SUPREME COURT OF TEXAS

SUPREME COURT ADVISORY COMMITTEE

TRANSCRIPT OF PROCEEDINGS

VOLUME 2 OF 2

Between the hours of 8:30 AM and 6:00 PM

May 27, 1989

00 Congress, Suite 1400

Austin, Texas

Luther H. Soules III, Chairman, presiding

Supreme Court Justice Nathan L. Hecht, Liaison

Jerry Kelley, Texas CSR No. 2004

Kornegay, Carroll & Kelley

100 Congress Avenue, Suite 750

Austin, Texas 78701

(512) 476-3967 (800) 234-DEPO

ORIGINAL

LAWYER'S NOTES

Page	Line	

MEMBERS PRESENT

Mr. Gilbert T. Adams Jr.

Mr. David J. Beck

Prof. Newell Blakely

Prof. Elaine Carlson

Mr. John E. Collins

Mr. Tom H. Davis

Prof. William V. Dorsaneo III

Prof. J. Hadley Edgar

Mr. Kenneth D. Fuller

Mr. Michael A. Hatchell

Mr. Charles F. Herring

Mr. Vester T. Hughes Jr.

Mr. Gilbert I. Low

Mr. Russell McMains

Mr. Charles Morris

Mr. John O'Quinn

Mr. Tom L. Ragland

Justice Ted Z. Robertson

Mr. Luther H. Soules III

Mr. Broadus A. Spivey

Anthony J. Sadberry

SUPREME COURT ADVISORY COMMITTEE

TRANSCRIPT OF PROCEEDINGS

VOLUME 2

INDEX

TRCP 183	670-671
TRCP 200	525-540
TRCP 201	644-646, 679-680
TRCP 206(2)	645-646
TRCP 208	525-541, 646-648
TRCP 215	648-650
TRCP 239a	341
TRCP 245	341-376, 387-396
TRCP 248	376-385
TRCP 254	385-387
TRCP 260	396
TRCP 269	397
TRCP 274	397-398
TRCP 278	398-440
TRCP 279	440-453
TRCP 295	453-460
TRCP 296	460-524
TRCP 297	460, 481-524
TRCP 298	494-524
TRCP 305	524-525
TRCP 306a	339-340 524-525
TRCP 324(b)	450-452
TRCP 329b	517-522 664-665
TRCP 534	660-661

TRCP 771	680-683
TRCP 781	660

CHAIRMAN SOULES: We're going to come to order. Thank you for getting here timely this morning.

Justice Hecht has some rules that the Court has observed need some fixing, minor fixing, maybe.

Justice Hecht, if you can give us those, we'll take those up first this morning.

JUSTICE HECHT: These are minor matters that have been called to our attention. They're all in the Rules of Appellate Procedure. The first one is Rule 5 (c). There is a reference to Civil Rules 316 and 317. And 317 has been repealed. So we should eliminate that reference.

CHAIRMAN SOULES: That's in TRAP --

JUSTICE HECHT: 5 (c).

MR. DAVIS: What page?

PROFESSOR EDGAR: 301 of the rule book. It's not in that book.

JUSTICE HECHT: These are separate items.

MR. MCMAINS: Not on the agenda. Until now.

PROFESSOR EDGAR: Page 301 of the red one. I don't know what it is in the gray one.

PROFESSOR DORSANEO: That's fine. Those were moved up into the TRAP rules.

CHAIRMAN SOULES: 317 was moved to the TRAP rules?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: Where?

PROFESSOR DORSANEO: 85.

CHAIRMAN SOULES: Remittitur? Is that what it's about?

PROFESSOR DORSANEO: Yes. I think it's 85 (b).

JUSTICE HECHT: It was called "misrecitals corrected" in the old rules.

PROFESSOR DORSANEO: Maybe it was just combined.

PROFESSOR DORSANEO: 317 through 319, the remittitur stuff got modernized last time around and certain of the information that appeared in the Rules of Civil Procedure were in fact moved up to Rule 85.

CHAIRMAN SOULES: And was 317 a remittitur rule?

PROFESSOR DORSANEO: Yes.

JUSTICE HECHT: Under that section that was called misrecitals corrected.

PROFESSOR DORSANEO: Maybe I'm off base altogether.

CHAIRMAN SOULES: Certainly the Rule 317 number needs to come out. The thing I'm struggling with is, does another number go in its place? I guess not.

PROFESSOR DORSANEO: No.

CHAIRMAN SOULES: Any objection to that deletion in Rule 5 (c)?

That's approved.

JUSTICE HECHT: Rule 74, the lead-in refers to "The Court of Appeals of the correct Supreme Judicial District." And the words "Supreme Judicial" should be omitted.

PROFESSOR DORSANEO: Put "Court of Appeals district"?

JUSTICE HECHT: You could. Or just say district.

PROFESSOR DORSANEO: I'd say just district.

CHAIRMAN SOULES: Where is that?

PROFESSOR DORSANEO: 74. The lead-in. Courts of appeal are no longer supreme judicial districts, they're just Courts of Appeal districts.

CHAIRMAN SOULES: Of the correct district, with a small "d"?

JUSTICE HECHT: That's what I'd say.

CHAIRMAN SOULES: Any opposition?

All right. That's done.

JUSTICE HECHT: In trying to eliminate all the references to NRE, we may have missed one in 90 (h). No, we caught that yesterday. That was in yours

yesterday, Luke.

CHAIRMAN SOULES: All right.

May I have permission? Holly has the rules on her computer now. We'll just have her search and everywhere "no reversible error" appears we'll have her drop it out.

JUSTICE HECHT: Good.

CHAIRMAN SOULES: Any opposition to that? And if substitution of writ denied is appropriate, we'll do that in its place.

JUSTICE HECHT: Fine.

CHAIRMAN SOULES: Okay.

JUSTICE HECHT: Then in the appendix to the Rules of Appellate Procedure, Rule 1, there's a format for the transcript in the record on appeal and it, too, refers to Supreme Judicial District, looks like three times. The words "Supreme Judicial" ought to be taken out and just say "appeal to the Court of Appeals for the blank District of Texas at blank." In the Red Book, it's on Page 346.

CHAIRMAN SOULES: In the gray book, it's on 329. It appears three times in the proposed form, doesn't it?

JUSTICE HECHT: Yes.

CHAIRMAN SOULES: Criminal case appendix, it

says.

JUSTICE HECHT: Right.

CHAIRMAN SOULES: These are on the computer, too, aren't they?

MS. HALFACRE: Yes. We'll just search it.

CHAIRMAN SOULES: We'll search for these words "Supreme Judicial" as they connect to the Court of Appeals and make these changes elsewhere also if they show up. Any opposition to that? Okay. We'll change the Criminal Cases Appendix Rule 1 by deleting "Supreme Judicial" and also do that elsewhere as may be appropriate.

JUSTICE HECHT: One final change, Luke. I don't have any specific recommendation for you this morning, but just by way of notice, Rule 172 specifies the time for argument in the Supreme Court. And you may notice that that's been shortened in most cases recently from 30 minutes per side with 15 minutes for conclusion by the petitioner to 25 minutes per side with 10 minutes in conclusion, although I think as a practical matter the time is pretty much set in each case how much time is going to be given. So I'm not sure what change the Court will want to make in that rule, but they'll probably want to make some change.

PROFESSOR EDGAR: In practice, it would

probably be more accurate to say each side will probably be allowed 25 minutes in argument and 10 minutes more in conclusion. I mean, that --

JUSTICE HECHT: That would be more accurate.

PROFESSOR EDGAR: -- would be more per current practice.

JUSTICE HECHT: Yes.

MR. HATCHELL: Judge Hecht, has the Court considered doing somewhat like the Fifth Circuit; in other words, classifying cases when they're set for argument, maybe giving people notice at that time?

JUSTICE HECHT: Yes. In fact, whenever writ is granted, there should be an indication in the grant how much time is going to be allotted for oral argument. But the practice the last five months has been to set that time on an ad hoc basis. The standard is 25, 25 and 10. But sometimes it's longer, sometimes there are multiple parties, and sometimes it's considerably shorter than that.

PROFESSOR EDGAR: Then are you shortening time from 25 to maybe 20 or something?

JUSTICE HECHT: We have shortened them in one case to 15, 15 and 5.

PROFESSOR EDGAR: Then perhaps the second sentence should also be modified to say "In some cases

the time allotted may be extended or shortened by the Court" to carry out current practice.

JUSTICE HECHT: And, of course, application can be and still is made occasionally for more time. I don't recall any applications for less time. And those are generally granted, I think. I mean, there's some feeling that they should get more time if they think they need more time. But in some cases where there may just be one or two very minor or very narrow issues, some feel there's no point in allowing 30 minutes a side.

CHAIRMAN SOULES: The rule, then, sets what is thought to be a standard time and provides for application for more time in a difficult case and provides that the court in its absolute discretion can shorten time, which it would do when it gave notice, I guess, when the application was granted.

JUSTICE HECHT: Yes.

CHAIRMAN SOULES: And then it can align parties. Really, probably the only thing that needs attention is to state what the standard is. Is that right, Judge? Because the other things are somewhat taken care of, aren't they?

JUSTICE HECHT: I think so. I mean, if there's no change other than just changing the standard,

30 would simply become 25 and 15 would become 10.

CHAIRMAN SOULES: Are you asking this committee to consider approving that?

JUSTICE HECHT: Yes.

CHAIRMAN SOULES: Any discussion?

Tom Ragland.

MR. RAGLAND: I have a question, Judge. Would it be better just to write the rule that says what the judge says, that it's going to be set according to the circumstances, and then have a comment following the rule that the current practice is 25, 25 and 10? That way you can change the comment without having to come back and having to change the rule. Would that be a workable approach to that?

JUSTICE HECHT: Yes. Although I guess if we're accustomed to seeing a standard in the rule perhaps it's best to leave some standard there and then just continue on as we've been doing.

MR. MCMAINS: Set the arguing times and say it will be X unless times are altered by the Court.

CHAIRMAN SOULES: That's what it says, Rusty. It's just a question of: What is the standard?

Any opposition to the 25 and 10 change in the place of 30 and 15?

All right. That stands approved, then,

Judge.

JUSTICE HECHT: That's it for me.

CHAIRMAN SOULES: Okay.

I want to welcome Justice Keltner who has joined us. Where is he?

JUSTICE KELTNER: I'm back in the back.

CHAIRMAN SOULES: Come sit with us.

JUSTICE KELTNER: This way I won't have to accept any responsibility.

CHAIRMAN SOULES: Don't you want to join us up here?

JUSTICE KELTNER: This is fine, thank you.

MR. SPIVEY: Did you bring him in to defend the Court of Appeals?

CHAIRMAN SOULES: Obviously made him feel like a stepchild, sitting back in the corner in the dark.

CHAIRMAN SOULES: What was that, Broadus?

MR. SPIVEY: Did you bring him in to defend the Court of Appeals after yesterday?

[Laughter]

CHAIRMAN SOULES: That's right.

Judge, your court was mentioned a couple of times yesterday.

JUSTICE KELTNER: I can well understand that.

PROFESSOR EDGAR: Luke, for whatever it's worth, I'm coming back to the very first thing we talked about, Appellate Rule 5 (c), the one about where Rule 317 went.

CHAIRMAN SOULES: Yes.

PROFESSOR EDGAR: I don't know whether we want to do anything about it, but didn't it go in Rule 306a, No. 6? Look at the Rules of Civil Procedure 306a, No. 6. I think that's where we put Rule 317.

CHAIRMAN SOULES: Comments. "Paragraph 6, with respect to nunc pro tunc orders, comes from former Rule 306b and makes clear" -- We said that, didn't we?

[Laughter]

MR. MCMAINS: Makes slightly clearer.

[Laughter]

MR. MCMAINS: Or makes slightly less obscure.

[Laughter]

CHAIRMAN SOULES: If we find where 317 went --

PROFESSOR DORSANEO: I remember now. I think it just went away.

MR. FULLER: It went to Willie Nelson's house.

JUSTICE HECHT: That's not the rule. That's not former Rule 317.

PROFESSOR EDGAR: Well, we did a bunch of changing, though, and shifting around and combining.

PROFESSOR DORSANEO: One of Harry Tindall's reports last time.

PROFESSOR EDGAR: Yes.

CHAIRMAN SOULES: It does say down here: "Comment on 1988 change: Amended to reflect repeal of Rule 317." So I guess it's somewhere in this rule. And maybe that's where it is.

PROFESSOR EDGAR: We may not want to make reference to that, but --

PROFESSOR DORSANEO: I think it was taken out. There's reference to it in 306.

CHAIRMAN SOULES: Well, why don't you think about it? If it's something we need to fix, we can do it maybe in another meeting or later today.

PROFESSOR DORSANEO: Okay. There was a reference to it in 306 as well. It was taken out of there.

MR. MCMAINS: It was taken out of there.

CHAIRMAN SOULES: Bill, would you give us your report, then, Dorsaneo, on the discovery rules?

PROFESSOR DORSANEO: I'll be happy to. Do you want Hadley to finish his report before I do mine?

CHAIRMAN SOULES: Yes. I apologize, Hadley.

Let's go ahead and finish yours. I apologize.

PROFESSOR EDGAR: No problem.

We had just finished looking at Rule 239. And the next reference here, Holly, is Rule 239a. But I don't find any reference to 239a, nor did we have anything to consider, as far as I know, on Rule 239a.

MR. FULLER: What page are we on in the book?

PROFESSOR EDGAR: Well, we're about Page 950 something, Ken, somewhere along there.

CHAIRMAN SOULES: 932 would be the page that we say --

MR. MCMAINS: That's where you say that that rule is.

PROFESSOR EDGAR: I didn't find it there.

MR. MCMAINS: But there isn't anything --

PROFESSOR EDGAR: And we didn't get any questions on Rule 239a. So I really don't know what the reference to that means. We did have something on Rule 239 which we dealt with, but I --

CHAIRMAN SOULES: Well, I don't see any --

PROFESSOR EDGAR: I don't either.

MS. HALFACRE: Blatant error.

CHAIRMAN SOULES: Okay.

PROFESSOR EDGAR: If you go to Rule 245, Page 934, you'll notice that there are two rules there.

There's one on Page 934 and one on Page 935. We recommend the one on 934. As I recall, 935 imposes a system of certification. And the members of the subcommittee felt that lawyers had too much else to do and you don't want to add that certification requirement. Basically what this does is give lawyers at least 45 days -- extends it from 10 days to 45 -- for setting the case for trial, but then once the case has been set the court may reset a contested case on reasonable notice or by agreement of the parties. But you are going to be guaranteed 45 days rather than 10. But once that 45-day period has passed, then you are going to be fair game.

MR. COLLINS: Do we have any discovery cutoff time to conflict with the 45 days? For example, you have to designate 30 days in advance.

MR. FULLER: 30 days and augment changes.

MR. MCMAINS: That's "not later than," actually.

MR. COLLINS: I understand. But I'm just thinking if I get that notice on the 1st of the month and I'm set 45 days later, is it the date of mailing that controls, or the date I received it in my office? For example, the letter comes in from Junction to Dallas, takes about four days to get there --

MR. FULLER: That's not as bad as if you get one from a Dallas law firm.

MR. COLLINS: It may take longer in Dallas, you're right.

PROFESSOR EDGAR: What's the rule now? You've got a 10-day --

MR. COLLINS: I understand. That's what I'm saying. I'm not saying the current rule is any good. I'm just trying to say that whatever the rule is now, the answer would be the same.

CHAIRMAN SOULES: We haven't fixed that and don't have anything here before us to fix it, John. The problem here is that a jury case has now got a 30-day fuse, but you can set a nonjury case on a 10-day fuse. Really, this 45 days was put in here to get the nonjury assignment beyond jury. We had some problems with that. I think several courts have. The court set a nonjury case and then it's too late to demand a jury and then they say, "Well, you waived your jury." Well, on this they can't set a nonjury case the first time within the 30 days. So you still have time to make a jury demand, pay a jury fee, get your jury.

MR. FULLER: Luke, this is going to cause some major problems in family law cases, this long fuse. It really is. Well, first of all, they deal with so

damned many cases. And if you've got that 45-day fuse on one of these things and then they're mandated by the court to dispose of, what is it, 50 percent of them within 90 days, you've used up half of it with the notice. Now, I don't care personally, but I think that you're gonna hear a hue and cry from some of the family law judges, because that's the name of the game. If you don't set them and you don't push them, nothing happens. And they're dealing with massive numbers. And I think you're gonna hear a lot of screaming and hollering on the 45 days. Now, most of mine are --

MR. LOW: How could they set them less than that if they've got all that many?

MR. FULLER: They set them and they settle, that's what I'm saying. They don't try them.

CHAIRMAN SOULES: All a judge has to do is set his cases. Once he sets them, if they don't go with that setting, then after that --

MR. FULLER: I know after that he can set them.

CHAIRMAN SOULES: -- he can set them. So, if he really wants to run his docket, he's got to set his cases for trial.

MR. FULLER: You've got a 90-day fuse on a lot of those divorces by mandate that, of course, are

supposed to be gotten rid of, then you are given a 45-day gate for setting them. You may have a problem.

CHAIRMAN SOULES: John really hit on this. We've got this problem: Trial judges want to control their dockets and set their cases on as short a fuse as possible, because it gives them control. And we need to support that control. We've got a problem right now that nonjury cases should be set more than 30 days ahead of time in order to keep people from forfeiting their jury rights. The question is: How much ahead of time?

Well, it could be 31, which doesn't give you any time at all to take care of your discovery problems, your supplementation and so forth that John raised.

Or it could be 90, which is not supportive of the court's control of its docket.

And this 45 was sort of: What's the most we can do to support the court and still give ourselves enough time, even though it may be a period of tight compression, 15 days, for us to get our case ready? And that's where the 45 days came from. We were trying to balance -- the Committee on Administration of Justice is where this debate took place -- the interests of all concerned and make it fit the 30-day jury trial rule. This should have been done when we did that rule, but we didn't pick up on the problem. So that's the whole

background on this.

Tom Ragland.

MR. RAGLAND: Luke, I think that this 45 days is likely to create some problems in your multicounty districts where they need much greater lead time than some of the metropolitan areas. In other words, they don't have the staff, they don't have the judges there every week, you know, maybe just once a month or once every three months. And I recognize these other needs, but I think 30 days instead of the 45 would be a lot more acceptable to a lot of the multicounty judges that I know.

CHAIRMAN SOULES: Well, 30 days doesn't fix the problem. You've got to have enough time after this nonjury setting is made to demand a jury and pay a jury fee. And the 30 days is that time. So, if the judge sets the case 30 days away, you've waived your jury.

MR. RAGLAND: Well, does anyone actually not request a jury early on in the case?

CHAIRMAN SOULES: Yes. Not everybody does like we do.

MR. LOW: We're also forgetting -- we're remembering the judges, but you've got lawyers, too. You know, you've got to remember the lawyers have to get their cases ready and they have to have a little notice.

And you can't just be like superman and just pick up and go like that.

MR. ADAMS: You've got to supplement interrogatories.

MR. BECK: You've got the problem of identifying expert witnesses. The defendant could be in the position of getting a notice for trial setting and being late identifying witnesses.

CHAIRMAN SOULES: Unless you give some time beyond 30 days.

MR. BECK: Exactly.

CHAIRMAN SOULES: That's right. In order to be accommodating, we said 45. But, of course, you can get continuances if you have to.

MR. COLLINS: Are there any local rules that require designation of experts longer than 30 days?

CHAIRMAN SOULES: I don't know.

Justice Hecht.

JUSTICE HECHT: What is the practice in Tarrant County? How long ahead of time are their settings made? Aren't their settings just made --

MR. FULLER: They've got the strangest system over there. You have to make a request at least by the 20th of the month in order to have it set the next month. Then they set it the next month, but not -- like

you make the request by the 20th of May, last time I was over there. Then they will set a docket starting in June, but it's the July docket they set. They set the docket a month ahead. So I think --

JUSTICE HECHT: You'll have a copy, hopefully, of the lawyer's letter requesting the setting, but you won't know about your setting over there, will you, until --

MR. FULLER: That's correct.

JUSTICE HECHT: -- about 30 days ahead of trial?

MR. FULLER: That's correct.

JUSTICE HECHT: Or maybe not even that much?

MR. FULLER: You get a copy of the letter that goes in May and then it will probably be close to the 15th of June before you get a notice of the July setting. And it might be less than 30 days.

JUSTICE HECHT: So a rule like this is going to affect the standard practice in Tarrant County?

MR. FULLER: Let me say this. It's been a couple of years since I've gone through that drill. That's the way it was last time I was there. Is anybody here from Tarrant County?

JUSTICE KELTNER: Yes. That is exactly the way it's done. And this would affect that practice.

PROFESSOR DORSANEO: Mansfield State Bank v. Cohen interrupts this rule and says notice to Mr. Cohen of the request for setting is notice of the setting.

CHAIRMAN SOULES: See, we started this problem when we lengthened demand for jury trial from 10 to 30. Now we've got to go on and fix this. And all those practices developed back when you had 10-day jury demands, jury fee. So those are going to have to be adjusted, too, unless we go back to 10-day jury demand, jury fee. I don't really want to do that. That's really waffling around. We just need to fix this.

JUSTICE HECHT: I sort of find it hard to believe that lawyers get first settings in less than 30 days or 45 days, either one. I mean, I don't see how you could possibly reasonably comply with the rules if you didn't know you were getting a trial setting at least about 60 days ahead of trial.

CHAIRMAN SOULES: This will help us, at least 45. Is there any opposition to this change, then, Rule 245? Any further discussion?

All right. That stands approved.

There is a second part to this, which is at the 4th, 5th, 6th and 7th lines of the next page, Hadley, on 935.

PROFESSOR EDGAR: That's the certification

provision.

CHAIRMAN SOULES: Right.

PROFESSOR EDGAR: Which our committee did not recommend.

CHAIRMAN SOULES: All right. Can I debate that?

PROFESSOR EDGAR: Sure.

CHAIRMAN SOULES: There are a number of counties where in order to request a trial setting you have to certify readiness for trial, but you get your trial setting a year away. When you request a setting, they set you a year or more away. In those counties, some of the judges say you can't take any further discovery because you've certified you're ready. So you can't ask for a trial, which is a year away, and then do your discovery while you're waiting for your time to pass so that you can get a jury.

And what this is saying is: If a judge wants to control his docket, require certification of readiness for trial before he gives you a trial setting so he doesn't have all these motions for continuance and announcements of not ready and so forth coming in and blowing up his jury docket for the week, winding up with nothing to do because he didn't call enough cases -- and those are real problems -- fine, he can require that,

but only if he can give you a trial within 60 days or 90 days. The 60 days doesn't make any difference to me. But this is again sought as some help in the local-rules effort, because our feeling is that the local rules which require certification of readiness for trial should not be permitted to function unless the judges in that area can give you a prompt trial. And that's the reason for this suggestion.

PROFESSOR EDGAR: Well, in part, I think one of our committee's concerns was that certification for trial doesn't appear anywhere in the rules. And suddenly here it is. Now, if we're going to have a certification procedure, then perhaps there should be a rule dealing with certification so that this rule would become meaningful to the bench and the bar. But just for it to appear in there out of the blue did not seem to be the way to approach the problem. And for that reason, and frankly we didn't get any explanation for the reason you gave, we just got this request without more. And it raised more questions among the committee than it solved. And for that reason we recommended the version that appears on Page 934 to the exclusion of the one on 935.

MR. SADBERRY: Mr. Chairman, I think it is a real problem, certainly in the experience I've had in

Harris County, with certification procedure. And the real fact, not only that discovery is often not allowed after certification, but there's also no consistency among the courts as to whether discovery may or may not be allowed. Every court is different. That may be a combination rule and local-rule problem, sounds like.

I understand the professor's comment that perhaps it's not clear, certainly no precedent or clarification as to what certification means in the context of this rule, and maybe we have to get at it in a different way, by saying this is a rule that doesn't allow local rules to prohibit discovery after certification if the case is not going forward, set for trial. That seems to be the problem. That may be where the fixing needs to be.

But I just add my comment that it is a real problem and there's no solution provided in the rules or, quite frankly, not even in the local rules of the courts. I'd like to see some effort to address it, because here it's recognized, but I think something needs to be done.

CHAIRMAN SOULES: Can we use a word different than certification? What we're really trying to do is say the status of readiness for trial.

MR. FULLER: Announcement of ready.

PROFESSOR DORSANEO: It really is a certification.

CHAIRMAN SOULES: That's the commonly-used term, but it may not be in the rules.

PROFESSOR EDGAR: If I might make a suggestion, Luke, rather than having to hammer out a concept that we really haven't had to deal with in subcommittee or something like that, it might be better to go ahead and simply approve the rule in the form it appears on Page 934 and then maybe if we could have some more input and suggestions about the formation of a rule on certification or something like that to deal with that as a separate, independent item, then the subcommittee could take it up at a later date, rather than trying to spend time here trying to hammer out something we really haven't all thought about.

CHAIRMAN SOULES: Let me ask you about this. What if we just delete the word "certification," just say "Readiness for trial shall not be a requisite for a trial setting unless the trial shall commence"? We don't have any certification problem.

JUDGE RIVERA: I think it's better if we leave it out, Luke, let that be a local problem. Large counties, for the ones that have a case that's gonna be set six months or a year from now are the places where

you get a motion or request for setting before they're ready, thinking they won't be ready by that time. If you make them get ready and you wait those six months or one year, then they ask for a setting and you give a setting and a year later, it doesn't work.

CHAIRMAN SOULES: Judge, this is too big a problem. This is a problem that is very hindering to people who are trying to get their rights resolved in the courthouse.

JUSTICE HECHT: Luke --

CHAIRMAN SOULES: Because you've got to get your case completely ready --

MR. O'QUINN: Then wait.

CHAIRMAN SOULES: -- in Harris County and certify that to the judge before you can ask for a setting. And then they'll give you a setting a year or two years away and won't let you do discovery in the meantime unless you've got some sort of exceptional cause. I mean, this is really -- the people of the State of Texas, and particularly the people in Harris County, are getting hurt by local practices that this will fix.

Justice Hecht.

JUSTICE HECHT: Does certification really work? I mean, does any lawyer know 60 days out from

trial that he's totally ready and he's not going to do any more discovery and nothing else is going to come up in virtually any case? It seems to me like this certification procedure is just an invitation to lie in order to get a trial setting.

JUDGE RIVERA: I think that's all that happens. We still get a request for "We need another physical examination," you know, 90 days after it's been certified for trial.

MR. FULLER: They've got up to 30 days to amend the answers to interrogs. You may have a whole new ballgame. Doesn't make sense to me.

CHAIRMAN SOULES: David Beck.

MR. BECK: I'm from Houston. And, you know, we've had this certification procedure in our local rules for years and years and yéars. And the fact of the matter is, it doesn't work very well at all. Everybody certifies they're ready. Nobody is ready. Or 90 percent of the people who certify their cases aren't ready. Those who think they're ready find out later they're really not ready. And the result is that most lawyers end up working things out by agreement. Others have to go to the courthouse and get the local judge to do that.

My concern is, Luke: By trying to hammer out

a rule of statewide applicability now, when we don't know the local conditions around the state, I think it's going to present some of these judges with a lot more problems than we're going to correct. We've got problems in Houston and John O'Quinn and I could probably sit down and hammer out a rule for Houston, but I don't know if that's going to work for some of the other judges around the state.

CHAIRMAN SOULES: Well, I've been talking about this publicly to the Judicial Conference, to judge meetings and to lawyer meetings for a year, and I've never found anyone who opposed making it a condition of readiness for trial -- eliminating that unless the judge can give you a trial setting in a short term.

MR. BECK: Well, everybody can agree with that in concept. But when you start getting down to, "All right, now let's figure out how this is going to work," the courts, at least in Houston, all they care about is having a case ready to be tried. And they've tried everything they can to get the cases off the docket that aren't really ready, to make sure that when they phone for a case that they've got a case that's ready to go for trial. The certification procedure doesn't work, because the lawyers certify it because they want to get in line with their case and they're

really not ready.

CHAIRMAN SOULES: And they lie. They have to lie.

MR. BECK: Well, misrepresent the facts.

[Laughter]

MR. BECK: My point is, I think what Hadley says is a good suggestion, that is, let's spend some time in a subcommittee really trying to figure out what the situation is and coming up with a good rule rather than trying to hammer out something today.

MR. DAVIS: What's the real quarrel with your suggestion? I mean, I fail to see it.

MR. O'QUINN: It's a problem.

CHAIRMAN SOULES: It needs to be done.

MR. DAVIS: What we're saying is to require certification a year or two before you can get a trial date, you shouldn't do that and cut the lawyers off. This seems to handle that, whether you call it certification or whether you call it readiness. And I don't see the harm it does.

CHAIRMAN SOULES: Take "certification of" out, say "readiness" --

MR. LOW: You know, not every court requires certification. You take here in the first paragraph that they may set it on motion. Not every court

requires that. Some of them just say, "Tell me you want it set." And then if you've got down here that certification shall not be a requirement, it leaves the local courts, if they want to, room to require certification and it makes them operate within some guidelines. I don't really see anything wrong with all this.

MR. BECK: If the case is set for trial, what difference does it make whether the lawyer certifies that?

MR. O'QUINN: I'd go with a rule like that, David. You shouldn't have to certify it to get on the docket. But as I sense it, the compromise is that if the judge is ready to try your case in the very near future, maybe it would be okay to let the trial judges require some statement that the case truly is ready for trial. While I agree with you, I've normally worked things out with other lawyers when we get caught in this situation. There's not only the aspect of having to misrepresent the true facts, there's the aspect of Russian roulette. Every once in a while you've got a situation where you've got a judge who won't bend. And I've gotten in some real traps on a couple of occasions. And I don't remember how we got out of those traps, but I really thought my clients' rights were going to be

prejudiced because some judge made me certify to try a lawsuit a year later. My doctor died, I can't remember the circumstances, but I lost a significant piece of evidence and I had to go get a new doctor or a new witness to cover that point of the case. And the judge was just adamant. He said, "You certified. I don't care if the doctor died." I said, "Well, Judge, this is just rank injustice."

MR. FULLER: What's the magic of certification? We're dealing with a buzzword. Everybody acknowledges that except in limited circumstances it's ignored anyway as a bunch of falsehoods or misrepresentations. What does it do to get certified? Not a cotton-picking thing except create problems.

CHAIRMAN SOULES: That's right.

MR. FULLER: And that judge can put you to trial if he wants to as long as he gives you 45 days notice. Now, it seems to me that we're just putting a club in here that can be selectively enforced if we want to. Because if there's a certification in there, you know you're not going to write in that, "All right, you can't do anything after that." I think we're smarter than that. So we're creating another vehicle for selective enforcement of rules. And it doesn't accomplish anything. If it did something, put it in.

But what does it do? I just don't understand.

MR. O'QUINN: Can I say something about that, Luke?

CHAIRMAN SOULES: Yes.

MR. O'QUINN: The problem is, Ken, I would go along with what I sense your approach to be, don't have any of this business of you've got to certify you're ready. What's happened is, we've got local judges with local rules that are doing that. What I sense Luke is arguing for is, we need to grapple with that problem. Maybe what we need to do is have a rule that just knocks that out completely.

MR. FULLER: Yes.

MR. O'QUINN: If you are arguing for that, I'm on your side. I don't think it should be at all, frankly.

MR. SADBERRY: That's what this is doing with the exception of the 60-day guaranteed trial setting is doing away with the certification practice as it's used to deny discovery?

MR. O'QUINN: Right.

CHAIRMAN SOULES: The judge in the county right north of Brazos County there --

MR. FULLER: Is that Williamson?

CHAIRMAN SOULES: No.

MR. O'QUINN: Are you in Leon County?

CHAIRMAN SOULES: May be Leon County. I can't think of his name.

MR. O'QUINN: There's a guy named Sandel out of Huntsville.

CHAIRMAN SOULES: Well, anyway, he says, "If you are ready to go to trial, I'll have you in trial in 60 days in this court." And he says he does it that way. So there's a judge who has a legitimate interest in knowing: Are you ready? Because I'm going to set eight cases on this Monday and I'm going to have a jury panel here and that's on the assumption that seven of them are going to settle and I'm going to have something to do, or five, and somebody is going to go home. But I want enough cases set that are ready, because we're going to work that week, we're not going to not work that week. And he wants to have certification of readiness. Or take the word "certification" out. He wants to have a condition or status of readiness announced before he'll give you a trial. That's one judge I'm trying to take care of.

But the judge I'm trying to get off of our toes is the one who says: You've got to say you're ready and then I'll give you a setting, but I'm so backlogged that it will be a year and a half. And

then the things that John's talking about, the gamesmanship problems, arise. And no one is ready a year and a half ahead of trial, I don't care who it is, in what case. It's just things change. And so that's why the 60 days. And I'd take out the word "certification" and just say "Readiness for trial shall not be a requisite to a trial setting unless the trial will commence no more than" -- this says 60 -- "X days after the date of the order setting the trial."

Bill Dorsaneo.

PROFESSOR DORSANEO: I think something needs to be said about this problem. I think that language is probably not as good as the other language, certification. And I would suggest maybe we put in a separate sentence, maybe at the end, maybe in the middle, that would say this: Certification of readiness for trial is not required in a motion to set a contested case for trial unless the trial is scheduled to commence not more than 60 days after the date of the order setting the trial.

CHAIRMAN SOULES: That's fine. I'll accept that.

MR. FULLER: Can we change "not more" to "within"? "Not more" is confusing.

PROFESSOR DORSANEO: It could be within.

CHAIRMAN SOULES: That's fine.

PROFESSOR DORSANEO: That references back to the motion that is referred to in the preceding sentence. I realize we don't really file formal motions.

CHAIRMAN SOULES: Do you move that language?

PROFESSOR DORSANEO: I move it.

MR. O'QUINN: I second it.

CHAIRMAN SOULES: Tom Davis. Discussion.

MR. DAVIS: Maybe I'm missing the point, but how do you handle a requirement that you certify for ready and then you can't do any more discovery? I don't care what period of time you put it back, with the rule it says you don't have to designate your experts until 30 days before trial. I mean, maybe I'm missing the point. How do you handle that? If you have any requirement of readiness for trial or certification for any period of time, certainly one more than 30 days, how do you handle that? I mean, am I missing something here?

MR. FULLER: Why don't we say that an announcement of ready won't shorten any time, or something of that type? You can put a kick-out in there.

MR. DAVIS: 60 days doesn't help a heck of a

lot.

PROFESSOR DORSANEO: At least if you make this motion for a setting and you fill out one of these things that says you've done all your discovery, you're meant to mean that.

MR. DAVIS: Yes. And then 30 days before the trial or 30 days after you certify it, I designate my experts. What are you going to do?

CHAIRMAN SOULES: John.

MR. O'QUINN: The problem you're going to get in, Tom, the rule says you shall designate your experts as soon as practical, but no less than 30 days before trial. There are some cases holding they can cut you off if you come in --

MR. DAVIS: But that's discretionary with the court.

MR. COLLINS: That's also in violation of due process.

MR. O'QUINN: I tend to agree with you, John, but there are some judges who look at it differently.

MR. FULLER: Couldn't we have put a kick-out in here that such announcement does not have the effect of shortening the time for any other discovery provided for in these rules, something to that effect?

PROFESSOR DORSANEO: But it will. It has the

effect.

MR. FULLER: Why does it have the effect? There's no such thing as certification of trial, not even anything in here that defines it. Y'all are just assuming that it does. There's nothing that says it cuts it off. That's just some interpretation that the judges have. Certification isn't defined anywhere in here, is it?

PROFESSOR EDGAR: See, you-all are talking now about this is assignment of cases for trial and really doesn't have anything to do with announcements as such. They're really two different things. And we're getting off on something else, it seems to me.

MR. FULLER: All right. How about this?

CHAIRMAN SOULES: It's a motion.

MR. FULLER: We've got one word we can cure the whole problem with. Certification of readiness of assignment for trial. Will that cure it?

CHAIRMAN SOULES: No. We've got a motion. Bill got it. This is not just an assignment, that's a title.

PROFESSOR DORSANEO: I realize what you are saying about the 60 days does not mesh, but it's an improvement over a year and not meshing.

CHAIRMAN SOULES: Maybe that number should be

30 days.

MR. DAVIS: 30 days would be better.

CHAIRMAN SOULES: And that fits, doesn't it? Because by then you're 30 days ahead of time.

MR. DAVIS: 30 days before trial I give you my experts. And you've already had to announce ready 30 days. So you can't take the depositions of them because you've already announced ready.

CHAIRMAN SOULES: David.

MR. BECK: Luke, I think it's important to realize how this whole certification process came up. The lawyers didn't introduce this. This is the judges that introduced this. And at least in Harris County the reason they introduced it was to try to get some certainty on their docket. You can play with these words and you can knock out the word "certification" and put all kind of provisos in here, but they're going to come up with another system to try to ensure certainty in their dockets.

Now, if you've got a court that has his or her own docket that they manage, they can introduce that certainty without any certification process or anything else by simply saying, "You are going to trial on March 9th, and both sides better be ready."

The problem is, when you have a central

docket system and one judge calls down there for some case that's 162 on the docket, the only way they have of knowing whether that case is ready to go is by some type of certification process. If you knock that out, they're going to come up with another system. So I don't know whether we're fixing anything here.

PROFESSOR DORSANEO: What this sentence that I'm proposing is designed to fix is that you can get a trial setting without saying a lot of stuff that is not true and that could be harmful to you most of the time. And the only time you have to make any kind of a certification that you're ready to go, really, that discovery is complete, is when you want a setting within the next period, whether it's 30 days or 60 days. That doesn't strike me as particularly onerous.

MR. O'QUINN: Luke, I'd like to offer the amendment that 60 be changed to 30.

JUSTICE HECHT: Well, Luke, let me just say that I think the Court's going to have some reluctance to recognize a certification procedure that doesn't work. And so, by putting it in the rule, even though you are trying to limit it, to me, the fact that it's in there is a recognition by the promulgators of the Rules of Civil Procedure that maybe this practice has some merit. And I've got some doubt as to whether it

ever has any merit under any circumstances.

MR. LOW: What can the trial judge require to know you're ready? He wants some information on whether the case is ready. If he can't call it a certification procedure, what will the court allow him to do to find out whether the case is ready?

MR. FULLER: I assume you have docket calls and you make an announcement. You make an announcement either ready, ready subject to so-and-so, or not ready.

JUSTICE HECHT: You can just put a requirement in here that no trial setting will be requested unless the party requesting it believes in good faith that he will be ready at the time the setting is made. Which is the most you can expect of a lawyer, anyway, I think.

MR. LOW: That's true. But the trial judges, from their experience, they find if they don't do this or some of them think if they don't do that they're just going to have cases that lawyers are requesting settings. It's going to be a hard problem. As David said, each trial judge is going to be a little different.

CHAIRMAN SOULES: We can stop this. If this is not going to pass, it's not going to pass. We've got a lot of problems in these local rules with this request

for trial setting.

MR. MORRIS: Luke --

CHAIRMAN SOULES: We've got a lot of problems there. Now, these trial judges, they have the right to have local rules that are not inconsistent with the Texas Rules of Civil Procedure. And when Elaine and I and others start going through those rules trying to take out these problems that are real, because these district judges have plenty of autonomy and their egos are plenty big, and they say, "Show me where it says my requirement for certification for readiness for trial a year and a half is precluded. Because I've got the right to do it if it's not precluded." And if we can't show them that, then we're not going to be able to sell that in September at the Judicial Conference. And so this is one of the worst problems in the local-rules practice. And we're not going to be able to get it fixed unless we do something in these rules, in my judgment.

PROFESSOR DORSANEO: That's really right. That's why I proposed doing something.

MR. BECK: The misrepresentation in the certification is that you represent that you are ready for trial at the time you request the trial setting, when in reality your representation ought to be that

"I will be ready for trial at the time that the court sets the case for trial." That's the certification you need to make.

PROFESSOR EDGAR: That makes sense.

JUDGE RIVERA: Luke, let me point out one thing. The Court Administration Act which is now in the Government Code states you will have an administrative judge if you've got more than two judges in any county. There's very few counties now that don't have two judges, or at least three or four counties that still have two judges. And one of the first things they tell the judge they've got to do is set up a system of docket control, trying the cases and moving the cases.

CHAIRMAN SOULES: Lefty, you had your hand up when I was speaking a minute ago.

MR. MORRIS: I'm withdrawing.

MR. DAVIS: Isn't what we're really concerned with, and you made the statement, that a certification of readiness or readiness for trial, whatever you want to call the label, should not cut off further discovery when you've got the 30 days to designate experts? And isn't that inconsistent with the readiness for trial? I mean, we're saying that that shouldn't cut it off, and it shouldn't. But if it doesn't, then isn't that inconsistent with your saying you're ready for trial

when you haven't taken my experts' depositions yet?

CHAIRMAN SOULES: Does anybody have anything new on this? John.

MR. O'QUINN: I was going to ask you, Luke, since you are grappling with the problem, how do you feel about David Beck's suggestion? The rule may just say that trial courts cannot require certification beyond a representation that the lawyer will be ready for trial on the date of setting.

PROFESSOR DORSANEO: Certification of readiness for trial is not a prerequisite to obtaining a trial setting.

CHAIRMAN SOULES: That's what this says, isn't it?

