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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

MAY 20, 1994

(MORNING SESSION)

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Taken before D'Lois Lea Nesbitt, Certified Shorthand Reporter in Travis County for the State of Texas, on the 20th day of May, A.D., 1994, between the hours of 8:30 o'clock a.m. and 12:00 noon, at the Capitol Extension, Room E1.002, 1400 North Congress Avenue, Austin, Texas 78701.

MAY 20, 1994 MEETING

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Charles L. Babcock
Professor Elaine Carlson
Honorable Ann Cochran
Professor William V. Dorsaneo
Anne Gardner
Honorable Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring Jr.
Donald M. Hunt
Tommy Jacks
Joseph Latting
Thomas S. Leatherbury
Gilbert I. Low
John Marks
Honorable F. Scott McCown
Russell H. McMains
Robert E. Meadows
Harriet E. Miers
Richard Orsinger
David L. Perry
Luther H. Soules III
Paula Sweeney
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta, Jr.
Pamela S. Baron
David J. Beck
Honorable Scott A. Brister
Sarah B. Duncan
Michael T. Gallagher
Franklin Jones, Jr.
David E. Keltner
Honorable David Peeples
Anthony Sadberry
Stephen D. Susman

EX OFFICIO MEMBERS:

Honorable Sam Houston Clinton
Honorable William Cornelius
Doyle Curry
Honorable Nathan L. Hecht
David B. Jackson
Doris Lange
Thomas Riney
Bonnie Wolbrueck

Paul N. Gold
Honorable Paul Heath Till

OTHERS PRESENT:

Lee Parsley, Supreme Court Staff Attorney
Holly H. Duderstadt, Soules & Wallace
Carl Hamilton
Denise Smith for Mike Gallagher

SUPREME COURT ADVISORY COMMITTEE

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CHAIRMAN SOULES: Why don't we come to order, and Paula is going to give a report this morning first on the charge. We do appreciate all of you being here. We're happy that you found the place. We wanted to wait a little this morning to start because everybody was coming to a new place, and it looks like our meeting is almost fully attended. I really appreciate all of you being here.

The Advisory Committee, of course, functions to advise the Supreme Court on rule changes. We have got a huge agenda from the task force activities that have been going on the past two years and then just from people that have written in, and in addition to the task force there is at least two notebooks to cover some day before we finish our work. We are in our, what now, third meeting, I think it is, of Schedule 6. I have been asked to try to focus the discussions as much as possible. Most of what we are going to be talking about has been before the committee on -- we are passing those materials around for anybody that doesn't have this. We don't

have enough copies for everybody, but some people should have Paula's report.

MS. SWEENEY: It was passed out at the last meeting.

CHAIRMAN SOULES: It was passed out at the last meeting. It's on her letterhead. It is really important for everyone on the committee to participate. The Supreme Court, of course, is interested in the division of the house of the committee whenever we vote to recommend or not recommend certain changes, but the Court's actually even more interested in the discussion that the committee brings to each one of these recommendations because where there are questions in the minds of members of the Court about whether they should go along with our recommendations they do look at the vote or the division of the house, but they will even more look to see what was said to see if that's convincing to a member of the Court. So when I say we need -- that I have been asked to focus the debate that doesn't mean to in any way limit discussion. However, if something has been said once by an individual,

I hope that you will accept the fact that everybody else is listening, and it doesn't need to be said too many more times after that in order for us to reach some kind of concurrence because the Supreme Court will add to your comments.

We do have a court reporter here. Those comments will always be recorded, and philosophical approaches are important because a lot of these things or virtually all of the changes that we address are policy changes. They are not just mechanical changes, and we do want to hear your thoughts and ideas about the underlying policies, but how many times they are reasserted or re-endorsed might not be quite as important as hearing them for the first time. Again, I thank all of you for being here, and Paula, you are ready to go forward with your report on the charge?

MS. SWEENEY: I am.

CHAIRMAN SOULES: Okay. Please do so.

MS. SWEENEY: What you-all should have is a stack that was passed out to everybody before. It's on Misko, Howie &

Sweeney letterhead. If you will bust it, take the letter off the front it will be easier to follow. The letter is the first three pages and then there is eleven pages of rules, and let me kind of orient you-all a little bit to how this is set up so you can see where we are going as we go there.

What we have done is revised the rules that are listed at the beginning of the letter there. We haven't revised all of the ones in our charge to look at, and in the section of the rules that are reprinted for you, each place there is a change, the change is in bold or drawn through, and there are asterisks, one, two, three, or however many, which at the end of the rule or section of rules that they apply to explains what this is about. Most of the changes that we will not be discussing you can see as you page through have to do with grammatical or sort of nonsubstantive, ministerial changes that are for clarity, and unless somebody sees something as you read through them that you want to bring up, I do not propose to talk about them. They are the unanimous sense of the subcommittee that they

do not in any way affect the substance of the rule, only the readability of it.

We have flagged the changes that do need discussion. If you will go to the third page of your rules, Rule 226, sort of something to get us started we will start by talking about God. There is a letter that was also circulated and attached which was sent to Justice Hecht from the ACLU regarding, quote, "God tests for jurors," and you should have that, but it is essentially a two-page letter objecting to the language in Rule 226 and 236 that asks the jurors to swear to their qualifications, quote, "so help you God," close quotes.

And the subcommittee considered whether or not that language should simply be struck through in those two rules so that the jurors would have to swear to either affirm to give true answers to the questions or later in Rule 236 to, I think it is, render a true verdict or truly deliberate, whatever that rule is there, but the same language is in both. We were not unanimous as to whether or not that language should be left in or deleted.

Obviously the argument raised by the ACLU is that it is a God test. It requires jurors to believe in God or to pretend that they believe in God in order to serve on a jury and the ACLU and others feel that that is inappropriate as a test for jurors. So if anybody has any thoughts about that, let us know. We could not be unanimous as to whether it should be stricken or left in.

MR. MARKS: I wouldn't vote against God.

MS. SWEENEY: Obviously, the sentiment of a lot of folks, including members of the subcommittee, was that it's a phrase that has been with us for a long time. It signifies the importance of what they are doing. It signifies the meaning of their oath, that they are supposed to answer truthfully, and to most people it is not offensive in any way.

MS. LANGE: And it's to your God. You know, if Buddhism is your god, then that's your god. I mean, I don't think we are denoting God as most of us would know.

MR. SADBERRY: Paula, a couple

of questions. One, I didn't see the letter, but are you at liberty to indicate the vision of the subcommittee as far as your views after discussing it? And secondly, I don't seem to have the letter. Was there any indication of any litigation on any of the ethical, religious constitutional issues that they pointed to, or is it just a feeling that they had?

MS. SWEENEY: Well, let's see if they threatened to sue.

MR. SADBERRY: And who?

MS. SWEENEY: And who?

MR. HERRING: Well, it hasn't been challenged in the past either here or somewhere else.

MS. SWEENEY: We are unaware of any formal challenge. No one has brought one to our attention. To summarize the position, and the letter is here, and it was attached to the materials that were originally sent out. "The current requirement of a religious test to be a juror is incompatible with the basic American notion that no religious test be demanded to hold public office," and then

points out that judges in order to be sworn in don't have to swear to God and --

HONORABLE F. SCOTT MCCOWN: Could I take up the other side of this? For the record, I'm a baptized, church-going Methodist, but I do not -- I already delete this in my court. I don't ask people who take the oath "so help you God" to testify, and I don't ask them when they take the jury "so help you God."

I say, "Do you solemnly swear or affirm that you will give true answers to all questions asked you," and that's all I do, and the reason is that if you believe in God and you're asked to swear then the fact that the oath doesn't end with "so help you God" it's not offensive to you, does not make it any less important to you. If you don't believe in God and you're asked "so help you God," then that does cause you problems and is offensive to you.

So on the balance that it offends one way and causes people of conscience to have problems one way while it offends nobody and causes nobody to have any problems of

conscience the other way, I just delete it, and I've never had any complaints about it from litigants or from witnesses or from jurors. The truth is is that when you swear, that is an oath, and it is religious, and it is to God. So if you swear, you are technically trapped, and when you perjure yourself you will go to hell. So we have covered the religious technicalities by merely asking them to swear. So I just say, "Do you solemnly swear or affirm," drop out the "God," and I think that's the better practice.

MR. YELENOSKY: That's also the practice in a lot of administrative hearings in my experience. Texas Employment Commission invariably asks you "under penalty of perjury," but they never ask you "so help you God." And I didn't want to be the first to vote against God, but I will second that, Scott, because I agreed with his sentiment to say that some people have -- it doesn't say which God. Well, some people don't believe in God at all so any reference to God is offensive to them, and I think that they may have a constitutional claim there.

CHAIRMAN SOULES: Joe Latting and then Harriet Miers.

MR. LATTING: I am a Sunday school-teaching Methodist, and I would like to side with Scott on this issue. I think that we don't need to be in the business of telling other people what they need to be thinking about God. I've had enough trouble by myself on that issue, and it's just --

CHAIRMAN SOULES: Speak up because we have got a lot of background noise in here.

MR. LATTING: Well, the Methodists are for this change.

CHAIRMAN SOULES: Harriet Miers.

MS. MIERS: Well, I would suggest that this is much more of a political question than a procedural one, and I don't know that the view of -- this is one where the vision of the house probably isn't going to be determined, and I think we are spending a lot more time on it than we probably should, and I would suggest that we move on because I don't think it is necessarily procedural.

CHAIRMAN SOULES: Judge Guittard.

HONORABLE C. A. GUITTARD: Mr. Chairman, the purpose of putting "so help you God" is to reinforce the oath, and since we don't believe that this is effective in some cases and the real penalty that we believe in that everybody can understand is the penalties of perjury, why don't we substitute instead of "so help you God," "under the penalties of perjury"?

CHAIRMAN SOULES: Rusty McMains.

MR. MCMAINS: Well, responding to Harriet's position, I think it is a procedural question in the sense that nobody used to think that whether or not you got to exercise a peremptory challenge without having to give a reason was something that would affect your clients in civil cases, and everybody does now because the Supreme Court has determined that the rights of jurors independent of the litigants and regardless of how much expense to the system is paramount in a constitutional sense, and so the question

is, the ACLU has already raised this issue. Then are they going to give somebody a basis to challenge the array because they were forced to exercise this, and all they need is one juror who serves or who didn't get picked who says that I didn't -- or maybe gets excused even because he refuses to do it, and that will affect the rights of litigants if the court continues to follow where they have gone in fashioning its progeny.

CHAIRMAN SOULES: Well, suppose a juror says, "No, I won't swear." Then what under this oath, "so help you God"?

HONORABLE F. SCOTT MCCOWN: You ask him if he will affirm, and if they say they will affirm, that's it.

CHAIRMAN SOULES: Then why not go straight to that? I mean, the oath that's in this 226 is an oath that a juror does not have to take to serve as a juror, right?

MR. LATTING: Not in Scott's court.

CHAIRMAN SOULES: Or is it? Is this a requirement?

HONORABLE F. SCOTT MCCOWN:

Well, it's not --

CHAIRMAN SOULES: If it's not a requirement, why is it a rule?

HONORABLE F. SCOTT MCCOWN: There is Fifth Circuit law that you cannot make a prospective juror swear an oath to God as a precondition of being a juror. So I think that there is already federal law on that. Now, I would recommend and I guess would put as a formal motion that we just simply delete the "so help you God." I agree with Harriet that it's a political problem. I think, though, it ought to be done, and I think if this committee said it ought to be done, that that would smooth the way for the Supreme Court to say we just adopted what the lawyers were doing.

I kind of like Judge Guittard's suggestion about "under pains and penalty of perjury," but the problem is I swear in everybody myself, and as a sitting judge I don't kind of want to be in the position of having to suggest to these witnesses or to these jurors who are coming in that I'm so worried about you lying to me I'm going to

threaten you with perjury right off. I just think the elegant, simple, "Do you solemnly swear or affirm that you will give true answers to all questions asked you concerning your qualifications as a juror," period. It keeps us tied to tradition. It takes out the hot button language, and it seems like a good compromise.

MR. LATTING: I second his motion.

CHAIRMAN SOULES: Any further discussion? Those in favor show by hands.

Okay. Those opposed. House to two. It's about -- we will have to count how many people there are here.

Is there any resistance to taking out the words "asked you"? I suppose the reason to take that out is that a juror might think that if a question to the general panel might not be asked to that particular juror, and you want them to answer all the questions that are asked --

MS. SWEENEY: And that's one of the ones that I skipped as being essentially a no-brainer. If you-all would rather go

through them one by one, we can.

CHAIRMAN SOULES: Any opposition to deleting "ask you"? Okay. There is none. That will be recommended to be deleted.

Okay. Paula.

MS. SWEENEY: Luke, do you want us to go through all of the ones that don't bear discussion to vote on those?

CHAIRMAN SOULES: Let's get to the policy problems first, I think.

MS. SWEENEY: All right.

CHAIRMAN SOULES: And then if necessary we will go back to housekeeping.

MS. SWEENEY: The next one is on page 4 in little subsection 4 there with the three asterisks. This was initially deleted, and at the last committee or one of the committee meetings this is what we were calling the meddling language. It was asked that we reinsert "In questioning you they are not meddling in your personal affairs, but are trying to select fair and impartial jurors who are free from any bias or prejudice in this particular case." We reinserted it, but

No. 1, or primarily the reason I bring it to your attention is there was considerable debate about whether the language about fair and impartial jurors should be included.

I personally -- well, the debate was on the one hand that that's not true. We are not trying to select fair and impartial jurors. Each side is trying to select unfair and partial jurors. They are trying to deselect those who are going to be unfair and partial to the other side, that in fact that this is not an accurate statement to the jury of what lawyers are trying to do.

On the other side of the debate some of the subcommittee felt that we are, in fact, trying to find a fair and impartial jury, that that needs to be conveyed to the jurors or the panelists, and that it needs to be emphasized to them that we are very much trying to obtain a fair and an unbiased result, and that therefore, the language should be reinserted as it is stated, but the question for the committee as a whole is whether or not in reinserting this meddling language there is objection to also reinserting the fair and

impartial juror language. Buddy.

CHAIRMAN SOULES: Okay. Buddy Low.

MR. LOW: I think that we are speaking of the system. Our system is trying to select fair and impartial jurors. The lawyer questioning and so forth gets to that because they determine bias. This lawyer may want somebody that's fair, that's not fair. That one may want somebody that's not fair, but it's our system and through that questioning that we are trying to get in our system fair and impartial jurors, and I think it would be a terrible mistake not to ask a juror to put that in there. I think that would be bad.

CHAIRMAN SOULES: Yes, sir. John Marks.

MR. MARKS: In keeping with what Buddy is saying maybe we could change the wording a little bit and just say "but are trying to select a fair and impartial jury free from any vice or prejudice."

CHAIRMAN SOULES: Anyone else? Okay. Is that a formal motion, John?

MR. MARKS: I will so move.

CHAIRMAN SOULES: Okay. Second?

