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BEFORE THE
SUPREME COURT ADVISORY COMMITTEE
AUSTIN, TEXAS

FEBRUARY 16, 1990

Austin, Texas

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HEARING HELD IN AUSTIN, TEXAS, ON FEBRUARY 16, 1990

B-F-F-O-R-F

LUTHER H. (LUKE) SOULES, III
CHAIRMAN

SUPREME COURT:
Justice Lloyd Doggett
Justice Nathan Hecht

COARCE CHAIR:
Doak Bishop

OTHER COMMITTEE MEMBERS:

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Broadus A. Spivey
Harry L. Tindall
Anthony J. SADBERRY
Kenneth D. Fuller
David J. Beck

Sam D. Sparks (San Angelo)

OTHER SPEAKERS:

Pat Hazel
Tom Leatherbury

SUPREME COURT ADVISORY COMMITTEE
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FEBRUARY 16, 1990

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P R O C E E D I N G S

Friday, February 16, 1990

Morning Session

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6 CHAIRMAN SOULES: Let's come to order, and I
7 thank everyone for being here at ten after 8:00 on Friday
8 morning. We will send a sign-up sheet around a little bit
9 later.

10 What I thought we would do by way of approaching
11 this thing this morning would be to try to finish our old
12 business, which includes sealed records and the charge,
13 first. Now, Lefty is doing a redraft of the sealed records
14 now. I believe he and Holly are working on that together.
15 And Hadley and Elaine and I finished Wednesday afternoon, I
16 guess it was --

17 MR. EDGAR: Late.

18 CHAIRMAN SOULES: Pardon?

19 MR. EDGAR: Late Wednesday.

20 CHAIRMAN SOULES: Late Wednesday afternoon
21 after having some good conversations through the week
22 together, the draft of the charge rules. And in fairness, I
23 would approach this that we would put those later in the
24 morning so that everybody has a chance, whenever you can
25 catch a moment, to look at those and see how you kind of feel

1 about them, and understand and absorb them before we talk
2 about them. If that is all right with the Committee, then
3 the only other old business that we have is in the agenda in
4 the front part of the big book.

5 With that in mind, then what we would -- I would
6 propose is that we would start with probably -- well, Harry
7 has got something that is rewritten, too. We need to come
8 back to that. Maybe we will wait and take a look at that,
9 but he certainly needs to have that done this morning --
10 start with the 1989 rules that we did not finish last time,
11 and then next, in whatever order we want to take them up, do
12 the sealed records, the charge, and Harry's 167 -- is it A,
13 Harry?

14 MR. TINDALL: Right.

15 CHAIRMAN SOULES: And I am open for anybody's
16 comments on how you think maybe better we could organize this
17 morning.

18 MR. EDGAR: Mr. Chairman, I move that we
19 proceed as you just outlined.

20 CHAIRMAN SOULES: Been moved. Is there a
21 second?

22 MR. TINDALL: Second.

23 CHAIRMAN SOULES: Okay. Those in favor say
24 "Aye."

25 (RESPONDED AYE)

1 CHAIRMAN SOULES: Opposed? Okay.

2 MR. DAVIS: Start off with noncontroversial
3 things, right?

4 MR. TINDALL: Court's charge.

5 MR. DAVIS: No, that isn't what I said. You
6 misunderstood.

7 CHAIRMAN SOULES: We have done 169, and we
8 were over to -- let me see. I have "Okay, it says, is on
9 208," and we had -- let me get my check list here to try to
10 get where we were, and you-all can help me.

11 Now, let's see, the last one I checked off was 201,
12 but let me see. Then there is a rule on 324. Did we pass on
13 that one?

14 Subcommittee recommended no change on that one.
15 All in agreement say "Aye."

16 (RESPONDED AYE)

17 CHAIRMAN SOULES: Opposed? That is
18 unanimously approved then.

19 MR. TINDALL: What page are you on?

20 CHAIRMAN SOULES: I am on Page 324, Harry.

21 MR. TINDALL: Okay.

22 CHAIRMAN SOULES: And if you need to have an
23 index, if you kind of go back to the, let's see, I guess it
24 is the third sheet in the book, it says "Written and oral
25 comments to TRCP, TRAP and TRCE." These are the comments to

1 the last -- to the '89 work. We have just now done the
2 last -- finished the last item on the first page, and that
3 goes on for two-and-a-half pages.

