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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

SEPTEMBER 16, 1995

(SATURDAY SESSION)

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Taken before D'Lois L. Jones, a
Certified Shorthand Reporter in Travis County
for the State of Texas, on the 16th day of
September, A.D., 1995, between the hours of
8:00 o'clock a.m. and 12:00 o'clock a.m. at
the Texas Law Center, 1414 Colorado, Room 104,
Austin, Texas 78701.

ORIGINAL

SEPTEMBER 16, 1995

MEMBERS PRESENT:

Charles L. Babcock
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Sarah B. Duncan
Anne L. Gardner
Honorable Clarence A. Guittard
Donald M. Hunt
Joseph Latting
Russell H. McMains
Anne McNamara
Robert E. Meadows
Richard R. Orsinger
Honorable David Peeples
Luther H. Soules III
Paula Sweeney
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta Jr.
Prof. Alex Albright
David J. Beck
Hon. Ann T. Cochran
Prof. William Dorsaneo III
Michael T. Gallagher
Michael A. Hatchell
Charles F. Herring
Tommy Jacks
Franklin Jones Jr.
David E. Keltner
Thomas S. Leatherbury
Gilbert I. Low
John H. Marks Jr.
Hon. F. Scott McCown
Harriett E. Miers
David L. Perry
Anthony J. Sadberry
Stephen D. Susman

EX OFFICIO MEMBERS:

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

Hon Sam Houston Clinton
Hon William Cornelius
Paul N. Gold
Doris Lange
W. Kenneth Law
Michael Prince

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1 CHAIRMAN SOULES: Good morning,
2 everyone, and thank you for being here this
3 morning. It's about ten after 8:00, and we
4 had at the conclusion of our session yesterday
5 voted to recommend the changes to Rule 320
6 subpart (a). I think we had finished that
7 subpart. Had we not, Don?

8 MR. HUNT: Yes, we have.

9 CHAIRMAN SOULES: Okay. And we
10 are now ready to proceed with your report, Don
11 Hunt, on the subsequent provisions of
12 Rule 320.

13 MR. HUNT: The proposed new
14 Rule 320(b) is for the most part bits and
15 pieces of two old rules in the shaded form,
16 and the struck out represents either
17 unnecessary language or language that's some
18 other place, but the idea was simply to remind
19 practitioners that complaints in general terms
20 would not be considered and that it's
21 sufficient in motion for new trial if the
22 complaint is understood by the judge, and
23 that's about all there is to it.

24 CHAIRMAN SOULES: Any
25 discussion on this? Any opposition? It will

1 be passed.

2 MR. HUNT: Subdivision (c)
3 concerns affidavits. We have never had, I
4 don't think, a rule that expressly stated what
5 had to be accompanied with a little bit of
6 swearing, and this simply details four
7 instances where supporting affidavits must be
8 attached or supported or included in the
9 record in some way if it's not otherwise
10 shown; jury misconduct, newly discovered,
11 equitable grounds, and then citation by
12 publication.

13 If there are any others that we need to
14 list we may want to consider that. We talked
15 yesterday about legal grounds for setting
16 aside a default judgment. Most of the legal
17 grounds that I know about don't require an
18 affidavit or taking of evidence or that kind
19 of thing. It's some problem with service or
20 some problem with the petition. Does anyone
21 know of any legal grounds to set aside a
22 default that requires an affidavit?

23 MR. LATTING: Why do we need
24 affidavits for things like this?

25 MR. HUNT: The case law says

1 you do on all of these things, and I am merely
2 trying to list those things that we know need
3 affidavits.

4 MR. ORSINGER: I can tell you
5 one, one instance where you would want
6 affidavits. If the trial court doesn't give
7 you a hearing on your motion for new trial and
8 allow you to develop the facts through sworn
9 testimony, you have to take your case to the
10 appellate court on the basis of your
11 affidavits. That's your dead issue.

12 CHAIRMAN SOULES: Justice
13 Duncan.

14 HONORABLE SARAH DUNCAN: I
15 thought, and I could be terribly wrong, the
16 law was that you can attach affidavits. In
17 the absence of an objection the judge can
18 consider those. If you don't have affidavits
19 and you want to preserve your complaint then
20 you are going to have to -- I am talking about
21 other than jury misconduct. Then you are
22 going to have to have testimony at a hearing
23 to support it. Am I right?

24 MR. HUNT: I think that's
25 correct, but we are trying to make a list here

1 and tell practitioners it would be a good idea
2 to have it. Now, maybe we don't want to use
3 the verb "required."

