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BEFORE THE
SUPREME COURT ADVISORY COMMITTEE
AUSTIN, TEXAS

FEBRUARY 10, 1990

Austin, Texas

1 * * * * *
2 HEARING HELD IN AUSTIN, TEXAS, ON FEBRUARY 10, 1989
3 * * * * *
4 B-E-F-O-R-E
5
6 LUTHER H. (LUKE) SOULES, III
CHAIRMAN
7 * * * * *
8 SUPREME COURT:
Justice Lloyd Doggett
9 Justice Nathan Hecht
10 COURT OF CRIMINAL APPEALS:
Judge Sam Houston Clinton
11
12 COAJ CHAIR
Justice David Peeples
13 SENATE JURISPRUDENCE COMMITTEE:
Marty Swanger
14
15 OTHER COMMITTEE MEMBERS:
Gilbert T. Adams, Jr. Sam D. Sparks (San Angelo)
Pat Beard Sam Sparks (El Paso)
16 Frank L. Branson Harry M. Reasoner
Elaine Carlson Judge Paul Rivera
17 John E. Collins
Tom H. Davis
18 William V. Dorsaneo III
J. Hadley Edgar
19 Charles F. Herring OTHER SPEAKERS:
Franklin Jones, Jr. Pat Hazel
20 Gilbert I. Low
Steve McConnico
21 Russell McMains
Charles (Lefty) Morris
22 John M. O'Quinn
Tom L. Ragland
23 Broadus A. Spivey
Harry L. Tindall
24
25

SUPREME COURT ADVISORY COMMITTEE
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FEBRUARY 10, 1990

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P R O C E E D I N G S

Saturday, February 10, 1990

Morning Session

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6 CHAIRMAN SOULES: Judge Peeples is here, and
7 the first thing on this agenda, just on Page 1, is a letter
8 from the COAJ where they did an edit of our typographical
9 errors. And we made every change -- I appreciate Judge
10 Peeples -- I guess he is out there getting coffee -- the work
11 they did on this.

12 MR. SPIVEY: If he is out, I move we take that
13 off the table.

14 MR. DAVIS: In all seriousness, do we have a
15 quorum? Can we proceed without a quorum? I understand -- I
16 don't want any -- I am not trying to cut off any --

17 CHAIRMAN SOULES: If you will look at Page 1,
18 you will see

19 MR. DAVIS: I was just asking the question.

20 CHAIRMAN SOULES: Well, there is no quorum
21 rule for this Committee.

22 MR. DAVIS: If it is raised later, I wanted to
23 be sure.

24 CHAIRMAN SOULES: Okay. The Chair declares we
25 are in session and that we have a quorum.

1 Okay, if you will open your books to Page 1,
2 we will get some -- this is housekeeping, anyway. We have
3 made all of the changes that the COAJ suggested on Page 1,
4 except H.

5 Where is Judge Peeples?

6 MR. HERRING: He was here just a minute ago.

7 CHAIRMAN SOULES: And the one we did not
8 make -- and they are right, they were errors. Some of the
9 errors that they caught were not in what we typed up, but
10 they got into what was published in the bar journal. In
11 other words, there were errors in that. So -- but we have
12 made all these corrections.

13 MR. SPIVEY: Except H.

14 CHAIRMAN SOULES: Except H.

15 MR. SPIVEY: I move we accept H.

16 CHAIRMAN SOULES: H doesn't fit. If you will
17 turn with me to Page 428.

18 Judge Peeples, I was just saying we have done all
19 these corrections that you sent us in the letter except H.

20 JUSTICE PEEPLES: I talked to Holly about
21 that. Apparently, we were wrong on one or two of those.

22 CHAIRMAN SOULES: Well, at this point, that is
23 the one -- the only one. Is that what is wrong?

24 JUSTICE PEEPLES: It is the kind of thing, if
25 you read it, it is obvious whether it is a mistake or not.

1 If you-all looked at it, and it is not a mistake --

2 CHAIRMAN SOULES: So can we withdraw Item H on
3 Page 2 of the agenda?

4 MR. SPIVEY: Withdraw?

5 CHAIRMAN SOULES: I am asking Judge Peeples.
6 It is his committee.

7 JUSTICE PEEPLES: If somebody looked at the
8 thing and what we said was wrong, that is fine.

9 CHAIRMAN SOULES: All right. I did, and if
10 you all want to get some comfort on that, if you will look at
11 Page 428 -- I am sorry, let's see, 429, and look at the
12 underscored lines there, one, two, three, four, five, six,
13 the sixth line starting with "If the" -- "If the attorney in
14 good faith believes that the order has been violated, the
15 attorney shall take the necessary actions provided under
16 Chapter 14, Family Code." And it is fine the way it is on
17 Page 429, and if we make the change that is suggested on H,
18 it will not be. They want to stop the sentence after
19 "violated" and capitalize T, "The attorney." Then you have
20 got two incomplete sentences. So that suggestion, you agree
21 it should be --

22 JUSTICE PEEPLES: That is the only one?

23 CHAIRMAN SOULES: That is the only one. The
24 rest of them we followed your lead. So do we have a motion
25 to make all the corrections except H and to withdraw H?

1 MR. SPIVEY: So moved.

2 CHAIRMAN SOULES: Moved. Second?

3 MR. HERRING: Second.

4 CHAIRMAN SOULES: All in favor say "Aye."

5 (RESPONDED AYE)

6 CHAIRMAN SOULES: Opposed? Okay, that is done
7 unanimately.

8 Next is, let's see, 3(a). Somebody objected,
9 said we ought to just eliminate local rules. But --

10 MR. COLLINS: I second the motion.

11 CHAIRMAN SOULES: But since we can't do
12 that --

13 MR. COLLINS: I thought we had a motion on the
14 table.

15 CHAIRMAN SOULES: Is there a motion to leave
16 3(a) the way it is, the way it has been recommended?

17 MR. HERRING: So moved.

18 CHAIRMAN SOULES: Okay, moved. Second?

19 MR. SPIVEY: Second

20 CHAIRMAN SOULES: All in favor say "Aye."

21 (RESPONDED AYE)

22 CHAIRMAN SOULES: Opposed? Okay.

23 The next one is -- I guess the next is Rule 4.
24 The FE&D lawyers want to be exempt from the provision that
25 takes Saturdays, Sundays and legal holidays out of any period

1 under five days, five days or under. That would be the only
2 exception. They have got a five-day period --

3 MR. SPIVEY: Is that Rule 6?

4 CHAIRMAN SOULES: Rule 4, it is on Page 9. A
5 way to handle this -- they consider it second best -- is to
6 change the five day rule in the FE&D -- the five-day time
7 period in the FE&D rule -- to six days and then they are not
8 in a five-day or less period.

9 MR. LOW: I think that is just for federal
10 rule to intervene. The problem is like if something comes up
11 on Friday, you know, and you have got to have a hearing on
12 Monday, you know, that is --

13 CHAIRMAN SOULES: Well, the judge has to set
14 that. The only item before the Committee is do we exempt
15 FE&D practice from the Saturday, Sunday and legal holiday
16 exception or do we just change their period to six days and
17 do it that way. We would have to expressly exempt them in
18 Rule 4 or tack a day -- move a five-day period to six-day
19 period. Which rule is this in, Elaine?

20 MS. CARLSON: It is in Rule 4, but it
21 dovetailed to 748, 49, 49(a) and 49(b) and (c).

22 CHAIRMAN SOULES: Okay, back here you see on
23 749(a) in the rule book, it says, "Appellate", that is the
24 tenant, "is unable to pay the cost of appeal and so forth, he
25 shall nevertheless be entitled to appeal by making proof of

1 such inability within five days." Can we change that to six
2 and that fix it?

3 MR. BRANSON: Buddy Low and I have voted and
4 we have decided that E&D stands for eating and delivering,
5 but what does F stands for?

6 CHAIRMAN SOULES: I don't know what the F
7 stands for. We are on the record.

8 Elaine, do you want to cover that with us?

9 MS. CARLSON: Yes, Ken Fuller's subcommittee,
10 which I am on, made the recommendation on Page 9, and my
11 subcommittee on the 700 series of FE&D endorsed their
12 recommendation to exempt it because it really dovetailed with
13 a lot of other time periods back in the 700 series. So we
14 would endorse the recommendation on Page 9 of the materials.

15 CHAIRMAN SOULES: All right. Is there a
16 second?

17 MR. HERRING: Second.

18 CHAIRMAN SOULES: Made and seconded. Any
19 opposition? Those in favor say "Aye."

20 (RESPONDED AYE)

21 CHAIRMAN SOULES: Opposed? Okay, we will add
22 that, then. It is on Page 11, isn't it, Elaine?

23 MS. CARLSON: It is actually on both.

24 CHAIRMAN SOULES: Is it? I didn't see it.
25 Okay.

1 JUSTICE HECHT: I am not clear on that.

2 CHAIRMAN SOULES: If you go to Page 11, you
3 will see something underscored. That is a change from what
4 we voted on the last time. It is an addition to what we
5 voted on last time. It doesn't change anything we did as far
6 as the words were concerned, but it does add an exception.

7 JUSTICE HECHT: So we are going Page 11
8 instead of Page 9?

9 CHAIRMAN SOULES: Yes, Page 9 is the original
10 rule.

11 Okay, next --

12 MR. EDGAR: Luke, I think if we adopt that in
13 toto, it is really not grammatically correct. You start out
14 by saying Saturdays and Sundays shall be counted, and then
15 you say Saturdays and Sundays -- you start out saying
16 Saturdays and Sundays shall not be counted, then you say and
17 they shall be counted. Don't you want to say except --
18 shouldn't that be an exception rather than an and? It just
19 seems to -- I hate to be picky because we have got a lot of
20 things to cover, but I think we ought to be grammatically
21 correct.

22 CHAIRMAN SOULES: I think we ought to take out
23 "Saturdays, Sundays and legal holidays shall be counted,"
24 just take that out the second time it is said, because you
25 say it in the first.

1 MR. EDGAR: That is right.

2 CHAIRMAN SOULES: Then just pick up "and" --
3 the words that would be added are these: "and for purposes
4 of the five-day period provided for under Rules 748, 749,
5 749(a), 749(b) and 749(c)." Does that fix that?

6 MR. EDGAR: How is it going to read?

7 CHAIRMAN SOULES: Well, if you look at
8 Page 11, if you take out from the underscored language, these
9 words, strike through them, "Saturdays, Sundays and legal
10 holidays shall be counted." Leave the rest of them in. That
11 is the way it would read.

12 MR. EDGAR: Okay.

13 CHAIRMAN SOULES: That all right? Okay. That
14 is unanimously approved, then.

15 Next is -- this has got a lot of -- it is
16 Page 29, I guess is the next one. The Committee recommends
17 that we leave five as we passed it the first time. There was
18 some effort to -- someone wanted to extend time periods when
19 there is courier delivery. Okay, those in favor of leaving
20 it like it is as recommended by the Committee say "Aye."

21 (RESPONDED AYE)

22 CHAIRMAN SOULES: Opposed? Okay, that stays
23 as is.

24 Next is Page 33, Rule 10. Let's see, Tom,
25 that is your letter, Tom Ragland. They recommend that we add

1 the words, "the party's last known address." If you look on
2 Page 35, this is the Committee's recommendation. The
3 Committee recommends that we require on withdrawal of counsel
4 that the motion states the party's last known address and
5 that we delete the language, "The court may impose further
6 conditions upon granting leave to withdraw." This is on
7 Page 35.

8 Is there any opposition to the Committee's
9 suggestion? There being none, that will stand recommended as
10 unanimous, the text as we see it on 35.

11 And we go to --

12 JUSTICE PEEPLRS: Luke, we deleted that
13 sentence in the middle there?

14 CHAIRMAN SOULES: Yes.

15 JUSTICE PEEPLES: Okay. What was the reason
16 for deleting that?

17 MR. BRANSON: Well, the subcommittee judged --
18 it was brought out that some people had had some rather
19 unusual stipulations put on them by some trial judges in
20 order to get out of lawsuits.

21 MR. SPIVVEY: One of them was a defense firm
22 was required to bill about \$120,000 worth of hours that was
23 already uncollectible because the defense judge -- the judge
24 just wouldn't let them out period, even though they qualified
25 to be let out.

1 JUSTICE PEEPLES: That is a case of bad cases
2 -- hard cases making some bad law for the rest of us, but
3 that is fine. Let's don't spend any time on it.

4 CHAIRMAN SOULES: Then we go to 18(b) on
5 Page 45 -- 18(b) on Page 45.

6 MR. O'QUINN: What are we doing on 45, please?

7 CHAIRMAN SOULES: Elaine, do you have anything
8 you want to say about this 18(b)?

9 MS. CARLSON: Does everyone see the loose
10 handout for some proposed changes to 18(b)? Mine was at
11 Page 50.

12 CHAIRMAN SOULES: It is at Page 50?

13 MS. CARLSON: Yes.

14 MS. HALFACRE: Or it is just loose.

15 CHAIRMAN SOULES: Okay.

16 MS. CARLSON: It is entitled Proposal to Amend
17 Rule 18(b).

18 MR. O'QUINN: Which one should we consider,
19 Page 45 or --

20 MS. CARLSON: This is a change for 45.

21 CHAIRMAN SOULES: How big a change is it,
22 Elaine?

23 MS. CARLSON: There are three things. The
24 second one, I think, is totally noncontroversial, the cross-
25 references are not proper. A(5) and AB(3) should be 2(e) and

1 2(f) under Roman Numeral II in the middle of that page.

2 UNIDENTIFIED: So moved.

3 UNIDENTIFIED: I am sorry, I am lost. I don't
4 have any idea what you-all are talking about.

5 CHAIRMAN SOULES: If we will go -- let's turn
6 to Page 45 in the materials, okay? Elaine, tell us what we
7 need to do to Page 45, 46 and 47 to make it conform to your
8 suggestion here.

9 MR. BRANSON: What are we changing in that
10 rule? Can we talk about that rule for a moment?

11 CHAIRMAN SOULES: Let me try to get -- we will
12 talk about it, Frank, no question about it. Can we get what
13 Elaine has suggested first so -- in a form that everybody can
14 look at it and then we will talk about it?

15 MS. CARLSON: On Page 48, Subsection 6.

16 CHAIRMAN SOULES: Forty-eight, Subsection 6.

17 MS. CARLSON: Second line makes reference to
18 2(e) and 2(f)(3).

19 CHAIRMAN SOULES: Okay, what should that be?

20 MS. CARLSON: A(5) and AB(3).

21 CHAIRMAN SOULES: A(5). So it is --

22 MS. CARLSON: No, actually, it has been
23 changed already, so that is one of the changes. 2(e) and
24 2(f)(3) is correct. So that is one of the changes. And that
25 is just cleaning up the cross-references.

1 MR. O'QUINN: Wait, wait. Elaine, I am
2 confused. Are you saying that what you just said is a change
3 from the existing rule or a change in the proposed rule?

4 MS. CARLSON: A change in the proposed rule.

5 CHAIRMAN SOULES: I see what happened. Holly
6 already fixed that. On Page 48 it is correct already. What
7 else, Elaine?

8 MS. CARLSON: There are two other comments
9 that we received, types of comments. One was that the new
10 provisions for recusal, in fact, were overlapping or could be
11 considered overlapping as grounds for disqualification with
12 the problem that grounds for recusal can be waived while
13 constitutional grounds for disqualification can't. And the
14 problem is that we are trapping, in part, a federal provision
15 for recusal under a new proposed amendment that we put on the
16 table last fall, and we are kind of mixing. It is not purely
17 one for disqualification. Some are not purely grounds for
18 recusal.

19 So I just suggested to kind of alert the bar to
20 that and to respond to the inquiries that we got. But on
21 this handout under Roman Numeral I, the Subsection 5 be added
22 -- one sentence be added to the existing Subsection 5 which
23 currently reads in the bottom of Page 47, "The parties to
24 proceedings may waive any grounds for recusal after it is
25 fully disclosed on the record." Adding the sentence,

1 "Constitutional grounds for disqualification cannot be
2 waived." And that would simply alert the bar that they are
3 going to have to assess whether there is specific basis for
4 what we call recusal, also could be overlapping as a
5 constitutional right.

6 JUSTICE PEEPLES: Why shouldn't you be able to
7 waive a constitutional right? You can waive every one of
8 them.

9 MS. CARLSON: I know. It is just existing
10 case law.

11 JUSTICE PEEPLES: In a criminal case, you can
12 waive every one you have got, almost. If it is knowing and
13 intelligent, why shouldn't you be able to do it?

14 MR. DORSANEO: I agree with Judge Peeples. I
15 think that whatever existing law may be, that this is a bad
16 sentence.

17 CHAIRMAN SOULES: We have actually talked
18 about this in this Committee before, and didn't want to do it
19 because we weren't sure -- I mean, a judge may be sitting
20 there, and he may be a law partner of one of the parties in
21 the case and everybody is perfectly happy with the judge
22 sitting on the bench even though he is constitutionally
23 disqualified, and he decides the case and somebody comes out
24 with a bad result and they say, woops, judgment is void
25 because the judge didn't have the power to sit. And the

1 cases hold, these old constitutional cases about the judge's
2 disqualification. If he is disqualified, he doesn't have the
3 power to hold court in the case.

4 MR. LOW: Just like jurisdiction, you can't
5 waive it.

6 CHAIRMAN SOULES: I am not sure the court
7 today would make that -- those are old cases.

8 MR. SPIVEY: Yes, old law is bad law.

9 CHAIRMAN SOULES: Okay, did we want to put
10 this sentence in and reduce the rule?

11 MR. BEARD: Simply just saying other than
12 constitutional grounds, "any grounds for recusal comma other
13 than constitutional grounds."

14 CHAIRMAN SOULES: Why put anything in at all?
15 Do we put anything in at all about this?

16 MR. BEARD: It is all right with me not to put
17 anything at all.

18 CHAIRMAN SOULES: Okay, is that a motion?
19 Have you made a motion?

20 MS. CARLSON: No, I am just putting the
21 concerns raised --

22 MR. SPIVEY: I think it ought to be Beard's
23 motion. He hasn't done anything since we have been meeting.

24 CHAIRMAN SOULES: Make a motion, Pat.

25 MR. BEARD: I move we leave it as it is.

1 JUSTICE PERPLES: Second.

2 CHAIRMAN SOULES: All in favor say "Aye."

3 (RESPONDED AYE)

4 CHAIRMAN SOULES: Opposed?

5 MR. EDGAR: No.

6 CHAIRMAN SOULES: Okay, the ayes have it.

7 Page 45, 46, 47, 48 will go to the Supreme Court as they now
8 appear, without change.

9 MR. EDGAR: I want to change my vote. I
10 thought you were voting to put this in. It is unanimous.

11 CHAIRMAN SOULES: Okay, unanimous.

12 MR. O'QUINN: Are we talking about
13 subparagraph -- question, please. Are we talking about
14 Subparagraph 5 on Page 47?

15 CHAIRMAN SOULES: That is correct.

16 MR. BRANSON: Mr. Chairman, is that the only
17 thing we changed in the rules?

18 CHAIRMAN SOULES: Yes, that is the only -- we
19 didn't change that. We voted not to change it. Is there
20 anything else on 18(a)?

21 MS. CARLSON: Yes.

22 MR. O'QUINN: Mr. Chairman, perhaps this was
23 put together at a prior meeting I wasn't at, but has the
24 Committee been through -- it looks like to me this is a
25 substantial change in Rule 18(b). Has the Committee been

1 through that and we are just doing some housekeeping?

2 CHAIRMAN SOULES: That is right.

3 MS. CARLSON: A third area of concern raised
4 from Senator Glasgow who suggested that the prohibited
5 relationship between a judge and a lawyer requiring recusal
6 should be limited to a relationship within the first degree
7 and not the third, and he made reference in a letter to, I
8 guess Justice Hecht, to a new statute which I set forth on
9 the handout, Section 82.066 of the Government Code, which
10 actually speaks in terms of attorney prohibition, not the
11 judge's obligation to recuse. The reason an attorney may not
12 appear before a judge or justice in a civil case, if the
13 attorney is related to the judge or justice by affinity or
14 consanguinity within the first degree.

15 CHAIRMAN SOULES: Well, we -- actually, the
16 complaints we have been getting are that in some rural
17 counties the judges are holding court in cases where their
18 siblings are appearing and having favoritism, and this would
19 be -- we try to do something to help those people. This
20 would reverse some of what we already did, I think, and in
21 effect it would say a judge could sit in more cases where his
22 family members are before him than less.

23 MS. CARLSON: That would be the effect.

24 CHAIRMAN SOULES: The movement of the
25 Committee was to try to reduce that rather than increase the

1 judge sitting in his own family cases. Frank Branson.

2 MR. BRANSON: I was just wondering, in some of
3 the rural counties, if you got a judge on the bench and his
4 relatives are practicing lawyers, what are they going to do?
5 It would make it impractical for lawyers' families to
6 practice in some areas.

7 JUSTICE HECHT: The only complaints that I
8 remember getting, Luke, from the Committee were first degree
9 complaints when we had some father and son complaints, and I
10 don't remember. And Senator Glasgow said that was the
11 complaint that they had had at the Legislature, and that is
12 why they passed the statute. All he raised was the question
13 of do we want to go as far as the third degree, and some
14 counties in the state where a good number of percentage of
15 the population is related within the third degree.

16 MR. DORSANEO: It also depends on how you
17 count, and it is not clear how you count.

18 MR. O'QUINN: Should we make that clear?

19 MR. DORSANEO: That is why nobody complains
20 about the third degree. They are not sure how to count.

21 CHAIRMAN SOULES: Where on Pages 45, 46, 47,
22 and 48 does this appear?

23 MS. CARLSON: Luke, it would be at the top of
24 46. It is actually 2(f).

25 CHAIRMAN SOULES: 2(f). It is the first

1 sentence on Page 46, and the question is do we make third, do
2 we change that to first?

3 MS. CARLSON: That is correct.

4 CHAIRMAN SOULES: Okay.

5 MR. BEARD: I move we change it to the first.

6 JUSTICE PEEPLES: Can I ask this? This is
7 published in the bar journal. How many people in these rural
8 counties that would be affected complained about the third
9 degree?

10 MS. CARLSON: The only correspondence the
11 subcommittee received was from Senator Glasgow.

12 JUSTICE PEEPLES: Boy, I heard some horror
13 stories about coziness beyond, you know, father/son.

14 MR. LOW: You have to be kin to have that.

15 MR. O'QUINN: Mr. Chairman, I move if you are
16 a friend of Buddy Low they can't sit.

17 JUSTICE PEEPLES: That is a greater evil than
18 what Frank was talking about.

19 CHAIRMAN SOULES: I have got a motion to
20 change it to the first. Is there a second?

21 MR. EDGAR: Second.

22 CHAIRMAN SOULES: There is a second. Any
23 discussion? Lefty.

24 MR. MORRIS: Yes. When you talk to the third
25 degree, Bill, you said it depends on -- how are you defining

1 -- how do you think the law defines third degree?

2 MR. DORSANEO: We don't have that much time.

3 MR. SPARKS (EL PASO): The trouble is, Lefty,
4 that for educational purposes it is calculated one way, for
5 criminal purposes it is calculated another, and there are
6 conflicting opinions as well as statutes on it.

7 MR. O'QUINN: Don't we already have something
8 in that regard? Wasn't that in the constitution already,
9 about relationship?

10 MR. TINDALL: That is the parties, not the
11 lawyers.

12 JUSTICE RIVERA: I think there is a statute
13 that states, wife, nephew, niece, and so forth.

14 MR. O'QUINN: That has already been construed,
15 at least in the context, has it not, of a judge being related
16 to a party, and is it on the third degree? I think we have
17 got some judicial interpretation in that area. I remember
18 reading some cases on that. And they used the tight rule,
19 the rule that limits disqualification, the way you count,
20 like you do in the guest statute cases, count the tight way.
21 You have to go up and down when you do your counting rather
22 than just go up the common ancestor and count down.

23 But anyway, so I don't know how much discussion,
24 but I feel kind of strong about this rule. I think that
25 there are cases, like Justice Peeples says, where the

1 relationships, not just father and son, but uncle/nephew,
2 uncle/niece, whatever, and just leaving aside the fact that
3 there is a terrific danger of something going wrong or there
4 being undue influence there, how does it look to the public
5 when somebody goes in with a lawyer who is not related to the
6 judge and knows the other lawyer is, particularly in a
7 divorce situation, which from my practice of law, nothing is
8 more bitter than a divorce situation, and nobody has more
9 discretion in a case than a divorce judge, in my perception,
10 about children, what happens to people's children, what
11 happens to people's property. And let's say the other side
12 just wipes them out, gets all the property, gets the kids, he
13 will always think it was because of this family relationship.
14 I think just that is bad business. I don't think that is a
15 good way to run our business.

16 CHAIRMAN SOULES: Let me just get a consensus
17 on this so we will know. How many feel -- I am going ask for
18 third degree and first degree. How many feel that third
19 degree is proper? How many feel first degree is proper?
20 That is pretty one-sided. Are we ready to vote, then?

21 Okay, those in favor of leaving it third
22 degree and leaving 18(b) as it is all the way through show by
23 hands. Opposed?

