. TINDALL: Right.

17 PROFESSOR EDGAR: And you
18 say the fee may be collected as cost by
19 judgment or both, which makes me believe that
20 there's a difference between it being as cost
21 and by judgment.

22 MR. TINDALL: There is a
23 difference.

24 PROFESSOR EDGAR: Oh.

25 MR. TINDALL: There is a

1 difference. When the judge says, "I find you
2 in contempt of court. You denied visitation
3 or you didn't pay child support." Judge
4 Casseb, you can explain it better than I can.

5 MR. MCMAINS: Talking
6 about the fee.

7 JUDGE CASSEB: You're
8 talking about what means then by a judge and
9 you can have judgment against that other
10 person just like you'd have a civil judgment
11 for so many dollars.

12 PROFESSOR EDGAR: Yes.

13 JUDGE CASSEB: That's what
14 he's talking about. That's the difference.
15 The other is he's --

16 MR. MCMAINS: What does
17 cost of what? Cost of --

18 MR. TINDALL: That's
19 right. The attorneys --

20 PROFESSOR EDGAR: This
21 says a fee may be collected. It says "a
22 fee." See, Harry, the last sentence?

23 MR. TINDALL: Well,
24 all right.

25 JUDGE PEEPLES: Taxed.

1 PROFESSOR EDGAR: Can be
2 taxed as cost, and he has to pay it before he
3 gets out of jail.

4 MR. TINDALL: That's
5 right.

6 PROFESSOR EDGAR: But
7 isn't that in the judgment?

8 MR. TINDALL: Well --

9 JUDGE PEEPLES: No.

10 MR. TINDALL: -- no. It's
11 different.

12 HONORABLE RIVERA: It can
13 be the judgment that says that you're entitled
14 to recover \$100 in fees and execution of the
15 issue. The other one says that you're
16 entitled to recover \$100 and taxed as costs
17 and then go to jail for that but not for a
18 judgment.

19 JUDGE CASSEB: Or a civil
20 debt. You go for the costs.

21 JUDGE PEEPLES: I don't
22 know why the winner in a contempt would want a
23 judgment if the judge is willing to tax it as
24 cost and put him in jail.

25 MR. TINDALL: Yeah.

1 It's -- I put it in because it's now in the
2 code and we're trying to conform the two.
3 You'd want it as costs.

4 JUDGE PEEPLES: Sometimes
5 a lawyer in his or her own name will get a
6 judgment against an obligor as opposed to the
7 client.

8 MR. TINDALL: Right.

9 JUDGE PEEPLES: I don't
10 see what the objection is in having it this
11 way.

12 PROFESSOR EDGAR: I was
13 just concerned about whether or not they were
14 different, and apparently they can be
15 different, and that was the question.

16 MR. SOULES: Apparently
17 the judge can enter a judgment taxing the fee
18 as costs and there are certain ways to enforce
19 costs.

20 PROFESSOR EDGAR: Outside
21 of judgment.

22 MR. SOULES: Outside the
23 ordinary judgment procedure, or the judge can
24 enter a judgment that the lawyer recover from
25 the party a civil judgment money judgment

1 which is enforced by execution and other
2 process, and this provides that either way is
3 okay, and I guess that's the way the Family
4 Bar wants it, and it seems like they're just
5 alternatives to get the money.

6 MR. TINDALL: That's
7 right.

8 MR. BEARD: Does this
9 contemplate that the Court can appoint any
10 member of the bar and he has the same duty as
11 the deputy?

12 MR. SOULES: Harry, do you
13 recommend these changes?

14 MR. TINDALL: I recommend
15 it.

16 MR. SOULES: And is there
17 any controversy in the Family Bar about it?

18 MR. TINDALL: No.

19 MR. SOULES: Do you know
20 of any reason why --

21 MR. TINDALL: I circulated
22 it. The reason what's in the book has been
23 cleaned up to what you have before you today.

24 MR. SOULES: This two
25 paragraph is just --

1 MR. TINDALL: Complete
2 substitution.

3 MR. SOULES: Deletes the
4 red lining and that is the full text of the
5 rule as it would be rendered finally by the
6 Court?

