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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

SEPTEMBER 15, 1995

(AFTERNOON SESSION)

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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 15th day of September, A.D. 1995, between the hours of 1:10 o'clock p.m. and 5:35 o'clock p.m., at the Texas Law Center, 1414 Colorado, Rooms 101 and 102, Austin, Texas 78701.

SEPTEMBER 15, 1995

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo III
Anne L. Gardner
Honorable Clarence A. Guittard
Charles F. Herring Jr.
Donald M. Hunt
Tommy Jacks
Joseph Latting
Gilbert I. Low
John H. Marks Jr.
Russell H. McMains
Anne McNamara
Robert E. Meadows
Richard R. Orsinger
Luther H. Soules III
Paula Sweeney
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta Jr.
Charles L. Babcock
David J. Beck
Hon. Ann Tyrrell Cochran
Sarah B. Duncan
Michael T. Gallagher
Michael A. Hatchell
Franklin Jones Jr.
David E. Keltner
Thomas S. Leatherbury
Honorable F. Scott McCown
Harriet E. Miers
Hon. David Peeples
David L. Perry
Anthony J. Sadberry
Stephen D. Susman

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
O.C. Hamilton
David B. Jackson
Michael Prince
Hon. Paul Heath Till
Bonnie Wolbrueck

EX-OFFICIO MEMBERS ABSENT:

Hon Sam Houston Clinton
Hon William Corneius
Paul N. Gold
Doris Lange
W. Kenneth Law

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CHAIRMAN SOULES: Let's get going. Okay. 166d. Joe, you have the floor, or Chuck, you can do this.

MR. LATTING: Well, this is -- where is old Tommy Jacks?

CHAIRMAN SOULES: He's gone.

MR. LATTING: All right. Well, this is a modified version of 166d. To tell you the truth, I can't remember what we changed different to be different from the last time we discussed this in this Committee. I know that Saturday a number of us met and went over -- a number of us including Tommy Jacks and me, and we've been on sort of opposite sides of the debate at the beginning of this committee's work.

And what I can tell you is that this draft satisfies him and me and everybody that I know of. I don't think there's anybody that I know of that's unhappy with the way we're approaching it here. But that doesn't mean that it's the only way to do it. I'm just saying that Tommy is happy with it and I'm happy with it, and I can't really -- I don't really think of anything much to bring up

specifically as I did with the other -- with the other rule, except that we have left hanging out here this issue that Richard has mentioned a number of times, and I don't propose that we put anything about it; that is, about the Nature of Hearing and Evidence and so on, because as Scott Brister says, the way these hearings always happen anyhow is the guy says, "He did this, that and the other."

And the other lawyer says, "No, I didn't" or "Yes, I did. But she did this, and here is what you really ought to pay attention to."

And then the judge says, "What happened?"

So I don't know if we want to get into talking about what kind of hearing we need to have.

MR. HERRING: Well, the other thing that we had originally is that Dorsaneo purports to be drafting a generic, all-purpose Hearing and Evidence Rule that will solve all the problems about the rules, and I think we were waiting for that enlightenment to descend, and we're reserving that issue until it happens.

MR. LATTING: Well, the light is still a little dim over here. But I'm not suggesting that we put that in. In fact, I'm suggesting that we take that out, that double question mark that we have there.

I think that the way this rule is laid out it seems to be pretty good to me; that is, the organization of it. We've got the procedure. You have a motion. You have a hearing, which we -- and I think we made some slight change to the wording of that, Alex, if I'm not mistaken. An oral hearing is required for motions requesting relief unless waived by those involved. We chose that language because there may be somebody who is not really a movant or a respondent but who may be in some way involved, and we wanted to preserve the notion that there was an actual oral hearing you were entitled to and not just some action by the judge.

We separate out -- in paragraph 2 we separated "Expenses for Compelling, Limiting, or Denying Discovery" from no. 3, "Sanctions." And that's where the real meat of the rule is. And what we've tried to do, I think it's

fair to say, is that this rule provides that you can get limiting expenses with limiting, compelling or denying discovery, but you can't get sanctions unless you find some extra bad stuff that occurred. We have preserved the language that we've been through many, many times and debated, sort of the -- I'm going to call it the Stephen Yelenosky phraseology, that unreasonably burdensome, and I propose we not talk about that any more because we've discussed that for hours, I think.

We get down to "Sanctionable conduct," and there was one -- I'm not sure whether we discussed this in here or not, but we start off by saying in 3(a)(i) that a person subject to a discovery order, other than a Discovery Control Plan under Rule 1, and the reason for that is that the feeling of the members of the committee, the subcommittee, was that these Discovery Control Plans, if you violate one of them, that shouldn't form the basis of sanctionable conduct, which I think is kind of ironic since I'm against them plans anyway under Rule 1.

But it seems like to me that if we're

going to have them, they ought to be enforceable, but the committee didn't feel like that you ought to be able to get sanctions for violating one of these rules we just provided for under discovery.

But the real meat of this rule is at the top of the next page. This is the part that we spent two or three days at two or three different times talking about, and this is what it's come down to under the A, B, C, and D here where we've got these situations.

And I might comment that under this rule you don't have to have violated a court order to be sanctioned, and that was sort of what the -- what I'm going to call the Tommy Jacks group of the committee thought ought to happen, but he's -- I think there has been a slight shift in position on that. In fact, they've changed their minds about that, is what's really happened, or Tommy has.

It says that you ought not to have to have -- necessarily have a violation of a court order if one of these things occurs. And one of them is that a party, a party's attorney, or a a person under the control of a

party has either disregarded a rule, a Discovery Control Plan, or subpoena repeatedly or in bad faith -- and so you either have to be able to show repeated violations or a bad faith action; (B) has destroyed evidence in bad faith or engaged in other conduct that an order compelling, denying, or limiting discovery cannot effectively remedy.

And if you will remember, we talked about that specific area and that language two meetings ago, if I'm not mistaken, either two or three meetings ago of this Committee.

Or (C), has repeatedly made discovery responses that are untimely, clearly inadequate or made for purposes of delay or discovery -- of delay, and there ought to be a comma there -- or discovery requests or objections to discovery that are not reasonably justified. We talked about that language, too. We've discussed, we being this whole Committee, have debated and discussed that language at length. And it was our sense that that didn't mean that you were right about it, but it meant that this language was the best we could come up with. It just

wasn't even reasonably justified to make the objections; and has otherwise -- or has otherwise abused the discovery process.

And that word was debated in this large Committee; that is, if you're just guilty of abusing the process, if you do that, if you're found to have done that, then, as it says in (b) below, a court may impose any of the following sanctions that are just under the circumstances.

And that language, "just under the circumstances," Alex, wasn't that where we pulled our Transamerican? Isn't that our shorthand version of the Transamerican?

PROFESSOR ALBRIGHT: No. I think we had some other Transamerican language.

MR. LATTING: I didn't think so, but maybe so.

PROFESSOR ALBRIGHT: Well, "just" as defined -- what Transamerican does is define "just."

MR. HERRING: Well, it pulls it out of the rule, is where it pulls it out of, and then discusses it.

MR. LATTING: Okay. And then we set them forth, so I don't think -- I can't recall anything that's worth talking about in that list, except I wonder, I just wonder out loud that if we say in no. (8) "such orders as are just," I wonder about why did we just stop at seven? Why don't we put eight or 10 more in there, but...

MS. SWEENEY: I'm sorry, I don't understand what you mean.

MR. LATTING: Huh?

MS. SWEENEY: I don't understand. What do you --

MR. LATTING: Well, I mean, we've listed seven things that a court can do. I don't know why we chose seven and then say that they can do anything else that's just. Why don't we just say that the court can make such orders as are just. We've got kind of a laundry list of things that can be done, and it doesn't seem to me like we need that, but I don't see any big issue about putting it in.

And then we've also talked about the time for compliance. We've debated that at length

here. And when I say we've debated it at length, Luke, I'm not saying we can't talk about it any more, I'm just reminding people that these are things that we have had fairly extensive debate on. In fact, all of them we've had fairly extensive debate on.

We had before the comment, I believe, didn't we, I know we talked about it, and I think we had the comment that paragraph 5 on "Review" does not change or address the availability of mandamus relief in sanctions proceedings. I know we talked about that in this Committee.

And so it sounds almost too good to be true, but I don't think that there's anything in this rule that comes to my mind that we haven't discussed at great length and that is still the subject of substantial disagreement. I move we pass it.

MR. LOW: I have one question.

CHAIRMAN SOULES: Okay. Any discussion? Buddy Low.

MR. LOW: Well, that "[??] Nature of Hearing and Evidence," what is that? Is that supposed to be a section? What

does that mean?

MR. LATTING: Well, that's just what Chuck Herring was mentioning, that Bill is supposed to be addressing what kind of hearings are required.

MR. LOW: Okay. So that's not a part of what we're --

MR. LATTING: No, no. That's just our little extra language.

CHAIRMAN SOULES: You can strike that out. That's not being voted on.

MR. LATTING: That's not being voted on at all.

MR. LOW: Okay.

MR. LATTING: John Marks.

CHAIRMAN SOULES: John Marks.

MR. MARKS: Okay. Under (ii) in (a), 3, "Sanctions," subsection (D), doesn't that just kind of open the door to letting the court do what it wants to do, "has otherwise abused the discovery process in seeking, making or resisting discovery"? Should that be in there? That's awfully broad.

And also under (C), "or discovery

requests or objections to discovery that are not reasonably justified."

MR. LATTING: Well --

MR. MARKS: I mean, should you allow the court to make the rulings simply like this without requiring, you know, something more of an order or something like that?

MR. LATTING: Well, we thought so, because we thought that anything that constituted abuse -- we didn't think that we could write everything that might -- that nasty, mean lawyers could think up to do; and that we thought that we needed to have some -- and when I say "we," I'm talking about this larger Committee. We thought we needed to have something to cover situations that were just abusive, and I guess --

MR. MARKS: Well, I understand you're chastising me for not being here --

MR. LATTING: No, no, no. No, I'm not at all.

MR. MARKS: -- when you all had that discussion. But it seems to me that that's awfully broad, and why shouldn't the

court look at that first before entering these draconian sanctions against somebody? I mean, I think (D) ought to be deleted from (ii) and the second part of (c). And I make that in the form of a motion.

CHAIRMAN SOULES: What is it now you're -- in (ii) you want (D) deleted?

MR. MARKS: Under (ii), delete under (C) after "delay" where it says "or discovery requests or objections to discovery that are not reasonably justified." And then all of (D).

MR. LATTING: Well, I'm not chastising you at all for not being around earlier, but we've talked about this so long that it's just the old thing over again, which is where do we draw the line?

All I can say is that I think Jacks and most of the people that I thought were of that persuasion were happy with this language and thought that it afforded enough protection to keep the court from doing something too arbitrary but still allowed enough leeway to provide for those unforeseeable or at least unforeseen situations that are truly abusive;

that to do something that's not even reasonably justified, you know, gives -- and we do have the Transamerican protection, and then all of that put together ought to be a reasonable balance of lawyers and courts, and so that's the only thing I can say. I hope that it doesn't come out, because I think we'll be sorry if we pass the rule that way.

Rusty.

CHAIRMAN SOULES: Well, wait a minute, there was a motion, I think, that we have here.

But this rendition of 166d reflects the votes of this Committee on prior occasions, and we voted on virtually every word of it and its organization. That doesn't mean that we don't revisit it today, because we're here on final consideration, so I don't want to make short shrift of this, but it may move faster, it may move slower, and that's what it does.

You're making a motion there, John, to delete in (ii) at the top of the second page in the one, two, three, four, five, sixth line down, after the words "made for purposes of delay," all of the rest of that paragraph

(ii)?

MR. MARKS: Yes.

CHAIRMAN SOULES: Is there a second?

MS. GARDNER: I'll second that.

CHAIRMAN SOULES: What?

MR. LOW: No, I was just going to raise a question.

CHAIRMAN SOULES: Is there a second?

MS. GARDNER: Yes, I second it.

CHAIRMAN SOULES: Okay. There's a second. Let's have discussion.

MR. LOW: Well, if you stop at "made for purposes of delay," if you stop there and you don't put "or discovery requests or objections," there's nothing in there that covers discovery requests at all. What else covers discovery requests?

CHAIRMAN SOULES: Well, that's why it's in there. That's why we voted to put it in.

MR. LOW: Yeah. So why take it out? Because otherwise it would just pertain to not giving discovery requests, and

discovery requests can be abusive, so I don't know why you would want to take that out, unless I just don't understand.

MS. SWEENEY: I agree with Buddy. I think it's important.

CHAIRMAN SOULES: Rusty McMains.

MR. McMAINS: Well, I agree with regards to having all of (C) intact, because it would need to be on both sides, whether you're asking for discovery or opposed to discovery. On the other hand, I also agree that (D) is an open-ended invitation to kind of invent something. I can't think of a single thing that doesn't fit that is condemnable that doesn't either fit within the parameters of the first parts or that should be made the subject of an order that is violated first.

The problem that I have is this a -- this (ii) is an alternative to violating an order. So if somebody is doing something repeatedly that isn't specifically covered in any of these things in (ii) that you want to deal with, you can go get an order from the court,

and if they continue to do it, then you automatically are into the sanctions area. I don't understand what (D) does other than open Pandora's box.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: What if you have a pretrial conference, they don't make certain things and you have a pretrial conference, and the judge says, "Okay. I want you to" -- something comes up about a lot of documents. He says, "Okay. I'm ordering you to do" -- "I want you to do this. I want you to do this and do that." It's not -- you haven't made a response or a request for anything. The judge just ordered it under a pretrial conference and you violate that. Where would that fit in other than in that section?

MR. McMAINS: Whether you violate an order of the court makes no difference.

MR. LOW: I understand. But where does it say a party -- an order of the court?

MR. McMAINS: In (i), the first one. See?

MR. LOW: Okay.

MR. McMAINS: The sanction says that in addition to these orders up here, in the Arabic numeral 3, "Sanctions," it says initially there, it says that "if the court finds that a person subject to a discovery order, other than a Discovery Control Plan under Rule 1, has failed to comply with the order, or" -- so this is the "or."

Now, you have either violated a court order or you fit into one of these categories before you can move into this sanctions area.

And so the problem I have is, what is it that -- and I realize their argument is basically, as I understand Joe's argument, is basically that, well, we can't even imagine how bad lawyers can be. If you tell them everything they can't do, they'll think of something else.

MR. LATTING: Yeah, that's my argument.

MR. McMAINS: And my position on that is, yeah, that's fine. But if it is abusive -- and your position is, well, if it's abusive, we can smell it. We know what it

is. It's like obscenity; we know it when we see it but we can't define it. You can damn sure get an order prohibiting it, and once you get an order prohibiting it and it continues, then you go straight to sanctions, and you don't have a problem.

But the idea that you are relieved of getting an order and merely just come in and say, "Well, they're doing this. It's an abuse of the discovery process, and it just -- it is because it just smells bad," and allowing the judge to say, "Well, you know, I believe that's right," because basically when you say that, particularly in the language "has otherwise abused," by definition it has to be something other than any of these other elements. It has to not be an obstruction of evidence. It has to not be a repeatedly made discovery response.

Okay. So what does it -- it has to fit outside of those and still constitute a discovery abuse, and basically it just has to be determined to be a discovery abuse. I see no useful function in having that additional offense in there.

MS. SWEENEY: Well, we do know of instances where --

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: -- lawyers obstruct discovery. That's not listed here, but I don't think you have to wait for them to do it repeatedly.

MR. MARKS: Like where they have struck each other?

MS. SWEENEY: Yes.

MR. MARKS: You mean like a fist fight?

MS. SWEENEY: Uh-huh. I think you may have been involved in some of those instances.

MR. MARKS: Me, Paula?

MS. SWEENEY: Yes.

CHAIRMAN SOULES: Who else is talking there? Okay. Paula, you have the floor.

MS. SWEENEY: Yeah. You've had situations where you're trying to take a deposition and somebody is so obstructive and obstreperous that the deposition ends because

they're screaming, because they're having tantrums, because they're hauling witnesses out in the hall, because they're interrupting. You've had, you know, witnesses or lawyers throwing things. I mean, there are all kinds of things that happen. I don't propose that we list in the rule "Don't throw things. Don't hit people." But I also don't think that you ought to let them hit people, go to the court, get an order saying "don't hit me again," but you can't get sanctions for it. There are a lot of things that --

MR. MARKS: Well, don't get --

CHAIRMAN SOULES: John Marks, you have not been recognized. Mr. Marks, you have not been recognized.

MR. MARKS: I'm sorry.

CHAIRMAN SOULES: We need to get ahold of this debate because we can't get it on the record any other way.

MS. SWEENEY: So I think we need the language. I agree with Buddy. We need the catchall phrase (D), that they've done something else that is bad that couldn't be listed here that hasn't previously been

brought to the court's attention but that we all know is a bad thing, and Judge, we want relief.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: If we're concerned about attorneys hitting one another, I assume that we're concerned if they do that at a deposition or as they pass in the hallway or on any occasion. And does the court need a discovery sanction in order to deal with that conduct? Is there some way in which, number one, I mean, I hope that's very rare; but number two, when that does happen, I would assume there's some other way in which a judge could deal with that without a discovery sanction. If not, then maybe we need a rule about attorneys hitting one another that isn't confined to depositions. I think that --

CHAIRMAN SOULES: Richard Orsinger, and then I'll get to Buddy Low.

MR. ORSINGER: My recollection of how we got to where we are today is that the Sanctions Task Force made a recommendation that permitted the district judge to drop even

death penalty sanctions on the first transgression. It was rejected by a majority vote. The subcommittee, which Joe was running, was instructed to come back with something that had a procedural step in between for some of these safeguards before the ultimate sanctions are levied. And the subcommittee report came back with slightly different wording but exactly like the task force. We debated that for another four or five hours. We voted it down. The subcommittee was sent back to come back with another proposal, and they came back with a proposal that was slightly different but not any practically different of going directly to sanctions on the basis of a motion without an intervening court order that was later violated.

Then finally Tommy Jacks volunteered to draft some paperwork for those who voted in the majority every time we took a vote on this. And my recollection is that at least at that time Tommy didn't come up with the language.

Now I understand, and I have not

participated in your subcommittee, now I understand that Tommy, as a representative of those who voted against the direct-to-the-death-penalty approach, has accepted this as compromise language that eliminates his concern about giving the district judge the power to go all the way on the first motion.

Now --

MR. LATTING: Can I speak to that?

MR. ORSINGER: Let me finish. I didn't want to usurp the floor, and maybe I'm wrong when I say that, but I think that's what happened.

MR. LATTING: Let me just reply, if I could. I think that that's pretty much accurate with, I think, one extra step in there. But what happened was that then we had the passage of the Discovery Rules which caused him and those with him on the subcommittee to rethink their requirement for an intervening court order because of the times involved, because of what it was going to do in throwing out of kilter the discovery scheduling that was going on in what we just

passed at the last meeting of this.

MR. ORSINGER: Okay. Well, I don't fully understand how those interrelate, but I will say this, that I am comfortable with the compromise that allows the court to go directly to the death penalty sanction without an intervening order on (A), (B) and (C). But I think if (D) is in there, then there's no reason in listing (A), (B) or (C), because we have a situation where any time the trial judge thinks the discovery process was abused in any way even once he can go all the way to the ultimate sanction, and the only remedy is by a mandamus or appeal to say that the trial court abused his discretion.

And I therefore feel like we are exactly where we were on day one when the task force recommendation was voted down and day two, three and four when the subcommittee recommendations were voted down as long as (D) is in there.

MS. GARDNER: May I be recognized, Mr. Chairman?

CHAIRMAN SOULES: Buddy Low is next. Then I'll get to Anne Gardner.

MR. LOW: I don't think Paula meant just the circumstance of hitting people. I think she stated some other things. I'm sitting here with my witness, we're taking depositions, and that's part of the discovery process, and ask him a question and I start nodding. Well, I had -- and he'll say "yes," and I do that (indicating). I mean, that's an abuse, and you've gone to New York to do that; or Rambo tactics, and I realize maybe the depositions rules take care of that. I don't know. But as I understand, this is the only thing that deals with sanctions and penalties for sanctions, and certainly there would be an abuse that's not listed here if somebody is nodding an answer or interfering with the witness, won't let a witness do this or that, even though the rules say they should. And I think that's what Paula was getting at, and for that reason I think we need that in there. And lastly, if there's just not anything else out there that it could be, what's it going to hurt?

CHAIRMAN SOULES: Well, this -- I was just looking back here at May of 1994,

which is -- we've had spotty discussions of sanctions since then, but that was the last time that we had any -- I think any real in-depth discussion of this. And this provision is not in what we were discussing in May of 1994, and it wasn't added at that time either, so this is something that is a change.

And I don't know whether -- one way to fix it would be to say "has otherwise repeatedly abused the discovery process." We use those words in some places so that we have some way to reach the undefined and maybe imponderable violations at this point. That may not work, though. I'm trying to come up with some balance between not being able to anticipate all of the violations that should be sanctioned with a direct path from one violation to ultimate sanctions, which we've never -- this Committee has never been in favor of the latter. And I don't know exactly how to do that. Maybe that's what the issue is.

Rusty.

MR. McMAINS: Well, once again,

we -- our Discovery Rules have in fact addressed mode of conduct at depositions. The actual number (B) or (A) here says "has disregarded a rule, a Discovery Control Plan, or subpoena repeatedly or in bad faith."

Now, coaching the witnesses in the course of the deposition, harassing witnesses, all of those things are prohibited under the rule. All of those things fit within the definition that allows them to impose sanctions now. But you're given some notice because you know what's in the rule.

Then this just says "has otherwise abused the discovery process in either making or resisting discovery," and that's it. And what it means is somehow otherwise. Okay. Well, we're going beyond conduct which is prohibited by the rules. We're talking about something otherwise. We're going beyond, since we're in this second part, violating a court order, and we're going beyond repeatedly making discovery responses that are untimely, clearly inadequate, doing all of these things that relate to the discovery process. It's something else.

And everybody is just saying, "Well, we don't know what it is, but surely it's going on because, after all, they're all lawyers involved."

I don't think that's any justification whatsoever to extend to the trial judges the power to zap somebody by simply saying, "I declare this to be a discovery abuse," whether it is or whether it's ever appeared in a case, ever appeared anywhere.

The problem we've gotten into with sanctions for the last 10, 15 years is the courts have not been able to distinguish between abuse of discovery and noncompliance. And now we have just stuck in "abuse" as a supplemental term, and we are right smack dab where we were before.

CHAIRMAN SOULES: Anne, I'm sorry, I said I would recognize you, and I didn't.

MS. GARDNER: Okay. First of all, I think hitting a witness or hitting the other lawyer would fit within the second part of (B) as conduct that an order compelling, denying or limiting cannot effectively

remedy.