4 HONORABLE C. A. GUITTARD:
5 Mr. Chairman?

6 CHAIRMAN SOULES: Is that your
7 point, Justice Duncan, that there are
8 alternatives to affidavits, and this rule
9 changes that?

10 HONORABLE SARAH DUNCAN: Yes.

11 CHAIRMAN SOULES: Okay.

12 HONORABLE C. A. GUITTARD:
13 Mr. Chairman, there is two points to be made
14 there. One is that we haven't undertaken to
15 change the law here. Now, if this committee
16 wants to change the law with respect to those
17 things, well, I think we ought to consider it.
18 The second point is --

19 CHAIRMAN SOULES: This does
20 change the law, Judge.

21 HONORABLE C. A. GUITTARD:
22 What?

23 CHAIRMAN SOULES: This 320(c).

24 HONORABLE C. A. GUITTARD: In
25 which respect?

1 CHAIRMAN SOULES: You don't
2 have to file affidavits to get a default
3 judgment set aside on equitable grounds. You
4 can do it through an oral hearing.

5 HONORABLE C. A. GUITTARD:
6 Yeah. Well, you may be right about that. The
7 point I wanted to make is that the purpose of
8 requiring affidavits, for instance, for jury
9 misconduct and other items here is that you
10 want to make sure there is somebody that will
11 swear to that before you convene the court and
12 have a hearing.

13 In other words, is this a serious motion
14 that somebody is willing to swear to?
15 Otherwise, you don't even need to hear it.

16 CHAIRMAN SOULES: And that is a
17 change in the law.

18 HONORABLE C. A. GUITTARD:
19 Well, in some respects. It isn't with respect
20 to jury misconduct or newly discovered
21 evidence.

22 MR. HUNT: Well, may I suggest,
23 too, that the thinking was that even on
24 equitable grounds it says "not otherwise shown
25 of record." That if a person is certain that

1 they are going to get an oral hearing and
2 wants to forego an affidavit, that's fine
3 because it gets otherwise shown of record.
4 The idea was to tell practitioners that unless
5 you can get it on the record these are four
6 instances in which an affidavit is required in
7 order to preserve error.

8 CHAIRMAN SOULES: Joe Latting.

9 MR. LATTING: I'd like to say
10 that it seems to me -- and I may be missing
11 something, but it seems to me that affidavits
12 are sort of an anachronism. Affidavits to me
13 are something that come up when I prepare a
14 motion and then think is this something that
15 we need to have an affidavit attached to, and
16 then if it is, we run jump through all the
17 hoops. Affidavits never make any substantive
18 difference in my life at all except they are
19 one more thing you have to do.

20 Do we need affidavits for things like
21 this? It seems like this is just one more
22 thing that you have in the law that people
23 have to do, and if they don't have it, they
24 haven't touched second base.

25 CHAIRMAN SOULES: There are

1 some trial judges who will not give you a
2 hearing after a judgment, period, even if it's
3 a dismissal, a DWOP. That's why we fixed
4 165(a) to require the judge give you a
5 hearing, and the Supreme Court says it's
6 mandatory.

7 So if he doesn't, you get to go back and
8 have a hearing; and the affidavits, there are
9 Supreme Court -- I think a recent case that
10 held that if the affidavit is filed with a
11 motion for new trial after a default judgment
12 are sufficient to raise -- to make a prima
13 facie case, then the trial judge should
14 reverse, and so you have got an opportunity as
15 a lawyer to make your appellate record even if
16 you have an obstinate trial judge who will not
17 give you the opportunity to do so, and there
18 are some of those people out there.

19 CHAIRMAN SOULES: Justice
20 Duncan.

21 HONORABLE SARAH DUNCAN: I hate
22 to disagree with Joe, but I sort of do on this
23 one because to me we are moving towards using
24 affidavits rather than live testimony and not
25 away from it, and my understanding of that

1 recent Supreme Court case was if you have got
2 an affidavit, it says what needs to be said to
3 preserve the complaint. You don't have to
4 have live testimony, and the trial court has
5 to consider the affidavits, and it's certainly
6 in most instances a lot cheaper and more
7 efficient to get an affidavit than it is to
8 fly someone in to give live testimony.

9 MR. LATTING: My comment is
10 that -- or it may be an assumption that it's
11 either an affidavit or live testimony. I'm
12 saying why have to have an affidavit at all?
13 I found out a month ago to my surprise that in
14 the federal statutes there is a federal
15 statute that's not in the rules. It says
16 anywhere an affidavit is required a
17 declaration may be used. You don't have to
18 make any affidavits in the federal practice.
19 You just have to have a lawyer say this is
20 what somebody will say.