24 MR. SPARKS (FL PASO): I have a question. I
25 don't want to open up the can of worms, but on Paragraph 2,

1 it says, "A judge shall recuse himself in any proceeding,"
2 and then we get over to five where you can waive any grounds
3 after disclosure. Did we have any resolve as to whether that
4 was a conflict or can you waive, Luke, the grounds in
5 Paragraph 2? I just --

6 MR. BEARD: I think we enjoined the view you
7 can waive anything. Maybe we will reverse these old cases
8 about nonwaiver on constitutional grounds. You ought to be
9 able to waive anything.

10 MR. LOW: In other words, you want to give the
11 court one more chance to get it right.

12 CHAIRMAN SOULES: The next item is on
13 Page 21 -- on Page 61, Rule 21.

14 MR. O'QUINN: May I ask a question?

15 CHAIRMAN SOULES: Yes, sir.

16 MR. O'QUINN: Back on Page 45, on Page 45
17 under Paragraph 2, the part that was X'ed out. If you look
18 at the fourth line of the part that was X'ed out, it talks
19 about -- the old rule apparently talks about recusal if a
20 judge had a personal bias and prejudice, quote, "concerning
21 the subject matter or a party," and now I look down to the
22 replacement, which is Paragraph B, who said he has a personal
23 bias and prejudice concerning a party. Did we intentionally
24 leave out the concept that a judge can be recused who has a
25 personal bias or prejudice concerning the subject matter?

1 Did we do that on purpose or knowingly, because we have left
2 that out, unless it is somewhere else.

3 CHAIRMAN SOULES: I don't think it is anyplace
4 else.

5 MR. DORSANEO: Financial interest in the
6 subject matter rather than bias or prejudice.

7 MR. O'QUINN: Is that what the Committee
8 wanted to do? Apparently the rule had previously been a
9 judge -- if a judge had a personal bias or expressed a
10 personal bias or prejudice about the subject matter, he was
11 to be recused, but now that can no longer be a ground of
12 recusal. That bothers me why they took that out.

13 MR. BRANSON: If you can recuse a juror for
14 that, you ought to be able to recuse a judge for that.

15 CHAIRMAN SOULES: I think what John is
16 suggesting is that we put after the word "concerning" in (b),
17 that we restore the words "the subject matter or".

18 MR. TINDALL: I second.

19 MR. BEARD: Can we take the judge on voir dire
20 to determine whether he has a bias against the subject
21 matter?

22 MR. O'QUINN: I don't think you can. I think
23 he has to express it in some way where you can just report it
24 to the record. I don't believe you can put a judge on the
25 stand and start asking him about his personal feelings.

1 JUSTICE PEEPLES: Would (a) immediately above
2 that not cover it? "His impartiality might reasonably be
3 questioned"?

4 CHAIRMAN SOULES: Probably does. Okay, we got
5 a motion and a second. Let just vote up or down. Those in
6 favor of adding "the subject matter or" back say "Aye."

7 (RESPONDED AYE)

8 CHAIRMAN SOULES: Opposed?

9 JUSTICE PEEPLES: No.

10 MR. BEARD: No.

11 CHAIRMAN SOULES: Okay, I believe the ayes
12 have it.

13 Next is Rule 21 on Page 61. Let's see, we had
14 pretty extensive debate on this. The complaint is --
15 principally, we got complaints about changing the rule to
16 require service on all parties rather than just the adverse
17 party, and Tom, I know you participated in that discussion
18 somewhat at length. Does anyone feel that our decision to
19 require the filing of papers on all parties when they are --
20 the service on all parties, does anyone feel that we ought to
21 change our earlier decision to require service on all
22 parties? No one feels we should make that change? Okay,
23 then that will stand the way we passed it.

24 Then there was a complaint about the three-day
25 notice period, and we have done something to fix that by

1 taking Saturdays, Sundays and legal holidays out of it. Does
2 anyone think we should do more?

3 MR. MORRIS: Where are you now, Luke?

4 CHAIRMAN SOULES: I am still on the same rule.
5 I am reading David's written comments on Page 63. The
6 Committee recommended, bottom line, no change at all to
7 Rule 21. That is the last sentence on 63. After they
8 studied it.

9 MR. SPARKS (EL PASO): I so move.

10 MR. O'QUINN: Mr. Chairman, the problem
11 regarding the three days and the weekend, the subcommittee
12 recommended no changes with regard to that problem.

13 CHAIRMAN SOULES: That is correct.

14 MR. O'QUINN: I thought thought they
15 recommended removing Saturdays and Sunday out of that?

16 CHAIRMAN SOULES: But that is back in four.

17 MR. O'QUINN: Don't cure the problem with 21
18 is what they said.

19 CHAIRMAN SOULES: Yes, they say now three days
20 is enough if you take Saturdays and Sundays and legal
21 holidays out of it.

22 MR. O'QUINN: Now I understand.

23 CHAIRMAN SOULES: Okay, it has been moved
24 there be no change Rule 21 from our prior work. Is there a
25 second?

1 JUSTICE PEEPLES: Second.

2 CHAIRMAN SOULES: Those in favor say "Aye."

3 (RESPONDED AYE)

4 CHAIRMAN SOULES: Opposed? 21 stays as is.

5 Okay, next is going to be --

6 MR. EDGAR: Page 73.

7 CHAIRMAN SOULES: Page 73, Rule 21(a).

8 MR. EDGAR: May I ask a question generally
9 about Rule 21(a)? Does this rule mean that if you are going
10 to use the United States mail to effect service you have to
11 do it by registered or certified mail?

12 CHAIRMAN SOULES: Yes.

13 MR. EDGAR: You can't just use a regular post
14 office.

15 CHAIRMAN SOULES: That is right.

16 MR. EDGAR: Well --

17 CHAIRMAN SOULES: For service.

18 MR. EDGAR: Well, but it is somewhat deceiving
19 when you look at the sentence, the second sentence in that
20 rule where it says, "Service by mail shall be complete upon
21 deposit of a paper enclosed in the post paid properly
22 addressed wrapper and post office." That seems to indicate
23 that you can, and I have been concerned about that. I think,
24 frankly, we just add to the expenses of litigation when
25 everything you do has to be by certified or registered mail.

1 CHAIRMAN SOULES: Well, we have debated that.

2 MR. EDGAR: I think the rule itself is less
3 than clear.

4 CHAIRMAN SOULES: All right, and we dropped a
5 word out of there. That used to say properly addressed
6 certified wrapper. I don't know why that word is out of
7 there.

8 MR. EDGAR: I don't think it has ever been in
9 there, Luke.

10 MR. JONES: Mr. Chairman, I have a small
11 problem with this rule, too, if you are at a point where you
12 want to listen to it.

13 CHAIRMAN SOULES: You are right, Hadley.
14 Where does it say certified?

15 MR. EDGAR: It says right up above that that
16 is one of the alternates you have to effect service, but then
17 the second sentence indicates that it is not necessary. At
18 least I think I could argue that. I am not sure but what I
19 wouldn't be correct and probably logical.

20 MS. CARLSON: I think that is what Dave Beck's
21 memo on Page 77 is directed at.

22 CHAIRMAN SOULES: Okay, Franklin, you had a
23 comment you wanted to make on this.

24 MR. JONES: I hope both of these will be
25 noncontroversial. You might want to include them both in the

1 same procedure. And mine has to do with this noticing by FAX
2 or telephonic photocopier or whatever they call that thing.
3 My suggestion is that we require the telephonic document
4 transfer notice be made between 8 and 5. I don't know how
5 many of you-all have the experience, but I have it
6 continually where my FAX goes to lighting up at six, seven
7 o'clock at night when the janitor is there and it, in effect,
8 deprives you of a day that I don't think we intended to
9 deprive anybody of.

10 MR. BRANSON: I don't see any problem moving
11 it back before 5, make it three o'clock.

12 MR. DAVIS: There is a proposal on Page 76
13 that I think may solve one of those things.

14 MR. JONES: Yes, that --

15 JUSTICE PEEPLES: The COAJ recommended that,
16 and I think David Beck agreed with that recommendation on 76.

17 MR. JONES: I haven't seen that.

18 MR. DAVIS: The one serviced by telephonic
19 copier on 76, I think.

20 CHAIRMAN SOULES: I think that may work
21 better, Franklin, for this reason. If we say that it has got
22 to be made between 8 and 5 and then somebody makes it at 6,
23 somebody is going to argue that is no service at all.

24 MR. DAVIS: Motion we adopt the suggestions.

25 CHAIRMAN SOULES: The motion is made that we

1 adopt the suggestion on Page 76.

2 MR. JONES: Second.

3 MR. DAVIS: Read it into the record or not?

4 CHAIRMAN SOULES: I second it.

5 MR. DAVIS: I would be glad to. I am looking
6 at it.

7 MR. EDGAR: Luke, you wouldn't consider moving
8 it back to earlier in the day?

9 MR. TINDALL: Why?

10 MR. BRANSON: Because five o'clock --

11 JUSTICE PERPLES: The thing about it, a hand
12 delivery at 4:59 is okay. Why shouldn't a FAX at 4:59 be
13 okay?

14 MR. SPIVEY: A lot of times you don't know.

15 MR. SPARKS (SAN ANGELO): You send it, but you
16 don't know if it is received.

17 MR. DORSANEO: What is three days are added to
18 any response, Mr. Spivey, by FAX. So what is the difference
19 between a few hours.

20 MR. BRANSON: On a hand delivery, you know you
21 get it. Now, you cannot be standing at that FAX machine
22 right before you leave your office, whereas if it comes in at
23 three o'clock in the afternoon there is a pretty good chance
24 that somebody will pick it up before you get out.

25 MR. LOW: We have a girl that stays there till

1 eight o'clock. Her and the maid. She will sign for anything
2 that comes in. If she won't, the maid will.

3 MR. TINDALL: You can always turn your machine
4 off.

5 MR. SPARKS (SAN ANGELO): Our janitor will
6 sign for it and throw it away.

7 CHAIRMAN SOULES: Is somebody proposing an
8 amendment that we make it earlier in the day?

9 MR. BRANSON: I move we move it back to
10 four o'clock, which is an hour before some people leave.

11 CHAIRMAN SOULES: Is there a second to the
12 amendment?

13 MR. JONES: If that is my motion, I have no
14 objection to that amendment. I would accept it.

15 CHAIRMAN SOULES: The only concern I see is
16 that here we don't even get a full day's work in in order to
17 FAX it out. We have got to stop the FAX at four o'clock and
18 if we still got a paper in the typewriter, then we got to
19 send a runner with it. We can't FAX it.

20 MR. TINDALL: I think you have got to apply
21 that to all methods of delivery, then. The messengers can't
22 deliver after four o'clock. The mail can't come after
23 four o'clock. I mean it is really creating a --

24 MR. BRANSON: There has got to be somebody
25 there to receive those things. This is a machine. Right now

1 people are delivering things at midnight.

2 CHAIRMAN SOULES: We are talking about
3 cutting an hour off of a regular work day for FAXing a
4 letter. That is fine as long as everybody understands that
5 is what we are voting. We are going to vote it up or down.

6 MR. O'QUINN: Mr. Chairman, I oppose that for
7 a lot of reasons, one of which, I don't see any rationality
8 or distinction between a guy walking in and handing me a
9 paper at five o'clock and sending it to me on my FAX machine.

10 CHAIRMAN SOULES: Or sliding it under your
11 back door.

12 MR. O'QUINN: I think the receiving thing will
13 probably be more -- a worse problem now if we limit the FAX
14 to five o'clock because it is true people walk in at all
15 times after five o'clock and get anybody to sign a piece of
16 paper.

17 CHAIRMAN SOULES: How many want four o'clock?
18 Show by hand. How many say five o'clock is okay? Okay, five
19 o'clock it is.

20 Okay, the motion is that we adopt the
21 suggestion on Page 76, "Service by telephonic document
22 transfer after 5:00 p.m. local time of the recipient shall be
23 deemed served on the following day." Those in favor say
24 "Aye."

25 (RESPONDED AYE)

1 CHAIRMAN SOULES: Opposed? That is unanimously
2 approved.

3 We have debated at length the certified versus
4 first class question. I don't know that anybody could
5 discuss it beyond what has been discussed here on several
6 meetings. How many believe that service should be
7 accomplished by just ordinary first class mail? One, two,
8 three, four, five.

9 MR. O'QUINN: Which is the easiest of the two?

10 CHAIRMAN SOULES: Why we have always been gun
11 shy is that somebody would say they mailed something, and
12 there is no green card, there is one lawyer swearing against
13 the other.

14 MR. O'QUINN: Which one is the green card?
15 Certified. Okay, can -- what do you do on first class?

16 CHAIRMAN SOULES: You just put it in the mail,
17 just mail the letter.

18 MR. O'QUINN: I understand the motion. I
19 apologize for interrupting.

20 CHAIRMAN SOULES: We have always felt like
21 forcing somebody to have a green card was a safety valve,
22 because we are talking about service and there are all kinds
23 of defaults that occur if you don't respond timely after you
24 have been served with something. Servicing for
25 interrogatories, servicing for request for admissions.

1 MR. O'QUINN: If we vote in favor of first
2 class, then there will be no official record of whether it
3 got mailed or not?

4 CHAIRMAN SOULES: That is right, or whether it
5 got delivered.

6 You have deemed request for admissions automatic
7 and the other side doesn't even have a green card.

8 MR. O'QUINN: I like the safety valve myself.
9 I am not trying to redebate this.

10 CHAIRMAN SOULES: The debate has always been
11 two things. One, it is expensive and cumbersome to do
12 certified mail, therefore we ought to do first class. The
13 other side is but there is so many things that happen after
14 service. We are not talking about receipt. We are talking
15 about, quote, "service," which is a very formal concept in
16 these rules. Service by certified mail. There are so many
17 things that happen in the discovery process, pleadings, and
18 otherwise that we want whoever sent something to us to have
19 to prove it by a green card or some sort of receipt. That is
20 the debate.

21 MR. O'QUINN: It has always been my
22 experience, I don't know about your experience, but if I am
23 in front of a judge and my opponent does not show up, and I
24 am asking that judge for reset, he always says where is your
25 green card. I think that is a feeling on the part of the

1 judges, too. They like to know if the other lawyer doesn't
2 show up that he did get it.

3 MR. LOW: Luke, another thing, if you believe
4 this service by mail is complete upon delivery, it doesn't
5 make a darn whether I got it or not. I might never have seen
6 it. There is no question. The lawyer swears, yes, I mailed
7 it, and it went to Taiwan.

8 CHAIRMAN SOULES: That is two sides of it. We
9 are talking about service, first class versus certified. How
10 many say first class should be enough for service? One, two,
11 three, four, five, six, seven. Those who want to maintain
12 certified practice show by hands. One, two, three, four,
13 five, six, seven. It is about 11 to two.

14 MR. DORSANEO: Mr. Chairman, I move that in
15 the sentence that Hadley Edgar identified that we add the
16 words "certified or registered" between "by" and "mail" such
17 that it would read "Service by certified or registered mail
18 shall be complete."

19 CHAIRMAN SOULES: Okay, the Chair will accept
20 that as an editorial change, and we voted on the substance of
21 that just now already.

22 MR. BRANSON: I have one other problem with
23 Rule 21(a) on the FAX issue. The way we have it now, you
24 can -- the only way you can deliver notice is using the
25 party's FAX number. Now, that many plaintiffs have FAX

1 numbers, but I can see where a defense lawyer could get
2 screwed up if you FAXed your notice to General Motors on
3 their FAX machine and didn't send it to their lawyer. So I
4 suggest we make parties -- we make them FAX it to the party's
5 lawyer and not to parties.

6 MR. TINDALL: I think we have a general rule
7 that all communications go to the lawyer.

8 MR. BRANSON: That is not what this thing
9 says.

10 JUSTICE PEEPLES: Luke, I thought our
11 Committee recommended something like that and for some reason
12 David Beck didn't go with it. I think Frank has got a good
13 point. If there is a lawyer on the case, you ought to serve
14 the lawyer, not the party. If it is General Motors or a
15 husband or a wife in a divorce case, it ought to be the
16 lawyer that gets the notice or it is no good.

17 MR. BRANSON: Telephonic document transfer to
18 the party's current telecopier number.

19 MR. TINDALL: Which "party" means lawyer if
20 they are represented by a lawyer.

21 MR. DORSANEO: That is assumed in these rules
22 generally. It commonly talks about service on a party all
23 throughout these rules.

24 MR. O'QUINN: Does it say it or is it just
25 assuming?

1 MR. DORSANEO: If you make it specific here,
2 make a distinction specific here, then you possibly create
3 the opposite inference in all the other places. I personally
4 wouldn't have a large problem if you sent it to General
5 Motors if I were deciding the case. I would think that you
6 wouldn't probably prevail under the argument that they got
7 it.

8 MR. DAVIS: I think your Supreme Court Code of
9 Professional Conduct provides that you must serve copies to
10 the attorney, if that is sufficient.

11 MR. BRANSON: We shouldn't tell them in the
12 rules to send it to the parties, then.

13 JUSTICE PEEPLES: If you will look about six
14 lines down, the words "as the case may be" used to be in the
15 rule, and those were taken out. And I think that the COAJ
16 said those need to be put back in, so you send it to the
17 party or the lawyer, as the case may be, which I think under
18 the rule as it exists right now said if you have got a
19 lawyer, you got to serve that lawyer.

20 MR. BRANSON: If the person is pro se, you
21 serve the parties. If you have got a lawyer, they ought to
22 get it.

23 CHAIRMAN SOULES: I am sorry, Judge Peeples.
24 I am not on the line you are on.

25 JUSTICE PEEPLES: Page 73, six lines down at

1 the very end. The words "as the case may be" we propose to
2 strike out. And I think those words in the existing rule had
3 the effect of saying if it is pro se, you serve the party.
4 If there is a lawyer, you serve the lawyer.

5 CHAIRMAN SOULES: Those words went back to
6 notice or document as the case may be. But we can make them
7 fit something else. That is no problem.

8 JUSTICE PEEPLES: Well, "as the case may be"
9 to the party to be served or his agent.

10 MR. EDGAR: I think "as the case may be"
11 should be after -- on Line 8 after "record comma".

12 JUSTICE PEEPLES: Yes, I think that is right.

13 CHAIRMAN SOULES: After "record"?

14 MR. EDGAR: Yes, after record "comma as the
15 case may be comma". Then that would solve the problem, I
16 think.

17 CHAIRMAN SOULES: It has been made and
18 seconded. All in favor say "Aye."

19 (RESPONDED AYE)

20 CHAIRMAN SOULES: Okay, that change will be
21 proposed. That is unanimous that change will be made in the
22 one, two, three, four, five, six, seven, eighth line of these
23 materials on Page 73 after the word "record," insert "as the
24 case may be" after the comma and then put a comma at the end
25 of it.

1 MR. O'QUINN: While that is helpful, I am not
2 sure that makes it clear what we are saying, and I am still
3 concerned because of what, for the first time, because what
4 was said about what is meant by party. And I would propose
5 that we just add a sentence somewhere with this rule that
6 says where the party is represented by an attorney to
7 notice -- or the delivery has to be made to the attorney.
8 Make it real clear.

9 MR. BEARD: Rule 8 says, "As attorney in
10 charge, all communications from the court or other counsel
11 with respect to a suit shall be sent to the attorney in
12 charge." And that is just attorney in charge. Part of that
13 implication, everything goes to the lawyer.

14 MR. O'QUINN: If it is covered by the rules, I
15 withdraw my suggestion.

16 CHAIRMAN SOULES: Okay, next item. Okay,
17 Elaine.

18 MS. CARLSON: Back on Page 73, the tenth line
19 down, does it make sense to have a comma after registered
20 mail?

21 MR. EDGAR: I couldn't hear you, Elaine.

22 MS. CARLSON: I am sorry, on Page 73, on the,
23 tenth, I think, line down, it begins "registered mail comma."
24 Does that make sense to have that comma there?

25 MR. O'QUINN: I think it is grammatically

1 incorrect, myself.

2 MR. EDGAR: I don't even think they have
3 registered mail any more. I don't even know why it is there.

4 MR. O'QUINN: That is not the point of her
5 comment, Hadley. The point of her comment is the comma
6 arguably is grammatically incorrect because there should not
7 be a comma there to separate what goes before the comma from
8 what comes after the comma.

9 CHAIRMAN SOULES: The Committee recommended we
10 delete that comma. Any opposition? Okay, that will be
11 deleted.

12 MR. DORSANEO: One more there. Does three
13 days extra telephonic document transfer make any sense?

14 CHAIRMAN SOULES: We voted for it. Okay, what
15 is next?

16 JUSTICE PEEPLES: If we can look, compare
17 Page 73 to Page 106.

18 CHAIRMAN SOULES: 106, everybody turn to Page
19 106.

20 JUSTICE PEEPLES: Well, if you will look on 73
21 about ten lines down where it is underlined, "or by
22 telephonic document transfer to the party's current
23 telecopier number," somebody is going to argue that you can
24 serve the party by FAX even if he has got a lawyer. So what
25 we proposed on 106 was to say "to the recipient's current

1 number."

2 CHAIRMAN SOULES: Okay, any objection?

3 JUSTICE PEEPLES: If it is a lawyer instead of
4 a party.

5 CHAIRMAN SOULES: Any objection to changing
6 the word --

7 JUSTICE PEEPLES: "Party" to "recipient".

8 CHAIRMAN SOULES: In the 11th line, change
9 "party's", singular possessive, to "recipient's" current
10 telecopier number. Any opposition to that? Okay, that will
11 be done.

12 Anything else on 21(a)? Okay, the next --

13 MR. COLLINS: What if you can't read the FAX
14 document?

15 CHAIRMAN SOULES: I am sorry?

16 MR. O'QUINN: Then it wasn't served. I think
17 that is what the trial judge would say if you showed it to
18 the judge and said, judge, this is what they sent me. Can
19 you read it? How can I respond to something I can't read?

20 CHAIRMAN SOULES: Okay, 177, 21(b). We are
21 now turning to Page 177. That is the next listed rule, Page
22 -- it is Rule 21(b), and the Committee recommends no change.
23 The Committee's report is on 178.

24 MR. TINDALL: By no change, you mean no change
25 from what we approved in August?

1 CHAIRMAN SOULES: Exactly. The rule that
2 appears at the front of each of these is the rule that we
3 have recommended to the Supreme Court, and when I say no
4 change, it means that our recommendation does not change.

5 MR. LOW: I move we go on.

6 CHAIRMAN SOULES: All right. Motion has been
7 made not to change our previous recommendation. Is there a
8 second?

9 MR. O'QUINN: Second.

10 CHAIRMAN SOULES: Made and seconded. All in
11 favor say "Aye."

12 (RESPONDED AYE)

13 CHAIRMAN SOULES: Okay, 21(b) will go to the
14 Court as is on 177.

15 The next item is Rule 57. It is at Page 183.
16 Committee's report is at Page 184. The Committee recommends
17 no change.

18 MR. TINDALL: So moved.

19 CHAIRMAN SOULES: Moved. Second?

20 MR. O'QUINN: Second.

21 CHAIRMAN SOULES: All in favor say "Aye."

22 (RESPONDED AYE)

23 CHAIRMAN SOULES: Opposed?

24 JUSTICE PEEPLES: Luke, are we going to leave
25 things as they are? Doesn't it just -- proposed changes die

1 for lack of a motion? We can just move on, can't we?

2 CHAIRMAN SOULES: I guess I need some
3 indication. I don't want to -- I really like to know.

4 MR. O'QUINN: I think Luke is making a record.
5 If anyone ever accuses him of sneaking one by, he can say no,
6 it is in the record.

7 CHAIRMAN SOULES: Okay, so Rule 57, then, will
8 go to the Court as shown on Page 183.

9 The next rule is Rule 60 on Page 187. The
10 Committee's report --

11 MR. O'QUINN: That is a change of rule
12 reference is all.

13 CHAIRMAN SOULES: Is on 188 and the Committee
14 recommends that we delete the last clause, "Notify the
15 opposite party's attorney of the filing of such pleadings
16 within five days from the filing of same," because we put all
17 the notice rules back in 21 and 21(a), and this is -- now it
18 should be dropped since we have combined all those.

19 MR. LOW: So move.

20 MR. RAGLAND: I have a question. This speaks
21 in singular about opposite party. My limited experience in
22 that, there has been more than one party in a lawsuit where
23 someone intervened.

24 MR. LOW: We are voting to do away with that.
25 It wouldn't make any difference.

1 CHAIRMAN SOULES: I think what Tom is
2 suggesting is that we take the words "the opposite" out of
3 the second line and put "of a party."

4 MR. RAGLAND: "All the parties."

5 CHAIRMAN SOULES: "Of any party." You are
6 saying all parties. All parties don't have to join a motion
7 to strike, do they?

8 MR. RAGLAND: I am talking about the notice
9 part of it.

10 MR. DORSANEO: Again, that is a pervasive
11 problem. You can say take out the word "opposite" and put
12 "a", but it is problem that appears everywhere. These rules
13 are written on the assumption that we have one party on one
14 side and another party on the other side and there is nobody
15 else involved.

16 CHAIRMAN SOULES: We fixed a lot of that. You
17 see what I am saying is on the second line change the
18 "opposite" to "a party" and then any party can file a motion
19 to strike. Any opposition to that? Okay, that will be done.

