

## I N D E X

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1 SUPREME COURT ADVISORY BOARD MEETING  
2 Held at 1414 Colorado,  
3 Austin, Texas 78701  
4 June 27, 1987

5 (VOLUME III)  
6 (Morning Session)

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June 27, 1987

(Morning Session)

CHAIRMAN SOULES: Does everybody have their materials? We have some extras if anyone needs any.

PROFESSOR EDGAR: All right. We were on page 319 yesterday looking at Rule 239(a). This was first called to our attention by Justice Spears by a memo from one of his briefing attorneys, Todd Clements. And then subsequent to that, we got a lot of correspondence. I've already gone into the postcard problem with those various clerks that have computer capacity. And we tried to solve that problem by simply providing for written notice. And to overcome the problem between the clerk saying that it was mailed and the recipient denying receipt, we have provided for certified mail, return receipt requested.

And in Todd's memo to Judge Spears, he had done some research with the postal people and obtained some information on the cost of various methods of proving receipt. And so what we suggest is the return receipt become a part of the

1 court's file. And that the cost of the certified  
 2 mailing is to be paid by the party obtaining the  
 3 judgment, but to be taxed as a cost of court. And  
 4 those changes are reflected in the recommended  
 5 rule that you see on page 319. And the committee  
 6 moves its adoption.

7 CHAIRMAN SOULES: Second?

8 PROFESSOR BLAKELY: Second.

9 MR. JONES: Second.

10 CHAIRMAN SOULES: Is there any  
 11 discussion?

12 MR. RAGLAND: I oppose that part  
 13 requiring the plaintiff to pay and notify the  
 14 defendant after he has already been notified.

15 CHAIRMAN SOULES: It seems --

16 MR. RAGLAND: I go along with giving  
 17 him written notice in lieu of a postcard, but  
 18 there is a presumption in law that a public  
 19 official performs a duty. And if he says he  
 20 mailed it out, well then that is a default on the  
 21 defendant to overcome that presumption.

22 CHAIRMAN SOULES: There is no question  
 23 we need to change the postcard to some other kind  
 24 of mail. The next issue, though, is whether it's  
 25 just first class mail that gets it or something

1 else. This certified mail will require extra work  
2 in the clerk's office, extra record keeping, the  
3 green card and so forth, and there is no due  
4 process requirement to do that. It isn't just  
5 first class mail -- it's first class mail, and  
6 then make a note on the docket "adequate" -- is my  
7 question.

8 MR. TINDALL: And if it comes back  
9 unsigned or refused?

10 CHAIRMAN SOULES: They do come back  
11 unsigned. They don't have to keep track of it,  
12 throw it in the trash.

13 PROFESSOR EDGAR: Well, the court had  
14 a case before it recently that gave rise to this  
15 problem. And as Judge Spears stated in his letter  
16 to us which we have back here somewhere --

17 CHAIRMAN SOULES: It's page 342, I  
18 believe, Hadley.

19 PROFESSOR EDGAR: Okay. He just  
20 suggested, as many others suggested, that this  
21 might be a way to solve the problem.

22 MR. RAGLAND: You just have another  
23 problem because if you have a green card in there,  
24 the defendant is going to come in and say, "Well,  
25 I didn't sign for it; it was a neighbor that

1 signed for it," and you've just got more  
2 rigamarole.

3 MR. TINDALL: And you can't restrict  
4 who signs for it any more.

5 MR. RAGLAND: That's right. You can't  
6 get restricted delivery.

7 MR. TINDALL: And you run into those  
8 problems. It could be signed by a spouse or a  
9 child or a neighbor.

10 CHAIRMAN SOULES: Judge Spears says --  
11 where is it?

12 PROFESSOR EDGAR: It's at the bottom  
13 of page 342.

14 CHAIRMAN SOULES: "I suggest that  
15 there would be fewer defaults and fewer attacks on  
16 defaults if a better method were devised to prove  
17 notice of default had been given. It occurs to  
18 me" --

19 PROFESSOR EDGAR: And of course  
20 just --

21 CHAIRMAN SOULES: -- "that your  
22 committee might consider making Rule 239(a) to  
23 require that notice of default judgment be sent by  
24 certified mail or some form of notice more  
25 effective than a postcard."



1 I wonder if we tried it just first class mail  
2 at this juncture, see if that solves the problem  
3 in part.

4 MR. RAGLAND: Luke, why don't we just  
5 say "written notice"? And if the clerk wants to  
6 go to the trouble of sending it certified mail,  
7 let them do it. If you put first class in there,  
8 then there may be -- I may want the clerk to use  
9 certified mail. If I do, I'm going to fix it up  
10 and take it over there and give it to them. But  
11 why restrict it other than just to say "written  
12 notice by U.S. Mail"? That would be good enough.

13 PROFESSOR EDGAR: What's that? I'm  
14 sorry. I was talking to Frank. What was your --  
15 what was the question?

16 MR. McMains: He was just talking  
17 about notice.

18 MR. RAGLAND: Well, I said why  
19 restrict it to first class when in some instances  
20 an attorney may want certified mail? And if  
21 you've got first class in there some of these  
22 clerks are going to say, "Well, the rule says  
23 first class and that's what we're going to do."

24 CHAIRMAN SOULES: Well, certified is  
25 first class. I mean, friends, that's just an

1 additional -- that's an overlay on the first  
2 class.

3 MR. RAGLAND: Well, it doesn't mean  
4 that to, you know, a \$900 a month clerk up there.

5 CHAIRMAN SOULES: Okay. Rusty?

6 MR. McMAINS: Well, that really  
7 doesn't make any difference anyway because the  
8 only way that the absence of the notice makes any  
9 difference is if people come in and take a  
10 position they didn't get notice. And you can --  
11 the lawyers can solve that problem anyway in terms  
12 of the plaintiff's lawyers. They can pick up the  
13 phone and call the people, or they can do their  
14 own notice for that matter in terms of building a  
15 record that they gave notice of the default. They  
16 can send it themselves.

17 I frankly don't think that the certified  
18 mail, return receipt establishes per se or  
19 eliminates the problem, because as I read the  
20 cases, the presumption of mailing -- I mean of  
21 receipt from mailing comes from the testimony of  
22 mailing, whether you've got the green card or not.  
23 And the fact that you don't have the green card is  
24 merely evidentiary.

25 And so the whole question is still going to

1 be up to the trial judge when somebody comes in  
2 and says "I didn't get the receipt" -- I mean, "I  
3 didn't get the stuff that was mailed." Then,  
4 there is also an inference it's permissible under  
5 the cases that it wasn't mailed. And basically,  
6 it's just an issue for the trial judge. And the  
7 trial judge just believes whichever -- whichever  
8 one he wants to believe and can either set it  
9 aside or not, and there isn't anything basically  
10 you can do about it on appeal. And it doesn't  
11 matter in my judgment whether there is a green  
12 card or not.

13 PROFESSOR EDGAR: Well, I think that  
14 was implicit in what Judge Spears said. He didn't  
15 say that it would solve all the problems, he just  
16 suggested that there would be fewer attacks on  
17 default judgments on that basis.

18 CHAIRMAN SOULES: Tom, are you  
19 suggesting an amendment then that we just -- we  
20 delete "a postcard notice thereof," insert  
21 "written notice only" --

22 JUDGE RIVERA: Have "written notice by  
23 mail"?

24 CHAIRMAN SOULES: Well, it says "the  
25 clerk shall mail written notice," and leave it at

1 that?

2 MR. RAGLAND: Right. Strike out all  
3 after "notice."

4 CHAIRMAN SOULES: Is there a second to  
5 the motion to amend?

6 MR. TINDALL: I second that.

7 CHAIRMAN SOULES: Okay. Is the  
8 amendment acceptable or not to the committee?  
9 Should we vote on it or -- Hadley, it's up to you.

10 PROFESSOR EDGAR: I don't want to  
11 stand on any formalities. If it's the consensus  
12 of the group that we should not have certified  
13 mail, well I will certainly abide by that although  
14 I think it's preferable to have certified mail,  
15 return receipt requested.

16 CHAIRMAN SOULES: Let's get a show of  
17 hands on that. First class or certified. How  
18 many feel that first class should be the  
19 requirement? Eight.

20 How many feel that certified should be the  
21 requirement? Seven. It's eight to seven. It's a  
22 close vote. Rusty?

23 MR. McMANS: Luke, I was just going  
24 to say in terms -- in lieu of the written notice  
25 argument, though, I think in 306(a) we already

1 have a first class mail requirement on notice.

2 Where is the rule book? It's under 306 --

3 PROFESSOR DORSANEO: It should be  
4 306(a)(3).

5 MR. McMAINS: So I mean we ought to be  
6 consistent because it's the same document. That's  
7 talking about any appealable order.

8 CHAIRMAN SOULES: Yeah, it says first  
9 class mail.

10 MR. McMAINS: Yeah. So I mean, I'm  
11 just saying we already require them to send it  
12 first class mail so we might as well --

13 CHAIRMAN SOULES: Why don't we -- all  
14 we've got to do is say "written notice" and that  
15 gets it here because 306(a) says what kind; is  
16 that right?

17 PROFESSOR EDGAR: 306(a)(3), it says  
18 by first-class mail.

19 CHAIRMAN SOULES: I thought we had  
20 this fixed some time ago and that's where we did  
21 it, but we didn't get it done in 239(a). That's  
22 what happened.

23 MR. McMAINS: I think that's just a --

24 PROFESSOR EDGAR: I guess you want to  
25 say then "shall, by first class mail"?

1                   CHAIRMAN SOULES: No. Just "shall  
2 mail written notice." 306(a) says how, unless you  
3 want to say it twice.

4                   PROFESSOR EDGAR: Okay.

5                   CHAIRMAN SOULES: And it doesn't  
6 matter to me. What do you suggest, Hadley?

7                   PROFESSOR EDGAR: I don't care.

8                   "Shall mail by written notice"?

9                   CHAIRMAN SOULES: "Shall mail written  
10 notice thereof to the party." And then the part  
11 about the other addition would not be made if we  
12 go that way.

13                   Let me read, then. In the beginning and in  
14 the sixth line, starting with the sentence, it  
15 starts with the word "immediately" -- this would  
16 be the only change. We'll vote as to whether or  
17 not this will be the only change.

18                   "Immediately upon the signing of the judgment,  
19 the clerk shall mail written notice thereof to the  
20 party against whom the judgment was rendered at  
21 the address shown in the certificate, and note the  
22 fact of such mailing on the docket." And there  
23 will be no other changes to Rule 239(a) as it is  
24 currently written. Those in favor say aye.

25                   COMMITTEE MEMBERS: Aye.

1 CHAIRMAN SOULES: Opposed?

2 PROFESSOR EDGAR: No.

3 CHAIRMAN SOULES: Okay. That's the  
4 House to one.

5 PROFESSOR EDGAR: All right. Rule 267  
6 -- apparently there has been some confusion  
7 between the COAJ and our committee on exactly  
8 where Rule 267 belongs. If you'll recall, at one  
9 point we were going to abolish it and it was going  
10 to go into the rules of evidence, and then the  
11 rules of evidence said no, it ought to belong here  
12 and we just really didn't know where it was.

13 Well finally at the last meeting, we  
14 recommended, and the Court has now included Rule  
15 267 in our rules rather than the Rules of  
16 Evidence. But as Professor Wicker pointed out to  
17 us in our letter, we also needed to conform it to  
18 the manner in which the rules of -- in which it  
19 had read. There is really no substantive change  
20 here at all between the rules of evidence  
21 provision and this rule, but it does need to be  
22 amended.

23 CHAIRMAN SOULES: Any objection?

24 Okay. All in favor of this change to Rule 267,  
25 please say ayé.

1 COMMITTEE MEMBERS: Aye.

2 CHAIRMAN SOULES: Opposed?

3 PROFESSOR BLAKELY: Mr. Chairman,  
4 excuse me.

5 CHAIRMAN SOULES: Newell. Excuse me.  
6 I didn't realize there was discussion.

7 PROFESSOR BLAKELY: I just want to  
8 intervene and take care of a housekeeping thing.

9 CHAIRMAN SOULES: Good.

10 PROFESSOR BLAKELY: If you will turn  
11 all the way to the hard cover at the back, you  
12 will see another suggestion by Wicker on this rule  
13 pointing out that -- that the rule --

14 MR. TINDALL: What page?

15 PROFESSOR BLAKELY: Right here at the  
16 back.

17 CHAIRMAN SOULES: Page 437, the very  
18 last page.

19 PROFESSOR BLAKELY: It says  
20 "witnesses, when placed under Rule 613," -- Rule  
21 of Evidence 613 has been changed to 614, so that  
22 ought to be placed --

23 PROFESSOR EDGAR: That's right.

24 PROFESSOR BLAKELY: That change ought  
25 to occur in the Rules of Civil Procedure, 267.



1 And it also says "of the Texas Rules of Evidence,"  
2 and that's been changed to Texas Rules of Civil  
3 Evidence, and that change ought to be made on page  
4 320.

5 PROFESSOR EDGAR: Yes.

6 CHAIRMAN SOULES: Where would you put  
7 that on page 320? Is there a place --

8 PROFESSOR EDGAR: Yes, right after  
9 subsection (d), it says "witnesses, when placed  
10 under the rule" -- it should be under Rule 614.

11 CHAIRMAN SOULES: Capitalize the "R."

12 PROFESSOR EDGAR: Yes. Strike out the  
13 "the."

14 CHAIRMAN SOULES: "Placed under Rule  
15 614" -- okay.

16 PROFESSOR EDGAR: 614.

17 PROFESSOR BLAKELY: "Of the Texas  
18 Rules of Civil Evidence."

19 MR. TINDALL: Has that name been  
20 adopted, Newell?

21 PROFESSOR BLAKELY: The Texas -- Rule  
22 267 has already been amended by the court and is  
23 going into effect January 1 of '88.

24 MR. TINDALL: No, but do we have now  
25 -- bear me out -- the Texas Rules of Civil

1 Evidence? Is that a name that we have formally  
2 adopted?

3 PROFESSOR BLAKELY: We have, and the  
4 Court has promulgated it and it goes into effect  
5 January 1 of '88.

6 MR. McMAINS: Yeah. It's in the April  
7 order.

8 MR. TINDALL: That we go by Rules of  
9 Civil Evidence?

10 MR. McMAINS: Right.

11 PROFESSOR EDGAR: So this should read  
12 -- subsection (d) should now read, "witnesses,  
13 when placed under" -- strike "the," capital R --  
14 "Rule 614 of the Texas Rules of Civil Evidence,  
15 shall be instructed by the court"; is that  
16 correct, Newell?

17 PROFESSOR BLAKELY: Yes.

18 CHAIRMAN SOULES: Those in favor,  
19 please say aye.

20 COMMITTEE MEMBERS: Aye.

21 CHAIRMAN SOULES: Opposed? Okay.  
22 That's unanimously approved then.

23 PROFESSOR EDGAR: All right. Now  
24 then --

25 MR. SPIVEY: Are we getting off that

1 rule right now? Before we do, under Section (1)  
2 there "a party who is a natural person," why don't  
3 we clear up a problem that has existed in a number  
4 of courts? I have had courts exclude the wife of  
5 a party. I think there is a case holding that the  
6 spouse of a party is entitled to be there, but  
7 occasionally I've had just real problems with the  
8 court trying to exclude a spouse.

9 MR. BRANSON: Are they unnatural?

10 MR. SPIVEY: No, they are fairly  
11 natural; one of them was good looking and the  
12 judge had no reason to. But it's -- I never can  
13 find that case, but I read it one time.

14 MR. TINDALL: I concur with Broadus.  
15 That's a good change to put in. There is a case  
16 that says you can't exclude a spouse but it's hard  
17 to find it.

18 PROFESSOR DORSANEO: No, it's not hard  
19 to find. Look in my case book; it's right there.

20 MR. SPIVEY: I'm sorry, Dorsaneo, I  
21 don't have that. I better get that.

22 PROFESSOR DORSANEO: But it depends on  
23 what the action is about, you know, the nature of  
24 the recovery.

25 CHAIRMAN SOULES: Well, is this going

1 to require that we -- we're changing this to make  
2 it consistent with 614 of the Rules of Civil  
3 Evidence. If we make that change, would we also  
4 have to change 614 of the Rules of Civil Evidence?

5 MR. SPIVEY: I think you should to be  
6 consistent, but --

7 CHAIRMAN SOULES: If it depends on the  
8 nature of the case as to whether or not the spouse  
9 is -- may be excluded, we ought to do some study  
10 on that.

11 MR. SPIVEY: Wait a minute. How in  
12 the world could it depend on the type of case  
13 because it's a community recovery.

14 CHAIRMAN SOULES: Bill Dorsaneo just  
15 said it did, I don't --

16 PROFESSOR DORSANEO: If the recovery  
17 is not -- if the non-named spouse is not a real  
18 party in interest in terms of the recovery, then  
19 it's a different deal.

20 MR. SPIVEY: The real named spouse  
21 would have an interest in recovery regardless of  
22 whether it was community or separate.

23 MR. BRANSON: I would agree with  
24 Broadus.

25 JUDGE RIVERA: It would depend on

1 whether the defendant is an individual and they  
2 are suing the corporate employer. Then they're  
3 always excluded.

4 MR. SPIVEY: No, but I'm saying that,  
5 number one, "a party who is a natural person,"  
6 there's a place that ought to be inserted.

7 CHAIRMAN SOULES: Broadus, I think --  
8 I don't think we've given it enough study, if  
9 you'll permit me. Let's study that the next time.

10 MR. BRANSON: Why don't we test the  
11 water on that, Luke, because I think we have.

12 MR. TINDALL: I think it's an outrage  
13 to keep those spouses out. I've had that hardship  
14 all the time, Luke, and it's wrong.

15 CHAIRMAN SOULES: All right.

16 MR. BRANSON: I've seen that problem  
17 too, and there is a case on it.

18 MR. SPIVEY: A good example is a  
19 custody case, and I had a judge apply it one time  
20 in a custody case. I can't imagine them being  
21 more of a party at interest, although they are not  
22 a legal party at interest. The wife was damn sure  
23 interested in the outcome because it affected  
24 them.

25 MR. BRANSON: Besides that, it is

1       ludicrous to make the lady sit out in the hall for  
2       three weeks during the trial, and that's what they  
3       do.

4               MR. TINDALL: And what you end up  
5       doing is you have the new spouse of the other  
6       party and you keep them out, and it's silly.

7               CHAIRMAN SOULES: Write it up and  
8       we'll put it on the agenda. Next item -- and  
9       we'll put it on there today.

10              PROFESSOR EDGAR: All right. I'm  
11       really -- well, I guess I must say I'm embarrassed  
12       by what I'm about to talk about now. Rules 273,  
13       4, 5 and 8, I did the very best I could to try  
14       and -- when we amended these rules -- to eliminate  
15       certain words in order to be consistent, like  
16       special issues. But when you roll your own  
17       cigarettes, sometimes these things happen.

18              And right after the court promulgated these  
19       rules and they appeared in the April 14 advance  
20       sheet, I started getting a bunch of phone calls  
21       about "Well, you didn't eliminate the word charges  
22       in some rules and you did in others," and, "You  
23       have 'issues' instead of 'questions' in some of  
24       them," and I said, "That's right, and we'll try  
25       and correct it as soon as we can." These are

1 simply trying to correct the errors that I regret  
2 we didn't pick up the first time. And that's all  
3 we have done.

4 CHAIRMAN SOULES: Well let's --  
5 everybody look at these. Which are they, 273 --

6 PROFESSOR EDGAR: Beginning on page  
7 321, Luke, 322, 323, 324 and 325.

8 CHAIRMAN SOULES: Okay. Let's take a  
9 minute and look at them and see.

10 PROFESSOR EDGAR: And Tina and I did  
11 our best to pick them all up, but I take the  
12 responsibility for it and I just missed some of  
13 them.

14 MR. BRANSON: I move the adoption of  
15 321 through 325 as corrected.

16 MR. JONES: I second the motion.

17 PROFESSOR EDGAR: I hope I've got them  
18 all. I may not have.

19 CHAIRMAN SOULES: Well, this is  
20 housekeeping in Rules 273, 274, 275, 276 and 278  
21 as they appeared in the Court's March 1987 order.

22 PROFESSOR EDGAR: Yes.

23 CHAIRMAN SOULES: And we're suggesting  
24 that the Court do these housekeeping items before  
25 they become effective?

1                   PROFESSOR EDGAR: Yes. And I don't  
2 really know what, Justice Wallace, the Court's  
3 timetable is going to be on the rules that we are  
4 recommending at this meeting. But as far as these  
5 rules are concerned, if we could ask the Court to  
6 perhaps give them some expedited handling so that  
7 they would -- the changes would be effective on  
8 January 1 of '88 so that we won't have to go  
9 through this problem with a bunch of lawyers and  
10 judges when the new rules become effective. I  
11 don't know whether that's possible.

12                   JUSTICE WALLACE: We have a conference  
13 scheduled for a week from Tuesday to consider  
14 these, providing Luke can get them in the final  
15 form in time for us to do it because we have to  
16 have them over to the Bar Journal by the first of  
17 August to get them printed in time to become  
18 effective on January 1. So we are going to try to  
19 get them all out.

20                   CHAIRMAN SOULES: We can do that. Let  
21 me -- in response to the timing, we're going to  
22 prepare the Court's conference agenda in my office  
23 next week. And we will Federal Express that  
24 agenda to all members of this committee on  
25 Thursday evening and to the Court. Now I had



1 planned on having another week, but it doesn't  
2 really make any difference. What I was going to  
3 do was ask you all to get back to me -- read them  
4 over the weekend and get them back to me the  
5 following Tuesday -- get your input and get them  
6 to the Court a week from Thursday. But --

7 JUSTICE WALLACE: We can handle that.

8 CHAIRMAN SOULES: But I can call the  
9 Court with your changes. I can call you, Judge,  
10 with what I get back from them.

11 JUSTICE WALLACE: I think it would  
12 work out better if you go ahead and do that.  
13 Let's just take the extra week. We discussed it  
14 on -- whether to have it a week from Tuesday or  
15 the following week and said "Well, the sooner the  
16 better," but we can do it that way.

17 CHAIRMAN SOULES: Well, it's very  
18 helpful to me to get that proposed conference  
19 agenda to you all for a flip-through, at least,  
20 and get your feedback because I don't get  
21 everything.

22 PROFESSOR EDGAR: That extra week  
23 would be extremely helpful because next Thursday  
24 is going to be the 4th of July weekend and it  
25 might be difficult for some people to --

1 MR. BRANSON: And I had planned to do  
2 nothing but read those rules, but people like  
3 Hadley and Buddy Low probably wouldn't.

4 CHAIRMAN SOULES: We're going to have  
5 to get that Fed Ex'd by Wednesday so that you will  
6 have it in your offices Thursday, and we'll just  
7 somehow do that. But we'll have it in your  
8 offices on Thursday morning. I will need your  
9 feedback in San Antonio by Tuesday morning. So if  
10 you're going to be word processing, you'll need to  
11 do it Monday and get it out Federal Express, or  
12 you can call us. Of course, you all know Tina,  
13 who does all this detail work for me in my office,  
14 and you can just call her and read her any  
15 insertions or errors and she'll correct them while  
16 you're on the phone.

17 MR. BRANSON: Can we just communicate  
18 with you electronically?

19 CHAIRMAN SOULES: Yes, sir. You can.

20 MR. BRANSON: Electronic transfer?

21 CHAIRMAN SOULES: You can file it  
22 electronically if you want to. But that's the  
23 plan. Will that work?

24 JUSTICE WALLACE: Yes, sir.

25 CHAIRMAN SOULES: Okay. And then all

1 these rules will have gone through the Court's  
2 process pursuant to a January 1, '88 effective  
3 date if they are promulgated by the Court.

4 Yes, sir. Bill Dorsaneo.

5 PROFESSOR DORSANEO: On this Rule 276  
6 on page 324, I have been concerned for some time  
7 about whether it's advisable to keep this  
8 modification language in the rule. I personally  
9 am not aware of that being a proper method to  
10 preserve the right to complain if you submit an  
11 instruction or an issue question, and it's  
12 modified and you get this notation done. I'd ask  
13 Professor Edgar what he thinks about that.

14 PROFESSOR EDGAR: Well, I think if the  
15 Court modifies it, I think you're still going to  
16 have to object and go through the process again --  
17 and I agree with you. But when I amended these  
18 rules originally, I was -- because of all the  
19 other problems we had, I was not trying to make  
20 any substantive changes except as under Rule 277,  
21 279. And I suggest what we do, Bill, is go ahead  
22 and approve this and then let's take a look at  
23 Rule 276 for some further study with the view in  
24 mind of correcting the problem you're raising.

25 CHAIRMAN SOULES: Any further

1 discussion on Rules 273, 274, 275, 276 and 278?

2 Those in favor of these changes say aye.

3 COMMITTEE MEMBERS: Aye.

4 CHAIRMAN SOULES: Opposed? It's  
5 unanimously approved.

6 MR. JONES: Hadley, does that conclude  
7 your report?

8 PROFESSOR EDGAR: Yes. Have we  
9 formally approved these changes?

10 CHAIRMAN SOULES: Yes, sir.

11 PROFESSOR EDGAR: Okay. I'm sorry.  
12 That concludes our report.

13 MR. JONES: Mr. Chairman?

14 CHAIRMAN SOULES: Franklin Jones.

15 MR. JONES: I have noticed what rare  
16 instances I have been in the room yesterday that  
17 we have kind of skipped around on the agenda from  
18 time to time, and I want to make a motion that we  
19 do so again. We have one matter that I know of on  
20 our agenda -- there could be many others -- but  
21 there's one that I'm peculiarly aware of, and  
22 that's Item 12 which the recommendation of that  
23 subcommittee is, in my judgment, highly  
24 controversial.

25 And I want to -- you know, I want to oppose

1 some of those recommendations and I've been told  
2 by a number of people in the room that they are  
3 going to be leaving throughout the day and they  
4 may not be available to vote when that matter is  
5 reached. Now I'm not one of them; I intend to be  
6 here until you gavel the meeting to a close.