21 What it is to me is running around and
22 getting red wax and candles. I mean, if a
23 lawyer says this is what my witness will say,
24 I will represent to the court that these are
25 the facts. I am just saying I think the days

1 of affidavits are anachronistic, and I think
2 we ought to get rid of them and make some kind
3 of formality, but all the pictures and
4 different things that you have to put on there
5 and the stamps and all that kind of stuff...

6 CHAIRMAN SOULES: Well, Judge
7 Cornyn did that right at the end. He
8 eliminated affidavits in all cases.

9 MR. LATTING: Well, why don't
10 we help him out?

11 CHAIRMAN SOULES: All you have
12 to have now for a paper that carries the
13 significance of an affidavit is an
14 acknowledgement, according to the Supreme
15 Court of Texas. But anyway, anything else on
16 320(c)? Richard Orsinger.

17 MR. ORSINGER: This conduct by
18 the current Rule 327 is required to be
19 supported by an affidavit, and setting aside a
20 judgment after citation by publication on
21 subdivision (4) requires an affidavit under
22 Rule 329, and I believe that the case law
23 requires an affidavit for (2) and (3). So if
24 we decide to abandon affidavits then we are
25 changing both existing rules and case law, as

1 I understand it; and I am not saying we
2 shouldn't; but I think we ought to be aware
3 that we are going to be changing the practice.

4 MR. LATTING: It's high time.

5 MR. ORSINGER: If we do that.

6 CHAIRMAN SOULES: Anything
7 else? Those in favor of 320(c) as written
8 show by hands. 13.

9 Those opposed? Okay. It passes 13 to
10 nothing.

11 MR. HUNT: Now, we move to jury
12 misconduct, and this was relabeled, "Procedure
13 for Jury Misconduct." Now, ignore the
14 footnote that you see on page 5 for just a
15 moment and let me tell you all that we did do
16 in the revision of this rule, and most of this
17 work represents Bill Dorsaneo's work.

18 We simply rephrased it without
19 substantive change to make it read a little
20 easier. Every change in here was for the
21 purpose of making it more grammatically
22 correct and to read a little easier.

23 CHAIRMAN SOULES: And you are
24 talking about now all sections of 320(d)?

25 MR. HUNT: Yes.

1 CHAIRMAN SOULES: Okay. The
2 two sections.

3 MR. HUNT: We just gave a
4 different title to it, but it's the same as
5 the old 327.

6 CHAIRMAN SOULES: Okay. Any
7 discussion about proposed 320(d)? Richard
8 Orsinger.

9 MR. ORSINGER: The first line
10 there, "supported by affidavit" is redundant
11 under the structure of (c) because (c) says
12 that jury misconduct has to be supported by
13 affidavits. So I would propose that we delete
14 "supported by affidavit" from (d)(1).

15 CHAIRMAN SOULES: Any objection
16 to that? What do you think, Don?

17 MR. HUNT: The reason why it's
18 left there is because it's been there for some
19 time, and if you take it out, somebody may
20 miss (c). It is not anything but a reminder.
21 We have in the law in a of number cases as we
22 have gone through these rules left in
23 reminders to counsel to keep all of us from
24 malpractice. It's probably redundant,
25 particularly considering its location, but it

1 doesn't hurt anything. So I don't care.

2 CHAIRMAN SOULES: Does that
3 satisfy you, Richard?

4 MR. ORSINGER: No. I'd like to
5 take it out.

6 CHAIRMAN SOULES: Okay. Motion
7 to take it out or leave it in. Those in favor
8 of taking it out. Seven.

9 Those who want to leave it in? Five.
10 Five to seven it comes out.

11 MR. HUNT: Now, if you would,
12 direct your attention to the end of
13 subdivision (2) where the footnote is.

14 MR. ORSINGER: Well, Luke, I
15 have got another comment on (d)(1).

16 CHAIRMAN SOULES: Okay.
17 320(d). Any other comments on 320(d)?

18 MR. ORSINGER: (D)(1).

19 CHAIRMAN SOULES: (D)(1).
20 Okay.

21 MR. ORSINGER: The very last
22 line, "injury probably resulted to the
23 complaining party" is something we talked
24 about yesterday afternoon, for those who were
25 not here, could arguably state the harmless

1 error rule in different words from the
2 conventional wording, and we made changes
3 yesterday to allow for this.

