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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE  
SEPTEMBER 15, 1995  
(AFTERNOON SESSION)

\* \* \* \* \*

Taken before William F. Wolfe,  
Certified Shorthand Reporter and Notary Public  
in Travis County for the State of Texas, on  
the 15th day of September, A.D. 1995, between  
the hours of 1:10 o'clock p.m. and 5:35  
o'clock p.m., at the Texas Law Center, 1414  
Colorado, Rooms 101 and 102, Austin, Texas  
78701.

COPY

SEPTEMBER 15, 1995

MEMBERS PRESENT:

Prof. Alexandra W. Albright  
Pamela Stanton Baron  
Honorable Scott A. Brister  
Prof. Elaine A. Carlson  
Prof. William V. Dorsaneo III  
Anne L. Gardner  
Honorable Clarence A. Guittard  
Charles F. Herring Jr.  
Donald M. Hunt  
Tommy Jacks  
Joseph Latting  
Gilbert I. Low  
John H. Marks Jr.  
Russell H. McMains  
Anne McNamara  
Robert E. Meadows  
Richard R. Orsinger  
Luther H. Soules III  
Paula Sweeney  
Stephen Yelenosky

EX OFFICIO MEMBERS:

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

MEMBERS ABSENT:

Alejandro Acosta Jr.  
Charles L. Babcock  
David J. Beck  
Hon. Ann Tyrrell Cochran  
Sarah B. Duncan  
Michael T. Gallagher  
Michael A. Hatchell  
Franklin Jones Jr.  
David E. Keltner  
Thomas S. Leatherbury  
Honorable F. Scott McCown  
Harriet E. Miers  
Hon. David Peeples  
David L. Perry  
Anthony J. Sadberry  
Stephen D. Susman

EX-OFFICIO MEMBERS ABSENT:

Hon Sam Houston Clinton  
Hon William Corneius  
Paul N. Gold  
Doris Lange  
W. Kenneth Law

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1                   CHAIRMAN SOULES:  Let's get  
2                   going.  Okay.  166d.  Joe, you have the floor,  
3                   or Chuck, you can do this.

4                   MR. LATTING:  Well, this is --  
5                   where is old Tommy Jacks?

6                   CHAIRMAN SOULES:  He's gone.

7                   MR. LATTING:  All right.  Well,  
8                   this is a modified version of 166d.  To tell  
9                   you the truth, I can't remember what we  
10                  changed different to be different from the  
11                  last time we discussed this in this  
12                  Committee.  I know that Saturday a number of  
13                  us met and went over -- a number of us  
14                  including Tommy Jacks and me, and we've been  
15                  on sort of opposite sides of the debate at the  
16                  beginning of this committee's work.

17                  And what I can tell you is that this  
18                  draft satisfies him and me and everybody that  
19                  I know of.  I don't think there's anybody that  
20                  I know of that's unhappy with the way we're  
21                  approaching it here.  But that doesn't mean  
22                  that it's the only way to do it.  I'm just  
23                  saying that Tommy is happy with it and I'm  
24                  happy with it, and I can't really -- I don't  
25                  really think of anything much to bring up

1 specifically as I did with the other -- with  
2 the other rule, except that we have left  
3 hanging out here this issue that Richard has  
4 mentioned a number of times, and I don't  
5 propose that we put anything about it; that  
6 is, about the Nature of Hearing and Evidence  
7 and so on, because as Scott Brister says, the  
8 way these hearings always happen anyhow is the  
9 guy says, "He did this, that and the other."

10 And the other lawyer says, "No, I didn't"  
11 or "Yes, I did. But she did this, and here is  
12 what you really ought to pay attention to."

13 And then the judge says, "What  
14 happened?"

15 So I don't know if we want to get into  
16 talking about what kind of hearing we need to  
17 have.

18 MR. HERRING: Well, the other  
19 thing that we had originally is that Dorsaneo  
20 purports to be drafting a generic, all-purpose  
21 Hearing and Evidence Rule that will solve all  
22 the problems about the rules, and I think we  
23 were waiting for that enlightenment to  
24 descend, and we're reserving that issue until  
25 it happens.

1 MR. LATTING: Well, the light  
2 is still a little dim over here. But I'm not  
3 suggesting that we put that in. In fact, I'm  
4 suggesting that we take that out, that double  
5 question mark that we have there.

6 I think that the way this rule is laid  
7 out it seems to be pretty good to me; that is,  
8 the organization of it. We've got the  
9 procedure. You have a motion. You have a  
10 hearing, which we -- and I think we made some  
11 slight change to the wording of that, Alex, if  
12 I'm not mistaken. An oral hearing is required  
13 for motions requesting relief unless waived by  
14 those involved. We chose that language  
15 because there may be somebody who is not  
16 really a movant or a respondent but who may be  
17 in some way involved, and we wanted to  
18 preserve the notion that there was an actual  
19 oral hearing you were entitled to and not just  
20 some action by the judge.

21 We separate out -- in paragraph 2 we  
22 separated "Expenses for Compelling, Limiting,  
23 or Denying Discovery" from no. 3, "Sanctions."  
24 And that's where the real meat of the rule  
25 is. And what we've tried to do, I think it's

1 fair to say, is that this rule provides that  
2 you can get limiting expenses with limiting,  
3 compelling or denying discovery, but you can't  
4 get sanctions unless you find some extra bad  
5 stuff that occurred. We have preserved the  
6 language that we've been through many, many  
7 times and debated, sort of the -- I'm going to  
8 call it the Stephen Yelenosky phraseology,  
9 that unreasonably burdensome, and I propose we  
10 not talk about that any more because we've  
11 discussed that for hours, I think.

12 We get down to "Sanctionable conduct,"  
13 and there was one -- I'm not sure whether we  
14 discussed this in here or not, but we start  
15 off by saying in 3(a)(i) that a person subject  
16 to a discovery order, other than a Discovery  
17 Control Plan under Rule 1, and the reason for  
18 that is that the feeling of the members of the  
19 committee, the subcommittee, was that these  
20 Discovery Control Plans, if you violate one of  
21 them, that shouldn't form the basis of  
22 sanctionable conduct, which I think is kind of  
23 ironic since I'm against them plans anyway  
24 under Rule 1.

25 But it seems like to me that if we're

1 going to have them, they ought to be  
2 enforceable, but the committee didn't feel  
3 like that you ought to be able to get  
4 sanctions for violating one of these rules we  
5 just provided for under discovery.

6 But the real meat of this rule is at the  
7 top of the next page. This is the part that  
8 we spent two or three days at two or three  
9 different times talking about, and this is  
10 what it's come down to under the A, B, C, and  
11 D here where we've got these situations.

12 And I might comment that under this rule  
13 you don't have to have violated a court order  
14 to be sanctioned, and that was sort of what  
15 the -- what I'm going to call the Tommy Jacks  
16 group of the committee thought ought to  
17 happen, but he's -- I think there has been a  
18 slight shift in position on that. In fact,  
19 they've changed their minds about that, is  
20 what's really happened, or Tommy has.

21 It says that you ought not to have to  
22 have -- necessarily have a violation of a  
23 court order if one of these things occurs.  
24 And one of them is that a party, a party's  
25 attorney, or a a person under the control of a



1 party has either disregarded a rule, a  
2 Discovery Control Plan, or subpoena repeatedly  
3 or in bad faith -- and so you either have to  
4 be able to show repeated violations or a bad  
5 faith action; (B) has destroyed evidence in  
6 bad faith or engaged in other conduct that an  
7 order compelling, denying, or limiting  
8 discovery cannot effectively remedy.

9 And if you will remember, we talked about  
10 that specific area and that language two  
11 meetings ago, if I'm not mistaken, either two  
12 or three meetings ago of this Committee.

13 Or (C), has repeatedly made discovery  
14 responses that are untimely, clearly  
15 inadequate or made for purposes of delay or  
16 discovery -- of delay, and there ought to be a  
17 comma there -- or discovery requests or  
18 objections to discovery that are not  
19 reasonably justified. We talked about that  
20 language, too. We've discussed, we being this  
21 whole Committee, have debated and discussed  
22 that language at length. And it was our sense  
23 that that didn't mean that you were right  
24 about it, but it meant that this language was  
25 the best we could come up with. It just

1 wasn't even reasonably justified to make the  
2 objections; and has otherwise -- or has  
3 otherwise abused the discovery process.

4 And that word was debated in this large  
5 Committee; that is, if you're just guilty of  
6 abusing the process, if you do that, if you're  
7 found to have done that, then, as it says in  
8 (b) below, a court may impose any of the  
9 following sanctions that are just under the  
10 circumstances.

11 And that language, "just under the  
12 circumstances," Alex, wasn't that where we  
13 pulled our Transamerican? Isn't that our  
14 shorthand version of the Transamerican?

15 PROFESSOR ALBRIGHT: No. I  
16 think we had some other Transamerican  
17 language.

18 MR. LATTING: I didn't think  
19 so, but maybe so.

20 PROFESSOR ALBRIGHT: Well,  
21 "just" as defined -- what Transamerican does  
22 is define "just."

23 MR. HERRING: Well, it pulls it  
24 out of the rule, is where it pulls it out of,  
25 and then discusses it.

1 MR. LATTING: Okay. And then  
2 we set them forth, so I don't think -- I can't  
3 recall anything that's worth talking about in  
4 that list, except I wonder, I just wonder out  
5 loud that if we say in no. (8) "such orders as  
6 are just," I wonder about why did we just stop  
7 at seven? Why don't we put eight or 10 more  
8 in there, but...

9 MS. SWEENEY: I'm sorry, I  
10 don't understand what you mean.

11 MR. LATTING: Huh?

12 MS. SWEENEY: I don't  
13 understand. What do you --

14 MR. LATTING: Well, I mean,  
15 we've listed seven things that a court can  
16 do. I don't know why we chose seven and then  
17 say that they can do anything else that's  
18 just. Why don't we just say that the court  
19 can make such orders as are just. We've got  
20 kind of a laundry list of things that can be  
21 done, and it doesn't seem to me like we need  
22 that, but I don't see any big issue about  
23 putting it in.

24 And then we've also talked about the time  
25 for compliance. We've debated that at length

1 here. And when I say we've debated it at  
2 length, Luke, I'm not saying we can't talk  
3 about it any more, I'm just reminding people  
4 that these are things that we have had fairly  
5 extensive debate on. In fact, all of them  
6 we've had fairly extensive debate on.

7 We had before the comment, I believe,  
8 didn't we, I know we talked about it, and I  
9 think we had the comment that paragraph 5 on  
10 "Review" does not change or address the  
11 availability of mandamus relief in sanctions  
12 proceedings. I know we talked about that in  
13 this Committee.

14 And so it sounds almost too good to be  
15 true, but I don't think that there's anything  
16 in this rule that comes to my mind that we  
17 haven't discussed at great length and that is  
18 still the subject of substantial  
19 disagreement. I move we pass it.

20 MR. LOW: I have one question.

21 CHAIRMAN SOULES: Okay. Any  
22 discussion? Buddy Low.

23 MR. LOW: Well, that "[??"  
24 Nature of Hearing and Evidence," what is  
25 that? Is that supposed to be a section? What

1 does that mean?

2 MR. LATTING: Well, that's just  
3 what Chuck Herring was mentioning, that Bill  
4 is supposed to be addressing what kind of  
5 hearings are required.

6 MR. LOW: Okay. So that's not  
7 a part of what we're --

8 MR. LATTING: No, no. That's  
9 just our little extra language.

10 CHAIRMAN SOULES: You can  
11 strike that out. That's not being voted on.

12 MR. LATTING: That's not being  
13 voted on at all.

14 MR. LOW: Okay.

15 MR. LATTING: John Marks.

16 CHAIRMAN SOULES: John Marks.

17 MR. MARKS: Okay. Under (ii)  
18 in (a), 3, "Sanctions," subsection (D),  
19 doesn't that just kind of open the door to  
20 letting the court do what it wants to do,  
21 "has otherwise abused the discovery process  
22 in seeking, making or resisting discovery"?  
23 Should that be in there? That's awfully  
24 broad.

25 And also under (C), "or discovery

1 requests or objections to discovery that are  
2 not reasonably justified."

3 MR. LATTING: Well --

4 MR. MARKS: I mean, should you  
5 allow the court to make the rulings simply  
6 like this without requiring, you know,  
7 something more of an order or something like  
8 that?

9 MR. LATTING: Well, we thought  
10 so, because we thought that anything that  
11 constituted abuse -- we didn't think that we  
12 could write everything that might -- that  
13 nasty, mean lawyers could think up to do; and  
14 that we thought that we needed to have some --  
15 and when I say "we," I'm talking about this  
16 larger Committee. We thought we needed to  
17 have something to cover situations that were  
18 just abusive, and I guess --

19 MR. MARKS: Well, I understand  
20 you're chastising me for not being here --

21 MR. LATTING: No, no, no. No,  
22 I'm not at all.

23 MR. MARKS: -- when you all had  
24 that discussion. But it seems to me that  
25 that's awfully broad, and why shouldn't the

1 court look at that first before entering these  
2 draconian sanctions against somebody? I mean,  
3 I think (D) ought to be deleted from (ii) and  
4 the second part of (c). And I make that in  
5 the form of a motion.

6 CHAIRMAN SOULES: What is it  
7 now you're -- in (ii) you want (D) deleted?

8 MR. MARKS: Under (ii), delete  
9 under (C) after "delay" where it says "or  
10 discovery requests or objections to discovery  
11 that are not reasonably justified." And then  
12 all of (D).

13 MR. LATTING: Well, I'm not  
14 chastising you at all for not being around  
15 earlier, but we've talked about this so long  
16 that it's just the old thing over again, which  
17 is where do we draw the line?

18 All I can say is that I think Jacks and  
19 most of the people that I thought were of that  
20 persuasion were happy with this language and  
21 thought that it afforded enough protection to  
22 keep the court from doing something too  
23 arbitrary but still allowed enough leeway to  
24 provide for those unforeseeable or at least  
25 unforeseen situations that are truly abusive;

1 that to do something that's not even  
2 reasonably justified, you know, gives -- and  
3 we do have the Transamerican protection, and  
4 then all of that put together ought to be a  
5 reasonable balance of lawyers and courts, and  
6 so that's the only thing I can say. I hope  
7 that it doesn't come out, because I think  
8 we'll be sorry if we pass the rule that way.

9 Rusty.

10 CHAIRMAN SOULES: Well, wait a  
11 minute, there was a motion, I think, that we  
12 have here.

13 But this rendition of 166d reflects the  
14 votes of this Committee on prior occasions,  
15 and we voted on virtually every word of it and  
16 its organization. That doesn't mean that we  
17 don't revisit it today, because we're here on  
18 final consideration, so I don't want to make  
19 short shrift of this, but it may move faster,  
20 it may move slower, and that's what it does.

21 You're making a motion there, John, to  
22 delete in (ii) at the top of the second page  
23 in the one, two, three, four, five, sixth line  
24 down, after the words "made for purposes of  
25 delay," all of the rest of that paragraph



1 (ii)?

2 MR. MARKS: Yes.

3 CHAIRMAN SOULES: Is there a  
4 second?

5 MS. GARDNER: I'll second that.

6 CHAIRMAN SOULES: What?

7 MR. LOW: No, I was just going  
8 to raise a question.

9 CHAIRMAN SOULES: Is there a  
10 second?

11 MS. GARDNER: Yes, I second it.

12 CHAIRMAN SOULES: Okay.

13 There's a second. Let's have discussion.

14 MR. LOW: Well, if you stop at  
15 "made for purposes of delay," if you stop  
16 there and you don't put "or discovery requests  
17 or objections," there's nothing in there that  
18 covers discovery requests at all. What else  
19 covers discovery requests?

20 CHAIRMAN SOULES: Well, that's  
21 why it's in there. That's why we voted to put  
22 it in.

23 MR. LOW: Yeah. So why take it  
24 out? Because otherwise it would just pertain  
25 to not giving discovery requests, and

1 discovery requests can be abusive, so I don't  
2 know why you would want to take that out,  
3 unless I just don't understand.

4 MS. SWEENEY: I agree with  
5 Buddy. I think it's important.

6 CHAIRMAN SOULES: Rusty  
7 McMains.

8 MR. McMAINS: Well, I agree  
9 with regards to having all of (C) intact,  
10 because it would need to be on both sides,  
11 whether you're asking for discovery or opposed  
12 to discovery. On the other hand, I also agree  
13 that (D) is an open-ended invitation to kind  
14 of invent something. I can't think of a  
15 single thing that doesn't fit that is  
16 condemnable that doesn't either fit within the  
17 parameters of the first parts or that should  
18 be made the subject of an order that is  
19 violated first.

20 The problem that I have is this a -- this  
21 (ii) is an alternative to violating an order.  
22 So if somebody is doing something repeatedly  
23 that isn't specifically covered in any of  
24 these things in (ii) that you want to deal  
25 with, you can go get an order from the court,

1 and if they continue to do it, then you  
2 automatically are into the sanctions area. I  
3 don't understand what (D) does other than open  
4 Pandora's box.

5 CHAIRMAN SOULES: Buddy Low.

6 MR. LOW: What if you have a  
7 pretrial conference, they don't make certain  
8 things and you have a pretrial conference, and  
9 the judge says, "Okay. I want you to" --  
10 something comes up about a lot of documents.  
11 He says, "Okay. I'm ordering you to do" -- "I  
12 want you to do this. I want you to do this  
13 and do that." It's not -- you haven't made a  
14 response or a request for anything. The judge  
15 just ordered it under a pretrial conference  
16 and you violate that. Where would that fit in  
17 other than in that section?

18 MR. McMANS: Whether you  
19 violate an order of the court makes no  
20 difference.

21 MR. LOW: I understand. But  
22 where does it say a party -- an order of the  
23 court?

24 MR. McMANS: In (i), the first  
25 one. See?

1 MR. LOW: Okay.

2 MR. McMAINS: The sanction says  
3 that in addition to these orders up here, in  
4 the Arabic numeral 3, "Sanctions," it says  
5 initially there, it says that "if the court  
6 finds that a person subject to a discovery  
7 order, other than a Discovery Control Plan  
8 under Rule 1, has failed to comply with the  
9 order, or" -- so this is the "or."

10 Now, you have either violated a court  
11 order or you fit into one of these categories  
12 before you can move into this sanctions area.

13 And so the problem I have is, what is it  
14 that -- and I realize their argument is  
15 basically, as I understand Joe's argument, is  
16 basically that, well, we can't even imagine  
17 how bad lawyers can be. If you tell them  
18 everything they can't do, they'll think of  
19 something else.

20 MR. LATTING: Yeah, that's my  
21 argument.

22 MR. McMAINS: And my position  
23 on that is, yeah, that's fine. But if it is  
24 abusive -- and your position is, well, if it's  
25 abusive, we can smell it. We know what it

1 is. It's like obscenity; we know it when we  
2 see it but we can't define it. You can damn  
3 sure get an order prohibiting it, and once you  
4 get an order prohibiting it and it continues,  
5 then you go straight to sanctions, and you  
6 don't have a problem.

7 But the idea that you are relieved of  
8 getting an order and merely just come in and  
9 say, "Well, they're doing this. It's an abuse  
10 of the discovery process, and it just -- it is  
11 because it just smells bad," and allowing the  
12 judge to say, "Well, you know, I believe  
13 that's right," because basically when you say  
14 that, particularly in the language "has  
15 otherwise abused," by definition it has to be  
16 something other than any of these other  
17 elements. It has to not be an obstruction of  
18 evidence. It has to not be a repeatedly made  
19 discovery response.

20 Okay. So what does it -- it has to fit  
21 outside of those and still constitute a  
22 discovery abuse, and basically it just has to  
23 be determined to be a discovery abuse. I see  
24 no useful function in having that additional  
25 offense in there.

1 MS. SWEENEY: Well, we do know  
2 of instances where --

3 CHAIRMAN SOULES: Paula  
4 Sweeney.

5 MS. SWEENEY: -- lawyers  
6 obstruct discovery. That's not listed here,  
7 but I don't think you have to wait for them to  
8 do it repeatedly.

9 MR. MARKS: Like where they  
10 have struck each other?

11 MS. SWEENEY: Yes.

12 MR. MARKS: You mean like a  
13 fist fight?

14 MS. SWEENEY: Uh-huh. I think  
15 you may have been involved in some of those  
16 instances.

17 MR. MARKS: Me, Paula?

18 MS. SWEENEY: Yes.

19 CHAIRMAN SOULES: Who else is  
20 talking there? Okay. Paula, you have the  
21 floor.

22 MS. SWEENEY: Yeah. You've had  
23 situations where you're trying to take a  
24 deposition and somebody is so obstructive and  
25 obstreperous that the deposition ends because

1 they're screaming, because they're having  
2 tantrums, because they're hauling witnesses  
3 out in the hall, because they're  
4 interrupting. You've had, you know, witnesses  
5 or lawyers throwing things. I mean, there are  
6 all kinds of things that happen. I don't  
7 propose that we list in the rule "Don't throw  
8 things. Don't hit people." But I also don't  
9 think that you ought to let them hit people,  
10 go to the court, get an order saying "don't  
11 hit me again," but you can't get sanctions for  
12 it. There are a lot of things that --

13 MR. MARKS: Well, don't get --

14 CHAIRMAN SOULES: John Marks,  
15 you have not been recognized. Mr. Marks, you  
16 have not been recognized.

17 MR. MARKS: I'm sorry.

18 CHAIRMAN SOULES: We need to  
19 get ahold of this debate because we can't get  
20 it on the record any other way.

21 MS. SWEENEY: So I think we  
22 need the language. I agree with Buddy. We  
23 need the catchall phrase (D), that they've  
24 done something else that is bad that couldn't  
25 be listed here that hasn't previously been

1 brought to the court's attention but that we  
2 all know is a bad thing, and Judge, we want  
3 relief.

4 CHAIRMAN SOULES: Steve  
5 Yelenosky.

6 MR. YELENOSKY: If we're  
7 concerned about attorneys hitting one another,  
8 I assume that we're concerned if they do that  
9 at a deposition or as they pass in the hallway  
10 or on any occasion. And does the court need a  
11 discovery sanction in order to deal with that  
12 conduct? Is there some way in which, number  
13 one, I mean, I hope that's very rare; but  
14 number two, when that does happen, I would  
15 assume there's some other way in which a judge  
16 could deal with that without a discovery  
17 sanction. If not, then maybe we need a rule  
18 about attorneys hitting one another that isn't  
19 confined to depositions. I think that --

20 CHAIRMAN SOULES: Richard  
21 Orsinger, and then I'll get to Buddy Low.

22 MR. ORSINGER: My recollection  
23 of how we got to where we are today is that  
24 the Sanctions Task Force made a recommendation  
25 that permitted the district judge to drop even



1 death penalty sanctions on the first  
2 transgression. It was rejected by a majority  
3 vote. The subcommittee, which Joe was  
4 running, was instructed to come back with  
5 something that had a procedural step in  
6 between for some of these safeguards before  
7 the ultimate sanctions are levied. And the  
8 subcommittee report came back with slightly  
9 different wording but exactly like the task  
10 force. We debated that for another four or  
11 five hours. We voted it down. The  
12 subcommittee was sent back to come back with  
13 another proposal, and they came back with a  
14 proposal that was slightly different but not  
15 any practically different of going directly to  
16 sanctions on the basis of a motion without an  
17 intervening court order that was later  
18 violated.

19 Then finally Tommy Jacks volunteered to  
20 draft some paperwork for those who voted in  
21 the majority every time we took a vote on  
22 this. And my recollection is that at least at  
23 that time Tommy didn't come up with the  
24 language.

25 Now I understand, and I have not

1 participated in your subcommittee, now I  
2 understand that Tommy, as a representative of  
3 those who voted against the direct-to-the-  
4 death-penalty approach, has accepted this as  
5 compromise language that eliminates his  
6 concern about giving the district judge the  
7 power to go all the way on the first motion.

8 Now --

9 MR. LATTING: Can I speak to  
10 that?

11 MR. ORSINGER: Let me finish.  
12 I didn't want to usurp the floor, and maybe  
13 I'm wrong when I say that, but I think that's  
14 what happened.

15 MR. LATTING: Let me just  
16 reply, if I could. I think that that's pretty  
17 much accurate with, I think, one extra step in  
18 there. But what happened was that then we had  
19 the passage of the Discovery Rules which  
20 caused him and those with him on the  
21 subcommittee to rethink their requirement for  
22 an intervening court order because of the  
23 times involved, because of what it was going  
24 to do in throwing out of kilter the discovery  
25 scheduling that was going on in what we just

1 passed at the last meeting of this.

2 MR. ORSINGER: Okay. Well, I  
3 don't fully understand how those interrelate,  
4 but I will say this, that I am comfortable  
5 with the compromise that allows the court to  
6 go directly to the death penalty sanction  
7 without an intervening order on (A), (B) and  
8 (C). But I think if (D) is in there, then  
9 there's no reason in listing (A), (B) or (C),  
10 because we have a situation where any time the  
11 trial judge thinks the discovery process was  
12 abused in any way even once he can go all the  
13 way to the ultimate sanction, and the only  
14 remedy is by a mandamus or appeal to say that  
15 the trial court abused his discretion.

16 And I therefore feel like we are exactly  
17 where we were on day one when the task force  
18 recommendation was voted down and day two,  
19 three and four when the subcommittee  
20 recommendations were voted down as long as (D)  
21 is in there.

22 MS. GARDNER: May I be  
23 recognized, Mr. Chairman?

24 CHAIRMAN SOULES: Buddy Low is  
25 next. Then I'll get to Anne Gardner.

1 MR. LOW: I don't think Paula  
2 meant just the circumstance of hitting  
3 people. I think she stated some other  
4 things. I'm sitting here with my witness,  
5 we're taking depositions, and that's part of  
6 the discovery process, and ask him a question  
7 and I start nodding. Well, I had -- and he'll  
8 say "yes," and I do that (indicating). I  
9 mean, that's an abuse, and you've gone to  
10 New York to do that; or Rambo tactics, and I  
11 realize maybe the depositions rules take care  
12 of that. I don't know. But as I understand,  
13 this is the only thing that deals with  
14 sanctions and penalties for sanctions, and  
15 certainly there would be an abuse that's not  
16 listed here if somebody is nodding an answer  
17 or interfering with the witness, won't let a  
18 witness do this or that, even though the rules  
19 say they should. And I think that's what  
20 Paula was getting at, and for that reason I  
21 think we need that in there. And lastly, if  
22 there's just not anything else out there that  
23 it could be, what's it going to hurt?

24 CHAIRMAN SOULES: Well, this --  
25 I was just looking back here at May of 1994,

1 which is -- we've had spotty discussions of  
2 sanctions since then, but that was the last  
3 time that we had any -- I think any real  
4 in-depth discussion of this. And this  
5 provision is not in what we were discussing in  
6 May of 1994, and it wasn't added at that time  
7 either, so this is something that is a  
8 change.

9 And I don't know whether -- one way to  
10 fix it would be to say "has otherwise  
11 repeatedly abused the discovery process." We  
12 use those words in some places so that we have  
13 some way to reach the undefined and maybe  
14 imponderable violations at this point. That  
15 may not work, though. I'm trying to come up  
16 with some balance between not being able to  
17 anticipate all of the violations that should  
18 be sanctioned with a direct path from one  
19 violation to ultimate sanctions, which we've  
20 never -- this Committee has never been in  
21 favor of the latter. And I don't know exactly  
22 how to do that. Maybe that's what the issue  
23 is.

24 Rusty.

25 MR. McMains: Well, once again,

1 we -- our Discovery Rules have in fact  
2 addressed mode of conduct at depositions. The  
3 actual number (B) or (A) here says "has  
4 disregarded a rule, a Discovery Control Plan,  
5 or subpoena repeatedly or in bad faith."

6 Now, coaching the witnesses in the course  
7 of the deposition, harassing witnesses, all of  
8 those things are prohibited under the rule.  
9 All of those things fit within the definition  
10 that allows them to impose sanctions now. But  
11 you're given some notice because you know  
12 what's in the rule.

13 Then this just says "has otherwise abused  
14 the discovery process in either making or  
15 resisting discovery," and that's it. And what  
16 it means is somehow otherwise. Okay. Well,  
17 we're going beyond conduct which is prohibited  
18 by the rules. We're talking about something  
19 otherwise. We're going beyond, since we're in  
20 this second part, violating a court order, and  
21 we're going beyond repeatedly making discovery  
22 responses that are untimely, clearly  
23 inadequate, doing all of these things that  
24 relate to the discovery process. It's  
25 something else.

1           And everybody is just saying, "Well, we  
2           don't know what it is, but surely it's going  
3           on because, after all, they're all lawyers  
4           involved."

5           I don't think that's any justification  
6           whatsoever to extend to the trial judges the  
7           power to zap somebody by simply saying, "I  
8           declare this to be a discovery abuse," whether  
9           it is or whether it's ever appeared in a case,  
10          ever appeared anywhere.

11          The problem we've gotten into with  
12          sanctions for the last 10, 15 years is the  
13          courts have not been able to distinguish  
14          between abuse of discovery and noncompliance.  
15          And now we have just stuck in "abuse" as a  
16          supplemental term, and we are right smack dab  
17          where we were before.

18                   CHAIRMAN SOULES: Anne, I'm  
19                   sorry, I said I would recognize you, and I  
20                   didn't.