Second, I think that I agree with all the criticisms of subsection (D); that the paragraph (ii), it seems to me, should be for the more egregious offenses and it opens the door to these ultimate sanctions for all offenses.

But I also -- when I originally seconded John's motion to amend or for deleting the second portion of (C), I felt and I still feel that the latter -- the second portion of (C) is subject to the same criticisms as (D), because there's nothing egregious about discovery requests or objections that are simply not reasonably justified.

CHAIRMAN SOULES: Well, that's modified by "repeatedly made."

MS. GARDNER: Well, if it is, it's not clear that it is. If it could be made clearer that that is the fact, then I would be happy with that and would withdraw my second.

CHAIRMAN SOULES: All right. "Repeatedly made." We don't have any problem with repeating that language. It may be

redundant. But if it's for clarity, that's fine.

MS. GARDNER: It doesn't seem that it modifies the whole -- both of those.

MR. YELENOSKY: Grammatically it does, but it could be clearer.

CHAIRMAN SOULES: Okay. We'll fix that then.

MS. GARDNER: Okay.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: The committee would be happy also -- I mean, the subcommittee would also be happy if we added the "repeatedly made" language to (D), "or has otherwise repeatedly abused the discovery process," et cetera.

CHAIRMAN SOULES: Let me ask you, Anne, you withdrew your second as to the verbage, deleting the verbage in (C). Are you also withdrawing your second on the deletion of (D)?

MS. GARDNER: Oh, did he also move to delete (D)?

CHAIRMAN SOULES: He did.

MS. GARDNER: No, I don't. I

still move to delete (D).

CHAIRMAN SOULES: Okay.

MR. ORSINGER: I'll second her motion or John's or whoever it was.

CHAIRMAN SOULES: Okay. The motion on the floor at this time is to delete (D) from (ii). Is there any opposition to that? The motion is to delete (D). Let's take a straw poll, if not an official vote, at least.

Let's see, those in favor of deleting (D) show by hands.

MR. MARKS: Deleting (D)?

CHAIRMAN SOULES: Deleting (D). Six. Those in favor of leaving it in. Well it's a pretty close vote. Maybe we need to talk about it.

MR. LOW: Just because the death penalty is given or listed here doesn't mean -- the Supreme Court has set some pretty good guidelines about death penalties. Now, I don't think it -- well, go ahead.

MR. LATTING: Let me speak to that.

CHAIRMAN SOULES: Well, I think

you need to wait until the other people that are talking are done, Joe, instead of jumping in to the middle of everyone's comment.

Okay. Buddy, please give us your views.

MR. LOW: I don't think that this implies that it's proper in every case that -- you know, the judge has got to use some discretion. I mean, you know, which one of these is he going to apply to this and which one to that, so these are the available ones. And I don't just interpret that to mean just a discovery abuse will do that. If it's so bad, then maybe so, but you better watch what the Court has written about the death penalty. That's all I'm saying.

CHAIRMAN SOULES: Joe.

MR. LATTING: I apologize for interrupting you. In direct connection with that, this is a computer error. We had this language -- we intended under "Sanctions" where it says, "A court may impose any of the following sanctions," it says, "that are just under the circumstances."

The language that we had intended to put in there, but didn't print it, is this: "A

court may impose any of the following sanctions that are directed to remedying the particular violations involved and that are no more severe than necessary to satisfy the legitimate purposes of the sanctions involved" -- "imposed," I'm sorry. That's the Transamerica language which says you can't do anything more than you need to, just because these are available, so I apologize for that error.

MS. SWEENEY: Could you read that again?

MR. LATTING: Yes. After the word "that," so it would read under (b), "Sanctions. A court may impose any of the following sanctions that," and then add this language, "that are just and that," well, do we need an "and" there -- "and that are directed to remedying the particular violations involved and that are no more severe than necessary to satisfy the legitimate purposes" -- and Alex, you have written "of the sanctions imposed."

Is that what we said? Is that what the language of the case says?

PROFESSOR ALBRIGHT: Well, Mr. Herring noted that if I said "it" every time, we would be using "it" when we had been using plurals before, so that's why I changed it.

MR. LATTING: Well, that may not be the most artful language, but the meaning is clear. It's the Transamerica requirement that you cannot impose a stronger sanction than necessary under the circumstances.

CHAIRMAN SOULES: That are just and that are directed to remedying the violation?

MR. LATTING: The particular violations involved.

CHAIRMAN SOULES: And what else?

MR. LATTING: And that are no more severe than necessary to satisfy the legitimate purposes.

MS. SWEENEY: Of such sanctions?

MR. LATTING: Of such sanctions, is what I would say, and just leave

it at that.

PROFESSOR ALBRIGHT: Good.

MR. LATTING: Now, that doesn't fully meet Rusty's argument, but I just wanted you to understand what the spirit of the committee is. That just got left out because my computer printed the wrong document. I'm sorry, but it's true.

CHAIRMAN SOULES: Well, I think historically in the process, Rusty did state or Richard did, I don't remember which of the two, we were -- there was a good deal of sentiment to use only 3(a)(i). And then Tommy Jacks and others came up with certain circumstances that because of their peculiarities or degree of violation should bypass by (i). And up until this, in looking back through my notes, up until July of 1995, that catchall was not in there. In other words, it was intended to be specific. The catchall would be dealt with under (i). It would first have to be the subject of a court order and then to severe sanctions. That's that's the background of the earlier drafts.

MR. LATTING: I think so too.

CHAIRMAN SOULES: So that's a new subject, and how do we deal with it?

Alex, and then I'll start around the table.

PROFESSOR ALBRIGHT: Well, we added this, as I recall -- I went to the Sanctions Subcommittee meeting in July after we had passed the Discovery Rules. And as I recall, the reason we included this was because in the new Discovery Rules there are lots of situations where people kept saying, "But what if this doesn't happen? What if people don't follow the rules like they're supposed to? Shouldn't they be sanctioned if they don't do this?"

And we kept saying, "That's going to be handled in the Sanctions Rules."

So I think if you think about a short time period for discovery where everybody has to be forthcoming in discovery, we felt like this needed to be added to take care of all of those different types of situations that might come up if somebody was abusing the discovery process without going through and reiterating every single situation in which that could

occur. Is that a fair statement?

MR. LATTING: Yes, that's true.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I feel, like Rusty, that Alex's concern is addressed by the language that someone who repeatedly violates a rule or even one time violates it in bad faith triggers this potential penalty. I feel like all of the Discovery Rules have all of the backup that they need. If it was one time in bad faith or if it's repeatedly done, then you can go directly to the sanction, even though you don't have a court order violated.

What I think has happened, and I want to say that I respect and admire the tenacity of the people that have done this, but the minority view has kept coming back and kept coming back and kept coming back and now finally the majority has given in to it, if we vote to support (D).

I don't think (D) is necessary to protect our Discovery Rules because (ii)(A) says "repeatedly or in bad faith," and now every single one of those Discovery Rules ought to

be able to be adequately protected by that language.

What (D) does is (D) makes everything else in (i) and (ii) irrelevant. We don't need any of that other language. All we need to do is to say we can do the sanctions set forth in subparagraph (b) below if a party has abused the discovery process. Then all of these lists which make us feel comfortable with this rule are irrelevant, because the judge can do anything they want, anything he or she wants, based on whatever he or she decides is an abuse subject only to the limitations that are imposed by Transamerican.

And I don't -- I didn't vote against this every single time because Transamerican was what I felt adequate security. I think that we are not bound to just say that Transamerican is all we get.

We are writing a rule here, and we can say that you can't go directly to serious sanctions without a violation of a court order unless you have some very severe, detrimental perhaps noncurable abuse of the discovery

process.

And I really do feel like that the Committee has just eroded its majority position over time because of the passage of time and because the proponents of this view have very artfully advocated it repeatedly, with no criticism to them. I know that it's an honest disagreement about what we should do, but I really do feel like we're revisiting the same vote for the fifth time, and now the majority is giving up.

CHAIRMAN SOULES: Well, this is exactly the language that set off the horrors of sanctions decisions that have abided in this jurisdiction until somebody finally found some federal cases and realized that they were violating the federal due process rights. And it was Transamerican -- what was it, about eight years of decisions before we finally got Transamerican.

Anne Gardner.

MS. GARDNER: Mr. Jacks has returned. I would be interested in hearing what he has to say.

MR. YELENOSKY: I tried to

brief him on it.

CHAIRMAN SOULES: Tommy, the motion is to delete (D) on Page 2. Specifically it would be 3(a)(ii) and then (D), which is the very last clause of that.

MR. JACKS: Yeah. Joe Latting finally wore me down. You're right, I did consent to this in this last draft. My philosophical views haven't changed any, that is, I still am bothered by having it in here, but Joe wore me down. What else can I say?

CHAIRMAN SOULES: Do you feel refreshed?

MR. JACKS: If it were put to a vote, I would vote to take it out, but....

MR. McMAINS: It was. You were gone.

MR. JACKS: Well, then never mind.

CHAIRMAN SOULES: Anything else on (D)? Judge Guittard.

HON. C. A. GUITTARD: Joe's explanation about this Transamerica language that was left out of (b) bothers me in that it seems to limit all these sanctions to

remedying abuses; whereas up here in (ii)(A) and (ii)(B) we talk about conduct that an order compelling, denying, or limiting discovery cannot effectively remedy. Do you see what I mean?

MR. LATTING: Yes, I do. I sure do.

HON. C. A. GUITTARD: And that ought not to be -- (B) ought not to be so limited. That's my first observation.

The second is, you're talking about how broad (D) is, and it seems to me in reading this language that (D) is no broader, in fact, it may not be as broad as, the language up here beginning in the third line, "other conduct that an order compelling, denying, or limiting discovery cannot effectively remedy."

What other conduct? Perhaps that ought to be limited in some way. Other abusive conduct? What kind of conduct is it that such an order cannot remedy? It seems like that is as broad as (D) is.

CHAIRMAN SOULES: Okay. Anything else on (D)? Those in favor of

deleting (D) hold up your hands. Eight to delete.

Those in favor of keeping it hold up your hands. 10. It passes by 10. I mean, (D) stays in by a vote of 10 to eight.

MS. SWEENEY: May I ask Joe a question?

CHAIRMAN SOULES: Yes. Paula Sweeney.

MS. SWEENEY: On the very bottom of the first page, Joe, under number (i), it says "a person subject to a discovery order, other than a Discovery Control Plan," and my question is about the word "discovery."

I mean, what exactly is a discovery order? Do we mean something by that, or do we just mean an order, and are we going to create a bunch of questions about, well, it was just an order but not a discovery order?

MR. LATTING: Well --

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: I'm sorry. Well, the rule is limited to a failure to make or cooperate in discovery, so I don't know that

we would need to have to have it say "discovery order."

MS. SWEENEY: Just "order"? Because I don't want to get into a thing where we didn't label it a discovery order, it's just a regular order or some other order. I mean, what's a discovery order that is different from it just being an order?

CHAIRMAN SOULES: Well, how about "an order under this rule." That's what we use under no. 1(c).

MR. LATTING: An order under this rule?

CHAIRMAN SOULES: Does that take care of your concern, Paula?

MS. SWEENEY: Sure. 3(a)(i).

CHAIRMAN SOULES: Any objection to that?

PROFESSOR ALBRIGHT: No, no.

MR. McMAINS: What do you mean, "under this rule"? I mean, this is a sanctions rule. This is not a discovery rule.

MR. LATTING: Yeah, that's right. Why don't we just say "an order."

MS. SWEENEY: How about "an

order"?

CHAIRMAN SOULES: Rusty, under 1(c) it says, "An order under this rule may compel, limit or deny discovery," and so forth.

PROFESSOR ALBRIGHT: But that's a sanction order under this rule. This rule, under this rule, you impose sanctions rules.

MR. LATTING: Why don't we just say "a person subject to an order"?

CHAIRMAN SOULES: Rule 166d says, starts out, Failure to Make or Cooperate in Discovery: Remedies. And then no. 1 is how you get an order to compel. And no. 2 is how you get expenses for getting an order to compel or protective order, as the case may be. And then no. 3 says a person subject to one of those orders that's talked about earlier in this rule that violates it can be sanctioned, I think.

PROFESSOR ALBRIGHT: In that case then we can take it out. If we're only talking about orders under -- violations of orders under part 1 of 166d are the only ones that violating can make you subject to

sanctions, then we don't have to have "other than a Discovery Control Plan under Rule 1."

I mean, I guess what we need to do is decide what orders we're talking about that can subject you to sanctions if you violate them. If it's only orders compelling, limiting or denying discovery, then we can say, "a person subject to an order under part 1 of this rule."

MR. HERRING: So it's okay to violate other discovery orders?

MS. SWEENEY: I would move to just say "order." I would just take out the word "discovery," and I so move.

MR. LATTING: I second that.

CHAIRMAN SOULES: Is there any opposition to that?

MR. JACKS: What if the order doesn't have anything to do with discovery, top, side or bottom?

MR. LATTING: Well, a motion for sanctions won't be brought under this rule.

MR. McMAINS: Why?

MR. JACKS: That's not what it

says.

MR. HAMILTON: How about saying "an order relating to discovery"?

MR. HERRING: Yeah, concerning or relating to discovery.

CHAIRMAN SOULES: An order what?

MR. HAMILTON: Relating to discovery.

CHAIRMAN SOULES: Does anybody have any opposition to that?

MR. McMAINS: Relating to discovery?

CHAIRMAN SOULES: An order related to discovery.

HON. PAUL HEATH TILL: Which is a discovery order.

CHAIRMAN SOULES: Okay. There being no opposition, that will be revised to say "an order related to discovery."

Anything else on 166d? Rusty.

MR. McMAINS: The change that Joe had talked about that his typewriter dropped or his computer dropped -- which is in (b), right? That's in 3(b)? Isn't that where

it is?

MR. LATTING: Yes, it is.

MR. McMAINS: The only question I have is, do you really think that's sufficient, given what we say in (a)? (a) says, "In addition to or in lieu of the relief provided above, the court may impose one or more of the sanctions set forth in subparagraph (b) below if the court finds that:"

And I realize that we put that into the (b) part, but it just -- the whole fact that it says "one or more," I mean, it does say "subject to the limitations," but I'm just wondering if somebody is going to say, "Well, we've looked at that laundry list and picked from it," and that any of them are okay.

Are we attempting to do this in hierarchical order?

MR. LATTING: No. And that language is just there as a reminder of the requirements, the due process requirements of Transamerican.

MR. McMAINS: Yeah. But I'm talking about now your -- the language that we

did put in, which I didn't write down, but which comes from Transamerican.

MR. LATTING: Well, it's a paraphrasing of Transamerican. It's not a direct quote.

MR. McMAINS: But doesn't it say -- it did say "no more severe"?

MR. LATTING: It says "that are no more severe than necessary to satisfy the legitimate purposes of the sanction."

MR. McMAINS: Okay. But then, of course, we have tons of cases that say that deterrence is one of the purposes of sanctions. That's how we got there in the first place, so if that's all that says, where does that give any of the other protections in Transamerica with regards to the defined first sanctions to remedies to having to make findings as to why those aren't good enough?

MR. LATTING: I don't think it does give us any more protection than Transamerica. I just think it may be that some young lawyer reading the rule or some young judge may not be aware of Transamerica, and there it is in the rule. So if they're

hearing a case somewhere, by putting it in the rule so it will be right there in front of everybody, its laudatory purposes will be manifest.

MR. McMAINS: You don't think somebody is going to argue that this displaces Transamerica; that Transamerica was decided under the old Discovery Rules and these new Discovery Rules don't have the same argument?

MR. LATTING: Well, if we put this in, that won't be much of an argument since it's going to be right under the rule. And this is Transamerica, as I understand it.

MR. McMAINS: It seems like you don't need to write it in the rule.

CHAIRMAN SOULES: Okay. I need to get my notes right here on this. When we voted on (D), then Joe had said earlier the Committee would accept the word "repeatedly." I don't know whether we voted to do that or not, did we?

MR. LATTING: We did not vote on that.

CHAIRMAN SOULES: Okay. Let's vote on that because it was discussed. Should

we put "repeatedly" in (D) or not? Those who say yes hold up your hands. Eight. Those opposed -- nine.

Those opposed. Nine. Nine to nine. It goes in.

MR. LATTING: Nine to nine, it goes in?

CHAIRMAN SOULES: I break the tie.

Okay. Anything else on 166d? Richard Orsinger.

MR. ORSINGER: Two things, so let me get to my second one after my first thing.

Because we put the Transamerican language in under (b), 3(b), I assume that that means that the rule doesn't say it applies to (1) and (2). Is that our intention? In other words, the Transamerican considerations only apply to those sanctions under 3(b) and not to sanctions under 2? Because if we mean it to apply to 2, we've got to put it someplace else besides in 3(b).

MR. YELENOSKY: Well, 3(a) says you go to 3(b).

CHAIRMAN SOULES: Are you talking about expenses for compelling, limiting or denying discovery?

MR. ORSINGER: And the award of appeasement.

CHAIRMAN SOULES: How could that violate Transamerican?

MR. ORSINGER: I guess only if it's so high that you can't litigate. If it's like, you know, 75,000 and you've got to pay it right now and you can't, then you run headlong into Transamerican.

CHAIRMAN SOULES: Well, (4) takes care of that, doesn't it?

MR. LATTING: Yeah, it does. We've already taken care of that.

CHAIRMAN SOULES: That's in "Time for Compliance." There's a general order down there.

HON. SCOTT A. BRISTER: How about a $10,000 sanction against Exxon? It's not going to preclude discovery, but it sure is more than a $500 slap on the wrist, don't you think? I mean, I'm pretty positive Transamerican applies to $10,000 in attorneys'

fees.

See, the task force got around this problem by expenses in (2) was limited to an amount that is not substantial. It was only slaps on the wrist, obviously an amorphous problem. This now can include substantial attorneys' fees as long as it's not own unreasonably burdensome. But I've never heard of a sanction that's going to be unreasonably burdensome for Exxon, and yet Transamerican procedures have to apply surely.

CHAIRMAN SOULES: Anything else on 166d?

MR. ORSINGER: Yeah. My other thing is I wanted someone to explain to me, we've just said that the statute on sanctions doesn't apply to discovery because we say so, but is that right? In other words, if you read the statute, it doesn't say that it doesn't apply to discovery.

MR. YELENOSKY: We already answered that.

MR. ORSINGER: It says that it applies to pleadings and motions and other -- pleadings and motions, is what the statute

says. And there will be some discovery pleadings, some discovery motions. And so are we comfortable that we can just haul off and make our own set of rules on everything relating to discovery? Because we've certainly made that assumption.

MR. LATTING: Well, I'm not sure I understand the question, but we've written Rule 13 to be in compliance with Chapter 10.

MR. ORSINGER: Well, let's say I file a motion relating to discovery that everyone around the table would agree violates Rule 13.

MR. LATTING: Well, I think you've run afoul.

CHAIRMAN SOULES: Let him finish his question.

MR. LATTING: Well, I thought he had.

MR. ORSINGER: Okay. Then we and our rules are saying the only way to address that is through Rule 166d, but the statute would apply to the motion, even though it was a discovery motion.

CHAIRMAN SOULES: Richard, the only thing that is -- a discovery motion is not excluded from Rule 13, as I understood it. It is discovery requests, responses, objections and claims of privilege. Motions, discovery motions are under the auspices of Rule 13.

MR. ORSINGER: And responses to motions also would be under Rule 13 and not under Rule 166d?

CHAIRMAN SOULES: Well, it could probably be under either rule.

MR. LATTING: It would be either one.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: And the statute only applies to -- it does apply to pleadings and motions, but it doesn't apply to other papers, according to its language.

Judge Guittard.

HON. C. A. GUITTARD: I believe that Joe agreed that there should be some modification of that proposed Transamerican language that had been left out of (b). And I wonder whether we ought to settle upon that or

whether or not the chairman can work that out before it goes to the Supreme Court without any further action by this Committee.

CHAIRMAN SOULES: Well, we should make -- the way it starts now, (b), A court may impose any of the following sanctions that are just and that are directed to remedying the particular violation.

HON. C. A. GUITTARD: Yes. And the question is whether or not it should be -- these sanctions should be limited to orders or sanctions that are directed to remedying, rather than as provided up in subdivision (B), conduct that cannot be remedied.

MR. LATTING: But I think that to remedy a violation but not to remedy conduct necessarily that -- can you remedy --

MR. YELENOSKY: It says it can't be remedied by -- essentially by equitable -- it cannot be remedied by an order compelling, denying or limiting, but it could be remedied essentially by a sanction of another type.

MR. LATTING: Right.

HON. C. A. GUITTARD: Is that

what it means then?

MR. LATTING: Yes, sir.

CHAIRMAN SOULES: That's what it means.

Steve Yelenosky.

MR. YELENOSKY: Yeah. On that point -- well, it's not really on that point, and this may be just minor language, but the Transamerica language is going to be on (b), right? And in 3(a), the way it reads leads one to think until they get down to (b) that Transamerica isn't in there, so I would just suggest a slight change in the 3(a) language, "Sanctionable conduct," and say, "In addition to or in lieu of the relief provided above, the court may impose" -- strike "one or more of the" -- "may impose sanctions as set forth in subparagraph (b)."

CHAIRMAN SOULES: What's your motion?

MR. YELENOSKY: My motion is to strike in 3(a) the five words "one or more of the" and then to add the word "as" between "sanctions" and "set forth," so that it sort of incorporates the standard as well as

the --

MR. LATTING: That's a good idea.

CHAIRMAN SOULES: Is there any opposition to that? There being no opposition, it will be done. So we will strike "one or more of the," and it will read "may impose sanctions as set forth" and so forth.

Anything else on 166d?

PROFESSOR DORSANEO: I hate to ask, but Joe, could you read that language again, the Transamerican language? I'm sitting here listening and thinking that --

CHAIRMAN SOULES: I'll read it as the chair and Joe can check it. "A court may impose any of the following sanctions that are just and that are directed to remedying the particular violation involved and that are no more severe than necessary to satisfy the legitimate purposes of such sanctions."

PROFESSOR DORSANEO: Well, I personally don't think that's Transamerican. I think the "and" -- and I realize somebody just talked about remedying and punishment as

remedying, but I think it's too --

HONORABLE C. A. GUITTARD: Remedying or punishing.

PROFESSOR DORSANEO: I think remedying is -- we went through this whole process of the legitimate purpose of sanctions. Once upon time, it was just remedy, and then it got to be deterrence, and then we finally got to saying punishment, and those are all legitimate purposes of sanctions, but the limitation on them being no more severe than they need to be is in addition to whatever purpose you're trying to achieve. And the purpose can be remedial or something other than remedial, but I don't think it's helpful to say that punishment is remedial.

HON. C. A. GUITTARD: I agree.

CHAIRMAN SOULES: Okay. Tommy Jacks.

