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SUPREME COURT ADVISORY COMMITTEE

NOVEMBER 20, 1993

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Taken before Anna L. Renken,
Certified Shorthand Reporter and Notary Public
in Travis County for the State of Texas, on
the 20th day of November, A.D. 1993, between
the hours of 8:30 o'clock a.m. and 12:50
o'clock p.m., at the Texas Law Center,
1414 Colorado, Austin, Texas.

ORIGINAL

SUPREME COURT ADVISORY COMMITTEE
INDEX TO TRANSCRIPT OF MEETING HELD
NOVEMBER 20, 1993

<u>TOPIC</u>	<u>PAGE NUMBERS</u>
Jury Charge Task Force Report	
TRCP 226a	511-524
TRCP 272(2)(d) & (e)	433-492
TRCP 272(2)(b)	492-505
New subpart to 272 governing standard of review	505-511
TRCP 274(5)	527-553
TRCP 279(2)	524-527
Discussions re: subsequent meetings	553 - 577
Rules of Civil Procedure Task Force Report	577 - 626

NOVEMBER 20, 1994 MEETING

MEMBERS PRESENT:

Alejandro Acosta Jr.
Prof. Alexandra W. Albright
Charles L. Babcock
Pamela Stanton Baron
Pat Beard
David J. Beck
Honorable Scott A. Brister
Prof. Elaine A. Carlson
John E. Collins
Prof. William V. Dorsaneo III
Sarah B. Duncan
J. Hadley Edgar
Kenneth D. Fuller
Michael T. Gallagher
Anne L. Gardner
Honorable Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring Jr.
Tommy Jacks
Joseph Latting
Thomas Leatherbury
Gilbert I. Low
Honorable F. Scott McCown
Russell H. McMains
Robert E. Meadows
Harriet E. Miers
Charles Morris
John M. O'Quinn
Richard R. Orsinger
Honorable David Peeples
Anthony J. Sadberry
Luther H. Soules III
Sam D. Sparks
Stephen D. Susman
Paula Sweeney
Harry L. Tindall
Stephen Yelenosky

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Doak Bishop
J. Shelby Sharpe
David B. Jackson
Hon. Doris Lange
Chief Justice Austin McCloud
Thomas C. Riney
Hon. Paul Heath Till
Hon. Bonnie Wolbrueck

OTHERS PRESENT:

Justice John Cornyn
Lee Parsley, Supreme Court Staff Attorney
Holly Duderstadt, Soules & Wallace

MEMBERS ABSENT:

Gilbert T. Adams
Frank Branson
Judge Solomon Casseb
Judge Ann T. Cochran
Tom Davis
Vester Hughs
Donald Hunt
David Keltner
John Marks
Steve McConnico
David L. Perry
Dan R. Price
Tom Ragland
Harry Reasoner
Judge Raul Rivera
Broadus Spivey

EX OFFICIO MEMBERS ABSENT:

Paul Gold
Judge Bob Thomas
Hon Sam Houston Clinton

P R O C E E D I N G S

Saturday, November 20, 1993

8:30 a.m.

MR. SOULES: I think we left off with Gus Hodges' favorite topic, inferential rebuttal. And I'm sure most of you went home and got out the little red book to remind ourselves of what exactly that inferential rebuttal was all about so that we could give this some stimulating discussion this morning.

MR. MCMAINS: I didn't get a wink of sleep last night.

MR. SOULES: That's right. And it put me back to the same nightmare as I had with it the first time 25 years ago.

So we're looking at the task force report of the jury charge task force, and we were back on 274. No. 272(2)(d) and (e). We had several suggestions on how to deal with this. Judge Guittard's suggestion was that we add a sentence to (e) that says

1 "disjunctive submission shall not be
2 considered an inferential rebuttal question"
3 or words to that effect. It may not be
4 exactly right.

5 We had another suggestion to
6 just simply delete (e) all together, and then
7 another suggestion to delete both (d) and (e)
8 all together. Those are the ones that I can
9 remember. Who wants to pick up the discussion
10 on this this morning. Nobody?

11 PROFESSOR DORSANEO: To state it
12 simply, on the inferential rebuttal concept
13 the separate submission of an inferential
14 rebuttal matter in question form is absolutely
15 clearly incompatible with the general
16 requirement of broad form submission whenever
17 feasible. Thus in my view it is completely
18 unnecessary to have Paragraph (e) which says
19 what you can't do again.

20 Now, with respect to the
21 submission of an inferential rebuttal matter
22 in the form of an instruction that's
23 justifiable under the current Rule 277 only on
24 the basis that such an instruction is proper
25 to enable the jury to render a verdict. As

1 long as we continue to think that the cases
2 like the one that recently validated the
3 Oscillator Case will continue to be the case
4 law. But that's the theory of submission of
5 inferential rebuttal matters in the form of an
6 instruction.

7 I don't think it's necessary
8 to resurrect the concept and to make it plain
9 that a question can cover the inferential
10 rebuttal aspect of the thing that is being
11 inquired about. I don't know if I'm saying
12 that in a clear way. I don't think it's
13 necessary to know about inferential rebuttal
14 in order to deal with it adequately.

15 HONORABLE ANN TYRELL COCKRAN:

16 From the discussions that I recall in our task
17 force meetings I think everybody on the task
18 force agreed that this really was not
19 necessary, given, but we were again afraid of
20 what the construction might be of our, you
21 know, deleting something, you know, that is
22 currently in the rules. It was really a
23 paranoia of whether our action if we had
24 deleted it would be taken as trying to, you
25 know, make some dramatic change in the law, or

1 whether it would just be reviewed as under
2 current practice unnecessary. We believed the
3 latter to be true, but we were afraid somebody
4 else with greater power of the pen would think
5 the former were true, and that's one of the
6 reasons that we left in that way.

7 HONORABLE C. A. GUITTARD:

8 Well, I suggest that in certain kinds of
9 cases, one of which I outlined yesterday by
10 the contract which had an oral contract in
11 which there were two possibilities, that the
12 clearest way and the simplest way to submit it
13 is to a disjunctive submission; and that
14 doesn't have the vices of inferential
15 rebuttal, and that the subdivision (d) should
16 remain as it is for that reason, to permit
17 that kind of submission.

18 My concern is that subdivision
19 (e) as drawn here is inconsistent with that to
20 the extent that disjunctive submission might
21 be considered inferential rebuttal. So I
22 would suggest that we either delete (e) or add
23 to (e) the language suggested that
24 "disjunctive submission shall not be
25 considered inferential rebuttal."

CHIEF JUSTICE AUSTIN MCCLOUD:

We've had back in several years ago of course we used to submit inferential rebuttal issues all the time. And then some years ago we started saying you don't submit an inferential rebuttal issue, but you carry it and cover it in an instruction. It doesn't take up a lot of space. It just says "An inferential rebuttal, inferential rebuttal question shall not be submitted." It's clear. A trial judge knows for certain you don't have to worry about it.

If you take that out, then you're going to -- I think you're going to have trial judges that will say, well, maybe they're entitled to a question, and he may not or she may not even be too familiar with what an inferential rebuttal question is, but start submitting that type of question. If it clearly says don't submit, you don't submit it.

We've had something like this for a number of years and it's worked pretty good, and as a trial judge you can look down there and as an appellate judge and say,

1 "Don't submit that."

2 HONORABLE F. SCOTT MCCOWN: I
3 think (e) raises an important problem that we
4 need to establish a principle about, and that
5 is it doesn't take up much space, it is clear,
6 but it has no importance except historical,
7 and our rules are littered with provisions
8 exactly like this that have no importance
9 except historical.

10 If what we want to do is
11 simplify and shorten the rules, we've got to
12 gut up, take out the provisions that are of
13 historical importance only and explain it in
14 short comments, a short comment that says
15 "We've taken this out not because we intend to
16 authorize it. It's not authorized, but it's
17 prohibited and impossible under the broad form
18 submission, the point that Bill made. And I
19 think we really need to adopt as a principle
20 wherever we can in the rules taking out
21 historical provisions.

22 PROFESSOR ALBRIGHT: This
23 raises another problem that we've talked about
24 before, is that of having explanatory notes
25 and comments at the end of the rules. And

1 Judge Hecht isn't here.

2 MS. SWEENEY: Yes, he is.

3 MR. BABCOCK: Yes, he is.

4 PROFESSOR ALBRIGHT: Here he
5 is, but he didn't hear me. But Judge Hecht, I
6 know in the task force on the revision of the
7 rules we've talked about that it might be a
8 good idea to have comments to the rules.
9 There are substantial comments on the
10 sanctions rules. There are no comments to
11 these rules, but I think this could be an
12 instance where you could take out the
13 inferential rebuttal rule because it's a
14 monster that I think everybody's eyes glaze
15 over whenever inferential rebuttals are
16 mentioned. It is only a matter of history,
17 and it creates problems because there are a
18 whole lot of people who don't even understand
19 what inferential rebuttals are. But we could
20 take the rule out, but put a comment that we
21 do not intend to allow inferential rebuttal
22 questions by taking the rule out, but that
23 they're objectionable because they cannot be
24 attained in a broad form question.

25 What do you think the Court's

1 attitude toward comments would be?

2 JUSTICE NATHAN HECHT: I think it
3 would be favorable. There has been some
4 resistance in the past to putting too much
5 substance in the comments, and therefore you
6 see in the comments that have been used almost
7 just a bare bones historical tracing of the
8 changes; but I think particular if we do make
9 any of the kinds of changes that Professor
10 Dorsaneo's group is recommending, we are
11 almost going to have to have more extensive
12 commentary just to show these same sorts of
13 things.

14 In this particular case I
15 think it would be a very helpful solution to
16 the problem. I think the comments attached to
17 the sanctions report were helpful too. I
18 think the Court would look favorably on it.

19 MR. ORSINGER: I know that
20 inferential rebuttal matters are a sacred cow
21 in our jurisprudence, but I would like to go
22 ahead and propose that we ban inferential
23 rebuttal instructions. It seems to me that
24 inferential rebuttal instructions are subsumed
25 in the Plaintiff's or Counter-Plaintiff's

1 principal responsibility to secure a necessary
2 finding or appropriate instructions, and that
3 it's just a vestige of an earlier time, and I
4 know that people are walking right up to it
5 here and not going all the way, but really I
6 mean what is the point in perpetuating that
7 practice in instructions when we can't justify
8 it in questions.

9 MR. LATTING: For example,
10 Richard, give us an example.

11 MR. ORSGINGER: I don't want to
12 give you an example, because I really don't
13 litigate inferential rebuttals, but I can just
14 tell you that in my conception of cases that
15 have traditionally involved inferential
16 rebuttal questions they seem to me to relate
17 to evidenciary matters that would be
18 inconsistent with the primary thrust of the
19 charge, and to move them out of questions and
20 into instructions allows the questions to be
21 simple, but it still involves commenting on
22 evidenciary aspects of the case that are
23 inconsistent with the principal thrust of
24 liability which is liability, causation and
25 damages at the most basic level. And I've

1 never understood why that was good other than
2 just as a political matter in favor of the
3 party who was defending the claim; and I
4 really wonder in light of our orientation now
5 toward succinct instructions and simple
6 questions where the jury can understand the
7 charge why we ought to perpetuate the
8 inferential rebuttal concept at all.

9 PROFESSOR CARLSON: I was
10 going to say that may be the effect, Richard,
11 of this requirement that the party with the
12 burden to plead has to do so in order to get
13 the matter to the jury. As I read the case
14 law it's not at all clear to me whether
15 inferential rebuttals need to be pled, but I
16 assume folks will now try pleading them if
17 they're deleted from the instructions and
18 definitions, if that can be a continued
19 practice in these changes, they will start
20 pleading them.

21 HONORABLE ANN TYRELL COCKRAN:
22 I would like to wholeheartedly second what
23 Richard just said. In the traditional car
24 wreck case, the sole proximate cause case, if
25 you read the instruction, and particularly if

1 you see the way the charge is put together now
2 with, you know, "Did the negligence, if any,
3 of the persons named below proximately cause
4 the occurrence in question," read the
5 definition of negligence, read the definition
6 of proximate cause, and if you read the
7 definition of sole proximate cause, sole
8 proximate cause adds no substantive, adds
9 nothing substantive to the charge. It is a
10 restatement of the definition of proximate
11 cause, but lot of times it is a restatement
12 that is phrased in such a way that it really
13 is the trial judge singling out a particular
14 piece of evidence, which you know, makes me
15 just as nervous as a cat to do. And yet, you
16 know, it's always been so well accepted, but
17 what it does is comment on the evidence in
18 favor of a particular side without adding one
19 substantive difference as far as what
20 proximate cause means.

21 PROFESSOR ALBRIGHT: As far as
22 inferential rebuttal instructions I think
23 there may be some situations where they're
24 helpful and others that are not. Again, I
25 would hate for us to put in the rule that you

1 can't have an inferential rebuttal instruction
2 or question because that just makes the
3 inferential rebuttal continue to live. If we
4 feel strongly that we don't want inferential
5 rebuttal instructions or questions, that could
6 again be put in the comment. But I think the
7 best thing to do is to let inferential
8 rebuttals die as an entity and let the trial
9 judge decide what instructions in this
10 particular case are helpful to the jury.

11 HONORABLE DAVID PEEPLES:

12 Thinking of a case like Yarborough vs Burner,
13 how would you submit sudden emergency and
14 unavoidable accident? Would you just not tell
15 the jury about those at all?

16 HONORABLE ANN TYRELL COCKRAN:

17 I think if you read the definition of
18 negligence and then really analyze the
19 instruction on sudden emergency, it doesn't
20 add anything either. It just says that if you
21 acted as a reasonable person would have done
22 under the circumstances, you weren't
23 negligent. That is what negligence is. It
24 doesn't add anything. All it does is comment
25 on some evidence.

1 MS. SEENEY: That's right.

2 HONORABLE DAVID PEEPLES: If
3 we have any faith in the jury, why can't we
4 trust the jury to answer the bottomline
5 questions after being told several things and
6 let the lawyers argue it?

7 HONORABLE ANN TYRELL COCKRAN:
8 Well, it's the problem of telling them the
9 same thing but shading it in favor of one
10 party. You know, if you-all want to say that
11 we get to start, you know, commenting on the
12 case to our juries, if you want to start
13 giving trial judges that power.

14 HONORABLE DAVID PEEPLES: It's
15 not a matter of starting. It's a matter of
16 stopping doing something. There are very few
17 instances in which an inferential rebuttal
18 instruction would be proper; and that's the
19 sole cause, sudden emergency and unavoidable
20 accident are the three I can think of.

21 I think Judge Guittard raised
22 a real good disjunctive submission situation
23 that we ought to authorize.

24 HONORABLE ANN TYRELL COCKRAN:
25 Yes. But speaking not for the task force but

1 for myself, I would be all in favor of just
2 deleting (e) out of this rule all together
3 just like Alex said, let it wither on the vine
4 without our comment one way or the other and
5 let it take its natural life course.

6 MR. MCMAINS: The only problem
7 I have with just the naked deletion of (e) is
8 that you then have totally eliminated any
9 prohibition of submitting what used to be an
10 inferential rebuttal question, and now what
11 you're saying is "Well, we can add 85 more
12 words in a comment to make sure everybody
13 understands we weren't really changing
14 anything." That seems to me to be a terribly
15 inefficient way of keeping something that
16 ain't broke in the rule, which is I think what
17 Judge McCloud was talking about.

18 If you take is out nakedly,
19 unless you substitute a prohibition of
20 inferential rebuttal matters being in the
21 charge at all, to say simply in an academic
22 sense "Well, it's incompatible with broad form
23 and therefore there is no reason for us to
24 talk about it," assumes that judges are going
25 to follow the first part of the rule that says

1 you shall submit it in broad form or that
2 they'll get reversed if they don't, neither
3 one of which is true under the current
4 jurisprudence.

5 There is nothing in these
6 rules and never has been that reverses a case
7 if it isn't submitted in broad form, and the
8 Supreme Court has refused to reverse cases
9 when they were not submitted in broad form in
10 a situation where it was quite feasible and
11 could have been done so and where the proper
12 issues were tendered. And they said that's
13 not reversible error. There is discretion in
14 the trial judge.

15 So if you take this out and
16 have no other mention about it, then you are
17 going to give effectively discretion to the
18 trial judges to start submitting questions on
19 inferential rebuttal, and whether that's what
20 you intend to do or not. And I oppose that
21 vehemently.

22 HONORABLE F. SCOTT MCCOWN: I
23 really think we have to let go of the past,
24 and were are not going to go back and have
25 inferential rebuttal questions whether we

1 delete (e) or not. If we delete (e), we're
2 not going to have inferential rebuttal
3 questions start popping up in charges.

4 And I really want to take
5 Rusty head-on, because I think this is an
6 important principle, not just here, but
7 throughout the rules. We have got to have
8 rules that are simple and clear, and it's not
9 true that putting it in the comment clutters
10 up the rules to the same extent as putting it
11 in the rules. The comments have a different
12 weight and a different purpose than rules, and
13 we really need to have our rules simple and
14 clear and let our comments carry the
15 historical perspective.

16 One other minor point: I
17 would hate to see a rule that said there
18 cannot be inferential rebuttal instructions,
19 because with broad form submission explaining
20 what the law is it seems to me if you had a
21 rule that said that you couldn't have
22 inferential rebuttal instructions, it would
23 simply give a ground of appellate point that
24 somehow the judge's explanation of the law
25 crossed the line into an inferential rebuttal

1 instruction. And I can't think of a good
2 example. This is not a good example, but
3 maybe it will illustrate what I mean.

4 I had a case where if the
5 agreement was executed, it was valid. If it
6 wasn't executed, it wasn't valid; and that's
7 what the statute said. The case law said that
8 executed did not require signatures as long as
9 the parties intended the written document to
10 be their agreement. So if you have an
11 instruction that says "If this document was
12 executed, then it's enforceable, by executed
13 that does not require signatures if the
14 parties intended the document to be their
15 written agreement," you've accurately captured
16 the law. They have to know both of those to
17 apply the law; but the minute you put on the
18 proviso does that become an inferential
19 rebuttal?

20 I know it doesn't in that
21 example, and that's why I started by saying
22 that is not a good example, but I think you
23 can see what I mean.

24 PROFESSOR DORSANEO: The
25 difficulty with inferential rebuttal as a

1 concept is a very, very complex concept
2 developed in a different environment. We
3 still use it and act like its contours are
4 still the same, and that just really doesn't
5 help us these days. We'd be better off to
6 just not worry about it and proceed to submit
7 questions broadly and clearly and to have
8 instructions that are proper to enable the
9 jury to understand and answer the questions.
10 And that's all we need.

11 HONORABLE F. SCOTT MCCOWN:

12 Right.

13 MR. YELENOSKY: I just have a
14 comment about comments. I think Judge McCown
15 raised an important point, and I think the
16 rule should be simple. I think there is a
17 difference between a comment that explains a
18 deletion and only needs to be made once and
19 then it becomes part of the institutional
20 knowledge, and that comment would say "We
21 don't need this because it's essentially
22 prohibited by broad form submissions." Once
23 everybody knows that, I don't think it's going
24 to creep up again. That's different from an
25 interpretive comment, for instance, in the

1 Disciplinary Rules that gives examples of what
2 is permissible and what is not, and you
3 continually refer back to that.

4 Is there some way that we can
5 make an explanation or a report that is not a
6 cumbersome comment that follows this
7 everywhere that only needs to be said once to
8 explain why there is a deletion?

9 MR. JACKS: The problem I have
10 with that is it will only be read once, and
11 that's by us. And having agreed with
12 Judge McCown from the outset yesterday, I'll
13 start out today by disagreeing with him. I do
14 think there is a danger that as you bring up
15 younger judges who weren't schooled in
16 inferential rebuttal issues and they have
17 nothing in the rules and nothing in a comment
18 either, that it won't be long before they'll
19 be out there wandering in the wilderness.

20 MR. YELENOSKY: I'm sure Bill
21 Dorsaneo will write about it though.

22 MR. JACKS: Well, that's fine.
23 But they can't all afford his book. But,
24 Rusty, let me ask you a question, and that is
25 would you be bothered by the Cockran/Orsinger

1 approach, and that is in the rule say not only
2 no issues, but no instructions either, and
3 let's get this vestige of the days of
4 Gus Hodges out of our jurisprudence?

5 MR. SOULES: Rusty, you may
6 respond to that now.

7 MR. MCMAINS: The answer to
8 that is I don't have any problem with doing
9 away with inferential rebuttal matters. That
10 was actually initially I think what was
11 proposed at one time point during the
12 committee work when we wound up with
13 questions; and the issue was -- and I don't
14 know whether it was just kind of evenly
15 divided or there wasn't enough sentiment to do
16 it the last time, but all we would have to do
17 is change the word "questions" to "matters,"
18 and say "inferential rebuttal matters shall
19 not be submitted."

20 HONORABLE C. A. GUITTARD:
21 Mr. Chairman, it seems to me that if we put in
22 a positive prohibition against inferential
23 rebuttal instructions, we are just creating
24 another technical ground for objections that
25 is to be litigated and give more work to

1 appellate judges who some of them think they
2 have enough to do already. The resourceful
3 lawyers have used such a provision in the
4 rules to raise points for appeal that really
5 have no merit and probably in most cases will
6 not succeed, but will just foul up the
7 appellate process. It seems to me that along
8 with what Professor Dorsaneo said all we need
9 is just some simple rules that the case be
10 submitted in clear and simple form, and that's
11 all we need. If we go to put additional
12 prohibitions on this kind of instruction or
13 that kind of instruction, then we'll just be
14 raising additional matters for controversy
15 that can do nobody any good.

16 MR. LOW: I tend to think with
17 Rusty. I mean I don't really fix something
18 unless it's broke, and we can operate with the
19 way this thing is written right here. Now,
20 I'm not as smart as some of the people around
21 this table knowing about -- maybe they know
22 the clear distinction between disjunctive
23 submission and inferential rebuttal, and there
24 are lot of lawyers like me that are maybe not
25 that smart. We state what it is we want and

1 what we don't want. And the judges understand
2 what we want and what we don't want, and we
3 live with that and can live with it; and I
4 don't think it's broke.

5 PROFESSOR EDGAR: If the
6 committee decides to recommend to the Court
7 that inferential rebuttal be eliminated, then
8 I have to agree with Rusty that putting it in
9 a comment is not the way to go about doing
10 it. I think that rather than simply omitting
11 any reference to it in the rule would be
12 likewise confusing for the Bench and the Bar,
13 and I would recommend that we take a look at
14 Rule 90. The first sentence says, "General
15 demurrers shall not be used." And if a
16 similar sentence appeared in the rule that
17 "inferential rebuttal shall not be used," then
18 I think that would be a very clear message to
19 the Bench and the Bar that you don't submit
20 inferential rebuttal; and I don't think that
21 that would cause a lot of appellate concern,
22 and I don't think that would be the grounds
23 for many appeals if inferential rebuttals were
24 not submitted.