MR. O'QUINN: No. What this says --

PROFESSOR DORSANEO: It's got "unless." I'm just saying period. The concept is that you can get a trial setting --

MR. O'QUINN: By certifying that you'll be ready on the date the case is set for trial.

CHAIRMAN SOULES: I guess that's what Judge Rivera was saying.

JUDGE RIVERA: I think if you put in the sentence that a request for a setting constitutes a representation that you will be ready on the date of

assignment, something like that would take care of it.

MR. FULLER: I like that. That you'll be ready on the date it's set for trial.

MR. DAVIS: That's the only date you can certify under that 30-day --

MR. O'QUINN: That may be a solution.

CHAIRMAN SOULES: But that does not eliminate the requirement that a judge could have you certify ready for trial when you ask for the setting.

MR. O'QUINN: You could put a sentence prohibiting that.

CHAIRMAN SOULES: That's what this sentence does.

MR. O'QUINN: Once you have a sentence prohibiting that, in order to do something for the judge --

JUDGE RIVERA: Say "No further certification will be required."

MR. O'QUINN: No further certification will be required.

MR. LOW: Or may be required.

PROFESSOR DORSANEO: Let's try to write out the language and then come back to it. I'm coming around the point of view where I sense what Justice Hecht is saying is really what David is saying, that

certification shouldn't be a prerequisite to obtaining a trial setting.

MR. LOW: But judges will call it something else. If you take that out, they're going to have that. They're going to want something that they know is not just pie in the sky, that it's ready.

PROFESSOR DORSANEO: But it's going to be in all these local rules. Then we can deal with it, have some tool to use.

CHAIRMAN SOULES: We've got to have something to deal with it in the local rules.

Lefty.

MR. MORRIS: Let me throw this out and then we'll come back. I thought of something along the line that no prerequisite for assignment of cases for trial shall interfere with deadlines described in the Texas Rules of Civil Procedure. But then that gets pretty harsh. That means that you really can't interfere with it.

MR. FULLER: Well, that's a land mine, though. You know, once the guy sets you for trial, sets you for trial in 15 days, and maybe the time hadn't run on answering interrogs, you've got a real dilemma.

MR. ADAMS: Luke, I've got another suggestion.

CHAIRMAN SOULES: Gilbert.

MR. ADAMS: It's a little bit off what we're talking about, but I don't think we ought to have a motion. I think it ought to be a written request. On a request for a trial setting, we commonly handle those in our area just by letter, where we request the court to set the case for trial. And I think that works well.

MR. RAGLAND: We do it by telephone.

MR. ADAMS: Certainly don't need to have a written or formal motion.

CHAIRMAN SOULES: So you would want to change --

PROFESSOR EDGAR: Talking about the second line on Page 934. The third word, "motion," should be changed to "written request."

PROFESSOR DORSANEO: Why even do it in writing?

CHAIRMAN SOULES: Just request?

MR. ADAMS: Well, it gives the other side notice that you have requested it. If they've got a problem, a lot of times we'll write in and say, "Your Honor, we would like to have the case set like on your September docket or" --

PROFESSOR DORSANEO: A written request is a motion, though. I mean, it doesn't have to be.

PROFESSOR EDGAR: But motions are filed with the court or the clerk.

PROFESSOR DORSANEO: Application to the court for an order.

MR. SPIVEY: There's one other alternative method that we use here in Austin, and that is pick up the phone, call the other lawyer and agree to a date. Most people will agree to a date six months or more off. And it's amazing how often that will get reached and it's amazing how many times both of them are ready when they've agreed to it.

PROFESSOR EDGAR: The rule also states "or by agreement of the parties."

MR. SPIVEY: But shouldn't we think about doing something to encourage that even more? The spirit of the Dallas rules of conduct, or whatever it is, is that lawyers should be overtly encouraged to cooperate. And a lot of noncooperation is simply thoughtlessness or, turned around, failure to think.

CHAIRMAN SOULES: Hadley, do you accept, then, Gilbert's suggestion for modification to substitute the words "written request" for the word "motion" the first time it appears in the first sentence of Rule 245?

PROFESSOR EDGAR: Oh, sure.

CHAIRMAN SOULES: Any objection to that?

That's done.

PROFESSOR EDGAR: And if you want to encourage the lawyers to agree, I have no problem with that either.

CHAIRMAN SOULES: Well, it's in here. Agreement.

What's next, Hadley?

MR. DAVIS: Have we solved the problem?

CHAIRMAN SOULES: No, we haven't.

PROFESSOR EDGAR: I think at this point what we have done, we have approved the form of Rule 245 as it appears on 934 and we're going to hold up for further consideration the proposed amendment to it on Page 935. Isn't that right, Luke?

CHAIRMAN SOULES: That's right.

Bill, you are working on language for that?

PROFESSOR DORSANEO: I am.

CHAIRMAN SOULES: Okay.

PROFESSOR EDGAR: All right.

The next one we find is Rule 248 on Page 951. This is one, Luke, I didn't receive until after our committee met. And as I advised you in my letter of March 2, therefore, we have no recommendation. And we didn't know the source of the proposed change either.

It was just a letter I got from you without any explanation. So I don't really know. Someone else will have to comment on it.

CHAIRMAN SOULES: What this is designed to do is fit, to some extent, the rule of evidence that you can object in advance of trial and obtain rulings that certain evidence will never be offered, not just in limine, where it can come up later, but have an absolute ruling. Then there are other things that can come up.

This is more of a problem on a central docket case. There are so many rulings that the motion judge won't really make. He'll just say, "I'll leave that for the trial judge, the judge who is going to try the case, to hear that, because that limits the evidence," or whatever.

So very far ahead of time it's very difficult to get certain rulings that will control a complicated case. This is really a complicated-case ruling, if you look at it, in this second part. This gives a party a motion in advance of trial to have certain legal rulings made that will be binding at the trial of the case.

And what happens in Bexar County, sometimes when you want those rulings made you can't get them made until the case is actually before a judge for jury selection.

MR. FULLER: That's awful.

CHAIRMAN SOULES: It's very bad. Rule 248 now says that you are to have these heard before the date designated for trial. Well, in a central docket, you really can't effectively get them heard before the day designated for trial, because the motion judge wants the judge that's going to try the case to hear them, and you don't get to that judge until the day designated for trial.

PROFESSOR EDGAR: Does that apply to exceptions to pleadings? Doesn't this preliminary judge at least decide exceptions to pleadings? Or does he defer that to the trial judge on the day of trial?

CHAIRMAN SOULES: Exceptions to pleadings are easier to get ruled on. They nearly always do get ruled on.

PROFESSOR EDGAR: Well, that was included in here in that. That's one thing that kind of threw me when I read it.

CHAIRMAN SOULES: I just picked that language up out of the first paragraph. So what the first paragraph changes -- look at it first and then the second one. The first paragraph says that you can present these before the trial commences. That's so that if you don't get to the judge before the day

designated for trial, at least you can put these motions in to the judge and have them heard and you're not cut off from having them heard. Now, what are they? That's the list that's already in the paragraph, first paragraph. I didn't change that list when we did the second sentence.

Now, the second sentence says they're to be determined by the court before jury selection commences. And the reason for that is you want to know when you voir dire the jury what the scope of the case is. And in a complex case it's sometimes pretty hard to know until you get the judge to say, "Okay, this is the way the case is going to be tried."

I realize this probably sounds kind of silly unless you've been in one of these cases where you've got these pleadings and discovery and there can be all kinds of legal reasons like statutes of fraud or there's no pleading that the agreement that's before you was fraudulently reduced to writing, doesn't reflect the parties' agreement. There are a lot of requisites in some of these cases where you can't get proof on unless you get some different proof on first. And if the pleadings don't support the different proof first, that other proof should never come in. It's highly prejudicial. And if you just start the trial and let

it roll, it usually does come in. And you don't get your case contained like it should be contained for a fair trial either way. I don't care whether it's counterclaims. We're talking mainly in commercial litigation.

So this is to say you can file this motion and ask for it to be heard before the trial commences, and you can get rulings before jury selection starts. The judge may overrule you, but at least you can try to get some rulings so that you can get a case described, if you will, in your own mind before you start.

Now, I think that's what 248 was designed to do when it was written. But if you read it, it doesn't get the job done. And this is an effort to try to make it get the job done, if I can.

David.

MR. BECK: Luke, just one general comment and a couple of specific ones. One, I think we've got to be careful in trying to adopt a rule of general applicability to solve isolated problems that arise. I think I understand what your problem is. It's when you've got a complicated matter and the judge takes everything along with the case and nothing gets sorted out until you're preparing the charge for jury determination. But if you're going to introduce this

second paragraph in here, you're going to have to limit it to unresolved matters. I mean, you don't want the trial judge having to go back in and try to resolve matters that an ancillary judge has already decided.

When you're talking about questions of law, isn't that a basis for motion for instructed verdict? Do you want those decided in advance of the trial? I mean, shouldn't you really be talking there about resolutions of questions of law that will somehow benefit the overall trial of the lawsuit? It seems we really need to work on the language here, if that's what your intention is.

CHAIRMAN SOULES: That's fine. This is not something that has to be done today either.

MR. BECK: In the "et cetera," I would suggest "and all other unresolved matters."

CHAIRMAN SOULES: Tom Ragland.

MR. RAGLAND: Luke, it seems to me that all of those problems that you mentioned to be covered by this amendment to Rule 248 are covered in Rule 166. I mean, anybody can file a motion to get anything resolved that relates to those problems under 166, it appears to me.

CHAIRMAN SOULES: I'm not sure of that. Rule 166 in its language is somewhat restrictive, Tom. But

maybe that's the place to work on it instead of here.

MR. RAGLAND: (g) says, "such other matters as may aid in the disposition of the action," and it goes on and and says what they can do.

CHAIRMAN SOULES: I know. Again, this is not of the same dimension. We don't have anything cooking on 248 like we do on the other problem that Bill is working on now. So, if this wants to be put away for study, it's okay with me, unless it's something we feel we can take care of today.

Hadley.

PROFESSOR EDGAR: Just another comment I would like to make. If the purpose of this is to set up maybe a two-stage opportunity for the lawyers to present these matters to the court, then it seems to me that when you've changed in the first paragraph the day designated for trial to the trial commences, then you are giving the lawyer an opportunity to argue to the court that "I have got until the day the trial commences to present all these matters to you that the rule now requires to have been presented previously." And I see some potential problem there.

MR. RAGLAND: I think also we made some effort to organize these rules in general chronological manner, pretrial, trial, posttrial; and to have

something stuck under the heading of jury cases here that deals with, in my view, something that's pretrial, is misleading, wouldn't be helpful any.

CHAIRMAN SOULES: That's in the rule now. That title is on it. We could change the title.

MR. LOW: Luke, all you're trying to cure, isn't it, to suggest to the trial court that all matters that have not been resolved that could have bearing on the way the case ought to be tried, it's only fair that the parties have those resolved before a jury is selected?

CHAIRMAN SOULES: That's right.

MR. LOW: And that's all you're saying. You're not saying that he can wait till then or something. And if the lawyers construe it that way, then so be it. A trial judge is pretty weak if he is going to let them do that. But that's the whole thing. You are just wanting it resolved in a timely fashion.

CHAIRMAN SOULES: That's right.

Tom Davis.

MR. DAVIS: I agree with what you've said as to how it ought to be handled. But I wonder if this is not a local situation or as a matter of policy should we try to get a statewide rule that tells every judge in the state that "You're gonna hear these matters before

you select a jury" and you're gonna do this and you're gonna do that. I feel that we maybe shouldn't get that far out, that this is best handled in a local manner. Maybe they don't do it right, maybe they don't hear it when they should, but I don't think we can pass a rule that's going to make them do that. And I think we're infringing maybe too far into the local situation. Once we get started with that, we could go on and on and on with things that some judges are doing that we don't think they ought to be doing.

MR. LOW: You don't tell them they have to. You just say as far as practicable.

MR. DAVIS: Well, that's common sense.

MR. LOW: That's right.

MR. DAVIS: They ought to know that.

MR. LOW: That's right. And these rules should be based on common sense, too.

MR. DAVIS: If they don't, we can't make them smarter.

CHAIRMAN SOULES: Does anybody have a motion as to this rule?

MR. O'QUINN: I move it be adopted.

MR. SADBERRY: I second it.

CHAIRMAN SOULES: Discussion?

Those in favor say aye.

Opposed?

Let's see a show of hands in favor.

Opposed?

Okay. It's down 6 to 5, with a whole lot of our members out of the room. I don't know where they are, but they ought to be in here to vote.

MR. FULLER: They're out writing motions to be ruled on before trial.

PROFESSOR EDGAR: All right. The next item is Rule 254. I don't find that in the book. I find a reference to it in a letter from Luke to me and from Justice Hecht to Carolyn Spears, but I don't find it in the book.

MS. HALFACRE: There wasn't a proposal.

PROFESSOR EDGAR: So I can't be of much help to you.

I did receive a copy of it after last week, I think, if my memory serves me correctly. But I don't know whether there are copies available for distribution to the rest of the committee or not.

CHAIRMAN SOULES: Well, I didn't prepare a redlined version of any rule on this, but Judge Spears' letter --

PROFESSOR EDGAR: It's Justice Hecht's letter to Judge Spears of the 224th District Court in San

Antonio.

CHAIRMAN SOULES: Right. And her letter is on the facing page, Page 955.

PROFESSOR EDGAR: Pages 954, 955. But we don't have a proposed rule or anything. So I don't know.

PROFESSOR CARLSON: There's already cases that cover the circumstances.

CHAIRMAN SOULES: Oh, I see what this is. This is not something we can fix.

[Laughter]

MR. MCMAINS: An irreparable problem.

CHAIRMAN SOULES: This is a legislative continuance problem. You've got a lady here who was dying and she had cancer and she was in Judge Spears' court and some person in the Legislature filed for a legislative continuance and it was mandatory and the case got dropped. Judge Spears was obviously terribly frustrated because the person who was trying to get her case tried would in all likelihood die before her case got tried. Well, that's something they're going to have to take up with the wiser people in the Legislature.

MR. DAVIS: You don't want to pass a rule repealing what the Legislature said?

[Laughter]

CHAIRMAN SOULES: Yes, sir. But I am afraid I can't get away with it, do what I want.

[Laughter]

CHAIRMAN SOULES: But it's terrible. I'll talk to Judge Spears about this. And Judge Rivera, I think the spirit is, we would do something about it if we could, but it's just not within our power.

JUDGE RIVERA: I think we need to let her know.

PROFESSOR EDGAR: Would you let her know?

CHAIRMAN SOULES: Yes.

What's the consensus, something we can't fix?

CHIEF JUSTICE PHILLIPS: we can't fix it.

CHAIRMAN SOULES: Okay. We have unanimity, then. Just something we can't fix. The Legislature has got to do it.

Bill, were you ready with something on 245?

PROFESSOR DORSANEO: Ready. Get your pencils out.

MR. FULLER: What page is it going to be on?

PROFESSOR DORSANEO: Page 935. But you're not going to see anything I'm going to say there.

[Laughter]

PROFESSOR DORSANEO: I suggest the addition of this relatively long sentence, probably at the end.

CHAIRMAN SOULES: On Page 934?

PROFESSOR DORSANEO: And probably in a separate paragraph.

CHAIRMAN SOULES: All right.

PROFESSOR DORSANEO: "A request for a trial setting constitutes a" --

PROFESSOR EDGAR: Just a minute now. Slow down.

PROFESSOR DORSANEO: -- "representation that the requesting party will be ready for trial on the date requested, but no additional certification concerning the completion of pretrial proceedings" --

CHAIRMAN SOULES: Completion of pretrial proceedings?

PROFESSOR DORSANEO: -- "or of current readiness for trial" --

MR. FULLER: Or?

PROFESSOR DORSANEO: -- "or of current readiness for trial shall be required in order to obtain a trial setting in a contested case." That probably has too many words in it.

CHIEF JUSTICE PHILLIPS: Is that in lieu of or in addition to?

PROFESSOR DORSANEO: In lieu of.

CHIEF JUSTICE PHILLIPS: Starting after the

semicolon?

PROFESSOR DORSANEO: The proviso stated is a separate concept.

MR. FULLER: Bill, my question is "will be ready for trial on the the date in question" -- it seems to me like you ought to say "date requested for trial" or "trial date" or something to clarify which --

PROFESSOR DORSANEO: The reason I said "date requested" is, I don't want the judge to pick the trial date. If I request a trial setting, I want to pick one, because I don't want him to say --

MR. FULLER: Okay. "On the date requested for trial"?

CHAIRMAN SOULES: "Trial date."

MR. ADAMS: You don't know the trial date, is the point.

PROFESSOR DORSANEO: I know when I can request it. I want it to be set for here, but --

MR. FULLER: This says if you request a trial setting in September you're certifying that in September you'll be ready.

MR. BECK: Why don't you just say "by the date requested."

CHAIRMAN SOULES: Chief Justice Phillips.

CHIEF JUSTICE PHILLIPS: I understand I

missed some earlier salient discussion and probably shouldn't speak, but I will anyway. I was a Harris County district judge when the ill-fated certification procedure was started there. It lasted two years. A majority of the judges repealed all those rules. Unfortunately, we didn't get the agreement of the district clerk, who continues to insist on the certification procedure. You cannot set a case for trial by computer in Harris County, the clerks have to certify it. Forms are handed out about certification, but it's not the rule in Harris County, nor anywhere else that I know of.

PROFESSOR DORSANEO: Our county has it.

CHIEF JUSTICE PHILLIPS: Well, maybe it's catching on. It looks to me like the simpler this rule can be in the state rules, the better. And then the place to really attack or look at trial settings is in our uniform local rules, as to what will be allowed and not allowed.

PROFESSOR DORSANEO: We need this in order to take the certification out of the local rules.

CHAIRMAN SOULES: Is that your motion?

CHIEF JUSTICE PHILLIPS: Okay. I didn't realize it was a statewide problem. It's a terrible idea. But I'm sure that's already been agreed on.

PROFESSOR DORSANEO: Yes.

CHIEF JUSTICE PHILLIPS: So I'll pull my flag down.

PROFESSOR DORSANEO: This is designed to take it out, but do it in a nice way.

CHAIRMAN SOULES: To try to fix it so that when Elaine goes through and deletes things from the local rules that are inconsistent with statewide Texas Rules of Civil Procedure, we've got this to say, "That's out. You can't have that."

CHIEF JUSTICE PHILLIPS: Well, part of my problem, and this has "in the court's own motion," but more and more courts are setting their own dockets now. I just hate to have too much of the State rule that's in the concept of requesting and parties agree or don't agree.

CHAIRMAN SOULES: This only applies to a request. The court can do anything he wants to, obviously, on his own motion.

Tom, did you have a comment on this?

MR. RAGLAND: May I offer some alternative language?

CHAIRMAN SOULES: All right. What is it?

MR. RAGLAND: No local rule or practice shall require a representation of readiness for trial more

than 30 days in advance of trial date.

MR. DAVIS: No. There's your experts designated 30 days before trial. I think you ought to cut it out completely. I don't think you can put any time limits in it without running into conflict with that.

CHAIRMAN SOULES: Are we ready to vote on Bill's proposal? All in favor say aye.

Opposed?

Okay. That's unanimously approved.

PROFESSOR EDGAR: Last paragraph on Page 934?

CHAIRMAN SOULES: Second paragraph to the one on 934. It will read as follows: "A request for a trial setting constitutes a representation that the requesting party will be ready for trial" -- somebody said by the date requested --

MR. FULLER: On the date requested. That's the alternative. One or the other. On or by.

PROFESSOR DORSANEO: I don't care.

PROFESSOR EDGAR: I like by. That's a little clearer.

CHAIRMAN SOULES: -- "by the date requested, but no additional certificate concerning the completion of the pretrial proceedings or of current readiness for trial shall be required in order to obtain a trial

setting in a contested case." No additional representation, rather than certification.

PROFESSOR DORSANEO: This is the question. I first said "shall constitute a certificate that you will be ready, but no additional certification." Then it's striking me that probably representation is strong enough to say a representation but no additional representation.

PROFESSOR EDGAR: Going to say representation instead of certification?

CHAIRMAN SOULES: Let me read it again. "A request for trial setting constitutes a representation that the requesting party will be ready for trial by the date requested, but no additional representation concerning the completion of pretrial proceedings or of current readiness for trial shall be required in order to obtain a trial setting in a contested case." That's our language. Everybody understand that's the language that was passed?

MR. ADAMS: I'd like to raise a point on "will be ready" rather than saying "reasonably expects to be ready" and the jeopardy that that could put a party in that requests the setting and then something happens, maybe something rather significant happens with regard to an expert or something. I don't know what.

The court turns back and says, "Well, look, you said you would be ready. I can't help it that your expert is out of the country or he died."

CHAIRMAN SOULES: So for "will" you would substitute "reasonably expects" or "reasonably and in good faith expects"?

PROFESSOR EDGAR: Yes, "reasonably and in good faith."

CHAIRMAN SOULES: All right. How many agree that "reasonably and in good faith" should be substituted for the word "will" prior to "be ready"?

MR. O'QUINN: No.

CHAIRMAN SOULES: Any opposition to that?

MR. BECK: Wait.

CHAIRMAN SOULES: People are going to have to stay at the table and participate, if they're going to participate! We've had people in and out of the room, we had a vote while ago with at least 20 people here and had about 11 people vote. So stay it your table. We've got a long agenda, we've got to get this done.

MR. O'QUINN: Luke, I oppose that change. I think you ought to be able to say, when you ask for a trial setting, that you will be ready.

CHAIRMAN SOULES: All right. One against. Anybody else against it?

PROFESSOR DORSANEO: I'm against it, too. I agree with John.

CHAIRMAN SOULES: Two.

MR. FULLER: Me, too.

CHAIRMAN SOULES: Three.

Let's just take a vote on it. Gilbert Adams has moved that we, in the phrase "the requesting party will be ready," that that be changed to say "the requesting party reasonably and in good faith expects to be ready." How many favor Gilbert's change?

Eleven.

How many are opposed?

Five.

Okay. That change will be made. And this is the way it will read for purposes of the record: "A request for a trial setting constitutes a representation that the requesting party reasonably and in good faith expects to be ready for trial by the date requested, but no additional representation concerning the completion of pretrial proceedings or of current readiness for trial shall be required in order to obtain a trial setting in a contested case."

Next item.

PROFESSOR EDGAR: Okay. We're at Page 956.

PROFESSOR DORSANEO: Rule 245 has come a long

way.

MR. O'QUINN: Yes.

CHAIRMAN SOULES: On Page 956 --

PROFESSOR EDGAR: We want to repeal the rule that sets up additional counties, as I recall. Let me get this out.

CHAIRMAN SOULES: There's a rule that says what happens whenever we create new counties. That's Rule 260. Someone has read that, said, "Repeal it because it's surplusage." It really doesn't matter. Let's just vote on it. Those in favor, say aye.

Opposed?

That's unanimously approved.

Next item.

PROFESSOR EDGAR: If you'll go to Page 964, there is a reference here in a letter by Justice Hecht to Luke concerning Rule 267. Now, it raised a question that we talked about yesterday, but the only reference to Rule 267 appears in this letter. And my committee didn't receive a copy of this letter, so I don't have anything to say about it.

CHAIRMAN SOULES: Well, we're working on --

PROFESSOR EDGAR: I know. But I say it carries over what someone talked about yesterday. But it's on the agenda and I wanted to call it to the

committee's attention.

CHAIRMAN SOULES: Thank you, sir.

PROFESSOR EDGAR: All right.

The next item is on Page 966, concerning Rule 269, cosmetic only. I tried to pick up every rule that talks about special issues. We just missed this one last time. And if the computer could go back and pick up some others, it would certainly be appreciated. There might be some more. I don't know where they would be.

CHAIRMAN SOULES: We'll look.

PROFESSOR EDGAR: Then also there's a typo change. "By" should be "but."

CHAIRMAN SOULES: Where is that.

PROFESSOR EDGAR: In the second paragraph, Paragraph (g).

CHAIRMAN SOULES: All in favor, say aye.

Opposed?

That unanimously passes.

We'll consider ourselves, then, charged to find where "special issues" may elsewhere be in the rules and to substitute "question" or "questions," as proper, and get those out as well.

PROFESSOR EDGAR: The reference to Rule 274 appears in a letter from somebody from Baylor who gets

all upset when you start messing around with Rules 274 through 279. It's at the bottom of Page 971. That really has something to do with Rule 279, which we'll get to in just a few minutes. So, if we can just move on --

PROFESSOR DORSANEO: Can I back up one second? Why don't we just take out on that 966, "whether upon questions or otherwise"?

PROFESSOR EDGAR: What rule are you on?

PROFESSOR DORSANEO: 269. Instead of changing "special issues" to "questions," why don't we just take out the phrase? "The party having the burden of proof on the whole case, or on all matters which are submitted by the charge shall be entitled to open and conclude the argument," instead of saying "whether upon questions or otherwise."

CHAIRMAN SOULES: Any objection?

That's done.

PROFESSOR EDGAR: All right.

Let's now look at Rule 278, which appears on Page 973. The last two sentences of Rule 278 have always been the subject of some concern about how you seek and obtain reversal on nonsubmitted questions or defective or nonsubmitted questions or defective or nonsubmitted instructions and definitions. And I've

always thought that these last two sentences are not really complete.

PROFESSOR DORSANEO: I agree.

PROFESSOR EDGAR: So what I've tried to do here is simply delete those two sentences and add the language that appears on 973 and over on Page 974 to point out specifically so that people won't have any problem with it.

Now, in doing that, I have incorporated the case of Morris v. Holt, which the Supreme Court decided in 1986. And in that case we had a party complaining of an opponent's question to the jury and the court in that case held that tender and refusal of the court to submit the opponent's question -- I mean the tender by the opponent of the opponent's question and refusal was sufficient and he didn't have to object to the charge and have the court overrule the objection. And so I've tried to incorporate that holding.

And the rule really wasn't very clear and some cases have gone different ways. But the Supreme Court has decided that issue now. And I would just like for everybody to take a look at this and first make sure it's technically correct. I hope it is. And then we can talk about the merits of it.

MR. HERRING: Some places you have submission

in writing and some places you don't. That probably ought to be consistent through the whole revision.

PROFESSOR EDGAR: It certainly should.

MR. HERRING: "a" says "submission in writing, "b" doesn't. The second line: "must request and tender it in writing in substantially correct wording." And then you go down at the end of that, the next-to-the-last line, and then you do say "in writing." And then in "c" again you don't have "in writing."

MR. MCMAINS: You also have "substantively" instead of "substantially."

MR. HERRING: Yes, the third line on "c."

PROFESSOR DORSANEO: You're requiring too much in "d."

MR. HERRING: If you are going to have it the way it is, it ought to say "in writing" again on the third line.

PROFESSOR EDGAR: The third line or the second line?

MR. HERRING: The second line. Because that's where you --

PROFESSOR EDGAR: All right. And then that should also be in "c" and "d," should it not?

MR. HERRING: Yes.

MR. FULLER: Anywhere you have "tender" you

ought to have "in writing."

MR. HERRING: Yes, "b," "c" and "d" all need "in writing."

PROFESSOR EDGAR: What was your other addition?

MR. HERRING: "Substantially" instead of "substantively" in "c," on the third line. I think that "and" in that third line ought to be an "or." "Substantially correct wording or object" --

PROFESSOR EDGAR: In "c"?

MR. HERRING: Yes.

PROFESSOR EDGAR: That's failure to submit. You've got to do both. Right? It's when it's submitted effectively that you can do either.

MR. HERRING: Then it's not --

MR. MCMAINS: You're saying that you have to do both?

PROFESSOR EDGAR: When the court fails to do it.

MR. HERRING: As to a definition of instructions, you've got "or."

MR. MCMAINS: You have to object and tender?

PROFESSOR EDGAR: Instruction definition? When the court fails to do it --

MR. FULLER: You've got to have something in

the record to show --

PROFESSOR DORSANEO: I think we could probably have disagreement over whether you ever have to do both. All right? And I personally think, as a policy matter, you should never have to do both. So, whatever the disagreement would be as to what the current law is, I would suggest that if it is a failure kind of situation that you have to request in substantially correct wording when it's a definition or instruction, but that you don't have to also object to failure.

PROFESSOR EDGAR: I have no problem with that. If we want to adopt that as a policy, I have no problem with it.

PROFESSOR DORSANEO: I have the same feeling with respect to submission of a defective question. I think that if it's a defective question and it's really there, all you should have to do is to object to the defect and not also request it in substantially correct wording. Without regard to what the current law is.

PROFESSOR EDGAR: I understand we're talking about what we want to do rather than what the current law is.

PROFESSOR DORSANEO: I think if the objection is clear enough that ought to be sufficient. Having to

have lawyers do two things as a matter of preservation of rights when their position is clear is not good, especially given the fact that it's not entirely clear about what's going to be done by question, what's going to be done by instruction and --

CHAIRMAN SOULES: Okay. Let's take it line by line. What do we need to do to get "a" the way this committee wants to recommend it to the Supreme Court?

MR. DAVIS: May I ask a question?

CHAIRMAN SOULES: Is it ready now?

MR. DAVIS: May I ask a question? I'm perhaps missing a point, but would you explain to me when you are talking about the party not relying on the question must either request and tender the question or object to the failure, if I'm not relying on it, why should I even have to object or tender one? I don't guess I -- maybe I'm overlooking something.

MR. O'QUINN: You don't have to.

PROFESSOR EDGAR: You don't have to. But it starts over here "To complain of and seek reversal of a judgment because of the court's failure," then you have to do so-and-so.

CHAIRMAN SOULES: It's a preservation-of-error rule. Okay. What's wrong with "a"? Is "a" okay the way it is?

PROFESSOR DORSANEO: And object to the court's failure.

MR. O'QUINN: I think the first problem is the first line on Page 974. The words "and object to the court's failure to include in the charge" should be stricken. Isn't that right, Bill?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: Failure to submit a question. "The party relying on the question must request and tender it in writing in substantially correct wording" --

MR. O'QUINN: Then strike down to the word "while."

CHAIRMAN SOULES: And then strike from there to the word "while."

MR. O'QUINN: You want to change the rest of that, don't you, Bill, to eliminate -- you want to give the option --

PROFESSOR DORSANEO: The option. Morris v. Holt --

CHAIRMAN SOULES: "While the party not relying on the question must either request and tender the question in writing in substantially correct form or object to the court's failure to include" --

PROFESSOR EDGAR: It in the charge. That's

Morris v. Holt.

PROFESSOR DORSANEO: And the reason you would do that is you would want to avoid waiver of the right to jury trial.

MR. COLLINS: Does this cover the situation where your opponent fails to submit a necessary element of a cause of action or defense?

PROFESSOR DORSANEO: Yes.

PROFESSOR EDGAR: That's to avoid a deemed finding.

MR. MCMAINS: You object to it.

PROFESSOR EDGAR: You object, then you run into the deemed-finding problem.

MR. FULLER: Now we're talking about questions, not instructions.

MR. COLLINS: That's right. "a" is questions. You get to instructions down here. Right, Hadley?

MR. O'QUINN: That brings a question to my mind, Hadley. If you want to avoid a deemed finding, do you have to object? What's the intent of this new rule?

PROFESSOR EDGAR: All I was trying to do is incorporate Morris v. Holt.

PROFESSOR DORSANEO: You can tender in

substantially correct form and not object or you can object and not tender.

MR. O'QUINN: And avoid the deemed finding?

PROFESSOR DORSANEO: Right.

MR. O'QUINN: Okay. That's what I thought you were doing, but I got confused by --

MR. COLLINS: You can do one or the other. You don't have to do both.

MR. O'QUINN: Right.

PROFESSOR EDGAR: That's right.

MR. DAVIS: As a matter of policy, maybe what it ought to be rather than what it is, to help the trial judge, wouldn't it be better that you have to tender a correct one rather than just objecting? Sometimes that objection can be a little obscure and he still has to go back and figure out how to rewrite it to meet the objection. What's the problem with the objecting party tendering in every situation as a matter of policy?

PROFESSOR DORSANEO: The nature of the objection would be something like this. I object because there's no causation question. There's no submission of causation. And the objection is a relatively short item. Actually, lawyers who go ahead and do the request in substantially correct wording are probably assuming a larger burden than they should.

And this is really in here to protect them from themselves.

MR. DAVIS: I'm thinking about helping the court a little.

PROFESSOR DORSANEO: I think the court has got plenty enough help in the charge area. Objecting to the charge, I think they've got plenty enough help.

CHAIRMAN SOULES: Hadley, would you accept the change where you've got "include it in the charge" and substitute "submit a question"?

PROFESSOR EDGAR: I'm sorry.

CHAIRMAN SOULES: "Object to the court's failure to submit a question" rather than "include it in the charge."

MR. O'QUINN: Talking about the last six words.

PROFESSOR EDGAR: Yes, yes.

MR. FULLER: Court's failure to submit the question would be more definitive.

CHAIRMAN SOULES: So "a" would then read "failure to submit a question, the party relying on the question must request and tender it in writing in substantially correct wording, while the party not relying on the question must either request and tender the question in substantially correct form or object to

the court's failure to submit a question."

PROFESSOR DORSANEO: Rusty had something.

PROFESSOR EDGAR: "The question."

CHAIRMAN SOULES: "The question"? Except "the question" is not there if you're objecting only. And that's why I put "a question." You are objecting to the omission of a question. But it can't be "the question," because you don't have one.

PROFESSOR EDGAR: All right.

CHAIRMAN SOULES: A question.

JUDGE RIVERA: How can you object --

CHAIRMAN SOULES: Is there something else now on this? Give me specific wording that you choose to submit for consideration on this "a."

MR. ADAMS: Are we attempting to state the law now? Is that what we are trying to do?

PROFESSOR EDGAR: In part, I think. That's all I started out doing. And then we might want to make some substantive changes as well, but --

CHAIRMAN SOULES: Rusty, have you got language you want to put in here?

MR. MCMAINS: What I want to do is to ask about the changes you just made that everybody seems to be willing to accept blindly. And that's all I'm trying to clarify. Because he is talking about failing to

submit "a question" as if that solves all of the problems about a missing element which may well be included by instruction.

PROFESSOR DORSANEO: May be better to have the language it had.

MR. MCMAINS: Included in the charge language was broader in the sense that it doesn't have to be in a question if it can be or is in the instruction.

MR. FULLER: In fact, should be.

MR. MCMAINS: And the fact that it is in instruction rather than in question form is not going to preserve any error, if it's there. The question is: When you look at it, is it there? And if it's there, under Island Recreation, even though you can't see it, it's there.

[Laughter]

MR. FULLER: Well, isn't it curable by --

MR. MCMAINS: Is that not true, Judge Phillips?

CHIEF JUSTICE PHILLIPS: That was before my time.

[Laughter]

PROFESSOR EDGAR: They can't lay that one on, you, can they?

CHAIRMAN SOULES: What I'm trying to get at

is "a" is failure to submit a question. That is the error that you are trying to preserve in "a" is the failure to submit a question. Now, it may be that there is no error. But we've got to assume that there is error and it is that error that you are trying to preserve. And doesn't failure to submit a question preserve it? I mean objecting to that failure. We're going to get to instructions in a minute. Or does it not?

MR. MCMAINS: The problem is this is related to the deemed-filings rule. They no longer talk about deemed findings relating to questions, they talk about deemed findings in terms of elements of claim or defense.

CHAIRMAN SOULES: Okay.

MR. MCMAINS: The real question you have here is: There is the omission to submit an element of a claim or a defense. What it is you do to protect against that. Frankly, I'm not sure that any of these changes really catalog the one place that is probably where there's the biggest problem.

MR. COLLINS: But, Rusty, isn't the only way to submit an element is by means of a question?

MR. MCMAINS: No.

PROFESSOR EDGAR: You've got the instruction.

MR. MCMAINS: You've got the Montgomery Ward case, which just says basically you can ask how much money should be apportioned, if any, for false imprisonment --

CHAIRMAN SOULES: Rusty, is it your point that included in the charge is the proper language at the end of this "a"?

MR. MCMAINS: Well, it's an improvement over the narrowing of the other --

PROFESSOR DORSANEO: But then "it" is a problem. Like include "it." What's "it"? It's really impossible to define "it."

CHAIRMAN SOULES: That's what I was going to get at, "it," the question. But this is failure to submit a question. The court has failed to submit a question. We're trying to preserve the error. That's all this is directed to.

MR. FULLER: Just on a question.

MR. O'QUINN: Why can't you just say at charge conference, Rusty: "Judge, you failed to submit this question which I consider to be a key element of the case"? If it turns out the judge covered it in an instruction --

MR. MCMAINS: That ain't error.

MR. O'QUINN: It's not error, but you've made

your objection. I think we're really debating something that's not -- to me, I don't see how it's going to be a problem. I think we can save the question. If the judge puts it in the instruction, then everybody is okay.

MR. MCMAINS: Well, the reason is because of opinions such as in the Houston Court of Appeals, Houston Belt & Terminal v. Wherry, which says: Yes, the question itself permits the jury to consider matters which are absolutely privileged in a defamation context. On the other hand, if that could have been cured by removing it from an instruction, and the failure of the party to request the instruction to remove it from the jury's consideration which was put in was a waiver of the complaint --

MR. O'QUINN: I think that's going to be covered in "c."

MR. MCMAINS: But the point is, they changed. That's all I'm saying now. We started out with this notion that if you have identified what the problem is, that ought to be sufficient to preserve error. And that was the theoretical policy justification, as I understood it.

CHAIRMAN SOULES: Anything additional on "a"? Let's vote on "a." We'll vote it either include "it"

in the charge or submit a question. I think otherwise generally the consensus is that it's all right.

Well, "a", we're deleting the words "and object to the court's failure to include it in the charge" from the top of Page 974. That's been deleted.

The balance of it is intact except whether we use "include it in the charge" or "submit a question" at the end. Those in favor of leaving it like it's typed, "include it in the charge," show by hands.

Twelve.

Those in favor of substituting "submit a question"?

So that's "include it in the charge." So, except for the deletion of the words that I read in the top two lines on 974, it's recommended as is.

Now "b."

MR. O'QUINN: Same problems on Lines 3 and 4.

PROFESSOR EDGAR: And object to court's the failure to include it in the charge.

CHAIRMAN SOULES: Tell me specifically what to do.

PROFESSOR EDGAR: On Line 4, where it begins "and object" --

MR. O'QUINN: Line 3.

PROFESSOR EDGAR: I mean Line 3. Pardon me.

CHAIRMAN SOULES: After the word "wording"?

PROFESSOR EDGAR: Yes.

CHAIRMAN SOULES: And delete to where?

PROFESSOR EDGAR: To the comma.

CHAIRMAN SOULES: Everybody agree with that?

PROFESSOR DORSANEO: Well, I would let him object and I wouldn't require him to --

MR. MCMAINS: You think that's existing law, Hadley?

PROFESSOR DORSANEO: I think existing law is you have to object.

MR. MCMAINS: That's right.

CHIEF JUSTICE PHILLIPS: And tender.

PROFESSOR DORSANEO: But I think only object.

CHAIRMAN SOULES: Yes, that's true.

MR. COLLINS: Let's don't change the law. I agree with that.

CHAIRMAN SOULES: The party relying on the question must object to the court's failure --

PROFESSOR DORSANEO: It's not "object to the court's failure," it's object to the defect.

CHAIRMAN SOULES: Must object to the defect or request and tender a question in writing and in substantially correct wording?

PROFESSOR DORSANEO: I don't think that's

fair to the trial judge. I think you have to object. I don't think you should be able to submit the trial judge a right one and not say anything about it at the charge conference.

MR. O'QUINN: Let me understand your position. Your position, Bill, is, you have to object and you only have to object?

PROFESSOR DORSANEO: Only have to object.

JUSTICE HECHT: You don't have to submit a correct instruction?

CHAIRMAN SOULES: Chief Justice Phillips.

CHIEF JUSTICE PHILLIPS: I think these ought to be consistent all the way through. And it was my understanding, and I'm hearing maybe I'm wrong, but that anytime it was your burden you had to see that the judge had in his or her hands the correct wording. And I think that's good. And I don't see that we should then require them to object unless you're going to require objections all the way through here.

PROFESSOR DORSANEO: The cases -- I think we could do that, but the case theory, a lot of the cases say because of our practice of --

MR. MCMAINS: Because we pretend it's the court's charge as opposed to the parties' charge. The theory basically is the court is the one submitting this

issue, and if it's the wrong issue, you object to it. or if it's defective in some, measure you object to it.

CHIEF JUSTICE PHILLIPS: I thought if it was your burden you had to help the court out at all times.

CHAIRMAN SOULES: That's the law.

PROFESSOR DORSANEO: If there's one there, you are helping the court out enough by objecting to the problem. The objection requires you to say what would be necessary to make it proper.

MR. O'QUINN: Bill, in other words, if the charge said, "Was the defendant's negligence the proximate cause" and the plaintiff wanted to say "a proximate cause," all the plaintiff should have to say is, "Judge, I object to the issue, the word 'the' should be 'a,'" and not tender that issue?

PROFESSOR DORSANEO: And not tender it.

CHIEF JUSTICE PHILLIPS: But that's a simple one. What if it's more complicated? How clear does it have to be to the judge how to fix it? Rather than getting into those permutations "Was the objection clear enough?" and getting into a Castleberry situation --

PROFESSOR DORSANEO: If the objection is not clear enough, is it improved by giving the judge a different formulation of the question?