7 But I would like to move that we now go to  
8 Item 12 for discussion and disposition.

9 MR. BRANSON: Second the motion.

10 CHAIRMAN SOULES: There's no problem  
11 with that except that I've got -- Hadley, I've got  
12 another item on the agenda for you and I don't  
13 know whether it's going to take any time to just  
14 try to finish it. On page 353, is there something  
15 -- 355, these are old COAJ items, Rules 247,  
16 247(a) and 250. And we just need to dispose of  
17 them.

18 PROFESSOR EDGAR: I'm sorry. I don't  
19 know what page --

20 CHAIRMAN SOULES: Okay. Page 355 of  
21 the main materials and following.

22 MR. TINDALL: This rule is almost  
23 nonsensical. Are we talking about Rule 247?

24 CHAIRMAN SOULES: Yes. This has been  
25 on our agenda for a long time. We just need to --

1           PROFESSOR EDGAR: Well, I'm sorry. I  
2 didn't -- I didn't have it in the material. Well,  
3 oh, yes, I'm sorry. We did consider it, if you'll  
4 look at item number four in my letter to you.  
5 It's on page 317.

6           CHAIRMAN SOULES: Okay.

7           PROFESSOR EDGAR: We considered -- our  
8 subcommittee considered it, and we do not  
9 recommend the amendments to Rule 247 and 250, nor  
10 the adoption of 247(a).

11          CHAIRMAN SOULES: All right, sir.  
12 Would you enlighten us just a little bit with  
13 discussion on that?

14          PROFESSOR EDGAR: Well, I don't know.

15          CHAIRMAN SOULES: That's putting  
16 somebody unfairly on the spot.

17          PROFESSOR EDGAR: Well, let's see.  
18 All right, 247(a) which you will find on-- my page  
19 is numbered blank, it's 00 -- it's 356, I guess --  
20 we saw as part of trying to incorporate in the  
21 rules some standardization on how to handle  
22 motions for continuance, in trying to utilize some  
23 type of uniform docket control and --

24          MR. JONES: We've perceived that,  
25 Hadley, as a resurrection of the ill-famed

1 administrative rules of the Chief Justice.

2 PROFESSOR EDGAR: The subcommittee was  
3 -- at this meeting, was composed of David Beck,  
4 Gilbert Low, Franklin Jones and myself. And the  
5 four of us unanimously concluded that this should  
6 be rejected.

7 MR. JONES: And I so move, Mr.  
8 Chairman.

9 CHAIRMAN SOULES: It's been moved and  
10 seconded that -- I'm saying that Hadley has moved  
11 and Franklin seconded it that the proposals to  
12 change Rule 247 and 250 and to add a new rule  
13 247(a) may be rejected. Any further discussion?  
14 Those voting to reject, please say aye.

15 COMMITTEE MEMBERS: Aye.

16 CHAIRMAN SOULES: Opposed? Okay.  
17 It's unanimously rejected.

18 PROFESSOR EDGAR: And I think that  
19 then concludes our report.

20 CHAIRMAN SOULES: Okay. And then,  
21 Newell, they are looking to you now wanting to  
22 hear your report, I believe. That's what you're  
23 talking about, the evidence report?

24 PROFESSOR BLAKELY: Mr. Chairman, this  
25 will be the report of the Evidence Subcommittee

1 and it begins on page 468, and there are now five  
2 items to be reported on. If you'll turn to 469,  
3 the first problem, problem number one, comes from  
4 a San Antonio lawyer named Soules, the Texas Rule  
5 of Civil Procedure 172 provides for auditors. The  
6 court can appoint an auditor. And it provides  
7 that the auditor's report shall be admissible in  
8 evidence.

9 Luke Soules reports that trial judges,  
10 despite that mandate of 172, are excluding them.  
11 It may be that one trial judge would exclude on  
12 one ground, and another, another. But Luke seems  
13 to feel, I gather, that Article 7 dealing with  
14 opinions, apparently, is most frequently the  
15 problem.

16 So I submitted the matter to the Evidence  
17 Committee, suggesting three possible approaches.  
18 One of these was the solution which I've got  
19 numbered 1A on page 469, and that would be simply  
20 to take 172 and stick in the amendment "despite  
21 any evidence rule to the contrary," because the  
22 feeling is 172 intends to override anything in the  
23 rules of evidence. So that was one approach. The  
24 vote on that was five for that solution.

25 Solution 1B was favored by two members of the



1 committee, and this is -- it's at the bottom of  
2 469 and top of 470 -- and this is the solution  
3 that Luke had recommended which would be to add a  
4 completely new rule. And it would be 706 over the  
5 rules of evidence which would -- let's see. Well,  
6 you can see it there at the bottom: "Verified  
7 reports of auditors appointed pursuant to Texas  
8 Rule of Civil Procedure 172, whether in the form  
9 of summaries, opinions, or otherwise, shall be  
10 admitted in evidence when offered by any party  
11 whether or not the facts or data in the reports  
12 are otherwise admissible and whether or not the  
13 reports embrace the ultimate issues to be decided  
14 by the trier of fact. Where exceptions to the  
15 reports have been filed, a party may contradict  
16 the reports by evidence supporting the  
17 exceptions."

18 And then he would amend, here at the top of  
19 page 470, Texas Rule of Civil Procedure 172, by  
20 striking the evidence aspects of it, striking  
21 "said report shall be admitted into evidence,"  
22 because, see, that would be taken care of over in  
23 the evidence rule. That should be "but may be  
24 contradicted by evidence from either party where  
25 exceptions to such report or any item thereof may

1 be" -- striking "have been" -- "may be filed  
2 within 30 days of the filing of such report," and  
3 so forth.

4 So that is Luther's suggestion and there were  
5 two members of the Evidence Committee for that.

6 A possible solution that I had submitted to  
7 the subcommittee and that no one was for, was to  
8 go through all of the rules of evidence and  
9 anticipate possible objections that somebody might  
10 raise on the basis of this, that or the other rule  
11 of evidence and try to frame language in  
12 connection with each specific rule that would take  
13 care of the matter. In other words, it would let  
14 in the audit report. No one seemed to be in favor  
15 of that.

16 I've got here Solution 1C. Judge Pope  
17 reacted ambiguously. In essence, he said he  
18 didn't see any objection to putting the same thing  
19 in the rules of civil procedure and the rules of  
20 evidence -- identical wording. He didn't say what  
21 language, so I just picked -- I just picked this  
22 Solution 1C which would amend the rules of civil  
23 procedure by the one addition, "despite any  
24 evidence rule to the contrary," and then precisely  
25 copy 172 over in the rules of evidence. So that's

1 Solution 1C.

2 And because there was more support for  
3 Solution 1A than for any other solution, I guess  
4 as chairman of the subcommittee I move approval of  
5 Solution 1A.

6 PROFESSOR DORSANEO: Second.

7 MR. JONES: I second the motion, Mr.  
8 Chairman.

9 MR. TINDALL: Can we have some  
10 discussion on that because I have dealt with these  
11 audit reports and I think Luke has got a  
12 preferable solution. If you've been on the hard  
13 side of trying to keep one out, they may come in  
14 over your most vigorous objection even though the  
15 report will have matters that you view as totally  
16 extraneous to what the appointment of the auditor  
17 was for. It seems to me that if that's your fear,  
18 then you ought to have an opportunity to file  
19 exceptions and try to keep that out before it  
20 comes in over your objection. This is a very  
21 powerful weapon in matrimonial cases if you're not  
22 very careful.

23 And 172, which just simply says that the  
24 judge -- say he appoints Arthur Anderson, then the  
25 Arthur Anderson report comes in and you're stuck

1 with it. And I don't think that's right.

2 CHAIRMAN SOULES: Well, the 1B that is  
3 there, I drafted it, so I don't -- I'm not trying  
4 to be particularly emphasizing words -- but it  
5 addresses the very problems that you have with the  
6 judge. He appoints this auditor. It's a court's  
7 auditor; it's not a party's auditor. It has to be  
8 independent. It should not be related to any  
9 party. It can't be the particular party's own  
10 auditor. I mean, this is independent.

11 MR. TINDALL: Sure.

12 CHAIRMAN SOULES: So it is powerful  
13 when it goes to the jury. But then when the judge  
14 gets that report back and sees how powerful it is,  
15 then they begin to squirm about its weight and the  
16 fact that it -- well, it concludes ultimate issues  
17 to be tried by the trier of fact. Well, it can.  
18 Obviously, the Texas Rules of Evidence permit  
19 experts to put those kinds of things forward. But  
20 judges, for some reason, become reluctant about  
21 these reports.

22 So the ultimate issue and the fact that data  
23 in the reports may otherwise be inadmissible --  
24 which, of course, can still get in an expert  
25 report under the rules of evidence, we've already

1 permitted all these things to be admitted into  
2 evidence under the expert rule -- but still when  
3 confronted with that, those seem to be the two  
4 hangups. One, it's got the ultimate issue, and  
5 two, it's got material in there that is not  
6 otherwise admissible into evidence, even though  
7 under the 700 series it is.

8 So this Rule 706 that's at the bottom  
9 specifically addresses the two problems and tells  
10 the trial court "Get through those problems and  
11 permit it to come into evidence." Then it also  
12 does have, as Harry pointed out, the specific  
13 language about objections and putting in evidence  
14 to support those objections.

15 Finally, it separates the evidence  
16 admissibility aspect of it out of the rules of  
17 civil procedure -- which have to do with  
18 appointing the auditor and getting the verified  
19 report filed and that sort of thing -- and then  
20 fixes up over in the evidence rules, then, how  
21 it's handled in the evidence stage of the trial.

22 Now that was the reason I did it that way,  
23 and I'm only saying that so everyone knows what  
24 the reason was. I'm not necessarily trying to  
25 sell it. Newell.

1           PROFESSOR BLAKELY: I just wanted to  
2 respond to Harry. Harry is trying to keep it out,  
3 filing exceptions and then an opportunity to argue  
4 that it shouldn't be in in the first place.

5           MR. TINDALL: That's right. Under  
6 Luke's proposal --

7           PROFESSOR BLAKELY: I don't think that  
8 occurs under Luke's proposal or any of these  
9 proposals. They come in; auditor reports come in.

10          CHAIRMAN SOULES: It comes in, period.  
11 But you --

12          PROFESSOR BLAKELY: And then if you  
13 file exceptions, then you may contradict.

14          CHAIRMAN SOULES: That's right.

15          MR. McCONNICO: But you can't  
16 contradict unless you do.

17          CHAIRMAN SOULES: Rusty?

18          MR. McMANS: Not being involved in  
19 this practice very much -- at least not until my  
20 wife files -- I'm curious, if you don't file  
21 exceptions is the auditor's report absolutely  
22 binding?

23          MR. TINDALL: Yes. Despite any  
24 evidence rule to the contrary, it's a proposal.

25          MR. McMANS: I mean like judicial

1 admissions.

2 MR. TINDALL: Virtually. But that  
3 rule is ambiguously used by the courts. If they  
4 don't much like it, they can sort of keep it out  
5 themselves.

6 MR. McMAINS: Well, I mean if the fact  
7 of not filing exceptions is that you can't  
8 contradict, why is it the same as being binding?  
9 And I'm just -- just from a question of the  
10 substantive aspect of the procedural law.

11 MR. TINDALL: The rule doesn't tell  
12 you what happens though, Rusty. Now it says --  
13 the current rule says: "The report shall be  
14 admitted into evidence, but may be contradicted by  
15 evidence from either party where exceptions to the  
16 report have been filed before trial."

17 MR. McMAINS: That's right. But what  
18 I'm saying is the effect of that, then, is that  
19 you can't controvert portions of the report unless  
20 you except to it.

21 MR. TINDALL: That's right.

22 MR. McMAINS: So that all I'm trying  
23 to figure out is -- what you're effectively doing  
24 is the same thing then as admitting a judicial  
25 admission and a denial of the admission, in

1 effect.

2 CHAIRMAN SOULES: It doesn't go as far  
3 as a judicial admission; it's only evidentiary.  
4 But then the cases, when you look at them, if the  
5 auditor's report is not controverted, it becomes  
6 noncontroverted evidence. You can't -- nobody can  
7 put any evidence in to controvert it.

8 MR. McMANS: All I'm trying to figure  
9 out is if you're -- obviously, you're concerned  
10 about this in a jury trial context.

11 CHAIRMAN SOULES: Right. I think  
12 that --

13 MR. McMANS: And I don't know where  
14 you get the authority to submit issues of fact  
15 that are not disputed. I mean that's --

16 CHAIRMAN SOULES: Well you wouldn't.  
17 You may raise --

18 MR. McMANS: That's why I'm saying I  
19 don't know what its function is.

20 CHAIRMAN SOULES: You may raise a fact  
21 issue, Rusty, from evidence extraneous to the  
22 auditor's report. The auditor may report, but the  
23 jury issue may not be all together based on that.  
24 A fraud issue, for example, the Herman estates  
25 case would be where we had a big problem with



1 this. It's not just in matrimonial cases; it's in  
2 any case involving a lot of business transactions.  
3 And even though you get the conclusions of an  
4 auditor, you may still have other issues that are  
5 collateral to the determination of liability or  
6 maybe even the amount of it.

7 I think the word "appointed" -- and I'm  
8 changing my own -- I think, you know, that ought  
9 to be "prepared" in the first line of what I've  
10 got under 706 -- and for this reason: If the  
11 auditor's report goes beyond what the auditor has  
12 been instructed by the court to do, there is an  
13 objection that you can make. This report does not  
14 conform to the court's order under Rule 172. And  
15 if we change verified reports of auditors  
16 "prepared" pursuant to Rule 172, then the court  
17 could look at that report and determine whether it  
18 was prepared pursuant to his order. If it is,  
19 then it's admissible. If it's not, then it would  
20 not be. It would have to be conformed -- adjusted  
21 to conform. Rather than just say any report  
22 prepared by an appointed auditor is admissible,  
23 say any report prepared pursuant to the court's  
24 order is admissible.

25 MR. TINDALL: I like that.

1 CHAIRMAN SOULES: That, then, gets  
2 your problem.

3 MR. TINDALL: They're wandering off  
4 and rendering opinions on values and things  
5 that --

6 CHAIRMAN SOULES: So whenever you go  
7 and you want a court-appointed auditor, you want  
8 to be sure that that order tells him to do what  
9 you think he needs to do in order to get you  
10 through the wicket to help you with these series  
11 of transactions.

12 Okay. If we change that word "appointed" to  
13 "prepared," now what? Does that -- and I, again,  
14 I'm not trying to sell this format. I have some  
15 concerns with the shorthand way of doing it in 1A  
16 because I don't think it specifically addresses  
17 the several problems, whereas 1B does. Newell?

18 PROFESSOR BLAKELY: Now, Mr. Chairman,  
19 suppose we adopt your proposal there and put an  
20 evidence rule in 706 and some opposing attorney  
21 objects under the hearsay rule, or objects under  
22 authentication that this is inadequately  
23 authenticated, and you say, "Yeah, but 706 here  
24 says that it is admissible."

25 Well, that's so. But that's just dealing

1 with opinions; that's in Article 7 dealing with  
2 opinions. That doesn't touch authentication and  
3 doesn't touch the hearsay rule, and so on. What  
4 does that -- does that -- doesn't that give the  
5 trial judge maybe a little bit of: "Well, I'm  
6 going to exclude that." "I think maybe you're  
7 right. I'm going to exclude that."

8 CHAIRMAN SOULES: I'd like to put --

9 PROFESSOR BLAKELY: While if you buy  
10 Solution 1A, here this thing is that sweeps across  
11 all of the rules of evidence and this thing is  
12 admissible despite any evidence rule that comes  
13 in.

14 CHAIRMAN SOULES: Well can we say --  
15 start out 1B with the language "despite any other  
16 evidence rule to the contrary,"?

17 MR. TINDALL: Of course you deal with  
18 the hearsay and authentication -- you deal with  
19 that now in every form of evidence. As I've  
20 worked through those rules of evidence, you have  
21 to move around like a computer to make certain  
22 you've covered all the bases anyway. So I don't  
23 think that's a unique problem with an auditor's  
24 report.

25 CHAIRMAN SOULES: But if we put that

1 in there "despite any other evidence rule to the  
2 contrary," then that would make this dominant.

3 MR. BEARD: Mr. Chairman, can we vote  
4 on the motion to see how we stand?

5 CHAIRMAN SOULES: Okay. The motion is  
6 that we take Solution 1A; we're discussing it  
7 really, I guess. How many favor generally the  
8 approach to 1A versus the approach to 1B, I guess  
9 we can get a consensus on that. 1A? Seven. 1B?  
10 Five. Okay. That's seven to five.

11 Well, I guess the motion is -- is there any  
12 other discussion? Rusty?

13 MR. McMANS: I'm not sure, however,  
14 that the committee has spoken to your suggested  
15 amendment to 1B which I think could be put in 1A  
16 in terms of said report when prepared pursuant to  
17 the order.

18 MR. BRANSON: Why don't you reask the  
19 question, Luke? How many would like 1B with that  
20 statement added to it?

21 CHAIRMAN SOULES: Okay. If 1B reads  
22 this way: "Despite any other evidence rule to the  
23 contrary, verified reports of auditors prepared  
24 pursuant to Texas Rule of Civil Procedure 172" --  
25 and then to the end. If that was the structure of

1 1B, how many would prefer that to the other  
2 alternatives? Twelve. That's the majority of the  
3 House. Would you accept that as a substitute  
4 motion?

5 PROFESSOR BLAKELY: I hear Robert out  
6 there screaming, but that's all right with me.

7 CHAIRMAN SOULES: All right. The  
8 substitute motion is then that we amend -- that we  
9 add a Rule 706 to the Texas Rules of Evidence as I  
10 just read it, and that we amend Rule 172 as it  
11 appears on page 470.

12 PROFESSOR EDGAR: Now, would you  
13 repeat how that lead into 706 is going to read?

14 CHAIRMAN SOULES: Yes, sir. It will  
15 say "Despite any other evidence rule to the  
16 contrary, verified reports of auditors prepared  
17 pursuant to Texas Rule of Civil Procedure 172" --  
18 and then complete --

19 PROFESSOR EDGAR: And appointed  
20 pursuant to Rule 172?

21 CHAIRMAN SOULES: No. "Verified  
22 reports of auditors prepared pursuant to." Strike  
23 "appointed" because 172 takes care of the  
24 "appointed."

25 PROFESSOR EDGAR: All right.

1 CHAIRMAN SOULES: Further discussion?

2 PROFESSOR DORSANEO: Mr. Chairman, on  
3 this Rule 172 proposal, the sentence that has been  
4 modified "exceptions to such report or any item  
5 thereof may be filed," do you think that that  
6 conveys the meaning that exceptions are necessary  
7 before the report can be contradicted?

8 CHAIRMAN SOULES: If it doesn't, that  
9 message should be in the rules.

10 MR. TINDALL: Unless exceptions to the  
11 report have been filed within 30 days, a party may  
12 not contradict. Isn't that what you're attempting  
13 to say, Luke? You give at least 30 days.

14 CHAIRMAN SOULES: Well why would you  
15 change "may" to "must"? Exceptions must be filed  
16 to tell everybody you've got a 30-day fuse  
17 running. If you don't, you're going to waive it.  
18 Just change "may" to "must."

19 MR. TINDALL: But I think the question  
20 is if you don't file exceptions, is it clear under  
21 the rule that your lips are sealed to contradict?

22 CHAIRMAN SOULES: I'm comfortable with  
23 leaving that in the evidence rule once you say  
24 you've got 30 days in which you must file  
25 objections in 172 because that's procedural.

1 MR. TINDALL: Yeah.

2 CHAIRMAN SOULES: And then pass on to  
3 what happens if you don't in the rule of evidence.  
4 Any further discussion? Those in favor say aye.

5 COMMITTEE MEMBERS: Aye.

6 CHAIRMAN SOULES: Opposed? That's  
7 unanimously recommended.

8 The next item then, Newell?

9 PROFESSOR ELAKELY: Mr. Chairman, the  
10 Texas State Bar Committee on Rules of Evidence  
11 passed four changes in the rules of evidence,  
12 recommended them to the Supreme Court, and that's  
13 been referred to this committee. And that begins  
14 with problem number two on page 471.

15 The Texas Rules of Appellate Procedure say  
16 that "When the court hears objections to offered  
17 evidence out of the presence of the jury and the  
18 rules, that such evidence be admitted -- that such  
19 objections shall be deemed to apply to such  
20 evidence when it is admitted before the jury  
21 without the necessity of repeating those  
22 objections." That's presently in the Texas Rules  
23 of Appellate Procedure.

24 Some member of the rules committee, Evidence  
25 Rules Committee, recommended that that be brought

1 into the rules of evidence. And he recommended it  
2 as an amendment to 103(a)(2), Offer of Proof, and  
3 the Evidence Rules Committee approved that; there  
4 was some thought that it wasn't necessary and  
5 perhaps inappropriate to try to bring everything  
6 in. But at any rate, the committee approved it.  
7 And I submitted it to the subcommittee, and the  
8 subcommittee approved it six to two; there you see  
9 the votes right under Solution IIA, six to two  
10 approved that.

11 I did not submit and should have, I now  
12 realize, a suggestion that had been made by Mike  
13 Sharlot who is chairman of that committee now,  
14 that it's not proper to put that amendment in  
15 103(a)(2) because (2) is from the proponent side,  
16 the offering side, and this amendment is really  
17 from the viewpoint of the objecting side. So I  
18 have put over here in Solution IIB precisely the  
19 same thing, except put it in from the standpoint  
20 of the objecting side as an amendment to  
21 103(a)(1). And I'm sure that anyone who voted for  
22 Solution IIA would vote for Solution IIB as  
23 preferable. And on all of those assumptions, I  
24 move approval of Solution IIB at the top of page  
25 472.



1 MR. JONES: I second the motion, Mr.  
2 Chairman.

3 MR. BRANSON: I notice that Tom  
4 Ragland and Franklin Jones were on that committee  
5 and you all voted against it.

6 MR. JONES: We voted against IIA.

7 PROFESSOR EDGAR: But not against IIB?

8 MR. TINDALL: Not against IIB, was  
9 that --

10 MR. JONES: Not against IIB.

11 PROFESSOR EDGAR: So that, in effect,  
12 this is a unanimous recommendation of the  
13 committee then at this point, I take it.

14 MR. JONES: And I have seconded the  
15 motion.

16 CHAIRMAN SOULES: The motion has been  
17 moved and made, and seconded that Solution IIB,  
18 amendment to Rule 103(a)(1) as it appears on page  
19 472 of our materials be recommended to the Supreme  
20 Court. Any further discussion? Elaine.

21 PROFESSOR CARLSON: I wonder if it  
22 wouldn't be just a little bit clearer -- and I'm  
23 sorry, Newell, I didn't raise this earlier -- if,  
24 in the amendment it read "when the court hears  
25 objections to the offered evidence out of the

1 presence of the jury in rules on the record."

2 MR. JONES: On the record?

3 PROFESSOR CARLSON: Uh-huh.

4 MR. JONES: I would go out and accept  
5 that.

6 CHAIRMAN SOULES: Elaine, I'm sorry.  
7 I didn't quite hear you. Would you say it again?

8 PROFESSOR CARLSON: My suggestion is  
9 in the underlying language on page 472, the  
10 amendment in IIB. "When the court hears  
11 objections to offered evidence out of the presence  
12 of the jury in rules on the record", -- "on the  
13 record" would be --

14 MR. JONES: Insert "on the record"  
15 between "rules" and "that", Luke.

16 PROFESSOR BLAKELY: -May I give one  
17 warning, Mr. Chairman.

18 CHAIRMAN SOULES: Yes, sir. Newell.

19 PROFESSOR BLAKELY: What we're doing  
20 here is simply bringing the exact language from  
21 the appellate rules into the trial rules. And if  
22 you change it, then there is some query as to what  
23 does that mean. If you add something, is it  
24 completely consistent with the appellate rules or  
25 does it give someone a basis for argument in that,

1 "Oh, no, it says here" -- and so forth.

2 PROFESSOR DORSANEO: Doesn't the court  
3 always rule on the record? I mean you don't rule  
4 off the record.

5 PROFESSOR EDGAR: If it ain't on the  
6 record, it isn't there.

7 MR. McMAINS: It ain't a ruling if it  
8 ain't on the record.

9 MR. TINDALL: Professor Newell, what  
10 about the flip side where the judge hears evidence  
11 outside of the jury and decides not to let it in.  
12 Do you have to retender it to preserve the -- I  
13 mean the flip side is preserving the old bill of  
14 exceptions. This seems to say that you don't have  
15 to renew the objections --

16 MR. McMAINS: Well that is the case.

17 MR. TINDALL: -- if the judge out of  
18 the hearing of the jury decides to let it in,  
19 right?

20 MR. McMAINS: Yeah, that is the law.

21 MR. TINDALL: You have preserved your  
22 objection. But the flip side has never been the  
23 rule, has it? You present evidence about a bill  
24 of exception, and the judge says "I'm not going to  
25 let it in." If you don't come back into the

1 courtroom and remember all those little tricks and  
2 say, "Judge, I offer that evidence" -- and if he,  
3 you know, doesn't -- then says "I refuse it,"  
4 your bill of exceptions is no good.

5 MR. BRANSON: Now you're not -- well,  
6 you're properly outside of the presence of the  
7 jury.

8 MR. TINDALL: No.

9 PROFESSOR BLAKELY: The judge has  
10 already -- you've already -- in the courtroom --

11 MR. TINDALL: You've got to offer it  
12 again on the record.

13 MR. BRANSON: Well, but you take the  
14 record with you. I mean the record is going in  
15 the bill of exceptions.

16 PROFESSOR DORSANEO: Not under  
17 T.R.A.P. 52 you don't.

18 MR. McMANS: No.

19 PROFESSOR DORSANEO: See that's the  
20 problem. This is only, you know, one -- taking  
21 one loose sentence from 52 and putting it in 103  
22 and there is a lot more in 52 that could go in  
23 103. And it's a larger problem. I think you just  
24 have to read 103 and 52 together.

