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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

SEPTEMBER 20, 1996

(AFTERNOON SESSION)

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Taken before D'Lois L. Jones, a
Certified Shorthand Reporter in Travis County
for the State of Texas, on the 20th day of
September, A.D., 1996, between the hours of
1:15 o'clock p.m. and 5:30 p.m. at the Texas
Law Center, 1414 Colorado, Room 101, Austin,
Texas 78701.

COPY

SEPTEMBER 20, 1996
AFTERNOON SESSION

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SEPTEMBER 20, 1996

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo III
Donald M. Hunt
David E. Keltner
Joseph Latting
Gilbert I. Low
John H. Marks Jr.
Russell H. McMains
Anne McNamara
Robert E. Meadows
Richard R. Orsinger
Honorable David Peeples
Luther H. Soules III
Stephen Yelenosky

EX OFFICIO MEMBERS:

Hon Sam Houston Clinton
Paul N. Gold
O.C. Hamilton
David B. Jackson
Doris Lange
Mark Sales
Bonnie Wolbrueck

MEMBERS ABSENT:

Alejandro Acosta, Jr.
Charles L. Babcock
David J. Beck
Hon. Ann T. Cochran
Hon. Sarah B. Duncan
Michael T. Gallagher
Anne L. Gardner
Hon. Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring, Jr.
Tommy Jacks
Franklin Jones Jr.
Thomas S. Leatherbury
Hon. F. Scott McCown
David L. Perry
Anthony J. Sadberry
Stephen D. Susman
Paula Sweeney

EX OFFICIO MEMBERS ABSENT:

Justice Nathan L. Hecht
Hon. William Cornelius
W. Kenneth Law
Hon. Paul Heath Till

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1
2 CHAIRMAN SOULES: Moving right
3 along, making a lot of progress here with
4 Bonnie's good report. Let's see. What page
5 are we on now?

6 MS. WOLBRUECK: We are on page
7 6.

8 CHAIRMAN SOULES: Page 6.

9 MS. WOLBRUECK: No. (5). This
10 is just the notice on finding of fact and
11 conclusions of law. This is from Rule 296 and
12 297. It just states that the clerk of the
13 court shall immediately call to the attention
14 of the judge who tried the case whenever there
15 is these filings. I don't think that that's
16 an issue.

17 CHAIRMAN SOULES: Okay. Good.

18 MS. WOLBRUECK: That section
19 actually basically concludes the section that
20 will be entitled "The Duties of the Clerk,"
21 and then we have some other rules as we go
22 along.

23 We had been requested to put into the
24 rules a rule on fax filing, electronically
25 transmitting court documents. On page 7.

1 CHAIRMAN SOULES: Okay. Before
2 we get there, does anyone have any dissent
3 then over the work up to now that Bonnie's
4 reported on, the rules that are called,
5 "Duties of the Clerk of the Court," 1 through
6 6, pages 1 through 6?

7 No objection to those, they will stand
8 then unanimously approved with the changes and
9 edits to be made that we have already put on
10 the record as we have gone along here, Bonnie,
11 and thank you for that.

12 Now we are on Rule 7, on page 7.

13 MS. WOLBRUECK: On page 7.

14 CHAIRMAN SOULES:
15 Electronically transmitted court documents.

16 MS. WOLBRUECK: This is a fax
17 filing rule. This rule basically mirrors most
18 of the fax filing plans that are in place in
19 the state of Texas today. There are just a
20 couple of minor changes, and one of them is
21 that the fax filing plans today as originally
22 drawn up many years ago required an
23 acknowledgement of the clerk.

24 Basically it had said that after filing
25 an electronically transmitted document the

1 clerk of the court will electronically
2 transmit to the sender an acknowledgement of
3 the finding together with cost receipts, if
4 any. Basically this is an acknowledgement
5 that is in many of the fax filing plans today.

6 The clerks committee would request that
7 the acknowledgement be deleted from this rule.
8 Basically it was placed there years ago when
9 technology was not trusted as it is today, and
10 basically we feel that fax filings shall be
11 treated the same way as mail delivery and
12 would not require an acknowledgement, and
13 basically the person sending the fax has
14 acknowledgement from their own fax machine
15 that it has been sent. So this plan, that's
16 the only difference basically between this and
17 what is in place today.

18 Now, as one other note for you, No. (11)
19 states when the document shall be filed by the
20 clerk. Most of the fax filing plans -- and I
21 think Lee can address this probably better
22 than I can. Most of the fax filing plans in
23 place today give you an 8:00 to 5:00 filing,
24 not a 24-hour filing. There are a couple of
25 them, it's my understanding, in the state of

1 Texas at this point that do allow 24-hour fax
2 filing as far as filing time. The clerk files
3 the document at whatever time is on the
4 machine.

5 There was a great deal of discussion in
6 the subcommittee about this. The subcommittee
7 agreed that it should only be an 8:00 to 5:00,
8 normal business hours. So those are the two
9 notes in this that I want you to be aware of.

10 CHAIRMAN SOULES: Technical
11 question, and I don't really know what this is
12 except that I hear everybody talk about it in
13 my office. Some of these machines will spool
14 received electronic faxes and then print them
15 as they catch up, but the receipt that I get
16 shows the time that the receiving fax machine
17 gets the end of the last page of my fax, and
18 say it says "4:45," but it doesn't get printed
19 in the clerk's office until 6:00 o'clock.

20 MS. WOLBRUECK: I think that
21 that issue, I had asked -- that hasn't really
22 become an issue in any of the clerks' offices
23 at this time, and I'm not sure. Maybe Lee can
24 address if he recalls if that issue had come
25 up before the Supreme Court at this time. I

1 called a lot of clerks' offices, and amazingly
2 fax filing is not something that's used a
3 great deal. It's usually only used, like, you
4 know, with me somebody from Dallas County or
5 Harris County or somewhere else that's much
6 further off that wants to get something to my
7 office timely.

8 CHAIRMAN SOULES: It may print
9 out the time with --

10 MR. ORSINGER: It prints out
11 the time it prints. It prints out the time it
12 prints the page, so that if you get a long fax
13 you should see the minutes incrementing.

14 MS. WOLBRUECK: My fax machine
15 prints both times. It prints the sender's
16 time and my time that I received it, and some
17 machines do that. They don't all do that.

18 MR. McMANS: Well, but this
19 rule says the filing isn't completed until the
20 stamp is affixed.

21 MS. WOLBRUECK: That's correct.

22 MR. McMANS: So actually
23 whenever it's sent doesn't make any difference
24 until you get a paper reproduction of it
25 that's printed and you affix the stamp. There

1 is nobody there to affix the stamp after 5:00.
2 Then it isn't filed until 10:00 o'clock the
3 next day.

4 MS. WOLBRUECK: Probably.

5 MR. MARKS: What if it's faxed
6 in at 4:00 and not stamped until later?

7 MS. WOLBRUECK: It should be,
8 and basically it states here that if it's
9 received before 5:00 p.m. then it will be
10 accepted on that date as filed.

11 MR. YELENOSKY: So you will
12 back stamp it?

13 MS. WOLBRUECK: The clerk will
14 have to -- it says, "Transmissions completed
15 during a normal business day before 5:00 p.m.
16 and accepted for filing will be filed on the
17 day of receipt."

18 CHAIRMAN SOULES: "If
19 transmission is completed and accepted for
20 filing."

21 MS. WOLBRUECK: That means that
22 everything is complete, if there were any fees
23 to be included with it, that all of that has
24 been verified.

25 CHAIRMAN SOULES: Say that

1 again, please.

2 MS. WOLBRUECK: That if there
3 were any fees or court costs to be included
4 with that filing, that all of that has also
5 taken place and that that document has been
6 received for filing.

7 PROFESSOR DORSANEO: Well, that
8 would be a change in current law. I mean, as
9 I understand it, if you file it, even if you
10 didn't pay the fee you get to pay the fee
11 later.

12 MR. ORSINGER: Especially on
13 motions for new trial.

14 PROFESSOR DORSANEO: Yeah.

15 MR. ORSINGER: Most people
16 don't send 10 bucks.

17 MR. McMains: Or 15.

18 MS. WOLBRUECK: All fees shall
19 be paid at the time of filing by statute.

20 PROFESSOR DORSANEO: Huh.

21 CHAIRMAN SOULES: Well, I think
22 we have got a Supreme Court decision
23 inconsistent with that.

24 PROFESSOR DORSANEO: Right.

25 CHAIRMAN SOULES: Because they

1 say if the clerk -- maybe that's deemed filed
2 as opposed to actually filed. I don't know
3 what the court held. Something was sent in,
4 got there on time. The fee wasn't paid. The
5 fee was paid late, out of court on appeal,
6 back in court on appeal. I think that the
7 Supreme Court level is saying that whenever
8 you get around to paying the fee you get the
9 filing date of the receipt of the papers.

10 MR. ORSINGER: If you pay
11 within a reasonable time, I think.

12 CHAIRMAN SOULES: So --

13 MS. WOLBRUECK: Like I said, I
14 have taken this pretty well verbatim from most
15 of the fax filing plans that are in place
16 today. The only change was the one that I had
17 told you about the acknowledgement, along with
18 No. (3) on page 7.

19 Most fax filing plans, if they are done
20 for a specific county court, costs and fees
21 shall be paid by a payment method authorized
22 by the clerk of the court. Many times there
23 is a method designated in that fax filing
24 plan. This just leaves it open that the court
25 may make that determination of how that method

1 will be done. So that was one change, and
2 actually that's the only thing other than the
3 acknowledgement.

4 CHAIRMAN SOULES: What do you
5 mean, like if you take plastic?

6 MS. WOLBRUECK: Yeah. Some
7 clerks are using escrow accounts. Some do
8 credit cards.

9 MR. ORSINGER: Can I ask a
10 question?

11 CHAIRMAN SOULES: Richard.

12 MR. ORSINGER: On paragraph
13 (3), fee and payment, it just categorically
14 says that you will not accept electronic
15 filing unless the fees have been paid.

16 Now, what if I walk in with a motion for
17 new trial and no check and I tender it and lay
18 it there on the clerk's desk? Are they
19 required to accept it and put a file stamp on
20 it and then give me a reasonable time to give
21 them a check, or can they refuse to touch it
22 and pretend like it hasn't been laid on their
23 counter?

24 CHAIRMAN SOULES: I think the
25 clerk should mark it "received," but not

1 filed. Do you do that?

2 MS. WOLBRUECK: It's probably
3 different policies. My policy is to mark
4 something "filed" whenever it's actually
5 tendered. There is some case law that says if
6 you tender something to a clerk for filing
7 it's actually filed.

8 CHAIRMAN SOULES: Whether or
9 not the fee is paid?

10 MS. WOLBRUECK: That's right.

11 CHAIRMAN SOULES: So the
12 statute that says the fee is to be paid at the
13 time of filing is really the time the fee is
14 due, not the condition of filing.

15 MS. WOLBRUECK: That's right.

16 MR. ORSINGER: Somebody
17 mentioned -- I don't know if it was Bonnie, or
18 somebody mentioned to me recently that there
19 is a lawyer in Dallas or someplace that
20 routinely files initial lawsuits without
21 tendering the filing fee. Did you say that to
22 me, Bonnie?

23 MS. WOLBRUECK: Yeah, but I
24 don't want anybody to know that there is
25 lawyers that do that.

1 MR. ORSINGER: I'm sorry. I
2 withdraw it. Can we erase this record?

3 Move to strike. Sorry, Bonnie.

4 CHAIRMAN SOULES: Carl
5 Hamilton.

6 MR. HAMILTON: I'd like to
7 suggest that we consider a provision in here
8 that has the clerk to either file something or
9 publish something as to whether they have
10 elected to do this, or does this mean they can
11 from day-to-day elect whether they want to
12 accept something?

13 MS. WOLBRUECK: That's probably
14 a good point because this has to be permissive
15 for the clerks. We cannot require this of
16 every clerk's office. I don't think that it's
17 fair to do so at this point, again because of
18 the adversity. I don't think it's fair to
19 require Loving County or any of the other
20 small counties that maybe just have a few
21 cases filed or a few documents filed annually,
22 and just the cost to the county is a large
23 cost. You understand that we are on very,
24 very strict budgets, and just, you know, many
25 counties that will not purchase a fax machine

1 and cannot afford possibly a fax machine, and
2 that seems a little bit hard for many of us in
3 today's technology, but it's very true.

4 Many counties don't have computers. So,
5 you know, and possibly what you are saying is
6 correct, if you would like to some way to
7 publish it or however you would like for that
8 information to be obtained.

9 MR. HAMILTON: Well, I think
10 there is some situations where the clerks say,
11 "We don't accept fax filing."

12 MS. LANGE: The county clerk
13 cannot by legislature accept any fax filing.

14 MR. HAMILTON: Yeah. But I am
15 talking about district clerks. Some district
16 clerks say, "We don't accept them." Then if
17 it's an emergency or if it's a friend or
18 something, they will do it. So it needs to be
19 one way or another.

20 MS. WOLBRUECK: Right now
21 according to the statute any clerk, a district
22 clerk, may not accept a fax filing pleading
23 unless they have an approved order by the
24 Supreme Court. The statute says that. It's
25 in the government code. The government code

1 dictates to the fact of fax filing and
2 approval by the Supreme Court, and that's one
3 of the issues that if we go with this as a
4 rule, we are going to have to look at the
5 statute as far as it being a rule and not
6 needing the Supreme Court approval, which I
7 have made a note that the clerks will address
8 that.

9 MR. McMAINS: What does this
10 part mean about -- it says, "A fee schedule
11 for electronic filing shall be adopted."

12 MS. WOLBRUECK: Basically the
13 way all fax filing plans were initiated and
14 started was that this is an additional service
15 that's being provided to the attorneys, and in
16 doing so if the clerk purchases a fax machine
17 to provide you that service, they would like
18 to have some reimbursement for doing so, and
19 then fee schedules have been addressed by
20 counties for that purpose.

21 MR. McMAINS: It's just that if
22 you are going to be able to charge a fee to
23 file something by fax, but it ain't filed
24 until you pay the fee, that still looks to me
25 to be that we have made it automatic that

1 whatever you file by fax isn't really filed
2 until you pay the fee.

3 PROFESSOR DORSANEO: Unless you
4 have a credit balance down at the district
5 clerk's office.

6 MR. McMAINS: Unless you just
7 deposit some money or something.

8 PROFESSOR DORSANEO: You could
9 fax them some money.

10 MR. McMAINS: Fax yourself out
11 of court.

12 CHAIRMAN SOULES: Well, what do
13 you do to collect filing fees that should have
14 been paid but were not paid, yet the item has
15 been filed?

16 MS. WOLBRUECK: You file a
17 motion to rule for costs.

18 CHAIRMAN SOULES: And then the
19 parties --

20 PROFESSOR DORSANEO: Why not
21 just send them a bill?

22 MS. WOLBRUECK: Well, you do
23 that, but if they refuse to pay it, but it's
24 not -- we would bill them. And, yes, Bill, we
25 send them a bill, and just -- you know, I

1 happen to be one of the clerks that I don't
2 have that problem, but there are clerks in
3 other parts of the state that have a great
4 deal of difficulty with it; and in fact, as a
5 last recourse they will file a motion to rule
6 for costs.

7 PROFESSOR DORSANEO: I would be
8 in favor of a rule that said you send them a
9 bill, and if they don't pay the bill, you send
10 them the paper back.

11 CHAIRMAN SOULES: I don't know
12 about that. Now, Justice Duncan is not here
13 to defend that.

14 The reason I'm asking these questions, we
15 don't have, as I recall, any place else in the
16 rules where the rules themselves burden the
17 right to file with any kind of payment. The
18 rules themselves, filing is not burdened
19 anywhere, is it?

20 MR. ORSINGER: Well, a jury
21 demand is no good unless you pay your jury
22 fee. Now, it doesn't mean you can't file your
23 jury demand, but that means it's worthless.

24 CHAIRMAN SOULES: I understand.
25 That's right.

1 MS. WOLBRUECK: That actually
2 is the only -- the only fee in the rule right
3 now is the jury fee, and that's the one that,
4 in fact, I have made note in here in this
5 packet that the clerks legislative committee
6 is looking at taking that fee out and putting
7 that into the statutes so that all fees are
8 addressed by statute.

9 CHAIRMAN SOULES: Given that,
10 though, regardless of what the fee is, is
11 there any place where the right to file a
12 document is burdened with the payment of some
13 fee, whether set by statute or otherwise,
14 whether that's in the rules?

15 MR. ORSINGER: Certainly not in
16 the rules, and I don't even think the statutes
17 preclude you from filing it.

18 CHAIRMAN SOULES: So I don't
19 think all this ought to be -- all this
20 business about payment of fees should be taken
21 out of this. If you get it by fax, you file
22 it, and then you have got the same remedies
23 that you would have if somebody sent a
24 paralegal over there with a document to file,
25 and you filed it without getting the money.

1 MR. ORSINGER: But as a
2 practical matter, Luke, even those who want to
3 pay the fee can't.

4 CHAIRMAN SOULES: I know that.

5 MR. ORSINGER: And so we have
6 to make allowance for credit arrangements,
7 periods of delay to file by fax and send the
8 check by mail. I mean, even if -- I would
9 never dream of filing something without
10 intentionally paying the filing fee, but I
11 can't do that if I file it by fax. So we have
12 to make it clear that someone who is trying to
13 pay can pay either by having a credit card or
14 by having a credit balance.

15 So I wouldn't be in favor of taking out
16 all financial arrangements, but I would be in
17 favor of saying that your fax filing is
18 effective when it's received, subject to
19 something later on happening to you if you
20 never send your filing fee.

21 CHAIRMAN SOULES: Okay.

22 MR. McMains: Is there
23 something legislative or whatever that
24 basically says that it's -- I mean, is it the
25 legislature that sets fees?

1 CHAIRMAN SOULES: Yes.

2 MS. WOLBRUECK: Yes.

3 MR. McMAINS: And they set the
4 fees all the time now?

5 MS. WOLBRUECK: Yes.

6 MR. McMAINS: I mean, there is
7 not anything in the rules and nothing that
8 says the Supreme Court can levy a tax of any
9 kind for doing anything?

10 MS. WOLBRUECK: Like I said,
11 the only fee that's in the rules --

12 MR. McMAINS: Well, I'm just
13 trying to figure out if it's even legal
14 basically to put in the rules some
15 authorization or delegation to some other
16 entity, or is there something in the way the
17 government code, the Constitution, or whatever
18 read which basically says those fees shall be
19 set uniformly by statute or some other
20 provision?

21 CHAIRMAN SOULES: They are set
22 by statute. Counterclaims, I mean, they have
23 got a long list of fees that are set by
24 statute; but if you are going to put a
25 prerequisite, a condition to filing, on any

1 filing, anywhere in the rules, this is the
2 worst place to do it.

3 MR. ORSINGER: True. It
4 defeats the whole purpose of writing the rule.

5 CHAIRMAN SOULES: Now, you can
6 write and say the clerk shall promptly bill
7 the filing party for the necessary fees or
8 whatever, but you are not going to get the fee
9 when you get the paper, Bonnie, are you?

10 MS. WOLBRUECK: All of the
11 counties that have this plan in place today
12 have to have mechanisms for collecting the
13 fees. It's a very, very simple procedure, and
14 most of them are done by credit cards.

15 CHAIRMAN SOULES: And how does
16 that mechanically work? They send you a --

17 MS. WOLBRUECK: You will send
18 in the information that this is the credit
19 card number that I want this charged to. You
20 are hooked up to the credit card companies by
21 telephone. You get the authorization that,
22 yes, this is a good card and a good number,
23 collect the fee, get the money. You know,
24 everybody is happy.

25 CHAIRMAN SOULES: Do the credit

1 card companies charge you a user fee for that?

2 MS. WOLBRUECK: Some of them
3 do, but there is a statute that doesn't
4 allow -- no, there is a statute that allows a
5 charge, an additional charge to be placed on
6 that, like a five-dollar fee or something, a
7 processing fee for a governmental entity in
8 use of credit cards.

9 CHAIRMAN SOULES: John Marks.

10 MR. MARKS: I think that since
11 this is basically an accommodation made by the
12 clerk that the provision with respect to
13 payment ought to stay in there; and I think
14 that this line that says "payment method
15 authorized by the clerk of the court," the
16 clerk is going to work out a way that's going
17 to accommodate the lawyers who want to file
18 things, but I think it ought to stay in there.

19 CHAIRMAN SOULES: Okay.

20 MR. ORSINGER: Well, actually
21 there is two things at issue here. One is you
22 leave in this business about the clerk having
23 the power to make arrangements, and the other
24 one is, is everything that's filed without an
25 arrangement is considered not filed, and if

1 you can physically present yourself to the
2 district clerk with a motion for new trial and
3 no 15 bucks and then get it filed and then
4 send your money in later, you shouldn't be any
5 worse off because you filed it by fax.

6 So there is a possibility you could leave
7 payment power and arrangements in here, but
8 that the punishment for prepaying is not that
9 your document is treated as if it was never
10 filed. Go ahead and treat it as if it was
11 filed and let the district clerk punt the
12 document after a week or something like that.

13 CHAIRMAN SOULES: It seems to
14 me this is worse than no rule at all. This
15 invites people to file a motion for new trial
16 on the 30th day by fax and gives a number of
17 arguments that it was untimely filed;
18 therefore, a party loses his right to appeal.
19 And people are going to use this that don't
20 read these traps, and who knows what the
21 appellate courts are going to do with the
22 traps.

23 Buddy.

24 MR. LOW: I was thinking we had
25 something in a rule already that said a fax

1 filing, you would treat it no different than
2 any other filing, just like -- I mean, so why
3 wouldn't when you are receiving it, no matter
4 when, why wouldn't you just treat it -- just
5 have something to say that's the same as if I
6 had brought that there myself. Fax filing is
7 just the same.

8 What if I had deposited it at 5:00
9 o'clock, hand-delivered it? I mean, fax
10 filing, I think that when we discussed it we
11 wanted to treat fax exactly no different than
12 if it had been delivered by me by hand in the
13 clerk's office. Wasn't that right?

14 MR. McMAINS: Actually, we
15 treated it differently in the rules anyway.
16 If you send out the notices by fax, it's just
17 like mailing.

18 MR. ORSINGER: It's worse than
19 mailing because it's a post-5:00 o'clock.

20 MR. McMAINS: Yeah.

21 MR. LOW: No. I didn't
22 mean -- I misspoke. I meant fax to the
23 clerk's office is what I meant, not fax, you
24 know, to the lawyers or something like that;
25 but I thought that the intent was to treat a

1 fax filing in the clerk's office just the same
2 as if I had just handed the clerk -- I was
3 there physically and handed the clerk that
4 document at the time it came in.

5 CHAIRMAN SOULES: Well, there
6 is no statewide rule on this right now. It's
7 just local rules.

8 MS. WOLBRUECK: No, sir. It's
9 a rule approved by the Supreme Court. By
10 order of Supreme Court there are probably I
11 would guesstimate about 50 or more -- I don't
12 know how many -- counties in the state of
13 Texas that now have this plan in place.

14 CHAIRMAN SOULES: But they
15 don't get it just because the Supreme Court
16 has got an order. They have got to --

17 MS. WOLBRUECK: Yes. That's
18 exactly right.

19 CHAIRMAN SOULES: -- send their
20 plan in, and the Supreme Court has got to
21 approve the county plan. So they have got a
22 rule that says, "You can have it. If you want
23 it, send us your scheme."

24 MS. WOLBRUECK: That's right.

25 CHAIRMAN SOULES: You send it

1 up, and they look at it, and they approve it,
2 send it back.

3 MS. WOLBRUECK: The only reason
4 I have included it in here is it was a
5 recommendation, a suggestion by the
6 subcommittee; and, you know, I don't have a
7 problem with taking it out and letting things
8 remain the way they are today if that's what
9 this committee would prefer.

10 MR. ORSINGER: I can make a
11 suggestion on (3), and that is that we take
12 out every sentence in (3) except for "Court
13 costs and fees shall be paid by a payment
14 method authorized by the clerk of the court."

15 So that puts a duty on somebody to pay in
16 the manner that the clerk tells them to pay,
17 but it takes out everything that says you
18 haven't really filed it if you don't, and then
19 it's not probably much different from the
20 condition that the clerk is in when somebody
21 walks up and drops it in the basket and walks
22 out without leaving a check.

23 CHAIRMAN SOULES: That's okay
24 with me.

25 PROFESSOR DORSANEO: You have

1 to change (11), too, then.