25 MR. SOULES: Let me ask a

1 question about what is an inferential
2 rebuttal. Suppose David Beck has got a case
3 and he's on one side or the other. It's a
4 business case. He may be the Plaintiff. He
5 may be the Defendant. And there is some
6 complication or complexity in instructing the
7 jury, and you can state a proposition
8 affirmatively, but it doesn't really seem to
9 get the job done unless you restate it
10 negatively. It's not all redundancy. It
11 works to clarify.

12 MR. O'QUINN: I think it's an
13 example of breach of fiduciary duty.

14 MR. SOULES: It works to
15 clarify.

16 MR. O'QUINN: The burden is on
17 the Defendant, and the breach of fiduciary
18 duty is a burden on itself.

19 MR. SOULES: It states a
20 positive proposition and is supposed to direct
21 the jury, but it seems to nudge the jury the
22 Plaintiff's way; but if you restate it
23 conversely, it balances and neutralizes, but I
24 say "Wait a minute," or David says, "Wait a
25 minute. If you state it conversely, that's an

1 inferential rebuttal instruction becuse there
2 it is positively and there it is negatively.
3 That is inferentially rebutting the positive,
4 so you cannot do that," period. I think
5 that's what we're going to generate if we say
6 "no inferential rebuttal," but I may be dead
7 wrong on that.

8 PROFESSOR DORSANEO: You're
9 100 percent right.

10 CHIEF JUSTICE AUSTIN MCCLOUD:
11 You're dead right.

12 HONORABLE ANN TYRELL COCKRAN:
13 Don't we just get into -- I mean, there are
14 going to be appeals to trials no matter what
15 the rule says. There is always going to be
16 somebody coming up with some ground for
17 argument; and you just get paralyzed if you,
18 you know, keep worrying about, "Oh, they'll
19 appeal this and they'll appeal that." They'll
20 appeal everything.

21 MR. SOULES: John O'Quinn had
22 a comment.

23 MR. O'QUINN: I've been trying
24 cases long enough to remember the way they
25 were tried like David Beck remembers

1 inferential rebuttal. And Judge McCown, that
2 may be part of what motivates what I'm about
3 to say, but I believe very strongly this needs
4 to be in the rule. (e) needs to be in the
5 rule. Inferential rebuttal issues are a
6 horror story. Inferential rebuttal
7 instructions probably we should not absolutely
8 prohibit them right now without a lot of
9 careful thinking, because there can be
10 occasions in which they can be important. And
11 I strongly urge us not to change this. I
12 think it's also important. Simplicity is
13 important. That's pretty simple.

14 And secondly what is important
15 is not to constantly be changing these rules
16 just for some elegance. People read too much
17 into the situation when you change rules. We
18 have been in a turmoil of rule changes. We
19 have most of our CLE is to keep up with all
20 the changes in the rules. And for people in
21 this room it's not too hard to do that,
22 because we help write them. But for the
23 average lawyer out there it is a nightmare.
24 We go one way on discovery. We go another
25 way. We go one way on sanctions. We go

1 another way. I think we need to also have
2 some balance here about concern for just
3 changing rules simply to make them look more
4 elegant.

5 You take that out, and you're
6 sending a message. You can write all the
7 comments you want, or Dorsaneo can publish all
8 the books he wants. You take out (e), some
9 judge, somewhere, sometime is going to say
10 "The reason that got taken out in Austin is
11 because it's now again proper for me to use
12 them, and I want to in my discretion." And
13 we're going to have to re-sort this out on
14 appeals and mislead a lot of litigants and
15 mislead a lot of judges, and that's the main
16 thing we shouldn't be doing.

17 MR. SOULES: If we were not
18 going to change the law, why change the rule?
19 That's any question.

20 HONORABLE F. SCOTT MCCOWN: Two
21 things. First the little thing. One person's
22 inferential rebuttal instruction is another
23 person's clear statement of the law; and
24 rather than say you don't have inferential
25 rebuttal instructions, what you need to say

1 because that doesn't help advance the legal
2 analysis, you need to say you have proper and
3 appropriate instructions. And then the trial
4 court and the appellate court on review say is
5 that a fair statement of the law in an
6 evenhanded way that doesn't push the case one
7 way or the other rather than getting into a
8 technical analysis of an inferential rebuttal
9 question which is built upon a practice and a
10 theory that we no longer employ. But then
11 that's the small point that I really think
12 probably the majority are in agreement with.

13 But the big point is that I
14 agree that we need stability in our rules and
15 that we've had too many changes; but if I
16 understood our mandate from the Supreme Court,
17 it's to try to revise these rules for the
18 21st Century and build a new foundation. And
19 I think the example of Rule 90 fits perfectly
20 with what I'm saying. We need to take out a
21 rule that general demurrers shall not be
22 used. When 90 percent of the lawyers cannot
23 tell you what a general demurrer is, there is
24 no reason to have it in your rule. And when
25 90 percent of the lawyers, and I bet it's at

1 least 90 percent, can't tell you what an
2 inferential rebuttal is, that practice is
3 dead.

4 It's past. We need to write
5 our rules for practice we have today in a
6 clear form. We need to preserve our history
7 in comments.

8 MR. LOW: One of the things
9 like even in Federal Court which I, you know,
10 move sometimes back to go to comment on and
11 say who is going to win and who is going lose
12 and win or loose and short circuit, and then
13 we reach a compromise and said you can
14 condition damages on liability. Even in
15 Federal Courts they tell the Plaintiff. They
16 tell you the contingencies. The Plaintiff
17 claims that the barn was red and so forth, and
18 the Defendant claims it was green and such and
19 such. Now, if you find that it was red, you
20 find for the Plaintiff. If you find it's
21 green. And everybody gets his story kind of
22 told, and it just doesn't just say, "Well, do
23 you find it was red" and no instructions. We
24 don't have those general comments.

25 So I think we need to leave

1 everything like it is. I agree with John
2 O'Quinn.

3 MR. MCMAINS: The problem with
4 the notion that some general statement that
5 you should only -- that you submit
6 instructions that are proper, so far we have
7 at least a half a dozen cases from the Supreme
8 Court and the Courts of Appeals that say that
9 the construction of the charge is
10 discretionary in many respects, and in fact
11 some to the point that say that only an abuse
12 of discretion with regards to the construct of
13 the charge. The one thing about this
14 particular submission which was what was
15 intended was that inferential rebuttal
16 questions shall not be submitted. That
17 removes it from the ambit of the discretionary
18 argument. It has a purpose. It served its
19 purpose, and when you take it out you will be
20 dis-serving the Bar in terms of what people
21 will do.

22 To say that people forgot is
23 merely to say now that people are going to go
24 back to the PJC1s they had a number of years
25 ago, get the unavoidable accident stuff, and

1 submit it in question form, and there isn't
2 any prohibition in these rules from doing that
3 when you take it out, and that's going to
4 happen sometimes. It's going to happen with
5 people that claim that they don't have any
6 history. And the idea that we have to remove
7 history from our rules I think is garbage.

8 MR. LOW: I move that we adopt
9 this as written.

10 MR. SOULES: With Judge
11 Guittard's sentence added to it?

12 MR. LOW: That was yesterday.

13 HONORABLE C. A. GUITTARD: My
14 sentence is "disjunctive submission is not
15 inferential rebuttal."

16 MR. LOW: I second that.

17 MR. MCMAINS: Use the
18 otherwise proper language that I think Sharpe
19 had suggested. Otherwise proper --

20 MR. LOW: Let me move with
21 proper language.

22 MR. SOULES: So you'll accept
23 it as amended?

24 MR. LOW: Yes.

25 MR. SOULES: Or maybe it's the

1 other way around. Judge Guittard, will you
2 accept Buddy's proposal?

3 HONORABLE C. A. GUITTARD:

4 Yes. If he wants to leave it there with some
5 language that would accomplish the same result
6 and permit disjunctive permission, well, I
7 would second the motion.

8 MR. SOULES: Any further
9 discussion?

10 PROFESSOR DORSANEO: I have
11 something that I absolutely have to say about
12 this.

13 PROFESSOR ALBRIGHT: Does it
14 make sense to make the first vote to get rid
15 of a mention of inferential rebuttals, because
16 if we're not going to mention inferential
17 rebuttals, maybe then we don't have to add to
18 the inferential rebuttal?

19 MR. LOW: We've got a motion
20 and a second.

21 MR. SOULES: Okay. I'll go
22 with this. Bill, did you have something
23 additional to comment?

24 PROFESSOR DORSANEO: I am not
25 sure I am completely following this. But as I

1 understand the proposal now we would authorize
2 a question like the Limos vs. Montez question
3 with Plaintiff, Defendant, both, neither.
4 That is the effect of what we just agreed to.
5 Or a question "Was the accident due to
6 negligence or rather than unavoidable?" Now,
7 I think that's the disjunctive submission of
8 an inferential rebuttal matter in question
9 form.

10 Now, I dislike the
11 Limos vs. Montez opinion, because I don't see
12 anything wrong with A, B, both, neither. I
13 don't think that it's confusing. I think it's
14 like an overreaction, but I think saying "Was
15 the accident due to negligence rather than
16 inavoidable" has a slightly different taste to
17 it to me at least. All right. That's why I
18 would like to see it out.

19 MR. O'QUINN: Which part out?

20 PROFESSOR DORSANEO:

21 Inferential rebuttal let's not mention it.

22 MR. O'QUINN: (e)?

23 PROFESSOR DORSANEO: (e). And
24 I have a separate thing to say about (d). I do
25 think (d) is broken because it suggests that

1 disjunctive submission -- and I'll continue to
2 talk about this for a second because I think
3 it is hooked together -- it suggests that
4 disjunctive submission is only proper when
5 there are -- it says when there are two
6 alternatives.

7 HONORABLE C. A. GUITTARD: No.
8 That's not what it says. It says you may do
9 it, one of the two alternatives. It doesn't
10 say you can't do it otherwise.

11 PROFESSOR DORSANEO: Well, all
12 right. It suggests. I didn't say it says it.
13 It suggests that there is some sort of a
14 limitation. Otherwise why say it? That you
15 can do it when there is two alternatives. If
16 it means you can do it when there are two
17 alternatives or when there is three or
18 seventeen.

19 HONORABLE C. A. GUITTARD: But
20 when one is necessarily true.

21 MR. GALLAGHER: Buddy, did you
22 accept the amendment to your suggestion?

23 MR. LOW: Yes, I did. Right.

24 MR. O'QUINN: Can I ask a
25 question? I don't want to make an argument.

1 MR. SOULES: John O'Quinn.

2 Anybody can answer it.

3 MR. O'QUINN: If we accept
4 what Judge Guittard wants us to add to (d),
5 does that create the possibility for the trial
6 judge to submit an automobile accident case in
7 the manner "Do you find that the occurrence
8 was the result of the negligence of the
9 Plaintiff or the Defendant, A and B and C and
10 D, or as a result of an unavoidable accident,"
11 because that is a possible way (d) could be
12 read with that addition?

13 I am totally opposed to this.

14 MR. GALLAGHER: That's my
15 concern about the amendment. My concern about
16 your accepting that amendment to your motion
17 is exactly what John says. And if that's the
18 effect of it, then --

19 MR. LOW: All right. I agree,
20 and I will restate the motion. Let's vote on
21 it without any changes. I'll move without any
22 changes.

23 MR. O'QUINN: I second it.

24 HONORABLE F. SCOTT MCCOWN:

25 Luke, could I come back to Alex' point

1 procedurally? I might be willing to vote for
2 the motion or be willing to vote against the
3 motion on the merits, but there is really a
4 preliminary question. If I need to get it
5 addressed first by moving to amend the motion
6 or to substitute, I guess that's the way to
7 go, but the preliminary question really is
8 whether we want (e) in our out. And in spite
9 of Rusty's characterization of my position as
10 garbage, I think it's a critical point; and
11 maybe this is not the best place for me to
12 fight the battle, because this issue may carry
13 a lot of historical, emotional feeling, and I
14 might better fight it with the question of
15 whether we're going to have "general demurrers
16 shall not be used" in the rules.

17 Nevertheless I think we've got
18 to separate, we have got to decide what we're
19 doing, and I think if we're going
20 to -- elegance is not just an aesthetic
21 value. It has a utilitarian purpose of making
22 the rules usable for the Bench and the Bar,
23 and I think we ought to get rid of the history
24 that is no longer relevant and put the history
25 in the comments, and I'd like a vote on that

1 question.

2 HONORABLE ANN TYRELL COCKRAN:
3 I think that's what we're getting. I mean,
4 the motion that Buddy made as I understand it
5 is that we accept Rule 272 as drafted.

6 MR. SOULES: (d) and (e).

7 HONORABLE ANN TYRELL COCKRAN:
8 That includes obviously the question of
9 whether or not you want to do anything about
10 (e).

11 MR. SPARKES: He wants an
12 inferential rebuttal vote.

13 HONORABLE ANN TYRELL COCKRAN:
14 I know. But I'm saying I know that. I don't
15 think we need it. That's what I'm saying.
16 But it seems to me that that's what the issue
17 is.

18 MR. O'QUINN: Move a question,
19 Mr. Chairman.

20 MR. SOULES: Well, the Chair
21 does not entertain to move a question, because
22 that's not our job here. Our job is to
23 discuss this fully so that we make a record
24 and get all the comments down; and when
25 everybody has said what they need to say, then

1 we'll --

2 MR. BECK: Luke, could you
3 tell us what the motion is?

4 MR. SOULES: The motion is, what
5 we're going to vote on is whether to keep (d)
6 and (e) just the way they are written in
7 question 272(2)(d) and (e).

8 HONORABLE ANN TYRELL COCKRAN:
9 We need a clarification, because I asked Buddy
10 if his motion was to all of the proposal for
11 Rule 272, not just (d) and (e).

12 MR. LOW: To the extent it has
13 not be modified by previous vote.

14 MR. SOULES: We've been
15 through the earlier part of it already, so
16 we're just down to this part of it, and we've
17 already acted on the rest of it.

18 MR. LOW: Right.

19 MR. SOULES: So that's what
20 you're talking about, keep (d) and (e) the
21 same way that it's written.

22 MR. LOW: Right. I'm not
23 trying to re-do what we did yesterday.

24 MR. SOULES: In the proposal.
25 Okay. Do we have any further comment about

1 that before we show hands? All right. Let's
2 take a consensus. The motion is to leave (d)
3 and (e) as it's written in the proposal of the
4 task force. Those in favor show hands. Those
5 opposed. Okay. 12 opposed. Let me see the
6 hands in favor again. 23 in favor of keeping
7 (d) and (e) as is to 12 against.

8 HONORABLE F. SCOTT MCCOWN:
9 Well, when you-all are all dead I'm going to
10 get rid of this inferential rebuttal point.

11 MR. O'QUINN: Judge, I do not
12 share Rusty's view that your position is
13 garbage. I want you to know I think it has a
14 lot of merit. I'm going to be selective.

15 HONORABLE F. SCOTT MCCOWN:
16 All right.

17 MR. LOW: We'll invite you to
18 Beaumont if you like.

19 MR. HATCHELL: We're going to
20 be up with Gus Hodges when we're dead.

21 MR. MCMAINS: Seniority will
22 prevail.

23 MR. SOULES: Hadley Edgar.

24 PROFESSOR EDGAR: I've come
25 back to the question that I raised yesterday

1 afternoon that the wording, and I voted
2 against the motion a moment ago, because of
3 the wording that is now subparagraph (e), and
4 I suggested that we state that in the positive
5 rather than in the negative. And what I'm
6 trying to do is to have the rule read as the
7 current law is, so that we should say that
8 "inferential rebuttal matters can be submitted
9 only as instructions or definitions."

10 That's the law, and I think
11 that the rule ought to state the law, because
12 there is some confusion about whether or not
13 inferential rebuttals can be submitted at
14 all. And if they are to be submitted as
15 issues and as definitions, then I think that's
16 the way that the rule should state.

17 MR. SHARPE: If we're wanting
18 to do what Hadley suggests, that needs to go
19 under (3) which deals with instructions and
20 definitions and not under questions. And if
21 he wants to have a subpart (c) and state what
22 he just said, I think that's fine; but I think
23 to have (e) in there based on all the
24 discussion we've heard and the vote taken I
25 think that needs to stay the same.

1 Now, whether we want to add a
2 subpart (c) to put what he said, that's open
3 for discussion, but I think it should go under
4 (3), not under (2) to deal with questions.

5 MR. SOULES: Anyone else on
6 this? Okay. Is there a second?

7 COMMITTEE MEMBERS: Seconded.

8 MR. SOULES: Any further
9 discussion? Those in favor show by hand.

10 HONORABLE ANN TYRELL COCKRAN:
11 What are we voting on?

12 MR. SOULES: We're voting on
13 adding a subsection (c), 272(1)(c).

14 MR. SHARPE: It would be
15 (3)(c).

16 MR. SOULES: Okay. 272(3)(c)
17 that says to the effect "inferential rebuttal
18 matters shall be submitted only by instruction
19 or definition."

20 HONORABLE DAVID PEEPLES: "May
21 be."

22 MR. SOULES: "May be."

23 MR. SHARPE: Mr. Chair, let me
24 clarify.

25 MR. SOULES: Shelby Sharpe.

1 MR. SHARPE: I was not asking
2 for a re-vote on (2)(e). (2)(e) is in.

3 MR. SOULES: Hadley is.

4 MR. SHARPE: Oh, right. Now,
5 he was suggesting (2)(e) come out and you add
6 (c). All I'm saying is leave (2)(e) in but
7 add (c).

8 MR. SOULES: That is not my
9 understanding of what Hadley's proposal is.
10 He is saying leave (2)(e) in. We've already
11 passed on that.

12 PROFESSOR EDGAR: That would
13 be redundant practically to say you don't do
14 it this way, and then you say you do it
15 another way.

16 HONORABLE C. A. GUITTARD: That
17 would be inferential rebuttal.

18 MR. SOULES: And it would be
19 too clear. Then you couldn't appeal. All
20 right. Hadley, state what your proposition is
21 and make it in terms of 272(3)(c), if you
22 will.

23 PROFESSOR EDGAR: I move that
24 we retain the spirit of the last motion by
25 retaining inferential rebuttal concepts, but I

1 move that we delete (2)(e) and substitute for
2 it (3)(c) which would read "inferential
3 rebuttal matters shall be submitted only as
4 definitions or instructions." That's the
5 current law.

6 MR. SOULES: Let me ask you
7 this: Would you modify that to just add a
8 (3)(c) and not delete (2)(e) or not? It's up
9 to you.

10 PROFESSOR EDGAR: Well, I
11 don't have any -- that's not my concern. If
12 that's the wishes of the committee, that's
13 fine. I don't think it needs to be there one
14 way and then negatively another way. I don't
15 think that's necessary; but if that's what the
16 committee wants, that's fine.

17 MR. SOULES: Since we've
18 already passed that point --

19 PROFESSOR EDGAR: Add (3)(c).

20 MR. SOULES: Okay. Add that
21 (3)(c). Those in favor?

22 PROFESSOR DORSANEO: I want to
23 make a clarification. Does he mean "may
24 be" or "shall be"?

25 PROFESSOR EDGAR: "Shall be."

1 PROFESSOR DORSANEO: "Must
2 be."

3 PROFESSOR EDGAR: No.

4 PROFESSOR DORSANEO: I'm going
5 to vote against "must be."

6 PROFESSOR EDGAR: "Shall." I
7 said "shall."

8 MR. O'QUINN: He said "shall"
9 as in "must."

10 MR. SOULES: I think there is
11 a proposition to amend your motion to say "may
12 be" submitted that way, "may only be"
13 submitted that way.

14 PROFESSOR EDGAR: I originally
15 said "can only be submitted" or "shall only be
16 submitted." I don't know how the English
17 grammarians would phrase this.

18 PROFESSOR DORSANEO: Well, my
19 concern is if you say that they "shall be,"
20 then the judge may not have discretion not to
21 do it when it isn't a good idea to put that in
22 there.

23 MR. SOULES: "May only be
24 submitted."

25 MR. O'QUINN: Yes. That's

1 better.

2 HONORABLE ANN TYRELL COCKRAN:

3 I would like to say that I voted "yes" on the
4 last vote, but it was very definitely not
5 because I was voting to preserve the
6 institution of inferential rebuttal. I was
7 voting to make sure nobody puts it in as a
8 question. So I don't think that, and I oppose
9 this proposal because it is not letting
10 inferential rebuttal slowly die on the vine
11 until it either dies or we do it when Scott
12 can get his thing passed. And if we adopt the
13 proposal that's on the table, we will never
14 get away from inferential rebuttal ever,
15 ever.

16 PROFESSOR EDGAR: Let me
17 respond to Judge Cockran.

18 MR. SOULES: Yes. Please do.

19 PROFESSOR EDGAR: Judge
20 Cockran, my only concern with this is that the
21 way that it is now worded is incorrect. At
22 most it's confusing -- or at least it's
23 confusing, because the law is that if they are
24 to be submitted, they are to be submitted only
25 as instructions or definitions. And that is

1 not in the rule; and I think that the rules
2 should state the status, the current status of
3 the law. That's my only concern.

4 MR. SOULES: I have a question
5 here. We say the question cannot be
6 submitted. But then we say "The court shall
7 submit such instructions and definitions that
8 shall be proper and enable the jury to render
9 a verdict." Doesn't that cover the situation
10 where an inferential rebuttal instruction may
11 be proper and may enable the jury to render a
12 verdict without highlighting in a new
13 paragraph the concept of inferential
14 rebuttal? That's the question.

15 MR. HATCHELL: The answer is
16 "yes."

17 CHIEF JUSTICE AUSTIN MCCLOUD:
18 Yes. That's right.

19 MR. SPARKS: If we pass (c),
20 you're saying we didn't need to do (d),
21 because that poses a similar instruction about
22 unavoidable accident. We need to do (e). I
23 understand what you're saying.

24 MR. SHARPE: Mr. Chair, I
25 agree with your point. I think it is covered

1 in (a). My only statement was that if you're
2 going to put what Hadley is saying, it's got
3 to go under instructions and not under the
4 question. And I agree. I think it's covered
5 in (a).

6 MR. SOULES: Any further
7 question? Sarah Duncan.

8 MS. DUNCAN: Maybe I don't
9 understand the history here. It's my
10 understanding that what we're trying to do in
11 the charge is give the jury what they need to
12 decide this case. And for those of us that
13 have spent days and days and lives thinking
14 about proximate cause, yes, it is very clear
15 that if (a) is the sole cause of the event,
16 then (b) can't be a proximate cause of that
17 event; but we're talking about a jury that may
18 not have spent, a juror who may not have spent
19 his entire life thinking about proximate
20 cause. And if an inferential rebuttal
21 instruction focuses the jury on what proximate
22 cause isn't, what is wrong with that?