21                   MS. GARDNER: Okay. First of  
22                   all, I think hitting a witness or hitting the  
23                   other lawyer would fit within the second part  
24                   of (B) as conduct that an order compelling,  
25                   denying or limiting cannot effectively

1 remedy.

2 Second, I think that I agree with all the  
3 criticisms of subsection (D); that the  
4 paragraph (ii), it seems to me, should be for  
5 the more egregious offenses and it opens the  
6 door to these ultimate sanctions for all  
7 offenses.

8 But I also -- when I originally seconded  
9 John's motion to amend or for deleting the  
10 second portion of (C), I felt and I still feel  
11 that the latter -- the second portion of (C)  
12 is subject to the same criticisms as (D),  
13 because there's nothing egregious about  
14 discovery requests or objections that are  
15 simply not reasonably justified.

16 CHAIRMAN SOULES: Well, that's  
17 modified by "repeatedly made."

18 MS. GARDNER: Well, if it is,  
19 it's not clear that it is. If it could be  
20 made clearer that that is the fact, then I  
21 would be happy with that and would withdraw my  
22 second.

23 CHAIRMAN SOULES: All right.  
24 "Repeatedly made." We don't have any problem  
25 with repeating that language. It may be



1 redundant. But if it's for clarity, that's  
2 fine.

3 MS. GARDNER: It doesn't seem  
4 that it modifies the whole -- both of those.

5 MR. YELENOSKY: Grammatically  
6 it does, but it could be clearer.

7 CHAIRMAN SOULES: Okay. We'll  
8 fix that then.

9 MS. GARDNER: Okay.

10 CHAIRMAN SOULES: Joe Latting.

11 MR. LATTING: The committee  
12 would be happy also -- I mean, the  
13 subcommittee would also be happy if we added  
14 the "repeatedly made" language to (D), "or has  
15 otherwise repeatedly abused the discovery  
16 process," et cetera.

17 CHAIRMAN SOULES: Let me ask  
18 you, Anne, you withdrew your second as to the  
19 verbage, deleting the verbage in (C). Are you  
20 also withdrawing your second on the deletion  
21 of (D)?

22 MS. GARDNER: Oh, did he also  
23 move to delete (D)?

24 CHAIRMAN SOULES: He did.

25 MS. GARDNER: No, I don't. I

1 still move to delete (D).

2 CHAIRMAN SOULES: Okay.

3 MR. ORSINGER: I'll second her  
4 motion or John's or whoever it was.

5 CHAIRMAN SOULES: Okay. The  
6 motion on the floor at this time is to delete  
7 (D) from (ii). Is there any opposition to  
8 that? The motion is to delete (D). Let's  
9 take a straw poll, if not an official vote, at  
10 least.

11 Let's see, those in favor of deleting (D)  
12 show by hands.

13 MR. MARKS: Deleting (D)?

14 CHAIRMAN SOULES: Deleting (D).  
15 Six. Those in favor of leaving it in. Well  
16 it's a pretty close vote. Maybe we need to  
17 talk about it.

18 MR. LOW: Just because the  
19 death penalty is given or listed here doesn't  
20 mean -- the Supreme Court has set some pretty  
21 good guidelines about death penalties. Now, I  
22 don't think it -- well, go ahead.

23 MR. LATTING: Let me speak to  
24 that.

25 CHAIRMAN SOULES: Well, I think

1 you need to wait until the other people that  
2 are talking are done, Joe, instead of jumping  
3 in to the middle of everyone's comment.

4 Okay. Buddy, please give us your views.

5 MR. LOW: I don't think that  
6 this implies that it's proper in every case  
7 that -- you know, the judge has got to use  
8 some discretion. I mean, you know, which one  
9 of these is he going to apply to this and  
10 which one to that, so these are the available  
11 ones. And I don't just interpret that to mean  
12 just a discovery abuse will do that. If it's  
13 so bad, then maybe so, but you better watch  
14 what the Court has written about the death  
15 penalty. That's all I'm saying.

16 CHAIRMAN SOULES: Joe.

17 MR. LATTING: I apologize for  
18 interrupting you. In direct connection with  
19 that, this is a computer error. We had this  
20 language -- we intended under "Sanctions"  
21 where it says, "A court may impose any of the  
22 following sanctions," it says, "that are just  
23 under the circumstances."

24 The language that we had intended to put  
25 in there, but didn't print it, is this: "A

1 court may impose any of the following  
2 sanctions that are directed to remedying the  
3 particular violations involved and that are no  
4 more severe than necessary to satisfy the  
5 legitimate purposes of the sanctions  
6 involved" -- "imposed," I'm sorry. That's the  
7 Transamerica language which says you can't do  
8 anything more than you need to, just because  
9 these are available, so I apologize for that  
10 error.

11 MS. SWEENEY: Could you read  
12 that again?

13 MR. LATTING: Yes. After the  
14 word "that," so it would read under (b),  
15 "Sanctions. A court may impose any of the  
16 following sanctions that," and then add this  
17 language, "that are just and that," well, do  
18 we need an "and" there -- "and that are  
19 directed to remedying the particular  
20 violations involved and that are no more  
21 severe than necessary to satisfy the  
22 legitimate purposes" -- and Alex, you have  
23 written "of the sanctions imposed."

24 Is that what we said? Is that what the  
25 language of the case says?

1                   PROFESSOR ALBRIGHT: Well,  
2                   Mr. Herring noted that if I said "it" every  
3                   time, we would be using "it" when we had been  
4                   using plurals before, so that's why I changed  
5                   it.

6                   MR. LATTING: Well, that may  
7                   not be the most artful language, but the  
8                   meaning is clear. It's the Transamerica  
9                   requirement that you cannot impose a stronger  
10                  sanction than necessary under the  
11                  circumstances.

12                  CHAIRMAN SOULES: That are just  
13                  and that are directed to remedying the  
14                  violation?

15                  MR. LATTING: The particular  
16                  violations involved.

17                  CHAIRMAN SOULES: And what  
18                  else?

19                  MR. LATTING: And that are no  
20                  more severe than necessary to satisfy the  
21                  legitimate purposes.

22                  MS. SWEENEY: Of such  
23                  sanctions?

24                  MR. LATTING: Of such  
25                  sanctions, is what I would say, and just leave

1 it at that.

2 PROFESSOR ALBRIGHT: Good.

3 MR. LATTING: Now, that doesn't  
4 fully meet Rusty's argument, but I just wanted  
5 you to understand what the spirit of the  
6 committee is. That just got left out because  
7 my computer printed the wrong document. I'm  
8 sorry, but it's true.

9 CHAIRMAN SOULES: Well, I think  
10 historically in the process, Rusty did state  
11 or Richard did, I don't remember which of the  
12 two, we were -- there was a good deal of  
13 sentiment to use only 3(a)(i). And then Tommy  
14 Jacks and others came up with certain  
15 circumstances that because of their  
16 peculiarities or degree of violation should  
17 bypass by (i). And up until this, in looking  
18 back through my notes, up until July of 1995,  
19 that catchall was not in there. In other  
20 words, it was intended to be specific. The  
21 catchall would be dealt with under (i). It  
22 would first have to be the subject of a court  
23 order and then to severe sanctions. That's  
24 that's the background of the earlier drafts.

25 MR. LATTING: I think so too.

1                   CHAIRMAN SOULES:  So that's a  
2                   new subject, and how do we deal with it?

3                   Alex, and then I'll start around the  
4                   table.

5                   PROFESSOR ALBRIGHT:  Well, we  
6                   added this, as I recall -- I went to the  
7                   Sanctions Subcommittee meeting in July after  
8                   we had passed the Discovery Rules.  And as I  
9                   recall, the reason we included this was  
10                  because in the new Discovery Rules there are  
11                  lots of situations where people kept saying,  
12                  "But what if this doesn't happen?  What if  
13                  people don't follow the rules like they're  
14                  supposed to?  Shouldn't they be sanctioned if  
15                  they don't do this?"

16                  And we kept saying, "That's going to be  
17                  handled in the Sanctions Rules."

18                  So I think if you think about a short  
19                  time period for discovery where everybody has  
20                  to be forthcoming in discovery, we felt like  
21                  this needed to be added to take care of all of  
22                  those different types of situations that might  
23                  come up if somebody was abusing the discovery  
24                  process without going through and reiterating  
25                  every single situation in which that could

1 occur. Is that a fair statement?

2 MR. LATTING: Yes, that's true.

3 CHAIRMAN SOULES: Richard  
4 Orsinger.

5 MR. ORSINGER: I feel, like  
6 Rusty, that Alex's concern is addressed by the  
7 language that someone who repeatedly violates  
8 a rule or even one time violates it in bad  
9 faith triggers this potential penalty. I feel  
10 like all of the Discovery Rules have all of  
11 the backup that they need. If it was one time  
12 in bad faith or if it's repeatedly done, then  
13 you can go directly to the sanction, even  
14 though you don't have a court order violated.

15 What I think has happened, and I want to  
16 say that I respect and admire the tenacity of  
17 the people that have done this, but the  
18 minority view has kept coming back and kept  
19 coming back and kept coming back and now  
20 finally the majority has given in to it, if we  
21 vote to support (D).

22 I don't think (D) is necessary to protect  
23 our Discovery Rules because (ii)(A) says  
24 "repeatedly or in bad faith," and now every  
25 single one of those Discovery Rules ought to



1 be able to be adequately protected by that  
2 language.

3 What (D) does is (D) makes everything  
4 else in (i) and (ii) irrelevant. We don't  
5 need any of that other language. All we need  
6 to do is to say we can do the sanctions set  
7 forth in subparagraph (b) below if a party has  
8 abused the discovery process. Then all of  
9 these lists which make us feel comfortable  
10 with this rule are irrelevant, because the  
11 judge can do anything they want, anything he  
12 or she wants, based on whatever he or she  
13 decides is an abuse subject only to the  
14 limitations that are imposed by  
15 Transamerican.

16 And I don't -- I didn't vote against this  
17 every single time because Transamerican was  
18 what I felt adequate security. I think that  
19 we are not bound to just say that  
20 Transamerican is all we get.

21 We are writing a rule here, and we can  
22 say that you can't go directly to serious  
23 sanctions without a violation of a court order  
24 unless you have some very severe, detrimental  
25 perhaps noncurable abuse of the discovery

1 process.

2 And I really do feel like that the  
3 Committee has just eroded its majority  
4 position over time because of the passage of  
5 time and because the proponents of this view  
6 have very artfully advocated it repeatedly,  
7 with no criticism to them. I know that it's  
8 an honest disagreement about what we should  
9 do, but I really do feel like we're revisiting  
10 the same vote for the fifth time, and now the  
11 majority is giving up.

12 CHAIRMAN SOULES: Well, this is  
13 exactly the language that set off the horrors  
14 of sanctions decisions that have abided in  
15 this jurisdiction until somebody finally found  
16 some federal cases and realized that they were  
17 violating the federal due process rights. And  
18 it was Transamerican -- what was it, about  
19 eight years of decisions before we finally got  
20 Transamerican.

21 Anne Gardner.

22 MS. GARDNER: Mr. Jacks has  
23 returned. I would be interested in hearing  
24 what he has to say.

25 MR. YELENOSKY: I tried to

1           brief him on it.

2                           CHAIRMAN SOULES: Tommy, the  
3 motion is to delete (D) on Page 2.  
4 Specifically it would be 3(a)(ii) and then  
5 (D), which is the very last clause of that.

6                           MR. JACKS: Yeah. Joe Latting  
7 finally wore me down. You're right, I did  
8 consent to this in this last draft. My  
9 philosophical views haven't changed any, that  
10 is, I still am bothered by having it in here,  
11 but Joe wore me down. What else can I say?

12                          CHAIRMAN SOULES: Do you feel  
13 refreshed?

14                          MR. JACKS: If it were put to a  
15 vote, I would vote to take it out, but....

16                          MR. McMAINS: It was. You were  
17 gone.

18                          MR. JACKS: Well, then never  
19 mind.

20                          CHAIRMAN SOULES: Anything else  
21 on (D)? Judge Guittard.

22                          HON. C. A. GUITTARD: Joe's  
23 explanation about this Transamerica language  
24 that was left out of (b) bothers me in that it  
25 seems to limit all these sanctions to

1 remedying abuses; whereas up here in (ii)(A)  
2 and (ii)(B) we talk about conduct that an  
3 order compelling, denying, or limiting  
4 discovery cannot effectively remedy. Do you  
5 see what I mean?

6 MR. LATTING: Yes, I do. I  
7 sure do.

8 HON. C. A. GUITTARD: And that  
9 ought not to be -- (B) ought not to be so  
10 limited. That's my first observation.

11 The second is, you're talking about how  
12 broad (D) is, and it seems to me in reading  
13 this language that (D) is no broader, in fact,  
14 it may not be as broad as, the language up  
15 here beginning in the third line, "other  
16 conduct that an order compelling, denying, or  
17 limiting discovery cannot effectively  
18 remedy."

19 What other conduct? Perhaps that ought  
20 to be limited in some way. Other abusive  
21 conduct? What kind of conduct is it that such  
22 an order cannot remedy? It seems like that is  
23 as broad as (D) is.

24 CHAIRMAN SOULES: Okay.  
25 Anything else on (D)? Those in favor of

1 deleting (D) hold up your hands. Eight to  
2 delete.

3 Those in favor of keeping it hold up your  
4 hands. 10. It passes by 10. I mean, (D)  
5 stays in by a vote of 10 to eight.

6 MS. SWEENEY: May I ask Joe a  
7 question?

8 CHAIRMAN SOULES: Yes. Paula  
9 Sweeney.

10 MS. SWEENEY: On the very  
11 bottom of the first page, Joe, under  
12 number (i), it says "a person subject to a  
13 discovery order, other than a Discovery  
14 Control Plan," and my question is about the  
15 word "discovery."

16 I mean, what exactly is a discovery  
17 order? Do we mean something by that, or do we  
18 just mean an order, and are we going to create  
19 a bunch of questions about, well, it was just  
20 an order but not a discovery order?

21 MR. LATTING: Well --

22 CHAIRMAN SOULES: Joe Latting.

23 MR. LATTING: I'm sorry. Well,  
24 the rule is limited to a failure to make or  
25 cooperate in discovery, so I don't know that

1 we would need to have to have it say  
2 "discovery order."

3 MS. SWEENEY: Just "order"?  
4 Because I don't want to get into a thing where  
5 we didn't label it a discovery order, it's  
6 just a regular order or some other order. I  
7 mean, what's a discovery order that is  
8 different from it just being an order?

9 CHAIRMAN SOULES: Well, how  
10 about "an order under this rule." That's what  
11 we use under no. 1(c).

12 MR. LATTING: An order under  
13 this rule?

14 CHAIRMAN SOULES: Does that  
15 take care of your concern, Paula?

16 MS. SWEENEY: Sure. 3(a)(i).

17 CHAIRMAN SOULES: Any objection  
18 to that?

19 PROFESSOR ALBRIGHT: No, no.

20 MR. McMains: What do you mean,  
21 "under this rule"? I mean, this is a  
22 sanctions rule. This is not a discovery rule.

23 MR. LATTING: Yeah, that's  
24 right. Why don't we just say "an order."

25 MS. SWEENEY: How about "an

1 order"?

2 CHAIRMAN SOULES: Rusty, under  
3 1(c) it says, "An order under this rule may  
4 compel, limit or deny discovery," and so  
5 forth.

6 PROFESSOR ALBRIGHT: But that's  
7 a sanction order under this rule. This rule,  
8 under this rule, you impose sanctions rules.

9 MR. LATTING: Why don't we just  
10 say "a person subject to an order"?

11 CHAIRMAN SOULES: Rule 166d  
12 says, starts out, Failure to Make or Cooperate  
13 in Discovery: Remedies. And then no. 1 is  
14 how you get an order to compel. And no. 2 is  
15 how you get expenses for getting an order to  
16 compel or protective order, as the case may  
17 be. And then no. 3 says a person subject to  
18 one of those orders that's talked about  
19 earlier in this rule that violates it can be  
20 sanctioned, I think.

21 PROFESSOR ALBRIGHT: In that  
22 case then we can take it out. If we're only  
23 talking about orders under -- violations of  
24 orders under part 1 of 166d are the only ones  
25 that violating can make you subject to

1 sanctions, then we don't have to have "other  
2 than a Discovery Control Plan under Rule 1."

3 I mean, I guess what we need to do is  
4 decide what orders we're talking about that  
5 can subject you to sanctions if you violate  
6 them. If it's only orders compelling,  
7 limiting or denying discovery, then we can  
8 say, "a person subject to an order under  
9 part 1 of this rule."

10 MR. HERRING: So it's okay to  
11 violate other discovery orders?

12 MS. SWEENEY: I would move to  
13 just say "order." I would just take out the  
14 word "discovery," and I so move.

15 MR. LATTING: I second that.

16 CHAIRMAN SOULES: Is there any  
17 opposition to that?

18 MR. JACKS: What if the order  
19 doesn't have anything to do with discovery,  
20 top, side or bottom?

21 MR. LATTING: Well, a motion  
22 for sanctions won't be brought under this  
23 rule.

24 MR. McMains: Why?

25 MR. JACKS: That's not what it



1 says.

2 MR. HAMILTON: How about saying  
3 "an order relating to discovery"?

4 MR. HERRING: Yeah, concerning  
5 or relating to discovery.

6 CHAIRMAN SOULES: An order  
7 what?

8 MR. HAMILTON: Relating to  
9 discovery.

10 CHAIRMAN SOULES: Does anybody  
11 have any opposition to that?

12 MR. McMANS: Relating to  
13 discovery?

14 CHAIRMAN SOULES: An order  
15 related to discovery.

16 HON. PAUL HEATH TILL: Which is  
17 a discovery order.

18 CHAIRMAN SOULES: Okay. There  
19 being no opposition, that will be revised to  
20 say "an order related to discovery."

21 Anything else on 166d? Rusty.

22 MR. McMANS: The change that  
23 Joe had talked about that his typewriter  
24 dropped or his computer dropped -- which is in  
25 (b), right? That's in 3(b)? Isn't that where

1 it is?

2 MR. LATTING: Yes, it is.

3 MR. McMains: The only question  
4 I have is, do you really think that's  
5 sufficient, given what we say in (a)? (a)  
6 says, "In addition to or in lieu of the relief  
7 provided above, the court may impose one or  
8 more of the sanctions set forth in  
9 subparagraph (b) below if the court finds  
10 that:"

11 And I realize that we put that into the  
12 (b) part, but it just -- the whole fact that  
13 it says "one or more," I mean, it does say  
14 "subject to the limitations," but I'm just  
15 wondering if somebody is going to say, "Well,  
16 we've looked at that laundry list and picked  
17 from it," and that any of them are okay.

18 Are we attempting to do this in  
19 hierarchical order?

20 MR. LATTING: No. And that  
21 language is just there as a reminder of the  
22 requirements, the due process requirements of  
23 Transamerican.

24 MR. McMains: Yeah. But I'm  
25 talking about now your -- the language that we

1 did put in, which I didn't write down, but  
2 which comes from Transamerican.

3 MR. LATTING: Well, it's a  
4 paraphrasing of Transamerican. It's not a  
5 direct quote.

6 MR. McMAINS: But doesn't it  
7 say -- it did say "no more severe"?

8 MR. LATTING: It says "that are  
9 no more severe than necessary to satisfy the  
10 legitimate purposes of the sanction."

11 MR. McMAINS: Okay. But then,  
12 of course, we have tons of cases that say that  
13 deterrence is one of the purposes of  
14 sanctions. That's how we got there in the  
15 first place, so if that's all that says, where  
16 does that give any of the other protections in  
17 Transamerica with regards to the defined first  
18 sanctions to remedies to having to make  
19 findings as to why those aren't good enough?

20 MR. LATTING: I don't think it  
21 does give us any more protection than  
22 Transamerica. I just think it may be that  
23 some young lawyer reading the rule or some  
24 young judge may not be aware of Transamerica,  
25 and there it is in the rule. So if they're

1 hearing a case somewhere, by putting it in the  
2 rule so it will be right there in front of  
3 everybody, its laudatory purposes will be  
4 manifest.

5 MR. McMAINS: You don't think  
6 somebody is going to argue that this displaces  
7 Transamerica; that Transamerica was decided  
8 under the old Discovery Rules and these new  
9 Discovery Rules don't have the same argument?

10 MR. LATTING: Well, if we put  
11 this in, that won't be much of an argument  
12 since it's going to be right under the rule.  
13 And this is Transamerica, as I understand it.

14 MR. McMAINS: It seems like you  
15 don't need to write it in the rule.

16 CHAIRMAN SOULES: Okay. I need  
17 to get my notes right here on this. When we  
18 voted on (D), then Joe had said earlier the  
19 Committee would accept the word "repeatedly."  
20 I don't know whether we voted to do that or  
21 not, did we?

22 MR. LATTING: We did not vote  
23 on that.

24 CHAIRMAN SOULES: Okay. Let's  
25 vote on that because it was discussed. Should

1 we put "repeatedly" in (D) or not? Those who  
2 say yes hold up your hands. Eight. Those  
3 opposed -- nine.

4 Those opposed. Nine. Nine to nine. It  
5 goes in.

6 MR. LATTING: Nine to nine, it  
7 goes in?

8 CHAIRMAN SOULES: I break the  
9 tie.

10 Okay. Anything else on 166d? Richard  
11 Orsinger.

12 MR. ORSINGER: Two things, so  
13 let me get to my second one after my first  
14 thing.

15 Because we put the Transamerican language  
16 in under (b), 3(b), I assume that that means  
17 that the rule doesn't say it applies to (1)  
18 and (2). Is that our intention? In other  
19 words, the Transamerican considerations only  
20 apply to those sanctions under 3(b) and not to  
21 sanctions under 2? Because if we mean it to  
22 apply to 2, we've got to put it someplace else  
23 besides in 3(b).

24 MR. YELENOSKY: Well, 3(a) says  
25 you go to 3(b).

1                   CHAIRMAN SOULES:  Are you  
2                   talking about expenses for compelling,  
3                   limiting or denying discovery?

4                   MR. ORSINGER:  And the award of  
5                   appeasement.

6                   CHAIRMAN SOULES:  How could  
7                   that violate Transamerican?

8                   MR. ORSINGER:  I guess only if  
9                   it's so high that you can't litigate.  If it's  
10                  like, you know, 75,000 and you've got to pay  
11                  it right now and you can't, then you run  
12                  headlong into Transamerican.

13                  CHAIRMAN SOULES:  Well, (4)  
14                  takes care of that, doesn't it?

15                  MR. LATTING:  Yeah, it does.  
16                  We've already taken care of that.

17                  CHAIRMAN SOULES:  That's in  
18                  "Time for Compliance."  There's a general  
19                  order down there.

20                  HON. SCOTT A. BRISTER:  How  
21                  about a \$10,000 sanction against Exxon?  It's  
22                  not going to preclude discovery, but it sure  
23                  is more than a \$500 slap on the wrist, don't  
24                  you think?  I mean, I'm pretty positive  
25                  Transamerican applies to \$10,000 in attorneys'

1 fees.

2 See, the task force got around this  
3 problem by expenses in (2) was limited to an  
4 amount that is not substantial. It was only  
5 slaps on the wrist, obviously an amorphous  
6 problem. This now can include substantial  
7 attorneys' fees as long as it's not own  
8 unreasonably burdensome. But I've never heard  
9 of a sanction that's going to be unreasonably  
10 burdensome for Exxon, and yet Transamerican  
11 procedures have to apply surely.

12 CHAIRMAN SOULES: Anything else  
13 on 166d?

14 MR. ORSINGER: Yeah. My other  
15 thing is I wanted someone to explain to me,  
16 we've just said that the statute on sanctions  
17 doesn't apply to discovery because we say so,  
18 but is that right? In other words, if you  
19 read the statute, it doesn't say that it  
20 doesn't apply to discovery.

21 MR. YELENOSKY: We already  
22 answered that.

23 MR. ORSINGER: It says that it  
24 applies to pleadings and motions and other --  
25 pleadings and motions, is what the statute

1 says. And there will be some discovery  
2 pleadings, some discovery motions. And so are  
3 we comfortable that we can just haul off and  
4 make our own set of rules on everything  
5 relating to discovery? Because we've  
6 certainly made that assumption.

7 MR. LATTING: Well, I'm not  
8 sure I understand the question, but we've  
9 written Rule 13 to be in compliance with  
10 Chapter 10.

11 MR. ORSINGER: Well, let's say  
12 I file a motion relating to discovery that  
13 everyone around the table would agree violates  
14 Rule 13.

15 MR. LATTING: Well, I think  
16 you've run afoul.

17 CHAIRMAN SOULES: Let him  
18 finish his question.

19 MR. LATTING: Well, I thought  
20 he had.

21 MR. ORSINGER: Okay. Then we  
22 and our rules are saying the only way to  
23 address that is through Rule 166d, but the  
24 statute would apply to the motion, even though  
25 it was a discovery motion.



1                   CHAIRMAN SOULES: Richard, the  
2                   only thing that is -- a discovery motion is  
3                   not excluded from Rule 13, as I understood  
4                   it. It is discovery requests, responses,  
5                   objections and claims of privilege. Motions,  
6                   discovery motions are under the auspices of  
7                   Rule 13.

8                   MR. ORSINGER: And responses to  
9                   motions also would be under Rule 13 and not  
10                  under Rule 166d?

11                  CHAIRMAN SOULES: Well, it  
12                  could probably be under either rule.

13                  MR. LATTING: It would be  
14                  either one.

15                  MR. ORSINGER: Okay.

16                  CHAIRMAN SOULES: And the  
17                  statute only applies to -- it does apply to  
18                  pleadings and motions, but it doesn't apply to  
19                  other papers, according to its language.

20                  Judge Guittard.

21                  HON. C. A. GUITTARD: I believe  
22                  that Joe agreed that there should be some  
23                  modification of that proposed Transamerican  
24                  language that had been left out of (b). And I  
25                  wonder whether we ought to settle upon that or

1           whether or not the chairman can work that out  
2           before it goes to the Supreme Court without  
3           any further action by this Committee.

4                       CHAIRMAN SOULES: Well, we  
5           should make -- the way it starts now, (b), A  
6           court may impose any of the following  
7           sanctions that are just and that are directed  
8           to remedying the particular violation.

9                       HON. C. A. GUITTARD: Yes. And  
10          the question is whether or not it should be --  
11          these sanctions should be limited to orders or  
12          sanctions that are directed to remedying,  
13          rather than as provided up in subdivision (B),  
14          conduct that cannot be remedied.

15                      MR. LATTING: But I think that  
16          to remedy a violation but not to remedy  
17          conduct necessarily that -- can you remedy --

18                      MR. YELENOSKY: It says it  
19          can't be remedied by -- essentially by  
20          equitable -- it cannot be remedied by an order  
21          compelling, denying or limiting, but it could  
22          be remedied essentially by a sanction of  
23          another type.

24                      MR. LATTING: Right.

25                      HON. C. A. GUITTARD: Is that

1           what it means then?

2                       MR. LATTING:    Yes, sir.

3                       CHAIRMAN SOULES:   That's what  
4           it means.

5                       Steve Yelenosky.

6                       MR. YELENOSKY:   Yeah.  On that  
7           point -- well, it's not really on that point,  
8           and this may be just minor language, but the  
9           Transamerica language is going to be on (b),  
10          right?  And in 3(a), the way it reads leads  
11          one to think until they get down to (b) that  
12          Transamerica isn't in there, so I would just  
13          suggest a slight change in the 3(a) language,  
14          "Sanctionable conduct," and say, "In addition  
15          to or in lieu of the relief provided above,  
16          the court may impose" -- strike "one or more  
17          of the" -- "may impose sanctions as set forth  
18          in subparagraph (b)."

19                      CHAIRMAN SOULES:   What's your  
20          motion?

21                      MR. YELENOSKY:   My motion is to  
22          strike in 3(a) the five words "one or more of  
23          the" and then to add the word "as" between  
24          "sanctions" and "set forth," so that it sort  
25          of incorporates the standard as well as

1 the --

2 MR. LATTING: That's a good  
3 idea.

4 CHAIRMAN SOULES: Is there any  
5 opposition to that? There being no  
6 opposition, it will be done. So we will  
7 strike "one or more of the," and it will read  
8 "may impose sanctions as set forth" and so  
9 forth.

10 Anything else on 166d?

11 PROFESSOR DORSANEO: I hate to  
12 ask, but Joe, could you read that language  
13 again, the Transamerican language? I'm  
14 sitting here listening and thinking that --

15 CHAIRMAN SOULES: I'll read it  
16 as the chair and Joe can check it. "A court  
17 may impose any of the following sanctions that  
18 are just and that are directed to remedying  
19 the particular violation involved and that are  
20 no more severe than necessary to satisfy the  
21 legitimate purposes of such sanctions."

22 PROFESSOR DORSANEO: Well, I  
23 personally don't think that's Transamerican.  
24 I think the "and" -- and I realize somebody  
25 just talked about remedying and punishment as

1 remedying, but I think it's too --

2 HONORABLE C. A. GUITTARD:

3 Remedying or punishing.

4 PROFESSOR DORSANEO: I think  
5 remedying is -- we went through this whole  
6 process of the legitimate purpose of  
7 sanctions. Once upon time, it was just  
8 remedy, and then it got to be deterrence, and  
9 then we finally got to saying punishment, and  
10 those are all legitimate purposes of  
11 sanctions, but the limitation on them being no  
12 more severe than they need to be is in  
13 addition to whatever purpose you're trying to  
14 achieve. And the purpose can be remedial or  
15 something other than remedial, but I don't  
16 think it's helpful to say that punishment is  
17 remedial.