JUSTICE HECHT: Yes. They leave out

foreseeability and proximate cause and the party says, "Your Honor, I object to that instruction. It's not a correct instruction of proximate cause, it omits the element of foreseeability." Doesn't he have to submit what the language element of foreseeability is?

CHAIRMAN SOULES: Yes.

CHIEF JUSTICE PHILLIPS: Makes it easier for the judge.

PROFESSOR DORSANEO: I think that's debatable. I wouldn't require it.

MR. MCMAINS: But the problem is, there are actually more waiver principles on defective submissions than there are objections. I mean, it's actually harder to do it right in terms of requesting it than it is to do the objecting --

CHIEF JUSTICE PHILLIPS: Then you are just putting the hardness over on the trial judge.

MR. O'QUINN: Judge, he's got a law degree. He ought to figure out something on his own.

MR. ADAMS: Also, the delay that occurs. If somebody doesn't have it there, then you've got to go get it typed, you've got to do this. But it's more efficient, it seems like to me, for the trial court, if somebody has got some suggestion, present it to the court, let him read it. If he likes it, he puts it in

there; if he doesn't, he leaves it out. It's clear to the appellate court. The appellate court doesn't have to worry about what was meant, what was said, what they thought. And it's clear.

PROFESSOR DORSANEO: I have my idea of a bunch of questions and I prepare that in advance and I want you to do it this way.

You say, "No, I'm just going to do it an entirely different way. I'm not even going to use your questions as a model. I have my own questions."

I object to this question. "This question you want to use has got this problem." Now, presumably, I've got to go back and write up a question that embodies my objection, is what you are saying. So not only do I have to object, I have to write the question the way you want to write it and embody and fix the problem I've identified. That's a lot of work.

CHAIRMAN SOULES: I want to get a consensus, then we're going to go past this. Those in favoring of requiring the party to tender the question in substantially correct form to preserve error in a defective question, show by hands.

MR. LOW: The party that's relying on it?

CHAIRMAN SOULES: The party relying on the question has to tender it in substantially correct form.

MR. DAVIS: Inquiry. Is that the present law?

CHAIRMAN SOULES: I think it is. But there's a debate about that.

PROFESSOR DORSANEO: Not in my class, it isn't. I think there are cases saying that. Some cases say that.

CHAIRMAN SOULES: We've got to go on, fellows. We've got a long agenda. We're going to be here till midnight tonight.

MR. COLLINS: Come on now, Luke. This is probably the most important thing --

CHAIRMAN SOULES: I know. But we're hearing the same thing back and forth. "I think we should require a written question." Then, "I think we shouldn't." I'm trying to get a consensus.

MR. DAVIS: Is that the present law?

MR. O'QUINN: We don't know if it's the law.

CHAIRMAN SOULES: The answer is: There's a disagreement about it.

The vote is going to be between having an objection made in open court, preserve the error in a defective question -- that alone -- or having to tender to the court in writing the question in substantially correct form.

MR. COLLINS: I don't want to vote until I know what I'm voting on.

CHAIRMAN SOULES: That's what the chair is going to call for a vote on. And I have.

MR. LOW: The party relying on it.

CHAIRMAN SOULES: How many feel that to preserve error in a defective question the party should have to only object in open court?

PROFESSOR EDGAR: The party relying on it.

CHAIRMAN SOULES: The party relying on it should have only to object in open court. How many feel that?

Nine.

How many feel that the party should be required to tender the question in substantially correct form in writing to the court in order to preserve that error?

Ten.

So tendering in writing will be what will be required. Now, we can write the rule that way and go on.

MR. DAVIS: Just because we prefer it a certain way doesn't mean we want to write it in the rule that way. I'm not for changing the rule to change the law as it exists now, whether we agree with the law or

don't agree with the law.

CHAIRMAN SOULES: But we have just voted 10 to 9 --

MR. DAVIS: How we think it ought to be.

CHAIRMAN SOULES: -- to resolve the disagreement on what the current law is one way. So we're going to state what the law is now in this rule. We've voted. So now we're going to write the rule to conform to that consensus.

PROFESSOR DORSANEO: I tell you, I've got a potential problem with that, because I'm confident that I know what the current law is on it, I'm sure other people are confident they know, and I'm sure we have a real disagreement.

CHAIRMAN SOULES: Well, but we've resolved that and we're going to go on with the agenda.

PROFESSOR DORSANEO: We have current cases that have been handled in the pipeline --

CHAIRMAN SOULES: All right. Help me write this "b" now so that it goes with the consensus that we've just taken so that we can go forward with our agenda. "submission of a defective question, the party relying on the question must request and tender in writing and in substantially correct wording," not also and object, "while the party not relying on the question

must either request and tender the question in writing in substantially correct form or object to the court's defective submission." That is the current law. Is there any further discussion on this unrelated to what we voted earlier on?

MR. MCMAINS: One clarification. Are you still on "b"?

CHAIRMAN SOULES: Rusty, yes.

MR. MCMAINS: Well, you have just imposed a burden on the party not relying on it to request?

JUDGE RIVERA: "Or."

CHIEF JUSTICE PHILLIPS: "Or."

CHAIRMAN SOULES: Look, we've got to read these materials, we have a lot of work to do, we've got to get down to it.

MR. COLLINS: Luke, that's fine. But I don't want to pass up the most important thing we're talking about in two days. I'm not going to be rushed into this. We could have another day. There's no deadline that says we have to get through these two volumes by the end of the day.

CHAIRMAN SOULES: When we get done with this, the whole thing may be tabled.

MR. COLLINS: I understand the chair's concern for wanting to get through it, but let's don't

skip over something that's really, really important.

CHAIRMAN SOULES: Tom Davis.

MR. DAVIS: Is that the present law the way you interpret it, the way we have worded it?

MR. O'QUINN: No.

MR. DAVIS: Or is it changing the law, in your opinion?

PROFESSOR DORSANEO: It's making it easier on the lawyers and harder on the judges. But that's all right with me.

MR. DAVIS: Which part is making it easier on the lawyer?

MR. O'QUINN: It makes it harder on the lawyer.

MR. DAVIS: I'm asking your view.

PROFESSOR DORSANEO: I don't think so. But I'm not sure that I'm always right either.

MR. O'QUINN: We'll stipulate that, Bill.

MR. DAVIS: I can decide to accept your view or somebody else's, but --

MR. FULLER: It seems to me what the present law is is immaterial if you are going to say what it is before we pass this ruling. From this date forward or the effective date of this rule, it's going to be this.

MR. COLLINS: At least we know what we're

changing, Ken.

CHAIRMAN SOULES: Let me read "b" and let's vote on it. "submission of a defective question, the party relying on the question must request and tender in" -- here's an insertion, three words -- "writing and in" then pick up "substantially correct wording."

MR. O'QUINN: I don't think you should have the "and," Luke. You haven't done it before. Look up above. We've always said "in writing and in substantially" --

CHAIRMAN SOULES: "And in substantially correct" --

MR. O'QUINN: No "and," Luke.

CHAIRMAN SOULES: "In writing in substantially correct wording, while the party not relying on the question must either request and tender the question in writing in substantially correct form or object to the court's submission." Any new discussion on this?

MR. O'QUINN: Yes. Seems like it should be parallel. In substantially correct "form" or in substantially correct "wording." What is the right way to say it?

MR. MCMAINS: "Form," I think is the correct way.

MR. O'QUINN: Then it's my suggestion to change it to "correct form."

CHAIRMAN SOULES: And the same thing up in "a."

MR. MCMAINS: Yes, in "a."

PROFESSOR DORSANEO: I want to make one observation. What we've done now, I think it's probably okay, is that the standard is the same now for failure to submit a question and for submission of a defective --

MR. O'QUINN: That's what they're doing, Bill.

PROFESSOR DORSANEO: Which I think is an improvement, as long as it doesn't screw with the current cases.

CHAIRMAN SOULES: All in favor, say aye.

Opposed?

MR. HATCHELL: No.

CHAIRMAN SOULES: "c. failure to submit a definition or instruction," Hadley. Focusing on that.

MR. MCMAINS: Point of information. We didn't impose the burden to object to in the other. Right?

PROFESSOR DORSANEO: No. Let's take that "and object to the court's failure to include it in

the charge" off and see.

CHAIRMAN SOULES: "failure to submit a definition or instruction, the party must request and tender the definition or instruction in writing and in substantially correct form."

MR. MCMAINS: Period. Or semicolon.

CHAIRMAN SOULES: Now, that would be the end as we are consistent, in that a party doesn't have to do both. So we would strike the words "and object to the court's failure to include it in the charge." Is that right?

PROFESSOR EDGAR: Right.

CHAIRMAN SOULES: Okay. Comments or discussions on this "c" part, which would read "failure to submit a definition or instruction, the party must request and tender the definition or instruction in writing and in substantially correct form."

MR. O'QUINN: Question.

PROFESSOR EDGAR: You did it again.

MR. DAVIS: Maybe we ought to say either party. Before, we identified which party we were talking about. There it just says "the party."

PROFESSOR DORSANEO: The complaining party.

PROFESSOR EDGAR: But it starts off, "To complain of and seek reversal of judgment because of the

court's: failure to submit the question, the party relying on the question must request" --

MR. FULLER: It's the complaining party.

MR. ADAMS: Question: Why are we taking out the objection? Because what if the party tenders the issue, the court inadvertently or whatever leaves it out, and he lays behind the log and says, "Well, I've submitted it, I don't have to say anything"?

JUDGE RIVERA: I tell the attorneys, "Anything you submit, you don't have to object to it again."

MR. ADAMS: What if it's inadvertently left out? Do you ever make a mistake? The question is: If somebody leaves it out.

JUDGE RIVERA: I initial every one, refused, given, modified and given.

CHAIRMAN SOULES: What we're trying to say is, if you call it to the trial court's attention one way, you've got your error preserved. And you don't have to do more than that. Because some people may not realize how many things you have to do.

PROFESSOR DORSANEO: It's hard enough to do this.

CHAIRMAN SOULES: That's right. It's a pressure-cooker situation.

Any further discussion on "c" now?

MR. DAVIS: Did you change the wording?

CHAIRMAN SOULES: Say that again. Did I --

MR. DAVIS: Read it.

CHAIRMAN SOULES: "failure to submit a definition or instruction, the party must request and tender the definition or instruction in writing in substantially correct form."

MR. DAVIS: You didn't add "the complaining party"? The word "complaining"?

PROFESSOR EDGAR: That's true in all of them, Tom.

CHAIRMAN SOULES: I did not because of the preliminary language at the beginning of this.

PROFESSOR EDGAR: I tried to do it in that form to eliminate that redundancy.

CHAIRMAN SOULES: Okay.

All in favor, say aye.

Opposed?

That's unanimously recommended.

Now, "d" reads: "submission of a defective definition or instruction, the party must either request and tender the definition of instruction in substantially correct wording or object to the court's defective submission."

MR. MCMAINS: "Definition or instruction," I think. "Tender the definition or," not "of."

CHAIRMAN SOULES: Okay. That's correct. That needs a typo correction there. Any discussion on --

MR. MCMAINS: Did you put the "in writing" part in?

CHAIRMAN SOULES: "submission of a defective definition or instruction, the party must either request and tender the definition or instruction in writing in substantially correct form or object to the court's defective submission." Either way.

MR. O'QUINN: Why are we doing a defective instruction differently than we do a defective question?

CHAIRMAN SOULES: This is what this says. I'm not saying it.

MR. O'QUINN: Oh, okay.

CHAIRMAN SOULES: Discussion?

Judge Phillips.

CHIEF JUSTICE PHILLIPS: To be consistent with "b," you need to take that second option out. There was a 10-to-9 vote on "b."

CHAIRMAN SOULES: The suggestion is that the last phrase of this, "or object to the court's defective submission," be deleted. The "or object to the court's

defective submission" be deleted.

PROFESSOR EDGAR: To be consistent with "b," though, where we have a defective submission, the party relying on it can preserve error by simply objecting. So it seems to me that you ought to be able to preserve error either way. If it's been defectively --

PROFESSOR DORSANEO: Why don't we make the party relying on it do it either way, too?

PROFESSOR EDGAR: Because parties relying on it don't rely on instructions. In a case where both parties are alleged to be negligent?

PROFESSOR DORSANEO: No. But one that says what fraud is. I'm sure as hell relying on it.

CHAIRMAN SOULES: In this case, either the party relying on it or the other party. Has it both ways.

PROFESSOR DORSANEO: I'm lobbying to have it both ways up there in "b" for both sides.

[Laughter]

CHAIRMAN SOULES: We're through with "b."

But "d" says that either the party relying on it or the other party can preserve error either by tendering or by objecting, either way, both ways.

MR. FULLER: Let me ask you this: "d" deals with the situation -- I haven't seen it dealt with yet.

How about where there's an instruction or a definition where you don't think there should be any instruction or definition? Just say, "All right, Judge, I don't think it should be commented at all, it should be out the window."

MR. MCMAINS: That's what defective means.

CHAIRMAN SOULES: Defective is also improper.

CHIEF JUSTICE PHILLIPS: You submit a blank piece of paper.

MR. FULLER: I wonder if we shouldn't use that word.

MR. O'QUINN: Some word like "none."

MR. COLLINS: Is there any magic in the phrase "defective question" or "defective definition or instruction"? What did you have in mind when you drafted that?

MR. MCMAINS: I suppose you're really legally incorrect or legally improper.

PROFESSOR DORSANEO: It's really improper.

PROFESSOR EDGAR: Improper.

CHAIRMAN SOULES: They talk about proper instructions. I guess "improper" would be a better word here in "d" than "defective," huh?

PROFESSOR DORSANEO: I think defective for questions --

MR. MCMAINS: Do you want defective or improper?

MR. O'QUINN: Yes.

CHIEF JUSTICE PHILLIPS: Defective means it's got an error in it.

CHAIRMAN SOULES: So put both words?

MR. MCMAINS: Yes. The real problem with "defective," what happens if it's defective by some portion of it being omitted?

PROFESSOR DORSANEO: I think it would be better to say "defective or improper." Because that would --

MR. LOW: The whole instruction may be improper.

PROFESSOR EDGAR: Defective or improper.

CHAIRMAN SOULES: The way I've got it now is: "submission of a defective or improper definition or instruction, the party must either request and tender the definition or instruction in writing in substantially correct form or object to the court's defective submission." Defective or improper submission.

MR. COLLINS: Are you changing that all the way through, Luke?

CHAIRMAN SOULES: Yes. I'm just making that

consistent.

Judge Phillips.

CHIEF JUSTICE PHILLIPS: To be consistent with what we've done heretofore, if it's defective -- that is, erroneous as a matter of law, there's some legal error in that instruction -- I think the party should have to submit it in substantially correct form. That was the fight we had in "b."

But if it's improper -- that is, this whole area shouldn't be submitted -- an Accord v. General Motors situation, then an objection should suffice. And we really need five categories to be consistent with what we've done.

MR. FULLER: Don't we have that here when we give the alternative "or object"?

CHAIRMAN SOULES: What Chief Justice Phillips is saying is that if it's a defective instruction, it's his view that that error be preserved only by tendering. His view is that you should not be able to preserve that error by objecting. If it's an improper instruction, --

MR. FULLER: Which means exclusion, take it out.

CHAIRMAN SOULES: -- should not have been submitted at all, you can't preserve that by requesting it, obviously, you can't tender, and that you preserve

that error by objection.

MR. FULLER: So he is saying do an "e" to cover improper.

CHAIRMAN SOULES: Now, this is a more general, global way to do it all, and either way goes, and it probably gives more latitude, but it's not nearly as precise.

MR. LOW: If you get into definitions of what's defective or improper, we know, but then as it goes down to the trial judge, they don't know what we're saying was improper and what effect.

MR. BECK: Let me ask Hadley. Hadley, in our subcommittee meeting, what was the reason again as to why we didn't make the distinction in "d" of party relying as to party not relying on the instruction definition?

PROFESSOR EDGAR: Well, there are a lot of different reasons, I guess, that people give. But it's always been my view that questions really belong to a party and instructions and definitions belong to the court. That's certainly an imperfect way of expressing it. But if you had a defective question, then it really shouldn't make any difference to impose a burden on one party or the other or to distinguish the burdens between parties. It does make a difference, or you can justify

it if you are talking about a question as distinguished from an instruction or definition. And I think that's probably what we've talked about.

MR. BECK: That's what concerns me. Because, you know, in these days of more global submissions, a definition or instruction is as much a part of my defense or somebody else's main cause of action as a question.

PROFESSOR EDGAR: Well, we really haven't dealt with that. Because if you go back and look at the court's motion or motion for rehearing in Scott v. Santa Fe, the Court pointed out that where you have, for example, a broad submission of negligence and then you have a limiting instruction about what the jury could consider, break-speed and look-out, that that's really to be considered a question problem rather than an instruction problem or definition problem. Now, we haven't dealt with that here.

MR. BECK: The problem is, there are a lot more cases out there other than automobile-accident cases. You take a fraud case, for example --

PROFESSOR EDGAR: When you define fraud, then that relates to the question. That's a question problem, not an instruction or definition problem.

MR. BECK: No, that's not right. The company

instructing fraud should be defined as -- and then you have the elements.

PROFESSOR DORSANEO: The fact of the matter is, our old scheme had certain objections handled by questions and certain objections handled by definitions. We don't do it that way anymore.

And really, although this is an improvement -- and probably a substantial improvement just at first blush -- over what we have now, especially in terms of clarity, in actuality, having different ways to make complaints in different contexts probably is a bad plan. Probably we ought to say, "Just make your objection clear" and that ought to be sufficient.

MR. BECK: But my basic point is, as a trial lawyer, when I'm over there having to object to that charge and having to argue to a jury in about 15 minutes, I don't want to have a chart over there with definition, instruction, question, and have different tests that are applied to each one. Let's be consistent in what we do. It's easier.

PROFESSOR DORSANEO: It's easier now, but it's not right.

MR. BECK: "d" is not consistent with "b."

JUSTICE HECHT: I'm just trying to make a note here and grasp what we're doing. Aren't we saying:

"To complain of any matter which a party believes was included in the charge improperly, all you have to do is object, either side, whether it's in your favor, not in your favor, whether it's an instruction or issue"?

MR. O'QUINN: That's not what we've written here.

PROFESSOR DORSANEO: I'm ready to vote in favor of that.

MR. MCMAINS: That's not what we did.

JUSTICE HECHT: To complain of any matter that is left out of the charge and you think it ought to be in the charge, either side, instruction or issue, all you have to do is tender. And then to complain of any defect in the language of the charge, it's in the charge and you think that it is wrongly worded. Then there's a question whether you would have to both object or tender. And I think the answer to the question turns on what the nature of the defect is. But we could work that out. But isn't that the simplest rule and the fairest to both sides? Or not?

MR. HUGHES: I like it.

MR. O'QUINN: I like it.

MR. COLLINS: I like that approach.

MR. O'QUINN: Judge Phillips wants you to have to tender the issues to help the trial judge.

CHIEF JUSTICE PHILLIPS: In the second part, not the first one.

MR. FULLER: May I say one thing on this? Those of you who have been there know there's nothing more frustrating than to be in that charge conference, you've been in trial for a week, the world's coming to an end, and the judge says, "You've got to submit something." Where's your typewriter? Where's your paralegal? Hell, they're gone. They're out there trying to get the damned closing arguments together and keep track of the exhibits you've been struggling with for three weeks.

Isn't there some way we can do away with the necessity of producing a piece of paper by a lawyer while you're in charge conference? I'd sure like to see us do it. Because that's something I've never been able to come up with an answer on.

JUDGE RIVERA: Bring it in before you start trial, hand it to the court.

MR. FULLER: That's wonderful if you know what the other side is going to do.

CHAIRMAN SOULES: We may defeat this or we may pass it, that doesn't keep it from coming back, but we've got to get on with our agenda.

MR. DAVIS: What are we voting on?

CHAIRMAN SOULES: What's on the table is "submission of a defective or improper definition or instruction, the party must either request and tender the definition or instruction in writing in substantially correct form or object to the court's defective or improper submission." Those in favor say aye.

Opposed?

Okay. The ayes have it.

Now, we voted on every piece of this. Now I want to take a vote on whether as a whole the committee wants to recommend these changes to the Supreme Court or not.

MR. DAVIS: I have a question that goes with this, if I may. I agree that we need an "e," a Section e.

CHAIRMAN SOULES: We've just voted that out.

MR. DAVIS: No, we didn't. We just voted we were going to submit "d."

CHAIRMAN SOULES: Tom, the chair overrules you.

MR. DAVIS: "d" and "e."

MR. COLLINS: Mr. Chairman, would you recognize me for a motion, please, sir?

CHAIRMAN SOULES: Yes, sir.

MR. COLLINS: I would move that we resubmit the proposed changes in Rule 278 to the subcommittee to incorporate Justice Hecht's idea of simplifying the entire objection process to both questions and definitions.

MR. MCMAINS: Second.

MR. BECK: Instructions, John?

MR. COLLINS: Yes, instructions.

CHAIRMAN SOULES: Okay. Motion has been made, clearly stated. Those in favor say aye.

Opposed?

All right. It's been referred back to committee.

PROFESSOR EDGAR: Can we take a break?

CHAIRMAN SOULES: Yes. We'll take a 10-minute break.

[Recess]

CHAIRMAN SOULES: Let's reconvene.

279, on Page 976, we've looked at that before and voted not to make that change. Is there any reason to change that?

PROFESSOR EDGAR: We never have voted on that.

CHAIRMAN SOULES: Okay. I'm wrong if you say it.

PROFESSOR EDGAR: I mean, not to my knowledge. I don't think we have.

PROFESSOR DORSANEO: I voted on it somewhere.

CHAIRMAN SOULES: Yes, we did. But let's don't debate that. Let's go to the rule.

PROFESSOR EDGAR: When we went back and reworked Rule 279 several years ago, we changed the last sentence. The last sentence did not include the words "legally or factually insufficient," it just said "when the evidence is insufficient to warrant." So we included "legally or factually."

Now, that's technically correct, but it created problems with I think one of the Houston courts of appeal. A lot of Baylor graduates are very upset about it because it might tend to mislead people. And if it does, well, then, we ought to -- and there are some letters in here. That's why I said that. Louis Muldrow was upset about it and one of the briefing clerks from the Eastland court was upset about it.

So I just suggest that we go ahead and really clarify what that sentence really means and also add to it the fact that -- or recognize the undisputed fact that you can only complain of factual sufficiency or insufficiency for the first time after verdict. And that's really all this addition at the bottom of Page

976 is designed to do. I think it states the existing law, and it certainly eliminates any confusion, and that's why our subcommittee is recommending it.

PROFESSOR DORSANEO: Second the motion.

CHAIRMAN SOULES: All right. Let me ask for these editorial changes. Strike "While," cap "a," strike "can only," insert "must," put a period after "verdict," then start the second sentence "A claim."

MR. SPIVEY: Luke --

MR. FULLER: Run that by again, Luke. I lost you.

CHAIRMAN SOULES: Okay. This "while" and these juxtapositions, to me, are confusing. So "A claim that the evidence was factually insufficient to warrant the submission of any question or that an answer to a question was against the great weight and preponderance of the evidence must be made after verdict."

MR. FULLER: Rather than can't.

CHAIRMAN SOULES: Period.

MR. FULLER: Must be made after verdict. Not "only" and all that stuff, just "must be made," striking "can" and "only"?

CHAIRMAN SOULES: Sentence No. 2: "A claim that there was no evidence to warrant the submission of any question or that an opposite answer to a question

was conclusively established as a matter of law may be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant."

MR. FULLER: Wait a minute.

MR. SPIVEY: That sounds to me like, if I can use a paraphrase, Jan Fouts. Fouts is a lawyer in Lubbock who asked a judge to submit it, the judge did, he objected to the charge, got a finding, and then got the case appealed on that issue that was submitted.

CHAIRMAN SOULES: Well, that's in the law now. Because you ask for a question to be submitted, which you feel you have conclusively established, but some appellate court is going to look at that some day and you may be wrong, so you have the right, right now, to go ahead and seek a jury verdict on something and to subsequently contend that as a matter of law you win that, regardless. And that is affirmatively placed there to avoid a trap. Because it happens at different places in the trial process. And you need to be able to cover yourself at those different places.

Now, to me, the simpler way would just be not to change. Why not leave it like it is except change "may" to "must" for both? For both. In effect, your objection to the charge that the dispute is either

conclusively established or there's no evidence wouldn't preserve error. You would have to make an objection after verdict.

PROFESSOR EDGAR: I think historically there's another reason for that, Luke. And I think in part it was to point out the distinction between the Federal Rules and the State Rules in that you could raise legal sufficiency post-verdict even though you had not raised it prior to.

CHAIRMAN SOULES: Right.

PROFESSOR EDGAR: Prior to it. And if you say "must," then you are going to raise another question about, "Well, what happened if you raised it pre-verdict? Does that mean that the failure to raise it post-verdict is a waiver?" And under the current law it's not. And that's why I think the word "may" -- if you say "must," I think you are going to create a problem.

CHAIRMAN SOULES: Can we say "may be made before or after verdict," instead of for the first time?

PROFESSOR EDGAR: Sure.

CHAIRMAN SOULES: Okay. Strike "for the first time." Say "may be made before or after verdict."

PROFESSOR DORSANEO: I have two -- three suggestions.

CHAIRMAN SOULES: Okay. What are they, Bill?

PROFESSOR DORSANEO: I would change the introductory words "A claim" in both sentences to "An objection" or "A complaint." Probably an objection. I would move this whole shooting match to the preceding rule, which talks about this entire subject of how you preserve complaints. 279 really does not. It deals with omitted questions and reviews now.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: And I would change "opposite answer" to "affirmative answer."

CHAIRMAN SOULES: Where is that?

PROFESSOR DORSANEO: In the second sentence.

CHAIRMAN SOULES: Okay.

Any objection to those three suggestions?

MR. FULLER: Let me make one further suggestion just to get rid of some verbiage. "Regardless of whether," you can substitute one word and just say "even though the submission." Or "even if."

CHAIRMAN SOULES: Does that change anything?

PROFESSOR EDGAR: No. That was in the old rule.

CHAIRMAN SOULES: I'm concerned about changing words that don't change meaning. If it was in the old rule, let's don't change it.

PROFESSOR DORSANEO: Last phrase of 279.

PROFESSOR EDGAR: Let me just stop and think about that now. If Rule 279 is really not dealing with objections --

PROFESSOR DORSANEO: Right.

PROFESSOR EDGAR: Okay. All right. Let's see now. What's now Rule 278 --

PROFESSOR DORSANEO: That sentence has always been in the wrong place.

PROFESSOR EDGAR: You're right.

PROFESSOR DORSANEO: Must have been tagged on the end in one of these meetings.

MR. FULLER: Somebody trying to get to the airplane.

PROFESSOR EDGAR: A committee like ours.

CHAIRMAN SOULES: New paragraph to 278? Okay.

PROFESSOR EDGAR: You changed "affirmative" and moved it.

What was your third suggestion?

PROFESSOR DORSANEO: To say in the beginning words "A claim" or "An objection" or "A complaint," I don't care, but it's really not -- it's a preservation thing. Right? Or it's a complaint.

MS. DUNCAN: Specific type of complaint.

PROFESSOR DORSANEO: "Complaint" is the broadest thing. Right?

CHAIRMAN SOULES: Okay. "A complaint that the evidence was factually insufficient to warrant the submission of any question or that an answer to a question was against the great weight and preponderance of the evidence must be made after verdict. A complaint that there was no evidence to warrant the submission of any question or that an affirmative answer to a question was conclusively established as a matter of law may be made before or after verdict, regardless of whether the submission of such question was requested by the complainant." And the suggestion was that that be deleted from Rule 279.

MR. DAVIS: What does "affirmative" mean?

PROFESSOR DORSANEO: It means yes, we do. It has to be conclusively established that the jury said no.

CHAIRMAN SOULES: How about "or in answer to a question that it was conclusively established"?

PROFESSOR DORSANEO: It's never going to be a "no," but that's all right.

CHAIRMAN SOULES: What if it's dollars?

PROFESSOR EDGAR: Okay. Just say "answer."

But you are right, Bill.

CHAIRMAN SOULES: Or that "in answer to a question." And that this paragraph as changed be removed from 279 and placed as a separate new second paragraph of Rule 278. Any further discussion?

Mike Hatchell.

MR. HATCHELL: I really hate to say this, but the whole first clause is improper. Under Owens v. Rogers, the Supreme Court has specifically held that there is no claim --

CHAIRMAN SOULES: Order, please. The court reporter is unable to take the proceedings because of background noise.

COURT REPORTER: Thank you.

MR. HATCHELL: The Supreme Court, in Owens v. Rogers, said that there is no such thing as a complaint that you cannot submit an issue because the evidence is factually insufficient or its answer would be against the weight or preferred. Conversely, trial courts must submit such question.

PROFESSOR DORSANEO: All right. I move to strike the "to warrant the submission of any question."

MR. HATCHELL: It's the answer.

PROFESSOR DORSANEO: No, it's the evidence that's insufficient to support the answer.

CHAIRMAN SOULES: A complaint that the

evidence was factually insufficient to support the answer.

MR. HATCHELL: Support is not right either. Preponderance relative to a failure to find.

PROFESSOR DORSANEO: If we could just say factually sufficient --

CHAIRMAN SOULES: Hold it. We're not getting a record on this. You've got to talk one at a time.

What's the suggestion? Somebody made a suggestion for verbiage.

MR. DAVIS: What's meant by "factually insufficient"?

CHAIRMAN SOULES: Mike, how do we change this to meet the problem you are --

PROFESSOR EDGAR: That the complaint was factually insufficient, sufficient to support an answer to a question?

PROFESSOR DORSANEO: Be all right with me.

MR. HATCHELL: Yes, the support is fine. It's when you get the weight of the preponderance of the evidence that you have a problem. That's an objection against answers and failure --

PROFESSOR EDGAR: I understand the technical precise statement you are making. But how are you going to correct it?

CHIEF JUSTICE PHILLIPS: I think it can be corrected with or against --

CHAIRMAN SOULES: "A complaint that the evidence was factually insufficient to" -- then we'll strike "warrant the submission of any question or that an." Factually insufficient to support an answer to a question.

PROFESSOR DORSANEO: Or that an answer --

CHAIRMAN SOULES: Or that an answer is, I guess.

PROFESSOR EDGAR: Was.

PROFESSOR DORSANEO: Is. If it is, it is.

CHAIRMAN SOULES: "A complaint that the evidence is factually insufficient to support an answer to a question or that an answer is against the great weight and preponderance of the evidence must be made after verdict."

Does that meet your observation, Mike?

MR. HATCHELL: That will be fine.

PROFESSOR DORSANEO: Change the first "was" in the first line to "is."

CHAIRMAN SOULES: I did. I changed it two places.

CHIEF JUSTICE PHILLIPS: I'm a basic fundamentalist. Rule 324 already says you've got to

make a motion on this point to take it up on appeal. Now, is this setting up another requirement before motion for new trial?

PROFESSOR EDGAR: That's why I said originally "can only be made." The thrust of my statement was different than what we now have. Here we seem to be dictating about when you do it. And I was just trying to distinguish between factual insufficiency and legal insufficiency and saying that it can only be made.

MR. HATCHELL: I think I would reference Rule 324 if it were me.

CHAIRMAN SOULES: It's not --

MR. FULLER: I'm coming more and more to the conclusion that we're fixing a car that's running good.

PROFESSOR DORSANEO: Trying to placate --

MR. BECK: A minor point. The heading of Rule 279 in the book we're working out of, I notice, is different than what's actually in the rules.

MR. FULLER: A little bit, yes.

MR. BECK: Why is that?

PROFESSOR EDGAR: No, no, no, no, no. Look in the old book. I meant to pick up -- I probably copied that from the gray book. What's in the gray book?

MR. BECK: Omission from the charge.

PROFESSOR EDGAR: Okay. I do not know where I got that, then. That was not my intention. I don't know where I got it.

MR. FULLER: This seems like a strange caption for this subject.

CHAIRMAN SOULES: We've got to get on with this. What are we going to do? Are we going to make these changes, not make them?

MR. BECK: I move we submit it back to committee along the lines of John Collins' motion earlier.

CHAIRMAN SOULES: Really, could we just decide whether something is broke?

PROFESSOR EDGAR: If you don't want it, that's fine.

MR. BECK: We had references to Rule 324. I just want to make sure we're not causing problems while trying to fix others.

MR. FULLER: I have a motion.

CHAIRMAN SOULES: One is that the stricken-through language is working.

MR. FULLER: I have a motion. I move that we not amend Rule 279.

CHAIRMAN SOULES: We've got a motion not to

amend Rule 279. Any further discussion on that?

In favor of the motion say aye.

Opposed?

Okay. Rule 279 will not be amended.

PROFESSOR DORSANEO: I hope Louis doesn't write us any more letters about it.

PROFESSOR EDGAR: I'm going to refer it to Beck. Beck is the one that made the motion.

CHAIRMAN SOULES: Next, Hadley.

PROFESSOR EDGAR: Now we get to Rule 295 on Page 996. This is something that I suggested. This case in part has always bothered me. That's Little Rock v. Dunn. We always remember that as a case talking about when you have irreconcilable conflicts. But one thing that the Court held in that case was that you could wait until after the jury had been discharged and then complain about a fatal conflict. So that the trial court really never had an opportunity to correct the error. And that's always disturbed me.

Now, the likelihood of having conflicts has been substantially diminished because of our broad issue practice now. But it just seems to me that if there is a fatal conflict, then you should be required to call it to the trial court's attention before discharge.

CHIEF JUSTICE PHILLIPS: In the absence of

doing that, and frequently you don't discover these until a few weeks later, but in the absence of that, who wins? Just whichever way the trial court --

MR. FULLER: Mistrial.

CHAIRMAN SOULES: No, no. The problem here is, you don't do it. You miss this opportunity to raise the conflict. And the jury does get discharged and it's gone.

MR. FULLER: The court can't correct --

CHAIRMAN SOULES: The court can't enter a judgment, the Court of Appeals can't enter a judgment, the Supreme Court can't enter a judgment on the verdict because there's not a verdict. And this doesn't help it because you just can't get there from here. No matter what you write, you can't solve the problem. So at some point the party says, "There's a conflict." Whenever it is, you can't waive the error because you can't get a judgment. I mean, the other side can't get a judgment.

MR. BECK: Luke, in our subcommittee, the problem it's intended to solve -- and I don't know how big a problem it is, frankly, but we had a lot of debate on this point -- is that if the jury comes back with a verdict, an attorney realizes that he has probably lost. But there is arguably a conflict in the findings. Should that attorney be obligated to go to the trial

judge and say, "Judge, there's a conflict here"? The judge can then somehow send the jury back with an appropriate instruction to see if there is a conflict. In other words, if the judge in good faith believes there is a conflict. I don't know how big a problem that is.

On the other side of the coin, the verdict is accepted, the jury discharged, you get back to your office and you say, "Wait a minute. There's a conflict in the jury's findings here." And I'm talking about a complicated-type case.

Well, you know, those things happen. But I don't know how big a problem that is either. So that was the nature of our discussion.

CHAIRMAN SOULES: This has been discussed in these appellate seminars. And that's right. A lawyer who is looking at a verdict and knows that he is going to get a new trial because of a conflict but if it goes back the way the rest of it looks like, when the jury fixes it, they're going to fix it against him. And he sits quiet. He shouldn't be able to do that.

But the problem is, if he does, there's nothing that you can do about it. You can't say he waived. Because when that jury is gone and motions for judgment come, the trial judge cannot enter a judgment

on the verdict. He can't say, "You waived the conflict because -- okay, you waived the conflict so now I've got a verdict." And I'm looking at it, but I can't get this judgment to any verdict.

MR. SPIVEY: You can save the problem by making better lawyers out of us by saying that the person who has the burden of proof must object if the issues would result in a conflict.

CHAIRMAN SOULES: And so, instead of a new trial, the judge defaults the party that didn't raise the conflict. Even if it was inadvertent.

MR. FULLER: That scares me.

PROFESSOR DORSANEO: The plaintiff is going to lose.

MR. SPIVEY: How would it be inadvertence if you prepare the charge and submit the charge, Luke?

CHAIRMAN SOULES: Like David was talking about a moment ago, you get some of these complex cases and you look at the verdict and you kind of figure you lost or won. And then you discharge the jury and you go back and you say, "Wait a minute. Look at these two things. These can't be reconciled."

MR. SPIVEY: You've never had the experience I've had of the judge finding a conflict when you thought there was not one?

CHAIRMAN SOULES: No, I haven't. But that's not to say I won't.

MR. SPIVEY: My suggestion is not pro plaintiff. In fact, the plaintiff is going to be harmed, I suppose, more times than the defendant.

CHAIRMAN SOULES: Okay. Suppose we make this change. Suppose this passes. The question is: So what?

MR. SPIVEY: The result is that the one upon whom the burden of proof lies is going to be damned sure a correct charge is submitted.

CHAIRMAN SOULES: We're going to have to write in some sanctions for a party not raising even something they didn't see, if we are going to do that.

MR. SPIVEY: No. Your sanctions are going to be you stand the burden of potentially losing your case.

CHAIRMAN SOULES: But that's not in these rules. We're going to have to write that into these rules if we're going to have anything.

MR. FULLER: Luke, this doesn't cure anything. It's not broke, again. Where it's fixable. I'll put it that way.

CHAIRMAN SOULES: It says you must bring it to the court's attention. But what if you don't? Nothing is solved.

PROFESSOR EDGAR: The party who would benefit from the conflict and fails to call it to the court's attention waives the conflict.

MR. SPIVEY: That's better.

CHIEF JUSTICE PHILLIPS: Just means you're deeming the trial court's judgment.

CHAIRMAN SOULES: What judgment?

CHIEF JUSTICE PHILLIPS: The trial court gets it and that's it. You can't complain on appeal.

CHAIRMAN SOULES: Which judgment?

MR. SPIVEY: Judge Phillips, I think Hadley is saying, and certainly I'm saying, that you don't place that burden on the trial court. You place that burden where it really ought to lie. That's on the advocates who prepare the charge. That avoids sand-bagging. And that's good for a system of justice, I think.

CHIEF JUSTICE PHILLIPS: The problem I have is the same as back in Rule 278. Fully a third of the questions that are being asked now, you can't tell whose burden of proof it is because it's mixed or handled only by an instruction somewhere else. When you get away from granulated issues, it's very hard to look at an issue and say whose burden of proof this is. Like the Muckelroy charge. I mean, everybody has got the burden.

JUSTICE HECHT: Plus, if you have a conflict, Broadus, you have one question answered yes, one question answered no, and you don't call it to the trial court's attention, he's still got to render a judgment.

MR. SPIVEY: Wasn't that a created defect? I mean, the law didn't have that defect in there. Either the attorneys or the trial judge allowed for conflict to exist in the submission of issues. And that's where it should be avoided.

JUSTICE HECHT: But you can't just let the trial judge guess whichever way he wants it to come out.

MR. SPIVEY: But the attorneys really prepare the charge. The court submits it and it's his charge. What I'm saying is, it's a coercion upon the attorneys to become better lawyers, especially as to the charge. But we have the opportunity to be.

CHIEF JUSTICE PHILLIPS: Broadus, if there's two issues in conflict and the plaintiff has the burden of proof on one, the defendant has the burden of proof on the other, if they're in conflict, your rule gets back to the trial court guessing which one he wants to follow.

CHAIRMAN SOULES: The reason they are in conflict, one party wins one issue, the other party wins the other issue. So you've got both parties at fault

because they didn't resolve the conflict.

MR. SPIVEY: Don't you go back to the problem? Wasn't that in the submission in the first place because you shouldn't have submitted both sides of the issue?

CHAIRMAN SOULES: But both parties are at fault because they did get submitted.

MR. HERRING: If the trial judge submits the issue to both sides --

MR. FULLER: I move we not amend 295.

CHAIRMAN SOULES: Motion has been made not to amend Rule 295. Second?

[The motion was seconded.]

CHAIRMAN SOULES: For?

Opposed?

The vote is unanimous not to amend 295.

MR. COLLINS: Broadus objected.

MR. SPIVEY: I had three fingers up.

PROFESSOR EDGAR: We need to consider the next three rules together:

Rule 296, which appears on Page 999;

Rule 297, which appears on 1022; and

Rule 298, which appears on Page 1042.

Now, when we went back and reworked the jury-charge rules, we really didn't pay any attention

to the nonjury-type cases. And this has created a lot of problems. Our workbook here is replete with correspondence concerning these rules. For one thing, the short time fuse that you have to make your request for findings of fact and conclusions of law.

And then you'll remember the recent Supreme Court case concerning the interpretation of Rule 295 on whether or not the request has to be filed with the clerk or whether it's simply presented to the judge.

And we see from the correspondence that judges and courts have just gone in every different direction on that particular issue, although the court, I think quite properly, held that something should be filed with the clerk. But that still doesn't take care of whether or not you should also call it to the judge's attention. So we've tried to incorporate that provision as well.

Now, just to kind of run through this with you -- and maybe you want to sit down and take a look at all three of them and read through them before we discuss it, that might be the best way to approach it.

Luke, I'll just leave that up to you.

CHAIRMAN SOULES: Maybe you could tie them together with --

MR. FULLER: You know, I've got a problem

with this language "served on the court."