MR. JACKS: There is another typographical error that Joe's computer failed to correct. In (b)(3), after the phrase "including attorney's fees," there should be a second comma --

MR. LATTING: That's true.

MR. JACKS: -- between "fees" and "caused."

CHAIRMAN SOULES: Where is it, Tommy, again?

MR. JACKS: It is after the word "fees" and before the word "caused" in 3(b).

CHAIRMAN SOULES: Okay. I've got it.

MR. LATTING: Everybody will like that.

CHAIRMAN SOULES: Anything else on 166d? Alex.

PROFESSOR ALBRIGHT: I have two motions. One is a clarification only. In (ii), what I'm going to be doing is dividing (C) into two separate parts, so it will read "(C) has repeatedly made discovery responses that are untimely, clearly inadequate or made for the purposes of delay; (D) has repeatedly made discovery requests, objections to discovery or claims of privilege that are not reasonably justified."

MR. LATTING: Yeah, we ought to

do that. We intend to do that.

HON. C. A. GUITTARD: Unanimous consent.

CHAIRMAN SOULES: Any objection to that? Okay. That will be done. And then we'll change (D) to (E)?

PROFESSOR ALBRIGHT: Right. Okay. And then my second one --

CHAIRMAN SOULES: I'm sorry, wait a minute. (C) will read "has repeatedly made discovery requests that are untimely, clearly inadequate or made for purposes of delay; or (D)" --

PROFESSOR ALBRIGHT: No. Cross out the (D). I mean, cross out "or."

MR. YELENOSKY: Yeah, you don't need "or."

CHAIRMAN SOULES: Well, we've got "or" every place else. "Or (D) has repeatedly made discovery requests, objections to discovery or claims of privilege that are not reasonably justified; or (E)" -- have you got it? Okay.

Anything else on 166d? Alex.

PROFESSOR ALBRIGHT: On (b)(2),

insert the word "allowing," or two words, "allowing or," before "disallowing," so at the very beginning you have "Allowing or disallowing further discovery in whole or in part, including changing discovery limitations."

HON. C. A. GUITTARD: Modifying.

CHAIRMAN SOULES: Including what?

PROFESSOR ALBRIGHT: Changing discovery limitations.

CHAIRMAN SOULES: How about "modifying"?

PROFESSOR ALBRIGHT: That would be fine, because I remember we discussed that before.

CHAIRMAN SOULES: Any opposition to that?

MR. HAMILTON: Where is that?

MR. ORSINGER: What does she mean by "discovery limitations"?

CHAIRMAN SOULES: What do you mean by "discovery limitations," Alex?

PROFESSOR ALBRIGHT: It would

be the discovery limitations proposed in Rule 1 primarily.

MR. ORSINGER: Like time limits?

PROFESSOR ALBRIGHT: Time limits, limitations on interrogatories, hours of depositions. I think throughout the discovery discussion about the Discovery Rules, we all felt that if someone was abusing discovery, that one possible sanction would be lessening their amount of discovery or certainly adding to the other person's hours of discovery or other limitations to remedy the problems caused by that abuse.

CHAIRMAN SOULES: Any opposition to changing (2) as suggested? Okay. That will be done, and it will read "Allowing or disallowing further discovery in whole or in part including modifying discovery limitations."

MR. LATTING: "Changing" is what she said.

MR. ORSINGER: But we changed it to "modify."

PROFESSOR ALBRIGHT: We

discussed the word "changing." We decided to go with the Anglo-Saxon word.

MR. MARKS: So what is "modifying"?

MR. YELENOSKY: It's French.

CHAIRMAN SOULES: Okay. "Changing." Any comment on that point? Okay. There's no opposition to that. It will be done.

Anything else on Rule 166d? Rusty.

MR. McMAINS: Well, I only have one -- I again have a problem with this no. (8), which says "Making such other orders as are just."

I mean, first of all, we already said in the first part that the court may impose any of the following sanctions that are just, and then we just close with saying "any other orders that are just." And as long as a just order is just, then -- I mean, I don't -- I just don't know exactly what this -- I mean, other than it's a catchall. Well, anything the court might imagine they ought to be able to do, I'm not so sure that we really want do that.

CHAIRMAN SOULES: Do you have a motion?

MR. McMAINS: I would move to delete (8) because I don't see that it adds anything.

CHAIRMAN SOULES: Is there a second? It fails for a lack of a second.

Anything else on 166d?

MR. YELENOSKY: Did you get the "or" between the (a) and the (b)?

CHAIRMAN SOULES: Where?

MR. YELENOSKY: 3(a)(i) and then -- (ii), "(A) has disregarded a rule, a Discovery Control Plan, a subpoena repeatedly or in bad faith; or (B)," since you put an "or" in front of all the other ones.

CHAIRMAN SOULES: Okay. I've got that. Okay. Put "or" just before (B).

Anything else on 166d?

Okay. So for my edification, where do we have now the sanction of deemed admissions?

MR. HERRING: You do not, not in here.

CHAIRMAN SOULES: So we're not going to have deemed admissions any more?

PROFESSOR ALBRIGHT: I think it's in a discovery rule.

MR. HERRING: We have not -- it was in the discovery rule. It was taken out of the discovery rule. We have not met on that issue here. I don't know where it ended up.

CHAIRMAN SOULES: Let's check and see if we've got that.

MR. HERRING: And there are a couple of other issues, Luke, that the subcommittee still needs to meet on on other sanctions matters, but not on these rules, not on these two.

CHAIRMAN SOULES: Not on discovery sanctions or Rule 13 sanctions?

MR. HERRING: Not on this general discovery sanction rule, that's correct.

PROFESSOR ALBRIGHT: In answer to your question about deemed admissions, Rule 13 of the Discovery Rules, 13(4), says, "Any matter admitted under" -- no, wait, never mind. I was looking at the wrong thing. Let me look again.

If no response is timely served, the request is admitted without the necessity of a court order. That's what it says in Rule 13(3).

CHAIRMAN SOULES: Okay. And then does that go on to provide for the way you escape a deemed admission? It does?

And then where is the automatic exclusion sanction? As I recall, you had that in the Discovery Rules too, the failure to respond or to supplement discovery? Is that in there, Alex?

PROFESSOR ALBRIGHT: Excuse me?

CHAIRMAN SOULES: The failure to respond or supplement discovery, the automatic exclusion rule.

PROFESSOR ALBRIGHT: The automatic exclusion rule is in Rule 6, I believe, Rule 5 or 6. Rule 6 is the automatic exclusion effective on trial for a failure to provide timely discovery.

CHAIRMAN SOULES: Okay. Those in favor of Rule 166d as amended by today's work show by hands. 16.

Those opposed. Five.

16 to five it passes.

Chuck, tell us what it is that you all need to look at beyond these two rules so that we'll have that in mind.

MR. HERRING: We need to go back and look at the Discovery Rules one more time. In the original task force report we dealt with the minor Sanctions Rules which are very minor. 18(a)(h), 21b, 120a, 166(a)(h), 203 and 269e. Those are very minor revisions just kind of interspersed in the rules. That's probably a total of 30 minutes more discussion here when we come back. Most of those revisions we hope have been taken into account and adequately dealt with in these two rules so we can just eliminate them, but we need one more session to look at them.

CHAIRMAN SOULES: Okay. I would like to see, if you will -- the Discovery Subcommittee has given us a disposition table of the Discovery Rules, which Alex brought in today.

Did you bring enough copies for everybody?

PROFESSOR ALBRIGHT: No, because it has not been reviewed by anyone.

CHAIRMAN SOULES: Okay.

PROFESSOR ALBRIGHT: And so before it gets passed around I would rather somebody review to make sure I got it right.

CHAIRMAN SOULES: Who would like to -- what I would like to do is get a few people involved in this to take a look and help Alex be sure that we've got the current rules juxtaposed with the proposed rules, and she goes through the entire text of all the current Discovery Rules and gives us a disposition table to check to be sure that we haven't overlooked something that might be important.

PROFESSOR ALBRIGHT: I have not even sent that to Steve Susman yet. I just finished it yesterday.

CHAIRMAN SOULES: Who would like to take a pass at this? Okay. Bill Dorsaneo, Chuck Herring, John Marks, Elaine Carlson. Will you make a note of those. Anyone else? Okay. That's Bill Dorsaneo, Chuck Herring, Elaine Carlson, John Marks.

Could you get them copies, Alex?

And Justice Sarah Duncan told me that she was interested in this also, and together with your subcommittee get the input of those people until you're satisfied that we've got everything covered that we need.

And I would like to have a report on that at the next meeting, just sort of a cleanup report that if you see -- I think in fairness to everybody, if you see a question, we should raise the question and let the Committee focus on it to resolve any question that there may be about that.

This is a tremendous piece of work that Alex has done. As a matter of fact, I think when your subcommittee and the other participants are done with this that we should send this to the Court, because it may very well be that the court may want to publish this to give guidance to the profession in trying to make a transition from the old rules to the new rules, if they promulgate the rules that we send them. And then, of course, it can be modified to reflect any modifications the Court may wish to make.

Thank you very much for this. There was a lot of work involved in this and something that very much needed to be done.

Okay. Anything else on sanctions today? Joe and Chuck, thank you very much again for the tremendous piece of work. I think, except for the loose ends that Chuck has talked about, that really completes the Sanctions Subcommittee efforts, and again, thank you all for a great job. I know that the Committee as a whole shares that feeling with me, and the Court will likewise.

We will then get for you a red-line version of the difference between what you brought here today and what we finished with, as well as a clean proposed Rule 13 and 166d for me to send to the Court with our recommendation that the Court promulgate these rules.

And another major milestone I guess I should mention is that except for the Task Force of the Justices of the Peace, which came much later than discovery, sanctions and the court's charge, we've now completed the path from task force through this Committee to

complete a final product to send to the Court. And that's been what, now, four years in the making, Chuck?

MR. HERRING: June 19th, 1991, Luke. It's been a long time.

CHAIRMAN SOULES: More than four years' worth of work on these rules, and I don't know, thousands of hours doesn't do it justice, tens of thousands of hours of lawyers' input from the bar, so thanks to everybody for that.

Next we had -- let's see, Steve, you had a Rule 25, medical records of a nonparty. Do you want to talk about that?

MR. YELENOSKY: Yeah.

CHAIRMAN SOULES: And we can maybe let this catch up with the Discovery Rules at the Court.

MR. YELENOSKY: Yeah. I think Holly just handed out two pages. The first one was the draft that I came up with after the last meeting, and I sent it to Judge Brister and John Marks. The second page is what John Marks came back with. And we've talked today, and with some modifications that

I think we both agree on I can propose something specific.

If you look at the second page, I would make some minor changes to what John has come back with, which is an improvement on what I had.

CHAIRMAN SOULES: Okay. What are those changes?

MR. YELENOSKY: One is just to clarify in the third line where he has "medical authorization," I thought of and used the term "medical records release."

CHAIRMAN SOULES: Now, are you looking at the top page or the second page?

MR. YELENOSKY: I'm sorry, the second page with the Liddell-Sapp letterhead on it.

CHAIRMAN SOULES: Okay. And we're on the third line of that.

MR. YELENOSKY: The third line begins "medical authorization," and I would just change that to "medical records release." I don't know if that's important.

And then at the very end, to just incorporate the very last sentence that I had

on the first page, which is "Nothing in this rule excuses."

CHAIRMAN SOULES: Okay. So take a minute and read it. You're reading the rule on the Liddell-Sapp letterhead, and you should append to that the last sentence on the first page, and then we'll talk about it.

You're moving that this be adopted?

MR. YELENOSKY: Yes.

CHAIRMAN SOULES: Okay. John, do you second that?

MR. MARKS: Yes.

MR. YELENOSKY: The last sentence doesn't -- I don't think it adds anything that isn't already true. But I guess that since it's a rule as to procedure, as a notice rule, you're just going to make clear that the fact that you give the notice to the other party does not prevent either that other party or someone else from raising some statutory confidentiality argument as an obstacle to the production of the records. But I think that's true regard regardless of whether you say it or not, so I'm not adverse to, if you feel it shouldn't be in there, to

taking it out.

CHAIRMAN SOULES: Okay. Discussion. Alex Albright.

PROFESSOR ALBRIGHT: This rule says that the production should -- if you want the production, you should do so by oral or written deposition. Under the new Discovery Rules or the proposed Discovery Rules we have Rule 19, Production of Documents and Tangible Things from a Nonparty which allows for production without a deposition. Did you mean to exclude that for a reason?

MR. YELENOSKY: I hadn't thought of it.

MR. MARKS: I hadn't thought about that, but there might be a good reason for excluding it since you're going for nonparty medical records.

MR. YELENOSKY: But they have production from a nonparty. That would be appropriate as long as you distinguish between a request for production to a party who happens to have nonparty medical records and a request for production directly to the nonparty. And if you can figure out language

that takes that into account, I don't have any problem. The whole point is to make sure that the nonparty gets notice, and a request for for production to the nonparty might do that.

HON. SCOTT A. BRISTER: You might just refer to the rules, "would do so pursuant to Rules X, Y and Z under discovery."

CHAIRMAN SOULES: Alex.

PROFESSOR ALBRIGHT: So did you intend when you were requesting production of these kinds of documents to a party you could not do it through an ordinary request for production of documents?

MR. MARKS: Yes, we did intend that.

CHAIRMAN SOULES: I didn't understand the question, Alex. I'm sorry, can you speak up and restate the question so I can hear it?

PROFESSOR ALBRIGHT: The question was, did they intend that if you were requesting these sorts of documents from a party, you could not obtain these documents through an ordinary request for production of documents? They want to have an oral or a

written deposition instead of a request for production of documents. I don't really understand why.

CHAIRMAN SOULES: Did you use the word "party" in your question?

PROFESSOR ALBRIGHT: A party, right.

CHAIRMAN SOULES: Well, this rule, as I read it, only applies to nonparties.

MR. YELENOSKY: Right. But you could -- and in my -- on the first page of my original draft I said when you issue a request for production or a subpoena for medical records of a nonparty you to have copy the subpoena.

And then John Marks came back with saying, well, let's do it by deposition and copy the subpoena.

If you're going to allow a request for production to a party, obviously, as you could do under the current rules that says, "Texas and Mental Health/Mental Retardation, give me the medical records of so and so," you would still need some mechanism of notifying so and

so that you're trying to get their records.

I guess you could go back to the original draft and say that would be okay if you copied the request for production to the nonparty, but --

CHAIRMAN SOULES: But Alex's question only deals with parties.

MR. YELENOSKY: No. It deals with both, as I understand it, because the new rules allow for a request for production that's addressed to a nonparty.

PROFESSOR ALBRIGHT: But their rule concerns whether you have documents that are held by a party or a nonparty, so long as those documents concern --

MR. YELENOSKY: -- a nonparty.

PROFESSOR ALBRIGHT: -- a nonparty's medical situation or mental health situation. If you're requesting those documents, the idea is that you want to give notice to the person who is discussed in those documents.

CHAIRMAN SOULES: Oh, I see.

PROFESSOR ALBRIGHT: So if the only purpose is notice, I don't see that you

really have to have a deposition. Why can't you send them a copy? You could send them a copy of the subpoena, if it is by deposition or Rule 19 production of documents and things from a nonparty when you do have a subpoena; but if you have a party from whom you're requesting those documents from, why couldn't you just send a copy of the request for production?

MR. YELENOSKY: Well, the only thing, I guess, that I've thought of in that regard is that with a request for production, that -- the response to a request for production, although it generally is not, could be immediate with no opportunity for the nonparty whose records are involved to interject himself or herself.

Do we have any more time when you're doing a notice of an oral deposition? You have the time between that and the deposition. You have the time laid out when the deposition is going to be. If it's a written deposition, you would have the time for --

CHAIRMAN SOULES: Buddy Low.

PROFESSOR ALBRIGHT: But actually when you're --

MR. YELENOSKY: I'm not --

CHAIRMAN SOULES: Buddy has a question here. Let's see what it is.

MR. LOW: My question is, why pick out medical records of a nonparty? For instance, what if I work with Temple and they want my personnel file to show what I made or something so they can compare with somebody, the plaintiff who is parallel with me, and they want to get my personnel file. Why? What's so sacred about medical records? I would consider that as sacred. Why is --

MR. YELENOSKY: Well, I'd rather produce my personnel records than my medical records.

MR. LOW: Well, a lot of people might not, though.

MR. YELENOSKY: Yeah. Well, some people might not. But a personnel file is owned by the --

CHAIRMAN SOULES: Buddy, you haven't finished your point yet.

MR. LOW: But my point is that

each person might put priority on what of their records they're getting. Why not just have a procedure when they're asking for records of a nonparty, whether it's medical or whatnot. That's all I ask.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I agree with Buddy's sentiment. At the very least I think we ought to put mental health records in here as well as medical records. They're covered by a separate privilege. But I would point out that the procedure under this rule doesn't protect medical records as well as the statute protects bank records.

In the bank records statute, they're specifically given 10 days to appear in court and make an objection, and if they don't, then it's presumed that they have no objection.

Here there might be a deposition on "x" days' notice. It's going to somebody that doesn't have the faintest idea of what to do with what they've just received. They've just received something in a lawsuit involving people they don't have and lawyers they don't

know. It seems to me maybe we ought to require that they be instructed that they have 10 days to come appear in court and make an objection or otherwise their records will be revealed.

As a practical matter, you can give a deposition notice to a layperson in a lawsuit that doesn't involve them and they won't know what to do with it.

MR. YELENOSKY: Look, I think we're forgetting what happened --

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: -- at the last meeting. I was sent away to draft this and confine it to medical records and write it. It came out in this fashion because nobody would go along with what you're suggesting right now, Richard. If they would go along with that, then I'm happy with that.

Sure, let's protect personnel files, if we can get it past this Committee. But it didn't seem that we could, and what I wanted to come away with was at least protection for medical records, and by that I meant to

include mental health records. And if that's not clear, we need to make that clear.

But I'm all for what you're saying, but the experience at the last meeting was I had to narrow down what I could get.

HON. SCOTT A. BRISTER: And the reason for that was --

CHAIRMAN SOULES: Judge Brister.

HON. SCOTT A. BRISTER: -- was because there are all these statutes, bank records statutes, and nobody in this room could say what we were about to draft wouldn't violate some of those without doing a lot of research, and was it necessary with all these statutes to try to put them all together in a rule, or were we just creating work for ourselves.

CHAIRMAN SOULES: Well, it boiled down to the Committee felt that we needed a rule for medical and I think also mental health records, because for whatever reason there needed to be more rule protection for those; and that the statutes as they existed in other areas would take care of

those other areas; and if we tried to write a rule, we wouldn't know what to write because there are so many other statutes and other areas.

MR. LOW: I didn't raise it out of mere ignorance. I was --

MR. ORSINGER: Can I respond? I think it would be very easy to write a rule that gives somebody entitlement to 10 days to come into court and to object and require that what's served on them tell them that they have the right to come in within 10 days and object. That's an easy rule to write.

CHAIRMAN SOULES: Today we're going to deal with medical and mental health, and if somebody wants to bring in a rule about other records, well --

MR. ORSINGER: I'm not talking about other records, I'm talking about this rule. I think it ought to say mental health records as well as medical, because there are separate privileges.

CHAIRMAN SOULES: There's no problem with that. Nobody disagrees with that, Richard.

MR. ORSINGER: And I think it ought to say that there's a minimum 10 days' notice, and it ought to say that the notice that's given tells people that they have 10 days, after which they forfeit their privacy. Otherwise, this is just illusory that we're giving them this protection.

MR. YELENOSKY: Well --

CHAIRMAN SOULES: Steve Yelenosky.

MR. ORSINGER: And if you want me to, I'll step next door and write something.

MR. YELENOSKY: Okay. You can do that. I guess in some instances the 10 days might help. But if you're saying that after the 10 days they've obviously waived it, that might hurt some people, because there are situations where the records might not be produced within 10 days and somebody might interject themselves on the 20th day and they still haven't been produced. Under your rule they've waived it, so I'm not sure it's a better protection. I would like to see what we could come up with there.

But I did want to add as far as other concerns like personnel files, another reason why we're focusing on medical records and mental health records, and maybe we need to make that specific and will, is as far as I know there isn't any privilege that applies to personnel files. They are under the ownership of the employer unless something contained within is particularly privileged. There are laws on confidentiality of medical records; therefore, what we're putting in here is a notice provision to make sure that those laws have an opportunity to operate.

CHAIRMAN SOULES: Okay. Aside from what Richard may want to add to this sentence about some period of time of notice, is there anything else on this proposed Rule, whatever it is, 25?

Judge Guittard.

HON. C. A. GUITTARD: The last sentence on Page 2, "However, if the identity of the nonparty," and so forth "is not directly or indirectly being disclosed," I would suggest merely, keeping the same sentence, this language: If the identity of

the nonparty whose records are -- will be -- let's see, "If the identity of the nonparty whose records are sought is not" -- "will not be directly or indirectly disclosed by the production." In other words, leave out the "beings." "Whose records are sought is not directly" -- "will not be directly or indirectly disclosed".

CHAIRMAN SOULES: Do you want to strike the word "being"?

HON. C. A. GUITTARD: Yeah. Strike "being," and instead of "is," say "will not be directly or indirectly" and strike "being" again, "disclosed."

MR. YELENOSKY: That's fine.

CHAIRMAN SOULES: Any objection to that?

MR. MARKS: No.

CHAIRMAN SOULES: Okay. That will be done.

HON. C. A. GUITTARD: I think if that's done, that's fine. But I'm trying to figure out how this applies. How can you get somebody's records without saying who you're going to get, whose records you're

going to get?

CHAIRMAN SOULES: There are a number of studies, for example, these studies where they take a drug and a placebo and they do tests like FDA tests and they can be -- and whenever they are produced, they are generally produced without the identities of the participating persons.

HON. C. A. GUITTARD: Yes. But the person whose records they are, who has a duty to disclose it, you have to say whose records they are and who you want to disclose it.

MR. YELENOSKY: No. You could say, for instance, Judge Guittard, John Marks was saying, for instance, with an expert, an expert has his opinion. What do you base that on? I base that on a review of 150 people. Produce those records. You get 150 medical records. You haven't asked for particular names and you don't get them when they're produced.

HON. C. A. GUITTARD: Well, who is the nonparty?

MR. YELENOSKY: The people

whose medical records are among those 150. But their identity is not going to be disclosed either by your request or by the documents.

CHAIRMAN SOULES: So you stipulate to redaction of all the names on all the records, just the statistical and medical information that was done in the study. That's all. That would be fair game for discovery with or without this notification.

HON. C. A. GUITTARD: But who is going to disclose it?

CHAIRMAN SOULES: The expert who did the study.

HON. C. A. GUITTARD: And he's the nonparty who you give the notice to?