4 MR. EDGAR: What page is Rule 324 on?

5 CHAIRMAN SOULES: Well, now, wait a minute.
6 No, that was -- let me get straight with you, Hadley. That
7 was Rule 206 on Page 324. Now we are going to Rule 208 on
8 Page 327, and we passed on that last time and said that was
9 okay as is. So I must have skipped one.

10 And so now we are to two -- Rule 216 on Page 332.
11 And let's see, David, I guess this is your subcommittee,
12 isn't it?

13 MR. EDGAR: No, it is mine.

14 MR. BECK: No.

15 CHAIRMAN SOULES: Oh, Hadley's. Okay,
16 Hadley.

17 MR. EDGAR: I have passed -- every one of you
18 should have before you a letter from me to the Committee
19 dated today concerning Rules 216 and 214.

20 The matter on Page 332 goes back, and this runs
21 through a number of rules, as to how to spell "jury," is it
22 hyphenated or not. My dictionary hyphenates it. I don't
23 know about anybody else's, but --

24 MR. TINDALL: Mine just offers one common
25 word, just n-o-n-j-u-r-y, without a space or a hyphen.

1 MR. EDGAR: Well, I will let -- I will leave
2 that to the grammarians, but, anyhow, that is what the
3 purpose of this page is about.

4 CHAIRMAN SOULES: All right. What do you
5 recommend?

6 MR. SPARKS (SAN ANGELO): Well, we have got to
7 do it right or --

8 MR. TINDALL: My unabridged dictionary at the
9 office has no hyphen or space, Hadley. Did you use --

10 MR. EDGAR: Well, I used Webster's Collegiate.
11 I don't know.

12 MR. TINDALL: That was raised in a number of
13 letters we got about the spelling of it.

14 CHAIRMAN SOULES: Where is it?

15 MR. TINDALL: It is spelled both -- there are
16 a number of places where it is with a hyphen and there are a
17 number of places where it is one word without a space.

18 CHAIRMAN SOULES: All right. Well, I will
19 assign that to every subcommittee jointly, if you will meet
20 in the interim in the next biannual and decide some uniform
21 way to do it, and we will get on Word Search and we will find
22 every place it is in the rules and fix it.

23 MR. TINDALL: I concur with that.

24 CHAIRMAN SOULES: Anybody want to change this?
25 There being no hands --

1 MS. CARLSON: Well, also, the TRAP
2 subcommittee suggested the same modification without the
3 hyphen.

4 MR. TINDALL: Without the hyphen is --

5 CHAIRMAN SOULES: All right. Well, let's
6 go -- that goes to the TRAP rules and everybody else, all the
7 other rules. We can make it uniform at least because we do
8 have these rules on disk now.

9 Okay. No change to 216. In favor say "Aye".

10 (RESPONDED AYE)

11 CHAIRMAN SOULES: Opposed? There will be no
12 change to 216.

13 MR. EDGAR: The letter on Page 335 refers to
14 simply the spelling of a -- of the comment -- of the word and
15 the comment on Page 334, and points out that it should be to
16 preclude a default judgment "in" a case, but the bar journal
17 incorrectly used "is" instead of "in."

18 CHAIRMAN SOULES: We have got it fixed.

19 MR. EDGAR: All right. So we don't need to
20 take any action on that.

21 CHAIRMAN SOULES: That is right.

22 MR. EDGAR: On Page 336, Rule 245, one letter
23 on Page 337 says the 45-day notice is too short, and another,
24 on Page 339, says not long enough.

25 Now, Judge Morris, in a letter on Page 341, says

1 that at least one appellate court has ruled that forfeiture
2 cases must be set within 30 days after the answer date. This
3 creates a conflict, he points out.