20 And then the Committee has moved to delete after
21 21(a) in the fourth line the balance of the language in the
22 rule on 187. Any opposition to that?

23 MR. O'QUINN: I have got a problem. If we
24 take out the last two lines, which I understand we are going
25 to take those two lines out, where is it in the rules that is

1 provided for when that has got -- when an intervention has to
2 be served? I can't find it.

3 CHAIRMAN SOULES: There is not a time -- you
4 mean in the trial process how late can an intervention be
5 done?

6 MR. O'QUINN: I was told that we are taking
7 the last two lines out because they are unnecessary because
8 some other rule spells out the time period for serving
9 intervention. If that is the reason we are taking it out,
10 then I can't find it in Rule 20 or 21, how many days you have
11 to serve an intervention.

12 MR. RIVERA: 21(a) says all papers, all
13 documents.

14 CHAIRMAN SOULES: 21 and 21(a) require notice
15 to be made contemporaneous with any filing.

16 MR. O'QUINN: But it doesn't say when.

17 CHAIRMAN SOULES: Contemporaneous, that is
18 when.

19 MR. BEARD: There is no rule as to when you
20 have to answer a pleading in intervention unless you are
21 served with a citation.

22 MR. O'QUINN: But Rule 21 says a true copy
23 should be served on other parties, but it doesn't say when.
24 I am saying these rules could be construed -- these rules,
25 21 and 21(a), that I could file an intervention, put your

1 copy in my file for two months, and then send it to you, and
2 I haven't violated 21 or 21(a).

3 MR. EDGAR: Where does 21(a) talk about
4 contemporaneous, Luke?

5 MR. O'QUINN: It doesn't say it. Can I put
6 the copy I owe you in my file for two months and send it to
7 you after two months?

8 CHAIRMAN SOULES: All right, turn with me to
9 Page 61.

10 MR. TINDALL: Luke, the old rule that we
11 appealed, 72, used the words "at the same time". Said you
12 had to serve at the same time, deliver or mail. Do you think
13 we ought to keep those words?

14 CHAIRMAN SOULES: That is what I am trying to
15 get into. The first paragraph on Page 61. We could either
16 say, "A true copy shall be contemporaneously served on all
17 the parties" or "served on all of the parties at the same
18 time".

19 MR. O'QUINN: Well, I think "at the same time"
20 should modify the word "served".

21 CHAIRMAN SOULES: "Served at the same time on
22 all of the parties". Any objection to that on Page 61?

23 MR. O'QUINN: Small point. Let me change what
24 you just said. I think you ought to say, "and at the same
25 time a true copy should be served". That makes it clear "at

1 the same time" is talking about at the same time you file it
2 with the clerk.

3 CHAIRMAN SOULES: Okay, so we insert the words
4 "at the same time" after the word "and" and before the words
5 "a true copy" in the one, two, three, four, five, in the
6 sixth line of Page 61. Any opposition to that?

7 MR. SPARKS (SAN ANGELO): That doesn't mean
8 they have to be served at the same time, it has to be
9 attempted to be effectuated at the same time.

10 MR. O'QUINN: I think that is true, and I
11 think, Sam, the service means that if you put it in the mail,
12 you have served it.

13 CHAIRMAN SOULES: Right. Okay. And actually,
14 then, when we get over here on Page 187, everything after
15 "party" in the third line should be deleted because
16 everything after the word "party" deals with service, and
17 that is covered by 21. Any opposition to that? Okay, the
18 last -- except for the word "party" at the beginning of the
19 third line on Page 187, the third, fourth, and fifth lines
20 will be deleted.

21 MR. TINDALL: Luke, Carol Baker all through
22 here wrote dozens of little technical changes. I assume all
23 of those were folded in. I see her letters every other rule.

24 CHAIRMAN SOULES: Just a second. Let me make
25 a note here, Harry.

1 The various committees got all of Carol Baker's
2 letters and made their recommendations off of that.

3 MR. TINDALL: All right.

4 CHAIRMAN SOULES: Okay, the next one is
5 Rule 63 on Page 191. The subcommittee recommends no change
6 on Page 192. All in agreement say "Aye."

7 (RESPONDED AYE)

8 CHAIRMAN SOULES: Opposed? The next item is
9 Rule 87 at Page 197.

10 MR. EDGAR: Now, David recommended that 63
11 pick up the 14-day rule, right?

12 CHAIRMAN SOULES: Let me see, Hadley.

13 MR. EDGAR: Looking on Page 193, and we have
14 just approved the 7-day rule. Is that -- I don't have any
15 problem with that as long as we know what we are doing in
16 case of this recommendation.

17 MS. CARLSON: I think he is just acknowledging
18 the suggestion.

19 MR. EDGAR: He says the Committee urges the
20 adoption of a 14-day rule.

21 CHAIRMAN SOULES: The comment under --

22 MR. EDGAR: I apologize to you. I misread it.

23 CHAIRMAN SOULES: Okay, you agree with what we
24 have done, then?

25 MR. EDGAR: Yes.

1 CHAIRMAN SOULES: Okay, next is they recommend
2 that we do adopt a change to 87, Rule 87 that begins on 197.
3 And the subcommittee's report is at Page 200.

4 MR. BEARD: I move that we adopt that.

5 CHAIRMAN SOULES: The heading should be
6 changed to Motion for Rehearing because it more accurately
7 describes it. That would be at 87 five. It is a heading
8 change. So on Page 198, we would strike the words "no
9 rehearing". We strike the word "no" and substitute for the
10 word "no" the words "motion for". And we, I guess, would put
11 in parenthesis that we are just changing the language in the
12 heading. And that is the only recommendation that the
13 Committee makes. All in favor say "Aye."

14 (RESPONDED AYE)

15 CHAIRMAN SOULES: Opposed? Okay, that will be
16 followed, then.

17 Okay, the next rule is Rule 106 on Page 205. The
18 Committee's report -- let's see, Carol Baker says we may have
19 already made this.

20 MR. TINDALL: I think we have on the preceding
21 page.

22 CHAIRMAN SOULES: Attempting -- no, we haven't
23 changed it here. She says that it ought to read "Service has
24 been attempted under either" -- "Service has been attempted"
25 -- i-n-g should be e-d. Okay, any opposition? That ought to

1 be done.

2 MR. TINDALL: I think the rule "has
3 attempted". We just got it boxed in. We really don't need
4 to make that.

5 CHAIRMAN SOULES: We do. We got to do it in
6 this text because if the Supreme Court adopts this, West
7 won't go back.

8 MR. TINDALL: West has "attempted".

9 MR. O'QUINN: The is not the point, Harry. We
10 are turning in a proposed rule, and it has to read correctly.

11 CHAIRMAN SOULES: They won't have it next
12 time. They will print our error if we don't fix it. Okay.

13 Next is Page -- Page 207, Rule 107, and Carol says
14 we need to put S's after the word "rule" -- on the word
15 "rule". Any opposition? Okay, that will be done.

16 Next is Rule 128 on Page 209. The subcommittee's
17 report is at Page 211. They recommend no change. Those who
18 would agree with the Committee say "Aye."

19 (RESPONDED AYE)

20 CHAIRMAN SOULES: Opposed? Okay, that will be
21 submitted, then, as is shown on Pages 209 and 210.

22 The next is 166, which we took care of
23 yesterday. Then we get to 166(a) at Page 235.

24 MR. McCONNICO: Luke, our subcommittee doesn't
25 have any proposals to change 166(a).

1 CHAIRMAN SOULES: Is the recommendation of the
2 subcommittee to leave it as it appears on Pages 235 through
3 237?

4 MR. McCONNICO: Yes.

5 CHAIRMAN SOULES: Okay, all in favor, say
6 "Aye."

7 (RESPONDED AYE)

8 CHAIRMAN SOULES: Opposed? 166(a) would
9 remain, then, as it is printed in the book.

10 The next one is 166(b) at Page 245, and Steve, what
11 is your Committee's recommendation -- do you and Bill need to
12 confer?

13 MR. McCONNICO: Yes, let's go ahead and do
14 this and then we will confer.

15 CHAIRMAN SOULES: 166(b) at 245. Steve, you
16 have the floor.

17 MR. McCONNICO: Yes, we do have a couple of
18 changes we propose to make in this. Specifically, the first
19 one is on Page 248, and if you look down at the D part, which
20 is the party communications, our comments on this are on
21 Page 253, and what happened here -- and Paul Gold pointed
22 this out -- we think an "and" was changed to an "or", and it
23 changes the meaning of the rule. If you look down and read
24 the rule, it says, "When made subsequent to the occurrence or
25 transaction upon which the suit is based and in connection

1 with the prosecution, investigation, or defense of the
2 particular suit," and then it becomes disjunctive "or". Paul
3 pointed out that that should be an "and", and we agree with
4 that.

5 We believe if you leave it as an "or" you could get
6 into the confusion and you could go back to pre-Terbedine,
7 pre-Stringer, pre-Flores, because then you could just go up
8 to the first part of the rule and if you show that a
9 communication was made subsequent to the occurrence and it
10 was made in connection with the investigation or defense of
11 the particular suit, it is privileged. And if you put "and"
12 in there, you are going to avoid that problem, hopefully.

13 CHAIRMAN SOULES: I think that change was
14 inadvertent. I think we said something there we didn't
15 intend to. Those in favor of changing "or" to "and" in the
16 text on one, two, three, four, four lines up from the bottom
17 of Page 248 say "Aye."

18 (RESPONDED AYE.)

19 CHAIRMAN SOULES: Opposed? It is unanimous.
20 Next.

21 MR. McCONNICO: The next rule change is a rule
22 change that is proposed, and it will be on Page 251. It will
23 be at the very end of 166(b)(4). Luke Soules proposed this.
24 And what it is is the addition appears on Page 254, our
25 comments and the reasons for the change. There would be an

1 addition that would go in at the end of 166(b)(4) which would
2 state, "The failure of a party to obtain a ruling prior to
3 trial on any objection to discovery or motion for protective
4 order does not waive such objection or motion." Then you
5 would have the addition, "But any matter that is withheld
6 from discovery pursuant to any objection or motion for
7 protective order, whether or not ruled upon prior to trial,
8 shall not be admitted in evidence to the benefit of the with-
9 holding party absent timely, supplemental production of the
10 matter pursuant to paragraph six."

11 And the purposes of that is simply to make clear
12 that a party can object to discovery, then not set a hearing,
13 hide the material he has objected to, and then use that as
14 evidence at the time of trial. We agree with that proposal
15 and think it should be added to the rule.

16 MR. O'QUINN: I need some help on where we are
17 at. I see the proposed change on Page 254. Now, where does
18 that go in the rule that appears on 250 and 251?

19 MR. McCONNICO: Okay, hold on. Let me go
20 back. It goes on Page 251 and it goes -- let's see where we
21 would put it. It is 249, right.

22 MR. O'QUINN: Where on 249?

23 MR. McCONNICO: Second sentence.

24 CHAIRMAN SOULES: If you go to Page 249, count
25 up six lines, you will see a line that begins with the word

1 "order" at the tailend of the sentence, and then it picks up
2 the words, "the failure of", and that is a sentence that we
3 have already passed, and what is -- on Page 254, the way the
4 rule would be modified, if we so vote, would be this: That
5 sentence that starts with "the failure" and ends with the
6 words "objection or motion period", the period would be
7 changed to a semicolon, and the language that is underscored
8 on Page 254 would be placed after that sentence to complete
9 that sentence, and the sentence as it would read, then, is
10 what is inset on Page 254 in its entirety.

11 MR. O'QUINN: The additional material would go
12 into that sentence which begins six lines up from the bottom
13 of Page 249?

14 MR. McCONNICO: Right.

15 CHAIRMAN SOULES: Exactly.

16 MR. O'QUINN: So the way this rule works is I
17 make an objection and my opponent doesn't do anything, I
18 don't waive my objection.

19 CHAIRMAN SOULES: That is right.

20 MR. O'QUINN: But I can't use the material
21 that I am hiding by my objection.

22 CHAIRMAN SOULES: That is right.

23 MR. O'QUINN: That puts the burden on the
24 other party to get the objection ruled.

25 MR. McCONNICO: Yes.

1 CHAIRMAN SOULES: Any opposition? Those in
2 favor say "Aye."

3 (RESPONDED AYE.)

4 CHAIRMAN SOULES: Opposed? Okay, that is
5 unanimous.

6 The next item is -- is that all on 166(b)?

7 MR. McCONNICO: That is it.

8 CHAIRMAN SOULES: Okay. Steve, the next item
9 is on 167(a), Rule 167(a), Page 288.

10 MR. SPARKS (SAN ANGELO): Before we get off
11 166(b) we had some discussion yesterday on -- which would be
12 166(b)(5), protective orders, and it had some discussion,
13 Rusty came up with some ideas how to change protective orders
14 where if they involve public health or safety, and I am still
15 concerned about that. And I am not talking about sealing or
16 anything. I am just saying that we ought to have some -- in
17 those areas. I am not talking about oil and gas or
18 geological or --

19 CHAIRMAN SOULES: Sam, let me tell you where
20 we are right now. Where we are right now is we are looking
21 at -- we got this agenda this morning is going to be divided
22 into two pieces. The first is to try to fix anything that we
23 didn't get fixed during 1989, and we are looking now at the
24 1989 agenda. Then we are going to go into all the new
25 suggestions that we have received. That is why you will --

1 the index seems to run through the rules twice.

2 MR. SPARKS (SAN ANGELO): As long as we are
3 not through with it.

4 CHAIRMAN SOULES: Any new matters about
5 166(b), and there is some others over there. This last
6 sentence was something that was kind of needed to fix -- we
7 tried to fix McKinney, but we didn't quite get it done. So
8 if we will go through the 1989 work first, if that is okay
9 with you all, and then we will pick up and go with all the
10 new information. So we are at 167(a) and at Page 288.

11 MR. McCONNICO: The big change, of course, in
12 this is it allows psychologists to do independent medical
13 examinations, and this drew a lot of written response and
14 comment in our commentaries on Page 295. The argument -- and
15 we have all been through this, and so I am just going to
16 state the argument real quickly -- is that under Coats v.
17 Whittington, you cannot let a psychologist do an independent
18 medical examination if there is an allegation that someone
19 has a mental injury. The problem is that the plaintiff can
20 have the psychologist come in as an expert and testify as to
21 the extent of the mental injury and then the defendant can't
22 go out and hire his own psychologist to examine and do an
23 independent medical exam. The federal rule was recently
24 changed. How long ago was it, Bill?

25 MR. DORSANEO: November of last year.

1 MR. McCONNICO: November of last year to allow
2 psychologists to do independent medical examinations. That
3 is kind of the pro side. The other side is -- and as Bill
4 Kilgarland pointed out in his written commentary, you know,
5 what is a psychologist. There are all different types of
6 psychologists. There are clinical psychologists, there are
7 school psychologists, there are occupational psychologists.
8 There are about six different categories of psychologists,
9 neuropsychologists. We don't limit the types that can do it.
10 Second, we don't put any type of limitations on anything they
11 can go into.

12 As Paul Gold pointed out in his written commentary,
13 this is going to make possibly for another ex parte
14 deposition.

15 The other problem we get into is what we saw
16 yesterday in the difficulty in sealing records that anytime
17 anyone alleges mental trauma in a case, or mental injury,
18 they could have a psychologist come in, do an independent
19 medical examination, and then anybody that wants to go to the
20 trouble of finding out what that psychological examination is
21 might be able to do it, based upon what we did yesterday.

22 So those are the problems. We didn't reach any
23 consensus. My feeling is that -- this is just individual
24 feeling -- that this rule could be abused. I could see a
25 situation where anybody alleges mental injury, that the other

1 side is going to immediately have a psychologist say let's go
2 ahead and let's do an examination of them. But by the same
3 token, as Gilbert Adams said on the subcommittee, it doesn't
4 seem fair for plaintiffs to be able to get the independent
5 medical examination or psychological examination and then for
6 the defendants not to.

7 My proposal is maybe to have an amendment, which we
8 have not written in here but I have just kind of written down
9 myself, and that is to leave the rule the same and then just
10 to have a provision that if the one party lists a
11 psychologist as an expert who will testify to the mental
12 condition of a party or of a person in the custody or under
13 the legal control of a party, the court may order the party
14 to submit to a mental examination by a psychologist or to
15 produce for examination the person in his custody or legal
16 control and just have that as an alternative.

17 MR. JONES: I move the adoption of your
18 suggestion.

19 MR. TINDALL: Steve, that really won't work in
20 family cases. The courts often want to appoint psychologists
21 without going into the long psychiatric background. There
22 are a lot of reasons why you want to look at the existing
23 family structure, and I really think that that is not going
24 to cure our problem. Coats Vs. Whittington has been a
25 chaotic ruling for our cases. I really think it ought to

1 just be psychologigists. I read Kilgarland's comments. It
2 would be a rare day that a school psychologist, it wouldn't
3 be a clinical psychologist appointed, very rare. I think it
4 has got to be like a federal rule, just another health
5 provider.

6 MR. BRANSON: I disagree.

7 CHAIRMAN SOULES: Let me get the record
8 straight on something right quick. Franklin made a motion
9 that we adopt McConnico's suggestion. It has been seconded
10 by Buddy Low, now the comments.

11 MR. SPARKS (SAN ANGELO): Have I understood
12 his motion, that is, that if one party lists a psychologit,
13 that the other party shall have the right of an examination
14 by a like classification psychologist?

15 MR. BEARD: If the court orders it.

16 MR. McCONNICO: But I don't say a like class.
17 I don't think we can get into defining it.

18 MR. LOW: You can iron that out.

19 MR. McCONNICO: I just think you have to say a
20 psychologist because --

21 CHAIRMAN SOULES: One at a time. Finish your
22 response.

23 MR. SPARKS (SAN ANGELO): I was just trying to
24 get where you are going exactly.

25 MR. McCONNICO: The other thing, and this is

1 for Harry, this really does impact on the family
2 practitioners a lot, and there were no family practitioners
3 that had any input on this on the subcommittee, and I don't
4 really know what impact it has on your practice, but it seems
5 to me that you would be dealing with this a lot more than
6 most of us.

7 MR. TINDALL: In every custody case, you will
8 have a psychologist and most litigants prefer psychologists
9 because they are not as oriented towards analysis and they
10 get their work done a lot quicker and report to the court,
11 and often times there will be motions down there to appoint
12 psychologists to evaluate the parties and all the children.
13 If you limit it to those cases where the other side has hired
14 a psychologist, then you hogtie the court's authority to
15 appoint a psychologist to evaluate the parties.

16 CHAIRMAN SOULES: Just a moment. Okay, let me
17 see the hands so I can take them in order and we will just
18 start here. Anybody -- there are a lot of hands up.
19 O'Quinn.

20 MR. O'QUINN: Harry, how have you been getting
21 court ordered psychologists before we have been talking about
22 putting that in the rule? How have you been getting it?

23 MR. TINDALL: We just did it. No one
24 objected. We sort of knew what 167(a) said, but we also have
25 a family code that talks about temporary orders and we sort

1 of mush it around and do it.

2 CHAIRMAN SOULES: Sam Sparks is next,
3 El Paso Sam, and then Ragland.

4 MR. SPARKS (EL PASO): In school law cases,
5 particularly in special education, when the cases are
6 appealed from the administrative decisionmaking to the state
7 courts, the losing party always gets a psychologist to
8 testify in a trial. And the winning party generally is
9 totally satisfied with the reports because the evidence is a
10 little bit loose in administrative hearings, and we are
11 seeing more and more and more of these now that Congress has
12 allowed attorneys fees, and we are going to see more and
13 more, particularly in the metropolitan areas. And those
14 school lawyers are going to have to have the ability to have
15 psychologists evaluate the minor children or in some --
16 anybody under 25. So I don't know how you are going to split
17 the level, but there is another evolving area of the law
18 where psychologists are necessary for examination.

19 CHAIRMAN SOULES: Tom Ragland.

20 MR. RAGLAND: I wanted to direct a question to
21 Harry. It seems like to me that I recall that the district
22 court or the family law court, when the welfare of the child
23 is placed in issue, has an inherent power to order such
24 examinations and consultations.

25 MR. TINDALL: Well, we thought so until this

1 Coats v. Whittington which says the rule doesn't allow for a
2 psychologist. It stopped the practice until we get this rule
3 amended.

4 CHAIRMAN SOULES: Harry and Ken Fuller made a
5 very -- they persuaded us -- it wasn't a one-sided vote, it
6 was a fairly close vote -- to add psychologists to this rule,
7 I guess, two meetings back.

8 MR. TINDALL: That is right. If they are
9 licensed health care providers and they get third party
10 reinsurance, why are we distinguishing between psychiatrists
11 and psychologists? It makes no sense to me.

12 CHAIRMAN SOULES: I guess what we are really
13 discussing here is whether to limit having a forced
14 psychological examination to cases where a psychologist is
15 listed as an expert. Is that right, Steve?

16 MR. McCONNICO: Yes. That is the proposal.

17 MR. TINDALL: It is really just relief from
18 the rule -- I mean from the holding. I hate to get into
19 these special case provisions. I know the Committee is
20 generally against that. Yet say in conservatorship cases, a
21 court can appoint a psychologist.

22 MR. BRANSON: The problem is obvious, though,
23 in the personal injury area. Anytime you have got an
24 allegation of mental anguish --

25 MR. TINDALL: Pain and mental anguish, they

1 are going to want to have a psychologist exam.

2 MR. DORSANEO: Is it any better if a
3 psychiatrist does it?

4 MR. BRANSON: They have medical standards that
5 you can go back and psychologists really don't. It is a lot
6 better.

7 CHAIRMAN SOULES: Judge Rivera.

8 JUSTICE RIVERA: We might be able to take care
9 of this by providing for mental examination by a doctor and
10 psychological evaluation by a psychologist. I remember that
11 distinction where we signed in orders when the Department of
12 Human Services come in, they are terminating rights or they
13 are doing something. There is always counseling,
14 psychological evaluation, and that seems to be different from
15 the mental examination, and it wouldn't cross, you know, the
16 doctor and psychologist.

17 MR. BRANSON: Judge, I am not able to follow
18 you. If you had a request, for example, with a personal
19 injury case where the plaintiff was claiming mental anguish,
20 which of those two would you think --

21 JUSTICE RIVERA: I am saying there is a
22 distinction. They come in and ask for a social study. It
23 doesn't have to be a psychologist. It doesn't have to be a
24 doctor. It can be a social worker. They come in and ask for
25 a mental examination, then it has to be a doctor, and that is

1 what the case says. I do remember and we do authorize a
2 psychological evaluation, which they don't call an
3 examination, in a lot of the abused children where the
4 department has taken away children and they seem to make that
5 distinction. I know we have several places in San Antonio
6 where we send them for evaluations on motions of the state.
7 It doesn't mention doctor, it doesn't medical or anything.

8 CHAIRMAN SOULES: Let me get a consensus. I
9 don't know how much time to spend on this. I can't really
10 tell from the comments how the mix is. How many feel that we
11 need to make any change in 167(a) other than the way it
12 appears on 288 and 289? How many feel we need to make a
13 change?

14 MR. McCONNICO: Luke --

15 MR. MORRIS: I don't understand what you are
16 asking.

17 CHAIRMAN SOULES: What I am asking is if we
18 have got a real one-sided consensus, that we just leave this
19 alone, then I want to find that out.

20 MR. O'QUINN: You don't have that. In fact,
21 you have got your subcommittee chairman recommending an
22 amendment. You have a motion on the floor to second to make
23 that amendment. That is what you have got right now.

24 CHAIRMAN SOULES: I am not trying to be out of
25 order. How many feel that the text on 288 and 289 needs to

1 be changed?

2 MR. SPARKS (EL PASO): The text includes the
3 underlined part?

4 CHAIRMAN SOULES: Everything.

5 MR. JONES: The rule as proposed.

6 CHAIRMAN SOULES: We need to work on this,
7 then. Thank you for giving me that consensus.

8 Judge Rivera, you are suggesting, I think as I
9 understand it, to get down to specific words, that in one,
10 two, three, four, five, in the sixth line just before the
11 word "psychologist", you would insert the words
12 "psychological evaluation by a psychologist". So that it
13 would read, "A mental examination by a physician or a
14 psychological evaluation by a psychologist."

15 JUSTICE RIVERA: That should take care of it.

16 CHAIRMAN SOULES: Is that your recommendation?

17 JUSTICE RIVERA: Yes, because you don't have a
18 psychologist doing a mental examination here.

19 CHAIRMAN SOULES: That doesn't change your
20 motion. Does anyone oppose that?

21 MR. EDGAR: I would like to find out from
22 Harry. Harry, would that solve your problem?

23 MR. TINDALL: The suggestion the judge -- yes,
24 that would solve my problem, but I am not sure it
25 satisfies --

1 MR. BRANSON: It doesn't solve my problem.

2 CHAIRMAN SOULES: Hold on just a second. All
3 we are doing is fixing a very small problem here. We are not
4 dealing with Franklin Jones' question yet. It seemed to me
5 like what Judge Rivera was suggesting was helpful to the rule
6 regardless of how it comes out.

7 MR. BRANSON: Can we take that up while we
8 have got a motion pending?

9 CHAIRMAN SOULES: I don't know, probably not.

10 JUSTICE RIVERA: I haven't had a request for a
11 psychologist in a personal injury, but I have had a request
12 for a psychologist in a family matter, but they asked for a
13 psychological evaluation.