MR. YELENOSKY: No. The nonparty is the people that he studied, his patients. You're talking about the medical records, meaning the records that pertain to the medical condition of a nonparty, so I'm asking Dr. Jones to give me the medical records of patients 1 through 150, and the nonparty who is not being identified are those 150 people. There may be records in the

possession of the expert, but with the records we're talking about the relationship is who is discussed in the medical records.

HON. C. A. GUITTARD: Oh.

CHAIRMAN SOULES: Okay. So let me see if this works: "When the production of medical or mental health records of a nonparty is sought and the nonparty has not signed a" -- and you just said a records release?

MR. YELENOSKY: Yeah, that's fine.

CHAIRMAN SOULES: And then it would read as written down to the last sentence, and that would read, "However, if the identity of the nonparty whose records are sought will not directly or indirectly be disclosed," and so forth, and then we would pick up the last sentence on page 2.

Any further discussion? Those in favor show by hands. 13.

Those opposed. Nobody is opposed, so that will pass, and I'll get that on to the Supreme Court.

MR. ORSINGER: Luke, I have some proposed language to add to it.

CHAIRMAN SOULES: Richard wants to add something. What do you want to add, Richard? Give it to us. Make a motion.

MR. ORSINGER: Okay. I would move that we adopt the following language or something close to it and add it to the end: The copy of the subpoena served upon the nonparty shall state that the records may be privileged and that the nonparty may make objection to the requesting party to assert such privilege within 10 days of service of notice. If such an objection is made within 10 days, the requesting party may obtain such records only upon motion and order with notice to the nonparty.

CHAIRMAN SOULES: You're saying the requesting party is supposed to raise the privilege?

MR. ORSINGER: No. The requesting party tells the nonparty they can raise the privilege within 10 days by contacting the requesting party, not necessarily by filing a pleading.

CHAIRMAN SOULES: Let me hear your wording one more time.

MR. ORSINGER: The copy of the subpoena served upon the nonparty shall state that the records may be privileged and that the nonparty may make objection to the requesting party to assert such an objection within 10 days of service of the notice.

MR. YELENOSKY: First you need to say "copy of the notice" because it's a copy of the notice, not a subpoena.

MR. ORSINGER: It's not a subpoena?

PROFESSOR DORSANEO: No.

MR. YELENOSKY: It's a notice of deposition.

PROFESSOR DORSANEO: It's the middle sentence here.

MR. ORSINGER: Sorry. Okay. Scratch that. Copy of the notice.

The conceptual framework here is --

CHAIRMAN SOULES: It sounds to me like -- I'm just talking about the words -- it sounds to me like you're -- the party, the nonparty is to ask the requesting party to make objections.

MR. ORSINGER: No. Here is

what I'm saying. I'm saying -- this is my proposal. It may be a bad one, but this is it. I'm not saying that the nonparty must hire a lawyer and file a motion to quash. I'm saying that the nonparty can call the person that issued the subpoena and say, "It says here that these records may be privileged and that I can object. I do object."

And then at that point the requesting party, knowing that an objection has been asserted, has to file a motion with the court, give notice to the nonparty, and then go before the judge and get a court order to get these privileged records. That avoids the necessity of the nonparty having to hire a lawyer to file a motion to quash.

Now, I'm not saying that the requesting party makes the objection. I'm just saying they're put on notice that the objection exists and then they have to go before the court, and the court presumably will either respect or penetrate the objection -- the privilege.

CHAIRMAN SOULES: Okay. Read it to me one more time.

MR. ORSINGER: The copy of the notice served upon the nonparty shall state that the records may be privileged and that the nonparty may make objection to the requesting party within 10 days of the service of the notice, so that means by mail you add three days or whatever. If such an objection is made within 10 days, the requesting party may obtain such records only upon motion and order with notice to the nonparty.

CHAIRMAN SOULES: Any objection to that? Carl Hamilton.

MR. HAMILTON: It seems to me like that objection ought to be made to the court.

MR. ORSINGER: The reason I didn't propose that is I think most laypeople are going to let it go because they're not going to hire a lawyer.

MR. HAMILTON: Well, they don't have to hire a lawyer just to write or call, just like they do with the requesting party.

MR. ORSINGER: Well, in Bexar County it wouldn't do you any good, because we have central assigned judges, and somebody

would walk down there, they don't have a district judge in their case, they're going to wander around the hallway looking for a district judge. Do you see what I'm saying?

CHAIRMAN SOULES: That just puts the requesting lawyer --

MR. ORSINGER: He's an officer of the court, and he says, "Well, Judge, you know, I subpoenaed this, but they're asserting a privilege. I've given them notice of the hearing. They're not here. I think it's not privileged because of x, y and z, but I need you to rule before I can get it."

And if the judge says, "I think it is privileged," then they don't get them.

MS. GARDNER: I think there are --

CHAIRMAN SOULES: Anne Gardner.

MS. GARDNER: I think there are -- I know there are lawyers in this day and time that will try to persuade the layperson that their objection is not valid and who will not reveal it to the court, and I'm afraid that that puts the layperson in the

clutches of unscrupulous lawyers.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Well, what Richard suggested certainly, I think, is more protection rather than -- it can't be any less protection.

With respect to whether you make the objection to the requesting attorney or to the court, remember that the concern for this came about -- primarily, initially the concern came about in the case where the records were requested of an individual in a state hospital, and that individual -- or in that situation, that individual may not understand, even as it's explained as Richard has written it, but may show this notice of deposition with notice of a potential privilege to a social worker or someone else who may take it to one of our attorneys who is coming by the state hospital or whatever.

But if an attorney doesn't get involved, it is going to be easier for that person or the social worker to call the person whose name is on the deposition notice and say,

"Hey, we want to at least know more about this before you get my medical records or my client's" -- me as a social worker -- "my client wants to know more about this before they release the records or does not want to release them."

So I think it is good to have you notify the opposing attorney.

The other point that was made is escaping me right now, and maybe I can come back to it.

CHAIRMAN SOULES: Okay. Let me see, so we'll vote on Richard's amendment, then, unless there's any further discussion. Those in favor of Richard's amendment hold your hands up. Nine. I think I counted nine. Did you count eight or nine? Please hold them up again.

HON. SCOTT A. BRISTER: This is to add Richard's language?

CHAIRMAN SOULES: Yes. Nine. Those opposed. 10. It fails by a vote of 10 to nine.

Okay. I will get that to the Court.

PROFESSOR ALBRIGHT: Can I make another motion?

CHAIRMAN SOULES: Yes. Alex Albright.

PROFESSOR ALBRIGHT: I would like to move that on the fourth line down we delete "by oral or written deposition" and insert "request such documents pursuant to Discovery Rules 11, 14, 17 or 19," which would be request for production of documents, oral deposition, deposition on written questions, or requests for production of documents from a nonparty.

And then "The nonparty whose records are sought shall be served with notice of the request in the same manner as service of citation as provided by Rule 106."

That's the way we have it for Rule 21, motion for entry on property. The reason we did that was because we were concerned that if you cannot find that person who is not a party to the litigation, you need to be able to have some sort of substituted service so that you have satisfied your obligation. Otherwise, you would just be left with, "Well, I can't get those documents because I can't find that person."

MR. YELENOSKY: Well, you have the good cause exception.

MR. MARKS: That's right.

MR. YELENOSKY: It says, "or unless otherwise ordered by the court upon a showing of good cause." "Good cause" is nobody knows where the person is and we really need these records and we'll try to use only the parts that are pertinent to the case.

PROFESSOR ALBRIGHT: All right. Then I will withdraw the second one, but I would still --

MR. YELENOSKY: Okay. And the first one is you enumerated certain provisions?

PROFESSOR ALBRIGHT: Right.

CHAIRMAN SOULES: We don't know what those rule numbers are going to be. That's one of the problems here. Is there really anything other than oral or written depositions and a request for production?

PROFESSOR ALBRIGHT: There's request for production from a party and request for production from a nonparty.

CHAIRMAN SOULES: Okay.

PROFESSOR ALBRIGHT: So there are four separate things.

CHAIRMAN SOULES: What if we just say "oral or written deposition or request for production"?

PROFESSOR ALBRIGHT: Okay. I think we need to -- or we can put blanks in there. I think whenever these are promulgated, the rule numbers should be put in there.

CHAIRMAN SOULES: Well, the concept now, though, is you want to be able to get them by a request for production from a nonparty or a party.

PROFESSOR ALBRIGHT: Yeah. The concept is, is use a request for production instead of always requiring a deposition.

MR. MARKS: For medical records? I can get medical records with a request for production from a medical facility?

PROFESSOR ALBRIGHT: Well, if you have a doctor, if the doctor is a party, can't you request documents in the possession of that party by a request for production of

documents?

MR. MARKS: Okay.

CHAIRMAN SOULES: Well, in order to expedite this and tell the Court what we're thinking about, can we just add on "request for production"?

PROFESSOR ALBRIGHT: I would say from a party or a nonparty.

MR. ORSINGER: That's all there are, are parties or nonparties.

PROFESSOR ALBRIGHT: Yeah. Well, I'm just afraid that a request for production everybody assumes is from a party.

CHAIRMAN SOULES: Okay. Is there a second to her motion?

MR. PRINCE: Second.

CHAIRMAN SOULES: Okay. To use the numbers, the blanks?

MR. PRINCE: Yeah.

MR. MARKS: Well, there's a drafting problem if you do that.

CHAIRMAN SOULES: All in favor show by hands.

HON. SCOTT A. BRISTER: What's the drafting problem?

CHAIRMAN SOULES: Those opposed. It fails by a vote of five to three.

HON. SCOTT A. BRISTER: No, no, no. Wait a minute.

CHAIRMAN SOULES: We've got to get on with this. Come on, this is nitpicking.

HON. SCOTT A. BRISTER: No. If this goes up like this, it's wrong. That's a problem.

CHAIRMAN SOULES: What's wrong with it?

HON. SCOTT A. BRISTER: Because it's just oral or written depositions.

CHAIRMAN SOULES: What about "or requests for production"? Can I get motion for that?

PROFESSOR ALBRIGHT: Well, nobody has voted on my motion yet.

CHAIRMAN SOULES: We did vote. We just voted.

PROFESSOR ALBRIGHT: No, we didn't.

HON. SCOTT A. BRISTER: I didn't.

CHAIRMAN SOULES: Okay. What is your motion?

PROFESSOR ALBRIGHT: My motion is to delete the words "by oral or written deposition" and insert the words "request such documents or shall" -- okay. "Such production shall request such documents pursuant to [proposed Discovery Rules 11, 14, 17 and 19]."

MR. PRINCE: Second.

CHAIRMAN SOULES: Moved and second. Any further discussion?

MR. ORSINGER: Yes. Does that include subpoenas issued incident to a hearing or a trial? If it doesn't, it needs to.

MR. YELENOSKY: No.

MR. ORSINGER: Well, surely you can subpoena them to come to some kind of preliminary hearing.

MR. YELENOSKY: Well, if you do, then are you going to copy notice of that subpoena -- I mean, the next sentence needs to be clarified then because --

MR. ORSINGER: We are not saying that you can't subpoena someone's

records to a hearing, are we? Is that what this is doing?

PROFESSOR ALBRIGHT: Okay. This is --

CHAIRMAN SOULES: Buddy Low.

MR. LOW: I have a question. We don't state that every place. We just say -- we have one rule now that says "methods of discovery." Try and combine them instead of citing a whole bunch of rules. I don't see why we don't just put "rules of discovery" here. The lawyers are going to know what they are. I mean, why set forth each rule and then they turn the page to this rule, that rule, and then you turn the page to that rule? That just doesn't seem like the right thing to do.

HON. SCOTT A. BRISTER: Let me make a proposal to put forth Buddy's idea. It would be in the third sentence drop everything after "authorization."

MR. YELENOSKY: The third line, you mean?

HON. SCOTT A. BRISTER: Third line, everything after "authorization" --

MR. YELENOSKY: Well, that's

out now. It's "records release."

HON. SCOTT A. BRISTER: -- or "records release" down to -- and then drop the rest of the sentence and continue on with "The nonparty whose records are sought shall be served with notice," and drop "by oral or written deposition."

PROFESSOR ALBRIGHT: I'll accept the amendment.

MR. LOW: I second that.

MR. YELENOSKY: And Richard, in response to the --

CHAIRMAN SOULES: Any discussion on proposal? All right. Let me see if I've got it. It would read "When the production of medical records or" -- I'm sorry. "When the production of medical or mental health records of a nonparty is sought and the nonparty has not signed a records release," you would then strike "the party seeking such production shall do so by oral or written deposition," and pick up with "The nonparty whose records are sought shall be served with notice in the same manner as required under these rules for service of

notice to a party"?

HON. SCOTT A. BRISTER: Right.

CHAIRMAN SOULES: Okay. Any opposition to that?

MR. ORSINGER: Yeah. That doesn't include subpoenas for hearings or trials.

CHAIRMAN SOULES: No. This is a discovery rule.

MR. ORSINGER: It is?

CHAIRMAN SOULES: Yeah. This is nothing but a discovery rule.

MR. ORSINGER: Okay.

MR. YELENOSKY: Well, John Marks and I had talked about that, because I was thinking, you know, well, this is how you would always get medical records. If you're suggesting, Richard, that you could subpoena medical records to court and there wouldn't have to be any notice to the nonparties whose medical records are at issue, then you have the same problem.

MR. ORSINGER: It will happen in temporary hearings in custody cases every single time.

CHAIRMAN SOULES: Well, this is a discovery rule, so we've passed the discovery rules, and we haven't dealt with this problem that Richard raises about subpoenas, so that's going to be governed by something else until we can get a proposal like you're doing.

Bill Dorsaneo.

PROFESSOR DORSANEO: This is designed to protect someone whose rights have already been violated or are going to be violated, because there's production notwithstanding the statutory prohibition against producing something without a release.

MR. YELENOSKY: There's no -- they produce --

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: They produce things when they get a subpoena. They say, "I've got a court order to produce this," and so --

PROFESSOR DORSANEO: In this last legislative session both the medical

liability and the Insurance Improvement Act and the statutes concerning hospitals were changed, I think, to prohibit that kind of behavior.

MR. YELENOSKY: Well, I don't know specifically about that language, but there are people who could possess these records who wouldn't fall within that statute as well.

For example, an employer who employs someone with a disability, their medical records section could have medical records.

CHAIRMAN SOULES: Okay. Where is Holly? We're going now to Judge Till.

Judge Till, give us -- we're not going to take up your task force report today, other than I would like to get a report on where -- what the status of your task force work is so that we can get some understanding of what's happening there.

HON. PAUL HEATH TILL: The task force was formed about a year ago or over a year ago, and after a great deal of dissension that had to be worked out we finally managed decide to arrive on a course taking Rule 523

as our starting point and trying to put into effect a set of rules that would in fact reflect 523 without a justice, primarily as a lay court having no further -- we know all of the district and county court rules and then the exceptions, merge the two and make a decision as to what to do.

We also went through the forcible detainer, forcible entry and detainer section and made some revisions in that area as well.

I propose that we will be finished with this as far as drafting a separate set of rules but not new rules. The total number of new rules that we are talking about is probably about six.

What we've done is taken the district court rules, modified them by the 500 set of rules, and produced what Rule 523 says you're supposed to do. We didn't go out and start writing a whole new set of rules. We just took the district and the county court set of rules, went through and modified each one of them as would be appropriate in the justice court under the 500 series rules. That's what we were attempting to do in the hope of

producing a document that would be of benefit to the justice courts throughout the state.

The forcible part has been -- the final report from the Justice Court Task Force is somewhat different than what I had envisioned when we got into it, but that's the way it goes.

But that's approximately where we are, and we should be finished in time for the next task force meeting --

CHAIRMAN SOULES: Okay.

HON. PAUL HEATH TILL: -- to that point anyway, if that's what it is to be.

But the concept of a different set of rules I know is something new. But at the same time, trying to make district and county court rules apply to justice court presents a serious problem really, because our time frame is totally different. We're not a court that has a trial record. We have to write in -- we use a docket sheet and we make notations of what happens in there and retain the document, since appeal is de novo and not on a writ of error.

And the additional broad responsibilities that are put on the justices of the peace by the legislature, every time they've got something don't know what to do with they give it to us, makes this court difficult, since you write rules primarily for the district and county court with the idea you're dealing with the bar primarily. I know there are pro se's in those courts, but that's not why you wrote the rules.

You wrote the rules for the bar to be able to deal with the court and the court to be able to deal with the bar and represent the public. Ours is the reverse. We don't -- we have collisions between the bar and the public in our court, such as on a sworn account or any number of areas where constantly you have to resolve in front of them, and we have no set rules with which to help us to resolve them, nor have there ever been any rules drafted to do that.

So after much consternation and a great deal of hesitation, I have been won over to the point -- I grant you, I was somewhat worn down in the process, but nevertheless, when it

got through, I got won over to the point of view that there does need to be a different set of rules.

I've attended a great number of justice court meetings over the last 20 years, and the largest single complaint is that they are not sure what the rules are and what they're to do. Most of the justices of the peace in this state are not attorneys. Only about 50 or 55 of them out of 780 are attorneys. The rest are not. And most of them serve as a justice of the peace at a great deal of financial hardship to themselves. They're doing it out of a sense that they're doing something for the community, and they have been constantly bombarding me, especially when they found out this task force was starting, wanting a different set of rules.

So that is what we're attempting to do, and that's the product that we're going to present to you.

CHAIRMAN SOULES: Does anybody have any questions? Okay.

HON. PAUL HEATH TILL: Then I'll take that to mean we are to continue

doing what we are doing.

HON. SCOTT A. BRISTER: What's our role on these again?

CHAIRMAN SOULES: As I understand it, I would have to get Justice Hecht to comment on this, but Justice Hecht --

HON. PAUL HEATH TILL: Justice Hecht, I think we need your opinion on this for a moment.

CHAIRMAN SOULES: Does the Supreme Court's order appointing a task force to do the JP Rules suggest that those rules are to come through our Committee?

JUSTICE HECHT: Yes. I mean, I don't know that the order does, but I'm sure the Court intends it to come through the Committee.

HON. PAUL HEATH TILL: That was my understanding, although that's not what I read in the order.

JUSTICE HECHT: We want everything to come through here.

CHAIRMAN SOULES: Okay. So when the rules are completed, then we'll need to decide how to deal with them.

HON. PAUL HEATH TILL: Well, I would hope I could get your attention to review them before I get to the final draft. There's an awful lot of work in there, folks, and it's -- I've got 10 people on my committee, and they're doing the work that all of you all have been doing over the last four or five years. We've done it in just over a year, so we've put a lot of effort into it. If it's going to be that we're going on a philosophical approach that doesn't meet with your approval, you know, I don't intend to invest any more of my time and money do to this on idle speculation that you're opposed to it.

We feel it is vital and as something important and would be of a great contribution.

One of the arguments that we had to overcome and that I presented to the committee was that what we're talking about here is having a separate set of rules and therefore there's a big problem that when you revise one set you don't do the other. But then it was pointed out to me quite succintly and the

argument was that that's true, but the courts, the two courts, are disparately and conceptually different. And our problem has been that the district and county court rules impose upon us a burden that's not appropriate and impose upon us rules and restrictions that are not appropriate. And we feel that we would be better off having a separate set of rules for that reason, and only after having spent a considerable amount of my time in going through this and reviewing it, the more I do it, the more I'm inclined to agree that it's true.

CHAIRMAN SOULES: Question, Judge Guittard.

HON. C. A. GUITTARD: I have been encouraged by you as chairman and by Justice Hecht to draft some General Rules that would apply both in the trial and in the appellate courts so that there wouldn't be duplication and so that it might be uniform.

In the respects that vacant property apply to both courts now, this effort to have a completely separate set of rules for the justice court would perplex me considerably as

to what to do about these General Rules and whether the General Rules should apply to the courts, since a great many of the rules that are included in Judge Till's draft are those that would be included in the General Rules.

Although I commend Judge Till and his committee for the effort that they have made and the diligence with which they've pursued this, I'm wondering whether or not that might go contrary to our concern for uniformity in the rules. It may be that there could be some other way of giving the justices enlightenment as to which rules apply and which ones don't. Or in those instances where the Rules of Civil Procedure don't apply or should be modified, then special rules for the courts, the justice courts, might make that explicit for their benefit and for the benefit of the lawyers that practice there. But I think that can be done without repeating all of the Rules of Civil Procedure that might apply to the justice courts.

I also note that there are some substantial changes in the practice that are suggested. For instance, as I read the

proposals, they would abolish the oral pleadings in the courts, in the justice courts. Now, that may be a good idea.

I think the idea has been that a layman who may not be able to even read or write should come to the -- should be able to come to the justice court and make a complaint, and the justice would write down the nature of the complaint on his docket and so forth without a formal pleadings; that oral pleadings are sufficient. Now, that may be obsolete, but my question is, is that what they really intend to do?

HON. PAUL HEATH TILL: Yes. The oral pleadings, if you think about it, it puts the burden on the court to make sure the pleadings are correct. He comes in and he says, "I pled this," and you think you wrote down what he says. He gets to trial and says, "I didn't say that at all, I said this. You know, I didn't say that, I said this."

Plus the fact I have about 12,000 civil cases a year that go through my court. And that rule would be fine if I had five or six, but 12,000, there ain't no way I can remember

or anyone else.

But what we will do is we will furnish them with a form and help them fill it out, but they have to still be able to read and understand, because what are they going to do with the citation? If they can't read, do we have the constable read them the citation so that they know they have been sued? I mean, we still serve them with a citation. They've got to -- we don't put the burden on the constable to go out there and find out or ascertain whether they can read and understand and read it to them or chase them down to do it. We serve them under 536 or 106 or 109 or whatever the case may be, whatever set of rules they are.

So the oral pleadings was definitely something that universally was objected to by the justices because it put the burden on the court to try to get -- they were the pleadings factory. They were the ones that had to make the pleadings, and it was a constant source of problems, so yes, that's why it's true. That was the idea.

HON. C. A. GUITTARD: Okay.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Judge, I haven't had time to review these carefully and I've really just glanced at them, but I will look at it more carefully. But my question is, are these to apply to just justice courts or small claims courts?

HON. PAUL HEATH TILL: We haven't decided to write pleadings in small claims courts.

MR. YELENOSKY: Okay. So there will still be oral pleadings in small claims courts?

HON. PAUL HEATH TILL: There aren't oral pleadings in small claims.

MR. YELENOSKY: There aren't?

HON. PAUL HEATH TILL: No, sir. There are sworn pleadings in small claims courts. They have to be reduced to writing and sworn to before they are properly before the court, so that would not apply at all.

But we're not saying anything about small claims courts. Small claims court is a

creature of the legislature, and all the rules and everything that apply to small claims court are strictly legislative. This has nothing to do with it.

MR. YELENOSKY: Okay. Well, I do know that evictions are handled in the justice courts, right?