PROFESSOR EDGAR: Well, you serve by either personal service or by mail. By mail you serve on lawyers. I don't know why you can't serve on the court, but --

MR. FULLER: Service sounds like service to me. Right here on 999, the last paragraph, it seems to me like it should be filed with the clerk of the court and whatever.

PROFESSOR EDGAR: The old rule said that notice of filing of the request shall be served on the opposite party.

MR. FULLER: Okay. I'd feel better with that, if we said notice.

CHAIRMAN SOULES: Served on each party.

MR. FULLER: This just says "served on the court and on each party."

CHAIRMAN SOULES: But up in the body you say you've got to file it with the clerk and call it to the court's attention. So just take out "the court and."

MR. FULLER: "Notice shall be served on each party to the suit," and strike out "the court"?

CHAIRMAN SOULES: Right. Because you've got that covered up there.

MR. RAGLAND: Luke, the reason for that is

because some of the trial judges get antsy if they don't have had copies in their hands. So the purpose of this was to get it in two places: Give it to the clerk, the clerk is directed to call it to the court's attention, and the trial judge gets a copy, too. So the trial judge gets two copies. They get fussy and say, "Well, I didn't know anything about it." It doesn't hurt anything for them to get two copies.

CHIEF JUSTICE PHILLIPS: I think it does.

CHAIRMAN SOULES: Chief Justice Phillips.

CHIEF JUSTICE PHILLIPS: Well, I'm at fault for some of this, I guess, with my opinion in Magallanes, but I think the personal service on the trial judge of these requests at any time is an outdated concept. It goes back to the time when suits were always tried in your home county.

The case the Supreme Court had, the lawyer was in San Antonio and the judge was in Brownsville. And you're really asking the lawyer to go hang around the courthouse for days hoping he can physically watch the judge leave? Or out of the courthouse or hoping the judge is not on vacation or has not exchanged benches somewhere else.

What Hadley has proposed here, I think, is long overdue. And in substance it's an excellent

change. The clerk ought to be the agent for the judge for receiving these requests. And the personal service on a judge just dates from a simpler time. We're talking many times it may cost two or three thousand dollars to make sure the judge gets that physical notice. And we have made these nonjury rules -- the Supreme Court wrote an opinion late last year by pur curiam that treats the failure to ask for findings the same as a deemed omission, the same as Rule 279, which I'm not sure was the right thing to have done either. As much as possible, we ought to encourage people to go nonjury, because it's so much cheaper and so much quicker for small commercial disputes.

But these rules, the way they're now written, in my opinion, make it virtually impossible to ever know you are going to be able to perfect a comprehensive appeal in a nonjury trial, and therefore they encourage people to pay jury fees and go to a long, expensive and delayed trial in simple commercial matters.

And the scheme that is being suggested here I'm very strongly in favor of and hope that the committee will act favorably on these basic ideas.

CHAIRMAN SOULES: Judge, let me clarify that now. The first part of this new writing says that we file it with the clerk and it's the clerk's

responsibility to get it to the court.

PROFESSOR EDGAR: No, it just says you call the request to the attention. All the clerk has to do is say, "Judge, they've got a finding of fact, a request has been filed in this court." That's all the clerk has to do. Then the lawyer, under the last paragraph here, then has to serve both the court and opposing counsel under Rule 21a, which would be in the mail.

CHAIRMAN SOULES: That's what I'm trying to straighten out with Judge Phillips, his feeling about that.

CHIEF JUSTICE PHILLIPS: I don't care how you do that. I want to get away from the personal service. I'm with Dorsaneo, though. I'm a little worried about serving the judge being different than serving the clerk.

CHAIRMAN SOULES: The problem is that this requires service on the court. Let's just talk about that for a moment. Let's just talk about that for a moment. We've got it filed with the clerk, the duty is on the clerk to call it to the judge's attention. That is obviously the clerk's duty, I think.

Now, just down here, does a lawyer also have to serve the court? He has filed it with the clerk and the rule says the clerk is supposed to tell the court

about it. Is the lawyer also supposed to tell the court?

CHIEF JUSTICE PHILLIPS: I would say no. But I think it's okay to go ahead and send a piece of certified mail or regular mail addressed directly to the judge.

MR. HERRING: The visiting-judge problem is terrible in some counties. We can't find the judges once they leave.

CHAIRMAN SOULES: Okay. So the consensus --

MR. FULLER: I don't know of any other place in the law where you are required to file anything personally with the judge. Am I missing one?

CHIEF JUSTICE PHILLIPS: Anything that goes to the judge --

MR. FULLER: Under the mandamus, but --

CHIEF JUSTICE PHILLIPS: It's going to be stamped by the clerk anyway. What's going to happen is, there's going to be two pieces of paper, one of which the clerk has to figure out they have to physically get in the judge's hands, and the other they just have to tell him about. I guess you have to do both. You have to say, "Judge, here's a copy of this letter, and incidentally I want to advise you I have a second copy I'm not giving to you."

CHAIRMAN SOULES: Served on the court. Aren't we really saying that you serve on the parties, with a copy to the judge who tried the case? It's really the judge and not the court that we're trying to get the thing to, isn't it?

PROFESSOR EDGAR: But you request the court to state in writing the findings of facts. That's got to be a human being and it's got to be the one that tried the case. And so that's the person that you make service on.

CHIEF JUSTICE PHILLIPS: But with the visiting judges there is a problem.

MR. FULLER: That's a major problem, let me tell you. It is a major, major problem.

CHAIRMAN SOULES: That's what we're trying to get at here, the judge who tried the case is to be sent a copy of this proposal. When you address it to the court, you address it to the court where the court is. And that court is going to make findings, whether it's the judge that tried the case or not. It may be a different judge.

CHIEF JUSTICE PHILLIPS: No, it's not.

PROFESSOR EDGAR: The second line would have to be "request the judge" rather than "request the court to state."

CHAIRMAN SOULES: I don't think so. Because that court is going to function on and on regardless of whether the judge that tried the case is even sitting on it.

CHIEF JUSTICE PHILLIPS: But the duty of the judge to make findings of fact survives the findings of fact even though there was a case where a new successor came on the bench.

CHAIRMAN SOULES: What if you are dead?

CHIEF JUSTICE PHILLIPS: Then I think the new judge can do it.

CHAIRMAN SOULES: So the court can make those findings, not the judge who tried the case.

CHIEF JUSTICE PHILLIPS: But if the other judge is around, even if he has been defeated or promoted --

CHAIRMAN SOULES: So all we're talking about is trying to get --

PROFESSOR DORSANEO: I don't know. I'm not quarreling with you. I don't know.

CHAIRMAN SOULES: It's the responsibility of the judge to make the findings of fact, the court, but what we're trying to do is get a copy of this proposal to the judge, the human, for his review.

MR. ADAMS: Luke, a problem, I know, in

Jefferson County, for instance, our judges tell us if we've got any kind of motion or anything that's going to come before them and you're gonna file it within three days of the hearing, get them a personal copy. They're saying that it's taking three days or so to get something from the District Clerk's Office just to the judge. And I think what we were thinking about or what the subcommittee was thinking about on this was that we needed to get these things to the judge. He's got some time limits to act and he needs to have that information before him as soon as practical. And just mailing him an extra copy was what we had in mind.

CHAIRMAN SOULES: Okay. Isn't that done if we say "serve the parties and deliver a copy to the judge who tried the case"?

PROFESSOR EDGAR: In accordance with Rule 21a.

CHAIRMAN SOULES: Does it have to go to the judge in accordance with Rule 21a?

MR. RAGLAND: Luke, the problem is, in some of the cases it was held that the judge didn't know about it. It places the person making the request, it places the burden on him to notify the judge.

CHAIRMAN SOULES: I'm just on the certified mail requirement. Does it have to go to the judge

certified mail?

MR. RAGLAND: Why not?

MR. DAVIS: Where are you going to mail it?

MR. HERRING: Where are you going to mail it to your visiting retired judge?

CHAIRMAN SOULES: You can find him.

CHIEF JUSTICE PHILLIPS: I don't know if I would do it certified mail. Because if they can't find him --

MR. FULLER: But 21a says registered mail.

CHIEF JUSTICE PHILLIPS: That's true.

MR. DAVIS: It may get back to you if they didn't get it.

PROFESSOR EDGAR: But at least you've made service, though, and at least it's timely. That's the thing about it.

CHAIRMAN SOULES: The reason we're struggling with the word "service" is that service on a judge is not in the rules. It's never been in the rules. You don't serve anything on a judge. Are we going to do that?

MR. RAGLAND: Why don't you say deliver?

CHAIRMAN SOULES: Deliver or mail a copy to the judge? Why not deliver or mail a copy to the judge who tried the case?

PROFESSOR EDGAR: In accordance with 21a.

CHAIRMAN SOULES: No. You can't -- well, 21a needs some work, anyway. I don't know how we get Federal Express into 21a right now.

PROFESSOR EDGAR: Let's assume you have a visiting judge and you mail it to the visiting judge in Cotulla. The judge is fishing. And you don't hear from the judge for five months, until you contact him again. Now, where are you?

CHIEF JUSTICE PHILLIPS: You're out unless you've done Rule 296.

PROFESSOR EDGAR: It seems to me that the party making this request should be able to rely upon something to show that he or she used all the diligence required in order to keep from having the adverse effects of the failure to make a timely request made in order to get these documents on file.

CHAIRMAN SOULES: Okay. And deliver or mail by certified mail a copy to the judge who tried the case.

CHIEF JUSTICE PHILLIPS: I don't see anything wrong with referencing 21a.

PROFESSOR EDGAR: I don't either. 21a is in there for that purpose.

CHIEF JUSTICE PHILLIPS: It's going to be

expanded to include personal delivery with some notation about Telecopier.

PROFESSOR EDGAR: 21a allows personal delivery.

CHIEF JUSTICE PHILLIPS: But I think that that same clause should be in 297.

PROFESSOR EDGAR: All right, all right, all right.

CHAIRMAN SOULES: All right. I was just trying to get words. Because 21a is a notice rule.

MR. FULLER: That's what we're talking about, is notice.

CHIEF JUSTICE PHILLIPS: And this is the only place the judge is directly contacted, but it's a whole lot better than having to personally contact him.

MR. FULLER: Anything but that. I don't want to go to Kerrville.

CHAIRMAN SOULES: Okay. How about this? "And provide a copy to the judge who tried the case by any method under Rule 21a."

MR. FULLER: In the manner authorized by.

MR. BECK: In the manner provided by Rule 21a.

PROFESSOR EDGAR: Or in accordance with. That's what you said. You've got all kinds of options

under 21a, Luke.

CHAIRMAN SOULES: And it calls them methods. 21a calls them methods.

CHIEF JUSTICE PHILLIPS: Isn't in accordance with 21a used in other places in the rules, though?

JUSTICE HECHT: I don't think so.

MR. RAGLAND: As provided for in Rule 21a.

CHAIRMAN SOULES: Well, when you try to make the words in one rule fit another, sometimes it's difficult.

MR. FULLER: Why don't you just say --

CHAIRMAN SOULES: What we want to say is that a copy goes to the judge, not notice. When you start trying to pick up notice in 21a, there are problems with that, too. We want a copy to the judge who tried the case --

PROFESSOR EDGAR: In the manner provided by 21a.

CHAIRMAN SOULES: -- by any method provided in Rule 21a. Okay. Is that all right?

PROFESSOR EDGAR: All right. Now, the word "court" that appears in the third line will remain. Is that what you said earlier?

CHAIRMAN SOULES: Right.

PROFESSOR EDGAR: But the last word in that

paragraph, "court" will become "judge"?

CHAIRMAN SOULES: "The judge who tried the case." I'm sorry.

PROFESSOR EDGAR: This is who you are going to call the requested attention of. That's got to be a human being. Right?

CHAIRMAN SOULES: Yes. To the judge who tried the case. That's right.

MR. RAGLAND: That's the only one you would serve the request on in the first place.

PROFESSOR EDGAR: Well, but that's right.

CHAIRMAN SOULES: Right. You're right, Hadley.

PROFESSOR EDGAR: All right. And then the notice of filing shall be served on each party to the suit and the judge who tried the case in the manner provided by Rule 21a. Is that what you just said?

CHIEF JUSTICE PHILLIPS: Did you change the first paragraph?

PROFESSOR EDGAR: No. We just changed the last word, "the court" to be "the judge who tried the case."

MR. FULLER: You've got the clerk bringing it to the attention of the judge who tried the case, and then we are sending notice of the filing to the judge

who tried the case.

PROFESSOR EDGAR: That's right. That was our intention.

PROFESSOR DORSANEO: Presumably if both of those aren't done -- what happens?

PROFESSOR EDGAR: Do what?

PROFESSOR DORSANEO: Suppose the clerk doesn't do it.

MR. FULLER: But that you did give him personal notice. That's the extreme situation.

PROFESSOR EDGAR: Well, the filing, though, is to cover the requirement now that the court has recognized that the request is to be filed with the clerk. And that's why that's there.

CHIEF JUSTICE PHILLIPS: You don't lose anything if the clerk doesn't act. I mean, as long as the judge does.

PROFESSOR EDGAR: Also, really, Tom was the one that did most of the work on this, and it's to his credit, not the subcommittee's, but he points out in Rule 297 that the date the request is filed -- i.e., with the clerk -- is what triggers the next time limit.

MR. RAGLAND: The response date.

PROFESSOR EDGAR: The response date.

Are you still working on that last sentence,

Luke?

CHAIRMAN SOULES: Yes. It misses a little bit. What I'm doing now is just adding a sentence. Taking the court and out of that first sentence and doing it this way: "The party making the request shall provide a copy to the judge who tried the case by any method provided in Rule 21a." So it says who's got the responsibility to get it to the judge. That's not stated. You know, it's assumed, but not stated. Is that okay with you?

PROFESSOR EDGAR: Sure.

MR. ADAMS: Parties --

CHAIRMAN SOULES: "The party making the request shall provide a copy to the judge who tried the case by any method allowed in Rule 21 a."

MR. RAGLAND: That doesn't address the requirement of serving it on the opposing parties.

CHAIRMAN SOULES: I'm leaving that in. Just taking out the words "the court and." It would now read: "Each request made pursuant to this rule shall be served pursuant to the notice required in 21a."

Then the second sentence: "The party making the request shall provide a copy to the judge who tried the case by any method allowed in Rule 21a."

PROFESSOR EDGAR: Okay. No problem.

MR. DAVIS: Want to put an "also" in?

CHAIRMAN SOULES: Where?

MR. DAVIS: "Shall also provide." Rather than somebody claiming that it's one or the other.

CHAIRMAN SOULES: Also, in addition to the clerk or --

PROFESSOR EDGAR: Just in that last sentence.

MR. DAVIS: Your last sentence.

CHAIRMAN SOULES: Okay. That doesn't matter to me.

MR. DAVIS: Some might argue if you did one or the other that's all you had to do. If you put the "also" in there --

CHAIRMAN SOULES: Good suggestion.

MR. DAVIS: Means both.

CHAIRMAN SOULES: Okay. Are we ready to vote on this now?

PROFESSOR EDGAR: I notice that we've increased the time limit, though, because we're increasing time limits here, too.

MR. FULLER: What was the reason for that?

PROFESSOR EDGAR: 10 days to 20.

MR. FULLER: What was the reason for that?

PROFESSOR EDGAR: Tom.

MR. RAGLAND: I just picked 30 days. There's

not anything magic about that. There was a complaint about being able to get the findings of fact filed, conclusions of law filed with the old rule and still --

MR. FULLER: I'm talking about the initial request to change it from 10 to 20 days.

MR. RAGLAND: Just wasn't timely.

MR. FULLER: Well, it doesn't take much.

CHAIRMAN SOULES: Sometimes it does.

CHIEF JUSTICE PHILLIPS: Judge Hecht sits here raising a problem which exists in the current rule but I suppose this one may be even worse; that is, you have to decide whether to file a motion for new trial and whether to start the appellate process before you ever see the findings and conclusions, which I think this is important enough that if that's a problem we ought to change the other rules and not this one. But it is a problem. We are forcing people to make an election just based on the trial judge's judgment without knowing the whys and wherefores.

MR. HATCHELL: Luke, just because of thoughtful comments like Judge Phillips', having served on the appellate section as well as having been on a number of planning committees for appellate seminars, I think that findings practice in Texas is so complicated and so outdated we need to start over from scratch.

This kind of tinkering just exacerbates the problems. I think the rule is in dire need of being scrapped and starting over from day one.

PROFESSOR DORSANEO: The approach ought to be that if it's a case tried to a judge, the judge ought to make determinations before judgment. And I would say that the federal approach here -- I'm not always in favor of just going to that, but the judge ought to be required to make findings of fact and conclusions of law in nonjury cases. It's not very hard.

CHIEF JUSTICE PHILLIPS: Federal judges hate that.

PROFESSOR EDGAR: Just a minute. We've thought about that, Bill. But there are a couple of differences between the federal practice and the state practice. First of all, the judge doesn't have any clerks. And either the judge is going to have to do it or you are going to impose that burden on every lawyer in every nonjury case. Just stop and think about that.

If part of the problem is, as Judge Phillips, I think, accurately stated earlier, that we're trying to streamline the system, if you require this, then you are going to slow the system down. In every case, before the trial court can enter a judgment, if there have to be findings of fact and conclusions of law, you are

simply adding expense to many, many cases which is totally unnecessary, you are unduly encumbering the clerk's office and the judge's work, and I think that there's something to be said for the state system, myself.

CHAIRMAN SOULES: Okay. I'll entertain a motion on that when we're done with these rules. Is there any further repair that needs to be made to the notice provisions as they're seen under Rule 296?

MR. RAGLAND: Excuse me, Luke. It occurs to me that 296, 7, 8 and 9 all mesh together. It might be better if we considered all of those before we vote on anything and have to come back and unvote something.

CHAIRMAN SOULES: I'll take a vote on the four when I've done with them one at a time time. Let's fix them one at a time and then up or down in flames as a group. Okay?

Are we done with 296?

MR. HERRING: What was the need that the committee saw to recommend the exact title of the -- instead of saying "such request shall be filed," you've got "shall be entitled Request for Findings of Fact and Conclusions of Law."

MR. RAGLAND: The purpose of that was so the clerk would know when you get something with that title

on there -- the lawyer would put it on there so the clerk would know he's supposed to send it to the judge immediately.

CHAIRMAN SOULES: That makes sense.

All in favor of Rule 296 say aye.

Opposed?

Let me see a show of hands in favor.

Eleven.

Opposed?

11 to 5. It's passed for the moment.

MR. FULLER: Just proves there ain't no choice.

PROFESSOR EDGAR: Okay. Rule 297. Go to Page 1022.

MR. SPIVEY: Mr. Chairman, would the chair entertain a motion to eat?

CHAIRMAN SOULES: I'd rather finish these rules, because we may get them done. No. That's facetious. Sure. Let's do that, go ahead and break, get some lunch.

[Noon recess]

PROFESSOR EDGAR: In talking to Chief Justice Phillips a moment ago, one thing we haven't solved here, and I just overlooked it, is how to handle this motion for new trial problem. And we just need to kind of keep

that in mind as we go through this.

But, anyhow, we need to go to Page 1022, I think, to look at Rule 297. And this requires, as we currently do, that the court then has 30 days to respond to the request for findings of fact. And then it's required to mail a copy of the response to each party to the suit. Now, the rules don't currently require that. And, surprisingly enough, the correspondence we worked with revealed that there were some judges that simply didn't send the lawyers the copies of the response. So we have provided for that.

Then the (b) part provides that if the court fails within 35 days after the filing of the original request -- that is, everything goes back to the old five-day period -- then you file a notice of past-due response. And then the court has -- well, then we'll deal with that in just a minute. But, anyhow, we have that provision in (b). That's what 297 is about.

CHAIRMAN SOULES: Is what the court writes a response? Or is it findings?

MR. RAGLAND: Well, the response was just -- that word was selected to keep from having to write "findings of fact and conclusions of law" over and over and over and over.

CHAIRMAN SOULES: How about findings and

conclusions?

PROFESSOR DORSANEO: On occasion I've gotten a response that says "I'm not gonna make any findings."

CHIEF JUSTICE PHILLIPS: Let's not encourage it.

[Laughter]

CHIEF JUSTICE PHILLIPS: We presume that lawyers don't request these after summary judgments, other places where the law says you don't have them.

CHAIRMAN SOULES: I'm concerned we're creating a new animal here called a response.

MR. RAGLAND: Time to respond to requests for findings of fact and conclusions of law. And the request refers to that. There's not anything magic about it. I was just trying to shorten down the text of the rule.

CHAIRMAN SOULES: You don't have any objection to putting "findings and conclusions" in the place of "response"?

MR. RAGLAND: Fine with me.

PROFESSOR EDGAR: There's not any pride of authorship here, it's trying to get the thought across, isn't it, Tom?

MR. RAGLAND: That's right. Subparagraph (a) under 297, first line, change the "court" to "judge."

CHAIRMAN SOULES: How about "Time to make findings of fact and conclusions of law"?

CHIEF JUSTICE PHILLIPS: I'm for that. I don't get a vote, but I'm for that.

CHAIRMAN SOULES: Maybe we could use the title "Time to make findings of fact and conclusions of law." That caption has always bothered me because the rule is about something else in large part.

MR. RAGLAND: Judge, that's the reason it changed. Under 296 it deals with the request and 297 deals with the response.

CHIEF JUSTICE PHILLIPS: Well, making filings and failing to make filings is kind of what it deals with.

PROFESSOR EDGAR: The reason I had changed all the references to "judge" to "court" was to try and make this gender neutral. If we're going to change "court," then, to "judge" in 297 A, first line, then we should perhaps strike --

CHAIRMAN SOULES: Let's don't change the "court" anyplace except where we have to mail to the judge that copy. Let's leave it alone. In this rule, leave it court. Instead of "prepare," the court shall make and file its findings of fact. In the first line. "When timely request is filed, the court shall make and

file its findings of fact and conclusions of law." After 30 days the court shall cause a copy of its conclusions to be mailed to each party to the suit. If the court fails to timely make findings of fact" --

PROFESSOR EDGAR: If the court fails to make --

CHAIRMAN SOULES: -- "fails to timely make findings of fact and conclusions of law, the party making the request shall" -- and so forth.

PROFESSOR EDGAR: And "the judge" appears in the next-to-last line and the one immediately above it. That should be "court." I just missed that.

CHAIRMAN SOULES: I agree. Why don't we change the title of that to "Notice of past-due findings of fact and conclusions of law in response to request for"?

MR. RAGLAND: That's not exactly right. Because Paragraph (a) tells when they're supposed to initially respond. Paragraph (b) is notice of past due.

CHAIRMAN SOULES: Fine.

PROFESSOR EDGAR: He just wants to strike the words "response to request for." Just eliminate that.

MR. RAGLAND: Oh, okay.

CHAIRMAN SOULES: And then the notice we're talking about is the notice the party gets. Is that

right? In the last sentence?

MR. RAGLAND: This is the notice to the judge. You are required under the present rule to advise the judge if he is tardy. This is what this addresses there. It's notice to the judge.

PROFESSOR EDGAR: Notice of past-due findings of fact and conclusions of law.

MR. RAGLAND: Judge, we filed them on July the 1st and now you haven't responded and they're past due. You've got five more days.

CHAIRMAN SOULES: Shouldn't we say such notice shall state the date instead of inform the judge? Because that's something that's going to be contained in the written notice, isn't it?

MR. RAGLAND: Yes, it might be.

PROFESSOR EDGAR: I don't know how you can inform them without stating, but I guess that's okay.

MR. RAGLAND: I attach copies of the original.

CHAIRMAN SOULES: Here, though, we're not putting the requirement that this goes to the judge by the party filing it. We're just saying that the notice gets filed and the clerk calls it to his attention. So what we're talking about, as I understand the last sentence, is something contained in the written notice

that gets filed.

PROFESSOR EDGAR: Wait a minute. Let's see. You file the notice with the clerk. But didn't you envision --

MR. RAGLAND: Wait a minute. Here's where 1044 is supposed to go.

PROFESSOR EDGAR: That's right.

Look on Page 1044. Somehow we got messed up here. (c) and (d) need to go with that. I don't know how that happened.

MR. RAGLAND: (c) and (d) to Rule 297, 1044.

PROFESSOR EDGAR: Look on Page 1044. (c) and (d) are a part of Rule 297. I thought that was too short.

CHAIRMAN SOULES: Okay. So we're going to add to this a (c) and a (d) from Page 1044. We're going to be reading this like one of Vester's books, with all our fingers stuck in here. Well, you don't need that last sentence, then, in (b), because you say it again in (b). Is that right?

PROFESSOR EDGAR: Just what the notice contains.

CHAIRMAN SOULES: Okay. So the "notice shall state" -- and strike "inform the judge the date" and so forth in (b).

And then (c) and (d) from 1044 -- let's look back here where we were with those. That time for filing. Is (c) okay on 1044? On filing notice to (b) above?

PROFESSOR EDGAR: No. Because what are you going to do about "respond"? What are you going to use in its place?

CHAIRMAN SOULES: Time for the court to make findings of fact and conclusions of law.

PROFESSOR EDGAR: Are extended?

CHAIRMAN SOULES: The time is extended, I guess.

PROFESSOR EDGAR: Yes. Pardon me.

CHAIRMAN SOULES: 45 days from the date the original request was filed. Then notice of filing. We'll make that the same.

MR. RAGLAND: Be consistent like 296.

CHAIRMAN SOULES: The same as 296. All right. Any more discussion on that rule, then, 297?

PROFESSOR CARLSON: Just two typos or additions. The title should be "for findings," and then the last sentence of (a) says "mailed to each party in suit," and I notice in 298 it says to "mailed to all parties in the suit." So, to be consistent, 297 (a), the last sentence, "mailed to all parties." If you

want consistent language.

PROFESSOR EDGAR: Yes, yes, yes.

CHAIRMAN SOULES: 297 should be "all parties"?

PROFESSOR CARLSON: "Mailed to all parties."

CHAIRMAN SOULES: 296 is "each party"?

PROFESSOR CARLSON: 298 is "all parties."

CHAIRMAN SOULES: We've got it "each party" twice. Let's strike 298 out. Where is that, Elaine?

PROFESSOR CARLSON: In 298 it's also in (a), the last seven words.

MR. DAVIS: It's also in (b).

PROFESSOR CARLSON: Yes.

CHAIRMAN SOULES: Okay. We'll get to 298. We may see it again there in a minute.

Is there any further discussion on 297?

MR. DAVIS: Is the floor open for discussion now?

CHAIRMAN SOULES: Let me run through and see if I've got everything in here and then we'll discuss it. The caption will be "Time to make findings of fact and conclusions of law."

The first line, we would change the word "prepare" to "make."

And in the fourth line we would change the

word "response" and insert "findings and conclusions."

Then in (b), in the first line we would change the word "respond" to "make" and insert after the word "timely" these words: "Make such findings of fact and conclusions of law." We would strike the words "to such request."

Then, in the fourth line, we would strike the words "response to request for."

And in the sixth line we would change the word "judge" to "court."

And in the seventh line we would delete "inform the judge" and insert the word "state."

On the next line, we would delete the words "response was" and insert the words "findings and conclusions were."

And then on Page 1044, (c) -- oh, in the first line, put a comma after "above."

In the second line, delete the word "respond" and make the words "make findings of fact and conclusions of law."

And then we would modify (d) on Page 1044 to track the last paragraph of 296 as we passed it.

That's the way the rule as constituted is now on the table.

PROFESSOR EDGAR: On 297 (b), could we keep

from splitting that infinitive and just say "if the court fails to make such findings of fact and conclusions of law timely"?

CHAIRMAN SOULES: Sure. "Fails to make" --

PROFESSOR EDGAR: Findings of fact and conclusions of law timely. Or fails to make timely such findings of fact and conclusions of law.

CHAIRMAN SOULES: Make timely. Okay. That's the way it is now as it is on the table. Discussion?

Tom Davis.

MR. DAVIS: In 297 (a), I was wondering about the 30 days and then in (b) the 35 days. My thought was that if the judge were actually making these findings of fact and conclusions of law, 30 days may be an appropriate time to give him. But as a practical matter, he's not. It's the lawyer that's doing it. And I wondered if we really needed to give that much time. And regardless of how much time we give, the five days in which the lawyer has to call it to his attention I feel is too short a period of time. I don't think that you can learn about it and do it in five days, no matter what time you put on there.

CHAIRMAN SOULES: Do you have a suggestion for changing those times? Or does anyone?

MR. DAVIS: Well, I have nothing magic about

15, nothing magic about 20. There may be some reason we may want to consider that if it affects the rules of time when to give notice of appeal, which I understand it does. But certainly the lawyer ought to have at least 10 days after the time's up for him to call it to their attention.

CHAIRMAN SOULES: How would we fix that? Would we make 30 "25" and give the lawyer 10?

PROFESSOR EDGAR: We were simply tracking the old rule. We didn't intend any change there. But whatever the committee feels it wants to do, it's easy to handle.

CHAIRMAN SOULES: Is the 35-day total something that's important? Do we need take time away from the 30 in order to extend the lawyer's cover time? Or can we keep the 30 days for the judge to act and then give the lawyer 10 days or some other number of days?

PROFESSOR EDGAR: Whatever the committee wants to do.

CHAIRMAN SOULES: I just don't know how it fits in this motion for new trial problem.

MR. DAVIS: We have the note over on 1043 --

CHAIRMAN SOULES: Doesn't affect it.

MR. DAVIS: Okay.

CHAIRMAN SOULES: Shall we make that 35 days

"40 days" or some other number of days?

MR. DAVIS: I think if you are going to leave the 30, then you ought to go to 40. If you go to 30, then you could go to 20.

PROFESSOR DORSANEO: I don't understand the problem, the motion for new trial problem. You don't have to complain about findings in a motion for new trial.

PROFESSOR EDGAR: No. But if you want to file a motion for new trial, you don't know what you want to say until maybe after you've got the findings of fact and conclusions of law.

PROFESSOR CARLSON: Requested findings.

PROFESSOR DORSANEO: I don't think so.

PROFESSOR EDGAR: That's the problem.

CHAIRMAN SOULES: Why don't we give the lawyer 10 days here, change 35 to 40, while the sages are considering the motion for new trial issue.

PROFESSOR EDGAR: The lawyers might want to do that simply to extend the appellate timetable. But they don't know what to include until they see what the findings of fact and conclusions of law are.

PROFESSOR DORSANEO: I can see you might want to attack a finding in a motion for new trial if you actually get a new trial.

CHAIRMAN SOULES: But this doesn't change. This doesn't affect it.

MR. DAVIS: I want to make sure we're not making a conflict.

PROFESSOR EDGAR: No, I don't think there's any problem.

CHAIRMAN SOULES: Okay. Is there any objection to making the 35-day period a 40-day period?

Okay. That's done.

PROFESSOR EDGAR: Let's go to 1044.

CHAIRMAN SOULES: Are we done now with 297? All in favor say aye.

Opposed?

That's unanimously recommended for adoption.

PROFESSOR EDGAR: Okay. 298.

PROFESSOR DORSANEO: What page?

PROFESSOR EDGAR: 1042. Sorry. These are to be made 10 days after the filing of the originals. And again you serve on the court and all parties in accordance with 21a. The court then has 10 days to respond. We'll have to change that. But I'm just talking about the substance of it.

CHAIRMAN SOULES: Okay.

PROFESSOR EDGAR: And mail a copy to all parties.

MR. FULLER: We've got all this response language in here.

PROFESSOR EDGAR: That all has to be changed.

MR. FULLER: I assume editorially that can just be conformed.

CHAIRMAN SOULES: Let's look at it.

MR. FULLER: Shall make --

CHAIRMAN SOULES: Conformed to Page 999. Okay.

PROFESSOR EDGAR: 298 (a) needs to say "After the court files." That word was omitted. "After the court files original findings of fact."

CHAIRMAN SOULES: Let's see. Findings and conclusions?

MR. FULLER: I think that was supposed to be possessive after the court's original findings. You are saying change it to after files?

PROFESSOR EDGAR: After the court files original finding. Singular.

CHAIRMAN SOULES: Request for specified additional or amended findings and conclusions. Findings or conclusions, or both? In accordance with the procedures set forth in Rules 296, 297. The request for these findings shall be made within 10 days after the filing of the original findings and conclusions by

the court. And then we'll conform this notice language to that that we did on Page 999 and 296.

PROFESSOR EDGAR: Do we need that "shall be" in there twice? Shall be made and then served. The next-to-last line in 298 (a). That "shall be."

MR. FULLER: You can just say "and served."

PROFESSOR EDGAR: Yes. Because we've already said "shall be."

Judge Phillips had a question.

CHAIRMAN SOULES: I'm sorry, Judge.

CHIEF JUSTICE PHILLIPS: In accordance with the procedures set forth in Rule 296 and 297, what does that refer to?

MR. RAGLAND: The same procedures for making the findings and serving the findings and filing it with the clerk and giving them to all the parties.

MR. FULLER: Serving, mailing, noticing, all that bit.

MR. RAGLAND: That was the intent of it, anyway.

CHIEF JUSTICE PHILLIPS: It's all covered, it seems to me.

CHAIRMAN SOULES: I think maybe what Chief Justice Phillips is talking about here is we could just put a period after the word "court" and not have any

notice.

CHIEF JUSTICE PHILLIPS: Well, no, I'm reluctant to refer back to those other rules, because it's unclear what's being picked up and what's not.

MR. RAGLAND: The idea, Judge, I don't know whether it clearly states it or not, is to have the party making these -- it may not be the same party making additional or amended findings who made it initially. The idea was to incorporate that procedure as far as filing it, fix the date on which you count your response time, giving notice to the judge and giving notice to the other parties.

MR. FULLER: You know what we might create a little confusion with there, though, those rules, 296 and 297, each have time limits in them, do they not? And I'm wondering if, as the Chief Justice says, it might not create some confusion if you refer back to those.

MR. RAGLAND: I hadn't thought about that.

PROFESSOR EDGAR: Would you just put a period after "both"?

CHIEF JUSTICE PHILLIPS: I would.

PROFESSOR EDGAR: That would eliminate the problem, potential question.

CHAIRMAN SOULES: Unless we're really picking

up something with this language. Y'all have thought this through. Can that be dropped without a problem? Why don't we hold that question about that deletion until we look at the rest of the rules and see if all the procedures are in place here in 298 to effectuate it. There's no notice of past due. Do we want notice of past due in connection with 298 filings?

MR. RAGLAND: I don't believe the present rules provide for that.

MR. FULLER: No, not on the addition of it.

MR. RAGLAND: On the amended or addition. It presently doesn't provide for it.

CHAIRMAN SOULES: So we're really not trying to get that in?

MR. RAGLAND: No reason you can't put it in.

MR. FULLER: I think we can leave those out without doing any violence to it.

CHAIRMAN SOULES: Okay. I'll delete that for now. If it occurs that we need to get it back in, we can certainly restore it.

(a) then would be -- after the word "court," we would put in the word "files" in the first line.

In the fourth line we would insert after the word "findings" the words "or conclusions." Put a period after "both."

In the fourth and fifth lines, we would strike the words "in accordance with the procedures set forth in Rules 296 and 297."

In the eighth and ninth lines, we would conform that to what we did for Rule 296 at Page 999, picking up the words "each party," of course. And that's the way (a) stands now.

Any objection to (a)?

There being none, that stands, then, as approved.

(b). "The court shall make and file" -- Going back now to try to track this 297 language, "The court shall make and file any additional or amended findings and conclusions within 10 days"?

MR. FULLER: Omitted?

CHAIRMAN SOULES: Amended.

PROFESSOR EDGAR: Actually, is "additional" --

CHAIRMAN SOULES: Thank you. "Or amended findings and conclusions within 10 days after such request is filed."

MR. FULLER: Cause a copy?

CHAIRMAN SOULES: We can take "file such response with the clerk" out, because we said "make and file and cause a copy to be mailed to each party to the

suit." Is there any objection to (b) in that form?

PROFESSOR CARLSON: I have a suggestion. I notice that the original version said the court will file these additional findings and conclusions as may be proper. They may not want to file. This makes it sound obligatory. Is that the intent?

CHAIRMAN SOULES: We've got the word "any." The court shall make and file any additional. Any objection to (b) in this form?

There being none, that stands approved.

PROFESSOR EDGAR: Let me just raise one question. Justice Phillips touched on this earlier. You know, the current case law is, if you request findings of fact and conclusions of law and the court doesn't do anything, then there is the presumption that the court found the opposite. That's the case law.

CHIEF JUSTICE PHILLIPS: Most of the cases.

PROFESSOR EDGAR: That's always really bothered me. I don't know whether it bothers you or not.

MR. FULLER: But on additional or original?

PROFESSOR EDGAR: If you just make request for findings of fact, the court doesn't do anything, then there is the presumption that the court found the opposite.

CHAIRMAN SOULES: My word. Is that to additional only or original?

CHIEF JUSTICE PHILLIPS: I think that's only to additional.

MR. FULLER: I thought it was, too.

PROFESSOR EDGAR: Pardon me. It is only to additional.

MR. FULLER: Because I don't know what the opposite would be on the original.

PROFESSOR EDGAR: You're right, you're right, you're right. You make additional.

CHAIRMAN SOULES: That loads you up when you decide to ask for them, doesn't it?

CHIEF JUSTICE PHILLIPS: But there's places that you have to ask for them or you don't get the benefit -- there are some catch-22s in this area that -- perhaps the courts have created that hole and they're going to have to dig their way out of it, but it could be done by a rule. Somebody needs to make a thorough study. There's very little scholarship on nonjury trials, for obvious reasons.

CHAIRMAN SOULES: Except for that that's occurring here, we hope. Can we fix that now or do we let that ride?

PROFESSOR EDGAR: I think it would be

appropriate to fix it here. Because here is where you are talking about your request for amended findings.

CHAIRMAN SOULES: All right. Now, the court shall make -- if the court fails to make them, what?

MR. DAVIS: Let's leave that alone here.

MR. FULLER: Anything you say is wrong.

PROFESSOR EDGAR: Well, if you wanted to direct it, I guess you could say that the failure of the court to make amended findings shall not be construed -- well, I don't know. I haven't thought about it.

MR. FULLER: It would seem to me that the safest thing to do, if you are going to do anything, would be just to say the failure of the court to make additional finding of fact and conclusions of law would result in the only conclusions of fact -- fact and conclusions of law being the original ones found by the court, something of that type. From back to the original.

PROFESSOR EDGAR: I'm sorry I brought it up.

[Laughter]

MR. FULLER: I thought you would be.

CHIEF JUSTICE PHILLIPS: I move it be recommitted to Hadley for solution.

MR. O'QUINN: We move that that problem be recommitted to Hadley's committee.

MR. FULLER: Along with the committee.

CHAIRMAN SOULES: Okay. We can.

CHIEF JUSTICE PHILLIPS: Not the whole rule, but that problem.

CHAIRMAN SOULES: Is it that complicated? Ken made a suggestion here that, in effect, there be no presumption --

MR. FULLER: I don't know how to say it.

CHIEF JUSTICE PHILLIPS: You could just say the failure to file additional or amended findings shall not --

PROFESSOR EDGAR: No presumption shall be created by the court's failure to make additional findings.

CHIEF JUSTICE PHILLIPS: I like that. If that's what you want to do. I've always been disturbed by that.

MR. BECK: Does that encourage the trial judge not to make them?

PROFESSOR EDGAR: Well, the current rule tends to discourage the trial court to make them if the court wants to really gut you pretty good.

CHAIRMAN SOULES: No findings or conclusions shall be deemed or presumed by any failure of the court --

CHIEF JUSTICE PHILLIPS: I'd flip it the other way. I'd do it the way Hadley dictated it.

CHAIRMAN SOULES: What's that?

MR. O'QUINN: Failure to make such additional findings or amended findings shall not result in any --

PROFESSOR EDGAR: No presumptions shall arise --

MR. O'QUINN: I think Luke's is better stated. No presumption of what?

CHAIRMAN SOULES: This says no findings or conclusions shall be deemed or presumed by any failure of the court to make additional or amended findings or conclusions.

PROFESSOR EDGAR: That's fine.

CHAIRMAN SOULES: All right.

Now, with that additional sentence in (b), is there any objection to (b)?

Being none, that stands approved.

(c). What does that bring to the table? Does that really add anything?

MR. FULLER: Well, I guess that's just -- that says how you deal with something that's been filed. When it gets file marked.

CHAIRMAN SOULES: We're going to do that in (a), aren't we?

MR. COLLINS: It directs the clerk to include that in the transcript on appeal.

PROFESSOR EDGAR: The clerk is directed to include certain things.

CHAIRMAN SOULES: Where is the direction to the transcript?

PROFESSOR DORSANEO: TRAP 51. Automatically goes in.

CHAIRMAN SOULES: What does it say, Bill?

PROFESSOR DORSANEO: Unless otherwise designated, blah, blah, blah, blah, the court's findings of fact and conclusions of law, which I think would include all of them, not just the original.

MR. O'QUINN: Including the amended.

CHAIRMAN SOULES: What's going to go in the transcript ought to be in Rule 51, not someplace else.

MR. O'QUINN: Makes sense.

MR. RAGLAND: Of course, you can designate more if you want to.

MR. COLLINS: You can designate additional.

PROFESSOR EDGAR: But 51 is where it ought to be. I don't think it needs to be in 298.