4 Now, I would like to go out of order just a moment,
5 if I might, because in a letter to me after the Committee
6 met, and as a result of the hearing that the Court held,
7 Franklin Jones pointed out that there was a conflict -- I
8 don't know whether Franklin did it or someone in his office.
9 I am giving him the benefit of the doubt -- that -- I have
10 that in the material to be presented later, but perhaps we
11 ought to take it up now, that --

12 CHAIRMAN SOULES: Hadley, is this your
13 February 16 letter that you are referring us to now?

14 MR. EDGAR: What I did -- yes. What I did,
15 you don't have -- you don't have what I am about to comment
16 on before you because this is in the material which arose as
17 a result of comments subsequent to the public hearing. But
18 Franklin pointed out that why shouldn't the notice period
19 correspond with the 30-day period in Rule 216 for paying a
20 jury fee. Also, that the 45-day notice will interfere with
21 the docket control of many district courts which have monthly
22 docket call.

23 Then he also points out that Rule 216 provides that
24 a party must request a jury trial and pay a jury fee not less
25 than 30 days in advance of trial. The 45-day trial notice

1 requirement in Rule 245 will result in the parties obtaining
2 an automatic continuance when the parties request for a jury
3 within the 15 days lead period and the case must be moved
4 from the nonjury to the jury docket. In some districts this
5 will be an exceptionally long delay to jury trial.

6 I simply point that out to you asking whether or
7 not you want to simply go back and reconsider this 45-day
8 period in the matter which is to be taken up later because of
9 the order of business which we earlier decided to proceed
10 upon.

11 CHAIRMAN SOULES: The reason, if you remember,
12 the agenda where this 245 got changed, the problem that we
13 were addressing -- and we had letters from the
14 practitioners -- a court could set a case on 10-day notice,
15 but you had to make a jury demand 30 days out. So what was
16 happening was the courts were setting cases on 10 days notice
17 and then saying, "You waived your jury demand, even though
18 you didn't even know when the case was going to be set 30
19 days ago."

20 And the reason that a 45-day period was put in
21 place was that this meant that the first time a court set a
22 case, there would still be time to make a jury demand, rather
23 than the first time the court sets a case, there is -- time
24 for jury demand is expired. And we just picked 45 days
25 saying, "Well, in that 15 days, if you want a jury, you ought

1 to be able to make up your mind and get it done." All I want
2 to do is remind you-all why we made this change because for
3 some other reasons now, there is some reconsideration.

4 And, Hadley, how would we harmonize all that?

5 MR. EDGAR: I don't know.

6 MR. JONES: The problem I saw with it was that
7 it picked up in my office that I think --

8 CHAIRMAN SOULES: Stop that a minute. He's
9 talking and we can't hear.

10 I am sorry, Franklin, we are not getting you.

11 MR. JONES: The problem that we picked up in
12 my office that I think was a valid point and I really think
13 we ought not to build this into the rules, and that is a
14 party can get an automatic continuance unless these two rules
15 are harmonized, that is, the rule of setting the case for
16 trial and the rule of jury demand.

17 Now, there is no -- I don't see any problem it
18 being either 30 or 45 days. The problem is if you set a case
19 either 30 or 45 days out on a nonjury docket, then a party
20 can come in within that 15-day lapse period and demand a jury
21 and he has got an automatic continuance on a motion in rural
22 courts that I know anything about. And that is a problem my
23 office has picked up on and I really don't see any reason for
24 that.

25 CHAIRMAN SOULES: I didn't know you ever set

1 nonjury cases.

2 MR. JONES: I am usually the one wanting a
3 jury, but occasionally I have a problem that doesn't appeal
4 to a jury for some reason.

5 CHAIRMAN SOULES: Franklin, if -- there is no
6 15-day period if the case is set 30 days out. When the case
7 is set at that very day, that is the last day you can demand
8 a jury and you may not even know it got set.

9 MR. SPIVEY: Judges don't always -- don't read
10 it all that way, though, they really don't.

11 CHAIRMAN SOULES: I am sorry.

12 MR. SPIVEY: Judges look at it as a
13 discretionary thing and that is what the appellate courts
14 pretty well uphold.