7 MR. TINDALL: That's
8 right.

9 MR. SOULES: Any further
10 discussion?

11 JUDGE CASSEB: I move for
12 substitution, because it's very helpful.

13 MR. SOULES: All right.
14 It's been moved by Judge Casseb. Those in
15 favor say aye.

16 ADVOSORY COMMITTEE: Aye.

17 MR. SOULES: Opposed same
18 sign. It's unanimously approved.

19 The next is -- let me turn
20 your attention to page 350 where Sam George
21 wants notice of proposed judgments. We worked
22 that through --

23 MR. TINDALL: I think
24 we've adopted that.

25 MR. SOULES: We worked

1 that through in the changes to 305 which
2 appear on page 74.

3 MR. TINDALL: Right.

4 MR. SOULES: The only
5 thing that we did not do really, I think, that
6 he wants is to put in a ten-day fuse. I have
7 some concern about that, because we may need a
8 judgment quick, and a judge may say, "Okay.
9 Here it is, and I'll see you back here this
10 afternoon. If you've got any problems, let me
11 know." And I'm not sure that we want to put a
12 rigid 10-day turnaround on proposed judgments
13 because of all the reasons why a judge might
14 be needing shorter than 10 days, but we do
15 require notice now because of what was done in
16 305 that the Supreme Court adopted. So is it
17 the sense of the committee that we need to do
18 more in response to Sam George's request than
19 what we did already at page 74? No one feels
20 that we need to do more at this time?

21 All right. Then the
22 suggestion of Mr. George, Sam George to the
23 extent that it's addressed by 305 we've done
24 and for the balance I guess we'll get some
25 experience with new Rule 305 before we address

1 those concerns. If they need to be addressed
2 later, we'll deem them rejected, those that
3 were not solved by 305 at this time. All in
4 favor say aye.

5 ADVISORY COMMITTEE: Aye.

6 MR. SOULES: Opposed?

7 Okay. This disposes of Mr. George's request
8 page 350. And what is next?

9 Next is at page 356.

10 MR. TINDALL: This fell in
11 my domain. Luke, this is kind of a nifty
12 suggestion, although I think I'm going to
13 defer to Bill Dorsaneo, and I think Rusty has
14 worked through these time tables many more
15 times than I have. It would percolate through
16 scores of rules, but basically she wants to
17 view the world on a seven-day cycle, so that
18 if something happens on Tuesday, you calculate
19 four Tuesdays from now as the deadline. She
20 says Alabama has gone to this. It's evidently
21 an English system of court computation. On
22 page three of her letter she notes the number
23 of rules that it would change.

24 PROFESSOR DORSANEO: I'm
25 ready to vote.

1 MR. TINDALL: Rusty, do
2 you agree that this is very tricky to get into
3 all these time tables? And I'm not sure it's
4 going to solve all of the problems. Something
5 could happen on Thursday and then next
6 Thursday is Thanksgiving, so you still --

7 MR. MCMAINS: Well, I tell
8 you, the general reaction of the bar is going
9 to be, "Wait a minute. You're taking 30 and
10 changing to 28?"

11 MR. TINDALL: There's one
12 minor precedent. We did change the TRO from
13 10 days to 14, but that's not computation and
14 none of the rules otherwise. We have always
15 been to the 30-day, 10-day notice for this
16 and --

17 MR. SOULES: What's your
18 suggestion, Harry?

19 MR. TINDALL: That we
20 reject it.

21 MR. SOULES: Motion has
22 been made that the proposal at page 356 be
23 rejected.

24 PROFESSOR DORSANEO: I'll
25 second it.

1 MR. SOULES: Seconded.

2 All in -- those who favor rejection say aye.

3 ADVISORY COMMITTEE: Aye.

4 MR. SOULES: Otherwise say
5 no. Okay. It's unanimously rejected.

6 Next?

7 MR. TINDALL: Next is
8 361. I do not know. This is from -- it may
9 be perfectly okay. I can't understand what
10 they're saying. This comes from the Oil, Gas
11 & Mineral Section of the bar. And you see the
12 underscoring on the page 361 of the materials
13 in terms of what happens following a citation
14 by publication. I don't have experience in
15 this area of the law, and I'm going to defer
16 to the Committee on this one.