2 CHAIRMAN SOULES: We have got
3 to change several places.

4 PROFESSOR DORSANEO: Yeah.

5 MR. McMAINS: Because (11) says
6 it ain't filed if it ain't paid.

7 CHAIRMAN SOULES: I guess first
8 we have got to get a consensus. John tends to
9 disagree.

10 MR. MARKS: I would have no
11 problem with that.

12 CHAIRMAN SOULES: Okay.
13 Anybody disagree with what Richard said?

14 MR. McMAINS: Well, it's not a
15 question of disagreement, but where is the
16 authorization of the clerk to charge a fee for
17 filing?

18 CHAIRMAN SOULES: Right here in
19 (4). That's an extra fee.

20 MR. ORSINGER: (3) says, "Court
21 costs and fees shall be paid by a payment
22 method authorized" --

23 MR. McMAINS: I know, but you
24 were talking about taking out -- were you
25 talking about taking out the first sentence,

1 too?

2 MR. ORSINGER: Yes, I was.

3 MR. McMAINS: And what do you
4 do about (4)?

5 MR. ORSINGER: I don't think
6 there is anything wrong with (4). I think
7 they ought to be entitled, unless you have a
8 problem with the legislature.

9 MR. McMAINS: I don't know. I
10 just -- it seems to me there must be a reason
11 why we don't ever allow -- that we have not
12 ever taken it upon ourselves to delegate to
13 somebody the power to assess fees. That seems
14 to me to be a fairly political question; and I
15 mean, since it's been done by the legislature
16 my question is, do we have the authority to do
17 that?

18 CHAIRMAN SOULES: Yes. We
19 don't, but the Supreme Court does.

20 MR. ORSINGER: And remember
21 that on the jury fee --

22 MR. McMAINS: But is it because
23 the legislature gave them the authority?

24 CHAIRMAN SOULES: Well, they
25 have the Constitutional authority to run the

1 courts, administer and run the courts
2 efficiently.

3 MR. ORSINGER: On the jury fee
4 we have a combined rule fee plus a legislative
5 fee add-on on top of the rule fee.

6 CHAIRMAN SOULES: I'm assuming
7 that what (4) is for is to take care of the
8 amortization costs of owning and operating the
9 equipment.

10 MS. WOLBRUECK: That's correct.

11 CHAIRMAN SOULES: That's an
12 extra cost to the clerk's office. Otherwise
13 it's all the same.

14 MS. WOLBRUECK: That's right.

15 CHAIRMAN SOULES: A paper comes
16 in, file it, store it, gone.

17 MS. WOLBRUECK: I would like
18 to -- if you don't mind, Luke, I would like to
19 defer to another rule while we are talking
20 about these fees. On page 22.

21 CHAIRMAN SOULES: Okay.

22 MS. WOLBRUECK: Rule 142 had to
23 do with security for costs, and originally it
24 says, "The clerk shall require from the
25 plaintiff fees," misspelled, "for services

1 rendered before issuing any process unless
2 filing is requested pursuant to Rule 145 of
3 these rules." Basically it said that the
4 clerk only from the plaintiff had to get the
5 fee before any process would be issued.

6 No. 1, I think that we should require the
7 fees from more than just the plaintiff, but
8 also that all fees should be paid at the time
9 of filing. This becomes an issue, as I said,
10 in some counties where attorneys refuse to pay
11 filing fees. They are statutory fees. They
12 are required by statutes, and I had hoped that
13 possibly as a security for costs that we could
14 address it in these rules, that court costs
15 should be paid at the time of filing.

16 It does not address the issue of should
17 the clerk file it or not if the fees are not
18 there. It is just the security for it.

19 CHAIRMAN SOULES: Well, this
20 expands. This is before issuing any process.

21 MS. WOLBRUECK: That's what it
22 was, and this now includes all filing.

23 CHAIRMAN SOULES: Bill
24 Dorsaneo.

25 PROFESSOR DORSANEO: Bonnie,

1 how big a problem is this for people of people
2 actually trying to evade payment of fees?
3 Isn't it a small problem?

4 MS. WOLBRUECK: In some
5 counties in the state it's a large problem.

6 PROFESSOR DORSANEO: Well, I
7 don't pay fees on a number of occasions, and I
8 am doing something that I don't do that often,
9 and when somebody sends me a bill I think,
10 "Whoops," and I'm sure I'm not alone in that
11 circumstance. Richard maybe keeps track of
12 all of that because he's more like that than I
13 am, but I'm not like that.

14 MS. WOLBRUECK: Well, why would
15 you put the burden on the clerk to have to go
16 into the billing and collection process?

17 MR. ORSINGER: Well, I would
18 like to ask, at the present time -- and maybe
19 you answered this and I missed it, but at the
20 present time if somebody mails it to you
21 without a check or if they walk in and drop it
22 off on the desk and walk out, do you not stamp
23 it or do you stamp it?

24 MS. WOLBRUECK: We file it.

25 MR. ORSINGER: Okay. We

1 shouldn't treat electronic --

2 MS. WOLBRUECK: But there are
3 mechanisms, you know, in place, as I said; and
4 the last resort is a motion to rule for costs.

5 MR. HAMILTON: There are a lot
6 of clerks that won't. They won't file them.
7 They won't file them in Hidalgo County without
8 the money.

9 MR. ORSINGER: Well, I think we
10 ought to have a uniform rule, and I think the
11 uniform rule ought to be that you file the
12 document, subject to having it stricken if
13 they don't pay within a reasonable time.

14 MR. McMAINS: Well, the fact of
15 the matter is the case law is that it is filed
16 when you tender it to the clerk, not when they
17 put their stamp on it.

18 MS. WOLBRUECK: That's right.

19 MR. McMAINS: What she's asking
20 us to do is to change the law -- I mean,
21 change the rules to basically say until they
22 put their stamp on it then it ain't filed, and
23 that is a significant change.

24 MS. WOLBRUECK: Only under fax
25 filing, and, Rusty, I am aware of the case law

1 that you mentioned.

2 MR. MARKS: What would be the
3 problem in allowing the filing whenever it's
4 received by the fax machine?

5 MS. WOLBRUECK: That allows
6 24-hour filing then, which is another issue.

7 CHAIRMAN SOULES: Well, Richard
8 had a proposition which would strip out any
9 conditions of filing based on paying the fees.
10 Is anyone opposed to that?

11 MR. HAMILTON: That changes
12 Rule 142 then.

13 CHAIRMAN SOULES: No.

14 MS. WOLBRUECK: We can address
15 142 as we get there.

16 CHAIRMAN SOULES: 142 is over
17 on page 22?

18 MS. WOLBRUECK: That's right,
19 and we can address that later.

20 CHAIRMAN SOULES: That doesn't
21 have anything to do with filing, never has
22 had.

23 MR. McMains: No, but she's
24 changed it.

25 CHAIRMAN SOULES: I know she's

1 changed it now to --

2 MR. McMAINS: It does now.

3 CHAIRMAN SOULES: It would now
4 if we pass it, but it doesn't change existing
5 law, because it only now deals with when the
6 clerk is to issue process.

7 Okay. Are we agreed then? Anyone
8 disagree that we would strip out any condition
9 based on paying fees?

10 MS. WOLBRUECK: I think I have
11 to voice a dissention to that for the clerks,
12 because I know there will be an issue with the
13 clerks on it.

14 CHAIRMAN SOULES: Okay. Anyone
15 else? Those in favor then, since we have a
16 split division.

17 MR. MARKS: Can I ask a
18 question first?

19 CHAIRMAN SOULES: Yes, sir.

20 MR. MARKS: Would that include
21 the last sentence? That probably is not
22 necessary now if we agree to take everything
23 else out.

24 CHAIRMAN SOULES: Well, I'm not
25 doing this sentence by sentence, and there are

1 places -- there are a lot of words in here
2 that I think we are going to have to go and
3 address if we take this policy position.

4 MR. MARKS: Okay.

5 CHAIRMAN SOULES: The policy
6 proposition is that the fax filing would not
7 be burdened with the requirement that the fees
8 be paid at the time of filing.

9 Those in favor show by hands. 13.
10 Opposed? To two.

11 Okay. Now, getting about that, Richard
12 would take out certain language in (3).

13 MR. ORSINGER: And you'd also
14 need to eliminate the distinction between
15 receipt and filing because I think the only
16 reason to distinguish receipt from filing was
17 the payment of a fee.

18 MS. WOLBRUECK: And the other
19 thing, Richard, is to make sure that you said
20 you sent me ten pages and I only got eight.

21 MR. ORSINGER: Well, we can do
22 that by leaving in the sentence that
23 says -- in (11), this would be the third
24 complete sentence, "the date and time
25 imprinted on the last page of the document

1 will determine the time of filing." We will
2 eliminate the distinction between receipt and
3 filing.

4 CHAIRMAN SOULES: Okay. These
5 words "and accepted for filing" no longer have
6 any function, do they?

7 MR. ORSINGER: That's right.

8 CHAIRMAN SOULES: Because that
9 had to do with payment of fees.

10 MR. ORSINGER: If the
11 transmission is incomplete, would the clerk
12 file the incomplete transmission, or would
13 they say, "This is an incomplete transmission.
14 I accept none of it"?

15 CHAIRMAN SOULES: I think they
16 ought to file the incomplete transmission.

17 MR. ORSINGER: Okay.

18 CHAIRMAN SOULES: Is there any
19 disagreement about that? It could be amended.

20 MR. ORSINGER: Then we are
21 going to have to change the sentence about the
22 last page, too, or I guess the last page
23 received?

24 MR. LOW: When they say
25 "received," there would be an argument you

1 didn't really receive but these six pages and
2 there were six pages that just weren't there.

3 MR. ORSINGER: But what if your
4 motion for new trial, the first page arrives,
5 and everybody knows you're trying to file a
6 motion for new trial, and the machine ran out
7 of paper and got unplugged or the electricity
8 went out; and, you know, you ought to get
9 credit for having filed the first page.

10 CHAIRMAN SOULES: Suppose it
11 happens in my office that somehow or another
12 we wind up with a duplexed original, printed
13 on both sides, and I tell my copy -- "Copy
14 this and file it. It's my motion for new
15 trial," and they go through and they copy
16 pages 1, 3, 5, 7, 9, and so forth to the last
17 odd numbered page; and when we go file it,
18 that's my motion for new trial. It's a motion
19 for new trial, but half of it's not there, and
20 I'm handing it to them. Can't I amend that?

21 MR. ORSINGER: Sure. Should be
22 able to.

23 CHAIRMAN SOULES: But it was
24 filed when it was gotten, when it was
25 received. So what's the difference? Is there

1 a difference? If there is, let's talk about
2 it.

3 MR. ORSINGER: No.

4 PROFESSOR CARLSON: But that
5 really is just the first page.

6 MR. ORSINGER: See, this is
7 directly analogous to mailing a motion for new
8 trial that's omitted page 3. Is your motion
9 no good because page 3 was omitted? Of course
10 not. I mean, you better amend it, but at
11 least it's considered filed.

12 MR. MARKS: Well, if you have
13 an incomplete transmission, doesn't that
14 message get back on the fax machine that --

15 MR. ORSINGER: Yes.

16 MR. MARKS: -- all of the pages
17 didn't go through?

18 CHAIRMAN SOULES: The legend
19 that we get back is a page-by-page legend at
20 the bottom that it got received. Every page
21 has a little legend at the bottom. I don't
22 know whether that's typical.

23 MR. ORSINGER: Well, frankly, I
24 think that we need to decide what paragraph
25 (11) is supposed to accomplish. Now, it seems

1 to me that if we are serious about taking
2 electronic filing, that if we have enough of a
3 document to realize what it is, that we ought
4 to give them credit for having filed a
5 semblance of that document and then let them
6 amend it rather than rejecting it.

7 MS. WOLBRUECK: Richard, what
8 if it's page 3, starts with page 3 and --

9 MR. ORSINGER: I don't know.

10 MS. WOLBRUECK: -- you didn't
11 receive the first two pages?

12 MR. ORSINGER: I mean, what
13 would you do, Bonnie, if it came to you in a
14 letter instead of off a fax machine, and it
15 starts with page 3? Would you file stamp it
16 or throw it away?

17 MS. WOLBRUECK: According to
18 this right now I would not.

19 MR. ORSINGER: What if it was a
20 letter, not a fax, a letter, that starts with
21 page 3? What would you do with it?

22 MS. WOLBRUECK: I would have to
23 call somebody and say, "What are you trying to
24 send me?"

25 MR. McMains: That's assuming

1 that the last page got there.

2 MR. KELTNER: So then the
3 practice would be to send an incomplete
4 document every day so you would be protected
5 on anything that didn't get there.

6 CHAIRMAN SOULES: Well, we are
7 talking about all of these things out on the
8 fringe, and maybe we need to, but I mean,
9 anything can happen and probably will. But
10 what should be our ordinary practice assuming
11 that the glitches are not all that big, and we
12 can see a way to fix them? The clerk and the
13 lawyers can communicate about it.

14 Rusty.

15 MR. McMAINS: Well, there is a
16 lot of things here that are interrelated is
17 the only problem, as he wants to take one
18 thing out. I mean, for instance, in the
19 requirements, which is section (6), it
20 requires that it be on paper 8 1/2 by 11,
21 contain the individual State Bar of Texas ID
22 number, address, telephone number, and
23 telecopier number.

24 Okay. Now, suppose the last page is the
25 page -- which is more likely to be the case,

1 that is where you have got your certificate
2 and all of your identification of information.
3 Suppose that page doesn't show up. Does the
4 clerk have the ability to refuse to file that
5 or not?

6 I mean, here it's listed as a
7 requirement, and so I don't know what it means
8 if it's a requirement, and yet you are trying
9 to rewrite some other part of the rule saying
10 that they have got to file whatever it is they
11 send, even if it's more or less unintelligible
12 in the form it got sent, and I'm not sure that
13 a clerk has an obligation to file something
14 that's unsigned anyway. I'm not sure, but I'm
15 not sure if since there is a requirement by
16 the lawyers to sign it, I'm not sure the clerk
17 is in error in not filing it.

18 CHAIRMAN SOULES: Well, let's
19 get past this. I mean, there is so much
20 distrust for this whole fax concept, and I
21 just don't understand what it is, and every
22 time we try to do anything it seems that has
23 to do with faxes we just start putting burdens
24 on it just so that we can make it more and
25 more detailed and more and more

1 issue-intensive and longer delays, and that
2 seems to be out of step with the modern world,
3 but I have argued that before and lost, so I
4 don't --

5 MR. ORSINGER: You have a
6 different alignment of people in the room,
7 Luke, so don't give up.

8 MS. WOLBRUECK: Possibly we
9 want to continue with the practice today by
10 local rule and Supreme Court approval and
11 maybe not put it in the rules.

12 CHAIRMAN SOULES: My idea would
13 be you just say the clerk can file
14 electronically and can charge an extra fee if
15 they do it and then let the world take care of
16 itself just like it does through the mail, and
17 when somebody shows up with it in their hand
18 and all the other things we are talking about
19 could happen whether or not it's --

20 MS. WOLBRUECK: There are two
21 different issues, Luke, that need to be
22 addressed. One is that we have to receive a
23 legible copy. No. 2, that the clerk is
24 required to make sure that it's printed on
25 something that can be preserved.

1 CHAIRMAN SOULES: Right.

2 MS. WOLBRUECK: And we do not
3 want things like the old thermal fax machines
4 that went away and turned black after, you
5 know, a few days or something.

6 CHAIRMAN SOULES: Okay. But
7 you determine that in your office because if
8 the receiving --

9 MR. ORSINGER: Yes.

10 MS. WOLBRUECK: That's right.

11 MR. ORSINGER: Bonnie is saying
12 that's what's essential here. What's
13 essential is you've got to be able to read it,
14 and it's got to last because it's a government
15 record, and all the rest of this is window
16 dressing really.

17 CHAIRMAN SOULES: Okay. Well,
18 we can put that in there, but the clerk --

19 MS. WOLBRUECK: We need the
20 essentials.

21 CHAIRMAN SOULES: The clerk may
22 do it if it's legible, if their machine is
23 legible, and on plain white paper, 8 1/2 by
24 11.

25 MS. WOLBRUECK: And I would

1 like for it to make sure that it directs the
2 clerk to copy it, you know, receive it on a
3 laser printer or a plain paper copy. I mean,
4 that directs every clerk to do so, that some
5 commissioners court won't decide that here's a
6 sale on this old thermal fax machine for \$20.
7 We are going to put it in your office.

8 MR. ORSINGER: But I don't
9 think Luke is saying that we should throw the
10 rule out. I think what he is saying is that
11 we shouldn't unduly disadvantage an effort to
12 file this way because of a glitch because you
13 can get glitches in hand-deliveries, and you
14 can get glitches in mail, and maybe we
15 shouldn't try to write a rule to cover all the
16 glitches because what rule covers a motion for
17 new trial that's missing page one that arrives
18 by envelope? There is no rule. So why does
19 there have to be a rule that covers a fax
20 filing that's missing page one?

21 MS. WOLBRUECK: Okay. We
22 will -- whatever then. Maybe Richard can
23 assist with the rewrite of it or something,
24 and we can look at it again.

25 MR. HAMILTON: I have another

1 problem. This apparently is directed only to
2 what you receive on your fax machine.

3 MS. WOLBRUECK: That's correct.

4 MR. HAMILTON: If I receive
5 something on my fax machine from another
6 lawyer that is to be filed, do these same
7 rules apply?

8 MS. WOLBRUECK: No. You would
9 tender it over the counter. There is a
10 different rule in there.

11 MR. HAMILTON: I know, but what
12 if it's slightly unlegible or something? Can
13 you refuse it?

14 MR. ORSINGER: You are talking
15 about like copies of somebody else's motion?

16 MR. HAMILTON: Yeah.

17 MR. ORSINGER: This doesn't
18 relate to that at all, supposedly. This says
19 to do --

20 MR. McMains: He's saying what
21 happens if basically he's a designated agent
22 for someone who is trying to -- who basically
23 electronically files, if you will, with him to
24 take it over there as opposed to directly with
25 the court. He's just wondering if he

1 shouldn't get the same benefits.

2 CHAIRMAN SOULES: Bonnie, all
3 you have to do is say that the printout has to
4 be on a certain kind of paper because 45 has
5 already got it has to be 8 1/2 by 11, has to
6 be signed by the lawyer. So Rule 45 has a lot
7 of the parameters of what is required for
8 filing already built in, and if you are trying
9 to tell the clerk they have to have a plain
10 paper copier, that's really all you have to
11 say, I think.

12 MS. WOLBRUECK: Okay. We will
13 re-adjust it, Luke, and bring it back to you.

14 CHAIRMAN SOULES: I don't have
15 any problem putting in there that there could
16 be a fee schedule. I don't know whether it's
17 enforceable or not.

18 PROFESSOR DORSANEO: Why does
19 it have to be different for every place? Why
20 can't there be just a -- what is the fee that
21 clerks charge?

22 MS. WOLBRUECK: It's different
23 from every place. Some of them actually do
24 subscriptions by size of law firms.

25 PROFESSOR DORSANEO: Huh?

1 MS. WOLBRUECK: Yes. If you
2 are a large law firm, you pay the clerk X
3 number of dollars a year and then you can do
4 all of your faxing to the clerk.

5 MR. ORSINGER: That way they
6 don't have to bill every single filing.

7 MR. McMAINS: Save their
8 administrative costs.

9 PROFESSOR DORSANEO: Pay an
10 annual user fee.

11 MS. WOLBRUECK: Yeah. Annual
12 user fee.

13 MR. ORSINGER: Why don't we let
14 them run their office the way they want to?

15 CHAIRMAN SOULES: And then if
16 you want to set a time for when they're filed,
17 that's fine. I mean, when you're closed after
18 5:00, somebody has got to find you to file
19 something specially. I mean --

20 MR. ORSINGER: Or mail it.

21 CHAIRMAN SOULES: Or mail it.
22 There are other ways to get around it. If you
23 say anything after 5:00 o'clock is filed the
24 next day...

25 MR. MARKS: Well, shouldn't

1 that be left up to the discretion of the
2 clerk, too? I mean, if the clerk wants to
3 accept something after 5:00 o'clock, why
4 should it be in the rules?

5 MR. ORSINGER: You know,
6 actually this rule doesn't prohibit late
7 filing. It just says that no matter how nasty
8 your clerk is, it's not going to be any worse
9 than 10:00 o'clock the next business day, but
10 see, transmissions completed after 5:00
11 o'clock on weekends or holidays will be
12 verified and filed before 10:00 on the first
13 business day. Well, at 7:30 on Friday night
14 is before 10:00 on the next business day.
15 This doesn't prohibit a clerk from filing up
16 until midnight. It just doesn't require them
17 to file it until 10:00 a.m. on the next
18 business day.

19 CHAIRMAN SOULES: Let's work on
20 this a little more and bring it up the next
21 time.

22 MS. WOLBRUECK: Okay.

23 CHAIRMAN SOULES: Okay. Next,
24 Bonnie?

25 MS. WOLBRUECK: Okay. The

1 continuation of this is just some rules that
2 the clerks directed some attention to. Rule
3 15 had to do with writs and process. Deleted
4 in this was the language about Monday next
5 after the expiration of 20 days. That was the
6 language that was stated here to be in the
7 writ.

8 That language is contained in the
9 citation rules, and the subcommittee added the
10 provision that is underlined there, "A person
11 authorized by law or these rules to serve
12 process and shall include the return for
13 service," basically to define that anybody
14 authorized by these rules may serve a process.
15 The last line in that that talked about the
16 clerk's seal being attached to it was moved to
17 the clerk's rule on issuance.

18 CHAIRMAN SOULES: Okay.

19 MS. WOLBRUECK: Rule 17, you
20 need to see Rule 126 for clarification of what
21 was done with Rule 17. Rule 126 on page 21.
22 There was some conflict between this, conflict
23 between Rule 17 and Rule 126. Rule 17 does
24 not require fees in advance for service, and
25 Rule 126 requires fees paid in advance for out

1 of county, for an out of county request. The
2 two rules seem to be in conflict.

3 The change would require all fees be paid
4 in advance and allow the clerk to collect the
5 fees, and the requirement of endorsement was
6 placed in the "Duties of the Clerk" section,
7 the pauper's oath or affidavit of inability;
8 and Richard, if you would like to address, we
9 had received a letter I think on that issue
10 out of Tarrant County with a problem that had
11 been addressed by an attorney general's
12 opinion, I think.

13 MR. ORSINGER: Yeah. We got it
14 from Tim Curry, the district clerk in Tarrant
15 County, and he was suggesting that we go ahead
16 and permit the district clerk to accept the
17 filing fees. Bonnie, listen, I want to be
18 sure I don't say the wrong thing here.

19 MS. WOLBRUECK: Okay.

20 MR. ORSINGER: Tim Curry wanted
21 us to change the rules to permit the clerk of
22 the court to accept the fee for service at the
23 time of filing, and we have done -- we have
24 fixed his problems? Do you feel like?

25 MS. WOLBRUECK: Yes. I think

1 so. Because what the problem was, that there
2 is a recent attorney general's opinion that
3 said that the clerk may not collect the
4 sheriff's service fee, and that's a common
5 practice in many counties, and Tim Curry is
6 the district attorney, I think, or assistant
7 D.A. or something in Tarrant County, and he
8 had written a concern for that.

9 So I feel like maybe we have addressed it
10 here, and Rule 17 was the one in conflict over
11 the AG's opinion that basically says that the
12 officer receiving any process shall not be
13 entitled in any cases to demand his fee, which
14 is what Rule 17 says today. So I think we
15 have addressed that with Rule 126 then.

16 CHAIRMAN SOULES: Okay.

17 MS. WOLBRUECK: I think Rule 19
18 this committee has addressed before. This is
19 nonadjournment of term, concerning terms, and
20 the subcommittee felt that it was unnecessary,
21 not -- a practice that was not necessary, and
22 so it was offered up to be deleted.

23 Rule 20 was the same way. Minutes read
24 and signed. This was deleted because it's no
25 longer a common practice.

1 Rule 71. Basically this was just to take
2 out the section that was put into the clerk's
3 rule on the docket and the clerk's record.

4 Going on to Rule 75 then, Rule 75 had to
5 do with withdrawal of pleadings. The
6 subcommittee had felt that this was no longer
7 a common practice or necessary, and the clerk
8 as custodian of the record has been addressed
9 in the clerk's rule. So Rule 75 was deleted
10 and then a new Rule 75 then becomes what was
11 Rule 75b, a and b.