15 CHAIRMAN SOULES: To give a jury.

16 MR. SPIVEY: Yes.

17 CHAIRMAN SOULES: But we don't want it
18 discretionary. We want them to have to give a jury and that
19 is -- I mean the way the Committee voted last time, I say
20 "we," I mean we took this position that a judge who set --
21 first sets a cases on a nonjury docket without a jury fee
22 having been demanded, at that point in time should be enough
23 in advance of the minimum jury demand period that a party
24 could demand a jury and have a right to it no matter what.

25 That is the reason that we changed 245 to read the

1 way it does now and not be discretionary with the court
2 whether or not you get a jury because you don't even know
3 that setting is there until the judge does it, and if your
4 30 days is already shot, you have got -- you are in a
5 discretionary period.

6 Some judges -- trial judges in San Antonio believe
7 that the constitutional right to a jury trial means you can't
8 use these rules to manipulate. Others say that is what the
9 rules say. So we can do what we want to do about it. So
10 there it is. And -- but the judges have raised a question
11 about a 30-day forfeiture case.

12 MR. EDGAR: Well, on Page 341 of your book --
13 CHAIRMAN SOULES: Right, in a forfeiture case.

14 MR. EDGAR: -- Judge Morris raises the
15 question, he says at least one appellate court, without
16 giving us a citation, has ruled that forfeiture cases must be
17 set within 30 days after answer date. And I know that there
18 certainly are some provisions for forfeiture under certain
19 circumstances, but I really don't know the case to which he
20 referred.

21 And if the rule would change to 45 days, it would
22 seem to me that a court would have difficulty in ordering
23 that a forfeiture case would be set for 30 days when the rule
24 says at least 45, but that is all we have and I just wanted
25 to call that to the Committee's attention.

1 here that I think that probably is provided for in Rule
2 306(c). And the question he addresses is how to treat a
3 request which is filed before the judgment is signed. And I
4 think that Rule 306(c) currently takes care of that because
5 it basically says that it will be deemed filed on the date
6 of, but subsequent to the date of signing the judgment.

7 CHAIRMAN SOULES: 306(c)?

8 MR. EDGAR: Yes. I wish he were here. Maybe
9 I didn't really understand the nature of his question.

10 CHAIRMAN SOULES: Did we make a change to
11 306(c)?

12 MR. BECK: No.

13 CHAIRMAN SOULES: Did not.

14 Where did we put -- well, this used to be a bigger
15 problem, and I don't know whether this is looking at a case
16 that is pre '84, but in 1984, the Committee recommended to
17 the Court, and the Court adopted, an amendment to 306(c) that
18 put premature file findings of fact and conclusions of law
19 within its ambit. Prior to that, there was a problem. They
20 were not within the ambit of 306(c).

21 MR. EDGAR: Well, with respect to the query
22 that he raises, though, on Page 420 --

23 CHAIRMAN SOULES: Okay.

24 MR. EDGAR: -- it seems to me that Rule 306(c)
25 solves that problem.

1 CHAIRMAN SOULES: As a result of an '84
2 amendment.

3 MR. EDGAR: Yes. So I don't know whether I
4 have missed something that he is raising, but absent that, I
5 recommend no change because I think it is already cured.

6 CHAIRMAN SOULES: We did make a change to
7 306(c) and I don't know where it is. I know we did.

8 MR. ADAMS: It wasn't published.

9 CHAIRMAN SOULES: It is not in the book, but I
10 know we did because you see -- and I can show you where we
11 did it. You will probably remember this. If you have got a
12 rule book, if you look in the fifth line of 306(c), every
13 such motion shall be deemed to have filed on the date of but
14 subsequent to the date of. And we changed that on the "date"
15 of but subsequent to the "time" of.

