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HEARING OF THE SUPREME COURT
ADVISORY COMMITTEE

NOVEMBER 19, 1994

VOLUME III

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Taken before William F. Wolfe, Certified Shorthand Reporter and Notary Public in Travis County for the State of Texas, on the 19th day of November, A.D. 1994, between the hours of 8:00 o'clock a.m. and 12:00 o'clock p.m., at the Texas Law Center, 1414 Colorado, Rooms 101 and 102, Austin, Texas 78701.

ORIGINAL

NOVEMBER 19, 1994 MEETING

MEMBERS PRESENT:

Alexandra Albright
Pamela Stanton Baron
David J. Beck
Honorable Scott A. Brister
Professor Elaine A. Carlson
Professor William Dorsaneo III
Honorable Sarah B. Duncan
Honorable Clarence A. Guittard
Michael A. Hatchell
John H. Marks, Jr.
Russell H. McMains
Anne McNamara
Harriet E. Miers
Richard Orsinger
Honorable David Peeples
Luther H. Soules III
Stephen D. Susman
Paula Sweeney
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta, Jr.
Charles L. Babcock
Ann Tyrrell Cochran
Michael T. Gallagher
Anne L. Gardner
Charles F. Herring
Donald M. Hunt
Tommy Jacks
Franklin Jones, Jr.
David E. Keltner
Joseph Latting
Thomas S. Leatherbury
Gilbert I. Low
Honorable F. Scott McCown
Robert E. Meadows
David L. Perry
Anthony J. Sadberry

EX OFFICIO MEMBERS PRESENT:

Justice Nathan L. Hecht
Honorable Sam Houston Clinton
Honorable William J. Cornelius
Paul Gold
David B. Jackson
Doris Lange
Bonnie Wolbrueck

EX OFFICIO MEMBERS ABSENT:

Doyle Curry
W. Kenneth Law
Thomas C. Riney
Hon. Paul Heath Till

Also present:

Lee Parsley, Supreme Court Staff Attorney
Holly Duderstadt
Denise Smith

SUPREME COURT ADVISORY COMMITTEE
NOVEMBER 19, 1994

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(Hearing Convened 8:00 a.m.)

CHAIRMAN SOULES: Let's go. Okay. We'll be in session. It's 8:00 o'clock, and I appreciate those of you who are here coming on time.

We are on Page 1080, if I've got my books correct. Is that where we are, Judge Guittard?

HONORABLE C. A. GUITTARD: Let me see, I think that's right.

CHAIRMAN SOULES: Or 1081, I guess, is maybe the place. This is in Volume II of the materials that are dated November 19 and 20 of 1993 on Page 1081, and let's proceed.

Judge Guittard, you have the floor.

HONORABLE C. A. GUITTARD: All right. Charles Spain has a suggestion that probably is technically correct. I don't know whether it's worth doing anything about. He asks, "To what does one concur or dissent? I thought a judge concurred or dissented to a judgment and joined or did not join in an opinion. To my consternation, however, it appears that a judge concurs or dissents to a

decision.

"Texas Rules of Civil Procedure 79 and 90 appear to use the word 'decision' as the overarching word (a 'verbalization,' as it were) for the postsubmission appellate process through rendition of judgment. The appellate 'decision' does not appear to be anything tangible as opposed to an opinion and judgment.

"I believe a more workable solution would be to replace the first sentence of Rule 90(e) with 'Any justice may file an opinion concurring in or dissenting from the judgment of the court of appeals and joining or not joining in the majority opinion.' One subtle benefit of such a change is that it reinforces the distinction between the opinion, an agent of stare decisis, and the judgment, a creature of res judicata. I would also change Rule 79(b) and (c) from 'cannot concur in a decision' to 'cannot agree in a decision.' There may be one or two other places in which 'decision' and 'concur' are used that would have to be adjusted. I confess I have not done an exhaustive search,"

he says.

Our committee looked at that and didn't really -- thought there might be some technical merit to that proposal, but didn't see that it would make much difference and didn't think it was necessary to make any change.

CHAIRMAN SOULES: Okay. The drill here is if you disagree with what the committee reports, speak up. Otherwise, we're going to accept what the committee reports and go on to the next topic.

HONORABLE C. A. GUITTARD: Okay. The next is at the top of Page 1083, Charles Spain again. Proposal: Texas Rules of Appellate Procedure 79(d), (e) and 100(f). He says, "Is it a 'motion for rehearing en banc' or a 'motion for reconsideration en banc'?"

Well, again, technically, probably "reconsideration" is a more proper word because you're not going to usually -- the court is not going to send it down for oral argument, so -- but the term "rehearing" has been used so much when you don't actually hear

oral argument that it really doesn't make any difference, so we don't propose any change.

CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD: I think 1088 and 1089 from Professor Edgar out of Lubbock is essentially the same thing.

CHAIRMAN SOULES: Let me see, is that 1085?

HONORABLE C. A. GUITTARD: No, 1088. Is there a 1085?

CHAIRMAN SOULES: And this is a letter from Judge Cohen? I guess it's another piece of his --

HONORABLE C. A. GUITTARD: That's on another page which I don't think --

CHAIRMAN SOULES: Well, this is as it affects 80(c).

HONORABLE C. A. GUITTARD: Here, that's at 1061 in my -- I think he has a letter in that.

CHAIRMAN SOULES: Right.

HONORABLE C. A. GUITTARD: Perhaps it mentions more than one rule, so we have it in more than one place.

I think we should go back, though. I

don't think -- I think probably we skipped over Judge Cohen's suggestion on Page 1061. And he proposes, he says, "I suggest that Rule 80(c) be amended to authorize the Court of Appeals to abate an appeal and remand the case to the District Court to conduct a hearing on any issue the Court of Appeals deems necessary" --

CHAIRMAN SOULES: Now, that's on Page 1085. That's why it's here, but you probably don't have your agenda. But for the purposes of you all looking at it, it's on Page 1085.

HONORABLE C. A. GUITTARD: Do all the people that weren't here yesterday, do they all have this?

PROFESSOR DORSANEO: Uh-huh.

HONORABLE C. A. GUITTARD: Okay. Good. He wants to be able to abate the appeal and remand the court of appeals to conduct a hearing on any issue the court of appeals deems necessary in order to decide the appeal appropriately. This authority exists and is often used in the federal system and in many other states. It is arguable that such a

procedure is already permissible under the existing rule that allows the court to make any other appropriate order as the law and nature of the case may require. Nevertheless, there has been significant discussion in several recent cases of the need for such a rule.

Then he gives a citation from a Beaumont court where Judge Brookshire advocated such a -- such where the court used such a procedure over the dissent of Justice Butts. Similar approaches have been used by the Houston first court, both decided before the rules were enacted.

And he says, "I propose rule 80(c) provide: In addition, the court may make any other appropriate order as the law and nature of the case may require," and then he would add this, "including abating the appeal and remanding the cause to the trial court for a hearing on any issue."

Our committee thought that was a good idea and recommend that the committee approve it. Any objection?

HONORABLE SAM HOUSTON CLINTON:

Well, I do.

CHAIRMAN SOULES: The concern I have is what is "any issue"? I mean, how broad is that?

HONORABLE SAM HOUSTON CLINTON: I'm sure opposed to that, unless you just want piecemeal appellate litigation. That's what it boils down to. If it's not limited to something to develop something in the record, you're starting on new things that were never presented at trial. That's how broad it is.

CHAIRMAN SOULES: It's so broad, I think, that they could say, Before we can decide this appeal we need a jury decision on this issue, so this is remanded. We're going to abate the appeal and remand it back to the trial court for a jury trial of the issues. And I don't think that's what any of us are inclined to understand it to be.

MS. BARON: I will say there are times when it's useful for more particular problems. For example, in Rule 55(a) you can now, if there's a dispute about accuracies or inaccuracies in the statement of facts, the appellate court can send it back to the trial

court to get it rectified. But if something is missing from the transcript and the district clerk has lost it and the parties can't agree on what was submitted in the trial court, there is no ability, I think, explicit ability, for the appellate court to tell the trial court to resolve the dispute in the record.

HONORABLE SAM HOUSTON CLINTON: That's provided in the rules now.

MS. BARON: I think on statement of facts but not for the transcript. If they agree, then the transcript, I think, can get fixed. But if they don't agree, it can't.

HONORABLE SAM HOUSTON CLINTON: But you're correcting things that exist. You're not holding a hearing on something that's not in the record, that's not been litigated, that's an entirely a new rule, which is what is permitted under here. And we get requests very often to do just something like that.

MS. BARON: Right.

HONORABLE SAM HOUSTON CLINTON:

The question, for example, of ineffective assistance of counsel might be raised. The court could say, as some have tried to, well, we don't have enough record here to determine that, so we're going to send it back and try it on that issue. Get some more testimony or evidence on that issue. And if it comes to us, we're going to say "No, you're not." We've had an ongoing discussion of this with Justice Cohen as well as one or two others from down in Harris County.

HONORABLE C. A. GUITTARD: Is there any way that we could limit this kind of abatement and make it useful without being too broad?

MS. BARON: Maybe if it's just to resolve problems necessary to the court's jurisdiction or to the record. Would that be too limiting or not limiting enough? Are there other situations that people are thinking of that would extend beyond that situation?

CHAIRMAN SOULES: Well, here's one: Suppose the court of appeals decides that the trial judge committed harmful error

in not making findings of fact or conclusions of law.

HONORABLE C. A. GUITTARD: Well, we can do that now, and we do it.

HONORABLE SAM HOUSTON CLINTON: Yeah, that's no problem.

CHAIRMAN SOULES: They remand -- I mean, they abate the appeal and ask the court to make findings of fact and conclusions of law.

HONORABLE C. A. GUITTARD: Yeah. I've done it myself.

CHAIRMAN SOULES: Where is the authority for that in the rule?

HONORABLE C. A. GUITTARD: Any other order, appropriate order, as the law and the nature of the case may require. That's broader than what Judge Cohen proposes.

CHAIRMAN SOULES: But that would be broader, I think, than what Pam has just suggested.

HONORABLE C. A. GUITTARD: Yeah, well....

CHAIRMAN SOULES: That's more than just fixing a problem with the record.

MS. BARON: Yes.

HONORABLE C. A. GUITTARD: As Judge Cohen says, perhaps it's arguable that we already have that power. What he says is that it's not clear and there has been some disagreement among the courts of appeals on it, so he wants to clear that up. How far that existing power goes under the present rules is, I guess, not clear.

PROFESSON DORSANEO: The question would be whether you take the language on any issue in this proposal in its broadest sense or you think of it in terms of what the court of appeals can consider, and that would only be something that's raised on a point of error using our current terminology. And presumably a point of error would not be able to do anything that wasn't preserved in the proper manner below, so you could read on any issue, you know, that way, you know, on any issue that is properly before the court of appeals.

HONORABLE C. A. GUITTARD: Or you could say on any matter pertinent to the issues raised on appeal.

PROFESSOR DORSANEO: But I wonder whether that's even too broad, because we don't want anybody being sent down there to do more evidence on any matter. And I'm thinking that we ought to disapprove this proposal or study it further to try to make it manageable. I don't think we could do it today. Maybe that's the problem with it, is that Justice Cohen would like it to be broader than it should be.

HONORABLE C. A. GUITTARD: Than it should be, right.

CHAIRMAN SOULES: Does anybody want to undertake to think this through and try to draft something for consideration by the committee later?

MR. HATCHELL: I'll do it.

CHAIRMAN SOULES: Do you want to do it, Mike?

MR. HATCHELL: Yeah.

CHAIRMAN SOULES: I mean, it may be a real good idea if we can just get it contained somehow.

MR. HATCHELL: Pam has volunteered.

CHAIRMAN SOULES: Okay. Mike Hatchell and Pam are going to prepare something, and if you could, maybe try to get it to us by a couple of weeks before the January meeting. If not, we'll take it up in March.

MR. HATCHELL: We can probably do it next week.

HONORABLE C. A. GUITTARD: Get it to Bill and me, if you can, so we can -- we're probably going to have a meeting just before New Years and we could look at it then.

CHAIRMAN SOULES: Okay. That takes us to 1088.

HONORABLE C. A. GUITTARD: Okay. Professor Edgar has two concerns. The damages for delay provisions in Rule 84, which relates to courts of appeals, and 131 -- 182(b), which relates to the Supreme Court, are inconsistent in that in the case of 84, the damages are related to -- the damages for delay are related to the amount, 10 times the amount of the cost or something like that; and in 182(b), the Supreme Court can award an appropriate amount and not limit it as the

courts of appeals are. And he wonders why there's any difference.

And our impression was that, well, this was intentionally done, and do you want to give -- the issue is, do you want to give the courts of appeals that broad of power? I don't know. That's a policy decision that this committee ought to consider. Our committee didn't think it was necessary to make any change.

CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD: Now, this next -- these next two proposals have to do with the issues of a mandate. Frankly, our committee hasn't reached this. We've got it on our agenda and we haven't come to it yet, and I don't think anybody is in a position to say that we haven't been working hard.

CHAIRMAN SOULES: No.

HONORABLE C. A. GUITTARD: But we just haven't gotten through this one yet. However, it says that -- the proposal is that the mandate should issue 50 days after the last filed motion instead of 45 days.

Both of these suggestions there say --

Judge Nye says that he should be allowed to wait for the return of the record from the Supreme Court before issuing the mandate.

So if you have any ideas about that, well, we'll be glad to hear them, but we still have it on our agenda for further consideration, if you think we ought to go ahead with it.

CHAIRMAN SOULES: Pam Baron.

MS. BARON: I just want to say that as a practical experience I don't think the clerks tactically issue the mandates on the 45th day. It just doesn't work that nicely and efficiently in most courts. They put it on their docket to issue it, but in fact it will issue somewhat later. That's true in Austin. That's true at the Supreme Court.

MR. HATCHELL: This isn't broke.

CHAIRMAN SOULES: What's that, Mike?

MR. HATCHELL: This isn't broke.

HONORABLE C. A. GUITTARD: It's

not broke, he says.

Okay. We'll just drop it, then, unless the committee thinks there's some merit in it.

CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD: The next one is 1093 about acknowledging receipt of the mandate and so forth. We considered it, and Judge Clinton talked us out of that, so we disapproved it yesterday.

CHAIRMAN SOULES: And what about 1092, "Once a mandate issues, a court of appeals should not be able to vacate, modify, correct or reform its judgment unless it is to correct a clerical error." We talked about that.

PROFESSOR DORSANEO: Yeah. And we decided against it.

CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD: Now, the next one is 1094, and there's two proposals in 1094. One is that the appendix should apply to both -- well, the criminal appendix should apply to both civil and criminal cases; should delete references to the supreme judicial district. It should read

appellant and appellee since the state is allowed to appeal.

Well, now, there are several questions there. This is another one that we have not taken care of.

PROFESSOR DORSANEO: Well, Judge, we do have -- this relates to that proposed order for preparation of the record.

HONORABLE C. A. GUITTARD: Well, I looked at that, but I didn't see where that helped.

PROFESSOR DORSANEO: Well, the appendix that's being referred to here on Page 1094, and correct me if I'm wrong, Judge Clinton, is basically the court of criminal appeals order of the preparation of the record.

HONORABLE SAM HOUSTON CLINTON: I don't have anything about -- what's 1094? I don't believe I have anything for that.

PROFESSOR DORSANEO: Well, I'm sure that I'm right, that when this term "appendix" is used here, it's the appendix to the rules of appellate procedure, and it's the court of criminal appeals order.

HONORABLE SAM HOUSTON CLINTON: Yeah. We've had ours for a long time, but isn't this an effort in here to do one for the Supreme Court?

PROFESSOR DORSANEO: Yes.

HONORABLE C. A. GUITTARD: I think the proposal is that we should adopt the criminal provisions in all cases.

PROFESSOR DORSANEO: Well, the criminal one actually was patterned on the original civil one, although it was greatly improved over the original civil one. And then the original civil one went away, if it did, when we went through the recodification process for the appellate rules. And we've been working on, and I think we have done, an order that is before the Supreme Court to review one that would be like the court of criminal appeals order.

But I guess the larger issue would be should we try to get both courts together on the same order, because the records are going to come up the same path. And I don't know if that has anything to do with this committee. Maybe we could work on it some more with the

court of criminal appeals and see if that would be possible.

HONORABLE SAM HOUSTON CLINTON: Well -- Clinton -- there should be, to avoid any differences in, for example, what you're going to put on the shuck, or whatever they call it in the Supreme Court, we call it the shuck. You wouldn't want to have one -- I don't think you would -- one for civil cases have certain information and one for criminal cases have different information. It would just drive everybody crazy trying to apply the right one, I think. So to that extent, yeah. And maybe even beyond that.

In making up the record, you know, we instruct the court reporter and the clerk in some pretty good details about how to do those, and I suppose there's no difference in civil and criminal in processing it, is there? Would there be any that you can think of?

HONORABLE C. A. GUITTARD: I can't think of any.

HONORABLE SAM HOUSTON CLINTON: I can't either. So yeah, I suppose so.

PROFESSOR DORSANEO: Now, our

new proposal has some things in it that are different from the court of criminal appeals order that we think are good ideas. And I'm not talking specifics now because I don't recall the exact specifics, but maybe we ought to get together and look at this proposal that we have and see if we can come up with something that would be uniform.

HONORABLE C. A. GUITTARD: Okay.

CHAIRMAN SOULES: What appendix is this we're talking about in 1094? What is the appendix?

PROFESSOR DORSANEO: The appendix that -- it's back here. This (indicating).

HONORABLE C. A. GUITTARD: The criminal case's appendix. Okay.

CHAIRMAN SOULES: So we're working with -- are we doing anything about this for civil cases?

PROFESSOR DORSANEO: Yes. We have drafted a rule, an order for the Supreme Court to review and see if they want to adopt, that would be like what the appendix which

actually is the court of criminal appeals order concerning how the record should be prepared.

CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD: Is that something that this whole committee ought to pass on, or can we just handle that more or less informally?

CHAIRMAN SOULES: I think you ought to handle it in your committee and then let us look at the order.

HONORABLE C. A. GUITTARD: Okay.

CHAIRMAN SOULES: And this first part of Rule 88, there's not anything in Rule 88 that prohibits collecting costs after mandate.

HONORABLE C. A. GUITTARD: No. We decided that that shouldn't be changed.

CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD: Now, next, then, under Rule 88, Judge Nye suggests that the thickness of each volume of the transcript should be set forth. And I know Ken Law suggested yesterday that that might be

a good idea; that if you've got too big a volume then it's difficult to handle. And I think there is some merit to that.

It says here, "See proposed order concerning preparation of record." I'm not sure -- I looked at that order. I couldn't find anyplace that specified the thickness of the mandate. Does it, Bill, on thickness of the transcript?

Now, it does provide that the transcript should be on eight-and-a-half by 11 paper and bound at the side, which would be a change from what I've always found, but I guess that's for the better. But the thickness of the transcript should depend on whether or not it's printed on one side or two. If it's -- or you can measure it in inches. I don't know if that's the best way to do it.

You could provide that, for instance, if it's -- the question -- then they go to the question of whether it should be printed on both sides of the paper, and it should be printed on both sides of the paper only if it will lie flat when it's open. You wouldn't want it printed on both sides of the paper if

it's bound on the left so it doesn't stay open. So I think probably the solution to that would be to allow it to be printed on both sides and have, say, a 200-page limit if it's printed on just one side and a 400-sheet or a 400-page limit if it's printed on both sides, because that would be the same thickness in each case.

So what does the committee think about that?

PROFESSOR DORSANEO: The thickness probably doesn't matter if it's bound on the side. It only matters if it's bound at the top with a two-hole punch thing.

MS. DUNCAN: Right. You can only buy the those GDC binders so thick and then you can't go any further.

PROFESSOR DORSANEO: Yeah. And that makes it about an inch and a half thick if it's bound on the side. I think that's one of the issues that we would have to discuss as to whether the court of criminal appeals would think it would be okay to make the transcript look like the statement of facts in terms of how it's bound, instead of looking like --

well, I don't know what it looks like.

CHAIRMAN SOULES: How much of a problem is this anyway?

HONORABLE SAM HOUSTON CLINTON: Clinton. You don't know what it looks like, our transcripts?

PROFESSOR DORSANEO: I know what yours -- I think I know what yours look like.

HONORABLE SAM HOUSTON CLINTON: Well, that's eight and a half by 14, by the way. And it lays out just like this (indicating).

PROFESSOR DORSANEO: Do you think your court would mind changing that to make it look like --

HONORABLE SAM HOUSTON CLINTON: Oh, I imagine they would.

PROFESSOR DORSANEO: Oh.

HONORABLE SAM HOUSTON: They haven't changed much along those lines since 1876.

MS. SWEENEY: Oh, gosh. Let's not rock the boat.

CHAIRMAN SOULES: I don't think

this makes much difference.

MS. DUNCAN: The cost to copy when they're bound the way they are now is about twice per page as it would be if it would lay flat.

HONORABLE C. A. GUITTARD: The suggestion is that the technology of binding at the side would forbid it being any -- getting too big. Well, that technology can change if it's bound so it lies flat, or there may be some limitations under present practices, but I don't know that the problem is altogether technological.