23 HONORABLE ANN TYRELL COCKRAN: I
24 guess the question is, I mean, in any
25 particular case you can debate whether or not

1 it's helpful or whether it's trying to nudge
2 the jury. If we institutionalize it in a rule
3 that encourages them always to be in
4 instructions, then I think you're doing away
5 with that individualized analysis of what
6 really will help the jury in this case; and
7 that's what (a) does, and I think we need to
8 stay with (a) and not --

9 MS. DUNCAN: It's my
10 understanding.

11 MR. SOULES: Sarah Duncan.

12 MS. DUNCAN: It's my
13 understanding from reading the minutes from
14 when (a) got into the rule that that is
15 precisely why "necessary" was changed to
16 "proper" was to give the judge the discretion
17 to give the jury whatever instructions the
18 parties request that will help the jury.

19 MR. SOULES: Anything further
20 on this? Ready for a vote? Those in favor of
21 adding the new (3)(c) as stated by the
22 proponents show by hands. Those opposed? The
23 house with three against.

24 JUSTICE NATHAN HECHT:
25 Mr. Chairman, I'd like to point out that

1 Justice Cornyn has come by.

2 MR. SOULE: Justice Cornyn,
3 welcome to our meeting. We appreciate your
4 coming here today. We would like to hear any
5 remarks or comments that you may have to give
6 us direction or encouragement or incentive or
7 disincentive.

8 JUSTICE JOHN CORNYN: I'm just
9 enjoying my cup of coffee and the debate over
10 one of the more important topics that go on.
11 I know how controversial it is, so I don't
12 need to give comments.

13 (Committee laughter.)

14 JUSTICE JOHN CORNYN: But I'm
15 just here to listen. Thank you very much.

16 MR. SOULES: Thanks for coming
17 and helping us do our work. Harry Tindall.

18 MR. TINDALL: Luke, I have a
19 proposal for subsection (f) to the questions
20 that would say "Advisory questions shall not
21 be submitted." In the area of family law it's
22 a dragon. In specialty courts it's not a
23 problem; but outside specialty courts we have
24 judges that want to dump everything on a jury
25 from hours of visitation on Wednesday night,

1 how the property ought to be divided; and the
2 Supreme Court -- I mean the State Bar
3 Committee on Court Rules par visits proposal
4 in this area have abolished advisory
5 questions, and PJ5 strongly suggests that they
6 not be used as an unnecessary use of judicial
7 resources. I think it's a problem only in
8 family law. For us it's a real problem. They
9 need to be buried.

10 HONORABLE DAVID PEEPLES: I
11 think that's a great idea. I haven't thought
12 about it. There is no reason in the world to
13 submit those things that the judge doesn't
14 have to follow --

15 MR. TINDALL: No. It's
16 terrible.

17 HONORABLE DAVID PEEPLES: --
18 in a family law case.

19 MR. TINDALL: And I so move.

20 HONORABLE DAVID PEEPLES:
21 Seconded.

22 MR. TINDALL: There would be a
23 new subsection (f) that would be advisory
24 questions. You'd have a caveat. "Advisory
25 questions shall not be submitted" period.

1 MR. SOULES: Does anyone see
2 this affecting any practice other than the
3 family law practice?

4 MR. TINDALL: I don't think
5 so.

6 MR. SOULES: I want to be sure
7 that we've passed that through our minds
8 before we do this and talk about it if there
9 is any other.

10 MR. TINDALL: We went through
11 the Bar Committee on Court Rules, and there
12 was no descent from anyone on the issue.

13 MR. SOULES: Okay. But I want
14 to run it through this committee too.

15 MR. TINDALL: I understand.

16 HONORABLE F. SCOTT MCCOWN:
17 Could I suggest that somebody check the
18 Family Code before we vote on this, because my
19 recollection is that the Family Code
20 authorizes it.

21 MR. TINDALL: Negative.

22 HONORABLE F. SCOTT MCCOWN: Are
23 you sure?

24 MR. TINDALL: No. Not at
25 all.

1 MR. ORSINGER: Has anybody got
2 a copy of the Family Code here?

3 HONORABLE F. SCOTT MCCOWN: I
4 thought there was a reference to it in the
5 Family Code.

6 MR. TINDALL: I don't think
7 so.

8 MR. SOULES: Anybody who wants
9 to have your remarks recorded needs to wait
10 until one speaker finishes, or Anna can't get
11 it down.

12 So the question is, does the
13 Family Code authorize the submission to the
14 jury of advisory questions. Does anyone
15 absolutely know the answer to that one way or
16 the other?

17 MR. TINDALL: I would not want
18 to argue on something.

19 MR. SOULES: Well, we'll need
20 to check that. Would you check that? Because
21 this is going to come back. These rules the
22 process is that the charge rules are going to
23 go to the subcommittee. They're not going to
24 be cast in stone until we see a complete
25 redraft and look at it, and we'll have an

1 opportunity at that time to add or delete once
2 again particularly if anyone has any new
3 ideas.

4 MR. TINDALL: Well, I'd like
5 to get it in today, because this is my last
6 meeting, and I know what it is to get
7 something put off.

8 MR. SOULES: All right. We
9 can take a vote on it today.

10 MR. ORSINGER: Subject to --

11 MR. TINDALL: I understand.

12 MR. SOULES: But Richard is
13 going to be here.

14 MR. ORSINGER: Yes. We could
15 approve this subject to something
16 contradictory in the Family Code.

17 MR. TINDALL: I realize it may
18 be revisited, but it's time to deal with it.

19 HONORABLE SCOTT A. BRISTER:
20 Could you explain to me what advisory
21 questions are? I'm just concerned in other
22 areas of law what it may be. Everybody in
23 Family Law may know what they are, but all the
24 rest of us don't, and somebody may consider
25 this wiping out something that we've all been

1 doing.

2 MR. TINDALL: It could be like
3 I say. If the judge would ask the jury "How
4 should the property in this divorce case be
5 divided," and the jury may be out for a couple
6 of days haggling over how to divide assets. I
7 mean it's crazy, and particularly in rural
8 areas where you have courts of general
9 jurisdiction. The judge just sort of let's
10 everything go to the jury, because they don't
11 try many of them. Maybe we could say this:
12 Advise -- and I hate to do this in the rules,
13 but I don't think it's in any other area of
14 law. Say "Advisory questions shall not be
15 submitted in family law cases." But that
16 starts this peculiar, and I was instructed not
17 to do that.

18 MR. SOULES: You've got that
19 in 76a.

20 MR. SUSMAN: Well, I think the
21 jurisprudence in other areas is the court
22 should not submit advisory questions or
23 opinions of a jury. I mean, they are not just
24 things that a jury should decide. There is a
25 lot of law on it. It does come up in other

1 contexts.

2 I just finished trying a jury
3 contract case where for a declaratory judgment
4 where the question was whether a certain
5 tender of gas was reasonable under the Uniform
6 Commercial Code, Section 2.306 or something
7 like that, reasonably proportionate to the
8 past under an output contract. One of the
9 parties wanted to submit an issue asking the
10 jury what would be a reasonable tender, which
11 was improper because the only issue in the
12 pleadings or the facts was how much had been
13 tendered, and so it was improper for the jury
14 I think to have a question just saying "What's
15 a reasonable tender? Give us the amount of
16 gas that would be reasonable."

17 The real question was, "Was
18 the amount tendered reasonable or not
19 reasonable?" So I think if you are going to
20 say anything about advisory opinions, advisory
21 questions not being allowed, you should not
22 limit it to family issues, because I think the
23 effect will be someone will come in and say
24 "Well, we can file a declaratory judgment" and
25 begin posing all kinds of hypothetical

1 questions to a jury to determine on what a
2 contract means, and I don't think that's
3 appropriate.

4 MR. TINDALL: I agree.

5 MR. SOULES: I guess another
6 possibility would be "Do you find that the
7 contract was ambiguous?" I think that
8 threshold question is for the Court to
9 decide.

10 MR. O'QUINN: Right.

11 MR. TINDALL: I agree.

12 HONORABLE F. SCOTT MCCOWN: It
13 seems to me like 2(a) would prohibit the
14 example that Steve just raised because it says
15 "The court shall submit questions on the
16 disputed material factual issues," and that's
17 not a material factual issue deciding a case
18 under the law. If in the family law area
19 there is an advisory practice, isn't that best
20 addressed in family law forums? We don't know
21 the extent of the practice or the extent of
22 the problem, and it seems to me kind of beyond
23 the purview of writing general rules of
24 procedure.

25 MR. TINDALL: Well, Judge,

1 deal with -- we prohibit practices through our
2 rules all the time. And I agree with the
3 majority of this committee. I think that these
4 rules are designed to stamp out practices that
5 we deem inadvisable as demurrers or
6 inferential rebuttal questions; and if we're
7 going to get rid of inferential rebuttals,
8 advisories are a nightmare compared to
9 inferential rebuttals.

10 HONORABLE F. SCOTT MCCOWN:

11 Well, it just seems that when you try a family
12 law jury case on the question of who ought to
13 be managing conservator I'm not sure that you
14 absolutely want to prohibit the judge from
15 asking the jury any questions at all about
16 visitation arrangements or powers and
17 responsibilities and absolutely prohibit
18 advisory questions at all. It may be that you
19 want to do that, but it just seems beyond.
20 It's not something the task force studied. It
21 seems beyond our ability to make an informed
22 decision about today. I don't mind taking it
23 up later.

24 MR. ORSINGER: Sarah Duncan
25 was sharp enough to remember that this was in

1 a footnote in Patrick Hazel's article on
2 proposed changes to the court's charge in the
3 Advisory Committee Volume II. And in footnote
4 10 on page 20 he says and I'll quote, "Insofar
5 as I know only family law has advisory
6 questions to the jury. I understand the
7 pattern jury charge folks dealing with
8 Volume V are trying to discourage these
9 questions going to the jury. I am a strong
10 advocate of the jury trial in civil cases.
11 Where however others have decided not to allow
12 the jury to determine a matter it strikes me
13 as illogical, unnecessary and expensive to ask
14 a jury for its advice. One may question
15 whether the legislature has taken this mater
16 out of the hands of the Texas Supreme Court by
17 enacting Section 1113 of the Texas Family
18 Code. That provision states that court,
19 quote, 'may submit or refuse to submit' closed
20 quote, certain questions to the jury, and if
21 they are submitted, the jury verdict on them
22 is, quote, 'advisory only.' Since the court
23 is given discretion in this matter I supposed
24 the Texas Supreme Court could make that
25 discretionary determination for all the trial

1 courts and say that these questions shall not
2 be submitted. Of course where one of those
3 questions is before the court a party has a
4 right to a jury. That right has been found
5 however not to be an absolute right to a jury
6 on those matters because the findings are not
7 binding." And then he cites Martin vs.
8 Martin, a Supreme Court case is '89.

9 "However because of the
10 statute we have decided to mandate not
11 submitting these questions except as allowed
12 by statute."

13 MR. SOULES: What page number
14 are you looking at?

15 MR. ORSINGER: Bates 836.

16 PROFESSOR DORSANEO: I don't
17 think there is a Title I case, only a Title II
18 case, and he talks about Chapter 11 there of
19 the Family Code.

20 MR. ORSGINGER: Well, yes,
21 1113 is a Title II section anyway and probably
22 doesn't apply to Title I.

23 PROFESSOR DORSANEO: It's not
24 what Harry is talking about adding.

25 MR. SOULES: All right.

1 Any --

2 MR. ORSINGER: Well, that's a
3 good distinction Harry. I'm sorry. Can I say
4 something on the record?

5 MR. SOULES: That's at 836 is
6 where he's talking about. Go ahead.

7 MR. ORSINGER: Professor
8 Dorsaneo has observed that your request is
9 addressed at least in the divorce example to
10 Title I to which Section 1113 does not apply,
11 and therefore there doesn't appear to be any
12 legislative impediment to barring advisory
13 issues in a divorce even if there might be a
14 legislative impediment to barring them in
15 child cases.

16 MR. TINDALL: But I think by
17 rule you remove the discretion of the trial
18 Court.

19 MR. SOULES: Anything else on
20 this? Okay. Those in favor of adding a new
21 paragraph 272(2)(f) as proposed by Mr. Tindall
22 show by hands. Those opposed. Sixteen to
23 nine against.

24 MS. SWEENEY: Luke, what was
25 the count? For or against? Luke, that did

1 not pass?

2 MR. SOULES: It did not pass.
3 Let's peruse the balance of Rule 272 as
4 proposed by the task force. Does anyone have
5 any other comments? This is a revisit.
6 Sarah Duncan.

7 MS. DUNCAN: This is a revisit
8 to 272 subsection (2)(b), the language about
9 "whenever feasible," and I said yesterday that
10 at least in my practice it does not seem to
11 work very well, and Professor Edgar suggested
12 that this had been debated ad nauseum and that
13 they didn't think better language was
14 necessary, was possible.

15 I'd like to suggest that
16 better language is possible, and what I would
17 like to suggest is "The court shall submit the
18 case on broad form questions whenever and to
19 the extent that method of submission is
20 practicable." "Practicable" as used in the
21 preceding sentence means not only feasible but
22 also consistent with the goals of broad form
23 submission, for instance, simplifying the
24 charge for the jury and reducing the risks of
25 a subsequent retrial, and the party's

1 Constitutional right of meaningful appellate
2 review of disputed questions of law and fact.
3 If necessary to further one of these goals,
4 the court may submit a claim or defense or any
5 element thereof separately and distinctly in a
6 checklist or in any other manner designed to
7 further the goals of broad form submission or
8 the party's right to meaningful appellate
9 review.

10 MR. SOULES: Is that in the
11 form of a motion?

12 MS. DUNCAN: If nobody wants
13 to discuss it, no. But if it is possible that
14 the committee might be willing to consider
15 changes to "whenever feasible," that's the
16 upshot.

17 MR. SOULE: Let's have
18 discussion and see.

19 HONORABLE F. SCOTT MCCOWN: I
20 was initially critical of this language, but I
21 was convinced yesterday by some people who had
22 thought about it a lot that it's the best
23 language we can get and we ought to leave
24 developments to the case law and not try to
25 change it.

1 MR. ORSINGER: I'm intrigued
2 by the suggestion about the appellate review,
3 because one of the consequences of broad form
4 has been that sufficiency of the evidence
5 challenges have been swallowed up, and it is
6 now in some cases impossible to figure out
7 what theory of liability the jury chose to
8 find liability on. And I don't know whether
9 that was intended or whether that's an
10 accidental byproduct of simplifying the jury
11 charge; but the part that Sarah is saying that
12 appellate review of the sufficiency of the
13 evidence should be a consideration in going to
14 broad form is a fair thing for us to consider,
15 because we definitely lost it.

16 MS. DUNCAN: Or the viability
17 of an included claim, legal viability of an
18 included claim or defense.

19 MR. HATCHELL: I think,
20 Richard, that your observation is taken care
21 of in Rule 81(b)(1) which says that a
22 reversible error occurs when you are prevented
23 from sending your case to the appellate
24 courts, and that's the objection that you
25 either need to be making to the charge or

1 making in your post judgment motion. I don't
2 think further language is necessary.

3 PROFESSOR CARLSON: Sarah, are
4 there any cases construing what Mike has
5 suggested that submission of broad forms could
6 be a violation under 81(b) or reversible error
7 because it impedes sufficient appellate
8 review?

9 MS. DUNCAN: In a sense that's
10 I think what the Supreme Court has been
11 saying, for instance, in the damages cases or
12 in the wrongly -- the not viable included
13 claim cases; but it's very difficult, and
14 we've had cases where we've tried making that
15 objection; and the comeback, the easy comeback
16 is E.B., whenever feasible means whenever
17 feasible. If it is possible to do in this
18 manner, the rest of it just doesn't matter.

19 MR. TINDALL: I'm real scared
20 with your proposed language. E.B. vs Spate is
21 a parental termination case. I know many of
22 you are familiar with it, but it was a
23 granulated issue, and our Supreme Court very
24 clearly said that's not what we mean, and that
25 dealt with someone where parental rights were

1 being terminated. They said they wanted a
2 Constitutional determination of what conduct
3 they had committed, and our courts said "No."
4 And I think that what you're getting in could
5 grow and grow and grow, and we'd be back to
6 special issues again because I want an
7 evidenciary review on some aspect of the
8 case.

9 MR. LOW: I think when we did
10 this we had a purpose of going back to Rule 1
11 which says the purpose of the rule is for
12 simplification. We want to get away from all
13 that stuff; and this just tells it was the
14 philosophy when we passed this that if you do
15 it that way, do it. We want to get away from
16 the old forum back, and I think that was the
17 purpose just to do away with it. And to put
18 new language is going to put new life into
19 something that we killed with just cause.

20 MR. SOULES: Any further
21 discussion?

22 HONORABLE DAVID PEEPLES: I
23 think it would be premature to act on this.
24 The committee did a whole bunch of things and
25 didn't even think about this.

1 HONORABLE ANN TYRELL COCKRAN:

2 No.

3 HONORABLE DAVID PEEPLES: Well,
4 you didn't propose anything on it.

5 HONORABLE ANN TYRELL COCKRAN:
6 No. But we sure thought about it. I don't
7 want anybody to think that this wasn't.

8 HONORABLE DAVID PEEPLES: It
9 was outside their charge. It was outside
10 their charge; and I think something this
11 serious we shouldn't just do on 10 minutes of
12 debate.

13 HONORABLE ANN TYRELL COCKRAN: I
14 would -- this fight has been fought; and I
15 just think that we are going to continue to be
16 paralyzed about the work that is before us if
17 we keep stopping to digress, to go back and
18 you know, re-argue the very same things that,
19 you know, other very good committees spent,
20 you know, lots of time and people agonized
21 over these decisions, you know, but it's
22 done. And the system works, and you know,
23 we're trying to make the rules so that we can
24 improve where we can, but I just object to our
25 going back to re-fight a very old battle.

1 MS. DUNCAN: If I could point
2 out in the minutes when the committee when the
3 "whenever feasible" language came in there are
4 expressed statements that it is not intended
5 to deprive anyone of a right of appellate
6 review, and it's never referenced as a
7 Constitution right, but it is a Constitutional
8 right; and all I'm suggesting is that what I
9 think was the committee's intent at the time
10 the "whenever feasible" language was included
11 be made clear in the rule so that we who argue
12 charges have a leg to stand on because
13 "whenever feasible" is cut and dry.

14 HONORABLE C. A. GUITTARD: I
15 would like to support Sarah's position on it.
16 I'm not sure that we can settle today on the
17 exact language, and I don't suppose Sarah
18 intends for us to, but there are cases where
19 it would be conceivably feasible to submit
20 broad form where there are some definite
21 advantages to submitting it separately so that
22 the right of appellate review could be
23 reserved or other cases of that sort; and
24 therefore I -- and moreover I don't think
25 under the decisions that the "whenever

1 feasible" language has been literally enforced
2 by the Supreme Court, and I think that kind of
3 a provision in the rule would be more nearly
4 what the current law actually is.

5 MS. DUNCAN: That's my point.

6 PROFESSOR DORSANEO: I've been
7 listening to what everybody has had to say,
8 and without being facetious, I think I do
9 agree with everybody. But I think that the
10 proper thing to do would be to send it to
11 Joe's committee to evaluate the part of the
12 rule that talks about broad form submission
13 whenever feasible to see if it could be made a
14 little clearer as to what that means in
15 particular problematic situations, multiple
16 legal theory cases for just as one example
17 without trying to deal with it here now. I
18 mean, I think everybody recognizes that we
19 want to have meaningful appellate reviews, but
20 also clear and simple submissions that don't
21 confuse the jury and how we accommodate both
22 things.

23 MR. ORSINGER: Just appoint
24 that to Paula Sweeney's committee. That would
25 be Paula Sweeney's committee.

1 MR. O'QUINN: I agree with the
2 comment that somebody -- I think it was
3 Judge Cockran. This battle has been fought
4 and fought and fought. There is a fundamental
5 policy issue here that we have debated, and I
6 thought we had decided. Either we're going to
7 have broad form submissions and that's the way
8 we want to handle jury trials, which I frankly
9 favor, or we want to go back towards the old
10 system where we cross examine the jury about
11 why they made their decision so somebody can
12 appeal it and re-examine it, which I thought
13 we don't want that anymore. I don't want it.

14 I think sending it back to
15 committee accomplishes nothing. You cannot
16 ride two horses at once. There will be no way
17 to figure some way that you can ride both
18 horses. Simplify the charge and have broad
19 forms submissions and also have the old way of
20 finding out exactly why did the jury say the
21 product was defective or that somebody was
22 negligent so we can have a fullblown appellate
23 review of that. And I think we're just
24 putting off deciding and memorializing frankly
25 something that most lawyers believe in. It

1 should whenever feasible be submitted in a
2 broad form manner; and I oppose sending it
3 back to the committee.

4 MS. DUNCAN: I am a fan of
5 broad form submission. It is not my intent to
6 have a negative effect on that. All I'm
7 saying is that we now have Supreme Court cases
8 where people have been reversed and a new
9 trial has been mandated because a case was
10 submitted not just in broad form, but so
11 broadly that you cannot segregate the
12 reversible error from the rest of the case.
13 And I'm not -- this is with all due respect,
14 there is being a lot said about what broad
15 form submissions means that is not what the
16 committee discussed when the language was
17 adopted.

18 MR. O'QUINN: May I respond?

19 MR. SOULES: Yes.

20 MR. O'QUINN: Sarah, as a
21 Plaintiff's lawyer I understand the tension
22 between broad form and having something in the
23 case where some appellate court is going to
24 reverse me because I got too broad. I am not
25 going to ask the trial judge to go too broad

1 to get me in that box. If I do, shame on me.
2 And there's no judge going to submit the case
3 more broadly than I run at him to submit. I
4 am always struggling to get it broad. I think
5 the solution is inherent in the way we
6 practice law. If lawyers are going to talk
7 the trial judges into being so broad that it's
8 going to cause the problems you're saying,
9 then they're being fools and they'll have to
10 suffer the consequences.

11 So in order to get the little
12 bit of good and to keep me from making a
13 stupid decision and asking for too broad a
14 submission, you're going to pump some language
15 in here that's going to scare a lot of trial
16 judges into not going broad form because of
17 these extra words you're going to put in
18 there. I think "whenever feasible" is the
19 right test. We need to encourage the new
20 concept. We need to encourage judges not to
21 be scared that they're going to be reversed if
22 they go towards broad form. There is real
23 fear out there among trial judges on that
24 subject. I really strongly urge you to not
25 change this language. We're sending the wrong

1 signal.