18 HON. C. A. GUITTARD: I agree.

19 CHAIRMAN SOULES: Okay. Tommy  
20 Jacks.

21 MR. JACKS: There is another  
22 typographical error that Joe's computer failed  
23 to correct. In (b)(3), after the phrase  
24 "including attorney's fees," there should be  
25 a second comma --

1 MR. LATTING: That's true.

2 MR. JACKS: -- between "fees"  
3 and "caused."

4 CHAIRMAN SOULES: Where is it,  
5 Tommy, again?

6 MR. JACKS: It is after the  
7 word "fees" and before the word "caused" in  
8 3(b).

9 CHAIRMAN SOULES: Okay. I've  
10 got it.

11 MR. LATTING: Everybody will  
12 like that.

13 CHAIRMAN SOULES: Anything else  
14 on 166d? Alex.

15 PROFESSOR ALBRIGHT: I have two  
16 motions. One is a clarification only. In  
17 (ii), what I'm going to be doing is dividing  
18 (C) into two separate parts, so it will read  
19 "(C) has repeatedly made discovery responses  
20 that are untimely, clearly inadequate or made  
21 for the purposes of delay; (D) has repeatedly  
22 made discovery requests, objections to  
23 discovery or claims of privilege that are not  
24 reasonably justified."

25 MR. LATTING: Yeah, we ought to

1 do that. We intend to do that.

2 HON. C. A. GUITTARD: Unanimous  
3 consent.

4 CHAIRMAN SOULES: Any objection  
5 to that? Okay. That will be done. And then  
6 we'll change (D) to (E)?

7 PROFESSOR ALBRIGHT: Right.  
8 Okay. And then my second one --

9 CHAIRMAN SOULES: I'm sorry,  
10 wait a minute. (C) will read "has repeatedly  
11 made discovery requests that are untimely,  
12 clearly inadequate or made for purposes of  
13 delay; or (D)" --

14 PROFESSOR ALBRIGHT: No. Cross  
15 out the (D). I mean, cross out "or."

16 MR. YELENOSKY: Yeah, you don't  
17 need "or."

18 CHAIRMAN SOULES: Well, we've  
19 got "or" every place else. "Or (D) has  
20 repeatedly made discovery requests, objections  
21 to discovery or claims of privilege that are  
22 not reasonably justified; or (E)" -- have you  
23 got it? Okay.

24 Anything else on 166d? Alex.

25 PROFESSOR ALBRIGHT: On (b)(2),

1 insert the word "allowing," or two words,  
2 "allowing or," before "disallowing," so at  
3 the very beginning you have "Allowing or  
4 disallowing further discovery in whole or in  
5 part, including changing discovery  
6 limitations."

7 HON. C. A. GUITTARD:  
8 Modifying.

9 CHAIRMAN SOULES: Including  
10 what?

11 PROFESSOR ALBRIGHT: Changing  
12 discovery limitations.

13 CHAIRMAN SOULES: How about  
14 "modifying"?

15 PROFESSOR ALBRIGHT: That would  
16 be fine, because I remember we discussed that  
17 before.

18 CHAIRMAN SOULES: Any  
19 opposition to that?

20 MR. HAMILTON: Where is that?

21 MR. ORSINGER: What does she  
22 mean by "discovery limitations"?

23 CHAIRMAN SOULES: What do you  
24 mean by "discovery limitations," Alex?

25 PROFESSOR ALBRIGHT: It would



1 be the discovery limitations proposed in  
2 Rule 1 primarily.

3 MR. ORSINGER: Like time  
4 limits?

5 PROFESSOR ALBRIGHT: Time  
6 limits, limitations on interrogatories, hours  
7 of depositions. I think throughout the  
8 discovery discussion about the Discovery  
9 Rules, we all felt that if someone was abusing  
10 discovery, that one possible sanction would be  
11 lessening their amount of discovery or  
12 certainly adding to the other person's hours  
13 of discovery or other limitations to remedy  
14 the problems caused by that abuse.

15 CHAIRMAN SOULES: Any  
16 opposition to changing (2) as suggested?  
17 Okay. That will be done, and it will read  
18 "Allowing or disallowing further discovery in  
19 whole or in part including modifying discovery  
20 limitations."

21 MR. LATTING: "Changing" is  
22 what she said.

23 MR. ORSINGER: But we changed  
24 it to "modify."

25 PROFESSOR ALBRIGHT: We

1 discussed the word "changing." We decided to  
2 go with the Anglo-Saxon word.

3 MR. MARKS: So what is  
4 "modifying"?

5 MR. YELENOSKY: It's French.

6 CHAIRMAN SOULES: Okay.

7 "Changing." Any comment on that point?

8 Okay. There's no opposition to that. It will  
9 be done.

10 Anything else on Rule 166d? Rusty.

11 MR. McMANS: Well, I only have  
12 one -- I again have a problem with this  
13 no. (8), which says "Making such other orders  
14 as are just."

15 I mean, first of all, we already said in  
16 the first part that the court may impose any  
17 of the following sanctions that are just, and  
18 then we just close with saying "any other  
19 orders that are just." And as long as a just  
20 order is just, then -- I mean, I don't -- I  
21 just don't know exactly what this -- I mean,  
22 other than it's a catchall. Well, anything  
23 the court might imagine they ought to be able  
24 to do, I'm not so sure that we really want do  
25 that.

1 CHAIRMAN SOULES: Do you have a  
2 motion?

3 MR. McMANS: I would move to  
4 delete (8) because I don't see that it adds  
5 anything.

6 CHAIRMAN SOULES: Is there a  
7 second? It fails for a lack of a second.

8 Anything else on 166d?

9 MR. YELENOSKY: Did you get the  
10 "or" between the (a) and the (b)?

11 CHAIRMAN SOULES: Where?

12 MR. YELENOSKY: 3(a)(i) and  
13 then -- (ii), "(A) has disregarded a rule, a  
14 Discovery Control Plan, a subpoena repeatedly  
15 or in bad faith; or (B)," since you put an  
16 "or" in front of all the other ones.

17 CHAIRMAN SOULES: Okay. I've  
18 got that. Okay. Put "or" just before (B).

19 Anything else on 166d?

20 Okay. So for my edification, where do we  
21 have now the sanction of deemed admissions?

22 MR. HERRING: You do not, not  
23 in here.

24 CHAIRMAN SOULES: So we're not  
25 going to have deemed admissions any more?

1                   PROFESSOR ALBRIGHT: I think  
2                   it's in a discovery rule.

3                   MR. HERRING: We have not -- it  
4                   was in the discovery rule. It was taken out  
5                   of the discovery rule. We have not met on  
6                   that issue here. I don't know where it ended  
7                   up.

8                   CHAIRMAN SOULES: Let's check  
9                   and see if we've got that.

10                  MR. HERRING: And there are a  
11                  couple of other issues, Luke, that the  
12                  subcommittee still needs to meet on on other  
13                  sanctions matters, but not on these rules, not  
14                  on these two.

15                  CHAIRMAN SOULES: Not on  
16                  discovery sanctions or Rule 13 sanctions?

17                  MR. HERRING: Not on this  
18                  general discovery sanction rule, that's  
19                  correct.

20                  PROFESSOR ALBRIGHT: In answer  
21                  to your question about deemed admissions,  
22                  Rule 13 of the Discovery Rules, 13(4), says,  
23                  "Any matter admitted under" -- no, wait,  
24                  never mind. I was looking at the wrong  
25                  thing. Let me look again.

1           If no response is timely served, the  
2 request is admitted without the necessity of a  
3 court order. That's what it says in  
4 Rule 13(3).

5                   CHAIRMAN SOULES: Okay. And  
6 then does that go on to provide for the way  
7 you escape a deemed admission? It does?

8           And then where is the automatic exclusion  
9 sanction? As I recall, you had that in the  
10 Discovery Rules too, the failure to respond or  
11 to supplement discovery? Is that in there,  
12 Alex?

13                   PROFESSOR ALBRIGHT: Excuse  
14 me?

15                   CHAIRMAN SOULES: The failure  
16 to respond or supplement discovery, the  
17 automatic exclusion rule.

18                   PROFESSOR ALBRIGHT: The  
19 automatic exclusion rule is in Rule 6, I  
20 believe, Rule 5 or 6. Rule 6 is the automatic  
21 exclusion effective on trial for a failure to  
22 provide timely discovery.

23                   CHAIRMAN SOULES: Okay. Those  
24 in favor of Rule 166d as amended by today's  
25 work show by hands. 16.

1           Those opposed.   Five.

2           16 to five it passes.

3           Chuck, tell us what it is that you all  
4 need to look at beyond these two rules so that  
5 we'll have that in mind.

6                       MR. HERRING:   We need to go  
7 back and look at the Discovery Rules one more  
8 time.   In the original task force report we  
9 dealt with the minor Sanctions Rules which are  
10 very minor.   18(a)(h), 21b, 120a, 166(a)(h),  
11 203 and 269e.   Those are very minor revisions  
12 just kind of interspersed in the rules.  
13 That's probably a total of 30 minutes more  
14 discussion here when we come back.   Most of  
15 those revisions we hope have been taken into  
16 account and adequately dealt with in these two  
17 rules so we can just eliminate them, but we  
18 need one more session to look at them.

19                      CHAIRMAN SOULES:   Okay.   I  
20 would like to see, if you will -- the  
21 Discovery Subcommittee has given us a  
22 disposition table of the Discovery Rules,  
23 which Alex brought in today.

24                      Did you bring enough copies for  
25 everybody?

1 PROFESSOR ALBRIGHT: No,  
2 because it has not been reviewed by anyone.

3 CHAIRMAN SOULES: Okay.

4 PROFESSOR ALBRIGHT: And so  
5 before it gets passed around I would rather  
6 somebody review to make sure I got it right.

7 CHAIRMAN SOULES: Who would  
8 like to -- what I would like to do is get a  
9 few people involved in this to take a look and  
10 help Alex be sure that we've got the current  
11 rules juxtaposed with the proposed rules, and  
12 she goes through the entire text of all the  
13 current Discovery Rules and gives us a  
14 disposition table to check to be sure that we  
15 haven't overlooked something that might be  
16 important.

17 PROFESSOR ALBRIGHT: I have not  
18 even sent that to Steve Susman yet. I just  
19 finished it yesterday.

20 CHAIRMAN SOULES: Who would  
21 like to take a pass at this? Okay. Bill  
22 Dorsaneo, Chuck Herring, John Marks, Elaine  
23 Carlson. Will you make a note of those.  
24 Anyone else? Okay. That's Bill Dorsaneo,  
25 Chuck Herring, Elaine Carlson, John Marks.

1           Could you get them copies, Alex?

2           And Justice Sarah Duncan told me that she  
3 was interested in this also, and together with  
4 your subcommittee get the input of those  
5 people until you're satisfied that we've got  
6 everything covered that we need.

7           And I would like to have a report on that  
8 at the next meeting, just sort of a cleanup  
9 report that if you see -- I think in fairness  
10 to everybody, if you see a question, we should  
11 raise the question and let the Committee focus  
12 on it to resolve any question that there may  
13 be about that.

14           This is a tremendous piece of work that  
15 Alex has done. As a matter of fact, I think  
16 when your subcommittee and the other  
17 participants are done with this that we should  
18 send this to the Court, because it may very  
19 well be that the court may want to publish  
20 this to give guidance to the profession in  
21 trying to make a transition from the old rules  
22 to the new rules, if they promulgate the rules  
23 that we send them. And then, of course, it  
24 can be modified to reflect any modifications  
25 the Court may wish to make.



1           Thank you very much for this. There was  
2 a lot of work involved in this and something  
3 that very much needed to be done.

4           Okay. Anything else on sanctions today?  
5 Joe and Chuck, thank you very much again for  
6 the tremendous piece of work. I think, except  
7 for the loose ends that Chuck has talked  
8 about, that really completes the Sanctions  
9 Subcommittee efforts, and again, thank you all  
10 for a great job. I know that the Committee as  
11 a whole shares that feeling with me, and the  
12 Court will likewise.

13           We will then get for you a red-line  
14 version of the difference between what you  
15 brought here today and what we finished with,  
16 as well as a clean proposed Rule 13 and 166d  
17 for me to send to the Court with our  
18 recommendation that the Court promulgate these  
19 rules.

20           And another major milestone I guess I  
21 should mention is that except for the Task  
22 Force of the Justices of the Peace, which came  
23 much later than discovery, sanctions and the  
24 court's charge, we've now completed the path  
25 from task force through this Committee to

1 complete a final product to send to the  
2 Court. And that's been what, now, four years  
3 in the making, Chuck?

4 MR. HERRING: June 19th, 1991,  
5 Luke. It's been a long time.

6 CHAIRMAN SOULES: More than  
7 four years' worth of work on these rules, and  
8 I don't know, thousands of hours doesn't do it  
9 justice, tens of thousands of hours of  
10 lawyers' input from the bar, so thanks to  
11 everybody for that.

12 Next we had -- let's see, Steve, you had  
13 a Rule 25, medical records of a nonparty. Do  
14 you want to talk about that?

15 MR. YELENOSKY: Yeah.

16 CHAIRMAN SOULES: And we can  
17 maybe let this catch up with the Discovery  
18 Rules at the Court.

19 MR. YELENOSKY: Yeah. I think  
20 Holly just handed out two pages. The first  
21 one was the draft that I came up with after  
22 the last meeting, and I sent it to Judge  
23 Brister and John Marks. The second page is  
24 what John Marks came back with. And we've  
25 talked today, and with some modifications that

1 I think we both agree on I can propose  
2 something specific.

3 If you look at the second page, I would  
4 make some minor changes to what John has come  
5 back with, which is an improvement on what I  
6 had.

7 CHAIRMAN SOULES: Okay. What  
8 are those changes?

9 MR. YELENOSKY: One is just to  
10 clarify in the third line where he has  
11 "medical authorization," I thought of and  
12 used the term "medical records release."

13 CHAIRMAN SOULES: Now, are you  
14 looking at the top page or the second page?

15 MR. YELENOSKY: I'm sorry, the  
16 second page with the Liddell-Sapp letterhead  
17 on it.

18 CHAIRMAN SOULES: Okay. And  
19 we're on the third line of that.

20 MR. YELENOSKY: The third line  
21 begins "medical authorization," and I would  
22 just change that to "medical records release."  
23 I don't know if that's important.

24 And then at the very end, to just  
25 incorporate the very last sentence that I had

1 on the first page, which is "Nothing in this  
2 rule excuses."

3 CHAIRMAN SOULES: Okay. So  
4 take a minute and read it. You're reading the  
5 rule on the Liddell-Sapp letterhead, and you  
6 should append to that the last sentence on the  
7 first page, and then we'll talk about it.

8 You're moving that this be adopted?

9 MR. YELENOSKY: Yes.

10 CHAIRMAN SOULES: Okay. John,  
11 do you second that?

12 MR. MARKS: Yes.

13 MR. YELENOSKY: The last  
14 sentence doesn't -- I don't think it adds  
15 anything that isn't already true. But I guess  
16 that since it's a rule as to procedure, as a  
17 notice rule, you're just going to make clear  
18 that the fact that you give the notice to the  
19 other party does not prevent either that other  
20 party or someone else from raising some  
21 statutory confidentiality argument as an  
22 obstacle to the production of the records.  
23 But I think that's true regard regardless of  
24 whether you say it or not, so I'm not adverse  
25 to, if you feel it shouldn't be in there, to

1 taking it out.

2 CHAIRMAN SOULES: Okay.

3 Discussion. Alex Albright.

4 PROFESSOR ALBRIGHT: This rule  
5 says that the production should -- if you want  
6 the production, you should do so by oral or  
7 written deposition. Under the new Discovery  
8 Rules or the proposed Discovery Rules we have  
9 Rule 19, Production of Documents and Tangible  
10 Things from a Nonparty which allows for  
11 production without a deposition. Did you mean  
12 to exclude that for a reason?

13 MR. YELENOSKY: I hadn't  
14 thought of it.

15 MR. MARKS: I hadn't thought  
16 about that, but there might be a good reason  
17 for excluding it since you're going for  
18 nonparty medical records.

19 MR. YELENOSKY: But they have  
20 production from a nonparty. That would be  
21 appropriate as long as you distinguish between  
22 a request for production to a party who  
23 happens to have nonparty medical records and a  
24 request for production directly to the  
25 nonparty. And if you can figure out language

1 that takes that into account, I don't have any  
2 problem. The whole point is to make sure that  
3 the nonparty gets notice, and a request for  
4 for production to the nonparty might do that.

5 HON. SCOTT A. BRISTER: You  
6 might just refer to the rules, "would do so  
7 pursuant to Rules X, Y and Z under discovery."

8 CHAIRMAN SOULES: Alex.

9 PROFESSOR ALBRIGHT: So did you  
10 intend when you were requesting production of  
11 these kinds of documents to a party you could  
12 not do it through an ordinary request for  
13 production of documents?

14 MR. MARKS: Yes, we did intend  
15 that.

16 CHAIRMAN SOULES: I didn't  
17 understand the question, Alex. I'm sorry, can  
18 you speak up and restate the question so I can  
19 hear it?

20 PROFESSOR ALBRIGHT: The  
21 question was, did they intend that if you were  
22 requesting these sorts of documents from a  
23 party, you could not obtain these documents  
24 through an ordinary request for production of  
25 documents? They want to have an oral or a

1 written deposition instead of a request for  
2 production of documents. I don't really  
3 understand why.

4 CHAIRMAN SOULES: Did you use  
5 the word "party" in your question?

6 PROFESSOR ALBRIGHT: A party,  
7 right.

8 CHAIRMAN SOULES: Well, this  
9 rule, as I read it, only applies to  
10 nonparties.

11 MR. YELENOSKY: Right. But you  
12 could -- and in my -- on the first page of my  
13 original draft I said when you issue a request  
14 for production or a subpoena for medical  
15 records of a nonparty you to have copy the  
16 subpoena.

17 And then John Marks came back with  
18 saying, well, let's do it by deposition and  
19 copy the subpoena.

20 If you're going to allow a request for  
21 production to a party, obviously, as you could  
22 do under the current rules that says, "Texas  
23 and Mental Health/Mental Retardation, give me  
24 the medical records of so and so," you would  
25 still need some mechanism of notifying so and

1 so that you're trying to get their records.

2 I guess you could go back to the original  
3 draft and say that would be okay if you copied  
4 the request for production to the nonparty,  
5 but --

6 CHAIRMAN SOULES: But Alex's  
7 question only deals with parties.

8 MR. YELENOSKY: No. It deals  
9 with both, as I understand it, because the new  
10 rules allow for a request for production  
11 that's addressed to a nonparty.

12 PROFESSOR ALBRIGHT: But their  
13 rule concerns whether you have documents that  
14 are held by a party or a nonparty, so long as  
15 those documents concern --

16 MR. YELENOSKY: -- a nonparty.

17 PROFESSOR ALBRIGHT: -- a  
18 nonparty's medical situation or mental health  
19 situation. If you're requesting those  
20 documents, the idea is that you want to give  
21 notice to the person who is discussed in those  
22 documents.

23 CHAIRMAN SOULES: Oh, I see.

24 PROFESSOR ALBRIGHT: So if the  
25 only purpose is notice, I don't see that you



1 really have to have a deposition. Why can't  
2 you send them a copy? You could send them a  
3 copy of the subpoena, if it is by deposition  
4 or Rule 19 production of documents and things  
5 from a nonparty when you do have a subpoena;  
6 but if you have a party from whom you're  
7 requesting those documents from, why couldn't  
8 you just send a copy of the request for  
9 production?

10 MR. YELENOSKY: Well, the only  
11 thing, I guess, that I've thought of in that  
12 regard is that with a request for production,  
13 that -- the response to a request for  
14 production, although it generally is not,  
15 could be immediate with no opportunity for the  
16 nonparty whose records are involved to  
17 interject himself or herself.

18 Do we have any more time when you're  
19 doing a notice of an oral deposition? You  
20 have the time between that and the  
21 deposition. You have the time laid out when  
22 the deposition is going to be. If it's a  
23 written deposition, you would have the time  
24 for --

25 CHAIRMAN SOULES: Buddy Low.

1 PROFESSOR ALBRIGHT: But  
2 actually when you're --

3 MR. YELENOSKY: I'm not --

4 CHAIRMAN SOULES: Buddy has a  
5 question here. Let's see what it is.

6 MR. LOW: My question is, why  
7 pick out medical records of a nonparty? For  
8 instance, what if I work with Temple and they  
9 want my personnel file to show what I made or  
10 something so they can compare with somebody,  
11 the plaintiff who is parallel with me, and  
12 they want to get my personnel file. Why?  
13 What's so sacred about medical records? I  
14 would consider that as sacred. Why is --

15 MR. YELENOSKY: Well, I'd  
16 rather produce my personnel records than my  
17 medical records.

18 MR. LOW: Well, a lot of people  
19 might not, though.

20 MR. YELENOSKY: Yeah. Well,  
21 some people might not. But a personnel file  
22 is owned by the --

23 CHAIRMAN SOULES: Buddy, you  
24 haven't finished your point yet.

25 MR. LOW: But my point is that

1 each person might put priority on what of  
2 their records they're getting. Why not just  
3 have a procedure when they're asking for  
4 records of a nonparty, whether it's medical or  
5 whatnot. That's all I ask.

6 CHAIRMAN SOULES: Richard  
7 Orsinger.

8 MR. ORSINGER: I agree with  
9 Buddy's sentiment. At the very least I think  
10 we ought to put mental health records in here  
11 as well as medical records. They're covered  
12 by a separate privilege. But I would point  
13 out that the procedure under this rule doesn't  
14 protect medical records as well as the statute  
15 protects bank records.

16 In the bank records statute, they're  
17 specifically given 10 days to appear in court  
18 and make an objection, and if they don't, then  
19 it's presumed that they have no objection.

20 Here there might be a deposition on "x"  
21 days' notice. It's going to somebody that  
22 doesn't have the faintest idea of what to do  
23 with what they've just received. They've just  
24 received something in a lawsuit involving  
25 people they don't have and lawyers they don't

1 know. It seems to me maybe we ought to  
2 require that they be instructed that they have  
3 10 days to come appear in court and make an  
4 objection or otherwise their records will be  
5 revealed.

6 As a practical matter, you can give a  
7 deposition notice to a layperson in a lawsuit  
8 that doesn't involve them and they won't know  
9 what to do with it.

10 MR. YELENOSKY: Look, I think  
11 we're forgetting what happened --

12 CHAIRMAN SOULES: Steve  
13 Yelenosky.

14 MR. YELENOSKY: -- at the last  
15 meeting. I was sent away to draft this and  
16 confine it to medical records and write it.  
17 It came out in this fashion because nobody  
18 would go along with what you're suggesting  
19 right now, Richard. If they would go along  
20 with that, then I'm happy with that.

21 Sure, let's protect personnel files, if  
22 we can get it past this Committee. But it  
23 didn't seem that we could, and what I wanted  
24 to come away with was at least protection for  
25 medical records, and by that I meant to

1 include mental health records. And if that's  
2 not clear, we need to make that clear.

3 But I'm all for what you're saying, but  
4 the experience at the last meeting was I had  
5 to narrow down what I could get.

6 HON. SCOTT A. BRISTER: And the  
7 reason for that was --

8 CHAIRMAN SOULES: Judge  
9 Brister.

10 HON. SCOTT A. BRISTER: -- was  
11 because there are all these statutes, bank  
12 records statutes, and nobody in this room  
13 could say what we were about to draft wouldn't  
14 violate some of those without doing a lot of  
15 research, and was it necessary with all these  
16 statutes to try to put them all together in a  
17 rule, or were we just creating work for  
18 ourselves.

19 CHAIRMAN SOULES: Well, it  
20 boiled down to the Committee felt that we  
21 needed a rule for medical and I think also  
22 mental health records, because for whatever  
23 reason there needed to be more rule protection  
24 for those; and that the statutes as they  
25 existed in other areas would take care of

1 those other areas; and if we tried to write a  
2 rule, we wouldn't know what to write because  
3 there are so many other statutes and other  
4 areas.

5 MR. LOW: I didn't raise it out  
6 of mere ignorance. I was --

7 MR. ORSINGER: Can I respond?  
8 I think it would be very easy to write a rule  
9 that gives somebody entitlement to 10 days to  
10 come into court and to object and require that  
11 what's served on them tell them that they have  
12 the right to come in within 10 days and  
13 object. That's an easy rule to write.

14 CHAIRMAN SOULES: Today we're  
15 going to deal with medical and mental health,  
16 and if somebody wants to bring in a rule about  
17 other records, well --

18 MR. ORSINGER: I'm not talking  
19 about other records, I'm talking about this  
20 rule. I think it ought to say mental health  
21 records as well as medical, because there are  
22 separate privileges.

23 CHAIRMAN SOULES: There's no  
24 problem with that. Nobody disagrees with  
25 that, Richard.

1                   MR. ORSINGER:  And I think it  
2                   ought to say that there's a minimum 10 days'  
3                   notice, and it ought to say that the notice  
4                   that's given tells people that they have  
5                   10 days, after which they forfeit their  
6                   privacy.  Otherwise, this is just illusory  
7                   that we're giving them this protection.

8                   MR. YELENOSKY:  Well --

9                   CHAIRMAN SOULES:  Steve  
10                  Yelenosky.

11                  MR. ORSINGER:  And if you want  
12                  me to, I'll step next door and write  
13                  something.

14                  MR. YELENOSKY:  Okay.  You can  
15                  do that.  I guess in some instances the  
16                  10 days might help.  But if you're saying that  
17                  after the 10 days they've obviously waived it,  
18                  that might hurt some people, because there are  
19                  situations where the records might not be  
20                  produced within 10 days and somebody might  
21                  interject themselves on the 20th day and they  
22                  still haven't been produced.  Under your rule  
23                  they've waived it, so I'm not sure it's a  
24                  better protection.  I would like to see what  
25                  we could come up with there.

1           But I did want to add as far as other  
2 concerns like personnel files, another reason  
3 why we're focusing on medical records and  
4 mental health records, and maybe we need to  
5 make that specific and will, is as far as I  
6 know there isn't any privilege that applies to  
7 personnel files. They are under the ownership  
8 of the employer unless something contained  
9 within is particularly privileged. There are  
10 laws on confidentiality of medical records;  
11 therefore, what we're putting in here is a  
12 notice provision to make sure that those laws  
13 have an opportunity to operate.

14                   CHAIRMAN SOULES: Okay. Aside  
15 from what Richard may want to add to this  
16 sentence about some period of time of notice,  
17 is there anything else on this proposed Rule,  
18 whatever it is, 25?

19                   Judge Guittard.

20                   HON. C. A. GUITTARD: The last  
21 sentence on Page 2, "However, if the identity  
22 of the nonparty," and so forth "is not  
23 directly or indirectly being disclosed," I  
24 would suggest merely, keeping the same  
25 sentence, this language: If the identity of



1 the nonparty whose records are -- will be --  
2 let's see, "If the identity of the nonparty  
3 whose records are sought is not" -- "will not  
4 be directly or indirectly disclosed by the  
5 production." In other words, leave out the  
6 "beings." "Whose records are sought is not  
7 directly" -- "will not be directly or  
8 indirectly disclosed".

9 CHAIRMAN SOULES: Do you want  
10 to strike the word "being"?

11 HON. C. A. GUITTARD: Yeah.  
12 Strike "being," and instead of "is," say "will  
13 not be directly or indirectly" and strike  
14 "being" again, "disclosed."

15 MR. YELENOSKY: That's fine.

16 CHAIRMAN SOULES: Any objection  
17 to that?

18 MR. MARKS: No.

19 CHAIRMAN SOULES: Okay. That  
20 will be done.

21 HON. C. A. GUITTARD: I think  
22 if that's done, that's fine. But I'm trying  
23 to figure out how this applies. How can you  
24 get somebody's records without saying who  
25 you're going to get, whose records you're

1 going to get?

2 CHAIRMAN SOULES: There are a  
3 number of studies, for example, these studies  
4 where they take a drug and a placebo and they  
5 do tests like FDA tests and they can be -- and  
6 whenever they are produced, they are generally  
7 produced without the identities of the  
8 participating persons.

9 HON. C. A. GUITTARD: Yes. But  
10 the person whose records they are, who has a  
11 duty to disclose it, you have to say whose  
12 records they are and who you want to disclose  
13 it.

14 MR. YELENOSKY: No. You could  
15 say, for instance, Judge Guittard, John Marks  
16 was saying, for instance, with an expert, an  
17 expert has his opinion. What do you base that  
18 on? I base that on a review of 150 people.  
19 Produce those records. You get 150 medical  
20 records. You haven't asked for particular  
21 names and you don't get them when they're  
22 produced.

23 HON. C. A. GUITTARD: Well, who  
24 is the nonparty?

25 MR. YELENOSKY: The people

1 whose medical records are among those 150.  
2 But their identity is not going to be  
3 disclosed either by your request or by the  
4 documents.

5 CHAIRMAN SOULES: So you  
6 stipulate to redaction of all the names on all  
7 the records, just the statistical and medical  
8 information that was done in the study.  
9 That's all. That would be fair game for  
10 discovery with or without this notification.