12 75a, is stated there as a, is concerning
13 exhibits, about the court reporter filing them
14 with the clerk; and then 75b, the first
15 sentence is the one that has been moved to the
16 clerks rules that had to do with all filed
17 exhibits shall be filed with the clerk, and so
18 then the new Rule 75 has a new section a, b,
19 and c. Is that clear?

20 PROFESSOR DORSANEO: Yes.

21 MS. WOLBRUECK: Okay. Good.

22 Going on to Rule 89, I think that there
23 is -- other members of the subcommittee are
24 actually looking at Rule 89 and clarifying it,
25 but basically what this notes is that last

1 paragraph was moved. The requirements of the
2 clerk was moved to the clerk's duties section,
3 and that's all that's been deleted there, is
4 that section that we have addressed before.

5 Going on to Rule 99, there is just some
6 clarification in Rule 99 on the issuance and
7 the form of citation, and basically Rule 99
8 did not refer to Rule 15 on who the citation
9 shall be directed to. So under No. (1) of the
10 "Form," (b)(1), it directs it who the citation
11 shall be directed to. There was just some
12 change for consistency to say instead of
13 "show," put "contain."

14 Under No. (7) it did not contain the
15 style of the case, just the names of the
16 party, and we felt that it was important that
17 the citation include the style of the case so
18 that the parties knew how to direct their
19 pleadings.

20 The remainder of it, basically there was
21 some duplication of the answer information
22 under No. (12) and under the notice, and we
23 have just deleted it to show that it was only
24 in there once. So No. (12) was deleted, and a
25 new No. (11) has the notice thing about, "You

1 have been sued," and has the answer
2 information in it. Rule 99, that's basically
3 all. There was just the deleting of the
4 duplication. Rule 108.

5 CHAIRMAN SOULES: Just a minute
6 on that one.

7 MS. WOLBRUECK: Yes.

8 CHAIRMAN SOULES: You see under
9 (12)?

10 MS. WOLBRUECK: Yes.

11 CHAIRMAN SOULES: "For the
12 relief demanded in the petition," those words
13 in the second line?

14 MS. WOLBRUECK: Yes.

15 CHAIRMAN SOULES: I think you
16 ought to put that in the very last line on the
17 page after "default judgment."

18 MS. WOLBRUECK: Okay.

19 PROFESSOR DORSANEO: Uh-huh.

20 CHAIRMAN SOULES: So it has a
21 little bit more information for this person.

22 MS. WOLBRUECK: Got it. Okay.
23 Thank you.

24 PROFESSOR DORSANEO: I have a
25 question before you get to 108, Bonnie.

1 MS. WOLBRUECK: Yes.

2 PROFESSOR DORSANEO: About Rule
3 103.

4 MS. WOLBRUECK: Yes.

5 PROFESSOR DORSANEO: Is that
6 okay?

7 MS. WOLBRUECK: Yes. In fact,
8 I have since decided that it was okay the way
9 it was written. We had talked about it
10 originally, and I had it in a previous
11 handout, and I think that it's okay. I think
12 that our committee has looked at it also, and
13 Rule 103, we have received a lot of
14 communication from private process servers in
15 regards to Rule 103. Isn't that the one?

16 PROFESSOR DORSANEO: Yes.
17 That's where it has the clerk having a limited
18 role in being an authorized officer.

19 MS. WOLBRUECK: Yes.

20 PROFESSOR DORSANEO: And my
21 question would be to the clerks committee, is
22 what are clerks doing? Are clerks doing that
23 or some --

24 MS. WOLBRUECK: Some clerks do
25 actually. So it's either the service --

1 basically Rule 103, what Bill is talking
2 about, is that it says here "service by
3 registered or certified mail and service by
4 publication shall, if requested, be made by
5 the clerk of the court," and we have decided
6 to let that stand as it is.

7 CHAIRMAN SOULES: That's done
8 in Bexar County.

9 PROFESSOR DORSANEO: But not
10 all clerks are doing that, right?

11 MS. WOLBRUECK: Not all clerks
12 do. It says "may."

13 PROFESSOR DORSANEO: So should
14 it say "shall"?

15 MS. WOLBRUECK: We have
16 discussed that in our clerks committee, and
17 the concern was that in many counties the
18 constable may be performing that service for
19 certified mail or service by publication, and
20 then that would really change procedures, and
21 that happened to be in one of the more urban
22 counties, and they were real concerned about
23 changing that as a requirement of the clerk.

24 CHAIRMAN SOULES: Politics.

25 MS. WOLBRUECK: And, you know,

1 I had a dissention within the committee on
2 that.

3 CHAIRMAN SOULES: Clerk versus
4 constable politics. Just leave that alone.

5 PROFESSOR DORSANEO: So it
6 shouldn't say "shall" the way it is now
7 because the clerks wouldn't want to be thought
8 of as being in violation of it.

9 MS. WOLBRUECK: That's right
10 because it says "shall, if requested" is what
11 the rule says right now.

12 CHAIRMAN SOULES: And that's
13 okay?

14 MS. WOLBRUECK: Yeah. That's
15 okay, because basically it leaves it open as
16 to who shall do it. It doesn't require the
17 clerk to do it.

18 PROFESSOR DORSANEO: Well, if I
19 request it, it does.

20 MS. WOLBRUECK: That's right.

21 PROFESSOR DORSANEO: But it's
22 my understanding that I can request that of
23 some clerks, and they will tell me they are
24 not doing that.

25 MR. ORSINGER: File for

1 mandamus.

2 PROFESSOR DORSANEO: Right.

3 MR. McMAINS: Well, everybody
4 else does.

5 PROFESSOR DORSANEO: I'm just
6 saying we might as well change it to "may" if
7 they are not going to do it anyway.

8 CHAIRMAN SOULES: Well, what
9 the clerk says is, "You need to get along with
10 the constable, don't you?"

11 They say, "Okay. Request withdrawn."

12 MS. WOLBRUECK: Okay. Rule
13 108, this just clarifies that a defendant
14 without stay shall be served with citation.
15 That's all. We just sort of did some
16 clarifying by striking that one sentence.

17 Rule 114 then is citation by publication,
18 and basically what we have done here is
19 combined Rules 111, 112, 114, and 115, which
20 all had to do with citation by publication,
21 and you can see here where each portion came
22 from, what rule it came from. Like No. (1) is
23 actually out of Rule 114. No. (2) came out of
24 Rule 111. No. (3) came out of Rule 112, and
25 then (b) is just the form of the citation by

1 publication, and (c) has to do with the
2 issuance out of Rule 114. Basically it's just
3 a combination of those rules into this one
4 rule on citation by publication.

5 MR. ORSINGER: Well, there were
6 some differences about publication sequences
7 and whatnot, and we consolidated them all down
8 to just one?

9 MS. WOLBRUECK: Yes. That's
10 right.

11 PROFESSOR DORSANEO: That's the
12 next one.

13 MS. WOLBRUECK: And that's
14 addressed in Rule 116 now.

15 MR. ORSINGER: Excuse me.

16 MS. WOLBRUECK: Basically there
17 is not a lot of change in 114. It's just
18 combining it together and making it in a
19 better format.

20 Rule 116. It was interesting for me to
21 note looking at Rule 116, which has to do with
22 service of citation by publication, which had
23 to do with who shall serve it and how long it
24 shall be published and where and the method
25 for publication, that it did not include an

1 editor's affidavit or a copy of the citation
2 to be included with the return, which is
3 actually common practice today.

4 If we issue a citation by publication,
5 there is an affidavit by the editor of the
6 newspaper stating that, yes, this has been
7 published, along with a copy of that actual
8 citation out of the newspaper so that that is
9 part of the return.

10 Rule 117a, the citation by publication in
11 a tax suit included all of that information in
12 it. So maybe that's where the common practice
13 has happened, is out of the tax citation. So
14 basically what we did here is we deleted what
15 Rule 116 had said, which is the first part of
16 page 14 there at the top of page 14, and we
17 have picked up the language out of Rule 117a
18 on citation by publications, which is the
19 delinquent tax citation by publication, and
20 have just basically combined that information
21 into this new Rule 116.

22 In this then is the portion that states
23 when -- how long a citation by publication
24 needs to be published. Civil citations were
25 to be published four consecutive weeks; tax

1 citations, one time a week for two weeks;
2 divorce citations today are only published one
3 time. This would just clarify that all civil
4 and tax citations would be published one time.
5 The subcommittee felt that that was sufficient
6 amount of publication.

7 One other question from the subcommittee
8 was that the last paragraph of Rule 14, the
9 second sentence beginning, "If the publication
10 of citation in a suit for delinquent ad
11 valorem taxes cannot be had for this fee it
12 goes on to a posting process." The
13 subcommittee's question to this full committee
14 is, do we want a posting process in the rule
15 for a civil citation also?

16 CHAIRMAN SOULES: How does it
17 work in tax cases?

18 MS. WOLBRUECK: Right here, the
19 way it's stated, on the bottom of page 14. It
20 comes right out of Rule 117a on a tax suit.

21 CHAIRMAN SOULES: Cannot be had
22 for what fee?

23 MS. WOLBRUECK: The publication
24 fee.

25 PROFESSOR DORSANEO: I don't

1 see why tax cases need to be any different, is
2 my main point, including the number of days
3 that it has to be published. I don't see why
4 they are different. You know, 28 days, 42
5 days, what difference does it make what kind
6 of a case it is for these technical
7 requirements? It's just a lot of extra detail
8 to no point.

9 MS. WOLBRUECK: That's
10 basically what we have done here then on Rule
11 116. It changes it to "publication of
12 citation," and that means all citations. So
13 the new Rule 116 would affect all citation by
14 publications.

15 PROFESSOR DORSANEO: There
16 still is a little bit of slippage between 116
17 and 117a in terms of the number of days that
18 have to expire before there can be an action.

19 MR. ORSINGER: Bonnie, Bill is
20 denoting here at the bottom of page 14 that in
21 a tax case you have to have 28 days for the
22 return instead of the Monday following the
23 20th day after service.

24 MS. WOLBRUECK: No. That has
25 to do with posting, and that's my question,

1 if, in fact, that you would like to make this
2 rule -- this comes out of 117a, which is the
3 delinquent tax suit citation by publication,
4 and it allows the posting on the bottom of
5 page 14, and I have kept it in there just for
6 a tax suit because I just followed 117.

7 My question to you is, do you want it
8 just for a tax suit, or would you like it for
9 all citations? And that has to do with
10 posting at the bottom of the page.

11 CHAIRMAN SOULES: If you can't
12 get the citation by publication published for
13 the lowest classified ad price then all you
14 have got to do is post on the courthouse door,
15 and you have got service on -- you have got
16 service by publication.

17 MS. WOLBRUECK: That's right.
18 According to what was 117a, delinquent tax.

19 CHAIRMAN SOULES: I don't think
20 that's -- I don't agree with that.

21 MR. McMAINS: Well, for
22 everybody, yeah. If you are talking about
23 taxes, at least you have probably got some
24 property in the county.

25 CHAIRMAN SOULES: You have

1 probably got some property, and you have
2 probably been sent a delinquent tax notice or
3 billed for taxes. Somebody has probably tried
4 to get a hold of you.

5 MR. ORSINGER: Well, and you
6 know by law taxes are due. You don't know by
7 law that you have been sued by a private
8 person.

9 MR. McMAINS: Yeah.

10 CHAIRMAN SOULES: Yeah. We are
11 all on the same -- that's the wavelength I'm
12 on. This is just out of the blue some person
13 gets sued, may be out of the blue, and it's
14 not even in a generally circulated newspaper.
15 Well, excuse me, not even in a newspaper
16 published in the county.

17 MR. McMAINS: Right. Where you
18 live.

19 CHAIRMAN SOULES: This doesn't
20 require it to be generally circulated. It
21 could be the GREENSHEET, I suppose, on the
22 newstandard at Mi Tiera.

23 MS. WOLBRUECK: Then this does
24 not change anything the way it's stated here
25 then?

1 MR. ORSINGER: Right.

2 MS. WOLBRUECK: That was just
3 my question.

4 MR. ORSINGER: The feeling is
5 not to let the posting --

6 CHAIRMAN SOULES: I wouldn't
7 delete the posting in an ordinary suit.

8 MS. WOLBRUECK: Which is the
9 way this is.

10 MR. ORSINGER: It's not there?

11 MS. WOLBRUECK: It's not there.

12 MR. ORSINGER: Yeah. It
13 doesn't exist except for tax suits.

14 CHAIRMAN SOULES: Well, it's in
15 this rule right now, and we are going to take
16 it out.

17 MR. ORSINGER: No. It needs to
18 stay here for tax suits.

19 PROFESSOR DORSANEO: But this
20 isn't tax suits. The next rule is tax suits.

21 MR. ORSINGER: No. Tax suits
22 are at the bottom of page 14. If you can't
23 get the low line rate on a tax suit, you can
24 post. That's the rule right now.

25 CHAIRMAN SOULES: Okay.

1 MR. ORSINGER: We are not
2 changing the rule. What we are discussing is
3 whether all lawsuits ought to be able to post,
4 and the answer to the question is "no."

5 CHAIRMAN SOULES: You have got,
6 "In a suit for delinquent or ad valorem
7 taxes," and that's a condition of using the
8 posting.

9 MS. WOLBRUECK: That's right.

10 MR. ORSINGER: And that's
11 already in 117.

12 CHAIRMAN SOULES: Let's leave
13 it there.

14 MS. WOLBRUECK: And what Rule
15 116 does, is this is publication of citation.
16 That means all citations. That means a
17 regular citation or a delinquent tax suit.
18 It's one rule that designates exactly how it
19 should be published.

20 CHAIRMAN SOULES: Okay. 117a.

21 MS. WOLBRUECK: There really
22 isn't -- not having a great deal of
23 information as far as requirements in a
24 delinquent tax suit, we did not really make
25 any changes except that on page 16, the bottom

1 of the page, is all of the language that we
2 just talked about in rule -- that we moved to
3 Rule 116 that has to do with the publication;
4 and what you see deleted, X'd out there, that
5 entire paragraph is what we just addressed in
6 Rule 116.

7 CHAIRMAN SOULES: Do you have
8 to do one time a week for two weeks in a tax
9 case?

10 MS. WOLBRUECK: That's what it
11 is right now, and we changed it to one time,
12 period.

13 CHAIRMAN SOULES: Okay. So
14 that has been changed in 117a.

15 MS. WOLBRUECK: Yes.

16 CHAIRMAN SOULES: And is there
17 anything statutory that requires that?

18 MS. WOLBRUECK: Not to my
19 knowledge, but I guess we need to double check
20 that.

21 CHAIRMAN SOULES: Sometime in
22 the last 20 years there was some legislative
23 changes involving delinquent tax litigation,
24 the most important of which I think was the 15
25 percent contingent fee aspect of it, but the

1 people that got into that business have gotten
2 several changes through the legislature to
3 accommodate their work. So this could be
4 statutory, so I would just urge you to take a
5 look --

6 MS. WOLBRUECK: Okay. I made a
7 note.

8 CHAIRMAN SOULES: -- at anything
9 that's going to be changed about the tax
10 procedure and check to see if it's precluded
11 by statute. Bill.

12 PROFESSOR DORSANEO: The best
13 crafted publication rule in the current rule
14 book is 117a. It has a few little flaws in
15 it, but it's the best job of drafting; and
16 that leads to my second point, which simply is
17 could we check with taxing authorities to see
18 if they would be happy with a publication, you
19 know, one-time rule where it's published for
20 28 days rather than the 42-day requirement
21 that's in the rule now.

22 Because I really do think aside from this
23 posting issue that you convinced me on a few
24 minutes ago, that there is no need to have a
25 different set of procedures for publication in

1 one kind of a case and then another.
2 Especially it ought not to be more onerous in
3 tax cases than in other kinds of cases, but
4 what I'm trying to get at is that this part of
5 the rule book needs to be simplified by making
6 the procedure as uniform as it can be made,
7 and I almost would like to get a vote on
8 whether that's a good idea or not, or should
9 we just let the tax cases be dealt with in a
10 separate rule that we just embrace without
11 trying to simplify in that area as well as in
12 other areas?

13 MR. LOW: The only thing that
14 concerns me, if there are any particular
15 statutes on those that relate. I don't see
16 them tied in in the notes.

17 PROFESSOR DORSANEO: When the
18 rules were promulgated, the new rules were
19 promulgated -- and if you look in your rule
20 book now I believe Rule 2 --

21 MR. LOW: Two.

22 PROFESSOR DORSANEO: -- "Scope
23 of Rules," it says that in tax cases all of
24 the statutes listed as repealed in the Supreme
25 Court's order aren't really repealed to the

1 extent they're tax case rules, but Rule 117a
2 shall govern the procedure and publication in
3 tax suits. So I think all of that has been
4 swept away. I think all of the statutes that
5 are referred to in Rule 2 of our rules of
6 civil procedure have been replaced by a new
7 tax code, but who do we talk to to find out
8 about the reality of that?

9 MR. LOW: I'm aware of that.
10 What I'm saying, there could have been
11 legislation passed since that time, and they
12 can't write out what the legislature may pass,
13 and I don't know that there has been, but
14 there could have been legislation passed.

15 PROFESSOR DORSANEO: Well,
16 there is a whole new tax code.

17 MR. LOW: That's right, and
18 there could be provisions in there that affect
19 this. I don't know.

20 CHAIRMAN SOULES: The person to
21 address is Oliver Hurt.

22 PROFESSOR DORSANEO: Okay.

23 CHAIRMAN SOULES: And whatever
24 changes you think you might need to make to
25 117a, I think if you would write him and ask

1 him if it contravenes any statute, No. 1; and
2 No. 2, do they have any opposition to the
3 change; and if so, what is it and why?

4 I believe you will get a response; and if
5 you don't, let me know or if you will send me
6 a copy, I will make a note on it and send it
7 to Oliver and tell him to please help us.

8 MR. ORSINGER: Luke, I'm of
9 counsel with the law firm. All I have got to
10 do is get on the elevator.

11 CHAIRMAN SOULES: And send a
12 copy to Orsinger, too. He knows who will be
13 answering the question. Oliver doesn't answer
14 the questions, but that's great, because if it
15 facilitates their work, they are going to be
16 happy to cooperate, and if they see a problem,
17 they will let us know, I think.

18 MR. ORSINGER: Well, if it
19 facilitates their work, it will facilitate the
20 revenues to the state because they get a piece
21 of successful collection.

22 CHAIRMAN SOULES: Okay.
23 Bonnie, what's next?

24 MS. WOLBRUECK: Continuing with
25 117a, as you realize, it goes on for pages in

1 the rule book. The only pages that we
2 actually did, like on page 19 we wanted to
3 make sure that it was consistent with Rule 99
4 and just added the "You have been sued"
5 section to it and basically kept much of the
6 other -- you can see the underlined portion
7 that we did.

8 CHAIRMAN SOULES: Okay.

9 MS. WOLBRUECK: Also, it adds
10 the name and address of the attorney plaintiff
11 and the address of the clerk. That's all
12 pursuant to Rule 99. Then under No. (6), that
13 form of citation, we did the same thing to
14 make sure that it was consistent with Rule 99,
15 and that was the one that also had the
16 citation, if it wasn't served, to be returned
17 in 90 days, and that's been deleted to be
18 consistent with Rule 99. That's basically it
19 on the citations.

20 Rule 120 just references back to the
21 clerk's record instead of the docket, and that
22 goes back to the consistency with the clerk's
23 rule. Rule 126 we addressed while ago.

24 CHAIRMAN SOULES: Could I ask a
25 question about 120?

1 MS. WOLBRUECK: Yes.

2 CHAIRMAN SOULES: And I got
3 curious about this the other day when I was
4 engaged by a client who wanted to make an
5 appearance but didn't want to file a general
6 denial because they weren't sure exactly what
7 position they were going to take, and
8 politically it was important to delay what
9 position they were going to take in the case.
10 So I said, "Oh, that's no problem. We will
11 just enter an appearance." I get out Rule 120
12 thinking that entering an appearance would
13 prevent a default judgment, but it doesn't say
14 that.

15 MR. ORSINGER: No. No. It
16 just obviates service.

17 CHAIRMAN SOULES: It just
18 obviates service. Shouldn't we put something
19 in Rule 120 that if you enter an appearance
20 you must have notice before any judgment can
21 be taken?

22 PROFESSOR ALBRIGHT: Isn't that
23 the purpose, that you can appear, but if you
24 haven't answered to deny the allegations then
25 you can get -- there could be a default

1 judgment, but you have to have notice of that
2 hearing, that you get notice of the hearing if
3 you have appeared. Isn't that the way it
4 should be?

5 CHAIRMAN SOULES: That's what I
6 thought it said, but it doesn't say that and
7 then I said, well, isn't that what it means,
8 and I never could get very much comfort on
9 that.

10 PROFESSOR DORSANEO: Appear and
11 answer.

12 MR. ORSINGER: I would have to
13 say that having not studied it in a long time
14 my belief is if you make a general appearance
15 without controverting the allegations in the
16 petition that you haven't entitled yourself to
17 a trial unless you have read cases.

18 PROFESSOR ALBRIGHT: There can
19 be a default judgment taken against you, but
20 you have to have notice of the default
21 judgment hearing.

22 MR. ORSINGER: I see the
23 distinction.

24 PROFESSOR ALBRIGHT: And there
25 is several cases on that issue.

1 PROFESSOR DORSANEO: If one
2 would be required. There wouldn't necessarily
3 be a hearing required.

4 MR. ORSINGER: Well, should it
5 say that here, or should we just rely on the
6 cases?

7 PROFESSOR ALBRIGHT: The issue
8 is always whether something is an appearance
9 or if it's an answer.

10 CHAIRMAN SOULES: I think it
11 ought to say, "No judgment can be taken
12 against a party who has appeared without
13 notice to the party."

14 MR. ORSINGER: You better allow
15 for a waiver because waivers typically waive
16 that right.

17 CHAIRMAN SOULES: You have got
18 that in the family code, don't you?

19 MR. ORSINGER: I don't know. I
20 don't know.

21 CHAIRMAN SOULES: Well, maybe
22 it's not worth being concerned about. I've
23 been at it 30 years. That's the first time it
24 came up.

25 PROFESSOR ALBRIGHT: Well,

1 there are quite a few appellate opinions on
2 it, but it seems like they have dealt with it.

3 What happens is when parties just send a
4 letter to the judge and say, "Yeah, Judge, I
5 got that citation," and that's all they do,
6 and that's an appearance, but they haven't
7 denied the allegations.

8 CHAIRMAN SOULES: Well, what
9 did that letter say that the court held was a
10 sufficient answer?

11 MR. ORSINGER: "It wasn't my
12 dog."

13 PROFESSOR CARLSON: "We want to
14 be heard, and we deny what they say."

15 CHAIRMAN SOULES: It was a
16 denial?

17 PROFESSOR CARLSON: Yeah. It
18 was a bill of review case.

19 CHAIRMAN SOULES: Okay. All
20 right. Well, if nobody else is worried about
21 this I guess I shouldn't be. Rule 126.

22 MS. WOLBRUECK: Rule 126 is the
23 one that we addressed previously.

24 MR. ORSINGER: I would comment
25 on that, Bonnie, that what if the affidavit of

1 inability is contested? This appears to say
2 that the sheriff or constable has to execute
3 the process if an affidavit has been endorsed.

4 Do you endorse it only after the period
5 for contest has expired or the contest has
6 been denied?

7 MS. WOLBRUECK: That's right,
8 and I think we discussed that in the
9 subcommittee meeting of a concern that it
10 can't just be pursuant to Rule 145. It has to
11 be on the -- the clerk has to follow Rule 145
12 before that endorsement can be done.

13 MR. ORSINGER: So the
14 endorsement is the legal act reflecting that
15 the affidavit is valid?

16 MS. WOLBRUECK: That's right.

17 MR. ORSINGER: Okay.

18 MS. WOLBRUECK: Back to Rule
19 142, the one I brought to your attention
20 earlier. Again, the clerks had a concern of
21 making sure that fees were collected,
22 statutory fees are collected, at the time of
23 filing or request for services, which is the
24 reason for this requested change; and as
25 another note, I think there is the whole

1 section on cost and security that I don't
2 think our subcommittee has really addressed
3 yet that probably needs to be addressed also.

4 CHAIRMAN SOULES: What does the
5 phrase "or the request for services" mean at
6 the end after "time for filing"?

7 MS. WOLBRUECK: That would be
8 if you ask me to issue a citation or
9 something.

10 PROFESSOR DORSANEO: Making a
11 copy, making a certified copy.

12 MR. HAMILTON: What are the
13 consequences if you don't? Say they are
14 required to be collected, but if they are not,
15 what happens?