14 CHAIRMAN SOULES: And that is not a problem
15 for you?

16 MR. TINDALL: No.

17 CHAIRMAN SOULES: Okay, I will come back to
18 that since it was off on a tangent. How many feel, then,
19 that the psychological examination, or I guess what we are
20 debating now, should a psychological evaluation -- should the
21 court have the power to order a psychological evaluation in
22 circumstances where there is no psychologist designated to
23 testify by the other side.

24 MR. JONES: You can state it that way or you
25 can state it the way Steve stated the motion on the rule,

1 either way, but that is a motion before the house.

2 CHAIRMAN SOULES: And if we get that
3 consensus, we will work on the language. How many feel that
4 that should be the law?

5 MR. BRANSON: Which?

6 CHAIRMAN SOULES: That a court would have the
7 power to order a psychological evaluation only where the
8 party to be so ordered has listed a psychologist as a, I
9 guess, either -- as a witness.

10 MR. O'QUINN: Testifying expert.

11 CHAIRMAN SOULES: As a witness, either fact
12 witness or expert witness.

13 MR. DORSANEO: What you are talking about is
14 not who can do it. You are talking about good cause and the
15 end controversy requirements. That is what is confusing the
16 issue. The second half of Coats doesn't say that you can get
17 a mental examination whenever somebody claims mental anguish.
18 It says just the opposite of that. What you are really
19 talking about is when you can have these examinations done by
20 whoever the hell it is, and that is a whole different
21 question.

22 MR. O'QUINN: You have got me confused now,
23 Bill. Now the way Steve stated the issue, I understood it,
24 with all due respect. Are you saying you don't like the way
25 Steve stated it or what? You have got me confused.

1 MR. DORSANEO: I am saying that what he is
2 talking about is a specific situation when a psychologist
3 could do an examination on court order, and what he is saying
4 is that when one side puts, in effect, puts the condition or
5 makes it clearly so that the condition is in controversy, it
6 is going to be something that is litigated, because they list
7 a witness, then you can establish your need for a competing
8 examination, if I understand what he is saying.

9 MR. O'QUINN: What I hear Steve saying is
10 simply this: If the person seeking the exam wants to use a
11 psychologist instead of a psychiatrist, an additional
12 requirement is going to be required in addition to whatever
13 else Rule 167(a) requires, and that is, the other side must
14 be using or must have listed a psychologist as a witness that
15 needs to be dealt with. Have I got it right, Steve?

16 MR. McCONNICO: That is right, but I think you
17 are both saying the same thing.

18 MR. DORSANEO: Same thing. It doesn't happen
19 that way. It happens the other way. They list them and then
20 you file your motion.

21 MR. O'QUINN: I just said that the other guy
22 had to have the psychologist.

23 MR. DORSANEO: You said it the other way
24 chronologically, though.

25 MR. SPARKS (EL PASO): I am hearing in another

1 area of law, family, you sometimes need a psychologist
2 without either party asking for it.

3 MR. TINDALL: Right, that is 98 percent of the
4 cases.

5 CHAIRMAN SOULES: Just a minute. Harry has
6 got the floor. We are not getting a record now. Harry,
7 state your position, then Pat Beard.

8 MR. TINDALL: Many times in these custody
9 cases the parties will hire independent psychologists and
10 psychiatrists, and when you get their reports, they conduct
11 the same tests. You send them to a psychiatrist, he
12 immediately sends them over for the standard battery of
13 psychological tests administered either by a parapsychiatrist
14 or by a psychologist. It is very -- it is impossible to
15 distinguish the services they render unless they become
16 treating health care practitioners as to what they are doing
17 with these people that they are clinically evaluating by
18 talking to them in their office.

19 CHAIRMAN SOULES: Pat Beard.

20 MR. BEARD: Well, a defendant can always have
21 his expert psychiatrist, psychologist sit in on an
22 examination of the plaintiff and can testify from all the
23 records. I am reluctant to order people in for psychological
24 examination. At one time the domestic relations lawyers,
25 with all due respect, especially women lawyers, would demand

1 a psychological examination of the husband on all occasions.
2 I think you can reach the result by just having your experts
3 sit in and advise you what questions to ask.

4 MR. TINDALL: It doesn't work that way.

5 CHAIRMAN SOULES: Anything new? Judge Rivera.

6 JUSTICE RIVERA: I think if we keep the
7 suggestion that I made and limit and adopt Steve's suggestion
8 but let that apply to cases other than family, we can do it,
9 because I do know in family, they come in together and say,
10 Judge, we need a social study. We want a psychologist
11 because it is complicated or we need an evaluation and they
12 come in together, but they have not listed any witnesses
13 before.

14 MR. SPARKS (EL PASO): Luke, I -- I am sorry.
15 I am hearing now that Harry's problem really isn't a problem.
16 The courts already have the power to do this.

17 MR. TINDALL: No, they have stopped since
18 Coats. Before that, what the Judge is describing is the
19 world we live in.

20 MR. DAVIS: We can exclude family law from
21 there, can't you?

22 MR. TINDALL: If you want to exclude family
23 law, I will be glad to go with Franklin's suggestion. I know
24 that Luke's philosophy has been, and generally the Committee,
25 we don't like to carve out special cases.

1 MR. LOW: I do a little family law practice,
2 too, and I know some of the people. They wouldn't
3 necessarily want to go. I have been before the bar myself
4 and I wouldn't want to have to go before a psychologist.

5 MR. O'QUINN: That proves he is mentally
6 healthy.

7 MR. LOW: Need to know child -- maybe you have
8 a child, but it shouldn't apply in every family law case.

9 MR. TINDALL: That is up to the judge
10 generally to evaluate. Sometimes they order it.

11 CHAIRMAN SOULES: Anything new? Okay, those
12 in favor of Steve's and Franklin's motion show by hand.

13 MR. EDGAR: Now, we have got -- didn't Judge
14 Rivera ask that his suggestion be implemented into that as
15 well?

16 CHAIRMAN SOULES: Let me get to that next. It
17 is just this motion. All in favor show by hands. One, two,
18 three, four, five, six, seven, eight, nine, 10, 11, 12, 13,
19 14, 15. Those opposed? Fifteen to four. Okay, 15 to four,
20 and you will have to write some language, Steve, for me to be
21 put into the rule.

22 MR. TINDALL: Mr. Chairman, can I move that we
23 exclude writing the same language, we exclude family law
24 cases from the coverage of that rule and the court can refer
25 the parties to psychologists.

1 MR. DORSANEO: Make a Title II case.

2 MR. TINDALL: Title II case. Is there any
3 objection to that?

4 MR. RAGLAND: Are you speaking solely with
5 regard to the matter of the child?

6 MR. JONES: I won't mess with your --

7 MR. TINDALL: Thank you, Franklin. Title II
8 cases, suits affecting the parent/child relationship.

9 CHAIRMAN SOULES: Okay, Harry moves that the
10 -- this restriction -- that word be, I guess, written up to
11 make in suits affecting, what, parent/child?

12 MR. TINDALL: Right, Title II family code.

13 CHAIRMAN SOULES: Title II family code cases.

14 MR. EDGAR: I am reluctant to approve
15 something until we see it all in writing and see how it works
16 out together.

17 CHAIRMAN SOULES: I know, but I have got to
18 get past 167(a) somehow.

19 MR. EDGAR: I understand that, but I think
20 sometimes we create problems for ourselves when we think we
21 know what we have done, and then we look at it when it is in
22 writing, we have created a problem.

23 CHAIRMAN SOULES: All I am asking for is a
24 consensus on whether to even work on Harry's problem or just
25 forget it. That is all I want to know. How many would be

1 favorably disposed towards exempting the Title II family code
2 cases from this restriction and permitting psychological
3 evaluations in those cases in any event when ordered by the
4 court? Okay, that is a consensus.

5 MR. DORSANEO: I am opposed to that.

6 CHAIRMAN SOULES: Opposed. There is a
7 consensus that we exempt it. Harry, will you get with Steve
8 and sometime here this morning, we will try to write that up?
9 And then now, finally, Judge Rivera's suggestion that we put
10 in here "a psychological evaluation by a", insert those words
11 after the word "or" and before the word "psychologist" in the
12 sixth line.

13 MR. BRANSON: I don't think we need that now.

14 JUSTICE RIVERA: I think we do because,
15 otherwise, it looks like they are ordering a psychologist to
16 perform a mental --

17 MR. TINDALL: Judge, they really do that,
18 anyway. But I think they are cured as long as -- they can
19 deal with that as long as they know that.

20 MR. BRANSON: Judge, I think our problem is
21 cured.

22 MR. TINDALL: Unless plaintiff is going to use
23 a psychologist, they are not subject to the perils of the
24 court ordering one.

25 CHAIRMAN SOULES: Judge Rivera, do you want to

1 make that a motion?

2 JUSTICE RIVERA: I will.

3 CHAIRMAN SOULES: Is there a second?

4 MR. EDGAR: Second.

5 CHAIRMAN SOULES: Motion has been made and
6 seconded that in the sixth line of rule on Page 288 after the
7 word "physician or" put that -- strangely enough, that
8 appears twice -- after these words "physician or mental
9 examination by a physician or" that is this insert to be
10 made, quote, "A psychological evaluation by a," close quotes.
11 That, then, would be inserted before the word psychologist
12 all in the sixth line of Page 288.

13 Motion has been made and seconded. Those in favor
14 say "Aye."

15 MR. REASONER: Luke, would you have somebody
16 delineate the difference again between a psychological
17 evaluation and a mental examination?

18 CHAIRMAN SOULES: Judge Rivera, would you do
19 that for us, please.

20 JUSTICE RIVERA: I don't know if there is
21 really any difference, but that is what they call it because
22 a psychologist is not a doctor, not an M.D.

23 MR. REASONER: It doesn't really seem to me it
24 is our place to invite ambiguity or to invite conflict
25 whether there is a difference between the two.

1 JUSTICE RIVERA: I think we need to
2 distinguish because it looks like we might be ordering a
3 psychologist to do a mental examination that only an M.D. can
4 do.

5 MR. REASONER: I don't understand that
6 distinction.

7 JUSTICE RIVERA: Association is they have the
8 people that are qualified and licensed to do that. A Ph.D.
9 is licensed in different places.

10 MR. REASONER: Judge, it is my understanding
11 that other than prescribing drugs, a psychologist could do
12 whatever mental examination a psychiatrist can do.

13 MR. TINDALL: Judge, that is right. They are
14 on the faculty of Baylor College of Medicine. They can't
15 admit, but they then treat after they are admitted.

16 JUSTICE RIVERA: But I have never seen
17 "psychological examination". It is always "evaluation". It
18 goes into testing rather than diagnosis.

19 MR. BRANSON: In their report, they say they
20 do a mental status.

21 CHAIRMAN SOULES: Okay, those in favor, say
22 "Aye."

23 (RESPONDED AYE)

24 CHAIRMAN SOULES: Opposed.

25 (RESPONDED NO)

1 CHAIRMAN SOULES: Okay, nays have it. That
2 will not be included.

3 MR. EDGAR: Luke, before we leave this, I
4 don't really know what Paul Gold had in mind. In his letter,
5 he talked about ex parte depositions, but it seems to me that
6 by, as I understand it, simply because under the current law
7 just alleging mental anguish does not put mental anguish in
8 controversy to require a mental examination. Isn't that
9 correct?

10 MR. DORSANEO: Right, you have to say
11 something like traumatic depressive neurosis in your
12 pleadings.

13 MR. EDGAR: Under this addition where we say
14 "or mental examination by a physician or psychologist", that
15 will now permit a party, the defendant, to ask for a mental
16 evaluation. Is that correct?

17 MR. DORSANEO: If he can show good cause and
18 end controversy, which is what you just talked about.

19 MR. EDGAR: So then this really is not
20 changing that. This is not intended to change that aspect of
21 the law.

22 MR. O'QUINN: If you look at the prior line --

23 MR. EDGAR: I understand that, but since we
24 have added "or a mental examination", it just kind of
25 concerned me. I wanted to make sure that that is not our

1 intent.

2 MR. O'QUINN: It is not, because if you look
3 at the prior line, line five, we had in there previous
4 physical or mental examinations. We already had mental
5 examination. We simply, for clarity, we reworked the way the
6 rule is laid out.

7 MR. BRANSON: Justice Hecht, would you agree
8 with that, that is the way you would interpret that?

9 JUSTICE HECHT: Well --

10 MR. BRANSON: I am not asking for a valued
11 opinion. I am just asking --

12 JUSTICE HECHT: You want Lloyd and me to vote
13 on it?

14 MR. BRANSON: The reason I asked the question,
15 Judge, you were shaking your head and I couldn't tell whether
16 you were in agreement or disagreement.

17 JUSTICE HECHT: The sense of the group has not
18 been to tamper with the first part, which ended with good
19 cause and end controversy but --

20 MR. BRANSON: When I see a Supreme Court judge
21 sitting there shaking his head, I just wonder what he is
22 shaking it at.

23 CHAIRMAN SOULES: Okay, the next rule is
24 Rule 168 on Page 293. Steve, what is your Committee's report
25 on that?

1 MR. McCONNICO: We suggest that the rule be
2 left, save and except for one addition suggested by Pat
3 Hazel. What happened -- and I think we all knew this -- but
4 Rule 167 where we talk about requests for production, we put
5 in what happens with the originals, but we never did that
6 with 168. Pat believes that we should add the addition which
7 he has on Page 303, and state what where the custody of the
8 originals and who keeps them. And this is consistent
9 language here with Rule 167. We move that it be adopted.

10 CHAIRMAN SOULES: Second?

11 MR. O'QUINN: Second.

12 CHAIRMAN SOULES: Those in favor say "Aye."

13 (RESPONDED AYE)

14 CHAIRMAN SOULES: Opposed? That is
15 unanimously approved, then, for a new paragraph seven,
16 Rule 168.

17 MR. DAVIS: Could we hold it just a second?
18 We were talking about one of the phantoms that everyone was
19 concerned with yesterday was how long attorneys have to hold,
20 if it is a court record. What is the affect of this on that?
21 Doesn't that --

22 MR. McCONNICO: No more so than 167. They
23 just don't state it.

24 MR. DAVIS: But in effect, it would mean that
25 we would have to maintain custody of it, doesn't it?

1 MR. McCONNICO: Well, 167 states that you have
2 to keep custody now of certain requests for production, and
3 all this is going to add is that you are going to have to
4 keep custody of the originals of the answers to
5 interrogatories. It does not state how long.

6 MR. DAVIS: But we have nothing, then, that
7 really addresses the problem as to how long we have to --

8 MR. McCONNICO: No.

9 MR. DAVIS: -- maintain original depositions,
10 answers to interrogatories or requests for production.

11 MR. McCONNICO: Right.

12 CHAIRMAN SOULES: Probably need a general rule
13 on that, Tom.

14 MR. DAVIS: That is what I am saying. That is
15 where we are.

16 CHAIRMAN SOULES: We don't have any guidelines
17 at all on that. Next is Rule 169.

18 MR. SPARKS (EL PASO): I have received some
19 communications from other lawyers. It has become a common
20 practice in a lot of collection cases and debt cases, things
21 of that nature, and I think also in the personal injury
22 field, if you ask a request for admission, you know answer
23 yes or no, you cannot, if No. 1, above is not admitted, then
24 an interrogatory filed, and they are all together, and the
25 clerks, according to the authority of someone named Luke

1 Soules, Luther Soules, has said that they don't accept
2 requests for admission because interrogatories aren't
3 supposed to. So the clerk just won't file the request or
4 anything else.

5 Is it our interpretation or intent that
6 interrogatories should be separate from requests for
7 admission, first of all, and did I see back in an earlier
8 rule where on summary judgment questions -- I am really
9 talking about collection cases, debt cases, things where
10 interrogatories can be filed for use in summary judgments on
11 those type cases. Did I see that right?

12 CHAIRMAN SOULES: Yes.

13 MR. SPARKS (EL PASO): And still is it our
14 intent that interrogatories should be a separate document
15 from admissions?

16 CHAIRMAN SOULES: Well, it was, and we really
17 reached Tom Davis' concern, I think, at Rule 169. We have
18 got a situation where requests for documents and responses to
19 requests for documents, interrogatories, responses to
20 interrogatories are not to be filed. Requests for admissions
21 and responses are to be filed. And to me, that means they
22 have got to be separate. I don't know, that is just the way
23 I see it. I mean, maybe some clerks file them, some don't.
24 If some of them have asked me the way I see it, that is the
25 way I see it. I have so advised them. Tom feels that the

1 requests for admissions, in order to facilitate this
2 alternative practice of alternating requests to admit and
3 interrogatories, and maybe then followed by a request for
4 documents. You know, do you admit? And if you don't,
5 say why. And then have you got any documents that support
6 you?

7 MR. SPARKS (EL PASO): Give me the documents
8 that support the petition.

9 CHAIRMAN SOULES: In order to accommodate that
10 practice, first, if we go to the point where we say that if
11 you alternate all three, that you can file, then we are going
12 to have district clerks back filing interrogatories and
13 responses again. We may want to do that, I don't know.

14 MR. COLLINS: I have a comment about that.

15 CHAIRMAN SOULES: The other alternative is to
16 say that requests for admissions and responses don't have to
17 be filed. If we eliminate that problem, then you could
18 alternate and you don't have a problem, because the clerk is
19 not even going to have the responsibility to file requests
20 for admissions. That is why I wanted to put 169 into this
21 discussion, because that is a way to fix it. It may be the
22 way to fix it, I don't know.

23 If that needs fixing, first, I guess, let's decide
24 whether we need to accommodate the practice of alternating
25 requests for admissions and interrogatories and requests for

1 documents in the same document in the same discovery request.
2 If we want to accommodate that, then we will go to what is
3 the best way to do it.

4 How many feel that we should accommodate that
5 approach that you can alternate requests for admissions,
6 interrogatories, and requests for documents, if you so wish,
7 in the same discovery request, that that should be
8 accommodated by the rules? How many feel that should be?

9 MR. O'QUINN: Accommodated in what way?

10 CHAIRMAN SOULES: Supports.

11 MR. DAVIS: Not prohibit you from doing it, if
12 you want to.

13 MR. O'QUINN: You are saying we are presently
14 prohibited from doing that?

15 MR. DAVIS: They won't file it.

16 CHAIRMAN SOULES: How many feel that we should
17 accommodate that practice? Show by hands. How many feel
18 that it should not be permitted? Okay, let me count them
19 again. I didn't realize it was going to be that close. How
20 many feel that that practice should be accommodated by the
21 rules? Show your hands. Let me count them. One, two,
22 three, four, five, six, seven, eight, nine, 10, 11, 12.

23 How many feel that it should not be? One, two,
24 three, four, five, six, seven. Twelve to seven. We are
25 going to do -- we are going to do something to accommodate

1 that practice. The problem now, John, again is requests for
2 admissions and responses must be filed. Other discovery is
3 not to be filed.

4 MR. O'QUINN: Must not be filed.

5 CHAIRMAN SOULES: That is right, must not be
6 filed. So whenever you come to the clerk's office and the
7 clerks that are, you know, space conscious and cost conscious
8 are going to say, "You got interrogatories and requests for
9 documents, I am not going to file it. You bring me some
10 requests separate, and then I will file it."

11 MR. TINDALL: Why don't we file admissions?

12 CHAIRMAN SOULES: That is one of the fixes is
13 should we just eliminate the requirement to file requests for
14 admissions and responses, and if we do that, then we take
15 care of the problem.

16 MR. BEARD: I move we eliminate the filing.

17 MR. SPARKS (EL PASO): One reason we have
18 filing of those are the time limitations when they are deemed
19 -- there are some things that go in there.

20 CHAIRMAN SOULES: John, do I need to recognize
21 you before a motion is put before the court? Okay, John
22 Collins.

23 MR. COLLINS: When we made the rather
24 innocuous rule change of not filing discovery matters, we
25 have opened up a whole new can of worms that we did not

1 anticipate, at least I did not anticipate. For example, how
2 long do you have to keep it, who keeps it, what is the Court
3 record, what happens if it is lost, who is liable if I lose
4 the original of McConnico's deposition? All of these
5 questions no one anticipated.

6 And we are beating our head against the wall right
7 now on what is filed, what is not going to be filed, when is
8 it filed, who keeps it. And my point is we have not
9 thoroughly examined the implications of the no filing rule.
10 And it is going to create an absolute nightmare for somebody
11 one of these days. Everybody has an anecdote about it
12 already now, but I defy anybody today in a multi-party case
13 that is pending to go to the clerk's office and find out what
14 has been done in that lawsuit. You can't do it.

15 And if you intervene, you are even in a worse spot.
16 If you are a formal party and you are trying to find out what
17 discovery has been done in that case, it will take you a week
18 and a half to call all the lawyers to see what discovery they
19 have got, who exchanged what when, and somebody has lost
20 their file, and it is impossible to reconstruct the discovery
21 that has been done in that case. And I am just saying that
22 that is going to create problems that we cannot foresee, and
23 I would propose that this Committee set aside some special
24 time to address that problem from a broad picture standpoint
25 rather than trying to patch it, which is what we are doing

1 right now.

2 CHAIRMAN SOULES: All right, that
3 responsibility is assigned to Steve McConnico's Committee for
4 study in the interim, and that will be also assigned to --
5 let me see, who is chairman of the first set of rules?

6 MR. McCONNICO: Beck.

7 CHAIRMAN SOULES: Beck, 76(a). He will have
8 to work with you, because 76(a) is a part of that. So I am
9 going to assign you two, I guess, as a special committee to
10 study the consequences, I guess, of not filing discovery,
11 make some report at our next meeting, whenever that is, you
12 and David you can get. And I want -- John Collins will be a
13 special member.

14 MR. COLLINS: I am already on McConnico's
15 Subcommittee.

16 CHAIRMAN SOULES: Now, Tom Davis.

17 MR. DAVIS: I take it from what action you are
18 taking that we will take no action on that problem at this
19 meeting.

20 CHAIRMAN SOULES: That is right. But we do
21 need to take action on whether or not we are going to file
22 requests for admissions. Somebody made a motion, I think it
23 was Pat Beard, but I didn't get it on the record, and Tom,
24 you have the floor.

25 MR. DAVIS: I agree with John. I think that

1 in order to accommodate the convenience of some district
2 clerks, which is a worthwhile thing to do, if you can, we
3 have created a monster, and we have sacrificed other matters
4 just for their convenience. I mean, if they don't have room
5 to get all of these, I am sorry, but I don't think we ought
6 to suffer for it or we ought to change the whole practice of
7 discovery because of that problem. Maybe the problem is to
8 eliminate getting more space to file it. I would make the
9 suggestion, since it is going to be before the subcommittee,
10 that you have the alternatives either that we go ahead and
11 file everything again like we use to and get by pretty good,
12 or we do not file requests for admissions, or if an
13 interrogatory and a request to produce is combined with a
14 request for admission that must be filed, then that will be
15 filed. Those are, I think, are the alternatives, but I think
16 the convenience of the clerk, to me, does not weigh too
17 heavily against some of the problems we have raised.

18 CHAIRMAN SOULES: Okay, those comments are in
19 the record, and the Committee will have the benefit of those
20 comments.

21 Now, does anyone have a motion to make about
22 Rule 169? This problem that we decided we were going to
23 address and accommodate, that is, the alternating
24 interrogatories, document requests, and requests for
25 admissions in the same discovery document.

1 MR. BEARD: My motion is --

2 CHAIRMAN SOULES: Pat Beard.

3 MR. BEARD: Make it uniform and simply not
4 file the requests for admissions.

5 CHAIRMAN SOULES: Is there a second?

6 MR. LOW: I second.

7 CHAIRMAN SOULES: There is a motion and a
8 second that we take out the requirement for filing requests
9 for admissions. Discussion. Hadley.

10 MR. EDGAR: Requests for admissions fall in an
11 entirely different category than other discovery requests.
12 For example, you don't have to introduce any evidence on it.
13 It is admitted. And there can well be some controversy on
14 whether or not a party actually responded to requests for
15 admissions. And the requesting party comes in and says
16 "Well, you never did respond." And the party to whom the
17 requesting party says "You never did respond." The
18 responding party says, "Oh, yes, I did." And there is a
19 controversy over that and whether or not he or she did, in
20 fact, respond is absolutely essential and vital to the
21 lawsuit. And when you have to file it, then it is either
22 filed or it isn't, and you know whether or not you have
23 complied or not. And I think you are going to create more
24 problems than you can shake a stick at if you abandon filing
25 requests for admissions and answers thereto.

1 CHAIRMAN SOULES: Buddy.

2 MR. LOW: You get the same thing. You didn't
3 answer the interrogatories, therefore it is too late. I
4 can't help it if the judge won't let you answer them.

5 CHAIRMAN SOULES: Wait a minute. Lefty Morris
6 had his hand up. He is next. Then you, Frank.

7 MR. MORRIS: Well, I am going to just
8 emphasize what Hadley did. On a request for admission, you
9 are actually removing things from the lawsuit. If the judge
10 is reviewing the file prior to the proceedings and
11 everything, and if things have been admitted to the court, I
12 think in the record -- and I think that is part of why we
13 drew that distinction at the time we did -- the Court, in
14 reviewing the record, needs to know what is in issue and what
15 is not. And if something has been taken out by an admission,
16 then the Court knows not to worry with that. And I think
17 that that, appropriately, should be in the court's record.