2 HONORABLE F. SCOTT MCCOWN:

3 The inability to segregate and separately
4 analyze reversible error is present with every
5 general verdict, and if you go broad form,
6 you're going to have that problem and there's
7 no way around it. And it seems to me that
8 there may be times when the trial judge in his
9 discretion, for example, if he has a legal
10 theory that's never been accepted or he has
11 one point where the evidence is strong and one
12 point where the evidence is perhaps not quite
13 there, may decide to break a case down into
14 two broad form questions as opposed to one;
15 and I don't think that's going to be reversed
16 if in fact the charge is otherwise proper and
17 that reasoning is strong. And with the
18 language "whenever feasible" while I think
19 "feasible" is heavy on the connotation of
20 possibility, it does seem to me to also have a
21 practicality connotation, because they say
22 "whenever possible." They said "whenever
23 feasible." And I think that gives enough room
24 for the case law to develop in this area where
25 there is tension, and I don't think that there

1 is any way to write the rule to resolve the
2 tension.

3 MR. LOW: All this came about
4 just simply because of negligence cases
5 because of Scott, Lori vs. City of Houston,
6 Vega, all of those just kind of general
7 charges just like we have in Federal court
8 that were general even way back before, and
9 because we kept this sacred cow. I have and
10 still favor, but I won't raise it again, but
11 if the committee wanted to consider, I would
12 want to consider going to the general charge
13 rather than going backwards to the other way,
14 because we got into this box through just the
15 negligence cases. And there were a lot of
16 lawyers that practiced on the same side of the
17 docket that I did, and we had contrib and all
18 that. We fragmented it where we didn't follow
19 Vega, Scott, and Lori and very well could
20 have.

21 So I would be strongly against
22 it. I think it's going in the wrong direction
23 and we really ought to go the other way.

24 MR. SOULES: Let's get a sense
25 of the committee before we assign Paula

1 Sweeney work to do that may or may not be
2 productive. I don't know which it would be.
3 Let's get a sense. How many feel that
4 "whenever feasible" should be retained as the
5 standard? Show by hands, please. Those
6 opposed. The house to three or four.

7 MS. DUNCAN: Could I ask for
8 one more thing?

9 PROFESSOR DORSANEO: The
10 question is to figure out what "whenever
11 feasible" means.

12 MR. O'QUINN: We'll hammer
13 that out in appeals, Bill.

14 MR. SOULES: Sarah, you go
15 ahead and speak, please. Because if I haven't
16 done this right, I want to get it done right.

17 MS. DUNCAN: I have one more
18 suggestion, and that is that we add a new
19 subpart to the rule on the standard of
20 reviewing charges. In my view --

21 PROFESSOR HADLEY: We can't
22 hear back here.

23 MS. DUNCAN: In my view even
24 though the Supreme Court said and is
25 frequently cited as having said that abuse of

1 discretion is the standard for review of
2 charges, that is not in fact what has
3 happened. And I would like a new subpart that
4 would separate out abuse of discretion as the
5 standard for reviewing the structure whether
6 it is broad enough or not broad enough, but
7 that we have the Whopper vs Packer meaning
8 gloss on abuse of discretion for errors of law
9 which are reviewed de novo, number one, to
10 determine whether there is error, but are
11 still subjected to the reversible error test,
12 because -- and this is to some extent very
13 selfish -- I'm getting real tired of briefing
14 why it is not a complete abuse of discretion
15 standard for every aspect of the charge. And
16 if the trial Court happened to rely on a case
17 that incorrectly stated the law, that is not
18 an abuse of discretion because it was with
19 reference to a guiding principle even though
20 it was wrong.

21 MR. SOULES: Okay.

22 MS. DUNCAN: So it's just a
23 new subpart, up or down?

24 MR. SOULES: Okay. Restate
25 the subpart, please.

1 MS. DUNCAN: The new subpart
2 would be a review standard of the review
3 section that clarifies that abuse of
4 discretion is the standard for reviewing the
5 structure of the charge, but --

6 MR. SOULES: Should that be in
7 the TRAP Rules? Maybe I'm asking an improper
8 question here.

9 MS. DUNCAN: We don't have a
10 charge rule in the TRAP Rules.

11 MS. SWEENEY: Let them write
12 one.

13 MR. SOULES: Do we have
14 appellate standards for review in the Rules of
15 Civil Procedure? I mean --

16 MS. DUNCAN: Oh, we do. For
17 instance, transfer of venue.

18 MR. SOULES: Okay, I see.
19 State it again. I've gotten distracted here.

20 MS. DUNCAN: Okay. That we
21 include a new subpart to Rule 272 governing
22 the standard of review.

23 PROFESSOR EDGAR: Would you
24 speak up? We can't hear a word you're saying
25 down here.

1 MS. DUNCAN: That we add a new
2 subpart to Rule 272 on standard of review, and
3 while I'm not particular about the particular
4 language, something like "Complaints regarding
5 the method of submission will be reviewed on
6 an abuse of discretion standard. Complaints
7 regarding errors of law in the content of the
8 Court's charge will be reviewed de novo." In
9 either case however the complaint will be
10 subjected to the reversible error standard in
11 Rule 81(b).

12 MR. SOULES: Is there a
13 second?

14 MR. GALLAGHER: No. There is
15 a question.

16 MR. SOULES: But is there a
17 second?

18 PROFESSOR EDGAR: Luke, this
19 is a substantial addition I think to what
20 we've discussed, so I would like --

21 MR. SOULES: Well, I think
22 Sarah intends that.

23 PROFESSOR EDGAR: I would like
24 to see that in writing. I think it's too
25 important to try and vote on it after hearing

1 it one time, because it does contain several
2 different concepts.

3 MS. DUNCAN: I agree.

4 PROFESSOR EDGAR: And I would
5 ask the Chair to defer a vote on that until it
6 can be reduced to writing and give the
7 committee an opportunity to discuss it. I
8 won't be here the next time, but I think in
9 all fairness that should be done.

10 MS. DUNCAN: I amend my motion
11 that we simply refer it to the charge
12 subcommittee as to whether there should be a
13 standard of review, and if so, what that
14 language should be.

15 MR. SOULES: Discussion.

16 MR. PERRY: Luke, yesterday
17 when we decided to go with the phrase in Rule
18 274 about reasonable guidance we discussed
19 putting that same phraseology in Section (3)
20 of Rule 274 which is --

21 MR. SOULES: Does that have to
22 do with Sarah's point?

23 MR. PERRY: Yes, it does for
24 this reason:

25 MR. SOULES: Okay.

1 MR. PERRY: That is a kind of
2 a standard of review of the charge. The
3 concept would be that the standard of review
4 would be whether the charge provides
5 reasonable guidance to the jury. And so I
6 would just suggest that if Sarah's idea is
7 going to go to the subcommittee, maybe that
8 idea could go along with it and the
9 subcommittee can consider it all as part of
10 their standards.

11 MR. SOULES: Okay.
12 Discussion?

13 MR. YELENOSKY: I have a
14 question.

15 MR. SOULES: Stephen
16 Yelenosky.

17 MR. YELENOSKY: I just have a
18 question. You mean to use the same term
19 "reasonable guidance" in determining whether
20 or not the tender was sufficient in
21 determining whether or not the actual charge
22 submitted to the jury was sufficient?

23 MR. PERRY: That was the
24 discussion that was had yesterday, yes.

25 MR. SOULES: As I understand

1 what David Perry was proposing yesterday it
2 would be that if the charge as a whole gave
3 reasonable guidance to the jury to decide the
4 case, that the case could not be reversed.

5 MR. PERRY: Right.

6 MR. SOULES: Does that answer
7 your question? That's his proposition.

8 MR. YELENOSKY: Yes.

9 MR. SOULES: Another standard
10 of review. Sarah has proposed a standard of
11 review. Okay. Any other discussion on this?
12 Those who favor Paula Sweeney's subcommittee
13 giving this attention and draftsmanship show
14 by hands.

15 HONORABLE DAVID PEEPLES: Just
16 take a look at it?

17 MR. BECK: Refer it to the
18 committee, in other words.

19 MR. SOULES: Refer it to the
20 committee. Sixteen. Those opposed. Okay.
21 16 to 10. And everybody who is sitting on
22 your hands hold them up.

23 Okay. Paula, could you give
24 that some thought?

25 MS. SWEENEY: Yes. And report

1 back at the next meeting?

2 MR. SOULES: Right. And also
3 get input from Sarah.

4 MR. SWEENEY: Sarah is on the
5 committee. She's on the subcommittee.

6 MR. SOULES: She's on the
7 subcommittee. And from David. Can you put
8 that in writing, David, to Paula, your
9 proposal, so that she'll have that to look
10 at?

11 MR. PERRY: Yes.

12 MR. SOULES: Okay. Having
13 chaired and received at least half a dozen
14 votes, maybe a dozen votes to approve these
15 beginning to end with the changes made by the
16 committee I think I'll just not take that vote
17 today, because it's never really been
18 conclusive.

19 Has anyone else got any
20 discussion about the charge to give Paula
21 Sweeney and her subcommittee guidance in
22 preparing a draft for final approval at our
23 next meeting?

24 MR. ORSINGER: I'd like to
25 raise something and maybe put Justice Hecht on

1 the spot. Yesterday an issue came up about
2 whether the instructions to the jurors should
3 be elevated from a Supreme Court miscellaneous
4 orders to being fixed in the rules; and my
5 concern about fixing them in the rules is that
6 it may lock us in for three or four or five
7 years, and I know there is experimentation
8 going on on jurors taking notes and even
9 jurors asking questions, and I feel like we
10 may cut back some of the Supreme Court's
11 flexibility. And I'm prepared actually to
12 move that we leave the specific instructions
13 to be part of a Supreme Court order rather
14 than part of the rule.

15 MR. SOULES: Any objection to
16 that, Judge, as you see it?

17 JUSTICE NATHAN HECHT: I can't
18 speak for the Court, but I would imagine and
19 my guess is that they would want to keep it as
20 a miscellaneous order, because we do get -- I
21 know there is some work going on now to change
22 the booklet that you give jurors, and I think
23 we do that in coordination with the
24 legislature or somebody. And I know we've had
25 drafts of that that have floated around. So I

1 think it would probably be easier for us to
2 keep it a miscellaneous order. I don't know
3 if we've changed it very much; but if it's a
4 rule, obviously it's very difficult to
5 change.

6 MR. SOULES: Does anyone have
7 any opposition to leaving that in the
8 miscellaneous order category? Paula Sweeney.

9 MS. SWEENEY: A question. We
10 drafted the general instructions which needed
11 it quite badly. Would the Court like for us
12 to submit the draft for informational purposes
13 or advisory purposes, because quite a bit of
14 work did go into that?

15 JUSTICE NATHAN HECHT: When
16 this group passes on it you might just go
17 ahead and send it over to the Court and get it
18 done.

19 Also when we changed the
20 gender references some years ago again it just
21 seems to me that is something that you want
22 the Court to be able to do with less process
23 than this group entails, so I would think if
24 you finish that up, you'd just send it over
25 there.

1 MS. SWEENEY: Okay.

2 MR. SOULES: Paula, would you
3 then take the work out of Rule 226(a) in the
4 rule and make that in the form of a proposal
5 to the Court to revise its miscellaneous order
6 rather than as a proposal to change the Rules
7 of Civil Procedure?

8 MS. SWEENEY: I will. We also
9 re-wrote the oaths a little bit. We took out
10 the "you" and "each of you" stuff and put them
11 sort of into regular English so they'd know
12 what they were swearing I'm going to do.

13 MR. SOULES: If you'll bring
14 all those recommendations forward in the form
15 of a miscellaneous order rather than a rule,
16 then we'll act on those in that form.

17 MS. SWEENEY: All right.

18 MR. ORSINGER: This may be
19 premature, but I would like to move that we go
20 ahead and authorize Paula's subcommittee to
21 move the current language out of rule status
22 to order status and then when complete forward
23 it to the Court, because it's not subject to
24 any further debate, I don't think.

25 MR. SOULES: I think that's

1 not the case. I think we'll want to look at
2 it. But is there any opposition to just
3 separating this into a miscellaneous order,
4 these items that have just been under
5 discussion? There being no opposition, that's
6 the way we'll do it, but we will take a look
7 at it before it goes to the Court from this
8 committee. Judge Guittard.

9 HONORABLE C. A. GUITTARD: I
10 have one or two minor matters to raise with
11 respect to the instructions. In connection
12 with Part 1 to the jury panel, Subdivision 5
13 of formula 4(b), "If a question is asked of
14 the whole panel that requires an answer from
15 you, please raise your hand and keep it raised
16 long enough for everyone to make a quick note
17 of the people who responded." My concern
18 about that is that sometimes questions are
19 asked by counsel to parts of a panel where
20 that still might apply. For instance, counsel
21 may say "I want to ask all of those of the
22 first row whether they are so and so and so,"
23 and the same consideration would apply. They
24 are supposed to raise their hand and keep it
25 up.

1 So I would suggest that
2 language be added to allow for that which says
3 in effect "If a question is asked of the whole
4 panel or part of a panel that requires an
5 answer from you," and so forth, "please raise
6 your hands, keep it raised up."

7 Another --

8 MR. SOULES: First, any
9 opposition to that? Paula, there being no
10 opposition if you would include that in
11 Part 1, Number 5.

12 MS. SWEENEY: Okay.

13 HONORABLE C. A. GUITTARD: The
14 other suggestion that I have is with respect
15 to the time for administering the oath. When
16 I was a trial judge I liked to give
17 the -- that has to do with the first part of
18 the written instructions.

19 MR. SOULES: Is this in
20 Part 2?

21 MS. SWEENEY: Yes. Which
22 oath? The panel oath or the venire oath?

23 HONORABLE C. A. GUITTARD: To
24 the jury panel before they take their final
25 oath. These instructions seem to require the

1 oath to be given before the instructions.
2 Now, it seems to me that the judge should have
3 some discretion there. When I was a trial
4 judge I liked to give the instructions before
5 the oath so that I could tell the jury that
6 "Now bearing in mind these instructions, will
7 you take this oath," and then they take the
8 oath and they've sworn that they'll abide by
9 all those instructions. And I think that's
10 effective, because I can remember on one
11 occasion I did that, and one of the jurors
12 held up his hand, and said, "Judge I don't
13 think I can take that oath." And I didn't
14 know what he had in mind, so I told the jury
15 to go out and put him on the stand, brought
16 the court reporter in. "Why can't you take
17 that oath?" And he said, "Judge, do I have to
18 swear that I have to decide the case according
19 to the evidence?" I said, "Yes, that's what
20 it says." He said, "I don't think I can do
21 that." "Well, why not?" "Well, I think I
22 ought to pray about it, and the Lord might
23 tell me to do it some other way." And I said,
24 "Well don't you think that you might ask the
25 Lord to help you decide the case according to

1 the evidence?" And he said, "Yes, I could;
2 but he might tell me nevertheless that other
3 way."

4 And at that point I was pretty
5 curious, and I said, "Well, how do you get
6 this word from the Lord that doesn't come from
7 the evidence?" He said, "Just like we got the
8 Bible." And so about that time the two
9 lawyers came up before the bench and said,
10 "Judge, we agree to excuse him. Go ahead with
11 11."

12 That illustrates that I think
13 the judge ought to have the discretion to give
14 the instructions before the oath.

15 MR. SOULES: Give the
16 instructions to the jury panel before the
17 oath.

18 HONORABLE C. A. GUITTARD:
19 Yes. To the 12 jurors.

20 MR. SOULES: That's to the
21 jury itself.

22 HONORABLE C. A. GUITTARD: To
23 the jury itself.

24 HONORABLE F. SCOTT MCCOWN: As
25 a discretionary matter --.

1 MR. ORSINGER: No. He's
2 talking about the venire.

3 HONORABLE F. SCOTT MCCOWN: --
4 or mandatory?

5 MR. SOULES: Or are we saying
6 go forward with 11, talking about to the
7 jury?

8 MS. SWEENEY: He's talking
9 about the jury.

10 MR. ORSINGER: Oh, I'm sorry.
11 Excuse me.

12 MR. SOULE: Is there any
13 opposition to rearranging the Part 2
14 ultimately with what will now be an
15 administrative order, put that so that the
16 judge can give the jury the oath before or
17 after the instructions? Any opposition?

18 HONORABLE SCOTT A. BRISTER:
19 To do what?

20 MR. SOULES: Judge Guittard's
21 proposal is that the trial judge be given
22 discretion to give the jury, the 12, the oath
23 either before or after the instructions in
24 Part 2, or whatever instructions are given,
25 before or after the jury is instructed. Is

1 there any opposition to that?

2 MS. SWEENEY: We'll draft it
3 that way.

4 MR. SOULES: No opposition.
5 Then that will be part of your work, Paula.

6 All right. Any other comments
7 now to give Paula direction in her work?
8 Tommy Jacks.

9 MR. JACKS: I have a question
10 of Paula. And that is, why did you take out
11 the part of the preliminary instructions to
12 the panel where the Court tells them that the
13 lawyers aren't meddling when they ask them all
14 these questions? I've always found that a
15 helpful part of the instruction, and I'm just
16 curious why it was deleted.

17 MS. SWEENEY: I think there is
18 still something in there to that effect.

19 HONORABLE ANN TYRELL COCKRAN:
20 I don't think there is.

21 HONORABLE F. SCOTT MCCOWN:
22 Because it's not true.

23 MR. JACKS: I know that. It's
24 what we call a legal fixture.

25 MR. SOULES: Let's try to find

1 that in the old 226(a) and look at it.

2 MR. ORSINGER: Luke, the
3 deleted language is in the handout.

4 MR. YELENOSKY: Right on the
5 page with Part 2 at the bottom.

6 MR. SOULES: Okay. Let's go
7 back to the...

8 HONORABLE ANN TYRELL COCKRAN:
9 It's at the very back.

10 MR. SOULES: At the very back
11 of the --

12 MR. ORSINGER: It's about five
13 pages from the end, six pages from the end.

14 HONORABLE ANN TYRELL COCKRAN:
15 Okay. It is on Subparagraph (4) of Part 1 on
16 the top of the second page of (4) where the
17 current language says "In questioning you,
18 they are not meddling in your personal
19 affairs, but are trying to select fair and
20 impartial jurors." On this last part I
21 thought it was a lie. All lawyers admit that
22 they want somebody who is on their side in the
23 questioning.

24 But the part about meddling I
25 don't think was taken out intentionally. If

1 you want to suggest --

2 MR. JACKS: If you'd be open
3 to putting it back in, I for one would like to
4 see it back in.

5 HONORABLE ANN TYRELL COCKRAN:
6 I think we'd be happy to work on some language
7 about meddling.

8 MR. LATTING: Say "May not be
9 meddling."

10 MS. SWEENEY: How about
11 "Lawyers are meddling, but it's permitted."

12 MR. SOULES: Okay. This
13 language is on if we start from the back of
14 the task force report, it's six pages back in
15 the top paragraph. It actually begins on a
16 previous page. If you're looking at the
17 language, it says in questioning you -- let's
18 see. "The parties through their attorneys
19 have the right to direct questions to each of
20 you concerning your qualifications,
21 background, experiences and attitudes. In
22 questioning you, they are not meddling in your
23 personal affairs, but are trying to select
24 fair and impartial jurors who are free from
25 any bias or prejudice in this particular

1 case."

2 That's been deleted or
3 recommended to be deleted by the task force,
4 and Tommy Jacks is suggesting that that or
5 some of that be put into Paula's work for the
6 administrative order.

7 HONORABLE ANN TYRELL COCKRAN:
8 I think it could still go in the current
9 Paragraph 4.

10 MS. SWEENEY: Yes.

11 MR. SOULES: Just reinstated
12 rather than deleted.

13 MS. SWEENEY: Yes.

14 MR. SOULES: Is there any
15 opposition to that? All right. Then all of
16 that language would be restored rather than
17 deleted.

18 MS. SWEENEY: All right.

19 MR. SOULES: Judge Guittard.

20 HONORABLE C. A. GUITTARD: Mr.
21 Chairman, I have a question with respect to
22 Rule 279, Subdivision (2) which doesn't
23 concern the committee's work except that they
24 brought forth the same concept, and it has to
25 do with these omitted elements of issues.

1 I wonder whether the committee
2 has considered what is an element of an
3 issue. I'm concerned with, for instance,
4 suppose there is just one theory of recovery
5 and the judge just submits a damage issue, no
6 liability issues. Can the judge then if there
7 is no objection make findings on the liability
8 issues if there is a disputed facts issue
9 there?

10 PROFESSOR DORSANEO: Judge, I
11 think a damage issue that is a standard one,
12 probably the type you're thinking about would
13 not be necessarily referable to any particular
14 ground of recovery or defense.

15 HONORABLE C. A. GUITTARD: But
16 it would be if there's only one ground of
17 recovery or defense in issue.

18 PROFESSOR DORSANEO: I don't
19 think so.

20 HONORABLE C. A. GUITTARD:
21 Okay.

22 PROFESSOR DORSANEO: Though
23 that maybe is a hard question.

24 HONORABLE C. A. GUITTARD:
25 Well, I just wondered whether the comittee has

1 considered that question and determined
2 whether or not there is a problem there.

3 MR. SOULES: My understanding
4 from Judge Cockran is that the committee did
5 address this, and that Mike Hatchell gave it
6 some input. Do you want to speak to this,
7 Mike?

8 MR. HATCHELL: Not
9 particularly.

10 MR. SOULES: All right.

11 MR. HATCHELL: We did consider
12 it.

13 PROFESSOR DORSANEO: The case
14 law would indicate to me that a damage
15 question that doesn't on its face disclose
16 what kind of a claim it relates to is not
17 necessarily referable to any particular claim,
18 hence no deeming of other elements would be
19 permissible assuming they weren't conclusively
20 established.

21 HONORABLE C. A. GUITTARD:
22 Maybe that's the answer.

23 MR. HATCHELL: That was the
24 task force's belief. One needs to read
25 Transco however where it appears that

1 Judge Ray has held that an entire liability
2 theory is necessarily referable to a damage
3 question, but we didn't want to tackle that
4 bear frankly.

5 HONORABLE C. A. GUITTARD:
6 You've thought about it.

7 MR. LOW: Luke, if you only
8 had one theory and you submit damages, I just
9 can't even imagine any lawyer unless he's just
10 saying, "Well, I've admitted liability," I
11 mean, I just can't imagine that not being
12 brought up and hashed and rehashed for just
13 one theory. I just don't think in
14 practicality it's going to be a problem.

15 MR. SOULES: Any other
16 discussion to assist Paula Sweeney's
17 subcommittee in their work? All right.
18 Paula, it's in your hands.

19 I want to thank Ann Cockran
20 and the task force. This is an enormous piece
21 of work. It's taken a lot of time, and it's a
22 great job. Thank you, Judge, and to all the
23 members of that task force.

