

SUPREME COURT OF TEXAS
SUPREME COURT ADVISORY COMMITTEE

TRANSCRIPT OF PROCEEDINGS

VOLUME 2 OF 2

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

May 27, 1989

00 Congress, Suite 1400

Austin, Texas

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Supreme Court Justice Nathan L. Hecht, Liaison

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Prof. William V. Dorsaneo III

Prof. J. Hadley Edgar

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Mr. Russell McMains

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Mr. John O'Quinn

Mr. Tom L. Ragland

Justice Ted Z. Robertson

Mr. Luther H. Soules III

Mr. Broadus A. Spivey

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

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

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

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11 And 317 has been repealed.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

13 CHAIRMAN SOULES: That's in TRAP --

14 JUSTICE HECHT: 5 (c).

15 MR. DAVIS: What page?

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

18 JUSTICE HECHT: These are separate items.

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

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

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

24 CHAIRMAN SOULES: 317 was moved to the TRAP
25 rules?

1 PROFESSOR DORSANEO: Yes.

2 CHAIRMAN SOULES: Where?

3 PROFESSOR DORSANEO: 85.

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

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

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

10 PROFESSOR DORSANEO: Maybe it was just
11 combined.

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

16 CHAIRMAN SOULES: And was 317 a remittitur
17 rule?

18 PROFESSOR DORSANEO: Yes.

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

21 PROFESSOR DORSANEO: Maybe I'm off base
22 altogether.

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

1 PROFESSOR DORSANEO: No.

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

4 That's approved.

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

9 PROFESSOR DORSANEO: Put "Court of Appeals
10 district"?

11 JUSTICE HECHT: You could. Or just say
12 district.

13 PROFESSOR DORSANEO: I'd say just district.

14 CHAIRMAN SOULES: Where is that?

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

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

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

21 CHAIRMAN SOULES: Any opposition?

22 All right. That's done.

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

1 yesterday, Luke.

2 CHAIRMAN SOULES: All right.

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

7 JUSTICE HECHT: Good.

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

11 JUSTICE HECHT: Fine.

12 CHAIRMAN SOULES: Okay.

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

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

24 JUSTICE HECHT: Yes.

25 CHAIRMAN SOULES: Criminal case appendix, it

1 says.

2 JUSTICE HECHT: Right.

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

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

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

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

25 PROFESSOR EDGAR: In practice, it would

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

4 JUSTICE HECHT: That would be more accurate.

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

7 JUSTICE HECHT: Yes.

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

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

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

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

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

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

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

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

18 JUSTICE HECHT: Yes.

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

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

1 30 would simply become 25 and 15 would become 10.

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

4 JUSTICE HECHT: Yes.

5 CHAIRMAN SOULES: Any discussion?

6 Tom Ragland.

7 MR. RAGLAND: I have a question, Judge.

8 Would it be better just to write the rule that says what
9 the judge says, that it's going to be set according to
10 the circumstances, and then have a comment following the
11 rule that the current practice is 25, 25 and 10? That
12 way you can change the comment without having to come
13 back and having to change the rule. Would that be a
14 workable approach to that?

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

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

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

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

25 All right. That stands approved, then,

1 Judge.

2 JUSTICE HECHT: That's it for me.

3 CHAIRMAN SOULES: Okay.

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

6 JUSTICE KELTNER: I'm back in the back.

7 CHAIRMAN SOULES: Come sit with us.

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

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

12 JUSTICE KELTNER: This is fine, thank you.

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

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

18 CHAIRMAN SOULES: What was that, Broadus?

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

21 [Laughter]

22 CHAIRMAN SOULES: That's right.

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

25 JUSTICE KELTNER: I can well understand that.

1 PROFESSOR EDGAR: Luke, for whatever it's
2 worth, I'm coming back to the very first thing we talked
3 about, Appellate Rule 5 (c), the one about where Rule
4 317 went.

5 CHAIRMAN SOULES: Yes.

6 PROFESSOR EDGAR: I don't know whether we
7 want to do anything about it, but didn't it go in Rule
8 306a, No. 6? Look at the Rules of Civil Procedure 306a,
9 No. 6. I think that's where we put Rule 317.