16 Now, I don't know why it's not -- I haven't got it
17 before you, but we voted to do that in 1989.

18 MR. BECK: It wasn't published, Luke.

19 CHAIRMAN SOULES: Well, that is probably
20 because it -- I dropped it in my office. But that was
21 very -- it was even -- not even discussed really. It was
22 obviously --

23 MR. EDGAR: It should be changed to be the
24 time of.

25 CHAIRMAN SOULES: I know. I remember us doing

1 it, and it will be in our minutes, but it is not in the -- it
2 was not published, but that is very noncontroversial.

3 MR. TINDALL: Two places, Luke.

4 CHAIRMAN SOULES: I know.

5 MR. TINDALL: It has got to be changed.

6 CHAIRMAN SOULES: I will get that fixed and I
7 apologize that that didn't make it. That is part of your
8 work. I promise.

9 All right, we are going to change, in Rule 306(c),
10 in the fifth line of the West Version, the word "date" to
11 "time," "date of signing of the judgment" to "time of signing
12 of the judgment." And then, likewise, in the very last line,
13 exactly the same change. Change "date of signing of the
14 judgment" to "time of signing of the judgment."

15 All in favor say "Aye."

16 (RESPONDED AYE)

17 CHAIRMAN SOULES: Opposed? Okay.

18 Are you making a note we have got a 306(c) change?

19 MR. EDGAR: Then on Page 421, 422, there is a
20 Fifth Court of Appeals memo suggesting that the comment be
21 clarified to Rule 296. And we, as a Committee, have never
22 really worked with the comments, Luke. Did you want -- do
23 you want to take that up here or --

24 CHAIRMAN SOULES: That would be fine. Let me
25 get my paper straight. Did you recommend then no change to

1 298?

2 MR. EDGAR: Well, I haven't gotten to that.

3 CHAIRMAN SOULES: You haven't gotten there
4 yet.

5 MR. EDGAR: I am talking about 296.

6 CHAIRMAN SOULES: 296. Okay. Is that -- is
7 that what we are still discussing?

8 MR. EDGAR: The memo on Page 421, 422 suggests
9 clarification of a comment. And I just wanted to call that
10 to the Chair's attention.

11 CHAIRMAN SOULES: Okay. Hadley, what would we
12 do to clarify it and what pages should we look at for
13 comment?

14 MR. EDGAR: Well, on Page 421.

15 CHAIRMAN SOULES: 421. Is the rule in the
16 book anywhere?

17 MR. EDGAR: The rule is on Page 415.

18 CHAIRMAN SOULES: 415.

19 MR. EDGAR: Four one five.

20 CHAIRMAN SOULES: And the -- they want us to
21 write the comment to say what?

22 MR. EDGAR: Well, he doesn't tell you what.
23 He just says he has a problem with it, as was frequently the
24 case in these comments, pointing out that one could construe
25 the comment to mean that findings of fact and conclusions of

1 law are -- well, pardon me.

2 CHAIRMAN SOULES: That is not what the comment
3 says.

4 MR. EDGAR: Well, you are right. Just a
5 moment.

6 CHAIRMAN SOULES: They may have published it
7 wrong in the bar journal, but our comment does not say that.

8 MR. EDGAR: He also refers to Rule 41(a) and I
9 am -- along with that, and I am wondering maybe if that
10 comment to 41(a) is not the comment to which he referred. I
11 will look right quick.

12 CHAIRMAN SOULES: Is that TRAP 49(a)?

13 MR. EDGAR: 41(a).

14 CHAIRMAN SOULES: 41(a). That is it.

15 MR. EDGAR: Yes. He is really referring to
16 that one, so I will leave that up to Dorsaneo's Committee.

17 CHAIRMAN SOULES: Okay.

18 MR. EDGAR: But, anyhow, the point he raises,
19 I think, is legally correct, but I don't know which one of
20 those comments.