4 CHAIRMAN SOULES: Don, would
5 you accept substitute words there, "probably
6 caused rendition of an improper judgment" as
7 we --

8 MR. HUNT: Sure. That's no
9 problem.

10 CHAIRMAN SOULES: -- straighten
11 things to like we did yesterday.

12 MR. HUNT: We may be talking
13 about a slightly different animal when we are
14 talking about trying to review what a jury
15 would have done, but I think it's still a
16 harmless error, or it's a harmful error rule.

17 CHAIRMAN SOULES: Is that what
18 you are suggesting, Richard, that we
19 substitute "probably caused rendition of an
20 improper judgment"?

21 MR. ORSINGER: I do, but let me
22 find out, Don, do you think that the test is
23 slightly different about when you should grant
24 a new trial, on this ground would be different
25 from the harmless error rule normally?

1 MR. HUNT: No, I don't. The
2 discussion, and this was private with just two
3 or three of us, was about the problem that
4 comes up where you don't get a peremptory --
5 or challenge for cause granted on voir dire
6 and how you preserve that and how you predict
7 what would have happened had you had some
8 other juror on the panel rather than the one
9 that you had.

10 And that test may have to be different,
11 and that caused me to rethink whether we
12 needed the typical language that we have used
13 for harmful error or whether we needed to
14 leave it in terms as it's expressed here. You
15 had probable injury because the jury didn't
16 hear something it should have heard because
17 you don't know that if they had heard it it
18 necessarily would have resulted in a different
19 verdict and a different judgment, but you're
20 trying to predict that your ability to
21 persuade the jury was lessened without this
22 evidence, or in this case it would be
23 different if there had been no jury
24 misconduct, if they had not received
25 extraneous information. I don't know. I

1 think it's the same, but --

2 MR. ORSINGER: Well, you know,
3 in those cases where you have error in the
4 alignment of the parties for strikes and
5 whatnot the standards they articulate is
6 something like in a close case there is
7 presumed harm, and they don't really go so far
8 as to say that probably resulted in an
9 improper judgment, and so maybe there is a
10 reason to articulate it differently.

11 CHAIRMAN SOULES: Elaine
12 Carlson.

13 PROFESSOR CARLSON: I think
14 what you're thinking about is the
15 misallocation of peremptory strikes where the
16 courts have said the test is did it result in
17 a materially unfair trial, looking at the
18 factors that are sharply conflicting proof and
19 whether it was a unanimous jury verdict or
20 not. So that is a little bit different spin
21 on the usual harmless error standard, but I
22 don't think it applies right here.

23 MR. ORSINGER: No. But the
24 concept does, which is that you may have a
25 juror who lied in voir dire, and that's going

1 to be picked up right here. And you know, is
2 the test that you have to show that it
3 probably resulted in an improper judgment, or
4 are you entitled to some kind of presumption
5 of harm or something like that? It may be a
6 little bit different rule.

7 I am going to withdraw my request that we
8 change the language, but I'd be curious to
9 hear what anybody else thinks about that.

10 CHAIRMAN SOULES: Well, with
11 this language, as I am understanding Don, the
12 language "that injury probably resulted to the
13 complaining party" is in the current rule,
14 right?

15 MR. HUNT: Right.

16 CHAIRMAN SOULES: So we don't
17 change anything if we leave it there.

18 MR. ORSINGER: That's true.

19 MR. HUNT: But you see on
20 320(a)(5) where we talked about our laundry
21 list of matters to put in a motion for new
22 trial, we changed that tag line. On page 3,
23 320(a)(5), tag line on subdivision (5), we
24 changed that to probably did -- or "probably
25 caused rendition of an improper judgment." I

1 don't see any problem in changing it here. I
2 think there may be a real problem in the area
3 where Elaine talks about.

4 CHAIRMAN SOULES: Well, if you
5 take a juror, if you have to take a juror in
6 the face of a challenge for cause and then you
7 win -- then you lose but he's against you
8 anyway, I guess that's -- I don't know how
9 you --

10 MR. ORSINGER: I'm bothered by
11 the change we made yesterday in light of this
12 conversation that Don had because I do think
13 that the Supreme Court articulates error in
14 jury selection differently from the normal
15 harmless error rule.