25 MR. McMANS: 103 really deals with --

1 I mean the problem is -- I think Newell had in the  
2 beginning is that the civil rules of evidence are  
3 things that a trial judge concerns himself with.  
4 He doesn't have to worry about it from the  
5 appellate court's angle. The appellate court is  
6 going to say that that's sufficient.

7 MR. BEARD: Well, Bill, you don't have  
8 to read off on your bill of exceptions.

9 PROFESSOR DORSANEO: Not now. Under  
10 52 you don't.

11 MR. TINDALL: But you formerly did,  
12 right?

13 PROFESSOR DORSANEO: Yeah, I think you  
14 did.

15 MR. McMANS: Arguably.

16 CHAIRMAN SOULES: There was some  
17 authority, though, that when you got the jury back  
18 in the box, you had to get up there and tell the  
19 judge, "I offered what I just offered," and he had  
20 to exclude it before the jury which was silly.  
21 But that's been eliminated entirely now, hasn't  
22 it, to preserve your error?

23 MR. TINDALL: And this is eliminated,  
24 too, so --

25 CHAIRMAN SOULES: Any further

1 discussion? Those in favor of Solution IIB --  
2 well, do we put on -- do we want to insert "on the  
3 record" -- which would be different from 52 or  
4 not? Those in favor of that insertion, show by  
5 hands. Opposed -- I'm sorry. I didn't see that.  
6 And those opposed show by hands. Okay. It seems  
7 to be opposed, Elaine. And then without inserting  
8 "on the record" at that point, now looking just as  
9 the text appears on 472 at Solution IIB, those in  
10 favor of amending Rule 103 as indicated, say aye.

11 COMMITTEE MEMBERS: Aye.

12 CHAIRMAN SOULES: Opposed? That's  
13 unanimously recommended.

14 PROFESSOR BLAKELY: Mr. Chairman,  
15 problem number three --

16 PROFESSOR EDGAR: Well, while we're on  
17 Rule 52, I just called to our collective attention  
18 that there are two remarkable typographical errors  
19 in the rule as it now appears. I'm looking at  
20 T.R.A.P. 52(c)(5). It states: "The judgment  
21 shall submit such bill to the adverse party." I  
22 think that means "The court shall submit."

23 PROFESSOR DORSANELO: I move the  
24 deletion of that sentence all together.

25 PROFESSOR EDGAR: Well, I'm just

1 simply stating that that is a typographical error,  
2 obviously.

3 PROFESSOR DORSANEO: Yes.

4 PROFESSOR BLAKELY: Are we bringing  
5 the typographical error into the evidence rules?  
6 Is that what you're --

7 PROFESSOR EDGAR: No. I'm just simply  
8 -- because I'll forget this if I don't say it now,  
9 but I've noted in my rules of evidence book that  
10 that is -- there is a typographical error there.  
11 And then, again, in Rule 52(c)(10) the sentence  
12 reads "anything occurring in open court or in  
13 chambers that is reported and so certified by the  
14 court reporter may be included in the statement of  
15 facts rather than in formal bills of exception,  
16 providing that in a civil case the party  
17 requesting that all or part of the jury arguments  
18 'of' the voir dire examination," and that should  
19 be "or."

20 MR. McMANS: No, it says "on" but it  
21 should be "or."

22 PROFESSOR EDGAR: Oh, okay. I've x'd  
23 it out, but anyhow that's also a typographical  
24 error. I simply call those to the committee's  
25 attention.

1 PROFESSOR DORSANEO: Why don't you  
2 move the correction?

3 PROFESSOR EDGAR: I move the  
4 correction.

5 PROFESSOR DORSANEO: Second.

6 CHAIRMAN SOULES: Okay. I've got  
7 changing "cn" to "or" in 52(c)(10), but I feel  
8 like there was more conversation about 52(c)(5)  
9 and the suggestion was made that it should be  
10 deleted.

11 MR. McMANS: Well, he was --

12 PROFESSOR DORSANEO: No.

13 MR. McMANS: That's all right.

14 CHAIRMAN SOULES: Okay. So what are  
15 we saying? "The court shall submit"?

16 PROFESSOR EDGAR: Yes.

17 CHAIRMAN SOULES: Those in favor of  
18 those two changes say aye.

19 COMMITTEE MEMBERS: Aye.

20 CHAIRMAN SOULES: Opposed?

21 JUSTICE WALLACE: Are we deleting (5)  
22 all together?

23 CHAIRMAN SOULES: Opposed?

24 JUSTICE WALLACE: Are we deleting (5)  
25 all together?



1 CHAIRMAN SOULES: No. Judge, what  
2 we're doing here, the word "judgment", the second  
3 word in (5) would be changed to "court." And that  
4 would be the only change in (5). And in (10) "on"  
5 to "or."

6 JUSTICE WALLACE: Okay.

7 CHAIRMAN SOULES: Next, Newell?

8 PROFESSOR BLAKELY: Mr. Chairman, on  
9 page 472 under the problem number three, Solution  
10 IIIA, this is the same song, second verse except  
11 from the offering party's side. This brings into  
12 the rules of evidence some language from 52(b),  
13 and you had the same vote for that. By the by, I  
14 should add McConnico; that vote came in late. Add  
15 that to "for."

16 MR. McCONNICO: Thanks, Newell.

17 PROFESSOR BLAKELY: And, belatedly, I  
18 should have said on the previous problem, he also  
19 joined the majority. But there it is, "The  
20 offering party shall as soon as practicable, but  
21 before the court's charge is read to the jury, be  
22 allowed to make, in the absence of the jury, its  
23 offer of proof." And then reading on what's the  
24 existing language in the rules of evidence. Move  
25 approval, Mr. Chairman.

1 CHAIRMAN SOULES: Motion has been made  
2 to amend Rule 103(b) as indicated on page 472.

3 Second?

4 MR. LOW: Second.

5 CHAIRMAN SOULES: Discussion?

6 PROFESSOR EDGAR: Tom, what were your  
7 and Franklin's objections to that?

8 MR. RAGLAND: That's what we are  
9 trying to figure out.

10 MR. JONES: Newell, are you sure  
11 Ragland and I voted against that?

12 PROFESSOR BLAKELY: Beg your pardon?

13 MR. JONES: I said are you sure that  
14 Ragland and I voted against that?

15 PROFESSOR BLAKELY: I can go back and  
16 check, but I don't notice --

17 MR. JONES: Well, did I tell you why?  
18 Because I can't now --

19 PROFESSOR BLAKELY: I may have just  
20 put that in there to make it up.

21 MR. JONES: You probably put it in  
22 there so it would carry.

23 CHAIRMAN SOULES: Further discussion?  
24 Those in favor say aye.

25 COMMITTEE MEMBERS: Aye.

1 CHAIRMAN SOULES: Opposed? That's  
2 unanimously recommended.

3 PROFESSOR BLAKELY: Mr. Chairman, on  
4 page 473 where I've got problem number four, the  
5 Texas Rules of Evidence Committee recommended that  
6 Rule 407 Subsequent Remedial Measures, be amended  
7 by striking the sentence "Nothing in this rule  
8 shall preclude admissibility in products liability  
9 cases based on strict liability."

10 The vote -- I'm orally amending the vote up  
11 there -- McConnico and O'Quinn responded after I  
12 had shut down the voting. So actually the  
13 subcommittee vote is a vote against this proposal,  
14 but the State Bar Evidence Committee recommended  
15 it. And you pretty well know the arguments for  
16 and against. I think one of the arguments for is  
17 that trial judges read that sentence and they say  
18 "Well, that means that we cannot admit subsequent"  
19 -- I mean that subsequent remedial measures come  
20 in in strict liability cases, and that's that --  
21 the products liability cases.

22 An argument that that should be struck is  
23 that 403 then would emerge as the controlling  
24 rule. And in some cases, the probative value of  
25 the subsequent remedial measure in products

1 liability cases is very minimal and prejudicial  
2 impact extremely heavy. But trial judges: "Well,  
3 but no, there is that sentence over there in 407."  
4 And they should be thinking in terms of 403, and  
5 may do so if that sentence is struck. That's one  
6 of the arguments for striking it. But you people  
7 know what's lurking in your minds on this  
8 particular sentence and the arguments that were  
9 made back in the liaison committee on that.

10 You know that the Fifth Circuit, of course,  
11 lets -- or rejects in products liability cases  
12 subsequent remedial measures and a number of  
13 Federal circuits do -- one or two do admit them.  
14 So that's about the size of it. And I, now  
15 representing the vote of the subcommittee, move  
16 disapproval of this recommendation.

17 MR. JONES: I second the motion, Mr.  
18 Chairman.

19 CHAIRMAN SOULES: Any further  
20 discussion?

21 MR. MORRIS: I move the question.

22 CHAIRMAN SOULES: Those in favor of  
23 the motion that no change be made to Rule 407 say  
24 aye.

25 COMMITTEE MEMBERS: Aye.

1 CHAIRMAN SOULES: Opposed?

2 PROFESSOR BLAKELY: Opposed.

3 CHAIRMAN SOULES: Okay. You think  
4 they should change it.

5 PROFESSOR BLAKELY: Yes.

6 CHAIRMAN SOULES: Okay. So that's  
7 House to one. No change.

8 Next.

9 PROFESSOR BLAKELY: Beginning on page  
10 473, problem number five dealing with Rule 705,  
11 we're going to let the expert testify, but let's  
12 explore the basis for his opinions out of the  
13 presence of the jury to be sure that a bunch of  
14 this inadmissible -- evidence inadmissible save as  
15 a basis, won't taint the jury if it is found that  
16 the basis is inadequate to support the opinion.

17 This is presently the language on the  
18 criminal side, and someone had recommended in the  
19 evidence committee -- the State Bar Evidence  
20 Committee -- that (d), subsection (d), be put in  
21 the civil rules. But the thought was, "Well, if  
22 we're going to get into that, let's just bring the  
23 whole rule over," and so the Bar Committee  
24 recommended that importation of the criminal  
25 language to the civil side.

1           The vote up there must be amended to -- with  
2 Jones and Ragland against, add McConnico and  
3 O'Quinn against. So the vote is five to four in  
4 favor of this change. And I move approval of this  
5 change.

6           CHAIRMAN SOULES: Second?

7           MR. LOW: I vote with you. I second  
8 it.

9           MR. TINDALL: I'll second.

10          MR. BRANSON: Let's discuss that if we  
11 could, Mr. Chairman.

12          CHAIRMAN SOULES: Now. Discussion.  
13 Franklin Jones.

14          MR. JONES: Mr. Chairman, I vigorously  
15 oppose this change, and I confess that it's only  
16 come up in my practice in the rare instances in  
17 which I try condemnation cases. And we have a  
18 condemnation lawyer up in Marshall who if  
19 obnoxious counted, he would be world champion.

20          PROFESSOR EDGAR: Could you speak up  
21 just a little, Franklin?

22          MR. JONES: I say we've got a  
23 condemnation lawyer up in Marshall that if  
24 obnoxious counted, he would be world champion.  
25 But he uses this rule, and it would be available

1 to every litigant and every cantankerous lawyer  
2 either on the north or the south side of the  
3 docket.

4 And whenever you trot your expert witness  
5 into the courtroom and by the time -- you ask him  
6 his name, and then the lawyer jumps up and says I  
7 want the witness on voir dire. He disrupts the  
8 presentation of your case; it's an obstructionist  
9 tactic is what it is. And I don't think we ought  
10 to give the -- or the trial court, of course, can  
11 always determine whether or not a witness is  
12 qualified. But to allow an obstructionist lawyer  
13 to be able to destroy the continuity of a trial is  
14 a bad mistake. And I think we ought to reject  
15 this change.

16 CHAIRMAN SOULES: Frank Branson.

17 MR. BRANSON: Along the same -- in  
18 support of Franklin's position, I have tried a  
19 case or two where my adversary has used this rule  
20 in the same manner that Franklin described. And  
21 basically what they did is cross examination  
22 before direct examination. In addition to that,  
23 anything provided by the additions to Rule 705 can  
24 currently be covered by taking a deposition of the  
25 experts. So it's not only adding fuel to those

1 obstructionists, but it's absolutely unnecessary,  
2 and I vehemently oppose the addition.

3 CHAIRMAN SOULES: Newell.

4 PROFESSOR BLAKELY: Mr. Chairman,  
5 responding to the two points that have been made  
6 here, a party opposing an expert can ask for  
7 permission to go into his qualifications before he  
8 gives his expert opinion. Whether or not this  
9 change is made, you will note the comment right at  
10 the end of it, this rule does not preclude a party  
11 from conducting a voir dire examination into the  
12 qualifications of the expert. The qualifications  
13 of the expert -- the opponent can make a contest  
14 on that before you finish your direct examination.  
15 And that's so with or without this particular  
16 rule.

17 MR. BRANSON: Judge, if they haven't  
18 -- I mean, Professor, if they haven't taken his  
19 deposition, the court is not going to grant that  
20 because --

21 MR. JONES: Well why pass the rule if  
22 it --

23 MR. BRANSON: Well, if they've taken  
24 his deposition, they don't need it.

25 PROFESSOR BLAKELY: Well, the



1 arguments for the rule, the qualifications point  
2 aside, is that this very well qualified expert may  
3 nevertheless have an inadequate basis for the  
4 opinion that he is going to give. And if he gives  
5 that opinion and then it's found out that his  
6 basis is inadequate and it is all struck, the jury  
7 is tainted.

8 Now Frank says well, you're going to discover  
9 that all on pretrial discovery --

10 MR. BRANSON: If a lawyer is diligent,  
11 he's asked interrogatories, he's got the name of  
12 the expert, he's then taken their deposition. He  
13 makes a motion to strike before the expert gets  
14 up. If he's not diligent, I don't see giving him  
15 the opportunity to come in the back door of the  
16 courthouse, and that's all this does.

17 MR. JONES: And if he's -- the expert  
18 is not qualified, all he's got to do is object to  
19 his opinion.

20 PROFESSOR BLAKELY: It's not a  
21 question of qualifications.

22 CHAIRMAN SOULES: Rusty, you had your  
23 hand up? Rusty McMains.

24 MR. McMAINS: Right. Well I agree  
25 with the Dean that it is not a qualification

1 issue. My concern is that the rule as it is  
2 stated basically makes a condition precedent to  
3 any expert opinion. You know, that you allow this  
4 voir dire examination. It doesn't matter whether  
5 or not it's a real significant contest or not, it  
6 just is a protracting, interfering mechanism in  
7 the trial. It's dilatory, disruptive.

8 Now, I can understand -- and I don't frankly  
9 have as much of a problem with the concept of a  
10 balancing instruction or balancing test being put  
11 in in terms of if the proponent of the expert is  
12 offering treatises and stuff and stick him in  
13 front of the jury -- of having some kind of  
14 instruction power. I frankly think he's got that  
15 now. I don't think there is any real doubt that  
16 -- you can do anything that's under the (c) part  
17 of the balancing test now without the necessity of  
18 it being in this part of the rule.

19 But the main thrust of the change is just a  
20 mandatory voir dire which I think is just an  
21 extremely disruptive practice and uncalled for.

22 CHAIRMAN SOULES: Steve McConnico.

23 MR. McCONNICO: Well, I agree it does  
24 allow mandatory voir dire which I think is used to  
25 slow down the trial. Plus, even if the courts do

1 have the power now that Rusty is talking about,  
2 this is going to highlight it. This is going to  
3 make it very clear that they have that power, and  
4 we're going to see the trial courts determining  
5 whether or not someone is qualified to give  
6 testimony instead of juries.

7 MR. McMANS: Oh, don't get me wrong.  
8 I'm not suggesting that they have the power to do  
9 what's in (b) and (c) now.

10 MR. McCONNICO: Yeah.

11 MR. McMANS: I mean arguably --  
12 obviously, if the judge wants to let somebody  
13 interrupt you, you're not going to be able to do  
14 anything about it anyway as a practical matter.  
15 But I mean what I'm talking about is the limiting  
16 instruction part of --

17 MR. McCONNICO: Of (d).

18 MR. McMANS: Of (d), yes. Right.

19 MR. McCONNICO: What I'm trying to say  
20 is if the court does have that power, this just  
21 highlights it and it's going to be giving the  
22 trial court a lot more power and determination on  
23 who is qualified to testify as an expert, instead  
24 of a jury. And if a person isn't qualified to  
25 testify as an expert, you can handle that in cross

1 examination and the jury can make that decision.

2 CHAIRMAN SOULES: Any further  
3 discussion?

4 PROFESSOR EDGAR: I just have a  
5 question. Newell, under the rules as they  
6 currently exist, doesn't the court have the power  
7 to properly allow voir dire examination to  
8 determine the qualifications of an expert?

9 PROFESSOR BLAKELY: Yes. And that  
10 will be so after this, and this rule has got  
11 nothing to do with examining the qualifications of  
12 an expert.

13 PROFESSOR EDGAR: Well then --

14 PROFESSOR BLAKELY: This rule has to  
15 do with examining the basis of his opinion.

16 MR. McMAINS: That's right.

17 MR. McCONNICO: That opens up that  
18 whole area as to his basis of getting in --

19 MR. McMAINS: It has to do with  
20 undermining the ultimate issue opinion stuff that  
21 we did in the first place.

22 PROFESSOR EDGAR: Well, but doesn't  
23 the court have that power now?

24 MR. TINDALL: Newell, why are we  
25 taking a criminal practice where there are very

1 limited discovery procedures, depositions are  
2 almost unheard of, and importing it into a civil  
3 practice where you can do anything?

4 MR. BRANSON: I could see if you  
5 didn't have depositions why this would be  
6 relevant. But if you've got depositions, all  
7 you're doing is encouraging sloppy legal work, and  
8 I don't think you ought to do it.

9 CHAIRMAN SOULES: Elaine Carlson?

10 PROFESSOR CARLSON: In listening to  
11 the comments, I wonder if we couldn't compromise  
12 by modifying some of the proposed language again.  
13 What if instead this (b) read "prior to the expert  
14 giving his opinion" -- then, "instruct or  
15 disclosing the underlying facts or data, a party  
16 against whom the opinion is offered" -- and we'd  
17 pick up that language again -- "shall upon request  
18 be permitted to conduct a voir dire examination  
19 directed to the underlying facts or data upon  
20 which the opinion is based when such disclosure  
21 has not been made."

22 MR. BRANSON: Well -- but then you  
23 still encourage them not to take depositions and  
24 do it all at the trial.

25 PROFESSOR CARLSON: Well I think

1 strategically most attorneys in a large case are  
2 going to do that anyway.

3 MR. JONES: Where is the criticism of  
4 the present rule coming from? Who is making a  
5 case that this rule ought to be changed?

6 MR. BRANSON: This came from the  
7 criminal lawyers.

8 PROFESSOR BLAKELY: Yeah, this came  
9 from the State Bar Committee.

10 MR. JONES: Well, I know that's where  
11 it came from, but what --

12 PROFESSOR BLAKELY: I don't remember  
13 who.

14 MR. JONES: -- what evidence do they  
15 have that we need to change this rule?

16 MR. TINDALL: Mr. Chairman, may I  
17 withdraw my second and maybe it will die at that  
18 point.

19 MR. BRANSON: You can't do that.

20 CHAIRMAN SOULES: All right. The  
21 Chair --

22 MR. LOW: I say that we go ahead.  
23 I've already seconded it. The Professor and I are  
24 going down together.

25 CHAIRMAN SOULES: It's been moved and

1 seconded by -- moved by Blakely and seconded by  
2 Low -- let's take a consensus. How many are  
3 inclined to make this change? If it's heavily  
4 resisted, we may just go on. Let's just get a  
5 consensus on the change to Rule 705. This is not  
6 a final vote, but how many feel that we should  
7 make such a change or a similar change? Three.  
8 How many feel we should not? Okay. How many feel  
9 we should continue to discuss it? There are no  
10 hands up on that.

11 Let's vote then. How -- those --

12 PROFESSOR BLAKELY: This is serious  
13 this time then, Mr. Chairman?

14 CHAIRMAN SOULES: I wanted everybody  
15 to see where it stood and if we want to go on and  
16 discuss it, we can.

17 PROFESSOR DORSANEO: I like paragraph  
18 (d). It seems to be a separate issue.

19 MR. RAGLAND: To make it official I  
20 move that we reject proposed amendment 705.

21 COMMITTEE MEMBER: Second.

22 CHAIRMAN SOULES: The motion has been  
23 made and seconded, and everybody agrees that we  
24 have fully discussed it, that the proposed change  
25 to Rule 705 be made. That's the motion, that it

1 be made. Those in favor show by hand.

2 MR. RAGLAND: Just a second. What was  
3 the motion?

4 CHAIRMAN SOULES: The motion is that  
5 Rule 705 be amended as indicated here because  
6 there was a motion on the floor before yours, Tom.

7 MR. RAGLAND: Okay.

8 PROFESSOR CARLSON: As it now appears  
9 on page 473?

10 CHAIRMAN SOULES: Yes. Well first,  
11 Elaine, do you want to offer your amendment? If  
12 so --

13 PROFESSOR CARLSON: No. I didn't seem  
14 to garner much support so -- in which case --

15 CHAIRMAN SOULES: I want to be sure  
16 that you're given every opportunity to get it on  
17 the record. Okay.

18 Those in favor of the changes proposed to  
19 Rule 705 on page 474 of the materials, show by  
20 hands. That's two. And opposed? Looks like 12.

21 MR. BEARD: As I was saying, I think  
22 everybody should have noted that in the Cullen  
23 Davis trial that they just had a hung jury on,  
24 there were two expert witnesses testifying in  
25 there, and their expert opinion was that Cullen



1 Davis committed the murders. So I don't think we  
2 have any rules about expert witnesses up there,  
3 you know.

4 CHAIRMAN SOULES: I didn't think so  
5 when I read the rules of evidence. When they came  
6 out, it was all over. Newell?

7 PROFESSOR BLAKELY: Mr. Chairman, when  
8 I solicited the subcommittee -- Buddy?

9 MR. McMANS: Buddy?

10 MR. LOW: Yeah. I'm sorry.

11 PROFESSOR BLAKELY: Yeah, when I sent  
12 out to the subcommittee, Buddy reacted by return  
13 mail, and I want to nominate him for committee  
14 member of the year.

15 PROFESSOR DORSANEO: I'll second that.

16 PROFESSOR EDGAR: I second.

17 CHAIRMAN SOULES: Does that conclude  
18 your report, Newell?

19 PROFESSOR BLAKELY: Yes, it does. We  
20 took care of the Wicker thing a moment ago.

21 CHAIRMAN SOULES: Thank you very much  
22 for that. That's always a well organized and well  
23 presented report, Newell.

24 What's the pleasure? We have the discovery  
25 types of rules and Bill Dorsaneo's bit. Rusty,

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1 you've got a -- yours will probably be short,  
2 won't it?

3 MR. McMAINS: Yes.

4 CHAIRMAN SOULES: Tony, Steve, Elaine  
5 -- which of these are going to be the most  
6 important changes as you see them? I think maybe  
7 Dorsaneo's.

8 MR. McMAINS: Yes, I think so.

9 CHAIRMAN SOULES: And the reason I'm  
10 putting those forward is I want the maximum number  
11 of people here when we talk about the most  
12 important changes, and I'm sure that some people  
13 are going to have to leave later in the day.  
14 Should we just take up Bill's report now?

15 MR. McCONNICO: I say we do.

16 CHAIRMAN SOULES: Okay. This is  
17 category five on your agenda.

18 PROFESSOR DORSANEO: Okay. If you  
19 will each turn to page 210. The easiest way to  
20 deal with the particular suggestions made by  
21 people who have written in and made suggestions is  
22 to look at the report of the standing committee on  
23 Rules 166(b)-215. First of all, there was a  
24 proposal made to amend Rules 167 and 168 to permit  
25 discovery before the defendant's answer day. The

1 committee, I think, unanimously -- well actually,  
2 it says divided, I don't know who voted against it  
3 -- but fairly close to unanimously decided that  
4 this committee should consider the matter. And we  
5 drafted Rules 167 and 168 as reflected on pages  
6 218 and 220 through 221 to provide for discovery  
7 and production of documents and interrogatories  
8 before answer day.

9 The specific language was modeled fairly  
10 closely on the companion Federal rule such that a  
11 written response and objections, if any, would be  
12 required within 30 days after service of the  
13 request in terms of Rule 167, and within 45 days  
14 after service of the citation and petition upon a  
15 defendant so that there is a little bit more time  
16 involved if what you have is the request served  
17 with the petition. That is in both 167 and 168,  
18 and again it fairly well tracks the exact language  
19 in the companion Federal rules. Basically the  
20 suggestion is to go to the Federal practice on  
21 these devices.

22 -CHAIRMAN SOULES: Is it so moved?

23 PROFESSOR DORSANEO: Yes. The  
24 committee moves adoption of those changes.

25 CHAIRMAN SOULES: Any second?

1 MR. McCONNICO: What --

2 CHAIRMAN SOULES: Before we discuss,  
3 do I hear a second?

4 MR. BEARD: Second.

5 CHAIRMAN SOULES: Pat Beard seconds.  
6 Now, discussion? Steve McConnico.

7 MR. McCONNICO: Luke, I opposed this  
8 in the subcommittee. And the reason I opposed it  
9 is because under the recent Fort Worth Court of  
10 Appeals case of Insulated Glass and the recent  
11 Supreme Court case of Gutierrez vs. Dallas  
12 Independent School District, if the person who  
13 receives the discovery does not respond to it,  
14 object to it, or ask for an extension within 30  
15 days, he waives it. He has to respond to it.

16 And as I see it under this rule, if someone  
17 is served with -- if the attorney gets the  
18 petition on the day that the answer is due along  
19 with the discovery, he then has 25 days within  
20 which to respond to such discovery request. He  
21 doesn't have any type of relationship with the  
22 person generally that he's representing. He  
23 doesn't know anything about the case. He then has  
24 to get into it and try to respond to that  
25 discovery in 25 days. In a big case, that's not

1 enough time.