CHAIRMAN SOULES: I don't think that the issue is worth having a different rule for civil and criminal cases.

HONORABLE C. A. GUITTARD: Okay.

CHAIRMAN SOULES: And if the court of criminal appeals is disinclined to change the way the transcript is bound, I think we ought to just leave this alone.

PROFESSOR DORSANEO: Well, we need to have a Supreme Court order that maybe would be the same as the court or criminal

appeals order, so I would like to try to lobby with the court of criminal appeals to look at our draft and see if they can stand it.

HONORABLE C. A. GUITTARD: Well, as a former appellate judge, I think some limit -- if you're going to bind it at the top like they've always traditionally been bound, they get awful bulky, and some limitation of the thickness is, I think, appropriate, so anyway, we'll handle that informally.

HONORABLE SAM HOUSTON CLINTON: My comment was more in the nature of just an observation, and I don't know whether in truth whether they -- I know they're pretty well stuck with eight-and-a-half by 14 paper, but whether they're stuck on some of the other things, especially now that we're getting some new blood, well, I just don't know, so we'll -- yeah, we'll work together.

CHAIRMAN SOULES: Okay. You all are going to work on this, then, and let us know what you recommend.

HONORABLE C. A. GUITTARD: Okay. The next one is, what, 1098 from

Mr. Spain again. It's a question of -- he says, "In theory the rule allows the court of appeals to order an opinion published after the court rules on the last timely filed motion for rehearing if the parties do not seek relief from the Supreme Court." He says, "This may be a loophole."

I don't know what kind of loophole he's talking about. Our court's practice was since you're not going to change the opinion or change the judgment in any way, there's no reason -- there's no limitation as to time as to when to publish. Nobody comes in with a motion that says "This opinion that you say is not published ought to be published because it complies with the rules for publication." We look at it, we decide, "Well, he's right, go ahead and publish it." It doesn't change anything so far as that case is concerned. So we don't recommend any actions on that in that respect.

CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD: Mr. Spain in 1100 says that there's some concern about what is an unpublished opinion.

And that is a perhaps a problem. We think that that can be easily cured by substituting for an "unpublished opinion" an "opinion designated not for publication," and that would clarify that question of whether it's an unpublished opinion or not.

CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD: In the next one Gloria Jackson in Dallas says she's recently been the victim of an unpublished opinion by the Dallas Court of Appeals.

CHAIRMAN SOULES: What page is this, Judge?

HONORABLE C. A. GUITTARD: This is on Page 1104.

CHAIRMAN SOULES: 1104. Go ahead.

JUSTICE CORNELIUS: I imagine there have been lots of victims.

HONORABLE C. A. GUITTARD: She says: We have been the victim of an unpublished opinion by the Dallas Court. The word "victim" is used because the opinions were not published but did modify or alter

existing law.

I think we recognize that it's a problem that sometimes courts of appeals are tempted to order an opinion published for illegitimate reasons. For instance, if a court says, "Well, this doesn't exactly follow such and such a Supreme Court case, we'll just not publish it," that's not a legitimate reason for not publishing it.

But I don't know what we can do about that. If anybody has any suggestions about how we could cure this inadequacy in our courts of appeals, well, other than by changing the way of selecting the judges, we welcome -- our committee would welcome the suggestion. We don't have any solution for that.

Unless somebody has a suggestion, then we'll go on.

CHAIRMAN SOULES: All right.

HONORABLE C. A. GUITTARD: Page 1106. In original proceedings the issuance of a writ is a vehicle by which relief is granted, but in habeas corpus the issuance of the writ must occur as the inital

act of the court and prior to the court's hearing on the matter upon oral argument and determination if the relator is entitled to be discharged from custody. In fact, the court does not acquire jurisdiction over the person of the relator until it causes the writ to issue or its issuance is waived by the respondent.

His draft would say, If the is court of the tentative opinion that the relator is entitled to the relief sought, the court will issue the writ, set the value of bond and so forth.

And his order of the court should say, If after hearing oral argument, the court determines that the relator should be discharged from custody, if shall enter an order to that effect. Otherwise, the court shall remand relator and so forth.

Now, our Rule 120, which is at Page, I believe, 49 of our cumulative report, has fixed most of this. There's still one lingering problem that we perhaps should look at.

Rule 120(c)(1) says -- it doesn't use

the language that he objects to. It says, "If the court is of the tentative opinion that relator is entitled to the relief sought, the court will set the amount of the bond to be executed by the relator as a condition of release, order relator released on execution and filing of the bond, and schedule oral arguments" and so forth.

So it doesn't say it shall grant the writ, and so that fixes that.

And then on Page 50, where it says "Order of the Court," Subdivision (h), it says, "If, after hearing argument, the court determines that all or part of the relief sought by relator shall be granted, it shall issue an order to that effect."

So it doesn't say anything about a writ there. The only place it says anything about a writ is this next sentence. "Otherwise, the court shall deny relief. If the court denies a writ of habeas corpus, the court shall remand the relator to custody."

And to have a complete fix of that, we perhaps ought to strike "a writ of habeas corpus" and say "If the court denies such

relief, the court shall remand the relator to custody." If there's no objection to that, I guess that could be done.

CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD: If everybody would take a good look at that.

CHAIRMAN SOULES: It looks like there's no objection to that.

HONORABLE SAM HOUSTON CLINTON: Well, I don't understand how you get -- if you don't issue a writ, I don't understand how you get jurisdiction over the person of the applicant or whoever it is. Applicant, yes.

HONORABLE C. A. GUITTARD: Well, you --

HONORABLE SAM HOUSTON CLINTON: I mean, that's the way it's been done for all of these years at least on the criminal side. You issue the writ to have the body brought before the court. Otherwise, you don't have -- or you could use some other vehicle, but that is usually the one that is used ever since it first started in the common law of England a thousand years ago.

HONORABLE C. A. GUITTARD:

Well, this approach would be in our Rule 120 that a habeas corpus proceeding on the civil side is started just like a mandamus. You start it by petition, and that gives the court jurisdiction. But in a habeas corpus case, the rule requires a showing by the relator in the petition that the relator is confined. And if he makes that showing and has grounds for relief, then the court hears the case or sets the bonds and let's him free on bond until the court can resolve the case.

And if it's a problem that we don't have any jurisdiction until we issue some sort of a writ, well, then perhaps we ought to deal with that. We had supposed that there was a problem along that line.

PROFESSOR DORSANEO: I don't think there's a problem. I think it's just very similar to doing away with the capias ad respondendum as a basis for litigating any civil proceeding. We no longer need to bring the defendant to jail in order to have the jurisdiction to proceed in the matter. And we could just say there's jurisdiction that's procedurally perfected by filing the petition

assuming the jurisdictional foundation is secure with respect to the person being deprived of his or her liberty. I don't have a problem with changing the mechanics.

HONORABLE C. A. GUITTARD: Okay.

JUSTICE CORNELIUS: Cornelius from Texarkana. We always just say that we conditionally issue the writ to grant leave to file, conditionally issue the writ, and then after we hear it on the merits, if we grant relief, we say that the relief is granted. Otherwise, we remand the party to the custody of the sheriff or wherever he's confined.

HONORABLE C. A. GUITTARD: That's just another way of saying the same thing, I guess.

JUSTICE CORNELIUS: Right, yes. So the writ or the vehicle by which you get jurisdiction over the person is in that case issued at least conditionally.

HONORABLE C. A. GUITTARD: Do you actually issue such a process?

JUSTICE CORNELIUS: Not a separate writ; it's just in an order.

HONORABLE C. A. GUITTARD: This would make the rule conform to the actual practice.

JUSTICE CORNELIUS: Yeah.

HONORABLE C. A. GUITTARD: It's sort of like the Supreme Court issuing a writ of error. Has anybody ever seen a writ of error? I never have. But you can call it a petition for review or something like that. It would have the same effect. Any other comments on that?

JUSTICE CORNELIUS: Well, what are we doing, putting in there that they will issue the writ, or just saying they'll --

HONORABLE C. A. GUITTARD: No, just saying that they'll grant the relief sought, which means the same thing, or in the first place --

JUSTICE CORNELIUS: But initially you just set bail.

HONORABLE C. A. GUITTARD: Initially it just says that if the court is of the tentative opinion that the relator is entitled to the relief sought, the court will set the amount of a bond to be executed --

JUSTICE CORNELIUS: Set the amount of a bond. It doesn't say issue it yet.

HONORABLE C. A. GUITTARD: -- and order the -- well, here is the order -- order the relator released on execution of a bond.

JUSTICE CORNELIUS: Well, that's the equivalent of a writ.

HONORABLE C. A. GUITTARD: Yeah, that's the equivalent of a writ. It just says it in a little more modern language and doesn't use the -- it dispenses with the Latin. I guess there are people that would object to the dispensing of the Latin since it's so honored and ancient.

HONORABLE SAM HOUSTON CLINTON: It's also in the constitution.

HONORABLE C. A. GUITTARD: Well, if we comply with the intent of the constitution, I suppose there's no particular problem.

Does anybody else have a suggestion?

So the only change there would be in Section (h) on Page 50 where it would say if

the court denies the relief sought, the court shall notify counsel and so forth.

If there's no further -- is there any further discussion?

CHAIRMAN SOULES: Okay. So you think that the rule that you've drafted in the principal report takes care of Mr. Fick's concern?

HONORABLE C. A. GUITTARD: Except in that one sentence where it still says "shall grant a writ," and -- no. In that one instance where it says "if the court denies a writ." And we'll put in place of that "if the court denies such relief, the court shall remand the relator to custody."

CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD: Okay?

CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD: All right. 1112. Judge Hecht had a suggestion that they ought to be able to grant temporary relief without granting a motion for leave to file. And under our proposed Rule 120 that's a moot point because we don't have motions for

leave to file anyway. We just have a petition and the court acts on the petition. So I take it that Judge Hecht's concern has been satisfied in that respect?

JUSTICE HECHT: Right.

HONORABLE C. A. GUITTARD: Okay. The next proposal on Page 1114 by Professor Edgar raises a question of why we require six copies of the brief in ordinary appeals and only three in the case of an original proceeding. And we discussed that and concluded that the original proceedings are handled in a somewhat different manner. You don't have to give a brief to each of the three briefing attorneys, and therefore -- and that that was a deliberate and conscious distinction we made between original proceedings and appeal, and we didn't see any reason to change it.

CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD: John Holloway of Houston on Page 1116 says, Is there anything that the Supreme Court has ever published as to what a page is or what kind of type should be used? Well I think we have

taken care of that in Rule 4(e). Isn't that right, Sarah?

MS. DUNCAN: Sort of.

CHAIRMAN SOULES: Sort of.

HONORABLE C. A. GUITTARD: Okay. And in the next case, the next item, Page 1118, the clerk of the Supreme Court, Mr. Adams, says, We would appreciate a rule in the next change that specifies the Court's preference on binding and material and color. It would also be helpful if the fees that the Court has approved were somehow incorporated into the rules, since we receive many filings without the required fees.

Well, that's two different proposals. The first one has to do with binding and color. And we provide for the binding. We discussed the color problem and decided that the courts of appeals would not -- and Judge Cornelius has suggested that the courts of appeals don't think that that's a necessary requirement.

Now, if the Supreme Court wants to do that for the Supreme Court, well -- and thinks that ought to be written into the rule --

well, we'll do it. We can draft it that way. But except in that case, we just don't think that anything should be added to our present Rule 4(e).

MR. HATCHELL: Luke.

CHAIRMAN SOULES: Mike Hatchell.

MR. HATCHELL: I'm obligated to speak on Mr. Adams' behalf, and it may well be that this is something that the committee can do.

CHAIRMAN SOULES: We can't hear you, Mike.

MR. HATCHELL: Mr. Adams and I had a conversation about this, and I want you to know his concerns. He receives a stack of documents and he's receiving a lot of stuff that has plastic on it, so they can't get any kind of thing that will affix to it.

And number two, apparently the Supreme Court uses a red stamp, and it is believed throughout the halls of the Supreme Court that the use of a red stamp comes from on high. Whether it's any higher than the chief justice or whether it goes up to God or not, I don't

know and nobody else seems to know. And this is absolutely immutable; it can never be changed. So they get a lot of red --

CHAIRMAN SOULES: Justice Hecht wants to know what you meant by "up to God."

MR. HATCHELL: So they get a lot of red covers and they can't get a readable stamp on that.

Sarah Duncan and I drafted a rule, and it was rejected by the committee. All of us are used to filing color-coded materials in the court of appeals with no problem whatsoever, but I don't know whether you want to take a straw vote on whether people would like to do that or not, but I -- Mr. Adams, I'm obligated to tell you his concerns.

CHAIRMAN SOULES: Okay. Justice Hecht, does the Court want Mr. Adams accommodated? This is an easy thing to do.

JUSTICE HECHT: I think we probably ought to take it up ourselves and see if -- I mean, I'll have to ask them. I don't know.

CHAIRMAN SOULES: Well, just prepare something for the Supreme Court. The

courts of appeals are not concerned with this, or are they?

JUSTICE CORNELIUS: I don't think so. I think it would just place an additional burden on the lawyers and would have no benefit to the court.

HONORABLE C. A. GUITTARD: Well, we'll -- oh, Sarah.

CHAIRMAN SOULES: Sarah Duncan.

MS. DUNCAN: One of the problems that Hatchell and I ran into is we are all so used to the fifth circuit system, but it does start with red. And once you discard red as your starting color, it's not as easy as it sounds. You run out of readily available binding colors. But the fifth circuit system is really nice and it works really slick.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Well, maybe Mr. Adams thinks that he wants this, but I seem to find a lot of activity in the court of appeals of sending briefs back or sending notices that they're not filing the brief because it's not the right color, which seems

to me to add a lot of administrative nonsense to the practice and way they do it. People actually are having to refile new briefs with new colors that didn't comply the first time, despite the fact that these color rules have been around for forever. But in at least every other appeal I'm in in the fifth circuit somebody has violated a color rule.

CHAIRMAN SOULES: Pam Baron.

MS. BARON: To go to binding very quickly, I think the rule as we've drafted it is overinclusive. It requires all briefs to be bound no matter how long they are. And as a practical matter, if you have a one or two-page supplemental brief or a short five-page brief, binding is -- you can bind it, I suppose, but it doesn't make a lot of sense. It's not a difficult problem. Also the binding rule doesn't suggest that it can only be spiral binding that lies flat.

And I think the experience with the plastic covers is that they come with the far-side binding that does not permit a brief to lie open and flat, and a lot of the clerk's activity consists of removing all of that from

the briefs before they're sent upstairs.

CHAIRMAN SOULES: Well, that clear binding comes from the type that folds open too.

MS. BARON: Right.

CHAIRMAN SOULES: Mr. Adams will not put something on the face of a red-colored brief and then stamp that?

MS. DUNCAN: No.

MS. BARON: No. They open it and put the cover, the red cover behind it and stamp the first page.

CHAIRMAN SOULES: But they won't stamp the first page of one that comes in clear plastic?

MS. DUNCAN: They can't.

CHAIRMAN SOULES: Pardon?

MS. DUNCAN: They can't.

MS. SWEENEY: If they lift up the plastic they can.

MR. McMAINS: No, no, no. You open the plastic and you do it on the next page.

CHAIRMAN SOULES: He doesn't want to do that?

MR. HATCHELL: No. They get mad as all get out to have to do that, and I've been lectured on this.

CHAIRMAN SOULES: So flexibility is not one of their options?

JUSTICE CORNELIUS: Why not adopt a rule forbidding the use of red?

MS. DUNCAN: And plastic.

CHAIRMAN SOULES: And clear plastic and black and dark blue.

MS. DUNCAN: And dark brown and dark gray.

PROFESSOR DORSANEO: I guess we could make everything all white or near white.

HONORABLE C. A. GUITTARD: The question Pam raises about binding lying flat seems to have some merit. I suppose that it might be practicable to say that if a brief shall exceed 10 pages or something like that, then these rules apply.

MS. BARON: All right.

HONORABLE C. A. GUITTARD: And also in that same connection you have a problem about printing on both sides. The present rule as now drafted says it shall be

printed on just one side of each sheet. It occurs to some of us that --

CHAIRMAN SOULES: Let's not do that over again, Judge.

HONORABLE C. A. GUITTARD: Well --

CHAIRMAN SOULES: That's done. We've got to move on; we've got other things to do.

HONORABLE C. A. GUITTARD: All right. Okay. Well, the next one, then, is Rule 1120 by Judge Hecht. He says, The Court is now considering a current change in practice, which the rule change also allows: To allot to each side the same time for argument, allowing the petitioner (or the party in that position) to reserve such time for rebuttal as counsel desires. Thus, for example, rather than allot the petitioner 30 minutes for argument, the respondent 30 minutes for argument, and the petitioner 15 minutes in rebuttal, as was once our practice, the Court would simply allot each side 30 minutes and allow petitioner to reserve such time for rebuttal as counsel

desires. It goes on to say that this is the procedure in the United States Supreme Court and other courts.

Well, we looked at that rule, Rule 172. Is that the one? And it doesn't say -- about the Supreme Court -- and it doesn't say how many minutes that they had.

CHAIRMAN SOULES: That's probably been changed.

HONORABLE C. A. GUITTARD: It's just simply revised in Rule 172 as each side may be allowed such time as the Court orders. And doesn't that take care of the situation? Why do we need to change that? Now, in the courts of appeals, the Rule 75(d) says that the parties may be allowed 30 minutes.

CHAIRMAN SOULES: Judge, this is taken care of because since this memo was written something was done to change the rule already.

HONORABLE C. A. GUITTARD: It's already been changed?

CHAIRMAN SOULES: Yes, sir.

HONORABLE C. A. GUITTARD: Very well. That's all taken care of then.

Let's go on, then, to the next one. 1122 by Sarah Duncan has been resolved because she was concerned whether the original Rule 120 applies to civil cases, and now our Rule 120 expressly is limited to civil cases, so that takes care of that.

1125. "The Supreme Court and the courts of appeals arguably need an equivalent rule to avoid the" --

PROFESSOR DORSANEO: Well, look in the book. 1125 (indicating).

CHAIRMAN SOULES: We'll go to 1125 there (indicating). Okay.

HONORABLE C. A. GUITTARD: Everything is there except the proposal itself (indicating). To avoid what?

MS. BARON: It's the carry-forward order, is what he's talking about, at the end of the year.

HONORABLE C. A. GUITTARD: Yeah. Okay. Well, that needs some attention. In other words, we need to -- that goes to the question of plenary power and so forth and should we provide, as the trial provides for the trial courts, that the --

that if the case is not disposed of by the end of the term it carries forward. Well, I guess we need to say that. But that also involves the question of plenary power, which should be dealt with in the same connection.

In other words, there's a question as to whether since the court terms have traditionally limited plenary power and since there's no provision that plenary power goes into the next term, there needs to be a provision, I guess, that the plenary power goes for a certain date after, say, the motion for rehearing is overruled or the application for writ is denied or whatever.

CHAIRMAN SOULES: Are you all working on that?

HONORABLE C. A. GUITTARD: I think we need to work that.

PROFESSOR DORSANEO: That's part of the plenary power problem. I'm sure that that was removed from the appellate rules on the theory that terms don't matter any more at the time they were drafted. And we should try to forget what we know about that problem, but I guess we can't forget it because it's

still with us in part for the plenary power concept.

CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD: So we're going to work on that.

CHAIRMAN SOULES: Okay. You're going to work on that.

You've got a few --

HONORABLE C. A. GUITTARD: -- from the supplemental.

CHAIRMAN SOULES: -- in the supplemental beginning on Page 440.

HONORABLE C. A. GUITTARD: Okay. Page 440 is our committee's report to the chairman on what they did in 1992 and 1993.

CHAIRMAN SOULES: It's all superseded now by your --

HONORABLE C. A. GUITTARD: It's all taken care of now one way or another, either rejected or adopted or something.

CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD: And so let's go on to 449. As the chairman says, cure the problem in Gordon against Guerra by

the Corpus Christi court holding that, under Rule 324(b)(4), a motion for new trial is necessary to complain on appeal that the damages found by the jury are in excess of the pleading.

Well, we've dealt with that, and I think that that should be dealt with. And the way we propose to deal with it is that -- to provide that a new trial may be granted, among other grounds, when the damages awarded by the jury are manifestly too large or too small because of the factual insufficiency or overwhelming preponderance of the evidence. And this would exclude cases where the -- damage in excess simply because of the pleadings -- and this would allow the court to modify the judgment because of the damages being in excess of the pleading.

So we'll take care of that. We haven't exactly presented that particular rule here, but we propose to.

CHAIRMAN SOULES: Okay. So you're working on that one.

HONORABLE C. A. GUITTARD: We're working on that one.

CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD: On Page 451, Mr. Spain says, Consider the term "file." A party tenders a document for filing, while it's the clerk who actually files the document. The Rules do not require the clerk to file every item tendered.

Well, our -- again, Mr. Spain is probably technically correct. However, it's not a problem that we think ought to be fixed. A document is filed if tendered by the party and accepted for filing by the clerk. But whenever the rules require a document to be filed, a tender is required. The rules do not require the clerk to accept a document tendered unless it's proper for filing. A document that's not accepted for filing is only tendered.