18 CHAIRMAN SOULES: Any other discussion? I am
19 sorry. Frank, did you want to say something?

20 MR. BRANSON: I suggest before we send Steve
21 and John off to redraft this, it might be worth getting a
22 consensus of -- just kind of a straw pole of the Committee --
23 about whether we would like to go back to filing everything.
24 Because I sense that the majority of the Committee would like
25 to return to the way we -- the days of old where we filed

1 things at the courthouse.

2 CHAIRMAN SOULES: The only thing I can do is
3 send that to the subcommittee under the time constraints
4 today, and I have done that. Anything else on this?

5 MR. BRANSON: Couldn't you just put that in,
6 so they will know what to work with?

7 JUSTICE PEEPLES: Yes, one other thing. As a
8 trial judge, when you get a file, whether it is the case on
9 the merits or summary judgment, you want to look at the file
10 and you need to see the pleadings and interrogatory answers
11 and requests for admissions. You never -- I never did --
12 look at depositions. The distinction that was drawn last
13 year, whatever, was a good one. I think we may have made a
14 mistake by saying you don't file interrogatories. We have
15 been talking about it for 30 minutes now.

16 MR. LOW: Production, would you look at that?

17 JUSTICE PEEPLES: No.

18 CHAIRMAN SOULES: Sam Sparks.

19 MR. SPARKS (EL PASO): We talked about this in
20 multiple, but I hate to take a position in this meeting that
21 might be inconsistent with the general solution that we might
22 at the next meeting. I suggest we continue the question of
23 filing this hybrid pleading until we hear from the
24 subcommittee so we have one rule that covers all the
25 discovery rather than attachments.

1 CHAIRMAN SOULES: Okay, the only thing I have
2 got to add to the discussion is that we can -- what we are
3 looking at here in this discussion is Page 304. The motion,
4 the essence of the motion is to delete the last sentence in
5 the first paragraph. An alternative would be to add this
6 clause in the middle of that sentence. Now, and after the
7 comma following the word "objection". We could say "whether
8 or not other discovery requests or responses are combined
9 therewith." Now, that is the alternative, and then we are
10 going to put the clerk to filing any combination.

11 So the motion is that we delete this sentence.
12 Does anyone --

13 MR. O'QUINN: Was that the motion or was the
14 motion to do one or the other?

15 CHAIRMAN SOULES: The motion that is on the
16 floor is to delete this sentence. It has been seconded.

17 MR. DAVIS: Why don't you offer that as an
18 amendment?

19 CHAIRMAN SOULES: Tom Davis offers this as an
20 amendment.

21 MR. BRANSON: Second.

22 CHAIRMAN SOULES: Is that amendment acceptable
23 to you, Pat? Okay, now we have a substituted motion which is
24 to, in the last sentence of the first paragraph of Page 304
25 after the word "objection". Let me read it all the way down

1 to where this would go in.

2 "A true copy of a request for admission or of
3 a written answer or objection comma whether or not
4 other discovery requests or responses or objections
5 or combined therewith comma together with proof of
6 the service thereof as provided in Rule 21(a) comma
7 shall be filed promptly in the clerk's office by
8 the party making it."

9 MR. DAVIS: If you file a combination, the
10 clerk will file it. Is that correct?

11 CHAIRMAN SOULES: Right, but probably it also
12 compels the filing of a combination response.

13 MR. RAGLAND: That creates a problem.

14 MR. LOW: That includes production of about
15 ten boxes of paper.

16 CHAIRMAN SOULES: Well, no, because the
17 response, the production response does not include the
18 documents. It just says I will do it, and I have got some
19 stuff, and I will give it to you, and here is when, and to
20 our convenience. So that doesn't include the documents
21 themselves.

22 All right, any further discussion on this
23 substitute motion? Tom Ragland.

24 MR. RAGLAND: I have a problem with this
25 filing a combination response because the attorney is going

1 to answer, respond to the request for admission. But we have
2 got another rule on interrogatories where the witness must
3 sign. I am not going to have some of my illiterate clients
4 making some admissions or vice versa, lawyers answering the
5 question.

6 CHAIRMAN SOULES: Well, you would have to
7 handle a combination response. You would have to have
8 different sets of signatures. You are going to have -- the
9 party is going to have to answer the interrogatories and the
10 lawyer can answer all the rest. But the lawyer can answer
11 requests for admissions and document requests, cannot answer
12 interrogatories. So you have got the design the signatures
13 accordingly, is what I understand.

14 Anything else on this? Those in favor of the
15 substitute motion say "Aye."

16 (RESPONDED AYE)

17 CHAIRMAN SOULES: Opposed.

18 (RESPONDED NO)

19 CHAIRMAN SOULES: Let me have a show of hands
20 on that.

21 MR. McCONNICO: Luke, be sure to -- you know,
22 we had two motions out. Let's make sure we know which one we
23 are voting on.

24 CHAIRMAN SOULES: All right, the substitute
25 motion is -- the motion on the floor, it is the only

1 motion -- is that the last line of the first paragraph of 169
2 would read as follows:

3 "A true copy of a request for admissions or of
4 a written answer or objection comma whether or not
5 other discovery requests or responses or objections
6 are combined therewith comma together with proof of
7 the service thereof as provided in Rule 21(a) shall
8 be filed promptly in the clerk's office by the
9 party making it."

10 MR. DAVIS: The clerk must file a combination
11 request.

12 CHAIRMAN SOULES: Those in favor show by
13 hands. Fifteen.

14 Those opposed? Fifteen to one, two, three, four,
15 five. That carries by a vote of 15 to five.

16 MR. REASONER: Luke, can I ask one question
17 for clarification? I thought Hadley's point about the
18 importance of this was a persuasive one, but as I read this
19 rule, you are not required to file your responses to requests
20 for admissions with the clerk.

21 CHAIRMAN SOULES: It says "a true copy of a
22 request for admission or of a written answer or objection."
23 They all have to be filed.

24 MR. REASONER: You think that will cover it.

25 MR. O'QUINN: That is the way it is right now.

1 MR. BEARD: Luke, what is the federal court
2 doing about all this?

3 MR. LOW: They don't file anything.

4 CHAIRMAN SOULES: Not only that, but they are
5 not consistent. You go to one clerk, he does it one way,
6 another clerk does it a different way.

7 MR. BEARD: But surely the same problems are
8 arising in the federal court that we are here. So there must
9 be something --

10 CHAIRMAN SOULES: They don't file anything.

11 MR. BEARD: I know that, but surely some
12 committee is studying that in federal court.

13 CHAIRMAN SOULES: Anything else on Rule 169?
14 Except for that change, then, 169 -- excuse me, let's get
15 attention to this.

16 Except for that change, 169, then, will go to the
17 Supreme Court as previously recommend. Is that correct? Any
18 opposition to that? All right, that is the way it stands.

19 JUSTICE HECHT: Mr. Chairman.

20 CHAIRMAN SOULES: Yes, sir, Justice Hecht.

21 JUSTICE HECHT: I know that the Committee had
22 elected to adjourn at 12:00 today, and it is 10:15, and I
23 can't let you get out of here without saying that I know that
24 the Court is very interested in comments to changes that have
25 been proposed in the charge rules, and I hope that friends of

1 business will not prevent you from debating those fully
2 before the conclusion of this meeting. We are interested in
3 all the comments on all the rules, but I just know that a
4 number of questions have been asked about those issues.

5 MR. DAVIS: I move we take that up out of
6 order immediately.

7 CHAIRMAN SOULES: Okay.

8 MR. COLLINS: Second.

9 CHAIRMAN SOULES: Okay, motion has been made
10 and seconded that we take that up out of order. That is fine
11 with the chair.

12 MR. EDGAR: That is going to take some debate.
13 Why don't we take a break for a minute and then we will come
14 back in?

15 CHAIRMAN SOULES: Well, on the break, I
16 want -- I ask the Committee to think about this: We are not
17 yet 40 percent through the rules that we did in 1989. There
18 are two and a half pages of those rules. If we are going to
19 go to the charge rules, which we are going to do right after
20 this break, we cannot finish this work by noon. And I
21 want -- I would like to have the Committee's guidance on what
22 to do about that whenever we return.

23 MR. COLLINS: Let's return another day.

24 MR. DAVIS: How about Friday? Thursday?

25 CHAIRMAN SOULES: I want your guidance when we

1 come back. Whatever you say is what we will try to do.

2 MR. McCONNICO: Mr. Chairman, before we break,
3 we only have one more discovery rule.

4 CHAIRMAN SOULES: We have one more discovery rule.
5 We are going to take it before we break. What is it, Steve?

6 MR. McCONNICO: It is 208, and we propose no
7 change, be adopted as is.

8 CHAIRMAN SOULES: All in favor say "Aye."

9 MR. O'QUINN: What are we voting on?

10 MR. McCONNICO: Okay, Rule 208. It is the
11 only remaining discovery rule. It is on Page 327. It is
12 depositions by written questions, and we vote -- our
13 proposition is that this not be changed and be adopted as
14 recommended.

15 MR. O'QUINN: What was somebody trying to get
16 you to change?

17 MR. McCONNICO: Nothing.

18 MR. SPIVEY: Everybody is in favor.

19 CHAIRMAN SOULES: 208 stays as is.

20 (Whereupon a recess was had, after which time the
21 hearing continued as follows:)

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P R O C E E D I N G S

Saturday, February 10, 1990

Afternoon Session

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CHAIRMAN SOULS: We are in session on the charge rules.

Okay, we are on the record, and we are going to take the charge rules which are in the book on 271 through 275. Of course, they are now 271 through 279 in the rules that are operative today. They are found at pages -- beginning at Page 342 and ending at Page 424 -- no, at Page 414. And there are two areas -- I think there are two, there may just be one -- where the complaints have been -- where a lot of complaints have been made about these proposals.

One is the trial judges want an appellate consequence to failing to submit in substantially correct form questions and instructions, because they feel like that gives them, I guess, a hammer or something more to force the parties to help them at the charge in generating a jury charge, a proper charge.

The second question, unless that is just part of the same one, is how to preserve error in the charge. The questions -- the latter one -- let's see, 272, we have got

1 a -- okay, on Page 354, we have Hadley's Committee's
2 recommendation for a substitute 272 on Page 354.

3 JUSTICE PEEPLES: You said Hadley. That is my
4 Committee.

5 MR. EDGAR: Can I make a report? I think I
6 can clarify that.

7 CHAIRMAN SOULES: Okay, and if that is done,
8 then the first problem goes away. If this is not done or
9 something like it, then there is another way to fix -- give
10 the judges some more -- a bigger hammer than they have right
11 now under the proposed 271 through 275. And Hadley, or who
12 wants to open with a report? Is it Judge Peeples or Hadley?
13 Hadley, okay.

14 MR. EDGAR: First of all, with respect to
15 these rules generally, Luke, the comments were certainly
16 favorable to your reorganization of the rules. I mean,
17 combining them into six rules or however many there are is
18 very well received, and following a letter Judge Peeples gave
19 me the credit for doing that, I would like to go on record as
20 saying that was your project.

21 But the problem, really, and all of the
22 objections -- and I guess we got probably a hundred people
23 voiced comments concerning what appears on Page 357,
24 Rule 273, Paragraph No. 1 in which, as now stated, would say
25 that only an objection only to the charge will preserve

1 error.

2 Many trial judges and others voiced concern that
3 there should be -- when something is entirely omitted from
4 the charge, then the complaining party should at least
5 request that it be placed in the charge, and by request, we
6 mean a request in writing. And that is really the basic
7 issue that I think we need to address.

8 Now, the Committee, on the administration of
9 justice, via Pat Hazel -- and I think Pat is here. He is
10 supposed to come to another meeting, but he can't find it.
11 And I am glad he is here -- wrote a letter which appears on
12 Page 355 and 356 on behalf of the COAJ voicing the concern
13 which I have just expressed. And he attempted to reduce to
14 writing the COAJ's recommended solution, and that appears on
15 Page 354.

16 Now, mechanically, he is combining two rules which
17 we have before us into a single rule, but if you would look
18 at No. 5, Paragraph No. 5 on Page 354, it focuses in upon the
19 manner in which they suggest that preservation of error be
20 achieved, which basically requires a request if the court's
21 charge completely omits a definition, special instruction, or
22 entire ground of recovery or defense, except when the court's
23 charge can be cured either by amending what is submitted or
24 by adding to the definition, special exception, or question,
25 then either an objection or request is proper.

1 I really think the first thing we should address,
2 though, is a broader issue, and that is should there be
3 circumstances under which a request is required, or should
4 only an objection cure error which is as now proposed on
5 Page 357.

6 MR. COLLINS: Hadley, I have a question.

7 CHAIRMAN SOULES: John Collins.

8 MR. COLLINS: On Page 354 there under 5(b), a
9 request is required when the court's charge omits a
10 definition, instruction, or ground of recovery. Does that
11 mean, for example, if I am the plaintiff in the case and the
12 defendant omits an element of his defense, am I obligated to
13 tell the court "Look, Buddy Low has screwed up and he hasn't
14 submitted part of his defense and here is a substantially
15 correct question"? Am I required to do that to represent
16 Buddy's client?

17 MR. EDGAR: Well, if you want to complain of
18 the omission of that element, you would have to object. You
19 wouldn't have to request.

20 MR. LOW: The way this is written, Hadley?

21 MR. McMains: Not true the way it is written.

22 JUSTICE PEEPLES: Why not under 5(c), Rusty?
23 You can cure that either by an instruction or changing the
24 wording of the question. Doesn't 5(c) say you can object or
25 request?

1 MR. LOW: It is not totally omitted like John
2 said.

3 MR. EDGAR: Now, what is omit. Let me make a
4 suggestion. Before we get into that, I think we should
5 address the broad issue, and that is whether or not there
6 should be circumstances in which a request is required, and
7 then let's deal with what we are going to require be
8 requested. But the broad issue, I think, is should in all
9 instances an objection only preserve error, or should there
10 be instances in which a party should also make a request?
11 Now, that is the first issue I think we should address.

12 MR. BRANSON: I move there should be instances
13 where you would need a request.

14 MR. SPARKS (EL PASO): I second it.

15 MR. BRANSON: That is an unusual combination.

16 CHAIRMAN SOULES: All right.

17 MR. SPARKS (EL PASO): Is there going to be a
18 problem later on?

19 CHAIRMAN SOULES: We voted the house to one
20 last meeting to have objections be the sole necessary
21 predicate for appellate review. Now, I just want to remind
22 you that we voted that strong after about two hours of
23 discussion. I don't care. All I am trying to do is focus
24 back on that discussion so that we -- if we need to redo it,
25 we can, fine. If we don't, that is fine too.

1 MR. EDGAR: I think we should also focus on
2 the fact that of all the trial judges that have complained
3 about this, of appellate judges that have complained about
4 it, those that are represented by the Committee on the
5 Administration of Justice, I think we ought to take that into
6 consideration, too, and I think that is one reason why the
7 Supreme Court had the round table forum to just see how well
8 received those suggestions were.

9 CHAIRMAN SOULES: I agree. There was another
10 thing in this proposal which we voted down that was
11 responsive to this, and that was that if a judge, hearing an
12 objection made, requested that the lawyer making the
13 objection tender to the court a solution to that objection in
14 substantially correct form, that the lawyer had to do that or
15 that objection was waived.

16 In other words, there wasn't any distinction
17 between something that was omitted, something that was
18 committed, these distinctions that are so apparently hard to
19 grasp in the practice. It is just that you make objections,
20 and that preserves error unless the judge says wait a minute,
21 stop, you submit what you want in substantially correct form
22 in writing on that objection. Then if the lawyer doesn't do
23 that, that objection is waived.

24 Now, I had that in my original draft and felt like
25 it was important to have the judge be able to force a

1 lawyer -- I mean, this charge conference is compressed, and
2 if the judge becomes concerned about that, to have say, okay,
3 you give me that in writing, and then if you don't do it, you
4 waive.

5 The debate on that, as I recall, was, well, if we
6 give the judge that lever, he will just say I want all your
7 objections. I want to cure all your objections by something
8 in writing. I really think that is a small percentage
9 problem. I think most of the time judges are going to hear
10 those objections and go along until they really do have a
11 problem, or maybe the adversary has a problem and says, "Hey,
12 Judge, I think he may be right on that." At that point, you
13 do some drafting on some minor points.

14 Now, that is a way to fix this without getting
15 into, and do as Frank has said, meet some cases -- find some
16 cases where requests should be necessary without preserving
17 these distinctions that are so hard to follow in the case
18 law.

19 MR. EDGAR: Of course, I wasn't at that
20 meeting, as you know, but I would have found another problem
21 with that, and that would literally then require you to have
22 to object to the omission of one of your opponent's
23 definitions or questions. And I don't think that -- to me,
24 that should not be the law. So I see a problem with that.
25 So in my view, we still have to come back to whether or not

1 we want to go solely by objection or whether we want to
2 incorporate the request procedure in some instances.

3 CHAIRMAN SOULES: Okay, Rusty, do you have a
4 comment at this time?

5 MR. McMAINS: In light of the fact, because we
6 really haven't had -- Hadley and I haven't had much
7 interchange in the Committee. Hadley hasn't had much
8 interchange, and Hadley did miss that meeting, circumstances
9 beyond his control.

10 The real focus of the controversy and the debate at
11 the meeting was because basically what everybody on the
12 Committee realized is that there was no agreement at all,
13 except on one regard, and that is that you shouldn't have to
14 be formulating the issues, instructions, or definitions of
15 your opposition.

16 You need to be in a position to object to something
17 that is there, but you just ought not to be doing that. Now,
18 there is no question that the current rule required that, but
19 we are trying to fix that to some extent, and we got into the
20 problem, as you have articulated before, of it is just not
21 that easy to tell sometimes whose burden it is on any
22 particular question because it may be both parties' burden,
23 such as in the definition of negligence when you have got a
24 case that has got to be proven, and for one purpose it is
25 somebody's burden and for some purpose it is another.

1 So old practice didn't function effectively in
2 light of the general charge in broad form submission and the
3 incorporation now of defensive matters as well as theories in
4 the instructions. So that your threshold question of should
5 you be required to do something by request is actually a
6 series of questions, because it assumes that we can define in
7 what context that request should be required. And that is
8 what we couldn't do and couldn't agree on and is why we went
9 to the context of the objection practice which was defined
10 more broadly, in fact, or more specifically than what is done
11 in this proposal to require that you point out how to fix the
12 problem it is that you are objecting to.

13 So to the extent of giving all the guidance in the
14 trial court and with regards to it having appellate
15 consequence, I do not think there is any difference in
16 appellate consequence with regards to the procedural change
17 we have other than you don't get tricky do'ed around by the
18 court of appeals determining that something was your burden
19 to do when you didn't think it was at the time.

20 MR. BRANSON: Would you have the court
21 reporter record the spelling of tricky do'ed?

22 CHAIRMAN SOULES: Who's next? Hadley, you
23 feel free to respond.

24 MR. EDGAR: I was just going to respond by
25 saying that trial judges feel differently than that, and they

1 have voiced almost -- well, all of them that have responded
2 have been unanimous in saying that we need help, and one way
3 that we get it is have something in writing. And because of
4 the compression and the frustration that goes on in the
5 charge conference, they just feel more comfortable and want
6 something in writing and want a requirement that it be in
7 writing in order to preserve error.

8 CHAIRMAN SOULES: That is right. Buddy Low.

9 MR. LOW: I remember Justice Hecht expressed a
10 lot of concerns about wanting to simplify what is omitted,
11 what is defective, and there was also concerns about, you
12 know, not doing the other lawyer's work. And I proposed
13 something and apparently hasn't been discussed much, because
14 some smart lawyers knew what they were doing, so I didn't
15 press it further. But I had proposed that we make it in
16 terms that no matter if it is definition, an issue, or
17 instruction, that if it is -- can properly be a part of your
18 case, that negligence may be a proper part, then you have to
19 submit it in proper form. But if it is not properly a part
20 of your case, all you have got to do is object to it. That
21 is kind of what I proposed, but I guess that never did get
22 very far because I sent it to you and sent it to some of the
23 others. But that seemed to me to satisfy and simplify. But
24 maybe I overlooked a lot.

25 That is what I propose, that you don't care whether

1 it is an objection -- I mean whether it is a definition,
2 whether it is omitted, or defective, or what. If what you
3 are talking about is properly a part of your case, cause of
4 action, or defense, then you had better submit it in proper
5 form or you won't complain on appeal. If it is not proper,
6 then all you have got to do is tell the judge I object to it,
7 it is part of his, now you make him draw it. That is what I
8 have proposed. And I drew something up on that and sent it
9 to you back a long time ago, but then Hadley came up with
10 another one that I thought was probably better than mine.

11 MR. SPARKS (EL PASO): Buddy, that was exactly
12 the way it was before we started fooling around with it.

13 MR. LOW: No, that isn't how it was.

14 MR. EDGAR: That is not quite true because if,
15 for example, if an instruction or definition had been
16 omitted, then you have to preserve error by request.

17 MR. LOW: Deemed admissions and all that.

18 CHAIRMAN SOULES: Franklin Jones had your hand
19 up.

20 MR. JONES: I just have some comments,
21 Mr. Chairman, which probably should be appropriately defined
22 as addressing whatever burden of proof exists by reason of
23 the fact that the Committee did adopt this rule last time and
24 particularly that I was there. And I have changed. The
25 reason I have changed is because of the letter from both of

1 the trial judges in my county telling me to change. That is
2 the primary reason.

3 Now, there is another reason, and I think it is
4 appropriate at this time that we talk about this or at least
5 think about it, and that is that I was moved to go along with
6 this procedure because it is basically the federal
7 proceeding. Harry Reasoner, two or three or four years ago
8 when I wanted to do something that would put federal rules in
9 the state practice, made the poignant observation that these
10 federal judges have these \$50,000 clerks that have nothing to
11 do but keep them out of error.

12 And I think another observation in that regard is
13 that there are statisticians who tell you that 95 percent of
14 our litigation today is in the state court system as opposed
15 to the federal system. Our judges, our trial judges, do not
16 like what we have done, and I think that it is incumbent upon
17 us to undo it and to simplify this thing and protect them in
18 the structure of their charge and the sanctity of it on
19 appeal.

20 CHAIRMAN SOULES: On 354, the suggestion for
21 Rule 272, this substitute rule on 354 cures all of the
22 complaints that I have read from the judges about what we
23 did, that is, they want substantially correct form written
24 requests on --

25 MR. EDGAR: Well, anything that is omitted

1 that the complaining party, if it is a definition,
2 instruction, or as Pat has suggested, an entire ground of
3 recovery or defense, then that has to be requested.
4 Basically, everything else is by objection. Simply stated,
5 that is the recommendation. But at least it recognizes there
6 are instances in which a request is required. And that is,
7 again, the threshold issue that we need to resolve, and if we
8 get over that, then we can determine what we want to request.

9 CHAIRMAN SOULES: Okay, is it the consensus
10 that in some circumstances a trial judge -- that we should be
11 required to make a request for the judge to act, and failing
12 that, have no appellate review? All that --

13 JUSTICE RIVERA: I think so.

14 CHAIRMAN SOULES: Is that the consensus? Show
15 by hands.

16 MR. JONES: In some instances.

17 CHAIRMAN SOULES: Those opposed? Okay,
18 so we now voted that we are going to require requests in some
19 circumstances. But in what circumstances?

20 MR. EDGAR: Now, the second situation is under
21 what circumstances. The proposal is that if a definition,
22 request, or theory of recovery or defense is omitted from the
23 charge, then you must request.

24 Now, that really doesn't change the current law, I
25 don't think, because if a definition or instruction is

1 omitted from the charge, then you are now required to request
2 in order to preserve error. So basically what this says is
3 that if an entire ground of recovery or defense is omitted,
4 then you must request in order to preserve error.

5 Now, it seems to me that I personally have some
6 problem with that wording because let's assume we have a comp
7 case, and Pat and I have talked about this, and as a matter
8 of fact, we have had several discussions this week, and in
9 talking to him, he realized that we need to make another
10 little change in what he has proposed here on 354, but that
11 doesn't really deal with the issue we have before us right
12 now.

13 But for example, in a comp case, if we have an
14 omitted question, and you see, this presumes that you can
15 always submit a case in broad form, and that broad form will
16 cover you on all problems. And it may not because it may not
17 be feasible to submit in broad form such as comp case. So
18 assume that there is an omitted question in a comp case.
19 Now, the party -- the plaintiff in this instance or maybe the
20 defendant, can he or she preserve error by merely objecting
21 or should we require tender?

22 I think we should require requests. I think
23 requests should be required if it is part of your theory of a
24 cause of action. But literally, you wouldn't have to because
25 it is not an entire ground of recovery or defense.

1 Now, I think we could cure that, and I have talked
2 to Pat about this, and I don't really -- we just talked about
3 it a few minutes ago. Rather than saying an entire ground of
4 recovery or defense, we might consider referring back to
5 Rule 277 and saying a question in proper form as provided by
6 Rule 277, whatever that means, because you see there it just
7 says "whenever feasible, the court shall submit on broad form
8 questions".