24 MR. LOW: Before we leave are
25 we leaving 274 for good now?

1 MS. SWEENEY: Yes.

2 MR. LOW: I wanted to raise a
3 question.

4 MR. SOULES: Well, we really
5 aren't leaving anything.

6 MR. LOW: No. I wanted to
7 bring up something I'd like you to think
8 about. I don't know what their intent was,
9 but down here where they say "A claim that has
10 no evidence to support the submission of a
11 question and answer may be made for the first
12 time after the verdict," and then they go down
13 here to something else, and it says it was
14 against the great weight, and preponderance of
15 the evidence must be made after the verdict.

16 Okay. Are they meaning can it
17 be made also for the first time after verdict,
18 or does it mean -- I mean, what do they mean
19 there? What was the intent? Because one of
20 them may be made for that first time after
21 verdict, and other one says must be made after
22 verdict." But what about before verdict? Can
23 you make it?

24 PROFESSOR ALBRIGHT: Factual
25 sufficiency you have to raise by motion for

1 new trial.

2 MR. LOW: I understand. But
3 I'm just saying I'm not questioning the law in
4 that area. I'm just questioning whether that
5 was what you intended to do, and if it
6 accomplished the purpose.

7 MR. ORSINGER: Yes. A comment
8 over here.

9 MR. SOULES: Isn't the
10 direction here don't bother the Court at the
11 charge conference --

12 MR. ORSINGER: Exactly.

13 MR. SOULES: -- with factually
14 insufficient complaints.

15 MS. SWEENEY: Yes.

16 MR. SOULES: The Court can't
17 do anything about them at that stage. You
18 must make them. I suppose now you must make
19 them after the verdict in order to preserve
20 your appellate complaint, and the complaints
21 made like that at the charge conference
22 preserve nothing.

23 PROFESSOR ALBRIGHT: That's
24 right.

25 MR. LOW: I know that. But on

1 the against the great weight and preponderance
2 of the evidence I mean, you know, everybody
3 just puts that in routinely, you know; and if
4 it's so against, do you want to burden the
5 trial court with that and say that it may need
6 to be made for the first time after verdict?
7 That was the only thing I wanted to know.

8 PROFESSOR ALBRIGHT: So you're
9 saying great weight and preponderance in
10 addition to factual insufficiency?

11 MR. LOW: Right. I understand.

12 PROFESSOR ALBRIGHT: Factual
13 insufficiency covers both insufficient
14 evidence and against the great weight and
15 preponderance.

16 MR. LOW: I understand that.
17 And I'm not arguing the point. I'm merely
18 asking is that clear in your mind, take a look
19 at it. I'm satisfied with it if it does what
20 you intend it to do.

21 MR. SOULES: I'm trying to
22 assimilate this. Okay. Richard Orsinger.

23 MR. ORSINGER: I think
24 Paragraph 5 provides that both the factual
25 insufficiency and a great weight point must be

1 made after the verdict, so it's not
2 inferential. It's really explicit.

3 HONORABLE ANN TYRELL COCKRAN: I
4 think the intent of the committee was to use
5 some mandatory language to make lawyers stop
6 making objections at the charge, objections
7 that the trial court cannot legally do
8 anything about at that period, which is why we
9 wanted to do a "must" so that it would try to
10 encourage lawyers to stop doing that.

11 MR. SOULES: I think Buddy is
12 seeing something we're not seeing. Help us
13 see what you're talking about.

14 MR. LOW: What I'm saying is
15 that, you know, you talk about no evidence,
16 insufficient evidence, against the great
17 weight and all that, and every objection
18 lawyers always put all that. And it looks
19 like to me the committee is trying to say,
20 "Look, don't burden the trial judge. He knows
21 whether it shouldn't be submitted and so
22 forth" like that. So you could make that
23 complaint for the first time after the
24 verdict.

25 Okay. Now, here is one of

1 them where you tell them a part of that you
2 may make for the first time after verdict.
3 The other part says "must be made after
4 verdict," but it doesn't say "may be made for
5 the first time after verdict."

6 If that's the way you wanted
7 it, that's fine; but to me I mean I realize
8 that some of those the trial judge can't do
9 anything about, but when you're trying to get
10 around and point out that the judge there is
11 just -- against the great weight or --

12 MR. SOULES: I think this
13 changes the law with that first sentence.

14 MR. LOW: And that's what --

15 MR. SOULES: It doesn't say
16 that a complaint made before the verdict, no
17 evidence complaint made before the verdict is
18 good; and the law is now that it is good. You
19 can complain no evidence at the charge stage
20 and you can protect that.

21 Would it work if we said "may
22 be made before or after the verdict"?

23 MR. O'QUINN: What are you
24 talking about?

25 MR. SOULES: Just the first

1 sentence. We're talking about legal
2 insufficiency.

3 MR. ORSINGER: Let me
4 clarify.

5 MR. SOULES: Is that what
6 you're talking about?

7 MR. LOW: No.

8 MR. O'QUINN: He's talking
9 about the second sentence. But I think your
10 point about the first sentence is a good
11 point. He's saying in the second sentence
12 that when you read the second sentence in the
13 context with the first sentence somebody might
14 get the impression that there is a doubt about
15 whether you should also make that objection
16 before the verdict. I think what Buddy is
17 saying in the second sentence for total
18 clarity it should read "You must make it after
19 the verdict," and it seems to be saying "And
20 you may not make it before the verdict."

21 HONORABLE C. A. GUITTARD:
22 That's right.

23 MR. LOW: You may or may not.
24 What I'm saying is that --

25 MR. O'QUINN: To make sure we

1 don't waste the judge's time you must make it
2 after the verdict; and Buddy is making double
3 clarity, and you may not make it before the
4 verdict. Is that right?

5 MR. LOW: Exactly.

6 HONORABLE C. A. GUITTARD: I
7 suggest some language that may be not
8 necessary, but I think may clarify the
9 matter. The first sentence "may be made
10 before or after the verdict." The second
11 sentence, a claim that is factually
12 insufficient to support the jury's answer to a
13 question, or that the answer would be against
14 the great preponderance and weight and
15 preponderance of the evidence. Instead of
16 "must," say "may only be made after the
17 verdict," mandated to make that objection
18 after the verdict.

19 MS. SWEENEY: You're right.

20 HONORABLE ANN TYRELL COCKRAN:
21 So the first one would be "may be made before
22 or after the verdict." And the second would
23 be made -- "only be made after the verdict."

24 MS. SWEENEY: Yes.

25 HONORABLE C. A. GUITTARD:

1 Yes. Instead of "was" you say "would be" or
2 "has to be."

3 MR. SOULES: Let's hear from
4 Mike since he has the task force history, and
5 then Hadley Edgar.

6 MR. HATCHELL: Well, just so
7 everybody understands why the sentence reads
8 the way it does, and I have no objection to
9 what Judge Guittard was saying, we are trying
10 to avoid the claim that if you do not make
11 your no evidence claim before the verdict, you
12 have waived it. And as long as we preserve
13 that, you're preserving the integrity of the
14 task force's recommendation.

15 MR. O'QUINN: It seems like
16 that would accomplish this.

17 MR. HATCHELL: I don't know
18 whether it will or not, but I just want you to
19 know what we were trying to do.

20 MR. SOULES: Well, Mike in
21 addressing that if it says "may be made before
22 or after the verdict," do you see that -- what
23 do you see there that may be a problem?

24 MR. HATCHELL: I think it's
25 probably covered. I think it's probably

1 okay.

2 PROFESSOR EDGAR: It certainly
3 is an improvement over the way it now reads
4 and the way it has read previously; but if you
5 really want to help the lawyer to know when he
6 or she can or must do things, then why don't
7 we put in there with respect to legal
8 insufficiency that it may be made either by
9 directed verdict, motion for directed verdict
10 before or after your case in chief, or after
11 the parties close, or by a motion from the
12 judgment NOV or motion to disregard, just set
13 them out in there. Those are the times you do
14 it.

15 MR. SOULES: But also you can
16 object to the charge on that basis too and
17 preserve it.

18 PROFESSOR EDGAR: And also
19 objection to the charge. That's another
20 grounds. And then with respect to factual
21 insufficiency put in there "can only be made
22 after the verdict by a motion for new trial,"
23 and that way there isn't any doubt about what
24 you have to do and when you can do it or when
25 you must do it, if that's what you want to do,

1 if you want to clarify it.

2 MR. SOULES: Let me get Judge
3 McCloud on that and then Pat Beard.

4 CHIEF JUSTICE AUSTIN MCCLOUD:
5 The only thing, I would be a little concerned
6 about that because we have some case law out
7 there to the effect that you can raise a no
8 evidence point even at motion for new trial.
9 Now, you wouldn't be entitled to a rendition,
10 but you would be entitled to a remand if the
11 Court bought it.

12 PROFESSOR EDGAR: You're
13 right.

14 CHIEF JUSTICE AUSTIN MCCLOUD:
15 So I'd be a little bit concerned you're maybe
16 getting a little bit too specific unless you
17 include every thing. It bugs me a little
18 bit.

19 PROFESSOR EDGAR: It depends
20 on whether we want to do that or not.

21 CHIEF JUSTICE AUSTIN MCCLOUD:
22 Yes.

23 MR. SOULES: Buddy Low, and
24 then I'll get Richard.

25 MR. LOW: What I was

1 suggesting, I thought that maybe what the
2 committee was trying to do is cut down on all
3 these lengthy objections, because I have never
4 found that objection. You can call it. You
5 can hit the evidence from topside to bottom,
6 insufficient, factually unsupportable, all
7 those things. Whether the trial judge can do
8 something about it or can't I've never found
9 those objections to really help the judge.
10 He's thought about that; and I thought maybe
11 what you were trying to do is say in all those
12 evidence objections you can just wait until
13 after the verdict to make motion for new trial
14 or something. If that wasn't the intent of
15 the committee, then that's fine.

16 MR. HATCHELL: That is a
17 subsidiary intent of what we are trying.

18 MR. LOW: But if that were
19 true, then you could say that all of these
20 claims tell the lawyers don't make them now,
21 make them -- they may be made after the
22 verdict, all of those evidence claims, and
23 then you get out of the box of "Wait a
24 minute. It's factually insufficient. Is that
25 no evidence or against the great weight," and

1 you eliminate all that line. If it's about
2 the evidence, then and as a practical matter
3 lawyers are still going to say, "Judge, they
4 don't have any evidence on that point." But
5 to preserve error it looks like the evidence
6 points you ought to be able to raise those.
7 Maybe I'm wrong.

8 MR. SOULES: This is
9 permissive of raising all those after
10 verdict.

11 MR. LOW: I know. But, see,
12 but it doesn't say that you also must -- like
13 where it says "must be made after verdict,"
14 all right, that doesn't tell me. That tells
15 me I have got to do it then, but it doesn't
16 tell me I don't have to do it before verdict.

17 MR. SOULES: Judge Guittard
18 has suggested on that and said "may only be
19 made after verdict." Is there any opposition
20 to that piece of it?

21 CHIEF JUSTICE AUSTIN MCCLOUD:
22 Yes. I have a little bit. I'm still
23 concerned about that, because we still see
24 lawyers who in their motion for judgment NOV
25 will have a no-evidence attack and then

1 they'll have a great weight attack, a
2 factually insufficient attack; and of course
3 as you would read this you might think, "Well,
4 it's after the verdict, and we'll file a
5 motion for judgment NOV, and I'm going to
6 attack it because it's against the greater
7 weight and preponderance of the evidence," and
8 that's not improper. Because of other
9 substantive and procedural law that is not a
10 proper place to have that.

11 And I think it can be
12 confusing. You said "must be made after the
13 verdict." Well, that doesn't help you even
14 though it's after the verdict if it's a great
15 weight. What you're really saying is "Go look
16 at the new trial rule, and you better have it
17 in your motion for new trial." I'm a little
18 bit concerned about what we're doing here. We
19 may be giving some mixed signals.

20 MR. SOULES: We may be then in
21 this second sentence expanding where you can
22 preserve factual insufficiency --

23 CHIEF JUSTICE AUSTIN MCCLOUD:
24 That's correct.

25 MR. SOULES: -- and moving it

1 to anything after the verdict.

2 CHIEF JUSTICE AUSTIN MCCLOUD:
3 That's right. Someone might take that
4 position. They'd say, "Well, this rule says
5 that I can do it after the verdict. That's
6 what the rule says." But I think other rules
7 will say, "Yes, you can do it, but the court
8 cannot grant you anything there. It can only
9 grant you a new trial."

10 MR. SOULES: Well, would it
11 help to say "may only be made after the
12 verdict in a motion for new trial"?

13 HONORABLE C. A. GUITTARD:
14 Right. I think that's good.

15 CHIEF JUSTICE AUSTIN MCCLOUD:
16 I think that would clarify it.

17 MR. SOULES: That is the only
18 place that you could raise that.

19 CHIEF JUSTICE AUSTIN MCCLOUD:
20 That is the only place.

21 MR. HATCHELL: No.

22 MR. SOULES: Mike says "No."

23 MR. HATCHELL: It's arguable.
24 There is this amorphous rule called motion to
25 correct, modify or reform the judgment.

1 HONORABLE F. SCOTT MCCOWN:

2 Aren't we confusing "when" and "how"?

3 MR. HATCHELL: You may be able
4 to make it in there.

5 CHIEF JUSTICE AUSTIN MCCLOUD:
6 Maybe so.

7 MR. SOULES: Do we want to
8 permit a broader preservation of error by
9 saying anyplace you put insufficiency after
10 the verdict it's considerable?

11 CHIEF JUSTICE AUSTIN MCCLOUD:
12 You'll run into a lot of other problems if you
13 do.

14 MR. SOULES: Okay. Scott
15 McCown.

16 HONORABLE F. SCOTT MCCOWN:
17 This is just a "when" rule. It's not the
18 "how" rule. The "how" rule is the motion.
19 Post verdict motions; and again I think that
20 we need to keep our rules simple, not try to
21 put the entire body of rule in every rule.
22 This is just the "when" rule. Other rules are
23 the "how" rule; and I think Judge Guittard's
24 suggestion solves the problem perfectly. It
25 gets to the task force point exactly, and I

1 don't think there is any opposition to it, and
2 I think it's all we need to do.

3 MR. HATCHELL: That was the
4 reason we wrote it the way we did.

5 HONORABLE F. SCOTT MCCOWN:
6 Right.

7 MR. ORSINGER: I'm troubled by
8 Hadley Edgar's discussion simply because I
9 think it may take a lot of debate for us to
10 figure this out, but in addition to the motion
11 to modify judgment which may be a proper place
12 to preserve legal sufficiency a motion for
13 remittitur for excessive damages probably
14 preserves factual sufficiency, and we haven't
15 mentioned that so far. And since this
16 includes the party with the burden of proof
17 establishing something as a matter of law, a
18 motion to enter judgment when the record
19 closes may also preserve error on the fact
20 that you establish something as a matter of
21 law.

22 And before we start running a
23 laundry list of the only ways to preserve
24 sufficiency of the evidence attacks we better
25 set aside a few hours for us all to sit around

1 and argue about what they are. I think that's
2 a very dangerous road to go down, and I would
3 rather just go with Judge Guittard's
4 suggestion about when you can preserve error
5 and then let's let everyone figure out later
6 on under different rules how you do it.

7 PROFESSOR ALBRIGHT: I think
8 Judge Guittard's language is fine, but just as
9 an alternative for the committee or whoever to
10 think about what if you said "A claim that
11 there was factually insufficient evidence or
12 against the greater weight and preponderance
13 of the evidence shall not be made as an
14 objection to the jury charge"?

15 HONORABLE F. SCOTT MCCOWN:
16 Luke, Judge Guittard's suggestion is elegant
17 and parallel in both sentences, and we've got
18 to trust these lawyers to be able to
19 understand English at some point without
20 loading up the rules.

21 MR. SOULES: Okay. As I
22 understand where we are now we would change
23 the first sentence to say "may be made before
24 or after the verdict."

25 MS. SWEENEY: Right.

1 MR. SOULES: We would delete
2 the words "for the first time."

3 HONORABLE F. SCOTT MCCOWN:
4 No.

5 MR. SOULES: Yes. And insert
6 in the place of that "before or after the
7 verdict. "

8 MS. SWEENEY: I thought we
9 were leaving "the first time" and saying "for
10 the first time before or after."

11 MR. SOULES: What does "for
12 the first time" add? What does that do?

13 MS. SWEENEY: So they don't
14 feel like they have to do it before and
15 after.

16 MR. O'QUINN: "Or."

17 MR. SOULES: What you're
18 saying is we ought to say may be made one time
19 and only one time.

20 MS. SWEENEY: Well, because
21 otherwise you're going to have people saying
22 "If I don't do it before," you know to cover
23 themselves they're going to keep doing it
24 before and then figure, "Well, I can do it
25 after also and clean it up" or whatever.

1 MR. SOULES: We're not getting
2 a record here. Judge Cockran.

3 HONORABLE ANN TYRELL COCKRAN:
4 No. That's all right.

5 MR. SOULES: Buddy Low.

6 MR. LOW: I move to accept the
7 language of Judge Guittard and move on.

8 MR. SOULES: All right. Well,
9 let me state it so that we have it right.
10 That's what I'm trying to do here. As I'm
11 understanding this in the first sentence we
12 would delete the words "for the first time"
13 and put in the place of those words "before
14 or." Okay. And then in the second sentence
15 we would delete the word "must" and substitute
16 there "may only be made after the verdict."

17 HONORABLE C. A. GUITTARD:
18 That's it.

19 MR. SOULES: All right. Any
20 other discussion on that?

21 MR. SPARKS: Just a practical
22 question, Luke. I don't do a lot of appellate
23 work, and so it gets to be this problem: I'm
24 in front of a judge and I really do believe
25 there is no evidence or a factually

1 insufficient evidence, Judge McCown's, and so
2 I object. "Judge you shouldn't give them that
3 issue, because there is factually insufficient
4 evidence here." So he says, "Well, we can
5 handle that later. I'm just going to go ahead
6 and give it." That's what most judges in real
7 life do. So after it's over I don't include a
8 factual insufficiency point in my motion for
9 new trial on whatever in my appellate work.
10 I've lost it?

11 MR. HATCHELL: Yes.

12 MR. SPARKS: So now you've
13 made a read good trap for the unaware.

14 MR. HATCHELL: Read the case
15 of Owens vs. Rogers which has been on the
16 books for 25 years.

17 MR. SPARKS: I said I don't do
18 much appellate work.

19 MR. SOULES: Pardon me. As
20 I'm understanding the way that I just restated
21 this, not that it's mine, but the way I
22 restated it, it does not change the law.

23 MR. HATCHELL: It does not.

24 MR. SOULES: It does not
25 change the law.

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HONORABLE F. SCOTT MCCOWN:

Could I make a point here on the term "the first time." I agree that the way that it's restated is better draftsmanship, and that's fine with me; but this is a good example of the usefulness of comments, because the present Rule 279 says "for the first time." We're deleting the words "for the first time." The Federal Rule requires for an NOV a directed verdict. Texas has already rejected that practice and we're different than the Federal Rule; and this would be a useful place for a comment to flag that by deleting the words "for the first time" we're not adopting the Federal practice.

MS. SWEENEY: Then put them back in.

MR. SOULES: Put them back in.

MR. SOULES: So we don't delete "for the first time" and say "may be made for the first time before or after the verdict." All right. Go ahead, Hadley Edgar.

PROFESSOR EDGAR: That's confusing. Say let's forget about the words

1 "or after" and just look at the word
2 "before." Then you're going to say "the first
3 time before verdict." Does that make sense?

4 MS. SWEENEY: Sure.

5 MR. SOULES: For legal
6 unsufficiency, yes. Doesn't it? What do you
7 see about that that doesn't make sense,
8 please?

9 PROFESSOR EDGAR: Well, in my
10 mind if you do it for the first time in many
11 instances you are going to be doing it before
12 verdict. If you -- it seems to me like those
13 two terms are in some way duplicitous; and I
14 think you're far better off just saying
15 "before or after verdict." I think "for the
16 first time" doesn't add a thing on earth and
17 might be confusing.

18 MR. SOULES: The thing that
19 bothers me about "for the first time" is do
20 you have to do it again --

21 MR. SPARKS: That's what I --

22 MR. SOULES: -- in order to
23 preserve error? And I don't know the answer
24 to that. It's just a question.

25 HONORABLE C. A. GUITTARD:

1 Mr. Chairman.

2 MR. SOULES: Judge Guittard.

3 HONORABLE C. A. GUITTARD:

4 Mr. Chairman, I think I agree that it's better
5 to delete "for the first time," because you
6 can make the claim that there is no evidence
7 to support submission of the issue in a sense
8 but a motion for directed verdict, and that
9 may be for the first time. I guess "may be
10 for the first time" -- "may be made before or
11 for the first time after the verdict" might be
12 a solution to it.

13 MR. SOULES: Discussion? "May
14 be made before or for" --

15 HONORABLE C. A. GUITTARD:
16 No. I take that back.

17 MR. SOULES: Now, Judge. Go
18 ahead. Pardon me.

19 HONORABLE C. A. GUITTARD:
20 "May be made for the first time after the
21 verdict," it indicates it might not be made
22 for the first time before. I think maybe just
23 deleting "for the first time" would be
24 better.

25 MR. SOULES: Okay. Judge

1 McCown.

2 HONORABLE F. SCOTT MCCOWN: I
3 think deleting "for the first time" and just
4 going with "before or after" is plain English
5 and captures what we want to do. The only
6 point I was trying to make is "for the first
7 time" has a history to it, and the history is
8 it was the express rejection of the Federal
9 Rule in favor of a Texas alternative, and
10 that's the kind of place where comments are
11 useful.

12 HONORABLE DAVID PEEPLES: But
13 Rule 301 allows for judgment NOV or to
14 disregard after verdict; and maybe we can just
15 add a clause there that says even if you
16 didn't make that motion before verdict. In
17 other words, you didn't have to do anything
18 before a verdict to preserve your right to
19 move for judgment NOV. That's what we're
20 talking about, isn't it?

21 MR. SOULES: Well, I think
22 that Richard has stated a problem he sees with
23 that. Richard Orsinger.

24 MR. ORSINGER: Maybe I'm just
25 too familiar with it, but I don't see any

1 confusion here at all. If you say you can do
2 it before or after, that means you can do
3 either one, the other, or both; and I don't
4 see why we've got to have all kinds of
5 sentences to say that you can do one, the
6 other or both. "Or" means one or the other or
7 both and means both. That's a convention
8 we're all familiar with.