So we don't think there's any problem about the rule and don't think anything needs to be done about it.

CHAIRMAN SOULES: Okay. 453.

HONORABLE C. A. GUITTARD: Next is 453. Lee Parsley has suggested that we expand the filing by mail to filing by private

mail service. If you recall, we debated that and decided there were too many problems and we disapproved it.

455. Mr. Spain says, Allow notice of judgment of the appellate court by alternative to first class mail; that is, interagency mail to the attorney general.

Well, there might be something we ought to do about that. We haven't reached that point. Interagency mail, there wouldn't be any problem about that, I would suppose. Whether it's first class mail or postcard, I don't know if that -- is a postcard first class mail?

PROFESSOR DORSANEO: No.

HONORABLE C. A. GUITTARD: Well, does anybody have any suggestions about that? Maybe we need to work on it.

CHAIRMAN SOULES: I haven't quite understood what it is. Where are we reading?

HONORABLE C. A. GUITTARD: It says --

CHAIRMAN SOULES: First, we're talking about 455?

HONORABLE C. A. GUITTARD: Yes. Notice of the judgment of the appellate court. Of course, if you have an opinion, you're going to have the opinion mailed out. And if it's a notice to the attorney general, the court can just send it by interagency mail down there in Austin.

If an Austin court wants to send an opinion or any other notice to the attorney general, they don't have to use the fed, the United States Postal Service, they can just use this interagency mail, which ought to be satisfactory, so we'll work on that some more.

CHAIRMAN SOULES: Just add "interagency mail."

HONORABLE C. A. GUITTARD: Well, we want to make sure that -- of what that exactly means.

PROFESSOR DORSANEO: I like to get first class mail. I throw everything else away without looking at it.

MS. DUNCAN: I agree.

HONORABLE C. A. GUITTARD: Well, if you were the attorney general, you might not.

PROFESSOR DORSANEO: Well, but I'm not.

HONORABLE C. A. GUITTARD: Okay.

MS. DUNCAN: But that really, it seems to me, should be decided by the attorney general and not by us.

HONORABLE C. A. GUITTARD: Okay. Let's check with the attorney general and see what they want down there. Okay?

JUSTICE CORNELIUS: I imagine it's the clerk of the Austin Court of Appeals that wants it rather than the attorney general, you know, so they can dispense with having to send first class letters right here in Austin.

HONORABLE C. A. GUITTARD: I think Ken Law would like to have it that way.

MS. BARON: I don't think it's a problem either. I don't think the attorney general is getting the mail a lot faster than if you put it in the mail and then it's delivered to their central mail office. That takes even longer for them to get it.

HONORABLE C. A. GUITTARD: So

you think interagency mail is fine for the attorney general?

MS. BARON: Yeah. I'll check with some people over there, if you like, but I don't that -- if they're getting it that way now, it's not broken; it's working.

HONORABLE C. A. GUITTARD: Well, I guess the concern here is if they're getting it that way now, they're not getting it in accordance with the rule, and the rule ought to be amended to allow what they're doing.

MS. BARON: Well, I'll commit to check on that, if you would like.

HONORABLE C. A. GUITTARD: All right. If you will check on that and let us know about that.

Mr. Moore, who is the district clerk down in San Marcos, wants to require notice of appeal when the bond is filed. But since we don't have to require any bond any more and have only a notice of appeal, there's no further problem about that.

CHAIRMAN SOULES: Have we done anything about this docketing statement

issue?

HONORABLE C. A. GUITTARD: Oh, yeah.

CHAIRMAN SOULES: Having to state who all the parties to the trial court's final judgment are, that's all taken care of?

HONORABLE C. A. GUITTARD: Yes.

PROFESSOR DORSANEO: Yes.

HONORABLE C. A. GUITTARD: That's another part of that same letter that we've already looked at.

CHAIRMAN SOULES: We've done that already. Okay.

HONORABLE C. A. GUITTARD: Now, on Page 463, our -- I made a talk to the Dallas Bar or to the Appellate Practice Section of the Dallas Bar and told them how this committee had decided to abolish the writ of error, the six-month writ of error practice. Mr. Rich was there, and he doesn't like that, so he wrote in this letter saying he doesn't like to -- he doesn't approve of the abolition of a writ of error practice and -- but we debated that at some length and came to that decision, so our committee

doesn't propose that we go back into that.

Next is 465 from Mr. Spain again. Change the deadline for ruling on motions for new trial in TRCP 329b(c) from the 75th to the 60th day so that the trial court's jurisdiction would expire on the 90th day, when the perfecting instrument is due.

Well, we haven't reached that either. I don't know whether there's anything worthwhile to do in there or not. What do you think, Bill?

PROFESSOR DORSANEO: I don't think we ought to do anything.

HONORABLE C. A. GUITTARD: Okay. We'll just drop it, then, unless somebody thinks it has some merit.

CHAIRMAN SOULES: It's dropped.

HONORABLE C. A. GUITTARD: Now, the next one is on Page 471. Let's see --

PROFESSOR DORSANEO: I don't know if you want to mention this (indicating).

HONORABLE C. A. GUITTARD: 467. Retain the six-month writ of error practice. That's the same thing we just discussed.

On Page 471 --

CHAIRMAN SOULES: Well, let's -- just because we looked -- this -- hasn't Ferris written us after we made that decision?

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: Is he bringing any new concerns that we didn't discuss at the time?

HONORABLE C. A. GUITTARD: I couldn't find any.

CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD: Now, 471. Change the rule of Click against Tyra, that the clerk cannot demand advance payment for the transcript when an appeal bond is filed.

Well, we've fixed that, I think, in Rule 51(c), which requires payment or arrangement to pay the clerk's fee before the clerk has a duty to prepare and file the transcript, so that's taken care of.

475 has to do with supersedeas bonds, Rule 47, and the chairman has proposed that we -- that since Laird vs. King has held that

the present Rule 47 doesn't comply with the statute, that we ought to revise the rule to comply with the statute. And of course, there's some question as to whether the Laird against King is correct. And since that's pending on writ of error, we -- our committee thought we ought to just wait until the Supreme Court passes on that and then we can write the rule differently depending on what the decision is.

CHAIRMAN SOULES: That makes sense.

PROFESSOR ELAINE CARLSON: Luke.

CHAIRMAN SOULES: I'm sorry, Elaine Carlson.

PROFESSOR ELAINE CARLSON: I think that that writ was dismissed on agreement of the parties. I think that that's true.

HONORABLE C. A. GUITTARD: It was dismissed?

PROFESSOR ELAINE CARLSON: I believe that's correct. I believe that just went away.

HONORABLE C. A. GUITTARD: Well, maybe we ought to do something about it then.

PROFESSOR DORSANEO: Yeah.

MS. DUNCAN: Yeah. That's a big problem.

PROFESSOR DORSANEO: We'll put that on our agenda, if that's true.

HONORABLE C. A. GUITTARD: We'll put that back on the agenda then.

CHAIRMAN SOULES: And Elaine, you've worked so much on 47 and 49, could you help with this?

PROFESSOR ELAINE CARLSON: You bet.

HONORABLE C. A. GUITTARD: I think that Elaine has already drafted something there. Have you not, Elaine? I guess we better look at that again.

CHAIRMAN SOULES: Yeah, let's look at it.

HONORABLE C. A. GUITTARD: Okay.

PROFESSOR DORSANEO: I think we need an unpublication rule.

CHAIRMAN SOULES: Unpublished Laird. Okay.

HONORABLE C. A. GUITTARD: This next suggestion by Judge Hecht says, Clarify the rule as to whether an order overruling --

CHAIRMAN SOULES: What page are you on, Judge Guittard?

HONORABLE C. A. GUITTARD: 481.

CHAIRMAN SOULES: 481. Okay.

HONORABLE C. A. GUITTARD: (Continuing) -- as to whether an order overruling a motion for directed verdict must be recited in the judgment or in a separate written order, citing a Houston case.

Our committee doesn't see any reason why it has to be done in any particular way just so long as the record shows it. But we have -- I don't know that we've actually tried to fix that, but I think perhaps we ought to say something like this: that the order granting or overruling a motion may be recited in the judgment, entered as a separate signed order, shown in the statement of facts, or otherwise made to appear in the record.

Is there any magic in how you show that

ruling in the record? You show it anyway. We'll -- as we draft those rules, we'll put that in, right, Bill?

PROFESSON DORSANEO: I guess we propose that the committee vote for the inclusion of this sentence somewhere, perhaps in Appellate Rule 52, but in our package that would be recommended for promulgation by the Supreme Court.

CHAIRMAN SOULES: Mike, you can give us some input on that, I think, can't you?

MR. HATCHELL: Well, this is an unfortunate problem. This is one of these levels of minutiae that you ought not have to deal with. The present rules say that anything that occurs in open court and so recorded by the court reporter is an adequate informal bill of exception. And there are three Corpus Christi cases and two Houston cases and one Austin case that leapfrog back that rule and pick up some 1940s and '50s cases that say that this has to be done.

The Supreme Court just ought to draft some -- procure an opinion and get rid of

those cases. But until they do, something like this has got to be put in the rules even though it's totally redundant and absolutely useless.

CHAIRMAN SOULES: Will you prepare the language?

MR. HATCHELL: Yeah.

HONORABLE C. A. GUITTARD: I've got it here, unless you want something different.

CHAIRMAN SOULES: Okay. Is everybody in agreement? Sarah.

MS. DUNCAN: Well, as long as -- and I think Mike and I are in agreement that we're not going to require either a written order or that it be recited in the judgment. If it's on the record, and everybody knows the JNOV or the directed verdict or the whatever was denied, that ought to be enough.

HONORABLE C. A. GUITTARD: That's what this language here says.

Okay. Let's go to 487.

CHAIRMAN SOULES: But this is a 1993 case.

MR. HATCHELL: Well, no. That case, though -- yeah, that's true. And they actually didn't decide that in that case. That is cited because Judge Cohen wrote a dissent and said you need to get rid of this stupid rule in Sipco, and that's why the case is cited.

CHAIRMAN SOULES: So you're going to provide -- or that language is already here and you're going to put it someplace?

PROFESSOR DORSANEO: We're going to put it somewhere.

CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD: The next is Page 487. Judge Hecht proposes to conform the special rules regarding electronic statement of facts to the TRAP or incorporate them into TRAP.

Well, as we did yesterday, we've done our best to incorporate them into TRAP, but we still have some work to do on that. We'll bring that back to the committee.

CHAIRMAN SOULES: And the times are exactly the same now?

HONORABLE C. A. GUITTARD: Yeah. We have made no difference as to times.

CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD: From Page 592, Mr. Spain says, "Does the Supreme Court really intend for notice to be sent to all parties to the trial court's judgment on matters such as granting a motion for extension of time to file the record?" Well --

CHAIRMAN SOULES: Answer, yes.

MR. HATCHELL: Correct.

HONORABLE C. A. GUITTARD: We haven't made any recommendation about that, so we'll just go on to something else.

597. Mr. Spain proposes to require parties to file docketing statements. We've already adopted that in our proposed Rule 57, which is --

CHAIRMAN SOULES: What page is this now?

HONORABLE C. A. GUITTARD: On Page 597. That's the rule we were asked about in another part of that Spain letter. We've already taken care of that.

CHAIRMAN SOULES: What happened with 489? What's this? Or is this another one? What is this? It's a couple of hundred pages.

HONORABLE C. A. GUITTARD: Well, that's all the material in there concerning electronic recording, and we've --

PROFESSOR DORSANEO: -- skipped that.

CHAIRMAN SOULES: Okay. That's all taken care of.

HONORABLE C. A. GUITTARD: And we say in -- that's in 587, and we've already been over that.

CHAIRMAN SOULES: 591. Did we talk about that one?

HONORABLE C. A. GUITTARD: 591. That's in there.

PROFESSOR DORSANEO: This is in here again.

HONORABLE C. A. GUITTARD: On Page 592.

CHAIRMAN SOULES: Is that TRAP 74? We did that?

HONORABLE C. A. GUITTARD: We

did that.

PROFESSOR DORSANEO: Docketing statement.

CHAIRMAN SOULES: That's all done.

HONORABLE C. A. GUITTARD: Okay. There's one more here from the Council of Chief Judges --

CHAIRMAN SOULES: In here where, Judge, so we can keep up.

HONORABLE C. A. GUITTARD: On Page 598.

CHAIRMAN SOULES: 598. Okay.

HONORABLE C. A. GUITTARD: The chief judges of the courts of appeals recommended that the -- that in criminal cases as well as civil cases the courts be authorized to advance the case for submission without oral argument, if they don't think oral argument will help any. But we've already adopted that.

There is a problem, though, in that Rule 75, Rule 75(e), which we have adopted, is contrary to -- seems to be contrary to Subdivision (a) of the same rule.

Subdivision (a) says: When a case is properly prepared for submission, any party who has filed briefs in accordance with the rules here -- therefor, who has made a timely request for argument upon the docket -- call of the docket for submission, has the right to -- well, the right of argument -- may upon call of the docket submit its oral argument to the court.

So in effect Subdivision (a) says you have the right to argument and Subdivision (f) says he has the right only if the court of appeals says they don't want to hear it. Now, I don't guess that's much of a problem, but that is a little -- maybe it's a little bit misleading. Perhaps Subdivision (a) should say "subject to Subdivision (f)" or something like that.

JUSTICE CORNELIUS: Right. I probably ought to do that to say "except as provided for in" --

HONORABLE C. A. GUITTARD: Right. In other words, say "except as provided for in Subdivision (f)."

JUSTICE CORNELIUS:

-- "Subdivision (f)," yes.

CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD: And I believe that's about all of the matters in the supplement.

Now, there are some other matters pending before the committee, and the only reasons why they're not in the supplement was instead of being mailed to Judge Hecht or to Mr. Soules, they were presented to our committee.

Like the attorney general had a series of suggestions which came in rather late that we haven't reached yet. Are we bound to consider them?

CHAIRMAN SOULES: Yes.

HONORABLE C. A. GUITTARD: All right. And there are various other questions before the court -- before the committee that I've got a list of here. It's all unfinished business that we might consider. And what I'd like this committee to do is to tell us whether we ought to just stop or whether we should go ahead and consider these things.

For instance, Rule 40(a)(2), there's a problem with Rule 40(a)(2). As we now have

it, it says that the notice of appeal has to specify the court to which the appeal is taken. Now, in Houston, those courts down there don't pay any attention to those designations of the courts. They take them in rotation, and so I guess it really doesn't make any difference, except that it might mislead some people who think that they could designate the court down there in Houston. They might not know what the court practice is. And they might even -- if the court disregards their choice, they might raise some sort of a mandamus or something about it and cause a little trouble. They won't ever get it changed. But perhaps this provision that it designate the appellate court really doesn't serve any purpose; that there are other places where it could go to, more than one court where the appellant can designate the one but he doesn't have to put it in a notice of appeal. So perhaps that part of the Rule 40(a)(2) should just be deleted.

There are other questions before us. I believe we took care of the involuntary dismissal rule yesterday.

We have a problem about Rule 61, which talks about disposition of appellate records. That is not adequate. And we should either repeal that or prepare a rule in light of the state statute that has to do with disposition of the records.

CHAIRMAN SOULES: Judge, let me interrupt you here. Since we don't have those materials distributed, what I'd like for you to do is consider the necessity of each of those in your subcommittee and then just make a report to us, if you will.

HONORABLE C. A. GUITTARD: All right. What I was attempting to do is simply saying whether we should go any further with those. If you think we ought to, we'll just go.

CHAIRMAN SOULES: I think you should. I think if someone has done some thinking about ways that these rules should be improved, we ought to get all that thinking understood and deal with it. If we're going to make a comprehensive revision of the TRAP rules, then we ought to get as many issues resolved as we possibly can, including all of

them that have been raised until the time that we send our final report.

HONORABLE C. A. GUITTARD: That's what we wanted to know. For instance, Pam Baron has come up with some suggestions that we think ought to be considered.

Pam, do you want to speak on that?

MS. BARON: Well, I sent a letter to Bill a little while ago. It just had some pickies going through the rules.

HONORABLE C. A. GUITTARD: Yeah.

MS. BARON: And if the subcommittee would go through them and consider them, that would be fine. I don't want to take the time now to --

HONORABLE C. A. GUITTARD: If we're at liberty to do that, we will.

CHAIRMAN SOULES: That's what we'd like for you to do.

MS. BARON: Okay. The other --

PROFESSOR DORSANEO: Now, we're going to have one more meeting before January, and we have at least five things that we've

mentioned that need to be taken care of. Several of them are difficult. And my plan, unless I'm instructed otherwise, would be to consider all of these matters, but to bring this appellate process to a close from a recommendation standpoint, because we've been doing this for four years and we'll never ever end. This will just go on in perpetuity.

HONORABLE C. A. GUITTARD: At least we ought to get something to the Supreme Court they can start working with.

CHAIRMAN SOULES: Yes.

HONORABLE C. A. GUITTARD: And we'll try to get that done by January.

Now, there's one other thing --

MS. BARON: Can I say one more thing? On the attorney general's time I solicited those from an administrative appellate practitioner, since we don't have a representative in this group, and there are some peculiarities in that area relating to administrative law records. There's also a new procedure by statute from the Motor Vehicle Commission. You can take an appeal, skip the district court level, and begin your

proceeding in the court of appeals. There's no time for filing the record; there's no time for filing the brief. It's unclear how you get everything where it's supposed to be and when the brief and time begins, and that's something they've just sort of had to work out by agreement of the parties.

There's no way to serve. When you begin your appeal in the trial court, you serve your petition like you would any other petition that would begin the suit. There's no way in the court of appeals to do that. And they tried to draft some things that would resolve these problems and some problems with the administrative records, which can be two boxes or 60 boxes, and sometimes there are small problems in the boxes that the parties are willing to fix but the court reporter cannot sign off on because the court reporter doesn't have a clue what's in the boxes.

So they've tried to develop some concepts, and they've actually given you specific language to consider that would fix the problems they're encountering pretty much on a daily basis.

HONORABLE C. A. GUITTARD: Very good. We'll consider that.

There's only one other thing that I would like to say and then I'm through, and that is, there are various textual matters that Lee Parsley has been working on that perhaps are not of sufficient significance to present to this committee; some of them may be. But by and large, the matters are of conforming one rule after we make a change in one rule.

Like in the electronic recording proposal, that requires changes of all the rules that refer to court reporters to put court recorders in there, other conforming amendments which I don't think this committee needs to worry about, but we will work with the Supreme Court and with its staff to make sure that those things are all polished up.

CHAIRMAN SOULES: Okay. Great. I want to thank you for all the work that you and your committee have done, Bill and Judge Guittard. It's an enormous undertaking and it's very well done. We'll hear from you on the still pending issues, then, in our January meeting and that should

button this up.

PROFESSOR DORSANEO: Also we're assuming that we're going to get help on the electronic recording drafts from Judge Brister and that he might even be able to meet with us about that.

Do we need help from any other source?

CHAIRMAN SOULES: Well, I don't know whether you're intending to include the 296/297 work.

HONORABLE C. A. GUITTARD: Yes. That's what we --

CHAIRMAN SOULES: But if you are, you would need to work with Paul Sweeney and her committee on that.

And the other other area is, oh, Tony Sadberry and his committee on the execution and enforcement of judgment rules, if you're intending to bring those forward. It may not be necessary to do that in order to complete your TRAP work, but if it is, then we would need to get their input on those subjects.

PROFESSOR DORSANEO: The trick is, one, of all of these will be dealing with Appellate Rule 52. There are two ways to go.

One way would involve essentially the revision of Rules 300 through 330 of the rules of civil procedure, because once you start working on preservation, you immediately go back to the rules that should be talking about preservation and you conclude that they're not very satisfactory.

Another way would be a cheaper and less complete revision of Appellate Rule 52 to make it as improved as it can be made without repairing the entire structure.

And if we do -- we've drafted it the long way, and there is, no doubt, a committee that is responsible for those rules here. Should we work with them, or draft it the short way, or draft it two ways or what?

CHAIRMAN SOULES: Well, let me --

HONORABLE C. A. GUITTARD: I think our draft is in the cumulative report now.

CHAIRMAN SOULES: Exactly. Of course, we have to have harmony so that the rules of civil procedure are going to work with the rules of appellate procedure, but we

do want to prioritize getting the TRAP rules finished.

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: And if we can't get the rules of civil procedure harmonized at the same time, we can do that later as we hear Paula's report and Tony's report later on.

HONORABLE C. A. GUITTARD: The only problem about that is how we -- what we do with those rules of civil procedure affects what we do with Rule 52.

CHAIRMAN SOULES: Go ahead and do Rule 52. And when that passes this committee, then we're going to have to conform the rules of civil procedure to fit Rule 52.

HONORABLE C. A. GUITTARD: But one way to do 52 is to say that the rule has to -- that the error has to be preserved, the objection has to be preserved as provided in the Rules of Civil Procedure, and then eliminate most of it from Rule 52. Or we could put it both in 52 and in the rules of civil procedure, which is probably the

preferable way.