17 MR. SOULES: Who wrote
18 this in?

19 MR. TINDALL: This was
20 done by Skipper Lay, I believe.

21 MR. SOULES: Do we have a
22 letter to support it?

23 MR. TINDALL: I think it's
24 on page 363.

25 MR. SOULES: 363, yes.

1 MR. TINDALL: He doesn't
2 really say in his letter what they're getting
3 at.

4 PROFESSOR DORSANEO: What
5 does that mean in English?

6 PROFESSOR EDGAR: What if
7 you have an oil and gas lease?

8 MR. TINDALL: That's what
9 I'm reading. I couldn't understand what
10 they're getting at.

11 PROFESSOR EDGAR: You
12 can't suspend, rescind a lease, but judgment
13 against the plaintiff get the proceeds from
14 the rental or whatever from the lease.

15 MR. BEARD: That's just
16 making his title good, citation by
17 publication. I think he ought to carry all
18 those burdens, set aside ought to be set
19 aside.

20 MR. TINDALL: We could
21 certainly -- I could get in touch with Skipper
22 Lay -- I know Skipper -- and ask him, say, "I
23 don't fully understand what you're getting
24 at," what the problem is if anyone else.

25 MR. SOULES: I think we

1 need a brief on this.

2 MR. TINDALL: I'll call
3 Skipper.

4 MR. SOULES: I don't know
5 how long a brief, but I think we need some
6 kind of brief, because I don't know why it's
7 needed. I guess this depicts a problem, but I
8 can't -- I'm not sure I see the problem. I
9 guess some problem is pretty obvious, oil and
10 gas thing.

11 Could we -- Harry, could
12 you write him and ask him to do a brief on
13 this --

14 MR. TINDALL: Yes, I
15 will.

16 MR. SOULES: -- of what
17 problem he's trying to fix? And maybe he's
18 got some case law that is a problem, but maybe
19 it's not bad case law either. I don't know.
20 Okay. You're going to contact.

21 MR. TINDALL: I will be
22 back in touch with him on that.

23 MR. SOULES: For now let's
24 go ahead. I'd like to go ahead and act on it,
25 and then if it comes back -- if he comes back

1 with a brief, then he will also come back with
2 a new proposal.

3 MR. TINDALL: I move that
4 we then reject it.

5 MR. SOULES: We're going
6 to at the time without further information act
7 to reject this. At least that's the vote
8 we're about to take with obvious invitation to
9 give us as much information as they care to
10 give us in the future and resubmit it if they
11 wish. Those in favor of that action say aye.

12 ADVISORY COMMITTEE: Aye.

13 MR. SOULES: Opposed?
14 That's unanimously rejected at this time.

15 MR. TINDALL: One more
16 rule on page 367 which purports to codify what
17 is required if you are seeking a new trial to
18 set aside a default judgment, and it goes on
19 page 367 over to 368, and there's a Bar Review
20 article that Aaron Jackson has written on
21 this. I am reluctant to make any
22 recommendation on it. As I recall there was a
23 case, Judge Hecht, the Court ruled on this
24 week, did it not, about once a default
25 judgment as opposed to a default judgment

1 or --

2 MR. SOULES: Post answer
3 and pre-answer?

4 MR. TINDALL: That's
5 right, when you just don't appear at trial but
6 there's an answer on file. And I --

7 JUSTICE HECHT: Well, as
8 you well have noted there's been a couple of
9 cases this spring in which there has been a
10 footnote in the Supreme Court opinion that
11 indicates that the Court is not -- has not
12 passed on whether after there can ever be a
13 requirement showing a meritorious claim of
14 defense in response to trying to set aside a
15 default judgment or trying to obtain a bill of
16 review. So you've got that problem in the
17 first paragraph of the rule.

18 MR. TINDALL: We might
19 ought to let the case law shake out on this.
20 I don't know of any reason to move on it at
21 this time, Luke.

22 MR. MCMAINS: I also don't
23 think -- this is all the reasons why you set
24 aside these. This is a special -- this is one
25 aspect of the default.

1 PROFESSOR DORSANE0: Stick
2 with the equitable mode.

3 MR. MCMAINS: There are
4 noncredit motions as well, and this would
5 suggest file a motion for new trial and a
6 motion to set aside the default. That to me
7 creates a real dichotomy, that is, it creates
8 a problem there.

9 MR. SOULES: Why don't
10 we -- this is fairly extensive. It's a
11 proposed new rule. Is this something we're
12 ready to act on now, or do you-all want to put
13 this over to the 12th?

14 MR. TINDALL: Let's move
15 it to the 12th.

16 PROFESSOR DORSANE0: Okay.
17 Let's move it to the 12th. We all have in
18 mind now what this man is trying to do. He's
19 written apparently extensively on it and given
20 it a lot of thought.