9 Pat, I would like your comment on that, if you
10 don't mind.

11 MR. HAZEL: I would like to say, first of all,
12 the attempt in this rule is because the Committee on the
13 Administration of Justice has opposed what we are doing, and
14 this was an attempt to write present law into one rule so it
15 would give better guidance because I think you-all did an
16 excellent job, whoever did it, of getting the framing of the
17 questions into one.

18 Now, on that, what I worry about that, frankly, is
19 that if a court doesn't submit a broad form question and
20 breaks anything even into two elements, and an element is
21 missing and I am on the other side, an objection wouldn't
22 take care of it. I have got to request one, as I hear under
23 what you are saying. If it is not an entire -- if it is an
24 element rather than a paragraph. If it is entire ground
25 recovery and they leave it out and it is theirs, I don't give

1 a hoot. They waived it.

2 MR. COLLINS: You have also waived it, too, if
3 you don't request it.

4 MR. HAZEL: I don't want it, if it is their
5 ground of recovery or of defense.

6 MR. COLLINS: Maver vs. Transport Insurance is
7 the authority for that principal.

8 MR. HAZEL: Sure I have waived it, but if it
9 is their ground of recovery, I don't mind waiving it. If you
10 are the plaintiff, you waived it. I had that happen to me,
11 but it is my ground of recovery then.

12 MR. EDGAR: I suppose it would depend, though,
13 on whether or not the court entered a judgment against you,
14 because then you might get a deemed finding against you, Pat.
15 That would be an instance, though, in which you might be
16 required to submit it under penalty of an adverse judgment.

17 MR. HAZEL: That is one of the things you have
18 got to always consider is what is the deemed situation or a
19 judge finding. I think -- the only thing I know about what
20 Rusty is saying, when you have to request something that the
21 other side is relying on, in effect, the only time I know is
22 if it is an omitted definition or instruction. Other than
23 that, I don't know when you would ever, unless it is an
24 entire ground of defense or ground of recovery, you wouldn't
25 want to do that. I can see what John is talking about.

1 MR. EDGAR: Does your proposal solve the
2 problem -- and I give you an actual situation where we have a
3 situation in which we have multiple parties, and the
4 plaintiff is seeking to recover based on employee, agency by
5 estoppel, agency by ostensible agency, and alter ego. Now,
6 these are questions that are going to have to be submitted to
7 the jury separately.

8 Now, neither one of them in and of themselves is an
9 entire ground of recovery or defense, and by failing to
10 submit that, is the plaintiff required only to -- and this is
11 the plaintiff's issues -- preserve error only by objection,
12 or would tender be required?

13 MR. HAZEL: Well, this is the one we discussed
14 earlier, and I think there is some problem with it in that,
15 depending on what else is submitted, what else is submitted,
16 the rest that is submitted is necessarily referable to that
17 ground of recovery, then I can have a deemed finding or --
18 but the judge can find against me and I suppose an objection
19 is all I need really to preserve, because it becomes part of
20 my ground of recovery.

21 The problem that I see is where you have two
22 defendants, you have got one going on negligence, another one
23 on whether or not he was in the course and scope if it is
24 against another defendant. And that one is left out. Well,
25 is what was submitted on negligence is certainly to the

1 driver, if that is the situation, accident, you know, the
2 ground of recovery. The full ground of recovery against the
3 driver.

4 But as against the employer, where they got to be
5 in the course and scope, the problem I see is what was
6 submitted necessarily referable to that because it can find
7 him without finding me.

8 And Jack Ratliff says, yes, it is. He thinks the
9 court is going to say it is, but I don't know. But I see
10 those problems exist now. I mean that is the problem. We
11 are trying -- all I was trying to do is write this rule so it
12 would reflect present law. And that is a problem with
13 present law, and I don't know what you do about it, you know,
14 other than submit these things in broad form and then you
15 don't have so much work.

16 MR. O'QUINN: I have a question. Pat, when
17 you said "I tried to write," where is the one you wrote?

18 MR. EDGAR: On Page 354.

19 MR. O'QUINN: That is yours, okay.

20 MR. HAZEL: Now, it has been rewritten since
21 Hadley and I discussed it.

22 MR. EDGAR: There were a couple of things that
23 were omitted.

24 MR. O'QUINN: I got the impression what is on
25 354 is what you wrote.

1 MR. EDGAR: No.

2 MR. REASONER: Mr. Chairman.

3 CHAIRMAN SOULES: Yes, sir. Harry Reasoner.

4 MR. REASONER: I guess listening to you-all
5 struggle with these distinctions really persuades me we ought
6 to rethink whether the objections is not the proper approach
7 because the proper objection is ultimately going to be one
8 that tells the trial court what is wrong with this charge or
9 its waiver, and if you then want to add something, the other
10 party is going to supply a request, or you can force the
11 objection of the party to elaborate enough on its objection
12 to say what is needed to cure it.

13 My difficulty when you get into distinctions like
14 this, I was talking to John O'Quinn, and I don't think either
15 one of us think we are good enough lawyers, but if this is
16 the rule, we are not going to request and object to
17 everything we care about, which just multiplies the paper
18 that is burdening the trial judge, makes his decision all the
19 harder. The difficulty you get into when you are trying to
20 make these decisions, look at 5(c), when the court's charge
21 can be cured either by amending what is submitted, well, I
22 submit to you any charge can cure by amending it or by
23 adding to the definition, special instruction, or question,
24 then either an objection or a request is proper.

25 It seems to me you are just compounding procedural

1 litigation when you get into this kind of thing, and just
2 requiring a clear objection would be a must simpler way to
3 practice and better for trial judges, as well.

4 MR. EDGAR: Again, the only thing I can say is
5 the trial judges don't agree with you.

6 CHAIRMAN SOULES: Their resistance to this is
7 that they don't feel that they have the tools to force the
8 lawyers to give them what the lawyers should give them for
9 composing a charge just by what is in 271(1), just ordering
10 them to do it. They want an appellate consequence to attach
11 to force the lawyers to do a thorough job.

12 MR. EDGAR: I think it is more than that,
13 Luke. You -- I have been in situations not too recently
14 where the charge conference was completed at 2:30 in the
15 morning. People are tired, judges are tired. They are under
16 pressure. They are really not listening to objections as
17 carefully as you and I are listening to one another right
18 now. And they want a backup. They want this done properly,
19 and they want something in writing if you are going to
20 complain of it on appeal if it has been omitted from the
21 charge.

22 If it is in the charge, although imperfectly, then
23 an objection is okay, because at least they have some visual
24 reference from which to work. But if it is not there, they
25 are just simply saying that they want something in writing.

1 So I think it is more than the problem that you stated a
2 moment ago.

3 CHAIRMAN SOULES: Okay, well, my experience is
4 these charge conferences, even though you have got these
5 written requests, generally they are listened to by the
6 judge, the judge listens to the matters orally, and he says
7 okay, what is this one about? You tell him, and he says I
8 refuse that or I grant it. They don't sit down and study --
9 until you really have their attention on a particular
10 problem, they don't study what they are given in writing.
11 They usually listen to it orally presented, but you have to
12 do it in writing in order to preserve error.

13 The middle ground, and again I am not necessarily
14 advocating it, I just don't want to absolutely lose sight of
15 the possibility of having objections preserve all error
16 unless the judge says I want that in writing, submit that to
17 me in writing, and I want to see it, otherwise you object --
18 that objection -- you waive that if you did not then comply
19 with what the judge has asked you to do, and your written
20 request then would be the appellate predicate and the
21 objection that you made would not. Now, that is a
22 possibility.

23 MR. BRANSON: You you are saying we shouldn't
24 have to do it in writing because the judges don't read it?

25 CHAIRMAN SOULES: No, no, not at all. Not at

1 all.

2 MR. SPARKS (EL PASO): Aren't you jumping,
3 though, into the problem that Buddy does, and that is, if you
4 are objecting, say, to a definition of, say, alter ego that
5 your opponent has and you make objection to the definitions
6 wrong, then you are having to perfect the objection to do
7 your opponent's work.

8 MR. EDGAR: You are going to have to cure your
9 opponent's error in order to preserve error.

10 CHAIRMAN SOULES: You have to do that right
11 now.

12 MR. REASONER: What I don't understand, an
13 objection, if it is adequate, should tell the court how to
14 cure it. So there is really no distinction. You have told
15 him how to cure it if your objection is good. You just
16 haven't written it out in the form of a request.

17 MR. SPARKS (EL PASO): I agree.

18 MR. BEARD: Luke, what I see in the trial
19 court are that they are going to have to draw the charge
20 before any -- as now, they are looking to the lawyers, the
21 plaintiff to give his issues, the defendant to give his. You
22 don't have to do anything, and if the trial court is saying
23 under this proposal I will have to draft up the charge and
24 give it to them and then they will start objecting. Now,
25 that is the complaint I am hearing as much as anything.

1 CHAIRMAN SOULES: The first paragraph of the
2 first charge rule is on Page 271 -- I mean Rule 271 on
3 342 says "The Court may order any party to submit proposed
4 jury questions, instructions, and definitions at any
5 reasonable time for the convenience of the Court."

6 MR. BEARD: Well, if they will enter such an
7 order, but they are just generally thinking in terms of that
8 they are going to be preparing the charge, because a lot of
9 places they don't have any pretrial orders or requirements
10 and they go there expecting the lawyers to hand them those
11 issues and definitions.

12 CHAIRMAN SOULES: Well, this is not looking to
13 a pretrial order.

14 MR. BEARD: Well, I think if the courts could
15 understand that they may order the parties to submit the
16 charge to them, I think it would eliminate the problem that
17 they are worrying about.

18 CHAIRMAN SOULES: Well, there it is in black
19 and white.

20 MR. EDGAR: Except for the fact that you have
21 also got to temper that, though, with the language on
22 Page 358 in Rule 270 -- proposed Rule 273(5) which says that
23 noncompliance of that provision shall never be a basis for
24 waiver.

25 CHAIRMAN SOULES: And right there is where the

1 sentence was deleted from last -- in our last meeting which
2 said unless the trial court, upon hearing the objection, has
3 requested that the -- whatever cures the objection be
4 submitted in substantially correct form. And if that occurs,
5 then it must be submitted -- requests in substantially
6 correct form in order to preserve the error.

7 MR. EDGAR: You are back into the problem,
8 though, of being placed into the position of having to tender
9 something that helps your opponent.

10 CHAIRMAN SOULES: You already have to do that
11 now. At this time you can't tell whether a -- something that
12 should be in the charge should be in a question or an
13 instruction, because it can be either place. The courts have
14 told us you can put anything you want that would ordinarily
15 be an instruction, you can put it -- be in a question, you
16 can put it down in an instruction. So now -- and we know
17 that instructions, in order to preserve error in instruction,
18 you must request that instruction in substantially correct
19 form.

20 MR. EDGAR: That is not necessarily true,
21 because if you go back and look at Scott vs. Santa Fe and
22 City of Austin vs. somebody, the court pointed out very
23 carefully that if it really pertains to the resolution of a
24 question, and instruction is considered part of a question
25 rather than an instruction.

1 CHAIRMAN SOULES: All right, then you read
2 that with comfort. I don't. That doesn't help me a bit when
3 I am trying to preserve error in my charge, because I don't
4 know how that appellate court is going to look at that.

5 MR. EDGAR: Well, I am just assuming that the
6 rule book changes.

7 CHAIRMAN SOULES: The way we have to preserve
8 error now is both object and request, or if we get some
9 comfort out of -- what is the case where the request will do
10 for an objection?

11 MR. DORSANEO: Florence vs. Hold, Volume 742.

12 CHAIRMAN SOULES: Then you request on
13 everything. Okay, I mean, there is no -- if we are going to
14 differentiate between a commission and an omission -- Bill,
15 you talk a minute. Then I will get to this other point. I
16 can't -- is an element a matter that is to be in a charge?
17 If we look at 354, let me go ahead and raise this.

18 JUSTICE PEEPLES: If it is part of a ground of
19 recovery or defense.

20 CHAIRMAN SOULES: If 354, where it says an
21 objection is required when the matter complained of -- wait a
22 minute, a request is required -- what was I looking at?

23 MR. EDGAR: Page 354.

24 MR. O'QUINN: 5(b).

25 CHAIRMAN SOULES: Okay, 5(a) and (b). An

1 objection is required when the matter complained of is
2 contained in the court's charge but claimed to be defective.
3 What -- is an element a matter?

4 MR. EDGAR: Yes.

5 CHAIRMAN SOULES: What if the element is not
6 in the charge?

7 MR. EDGAR: Well, does it render what is there
8 defective?

9 CHAIRMAN SOULES: And what is there -- the
10 omission of that element is a valid complaint.

11 MR. EDGAR: Well, then it is a matter.

12 CHAIRMAN SOULES: And it is not there.

13 MR. EDGAR: It is a matter.

14 CHAIRMAN SOULES: Okay, then you have to
15 request the element.

16 MR. EDGAR: No, it says objection.

17 CHAIRMAN SOULES: Not under this Rule 272 on
18 Page 354.

19 MR. EDGAR: That is the way I read it, and
20 that is what Pat's intention was. I don't interpret it that
21 way.

22 CHAIRMAN SOULES: If you read, if an element
23 is a matter that is omitted, then it is not contained.

24 MR. EDGAR: When the matter complained of --
25 you are complaining of an element -- you are complaining of a

1 question because an element has been omitted.

2 CHAIRMAN SOULES: Maybe. That is one way to
3 look at it.

4 MR. EDGAR: Well, and I think that is what Pat
5 meant.

6 MR. HAZEL: When it says entire ground of
7 recovery is the only thing omitted that you have to request.
8 If that is your entire ground of recovery, yes, but that
9 is -- you just said it was an element.

10 CHAIRMAN SOULES: It is an element.

11 MR. BEARD: Well, if it is just an element,
12 then it ain't the whole thing.

13 MR. REASONER: We also have to worry about
14 definitions and special instructions, whatever they are.

15 MR. EDGAR: If they are omitted as well, then
16 they would have to be requested.

17 MR. HAZEL: I am sorry.

18 CHAIRMAN SOULES: Bill Dorsaneo.

19 MR. DORSANEO: Well, my first experience with
20 the Texas charge, like most of you, was in law school, and I
21 was impressed by the complexity of the overall system. In
22 fact, I was bewildered by it, and it took a fairly long
23 period of time before I appreciated the detail. Now, we have
24 come a long way toward simplifying the entire process. I
25 think, well, pretty substantial benefit of the system.

1 Why we refuse to simplify it in this respect is,
2 frankly, beyond me. Law professors can sit and debate and we
3 can disagree among ourselves about what all of these prior
4 cases mean, but I will tell you it takes a lot of learning
5 and a lot of conversation to come to particular points of
6 disagreement on these matters. And this seems to me to be
7 the practical world of what needs to be done in order for you
8 to be able to say on appeal the charge should have been this
9 way or that way.

10 Pat, you think your famous case is one where an
11 objection and request was combined and that screwed up
12 everything all along the way. You are doing the wrong thing,
13 you are doing it the wrong way, combining requests with
14 objections, and that part of Texas practice, this complexity,
15 is just, you know -- I am looking at it this way. I am
16 really sorry to see all of old venue law gone, because I knew
17 all that law and all the details of it, and I miss it. And I
18 suppose I will miss all of this complexity when it goes away.
19 And I think I understand it better than other people
20 understand it, so I think I may miss it more, but it needs to
21 be simplified. That just is all there is to it.

22 I will say one last thing. If we are going to
23 leave it the way it is, complicated, then let's not rewrite
24 it and change it to something that is different from the way
25 it is but is just as complex. Let's don't screw with it or

1 change it to something that is simple, because if you take
2 somebody's word for it and this is codified existing law,
3 that is not going to be everybody's point of view, and it is
4 not really going to codify the existing law that exists. It
5 is the confusion about what it is that we are meaning to do.

6 Simplify it will handle it, and a clear objection
7 simplifies it. If the objection is not clear enough, well,
8 the objection is no good. If there is a problem with that
9 sentence that the trial judge is misreading about that they
10 can't ask somebody to do something, then let's soften that
11 sentence a little bit, soften it a little bit instead of
12 saying that you can just tell the judge to piss off, and have
13 the sentence read a little differently, if that is the
14 problem, the sentence that you were talking about earlier,
15 Pat.

16 MR. BEARD: I really think that that Committee
17 is the problem. They think they are going to have to draft
18 the first draft in that charge. And if they don't think
19 that, then I think we have eliminated all of the problem, and
20 the objection procedure will be satisfactory.

21 MR. DORSANEO: Under the current rules now,
22 they have to draft the first version of the charge, they do
23 because this request procedure is at the back end in terms of
24 preserving a complaint, and lawyers who are not reputable
25 slide that stuff in at the end to try to trick the judge to

1 trap him, and that is the request preservation procedure. It
2 is not request up here at the front end. It is request in
3 time to get the judge to sign it refused, after the meeting,
4 after the charge conference, and that is what the rules
5 provide.

6 MR. BEARD: But the normal practice is the
7 judge gets those charge requests, he asks for them maybe when
8 the trial starts, maybe at the end, but he gets them as a
9 normal matter.

10 MR. DORSANEO: That is what the rules says to
11 me. It just says at the end, and you don't have to get the
12 thing stamped refused, in so many words. You can preserve
13 your right to complain about what the judge didn't do by a
14 clear objection that maybe does, in fact, combine I object
15 because you should have put it this way combined with what
16 would have been thought of as a request. Maybe that is the
17 degree of clarity that is sufficient.

18 But rules that say you have to wear a red hat and a
19 bandana and keep one eye closed in order to preserve your
20 substantive argument don't make any sense to me.

21 JUSTICE PEEPLES: Can I be heard? I think
22 that we need to simplify existing law but not change it
23 entirely the way the proposal does. I think what has the
24 trial judges around the state concerned is that the existing
25 proposal says all you have to do is object to preserve error

1 on an entire failure to submit a complete ground of recovery
2 or defense.

3 Now, I think we were wrong to do that. I think
4 that whoever has the burden, if a ground of recovery or
5 defense is totally left out, the person with the burden ought
6 to have to submit it in writing or it is waived. But I would
7 be willing to change a few words in 5(b) so that if it is an
8 instruction or a definition or any defect in something that
9 is already there, you preserve by objecting.

10 And I think we could do it by changing in 5(b),
11 taking out the words "a definition, special instruction, or",
12 and so it would say, "A request is required when the court's
13 charge completely omits an entire ground of recovery or
14 defense".

15 MR. SPARKS (SAN ANGELO): Maybe you are just
16 talking about the degree of objection. You know, I object
17 because that is a bad charge, Judge, or do you have to
18 specifically tell him why it is bad, or do you have to go to
19 the next step and request it in writing in the correct form?
20 That is the degree of objection.

21 JUSTICE PREPLES: I am saying if it is an
22 entire ground, you ought to have to do it in writing.

23 Here is the problem: The charge is prepared, and I
24 have got it right there and what I think the lawyers are
25 really serious about, and I have made my best effort to

1 submit, and someone comes up with an objection on their
2 eighth cause of action, and the objection might be good or it
3 might not. I can't see it. I had to listen to it one time.
4 I have got to have my reporter read it back. And if I decide
5 to submit it, we have got to stop and have someone type it
6 up. If it has got to be submitted in writing, and I like it,
7 I just put a number on it and unstaple what I have got and
8 put it right in there.

9 What is unfair about requiring the person with the
10 burden on an entire ground of recovery or defense, requiring
11 that person to have it in writing? There is nothing unfair
12 or tricky about that.

13 MR. DAVJS: How can you draw the distinction
14 sometime between what is an entire admission or an entire
15 ground of recovery or defense? It is just not clear
16 sometimes which is which.

17 JUSTICE PREPLER: If an element of it is
18 submitted, then it is not entirely omitted. If that element
19 is necessarily referable to another ground of recovery or
20 defense, I think it is not entirely -- that it is entirely
21 omitted. I don't know if that made sense.

22 You have got a case where breach of contract and
23 DTPA and breach of fiduciary duty and bad faith and a bunch
24 of things are pleaded, and the party is only serious about
25 one or two and you have got it in the charge, and they come

1 up with an objection about the others when the jury is
2 waiting and it is all stapled and typed up, they have got
3 copies. And if I have got to change the charge and have
4 someone type up something new, there is a lot of delay, and I
5 haven't been a believe to see it in writing.

6 Under the present law, it has got to be in writing
7 substantially correct where I can put another number on it
8 and put it in the charge and have it copied and distribute
9 it. And that makes sense. And I think we ought to implement
10 that and we can omit the part that says if it is just a
11 definition or instruction you have got to tender it. If that
12 is all it is, everybody objects and that preserves it. That
13 simplifies most of the stuff you were talking about, Bill.

14 CHAIRMAN SOULES: Judge, the objection is,
15 Your Honor, you did not submit my cause of action in my
16 eighth round of recovery in my pleading. And that is the
17 objection, and you open it up and there it is. You don't --
18 it is not submitted. If you had the power, then, to say
19 submit that to me in substantially correct form, then I will
20 include it. And then the lawyer doesn't do so, he waives
21 that then. Isn't that enough?

22 JUSTICE PEEPLES: No, it is not enough because
23 we have got to wait for him to do it and he is doing it in
24 handwriting and we can't submit that, and if I like it, I
25 have got to have it typed up. There is a lot of time lost.

1 I say there is nothing unfair about requiring him to have in
2 writing something that he pleaded in his live pleading.

3 MR. TINDALL: Judge, what is wrong with
4 Rule 271, though, that would require you -- as a trial judge,
5 you could require it the day they start trial.

6 JUSTICE PEEPLES: Yes, and I think very few
7 lawyers, if any, would say I am not going to do it. What
8 they will do is they will come up with something that really
9 doesn't come close. It is not good enough to submit. That
10 complies with that rule, but there is no waiver if they can
11 make an objection at the very end.

12 MR. SPARKS (EL PASO): Would you change
13 Paragraph C at all in the past proposal?

14 JUSTICE PEEPLES: As I understand 5(c), it
15 states the rule of Scott VS. Atchison and Topeka Railway. In
16 other words, if you can reword a question or add something to
17 an instruction, then you can object or request either one of
18 those preserves.

19 MR. DORSANEO: What would you do now in the
20 delay problem if the lawyer came up and gave you something
21 that you could consider to be inadequate at the beginning
22 stage and then --

23 JUSTICE PEEPLES: Inadequate?

24 MR. DORSANEO: Yes. I mean, aren't we in that
25 same position now? If I come to you at the very end before

1 the charge is really finished and provide you with this
2 written thing, I mean isn't there a delay problem in our
3 system already, even when you need to make the request?

4 JUSTICE PEEPLES: If it is raised by the
5 evidence and if it is substantially correct, I can either
6 submit it like that or have it reworded slightly. But if all
7 he has to do is object, there is a lot more delay and I don't
8 have the benefit of seeing it in writing, which a unanimous
9 Supreme Court five years ago said is very important in an
10 opinion by Justice Kilgarland, and I agree with that.

11 MR. DORSANEO: To me, the delay problem is not
12 a significant enough concern. I understand what you are
13 saying, but I think Luke's proposal is the middle ground
14 where I would like to see things perhaps land, if we can get
15 a middle ground, but I don't know what language you had and I
16 didn't really understand the language either.

17 JUSTICE PEEPLES: Look at 5(b). If we take
18 out the words "a definition, special instruction, or" and add
19 the word "and", it would read as follows: "A request is
20 required when the court's charge completely omits an entire
21 ground of recovery or defense."

22 CHAIRMAN SOULES: What page are you on, Judge?
23 I am sorry.

24 JUSTICE PEEPLES: Three fifty-four. And I
25 suppose 5(a), we might want to say "or an instruction or

1 definition is omitted". Now, that would change existing law.
2 But I have thought it is a little unfair to require me to
3 tender an instruction or definition that the other side
4 relies on.

5 MR. DORSANEO: What you are saying is a
6 request is required when the court's charge omits an entire
7 ground of recovery defense.

8 JUSTICE PEEPLES: That makes sense.

9 MR. DORSANEO: That is the part where I have
10 the biggest problem on my own position, okay. That is where
11 I have the biggest problem with my own position. I wouldn't
12 come out that way, but that is progress to require it only in
13 that situation, in my view. That does do ample
14 simplification, I think, without creating commensurate
15 problems. That is getting closer, although if I had the
16 votes, I would vote otherwise.

17 JUSTICE PEEPLES: Pat, what do you think about
18 that, what I said?

19 MR. HAZEL: I think that is fine. You have
20 got to understand, I am not against what Luke is proposing.
21 I am trying to find a way to write the present law in one
22 rule.

23 JUSTICE PEEPLES: What we tried to do on 354
24 was put it down in black and white something that implements
25 existing law as we thought we understood it.

1 MR. HAZEL: That is all that was done for.
2 Now, Hadley has got a new way that I rewrote that seed and
3 that you have got.

4 MR. EDGAR: I will pass that out. I didn't
5 want to do that until we got where we were because it would
6 just confuse everybody.

7 MR. JONES: Mr. Chairman.

8 CHAIRMAN SOULES: Franklin Jones.

9 MR. JONES: I am trying to be as objective as
10 my judge will allow me to be. What I would like to hear from
11 is some of the other -- I would like to hear from some of the
12 trial lawyers and the trial judges in the room who actually
13 are in the courthouse.