9 I really don't think this is
10 confusing, and I think some of the proposals
11 we're writing are confusing.

12 MR. SOULES: Okay.

13 MS. SWEENEY: Is there any
14 sentiment to do "before and/or after"?

15 MR. ORSINGER: Let's make it
16 disjunctive.

17 MR. O'QUINN: There's
18 sentiment, but --

19 MR. SOULES: It would say "be
20 made before or after verdict," and the other
21 one would be "may only be may after verdict,"
22 and that's the proposition. And Judge McCown,
23 if you could give Paula some language that you
24 propose for a comment by letter or make a note
25 today and give it to Paula, she and her

1 subcommittee can consider whether that's
2 something they want to propose, and we can
3 talk about that again.

4 Okay. Now, as stated those in
5 favor show hands. Okay. Those opposed. I
6 believe that's unanimous.

7 Anything else now? Is there
8 anything else that anyone sees to give
9 direction to Paula's subcommittee? Paula, it
10 is in your good hands. Thank you.

11 MS. SWEENEY: When is our next
12 meeting?

13 MR. SOULES: I think January.
14 Probably not until after the holidays. Maybe
15 this is a good time to talk about that. It
16 looks to me like with the workload that we've
17 got that we need to meet every other month
18 until we get our work done. Once a month
19 we've tried before, and it was just impossible
20 to get a good group here; and to some extent
21 this is going to require those of us in trial
22 or those of us who get assigned to an oral
23 submission in appellate courts to advise
24 judges that we need to be away for a day, for
25 a Friday.

1 I have found the courts to be
2 receptive to that, very receptive to that when
3 it has to do with important CLE work as I know
4 Richard has and this kind of work, but we need
5 very much to have a full contingent here.
6 Otherwise we -- you can see the debate. I
7 don't think the debate when it's resolved has
8 ever come down to a partisan decision or even
9 a division on partisan lines as to how these
10 rules ought to read.

11 The problem is that if there
12 is a contingent of partisanship on one side
13 and the others are not here, we don't hear the
14 other side, and we don't get the benefit of
15 their perception. And this committee is made
16 up of lawyers from rural communities, lawyers
17 from urban communities, professors and judges,
18 lawyers that primarily practice in the
19 Plaintiff's personal injury area, lawyers that
20 primarily practice in the defense personal
21 injury area, lawyers that are business
22 lawyers, a court reporter, district clerk,
23 justice of the peace, county clerk; and we
24 really need the input from the whole committee
25 to get a good work product to accomplish what

1 the court wants us to accomplish.

2 I think once a month is too
3 often, but I think if we meet twice a month
4 (SIC) every other month, we can probably get
5 this --

6 MR. SUSMAN: Once a month?

7 MR. SOULES: Every two
8 months. Thank you. Every other month is
9 probably enough for us to get the job done.
10 And we've got the -- most of these materials
11 we now have and there can be some review, and
12 the subcommittees can meet in the interim
13 which may mean that there is a meeting every
14 month because the subcommittees may need to
15 meet. They can meet by telephone, or they can
16 meet some by correspondence where the agenda
17 is short in the subcommittee, or in some cases
18 they may need to meet face-to-face.

19 What do you-all think about
20 the prospect of meeting every other month?
21 Joe Latting.

22 MR. LATTING: I like the
23 prospect, but I was going to suggest that we
24 might perhaps start meeting in February,
25 because I don't think much is going to get met

1 about rules in this month of December. I
2 don't think my subcommittee can get together
3 and do the work we need to do and be ready to
4 come back and present it in January.

5 MR. SOULES: Well, if your
6 agenda is not ready in January, we've still
7 got two volumes of materials to go through
8 some of which may not take a lot of
9 attention.

10 MR. LATTING: With that
11 understanding then.

12 MR. SOULES: And Paula's group
13 may or may not be able to meet.

14 MS. SWEENEY: We'll be ready.

15 MR. SUSMAN: I think it's a
16 good idea that we meet every other month, but
17 I agree we probably ought to begin meeting
18 early January and pick the same Friday every
19 other month, like the first Friday of every
20 month beginning in February every other month
21 so it would be the first Friday in February,
22 the first Friday of April, the first Friday of
23 June or however it goes, and you'll know to
24 put it on your calendar when you know what
25 Friday it's going to be.

1 MR. SOULES: That's my
2 question.

3 MR. SUSMAN: That's what I
4 would suggest.

5 MR. SOULES: I think we ought
6 to set it on a set schedule. Is Friday a day
7 that is better than some other day?

8 MR. LATTING: Yes.

9 MR. O'QUINN: Yes.

10 MR. SUSMAN: Yes.

11 MR. SOULES: In order to really
12 get our work done I think we also need to meet
13 on Saturdays. This committee has attempted to
14 meet all day Saturday on a number of
15 occasions, and we wind up really losing
16 membership, and those are members that some of
17 who are not here any longer. So I need to get
18 direction for these people from you people
19 whether you feel that we can give this a full
20 Saturday when we meet rather than just half a
21 day on Saturday.

22 MR. LATTING: No.

23 MR. SOULES: Those in favor of
24 half days on Saturdays show hands. Okay.
25 That's almost unanimous. So we would meet

1 Friday and Saturday morning. Start time
2 worked very well this meeting at 8:30. That
3 meant that a lot of people had to come in on
4 Friday night, but when we've had the start
5 time any later it seems to encourage people to
6 come in that morning and many of them don't
7 get here until 10:00 o'clock because they
8 catch flights from wherever or come in.

9 Is 8:30 a reasonable start
10 time?

11 MR. MCMAINS: Yes.

12 MR. SUSMAN: Yes.

13 MR. SOULES: Anyone opposed to
14 that? Okay. Which Friday? Shelby Sharpe,
15 you had your hand up.

16 MR. SHARPE: Luke, could I
17 suggest that we have our next meeting the last
18 Friday in January. I think that will give us
19 sufficient time. It will also give us at
20 least a week up on going to February. Going
21 January, March, et cetera I think would be
22 better than waiting all the way to February.

23 HONORABLE PAUL HEATH TIL:

24 Agreed.

25 MR. SHARPE: I'd like to see us

1 go the last Friday in January.

2 MR. SOULES: Does anyone have
3 a calendar?

4 MS. WOLBRUECK: January the
5 28th.

6 MR. SOULES: Somebody look and
7 see whether the last Friday or the next to
8 last Friday seems to conflict with more
9 holidays than that other date.

10 MR. SHARPE: It should not.

11 MR. SOULES: The 28th if it's
12 the last Friday all year long, is that going
13 to conflict with holidays worse than next to
14 last Friday?

15 MR. SHARPE: It's not going to
16 hit Easter this coming year, so the last
17 Friday of the month should be clear.

18 MS. SWEENEY: Luke.

19 MR. SOULES: Paula Sweeney.

20 MS. SWEENEY: I'm new to the
21 committee, and I don't know the history. But
22 has there ever been any sentiment expressed to
23 moving to Dallas and Houston periodically as
24 opposed to everyone having to come to Austin?
25 It's easier to get to those cities, and it's

1 more attractive to a lot of folks to every
2 once in a while be at home and make an 8:30
3 meeting than be in Austin making one.

4 HONORABLE F. SCOTT MCCOWN: I
5 think the meetings ought to be in Austin.

6 MR. O'QUINN: History. Judge,
7 history.

8 MR. SOULES: We haven't tried
9 that with this committee. I know that other
10 bar committees off and on have tried that, but
11 we seem to get more attendance in Austin.
12 Also I think it's important to have the
13 opportunity for the judges to come and
14 participate or listen, and this is certainly
15 more convenient for the Supreme Court if they
16 want to come.

17 Over the years I think the
18 committee's work has been more understood and
19 more acceptable to the Court the more members
20 of the Court that come and participate or
21 listen for a while; and I think they get an
22 impression, better impression of what we're
23 doing, and so that may be a plus for doing it
24 in Austin.

25 MR. MCMAINS: Luke, the only

1 one is probably if you start in January, then
2 you wind up in May, January, March, May.
3 That's Memorial Day weekend is the only one
4 that probably --

5 HONORABLE PAUL HEATH TIL:

6 Also if you go up through the end of the year,
7 you'll end up in November a year from now it
8 will be the wrong weekend too. You need to be
9 the third week.

10 MR. SOULES: Does that
11 conflict with Thanksgiving in November?

12 HONORABLE PAUL HEATH TIL: It
13 sure does.

14 MR. LOW: Why don't you give
15 us a schedule, and if a holiday conflicts,
16 substitute it in, and we can just have our
17 schedule amended.

18 HONORABLE PAUL HEATH TIL: The
19 third Friday doesn't conflict.

20 MR. SUSMAN: I just I mean
21 there are a lot of new subcommittees and there
22 are a lot of new people and there's a lot of
23 work to be done. Now, we're going into
24 Thanksgiving, and Christmas, you know.
25 December is out; and my concern is if you make

1 it too early in January, I mean, the
2 subcommittees will not have an opportunity to
3 meet and function truly as a subcommittee and
4 do work. And I don't think particularly we
5 have a big subject with discovery coming up
6 that everyone is interested in, and that task
7 force has not even finished its work, and I
8 would suggest we begin the first Friday in
9 February which gives us one more week.

10 HONORABLE PAUL HEATH TIL:

11 Then we get caught with the month thereafter.
12 Because every other month that's just going to
13 mess up everything anyway. Then we'll end up
14 in December.

15 MR. SUSMAN: I don't
16 understand that. The first Friday.

17 MR. LATTING: What is wrong
18 with that?

19 MR. SUSMAN: I'd like to go to
20 all first Fridays, the Friday in February, the
21 first Friday in April.

22 MR. SOULES: We're either
23 going to the third Friday of the month which
24 will commence in January or do it the first
25 Friday of the month which is going to commence

1 in February. Okay.

2 HONORABLE C. A. GUITTARD:

3 Leave it to the discretion of the Chair.

4 MR. SOULES: No. We're going
5 to decide it now. Those who favor the first
6 Friday of the month beginning in February
7 which will put us on Good Friday in April.
8 That will put us on Good Friday; is that
9 right? Let's do it the third Friday of the
10 month. Apparently that doesn't conflict with
11 any holidays all year long. January 21st,
12 and then Holly will send everybody a notice of
13 the meetings, and we'll set them that way.
14 Justice Hecht.

15 JUSTICE NATHAN HECHT: Several
16 of you have asked about reimbursement of your
17 expenses; and you may apply to the Bar for
18 reimbursement of those. We don't usually have
19 the forms here, and I know many of you
20 historically have paid your own expenses.
21 Used to you had to. In fact we had to pay
22 even the cost of materials which is a very
23 significant cost; but we asked the Bar to pay
24 for this and they agreed. So you can apply to
25 the Bar for reimbursement of your expenses as

1 you would an ordinary committee meeting.

2 MR. SOULES: Holly, when she
3 sends out the schedule of the meetings for the
4 year, will also send an expense. You can get
5 it from the State Bar, and we'll send you the
6 expense reimbursement form that you may submit
7 if you wish. Should that go directly to the
8 Bar?

9 JUSTICE NATHAN HECHT: To the
10 Bar.

11 MR. SOUES: Should it be
12 addressed to any individual?

13 JUSTICE NATHAN HECHT: On
14 their form they have who it's supposed to send
15 it to.

16 MR. SOULES: Okay. David
17 Beck.

18 MR. BECK: Luke, could I make
19 a suggestion? I guess, and I know this
20 meeting is not typical because you have the
21 old committee, the new committee. You've got
22 the task force proposals, but I really think
23 it's -- our subcommittee is really backed up
24 on suggestions made by lawyers; and I really
25 think we need to do something to try to cover

1 as much material as we can at the meeting.

2 What I would suggest is if the
3 subcommittees who are dealing with whether to
4 amend specific rules to deal with discrete
5 problems can somehow circulate something to
6 all the members of this committee before the
7 meeting, and I would suggest that the way to
8 do it is set forth what the perceived problem
9 is, what the rule is, and what the suggested
10 amendment to the rule is so that the
11 subcommittee chairman at least before we ever
12 get to our meeting has at least some rough
13 sense of what this committee wants so we don't
14 spend, you know, an unusual amount of time
15 discussing three words in an amendment to
16 Rule 18a, for example.

17 I just think it would make
18 things go a lot quicker when dealing with just
19 discrete problems. I'm not talking about, you
20 know, conceptual problems dealing with
21 discovery and things like that. I don't know
22 if that makes sense or not, but I sure would
23 suggest it.

24 MR. SOULES: That is precisely
25 the way the subcommittees are supposed to

1 operate, but you only need to send me your
2 report, and I'll reproduce it, and --

3 MR. BECK: And send it to
4 everybody on the committee.

5 MR. SOULES: -- and send it to
6 everyone. Okay. What we will want -- and
7 this is addressing David's point -- what we
8 will want from each subcommittee is for the
9 committee to go through, subcommittee to go
10 through the materials that are in these
11 volumes and review them and prepare a change
12 that would address whatever the issue is
13 that's been raised whether you like it or
14 don't like it so that we can look at it in a
15 form that we could act on it if the committee
16 likes it; and that has really sped up the
17 process before.

18 In other words, you will give
19 us a red-line version of the existing rule
20 with a change that addresses whatever has been
21 requested, and then you can recommend that we
22 don't do it or that we do do it; and then if
23 we decide to do it, we'll have the draft
24 there, and we may be able to use it just the
25 way it is or with slight change, and then that

1 will be history we can go on. That will be
2 something we can put into our report for the
3 Supreme Court, and be past that rule and on to
4 something else.

5 If we just take the letters or
6 the inquiries that come in and address them
7 here at this committee and we have no drafting
8 done, then that goes to the next meeting which
9 is the first meeting at which we have some
10 drafting to consider, and then we go back
11 through a lot of the same debate. So if you
12 understand what I'm saying, we need a red-line
13 version from the subcommittee of every rule
14 addressing ever inquiry; and some of that is
15 makework, because some of these suggestions
16 are really not very significant or are really
17 misguided, but they are few. Most of them
18 have some substance and will need some
19 drafting.

20 MR. LATTING: Where do we get
21 those?

22 MR. SOULES: This is just my
23 set of materials that Holly Bates stamped and
24 put them together.

25 MS. DUDERSTADT: That's

1 what's in your big volume.

2 MR. SOULES: That's these two
3 books (indicating).

4 MR. LATTING: Okay.

5 MS. DUDERSTADT: It comes from
6 everywhere.

7 MR. SOULES: Volume I and
8 Volume II. That's your subcommittee agenda
9 and your rules here and stuff, that 13 is out
10 of 114; and that will be in Joe's work,
11 because it's what the task force dealt with.

12 HONORABLE C. A. GUITTARD:
13 Mr. Chairman.

14 MR. SOULES: Mr. Guittard.

15 HONORABLE C. A. GUITTARD:
16 Can you give us some indication of the
17 sequence of the task force's reports that
18 you're going -- the order in which you'll
19 probably take them up? I think the appellate
20 rules will have if we give attention to these
21 new suggestions which our committee has had
22 before, we're not going to be able to complete
23 or present suggestions and go through those
24 and add them to the report in January. And so
25 I would like some guidance as to when our

1 report will probably be reached for action by
2 this committee.

3 MR. SOULES: Given what you've
4 just said, I think that probably would be in
5 the March meeting.

6 HONORABLE C. A. GUITTARD:
7 Okay. We'll shoot for that.

8 MR. SOULES: I'm hopeful that
9 we will have the discovery task force report.
10 I'm told it will be here in three weeks; and I
11 can get that to -- it's you're committee,
12 isn't it, Steve, and you-all be prepared to
13 report on that. It's going to be a general
14 discussion I know, because it's going to be
15 broad. We'll take the broad subject. We'll
16 take that up as we've taken up sanctions and
17 the charge.

18 That will be probably first on
19 our agenda in January. Then if your report is
20 ready, Judge Guittard, we'll do it. If not,
21 we'll postpone --

22 HONORABLE C. A. GUITTARD: We
23 can have at least a part of it ready.

24 MR. SOULES: -- we'll
25 postpone it to March. I do think it's

1 important that whatever your subcommittee
2 reports on that it include the suggestions
3 that have come from whatever quarter and not
4 work on it as it now is and then have to
5 revisit because we later take up what has come
6 from the public.

7 And that's -- and Bill, can
8 you work with Judge Guittard to get that
9 done? You're going to do the TRAP Rule?

10 PROFESSOR DORSANEO: I think
11 he's planning on me working on that with him.

12 MR. SOULES: And I want to get
13 Bill on today for a discussion at least of
14 where he is with his work. So bringing this
15 to closure, we would start with discovery.
16 Then if the appellate materials are ready,
17 we'll deal with those. If they're not, we'll
18 put that off until March. If the sanctions
19 materials are ready, we'll deal with those.
20 If not, we'll put them off until March. We'll
21 certainly come back to the charge rules.
22 Paula, you'll have those ready for us in
23 January.

24 MS. SWEENEY: No problem.

25 MR. SOULES: No problem. And

1 then we'll just begin with Rule 1 and start
2 through the book, except we will have already
3 covered discovery and subject to what I've
4 already said. Steve Susman.

5 MR. SUSMAN: One question of
6 clarification. The discovery task force is
7 still working. There is a discovery
8 subcommittee of this committee many of whose
9 members are not on the task force. Does it
10 make sense for -- I mean, what do you want?
11 The subcommittee to have no involvement with
12 the tax force now, or should we come to them
13 and say, "Well, we'll go to your meetings" to
14 kind of for information, or just wait until
15 they report and then? I mean, what is the
16 drill given the fact that they're still
17 working?

18 MR. SOULES: Given the
19 progress of that committee I think we better
20 leave it alone and let it come to closure
21 without any involvement from here. And as
22 soon as I get that report I'll get it to you,
23 and you may or may not be able to have a
24 report in January. It will probably be very
25 difficult, but we can at least talk about the

1 task force report.

2 MR. SUSMAN: They said three
3 weeks?

4 MR. SOULES: That's what they
5 say. But there have been some -- that has
6 been a little bit slow, so I don't know what
7 we'll have, but at least we'll have the task
8 force report. Hopefully David Keltner will be
9 here. We can talk about it. And if that's
10 all we do is get the task force report and
11 talk about it, that should give you guidance
12 to go forward from there.

13 Okay. Any other questions
14 about logistics? David Perry?

15 MR. PERRY: Let me comment,
16 Luke, that we have got some drafts of the
17 discovery task force work. Some of it is
18 almost final, and some of it is pretty rough;
19 but I'll just make copies of it, Steve, and
20 send you what we've got so you can be looking
21 it over and starting to think about it.

22 MR. SOULES: Is that what I
23 have here?

24 MR. PERRY: I don't know,
25 because I haven't seen what you have got.

1 MR. SHARPE: That's court
2 rules. Stuff we've done so far.

3 MR. SOULES: The court rules
4 subcommittee on discovery?

5 MR. SHARPE: Yes. That's what
6 it's done so far on things it's considering.

7 MR. SOULES: Okay. Shelby's
8 committee for the State Bar has some materials
9 that we didn't have in the book, and I'll pass
10 these around. And Steve, these are going to
11 be mostly --

12 MR. SHARPE: This is very
13 preliminary stuff on discovery.

14 MR. SOULES: Holly, will you
15 pass those around and give them to the right
16 people?

17 Okay. Now, we have got a
18 sign-in list. Has everyone signed up for
19 yesterday that was here yesterday and everyone
20 signed up for today that was here today?

21 Pat, we're going to meet on
22 the third Friday beginning in January every
23 other month.

24 MR. SUSMAN: The dates for your
25 information are March 18th and 19th, May 20th

1 and 21st, July 15th and 16th; and then we move
2 to September, but I didn't get September.

3 PROFESSOR EDGAR: This might
4 be a premature question but kind of ties in
5 with this as far as the Bench and Bar
6 generally are concerned. Does Justice Hecht
7 have any idea about what the Supreme Court's
8 thoughts are with respect to periodic
9 publication of these rules, or does the Court
10 envision maybe waiting until you're through
11 with your entire project and publishing one
12 change, or what is the Court's thought on
13 that, if it's thought about it at all?

14 JUSTICE NATHAN HECHT: Three
15 of us were on a panel for the appellate
16 section back a month or so ago and were asked
17 that very question; and the three of us on the
18 panel seemed to think that if there are areas
19 which we agree on fairly early on and would be
20 helpful and ought not to be delayed until the
21 end of a lengthy process which may result if
22 we undertake Bill's recodification proposal,
23 then probably the Court would want to go ahead
24 and do those.

25 If on the other hand it's all

1 sort of funneling together and it's not going
2 to take very long and we may know something by
3 the end of next year anyway, then it would
4 probably be better to delay it and do it all
5 at once; and I think we can't make up our
6 minds on that until we see how the committee
7 goes along. But we're open to doing it in
8 stages, but we also may want to just do it at
9 one time.

10 MR. SOULES: Okay. Robert
11 Meadows.

12 MR. MEADOWS: One housekeeping
13 question: Since we're going to have a set
14 schedule throughout the year, would it be
15 appropriate to approach the Court about
16 getting an order that would protect us for
17 each of those dates?

18 MR. SOULES: After all, they
19 are the Supremes.

20 JUSTICE NATHAN HECHT: Well,
21 I'll mention it to them. We have had this
22 request come up a time or two in the past with
23 respect to the president of the State Bar, and
24 I can't remember all of our discussions on
25 that subject, but I'll ask them. We also have

1 Federal State Relations Committee, a formal
2 committee that operates in Texas, and it has
3 district judges on it and two members of our
4 court, and some Federal district judges and a
5 couple of members of the Circuit, and we may
6 want to take it up with them too. I don't
7 think it would be any problem with them
8 generally speaking if that's what we -- if we
9 wanted to do it ourselves I think we'll just
10 have to talk about it and see. I can't tell
11 you for sure.

12 MR. SOULES: How many feel
13 that's needed?

14 JUSTICE NATHAN HECHT: I would
15 hope that the judges of Texas would
16 accommodate us on this without anything
17 formal.

18 HONORABLE C. A. GUITTARD:
19 Just say the Supreme Court looks with favor
20 upon it.

21 JUSTICE NATHAN HECHT: Yes.

22 HONORABLE ANN TYRELL COCKRAN:
23 Let's also state that the trial judges also
24 look with favor that you tell us in advance
25 instead of the day before you're going.

1 JUSTICE NATHAN HECHT: The
2 problem in the past has been we don't want any
3 games-playing with the district judges and
4 particularly with our Federal brothers and
5 sisters, and so we have kind of tried to stay
6 out of it in the past.

7 MR. SOULES: Another thing
8 that I found helpful is to request if I'm
9 going to be in trial, to talk to the other
10 lawyers and explain what it is, what the need
11 is and ask them if they'll agree to, if they
12 will permit me to submit an unopposed motion
13 to be off on Friday even during trial. I have
14 never had anybody decline; and when that's
15 submitted by a letter or by a motion to the
16 trial judge I've never had a trial judge say
17 no. So maybe that's an idea that may help.