21 HONORABLE RIVERA: He was
22 the attorney in the Southland case. That was
23 tried in my court, and that's his problem.

24 MR. SOULES: He lost the
25 case.

1 HONORABLE RIVERA: He won
2 on appeal, but he had no testimony, so the
3 judge granted on affidavit it's good. And
4 this is what he's trying to do. He shouldn't
5 be forced to bring a witness. In this case it
6 was somebody that had gone broke and he had
7 come in and taken over and "I can't even find
8 my clients but I've got an affidavit from the
9 insurance adjustor, and it's good, and we've
10 got a reversal on it. Can't do that. You
11 have to show something. There's an affidavit
12 from the insurance adjustor. I've got the
13 citation and put it in a drawer and I went on
14 vacation and when I came back and looked into
15 the letter the secretary went on vacation.
16 Before we knew it, 30 days were gone."

17 PROFESSOR EDGAR: Hasn't
18 the United State Supreme Court -- also due
19 process problem when you require meritorious
20 defense?

21 MR. TINDALL: Yes.

22 JUSTICE HECHT: That's an
23 open question.

24 MR. SOULES: All right.
25 Could you maybe scrub this out a little bit?

1 MR. TINDALL: Yeah. I'll
2 check it out.

3 MR. SOULES: Reset to
4 August the 12th.

5 MR. TINDALL: One other,
6 394, Judge Hecht has raised an issue that I
7 raised here two years ago. As I read it,
8 you're saying about -- this is a strange
9 rule. I don't think anyone has ever -- I
10 think these rules have been around since --
11 I'm not sure. It's Rules of Practice &
12 Procedure in certain district courts, your
13 administrative-type rules, and they're buried
14 back here really at the end of our rules
15 before we get off -- well, it's at the end of
16 the rules where we went to appeals about
17 exchanging benches; and Judge Hecht raised the
18 question should there be a general rule for
19 multi-district litigation generally and should
20 these rules prescribe for Federal courts.

21 MR. SOULES: Harry, we
22 decided to appoint -- I'm sorry. I don't mean
23 to interrupt you, but I think we decided and
24 have appointed a committee to come up with
25 multi-district and multi-county rules.

1 MR. TINDALL: Okay.

2 MR. SOULES: And this
3 probably has been resolved for future action.

4 MR. TINDALL: Okay.
5 That's all that is between 315 and 330.

6 MR. SOULES: What's next?
7 Page 396, Elaine, I think this is your report
8 on 396 which deals with Rule 749(c).

9 PROFESSOR CARLSON:
10 749(c). As I set forth in our opinion letter
11 we have tried as a subcommittee to obtain what
12 the problem was. We're addressing and
13 currently raised Walker versus --

14 (Committee members
15 speaking at the same time rendered
16 transcription inaudible).

17 PROFESSOR CARLSON: -- but
18 unpublished appellate opinion, and looking at
19 the points of error the sub-committee was not
20 comfortable that we were able to ascertain the
21 problem to apparently or properly address it,
22 so we just begged off for the time, and it's
23 been tabled until we have a clear picture and
24 see what it is.

25 MR. SOULES: What is (c)?

1 I see. They say pauper has to before he can
2 resist annual FE&D has to pay a month's rent.

3 JUSTICE HECHT: Before he
4 can appeal.

5 MR. SOULES: Before he can
6 appeal. That may be kind of like the new
7 county rule and the one that said the woman
8 that got married had to join her husband.
9 That may not be something that we can really
10 carry too much longer in the text of the
11 rules. It looks to me like it may be a small
12 problem. Let's see. It's Rule 749(c)?

13 PROFESSOR CARLSON:
14 Apparently from looking at the complaint writ
15 granted on the pauper's affidavit did not
16 comply with the rule and don't believe
17 considers apparently proper pauper's
18 affidavit, so the litigant got -- certainly
19 49(b) to certainly 49(c). I suppose
20 triggered, got triggered.

21 JUSTICE HECHT: It's true
22 that the points of error on which the
23 application was granted as set out in the
24 Supreme Court judgment do not reflect all of
25 the issues that were raised and briefed in the

1 case, but the issue very simply is under Rule
2 749(c) as in most instances a pauper can
3 appeal by filing an affidavit. However, it
4 then goes on to provide that when the case
5 involves nonpayment of rents such appeal is
6 perfected when both paupers affidavit has been
7 filed and one rental period rent has been
8 paid.