CHAIRMAN SOULES: That's what I heard yesterday.

HONORABLE C. A. GUITTARD: Yeah.

CHAIRMAN SOULES: And that was what seemed to be the consensus of the committee, to put it in both places.

HONORABLE C. A. GUITTARD: I don't know about that. Well, okay.

CHAIRMAN SOULES: Okay. Anything else on appellate? Paula Sweeney.

MS. SWEENEY: Actually it's a little bit different than appellate; it's more of a general question. Are we shooting at any target date?

CHAIRMAN SOULES: Yes.

MS. SWEENEY: And what would that be?

CHAIRMAN SOULES: When we can get done.

MS. SWEENEY: Okay.

CHAIRMAN SOULES: The sooner the better. And we've only touched the appellate part of these three volumes of

materials that we've still got to deal with, plus we've only got the charge rules finished from your committee, so we're still a long way away from done.

I suspect we're going to meet every other month all year in 1995. We may pick up momentum at some point when we really start coming to a close; often that happens. But right now I can't say that, and I think we need to be prepared to meet every other month in 1995.

MS. SWEENEY: Are you thinking towards piecemeal submitting things to the Court? Do we want to try to -- I mean, I'm hearing from this discussion right now that we might do the TRAP rules separate.

CHAIRMAN SOULES: Right.

MS. SWEENEY: But is everything else going to try and stay in a unit or --

CHAIRMAN SOULES: No. If we can get the -- for example, if we can complete your section, we'll send that to the Court. And when we get discovery finished, we can send that to the court, unless we decide that it's important to wait until we also have

sanctions finished before we send sanctions and discovery to the Court. That may be our decision.

MS. SWEENEY: Right.

CHAIRMAN SOULES: The things that are related, so interrelated that they need to go together, we'll send together. And I think that probably soon after the TRAP rules go, we need to get the rest of your report and Tony Sadberry's report, because they do relate to matters that we talked about yesterday there in the TRAP rules. So as the package goes up, it gives the Court comfort that we've fixed problems in the civil procedure rules.

And we've got loose ends, but we want to give the Court -- instead of giving the Court a mass of information that's going to take a long time, it's going to take a long time anyway, so if we can give the Court completed packages, as it were, so that they can begin their process, obviously we're going to get to the end of the rule book a lot quicker that way. And that's my understanding of what the Court wants.

MS. SWEENEY: So that the Court might enact some sections and get them in the book and then some other sections might come, so we're not trying to get everything to come together at some harmonic convergence?

CHAIRMAN SOULES: I hear that two ways. I think maybe the TRAP rules separately, but I know the Court wants to start acting on them. Whether they're going to have a group of rules that come into effect on January 1 of '96 and another bunch of rules that come into effect on April 1 of '96 and another bunch of rules, and we start the hue and cry that we hear from the bar --

MS. SWEENEY: I can hear the howling now.

CHAIRMAN SOULES: -- that "Everytime I look up, here comes another slug of rules," you know, they may not -- they may want to get the TRAP rules done at one time and then all the rules of civil procedure actually effective at one time, but that, of course, is completely up to the Court. Once we send them our work product, they deal with that as they choose.

Judge Clinton.

HONORABLE SAM HOUSTON CLINTON: I don't want to give you a headache, but I remind you that the State Bar Committee on Administration Rules of Evidence has finished their report and it's on the way. It's already received probably by the respective high court.

CHAIRMAN SOULES: That has been received by our committee and sent to the rules of civil evidence subcommittee of this advisory committee, so....

HONORABLE C. A. GUITTARD: And I want to emphasize too that it's not just to the Supreme Court that we're giving them to; we give it to the court of criminal appeals, and they need to -- they'll want to look at them too, because we want their approval insofar as they apply to criminal cases.

CHAIRMAN SOULES: Right. We'll have to hear back from both the court of criminal appeals and --

HONORABLE SAM HOUSTON CLINTON: What are you talking about, the rules of evidence?

HONORABLE C. A. GUITTARD: No, the rules of -- the appellate rules.

HONORABLE SAM HOUSTON CLINTON: Oh, sure.

HONORABLE C. A. GUITTARD: Sure. So it's just not the Supreme Court; it's the court of criminal appeals as well.

CHAIRMAN SOULES: Any other questions or comments on the rules of appellate procedure?

Okay. David Beck, let's get your report. You've been prepared a couple of times and haven't had a chance to get on the record. We'll find this report or these -- David has given us a written report. We also have the materials that will be in Volume I from November 19th and 20th of '93 and the first rules in the supplements.

MS. SWEENEY: Is this the only written report, or is there something else we should dig out (indicating)?

MR. BECK: That and Volume I.

CHAIRMAN SOULES: Volume I plus the supplement plus this memorandum report.

I have a sign-up sheet. If anyone has

failed to sign it, please do so now before we recess today.

MR. BECK: Let's start first with Rule 18a, which is the rule that deals with the recusal or disqualification of judges.

CHAIRMAN SOULES: Do we have an inquiry on that you can refer us to in the materials?

MR. BECK: Yes. Let me refer you to Page 113(a) in Volume I. Basically the problem is that Rule 18a says that if you're going to file a motion to recuse or disqualify a judge, you must file it 10 days before trial. The problem is that in some instances you don't learn of the reason or the basis for recusal until during trial or perhaps even a few days before trial. There's case law to the effect that the wording of the rule is mandatory, and so arguably, if you find out the basis for the recusal three days before trial, you're really precluded from the very wording of the rule from raising the point.

There is a case which I've cited in here, Keene Corporation vs. Rogers, which judicially

engrafted a good cause exception to that. In fact, one of the judges involved in that case out of Texarkana is the one that's raised the inquiry here.

And the suggestion made is that we amend the rule to make clear that if you learn for the first time of a basis for recusal or disqualification within the 10-day period or even during trial, that you be allowed to file your motion.

Now, the problem with that is that somebody may try to abuse the rule and thereby avoid a trial setting. But on balance, our subcommittee believes that the point that Judge Bleil made is a good one; that if a party in good faith learns that there is a situation in which a judge ought not to be sitting, that that party ought to have the right to take advantage of Rule 18a notwithstanding the fact that they may not learn of the problem until two days into the trial or two days before the trial. So our subcommittee would recommend that the rule be amended to allow for the filing of such a motion.

Now, Luke, we can do it a couple of ways. We can change the wording in the rule to specifically say that, or we can allow a good-cause exception in here if you first learn of the problem within the 10-day period or during trial.

So we really just want to kind of get a sense of the committee, the full committee, of which way you would like to go on this and then we can act accordingly.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: The -- almost the main purpose for the 10-day rule I've seen is the main -- is the recusal that comes when you make a ruling somebody doesn't like in a pretrial conference or voir dire and they file a motion for recusal.

The advantage of the 10-day rule is, you know, if it's allowed, then you -- remember, I can't refuse or deny a motion for recusal. I can only grant it or refer. That means if I'm in trial, they don't like my ruling, they file a motion, and they're allowed to do it within 10 days, we stop the trial, get a

visiting judge to come hear it. And I understand the problem, but if you break and allow something within 10 days, you're going to have to have language that says it may not be based on any ruling made by the judge, because otherwise, that's the way we avoid a very big problem. And if you open up the possibility within 10 days, you're going to have lots of trials stopping while you go get a visiting judge, have a hearing on the recusal, et cetera.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: Well, in the first place, David, I mean, can't you just say it like you said without using good cause? Just say the ground for recusal became known only, you know, within the 10-day period of time or during trial and could not have, by the use of reasonable diligence, been known otherwise; instead of using the good cause.

MR. BECK: Sure.

MR. SUSMAN: So it's clear that it's the limited circumstances where you could not have known the ground until that time.

MR. BECK: Yeah. And I think

that's the sense of our subcommittee, Steve.

MS. BARON: I think there's some language like that --

CHAIRMAN SOULES: Paula Sweeney, you had your hand up.

MS. BARON: I'm sorry. (Continuing) -- in the appellate rules that talks about you have a 30-day cutoff but you can do it later under certain circumstances. You might want to look at that.

CHAIRMAN SOULES: Paula, did you have something?

MS. SWEENEY: Similar to what Steve is saying, the concern the judge has is of being sandbagged by something people already knew but they waited to see if everything was going to go how they wanted, which, if we're not careful about drafting the rule, we could permit; whereas, what the committee is addressing is a newly discovered problem. So I think it needs to be phrased in terms of newly discovered. That way they couldn't wait to see if you, you know, overruled an objection and then raised it.

CHAIRMAN SOULES: Rusty

McMains.

MR. McMAINS: Yeah. But the language of "unless the ground didn't arise" doesn't answer Judge Brister's problem, because the ground they're concerned about being alleged is that he made this ruling, which is obviously biased.

HONORABLE SCOTT BRISTER: Yeah. I'm biased because I've overruled all their objections.

MR. McMAINS: Right, I've overruled all their motions. And that's what is going on now in Houston.

CHAIRMAN SOULES: I think the rule ought to provide that it cannot be a ground for recusal, what a judge orders. That's not the purpose. The judge is up there to call fouls and fairs and balls and strikes. That's his job. It's something extraneous to him doing his job on the bench that Rule 18a is all about anyway. And even though you get 10 bad rulings, I mean, that's what we have the appellate courts for. It's not supposed to even encompass getting rid of a judge because of what he's doing when he's

got his robe on and on the bench.

Now, when he goes -- as some of us have had happened -- he crosses the river and starts talking to his friends about the case and how he feels about it and how he feels about a particular party and is overheard, then that's clearly a problem, even if it happens during trial.

MR. BECK: The case that engrafted the good cause exception involved a situation where during trial the defendant learned that the plaintiffs had hired the trial judge's son-in-law in the law firm, and that's what spawned the motion.

HONORABLE SCOTT BRISTER: That's a problem.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Well, it seems to me it's a distinction between the grounds and the evidence, though. I mean, if the grounds are that you're related to somebody in the case, bad rulings might be evidence that you're reacting or you're basing your decisions on that relationship, but that

wouldn't be the grounds. I don't know whether elsewhere in the rules it makes that clear, but it isn't a question of whether it happens during the trial or earlier on or in an earlier pretrial ruling. As you say, the ruling itself isn't and shouldn't be grounds for recusal. No ruling should be grounds for recusal; it's just evidence perhaps.

CHAIRMAN SOULES: I don't even think it's evidence. It's nothing.

MR. YELENOSKY: Well, maybe not. But in any event, it should never be grounds. And is that not clear elsewhere in the rules?

CHAIRMAN SOULES: Chuck Herring.

MR. HERRING: I have a question for David. We have three grounds, as I recall, set out by the Texas Constitution for constitutional disqualification including the consequence under the --

THE REPORTER: Could you speak up, please, Mr. Herring?

MR. HERRING: Yeah. We have three grounds set out in the Texas

Constitution for disqualification on constitutional grounds. And the Supreme Court has held that if you have a constitutional disqualification, the judgment is null and void. It is a jurisdictional disqualification. How does that fit with the 10-day limit in 18a?

MR. BECK: I'm not sure how it fits. I mean, obviously, if you've got some constitutional argument you can make, I mean, you're in pretty good shape. And I'm not sure you can actually waive that. I think that the complaints that we're getting about this rule really deal with the situations such as a trial judge being given a very substantial campaign contribution by either the plaintiff or the defendant and the other party says, "Look, this judge cannot handle my case fairly," or at least that's the perception. Well, they find out about it, let's say, four days before trial because the contribution wasn't made but 10 days before trial. Well, how do you deal with that? Shouldn't a party have an opportunity to at least raise the point?

MR. HERRING: Well, my only point is that it seems to me you have to be careful if you're going to have a 10-day limit or a good cause exception, however you're going to draft it, to make clear that those kinds of challenges, the constitutionally disqualifying interest or the consanguinity of the relationship issue, that those can be raised at any time, because they have to be, because there's a lack of jurisdiction.

JUSTICE CORNELIUS: Luke.

CHAIRMAN SOULES: Judge Cornelius.

JUSTICE CORNELIUS: The problem here is not constitutional disqualification, but the need for recusal for something that gives rise to an appearance of impropriety or partiality or something. We had two cases in our court that involved a situation like this. Steve's suggestion about tying it to newly discovered grounds, I think, will take care of Judge Brister's concern.

MR. HERRING: Well, but 18a speaks to disqualification --

JUSTICE CORNELIUS: Well, it

couldn't be newly discovered if he was complaining of some ruling that you had made.

HONORABLE SCOTT BRISTER: For instance, trying a disbarment case, and I ruled they hadn't requested a jury, so while we're starting the evidence, they write out a motion for disqualification and hand it to me that I'm showing bias because I wouldn't let them have a jury, which they didn't request 30 days before the trial date.

Now, if you wipe out the 10 -- if I just throw it away because it was within 10 days of trial, it's an improper motion, I don't have to do anything on it. If there's exceptions, you've got to make clear that such a motion based on the judge's -- any judge's ruling is an improper motion, not that it can be done this -- it's just an improper motion. It doesn't even have to be considered, because if I have to consider it, I can't deny it. I have to stop and refer it to a visiting judge. I can't deny that motion if it's improper.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: Can't we deal with

that by providing that when motions made like that during trial or committed prior to trial, that they will not stop the underlying proceeding; that in other words, some procedure -- you have a procedural point which is well taken, I mean, because there will be people that just make that motion to get the trial stopped and allege that it's newly discovered. They just learned that the judge's son is working for the law firm, when in fact he's been working for the law firm, you know, for two years. But they'll -- I mean, couldn't we solve that simply by setting up a procedure where that kind of motion made in that kind of --

MR. BECK: Yeah. Steve, the rule currently provides that you can't just file a motion and allege. It has to be verified and you've got to specifically set forth the grounds, so I mean, there's a verification aspect to this. And if someone is going to misstate the evidence, you know -- I mean, there are a lot of traditional problems that are raised.

But I like the idea of putting in there

the condition that not only must you have discovered it within the period but by the exercise of reasonable diligence you could not have discovered it otherwise, because you don't want a situation where somebody knew six months before trial and then waited until the last minute and inserted it.

I think the question that Judge Brister raised is whether or not we ought to expressly put a sentence in the rule which says that no trial -- or no ruling of the court made during trial can serve as the basis for a motion.

CHAIRMAN SOULES: Ever. Not just during the trial.

MR. BECK: Pardon me?

CHAIRMAN SOULES: No ruling of a judge ever can be grounds or evidence. I mean, it may have occurred in the pretrial process. That's his job, to make rulings. And the rulings should not be evidence of bias or prejudice.

MR. BECK: Well, Luke, let me just differ with you in one respect, and this gets to the point that was raised a moment

ago. The rulings of the court may be evidence of the very points you're trying to make. In other words, the ruling in and of itself cannot serve as the basis for the motion, but it may well be evidence supporting the claim that you're making under the motion.

CHAIRMAN SOULES: I don't think it should be permitted as evidence. There may be some disagreement about that.

MR. BECK: What is the sense of the committee?

CHAIRMAN SOULES: Should the rulings of the judge be evidence, evidentiary, on a Rule 18a recusal motion?

MS. SWEENEY: Yes.

HONORABLE SCOTT BRISTER: I'm sorry?

CHAIRMAN SOULES: I just --

MR. BECK: Well, the question, Judge, is whether or not the rulings of the court should be permitted to be used not as a basis for the motion, but as evidence of the basis of the motion.

MS. SWEENEY: Absolutely. What else could you use?

MS. DUNCAN: From the appellate perspective, it's the harm analysis.

CHAIRMAN SOULES: I'm sorry?

MS. DUNCAN: It's almost the harm analysis. Not only is there this bias against me and my client, but it is harming me in the process of this proceeding.

HONORABLE SCOTT BRISTER: Again, the problem is -- the problem -- I don't really care whether, you know, I can be recused. I don't mind getting out of work, you know, because they don't like my rulings. The problem is starting a trial and having to stop with people -- you know, as long as you can do that -- the nice thing about an absolutely 10 day is you just can't do that. You just can't even file it. It's a nice bright line rule.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Well, I'm glad there's some support on that, because I do think that it may be evidence in some instances, and I wouldn't like a rule that said you could never raise the ruling of the

court, particularly if there's an egregious ruling of the court that would be -- in some instance, it might be considered evidence of bias, and I wouldn't want to proscribe that.

But what you could do, if it's in the middle of -- you can make it clear that it's evidentiary and it's not grounds. If they come and you make a ruling and they say "I want to recuse you because you made this ruling," that's an improper motion, because there are no grounds stated. Why is it -- what is motivating the bias that you allege is evidenced by this ruling? There has to be something newly discovered about the judge's relationship or a campaign contribution or something that fits logically what the grounds would be as opposed to evidence. So if you make that distinction, will that take care of your concerns?

CHAIRMAN SOULES: Chuck Herring, and then I'll get to Sarah.

MR. HERRING: Well, I think you have to have it at least as evidentiary grounds. You have to be able to -- unless you're going to abolish some of the

traditional grounds for recusal. We have a ground that a judge shall recuse himself under 18(b)(2) when his impartiality might reasonably be questioned, or he has a personal bias or prejudice concerning the subject matter or the party. Now, how in the world do you show that, or why would you logically exclude a ruling that has specifically established that? I think it has to at least be evidentiary, unless you're going to abolish those grounds, which I don't think should be done.

CHAIRMAN SOULES: Well, in response, my concept is that anything the judge does with his robe on behind the bench is his job and that this rule has to be proven altogether by something else. That's the answer.

MR. HERRING: Well, what do you do in a case that someone has where the judge says, "I really don't like these DTPA cases." I mean, we've all probably heard judges say that. "This is just a bad law. This is a bad kind of provision and we shouldn't have these cases." Now, is that bias concerning the

subject matter of the litigation traditionally under Rule 18(b)(2)?

CHAIRMAN SOULES: It's unfair to answer a question with a question. But is that a ruling?

HONORABLE SCOTT BRISTER: Or I didn't know your clients were homosexuals. I'm changing my ruling because your clients are homosexual.

MR. HERRING: Just add it as a tagline to the reason for your ruling, sure.

HONORABLE SCOTT BRISTER: That's going to be a problem if you say that, but that's no -- that's fine. We'll just save that and just appeal.

HONORABLE C. A. GUITTARD: Or after the first witness testified, "I don't want to hear any more of this case."

CHAIRMAN SOULES: I imagine that happens a lot. Maybe they just don't articulate it. Sarah Duncan.

MS. DUNCAN: I remember -- I don't know if this is the law or not, but I remember that Judge Stovall as administrative judge used to have a rule that if the motion

to recuse was on its face insufficient to justify recusal, no referral was required. Is that no longer the administrative rule in Houston?

PROFESSOR DORSANEO: Cases have passed that by and felt they can't do it.

MS. DUNCAN: It won't work. Okay.

MR. GOLD: How can that be? I mean, it begs the question.

CHAIRMAN SOULES: Judge Peeples, excuse me.

HONORABLE DAVID PEEPLES: I don't know. I think that rulings and so forth and statements by the judge ought to be admissible as evidence. The important thing, 95 percent of my concern as the judge, is when do I have to interrupt what I'm doing, stop it, and refer it to the administrative judge for a decision? I know that that's the most -- by far the most important concern.

CHAIRMAN SOULES: There is a provision in the rule that's here for that, to try to serve that purpose, and it says, "Except for good cause stated in the order in

which further action is taken, the judge shall make no further orders and shall take no further action in the case after filing of the motion and prior to a hearing on the motion." That's in there for the judge to say, "I'm in trial and I'm going forward. I'm going to go ahead and refer this, but I'm not going to stop the trial," because --

HONORABLE SCOTT BRISTER: After I get mandamused?

CHAIRMAN SOULES: Maybe. But that's why this is here.

HONORABLE SCOTT BRISTER: It will certainly be filed. A mandamus will certainly be filed, and some courts of appeals will stay it.

CHAIRMAN SOULES: That's why this is here. I mean, it may not work.

HONORABLE SCOTT BRISTER: Where with the 10-day rule nobody is going to stay it. Nobody is going to.

MR. MARKS: Luke, let me make a suggestion.

CHAIRMAN SOULES: Yeah. John Marks, and then, David, I'll get back to you.

MR. MARKS: I just wanted to say that it seems to me if there is a legitimate basis that you've just discovered for disqualifying a judge that's trying a case and you have a client who is going to be substantially impaired by this, we've got to have some basis for looking into that.

And maybe you don't like the idea of having the case interrupted so that it can be reviewed, but by the same token, there are substantial rights being affected by what that judge may be doing. I think it's almost imperative that we have something like that.

MS. DUNCAN: I think it's an open-courts violation not to let them file the motion.

HONORABLE SCOTT BRISTER: But can't you raise the son-in-law problem after trial? I mean, that was Pennzoil vs. Texaco, wasn't it? I mean, that was all raised on motions for new trial. We found out about the -- I mean, those are -- do we have to -- this is a question of do we have to interrupt the trial. And if you find out about the son-in-law during the trial, file a motion for

new trial.

MR. BECK: Judge, I think that if you know about it 10 days before the trial starts and you don't raise it, I think you arguably have waived it.