CHAIRMAN SOULES: Okay. So (c) is un-necessary? Is that right or not?

PROFESSOR EDGAR: I think so.

MR. RAGLAND: I don't know why I put it in there.

MR. HERRING: Does 51 pick up --

PROFESSOR EDGAR: You don't need to include the request unless somebody wants it included. Unless there's some basis for showing error.

CHAIRMAN SOULES: Any objection to omitting (c)?

There being none, (c) of proposed Rule 298 on Page 1042 and 1043 would be deleted.

MR. COLLINS: I have just a general question for the sense of uniformity. What's the magic on 10 days in Rule 298? Or is there any magic? Why don't we make that 30 days, like filing motions for new trials, so that any post-judgment activity, post-trial activity, be a 30-day deadline instead of having 10 days?

CHAIRMAN SOULES: You're in a position where the parties by now should have looked at findings and conclusions and probably can do a faster response time than 30 if getting on with the appeal or getting on with the process is important.

MR. FULLER: Five days here, ten days there. We added five days to the brief to the attention of the court that none had been filed. Now if you add that you've got -- hell, you've added nearly another month

to your appellate process.

MR. COLLINS: Well, you had that in jury trials, anyway. In essence, what this is --

MR. FULLER: We want to get this damned thing over with.

MR. COLLINS: Well, I know. But, in essence, what this is, this is a motion for new trial in a nonjury case, is really what you're talking about. We don't have it labeled that, but that's what it is.

MR. RAGLAND: John, I can tell you why -- there's nothing magic about 10 except that it is more than the present rule provides, 5, which means that if you file a request for additional findings on Friday afternoon, then two of the five days are used up before anybody knows about it.

MR. COLLINS: I understand. I'm in favor of the 10. I'm just, in the sense of uniformity, suggesting 30.

CHAIRMAN SOULES: Well, the first ones only have 20. You only have 20 days to make it. Should we make them both 20 days?

MR. BECK: You're talking about additional findings. When you get to that stage it seems to me you ought to know your case, know what the findings should have been or excluded and you shouldn't need the full 20

days. It ought to be less.

MR. RAGLAND: There's an argument in favor of expanding the 10 days because the person who makes a request for additional findings may not be the same person who made the original findings. So there could be an argument made for expanding that period of time.

CHAIRMAN SOULES: Want to put 20 in both places?

Elaine.

PROFESSOR CARLSON: If there's no motion for new trial filed, then does the court just retain power after 30 days to make these findings and conclusions? When we extend all these --

CHAIRMAN SOULES: Doesn't have 30 days. That's over.

PROFESSOR EDGAR: Plénary power for 30 days after signing and that's it.

CHAIRMAN SOULES: This is basically conceived to be done before the judgment is signed, isn't it?

PROFESSOR DORSANEO: No. It's part of the appeal, not part of anything else. It's part of the appeal. I think you could make them later.

CHAIRMAN SOULES: If the judge signs the judgment, this is pretty well cut off.

JUDGE ROBERTSON: The Court of Appeals can

send them back even.

PROFESSOR DORSANEO: There's really no big hurry here on this.

CHAIRMAN SOULES: That's why we like jury trials, isn't it, John?

MR. O'QUINN: One of the reasons. I want to apologize for not being back on time. I'm not feeling well.

CHAIRMAN SOULES: Is there a proposal that we change 10 to some other number of days? Do you want to make that 20, John?

MR. COLLINS: I was just tossing it out.

CHAIRMAN SOULES: Leave it 10.

MR. DAVIS: While we're talking about days, on Page 1044, Paragraph (c), 297, when we extended the days for 297 (b), we did not extend the days in (c).

CHAIRMAN SOULES: What should they be?

MR. DAVIS: At least another five days. I'm going to ask y'all to consider whether we still want to give 30 days instead of 20 days to make the original findings of fact or conclusions of law. And the idea that what we're trying to do and our problem has been, the courts have not been doing them. And the longer you put something off, the easier it is. And most of these are going to be written up for them anyway, all you are

going to have to do is sign it. It just seems like to me 30 days is a little too long. But regardless of what it is, we have to change the days in (c) to at least give 10 days after (b).

CHAIRMAN SOULES: Which would be 50 days.

MR. DAVIS: As we stand now, I think (c) has 40 days, if I remember right. (c) is going to have to be at least 50.

MR. RAGLAND: Tom, let me see if I've got this figured out right. The 10 days under 296 is dated from the date the request for additional findings were made and not from the date the original findings were requested.

MR. DAVIS: I'm sorry. 296?

MR. RAGLAND: Look on Page 1042.

PROFESSOR EDGAR: That 10-day period starts after the request is filed.

MR. RAGLAND: For additional findings. The time period that you're speaking of here is under 297, which brings it back to the filing the original.

MR. DAVIS: Yes, yes, yes.

MR. RAGLAND: Does that answer your question?

MR. DAVIS: Well, (a) of 297, as I'm understanding it, gives 30 days for him to file.

PROFESSOR EDGAR: Right.

MR. DAVIS: Then if he fails to do it from the same starting time, you have 35 days, which we change to 40 in order to --

CHAIRMAN SOULES: Notice of past due.

PROFESSOR EDGAR: After the filing of the original request.

MR. DAVIS: Then it jumps and says "Upon filing the notice in (b) above," which is the 40 days, then the time to respond is extended to 45 days from the date the original request was filed.

CHAIRMAN SOULES: And you want to give 10 days. So that should be 50.

MR. DAVIS: I think it should be 10 days.

MR. FULLER: Change it to 50.

MR. RAGLAND: We shortened it on the other end, didn't we?

MR. DAVIS: I suggested we shorten the 30 days, but that hasn't been done. But would the 30, 40, 50 --

CHAIRMAN SOULES: I guess we could get a show of hands whether the judge should have 20 days or 30 days and then move all these back.

PROFESSOR DORSANEO: [Bronx cheer]

CHAIRMAN SOULES: Is that a reaction? I don't think the court reporter got that.

MR. FULLER: He overreacted again.

CHAIRMAN SOULES: How many feel that the trial judge should have 30 days to make these findings?

MR. FULLER: The old rule was 20, wasn't it? Wasn't the old rule 20?

CHAIRMAN SOULES: How many feel the trial judge should have 20 days to make the original finding?

All right. There's consensus that that be 20.

So let's go back and look at 297. (a) is 20 days.

PROFESSOR EDGAR: That's 10 less than he has now.

CHAIRMAN SOULES: Well, let's see.

PROFESSOR EDGAR: It's on Page 1022. Rule 297.

CHAIRMAN SOULES: Oh, yes.

PROFESSOR EDGAR: He now has 30 days. You are going to shorten that time?

CHAIRMAN SOULES: Well, the vote was to --

PROFESSOR EDGAR: I'm not sure we knew what we were doing.

CHAIRMAN SOULES: Be sure we know we're changing the existing time period.

MR. SPIVEY: Was that a first?

CHAIRMAN SOULES: Again, those for 30.

MR. O'QUINN: That's the rule right now?

PROFESSOR DORSANEO: Depending on when the request is made. It has down to 20.

CHAIRMAN SOULES: How many for 20?

Vote stays the same. Consensus says it should be 20. So we go back to 297 (a) and that's 20 days.

And then (b) becomes 30 days.

MR. DAVIS: And (c) will be 40.

CHAIRMAN SOULES: (c) is 40 days.

Now, on the composite --

PROFESSOR DORSANEO: One question.

CHAIRMAN SOULES: Let's have order. Nothing is getting on the record here.

Bill, you've got --

PROFESSOR DORSANEO: One question. I was out of the room and I apologize. I forgot to check out, that's the reason I did that.

But on the rule for additional and amended findings, (a) now just simply requests filing with the clerk the request for additional or amended. Right?

CHAIRMAN SOULES: No. All these requests are going to have to conform with what we did in 296 on Page 999. All the notice requirements are going to be the

same as 296. Serve everybody, get one to the judge. Okay.

Now, with 296, 297 and 298 as they are presently before the committee, we voted on them individually and I believe the commitment to Tom was that we would then vote on them as a composite. We're ready to do that. Those in favor of 296, 297, 298 as they now stand say aye.

Opposed?

Okay. The ayes have it. Those will be recommended.

PROFESSOR EDGAR: Now look on Page 1043, if you will. I've talked to Bill about this. The appellate rules will need to be amended to accommodate the expanded timetable, because, you see, now the appellate record on nonjury trials has to be filed within 60 days, as I recall, after the judgment is signed. And we're extending that.

Now, my recommendation would be -- and this is a policy decision, I think, that the committee needs to make. I frankly don't know why we have a different time period for nonjury cases and a different appellate timetable for jury cases. I don't know why that can't be standardized. And it seems to me that we can solve this problem we're facing now by simply having an

appellate timetable for nonjury cases to read as they now read for jury cases.

CHAIRMAN SOULES: What TRAP rule?

PROFESSOR EDGAR: Page 1043. I listed them there.

MR. SPIVEY: A simpler motion in almost exact words, isn't it clerical to go back and make the changes?

CHAIRMAN SOULES: I don't know. There are so many nonjury appeals I think we're just going to have to look at that. Maybe it won't take very long. If it does, I don't know what we do with 296, 297, 298, because we've got to fix that.

PROFESSOR EDGAR: We need to do something with the appellate rules, though, in adopting those.

MR. HATCHELL: First of all, the time limits are the same except in those cases where the motions are filed, a solution would be to change 29 (b) to give an extension anytime a request is filed.

CHAIRMAN SOULES: Is that right, professors?

Appellate practitioners, does that sound right?

All right.

PROFESSOR EDGAR: But that really doesn't solve a policy question, though, about why we have

different time periods for different types of appeals in civil cases.

CHAIRMAN SOULES: Mike says we don't.

MR. FULLER: Motion for new trial.

PROFESSOR EDGAR: But if. That's what I'm saying. So, if you file requests for findings under Mike's suggestion, then you've got a different timetable than if you don't file a request for findings of fact and conclusions of law.

MR. COLLINS: Well, you have a different timetable in a jury trial, too.

PROFESSOR EDGAR: Why do you?

MR. COLLINS: If you file a motion for new trial. You have the same timetable if nothing happens after judgment in both jury and non.

MR. HATCHELL: If that's what you want to do. I'm not suggesting we did do that. That's the only way I know to do it.

CHAIRMAN SOULES: It's got to be fixed. Look at 329. Where in 329 do we put this?

PROFESSOR EDGAR: Pardon.

CHAIRMAN SOULES: I'm asking Mike. Where would we put it in 329?

MR. HATCHELL: Oh, it's (b), isn't it? I don't have a rule book. I hate these rules so bad I

don't want to do anything to preserve them.

MR. COLLINS: Mr. Reporter, be sure and get Mr. Hatchell's remarks.

[Laughter]

CHAIRMAN SOULES: Are you going to report on 329 (b)?

PROFESSOR EDGAR: No, that's not mine. That's why I contacted Bill.

MR. HATCHELL: It must be in a TRAP rule.

PROFESSOR EDGAR: The timetables are in the TRAP rules, but to cure the problem you're trying -- by the method you're suggesting, we have to deal with 329 (b).

MR. HATCHELL: It would be 41 for the perfection and then for the record it would be --

PROFESSOR EDGAR: 54 (a).

MR. HATCHELL: 54 (a). What you would do to change it would be to also provide or to substitute for the motion for new trial practice in nonjury cases if a request for findings of fact and conclusions of law was made. That would extend --

PROFESSOR EDGAR: Were timely made. Made timely.

CHAIRMAN SOULES: I need language and a place for it.

PROFESSOR DORSANEO: Frankly, I have an internal debate as to whether it's necessary, because the nonjury work that -- well, Ken and I have done, we've done a lot of those. We always file a motion for new trial. So we're always on a longer track. It is an extra step that doesn't make a lot of sense except to extend the timetable.

MR. FULLER: Except to us. It makes sense to us. Right?

PROFESSOR EDGAR: Well, certainly most appellate practitioners are going to automatically file a motion for new trial simply to extend the appellate timetable. But there are a lot of people out there who don't do this every day.

MR. FULLER: I feel constrained to make a comment at this time.

PROFESSOR EDGAR: We have to do it here, though.

CHAIRMAN SOULES: We have to do this. I need language and I need a place to put it, or else we can't go forward with what we've just voted on, we've got to just back off of that.

MR. FULLER: That's what I want to mention, Luke. This, to me, really points up the sin of our ways. We're tinkering with things to try to make them a

little bit better and a little bit clearer. And this is the very thing that I was talking about earlier. We're making too damned many changes. When you make a change, you upset the equilibrium all the way across the board. Okay. We voted. But I said it. Don't make any more changes than you have to. Because when you do, you just create extra problems and it's no better.

CHAIRMAN SOULES: There are some things that are getting fixed in this series of 290 rules.

MR. FULLER: But it wasn't bad broke. It was working.

CHAIRMAN SOULES: Let's go ahead and fix this right now. We're bound to be able to find it.

MR. O'QUINN: Where is the timetable for a nonjury case?

PROFESSOR EDGAR: Appellate Rule 41 (a) (1). And you would have to say "or, within 90 days after the judgment is signed if a timely motion for new trial has been filed by any party or if findings of fact or conclusions of law have been requested." Isn't that what you would have to say?

PROFESSOR DORSANEO: In a nonjury case.

CHAIRMAN SOULES: Do you ask for those in jury cases?

PROFESSOR DORSANEO: You might ask for

additional findings under 79.

CHIEF JUSTICE PHILLIPS: I wouldn't give them an extra delay step by doing it, though. If you allow some delay by doing it, we'll see a lot more of them in jury trials, which we don't want.

PROFESSOR DORSANEO: That's what I'm saying. I'd say in a nonjury trial, in order to not have there be any confusion --

MR. SPIVEY: Say again.

CHAIRMAN SOULES: We would add, then, at the end of the first sentence of Rule 41 --

PROFESSOR DORSANEO: (a) (1).

CHAIRMAN SOULES: -- (a) (1), we would put a comma after "party," say, "or if any party has filed a request for findings of fact and conclusions of law in a nonjury case."

PROFESSOR EDGAR: Timely filed or filed timely. You would want to make it timely, wouldn't you?

CHAIRMAN SOULES: "Or if any party has timely filed a request for findings of fact or conclusions of law in a nonjury case."

PROFESSOR EDGAR: Yes.

CHAIRMAN SOULES: All in favor say aye.

Opposed?

Ayes have it.

PROFESSOR DORSANEO: You've got to go over here and do the same thing for the record, if you are going to do it.

PROFESSOR EDGAR: 54 (a). You would have to put exactly the same clause in the sixth line, after the word "party."

CHAIRMAN SOULES: By any party --

PROFESSOR EDGAR: Or.

CHAIRMAN SOULES: -- comma, or the same language we just put in, and then comma.

PROFESSOR EDGAR: Within 120 days after the judgment is signed.

CHAIRMAN SOULES: Okay. Does that fit?

PROFESSOR EDGAR: Yes, I think that's all we need to do. Now, that --

CHAIRMAN SOULES: In favor, say aye.

MR. HATCHELL: The first comment I made I think is still valid. I'm not positive about what we want to do, but we will have a situation, the way we've done it, where the trial court's plenary power periods will be different in nonjury cases than in jury trials. Because we haven't done any amendments in 329 (b), which I'm not advocating we do, but we will have that discrepancy.

CHAIRMAN SOULES: How big a problem is that?

MR. HATCHELL: I don't know.

MR. DAVIS: We're trying to make everything the same. What do we have to do?

MR. COLLINS: Are there more nonjury appeals than there are jury appeals?

MR. FULLER: I would think so.

CHIEF JUSTICE PHILLIPS: No, I doubt it.

JUSTICE HECHT: More jury appeals.

CHAIRMAN SOULES: Are we done with this? Or do we need to do more? As far as we can tell.

MR. DAVIS: What do you suggest we do?

MR. HATCHELL: I'm not suggesting any opinion, I just want to point out --

MR. DAVIS: If you were going to change it --

CHAIRMAN SOULES: Okay. Mike, I want to ask you to think about this one. If you see that we've got something here that is not going to work because we have an oversight -- maybe Elaine, too -- because we have an oversight, then get a letter to the chair, will you please, right away, and we will see that the Court gets that with some suggestion that action on these be delayed until we get it fixed.

PROFESSOR DORSANEO: 329 (b), we really get down to dealing with some very fundamental revisions in the procedural rules that took years and years to write.

MR. O'QUINN: Got screwed up.

PROFESSOR DORSANEO: I wrote it, drafted it, wrote it down in handwriting, and I don't think that I could sit here and draft it now. I would be afraid to recommend to anybody a draft that would be done like that. Or one that would be done at home and sent in.

CHAIRMAN SOULES: I don't think we can do this now. If you, Mike, Bill, Elaine --

MR. SPIVEY: Not me. I've got a question.

CHAIRMAN SOULES: Broadus has his hand up.

But if you-all will, please, look at this and tell us if we've created a problem here that needs to be fixed before these rules are passed on by the Supreme Court, whether they adopt them or don't adopt them.

MR. SPIVEY: Would you increase that charge just a little bit and ask those other persons whom you have named on that subcommittee to try to coordinate these rules and see if they can't tailor this to create companion rules for jury and nonjury trials so that we have a more simplified judicial process?

MR. COLLINS: And then we're going to come back a year from now and change them again. That's what's gonna happen.

CHAIRMAN SOULES: Well, for now, if you three will, work with Hadley and Tom Ragland to be sure that

we haven't created something here that's just a schism that we have to get out of. If so, we certainly need to so advise the Court promptly. Let me know.

MR. DAVIS: Talking about the plenary power of the Court or --

CHAIRMAN SOULES: We've got to go on, Tom.

MR. DAVIS: -- coming to an end before he makes his findings of fact --

CHAIRMAN SOULES: That's a problem I was just advised was not a problem. He can make them after.

Okay. Next, Hadley. Do you have other rules to report on?

PROFESSOR EDGAR: I think so. Just a minute.

CHAIRMAN SOULES: Okay.

PROFESSOR EDGAR: Rule 305 is on Page 1048. We passed that yesterday, didn't we?

CHAIRMAN SOULES: Yes, we did.

PROFESSOR EDGAR: All right.

Now, at the top of the cover sheet, I see a reference to Rule 306a on Page 1048. And I don't know what that is.

CHAIRMAN SOULES: I don't either.

MS. HALFACRE: Move over to 1049.

CHAIRMAN SOULES: It's on 1049.

MS. HALFACRE: Loomis's letter again.

CHAIRMAN SOULES: It's on 1053, I guess, is where Wendell Loomis talks about 1052.

MR. FULLER: We talked about that yesterday and decided we couldn't --

PROFESSOR EDGAR: That's been resolved.

CHAIRMAN SOULES: We've got that resolved? Okay.

PROFESSOR EDGAR: All right.

That's all I have, Mr. Chairman.

CHAIRMAN SOULES: Okay.

Let's see. David, you had a matter that was over from yesterday.

PROFESSOR EDGAR: On Rule 305 on Page 1048, we resolved that issue yesterday? Or did we hold that over till today?

CHAIRMAN SOULES: 1048. We approved this, changing "either" to "any," changing "person" to "party."

David.

MR. BECK: All right. There were two items that were carried over till today. One had to do with the problem that was raised about who can be present during a deposition. There were examples of dogs being present, and four and five witnesses, and so on. I have drafted something. I've talked to John O'Quinn about

it. John may want to make two additional comments, because there are a couple of things we talked about that I don't think we can agree on. But let me just give you the essence of what I've done and tell you why.

"In the absence of court order or the written agreement of counsel, no witness shall attend a deposition of another witness. This rule does not require exclusion of (1) a party who is a natural person or the spouse of such natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney."

Now, this comes essentially from Rule 614 of the Texas Rules of Evidence. There is one major change between the Texas Rule of Evidence and this proposal, and that is that the Texas Rule of Evidence has an additional category of persons who cannot be excluded, and that is a person whose presence is shown to be essential to the presentation of the case.

John, I think, objected to that in this proposal, and I tend to agree with him, because if you think you need to have an expert present during a deposition, you can always go and get the court's permission to do so. When you're talking about the rule of evidence, the court is there. And if you've got any problems, the court can resolve them right away.

I think what we are trying to solve is problems without the necessity of having to get a court involved and having to go to the courthouse to resolve matters which most reasonable attorneys can work out, anyway.

So that, Mr. Chairman, is the proposal.

MR. FULLER: But your lead-in language was "no other witness."

MR. BECK: "No witness shall attend the deposition of another witness."

MR. FULLER: That doesn't preclude the situation where this intimidation person they're bringing is not going to be a witness.

CHIEF JUSTICE PHILLIPS: The dog is not going to be a witness.

CHAIRMAN SOULES: No person shall attend the deposition of another person.

PROFESSOR EDGAR: No person or other animal.

CHAIRMAN SOULES: No person or dog.

MR. O'QUINN: Then they'll bring a cat.

MR. FULLER: You are making the decision at the time of the deposition whether or not the person they have there is going to be called as a witness. They can always say, "I'm not going to call him as a witness."

CHAIRMAN SOULES: Just a minute. Let me get organized here. 208. I think you said 200, but we ought to pick up --

MR. BECK: The next question is: Where does this go? If you're going to put it in Rule 200, that's the oral deposition rule. If you are going to also include it in the written question rule, that's rule 208. Bill Dorsaneo had a good suggestion, which was: You may want to put it in Rule 166b, which governs all discovery, which would take care of your written questions and your oral depositions.

CHAIRMAN SOULES: I suggest we make it a rule between 189 and 199, because they're vacant now, and it would apply to all depositions and it would be in the deposition area.

MR. BECK: That's fine.

CHAIRMAN SOULES: So we've got that language. You are moving to adopt that language somewhere in these vacant rules so that it would apply to all deposition proceedings. No person can attend the deposition of another person unless they're a party or spouse of a party, unless there's a court order permitting that attendance?

MR. BECK: Or the agreement of counsel.

CHAIRMAN SOULES: That's taken care of by a

completely different rule which says parties can agree to bury these rules at will. We don't need that in this rule.

MR. FULLER: I have a question. Where are you going to fit in --

CHAIRMAN SOULES: That is a proposition and it's ready for debate.

MR. FULLER: Question on it, though. How about the case where you as a lawyer need a bona fide paralegal present? My question to you is: Will your language require me to go to the court and get a court order in order to have my paralegal sit in?

MR. BECK: I talk in terms of witnesses. You have to have the court reporter, you may need an interpreter, you may need four legal assistants, you may have an associate with you. You can't put all of that in the rule. So what I tried to do was to deal solely with the witness. Now, if you are talking about third-party observers, I'm sorry, I've never had a problem with that. Because if the deposition is in my office, I don't want somebody there, I throw them out.

MR. FULLER: Well, that's a major problem in our practice. That's what brought this to light to begin with. We do a lot of domestic-relations practice. That's all we do. And it is a major problem. You know,

the wife shows up to take my client's deposition, she's got the fellow's two prior wives sitting there, or his banker or mortgage holder. It's a major problem. I'd like to see it solved.

CHAIRMAN SOULES: Tom Davis.

MR. DAVIS: I think you've got it turned around the wrong way. What you are going to do is increase the time of the court to get orders. I think it ought to be the other way, that it's going to be the burden on the person who wants to exclude somebody to get the order, rather than me having to get an order every time I want to bring --

MR. FULLER: No. The problem with that is, you don't know until you show up for the deposition. See, you don't know who they're going to bring to the deposition until you show up. We talked about that yesterday. Then people come from out of town, you've got your court reporter. My perception is, if you want someone extra in, you ought to have to go to court ahead of time and get permission and fight that battle before everyone has sat down with all the records to take the deposition.

MR. DAVIS: Let me outline a very specific problem. Most of my cases are fairly technical in dealing with aviation. Many times I have an expert

flutter witness. There are not many flutter experts in the country. When I'm taking the deposition of the defendant's flutter expert, I want my flutter expert sitting there next to me to help me out with terminology or when the guy's ducking the question and I don't know it. Now, I can't ever say that man is not going to be a witness, because he is going to be a witness. And they're going to have a chance to depose him. And whether he is sitting in that room or not, he's going to see that deposition before his deposition is taken if his is not taken first. But I need him there. It's important, it's imperative. And this is in nearly every case. And to have to go to get an order from the court before I can have him there, I'm not really in favor of.

MR. SPIVEY: Can't you handle this by some methodology other than trying to aim at the identity of the person that's there and just address the intimidation factor?

MR. BECK: Well, the trouble is, you can't write a rule of general applicability by taking these isolated examples of dogs and former wives showing up and everything else. This one is a real problem, because this happens quite frequently. That's why Rule 614 of the Texas Rules of Evidence has this category for a person whose presence is essential to the present

preparation of the case. I don't have any objection to having that person there, but I left it out because John had some concerns about it. Which he may want to speak to.

MR. FULLER: Isn't your problem taken care of by the agreement factor? You said, "Let's agree." I gather the guy on the other side has got the same problem you do, he wants to take your expert.

MR. DAVIS: No. The one whose deposition is taken first doesn't have that problem. So why should he agree? I mean --

MR. FULLER: I don't know the answer.

CHAIRMAN SOULES: Let's see if I can help this. If we go to Rule 200 (2), Notice of Examination, this may not fix the written deposition, but if we make the notice of the deposition state the identity of all persons who will attend in addition to the parties, spouses of parties, counsel and the officer taking the deposition, or counsel, employees of counsel -- and I realize that can be abused, but at least we should try to accommodate that, then --

MR. FULLER: If you make the notice include those names?

CHAIRMAN SOULES: The notice would have to state that. Then you could file a motion for protective

order.

MR. FULLER: I'll settle for that. Just let me know ahead of time, give me a chance to go to the court.

CHAIRMAN SOULES: Then whether it's dogs or people --

MR. COLLINS: If it's done by agreement and they show up and there's somebody there you don't want, then you don't have an agreement. It's either done by agreement or notice. So it's fairly simple.

CHAIRMAN SOULES: The identity of all persons who will attend in addition to the parties, spouses of parties, counsel, employees of counsel -- I'm using "employees" in the strict sense. I'm talking about your paralegals, somebody that's on your payroll.

MR. SPIVEY: I sure fear we're making something a lot more technical than we need to.

MR. DAVIS: How about those present for the deposition?

CHAIRMAN SOULES: If they're in the notice. When you notice the deposition, you go through what has got to be stated and it gets down to documents that they're supposed to bring, and state the identity of all persons who will attend in addition to the parties, spouses of parties, counsel, employees of counsel, and

the officer taking the deposition.

MR. BECK: Luke, do you need to be that explicit? Why can't you simply require them to put in the notice if they want to bring anybody whose presence is essential to the presentation of their cause? In other words, that would take care of the expert. But if you start having to list, you know, the lawyers, the --

CHAIRMAN SOULES: No, this says "other than." It's the identity of all persons who will attend in addition to these.

MR. O'QUINN: The problem with that is, if I don't misunderstand you, you said that it isn't open-ended. You say employees. They would put all the employees in there and all listen to the deposition. My suggestion --

CHAIRMAN SOULES: Employees of counsel.

MR. O'QUINN: I thought you said of counsel. I misunderstood. Well, it would be my suggestion that we take the three categories that David came up with -- the parties, the corporate representatives and persons necessary to help the lawyer, whatever that language is. But those, the third kind, would have to be --

MR. BECK: Identified in the notice.

MR. O'QUINN: You could say in the notice "I'm bringing a paralegal consultant and an expert,"

period.

CHAIRMAN SOULES: I may want to propose that somebody hear who is not in that category.

MR. O'QUINN: Such as?

CHAIRMAN SOULES: Another witness.

MR. BECK: Then you've got to get the agreement of counsel or --

MR. O'QUINN: We have a philosophical disagreement about the rule.

MR. BECK: Anybody else essential to the preparation of the case. I don't think most lawyers would object to the expert being present, but supposing John is taking my man's deposition, key man, and I bring in five people and I say, "All these people are essential to the preparation of my case"?

MR. O'QUINN: "We're gonna watch you."

MR. BECK: Yes. See?

CHAIRMAN SOULES: But if we identify them in the notice --

MR. BECK: That tells him what I'm going to do in advance and he can run down there and get a court order.

CHAIRMAN SOULES: Why don't we permit these people to go --

MR. SPIVEY: Keep in mind we're trying to

keep the involvement of the court out of this.

CHAIRMAN SOULES: Exactly. That's why I'm saying these people go to the deposition without identification: Parties, spouses of parties, counsel, employees of counsel, and the officers taking the deposition. And the witness.

MR. O'QUINN: What about the corporate representative?

CHAIRMAN SOULES: Then, I guess, in addition to the witness. The witness needs to be here.

MR. DAVIS: If you bring your dog, you have to tell the dog's name.

CHAIRMAN SOULES: Anybody else that comes, you've got to put it in the notice that they're going to attend.

MR. O'QUINN: One more thing. If I'm taking your people's deposition and I send you a notice and I say "I'm bringing a consulting expert," if you want to have somebody there, you can't put that in the notice. There's got to be some document by which you tell me you intend to bring four other employees of the corporation. So I don't know what that document is going to be called, but you need something.

MR. DAVIS: If you're a witness, you may bring two more people.

CHAIRMAN SOULES: All right. If any other party intends to attend the deposition, he must give timely notice of the identity of such other parties. Other persons.

John, I'm going to add this or I'm proposing to add this: If any other party intends to have such other persons -- those other persons that we just -- attend, that party must give timely notice of the identities of such other persons.

MR. FULLER: Makes the notice go both ways.

CHAIRMAN SOULES: Makes the notice go both ways.

MR. O'QUINN: Fine. You may get a debate about the time. If you start putting deadlines in, then you've got a problem. He'll fax it to you at 8 PM the day before the deposition starts.

PROFESSOR DORSANEO: These flubber experts, are they allowed?

MR. FULLER: Flutter, not flubber.

PROFESSOR DORSANEO: Flubber.

CHAIRMAN SOULES: How crucial is this on a deposition on written interrogatories?

PROFESSOR BLAKELY: Tom Ragland wanted them.

MR. BECK: Somebody suggested them yesterday. I don't think it's a problem. Normally what I ask on

cross-questions is: "Who all was present" and so on.

Tom, what do you think?

MR. RAGLAND: The problem is having someone there to coach the witness. You may want to withdraw your written questions.

MR. DAVIS: You write your script beforehand.

CHAIRMAN SOULES: I will add that same language to Rule 208 in the second paragraph, where it talks about the notice that goes for a written deposition.

Now I'm trying to look at 188, which is foreign jurisdiction.

PROFESSOR DORSANEO: I don't think that deals with the manner.

CHAIRMAN SOULES: I guess it doesn't.

I guess we'll vote. Should that language, then, be added to Rule 200 (2) (a), and in the second paragraph 208? Let me read it again. It's easier in 200 (a) (2), but the notice -- that's not in the words, but the notice shall state, in addition to the other things that are required in notices under 200, 208, the following: The identity of all persons who will attend, in addition to the witness --

MR. FULLER: Other than? Other than, rather than in addition to? Other than.

CHAIRMAN SOULES: The identity of other persons who will attend other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the deposition. If any other party intends to have any such other persons attend, that party must give timely notice of the identities of such other persons.

MR. O'QUINN: That's fine.

CHAIRMAN SOULES: Okay.

In favor say aye.

Opposed?

That passes unanimously.

PROFESSOR BLAKELY: Would you, Luther, at the end of Civil Evidence Rule 614, put "Comment: See Rule" whatever it is, "Rule of Civil Proceedure 200 respecting the taking of depositions"?

CHAIRMAN SOULES: 200, 208.

MR. BECK: Just so the record is clear, as I understand what we did, the basic amendment includes the basic changes that we had in --

PROFESSOR BLAKELY: Do you mean the --

MR. BECK: The party, natural person or spouse, employee of the attorney, then a person whose presence is essential -- that's what we need to clarify.

CHAIRMAN SOULES: No, it does not.

MR. BECK: That's what you put in the notice provision?

CHAIRMAN SOULES: That's right. They're not automatically included, because there's no court there to rule whether they are necessary. The parties may resolve that among themselves. If they do, great; if they can't, then they go to the court on motion for protection. Excuse me one moment. I didn't catch the rule of evidence number. I should have.

MR. BECK: 614.

MR. O'QUINN: 614.

CHAIRMAN SOULES: Thank you.

MR. DAVIS: If I notice I'm to bring my expert in, if you don't like that or don't want me to or just because I put it in the notice, does that mean something says he can do it unless you do something?

CHAIRMAN SOULES: Well, the way it flows from this, is expected to flow, is that if the party objects to that and they can't work it out by agreement, they would file a motion for protection under 166b 6, I guess it is.

MR. DAVIS: But just because I designate, where does it say I can do it?

CHAIRMAN SOULES: That's the mechanism that we voted here to accept. That was discussion earlier

on. If you don't like it, you go get a motion for protective order.

MR. DAVIS: Where does it say that? I'm not sure what rule.

CHAIRMAN SOULES: You just have to understand all the rules have got to work together. That's that part of it, I think.

MR. FULLER: It's like any other notice you get. If you get a notice that's onerous, what do you do? You file a motion for protection with the court.

MR. DAVIS: If it specifically says in that case you have to do it.

MR. FULLER: Just under the general notice rules like you would any other deposition.

MR. DAVIS: Whatever I put in the notice, that's what it's going to be unless you change it?

CHAIRMAN SOULES: Right. At least you've given notice. Does that resolve this now?

Now, while David is here, because I know he has got an airplane, he and I have worked on this -- what is it?

MR. BECK: Canon 5 E of the Code of Judicial Conduct, specifically the problem was numbered Ethics Opinion 121 that we discussed yesterday.

MR. O'QUINN: Page reference, please.

MR. BECK: 21. I was asked to look at Rule 166, which is the pretrial rule, to see if there's some way we could fix that. And I mentioned to Luke that a very simple way we may be able to deal with it is to add a new subsection to Rule 166 which just simply says the settlement of the case, period. Because if you look at the introductory sentence, it talks about how the court may call the parties or their agents to appear before it for a conference to consider, colon, then it has a laundry list. And we would add here the settlement of the case, which makes clear that the court has the authority to get involved in the settlement of the case.

If you want to go further than that, what you could do is add a second sentence, which would say: To aid such consideration, the court may encourage the settlement of the case by conducting settlement conferences and by taking other reasonable steps necessary to facilitate settlement.

The problem is caused by this Ethics Opinion 121 that posed a hypothetical question. The hypothetical question was: May a district judge conduct settlement conferences where he only conveys settlement offers and asks questions? And the answer was that that was a violation of Canon 5 E.

CHAIRMAN SOULES: Okay.

MR. BECK: They do that all the time.

CHAIRMAN SOULES: Let's vote that up or down.

How many are in favor of that change? Say aye.

Opposed?

That passes.

I had one on Rule 3a. Where is that? David, I need you to concur with me here on Page 418. This business about Item 6 on the local rules.

David and I discussed this and worked out this language. We would say "No local rule or order or practice of any court other than local rules which fully comply with all requirements of this Rule 3a shall ever be applied to determine the merits of any matter." Then we would put in a comment that this rule does not limit the making of any order in any individual case.

MR. BECK: I agree with that.

CHAIRMAN SOULES: Is that acceptable?

Those in favor say aye.

Opposed?

Okay. Those were the things that David and I had on our agenda.

Does that complete the things that you were interested in? Okay.

Now let's go to discovery. We've got to get

that done.

MR. DAVIS: Could we take a little break?

CHAIRMAN SOULES: Yes, sir. Five minutes?

[Recess]

CHAIRMAN SOULES: Let's reconvene and talk first about this question of making a uniform standard regarding consultants. We've got three different standards, and they ought to be uniform.

Bill, can you speak first to that?

PROFESSOR DORSANEO: Yes.

Please open your first volume to Page 367. While you're doing that --

PROFESSOR EDGAR: Volume 1, Page 367?

PROFESSOR DORSANEO: Yes. Three standards, or at least one way to describe the three standards that are involved in the treatment of a consultant as a true consultant or as a discoverable consultant involve:

1. Whether the testifying expert "relied upon" the consultant's work in developing opinions;

2. To the extent this is different, whether the testifying expert's opinions are based in whole or in part on the opinions of the consultant; and

3. To the extent this is different, whether the testifying expert's opinions and impressions were developed after reviewing the consulting expert's

opinions and impressions.

The current rule provides in 2e what's indicated at the bottom of Page 367. And what is proposed is the addition of the language "or if the consulting expert's opinions or impressions have been reviewed by a testifying expert." If that's so, the consultant is fully opened up and arguments about whether or not what was reviewed doesn't form a basis or does form a basis are eliminated.

The last set of amendments, January 1, 1988, added the "reviewed by" concept into the last unnumbered paragraph of the exemptions, but there is still controversy about whether you can find out more than the identity of the consultant's work whose work has been reviewed by the testifying expert. COAJ proposes the additional language at the bottom of 2e to deal with that problem, on Page 368 a companion change to 3b, which is the exemption part, and that basically takes care of the first item.

MR. DAVIS: Move we adopt it.

CHIEF JUSTICE PHILLIPS: Question. I'm a little interested in the purpose behind this. It seems to me what you have here is you go out and you hire an expert and he comes back with something basically unfavorable to your case. So you go hire another

expert. And he comes back with something favorable. And the policy question is: Do we want the guy you're gonna hire, the guy you're gonna use, which is the fellow that has a conclusion favorable to yours, to be looking at the other report to see if there's holes in his report, so on and so forth? What this rule is going to say, if you are the lawyer, you don't let your new guy know about what the earlier fellow has done.

PROFESSOR DORSANEO: Right. Also, if you don't say it's discoverable, then you have the problem of the expert perhaps reviewing it and not disclosing that it's in his or her background.

CHIEF JUSTICE PHILLIPS: On cross he's supposed to do that. Yes?

PROFESSOR DORSANEO: That's the problem we're trying to deal with. 'Cause he'll say, "I reviewed it, but I didn't rely on it."

CHAIRMAN SOULES: We've got three standards. In 166b 3e this standard "reviewed by" is stated in those words.

In 3b we have "work product forms the basis of" as the standard.

And in the Texas Rules of Evidence, it's "made known to" is the standard.

And they all ought to be the same.

CHIEF JUSTICE PHILLIPS: Are they all looking at the same end?

CHAIRMAN SOULES: They're all looking at the same thing. Whether or not a consulting expert work product is immune from discovery or other use.

Now, the move has been to get --

CHIEF JUSTICE PHILLIPS: Of course, in 3e it's just the name, as Bill pointed out. Once you ever read it, you have to disclose the name.

CHAIRMAN SOULES: Right.

CHIEF JUSTICE PHILLIPS: Which then, I guess, with the payment of another thousand dollars, would lead to the information.

CHAIRMAN SOULES: This is an objective standard. If somebody has reviewed the work product, the other side gets to see it. The only way you can keep an expert's work from being discovered is to keep it totally pure. In other words, if you leave the consultant-lawyer environment, it becomes discoverable. So now you have an objective standard across the rules which is uniform. That's the purpose. Does that satisfy you as far as your understanding is concerned?

CHIEF JUSTICE PHILLIPS: I was trying to get a broader context of where this leaves us. I guess there is no good answer to this. So you just have to

make compromises.

MR. DAVIS: Search for truth.

CHAIRMAN SOULES: Any further discussion on this? Motion has been made to adopt it.

All in favor say aye.

Opposed?

It's unanimously recommended.

PROFESSOR DORSANEO: Just for the record, it's noted that the change would be in 2e (1), 2e (2), and 3b.

CHAIRMAN SOULES: And then Texas Rules of Civil Evidence 703 --

PROFESSOR DORSANEO: Please turn to Page 54.

CHAIRMAN SOULES: We've already done it. That did it.

PROFESSOR DORSANEO: Okay.

Next item. Please turn to 747 and 748.

CHAIRMAN SOULES: Bill, what page were you on for "reviewed by"?

PROFESSOR DORSANEO: 366. Actually, 367, I'm sorry, 368 and 369.

CHAIRMAN SOULES: So the changes shown on 367 were adopted and the change shown on 54 was adopted?

PROFESSOR DORSANEO: 367, continuing on to 368, not covering 369 at this point.

CHAIRMAN SOULES: Okay.

MR. DAVIS: That comes later?

PROFESSOR DORSANEO: Yes, I'm going to talk about that in a minute.

CHAIRMAN SOULES: 367, 368 and 54, then, are passed, so the record is clear on that.

PROFESSOR BLAKELY: In 54, there's a typographical error in the words --

PROFESSOR DORSANEO: The words "if of" on 54 go before the word "a" in the fourth line. The third word in the fourth line, "reasonbly," needs to be spelled with an "a" between the "n" and the "b."

CHAIRMAN SOULES: I've got those changes noted from yesterday. Okay.

PROFESSOR DORSANEO: That takes care of the first item.

The second item, which is on Page 747 and it also is repeated on Page 772, what I'm going to ask you to do is do this [demonstrating holding both pages of the booklet open simultaneously]. 747 and 772. And the reason will be clear.

Witness statements. Some clerical changes have been recommended by the Committee on Administration of Justice to the witness statements provision to conform the language of exceptions to one another. In

addition to that, an additional sentence for more than merely clarification purposes is recommended as reflected on 747 and 772, both, in order to avoid someone contending that a photograph is a witness statement.

CHAIRMAN SOULES: Because the Court has so held. Okay.