14 Now, my recollection is when you get ready to have
15 your objections to the court's charge, you have already had
16 your charge conference, you have already sat around the room,
17 everybody has bantered about what they think the evidence is,
18 they have requested the instructions and the issues, and the
19 court puts the charge together and he says now, is this
20 everything everybody has got and they say yes. All right,
21 let's go in the courtroom on the record and get everybody's
22 objections.

23 Okay, we go in there and then some guy gets up and
24 says I want to object because the court has omitted an entire
25 ground of recovery, or the court has omitted as a fact an

1 element of the charge. As that guy is in trouble, and I
2 think that is what these district judges don't want changed.
3 And I defy anybody in this room to tell me how changing that
4 is progress.

5 It boggles my mind to say that a district judge,
6 after he struggles with a charge and gets it put together and
7 walks in the courtroom, is obstructing progress when he wants
8 to know he has got everybody's theory in the charge. Am I
9 wrong about that?

10 JUSTICE HECHT: If the lawyer says, Oh, my
11 God, that is right, you pointed that out, I see that now, I
12 didn't realize that before, I don't know what happened to
13 those issues, I thought I had them in my briefcase. Judge,
14 just give me a few minutes because this is really critical to
15 me. I have got to have these issues, and I just -- I need
16 them, and I will write them out, I will do whatever you want
17 me to. I will give them to you. And the trial judge just
18 says no, I am sorry, you are too late. I agreed with that
19 objection, you waived your cause of action and we are going
20 to the jury.

21 Don't you think there would be some problem with
22 that on appeal if a lawyer tried to submit the action and was
23 precluded from doing so.

24 MR. JONES: Judge, somewhere we have got to
25 draw the line on where crying won't get it, and in my

1 judgment, it ought to be when that charge is put together,
2 because this is -- my experience has been this has happened
3 seven and eight and nine o'clock at night and occasionally
4 eleven and twelve o'clock at night, and the parties struggle
5 to save the time of the jury. We don't like to -- at least
6 in the rural districts, have the jury waiting on them while
7 they are putting the charge together. They try to get it
8 together and have it ready for the jury at nine o'clock and
9 then do their objections at 8:30. And the gist, I think, is
10 the practical real world that these trial judges, all hundred
11 of them, are talking about, and I would like to hear if there
12 is somebody, if there is a trial judge in the room or a trial
13 lawyer in the room that really disagrees with what these
14 judges are saying.

15 MR. SPARKS (SAN ANGELO): I will say
16 something. I think when you start -- and I have had some --
17 and Judge Bunton is a great judge, but you go to federal
18 court and -- let me finish -- when justice starts being
19 sacrificed for the expediency of time -- and I think that is
20 what Judge Hecht is saying -- we may be doing a disservice to
21 our very profession. I don't think you can just say well, I
22 have got to get reelected. That jury has been sitting out
23 there for four hours, let's get something done and forget
24 justice. I don't care if that comes out right. It is a
25 little broader problem.

1 MR. JONES: We have been doing that for --

2 MR. SPARKS (SAN ANGELO): That doesn't mean it
3 has been right, Franklin, because it has been done that way.

4 CHAIRMAN SOULES: We can address the same
5 thing that I propose here and I am trying to get it typed up
6 now, we can address the omission of an entire ground of
7 recovery or defense and simply say that compliance with
8 271(1) is mandatory in order to preserve that error, and I am
9 having it done now. So at least we will have language we can
10 look at to fix that problem. And I will have it out in just
11 a moment.

12 MR. JONES: Mr. Chairman, I ask for a ruling
13 from the Chair that Judge Bunton cannot be cited as
14 authority.

15 MR. SPARKS (SAN ANGELO): Let the record
16 reflect that Judge Bunton has set such an outstanding example
17 for the rest of the judiciary, in my opinion. They may
18 follow him.

19 CHAIRMAN SOULES: Let the record reflect that
20 Judge Bunton is the judge.

21 Basically, what I am writing up now is this two --
22 let's turn a moment to -- let me see if we can get the ball
23 advanced at all here. I think on Page 385 that the words "in
24 substantially correct form" should be added to No. 1. This
25 is on Page 385.

1 MR. EDGAR: What paragraph?

2 CHAIRMAN SOULES: No. 1. It says, "The court
3 may order any party to submit to the proposed jury questions,
4 instructions, and definitions." We should insert if we are
5 going to use this at all "in substantially correct form".
6 That should have been in there all along. "At any reasonable
7 time for the discretion of the court."

8 MR. TINDALL: Shouldn't we add in writing?
9 Someone wrote me about that.

10 CHAIRMAN SOULES: In writing and in
11 substantially correct form.

12 MR. DORSANEO: Say written.

13 CHAIRMAN SOULES: Submit written proposed jury
14 questions. Okay, I am going to put "in writing" and "in
15 substantially correct form" after "definitions".

16 Now, the real problem that they are fussing about
17 is in terms of where it is located is on Page 391, because
18 having this power to order this be done, if lawyers don't do
19 it, it doesn't have any appellate consequence. And they feel
20 like they don't have enough leverage because of what is
21 written in 273(5) on Page 391. "Compliance or noncompliance
22 with Rule 271(1) shall never constitute waiver of any
23 objection to the court's charge made in compliance with Rule
24 272 or 273." Okay?

25 What I am writing up now makes two exceptions to

1 that, and one is if the judge requires it, orders you to do
2 it at the charge conference, and the other one is if the
3 objection is the omission, the failure to submit an entire
4 ground of recovery or defense. If the judge orders you to do
5 this at the charge conference to cure an objection, tender
6 something that would cure an objection, you have got to do it
7 in order to keep the objection preserved.

8 MR. BEARD: Luke, does this allow the court to
9 argue the charge to both sides of the case, not limited in
10 what he can order?

11 CHAIRMAN SOULES: He can order anybody to do
12 anything, but he orders the objecting party to cure the
13 objection.

14 MR. SPARKS (SAN ANGELO): So at the beginning
15 of the trial, a judge orders a defense lawyer to submit him a
16 substantially correct charge on the whole case?

17 CHAIRMAN SOULES: Could do that.

18 MR. SPARKS (SAN ANGELO): And he doesn't order
19 the plaintiff's lawyer to. So therefore, the plaintiff's
20 lawyer gets to preserve all of his objections -- all of his
21 problems by objections, but the defense lawyer has the
22 problem of submission in writing in substantially correct
23 form.

24 CHAIRMAN SOULES: No.

25 MR. SPARKS (SAN ANGELO): It seems reasonable,

1 but I am wondering.

2 MR. DORSANEO: How about the one exception on
3 the ground of recovery?

4 CHAIRMAN SOULES: That is fine.

5 MR. DORSANEO: I am willing to go with that,
6 if that will satisfy COAJ.

7 CHAIRMAN SOULES: Take out the middle
8 complaint. Let me get it out here on the table. Holly is
9 running it now.

10 MR. SPARKS (SAN ANGELO): One of the problems
11 I have got is if the judge doesn't want to draft the charge,
12 then to achieve justice, you have to, in writing, submit
13 substantially correct form. If a judge is willing to work,
14 then you just have to object. It is the working judge -- you
15 shouldn't be punished because you have got a good judge that
16 wants to work. I am having problems with the concept.

17 CHAIRMAN SOULES: All the judge has to do is
18 ask for help, order you to help him, whether he is a working
19 judge or a lazy judge.

20 MR. SPARKS (SAN ANGELO): What I am saying is
21 a working judge is going to have his own charge. He is going
22 to say have you got any objections? He is not going to order
23 anybody to do it. A lazy judge says you-all do that for me.
24 When he says that, I will say you better do it right or you
25 are in a different shape than with a judge that does work. I

1 think you ought to have different degrees of justice out here
2 realizing there are good lawyers and bad lawyers and we are
3 really looking for justice.

4 MR. BRANSON: It is nice to have them take the
5 time to look at what you got in case they might vote with
6 you.

7 MR. JONES: I am being moved a little bit
8 further into Judge Hecht's corner. Now, there has got to be
9 some point in time where you address this problem.
10 Otherwise, I don't think the judge should be allowed to make
11 authority to draw the battle lines before trial, maybe even
12 the day of trial. Probably, if we are going to draw a line
13 on where the judge can draw the line, it should be at the
14 close of the evidence.

15 MR. DORSANEO: Yes.

16 MR. JONES: And I don't think any party ought
17 to have to anticipate every issue they want submitted to the
18 jury before the evidence is in. So I think that ought to
19 enter into our thinking.

20 JUSTICE PREPLER: Luke, under your proposal,
21 what would prevent a judge from saying routinely, in every
22 jury case, the day before the charge is prepared, lawyers,
23 you will have your requested issues on my desk at
24 nine o'clock in the morning?

25 CHAIRMAN SOULES: Nothing would prevent that.

1 JUSTICE PEEPLES: But what we have right now
2 is the law says that for the judge, says you have them in
3 here if you are serious about it or it is waived. What is
4 wrong with having the rules of procedure say it instead of
5 making the judge say it?

6 CHAIRMAN SOULES: Again, my practice is
7 usually at least by the time the trial begins to wind down,
8 the judge asks for your questions and instructions.

9 JUSTICE PEEPLES: People submit them if they
10 are serious about them because they waive it if they don't.

11 CHAIRMAN SOULES: Not at that point.

12 JUSTICE PEEPLES: By the time of submission,
13 they waive it if though don't.

14 MR. BEARD: I don't think they are projecting
15 the issues before they start for trial.

16 JUSTICE HECHT: It is never that simple. As
17 you know, people request things but what actually gets --
18 falls through the drafting process or gets given or
19 compromised on is something different, and that is the point
20 where you start to worry about preservation of error.

21 If I might summarize the debate for a second, we
22 started on this because we thought it was a good idea to
23 simplify the rules period, and then we said, well, here is
24 some charge rules, they are pretty complicated, let's
25 simplify them. That seemed like a good idea. Then we said,

1 well, what is the law? We will just write down what the law
2 is, and then we will have it in one place. So we spent two
3 hours arguing about what the law is and nobody could agree.

4 So we said, well, then let's put down what the law
5 ought to be. And then we will have that in one place. We
6 spent another two hours arguing about that and we couldn't
7 agree.

8 The problem is if you have to request in writing
9 anything to preserve error, I do not understand why the
10 prudent lawyer is not going to request everything that he
11 objects to, because otherwise, he is worrying about an
12 appeals court disagreeing with him about whether it falls
13 into a category or not.

14 Now, after hours of discussion, that is where we
15 came out. We said this ought not to be a trap for lawyers
16 who are trying their case and trying to preserve error, and
17 that is why we came up with the rule that we did, and it was
18 after the weariness of having debated it fully that we
19 finally decided we couldn't come out any other way.

20 Then we get letters, not from a hundred trial
21 judges by my count, but more like 15 or 20. And you are
22 welcome to read the letters. I would say they are fairly
23 strong in their -- some of their wording, but none of them
24 reflect the kind of agonizing discussion that this Committee
25 had gone through now for some hours in trying to decide how

1 do you preserve error in the court's charge.

2 And so, I mean, we swing and we swing, but if the
3 trial judges -- if the trial judges who have complained have
4 complained that they are not going to be able to get stuff in
5 writing anymore in order to make up the charge and it is not
6 fair to compare them to federal courts who have all this
7 help.

8 Well, if there is any way we have taken that out of
9 these charges, then we ought to put it back in because I
10 think it was the intention of the Committee that the trial
11 judges ought to get all the help they can get in writing as
12 often as they want on what is in the charge. The only
13 question that the discussion addresses is should a lawyer
14 lose his right to appeal on a certain point because he didn't
15 jump through the hoops the right way at what is, I think
16 everybody agrees, one of the pressure points of the trial,
17 and that is the preparation of the charge.

18 And it seems to me that the better rule is that a
19 lawyer ought to get to state his objection in court. It
20 ought to have to be clear and unequivocal. If the judge
21 wants to see it in writing, they can take time to go write it
22 down, but that he ought not to have to do any more than that
23 to go back to his office and know that he either preserves it
24 or it isn't preserved.

25 MR. ADAMS: My question on that is is that

1 true for the party who has the burden of proof as
2 distinguished? I mean, it seems like to me that the party
3 with the burden of proof should have the duty to come forward
4 with the substantially correct construction of the issue or
5 whatever else, that he cannot even object to it in the sense
6 that a thing about some wording in it. But if he has got --
7 but the thing he is trying -- he has got the burden of proof
8 on, he ought to come forward. I think it is the same thing
9 they were talking about when we started. It just seems like
10 we are overly complicating this thing by leaving out the
11 element of the burden of proof.

12 JUSTICE HECHT: I think, to summarize, the
13 discussion -- this is not a fair summary -- in a general
14 charge, you can't always tell who has got the burden of
15 proof.

16 MR. LOW: The way we did that was whether it
17 could properly be construed as a part of your case, defense,
18 or whatever.

19 JUSTICE HECHT: Do you want your right to
20 appeal to rest on that kind of a characterization? You are
21 going to be arguing in the court of appeals, yes, this is
22 properly a part of the case, no, it is not properly a part of
23 the case.

24 MR. LOW: Generally a lawyer ought to know
25 that much about his case or his client is in bad trouble to

1 start with.

2 MR. BEARD: There is no burden of proof on
3 instructions.

4 MR. LOW: Well, instructions, there is not a
5 burden of proof on that, but you might have a burden of
6 proof, say, on negligence and the other side, too. So you
7 would tender them.

8 MR. SPARKS (SAN ANGELO): What about --

9 MR. LOW: Could very well be the same.

10 CHAIRMAN SOULES: Pat Hazel.

11 MR. HAZEL: I keep -- as I hear you, it seems
12 to me you are talking about two separate phases or functions.
13 One of them is to guide the trial judge in trying to frame
14 the court's charge. That is -- if you have got something
15 where the trial judge is going to order folks to submit your
16 stuff in writing to you, that ought to be back in the rule on
17 the framing where I think you have got it.

18 The other is complaining about the court. Once the
19 court has done it, now I want to make my complaints and I
20 want to preserve them for appeal. To me, that is a separate
21 function, and that is where, if you are going to leave in --
22 personally, I like the idea of simplifying it and getting
23 just the objections. But if -- that is where the rule ought
24 to say. But now, if the trial judge orders, hey, I want your
25 objections put in writing and I want them in substantially

1 correct wording for me to rule on them, then the trial judge
2 can, in his or her discretion, do that. And it would be a
3 separate function.

4 I wanted all this stuff to start with to help me
5 how I am going to draft mine, but now we are in a different
6 stage. I have drafted. Here is what I am going to the jury
7 with. If you don't complain, objection would do it. But if
8 a trial judge -- and I would put in the discretion not just
9 if he wants to or whatever that language is, because that a
10 little bit worries me because they might just say, well, I
11 will show you, because if a trial judge said put everything
12 in, that might be exceeding discretion to do a thing like
13 that. But to be -- able to then drop that stuff. That all
14 ought to preserve the error. I mean, if you don't do it, it
15 ought to preserve.

16 It seems to me you are talking about two different
17 functions -- guiding the judge and framing the thing to start
18 with, and then complaining once the judge has done it to
19 preserve error. That is all I was trying to address and the
20 Committee on the Administration of Justice was trying to
21 address was that last one.

22 And I like the -- personally, I like the idea of
23 the simplification, but I think the judge, in order to
24 satisfy what these trial judges apparently are complaining
25 about primarily, they are saying "Look, we are afraid of

1 being sandbagged," as I see it. I don't want to go in there
2 and have a bunch of objections that may be right and saying I
3 ought to ask a question or submit a question or definition or
4 instruction and I don't see it. I want to see it before I do
5 it. And I think they ought to have the power to order that
6 be done. And that ought to be good on appeal -- I mean
7 required for appeal.

8 MR. BRANSON: Justice Hecht, from a trial
9 judge's standpoint, would it have been just as easy to sort
10 out a properly formed objection as it would have to see the
11 instructions in front of you?

12 JUSTICE HECHT: Yes, it would have been just
13 as easy, and if there was any doubt in my mind about an
14 objection, I would simply say, well, let's take a break,
15 write it out. If it is complex, you are going to have to
16 write it out. You would just say have you written it out?
17 Yes, it is right there in your stuff. Now, have you written
18 it out? No, I haven't written it out. Well, would you write
19 it out for me.

20 I don't want the trial judge to be sandbagged,
21 either, but we have tried to cover that in this rule by
22 saying it has got to be an exact, explicit, specific
23 objection so that they won't get sandbagged. And if there is
24 any question in their minds, all they have to do is say is an
25 exact -- submit it in writing. And then they can look at it

1 there. I just don't see why the right to appeal ought to be
2 conditioned on jumping through these kind of hoops.

3 CHAIRMAN SOULES: I passed around a one-page
4 typewritten item that fixes two of the problems, if we want
5 to do it that way, that have been raised, Pat, that the trial
6 judge should have some neutral party to try to get something
7 in writing whenever an objection has been made that the trial
8 judge things may have some particular objection. That is
9 B -- A, and then the B is Judge Peeples' concern that when
10 there is a complete omission of a ground of defense that that
11 should not be preserved simply by objection, which of course,
12 we voted again house to one, I think he being the one last
13 time.

14 But this cures those two problems, maybe. At least
15 it is an attempt. Franklin.

16 MR. JONES: Can I make one comment,
17 Mr. Chairman? I apologize for being out of the room
18 temporarily while this was being discussed.

19 MR. EDGAR: Can't hear you, Frankling.

20 MR. JONES: But I want to make a comment in
21 this matter that may have been touched on while I was out of
22 the room, I apologize if it has, but I think it is a point
23 that will be dear to every trial judge, well, no, not trial
24 judge, but every trial lawyer in the room, and that is that
25 we don't want a rule, I don't think, that says a trial judge

1 can call for requested instructions, definitions and what all
2 the week before trial, the day of announcement, or day of
3 docket call, or anything like that on pain or forfeiture of
4 waiving.

5 And I don't know whether that has been discussed or
6 not, but Judge Hecht made the point you don't want to do that
7 to a busy trial lawyer. At some point after the close of the
8 evidence, (inaudible) the lawyers be burdened with that not
9 stating something it is the consensus of this Committee. If
10 not, I would like to get a consensus.

11 CHAIRMAN SOULES: I think it is a consensus,
12 and these rules which we voted to adopt protect you in that
13 regard. You have no appellate consequence for doing anything
14 until the charge conference.

15 MR. JONES: We are talking about changing
16 those rules.

17 CHAIRMAN SOULES: No, I am talking about the
18 changes that we have -- yes, but the changes that are being
19 discussed won't affect the fact that you are not stuck with
20 anything until the charge comes. At the charge conference,
21 if you don't act, you waive. But up until that point,
22 whatever you do, you are in safe harbor in terms of appeal.
23 You don't have any appellate consequence.

24 MR. JONES: (Inaudible).

25 COURT REPORTER: Can't hear.

1 CHAIRMAN SOULES: Franklin, if you would speak
2 up. I am sorry, we have got this thing running here and she
3 couldn't hear what you said.

4 MR. JONES: I am just saying a lot of judges
5 have required you to do this on the day of docket call and,
6 you know, you start drawing charges in cases that don't
7 settle, then what?

8 CHAIRMAN SOULES: What I have passed around
9 omits something I underlined later, and that is where it says
10 if it omits entire ground of recovery or defense, compliance
11 with 272 is mandatory. That really shouldn't be worded that
12 way. It should say, "Compliance with Rule," whatever it is,
13 "271(1) prior to the jury being charged is mandatory." So
14 that it moves that point to the charge conference rather than
15 back at the time Franklin is talking about. I did that
16 innerlineation a minute ago.

17 MR. EDGAR: Where did you underline something?

18 CHAIRMAN SOULES: You see in B where it says
19 compliance with 271(1) is required, compliance with 271(1)
20 prior to the court charging the jury is required, so that it
21 doesn't go back and root into what you tried to give the
22 judge before the trial started somewhere midway. You are not
23 stuck with that. Maybe it needs a little bit more work than
24 that. Elaine Carlson.

25 MS. CARLSON: What about using inclusion in

1 both your proposed 5(a) and (b) within a reasonable time
2 after the close of the evidence? Put that in (a) after the
3 word objection in the last sentence. To preserve error, you
4 have got to do this within a reasonable time at the close of
5 the evidence.

6 MR. BEARD: You don't know when you are going
7 to get the charge. You work on it and work on it and say,
8 okay, meet at 8:30 in the morning and you will see the final
9 charge. You have got to see that final charge.

10 CHAIRMAN SOULES: I think that A is covered
11 because a judge is going to order you to do it. He will
12 probably put a time in and you have got to comply with the
13 order.

14 MS. CARLSON: That was Franklin's concern, as
15 I understand.

16 MR. SPARKS (SAN ANGELO): What if you like B
17 but you don't like A?

18 CHAIRMAN SOULES: That is another mark up is
19 to take A out and leave B only in, and I think that is
20 something that maybe Judge Peeples favors. I am not sure.

21 MR. DAVIS: Take B out and leave A only.

22 CHAIRMAN SOULES: Well, B, the problem of an
23 entirely omitted ground of recovery or defense has been a
24 problem, but it is serious.

25 MR. DAVIS: My problem is being able to always

1 identify when that condition exists. And I think that is
2 where you get into differences of opinion and there you are
3 again. It is easy to put on words, but then you get that in
4 a context and maybe it is and maybe it isn't, so what do you
5 do? Well, you submit it. It isn't as clear as it appears by
6 the words.

7 CHAIRMAN SOULES: Does the Committee feel that
8 what has been drafted there at least speaks to the problem
9 that we have been trying to grapple with, whether we adopt
10 them or not?

11 MR. DORSANEO: I think it identifies the
12 problem and potential solutions. I have a problem with both
13 proposals, and I end up on balance coming back to my initial
14 point of view that probably the exceptions create
15 difficulties. I think that the second objection may create
16 fewer difficulties statistically, but I don't know if that is
17 so. Just talking about that, and I am not sure about it,
18 whether that is helpful or harmful.

19 CHAIRMAN SOULES: Where I am headed is if
20 these do address them, then we could vote either A, not to
21 change the rules that we have sent to the court, leave them
22 like they are, B, change to include both of those exceptions,
23 or C, change to include just one of them and not the other.
24 But I don't know if we are there.

25 MR. BEARD: I am ready to move that we keep

1 the rule that we proposed at our last one be the one we have
2 submitted.

3 CHAIRMAN SOULES: Is there a second?

4 MR. DORSANEO: I will second that.

5 CHAIRMAN SOULES: Moved and seconded. Is
6 there any discussion that we should have about that that is
7 new, something that hasn't been discussed, because we
8 understand the discussions up to now to have been on that
9 topic anyway.

10 MR. EDGAR: I thought earlier today we almost
11 unanimously determined that a request was necessary.

12 MR. DORSANEO: Except for the substantially
13 correct form.

14 MR. EDGARD: But that is not what Pat just
15 said.

16 MR. TINDALL: I think we have changed our
17 position.

18 CHAIRMAN SOULES: Well, that is right. We did
19 that.

20 MR. BEARD: With that change --

21 CHAIRMAN SOULES: What change? That changes
22 everything. That is what we have been debating for the last
23 two hours.

24 MR. BEARD: I go back. My motion is to
25 reaffirm what we submitted to the bar.

1 CHAIRMAN SOULES: But put in the words "in
2 writing and in substantially correct form" in 271(1). We
3 approved that.

4 MR. TINDALL: That is not controversial.

5 CHAIRMAN SOULES: That was not controversial.

6 MR. JONES: If I understand, Mr. Chairman,
7 this motion is to undo what we did thirty or forty minutes
8 ago.

9 MR. BEARD: That is right.

10 MR. TINDALL: What we did in August.

11 MR. BEARD: I would just say that I think that
12 the judge may protect himself with appropriate orders. That
13 was one of the things that bothered me when you said they
14 didn't want to draft the charges. So in light of the fact
15 that I believe the judge can protect himself in that, I move
16 that motion.

17 JUSTICE DOGGETT: Is the effect of your motion
18 to leave it in the same form that all these trial judges have
19 written us complaining about?

20 MR. BEARD: Yes. We just have to explain to
21 them they can protect themselves by making this a
22 requirement.

23 MR. DAVIS: We are just recommending. You are
24 the ones that do it.

25 CHAIRMAN SOULES: Sam Sparks, El Paso.

1 MR. SPARKS (EL PASO): Paragraph one on 271 on
2 Page 385, does that speak to -- that the court may order any
3 party to submit blah, blah, blah at any reasonable time for
4 the convenience of the court? And it doesn't seem to me that
5 that speaks to Jones' concern about submitting, you know,
6 before the trial at docket call. I am just a little
7 concerned about that time definition -- any reasonable time
8 for the convenience of the court. That could be --

9 MR. BRANSON: Right after the close of
10 evidence.

11 MR. SPARKS (EL PASO): I would love that.

12 MR. TINDALL: When all parties have rested.

13 MR. SPARKS (EL PASO): The question is what
14 does that mean.

15 CHAIRMAN SOULES: The function of 271(1) is
16 just is to give the trial judge assistance in proposing a
17 charge, and it has no appellate consequence whatsoever unless
18 we give it appellate consequence by the A or B that is now in
19 the room. This is just telling the judge anytime you want
20 some help from the lawyers on what they think the charge
21 ought to be, you can ask for it, you can order them to give
22 it to you. John O'Quinn.