16 MS. WOLBRUECK: There is no
17 consequences in this rule.

18 MR. ORSINGER: I don't think
19 the rules say what happens.

20 CHAIRMAN SOULES: Well, they
21 don't even say that you -- this underscored
22 language, as I pointed out earlier, 142 before
23 only commanded the clerk to collect fees
24 before issuing process. It doesn't have
25 anything to do with filing.

1 So this really makes two changes. It's
2 not only fees for the plaintiff. It's being
3 enlarged to include fees from everyone, but it
4 also expands fees from fees for process to
5 fees for everything.

6 MS. WOLBRUECK: That's correct.

7 CHAIRMAN SOULES: I don't have
8 a problem with saying, "All statutory fees
9 that are required to be collected by the clerk
10 of the court are due for payment at the time
11 of filing or request for services" so that we
12 know there at that time they should be -- you
13 are liable for them. But "shall be paid" --

14 PROFESSOR DORSANEO: Too
15 strong.

16 CHAIRMAN SOULES: And then if
17 you want the strength of the old wording, you
18 could include that as either the first or
19 second sentence, that before you issue any
20 process you have the absolute right to
21 prepayment.

22 PROFESSOR DORSANEO: Or before
23 you perform any services as distinguished from
24 just filing something. Maybe that's a more
25 legitimate position to take, is that "I'm not

1 going to actually go work on this until you
2 pay me my fee" as distinguished from "I'm not
3 going to stamp this paper you're handing me."

4 MR. ORSINGER: Well, now, how
5 does that apply to an appellate transcript?

6 CHAIRMAN SOULES: Well,
7 Rule 142 doesn't apply to an appellate
8 transcript right now.

9 MR. ORSINGER: It doesn't? Why
10 not?

11 CHAIRMAN SOULES: Because it's
12 not process. It's not issuing process.

13 MR. ORSINGER: Rule 142 as
14 written now would be broad enough to include
15 the cost of preparing a transcript for appeal.

16 CHAIRMAN SOULES: You are
17 talking about the proposed rule?

18 MR. ORSINGER: Yes.

19 CHAIRMAN SOULES: Or the
20 existing? Okay. Then I'm miscommunicating.

21 MR. ORSINGER: Well, and under
22 the current practice I don't think the clerk
23 can require payment before issuance of a
24 transcript, but the appellate rules are
25 changing that, aren't they?

1 MS. WOLBRUECK: That's correct.

2 MR. ORSINGER: The appellate
3 rules will actually say, "We don't have to
4 assemble your transcript unless you pay us
5 first."

6 PROFESSOR DORSANEO: Or "make
7 arrangements."

8 MS. WOLBRUECK: "Make
9 arrangements."

10 MR. ORSINGER: Or "make
11 arrangements to pay." So that change in the
12 law basically means we won't render the
13 service unless you pay us or arrange to pay
14 us. What about --

15 CHAIRMAN SOULES: Maybe nobody
16 else is that concerned.

17 MR. ORSINGER: What about a
18 first sentence that says, "All statutory
19 filing fees shall be paid at the time of
20 filing," or is that too strong for you?

21 CHAIRMAN SOULES: That's what
22 we are trying to get away from.

23 PROFESSOR DORSANEO: It's
24 better if it says they are due.

25 MR. ORSINGER: Okay. "All

1 statutory filing fees are due and all fees for
2 requests of services shall be paid at the time
3 services are rendered," the second sentence.

4 CHAIRMAN SOULES: Right. And
5 if you want a third sentence, use the
6 old -- use the presently active Rule 142.

7 MS. WOLBRUECK: We have to be
8 clear -- I had several clerks working on this,
9 and the first time we wrote it, we wrote
10 something about all statutory filing fees.

11 That almost makes it sound like
12 everything that -- all of the fees are to be
13 paid, when only maybe one of them should be
14 paid by statute. So that's the reason we kept
15 trying to word this to where it's just that
16 are required to be collected, and we were also
17 concerned -- first of all we said, "All
18 statutory fees shall be collected by the
19 clerk." Well, there is a lot of statutory
20 fees that possibly that the clerk does not
21 collect, like service fees.

22 MR. HAMILTON: I think it needs
23 to say that the clerk cannot refuse to file
24 something for nonpayment of fees, otherwise
25 you are going to have some clerks that read it

1 to say we are not going to file it if you
2 don't pay the fee.

3 MR. ORSINGER: But, Carl, if
4 you say that, then why doesn't everyone in the
5 state just file their original petitions with
6 no check?

7 MS. WOLBRUECK: I would really
8 not --

9 MR. HAMILTON: Well, they are
10 not going to get process issued until
11 they -- on the original petition they can't
12 get process issued until they pay.

13 MS. WOLBRUECK: That goes back
14 to the problem with the severed cause that has
15 no process on it, and we do all of this work
16 and don't get any court costs on it. I mean,
17 there is a lot of issues, a lot of cases that
18 are filed without process, a friendly suit or
19 something that's filed. And the statute
20 requires it, you know, and it's just it's a
21 difficult issue, and I know that it is, and
22 I'm not sure exactly, but I would really hate
23 for it to say that because I'm afraid there
24 would be too much abuse of it, and then the
25 clerk will be put into the billing and

1 collection process.

2 MR. ORSINGER: You know, the
3 truth is that probably we should require that
4 an original petition be accompanied by payment
5 or an affidavit of inability. You know, all
6 the rest of the filing fees we are talking
7 about had to do with people that were in court
8 trying to protect rights, but we really don't
9 have an obligation for everyone to file any
10 lawsuit they want and pay no filing fee, and
11 what's wrong with saying that we won't take
12 their petition unless a fee or an affidavit is
13 accompanying it?

14 MS. WOLBRUECK: If it is an
15 issue, we could certainly just go back to the
16 way Rule 142 was and just have it to do with
17 the process and continue the way the practice
18 is today.

19 CHAIRMAN SOULES: Well, that's
20 better than what Carl is saying because you
21 are worried about opening Pandora's box --

22 MS. WOLBRUECK: Yes.

23 CHAIRMAN SOULES: -- by telling
24 everybody they can do something, and if they
25 can, they may be able to; but what about just

1 shortening this up? "Statutory filing fees
2 are due for payment at the time of filing," so
3 we don't have to worry about the "all."

4 MS. WOLBRUECK: Okay.

5 PROFESSOR ALBRIGHT: But aren't
6 there other fees that are not filing fees that
7 you are concerned about also?

8 CHAIRMAN SOULES: Those are the
9 ones we are worried about, though, as far as
10 precluding the filing.

11 MS. WOLBRUECK: Except for the
12 issuance fees, and maybe then we can include
13 the other paragraph, the other sentence.

14 CHAIRMAN SOULES: And then you
15 can say, "The clerk shall require from the
16 plaintiff fees for services."

17 MR. ORSINGER: Don't limit it
18 to the plaintiff.

19 CHAIRMAN SOULES: "Clerk shall
20 require from a party fees for other services
21 or for any process." I'm not getting the
22 words as nice as they should be, but "before
23 performing any other services or issuing any
24 other process."

25 Now, if you read those two sentences

1 together, they say filing fees are treated
2 differently since the second sentence makes it
3 clear that you don't have to do anything until
4 you've paid. The other one says they are only
5 due, good argument to contrast, but somebody
6 has got to read those pretty carefully to
7 figure out that they can finagle you around
8 without -- it doesn't just say that.

9 MS. WOLBRUECK: That's fine.

10 CHAIRMAN SOULES: You want to
11 try to write it that way and take a look at
12 it?

13 MS. WOLBRUECK: Sure will.

14 CHAIRMAN SOULES: Okay.

15 MR. ORSINGER: Luke, do you
16 have any feeling about a proviso that you
17 can't file a petition without a filing fee, or
18 an affidavit?

19 CHAIRMAN SOULES: I think we
20 ought to just make it general.

21 MR. ORSINGER: Okay.

22 MS. WOLBRUECK: This is okay.
23 We will accept it like that.

24 Rule 216 is the jury fee that we talked
25 about earlier, and the clerks committee would

1 recommend that we delete the fee from the
2 statute. In fact, our clerks legislative
3 committee is pursuing to delete the fee from
4 the rule, but we are pursuing putting the rule
5 into the statute, and possibly we will have to
6 coordinate with the Supreme Court and see if
7 the changes could maybe coincide with the
8 January of '97 date or something. If we can
9 get -- we can make the legislation effective
10 January of '97. '98.

11 MR. ORSINGER: Better make it
12 January of '99.

13 MS. WOLBRUECK: '97, '99?
14 Where am I? This is '96, right? It would be
15 January of '98 is when the legislation when we
16 could possibly -- after the legislature has
17 met next year, but anyway, I want you to know
18 that I have taken this up with the clerks
19 legislative committee, and they agree with
20 this and would be more than happy to pursue
21 this with legislation.

22 CHAIRMAN SOULES: Okay. So
23 assuming you get legislation you want to
24 delete this; otherwise, I guess you want to
25 keep it.

1 MS. WOLBRUECK: That's right.
2 Otherwise, yes, it will remain there until we
3 can get the legislation.

4 CHAIRMAN SOULES: Okay.

5 MS. WOLBRUECK: Back to Rule
6 245, we addressed this earlier in adding the
7 notice provision under (c).

8 MR. ORSINGER: Bonnie, on the
9 second line we ought to say, "On the court's
10 own initiative.

11 MS. WOLBRUECK: On which?

12 MR. ORSINGER: 245(a).

13 MS. WOLBRUECK: Oh, okay.

14 MR. McMANS: As opposed to
15 "motion."

16 MR. ORSINGER: We have been
17 doing that everywhere else, "court's own
18 initiative" as opposed to "motion." I'm
19 sorry.

20 MS. WOLBRUECK: And that's our
21 report.

22 MR. ORSINGER: Luke, I would
23 like to publicly acknowledge all the hard work
24 that Bonnie and her committee has done. This
25 is tough stuff to slog through, and they have

1 had to really do a lot of work on it. They
2 have put a lot of work into it, and we are
3 really the beneficiaries of that.

4 CHAIRMAN SOULES: Well, I
5 commend you, too. I think it's a great piece
6 of work, and this information has been
7 scattered and never really brought to focus, I
8 think, since the rules were actually pulled
9 out of the statutes back in the late Thirties
10 and early Forties.

11 MS. WOLBRUECK: I think it will
12 be very beneficial. I mean, once this is
13 accomplished and implemented I think it will
14 be very beneficial for clerks and for
15 everyone.

16 CHAIRMAN SOULES: Is the
17 committee then all in agreement with these
18 changes, subject to the edit that would appear
19 on the record and comments that have been made
20 on the record that Bonnie will be revising
21 from?

22 Okay. All agreed. That's fine. Thank
23 you very much.

24 MS. WOLBRUECK: Sure.

25 CHAIRMAN SOULES: Where now?

1 MR. ORSINGER: Well, Bill
2 Dorsaneo has asked me in our disposition chart
3 on Rules 15 through 165a to take an issue up
4 out of order so that those who are
5 contemplating catching an early flight can
6 discuss probably --

7 PROFESSOR DORSANEO: Probably a
8 moot point.

9 MR. ORSINGER: Probably a moot
10 point at this point, but I would rather that
11 we do it when we have more people here because
12 some of these other items have either been
13 adopted or rejected and are not controversial,
14 and I am referring to page 14 of your agenda
15 or disposition chart, Rule 18a.

16 Page 14 of this chart, Rule 18a, and it's
17 a proposal from Jim Parker about the grounds
18 for recusal not being known ten days before
19 trial, and we have -- this issue has been
20 attended by some controversy. We have
21 attempted to redo the rules on
22 disqualification and recusal to address not
23 only that problem, but to address the problem
24 that the Constitution permits you to raise a
25 disqualification issue at any time, including

1 after the judgment is signed; and if the
2 judgment is disqualified, the judgment is
3 void.

4 So I presume it could be even
5 collaterally attacked; whereas recusal clearly
6 is subject to waiver and notice requirements
7 and things of that nature, and to make matters
8 more complicated, the legislature has gotten
9 in there and talked about things that look
10 like disqualification that go beyond what the
11 Constitution says is disqualification.

12 So we have got the Constitution on
13 disqualification. We have got legislation on
14 disqualification. We have got rules on
15 recusal, and they use similar terminology, but
16 probably mean different things. The word
17 "relationship" may mean one thing in one
18 situation and another. "Financial interest"
19 may mean one thing in one situation, may mean
20 something different in another.

21 So what we have tried to do is to
22 reconcile these differences, make it clear
23 when we are talking about disqualification
24 what that means, when we are talking about
25 recusal what that means, make it clear that

1 all of our timetables relate to something
2 that's in our control, meaning not
3 Constitutional disqualification because we
4 can't impose time limits on that, and just try
5 to segregate them so that they are not so
6 confusing.

7 Now, Lee Parsley was brave enough or
8 foolish enough to volunteer to try to put the
9 subcommittee's product into final form, what
10 you are looking at right here, and I'm going
11 to ask Lee to do it; but let me just tell you
12 by way of introduction to it that the grounds
13 for disqualification in this proposal include
14 both Constitutional disqualification and
15 disqualification standards in the Civil
16 Practice and Remedies Code or the government
17 code and, therefore, perhaps represent a
18 philosophical assumption that some might
19 challenge, which is that perhaps it's not our
20 position to say that all of the supernatural
21 qualities of a disqualification apply to more
22 grounds than just what the Constitution says,
23 and I think that that is a debatable
24 proposition.

25 At any rate, with that, Lee, would you go

1 forward with an explanation of what our
2 current draft has done?

3 MR. PARSLEY: Okay. In your
4 packet you have I think a total of 16 pages.
5 That consists of the proposed rule, the clean
6 copy for the first six pages, a redlined copy
7 against the current rules from pages 7 through
8 14, and then an alternative -- I'm sorry. 7
9 through 13, and then an alternative proposal
10 that we can talk about a little on pages 14,
11 15, and 16.

12 As a general proposition what I did was
13 to take Rule 18b, which talks about the
14 grounds for disqualification and recusal and
15 start with that and then follow it with old
16 Rule 18a, which is the procedure for
17 disqualification and recusal, because it made
18 more sense to me that you would read the
19 grounds first and the procedure second.

20 So generally what's happened here is old
21 18b in this proposal precedes old 18a. The
22 footnotes, you will notice, starting on page 1
23 and then starting on page 7, if you read the
24 footnotes, they are the same. When I did the
25 clean copy I didn't take out the footnotes, so

1 you can refer to either copy and have the same
2 set of footnotes. So Footnote 1 is the same
3 footnote as 21 and so forth. I didn't start
4 the numbering over because that was
5 technologically beyond me.

6 All right. Most of what has gone on in
7 the -- starting out, grounds for
8 disqualification and grounds for recusal is
9 not different from what is in 18b now, except
10 that the language has been cleaned up some.
11 There are four subdivisions under paragraph
12 (a), "Grounds for Disqualification," where if
13 you look at the current rule there are only
14 three subdivisions, (a), (b) and (c).

15 That is not a difference. That is only
16 because I separated out paragraph (a) of the
17 current rule. It really has two different
18 grounds of disqualification in it, and I made
19 it clear that there are two different grounds
20 there by separating out into two
21 subparagraphs. So, in other words, paragraph
22 (a), "Grounds for Disqualification," is not
23 intended to be substantively different at all
24 from what is currently Rule 18b, paragraph
25 (1), disqualification.

1 The first question, the first footnote
2 you see there, definition of "an interest"
3 should include an interest either as a
4 fiduciary or as an individual, which means
5 there is a definitional section at the end of
6 the rule, and instead of saying here "either
7 as an individual or as a fiduciary," we just
8 take that out and say in the definition of "an
9 interest," you have an interest if you have
10 one either as an individual or as a fiduciary.
11 That's really a style point that's not
12 supposed to change the substance of it at all.

13 The second footnote or Footnote 22 points
14 out what is our first big rule with these
15 rules when you look at them closely. That is,
16 this paragraph talks about the judge should
17 disqualify himself or herself in a case where
18 the judge knows that he or she has an interest
19 in the subject matter of the controversy.
20 Note that that is not referring to a financial
21 interest, which other parts of the rule refer
22 to, and note that it talks about "in the
23 subject matter of the controversy," which is
24 not to say that if you have an interest in a
25 party, presumably you are not disqualified.

1 You must have an interest in the subject
2 matter.

3 Now, contrast that, if you will go down
4 on your rule to paragraph (b)(6), that will be
5 on page two or page eight. "The judge knows
6 that he or she or his or her spouse or minor
7 child residing in the judge's household has a
8 financial interest," this time, "in the
9 subject matter in controversy," which is the
10 same, "or in a party to the case or any other
11 interest." This time it's not financial
12 interest. It's just an interest. "That could
13 be substantially affected by the outcome of
14 the case."

15 And then the next paragraph again talks
16 about the same subject matter, "The judge's
17 spouse or a person to whom the judge is
18 related within the third degree of affinity or
19 consanguinity." If you drop down to the big
20 (B) there, "is known by the judge to have an
21 interest that could be substantially affected
22 by the outcome of the case."

23 So, in other words, in this rule when you
24 combine them and read them together you find
25 that there are three different but overlapping

1 provisions about when a judge is either
2 disqualified or recused based on an interest
3 in either the subject matter in controversy, a
4 party in the case, or whether it's a financial
5 interest or whether their interest could be
6 substantially affected by the outcome of the
7 case.

8 That is a mess in my humble opinion, and
9 I have suggested in the alternative how we
10 might correct that, but in doing so we would
11 expand the grounds for disqualification, which
12 we may not want to do, because
13 disqualification comes from the Constitution.

14 HONORABLE SCOTT BRISTER: What
15 is an interest that's not a financial
16 interest? You said, "An interest in a party."

17 MR. PARSLEY: It's not defined.
18 "Financial interest" is currently defined in
19 the rule. Just, quote, "an interest" is not
20 defined. What that means, I couldn't tell
21 you.

22 HONORABLE SCOTT BRISTER:
23 Right. Well, I mean, I know there is cases
24 saying that it's not sympathy. You know,
25 actually, there is a case, you are a Mustang

1 booster, doesn't mean because you're a booster
2 of the Mustangs you can't sit on the DALLAS
3 MORNING NEWS case where they want the papers
4 to see if you have been paying atheletes.

5 So I think my understanding was
6 disqualification was required to be a
7 financial interest, that this interest has
8 been termed to be financial interest.
9 Obviously if you own stock in one of the
10 parties, that's a financial interest. It's
11 not necessarily in the outcome of the case,
12 but I think they always construed that to -- I
13 just wonder what kind of interest would you
14 have that's not financial that ought to be
15 disqualifying?

16 MR. PARSLEY: I'm not sure
17 there is one.

18 PROFESSOR DORSANEO: A query in
19 interest.

20 MR. PARSLEY: My point is that
21 that's where our problem is, that we need to
22 be more specific in the rule. If what we
23 really mean is a financial interest then we
24 should say so. In every instance in this rule
25 we should say "a financial interest in the

1 case," and we should define "financial
2 interest."

3 HONORABLE SCOTT BRISTER: It
4 seems like financial interest ought to
5 disqualify you and drop it out of all of the
6 recusal section because it ought to disqualify
7 you.

8 PROFESSOR DORSANEO: What does
9 the Constitution say? What language does it
10 use?

11 HONORABLE SCOTT BRISTER:
12 "Interest." It says "interest."

13 PROFESSOR DORSANEO: So the way
14 it is now is because it's just
15 monkey-see-monkey-do the Constitution.

16 MR. PARSLEY: That's right.
17 Now, if we do what Judge Brister is
18 suggesting, which is essentially what I have
19 suggested in the alternative, then we expand
20 the grounds for disqualification; and, of
21 course, disqualification can be raised at any
22 time; and if there are grounds for
23 disqualification under current case law, it
24 must happen, and you could raise it on appeal,
25 and you get to go back for new trial, I

1 suppose; and we would expand that possibly, or
2 at least arguably we would expand that by
3 doing --

4 HONORABLE SCOTT BRISTER:
5 Aren't we contracting it if we limit interest
6 to financial interest?

7 MR. PARSLEY: I don't think we
8 can contract the Constitution, but we probably
9 can expand it.

10 HONORABLE SCOTT BRISTER: Yeah.
11 But the cases have never interpreted
12 "interest" in the Constitution to be anything
13 other than financial interests.

14 CHAIRMAN SOULES: For example,
15 suppose there is a -- the Blalock case is an
16 odd case the way it developed, but suppose you
17 are trying the Rio Grande River Valley water
18 rights case, and it's whether or not your city
19 is going to have water where you are a
20 resident or how much water. Now, sure, I can
21 convert that through some steps to a financial
22 interest, but it's really more than that.

23 The real interest is a different interest
24 than a financial interest, or suppose it's a
25 controversy about where rivers change banks.

1 Am I going to be a resident of Texas or New
2 Mexico? Maybe that couldn't be tried in state
3 court or Federal -- well, I guess it could be
4 tried in Federal court. There are interests
5 other than financial interests that could be
6 compelling on a judge, I think.

7 HONORABLE SCOTT BRISTER: Well,
8 I am concerned about broadening it. The one I
9 just thought of, well, you know, what if they
10 filed in my court one of these cases that the
11 way judges are elected have to be done by
12 subdistricts. You know, I would certainly be
13 interested in that case and how it came out.

14 You know, on the other hand, if you don't
15 go to Federal Court, you know, is it a good
16 idea to wipe out -- like I say, I mean, other
17 persons have researched all the cases on
18 disqualification, and they have never
19 disqualified us for anything except financial,
20 and once you start down the road of, well,
21 he's interested in the outcome then you get
22 to, "Well, you're an SMU booster. You can't
23 do anything about SMU."

24 "You're a Houstonian. You can't do
25 anything with the city of Houston," and

1 suddenly the only judges you get are visiting
2 judges anymore.

3 CHAIRMAN SOULES: Just take
4 the -- well, of course, Hardberger is a quo
5 warranto case, so I guess that doesn't work
6 either. And there are a lot of cases where
7 they are not necessarily about financial
8 issues, or at least facially. They are
9 injunctive questions, election questions, and
10 that judge happens to have the same interest
11 as the parties that are in litigation, and
12 whatever is decided there is going to
13 ultimately probably control what that
14 judge -- the outcome of that judge's dispute,
15 but it's not that judge's dispute that's
16 before that judge. It's this other situation.

17 The Constitution, I think, is broader
18 than financial interest, but it just says
19 "interest," and it is a disqualification
20 because it's a Constitutional
21 disqualification, and whatever baggage we want
22 to put on it doesn't change the fact that a
23 party can disqualify a judge under the
24 Constitution whether this rule says you can or
25 can't.

1 HONORABLE SCOTT BRISTER: Sure.

2 CHAIRMAN SOULES: And it seems
3 to me like that under "Grounds for
4 Disqualification" we should -- whether we add
5 anything to it or not, I'm not to that point
6 yet, but we should track the Constitution
7 language.

8 MR. PARSLEY: I think we
9 clearly should not try to restrict the
10 Constitution. I think we can expand the
11 Constitution, but we shouldn't try to restrict
12 it, and I think adding the word "financial" in
13 here might restrict the Constitution, and so I
14 don't think we could do that anyway.

15 PROFESSOR DORSANEO: What about
16 even your first paragraph? I mean, "served as
17 a lawyer in the matter in controversy" looks
18 broader to me than "a lawyer in", you know, "a
19 case."

20 HONORABLE SCOTT BRISTER: The
21 Constitution says "acted as counsel," doesn't
22 it?

23 MR. PARSLEY: I think that may
24 be right.

25 MR. ORSINGER: Well, the

1 distinction that Bill is going at, which I
2 see, is what if you were involved advising a
3 party when it was a business transaction but
4 before it turned into a lawsuit, and then the
5 case is --

6 HONORABLE SCOTT BRISTER:
7 Clearly disqualified.

8 MR. ORSINGER: Not under this
9 language. "In a case in which the judge was a
10 lawyer" could arguably mean once litigation
11 started.

12 HONORABLE SCOTT BRISTER: "When
13 he shall have been counsel in the case" is
14 what the Constitution says.

15 MR. ORSINGER: The Rule 18b
16 says, "served as a lawyer in the matter in
17 controversy," which is broad enough to include
18 at the transaction level before a lawsuit was
19 filed.

20 MR. PARSLEY: Right. But what
21 Judge Brister is saying is the Constitution is
22 not as restricted as the rule is. The
23 Constitution says "counsel in a case."

24 HONORABLE SCOTT BRISTER: And
25 it's been held in one case if you did the

1 title opinion query, whether that was being
2 counsel in the case; but if you did the title
3 opinion, you are disqualified from doing the
4 trespass to try title case later.