16 CHAIRMAN SOULES: You suggest
17 we put 320(a)(5) back to the way it was?

18 HONORABLE C. A. GUITTARD:
19 Well, they ought to be the same either way.

20 CHAIRMAN SOULES: Yeah. I
21 agree.

22 HONORABLE SARAH DUNCAN: The
23 conversations have gotten me concerned such
24 that since Richard has withdrawn his motion I
25 am going to assert it now. Because to me if

1 it didn't probably result in an improper
2 judgment, it should not cause a court to go
3 through the entire process again, and your
4 example, Luke, is an illustration of that.

5 HONORABLE C. A. GUITTARD: Is
6 that the same thing with respect to a juror
7 that hadn't made proper answers?

8 HONORABLE SARAH DUNCAN: Yeah.
9 To me, my opinion only, under a proper harm
10 analysis if a juror's wrong answers have not
11 probably resulted in a wrong judgment, I don't
12 think -- in my opinion you should not go
13 through the entire trial process again.

14 HONORABLE C. A. GUITTARD: If
15 we want to change the law in that respect,
16 fine.

17 HONORABLE SARAH DUNCAN: I
18 think that -- I thought it was as Elaine said,
19 that there was a difference between the
20 structure of choosing the juror and the
21 individual error in choosing a juror and that
22 the Supreme Court's opinions had applied a
23 different harm analysis to the structure of
24 choosing the juror.

25 MR. ORSINGER: From whether a

1 juror lied in voir dire, for example?

2 CHAIRMAN SOULES: Elaine
3 Carlson.

4 PROFESSOR CARLSON: What if a
5 juror lied on voir dire and it turns out they
6 should have been struck for cause -- grounds,
7 and they served anyway and you had a 10/2
8 verdict?

9 HONORABLE SARAH DUNCAN: In my
10 understanding that was still subject to the
11 regular harm analysis. Maybe I'm wrong.

12 PROFESSOR CARLSON: I'm not
13 sure about that.

14 CHAIRMAN SOULES: There are
15 many places where the Supreme Court cases just
16 don't go through the harm analysis. When they
17 don't want to do it, they don't do it.
18 Whenever the problem is one that they want to
19 fix, they will worry about it; and whenever
20 the problem is one that just smells bad on its
21 face, they don't worry about it. Like a juror
22 lying on a material matter that would have
23 been a disqualification, they just seem
24 to -- you know, that smells so bad we are not
25 going to really get into this harmful error

1 analysis.

2 And, for example, with distributing
3 strikes cases. The problem is that getting
4 into the harmful error issue is just too hard
5 to do. It's almost impossible to do. How do
6 you penetrate this layer of noninformation?
7 So you kind of do it on instinct rather than
8 really doing it with the algebraic analysis.

9 And I don't -- it seems to me like where
10 you have got some kind of poison in the jury
11 that you do have that somewhat of a hermetic
12 seal on really getting to the issue of did it
13 really cause an improper judgment, for
14 whatever it's worth. Richard.

15 MR. ORSINGER: If you have some
16 tainted juror, it's more than just the vote of
17 that juror that's at stake. It's also the
18 deliberation of the jury and the impact that
19 that juror had, and since we can never ask any
20 questions or get any affidavits considered on
21 who said what and what effect it had, you are
22 left with the idea that someone maybe who has
23 a burning prejudice against one of the parties
24 was on that jury poisoning the whole
25 deliberation, and I don't know how you

1 ever -- I mean, the Supreme Court gets into
2 this business about weighing whether the case
3 was close or not, but you know, there are some
4 cases that are won that are not close, and
5 there is a surprising victor and a surprising
6 losing party, and I think that there is a
7 reason to articulate the test differently from
8 the normal types of error that lead to
9 reversal.

10 CHAIRMAN SOULES: And then who
11 wins and who loses? I mean, this person who's
12 putting the poison in the jury may be in my
13 tent, but my damages may be one-tenth of what
14 I expected to recover. So now what? Did the
15 error in him being on the jury, was it cured
16 by his vote for him, or was it not cured by
17 his vote against me? Because I don't know
18 whether he voted for me or against me. He was
19 for me on liability, but he killed me on
20 damages. Maybe that's the deal he cut. I
21 mean, just how do you get to the issue here?

22 HONORABLE C. A. GUITTARD:
23 Well, it seems like to me that's a pretty
24 difficult area, and I'm not prepared to get
25 into all the questions of what effect this

1 might have. It seems like to me the committee
2 would do better to stick with the language
3 that's now in the rules so we don't create
4 uncertainty in the law.