2 In most cases what he's going to do is he's  
3 going to file a motion to extend time and we're  
4 going to have another discovery motion in the  
5 trial court. But I don't think we should be doing  
6 anything that adds to additional discovery motions  
7 in the trial court. I think we've bogged our  
8 trial courts down too much with all of these  
9 discovery motions that every time we go to the  
10 courthouse that's what's on the docket. That's  
11 what the trial courts are telling me; judges are  
12 telling me they are taking up a lot of their time.  
13 For that reason, I oppose it.

14 CHAIRMAN SOULES: Buddy Low.

15 MR. LOW: Luke, what are they talking  
16 about? What -- I don't see a proposed rule on  
17 210. Is he just generally --

18 MR. McMAINS: It's on 218.

19 MR. LOW: Oh. Okay. Well now --

20 MR. McMAINS: 218 is the proposed rule  
21 on Rule 167. And 168 is on 220.

22 -PROFESSOR DORSAMEO: 220 and 221.

23 CHAIRMAN SOULES: 167, 168, those two  
24 rules -- is it just those two, Bill?

25 PROFESSOR DORSAMEO: Yes.

1                   CHAIRMAN SOULES: As they appear on  
2 pages 218 through 222.

3                   MR. LOW: Okay. Go to Hadley. I may  
4 have further questions now that I know where we  
5 are.

6                   CHAIRMAN SOULES: Hadley Edgar.

7                   PROFESSOR EDGAR: To carry on with  
8 what Steve said just a moment ago, not only does  
9 this place the lawyer attempting to answer this  
10 under, I think, real undue time constraints, but  
11 I'm also wondering what's wrong with the present  
12 practice? I mean, is there something -- some  
13 reason why our current practice is not working  
14 adequately? Because unless there is some  
15 compelling reason, I would be reluctant to force  
16 this change and bring up all the problems that  
17 Steve has, I think, properly raised. And I'd like  
18 to hear some comment --

19                   CHAIRMAN SOULES: Rusty McMains.

20                   MR. McMAINS: Well, I was in the --  
21 even though I'm not on the committee, I was  
22 involved in the discussion about this, and Paul  
23 Gold, I think, was one of the people who -- with  
24 Branson's office that spoke for it. And the basic  
25 thesis was simply that right now the way the

1 rules --

2 PROFESSOR DORSANEO: You are on the  
3 committee.

4 MR. McMAINS: Oh, all right. I am on  
5 the committee.

6 PROFESSOR EDGAR: You are on the  
7 committee.

8 MR. McMAINS: I thought I was an  
9 interloper. But at any rate, one of the reasons  
10 that they are proposing this is that right now  
11 essentially just because of the order of practice,  
12 what happens is that a lot of people --  
13 particularly in your personal injury type practice  
14 where they use form interrogatories and form  
15 requests for production, and now I'm getting  
16 fairly standard 175 requests for production in  
17 order to avoid the interrogatory rule on  
18 limitation of the number of questions -- the  
19 discovery is all initiated by the defendant.

20 The defendant files an answer and then  
21 immediately begins initiating discovery. And  
22 you're on the defensive particularly with the  
23 sanctions practice as it currently is. And that  
24 is really not a very fair procedure in terms of  
25 plaintiff is initiating the lawsuit, sometimes in



1 the dark, can't talk with the defendant's  
2 witnesses who frequently have the sufficiency of  
3 the information. You get back special exceptions,  
4 you get back requests for production, you get back  
5 interrogatories, requests for admissions and all  
6 kinds of things. So that in my judgment, it does  
7 not increase the number of motions that have to be  
8 filed, it's just a question of who has to file  
9 them.

10 At least if you have the ability to initiate  
11 and inaugurate the discovery, then when the  
12 defendant gets it and he's under the gun, then  
13 maybe you can have a little bit better leverage to  
14 work out some kind of an agreeable scheduling for  
15 orderly discovery. And I think that's one of the  
16 basic --

17 PROFESSOR EDGAR: Well it seems to me,  
18 though, that the plaintiff -- the plaintiff's  
19 attorney that is in the position to initiate  
20 discovery simultaneously with the filing of the  
21 petition is equally in the capacity -- or has the  
22 ability to initiate that discovery immediately  
23 upon the filing of an answer. And in all  
24 probability, he is going to file that prior -- the  
25 defendant is not going to initiate discovery

1 simultaneously with the filing of the answer.

2 MR. McMAINS: That's not true though.  
3 I mean that by and large --

4 MR. JONES: There's one point that  
5 ought to be made here, Mr. Chairman.

6 MR. McMAINS: -- in the personal  
7 injury practice, 90 percent of the time I get  
8 discovery requests, interrogatories --

9 PROFESSOR BLAKELY: Notice --

10 MR. McMAINS: -- requests for  
11 admissions, notice of depositions --

12 CHAIRMAN SOULES: We've got too many  
13 talking. We're not on the record now.

14 MR. McMAINS: I'm sorry.

15 CHAIRMAN SOULES: Hadley had the  
16 floor. Did you finish expressing yourself?

17 PROFESSOR EDGAR: Well, okay. All  
18 right.

19 MR. McMAINS: I mean I'm just saying  
20 it's my experience in the practice of personal  
21 injury litigation, products litigation, and things  
22 that have very standard form interrogatories that  
23 are computer generated, that you get those.

24 MR. LOW: Well, I didn't realize you  
25 couldn't do this. I've been doing it.

1 MR. McMAINS: Well, you're supposed to  
2 have a motion with the court to do it.

3 MR. LOW: Well, because sometimes I'll  
4 file a lawsuit and it's kind of getting close to  
5 limitation and I have the sheriff serve the  
6 interrogatories. And when they get it, you know,  
7 I work out something. I tell the other lawyer  
8 that, you know, if he's got a time problem or  
9 something, I tell him what my time problem is, but  
10 I didn't know that I couldn't do that.

11 CHAIRMAN SOULES: Current practice  
12 does not permit that.

13 MR. McMAINS: Well, under Gutierrez,  
14 however, I think there is a good possibility that  
15 if they don't object, they may have a problem.

16 MR. JONES: Are you telling us, Rusty,  
17 that the rules provide for a motion --

18 MR. McMAINS: The rule provides right  
19 now that you could initiate discovery before  
20 answer date only with leave of the court. That's  
21 the way I --

22 MR. TINDALL: It doesn't seem like  
23 there's much sentiment for change, Luke. Can we  
24 leave it alone?

25 CHAIRMAN SOULES: Well, I want to make

1 sure everybody gets heard on this. Pat.

2 MR. BEARD: Mr. Chairman, this is a  
3 practice that is laid on us in all of the  
4 litigation pretty well in the other states. You  
5 get a petition served on you, you get a request  
6 for admissions, interrogatories. And I don't know  
7 why we can't live with it just like there is an  
8 extended period of time beyond the answer date to  
9 answer. And while the plaintiff is preparing his  
10 lawsuit, why shouldn't he prepare his basic  
11 request, interrogatories --

12 MR. McMAINS: He should.

13 MR. BEARD: -- and get it on rather  
14 than in another time frame.

15 MR. McMAINS: Let me say one other  
16 thing that I think is a salutary benefit to the  
17 rule, Franklin, and that is that if you serve this  
18 by the sheriff on the party, at least the party  
19 knows that there is something out there. And  
20 frequently you will have -- at least I have the  
21 problem of lawyers that have the tendency to let  
22 the interrogatories that you send to their office  
23 kind of lay around for awhile before they ever  
24 manage to even get it to the party. And I think  
25 there is actually a salutary benefit to the party

1 seeing that there are questions that need to be  
2 asked and you to focus on in the beginning.

3 CHAIRMAN SOULES: Tony SADBERRY.

4 MR. SADBERRY: Mr. Chairman, I would  
5 like to go back to Steve's question, if I may,  
6 with authority, the cites concerning the waiving  
7 of objections -- I wonder if that would be cured  
8 by a provision that in 45 days or 30 days -- 45  
9 days of service or 30 days after appeal, the  
10 discovery requests are gone. Would that solve the  
11 problem?

12 MR. McCONNICO: I don't think so  
13 because the defense attorney gets the  
14 interrogatory requests on the 20th day. Under  
15 this rule, he has 25 days to respond to it. If he  
16 doesn't respond to it in 25 days, under that Fort  
17 Worth Insulated Glass case and then Gutierrez from  
18 the Supreme Court, he can't file any objections.  
19 He's waived them.

20 MR. SADBERRY: I agree with that  
21 interpretation, but if the rule provided that, he  
22 still has 30 days after the receipt of request for  
23 discovery.

24 CHAIRMAN SOULES: What I'm sensitive  
25 to here is the timing of the answers. What would

1 be wrong with saying that the answers -- responses  
2 to this type of discovery are due 30 days after  
3 the answer is filed?

4 MR. JONES: Well, suppose you've got a  
5 limitation problem.

6 JUDGE RIVERA: They're going to object  
7 to that more than what we have now because now you  
8 can get it earlier with leave from the courts.

9 MR. SADBERRY: I think the problem is  
10 created by 45 days after service of citation. You  
11 might not serve the discovery requests  
12 contemporaneously with the petition until sometime  
13 in the period after service. And the 45 days  
14 would require a response to discovery request.  
15 Not -- that might not provide 30 days from the  
16 time of the discovery requests.

17 MR. BRANSON: I tell you what. With  
18 the new frivolous statute that the Legislature has  
19 passed, we really ought to look at something like  
20 a John Doe statute to allow a vehicle for  
21 discovery before the actual parties are named. I  
22 mean particularly in the medical negligence field  
23 where you've got a record that many times doesn't  
24 reflect what actually occurred and you're trying  
25 to figure out who needs to be sued. If you have

1 to go out and sue them now for the statute of  
2 limitation purposes, there are going to be a lot  
3 of cross actions and frivolous lawsuits filed.

4 CHAIRMAN SOULES: We'll put it on the  
5 agenda, Frank, as soon as you get it prepared.

6 MR. BRANSON: Okay. I'll prepare one  
7 and send it to you.

8 CHAIRMAN SOULES: Thank you. And I  
9 agree that that needs to be looked at. Rusty.

10 MR. McMANS: I do foresee, I think,  
11 based on the last comment -- and I'm not sure  
12 whether this would necessarily solve Steve's  
13 problem -- but it seems to me that the ability --  
14 what we should do is to be able to initiate the  
15 discovery contemporaneous with service.

16 CHAIRMAN SOULES: Yes.

17 MR. McMANS: And it may be that we  
18 don't need to actually allow service, you know, of  
19 discovery requests on the person after service and  
20 before answer. But if you have them served by the  
21 party -- served on the party where they are all in  
22 one packet, then they are going to get to the  
23 lawyer, and I think the 45 days is sufficient,  
24 frankly, from that standpoint.

25 I would have a concern if -- in terms of if

1 you were going to serve them one day with a  
2 petition and a week later with the  
3 interrogatories, or whatever, then I could foresee  
4 that being a problem. But I think we can fix that  
5 in the drafting.

6 CHAIRMAN SOULES: Judge Rivera, I  
7 didn't quite follow what you were suggesting there  
8 that people would object --

9 JUDGE RIVERA: Well right now, we have  
10 a procedure where they can go and get not only  
11 discovery before answer date, but expedited  
12 discovery.

13 CHAIRMAN SOULES: Yes, sir.

14 JUDGE RIVERA: And we can issue an  
15 order for them to even go look at the premises or  
16 get hold of some property or some evidence and  
17 hold it -- which is when it is more important than  
18 answering questions -- and we permit that. But  
19 this says, you know, not to consult the court and  
20 open it for everybody all the time.

21 MR. McCONNICO: I think what Judge  
22 Rivera is saying is important because we already  
23 have the motion for leave to file that allows it  
24 when you need to do it. You can do it under our  
25 present rule. Where if we go to this rule, we



1 might be just creating some new problems.

2 JUDGE RIVERA: Yes, we've done it in  
3 three, four or five days already, when there is an  
4 explosion or a crash.

5 MR. McMAINS: But that doesn't  
6 eliminate the motion practice problem.

7 CHAIRMAN SOULES: Buddy Low.

8 MR. LOW: Luke, I think you could  
9 accomplish both purposes. I don't think it would  
10 be the intent to repeal that and take away what  
11 they have, that right. If you need shorter  
12 discovery then go to the court and get an order,  
13 but why -- where a lot of times this is routinely  
14 done -- why have to go to court every time and get  
15 an order? Why not just allow a vehicle for them  
16 to serve the interrogatories or requests along  
17 with the lawsuit without taking away the rights.  
18 You still have this other right.

19 JUDGE RIVERA: Judges feel very uneasy  
20 when there is litigation with no attorney on one  
21 side.

22 MR. LOW: Well, all right. Well, the  
23 judge may not would do that. But all I'm saying  
24 is --

25 JUDGE RIVERA: There's always a

1 tendency to take advantage of somebody that is pro  
2 se.

3 MR. LOW: I understand. But the  
4 proposal here would allow you time. They've been  
5 served with it, they've got time to answer and so  
6 forth, but if you have a specific situation then  
7 -- that you can explain to the judge and convince  
8 him, he could even shorten it from that. But they  
9 are not inconsistent. You could have both of them  
10 exist. They are not exclusive of each other.

11 PROFESSOR DORSANEO: The more I  
12 thought about it, I think that the plaintiff ought  
13 to be in charge of establishing the discovery  
14 scheme. I just think that makes more sense in  
15 terms of our litigation. And I don't know whether  
16 45 days after service of citation and petition is  
17 the appropriate time period, but I represented  
18 defendants for a lot of years and it really  
19 doesn't make that much difference to me when 30  
20 days begins to run with respect to my preparation.  
21 I don't even understand Steve's point, frankly.

22 MR. McCONNICO: You don't. Okay.

23 MR. McMAINS: If you're concerned  
24 about 30 full days or something even at the  
25 outset, then make it 50 days.

1           CHAIRMAN SOULES: Why not say 30 days  
2 after the answer date? Just start the 30-day  
3 period -- we can always keep 30 days, don't have  
4 different variations of days, just say we start it  
5 at some other time. What bothers me --

6           MR. BEARD: Well, it shouldn't be 30  
7 days after the answer date. It should be service  
8 of citation because of that variation we have in  
9 the answer date.

10          CHAIRMAN SOULES: Okay. Sixty days?  
11 I mean I see your point.

12          MR. McCONNICO: I think 60 would solve  
13 the problem because what I'm worried about is the  
14 time crunch --

15          CHAIRMAN SOULES: Sixty days after  
16 service of citation, that helps, doesn't it?

17          MR. McMAINS: But then again the  
18 problem is that you're still talking about who is  
19 initiating it from the standpoint of whose are due  
20 first. What if a defendant serves them on you  
21 contemporaneous with his answer, then you've got  
22 less time than he does.

23          MR. McCONNICO: And it depends --  
24 that's right.

25          MR. McMAINS: And I think the reason

1 for the 45 days -- and I think you could probably  
2 push it to 50 and it would be about the same.

3 MR. McCONNICO: If it was 30 days from  
4 the answer date then it would fall the same for  
5 each side possibly.

6 MR. McMANS: Well, if you say 30 days  
7 of answer date or the date answer is due.

8 PROFESSOR DORSANEO: The date answer  
9 was filed?

10 MR. McMANS: I mean date the answer  
11 was filed. In other words -- but then you see you  
12 would be varying it, you wouldn't be giving him a  
13 specific date at the time that you serve him  
14 because he doesn't have -- the party does not have  
15 any control over when the answer is filed if he  
16 sends it on to his attorney. In order to give  
17 specific notice of the dates that he's supposed to  
18 file the answers to interrogatories or response to  
19 requests for production, it needs to run from the  
20 date of service of the citation.

21 MR. McCONNICO: But you know under  
22 what Luke said, the defendant could still initiate  
23 discovery if he gets it -- say you served him  
24 immediately, if he gets it to his attorney and his  
25 attorney gets the answer on file and hits you with

1 the interrogatories, request for production,  
2 whatever, and you've only got 30 days to respond  
3 and he still has an extra 15.

4 MR. McMANS: Well, I'll take that  
5 risk.

6 PROFESSOR DORSANEO: They're not going  
7 to be that fast.

8 CHAIRMAN SOULES: Well, we need to  
9 make this period a fair period. Maybe somebody  
10 does run in the door and get the jump on you, but  
11 I think short of 60 days is not fair.

12 MR. McCONNICO: I think what Luke is  
13 saying is right. I think that solves the problem  
14 of when they come in on the 20th day to the  
15 defense counsel's office after they have been  
16 served, which happens a lot. And they say, "Here.  
17 I've got these interrogatories. I've got these  
18 requests for production." And the requests for  
19 production are very voluminous, the attorney goes  
20 to enter the court to ask for extra time to file  
21 these, the court doesn't give it to him. He's got  
22 25 days to go up to Michigan or wherever else to  
23 look at records --

24 MR. McMANS: Well, you've only got 30  
25 days under the rules now --

1 MR. McCONNICO: -- if he doesn't give  
2 it to you.

3 MR. McMAINS: So -- yeah. So all I'm  
4 saying is what's wrong with 50 days? You keep  
5 talking about 60 days, but 50 days still gives you  
6 by and large -- well, generally gives you at least  
7 30 days after the answer is due.

8 CHAIRMAN SOULES: How many are for 60  
9 and how many are for 50? Let's get that out of  
10 the way. How many think that the period should be  
11 50?

12 MR. JONES: Have we moved off of the  
13 45?

14 CHAIRMAN SOULES: Yes, sir. How many  
15 think it should be 60? Okay. Well there's -- I  
16 don't know. It's easier for me to remember  
17 thirties and sixties. And I think it's going to  
18 be easier for a lot of other lawyers to do that --  
19 I guess because I hate these unusual numbers in  
20 the rules and that's why I favor something more  
21 like --

22 MR. JONES: Are you going to count the  
23 votes, Mr. Chairman?

24 CHAIRMAN SOULES: I think the vote was  
25 for 50. Okay. Fifty is what the number is then.

1 Now that doesn't mean that we have accepted the  
2 approval.

3 Now one thing we do need to be sure, Bill,  
4 and I think it's important we look at these to see  
5 if Judge Rivera's problem is -- his perceived  
6 problem is here. Does this preclude the court  
7 ordering answers short of these standard time  
8 periods?

9 MR. McMANS: No.

10 CHAIRMAN SOULES: Because that's  
11 necessary. The court has got to be able to order  
12 discovery responses quicker than this if a party  
13 can get an expedited discovery motion ready.

14 PROFESSOR DORSANEO: Well both of the  
15 rules -- unless I'm off beam here -- 168 in  
16 paragraph four, the last sentence says: "The  
17 court, on motion and notice for good cause shown,  
18 may enlarge or shorten the time for serving  
19 answers or objections."

20 And in 167, there's a similar sentence at the  
21 end of paragraph two: "The time for making a  
22 response may be shortened or lengthened by the  
23 court." So I think the court has control over the  
24 time frame ultimately.

25 CHAIRMAN SOULES: Does that give you

1 some comfort, Judge Rivera?

2 JUDGE RIVERA: We've had that all  
3 along.

4 CHAIRMAN SOULES: So as long as we  
5 don't change that -- that's what you want to be  
6 sure doesn't get changed in this --

7 JUDGE RIVERA: Well to me it doesn't  
8 make any difference; they come in from time to  
9 time. But I'm saying that we've done that, you  
10 know, without this rule. The only thing is this  
11 rule would do it without bringing it to the  
12 court's attention.

13 CHAIRMAN SOULES: Right. Okay. Those  
14 in favor of the proposed change in Rule 167 say  
15 aye -- oh, Tony, you had your hand up. I'm sorry,  
16 I didn't see any other hands up.

17 MR. SADBERRY: Mr. Chairman, I'm not  
18 sure I'm reading this right, but before it goes to  
19 the subcommittee, shouldn't the word under  
20 paragraph two --

21 CHAIRMAN SOULES: Tony, I can't hear  
22 you. I'm sorry. If you're going to have outside  
23 conversations, please have them outside of the  
24 room.

25 MR. SADBERRY: -- second line,



1 shouldn't that say --

2 PROFESSOR EDGAR: What page are you  
3 on?

4 MR. SADBERRY: On page 218, that's  
5 Rule 167. Is that where we are?

6 PROFESSOR EDGAR: Yes.

7 CHAIRMAN SOULES: Tony, I was so  
8 distracted, I haven't followed a word you've said.  
9 Would you please start over again for my benefit,  
10 and I apologize.

11 MR. SADBERRY: That's all right. On  
12 page 218, the proposed change to Rule 167,  
13 shouldn't that be "defendant" second line to the  
14 amended portion?

15 PROFESSOR DORSAMEO: I'm not seeing  
16 where you are.

17 PROFESSOR EDGAR: Be served upon the  
18 defendant rather than the plaintiff.

19 CHAIRMAN SOULES: Well, yeah. The  
20 plaintiff is going to be serving --

21 MR. McMANS: Served upon the  
22 defendant, yes.

23 PROFESSOR DORSAMEO: Thank you.

24 PROFESSOR EDGAR: Very good, Tony.

25 CHAIRMAN SOULES: Okay. With that

1 change, those in favor of Rule 167 say aye.

2 COMMITTEE MEMBERS: Aye.

3 CHAIRMAN SOULES: Opposed?

4 MR. LOW: Let me ask a question.

5 Where is it in the rules now that gives the right  
6 -- I don't see it where the judge has the right to  
7 shorten it.

8 PROFESSOR EDGAR: Last sentence of  
9 Rule 167(2), for one thing. And then in Rule 168,  
10 the last sentence of number four.

11 MR. LOW: Okay. So that sentence  
12 still remains. Okay.

13 CHAIRMAN SOULES: Okay. Those in  
14 favor of the changes to Rule 168 that appear on  
15 pages 220 and 221 of the materials say aye. Yes,  
16 sir. Tom Ragland.

17 PROFESSOR DORSANEO: I don't know if  
18 that's right. Can I see the Federal Rule Book?

19 MR. RAGLAND: Did we resolve about how  
20 that change was applied to both sides of the  
21 docket?

22 PROFESSOR DORSANEO: That should say  
23 plaintiff.

24 CHAIRMAN SOULES: Yes. We've  
25 discussed it and the mechanics of how it would

1 work, and that was discussed.

2 MR. McCONNICO: Did we decide which  
3 day period we were going to use?

4 CHAIRMAN SOULES: Fifty days. Those  
5 in favor of the suggested changes to Rule 163 --

6 PROFESSOR EDGAR: Wait just a minute.

7 MR. SADBERRY: We've got the same  
8 question here. Bill thinks it should be  
9 plaintiff.

10 PROFESSOR DORSANEO: Let's look --  
11 it's copied from the Federal rule. Let's look at  
12 that.

13 CHAIRMAN SOULES: Why not say: "The  
14 request may, without leave of court, be served  
15 upon a party"?

16 MR. McMANS: Well, that's what it did  
17 say before we changed it.

18 CHAIRMAN SOULES: A party after the  
19 commencement of action. Either side can start  
20 discovery after the commencement of the action.

21 MR. TINDALL: Well, the Federal rule  
22 reads, Luke, "Any party may serve upon any other  
23 party written interrogatories" -- et cetera, et  
24 cetera.

25 PROFESSOR DORSANEO: Well, that's one

1 -- we're looking at Federal Rule 34.

2 MR. TINDALL: 34?

3 PROFESSOR DORSANEO: (b) says: "The  
4 request may, with leave of court, be served" --  
5 "without leave of court, be served upon the  
6 plaintiff after commencement of the action and  
7 upon any other party with or after service or  
8 summons and complaint."

9 CHAIRMAN SOULES: Our rules are not  
10 designed to give anybody a jump that the other  
11 side doesn't have.

12 PROFESSOR DORSANEO: No, I think it  
13 should say plaintiff.

14 CHAIRMAN SOULES: Why don't we say the  
15 request --

16 MR. TINDALL: Well, that would imply  
17 that you formally needed leave of court.

18 CHAIRMAN SOULES: "The request may,  
19 without leave of court, be served upon" -- excuse  
20 me. Let's see if I can get this thought across.  
21 "The request may, without leave of court, be  
22 served upon a party after commencement of the  
23 action." What we're attempting to do here, isn't  
24 it, is permit discovery to start as soon as the  
25 action is commenced by anybody who wants to start

1 discovery after the action has been commenced.

2 PROFESSOR DORSAMEO: But it's  
3 commenced by the filing of the petition and this  
4 rule is designed to say that you cannot serve on  
5 the defendant until there is service of citation.  
6 I mean, it's commencement of the action and then  
7 service. And service is after commencement of the  
8 action. If you say it that way, you could --

9 CHAIRMAN SOULES: Oh, I see.

10 PROFESSOR DORSAMEO: -- send somebody  
11 interrogatories before they are served.

12 CHAIRMAN SOULES: I've got you.  
13 Plaintiff is the correct word. As printed, it's  
14 right.

15 MR. McCOENICCO: How can you serve a  
16 plaintiff -- who's going to serve them if the  
17 defendant hasn't answered?

18 CHAIRMAN SOULES: The defendant knows  
19 he's been sued.

20 MR. TINDALL: Well why should we allow  
21 defendant to serve interrogatories if he won't  
22 come into court?

23 MR. McMANS: Well if you serve  
24 interrogatories, I think he has to appear.

25 PROFESSOR EDGAR: The action has been

1 commenced but he has not yet been served with  
2 process.

3 MR. TINDALL: Well why should we --

4 PROFESSOR EDGAR: This simply permits  
5 -- what this does is permit either party after the  
6 commencement of the action to initiate discovery.

7 MR. TINDALL: So you know a lawsuit is  
8 coming, you can go ahead and notice the plaintiff  
9 for deposition even though you have never answered  
10 the lawsuit?

11 MR. BRANSON: But you've sent -- but  
12 you're actually making an appearance when you do.

13 CHAIRMAN SOULES: Which is the Federal  
14 law. That's the Federal rule.

15 MR. SADBERRY: If I may, I think  
16 that's correct. I withdraw that comment and think  
17 it should remain plaintiff, and it should be as  
18 written.