Luke, let me make a suggestion to try to -- because we have a lot of other rules we've got to get through. I think we've got a pretty good sense of the group here, and let me try to draft a specific amendment that tries to take in the judge's concern and see if I can somehow come up with a balance that satisfies his concern while at the same time allows the orders to be used as evidence.

CHAIRMAN SOULES: Okay.

MR. BECK: Is that okay?

CHAIRMAN SOULES: Sure. And maybe Steve's idea that if it's filed within 10 days of trial, it doesn't -- the judge doesn't have to stop while it's being dealt with.

MR. BECK: Right. Okay. The next --

CHAIRMAN SOULES: And I think that takes care of the mandamus issue, because

there's no rule that says you can't -- this rule says you have to stop. If it weren't for this rule, you don't have to stop. So if we say -- if you use Steve's idea that you don't have to stop, you can go forward while they decide these issues, and if it turns out you're recused, then you've got to dismiss the jury, but you didn't have to do it while it was a live issue, so maybe that works.

HONORABLE C. A. GUITTARD: Or you might decide in that party's favor and he won't want to pursue it any further.

HONORABLE SCOTT BRISTER: Sure.

HONORABLE C. A. GUITTARD: On the other hand, the judge that has a vested interest may not decide in his favor, so that's a problem.

CHAIRMAN SOULES: Okay. What's next?

MR. BECK: All right. Next is Rule 20, and in Volume I it's 602, Page 602. This is something that frankly is not in our report because we really needed the guidance from some of our judges here. We had a couple of judges raise the question about court

minutes.

The second sentence of Rule 20 --

CHAIRMAN SOULES: This is actually on Page 115. That's an old number, so it's Page 115 in Volume I, I guess.

MR. BECK: But anyway, the second sentence of Rule 20 says that "Each special judge shall sign the minutes of such proceedings as were had before him."

Apparently the problem is with visiting judges coming in and trying a lawsuit and then going back to their respective venues but they never signed these minutes. And the question is whether or not the presiding judge can sign the minutes or not.

And another related question is whether we just ought to do away with that second sentence in Rule 20. I mean, is it an anachronism? And I don't know. Perhaps some of the judges can give us some assistance on whether that's a problem, and if so, whether or not we just ought to do away with the second sentence.

PROFESSOR DORSANEO: I don't think anybody signs any minutes.

HONORABLE C. A. GUITTARD: I don't remember ever signing any minutes.

MR. BECK: Do we need Rule 20 at all?

MS. WOLBRUECK: I don't think there's -- I don't think any judges do this any more.

HONORABLE DAVID PEEPLES: I sign them every year, but I never knew what I was signing.

MR. McMAINS: But you didn't swear to it.

HONORABLE C. A. GUITTARD: It seems to me that the clerk's duty to sign the minutes ought to take care of the judge. He's going to rely on the clerk anyway. Why should the judge sign the minutes?

CHAIRMAN SOULES: Do we need 20? That's the question.

I'm sorry, Bonnie, you had your hand up and I didn't see you.

MS. WOLBRUECK: Many years ago I know that judges used to sign the minutes, but common practice has become to where they no longer do this, and I would recommend that

this rule be repealed.

PROFESSOR DORSANEO: I think that was the recommendation of the task force on recodification as well.

CHAIRMAN SOULES: Any objection to that? Okay.

MR. BECK: We have no objection.

CHAIRMAN SOULES: Okay. Then let's repeal it.

MR. BECK: All right. The next rule is Rule 21 and 21a. And I guess I was a little bit surprised with apparently what is going on in the practice.

CHAIRMAN SOULES: This is 117 apparently?

MR. BECK: I've got 121, Luke. But there are several problems with respect to these rules that have been raised. Apparently there are lawyers out there, notwithstanding what Rule 8 says, that are serving papers on parties even though they are represented by attorneys in the case.

Now, Rule 8 specifically says that all communications with respect to the suit shall

be with the party's attorney in charge. But yet when you look at some of our other rules, deposition rules and so on, it says either a party or a party's attorney. And apparently some lawyers out there are trying to take advantage of that and are serving parties directly and not serving their counsel, apparently because it gives them some type of a perceived advantage.

Our proposal is that we clarify Rules 18a(b), 21, 21a, 89, 200, 201, 208, and 306a to conform with Rule 8 to require service of all communications on the party's attorney of record when a party is represented by counsel.

And somebody, Mr. Chairman, is also going to have to look at our justice court rules and ancillary proceedings rules to make certain that those same changes are made.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Well, since Judge McCown isn't here, I'll make the argument that we shouldn't have to repeat in every reference and every rule something that

may be able to be taken care of by a predicate rules that just covers it for all the rules and says that "Whenever there is service on a party and a party is represented by counsel, that means service on counsel." And then you don't have to repeat it every time, or some language to that effect.

MR. BECK: Well, what you could do is refer them back to Rule 8, consistent with Rule 8.

MR. YELENOSKY: Right, consistent with Rule 8, rather than just repeating the verbage everywhere it appears. Do that, and I don't -- and I think Judge McCown would say, and I would agree with him, that you don't need to say "refer back" either. That's implicit. You have in the beginning a rule that says "When somebody is represented by an attorney, any reference to 'party' means the attorney in charge," and that should take care of it.

CHAIRMAN SOULES: Rusty McMains, go ahead.

MR. McMAINS: The only rule that I see here that I have any concern about

is 306(a), because that's the extension of jurisdiction rule. And basically it says that if a party or his attorney has notice of the judgment within a certain period of time, then you don't get -- if you change that in some way to say that it's the attorney alone that needs to have notice of the judgment, then the tremendous extensions that are possible under that rule are afforded even though the party may know full well that's going on, which is totally inconsistent with the function of the rule of extensions.

MR. YELENOSKY: Well, then Rule 306(a) would be the exception to the overall rule that says to cite Rule 8.

MR. McMAINS: Now, I'm not suggesting that it say that you give notice to the party on the other hand. I'm not saying that when you serve things you ought to be able to -- you ought to be serving attorneys if the attorneys are representing them. But the clerks are actually supposed to be giving notice to parties and/or attorneys, and if they do either one, that's quite sufficient. Now, that's the only rule that I'm not sure

that the same policy would apply to.

CHAIRMAN SOULES: Alex, you had your hand up, and then I'll get Judge Guittard.

PROFESSOR ALBRIGHT: We talked about this in the committee to revise all the rules, and I think maybe we should get the sense of the committee that this is a good idea and then refer it to that committee which will be researching all the rules for these types of things anyway.

MR. BECK: We can make suggestions as to how mechanically we can do it if the notion of the full committee is that we do it.

CHAIRMAN SOULES: Is anyone -- I mean, the substance of the recommendation is that if a party has an attorney of record, all notices and service go to the attorney of record and not to the party.

MR. BECK: Correct.

CHAIRMAN SOULES: Except maybe under 306(a).

MR. BECK: Correct.

CHAIRMAN SOULES: Is there

anyone opposed to that?

There's no opposition to that, David, so --

HONORABLE C. A. GUITTARD: Let me just --

CHAIRMAN SOULES: Oh, Judge Guittard.

HONORABLE C. A. GUITTARD: This has been taken care of in the appellate rules, No. 4, Rule 4(f). It says -- and I think the appellate rules and the trial rules should be consistent, if not identical -- that service on a party represented by counsel shall be made on that party's attorney in charge as defined in paragraph (b). No service may be made on the party represented.

CHAIRMAN SOULES: So we can model it after that.

HONORABLE C. A. GUITTARD: If you want to change it, we want to know what you do so we might want to conform.

MR. BECK: Okay. Thank you, Judge.

Okay. The next problem with these two rules has to do with difficulty in determining

who all the counsel are in a case. And there have been several suggestions made to the effect that in the certificate of service, as opposed to simply stating a boilerplate phrase such as "All counsel of record have been served," that you actually specifically set forth who the counsel are along their addresses.

And apparently the problem that frequently arises particularly on the defense side is that you don't know who the other counsel in the case are so you've got to make multiple calls to the clerk to find out if anybody has answered yet, and if so, who they are, et cetera, et cetera. And this is frequently done in the federal court, and I don't know that it's a problem in federal practice, but anyway, that's a problem.

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: I understand the concept behind that, but that is going to be in practice a big make-work item to -- you know, now a certificate of service is three lines, and in a multiparty case it could

easily become eight pages, five pages, three pages, of just listing all the people and their lawyers. And in jurisdictions where you have to do this, it's an enormous pain.

You know, I mean, there's a remedy if you don't get served with something for those cases where that happens, but I just -- to make all litigants, every time they send anything out, make a list like this of lawyers, addresses, et cetera, and, God forbid, one of the addresses on the form is wrong, you know, it just seems to me that the remedy exists if someone doesn't get served for them to show, "Hey, I didn't get served," rather than having to go through this.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: David, can't you solve this problem by putting the burden on the lawyer who is doing the serving to keep a list? He's got a duty to keep in his files a list of everyone whom he has served that particular document, and he must turn that list over to any other counsel of record upon request. Doesn't that solve the problem? Then you don't have to type that damn long

list.

MR. BECK: It's just one time.

MR. SUSMAN: What?

MR. BECK: It's just one time. Just call up and get it. If the burden is on the counsel to provide the list, you call up, say "Give us the list," they give you the list, and that's the end of it. Right?

MR. SUSMAN: Yeah. I'm just saying you don't have to type it in --

MR. BECK: I understand.

MR. SUSMAN: -- everytime you file a pleading, a long list. But it changes, though. That list is changing all the time, as you know, because lawyers are changing in big cases, and I mean, it's a major problem for secretaries and legal assitants to keep it current. So I would just put the burden on the lawyer to keep the list so that he's got to fess up as to who was served.

MR. GOLD: Luke.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: I just wanted to address one point in relation to this, and I wanted to find out if there had been any

complaint about on the certificate of service people saying that they were issuing service by multiple means without identifying the specific means that they were using.

I see that all the time now. I get a boilerplate that says "Service has been made by certified mail, telefax and/or hand delivery," and there's no way of determining how it was specifically done. I mean, am I the only one that sees that, or is that --

CHAIRMAN SOULES: No. That's what has developed now. But what's being discussed here in my judgment does not put into effect the presumption of service.

PROFESSOR DORSANEO: Right.

CHAIRMAN SOULES: At least our certificate says it was placed in an official depository of the United States Mail, properly addressed, postage prepaid. It tracks the rule that says if you do all that, you've got presumption of service. It's only about that long (indicating), and it's on the word processor. Every typist in the office has got it. And then it says who. And the attorneys in charge are identifiable pretty early in a

case, and after that, they have to -- the only change that can come about is by notification to everybody that there's been a change. Only the attorney in charge has to be served.

And then you get into big cases, as in the nuclear power plant litigation, where we had the court from time to time enter orders saying here is the service list. And the court ordered a modified statement of service that we've served this, and you had to say how, because if it's certified mail, it extends by three days; if it's hand delivery, it doesn't. So how can you -- when you get something like Paul is talking about, there's nothing on the certificate of service that tells Paul or anyone else what his response time is.

You can have a modified certificate of service, as we did, in which they -- all it had to say was you served everybody on the service list dated whatever date it was. And then about every 90 days that service list was changed by Judge Hardy because somebody wanted a change. So there are ways to work it out in

the big cases where you have a lot of people.

But I think if you're going to invoke the presumption of service and put the burden of proof on the party who didn't get service to prove they didn't get service, well, there ought to be some pretty strict compliance with what the rules require. It is a little bit of a problem, except it's all on a word processor.

Sarah Duncan.

MS. DUNCAN: I would just say we've had that in the appellate rules, I guess, since we've had the appellate rules, and I personally find it extremely helpful.

CHAIRMAN SOULES: Helpful to do what?

MS. DUNCAN: To have the parties listed on the certificate of service.

MS. SWEENEY: You don't send out three things a day in the court of appeals.

MS. DUNCAN: That's true.

MS. SWEENEY: You know, I mean, there's a huge difference.

MS. DUNCAN: Well, we did it in

Heep for five years just because, I mean, that's how we kept each other updated in the constant changes in the service list, but I mean, it's not always like that.

MR. BECK: Let us come back to the committee with some specific wording. Okay? I think we've got a pretty good idea of what the sense of the committee is on that point.

CHAIRMAN SOULES: I can't tell whether people want to do the shorthand and leave it at that or really show compliance with the rule that raises the presumption, whatever it is, 21 or 21a, and maybe -- I think we probably ought to get that resolved. I don't feel like I have an understanding of what the consensus is.

How many feel that there should be just a shorthand statement and that constitutes service and raises the presumption of whatever it is, 21a, or whatever it is? How many? Four.

How many think otherwise? Seven.

Okay. Well, it's by a close vote, but a majority of those voting feel like there ought

to be complete compliance with the certificate of service.

PROFESSOR DORSANEO: Well, I think if you're going to get the presumption --

CHAIRMAN SOULES: -- you're going to get the presumption.

PROFESSON DORSANEO: But maybe you don't want that presumption.

CHAIRMAN SOULES: Well --

MR. GOLD: Can I get a clarification on that? Because there may be two parts. I really believe that it's very important to know how the document was served, for instance. I think that you could shorthand that everybody got the document via certified mail or if somebody got it different, then you specify that person, but to me, I think you could shorthand easily if everybody in the case through lead counsel got this document via certified mail. That would be easy. But if somebody got it by hand delivery, you specifically say who that is and how they got it differently.

But I guess what I'm saying is there's a

hybrid here, I believe, between the exactitude required by the rule to raise the presumption and the shorthand, and I just want to clarify that, because I think the vote might be a little bit confused if anyone else agrees with that proposition.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I agree with what Paul just said. I voted the way I did because I think the type of service should be specified, but I don't necessarily think that the names of the people should be listed unless it's necessary to do that to show how they were served, so my vote would have changed if we had done that.

MS. SWEENEY: Which would have made it a tie.

CHAIRMAN SOULES: Steve Yelenosky, and then back to David.

MR. YELENOSKY: Well, if you have that many, like in Paula's case, could you file something, as Luke said he did in a large case, saying "Here is the list of people I'm going to serve," and then each time you

refer back to the people listed on the previously filed parties list have been served via certified nail, and that's all you do until that list changed and then you file another list.

MS. SWEENEY: I would rather do that than do it over and over and over and over and over, although even that to me seems much --

MR. YELENOSKY: It's better than what you're getting on the last vote.

MS. SWEENEY: Well, we moved to a tie with Richard here, so --

MR. ORSINGER: No. It's six to five.

MS. SWEENEY: -- it's another step.

MR. YELENOSKY: Okay.

MS. SWEENEY: Oh, six to five. Oh, okay.

MR. GOLD: You're learning to be accommodating.

MR. BECK: But Luke, I think the reason multiple methods of service are referred to is because nowadays you not only

get a fax service, but you also get it followed up by a certified mail service. And I think to require somebody on the service list to go through each party and say "This person by fax, this person by certified mail, this person by courier," I think gets to be a real procedural nightmare.

PROFESSOR ALBRIGHT: Except, David, that is what is very important for determining how much time you have to respond, so if the person -- you know, if I just get something put on my desk that arrived two days ago and I was gone and it doesn't say the method of service, I can't -- I may not be able to figure out whether -- you know, presumably it would be apparent if I got it by fax, but if it was hand-delivered or mailed, it may not be apparent from what I have on my desk. So I think that's why what Paul is saying and what Richard is saying about the method of service is important.

If you're faxing it and intending someone to respond accordingly, or if it's just that, you know, you need to know whether you're supposed to respond to the fax or to the

certified mail if you're getting it both ways.

CHAIRMAN SOULES: Okay. David, we can come back to this after you get a chance to work on it some more.

MR. BECK: Okay. The next one has to do with service by courier after 5:00 p.m. You'll recall that the last time we made an amendment to Rule 21a, we made certain that if there was a fax service after 5:00 p.m. that it rolled over to the next day. Well, apparently what is happening at least in our part of Texas is that there are a lot of people who are turning off their fax machines at 5:00 p.m., so what the opposition is doing is slipping under the door courier-type deliveries and then getting a certificate from the courier that service took place at a certain time.

And under our rule, at least the way our subcommittee read it, arguably service is on that day. So the recommendation is that we make very clear in the rule that not only is service by fax after 5:00 p.m. rolled over to the next day, but service by courier after 5:00 p.m. also has that same effect.

CHAIRMAN SOULES: Shouldn't you just eliminate the after 5:00 on fax service and put in after 5:00 on hand delivery? Because fax is the only one that gets four days. Fax gets the three-day extension of certified mail already, and I've always thought that was not needed, but Tom Davis --

MR. BECK: At least in Houston sometimes it takes three or four days to get a letter to somebody mailing it across the street.

CHAIRMAN SOULES: I understand. But faxes -- giving the fax delivery an extra day because it comes after 5:00 o'clock adds to something that's already in the rules. Fax delivery is just like certified mail. You get three days extra if somebody faxes you their pleading. What difference does it make if it's after 5:00 o'clock? You have 33 days instead of 30.

MR. SUSMAN: I want to make a point. Seriously, David, don't you think we are sending the wrong message to our associates by suggesting to them that the

workday ends at 5:00? Seriously, can't we make it 7:00? I think this is the wrong message. I don't think we should be sending it.

MR. BECK: Well, let's forbid the turning off of fax machines.

MR. GOLD: Or we could have the designated associate rule.

CHAIRMAN SOULES: I've gotten a lot of complaints over the years about this courier delivery sliding it under the door after 5:00 or after whatever time, after the office is locked up, particularly if it's on Friday. By the time you get back, three days have expired before you even know it's in your office. And I don't see a problem with --

MR. BECK: Well, see, the concern at least those of us in Houston have is, under our local rules, a response to a motion has to be filed at least two days prior to the hearing. So what you do is you get something slipped under the door on Friday and you walk in on Monday morning, if you're not working on Saturday, and you find out that the hearing on Monday you suddenly have a 25-page

response that you've got to appear before a judge and respond to. I mean, it's unfortunate that we need to, you know, change our rules to deal with those abuses, but it's going on.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I agree that an after 5:00 delivery ought to be considered delivery on the next business day, but I would like to speak in favor of eliminating the three days for fax delivery. When fax machines were new and people were uncertain about the technology, maybe there was some logic in pretending that fax delivery was as slow as mail delivery. But in reality fax delivery is instantaneous, and I don't see any reason why we should pretend like it takes three days for somebody to get a fax when they have received it within a few seconds of when it passes through the fax machine. And so I think we ought to throw out the three-day rule on faxes and treat it just as if it was a hand delivery.

CHAIRMAN SOULES: Bill

Dorsaneo.

PROFESSOR DORSANEO: You can tell me that I'm out of order and I'll be pleased to be quiet, but I don't like the three-day rule altogether, because I'm not sure how to do the calculations on the time. And when I have to do a double calculation, I'm doubly unsure about how to do that double calculation.

And I didn't mention it when we did our appellate report, but we have language added on adding a three-day rule in the appellate rules, and I frankly am not sure even what it's about. Whenever a party has the right or is required to do some action within a prescribed period after the service of the notice, three days shall be added to the prescribed period. Well, does that mean that if something is scheduled to happen in the court on a particular day, that three more days are added to that? No, it doesn't mean that. I don't like double calculation, and if we have a problem that the periods are too short, we ought to make them longer. So that's just...

CHAIRMAN SOULES: Harris Miers.

MS. MIERS: Well, I was just going to say I think that if we eliminate the three-day rule, we will practice law by fax, and we do now more than ought to be the case.

And generally speaking now many, many lawyers will serve everything by fax because they use it tactically, and that's absurd. That's not the purpose of a fax. There's generally no reason for sending a big thick document by fax, and there's no urgency to the issue other than just to create a false sense of necessity to respond, so -- I mean, I think the three-day rule has a good effect and I wouldn't want to eliminate it.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Well, it has an effect because the three-day rule applies to mail and so you're equalizing it somewhat. But as Bill Dorsaneo suggests, if you eliminate the three-day rule for mail as well and make the periods a little longer, that would not tend to encourage the use of fax. That would be equalizing that, as a matter of

fact. If you had a little longer period, you wouldn't have to do the double calculation. I guess I'd have to think it through, but I don't think that that would encourage the use of a fax because there wouldn't be any advantage to it, right? Is that right, Bill?

PROFESSOR DORSANEO: I haven't thought it through. This is a whole new topic we've just raised.

CHAIRMAN SOULES: Alex, and then we'll get to Richard.

PROFESSOR ALBRIGHT: I think another problem with the being able to hand deliver and fax and responding is that it's not when you have 30 days to answer interrogatories, it's the three-day rule for giving notice of hearings, which, under Rule 4, you do count Saturdays and Sundays and holidays for, so you can give a notice on Friday for a Monday hearing.

If we took that out, if we said you can't count weekends for the short notice, the three-day notice of hearing rule, then I think that would solve a lot of your problems, because it's the short notice that you're

having to deal with.

CHAIRMAN SOULES: Well, under Rule 4 you don't count Saturdays, Sundays or legal holidays.

PROFESSOR ALBRIGHT: Right. Except for the three-day notice rule which...

THE REPORTER: Professor Albright, speak up a little, please.