PROFESSOR DORSANEO: If a photograph is not a witness statement, it is not entitled to the exemption for witness statements --

CHAIRMAN SOULES: Makes it discoverable.

PROFESSOR DORSANEO: -- and is discoverable just like when a photograph is not a communication.

So I move those changes to the witness statements part of 166b, Paragraph 3.

CHAIRMAN SOULES: Discussion?

In favor say aye. All those in favor say aye.

No vote?

MR. DAVIS: What are we voting on?

CHAIRMAN SOULES: We're voting on the Paragraph c on Page 772.

MR. DAVIS: Okay.

MR. O'QUINN: Luke, is it true that the same changes appear on 747?

CHAIRMAN SOULES: Yes. Well --

MR. O'QUINN: Looks the same to me.

CHAIRMAN SOULES: Yes, they are. One came, I think, out of the Committee on Administration of Justice.

PROFESSOR DORSANEO: Trust me, John.

MR. O'QUINN: No, Bill.

PROFESSOR EDGAR: You've got to be kidding.

CHAIRMAN SOULES: I think the 72 series is easier to read because it's double spaced and it's just a little bit easier to see.

Okay, Bill.

Those in favor say aye.

Opposed?

Carries unanimously.

PROFESSOR DORSANEO: The next one, party communications, the first change is to correct a problem that is largely clerical. In the current version of the rule, a word was not included that should have been included. And the word that should have been included is "communications." All right? The current rule reads: "With the exception of discoverable communications prepared by or for experts and other discoverable communications between agents or representatives," et cetera, et cetera. There needs

to be another word, "communications," in there to identify what it is that this exemption is talking about. The change to remove "and other discoverable" makes the exception make sense; otherwise, it makes nonsense.

MR. O'QUINN: Would you tell me why it's nonsense? I'm getting lost here.

PROFESSOR DORSANEO: All right. Look at Page 772, please.

MR. O'QUINN: I'm looking at that.

PROFESSOR DORSANEO: Toward the bottom.

MR. O'QUINN: I'm looking at that.

PROFESSOR DORSANEO: If you read "d" from beginning to end, you will ultimately get the sensation that there is something missing, because there is no word that "d" is talking about. Because the operative word is "communications." And it begins "With the exception of," et cetera. And unless you take out "and other discoverable" you never have the word "communications" appearing as the key word in the entire exemption.

MR. O'QUINN: That's a change of substance, isn't it?

PROFESSOR DORSANEO: No. It's a change, as I said, that makes this make sense. Otherwise you have to

read in party communications, the title, at that point, in order to make it make sense.

PROFESSOR EDGAR: In other words, "communications" is not the subject of the sentence as it's presently constructed, is what you are saying, and it should be.

CHAIRMAN SOULES: That's correct. Grammatically it's now made the subject, which it's always been regarded, but hard to read.

PROFESSOR DORSANEO: As originally drafted, there was communications, communications.

CHAIRMAN SOULES: Anyway, this is just a fix, grammatical fix.

PROFESSOR DORSANEO: And other discoverable communications viewed as a separate and additional part of this "d" adds no meaning. So we can just take out "and other discoverable," leaving "communications," and it makes sense. That's the first adjustment. Should be noncontroversial.

The second adjustment, look at the language yourself and compare it, merely clarifies and conforms common concepts in the witness statement provision and the party communication provisions to each other. Not really a change of substance at all. Slight change of language.

CHAIRMAN SOULES: The "subsequent to litigation" and so forth was written two different ways. It never needed to be written two different ways. Everybody was trying to figure out why we wrote it two different ways. All this does is make them both exactly alike because the standards are exactly alike.

JUSTICE HECHT: I've got a question.

CHAIRMAN SOULES: Justice Hecht.

JUSTICE HECHT: Last time, you took out "in connection with the prosecution, investigation or defense of the particular suit" and replaced it with "in anticipation of the prosecution or defense of the claims made a part of the pending litigation." Right?

CHAIRMAN SOULES: Yes.

JUSTICE HECHT: And now we're putting it back in?

CHAIRMAN SOULES: You see -- let's see.

PROFESSOR DORSANEO: Yes. And I think that it really is there.

CHAIRMAN SOULES: Read the "Witness Statements." Go back over on Page 772 and start with the word "when." We struck through "if the statement was made." Starting there with "when" and stopping with "litigation." That language is in the witness statement part "c."

Now this "Party communications" in part "d" tracks "Witness Statements" word for word instead of saying something different.

PROFESSOR DORSANEO: In my view, if something is made in connection with the prosecution, investigation or defense of a particular suit, it is made in anticipation of the prosecution, investigation or defense of the claims made in the pending litigation.

MR. O'QUINN: You are saying it's not necessary language?

CHAIRMAN SOULES: I don't know. I think it is.

PROFESSOR DORSANEO: It's helpful language.

MR. O'QUINN: The cases talk about that a lot.

PROFESSOR DORSANEO: Yes. It's helpful language. It really does conform it to the --

MR. O'QUINN: I don't know whether this is a major point. Sometimes people get hung up on commas. There's no comma between the words "is based" and "in connection," but the way you do it in "d," you put a comma between the words "is based" and "in connection."

CHAIRMAN SOULES: Let me delete those commas. I apologize. I want them to be exactly the same.

PROFESSOR EDGAR: Your purpose here really is

not to change any operative bases for the application of the rule, but simply to make "c" and "d" consistent one with the other to make it clear that the standard is the same.

CHAIRMAN SOULES: That's right.

PROFESSOR EDGAR: That's all you're trying to do.

CHAIRMAN SOULES: That's all.

PROFESSOR EDGAR: Literally the same in addition to being realistically the same.

CHAIRMAN SOULES: That's right.

All in favor say aye.

Opposed?

Okay. That passes.

PROFESSOR DORSANEO: Mr. Chairman, let me ask you a question about this before I raise it.

CHAIRMAN SOULES: Okay. This is on Page 379. The COAJ has asked for an additional sentence.

PROFESSOR DORSANEO: I'm sorry to ask you to turn back again, but this is a COAJ proposal that is really the other half of the "and otherwise discoverable communications" deletion. On Page 369, the COAJ proposes adding a sentence between the sentence we just voted on and the last sentence of 3d to say that the party communication exemption does not include

communications prepared by or for experts that are otherwise discoverable. And I think that is a good statement because you shouldn't be able to rely on the party communications exemption if the expert material is discoverable under what 2e and 3b say.

PROFESSOR EDGAR: Doesn't that automatically follow?

CHAIRMAN SOULES: This may be redundant, but it makes clear that this is not to protect something that's otherwise discoverable. It doesn't hurt anything.

PROFESSOR DORSANEO: Plus it's consistently saying a photograph is not a communication.

PROFESSOR EDGAR: I have some concern about that, too, but that's all right.

PROFESSOR DORSANEO: So I move the adoption of that sentence from Page 369, based on the COAJ report.

MR. DAVIS: Where?

CHAIRMAN SOULES: Page 369.

MR. DAVIS: Where does it go?

CHAIRMAN SOULES: Do you see where the last sentence is in 772?

PROFESSOR DORSANEO: Actually on 773.

CHAIRMAN SOULES: Okay. Right there before

the word "for," this insert goes.

MR. DAVIS: Claims made a part of the pending litigation and that's the same?

CHAIRMAN SOULES: That sentence goes in there.

Any opposition?

Okay. That stands approved.

PROFESSOR DORSANEO: Mr. Chairman, I'd like to defer to you, because on the presentation of objections changes I think you can explain them more quickly.

CHAIRMAN SOULES: Okay. Thank you. Maybe you're right.

PROFESSOR DORSANEO: Pages 773 and 774.

CHAIRMAN SOULES: This is directed at the paper war and unnecessary paper and unnecessary hearings and this whole problem of where discovery has gotten bogged down so much in court appearances and everything you've got to do. If you object, you've got to file a motion for protection, you've got to support it with affidavits, you've got to request a hearing, and now you have to have a hearing just to preserve your objection and to keep from waiving it. That's what the law is now.

So anytime a lawyer files an objection to

discovery, even if he believes the other side's absolutely going to agree to it, he's got to do all that. We're doing it all the time. And it is generating paper and work and cost to litigants, and judge time. It's just crushing. And that is the biggest complaint of the discovery system. It may be the biggest complaint in the litigation system today.

MR. DAVIS: Just reversing --

CHAIRMAN SOULES: It reverses McKinney. Now, what does it do? It says if you object, you never waive that objection. That's all you have to do. You don't have to file any motions.

Now, suppose you object and you say it's attorney-client privilege. How does that get resolved? It can be resolved in depositions. You can find out who was there, you can find out what was said, what was the purpose of it, and if you think you can penetrate the privilege, you go to court and you ask the judge, "Here's my record and I want it." Or the other side concedes it and you never see a judge about it. Or the objection may be so obviously good that the other side never even pursues it. There's no judge, there's no time, there's no paperwork, there's no nothing.

A lot of these objections are really happening because the request is so broad that you're afraid

it may get something that you know is privileged, and if you don't claim a privilege you waive it. I think that's still good law. You ought to have to identify the things that you are taking the privilege to.

And so whenever you respond to a broad discovery request, you make the proper claims for protection in the future and the objections are there and you never have to do any more to preserve that. You never waive it, you don't run into McKinney.

Now, that was the way the rule would have been written today if this committee's recommendation had been adopted by the Supreme Court in 1983, becoming effective in 1984. But the Supreme Court didn't do it that way. I'm not saying one way or the other, but this is what we wanted, because all these other rules we took out motion for production -- remember, we used to have a motion to get documents. We've changed it to a request. We got the judge out of the loop. And the whole scheme of the 1984 discovery rules was get the judge out of the loop, let us handle it on our own until we have a problem. And this was a part of the SCAC's '83, '84 scheme. Now it's putting it back because it's not working.

What I think is working pretty good is, now that there are sanctions for hiding something and not

raising it and saying, "I'm protected," we're getting more openness in the discovery process. Because people don't want to suffer the sanctions that you suffer if you are not open and it finally does open up. The witness says, "Oh, yes, I wrote a memorandum." What is the case with the Houston police? Holman or something like that. That, I think, is good. We don't have as much trifling in the discovery process and the production process as we used to have.

And the other thing that we've got pretty well fixed, and we're going to do some more about that today, is: When you do have a hearing, how do you conduct it? A judge needs to look at some things, he doesn't have to look at other things. You've got to put on some evidence, it's burdensome, expensive. If we're not really having too many hearings, that's not really broken either. When you do have a hearing, from the initial production side, we've accomplished a lot. From how do you conduct a hearing when you have to have a hearing, we've accomplished a lot. But where we've really got a problem is in between that with all this I just spoke about.

What this does, then, once you do your objection, you're covered. That's the first part. Says: "Either an objection or a motion for protective

order made by a party to discovery shall preserve that objection pending any subsequent hearing, without further support or action by the party."

Then it says: "Any party may at any reasonable time set for hearing any objection or motion pertaining thereto."

And then it goes: "In objecting to an appropriate discovery request within the scope of Paragraph 2, the party seeking to exclude any matter from discovery on the basis of an exemption or immunity from discovery must specifically plead" -- that's still got to be open with what you are doing -- "the particular exemption or immunity from discovery relied upon and at or prior to any hearing shall produce any evidence necessary to support such claim."

You don't have to make an affidavit, but you have the burden at the hearing. If there ever is a hearing, it's your burden if you are seeking immunity or protection. Now a different thing picks up in here.

We should probably vote on this two ways, but I'll get the whole thing out. The next part says that a discovery hearing is a paper hearing.

PROFESSOR DORSANEO: No, not on this page.

CHAIRMAN SOULES: Well, it says, though, support such claim -- okay -- either in the form of

affidavits or testimony.

PROFESSOR DORSANEO: If you want to talk about that, Luke, it's on 748.

CHAIRMAN SOULES: Okay. I'll finish this, then. If the trial court determines that an in camera preview by the court, so forth. And the objecting party must segregate and produce the discovery to the court in a sealed wrapper as in camera --

MR. O'QUINN: I don't understand that.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: As I understand it, this seeks to broaden and to clarify the current Paragraph 4 by talking about not just documents but discovery.

MR. O'QUINN: That's easy, that's easy. But what are the words "oral answers"? That's where I get confused.

CHAIRMAN SOULES: Hold on just a second and let me straighten that out, if I can. What this does, right now the only in camera examination that's provided by the rule is in camera review of the documents. There is no in camera review of oral testimony. And that needs to be picked up in the in camera. And that's what this is written to do. I may have just dropped something here in the edit process. If the trial court determines an in camera preview by the court of some or

all of the discovery is necessary, the objecting party must segregate and produce the discovery to the court in a sealed wrapper.

PROFESSOR DORSANEO: On Page 748 it says "or by in camera oral answers."

CHAIRMAN SOULES: Or by. That's what that should be. Or by.

PROFESSOR EDGAR: In camera, comma, oral answers?

CHAIRMAN SOULES: No, that means the judge takes the witness back and gets the answers to the questions. Then the court reporter transcribes it. If he thinks that's privileged, it gets sealed and never seen unless it goes to an appellate court. So, if you can wrap it, you seal it; if you can't wrap it, the judge can hear the oral testimony.

MR. RAGLAND: Before you move on, Luke, three lines above that, is there any significance in using the word "preview" as opposed to "review"?

CHAIRMAN SOULES: Well, the concept there is the judge previews the discovery before the parties see the discovery.

PROFESSOR EDGAR: That's what in camera means, though, doesn't it?

CHAIRMAN SOULES: In camera means, I thought,

in chambers.

MR. O'QUINN: In secret.

CHAIRMAN SOULES: In secret. In secret preview. But a preview is meant to put it at a time as well as to describe an activity.

MR. HERRING: Luke, how does this work in a deposition shutdown? Just go to the courthouse.

CHAIRMAN SOULES: We go on, ask the questions, they take the privilege, you just don't get any answers, you go on and finish the deposition on what they do give you discovery on, then take the questions they didn't answer to the court.

MR. HERRING: Sometimes you've got people from out of town, you can go over and have a hearing right away.

CHAIRMAN SOULES: They do. Our judges are usually very responsive to that.

MR. HERRING: But on non-privileged matters, do you still have to have it reduced to writing?

CHAIRMAN SOULES: No, no. The judge can hear in camera oral answers.

PROFESSOR DORSANEO: We've also done it where the other side leaves and the answers are given and written down in the book and just not heard.

CHAIRMAN SOULES: Yes. That depends on how

careful you feel you really have to be. If it's something sensitive enough, you are not going to want to do it that way. It's out then. If you go get the court's own court reporter to do it, you've got more privilege.

MR. HERRING: If it's privileged and we're going to be here a week and they won't let me go into it, do I have to raise that by written record? I can't put on any testimony?

CHAIRMAN SOULES: I haven't gotten there yet. When I get there, the answer is going to be yes. And it may not be the right answer, but that's over on this other page.

JUSTICE HECHT: I hear what you are saying about a court reporter being present, but it doesn't specify here. Is it contemplated that any in camera hearing before the court would be on the record and the record sealed?

CHAIRMAN SOULES: Yes.

MR. O'QUINN: Would it be useful to explain that?

CHAIRMAN SOULES: Or by in camera oral answers to be transcribed?

JUSTICE HECHT: You may want to add a sentence and say any in camera hearing shall be on the

record and the record sealed, something like that.

CHAIRMAN SOULES: To be transcribed and sealed in the event the objection is sustained.

Then the last one, now, this just codifies the present law. Objections served after the date on which answers would be served are waived unless an extension of time has been obtained by agreement or order of the court or good cause is shown for the failure to object within such time.

So that's still keeping us back. Don't trifle. If you've got objections, make them, make them fully. Because if you don't, this preserves the sanctions. And we have managed to fix the first part that I was talking about, the integrity of production. That's this rule then.

MR. O'QUINN: Suggestion.

Go ahead, Bill.

PROFESSOR DORSANEO: Let me summarize. So really we have three things in this draft:

1. The first sentence, which is the principal way to deal with what I'll refer to as the McKinney issue.

2. The adjustments in the body, including the in camera oral answers.

3. The move of the sentence "Objections

served after the date" from Rule 168, 6, to this general rule, making it unnecessary to repeat that objections language in the other specific discovery rule.

The last one is the least controversial, because it's simply a move of language that appears elsewhere now.

MR. DAVIS: Are we starting on this now?

CHAIRMAN SOULES: Yes, sir.

MR. DAVIS: The first one, I guess on Page 773, Paragraph 4, I'm somewhat reluctant to reverse a Supreme Court opinion. I assume that's something they can take care of and maybe appropriately should take care of rather than us trying to take care of it in a rule change.

PROFESSOR DORSANEO: We're not reversing anything. We can make a recommendation to them and then see what they think is appropriate to do.

MR. DAVIS: You can call it what you like, but that's what in effect --

CHAIRMAN SOULES: The Court has got to adopt this. They've got to overrule their own opinion. We're not doing that.

MR. DAVIS: They're at least commenting on what they ought to do with their opinion.

CHAIRMAN SOULES: This is a real problem.

The courts have a real problem with this.

MR. DAVIS: I mean, there are some other opinions up there I'd like to get into and discuss, too, if we're going to start doing that.

CHAIRMAN SOULES: Okay. That's it.

Mike.

MR. HATCHELL: I have the same concern as Tom's. I applaud any move to undo McKinney, but I am afraid that I'm having problems understanding how this does that, because this sentence preserves your objection pending any subsequent hearing. It seems to me that's the problem, not the solution.

CHAIRMAN SOULES: Hearing thereon.

MR. HATCHELL: But that was the problem that was identified in McKinney. I see Justice Hecht is shaking his head. That's the problem. As Dorsaneo's text states.

PROFESSOR DORSANEO: Not my text.

MR. HATCHELL: Pending any hearing, your objection is good.

CHAIRMAN SOULES: I'll take that out.

MR. HATCHELL: And you don't have to answer discovery. The problem is, the case rolls along, nobody pushes it to fruition, and then you come to trial and the question is: Here we have an unanswered

interrogatory request. Who had the burden of getting that ruled on? And who suffers the consequences at this point?

CHAIRMAN SOULES: I agree. "Pending any subsequent hearing" should come out of this proposal for that reason.

MR. O'QUINN: In other words, what you are saying and what Mike is saying is that if one party makes the objection and nobody does anything and we show up for trial, the party that made the objection is going to prevail?

CHAIRMAN SOULES: That's right.

MR. DAVIS: Putting the burden on the non-objecting party.

CHAIRMAN SOULES: To get a hearing if he wants to have a hearing. You've got to get this done prior to trial. You can't show up at trial and have sanctions imposed because something didn't get done.

MR. O'QUINN: If this is a philosophical issue about who ought to have the burden to go forward --

MR. DAVIS: A lot of the rules put the burden on the objecting party. This turns it around.

CHAIRMAN SOULES: That's right. It does not put the burden on the other party to do anything except

get a hearing. But at the hearing, the objecting party has all the burden. If the responsive party doesn't care or acknowledges that your objection is good, there isn't any need for any burden on anybody. It just goes away. The court never becomes involved.

MR. DAVIS: Well, how does this fit with some of the case law under Peeples that said the objecting party had to request the hearing?

CHAIRMAN SOULES: Whoever wants a hearing has to ask for the hearing. If anybody wants a hearing. That is the change. But once there is a hearing, the burdens are the same as they are in Peeples.

MR. DAVIS: The burden of who they put the hearing on. If the objecting party wants to prevail, they must request the hearing. At least there's some law to that effect.

CHAIRMAN SOULES: There is.

MR. DAVIS: This seems to go contra to that.

CHAIRMAN SOULES: That's the purpose of it.

MR. DAVIS: Contra to the present law as it now exists.

CHAIRMAN SOULES: That's the purpose for doing it.

MR. O'QUINN: What Luke is saying is there's a real good reason for doing it, Tom. We're manu-

facturing a lot of unnecessary work because the guy making the objection is terrorized by our sanction rules to think if he doesn't do everything in apple-pie order instantly he's going to waive his objection. What results is a lot of things get objected to, affidavits filed, hearings set in rapid-fire order. Maybe what might happen is somebody might make an objection, the lawyers might get together, it might go away, they might do something different. That's Luke's point of view. I happen to agree with it. But the opposite --

MR. DAVIS: He might not do that.

CHAIRMAN SOULES: That point was made. And the response to that is, it can't minimize objections. Because today, within the 30 days that you have to make objections, you better make every conceivable objection or you waive it.

MR. O'QUINN: Still have to make them.

CHAIRMAN SOULES: The compulsion to make objections is not going to be changed by this.

MR. DAVIS: If you know you have to get a hearing and present evidence, you may not make as many.

CHAIRMAN SOULES: You still can't run the risk of waiving your client's rights.

MR. SADBERRY: It's a burden of going forward --

MR. O'QUINN: To my mind, we're reversing the current situation where the objecting party has to go through all this great amount of work. And we have to decide if that's what we want to do. Luke, to me, has made a compelling argument that we should change.

MR. DAVIS: Does this also mean where, in the Peeples situation, that says the objecting party has to set a hearing, are we reversing that now and saying the non-objecting party is the one who has to get the hearing as requested?

CHAIRMAN SOULES: Either say can.

MR. DAVIS: Can. But I mean must.

MR. O'QUINN: As a practical matter, yes. Because if he doesn't, then the objection just remains good and you go to trial without your discovery.

PROFESSOR EDGAR: Let's think about this. I can't give you a fact situation, Tom, but let's assume that we have an objection and the non-objector really doesn't care one way or the other. So then the objecting party does nothing, because the other party doesn't care. And then at trial the party who said "I didn't care" by failing to object, now says, "Okay, you didn't object; therefore, you can't do whatever -- you didn't get a hearing."

MR. DAVIS: Let me carry that on with you.

If I think you don't care anything about that objection, why don't I just ask you, "What's your objections here? Do you really care about these? Or can we just assume they're good and go on about our business?"

MR. RAGLAND: There's some of them --

MR. DAVIS: And then, if they won't agree, I guess you've got to go through a hearing. My objection is reversing the burden. I think it ought to be onerous on the one that's resisting discovery and not put it on the other side.

CHAIRMAN SOULES: Any other discussion?

MR. DAVIS: And I like the present law like it is and don't think we ought to be changing it.

PROFESSOR DORSANEO: Can we vote the philosophical issue and then see about the language and placement of it?

MR. RAGLAND: I have a comment. It may be picky, but where you use "preview," Page 774, all the discovery stuff that I'm accustomed to, anyway, uses "inspection and review." "Preview," to me, sounds like some sort of ex parte deal. I think the use of "preview" here is worth at least six appellate opinions.

CHAIRMAN SOULES: Okay. "Inspection and review"? Tom, I'll accept that. "Inspection and review" in the place of "preview."

MR. O'QUINN: One other minor change. At the top of Page 774, where you have the words "set for hearing," since the court sets hearings, I think it should be "request a hearing."

CHAIRMAN SOULES: Request a hearing. That's a good suggestion. I'll adopt it.

Anything else?

Okay. Those in favor say aye.

Opposed?

MR. DAVIS: No. What are we voting on?

CHAIRMAN SOULES: We're voting on 773, 774 and 775.

PROFESSOR DORSANEO: If we're going to vote more than concept, that sentence is still not good enough.

CHAIRMAN SOULES: All right. What needs to be -- "pending any subsequent hearing" was deleted.

PROFESSOR DORSANEO: The reason why you put it in there, I'll bet, if you think about it, is because of a thought that goes something like this: Unless the objection is heard or ruled upon at a pretrial hearing, overruled at a pretrial hearing. That's what pending meant. We need to get in the notion here that if the objection is made and it's not presented, nobody thinks enough of the matter to pursue the issue, that it's a

nonissue in the case, not that the objection is waived.

MR. SADBERRY: You've got to do that after the hearing sentence, I believe.

PROFESSOR DORSANEO: I would put it at the very end of this whole shooting match.

MR. SADBERRY: If there's no question, the question --

PROFESSOR DORSANEO: If no party requests a hearing or something like that on an objection that is timely made during the pretrial phase of the litigation --

MR. SADBERRY: The objection is not invalid or overruled or something like that. You don't lose the value. It's not held against you.

PROFESSOR CARLSON: Something like until such time as such discovery objections are overruled by the court.

MR. SADBERRY: Also, failure of the party to make the objection. That's really what he is saying.

CHAIRMAN SOULES: What is that, Tony?

MR. SADBERRY: I think it comes after the sentence "any reasonable time request a hearing." I think it comes after that. Failure to make the objection.

CHAIRMAN SOULES: Okay. We need to insert

something, then, after the underlying portion on the second line of Page 774. And that should be what?

MR. O'QUINN: What's the subject?

CHAIRMAN SOULES: The subject is, we don't want to say that "the objection preserves," that the making of the objection preserves that objection, period, because the judge may overrule it. So what we've got to do is put something in there that will take care of that, I guess.

JUSTICE HECHT: You want that overruling to preserve it on appeal, don't you?

CHAIRMAN SOULES: Yes.

PROFESSOR DORSANEO: I guess you really want it to be subject to be ruled upon at trial. It's not waived pending dealt with at trial.

CHAIRMAN SOULES: I don't understand why pending any subsequent hearing, at least that doesn't fix it. Because we go on later and say, if there is a hearing, all the burdens that have to be discharged.

MR. O'QUINN: What's wrong with the words "pending"? I don't understand why they're bad words.

CHAIRMAN SOULES: Well, McKinney says pending any subsequent hearing. But if you don't have a hearing, you waive it. When trial starts, you've waived it

because you didn't get a subsequent hearing.

MR. O'QUINN: You think that gets us back into McKinney?

CHAIRMAN SOULES: Yes. That's what Mike was saying. And I agree with him.

PROFESSOR DORSANEO: How about this concept? If a pretrial determination of an objection or a motion for a protective order is not obtained -- really, the objection is preserved for determination at trial. That's really the idea, isn't it? Isn't that the idea in the dissent?

CHAIRMAN SOULES: Either an objection or motion for protective order made by a party to discovery shall preserve that objection unless that objection is set for hearing by either party. And without further support or action by the party making the objection.

JUSTICE HECHT: Don't you preserve it anyway? I mean, you don't want to have a hearing and you lose and you also lose your objection. You can't complain on appeal that your objection got overruled.

MR. RAGLAND: But your error would be the court's ruling on the hearing, wouldn't it?

MS. DUNCAN: You're going to have to have a ruling on that objection before you get the discovery.

CHAIRMAN SOULES: Unless the objection is

overruled, the discovery shall not be allowed. Unless the objection is overruled, the discovery shall not be allowed.

MR. HATCHELL: Still doesn't get you --

MR. O'QUINN: Doesn't do what, Mike?

MR. HATCHELL: Doesn't get you past the question of who has the burden.

CHAIRMAN SOULES: The burden at the hearing? The requester.

PROFESSOR DORSANEO: Failure to present objection or obtain ruling before trial does not waive the objection unless the hearing was requested by --

MR. HATCHELL: Can I offer just maybe a -- I don't have any language, but I think there is real brilliance in the notion that either party may do this, because casting that dual burden has the automatic effect of putting upon the party who ultimately complains on appeal the burden. So I wonder if you could work on that sentence.

CHAIRMAN SOULES: Where is it?

MR. HATCHELL: Top of 774. I think that Rule 52 (a) really works in conjunction with this and puts the burden on the party who ultimately wants to complain on appeal to request the hearing and get the ruling, although McKinney uses 52 (a) just backwards.

MR. O'QUINN: Mike, why would the objecting party ever need to request a hearing?

MR. HATCHELL: Well, I'm not sure why.

MR. O'QUINN: I can't think of an example.

MR. HATCHELL: I perceive that there are actually three types of discovery requests involved here, though, and that's why this is very complicated:

1. The McKinney-type example, which really the burden probably ought to be on the objecting party.

2. Then there are some, like "Give me a witness list," that really ought to be on the discovering party.

3. Then a whole bunch of things in the middle where the party who ultimately wants to appeal or complain ought to have the burden.

But I think you're probably right.

MR. O'QUINN: I don't see how you get to No. 3. Because if you have it the party that wants to complain --

MR. HATCHELL: I think if you preserve an objection by this rule you're probably right.

MR. O'QUINN: But if you have an objection and no ruling on it, the only person that could conceivably complain is the one that did not get his discovery.

CHAIRMAN SOULES: I know if I were going to go to Minneapolis tomorrow to give a deposition and I had a troublesome objection that I had made and I had you on the other side and we went up there and we got into an argument about the validity of that objection and I don't give you discovery and come back down here and that objection then gets overruled, I'm going to get sanctioned and you're going to get some money. And, you know, where you make an objection and you're exposed to problems as a result of that objection, I think you would set that objection as the objecting party. If you need a ruling. I may need a ruling on that before we go forward.

MR. O'QUINN: Fear of sanctions.

CHAIRMAN SOULES: For fear of sanctions, just because I need to tell my client how to prepare for a serious deposition and whether or not they're going to have to make that production that conforms to a duces tecum. And you may agree that the objection is okay, so we don't worry about it. You may say, "I read your objection and I intend to pursue that vigorously when we get to Minneapolis. You better get a hearing." I don't think it's necessarily --

Justice Hecht.

JUSTICE HECHT: I hate to interrupt the

discussion, but the management has advised us that there is a wedding in this room this afternoon and we have to vacate within the next 20 minutes. And I know we're not done. The State Bar Building is closed for Memorial weekend. So you're welcome to use either the Supreme Court courtroom or the conference room. The conference room obviously is a little smaller, but maybe a little more comfortable. And the courtroom is larger. It's up to y'all, whichever one you want to use.

JUDGE ROBERTSON: Is there air conditioning today?

MR. DAVIS: Will we all fit?

JUSTICE HECHT: There's 20 people here. There are plenty of chairs. It's probably easier to fit in the courtroom.

MR. HUGHES: Is the air conditioning on?

JUSTICE HECHT: Yes.

CHAIRMAN SOULES: Before we leave, let me see if I can fix this by adding this sentence. "Any party may at any reasonable time request a hearing on any objection, but the failure to request a hearing shall not constitute a waiver by any party." That just puts it right there where you can request it, but the failure doesn't constitute a waiver. "Any party may at any reasonable time request a hearing on any objection or

motion pertaining thereto, but the failure to request a hearing shall not constitute a waiver by any party."

MR. COLLINS: Luke --

MR. DAVIS: Let's recess and get on over there.

PROFESSOR DORSANEO: I like my sentence better.

MR. O'QUINN: Do you want to try to get this one thing nailed down?

CHAIRMAN SOULES: Yes, that's what I want to try to do.

Is there any further discussion on this?

MR. COLLINS: Yes.

MR. DAVIS: Yes.

CHAIRMAN SOULES: Okay. We'll move and then discuss it.

[Recess]

[The proceedings resumed in the Supreme Court Building]

CHAIRMAN SOULES: Hadley suggests that we add the sentence -- he doesn't say where -- "The failure of a party to obtain a ruling prior to trial on any objection to discovery or motion for protective order," either does or does not constitute waiver of the objection.

PROFESSOR EDGAR: Or motion.

CHAIRMAN SOULES: Or motion.

PROFESSOR EDGAR: It seems to me that you could say it that way and then vote up or down the philosophy of whether it does or does not constitute a waiver.

CHAIRMAN SOULES: And you, I guess, would put that right there where it says --

PROFESSOR EDGAR: Put it anywhere you want to. I was just trying to draft a sentence that would take care of the problem either way.

CHAIRMAN SOULES: I don't have any problem with that.

MR. DAVIS: Voted for or against --

PROFESSOR EDGAR: I'm simply saying if you do that, you can draft it either does or does not constitute a waiver.

MR. O'QUINN: That kind of modifies McKinney a little, doesn't it? You don't waive it by not asking for a hearing immediately.

CHAIRMAN SOULES: But if you say it constitutes waiver, then the judge is going to have to get involved. Somebody is going to have to ask, regardless. If you say it does not, then the objection is preserved until somebody --

MR. DAVIS: Or if they don't get a ruling, then the objection is no good. They don't necessarily have to get a ruling. They may decide they don't want their objection anymore.

MR. RAGLAND: Read it one more time.

CHAIRMAN SOULES: I'm going to read it "does not."

"The failure of a party to obtain a ruling prior to trial on any objection to discovery or motion for protective order does not waive the objection or motion."

MR. RAGLAND: How can you waive a motion?

CHAIRMAN SOULES: Well, of course, you can object -- you can contest discovery either by a motion for protection or by objection. So this says either way the lawyer does it he's got that point.

MR. RAGLAND: But the error on a motion is the court's ruling on his motion.

MR. DAVIS: You waive your motion and then the same --

CHAIRMAN SOULES: On grounds of the motion?

PROFESSOR EDGAR: You can waive your motion, can't you? I would think you could.

MR. DAVIS: Do we get an affirmative submission, too?

[Laughter]

CHAIRMAN SOULES: You may. You may object, request, vote, all kinds of things, Tom. I love it.

This is acceptable to me, to go in there where I had tried to underline that phrase or clause.

PROFESSOR DORSANEO: The difficulty that I have, and I think we need to talk about it, is what that means. In the context of this kind of a problem, I think I know the answer. If somebody has made an objection, in whatever form, that I'm not going to disclose this to you, it's privileged by the attorney-client privilege, and the same question comes up at trial, the objection ought to be available at trial, arguably, on the same basis and dealt with then.

If somebody tries to introduce a document that wasn't produced, let's say a deed, in response to a request for production and there was an objection made during the pretrial stage about that deed, presumably in the right form, should the person who made the objection be able to introduce the deed without getting a pretrial ruling?

My answer to that would probably be yes, assuming they made the objection, the objection was a viable objection, and all of the rest of it. Because in a sense what the other person has done is to review the

objection and say, "Well, I guess that's good." Now, I don't know how it could be good, though. In my mind, if it's relevant in the trial sense, I don't know how it could be good. But still the other side didn't pursue it. I suppose they would have their own reasons. And that's the hard question. That's the hard one for me.

CHAIRMAN SOULES: Isn't that like you didn't produce? You didn't produce for whatever reason? You hid it, you objected to it --

MR. DAVIS: You didn't have to hide it, but you did.

CHAIRMAN SOULES: And now you want to use it. You're precluded from that.

PROFESSOR DORSANEO: That really is McKinney, in my view.

CHAIRMAN SOULES: McKinney, in my view, is this: I assert attorney-client privilege and objection prior to trial and I go to trial and I've never had a hearing on that. And the other side puts my client up on the stand and goes right into attorney-client privilege and says, "Buddy, you've waived the attorney-client privilege because you never had your motion heard." And that's what's coming on the heels of the McKinney decision. That's the next step.

PROFESSOR DORSANEO: That's the one I like.

I have an easy answer to that one.

CHAIRMAN SOULES: What is it?

PROFESSOR DORSANEO: The objection should be able to be made in trial.

CHAIRMAN SOULES: No, you waived it in discovery because you didn't get a hearing.

MR. O'QUINN: Wasn't a discovery objection. I never knew that that argument --

CHAIRMAN SOULES: How far does it go? It's right there on McKinney, right there on the face of it.

MR. DAVIS: But this rule as you have it drawn also covers the situation where you do not disclose something or do not produce something. You object. You didn't have to, you had the legal right to and you exercised it. You objected and held it back. Then we come to trial and you say, "Okay, here it is." You offer it because you didn't produce it. And I complain, "No, wait a minute. You should have gotten a hearing on that. That objection is now good, because you didn't get a hearing." And therefore he can use it.

CHAIRMAN SOULES: You have to supplement discovery responses 30 days ahead of trial. And a response is an objection. And you have to supplement that as well. Should be the ruling. If you are going to withdraw an objection and produce a document that was

sought in discovery, that needs to be done. That fits the rules.

MR. O'QUINN: You say the document would be excluded at sanctions --

CHAIRMAN SOULES: Exactly.

MR. O'QUINN: See, that's the solution to Tom's problem.

CHAIRMAN SOULES: Right.

MR. HATCHELL: Shouldn't we do it more in terms of a functional basis? What would really happen, the party who objected suffered in discovery sanction for not answering when we think he didn't have to answer. Shouldn't we draft it more in terms of "A party will not suffer discovery sanctions"? Or am I off base?

PROFESSOR DORSANEO: But the sanction is not a discovery sanction in the conventional sense, it's the inability to be able to use something that was held back at trial.

MR. HATCHELL: That's why I thought it would drive around your problem.

PROFESSOR DORSANEO: I don't think you can drive around the problem. I think it is the problem.

MR. DAVIS: Back to your situation on your client, attorney-client privilege, I mean, if you were really sincere in that and it was really important to

you, I don't think it's too much of a burden for you to get a ruling on it before you go to trial. I mean, I think you would want to know before you went to trial whether it was going to be admissible or not.

CHAIRMAN SOULES: That really puts it to the issue. Does a lawyer, every time he makes an objection, have to get a ruling or be in a waiver situation, at trial, of that objection?

MR. DAVIS: Or get an agreement of counsel.

CHAIRMAN SOULES: What I'm trying to do is reduce the make work, reduce the make paper, get it down to where it's an objection. Once you do that, nobody has got a waiver situation. Now, that doesn't get you out of the duty to produce something that you expect to use at trial. There are sanctions if you don't do that. And they're not limited to you didn't produce it because you were making a claim or it was in your desk drawer or it didn't show up. It's just absolutely that way. You can't use it at trial unless you supplement.

MR. DAVIS: There's one addition to that. You're talking about the objections that he made that he waived. He may not want to rely on half of them now by the time he gets to trial. So he doesn't care. It's only those that he intends to rely on and wants to rely on to keep out the testimony or not produce the document

or whatever it is. It's only those that are important to him that he wants to rely on that he better be getting under the law as it is now, getting a hearing on. And I don't think that's too much of a problem. It doesn't mean he has to get a hearing on every single objection he files. He may not want to rely on every single objection. But if he does, then I say the burden ought to be on him to get the hearing. But it doesn't necessarily mean it's going to be every objection he makes. Normally, in the normal course of action, about 75 percent of them don't make a bit of difference in the world. And by the time you get to trial you're not worried about them anyway.

CHAIRMAN SOULES: But the course of discovery goes all the way through the trial. John honors my claim of attorney-client privilége all the way through. He agrees. And then we get to trial and under McKinney I will have now waived that because I never got a hearing on it.

MR. DAVIS: No, if he agrees it's valid, then I don't think you've got any problem.

CHAIRMAN SOULES: Course of conduct --

MR. DAVIS: You can get a stipulation. If he thinks it's valid, you can get him to agree to that.

CHAIRMAN SOULES: Are we going to put the

lawyers of the State of Texas to that safeguard?

MR. DAVIS: I say if you are going to rely on it, you ought to get a hearing and get it disposed of. If not, you don't have to worry about it.

CHAIRMAN SOULES: Both sides are stated. It's just a question of: Are we going to do the paperwork or are we not? What's the best solution for the rules to provide, we think?

MR. COLLINS: I'd like to hear from -- where is Judge Hecht?

JUSTICE HECHT: Right here.

MR. COLLINS: I'd like to hear from you and Judge Keltner. Y'all have been on the trial bench and y'all have hassled with those discovery things. What's the easiest way to handle that from a trial judge's perspective?

JUSTICE HECHT: Well, I wrote the dissent in McKinney. So I'm on the record. As Bill Edwards told me down in Corpus Christi the other day, he said, "I typically get asked in a case, 'Please identify every witness and every document and tell every fact you know in support of all the allegations you make in Paragraph 1, Paragraph 2, Paragraph 3, Paragraph 4.' And I typically object to all those requests on the grounds that they're vague and burdensome and improper under the

rules and they're not entitled to that kind of discovery. And typically the other side doesn't do anything about that and we go on about our business, we go on about legitimate discovery and noticing depositions and so on. But," he said, "I don't want to have to remember that I got asked that question at one point and I made that objection at one point and I've got to go now, before I start to voir dire the jury, get a ruling on that objection. Otherwise I put the first witness on the witness stand and I say, 'Now state your name, sir.' And then you say, 'What happened on the day in question?' And the other side says, 'I object, Your Honor. I asked him that question on interrogatories when this case first started and he never did answer it and he objected to it and now the trial has started and he has waived his objection.' And I object to him putting on any evidence about the facts of this case because he's never supplemented his answers to my interrogatories and he has never gotten a ruling on objections."

He says, "That's just a waste of time." It happens all the time. But lawyers make all kinds of objections just out of an abudance of caution that they don't ever intend to really get a ruling upon or rely upon, and have to, either, No. 1, go back all through

your discovery over the years and try to remember what all those objections were and go in before trial, like a motion in limine, and say, "Judge, I've got 86 objections here and I need your ruling on them" or else to try to get the other side to enter into a binding agreement, because it's going to have to be binding under the rules, which means it's either got to be on the record or in writing, signed by both parties. It's just a waste of time.

If somebody wants the information and they request it and the other side objects and you still think you are entitled to the information, then you go to courthouse and you say, "Give me the information." And the judge rules on that request and objection. If the objection is frivolous, then 215 clearly provides for sanctions for making frivolous objections. And you just ask the judge right then and there, you say, "Judge, this was a frivolous objection, he's making me waste my time and yours both by coming down here for a hearing, and I want some sanctions for coming down here." And you can take that up under Rule 215. It's specifically provided for. Otherwise, the parties just go on trying to do the best they can through discovery, hopefully most of it by agreement, without taking up time preparing motions and getting rulings on them.