19 CHAIRMAN SOULES: Okay. Those in  
20 favor say aye.

21 COMMITTEE MEMBERS: Aye.

22 CHAIRMAN SOULES: Opposed? Rule  
23 168 --

24 MR. TINDALL: Luke, can I ask a  
25 question about 167? I wasn't around when it was

1 adopted. Why do we have it -- it's always been an  
2 oddball ruled the way it's --

3 CHAIRMAN SOULES: The vote has been  
4 taken.

5 MR. TINDALL: No, no. I'm not  
6 changing that. I'm just asking this as a point of  
7 inquiry. Rule 167 has all of these "request" and  
8 "response" in all caps. Is there some -- what are  
9 we trying to do there?

10 CHAIRMAN SOULES: We are going to be  
11 working on some discovery cleanup in the interim.  
12 I don't know. But let's get -- we've got a big  
13 agenda --

14 MR. TINDALL: All right.

15 CHAIRMAN SOULES: -- and we're going  
16 to start losing our committee on some very  
17 important things. Particularly, I think, the  
18 deposition filing rule we need to get on the table  
19 while we've got as many people here as possible.

20 PROFESSOR DORSANEO: Are we ready for  
21 number two?

22 -CHAIRMAN SOULES: I want to get a vote  
23 on Rule 168. How many are in favor of the  
24 proposed changes to Rule 168 shown on page 220 and  
25 221 say aye.

1 COMMITTEE MEMBERS: Aye.

2 CHAIRMAN SOULES: Opposed?

3 MR. LOW: Wait a minute. I've got a  
4 question. Are you saying here on Section 6 on  
5 221 --

6 PROFESSOR DORSANEO: No. We haven't  
7 done that one yet. That's next.

8 CHAIRMAN SOULES: Okay.

9 MR. LOW: Okay. I'll vote till we get  
10 to this.

11 CHAIRMAN SOULES: Okay. Now then  
12 we're going to move to -- okay. We've approved  
13 the changes on 220 to 168, but we have not yet  
14 approved the changes on 221; is that right, Bill?

15 PROFESSOR DORSANEO: Yes.

16 CHAIRMAN SOULES: Okay. Now let's  
17 take those up.

18 PROFESSOR DORSANEO: Well, the next  
19 one does involve basically paragraph six of the  
20 interrogatory rule which is, as Buddy pointed out,  
21 on page 221. A proposal was made to have the rule  
22 provide explicitly that late objections are waived  
23 unless good cause is shown for the failure to  
24 object on time basically.

25 The language that was placed in proposed



1 amended paragraph six to Rule 168 on page 221 of  
2 this draft is taken literally from the Court's  
3 opinion in Independent Insulating Glass vs.  
4 Street. It doesn't provide exactly that  
5 objections are waived. It provides that they are  
6 waived unless an extension of time has been  
7 obtained or good cause is shown for the failure to  
8 object within the time period which would either  
9 be 30 or 40 or 50 days.

10 CHAIRMAN SOULES: Codifies into the  
11 rule the Independent Insulating Glass holding.

12 PROFESSOR DORSAMEO: And perhaps more  
13 importantly, it codifies the Gutierrez vs.  
14 D.I.S.D. Case. I think some of the committee  
15 members, especially Steve and I, concur on this  
16 and believe that it is not necessarily a good idea  
17 to codify the opinions of courts of appeals, but  
18 the Supreme Court is a different matter.

19 CHAIRMAN SOULES: Well we have where  
20 we've seen that rulings of the Supreme Court have  
21 not maybe given full notice to the Bar in the  
22 rules, tried to make the rules give notice of that  
23 to the practitioner so that they would have a  
24 place to look and see where the problems may arise  
25 in one spot. So this would be consistent if we

1 want to do it. Buddy Low.

2 MR. LOW: Okay. I've got a question.  
3 Does that case hold that under Rule 11 that  
4 another lawyer and I can't agree -- I don't care  
5 if I'm representing a plaintiff or a defendant --  
6 I say, "Look. I need about 10 or 12 days, confirm  
7 it in writing." I don't get an order to the  
8 court; I don't have to go down and get the judge  
9 now to sign that. And we do that all the time on  
10 both sides of the docket. And this looks like  
11 I've got to go down and get an order of the court.

12 Now I realize that under Rule 11 agreements  
13 between lawyers that that would eliminate that  
14 right, and I bet you I haven't made  
15 interrogatories on time in 10 years or the other  
16 side either. You know, not dragging your feet but  
17 the discovery is pretty extensive and sometimes  
18 you say, "Well, give me another 10 days." "Sure,  
19 confirm it in writing" -- or they'll do the same  
20 with me. And that eliminates that factor. Does  
21 the Supreme Court say we can't do that?

22 -MR. BEARD: I don't think so, Buddy.  
23 That's a good cause if the other lawyer is going  
24 to say I didn't give you the -- and that's showing  
25 good cause.

1 MR. LOW: I just think it ought to be  
2 by agreement between attorneys in writing or  
3 something. I just don't think you ought to have  
4 to go down and get an order of the court expressly  
5 so stating.

6 PROFESSOR DORSANEC: It can be changed  
7 to say "unless" --

8 CHAIRMAN SOULES: "An extension of  
9 time has been obtained by agreement"?

10 MR. LOW: "By written agreement."

11 CHAIRMAN SOULES: No, "by agreement."

12 MR. LOW: All right.

13 CHAIRMAN SOULES: Because Rule 11 says  
14 what kind of an agreement you have to have to have  
15 an agreement.

16 MR. TINDALL: But that's that old deal  
17 about the State of Texas citation back over in  
18 another rule. You better say here that it's by  
19 written agreement.

20 CHAIRMAN SOULES: Well, we've tried to  
21 change -- we've tried to make Rule 11 more  
22 important by not saying what kind of agreement  
23 elsewhere in the rules. In other words, we have  
24 tried to focus back in this last year, focus back  
25 to Rule 11 and say that's what agreement means and

1 we're not going to have all kinds of agreements  
2 depending on whether they appear somewhere else in  
3 the rules. I mean, that was an effort of this  
4 committee during this very series of sessions.  
5 But if we put in "unless an extension of time has  
6 been obtained by agreement or by order of the  
7 court"?

8 MR. LOW: Yeah. Would that violate  
9 the Supreme Court ruling? I mean I'm not --

10 PROFESSOR DORSANEQ: No.

11 CHAIRMAN SOULES: "Or good cause as  
12 shown for failure"? Why do we have to say in  
13 accordance with paragraph four? Just say it's  
14 been obtained by agreement or order of the court  
15 or good cause is shown for the failure?

16 MR. LOW: That's fine with me.

17 CHAIRMAN SOULES: Let me read it the  
18 way I have it in my notes here. "Objection served  
19 after the date on which answers are to be served  
20 are waived unless an extension of time has been  
21 obtained by agreement or order of the court, or  
22 good cause is shown for the failure to object  
23 within such period." Any problem with that, Bill?

24 PROFESSOR DORSANEQ: No.

25 CHAIRMAN SOULES: Any further

1 discussion on that? Those in favor say aye.

2 COMMITTEE MEMBERS: Aye.

3 CHAIRMAN SOULES: Opposed? That will  
4 be unanimously approved.

5 PROFESSOR DORSANEC: Now Clyde Jackson  
6 had another suggestion that the committee decided  
7 not to put in a written draft. That suggestion  
8 involved having --

9 CHAIRMAN SOULES: That's on page 234.

10 PROFESSOR DORSANEC: -- a 329(b) type  
11 of activity concerning objections. Really on page  
12 236 if you look at Mr. Jackson's language, it  
13 says: "In the event that a written order is not  
14 signed by the court sustaining any such objections  
15 within 75 days after interrogatories are served,  
16 it shall be considered overruled by operation of  
17 law on expiration of that period." And the  
18 committee decided that that was not a good idea.

19 CHAIRMAN SOULES: Motion?

20 PROFESSOR DORSANEC: We -- the  
21 committee moves the rejection of that suggestion.

22 -CHAIRMAN SOULES: Second?

23 MR. BRANSON: Seccond.

24 CHAIRMAN SOULES: Discussion? Those  
25 who vote to reject say aye.

1 COMMITTEE MEMBERS: Aye.

2 CHAIRMAN SOULES: Otherwise? That's  
3 unanimously rejected.

4 PROFESSOR DORSANEO: Now the next  
5 problem involves Rule 166(b) and --

6 PROFESSOR EDGAR: I noticed, Bill,  
7 that you deleted, in Rule 168 on page 227, the  
8 last sentence of paragraph number five. Look on  
9 page 227.

10 CHAIRMAN SOULES: Hadley, go with me  
11 to page 221. It was printed in two places and we  
12 have been referring to 221.

13 PROFESSOR EDGAR: Oh, okay. All  
14 right.

15 CHAIRMAN SOULES: If you don't mind.

16 PROFESSOR EDGAR: No problem.

17 CHAIRMAN SOULES: Thank you.

18 PROFESSOR EDGAR: I assume that you're  
19 recommending that material be deleted?

20 PROFESSOR DORSANEO: Well actually,  
21 that was already deleted in the -- I'm glad you  
22 mentioned that. That, in the last Supreme Court  
23 order, dropped out of the rule, at least in the  
24 one printed in the Advocate section report of the  
25 litigation section. And frankly, it does pick

1 that up that that disappeared, and maybe we ought  
2 to just take a look at it and see whether it  
3 disappeared inadvertently or on purpose.

4 MR. McMANS: The reason I think it  
5 disappeared was because of the nonfiling of a lot  
6 of paper now that is supposed to be taken for the  
7 exception.

8 PROFESSOR EDGAR: I see that it's been  
9 dropped out, but we didn't recommend that it be  
10 dropped out. And I'm just wondering -- and  
11 certainly the Court can do that, I'm just  
12 wondering what happened. I'm wondering of the  
13 circumstance.

14 PROFESSOR DORSANEO: Well that's why  
15 I --

16 PROFESSOR EDGAR: Yeah, I understand.  
17 I know.

18 MR. McMANS: Are interrogatories and  
19 answers still filed now under the new rules?

20 CHAIRMAN SOULES: No.

21 MR. McMANS: See, that's what I think  
22 -- that's the reason I think that was dropped out.  
23 Was that a conforming change trying to drop out  
24 the stuff about filing interrogatories, Judge?

25 JUSTICE WALLACE: You got me. I'm in

1 the cold here.

2 PROFESSOR EDGAR: Well, but that  
3 sentence -- the sentence that has been deleted  
4 first talks about copies and also then about  
5 promptly filing them. There are two matters. If  
6 you're just concerned about the filing aspect then  
7 the first clause should remain.

8 PROFESSOR DORSANEO: Yes.

9 PROFESSOR EDGAR: Now I'm just raising  
10 the question. I didn't know we had done that.

11 MR. McMANS: Where is the report?  
12 Where are our minutes from the last time? Are  
13 they reflected --

14 PROFESSOR EDGAR: I don't know. I  
15 didn't bring my minutes.

16 PROFESSOR BLAKELY: At the beginning  
17 of the supplement, this book right here.

18 PROFESSOR EDGAR: Yes. It's in the  
19 beginning of the supplement. That's right.

20 MR. BEARD: Well isn't it service that  
21 is really -- you've got to serve as true copies --

22 PROFESSOR DORSANEO: On somebody.

23 MR. BEARD: -- on somebody in  
24 answer --

25 PROFESSOR DORSANEO: If it's not the



1 court, it has to be the other side, I guess.

2 MR. BEARD: I think it really doesn't  
3 make any difference if it's in there. The court  
4 probably dropped it as being not material.

5 PROFESSOR DORSANEO: The thing in the  
6 Advocate, the litigation section before that  
7 brought this to our attention, is that it's  
8 dropped out, but it's not indicated as being  
9 dropped out on purpose by being crossed out. See,  
10 it's just kind of not there.

11 CHAIRMAN SOULES: It fell off.

12 PROFESSOR EDGAR: Pat, let's assume  
13 that plaintiff files the lawsuit and wants to  
14 serve interrogatories on defendant A. Now, under  
15 the rules is he required to also serve copies of  
16 those interrogatories on defendants B and C?

17 MR. BEARD: Yeah, they have to have an  
18 opportunity.

19 PROFESSOR EDGAR: All right. The only  
20 way you're going to do that is to include this  
21 first clause in what has been deleted because  
22 that's what it says. It says you serve copies of  
23 interrogatories on all other parties.

24 PROFESSOR CARLSON: But that's what  
25 subsection (7) says now in -- I'm looking at the

1 court rules.

2 PROFESSOR EDGAR: Well, all right.  
3 Let's look --

4 CHAIRMAN SOULES: Yeah, that's it.  
5 That's where it went. I knew we did something  
6 with --

7 PROFESSOR EDGAR: Okay. It's in (7).  
8 Then that's where it is. Okay.

9 CHAIRMAN SOULES: I couldn't find it,  
10 but that's where it is. Thanks, Elaine.

11 PROFESSOR DORSANEO: For the sake of  
12 clarity, though, I move that this -- if it's not  
13 reflected in one of the Supreme Court orders as  
14 being taken out on purpose, I would move that the  
15 Supreme Court be advised to explain that clearly  
16 to the Bar.

17 CHAIRMAN SOULES: What, Bill?

18 PROFESSOR CARLSON: Well, Bill, in  
19 looking at the court rules it says in the  
20 comments, "These changes permit serving responses  
21 and objections simultaneously and delete the  
22 requirement for filing interrogatories, responses  
23 and objections."

24 PROFESSOR DORSANEO: But is it  
25 crossed?

1           PROFESSOR CARLSON: It's not crossed,  
2 but it's in the comments.

3           CHAIRMAN SOULES: Well, Bill, we are  
4 really talking about something -- when the  
5 logistics of developing this Supreme Court order  
6 -- ultimately what the Court wants is something  
7 that doesn't have any strike-overs, just plain  
8 text and material and that's what they get  
9 finally.

10           And number (7), of course, gives notice to  
11 the parties and the comment says why. But this  
12 other -- this work that we do in preliminary  
13 drafts is not in the Court's order at all. It's  
14 got to be cleaned up. And I realize that  
15 somewhere along in the word processor.

16           MR. McMAINS: That's what they did do,  
17 Luke. They did knock out the filing requirements.

18           CHAIRMAN SOULES: And they moved the  
19 service to (7).

20           PROFESSOR EDGAR: To (7).

21           CHAIRMAN SOULES: That's right. Okay.  
22 And that's been done.

23           PROFESSOR EDGAR: Okay. Those then in  
24 favor of -- well, we've voted now on 168.

25           MR. RAGLAND: Luke, I have a question.

1 CHAIRMAN SOULES: Okay, sir.

2 MR. RAGLAND: What does the nonfiling  
3 of interrogatories rule do to what we just did  
4 about filing interrogatories simultaneously with  
5 the filing of the petition? Is the clerk going to  
6 accept --

7 CHAIRMAN SOULES: Service.

8 PROFESSOR EDGAR: It's just service.

9 CHAIRMAN SOULES: Service of  
10 interrogatories simultaneously with filing. You  
11 do not file them. You can serve them, but you  
12 don't file them.

13 MR. RAGLAND: I understand that. But  
14 didn't we just address a rule that would allow the  
15 plaintiff to attach interrogatories to the  
16 original petition --

17 CHAIRMAN SOULES: No.

18 MR. RAGLAND: -- and get it served?

19 CHAIRMAN SOULES: No.

20 MR. RAGLAND: We didn't do that?

21 CHAIRMAN SOULES: No. You can attach  
22 interrogatories to a citation and get them served,  
23 but you don't file them.

24 MR. RAGLAND: Well how are you going  
25 to -- how is the clerk -- how are you going to get

1 a clerk to attach something to a citation that  
2 hasn't been filed?

3 CHAIRMAN SOULES: We've got too much  
4 agenda. I'm sorry. That's something that we'll  
5 just have to work out, I guess.

6 Okay. Next issue, Bill? What's your next  
7 point?

8 PROFESSOR DORSANEO: Well, the next  
9 one involves a larger problem. Basically --

10 CHAIRMAN SOULES: That's page what?

11 PROFESSOR DORSANEO: -- it's concerned  
12 with Rule 166(b) which begins on page 213 and ends  
13 on 216.

14 Let me approach the matter this way. We were  
15 advised by you, Mr. Chairman, that objections and  
16 complaints had been leveled at Rule 166(b) because  
17 of the fact that it did not address burdens  
18 imposed upon the trial judge or the party  
19 resisting discovery. Particularly in this packet,  
20 a letter by David Chamberlain on pages 244 and 245  
21 makes mention of a perceived problem with the rule  
22 -- silence on what Chamberlain calls "an  
23 extraordinary burden upon the trial judge to wade  
24 through documents," et cetera.

25 We concluded that in order to address this

1 problem clearly, a new paragraph four was needed  
2 concerning burdens in the discovery process. And  
3 I think probably at my suggestion -- but I believe  
4 the committee members virtually all concurred in  
5 this -- the issue of burdens uncovered or involved  
6 a problem in paragraph three which does not  
7 contain very much guidance concerning the contours  
8 of the particular exemptions covered.

9 So this draft basically involves two distinct  
10 but closely related problems and proposed  
11 solutions. First the draft attempts to provide  
12 guidance to the lawyers about the particular  
13 content of exemptions that are not now defined  
14 such as, for example, work product and witness  
15 statements. And it also attempts to codify in  
16 clearer terms, in fairer terms if you like, the  
17 Supreme Court's holdings involving burdens imposed  
18 upon the discovering party and the party resisting  
19 discovery in paragraph four. Those two items are  
20 related but they are distinct one from the other  
21 and could be taken up separately if the Chairman  
22 wishes to do that.

23 My own view is that some of these items are a  
24 lot less controversial than others and it could be  
25 dealt with that way as well.

1 CHAIRMAN SOULES: Why don't you just  
2 take them up any way you are comfortable with.

3 PROFESSOR DORSANEO: All right. Well  
4 the first question, a policy question, I suppose,  
5 is whether we should have a better definition of  
6 the contours of exemptions. If I could direct  
7 your attention to page 214 -- particularly  
8 paragraph (d) which, I believe, would be a less  
9 controversial item than any of the others -- you  
10 can ascertain my meaning.

11 Paragraph (d) now in the rule that's proposed  
12 to go into effect January 1, 1988, covers witness  
13 statements, but all it provides is that the  
14 written statements of potential witnesses and  
15 parties are not discoverable. The rule doesn't  
16 tell us what a witness statement is or have any  
17 anticipation of litigation language limiting the  
18 exemptions. But when we look at Allen vs.  
19 Humphreys, a case decided by the Supreme Court in  
20 1977 which spelled out the contours of the witness  
21 statement exemption in old Rule 167, it is quite  
22 clear that only witness statements, in effect, in  
23 anticipation of litigation are exempt from  
24 discovery, not just any old witness statement.

25 So it's my view that we need to spell that

1 out in order to have the rules say what the  
2 Supreme Court has said on witness statements. And  
3 that that's only fair to the lawyers in the state  
4 to have them advised about the exact content of  
5 the witness statement exemption.

6 Second, as a matter of clarity, the last part  
7 of this paragraph (d) which talks about "The term  
8 'written statements' includes," et cetera,  
9 attempts to do the same kind of thing by reference  
10 to language that appears in paragraph two of  
11 166(b). Basically, bottom line the idea is to  
12 explain to the lawyers and to the judges what is  
13 meant by a written statement of a potential  
14 witness and a party.

15 MR. SPIVEY: Doesn't your comment  
16 there on (d), though, conflict with the recent  
17 Supreme Court decision where you say "or defense"  
18 -- right at the last of the underlined portion of  
19 (d) there -- "or the defense of the particular  
20 suit"? If you had a period there rather than "in  
21 connection with the particular circumstances out  
22 of which it arose," I thought that was the  
23 distinction that the Court made.

24 PROFESSOR DORSANEO: No, I think that  
25 this is exactly Allen vs. Humphreys language.



1           MR. SPIVEY:   Okay.   That's the  
2 language.   I'm just going by my recollection.

3           MR. McCONNICO:   I think what Broadus  
4 is saying, if I could agree, I think to satisfy  
5 Stringer, Turbodyne and those cases that came  
6 after Allen v Humphreys, what we might need to say  
7 -- and I haven't reviewed the cases recently --  
8 "or in connection with the particular  
9 circumstances out of which it arose in  
10 anticipation of litigation."   I think we need that  
11 language in there on that phrase.

12           PROFESSOR DORSANEO:   Well, I chose  
13 this language carefully, and it is consistent with  
14 my reading of those cases.   And basically it  
15 extends from the exact language that appears on  
16 one of the pages in Allen vs. Humphreys.

17           Now I will grant you that the next page in  
18 Allen vs. Humphreys could be construed more  
19 narrowly, but this is how I read those cases.   Now  
20 there is obviously room for disagreement on what  
21 those cases mean, and part of this attempt is to  
22 try to address that.

23           MR. SPIVEY:   I'm not arguing which is  
24 the better policy.   I'm just arguing to try to  
25 bring the rule consistent with the Supreme Court

1 because it is not our role to second guess the  
2 Supreme Court on what they meant, but try to  
3 codify what they meant.

4 PROFESSOR DORSANEO: That was my  
5 attempt.

6 JUSTICE WALLACE: For whatever it's  
7 worth, the point that Steve made has really been  
8 the stickler on that because that phrase hanging  
9 out there all along is what has caused the  
10 confusion. "Or arising out of the appearance upon  
11 which it is based," there is at least -- a lot of  
12 people interpret that as saying an adjuster goes  
13 out as soon as he is notified of an accident then  
14 he's -- it is arising out of the occurrence on  
15 which actually the claim is based so therefore it  
16 is privileged. And that has really been a problem  
17 for us.

18 MR. SPIVEY: Well, and I think that's  
19 what gives the trial courts a problem and gives  
20 the lawyers a problem. In fact, you know, you  
21 could be helping the defendant to set out the  
22 blueprint for distinction here and that's not my  
23 concern. My real concern is along with -- exactly  
24 what you're saying -- what's giving the courts  
25 problems because it ought to be clear. And there

1 is still a confusion in my mind as a lawyer  
2 reading that what I can claim is privileged and  
3 not privileged. It may just be that maybe we need  
4 to address the verbage to clarify that a little  
5 bit more.

6 CHAIRMAN SOULES: There are two  
7 problems here. One is witness statements and the  
8 other is party communications. The cases are  
9 really party communications cases that the Supreme  
10 Court has been struggling with. We dealt with  
11 that when we worked on this rule the last time.  
12 And the Supreme Court amended party communications  
13 -- that's Turbodyne, Stringer and those ones -- by  
14 putting in that for those to be privileged they  
15 must be made in anticipation of the prosecution or  
16 defense of claims, made a part of the case of the  
17 pending litigation.

18 Now we did not transfer that problem that the  
19 Court was having with party communications over to  
20 witness statements, and I haven't seen it come up  
21 in a witness statement context. It may be the  
22 same problem. What we're looking at here in (d)  
23 on page --

24 PROFESSOR DORSAMEO: It's the same  
25 thing.

1 CHAIRMAN SOULES: Pardon me?

2 PROFESSOR DORSANEO: I say it is the  
3 same thing.

4 CHAIRMAN SOULES: Okay.

5 PROFESSOR DORSANEO: It will be fine  
6 to take that language and --

7 CHAIRMAN SOULES: What we're looking  
8 at on (d) at witness statement, we can transfer --  
9 if you'll work with me just a second here -- if  
10 you go down to the next to the last line on that  
11 page where it says "and" -- and then start, "in  
12 anticipation of the prosecution or defense of the  
13 claims made in the pending litigation" -- take  
14 that language which we developed in this committee  
15 in earlier sessions and substitute it for --

16 PROFESSOR DORSANEO: Yes.

17 CHAIRMAN SOULES: Now put your finger  
18 up here with me on the sixth line from the top,  
19 substitute our developed language for this:  
20 "connection with the particular circumstances out  
21 of which it arose." Then we have fixed it in both  
22 places the same way. And we spent a lot of time  
23 working out that fix in a previous session. Does  
24 that speak to the problem and get it resolved?

25 PROFESSOR DORSANEO: Yes.

1 MR. McCONNICO: I believe it does.

2 MR. BRANSON: Justice Wallace, would  
3 that help the Court?

4 JUSTICE WALLACE: Yes.

5 CHAIRMAN SOULES: Okay. Will you  
6 accept that as a --

7 PROFESSOR DORSANEO: Yes. That's  
8 fine. The language used in (d) was taken exactly  
9 from the Supreme Court's opinion in Allen vs.  
10 Humphreys, but if the Supreme Court prefers this  
11 other language, that's fine.

12 PROFESSOR EDGAR: All right. Now  
13 exactly what are we going to transfer?

14 CHAIRMAN SOULES: Okay. Let me --

15 PROFESSOR EDGAR: Or duplicate?

16 CHAIRMAN SOULES: I'm going to read  
17 the sixth line from the top. We're going to leave  
18 "in" where it says "in." We're going to strike  
19 the following words: "connection with the  
20 particular circumstances out of which it arose."  
21 After the "in" -- which we left in -- we're going  
22 to insert: "anticipation of the prosecution or  
23 defense of the claims made in the pending  
24 litigation."

25 PROFESSOR EDGAR: We're going to

1 strike "connection" out then.

2 CHAIRMAN SOULES: Yes.

3 PROFESSOR EDGAR: Okay.

4 CHAIRMAN SOULES: From "in" forward  
5 and then we'll have the same language consistent  
6 in both places. Tom, we'll get to you in just a  
7 second. Tom Ragland will have the floor first  
8 when everybody gets caught up. Are we ready for  
9 Tom? Okay, Tom. Thank you.

10 MR. RAGLAND: This obviously addresses  
11 some of the many problems, but it also has created  
12 some problems. This type of language here in  
13 worker's compensation cases, where the insurance  
14 carrier is the defendant, and they hide behind  
15 this type of language to keep you from getting  
16 from them material that is essential to the  
17 prosecution of the case. They contend, you know,  
18 that they are representatives of the company and  
19 the basis of the cause of action arose on the date  
20 of the injury. And the most frequent one is like  
21 wage statements, for example, where they have  
22 access from the employer, the wage data. And I  
23 have found on several occasions where they request  
24 a wage statement from the employee and they get it  
25 and they don't like it and they ask them to send

1           them another one. And then they give you the one  
2           they want.