PROFESSOR DORSANEO: Second.

CHAIRMAN SOULES: All in favor say "I." Opposed?

Okay. So we will change that to say we are trying to select a fair and impartial jury free from any vice?

MS. SWEENEY: "Which is" or just take it out?

MR. MARKS: Just take it out.

CHAIRMAN SOULES: "Free from any vice or prejudice in this particular case." Okay. Okay. Anyone opposed then to leaving that sentence in as amended?

No. No opposition. So none will be recommended.

MS. SWEENEY: All right. The next significant change is 226(a)26 which is on page 5. Let me make sure I'm in the right place here. Okay. It's paragraph 6 on page 5. This language has already come by you-all once, but it needs to be looked at very closely, and it's the instruction that's

to the effect that "During the presentation of evidence the attorneys may make legal objections. If an objection to a question is sustained, disregard the question and do not speculate about why it was asked or what the answer might have been. If an objection to a witness' answer is sustained, disregard that answer."

The sentence that gives us problem is the following: "It is not evidence and should not be considered. Do not speculate about or consider for any reason the objections or my rulings on that." Judge Brister pointed out the biggest concern with this, which is if, in fact, this instruction is given at the beginning, disregard the answer. If they are being told as normally now happens in the middle of the trial, someone makes an objection. It's either sustained or overruled, and then the jury may or may not be instructed depending on whether or not someone asks for it or whether or not the court decides to do it on its own, and that has considerable significance in terms of appellate overview of whether or not error has

been preserved.

There is obviously a lot of debate about when you have to ask for an instruction, when you don't have to ask for an instruction and so on. If this language is included that they are being told "disregard the answer," there is a lot of concern about what effect is this going to have. Does it mean that there is no longer any requirement that lawyers ask for an instruction to the jury? Does it mean that it's automatic, and what if you do want an instruction to the jury? Given this would it be redundant and impossible to get. In other words, it's not a ministerial change.

Most of us feel that it does have substantive effect. It has already essentially come by once without comment, but we believe that it requires the attention of the committee because of the things that I just pointed out. You know, if you wanted to get an instruction to disregard something particularly odious that happened, could you get it, or would you be estopped or arguably estopped from doing so?

CHAIRMAN SOULES: What do you

recommend, Paula?

MS. SWEENEY: I think it should come out.

CHAIRMAN SOULES: "Disregard that answer" should not be in the rule? That's your suggestion?

MS. SWEENEY: Yeah. I actually question whether the entire language should be in there at all.

CHAIRMAN SOULES: All right. Discussion anyone? Yes. Anne Gardner.

MS. GARDNER: I just have had several experiences where I handled cases on appeal for folks, for other lawyers who tried the cases where they didn't ask for that instruction, and I don't know how prevalent it is that trial lawyers are aware that they need to ask or when they need to ask that an answer be disregarded after the objection has been sustained, and I'm not so sure that it's not a trap for the average or maybe -- I don't know what percentage of trial lawyers are aware of it, but I just know that some are not, and it does seem like that it can be a trap, and it may be something that needs to be seriously

considered, and it doesn't seem fair to sustain an objection and yet the objection has not been sustained for the purposes of an appeal. The trial judge's ruling has been for nothing if a lawyer doesn't go further and ask for that instruction.

CHAIRMAN SOULES: Rusty McMains.

MR. MCMAINS: I'm not terribly certain I understand the concern from the appellate standpoint that if you have objected successfully to an answer it is not going to be considered by an appellate court as any evidence in the record to support a verdict in my judgment. Now, whether or not you -- and if you wish to make a complaint if you have got your objection sustained, then as the party to whom the objection has been sustained they don't have any complaint anyway. I mean, the party that got the objection sustained, they don't have any complaint because they got what they want, and the only way they could go forward is by asking the court further to disregard, and I guess if that's what you're concerned about, is that the point that you

are talking about losing is that you ask him to tell the jury to disregard it, that somehow the judge fixes it by this instruction, and it ceases to be error?

HONORABLE F. SCOTT MCCOWN: I agree with Rusty. I would recommend that we leave this Instruction No. 6 in because it's something that lawyers often in voir dire like to explain to the jury because they like the jury to understand the objection process, and from their point of view it would be much better coming from the judge so they are not doing it. The judge explains the objection process, and the jury then understands how they are supposed to do it. Then during the trial you are not put to that tough tactical decision of do I object or not. You can choose not to object and in closing argument go back to this instruction.

On the other hand if it's so terrible during trial that you want to object, it seems to me you've got the trial judge where he can't overrule you because all you've got to do is stand up and say, "Judge, I request that you remind the jury about the instruction you

gave them to disregard any answer that came from an objection that was sustained." Now, what's the trial judge going to say to that? He has to say "Yeah, remember that jury." So I don't think you lose anything as an advocate. I think from the litigants' point of view it's all gain. So I think it kind of helps.

CHAIRMAN SOULES: Mike Hatchell.

MR. HATCHELL: I'm not taking a position on whether it should be in or out, but what I think Anne is referring to is the fact that there are reported cases that say that if an answer from a witness comes in, is objected to, the objection is sustained, and no request for an instruction is made, the evidence is still in the record for the purposes of appeal, and it is substantive evidence.

MS. GARDNER: Which I don't think it's fair, and I would be in favor of leaving this language in because that would take out the trap for the unwary trial lawyer.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: What if you have a question that, you know, didn't your -- like we had a lawyer down in Beaumont said "Well, all your drug charges and so forth," and some answer comes out. Well, you are sitting there and say "objection and disregard the question." I mean, a judge ought to be able to say, "Wait a minute. Now, don't regard -- you disregard that question and disregard that answer," and if he sustains the objection, if that doesn't go to the jury, and they are going to carry it forward, I think they should be instructed because the judge in that trial went much further, and that's probably going to be a point on appeal, but what's wrong with doing that?

HONORABLE F. SCOTT MCCOWN: You can do both.

MR. LOW: Well, that's all.

CHAIRMAN SOULES: Okay. Bill Dorsaneo.

PROFESSOR DORSANEO: Well, I agree with Mike. There are reported cases that say that counsel must scoop this information out of the record. Those cases, I

believe, rest on the assumption that the jury has not been given this type of an instruction, at least they do in part. My question would be whether this instruction at the beginning would be sufficient to obviate the need for another instruction either contemporaneously with the presentation of the answer, shortly thereafter, or as Judge McCown indicated at a later stage in the proceeding.

I would hope that those cases that don't seem to remember that this instruction is in here would treat the instruction as sufficient. I guess what I'm saying, bottom line, I'd like the inclusion of the instruction to disregard the answer because I like the concept, and I don't like the cases that hold otherwise. So I would recommend that we put "disregard that answer" in there simply because that's a better procedure.

CHAIRMAN SOULES: Is it just the -- where is this instruction? I'm sorry. I'm just having a hard time finding it.

MR. MCMAINS: Page 5, No. 6.

CHAIRMAN SOULES: No. I mean in the current rules as this language.

HONORABLE F. SCOTT MCCOWN: It's not there.

CHAIRMAN SOULES: None of it's in there?

HONORABLE F. SCOTT MCCOWN: Right.

MS. SWEENEY: Right. This has gone by. The reason only the parts that are highlighted are highlighted is because this has gone by before without comment, but we really felt like it needed to be looked at.

CHAIRMAN SOULES: Because, you know, substantively this says that if an objection to a question is sustained, disregard the question, and if answers come behind the question, it is not in evidence.

MS. SWEENEY: But from an appellate standpoint what they are saying is that it is in evidence or it is part of the record in any event.

CHAIRMAN SOULES: Well, this suggests that that's changed. "It is not in evidence," period. Then the appellate review would say it's not, or can you waive this? Of course, you can waive anything. We all know

that. Judge Cornelius knows that.

MR. MCMAINS: Frankly, I mean, I think that this issue has not really been expressly dealt with by any courts, certainly not with this language in there. I think what we are saying is that from a policy standpoint, from an appellate standpoint, it makes more sense that if you have objected successfully to an answer that that not be -- that that not then allow that evidence to stand as being able to support the verdict, and it then is up to the litigant as to whether he wants a new instruction for emphasis with the jury, and he may rather de-emphasize it at that point.

I mean, otherwise, if you just say that basically unless you strike the answer then you have made every objection process where there is an answer that comes out, you have made every one of them a two-stage process, which further complicates and makes preservation more difficult, not less difficult, and I believe that even if it is a policy change, which I'm not sure that it is, but if it is a policy change it's nonetheless

a good policy change that somebody has made an objection that is sustained to an answer. That ought not to be something that is usable to support a verdict or judgment.

CHAIRMAN SOULES: And if somebody has popped an answer in before the question before you can get on your feet and do something about it if the objection is sustained to the question, that's the end of it. The answer goes out of the record as far as appellate consideration as well, or it will be in the record, but it wouldn't be considered as evidence.

MR. MCMAINS: Based on this instruction I suppose that that would be the case. I don't know.

CHAIRMAN SOULES: Is that what you are suggesting should be the case?

MR. MCMAINS: Frankly, yes. You know, the question is -- the problem you have in all of these things, like Buddy points out, is that when you are sitting there tactically with a grossly offensive question or a grossly offensive and unexpected answer, moving to strike is not really going to -- it

doesn't help you a lot of times, and it would be better to let it lie. Maybe it doesn't come up again, but if the other side decides to try and use it in some way, you have got at least this that you can talk to the jury about and say, "Remember in the beginning." That's not evidence. That's all he has to resort to.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: And really in the case I'm talking about the lawyer violated the motion in limine. The judge told them to disregard, and he said the asking of that question was misconduct by this lawyer, and it's improper, and it might go to the Supreme Court, but I think that the lawyer ought to have the tool that he can ask the judge to do something because they are not going to just listen to a lawyer objects, sustained. If Bill made a motion, I would second it, if that was his motion to not --

CHAIRMAN SOULES: To adopt this as written?

MR. LOW: Right.

CHAIRMAN SOULES: Okay. Any further discussion on this? Those in -- I'm

sorry. Elaine Carlson.

PROFESSOR CARLSON: Paula, if No. 6 is included or passed the way that it's written that would not obviate the need to move for a mistrial if you wanted to argue on appeal, like Buddy is suggesting, we really should have had a mistrial?

MS. SWEENEY: I don't see that it would, but I'm not the jurors. It doesn't seem to us to have that impact.

CHAIRMAN SOULES: Okay. Tony Sadberry.

MR. SADBERRY: I just had one question for Paula.

CHAIRMAN SOULES: Speak up a little.

MR. SADBERRY: As to the concerns that having this rule as an instruction rule would somehow ban a lawyer who wanted -- who did desire to have an instruction at the point of the occurrence, would be precluded from being able to get that instruction, possibly.

MS. SWEENEY: I think the -- yeah.

MR. SADBERRY: Because it's already been given.

MS. SWEENEY: That was Judge Brister's wording was if you have already got this in the rule, someone has thrown a stinker out, and you want an instruction, and the judge says, "Well, I have already given that."

MR. SADBERRY: What about Judge McCown's suggestion that you could ask that the jury be reminded? I guess my concern would be as a trial litigant would that be offensive to the court that somehow you were proving something in the record that maybe the rule prohibits, yet you have the second instruction?

MS. SWEENEY: Well, I don't think the rule prohibits it. The concern was more that the court might be concerned about the repetitiveness.

MR. SADBERRY: Right. And consider it lawyer misconduct.

MR. MARKS: So it's kind of a running instruction.

CHAIRMAN SOULES: Okay. Those in favor of leaving 6 in as it appears on

page 5 show by hands.

Those opposed. Okay. That's unanimously recommended to the Supreme Court.

Next, Paula.

MS. SWEENEY: One moment, please, while I find it. The next, there are a lot of language and a variety of other changes in between but for substance skip to page 9. In between is Rule 236 which has the same "so help you God" language in it, but I think we have addressed that, and on page 9 you are looking at Rule 272, part (2), section (d) having to do with disjunctive submission.

This language has come by before. It says that the court may submit a question disjunctively when the evidence shows as a matter of law that one or the other of the conditions or facts inquired about necessarily exists. We all agreed that taking out "conditions or facts" and putting in "matters" was an easy improvement to the rule.

What we disagree about is the language "as a matter of law" as many felt it is unnecessary, that it potentially implies that decisions have been made that have perhaps not

been made by the court as to whether or not one or another condition actually as a matter of law exists, and that it potentially should come out because it implies that a decision has been made that has not been made, but I think it was -- either Judge Cochran or Judge Brister thought that it should stay in because that was exactly --

HONORABLE SCOTT A. BRISTER: Not me.

MS. SWEENEY: Oh, it wasn't you? It must have been Judge Cochran. That, in fact, that that is the decision that is being made by the court when a disjunctive submission is made, and therefore, it is not harmful, and we couldn't agree. So you-all have to decide.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: I think I may have made this point to the subcommittee, but I will go ahead and make it again here. The disjunctive submission language in our current rules started out as an exception to separate and distinct submission. In other

words, disjunctive submission was a type of broad form submission when broad form submission was not the way things were allowed to be done. If you think about Limos vs. Montez and just your standard negligence question, that's a disjunctive submission, but nowadays it's not necessary for one or the other of the matters inquired about to necessarily exist.

Disjunctive submission nowadays is not an either-or proposition. It is simply permissible as a method of submission. So I would recommend that this paragraph be eliminated altogether, or in lieu of that just simply say, "A court may submit a question disjunctively," period, or perhaps as a form of broad form submission. In other words, leaving this in here is forgetting why it got in here to begin with, and I think if we are going to have broad form submission we shouldn't suggest to courts and lawyers that if you do it disjunctively with an "or" it has to be "either-or."

CHAIRMAN SOULES: In other words, let me see if I can -- in the separate

and distinct if something was either black or white you could ask the jury, "Was it black or white? Answer black or white." Now with broad questions you can ask the jury, "Was it black or white? Answer yes or no," and it can be "no."

PROFESSOR DORSANEO: Right. In 1940 --

CHAIRMAN SOULES: That's really the way it is.

PROFESSOR DORSANEO: In 1940 the disjunctive submission proposal that came out of the Advisory Committee was adopted by the court and then before the rules went into effect changed would have allowed disjunctive submission whether or not it was either-or. It would have allowed speed brakes or lookout. Was the defendant negligent in speed brakes or failing to keep a proper lookout?

And then it got changed by the court to be either-or. Now, I don't necessarily think that's a great mischief to say you can do it if it's either-or, but there is at least one case, Ravenol vs. Morrison whether it was "either-or" or "or," and they say "No, that's

wrong. That was error." So it does cause some trouble because people read into it what it was meant to mean before broad form submission became the method of submission.

CHAIRMAN SOULES: Well, this sort of says there has got to be one --

PROFESSOR DORSANEO: One or the other.

CHAIRMAN SOULES: There can't be more than two. One or the other.

MR. MCMAINS: That is correct.

CHAIRMAN SOULES: And if it's the third one, you can't use this. Okay. As long as we have got an understanding of what this seems to be saying let's debate it. Buddy Low.