PROFESSOR ALBRIGHT: Oh, sorry.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: I didn't want to detract from the discussion about the telefaxes and the certified mail, but I didn't want to lose the issue here on No. 3, which is merely that service via hand delivery after 5:00 would be treated a certain way, and I think that has some real merit. And I think we should also talk about the three-day rule with regard to certified mail and with regard to fax, but I think the problem that David was bringing up and that the committee is bringing is this issue about how you've got a hearing in Houston and someone hand delivers you a response at 8:00 o'clock at night at some place other than Steve's office, no one is

there, and you don't get it. You don't get. And I think we should address that. I think we should address the issue about it being deemed served the following day if it's hand delivered after 5:00, because I think that was the problem that we need to deal with.

MR. BECK: Yeah. I think we're talking about two different issues here, though. I mean, the first issue is the one that Paul just referred to, I mean, and I think the answer to that ought to be very, very clear. I mean, we ought not somehow reward somebody who uses under-the-door late service.

The second issue, the three-day rule, is a totally different issue. And as I recall the discussion, when we made the three-day extension apply to faxes, it was for the very reason that Harriet mentioned. We did not want to encourage people to serve parties by faxes.

Now, I guess the point that I would make is that there is a very good basis for the three-day extension with respect to mail, because under the rules we're entitled to

certain time periods within which to respond and do other things. And at least our experience in Houston is that it frequently takes several days to get mail, even though it's mailed from somebody in the same city. So I think there's a legitimate basis for the three-day extension with respect to mail.

The question then is whether there's a similar bona fide reason for giving a three-day extension for faxes. To me there may be two justifications for treating faxes the same as mail with respect to the three-day extension. The first is, do we want to encourage the use of service by fax. And I guess I come down on the no side of that. And if you somehow treat fax service differently, I think that you may well encourage service by fax.

The other reason is, you know, one of the things we're trying to do with a lot of these changes is to cut down the cost of litigation. It costs a lot more to serve somebody with a 40-page brief than it does by putting it in the mail or having it delivered by courier. And I think if we encourage the

use of faxes, what we are doing is encouraging that additional costs be incurred, because I know that firms charge -- Anne McNamara can probably testify to that better than anybody else, but you know, some firms charge up to a dollar a page for faxes. So I think we're really encouraging increased costs if we encourage faxes.

CHAIRMAN SOULES: Okay. Let's take the first issue. This is the question of whether hand delivery service after 5:00 o'clock -- you all say can 5:00; if somebody wants to move to change it to a different hour, okay, but 5:00 for now -- after 5:00 should be considered served on the next business day. How many favor that?

Okay. How many are opposed?

Okay. So that's unanimously in favor.

Is 5:00 o'clock the right hour? How many believe 5:00 o'clock is the right hour? Show by hands. Does anybody think any other hour is proper? Okay. 5:00 o'clock. So that's settled.

MS. SWEENEY: You also said "business day." Do you want to focus on that

for a sec?

CHAIRMAN SOULES: That's the next day that's not a Saturday, Sunday or legal holiday.

MS. SWEENEY: Which is not what the --

PROFESSOR ALBRIGHT: Which is not the way it works now.

MS. SWEENEY: I know. I know. I mean, that's a major change we've just made, and that's the reason I say do we want to focus on it. I agree with it, but, you know...

CHAIRMAN SOULES: Yeah. I think everybody has got that. Does anyone disagree? The days that are not counted -- to get to the next day, you have for skip Saturdays, Sundays and legal holidays, and then the next day is the day of service.

Okay. Judge Guittard.

HONORABLE C. A. GUITTARD: I have a concern about the uniformity between the appellate rules and the trial rules and how we go about doing that uniformly. I have two suggestions. One is that that Dave's

committee, as they go through the trial rules, if they will look at the appellate rules and see what they say. Now, I'm not saying they ought to be bound by that, but if they come up with a different rule, then we ought to be advised and we ought to have an opportunity to conform the appellate rules.

MR. BECK: I think that's a good point, Judge.

CHAIRMAN SOULES: Okay. Richard Orsinger.

MR. ORSINGER: Can I revisit the question of whether we should encourage or discourage faxes?

CHAIRMAN SOULES: Okay. What do you propose?

MR. ORSINGER: Okay. I'm in favor of faxes, and I think that the world is going to move forward in terms of electronic or digital communications as opposed to paper communications. And just as a matter of policy, I don't agree that we should discourage them, but I'm not sure I understand what the problem is with the faxes as they're now being misused. And can I get either

Harriet or David to say what it is about the way people are using faxes now that is a problem.

MS. McNAMARA: Maybe I can jump in here on this because David mentioned it.

CHAIRMAN SOULES: Okay. Anne McNamara.

MS. McNAMARA: Faxes are -- I agree with Richard that faxes are inexpensive technology. From a corporate perspective, we use them all the time for communication. The problem gets to how large law firms treat them as a profit center, and I'm not sure we ought to let that aspect of it drive how the rules are done, because clients and their law firms ought to get their act together on that, and clients who are paying too much for that ought to object.

Couriers are very expensive. That's labor intensive compared to technology.

CHAIRMAN SOULES: Harriet.

MS. MIERS: Well, actually I think the ABA Ethical Rules now will not allow you to have a profit center on faxes. And to my knowledge, firms that have become aware of

that have revised their practices so that they are not making money on faxes and are ethically bound not to make money on faxes, as we understand the rule.

But the concern I have is that the speed with which people feel documents have to be delivered, and maybe everybody will go to this technology, but faxes aren't now technically, I don't think, from a technology standpoint -- I mean, we have a room that has 20 faxes that can be blocked up and we're getting busy signals because people aren't able to wait. Why practice law under the philosophy that says that you want -- whether it's urgent or not, it's a routine set of interrogatories and you're going to send it by fax. Why do we encourage that?

CHAIRMAN SOULES: Sarah.

MS. DUNCAN: I would just like to point out, having been in a very large firm and then having my fax machine 10 feet away and having a plain-paper fax as opposed to a thermal-paper fax, it's two different worlds. In a 300-person office, it can take four hours or five hours to get a fax, and then you get

40 pages of interrogatories or a brief on thermal paper. From my perspective as a solo practitioner, I would rather get a fax. I have a plain-paper fax. It's 10 feet away, and I don't have to go to the post office to pick up a certified, but not everybody has the same technology.

And at Fulbright, for instance, they have many, many, many fax operators, and their full-time job is to receive and send and route and copy faxes, and that is an additional cost. And if we encourage service by fax on a 300-person law firm, we have increased their costs.

CHAIRMAN SOULES: We're going to take about 10 minutes here and then come back.

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

CHAIRMAN SOULES: Okay. Let's go to work. Back to fax. I don't know whether this is helpful to start with, but Alex had pointed out to me that in Rule 4, David, 21 should not be mentioned there. It

should be Rule 21a only, because the only three-day period that's supposed to not be extended by Saturdays, Sundays and legal holidays are the three extra days that you get due to fax filing or certified mail, fax sevice or certified mail service. And that was the intention when this went in, but it's just -- I don't know, 21 should never have been a part of that provision to Rule 4.

MR. BECK: 20 or 21?

CHAIRMAN SOULES: The three-day period in 21 is notice of a hearing, and that was not supposed to -- that was what we thought we were doing in Rule 4, was giving Saturdays and Sundays and legal holidays to extend particularly the three-day notice of a hearing. And the way it got written, which was probably my draftsmanship, it didn't come out that way.

So now we're down to do we want three days extra or not as a result of fax service.

Okay. Richard Orsinger.

MR. ORSINGER: I'd like to pursue this technology part of it for just a minute.

CHAIRMAN SOULES: Does anyone have any objection to deleting Rule 21 out of Rule 4? It shouldn't have been in there in the first place. No objection, so we'll do that.

Okay. Richard, I'm sorry to interrupt you.

MR. ORSINGER: If you're running Windows software now, whether you use Microsoft Word or Word Perfect as a word processor, if you have a fax modem in your machine, which costs around $250, you can actually fax your materials from your computer to your recipient without having to print it out and feed it into a normal fax machine that scans it and then translates it into digital form. And it's just like printing to your Laser Jet. It's just you put another driver on there and you print it to the fax machine instead of printing it to the Laser Jet. And then the software program, if the number is busy that you're sending it to, it will recycle around until the number is free and then it will go ahead and transmit it and then print out or keep a record of the fact that

the fax was transmitted.

On the opposite end somebody -- if they have a conventional fax machine, it may print out normally, or if they have fax board, it will print out into their computer memory or it will print out on their Laser Jet, whatever.

If you're modernized, this is much easier than either the current method of printing, feeding it into the fax machine, or than mailing, and I don't personally think that we should discourage the use of faxes entirely in lieu of mail; and I think that our whole society is going there; and that we're in a transition period now where some offices are using an old technology. And the faxes, particularly if it's a large office with a big volume, it may create an unusual burden from them. But I think even those offices will progress in their fax technology.

And if you have a law firm with 300 lawyers, if each legal assistant or secretary can send that letter by fax by just hitting two keys on their computer, then we're way ahead of where we are today. So my personal

philosophy is that we shouldn't penalize faxes; in fact, we should let people become adjusted to using them in lieu of United States Mail.

CHAIRMAN SOULES: Sarah, and then I'll get to John Marks.

MS. DUNCAN: Well, with all respect, I don't think you understand the problem. For instance, for Fulbright & Jaworski to upgrade their RAM chips in all of their offices, in all of their computers, to even use Windows technology is hundreds and hundreds of thousands of dollars.

And you've got Roy Minton, who doesn't even have a computer in the office since I left. We've got all sorts of technology -- they actually may have one now. I don't mean to say that. It's not -- that's not my point.

My point is we've got all levels of technology throughout the state of Texas, and I don't think we can force the use of one means of service at the expense of all of those lawyers and firms. They need to be able to choose between fax and mail and private

courier, and there needs to be no advantage or disadvantage to using one over the other in my view.

CHAIRMAN SOULES: John Marks.

MR. MARKS: I think Sarah made my point. It seems to me that somebody here has to speak for the lawyers of Pecos, Munday, Aspermont, all the little towns and all ages of lawyers. I mean, there are a lot of old lawyers still who don't have this kind of technology. And I think what Richard is suggesting may be in the future 10 or 15 years from now, but to do it now would be really bad.

CHAIRMAN SOULES: Anyone else?

Okay. Should we have three extra days for fax service? Show by hands, please, those in favor. 10.

Those opposed.

10 to three for, so we keep the three days.

But we should delete the after 5:00 because we've already got the three days.

Any opposition to that?

HONORABLE C. A. GUITTARD:

Well, there's already an after 5:00.

CHAIRMAN SOULES: Right now, even though we get an extra three days for fax, there's also a provision that says if it's received after 5:00 you get another day.

MS. DUNCAN: Because it is not deemed received until the next day, and that's when the three days start running.

CHAIRMAN SOULES: That's right. Why four days for fax when we know we get it faster than mail?

MS. DUNCAN: Because it's --

MR. YELENOSKY: If it's going to be treated like mail, it should be treated like mail and --

CHAIRMAN SOULES: I think it's just an extra day to count that gets confusing and it shouldn't. Steve Yelenosky.

MR. YELENOSKY: Well, I mean, that goes to the reason why I voted for three days for fax, is because I do think it should be treated like mail for the reasons said. But I still get back to the three-day rule, and I still think after thinking about it more that it is a double calculation. And if we

were to get rid of the three-day rule, we could get rid of the three-day rule for both mail and fax. And as Bill Dorsaneo says, if the problem is that things happen too quickly, then we need to lengthen the time period.

CHAIRMAN SOULES: Okay. Well, we have made a decision, and if you want to submit that and provide that to the committee --

MR. YELENOSKY: Well, I mean, obviously that's a big change, to get rid of the three-day rule.

CHAIRMAN SOULES: And we've got to go through a whole expanse of rules because we've got all kinds of periods and change all those times periods to something else, or we can change none, other than deleting the one extra day for after 5:00 on fax.

And that also creates a problem, because if you send something from El Paso to Houston, and El Paso time is 4:30 and Houston is 5:30, there's an extra day that you didn't even think you had. I mean, it creates some silliness.

Any objection to deleting the part about

after 5:00 faxes?

MS. DUNCAN: Can I ask a question?

CHAIRMAN SOULES: Sarah Duncan.

MS. DUNCAN: What have we done with hand deliveries after 5:00?

CHAIRMAN SOULES: After 5:00 hand deliveries go to the next business day or next day that's not a Saturday, Sunday or legal holiday.

CHAIRMAN SOULES: Alex.

PROFESSOR ALBRIGHT: I think that's fine, but I think we also need to have something in the rule that says when service by fax is effective, or that may be in the rules. Is it?

MS. DUNCAN: Deemed the following day.

PROFESSOR ALBRIGHT: I mean, but when is it -- I mean, is it, you know, when I put it in? What if I'm -- I fax a lot of times at 11:00 o'clock at night from my computer, so is it -- you know, if it's 11:00 o'clock at night on Friday night, is it deemed -- I mean --

MR. GOLD: Unconscionable.

PROFESSOR ALBRIGHT: I know now it's the next day or three days. I know that. But if I fax something at 11:00 o'clock at night, should it be that I faxed it that day when I put it into the computer network system, or should it be when they receive it?

CHAIRMAN SOULES: There's still a lot of unreliability in fax transmission. You see it all the time. I think that the service should be complete when it's received.

PROFESSOR ALBRIGHT: Okay. Received in their fax machine at midnight?

CHAIRMAN SOULES: Yes.

PROFESSOR ALBRIGHT: Okay. So if I'm faxing at 11:00 from Austin, Texas, to El Paso, it's what time it appears on their fax machine when it comes out?

CHAIRMAN SOULES: Right. That's what I'm proposing.

MR. YELENOSKY: But that's not consistent with the mail idea, because you put it in the mailbox, it might not get there, but the three-day rule applies from the day you put it in the mailbox. You put it in the fax

machine, if it doesn't get there at all, obviously they can raise the objection that it was never received.

CHAIRMAN SOULES: Okay. We've got two ideas. It's either got to be when you send it or when it's received, and you can get a confirmation on when it's received.

Should it be when it's sent? How many feel that it should be deemed served when it's sent?

MR. ORSINGER: Before we vote on that, can I say something?

CHAIRMAN SOULES: This is very simple. Let's get past it.

MR. ORSINGER: Well, it's the wrong question. I mean, if you don't mind if I would something, I would like to say something.

CHAIRMAN SOULES: Yes, sir.

MR. ORSINGER: Okay. Receipt and transmission is simultaneous with the fax. The question is not whether it's the time you send it or the time you receive it; it has nothing to do with the time of the fax transmission. It has to do with the time zone

you're in on the sending machine and the time zone you're in on the receiving machine. Your fax machine cannot send a fax transmission that isn't being received simultaneous with its being sent. If you read it into memory and it takes three hours for it to get the other machine, then the transmission doesn't occur until three hours after you put it into your machine after. But once transmission starts, it's simultaneous.

PROFESSOR ALBRIGHT: Right.

MR. ORSINGER: And so the question is not to ask do we look at when it was sent versus when it was received in the sense that there's a time difference, because there is no -- it's instantaneous electronic communication. But the clock on the receiving office may have a different time than the clock on the sending office, and that's the question I think you ought to ask.

If you're in Houston and you send it to El Paso, do we use El Paso time because they received it or do we use Houston time because they sent it? That's my point.

HONORABLE C. A. GUITTARD: It

should be the recipient.

CHAIRMAN SOULES: I sent a fax several times last Saturday, and I don't know how in the hell to do it, but it never got received because whatever was happening on the other end wasn't receiving.

MR. ORSINGER: Well, you never sent it then.

CHAIRMAN SOULES: But I did send it.

MR. ORSINGER: Well, not --

CHAIRMAN SOULES: Or did I?

MR. ORSINGER: You didn't.

MR. GOLD: This sounds like if a tree falls and no one hears it.

CHAIRMAN SOULES: Is receipt an easier time to define than sending because of what I just said?

MR. ORSINGER: Yes.

CHAIRMAN SOULES: I don't know.

MR. ORSINGER: Yes, it is, because if for some reason you think you're sending it when you're not, that should not be called sending. You thought you were sending it. You weren't. But clearly if it's not

received, it hasn't been sent.

CHAIRMAN SOULES: So that's why that -- so sent or received. Time of sending, show by hands. This is when service occurs.

Okay. Time of receipt, show by hands.

Everybody is in favor of time of receipt.

PROFESSOR DORSANEO: I'm in favor of none of this, and I don't understand how, if you're sending it -- when I'm sending it, the machine may do whatever it's doing or not doing. But what you're saying is that it's when the machine sends it.

CHAIRMAN SOULES: No. It's when it's received. It's when you receive it.

Judge Peeples.

HONORABLE DAVID PEEPLES: As I understand it, your proposal would have a different after 5:00 o'clock rule for courier and fax?

CHAIRMAN SOULES: No -- yes.

MS. SWEENEY: Why?

HONORABLE DAVID PEEPLES: Because the important thing, it seems to me, is that people ought to be able to go home at 5:00 if they want to, and whatever arrives

afterwards is next day's mail. Now, why should it be different for fax than for courier?

CHAIRMAN SOULES: Okay. Let me see if I can articulate this. When I drop something in the official depository of the United States Mail, it is served. And I get three extra days -- or you get three extra days. When I put it on the fax, if you receive it, that's going to be a lot faster receipt than when I drop it in the mail. You get three extra days. Why would you get four?

HONORABLE DAVID PEEPLES: My question was, is there a different after 5:00 rule for courier than fax, not U.S. Mail.

CHAIRMAN SOULES: Yes.

MS. DUNCAN: Yes.

CHAIRMAN SOULES: Because you get three extra days on fax and you don't get any extra days on courier.

MS. DUNCAN: The difference is --

CHAIRMAN SOULES: We've already voted on this.

MS. DUNCAN: No, wait a minute. If you're saying that we just voted that the time of receipt even after 5:00 is receit on that day --

CHAIRMAN SOULES: Yes.

MS. DUNCAN: -- I don't think that's what was understood by the members of the committee and I rescind my -- I withdraw my vote. Not that it makes any difference, but I withdraw it.

MR. MARKS: I agree with that.

MR. GOLD: Can I throw something in?

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: I don't know if we voted on it, it may have been received and sent, but I just wasn't on the transmission line.

MR. McMAINS: Your machine ain't working, Paul.

MR. GOLD: But what I'm thinking is that with a fax, a fax should be treated the same way as hand delivery. I agree that you should be able to go home at 5:00 o'clock if you haven't gotten anything

and say day is done. The thing about it is I don't think a fax should get three days. I think one day is fine, because if something gets screwed up, you know it with a fax and you can get that resolved in 24 hours. You can get the complete thing. You know what everyone is talking about, and it's really an issue of I just want to go home and I want to shut the fax machine off, or it's halfway through and is this guy sending me a 50-page document or 500 pages? Do I need to sit here and wait? It should just be the next day. But I don't think we need three days with a fax. I think that we'll accomplish what Harriet wants to do by discouraging faxes of documents if it's received the next day.

CHAIRMAN SOULES: Okay. As I understand the record right now, and this is the way David's committee is going to prepare it, we're going to look at it again, the record is that there will be no extra day for after 5:00 on fax. On hand delivery after 5:00, it's the next day that's not a Saturday, Sunday or legal holiday. The three days, there will a three-day extension for fax, just

like mail, and that's on the record, and that's the way we're going to leave it.

MR. MARKS: I misunderstood.

MS. SWEENEY: So did I.

MR. BECK: The only thing I would say that I didn't understand was that the committee had voted to take that extra day away for fax delivery after 5:00. I mean, am I mistaken about that?

MS. SWEENEY: No, you're not.

CHAIRMAN SOULES: Why four days for fax and three days for mail?

MR. BECK: Well, let me try to answer that.

MR. MARKS: The question is whether we voted on it, and I don't think we have.

CHAIRMAN SOULES: Well, I understood that we had.

MR. ORSINGER: I clearly understood it also.

MS. SWEENEY: Okay. Let's vote on whether we voted on it.

CHAIRMAN SOULES: We're just using a lot of time. I'm sorry, I'm trying to

speed things up and I should know better.

Somebody make a motion. Let's just start over again and try to get the record straight.

MR. BECK: I move that we treat hand delivery after 5:00 the same way that the rule currently treats fax delivery after 5:00, which is that it rolls over to the next day.

MS. SWEENEY: Second.

MR. BECK: And I further move that -- well, I'll just stop right there.

HONORABLE C. A. GUITTARD: Mr. Chairman, I agree with that motion. But I also want to point out that the appellate rules say service by telephonic document transfer is complete on receipt, and we don't have any three-day or any other rule there.

PROFESSOR DORSANEO: Yet.

HONORABLE C. A. GUITTARD: What? Yet.

MS. DUNCAN: Wait a minute. I want to make a point about what is the difference.

CHAIRMAN SOULES: Okay. Sarah.