21 CHAIRMAN SOULES: Could we -- when we get
22 there, could you remind us to revisit this? Thank you,
23 Hadley.

24
25

1 (At this time there was a
2 brief discussion off the record, after which time the
3 hearing continued as follows:)

4 MR. EDGAR: All right. Luke, on --

5 CHAIRMAN SOULES: Okay. Have we finished that
6 item now? Tom Davis.

7 MR. DAVIS: As a matter of information, who
8 does write the comments?

9 CHAIRMAN SOULES: We sometimes write them
10 here, I sometimes try to write them, and before -- and they
11 come to the Committee in the report. So sometimes they are
12 written here, and sometimes I write them, sometimes they are
13 in the proposals that come. So there is not any real --

14 MR. DAVIS: When we adopt the rule, we should
15 also consider the comments, too, right?

16 CHAIRMAN SOULES: Well, we always do. We
17 have -- as a matter of fact, and many times we have decided
18 to write a rule and then the Committee has said, "Put in a
19 comment that we did it for this reason." So that is our
20 practice now.

21 MR. EDGAR: On Page 423, Judge Star raises a
22 question concerning Rule 298, which appears on Page 418. And
23 you will --

24 CHAIRMAN SOULES: Hadley, are we --

25 MR. EDGAR: We are talking about Rule 298.

1 CHAIRMAN SOULES: Okay. So --

2 MR. EDGAR: It appears on Page 418.

3 CHAIRMAN SOULES: Okay. I do not have a
4 consensus on 297 and 296. Is it your motion that there be
5 no change to the '89 work product or do we need to look at
6 this --

7 MR. EDGAR: No.

8 CHAIRMAN SOULES: -- before we do that?

9 MR. EDGAR: Yes, except as respects the
10 comment to Rule 41(a), but as far as 296 is concerned,
11 recommend no change.

12 CHAIRMAN SOULES: And 297?

13 MR. EDGAR: Well, there was no concerns voiced
14 to 297.

15 CHAIRMAN SOULES: Okay. All in favor of no
16 change to the recommended version of 296 and 297, say "Aye."

17 (RESPONDED AYE)

18 CHAIRMAN SOULES: Opposed? Okay. Thank you.

19 MR. EDGAR: All right. Rule 298, appearing on
20 Pages 418 and 419, you notice that what we did in Rule 298
21 was require notice in accordance with Rule 21(a), and this
22 gets us back to certified and registered mail. Apparently,
23 lawyers are sending these to the court, which we are now
24 going to require in addition to sending it to the clerk,
25 certified registered mail, return receipt requested, which

1 means that the court then has to interrupt its proceedings to
2 receive what the -- what Judge Starr calls, on Page 423, "a
3 \$10 envelope."

4 And I think he has got a valid point. To interrupt
5 court proceedings to have to receive mail to comply -- and I
6 am not sure that Rule 21(a) requires that delivery to the
7 court or to the clerk be by certified mail. I think it only
8 is to opposing parties, but yet that is his concern.

9 This then goes back to Rule 21(a), which I have had
10 some personal frustration with for a long time. But we voted
11 to do what we did and I don't know that we can -- whether we
12 want to undo that or not.

13 CHAIRMAN SOULES: The Committee, in its '89
14 deliberations, put in the certified mail service on judges
15 because of the time periods from -- during which a judge must
16 act after receipt of findings of fact and conclusions of law.
17 And it was our discussion that it was fair -- only fair to
18 the judge for them -- for there to be proof that he got those
19 findings of facts and conclusions of law on a given date and
20 not -- so that there is a time from which it starts running.

21 And if you remember, we -- this is not just filing
22 with the clerk where you would have a file stamp because the
23 judges say, "Well, that doesn't help us any, it lays over
24 there in the file jacket and we don't get a chance to look at
25 it, we may not even know it is there while our time is

1 ticking."

2 So we say, "Well, fine. We will deliver them to
3 the judge." Well, what proof do you have that the judge got
4 them delivered? And this was put in there to give judges
5 some sort of a safety valve that really does -- where you got
6 to prove you got them, you have got to have a green card.

7 Now, it doesn't matter to me, but that is why
8 we did it this way.

9 MR. EDGAR: The problem -- the problem,
10 however, is that I don't think that Rule 21(a) requires that
11 the court be served by certified registered mail.