9 Well, query, if he's
10 complied with the pauper requirements by
11 filing an affidavit, can he still be required
12 to make a deposit of the rent? So it's a
13 curious provision of the rule.

14 PROFESSOR CARLSON:

15 Supersedeas, I suppose.

16 JUSTICE HECHT: Because
17 supersedeas is provided for elsewhere in this
18 series of rules. This is the appeal bond. To
19 supersede he also has to put one month's
20 deposit in the registry. That's a different
21 issue.

22 MR. SOULES: Do you-all
23 have a rule book? If we could look at this, I
24 think we could probably get this done or
25 decide whether we want to do it anyway.

1 749(c), first paragraph is stays. Picking up
2 there though, "when pauper's affidavit has
3 been filed in lieu of an appeal bond" and so
4 forth. "However, when the case involves a
5 non-payment of rent such appeal is perfected
6 when both the pauper's affidavit is filed and
7 one rental period paid."

8 What is under question is
9 should we take out both and make the appeal be
10 perfected with the pauper's affidavit filed
11 and delete the requirement that one rental
12 period is paid to the registry of the court?
13 That's the perfection of the appeal.

14 Then next "In a case where
15 the pauper's affidavit is contested by the
16 landlord the appeal shall be perfected when
17 the contest is overruled and a monthly rent is
18 paid," should we delete it there?

19 So should we simply make
20 this rule operative to perfect an appeal where
21 the affidavit has been filed and to deem the
22 appeal perfected in a contested pauper's
23 affidavit when that's overruled and delete
24 from the rule the requirement that a month
25 rent be paid to the registry of the court in

1 either case?

2 PROFESSOR EDGAR: It
3 certainly seems inconsistent to require the
4 deposit of the month's rent when you're going
5 up on a pauper's affidavit; and I'm just
6 wondering though whether that was discussed
7 and if so, why that requirement was included
8 when the rule was adopted as it now appears,
9 because surely that dichotomy was apparent.

10 MR. BEARD: Well, the
11 pauper is not entitled to free rent. Years
12 ago I used to try a number of those things and
13 that just delayed the time they had to get
14 out.

15 JUSTICE HECHT: That's
16 separately provided. The supersedeas, he does
17 have to put up a month's rent. I think it's
18 in 749(b), but maybe in (a).

19 MR. SOULES: Well, it's an
20 interesting comment at the bottom here that
21 Sarah is pointing out to me. It says
22 effective August 15th of 1982 this rule was
23 amended so that one month's rent need not be
24 paid when an appeal bond is made.

25 MR. MCMAINS: When a bond

1 is made.

2 MR. SOULES: That's only
3 when you're doing it on pauper's affidavit.
4 Of course, what this is doing is trying to
5 give the landlord something. Oh, I see.
6 Justice Hecht, what you're pointing out is
7 that if an FE&D judgment could be rendered by
8 the Justice of the Peace and that would evict
9 the pauper unless the pauper post at least one
10 month's rent to stay in. So there's nothing
11 in the constitution about that, I guess.

12 JUSTICE HECHT: No.

13 MR. SOULES: But at least
14 the pauper can move forward to have the
15 eviction reviewed without payment of this
16 month's rent if we amend this. And that's
17 about all we're doing is just giving him
18 review without the posting of a bond of month
19 rent.

20 JUSTICE HECHT: (Nods
21 affirmatively.)

22 MR. SOULES: He still gets
23 review as any other pauper, free review on the
24 filing of the pauper's affidavit like we have
25 in the rules of appellate procedure. Anything

1 wrong with taking that out?

2 MR. MCMAINS: Really if
3 that's the case, can't you just shorten that
4 rule considerably by just the first sentence
5 after the appeal bond part says when a
6 pauper's affidavit has been filed in lieu of
7 the appeal bond that shall be perfected if
8 the pauper's affidavit is filed with the
9 court, period. What else do you need?

10 MR. SOULES: Well, the
11 next part of this has to do with the contested
12 affidavit.

13 MR. MCMAINS: That's
14 right. But you can put the contested
15 affidavit in there too, but I mean there's a
16 lot of redundancy in there right now with all
17 of this because it then says the same thing,
18 starts talking about nonpayment of rents and
19 then it basically doesn't make any distinction
20 in nonpayment.