MR. LOW: If I understand Bill correctly he's saying the reason we couldn't do it before and so they allowed them to do it when under these conditions. Now we can do it generally, so if he's saying that he would just put a period after "may submit disjunctively," I would second that motion. I mean, because they can now; isn't that right, Bill? So if you need to put anything I would

stop there.

CHAIRMAN SOULES: I think Bill is saying just to leave it be altogether.

MR. LOW: All right. I would second that.

CHAIRMAN SOULES: Which is it, Bill?

PROFESSOR DORSANEO: I would delete it.

MR. CURRY: Neither-or.

MR. MCMAINS: Right. Delete it or leave it.

CHAIRMAN SOULES: David Perry. Excuse me.

MR. PERRY: Is there any place that anybody uses disjunctive submission now that we no longer try workers' comp. cases and ask temporary or permanent?

CHAIRMAN SOULES: I don't know.

MR. PERRY: If there is not, why don't we take this paragraph out?

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: You could have contract interpretation where it's one or

the other, but the problem is is the defense's version of the contract interpretation becomes an inferential rebuttal, which is improper and can be error and reversible error. So that's why I moved to get rid of inferential rebuttals last time and got voted down, but that is a disjunctive portion.

CHAIRMAN SOULES: Rusty had his hand up and then I will get to you, Judge Guittard. Did you want to comment on --

MR. MCMAINS: Yeah. Well, the only thing I was -- the problem I have is the same problem I have when we change any of the rules. If you take it out altogether, my real concern is that if you take it out altogether somebody is going to interpret that to mean that you can't do it. I mean, you used to be able to do it, but now you can't do it, and saying simply that the court may submit a question disjunctively or submit questions disjunctively, I mean either one, empowers the court and then eliminates the evil that I think is perceived in the rule as opposed to perhaps suggesting that we are doing more than we are doing. We are actually trying to give

the court more power to not restrict it any further, and that I think would be my concern about taking it out altogether.

CHAIRMAN SOULES: Judge Guittard.

HONORABLE C. A. GUITTARD: It seems to me, Mr. Chairman, that disjunctive submission in certain instances is a useful thing and that this decision of the Supreme Court that says that it's error because it's inferential rebuttal is all wrong. In other words, in the contract case, does it mean this or that? That seems to me to be an imminently fair way of submitting a contract of that kind of issue, and why don't we provide that that can properly be done?

CHAIRMAN SOULES: Anyone else? Judge McCown.

HONORABLE F. SCOTT MCCOWN: If we are -- I would get rid of (d) altogether, I don't much care, but if we are going to keep (d) I think we need the language "as a matter of law" because we need to focus the trial judge on the fact that the trial judge is making a legal decision. He's saying that

under this record under the law it's either total and permanent or it's partial but there is definitely an incapacity, or he's saying that the contract either means (a) or it means (b) but it means one of those two things, and if we take that out, I don't think that the trial judge is focused on the fact that he or she is making a legal call, and they need to be before they use disjunctive submission.

CHAIRMAN SOULES: Anyone else? Joe Latting.

MR. LATTING: I would say in connection with what Rusty said it seems to me that if we do take this language out of the rule altogether at least we need a comment, and it would seem to me that it would be better to have the -- to leave the language in and empower the court to submit disjunctively where appropriate and if Scott's comments -- I guess I agree with what Scott said. I am trying to think of a situation where you wouldn't have to make that call, but I can't think of one, but it does seem to me too dangerous just to take it out altogether beause you find some will say, "Well, they

took it out and so they must have been doing something," and I don't think we ought to leave that question.

CHAIRMAN SOULES: That was our concern on the inferential rebuttal issue when it came up last time. If we are going to be consistent I guess we would not -- we would do something similar with this that we did with inferential rebuttal.

MS. SWEENEY: You would leave the paragraph in but question whether or not to leave in the language "as a matter of law"?

CHAIRMAN SOULES: Yeah. And I'm not saying -- of course, it's not my decision. It's your decision, but that would be consistent with what we did on inferential rebuttal. How many feel that we should leave something about disjunctive submission here without saying what it is you'd leave? Okay. How many are opposed to that?

Okay. So almost unanimously the committee feels that disjunctive submission, we shouldn't just eliminate (d). Now, what are we going to do with it? Bill.

PROFESSOR DORSANEO: I have

another suggestion. Why don't we say "The court" -- or something like this. "The court may submit a question or questions disjunctively when disjunctive submission will facilitate the presentation of the case."

CHAIRMAN SOULES: John Marks.

MR. MARKS: It seems to me that by changing it we are creating more confusion than anything else, and is there a problem with it the way it's written?

PROFESSOR DORSANEO: Again, there is a problem. There is at least one case that seems to me would or should have been considered proper broad form submission that is reversed because the question that the jury was asked disjunctively was not a true either-or situation.

MR. MARKS: Well, how are we going to take care of that by fooling around with this?

PROFESSOR DORSANEO: Well, the --

MR. MARKS: Other than just leaving it.

PROFESSOR DORSANEO: The

offensive language is the limitation when the evidence shows as a matter of law that it's either this or that. It's not required under broad form submission that it be either this or that. It could be this or that or something else.

HONORABLE C. A. GUITTARD: But it says "necessarily exist." That means the same thing.

CHAIRMAN SOULES: Well, if you had I guess some -- in some cases the question "Was it black or white" is a disjunctive submission. In other cases the question "Was it black or white" is not a disjunctive submission because if you instruct, "Answer black or white" it's disjunctive. If you instruct "Answer yes or no," I guess it's not, but I don't know that. Are we using disjunctive -- "or" as a disjunctive and we are using it in a lot of places where the question is really not in section (d) disjunctive submission, and what I'm really trying to focus on is exactly what are we talking about in disjunctive submission? Is it just any question that has an "or" in it?

HONORABLE F. SCOTT MCCOWN: No.

MR. MCMAINS: No.

CHAIRMAN SOULES: Or is it something else?

HONORABLE F. SCOTT MCCOWN: I think that Professor Dorsaneo has identified the wrong offending language. What we are talking about is a question that gives a jury choices, but the choices do not include the answer "no." So what we are saying is that the judge has already determined that there has not been a failure of the burden of proof. He's already said that under the law Choice A or Choice B, which is disjunctive, or if you wanted to say multiple choices, Choice A, B, C, D, or E, one of those choices is the answer.

So the judge has made a legal decision. So the offending language is not "When the evidence shows as a matter of law that one of the conditions inquired about necessarily exists." The offending language is the term "disjunctive" and "one or the other." What's offensive about disjunctive submission is it's either A or B. It doesn't have give the judge

the option to say it's either A, B, C, D, or E.

PROFESSOR DORSANEO: I would agree with that, but the language that's really offensive is "one or the other."

CHAIRMAN SOULES: Well, how about "one or another"?

MR. MCMAINS: Well, how about --

MR. JACKS: How about one?

MR. MCMAINS: One or more of the matters inquired about necessarily. One or --

MR. LATTING: Yeah. Because it could be A and B out of A, B, C, D, and E.

HONORABLE F. SCOTT MCCOWN: No. It's going to have to be one.

MR. LATTING: How about "any"?

MR. MCMAINS: You just want to say "one of the matters inquired about necessarily"?

HONORABLE F. SCOTT MCCOWN: Right.

CHAIRMAN SOULES: Well, then why won't the judge submit the question if he

has decided one of them exists as a matter of law? The judge has decided that one of them exists as a matter of law.

MR. MCMAINS: He's not deciding which one. He's just deciding that one --

CHAIRMAN SOULES: Well, your language says that. If you don't say "one or another exists as a matter of law."

HONORABLE F. SCOTT MCCOWN: Well, what you are really saying is that the court may submit a multiple choice question when the evidence shows as a matter of law that one of the choices is the answer. That's what you are saying. Isn't that what you are saying, Bill? The court may submit a multiple choice question when the evidence shows as a matter of law that one of the choices is the answer.

CHAIRMAN SOULES: Do you have a response to that, or do you want to think about it for a moment?

PROFESSOR DORSANEO: I think that's technically right, but when you say it that way it suggests that only one.

HONORABLE F. SCOTT MCCOWN: But

it is only one. That's what disjunctive is, and that may be why the court said disjunctive. It can only be one of two because they foresaw all the practical problems of when it's more than two it becomes -- it gets a little scary.

PROFESSOR DORSANEO: Consider this question. The question that is in the concurring opinion in Scott which asks in a series "Was the defendant negligent in" blank or blank or blank. That would not be -- to me that's disjunctive submission, but it's not only -- you could consider it conjunctive submission, too, if you wanted to, but it is a species of disjunctive submission that considers more than one alternative, and I wouldn't want anybody to think that that would be inappropriate because I think it is appropriate.

So that would be my only comment except to go back to history again. The original proposal on disjunctive submission was a depart -- a recommendation of this committee in its original incarnation was proposed as a departure from separate and distinct

submission where the question could be asked simply in the way that I stated it in an ordinary negligence case. In other words, this committee recommended to the Supreme Court originally that we move to something like Limos vs. Montez, but it was repealed before it ever went into effect. So the disjunctive submission problem is a creature of the past, and I think all we need to do is to suggest to the trial judge that he or she can formulate a disjunctive submission without imposing a lot of technical requirements on it.

CHAIRMAN SOULES: If the judge is not required to decide as a matter of law that one or another exists in order to submit a disjunctive submission, and so then a judge says "One or two or three or four," and leaves out five and six, which some party says should have been submitted it's up to that party -- that party has to complain right then and there and call it to the judge's attention, doesn't it, or you waive error? Can't disjunctive submission be used whether or not the judge decides as a matter of law one or

the other is present as long as the judge submits the entire array that the parties insist, have in their pleadings, and have some support in the evidence? So why not just stop after the word "the court may submit questions disjunctively," and let the parties handle that problem at the charge and the charge conference like they handle all the other problems?

HONORABLE F. SCOTT MCCOWN: But I would be -- I would think that would be very dangerous because it eliminates the burden of proof and the possible "no" answer with no meaning solely that nobody has proved it to us by a preponderance of the evidence. We have already weekend the burden of proof immensely with the "yes" answer in placing the burden by instruction, and if you simply said that the judge would take all of the choices raised by the evidence, put them in a multiple choice question without the provision for a "no" answer based on the burden of proof, I would think that would be a serious problem.

CHAIRMAN SOULES: Well, the burden of proof is there. I mean, "Answer yes

or no, and here is the array," and they can answer every one of them.

HONORABLE F. SCOTT MCCOWN: That's not disjunctive if you say "Answer yes or no, and here is the array."

CHAIRMAN SOULES: David Perry and then I will get to you.

MR. PERRY: You also, I think, run the danger if you go to frequent disjunctive or multiple choice submission I think you run the danger of causing pretty major changes in trial strategy whereas right now the nature of the submission tends to require everybody to try to focus into one or a few theories, but if you are entitled to a lot of multiple choice submissions, that's likely to cause people to want to start putting anything in the evidence that they can and try to figure it out or talk the jury into it at the end, and you get a lot of shotgunning, and I don't know where you go from there.

CHAIRMAN SOULES: Sometimes that's all you got.

MR. PERRY: Well, that's true.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: If I claim it's black and you claim it's white, are you going to say under Scott's theory "Well, I observed the proof of white, and you observed the proof --" you already said that. You are arguing that, and any answer must be based upon the burden of proof. So how have you weakened it? I just don't understand that.

CHAIRMAN SOULES: Any response to that?

HONORABLE F. SCOTT MCCOWN: Well, if you are forcing the jury to answer "Yes, it's black" or "Yes, it's white" when under the law one of their answers can be "You haven't proven that it's black or white, therefore, you lose."

MR. LOW: Then it might not be disjunctive. It would be -- the judge in the appropriate situation would start out telling them that they shall submit in broad form. Now we are telling them in the appropriate situation, and we don't have to tell the judge everything at every I or dot every T or cross every T where he can do these things, and most

judges know those. We don't have to write a book for them again. So we give them a tool, and we have very trained and skilled judges, and they know only to do it when it's appropriate.

MR. LATTING: Why don't we say that in the rule, that they may submit it -- the court may submit a question disjunctively where appropriate? Do you have an objection to that, Bill?

PROFESSOR DORSANEO: No. I think that would be fine. To crystalize my own thoughts I think Scott's suggestion that the language "the other" is the main culprit is right, but instead of saying that, if we didn't just do it "where appropriate" instead of saying that one of the matters inquired about necessarily exists, my preference would be to say "one or more" rather than "one or the other." Frankly, I think "one necessarily exists" is better than "one or the other." "One or more" I think is better yet and very clear, and I think that is when it's appropriate.

CHIEF JUSTICE CORNELIUS: What

about Luke's suggestion "one or another"? Wouldn't that solve the problem?

PROFESSOR DORSANEO: That might do it as well.

MR. MCMAINS: I think that's the same. "One or another of the matter" is the same.

CHIEF JUSTICE CORNELIUS: But "another" is not the same as "the other."

MR. MCMAINS: No. But "another" is the same as "more."

CHAIRMAN SOULES: No, I think not, Rusty. I mean, that's not what's in my mind there. When I say one or another that means it's got to be one. You select one or you select another or you select another.

MR. MCMAINS: Well, that's what --

CHAIRMAN SOULES: Bill's, "one or more" means you could select one or two or three of the array. So I think they are saying two different things. I mean, I intend it to say it differently. I'm not sure I really disagree with Bill, but we are saying two different things. Suppose there were an

array of five, and a judge says "Those are the five. One or two or three of them may be, but there is no more than five, and one or some number of that five necessarily exists in this case as a matter of law."

MR. LATTING: If we substitute the word "more" for "one or the other" we would have it taken care of.

CHIEF JUSTICE CORNELIUS: It's got to be one, one or another.

CHAIRMAN SOULES: If it's one or another it's got to be one of them, but if it's one or more it could be three of the five.

CHIEF JUSTICE CORNELIUS: Right. That's why I think it ought to be one or another.

CHAIRMAN SOULES: But the judge is saying "That's the universe, and some of those exist as a matter of law. I just can't tell which ones."

CHIEF JUSTICE CORNELIUS: But I think that would take care of that Supreme Court ruling wouldn't it, Bill?

PROFESSOR DORSANEO: That

probably would. All of these suggestions are much better than what we have right now, "one or the other." So I would be willing to go along with any of them.

MR. LATTING: If you just substitute the word "more" for "the other" as the rule is written on page 9 so it reads "The court may submit a question disjunctively when the evidence shows as a matter of law that one or more of the conditions --

CHIEF JUSTICE CORNELIUS: Not more. Not more. One or another.

MR. LATTING: One or more.

CHIEF JUSTICE CORNELIUS: No. One or another.

CHAIRMAN SOULES: No. See, Judge Cornelius disagrees with you. Judge Cornelius feels that the judge should have to decide as a matter of law that one of the array exists and not --

CHIEF JUSTICE CORNELIUS: Not more than one.