5 MR. ORSINGER: But were you
6 disqualified under Rule 18b, which says that,
7 or were you disqualified under the
8 Constitution, which has broader language?

9 HONORABLE SCOTT BRISTER: Yeah.
10 18b, this was, what, 1988? And almost all the
11 cases are just disqualification. This is new.

12 MR. ORSINGER: Okay.

13 HONORABLE SCOTT BRISTER:
14 Almost all the cases are all --

15 PROFESSOR DORSANEO: Why can't
16 we just cross-refer to the Constitution on
17 disqualification?

18 MR. ORSINGER: You can, but it
19 makes perfect sense to write a rule that's
20 consistent with the Constitution.

21 PROFESSOR DORSANEO: But what
22 happens when you copy one thing, then it ends
23 up getting changed at some point, and the
24 inconsistency becomes inevitable.

25 MR. ORSINGER: Well, what we

1 have now is three different sources of
2 authority, the Constitution, the statute, and
3 the rules, and they all say different stuff.

4 HONORABLE SCOTT BRISTER:

5 That's correct.

6 PROFESSOR DORSANEO: My point.

7 MR. McMAINS: What is the
8 statutory basis for disqualification? I mean,
9 I'm not sure I --

10 MR. ORSINGER: It's in the
11 government code, and I don't have it.

12 HONORABLE SCOTT BRISTER:
13 Constitution is Article 5, Section 11.

14 CHAIRMAN SOULES: It does not
15 include "previously practiced law with another
16 lawyer."

17 HONORABLE SCOTT BRISTER: No.
18 That's interesting. That was added by the
19 rules to be a disqualification, which it was
20 not in the --

21 MR. PARSLEY: Right. That was
22 added by rule and not by statute.

23 CHAIRMAN SOULES: And this
24 "knows that he or she has an interest," that's
25 not in the Constitution.

1 HONORABLE SCOTT BRISTER: The
2 Constitution says, "no judge shall sit in any
3 case wherein he may be interested."

4 CHAIRMAN SOULES: "May be
5 interested."

6 HONORABLE SCOTT BRISTER: "Or
7 either of the parties connected by affinity,
8 consanguinity, or when he shall have been
9 counsel in the case."

10 MR. ORSINGER: The Constitution
11 doesn't limit it to the third degree?

12 PROFESSOR CARLSON: No.

13 HONORABLE SCOTT BRISTER: It
14 says, "In such degree as shall be prescribed
15 by law." Government code sets out the --

16 MR. ORSINGER: Okay.

17 MR. McMAINS: And that's the
18 legislature.

19 PROFESSOR DORSANEO: And the
20 way to count it under 574.

21 HONORABLE SCOTT BRISTER:
22 Right.

23 CHAIRMAN SOULES: To me (1)
24 ought to be "was counsel" under the
25 Constitution.

1 MR. PARSLEY: I propose "was a
2 lawyer," but "was counsel" is --

3 CHAIRMAN SOULES: Because
4 that's what the Constitution says.

5 HONORABLE SCOTT BRISTER: I
6 can't find the statute. Who made this book?

7 CHAIRMAN SOULES: Alex
8 Albright.

9 PROFESSOR ALBRIGHT: Don't we
10 have a bigger issue here that we are kind of
11 dancing around? We are talking about it as
12 far as each individual item here, but isn't
13 the issue really do we want disqualification
14 any broader than the Constitution? The
15 ramifications of disqualification is that even
16 if it's not brought up then the case is null
17 and void, right? It's fundamental error in
18 effect, right?

19 HONORABLE SCOTT BRISTER: Yeah.

20 PROFESSOR ALBRIGHT: Isn't that
21 disqualification?

22 MR. ORSINGER: That's only the
23 Constitution.

24 PROFESSOR ALBRIGHT: Under the
25 Constitution.

1 MR. ORSINGER: It's only
2 Constitutional disqualification that has that
3 clout.

4 PROFESSOR ALBRIGHT: Right.
5 But it seems like shouldn't we have that
6 disqualification should be that fundamental
7 error concept and recusal should be other
8 grounds for getting the judge out --

9 CHAIRMAN SOULES: I agree.

10 PROFESSOR ALBRIGHT: -- and
11 it's not fundamental error?

12 HONORABLE SCOTT BRISTER: Sure.

13 CHAIRMAN SOULES: That's really
14 what it ought to be. I mean, we ought to have
15 probably three things under (a). "Was
16 counsel." No. (3), "may be interested."

17 PROFESSOR ALBRIGHT: Well, why
18 can't we just do what Bill said,
19 disqualification is disqualification under the
20 Constitution; and if the Constitution says,
21 well, you have to look to the statutes to
22 figure out how you count consanguinity -- I
23 have never been able to say that word.
24 Consanguinity. Then you go to the -- then the
25 Constitution tells you to go to the statute.

1 Because I agree with Bill, if we try to
2 repeat what the Constitution says and then we
3 "Garnerize" the Constitution, I guarantee you
4 it will be two different things.

5 CHAIRMAN SOULES: Well, the
6 Constitution, there is probably not 20 words
7 there, and we can put them under (a). The
8 Supreme Court did this. We didn't do this.

9 PROFESSOR ALBRIGHT: Right.
10 But I'm just saying why don't we just do it
11 where it's like the Constitution?

12 CHAIRMAN SOULES: We wrote 18a
13 and b for recusal only. No, we wrote 18c,
14 right? That's the procedure part of it, and
15 all that did was give a means to implement the
16 code of judicial conduct, which said when a
17 judge should be recused and disqualified both,
18 which the Supreme Court had recently adopted.
19 Section (3)(c) was a part of the code of
20 judicial conduct.

21 We didn't touch the Constitutional
22 question at all, but there was no way to
23 implement recusal at the time. The Supreme
24 Court then -- and I don't have this by word
25 from any justice or member of the court, but

1 as I understand what happened, the judiciary
2 decided that they did not want a performance
3 of judicial duties in violation of Canon
4 (3)(c) of the code of judicial conduct to be a
5 disciplinary issue which, of course, anything
6 under the code of judicial conduct rises to a
7 disciplinary issue.

8 So they took those grounds out of -- they
9 took (3)(c) out of the code of judicial
10 conduct, put it over in the rules, and said,
11 "You are recused if you do that. You will be
12 recused if you do this," which is the only
13 consequence then was to be recused as opposed
14 to being under the code of judicial conduct
15 violation, and when they did that they also
16 put in this disqualification language, and
17 it's odd that -- well, and we never did change
18 18a.

19 So if you just read the rules you think
20 if you are going to disqualify a judge who is
21 interested in a case and was counsel and is
22 connected to a party, all three things that
23 the Constitution prohibits, you have got to do
24 that ten days ahead of the hearing. That's
25 what the rules say.

1 HONORABLE SCOTT BRISTER: By
2 sworn motion, da-da-da.

3 CHAIRMAN SOULES: By sworn
4 motion and so forth and so on. They didn't
5 make any exception to that obviously, but
6 since then, of course, in the decisions they
7 say that doesn't even apply to it. So what we
8 are getting a chance to do here -- and it
9 needs to be done because some of us around
10 here have been in this fairly recently -- is
11 to focus the disqualification grounds.
12 Probably they should be only Constitutional
13 grounds. Collect in the recusal basket
14 everything else and then take the procedure
15 and restrict it to recusal, and if we even
16 write anything on disqualification, it won't
17 be much of a rule on that.

18 MR. ORSINGER: "May be filed at
19 any time in any way"?

20 CHAIRMAN SOULES: Before or
21 after judgment and on and on.

22 MR. ORSINGER: Oral or in
23 writing.

24 CHAIRMAN SOULES: This is not
25 fixed, this 18a and 18b.

1 MR. McMAINS: I don't
2 understand how the legislature got -- I mean,
3 the legislature came in and said that there
4 are other things that are disqualifying?

5 PROFESSOR DORSANEO: No. There
6 is a statute that talks about it.

7 MR. McMAINS: The government
8 code?

9 HONORABLE SCOTT BRISTER: All
10 you have got in here is 21.005 of the
11 government code, which is, "The judge can't
12 sit in a case if either party is related to
13 within the third degree." I don't think there
14 is currently any other statute.

15 PROFESSOR DORSANEO: There is
16 one about being related to the lawyer.

17 PROFESSOR CARLSON: Yeah.

18 HONORABLE SCOTT BRISTER:
19 Statute?

20 PROFESSOR CARLSON: Yeah.

21 PROFESSOR DORSANEO: Yeah.
22 About being, like -- you know, about the same
23 time that Luke is talking about there was this
24 case where somebody's son was a lawyer.

25 PROFESSOR CARLSON: Oh, yeah.

1 I remember that one.

2 HONORABLE SCOTT BRISTER:
3 Appointed them as an ad litem and gave them a
4 fee.

5 PROFESSOR DORSANEO: That case
6 went away, to my recollection, but it spawned
7 the statute.

8 CHAIRMAN SOULES: You know, if
9 you look at No. (2), this may be just an
10 extension of the notion that if you are in a
11 law firm that represents a party at the time
12 you are in the law firm you are counsel, you
13 are one of them, and (2) may be just more
14 words to describe what "counsel" is.

15 HONORABLE SCOTT BRISTER: No
16 question the Constitutional language has been
17 construed to cover the situation you are
18 talking about, even if you didn't personally
19 handle it.

20 MR. ORSINGER: (2) is a
21 corollary of (1). (1) is the general
22 principle, and (2) is the special situation in
23 which the general principle applies.

24 CHAIRMAN SOULES: "Previously
25 practiced law with another lawyer, who was a

1 lawyer in the case during the time the judge
2 and the lawyer practiced together." That's
3 just counsel.

4 MR. McMAINS: Right.

5 MR. ORSINGER: That's the same
6 as (1).

7 CHAIRMAN SOULES: That's the
8 same as (1).

9 MR. McMAINS: That's the same
10 violation of the provision in the
11 Constitution.

12 PROFESSOR DORSANEO: That's why
13 it's in (1) now.

14 CHAIRMAN SOULES: So it stays
15 there. That's why it's in (1) now, so it
16 stays there. So we have got four things in
17 (a) that are Constitutional, that are all
18 Constitutional.

19 MR. McMAINS: There is actually
20 only three, but there is an explanation as a
21 subset of (1). That's all.

22 CHAIRMAN SOULES: If you don't
23 know what "counsel" means, it means you did it
24 or your partner did it while you-all were
25 partners.

1 MR. PARSLEY: Maybe it should
2 say "was counsel, which includes having
3 previously practiced law with another lawyer
4 who" and so forth.

5 MR. McMAINS: That's fine.

6 MR. KELTNER: Yes.

7 HONORABLE SCOTT BRISTER: Now,
8 of course, let me just point out that was an
9 interpretation, and there might be an argument
10 that that's not a good interpretation. I know
11 a lot more about what Andrews -- I know a lot
12 more about what I did in eight years at
13 Andrews & Kurth as opposed to what the other
14 180 lawyers were doing during that time
15 period, and one I could be expected to
16 recognize instantaneously. The other I will
17 never know unless somebody else tells me.

18 MR. ORSINGER: But, you know, I
19 think if you were disqualifying a lawyer, the
20 fact that they practiced together at the time
21 the case was in the office would be fatal to
22 the lawyer.

23 MR. McMAINS: Yes.

24 MR. ORSINGER: Why shouldn't it
25 be fatal to the judge? It ought to be even

1 more fatal.

2 HONORABLE SCOTT BRISTER: Well,
3 well...

4 MR. ORSINGER: Shouldn't it?

5 HONORABLE SCOTT BRISTER: There
6 is a lot fewer of us than there are of you,
7 for one thing, and we are talking about
8 disqualification, remember. This means we may
9 have spent three years and hundreds of
10 thousands of dollars and whoever lost says,
11 "Hey, hey, let's do it over again."

12 That's a big problem as opposed to
13 when -- you know, during the trial or sometime
14 if you want to get other counsel out, that's
15 fine, but that doesn't void everything that's
16 happened. We are talking disqualification
17 here. That is a disaster, and I wouldn't
18 even --

19 MR. MARKS: Well, doesn't a
20 little red flag go up, Judge, when you see
21 your old firm coming into or didn't it go up
22 when you saw your old firm coming in.

23 HONORABLE SCOTT BRISTER:
24 Separate question, and I know a lot of judges
25 would like a rule on that in recusal about

1 when do I start handling my old firm's cases;
2 but, you know, these days as fluid as firms
3 are, the fact that it was in my -- at Andrews
4 & Kurth ten years ago by no means that whoever
5 is doing it now -- in fact, probably more than
6 half of Andrews & Kurth is somewhere else now
7 and took most of the cases that we worked with
8 and clients with them.

9 And so, you know, there may be an
10 argument for -- you have to remember the
11 interesting thing about all these old cases
12 and how it's been construed, there is a lot
13 of, in my opinion, bizarre construction of the
14 Constitution because they had nothing else to
15 work with. They had no 18b. They had no
16 recusal, and they had judges appearing as
17 witnesses in the trials that they were
18 presiding over; and so, you know, they
19 stretched a lot of things in the Constitution
20 to try to get -- to reap some really bad
21 outcomes that are more taken care of now.

22 We have got judicial canons of ethics we
23 didn't have then. We have got recusal and all
24 of this other stuff. I'm just suggesting
25 whether maybe that might not be something that

1 you -- you know, if it was in the firm at the
2 same time, might be something you put in the
3 recusal section because the Constitution
4 doesn't say that.

5 MR. PARSLEY: For redrafting
6 this I think I need to know two things. In
7 No. (1) do I merge (2) with it, which just is
8 not in the Constitution, or do you delete
9 (2)?

10 CHAIRMAN SOULES: Here's what I
11 would do right here.

12 MR. PARSLEY: Okay. And do you
13 still refer to the third degree of
14 consanguinity, which is not in the
15 Constitution either but comes with the
16 statute?

17 CHAIRMAN SOULES: Yes. I think
18 you do.

19 MR. McMANS: I think you do.

20 CHAIRMAN SOULES: Because it's
21 in the statute and it's been there forever and
22 the Constitution authorizes that.

23 MR. McMANS: Well, and the
24 Constitution says it's up to the legislature,
25 and the legislature has spoken. So that is

1 effectively the Constitutional relationship.

2 MR. PARSLEY: So that we
3 don't -- I'm going to keep trying to move on
4 this. I know what to do, and I have got
5 Luke's draft.

6 CHAIRMAN SOULES: It says, "is
7 counsel, practiced law with another lawyer who
8 was counsel in the case." What's next?

9 MR. PARSLEY: No. (3) says "may
10 be interested."

11 CHAIRMAN SOULES: "May be
12 interested."

13 MR. PARSLEY: No. (4) says,
14 "connected with a party by affinity or
15 consanguinity within the third degree."

16 CHAIRMAN SOULES: Those words
17 are not as good as what he wrote, but they are
18 words that are in the Constitution.

19 MR. PARSLEY: So grounds for
20 disqualification is going to follow as nearly
21 as we can the Constitution. Then Footnote
22 No. 3 on the clean copy and 23 on the other
23 copy, I note that I changed everywhere in the
24 rule to "affinity or consanguinity," and in
25 some places it talked about a party is related

1 or has relationship within the third degree.
2 The relationship within the third degree has
3 no legal meaning that I can find, and
4 consanguinity and affinity do. So that's a
5 change I have made throughout, and it appears
6 probably three or four times in the rule.

7 CHAIRMAN SOULES: Fine.

8 MR. PARSLEY: All right.

9 Paragraph (b), "Grounds for Recusal." Really,
10 not much there. You can see my redline
11 changes, mostly small. I have taken out
12 references to "proceeding" everywhere in favor
13 of using the word "case." That's something we
14 have adopted in the appellate rules. I'm
15 trying to bring that forward here. Trying to
16 gender neutralize it, and anybody that wants
17 to help me on taking out a bunch of "his" or
18 "hers" I would like to hear that.

19 My next question would be whether we can
20 merge (6) and (7) because (6) and (7) really
21 speak to the same issue again, and this has to
22 do with an interest the judge or somebody in
23 the judge's family has.

24 MR. McMains: I have one
25 concern about your change in (3).

1 MR. PARSLEY: Okay.

2 MR. McMAINS: As I read the
3 redlined part.

4 MR. PARSLEY: Right.

5 MR. McMAINS: You've talked
6 about "disputed evidentiary facts concerning
7 the proceeding." The problem I have is that
8 disputed evidentiary facts, if you take out
9 the "concerning the proceeding," there may be
10 some facts relating to local knowledge --

11 MR. PARSLEY: Let me stop you
12 for a second.

13 MR. McMAINS: -- of
14 transactions or whatever, and it bothers me
15 that somebody will consider this to expand the
16 grounds for recusal.

17 MR. PARSLEY: Let me stop you
18 for a second and tell you how I think that's
19 taken care of. If you go back to the
20 introductory paragraph, "A judge must recuse
21 himself or herself in a case in which" then
22 you drop down to (3), "the judge has personal
23 knowledge of disputed evidentiary facts." So
24 it is tied to a case by the introductory
25 sentence. If that's not good enough, I'm

1 willing to change it, but that's why I did it
2 that way.

3 And the other question, that brings me to
4 the next question. Are (3) and (4) really
5 saying the same thing? (3) says the judge has
6 personal knowledge of disputed evidentiary
7 facts. (4) says the judge is a material
8 witness. What's the difference between those?

9 MR. ORSINGER: Well, material
10 is one difference. Because under (4) it's got
11 to be material, and under (3) it doesn't.
12 Although, in practicality it should.

13 What if the fact is of little consequence
14 to the outcome of the proceeding, but it does
15 happen to be known to the judge?

16 MR. PARSLEY: And if it's
17 disputed, he must recuse.

18 MR. ORSINGER: Well, I don't
19 know. I mean, I would only argue he should
20 only be recused if it's an important fact.
21 Now, maybe that's too fine --

22 MR. PARSLEY: (3) doesn't say
23 that. (3) just says if it's disputed, he must
24 recuse.

25 MR. ORSINGER: (3) can say

1 anything we want it to say. I'm saying it
2 ought to say "material" just like it does when
3 a lawyer is disqualified from being an
4 advocate and a witness in the same proceeding,
5 it's only if it's a material issue that the
6 lawyer is disqualified.

7 MR. PARSLEY: It's up to the
8 committee, but it seems to me that (3) and (4)
9 speak generally to the same idea and that we
10 could delete one or the other, but maybe they
11 are speaking to something different, and we
12 can go on to the next point.

13 MR. McMAINS: Now, you are
14 talking about grounds for recusal?

15 MR. ORSINGER: Yes.

16 MR. PARSLEY: Right. Grounds
17 for recusal, (b)(3) and (b)(4). (B)(3) talks
18 about the judge knows disputed evidentiary
19 facts. (B)(4) says the judge is a material
20 witness.

21 CHAIRMAN SOULES: Anybody who
22 has tried to do one of these things knows how
23 hard it is. I don't care what the words are.
24 It's hard, and I think we ought to not change
25 one ground.

1 MR. PARSLEY: All right. I
2 didn't propose to take them out. I just
3 suggested it.

4 CHAIRMAN SOULES: Or merge two
5 into one anywhere.

6 HONORABLE SCOTT BRISTER: But
7 especially on (6) and (7). (6) is identical
8 to a financial interest. It's me, my spouse,
9 or a minor child in my household.

10 Well, my spouse is financial -- my spouse
11 owns stock in the company. That's going to be
12 my financial interest. My minor owns stock in
13 the company. I'm going to be the fiduciary,
14 which is the same as the interest. It is
15 completely superfluous, I think.

16 CHAIRMAN SOULES: But not
17 harmful?

18 HONORABLE SCOTT BRISTER: Well,
19 you know, it raises the question when I say "I
20 think." I don't know. Maybe it adds
21 something. You can get in -- if I have a
22 financial interest individual as a fiduciary,
23 I know what that means; but, you know, you get
24 into is that -- you know, you-all are the ones
25 that drafted it. Why do we have this twice?

1 CHAIRMAN SOULES: Well, this
2 came out of CJC, and that was an ABA project.

3 PROFESSOR DORSANEO: Well, to
4 do it right we need to check and see why these
5 different provisions are in the ABA draft.
6 It's going to say if we just go look it up.

7 MR. PARSLEY: Well, but you can
8 read the words on the page, and (6) and (7)
9 say the same thing for all practical purposes.

10 HONORABLE SCOTT BRISTER: Yeah.

11 MR. PARSLEY: But (7) doesn't
12 use the -- it doesn't talk about a minor
13 residing in the judge's household, but it
14 talks about the third degree of affinity or
15 consanguinity; and, of course, your minor
16 child is within the third degree of affinity
17 or consanguinity, so that would cover the
18 child.

19 PROFESSOR DORSANEO: (6) has
20 "knowledge" in it. (7) does not.

21 MR. McMAINS: Yes.

22 MR. PARSLEY: Yes, it does.
23 (7)(B), large (B), "is known by the judge to
24 have an interest." So when you get down to
25 the interest part it talks about

1 again -- requires the knowledge part.

2 MR. ORSINGER: Well, (7)(C) is
3 not in (6), which has to do with a family
4 member being a witness.

5 MR. PARSLEY: That's right.
6 That's why you would favor (7) over (6). If
7 you are going to delete either one, you would
8 delete (6) and leave (7). (7) is broader than
9 (6).

10 PROFESSOR DORSANEO: (7)(A)
11 does not have "knowledge."

12 MR. PARSLEY: Right.

13 HONORABLE SCOTT BRISTER:
14 Except -- and also, financial interest in (6)
15 can be one share of stock, and you know, my
16 car wreck case with Exxon is not going to
17 affect substantially my financial interest,
18 but having Exxon stock is having a problem if
19 I'm ruling on that case because that's a
20 financial interest. I'm disqualified anyway,
21 I think.

22 CHAIRMAN SOULES: Where do you
23 have "individually or as a fiduciary"?

24 MR. PARSLEY: Well, I didn't --

25 HONORABLE SCOTT BRISTER: It's

1 in the definition section.

2 MR. PARSLEY: It's in the
3 alternative draft. At 1:00 o'clock this
4 morning I didn't bring that forward to the
5 other draft. The alternative draft on page
6 15, go to page 15 towards the bottom of the
7 page, large (A), "Either an individual or
8 fiduciary ownership, however small, of a legal
9 or equitable interest."

10 CHAIRMAN SOULES: There is one
11 thing (6) has got that (7) doesn't, is
12 "individually or as a fiduciary."

13 HONORABLE SCOTT BRISTER: Which
14 raises another interesting question. The
15 canons say I can't be a fiduciary for anybody
16 except somebody in my family, which is the
17 third degree of consanguinity anyway. I can't
18 be a --

19 MR. ORSINGER: Except in East
20 Texas.

21 HONORABLE SCOTT BRISTER:
22 -- personal representative under the canons of
23 ethics, so...

24 And the old 18a said that has
25 individually fiduciary, but now that we have

1 got new canons that say I can't do that
2 anyway, it's covered by the third degree of
3 consanguinity.

4 PROFESSOR DORSANEO: You could
5 read this (6) at the end where it says "or any
6 other interest," it could be substantially
7 effective to modify the first reference to
8 "financial interest in the subject matter."

9 MR. HAMILTON: (6) is different
10 than (7) because (6) includes the judge
11 himself. (7) only includes his spouse and
12 others.

13 HONORABLE SCOTT BRISTER: Yeah.
14 It's definitely splintered all apart, but they
15 are the same thing. I mean, you know, the
16 judge is disqualified anyway, so it doesn't
17 matter what is in the recusal section.

18 MR. PARSLEY: Right. The judge
19 is disqualified. Maybe.

20 MR. ORSINGER: Luke, were you
21 saying that (6) and (7) were both in the code
22 of judicial conduct or just one of them was in
23 the code of judicial conduct?

24 CHAIRMAN SOULES: My
25 understanding is that all of these recusal

1 grounds came right out of the CJC, verbatim.

2 MR. KELTNER: Yes.

3 MR. McMAINS: Yes. That's how
4 we got them in here.

5 PROFESSOR DORSANEO: I would
6 suggest we check the current CJC and see if
7 anybody has been working on this some more.

8 MR. PARSLEY: Okay. I will go
9 look at that. I left all of this, as you can
10 see, in here; although I think it's redundant.
11 I think we could write a whole lot better
12 rule. Look at, please, Footnote No. --

13 CHAIRMAN SOULES: This is hard.
14 If we change it, it's going to get harder if
15 we drop things.

16 MR. PARSLEY: I so far have not
17 dropped anything, and I'm not going to unless
18 the committee tells me to.

19 Look at Footnote 6 and 7, or on the other
20 page, 26 and 27. Again, it talks about the
21 judge participated as counsel, which of course
22 is a ground for recusal -- I mean,
23 disqualification, but yet we repeat it here as
24 a ground for recusal.