HON. PAUL HEATH TILL: That is correct.

MR. YELENOSKY: Okay. And if you're going to eliminate oral pleadings in justice court, evictions have a really short time frame. And requiring the court to do the pleadings is one thing when you're talking about a petition, but requiring the court to accept an oral answer on an eviction seems to me to be something that ought to continue, because somebody -- because they can read that they're about to be evicted doesn't mean that they can put together an answer or that they can get into the court quickly enough to have the form in an answer before they have miss their deadline. You only have six or seven days to respond.

HON. PAUL HEATH TILL: The

problem about that is that it often takes a sworn pleading before you can institute a forcible. It also requires a written answer now. Yes, that part we would not be able to modify.

MR. YELENOSKY: When did that get in?

HON. PAUL HEATH TILL: That's been in for quite a while, the last 22 years anyway.

MR. YELENOSKY: Well, then --

HON. PAUL HEATH TILL: See, the problem is that people hear oral pleadings in justice court and then they universally apply to everything that is in my court. It simply does not work.

MR. YELENOSKY: Well, I haven't been practicing law for 22 years, but I know that within the last 22 years that the justice courts at least in Travis County would accept an oral answer on an eviction. That's been in the last 10 years, so that may be -- I mean, if that was proscribed by the rules, then I hope it continues to be ignored, because I think that's the practical way to deal with

evictions when you only have six or seven days to respond and all you want to say is "I want a hearing."

If what you're saying is that "We're going to evict you because you have been a nuisance around the complex," and all the person wants to do is say "I want a hearing," basically a general denial, and now they're going to have to go in within six or seven days and fill out a form, I don't think that that's an improvement.

HON. PAUL HEATH TILL: Well, if I may respond?

CHAIRMAN SOULES: Yes, sir.

HON. PAUL HEATH TILL: First off, you're served with a notice of a trial setting. You are not served with a notice to respond by pleading. That is part of the requirement for forcibles now. If you want to file a written answer, you may do so, and that changes the burden of proof on a default judgment, but it doesn't change anything other than that.

Now, you're confusing apples and oranges. On a forcible detainer, if a person

is properly served, they are served with a notice as to when to appear in court for trial on that subject. They don't have to file an answer to get that trial. They just have to appear. There's no requirement that they file an answer before the court. They're entitled to a hearing. No such request is entered. So I guess in Travis County when they were taking their oral answer, it was a moot point anyway because they were entitled to one in the first place.

CHAIRMAN SOULES: Judge, when we get your --

MR. YELENOSKY: Well, we'll talk.

CHAIRMAN SOULES: When we get your task force report we'll go to work on it.

MR. YELENOSKY: And I'll talk to him about that later.

CHAIRMAN SOULES: And we've got -- is the information that we've gotten so far, which seems to be Rules 1 through 457 sequentially, are these the product of the task force, and they've been approved by the

task force?

HON. PAUL HEATH TILL: Yes, sir.

CHAIRMAN SOULES: Okay.

HON. PAUL HEATH TILL: I didn't exactly intend for it to be published as the final product. This was an intermediate draft that I sent you just to let you know what we were up to and what we were doing, but no harm is done, since we can go ahead and redraft and finish up. We're in the process of going through and changing what we thought was outmoded language. We changed "his" and "her" to the name of the party. We did that throughout, but I don't really know that that would be something that any of you would have any objection to. At least I hope not.

CHAIRMAN SOULES: This is not a final final?

HON. PAUL HEATH TILL: No, sir.

CHAIRMAN SOULES: Okay.

HON. PAUL HEATH TILL: The final draft is being prepared now, and we'll be going over it in the next three meetings of my task force and then after we do that then I

should be able to submit it to you.

CHAIRMAN SOULES: Okay. As soon as we get your final product then we will certainly make it the subject of a meeting and decide with your guidance how we should approach the issues.

Before we go to another report here, Richard Orsinger has the responsibility for Rules 15 to 165. That's pleadings and amendments and a number of things.

MR. ORSINGER: 76a.

CHAIRMAN SOULES: 76a.

MR. ORSINGER: Sealed records.

CHAIRMAN SOULES: Right. Sealed records. And I've asked Rusty to help with that.

There are only now four members of that committee that I -- I think that's right. That's Richard, who is now the chair, because David Beck obviously is very occupied in his duties as president of the state bar. He's still on the committee, but not -- obviously not able to chair the subcommittee during his tenure as president; Tom Leatherbury and David Perry. And David Perry, let's see, he was a

member while he was chair of the Court Rules Committee, right? Okay. We need some -- Richard needs some help because the rules are -- they really need to be dovetailed into the Discovery Rules, and probably that task alone is going to be a fairly significant one. So we're looking for volunteers to amplify Richard's subcommittee. Okay. Michael Prince; Bonnie Wolbrueck?

MS. WOLBRUECK: Yes, I've already told Richard I would be on the committee.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: The members of the Advisory Committee that are members of the Task Force on Recodification might be good candidates, because we have taken a stab at those parts of the rulebook, you know, from a remedial perspective in certain respects, and I would be at least willing to coordinate that.

CHAIRMAN SOULES: Okay. Let me just put you on that committee, if that's okay. And then who else would you suggest?

PROFESSOR DORSANEO: Alex Albright and Elaine Carlson.

CHAIRMAN SOULES: Will you volunteer, Elaine?

PROFESSOR CARLSON: Of course.

MR. ORSINGER: Alex, you don't have to be the reporter, if you'll just participate.

PROFESSOR ALBRIGHT: Okay. I'll be glad to do that.

CHAIRMAN SOULES: Okay. Is there anyone else? Who did I write to you, Richard, that --

MR. ORSINGER: You mentioned David Keltner and Rusty McMains, but David wrote me back a letter and said that he was just involved for purposes of dovetailing the pretrial deadlines, which were discovery deadlines. I got the impression that he wasn't in for all of those rules, which there are 125 rules, so I don't know what you want to do with that.

CHAIRMAN SOULES: I'm going put him on your committee. Since he's not here, we'll volunteer him too.

PROFESSOR ALBRIGHT: Isn't Chip Babcock real involved in Rule 76a?

CHAIRMAN SOULES: Yeah. Leatherbury should be and Chip too. They both do a lot of first amendment work.

PROFESSOR ALBRIGHT: Chip is not here either, so do you want to put him on that committee too?

CHAIRMAN SOULES: It appears that Leatherbury, according to my able assistant here, has been here of all of our meetings one half of one day, so have you had any response from him at all?

MR. ORSINGER: No, none.

CHAIRMAN SOULES: Well, we'll delete him from all subcommittees and leave it to the Court to do anything else.

And let's put Chip Babcock on for 76a. Obviously you can assign particular points to particular people. So the committee will now be Richard Orsinger, chair; David Beck, Michael Prince, Bonnie Wolbrueck, Bill Dorsaneo, Elaine Carlson, Alex Albright, Rusty McMains and Chip Babcock.

MR. ORSINGER: What about

Keltner?

CHAIRMAN SOULES: And Keltner and David Perry, pardon me. Do you want to write him a letter? I'll get Holly to send you a letter that will have the list and put copies to all of the people.

Okay. Next is -- time out. We're going to take ten. Be back at 3:30.

(At this time there was a recess.)

CHAIRMAN SOULES: Okay. We're going to get to work.

The State Bar Committee on Rules of Evidence has been in a year or so effort to give us a pro forma, if you will, on the merger of the Rules of Civil Evidence and the Rules of Criminal Evidence. There is a big database that Buddy and Mike can tell you about in a minute. And I just want to get a status report on that and then try to ask the Court as the chair of this Committee, request that the Supreme Court get with the Court of Criminal Appeals and appoint a joint task force to look at those rules together with a few members, sort of like we did with the

Rules of Appellate Procedure several years back, whenever their effective date was, so that persons responsible to the Court of Criminal Appeals are on the committee and people responsible to the Supreme Court -- the practitioners of civil appellate and the practitioners of criminal appellate will all be there looking after their own interests so that something doesn't fall through the cracks.

But Buddy, why don't you go ahead and give us the status of your review of that. You and Mike together can share that status report in sort of the same vein that Justice Till give us earlier.

MR. LOW: Mike has in his committee spent a lot of time trying to combine the Civil and the Criminal Rules of Evidence. And they've given me a red-line -- they've given me two stacks of material. One is a proposed change red-lined against what it is now in the Code of Criminal Evidence, one red-lined Civil Evidence. There are not many substantive changes.

I've gone through that. I have not

submitted that to my committee because I felt like, as Luke said, we need some criminal lawyers on there. There are some substantive changes that I think should be made if we're going to do that. We should go through it rule by rule, and it would be -- it would take a little time. But the basic question I would want to know from both courts is that do they want the rules combined? And I'm assuming they do or they wouldn't have had the state bar do this work.

And with that direction and with the help of the Court, I and my committee members would be glad to serve with whomever else is appointed by the Supreme Court to go through these rule by rule.

I'll give you an example. There are many of them that apply in a civil case but not criminal, 407, rules on insurance and things of that nature. That can be taken care of. They've done that, just as the federal rules have, by stating in criminal cases this will be the rule. But we do need some guidance.

For instance, in civil cases it says the judge may on his own motion take judicial

notice of certain things, shall take judicial notice when requested by counsel. In a criminal case, it just says that the judge shall take judicial notice when requested by counsel. Should it be that the judge could in a criminal case on his own? I don't know. I don't know that might violate some constitutional guideline with the judge doing that. That's something I don't know. We need some help from the criminal lawyers.

But first I would like to know from the courts, if they want to do that, if they will appoint such a committee along with my committee members. We'll be glad to do that, go through it rule by rule.

And there has been a lot of work done by the State Bar Committee, and they've helped me fairly well post it, and they've done good work, but I think if we're going to combine them, we're going to need to make some further substantive changes, because I believe you all didn't make that many substantive changes. Your main effort was to consolidate. Is that correct?

MR. PRINCE: Do you want me to

address that?

CHAIRMAN SOULES: Mike, yes. Do you have something you want to add?

MR. PRINCE: I was chairman of that subcommittee and then chairman of the whole committee this year, but we did a lot, just hundreds of man hours and woman hours of work on that. And pretty much I would say in maybe as much as 90 percent of the cases the rules were almost identical, so there's very little change.

There are some -- as Buddy pointed out, there are some minor areas where you have a rule in a criminal case with a civil case. We did mechanically merge, clean up the language where there were inconsistencies, adopt a recommended choice of language where the difference in language didn't make any substantive difference, and we had some criminal lawyer input on our committee. But I think your idea is good.

I think at least a couple -- you have four members on your committee, as I understand it, Buddy, and I would think you would need at least two more who were criminal

lawyers who could serve in that function. And there may be some areas of substantive law that you want to look at beyond what we've looked at. But I think it's a worthwhile project considering we did it at the request of the Court, and so I think there is some interest -- request of the Supreme Court. There is some interest, and Justice Clinton attended our meetings last year, so he was aware of this and had some input while it was going on. I think there's some interest in it.

I think they're looking to your group for a recommendation, a policy recommendation about whether it should be done or not, and I think what Buddy is saying is before he can make a decision or his committee can make a recommendation about whether it ought to be done, those substantive areas need to be looked at, and I agree with that, and so I would concur in what he's asked for.

CHAIRMAN SOULES: Okay. What the Chair suggests is that we -- is that we recommend or suggest at least to the Supreme Court or inquire of the Supreme Court and the

Court of Criminal Appeals and ask the Supreme Court to inquire of the Court of Criminal Appeals if they want to have this project taken -- undertaken as a joint project of the two courts. And if they do, then to ask them to each appoint members to a task force and have that task force get -- bring to us and to both courts a work product, a final product report that we can pass on, much like we did on the Rules of Appellate Procedure sometime in the past. Does that sound like a logical approach to you?

MR. PRINCE: That sounds like a logical approach to me.

CHAIRMAN SOULES: Does anybody disagree with that? Paula Sweeney.

MS. SWEENEY: What is the ostensible reason for wanting to combine the two sets of rules to begin with? I mean, obviously this idea germinated somewhere? What's the germ?

MR. LOW: The federal courts do it in the federal rules, and --

CHAIRMAN SOULES: Well, Mike, I think you can address that.

MR. PRINCE: Yeah, I can address that. That's part of it. Saving paper is one thing. A lot of the cases you read now, although the rules don't -- and the courts, of course, don't hold to that in all of their procedures, but in a lot of rulings, each track of the appellate system and at the trial court I've seen this happen. But when there is a ruling on hearsay or a sustained objection where the rules are identical, that persuades the parties on either side -- I mean, there's no logical reason for the rules to be separated except when there is a specific constitutional or Texas statutory ruling that has historical meaning on different rulings. And so the unification is a way of simplifying or having in one place what, if there are differences, what those differences are with possible comments as to why they are there. That makes it a lot easier for the rules of reference.

We had on our committee, for example, we had a lot of trial judges who sit in jurisdictions where they hear all kinds of cases, both civil and crimimal, and we heard I

think it's fair to say uniformly judges who sit in those jurisdictions who said that would make it easier for them to have that one reference book to look at rather than going to two separate places to determine whether there were two different rules or two separate rules.

It helps you if you have a set of annotated rules. Some publisher later is going to put this out, just like the West went under the federal rules. You'll see under rule forty-whatever in the federal rules in the annotated books that come out rulings in civil cases and criminal cases, handy, ease of reference things.

So I think that's the origin of it. There's just no good reason not to do it, and it makes a lot of sense to have it all in one place. And where the differences are, the differences are still there, just like in the federal rule.

CHAIRMAN SOULES: Did I understand that your committee approached the Supreme Court or vice versa?

MR. PRINCE: The Supreme Court

approached our committee.

CHAIRMAN SOULES: And you were asking the Court if there was something substantive that they wanted your committee to undertake?

MR. PRINCE: No. The committee came to -- the Supreme Court came to us. And of course, Lee Parsley can speak to this more directly than anybody, since he was the -- since he was the person who brought it to our State Bar Committee. But they wanted a recommendation from the State Bar Committee on Administration of Rules of Evidence about whether or not we thought it was a good idea and would recommend the merging and unification of the rules, and if we were to make such a recommendation, in what form would we recommend that those rules be.

And we did adopt that recommendation by the vote of our Committee at the last meeting in May of this past year and thought it was a good idea and recommended the form in which it should be. And that's the form in which it is now that has been forwarded to you.

I think, Lee, you still have the

diskettes on all of that work that was done, which has -- I think it's in five different forms. It's got a civil set with the criminal inserted. It's got a criminal set with the civil inserted, and then it's got one set with our Committee's recommendation about what it ought to be merged in, and the work that you did on it later with the cleanup.

Have I accurately stated what you have on there?

MR. PARSLEY: That's correct.

MR. LOW: What I've gotten is the red-lined version compared with what you have recommended red-lined against the present criminal rule, then the same thing against the civil rule.

MR. PRINCE: Right. And he has the diskettes. Lee has got the diskettes on that. Does that answer your question?

CHAIRMAN SOULES: Yeah. It was really Paula's question.

MR. PRINCE: Oh, I'm sorry.

CHAIRMAN SOULES: Paula, did you get that answer?

MS. SWEENEY: Yes. Thank you.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: Luke, can I ask --

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: This is a nonsubstantive merging of the rules. No one has ever mentioned the possibility of considering substantive changes to specific rules. I know that our rules are largely patterned after the federal rules. Is there any consideration being given on whether the scope of a privilege or exceptions or whatever should be reworded or something?

MR. LOW: No. That's what I'm saying, that I think if we're going to merge the rules, we should then make a study. And although I didn't state it because I didn't think of it until you told me, we perhaps should compare the criminal rules with it and see if, you know, there are substantive changes. I think we should look at each rule for substantive changes when we do combine them.

MR. ORSINGER: Okay. I mean, I

think we should consider this. I mean, every other rule of procedure we're looking at as to whether it's a good rule or a bad rule, and there may be some opinions about some of those Rules of Evidence as to whether they should be where they are.

MR. LOW: It would be useless to combine them and then come back two years later and make substantive changes that should have been made. I mean, I think that's why I put in my letter, the cover letter, that it would be a fairly good task not to diminish the long hours and hard work the committee did, because it did an excellent job of combining, but we need to take it further if we're going to do it.

MR. PRINCE: Yeah. Just a point of clarification on that, too. There are -- we had -- the Administration of Rules of Evidence Committee of the State Bar does -- its function is to come up with, I think as this group knows, and from time to time make recommended changes in the Rules of Evidence if they think it's appropriate. And then this Committee decides whether to pass on that and

send it on to the Supreme Court or not.

In the last three or four years we have adopted certain recommendations that we did incorporate in what we were proposing. But in each case what Buddy has now, what his committee has now, back where we were making a recommendation that hasn't -- that is not part of the current rules either on the civil or the criminal side, that is indicated by footnotes. So we've clearly identified this. In the rest of this, the text is merged and where there is a case where we make a recommended change in the unification of both rules, where it's something that's beyond what's in current rules on either side right now, that's clearly identified by a footnote reference.

But there are other areas that we did not look at that we hadn't adopted a rule on, and Buddy is exactly right about that. There may be other areas of substantive change that need to be looked at.

MR. LOW: I didn't mean to imply --

MR. PRINCE: No, I understand.

MR. LOW: -- that you didn't make some changes, but I'm just saying the main effort was that, and as recommendations come up, we may want to go through it.

MR. PRINCE: Of course. Sure.

CHAIRMAN SOULES: Okay. Anything else on that? Any questions?

Okay. Next I'll let Holly pass out this Affidavit of Inability, and I would like to take this in two parts, Steve. I would like to talk first about paragraph -- let's see, the opening paragraphs and then paragraphs 3 and 4 before we talk about the clerk having the right to contest.

Steve, Rule 145, what's this all about?

MR. YELENOSKY: Well, once again we have two pages here. The second page is a letter I wrote actually to Bonnie, and we've talked about it since then, I guess, that was a year and a half ago, explaining where this proposed change in the rule comes from and what it's intended to do.

This rule came really out of the State Bar Committee on Legal Services to the Poor back in late '93, I guess, and has been

promoted by the Legal Services community largely in reaction to complaints from attorneys accepting referrals from the Legal Services community.

The part that obviously is the big change that's underlined in no. 3 basically replaces an affidavit of inability with an attorney's certification that the individual is being represented directly by an attorney in an IOLTA funded program and has been screened for IOLTA eligibility or is being represented by a private attorney upon referral from one of those programs and after that screening. That would substitute for the affidavit of inability, and it would not be contestable.

The reason for that is that -- the intent of that is to ease, and since it was proposed, has been to ease the representation of poor people basically by cutting out the contests of the affidavit that are often made and cause consternation among the private bar who accept these cases who say, "Well, I accepted this case, and I'm willing to give my volunteer time to help this person with their problem, but what I don't like is having to deal with

the contests over an affidavit of inability and appearing at a hearing and dealing with that when I wouldn't be doing this case if I wasn't convinced that the individual is indigent and I know that you've already screened them for indigency."

So that's what it proposes to do. Of course, it's possible with any system that someone could get through this system who should be paying a filing fee, but that possibility weighed against the immense duplication of effort going on with our IOLTA funded programs doing screenings initially is -- weighs in this direction in my mind.

The other part of it -- I guess you said you want to leave out the portion dealing with the clerks.

CHAIRMAN SOULES: Right.

MR. YELENOSKY: And talk about that secondly.

CHAIRMAN SOULES: Okay. So if the client has been screened through an IOLTA program and the lawyer has taken that client's case without fee including without a contingent fee, then the lawyer files a

certificate as set forth in this rule, and that takes care of costs. That means the party is free of any obligation to pay costs?

MR. YELENOSKY: Right.

CHAIRMAN SOULES: And that it's noncontestable?

MR. YELENOSKY: That's right.

CHAIRMAN SOULES: Okay.

HON. SCOTT A. BRISTER: You've just taken Rule 145 and added the underlined language there?

MR. YELENOSKY: I believe so, but it's been so long now, I would hesitate if someone said that's wrong.

CHAIRMAN SOULES: One question: If the indigent recovers in the suit, I guess then the costs would be charged to the losing party, so that would -- the indigent would not need to pay costs in that event anyway, right?

MR. YELENOSKY: That's right.

CHAIRMAN SOULES: Okay. Is there any opposition to this?

Judge Guittard.

HON. C. A. GUITTARD:

Mr. Chairman, I'm not opposing it, but I wanted to point out that in the Appellate Rules that we adopted, Rule 45 of the proposed TRAP Rules, we have tried to follow 145 of the Rules of Civil Procedure. And I don't know why this attorney certificate procedure shouldn't apply both on appeal and in the trial court, so then I would assume that this -- if we adopt this, then we ought to likewise modify the Appellate Rule 45.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: Well, David is not here right now, but you know, at the appellate level the proceeding in forma pauperis is going to be a particular burden to the court reporter, and the affidavit of inability at the trial level really I think the government absorbs the cost except for, I guess, maybe even including the cost of service and subpoenas and whatnot. But I'm not sure that we ought to condemn a court reporter to do a job that might normally be worth $10,000 on the basis of a certificate that can't be contested at a judicial hearing.

CHAIRMAN SOULES: Okay. Well, let's take this aside as to whether we take this to the appellate courts. You all can muse about that and let us know.

HON. C. A. GUITTARD: Do you want us to do a report to you on that?

CHAIRMAN SOULES: Yes, sir, if you would like. If you decide that you should make a report on it to us, then go ahead. If you decide that it's not something that needs a report, that's okay too.

Bonnie, what's your approach to this?

MS. WOLBRUECK: Well, I talked to Steve about this, and we agreed to this in this format as much as I recall. Of course, I don't need to tell all of you that there's much abuse throughout the state in Rule 145. We have attorneys that file every lawsuit with an affidavit of inability. We have attorneys that take multimillion lawsuits on a contingency and file an affidavit of inability, so there is much abuse of Rule 145, and every clerk in the state of Texas will attest to that, and I believe that some changes do need to be made.

CHAIRMAN SOULES: All right. Just, though, focusing on the changes to accommodate the IOLTA client.

MS. WOLBRUECK: At this point I don't think we oppose that.

CHAIRMAN SOULES: Judge Brister.

HON. SCOTT A. BRISTER: The current Rule 145 has paragraph 3(1), "is receiving free legal services, without contingency" as rather than being automatic, makes -- can be filed to assist the court in understanding the financial condition of the party. I'm not that familiar with -- I'd like to hear just briefly about the IOLTA screening. But assuming that screening is adequate, I don't have a problem with making that automatic.

But I'm not sure that just because the attorney comes in and says, "I'm not doing a contingency," end of hearing, that it is now mandatory that the clerk, the court reporter, everybody works for free, and that we need to make that change in order to make the other change.

CHAIRMAN SOULES: Steve.