CHAIRMAN SOULES: Not some number within the array exists. So we have got a difference of view on that.

CHIEF JUSTICE CORNELIUS: But by using "another" you could have more choices, but it still has to be one of those choices.

CHAIRMAN SOULES: And Bill, I think you and Joe may be together that you think as long as the choices are -- the universe of choices are complete, it could be several.

CHIEF JUSTICE CORNELIUS: Right.

CHAIRMAN SOULES: Judge Cornelius says, "Okay. We have got a complete universe of choices, but it's got to be one." The judge has to decide it has to be one, not some number within that universe. Rusty.

MR. MCMAINS: Scott, is your concern that we haven't really -- that disjunctive submission doesn't click with anybody in terms of what that means? I mean, to a trial judge because I think what everybody here is saying it means and it probably isn't defined anywhere. It's one that we aren't answering "yes" or "no."

CHAIRMAN SOULES: That's right.

MR. MCMAINS: It's one in which we are answering that it's whatever this universe of choices we have, only one of them is going to be an answer.

CHIEF JUSTICE CORNELIUS: Right. Right.

MR. MCMAINS: And any problem we have with the burden of proof theoretically sticks by our instruction, which says when you answer that, you know, answer it in accordance with the preponderance of the evidence. So they have to find for the preponderance of the evidence that that one exists. It doesn't place the burden of proof on any particular party. Now, that may be a problem. Okay. We have one. That answer, you know that answer based on the instructions is in accordance with the preponderance of the evidence.

HONORABLE F. SCOTT MCCOWN: No, no. No.

MR. MCMAINS: What you don't know is who had the burden to produce it.

HONORABLE F. SCOTT MCCOWN: I don't have any problem as long as you say that the evidence shows as a matter of law whatever

it is you want it to show that the matters inquired about necessarily exist. I think what it's important -- and this is straight out of the present rule, what it's important to say to the trial judge is that you were doing something judicial at this point. You are making the decision that whether it's "either-or" that one of those is a matter of law, or you're saying if it's multiple choice, A, B, or C that one of those is a matter of law. You are judicially creating a floor so to speak. You are judicially saying that the jury can't just answer the question "no."

MR. MCMAINS: My only problem with the matter of law language in the very specific is that we are really talking about the submission of a question of fact or a universe of facts. So when you say that we are going to make a decision as a matter of law that one or another of these facts exists it really is --

HONORABLE F. SCOTT MCCOWN: No. But that's not --

MR. MCMAINS: It kind of runs contrary to the notion that most --

HONORABLE F. SCOTT MCCOWN: No, No.

MR. MCMAINS: -- people deal with.

CHAIRMAN SOULES: Judge McCown. You are going to have to let Rusty finish because we are making a record.

HONORABLE F. SCOTT MCCOWN: Okay. I'm sorry.

CHAIRMAN SOULES: And speak one at a time and then I will call you.

MR. MCMAINS: I'm just saying I think it's a factual. I think that a lot of what disjunctive submissions historically have been in the non-comp. period at least are in large measure basically factual conditions that necessarily existed with one or the other as opposed to legal issues at all. I mean, it was either, you know, like if there is a dispute as to whether somebody was on the premises when he was injured. Well, he either was or he wasn't, and there are not really a whole lot of law that goes into that. I mean, either he was or he wasn't, and that's why I think that the problem with the matter of law

requirement is that it tends to signal that you are making a decision that may be purely factual, and that's an over-limitation of what the disjunctive submission is supposed to be.

CHAIRMAN SOULES: Judge McCown. Thank you.

HONORABLE F. SCOTT MCCOWN: Okay. The term "as a matter of law" is a term of -- Rusty, the term "as a matter of law" is a term of art that signals this is a directed verdict decision. When a judge makes a directed verdict at the end of the case that's factual in the sense that he's heard the facts and that he's decided based on the facts. There is no question to go to the jury under the law. When you do a disjunctive submission you are doing the same thing. You have to adopt a directed verdict analysis. You have to apply directed verdict standard, and you have to say under the facts under the law it's either A or it's B, and that's why I think that it's important that it be there as a signal to the judge directed verdict analysis required.

CHAIRMAN SOULES: Well, maybe

that's the reason it's written this way is, you know, the jury is in the jury room, and they can't agree, and if you have just got two choices, the judge can say "Go back and decide which one. That's your job." If you have got three or more it gets more complicated. Maybe it's supposed to be only useful where you have got one of two alternatives, and you can tell the jury "Decide or hang, but you've got to decide. You've got to answer A or B. You can't answer 'no' this time." Mike Hatchell.

MR. HATCHELL: Scott, I think that the scenario that you postulate can exist. I think Rusty's concern is that it doesn't necessarily exist. Take David Perry's example of a workers' comp. situation. The sustaining of permanent or partial injury may well be dependent upon the jury's resolution of a factual dispute as to whether or not there is any injury at all. So it really isn't a matter of law determination for the judge, and in Alex's case the meaning of a clause in a contract may be dependent upon the jury's resolution of whether a condition precedent occurred. So if you start saying

matter of law, it seems to me that you are excluding a wide range of possible scenarios from the rule.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: I'm not so concerned that we need to signal that to trial judges. No. 1, we have got a pattern jury charge where with the possible exception of worker's comp. I can't think of anywhere where it suggests that I should submit something disjunctively. So I'm probably not going to come up with the idea, oh, I just like to do that unless some of the attorneys suggest it, and as far as signaling trial judges, if I make that mistake in the few cases where disjunctive comes up, I'm sure the Court of Appeals will signal me that I -- I mean, that's going to be a point. That's going to be reversed on appeal.

We have got a stack of law -- not a stack. We have got law on what's disjunctive and when not, and I hesitate to try to write all of that law into just one little reference about disjunctive, especially when there is

substantial disagreement as to how important it is and whether we even want to do it and what circumstances you want to do it. I would vote for the where appropriate language and leave it at that.

CHAIRMAN SOULES: Okay, Judge Brister. Elaine Carlson.

PROFESSOR CARLSON: Judge McCown, are you suggesting that the submission would be proper of a question disjunctively when the evidence is such that reasonable minds cannot differ as to whether one or another of the matters inquired about and no other necessarily exists?

HONORABLE F. SCOTT MCCOWN: Well, the classic formulation is comp., and I disagree with Mike on his comp. analogy and his contract analogy because if the question is, "Was there an injury" that's going to be a condition. You wouldn't get to your partial question unless you answered the condition, "Was there an injury?" If the question was, "Was the condition precedent fulfilled" then "Is the contract A or B" would be conditioned upon a "yes" answer to finding the condition

precedent fulfilled.

When you have a disjunctive submission and, by the way, this is what's in the rule now. I'm not arguing for something to come in. I'm arguing against it coming out. The way -- what the trial judge is saying is that if you get to this question I am telling you based on this record and the law that one of two things is true, A or B. To do that you would have to employ a directed verdict analysis. You have to say that I am directing this jury under the facts as I've heard them under the laws we have got that it's either A or B.

CHAIRMAN SOULES: Let me ask David Perry, it's been a long time since I have seen a comp. case, but if the question of injury at all is a fact question, do you ask that question first "was he injured" and then go to the "either-or" questions after that?

MR. PERRY: Yeah. And what Judge McCown just now said is exactly the way it was done, and there had to be -- it had to be shown beyond dispute that one or the other of the two conditions existed before you could

use a disjunctive submission, and the only time you ever really used it was where you had a question of permanent on the one hand and temporary on the other, or if you had the question of total on the one hand and partial on the other.

CHAIRMAN SOULES: That's where you had injury proven as a matter of law?

MR. PERRY: Injury proven as a matter of law or previously established by an answer to a previous question.

CHAIRMAN SOULES: That's exactly where I was getting to, right there, because at that point the judge is not deciding as a matter of law. When he submits his charge he has not decided as a matter of law that one or the other necessarily exists because it predicates on the fact finding up here. So we are not really using (d). (D) has not been used as it's written in that case, which is probably its most common use.

MR. PERRY: No. It has because by the time the jury gets to that question it is true as a matter of law that one or the two exists.

CHAIRMAN SOULES: As a matter of fact, not as a matter of law.

MR. PERRY: Well, the phrase "as a matter of law" is a term of art that means beyond dispute.

PROFESSOR DORSANEO: It actually didn't mean that. It meant that -- it was an unarticulate way of saying "under the law." It was an inarticulate way of saying "under the law."

MR. PERRY: The phrase "as a matter of law" is used in this here in the same way that it's used in the summary judgment rules, that as a matter of law there is no disputed question of fact. In other words, as a matter of law there is no disputed question of fact other than A or B. It's either A or B, and there cannot be anything else. I mean, that's the way the rule is now.

PROFESSOR DORSANEO: Well, I agree with you that's what it says, but the people who wrote it didn't write it very well. What they meant for it to say was under the law. Under the law as it exists that if an injury is of one type it's necessarily not of

submit questions disjunctively where appropriate."

Any further discussion? Those in favor show by hands.

MR. PERRY: Wait a minute. Yeah. I think that is a terrible suggestion because it does not provide the court any guidance whatsoever. It doesn't mean anything, and it doesn't provide any guidance whatsoever to either the court or to trial counsel. Nobody is going to know when it is appropriate or when it is not appropriate until there has been enough time developed to have a body of appellate law on the subject, and what that change would do is that change would take all of the present law that there is on when you can have a disjunctive submission and throw it out without substituting anything in its place, which in my judgment just leaves everybody open to unexpected and unintended and unforeseen reversals.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: When we went to say "and the court shall submit on broad form" we

didn't define "broad form." We have to give the judge some guidance. We don't say this. I don't think that's bad at all that you don't give the trial judge all that guidance. We didn't do it on broad form. What does that mean? I mean, does that mean you can submit 50 things at once multifarious? What? And I think that disjunctive, first a trial judge and lawyers have to understand what's meant by disjunctive, and I'm not sure I do or the committee but to me, like somebody puts on evidence the barn was red. Somebody puts on evidence it's green, but there is no evidence it's not painted. So it's only one or the other, and I think you have got to confine yourself to the record, and that would be just, you know, most judges understand it, and I would endorse the motion.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: I think David's -- I certainly didn't intend by seconding, agreeing with "where appropriate," to throw out all the appellate opinions. If there is any question of that what we have

done in the other drafts or comment or whatever else is not intended to -- you know, they are just sanctions things. There is a list of 15 things you can do wrong, and you cannot -- you can make that list as long as you want, and you can never include everything in there, and I think we could convene this committee forever and never imagine all the circumstances we may be presented where disjunctive might be a good idea and might be the most appropriate way to submit it, and trying to draft a rule to include them all I think is impossible.

Eliminating it completely I think also sends the wrong message. So I think the best thing like in sanctions is you make a general thing saying the comment if necessary, and we are not intending to change anything by this. We are just making it short and recognizing that life is too short to limit, just to list every circumstance, and we are not smart enough to list every circumstance where it might come up.

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: You know, the rule has, if you read it, section (b), broad form submission is essentially mandatory, and we have been given plenty of input that that is the way that it is supposed to be done. Broad form questions is how we are supposed to submit cases whenever it's feasible. We shall do it that way. (D) is in essence an exception to that, and as such I believe it should be as narrowly drawn as possible.

I mean, I'm in favor of the "as a matter of law" language that was in there because what we are saying is, "Judge, you are instructed to direct that the law is submitted on broad form unless in this narrow little area it's either A or it's B," and then it is possible you may in that limited circumstance submit it disjunctively, but when you then -- if you phrase it the way it's on the table, "where appropriate," you are saying you have to do it this way whenever feasible you are directed that you shall do it by broad form, but where it's appropriate you could also do it this other way, and it's completely, internally inconsistent and

contradictory, and it is taking a step back in the direction we have been told not to go.

So I think that the motion should be defeated. I don't think we should do it that way at all, and the question really needs to go back to it is a narrow circumstance in which it's permitted that we do it that way. The question is do we want to tell the courts that it's as a matter of law that way or not, but I don't think that we are in a position where we are entitled to open it up entirely and say, "Well, or on the other hand you can do it disjunctively if you feel like it." We don't have that authority.

CHAIRMAN SOULES: Okay. Anyone else?

HONORABLE SCOTT BRISTER: Let me ask Paula, why is disjunctive submission an exception to broad form? Every time I have submitted disjunctive it has been a broad form question.

MS. SWEENEY: Like what?

HONORABLE SCOTT BRISTER: Well, you know, who breached the contract, A or B? Now, I could submit it one's got a claim and

the defendant's got a counterclaim. I could submit two questions. Did the defendant breach the contract? Yes or no. Second question, did the plaintiff breach the contract? Yes or no.

But it's broad form to say who breached the contract, A or B, and the jury decides who did it first.

MS. SWEENEY: But that is a limited -- that is a very finite universe that you are defining for them, and as a matter of law it must be one or the other if you are submitting it that way.

HONORABLE SCOTT BRISTER: That's right.

MS. SWEENEY: You know, that is an entirely different phrasing of the rule than to say "where appropriate" because as David said that gives -- that's no guidance to anybody, and what it's going to create is a whole raft of "Well, I think it's appropriate in this case. I think it's appropriate in this case." We don't have any guidance, and we won't until we have ten years of appellate decisions.

HONORABLE SCOTT BRISTER: We have got Highland Rec. Creek. We have got Supreme Court cases saying it has to be, you know. I don't know if it specifically said matter of law or whatever, but I can't imagine the Court of Appeals is going to have much trouble if there was a third alternative that somebody was proposing as another way and I leave it out and they object to the charge, I'm going to see that case again. And again, you know, I think we need to put in a comment this doesn't reverse 20 years of Supreme Court cases when we say that.

CHAIRMAN SOULES: Okay. Rusty anything new?

MR. MCMAINS: Well, I just want to throw out a new wording that I think coincides with what we have been talking about as being the disjunctive submission that at least hopefully would clarify what I think we have meant, and that is -- and I don't -- I still for the reasons I talked about don't like the matter of law, but what I would propose, "The court may submit a question disjunctively when the evidence shows that one

and only one of the matters inquired about necessarily exists," which means basically that we are only going to get one answer regardless of how many choices we have. By definition it's not going to be a "yes" or "no." I mean, and that's why the disjunctive submission looks different and why the burden of proof instructions are different.

CHAIRMAN SOULES: Okay. Hold that thought because we have got a motion on the floor we are going to vote on in just a minute, and if it fails, we will come back to it. John Marks.

MR. MARKS: Would this help if we changed to say "The court may submit a question disjunctively where permitted by law"?

HONORABLE F. SCOTT MCCOWN: I have something new.

CHAIRMAN SOULES: Okay. Judge McCown. Something new.

HONORABLE F. SCOTT MCCOWN: Something new. If you look at the way the rule is right now it says "The court may submit a question disjunctively when it is

apparent from the evidence that one or the others of the conditions or facts inquired about necessarily exist." It's short. We have got a body of law on it. If we change the wording to "where appropriate" or "where under the law it's permissible," why are we changing it unless we are changing the meaning?