18 Okay. Bill, why don't you
19 give us some introduction and understanding
20 about your project. This is in a book. I
21 don't know whether you have all gotten your
22 copies. It looks like this (indicating). It
23 says Report Of Texas Supreme Court Task Force
24 On Rules of Civil Procedure. Has everybody
25 got one of these?

PROFESSOR DORSANEO:

1 Simultaneously with the appointment of the
2 task forces on discovery and the task force on
3 the jury charge the Court appointed a task
4 force to consider the desirability and
5 feasibility of recodifying the Texas Rules of
6 Civil Procedure with or without substantive
7 change. The members of the task force met on
8 several occasions, and naturally the first
9 thing that we did was to take a look at the
10 organization of the Texas Rules of Civil
11 Procedure the way that they had been
12 structured originally.

14 You have or don't have the
15 report that we have submitted. You'll note if
16 you have it and even if you don't that the
17 general original organization has been
18 impaired because of the adoption of the
19 appellate rules. The overall organization of
20 the Texas Rules of Civil Procedure was an
21 organization that began with general rules,
22 then went to rules of practice in district and
23 county courts, and then the third and fourth
24 parts involved practice and procedure in the
25 Courts of Civil Appeals and the Supreme Court

1 respectively.

2 When we adopted the appellate
3 rules a large hole developed in the middle of
4 the procedural rules beginning at Rule 330.
5 In addition to that the adoption of the
6 appellate rules meant with respect to the
7 overall organization that the rulebook now
8 begins with a general rule section in Part 1,
9 and then in Part 2 Rules of Practice in
10 District and County Courts another general
11 rules section such that we have two general
12 rule sections adjacent to each other although
13 one of them is a subpart of the second part
14 that both deal with the practice in district
15 and county level courts.

16 These rules all together
17 number approximately 30, so we begin our
18 rulebook with 30 general rules in two
19 sections. The general rules in these two
20 sections of general rules cover a multitude of
21 topics including some provisions concerning
22 costs which are dealt with elsewhere, some
23 provisions concerning clerks which may
24 correspond to provisions in the rules
25 elsewhere, some provisions concerning counsel,

1 leading counsel, and a variety of identifiable
2 matters.

3 We believe organizationally at
4 the beginning part of the rulebook that
5 something could be done better to organize the
6 general rules into a more workable unit. The
7 specific suggestion is to take most of them
8 and put them in a part of the rulebook at the
9 back that deals with a variety of specific
10 subjects, counsel, courts, clerks, court
11 reporters and court costs such that if you
12 have a general rule, for example, that relates
13 to costs or security for costs, you could find
14 it without looking through all of the general
15 rules. Moreover, these types of rules tend to
16 be relatively technical, particularly the ones
17 concerning clerks, and it seemed to us that
18 they would go better at the back of the book
19 rather than at the beginning of the book.

20 Maybe this is just an example
21 of the overall conclusion that you reach when
22 you look at the Texas Rules of Civil Procedure
23 as they exist right now, because in addition
24 to the adoption of the appellate rules since
25 their promulgation, the Rules of Civil

1 Procedure, more than 50 years ago, there have
2 been a number of other things that have
3 happened. We have revised and changed, or the
4 Court has revised and changed rules concerning
5 venue practice, concerning pretrial discovery,
6 concerning the jury charge which we're still
7 working on, concerning findings of fact in
8 Bench trials. We have modified our procedural
9 rules with respect to how you serve papers
10 including notices on other parties.

11 Parenthetically I might note
12 that that information is contained in this
13 general rules area without being put with the
14 service information that relates to other
15 things. Rules concerning post judgment
16 motions, durations of trial courts plannery
17 power, and other things, even the adoption of
18 a special appearance practice, summary
19 judgment practice, mental and physical
20 examinations. Even the adoption of the
21 interrogatory rule came later.

22 So we've had a lot of things
23 that have happened in the period of time that
24 we've had this rulebook. A number of rules
25 have been repealed for a variety of reasons.

1 Some because of the adoption of the Rules of
2 Civil Evidence, some because we no longer have
3 a practice of appealing from county level
4 courts to district courts. Yet other rules
5 have hung around even though they probably
6 should have been repealed because in the case
7 of some of them they relate to those appeals
8 from county level courts to district level
9 courts.

10 So from the standpoint of an
11 analysis of the rulebook that we have today it
12 looks like there have been so many changes to
13 it that it's about time to try to organize it
14 in a more coherent fashion. It's just been
15 affected by a lot of adjustments over time.
16 And if you take the time to look at individual
17 parts of it, I think you'll probably believe
18 that some work would make the rules better
19 than they are right now. It's been caused by
20 a lot of the changes that have transpired over
21 time.

22 Some of these changes have
23 been of larger scale changes than others.
24 Changes in discovery practice have been not
25 just adjustments. They have been major

1 changes from a conceptual standpoint. In our
2 rulebook now we don't even have a section
3 that's called "Discovery." We have the paper
4 discovery rules in a pretrial section, and
5 then we have the deposition rules in a section
6 called evidence and depositions that contains
7 some evidence rules, but not too many because
8 most of them have been moved to the Rules of
9 Civil Evidence or repealed.

10 We have in this developmental
11 stages continuing developmental stages
12 activity concerning pretrial practice,
13 pretrail orders and what role they play in the
14 practice; and although that was in the
15 original game plan, it's not really in there
16 in the same fashion with the same attitude
17 that we might take as things move along.

18 But the bottom line is with
19 respect to the rules of practice in district
20 and county level courts our conclusion was
21 that they could be reorganized more coherently
22 in an overall fashion, that they should be
23 reorganized at some point into a different,
24 more modern pattern, and that frankly the
25 organization, the overall organization of the

1 Federal Rules of Civil Procedure was
2 serviceable; and that's what we tentatively
3 recommend as a way to organize the rulebook
4 overall.

5 That would mean with respect
6 to practice in district and county level
7 courts that we'd have a section talking about
8 commencement of the action, service of
9 process, and service of pleadings, motions and
10 orders, a section on pleadings and motions
11 rather than a section merely on pleadings
12 which doesn't mention motions leaving that to
13 the coverage of the general rules which our
14 current rulebook does, a section on parties.
15 We have a section on parties, but a better
16 section on parties perhaps could be put
17 together, a section or two sections on
18 discovery and pretrial procedure depending
19 upon how you divide it up, a section on trial,
20 a section on judgments, motions for judgment
21 and new trials, and then sections thereafter
22 dealing with provisional final remedies,
23 special proceedings, and I'll need to get back
24 to those in a minute, a particular section on
25 counsel, courts, clerks, court reporters,

1 court records and court costs along with some
2 closing rules.

3 Not so much of a big deal to
4 reorganize somewhat the particular subparts of
5 the rules of practice in district and county
6 level courts, but we could improve the overall
7 rulebook by doing so.

8 When you start looking at
9 individual sections and in specific rules you
10 get -- I think at least I get, and I think the
11 committee members and other people who have
12 looked at it get a clear motivation to do
13 something. The original rules of procedure
14 pick any place, almost any place are short,
15 sometimes one-sentence, one-paragraph rules
16 with relatively uninformative subtitles with
17 the exception of the things that we've worked
18 on over the years, venue and discovery, for
19 example. Most of the rules numerically were
20 copied from the Revised Civil Statutes of 1925
21 verbatim. And if you went and checked, I
22 think you would find out that most of those
23 were copied from earlier codifications without
24 change.

25 So we have just copywork up

1 through 1993 of short rules, uninformative
2 titles, and something that looks very
3 different from Rules of Procedure that we've
4 picked up later such as the discovery rules
5 and the venue rules. And what we believe as a
6 task force is that our rulebook would be a lot
7 more user friendly, it would be easier to find
8 things if some of the district rules were
9 combined together when they deal with
10 essentially the same subject, and if the
11 titles would be rewritten and made into
12 subtitles such that our rulebook would look
13 more like the rules that we did adopt recently
14 or the rules that we copied initially from the
15 1937 version of the Federal rules, for
16 example, the rules concerning parties, joiner
17 of claims and parties.

18 I guess bottom line the task
19 force concluded that for a large part of the
20 rulebook we have things that have been done
21 copywise in the same way for more than 100
22 years, and there hasn't been an attempt really
23 to examine them for anachronistic commentary,
24 bad manner of presentation, redundancy, lack
25 of clarity, or any of the kinds of things that

1 have been done for much, if not most of the
2 rest of the Revised Civil Statutes of 1925
3 during the recodification process.

4 From my perspective perhaps
5 the most important code has received the least
6 attention in this respect. The reorganization
7 would be partially driven by an attitude that
8 longer rules with more informative subtitles
9 would be something that counsel and courts
10 could use to function with at a higher level
11 of professionalism; and you almost have to
12 take a look at the table of contents which is
13 Appendix A of this report. You have to take a
14 look at the disposition table which indicates
15 where things would be placed and what they
16 would be called and to take a brief look at
17 Appendix C, a longer look if you like, to get
18 an idea of what it would look like if it was
19 done in the manner that I suggest.

20 Our task force believed rather
21 than doing this abstractly that if we could
22 take a shot at following this plan, you and
23 others could get a much better idea of where
24 we would ultimately end up and why it's
25 perhaps worth doing. For me to try to explain

1 it generally doesn't really do justice to it.

2 There is another subject that
3 I'll mention with respect to the special
4 proceedings and ancillary remedies. One of
5 the things that happened when the original
6 rules were promulgated at least from the
7 standpoint of looking back to see what went on
8 is that a lot of things were taken out of the
9 statutes on the basis that they were
10 procedural, but a component of the same
11 subject was left in the statutes on the basis
12 that that part of it was substantive, hence
13 now we have coverage in the Rules of Civil
14 Procedure of things that are also covered in
15 the Civil Practice & Remedies Code, and on
16 some occasions not only in the Civil Practice
17 & Remedies Code, but in the Rules of Civil
18 Procedure, the Civil Practice & Remedies Code
19 and the Property Code.

20 The task force believes this
21 needs to be reexamined to see whether these
22 things ought not to be combined together again
23 either in these other codes or in the Rules of
24 Civil Procedure rather than to have the same
25 subject covered in several different places.

1 For many if not most of those things as events
2 have happened there are procedural parts of
3 those codes that have been enacted later, so
4 we either have duplication, contradiction
5 along with some truncation of coverage from
6 book to book.

7 I think our preference would
8 be to send -- our initial preference would be
9 to send a lot of what is in the current
10 rulebook back to the -- after Rule 330 back to
11 the Revised Civil Statutes Of 1925 as
12 subsequently recodified. I believe we would
13 want to keep the important subject of
14 injunctions and perhaps all of execution in
15 the procedural rulebook. Other provisional
16 remedies, attachment, garnishment, distress
17 warrants that's debatable. Other special
18 proceedings toward the back, yet forcible
19 detainer, forcible entry and detainer, they
20 are covered in two places, and that would need
21 special attention or could get special
22 attention.

23 Now, of course it's not
24 necessary to do anything about anything after
25 Rule 330 in order really to reorganize the

1 first 330 in some fashion or another, but the
2 ultimate project suggested to us looking at
3 those and reevaluating decisions that were
4 made in 1939 and 1940 about coverage.

5 If anybody wants to ask any of
6 us a question, I'd be glad to try to answer
7 it. How long could it take to do this? In my
8 view it would take a while to do it right; and
9 it ought to be done right, and it ought to be
10 done with some commentary, but it wouldn't
11 take an eternity to do it.

12 PROFESSOR EDGAR: Bill, I
13 would like to congratulate you on what you've
14 done thus far. You've done a fine job getting
15 this thing started. I just have a couple of
16 questions though. I was looking here on page
17 115 where the Court's charge is to be
18 inserted, and you've left for example I think
19 six rule numbers, but let's just assume that
20 we wind up with nine court charges rules. Do
21 you envision going to a decimal system with
22 respect to additions? How are you going to
23 handle that?

24 PROFESSOR DORSANEO: This is
25 another matter that I perhaps could have

1 talked about. If you look at our rules, the
2 answer would be "No." The answer would be to
3 develop a numbering system that we would use
4 coherently and that would be one that would
5 easy to use.

6 Right now we have in our
7 rulebook, if you go and look at it, we have a
8 number of rules numbered 3a, 14a, 14b, 14c,
9 18a, 18b, and yet in other places we have
10 gaps. There is no Rule 187. There is no Rule
11 189. There is no Rule 181 or 182. In
12 addition to that from rule to rule we have
13 different numbering schemes. We have some
14 rules that begin Rule 201, and then the first
15 numbered paragraph or the first paragraph is
16 one, right. And then on other occasions it's
17 329b, and the first paragraph is (a). And
18 this is indicative of changing things over a
19 period of time without any reference to the
20 rulebook as a whole, and we would plan on
21 having the rules numbered consecutively.

22 When we did the Appellate
23 Rules however we left some gaps on purpose.
24 If you look at the Appellate Rules, there are
25 some places where there is a gap that a

1 particular section of rules begins with or
2 ends with an odd number of 29, and the next
3 section begins with 40. So we could leave
4 some gaps if we expected some changes or
5 anticipated some likely changes if people
6 thought that that would be desirable.

7 But part of the cleanup
8 process would involve renumbering, would
9 involve cleaning up the numbering scheme. And
10 I don't think it would involve trying to
11 follow the Federal numbering pattern as
12 distinguished from the overall Federal
13 organizational pattern.

14 PROFESSOR EDGAR: My second
15 question then is do you envision or have you
16 considered whether to publish the rules in a
17 bound volume or in looseleaf so that we won't
18 have to get a new book each time like we've
19 done with pattern jury charges?

20 PROFESSOR DORSANEO: No. I
21 haven't really thought about that. Frankly I
22 would be sufficiently optimistic to say if we
23 did this and did it right, then that would be
24 more of an academic question.

25 MS. DUNCAN: My only

1 concern -- I believe you mentioned this
2 yesterday. My only concern is research. And
3 we've all experienced the lost evidence
4 rules. Have you had any discussions with any
5 of the publishers about at the same time we do
6 the recodification also changing the
7 annotations so that they can be found and we
8 can get rid of --

9 PROFESSOR DORSANEO: No.

10 MS. DUNCAN: -- six volumes of
11 statutes?

12 PROFESSOR DORSANEO: I had
13 thought about this. And in this draft that
14 you have here you will note that our working
15 draft contains the comments to the rules that
16 we have in the rulebook already. I've been
17 making further adjustments myself. When the
18 Appellate Rules were done the comments to the
19 old Rules of Civil Procedure were discarded,
20 see, that the Appellate Rules replaced. In my
21 view that was because of a person power
22 problem. Really I was doing it. Okay. And I
23 think we ought to go back and try to --

24 MS. DUNCAN: Recapture.

25 PROFESSOR DORSANEO: --

1 recapture some of that. And it can be done,
2 of course, if you have the right people
3 working on it. And I think in addition to
4 that we could do more, but to rely upon a
5 publisher to do it is especially -- like West
6 is not my best friend. I'll say especially
7 West to recognize the source of that comment,
8 okay, is not a good idea.

9 We should do more of that. We
10 should find the resources to do it together
11 with doing some commentary when that makes
12 sense in order to solve these problems that
13 will come up. And none of us will remember
14 everything. And when we we did the Appellate
15 Rules I thought I would remember, and I don't
16 remember what exactly happened.

17 MS. DUNCAN: But yet that was
18 my question was not to delegate to the
19 publisher; but if we have people that know, we
20 might go get down because right now you have
21 to keep your old evidence statutes in order to
22 have the cases, and the cases and the evidence
23 only starts whatever year that was.

24 PROFESSOR DORSANEO: I think we
25 could do that if we had people dedicated to

1 the task and the right resources. This has
2 all been volunteer work over the years, as it
3 is now, and most of the time it's been done
4 relatively unsystematiclaly in comparison to
5 how it could have been done. Not being
6 critical -- certainly not being critical of
7 anyone. As the report indicates, a tremendous
8 amount of good work has been done. Much if
9 not most of it can be retained, and I applaud
10 the members of this committee now and the
11 prior members as leading legal citizens in
12 this jurisdiction and reject the idea that
13 it's being -- that this is being done on some
14 personal advantage basis or for some other
15 reason.

16 MR. LOW: I commend you on the
17 work, and I sometimes am a little slow picking
18 something up, but if I understand what you
19 did, it looks like to me -- correct me if I'm
20 wrong -- you have just taken the rules you
21 have and you've organized them in the places
22 they ought to be. The next task was you've
23 eliminated rules that were duplications and so
24 forth. The next task is you have polished up
25 the language and don't say you do things like

1 that. But you have not taken, made
2 controversial changes. You only polished up,
3 eliminated, so that based on what you have we
4 can put in numbers or whatever, and the work
5 that we're doing now will be compatible with
6 exactly what you're doing here and with you
7 having eliminated those rules we don't need
8 and so forth. Is that correct?

9 PROFESSOR DORSANEO: The answer
10 to that is primarily "yes." And we won't be
11 able to do this until the other things are
12 taken care of.

13 MR. LOW: I know. But what
14 you've done now will be compatible with us
15 putting this in it.

16 PROFESSOR DORSANEO: There are
17 some things in this draft that are things that
18 are being worked on by other committees right
19 now. I'm kind of anticipating that something
20 may come of it. The pretrial rule that is
21 from the Committee on Court Rules that didn't
22 even pass that committee but it's still on the
23 table as a draft is in this draft.

24 MR. LOW: And you do have
25 things like a new rule, maybe a source that's

1 a Federal Rule, you have a few of those.

2 PROFESSOR DORSANEO: Right.

3 MR. LOW: So you have done
4 some adding of new rules.

5 PROFESSOR DORSANEO: The main
6 ones would be Federal Rule 12 without a
7 12(b)(6) motion but just organizationally.

8 MR. LOW: Yes.

9 PROFESSOR DORSANEO: No
10 general demurrer. Federal Rule 7 which talks
11 about pleadings and motions, but these are
12 rules that I consider to be essentially
13 structural and organizational rather than
14 controversial.

15 MR. LOW: What I'm trying to
16 do, and I'll shut up, is brag on you a little
17 bit.

18 MR. SOULES: I don't know if
19 this will answer any questions that may be in
20 your mind, but one of the things I would like
21 to do, and this is subject to Justice Hecht's
22 approval since actually this committee is to
23 report to the Court before we take it on, but
24 if we take it on, it will be to of course make
25 Bill the subcommittee chairman of this

1 committee and to make every chair of every
2 other subcommittee a member of his committee
3 so that, for example, for what are now numbers
4 1 through 14 which Alejandro Acosta is the
5 chair of, he would be on this committee and
6 assist Bill as something of a watchdog over
7 those rules to see that they get in there; or
8 if they don't get in there, what gets omitted,
9 and if they get changed, what those changes
10 are so that both Bill and Alejandro can give
11 us a report that we can inquire into about
12 have we -- do we have an adequate transition
13 of the rules as they existed before. And then
14 anyone else who wanted to volunteer would also
15 be on this committee if you wish.

16 Now, we don't have authority
17 for that yet, but that's my concept of how we
18 could do it if we get that authority. Does
19 that sound all right with you, Judge?

20 JUSTICE NATHAN HECHT: Yes,
21 generally speaking. But it's important that
22 whoever joins in the actual work process of
23 this be committed to doing it, because there
24 will be a lot of work involved, and it won't
25 be fair to everybody who is on there unless

1 all are pulling on it equally, so this is not
2 a title to have. This is some work to be
3 done.

4 MR. SOULES: I know Bill needs
5 to go. He has got to go to an airplane, but
6 we can still discuss this a few minutes, if
7 you wish.

8 MR. LOW: I think the appeal
9 rules of evidence, nothing to do. I should
10 not be on the committee. Just talking about
11 the chairman of the subcommittees on these
12 particular rules. That way should be a bigger
13 committee and the committee more difficult to
14 work.

15 MR. SOULES: That may be.
16 However the TRAP Rules since some of them were
17 rooted in these rules, that chair may be, and
18 there may be some evidence points too. I
19 don't know.

20 MR. LOW: That's fine.

21 MR. SOULES: And then like
22 Tony Sadberry's rules we got to those or the
23 extraordinary writ rules, how we deal with
24 those. Of course, that's not really
25 responsive to your question.

1 Does anyone have any -- you
2 had your hand up, David.

3 MR. PERRY: Luke, I was just
4 going to comment that it looks like a
5 tremendous amount of work has already been
6 done, and I had wanted to ask Bill, and maybe
7 you can answer the question. We could partly
8 hear down at this end of the table some of the
9 conversations you-all were having up here. We
10 couldn't hear at all very well. Am I correct
11 that this is almost entirely a reorganization
12 of the rules without a textual change in the
13 rules themselves?

14 PROFESSOR ALBRIGHT: If I can
15 respond, I'm on the task force. And what we
16 have done is primarily reorganize. I think
17 the way Buddy described it was exactly what we
18 did. We took the rulebook. We developed a
19 new organization. We took the rules and fit
20 them with the existing rules and fit them in
21 within the new organization. We then took
22 rules out that were redundant or antiquated
23 that weren't needed anymore. We revised
24 current rules to make them more readable or to
25 take out redundant language.

There are some substantive changes, but I think what we anticipate, this is a very early working draft I would say. This is an organizational draft. We really haven't had anything before now. We have not -- our committee has not met since this draft has come out, so we haven't had anything in front of us to really see it all together. And I think there will be more revision, and there may be substantive revisions; but if there are any, they would certainly be brought before this committee to discuss just like any other substantive revision would be. So right now it is -- the effort is primarily organizational, and a readability type thing.

MR. SOULES: Are there any other members of this task force on this committee?

MS. ALBRIGHT: Elaine Carlson has been working with us the last few meetings. I think I may be the only one that's been on it the whole time. Is there anybody else?

PROFESSOR CARLSON: Judge Hughes.

1 PROFESSOR ALBRIGHT: Judge
2 Hughes is on it, but he's not on this
3 committee.

4 MR. PERRY: I was just going
5 to comment that one of the problems that we
6 had with the nonsubstantive revisions that
7 produced Civil Practice Remedies Code was that
8 the language changes from going to the old
9 statutes to the new were so great that
10 oftentimes it took an awful lot of time and
11 effort and work to see if the change was
12 nonsubstantive or not.

13 The impression I have is that
14 you-all have avoided that problem by making
15 only very minor textual changes that I suppose
16 can be easily seen with red-lining and
17 underlining and that sort of thing. But I
18 haven't really looked through here enough to
19 verify if that's right. Is that basically
20 correct?

21 PROFESSOR ALBRIGHT: Yes. I
22 think that when we do make textual changes we
23 are trying very carefully to keep track of
24 what we are doing so that you-all can see what
25 the changes are so that we can discuss them

1 and see whether people agree with those
2 changes or not. But there is a lot of -- some
3 rules we have taken and completely rewritten,
4 because they are so redundant, so
5 misorganized, disorganized; and so they have
6 been completely rewritten.