11 HON. C. A. GUITTARD: But who  
12 is going to disclose it?

13 CHAIRMAN SOULES: The expert  
14 who did the study.

15 HON. C. A. GUITTARD: And he's  
16 the nonparty who you give the notice to?

17 MR. YELENOSKY: No. The  
18 nonparty is the people that he studied, his  
19 patients. You're talking about the medical  
20 records, meaning the records that pertain to  
21 the medical condition of a nonparty, so I'm  
22 asking Dr. Jones to give me the medical  
23 records of patients 1 through 150, and the  
24 nonparty who is not being identified are those  
25 150 people. There may be records in the

1 possession of the expert, but with the records  
2 we're talking about the relationship is who is  
3 discussed in the medical records.

4 HON. C. A. GUITTARD: Oh.

5 CHAIRMAN SOULES: Okay. So let  
6 me see if this works: "When the production of  
7 medical or mental health records of a nonparty  
8 is sought and the nonparty has not signed  
9 a" -- and you just said a records release?

10 MR. YELENOSKY: Yeah, that's  
11 fine.

12 CHAIRMAN SOULES: And then it  
13 would read as written down to the last  
14 sentence, and that would read, "However, if  
15 the identity of the nonparty whose records are  
16 sought will not directly or indirectly be  
17 disclosed," and so forth, and then we would  
18 pick up the last sentence on page 2.

19 Any further discussion? Those in favor  
20 show by hands. 13.

21 Those opposed. Nobody is opposed, so  
22 that will pass, and I'll get that on to the  
23 Supreme Court.

24 MR. ORSINGER: Luke, I have  
25 some proposed language to add to it.

1                   CHAIRMAN SOULES: Richard wants  
2 to add something. What do you want to add,  
3 Richard? Give it to us. Make a motion.

4                   MR. ORSINGER: Okay. I would  
5 move that we adopt the following language or  
6 something close to it and add it to the end:  
7 The copy of the subpoena served upon the  
8 nonparty shall state that the records may be  
9 privileged and that the nonparty may make  
10 objection to the requesting party to assert  
11 such privilege within 10 days of service of  
12 notice. If such an objection is made within  
13 10 days, the requesting party may obtain such  
14 records only upon motion and order with notice  
15 to the nonparty.

16                   CHAIRMAN SOULES: You're saying  
17 the requesting party is supposed to raise the  
18 privilege?

19                   MR. ORSINGER: No. The  
20 requesting party tells the nonparty they can  
21 raise the privilege within 10 days by  
22 contacting the requesting party, not  
23 necessarily by filing a pleading.

24                   CHAIRMAN SOULES: Let me hear  
25 your wording one more time.

1 MR. ORSINGER: The copy of the  
2 subpoena served upon the nonparty shall state  
3 that the records may be privileged and that  
4 the nonparty may make objection to the  
5 requesting party to assert such an objection  
6 within 10 days of service of the notice.

7 MR. YELENOSKY: First you need  
8 to say "copy of the notice" because it's a  
9 copy of the notice, not a subpoena.

10 MR. ORSINGER: It's not a  
11 subpoena?

12 PROFESSOR DORSANEO: No.

13 MR. YELENOSKY: It's a notice  
14 of deposition.

15 PROFESSOR DORSANEO: It's the  
16 middle sentence here.

17 MR. ORSINGER: Sorry. Okay.  
18 Scratch that. Copy of the notice.

19 The conceptual framework here is --

20 CHAIRMAN SOULES: It sounds to  
21 me like -- I'm just talking about the words --  
22 it sounds to me like you're -- the party, the  
23 nonparty is to ask the requesting party to  
24 make objections.

25 MR. ORSINGER: No. Here is

1 what I'm saying. I'm saying -- this is my  
2 proposal. It may be a bad one, but this is  
3 it. I'm not saying that the nonparty must  
4 hire a lawyer and file a motion to quash. I'm  
5 saying that the nonparty can call the person  
6 that issued the subpoena and say, "It says  
7 here that these records may be privileged and  
8 that I can object. I do object."

9 And then at that point the requesting  
10 party, knowing that an objection has been  
11 asserted, has to file a motion with the court,  
12 give notice to the nonparty, and then go  
13 before the judge and get a court order to get  
14 these privileged records. That avoids the  
15 necessity of the nonparty having to hire a  
16 lawyer to file a motion to quash.

17 Now, I'm not saying that the requesting  
18 party makes the objection. I'm just saying  
19 they're put on notice that the objection  
20 exists and then they have to go before the  
21 court, and the court presumably will either  
22 respect or penetrate the objection -- the  
23 privilege.

24 CHAIRMAN SOULES: Okay. Read  
25 it to me one more time.

1 MR. ORSINGER: The copy of the  
2 notice served upon the nonparty shall state  
3 that the records may be privileged and that  
4 the nonparty may make objection to the  
5 requesting party within 10 days of the service  
6 of the notice, so that means by mail you add  
7 three days or whatever. If such an objection  
8 is made within 10 days, the requesting party  
9 may obtain such records only upon motion and  
10 order with notice to the nonparty.

11 CHAIRMAN SOULES: Any objection  
12 to that? Carl Hamilton.

13 MR. HAMILTON: It seems to me  
14 like that objection ought to be made to the  
15 court.

16 MR. ORSINGER: The reason I  
17 didn't propose that is I think most laypeople  
18 are going to let it go because they're not  
19 going to hire a lawyer.

20 MR. HAMILTON: Well, they don't  
21 have to hire a lawyer just to write or call,  
22 just like they do with the requesting party.

23 MR. ORSINGER: Well, in Bexar  
24 County it wouldn't do you any good, because we  
25 have central assigned judges, and somebody



1 would walk down there, they don't have a  
2 district judge in their case, they're going to  
3 wander around the hallway looking for a  
4 district judge. Do you see what I'm saying?

5 CHAIRMAN SOULES: That just  
6 puts the requesting lawyer --

7 MR. ORSINGER: He's an officer  
8 of the court, and he says, "Well, Judge, you  
9 know, I subpoenaed this, but they're asserting  
10 a privilege. I've given them notice of the  
11 hearing. They're not here. I think it's not  
12 privileged because of x, y and z, but I need  
13 you to rule before I can get it."

14 And if the judge says, "I think it is  
15 privileged," then they don't get them.

16 MS. GARDNER: I think there  
17 are --

18 CHAIRMAN SOULES: Anne  
19 Gardner.

20 MS. GARDNER: I think there  
21 are -- I know there are lawyers in this day  
22 and time that will try to persuade the  
23 layperson that their objection is not valid  
24 and who will not reveal it to the court, and  
25 I'm afraid that that puts the layperson in the

1 clutches of unscrupulous lawyers.

2 CHAIRMAN SOULES: Steve  
3 Yelenosky.

4 MR. YELENOSKY: Well, what  
5 Richard suggested certainly, I think, is more  
6 protection rather than -- it can't be any less  
7 protection.

8 With respect to whether you make the  
9 objection to the requesting attorney or to the  
10 court, remember that the concern for this came  
11 about -- primarily, initially the concern came  
12 about in the case where the records were  
13 requested of an individual in a state  
14 hospital, and that individual -- or in that  
15 situation, that individual may not understand,  
16 even as it's explained as Richard has written  
17 it, but may show this notice of deposition  
18 with notice of a potential privilege to a  
19 social worker or someone else who may take it  
20 to one of our attorneys who is coming by the  
21 state hospital or whatever.

22 But if an attorney doesn't get involved,  
23 it is going to be easier for that person or  
24 the social worker to call the person whose  
25 name is on the deposition notice and say,

1 "Hey, we want to at least know more about  
2 this before you get my medical records or my  
3 client's" -- me as a social worker -- "my  
4 client wants to know more about this before  
5 they release the records or does not want to  
6 release them."

7 So I think it is good to have you notify  
8 the opposing attorney.

9 The other point that was made is escaping  
10 me right now, and maybe I can come back to it.

11 CHAIRMAN SOULES: Okay. Let me  
12 see, so we'll vote on Richard's amendment,  
13 then, unless there's any further discussion.  
14 Those in favor of Richard's amendment hold  
15 your hands up. Nine. I think I counted  
16 nine. Did you count eight or nine? Please  
17 hold them up again.

18 HON. SCOTT A. BRISTER: This is  
19 to add Richard's language?

20 CHAIRMAN SOULES: Yes. Nine.  
21 Those opposed. 10. It fails by a vote of 10  
22 to nine.

23 Okay. I will get that to the Court.

24 PROFESSOR ALBRIGHT: Can I make  
25 another motion?

1                   CHAIRMAN SOULES:  Yes.  Alex  
2                   Albright.

3                   PROFESSOR ALBRIGHT:  I would  
4                   like to move that on the fourth line down we  
5                   delete "by oral or written deposition" and  
6                   insert "request such documents pursuant to  
7                   Discovery Rules 11, 14, 17 or 19," which would  
8                   be request for production of documents, oral  
9                   deposition, deposition on written questions,  
10                  or requests for production of documents from a  
11                  nonparty.

12                  And then "The nonparty whose records are  
13                  sought shall be served with notice of the  
14                  request in the same manner as service of  
15                  citation as provided by Rule 106."

16                  That's the way we have it for Rule 21,  
17                  motion for entry on property.  The reason we  
18                  did that was because we were concerned that if  
19                  you cannot find that person who is not a party  
20                  to the litigation, you need to be able to have  
21                  some sort of substituted service so that you  
22                  have satisfied your obligation.  Otherwise,  
23                  you would just be left with, "Well, I can't  
24                  get those documents because I can't find that  
25                  person."

1 MR. YELENOSKY: Well, you have  
2 the good cause exception.

3 MR. MARKS: That's right.

4 MR. YELENOSKY: It says, "or  
5 unless otherwise ordered by the court upon a  
6 showing of good cause." "Good cause" is  
7 nobody knows where the person is and we really  
8 need these records and we'll try to use only  
9 the parts that are pertinent to the case.

10 PROFESSOR ALBRIGHT: All  
11 right. Then I will withdraw the second one,  
12 but I would still --

13 MR. YELENOSKY: Okay. And the  
14 first one is you enumerated certain  
15 provisions?

16 PROFESSOR ALBRIGHT: Right.

17 CHAIRMAN SOULES: We don't know  
18 what those rule numbers are going to be.  
19 That's one of the problems here. Is there  
20 really anything other than oral or written  
21 depositions and a request for production?

22 PROFESSOR ALBRIGHT: There's  
23 request for production from a party and  
24 request for production from a nonparty.

25 CHAIRMAN SOULES: Okay.

1                   PROFESSOR ALBRIGHT: So there  
2 are four separate things.

3                   CHAIRMAN SOULES: What if we  
4 just say "oral or written deposition or  
5 request for production"?

6                   PROFESSOR ALBRIGHT: Okay. I  
7 think we need to -- or we can put blanks in  
8 there. I think whenever these are  
9 promulgated, the rule numbers should be put in  
10 there.

11                   CHAIRMAN SOULES: Well, the  
12 concept now, though, is you want to be able to  
13 get them by a request for production from a  
14 nonparty or a party.

15                   PROFESSOR ALBRIGHT: Yeah. The  
16 concept is, is use a request for production  
17 instead of always requiring a deposition.

18                   MR. MARKS: For medical  
19 records? I can get medical records with a  
20 request for production from a medical  
21 facility?

22                   PROFESSOR ALBRIGHT: Well, if  
23 you have a doctor, if the doctor is a party,  
24 can't you request documents in the possession  
25 of that party by a request for production of

1 documents?

2 MR. MARKS: Okay.

3 CHAIRMAN SOULES: Well, in  
4 order to expedite this and tell the Court what  
5 we're thinking about, can we just add on  
6 "request for production"?

7 PROFESSOR ALBRIGHT: I would  
8 say from a party or a nonparty.

9 MR. ORSINGER: That's all there  
10 are, are parties or nonparties.

11 PROFESSOR ALBRIGHT: Yeah.  
12 Well, I'm just afraid that a request for  
13 production everybody assumes is from a party.

14 CHAIRMAN SOULES: Okay. Is  
15 there a second to her motion?

16 MR. PRINCE: Second.

17 CHAIRMAN SOULES: Okay. To use  
18 the numbers, the blanks?

19 MR. PRINCE: Yeah.

20 MR. MARKS: Well, there's a  
21 drafting problem if you do that.

22 CHAIRMAN SOULES: All in favor  
23 show by hands.

24 HON. SCOTT A. BRISTER: What's  
25 the drafting problem?

1 CHAIRMAN SOULES: Those  
2 opposed. It fails by a vote of five to three.

3 HON. SCOTT A. BRISTER: No, no,  
4 no. Wait a minute.

5 CHAIRMAN SOULES: We've got to  
6 get on with this. Come on, this is  
7 nitpicking.

8 HON. SCOTT A. BRISTER: No. If  
9 this goes up like this, it's wrong. That's a  
10 problem.

11 CHAIRMAN SOULES: What's wrong  
12 with it?

13 HON. SCOTT A. BRISTER: Because  
14 it's just oral or written depositions.

15 CHAIRMAN SOULES: What about  
16 "or requests for production"? Can I get  
17 motion for that?

18 PROFESSOR ALBRIGHT: Well,  
19 nobody has voted on my motion yet.

20 CHAIRMAN SOULES: We did vote.  
21 We just voted.

22 PROFESSOR ALBRIGHT: No, we  
23 didn't.

24 HON. SCOTT A. BRISTER: I  
25 didn't.



1 CHAIRMAN SOULES: Okay. What  
2 is your motion?

3 PROFESSOR ALBRIGHT: My motion  
4 is to delete the words "by oral or written  
5 deposition" and insert the words "request such  
6 documents or shall" -- okay. "Such production  
7 shall request such documents pursuant to  
8 [proposed Discovery Rules 11, 14, 17 and  
9 19]."

10 MR. PRINCE: Second.

11 CHAIRMAN SOULES: Moved and  
12 second. Any further discussion?

13 MR. ORSINGER: Yes. Does that  
14 include subpoenas issued incident to a hearing  
15 or a trial? If it doesn't, it needs to.

16 MR. YELENOSKY: No.

17 MR. ORSINGER: Well, surely you  
18 can subpoena them to come to some kind of  
19 preliminary hearing.

20 MR. YELENOSKY: Well, if you  
21 do, then are you going to copy notice of that  
22 subpoena -- I mean, the next sentence needs to  
23 be clarified then because --

24 MR. ORSINGER: We are not  
25 saying that you can't subpoena someone's

1 records to a hearing, are we? Is that what  
2 this is doing?

3 PROFESSOR ALBRIGHT: Okay.

4 This is --

5 CHAIRMAN SOULES: Buddy Low.

6 MR. LOW: I have a question.  
7 We don't state that every place. We just  
8 say -- we have one rule now that says "methods  
9 of discovery." Try and combine them instead  
10 of citing a whole bunch of rules. I don't see  
11 why we don't just put "rules of discovery"  
12 here. The lawyers are going to know what they  
13 are. I mean, why set forth each rule and then  
14 they turn the page to this rule, that rule,  
15 and then you turn the page to that rule? That  
16 just doesn't seem like the right thing to do.

17 HON. SCOTT A. BRISTER: Let me  
18 make a proposal to put forth Buddy's idea. It  
19 would be in the third sentence drop everything  
20 after "authorization."

21 MR. YELENOSKY: The third line,  
22 you mean?

23 HON. SCOTT A. BRISTER: Third  
24 line, everything after "authorization" --

25 MR. YELENOSKY: Well, that's

1 out now. It's "records release."

2 HON. SCOTT A. BRISTER: -- or  
3 "records release" down to -- and then drop  
4 the rest of the sentence and continue on with  
5 "The nonparty whose records are sought shall  
6 be served with notice," and drop "by oral or  
7 written deposition."

8 PROFESSOR ALBRIGHT: I'll  
9 accept the amendment.

10 MR. LOW: I second that.

11 MR. YELENOSKY: And Richard, in  
12 response to the --

13 CHAIRMAN SOULES: Any  
14 discussion on proposal? All right. Let me  
15 see if I've got it. It would read "When the  
16 production of medical records or" -- I'm  
17 sorry. "When the production of medical or  
18 mental health records of a nonparty is sought  
19 and the nonparty has not signed a records  
20 release," you would then strike "the party  
21 seeking such production shall do so by oral or  
22 written deposition," and pick up with "The  
23 nonparty whose records are sought shall be  
24 served with notice in the same manner as  
25 required under these rules for service of

1 notice to a party"?

2 HON. SCOTT A. BRISTER: Right.

3 CHAIRMAN SOULES: Okay. Any  
4 opposition to that?

5 MR. ORSINGER: Yeah. That  
6 doesn't include subpoenas for hearings or  
7 trials.

8 CHAIRMAN SOULES: No. This is  
9 a discovery rule.

10 MR. ORSINGER: It is?

11 CHAIRMAN SOULES: Yeah. This  
12 is nothing but a discovery rule.

13 MR. ORSINGER: Okay.

14 MR. YELENOSKY: Well, John  
15 Marks and I had talked about that, because I  
16 was thinking, you know, well, this is how you  
17 would always get medical records. If you're  
18 suggesting, Richard, that you could subpoena  
19 medical records to court and there wouldn't  
20 have to be any notice to the nonparties whose  
21 medical records are at issue, then you have  
22 the same problem.

23 MR. ORSINGER: It will happen  
24 in temporary hearings in custody cases every  
25 single time.

1                   CHAIRMAN SOULES: Well, this is  
2 a discovery rule, so we've passed the  
3 discovery rules, and we haven't dealt with  
4 this problem that Richard raises about  
5 subpoenas, so that's going to be governed by  
6 something else until we can get a proposal  
7 like you're doing.

8                   Bill Dorsaneo.

9                   PROFESSOR DORSANEO: This is  
10 designed to protect someone whose rights have  
11 already been violated or are going to be  
12 violated, because there's production  
13 notwithstanding the statutory prohibition  
14 against producing something without a  
15 release.

16                   MR. YELENOSKY: There's no --  
17 they produce --

18                   CHAIRMAN SOULES: Steve  
19 Yelenosky.

20                   MR. YELENOSKY: They produce  
21 things when they get a subpoena. They say,  
22 "I've got a court order to produce this," and  
23 so --

24                   PROFESSOR DORSANEO: In this  
25 last legislative session both the medical

1 liability and the Insurance Improvement Act  
2 and the statutes concerning hospitals were  
3 changed, I think, to prohibit that kind of  
4 behavior.

5 MR. YELENOSKY: Well, I don't  
6 know specifically about that language, but  
7 there are people who could possess these  
8 records who wouldn't fall within that statute  
9 as well.

10 For example, an employer who employs  
11 someone with a disability, their medical  
12 records section could have medical records.

13 CHAIRMAN SOULES: Okay. Where  
14 is Holly? We're going now to Judge Till.

15 Judge Till, give us -- we're not going to  
16 take up your task force report today, other  
17 than I would like to get a report on where --  
18 what the status of your task force work is so  
19 that we can get some understanding of what's  
20 happening there.

21 HON. PAUL HEATH TILL: The task  
22 force was formed about a year ago or over a  
23 year ago, and after a great deal of dissension  
24 that had to be worked out we finally managed  
25 decide to arrive on a course taking Rule 523

1 as our starting point and trying to put into  
2 effect a set of rules that would in fact  
3 reflect 523 without a justice, primarily as a  
4 lay court having no further -- we know all of  
5 the district and county court rules and then  
6 the exceptions, merge the two and make a  
7 decision as to what to do.

8 We also went through the forcible  
9 detainer, forcible entry and detainer section  
10 and made some revisions in that area as well.

11 I propose that we will be finished with  
12 this as far as drafting a separate set of  
13 rules but not new rules. The total number of  
14 new rules that we are talking about is  
15 probably about six.

16 What we've done is taken the district  
17 court rules, modified them by the 500 set of  
18 rules, and produced what Rule 523 says you're  
19 supposed to do. We didn't go out and start  
20 writing a whole new set of rules. We just  
21 took the district and the county court set of  
22 rules, went through and modified each one of  
23 them as would be appropriate in the justice  
24 court under the 500 series rules. That's what  
25 we were attempting to do in the hope of

1 producing a document that would be of benefit  
2 to the justice courts throughout the state.

3 The forcible part has been -- the final  
4 report from the Justice Court Task Force is  
5 somewhat different than what I had envisioned  
6 when we got into it, but that's the way it  
7 goes.

8 But that's approximately where we are,  
9 and we should be finished in time for the next  
10 task force meeting --

11 CHAIRMAN SOULES: Okay.

12 HON. PAUL HEATH TILL: -- to  
13 that point anyway, if that's what it is to  
14 be.

15 But the concept of a different set of  
16 rules I know is something new. But at the  
17 same time, trying to make district and county  
18 court rules apply to justice court presents a  
19 serious problem really, because our time frame  
20 is totally different. We're not a court that  
21 has a trial record. We have to write in -- we  
22 use a docket sheet and we make notations of  
23 what happens in there and retain the document,  
24 since appeal is de novo and not on a writ of  
25 error.



1           And the additional broad responsibilities  
2           that are put on the justices of the peace by  
3           the legislature, every time they've got  
4           something don't know what to do with they give  
5           it to us, makes this court difficult, since  
6           you write rules primarily for the district and  
7           county court with the idea you're dealing with  
8           the bar primarily. I know there are pro se's  
9           in those courts, but that's not why you wrote  
10          the rules.

11          You wrote the rules for the bar to be  
12          able to deal with the court and the court to  
13          be able to deal with the bar and represent the  
14          public. Ours is the reverse. We don't -- we  
15          have collisions between the bar and the public  
16          in our court, such as on a sworn account or  
17          any number of areas where constantly you have  
18          to resolve in front of them, and we have no  
19          set rules with which to help us to resolve  
20          them, nor have there ever been any rules  
21          drafted to do that.

22          So after much consternation and a great  
23          deal of hesitation, I have been won over to  
24          the point -- I grant you, I was somewhat worn  
25          down in the process, but nevertheless, when it

1 got through, I got won over to the point of  
2 view that there does need to be a different  
3 set of rules.

4 I've attended a great number of justice  
5 court meetings over the last 20 years, and the  
6 largest single complaint is that they are not  
7 sure what the rules are and what they're to  
8 do. Most of the justices of the peace in this  
9 state are not attorneys. Only about 50 or 55  
10 of them out of 780 are attorneys. The rest  
11 are not. And most of them serve as a justice  
12 of the peace at a great deal of financial  
13 hardship to themselves. They're doing it out  
14 of a sense that they're doing something for  
15 the community, and they have been constantly  
16 bombarding me, especially when they found out  
17 this task force was starting, wanting a  
18 different set of rules.

19 So that is what we're attempting to do,  
20 and that's the product that we're going to  
21 present to you.

22 CHAIRMAN SOULES: Does anybody  
23 have any questions? Okay.

24 HON. PAUL HEATH TILL: Then  
25 I'll take that to mean we are to continue

1 doing what we are doing.

2 HON. SCOTT A. BRISTER: What's  
3 our role on these again?

4 CHAIRMAN SOULES: As I  
5 understand it, I would have to get Justice  
6 Hecht to comment on this, but Justice Hecht --

7 HON. PAUL HEATH TILL: Justice  
8 Hecht, I think we need your opinion on this  
9 for a moment.

10 CHAIRMAN SOULES: Does the  
11 Supreme Court's order appointing a task force  
12 to do the JP Rules suggest that those rules  
13 are to come through our Committee?

14 JUSTICE HECHT: Yes. I mean, I  
15 don't know that the order does, but I'm sure  
16 the Court intends it to come through the  
17 Committee.

18 HON. PAUL HEATH TILL: That was  
19 my understanding, although that's not what I  
20 read in the order.

21 JUSTICE HECHT: We want  
22 everything to come through here.

23 CHAIRMAN SOULES: Okay. So  
24 when the rules are completed, then we'll need  
25 to decide how to deal with them.

1                   HON. PAUL HEATH TILL: Well, I  
2 would hope I could get your attention to  
3 review them before I get to the final draft.  
4 There's an awful lot of work in there, folks,  
5 and it's -- I've got 10 people on my  
6 committee, and they're doing the work that all  
7 of you all have been doing over the last four  
8 or five years. We've done it in just over a  
9 year, so we've put a lot of effort into it.  
10 If it's going to be that we're going on a  
11 philosophical approach that doesn't meet with  
12 your approval, you know, I don't intend to  
13 invest any more of my time and money do to  
14 this on idle speculation that you're opposed  
15 to it.

16                   We feel it is vital and as something  
17 important and would be of a great  
18 contribution.

19                   One of the arguments that we had to  
20 overcome and that I presented to the committee  
21 was that what we're talking about here is  
22 having a separate set of rules and therefore  
23 there's a big problem that when you revise one  
24 set you don't do the other. But then it was  
25 pointed out to me quite succinctly and the

1 argument was that that's true, but the courts,  
2 the two courts, are disparately and  
3 conceptually different. And our problem has  
4 been that the district and county court rules  
5 impose upon us a burden that's not appropriate  
6 and impose upon us rules and restrictions that  
7 are not appropriate. And we feel that we  
8 would be better off having a separate set of  
9 rules for that reason, and only after having  
10 spent a considerable amount of my time in  
11 going through this and reviewing it, the more  
12 I do it, the more I'm inclined to agree that  
13 it's true.

14 CHAIRMAN SOULES: Question,  
15 Judge Guittard.

16 HON. C. A. GUITTARD: I have  
17 been encouraged by you as chairman and by  
18 Justice Hecht to draft some General Rules that  
19 would apply both in the trial and in the  
20 appellate courts so that there wouldn't be  
21 duplication and so that it might be uniform.

22 In the respects that vacant property  
23 apply to both courts now, this effort to have  
24 a completely separate set of rules for the  
25 justice court would perplex me considerably as

1 to what to do about these General Rules and  
2 whether the General Rules should apply to the  
3 courts, since a great many of the rules that  
4 are included in Judge Till's draft are those  
5 that would be included in the General Rules.

6 Although I commend Judge Till and his  
7 committee for the effort that they have made  
8 and the diligence with which they've pursued  
9 this, I'm wondering whether or not that might  
10 go contrary to our concern for uniformity in  
11 the rules. It may be that there could be some  
12 other way of giving the justices enlightenment  
13 as to which rules apply and which ones don't.  
14 Or in those instances where the Rules of Civil  
15 Procedure don't apply or should be modified,  
16 then special rules for the courts, the justice  
17 courts, might make that explicit for their  
18 benefit and for the benefit of the lawyers  
19 that practice there. But I think that can be  
20 done without repeating all of the Rules of  
21 Civil Procedure that might apply to the  
22 justice courts.

23 I also note that there are some  
24 substantial changes in the practice that are  
25 suggested. For instance, as I read the

1 proposals, they would abolish the oral  
2 pleadings in the courts, in the justice  
3 courts. Now, that may be a good idea.

4 I think the idea has been that a layman  
5 who may not be able to even read or write  
6 should come to the -- should be able to come  
7 to the justice court and make a complaint, and  
8 the justice would write down the nature of the  
9 complaint on his docket and so forth without a  
10 formal pleadings; that oral pleadings are  
11 sufficient. Now, that may be obsolete, but my  
12 question is, is that what they really intend  
13 to do?

14 HON. PAUL HEATH TILL: Yes.  
15 The oral pleadings, if you think about it, it  
16 puts the burden on the court to make sure the  
17 pleadings are correct. He comes in and he  
18 says, "I pled this," and you think you wrote  
19 down what he says. He gets to trial and says,  
20 "I didn't say that at all, I said this. You  
21 know, I didn't say that, I said this."

22 Plus the fact I have about 12,000 civil  
23 cases a year that go through my court. And  
24 that rule would be fine if I had five or six,  
25 but 12,000, there ain't no way I can remember

1 or anyone else.

2 But what we will do is we will furnish  
3 them with a form and help them fill it out,  
4 but they have to still be able to read and  
5 understand, because what are they going to do  
6 with the citation? If they can't read, do we  
7 have the constable read them the citation so  
8 that they know they have been sued? I mean,  
9 we still serve them with a citation. They've  
10 got to -- we don't put the burden on the  
11 constable to go out there and find out or  
12 ascertain whether they can read and understand  
13 and read it to them or chase them down to do  
14 it. We serve them under 536 or 106 or 109 or  
15 whatever the case may be, whatever set of  
16 rules they are.

17 So the oral pleadings was definitely  
18 something that universally was objected to by  
19 the justices because it put the burden on the  
20 court to try to get -- they were the pleadings  
21 factory. They were the ones that had to make  
22 the pleadings, and it was a constant source of  
23 problems, so yes, that's why it's true. That  
24 was the idea.

25 HON. C. A. GUITTARD: Okay.



1 CHAIRMAN SOULES: Steve  
2 Yelenosky.

3 MR. YELENOSKY: Judge, I  
4 haven't had time to review these carefully and  
5 I've really just glanced at them, but I will  
6 look at it more carefully. But my question  
7 is, are these to apply to just justice courts  
8 or small claims courts?

9 HON. PAUL HEATH TILL: We  
10 haven't decided to write pleadings in small  
11 claims courts.

12 MR. YELENOSKY: Okay. So there  
13 will still be oral pleadings in small claims  
14 courts?

15 HON. PAUL HEATH TILL: There  
16 aren't oral pleadings in small claims.

17 MR. YELENOSKY: There aren't?

18 HON. PAUL HEATH TILL: No,  
19 sir. There are sworn pleadings in small  
20 claims courts. They have to be reduced to  
21 writing and sworn to before they are properly  
22 before the court, so that would not apply at  
23 all.