It's not an area where we are clarifying. I think we do toss out the past, and we don't replace it with anything. We can solve Bill's problem by just taking out the words "or the other." We don't have to put in the words "as a matter of law." Just go with exactly what the present rule is but take out "or the other," and that solves Bill's problem, leaves it the way it is, doesn't put in "as a matter of law."

CHAIRMAN SOULES: All right. Anyone else have anything new? Okay. Well, let's vote on the motion on the floor, which is to have --

MR. LATTING: Well, why don't we vote disjunctively to decide which one we want?

CHAIRMAN SOULES: Because the chair is going to cause question.

MR. MARKS: Because nobody can define disjunctively.

CHAIRMAN SOULES: All right. The motion is that (d) read in its entirety, "(d) Disjunctive Submission. The court may submit questions disjunctively where appropriate." Those in favor show by hands. Joe's not even voting for his second.

PROFESSOR DORSANEO: I will vote for many of these.

CHAIRMAN SOULES: Five. Those opposed? 13. It's defeated 5 to 13. Anybody else have a motion on this?

HONORABLE F. SCOTT MCCOWN: I move that we take the words from the rule as it exists now and strike the words "or the other."

CHAIRMAN SOULES: All right. Is there a second to that?

MS. SWEENEY: Second.

CHAIRMAN SOULES: Moved and seconded. Discussion? Rusty.

MR. MCMAINS: The problem when

you do that is it basically says that one of the matters inquired about necessarily exists. It doesn't say that only one. I mean, one of the problems I have with it, it depends on how it is one accepts that.

HONORABLE F. SCOTT MCCOWN: I will accept a friendly amendment to say only one.

PROFESSOR DORSANEO: Now, I have to be against it. When it says one I can read it to say one or more and would.

MR. MCMAINS: I know you would. That's precisely my point.

CHAIRMAN SOULES: All right. Who seconded?

MR. LOW: No. I did. Not necessarily -- it either exists, not just necessarily. It either exists in this case or doesn't. Why put "necessarily exists"? What do you mean by "necessarily"? I mean, I don't know what "necessarily" means.

HONORABLE SCOTT BRISTER: Same thing as "must."

MR. LOW: Well, but then one or the other exists as far as this case is

concerned, but anyhow that's all I have to say.

MR. LATTING: I have a question.

CHAIRMAN SOULES: Okay. Joe Latting.

MR. LATTING: And I will address this to Scott or Rusty or anybody else for that matter. What do you do when you have the situation, say for example, hypothetically you have applicants to a law school and you were required hypothetically to take the three most qualified applicants, and if there were a jury question, and there were nine applicants, and the jury was asked "We know that three of them are the most qualified." Would you submit that disjunctively, say "Here is a list of nine people. Which three are the most qualified?"

It seems like to me that's a sort of disjunctive submission, but if it can only be one choice, then this won't fit for that. So and what I'm trying to figure, it seems like to me where we ought to be headed is to get jury questions that are simple, that are

straight-forward, that correctly place the burden of proof, and don't comment on the evidence. So that was my problem earlier about having it to only be one thing.

CHAIRMAN SOULES: Rusty McMains.

MR. MCMAINS: But the problem that I think we are having is -- again, it is a definition of terms. It is what do you mean by disjunctive submission? It's not just the fact that "or" is in the question. And it's that, No. 1, it's not a "yes" or "no" answer, and No. 2, historically the way it has developed, although be it perhaps erroneously, that basically one state or another state.

Bill's legitimate concern, I think, is or a third state. You ought to have those three options. For instance, you might have three parties to a contract, each one of them claiming a different construction, nobody claiming it's ambiguous. Now, under the facts in that case and the pleadings as it's submitted one of those three interpretations is the right interpretation if it can't be made as a matter of law and is going to be

relevant. Now, which one? And so that you ought -- but only one. I mean, if they were mutually conflicting on other issues. So the problem I have is that if you say more than one answer can be had, that to me destroys the disjunctive nature of the submission. You can have more than one answer. I don't think it's a disjunctive submission. I think it's a multiple choice submission. I think it's a checklist submission. It might be a broad form submission. It might not be a broad form submission.

The function and value of having a disjunctive submission is being able to hone in on an isolated fact that really is the core of the controversy that probably is too narrow to qualify as a broad form but which in the final analysis the court looks at and says, "Isn't this really the question and why don't we get an answer to that question?" So we are talking about it in the reverse context of what it used to be. It used to be that it was an objection -- that the disjunctive submission was a broad form submission.

What I am suggesting now is that the

disjunctive submission is an exception to the broad form submission, and that's when it should be used, and that's why I think that we need to target that for the court to make sure that they understand that despite the admonitions of broad form, despite the admonitions of inferential rebuttal that if, in fact, one of two circumstances or one of three circumstances, makes no difference, exists upon which somebody's right to recover is going to be predicated, you ought to be able to target that question and get a clear answer, and that I think is what we are preserving. Now, maybe that opens up the debate again further in terms of people opposing broad form, but that's what I mean by disjunctive, and that's why I limited it.

CHAIRMAN SOULES: In other words, your multiple choice wouldn't have "any of the above" or "all of the above." It's got to be one of those.

MR. MCMAINS: It's not disjunctive in my judgment.

CHAIRMAN SOULES: All right. Then --

HONORABLE F. SCOTT MCCOWN: I will accept that as a friendly amendment. "The court may submit a question disjunctively when it is apparent from the evidence that only one of the matters inquired about necessarily exists."

CHAIRMAN SOULES: Okay. Let me write that down so I have got it. Okay. Let's see. "The court may submit questions disjunctively"?

HONORABLE F. SCOTT MCCOWN: A question.

CHAIRMAN SOULES: Well, question, only one question per charge?

HONORABLE F. SCOTT MCCOWN: Well, it's Rule 277. I was just tracking the rule. "The court may submit a question disjunctively when it is apparent from the evidence that only one of the conditions or facts inquired about necessarily exists."

CHAIRMAN SOULES: Okay.

HONORABLE F. SCOTT MCCOWN: It's the fourth paragraph of Rule 277 in the present version.

MS. SWEENEY: You said another

friendly amendment would be conditions or facts?

HONORABLE F. SCOTT MCCOWN: Sure. That would be fine. "When only one of the matters inquired about necessarily exists."

HONORABLE SCOTT BRISTER: How about "evidence shows" instead of "necessarily appearing from the evidence"?

HONORABLE F. SCOTT MCCOWN: The evidence shows. I think we have just worked our way back to what the committee proposed.

HONORABLE SCOTT BRISTER: That's what we have a committee for.

HONORABLE F. SCOTT MCCOWN: Yeah. So it's the committee version on page 9 except putting in the word "only" and striking the words "or the other," and striking "as a matter of law." I will give up on that. Striking "as a matter of law" but putting in "matters" instead of "conditions or facts."

CHAIRMAN SOULES: Okay, Judge McCown. So give me your words again then as you have now lined them up.

HONORABLE F. SCOTT MCCOWN: "The

court may submit a question disjunctively when the evidence shows that only one of the matters inquired about necessarily exists."

CHAIRMAN SOULES: All right. Is there a second?

MS. SWEENEY: Second.

CHAIRMAN SOULES: Paula seconds. Discussion?

MR. CURRY: I have got a question. Haven't we come through a circle since we started out with the idea that paragraph (d) really isn't needed with submissions. We already have we can do it disjunctively even if it wasn't there. So is it to appear that if we did that, then someone out there would say "then you can no longer do it disjunctive." Judge Brister suggested why not just do that and put a comment in it, a footnote. The reason we are doing this is because we no longer need it. The submissions that we have take care of disjunctive things.

CHAIRMAN SOULES: Well, we have stepped through that. We have stepped through it. We are going to leave something in there about disjunctive. We are not going to do it

where we just say --

MR. CURRY: That was never a motion. It was Bill's suggestion, and he never made it a motion, and so I thought it was --

CHAIRMAN SOULES: Okay. Any further discussion on the motion that's on the floor? Okay. It's been moved and seconded that subsection (d) read as stated by Judge Scott McCown. Those in favor show by hands. 19.

Those opposed? Well, that's -- there is no opposition to that, with 19 favorable votes.

HONORABLE C. A. GUITTARD: Mr. Chairman?

CHAIRMAN SOULES: Judge Guittard.

HONORABLE C. A. GUITTARD: I have an amendment, an addition to propose to the committee, either that or the following one. "A proper disjunctive question is not an impermissible, inferential rebuttal submission." Now, my reason for that is that under a certain decision of the Supreme Court

all of what we have been talking about is pretty well mute. As I understand it the Supreme Court says you can't submit a question, "Does the contract mean A, or does it mean B," because that's inferential rebuttal, and that's what we have been talking about. We have been making the assumption that that is a proper way to submit it. Now, in order to have anything valuable that we have done here, we have to say that if it's done properly it's not inferential rebuttal.

HONORABLE F. SCOTT MCCOWN: Second. I agree.

HONORABLE C. A. GUITTARD: Now, let me -- my understanding of the history of this disjunctive submission is a little different. As I recall, the problem was that the defendant had to have an affirmative submission of his theory of the case, and if you submit both the plaintiff's theory and the defendant's theory, there is a possibility of a conflict in finding, and the disjunctive submission was started as a method of avoiding that conflict. It's still a valid submission, and it should not be thrown out because it's

inferential rebuttal. So that's my motion.

HONORABLE F. SCOTT MCCOWN: I second that.

CHAIRMAN SOULES: Moved and seconded. Any discussion? Bill Dorsaneo.

PROFESSOR DORSANEO: The typical case taking it out of the personal injury area would be one like this, where it's a contract case and there is a claim by an employee that he was to be paid commission, and the employer says, "No, the employee is to be paid a salary only," and a sensible way to submit that would be to ask whether the employee was to be paid a commission, you know, rather than only a salary or rather than a salary and giving the choice between one or the other.

That seems to me to make perfectly good sense as a way to submit the alternatives to the jury, but I think a very sound argument could be made that the defensive argument would be an inferential rebuttal defense, that salary is an inferential rebuttal or converse theory to the commission claim. Now, by virtue of the fact that that's probably

technically inferential rebuttal my sensible method of submission would be disallowed.

Frankly, my suspicion is that Limos vs. Montez was on the way to eliminating inferential rebuttal submissions altogether, but it doesn't seem we are going to get there. If we are going to have converse theories in the charge, articulated in the charge, they ought to be articulated as true choices rather than in some mysterious "yes" or "no" manner.

CHAIRMAN SOULES: I do think we are getting to a real problem here that we need everybody to recognize, and that is that the plaintiff comes in and says, "I'm entitled to a commission." The defendant says "no," and the evidence that the defendant puts in is he was only a salaried employee. Plaintiff has the burden of proof. Defendant doesn't have a burden of proof. If you put it in disjunctive, you are inferring that defendant has the burden of proof, I guess.

PROFESSOR DORSANEO: That's why I said "rather than."

CHAIRMAN SOULES: And that is something of an inferential rebuttal, and if

we are going to go to that sort of submissions by saying that's not inferential rebuttal we are probably going to be opening up arguments at the charge conference that the defensive theories ought to be submitted or one defensive theory you ought to have to submit that even though the defendant doesn't have the burden of proof, and that's okay with me if it's okay with everybody else as long as we see the possibility that at the charge conference this may be going on.

HONORABLE C. A. GUITTARD: Luke, there is no problem there really because there is always the possibility of instruction if you find the preponderance of the evidence A, you will answer "A." Otherwise you will answer "no." You will answer "B." That there is cases on disjunctive submission that take care of that.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: I think the more proper objection to a disjunctive question as you-all have been talking about is that it misplaces the burden of proof. Then

it can be cured by the instruction or by changing the language. The problem is, is when you use "I object to improper inferential rebuttal" it doesn't help anybody cure the problem, but you know, you can make it a proper question. So I would be in favor of preventing an inferential rebuttal objection to these types of questions, but it may be --

CHAIRMAN SOULES: Anyone else?

PROFESSOR ALBRIGHT: Do we need to include something that -- well, I think it just messes it up, but I think maybe just as part of the legislative history it is proper to make an objection that it misplaces the burden of proof that can then be cured by instruction.

CHAIRMAN SOULES: Okay. Judge Guittard, state your additional sentence that you want to add to (d).

HONORABLE C. A. GUITTARD: "a proper disjunctive question is not an impermissible inferential rebuttal submission."

CHAIRMAN SOULES: Okay. All in favor show by hands. 15 for. Those opposed?

Two against. Okay. Paula, did you get the language?

MS. SWEENEY: "a proper disjunctive question is not an impermissible inferential rebuttal submission."

Okay. Two more, and they should be relatively easy, and then that's the conclusion of where we are.

CHAIRMAN SOULES: Please don't ever say that. Those are the very ones that get --

MS. SWEENEY: That was a necessary predicate to this next one, Luke.

PROFESSOR DORSANEO: Mr. Chairman, before we leave this I hope it's the sense of the committee that Joe's question would be considered a proper broad form question where you are choosing three out of nine employees, consistent with Rusty's remarks that he doesn't consider that to be disjunctive because we wouldn't want to give the message to anyone that you can't formulate a broad form question that has more than one answer blank.

CHAIRMAN SOULES: All right.

No one has -- I guess what Bill is saying, everybody understands that to be the case?

Okay. That is on the record, and everybody agrees you're right. Okay. Now, Paula, go ahead. Thank you.

MS. SWEENEY: Page 10, top Paragraph No. 2, under "Objections." We bring this to your attention because there is unanimity on the subcommittee but we are disagreeing on the recommendation Luke made to us, and so we thought that you-all might want to know about it and possibly discuss it. The language at the end, the last sentence which is in bold and scratched out or lined through is language that Luke proposed be added to the end of the instruction.

We unanimously felt in our discussions that it was basically duplicative of language that was already contained elsewhere. For instance, "A party objecting to the charge must point out distinctly the matter complained of," and just a little bit ahead in the rule it already says that before the charge is read to the jury you have to stating distinctly the matter objected to and the

grounds of your objection set forth your objection. So that's already covered.

"That it identifies the portion of the charge to which complaint is made." Well, elsewhere it is clear that you have to under part 3 of spirit of concealed objection, "No objection to one part of the charge can be adopted or apply to any other part of the charge by reference only." So it's clear that you have to specify what part of the charge you are objecting to.

"That it be specific enough to inform the trial court to make a correct ruling." And the rest of that sentence essentially we felt added a lot of language that was going to open a big can of worms about what's specific enough, what's not specific enough, did it fairly apprise the trial court, or not fairly apprise the trial court, is it sufficient to give rise to this presumption on appeal, or not give rise to it when by already saying that one must state distinctly the matter objected to one has set forth the standard without giving rise to a lot of other potentially problematic language about how

distinct it has to be or how specific it has to be. So the sense of the subcommittee -- and I would move that the rule be adopted as it's written in paragraph 2 without the stricken through language at the end.

CHAIRMAN SOULES: Rusty McMains.