MR. DAVIS: Well, doesn't he disclose the names of those people sometime, someplace, somehow before trial? Surely he doesn't go to trial without ever telling them anybody.

JUSTICE HECHT: He doesn't answer the question. He doesn't answer the interrogatory.

MR. DAVIS: But somewhere, somehow, in a pretrial order or supplement, I don't think he's going to run the risk of not disclosing the people that he's going to use for --

JUSTICE HECHT: That's what McKinney is.

PROFESSOR DORSANEO: Why isn't that objection frivolous if he is supposed to identify persons having knowledge of relevant facts?

CHAIRMAN SOULES: He said witnesses.

MR. COLLINS: Witnesses and persons are different.

CHAIRMAN SOULES: So now those of us who are smart enough, we won't ask persons with knowledgeable facts, we'll ask issues. The objection is made, never presented to the court. I say, "Judge, he can't put on any witnesses. He asked the question, but he didn't have a hearing. He made the objection, but he didn't have a hearing. McKinney got him."

PROFESSOR DORSANEO: My objection would be

frivolous if I said it's not relevant to any issue in the case and ultimately I'm trying to introduce it to establish that something is separate party in a divorce case. So what would happen to me in that situation is that I would presumably try to introduce the deed, there would be a complaint that it wasn't produced, I would say, "But I had an objection that is preserved," and the judge would say, "Well, what is the objection?"

JUSTICE HECHT: You would say, "It's not relevant."

The judge says, "It's the touchstone of the case."

You say, "Yes, but I had a good objection and they never got a ruling on it."

The judge says, "That's abusive discovery. You can't introduce the whole key to this case at trial when you didn't produce it to valid request during discovery."

PROFESSOR DORSANEO: I propose my little additional language, because it will work.

MR. O'QUINN: How can you tell the judge that it was lack of relevance at your objection to discovery but yet it's relevant to become evidence?

PROFESSOR DORSANEO: I can't. When I try to do that, what I'm really doing is delaying the present-

ation of my objection, which wasn't good before and is clearly not good now, given what I'm trying to do, and I really don't have an objection anymore. I have waived my objection, which wasn't any good to begin with.

MR. O'QUINN: But you got the benefit of the surprise, I guess. You got to put on your evidence right then without seeing it beforehand.

JUSTICE HECHT: But the risk in McKinney is that you are going to get asked all kinds of onerous and clearly objectionable requests for discovery, you are going to object to those over the long course of preparing for trial, you are going to forget to get a ruling on one of them, and you are going to try to produce that evidence at trial, and you are going to be met with the contention that you never got an objection, you waived that, and therefore you cannot act in derogation of it.

MR. DAVIS: If that evidence is important to you, then you are not going to forget it.

JUSTICE HECHT: Well, if I ask you enough --

MR. DAVIS: You're going to forget that that's unimportant, maybe.

JUSTICE HECHT: If I ask you enough ridiculous questions, you may forget some of them, particularly over the course of time.

MR. DAVIS: If you ask me my witnesses who have knowledge of a claim, I'm not going to sit back and never get a ruling on that.

JUSTICE HECHT: You're not? I would like to know one lawyer who tells me that he objects to interrogatories and then immediately sets them for hearing and goes down there to stand on his objections and gets a ruling on it. If you are asking for my trial experience, the guy that came in asking for discovery was the guy that was opposing the objection, not the guy that was making the objection. And the fellow who had made objections had made about 50 of them. And the requesting party was challenging about three. And he said, "Well, I agree to all these others, Judge. I just want a ruling on these three." And all the other 47 went away. That's the way I think it works in real life.

MR. DAVIS: I think the issue is drawn.

PROFESSOR DORSANEO: I think we need to say that the objection is going to be what's at issue at trial, and that the person who made the objection earlier on continues to have the -- I think it would be immaterial that the person continues to have the burden to be able to sustain the objection. And if they can't sustain it at trial, then the other side doesn't lose

whatever benefit they should have obtained by getting discovery.

MR. O'QUINN: What you are saying is: Objection is not waived by failing to before trial, nor is it sustained offhand.

PROFESSOR DORSANEO: When I try to introduce that deed and I try to say, "Well I made a relevance objection back there and it wasn't ruled on, so it was good," that's not the result.

CHAIRMAN SOULES: This hearing that's described that takes place when somebody requests it doesn't have to take place prior to trial.

PROFESSOR DORSANEO: I say this to put it on the record. I propose this: "If no pretrial hearing is requested by any party to determine the validity of an objection to discovery, the objection is not waived and, if appropriate, may be presented and ruled upon at trial."

The idea there being that the burdens would be the same, and if it comes up at trial because somebody tries to introduce a deed or call a witness when they haven't responded to an appropriate discovery request, you know, not one that was objectionable and objected to, that they wouldn't be able to prevent it. They wouldn't be able to call a witness or introduce the

deed, because they really never did have an appropriate objection.

MR. COLLINS: Well, what if your objection to the deed was good during discovery, you had an attorney-client privilege or something like that, and then suddenly during the development of the trial it comes out that there's something in this deed that you desperately have to get in evidence that you didn't anticipate? Can you then get it in?

PROFESSOR DORSANEO: This would still work. Because it just says the objection is not waived, it's presented at trial, and if you have a basis for sustaining it at trial, which --

MR. COLLINS: But you were the one objecting to the discovery of the deed, though.

CHAIRMAN SOULES: I don't think that's right, Bill. I think it's a completely different set of procedural rules that apply in that circumstance. You've got to now show good cause. You did object. So you don't have to show good cause for failing to object, but why you didn't take care of this problem in advance of trial and give everybody notice of this evidence.

Do you agree with that, Judge Keltner?

JUSTICE KELTNER: I think that's absolutely right.

CHAIRMAN SOULES: So all this really does is put the cooperation, what's going on out there in the real world that we talked about, down in the rules. And nobody loses anything by not going and spending a bunch of court time and paperwork. And that will have to do, under McKinney, with a lot more far-reaching things.

This language Hadley has says "Failure of a party to obtain a ruling prior to trial on any objection to discovery or motion for protective order does not waive the objection or motion."

MR. DAVIS: Doesn't grant it, either.

CHAIRMAN SOULES: Doesn't grant it.

MR. DAVIS: It's still open for discussion from either side.

CHAIRMAN SOULES: And if it turns out in trial that something has been hidden behind the objection, you did get a ruling on it. Or you might not. But, I mean, that's taken care of by the trial judges right now. That's not anything that's not going on. Are we ready for a vote?

PROFESSOR EDGAR: That should be "the failure of a party."

CHAIRMAN SOULES: "Failure of a party to obtain," okay. This would go right here under the underscored portion of the top two lines of 774.

PROFESSOR CARLSON: Do we want to leave that that broad or do we want to limit it to a privilege of claim and exemption?

CHAIRMAN SOULES: No, anything.

PROFESSOR DORSANEO: It's hard for me to see how the protective order part wouldn't be something that should be presented during the discovery phase, as opposed to or as distinguished from an objection.

CHAIRMAN SOULES: They may look at the protective order and agree it's good. Why use court time and witness time and all going over and presenting it and doing a Peeples hearing, Peeples two-step, when everybody agrees it's okay? That's the response. I don't know whether it's --

MR. DAVIS: You've presented it both ways?

CHAIRMAN SOULES: I'm adopting it as it does not waive.

MR. COLLINS: I drafted a little sentence here as to what your original sentence on Page 773 and 774 means is: That all discovery objections are good unless the trial court overrules them, period. Now, that's the effect of it. Just as long as we know what we're doing.

CHAIRMAN SOULES: At or prior to trial, that's right. That is the effect of it.

Those in favor of these changes show by hands.

MR. DAVIS: Just the waiver.

CHAIRMAN SOULES: Let's vote on the waiver aspect. Those in favor of the no waiver for failure to have a hearing and whatever.

Ten in favor.

Those against? Two.

10 to 2 to have no waiver.

PROFESSOR DORSANEO: Just for the record, again, personally I would suggest that it be spelled out what that means. Otherwise, we're going to run into difficulty with some of our 14 courts.

CHAIRMAN SOULES: Now, then, on the other aspects of this, I presume the question of --

PROFESSOR EDGAR: Where does that go?

CHAIRMAN SOULES: Let me clarify that. That takes care of 4 as it begins on 773, goes down to the end of the underscored portion, with this inserted at that point. And it stops, I guess, at the end of this.

PROFESSOR EDGAR: It just seems to me, Luke, when you are talking about -- the presentation of objections starts out by saying what you've got to do in order to preserve certain things. And then it seems like logically "the failure to do it constitutes waiver"

ought to go at the end. Now, I'm just thinking out loud, but aren't you putting the cart before the horse if you --

CHAIRMAN SOULES: The reason that I wanted to put it here was you say "either party can have a hearing," but then you say "if you don't, you don't waive anything." That's why I thought it went here, because it would have the point/counterpoint there in successive sentences.

MR. DAVIS: This is Paragraph 4 on 773, 74 and 75?

CHAIRMAN SOULES: Right. But we haven't voted on that part that stops at the end of this sentence --

MR. DAVIS: I'm saying those are the pages because of the Paragraph 4 --

CHAIRMAN SOULES: Yes.

MR. DAVIS: I want to make sure which ones we're dealing with.

CHAIRMAN SOULES: That's right. Those are the ones. Then the next matter just sets forth the burdens that now exist and the practice that those burdens be discharged either by affidavit or by testimony.

MR. DAVIS: I have a comment on that part.

CHAIRMAN SOULES: Okay.

MR. COLLINS: What page are you looking at now?

MR. DAVIS: 774.

CHAIRMAN SOULES: 774.

MR. DAVIS: Talking about "produce evidence necessary to support such claim either in the form of affidavits or testimony."

CHAIRMAN SOULES: What we're looking at right now to vote on is from the word "in" in the second line of 774 to the end of that sentence and before the stricken-out part begins.

MR. DAVIS: I want to address the idea of meeting your burden to show privilege by use of affidavits. I think that is a very unfair situation. You have investigative privilege. They'll come in and claim investigative privilege, that, "We did this and we investigated in anticipation of this suit and so forth." They are the sole possessors of the knowledge of what they did. I mean, this is evidence that is solely within their possession. And I don't think they ought to be able to establish that burden by just an affidavit, because, frankly, they're the only ones that can prepare an affidavit. Not only can I not cross-examine their affidavit, but I don't have the

information or facts available to me to submit an affidavit from my side contesting it. You can't contest it either by cross-examination or by counter-affidavit. You're hopeless, I think. They ought to have to do it by live testimony. At least you get a chance to cross-examine and the court then at least has both sides of the issue instead of one side. And that's what's happening. They're coming in the day of the hearing with these affidavits. You don't even have a chance to take the deposition of the people. So I would suggest that this burden to establish a prima facie privilege have to not be allowed by affidavit.

CHAIRMAN SOULES: The counterpoint on that, Tom, is that showing up at the last minute with affidavits is not being addressed in these comments that I'm about to make.

Affidavits -- you can take a deposition and contest those affidavits, if you have time. If you have time. And that would be a cost saver. Because you're going to take that party's deposition anyway. And instead of having the party who is objecting come bring a witness live to the hearing just on that -- and even if you get an adverse ruling based on affidavits -- now I am addressing that, I'm not saying this is the best of all worlds, either, when you take that deposition,

you could lay in the basis for this ruling, and if it turns out that affidavit was, I won't say false, but misleading, then you go back and get it straightened out or the other side says, "You've got me. I can read the rules, I've got to cough this up." The live testimony hearings are expensive and they are --

MR. O'QUINN: Time-consuming.

CHAIRMAN SOULES: -- time consuming. They divert a party from their usual work to have to come. This an alternate way to do it.

MR. DAVIS: Therefore, you don't make the objection unless it's a good one, you don't stand by it unless you can support it.

MR. O'QUINN: Tom, even if everybody adopted your view of who should get the hearing, the objecting party has to ask for a hearing and does ask for a hearing. As I understand, even under McKinney he can show up on the day of trial with a handful of affidavits.

I agree with Tom on this particular issue. If you want to rely on affidavits before the hearing, you've got to serve them and give the guy a chance to take depositions. Why can't we have a rule like that? If you want to use affidavits, you've got to serve them on the other party --

CHAIRMAN SOULES: How long? That's easy to fix.

MR. O'QUINN: What do you think would be fair?

CHAIRMAN SOULES: If you get served the affidavit three days in advance of the hearing, you could go over and continue. "I want to take this guy's deposition before you rule on this." I think the affidavits are --

MR. DAVIS: Where should the burden be? You're objecting, you're saying, "No discovery, I want to hide the facts, I don't want you to find this out, I'm objecting." Now, should the burden be on you to support that claim, even if you have to bring somebody in from New York and put him on the witness stand and even though it's expensive and even though it's all those things that you said that for you to do that you are going to do it, or should you just be allowed to get an affidavit from him saying all these things and then that puts the burden on me to go out and take the deposition, maybe travel to New York to do it, pay the original cost of the deposition and everything? Where should that be even if I do have time?

CHAIRMAN SOULES: Okay. Well, the rule now permits proof by affidavit.

PROFESSOR DORSANEO: The difficulty is that really, frankly, the scope of discovery is so broad that it would be perfectly possible for someone to ask to take the deposition or to get information from somebody in Tokyo who really doesn't know anything about anything having to do with this case.

MR. O'QUINN: That's true.

PROFESSOR DORSANEO: But you as the requesting party suspect they might. Now, where should the burden be in that situation? That's the tough call, to me, is that you make assumptions about, "Well, I really would be entitled to ultimately get this information if the true facts came out." And that's frequently true, but it's not universally so.

MR. O'QUINN: What we're doing now is not taking the deposition to get discovery information, we're taking the deposition to test the alleged facts that support the allegations.

MR. DAVIS: The deposition was conducted in --

MR. O'QUINN: It seems like to me if you want to have a rule -- Tom believes you should not be allowed to do it by affidavit. Is that correct, Tom?

MR. DAVIS: That's correct.

MR. O'QUINN: It seems like to me there

should be some routine things you should be able to do by affidavit. Why don't you scribble up something about if you want to do it by affidavit you have to serve them so many days before the hearing?

CHAIRMAN SOULES: How many days?

MR. O'QUINN: What's wrong with seven? That's what they do in summary judgment.

MR. DAVIS: I understand. That's not enough, either. But at least in a summary judgment you can have a little more information about the facts yourself and available to you, whether it's in this situation --

MR. O'QUINN: How much time would you feel comfortable with, Tom?

MR. DAVIS: I don't know.

MR. O'QUINN: I don't like them showing up with an affidavit from some guy in the risk-management group saying, "All this was done in anticipation of litigation."

MR. DAVIS: Depends on whether they have a Houston office or Dallas office and they don't have any other thing set for trial where you can agree, as we're supposed to now, on dates, which sometimes takes at least a month to find a date that someone has free time, or whether the guy is up in New York. Then you get into a question of: Do they have to bring him down or do you

have to go up there?

MR. O'QUINN: If they hand me an affidavit signed by some guy in New York City, I'm going to file a notice to take his deposition in my office in Houston. As I understand the rules, they're going to have to object to that. If they don't produce him, then they've got themselves a problem. When they file an objection, then we're going to be going to see the trial judge about there is objection to my getting a deposition and about the original deposition that led to the affidavit. I can't see but what the trial judge is going to say, "Wait a second. This is controversial. We are going to have a hearing, we are going to do a little discovery."

MR. DAVIS: I think it's simpler to strike my affidavit and force the testimony. Then you don't have any of these problems, you don't have any of that setting depositions or who is paying for them --

MR. O'QUINN: I happen to like your approach. I happen to like to look at the question in the hearing. But I think what we're hearing is that there are a lot of things that happen that that would just unnecessarily burden you to have long hearings on objections.

CHAIRMAN SOULES: Let me suggest this be inserted in order to get language before the committee. Where it says "form of affidavits," just before the

stricken language there, "form of affidavits or testimony," the reason I struck "live" is that was in the rules, but you ought to be able to do it by deposition testimony.

PROFESSOR EDGAR: What page?

CHAIRMAN SOULES: 774. I would say "form of affidavits, served at least seven days before the hearing, or by testimony."

MR. COLLINS: Why don't you put "testimony" before "affidavits"?

CHAIRMAN SOULES: Either by testimony --

MR. COLLINS: Testimony or affidavits served at least seven days prior to hearing.

MR. DAVIS: Served. What does serve mean? What if it's mailed?

CHAIRMAN SOULES: You get three days extension. That makes it 10. The reason, John, I would like not to do that is that I'm concerned that we're going to wind up saying that "seven days before the hearing" modifies testimony and --

MR. COLLINS: That's fine.

CHAIRMAN SOULES: Okay. That's what I would propose, then, as far as that sentence is concerned, it be modified that way, by requiring that they be served seven days before the hearing. Otherwise the hearing

would be on testimony, which could be by deposition.

MR. DAVIS: That still allows the court to rely on affidavits.

CHAIRMAN SOULES: Put in seven days in advance.

MR. O'QUINN: What if the party who wanted to do it by affidavit set the hearing within five days? Then we're going to get caught up in gamesmanship.

CHAIRMAN SOULES: Couldn't use the affidavit, because it wasn't served within seven days.

PROFESSOR DORSANEO: The problem we have on time, suppose you provide me a deposition notice that gives me less time to do all this.

MR. O'QUINN: If you want to do it by affidavit, you better show up with the witness.

CHAIRMAN SOULES: You would have to deal with that in a motion for protection.

PROFESSOR DORSANEO: Get time to get my ducks together?

MR. O'QUINN: Yes.

PROFESSOR DORSANEO: That makes sense.

MR. O'QUINN: Stay discovery until we can have a hearing on my objection.

CHAIRMAN SOULES: Okay. We're ready to vote on this.

Those in favor say aye.

Opposed?

The ayes have it.

Then pick up down here. "If the trial court determines that an in camera inspection and review by the court of some or all of the discovery is necessary, the objecting party must segregate and produce the discovery to the court in a sealed wrapper or by in camera oral answers to be transcribed and sealed in the event the objection is sustained."

In favor say aye.

PROFESSOR DORSANEO: I would say "pending a determination of the objection."

CHAIRMAN SOULES: Gets back to McKinney.

MR. DAVIS: Excuse me. What is meant by "in camera oral answers"? That phrase kind of stopped me there.

CHAIRMAN SOULES: Well, if you have a judge attending the deposition, and we've had that, that's the easiest example to give. Then everybody leaves the room and the judge hears the answer to the question. Or you could put a series of questions.

MR. DAVIS: Discovery to the court in a sealed wrapper. This pertains to documents, I presume.

CHAIRMAN SOULES: Documents or deposition.

MR. DAVIS: Something in paper in a sealed wrapper.

CHAIRMAN SOULES: I've changed --

MR. DAVIS: In a sealed wrapper.

CHAIRMAN SOULES: And "as in," that was a mistranscription. That should be "or by in camera oral answer."

MR. DAVIS: All right.

CHAIRMAN SOULES: Actually, "as is," the reason that's in there, because I write so fast that's supposed to be "o r" instead of "a s." That's sure not Holly's fall.

MR. DAVIS: Here are some documents that I'm claiming are privileged. I put them in a sealed wrapper, hand them to the judge for him to look at.

Now, does in camera oral answers mean that I go in there to his office with him and explain what these documents are?

[Laughter]

CHAIRMAN SOULES: No.

MR. DAVIS: Don't laugh. I've seen it done.

CHAIRMAN SOULES: Go with me for a moment. The judge is at the deposition --

MR. DAVIS: We're talking about different things.

PROFESSOR EDGAR: You see, the problem is, Luke, that it's not clear what you mean by in camera oral answers.

CHAIRMAN SOULES: To questions. Depositions.

MR. DAVIS: To me, it meant something entirely different.

PROFESSOR EDGAR: So I think you ought to be a little more clear about what you mean by that term.

CHAIRMAN SOULES: Or in camera oral answers to deposition questions.

MR. DAVIS: I was thinking of the defense attorney going into the office and explaining what these documents were, why they were privileged.

CHAIRMAN SOULES: I see your confusion. I hadn't seen that. I agree that's valid. So it would read "discovery to the court in a sealed wrapper or in camera oral answers to deposition questions to be transcribed and sealed in the event the objection is sustained."

PROFESSOR EDGAR: Or by.

CHAIRMAN SOULES: Or by?

PROFESSOR EDGAR: You said or. Or by.

MR. O'QUINN: Inspection or listening to or in camera review of or --

PROFESSOR EDGAR: Answers.

MR. O'QUINN: In camera answers? That doesn't make sense. He's in camera listening to --

PROFESSOR EDGAR: The deposition questions.

PROFESSOR DORSANEO: The oral answers made in camera, really.

MR. O'QUINN: Deposition questions made in camera?

PROFESSOR EDGAR: Oral answers made in camera to deposition questions.

MR. O'QUINN: That might be clearer. Is that confusing you now, Luke?

CHAIRMAN SOULES: No. I'm trying to get it in the right order. How do the words run now?

PROFESSOR EDGAR: In sealed wrapper or by oral answers to in camera deposition questions.

CHAIRMAN SOULES: Made in camera.

MR. O'QUINN: Yes.

MR. DAVIS: Strike the word "oral answers."

MR. O'QUINN: Or by oral answers made in camera to deposition questions.

PROFESSOR DORSANEO: Actually, maybe strike the word "oral." Because they could be written answers if they were answered at the deposition outside of the hearing.

CHAIRMAN SOULES: But then you seal it up in

an envelope.

MR. O'QUINN: That would be a document.

MR. DAVIS: Now you've got me confused again. What are these oral answers to --

CHAIRMAN SOULES: Charles is your witness. I start asking questions. You say, "Privileged." I then put the questions to Charles. You can usually see what the first series of questions are going to be. What was said at this meeting, what was said at that meeting, what was said at that other meeting? We've now established that you had this series of meetings and you're claiming privilege on all of them. I want to get it over with, so I go ahead and I say, "Okay, I want what was said at that meeting."

"Objection."

Preserved.

"What was said at the next meeting?"

"Objection."

Preserved.

Then you're not comfortable with having the court reporter hear those answers because they're too critical and something might happen. You don't know this reporter, you don't know the reporter's relationship with the law firm or whatever, so you are just not comfortable with it. But you don't give those answers

in deposition.

Then you go to court and you take the transcript of the questions and the judge and the witness go into chambers with the court reporter and the judge reads the questions and the witness answers the questions orally and they get taken down, they're transcribed, and if the judge sustains the objections, he seals them. Of course, if he overrules the objections, then you get the answers and the follow-up questions.

MR. O'QUINN: How do you feel about the fact that the judge gets to hear the answers on crucial attorney-client relationship?

CHAIRMAN SOULES: I don't know what else to do. I kind of like it in San Antonio where we have Russion roulette. I may not get the same judge at trial. But Judge Hardy did this extensively in the nuclear power plant thing. And where there was going to be a lot of it, he would come and sit in the deposition.

PROFESSOR DORSANEO: I find it hard to believe that many of the Dallas judges would want to have me come over there and bring people to give answers to questions.

CHAIRMAN SOULES: How else do you do it? If you are not going to trust the court reporter --

PROFESSOR DORSANEO: I'm going to trust the court reporter; otherwise I'm not going to have that court reporter.

MR. O'QUINN: May be the other guy's court reporter.

PROFESSOR DORSANEO: I'll call and have my own.

CHAIRMAN SOULES: Could be somebody they pay millions of dollars a year to.

MR. O'QUINN: How do you feel about the reporter taking it down in the judge's chambers?

CHAIRMAN SOULES: I think it's the court's own court reporter. The record has got to be made for appeal. Maybe you are going to go on with it mandamus.

JUSTICE HECHT: One way around this is just to require the witness to answer the questions in writing, tender that to the district judge and let him rule on it and either seal that or release it. Because if I were the trial judge and you came to me and you said, "Judge, I've asked this guy these questions, he won't answer them, I want him to answer him," I'm not going to invite him in chambers and listen to the answers, I'm just going to say, "Go out in the hallway and write down your answers and swear to them and bring them around there and I'll look at them. And if they're

not privileged, I'm going to give them to the other side; if they are, I'm going to seal it and you can take it up on appeal."

MR. DAVIS: And who's really going to be making the answers? Whereas, if he's oral in there by himself, then the witness has to.

JUSTICE HECHT: If you asked me, "Judge, I'd just as soon you asked him the questions," I'd say, "Fine."

CHAIRMAN SOULES: This doesn't preclude the trial judge doing that. But it does permit the trial judge, if he cares to, to hear the oral answers in chambers. The judge can do it either way.

MR. O'QUINN: By putting it one way, it may lead the judge to think he has got to listen. By either listening to them or having them submitted to him in writing under oath.

CHAIRMAN SOULES: Are we going to take away the trial judge's ability to just go hear the answers orally and have his court reporter take them down?

MR. O'QUINN: What makes me nervous on attorney-client privilege, things that are supposed to be sealed somehow don't stay sealed. We've all seen that happen.

CHAIRMAN SOULES: But that's just inherent

in --

MR. DAVIS: How else can the court rule on it?

CHAIRMAN SOULES: How many feel that the judge should be permitted, if he is willing, to hear oral responses in camera to deposition questions?

That's a majority.

PROFESSOR DORSANEO: I just don't think they will.

MR. DAVIS: They don't have to rule on anything they don't want to.

CHAIRMAN SOULES: In a sealed wrapper to oral answers made in camera to deposition questions. We need to do this oral answers to deposition questions. To be transcribed --

PROFESSOR DORSANEO: That's why just answers. Because "answers" just leaves it open to practice. Whatever way you are going to have the answers.

MR. O'QUINN: What about answers made to the judge in camera?

CHAIRMAN SOULES: Or by answers made in camera to deposition questions to be transcribed and sealed in the event the objection is sustained.

Those in favor say aye.

Opposed?

That passed.

Then the rest of this is -- well, let's see. I've got "preview" here again and I need to change that to "inspection and review."

PROFESSOR EDGAR: Are you going to say a "review and inspection" or "an inspection and review"?

MR. COLLINS: Why don't we just say it's not necessary for the court to conduct a hearing?

CHAIRMAN SOULES: For what?

MR. COLLINS: Before ruling on an objection.

CHAIRMAN SOULES: Well, no, they have a hearing. But this is where it's "unnecessary expense, harassment or annoyance, or invasion of personal, constitutional or property rights." What they're trying to do there is say if it's not an immunity or privilege or something like that, there really isn't anything to look at in camera. The objection is burdensome and harassment. And it's file cabinets full of documents. And you don't have to bring those for an in camera inspection. You can describe them and the judge can rule from the bench without looking at file cabinets full of documents. He can rule on relevancy, whatever, that way. But he can't rule on privilege or immunity that way. And that's really what the case law is. That's really what the rule is right now, too.

It says to conduct an inspection of the individual documents. Again, that was documents. And I'm trying to make this an inspection and review of the particular discovery so that it applies more broadly than just the documents. That was the purpose of the word change.

Those in favor say aye.

Opposed?

That passes.

The last is we now have a rule that says objections not made under Rule 168 are waived. And that's been already broadened to cover documents and everything else, but it's just in 168. All this does is take it out of 168 and put it in the general rule because it's got general application.

Those in favor say aye.

Opposed?

That passes.

Okay, Bill. That's probably the report on that one.

MR. RAGLAND: On 775, the last underline, "failure to objection" --

CHAIRMAN SOULES: Failure to object. That needs to be corrected. Thank you. We will generate all these back off of our machine and send them to the

respective subcommittee chairs for review and to send back to me for grammatical corrections, whatever, if I've missed something. So this is not going to go to the Court without the chair getting a chance to look at it again to be sure we've got it right. If there's a question about any of it, I will have the court reporter's transcript and I can get the pages for you if you want to review what took place here before we pass on whether we've got it right.

What's the next thing, Bill?

PROFESSOR DORSANEO: I presume pursuant to our discussion that the 748 alternative paper hearings doesn't need to be discussed.

CHAIRMAN SOULES: I think not. I think that's probably been precluded. I had written this rule so that discovery hearings would be like plea of privilege hearings, be altogether on affidavits. And I think that's already been rejected --

MR. DAVIS: I sure hope so.

CHAIRMAN SOULES: -- by the committee.

Justice Hecht.

JUSTICE HECHT: I don't know if this is the time to interpose this, and I don't think it's on the agenda and I don't want to disrupt, because I know it's getting late, I don't want to take a lot of time, but I

also don't want the occasion to pass without getting at least a brief response from this group on an issue that arose in the last series of amendments and continues to be troublesome.

In the investigative privilege/work product area, in that general area of privilege, there is a two-pronged basis for establishing the privilege or trying to get around the privilege under the Federal Rules. The two prongs are:

1. In anticipation of litigation and

2. Substantial need and undue hardship.

In other words, even if the materials are prepared in anticipation of litigation under the Federal Rules, if the party requesting discovery can show substantial need for the information and undue hardship without it, he is entitled to at least some of the information, particularly the factual type of information. That second prong did not appear in the Texas Rules, I don't think, until the last series of amendments. And now it does appear in Rule 166b as an exception to --

PROFESSOR DORSANEO: Witness statements and party communications, but not work product and experts.

JUSTICE HECHT: Right. Now, I get the feeling, if it can be simplified, that the federal

procedure is to emphasize need and hardship and to deemphasize anticipation of litigation. It just strikes me from the cases that there's much less fussing about anticipation of litigation and much more fussing about need and hardship. And because we have not had that second prong in the Texas discovery rules before, all of our fussing is about anticipation of litigation.

It leads to the anomaly, as some have said, that every fool knows there's going to be litigation except the parties and the judge that are worrying about this privilege. Because anticipation of litigation takes on a very strict and careful interpretation in Texas jurisprudence because that's what the whole privilege hangs on. If you establish that, you've got the privilege; if you don't establish it, you don't.

Query: With the addition of undue hardship and substantial hardship and need, with that addition to the Texas Rules, do you feel that that's a better place to determine the privilege issue rather than the anticipation of litigation? In other words, as long as information is not prepared in the ordinary course of business, an investigation is not made in the ordinary course of business, pretty much made in anticipation of litigation. But that doesn't mean that when a party has got it, because he happened to be Johnny on the spot, he

was the only one that knew about it, the accident or whatever, and the other side doesn't have it and can't get it and needs it to be able to go to trial so that the case can be tried on an equal basis, that that party shouldn't be able to get that information even though it was pretty much made in anticipation of litigation. In other words, what I'm asking is: Do you see a shift away from the anticipation of litigation prong to the need-and-hardship prong?

MR. DAVIS: My reaction is: Why do you need both? I mean, your anticipation is your first step in the law. And the law and the cases that we have had on it have been kind of strict on it as I've been interpreting them. I don't see any reason to change that. And if you don't get past that first hurdle, that's as far as you need to go. But then even if no rare circumstances where it was in anticipation of litigation, you can still get it if you show undue hardship. I don't know that I understand what you mean by the emphasis other than you are saying should you try undue hardship first. And then if you get by that one, then you don't worry about anticipation? I mean, that would be up to the court, I guess, that was hearing it.

JUSTICE HECHT: Well, what I'm asking: We never have had the second prong. Now we've got it.

Isn't the real struggle over the second prong rather than the first prong, and the reason that the first prong has been so important is because that was the only prong up until recently.

CHAIRMAN SOULES: Judge, you know, when you read Stringer, Turbodyne, when you read those cases, I don't see that the decisions are being made on anticipation of litigation. I know that's what we talk about. And I talked to Judge Peeples about that the other day, and his view was that that's where the play was. But the play is on purity. Purity of artists to know one thing. These cases are really saying purity in anticipation of litigation. If it's pure, it's pretty well taken at face value. And, of course, some of these things are case specific. It was really in a different case. Was it also done for governmental agency report? Is it also the kind of an investigation that is done in the ordinary course of business? And the cases that we see are really where it's anticipation of litigation plus. And if it goes to plus, it's discoverable. And that's where the Texas play is, is the plus.

JUSTICE HECHT: Well, you mean solely in anticipation?

CHAIRMAN SOULES: Yes. This rule has been, as it's interpreted, it's got to be solely in antici-

pation of litigation.

JUSTICE HECHT: Well, I didn't understand -- I read the committee debates from the last committee meeting. There was a proposal to interject "solely" and that was rejected by the committee.

CHAIRMAN SOULES: But that's where the cases are. They are solely.

PROFESSOR DORSANEO: I don't know if I would go that far. I think the point that I would make is that if it isn't clearly within the strict exemption, the discovering party ought to be able to obtain the information without showing that they have any kind of substantial need. And that the substantial need/undue hardship approach to the problem is going to be relatively more idiosyncratic in terms of what the individual judge thinks about the overall circumstances of the case.

CHAIRMAN SOULES: The reason --

PROFESSOR DORSANEO: I'm not sure that it would be sensible to give that much leeway to the process from court to court, because I think you probably could never challenge whatever happened.

Also, the federal rule, frankly, in terms of the way trial preparation materials are defined, has been historically very anti-discovery in comparison

to other systems. Trial preparation materials are defined very broadly, to include things prepared by a whole range of people in the general anticipation sense.

CHAIRMAN SOULES: The reason we're not getting to substantial need and undue hardship is, what we're really finding is that it's not pure anticipation of litigation, so you never do get to that point, at least, the way I see the cases lining up. If we ever get to the point where we've got pure anticipation of litigation, somebody still wants it, then they've got to go to the second step. But that really isn't being litigated right now.

JUSTICE HECHT: Okay. That answers my question.

CHAIRMAN SOULES: Okay.

What's next, Bill? Do we have anything else on discovery?

PROFESSOR DORSANEO: Yes. There are several things. The one controversial thing, for those who are walking out the door, might be encouraged to stay for a moment longer, is the proposal with respect to Rule 167a, or the various proposals. Pages 801 and 802, for starters.

Now, very briefly, our Rule 167a with respect to this particular issue is based on the companion

Federal Rule 35. Neither Rule 167a nor Federal Rule 35 let's say on January 1, 1989, provided for mental examinations to be conducted by psychologists as opposed to physicians; that is to say, medical doctors.

Coats v. Whittington determined that our Rule 167a did not authorize a trial judge to require a person to submit to a mental examination by a psychologist because of the interpretation of the language of the current rule. This has generated controversy and this same controversy has been generated at a national level more or less simultaneously with respect to Federal Rule 35.

In general terms, the proposal is to let psychologists define properly. And that's what I'm leaving open at the outset here, to conduct mental examinations if ordered and if otherwise appropriate under Rule 167 A and if ordered by the court. That's the general proposal. That's the general idea. I don't know if you want to vote on that, because if the answer was no, that would curtail the discussion altogether.

MR. COLLINS: Why don't we vote on that first?

PROFESSOR EDGAR: You are suggesting, then, that we reach the merits of whether or not we consider

that a "psychologist" is a person competent to rely upon under Rule --

PROFESSOR DORSANEO: There are various ways you can define "psychologist." One way is the way it's proposed to be added, has now been added, effective November 1988. So I misspoke myself as to dates. For the purpose of this rule, the federal rule now provides a psychologist is a psychologist licensed or certified by a state or the District of Columbia. Now, that's less broad in terms of licensing than it could be, because it's restricted to an American state or the District of Columbia rather than being licensed by any nation. It is more restrictive than other definitions of psychologists that could be used or other definitions of mental health professionals that could be used.

For example, the definition that is in Texas Rule of Civil Evidence 510 of professional in the mental-health professional context is much broader, including any person who provides assistance in drug-abuse programs, without regard to their certification or licensing. So, if we did use the term "psychologist," we could be precise and we could even be more precise than the federal rule.

PROFESSOR EDGAR: I was worried about making it more restrictive rather than more broad. Because I

just have an inherent distrust of psychologists and I would like to make it as restrictive as possible, if we are going to adopt the policy.

PROFESSOR DORSANEO: The reality of it is -- and my psychologist acquaintances make the point -- in plain society most of the testing that's done that would come into play is in fact done by psychologists and very little of that kind of work is done by psychiatrists.

MR. RAGLAND: The problem with that is, when you get a court order, that witness is then the court's witness. I don't care what they say otherwise, when he comes into the courtroom, he's going to be labeled the court's witness. I move to tear this page out and throw it away.

[Laughter]

CHAIRMAN SOULES: The Committee on Administration of Justice discussed this rule at its last meeting and disapproved it for now and deferred it to its committee for further study. And the reason for that was that, according to the knowledge that was available at the time, there is no licensing in Texas for psychologists.

PROFESSOR DORSANEO: That's not true.

MR. COLLINS: They are licensed.

PROFESSOR EDGAR: They have a grievance

committee and a review committee for all these sex maniacs.

CHAIRMAN SOULES: Why didn't this man who wrote us talk about licensing instead of just about association? This Kevin W. Carlson, JD, Ph.D., doesn't say a word about state licensing.

MR. COLLINS: No, they are licensed.

PROFESSOR DORSANEO: They are.

MR. COLLINS: Hell, everybody is licensed in Texas.

PROFESSOR EDGAR: I've got a friend on the panel that takes all their grievances.

CHAIRMAN SOULES: But that could be a part of the psychological association, I don't know.

PROFESSOR DORSANEO: He may have been making a broader proposal than the persons who are just licensed.

CHAIRMAN SOULES: That may be it.

Tom made a motion to reject it.

MR. RAGLAND: Yes, sir.

CHAIRMAN SOULES: Are we ready to vote on Tom's motion?

PROFESSOR DORSANEO: Why don't I make a motion on the issue of whether we change it? I mean, I understand your motion to repeal the whole rule, Tom.

MR. RAGLAND: No, no. I suggest a proposal to add licensed psychologists --

PROFESSOR DORSANEO: I'll assume the burden.

MR. RAGLAND: That appears on Page 802.

PROFESSOR DORSANEO: Let me assume the burden just so we don't have to take two votes.

CHAIRMAN SOULES: Okay.

MR. DAVIS: What's the effect of us putting it in there? What's the effect if we don't?

CHAIRMAN SOULES: Your client can be ordered by the court to submit to a psychological examination.

PROFESSOR DORSANEO: If there's good cause, if the mental condition is in controversy --

MR. DAVIS: We do have a ruling that that doesn't affect it.

CHAIRMAN SOULES: Let's have order. Jerry can't take more than one at a time.

COURT REPORTER: Thank you.

CHAIRMAN SOULES: We're going to need to show this to the family-law lawyers. They want this. They're pushing hard for it.

PROFESSOR EDGAR: I don't think that was a second to Bill's motion, so I would move that we exceed to the COAJ's recommendation and wait for them to review the matter further and then we will study it more at

that time.

MR. COLLINS: I would second the motion. What was the motion? Motion to table?

PROFESSOR DORSANEO: I moved to make determination as to whether we wanted to add psychologists in or just leave it the way it is now after Coats. And I didn't don't want to argue -- I will argue a little bit. Coats really changed the practice. Psychologists were used. And they were the ones who did these examinations in the appropriate cases.

MR. RAGLAND: But the difference is: The psychologists were used but not used under order of the court. That's a significant difference if you are representing a plaintiff in a personal-injury suit. To have some yo-yo with a degree about this long that doesn't mean anything and he is given the stamp of approval of the court. If the parties want to use them, that's all right, but I object to letting the court --

CHAIRMAN SOULES: I don't think psychologists are yo-yos of any kind. They're going to be reading this.

MR. RAGLAND: Well, that's all right.

CHAIRMAN SOULES: Does anyone else have any comment about that?

MR. COLLINS: I would second Professor

Dorsaneo's motion.

MR. SADBERRY: What I understand about his motion is whether or not we decide here today, up or down, as opposed to sending it back for further study.

Isn't that the motion, Bill?

CHAIRMAN SOULES: Are we ready to vote?

MR. DAVIS: What would be the purpose for further study?

CHAIRMAN SOULES: I suppose we could learn something about the licensing we don't know.

MR. DAVIS: Dorsaneo knows about it. I've heard a lot of people here say they are licensed. I assume they are.

MR. HATCHELL: I think there's a broad category of people who call themselves psychologists who are not properly licensed. Also, I think you could accomplish the same thing by saying utilize psychologists.

CHAIRMAN SOULES: Okay. The motion, then, is to adopt the changes --

PROFESSOR DORSANEO: Not specific language.

CHAIRMAN SOULES: Oh, it's not? It's to add psychologists to the class of people who can be appointed by the court under Rule 167a?

PROFESSOR DORSANEO: When it's appropriate.

CHAIRMAN SOULES: Let's take one at a time.

How many in favor of adding psychologists to the class of persons that can be appointed under Rule 167a? Please show by hands.

Six for.

How many against?

Five.

MR. DAVIS: Now what do we call them?

PROFESSOR DORSANEO: I would recommend -- this is just personal, this is not something that I got a response from from my committee, but I did send it out to the subcommittee. I would recommend that we follow the federal definition. And that is because I think we're safe enough if it's a psychologist licensed by a state, even if it's Oklahoma, and we don't need to just stick with Texas licensing. An alternative would be just licensed in Texas.

MR. DAVIS: What's wrong with "licensed psychologists"?

PROFESSOR DORSANEO: That would probably include Great Britain, France, Mexico.

PROFESSOR EDGAR: Do you want one licensed in Mexico?

MR. COLLINS: That allows a physician the same thing. You can get a physician from Hong Kong,

I guess.

PROFESSOR EDGAR: Let me emphasize we're not talking about, as Tom suggested, whether or not a party can call a psychologist. We're talking about who the court can require to appear as a court witness.