24 But we're not saying anything about small  
25 claims courts. Small claims court is a

1 creature of the legislature, and all the rules  
2 and everything that apply to small claims  
3 court are strictly legislative. This has  
4 nothing to do with it.

5 MR. YELENOSKY: Okay. Well, I  
6 do know that evictions are handled in the  
7 justice courts, right?

8 HON. PAUL HEATH TILL: That is  
9 correct.

10 MR. YELENOSKY: Okay. And if  
11 you're going to eliminate oral pleadings in  
12 justice court, evictions have a really short  
13 time frame. And requiring the court to do the  
14 pleadings is one thing when you're talking  
15 about a petition, but requiring the court to  
16 accept an oral answer on an eviction seems to  
17 me to be something that ought to continue,  
18 because somebody -- because they can read that  
19 they're about to be evicted doesn't mean that  
20 they can put together an answer or that they  
21 can get into the court quickly enough to have  
22 the form in an answer before they have miss  
23 their deadline. You only have six or seven  
24 days to respond.

25 HON. PAUL HEATH TILL: The

1 problem about that is that it often takes a  
2 sworn pleading before you can institute a  
3 forcible. It also requires a written answer  
4 now. Yes, that part we would not be able to  
5 modify.

6 MR. YELENOSKY: When did that  
7 get in?

8 HON. PAUL HEATH TILL: That's  
9 been in for quite a while, the last 22 years  
10 anyway.

11 MR. YELENOSKY: Well, then --

12 HON. PAUL HEATH TILL: See, the  
13 problem is that people hear oral pleadings in  
14 justice court and then they universally apply  
15 to everything that is in my court. It simply  
16 does not work.

17 MR. YELENOSKY: Well, I haven't  
18 been practicing law for 22 years, but I know  
19 that within the last 22 years that the justice  
20 courts at least in Travis County would accept  
21 an oral answer on an eviction. That's been in  
22 the last 10 years, so that may be -- I mean,  
23 if that was proscribed by the rules, then I  
24 hope it continues to be ignored, because I  
25 think that's the practical way to deal with

1 evictions when you only have six or seven days  
2 to respond and all you want to say is "I want  
3 a hearing."

4 If what you're saying is that "We're  
5 going to evict you because you have been a  
6 nuisance around the complex," and all the  
7 person wants to do is say "I want a hearing,"  
8 basically a general denial, and now they're  
9 going to have to go in within six or seven  
10 days and fill out a form, I don't think that  
11 that's an improvement.

12 HON. PAUL HEATH TILL: Well, if  
13 I may respond?

14 CHAIRMAN SOULES: Yes, sir.

15 HON. PAUL HEATH TILL: First  
16 off, you're served with a notice of a trial  
17 setting. You are not served with a notice to  
18 respond by pleading. That is part of the  
19 requirement for forcibles now. If you want to  
20 file a written answer, you may do so, and that  
21 changes the burden of proof on a default  
22 judgment, but it doesn't change anything other  
23 than that.

24 Now, you're confusing apples and  
25 oranges. On a forcible detainer, if a person

1 is properly served, they are served with a  
2 notice as to when to appear in court for trial  
3 on that subject. They don't have to file an  
4 answer to get that trial. They just have to  
5 appear. There's no requirement that they file  
6 an answer before the court. They're entitled  
7 to a hearing. No such request is entered. So  
8 I guess in Travis County when they were taking  
9 their oral answer, it was a moot point anyway  
10 because they were entitled to one in the first  
11 place.

12 CHAIRMAN SOULES: Judge, when  
13 we get your --

14 MR. YELENOSKY: Well, we'll  
15 talk.

16 CHAIRMAN SOULES: When we get  
17 your task force report we'll go to work on  
18 it.

19 MR. YELENOSKY: And I'll talk  
20 to him about that later.

21 CHAIRMAN SOULES: And we've  
22 got -- is the information that we've gotten so  
23 far, which seems to be Rules 1 through 457  
24 sequentially, are these the product of the  
25 task force, and they've been approved by the

1 task force?

2 HON. PAUL HEATH TILL: Yes,  
3 sir.

4 CHAIRMAN SOULES: Okay.

5 HON. PAUL HEATH TILL: I didn't  
6 exactly intend for it to be published as the  
7 final product. This was an intermediate draft  
8 that I sent you just to let you know what we  
9 were up to and what we were doing, but no harm  
10 is done, since we can go ahead and redraft and  
11 finish up. We're in the process of going  
12 through and changing what we thought was  
13 outmoded language. We changed "his" and "her"  
14 to the name of the party. We did that  
15 throughout, but I don't really know that that  
16 would be something that any of you would have  
17 any objection to. At least I hope not.

18 CHAIRMAN SOULES: This is not a  
19 final final?

20 HON. PAUL HEATH TILL: No, sir.

21 CHAIRMAN SOULES: Okay.

22 HON. PAUL HEATH TILL: The  
23 final draft is being prepared now, and we'll  
24 be going over it in the next three meetings of  
25 my task force and then after we do that then I

1 should be able to submit it to you.

2 CHAIRMAN SOULES: Okay. As  
3 soon as we get your final product then we will  
4 certainly make it the subject of a meeting and  
5 decide with your guidance how we should  
6 approach the issues.

7 Before we go to another report here,  
8 Richard Orsinger has the responsibility for  
9 Rules 15 to 165. That's pleadings and  
10 amendments and a number of things.

11 MR. ORSINGER: 76a.

12 CHAIRMAN SOULES: 76a.

13 MR. ORSINGER: Sealed records.

14 CHAIRMAN SOULES: Right.

15 Sealed records. And I've asked Rusty to help  
16 with that.

17 There are only now four members of that  
18 committee that I -- I think that's right.  
19 That's Richard, who is now the chair, because  
20 David Beck obviously is very occupied in his  
21 duties as president of the state bar. He's  
22 still on the committee, but not -- obviously  
23 not able to chair the subcommittee during his  
24 tenure as president; Tom Leatherbury and David  
25 Perry. And David Perry, let's see, he was a

1 member while he was chair of the Court Rules  
2 Committee, right? Okay. We need some --  
3 Richard needs some help because the rules  
4 are -- they really need to be dovetailed into  
5 the Discovery Rules, and probably that task  
6 alone is going to be a fairly significant  
7 one. So we're looking for volunteers to  
8 amplify Richard's subcommittee. Okay.  
9 Michael Prince; Bonnie Wolbrueck?

10 MS. WOLBRUECK: Yes, I've  
11 already told Richard I would be on the  
12 committee.

13 CHAIRMAN SOULES: Bill  
14 Dorsaneo.

15 PROFESSOR DORSANEO: The  
16 members of the Advisory Committee that are  
17 members of the Task Force on Recodification  
18 might be good candidates, because we have  
19 taken a stab at those parts of the rulebook,  
20 you know, from a remedial perspective in  
21 certain respects, and I would be at least  
22 willing to coordinate that.

23 CHAIRMAN SOULES: Okay. Let me  
24 just put you on that committee, if that's  
25 okay. And then who else would you suggest?



1                   PROFESSOR DORSANEO: Alex  
2 Albright and Elaine Carlson.

3                   CHAIRMAN SOULES: Will you  
4 volunteer, Elaine?

5                   PROFESSOR CARLSON: Of course.

6                   MR. ORSINGER: Alex, you don't  
7 have to be the reporter, if you'll just  
8 participate.

9                   PROFESSOR ALBRIGHT: Okay.  
10 I'll be glad to do that.

11                   CHAIRMAN SOULES: Okay. Is  
12 there anyone else? Who did I write to you,  
13 Richard, that --

14                   MR. ORSINGER: You mentioned  
15 David Keltner and Rusty McMains, but David  
16 wrote me back a letter and said that he was  
17 just involved for purposes of dovetailing the  
18 pretrial deadlines, which were discovery  
19 deadlines. I got the impression that he  
20 wasn't in for all of those rules, which there  
21 are 125 rules, so I don't know what you want  
22 to do with that.

23                   CHAIRMAN SOULES: I'm going put  
24 him on your committee. Since he's not here,  
25 we'll volunteer him too.

1 PROFESSOR ALBRIGHT: Isn't Chip  
2 Babcock real involved in Rule 76a?

3 CHAIRMAN SOULES: Yeah.  
4 Leatherbury should be and Chip too. They both  
5 do a lot of first amendment work.

6 PROFESSOR ALBRIGHT: Chip is  
7 not here either, so do you want to put him on  
8 that committee too?

9 CHAIRMAN SOULES: It appears  
10 that Leatherbury, according to my able  
11 assistant here, has been here of all of our  
12 meetings one half of one day, so have you had  
13 any response from him at all?

14 MR. ORSINGER: No, none.

15 CHAIRMAN SOULES: Well, we'll  
16 delete him from all subcommittees and leave it  
17 to the Court to do anything else.

18 And let's put Chip Babcock on for 76a.  
19 Obviously you can assign particular points to  
20 particular people. So the committee will now  
21 be Richard Orsinger, chair; David Beck,  
22 Michael Prince, Bonnie Wolbrueck, Bill  
23 Dorsaneo, Elaine Carlson, Alex Albright, Rusty  
24 McMains and Chip Babcock.

25 MR. ORSINGER: What about

1 Keltner?

2 CHAIRMAN SOULES: And Keltner  
3 and David Perry, pardon me. Do you want to  
4 write him a letter? I'll get Holly to send  
5 you a letter that will have the list and put  
6 copies to all of the people.

7 Okay. Next is -- time out. We're going  
8 to take ten. Be back at 3:30.

9 (At this time there was a  
10 recess.)

11 CHAIRMAN SOULES: Okay. We're  
12 going to get to work.

13 The State Bar Committee on Rules of  
14 Evidence has been in a year or so effort to  
15 give us a pro forma, if you will, on the  
16 merger of the Rules of Civil Evidence and the  
17 Rules of Criminal Evidence. There is a big  
18 database that Buddy and Mike can tell you  
19 about in a minute. And I just want to get a  
20 status report on that and then try to ask the  
21 Court as the chair of this Committee, request  
22 that the Supreme Court get with the Court of  
23 Criminal Appeals and appoint a joint task  
24 force to look at those rules together with a  
25 few members, sort of like we did with the

1 Rules of Appellate Procedure several years  
2 back, whenever their effective date was, so  
3 that persons responsible to the Court of  
4 Criminal Appeals are on the committee and  
5 people responsible to the Supreme Court -- the  
6 practitioners of civil appellate and the  
7 practitioners of criminal appellate will all  
8 be there looking after their own interests so  
9 that something doesn't fall through the  
10 cracks.

11 But Buddy, why don't you go ahead and  
12 give us the status of your review of that.  
13 You and Mike together can share that status  
14 report in sort of the same vein that Justice  
15 Till give us earlier.

16 MR. LOW: Mike has in his  
17 committee spent a lot of time trying to  
18 combine the Civil and the Criminal Rules of  
19 Evidence. And they've given me a red-line --  
20 they've given me two stacks of material. One  
21 is a proposed change red-lined against what it  
22 is now in the Code of Criminal Evidence, one  
23 red-lined Civil Evidence. There are not many  
24 substantive changes.

25 I've gone through that. I have not

1 submitted that to my committee because I felt  
2 like, as Luke said, we need some criminal  
3 lawyers on there. There are some substantive  
4 changes that I think should be made if we're  
5 going to do that. We should go through it  
6 rule by rule, and it would be -- it would take  
7 a little time. But the basic question I would  
8 want to know from both courts is that do they  
9 want the rules combined? And I'm assuming  
10 they do or they wouldn't have had the state  
11 bar do this work.

12 And with that direction and with the help  
13 of the Court, I and my committee members would  
14 be glad to serve with whomever else is  
15 appointed by the Supreme Court to go through  
16 these rule by rule.

17 I'll give you an example. There are many  
18 of them that apply in a civil case but not  
19 criminal, 407, rules on insurance and things  
20 of that nature. That can be taken care of.  
21 They've done that, just as the federal rules  
22 have, by stating in criminal cases this will  
23 be the rule. But we do need some guidance.

24 For instance, in civil cases it says the  
25 judge may on his own motion take judicial

1 notice of certain things, shall take judicial  
2 notice when requested by counsel. In a  
3 criminal case, it just says that the judge  
4 shall take judicial notice when requested by  
5 counsel. Should it be that the judge could in  
6 a criminal case on his own? I don't know. I  
7 don't know that might violate some  
8 constitutional guideline with the judge doing  
9 that. That's something I don't know. We need  
10 some help from the criminal lawyers.

11 But first I would like to know from the  
12 courts, if they want to do that, if they will  
13 appoint such a committee along with my  
14 committee members. We'll be glad to do that,  
15 go through it rule by rule.

16 And there has been a lot of work done by  
17 the State Bar Committee, and they've helped me  
18 fairly well post it, and they've done good  
19 work, but I think if we're going to combine  
20 them, we're going to need to make some further  
21 substantive changes, because I believe you all  
22 didn't make that many substantive changes.  
23 Your main effort was to consolidate. Is that  
24 correct?

25 MR. PRINCE: Do you want me to

1 address that?

2 CHAIRMAN SOULES: Mike, yes.  
3 Do you have something you want to add?

4 MR. PRINCE: I was chairman of  
5 that subcommittee and then chairman of the  
6 whole committee this year, but we did a lot,  
7 just hundreds of man hours and woman hours of  
8 work on that. And pretty much I would say in  
9 maybe as much as 90 percent of the cases the  
10 rules were almost identical, so there's very  
11 little change.

12 There are some -- as Buddy pointed out,  
13 there are some minor areas where you have a  
14 rule in a criminal case with a civil case. We  
15 did mechanically merge, clean up the language  
16 where there were inconsistencies, adopt a  
17 recommended choice of language where the  
18 difference in language didn't make any  
19 substantive difference, and we had some  
20 criminal lawyer input on our committee. But I  
21 think your idea is good.

22 I think at least a couple -- you have  
23 four members on your committee, as I  
24 understand it, Buddy, and I would think you  
25 would need at least two more who were criminal

1 lawyers who could serve in that function. And  
2 there may be some areas of substantive law  
3 that you want to look at beyond what we've  
4 looked at. But I think it's a worthwhile  
5 project considering we did it at the request  
6 of the Court, and so I think there is some  
7 interest -- request of the Supreme Court.  
8 There is some interest, and Justice Clinton  
9 attended our meetings last year, so he was  
10 aware of this and had some input while it was  
11 going on. I think there's some interest in  
12 it.

13 I think they're looking to your group for  
14 a recommendation, a policy recommendation  
15 about whether it should be done or not, and I  
16 think what Buddy is saying is before he can  
17 make a decision or his committee can make a  
18 recommendation about whether it ought to be  
19 done, those substantive areas need to be  
20 looked at, and I agree with that, and so I  
21 would concur in what he's asked for.

22 CHAIRMAN SOULES: Okay. What  
23 the Chair suggests is that we -- is that we  
24 recommend or suggest at least to the Supreme  
25 Court or inquire of the Supreme Court and the



1 Court of Criminal Appeals and ask the Supreme  
2 Court to inquire of the Court of Criminal  
3 Appeals if they want to have this project  
4 taken -- undertaken as a joint project of the  
5 two courts. And if they do, then to ask them  
6 to each appoint members to a task force and  
7 have that task force get -- bring to us and to  
8 both courts a work product, a final product  
9 report that we can pass on, much like we did  
10 on the Rules of Appellate Procedure sometime  
11 in the past. Does that sound like a logical  
12 approach to you?

13 MR. PRINCE: That sounds like a  
14 logical approach to me.

15 CHAIRMAN SOULES: Does anybody  
16 disagree with that? Paula Sweeney.

17 MS. SWEENEY: What is the  
18 ostensible reason for wanting to combine the  
19 two sets of rules to begin with? I mean,  
20 obviously this idea germinated somewhere?  
21 What's the germ?

22 MR. LOW: The federal courts do  
23 it in the federal rules, and --

24 CHAIRMAN SOULES: Well, Mike, I  
25 think you can address that.

1 MR. PRINCE: Yeah, I can  
2 address that. That's part of it. Saving  
3 paper is one thing. A lot of the cases you  
4 read now, although the rules don't -- and the  
5 courts, of course, don't hold to that in all  
6 of their procedures, but in a lot of rulings,  
7 each track of the appellate system and at the  
8 trial court I've seen this happen. But when  
9 there is a ruling on hearsay or a sustained  
10 objection where the rules are identical, that  
11 persuades the parties on either side -- I  
12 mean, there's no logical reason for the rules  
13 to be separated except when there is a  
14 specific constitutional or Texas statutory  
15 ruling that has historical meaning on  
16 different rulings. And so the unification is  
17 a way of simplifying or having in one place  
18 what, if there are differences, what those  
19 differences are with possible comments as to  
20 why they are there. That makes it a lot  
21 easier for the rules of reference.

22 We had on our committee, for example, we  
23 had a lot of trial judges who sit in  
24 jurisdictions where they hear all kinds of  
25 cases, both civil and criminal, and we heard I

1 think it's fair to say uniformly judges who  
2 sit in those jurisdictions who said that would  
3 make it easier for them to have that one  
4 reference book to look at rather than going to  
5 two separate places to determine whether there  
6 were two different rules or two separate  
7 rules.

8 It helps you if you have a set of  
9 annotated rules. Some publisher later is  
10 going to put this out, just like the West went  
11 under the federal rules. You'll see under  
12 rule forty-whatever in the federal rules in  
13 the annotated books that come out rulings in  
14 civil cases and criminal cases, handy, ease of  
15 reference things.

16 So I think that's the origin of it.  
17 There's just no good reason not to do it, and  
18 it makes a lot of sense to have it all in one  
19 place. And where the differences are, the  
20 differences are still there, just like in the  
21 federal rule.

22 CHAIRMAN SOULES: Did I  
23 understand that your committee approached the  
24 Supreme Court or vice versa?

25 MR. PRINCE: The Supreme Court

1           approached our committee.

2                           CHAIRMAN SOULES:   And you were  
3           asking the Court if there was something  
4           substantive that they wanted your committee to  
5           undertake?

6                           MR. PRINCE:   No.   The committee  
7           came to -- the Supreme Court came to us.   And  
8           of course, Lee Parsley can speak to this more  
9           directly than anybody, since he was the --  
10          since he was the person who brought it to our  
11          State Bar Committee.   But they wanted a  
12          recommendation from the State Bar Committee on  
13          Administration of Rules of Evidence about  
14          whether or not we thought it was a good idea  
15          and would recommend the merging and  
16          unification of the rules, and if we were to  
17          make such a recommendation, in what form would  
18          we recommend that those rules be.

19                          And we did adopt that recommendation by  
20          the vote of our Committee at the last meeting  
21          in May of this past year and thought it was a  
22          good idea and recommended the form in which it  
23          should be.   And that's the form in which it is  
24          now that has been forwarded to you.

25                          I think, Lee, you still have the

1 diskettes on all of that work that was done,  
2 which has -- I think it's in five different  
3 forms. It's got a civil set with the criminal  
4 inserted. It's got a criminal set with the  
5 civil inserted, and then it's got one set with  
6 our Committee's recommendation about what it  
7 ought to be merged in, and the work that you  
8 did on it later with the cleanup.

9 Have I accurately stated what you have on  
10 there?

11 MR. PARSLEY: That's correct.

12 MR. LOW: What I've gotten is  
13 the red-lined version compared with what you  
14 have recommended red-lined against the present  
15 criminal rule, then the same thing against the  
16 civil rule.

17 MR. PRINCE: Right. And he has  
18 the diskettes. Lee has got the diskettes on  
19 that. Does that answer your question?

20 CHAIRMAN SOULES: Yeah. It was  
21 really Paula's question.

22 MR. PRINCE: Oh, I'm sorry.

23 CHAIRMAN SOULES: Paula, did  
24 you get that answer?

25 MS. SWEENEY: Yes. Thank you.

1 CHAIRMAN SOULES: Okay.

2 MR. ORSINGER: Luke, can I  
3 ask --

4 CHAIRMAN SOULES: Richard  
5 Orsinger.

6 MR. ORSINGER: This is a  
7 nonsubstantive merging of the rules. No one  
8 has ever mentioned the possibility of  
9 considering substantive changes to specific  
10 rules. I know that our rules are largely  
11 patterned after the federal rules. Is there  
12 any consideration being given on whether the  
13 scope of a privilege or exceptions or whatever  
14 should be reworded or something?

15 MR. LOW: No. That's what I'm  
16 saying, that I think if we're going to merge  
17 the rules, we should then make a study. And  
18 although I didn't state it because I didn't  
19 think of it until you told me, we perhaps  
20 should compare the criminal rules with it and  
21 see if, you know, there are substantive  
22 changes. I think we should look at each rule  
23 for substantive changes when we do combine  
24 them.

25 MR. ORSINGER: Okay. I mean, I

1 think we should consider this. I mean, every  
2 other rule of procedure we're looking at as to  
3 whether it's a good rule or a bad rule, and  
4 there may be some opinions about some of those  
5 Rules of Evidence as to whether they should be  
6 where they are.

7 MR. LOW: It would be useless  
8 to combine them and then come back two years  
9 later and make substantive changes that should  
10 have been made. I mean, I think that's why I  
11 put in my letter, the cover letter, that it  
12 would be a fairly good task not to diminish  
13 the long hours and hard work the committee  
14 did, because it did an excellent job of  
15 combining, but we need to take it further if  
16 we're going to do it.

17 MR. PRINCE: Yeah. Just a  
18 point of clarification on that, too. There  
19 are -- we had -- the Administration of Rules  
20 of Evidence Committee of the State Bar does --  
21 its function is to come up with, I think as  
22 this group knows, and from time to time make  
23 recommended changes in the Rules of Evidence  
24 if they think it's appropriate. And then this  
25 Committee decides whether to pass on that and

1 send it on to the Supreme Court or not.

2 In the last three or four years we have  
3 adopted certain recommendations that we did  
4 incorporate in what we were proposing. But in  
5 each case what Buddy has now, what his  
6 committee has now, back where we were making a  
7 recommendation that hasn't -- that is not part  
8 of the current rules either on the civil or  
9 the criminal side, that is indicated by  
10 footnotes. So we've clearly identified this.  
11 In the rest of this, the text is merged and  
12 where there is a case where we make a  
13 recommended change in the unification of both  
14 rules, where it's something that's beyond  
15 what's in current rules on either side right  
16 now, that's clearly identified by a footnote  
17 reference.

18 But there are other areas that we did not  
19 look at that we hadn't adopted a rule on, and  
20 Buddy is exactly right about that. There may  
21 be other areas of substantive change that need  
22 to be looked at.

23 MR. LOW: I didn't mean to  
24 imply --

25 MR. PRINCE: No, I understand.



1 MR. LOW: -- that you didn't  
2 make some changes, but I'm just saying the  
3 main effort was that, and as recommendations  
4 come up, we may want to go through it.

5 MR. PRINCE: Of course. Sure.

6 CHAIRMAN SOULES: Okay.  
7 Anything else on that? Any questions?

8 Okay. Next I'll let Holly pass out this  
9 Affidavit of Inability, and I would like to  
10 take this in two parts, Steve. I would like  
11 to talk first about paragraph -- let's see,  
12 the opening paragraphs and then paragraphs 3  
13 and 4 before we talk about the clerk having  
14 the right to contest.

15 Steve, Rule 145, what's this all about?

16 MR. YELENOSKY: Well, once  
17 again we have two pages here. The second page  
18 is a letter I wrote actually to Bonnie, and  
19 we've talked about it since then, I guess,  
20 that was a year and a half ago, explaining  
21 where this proposed change in the rule comes  
22 from and what it's intended to do.

23 This rule came really out of the State  
24 Bar Committee on Legal Services to the Poor  
25 back in late '93, I guess, and has been

1 promoted by the Legal Services community  
2 largely in reaction to complaints from  
3 attorneys accepting referrals from the Legal  
4 Services community.

5 The part that obviously is the big change  
6 that's underlined in no. 3 basically replaces  
7 an affidavit of inability with an attorney's  
8 certification that the individual is being  
9 represented directly by an attorney in an  
10 IOLTA funded program and has been screened for  
11 IOLTA eligibility or is being represented by a  
12 private attorney upon referral from one of  
13 those programs and after that screening. That  
14 would substitute for the affidavit of  
15 inability, and it would not be contestable.

16 The reason for that is that -- the intent  
17 of that is to ease, and since it was proposed,  
18 has been to ease the representation of poor  
19 people basically by cutting out the contests  
20 of the affidavit that are often made and cause  
21 consternation among the private bar who accept  
22 these cases who say, "Well, I accepted this  
23 case, and I'm willing to give my volunteer  
24 time to help this person with their problem,  
25 but what I don't like is having to deal with

1 the contests over an affidavit of inability  
2 and appearing at a hearing and dealing with  
3 that when I wouldn't be doing this case if I  
4 wasn't convinced that the individual is  
5 indigent and I know that you've already  
6 screened them for indigency."

7 So that's what it proposes to do. Of  
8 course, it's possible with any system that  
9 someone could get through this system who  
10 should be paying a filing fee, but that  
11 possibility weighed against the immense  
12 duplication of effort going on with our IOLTA  
13 funded programs doing screenings initially  
14 is -- weighs in this direction in my mind.

15 The other part of it -- I guess you said  
16 you want to leave out the portion dealing with  
17 the clerks.

18 CHAIRMAN SOULES: Right.

19 MR. YELENOSKY: And talk about  
20 that secondly.

21 CHAIRMAN SOULES: Okay. So if  
22 the client has been screened through an IOLTA  
23 program and the lawyer has taken that client's  
24 case without fee including without a  
25 contingent fee, then the lawyer files a

1 certificate as set forth in this rule, and  
2 that takes care of costs. That means the  
3 party is free of any obligation to pay costs?

4 MR. YELENOSKY: Right.

5 CHAIRMAN SOULES: And that it's  
6 noncontestable?

7 MR. YELENOSKY: That's right.

8 CHAIRMAN SOULES: Okay.

9 HON. SCOTT A. BRISTER: You've  
10 just taken Rule 145 and added the underlined  
11 language there?

12 MR. YELENOSKY: I believe so,  
13 but it's been so long now, I would hesitate if  
14 someone said that's wrong.

15 CHAIRMAN SOULES: One  
16 question: If the indigent recovers in the  
17 suit, I guess then the costs would be charged  
18 to the losing party, so that would -- the  
19 indigent would not need to pay costs in that  
20 event anyway, right?

21 MR. YELENOSKY: That's right.

22 CHAIRMAN SOULES: Okay. Is  
23 there any opposition to this?

24 Judge Guittard.

25 HON. C. A. GUITTARD:

1 Mr. Chairman, I'm not opposing it, but I  
2 wanted to point out that in the Appellate  
3 Rules that we adopted, Rule 45 of the proposed  
4 TRAP Rules, we have tried to follow 145 of the  
5 Rules of Civil Procedure. And I don't know  
6 why this attorney certificate procedure  
7 shouldn't apply both on appeal and in the  
8 trial court, so then I would assume that  
9 this -- if we adopt this, then we ought to  
10 likewise modify the Appellate Rule 45.

11 CHAIRMAN SOULES: Richard  
12 Orsinger.

13 MR. ORSINGER: Well, David is  
14 not here right now, but you know, at the  
15 appellate level the proceeding in forma  
16 pauperis is going to be a particular burden to  
17 the court reporter, and the affidavit of  
18 inability at the trial level really I think  
19 the government absorbs the cost except for, I  
20 guess, maybe even including the cost of  
21 service and subpoenas and whatnot. But I'm  
22 not sure that we ought to condemn a court  
23 reporter to do a job that might normally be  
24 worth \$10,000 on the basis of a certificate  
25 that can't be contested at a judicial hearing.

1 CHAIRMAN SOULES: Okay. Well,  
2 let's take this aside as to whether we take  
3 this to the appellate courts. You all can  
4 muse about that and let us know.

5 HON. C. A. GUITTARD: Do you  
6 want us to do a report to you on that?

7 CHAIRMAN SOULES: Yes, sir, if  
8 you would like. If you decide that you should  
9 make a report on it to us, then go ahead. If  
10 you decide that it's not something that needs  
11 a report, that's okay too.

12 Bonnie, what's your approach to this?

13 MS. WOLBRUECK: Well, I talked  
14 to Steve about this, and we agreed to this in  
15 this format as much as I recall. Of course, I  
16 don't need to tell all of you that there's  
17 much abuse throughout the state in Rule 145.  
18 We have attorneys that file every lawsuit with  
19 an affidavit of inability. We have attorneys  
20 that take multimillion lawsuits on a  
21 contingency and file an affidavit of  
22 inability, so there is much abuse of Rule 145,  
23 and every clerk in the state of Texas will  
24 attest to that, and I believe that some  
25 changes do need to be made.

1                   CHAIRMAN SOULES: All right.  
2                   Just, though, focusing on the changes to  
3                   accommodate the IOLTA client.

4                   MS. WOLBRUECK: At this point I  
5                   don't think we oppose that.

6                   CHAIRMAN SOULES: Judge  
7                   Brister.

8                   HON. SCOTT A. BRISTER: The  
9                   current Rule 145 has paragraph 3(1), "is  
10                  receiving free legal services, without  
11                  contingency" as rather than being automatic,  
12                  makes -- can be filed to assist the court in  
13                  understanding the financial condition of the  
14                  party. I'm not that familiar with -- I'd like  
15                  to hear just briefly about the IOLTA  
16                  screening. But assuming that screening is  
17                  adequate, I don't have a problem with making  
18                  that automatic.