MR. MCMAINS: The problem that I have with the omission of the language you have suggested, which as I understand actually the language is basically taken out of the caselaw anyway --

CHAIRMAN SOULES: It's straight out of the cases. It is out of Supreme Court cases.

MR. MCMAINS: The problem I have with the omission of it altogether is that there is nothing about our objection practice as it's here declared that requires us to inform the judge how to fix it. Because we have already basically taken the request practice and converted to an objection practice and the request practice has to only be kind of sort of close. It doesn't have to be substantially correct or even, frankly, is

kind of irrelevant, but it is correct you have to do them, but the objection is the real focus.

So why do you want -- and the problem I have is so all it says is that you must -- that all the objection is limited to is that you state distinctly the matter objected to and the grounds of the objection. Now, one of the grounds of objections that are frequently made is comment on the weight of the evidence. Question, "How do you fix it?" "Not my job" is the response.

Comment on the weight of the evidence goes to the Court of Appeals, goes to the Supreme Court. Somebody up there decides, well, yeah. That's comment on the weight of the evidence. There is no requirement to be specific, and I have less problem with the specificity than I do with you need to tell them how to fix it. I mean, the objection must be specific enough where it is -- where basically there has been a conscious decision by the judge to disregard your concern.

And so that's my -- that I think is the contrast between what Luke's provision puts in

there, and I think without something like's in the last part that you struck out the naked "matter objected to and the grounds of the objection" is too generic and likely to be too liberal in reversing cases.

CHAIRMAN SOULES: Well, to give some history on this, this committee voted almost unanimously, or maybe it was unanimously, what, three years back or four to change to a practice of preservation of error that's very similar to what's in these new rules, and the Supreme Court went along with that, but the district judges got together and brought tremendous force to bear on the Supreme Court, and our work product was discarded, and the reason that the district judges brought that force to bear was that they felt that taking the request practice out would give them no assistance in fixing the charge, and that so much appellate reversal is based on problems with the charge.

They don't have staff. They don't have time to research. This is all coming in a compressed period of time at the charge conference and that they are going to get

ambushed and be reversed without even having been informed about what the problem was until they read the appellate briefs, if they do. In order for us to, I think, to get these rules acceptable to the district judges or at least to the point where the Supreme Court can suggest to the trial judges that they should be acceptable we are going to have to communicate to the trial judges that they are going to be informed at the charge conference what the problem is and how to fix it. Otherwise I don't know if the Supreme Court will go along with this anymore.

And we have got trial judges here, and Judge Brister, you are here. I think Judge McCown just stepped out, but you may remember that involvement, which really just gives the history of a problem that we had that may justify what Rusty is suggesting. I don't have any -- I'm not urging this language be in there. I'm trying to address a problem that the trial judges particularly perceive, and it's a real one. They have got to be -- how do they fix something if the objection is comment on the weight of the evidence at that

point of the charge, period, and it's not my job, judge. It's your job. Mike Hatchell.

MR. HATCHELL: Luke, if I could add to your history just a little bit, and as you know, the task force was reformed after the defeat of this committee's work under Ann Cochran's guidance, and Ann's special mission was to be a liaison to the district bench and the other judges, and she accomplished that goal remarkably well, and as I recall the task force report and the rules that we have already adopted contain the standards which also come out of Payne, in other words, a reasonable guidance. But she has laid the groundwork for us in getting the approval of the judges to the task force suggestions, and so I think that that is a hurdle that we are at least beyond. The thing that I am concerned about, and I am very much in favor of what you are trying to do, but is this language we are talking about inconsistent now with the task force report that we adopted three meetings ago?

MS. SWEENEY: To follow up on that, the telling them how to fix it is almost

backing us back into drafting the form, how are you supposed to submit it. It's getting us away from making objections to it and getting us back to drafting, and that's what was adopted three meetings ago that we are getting away from. So what we have in the rule now is the language that says you have to state distinctly what you are objecting to and the grounds of the objection.

It has to be tied to the rule. It has to be specific enough to inform -- it has to be tied to a particular part of the rule, and the risk you run with going along with what Rusty was saying is that then -- if you are saying you then have to tell the judge how to fix it, you then have to draft it, including perhaps the other side's issues, which is exactly what we all agreed a couple of meetings ago we would not require litigants to do. And you know, I don't know if you want to remake that decision or not.

HONORABLE SCOTT BRISTER: What happens -- I had a case last week where defendant objects on a malpractice case, death case, what sum of money was suffered as a

result of. So I say, "Okay. I put in occurrence."

"We object to that because the child was sick all week."

"Well, what would you want me to put in? How about death" because it's a wrongful death claim.

"Well, we don't want death in because that's a comment and emphasizes that a child died."

"What would you not object to? Tell me."

"We don't know." Big firm, defense lawyer, "I have no suggestions, but we are going to object to anything you suggest."

You know, I can appreciate sometimes I just got to make a choice and everybody is going to object to it, but that's at least the concern. The trial judges sometimes do feel like that it ain't fair, you know, but you're not going to -- now, could an argument be made that, you know, their objection is not specific enough because they are not -- I doubt it in that kind of circumstances. I suppose it's just one of those times when --

MS. SWEENEY: Well, I think

there is just going to be times where, you know, you object to the question being asked, and you are going to keep objecting to it being asked however it's asked, and there is not a fix other than take it out, which is probably exactly what they wanted, take it out.

HONORABLE SCOTT BRISTER: Okay. Take the damage question out. Okay. Great.

CHAIRMAN SOULES: All right. And just by way of response factually to, I think, Paula, what you are saying there, it's true that the first part of the bold sentence there that you have stricken through, "A party objecting to the charge must point out distinctly the matter complained of and the grounds of the complaint," that is up in the rule where it says "stating distinctly the matter objected to and the grounds of the objection," but there is no standard for what that means. And all the rest of that starting with "by an objection that identifies" and so forth is a standard. Whether it's a good one or not, I don't know, and that standard is not elsewhere in the rule. It is not in three

because that's minute differentiations, different shades, and obscured or concealed by voluminous.

MS. SWEENEY: No. You're right. The first part is what we thought was duplicative. The second part is what we thought was problematic. This is the problematic part.

CHAIRMAN SOULES: And if we take that out, there is no standard for "distincly the matter objected to and the grounds of the objection" and no statement that it has to assist the trial judge in curing the problem. David Perry.

MR. PERRY: I don't understand in the kind of case that Judge Brister mentioned -- I don't understand why the party ought not to have to make a decision as to what they want and tell the court that. It doesn't seem to me that it promotes the administration of justice to let a party continually say "I will object to whatever you do" without telling the court what I believe is a proper way to go about it.

HONORABLE SCOTT BRISTER: It

does seem a little unfair sometimes to us.

CHAIRMAN SOULES: In Barton vs. Guerra, this is the case I sent to Paula, it says "An objection must be made with sufficient particularity to allow the court to make an informed ruling and the other party to remedy the defect if possible," citing McKinney, Supreme Court case, and what I think we are all trying to do and what the trial judges are certainly trying to do is get enough information to the trial judge and to the adverse party so there is not an ambush on appeal. Just go up and down, up and down, like the judges used to do on separate and distinct. That's why ultimately, I think, first at the instance of the plaintiffs but finally with concurrence of everybody we brought forward the question so there wouldn't be so much charge reversal and retrial.

How far should a party there have to go to assist the trial judge in carrying an objection and really informing his adversary? Specifically, this is the problem, giving the adversary a chance to fix it before there is an appeal. Now, that's the policy question

that we are directing our attention to, and if it's enough without the bold, well, that's essentially what this is. Citizens Bank vs. Bowles, and that's a -- what I wrote, and again, I don't care what the language is. It comes as an amalgamation of Borden, McKinney, and what case did you mention? Let's see. This is a Supreme Court case, I think.

No. This Citizens Bank and Dickinson. "An objection does not meet the requirement unless the defect relied upon and the grounds of the objection are stated specifically enough to support the conclusion that the trial court was fully cognizant of the grounds complained of and chose to overrule it." And then McDonald, I'm trying to find where McDonald -- I thought I had this marked, but I don't. Anyway, do we put a standard in for the statement "matter objected to and the grounds of the objection" or not? Joe and then Rusty and Bill.

MR. LATTING: I have a question for Paula. How would you feel about this language from McKinney that an objection must be made with sufficient particularity to allow

the court to make an informed ruling and to remedy the defect if possible? How would that strike you?

MS. SWEENEY: A good part of the concern was the last of it about supporting presumptions on appeal because we felt that that would give rise to an awful lot of appellate discussion about what was sufficient to support the assumption. I think the part in the middle that you are talking about, "sufficient specificity to inform the trial court to make a correct ruling," is not the area that was of great concern, and I don't really have a problem with that at all. I think the objection -- you know, if all you're saying is it's a comment, and you don't say anything else, you are probably not giving the court much guidance.

MR. LATTING: Well, David raised the question and so did Scott. It doesn't seem fair to stand there -- and my partner, John, is over there smiling about it now, so it makes me think it's a good point.

CHAIRMAN SOULES: There are two things here. There is the Borden case. There

are two things here. There is the Borden case, which is the first half of this sentence and then there is Morris and Payne.

MR. HATCHELL: There is Molton vs. Alamo Ambulance.

CHAIRMAN SOULES: Molton and the Morris case.

MR. HATCHELL: Payne is one.

CHAIRMAN SOULES: And Payne that pick up the language that deal with the same, is to support a presumption on appeal, and the law is there. Are we by not mentioning the law saying it's going to be different, or are we going to pick up that law and put it in the rule, or what are we going to do? Rusty McMains.

MR. MCMAINS: Yeah. The problem I have is that I think if the court -- if we were to change this and leave out any stuff about how specific the objection needed to be by informing the problem, likely when the Supreme Court were to face the issue whoever is there is going to say it's got to be specific, and they are not going to change the caselaw they already have because this

language isn't in the rule now.

So not putting it in there only, in my judgment, kind of deceives the trial lawyer because we have substituted now an objection practice for a request practice, and the request practice is now more of a pro forma thing or so it was intended, and that's what we voted. And so if you leave the old objection practice as it was, courts were a lot more liberal about objections until we started getting into the broad form problem and trying to figure out exactly how specific did you have to be, but I think the trial courts are still going to want to be sufficiently advised so that they can fix the problem. Not that you have to write it for them, and I think that our rules say that you don't have to write it for them.

They have to know what it is that needs to be worked on, and they have to know why it is that what's there is not acceptable, and just to say the grounds of the complaint -- "make an objection specifically and the grounds of the complaint," well, I object to the use of the third word in the fifth line on

the grounds it's comment on the weight of the evidence. That satisfies that and will be held by a court to satisfy it in an intermediate level anyway and reverse the case even though it may not tell the trial judge the faintest idea why that's a comment on the weight of the evidence or what it is you could do to use a different word, and that to me is in the final analysis is going to be deceptive and cause more litigation than what we already have.

MR. PERRY: Shouldn't you have to tell the judge the relief requested?

MS. SWEENEY: Say again.

MR. PERRY: Shouldn't you have to tell the judge the relief that you are asking for?

MR. MCMAINS: It wouldn't be a bad idea.

MR. LATTING: That's not enough.

MR. PERRY: Well, the thing is maybe it's enough and maybe it's not. If you ask to have the language taken out then on appeal you can look at if you take that

language out are you left with a correct charge or not. But at a minimum, you know, for example, let's suppose that there are two possible ways to submit something and it's not clear which is right. It's not fair to let a party sit there and say "Well, whichever way you go to submit it I'm going to object."

MR. LATTING: I agree.

MR. PERRY: They ought to have to say "I think you should not submit it this way, and you should submit it this way." So it seems to me at a minimum the relief you're asking for ought to have to be set forth, and that relief ought to basically -- the judge ought to be able to then make a decision if I grant that relief will I have a correct charge or not.

MS. SWEENEY: Well, let me modify my motion if I could to maybe this will -- I would move that we adopt the sentence that's stricken out but take out the first part because it is plainly contained a couple of lines above so that it starts on the third line with the word "an," "an objection" and says "An objection must identify the

portion of the charge to which complaint is made and be specific enough to inform the trial court to make a correct ruling on that objection," period. And leave out all of the stuff about the presumption on appeal even though that's in the caselaw, but because I think -- and I think the sense of the subcommittee was then you are going to end up with a whole bunch of discussion about what is sufficient to support presumptions on appeal, and I don't think we need to be writing a whole lot of law about that.

HONORABLE C. A. GUITTARD: Mr. Chairman, I second the motion but suggest a slight amendment. Instead of "inform the court to make a correct ruling" just simply say "enable the court to make a correct ruling."

MS. SWEENEY: Okay.

MR. LOW: I second that motion.

CHAIRMAN SOULES: All right. Discussion? So Molton and Mark vs. Holt, we just wouldn't put anything in there about those cases? Okay. Okay.

MR. PERRY: Let me propose an

amendment to that to add in that you also inform the court of the relief requested so it would read "identify the portion of the charge to which complaint is made and state the relief requested."

CHAIRMAN SOULES: Let me ask you a question about that, David, and here's what bothers me that everybody around this table is going to know that's in there, and we are going to do it, but there may be some other lawyers who will say "I object to something," but doesn't say "and I ask that it be deleted." He just leaves that part out. Now then, is his objection defective and will not support reversal because he didn't say "and I ask that it be taken out," and I ask whatever it is I want done about it? Is that going to impose a technicality on the objection that will result in waiver, wholesale waiver, by those who are not so technically oriented to making objections? That's my only question.

John Marks.

MR. MARKS: The language that you read out of that case in essence said to

give the other party the opportunity to make the correction, and I think that's what we should focus on.

CHAIRMAN SOULES: The party and the judge.

MR. MARKS: Well, mostly the other party. I mean, we do have an advocate system still, and I don't think a person that doesn't have the burden of proof should have the requirement to go educate the lawyer and the judge as to how it should be. I mean, he should be entitled to make his objection.

CHAIRMAN SOULES: Anne Gardner.

MS. GARDNER: I agree. I think that -- I'm concerned that the language in there where it says "and specific enough to inform the trial court to make a correct ruling" would be going back to requiring a party without the burden of the pleading in a situation where there is a failure to give a definition or instruction essentially would be putting the burden on that party even though he doesn't have the burden to plead and tender a request to do it verbally, and that would be going back.

CHAIRMAN SOULES: Let me get Buddy Low and then Judge Brister.

MR. LOW: Well, as an officer of the court he has a duty to assist the court. It's not the other lawyer, and we are officers of the court to reach a fair and just result, and hiding behind the law is something I love, but it's gone.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: Yeah. I mean, we are not asking you to tender it. We are not asking your secretary to type it up, but if there is an essential element out, you can't just object to the form of the jury charge to preserve error. I mean, I think the new way we are approaching this says you have to at least tell me why it's wrong, and if you tell me "well, because it leaves out signs," well, then I know how to correct it, but when you are just objecting to language so in case you lose you'll have objected to the charge and may get it reversed on appeal, but you know, the thing -- maybe one way to do it, and one way I thought of was to be specific enough

to notify the trial court how to correct it. We are talking about identifying the complaint and informing the trial court how to correct it, some way where other than just objection.