MR. YELENOSKY: First of all, yeah, I wish I had a rulebook in front of me here, but I think you're right, that this underlining not only adds but probably replaces, so there isn't strike-out language here, and so I think we can clarify that with a rulebook. And there was a previous opportunity for an attorney to certify, but that was of no --

HONORABLE SCOTT A. BRISTER: -- not much value.

MR. YELENOSKY: -- dispositive quality. So yeah, sure, you can file an attorney's certificate and you need to say that in the rule, but it doesn't add anything.

HON. SCOTT A. BRISTER: What's the IOLTA screening process?

MR. YELENOSKY: Well, first of all, in order to -- it has to be a program funded by IOLTA, so the screening process first is the Equal Justice Committee that distributes IOLTA funds deciding to fund a particular program or project with Interest on

Lawyers' Trust Account. And of course, in order to be funded it has to meet a variety of criteria, but including that it's serving people that are no more than 125 percent above the poverty line.

Now, again, the last time I looked at this was awhile ago, but at that point it was 125 percent, and I don't believe that's changed, that IOLTA money has gone down, so I think it's still. When I say 125 percent of poverty level, you have to remember that 100 percent of poverty level as described by the federal government is incredibly low, and I couldn't give you the number off the top of my head, but it's federal poverty figures.

So when we say they're screened, income information -- if you go to a Legal Services office, for instance, people are asked what their income is, whether they're on assistance. If they're on some kind of assistance, then they've also been screened by the federal government. But if they're not on some kind of assistance, then it would be a representation as to their income level.

It is correct that you don't have any

independent investigation generally of the person's income. And that's what I said initially, that there could be somebody who represents to a Legal Services program that, you know, "My income is such" -- sometimes there are indications. Usually you know what your population is like, and if somebody comes in with an address that doesn't appear to be in an area that is indigent or has a problem that doesn't appear to be a problem that's suffered by somebody of low income, there are warnings signs.

But sure, someone could logically come in and say, "Yeah, I make minimum wage and I have 15 children," and it's not true. But that, I think, is an evil worth accepting because that can happen in any system. You can have violations there. And the same person might very well say that on an affidavit, you know, so that's your only added protection.

What you do know is that a Legal Services program has screened them. Generally they have some kind of assistance or public housing or assisted housing that seems to verify that generally. And you've got a private attorney

who has accepted or -- either a Legal Services attorney or a private attorney who is not paid who is sufficiently interested in the case to take it without fee because he thinks there's a pro bono issue there, so you have those checks. And the question is, do you then want to have this private attorney or Legal Services attorney -- and usually it's the private attorneys that complain about having to deal with the contest.

CHAIRMAN SOULES: Judge Till.

HON. PAUL HEATH TILL: So the screening for IOLTA would be if they come in and they're under any federal subsidy program, then that would be an automatic qualification?

MR. YELENOSKY: No. No. What I'm saying is that when somebody applies from Legal Services, very often they will be receiving some federal assistance, which they couldn't have gotten if they weren't poor. But that is not sufficient. Legal Services programs and IOLTA programs will ask about their income and what their income is. I'm just saying that's another independent source

of verification of low income status. If somebody comes in and they say, "I live in public housing, I get food stamps and I get AFDC," and you ask them what their income is, you have some reason to believe them if, you know, you have some indication they're receiving public assistance.

HON. PAUL HEATH TILL: But there is no -- there is really no investigation or anything?

MR. YELENOSKY: No.

HON. PAUL HEATH TILL: You just take it -- but then this becomes an assurance that the court is to accept it without question?

MR. YELENOSKY: That's correct.

HON. PAUL HEATH TILL: I would oppose that.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: Steve, would you be comfortable with a midground that you still have to file an affidavit swearing to all of that, but that the affidavit wouldn't be subject to contest, just subject to

prosecution if it's false?

MR. YELENOSKY: Well, this does require the attorney to file a certificate. You're saying to have the client file an affidavit?

MR. ORSINGER: I'm talking about that somebody -- you want to avoid a contest.

MR. YELENOSKY: Right.

MR. ORSINGER: I personally would like to avoid fraud on the government.

Now, you could possibly keep people from lying by making them go under oath with the perhaps fear that they might get indicted and put in jail if they're caught lying. And it seems to me that's a better safeguard than just the fact that they've convinced a federal agency to support them. And yet it would still accomplish your purpose. This may not meet Judge Till's concerns, but at least somebody is going under oath, and if they're caught lying they could go to jail. It seems to me that that ought to help a little bit.

CHAIRMAN SOULES: Any problem with that, Steve?

HON. PAUL HEATH TILL: Excuse me, how are you going to find out if they're lying if you can't contest it?

MR. ORSINGER: I don't know. Maybe it's a stupid suggestion. I don't know.

MR. YELENOSKY: Well, let me ask you this: How are you going to decide which ones to contest? Are you going to contest all of them? Because then the question is, are we willing to say that we're going to contest all affidavits and we would rather do that to catch the few that are maybe fraudulent? Because I don't know what your criteria would be for contesting it.

CHAIRMAN SOULES: Mr. Jackson.

MR. JACKSON: Can I give you -- we do this sort of on a practical basis there in Dallas now. We go through Ethel Ligans, who is the legal person there in Dallas for their pro bono program. And basically it operates the same way. It helps us avoid conflicts, because we'll take a pro bono deposition in a case that comes through Ethel's office. The other side then says, "You're working for them for free. You've

got to work for us for free."

And we say, "We're not working for anybody for free. We're working for Ethel Ligans for free. If you go to Ethel Ligans and she tells us you're a pro bono candidate, we will work for you too."

So basically everything comes through the agency, not from the lawyers.

CHAIRMAN SOULES: Well, this comes through --

MR. JACKSON: Ethel comes and tells the court that these are people that they recommend. Wouldn't that cut out some fraud?

MR. YELENOSKY: Well, that seems analogous to the program saying that we have screened them. We haven't done an independent investigation unless there's been some indication that would lead us to do that, which there could be.

The other side could say, "Hey, I know he has a boat." Then the Legal Services program ought to ask some questions. But without some independent investigation -- now, with the person that you're talking about, I don't know

whether she sends out a private investigator. She probably operates on a declaration.

MR. JACKSON: She probably doesn't. But we're of the opinion that if she tells us it's okay, we'll do it.

MR. YELENOSKY: Well, that's analogous to a screening by an IOLTA program in my opinion.

CHAIRMAN SOULES: Judge Till.

HON. PAUL HEATH TILL: Why not let the person on the other side of this equation do the challenging if they think it's appropriate. They're the ones that are on the recipient end. Why couldn't they challenge the validity and set it for a hearing.

MR. YELENOSKY: That's what they do now.

HON. PAUL HEATH TILL: Well, what's wrong with that?

MR. YELENOSKY: Well, what's wrong with that is why the Legal Services for the Poor Committee proposed this, which is that the private attorneys who are representing indigents are feeling that routinely I guess in some jurisdictions that

the other attorney is going to oppose the affidavit every time and they're going to be stuck dealing with that and focusing on that more than on the underlying problem.

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: Steve, once you get the contest, what do you have to do to respond to it?

MR. YELENOSKY: Well, I mean, generally we didn't deal with them in Legal Services, but there's a hearing. There's a hearing on whether or not the person is -- you have to prove up the person's indigency.

HON. SCOTT A. BRISTER: Well, the burden of proof is on the indigent. I'm wondering if, rather than make it mandatory, it might make sense under these circumstances to shift the burden of proof to the party contesting it.

MR. YELENOSKY: Then they would just engage in discovery of all your income and --

CHAIRMAN SOULES: Okay. Any other comment on this? This is Steve's

proposal for amendment to the opening paragraph or paragraphs 3 or 4 of Rule 145.

Alex Albright.

PROFESSOR ALBRIGHT: I would just like to move for the adoption of it. I think it seems like this is more screening than probably goes on under the current procedure, and that if these people have gone through all these screening procedures, the chances of fraud are relatively nil. And if I have tried to represent somebody or if I have been assigned this case by my pro bono clinic, I think that to require me to have to go down to the courthouse and prove up this person's income is just an added something that I have to do that I shouldn't. I just don't see the point of it.

CHAIRMAN SOULES: Anything else on this? Carl Hamilton.

MR. HAMILTON: I like Richard Orsinger's suggestion that the indigent have to file an affidavit. I would like to propose that as an amendment.

CHAIRMAN SOULES: Okay. The motion has been made that the indigent -- that

this should be changed so that the indigent must file an affidavit.

MR. ORSINGER: Second.

CHAIRMAN SOULES: It's seconded. Any opposition? No opposition. That's done. Any other comments?

Judge Brister.

HON. SCOTT A. BRISTER: I would move that we drop the (1) out of no. 3 and leave it as is, which is, the current rule says, "If the party is represented by an attorney who is providing free legal services without contingency because of the party's indigency, said attorney may file an affidavit to that effect to assist the court in understanding the financial condition of the party."

And let's make this IOLTA section a separate section that has the mandatory-type language in it.

CHAIRMAN SOULES: I don't see any reason for deleting the current paragraph 3. It's a different subject than this new paragraph 3.

MR. YELENOSKY: It's a

situation where they haven't received the referral through an IOLTA program, and there's certainly no harm in leaving it in.

CHAIRMAN SOULES: Right. So why don't we -- would it meet your suggestion there, Judge Brister, to leave (3) in and make this (3) that he proposes (4)?

HON. SCOTT A. BRISTER: (4) or or with dropping no. 1, yeah.

MR. YELENOSKY: The only drafting issue there is to distinguish certification under (3) and the new (4), and perhaps (3) should be labeled something different. Because up at the preamble paragraph we're saying except an attorney's certificate, so I can work on that. I could do it right now or bring it back tomorrow.

HON. SCOTT A. BRISTER: That's easy enough.

MR. YELENOSKY: Yeah.

CHAIRMAN SOULES: Why do you want to delete "receiving free legal services without contingency"?

HON. SCOTT A. BRISTER: Because that's what the current no. 3 is.

CHAIRMAN SOULES: Well, why shouldn't that also be the requirement if it's an IOLTA?

HON. SCOTT A. BRISTER: Well, that's a good question.

MR. YELENOSKY: Well, I can work on the language on that.

CHAIRMAN SOULES: Well, I want to hear from Judge Brister on that. Is that okay?

HON. SCOTT A. BRISTER: That makes sense.

CHAIRMAN SOULES: Okay. So you would leave (3) intact, but it would require an affidavit?

MR. YELENOSKY: But it would not be contestable, is what you're saying?

CHAIRMAN SOULES: The new (4), that's correct.

MR. YELENOSKY: All right. I'll bring it back tomorrow after revising it.

CHAIRMAN SOULES: Well, we've still got to vote on it, so the -- and you'll have to do some work on the preamble, I guess, to make it fit the rule leaving the current

(3) in and adding your (4) and (5), the last two paragraphs of (4) and (5).

Okay. Without regard to the issue in no. 1 about the clerk contesting the affidavit, which we'll get to in a moment, is there any opposition to these changes?

Okay. One.

Those in favor show by hands. 13.

And those opposed. One. Okay. It carries by a vote of 13 to one.

HON. C. A. GUITTARD: Mr. Chairman, this Committee has already approved our TRAP Rule 45 which is parallel and in which some of this language from 145 has been slightly modified, and I'm wondering -- I would like to inquire of Mr. Yelenosky if that has been considered, or if not, whether it should be?

CHAIRMAN SOULES: Modifying Rule 145 to be what?

HON. C. A. GUITTARD: In accordance with TRAP Rule 45 as approved by this Committee.

CHAIRMAN SOULES: That hasn't been considered, right, Steve?

MR. YELENOSKY: Well, thinking about it actually with Richard, as someone who does appellate work routinely, at the point where you file -- where under the new rules, you file a notice of appeal rather than an appeal bond and you would be requesting that the court reporter prepare the transcript or statement of facts at that point?

HON. C. A. GUITTARD: Yeah.

MR. YELENOSKY: And so I guess -- so which rules would apply at that point? Would you still be under -- 145 would still apply, or would you go under to the Appellate Rules?

MR. ORSINGER: No. There's a drafting problem.

CHAIRMAN SOULES: Okay. The Appellate Rules are off the table. We've got a lot of rules that are on the table. If you want to bring something to the Appellate Rules --

MR. YELENOSKY: Well, I'm just trying to get it clear that if it was the Appellate Rules, then this doesn't address that situation. And I guess Luke has

suggested that you all report on those as to whether you think the TRAP Rules should follow this rule.

CHAIRMAN SOULES: If we get a proposal, we'll look at.

Okay. Now, the next thing that's in this rule is whether the clerk should be allowed to contest the affidavit.

MR. YELENOSKY: The affidavits other than the ones that --

CHAIRMAN SOULES: Exactly.

MR. YELENOSKY: -- are under (4)?

CHAIRMAN SOULES: This rule was modified was some years back, and there was a problem, and that was that Ray Hardy, then the district clerk of Harris County, felt that it was his responsibility and duty as a public official to contest every affidavit of inability that was filed there, because otherwise one might slip through and it was his responsibility to see that that didn't happen.

It was modified to then delete the clerk's authority to contest because there was

a lot of court activity going on about that. And the last sentence was added that if the court finds that another party to the suit can pay the costs of the action, the other party shall pay the cost to the action. In other words, the winning party, the nonindigent, if he's got the ability to pay the costs, he must pay, so that there was some answer to the fact that the clerks were being removed from their -- from the contest process, but the county would still have a way to recover costs where it might be appropriate.

Now, that was what was done, I don't know, probably in the mid or early '80s when that change was made.

HON. SCOTT A. BRISTER: So if somebody was indigent and you win, you've got to pay the costs anyway?

CHAIRMAN SOULES: Yes. Read the last sentence. It says, "If the court finds that another party to the suit can pay the costs of the action, the other party shall pay the costs of the action."

MS. SWEENEY: That's terrible.

CHAIRMAN SOULES: Well, that's

what it is now. And unless we're going to retrogress to earlier days, then that change in no. 1 shouldn't be made.

Bonnie, do you want to speak to this?

MS. WOLBRUECK: Yes, I do. As I stated before, in the Rule 145 there has been much misuse and abuse since the new rule went into effect not allowing the clerk to contest it. Understandably the last sentence was added, but the reality in court life and everyday life is many times these affidavits, although I may stamp all over the docket sheet that there is an affidavit filed, the issue is not brought before the court unless the clerk files a motion to rule on the costs, which means additional time, court time.

And most divorces at least will come in to -- each party will pay their own costs. I mean, most divorce decrees read like that, so the county is usually out the cost on, you know, all of these affidavits, unless the clerk actually files a motion to rule for costs and handles it from there.

I would suggest that it remain in there that the clerk can contest it because possibly

then it would stop some of the abuse.

CHAIRMAN SOULES: Okay. So you think it should be amended to put back the provision that the clerk can contest?

MS. WOLBRUECK: There has to be some mechanism in it to stop the abuse that's happening.

CHAIRMAN SOULES: Have you tried to notify the court that you have an affidavit of inability?

MS. WOLBRUECK: Yes, I do. In fact, some clerks have great big red stamps that they stamp all over the docket sheet hoping that the court will see whenever they come forward and contest it or something, but even with that sometimes it's missed.

HON. SCOTT A. BRISTER: I'll second it.

CHAIRMAN SOULES: Okay. Moved and seconded. Is there any discussion, any further discussion on that?

HON. C. A. GUITTARD: What is the motion?

CHAIRMAN SOULES: That the clerk be -- that we put back in the rule the

clerk's authority to contest an affidavit of inability.

MR. HAMILTON: It's in this present rule.

CHAIRMAN SOULES: Well, no, that's the underlined part. It was taken out. I don't know when.

MR. PRINCE: Question.

CHAIRMAN SOULES: Yes, sir.

MR. PRINCE: What you're talking about is not that that would be in a case with an affidavit other than this prescreened --

MS. WOLBRUECK: Other than that, yes. We have agreed to the one where the indigent is legally indigent, you know, that screening; though any other affidavits, the clerk could, yes.

CHAIRMAN SOULES: Okay. Those in favor show by hands. 16. Those opposed. Okay. That carries 16 to nothing.

MR. ORSINGER: Luke, do we have specific language, or does someone from my subcommittee need to redraft this rule?

CHAIRMAN SOULES: No. We've

got the language now, so we'll send this to your committee to be sure that you have a copy of it.

Be sure it goes to his committee as well.

Okay. Now let's get to Rule 114. Are there any other preliminary matters in there that we need to cover?

Okay. 114 --

MS. GARDNER: Mr. Chairman.

CHAIRMAN SOULES: Anne Gardner.

MS. GARDNER: I'd like to make a motion that we delete the last sentence of that section 1, that paragraph 1 of Rule 145.

CHAIRMAN SOULES: The motion has been made to delete the last sentence. Is there a second?

HON. C. A. GUITTARD: The last sentence of what?

CHAIRMAN SOULES: The last sentence of paragraph 1.

MR. HAMILTON: I'll second it.

CHAIRMAN SOULES: It's seconded. Is there any discussion? Those in favor show by hands. Those opposed. It

passes.

Okay. Anything else on that rule?

Okay. The next rule is Rule 114. Who is going to report on that? Steve or Alex?

PROFESSOR ALBRIGHT: I think I am.

CHAIRMAN SOULES: Okay.

PROFESSOR ALBRIGHT: You should have before you -- the cover letter is from Delgado, Alcosta & Braden, and right behind the cover letter is our report red-lined from our report made in the May meeting, I think, when we voted on these matters.

There are only three items that we need to bring up that are where we proposed something different from what was passed upon in May.

If you would look on page 4, Rule 4, in the middle of that paragraph, you will see that there is a red line in the rule. There's a little line on the left-hand margin that shows you where it is, where it says "legal holidays shall be counted for purpose of" -- it actually should read "counted for purposes of the three-day period." Delete the "s" in

"periods," I suppose, and we should add that "s" to the end of "purpose" so it should be "purposes."

CHAIRMAN SOULES: Is there any opposition to that? Okay. That's done.

PROFESSOR ALBRIGHT: And then in Rule 9, page 7 --

MS. SWEENEY: We don't need to look at Rule 6?

PROFESSOR ALBRIGHT: Excuse me?

MS. SWEENEY: The chart says Rule 6 has changed.

PROFESSOR ALBRIGHT: No. That's just -- we recommended on the chart on where it says "Rule 6" and it's red-lined "changes suggested," those are changes suggested by the Supreme Court Advisory Committee that were already voted on. That's where the subcommittee's proposal was rejected by the entire Committee.

HON. PAUL HEATH TILL: Where are you now?

PROFESSOR ALBRIGHT: Okay. I am now at Rule 9 on page 7. The subcommittee

had recommended that this rule be deleted, but the Advisory Committee voted to keep it in as changed. The only change that the subcommittee recommends is that instead of including this as a separate rule, add it to the end of Rule 7(a), which is our combined rule on representation by an attorney.

CHAIRMAN SOULES: Any opposition to that? It's done.

MR. PRINCE: That would be (d), 7(d), you mean?

PROFESSOR ALBRIGHT: No. It would just be a sentence at the end of 7(a).

MR. PRINCE: A separate sentence?

PROFESSOR ALBRIGHT: Yes.

CHAIRMAN SOULES: Okay. That's done.

PROFESSOR ALBRIGHT: Then this is not in any of your drafts, but Bonnie Wolbrueck just noted, just told me that in TRAP Rule 48 we had passed some changes to the deposit in lieu of bond. And as I recall, we had lots of suggestions and votes on this, and so she suggested we make this rule the same as

the appellate rule.

And Steve, you and I represent a majority of the committee, I suppose, so do you have any opposition?

MR. YELENOSKY: I have no strong feelings either way on that one.

PROFESSOR ALBRIGHT: Okay. So we would recommend that Rule 14c concerning deposits in lieu of bond be made the same as the TRAP Rule.

CHAIRMAN SOULES: Is that the text that's here now?

PROFESSOR ALBRIGHT: No. This is -- Bonnie just told me about that. What this does is allows people to deposit a cashier's check. You can deposit cash or a cashier's check made payable to the clerk, drawn on any bank or savings and loan association chartered by the government of the United States of America or any state thereof and insured by the government of the United States of America or any agency thereof. The clerk shall deposit any cashier's check promptly.

CHAIRMAN SOULES: Okay. And

that's TRAP what number?

PROFESSOR ALBRIGHT: 48.

CHAIRMAN SOULES: 48. Okay. So change 14c to read like TRAP 48?

PROFESSOR ALBRIGHT: Right.

CHAIRMAN SOULES: Any opposition to that? It's done.

PROFESSOR ALBRIGHT: And that's it.

CHAIRMAN SOULES: Okay. Do we have a red-line from the existing rules to the now amended rules?

PROFESSOR ALBRIGHT: Yes. That's what's -- behind our first report is the second report, which is the red-lined version, which is now going to need to be changed a little bit.

CHAIRMAN SOULES: Now, what?

PROFESSOR ALBRIGHT: The red-lined version, which is at the end of this report, is now going to have to be changed a little bit. Holly did that, so Holly has it on her computer.

CHAIRMAN SOULES: Okay. So can we go a red-lined version, then, of this

subcommittee's entire report from 1 to 14 with the rules as presently -- as we recommend their changes compared to the existing rules?

PROFESSOR ALBRIGHT: Yes. It is attached to the report that you should have in your hands.

CHAIRMAN SOULES: But I think you said that needed to be changed?

PROFESSOR ALBRIGHT: Right. But it can be done very easily.

CHAIRMAN SOULES: Okay. Now, does that also deal with all of the inquiries that we had from the public on these rules?

PROFESSOR ALBRIGHT: Yes. I believe I got in the mail yesterday one from Alex Alcosta that was sent to Alex from you, and I have not had a chance to look at it so the committee has not had a chance to look at it, but we have a table which shows all of the inquiries from the public.

If you look on page 2 of our report of 9/12/95, we have gone through and listed each comment we have had and how we have disposed of it.

MR. YELENOSKY: And also, Alex,

what we recommended and also what the Committee as a whole accepted and didn't accept. And basically I think that comes down to the Committee wanted to smoke and go to church on Sunday, and we lost our recommendations on that.

CHAIRMAN SOULES: Do we have a written report from you addressing each of these letters that we got from members of the public, lawyers and so forth?

PROFESSOR ALBRIGHT: Yes. Look on page 2 on the report of --

CHAIRMAN SOULES: Page 2?

MR. YELENOSKY: It's the page right after the list of recipients and ex-officio members.

CHAIRMAN SOULES: Oh, okay.

MR. YELENOSKY: There weren't that many covered.

CHAIRMAN SOULES: Okay. So you've covered page 4, which is -- and then what about page 6? I don't know if you covered that.

PROFESSOR ALBRIGHT: There were some in there that really didn't cover our

rules.

CHAIRMAN SOULES: Okay. Will you check, then, to see that everything has been covered?