19                  But I'm not sure that just because the  
20                  attorney comes in and says, "I'm not doing a  
21                  contingency," end of hearing, that it is now  
22                  mandatory that the clerk, the court reporter,  
23                  everybody works for free, and that we need to  
24                  make that change in order to make the other  
25                  change.

1 CHAIRMAN SOULES: Steve.

2 MR. YELENOSKY: First of all,  
3 yeah, I wish I had a rulebook in front of me  
4 here, but I think you're right, that this  
5 underlining not only adds but probably  
6 replaces, so there isn't strike-out language  
7 here, and so I think we can clarify that with  
8 a rulebook. And there was a previous  
9 opportunity for an attorney to certify, but  
10 that was of no --

11 HONORABLE SCOTT A. BRISTER:  
12 -- not much value.

13 MR. YELENOSKY: -- dispositive  
14 quality. So yeah, sure, you can file an  
15 attorney's certificate and you need to say  
16 that in the rule, but it doesn't add  
17 anything.

18 HON. SCOTT A. BRISTER: What's  
19 the IOLTA screening process?

20 MR. YELENOSKY: Well, first of  
21 all, in order to -- it has to be a program  
22 funded by IOLTA, so the screening process  
23 first is the Equal Justice Committee that  
24 distributes IOLTA funds deciding to fund a  
25 particular program or project with Interest on



1 Lawyers' Trust Account. And of course, in  
2 order to be funded it has to meet a variety of  
3 criteria, but including that it's serving  
4 people that are no more than 125 percent above  
5 the poverty line.

6 Now, again, the last time I looked at  
7 this was awhile ago, but at that point it was  
8 125 percent, and I don't believe that's  
9 changed, that IOLTA money has gone down, so I  
10 think it's still. When I say 125 percent of  
11 poverty level, you have to remember that  
12 100 percent of poverty level as described by  
13 the federal government is incredibly low, and  
14 I couldn't give you the number off the top of  
15 my head, but it's federal poverty figures.

16 So when we say they're screened, income  
17 information -- if you go to a Legal Services  
18 office, for instance, people are asked what  
19 their income is, whether they're on  
20 assistance. If they're on some kind of  
21 assistance, then they've also been screened by  
22 the federal government. But if they're not on  
23 some kind of assistance, then it would be a  
24 representation as to their income level.

25 It is correct that you don't have any

1 independent investigation generally of the  
2 person's income. And that's what I said  
3 initially, that there could be somebody who  
4 represents to a Legal Services program that,  
5 you know, "My income is such" -- sometimes  
6 there are indications. Usually you know what  
7 your population is like, and if somebody comes  
8 in with an address that doesn't appear to be  
9 in an area that is indigent or has a problem  
10 that doesn't appear to be a problem that's  
11 suffered by somebody of low income, there are  
12 warnings signs.

13 But sure, someone could logically come in  
14 and say, "Yeah, I make minimum wage and I have  
15 15 children," and it's not true. But that, I  
16 think, is an evil worth accepting because that  
17 can happen in any system. You can have  
18 violations there. And the same person might  
19 very well say that on an affidavit, you know,  
20 so that's your only added protection.

21 What you do know is that a Legal Services  
22 program has screened them. Generally they  
23 have some kind of assistance or public housing  
24 or assisted housing that seems to verify that  
25 generally. And you've got a private attorney

1           who has accepted or -- either a Legal Services  
2           attorney or a private attorney who is not paid  
3           who is sufficiently interested in the case to  
4           take it without fee because he thinks there's  
5           a pro bono issue there, so you have those  
6           checks. And the question is, do you then want  
7           to have this private attorney or Legal  
8           Services attorney -- and usually it's the  
9           private attorneys that complain about having  
10          to deal with the contest.

11                           CHAIRMAN SOULES: Judge Till.

12                           HON. PAUL HEATH TILL: So the  
13          screening for IOLTA would be if they come in  
14          and they're under any federal subsidy program,  
15          then that would be an automatic  
16          qualification?

17                           MR. YELENOSKY: No. No. What  
18          I'm saying is that when somebody applies from  
19          Legal Services, very often they will be  
20          receiving some federal assistance, which they  
21          couldn't have gotten if they weren't poor.  
22          But that is not sufficient. Legal Services  
23          programs and IOLTA programs will ask about  
24          their income and what their income is. I'm  
25          just saying that's another independent source

1 of verification of low income status. If  
2 somebody comes in and they say, "I live in  
3 public housing, I get food stamps and I get  
4 AFDC," and you ask them what their income is,  
5 you have some reason to believe them if, you  
6 know, you have some indication they're  
7 receiving public assistance.

8 HON. PAUL HEATH TILL: But  
9 there is no -- there is really no  
10 investigation or anything?

11 MR. YELENOSKY: No.

12 HON. PAUL HEATH TILL: You just  
13 take it -- but then this becomes an assurance  
14 that the court is to accept it without  
15 question?

16 MR. YELENOSKY: That's correct.

17 HON. PAUL HEATH TILL: I would  
18 oppose that.

19 CHAIRMAN SOULES: Richard  
20 Orsinger.

21 MR. ORSINGER: Steve, would you  
22 be comfortable with a midground that you still  
23 have to file an affidavit swearing to all of  
24 that, but that the affidavit wouldn't be  
25 subject to contest, just subject to

1 prosecution if it's false?

2 MR. YELENOSKY: Well, this does  
3 require the attorney to file a certificate.  
4 You're saying to have the client file an  
5 affidavit?

6 MR. ORSINGER: I'm talking  
7 about that somebody -- you want to avoid a  
8 contest.

9 MR. YELENOSKY: Right.

10 MR. ORSINGER: I personally  
11 would like to avoid fraud on the government.

12 Now, you could possibly keep people from  
13 lying by making them go under oath with the  
14 perhaps fear that they might get indicted and  
15 put in jail if they're caught lying. And it  
16 seems to me that's a better safeguard than  
17 just the fact that they've convinced a federal  
18 agency to support them. And yet it would  
19 still accomplish your purpose. This may not  
20 meet Judge Till's concerns, but at least  
21 somebody is going under oath, and if they're  
22 caught lying they could go to jail. It seems  
23 to me that that ought to help a little bit.

24 CHAIRMAN SOULES: Any problem  
25 with that, Steve?

1 HON. PAUL HEATH TILL: Excuse  
2 me, how are you going to find out if they're  
3 lying if you can't contest it?

4 MR. ORSINGER: I don't know.  
5 Maybe it's a stupid suggestion. I don't know.

6 MR. YELENOSKY: Well, let me  
7 ask you this: How are you going to decide  
8 which ones to contest? Are you going to  
9 contest all of them? Because then the  
10 question is, are we willing to say that we're  
11 going to contest all affidavits and we would  
12 rather do that to catch the few that are maybe  
13 fraudulent? Because I don't know what your  
14 criteria would be for contesting it.

15 CHAIRMAN SOULES: Mr. Jackson.

16 MR. JACKSON: Can I give you --  
17 we do this sort of on a practical basis there  
18 in Dallas now. We go through Ethel Ligans,  
19 who is the legal person there in Dallas for  
20 their pro bono program. And basically it  
21 operates the same way. It helps us avoid  
22 conflicts, because we'll take a pro bono  
23 deposition in a case that comes through  
24 Ethel's office. The other side then says,  
25 "You're working for them for free. You've

1 got to work for us for free."

2 And we say, "We're not working for  
3 anybody for free. We're working for Ethel  
4 Ligans for free. If you go to Ethel Ligans  
5 and she tells us you're a pro bono candidate,  
6 we will work for you too."

7 So basically everything comes through the  
8 agency, not from the lawyers.

9 CHAIRMAN SOULES: Well, this  
10 comes through --

11 MR. JACKSON: Ethel comes and  
12 tells the court that these are people that  
13 they recommend. Wouldn't that cut out some  
14 fraud?

15 MR. YELENOSKY: Well, that  
16 seems analogous to the program saying that we  
17 have screened them. We haven't done an  
18 independent investigation unless there's been  
19 some indication that would lead us to do that,  
20 which there could be.

21 The other side could say, "Hey, I know he  
22 has a boat." Then the Legal Services program  
23 ought to ask some questions. But without some  
24 independent investigation -- now, with the  
25 person that you're talking about, I don't know

1 whether she sends out a private investigator.  
2 She probably operates on a declaration.

3 MR. JACKSON: She probably  
4 doesn't. But we're of the opinion that if she  
5 tells us it's okay, we'll do it.

6 MR. YELENOSKY: Well, that's  
7 analogous to a screening by an IOLTA program  
8 in my opinion.

9 CHAIRMAN SOULES: Judge Till.

10 HON. PAUL HEATH TILL: Why not  
11 let the person on the other side of this  
12 equation do the challenging if they think it's  
13 appropriate. They're the ones that are on the  
14 recipient end. Why couldn't they challenge  
15 the validity and set it for a hearing.

16 MR. YELENOSKY: That's what  
17 they do now.

18 HON. PAUL HEATH TILL: Well,  
19 what's wrong with that?

20 MR. YELENOSKY: Well, what's  
21 wrong with that is why the Legal Services for  
22 the Poor Committee proposed this, which is  
23 that the private attorneys who are  
24 representing indigents are feeling that  
25 routinely I guess in some jurisdictions that



1 the other attorney is going to oppose the  
2 affidavit every time and they're going to be  
3 stuck dealing with that and focusing on that  
4 more than on the underlying problem.

5 CHAIRMAN SOULES: Paula  
6 Sweeney.

7 MS. SWEENEY: Steve, once you  
8 get the contest, what do you have to do to  
9 respond to it?

10 MR. YELENOSKY: Well, I mean,  
11 generally we didn't deal with them in Legal  
12 Services, but there's a hearing. There's a  
13 hearing on whether or not the person is -- you  
14 have to prove up the person's indigency.

15 HON. SCOTT A. BRISTER: Well,  
16 the burden of proof is on the indigent. I'm  
17 wondering if, rather than make it mandatory,  
18 it might make sense under these circumstances  
19 to shift the burden of proof to the party  
20 contesting it.

21 MR. YELENOSKY: Then they would  
22 just engage in discovery of all your income  
23 and --

24 CHAIRMAN SOULES: Okay. Any  
25 other comment on this? This is Steve's

1 proposal for amendment to the opening  
2 paragraph or paragraphs 3 or 4 of Rule 145.

3 Alex Albright.

4 PROFESSOR ALBRIGHT: I would  
5 just like to move for the adoption of it. I  
6 think it seems like this is more screening  
7 than probably goes on under the current  
8 procedure, and that if these people have gone  
9 through all these screening procedures, the  
10 chances of fraud are relatively nil. And if I  
11 have tried to represent somebody or if I have  
12 been assigned this case by my pro bono clinic,  
13 I think that to require me to have to go down  
14 to the courthouse and prove up this person's  
15 income is just an added something that I have  
16 to do that I shouldn't. I just don't see the  
17 point of it.

18 CHAIRMAN SOULES: Anything else  
19 on this? Carl Hamilton.

20 MR. HAMILTON: I like Richard  
21 Orsinger's suggestion that the indigent have  
22 to file an affidavit. I would like to propose  
23 that as an amendment.

24 CHAIRMAN SOULES: Okay. The  
25 motion has been made that the indigent -- that

1 this should be changed so that the indigent  
2 must file an affidavit.

3 MR. ORSINGER: Second.

4 CHAIRMAN SOULES: It's  
5 seconded. Any opposition? No opposition.  
6 That's done. Any other comments?

7 Judge Brister.

8 HON. SCOTT A. BRISTER: I would  
9 move that we drop the (1) out of no. 3 and  
10 leave it as is, which is, the current rule  
11 says, "If the party is represented by an  
12 attorney who is providing free legal services  
13 without contingency because of the party's  
14 indigency, said attorney may file an affidavit  
15 to that effect to assist the court in  
16 understanding the financial condition of the  
17 party."

18 And let's make this IOLTA section a  
19 separate section that has the mandatory-type  
20 language in it.

21 CHAIRMAN SOULES: I don't see  
22 any reason for deleting the current  
23 paragraph 3. It's a different subject than  
24 this new paragraph 3.

25 MR. YELENOSKY: It's a

1 situation where they haven't received the  
2 referral through an IOLTA program, and there's  
3 certainly no harm in leaving it in.

4 CHAIRMAN SOULES: Right. So  
5 why don't we -- would it meet your suggestion  
6 there, Judge Brister, to leave (3) in and make  
7 this (3) that he proposes (4)?

8 HON. SCOTT A. BRISTER: (4) or  
9 or with dropping no. 1, yeah.

10 MR. YELENOSKY: The only  
11 drafting issue there is to distinguish  
12 certification under (3) and the new (4), and  
13 perhaps (3) should be labeled something  
14 different. Because up at the preamble  
15 paragraph we're saying except an attorney's  
16 certificate, so I can work on that. I could  
17 do it right now or bring it back tomorrow.

18 HON. SCOTT A. BRISTER: That's  
19 easy enough.

20 MR. YELENOSKY: Yeah.

21 CHAIRMAN SOULES: Why do you  
22 want to delete "receiving free legal services  
23 without contingency"?

24 HON. SCOTT A. BRISTER: Because  
25 that's what the current no. 3 is.

1                   CHAIRMAN SOULES: Well, why  
2 shouldn't that also be the requirement if it's  
3 an IOLTA?

4                   HON. SCOTT A. BRISTER: Well,  
5 that's a good question.

6                   MR. YELENOSKY: Well, I can  
7 work on the language on that.

8                   CHAIRMAN SOULES: Well, I want  
9 to hear from Judge Brister on that. Is that  
10 okay?

11                  HON. SCOTT A. BRISTER: That  
12 makes sense.

13                  CHAIRMAN SOULES: Okay. So you  
14 would leave (3) intact, but it would require  
15 an affidavit?

16                  MR. YELENOSKY: But it would  
17 not be contestable, is what you're saying?

18                  CHAIRMAN SOULES: The new (4),  
19 that's correct.

20                  MR. YELENOSKY: All right.  
21 I'll bring it back tomorrow after revising it.

22                  CHAIRMAN SOULES: Well, we've  
23 still got to vote on it, so the -- and you'll  
24 have to do some work on the preamble, I guess,  
25 to make it fit the rule leaving the current

1 (3) in and adding your (4) and (5), the last  
2 two paragraphs of (4) and (5).

3 Okay. Without regard to the issue in  
4 no. 1 about the clerk contesting the  
5 affidavit, which we'll get to in a moment, is  
6 there any opposition to these changes?

7 Okay. One.

8 Those in favor show by hands. 13.

9 And those opposed. One. Okay. It  
10 carries by a vote of 13 to one.

11 HON. C. A. GUITTARD:

12 Mr. Chairman, this Committee has already  
13 approved our TRAP Rule 45 which is parallel  
14 and in which some of this language from 145  
15 has been slightly modified, and I'm  
16 wondering -- I would like to inquire of  
17 Mr. Yelenosky if that has been considered, or  
18 if not, whether it should be?

19 CHAIRMAN SOULES: Modifying  
20 Rule 145 to be what?

21 HON. C. A. GUITTARD: In  
22 accordance with TRAP Rule 45 as approved by  
23 this Committee.

24 CHAIRMAN SOULES: That hasn't  
25 been considered, right, Steve?

1 MR. YELENOSKY: Well, thinking  
2 about it actually with Richard, as someone who  
3 does appellate work routinely, at the point  
4 where you file -- where under the new rules,  
5 you file a notice of appeal rather than an  
6 appeal bond and you would be requesting that  
7 the court reporter prepare the transcript or  
8 statement of facts at that point?

9 HON. C. A. GUITTARD: Yeah.

10 MR. YELENOSKY: And so I  
11 guess -- so which rules would apply at that  
12 point? Would you still be under -- 145 would  
13 still apply, or would you go under to the  
14 Appellate Rules?

15 MR. ORSINGER: No. There's a  
16 drafting problem.

17 CHAIRMAN SOULES: Okay. The  
18 Appellate Rules are off the table. We've got  
19 a lot of rules that are on the table. If you  
20 want to bring something to the Appellate  
21 Rules --

22 MR. YELENOSKY: Well, I'm just  
23 trying to get it clear that if it was the  
24 Appellate Rules, then this doesn't address  
25 that situation. And I guess Luke has

1 suggested that you all report on those as to  
2 whether you think the TRAP Rules should follow  
3 this rule.

4 CHAIRMAN SOULES: If we get a  
5 proposal, we'll look at.

6 Okay. Now, the next thing that's in this  
7 rule is whether the clerk should be allowed to  
8 contest the affidavit.

9 MR. YELENOSKY: The affidavits  
10 other than the ones that --

11 CHAIRMAN SOULES: Exactly.

12 MR. YELENOSKY: -- are under  
13 (4)?

14 CHAIRMAN SOULES: This rule was  
15 modified was some years back, and there was a  
16 problem, and that was that Ray Hardy, then the  
17 district clerk of Harris County, felt that it  
18 was his responsibility and duty as a public  
19 official to contest every affidavit of  
20 inability that was filed there, because  
21 otherwise one might slip through and it was  
22 his responsibility to see that that didn't  
23 happen.

24 It was modified to then delete the  
25 clerk's authority to contest because there was



1 a lot of court activity going on about that.  
2 And the last sentence was added that if the  
3 court finds that another party to the suit can  
4 pay the costs of the action, the other party  
5 shall pay the cost to the action. In other  
6 words, the winning party, the nonindigent, if  
7 he's got the ability to pay the costs, he must  
8 pay, so that there was some answer to the fact  
9 that the clerks were being removed from  
10 their -- from the contest process, but the  
11 county would still have a way to recover costs  
12 where it might be appropriate.

13 Now, that was what was done, I don't  
14 know, probably in the mid or early '80s when  
15 that change was made.

16 HON. SCOTT A. BRISTER: So if  
17 somebody was indigent and you win, you've got  
18 to pay the costs anyway?

19 CHAIRMAN SOULES: Yes. Read  
20 the last sentence. It says, "If the court  
21 finds that another party to the suit can pay  
22 the costs of the action, the other party shall  
23 pay the costs of the action."

24 MS. SWEENEY: That's terrible.

25 CHAIRMAN SOULES: Well, that's

1 what it is now. And unless we're going to  
2 retrogress to earlier days, then that change  
3 in no. 1 shouldn't be made.

4 Bonnie, do you want to speak to this?

5 MS. WOLBRUECK: Yes, I do. As  
6 I stated before, in the Rule 145 there has  
7 been much misuse and abuse since the new rule  
8 went into effect not allowing the clerk to  
9 contest it. Understandably the last sentence  
10 was added, but the reality in court life and  
11 everyday life is many times these affidavits,  
12 although I may stamp all over the docket sheet  
13 that there is an affidavit filed, the issue is  
14 not brought before the court unless the clerk  
15 files a motion to rule on the costs, which  
16 means additional time, court time.

17 And most divorces at least will come in  
18 to -- each party will pay their own costs. I  
19 mean, most divorce decrees read like that, so  
20 the county is usually out the cost on, you  
21 know, all of these affidavits, unless the  
22 clerk actually files a motion to rule for  
23 costs and handles it from there.

24 I would suggest that it remain in there  
25 that the clerk can contest it because possibly

1 then it would stop some of the abuse.

2 CHAIRMAN SOULES: Okay. So you  
3 think it should be amended to put back the  
4 provision that the clerk can contest?

5 MS. WOLBRUECK: There has to be  
6 some mechanism in it to stop the abuse that's  
7 happening.

8 CHAIRMAN SOULES: Have you  
9 tried to notify the court that you have an  
10 affidavit of inability?

11 MS. WOLBRUECK: Yes, I do. In  
12 fact, some clerks have great big red stamps  
13 that they stamp all over the docket sheet  
14 hoping that the court will see whenever they  
15 come forward and contest it or something, but  
16 even with that sometimes it's missed.

17 HON. SCOTT A. BRISTER: I'll  
18 second it.

19 CHAIRMAN SOULES: Okay. Moved  
20 and seconded. Is there any discussion, any  
21 further discussion on that?

22 HON. C. A. GUITTARD: What is  
23 the motion?

24 CHAIRMAN SOULES: That the  
25 clerk be -- that we put back in the rule the

1 clerk's authority to contest an affidavit of  
2 inability.

3 MR. HAMILTON: It's in this  
4 present rule.

5 CHAIRMAN SOULES: Well, no,  
6 that's the underlined part. It was taken  
7 out. I don't know when.

8 MR. PRINCE: Question.

9 CHAIRMAN SOULES: Yes, sir.

10 MR. PRINCE: What you're  
11 talking about is not that that would be in a  
12 case with an affidavit other than this  
13 prescreened --

14 MS. WOLBRUECK: Other than  
15 that, yes. We have agreed to the one where  
16 the indigent is legally indigent, you know,  
17 that screening; though any other affidavits,  
18 the clerk could, yes.

19 CHAIRMAN SOULES: Okay. Those  
20 in favor show by hands. 16. Those opposed.  
21 Okay. That carries 16 to nothing.

22 MR. ORSINGER: Luke, do we have  
23 specific language, or does someone from my  
24 subcommittee need to redraft this rule?

25 CHAIRMAN SOULES: No. We've

1 got the language now, so we'll send this to  
2 your committee to be sure that you have a copy  
3 of it.

4 Be sure it goes to his committee as well.

5 Okay. Now let's get to Rule 114. Are  
6 there any other preliminary matters in there  
7 that we need to cover?

8 Okay. 114 --

9 MS. GARDNER: Mr. Chairman.

10 CHAIRMAN SOULES: Anne

11 Gardner.

12 MS. GARDNER: I'd like to make  
13 a motion that we delete the last sentence of  
14 that section 1, that paragraph 1 of Rule 145.

15 CHAIRMAN SOULES: The motion  
16 has been made to delete the last sentence. Is  
17 there a second?

18 HON. C. A. GUITTARD: The last  
19 sentence of what?

20 CHAIRMAN SOULES: The last  
21 sentence of paragraph 1.

22 MR. HAMILTON: I'll second it.

23 CHAIRMAN SOULES: It's  
24 seconded. Is there any discussion? Those in  
25 favor show by hands. Those opposed. It

1 passes.

2 Okay. Anything else on that rule?

3 Okay. The next rule is Rule 114. Who is  
4 going to report on that? Steve or Alex?

5 PROFESSOR ALBRIGHT: I think I  
6 am.

7 CHAIRMAN SOULES: Okay.

8 PROFESSOR ALBRIGHT: You should  
9 have before you -- the cover letter is from  
10 Delgado, Alcosta & Braden, and right behind  
11 the cover letter is our report red-lined from  
12 our report made in the May meeting, I think,  
13 when we voted on these matters.

14 There are only three items that we need  
15 to bring up that are where we proposed  
16 something different from what was passed upon  
17 in May.

18 If you would look on page 4, Rule 4, in  
19 the middle of that paragraph, you will see  
20 that there is a red line in the rule. There's  
21 a little line on the left-hand margin that  
22 shows you where it is, where it says "legal  
23 holidays shall be counted for purpose of" --  
24 it actually should read "counted for purposes  
25 of the three-day period." Delete the "s" in

1 "periods," I suppose, and we should add that  
2 "s" to the end of "purpose" so it should be  
3 "purposes."

4 CHAIRMAN SOULES: Is there any  
5 opposition to that? Okay. That's done.

6 PROFESSOR ALBRIGHT: And then  
7 in Rule 9, page 7 --

8 MS. SWEENEY: We don't need to  
9 look at Rule 6?

10 PROFESSOR ALBRIGHT: Excuse  
11 me?

12 MS. SWEENEY: The chart says  
13 Rule 6 has changed.

14 PROFESSOR ALBRIGHT: No.  
15 That's just -- we recommended on the chart on  
16 where it says "Rule 6" and it's red-lined  
17 "changes suggested," those are changes  
18 suggested by the Supreme Court Advisory  
19 Committee that were already voted on. That's  
20 where the subcommittee's proposal was rejected  
21 by the entire Committee.

22 HON. PAUL HEATH TILL: Where  
23 are you now?

24 PROFESSOR ALBRIGHT: Okay. I  
25 am now at Rule 9 on page 7. The subcommittee

1 had recommended that this rule be deleted, but  
2 the Advisory Committee voted to keep it in as  
3 changed. The only change that the  
4 subcommittee recommends is that instead of  
5 including this as a separate rule, add it to  
6 the end of Rule 7(a), which is our combined  
7 rule on representation by an attorney.

8 CHAIRMAN SOULES: Any  
9 opposition to that? It's done.

10 MR. PRINCE: That would be (d),  
11 7(d), you mean?

12 PROFESSOR ALBRIGHT: No. It  
13 would just be a sentence at the end of 7(a).

14 MR. PRINCE: A separate  
15 sentence?

16 PROFESSOR ALBRIGHT: Yes.

17 CHAIRMAN SOULES: Okay. That's  
18 done.

19 PROFESSOR ALBRIGHT: Then this  
20 is not in any of your drafts, but Bonnie  
21 Wolbrueck just noted, just told me that in  
22 TRAP Rule 48 we had passed some changes to the  
23 deposit in lieu of bond. And as I recall, we  
24 had lots of suggestions and votes on this, and  
25 so she suggested we make this rule the same as



1 the appellate rule.

2 And Steve, you and I represent a majority  
3 of the committee, I suppose, so do you have  
4 any opposition?

5 MR. YELENOSKY: I have no  
6 strong feelings either way on that one.

7 PROFESSOR ALBRIGHT: Okay. So  
8 we would recommend that Rule 14c concerning  
9 deposits in lieu of bond be made the same as  
10 the TRAP Rule.

11 CHAIRMAN SOULES: Is that the  
12 text that's here now?

13 PROFESSOR ALBRIGHT: No. This  
14 is -- Bonnie just told me about that. What  
15 this does is allows people to deposit a  
16 cashier's check. You can deposit cash or a  
17 cashier's check made payable to the clerk,  
18 drawn on any bank or savings and loan  
19 association chartered by the government of the  
20 United States of America or any state thereof  
21 and insured by the government of the United  
22 States of America or any agency thereof. The  
23 clerk shall deposit any cashier's check  
24 promptly.

25 CHAIRMAN SOULES: Okay. And

1 that's TRAP what number?

2 PROFESSOR ALBRIGHT: 48.

3 CHAIRMAN SOULES: 48. Okay.

4 So change 14c to read like TRAP 48?

5 PROFESSOR ALBRIGHT: Right.

6 CHAIRMAN SOULES: Any

7 opposition to that? It's done.

8 PROFESSOR ALBRIGHT: And that's  
9 it.

10 CHAIRMAN SOULES: Okay. Do we  
11 have a red-line from the existing rules to the  
12 now amended rules?

13 PROFESSOR ALBRIGHT: Yes.  
14 That's what's -- behind our first report is  
15 the second report, which is the red-lined  
16 version, which is now going to need to be  
17 changed a little bit.

18 CHAIRMAN SOULES: Now, what?

19 PROFESSOR ALBRIGHT: The  
20 red-lined version, which is at the end of this  
21 report, is now going to have to be changed a  
22 little bit. Holly did that, so Holly has it  
23 on her computer.

24 CHAIRMAN SOULES: Okay. So can  
25 we go a red-lined version, then, of this

1 subcommittee's entire report from 1 to 14 with  
2 the rules as presently -- as we recommend  
3 their changes compared to the existing rules?

4 PROFESSOR ALBRIGHT: Yes. It  
5 is attached to the report that you should have  
6 in your hands.

7 CHAIRMAN SOULES: But I think  
8 you said that needed to be changed?

9 PROFESSOR ALBRIGHT: Right.  
10 But it can be done very easily.

11 CHAIRMAN SOULES: Okay. Now,  
12 does that also deal with all of the inquiries  
13 that we had from the public on these rules?

14 PROFESSOR ALBRIGHT: Yes. I  
15 believe I got in the mail yesterday one from  
16 Alex Alcosta that was sent to Alex from you,  
17 and I have not had a chance to look at it so  
18 the committee has not had a chance to look at  
19 it, but we have a table which shows all of the  
20 inquiries from the public.

21 If you look on page 2 of our report of  
22 9/12/95, we have gone through and listed each  
23 comment we have had and how we have disposed  
24 of it.

25 MR. YELENOSKY: And also, Alex,

1 what we recommended and also what the  
2 Committee as a whole accepted and didn't  
3 accept. And basically I think that comes down  
4 to the Committee wanted to smoke and go to  
5 church on Sunday, and we lost our  
6 recommendations on that.

7 CHAIRMAN SOULES: Do we have a  
8 written report from you addressing each of  
9 these letters that we got from members of the  
10 public, lawyers and so forth?

11 PROFESSOR ALBRIGHT: Yes. Look  
12 on page 2 on the report of --

13 CHAIRMAN SOULES: Page 2?

14 MR. YELENOSKY: It's the page  
15 right after the list of recipients and  
16 ex-officio members.

17 CHAIRMAN SOULES: Oh, okay.

18 MR. YELENOSKY: There weren't  
19 that many covered.

20 CHAIRMAN SOULES: Okay. So  
21 you've covered page 4, which is -- and then  
22 what about page 6? I don't know if you  
23 covered that.

24 PROFESSOR ALBRIGHT: There were  
25 some in there that really didn't cover our

1 rules.