MS. DUNCAN: As a general rule, for a lot of people who do not have airport

mail facilities, you can't get something postmarked after 5:00, and that's the deterrence. Alex and I can fax 24 hours a day, and so can Richard, just by ourselves sitting at our computers. You can get something hand delivered easily, as easily after 5:00 as you can before 5:00. And that to me is why you have to draw a distinction between service by mail being complete upon deposit with the United States Post Office and service by fax or hand delivery after 5:00.

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: I am concerned, and I think Harriet Miers alluded to this. We need to lower the temperature level and attack the idea that every document is an emergency. Now, isn't that happening in the world around us? Everything is an emergency. You've got to fax it. You've got to get it there right now after 5:00 by courier instead of mailing it and going on to something else. I think that's a pernicious mindset that has taken root in the legal culture.

MS. DUNCAN: It creates a lot of stress.

HONORABLE DAVID PEEPLES: And it doesn't affect me that much because I don't have to practice law, but I sure see it.

MS. SWEENEY: Well, Mr. Chairman, I would offer that you can't put it back in the bottle. It's too late. I mean, what you all are saying is we don't want the practice of law to be like everything else in the world, and I don't think we can do that. I think that things have speeded up and, you know, this committee sitting here can't slow them back down. We've got to deal with the fact that things are speeded up. It's not any fun, but it's a reality.

HONORABLE DAVID PEEPLES: Well, if service by courier or fax doesn't -- I mean, if you've still got the three-day rule, you can't gain that much by it. I mean, I understand and I like what Richard says, it's easier to do from a computer and so forth.

MS. SWEENEY: It's cheaper too.

HONORABLE DAVID PEEPLES: But I'd like to put a damper on this hurry-up

attitude that we see every day.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: This is obviously contrary to a lot of the views here, but I actually appreciate receiving something by fax, because if they're doing something in my case to me, I find out about it right away rather than two or three days down the road. I consider it a courtesy that I send something by fax and by mail rather than just sending it by mail, and I routinely do send it by fax and by mail and I do it because I think I'm helping the other side, not hurting them. Now, maybe I'm just weird. I don't know.

CHAIRMAN SOULES: Anne Gardner.

MS. GARDNER: I appreciate it too, but I'm seeing some situations where some attorneys, a few attorneys, are misusing the facility of being able to use fax, and I'm getting faxes like at 5:30 and 6:30 in the evening when I have a hearing scheduled the next morning, telling me something about -- or forwarding the brief, for example, waiting until the last possible moment deliberately to

advise me of information that -- I mean, they're using it as a devious device to either intimidate or just hassle, and I don't think -- that's a misuse that's being allowed and it's being done more and more.

CHAIRMAN SOULES: John Marks.

MR. MARKS: I think the problem is that, as you said, it's not the receipt of it, which everybody appreciates, but it's the response time that you have after you get it that we're all concerned about. And that ties into what Judge Peeples was saying. What is the rush? I mean, why not treat a fax just like you would treat a hand delivery after 5:00 o'clock? I mean, why not do that?

CHAIRMAN SOULES: Well, you don't get three days on a hand delivery. Do you want that?

MR. MARKS: Well, give it the same thing then. Either way.

CHAIRMAN SOULES: Alex, did you have your hand up?

PROFESSOR ALBRIGHT: Well, I was just going to say the same thing that John said. I think Sarah and I use the fax machine

because, without secretaries, it's easier and cheaper to use the other person's fax machine as a printer instead of xeroxing and mailing and addressing an envelope. We're not doing it because we want to give something to somebody at the last minute so they have to address it overnight, we're just using it as a substitute for mail or hand delivery.

And I think by treating fax either as -- I think by treating it as mail you are encouraging people that it's easier to use fax instead of mail. They can still use fax instead of mail. The only time that you -- when you have someone who has to respond to something quickly, then you have to go to the expense of hand delivery; whereas fax and mail both have three days added to it and so you use those two systems interchangeably.

CHAIRMAN SOULES: Anne McNamara.

MS. McNAMARA: Luke, it seems like we're confusing -- I mean, we've got two reasons for the three-day rule that keep getting mushed up.

One is that fax technology is not

reliable and you need the extra time to make sure that you've got Page 27 through 30 and get back to the person who sent it to you and make sure you get them, and that may make sense. I don't know how dependable faxes are.

The other is the slowing down of the process and the dampening of the frenzy. If that's the objective, we ought to put the three days on the courier aspect of it as well. But it seems to me that it's one or the other, and we're going back and forth between the two.

CHAIRMAN SOULES: Sarah.

MS. DUNCAN: It seems to me that we do have two issues, but I would restate them a little bit differently. It was my understanding that several people were saying we want the three-day rule on faxes like we have on mail so that we don't encourage the use of faxes rather than mail.

MR. BECK: Or discourage it.

MS. DUNCAN: Or discourage it; that they are equal means of communication. And that's to some extent a protection of the people who would rather receive a hard copy by

mail rather than thermal paper six or seven hours later.

And then the other issue is, is it deemed received at the time of receipt regardless of when the time of receipt is, or is it like a hand delivery, that if it's received after 5:00, then it's deemed received the next day?

And that to me is the same reasoning that we used for hand delivery, but those are two separate issues, it seems to me. And it's not four days for fax; it's just you've got to break those two issues down to understand why fax is being treated differently.

CHAIRMAN SOULES: Somebody justify why a fax after 5:00 needs to go over to the next day when you already have three added days?

MR. BECK: Luke, let me --

CHAIRMAN SOULES: I can drop -- I can go to the furthest, remotest official depository of the United States Mail at 11:59 tonight and drop a certified mail letter in that mailbox and it has been served, and you get three extra days. Or I can run it through my fax machine at 11:59 and you have been

served, or not, and that's -- and you have an extra three days. Why do we need an additional day for fax because you're going to get the fax a whole lot faster than you're going to get the mail?

MR. BECK: Let me make a stab at it.

CHAIRMAN SOULES: Okay.

MR. BECK: When the rule as it is currently adopted was passed upon by this committee, the philosophy was, as Sarah stated, that we neither encourage nor discourage the use of faxes but make it neutral with respect to giving someone the option of service by mail or by fax. And the concern was that because of after 5:00 fax facilities that are available, that you are not treating the two the same, because very few people get mail delivered at 11:00 o'clock at night. Most mail is usually in the morning, sometimes in early afternoon, during business hours. And so to try to continue that parity, the notion was that if you get something after 5:00 by fax, it rolls over to the next day simply because mail is delivered

usually during business hours, and the notion was to treat the fax the same way.

MR. YELENOSKY: But that isn't the proper way to look at it, because it's the putting the mail in the box that begins the three-day rule, so your three days start running while the mail is sitting there in the deposit box versus the fax which is sitting there in your office, so I mean, Luke is right on that point.

But I mean, I guess another question here is why everybody thinks that the fax machine is making everything frantic if right now we already have the three-day rule apply to fax. Is it that fact that it came over a fax machine that creates high anxiety?

MR. ORSINGER: That's exactly what it is.

MR. YELENOSKY: There it is. It came over the fax. I mean, I remember when fax machines first came in, everybody wanted it. In the Legal Aid office, everybody wanted it so we could hear the thing ring when it came in because, oh, that must be something really important. And now, I mean, it's

routine. So it may be partly a mindset, because the way the rule reads now, you shouldn't have any more anxiety about a fax coming in than hearing that somebody is walking down to the postal box, because they're treated the same way.

CHAIRMAN SOULES: In response to David, if a fax comes in at 11:59, it will be in your office the next morning. If I drop this letter in the remotest official depository of the United States Mail in Bexar County, it's not going to be in your office the next morning.

MR. YELENOSKY: But the deadline is the same.

CHAIRMAN SOULES: Well, actually the fax that he gets the next morning has got four days instead of three, and you've got to learn -- everybody has got to factor that in when they set a hearing. They've got to add a day. It's a new day. It's a new burden on the counting process, which is okay, if that's what the committee wants to continue. But to me it's not worth it.

MR. MARKS: It's not working or

it's not worth it?

CHAIRMAN SOULES: Not worth it.

MR. MARKS: Worth. Okay.

CHAIRMAN SOULES: So what if I want to set a hearing in 33 days or whatever? Let's say it's a summary judgment hearing and I want to set it on 24 days, I don't want to do it by courier delivery, and I send you a fax after 5:00 o'clock. That can't be heard on the 24th day. It has to be heard on the 25th day. Whereas, if I had gone to that remote place in Bexar County and dropped it in the mail, I could have it heard in the 24th day.

Now, why should our associate lawyers be trying to figure out whether they can have the summary judgment heard on the 24th day or the 25th day because they used a fax instead of mailing it? To me it's not worth it.

MR. BECK: Let's vote.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: I was just going to say one thing. It seems like -- and I think that I'm on the same wavelength as David, is that the problem is not generally the fax

transmission, it's not mail, it's not hand delivery; it's that really the issue is two dates. One, the stuff that you get after 5:00 on Friday; and the stuff that you get after 5:00 when you've got a hearing. And I don't know if we can change the rule really to accommodate those two problems, because that's really what it is, is you don't want to get that hand delivery after 5:00 o'clock on Friday when you've left and then it's -- you know, you've got to do -- three days have gone by or two additional days have gone by before you can do anything on it, or the fax delivery. It's all the same.

But to try to get into the metaphysics of transmission and everything to cure that, I don't know if we're going to be able to do it.

But that's the problem that I see, is the hearing date where you get something at the last minute or after the last minute, and Friday. But I don't know if we should change the whole rules for those two circumstances.

CHAIRMAN SOULES: Harriet.

MS. MIERS: I mean, I guess I

just have unreasonable clients, but if I get something on a day, even if it's after 5:00, they like me to be there, have gotten it and gotten it to them, and this not-any-disadvantage-to-doing-things-after-5:00 really encourages people to do things after 5:00.

And there's no reason why they can't wait and fax it in the morning just as well. I mean, why do you fax it at 11:00 o'clock at night when you could fax it at 9:00 the next morning? I mean, it just creates an attitude of hostility that isn't necessary.

CHAIRMAN SOULES: Paula.

MS. SWEENEY: Can I raise something completely different rather than let this --

CHAIRMAN SOULES: No. Let's get through this.

MS. SWEENEY: Well, this is -- all right. It's completely different, but it's on that issue. It's just an aspect that we haven't talked about.

CHAIRMAN SOULES: Okay.

MS. SWEENEY: And I don't know if this is the rule that needs to address it

or not, but it needs addressing.

My partner is in trial. The opposition files a mandamus. They mail him his copy. They're in trial out of town. It gets to our office three days after it was filed, ruled on and denied. Is this the rule that can address whether while in trial service should be made at the courthouse?

MR. BECK: Well, Judge Guittard, maybe you ought to answer that question. You're talking about a mandamus action, so that falls under the appellate rules, doesn't it?

MS. SWEENEY: Or anything.

MR. BECK: Let me say this: Professionally, I mean, you would think that the lawyer would serve the other lawyer by hand since they're in the courtroom trying a lawsuit when the mandamus action is filed. But I don't know what the appellate rules provide.

MS. DUNCAN: We have the same problem. I mean, I always serve a brief by mail because that way I know the day without question and I don't have to rely on hand

delivery and it's more expensive. But I have had a lot of people complain that I will file it with the court in person but serve it by hand.

MS. SWEENEY: By mail.

MR. ORSINGER: By mail.

MS. DUNCAN: By mail. By mail. And it's the same -- we have the same problem in the appellate rules that we have in the trial rules.

MS. SWEENEY: But it's not the same as when you're in trial, and I'm just wondering if the clause could be, while we're working on all this timing, if you all could tinker with adding a clause that says, However, if you're in trial, it is considered terminal chicken to mail it.

MR. BECK: It is bad, very bad.

MS. SWEENEY: Bad, very bad.

CHAIRMAN SOULES: Anyone else? Pam Baron.

MS. BARON: Paula, I think we've to some extent cured the problem at least on mandamus during trial because the proposed mandamus rules now say that if you're

seeking temporary or emergency relief, you have to immediately notify or make a diligent effort to notify of the filing. And maybe we need to clarify that somehow.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: I'm sitting here listening to all of this, and I don't like getting faxes in lieu of getting first class mail, even though it may be easier on Sarah and Alex to deal with me that way, because it is going to be on thermal paper, it's probably going to be incomplete, I'm probably not going to have anyone there to have noticed that, and it may well be balled up on the floor with a lot of other faxes. Okay?

Now, I don't like sending it because I don't know how. I remember -- and you don't either, from what you said. I remember, Rusty, when we were trying to send a fax after 5:00 o'clock, you don't want to get faxes from me after 5:00 o'clock, because you may well not get them and you probably won't get all of them. Something will happen.

And so I continue to think, and I'm sitting -- or I say, Well, I'm going to want to do these forms. I say, Well, it's 21 days, add three days if it's service by mail; add four days if it's service by fax; add no days if by courier. Now, this is way overengineered and designed to fail.

And then we're going to do a certificate of service, which is going to describe all of this or describe none of it. And I just think we need to go back to something more simple.

MS. DUNCAN: Service by mail.

PROFESSOR DORSANEO: I would be pleased to get faxes from Richard if I had the ability to receive them.

HONORABLE C. A. GUITTARD: I move we change it all to service by Pony Express.

MS. SWEENEY: He doesn't know how to ride a horse.

HONORABLE DAVID PEEPLES: Luke, I think we ought to let David's committee draft on this and come back with it. We can't draft it on the floor like this.

MR. BECK: Could we at least

vote on this four-day/three day issue with respect to faxes so we get some sense of the committee on this?

CHAIRMAN SOULES: Okay. Faxes. How many think that we should have four days for faxes after 5:00?

MS. SWEENEY: Is that the same as hand delivery?

CHAIRMAN SOULES: No, it's not the same as hand delivery.

MS. BARON: It's three days.

MR. ORSINGER: No. Four days if it's delivered after 5:00.

MS. SWEENEY: It needs to be the same as --

MS. BARON: Well, it's -- the hours are from 5:00 until midnight.

CHAIRMAN SOULES: David, will you please state the proposition. I can't seem to get it stated.

MR. BECK: Okay. We've already decided, as I understand it, that in the event there is service by courier after 5:00, it rolls over to the next day.

The issue that we need some guidance on

is the issue that Luke raised earlier, which is if you receive a fax after 5:00, does it roll over to the next day just as hand service rolls over to the next day, which would have the effect of allowing you four extra days if you get service after 5:00 by fax as opposed to the three extra days you get if you're served by certified mail?

We just need some guidance as to whether or not this committee thinks that whenever you are served by fax after 5:00, you're entitled to four days, in effect, as opposed to the three that certified mail does.

CHAIRMAN SOULES: Okay. Those in favor show by hands.

PROFESSOR DORSANEO: Which one?

CHAIRMAN SOULES: Eleven. That's for four days.

That's -- all those opposed. Apparently not very many. Okay. Three -- four.

Okay. Go ahead, Rusty.

MR. McMAINS: Well, I wanted to ask one other question about the drafting on this rule. When you have -- if you actually

receive it both ways, that is, if it's certified mail and fax, which -- I mean, because I can understand that what will happen is people will say, on the respondent side, "Well, I got it by fax so I get four days." So you get the extra day, correct?

MR. BECK: Yeah. And the response would be "You have been served by mail as a courtesy." We gave you -- you were served by fax.

MR. McMAINS: I understood that, but I'm just saying that -- I mean, are you saying that the method -- if we're going to say the method of delivery described in the certificate, if you want to do it that way, so that if you certify that you faxed it, then you're stuck with the four days; if you certify you mailed it, you've got three days.

MR. ORSINGER: What if you certify both?

MR. McMAINS: So then the question is what happens if you certify both. And you should have to decide whether you want the most or the least.

MR. ORSINGER: You should be

punished for using the fax, Rusty.

MR. McMAINS: Good idea.

MR. ORSINGER: Make it six days.

MR. McMAINS: It should be five days if you do both.

CHAIRMAN SOULES: On that vote, we will not serve by fax, I can assure you. Our firm is going to quit serving by fax, because I can put it in certified mail and I can buy myself a day of your time. And that's -- we want to discourage people from using fax. Okay. I guess that's the point.

MR. BECK: Can we move to the next issue?

CHAIRMAN SOULES: Justice Hecht. Excuse me, David.

JUSTICE HECHT: Can I just get an idea? The federal rules don't allow service by fax, and I think we changed ours the last time to do that. Just for a straw vote, it's not pending, I mean, what is the sentiment? How many people would prefer that you not serve anything by fax?

MS. SWEENEY: Are you

distinguishing "serve" from "provide to"?

JUSTICE HECHT: Yes. Service under the rules.

All right. And --

MR. ORSINGER: What was that count?

CHAIRMAN SOULES: Seven.

MR. GOLD: Are we talking about service of formal documents like discovery responses as opposed to --

CHAIRMAN SOULES: We're talking about, quote, service, as used in the rules.

MR. GOLD: All right. Yeah, I agree with that.

CHAIRMAN SOULES: And how many support --

MR. YELENOSKY: Yeah. Take the other side, because I may want to --

JUSTICE HECHT: Okay. How many want service by fax? How many think that's a good idea?

MR. ORSINGER: My goodness.

CHAIRMAN SOULES: Four. The vote, then, would be to eliminate service by fax.

MS. DUNCAN: That's service.

MR. ORSINGER: You guys are going to get a lot of letters on this if you eliminate service by fax, because there are a lot of people out there that will raise a lot of fuss.

PROFESSOR DORSANEO: A lot of "faxists."

MS. DUNCAN: Yeah, "faxists."

CHAIRMAN SOULES: Okay. Does that give you what you need, David?

MR. BECK: Yes.

CHAIRMAN SOULES: Okay. What's next?

MR. BECK: And we'll come back to the full committee.

Another issue under these rules has to do with whether state agencies are relieved from the obligation of mailing by certified or registered mail. In other words, there's a question of whether state agencies and governmental should be treated differently. And our committee does not recommend any change. Our view is that they ought to be treated the same as any other litigants.

CHAIRMAN SOULES: Any opposition to that? Okay. That's unanimously approved.

MR. BECK: Okay. There's a concern raised about Rule 23, which has to do with suits to be numbered consecutively and random assignment by district clerks. Our committee has not made any recommendation with respect to that, because frankly it was really an anticipated problem that was raised and we have received no further information about it. But apparently the concern had to do with somehow direct clerks not having the option to randomly assign lawsuits to judges and they were concerned about somehow manipulation taking place by lawyers filing suits to get cases in specific courts. But we have not received any information beyond that which we received from John Appleman, district clerk of Jefferson County, so our committee makes no recommendation at this time in the absence of further information that there's a problem.

If there's somebody among the district clerks here that thinks there's a problem raised, we'll be glad to try to address it.

HONORABLE C. A. GUITTARD: Isn't that a local problem that can be handled by local rules? It is in Dallas.

MS. WOLBRUECK: We handled it by local rule. We just follow a regular consecutive number, but then there's a randomly selected -- random designation by local rule. I mean, I think we follow this rule along with our local rule.

CHAIRMAN SOULES: I think what Mr. Appleman is saying is that lawyers come in and file multiple petitions, and I guess they nonsuit the courts they don't want to be in.

MR. BECK: That's one of the problems. But I know that happened a few years ago in Houston, and our judges dealt with that by local rule.

HONORABLE C. A. GUITTARD: I had that problem when I was on the trial bench, and I was the one that they left after nonsuiting the others, and I transferred the case back to the one where it was first filed, so that can be handled.

CHAIRMAN SOULES: Okay. So does the committee feel there's no necessity

for statewide rule on this subject?

MR. BECK: Not in the absence of some additional information being called to our attention.

CHAIRMAN SOULES: Okay.

MR. BECK: Okay. The next rule is Rule 40a, which is our permissive joinder rule. And for those of you who are using Volume I, it's Page 169, at least in the Volume I that I have.

This is a suggestion by Jack Ratliff at The University of Texas Law School. His comment is that the language in Rule 40a which says, and I quote, "arising out of the same transaction, occurrence or series of transactions or occurrences," end of quote, is "too confusing."

Our subcommittee disagrees with that. This language has been in the federal rules since 1937. It's intended to provide some flexibility. There's a whole body of case law which has arisen under Texas law with respect to that, and so our committee recommends that no change be made in that rule with respect to the language and the problem there.

CHAIRMAN SOULES: Alex.

PROFESSOR ALBRIGHT: I think that the problem is more complex than Jack Ratliff's letter or memo says it is. I know that -- I don't know where Bill Dorsaneo went, but I know that --

PROFESSOR DORSANEO: He's here.

PROFESSOR ALBRIGHT: There you are. I didn't see you.

I know in Bill's case books he brings up problems with it, and I think there is -- I think when I teach joinder, it's more complex than it needs to be, is my take on it, and you know, you have Rule 40 or -- what is it?

PROFESSOR DORSANEO: The problem is really in 51a.

PROFESSOR ALBRIGHT: Yeah. 51 is really the problem. And I would recommend that somebody might want to study all three of these joinder rules.

PROFESSOR DORSANEO: I can bring back my rejected proposal of many years ago on how to coordinate -- which will be back when the task force recommendation on parties and claims rules comes up again.

The complexity involves not this precise word group.