PROFESSOR ALBRIGHT: The only thing that is not covered is a letter that we got in the mail yesterday or the day before.

CHAIRMAN SOULES: Okay. Good enough. Thank you very much. I appreciate that.

Now let's go to the next report, which is what? Don, we need to do yours next because -- is that right, Lee? You want to try to get that done next for sure? Okay.

Don Hunt, the Report of the Subcommittee on Rule 315 to Rule 331. We'll take that out of order because the Court wants that as soon as possible.

Now, each chair of each subcommittee needs to make a chart similar to what Alex has in her report on every letter that's addressed to your area. In other words, if you look on page 2, numbered page 2 of the Delgado, Acosta & Braden letter that we just looked at, you'll see here there's a list of every item that's

in their part of the agenda and the supplement to the agenda. And we need that addressed by the subcommittees and the subcommittees' chairs so that we can have to complete report on all these materials, and you'll want to have those ready for the next meeting.

Okay. Don Hunt.

MR. HUNT: Mr. Chairman, I should report first that this is more the report of the chair rather than the subcommittee. The subcommittee met on one occasion in May of 1995. We took action on the rules, and based on the action took there, I performed some drafting. Most of this drafting was done immediately after the subcommittee meeting, but because we had spent so much time on discovery and sanctions, we have not gotten back together since then, and I really anticipated this would be one meeting further down the line. But it doesn't matter. We can look at these today.

But what I want to advise you of is that the summary of the responses to the letters on page 2 really represents my judgment and not the subcommittee's, but we can look at all

those, if we need to, or next time we will have a report of the subcommittee responding to all of the letters from the public.

What you have here, from Rule 315 to 331 boiled down into three or four new rules, deals with all those things that occur postverdict and preappeal. There's one rule that's not covered, and that's Rule 301, and that just falls into the gambit of another subcommittee. All that does is deal with addressing what should be in the judgment.

For the most part, this work that we have done deals with what Bill Dorsaneo and Judge Guittard drafted originally, and is an attempt to take the TRAP Rules as now sent to the Court and to incorporate into these motion rules that occur postverdict what we've already done. And we can go through these one by one, if that's your pleasure.

CHAIRMAN SOULES: I think that's what we should do.

MR. HUNT: Beginning at Rule 320, you will see a red-line there of the present rule. And as you can tell, most all of the present rule is kept, but there's been

much that has been added. What has been added in each instance is an attempt to detail what could be in a motion for new trial by way of illustration more than anything else. If the language is not clear that we are attempting only to be instructive to attorneys of those matters which could be included, then we need to change it.

But it begins as shown there in 320(a) by specifying the grounds that may be included. And it retains the good cause language, but changes the location just slightly. It indicates only that for good cause a new trial may be granted and a judgment on the motion of a party or on the judge's own motion. Well, I've left out part of it. "For good cause, a new trial may be granted and a judgment may be set aside on the motion of a party or on the judge's own motion in the following instances, among others."

Then (1) lists what we think of as -- well, the first several list what we think of are the traditional things that you include in a motion for new trial: When the evidence is factually insufficient to support a jury

finding; (2) is an overwhelming preponderance of the evidence; (3), when the damages awarded are either two small or too large or retaining the factual insufficiency and overwhelming preponderance test; (4) is simply an error of law that the judge has made that has caused and probably did cause a rendition of an improper judgment; (5) tries to incorporate misconduct of a jury, misconduct of an officer, any communication made the jury, and a juror's erroneous or incorrect answer on voir dire examination. I've tried to structure that specially, that is, as it's laid out so that it's clear that the "when" applies to all four of these and that "has probably resulted in injury to the movant" applies to all four.

I think this represents the plowing of no new ground. I was concerned about the language in (5) where it talks about any communication made to the jury and whether or not we might be suggesting to the bar that because we're listing all of these things on which one might get a new trial and could include in a motion, that we're saying that

you can get a new trial under (5)(iii) on any communication made to a jury that has probably resulted in injury to a movant. That comes out of present Rule 327 and out of the Rule of Evidence 606(b). That language is there, and I don't know whether we want to retain it or not, but it's something to look at and talk about.

But (6) then just details newly discovered evidence. (7) details default judgment problems, and it has all three that I know to be a problem, where you have a defect in service or the petition is a problem because it doesn't allege enough to allege a claim for example; or because of insufficiency of evidence; and then (iii) under (7) is the standard equitable motion for new trial.

(8) is citation by publication. (9) is conflict in the jury findings, and (10) is anytime there's -- this list of things that may cause an improper verdict or adverse judgment, evidence, court's charge, argument, and any occurrence or ruling. The idea there is to list all of the possible grounds, at least the common ones, and leave it open that

there go could be others.

Mr. Chairman, I don't know the best way to proceed through this, because much of this, I think, is noncontroversial. Perhaps it would be better if we did it looking at 320(a) and then going on to (b), (c) and (d).

CHAIRMAN SOULES: Okay. 320(a), any comment?

MR. HUNT: In that sense, the subcommittee proposes the adoption of 320(a).

CHAIRMAN SOULES: Anne Gardner.

MS. GARDNER: First of all, I want to compliment Don on how these are done. It's so easy to read the corrections and changes when they're red-lined for us to read.

The only comment I had was in subsection (7) about default judgments. I just had a question about whether (ii) might present -- might be possibly confusing, because I think insufficiency of the evidence of damages only gets you a new trial on damages from a default judgment. You're still -- it doesn't get you a new trial on liability. Isn't that correct? It only gets you a partial new trial, and

listing it among other grounds that would allow a new trial on the complete case might lead someone to believe that this is a change in the law.

MR. HUNT: It's not intended to be.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I'm on shaky ground here, but I know that when they're affirming, they always tell you that the failure to file an answer admits liability, but not damages.

MS. GARDNER: That's correct.

MR. ORSINGER: But I'm not sure that if there's inadequate proof of damages in the court of appeals that they're free to remand just the damages.

MS. GARDNER: I believe that's correct.

MR. ORSINGER: Okay. Do you think they can sever the damages in a default situation?

MS. GARDNER: Yes, I think they can. And also where there's insufficient

evidence of a causal connection between the liability and damages.

CHAIRMAN SOULES: Now, there's something that's --

MS. GARDNER: And they remand for new trial on that, on the issue of damages alone.

CHAIRMAN SOULES: That's something that is omitted. Shouldn't (7)(ii) be because of insufficiency of evidence of causation of damages?

HON. C. A. GUITTARD: Well, I don't think --

CHAIRMAN SOULES: Judge Guittard.

HONORABLE C. A. GUITTARD: The question is, is evidence of causation -- is causation admitted? In other words, if the suit is for a collision, the default judgment doesn't admit the damages, but does it admit that the negligence alleged proximately caused the collision?

MR. ORSINGER: No. No, it doesn't.

PROFESSOR DORSANEO: Anne, look

at the top of page 7. These grounds in 320, although we could argue and I think even I could say that some of them could be adjusted some, don't necessarily even imply that you would get a complete new trial rather than a partial new trial.

MS. GARDNER: That was my concern.

PROFESSOR DORSANEO: And that partial new trial language that's in 320 now is repeated over here in paragraph (f) of --

CHAIRMAN SOULES: -- 320.

PROFESSOR DORSANEO: -- 320. You just get there eventually.

MS. GARDNER: Oh, okay. I see, you're still in the same rule. All right.

CHAIRMAN SOULES: But the causation is not admitted on a default situation.

MR. ORSINGER: Well, if I may, I don't purport to be an expert on this, but under that Supreme Court case, which Bill will give us the name of, there are two different forms of causation. One of them is the causation that leads to -- well, the first

causation, which I've never quite understood, and the section causation is that from the wrongful event that these damages that were recovered from were proximately related, so -- I think it was Justice Cornyn's opinion. He broke causation down into two different components, and the second component is not admitted by the default, but the first one is.

PROFESSOR DORSANEO: The first one is, yeah.

MR. ORSINGER: And so I have made a marginal notation here that maybe we ought to specifically refer in paragraph (ii) or whatever it is, to borrow the language out of that Supreme Court case.

MS. GARDNER: That's Compuserve or Compugraphic?

MR. ORSINGER: Yeah, Compugraphic.

MS. GARDNER: Compugraphic.

CHAIRMAN SOULES: Well, it's the conduct that caused the accident, but did the accident cause the injury?

MR. ORSINGER: Okay. That's the difference.

CHAIRMAN SOULES: That the conduct caused the accident is admitted, but that the accident caused the injury is not.

PROFESSOR DORSANEO: But you could think of that second one as damages without feeling too stupid.

MS. GARDNER: You still only get a partial new trial on damages.

PROFESSOR DORSANEO: It's kind of injury and damages.

MR. ORSINGER: Well, you could modify this language by just saying "insufficient evidence of the damages or of the," and then borrow the language out of that opinion about this causal relationship between the event and the claimed injury.

CHAIRMAN SOULES: Say "evidence of causation of damages or amount of damages."

MR. ORSINGER: I think we ought to be careful that we don't overstate the case. We ought to use the Supreme Court's words for that second form of causation, because if we just say "causation" generally without qualifying it, we might be including the first element of causation.

HON. C. A. GUITTARD: That was my concern awhile ago.

CHAIRMAN SOULES: Causation of damages.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: Anyway, the way it's written now, the rule could be construed as saying that except for, the "among others" at the top, that the causation of damages is admitted, which is not in the current law.

What do you think, Don? Is there a way to fix it?

MR. HUNT: I don't have any problem with changing it to read "because of insufficiency of evidence of causation or amount of damages."

CHAIRMAN SOULES: Causation of damages or amount of damages?

MR. HUNT: Well, either one. Do you need both of them in there, causation?

HON. C. A. GUITTARD: Yeah, you do.

CHAIRMAN SOULES: Well, you're talking about a particular causation. There

are two, so you've got to talk about which causation.

MR. HUNT: So we want "insufficiency of evidence of causation of damages or amount of damages"?

CHAIRMAN SOULES: Or something to that effect.

MR. ORSINGER: I would propose that Don look at that Supreme Court case and see if he can't borrow their language as closely as possible.

CHAIRMAN SOULES: Sure.

MR. ORSINGER: Because they thought that they distinguished it adequately.

HON. C. A. GUITTARD: Why don't we say "evidence of the cause or amount of damages."

MR. MARKS: Yeah.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: Which would actually be covered by (a)(1) or (a)(2), really (a)(1), anyway, not just "among others." I mean, this is really meant to be kind of a convenient best descriptive list to be helpful.

MR. ORSINGER: (1) only applies in a jury trial, and this is a default judgment, (a)(1). You can't borrow (1) through (6) for (7).

PROFESSOR DORSANEO: You're right. Oh, I see. I stand corrected.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: I would also mention that we have completely -- if I understand this, we have completely forgotten where they fail to give service at all to the defendant, not that there's a defect, but just plain old lack of service, and then they have, you know, the constitutional dimensions of due process and everything, and we probably ought to mention that as a valid ground.

PROFESSOR DORSANEO: Well, that one is covered. That's error of law.

MR. ORSINGER: Well, maybe not. I mean, to me, (i) ought to be "lack of proper notice" or "lack of due process" or some concept that if you didn't get notice to somebody you can't enter a judgment against them.

HON. C. A. GUITTARD: I think

you're right. Just add before the rest of that, make (i) "lack of service," and then the rest should be (ii), (iii) and (iv).

PROFESSOR DORSANEO: Mr. Chairman, it seems to me the real vote is whether we should try to have a rule that articulates what the main good cause situations are, or whether, like our current rule and like the current federal rule, we make reference either specifically or opaquely to the law.

And my preference and Judge Guittard's preference and I think the preference of every student I've ever had would be that the rule give a pretty good list of the circumstances in which you could get a new trial.

We could argue about the items in this list and try to redraft them here today or we can perhaps identify, because on (a)(7), my view right now is that it might be better just to say when the default judgment was improper on legal or equitable grounds, rather than try to articulate it in a detailed way.

The same thing with respect to (a)(6). I mean, that's slightly different than newly

discovered -- than some newly discovered evidence cases such as Jackson vs. Van Winkle. It doesn't talk about, well, the evidence not being cumulative, for example. But none of that -- that doesn't trouble me very much because this, although not maybe completely perfect, it's nearly that. We could go back and look at some of these.

I guess in (a)(8), "when a defendant cited by publication moves to set aside a judgment for good cause," well, I guess maybe the moving for it shouldn't be good cause for the grant of a new trial, but maybe I'm not thinking clearly enough about it. I guess what I'm saying is that if we've got to vote on the concept, then --

CHAIRMAN SOULES: We can vote on the concept of whether or not to have a nonexclusive list.

PROFESSOR DORSANEO: Yeah, nonexclusive but --

CHAIRMAN SOULES: -- but instructive.

PROFESSOR DORSANEO: -- it's a 95 percent exclusive list.

HON. C. A. GUITTARD: Not exclusive but instructive.

PROFESSOR DORSANEO: Very instructive.

MR. ORSINGER: I don't know that anybody is against that. Why do we need to vote on that?

CHAIRMAN SOULES: Is there anyone opposed to that? All right.

But we shouldn't write a rule that tends to ignore or suggest that we're changing case law either.

PROFESSOR DORSANEO: That's right.

MS. GARDNER: My only point about (7) was that I still think that the average lawyer might conclude from the fact that the insufficiency of evidence of damages is in this list of grounds for complete new trial that therefore he's going to get a complete new trial based on that ground.

And I would propose or move that we omit that ground from the list of under (7), just delete (ii), because the other two would get you a new trial, a complete new trial on both

liability and damages, (i) and (iii), but (ii) would not, so I would propose or move to omit that.

CHAIRMAN SOULES: Well, it might or it might not, (ii).

MS. GARDNER: (ii)?

CHAIRMAN SOULES: The trial judge is not precluded from giving you a new trial on the whole case.

MS. GARDNER: Well, no. But it would be in the interest of justice. It wouldn't be based on evidence of damages. I mean, he could on his own motion.

MR. ORSINGER: Could we leave it in there and put it in the end in its own little category saying that the new trial is as to that part of causation and damages only? I hate to take it out of here altogether because it's probably your best shot at it.

HON. C. A. GUITTARD: What about in the preamble to (a), "a complete or partial new trial may be granted" and so forth, and then you've got (f) over here to qualify that with respect to partial new

trials?

MR. ORSINGER: Good point.

PROFESSOR DORSANEO: But then that suggests that you're only entitled to a partial new trial.

HON. C. A. GUITTARD: Well (f) takes care of that, doesn't it?

MR. ORSINGER: Well, a new trial could be granted on one cause of action and not another on the basis of a jury finding conflict or whatever. I mean, if they're severable without unfairness, why do we need to ball ourselves up in that? Why don't we just say partial or full new trial, and then let's have separate rules about when you get a partial or a full new trial.

PROFESSOR DORSANEO: I'm convinced now.

CHAIRMAN SOULES: Convinced how?

PROFESSOR DORSANEO: I'm convinced, I think, of what Richard and Judge Guittard said together, that maybe we ought not to be thinking so much about new trial means complete new trial any more like we used

to. You have to think about that as being a separate issue.

HON. C. A. GUITTARD: So that (a) says "a full or partial new trial may be granted."

MR. ORSINGER: I would move or second that proposal.

CHAIRMAN SOULES: So you're talking about putting in the first line of (a) "Grounds. For good cause, a full or partial new trial may be granted"?

HON. C. A. GUITTARD: Yes.

MR. HUNT: Full or complete, or does it matter?

MR. ORSINGER: Just as long as it's consistent.

PROFESSOR DORSANEO: Probably complete. You might say "complete or partial new trial as appropriate."

CHAIRMAN SOULES: How about "a new trial or partial new trial"?

HON. C. A. GUITTARD: Okay.

PROFESSOR DORSANEO: Perhaps "partial new trial in accordance with paragraph" -- some subparagraph, whatever it

is.

CHAIRMAN SOULES: Okay. Well, work on that lead-in to (a) with this concept in mind, Don.

MR. HUNT: Do we want to try to vote on that? I don't know that there's any objection to that.

CHAIRMAN SOULES: Is there any objection to that?

Okay. Just revise the language to fit the consensus of the Committee.

MR. HUNT: All right. Can we do the same thing for --

CHAIRMAN SOULES: Also, I mean, in Peralta that's a no-service default. You don't have to have a meritorious defense in a no-service default.

MR. ORSINGER: That's right. Why don't we just insert "lack of service," or instead of "defect of service," we could say "lack of proper service," and that would include both no service as well as defective service.

PROFESSOR DORSANEO: I think we can accept that.

HON. C. A. GUITTARD: Yeah. That's okay.

MR. HUNT: Just amend (i) to make it -- (7)(i) -- "because of a lack of proper service." Is that what you're saying?

MR. ORSINGER: That's the proposal.

MR. HUNT: Well, that would cure having another letter there, so that it would read now "because of a lack of proper service of process or defect in the petition"?

HON. C. A. GUITTARD: Yeah.

MR. HUNT: See, I was trying to separate each one of those, and you could have a defect in process and a defect in petition. Do we want to separate out the proper --

HON. C. A. GUITTARD: Maybe there ought to be a separate subdivision as to petitions.

MR. HUNT: Because of a defect in the petition?

HON. C. A. GUITTARD: Yeah. Or (ii), defect in or lack of service.

MR. ORSINGER: Don, can you give us an example of a defect in the petition

that would result in a new trial?

PROFESSOR DORSANEO: It's harder nowadays. But it used to be, if you didn't allege a complete cause of action, if you didn't allege a proximate causation, for example, that there wouldn't be a waiver of a pleading defect in a default judgment case. And that, I guess, messed up in the Edwards Feed Mill case, and then -- what's the post-statute default judgment case that Franklin Spears wrote? That messed it up a little bit more.

I'm less happy with knowing what the answer to your question is, but there's still a circumstance in which the pleading is so defective that the default judgment itself goes away because the judgment is far beyond the pleading.

MR. HUNT: The one I'm familiar with, and it may be more a matter of service than anything else, is where the plaintiff serves the original petition. The defendant doesn't answer. The plaintiff then amends petition to double the damages and then takes default, and so that there is a defect in the

sense that the judgment is a lot more than on the petition that's served on the defendant. And that may be a problem with service. It may be a problem that's better described in some other way, but that's one problem with petitions that oftentimes results in defaults being reversed.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: I just taught default judgments on Wednesday and I just did some research real fast and pulled up a bunch of default judgment cases. And I think you will find that there are any number of reasons why defaults are overturned.

And I like Bill Dorsaneo's suggestion that we say "when a default judgment was improper on legal or equitable grounds," because I think we will find that there are any number of enumerations, and it sounds like we're all kind of finding different situations that could be put into these (i)'s and (ii)'s. And I think you really just kind of have to go to the cases and figure out what your situation is. And there are legal errors

and there are equitable errors and they change with the cases, and so I would just move to say "on legal or equitable grounds."

CHAIRMAN SOULES: What's the consensus about that? Does anybody disagree with that? All right. We'll make that change then, so on (7) we'll strike everything after "improper" and add "on legal of equitable grounds."

MR. HUNT: That done, I think that accomplishes the idea of having an instructive list that doesn't change the law.

MR. ORSINGER: Do we need the phrase "legal or equitable," or does that in fact encompass the entirety of law? Is there any other type of argument besides a legal one or an equitable one?

MR. YELENOSKY: An inequitable and illegal one.

MR. ORSINGER: Maybe we ought to just say "where a default judgment was improper."

PROFESSOR DORSANEO: Well, but it's not -- it's really not improper to begin with. It's going to be set aside -- I mean, I

didn't quite catch all of what Professor Albright said, but when a default judgment should be set aside on legal or equitable grounds, it's not improper to begin with if it should be set aside on equitable grounds. It just should be set aside on equitable grounds because you make an equitable argument and you should get equitable relief, even though you don't have a legal argument.

What people overlook is, and the cases do and the courts do as well when they try to harmonize things, they overlook the fact that you're entitled to a new trial if there's been no service of process on legal grounds, and there's no need to show and there never has been a need to show, and Peralta was not the first time it was clear to thoughtful people, that there was no need to show a meritorious defense. And if there's a legal reason why the default judgment is vulnerable to attack, that's the end of it.

And we have the Lopez vs. Lopez or whatever that messes that up. That's why I think it's important to say "legal or equitable grounds," because people think only

in terms of equitable grounds and overlook their legal arguments.

MR. ORSINGER: But if I may, Bill's point is, if it's set aside on equitable grounds, there's nothing improper about the granting of it. We just relieved them from it out of equity.

CHAIRMAN SOULES: So "when a default judgment should be set aside on legal or equitable grounds" will be no. 7. Okay. When a default judgment should be set aside on legal or equitable grounds.

Does that square with you, Don?

MR. HUNT: Yes, sir. I now have it "when a default judgment should be set aside on either legal or equitable grounds," and unless there's disagreement, I'll record that as a change.

CHAIRMAN SOULES: Okay. Any disagreement?

Now, one other suggestion, I know "among others" probably gets this at the top, but what about adding an (11) that says "such other grounds as warrant a new trial" or words to that effect?

HONORABLE C. A. GUITTARD: Well, it says "in the following instances among others." Doesn't the "among others" take care of that?

CHAIRMAN SOULES: It may. I don't think it's as clear.

HON. C. A. GUITTARD: Okay.

MR. LOW: A trial judge can just grant a new trial if he thinks there's an unfair result, so doesn't that come within what you're talking about? I mean, he just for a number of reasons just thinks it was unfair and that would take care of what you're talking about. I mean, that's needed for what you're talking about.

CHAIRMAN SOULES: Right. I think so.

MR. HUNT: Well, what's your pleasure? Shall we add an 11th or keep it at 10?

CHAIRMAN SOULES: Does anybody have a -- Richard.

MR. ORSINGER: I'd like to discuss that for just a second. We know in the mandamus cases, Johnson and whatnot, that

the trial court can set it aside in the interest of justice without having had any specific reason other than just judicial discretion. But we don't list that here anywhere, do we?

HON. C. A. GUITTARD: Nor should we.

MR. ORSINGER: Well, maybe we don't want to encourage that, but the law certainly recognizes it. Should we say it, or should we just leave it to people who are clever to find it?

MR. LOW: Even if you don't say it, I don't think you're going to change it.

CHAIRMAN SOULES: Well, I think we ought to say it. I mean, default judgment is a bad thing. People ought to be given the opportunity to --

MR. ORSINGER: Well, that's not just default. In other words, the trial court has a prerogative under the common law, apparently, to grant a new trial in the interest of justice and they don't have to answer to anybody for why. And we don't say that here, even though we know that, and I'm

wondering should we say that?

CHAIRMAN SOULES: I'd like to see an (11) that says "such other grounds as warrant a new trial or in the interest of justice."

MR. HUNT: Say that once more.

CHAIRMAN SOULES: "Such other grounds as warrant a new trial or in the interest of justice."