3           I don't know if we can write a rule that is  
4           going to cover every contingency, but I want to  
5           point out that this is creating some problems for  
6           those of us who practice worker's  
7           compensation. Getting something from the  
8           insurance carrier that they don't want to give you  
9           is practically an impossibility without having a  
10          motion to compel in a hearing and an order. Or  
11          the alternative is to take a separate deposition  
12          of an employer -- which you've got to incur the  
13          time, trouble and expense of that -- and sometimes  
14          the employer is even out of state.

15                   CHAIRMAN SOULES: Okay. With that  
16                   change in (d) --

17                   PROFESSOR EDGAR: All right. Now what  
18                   we're talking about, Luke, then the witness  
19                   statement will not be discoverable if it's made  
20                   subsequent to the occurrence and in connection  
21                   with prosecution and investigation of the defense  
22                   or in anticipation of prosecution of the defense  
23                   of pending litigation, right? One or the other?

24                   CHAIRMAN SOULES: Yes, sir.

25                   PROFESSOR EDGAR: Okay. That's fine.

1 MR. McMANS: Now, let me -- Luke, can  
2 I ask you a question about that?

3 CHAIRMAN SOULES: Rusty. Yes, sir.

4 MR. McMANS: And I don't anticipate  
5 this to be a problem, but I have had rather  
6 variant rulings from trial courts. What happens  
7 when the witness statement is used by the witness  
8 who is in fact deposed?

9 CHAIRMAN SOULES: To refresh his  
10 recollection?

11 MR. McMANS: I mean I understand that  
12 under the evidence rule that's supposed to be  
13 something that's admissible, but this says you  
14 can't get it. I mean we have just added -- it now  
15 says unqualifiedly that it's not discoverable.  
16 Now a lot of times --

17 CHAIRMAN SOULES: It's a privilege  
18 that is waived is what this law is. It's a  
19 privilege but it's waived whenever he prepares  
20 himself for a deposition.

21 MR. McMANS: Well, I understand the  
22 argument about waiver of privilege, but waiver of  
23 privilege again is common law stuff that's not  
24 really in here. I mean it's not in the -- we  
25 don't -- there is nothing here in the rule talking



1 about waiver. This just says very specifically it  
2 is not discoverable.

3 Now when a witness has in fact used a  
4 statement -- and this is more often what happens  
5 -- and denies that he has, then you have no  
6 mechanism by which to test that. I mean in terms  
7 of an in camera inspection. And I don't know --

8 MR. LOW: There's not much you can do  
9 about it.

10 CHAIRMAN SOULES: I don't know how we  
11 can fix that today anyway.

12 MR. McCONNICO: We haven't changed  
13 that. That's the existing problem today.

14 MR. McMANS: No, I'm saying -- that's  
15 what I'm saying. It is a problem. I'm just  
16 curious as to whether or not when we make just a  
17 blanket statement that it is not discoverable.

18 CHAIRMAN SOULES: Well --

19 MR. McMANS: You see, what I'm saying  
20 is we've taken out the statement that it's  
21 privileged and we put in a statement that it's not  
22 discoverable. So what I'm getting at is have you  
23 affected the waiver arguments? That's --

24 CHAIRMAN SOULES: 165(b) which has  
25 been in effect since 1984 says, "the following

1 matters are not discoverable." And they are  
2 discoverable if there's waiver of those matters.  
3 And the law is there and I don't think we can fix  
4 that here today without bogging down.

5 PROFESSOR EDGAR: The only thing you  
6 could do is maybe precede that by saying "unless  
7 waived, the following matters are not  
8 discoverable." But that opens up another --

9 CHAIRMAN SOULES: I don't know where  
10 it's going to take us. I think we ought to spend  
11 time considering that that we don't have today.  
12 I'll yield and we can spend our time on it, but  
13 we've got a lot of matters that have been  
14 submitted.

15 Okay. Those in favor of -- is it just (d) or  
16 are we ready to talk about --

17 PROFESSOR DORSANEO: I think it would  
18 be better to do them just one at a time.

19 CHAIRMAN SOULES: Okay. -- of (d) on  
20 page 214 say aye.

21 COMMITTEE MEMBERS: Aye.

22 CHAIRMAN SOULES: Opposed? And of  
23 course that's as we've changed it. Next, Bill?

24 PROFESSOR DORSANEO: Now if I can go  
25 to (b) on page 213, an attempted a definition of

1 work product. The current rule says the work  
2 product of an attorney. The language in the  
3 current rule -- the term "work product," according  
4 to my research, was added to the procedural rule  
5 in 1973 for the first time. Prior to that time,  
6 the Supreme Court recognized the work product  
7 doctrine and the United States Supreme Court's  
8 opinion in Hickman vs. Taylor and a case called  
9 Leonard vs. Moore which was authored by Justice  
10 Pope. But we don't have in the rule a definition  
11 of work product of an attorney that the lawyers  
12 can use in determining whether or not the  
13 exemption is applicable.

14 This particular language is taken from a  
15 court of appeals opinion of the Houston 1st  
16 District Court in Evans vs. State Farm Mutual  
17 Automobile Insurance Company as reflected on page  
18 217 of this book. The language may not be exactly  
19 the same as the Evans case because I also used in  
20 formulating a work product definition the United  
21 States Supreme Court's opinion in Hickman vs.  
22 Taylor and the language of Federal Rule 26,  
23 paragraph (b).

24 To me, the central -- one central issue,  
25 probably the most important central issue, is

1 whether or not we are going to define work product  
2 in terms at all. I mean I think -- I hope we're  
3 going to do that -- but whether or not work  
4 product ought to include what is termed "ordinary  
5 work product" as well as what is termed "opinion  
6 work product."

7 The draft covers both, which is conventional  
8 from state to state and in the Federal rules. Now  
9 what I mean by that is this. If you look at the  
10 draft, it talks about "The mental impressions,  
11 conclusions, opinions or legal theories of an  
12 attorney or other representative of a party," and  
13 that would be opinion work product.

14 And then it goes on to say "as well as any  
15 notes, memoranda, briefs, communications and other  
16 written" -- "and other writings prepared by an  
17 attorney or an attorney's agents in anticipation  
18 of litigation." Now that might or might not be  
19 opinion work product. It might just be factual  
20 information that does not involve the mental  
21 impressions, conclusions, opinions or legal  
22 theories of an attorney, if you can at least  
23 conceptually imagine that when a lawyer is writing  
24 factual information down that he is not also  
25 indicating his or her mental impressions. That is

1 a significant issue.

2 Another issue is whether when it says "the  
3 work product of an attorney" in our rule do we  
4 want to include within the definition of the term  
5 "attorney," agents of the attorney or other  
6 representatives of parties, or is it just you have  
7 to have a law license to be involved in the  
8 creation or production of work product? I don't  
9 mean to complicate things but I don't want to  
10 mislead the committee into thinking that this is  
11 an easy thing to define because it is not an easy  
12 thing to define. This definition does come from  
13 what I perceive to be the majority definition, the  
14 conventional definition of the term "work product"  
15 in our Texas court opinions and at the Federal  
16 level and of course our Texas court of opinions  
17 borrow from the Federal definitions.

18 MR. LOW: Bill, I see one possible  
19 conflict. Where you say "in anticipation of  
20 litigation" or "preparation for trial", now it  
21 can't be a comp suit. It's got to be "in  
22 anticipation of the litigation in question"  
23 because you know you can get their comp file even  
24 though an attorney was representing them. And I  
25 think it should be confined to anticipation of the

1 litigation in question, or anticipation of the  
2 trial of that case. I think other litigation or  
3 proposed litigation, it may under some  
4 circumstances be discoverable. The court has  
5 specifically held that if you prepare something in  
6 anticipation of a comp suit, that same insurance  
7 carrier can't claim that it's a privilege in  
8 connection with a third party suit.

9 PROFESSOR DORSANEO: Well the question  
10 is whether -- another issue -- and again I think  
11 it's good that you raise that is whether this  
12 paragraph 3(b) ought to be broader than the party  
13 communication exemption because of the fact that  
14 we are talking about us, I guess.

15 CHAIRMAN SOULES: Now we're talking  
16 about the work product of the lawyer. We've said  
17 the pending litigation for communications, we've  
18 said the pending litigation for witness  
19 statements, now we're talking about a lawyer's  
20 work product. Is that protected even if it's not  
21 in pending litigation? I favor protecting it. At  
22 that point, I think we've got something more  
23 sacrosanct. This is a lawyer's own work product.

24 MR. LOW: Yeah, but it might be his  
25 agents. Or the insurance adjuster.

1 MR. McMAINS: In fact, I've already  
2 been advised by defense lawyers as they were  
3 reading the opinions of the Supreme Court that  
4 they are now basically making specific requests to  
5 insurance adjusters for their investigation  
6 claiming them to be their agents in order to try  
7 and broaden and get around the party communication  
8 limitations that have been made.

9 PROFESSOR DORSANEO: But it's my view  
10 we need to -- it would be nice to define work  
11 product. And some of these dodges, I would hope,  
12 could be dealt with by judicial decision saying  
13 that this is not really -- you know, you can't  
14 just make somebody your agent by saying, "Here,  
15 wear this red hat."

16 MR. BRANSON: Luke, you're not  
17 suggesting where you have similar litigation --  
18 let's say you've got a lawsuit of one type that is  
19 disposed of in some manner, and then you've got a  
20 second piece of similar litigation, many times  
21 involving the same party -- that the work product  
22 from the former by way of the attorney's work  
23 product is not discoverable in the second, are  
24 you?

25 CHAIRMAN SOULES: Yes. The attorney's

1 work product.

2 MR. BRANSON: That's what I thought  
3 you said.

4 CHAIRMAN SOULES: Now I'm not talking  
5 about the communications. That's not discoverable  
6 now. This is the lawyer's file. This is not the  
7 witness statements or the party communications.  
8 This is the lawyer's work product file.

9 MR. BRANSON: It's not work product in  
10 the pending litigation though.

11 CHAIRMAN SOULES: That's correct.  
12 It's work product in a former litigation where he  
13 allowed himself to run amok in thought processes  
14 and made notes, his own notes, and put his own  
15 mental impressions down, and those --

16 MR. BRANSON: But why should that not  
17 be discoverable in separate litigation? I mean  
18 we're not talking now about litigation --

19 CHAIRMAN SOULES: I don't want him to  
20 see my notes. I guess is why not.

21 MR. LOW: Well, what if you've got a  
22 Kelly case, it's Stowered (phonetic), are you  
23 going to protect it? You've got a Kelly case,  
24 you've got Stowers, where are you then? The  
25 lawyers, most of them --



1 CHAIRMAN SOULES: Buddy, say that  
2 again. I'm sorry. I didn't hear you.

3 MR. LOW: What if you've got a Kelly  
4 case, a Stowers situation, the whole subject of a  
5 lawsuit is the lawyer's work. Now how are you  
6 going to protect that?

7 CHAIRMAN SOULES: It's not protected  
8 because that's what's at issue. That's issue  
9 injection.

10 MR. McMANS: Where is that in here?  
11 That's not in here.

12 CHAIRMAN SOULES: Rusty, that's a part  
13 of the waiver concept and it's in the common law.  
14 Issue injection waiver is waiver.

15 PROFESSOR EDGAR: Do what now, Luke?

16 CHAIRMAN SOULES: That's Ginsberg  
17 (phonetic). It's not nonsense. It's Supreme  
18 Court law.

19 PROFESSOR EDGAR: Well, no,  
20 Ginsberg --

21 MR. McMANS: We don't have this right  
22 now anyway. We don't have any attempt at  
23 broadening work product.

24 PROFESSOR EDGAR: Ginsberg just says  
25 -- as I recall Ginsberg, it just says that you

1 cannot use privilege offensively.

2 MR. McMAINS: That's right.

3 PROFESSOR EDGAR: In Kelly, the  
4 carrier is not using it offensively, it's using it  
5 defensively.

6 MR. McMAINS: That's exactly right.

7 PROFESSOR EDGAR: So Ginsberg is not  
8 authority for that proposition.

9 CHAIRMAN SCULES: That's when you  
10 waive -- you even waive attorney/client privilege  
11 whenever you say, "I relied on my lawyer for the  
12 good faith." You issue -- you inject it -- issue  
13 injection is a waiver issue as a waiver basis.

14 PROFESSOR EDGAR: What I'm saying,  
15 Luke, is that Ginsberg is not authority for the  
16 proposition that you just stated, as I read it.

17 MR. McMAINS: It's not an issue  
18 injection voluntarily. It's a voluntary injection  
19 by the plaintiff when the plaintiff said that you  
20 have messed with my lawsuit --

21 PROFESSOR EDGAR: I really --

22 MR. McMAINS: -- Mr. Insurance  
23 Company, and I'm entitled.

24 PROFESSOR EDGAR: I'm not sure the  
25 answer you gave is adequate. And I think Rusty

1 and Buddy have a good point here that we really  
2 need to think about very carefully.

3 PROFESSOR DORSANEO: Well let me say  
4 this, this draft really does not address -- and on  
5 purpose it doesn't address -- the related  
6 litigation or the durational aspect of the work  
7 product exemption. I didn't want to deal with  
8 that this time because that is a problem that will  
9 derail any attempts to define this term.

10 MR. BRANSON: But we certainly don't  
11 want to leave the impression that we've dealt with  
12 it, Bill. And that's --

13 PROFESSOR DORSANEO: Well, I don't  
14 think it does though.

15 MR. McMAINS: Yes, it does.

16 PROFESSOR DORSANEO: It does?

17 MR. McMAINS: Yes.

18 MR. LOW: You could have litigation  
19 where the same attorney has represented a company.  
20 I've got some now over a period, and we discovered  
21 it showing a pattern of conduct of how this  
22 company has acted on advice of attorney in other  
23 related cases. I think you're just walking into  
24 quicksand.

25 MR. McMAINS: You've also got -- see,

1 right now one of the things as I see it, there's a  
2 problem with the way (b) is --

3 CHAIRMAN SOULES: Hadley, I think  
4 you're right -- go ahead.

5 MR. McMANS: -- is "the anticipation  
6 of litigation or in preparation for trial" is just  
7 out there hanging. It's of any litigation or  
8 preparation for any trial. Whereas when we've got  
9 party communications and witness statements, we're  
10 dealing with a particular subject matter of the  
11 pending claims.

12 CHAIRMAN SOULES: That's right.

13 MR. McMANS: Now when you start  
14 expanding a work product privilege which is  
15 definitively different in terms of its scope than  
16 the scope in the other two by implication, I do  
17 not believe that the courts will have any  
18 difficulty believing that the committee  
19 intentionally made this broader such that when the  
20 lawyer for the insurance company tells them they  
21 ought to pay this claim because otherwise they are  
22 committing a tort of bad faith. We can't get that  
23 material. And there are a lot of judges, at least  
24 in my district, that will not give it to him under  
25 that interpretation. I will guarantee it.

1 CHAIRMAN SOULES: I do not think that  
2 "or other representative" in the third line of the  
3 new text -- "or other representative of a party"  
4 should be included in this.

5 MR. McMANS: Yes, that's a different  
6 issue though. Right now --

7 CHAIRMAN SOULES: Well it makes this  
8 issue we're talking about an easier one for me.

9 PROFESSOR EDGAR: I think it does.

10 CHAIRMAN SOULES: Once that comes out,  
11 it makes this issue easier because -- for me.

12 The way (b) is now, it says "The work product  
13 of an attorney" -- let's leave it at that. Now if  
14 we want to say the attorney's agents or the  
15 attorney, okay. But that's further down in this  
16 text. Let's take out this "or other  
17 representative of a party" because that's going to  
18 be a witness or it's going to come under party  
19 communications. To me, that is out of place in  
20 (b), the words "or other representatives of a  
21 party."

22 MR. McMANS: Yes.

23 CHAIRMAN SOULES: And should be  
24 deleted.

25 MR. McMANS: That's one of the

1           problems. I agree.

2                   CHAIRMAN SOULES: Now we're talking  
3 about the lawyer and the paralegals, I think.  
4 That's the way I read "or an attorney's agent."

5                   PROFESSOR DORSANEQ: Or an  
6 investigator.

7                   CHAIRMAN SOULES: Pardon me?

8                   PROFESSOR DORSANEQ: Or an  
9 investigator.

10                  CHAIRMAN SOULES: Or an investigator.  
11 Now do we want attorney work product to attach to  
12 that class of people or not? Or do we want them  
13 to be communications and witnesses, and fall under  
14 that type?

15                  MR. BRANSON: Well, I think in the  
16 original litigation, everyone at the table could  
17 agree we want it not discoverable.

18                  MR. McMANS: Yes. Right.

19                  MR. BRANSON: But in non -- in related  
20 litigation, not that litigation, I think you have  
21 the majority of this committee who would think  
22 that the attorney's work product is discoverable.

23                  CHAIRMAN SOULES: Well, first, Frank,  
24 we've already said that in other litigation,  
25 representatives are discoverable. Their

1 communications are discoverable. That's kind of  
2 what we did in (d) and (e). Now we're inside the  
3 law office, and I think an investigator is a (d)  
4 or an (e). I don't think he's an attorney.

5 PROFESSOR DORSANEO: Okay.

6 CHAIRMAN SOULES: That's what I say.  
7 But I think a paralegal is an attorney.

8 PROFESSOR DORSANEO: Well, I was  
9 thinking of an investigator that's working for the  
10 law firm.

11 CHAIRMAN SOULES: I still think --

12 PROFESSOR DORSANEO: You still think  
13 so?

14 CHAIRMAN SOULES: I still think he's  
15 an investigator, a (d) or an (e).

16 JUSTICE WALLACE: I don't want to  
17 complicate it, but how about somebody who  
18 designates their general counsel as their "safety  
19 officer" and on the table of operations, he's in  
20 charge of all investigation and all safety  
21 maintenance.

22 MR. McMAINS: That's right. And  
23 that's happening. They are being advised to do  
24 it.

25 MR. BRANSON: And they also designate

1 their insurance carrier as their safety  
2 representative.. We've had some truck cases where  
3 that -- the only safety the trucking company had  
4 was what their insurance company provided.

5 CHAIRMAN SOULES: I would favor taking  
6 out "or an attorney's agent or representative" and  
7 let the court handle just who the attorney is and  
8 whether the paralegal is in fact an attorney  
9 because everything that's there is the attorney's  
10 work product. It's not something specially  
11 generated by somebody else. And then I would  
12 insulate the attorney's work product, that is his  
13 file, more than I would the party communications  
14 and witnesses. And there's where Frank and I are  
15 finally, I think -- draws the line.

16 MR. BRANSON: Could we get a feel for  
17 this committee's feeling on that issue because  
18 I --

19 CHAIRMAN SOULES: Well I'm trying to  
20 get it boiled down to just that, Frank. That's  
21 what I'm trying to get to.

22 MR. BRANSON: Well, what if we just  
23 started out there and then worked back trying to  
24 make the rule reflect the committee's opinion.

25 CHAIRMAN SOULES: Frank, with this



1 baggage in here there are going to be people who  
2 are not going to understand that same issue. And  
3 what I'm trying to do is get the baggage off of it  
4 and just say we're talking about the lawyer's  
5 file. Nothing else. His mental impressions.

6 MR. BRANSON: In related litigation.

7 CHAIRMAN SOULES: How many feel that  
8 the lawyer's mental impressions and his own file  
9 -- not that of his representatives, investigators  
10 or anything, eliminate all of that -- we're just  
11 now talking about the lawyer's own file and his  
12 mental impressions, his notes should be  
13 discoverable in subsequent litigation? Eight.

14 How many feel that it should not be  
15 discoverable in any subsequent litigation, the  
16 notes of the lawyers? Okay --

17 PROFESSOR DORSANEO: "Any" is too  
18 broad for me.

19 CHAIRMAN SOULES: Well, the Kelly  
20 case, there's a problem, but --

21 MR. McCONNICO: Kelly and Ranger  
22 Mutual, that's the problem.

23 PROFESSOR EDGAR: Those are problems.

24 MR. McCONNICO: That's the cases it  
25 should be in to. It shouldn't be into any other

1 case.

2 CHAIRMAN SOULES: Okay.

3 PROFESSOR EDGAR: That's right.

4 CHAIRMAN SOULES: Kelly and Ranger  
5 Mutual -- outside of Kelly and Ranger Mutual --

6 PROFESSOR DORSANEO: You should be  
7 able to get your comp file in a products case.  
8 That's next.

9 CHAIRMAN SOULES: How many feel that  
10 except where --

11 MR. BRANSON: That's should not be  
12 able to.

13 PROFESSOR DORSANEO: Should not.

14 PROFESSOR EDGAR: That's right.

15 MR. McCONNICO: But it should be if  
16 you're going to say that the vote is that it  
17 should be discoverable in Kelly Ranger Mutual.

18 CHAIRMAN SOULES: If the legal work is  
19 an issue in the subsequent litigation -- all  
20 right, say that -- how many people feel that the  
21 lawyer's own file should not be discoverable in  
22 subsequent litigation unless the legal work is an  
23 issue in that litigation?

24 MR. McCONNICO: I agree with that.

25 PROFESSOR ELAKELY: It's not in your

1 question.

2 CHAIRMAN SOULES: It's not  
3 discoverable because it's not an issue in the  
4 subsequent litigation.

5 PROFESSOR EDCAR: What you have is an  
6 in camera inspection and have the court make that  
7 determination. That's the way you do it, or  
8 that's the way you should do it.

9 MR. BRANSON: Okay. Well let me give  
10 you another example. Let me --

11 CHAIRMAN SOULES: Let me test the  
12 water -- I think we've it got here -- and then get  
13 a consensus. All right. The lawyer's file, its  
14 subsequent litigation -- and in that subsequent  
15 litigation the legal work is not at issue -- how  
16 many feel that the work product should not be  
17 discoverable?

18 MR. LOW: Luke, wait. When you say  
19 not at issue, you mean it's not the subject  
20 matter? Because if it's not at issue, it won't be  
21 the subject of discovery.

22 MR. McMANS: It won't be relevant.

23 CHAIRMAN SOULES: The legal work is  
24 not in issue.

25 MR. BRANSON: It might lead to

1 discoverable --

2 MR. McCONNICO: Why don't we say  
3 "legal work and opinions"?

4 CHAIRMAN SOULES: Okay. The legal  
5 work and opinions are not in issue. It's just  
6 trying to fish around -- never mind. That's  
7 argumentative. The legal work and opinions done  
8 in the former case were not in issue in this case.  
9 It's the lawyer's own file. How many feel that  
10 the file should be discoverable? If you can state  
11 it better than I can, Rusty, that would be great.

12 MR. McMAINS: What I'm trying to ask,  
13 Luke -- and all I'm trying to get you to notice is  
14 that if we have focused at this juncture on (b),  
15 okay?

16 CHAIRMAN SOULES: (b). Yes.

17 MR. McMAINS: All I'm saying is your  
18 concern about the fact that the attorney/client  
19 relationship may generate a privileged  
20 communication in some manner --

21 CHAIRMAN SOULES: No. I'm not on  
22 attorney/client.

23 MR. McMAINS: Well, it's roughly the  
24 same thing. That's what I'm saying is I think  
25 there is a difference, arguably, between work

1 product in terms of discoverability in the  
2 particular litigation, and then a broader question  
3 of whether or not your file should be discoverable  
4 at all because of some other rule of privilege.

5 CHAIRMAN SOULES: Please, I've not  
6 mentioned attorney/client privilege. I'm talking  
7 about work product, mental impressions. If you've  
8 got another --

9 MR. McMAINS: You cannot distinguish  
10 that.

11 MR. SPIVEY: But, Luke, don't we have  
12 to talk about them together because of the  
13 interrelation?

14 CHAIRMAN SOULES: Well, maybe. But a  
15 part of the lawyer's file -- say you've got a file  
16 that's all work product. Some of it is  
17 attorney/client communications. That "some" has  
18 two bases for privilege, not just one. I'm just  
19 talking about one. I haven't gotten to two. Just  
20 say there is no two in there. There is no  
21 attorney/client privilege in there, in the files.

22 MR. McMAINS: You can't do that.

23 CHAIRMAN SOULES: Well of course you  
24 can. You've just got the lawyer, he's researched,  
25 he's made all his notes, he's theorized about what

1 his case might be, what the defenses might be,  
2 he's exposed his client, whatever. Anyway --

3 MR. BRANSON: Let me give you two  
4 examples and see if this is what you're talking  
5 about.

6 CHAIRMAN SOULES: Well, I want to get  
7 this vote and then we'll discuss it again. This  
8 is what you asked me to do.

9 MR. BRANSON: But I think it will  
10 help --

11 CHAIRMAN SOULES: We've got this  
12 situation. We've just got work product, not  
13 attorney/client privilege. It's the file. It's  
14 subsequent litigation and the legal work and  
15 opinions of the prior litigation are not in issue  
16 in this subsequent litigation. How many say that  
17 lawyer's file is discoverable? How many want it  
18 discoverable?

19 MR. BRANSON: Before you take --

20 CHAIRMAN SOULES: How many want it not  
21 discoverable? All right. Now there's a consensus  
22 of the House. Now talk away.

23 MR. SPIVEY: Now, Luke, let me make a  
24 statement.

25 CHAIRMAN SOULES: Sir?

1 MR. SPIVEY: Tom just verbalized what  
2 I've been concerned about and that is here we are  
3 making rules saying things are and are not  
4 discoverable. And they -- really that issue, that  
5 determination should be made in the light of the  
6 facts of a particular case. Because you've got  
7 one thing entirely when you've got a Stowers case  
8 perhaps dealing with a propriety of the conduct in  
9 not taking an offer or not making an offer, and  
10 you do in just a multitude of other situations  
11 where somebody would want to get into an  
12 attorney's file. And I'm concerned that we can  
13 draft such a broad rule, that's why I voted  
14 against it, and that's why I'm concerned about not  
15 putting that in perspective.