25 MR. McMAINS: Where is it?

1 What page?

2 MR. ORSINGER: Top of page two.

3 MR. PARSLEY: Top of page two.

4 CHAIRMAN SOULES: It has a
5 function.

6 MR. PARSLEY: It does?

7 CHAIRMAN SOULES: It does. It
8 has an appellate function.

9 MR. McMAINS: Are you talking
10 about (5)?

11 MR. MARKS: What is the
12 appellate function?

13 CHAIRMAN SOULES: There may be
14 some question about whether or not the
15 disqualification of a judge is reviewable, but
16 there is not any question that a recusal is
17 not reviewable.

18 MR. ORSINGER: You mean by a
19 mandamus?

20 CHAIRMAN SOULES: Any way. Any
21 way.

22 MR. McMAINS: Yeah. A judge
23 who decides to recuse is --

24 HONORABLE SCOTT BRISTER:
25 That's it.

1 MR. ORSINGER: Well, even a
2 refusal to recuse is appealable at the end of
3 the case, but not by a mandamus.

4 CHAIRMAN SOULES: And that's
5 the only thing.

6 MR. ORSINGER: A
7 disqualification may be reviewable by a
8 mandamus, you are saying?

9 CHAIRMAN SOULES: That's not
10 decided yet.

11 MR. McMANS: There is a case.

12 CHAIRMAN SOULES: A recusal is
13 not reviewable by appeal, mandamus, or
14 anything else. You just -- the parties get a
15 new judge. He doesn't get challenged, and
16 they get a trial, and the policy was that is
17 not harmful error. Top or side or bottom, it
18 cannot be, and we are not ever going to look
19 at it. So...

20 MR. PARSLEY: All right. It
21 talks about "counsel, adviser, or material
22 witness," and I would argue that the reference
23 to material witness is purely redundant with
24 what precedes it, but I'm not anxious to
25 change it. It's harmless as well. It's

1 there, and if you have it twice, it doesn't
2 hurt anything.

3 All right. Other than that, things are
4 changed -- the changes are all pretty
5 technical all the way through to where we pick
6 up with the procedure in paragraph (g).

7 Oh, paragraph (d), let me mention it to
8 you. I have got a footnote there. "The
9 parties may waive any ground for recusal after
10 it is fully disclosed on the record." My
11 footnote is "and disqualification"?

12 MR. McMAINS: No.

13 HONORABLE SCOTT BRISTER:

14 Huh-uh.

15 MR. McMAINS: You can't waive a
16 disqualification, I don't think.

17 HONORABLE SCOTT BRISTER: You
18 can actually agree to waive it and can't be
19 held to it.

20 MR. PARSLEY: It's not
21 effective. Okay.

22 CHAIRMAN SOULES: The judge
23 does not have the capacity to act in a case
24 that he is disqualified in.

25 MR. PARSLEY: That's it. Okay.

1 MR. McMAINS: Right. It lacks
2 judicial authority.

3 MR. PARSLEY: All right. Now,
4 paragraph (e) is what this committee had
5 worked on before, and it has to do with a late
6 discovery of -- I'm sorry. That's not right.
7 I misspoke. That's out of the current rule.

8 HONORABLE SCOTT BRISTER: And
9 this is one of the things that makes it
10 confusing. When you put "financial interest"
11 in three different places, then this refers
12 to --

13 MR. PARSLEY: Two out of the
14 three.

15 HONORABLE SCOTT BRISTER:
16 -- two of them. Yeah. Two of them you can
17 sell the stock and then go ahead and rule on
18 the case, but the third one you would still be
19 recused under it. That doesn't make sense.

20 I mean, it seems like to me if you
21 have -- it seems like to me something that
22 ought to be a matter of discretion, reviewable
23 for abuse of discretion based on all the
24 circumstances maybe; but definitely if you
25 have a hundred shares of stock and you sell it

1 and have no other interest in the giant
2 company, what difference does it make? Okay.
3 You have sold it, but that means you ought to
4 be recused?

5 You know, if there is some ground still
6 left for bias that that will be evidentiary
7 of, that's fine; or impartiality might
8 reasonably be questioned, but if you have sold
9 the stock, why should financial interest still
10 come into play?

11 MR. PARSLEY: Unless there is
12 movement afoot to change it...

13 I would simplify all of this, but I'm
14 only the drafter. I'm not the -- all right.
15 Procedure. We talked about it in the
16 subcommittee. Richard Orsinger's opinion of
17 the procedure was that the procedure ought to
18 be the same for disqualification or recusal,
19 that if somebody is disqualified and you say,
20 "Judge, I think you are disqualified. You
21 have an interest in the case." The judge
22 says, "No, I'm not going to do it." Shouldn't
23 the procedure apply where you file a motion to
24 disqualify him and so forth?

25 CHAIRMAN SOULES: I agree with

1 that.

2 MR. PARSLEY: And so (g) has
3 been -- that is old Rule 18a, and it has been
4 made specifically applicable to both
5 disqualification and recusal, how it is you go
6 about asking the court system to get the judge
7 off your case.

8 PROFESSOR DORSANEO: How did we
9 get to (g)? I thought we were talking
10 about --

11 MR. PARSLEY: Well, I was
12 moving along, Bill.

13 PROFESSOR DORSANEO: I must
14 have fallen asleep. I was thinking about what
15 Judge Brister was saying about late discovery
16 of interest, and it struck me that what he
17 said was absolutely right.

18 MR. PARSLEY: He is right, but
19 nobody so far has moved to take a change, and
20 so I --

21 HONORABLE SCOTT BRISTER: And
22 another thing, if I sell my stock, I can only
23 get back into the case if I have devoted a
24 substantial time to the case. You know, I
25 don't know where that came from, but

1 definitely that wasn't the law before 18b was
2 added.

3 PROFESSOR DORSANEO: But, why
4 doesn't -- at least under the way this draft
5 is worded, why don't -- if you sell your
6 stock, why aren't you no longer having an
7 interest in the subject matter in controversy,
8 you know, under, (1)(b) or, you know, (a)(3)
9 in this draft? Why doesn't -- if I was
10 understanding you, why isn't that referenced
11 here?

12 HONORABLE SCOTT BRISTER: Well,
13 the usual way it comes up is the case has
14 rattled around in my court. I didn't know
15 it's there. They come in six months into it,
16 and I say, "Hey, by the way, my wife's uncle
17 may have some stock in this company. Let me
18 check into it," and you know, it's a hundred
19 shares, and you sell it. You know, I think it
20 doesn't say at what time, but it says, "A
21 judge must recuse if somebody owns" --

22 MR. McMAINS: I don't think
23 that's within the third degree.

24 PROFESSOR DORSANEO: I think I
25 was misunderstanding. The disqualification

1 for interest ought to be able to be fixed,
2 too.

3 CHAIRMAN SOULES: Huh-uh.

4 PROFESSOR DORSANEO: Why not?

5 CHAIRMAN SOULES: Can't be
6 fixed.

7 MR. MEADOWS: That's the
8 problem with this. I'm sorry, Judge, to
9 interrupt.

10 HONORABLE SCOTT BRISTER: No.
11 Go ahead.

12 MR. MEADOWS: But I have just
13 gone through this very exercise under (e), and
14 a judge who has, say, ten shares of stock and
15 sells it and has devoted substantial time
16 under this provision can stay on the case, but
17 anybody who is seeking recusal under this is
18 going to also, I would expect, seek
19 disqualification under the Constitution, and
20 the argument would go there, if you have
21 presided over the case for any time at all,
22 you are disqualified judge, and therefore, you
23 are not qualified to sit on the case. So
24 if --

25 HONORABLE SCOTT BRISTER: The

1 language is, "A judge must disqualify if you
2 know that you have an interest." It doesn't
3 say, unless you put it in, "or they can sell
4 the interest" in which case then --

5 MR. ORSINGER: You are
6 disqualified before you even have time to sell
7 your stock.

8 MR. MEADOWS: Right.

9 MR. McMAINS: You are
10 disqualified under the Constitution if you
11 have an interest, not whether you know it or
12 not.

13 MR. MEADOWS: Right.

14 MR. ORSINGER: And everything
15 you have done in the case apparently is void,
16 too.

17 MR. MEADOWS: That's the
18 argument. So this doesn't really allow you to
19 fix anything because anyone raising -- anyone
20 pursuing an effort to get rid of a judge is
21 going to seek recusal and disqualification.
22 You are going to frame it under both the
23 Constitution and Rule 18b, and the judge says,
24 "Well, I'm selling my stock. I fixed the
25 problem. I have devoted substantial time to

1 this case."

2 The response is, "Well, you haven't fixed
3 the problem at all because you are
4 disqualified because you owned stock as a
5 presiding judge over this case."

6 MR. PARSLEY: Well, the
7 distinction is -- and it's a small one -- is
8 that in (a), paragraph (a), grounds for
9 disqualification, they are tied -- well, that
10 came out. I'm wrong. We changed that just
11 then. I started to say they are tied to
12 having an interest in the subject matter in
13 controversy, but that's the old rule, but
14 that's not out of the Constitution. The
15 Constitution says "may be interested," so you
16 are right.

17 MR. MEADOWS: Right. And the
18 cases dealing with that language discuss, as
19 Judge Brister said, financial interest, no
20 matter how small.

21 HONORABLE SCOTT BRISTER: And
22 did allow you to sell out. The Rio Grande
23 case Luke was talking about in Hidalgo. Texas
24 Supreme Court held that the judge who, you
25 know, divested of whatever this property was

1 that might have had some tiny interest in
2 getting Rio Grande water wasn't disqualified
3 under that anymore because he had sold it.

4 PROFESSOR CARLSON: And that
5 was argued as a disqualification case.

6 CHAIRMAN SOULES: Really, the
7 judge --

8 MR. McMAINS: They didn't have
9 anything else.

10 CHAIRMAN SOULES: That case was
11 filed as a mandamus for the judge to proceed
12 to trial. Judge Blalock has said, "I don't
13 know whether I'm disqualified in this case, so
14 I'm not going to do anything."

15 He had this huge valley water rights
16 case; and he said, "I'm just not going to do
17 anything," and so the parties filed a mandamus
18 for him to proceed to trial, and he was
19 mandamus'd to proceed to trial.

20 HONORABLE SCOTT BRISTER: But,
21 again in, you know, that case mostly folks
22 know the fact of the -- look, we can't get
23 anybody else to hear this. Things have
24 changed so much from -- I mean, all of the
25 interpretation of what the court has said the

1 Constitution means, in my opinion, you could
2 throw them mostly out because the problems
3 they were dealing with are not our problems
4 anymore.

5 There is a hundred judges you could
6 appoint. They are lined up to come in and
7 hear these cases. We don't have the
8 logistical problems. We don't have the what
9 do you do with all of these recusal grounds?
10 They are all in the rule now, and I don't know
11 that we should -- you know, let's think about
12 it.

13 Certainly we can't change the
14 Constitution, but let's not necessarily be
15 bound with what was done 40 years ago because
16 it's a whole different -- you know, we have
17 got a lot more options than they did.

18 MR. MEADOWS: I'm not arguing
19 you take this out, because I believe it should
20 be here as a reasonable solution, and I think
21 you can read some of the cases that deal with
22 Constitutional disqualification as to allow
23 this very remedy, but I'm just saying that
24 it's a -- there is a seam here that allows
25 someone seeking to get rid of a judge under

1 these facts to succeed on a disqualification
2 argument where you would not be able to under
3 a Rule 18b argument.

4 MR. PARSLEY: If the judge's
5 wife holds the interest and the judge's wife
6 divests herself of it, the judge's spouse, how
7 about that?

8 MR. McMains: That's okay.
9 That's only recusal, not disqualification.

10 MR. PARSLEY: Right.

11 MR. Meadows: The judge would
12 be disqualified on --

13 MR. Keltner: Not under the
14 Constitution.

15 PROFESSOR ALBRIGHT: It's
16 community property.

17 HONORABLE SCOTT BRISTER: If
18 it's community property, why wouldn't you have
19 a --

20 MR. Keltner: It might not be
21 that. The whole problem I have with this
22 whole section is this: What we are trying to
23 say is instead of dealing with discretion we
24 are going to pick this one little bitty
25 instant where a judge attempted to divest

1 himself or herself of stock and let them if
2 they have spent substantial time sitting on
3 the case.

4 I mean, the whole idea of recusal is that
5 the system is fair and appears to be fair.
6 Well, if I'm sitting there and a judge comes
7 up, and it may be not a hundred shares of
8 General Motors, but a hundred of two hundred
9 shares of a company that he or she has held an
10 interest in for a long time. How am I going
11 to explain that's fair to a client by forcing
12 the judge to sell because he desperately wants
13 to sit on this case? It just doesn't seem to
14 make sense that we just carve out this one
15 little item and put it in the rule.

16 HONORABLE SCOTT BRISTER: It's
17 because the -- why do we look at -- even
18 though we say you must recuse, why don't we
19 review these for abuse of discretion? Because
20 on the ones that count -- like impartiality
21 might reasonably be questioned -- you have got
22 to look at all the facts.

23 MR. KELTNER: I absolutely
24 agree.

25 HONORABLE SCOTT BRISTER: And a

1 hundred shares in Exxon, you sell out. You
2 ought to go ahead and rule on the case. A
3 hundred shares with your former fraternity
4 brother, you ought to be off the case.

5 MR. KELTNER: I agree.

6 HONORABLE SCOTT BRISTER: And
7 that ought to be reviewed for abuse of
8 discretion.

9 MR. KELTNER: I guess my point
10 is this, that an abuse of discretion situation
11 is not something we are going to be able to
12 write in the rules in any event, especially on
13 recusal, at least in my judgment; but I don't
14 think we ought to try to deal case by case
15 with them either, which this exception appears
16 to do.

17 It would seem to me that the issue of
18 whether a person can -- a judge can divest him
19 or herself successfully for recusal purposes
20 or a person related to them is something
21 that's probably going to be decided by case
22 law and I think partially has been already.

23 MR. MEADOWS: Well, maybe, but
24 I think this is probably a pretty useful
25 remedy because it's probably not uncommon for

1 a judge to have some inconsequential interest
2 in some Fortune 500 company in some stock plan
3 or some, you know, retirement plan that they
4 are not even aware of, and then they are
5 confronted with it when they are dealing with
6 the Exxon case, and they have been two years
7 into it, and somebody digs it up, finds out
8 about it, and you really want to get rid of
9 the judge on those. I mean, I think that --

10 MR. KELTNER: It depends.

11 MR. MEADOWS: Well, yeah,
12 somebody is going to want to.

13 MR. KELTNER: Depends on how
14 things are going.

15 HONORABLE SCOTT BRISTER:
16 That's right.

17 MR. KELTNER: Which is the
18 reason to put it exactly like Judge Brister is
19 stating it, that it ought to be on an abuse of
20 discretion basis. We ought not to allow
21 parties to come in merely because things are
22 going wrong, dig for things, find out about
23 the judge, get him or her off of the case.
24 That's not justice either, and that's the
25 problem when we are dealing with recusal; but

1 remember, this stuff we are looking at, also
2 the appearance of propriety is probably in the
3 largest picture that we can ever look at it.
4 So we need to be very careful.

5 MR. PARSLEY: So if I might
6 focus a little bit so I know what to do, what
7 is the committee asking that I do to paragraph
8 (e)? Do I delete it? Do I alter something?

9 HONORABLE SCOTT BRISTER: I
10 would like to volunteer to try to crush some
11 of these together and see if we can't make
12 it -- you know, it may be broader actually if
13 we can put them in fewer places, and then --
14 but I just don't -- this organization just
15 offends me to have it all split up. There may
16 be good reasons, but I don't see them, and I
17 would like to try to shorten it, put a bunch
18 of them together, and it seems to me this
19 ought to be applicable to all of them, you
20 know, if you divest.

21 Now, you can't divest yourself of bias.
22 You can't divest yourself of impartiality,
23 might reasonably be questioned probably.

24 MR. ORSINGER: How about a
25 spouse?

1 HONORABLE SCOTT BRISTER: Well,
2 that's one way to divest of the property, I
3 guess. But, you know, it seems like those are
4 the kinds of things that ought to be part of
5 recusal, you ought to be able to cure, and it
6 ought to be reviewed on appeal for abuse of
7 discretion.

8 Remember, all of this is not going to be
9 decided by me. It's going to be decided by
10 the judge that I refer it to if I decline to
11 recuse. So we have got lots of procedural
12 protections in here.

13 MR. KELTNER: Yes.

14 CHAIRMAN SOULES: But what
15 difference does it make if a different judge
16 takes over? You have plenty of business.

17 HONORABLE SCOTT BRISTER: No
18 question about that. And this was
19 interesting. I always thought until I became
20 a judge and I started recusing myself from all
21 the Andrews Kurth cases, and West came up and
22 said, "What are you doing sending all of these
23 fat cases to me," you know, because the people
24 who went on the bench from small firms get all
25 the breast implant cases, all the asbestos

1 cases, and all the people from big firms have
2 car wrecks and slip and falls. That's what
3 the problem is.

4 MR. ORSINGER: The opposite of
5 their experience.

6 CHAIRMAN SOULES: To begin
7 with, but in our county this (e), if it's a
8 very big case, every judge in the courthouse
9 has probably devoted substantial time to the
10 case.

11 MR. KELTNER: That's right.
12 That happens in San Antonio. That's true.

13 CHAIRMAN SOULES: Because it
14 just rocks around and you get to trial and you
15 get a judge.

16 HONORABLE SCOTT BRISTER: See,
17 to me devoted substantial time ought to be one
18 of the factors considered in whether the cure
19 ought to be allowed or not, but it ought not
20 be the distinction. If the judge the first
21 time finds out about it and sells all ten
22 shares in Exxon, I think that is not a good
23 cure under this because I didn't devote
24 substantial time to it. I shouldn't have
25 raised those ten shares until I work on it

1 awhile.

2 So I will volunteer to try to put some of
3 this together and really just start back at
4 scratch with the --

5 MR. PARSLEY: I will send you a
6 disk.

7 HONORABLE SCOTT BRISTER: Okay.

8 MR. ORSINGER: He doesn't even
9 need a disk.

10 HONORABLE SCOTT BRISTER: I am
11 very concerned about the ten-day newly arising
12 thing. I guess that's what you are going to
13 next.

14 MR. PARSLEY: Next?
15 Mr. Chairman I think has got a --

16 CHAIRMAN SOULES: Yeah. Are
17 you saying, Judge, that you are going to
18 attempt to compress the grounds for recusal?

19 HONORABLE SCOTT BRISTER:
20 Right. And do a new section on cure.

21 CHAIRMAN SOULES: Oh, and cure.
22 Is the committee disposed to a compression on
23 the grounds of recusal? Is there anyone
24 disposed that way? I mean, no need to do work
25 that the committee is not interested in

1 anyway.

2 HONORABLE SCOTT BRISTER: Sure.
3 That's right.

4 CHAIRMAN SOULES: As far as the
5 grounds for recusal, is anyone interested in a
6 change in that to compress and combine some of
7 those grounds?

8 MR. MEADOWS: Well, he's just
9 talking about making it more understandable or
10 attempt to improve the organization.

11 HONORABLE SCOTT BRISTER: Pull
12 out some of the things that Lee points out,
13 that I agree with, are just duplicative.

14 MR. MEADOWS: Yeah. I would
15 certainly be interested in that.

16 MR. MARKS: I am, too.

17 CHAIRMAN SOULES: Okay.

18 MR. KELTNER: Are we talking
19 about the grounds of recusal themselves?

20 MR. McMAINS: Yeah.

21 CHAIRMAN SOULES: Yes.

22 MR. KELTNER: Again, I guess
23 I'm not opposed to it, but let's remember the
24 history that Luke was telling us about. They
25 got pulled out of one place, put another,

1 and --

2 MR. McMAINS: And then taken
3 out again.

4 MR. KELTNER: And I wouldn't
5 change the grounds of recusal, personally. I
6 might change the curative things and the way
7 you might consider them, but I wouldn't change
8 the grounds themselves, would be my advice.

9 CHAIRMAN SOULES: Well, that
10 was the reason I was asking whether or not
11 Judge Brister was going to be doing some work
12 we were not interested in.

13 MR. KELTNER: I think it would
14 be a big mistake to change --

15 HONORABLE SCOTT BRISTER: What
16 I'm talking about, for instance, I think the
17 rule says a judge is disqualified if he has a
18 financial interest, a judge is disqualified if
19 he has an interest that's substantially
20 effective. It doesn't have to be
21 substantially effective. It's just if I have
22 a financially -- the "substantially effective"
23 is just surplusage and can be confusing.

24 CHAIRMAN SOULES: Okay, Judge.
25 Now, where are we going?

1 MR. PARSLEY: How about (g)(1)
2 under "Procedure"? I have attempted simply to
3 simplify the paragraph, except for one
4 substantive change I will point out to you.
5 The first sentence in the current rule says
6 "at least ten days before the date set for
7 trial" and so forth, and we had previously in
8 this committee pulled that sentence out and
9 put it in a timing section, which follows as
10 (g)(2), and we will get to that in a second.

11 So otherwise, I have just simply said, "a
12 party may move for the disqualification or
13 recusal of the judge before whom a case is
14 pending by filing a motion stating with
15 particularity the grounds for disqualification
16 or recusal. The motion must be verified,"
17 which is not new.

18 "The motion may be based on personal
19 knowledge or on information and belief if the
20 grounds of such belief are specifically
21 stated." That's where I did make a change
22 because the current rule says, "The grounds
23 must be based" or "shall be based on" -- I
24 can't find it right off, but it says "on
25 personal knowledge on facts that would be

1 admissible," but then goes on to say "on
2 information and belief"; and, of course, on
3 information and belief I don't think is
4 admissible facts in any circumstance.

5 And so it seems silly to me to say "on
6 personal knowledge and facts that are
7 admissible" and then to follow-up and say "on
8 personal information and belief," so I struck
9 the part about facts that would be admissible.
10 That's a substantive change.

11 HONORABLE SCOTT BRISTER:

12 That's fine.

13 MR. PARSLEY: Then I followed
14 up with a sentence that we had talked about
15 before in committee. "Although a judge's
16 ruling is not a ground for disqualification or
17 recusal, it may be evidence supporting the
18 motion." Again, we talked about that in
19 committee. I just brought it forward.

20 (G)(2) is "Time for Filing. A motion to
21 disqualify may be filed at any time." That is
22 something else we did in this committee.

23 "The motion to recuse must be filed ten
24 days before the first hearing or trial that
25 occurs after the grounds for recusal arise,"

1 and that is, as I said, from paragraph (1)
2 above, just brought it down. "Except as
3 follows," and there is the two exceptions that
4 we have -- one of them is in the current rule.
5 The second one we created.

6 The first exception, "may be filed at the
7 earliest practicable time within that ten-day
8 period if a judge is assigned to the case
9 within the ten-day period." That's out of the
10 current rule.

11 The second one, "The motion may be filed
12 at the earliest practicable time after the
13 grounds for disqualification or recusal arise,
14 if the grounds arise less than ten days before
15 the trial or hearing."

16 You need to follow up with paragraph (4).
17 Skip paragraph (3) for a second and go to
18 paragraph (4). "After the motion to recuse or
19 disqualify has been filed, the judge who is
20 subject to the motion must not, except for
21 good cause, proceed with the case,
22 unless" -- this ties back in to what we just
23 talked about. "Unless the motion was filed
24 under paragraph (g)(2)(B)(ii), in which case
25 the judge may proceed with the case until an

1 order disqualifying or recusing the judge is
2 made."

3 So in other words, if it's a late motion
4 based on late discovered grounds the judge can
5 proceed with the case until ordered
6 disqualified or recused, and that I think is
7 what we have talked about in this committee
8 before.

9 PROFESSOR DORSANEO: In Item
10 (ii) on page ten why do you have "for
11 disqualification"?

12 MR. ORSINGER: It shouldn't be.
13 That was left over vestige.

14 PROFESSOR DORSANEO: So take
15 out "disqualification or" in Item (ii).

16 MR. ORSINGER: Yeah. Because
17 disqualification can be at any time. It's
18 only recusal that we are purporting to
19 regulate.