HON. C. A. GUITTARD: Why the "or"?

CHAIRMAN SOULES: Should it be be "and in the interest of justice"?

HON. C. A. GUITTARD: Yes, sir. "Warrant a new trial in the interest of justice."

CHAIRMAN SOULES: Warrant a new trial in the interest of justice?

MR. LOW: Yeah. That makes sense.

CHAIRMAN SOULES: That's fine.

MR. HAMILTON: Do we need (8)? Do we need to still leave (8) in there in view of the way we've changed (7)?

CHAIRMAN SOULES: The question

is, do we need (8) in view of the way we've changed (7).

HON. C. A. GUITTARD: The purpose of putting (8) in there is because we have a rule, what is it, 329a --

MR. HUNT: 329.

HON. C. A. GUITTARD: What?

MR. ORSINGER: It's 329.

HON. C. A. GUITTARD: -- 329 that provides for a new trial in those instances, and this simply brings that forward into this rule for completeness.

MR. ORSINGER: Would we leave Rule 329 in or would we kill it? We would just leave it in?

HON. C. A. GUITTARD: Yes, leave it in.

MR. HUNT: There's a proposal to make a short amendment to 329, but Rule 329 still serves a purpose, and we'll see that when we get to it. But this is just a recognition that there's a little different rule where the defendant was served by publication.

CHAIRMAN SOULES: And I think

we should take out "among others" in the preamble since we put in (11), if that's what the Committee wants to do.

Okay. Anything else on Rule 320?

MR. ORSINGER: Rule 320(a).

CHAIRMAN SOULES: 320(a).

MR. HUNT: 320(a). There are two matters. The spirit of Chuck Herring moves among us, and the suggestion has been made that we change the second line in (a) where it says "motion" to the word "initiative," since judges don't make motions, "on the court's own initiative."

HON. C. A. GUITTARD: Well, we need to go through all the rules that say "the court's own motion," then, and do that.

PROFESSOR DORSANEO: Is that where that came from earlier when we were talking about that? I think that's silly. The judge doesn't make a motion, but that's in effect what the judge is doing. The judge doesn't make an initiative either.

CHAIRMAN SOULES: Really shouldn't we say "on the judge's own ruling"?

HON. C. A. GUITTARD: Well,

that's a well understood concept, on the judge's own motion. It may not be technically accurate in some respects, but it's well understood and it seems like to me we ought to keep it as it is.

PROFESSOR DORSANEO: I think we should just say "initiative" and suggest that the judge doesn't have to have any parameters. He can just kind of do it.

CHAIRMAN SOULES: Well, Rule 41 says "or on its own initiative." It uses that for severance, so it's actually in the rule.

HON. C. A. GUITTARD: Yeah. Well, it's used both ways. But I don't see any preference for saying "initiative" over "motion," if it's understood what it means and there's no ambiguities or problems out of it.

CHAIRMAN SOULES: Okay. Initiative or motion? Those in favor of "initiative" hold up your hands. Two.

Those in favor of "motion." Four. "Motion" stays.

MR. HUNT: It stays. And the other thing that I wanted to call to the

Committee's attention is my concern that I announced earlier, that in (a)(5) where it talks about any communication made to the jury, this seems to say one may move for a new trial merely based on a communication to the jury. But 327 and the Rule of Evidence 606(b), while it contains that language of communication to the jury, there will never be a new trial granted based on a mere communication. It's really misconduct as determined under 327, and I don't know what "communication made to a jury" means if you can't get it into evidence under 327(b) or 606(b).

And so I raise that question to the Committee. Do we want to keep that? Because that's where it comes from. It's what Professor Dorsaneo originally proposed in his draft, and I've just copied it, and all I've done is try to break it up.

PROFESSOR DORSANEO: That wasn't me. That's the judge that did that.

MR. HUNT: Oh, that's Judge Guittard. All right. Judge Guittard, you get the credit.

CHAIRMAN SOULES: Defend yourself, Judge Guittard.

HON. C. A. GUITTARD: Well, I was merely bringing it forward from the other rules in order to make this complete.

MR. HUNT: All right. No one takes credit for it. But does anyone want to it left in?

PROFESSOR DORSANEO: Well, it comes from paragraph (a) of Rule 327.

HON. C. A. GUITTARD: In other words, that's not what you call "jury misconduct" exactly. It's something a little different, and it's listed here because there are grounds -- it's provided for grounds elsewhere, as grounds for a new trial.

MR. HUNT: That's true. But you can't get it into evidence unless it really fits jury misconduct, unless you change what's jury misconduct.

MS. GARDNER: Jury misconduct is basically an outside influence, which is usually a communication to a juror, right?

PROFESSOR DORSANEO: Well, we do know that it's possible to have some

communications with the jury that are perfectly permissible, so I think we ought to take it out.

MR. ORSINGER: The bailiff does that all the time.

PROFESSOR DORSANEO: I mean, if somebody says "good morning" to you, you can say "good morning" back to them.

MR. ORSINGER: Can I comment that under Rule of Evidence 606 they talk about what jurors can and cannot testify to, and one is whether any outside influence was improperly brought to bear upon any juror. And I think that this communication made to the jury is an effort to describe the concept of an improper outside influence. Maybe we ought to use the word --

HON. C. A. GUITTARD: -- improper communication?

MR. ORSINGER: It could be improper communication. But really aren't we really more concerned with an improper outside influence or an outside influence improperly brought to bear, whether it was a communication or a threat to a member of the

family or circulars laid on a juror's doorstep every morning or whatever?

CHAIRMAN SOULES: What Rule of Evidence says that?

MR. ORSINGER: 606(b).

HON. C. A. GUITTARD: Well, the alternative is to -- instead of just "communication made to the jury," just adopt the language we have over here under the misconduct rule, "outside influence made to bear on the jury." That's one of the grounds for a new trial. Just put it in just like it says in the rule.

MR. LOW: Luke.

CHAIRMAN SOULES: Yes, sir. Buddy Low.

MR. LOW: One of the things we're going to get into, my committee looked into that, and the way that Rule of Evidence is now, it would even keep a juror from testifying as to whether he was qualified, in other words, lived in the county or something like that. So we've taken the federal rule and modified it to some extent. The Federal Rule of Evidence 606 is what we're going to

recommend. But I think we don't need to mix and mingle. We can discuss it when we pick up that 606, both civil and criminal, which both need to be changed a little, and then we can come back to this. But I think some modification is going to have to be had under the Rule of Evidence.

CHAIRMAN SOULES: Any communication made to -- I think Richard is right. It would have to be "outside influence improperly brought to bear."

HON. C. A. GUITTARD: Well, put that in instead of "communication."

CHAIRMAN SOULES: Okay. Any outside influence --

MR. HAMILTON: The federal rule is "extraneous prejudicial information improperly brought to the jury's attention."

MS. GARDNER: But our case law says "outside influence."

MR. ORSINGER: I would favor our concept because it's broader, since it includes inducements and threats even indirectly.

MS. GARDNER: Well, outside

influence is a ground for misconduct, so are you substituting it for misconduct, outside influence for misconduct, or are you going to have both misconduct and outside influence?

MR. HUNT: Mr. Chairman, I think Anne has identified the problem there that troubled me, that we really don't have any communication made to a jury that will get you a new trial except misconduct. And when we have said "misconduct," which Rule 327 identifies and indicates that to which a jury may testify, we've said it all. And that's the reason why I brought it to your attention for the possibility of striking any communication made to the jury, because it doesn't add much.

PROFESSOR DORSANEO: Why don't we just strike that?

MR. ORSINGER: I'd support that, because it's included in "misconduct" as defined in Rule 327.

PROFESSOR DORSANEO: Well, 327 doesn't really define it, but it says, you know, by all of those things in the admonitory instructions about what you're not supposed to

do; that if you do any of those things, that's all misconduct, but you just can't prove it because the juror is not competent to testify about it. But it's still misconduct.

CHAIRMAN SOULES: So is the sense of the Committee that "misconduct of the jury" includes any communication made to the jury or includes outside influence improperly brought to bear upon any juror?

HON. C. A. GUITTARD: That's unclear really. That may be the interpretation, but it's not clearly the interpretation.

MR. ORSINGER: Well, why don't we clear that up in Rule 327 rather than in the middle of this rule, which is a long rule that's doing a lot more. Why don't we just say "misconduct of the jury," and then over under Rule 327 let's rewrite it so that it makes sense.

MR. HUNT: That would be my suggestion, that "communication to the jury" doesn't have any place in here because it doesn't have any meaning.

CHAIRMAN SOULES: Any objection

to that?

Okay. We'll just take out (iii) and make (iv) (iii), unless there's some objection, and there is none.

MR. HUNT: Mr. Chairman, I then move that we adopt Rule 320(a) as amended.

MR. ORSINGER: I have another point that I want to raise.

CHAIRMAN SOULES: Okay. Richard Orsinger.

MR. ORSINGER: Subdivision (a)(5) and subdivision -- and I've lost the other subdivision -- talks about these errors that probably resulted in injury to the movant. And I'm a little concerned that that language reads differently from the definition of harmful error that's set out in the Rules of Appellate Procedure, because you're only supposed to reverse where the error was reasonably calculated to cause and probably did cause rendition of an improper judgment. And we're saying "probably resulted in an injury."

Now, the harmless error rule is a balancing test that it is more likely than

not, so I think "probably" is correct conceptually. But the "injury" part of this, to me, "injury" could mean something other than "probably resulted in an improper judgment," and so I think we need to be real careful when we pick our words here that we're not affecting the harmless error rule somehow.

MR. HUNT: I'm not sure why that language is used there. I had that same question. Again, that was copied from some prior work, and we didn't cover that in the committee and it would be good to address it here. I don't see much difference in using the typical language that we've used for harmless error; that is, reasonably calculated to cause and probably did cause a rendition of an improper judgment.

CHAIRMAN SOULES: You would substitute that for "has probably resulted in injury to the movant" in (5)?

MR. HUNT: Yes.

MR. ORSINGER: And it's there in (4) already.

CHAIRMAN SOULES: And it's in (4) already, and there's something similar in

(6).

PROFESSOR DORSANEO: No. But in (5)(iii), where we took out "any communication made to the jury," maybe we should say "misconduct of a party or counsel or a juror." I don't know why we left them out, but they do count.

HON. C. A. GUITTARD: Well, we've got misconduct of counsel.

PROFESSOR DORSANEO: Where is that?

HON. C. A. GUITTARD: Or argument of counsel, at least, over under (10).

PROFESSOR DORSANEO: Okay.

MR. ORSINGER: Isn't misconduct of a party going to be subsumed in this improper influence on the jury?

CHAIRMAN SOULES: Where is that?

MR. ORSINGER: Well, (5)(i) is misconduct of the jury, and we've agreed that we're going to go over and work with that concept under Rule 327.

Rule 327 is where they talk about

improper influences on the jury. I don't know why we need to mention who might bring the improper influence. It could even be someone in the neighborhood that feels strongly about the case or something.

CHAIRMAN SOULES: Don, it's in (10) that we've got got another standard besides the harmless error that probably should just be the harmless error.

MR. HUNT: That's correct.

CHAIRMAN SOULES: From "probably resulted in" and so forth to the end, we should put in "is reasonably calculated" and so forth.

MR. ORSINGER: Can I make a proposal? I've never understood why we say "reasonably calculated to and probably did cause." Why don't we just say "probably did cause"? I don't see how that ever adds anything, and the words are really not meaningful to me.

HON. C. A. GUITTARD: I agree.

MR. ORSINGER: As I understand the harmless error rule, it's a balancing test of whether it probably is more likely than not

that you got the wrong judgment. And it's reasonably calculated to and probably resulted in the wrong judgment. The "reasonably calculated to" part has never made any sense to me, and since we're talking about it, why don't we just strike it?

HON. C. A. GUITTARD: I think that's right. In other words, "calculated to cause" sort of implies that it's intended to cause, and that's not the way the courts have applied it. They've sort of ignored that term "calculated to cause," and so why don't we just leave it out?

MR. HUNT: So you want to change it in all instances in (4), (5), (6) and (10) to simply read "probably caused rendition of an improper judgment"?

MR. ORSINGER: I so move.

CHAIRMAN SOULES: That's what he wants to do.

MR. ORSINGER: I so move.

CHAIRMAN SOULES: Any objection to that? No objection. It's done.

MR. HUNT: Anything else? Then I move the adoption of Rule 320(a) as amended.

CHAIRMAN SOULES: Okay. Now, (6) does not have that same --

MR. HUNT: No. I included that as changing it.

CHAIRMAN SOULES: Okay. I think you're going to have to rework that because it says "if presented at trial probably caused rendition of an improper judgment." In other words, it doesn't quite fit that way. It doesn't work that way.

HON. C. A. GUITTARD: Isn't this what the newly discovered evidence rules say, that the evidence that's newly discovered must be some that couldn't be discovered by reasonable diligence, and also, if offered, would probably have caused a different judgment?

CHAIRMAN SOULES: Well, this says "resulted in a verdict favorable to the movant."

HON. C. A. GUITTARD: Isn't that what the newly discovered evidence rules say? Isn't that what the decision -- how the decision is interpreted?

CHAIRMAN SOULES: A verdict

favorable to the movant?

HON. C. A. GUITTARD: Uh-huh.

CHAIRMAN SOULES: I don't know.

MR. ORSINGER: It's saying that the focus is on the verdict rather than the judgment, whereas in the rest of them the focus is on the judgment.

HON. C. A. GUITTARD: Yeah. I'm not particularly wedded to that, but I just suggest that this is probably what the decisions say. If we want to change it, fine.

MR. HUNT: I think Judge Guittard is correct, that on the new evidence test as stated there it is as the cases indicate.

CHAIRMAN SOULES: Okay. So (6) stays the way it is.

MS. GARDNER: Excuse me, I was just going to read from Jackson vs. Van Winkle where it says -- one of the elements is "that is so material that it would probably produce a different result if a new trial were granted," which is basically the same thing that you just said.

HON. C. A. GUITTARD: I would

offer this other suggestion, though: I don't think that's adequate, because it might not be a jury case, and I think that perhaps it ought to be the same as elsewhere, that it would have resulted in a -- well, in a what?

MR. ORSINGER: Different judgment.

HON. C. A. GUITTARD: Different judgment.

CHAIRMAN SOULES: But if you say "the inability to present the evidence probably caused the rendition of an improper judgment," you would just have to change more of the words here, because --

HON. C. A. GUITTARD: Well, of course, what the decisions say is this particular evidence, if admitted at the trial, would have caused a different result probably.

MR. ORSINGER: Probably would have.

HON. C. A. GUITTARD: Probably would have caused a different result. Instead of "resulted in a verdict favorable to the defendant," it would say "would probably have caused a different result."

CHAIRMAN SOULES: What are you reading from? What does it say, Anne?

MS. GARDNER: Would probably produce a different result.

HONORABLE C. A. GUITTARD: Would probably have produced?

MS. GARDNER: Well, it says it in the present tense. "It is so material that it would probably produce a different result if a new trial were granted."

MR. ORSINGER: That's not good grammar.

MS. GARDNER: That's the Supreme Court.

MR. ORSINGER: I rest my case.

HON. C. A. GUITTARD: I have no compunction about revising the Supreme Court's grammar.

MR. ORSINGER: But you're already retired.

HON. C. A. GUITTARD: In other words, what the Court says is not if a new trial had been granted this evidence would probably change the result, don't they say that it probably would have caused a different

result if it had been admitted at the trial?

MS. GARDNER: I think what they were saying is that if we grant a new trial, it will produce a different result when this evidence introduced in the future at that new trial.

HON. C. A. GUITTARD: Maybe so.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: What about if no judgment has been entered? I've had a judge grant a new trial without having ever entered a judgment, so it wouldn't be a different judgment.

HON. C. A. GUITTARD: Well, that's a mistrial rather than a new trial, isn't it?

MR. LOW: No, it's not. He can declare -- because a mistrial you would be mandamused on, and you can't on a new trial. And I can't tell you that they can do it, but they've done it.

HON. C. A. GUITTARD: Well, I could see it argued that --

MR. LOW: And can't you make a motion for a new trial? Can't you make a

motion for a new trial before judgment is entered, and couldn't the judge grant it?

MS. GARDNER: Yes.

HON. C. A. GUITTARD: Well, it seems to me --

MR. LOW: So there wouldn't be a different judgment.

HON. C. A. GUITTARD: It seems to me that there are decisions that say that the it's the duty of the judge to render judgment on the verdict. Now, he can render judgment on the verdict and then grant a new trial. And doesn't he have to do that if he wants to exercise this unlimited discretion?

CHAIRMAN SOULES: It's harmless.

HON. C. A. GUITTARD: It probably is, yeah.

CHAIRMAN SOULES: And then some judges just don't go through the steps.

MR. LOW: It doesn't operate that way. They'll make a new trial, and I'll say, "This is an unfair result," and so forth and make a motion for new trial, and you can ask him to enter 10 judgments and he won't

enter them, and he can grant a new trial and there's nothing you can do.

And we say here up at the caption "a new trial may be granted and the judgment set aside." Well, I guess you would change that, but I think the result would be different. The jury verdict or judgment entered would have been different.

CHAIRMAN SOULES: But really the structure of the rules -- and we're not going to restructure the rules -- contemplate that there's a judgment before there's a new trial, and just because judges circumvent that -- you know, we all know what the rules mean. They shouldn't circumvent that but they do.

MS. GARDNER: Oh, excuse me, Luke. I know where I had seen that before. Excuse me. It's in Rule 329(b). (a) says "a motion for new trial if file shall be filed prior to or within 30 days after the judgment or other order complained of is signed." So it can be done.

CHAIRMAN SOULES: Right. And it can be acted on, but the rules are all

structured to go verdict, judgment, new trial.

MR. LOW: In my many years of practice it hasn't been that way, though.

MR. ORSINGER: Well, Luke, Richard Orsinger, I agree with Judge Guittard. I had this come up in a case and I did some research on it. And there are some sections in TexJur that if they grant a new trial before they enter a judgment, I think it's categorized as a mistrial even though we know that it's not a mistrial.

MR. LOW: I went through that some years back, and they can be mandamused on that until there's a new trial.

HON. C. A. GUITTARD: In other words, if the judge says, "I grant a new trial," he can't be mandamused. And if he for the same reasons and under the circumstances say, "I grant a mistrial," he could be mandamused.

MR. LOW: That's right.

HON. C. A. GUITTARD: That doesn't make too much sense.

MR. LOW: Well, that's the way it is.

CHAIRMAN SOULES: In theory you can mandamus a judge to render judgment on a verdict, but before you can mandamus a judge on a mistrial order, you've got to have a verdict, don't you?

MR. LOW: We went through it where the judge -- we just started questioning the jury right in the box, and the judge heard enough to grant a new trial right there. And we went through it and tried to mandamus, and he said exactly what the judge said, "I grant a new trial."

Now, that was some years back, and the law might have changed a lot since then, but that's the last time I went through it. We got a new trial before the jury ever left the box.

CHAIRMAN SOULES: But you had a verdict?

MR. LOW: We had a verdict. And they started -- they admitted -- they talked about insurance and a bunch of stuff right there, and the judge just granted a new trial.

MR. ORSINGER: But I think the

only grounds that you can mandamus a mistrial on is where you erroneously conclude that you have a conflict in the verdict and you don't.

MR. LOW: You could be right on that. I don't know.

CHAIRMAN SOULES: If we're going to say calculated to -- well, not calculated. If we're going to say "probably caused rendition of an improper judgment" in (6), something has to be rewritten, because you can't say that if the evidence had been presented at trial it probably caused rendition of an improper judgment. That's just a non sequitur.

MR. ORSINGER: I would say "a different judgment." Why can't we say "a different judgment" rather than "improper"?

MR. PRINCE: Why don't you just use the language that Anne read right out of that case and put it in with the future trial but in present tense? Just use the same language.

CHAIRMAN SOULES: Or you could say "the unavailability of the evidence at trial probably caused rendition of an improper

judgment." That's one way to make it parallel.

HON. C. A. GUITTARD: I don't object to what Anne said, but it probably would bring about a different result if admitted on a new trial.

MR. ORSINGER: But I would say -- this, as written, "if presented at the trial," means if presented at the trial you just finished.

HON. C. A. GUITTARD: Yeah.

MR. ORSINGER: If we're going to talk in the present tense, we probably ought to just delete that clause so that we're not making a reference to the past. Then we can go ahead and talk in the present tense. But if we're going to talk about the trial that we just finished, we need to use the preterite past or whatever tense that is.

HON. C. A. GUITTARD: That's right. In other words, you've discovered new evidence that might change the result in the future, but that's not the test. The question is, is this an improper judgment because this evidence wasn't presented in that trial.

CHAIRMAN SOULES: Okay.

MR. HUNT: Mr. Chairman, could I ask Anne to read that language again?

MS. GARDNER: Sure. "That it is so material that it would probably produce a different result if a new trial were granted."

HON. C. A. GUITTARD: Where does that come from?

MS. GARDNER: This is from Jackson vs. Van Winkle, 1983, Supreme Court.

The whole paragraph is "It is incumbent upon a party who seeks a new trial on the grounds of newly discovered evidence to satisfy the court, first, that the evidence has come to his knowledge since the trial; second, that it was not owing to the want of due diligence that it did not come sooner; third, that it is not cumulative; fourth, that it is so material that it would probably produce a different result if a new trial were granted."

HON. C. A. GUITTARD: If the Supreme Court says that, that's fine. Let's put it in there.

CHAIRMAN SOULES: Okay. Again, one alternative would be to say and the unavailability of the evidence caused rendition -- probably caused rendition of an improper judgment. That fits the other language of (6): "When new evidence has been discovered that was not available at the trial by the movant's use of reasonable diligence, and the unavailability of the evidence probably caused an improper judgment."

Well, either way, you can use that or Anne's or something like that.

MR. HUNT: Mr. Chairman, how about this language then: "When new evidence, which is not cumulative, has been discovered that was not available at the trial by the movant's use of due diligence, and its unavailability probably caused the rendition of an improper judgment"?

CHAIRMAN SOULES: Does anybody object to that? That sounds fine, except you said "due" instead of "reasonable diligence."

MR. PRINCE: Let's not talk about due diligence.

MR. ORSINGER: It's like horse

and buggy. It goes together.

MR. HUNT: I'll use "reasonable diligence."

CHAIRMAN SOULES: Okay. Anything else on 320(a), Grounds? Is anyone opposed to 320(a) now as amended by the Committee's discussion? Okay. It stands approved.

And we will be here at 8:00 o'clock tomorrow morning. It's 5:35. I appreciate your long day here today.

(MEETING ADJOURNED.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

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 September 15, 1995, afternoon session, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $1,297.75.

CHARGED TO: Soules & Wallace, P.C..

Given under my hand and seal of office on this the 29th day of September, 1995.

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