16 CHAIRMAN SOULES: Let me -- so that we  
17 can move on, I want to read (b) which I think will  
18 state what the committee just voted on. I'm not  
19 saying that it does, I may be wrong. I'm saying I  
20 think it does. If we take (b) -- if we take out  
21 in the third line "or other representative of a  
22 party" and then we take out in the fifth line "or  
23 an attorney's agents or representatives" then we  
24 say that "the mental impressions, conclusions or  
25 opinions or legal theories of an attorney as well

A

1 as any notes, memoranda, briefs, communications  
2 and other writings prepared by an attorney in  
3 anticipation of litigation or in preparation for  
4 trial are not discoverable." Now that to me is  
5 what the committee consensus showed a moment ago.

6 MR. LOW: Luke, let me raise one  
7 question.

8 CHAIRMAN SOULES: Buddy Low.

9 MR. LOW: Now when you speak in terms  
10 of privilege and you define what's privileged, the  
11 traditional rules are that privileges are waived  
12 and you can obtain information that's privileged.  
13 But when you go a step further and you just say  
14 it's not discoverable, you're not just saying it's  
15 privileged, and -- but there are other ways you  
16 can get it. You're just saying that it's not  
17 discoverable.

18 CHAIRMAN SOULES: Let me see if this  
19 gets to where you are. Suppose we just stop in  
20 the -- if we start at exemptions, "the following  
21 matters are protected from disclosure by  
22 privilege" and then list them.

23 MR. LOW: That would be better.

24 CHAIRMAN SOULES: Okay. "The  
25 following matters are protected from



1 disclosure" --

2 MR. McCONNICO: Where are we writing  
3 this, Luke?

4 CHAIRMAN SOULES: Right at three, in  
5 the heading.

6 MR. McCONNICO: The problem is there  
7 are a lot of other privileges that protect  
8 discovery besides what are here, like Article 5,  
9 traditionally. Those things that are privileged  
10 aren't discoverable.

11 PROFESSOR DORSANEO: Well but that's  
12 supposedly what (a) is about, 3(a).

13 CHAIRMAN SOULES: If we say:  
14 Exemptions. "The following matters are protected  
15 from disclosure by privilege," and then we say (a)  
16 -- and that's just a repeat. That may need a  
17 little something. But then (b) -- and we say work  
18 product and we take out the "are not discoverable"  
19 at the tag of it and we do that all the way  
20 through.

21 PROFESSOR EDGAR: But that doesn't  
22 cover the Ranger case or the Kelly case.

23 MR. McCONNICO: No, it doesn't.

24 PROFESSOR EDGAR: We haven't dealt  
25 with that --

1 CHAIRMAN SOULES: Yes.

2 PROFESSOR EDGAR: -- and as long as we  
3 recognize we haven't dealt with it, well that's  
4 all right.

5 CHAIRMAN SOULES: How do we deal with  
6 that? By saying --

7 MR. McMAINS: You see what I was  
8 getting at is you are definitively using a  
9 different standard than they are using in party  
10 communications --

11 CHAIRMAN SOULES: Yes.

12 MR. McMAINS: -- and witness  
13 statements.

14 CHAIRMAN SOULES: Yes.

15 MR. McMAINS: If you're going to take  
16 out that, at least where they inject, where the  
17 attorney work is an issue in the litigation, there  
18 is a proper issue in the litigation and otherwise  
19 protect the work product of the attorney, then I  
20 think you've got to write that in there, in  
21 addition to what we have.

22 CHAIRMAN SOULES: Yes. So write "in  
23 subsequent litigation where the work product is an  
24 issue"?

25 MR. McCONNICO: "The attorney work

1 product is an issue."

2 MR. BRANSON: Well, do you want to put  
3 it that way or do you want to express it in terms  
4 of "form a part of the basis of a cause of  
5 action" --

6 MR. McMAINS: Or defense.

7 MR. BRANSON: -- or defense.

8 MR. McMAINS: If you say "form the  
9 basis of a cause of action or defense", that gets  
10 you the estoppel argument you were talking about  
11 in Ginsberg, and it gets you Ranger vs. Guinn and  
12 All State vs. Kelly.

13 CHAIRMAN SOULES: Okay. It sure does.  
14 "Provided that in subsequent litigation where the  
15 attorney work product forms the basis" -- help me,  
16 Rusty.

17 PROFESSOR DORSAHEO: You could say  
18 "attorney conduct."

19 MR. BRANSON: In whole or in part?  
20 Because it may not be the whole basis, but it may  
21 be part of it.

22 MR. TINDALL: Bill suggests conduct of  
23 the attorney. I think that's what you're --

24 MR. BRANSON: Well, but it's not  
25 really conduct, it's opinion.

1           MR. McMAINS: It's not just the  
2 attorney's conduct, it may be his opinion and what  
3 it generates to the other side.

4           PROFESSOR EDGAR: It may be both.

5           MR. BRANSON: Right.

6           PROFESSOR EDGAR: It may be his  
7 conduct as a result of his opinion.

8           MR. BRANSON: And it may be conduct  
9 contrary to his opinion. I mean we've certainly  
10 seen that from time to time. An attorney says one  
11 thing and they do another.

12           MR. LOW: But in some cases, the crime  
13 fraud exception is a way to get attorneys. If  
14 somebody commits a fraud through the lawyer,  
15 Frank's amendment would catch that.

16           MR. BEARD: Well, Rusty, as a  
17 procedural matter, you get a discovery, you answer  
18 everything, you know, communications, everything  
19 under the sun. Now do you answer in that work  
20 product, "I claim the privilege under work  
21 product," generally, or do you say, "In a letter  
22 dated April\_2nd" -- on down the line?

23           MR. McMAINS: Well I think there are  
24 other provisions of the rule that deal with how  
25 you claim the specific exemptions. We haven't

1 gotten to those yet, but they are consistent.

2 CHAIRMAN SOULES: Okay. Let me run  
3 this through. Now, we'll do it just like we had  
4 -- "The mental impressions, conclusions, opinions  
5 or legal theories of an attorney as well as any  
6 notes, memoranda, briefs, communications and other  
7 writings prepared by an attorney in anticipation  
8 of litigation or in preparation for trial,  
9 provided that in subsequent litigation where the  
10 attorney work product forms a part of the cause of  
11 action or defense, the work product is not  
12 protected from disclosure."

13 MR. BRANSON: That would work.

14 MR. McMAINS: The question is though  
15 is it limited to subsequent litigation?

16 CHAIRMAN SOULES: This is.

17 MR. McMAINS: No. See, I'm not sure  
18 that's true.

19 CHAIRMAN SOULES: All right. "In  
20 other litigation."

21 PROFESSOR EDGAR: "Other" litigation  
22 rather than "subsequent."

23 CHAIRMAN SOULES: That's right.

24 Because they can -- I'll agree with that. Other  
25 litigation where it's in issue.

1 PROFESSOR DORSANEO: Why did you take  
2 out the representatives of an attorney?

3 CHAIRMAN SOULES: Because I don't want  
4 them making the investigator a representative or  
5 the guilty driver a representative, all the  
6 charades that you have to face when you see that.  
7 And I think that's --

8 PROFESSOR EDGAR: Leave that up to the  
9 court to determine how far the attorney privilege  
10 goes.

11 PROFESSOR DORSANEO: Well, but aren't  
12 we suggesting that you have to have a law license?

13 MR. McCONNICO: Didn't we say their  
14 agents, though?

15 CHAIRMAN SOULES: No.

16 MR. McCONNICO: We need to protect our  
17 paralegals.

18 CHAIRMAN SOULES: I think that a court  
19 will protect the paralegals because he will say  
20 that that's not an independent mental impression,  
21 that's the lawyer's mental impression shared with  
22 that individual in his office.

23 MR. McCONNICO: What have they done in  
24 Federal cases?

25 PROFESSOR EDGAR: Well, I can see a

1 briefing attorney, you know a briefing clerk --

2 MR. McMAINS: What about employee,  
3 attorney -- well, I don't know about employee.

4 CHAIRMAN SOULES: In other words, I'm  
5 opting for having the courts throw out everybody  
6 that we can't protect, in effect, under our own  
7 mental impressions in order to avoid the charades.  
8 I would rather take on the burden of establishing  
9 that, really, the paralegal's impression is mine.

10 MR. BRANSON: Now do we want to say  
11 "form the basis of," or "form the basis of in  
12 whole or in part"? I mean it's not necessarily  
13 the entire basis of --

14 CHAIRMAN SOULES: "Forms a part of a  
15 cause of action of defense" --

16 MR. BRANSON: Okay.

17 CHAIRMAN SOULES: -- is what I've  
18 written here.

19 MR. BRANSON: Okay.

20 MR. McCONNIC: I think we need to be  
21 more expressive in protecting the paralegals  
22 because the way this is written now, there are  
23 going to be some courts that are going to order  
24 that the paralegals' opinions have to be produced.

25 CHAIRMAN SOULES: Those two views are

1 on the table. How many feel that we should be  
2 more expressive about protecting the paralegals?  
3 Six. How many feel we should not? I mean it's --  
4 once you start adding people behind the attorney,  
5 you start into the charade. And that's the  
6 problem that's before us.

7 PROFESSOR DORSANEO: Well I know that  
8 in my case --

9 MR. BEARD: If you do one then, of  
10 course, you construe that's the only one.

11 MR. BRANSON: And I think you might  
12 ought to put a "may form the basis" instead of  
13 "forms the basis" because you'll get some courts  
14 that say I don't believe it does even in a Ranger  
15 case or a Kelly case.

16 PROFESSOR DORSANEO: Well I know in  
17 my case Suzanne ought to be covered by this thing.  
18 I mean that's what it boils down to, and that's  
19 not some guy I don't even know.

20 MR. BRANSON: Well, let's just write  
21 in there that Suzanne is covered.

22 CHAIRMAN SOULES: Well how do you  
23 describe that? You can't call it an attorney's  
24 agent because he will make everybody his agent. So  
25 what words do we use?



1 MR. TINDALL: Well the Federal rule  
2 uses the word -- if it's any help --  
3 "representative."

4 MR. McCONNICO: That's worse.

5 CHAIRMAN SOULES: Same thing.

6 MR. McMANS: What about his support  
7 staff?

8 MR. McCONNICO: Support staff will  
9 become insurance agents.

10 PROFESSOR DORSANEO: I think the court  
11 can deal with that.

12 MR. McMANS: I think as long as  
13 you're --

14 MR. McCONNICO: I do too. I agree  
15 with that. I think we should put it "his office  
16 support staff." Put it like it's the people that  
17 work in his office.

18 MR. McMANS: Right. I just think  
19 that if you say that you get -- you put a little  
20 more gloss on what it is you are trying to do and  
21 eliminate some of the artificiality.

22 CHAIRMAN SOULES: "Prepared by an  
23 attorney or an attorney's office support staff"?

24 MR. McCONNICO: I support that.

25 CHAIRMAN SOULES: That's what we want

1 to use? Okay.

2 PROFESSOR EDGAR: "Office support  
3 staff." I'm comfortable with that.

4 MR. McMAINS: Yeah. I think it -- at  
5 least it conveys a better impression of what we  
6 mean.

7 PROFESSOR DORSANEO: I guess --  
8 suppose somebody is at a different office?

9 MR. McCONNICO: It's going to be hard  
10 to say in-house counsel for Exxon is the  
11 attorney's office support staff.

12 CHAIRMAN SOULES: Okay. Let me read  
13 it now. "The following matters are protected from  
14 disclosure by privilege: (a) any matter protected  
15 from disclosure by privilege, (b) work product.  
16 The mental impressions, conclusions, opinions or  
17 legal theories of an attorney as well as any  
18 notes" --

19 PROFESSOR EDGAR: Or office support  
20 staff.

21 CHAIRMAN SOULES: -- "of an attorney  
22 or an attorney's office support staff."

23 "The mental impressions, conclusions,  
24 opinions or legal theories" -- strike "of an  
25 attorney" and go right down to "as well as." "The

1 mental impressions, conclusions, opinions or legal  
2 theories, as well as any notes, memoranda, briefs,  
3 communications and other writings prepared by an  
4 attorney or an attorney's office support staff in  
5 anticipation of litigation or in preparation for  
6 trial provided that in other litigation where the  
7 attorney work product forms a part of the cause of  
8 action or defense, the work product is not  
9 protected from disclosure."

10 MR. BRANSON: "May form."

11 MR. McMAINS: "May form a part."

12 CHAIRMAN SOULES: I'm almost ready to  
13 vote on that except for this. I believe that the  
14 attorney's work product is discoverable in the  
15 pending litigation if it forms a part of the cause  
16 of action or defense.

17 MR. McMAINS: That's right. That's  
18 what I was talking about.

19 CHAIRMAN SOULES: So we don't have to  
20 differentiate between current and subsequent if  
21 provided that "where the attorney work product may  
22 form a part of the cause of action or defense the  
23 work product is not protected from disclosure."  
24 That's the way it is.

25 MR. RAGLAND: I have a question.

1 CHAIRMAN SOULES: Yes, sir. Tom  
2 Ragland.

3 MR. RAGLAND: Has anyone considered  
4 this proposed amendment that we've talked about  
5 for the last hour in light of evidence Rule 503  
6 and whether it has any effect, and aren't we just  
7 getting tangled up in our own underwear trying to  
8 write something that possibly creates more  
9 problems than we're solving?

10 CHAIRMAN SOULES: Well, that's  
11 attorney/client privilege. And that's -- again,  
12 that's a different --

13 MR. RAGLAND: I know it is. But  
14 you've got language that is slopping from one rule  
15 to the other over there, Luke, and I think we're  
16 just creating more problems than we're solving.

17 CHAIRMAN SOULES: Any further  
18 discussion? All right. Let me read it now. And  
19 this -- I'm not going to read it from the  
20 beginning, I'm just going to read the (b) part of  
21 it. "Work Product. The mental impressions,  
22 conclusions, opinions or legal theories as well as  
23 any notes, memoranda, briefs, communications and  
24 other writings prepared by an attorney or an  
25 attorney's office support staff in anticipation of

1 litigation or in preparation for trial provided  
2 that where the attorney work product may form a  
3 part of the cause of action or defense, the work  
4 product is not protected from disclosure."

5 MR. McCONNICO: Luke, I hate to ask  
6 you to do that, but would you read the first part  
7 of that again? The very first two or three  
8 sentences.

9 CHAIRMAN SOULES: "The mental  
10 impressions, conclusions, opinions or legal  
11 theories as well as any notes" -- and so forth.

12 MR. McMANS: -- "memoranda, briefs,  
13 communications" --

14 MR. McCONNICO: Okay. And then we put  
15 "of the attorney and his office support staff."

16 CHAIRMAN SOULES: I just want it to  
17 say that once instead of twice.

18 MR. McCONNICO: Okay.

19 CHAIRMAN SOULES: Those in favor say  
20 aye.

21 COMMITTEE MEMBERS: Aye.

22 CHAIRMAN SOULES: Opposed?

23 PROFESSOR DORSANEO: Well, I still  
24 don't like the office support staff.

25 MR. McCONNICO: Can you have a Kelly

1 case without waiving the lawyer's rights?

2 CHAIRMAN SOULES: Bill, do I count you  
3 as a negative or positive? I know you don't like  
4 that part of --

5 PROFESSOR DORSANEO: I think you ought  
6 to count me as a negative. I think, you know, a  
7 bona fide agent of an attorney ought to be covered  
8 whether he is in the same office or not. I mean I  
9 just believe that and I think the courts can deal  
10 with games and we have plenty of games and the  
11 courts --

12 MR. TINDALL: "Person employed by an  
13 attorney," would that cover it?

14 CHAIRMAN SOULES: I think if you just  
15 stopped at attorney, you've got that argument.  
16 Now we have made it plain that you don't have that  
17 argument. That's why --

18 PROFESSOR EDGAR: There may not be any  
19 privilege in a Kelly case -- in a Stowers case.

20 PROFESSOR DORSANEO: I've got cases  
21 right now where the paralegal is not an office  
22 support staff person and, by God, I think it ought  
23 to be work product. I mean, you know --

24 CHAIRMAN SOULES: I think if you stop  
25 at attorney, you avoid the charade and you give

1 the court the opportunity to extend the attorney  
2 to his true extension and no further. And I think  
3 an attorney's true extension is his paralegal.  
4 And if you just say "attorney," I think you're all  
5 right. See, that's where I'm coming from. But  
6 once you add anything beyond that, then you're  
7 talking about something besides the attorney.

8 PROFESSOR DORSANEO: Well, then, what  
9 do you do with these litigation support systems  
10 that people, you know, make contracts with? Are  
11 they just out? Is that always discoverable? I  
12 mean this looks like a small town -- small, little  
13 old office operation where everybody, everything  
14 is in-house and that's just not the modern reality  
15 of litigation.

16 PROFESSOR EDGAR: It's not.

17 MR. BRANSON: Let me give you an  
18 example. I've got all of my support staff  
19 incorporated in a separate investigative  
20 corporation. You've got nurses, doctors,  
21 investigators, video tape operators, are they  
22 technically-support staff?

23  
24 (Please see attached handwritten  
25 (explanation of the preceding  
(statement.

During the discussions in the Sat.  
morning meeting intending to use as example  
of an attorney who set up a separate  
investigative Corp including, investigators, nurses,  
Drs, medical illustrators, and video  
operators - I mispoke myself and  
made a reference to my Spec staff. -

The record should state that as  
a hypothetical Attorney rather than  
my investigative Corporation -

The discussion came during  
the discussion of privileges - -

Thank you  
Frank L. Bonner



1  
2 MR. SPIVEY: Not in your case because  
3 it's a separate entity. Old buddy, you just got  
4 discovered.

5 CHAIRMAN SOULES: Newell Blakely.

6 MR. BRANSON: Well why would they not  
7 be? Functionally, that's the way they operate.

8 CHAIRMAN SOULES: Newell Blakely.

9 PROFESSOR BLAKELY: Luke, you've got  
10 litigation A and litigation B. In litigation B,  
11 an issue in the case is the lawyer's file in  
12 litigation A. And you think that the lawyer's  
13 file in litigation A is discoverable in litigation  
14 B. Do I have that straight?

15 CHAIRMAN SOULES: Uh-huh.

16 PROFESSOR BLAKELY: All right.  
17 Suppose the lawyer in litigation B says open your  
18 briefcase in litigation B. "No, no. That's not  
19 an issue." I understand. But the language as  
20 you've got it, since you no longer distinguish  
21 between prior litigation and subsequent  
22 litigation, the language that you just drew lets  
23 either attorney get into the other attorney's  
24 litigation B file. Am I wrong about that?

25 CHAIRMAN SOULES: You're right about

1 that.

2 PROFESSOR BLAKELY: That's an ugly,  
3 and I sure hate to say it because it messes things  
4 up.

5 CHAIRMAN SOULES: Now one thing that  
6 -- we've spent a lot of time working on this. If  
7 it's not straight, Bill, in your judgment, the one  
8 thing we can do is leave it just like it is, the  
9 work product of an attorney and not change it and  
10 leave the law to develop.

11 PROFESSOR DORSANEO: Well maybe we're  
12 not ready.

13 PROFESSOR EDGAR: Well let me just  
14 raise the question, and I looked at Rule 503(d)(3)  
15 a moment ago. And the thing we're most concerned  
16 about here-- at least I am -- are the Tilly  
17 (phonetic) cases, or Kelly cases. And is it  
18 proper to say that under 503(d)(3) that in that  
19 type of situation, the communication is not  
20 privileged, thus therefore it is subject to  
21 discovery?

22 MR. McMAINS: Well actually you can do  
23 it under (d)(5). In the All State and Tilly  
24 analysis, it's (d)(5). The lawyer represents both  
25 under Ranger vs. Guinn.

1 PROFESSOR EDGAR: Well, but also you  
2 have a breach of duty by a lawyer to the client  
3 too in the Tilly case and so --

4 MR. McMAINS: Well I -- yeah, I  
5 understand, but you don't have to have malpractice  
6 and you don't have to have a breach of duty at all  
7 in order to form the basis of part of the cause of  
8 action or defense. Whereas you would have to  
9 have, you know, an allegation of breach of duty by  
10 the lawyer, whereas what takes it out of privilege  
11 is communications to joint clients. And insureds  
12 and insurance companies are joint clients under  
13 both the DR's and Ranger vs. Guinn.

14 MR. McCONNICO: Well, I didn't see how  
15 you could have this privilege or could claim this  
16 privilege on a Ranger, Mutual or a Tilly  
17 situation.

18 MR. McMAINS: I've had lawyers do it.  
19 I've requested lawyer's files who supposedly  
20 represented the insured, when I was representing  
21 the insured suing them, and they claimed the  
22 attorney-client privilege.

23 PROFESSOR EDGAR: I'm coming back to  
24 what Tom Ragland said a moment ago that maybe Rule  
25 503 takes care of the problem for which we were

1 trying to carve an exception to take care of the  
2 problem on the work product.

3 MR. McMANS: Let me say this, Luke,  
4 that I agree that once we convert the  
5 nondiscoverability to a privilege insofar as if  
6 you can relate it back somehow to 503, then you  
7 can probably get around at least the Kelly  
8 problem, arguably. On the other hand, it does not  
9 exactly get around other things such as just the  
10 general Ginsberg problem or the fraud problem.

11 PROFESSOR EDGAR: That's true.

12 MR. McMANS: I mean if -- basically,  
13 an attorney is an agent of fraud if it is his  
14 office that is basically utilized as a fraud in  
15 the action. In the very action you're in, if you  
16 say "other action," you can't get to it. I mean  
17 if the attorney on an antitrust case has written  
18 his client and said, "Hey, you do this," and  
19 that's a violation of the antitrust laws, should  
20 you be -- but if you're going to do it, then let's  
21 do it this way because we can cover it up better.  
22 I mean should that be discoverable or not? And I  
23 just think that it should be.

24 CHAIRMAN SOULES: Yeah. And we've  
25 gotten past that point. The uncertainty I feel

1 about doing anything right now, and I feel Bill  
2 feels too, maybe we ought to take a show of hands  
3 on whether we stick with our last vote or whether  
4 we just leave work product the way it is and leave  
5 it for further study.

6 Bill, do you want to go on with what we've  
7 got and vote it out, or do you want to take it for  
8 further study? You're the person that's labored  
9 with this, and I think we ought to defer to you on  
10 that. We've gotten as far as we can get with it  
11 today. We either take what we've got or we give  
12 it back to you for further study.

13 PROFESSOR DORSANEO: Well, I don't  
14 think it's quite ready frankly.

15 CHAIRMAN SOULES: You want us to --

16 PROFESSOR DORSANEO: I think it's --

17 CHAIRMAN SOULES: We'll leave (3)(b) --  
18 your preference would be to leave (3)(b) as is and  
19 give it some more study?

20 PROFESSOR DORSANEO: That would be my  
21 preference. I mean that's just a hard problem,  
22 and there aren't many of us here.

23 CHAIRMAN SOULES: Shall we not defer  
24 to Bill on that?

25 MR. McCONNICO: Yes.

1 PROFESSOR EDGAR: Yes, let's do that.

2 CHAIRMAN SOULES: Okay. Let's defer  
3 to Bill on that.

4 PROFESSOR EDGAR: On (3)(b).

5 CHAIRMAN SOULES: We'll table that.  
6 And, Bill, you have labored and I know you will  
7 more on it. And we'll get it right.

8 PROFESSOR EDGAR: But then we're not  
9 going to change the wording of (3), though.

10 CHAIRMAN SOULES: (3)(b). I guess --

11 PROFESSOR EDGAR: You see the  
12 following matters aren't -- we're going to leave  
13 that: "The following matters are not  
14 discoverable."

15 CHAIRMAN SOULES: Okay.

16 MR. McMains: What? Now --

17 PROFESSOR DORSANEO: It doesn't  
18 matter.

19 PROFESSOR EDGAR: Well, the reason for  
20 that is that we've already have a protection by  
21 privilege, and this goes back to what either you  
22 or Buddy were saying awhile ago. It's one thing  
23 to say that something is not privileged; it's  
24 another thing to say it's not discoverable. And  
25 I'm -- until we can resolve this problem that

1 we've just wrestled with, I feel more comfortable  
2 by leaving the rule as it now says "The following  
3 are not discoverable," rather than starting to  
4 talk about privilege.

5 MR. McMAINS: Yeah, but now what  
6 you're doing is you're saying that the mere --

7 PROFESSOR EDGAR: I would feel more  
8 comfortable by utilizing Rule 503 in determining  
9 privilege and looking to 166(b) to determine  
10 discoverability.

11 MR. McMAINS: But 166(b) doesn't talk  
12 about privilege. That's what you're just now  
13 saying.

14 PROFESSOR EDGAR: That's right.

15 MR. McMAINS: And so the problem I  
16 have is when I say I want the attorney's file in a  
17 Kelly case, I'm entitled to it under 503. Where  
18 do I get it under 166?

19 PROFESSOR EDGAR: You don't. You  
20 don't unless you -- all right. You're right.

21 MR. McMAINS: Where do I get it?

22 PROFESSOR EDGAR: You can't.

23 CHAIRMAN SOULES: Okay. We want to go  
24 to the next item of written agenda because --

25 PROFESSOR EDGAR: No, wait a minute.

1 He's right. You can't get it.

2 MR. McMANS: You can't get it now.

3 PROFESSOR EDGAR: Because it's not  
4 discoverable.

5 CHAIRMAN SOULES: Well that's the way  
6 the rule is written, and it's not -- we're going  
7 to have to go on. It's almost noon. We have  
8 about 40 items on the agenda and to change the  
9 question of not discoverable is not before the  
10 committee and it will not be changed at this  
11 session. So let's go forward.

12 MR. McMANS: We already voted on it.

13 PROFESSOR EDGAR: We voted on it a  
14 minute ago.

15 CHAIRMAN SOULES: We voted on that in  
16 connection with the change to (b). We've decided  
17 to table that and give it back to Bill. And,  
18 Rusty, I'll put it at the end of the agenda, if  
19 you like, but we have to go forward with our other  
20 work.

21 PROFESSOR DORSANEO: Well, I've got  
22 one other thing that I need to mention. This is  
23 proposed paragraph 4 to be substituted in the  
24 order of the rule --

25 CHAIRMAN SOULES: Rusty, I'm going to



1 put that at the end of the agenda.