2 CHAIRMAN SOULES: Okay. Will  
3 you check, then, to see that everything has  
4 been covered?

5 PROFESSOR ALBRIGHT: The only  
6 thing that is not covered is a letter that we  
7 got in the mail yesterday or the day before.

8 CHAIRMAN SOULES: Okay. Good  
9 enough. Thank you very much. I appreciate  
10 that.

11 Now let's go to the next report, which is  
12 what? Don, we need to do yours next  
13 because -- is that right, Lee? You want to  
14 try to get that done next for sure? Okay.

15 Don Hunt, the Report of the Subcommittee  
16 on Rule 315 to Rule 331. We'll take that out  
17 of order because the Court wants that as soon  
18 as possible.

19 Now, each chair of each subcommittee  
20 needs to make a chart similar to what Alex has  
21 in her report on every letter that's addressed  
22 to your area. In other words, if you look on  
23 page 2, numbered page 2 of the Delgado, Acosta  
24 & Braden letter that we just looked at, you'll  
25 see here there's a list of every item that's

1 in their part of the agenda and the supplement  
2 to the agenda. And we need that addressed by  
3 the subcommittees and the subcommittees'  
4 chairs so that we can have to complete report  
5 on all these materials, and you'll want to  
6 have those ready for the next meeting.

7 Okay. Don Hunt.

8 MR. HUNT: Mr. Chairman, I  
9 should report first that this is more the  
10 report of the chair rather than the  
11 subcommittee. The subcommittee met on one  
12 occasion in May of 1995. We took action on  
13 the rules, and based on the action took there,  
14 I performed some drafting. Most of this  
15 drafting was done immediately after the  
16 subcommittee meeting, but because we had spent  
17 so much time on discovery and sanctions, we  
18 have not gotten back together since then, and  
19 I really anticipated this would be one meeting  
20 further down the line. But it doesn't  
21 matter. We can look at these today.

22 But what I want to advise you of is that  
23 the summary of the responses to the letters on  
24 page 2 really represents my judgment and not  
25 the subcommittee's, but we can look at all

1 those, if we need to, or next time we will  
2 have a report of the subcommittee responding  
3 to all of the letters from the public.

4 What you have here, from Rule 315 to 331  
5 boiled down into three or four new rules,  
6 deals with all those things that occur  
7 postverdict and preappeal. There's one rule  
8 that's not covered, and that's Rule 301, and  
9 that just falls into the gambit of another  
10 subcommittee. All that does is deal with  
11 addressing what should be in the judgment.

12 For the most part, this work that we have  
13 done deals with what Bill Dorsaneo and Judge  
14 Guittard drafted originally, and is an attempt  
15 to take the TRAP Rules as now sent to the  
16 Court and to incorporate into these motion  
17 rules that occur postverdict what we've  
18 already done. And we can go through these one  
19 by one, if that's your pleasure.

20 CHAIRMAN SOULES: I think  
21 that's what we should do.

22 MR. HUNT: Beginning at  
23 Rule 320, you will see a red-line there of the  
24 present rule. And as you can tell, most all  
25 of the present rule is kept, but there's been

1 much that has been added. What has been added  
2 in each instance is an attempt to detail what  
3 could be in a motion for new trial by way of  
4 illustration more than anything else. If the  
5 language is not clear that we are attempting  
6 only to be instructive to attorneys of those  
7 matters which could be included, then we need  
8 to change it.

9 But it begins as shown there in 320(a) by  
10 specifying the grounds that may be included.  
11 And it retains the good cause language, but  
12 changes the location just slightly. It  
13 indicates only that for good cause a new trial  
14 may be granted and a judgment on the motion of  
15 a party or on the judge's own motion. Well,  
16 I've left out part of it. "For good cause, a  
17 new trial may be granted and a judgment may be  
18 set aside on the motion of a party or on the  
19 judge's own motion in the following instances,  
20 among others."

21 Then (1) lists what we think of as --  
22 well, the first several list what we think of  
23 are the traditional things that you include in  
24 a motion for new trial: When the evidence is  
25 factually insufficient to support a jury



1 finding; (2) is an overwhelming preponderance  
2 of the evidence; (3), when the damages awarded  
3 are either too small or too large or retaining  
4 the factual insufficiency and overwhelming  
5 preponderance test; (4) is simply an error of  
6 law that the judge has made that has caused  
7 and probably did cause a rendition of an  
8 improper judgment; (5) tries to incorporate  
9 misconduct of a jury, misconduct of an  
10 officer, any communication made to the jury, and  
11 a juror's erroneous or incorrect answer on  
12 voir dire examination. I've tried to  
13 structure that specially, that is, as it's  
14 laid out so that it's clear that the "when"  
15 applies to all four of these and that "has  
16 probably resulted in injury to the movant"  
17 applies to all four.

18 I think this represents the plowing of no  
19 new ground. I was concerned about the  
20 language in (5) where it talks about any  
21 communication made to the jury and whether or  
22 not we might be suggesting to the bar that  
23 because we're listing all of these things on  
24 which one might get a new trial and could  
25 include in a motion, that we're saying that

1 you can get a new trial under (5)(iii) on any  
2 communication made to a jury that has probably  
3 resulted in injury to a movant. That comes  
4 out of present Rule 327 and out of the Rule of  
5 Evidence 606(b). That language is there, and  
6 I don't know whether we want to retain it or  
7 not, but it's something to look at and talk  
8 about.

9 But (6) then just details newly  
10 discovered evidence. (7) details default  
11 judgment problems, and it has all three that I  
12 know to be a problem, where you have a defect  
13 in service or the petition is a problem  
14 because it doesn't allege enough to allege a  
15 claim for example; or because of insufficiency  
16 of evidence; and then (iii) under (7) is the  
17 standard equitable motion for new trial.

18 (8) is citation by publication. (9) is  
19 conflict in the jury findings, and (10) is  
20 anytime there's -- this list of things that  
21 may cause an improper verdict or adverse  
22 judgment, evidence, court's charge, argument,  
23 and any occurrence or ruling. The idea there  
24 is to list all of the possible grounds, at  
25 least the common ones, and leave it open that

1 there go could be others.

2 Mr. Chairman, I don't know the best way  
3 to proceed through this, because much of this,  
4 I think, is noncontroversial. Perhaps it  
5 would be better if we did it looking at 320(a)  
6 and then going on to (b), (c) and (d).

7 CHAIRMAN SOULES: Okay.  
8 320(a), any comment?

9 MR. HUNT: In that sense, the  
10 subcommittee proposes the adoption of 320(a).

11 CHAIRMAN SOULES: Anne Gardner.

12 MS. GARDNER: First of all, I  
13 want to compliment Don on how these are done.  
14 It's so easy to read the corrections and  
15 changes when they're red-lined for us to  
16 read.

17 The only comment I had was in subsection  
18 (7) about default judgments. I just had a  
19 question about whether (ii) might present --  
20 might be possibly confusing, because I think  
21 insufficiency of the evidence of damages only  
22 gets you a new trial on damages from a default  
23 judgment. You're still -- it doesn't get you  
24 a new trial on liability. Isn't that correct?  
25 It only gets you a partial new trial, and

1 listing it among other grounds that would  
2 allow a new trial on the complete case might  
3 lead someone to believe that this is a change  
4 in the law.

5 MR. HUNT: It's not intended to  
6 be.

7 CHAIRMAN SOULES: Richard  
8 Orsinger.

9 MR. ORSINGER: I'm on shaky  
10 ground here, but I know that when they're  
11 affirming, they always tell you that the  
12 failure to file an answer admits liability,  
13 but not damages.

14 MS. GARDNER: That's correct.

15 MR. ORSINGER: But I'm not sure  
16 that if there's inadequate proof of damages in  
17 the court of appeals that they're free to  
18 remand just the damages.

19 MS. GARDNER: I believe that's  
20 correct.

21 MR. ORSINGER: Okay. Do you  
22 think they can sever the damages in a default  
23 situation?

24 MS. GARDNER: Yes, I think they  
25 can. And also where there's insufficient

1 evidence of a causal connection between the  
2 liability and damages.

3 CHAIRMAN SOULES: Now, there's  
4 something that's --

5 MS. GARDNER: And they remand  
6 for new trial on that, on the issue of damages  
7 alone.

8 CHAIRMAN SOULES: That's  
9 something that is omitted. Shouldn't (7)(ii)  
10 be because of insufficiency of evidence of  
11 causation of damages?

12 HON. C. A. GUITTARD: Well, I  
13 don't think --

14 CHAIRMAN SOULES: Judge  
15 Guittard.

16 HONORABLE C. A. GUITTARD: The  
17 question is, is evidence of causation -- is  
18 causation admitted? In other words, if the  
19 suit is for a collision, the default judgment  
20 doesn't admit the damages, but does it admit  
21 that the negligence alleged proximately caused  
22 the collision?

23 MR. ORSINGER: No. No, it  
24 doesn't.

25 PROFESSOR DORSANEO: Anne, look

1 at the top of page 7. These grounds in 320,  
2 although we could argue and I think even I  
3 could say that some of them could be adjusted  
4 some, don't necessarily even imply that you  
5 would get a complete new trial rather than a  
6 partial new trial.

7 MS. GARDNER: That was my  
8 concern.

9 PROFESSOR DORSANEO: And that  
10 partial new trial language that's in 320 now  
11 is repeated over here in paragraph (f) of --

12 CHAIRMAN SOULES: -- 320.

13 PROFESSOR DORSANEO: -- 320.  
14 You just get there eventually.

15 MS. GARDNER: Oh, okay. I see,  
16 you're still in the same rule. All right.

17 CHAIRMAN SOULES: But the  
18 causation is not admitted on a default  
19 situation.

20 MR. ORSINGER: Well, if I may,  
21 I don't purport to be an expert on this, but  
22 under that Supreme Court case, which Bill will  
23 give us the name of, there are two different  
24 forms of causation. One of them is the  
25 causation that leads to -- well, the first

1 causation, which I've never quite understood,  
2 and the section causation is that from the  
3 wrongful event that these damages that were  
4 recovered from were proximately related, so --  
5 I think it was Justice Cornyn's opinion. He  
6 broke causation down into two different  
7 components, and the second component is not  
8 admitted by the default, but the first one is.

9 PROFESSOR DORSANEO: The first  
10 one is, yeah.

11 MR. ORSINGER: And so I have  
12 made a marginal notation here that maybe we  
13 ought to specifically refer in paragraph (ii)  
14 or whatever it is, to borrow the language out  
15 of that Supreme Court case.

16 MS. GARDNER: That's Compuserve  
17 or Compugraphic?

18 MR. ORSINGER: Yeah,  
19 Compugraphic.

20 MS. GARDNER: Compugraphic.

21 CHAIRMAN SOULES: Well, it's  
22 the conduct that caused the accident, but did  
23 the accident cause the injury?

24 MR. ORSINGER: Okay. That's  
25 the difference.

1 CHAIRMAN SOULES: That the  
2 conduct caused the accident is admitted, but  
3 that the accident caused the injury is not.

4 PROFESSOR DORSANEO: But you  
5 could think of that second one as damages  
6 without feeling too stupid.

7 MS. GARDNER: You still only  
8 get a partial new trial on damages.

9 PROFESSOR DORSANEO: It's kind  
10 of injury and damages.

11 MR. ORSINGER: Well, you could  
12 modify this language by just saying  
13 "insufficient evidence of the damages or of  
14 the," and then borrow the language out of that  
15 opinion about this causal relationship between  
16 the event and the claimed injury.

17 CHAIRMAN SOULES: Say "evidence  
18 of causation of damages or amount of damages."

19 MR. ORSINGER: I think we ought  
20 to be careful that we don't overstate the  
21 case. We ought to use the Supreme Court's  
22 words for that second form of causation,  
23 because if we just say "causation" generally  
24 without qualifying it, we might be including  
25 the first element of causation.



1 HON. C. A. GUITTARD: That was  
2 my concern awhile ago.

3 CHAIRMAN SOULES: Causation of  
4 damages.

5 MR. ORSINGER: Okay.

6 CHAIRMAN SOULES: Anyway, the  
7 way it's written now, the rule could be  
8 construed as saying that except for, the  
9 "among others" at the top, that the causation  
10 of damages is admitted, which is not in the  
11 current law.

12 What do you think, Don? Is there a way  
13 to fix it?

14 MR. HUNT: I don't have any  
15 problem with changing it to read "because of  
16 insufficiency of evidence of causation or  
17 amount of damages."

18 CHAIRMAN SOULES: Causation of  
19 damages or amount of damages?

20 MR. HUNT: Well, either one.  
21 Do you need both of them in there, causation?

22 HON. C. A. GUITTARD: Yeah, you  
23 do.

24 CHAIRMAN SOULES: Well, you're  
25 talking about a particular causation. There

1 are two, so you've got to talk about which  
2 causation.

3 MR. HUNT: So we want  
4 "insufficiency of evidence of causation of  
5 damages or amount of damages"?

6 CHAIRMAN SOULES: Or something  
7 to that effect.

8 MR. ORSINGER: I would propose  
9 that Don look at that Supreme Court case and  
10 see if he can't borrow their language as  
11 closely as possible.

12 CHAIRMAN SOULES: Sure.

13 MR. ORSINGER: Because they  
14 thought that they distinguished it adequately.

15 HON. C. A. GUITTARD: Why don't  
16 we say "evidence of the cause or amount of  
17 damages."

18 MR. MARKS: Yeah.

19 CHAIRMAN SOULES: Okay.

20 PROFESSOR DORSANEO: Which  
21 would actually be covered by (a)(1) or (a)(2),  
22 really (a)(1), anyway, not just "among  
23 others." I mean, this is really meant to be  
24 kind of a convenient best descriptive list to  
25 be helpful.

1 MR. ORSINGER: (1) only applies  
2 in a jury trial, and this is a default  
3 judgment, (a)(1). You can't borrow (1)  
4 through (6) for (7).

5 PROFESSOR DORSANEO: You're  
6 right. Oh, I see. I stand corrected.

7 CHAIRMAN SOULES: Okay.

8 MR. ORSINGER: I would also  
9 mention that we have completely -- if I  
10 understand this, we have completely forgotten  
11 where they fail to give service at all to the  
12 defendant, not that there's a defect, but just  
13 plain old lack of service, and then they have,  
14 you know, the constitutional dimensions of due  
15 process and everything, and we probably ought  
16 to mention that as a valid ground.

17 PROFESSOR DORSANEO: Well, that  
18 one is covered. That's error of law.

19 MR. ORSINGER: Well, maybe  
20 not. I mean, to me, (i) ought to be "lack of  
21 proper notice" or "lack of due process" or  
22 some concept that if you didn't get notice to  
23 somebody you can't enter a judgment against  
24 them.

25 HON. C. A. GUITTARD: I think

1 you're right. Just add before the rest of  
2 that, make (i) "lack of service," and then the  
3 rest should be (ii), (iii) and (iv).

4 PROFESSOR DORSANEO:  
5 Mr. Chairman, it seems to me the real vote is  
6 whether we should try to have a rule that  
7 articulates what the main good cause  
8 situations are, or whether, like our current  
9 rule and like the current federal rule, we  
10 make reference either specifically or opaquely  
11 to the law.

12 And my preference and Judge Guittard's  
13 preference and I think the preference of every  
14 student I've ever had would be that the rule  
15 give a pretty good list of the circumstances  
16 in which you could get a new trial.

17 We could argue about the items in this  
18 list and try to redraft them here today or we  
19 can perhaps identify, because on (a)(7), my  
20 view right now is that it might be better just  
21 to say when the default judgment was improper  
22 on legal or equitable grounds, rather than try  
23 to articulate it in a detailed way.

24 The same thing with respect to (a)(6). I  
25 mean, that's slightly different than newly

1 discovered -- than some newly discovered  
2 evidence cases such as Jackson vs. Van Winkle.  
3 It doesn't talk about, well, the evidence not  
4 being cumulative, for example. But none of  
5 that -- that doesn't trouble me very much  
6 because this, although not maybe completely  
7 perfect, it's nearly that. We could go back  
8 and look at some of these.

9 I guess in (a)(8), "when a defendant  
10 cited by publication moves to set aside a  
11 judgment for good cause," well, I guess maybe  
12 the moving for it shouldn't be good cause for  
13 the grant of a new trial, but maybe I'm not  
14 thinking clearly enough about it. I guess  
15 what I'm saying is that if we've got to vote  
16 on the concept, then --

17 CHAIRMAN SOULES: We can vote  
18 on the concept of whether or not to have a  
19 nonexclusive list.

20 PROFESSOR DORSANEO: Yeah,  
21 nonexclusive but --

22 CHAIRMAN SOULES: -- but  
23 instructive.

24 PROFESSOR DORSANEO: -- it's a  
25 95 percent exclusive list.

1 HON. C. A. GUITTARD: Not  
2 exclusive but instructive.

3 PROFESSOR DORSANEO: Very  
4 instructive.

5 MR. ORSINGER: I don't know  
6 that anybody is against that. Why do we need  
7 to vote on that?

8 CHAIRMAN SOULES: Is there  
9 anyone opposed to that? All right.

10 But we shouldn't write a rule that tends  
11 to ignore or suggest that we're changing case  
12 law either.

13 PROFESSOR DORSANEO: That's  
14 right.

15 MS. GARDNER: My only point  
16 about (7) was that I still think that the  
17 average lawyer might conclude from the fact  
18 that the insufficiency of evidence of damages  
19 is in this list of grounds for complete new  
20 trial that therefore he's going to get a  
21 complete new trial based on that ground.

22 And I would propose or move that we omit  
23 that ground from the list of under (7), just  
24 delete (ii), because the other two would get  
25 you a new trial, a complete new trial on both

1 liability and damages, (i) and (iii), but (ii)  
2 would not, so I would propose or move to omit  
3 that.

4 CHAIRMAN SOULES: Well, it  
5 might or it might not, (ii).

6 MS. GARDNER: (ii)?

7 CHAIRMAN SOULES: The trial  
8 judge is not precluded from giving you a new  
9 trial on the whole case.

10 MS. GARDNER: Well, no. But it  
11 would be in the interest of justice. It  
12 wouldn't be based on evidence of damages. I  
13 mean, he could on his own motion.

14 MR. ORSINGER: Could we leave  
15 it in there and put it in the end in its own  
16 little category saying that the new trial is  
17 as to that part of causation and damages  
18 only? I hate to take it out of here  
19 altogether because it's probably your best  
20 shot at it.

21 HON. C. A. GUITTARD: What  
22 about in the preamble to (a), "a complete or  
23 partial new trial may be granted" and so  
24 forth, and then you've got (f) over here to  
25 qualify that with respect to partial new

1 trials?

2 MR. ORSINGER: Good point.

3 PROFESSOR DORSANEO: But then  
4 that suggests that you're only entitled to a  
5 partial new trial.

6 HON. C. A. GUITTARD: Well (f)  
7 takes care of that, doesn't it?

8 MR. ORSINGER: Well, a new  
9 trial could be granted on one cause of action  
10 and not another on the basis of a jury finding  
11 conflict or whatever. I mean, if they're  
12 severable without unfairness, why do we need  
13 to ball ourselves up in that? Why don't we  
14 just say partial or full new trial, and then  
15 let's have separate rules about when you get a  
16 partial or a full new trial.

17 PROFESSOR DORSANEO: I'm  
18 convinced now.

19 CHAIRMAN SOULES: Convinced  
20 how?

21 PROFESSOR DORSANEO: I'm  
22 convinced, I think, of what Richard and Judge  
23 Guittard said together, that maybe we ought  
24 not to be thinking so much about new trial  
25 means complete new trial any more like we used



1 to. You have to think about that as being a  
2 separate issue.

3 HON. C. A. GUITTARD: So that  
4 (a) says "a full or partial new trial may be  
5 granted."

6 MR. ORSINGER: I would move or  
7 second that proposal.

8 CHAIRMAN SOULES: So you're  
9 talking about putting in the first line of (a)  
10 "Grounds. For good cause, a full or partial  
11 new trial may be granted"?

12 HON. C. A. GUITTARD: Yes.

13 MR. HUNT: Full or complete, or  
14 does it matter?

15 MR. ORSINGER: Just as long as  
16 it's consistent.

17 PROFESSOR DORSANEO: Probably  
18 complete. You might say "complete or partial  
19 new trial as appropriate."

20 CHAIRMAN SOULES: How about "a  
21 new trial or partial new trial"?

22 HON. C. A. GUITTARD: Okay.

23 PROFESSOR DORSANEO: Perhaps  
24 "partial new trial in accordance with  
25 paragraph" -- some subparagraph, whatever it

1 is.

2 CHAIRMAN SOULES: Okay. Well,  
3 work on that lead-in to (a) with this concept  
4 in mind, Don.

5 MR. HUNT: Do we want to try to  
6 vote on that? I don't know that there's any  
7 objection to that.

8 CHAIRMAN SOULES: Is there any  
9 objection to that?

10 Okay. Just revise the language to fit  
11 the consensus of the Committee.

12 MR. HUNT: All right. Can we  
13 do the same thing for --

14 CHAIRMAN SOULES: Also, I mean,  
15 in Peralta that's a no-service default. You  
16 don't have to have a meritorious defense in a  
17 no-service default.

18 MR. ORSINGER: That's right.  
19 Why don't we just insert "lack of service," or  
20 instead of "defect of service," we could say  
21 "lack of proper service," and that would  
22 include both no service as well as defective  
23 service.

24 PROFESSOR DORSANEO: I think we  
25 can accept that.

1 HON. C. A. GUITTARD: Yeah.

2 That's okay.

3 MR. HUNT: Just amend (i) to  
4 make it -- (7)(i) -- "because of a lack of  
5 proper service." Is that what you're saying?

6 MR. ORSINGER: That's the  
7 proposal.

8 MR. HUNT: Well, that would  
9 cure having another letter there, so that it  
10 would read now "because of a lack of proper  
11 service of process or defect in the petition"?

12 HON. C. A. GUITTARD: Yeah.

13 MR. HUNT: See, I was trying to  
14 separate each one of those, and you could have  
15 a defect in process and a defect in petition.  
16 Do we want to separate out the proper --

17 HON. C. A. GUITTARD: Maybe  
18 there ought to be a separate subdivision as to  
19 petitions.

20 MR. HUNT: Because of a defect  
21 in the petition?

22 HON. C. A. GUITTARD: Yeah. Or  
23 (ii), defect in or lack of service.

24 MR. ORSINGER: Don, can you  
25 give us an example of a defect in the petition

1 that would result in a new trial?

2 PROFESSOR DORSANEO: It's  
3 harder nowadays. But it used to be, if you  
4 didn't allege a complete cause of action, if  
5 you didn't allege a proximate causation, for  
6 example, that there wouldn't be a waiver of a  
7 pleading defect in a default judgment case.  
8 And that, I guess, messed up in the Edwards  
9 Feed Mill case, and then -- what's the  
10 post-statute default judgment case that  
11 Franklin Spears wrote? That messed it up a  
12 little bit more.

13 I'm less happy with knowing what the  
14 answer to your question is, but there's still  
15 a circumstance in which the pleading is so  
16 defective that the default judgment itself  
17 goes away because the judgment is far beyond  
18 the pleading.

19 MR. HUNT: The one I'm familiar  
20 with, and it may be more a matter of service  
21 than anything else, is where the plaintiff  
22 serves the original petition. The defendant  
23 doesn't answer. The plaintiff then amends  
24 petition to double the damages and then takes  
25 default, and so that there is a defect in the

1 sense that the judgment is a lot more than on  
2 the petition that's served on the defendant.  
3 And that may be a problem with service. It  
4 may be a problem that's better described in  
5 some other way, but that's one problem with  
6 petitions that oftentimes results in defaults  
7 being reversed.

8 CHAIRMAN SOULES: Alex  
9 Albright.

10 PROFESSOR ALBRIGHT: I just  
11 taught default judgments on Wednesday and I  
12 just did some research real fast and pulled up  
13 a bunch of default judgment cases. And I  
14 think you will find that there are any number  
15 of reasons why defaults are overturned.

16 And I like Bill Dorsaneo's suggestion  
17 that we say "when a default judgment was  
18 improper on legal or equitable grounds,"  
19 because I think we will find that there are  
20 any number of enumerations, and it sounds like  
21 we're all kind of finding different situations  
22 that could be put into these (i)'s and  
23 (ii)'s. And I think you really just kind of  
24 have to go to the cases and figure out what  
25 your situation is. And there are legal errors

1 and there are equitable errors and they change  
2 with the cases, and so I would just move to  
3 say "on legal or equitable grounds."

4 CHAIRMAN SOULES: What's the  
5 consensus about that? Does anybody disagree  
6 with that? All right. We'll make that change  
7 then, so on (7) we'll strike everything after  
8 "improper" and add "on legal of equitable  
9 grounds."

10 MR. HUNT: That done, I think  
11 that accomplishes the idea of having an  
12 instructive list that doesn't change the law.

13 MR. ORSINGER: Do we need the  
14 phrase "legal or equitable," or does that in  
15 fact encompass the entirety of law? Is there  
16 any other type of argument besides a legal one  
17 or an equitable one?

18 MR. YELENOSKY: An inequitable  
19 and illegal one.

20 MR. ORSINGER: Maybe we ought  
21 to just say "where a default judgment was  
22 improper."

23 PROFESSOR DORSANEO: Well, but  
24 it's not -- it's really not improper to begin  
25 with. It's going to be set aside -- I mean, I

1 didn't quite catch all of what Professor  
2 Albright said, but when a default judgment  
3 should be set aside on legal or equitable  
4 grounds, it's not improper to begin with if it  
5 should be set aside on equitable grounds. It  
6 just should be set aside on equitable grounds  
7 because you make an equitable argument and you  
8 should get equitable relief, even though you  
9 don't have a legal argument.

10 What people overlook is, and the cases do  
11 and the courts do as well when they try to  
12 harmonize things, they overlook the fact that  
13 you're entitled to a new trial if there's been  
14 no service of process on legal grounds, and  
15 there's no need to show and there never has  
16 been a need to show, and Peralta was not the  
17 first time it was clear to thoughtful people,  
18 that there was no need to show a meritorious  
19 defense. And if there's a legal reason why  
20 the default judgment is vulnerable to attack,  
21 that's the end of it.

22 And we have the Lopez vs. Lopez or  
23 whatever that messes that up. That's why I  
24 think it's important to say "legal or  
25 equitable grounds," because people think only

1 in terms of equitable grounds and overlook  
2 their legal arguments.

3 MR. ORSINGER: But if I may,  
4 Bill's point is, if it's set aside on  
5 equitable grounds, there's nothing improper  
6 about the granting of it. We just relieved  
7 them from it out of equity.

8 CHAIRMAN SOULES: So "when a  
9 default judgment should be set aside on legal  
10 or equitable grounds" will be no. 7. Okay.  
11 When a default judgment should be set aside on  
12 legal or equitable grounds.

13 Does that square with you, Don?

14 MR. HUNT: Yes, sir. I now  
15 have it "when a default judgment should be set  
16 aside on either legal or equitable grounds,"  
17 and unless there's disagreement, I'll record  
18 that as a change.

19 CHAIRMAN SOULES: Okay. Any  
20 disagreement?

21 Now, one other suggestion, I know "among  
22 others" probably gets this at the top, but  
23 what about adding an (11) that says "such  
24 other grounds as warrant a new trial" or words  
25 to that effect?



1 HONORABLE C. A. GUITTARD:  
2 Well, it says "in the following instances  
3 among others." Doesn't the "among others"  
4 take care of that?

5 CHAIRMAN SOULES: It may. I  
6 don't think it's as clear.

7 HON. C. A. GUITTARD: Okay.

8 MR. LOW: A trial judge can  
9 just grant a new trial if he thinks there's an  
10 unfair result, so doesn't that come within  
11 what you're talking about? I mean, he just  
12 for a number of reasons just thinks it was  
13 unfair and that would take care of what you're  
14 talking about. I mean, that's needed for what  
15 you're talking about.

16 CHAIRMAN SOULES: Right. I  
17 think so.

18 MR. HUNT: Well, what's your  
19 pleasure? Shall we add an 11th or keep it at  
20 10?

21 CHAIRMAN SOULES: Does anybody  
22 have a -- Richard.

23 MR. ORSINGER: I'd like to  
24 discuss that for just a second. We know in  
25 the mandamus cases, Johnson and whatnot, that

1 the trial court can set it aside in the  
2 interest of justice without having had any  
3 specific reason other than just judicial  
4 discretion. But we don't list that here  
5 anywhere, do we?

6 HON. C. A. GUITTARD: Nor  
7 should we.

8 MR. ORSINGER: Well, maybe we  
9 don't want to encourage that, but the law  
10 certainly recognizes it. Should we say it, or  
11 should we just leave it to people who are  
12 clever to find it?

13 MR. LOW: Even if you don't say  
14 it, I don't think you're going to change it.

15 CHAIRMAN SOULES: Well, I think  
16 we ought to say it. I mean, default judgment  
17 is a bad thing. People ought to be given the  
18 opportunity to --

19 MR. ORSINGER: Well, that's not  
20 just default. In other words, the trial court  
21 has a prerogative under the common law,  
22 apparently, to grant a new trial in the  
23 interest of justice and they don't have to  
24 answer to anybody for why. And we don't say  
25 that here, even though we know that, and I'm

1 wondering should we say that?