I don't -- yes. It's not putting the burden to prepare, to correct, the other side's issues, but you just can't lie behind the law of a general objection to go up on appeal even though that will incidentally inform your opponent of how they need to correctly submit the pleading.

CHAIRMAN SOULES: The task force because of influence of Judge Cochran was expanded to include a number of district judges, and I know some of you were on that task force, and I attended some of the meetings, and those judges' orientation and John's were the point you're making, and this wound up being about half the committee I think of district judges, and they were just adamant this is the court's charge. It's not an adversarial thing. That's their perception of it.

I perceive it differently as do you. But this is the court's charge. It's not supposed

to be an adversarial thing. I'm supposed to be able to get help from the parties to put together a charge that's going to conclude this case and not get ambushed by a party laying behind the law and taking something up on appeal I was never told about. I think that the rule ought to require cooperation with the court to get a charge of that nature, and there was pretty much agreement across even the lawyers involved. You may have been on the task force. I can't remember the members of it, but there was a strong feeling about that.

MR. MARKS: And I would suggest that we shouldn't tell the court. Just taking Judge Brister's example, "I object to this instruction because of the word 'error' and the word 'death' as a comment on the weight of the evidence or it assumes" or whatever. Well, you have pointed out the word that you think is objectionable. Now, who should go forward and supply that word? I mean, Judge Brister, should the defendants say "Well, use this word" or should the person who has the burden of proof ought to say "Well, use this

word," and at some point in time you have to make a decision as to which word is appropriate, but essentially you're saying --

HONORABLE SCOTT BRISTER: And I don't mind that if they come up with a proposal. My big defense lawyers with a stack of lawyers and secretaries and stuff, "We don't know, but we are going to object to anything so in case we lose."

MR. MARKS: So what about we lose -- well, the plaintiff is there, and the plaintiff has to say, "Well, use this."

HONORABLE SCOTT BRISTER: The plaintiff said he would take either one.

MR. MARKS: But the problem has been pointed out to you.

HONORABLE SCOTT BRISTER: No help. No help.

MR. MARKS: The problem has been pointed out to you. In other words, it's not a general objection to the instruction because of comment on the weight of the evidence. It's on objection to the word "occurrence" or the word "death." So the word in the instruction has been pointed out to

you. Now, I mean, if you take it further than that I think we get in trouble with the process.

HONORABLE SCOTT BRISTER: They will be telling the appellate courts something that should have been in there because the appeals judges will ask them, "What would you rather have had," and they will tell those appellate judges something they didn't tell me. That's what I don't like.

CHAIRMAN SOULES: Judge McCown and then I will get to Mike.

HONORABLE F. SCOTT MCCOWN: I think that the version that Paula has proposed here strikes the right balance because notice what it says. It says it has to be specific enough to identify the portion of the charge to which you are complaining and specific enough to inform the trial court, in Judge Guittard's words, to enable the trial court to make a correct ruling on the objection. It doesn't say specific enough to inform the trial charge how to correctly do it right. It doesn't propose a request, which we want to get away from, but it says you got to tell

them specifically what your beefing about so they can either overrule your objection or sustain it.

And if they sustain it, and they ask you, "Now, what should we substitute for," all that can be done on the record. You can create a record of how much help they were able to give you, and they are going to have to object again to whatever you come up with. So they are going to have to have some reason why your second formulation doesn't work. So I think it strikes the right balance between the adversarial versus being fair to the judge.

CHAIRMAN SOULES: Okay. Let me ask Paula -- excuse me a second. The court reporter cannot get all of this. She needs to change paper. Let's take about 10 minutes.

(At this time there was a recess, after which time the proceedings continued as follows:)

CHAIRMAN SOULES: Paula, would it be acceptable to you -- we're back on the record. We're back in session. Would it be acceptable to you -- you have broken this into three parts, the duplicative parts which you

suggest be taken out. That's fine in accordance with me if it is with the committee. The second part has to do with the specifics of the objection, and the third part has to do with presumption on appeal. Could we just focus on the second part at this point? Because if we are going to take out the words "to support a presumption on appeal that the trial court was informed and chose to overrule the objection" I would like to get a record vote on that particular part of it rather than have that be a part of the current motion.

MS. SWEENEY: That's fine. Let's talk about it in terms of three sentences, and I guess since we have been focusing on the second one let's define the motion that's pending to say that that sentence starting with "an" should read -- the motion is that it should read "An objection must identify that portion of the charge to which complaint is made and be specific enough to enable the trial court to make an informed" -- someone suggested over the break that it should say "to make an informed ruling

on the objection" rather than "a correct ruling on the objection," and I accept that suggestion. It makes much better sense.

CHAIRMAN SOULES: Okay. All right. So I'm going to read this and see if I have got it right. Your motion is that we include in section 2 these words: "an objection must identify the portions of the charge to which complaint is made and be specific enough to enable the trial court to make an informed ruling on the objection."

MS. SWEENEY: Yeah. "Identify that portion of the charge" because we are speaking of an objection, so grammatically it would have to be -- the next section would address the next portion.

MR. LATTING: I have a question.

CHAIRMAN SOULES: Just a moment. We are going to have to get -- the court reporter can't make a record with background noise. Okay. For all of you that just came in the language being proposed to be included, and we are not voting on the part about the presumption on appeal, the last

clause of this. Just now we are taking up at this time whether to include the following language: "An objection must identify that portion of the charge to which a complaint is made and be specific enough to enable the trial court to make an informed ruling on the objection." Okay. That's a motion. That's seconded. Joe Latting.

MR. LATTING: Paula, I have a question. Is there a difference between informed and correct ruling?

MS. SWEENEY: Well, what was just pointed out to me was that we created circularity there that would be a pain. If you say that the objection has to be specific enough to inform the court to make a correct ruling and then you go up and it's decided the court did not make a correct ruling then inferentially the objection wasn't specific enough, and therefore, you didn't preserve an error, and it becomes stupid. So an informed ruling is a lot better. That's why I changed it.

CHAIRMAN SOULES: There is a reason for it.

MR. LATTING: So depending on the stupidity of the trial judge your objection would have to be better and better.

CHAIRMAN SOULES: All right. Any further discussion on that?

HONORABLE SCOTT BRISTER: What happens to my case on appeal? That's the rule?

MR. MARKS: I heard how you handled that, Judge.

CHAIRMAN SOULES: Any further discussion on this? We need to move on. Okay. Those in favor show by hands. 20.

Those opposed. No opposition. So the vote is 20 for, none against. We will consider that recommended unanimously.

MS. SWEENEY: And then I guess to --

CHAIRMAN SOULES: And then, Paula, your motion is that we not include the words, or words to this effect, "or to support a presumption on appeal that the trial court was informed and chose to overrule the objection." In other words, the Morris vs. Holt -- was it Molton?

MR. HATCHELL: Well, I don't think that's -- let's see. I'm sorry. What are we leaving out here?

MS. SWEENEY: The last sentence starting with the word "or to support a presumption on appeal that the trial court was informed and chose to overrule the objection."

MR. HATCHELL: Well, I think that that has nothing to do with the specificity of the objection. That has to do with what happens when the court doesn't rule.

PROFESSOR DORSANEO: That's an Acor problem.

MR. HATCHELL: Yeah. Right.

PROFESSOR DORSANEO: Acor vs. General Motors. If the court doesn't rule, it's presumed that the objection is overruled, but that will only make sense if the objection was sensible.

MR. HATCHELL: Right.

CHAIRMAN SOULES: Okay. Paula's proposal is to delete that language.

MR. HATCHELL: Right.

CHAIRMAN SOULES: Okay. Is there a second?

PROFESSOR ALBRIGHT: I second.

CHAIRMAN SOULES: Alex Albright seconds. Any discussion about that?

Okay. Those who vote to delete that show by hands. Anyone opposed? About 20 to 1. Vote is 20 to 1 to delete.

So the -- now, where we are with section 2 is that all of the language that's not stricken through would be approved, and the sentence we voted on earlier would be added, and that would be the entire section 2. Does everybody agree with that?

Okay. Everybody agrees. Next. Paula, thank you.

MS. SWEENEY: Stay right where you are. Four little asterisks next to the comment there, "The change in the second sentence, requiring an objection by a party required to tender is intended to modify the rule enunciated in State vs. Payne. We were asked to write a comment when we went over the task force recommendations. The committee requested that this comment or something like it be included, and so we are showing it to you for your comment. We think it's okay, and

I would move that the comment be added as phrased there.

MR. LATTING: Could I ask you a question, please?

CHAIRMAN SOULES: Everybody have in mind what Paula is talking about? Does anybody need clarification on that?

Okay. Joe, Joe Latting.

MR. LATTING: Paula, what is the idea of requiring an objection where you also have to make a tender?

MS. SWEENEY: Well, if you tendered but something else gets submitted you still have to object. In other words, you tendered it, judge says "No. I'm not going to do it that way. I'm going to change it. I'm going to do it this way." You've tendered but the tender does not support your record. You still have to say, you know, "I tendered it, and I did that step, but I also object to what you are now choosing to do."

MR. LATTING: Okay. But what's the idea of having to do that?

MS. SWEENEY: To point out to the court that they are messing up. In other

words, you can't just give them a stack, you know, have them check or accept or reject it or whatever and sit on it. When you get the final product there in front of you if there is something wrong with the question that's being asked, even if it's your question that's being tinkered with, you still have to tell the court "you're messing up" with sufficient specificity on why they're messing up. It's just to keep people from laying behind the law.

MR. LOW: Isn't that a -- I mean, heretofore I know we went off on what was effective and when it was omitted and when you have to give a correct definition and so forth, but isn't this the first time that we have ever had a rule that said that in each situation you have to object to every defect in the charge and you have to then also tender certain others? In other words, you've got to object, which to me is going to lengthen -- well, I won't argue that point, but is that true?

MS. SWEENEY: That is what was -- well, Mike is --

CHAIRMAN SOULES: Mike Hatchell.

MR. HATCHELL: Well, just look back, Buddy. It refers back to paragraph 1. You need to look back to paragraph 1 because it's keyed to paragraph 1, so it will not. It's actually going to simplify.

MR. LOW: How do you mean, Mike?

MR. CURRY: This comment you mean?

MR. LOW: Oh, I'm not talking about the comment. I'm talking about the --

MR. HATCHELL: You're talking about the language.

MR. LOW: The specificity of --

CHAIRMAN SOULES: Any objection to the comment? Bill Dorsaneo.

PROFESSOR DORSANEO: I don't like the comment at all. I think that it gives the wrong message. The rule enunciated in State vs. Payne is that the trial judge must be informed of the problem, and I think that's the right message. I think that's what we have been talking about. Maybe a kind of

re-articulation of the second sentence the way Paula stated it a moment ago would be the proper thing to do. Say that if what is tendered is changed or modified by the court, that the tender is not sufficient to preserve the complaint. That's the rule of Stacks vs. Rushing and a number of cases that have been around for a long time, and I guess what I'm saying is I don't see that there is anything in State vs. Payne that's inconsistent with the requirement of there being an objection if what was tendered gets challenged.

MS. SWEENEY: I don't believe we need the comment myself. The reason it's here is because we were asked to put it here. So that's why it's here, but I don't think we need it. I think it's pretty apparent what the rule does.

CHAIRMAN SOULES: How many feel we should include the comment? How many feel we should not include the comment? 10 to 1 to delete the comment.

MS. SWEENEY: Okay. And last for your perusal starting at the bottom of page 10, the comment there that says, "Comment

under Texas R. Civ. P. 301" was another comment that was requested that we draft, and Judge McCown drafted it for us, and it is to the effect that a motion for directed verdict is not a prerequisite to a motion for JNOV and contrasts it to the federal practice, and it just emphasizes that we are not adopting the federal practice. Texas is different, and again, the committee asked that we draft this proposal or this comment, and Judge McCown drafted it.

HONORABLE F. SCOTT MCCOWN: I don't think we need this comment either, but I was asked to draft it, and I did. I think the comment is correct, and I think that the comment correctly interprets the rule, but I don't think the rule really needs the interpretations.

MS. SWEENEY: Right.

CHAIRMAN SOULES: Well, if we are going to include the comment couldn't we just stop after "verdict" in the second line and not say or state so categorically that we are not going along with the Feds?

HONORABLE F. SCOTT MCCOWN:

Yeah. I would recommend we just not have the comment at all but...

MS. SWEENEY: And I agree with that.

PROFESSOR DORSANEO: Second.

CHAIRMAN SOULES: Okay. Anyone? We will just vote on whether to include the comment. Those who feel the comment should be included show by hands.

Those who feel it should not be included show by hands. Okay. None in favor and heavy majority to omit the comment. Okay. So the comment will be omitted.

MS. SWEENEY: And then the last part of our report is to tell you that there are other rules in our task to look at which we are going to do. The only thing that we have decided subject to you-all's guidance about jury selection is that we are not going to try to write Batson rules. The cases are just too -- there is too much going on and to try and codify that into the rules right now would be probably futile. So other than that that's what we have done so far.

CHAIRMAN SOULES: Okay. For

your planning purposes we are going to break at noon. We are going to come back at 1:00. We are going to reconvene at 1:00 o'clock. We are going to do -- we are going to finish the charge rules today. Following that we are going to do sanctions and then if there is time appellate, and in the morning at 8:30 we are going to start, wherever we get with these other problems, in the morning at 8:30 we are going to do discovery, and that will probably take all of Saturday morning.

Okay. All right. Now, Paula, just by way of housekeeping what I want to do now is vote to recommend to the Supreme Court of Texas all of the changes to the charge rules that are here as modified by our votes today.

MS. WOLBRUECK: Mr. Chairman.

CHAIRMAN SOULES: Yes.

MS. WOLBRUECK: I have a request under 216 in regards to the jury fee. To be consistent statewide the jury fee in Harris County right now is $20, and that was through the legislative action. If we could change that jury fee to be $20 for district court and $10 for county courts.

CHAIRMAN SOULES: I guess we could say "at least" in there. Go ahead, Paula.

MS. SWEENEY: There is a lot of discussion about the jury fees right now going on in different groups, and this has been sort of unchanged. We haven't really talked about it, but to the extent that it makes a difference I know that there are proposals pending before the Bar board of directors and among others to vary the fee to fund different efforts. Some people want to -- not necessarily before the Bar board, but there are proposals to increase fees here to there to fund indigent services or legal services to the poor and a host of other things. So that's not a rule that we have really done much with, and in fact, there is a note there for the subcommittee to consider Luke's suggestion about whether it should be in part (a), jury docket or nonjury docket. I would prefer if it's all right that we not address 216 right now since the subcommittee hasn't really looked at it.

MS. WOLBRUECK: That was the

only suggestion because of the legislative change that is in Harris County at this time.

CHAIRMAN SOULES: We could fix this pretty quickly. We could put "at least" or just say "a fee must be deposited."