MR. BECK: Well, I mean, the only thing we were operating on is the problem that was called to our attention, and we didn't see that there was any change necessitated by that language. We thought that there was a body of Texas law and federal case authority which at least gave some flesh to those bones, and we didn't see any basis for changing that wording.

Now, if there are some other problems out there that we're not aware of, then somebody needs to bring it to our subcommittee's attention.

PROFESSOR ALBRIGHT: I nominate Bill Dorsaneo.

MR. BECK: Bill, if you will write me some kind of a letter or note, or fax it to me, if you will --

PROFESSOR DORSANEO: I'll fax you some of the pages.

MR. BECK: -- we'll be glad to take a look at it.

CHAIRMAN SOULES: Okay. So in

response, though, to Jack Ratliff's inquiry, your recommendation is no change?

MR. BECK: Correct.

CHAIRMAN SOULES: Any further discussion on that? There being no further discussion, does anyone think it should be changed? Okay. Then the committee is unanimous for no change.

MR. BECK: All right. The next rule that has been drawn to our attention with respect to problems is Rule 47, which has to do with claims for relief. In Volume I that would be Page 173.

One of the problems that has been raised really has to do with courts of limited jurisdiction. The concern is that whenever a suit is filed, for example, in a court of limited jurisdiction with no precise amount in controversy set forth, that there is a risk that there will be a subsequent pleading which somehow raises the amount in controversy beyond the court's jurisdictional limit and somehow that will circumvent the court's limited jurisdiction.

Our committee looked at it and looked at

the case law, and the case law seems to be pretty clear, which is that a court of limited jurisdiction cannot enter a judgment in excess of its jurisdictional amount unless the increase in damages beyond the amount is due solely to the passage of time. And so subsequently, if you don't have that subsequent passage of time addition, a court cannot make a judgment beyond its jurisdictional amount, so we didn't really see that there was any change needed.

The specific recommendation made was that the Rule 47 be changed to require people to specifically allege the amount in controversy. Well, you know, we got away from that during the last tort reform discussions we had, and the bottom line of all this is that our case law seems to deal adequately with this problem and we don't recommend any change be brought about. If there's a concern about what the amount in controversy is, you always have a special exception that you can raise it on.

CHAIRMAN SOULES: Discussion? No discussion.

PROFESSOR DORSANEO: Well, but there is some case law that suggests that there is a broader opportunity to increase the amount. That case law, you know, which can be located in the book probably, is, as you say it is, with respect to Supreme Court opinions.

But on this issue, could the committee take a look at the word "other" that is in 47(c)? I've thought for years that that was just an extra word that is misleading that deals with essentially the same problem.

MR. BECK: Bill, wouldn't that apply to some type of injunctive relief, for example, or declaratory-type relief? I mean, isn't that what that's referring to?

PROFESSOR DORSANEO: I just think that you don't need to say "other" there.

MR. BECK: Okay. We'll take a look at it.

MR. McMAINS: Are you concerned that the "other" might suggest additional? Is that it?

PROFESSOR DORSANEO: Well, I'm

concerned that the word "other" suggests that there's something going on when it would just be better just to leave it out. When you make a claim for liquidated damages, you do it like this; when you make a demand for judgment for all the relief which you deem yourself entitled. "Other" suggests...

MR. McMAINS: But I think that it was intended to suggest relief other than for liquidated damages.

PROFESSOR DORSANEO: Yes.

MR. McMAINS: And that's why if you say "all relief," then it doesn't necessarily specify something different than liquidated damages. I think that's why the word is there. It probably means -- well, it may well be intended to mean other types of relief.

PROFESSOR DORSANEO: Well, but the demand for -- you know, you can think of (b) being the demand for judgment or you can think of (b) being the nature of how you make claims for unliquidated damages. And the demand for judgment, the ad damnum clause, is commonly where you do that, but it commonly

appears in both places. It probably should appear in the body of the petition, and then if you want to call it the prayer, the prayer. Why don't we just say in the prayer, you know, the demand for judgment is for all the relief that you want, instead of all of the other relief.

MR. YELENOSKY: Right. It implies that (a) and (b) have taken care of it.

CHAIRMAN SOULES: Steve Yelenosky, what?

MR. YELENOSKY: I mean, it implies that (a) and (b) have taken care of the demand for unliquidated damages, and you do need to say it in (c) because -- yeah. I mean, it is all the relief that has to be demanded for. Is that what you meant?

PROFESSOR DORSANEO: Yes. When I think of the demand for judgment, I'm thinking of the end of it, okay, the ad damnum clause. I think that's what it was meant to mean. And when we stuck (b) in between there, okay, it got stuck in as a separate and independent kind of -- in

unliquidated damages cases you don't give them a number. And then (b) got changed to "other" or had that "other" put in there. I just think it would have been better to do it otherwise.

CHAIRMAN SOULES: Well, does (c) pick up, for example, attorneys' fees, prejudgment interest?

PROFESSOR DORSANEO: Yeah. It would do it anyway if you took out "other." It would pick up the demand for unliquidated damages, attorneys' fees, prejudgment interest, injunctive relief, reformation -- of course, under our case law you would have to specify that and not just say "all other relief."

CHAIRMAN SOULES: Okay. What's next, David?

MR. BECK: All right. Next is Rule 63, and that's in Volume I on Page 622.

CHAIRMAN SOULES: For the record, I guess we need to say that the committee recommends no change -- the subcommittee recommends, and the committee as a whole agrees, no change in response to this

request from Broadus Spivey.

MR. BECK: Correct. Rule 47.

CHAIRMAN SOULES: Okay.

MR. BECK: The next one is Rule 63, Volume I, Page 622. The problem has to do with parties amending pleadings only a short time prior to trial so that significant new allegations, new theories, are introduced on the eve of trial. What that spawns frequently are special exceptions and in many, many instances motions for continuance. And the recommendation of our committee, which I think is consistent with the recommendation that the committee on rules has recently made, is that we amend Rule 63 to permit a party to amend their pleadings not less than 30 days prior to trial as opposed to the current seven days, except for good cause and with leave of court.

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: Could I suggest that this rule needs to dovetail with whatever ends up coming out of the discovery rules, because if you can designate your experts

30 days before, you know, then that's going to lead to potential amendments, so they need to be tied together so that you have time to finish your discovery before you finalize your pleadings.

CHAIRMAN SOULES: Sarah Duncan.

MS. DUNCAN: I would also suggest that amendments after trial are also causing -- Greenberg-type (sic) cases are also causing a lot of problems, and maybe we want to look at that.

PROFESSOR DORSANEO: This needs to be thought about in the context of summary judgment too, if you're going to do that.

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: May I say that I'm a little surprised that David's proposal hasn't drawn any fire. Is everybody for that? I like it, but it sure surprises me that nobody is --

MS. SWEENEY: I'm not. That's why I think it should be tied to the discovery rules. Right now we can't do it this way if you're designating experts.

CHAIRMAN SOULES: I particularly oppose the "good cause." I think the Greenhalgh test is what ought to be the rule.

MR. ORSINGER: Would you articulate that?

CHAIRMAN SOULES: Greenhalgh.

MR. ORSINGER: Oh, Greenhalgh. The amending of the pleadings after the jury verdict came in?

CHAIRMAN SOULES: Or actually that's within -- it's after seven days. Greenhalgh applies to any time after seven days prior to trial. And it doesn't state a new cause of action, it doesn't cause surprise, it just fixes a technical flaw on the pleadings that clearly everybody knows or can anticipate you're going to trial on that and now you can't get your evidence in, you can't get your charge, because you've got a technical problem with your pleadings.

I don't know what "good cause" is going to turn out to be as it becomes interpreted by the courts, and we've got Greenhalgh on one side and we've got another case that's after

Greenhalgh that pretty well -- I just can't think of the name of it.

PROFESSOR ALBRIGHT: The Sand & Gravel case.

CHAIRMAN SOULES: What is it?

PROFESSOR ALBRIGHT: Sand & Gravel.

CHAIRMAN SOULES: Right.

PROFESSOR DORSANEO: Chapin. That's Chapin. That one is covered in mine. That's a verified denial.

CHAIRMAN SOULES: Sarah.

MS. DUNCAN: But there is a problem when two million is plead, the jury returns with 20, and the pleadings are amended to permit a judgment of 20 when that defendant may very well have settled that case a long time ago and many millions ago if they had thought there was going to be a judgment of 20 million in that case. And that was the problem with the National Convenience Store case in San Antonio, and I think we need to address that.

MR. GOLD: Boy, I've never seen any defendant that would have done that.

MR. McMAINS: The pleadings wouldn't have helped at all, would they, Paul?

MR. GOLD: If that were the case, I would be upping my demands all the time.

CHAIRMAN SOULES: We can't get a record with comments coming from all directions.

Judge Peeples.

HONORABLE DAVID PEEPLES: I would like us to consider David's proposal. I think pleadings have become next to meaningless because they can be submitted so freely right up to trial and after trial, which I think is a bad direction for us to have taken. But this is a controversial enough matter that we ought to talk about it. I'm glad you put on it on the table, and we need to take a look at it.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: I think this issue altogether can come up with discovery, because one thing I've always thought is you can amend your pleadings so

easily but you cannot amend your discovery. And I think they do need to be taken together and I think they present a lot of the same issues.

CHAIRMAN SOULES: So what's the sense, that we should table this until we deal with discovery probably?

MR. GOLD: I move we table.

CHAIRMAN SOULES: Any objection to that? Okay. It will be tabled until we have discovery done or at least we'll do it along with discovery.

Next?

MR. BECK: All right. Our next rule is Rule 64, which has to do with supplements to the rules. And specifically I want to refer you to page -- I believe it's Page 185 in Volume I.

And the problem raised is, let me see if I can succinctly state it, that in these environmental times in which we live and in which we're trying to preserve trees, we want to discourage a lot of paperwork, and if someone has a 50-page pleading and they're amending their pleading to change one

paragraph, that under the current rule they are required to file the whole additional 50 pages again and serve everybody with the 50 pages.

And the question raised is if the amendment really adds one paragraph, why can't you simply amend your pleadings and refer only to the one paragraph? That's the question which has been raised.

MR. MARKS: Because you can't hide the amendment that way.

MR. BECK: Pardon me?

CHAIRMAN SOULES: What does your committee recommend?

MR. BECK: Well, I think our view is that anything that will makes it easier to practice law and to save cost we're in favor of. I know when I first started practicing, you could file a supplement to your pleading, add a paragraph, even though it added a new theory or a new allegation, and that was sufficient.

PROFESSOR DORSANEO: Not in our practice, it's never been.

MR. BECK: Pardon me?

PROFESSOR DORSANEO: In our practice it's never been that way.

MR. BECK: We did it that way. I can tell you that.

PROFESSOR DORSANEO: A supplemental petition in our practice is what would be referred to as a reply in federal practice. I've always thought that that was kind of almost too much adherence to history that pleadings will be by petition and answer, so everything a plaintiff files is some kind of a petition even though it's a reply to an answer. I guess I agree with you. Somebody ought to be able to just supplement and then maybe we would change the name of a supplemental petition to what it really is, a reply to an answer. Now, that departs from a whole bunch of history that mostly has been forgotten anyway.

MS. SWEENEY: I move that we do that, that we adopt that provision that you do that, and you all write something that says we can file supplemental petitions.

PROFESSOR DORSANEO: The down side, of course, is that the judge has to be

looking at two pieces of paper in order to figure out what the live pleadings are.

MR. ORSINGER: The judges don't read them anyway, do they? They rely on the lawyers to raise these contentions.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: Just to throw out the other side of this so we can discuss it, is you could theoretically wind up with a file full of piecemeal supplements and amendments and whatever. We were talking at the break, ironically, I didn't know that this was going to come up, on computer and if you could -- but of course, everyone doesn't use computer -- but on computer you could redline things like we've done in all these rules. You redline it if you're adding it or you strike it out if you're deleting it, and you've got one document but you know exactly what's been added or subtracted.

Of course, the down side of that, Paula brought it up at the break as well, is you inadvertently fail to highlight something or strike through it, and then all sorts of motions for sanctions come about. But I do

think we need to consider the potential problem of having these -- you can't then look at one document and see what the state of affairs is, and that could become problematical.

CHAIRMAN SOULES: The scheme now is you have all of your allegations, all of the plaintiff's allegations are in one something called an original petition. It can be the fifth original petition, but that's why it's called the original petition, because it's the petition on which you're going to trial. The supplemental petition is in response to something that the defendant raises, hypothetically, and the idea was that if you're only responding to something that the other party raised, you don't have to redo your entire petition. You can leave that as it is and respond by supplementing. Now, as I understand it, that's the way we do it now.

PROFESSOR DORSANEO: Then we have trial amendments which don't need to --

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: -- which can be supplements.

CHAIRMAN SOULES: So the suggestion here is that a supplement could be used to add or delete anything from your pleadings.

MR. BECK: Well, it's two things. For example, if you had a 50-page pleading and you are amending Paragraph 20, under the current rule, because it's an amendment, you have to restate the whole document and file it on everybody. That's one of the issues. The second one is instead of amending something, you are simply adding a new paragraph to your original petition.

The query is, do you have to put it as part of your original document, call it an amendment, and then refile the whole document with the court and with the other counsel? So if we can get a sense of what the committee's inclination is, we can draft language to deal with the issue, but we need to get a sense of the committee as to what you want us to do.

MR. McMAINS: Well, there's a certain interaction here too, though, with the special exception practice, because basically the situation with specific exceptions is that

if you specially except to whatever the last pleading was and it changes, your special exception is no good any more. You have to go do another one in essence. And so if you have all of this kind of shifting stuff, I'm not sure what that does to the specific special exception situation either unless you just kind of deem it to continue as to the -- if it hadn't been heard at the time of the amendment.

CHAIRMAN SOULES: John Marks.

MR. MARKS: I'm sort of in favor of having live pleadings all in one place. I mean, it can get very confusing if you have to look at several different places to know what you're going to go to trial on. And I think if you're going to amend pleadings or answers and petitions, it ought to be on one document. I think that's more efficient.

CHAIRMAN SOULES: Anything further? Paul Gold.

MR. GOLD: I do believe, though, and I don't know if it can be done elegantly, as Judge McCown would urge, but I really do believe that on whether you're

supplementing a petition, an answer, my goodness, answers to interrogatories, that there should be some requirement that you specify what it is you're adding or deleting, because I think a tremendous amount of time and resources are expended and wasted.

Paula and I were talking at the break about how an amended petition or an amendment answer comes in, and you have to give it to somebody, spend hours saying where is the new item, what did they put it in, what it did they take out, so I think maybe a requirement that you have to specify what it is you're adding or subtracting, whether it be a pleading or whether it be a discovery response, might be beneficial.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: I don't remember exactly what we did on sending diskettes, but I think we talked about sending diskettes for interrogatories, and it may be presumptuous to say all attorneys have computers now, but I guess what you could do is that the attorney making the amendment

could make the amendment in computer form and put it on a diskette, and all you would need to do is print out the part that has changed, insert, you know, Paragraph 19 appeared like this and I've changed it to this, here is the diskette, if you want to reprint the whole thing, and then wait until right before trial and reprint it with all the changes that have been made electronically.

MR. GOLD: That's assuming everybody has a computer.

MR. YELENOSKY: Yeah, that's assuming everyone has a computer.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I thought that there was a prohibition against attaching an earlier version of your pleading and then just laying two pages worth of changes on it. I can't find that in the rule, but isn't there something that prohibits you from attaching your previous version of your pleading as an Exhibit A and then just having two pages that set out a new cause of action? But I cannot find that in the rule.

PROFESSOR DORSANEO: Well, it's superseding. An amended pleading supersedes what it amended.

MR. ORSINGER: Can we still incorporate our last petition or answer and then have two or three pages worth of new allegations and treat it as if it's a new pleading, or do we have to merge it all together into one seamless document?

PROFESSOR DORSANEO: The paragraphing rules could be read to require that, but probably shouldn't.

MR. ORSINGER: Because I think that at the very least we ought to permit someone, if we're going to require them to have a consolidated pleading, to attach their previous version as an exhibit, and then if they want to, set out their new cause of action or whatever in two or three pages.

PROFESSOR DORSANEO: To me that would not offend the rules, except as to the formatting of the amended pleading in terms of practice, because an exhibit would be considered part of the pleading. So you would not be relying on a superseded pleading; you

would be relying on your new pleading, which included the old pleading as an exhibit. Now, there are a lot of courts that I could go to in Dallas, I'm sure, where they would disbelieve me when I said that, among others.

MR. ORSINGER: I would then ask, should we have a clause that permits you specifically to incorporate a prior pleading by reference or by attachment or something so that -- because Rule 65 to me implies that if it's a prior pleading that it's superseded.

PROFESSOR DORSANEO: Okay.

MR. ORSINGER: And I think that some people may prefer to just put two or three new pages down and incorporate their old pleading.

PROFESSOR DORSANEO: If they attached it.

MR. ORSINGER: If they attached it. I don't care whether they attached it or not. I don't have a problem with them attaching it.

PROFESSOR DORSANEO: It says it can incorporate from the superseded pleading.

MR. ORSINGER: So it has to be

attached.

CHAIRMAN SOULES: But what we're really talking about here, I guess, is getting a consensus of whether some additional paper, but not the entire pleading, could be used to add or delete from a prior pleading. And if so, there's a lot of ways we could go about doing that --

PROFESSOR DORSANEO: Of course, the last thing --

CHAIRMAN SOULES: -- as opposed to having to retype the entire original or amended original petition.

PROFESSOR DORSANEO: Of course, the last thing that needs to be said to get a complete understanding of this is that if somebody added in a supplemental answer, let's say, inferential rebuttal matters or defenses, and there was no special exception to that approach, then the supplemental answer would not supersede the general denial and all of the affirmative defenses if things were properly -- so you can do what you want to get authorized, David, but somebody has the right to make you do it over by special

exception.

CHAIRMAN SOULES: I don't know about that.

PROFESSOR DORSANEO: Well --

CHAIRMAN SOULES: It says "Each supplemental petition or answer, made by either party, shall be a response to the last preceding pleading by the other party."

PROFESSOR DORSANEO: Well, but I can break all of these rules if nobody cares.

CHAIRMAN SOULES: Yeah, sure.

Okay. Any other discussion on this? Okay. David, state the proposition that you need guidance on.

MR. BECK: Should rule -- let me get the precise rule here. Should Rule 64 be amended to allow for amendment to an operative pleading or a supplement to an operative pleading simply by filing a document that sets forth the amendment itself or the supplement itself without having to restate all of the various portions of the operative pleading that you are not changing or supplementing?

CHAIRMAN SOULES: Okay. Those in favor show by hands. Eight.

Those opposed? Anne McNamara, is your hand up?

MS. McNAMARA: Yes, sir.

CHAIRMAN SOULES: The vote is eight to seven no change.

Rusty.

MR. McMAINS: What I was going to say is that I don't have an objection to the notion of an incorporation by reference --

MR. GOLD: And neither do I.

MR. McMAINS: -- by exhibit. But I do agree that we need to have in a single place the pleading. And that's not -- and while that's not any less paper necessarily, it's less work. I mean, you're talking about photostating something and putting on top the change, which has two advantages: Number one, you get to see what the change is; and number two, you don't have to retype it or reformat it or generate it there. So I think that there is a middle ground that maybe the majority of the committee might actually support, is what I'm

getting at. I think everybody's opposition, mine certainly, was that I don't want to have 37 places to look to find out what the pleadings are.

CHAIRMAN SOULES: Okay. We've got about five more minutes.

Pam Baron.

MS. BARON: Well, another way to do that is to alternate maybe and have a certain limit on how many supplements you can have and then you file a new one or something like that.

MR. McMAINS: One other thing in the TRAP rules, remember, we have -- one of the things we do is we tell the clerk to do the live pleadings. Well, now, if all of a sudden you've got to go through all the documents, there's a lot of legal work there to deal with there, lots of live pleadings, and that's another aspect there.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: I'd like, if we could, to take a vote on a motion in the form that Rusty is saying, because I too voted against the proposition, but would vote for

the proposition with an incorporation by reference, so that you have one document with everything attached to it.

CHAIRMAN SOULES: Incorporation by reference or incorporation by attachment?

MR. GOLD: Incorporation by attachment.

CHAIRMAN SOULES: Okay. Any other discussion on that?

Okay. How many are in favor of permitting pleadings to be changed by just attaching the prior pleading and then whatever is added or deleted be stated in the amendment? I'll have to put it that way, I guess. That's 14.

Those opposed? Okay. Well, that carries unanimously. All the voters voted in favor of that.

Okay. That probably winds up as much business as we can get done in this session.

David, we can complete your report, and hopefully we'll have discovery, I'm sure, by Steve, and he will have the discovery report for us next time.

The appellate rules will be essentially

scrubbed up. I think probably we should start with those because that's one thing we can close. We should be able to close on the appellate rules. Then we'll finish David's report and then go to discovery after that.

(HEARING ADJOURNED 12:00 P.M.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

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I, WILLIAM F. WOLFE, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on November 19, 1994, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $1,382^{00}$.

CHARGED TO: Soules & Wallace.

Given under my hand and seal of office on this the 23rd day of November, 1994.

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