5 CHAIRMAN SOULES: Do you want
6 to speak to that, Sarah? It was your motion
7 to change it.

8 HONORABLE SARAH DUNCAN: No.

9 CHAIRMAN SOULES: Anything else
10 on this? Okay. Those in favor of leaving the
11 rule as written by Don that is on page 5. We
12 are talking about 320(d)(1). Show by hands.
13 12.

14 Those who prefer to substitute
15 traditional language of "probably caused
16 rendition of an improper judgment" in lieu of
17 that. Two. Okay. So the vote was, what, 13
18 to 2?

19 MS. DUDERSTADT: Twelve.

20 CHAIRMAN SOULES: 12 to 2 to
21 leave it as proposed. Should we also go back
22 then and fix (5)? Because they are the same
23 thing.

24 MR. HUNT: Have to.

25 HONORABLE C. A. GUITTARD: So

1 moved.

2 CHAIRMAN SOULES: So moved.
3 Any objections? No objection. So 320(a)(5)
4 will then be made to conform to the vote we
5 just took.

6 Anything else on 320(d)? Carl Hamilton.

7 MR. HAMILTON: Bottom of
8 page 4, we took out communication on No. (5).
9 Do we want to take it out there, too?

10 HONORABLE C. A. GUITTARD: Of
11 course, its being here is why it was put in
12 (5).

13 MR. ORSINGER: Richard
14 Orsinger. When we took it out yesterday it
15 was because we were making reference to this
16 rule, and this is where we need to leave it so
17 that subdivision 320(a)(5)(1), or little (i) I
18 guess I should say, says "misconduct of the
19 jury." You have to come over here to this
20 rule.

21 CHAIRMAN SOULES: Misconduct is
22 defined someplace, isn't it?

23 MR. ORSINGER: This is the
24 rule.

25 MR. HUNT: This is the rule,

1 but you don't really get into misconduct until
2 you get to subdivision (2) where it indicates
3 that to which a juror may testify because
4 that's where you really identify the evidence
5 that's admissible. That's right out of
6 606(b).

7 MR. HAMILTON: Well,
8 subdivision (d) starts with what the grounds
9 for the motion are, communications, but under
10 (a) we are talking about grounds, and we took
11 that out. So it seems to me it ought to come
12 out here, too.

13 CHAIRMAN SOULES: That's right.

14 MR. HUNT: Well, one of the
15 reasons perhaps for leaving it in here would
16 be because it was ambiguous when we put it in
17 before. It was included within the big
18 umbrella of jury misconduct; and we know that
19 one form of jury misconduct certainly is this
20 extraneous outside influence that's brought to
21 bear on a juror; and so when the motion
22 attempts to set up this kind of outside
23 influence as a result of a communication, this
24 authorizes it; but this subdivision (d)
25 circumscribes what kind of communication will

1 be admissible; and that's what 320(a) didn't
2 do. It gave you no real parameters. The
3 communication fits under jury misconduct where
4 it's explained here as being the kind of
5 communication identified in subdivision (2).

6 CHAIRMAN SOULES: I can't see
7 why you would treat the rules differently. If
8 there is some ambiguity or vagueness that
9 needs to be fixed in (d)(1), that same
10 vagueness is present in (a)(5). They are
11 exactly the same.

12 MR. HUNT: That's correct.

13 CHAIRMAN SOULES: So we ought
14 to either take it out both places or fix it.

15 Aren't we really talking about improper
16 communication made to the jury?

17 MR. HAMILTON: It's not any
18 communication. It's improper communication.

19 CHAIRMAN SOULES: Improper
20 communication. And if that's something that
21 should be articulated because otherwise it
22 might be thought to be omitted then we ought
23 to articulate it somehow.

24 HONORABLE C. A. GUITTARD: It
25 says "when the ground of the motion is

1 communication made by the jury." Of course,
2 if it's not an improper communication, it's
3 not a ground.

4 CHAIRMAN SOULES: Well, we talk
5 about misconduct of the jury, not just conduct
6 of the jury.

7 HONORABLE C. A. GUITTARD:
8 Right.

9 CHAIRMAN SOULES: Misconduct of
10 the officer, improper communication. I've
11 said enough, I guess. Anne Gardner.

12 MS. GARDNER: Well, I agree
13 with the motion to change it if there is a
14 motion to eliminate it here because I think
15 the same problem does exist as existed with
16 the rule that we were discussing yesterday, in
17 that if there was an improper communication
18 then it did constitute an outside influence;
19 and therefore, it did constitute misconduct.
20 So it's really duplicative.