7 Other rules we have not.
8 People like Judge Hughes want -- Judge Hughes,
9 for instance, wants to go through and
10 completely rewrite every rule in plain English
11 and see what happens to that, so there may
12 be -- towards the end there may be some
13 proposals of lots of revision that are not
14 substantive, but I think when that happens,
15 you know, this group is going to have to
16 discuss it.

17 MR. SUSMAN: Is it possible to
18 get a red-line copy, something that shows what
19 the changes have been made in these rules? Do
20 you have that?

21 PROFESSOR ALBRIGHT: We do not
22 have it now. I think we need it. I think
23 it's just been a matter of time and manpower;
24 and I'm going to propose -- I've always
25 thought we needed one. Right now I think the

1 best that we have is this --

2 MR. SUSMAN: Grid.

3 PROFESSOR ALBRIGHT: -- is the
4 disposition table where you'll see things
5 like, for instance, on Rule 44 it says
6 "significant wording change." So what I'm
7 hoping to do is get a research assistant or
8 somebody to go through and really do a
9 red-line version, because I think it will
10 be -- I think we're going to need that and it
11 will be significant.

12 MR. SUSMAN: One more
13 question. That is, Luke, I mean is the
14 proposal to have these things come out at the
15 same time the changes we are discussing? I
16 mean what's the relationship between this
17 project and all these other things we've been
18 discussing for two days? I mean should the
19 new discovery rules, for example, be in this
20 format to fit in here in a reorganized format,
21 or as if we're going to stick them in the old
22 book, or do you want both versions?

23 MR. SOULES: Well, we're going
24 to work forward now in the subcommittees, the
25 assigned subcommittees as though this project

1 were not ongoing --

2 MR. SUSMAN: Yes.

3 MR. SOULES: -- so that we can
4 have our options and the Court can have its
5 options to either go ahead and change the
6 sanctions rule if it wishes or the discovery
7 rules or the charge rules or some of these
8 other rules that may badly need fixing at some
9 interim date. Then that work would be folded
10 into this project when this project is
11 finished. Is that responsive to your
12 question?

13 MR. SUSMAN: (Nods
14 affirmatively.)

15 PROFESSOR ALBRIGHT: And you'll
16 see that we did not touch sanctions,
17 discovery, jury charge. Discovery, for
18 instance, I did some reorganization of the
19 discovery rules, but I used the exact words of
20 the current rule, because I thought there is
21 no point in doing any changes in the discovery
22 rules until the discovery task force report
23 comes out and this group discusses it.

24 MR. GALLAGHER: Just a
25 question. Would it be possible for us to

1 obtain a listing of all Federal Rules that
2 have been extracted from the Federal system
3 and incorporated into the draft that on which
4 you're currently working just so that we can
5 have a quick reference to what Federal Rules
6 are being brought over?

7 PROFESSOR ALBRIGHT: I think
8 if there are, there may be a couple, but
9 they're not significant. They would be in
10 here.

11 MR. GALLAGHER: Is that in
12 here?

13 MR. LOW: Yes. Page four from
14 the back.

15 PROFESSOR ALBRIGHT: They
16 would be in the disposition table if there are
17 some. We did not do a major effort to
18 incorporate Federal Rules into the State
19 Rules.

20 MR. GALLAGHER: "Major" is the
21 operative word.

22 PROFESSOR ALBRIGHT: We did
23 not. I guess whenever we were revising we
24 would take other alternatives whether they be
25 Federal Rules, other State Rules, but I don't

1 even think --

2 MR. BABCOCK: You took some
3 Rule 11.

4 PROFESSOR ALBRIGHT: Did we do
5 Rule 11?

6 MR. BABCOCK: Some of it.

7 PROFESSOR ALBRIGHT: I think
8 your best bet is just to look at the
9 disposition table. Each person on the task
10 force was in charge of specific rules, so it
11 may be that that particular person said, "Gee,
12 the Federal Rule does a lot better job than
13 the State Rule to accomplish the same
14 purpose," but that should all be in the
15 comment or in the disposition table.

16 MR. GALLAGHER: There is
17 someplace, though, that if there are some of
18 us who are concerned about the number of
19 Federal Rules that are being incorporated,
20 there is somewhere in this draft where we can
21 find that information?

22 PROFESSOR ALBRIGHT: It should
23 be in the disposition table, Appendix B and/or
24 in the comments following the rules. Again,
25 this is still a very early working draft; and

1 I think that is an important -- I think when
2 the final report comes out it is very
3 important that everybody know where the
4 proposed rules came from.

5 MR. GALLAGHER: Was Rule 11
6 brought over?

7 MR. BABCOCK: Somebody is
8 telling me that there is --

9 MR. BABCOCK: Some of it was.
10 It's in new Rule 24.

11 PROFESSOR ALBRIGHT: See, I
12 didn't realize that. I didn't think we had
13 worked with Rule 11 -- I mean Rule 13, because
14 that was part of the sanctions task force, so
15 it may be. I know the original Rule 13 has a
16 comment that it's based on Rule 11, so that
17 may be where that came from.

18 Yes. See, if you look on
19 Rule 24 on page 29, it has a comment,
20 "Original Source Federal Rule 11." That came
21 from when Rule 13 was first written. But in
22 any event I agree that when the final proposal
23 comes out that the source of all these be
24 identified.

25 MR. GALLAGHER: (Nods

1 affirmatively.)

2 MR. SUSMAN: I mean this seems
3 like such a worthwhile project. It's
4 incredible. I mean why don't we really push
5 it through and get it done? Is this something
6 the Court might actually adopt?

7 JUSTICE NATHAN HECHT: Yes. I
8 think so.

9 MR. SUSMAN: I mean without
10 regard to any substance changes, I mean, just
11 the reorganization seems so wonderful to do
12 it.

13 JUSTICE NATHAN HECHT: That's
14 why we formed this task force was to look at
15 this and see, because I think the prevailing
16 feeling the last time we talked about this was
17 that this would be a worthwhile project and
18 would really make a big difference
19 particularly as old as the rules are and for a
20 whole lot of other reasons.

21 On the other hand, we are
22 sensitive to the very significant criticism in
23 the Bar already that this is going to screw up
24 research from now on, there will be a great
25 divide here at a point in time, and Sheppard

1 won't work anymore, and the Digest won't be
2 the same, and that we ought to just try to
3 patch and mend and keep going. And I mean I
4 think there is some substance to that
5 criticism, but I still think the prevailing
6 feeling is to go ahead and try to do this; but
7 we want to hear what the committee thinks
8 about it.

9 MR. SOULES: And that's what
10 is on the floor now. I think we can put that
11 on the floor. What do you think about it? Is
12 the gain worth the gamble?

13 HONORABLE F. SCOTT MCCOWN: It
14 depends on how it looks.

15 MR. SUSMAN: What?

16 HONORABLE F. SCOTT MCCOWN: It
17 depends on how it looks at the end. I think
18 the process is worth doing, but to tell
19 whether the disruption is worth the adoption
20 is going to depend on how good the final
21 product is.

22 MR. SOULES: Say that, as an
23 example, say this is the final product. Of
24 course, it needs work. But is it worth it?
25 If you look back here in Appendix C they have

1 reorganized the rules in the order that the
2 disposition table sets out, and so we know it
3 can be done. It's a matter of a lot of work.
4 The work shouldn't be done unless we're very
5 inclined, I think, to go along with it, unless
6 the Supreme Court is very inclined to go along
7 with it, because this is going to be a massive
8 undertaking.

9 MR. LOW: Luke, I think it
10 doesn't present a big profit. You put the
11 source it was old Rule such and such, and you
12 could even put notes; but to say that we
13 shouldn't go forward with something that needs
14 to be done I think definitely I agree with
15 Steve.

16 MR. PERRY: I think that there
17 are really two different things that are being
18 done at the same time. One is the
19 reorganization and the renumbering. It
20 appears to me that that is almost complete and
21 very beneficial and almost entirely
22 noncontroversial.

23 The other thing that is being
24 done is textual rewriting to one degree or
25 another. It appears to me that the more of

1 that that is done, the greater is the danger
2 of becoming involved in a morass where it is
3 hard to figure out what is going on and hard
4 to be sure of whether the change is
5 substantive or nonsubstantive; but that in
6 terms of practicality if the task force or the
7 committee adopted the approach of keeping the
8 textual changes minor where you could readily
9 see on a red-line what had happened, that this
10 project might be 50 or 75 percent complete
11 now.

12 MR. BABCOCK: What has been
13 the experience with the codification of the
14 Civil Practices & Remedies Code, Nathan? Has
15 that caused a big problem with research and
16 Sheppardizing?

17 JUSTICE NATHAN HECHT: No. My
18 sentiment is that it hasn't, although it's all
19 happened since I've been on the Bench, so I
20 haven't had the same problems that you-all
21 have had. But my sense of it is that the
22 legislative recodifications have been
23 favorably perceived. There have been problems
24 as David points out. There is a statement in
25 the front of recodifications that says this is

1 supposed to be nonsubstantive, but sometimes
2 it is pretty hard to take some of those
3 changes as being nonsubstantive.

4 And here the effort is
5 originally undertaken to try to be
6 nonsubstantive, although I know the Federal
7 Rules are involved in a plain English type of
8 rewrite, an editorial type of rewrite where
9 some of the language is restructured. In some
10 of these rules you can't hardly rewrite them
11 without changing the language pretty
12 dramatically. They are very confusing rules.
13 But in some cases it's possible not to do
14 that. So I think we're going to have to see
15 about that as we go through.

16 MR. SUSMAN: The only objection
17 I've heard to doing it is the difficulty it
18 presents for research, but I mean with
19 computerized research today can't that be
20 overcome fairly easily? I mean, my sense is
21 that basically you tell the computer, you know
22 Weslaw or Lexus to do anything. It's not a
23 big deal.

24 MR. SWEENEY: Do you do a lot
25 of your own research?

1 MR. SUSMAN: I have never done
2 it.

3 MR. SWEENEY: It is a big
4 deal.

5 MR. SUSMAN: It's a big
6 deal? Is it a real big, bad deal?

7 MS. SWEENEY: It's not as easy
8 as it sounds.

9 MR. ORSINGER: I've got
10 several comments. I practiced through the
11 adoption of the Rules Of Appellate Procedure
12 which were on a smaller scale than what we're
13 talking about here. But I didn't really find
14 it that cumbersome to go from old rule to new
15 rule numbers and with the derivation tables;
16 and I think the TRAP needs to be restructured
17 a little bit, but we have already lived
18 through that, some of us, and we survived that
19 all right.

20 Computer research, I was
21 interested in Hadley Edgar's suggestion of why
22 not use the decimal system or at least noting
23 that they didn't use the decimal system. If
24 you're going to use computer research right
25 now and run an old rule number and it's going

1 to pick up a new rule number that deals with
2 the different subject matter, your electronic
3 searches are going to pull up the old rules
4 and the new rules. One way to avoid that is
5 to go to a decimal system with the new rules,
6 so that if you want to run the new rules, you
7 run Rule 3.1 rather than Rule 3a, and you
8 won't pick up the old rules that way. That
9 way you can when you do a computer search if
10 you want to search the old rules, you use our
11 old numerology. If you want to search the new
12 rules, you use our new decimal system and you
13 won't be picking up old rules that are on a
14 new subject matter and vice versa.

15 I'd also say that if we're
16 going to redraft for modern language, which I
17 think is a worthy goal, that we ought to do it
18 at the same time that we renumber so that we
19 can all suffer through the mental change of
20 the new system and not just adopt renumbering
21 now and then maybe three or five years down
22 the road come in and write clean language.
23 Maybe it's not realistic for us to write the
24 clean language right now, but it seems to me
25 that if there is virtue in making the rules

1 more clearly written, and I personally think
2 there is, then we probably ought to let that
3 hit at the same time that the restructuring
4 hits so that we can all memorize something
5 we're going to live with for the next 15 years
6 rather than setting ourselves up for a pretty
7 major change just three to five years down the
8 road.

9 MS. DUNCAN: I do all my own
10 research, and it's a tremendous problem, but I
11 think there is -- what I've seen, there is a
12 big difference between the statutory
13 recodifications and the rule codifications.
14 West had tried to move the annotations in the
15 statutes to the new codification, but they've
16 made absolutely no effort to do that on the
17 rules. And what I was suggesting to Bill is
18 we've got obviously the people who know where
19 they should be moved. All I'm suggesting is
20 that it all be done at once, because the
21 problem from my perspective is not so much
22 that I can't find the annotations for the old
23 rules. I know where they are. It's that
24 we're all going to have to have two separate
25 sets of books, which is what we have to have

1 now. The actual Black Statutes are probably
2 no more than about 15 volumes now, but you
3 can't get rid of the other 40 volumes without
4 getting rid of the annotations that have not
5 been moved.

6 MR. YELENOSKY: Well, I
7 originally raised my hand to say what Richard
8 has already said, which is we're making
9 substantive changes, and that's a great time
10 to recodify, because there isn't going to be
11 old case law in some of the changes we'll be
12 making. And if you have a new substantive
13 change, you want it in the new codified
14 version.

15 As far as computer research I
16 don't know how many people do computer
17 research, but that is increasing, and
18 conceptually of course it's entirely possible
19 that Lexus and Weslaw could program their
20 computers that when you put in a new codified
21 number it would pick up the old number as
22 well. I mean, that's just a question of
23 programming, but obviously we don't have any
24 control over them. I don't know if that can
25 be done, but to the extent that there is

1 greater computerization I mean that really
2 isn't the problem.

3 MR. SOULES: We can build a
4 detailed --

5 MR. YELENOSKY: Right. Right.
6 No. I mean --

7 MS. DUNCAN: Computerized
8 research is still considerably more expensive
9 than sitting with the book.

10 MR. YELENOSKY: Sure. It's
11 not a problem for a programmer, I mean, for a
12 computer to do that.

13 MS. DUNCAN: Right.

14 MR. SOULES: We can build a
15 detailed disposition table and put it in the
16 book, and people should be able to understand
17 how to use that. The issue of nonsubstantive
18 we'll have to pass on this another day, but I
19 think that we should not include any statement
20 like they did in the Civil Practices Remedies
21 Code that is not a substantive revision. It
22 ought to say these rules are what they say,
23 and they mean what they say. The Supreme
24 Court in Atchinson said that we didn't change
25 the discovery rules that we did change, and

1 the record of this committee was that we were
2 deliberately making the change, but the
3 Supreme Court wrote in Atchinson Allen vs.
4 Humphrey controls because the changes were
5 nonsubstantive, and "We're going to ignore the
6 language in the rule," and they've done that
7 ever since. And I've never understood why
8 they did that, but somebody wrote that opinion
9 and said so, and the Court went along, and
10 there are going to be some changes.

11 There are going to be some
12 changes that are generated out of Steve's
13 work, all our work here that will roll into
14 this, and the new rules ought to be clearly I
15 think labeled that these rules mean what they
16 say, and these are the rules and they should
17 be interpreted accordingly according to their
18 own language. Judge Guittard.

19 HONORABLE C. A. GUITTARD: I
20 noticed in some of these notes in the draft
21 there is references to whether or not a
22 substantive change is made, and I'm wondering
23 whether the task force intends to
24 systematically point out or identify those
25 rules that do have substantive changes so that

1 that won't be a matter of uncertainty.

2 MR. SOULES: I think the task
3 force needs to point out every change and
4 verbiage by red-line and then give its view as
5 to whether or not it's a substantive change.
6 Then every subcommittee chair needs to take up
7 that piece of the recodification and pass on
8 itself on whether or not there is a
9 substantive change, and then we'll all look at
10 it together so that we have several layers of
11 people saying this is or is not a substantive
12 change. If it is, we want to know about it
13 and pass on it. If it's not, then it's not.
14 That would be my concept of how this would
15 develop. And I think that's yours too, isn't
16 it, Alex?

17 PROFESSOR ALBRIGHT: Yes. My
18 concern with giving this out early is because
19 I think it does look somewhat unorganized,
20 because we don't have a red-line yet. I think
21 we have got to have a red-line and really
22 track every single change and what it means,
23 and I think we have got to have comments to it
24 too.

25 MR. SOULES: But this is a

1 tremendous piece of work of Bill and Alex and
2 Elaine, and that committee has not functioned
3 fully. About one third of its members have
4 done all the work, and I know that, and
5 appreciate Bill and Elaine and Alex what
6 they've done to contribute to this. And one
7 thing Bill requested of me was to see that
8 whatever committee is formed here if we get
9 the authority to go forward is going to be a
10 real working committee, because he needs a lot
11 of assistance, and three people can't do it by
12 themselves. Shelby Sharpe.

13 MR. SHARPE: I move that
14 committee be formed.

15 MR. SOULES: Well, we've got
16 to get clearance from the Supreme Court first,
17 but based on -- I think we need a sense,
18 consensus vote. How many feel that is a
19 worthwhile project? How many are ready to go
20 with it and see it through if this work is
21 done? Who is not? That's unanimous. That
22 means we are committed to do this.

23 PROFESSOR ALBRIGHT: If I can
24 make a comment about that, I think that may be
25 unusual with this group as far as the whole

1 Bar is concerned, because I think there is a
2 lot of resistance in the Bar to changing rules
3 and rule numbers, and "You-all have been
4 messing with the rules so much. Now this is
5 just going to make our lives harder." I think
6 if we do do this, it's going to be a sales
7 job, and this group is going to have to go
8 around and do the sales.

9 I know if you look back at the
10 Bar Journal from 1941, they all went out doing
11 sales jobs at local Bar associations; and we
12 may have to do that.

13 MS. LANGE: I would
14 respectfully request that Bonnie Wolbrueck,
15 the district clerk, be appointed to this
16 committee since procedures does affect clerks.

17 MR. SOULES: Fine. We would
18 like to have you on that committee.

19 HONORABLE F. SCOTT MCCOWN: To
20 follow up on Alex' point, that is exactly what
21 I was trying to say in terms of selling it to
22 the Bar. If all we do is take our present
23 rules and move them around, then the Bar is
24 not going to buy into it. This version not
25 only has to be a reorganization, but it has to

1 trim out the dead wood and provide clarity,
2 and so the Bar can see, "Yes, we're paying a
3 cost, but it's a one-time cost because these
4 rules are so good they can last 100 years."
5 If all we do is produce a poorly drated set of
6 rules wonderfully organized, there is no point
7 in it.

8 MR. SOULES: The disposition
9 table has to be made very easy. That has to
10 be easy for somebody to pick up. That may be
11 the biggest sell we have is this is easy to go
12 from one to another.

13 MS. DUNCAN: That's just one
14 part of it.

15 MR. SOULES: Okay. Sarah, go
16 ahead.

17 MS. DUNCAN: Just even if you
18 have -- we've got disposition tables for some
19 of the rule codifications that have been
20 done. But if you don't work into some
21 arrangement with West to move those
22 annotations, people are buying, and I have my
23 own library, and I pay individually for it.
24 My firm does not pay for it, and I have
25 probably half of the books on that wall are

1 absolutely useless except that I have to have
2 them to find the annotations under the
3 disposition table. And if we are going to
4 cause that kind of expense to individual
5 practitioners around the state when we don't
6 have to, I think we're going to stand a good
7 chance of losing the fight for the
8 recodification, but I think it can be done.
9 We just need to work out those kinds of little
10 things before trying to push it on anybody.

11 MR. SOULES: As far as
12 changing the rules the Supreme Court and we
13 get a bad rap on a lot of that, I think. If
14 you go back as far as you can in the Texas
15 Southwest 2nd to about 1990 and just start
16 from there and look across all the books it
17 says "Court Rules," "Court Rules," "Court
18 Rules." Those are not changes in the Rules Of
19 Civil Procedure. Any time the 5th Circuit
20 changes a local rule they put it in the Texas
21 cases and they put a label "Court Rules" on
22 the spine of the books, and I get comments
23 "Look at all the rules changes. Just look
24 there on your bookshelf, and there's a change
25 every third volume."

1 And that is not our
2 responsibility, so we're not at fault on that,
3 because those don't have anything to do with
4 anything that the Supreme Court has done or
5 we've done. But anyway, we're going now to
6 what will be significant change, and we have
7 got to deal with that with the Bar.

8 HONORABLE C. A. GUITTARD:
9 Write an article.

10 MR. SOULES: Write an
11 article. We probably will have to. And if
12 the Supreme Court follows what it did last
13 time, there will be some public hearings on
14 this when it's all done before it's put into
15 effect anyway. I don't know whether they'll
16 do that again or won't. That's of course up
17 to them.

18 Any other comments or
19 suggestions? Justice Hecht, do you need
20 anything more from us by way of responsiveness
21 to this?

22 JUSTICE NATHAN HECHT: No.
23 This is very helpful.

24 MR. SOULES: Do you need
25 anything further from us on any matters that

1 we can address maybe today?

2 JUSTICE NATHAN HECHT: I think
3 this is what we needed immediately.

4 MR. SOULES: I think I failed
5 to express the appreciation of the committee
6 to Chuck and his task force for the great job
7 they did on the sanctions rule. There is
8 still obviously work to be done, but that was
9 a tremendous undertaking; and development of
10 all the materials that you have put together I
11 don't know how you did it in the time you did;
12 and his was the first task force to report.
13 I'd add that I commend you and thank all of
14 you for your work. I think we're adjourned
15 unless somebody has got anything else.

16 HONORABLE DAVID PEEPLE: I
17 think Holly has done an awful good job of
18 putting this together; and Anna has been the
19 most uncomplaining, long enduring
20 court reporter I've ever seen.

21 MR. SOULES: That's true.
22 Thank you.

23

24

25

1 STATE OF TEXAS)

2)

3 COUNTY OF TRAVIS)

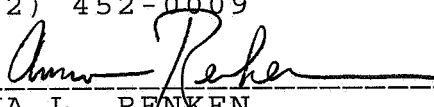
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 I, ANNA L. RENKEN,

court reporter in and for the County of
Travis, State of Texas, do hereby certify that
the above and foregoing statements were made
before me by the said parties, and same were
reduced to computer transcription under my
direction; that the above and foregoing
statements as set forth in computer
transcription are a full, true, and correct
transcript of the proceedings had at the time
of taking said hearing.

1 GIVEN UNDER MY HAND and
2 seal of office on this 19th day of DECEMBER,
3 1993.
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6

7 ANNA RENKEN & ASSOCIATES
8 3404 Guadalupe
9 Austin, Texas 78705
10 (512) 452-0009

11 
12 ANNA L. RENKEN
13 Certified Court Reporter
14 and Notary Public
15 in Travis County
16 for the State of Texas

17 Certification No. 2343
18 Certificate Expires 12/31/94
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