23 MR. O'QUINN: First, I need to ask a question.
24 What are we voting on adopting? Are we voting on adopting
25 what is on Page 354 --

1 CHAIRMAN SOULES: No.

2 MR. O'QUINN: Or are we voting on adopting
3 this thing I was handed?

4 CHAIRMAN SOULES: No.

5 MR. TINDALL: 385, John. It was a handout.

6 CHAIRMAN SOULES: We are voting to adopt
7 pages -- the rules that appear at pages -- voting on whether
8 to adopt the rules that appear at the following pages:

9 MR. EDGAR: Pages 385 to 400.

10 CHAIRMAN SOULES: 385 and sequentially through
11 400, which is what the Committee voted out in August,
12 exactly.

13 MR. JONES: What we all voted against
14 40 minutes ago.

15 MR. O'QUINN: And I haven't had a chance -- I
16 have watched -- the discussion caused me to read what is on
17 Page 385 through 391. You referenced 391.

18 MR. EDGAR: Can't hear you, John.

19 MR. O'QUINN: Good point. Let me ask the
20 question correctly. Under the rules that we are now voting
21 to adopt, when do you have to request in order to preserve
22 your right?

23 CHAIRMAN SOULES: You never have to request

24 MR. O'QUINN: Never have to request.

25 CHAIRMAN SOULES: That is right.

1 MR. EDGAR: Nobody does.

2 CHAIRMAN SOULES: That is past motion.

3 MR. O'QUINN: All you have to do is object.

4 CHAIRMAN SOULES: That is right.

5 MR. O'QUINN: No matter what it is and no
6 matter whose burden it was.

7 CHAIRMAN SOULES: That is right.

8 MR. O'QUINN: I would like to offer an
9 amendment. My amendment would be that provided that if the
10 judge requests a party to submit an issue or an instruction
11 or a definition in substantially correct form to cure his
12 objection, that the party shall do so.

13 CHAIRMAN SOULES: Okay, that is the A part of
14 what I passed around a minute ago.

15 MR. O'QUINN: That has already been voted on?

16 CHAIRMAN SOULES: No, it hasn't been voted on.
17 Okay, there is an amendment. Is that an acceptable
18 amendment? If it is not, we will vote on it.

19 MR. BEARD: That gets us back in the same
20 place, we have to submit our objection if it is not precise
21 enough. The judge satisfies all your objections by saying
22 submit it in substantially correct form.

23 MR. O'QUINN: Pat, the reason I propose that
24 is because I think that solves the complaint of judges. If
25 they want to know, they have got some mechanism whereby when

1 it is eleven o'clock at night and somebody is making an
2 hour's worth of objections, they can say, on that one, I want
3 you to write it out so I can look at it and see exactly what
4 it is you want in the charge. Apparently, that is a concern
5 of the trial judges. As a lawyer, that doesn't cause me any
6 problems. If the judge wants me to do that, wants to make me
7 do that, I am happy to do it.

8 MR. DAVIS: It does concern some lawyers, as
9 the judge may require you to draft all of the issues.

10 CHAIRMAN SOULES: That is a potential abuse.

11 MR. DAVIS: That is the other side of the
12 coin.

13 MR. O'QUINN: If he wants me to draw the whole
14 charge, I will be happy to.

15 MR. BRANSON: Is that the best thing that
16 could happen to you, Tom.

17 MR. O'QUINN: If the judge tells me, John, you
18 draw the whole charge, plaintiff and defense, that is a plus
19 for me. I will be happy to do it.

20 MR. SPARKS (SAN ANGELO): Except to this
21 point. When you start to appeal, you have got a different
22 burden than the person that just gets to object to preserve
23 everything. You have got to have written it perfectly or you
24 have lost your right to comply.

25 CHAIRMAN SOULES: Not under these rules.

1 MR. SPARKS (SAN ANGELO): Under the proposed
2 rule of A, if the judge tells you to submit it in
3 substantially correct form and you do not, then an objection
4 simply takes care of all of it?

5 CHAIRMAN SOULES: On a particular question,
6 the answer to that is no.

7 MR. O'QUINN: Why is Sam not right that if a
8 judge makes me draw the defendant's issue instead of just
9 object to the way it is worded or object to the fact it is
10 not in there and I don't do it in substantially correct form,
11 then I have assumed a higher burden. I have now got a higher
12 burden than if I merely objected to it. What is your
13 solution to his argument? For me, John, you are making a big
14 appellate problem for yourself, John, by offering that
15 amendment.

16 MR. SPARKS (SAN ANGELO): It is the placing of
17 the burden that I am complaining about. I think a trial
18 court under the proposed rule can put a different burden on
19 one party as opposed to the other.

20 CHAIRMAN SOULES: Okay, if we are talking
21 about a particular objection, not just the judge saying do
22 the whole charge. He has picked up on a particular
23 objection, which is the way that is written, then --

24 MR. O'QUINN: I don't like the way that they
25 submitted their defense on negligence, contributory

1 negligence, for example. He says, well, John, you don't like
2 it, you write it out the way you think it ought to be written
3 out.

4 CHAIRMAN SOULES: First of all, you have
5 waived the complaint because you said you didn't like it.

6 MR. O'QUINN: I said I don't like it for these
7 specific, definite reasons, et cetera.

8 CHAIRMAN SOULES: Then and the judge says,
9 okay, write out the cure, and then you would have to write
10 out the cure, or you would waive your objection.

11 MR. O'QUINN: And Sam says that is going to
12 make it harder for me to win on appeal than if I just made a
13 real good specific objection.

14 MR. BEARD: Luke, I don't accept the
15 amendment. Let's just get this issue voted on.

16 CHAIRMAN SOULES: Are we ready to vote on
17 that? Okay, how many are in favor of exception A which would
18 require to preserve appellate error in a charge complaint
19 that you request in substantially correct form anything that
20 a judge requires you to submit in that form?

21 MR. BEARD: That is not my motion. My motion
22 is to adopt --

23 CHAIRMAN SOULES: I have got to vote on the
24 amendment first.

25 MR. BEARD: You are right.

1 CHAIRMAN SOULES: How many are in favor of
2 making that exception that John proposes? One, two, three --
3 let me count them. One, two, three, four, five, six, seven.
4 How many oppose it? One, two, three, four, five, six, seven,
5 eight, nine oppose it. So that is defeated.

6 Now, does anyone want to propose the adoption of B
7 as an amendment?

8 JUSTICE PEEPLES: Luke, I will be honest, I am
9 against Pat's motion, but -- and if we vote it down, I think
10 we ought to, you know, maybe go with your 5(a) and (b). I
11 mean, that is half a loaf.

12 MR. BRANSON: We get to the underlying motion
13 if we are --

14 MR. EDGAR: Pat has a motion on the floor and
15 you are asking us to vote on something that is not on the
16 floor.

17 CHAIRMAN SOULES: I stand corrected. All
18 right, how many are in favor of Pat's --

19 MR. O'QUINN: Point of information. Under the
20 rules we are fixing to vote on, if my objection is that a
21 defense was not submitted in any way, some pled defense
22 didn't get itself in the charge, do I have to object to that?

23 MR. McCONNICO: Sure.

24 MR. O'QUINN: I got to read the defendant's
25 pleading and make sure which ones got in the charges.

1 CHAIRMAN SOULES: No, no, because you are not
2 going to complain of that omission on appeal anyway. You are
3 happy that it was omitted.

4 MR. O'QUINN: That seems to be what your R was
5 about.

6 CHAIRMAN SOULES: No, what it is is you are
7 the plaintiff and you have got a pled ground and the judge --
8 and you don't give the judge any question about it and the
9 judge then says --

10 MR. O'QUINN: I can't say -- okay.

11 CHAIRMAN SOULES: All you have got to do is
12 object.

13 MR. O'QUINN: You didn't submit my theory
14 under products liability.

15 CHAIRMAN SOULES: I don't know how specific
16 you have got to get, but the objection alone will take care
17 of it.

18 MR. O'QUINN: Okay, and I got an appeal.

19 CHAIRMAN SOULES: And you got an appeal on
20 that point.

21 MR. DORSANEO: Maybe your objection would need
22 to be more detailed.

23 MR. O'QUINN: More detailed, assuming it was a
24 good objection.

25 CHAIRMAN SOULES: But it doesn't have to be in

1 writing.

2 MR. EDGAR: By the same token, the defendant
3 could say, Your Honor, I object on the grounds you didn't
4 submit my theory of statute of limitations in sufficient
5 detail, and that preserves error.

6 MR. BRANSON: But you don't have to express
7 statute of limitations.

8 MR. O'QUINN: Under these rules, the rules we
9 have always worked under, if the party relying on that ground
10 of recovery or that defense is going to appeal, he has still
11 got to submit something.

12 CHAIRMAN SOULES: Under these rules, a written
13 request is not necessary to preserve any error whatsoever.
14 An objection is all it takes in any content.

15 MR. O'QUINN: I got you.

16 CHAIRMAN SOULES: That is just to make it
17 perfectly plain.

18 How many -- those in favor of Pat's motion, which
19 is to reaffirm and that we recommend to the court our August
20 work product? Those in favor show by hands. One, two,
21 three, four. Those opposed? One, two, three, four, five,
22 six, seven. That is the majority. Now, what are we going to
23 do? What are we going to do? Just leave the charge rules
24 the way they are?

25 MR. MORRIS: Why don't we leave it and study

1 it for another year? We have excellent minds all around the
2 room in terrible disagreement. I know you feel frustrated.

3 CHAIRMAN SOULES: I don't feel frustrated.

4 MR. MORRIS: I think the whole Committee
5 probably does. I think we need to study it a little more is
6 what I am seeing. People on all sides of the docket and all
7 kinds of people who are capable of doing -- thinking and have
8 a lot of experience and there is so much disagreement, surely,
9 we can, as a Supreme Court Advisory Committee, come together
10 on this. But I think it needs more work.

11 MR. DORSANEO: Be back to the same place.

12 CHAIRMAN SOULES: We can't get off this thing
13 here.

14 MR. DORSANEO: We understand what the issue
15 is.

16 CHAIRMAN SOULES: Let me try to get a
17 consensus now.

18 MR. EDGAR: May I make a motion?

19 CHAIRMAN SOULES: Yes, sir.

20 MR. EDGAR: I move that we -- I am concerned
21 about the wording, but I move that we adopt the spirit of
22 your proposal that you passed out to us which includes both
23 5(a) and 5(b).

24 CHAIRMAN SOULES: All right, how many would
25 approve the rules, the August work product, if those two

1 changes were made?

2 MR. COLLINS: Point of inquiry. This is not
3 an official vote, this is just a pole?

4 CHAIRMAN SOULES: I am trying to see if we can
5 advance the ball any further or if the game is over. If it
6 is over, it is over, but I don't want to leave it without
7 being certain that that is it.

8 If those two changes were made, maybe not exactly
9 in those words, but in substance.

10 MR. COLLINS: These changes right here?

11 CHAIRMAN SOULES: Yes. Where the judge could
12 require you to submit, one, and two, if it is an entirely
13 omitted ground of recovery or defense.

14 JUSTICE RIVERA: Have to change to 271(1).

15 CHAIRMAN SOULES: Yes, the two -- and that
16 would be done anyway.

17 MR. REASONER: Luke, I wonder if I could ask
18 Judge Peeples a question. Judge, I guess 5(b) bothers me
19 because it seems you get into the metaphysics of trying to
20 figure out what an entire ground of recovery or defense is
21 and the whole business of necessarily referrable. And
22 wouldn't your concerns about having sufficient leverage over
23 the lawyers to force them to help you be entirely satisfied
24 by 5(a)?

25 MR. DORSANEO: You are just left with your

1 timing problem.

2 MR. REASONER: You can avoid that, just ask
3 for them at the outset of the trial.

4 JUSTICE PREPPLES: 5(a), okay, the one Luke
5 submitted?

6 CHAIRMAN SOULES: Right.

7 MR. REASONER: I am sorry, yes.

8 JUSTICE PREPPLES: Well, I suppose so, but if a
9 judge has the authority to do that in every case, that is
10 what the rules do right now. I just don't see how that
11 advances the ball very much at all.

12 MR. REASONER: The problem with 5(b) is that
13 you can -- I can sit there and object, and then somebody is
14 going to argue and wait a minute, you waived it because there
15 was a complete omission here of this ground of recovery or
16 defense, and nobody tells me that until I get in the court of
17 appeals.

18 JUSTICE PREPPLES: I just know that as a trial
19 judge it was a great comfort to me knowing that I had
20 winnowed the case down to what I had in the charge, and if
21 they didn't give it to me in writing and if it was something
22 that was pleaded, it is waived if it was an independent
23 ground. And I do not see the problem with telling what is an
24 independent ground of recovery and defense as opposed to an
25 element or fragment of something else. I just don't.

1 MR. REASONER: Perhaps I was warped by having
2 Gus Hodges as a father-in-law, but I never understood
3 necessarily referrable. I always thought you played it round
4 or flat, if there was enough money involved.

5 MR. JONES: He says there is another way.

6 MR. REASONER: You know, he has probably got
7 the better side. Well, you know, it seems to me in federal
8 court, you never have a problem because a lawyer who wants
9 something -- I mean, they are going to submit whatever the
10 judge wants them to submit. I am frankly surprised that that
11 doesn't happen in state court. I mean, it certainly does.
12 You know, it wouldn't occur to me not to give a judge
13 whatever he wanted in writing.

14 JUSTICE PEEPLES: You are not handling volume
15 litigation like a lot of lawyers are.

16 MR. REASONER: I understand your point,
17 although much of your concerns, I would think, are now
18 alleviated by pattern charges, so that a lot of what we are
19 arguing about here is all well-defined, I would think.

20 CHAIRMAN SOULES: If we --

21 MR. O'QUINN: Ask a question to get
22 information.

23 CHAIRMAN SOULES: Maybe it would still be
24 imperfect, but how many would find this revision acceptable
25 if we made those two changes?

1 MR. DAVIS: As they are here without any
2 additional --

3 CHAIRMAN SOULES: Well, the words may not be
4 perfect, but in substance.

5 MR. JONES: You have to have time limit in
6 here, Mr. Chairman.

7 MR. DAVIS: Example, any time limit on when
8 the judge can require you to make the written charge, that
9 would be --

10 CHAIRMAN SOULES: There is no time limit on
11 it, but there is no appellate consequence to not doing it as
12 long as you get it done by the charge conference.

13 MR. DAVIS: You are saying the judge can tell
14 you to do it a week before the trial and you say, no, I ain't
15 going to do it, and you don't have to worry on appeal because
16 you didn't do it until --

17 CHAIRMAN SOULES: Franklin, I underlined
18 before compliance with 271(1) before the court charges the
19 jury.

20 MR. EDGAR: That pertains to Subparagraph B
21 and not to A, though, so you need to have a time limit in A,
22 as, well, don't you?

23 CHAIRMAN SOULES: Okay, it would be to both.

24 MR. DAVIS: Then you have a time limit on A,
25 all right.

1 CHAIRMAN SOULES: I understand that, and I
2 intended that.

3 All right, how many would be -- would find these
4 rules acceptable with those two changes?

5 MR. SPARKS (SAN ANGELO): If you combined it
6 with something like Buddy Low's, Luke, that said the party
7 depending upon on appeal or something.

8 CHAIRMAN SOULES: That is a completely new
9 approach than this. So that would mean --

10 MR. LOW: It would not be, Luke, if you put up
11 here that the trial court could order. I mean, there is a
12 big segment at a complaint, a trial judge shouldn't be able
13 to make me draw substantially correct what the defendant has,
14 and if I don't, then I am in error whereas an objection
15 ordinarily is sufficient.

16 CHAIRMAN SOULES: How do we fix that? Maybe
17 that is a --

18 MR. LOW: But the trial courts could order a
19 party with regard to something that is proper, which he is
20 properly a part of his claim, cause of action, or defense, is
21 properly a part of it. You can't always tell, negligence may
22 be both of them, but a good lawyer is going to have prepared
23 something if everything that is properly a part of his case,
24 if he feels it is properly a part. So if it is properly a
25 part of your case, the judge ought to say, okay, you draw it.

1 Say the judge submitted something different than
2 what you wanted, but if it is the other person's burden or
3 something that is properly a part of their case, lawyers
4 don't want to be having to draw something in substantially
5 correct form.

6 Now, I don't have that language with me. I
7 prepared and did some work on the rules. I think I sent a
8 copy to you, didn't I, Justice Hecht, a year ago where it is
9 properly a part of your claim, defense, or cause of action, I
10 think was the term I used. Now, and if you have any question
11 whether it is, then that is --

12 MR. DORSANEO: Mr. Chairman, I think that
13 could be drafted and that makes sense as long as the sequence
14 involves charge conference, objections, the judge says I
15 would like to see that in writing, it is properly part of
16 your case, submit it in writing to protect the objection but
17 not way before -- a week before the trial -- but as part of
18 just that sequence happening, just like that. That would let
19 you, in effect, do what you can't do now is combine
20 objections and requests so you don't get into the problem of
21 you used the wrong gun.

22 MR. LOW: Two points, time limit and not
23 making somebody draw something in correct form that is not
24 even their burden of proof.

25 MR. SPIVEY: Mr. Chairman, could we get a vote

1 on -- a show on your request?

2 CHAIRMAN SOULES: Okay, what --

3 MR. DAVIS: How about as restated?

4 CHAIRMAN SOULES: With this most recent
5 discussion, I am having a hard time really getting a grasp on
6 it enough to articulate what it really is that we are voting
7 on. John O'Quinn.

8 MR. O'QUINN: Are you proposing, Luke, that we
9 add something to our existing -- apparently, we voted down
10 the massive redo of the existing rules, didn't we, nine to
11 seven? That is what it seemed like we just did. Where we
12 are sitting right now, it seems to me we have got our
13 existing rules with no changes. That seems to be what the
14 vote was.

15 CHAIRMAN SOULES: That is a really not what we
16 voted, because almost unanimously the reorganization of these
17 rules is supported in the public and the judges and the
18 lawyers and this Committee and by the court. We really voted
19 down the -- the problem about how to preserve error is the
20 only --

21 JUSTICE RIVERA: Voted down the change that we
22 proposed last year.

23 CHAIRMAN SOULES: But the reason that it has
24 been voted down is because of the preservation of error
25 aspect of it.

1 MR. O'QUINN: Not because of the other thing.

2 CHAIRMAN SOULES: Everything else people
3 support widely. As a matter of fact, there is no opposition
4 to it.

5 MR. O'QUINN: Do you want to see what part we
6 can save, the nonobjection parts? Identify that and let's
7 say that is safe?

8 MR. EDGAR: It really kind of all ties
9 together. You really need to solve the preservation of error
10 problem in order for the way in which the rules are imposed
11 to be reorganized fit together, John.

12 CHAIRMAN SOULES: Let me see if I can --

13 MR. O'QUINN: We are mandated to stop.

14 CHAIRMAN SOULES: Does anyone want to propose
15 that we amend that and stay another 30 minutes or something?

16 MR. SPIVEY: We are going to meet again next
17 week anyhow.

18 CHAIRMAN SOULES: We are? I don't know that.

19 MR. O'QUINN: Let's discuss that then.

20 CHAIRMAN SOULES: Okay, before we do that, I
21 will take a poll. Don't vote if you feel like I am not
22 giving you enough time to think about this, but if we took A
23 and limited the court's ability to demand or require a
24 request to somehow --

25 MR. LOW: Reasonable time.

1 CHAIRMAN SOULES: -- to the party with the
2 burden, and I don't know how in the world to do that, but
3 assume there is a way to do that.

4 MR. O'QUINN: Use existing rule, which is an
5 issue, instruction, definition on which you rely, you have to
6 tender in substantially correct form.

7 CHAIRMAN SOULES: All right, if we do that,
8 let's see, on which -- trial court asks the parties to tender
9 a question.

10 MR. O'QUINN: Ask the objecting party to
11 tender requests on issue, instruction, or definition, that
12 the objecting party relies, on which the objecting party
13 relies.

14 CHAIRMAN SOULES: Okay, if we get that
15 language into A and then put A and B in as exceptions, does
16 the Committee favor the changes?

17 MR. O'QUINN: All of them, 385 to 400?

18 CHAIRMAN SOULES: The whole thing.

19 MR. O'QUINN: Including it the way you
20 preserve complaints by objection only?

21 CHAIRMAN SOULES: Except with these two
22 exceptions. Does the Committee then favor that?

23 Those in favor show by hand. Six, seven, eight,
24 nine, 10, 11, 12, 13. Did you have your hand up, Broadus? I
25 couldn't see.

1 MR. SPIVEY: Yes.

2 CHAIRMAN SOULES: Okay, 14. Those opposed?
3 Well, it is unopposed.

4 You see how close this is to getting done and I
5 don't think the game is over and --

6 MR. DAVIS: All you have got to do is put in
7 words what we have said. There is your problem.

8 MR. EDGAR: There is one other thing that will
9 need to be done.

10 CHAIRMAN SOULES: Let me be very clear. We
11 are not going to address again whether -- the different ways
12 of preserving omissions and commissions and all that sort of
13 thing. We are going to preserve everything by objection,
14 except a total omission of a ground of recovery -- or let's
15 take a consensus on that.

16 MR. O'QUINN: Don't do it again. You got it.

17 CHAIRMAN SOULES: And where the judge asks
18 somebody relying on a question, instruction, or definition,
19 to give it in substantially correct form. We do that and we
20 are going to look at those two things, the language, and we
21 are going to get those done with language, and we are not
22 going to debate about whether it should be done. We are just
23 going to get it done. Is that what we are going to do?

24 If that is the case, I can get this done through
25 our next meeting. We can't revisit this whole problem again.

1 MR. EDGAR: There is one other thing. We will
2 now have to include, though, that you omitted, and that is a
3 section on requests.

4 MR. O'QUINN: What do you mean?

5 MR. EDGAR: When we eliminated having to make
6 a request, there is a rule that deals with requests.

7 CHAIRMAN SOULES: All right, I will look back
8 at that.

9 MR. EDGAR: We need to go back and pick that
10 up. It is a housekeeping thing, but we need to have it in
11 there.

12 CHAIRMAN SOULES: Would you find it for me so
13 I can look at?

14 Now, then, while Hadley is looking for that
15 language, when do we meet again?

16 MR. SPIVEY: Can we meet Friday? I move we
17 meet Friday.

18 MR. O'QUINN: Right down Rule 274.

19 MR. EDGAR: That is what it is.

20 CHAIRMAN SOULES: Is it a court holiday next
21 Friday?

22 JUSTICE DOGGETT: Yes, it is a court holiday
23 Friday.

24 CHAIRMAN SOULES: The district court?

25 JUSTICE DOGGETT: No, for our court. I don't

1 think it is a court holiday anywhere else.

2 CHAIRMAN SOULES: I know a judge is trying to
3 set me for a hearing that day, but I guess everybody has got
4 that problem.

5 MR. EDGAR: Luke, 276.

6 CHAIRMAN SOULES: Okay, we will meet at eight
7 o'clock, Friday, the 16th, and we will meet until we finish.

8 MR. O'QUINN: Including Saturday?

9 CHAIRMAN SOULES: No.

10 MR. EDGAR: We may not be able to use the
11 state bar headquarters. We may have to -- will you advise us
12 by some method where we will be meeting?

13 MR. BRANSON: I know it may upset you, but I
14 can't meet on Friday. Don't change the meeting. I can be
15 here earlier in the week, but not Friday.

16 CHAIRMAN SOULES: All right, is the consensus,
17 then, we are going to meet Friday. We are going to work a
18 long day until we get done with the agenda that we had in
19 '89, plus all the new work. It is going to be a long, long
20 meeting.

21 Do you want to meet Friday and Saturday?

22 MR. DAVIS: Hopefully, we won't need to meet
23 on Saturday.

24 CHAIRMAN SOULES: What is the commitment for
25 Saturday, till noon?

1 MR. SPARKS (SAN ANGELO): At least as much
2 time as we put in this time.

3 MR. SPIVEY: You can't get people to work past
4 noon on Saturday.

5 CHAIRMAN SOULES: Okay, we will meet Friday
6 the 16th and Saturday until noon.

7 MS. CARLSON: What time frame?

8 CHAIRMAN SOULES: Friday at 8:00 a.m. Is that
9 all right, 8:00 a.m.? That means everybody has to come in
10 the night before, but at least we can get a full day in.

11 Okay, eight o'clock Friday morning. We will work a
12 long day and if we can, we will get done.

13 We stand adjourned.

14

15 (At this time the hearing recessed 12:15 p.m., to
16 reconvene at 8:00 a.m. on Friday, February 16, 1990.)

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1 THE STATE OF TEXAS)
2)
3 COUNTY OF TRAVIS)
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6 I, LESLIE DUTSCHKE, CERTIFIED SHORTHAND
7 REPORTER in Travis County for the State of Texas, do hereby
8 certify that the foregoing 509 pages constitute a true and
9 correct transcription, to the best of my ability, of the
10 testimony introduced and the proceedings had upon the hearing
11 of the TEXAS SUPREME COURT ADVISORY COMMITTEE, which hearing
12 was held at the Texas Law Center, 1414 Colorado, Austin,
13 Travis County, Texas, on February 9th and 10th, 1990.

14 WITNESS my hand and signature of office this,
15 the 20th day of February, 1990.

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