21 MR. SOULES: All right.
22 Rusty, then is it your suggestion that we
23 would period and semicolon following Court in
24 the fifth line.

25 MR. MCMAINS: Right, put a

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1 period.

2 MR. SOULES: Put a period
3 there and put in --

4 MR. MCMAINS: Put in the
5 case where the pauper's affidavit is contested
6 by the landlords the appeal shall be
7 perfected when the contest is overruled
8 period.

9 MR. SOULES: All right.
10 So I'm going to state this now for the record
11 how we would have it. We would leave the
12 first sentence of 749(c) alone, first
13 paragraph. The second paragraph the first
14 sentence would be left as it is down to the
15 semicolon. That would be changed to a period
16 after court. The balance of the first
17 sentence would then be stricken down through
18 the word "register." Thereafter in the -- we
19 would have a sentence remaining in the rule
20 that would say, "In a case where the pauper's
21 affidavit is contested by a landlord the
22 appeal shall be perfected when the contest is
23 overruled" period, and strike the balance of
24 the language in Rule 749(c) following the word
25 "overruled." Is that your view, Rusty?

1 MR. MCMAINS: Yes.

2 MR. SOULES: Those in
3 favor say aye.

4 ADVISORY COMMITTEE: Aye.

5 MR. SOULES: Opposed?

6 Unanimously approved. Page 407.

7 MR. SADBERRY: At the last
8 meeting, I think this has to do with the
9 inconsistencies and the service process with
10 the justice court proceedings contrasted with
11 the other proceedings which were changed. And
12 I think at the May meeting this committee
13 adopted for recommendation the elimination of
14 the 90-day provision. And if I'm correct,
15 that's already done, so we have now before us
16 the study of whether there are any other
17 inconsistencies, and that's I guess what has
18 been assigned to us for action taken earlier
19 today. And we'll do that. I guess my only
20 question is, is there anything that stands out
21 right now that our attention can address to
22 specifically look at to make a general review
23 to see if there are inconsistencies?

24 I supposed what we want to
25 do is not have inconsistencies. That's what

1 we're to look at to see if we can find any
2 others and bring them on, but I think we've
3 taken care of the main one we knew about
4 already, and that's the 90-day provision where
5 you have to return an unserved citation to the
6 district clerk's office.

7 MR. SOULES: That was
8 fixed at page 75 of the last materials.

9 MR. SADBERRY: Right. We
10 just need to review another careful study, and
11 I guess we can make a report on that in
12 August.

13 MR. SOULES: Super. On
14 August 12 you'll then make a report on the
15 changes needed with those changes in red line
16 form to conform the justice citation practice
17 to the 99 and 100 series that we did last
18 go-around effective '88, I guess. Is that
19 your plan?

20 MR. SADBERRY: That's how
21 I see it.

22 MR. SOULES: Okay. Well,
23 we'll put that on the agenda then for August
24 the 12th.

25 MR. SOULES: I'm going to

1 wait until the August the 12th meeting to form
2 these committees. I'm going to admit having
3 misled Haley. I'm not going to form these
4 committees first while we've got a crowd here
5 and go with Hadley's reports. So we'll first
6 form, approve our minutes and then we'll take
7 Items 31, 32 and 33 first, and then we'll
8 take --

9 PROFESSOR EDGAR: Items 31
10 and 33, what were you looking at?

11 MR. SOULES: I was looking
12 at the agenda, which is just to form these
13 committees.

14 MR. MCMAINS: On the front
15 page.

16 MR. SOULES: Form a
17 subcommittee. 1637 is -- I guess that's the
18 bill that we talked about earlier today.

19 JUSTICE HECHT: Yes.

20 MR. SOULES: That's the
21 sealed records. We'll form a committee on
22 sealed records and then add to it anyone who
23 wants to join in, expand the multicounty,
24 multidistrict committee then and thereafter,
25 and then the reformatting committee, and then

1 we're going to -- we need to write David Beck
2 a letter and tell him that we want a full
3 report of this Item 33. That would be we want
4 to act on that and not just form a committee.
5 He's going to do that.

6 So we'll form these
7 committees described in 30, 31 and 32. Then
8 we will take up Hadley's item on the agenda,
9 which is Rule 278. Then we will take up
10 Rusty's report on TRAP 40. Is that right?