2 CHAIRMAN SOULES: I'd like to  
3 see an (11) that says "such other grounds as  
4 warrant a new trial or in the interest of  
5 justice."

6 MR. HUNT: Say that once more.

7 CHAIRMAN SOULES: "Such other  
8 grounds as warrant a new trial or in the  
9 interest of justice."

10 HON. C. A. GUITTARD: Why the  
11 "or"?

12 CHAIRMAN SOULES: Should it be  
13 be "and in the interest of justice"?

14 HON. C. A. GUITTARD: Yes,  
15 sir. "Warrant a new trial in the interest of  
16 justice."

17 CHAIRMAN SOULES: Warrant a new  
18 trial in the interest of justice?

19 MR. LOW: Yeah. That makes  
20 sense.

21 CHAIRMAN SOULES: That's fine.

22 MR. HAMILTON: Do we need (8)?  
23 Do we need to still leave (8) in there in view  
24 of the way we've changed (7)?

25 CHAIRMAN SOULES: The question

1 is, do we need (8) in view of the way we've  
2 changed (7).

3 HON. C. A. GUITTARD: The  
4 purpose of putting (8) in there is because we  
5 have a rule, what is it, 329a --

6 MR. HUNT: 329.

7 HON. C. A. GUITTARD: What?

8 MR. ORSINGER: It's 329.

9 HON. C. A. GUITTARD: -- 329  
10 that provides for a new trial in those  
11 instances, and this simply brings that forward  
12 into this rule for completeness.

13 MR. ORSINGER: Would we leave  
14 Rule 329 in or would we kill it? We would  
15 just leave it in?

16 HON. C. A. GUITTARD: Yes,  
17 leave it in.

18 MR. HUNT: There's a proposal  
19 to make a short amendment to 329, but Rule 329  
20 still serves a purpose, and we'll see that  
21 when we get to it. But this is just a  
22 recognition that there's a little different  
23 rule where the defendant was served by  
24 publication.

25 CHAIRMAN SOULES: And I think

1 we should take out "among others" in the  
2 preamble since we put in (11), if that's what  
3 the Committee wants to do.

4 Okay. Anything else on Rule 320?

5 MR. ORSINGER: Rule 320(a).

6 CHAIRMAN SOULES: 320(a).

7 MR. HUNT: 320(a). There are  
8 two matters. The spirit of Chuck Herring  
9 moves among us, and the suggestion has been  
10 made that we change the second line in (a)  
11 where it says "motion" to the word  
12 "initiative," since judges don't make  
13 motions, "on the court's own initiative."

14 HON. C. A. GUITTARD: Well, we  
15 need to go through all the rules that say "the  
16 court's own motion," then, and do that.

17 PROFESSOR DORSANEO: Is that  
18 where that came from earlier when we were  
19 talking about that? I think that's silly.  
20 The judge doesn't make a motion, but that's in  
21 effect what the judge is doing. The judge  
22 doesn't make an initiative either.

23 CHAIRMAN SOULES: Really  
24 shouldn't we say "on the judge's own ruling"?

25 HON. C. A. GUITTARD: Well,

1 that's a well understood concept, on the  
2 judge's own motion. It may not be technically  
3 accurate in some respects, but it's well  
4 understood and it seems like to me we ought to  
5 keep it as it is.

6 PROFESSOR DORSANEO: I think we  
7 should just say "initiative" and suggest that  
8 the judge doesn't have to have any  
9 parameters. He can just kind of do it.

10 CHAIRMAN SOULES: Well, Rule 41  
11 says "or on its own initiative." It uses that  
12 for severance, so it's actually in the rule.

13 HON. C. A. GUITTARD: Yeah.  
14 Well, it's used both ways. But I don't see  
15 any preference for saying "initiative" over  
16 "motion," if it's understood what it means  
17 and there's no ambiguities or problems out of  
18 it.

19 CHAIRMAN SOULES: Okay.  
20 Initiative or motion? Those in favor of  
21 "initiative" hold up your hands. Two.  
22 Those in favor of "motion." Four.  
23 "Motion" stays.

24 MR. HUNT: It stays. And the  
25 other thing that I wanted to call to the

1 Committee's attention is my concern that I  
2 announced earlier, that in (a)(5) where it  
3 talks about any communication made to the  
4 jury, this seems to say one may move for a new  
5 trial merely based on a communication to the  
6 jury. But 327 and the Rule of Evidence  
7 606(b), while it contains that language of  
8 communication to the jury, there will never be  
9 a new trial granted based on a mere  
10 communication. It's really misconduct as  
11 determined under 327, and I don't know what  
12 "communication made to a jury" means if you  
13 can't get it into evidence under 327(b) or  
14 606(b).

15 And so I raise that question to the  
16 Committee. Do we want to keep that? Because  
17 that's where it comes from. It's what  
18 Professor Dorsaneo originally proposed in his  
19 draft, and I've just copied it, and all I've  
20 done is try to break it up.

21 PROFESSOR DORSANEO: That  
22 wasn't me. That's the judge that did that.

23 MR. HUNT: Oh, that's Judge  
24 Guittard. All right. Judge Guittard, you get  
25 the credit.

1 CHAIRMAN SOULES: Defend  
2 yourself, Judge Guittard.

3 HON. C. A. GUITTARD: Well, I  
4 was merely bringing it forward from the other  
5 rules in order to make this complete.

6 MR. HUNT: All right. No one  
7 takes credit for it. But does anyone want to  
8 it left in?

9 PROFESSOR DORSANEO: Well, it  
10 comes from paragraph (a) of Rule 327.

11 HON. C. A. GUITTARD: In other  
12 words, that's not what you call "jury  
13 misconduct" exactly. It's something a little  
14 different, and it's listed here because there  
15 are grounds -- it's provided for grounds  
16 elsewhere, as grounds for a new trial.

17 MR. HUNT: That's true. But  
18 you can't get it into evidence unless it  
19 really fits jury misconduct, unless you change  
20 what's jury misconduct.

21 MS. GARDNER: Jury misconduct  
22 is basically an outside influence, which is  
23 usually a communication to a juror, right?

24 PROFESSOR DORSANEO: Well, we  
25 do know that it's possible to have some



1 communications with the jury that are  
2 perfectly permissible, so I think we ought to  
3 take it out.

4 MR. ORSINGER: The bailiff does  
5 that all the time.

6 PROFESSOR DORSANEO: I mean, if  
7 somebody says "good morning" to you, you can  
8 say "good morning" back to them.

9 MR. ORSINGER: Can I comment  
10 that under Rule of Evidence 606 they talk  
11 about what jurors can and cannot testify to,  
12 and one is whether any outside influence was  
13 improperly brought to bear upon any juror.  
14 And I think that this communication made to  
15 the jury is an effort to describe the concept  
16 of an improper outside influence. Maybe we  
17 ought to use the word --

18 HON. C. A. GUITTARD: --  
19 improper communication?

20 MR. ORSINGER: It could be  
21 improper communication. But really aren't we  
22 really more concerned with an improper outside  
23 influence or an outside influence improperly  
24 brought to bear, whether it was a  
25 communication or a threat to a member of the

1 family or circulars laid on a juror's doorstep  
2 every morning or whatever?

3 CHAIRMAN SOULES: What Rule of  
4 Evidence says that?

5 MR. ORSINGER: 606(b).

6 HON. C. A. GUITTARD: Well, the  
7 alternative is to -- instead of just  
8 "communication made to the jury," just adopt  
9 the language we have over here under the  
10 misconduct rule, "outside influence made to  
11 bear on the jury." That's one of the grounds  
12 for a new trial. Just put it in just like it  
13 says in the rule.

14 MR. LOW: Luke.

15 CHAIRMAN SOULES: Yes, sir.  
16 Buddy Low.

17 MR. LOW: One of the things  
18 we're going to get into, my committee looked  
19 into that, and the way that Rule of Evidence  
20 is now, it would even keep a juror from  
21 testifying as to whether he was qualified, in  
22 other words, lived in the county or something  
23 like that. So we've taken the federal rule  
24 and modified it to some extent. The Federal  
25 Rule of Evidence 606 is what we're going to

1 recommend. But I think we don't need to mix  
2 and mingle. We can discuss it when we pick up  
3 that 606, both civil and criminal, which both  
4 need to be changed a little, and then we can  
5 come back to this. But I think some  
6 modification is going to have to be had under  
7 the Rule of Evidence.

8 CHAIRMAN SOULES: Any  
9 communication made to -- I think Richard is  
10 right. It would have to be "outside influence  
11 improperly brought to bear."

12 HON. C. A. GUITTARD: Well, put  
13 that in instead of "communication."

14 CHAIRMAN SOULES: Okay. Any  
15 outside influence --

16 MR. HAMILTON: The federal rule  
17 is "extraneous prejudicial information  
18 improperly brought to the jury's attention."

19 MS. GARDNER: But our case law  
20 says "outside influence."

21 MR. ORSINGER: I would favor  
22 our concept because it's broader, since it  
23 includes inducements and threats even  
24 indirectly.

25 MS. GARDNER: Well, outside

1 influence is a ground for misconduct, so are  
2 you substituting it for misconduct, outside  
3 influence for misconduct, or are you going to  
4 have both misconduct and outside influence?

5 MR. HUNT: Mr. Chairman, I  
6 think Anne has identified the problem there  
7 that troubled me, that we really don't have  
8 any communication made to a jury that will get  
9 you a new trial except misconduct. And when  
10 we have said "misconduct," which  
11 Rule 327 identifies and indicates that to  
12 which a jury may testify, we've said it all.  
13 And that's the reason why I brought it to your  
14 attention for the possibility of striking any  
15 communication made to the jury, because it  
16 doesn't add much.

17 PROFESSOR DORSANEO: Why don't  
18 we just strike that?

19 MR. ORSINGER: I'd support  
20 that, because it's included in "misconduct" as  
21 defined in Rule 327.

22 PROFESSOR DORSANEO: Well, 327  
23 doesn't really define it, but it says, you  
24 know, by all of those things in the admonitory  
25 instructions about what you're not supposed to

1 do; that if you do any of those things, that's  
2 all misconduct, but you just can't prove it  
3 because the juror is not competent to testify  
4 about it. But it's still misconduct.

5 CHAIRMAN SOULES: So is the  
6 sense of the Committee that "misconduct of the  
7 jury" includes any communication made to the  
8 jury or includes outside influence improperly  
9 brought to bear upon any juror?

10 HON. C. A. GUITTARD: That's  
11 unclear really. That may be the  
12 interpretation, but it's not clearly the  
13 interpretation.

14 MR. ORSINGER: Well, why don't  
15 we clear that up in Rule 327 rather than in  
16 the middle of this rule, which is a long rule  
17 that's doing a lot more. Why don't we just  
18 say "misconduct of the jury," and then over  
19 under Rule 327 let's rewrite it so that it  
20 makes sense.

21 MR. HUNT: That would be my  
22 suggestion, that "communication to the jury"  
23 doesn't have any place in here because it  
24 doesn't have any meaning.

25 CHAIRMAN SOULES: Any objection

1 to that?

2 Okay. We'll just take out (iii) and make  
3 (iv) (iii), unless there's some objection, and  
4 there is none.

5 MR. HUNT: Mr. Chairman, I then  
6 move that we adopt Rule 320(a) as amended.

7 MR. ORSINGER: I have another  
8 point that I want to raise.

9 CHAIRMAN SOULES: Okay.  
10 Richard Orsinger.

11 MR. ORSINGER: Subdivision  
12 (a)(5) and subdivision -- and I've lost the  
13 other subdivision -- talks about these errors  
14 that probably resulted in injury to the  
15 movant. And I'm a little concerned that that  
16 language reads differently from the definition  
17 of harmful error that's set out in the Rules  
18 of Appellate Procedure, because you're only  
19 supposed to reverse where the error was  
20 reasonably calculated to cause and probably  
21 did cause rendition of an improper judgment.  
22 And we're saying "probably resulted in an  
23 injury."

24 Now, the harmless error rule is a  
25 balancing test that it is more likely than

1 not, so I think "probably" is correct  
2 conceptually. But the "injury" part of this,  
3 to me, "injury" could mean something other  
4 than "probably resulted in an improper  
5 judgment," and so I think we need to be real  
6 careful when we pick our words here that we're  
7 not affecting the harmless error rule somehow.

8 MR. HUNT: I'm not sure why  
9 that language is used there. I had that same  
10 question. Again, that was copied from some  
11 prior work, and we didn't cover that in the  
12 committee and it would be good to address it  
13 here. I don't see much difference in using  
14 the typical language that we've used for  
15 harmless error; that is, reasonably calculated  
16 to cause and probably did cause a rendition of  
17 an improper judgment.

18 CHAIRMAN SOULES: You would  
19 substitute that for "has probably resulted in  
20 injury to the movant" in (5)?

21 MR. HUNT: Yes.

22 MR. ORSINGER: And it's there  
23 in (4) already.

24 CHAIRMAN SOULES: And it's in  
25 (4) already, and there's something similar in

1 (6).

2 PROFESSOR DORSANEO: No. But  
3 in (5)(iii), where we took out "any  
4 communication made to the jury," maybe we  
5 should say "misconduct of a party or counsel  
6 or a juror." I don't know why we left them  
7 out, but they do count.

8 HON. C. A. GUITTARD: Well,  
9 we've got misconduct of counsel.

10 PROFESSOR DORSANEO: Where is  
11 that?

12 HON. C. A. GUITTARD: Or  
13 argument of counsel, at least, over under  
14 (10).

15 PROFESSOR DORSANEO: Okay.

16 MR. ORSINGER: Isn't misconduct  
17 of a party going to be subsumed in this  
18 improper influence on the jury?

19 CHAIRMAN SOULES: Where is  
20 that?

21 MR. ORSINGER: Well, (5)(i) is  
22 misconduct of the jury, and we've agreed that  
23 we're going to go over and work with that  
24 concept under Rule 327.

25 Rule 327 is where they talk about



1 improper influences on the jury. I don't know  
2 why we need to mention who might bring the  
3 improper influence. It could even be someone  
4 in the neighborhood that feels strongly about  
5 the case or something.

6 CHAIRMAN SOULES: Don, it's in  
7 (10) that we've got got another standard  
8 besides the harmless error that probably  
9 should just be the harmless error.

10 MR. HUNT: That's correct.

11 CHAIRMAN SOULES: From  
12 "probably resulted in" and so forth to the  
13 end, we should put in "is reasonably  
14 calculated" and so forth.

15 MR. ORSINGER: Can I make a  
16 proposal? I've never understood why we say  
17 "reasonably calculated to and probably did  
18 cause." Why don't we just say "probably did  
19 cause"? I don't see how that ever adds  
20 anything, and the words are really not  
21 meaningful to me.

22 HON. C. A. GUITTARD: I agree.

23 MR. ORSINGER: As I understand  
24 the harmless error rule, it's a balancing test  
25 of whether it probably is more likely than not

1 that you got the wrong judgment. And it's  
2 reasonably calculated to and probably resulted  
3 in the wrong judgment. The "reasonably  
4 calculated to" part has never made any sense  
5 to me, and since we're talking about it, why  
6 don't we just strike it?

7 HON. C. A. GUITTARD: I think  
8 that's right. In other words, "calculated to  
9 cause" sort of implies that it's intended to  
10 cause, and that's not the way the courts have  
11 applied it. They've sort of ignored that term  
12 "calculated to cause," and so why don't we  
13 just leave it out?

14 MR. HUNT: So you want to  
15 change it in all instances in (4), (5), (6)  
16 and (10) to simply read "probably caused  
17 rendition of an improper judgment"?

18 MR. ORSINGER: I so move.

19 CHAIRMAN SOULES: That's what  
20 he wants to do.

21 MR. ORSINGER: I so move.

22 CHAIRMAN SOULES: Any objection  
23 to that? No objection. It's done.

24 MR. HUNT: Anything else? Then  
25 I move the adoption of Rule 320(a) as amended.

1                   CHAIRMAN SOULES: Okay. Now,  
2                   (6) does not have that same --

3                   MR. HUNT: No. I included that  
4                   as changing it.

5                   CHAIRMAN SOULES: Okay. I  
6                   think you're going to have to rework that  
7                   because it says "if presented at trial  
8                   probably caused rendition of an improper  
9                   judgment." In other words, it doesn't quite  
10                  fit that way. It doesn't work that way.

11                  HON. C. A. GUITTARD: Isn't  
12                  this what the newly discovered evidence rules  
13                  say, that the evidence that's newly discovered  
14                  must be some that couldn't be discovered by  
15                  reasonable diligence, and also, if offered,  
16                  would probably have caused a different  
17                  judgment?

18                  CHAIRMAN SOULES: Well, this  
19                  says "resulted in a verdict favorable to the  
20                  movant."

21                  HON. C. A. GUITTARD: Isn't  
22                  that what the newly discovered evidence rules  
23                  say? Isn't that what the decision -- how the  
24                  decision is interpreted?

25                  CHAIRMAN SOULES: A verdict

1 favorable to the movant?

2 HON. C. A. GUITTARD: Uh-huh.

3 CHAIRMAN SOULES: I don't know.

4 MR. ORSINGER: It's saying that  
5 the focus is on the verdict rather than the  
6 judgment, whereas in the rest of them the  
7 focus is on the judgment.

8 HON. C. A. GUITTARD: Yeah.  
9 I'm not particularly wedded to that, but I  
10 just suggest that this is probably what the  
11 decisions say. If we want to change it, fine.

12 MR. HUNT: I think Judge  
13 Guittard is correct, that on the new evidence  
14 test as stated there it is as the cases  
15 indicate.

16 CHAIRMAN SOULES: Okay. So (6)  
17 stays the way it is.

18 MS. GARDNER: Excuse me, I was  
19 just going to read from Jackson vs. Van Winkle  
20 where it says -- one of the elements is "that  
21 is so material that it would probably produce  
22 a different result if a new trial were  
23 granted," which is basically the same thing  
24 that you just said.

25 HON. C. A. GUITTARD: I would

1 offer this other suggestion, though: I don't  
2 think that's adequate, because it might not be  
3 a jury case, and I think that perhaps it ought  
4 to be the same as elsewhere, that it would  
5 have resulted in a -- well, in a what?

6 MR. ORSINGER: Different  
7 judgment.

8 HON. C. A. GUITTARD: Different  
9 judgment.

10 CHAIRMAN SOULES: But if you  
11 say "the inability to present the evidence  
12 probably caused the rendition of an improper  
13 judgment," you would just have to change more  
14 of the words here, because --

15 HON. C. A. GUITTARD: Well, of  
16 course, what the decisions say is this  
17 particular evidence, if admitted at the trial,  
18 would have caused a different result probably.

19 MR. ORSINGER: Probably would  
20 have.

21 HON. C. A. GUITTARD: Probably  
22 would have caused a different result. Instead  
23 of "resulted in a verdict favorable to the  
24 defendant," it would say "would probably have  
25 caused a different result."

1 CHAIRMAN SOULES: What are you  
2 reading from? What does it say, Anne?

3 MS. GARDNER: Would probably  
4 produce a different result.

5 HONORABLE C. A. GUITTARD:  
6 Would probably have produced?

7 MS. GARDNER: Well, it says it  
8 in the present tense. "It is so material that  
9 it would probably produce a different result  
10 if a new trial were granted."

11 MR. ORSINGER: That's not good  
12 grammar.

13 MS. GARDNER: That's the  
14 Supreme Court.

15 MR. ORSINGER: I rest my case.

16 HON. C. A. GUITTARD: I have no  
17 compunction about revising the Supreme Court's  
18 grammar.

19 MR. ORSINGER: But you're  
20 already retired.

21 HON. C. A. GUITTARD: In other  
22 words, what the Court says is not if a new  
23 trial had been granted this evidence would  
24 probably change the result, don't they say  
25 that it probably would have caused a different

1 result if it had been admitted at the trial?

2 MS. GARDNER: I think what they  
3 were saying is that if we grant a new trial,  
4 it will produce a different result when this  
5 evidence introduced in the future at that new  
6 trial.

7 HON. C. A. GUITTARD: Maybe so.

8 CHAIRMAN SOULES: Buddy Low.

9 MR. LOW: What about if no  
10 judgment has been entered? I've had a judge  
11 grant a new trial without having ever entered  
12 a judgment, so it wouldn't be a different  
13 judgment.

14 HON. C. A. GUITTARD: Well,  
15 that's a mistrial rather than a new trial,  
16 isn't it?

17 MR. LOW: No, it's not. He can  
18 declare -- because a mistrial you would be  
19 mandamus on, and you can't on a new trial.  
20 And I can't tell you that they can do it, but  
21 they've done it.

22 HON. C. A. GUITTARD: Well, I  
23 could see it argued that --

24 MR. LOW: And can't you make a  
25 motion for a new trial? Can't you make a

1 motion for a new trial before judgment is  
2 entered, and couldn't the judge grant it?

3 MS. GARDNER: Yes.

4 HON. C. A. GUITTARD: Well, it  
5 seems to me --

6 MR. LOW: So there wouldn't be  
7 a different judgment.

8 HON. C. A. GUITTARD: It seems  
9 to me that there are decisions that say that  
10 the it's the duty of the judge to render  
11 judgment on the verdict. Now, he can render  
12 judgment on the verdict and then grant a new  
13 trial. And doesn't he have to do that if he  
14 wants to exercise this unlimited discretion?

15 CHAIRMAN SOULES: It's  
16 harmless.

17 HON. C. A. GUITTARD: It  
18 probably is, yeah.

19 CHAIRMAN SOULES: And then some  
20 judges just don't go through the steps.

21 MR. LOW: It doesn't operate  
22 that way. They'll make a new trial, and I'll  
23 say, "This is an unfair result," and so forth  
24 and make a motion for new trial, and you can  
25 ask him to enter 10 judgments and he won't



1 enter them, and he can grant a new trial and  
2 there's nothing you can do.

3 And we say here up at the caption "a new  
4 trial may be granted and the judgment set  
5 aside." Well, I guess you would change that,  
6 but I think the result would be different.  
7 The jury verdict or judgment entered would  
8 have been different.

9 CHAIRMAN SOULES: But really  
10 the structure of the rules -- and we're not  
11 going to restructure the rules -- contemplate  
12 that there's a judgment before there's a new  
13 trial, and just because judges circumvent  
14 that -- you know, we all know what the rules  
15 mean. They shouldn't circumvent that but they  
16 do.

17 MS. GARDNER: Oh, excuse me,  
18 Luke. I know where I had seen that before.  
19 Excuse me. It's in Rule 329(b). (a) says "a  
20 motion for new trial if file shall be filed  
21 prior to or within 30 days after the judgment  
22 or other order complained of is signed." So  
23 it can be done.

24 CHAIRMAN SOULES: Right. And  
25 it can be acted on, but the rules are all

1 structured to go verdict, judgment, new trial.

2 MR. LOW: In my many years of  
3 practice it hasn't been that way, though.

4 MR. ORSINGER: Well, Luke,  
5 Richard Orsinger, I agree with Judge  
6 Guittard. I had this come up in a case and I  
7 did some research on it. And there are some  
8 sections in TexJur that if they grant a new  
9 trial before they enter a judgment, I think  
10 it's categorized as a mistrial even though we  
11 know that it's not a mistrial.

12 MR. LOW: I went through that  
13 some years back, and they can be mandamused on  
14 that until there's a new trial.

15 HON. C. A. GUITTARD: In other  
16 words, if the judge says, "I grant a new  
17 trial," he can't be mandamused. And if he for  
18 the same reasons and under the circumstances  
19 say, "I grant a mistrial," he could be  
20 mandamused.

21 MR. LOW: That's right.

22 HON. C. A. GUITTARD: That  
23 doesn't make too much sense.

24 MR. LOW: Well, that's the way  
25 it is.

1                   CHAIRMAN SOULES: In theory you  
2 can mandamus a judge to render judgment on a  
3 verdict, but before you can mandamus a judge  
4 on a mistrial order, you've got to have a  
5 verdict, don't you?

6                   MR. LOW: We went through it  
7 where the judge -- we just started questioning  
8 the jury right in the box, and the judge heard  
9 enough to grant a new trial right there. And  
10 we went through it and tried to mandamus, and  
11 he said exactly what the judge said, "I grant  
12 a new trial."

13                   Now, that was some years back, and the  
14 law might have changed a lot since then, but  
15 that's the last time I went through it. We  
16 got a new trial before the jury ever left the  
17 box.

18                   CHAIRMAN SOULES: But you had a  
19 verdict?

20                   MR. LOW: We had a verdict.  
21 And they started -- they admitted -- they  
22 talked about insurance and a bunch of stuff  
23 right there, and the judge just granted a new  
24 trial.

25                   MR. ORSINGER: But I think the

1 only grounds that you can mandamus a mistrial  
2 on is where you erroneously conclude that you  
3 have a conflict in the verdict and you don't.

4 MR. LOW: You could be right on  
5 that. I don't know.

6 CHAIRMAN SOULES: If we're  
7 going to say calculated to -- well, not  
8 calculated. If we're going to say "probably  
9 caused rendition of an improper judgment" in  
10 (6), something has to be rewritten, because  
11 you can't say that if the evidence had been  
12 presented at trial it probably caused  
13 rendition of an improper judgment. That's  
14 just a non sequitur.

15 MR. ORSINGER: I would say "a  
16 different judgment." Why can't we say "a  
17 different judgment" rather than "improper"?

18 MR. PRINCE: Why don't you just  
19 use the language that Anne read right out of  
20 that case and put it in with the future trial  
21 but in present tense? Just use the same  
22 language.

23 CHAIRMAN SOULES: Or you could  
24 say "the unavailability of the evidence at  
25 trial probably caused rendition of an improper

1 judgment." That's one way to make it  
2 parallel.

3 HON. C. A. GUITTARD: I don't  
4 object to what Anne said, but it probably  
5 would bring about a different result if  
6 admitted on a new trial.

7 MR. ORSINGER: But I would  
8 say -- this, as written, "if presented at the  
9 trial," means if presented at the trial you  
10 just finished.

11 HON. C. A. GUITTARD: Yeah.

12 MR. ORSINGER: If we're going  
13 to talk in the present tense, we probably  
14 ought to just delete that clause so that we're  
15 not making a reference to the past. Then we  
16 can go ahead and talk in the present tense.  
17 But if we're going to talk about the trial  
18 that we just finished, we need to use the  
19 preterite past or whatever tense that is.

20 HON. C. A. GUITTARD: That's  
21 right. In other words, you've discovered new  
22 evidence that might change the result in the  
23 future, but that's not the test. The question  
24 is, is this an improper judgment because this  
25 evidence wasn't presented in that trial.

1 CHAIRMAN SOULES: Okay.

2 MR. HUNT: Mr. Chairman, could  
3 I ask Anne to read that language again?

4 MS. GARDNER: Sure. "That it  
5 is so material that it would probably produce  
6 a different result if a new trial were  
7 granted."

8 HON. C. A. GUITTARD: Where  
9 does that come from?

10 MS. GARDNER: This is from  
11 Jackson vs. Van Winkle, 1983, Supreme Court.

12 The whole paragraph is "It is incumbent  
13 upon a party who seeks a new trial on the  
14 grounds of newly discovered evidence to  
15 satisfy the court, first, that the evidence  
16 has come to his knowledge since the trial;  
17 second, that it was not owing to the want of  
18 due diligence that it did not come sooner;  
19 third, that it is not cumulative; fourth, that  
20 it is so material that it would probably  
21 produce a different result if a new trial were  
22 granted."

23 HON. C. A. GUITTARD: If the  
24 Supreme Court says that, that's fine. Let's  
25 put it in there.

1                   CHAIRMAN SOULES: Okay. Again,  
2                   one alternative would be to say and the  
3                   unavailability of the evidence caused  
4                   rendition -- probably caused rendition of an  
5                   improper judgment. That fits the other  
6                   language of (6): "When new evidence has been  
7                   discovered that was not available at the trial  
8                   by the movant's use of reasonable diligence,  
9                   and the unavailability of the evidence  
10                  probably caused an improper judgment."

11                  Well, either way, you can use that or  
12                  Anne's or something like that.

13                  MR. HUNT: Mr. Chairman, how  
14                  about this language then: "When new evidence,  
15                  which is not cumulative, has been discovered  
16                  that was not available at the trial by the  
17                  movant's use of due diligence, and its  
18                  unavailability probably caused the rendition  
19                  of an improper judgment"?

20                  CHAIRMAN SOULES: Does anybody  
21                  object to that? That sounds fine, except you  
22                  said "due" instead of "reasonable diligence."

23                  MR. PRINCE: Let's not talk  
24                  about due diligence.

25                  MR. ORSINGER: It's like horse

1 and buggy. It goes together.

2 MR. HUNT: I'll use "reasonable  
3 diligence."

4 CHAIRMAN SOULES: Okay.  
5 Anything else on 320(a), Grounds? Is anyone  
6 opposed to 320(a) now as amended by the  
7 Committee's discussion? Okay. It stands  
8 approved.

9 And we will be here at 8:00 o'clock  
10 tomorrow morning. It's 5:35. I appreciate  
11 your long day here today.

12 (MEETING ADJOURNED.)

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CERTIFICATION OF THE HEARING OF  
SUPREME COURT ADVISORY COMMITTEE  
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I, WILLIAM F. WOLFE, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on September 15, 1995, afternoon session, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are \$1,297.75.  
CHARGED TO: Soules & Wallace, P.C..

Given under my hand and seal of office on this the 29th day of September, 1995.

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