MR. DAVIS: If he decides to do it.

PROFESSOR EDGAR: If he decides to do so. That's what Rule 167a is talking about. And I think we have some justification or some rational basis for limiting that to a person licensed to practice psychology in the state of Texas, because we know what those standards are.

JUDGE ROBERTSON: Provided that psychologist has an MD degree.

[Laughter]

PROFESSOR EDGAR: I'd like to add that, Your Honor, but --

CHAIRMAN SOULES: The language that we have here, let's get to this language, picks up Rules of Civil Evidence 509 and 510.

PROFESSOR DORSANEO: No, that's no good. I don't mean to butt in, but I will because I think it's faster. 510 covers a whole range of people. It covers about anybody who is in the palmist business, frankly. It's very broad. It says MDs the first thing, then it

says psychologists licensed in any nation, and then it says anybody in the business of providing counseling for drug abuse, and then it's even broader than that in the next section.

CHAIRMAN SOULES: Mine doesn't read that way, but I guess I've got the wrong 510.

MR. HERRING: The last one, reasonably believed by the patient --

CHAIRMAN SOULES: The third one says involved in the treatment or examination of drug abusers.

MR. HERRING: And the limitation on the State is licensed or certified by the State of Texas for the diagnosis, evaluation or treatment of any mental or emotional disorder. 510 (a) (1) (B).

CHAIRMAN SOULES: What about adopting that language in 510 that says licensed or certified by the State of Texas in the diagnosis, evaluation or treatment of any mental or emotional disorder?

PROFESSOR DORSANEO: That's fine.

MR. DAVIS: Why do you need all that language? Why not just licensed in Texas?

PROFESSOR EDGAR: Luke, we're leaving. When will we meet again?

CHAIRMAN SOULES: I don't know.

PROFESSOR EDGAR: Will we meet again before

we submit to the Court the rules for adoption?

CHAIRMAN SOULES: Yes.

What do you suggest, Bill?

PROFESSOR DORSANEO: Let me look at this. I may have misspoken myself, trying to hurry.

CHAIRMAN SOULES: While he's looking at that, this just deletes the language about objections not made or waived from 168 that we moved into 166. That's all it does.

MR. DAVIS: We've already done it.

CHAIRMAN SOULES: Is that unanimously approved?

Hearing no objection, it's approved.

I'm trying to see things that are of that nature.

Rule 169. The only discovery that cannot now be initiated after commencement of the action is request for admission. This is on Page 831. It conforms to all the other discovery rules. Interrogatories, depositions, request for production of documents, so forth can all start the commencement of the action. That was overlooked when we did them in the past. The motion is that that conforming amendment be made. Any objection?

That will stand approved.

On the second page of that, on Page 832, this is a suggestion that you can't deem admitted responses to request for admissions unless the request for admissions on its face contains a notice that the matters included in the request will be deemed admitted if the recipient fails to answer or object within the time allowed by this rule and stated in the request.

MR. RAGLAND: Why should that be in there?

CHAIRMAN SOULES: It bright lines the penalty.

MR. HERRING: Pro se. Somebody had a problem with pro se litigants on the other side. It's protection for them and protection for you.

MR. RAGLAND: They won't understand the significance of deemed admitted.

CHAIRMAN SOULES: Does anyone object to this?

MR. RAGLAND: No need to change. I object to it.

CHAIRMAN SOULES: Okay.

Any further discussion?

PROFESSOR DORSANEO: I don't care for it, either, but I don't have strong objections to it.

CHAIRMAN SOULES: If we tell them a default is going to be taken if they don't answer --

MR. DAVIS: I thought this was already in

there.

CHAIRMAN SOULES: It's not.

All in favor of this change show by hands:

Two.

Opposed?

Three.

Okay. It fails.

The other change, if it's necessary, if you serve them prior to the answer day, you get 50 days. That also conforms to the other discovery rules. Any objection to that?

There being none, it's approved.

COAJ recommended that we put that warning in. I realize we've voted, but I didn't want to fail to advise the group on that in case anyone would want to reconsider.

PROFESSOR DORSANEO: I have a list of the other things.

CHAIRMAN SOULES: What have you got?

PROFESSOR DORSANEO: We can come back to this other thing. Page 867 for Rule 201. Simple change. Change the misreference.

CHAIRMAN SOULES: Okay.

Any objection to that?

Hearing none, that stands approved.

PROFESSOR DORSANEO: 206 on Page 875.

CHAIRMAN SOULES: That's probably put in by the court reporters association. They want you to have to ask for a copy from the court reporter and not get a copy from your colleagues.

MR. RAGLAND: That wasn't the intent whenever we changed it, I can assure you.

PROFESSOR DORSANEO: I don't know where this recommendation came from.

CHAIRMAN SOULES: I don't either. "Requests for copies of the deposition transcripts shall be made directly to the officer who made the transcript."

MR. DAVIS: Here's Wally Kornegay's letter.

MS. HALFACRE: Look at the letter on 878.

CHAIRMAN SOULES: 878? This copy is going to have to be bought from the court reporter if that's what -- that's what George Pletcher is suggesting, just in those words.

PROFESSOR DORSANEO: This 874 letter could be about anything.

CHAIRMAN SOULES: All this does is permit -- well, you could withdraw the deposition from the clerk and copy it and then give it back. All this does is give you the same right as to the custodial attorney who now --

MR. RAGLAND: That was exactly what we discussed when we amended this. Exactly that.

CHAIRMAN SOULES: That's right. Exactly that. Was it your position it ought to be left like it is?

MR. RAGLAND: Yes.

MR. DAVIS: Let's see.

CHAIRMAN SOULES: Not only that, the court reporter is not going to have the transcript. The court reporter has then got to come to you and you give it back.

MR. RAGLAND: The argument or the concern was that some parties being brought into the case late and the depositions weren't on file, they wouldn't have any access to the depositions. And it was a year later and the court reporter has lost all his notes or erased his tapes or whatever, they don't have anywhere to get it.

CHAIRMAN SOULES: So the motion is to reject it. Any opposition?

That stands rejected.

PROFESSOR DORSANEO: The next one is on Page 880. Rule 208.

CHAIRMAN SOULES: Now, that restores us back to a point we amended away before.

PROFESSOR DORSANEO: Are you sure?

CHAIRMAN SOULES: Yes. Makes leave of court necessary where it's not now.

PROFESSOR DORSANEO: Says leave of court must be obtained only if a party wishes to take -- okay. Making it necessary if a party seeks to take a written deposition prior to appearance date.

CHAIRMAN SOULES: All discovery can begin at the commencement of the action in Texas now. It's uniform with the change in the request for admissions to the rule. I don't see any need to change it unless somebody else does.

MR. HERRING: This is on written questions? Isn't that language in the oral depositions?

CHAIRMAN SOULES: No. We took it out.

PROFESSOR DORSANEO: It is in the oral one.

MR. HERRING: In Paragraph 1, the second sentence, it says "Leave of court, granted with or without notice, must be obtained only if the party seeks to take a deposition prior to the appearance" --

PROFESSOR DORSANEO: That's right. The question is whether a written deposition ought to be treated like an oral deposition or should be treated like an interrogatory.

MR. HERRING: That's the issue.

MR. DAVIS: Not to mention depositions.

But it says right on the top.

CHAIRMAN SOULES: I'm sure you're right, Charles, but where is that?

MR. HERRING: Right here.

CHAIRMAN SOULES: All right.

What do you want to do about written depositions? Do you want to add that or not?

PROFESSOR DORSANEO: I move they be treated like oral depositions just for the sake of consistency.

CHAIRMAN SOULES: Any opposition to that?

Okay. That stands approved.

PROFESSOR DORSANEO: The next one that I have is Page 895. This is based on correspondence to Judge Kilgarlin.

MR. DAVIS: I see nothing wrong with that. I think that ought to --

MR. COLLINS: I have a question about the third line, "to resolve the discovery abuse" --

MR. HERRING: Dispute.

PROFESSOR DORSANEO: Problem.

PROFESSOR CARLSON: Dispute.

CHAIRMAN SOULES: Dispute is a good word.

PROFESSOR DORSANEO: I move the adoption of that language.

MR. RAGLAND: Question. What does it

accomplish by putting it in there? There are no sanctions if you don't.

MR. HERRING: Some of the federal local rules put a sanction. You can't obtain a hearing until you do it. This doesn't really have a sanction.

MR. DAVIS: Just says you should do it.

CHAIRMAN SOULES: I think it's a step toward professionalism, too.

MR. DAVIS: That's in most all of your codes.

MR. HERRING: We've got a local rule.

CHAIRMAN SOULES: We have that in Bexar County.

JUSTICE HECHT: Should it apply to more discovery motions?

PROFESSOR DORSANEO: Probably should apply to more than just sanctions.

MR. DAVIS: I think it ought to apply to any motion.

CHAIRMAN SOULES: Let's put this one in --

MR. DAVIS: No motion hearing, anything else should be done without it.

CHAIRMAN SOULES: I never do know what your motion is until you present it to me. So we get on the phone, we confer about a motion I've never seen, but that motion has got to say that we conferred. To me,

the certification ought to be that prior to a hearing on this motion the parties must confer in an attempt to resolve the dispute. Because, Charlie, we just talk over the phone, I'm going to raise all these objections --

MR. HERRING: You're not going to state it the same way you state it in the motion. But if you had to confer before you set it for hearing, that would certainly eliminate a lot of hearings, save a lot of court time.

CHAIRMAN SOULES: I had that disagreement with the Bexar County judges. They didn't buy it.

MR. DAVIS: You want to save filing, too. The main thing, they want you to try to discuss it.

CHAIRMAN SOULES: That's right. That was their point. All you've got to do is try to discuss the general nature of what your problem is and you can put it in your motion. That was the way they came down. I guess that's the way we're coming down.

Anything else?

PROFESSOR DORSANEO: Yes. Let me go back to 167a and make a specific proposal. Look in the rule book or look wherever, but I think you'll be able to understand it even if you don't. I move to amend 167 (b) (1) by striking "physical or mental examination by

a physician" and inserting "physical examination by a physician, or mental examination by a physician or psychologist." I also move the adoption of a definitional paragraph with whatever letter or number would be the last -- I realize ours is longer than the federal -- headed "Definitions" and that that read like this: "For the purpose of this rule, a psychologist is a psychologist licensed or certified by the State of Texas."

MR. RAGLAND: I want to amend that motion. I move that we eliminate any reference to psychologists in Rule 167a.

CHAIRMAN SOULES: All right.

Bill, should we vote on the amendment first and then -- I'm going to have to do some drafting here, but haven't we already said that we're going to include psychologists? We've already voted on that. We can't reverse that.

MR. RAGLAND: I'm going file a motion for rehearing.

[Laughter]

MR. COLLINS: I don't believe we've heard the last from Tom on this.

CHAIRMAN SOULES: Bill, you're going to have to give me the words because I can't get them that way.

What do you want out and what do you want in, looking on Pages 799 and 800? We've got to put a closure of parentheses --

PROFESSOR DORSANEO: I'm sorry. Let's do it over. I read it wrong, frankly, into the record.

In Subdivision (a) --

CHAIRMAN SOULES: What line? Do we put "tissue type" in there?

PROFESSOR DORSANEO: No, I'm not even using that one. I'm not even using Harry's draft at all.

CHAIRMAN SOULES: You've got to use it.

MS. DUNCAN: No, we can --

MR. HERRING: He's just adding two words in the rule and that definition. Right?

PROFESSOR DORSANEO: In the rule itself, where it provides to submit to á "physical or mental examination by a physician," I move to strike "physical or mental examination by a physician" and to substitute "physical examination by a physician, or mental examination by a physician or psychologist."

Now the rule says, in the "Order for Examination" paragraph: "When the mental or physical condition" -- skipping the parenthetical -- "of a party, or of a person in the custody or under the legal control of a person, is in controversy, the court in which the

action is pending may order the person to submit to a physical or mental examination by a physician."

I move to change that language to "physical examination by a physician or mental examination by a physician or psychologist."

CHAIRMAN SOULES: Okay.

Those in favor --

PROFESSOR DORSANEO: Then we have to define psychologist.

CHAIRMAN SOULES: So far, those who agree show by hands.

Those opposed?

Motion carries to make that change.

PROFESSOR DORSANEO: I move to define psychologist. And we can either do it in a Subparagraph (d) or do it at the end of (a), but I think Subparagraph (d) would be better, in the manner of the federal rule. Add a Subparagraph (d,) subtitle that "Definitions," and have it read: "For the purpose of this rule, a psychologist is a psychologist licensed by the State of Texas."

CHAIRMAN SOULES: How about any state in the United States or the District of Columbia?

MR. COLLINS: Yes, let's do it like the federal rule. There are some specialties in psychology

that cut across state lines.

CHAIRMAN SOULES: How many favor all states and DC as opposed to "State of Texas" only? Hold your hands up.

"State of Texas" only hold your hands up.

"State of Texas" only controls.

PROFESSOR DORSANEO: For housekeeping, couldn't we give a subheading to (c) down here? Something like "No comment" or -- see, 167a, there's no subheading in (c). All the others have subheadings. That's the one that says if no examination is sought then you can't comment on a party's willingness. Maybe "No comment."

MR. HERRING: I notice you didn't say "certified" back there in your definition. Are you sure that all psychologists are licensed as opposed to certified in Texas?

PROFESSOR DORSANEO: No.

MR. RAGLAND: Who's going to be the certification official?

MR. HERRING: Licensed or certified by the State of Texas is what Rule 510 says. I just don't know what you call what you do to psychologists.

PROFESSOR DORSANEO: I really am afraid that 510 is broader. It's covering people that don't have to

have a license but they're certified.

CHAIRMAN SOULES: All in favor show by hand these changes.

All opposed?

That carries.

PROFESSOR DORSANEO: Please turn to 729. This is the Deerfield problem.

CHAIRMAN SOULES: It tells you how you get your proof to the court, since the proof is not filed anymore.

PROFESSOR DORSANEO: The problem is this: Since depositions are not filed -- actually, the problem is larger than just depositions. It includes whatever discovery products are not filed. The courts have held that it's not summary judgment evidence unless it's somehow presented as an attachment to an affidavit or otherwise authenticated.

CHAIRMAN SOULES: This tells us the same thing we've been teaching in these courses. You've got to get your papers together and have them filed.

PROFESSOR DORSANEO: This provides a mechanism for doing that. I move its adoption.

CHAIRMAN SOULES: Any objection?

It's unanimously approved.

Mike, if you have a language problem in that,

let us know.

MR. HATCHELL: I don't really. But I don't understand why we're restating time limits when all you're doing is attaching proof to the motions which have time limits. That then encourages the filing of discovery separate and apart from the motions, and the cases are split on that. One case says that is proof, one case says that is not proof.

CHAIRMAN SOULES: Does anybody want to change their vote?

MR. RAGLAND: Well, we're going to draw rules where everybody, regardless of their ingenuity and diligence, will know how to file a motion for summary judgment when it ought to be in there.

CHAIRMAN SOULES: What's next?

PROFESSOR DORSANEO: That's all.

CHAIRMAN SOULES: Let's go to Page 652 and try to get this done.

PROFESSOR DORSANEO: What page?

CHAIRMAN SOULES: Page 652. The work I did on this was to put a period after "pleadings" in the fourth line and start a sentence over again so that that sentence is not so long. It's so difficult to read as a single sentence. Nothing changed in that.

The next sentence would read like this:

"When the defendant specifically denies venue allegations, the claimant is required, by prima facie proof as provided in Paragraph 3 of this rule, to support his pleading that the cause of action that is taken as established by the pleadings, or a part of such cause of action, accrued in the county of suit." So it says in the second sentence that the cause of action, or part thereof, that's established by the pleadings, but when specifically denied, you have to support by affidavits where it occurred. Prima facie proof where it occurred.

MR. DAVIS: You mean specifically denied that it occurred in the county of suit rather than just specifically denied, period, that it might be specifically denied on other grounds?

CHAIRMAN SOULES: Tom, to me, that's here because that's the only way you can read it. And to put that language in makes the sentence hard to read.

MR. DAVIS: Okay. You thought about it. You didn't overlook it?

CHAIRMAN SOULES: Yes. To try to keep the sentence to some size --

MR. DAVIS: I remember that was one of the discussion points.

CHAIRMAN SOULES: Right. But it says what

has to be proved accrued in the county of suit. That's really what the motion of transfer is all about anyway. So that's what has to be denied. That's what the dispute is about.

MR. DAVIS: You know if they came in and said it specifically occurred in the county of suit then they specifically denied it on some other grounds.

CHAIRMAN SOULES: But if they don't even raise that, they don't even have a motion going.

MR. DAVIS: I think that's a reasonable assumption.

CHAIRMAN SOULES: Okay.

Then the other comments that were made as to 653, I've changed that to adopt the suggestions, the underscored portion, "provided, however, that no person shall ever be required, for venue purposes, to support by prima facie proof the existence of a cause of action, or part thereof" and took out the "absence" language that didn't need to be there. I move that this change be recommended to the Supreme Court for promulgation.

MR. HERRING: Take out the "absence" language in the last part?

CHAIRMAN SOULES: Yes, I did.

PROFESSOR DORSANEO: Second.

CHAIRMAN SOULES: Any objection?

Okay. That stands approved.

MR. HERRING: Did you change the "merit" --

CHAIRMAN SOULES: Yes, I changed the "merit" to "merits" and "if" to "of" over on the next page. Again, we're going to get a chance to look at this for typos and that sort of thing.

MR. DAVIS: Might change a word or two here or there.

CHAIRMAN SOULES: Well, I'm going to give them back to you just like they are.

MR. DAVIS: Oh, I understand. I understand.

CHAIRMAN SOULES: What other fairly-pressing items should we discuss before we adjourn? We can work a little bit longer, if you wish. I don't think we ought to try to take up a whole large report.

Let's see, Tony, do you have -- Tony had to leave.

PROFESSOR CARLSON: But he has a written report.

CHAIRMAN SOULES: Let's see. We've gotten Hadley's, we got Bill's, we got David's. Tony has a written report. Did we get all of Frank Branson's?

Holly, you had a couple of carryovers there in the early rules you were pointing out. Why don't you find those and we'll see if they need to be brought up.

We've got Rusty's, Newell's. We have really done this agenda pretty thoroughly.

MR. DAVIS: We cut it up pretty good.

CHAIRMAN SOULES: Elaine, have you read Tony's report to the point where you can give us that?

PROFESSOR CARLSON: I think so. It was yesterday.

Before we get to that, there was one matter you asked my subcommittee to look at that's very perfunctory, on Page 1143, correcting a reference in Rule 781 to the Texas Rules of Civil Procedure to now reference Texas Rule of Appellate Procedure 42. There was a technical correction making that substantive change.

CHAIRMAN SOULES: Is that a correct reference the way it's now put in?

PROFESSOR CARLSON: Yes.

CHAIRMAN SOULES: Do you recommend it?

PROFESSOR CARLSON: Yes.

CHAIRMAN SOULES: Any opposition?

That's done.

PROFESSOR CARLSON: All right.

On Page 1113 and 1114 is a written report of Tony Sadberry's subcommittee. The first recommendation by that subcommittee is that to be consistent with the

changes that were made effective 1988 on citations for district and county courts, that citations pertaining to I think it's forcible entry and detainer cases delete the 90-day life of a citation.

CHAIRMAN SOULES: That should be done. No need to have citations expire.

PROFESSOR DORSANEO: So move.

CHAIRMAN SOULES: Any objections to that?

There being done, that's adopted.

Is there any other suggestion?

PROFESSOR CARLSON: No.

PROFESSOR DORSANEO: That was quick.

CHAIRMAN SOULES: That takes care of that.

Did you find any other points?

MS. HALFACRE: Rule 13. You've got two letters on Pages 432, 433 and 434.

CHAIRMAN SOULES: This is waiting until 30 days. The Onion mandamus case should give them some concern about that. He wants to eliminate the abuse, not wait till 30 days before trial to give the names. We didn't want to have a lawyer have to get ready 90 days or 120 days. The supplementation of discovery should occur close to trial, where you can get your case ready and have a pretty good idea what it's about. This 30-day thing was hashed out at length.

MR. RAGLAND: In order to take the depositions right at the last minute. The problem I've seen that comes up is where the trial court won't let you take the deposition of the expert witness designated on the 30th day. And then they say, "Well, discovery is cut off." They won't let you take the deposition. And you're really in a jam.

CHAIRMAN SOULES: I don't know how to fix that.

MR. RAGLAND: That's not covered in this request here, but --

PROFESSOR DORSANEO: What we did on Rule 245 should help on that. So we won't have to certify, anyway.

CHAIRMAN SOULES: Right.

We recommend no change on that?

MR. RAGLAND: I recommend no change.

CHAIRMAN SOULES: Any objection to that recommendation?

No change.

MR. DAVIS: 45 days, they'll wait till the 46th day.

CHAIRMAN SOULES: And here is Clint Lewis' letter to Judge Gonzales that there's too much sanctioning. Does anybody want to change that at this

juncture?

MR. DAVIS: I'd say there ought to be more.

CHAIRMAN SOULES: Tom wants more.

Anyone object to a recommendation to the court of no change in that respect?

Okay. That will be the recommendation. No change.

435. That's a little bit different.

MS. HALFACRE: We haven't addressed that yet.

CHAIRMAN SOULES: The recommendation is that the judge be -- well, we can't change that. That's constitutional. Well, we could, I guess. But up to now disqualification as stated in the rule has gone only to the limits of the Constitution and no further, because the judge is consitutionally disqualified and we just put that in the rule under certain circumstances. They want to add that the judge is disqualified not just if either of the parties or their attorneys are related by affinity or consanguinity. And that would take this rule beyond disqualifications. I don't think we can do that. We can say the judge ought to be recused for that, but not disqualified. Because we can't --

MR. RAGLAND: What about recusing the attorney?

[Laughter]

CHAIRMAN SOULES: Any change on that?

Any objection to no change?

MR. DAVIS: The attorney may pick up the case the day before trial.

CHAIRMAN SOULES: The next set I guess we need to look at -- that's Sadberry's rules.

Tindall's. 315 to 331. Those are the rules. And they are found where? May not be any. 315 to 331. Yes, there are some. They are from 1048 to 1112. Let's see if any of those are corrected. Did we do those?

MR. RAGLAND: On 1048 we did.

PROFESSOR DORSANEO: We did 1048.

CHAIRMAN SOULES: Yes, we've been through all these.

We did not do 329b. Oh, Justice O'Connor wants us to do everything in multiples of seven days. I think that has merit, but I think that should go to the comprehensive effort down the line, don't you?

Okay. We'll table that for the comprehensive effort.

MR. RAGLAND: It would be interesting to hear the reasoning.

CHAIRMAN SOULES: So that everything is on a Monday. You would almost do away with Saturdays and Sundays. Doesn't do away with legal holidays. But

that's one of the things we fixed in the temporary restraining order rule, which would make it 14 days. The judge could sign a TRO on a weekday, two weeks later on that same weekday you would have the hearing. You wouldn't have to worry about whether the 10th day was on Saturday, Sunday or whatever. It doesn't do away with legal holidays.

MR. DAVIS: Monday is garbage day.

CHAIRMAN SOULES: Is there anything left we haven't covered? We tabled a few things.

MS. HALFACRE: Have we addressed Justice Hecht's inquiry, Page 1111?

CHAIRMAN SOULES: Should there be general rules for multidistrict litigation generally? I think so. We've got to get to that project.

Justice Hecht, would you, for the committee and on the record, tell us what the circumstances are today that have given rise to a concern that we may need these multicounty/multidistrict rules so that we can assign that and undertake the project?

JUSTICE HECHT: There is, of course, increasing litigation in the state of Texas that is pending in state and federal courts in more than one district and county. Some of it involves asbestosis litigation, some of it involves plane crashes. There

is, for example, some air crash litigation that is pending in state courts in Dallas, I believe Tarrant County, Hunt County, and the Northern District of Texas.

The Court received an application for mandamus a couple of months ago in which all of the parties in that aircraft litigation had reached an agreement with respect to the conduct of discovery in all of those cases except for one case in Hunt County. And the lawyers in that case had not reached an agreement. The defense counsel was the same as the defense counsel in most or all of the other litigation. The plaintiff's counsel, I don't know whether he's involved in any other cases or not. But, in any event, they could not reach any agreement on discovery. And the trial judge refused to require them to conduct discovery in accordance with the agreement that was governing all the other cases. And so I believe the defendant requested mandamus directed to the trial judge to compel some kind of agreement or enter some sort of order bringing that case into line with the other cases. Obviously the trial judge had refused to do that.

The Court, I believe, declined the application for mandamus, refused it, but that was one instance, and there have been others, where there has been a discussion at conference on whether there ought

not to be some kind of rules governing the conduct of litigation which arises out of the same circumstances but is pending in different counties and may involve different parties. We've never had those kind of rules in Texas. I think probably we've never much needed them. But query: With this kind of increasing complex litigation, is there a need for them now?

The American Law Institute has a restatement project going on to -- well, it's not a restatement project, it's a rules-writing project to try to codify some of these concepts in multidistrict litigation, both for state and federal courts. And it may serve as a blueprint for some rules. Obviously the federal courts have a multidistrict panel. That may be helpful. But the Court feels like at some point we're going to need to study this area.

MR. DAVIS: Are you aware of any other states that have multidistrict rules or procedures?

JUSTICE HECHT: No. But we haven't looked.

MR. DAVIS: I'm basing a scenario on which I have some familiarity. I'm not aware of any state that has it, was the reason I was curious if you knew of one.

JUSTICE HECHT: No.

MR. DAVIS: Of course, the federal I'm familiar with, but I've never heard of it in a state

except maybe as they've done here, on a voluntary basis in specific cases in specific courts.

JUSTICE HECHT: And, frankly, I don't see how the parties can help but agree at some point when you have so many actions pending. They're just going to have to agree to the conduct of discovery. Otherwise it would just be unmanageable.

MR. DAVIS: What it is is arguments over who is going to do the discovery.

JUSTICE HECHT: Who's going to go first, yes.

CHAIRMAN SOULES: I will take that charge as chairman to get a subcommittee to become involved with the concept of multicounty/multidistrict litigation, Your Honor, if that's okay.

JUSTICE HECHT: That would be great.

CHAIRMAN SOULES: Are there volunteers for service on that?

MR. HERRING: Sure.

CHAIRMAN SOULES: Okay. Elaine will be on the committee, Charles Herring will be on the committee. Do you want to be on the committee, Tom?

MR. DAVIS: If we have one. I want to speak to that first.

CHAIRMAN SOULES: I'm going to accept the charge.

MR. DAVIS: I think first we ought to see if there are any other states that do have it. I think that's maybe the first, No. 1 step. And I would also suggest that we do have a lot of other things to do, and while this may be a worthwhile project, I doubt if it should take priority or be too high on our list, because I don't think the need for it just occurs every day. And I have some doubt as to the real need for it in a specific state. In a nationwide situation I can understand it.

JUSTICE HECHT: Well, you can do what you want to about this. The majority of the Court asked me to ask you to report back to them on complex litigation. If you want to tell them no, just tell me to tell them no.

CHAIRMAN SOULES: We will do so. I'm appointing a committee now of Charles Herring and Elaine Carlson. Are there any other volunteers?

MR. DAVIS: I will.

CHAIRMAN SOULES: And Tom Davis. I will assign additional membership to that by circulating a letter to the committee as a whole and asking who would like to serve. And all persons who volunteer will be appointed to a committee. There won't be anyone excluded. And if it doesn't appear to me to be

representative of the various types of litigation people involved, I'll probably make some calls to get that representation, so that it's extensive and adequate to get the idea across.

Let's see. We've got about --

MR. HERRING: Was there anything else in his second question there?

Judge, you had a question about rules for comity for litigation. Is that the same thing?

JUSTICE HECHT: That's the same thing.

CHAIRMAN SOULES: Take that as part of the same charge and assign it to the same committee.

There are some tags. I think just going back now for about five things that may be controversial, may not. Remember we talked about this interpreter, Page 36. Taking this language that -- what did we have? We had a Rule 183 and Evidence Rule 604.

MS. HALFACRE: We've got 183 and 861 in our books.

CHAIRMAN SOULES: Okay. "The court may, when necessary, appoint interpreters, who may be summoned in the same manner." You can subpoena an interpreter. We need to change that. Doesn't look very workable. But that's not the point. It's do we --

MR. RAGLAND: Page 36? I've got that we

tabled that.

CHAIRMAN SOULES: We did until today. What they want us to do is to adopt Federal Rule 43 (f), which talks about the court making an appointment of an interpreter of its own selection, fixing a fee, and charging it as costs, and that that should go into our interpreter rule. Isn't that a reasonable request?

Is there any objection to it?

Okay. Then that will stand adopted.

Next is Page 135.

MR. HERRING: Didn't we do that?

MR. RAGLAND: We did that yesterday.

MS. DUNCAN: Rusty is going to look at it.

CHAIRMAN SOULES: We passed it, then I think someone wanted to look at it. But he's not here. So we will leave it passed. It is recommended for adoption.

On Page 164, the question of what happens when you have an evenly-divided Court of Appeals on a point of recusal.

MR. DAVIS: Flip a coin.

CHAIRMAN SOULES: The thing that I would like, observation comes to my mind of where you have a court of more than three judges. Does the panel being evenly divided cause a recusal to be denied? Presumably the judge who is challenged is not going to act. If the

others split evenly, is a recusal denied?

MR. RAGLAND: Isn't the basic rule on appellate courts that you have to have a majority vote in order to get an affirmative opinion?

CHAIRMAN SOULES: Yes.

MR. RAGLAND: Why shouldn't that be it here?

MR. DAVIS: This is a little different situation. If there's one or an evenly-divided number of judges that think you should, to me, I think it's good public relations, or whatever you want to call it, that he do recuse himself. I can see some interesting newspaper articles on it.

MR. RAGLAND: I agree with that. Seems like to me that any judge would recuse himself if one person objected to it. But the question is whether or not he's compelled.

MR. DAVIS: That's what it is. Whether the Supreme Court ought to encourage him to recuse himself when there's at least some grounds for it, or to what extent they want to encourage it. I would suggest it ought to be encouraged.

MR. HERRING: This is recommended by the Committee on Administration of Justice?

CHAIRMAN SOULES: Yes. Evenly divided en banc, the motion to accuse should be granted. I'd

like to put that in there. At least you are going to have the whole court look at whether a brother judge should sit. If they can't, it would be denied. Is there an objection to inserting en banc there?

No objection. That will be granted.

MR. HATCHELL: Does it automatically go to the en banc?

CHAIRMAN SOULES: Yes. Majority of the justices or the judges sitting en banc. If you can't get a majority, you've got to get them en banc. If you can't get a majority with three, they've got to meet en banc. If they're evenly divided, the question is, denial or granted?

How many feel that the motion should be denied in the event of even division? Show by hands.

How many feel that the motion should be granted and the judge should be recused if there's an evenly-divided court?

Five. Five to nothing.

We will change the word "denied" to "granted" as it appears on Page 164, insert the words "en banc" to highlight that need. And that stands approved.

Is there something on 170? We're not going to get that done, I don't think.

Did we work this business on cross-appeals

and that sort of thing?

MR. HATCHELL: I talked to Rusty this morning. He said that's a major project, needs to be tabled.

CHAIRMAN SOULES: I'm going to assign that for study to the rules and appellate subcommittee. Mike, if you would accept it, I would like to appoint you cochairman, with Rusty, of that committee. Would you accept that?

MR. HATCHELL: Yes.

CHAIRMAN SOULES: Thank you.

What's the next one here, 184?

PROFESSOR DORSANEO: The same project.

CHAIRMAN SOULES: So I assign that also to the same committee.

Page 207 we did not take up.

Elaine, could I get your attention for that? I know you've got the local rules project, but this supersedeas is something you are quite interested in. This is on Pages 207, 208. You are doing some work on that, are you not, now?

PROFESSOR CARLSON: Yes. I'm writing a paper.

CHAIRMAN SOULES: Would you look at this fairly extensive project and --

PROFESSOR CARLSON: Certainly.

CHAIRMAN SOULES: If you need any help, call on any of us or call me.

MR. COLLINS: I'd like you to look at Senator Parker's bill, too, and let us know about that.

CHAIRMAN SOULES: I saw that and I appreciate the Legislature and their statute and we will certainly work to have our rules not in conflict with that to the absolute best of our ability. If we have a problem in doing that, we would wish to talk to the Senator about it and see if he can work with us as we indeed will work with him.

On Page 222, we tabled this because the question is: Is there any review of supersedeas other than at the appellate level? The suggestion was made we change it to appellate court. Did anybody look at that to determine whether there's any jurisdiction elsewhere?

PROFESSOR CARLSON: Under the bill or under --

CHAIRMAN SOULES: The Supreme Court doesn't have fact-finding powers. I think that was the question yesterday. Why make this change? Because the Supreme Court can't do anything with it anyway.

JUSTICE HECHT: I'm not sure that the Court doesn't have fact-finding powers in the sense that we

have some original jurisdiction which did not specify whether we do or don't. And when the Court has exercised that jurisdiction in the past, they've simply appointed a master to go conduct a hearing and report back.

But that issue aside, I'm not sure that it isn't just as convenient for the parties to go to the Court of Appeals and get the issue resolved even if the matter arises during application for writ of error, unless there's some feeling on the part of the attorneys that they can't do that. That once the application is filed and, say, granted, that they can no longer go back to the Court of Appeals for a review of the supersedeas question.

CHAIRMAN SOULES: There's no question they can go to the trial court.

JUSTICE HECHT: When the case is in the Supreme Court, can't the parties go back to the trial court?

CHAIRMAN SOULES: Absolutely.

JUSTICE HECHT: Then, if they don't like the trial court's ruling, can't they go back to the Court of Appeals?

CHAIRMAN SOULES: Absolutely.

JUSTICE HECHT: So it looks like they're

fully protected unless they want a third level of appeal. That does raise a jurisdictional question.

CHAIRMAN SOULES: On Page 222, is there a motion one way or the other on this suggestion?

PROFESSOR DORSANEO: I move that the proposal to amend on Page 222 be denied.

CHAIRMAN SOULES: All in favor of that denial show your hands.

Opposed?

Okay. That's denied.

Did we get this on 328, Judge Hecht's -- have we been through all that now, Holly?

Oh, the premature application. Where is that? 130 (a). Let me assign that to you, Mike.

MR. HATCHELL: That needs careful study.

CHAIRMAN SOULES: Rusty and Mike Hatchell.

Can we wait for a subsequent report on that, Your Honor?

JUSTICE HECHT: Yes.

CHAIRMAN SOULES: TRAP Rule 130 (a), the reference is on Page 328 of these materials, it's Item 5 on that page, that's being assigned to Rusty and Mike for their committee to study and report on.

Page 422.

PROFESSOR DORSANEO: That's the proposal by

Justice O'Connor, I believe, to modify the enlargement rule such that the mailing provision applies to all documents and not just motions for new trial.

I move the adoption of the language on Page 422 as long as the additional matter that we voted on affirmatively yesterday is added to the paragraph beginning, "If any document."

CHAIRMAN SOULES: That is in the third and fourth lines, first to delete "one day" and the word "more" and insert, after the word "mail," "on." So it reads: "deposited in the mail on or before the last day for filing same." Is that right?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: Okay. With that change in the text on Page 422, and there's a typo, "si" instead of "is," you move that this be recommended for adoption?

PROFESSOR DORSANEO: Yes. With the effect being if you send something by mail, if you send it on or before the last day that it's due, you meet your deadline if it gets there not more than 10 days tardily.

CHAIRMAN SOULES: Whatever it is. Whatever kind of document?

PROFESSOR DORSANEO: Whatever it is. I don't think there's maybe anything that it really matters.

MR. RAGLAND: Didn't we do something to Rule

5 yesterday?

CHAIRMAN SOULES: That was tabled. This is TRAP 5.

MR. HATCHELL: Wait a minute. Is this TRAP 5?

PROFESSOR DORSANEO: No. This is Civil Rule 5.

Luke raised the "on or before" point with respect to this yesterday.

CHAIRMAN SOULES: Okay. Is there any opposition to this suggestion, then?

That stands unanimously adopted.

PROFESSOR DORSANEO: I've got one more, if somebody has a red book. Could we look at Paragraph 201, 5? It's one I missed. This, if it hasn't already been corrected, is just a clerical mistake. "Time and place." It hasn't already been corrected. I move to amend Rule 201, Paragraph 5, to correct the misreference to Paragraph 4 of Rule 166b by replacing that with "Paragraph 5 of 166b."

CHAIRMAN SOULES: Where is that now?

PROFESSOR DORSANEO: Paragraph 5 of Rule 201. In the booklet, this matter is pointed out on Page 224.

CHAIRMAN SOULES: Okay. Page 224.

PROFESSOR DORSANEO: Paragraph 4 of Bill

Kilgarlin's letter says "Rule 201, 5 states that depositions of a party may be taken in the county of suit subject to the provisions of Paragraph 4 of Rule 166b." I can't for the life of me see how Paragraph 4 is involved. It's not involved.

MR. DAVIS: Should be 5.

PROFESSOR DORSANEO: Should be 5. Paragraph 4 now deals with objections rather than protective orders.

CHAIRMAN SOULES: What happened was we inserted a new paragraph and they got renumbered. This Paragraph 4 was a new paragraph. Protective orders used to be 4. We didn't change the number.

MS. HALFACRE: That's in the book at 867.

CHAIRMAN SOULES: Yes, it's in here.

Any objection to that change?

That stands approved.

Is there any other business?

Elaine.

PROFESSOR CARLSON: I see a matter that's within my subcommittee I had not seen before today or if I did I overlooked it. I apologize. But it's pretty straightforward and I think addresses a concern addressed by Mr. Stone on Page 1140 of the book to Rule 771, which allows for parties to file written objections

to partition reports but gives them time a period. We would like to have a time period and suggest 30 days.

CHAIRMAN SOULES: 771. Is that that report of abstract or something? Let me see what that is. 771.

PROFESSOR CARLSON: I think it's a report on value of land when partition is required.

CHAIRMAN SOULES: Value of land on partition. And they want to get a time limit.

PROFESSOR CARLSON: Right. I can go ahead and make a motion, if you like.

CHAIRMAN SOULES: At 1138 there's a redline. Is that the suggestion that you want to move adoption of, Elaine?

PROFESSOR CARLSON: Not in full. This is a zealous suggestion here.

CHAIRMAN SOULES: Can we have your mark-up on that page, then?

PROFESSOR CARLSON: I move the first modification that's suggested, "File a written objection to the report at any time within 30 days of the date the report is filed," and none of the other suggestions.

CHAIRMAN SOULES: All right. You don't want the report to be binding on the court, but you want to give the court the suggestion it was rejected. So

that's the reason you're not going with that. What about this stricken language, "of the commissioners in partition, and in such case"? Does that come out?

PROFESSOR CARLSON: I don't think it really adds anything that is terribly different than what the rule says now.

CHAIRMAN SOULES: I mean the part that's shown deleted. Do we delete that? Then it would read "In the event that a written objection is filed by any party to the suit, then a trial of the issues thereon shall be had as in other cases." You don't want to offer that?

PROFESSOR CARLSON: Maybe it would be easier to offer my suggestion. The rule begins by -- as it now stands -- "Either party to the suit may file objections to any report of the commissioners in partition." I move we add the words "within 30 days of the date the report is, comma."

CHAIRMAN SOULES: And that's the only change?

PROFESSOR CARLSON: Right.

CHAIRMAN SOULES: Okay. The motion, then, is that in Rule 771 -- and the language for that rule is this "Either party to the suit may file objections to any report of the commissioners in partition, comma" then this insertion "within 30 days of the date the

report is filed, comma."

MS. DUNCAN: You shouldn't have a comma there.

CHAIRMAN SOULES: "Either party to the suit may file objections to any report of the commissioners within 30 days of the date the report is filed," and so forth to the end of the rule without further change?

PROFESSOR CARLSON: That's correct.

CHAIRMAN SOULES: Any objection? Goes in after "in partition." Any objection to that change?

That stands approved.

And we'll have to write that up. That's got to be specially written because it's not the way it is in our book.

Is there any other business?

Well, I can only tell you how much I appreciate your effort. Because we have completed an extensive agenda in two long days, 30-minute lunch breaks, from 8:30 to 6:00 both days.

PROFESSOR DORSANEO: I have one motion. I move that the committee members be assessed the proportionate cost for preparing materials for this session in the manner it's been done before, including academics, but excluding sitting judges.

CHAIRMAN SOULES: We've never assessed the

academics. I'll give you a chance to participate if you want. We've always excluded judges and academics.

MR. RAGLAND: I thought that was a standing rule. If not, I'll second the motion.

CHAIRMAN SOULES: It's a standing rule. I'll do that. That includes the court reporter's transcript and the out-of-pocket costs to the chair of conducting the meeting; that is, the materials in the report for the meeting.

MR. RAGLAND: I'd like to acknowledge on the record the outstanding work of these ladies here. They made things go a lot smoother.

CHAIRMAN SOULES: Holly Halfacre and Sarah Duncan have contributed immensely to this.

JUSTICE HECHT: Let me add on the record, for what it's worth, we're going to make every effort to see that this committee gets some funding from some source. I don't know exactly how we're going to do that, but we are functioning on the backs of the committee members, who have already made a substantial contribution way too long. I can't promise that we're going to find any, but we're sure going to try.