21 HONORABLE C. A. GUITTARD: Now,
22 just a minute. Let me ask this: Suppose
23 there is some sort of improper communication
24 made to the jury. Suppose somebody tells the
25 jury, "Decide for the plaintiff because the

1 defendant's insured," and it's not misconduct
2 of the jury. It's just some communication
3 made to the jury, and it might not necessarily
4 be an influence, of course, but if the jury
5 overhears somebody say that the defendant has
6 insurance or this is an insurance company
7 defending this suit or something like that,
8 that might not be considered an outside
9 influence, but it might be an improper
10 communication.

11 CHAIRMAN SOULES: Well, see,
12 you have to go through a couple of steps here,
13 and I am not sure everybody goes through those
14 steps, and you are not going through them, and
15 I probably wouldn't go through them, too. If
16 the jury, having received that improper
17 communication considers it, it's jury
18 misconduct.

19 HONORABLE C. A. GUITTARD:
20 Yeah. But you can't prove whether they did or
21 not.

22 CHAIRMAN SOULES: When we took
23 the vote yesterday to delete "any
24 communication made to the jury" I thought
25 there was some place in these rules that

1 defined jury misconduct and made improper
2 communication jury misconduct and that it was
3 articulated, and that apparently is not the
4 case.

5 MR. ORSINGER: Luke, it does by
6 inference. Old Rule 327, which has the same
7 language, was entitled "For Jury Misconduct,"
8 and then it started out, "where the ground for
9 the motion is misconduct of the jury or an
10 officer in charge or because of a
11 communication or a juror lied,"
12 blah-blah-blah-blah.

13 Now, the text did not say jury misconduct
14 means improper communication, officer,
15 whatever, but the title of the section said
16 "New Trial for Jury Misconduct," and so it
17 kind of inferentially said that what's in this
18 rule must all be jury misconduct.

19 CHAIRMAN SOULES: But that's
20 not all brought forward in this new scheme.

21 MR. ORSINGER: No. The
22 language of the text of the rule is brought
23 forward, but the title is changed from "For
24 Jury Misconduct" to "Procedure for Jury
25 Misconduct," and what we really ought to have

1 is a definition or description of jury
2 misconduct in the text. Then you will have
3 exactly what you want.

4 CHAIRMAN SOULES: I don't know
5 whether we could ever outline every -- let me
6 just ask this question: Should the rules
7 articulate that improper communication made to
8 the jury is a ground for a motion for new
9 trial? How many feel that the rules should
10 articulate that? Show by hands. 15.

11 How many feel otherwise? One. 15 to 1.
12 So that would suggest that we change (a)(5),
13 little (3), put it back in and say "improper
14 communication made to the jury."

15 HONORABLE C. A. GUITTARD:
16 Okay.

17 MR. ORSINGER: All right.

18 CHAIRMAN SOULES: Okay.
19 Anybody that would change their vote on this
20 proposition if we put that language back in a
21 (a)(5)?

22 MR. ORSINGER: Are you taking
23 the word "any" out, or is it going to say "any
24 improper"?

25 CHAIRMAN SOULES: Yes. I am

1 taking the word "any" out, and I am
2 substituting the word "improper" for "any."

3 Then we get to, let's see, 320(d)(1), and
4 the same thing. "Improper" for "any" in the
5 last line on page 4.

6 HONORABLE C. A. GUITTARD: Why
7 don't we take the -- as long as we are
8 changing that why don't we take out "made"?
9 It doesn't add anything. "Improper
10 communication to the jury."

11 CHAIRMAN SOULES: Any objection
12 to that? No objection. It's done. Both
13 places?

14 HONORABLE C. A. GUITTARD:
15 Yeah.

16 CHAIRMAN SOULES: Okay.
17 Anything else on 320?

18 HONORABLE DAVID PEEPLES: Luke,
19 we are talking about an outside communication,
20 aren't we? Somebody says "Juror No. 1 made an
21 improper communication," we don't mean to
22 breach that, do we? Juror No. 1 talked about
23 insurance to the other eleven.

24 CHAIRMAN SOULES: Well, you
25 can't prove -- on No. (2) here it says what

1 you can and cannot get to through the
2 testimony of the jurors.

3 HONORABLE DAVID PEEPLES: I
4 mean, it's understood we are talking about an
5 outside communication, isn't it?

6 MR. ORSINGER: It is
7 understood, but it doesn't say that.

8 HONORABLE DAVID PEEPLES: It
9 doesn't say it. Yeah.

10 MR. ORSINGER: It sure doesn't.

11 MS. SWEENEY: Well, are you-all
12 at the point of considering the footnote yet
13 on page 5?

14 CHAIRMAN SOULES: I didn't hear
15 you, Paula.

16 MS. SWEENEY: Are you-all at
17 the point yet of considering the footnote on
18 page 5 because that's right in the middle of
19 what you are talking about?