11 MR. MCMAINS: 40(c).

12 MR. SOULES: 40(c).

13 MR. MCMAINS: Maybe more
14 than that.

15 MR. SOULES: And then we
16 will do David Beck's trial notice rule, and
17 then we will do Tony's report on any justice
18 rules, and then we'll do -- then we'll take --
19 Rusty, get Mike Hatchell to do a report on 138
20 premature filed application for writ of
21 error. Will you get him to get that ready and
22 put him down then following that report?
23 Then do a report on 138.

24 MR. MCMAINS: The heading
25 incidentally that's on there is Number 15. I

1 think it's nothing but that it should say
2 Court of Criminal Appeals.

3 MR. SOULES: We acted on
4 that.

5 MR. MCMAINS: We've
6 already done that.

7 MR. SOULES: We did.

8 MR. MCMAINS: Done that.
9 That's all I need. Rule 82 will be Doak
10 Bishop's. He's been assigned to the other
11 side of it from my suggestion, and Rusty
12 40(c), and then we'll have Harry report on
13 329(c) Tindall, and then Justice Hecht has
14 items, don't you Justice Hecht?

15 JUSTICE HECHT: Yes.

16 MR. SOULES: Do you want
17 to bring those now for assignment so that
18 we'll know that those are on the agenda?

19 JUSTICE HECHT: Yes.

20 MR. SOULES: Does anyone
21 while we're getting those out have any new
22 business? We are close to adjournment, but
23 I'd like to get these suggestions out. Judge,
24 why don't you just tell us what they are and
25 I'll take copies of them or you can mail me

1 copies and I'll get them out to the
2 committees.

3 JUSTICE HECHT: All
4 right. They are a proposed change in TRAP
5 Rule 90(e) which concerns publication of Court
6 of Appeals opinions. The issue is when may a
7 Court of Appeals decide to publish an opinion
8 which has previously been unpublished. And
9 one case, for example, the Exxon case, we were
10 talking about earlier the Amarillo Court of
11 Appeals did not publish an opinion. The
12 Supreme Court denied the writ. Then in a
13 federal case subsequently the Amarillo court
14 decided to publish the opinion. The Supreme
15 Court of the United States remanded the case
16 to the 5th Circuit to consider it in light of
17 the Amarillo Court of Appeal case and Court of
18 Appeals opinion, and the 5th Circuit decided
19 that was a law of Texas and applied it.

20 So query, is there any
21 cutoff as to when that happens years from now
22 when they decide to publish some cases, is
23 there any cut-off when the Supreme Court can
24 decide to publish it or is there some point
25 where they're unpublished? So I've got some

1 suggestive language on that, but we really
2 need the committee to look at it.

3 MR. SOULES: I'll send
4 that, Rusty, to your committee, you and Mike.
5 And Judge McCloud was it your court that
6 published the opinion?.

7 MR. MCMAINS: The Amarillo
8 court.

9 MR. SOULES: The Amarillo
10 court. Okay. Thank you.

11 JUSTICE HECHT: Rule 130
12 is the Rose, Ratcliff problem, which is what
13 happens when a party in the Court of Appeals
14 files an application for writ of error before
15 he files motion for rehearing. That's the
16 Ratcliff problem. There's an old Supreme
17 Court case that says the filing of an
18 application divests the Court of Appeals from
19 ruling. They can't do anything else. And so
20 he's caught in a Catch-22 since he's divested
21 the Court of Appeals the jurisdiction he can't
22 file the motion for rehearing that he's got to
23 have in order to have his application heard by
24 the Supreme Court.

25 And Ratcliff there was the

1 Court of Appeals. I wrote the opinion, and we
2 said, Well, the fellow is out of luck. It
3 ought not to be the case, but the Supreme
4 Court wrote the opinion and they ought to do
5 something about it, and all they did was deny
6 the application for mandamus.

7 So now we need to do
8 something about it, but then there's the Rose
9 case, which is what happens if one of the
10 parties files an application before the court
11 is done ruling on all the motions. Several
12 parties file motions, or one party files a
13 motion and then somebody else decides to file
14 a motion. The whole thing is kind of ginning
15 around there and all of a sudden somebody is
16 coming down with an application for writ of
17 error.

18 The general proposal here
19 is that it be treated like a prematurely filed
20 appeal bond, which is that you just hold it
21 until the Court of Appeals gets through doing
22 everything they're supposed to do, and then if
23 the pleadings haven't been filed, then that's
24 tough.