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

13 [Laughter]

14 MR. MCMAINS: Makes slightly clearer.

15 [Laughter]

16 MR. MCMAINS: Or makes slightly less obscure.

17 [Laughter]

18 CHAIRMAN SOULES: If we find where 317
19 went --

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

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

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

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

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

5 PROFESSOR EDGAR: Yes.

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

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

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

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

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

20 MR. MCMAINS: It was taken out of there.

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

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

25 CHAIRMAN SOULES: Yes. I apologize, Hadley.

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

2 PROFESSOR EDGAR: No problem.

3 We had just finished looking at Rule 239.

4 And the next reference here, Holly, is Rule 239a. But

5 I don't find any reference to 239a, nor did we have

6 anything to consider, as far as I know, on Rule 239a.

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

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

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

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

14 PROFESSOR EDGAR: I didn't find it there.

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

16 PROFESSOR EDGAR: And we didn't get any
17 questions on Rule 239a. So I really don't know what the
18 reference to that means. We did have something on Rule
19 239 which we dealt with, but I --

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

21 PROFESSOR EDGAR: I don't either.

22 MS. HALFACRE: Blatant error.

23 CHAIRMAN SOULES: Okay.

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

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

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

17 MR. FULLER: 30 days and augment changes.

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

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

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

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

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

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

11 CHAIRMAN SOULES: We haven't fixed that and
12 don't have anything here before us to fix it, John. The
13 problem here is that a jury case has now got a 30-day
14 fuse, but you can set a nonjury case on a 10-day fuse.
15 Really, this 45 days was put in here to get the nonjury
16 assignment beyond jury. We had some problems with that.
17 I think several courts have. The court set a nonjury
18 case and then it's too late to demand a jury and then
19 they say, "Well, you waived your jury." Well, on this
20 they can't set a nonjury case the first time within the
21 30 days. So you still have time to make a jury demand,
22 pay a jury fee, get your jury.

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

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

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

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

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

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

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

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

1 supposed to be gotten rid of, then you are given a
2 45-day gate for setting them. You may have a problem.

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

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

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

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

1 background on this.

2 Tom Ragland.

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

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

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

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

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

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

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

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

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

11 MR. BECK: Exactly.

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

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

17 CHAIRMAN SOULES: I don't know.

18 Justice Hecht.

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

22 MR. FULLER: They've got the strangest system
23 over there. You have to make a request at least by the
24 20th of the month in order to have it set the next
25 month. Then they set it the next month, but not -- like

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

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

9 MR. FULLER: That's correct.

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

12 MR. FULLER: That's correct.

13 JUSTICE HECHT: Or maybe not even that much?

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

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

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

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

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

4 CHAIRMAN SOULES: See, we started this
5 problem when we lengthened demand for jury trial from
6 10 to 30. Now we've got to go on and fix this. And all
7 those practices developed back when you had 10-day jury
8 demands, jury fee. So those are going to have to be
9 adjusted, too, unless we go back to 10-day jury demand,
10 jury fee. I don't really want to do that. That's
11 really waffling around. We just need to fix this.

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

18 CHAIRMAN SOULES: This will help us, at least
19 45. Is there any opposition to this change, then, Rule
20 245? Any further discussion?

21 All right. That stands approved.

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

25 PROFESSOR EDGAR: That's the certification

1 provision.

2 CHAIRMAN SOULES: Right.

3 PROFESSOR EDGAR: Which our committee did not
4 recommend.

5 CHAIRMAN SOULES: All right. Can I debate
6 that?

7 PROFESSOR EDGAR: Sure.

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

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

1 but only if he can give you a trial within 60 days or
2 90 days. The 60 days doesn't make any difference to me.
3 But this is again sought as some help in the local-rules
4 effort, because our feeling is that the local rules
5 which require certification of readiness for trial
6 should not be permitted to function unless the judges
7 in that area can give you a prompt trial. And that's
8 the reason for this suggestion.

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

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

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

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

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

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

25 MR. FULLER: Announcement of ready.

1 PROFESSOR DORSANE0: It really is a
2 certification.

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

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

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

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

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

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

10 JUSTICE HECHT: Luke --

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

13 MR. O'QUINN: Then wait.

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

23 Justice Hecht.

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

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

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

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

13 CHAIRMAN SOULES: David Beck.

14 MR. BECK: I'm from Houston. And, you know,
15 we've had this certification procedure in our local
16 rules for years and years and years. And the fact of
17 the matter is, it doesn't work very well at all.
18 Everybody certifies they're ready. Nobody is ready. Or
19 90 percent of the people who certify their cases aren't
20 ready. Those who think they're ready find out later
21 they're really not ready. And the result is that most
22 lawyers end up working things out by agreement. Others
23 have to go to the courthouse and get the local judge to
24 do that.