20 MR. PARSLEY: That's right.

21 CHAIRMAN SOULES: Where is
22 that, Bill?

23 PROFESSOR DORSANEO: In Item
24 (ii).

25 CHAIRMAN SOULES: Item (ii).

1 MR. ORSINGER: Or if you are on
2 page four.

3 CHAIRMAN SOULES: Okay.

4 HONORABLE SCOTT BRISTER: How
5 is that going to work? I'm in trial, and they
6 don't like the way things are going, so they
7 file a motion that I'm biased, and it's set
8 for hearing. They go to the hearing, or do
9 they stay in my trial?

10 MR. ORSINGER: They stay in
11 your trial if you are in trial, unless they
12 want to have some stuff bad happen to them.
13 In other words, you are entitled --

14 HONORABLE SCOTT BRISTER: They
15 are going to demand to go to the hearing.

16 MR. ORSINGER: They don't have
17 the right. The disqualification proceeding by
18 the judge to whom you refer it -- or, pardon
19 me, the recusal proceeding is to be held
20 without interrupting your trial. Now, maybe
21 we don't make that clear, but we haven't
22 studied those words yet.

23 MR. PARSLEY: That's certainly
24 not in here.

25 CHAIRMAN SOULES: Is that what

1 you mean?

2 MR. ORSINGER: It's supposed to
3 be a parallel proceeding. It's not supposed
4 to stop the trial.

5 HONORABLE SCOTT BRISTER: Yeah.
6 Because remember we had discussed -- this is a
7 big problem. I don't want anything to be late
8 after ten days if it stops the trial, which is
9 why it's usually filed. It's an idea we had
10 discussed some months ago, was having a
11 parallel proceeding, but they are going to
12 want to go to that hearing.

13 CHAIRMAN SOULES: And I think,
14 to me, those are not the same things, and
15 maybe I miscomprehended that. When the motion
16 is filed, then it gets referred to the
17 presiding judge, and the presiding judge
18 appoints another judge to hear it and then
19 there is a hearing.

20 Okay. And all of that between filing of
21 the motion and the hearing takes time, and
22 then the judge that hears it may or may not
23 rule. Usually they do rule from the bench on
24 motions for recusal in my experience, but they
25 may not rule, and so these hearings, I have

1 never had one go more than a day, the actual
2 hearing.

3 MR. ORSINGER: Right.

4 CHAIRMAN SOULES: And I
5 don't --

6 MR. ORSINGER: You think it
7 should stop the trial proceeding long enough
8 to resolve the recusal hearing?

9 CHAIRMAN SOULES: For the
10 hearing it seems to me like the lawyers -- I
11 don't know that you need to write it in here,
12 but I don't think you should write it out that
13 the judge under motion to recuse and the
14 lawyers that filed it don't get a recess to go
15 to the assigned judge long enough to conduct a
16 hearing and get back.

17 MR. PARSLEY: I think the way
18 it's written now it addresses it neither way.
19 It just says the judge may proceed with the
20 case, and I guess it would be up to the judge
21 to do it.

22 HONORABLE SCOTT BRISTER: I
23 have got one motion to recuse that the
24 presiding -- see, I don't have power over
25 these presiding judges, and sometimes they do

1 unpredictable things. I have one five year
2 old case set for trial in October. I just got
3 the notice of hearing. It's set for
4 Thanksgiving because that's the earliest the
5 visiting judge could get to it. I mean, the
6 visiting judge is going to hear it three
7 months from now.

8 So, yeah, the vast majority of them
9 happen quick, but some of them don't, and the
10 trial judge has nothing to do about it. My
11 particular case, the pro se party that doesn't
12 want to go forward with trial called up the
13 presiding judge. You know, does that mean I
14 can call up the presiding judge and tell him I
15 think it's a frivolous motion, so he ought to
16 set it early?

17 You know, this is the main -- the main
18 ground for hearings on recusals is bias,
19 because if you point out to the judge that
20 they own stock and stuff like that, every
21 judge I know gets off the case. So the only
22 ones that go this far are bias and
23 impartiality questions, and the vast majority
24 of those are filed immediately before or
25 during trial to try to stop it; and if you

1 stop it, they win. That's what they wanted to
2 do anyway, and to merely threaten them that we
3 may sanction you on the back end is not
4 enough.

5 The good thing about it right now with
6 the current rule, the reason it's not a
7 problem, is because during trial they file
8 this motion, and you say, "Sorry, it's not ten
9 days before trial. Forget it." And we don't
10 fool with it, and if I make biased, wrong
11 rulings, you can appeal. I mean, we are
12 talking about bias and impartiality, and the
13 cases almost never strike a judge. They just,
14 you know, say, "Look, you should have
15 appealed. You appeal. If they are all so
16 wrong, you can reverse it."

17 MR. ORSINGER: Did you know
18 that there is a court of appeals case saying
19 that where the grounds for recusal occur after
20 the ten day period that you have a common law
21 right to raise it? Now, we are sitting here
22 pretending like they can't do it, but they can
23 do it, at least to one court of appeals.

24 HONORABLE SCOTT BRISTER: Yeah.
25 Well, there is the -- you know, where one of

1 the firms hires the judge's son or whatever
2 during trial, and you know, I think the courts
3 are going to imply whatever they need to imply
4 to look at that. I'm just not saying -- the
5 problem is it's going to be -- you know, if
6 you start down that road it's, you know...

7 MR. PARSLEY: Okay. I think
8 the specific question maybe is, that we ought
9 to get answered right now, it just simply says
10 the judge may proceed with the case, and it
11 does not say that anybody gets time to go do
12 the hearing or anything else. Should that be
13 changed? Do you-all want me to change it
14 somewhere? If I should, I will mark on the
15 page. If not, I will go on.

16 HONORABLE SCOTT BRISTER: It's
17 going to be -- that question is going to arise
18 the first day the rule goes into effect. I
19 think you need to answer it. I think you need
20 to say it shall not interrupt -- "Scheduling
21 of the hearing shall not interrupt the trial
22 proceedings."

23 CHAIRMAN SOULES: You are
24 talking about an actual trial?

25 HONORABLE SCOTT BRISTER: I

1 mean, my particular one I'm thinking of was I
2 had gone over to San Antonio as you have to do
3 for a lawyer disciplinary case, and after
4 denying the third motion for continuance,
5 started trial, and was handed up in
6 handwriting the motion to recuse because
7 you're biased.

8 You know, I mean, these guys, this was,
9 you know, people that, you know, admitted
10 themselves to the hospital so they wouldn't
11 have to go forward on this. These were just
12 truly bad guys, didn't want to go to trial,
13 were willing to do anything to avoid trial,
14 including file a motion to recuse.

15 CHAIRMAN SOULES: So this is a
16 motion filed within ten days of the hearing or
17 trial, or what is it you are talking about?
18 Is this just for trial?

19 MR. PARSLEY: No. Ten days
20 before a trial or hearing.

21 MR. McMANS: Trial or hearing.

22 CHAIRMAN SOULES: Well, you are
23 saying the judge can proceed with the case.

24 MR. PARSLEY: That's what --
25 yes, that's what this draft says.

1 CHAIRMAN SOULES: Don't you
2 mean "trial or hearing"?

3 MR. PARSLEY: Tell me. I would
4 say the judge is -- whatever it is that's
5 going on, the judge can proceed.

6 CHAIRMAN SOULES: Well, it may
7 be filed within ten days of a hearing in three
8 days, but it's filed outside of ten days of a
9 hearing in 12 days; but we have got -- this is
10 not hypothetical. This is real.

11 MR. ORSINGER: But if you are,
12 I mean --

13 CHAIRMAN SOULES: What I'm
14 saying.

15 MR. ORSINGER: But if you
16 cannot recuse the judge before the hearing,
17 you can't recuse them at all, because you have
18 got to recuse them at the first opportunity.
19 What's the logic in letting them handle two or
20 three things and not the fourth one?

21 CHAIRMAN SOULES: Because I'm
22 within ten days of one hearing, but I'm not
23 within ten days of the next hearing, and I
24 have got hearings every three days.

25 MR. ORSINGER: Well, Luke, if

1 they are disqualified on the fourth hearing,
2 then what does that say about your first,
3 second, and third hearing?

4 HONORABLE SCOTT BRISTER:
5 Disqualified, yeah, but not --

6 MR. ORSINGER: I mean, if they
7 are recused on the fourth hearing, what does
8 that say about your first, second, and third
9 hearing?

10 HONORABLE SCOTT BRISTER: No
11 problem.

12 CHAIRMAN SOULES: If they were
13 acting for good cause?

14 HONORABLE SCOTT BRISTER: No.

15 CHAIRMAN SOULES: Oh, this is
16 without good cause. This is giving them a
17 window to act for ten more days or if they are
18 in trial, to go forward, I guess.

19 MR. ORSINGER: But it's only
20 for events that either occur after or are
21 learned after the ten-day deadline. If you
22 just sat -- if you sat on it, and you didn't
23 do anything, this rule doesn't help you.

24 This is to address the problem that the
25 Texarkana court of appeals says we have a

1 common law right to do anyway, which is to
2 raise matters after the deadline that arose
3 after the deadline.

4 CHAIRMAN SOULES: Well, that's
5 a problem that we are not even talking about,
6 which is another big problem with me; and that
7 is, suppose the grounds arise 20 days ago, but
8 I didn't find out about them until three days
9 before the hearing. I'm just -- this rule
10 doesn't even speak to that situation.

11 MR. PARSLEY: I have got a
12 footnote that asks that question also.

13 MR. KELTNER: Yeah. He talks
14 about that issue, and I think that's an
15 important thing to have, too.

16 CHAIRMAN SOULES: Very
17 important. So I'm now within ten days of that
18 hearing in three days, and I'm filing my
19 motion to recuse, and the judge is empowered
20 to go on with discovery and certifying class
21 actions and taking all kinds of extended
22 temporary orders of all kinds, not just in
23 divorce cases, but other things indefinitely.

24 MR. ORSINGER: It's up to the
25 administrative judge how soon you get a second

1 opinion on that. The alternative --

2 CHAIRMAN SOULES: That's a
3 completely new architecture of 18a.

4 MR. PARSLEY: It solves Luke's
5 problem to strike the word "case" and just
6 say, "The judge may proceed with the trial or
7 hearing."

8 CHAIRMAN SOULES: That's right.
9 It does. That solves that problem, and there
10 is some abuse in that.

11 MR. MEADOWS: But if you don't
12 have ten days notice of the hearing, obviously
13 this doesn't apply. I mean, there is a case
14 that says that.

15 If you want to recuse the judge, nothing
16 is happening in the case, the case is quiet,
17 and you conclude for some reason that you want
18 or need to recuse the judge; and a hearing is
19 set three days out, you can still move to
20 recuse the judge.

21 HONORABLE SCOTT BRISTER:
22 Right.

23 MR. MEADOWS: Because you
24 weren't given ten -- you don't have ten days
25 notice of the hearing. There is a case right

1 on point.

2 HONORABLE SCOTT BRISTER:
3 Metzger. Yeah. If the judge gives you seven
4 days notice that you are about to get
5 sanctioned, you can file it late.

6 CHAIRMAN SOULES: And what
7 happened to the words "except for good cause
8 stated in the order in which such action was
9 taken"?

10 MR. PARSLEY: Yes. I dropped
11 that. I don't know whether I put a note on
12 that or not.

13 CHAIRMAN SOULES: Why?

14 MR. PARSLEY: Well, I intended
15 to ask about that. It seems to me that if
16 good cause is not stated somewhere, you are
17 going to get -- maybe you are going to get
18 dinged on that. I don't know. Maybe it needs
19 to be in there.

20 CHAIRMAN SOULES: I mean, that
21 was basically -- I think when we passed this
22 rule we had ten-day T.R.O.'s extended for ten.
23 Now we have got 14 T.R.O.'s extended for 14,
24 which helps some, but that's not the whole
25 answer.

1 The judge comes in and says, "You have
2 filed a motion to recuse. I have got a T.R.O.
3 that's about to lapse. I think it's a good
4 T.R.O. This is a divorce case. There has
5 been some abuse. There has been some
6 squandering of funds. I'm going to extend the
7 T.R.O."

8 The T.R.O. is extended, and that was one
9 of the specific examples that this committee
10 discussed when we passed this, that there had
11 to be room for a trial judge to act in those
12 circumstances, even under the threat of the
13 filing of a motion.

14 MR. PARSLEY: It's easy enough
15 to restore the "stated in the order," so I
16 will mark that.

17 HONORABLE SCOTT BRISTER: Why
18 did you add that it has to be the first,
19 before the first hearing or trial?

20 MR. PARSLEY: Where are you?

21 HONORABLE SCOTT BRISTER:
22 (G)(2)(B), "Motion to recuse must be filed at
23 least ten days before the first hearing."
24 Because the Metzger case is -- they had a
25 month-long trial and then filed the recusal

1 based on bias after the court of appeals said,
2 "Well" -- and there are several cases that say
3 you can go through the trial and then file
4 your motion for bias and get the procedure to
5 roll through before you have the motion for
6 new trial, judgment NOV hearing.

7 MR. PARSLEY: The answer to
8 your question is I simply brought the language
9 forward from what the committee had done
10 before.

11 HONORABLE SCOTT BRISTER: Oh.

12 MR. PARSLEY: But if it needs
13 to be deleted, then we sure can do that.

14 MR. ORSINGER: I think the idea
15 is that if you know about it ten days before a
16 hearing, you have to say something about it or
17 else you are not going to be able to recuse
18 the judge late.

19 CHAIRMAN SOULES: Except that
20 that's also an over-simplification because you
21 are learning as you go along how much
22 involvement this judge had with his old law
23 firm in representing this client who is now
24 before him, or you are trying to find out.

25 You know that his old law firm

1 represented him. You know things are really
2 going bad. You are trying to find out whether
3 the judge was in the firm at the time. You
4 know a lot, but you don't have it all yet, and
5 you are not ready for a hearing. You are not
6 even ready to file your motion because you are
7 not absolutely certain that you have got what
8 you need, and then you finally get there.

9 Exactly when -- the two problems with
10 this, you say, "The grounds for the recusal
11 arise." Well, those grounds for recusal arose
12 ten years ago when the judge and his law
13 partner made lots of money off of this trust,
14 and the judge even represented this trust in a
15 piece of litigation, and we are digging in the
16 old courthouse files because we heard about
17 that, and we are trying to find where the
18 judge did that, but we don't have proof. So
19 we have -- but we finally discovered it.

20 MR. PARSLEY: So it needs to be
21 "when the party knew or should have known
22 about the grounds of recusal"? Is that better
23 than "arise," or what's the solution?

24 CHAIRMAN SOULES: At least
25 that.

1 MR. PARSLEY: And that occurs
2 in two places.

3 HONORABLE SCOTT BRISTER: Do we
4 really want to get into an evidentiary hearing
5 on that?

6 MR. KELTNER: Well, I think
7 there are times that you are going to. I
8 mean, think about the nefarious things that
9 this is really designed to get at.

10 Let's assume that you find out two days
11 before trial that the judge has just gotten
12 back from a hunting trip with the lawyer on
13 the other side and then can't remember who
14 paid for it. True case. Couldn't have known
15 it, couldn't have known at all. In fact, this
16 was one in a series of annual hunting trips
17 that no one can remember who paid for, and
18 it's easy to prove, but you have got to try to
19 prove it.

20 HONORABLE SCOTT BRISTER: No.
21 I'm inclined to say, it's all right. You
22 don't lose anything because you knew about it.
23 You don't waive anything because you knew
24 about it for ten years and didn't say anything
25 about it, as long as you don't stop my

1 proceedings. My only concern about -- I mean,
2 the nice thing about the ten days before is I
3 can schedule my life and know what's going to
4 trial and what's not, and we don't waste any
5 time.

6 MR. KELTNER: I see.

7 HONORABLE SCOTT BRISTER: I
8 like this parallel proceeding thing as long as
9 it's clear they don't get to stop and go to
10 the proceeding. We are going to keep doing
11 what we are doing, and, you know, the recusal
12 thing will do its point. I don't care if you
13 have known about it forever and didn't do
14 anything about it and get mad at me in trial
15 and want to raise it now.

16 Gosh, we don't want to go into put you on
17 the stand, and "Didn't you know earlier?" Oh,
18 brother. These are combative enough hearings.
19 Who cares when they knew or should have known
20 about it? So you have learned about it late.

21 CHAIRMAN SOULES: I agree with
22 you, Judge, and the flexibility of the old
23 rule, it doesn't have this "knew or should
24 have known" or what have you in there, but
25 that may be and probably according to you has

1 been -- in your experience, has been abused,
2 and if they are within ten days of the hearing
3 or a trial, and they raise it, maybe you
4 should be entitled to go forward with what has
5 already been scheduled that's not beyond the
6 ten days. Probably within that ten days you
7 are going to get a hearing anyway.

8 I know you've had a bad experience, but
9 that doesn't sound to me like the
10 administration is being --

11 MR. HAMILTON: Are you saying
12 then you get to hear him at the end of the
13 trial? Is that what you are suggesting?

14 HONORABLE SCOTT BRISTER: Well,
15 there is nothing that's saying how fast the
16 hearing has to be at all.

17 MR. HAMILTON: No. But if you
18 can't have the hearing -- the trial stop a day
19 for the hearing and your trial keeps going,
20 then you never get to hear it on the motion to
21 recuse 'til the trial is over. Then if the
22 movant was right, then you have wasted all
23 that trial time.

24 HONORABLE SCOTT BRISTER: Well,
25 No. 1, you could do it after 4:30 or before

1 9:00 in the morning or on a Saturday, God
2 forbid. You know, these are visiting judges,
3 after all. They are getting paid for this
4 stuff. They can work past noon.

5 MR. ORSINGER: Well, an
6 additional consideration is that if, in fact,
7 this doesn't operate as a continuance of the
8 trial, then a lot of people are not going to
9 file it in order to accomplish that.

10 I mean, one of the things we are trying
11 to do is to take the incentive out of an
12 abusive recusal motion; and if it doesn't stop
13 the trial, all it does is get you a hearing in
14 front of another judge where you have got to
15 pay 5,000 in attorneys' fees and you are still
16 fighting your jury trial then you are probably
17 not going to file the abusive motion, or it's
18 less likely because you don't have any payoff.
19 The payoff is the delay, and if you take the
20 delay away then a lot of the abusive recusal
21 motions will never get filed.

22 CHAIRMAN SOULES: About all we
23 are going to get out of this is a day's work
24 in another court. We are going to get this
25 day off in this court, but we are going to

1 have a big day in another court.

2 HONORABLE SCOTT BRISTER: Keep
3 in mind, though, almost all motions to recuse
4 that get referred get denied. Now, of course,
5 you know, the ones that get granted you don't
6 read appeals on, so maybe -- but, you know, I
7 can tell -- especially on bias and
8 impartiality, almost always denied.

9 Now, the judge's son, I mean, hired the
10 judge's son got denied, too, when they
11 eventually got to the hearing because he
12 didn't have an interest in the attorneys' fee
13 in the case. He wasn't working on the case.
14 He was just working in the firm. It got
15 denied, too.

16 I mean, you almost always lose these
17 unless the judge willingly says, "Yep, you're
18 right. I don't want any part of this. Send
19 it to somebody else."

20 MR. ORSINGER: Well, we can
21 eliminate everybody's concern, it sounds like,
22 by just saying that if it's filed within ten
23 days of the hearing or trial, you just go
24 ahead with the hearing or trial, and we don't
25 care. You might have known about it for ten

1 years. You can still have it heard, but you
2 just can't stop the proceeding to have it
3 heard. That solves your problem, and that
4 solves your problem.

5 HONORABLE SCOTT BRISTER: Yep.

6 MR. PARSLEY: Right. And
7 (2)(B), go back to page three, or you can be
8 on -- if you are on the redlined version, you
9 can be on page ten.

10 We can change that to say, "A motion to
11 recuse must be filed at least ten days before
12 the date the case is set for a hearing or
13 trial," which is I think the old -- exactly
14 out of the old rule. It says, "At least ten
15 days before the date set for trial or
16 hearing."

17 MR. ORSINGER: Not really.
18 What it really ought to say is that if it is
19 filed within ten days of a hearing or trial,
20 the court may proceed with the hearing or
21 trial.

22 MR. PARSLEY: Right.

23 MR. ORSINGER: We are really
24 abandoning a ten-day deadline.

25 PROFESSOR DORSANEO: Uh-huh.

1 MR. ORSINGER: And we are just
2 saying if you wait within ten days, the court
3 can go ahead with whatever they are doing
4 until you have some kind of hearing; and if
5 the judge loses, he's out or she's out; and if
6 he doesn't lose, you can just continue on.

7 MR. McMains: Well, what does
8 our current 18a say?

9 CHAIRMAN SOULES: It doesn't
10 say that it has to be filed any time. It just
11 says, if I'm getting it right, paragraph (e)
12 says, "If within ten days, the motion shall be
13 filed at the earliest practicable time
14 before."

15 HONORABLE SCOTT BRISTER: No.
16 18a(a) says, "At least ten days before the
17 date set for trial or other hearing" --

18 CHAIRMAN SOULES: Oh, yeah.
19 There you go.

20 HONORABLE SCOTT BRISTER:
21 -- "any party may file."

22 MR. ORSINGER: And the courts
23 say that if you don't do that, you waive it if
24 you knew about it.

25 HONORABLE SCOTT BRISTER: If

1 it's less than ten days, you just throw it in
2 the file and keep on doing whatever you are
3 doing.

4 MR. McMAINS: That's true even
5 if you had other hearings before the judge?

6 HONORABLE SCOTT BRISTER: Yep.

7 MR. KELTNER: Yes.

8 MR. McMAINS: Okay.

9 MR. MEADOWS: But I don't think
10 we ought to change the current law
11 that's -- this rule doesn't apply this way if
12 you don't have ten days notice of the hearing.
13 I mean, you can still file it. You get notice
14 from the --

15 CHAIRMAN SOULES: Yeah.

16 MR. MEADOWS: We don't want to
17 change that. I mean, the "must" language
18 might change that.

19 HONORABLE SCOTT BRISTER: Let's
20 take the Metzger case where the judge gives
21 you a week's notice you are fixing to be
22 sanctioned. Under this parallel proceeding
23 you could go ahead and file. You could go
24 ahead and have a parallel proceeding, but the
25 sanctions hearing goes ahead until -- unless

1 you tell the presiding judge you need it done
2 before then.

3 MR. PARSLEY: So is the
4 final version supposed to say if it's filed
5 within ten days of the hearing or trial, the
6 judge may proceed with the hearing or trial,
7 and that's it?

8 MR. ORSINGER: I'm comfortable
9 with that.

10 MR. PARSLEY: Otherwise, the
11 judge can't proceed.

12 CHAIRMAN SOULES: That's right.

13 PROFESSOR DORSANEO: Is it
14 possible that they can set motions if that's
15 what it says?

16 CHAIRMAN SOULES: Except in
17 emergency.

18 HONORABLE SCOTT BRISTER: No
19 question from my point of view it's easiest
20 just to say "ten days," but I thought
21 everybody was all concerned about this, you
22 know, didn't find out about it until too late.

23 HONORABLE DAVID PEEPLES: Luke,
24 I see a difference between within ten days of
25 the first hearing before that judge and then

1 within ten days when you have had several
2 hearings and have not recused. Because, as we
3 all know in San Antonio, you don't find out
4 who your jury trial judge is until Friday
5 before Monday, and you ought to be able to
6 file in those circumstances and stop
7 everything until it's heard.

8 MR. PARSLEY: Does that fall
9 under paragraph (2)(B)(i), the earliest
10 practicable time within ten-day period if the
11 judge is assigned to the case within the
12 ten-day period?

13 HONORABLE DAVID PEEPLES: Yeah.
14 But the language you-all were talking about I
15 thought was going to make a change in that,
16 which I didn't want.

17 MR. PARSLEY: We need to retain
18 that.

19 CHAIRMAN SOULES: Yeah. We
20 have got to retain that.

21 MR. PARSLEY: And it stops it,
22 stops the case, stops the hearing or trial.

23 HONORABLE DAVID PEEPLES: Can I
24 offer a couple of things?

25 CHAIRMAN SOULES: Yes, sir,

1 Judge. Please.

2 HONORABLE DAVID PEEPLES: I
3 have been waiting until we get to the next
4 page. At some point I think we need to
5 do -- make three changes. I think we ought to
6 authorize telephone hearings in the discretion
7 of the recusal judge, because a lot of times
8 somebody is brought in from out of town.

9 And the second thing is we have got
10 "certified copy" on the next page, and we
11 ought to be able to use fax copies, especially
12 when you are dealing with long distances. The
13 way we do it, somebody in Laredo. They fax it
14 to us. They shouldn't have to send us a
15 certified copy of all this junk.