2 PROFESSOR DORSANEO: The current  
3 paragraph 4, I'd ask you to read, please, on page  
4 215 and 216, this Presentation of Objections  
5 business. It is meant to deal with this issue of  
6 burdens. And the way I understand the problem is  
7 this. We have a general problem of who has the  
8 responsibility of raising an objection and how the  
9 objection is presented. And secondly, we have a  
10 specific problem involving documents and in camera  
11 examinations of documents.

12 The Supreme Court has struggled with this  
13 matter in the first Peeples opinion, in the second  
14 Peeples opinion and the Weisel case, and recently  
15 in a writ refused in the Glanz (phonetic) case.  
16 And what I have attempted to do is to draft  
17 something that I can follow in handling discovery  
18 objections in my practice. And frankly, I don't  
19 understand exactly what I meant to do from the  
20 Supreme Court opinions themselves. This is an  
21 effort to improve upon that, to be candid.

22 PROFESSOR EDGAR: I think you've done  
23 a real fine job.

24 MR. McCONNICO: I'll third that. I  
25 think it's a real good job.

1 PROFESSOR EDGAR: Are you moving its  
2 adoption?

3 PROFESSOR DORSANEO: I move its  
4 adoption.

5 PROFESSOR EDGAR: I second the motion.

6 CHAIRMAN SOULES: Moved and seconded.

7 Any further discussion?

8 MR. RAGLAND: Luke, I have a question.

9 MR. BEARD: Let me ask this.

10 CHAIRMAN SOULES: Tom Ragland and then  
11 Pat Beard.

12 MR. RAGLAND: The third line at the  
13 bottom of page 215, "such as attorney-client or  
14 attorney work product," is that attorney-client  
15 privilege or client's work product or  
16 attorney-client work product?

17 PROFESSOR DORSANEO: Yes. That's  
18 language right out of Weisel. But that's what is  
19 meant, specific privilege or exemption such as  
20 attorney -- we could change it, you know, to clean  
21 it up such as the attorney-client privilege or the  
22 attorney work product exemption instead.

23 MR. RAGLAND: Well, that answers my  
24 question. I wasn't objecting to it. I was just  
25 questioning it.

1 MR. BEARD: Bill, let's go back to  
2 what we talked about in our subcommittee  
3 conversation. You get a general request on all  
4 documents. Now the client has got all the  
5 correspondence from the lawyer's side. If -- do  
6 you have to come in and claim that privilege and  
7 list all of those documents and claim that  
8 generally? Should a general request for all  
9 documents be construed to include what would  
10 normally be privileged communication so that you  
11 have to go object to it? Should you have to  
12 object unless they specifically are asking for  
13 attorney's communications and all? We really  
14 shouldn't have the burden to say you can have  
15 everything except these privileged communications.

16 PROFESSOR DORSANEO: Well the Graft  
17 does not get to the issue of the sufficiency of  
18 the request at the threshold; it doesn't reach  
19 that. And I didn't -- I mean except to the -- it  
20 says "In responding to an appropriate discovery  
21 request directly addressed to the matter" -- it  
22 tries to deal with it that way. That's the best I  
23 could do. If I'm understanding you correctly, if  
24 somebody said "I want everything."

25 MR. BEARD: That's what they ask me.

1                   PROFESSOR DORSANEQ: "I want  
2 everything" -- then I would object to that on the  
3 basis that the request is inappropriate because it  
4 is not sufficiently specific in terms of  
5 identifying the specific items or categories as  
6 required by Rule 167 of the Texas Rules of Civil  
7 Procedure. But beyond that, I haven't gone.

8                   MR. BEARD: Well, can we say that a  
9 general request does not include a request for  
10 attorney-client communications?

11                   MR. TINDALL: I think we can say that.

12                   MR. BEARD: Well, that's the issue we  
13 raise -- they raised. You know, you waive it if  
14 you have attorney privilege and they'll produce  
15 it. You don't produce it now. You don't object  
16 and you don't produce it, which is the sort of a  
17 routine.

18                   But this says you've got to object to claim  
19 your privilege, and I don't think we should have  
20 that burden because that's not the way we  
21 generally practice. We don't claim the privilege  
22 because we just, you know, assume that the  
23 privilege is there. And that was one of the  
24 issues we talked about.

25                   PROFESSOR DORSANEQ: We could add

1 language saying --

2 MR. BEARD: If you waived it, you did  
3 not claim it because you never even thought about  
4 it.

5 PROFESSOR DORSANEO: We could add  
6 language saying that a general request --

7 PROFESSOR EDGAR: But under Rule 167,  
8 don't you have to request something specific in  
9 order for it to be -- isn't that what Rule 167  
10 says?

11 MR. BEARD: Well, all documents --  
12 they are very general with regard to a specific  
13 accident or a specific contract.

14 PROFESSOR EDGAR: Well, maybe that's  
15 because the request is improper, though. And it  
16 seems to me that your objection at that point is  
17 that the request is overly broad.

18 MR. BEARD: Well you can't really  
19 specify until you know what you're going to get.  
20 If you've got a contract dispute, we want  
21 everything involving that contract dispute.

22 CHAIRMAN SOULES: Some of the teachers  
23 in these seminars are, you know, giving the  
24 imaginary horribles, now, after this Gutierrez and  
25 the Glass case, that when you get a broad request

1 like that, you have to start -- you have to list  
2 all of the immunities right away. You just get  
3 the checklist out here that we're going down --  
4 work product and communication and all -- and you  
5 better file that right away because if you don't  
6 and you subsequently get to the point where you  
7 realize: "They meant my file; I didn't know that  
8 it meant my file" --

9 MR. BEARD: That's what I want to  
10 eliminate.

11 CHAIRMAN SOULES: -- and the 30 days  
12 are gone, and they say "Well, you've waived your  
13 file.

14 And so it's a way -- it's sort of where the  
15 Court's opinions have taken us with the  
16 heavy-handed sanctions. And I think they had to  
17 do that in order to get discovery off of high  
18 center, and they've accomplished that. But now  
19 they've taken us to the point where it's  
20 generating all kinds of boilerplate paperwork  
21 because of some overreaction, maybe, to it. But  
22 that's where you're coming from, isn't it, Pat?

23 MR. BEARD: Yeah, you've got these  
24 people out on these seminars saying you -- you  
25 claim all that or else you've waived it subject to

1 sanctions and all of that.

2 CHAIRMAN SOULES: And the second  
3 problem that I --

4 MR. BEARD: And we don't really  
5 practice law that way. We just don't produce it  
6 in response to a general request.

7 CHAIRMAN SOULES: Another problem,  
8 Bill, that I worry with is the Supreme Court  
9 hasn't said it in a long time -- they did in what,  
10 Touche (phonetic) and Lawrence, that the party  
11 seeking discovery has the burden to show relevance  
12 within the scope of 166(b). That was the essence  
13 of Lawrence and Touche. But since that time  
14 they've talked about immunities and what you have  
15 to do under Peeples, and it looks like, if you  
16 read the cases literally, they never do go through  
17 the relevance aspect. They just say if you are  
18 resisting discovery, you've got to show you're  
19 entitled to resist. So I've got to show -- if I'm  
20 a resisting party -- an absence of relevance if  
21 you read literally what those -- although they're  
22 not dealing with relevance, they're dealing with  
23 privilege, but they say broadly that a resisting  
24 party has the burden to show that he's entitled to  
25 resist discovery.

1 I think that I ought to include the concept  
2 that a party seeking discovery has the burden to  
3 show that the discovery is relevant in the  
4 discovery sense. Thereafter, a party resisting  
5 discovery has the burden to show a privilege or  
6 immunity because that's really the way, if you  
7 read all of the cases, the old ones and the new  
8 ones, that's the whole scheme.

9 MR. TINDALL: We got rid of that.  
10 That's almost a good cause, though, Luke, and that  
11 used to be the rule for documents.

12 CHAIRMAN SOULES: No. I'm talking  
13 about relevant in the relevant sense -- broadest  
14 sense of discovery. He's asked me for something  
15 that has to do with a ranch in Argentina and this  
16 is a cow that died on a ranch in Atascosa County  
17 and they never saw each other in their lives, you  
18 know. I mean it's just absolutely out of bounds.  
19 And that's, you know, why -- that's the difference  
20 between Lawrence and Touche.

21 MR. LOW: Luke, it doesn't have to be  
22 something that's relevant, but it has to maybe  
23 lead to something.

24 MR. McCONNICO: Right.

25 CHAIRMAN SOULES: No, I'm saying



1 relevant in the 166(b) sense. Relevant in the  
2 discovery sense.

3 MR. McCONNICO: And it leads to  
4 admissibility.

5 CHAIRMAN SOULES: It leads to  
6 admissibility. I mean, to get within the purview  
7 of the scope of discovery and say, "I'm in the  
8 scope of discovery where I'm entitled to have  
9 information," is the moving party's burden.

10 MR. LOW: Well, isn't that always true  
11 that under anything you are seeking, you've got to  
12 show that it in some way relates to, or may lead  
13 to something?

14 CHAIRMAN SOULES: But if you read  
15 Weisel and Peebles and all that, they ignore that.  
16 The -- Jordan -- the Court has ignored that since  
17 Touche and Lawrence.

18 PROFESSOR EDGAR: Well, I'm not sure  
19 it has ignored it, rather it really hasn't been  
20 necessary to the decision so they haven't been  
21 called upon to discuss it.

22 CHAIRMAN SOULES: But they would say  
23 it by writing so broadly.

24 PROFESSOR EDGAR: Well, but I think  
25 you've got to read the cases within the context of

1 the questions presented to the Court.

2 CHAIRMAN SOULES: All right.

3 PROFESSOR EDGAR: I agree with you  
4 that I have no problem with emphasizing that  
5 relevance is a threshold requirement.

6 CHAIRMAN SOULES: All right. Let's go  
7 right to the language of four. "In responding to  
8 an appropriate discovery request directly  
9 addressed to the matter, a party who seeks to  
10 exclude any matter from discovery" -- on what  
11 basis? Relevance. I want to exclude that from  
12 discovery because it's not relevant in the  
13 discovery sense.

14 This rule, the way it's written, changes  
15 Lawrence and Touche because it does not require --  
16 if you want to say it's not relevant, you've got  
17 to prove it's not relevant because you are seeking  
18 to exclude it from discovery.

19 MR. BEARD: The Federal rule puts the  
20 burden on you to show it's relevant if you want to  
21 make somebody testify -- compel them to testify.

22 CHAIRMAN SOULES: You've got to show  
23 it's relevant. Well, this rule changes Touche and  
24 Lawrence.

25 MR. McCONNICO: I don't agree with

1 that because I think what Bill has done here is  
2 just shown the process of how you present your  
3 objections. And I think the language at the first  
4 of 166(b) states the same, that the only thing  
5 that's discoverable is something that leads to  
6 admissible evidence.

7 This, I see, is a mechanical section that  
8 says, "this is what you've got to do," and it has  
9 codified Peeples and Weisel and Insulated Glass.

10 CHAIRMAN SOULES: But it doesn't tell  
11 you what you've got to do because it doesn't start  
12 with Step 1, it starts with Step 3, which is where  
13 Peeples and Weisel start. They don't start with  
14 Step 1. Step 1 is the party seeking discovery has  
15 to show what it seeks is relevant.

16 MR. McCONNICO: But after Jampole  
17 (phonetic) maybe there isn't a Step 1 because  
18 Jampole came after Lawrence. And in Jampole, the  
19 Court was saying -- and I haven't read this  
20 recently, so I might not should be discussing it  
21 -- but as I remember what Jampole said is that  
22 we're going to assume that it is.

23 CHAIRMAN SOULES: No. The Jampole  
24 discovery request set up the reasons why the  
25 seeking party contended that the discovery was

1 relevant, and they've got all of those kinds of  
2 cars and vehicles. In Lawrence, the seeking party  
3 did not set up relevance properly, and they did  
4 not get the discovery.

5 And those two cases are very teaching in the  
6 way of how you need to explain that what you're  
7 trying to get will bear on your case, because if  
8 you do, there is no question that you get it.  
9 That's what Jampole says. Once you set it up,  
10 show that it's relevant, you get that discovery  
11 unless it's immune.

12 And I think -- of course I'm on the record by  
13 filings that somebody needs to say -- to go back  
14 before Peeples and set out what really is supposed  
15 to happen from one end to the other of a discovery  
16 hearing, and the first thing is the party seeking  
17 -- if it's an issue, if relevance is an issue --  
18 the party seeking discovery has got to carry that  
19 burden before privilege even comes up.

20 MR. BEARD: Well, attorney-client  
21 privilege should not be waived unless you actually  
22 produce evidence. Some evidence has to come in  
23 and you shouldn't waive it just because you failed  
24 to timely object to something you weren't even  
25 considering.

1 CHAIRMAN SOULES: Oh, I agree with  
2 that.

3 MR. BEARD: So I really think we need  
4 a rule that says there is no waiver unless there  
5 is the production of evidence -- of the  
6 attorney-client privilege.

7 CHAIRMAN SOULES: We're talking about  
8 two different things.

9 MR. McCONNICO: I think in doing that,  
10 Luke, the point I'll make is we're going to have  
11 to be darn careful on how we do that because how  
12 can the plaintiff say how this can lead up to  
13 admissible evidence when he has never seen this  
14 and had the right to do discovery to begin with.

15 CHAIRMAN SOULES: The same way he did  
16 in Jampole. He did a good job.

17 MR. McCONNICO: We're going to have to  
18 be very careful not to restrict his ability to get  
19 to it because that's why he's doing discovery. He  
20 doesn't know how it's going to lead to  
21 admissibility.

22 CHAIRMAN SOULES: Reasonably  
23 calculated to lead. And that's -- that lawyer did  
24 a good job. He's a Houston lawyer, and I should  
25 be able to recall his name. Buddy Low.

1 MR. LOW: But Luke, the person with  
2 the document is in a better position to show --

3 CHAIRMAN SOULES: Doug Mathews was the  
4 lawyer.

5 MR. LOW: -- by presenting it to the  
6 court or something. And if it's a document, they  
7 just might have described it to you, and you might  
8 not can really show that. But that person can  
9 show the court in camera; it's not an unreasonable  
10 thing.

11 Now if the plaintiff is asking for just a  
12 whole bunch of stuff, and it's real burdensome and  
13 everything, you can face that issue. But  
14 sometimes the other party that doesn't have the  
15 document is not really able to show. The man with  
16 the document is in a better position to do  
17 something and present it to the court and take  
18 care of it, than the man without the document.

19 MR. BEARD: Buddy, the question -- the  
20 description of the abilities of the court that  
21 you're going to try -- whether you're in the  
22 Federal court or state court -- is sometimes  
23 described vividly to the client before or after  
24 litigation.

25 Now if you're put where you have to give that

1 to the judge in camera to inspect and you've just  
2 said a lot of bad things about him --

3 MR. LOW: Oh, I would presume the  
4 lawyers don't use good discretion.

5 MR. BEARD: Well in California they  
6 don't like to write anything because of the  
7 discovery question.

8 CHAIRMAN SOULES: It would help me if  
9 we put "In responding to an appropriate discovery  
10 request within the scope of paragraph two directly  
11 addressed to the matter, a party who seeks to  
12 exclude any matter from discovery, on the basis of  
13 any exemption or immunity from discovery" -- then  
14 it separates those burdens and sets them up the  
15 way all the cases read together sets them up.

16 MR. TINDALL: What do you mean by  
17 "immunity"?

18 CHAIRMAN SOULES: Well, that's what  
19 the cases use. They use the word "immunity"  
20 essentially to mean any reason why it's not  
21 discoverable. But if you read Peeples and Weisel,  
22 you can read that immunity means not relevant.  
23 That's where you get to the problem. That's the  
24 word -- that's the loose writing that's causing  
25 the problem.

1 MR. TINDALL: Or we say not relevant  
2 nor calculated to lead to any --

3 CHAIRMAN SOULES: Well, now that's why  
4 I put "within the scope of paragraph two," which  
5 is the whole scope.

6 MR. TINDALL: Oh, okay.

7 CHAIRMAN SOULES: So, "In responding  
8 to an appropriate discovery request within the  
9 scope of paragraph two directly addressed to the  
10 matter, a party who seeks to exclude any matter  
11 from discovery on the basis of exemption or  
12 immunity" -- and those words now have meaning in  
13 the cases --

14 MR. TINDALL: I hate to see it  
15 perpetuate the word "immunity." That sort of  
16 has --

17 CHAIRMAN SOULES: Exemption or  
18 privilege. Well, exemption.

19 MR. BRANSON: There's actually another  
20 category, Luke.

21 MR. TINDALL: Exemption or privilege.

22 -CHAIRMAN SOULES: Exemption is what we  
23 use in this 156(b).

24 MR. TINDALL: I know, but not  
25 immunity.



1 MR. BRANSON: There is actually  
2 another category besides those two. And the only  
3 place I've encountered it is in Article  
4 4447(b)(3), a little-used section of the Health  
5 Code, that has been interpreted to prevent the  
6 discovery of hospital minutes, minutes of records,  
7 in a case called Wadley (phonetic) Hospital vs.  
8 Dow Jones.

9 The court, in that opinion, talks about that  
10 statute almost as a prohibition statute, not a  
11 privilege which is waivable, but -- and it may  
12 be that it fits within the immunity provision --  
13 but in that particular case it was not discussed  
14 in that light. But it was even stronger than a  
15 privilege.

16 CHAIRMAN SOULES: Well, exemption or  
17 immunity. I mean that's there. We are not going  
18 to extend the use of the term; it's in the cases.

19 PROFESSOR EDGAR: All right. How  
20 would you propose, then, that that --

21 CHAIRMAN SOULES: "In responding to an  
22 appropriate-discovery request within the scope of  
23 paragraph two directly addressed to the matter, a  
24 party who seeks to exclude any matter from  
25 discovery, on the basis of exemption or immunity

1 from discovery, must specifically plead the  
2 particular exemption or immunity" --

3 MR. McCONNICO: Well, what about  
4 Article 5 where you had --

5 CHAIRMAN SOULES: -- "from discovery  
6 relied upon," and so forth. Now that would be my  
7 change.

8 Bill, did you have -- I mean, Steve, did you  
9 have a question about this?

10 MR. McCONNICO: I'm sorry I  
11 interrupted, Luke.

12 CHAIRMAN SOULES: Okay.

13 MR. McCONNICO: I think we need to put  
14 in there also "privilege" because we have stated  
15 in -- before that any matter under Article 5 --

16 CHAIRMAN SOULES: Okay. "Exemptions"  
17 -- three -- as it is now written by the Supreme  
18 Court of Texas, it says: "The following matters  
19 are not discoverable: (a) Any matter protected  
20 from disclosure by privilege."

21 So in our rule, "exemption" includes any  
22 matter protected from disclosure by privilege, and  
23 that's why I used exemption.

24 MR. McCONNICO: Okay.

25 MR. TINDALL: Okay. What if the

1 request is "Give me the report of your experts  
2 that you don't plan to call at trial"? Now what  
3 -- then that's clearly privilege and you file a  
4 motion for protection, right?

5 CHAIRMAN SOULES: That's right. If  
6 you don't, you waive it.

7 MR. TINDALL: Why not key back, then,  
8 to privilege?

9 MR. McCONNICO: No. You key back  
10 to --

11 CHAIRMAN SOULES: You key back to  
12 exemption because that's --

13 MR. TINDALL: But we're over here now  
14 in the mechanics of filing the protection. And  
15 you say, "Well, it's privileged."

16 MR. McCONNICO: Well, no, it's exempt  
17 under three, paragraph three, of 166(b) which is  
18 exemptions.

19 CHAIRMAN SOULES: Sometimes you use a  
20 word we're already using in the rule, except for  
21 immunity which has got a broad meaning in the  
22 cases. -

23 MR. TINDALL: So in keying it back, an  
24 exemption includes all privileges.

25 CHAIRMAN SOULES: Every privilege is

1 an exemption under the language of the rule.

2 MR. TINDALL: All right.

3 CHAIRMAN SOULES: Lefty.

4 MR. MORRIS: Luke, I just have a real  
5 quick question, kind of a threshold thing, but it  
6 seems like we're writing a seminar paper here  
7 rather than the rules of civil procedure. And I  
8 think that's what the case law is all about. I  
9 don't know that we can sit and just take every  
10 Supreme Court case and get it drafted annually on  
11 the rules of civil procedure and really have a --  
12 we have to have flexibility. And I just really,  
13 seriously question this type of seminar paper  
14 being in the rules of procedure.

15 CHAIRMAN SOULES: There is an outcry  
16 for a paragraph four. The judges -- the district  
17 judges and the Bar, they are wanting this spelled  
18 out. We are getting a lot of inquiry. This needs  
19 to be done because you have to read a lot of cases  
20 and worry about a lot of in-between to really  
21 perceive how that discovery hearing is supposed to  
22 take place.- But it's very plain. I mean, this is  
23 the way it takes place. And Bill has it  
24 succinctly stated.

25 MR. MORRIS: I'm not being critical of

1 the way it's written. I'm being critical of -- or  
2 at least I have a serious doubt about our role in  
3 taking these cases and drafting them into the  
4 rules regularly because a new case is going to  
5 come along --

6 MR. RAGLAND: Amen.

7 MR. MORRIS: -- and then we're going  
8 to be back doing it again next year. And that's  
9 what the common law is all about.

10 CHAIRMAN SOULES: But if the Supreme  
11 Court adopts this procedure, then it will have a  
12 procedure and it won't need to continue to write  
13 cases. Where if the procedure is not done, it can  
14 say "Read the rule," instead of "We're going to  
15 grade your papers whenever you do it some other  
16 way."

17 MR. McCONNICO: Lefty, I generally  
18 agree with you that we can't take care of every  
19 case. But now when we have a request for  
20 production and we respond to that request for  
21 production, you have to look at at least six  
22 different cases. And that's too confusing to most  
23 members of the Bar. We have to get it consistent  
24 in one paragraph where they'll know what to do.  
25 It's inviting too much malpractice the way the

1 system is now, and it's not the lawyer's fault if  
2 they commit malpractice.

3 CHAIRMAN SOULES: Let me read through  
4 this, Bill, and I've gotten down to "When a  
5 party's objection concerns the discoverability of  
6 documents and is based on a specific" -- can we  
7 continue to use immunity or exemption and just  
8 strike "privilege" because that is an exemption in  
9 an earlier part of the rule -- "such as" -- and  
10 the "such as," I think, is still okay --  
11 "attorney-client privilege or attorney work  
12 product," if we want to leave -- "the party's  
13 objection may be supported by an affidavit," and  
14 so forth, saying how you set up the proof. "The  
15 court's order concerning the need for an  
16 inspection shall specify a reasonable time, place  
17 and manner" -- "When a party seeks to exclude  
18 documents from discovery and the basis for  
19 objection is lack of relevancy, is burdensome" --  
20 it's not lack of relevancy, it's burdensomeness or  
21 harassment is really what that case is, Bill.

22 -PROFESSOR DORSANEO: Uh-huh.

23 CHAIRMAN SOULES: Strike "lack of  
24 relevancy" -- "basis for objection is  
25 burdensomeness or harassment, rather than a

1 specific immunity or exemption, it is not  
2 necessary for the court to conduct an inspection  
3 of the individual documents before ruling on the  
4 objection."

5 PROFESSOR DORSANEO: See, the theory  
6 there is if it's a pain -- if nobody should have  
7 to look through these, then the judge shouldn't  
8 have to, either.

9 CHAIRMAN SOULES: Would you accept my  
10 suggestions as friendly amendments or not? I mean  
11 it's up to you.

12 PROFESSOR DORSANEO: Yes, I think they  
13 are fine. I think ultimately, obviously this is  
14 going to be for the Supreme Court to see if they  
15 like this notion of putting some of the burden on  
16 the trial judge to decide what kind of an in  
17 camera inspection is necessary or appropriate. I  
18 think that's the key to it because right now we  
19 don't know whether you have to bring everything to  
20 the courthouse and say, "Here, Judge. Look at  
21 this, or tell me you don't want to."

22 -MR. McCONNICO: In fact, we have two  
23 court of appeals opinions that probably conflict  
24 with what to rule.

25 CHAIRMAN SOULES: As reread and as now

1 before the committee, how many are in favor? Say  
2 aye.

3 COMMITTEE MEMBERS: Aye.

4 CHAIRMAN SOULES: Opposed?

5 MR. MORRIS: I'm opposed.

6 CHAIRMAN SOULES: Okay. That takes of  
7 four.

8 MR. LOW: I'm not positive every  
9 provision -- does it have in there -- did you  
10 exclude the part, or did you put in there the part  
11 about the person making the request must show it's  
12 relevant or --

13 CHAIRMAN SOULES: Yes.

14 MR. LOW: I'm opposed.

15 MR. MORRIS: I'm opposed too.

16 CHAIRMAN SOULES: It says "In  
17 responding to an appropriate discovery request  
18 within the scope of paragraph two directly  
19 addressed to the matter, a party who seeks to  
20 exclude any matter from discovery on the basis of  
21 exemption or immunity must specifically plead,"  
22 and so forth. It doesn't --

23 PROFESSOR EDGAR: It doesn't use the  
24 word "relevant," it just keys back to paragraph  
25 two.



1                   CHAIRMAN SOULES: Keys back to  
2 paragraph two.

3                   Okay. Lunch is served. And why don't we  
4 just get our sandwiches and come back in and eat  
5 and work at the same time to get through the day.

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8                   (Lunch recess.)  
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## REPORTER'S CERTIFICATE

THE STATE OF TEXAS     X  
 COUNTY OF TRAVIS       X

I, Priscilla Judge, Court Reporter for the State of Texas, do hereby certify that the above and foregoing typewritten pages contain a true and correct transcription of all the proceedings directed by counsel to be included in the statement of facts in SUPREME COURT ADVISORY BOARD MEETING, and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

I further certify that my charge for preparation of the statement of facts is \$\_\_\_\_\_.

WITNESS MY HAND AND SEAL OF OFFICE this, the 15<sup>th</sup> day of July, 1967.

*Priscilla Judge*

Priscilla Judge, Court Reporter  
 316 W. 12th Street, Suite 315  
 Austin, Texas 78701           512-474-5427

Notary Public expires 08-05-90  
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