25 My concern is, Luke: By trying to hammer out

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

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

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

1 really not ready.

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

4 MR. BECK: Well, misrepresent the facts.

5 [Laughter]

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

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

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

14 CHAIRMAN SOULES: It needs to be done.

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

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

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

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

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

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

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

9 MR. FULLER: What's the magic of certifi-
10 cation? We're dealing with a buzzword. Everybody
11 acknowledges that except in limited circumstances
12 it's ignored anyway as a bunch of falsehoods or mis-
13 representations. What does it do to get certified?
14 Not a cotton-picking thing except create problems.

15 CHAIRMAN SOULES: That's right.

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

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

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

4 CHAIRMAN SOULES: Yes.

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

13 MR. FULLER: Yes.

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

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

21 MR. O'QUINN: Right.

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

24 MR. FULLER: Is that Williamson?

25 CHAIRMAN SOULES: No.

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

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

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

6 CHAIRMAN SOULES: Well, anyway, he says, "If
7 you are ready to go to trial, I'll have you in trial in
8 60 days in this court." And he says he does it that
9 way. So there's a judge who has a legitimate interest
10 in knowing: Are you ready? Because I'm going to set
11 eight cases on this Monday and I'm going to have a jury
12 panel here and that's on the assumption that seven of
13 them are going to settle and I'm going to have something
14 to do, or five, and somebody is going to go home. But I
15 want enough cases set that are ready, because we're
16 going to work that week, we're not going to not work
17 that week. And he wants to have certification of
18 readiness. Or take the word "certification" out.
19 He wants to have a condition or status of readiness
20 announced before he'll give you a trial. That's one
21 judge I'm trying to take care of.

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

1 CHAIRMAN SOULES: That's fine.

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

6 CHAIRMAN SOULES: Do you move that language?

7 PROFESSOR DORSANEO: I move it.

8 MR. O'QUINN: I second it.

9 CHAIRMAN SOULES: Tom Davis. Discussion.

10 MR. DAVIS: Maybe I'm missing the point, but
11 how do you handle a requirement that you certify for
12 ready and then you can't do any more discovery? I don't
13 care what period of time you put it back, with the rule
14 it says you don't have to designate your experts until
15 30 days before trial. I mean, maybe I'm missing the
16 point. How do you handle that? If you have any
17 requirement of readiness for trial or certification for
18 any period of time, certainly one more than 30 days, how
19 do you handle that? I mean, am I missing something
20 here?

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

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

1 lot.

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

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

9 CHAIRMAN SOULES: John.

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

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

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

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

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

25 PROFESSOR DORSANEO: But it will. It has the

1 effect.

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

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

14 MR. FULLER: All right. How about this?

15 CHAIRMAN SOULES: It's a motion.

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

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

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

25 CHAIRMAN SOULES: Maybe that number should be

1 30 days.

2 MR. DAVIS: 30 days would be better.

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

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

9 CHAIRMAN SOULES: David.

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

20 Now, if you've got a court that has his or
21 her own docket that they manage, they can introduce that
22 certainty without any certification process or anything
23 else by simply saying, "You are going to trial on March
24 9th, and both sides better be ready."

25 The problem is, when you have a central

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

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

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

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

1 ever has any merit under any circumstances.

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

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

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

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

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

1 for trial setting.

2 MR. MORRIS: Luke --

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

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

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

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

4 PROFESSOR EDGAR: That makes sense.

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

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

16 MR. MORRIS: I'm withdrawing.

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

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

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

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

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

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

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

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

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

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

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

1 assignment, something like that would take care of it.

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

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

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

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

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

12 CHAIRMAN SOULES: That's what this sentence
13 does.

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

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

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

21 MR. LOW: Or may be required.

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

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

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

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

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

12 Lefty.

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

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

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

1 CHAIRMAN SOULES: Gilbert.

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

8 MR. RAGLAND: We do it by telephone.

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

11 CHAIRMAN SOULES: So you would want to
12 change --

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

16 PROFESSOR DORSANEO: Why even do it in
17 writing?

18 CHAIRMAN SOULES: Just request?

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

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