MS. WOLBRUECK: I would prefer it to have a specific fee as far as clerks are concerned, and I would think the attorneys would agree with that.

MR. CURRY: It also says "unless otherwise provided by law." Most other counties have provided otherwise by law in setting their own jury fee.

MS. SWEENEY: What I'm saying, Luke, is that these rules are typed here, but we haven't done anything with them. We started with 226 on page 3. So I would rather you modify your motion to not include 216 through 225 because we haven't looked at them. They just happened to be typed here because you made that one suggestion, so we started typing there.

CHAIRMAN SOULES: You are not addressing 216 through what?

MS. SWEENEY: Through 225. We

are starting at 226 and going through 279.

CHAIRMAN SOULES: Okay. Okay. So what we are voting on now is to recommend to the Supreme Court that the language in Rules 226 through 279 --

MS. SWEENEY: Yes.

CHAIRMAN SOULES: As shown in the report to the -- in the report to the Supreme Court Advisory Committee from the Jury Charge Subcommittee as we voted to change and amend this language today. Now, Paula, is there any other just editorial comment? Do you need to take us to any other issues and questions just running through them so that they come to our attention?

MS. SWEENEY: I don't think so.

CHAIRMAN SOULES: Okay.

MS. SWEENEY: I was going to suggest that what we might do is let people look at this during the course of the day to read all the little ministerial changes and then perhaps we could take a vote, you know, after lunch or middle of the afternoon or whatever. I don't think there is anything else in there that either hadn't already been

decided -- some of it that is highlighted and is marked by the asterisk you-all already decided, and it's just highlighted to show you that's the change you made to the existing rule, and the others are marked that they are either for consistency or clarity or plain English or grammatical correction or whatever.

CHAIRMAN SOULES: All right. With the understanding that anyone can call to the attention of the committee for the balance of the day any concerns they have in these rules I would like to now dictate a motion that we approve Rules 226 through 279 consistent with our discussions through the day and in our past meetings.

MS. SWEENEY: Second.

CHAIRMAN SOULES: Is there a second to the motion? It's been moved by Paula, seconded by Elaine Carlson. Those in favor show by hands. Those opposed? That's unanimous that we send those to the Supreme Court with our recommendation that they be adopted as changes to the Rules of Civil Procedure.

Paula, just to get another problem to you

for your committee to address in these earlier rules, there are a lot of district judges that don't keep separate jury and nonjury dockets as such. They just set cases on the trial docket, and if there is a jury fee been paid, it's a jury case, and if there is not, it's a nonjury case and --

MS. WOLBRUECK: I was going to make the same recommendation on Rule 218, the jury docket kept by the clerk. That's really an old rule, and most clerks do not keep such a book anymore. That's something to be considered, and then if you change -- if you repeal or something, Rule 218 to 220 talks about the jury docket also. So I would make some suggestions for that also.

CHAIRMAN SOULES: Well, we need to address these so that they accommodate that practice instead -- I mean, the judge calls his trial docket. If he has got a jury, he may try a jury case. If he doesn't, he may try the nonjury cases, but it gives the judges -- and plenty of them have indicated to me that they want the flexibility of not having to have this docket or that docket.

They just want to have one docket, and they will deal with the case as it comes up, if you could address that problem.

MS. SWEENEY: To the extent that I'm sure I understand it we will. You're saying that the rules provide they need to have one of each and they're saying they want to merge?

CHAIRMAN SOULES: And they do merge them.

MS. SWEENEY: Okay.

HONORABLE SCOTT BRISTER: I have got 10 cases on the docket next week. Seven of them have paid jury fees and three haven't. It's just the one that's on the computer is what's on the trial docket.

MS. SWEENEY: So you are in violation of these rules?

HONORABLE SCOTT BRISTER: Yes.

CHAIRMAN SOULES: And then Judge Brister is going to try whatever case he decides to try, jury or nonjury. If he doesn't have a jury panel I guess he will try a nonjury case, but he's going to make a decision what he wants to try, and they ought

to be given that flexibility. Do you need any other clarification on that?

MS. SWEENEY: No. I think I get it.

CHAIRMAN SOULES: All right. Well, congratulations to you and -- yes, sir. Judge Guittard.

HONORABLE C. A. GUITTARD: I have a general motion to make if this is the proper time to make it.

CHAIRMAN SOULES: Yes, sir. Well, let me before that I do want to thank Paula and her committee for their intense work on this. They have done great work, and this is something we have been trying to get accomplished now for at least four years that I know of, and I also want to commend Judge Cochran and her task force for getting this to the point where a subcommittee of this committee could refine it and get it to that point where we are unanimous in recommending it to the Supreme Court. I'm sure the Supreme Court appreciates all the work. Thank you very much.

Judge Guittard, you are recognized for a

another type.

CHAIRMAN SOULES: Okay. Did anybody have a motion that we can bring this to focus, or is there a motion already? I don't remember.

MR. LATTING: I'm going to second Bill Dorsaneo's motion, again, which is as I understand it the court may submit a question disjunctively where appropriate.

CHAIRMAN SOULES: I will accept that.

PROFESSOR ALBRIGHT: How about just disjunctively, period? What does "where appropriate" add?

MR. LATTING: It tells the judges like Scott wants to that this is really serious.

HONORABLE SCOTT BRISTER: There might be a question. They might want to look something up.

CHAIRMAN SOULES: All right. Motion has been made and seconded that we say that -- that (d) in it's entirety -- that (d) be changed so that it reads in its entirety, "(d) Disjunctive Submission. The court may

motion.

HONORABLE C. A. GUITTARD: Thank you. My motion is that whenever in the rules the word "court" is used to refer to the judge as distinct from the jury that the word "judge" be used rather than "court."

PROFESSOR ALBRIGHT: I second.

CHAIRMAN SOULES: Any opposition to that? There being no opposition let it be accepted, and I guess, Bill, that is something that will be in your consideration then in your rewrite. Try to address that.

And Judge Guittard, would you give Bill assistance as he does that?

HONORABLE C. A. GUITTARD: Yes, I will.

CHAIRMAN SOULES: I know you will.

MS. SWEENEY: And we did that by the way in this whole set.

CHAIRMAN SOULES: Okay. Now the chair recognizes Joe Latting on sanctions. Do we have a recent work product on that, Joe?

MR. LATTING: Yes. It's been passed out this morning if anybody doesn't

have a copy.

CHAIRMAN SOULES: It's captioned, I think, "Rule 166d. Failure to make or cooperate in discovery. Remedies."

MR. LATTING: I'm not sure we have enough for all of you. Have you got one over there, Tom?

This is a draft with annotations to our earlier discussions that was prepared by Pam Baron in, I suppose, obedience to the committee's direction that we prepare this kind of a rule. It is after the Tommy Jacks version of the emasculations of the trial judge's ability to deal with discovery abuse, and Chuck Herring is really the producer of this draft. He took Pam's draft and worked --

MR. HERRING: Really, Tommy Jacks is the producer. Pam and Tommy and I met last week, and Tommy can probably explain the changes better.

MR. LATTING: Okay. I was going to suggest that we defer to Tommy to explain what this is. I think that we have all said -- I think it's the feeling generally of the members of the committee that until we

get our discovery rules decided on that this is pretty much cart before the horse, but we know that the Supreme Court wants us to do something about sanctions. So here it is, but it really seems to us, seems to me and I know to Chuck, and I will look to Scott and Tommy; I think they are nodding, that this is premature since we are facing the wholesale changes in the discovery rules, but with that disclaimer I will recognize Chuck and Tommy.

MR. HERRING: Well, I will recognize Tommy.

CHAIRMAN SOULES: Well, let's try to make progress on this in spite of the fact that we don't have the discovery rules before us. They will be here tomorrow, but of course, that's going to be after your report, and with the understanding that there may have to be some modification on this after we see those discovery rules, but at least let's spend a little time on this and see what progress we can make on it today. Tommy Jacks.

MR. JACKS: All right. What Chuck and Pam Baron and I tried to do when we

got together the other day was to produce drafts that reflect the changes that were made by vote at the meeting in January, which was the last time this subject was really discussed, and then also to make some other changes either because they have been suggested during discussion or because we thought it cleaned up the end product.

Let me run through it with you just beginning with section 1. In section 1(a) the only change is to reflect that this draft are ones which had already been voted on at the January meeting. One of those actually was a suggestion by the subcommittee, and the other was a product of a vote. I won't dwell on those unless someone has questions about them.

In subparagraph (b) again there is no change reflected here that was not already discussed and voted on in January, so again I won't discuss that. Then (c), the one change that was made there was in subparagraph small Roman numeral (iv) of (c). There we added "a person under control of the party" as being one of those whose conduct could have resulted in sanctions that the court in turn pursuant

to this paragraph would be justifying in writing. For example, the employee of a corporation who was a party whose conduct had prompted or warranted the sanctions by the court.

Paragraph 2 on the second page is where the -- what has hence been called disparangingly by some the Jacks emasculation, which was the product of a vote of this full committee in January. The committee at that time did vote to substitute the version that I had offered for the subcommittee version. So we have deleted the subcommittee version. We have replaced that with the version I had offered. There are some changes here. In subparagraph (a), this I think was the result of suggestion from the chair that -- and I remember Luke pointed out that under 166b the court can compel, limit, or deny discovery, not just compel or quash discovery, and then so that change is made.

And in subparagraph (c) the words "supported by affidavit" have been deleted because as we see on the next page there was disapproval by many on the committee, and I

think I actually myself agreed to delete the requirement that any motion to compel discovery that also seeks sanctions be supported by affidavit, and but we have neglected to delete it in a couple of other places so we have done so here. Also, the language in relation to the resources of the party has sparked quite a bit of controversy and discussion during the January meeting, and again I had myself voluntarily deleted that language, and that deletion is reflected here.

In subparagraph (d) on the third page the red-lining that appears in the second and third lines actually shouldn't be red-lined. Pam when she was retyping my version to create this draft had just mistakenly looked at the wrong subsection and had picked up the language "expenses including attorney fees." It really never was in my proposal. (C) always was the section that dealt with recovering expenses, and (d) always was the subsection that dealt with recovering sanctions.

MR. HERRING: Sanctions in the context of motion to compel.

MR. JACKS: In the context of motion to compel. Exactly.

MR. HERRING: (c) and (d) deal with when you get either expenses in (c) and (d) is sanctions in the context of a motion to compel. Outside of a motion to compel you go to paragraph 3.

MR. JACKS: That's correct. Again the substance of subparagraph (d) was a part of the version that was approved by the vote of this committee in January. We've tried to clean it up a little bit. There was an urge -- it was urged that we try to simplify it somewhat, and we made an effort in that regard. Again, we deleted the "supported by affidavit" language. We have in order to achieve consistency with other parts of this rule have added "law firms or other persons or entities" as one whose conduct could prompt sanctions.

And then beginning in (d)3, about midway down in subparagraph (d), we have tried simply to make language, not substantive changes which consolidate some of the language to make it just a little less wordy. It still says

the same thing. In subparagraph (e) there is no change there that was not voted on by the committee in January. That's as you last saw it.

Probably the only what I would regard as truly substantive work we did since the January meeting, and this was done by Chuck, Pam, and I, is in paragraph 3 on page 3. As paragraph 3 had originally been written by the subcommittee it really left you up in the air regarding what conduct was outside the motion to compel setting that would prompt or permit the awarding of sanctions. Previously this section of the rule had simply said, "In addition or in lieu of the relief provided above the court may make an award of sanctions," period, without saying what it was that someone might do that could justify the court's doing so.

For lack of any better idea about how to handle it we simply employed the Transamerican standard which had been used in language also in paragraph 1, which was already in the rule the committee had approved. So that the court may award sanctions if one of the

circumstances under 2(d) exists. That's where the sanctions are sought in connection with the motion to compel or quash discovery or "if a party, person in control of a party, an attorney, or law firm or other person or entity has acted in flagrant bad faith or with callous disregard of the rule, subpoena, or order" and then follows is the listing of the sanctions that the court can enter in that event, and they are the same ones you saw and voted on in January, and there are no changes made there, I think, unless it's the addition of the words "discovery or trial" in sub (c), but I think all of this is as we saw it in January.

Chuck, let me ask you about from here on out I think you might be able to take over and explain because my work ended with 2 and 3.

MR. HERRING: The rest of it is simply Pam's attempt to reflect the previous votes by the committee last time.

MR. JACKS: Okay.

MR. HERRING: And there are no other changes that were made since we voted last time. The only language that I believe

she and I talked about probably needs to be modified on page 4, on paragraph 4 on page 4, the red-line at the end of that paragraph, which is simply straight out of the Braden V. Downey is not worded quite as smoothly as it probably should be.

It probably should say, "The district judge must conduct the hearing and either" and then continue as it is, or the word "makes" under the second Roman II(i) should be "make" and then "make written findings, or oral findings on the record," strike the words "after a hearing," but there are no other changes on page 4 or thereafter other than what were voted on last time. So really the key changes that you have in this draft or I guess what we should focus on today unless someone wants to talk about something else is to see if we have correctly understood the consensus of the committee with the changes that Tommy has already mentioned.

I think those are the only thing different from what we have voted on before. We have punted obviously on page 5. That's just part of the comment, and that basically

is punted as we agreed to do to Professor Dorsaneo's committee in terms of what kinds of hearing, what form of hearing due process should require, and the vote was to develop a generic rule to deal with hearings and figure out how that applies to this, and I think that's about it, Tommy.

The only other comment, the subcommittee did vote unanimously this week that we should not ask that this committee vote on the this version or do anything with it other than make changes we want to talk about, and until we deal with the nuclear weapon that dropped amid our subcommittee meeting, which was the discovery subcommittee proposals, because if we really change discovery completely, we have a six-month limit, 50 hours, we have new cut-offs and starting dates for certain kinds of discovery, we may end up with a very different set of crimes for which we need to fashion punishment and the procedures.

And so our subcommittee felt very strongly that we ought not to finally adopt a sanctions rule until we see a little better what the lay of the land is going to be on our

discovery system based on the proposed wholesale revisions that we now have in front of us to that, but we can discuss it further now, or we can come back to it after we do our discovery portion of the work.

CHAIRMAN SOULES: Okay. Well, let's give this some reading if you have time over the lunch hour. Do we have -- is our lunch here? Yeah. Looks like it.

MR. HERRING: Dessert is here.

CHAIRMAN SOULES: Desserts are here. Only desserts? Well, I guess it will be here in just a minute.

Tommy, I know you've got a commitment at lunch and several others may have scheduled to have telephone calls with your offices or with others during the business hours. Why don't we adjourn at this time? It's five minutes to 12:00. We will come back at 1:00.

(Whereupon the committee adjourned for the noon recess, after which the proceedings continued as reflected in Volume II.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS LEA NESBITT, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on May 20, 1994, and the same were therafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $ 858.00.

CHARGED TO: Luther H. Soules, III.

Given under my hand and seal of office on this the 8th day of June, 1994.

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