20 CHAIRMAN SOULES: Well, I think
21 what Judge Peeples is suggesting is that we
22 change both those places to say "improper
23 outside communication to the jury."

24 HONORABLE DAVID PEEPLES: If
25 that's what we mean to do, we probably ought

1 to say it. If that's not what we mean to do,
2 let's just leave it alone.

3 MR. YELENOSKY: We don't know
4 what we mean to do until we look at footnote
5 number -- or on page 5, Footnote No. 1,
6 because it addresses the question of whether
7 we do want to allow testimony from the jury as
8 to the things that are not outside.

9 CHAIRMAN SOULES: Okay. Judge
10 Peeples, can you hold that thought, I guess,
11 'til we get to that point.

12 HONORABLE DAVID PEEPLES: Sure.
13 Sure.

14 CHAIRMAN SOULES: And when
15 that's resolved call it back to my attention,
16 and we will deal with it then. What else on
17 this, Don? Anything else on 320(d)? Any
18 further discussion on 320(d)?

19 MR. ORSINGER: Well, the
20 footnote is part of (d)(2).

21 CHAIRMAN SOULES: I am talking
22 about all, not just (d)(1) but also (d)(2).

23 MR. ORSINGER: Well, then it's
24 time to talk about Footnote 1.

25 CHAIRMAN SOULES: All right.

1 Let's proceed.

2 MR. HUNT: The purpose for
3 Footnote 1 was not to recommend anything to
4 this committee. It was a matter of
5 discussion, and the thought was that if we did
6 a little briefing and looking to see the
7 difference in the federal rule and the
8 criminal rule we could lay out for you reasons
9 for changing it if anyone wanted to. Now, the
10 prerogative it seems to me to change this rule
11 belongs not so much to my subcommittee but to
12 the evidence subcommittee.

13 I visited with Michael Prince and
14 indicated to him that I would share this with
15 him and intended to send it to him, but I
16 didn't get it to him until yesterday, but the
17 analysis here is that under the federal rule
18 you can occasionally set aside a verdict for
19 jury misconduct, and most of those set asides
20 in the federal case take place under that
21 language of extraneous prejudicial information
22 was improperly brought to the jury's
23 attention.

24 Now, that's what I think the outside
25 communication that was in the federal rule

1 that we copied meant, and that's the reason
2 why there is at least some interest among the
3 commentators to change the Texas rule and
4 maybe go back to the federal language, or not
5 go back to but use the federal language.

6 As I understood it when we adopted the
7 Texas Rule of Evidence we took out that extra
8 language. We didn't adopt it from the federal
9 rule because there was the thinking that it
10 was a duplication, and apparently it's not.
11 It made a real difference because I don't know
12 of any Texas cases in the last few years that
13 have been reversed for jury misconduct, and
14 that's the purpose to look at it, if we want
15 to, or refer it to the evidence committee.

16 CHAIRMAN SOULES: Joe Latting.

17 MR. LATTING: Well, I'd like to
18 remind the committee and, Judge Guittard, you
19 might correct me on this, but I think that
20 this was very, very carefully considered by
21 the Supreme Court, and I remember hearing Jack
22 Pope say that the day when we are going to
23 have a trial and then we are going to have a
24 trial of the jury about the trial is over, and
25 we want to foreclose any inquiry as to what

1 went on in the jury room except for outside
2 corruption, and we do not want jurors being
3 interrogated about "What did you say? Did you
4 talk about insurance? Did you do this or
5 that?"

6 And so this is not some inadvertent thing
7 that happened because what had grown up was we
8 would have our trial, and the losing side
9 would then immediately go and start polling
10 the jurors, the ones that would talk, and say,
11 "Would you be willing to talk about what the
12 deliberations were?" You have got a \$7
13 million verdict.

14 "Well, I believe there was some mention
15 of insurance."

16 "Oh, really," and so on and so on. Not
17 only did you you have your discovery
18 litigation, then you had the
19 litigation-litigation. Then you had the jury
20 litigation after that, and the Supreme Court
21 said, "Enough of that. Unless it's
22 corruption, we are not going to talk to jurors
23 about what they talked about." Corruption
24 being outside. So if we are suggesting this
25 to the Court, we are suggesting a going back