25 A technical change to 181,

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1 which is it requires that the Supreme Court
2 announce its judgment in open court, and we
3 have changed that practice and no longer do
4 that.

5 MR. SOULES: I'll send
6 that to your committee.

7 JUSTICE HECHT: To the
8 Rules of Civil Procedure, Rule 10 we continue
9 to be troubled by withdrawal of counsel, and
10 parties are not notified, particularly the
11 party who is left without a lawyer, trial
12 settings, deadlines and then something happens
13 and he comes in and complains that he didn't
14 get notice of it, his attorney withdrew
15 without telling him. So we have a proposal to
16 clarify that, Texas Rule of Civil Procedure
17 10.

18 MR. SOULES: I'll assign
19 it to the proper subcommittee and ask them to
20 look whether the TRAP rule as to withdrawal
21 should be dealt with.

22 JUSTICE HECHT: The last
23 thing I have today is Rule of Civil Procedure
24 18(b) and Appellate Rule 15(a) regarding the
25 disqualification and refusal of judge. Query,

1 should there be a provision that requires
2 disqualification in the event that the judge
3 or a member of his family has financial
4 interest in the case? That's one problem
5 that's not covered by the rule, and two, it's
6 one that has been mentioned to us in the
7 correspondence we received, what about the
8 judge being disqualified when a member of his
9 family is serving as counsel in the case?

10 We've gotten substantial
11 complaint -- well, gotten a loud complaint
12 from, I think, three lawyers that say that
13 it's just not fair to be up against the
14 judge's son in the courtroom. So we've got
15 proposal on that.

16 MR. SOULES: I'll assign
17 that to Rule 18(b) subcommittee to look at
18 both those rules.

19 PROFESSOR EDGAR: I'd like
20 to address this to justice Hecht. I was
21 noticing in your letter to Luke, Justice
22 Hecht, dated May 15, 1989, which appears on
23 page 394 of our agenda you raised a question
24 concerning TRAP 90(a) which is your Item
25 Number 4, should the Court of Appeals be

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1 required to address factual sufficiency
2 whenever the issue is raised unless the Court
3 of Appeals finds the evidence legally
4 insufficient? Now, we have not discussed
5 that, have we?

6 JUSTICE HECHT: We
7 discussed that at the last meeting.

8 PROFESSOR EDGAR: Did we
9 resolve that issue?

10 JUSTICE HECHT: Said no.

11 PROFESSOR EDGAR: All
12 right. What about the Dondi problem on page
13 395?

14 JUSTICE HECHT: We
15 discussed that last time and tentatively
16 decided that we'd rather not put it in the
17 rules, and the Professionalism Committee is
18 thinking about putting it in the Rules of
19 Professional Responsibility or something like
20 that.

21 PROFESSOR EDGAR: Thank
22 you.

23 MR. SOULES: Is there any
24 more new business or old business? As Chair I
25 want to thank Anna Renken who is a fine Austin

1 court reporter for coming and taking this
2 record for us today. Anna, thank you. And
3 Holly Halfacre, my paralegal, and Sarah
4 Duncan, my partner for coming and helping me
5 keep this thing running today. Thank you-all
6 very much for attending, and I appreciate your
7 input and your work.

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1 THE STATE OF TEXAS)
 2 COUNTY OF TRAVIS)

3 I, ANNA L. RENKEN, Certified Court
 4 Reporter in Travis County for the State of
 5 Texas, do hereby certify that the facts stated
 6 by me in the caption hereof are true; that the
 7 said committee members did make the above and
 8 foregoing statements propounded as shown; that
 9 I did, in shorthand, report said proceedings;
 10 and that the above and foregoing typewritten
 11 pages contain a full, true and correct
 12 transcription of my shorthand notes taken on
 13 said occasion.

14 WITNESS my hand and signature of office
 15 this, the 31st day of August,
 16 A. D., 1989.

17
 18 ANNA RENKEN & ASSOCIATES
 19 3404 Guadalupe
 20 Austin, Texas 78705
 (512) 452-0009

21 Anna Renken
 ANNA L. RENKEN
 22 Certified Court Reporter
 in Travis County
 23 for the State of Texas

24 Certification No. 2343
 Certificate Expires 12/31/90

25

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CERTIFICATE OF CHARGES:

Charges for Preparation of

Transcript (Orig) 1947.00

Mileage.....

TOTAL FEES

CHARGED TO 1947.00


Anna L. Renken

#000,460AR

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