12 CHAIRMAN SOULES: It doesn't.

13 MR. EDGAR: It talks about serving a party.
14 And, apparently, lawyers have, by making this reference to
15 Rule 21(a) and not discerning that difference, simply send
16 everybody -- serve them by certified or registered mail.

17 And perhaps this problem that you are presenting
18 could be solved if we made some effort to make it clear in
19 Rule 21(a) that neither the clerk nor the court need to
20 receive notice by certified or registered mail in order to
21 comply with that rule. This goes back to Rule 21(a), I
22 think, and, frankly --

23 MR. FULLER: That is the evil right there, is
24 trying to utilize 21(a).

25 MR. EDGAR: Well, we did that because that is

1 such a shorthand way of doing it.

2 MR. FULLER: It didn't work.

3 MR. EDGAR: And I can see how this is going to
4 create problems with a busy court in a jury trial and having
5 to interrupt the proceedings to receive certified mail.

6 CHAIRMAN SOULES: Well, that seems to me
7 that -- is that a real problem? I haven't been in a
8 courtroom in a long time where -- during trial where there is
9 not some employee of the court outside of the courtroom doing
10 something.

11 MR. EDGAR: Yes, but this has to be delivered
12 to the court, the judge.

13 CHAIRMAN SOULES: But any -- doesn't any
14 representative --

15 MR. EDGAR: If it goes to addressee only, it
16 does.

17 CHAIRMAN SOULES: If it is addressee only.
18 Tom Ragland.

19 MR. RAGLAND: I was on the subcommittee that
20 worked on this, and my recollection the reason we put that
21 about serving the judge is because if you had a visiting
22 judge, the clerk couldn't deliver that copy of it and,
23 therefore, that visiting judge would be given a certified
24 copy.

25 CHAIRMAN SOULES: That was another part of the

1 discussion, no question.

2 (At this time there was a
3 brief discussion off the record, after which time the
4 hearing continued as follows:)

5 MR. RAGLAND: Okay. Could we address that
6 comment, service on the judge no longer necessary?

7 CHAIRMAN SOULES: I am not -- I am reluctant
8 to leave it that way, but that is up to the Committee.

9 MR. EDGAR: Should we get on the record --

10 CHAIRMAN SOULES: Okay.

11 MR. EDGAR: -- the suggestion I made, or just
12 go ahead and reconsider it, or leave like it is, or --

13 CHAIRMAN SOULES: We are on 290 -- Rule 298 --

14 MR. EDGAR: 298(a).

15 CHAIRMAN SOULES: -- on Page 418. And Hadley
16 has a suggestion for change in 298(a) in response to the
17 public comment coming in from -- who was it, from Judge
18 Starr?

19 MR. EDGAR: Yes.

20 CHAIRMAN SOULES: And, Hadley, what is that
21 suggestion?

22 MR. EDGAR: The suggestion to cure his concern
23 would be to, in the last sentence of four -- of 298(a),
24 change it to read as follows: "The party making the request
25 shall also deliver a copy to the judge who tried the case and

1 indicate thereon the date and manner of delivery period".

2 MR. SPIVEY: You are encouraging ex parte
3 communication. Most of my problems don't need any
4 encouragement.

5 CHAIRMAN SOULES: Well, it has been mandated
6 before.

7 MR. BECK: Hadley, wouldn't you make the same
8 suggestion in 296?

9 CHAIRMAN SOULES: Yes, we have got to go back.
10 Whatever we do here, we have got to go back and do it on 296.
11 You are right, David.

12 MR. EDGAR: But that is the issue that we have
13 before us. And why don't you go ahead and voice your concern
14 again, David, so that we can get it on the record.

15 MR. BECK: Well, I think I would say that the
16 language proposed by Hadley certainly corrects the problem
17 that Judge Starr raised. However, I think that we have got
18 to go back to the original reason as to why we even amended
19 this rule in the first place, which was to deal with the case
20 law which says that to preserve error you had to call your
21 request for findings of fact and conclusions of law to the
22 trial judge. And so our original concern was, well, let's
23 put in the rule a requirement to that effect and put
24 something express with respect to how you can document that.

25 And what I am saying is that if we make this