16 And third, the recusal judge ought to be
17 able to rule on the pleadings if the pleadings
18 don't state a recusable ground.

19 MR. ORSINGER: If taken as
20 true.

21 HONORABLE DAVID PEEPLES: Yeah.
22 Assuming it's true, it doesn't state a recusal
23 cause of action, so to speak, he ought to be
24 able to dismiss it outright.

25 MR. PARSLEY: That was my

1 error. That was supposed to be in here, and I
2 failed to include it, but the committee had
3 already asked for that.

4 HONORABLE DAVID PEEPLES: That
5 all needs to be said and then maybe a trial
6 doesn't get stalled until Thanksgiving. I
7 mean, you can't make the regional
8 administrative judge assign somebody quickly,
9 but if it's in black letter in the rule, it
10 will get done more often, and so I'm not sure
11 where those all ought to go, but I would like
12 to see those provisions in here.

13 CHAIRMAN SOULES: Okay. Run
14 them by again, Judge.

15 HONORABLE DAVID PEEPLES:
16 Telephone hearings in the discretion of the
17 recusal judge. Now, sometimes it's too
18 complicated. You couldn't do it, but
19 sometimes it's not complicated, and if people
20 know that they file this recusal and there is
21 going to be a hearing very quickly over the
22 telephone, I think some of the frivolous ones
23 just won't get granted.

24 MR. ORSINGER: When you say
25 "recusing judge" you mean the judge to which

1 it's referred?

2 HONORABLE DAVID PEEPLES: I
3 mean, the one who's hearing it, who's going to
4 hear the recusal motion.

5 MR. McMAINS: The referred
6 judge, the judge to whom it's referred.

7 CHAIRMAN SOULES: The assigned
8 judge.

9 HONORABLE DAVID PEEPLES: The
10 assigned judge is probably the better word,
11 and then fax, the use of faxed pleadings ought
12 to be authorized.

13 CHAIRMAN SOULES: Do we have
14 "certified" in here somewhere?

15 HONORABLE DAVID PEEPLES: Yes.
16 It's on (5)(C).

17 CHAIRMAN SOULES: In the
18 present rule?

19 HONORABLE DAVID PEEPLES: Well,
20 it's in this one right here. It's on page
21 five of the clean copy, second paragraph, big
22 (C), second sentence. "The judge must
23 promptly forward to the presiding judge a
24 certified copy," and that -- good night.

25 CHAIRMAN SOULES: Certified

1 copy is not necessary.

2 HONORABLE DAVID PEEPLES: I
3 think a faxed copy is perfectly fine. Yeah.

4 And then the third point is dismiss on
5 the pleadings, if everything taken as true it
6 doesn't rise to the level it has to to justify
7 recusal.

8 CHAIRMAN SOULES: Okay. Now,
9 that was in the old rule, and that's not
10 necessary.

11 Okay. Has everybody signed up the
12 sign-up sheet, everybody that's left here? Be
13 sure to sign up. Okay. Carl Hamilton.

14 MR. HAMILTON: Court rules
15 submitted a change on Rule 18a that Judge
16 Hedges worked up. I don't know if you have a
17 copy of that or not, Luke, and I have
18 forgotten what all was said in it; but one of
19 the things that she wanted to put in there and
20 we did was that the presiding judge had the
21 authority to dismiss a frivolous motion to
22 recuse that was filed if it didn't state the
23 proper ground, or however that is worded in
24 there, Lee.

25 MR. PARSLEY: That's what Judge

1 Peeples is talking about, and that's what it
2 is that the subcommittee instructed me to
3 include, and I failed to do that.

4 MR. HAMILTON: But it was the
5 presiding judge rather than the judge assigned
6 to it.

7 HONORABLE DAVID PEEPLES: It
8 ought to be either one probably.

9 MR. PARSLEY: Yeah. That's
10 what I was thinking. It ought to be either
11 judge ought to be able to look at the
12 pleadings and say, "It doesn't state grounds."

13 MR. ORSINGER: If you are the
14 presiding administrative district judge and
15 you reject the motion, haven't you just made
16 yourself the judge assigned, because you have
17 just ruled on it? So, I mean, to me they are
18 really the same person.

19 If you dismiss it out of hand, you have
20 just made yourself the judge who took the
21 referral on it, right?

22 PROFESSOR ALBRIGHT: The
23 presiding judge can't do that, though.

24 MR. ORSINGER: I think the
25 presiding judge can hear -- can't you hear it

1 as a presiding judge?

2 HONORABLE DAVID PEEPLES: Oh,
3 sure.

4 CHAIRMAN SOULES: Assign
5 yourself.

6 MR. PARSLEY: And this rule
7 allows the presiding judge to assign him or
8 herself.

9 CHAIRMAN SOULES: Yeah.

10 MR. PARSLEY: All right. Can I
11 ask another quick question?

12 MR. HAMILTON: Can I say one
13 other thing?

14 CHAIRMAN SOULES: Yes, sir.
15 Carl Hamilton.

16 MR. HAMILTON: Another thing
17 that I think we changed in our rule is that
18 there was confusion about the word "presiding
19 judge," and we have changed it to make it
20 every place "the presiding judge of the
21 administrative district" because counties have
22 presiding judges, too, and there is some
23 confusion about whether that presiding judge
24 might have any authority to do it.

25 CHAIRMAN SOULES: It's actually

1 what we shorthand call the regional judge.

2 What is your official title?

3 HONORABLE DAVID PEEPLES:

4 That's in existing (c). 18a(c) says, "The
5 presiding judge of the administrative judicial
6 district," and that's the full title; and if
7 it says that once and then refers just to
8 presiding judge, that probably is good enough.

9 MR. ORSINGER: Carl, I have a
10 copy of your proposed 18a. Do you want to see
11 it?

12 MR. HAMILTON: Yeah.

13 PROFESSOR DORSANEO: Otherwise
14 "presiding judge" means the judge.

15 MR. McMANS: But there is a
16 presiding judge in the county, too.

17 MR. PARSLEY: Go back up,
18 please, to page four or to page ten, paragraph
19 (3), titled "Notice." Look at that, and does
20 anybody think that that notice is really
21 necessary? Does Rule 21a, "Service," cover
22 it?

23 CHAIRMAN SOULES: Is that out
24 of the current rule?

25 HONORABLE SCOTT BRISTER: Yeah.

1 There is actually some cases that rely on the
2 fact they strike your motion to recuse because
3 you didn't give notice that it be submitted to
4 the judge within three days, and it's in
5 improper form.

6 MR. PARSLEY: Do we want that?

7 HONORABLE DAVID PEEPLES: I
8 don't think this adds anything worthwhile.

9 HONORABLE SCOTT BRISTER: No.

10 CHAIRMAN SOULES: I don't think
11 so.

12 HONORABLE DAVID PEEPLES: I
13 mean, you tell the sitting judge that he's got
14 to stop in his tracks when he gets it, and
15 that's enough.

16 MR. McMains: How do you
17 present a motion to recuse to the judge?

18 HONORABLE SCOTT BRISTER: Well,
19 there is -- the current rule says I have an
20 option to hold a hearing on it, but there is a
21 case that says you don't have the right to a
22 hearing. I mean, it seems like it ought to be
23 submission. I mean, who is going to know
24 better than the judge what the facts are?

25 MR. McMains: No, but, I mean,

1 the point is that if -- it shouldn't be
2 presented to you because you either are going
3 to recuse or not; and if you're not, it's
4 not -- the motion to recuse you is not yours
5 to decide.

6 HONORABLE SCOTT BRISTER: It
7 ought to be like the findings and conclusions,
8 that the clerk has to give it to the judge,
9 you know, when it's filed.

10 CHAIRMAN SOULES: Well, and
11 here is the idea to that. You file it.
12 That's in the clerk's office. The judge
13 hasn't seen it yet, hasn't been --

14 HONORABLE SCOTT BRISTER: Don't
15 know anything about it.

16 MR. McMains: Oh, I see.

17 CHAIRMAN SOULES: I'm going to
18 recuse Judge Brister, and so it's filed, and I
19 serve you, Rusty, and I tell you that I'm
20 going to present this to Judge Brister within
21 three days unless he orders something else.
22 Then it's presented for his decision to
23 voluntarily recuse or refer, and that's what
24 that's really about there.

25 It's not that it will be presented to the

1 assigned judge because we don't know that or
2 when it's going to get sent to the regional
3 judge because we don't know that, and that's
4 to give somebody new time to say -- call Judge
5 Brister and say, "Soules is what he may be,
6 and I want to talk to you about this."

7 MR. McMAINS: Well, but the
8 technical term of presentment of the motion
9 would be the presentment of a motion to the
10 judge to take action, and the judge to whom
11 you are presenting the motion doesn't have the
12 power to grant your motion.

13 CHAIRMAN SOULES: But he has
14 the power to step down.

15 MR. McMAINS: He has the power
16 to step down.

17 CHAIRMAN SOULES: And that is
18 action.

19 MR. McMAINS: And effectively
20 grant your motion, but he can't -- but if he
21 says, "No," the hearing is going to be before
22 a different judge.

23 CHAIRMAN SOULES: Right.

24 MR. McMAINS: And what are the
25 notice of requirements for that hearing?

1 CHAIRMAN SOULES: There aren't
2 any. Well, the usual standard ones. I don't
3 know. It doesn't matter to me whether it's in
4 there or not, but now that I think about it,
5 that was so everybody would know that this is
6 going to be presented to the judge, the
7 sitting judge.

8 PROFESSOR ALBRIGHT: Isn't it
9 kind of if you have a response, you better get
10 it in within the three days?

11 CHAIRMAN SOULES: Yeah. Do
12 whatever you are going to do because I want
13 this presented.

14 HONORABLE DAVID PEEPLES: A
15 minute ago I said this language didn't matter.
16 You know, a lot of things do get filed that
17 don't necessarily get to the judge, and the
18 judge doesn't step down and send it to the
19 presiding judge until he knows about it, and
20 so there ought to be a presentment
21 requirement, and maybe what we have is good
22 enough.

23 CHAIRMAN SOULES: Okay.
24 Anything else on 18a or b?

25 MR. ORSINGER: Yeah. I have

1 got a couple of things.

2 CHAIRMAN SOULES: Okay.

3 Richard.

4 MR. ORSINGER: On the bottom of
5 page four and for those of you on the redline
6 I'm talking about (g)(5)(A) -- no. Pardon me.
7 Bottom of page five in paragraph (h) is what
8 I'm talking about, appellate review.

9 We purport to talk about what the
10 appellate review is of a motion, and that
11 means in this context both a motion to
12 disqualify and a motion to recuse and say that
13 it can be reviewed for an abuse of discretion,
14 which I think is clearly the standard on a
15 recusal. I question whether that's a standard
16 on a disqualification, but then we say that
17 the motion is granted that's not reviewable,
18 but then there has been some discussion that
19 perhaps mandamus is available --

20 CHAIRMAN SOULES: Nobody knows
21 the answer to that.

22 MR. ORSINGER: -- on a
23 disqualification. So are we saying something
24 that we don't know that it's correct, and
25 should we be saying something different?

1 MR. PARSLEY: Should it say,
2 "If the motion to recuse is denied," and so
3 forth, and then if the motion to recuse is
4 granted, it is not reviewable? Should it just
5 be --

6 CHAIRMAN SOULES: I think it's
7 better to leave that unaddressed by the
8 committee. The courts are going to eventually
9 have to deal with that question, but there is
10 no -- no one is predicting what they are going
11 to do.

12 The court has the power to say, "Get
13 another judge and get on with your trial,"
14 even if the first judge was qualified, the
15 Supreme Court; and if the Supreme Court
16 doesn't care to review the few times that a
17 judge was disqualified and the fewer times
18 that the judge was disqualified when the judge
19 should not have been disqualified and just get
20 on with the trial, that's a policy decision
21 they can make when the case gets to them for
22 that purpose, and I don't think we ought to
23 write a -- I think we ought to leave it just
24 like it is.

25 MR. ORSINGER: Well, as it is

1 right now, we don't know whether it's right or
2 wrong. We will just leave it that way?

3 CHAIRMAN SOULES: Yeah.

4 MR. ORSINGER: Okay. The other
5 thing I would like to say is back on page
6 three, which is ground (g), "Procedure." We
7 purport to require that the motion -- and that
8 means both the motion to recuse and
9 disqualify -- has to be verified based on
10 personal knowledge, et cetera; and are we
11 comfortable applying those criteria to a
12 motion to disqualify?

13 I mean, are we empowered to say that a
14 motion to disqualify has to be based on a
15 verified pleading or affidavit showing
16 personal knowledge, or are we saying too much
17 there?

18 CHAIRMAN SOULES: What page is
19 that?

20 MR. ORSINGER: On page three,
21 (g)(1).

22 HONORABLE SCOTT BRISTER: It's
23 what the current rule says, and there is no
24 question it doesn't apply to disqualification.

25 MR. McMains: Not

1 Constitutional disqualification. That's true.

2 HONORABLE SCOTT BRISTER:

3 Right.

4 MR. ORSINGER: Well, then I
5 think that it's misleading for us to say that
6 it is because people are going to say, "Ah,
7 you didn't verify it, so you are out of here,"
8 and then at the end of the case when they
9 appeal it you find out they had a good ground
10 for disqualification.

11 HONORABLE SCOTT BRISTER:

12 People don't do that because they know
13 disqualification makes everything void.

14 MR. ORSINGER: So we are just
15 going to say it in here even though we know we
16 don't mean it?

17 CHAIRMAN SOULES: I think that
18 speaks to a motion to recuse.

19 MR. ORSINGER: Well, we talk
20 about, "A party may move for disqualification
21 or recusal. The motion must be verified. The
22 motion may be based on personal knowledge or
23 information" -- this is a -- everything is
24 combined into one rule now, so the word "the
25 motion" would apply to both, and particularly

1 when the first sentence says it applies to
2 both.

3 CHAIRMAN SOULES: Well, but if
4 we start that second sentence by saying "a
5 motion to recuse must be" and so forth --

6 HONORABLE SCOTT BRISTER: I
7 don't see anything wrong with saying even
8 disqualification motions ought to be specific
9 and ought to be filed in writing and ought to
10 be based on personal knowledge.

11 Now, the facts of the matter are not
12 doing -- those won't end up being a waiver,
13 but I don't see any reason -- maybe verified.
14 Maybe you want to just limit the verification
15 to recusal, but I mean, the alternative is you
16 put, "Motion for disqualification can be any
17 form, any way you want." You know, you can
18 put them in Chinese, and they still count, you
19 know.

20 PROFESSOR DORSANEO: Do they?

21 MR. ORSINGER: Well, that oral
22 one sure would count. I mean, an oral motion
23 to disqualify on Constitutional grounds would
24 surely count, although we don't appear to
25 permit it.

1 CHAIRMAN SOULES: I just think
2 the second sentence ought to say "a motion to
3 recuse" and put that baggage on there because
4 if a judge is disqualified and the point is
5 raised --

6 MR. McMAINS: Somehow.

7 CHAIRMAN SOULES: -- somehow,
8 sometime, somewhere, the judge is out.

9 HONORABLE SCOTT BRISTER: Don't
10 you probably still have to state it with
11 particularity? You can't just file a one-page
12 motion, judge is disqualified.

13 MR. ORSINGER: Yeah. If we
14 leave the first sentence alone then
15 particularity is still required for both
16 motions. The second sentence then is limited
17 to a recusal, and then what is the third
18 sentence? Does that apply to both, or does
19 that just apply to one?

20 CHAIRMAN SOULES: To both.

21 MR. McMAINS: What's it say?

22 MR. ORSINGER: "Motion may be
23 based on personal knowledge or information and
24 belief if the grounds of such belief are
25 specifically stated."

1 CHAIRMAN SOULES: No. That's
2 just to recuse.

3 PROFESSOR DORSANEO: The more
4 we talk about this I think that talking about
5 anything in (b), if it's a ground for recusal,
6 then all of this makes sense; but the ground
7 for disqualification based upon what we are
8 talking about, it's just a whole different
9 ball game, and we perpetuate confusion by not
10 just facing up to that.

11 CHAIRMAN SOULES: That's all
12 right.

13 MR. ORSINGER: You want to
14 break out disqualification and not put any
15 parameters on it?

16 HONORABLE SCOTT BRISTER: Not
17 have any rule on disqualification?

18 MR. ORSINGER: No. We have to
19 have a rule on it, but we don't put any
20 parameters on it. We don't limit it.

21 HONORABLE SCOTT BRISTER:
22 What's the rule going to say?

23 PROFESSOR DORSANEO: "Grounds
24 for disqualification."

25 HONORABLE SCOTT BRISTER: Which

1 are already stated in the Constitution.

2 PROFESSOR DORSANEO: Yes.

3 MR. ORSINGER: And you can say
4 that it can be raised at any time, in any way.

5 HONORABLE SCOTT BRISTER: And
6 the procedure is anything you want it to be.
7 What a great rule.

8 PROFESSOR DORSANEO: If that's
9 what the law is, why wouldn't that be a good
10 rule?

11 I'm serious. If that's what the law is,
12 why isn't that a better rule?

13 HONORABLE SCOTT BRISTER:
14 Because it doesn't tell you anything.

15 PROFESSOR DORSANEO: You don't
16 need to know anything.

17 CHAIRMAN SOULES: We are going
18 to need a break in about five minutes.

19 The second and third sentences could be
20 combined into one for recusal, if you want to
21 do it that way.

22 HONORABLE SCOTT BRISTER: Yeah.

23 MR. ORSINGER: Well, Luke, do
24 you want to just pull disqualification out of
25 the procedural section altogether and just

1 have a very generic statement about your
2 ability to disqualify upon motion?

3 CHAIRMAN SOULES: Right now I
4 think what you say about disqualification is
5 instructive.

6 HONORABLE SCOTT BRISTER: You
7 still have to have the procedure for referring
8 to somebody else, don't you?

9 MR. ORSINGER: Yeah. Yeah.

10 PROFESSOR CARLSON: No. It's
11 required by law.

12 CHAIRMAN SOULES: I think it's
13 instructive.

14 MR. PARSLEY: Basic
15 Constitutional rights are subject to some
16 procedure. I mean, you know, we didn't remove
17 procedure just because we put it in the
18 Constitution.

19 MR. ORSINGER: A lot of them
20 are subject to waiver, too, but this one
21 happens not to be.

22 MR. PARSLEY: Okay. I will do
23 whatever you say, but taking out the procedure
24 hurts.

25 CHAIRMAN SOULES: Okay. Let's

1 take about five minutes and see where we are.

2 (At this time there was a
3 recess, after which time the proceedings
4 continued as follows:)

5 CHAIRMAN SOULES: Okay. What's
6 next?

7 MR. ORSINGER: Well, next is to
8 just drop back on the main agenda, I mean, the
9 disposition chart; and the first item that's
10 on the disposition chart that we haven't
11 already covered is on page five.

12 CHAIRMAN SOULES: Okay. Where
13 is that? On page five. Okay.

14 MR. ORSINGER: It's page 183,
15 184, and that has to do with inadvertent
16 dismissal of a party in an amended pleading
17 and then reinserting the party into the case
18 in yet a subsequent amended pleading, and the
19 Supreme Court has spoken on that, and our rule
20 committee has a rule written for that that
21 would not cause that inadvertent omission to
22 eliminate the party from the suit as long as
23 they are brought back in at a time when they
24 are not damaged by their having been omitted,
25 and I had this set up to read, and now it's

1 under parties. This is pleadings. Bill, I
2 took your pleadings.

3 PROFESSOR DORSANEO: Right
4 here.

5 MR. ORSINGER: Oh, here, I
6 wrote on it. Yeah. It's under our proposed
7 rule blank, called "Voluntary Dismissals and
8 Nonsuits," which you don't have a copy of in
9 front of you, but we have discussed it before,
10 and this is the current status of the
11 language.

12 Rule blank, subdivision (c), "Relation
13 back," and the general rule is entitled
14 "Voluntary Dismissals and Nonsuits."
15 Subdivision (c), relation back, quote, "If a
16 voluntary dismissal or nonsuit has been
17 obtained by the inadvertent omission of a
18 defendant from an amended petition, the
19 plaintiff may name the defendant in a
20 subsequent petition that relates back to the
21 date of the petition that was filed before the
22 inadvertent omission, if the omitted defendant
23 whose name is added to the subsequent petition
24 is added to the subsequent petition" -- pardon
25 me, "is not otherwise harmed or prejudiced by

1 the correction of the inadvertent omission."

2 CHAIRMAN SOULES: Any objection
3 to that?

4 No objection? Stands approved.

5 MR. MARKS: Excuse me.

6 CHAIRMAN SOULES: John Marks.

7 MR. MARKS: I presume we have
8 talked about that before?

9 MR. ORSINGER: We have talked
10 about that before.

11 MR. MARKS: Okay.

12 MR. ORSINGER: And the idea is,
13 is that the Supreme Court has handed down a
14 case saying that you can rescue yourself from
15 an inadvertent omission if you catch it in
16 time, so we are going with the flow.

17 CHAIRMAN SOULES: Next?

18 MR. ORSINGER: Okay. The next
19 item is Rule 64, page 185, and that has to do
20 with a suggestion by Richard Sommer that we be
21 able to amend our pleadings by changing and
22 reprinting and filing only the changed
23 paragraphs without having to restate the
24 entire pleading, save trees and global
25 warming, you know, all of that.

1 And our feeling was that that's been
2 rejected already in the committee vote because
3 that puts the burden on the judge to look
4 through multiple folders of the jackets of the
5 file in order to construe what the current
6 pleadings are, and while it's worthy to save
7 trees and avoid global warming, we also need
8 to be able to go to one place to find out what
9 the pleadings are.

10 So our recommendation was not to change
11 the rule, and I think that the committee has
12 formerly said that.

13 CHAIRMAN SOULES: So you
14 recommend no change?

15 MR. ORSINGER: No change.

16 CHAIRMAN SOULES: Any objection
17 to that? No change then it will be.

18 MR. ORSINGER: Next is page
19 187. Excuse me just a minute here. And that
20 was a proposal by Glen Wilkerson that the
21 deadline for amending pleadings should be
22 pushed back to 30 days before trial and after
23 that fact only on good cause, and he proposed
24 shifting the burden of proving no surprise to
25 the party who wanted to amend; whereas right

1 now really under the Greenhaulgh case, I
2 think, you have to -- there is, I think, an
3 inclination to permit the amendment unless
4 there is a showing that it would be a
5 surprise.

6 CHAIRMAN SOULES: That's right.

7 MR. ORSINGER: So we recommend
8 no change, however -- no change as to the
9 burden, but we have previously recommended
10 that the pleading deadline work backward from
11 the disclose of the -- the closure of the
12 discovery window, and we also have discussed
13 that; but I don't know that we have had a
14 resolution of that, and I don't even really
15 know whether we are pending something on the
16 discovery committee on that or what. Let's
17 see.

18 CHAIRMAN SOULES: I can answer
19 that question. We are waiting for the Supreme
20 Court to get the discovery rules back to us;
21 and if there is going to be a discovery window
22 then we are going to be tailoring
23 interventions, amended pleadings, and so
24 forth, to fit that; and we haven't focused on
25 that work yet because it may be needed and it

1 may not be needed.

2 So we are not addressing his request to
3 move to 30 days before trial because we may be
4 making some number of days before some other
5 event. So that's being tabled and reserved
6 for a later date, but you are recommending no
7 change on the burden of showing whatever is
8 necessary to --

9 MR. ORSINGER: Amend after the
10 deadline.

11 CHAIRMAN SOULES: -- amend or
12 prevent amendment after the deadline. Any
13 objection to that?

14 No objection. That stands approved.

15 MR. ORSINGER: Okay. Then we
16 go to Rule 74, page 188 of the agenda, and the
17 recommendation was to permit fax filing, and
18 we have discussed that today, what our
19 proposal is on fax filing, and it's gone back
20 for editing.

21 CHAIRMAN SOULES: Okay. So we
22 are working on that.

23 MR. ORSINGER: The next item,
24 we move to the first supplement, page 5, and
25 let's see here. No. It's not the first

1 supplement?

2 CHAIRMAN SOULES: I think it's
3 just 75a and b.

4 MR. ORSINGER: Well, I have got
5 a problem here, and I don't know what it is.
6 Northrup. I'm going to, I guess, maybe get
7 back to you on the exact reference, but I can
8 tell you what the issue was.

9 There was a comment that we are required
10 to file our exhibits with the court clerk, but
11 the court reporter is responsible to forward
12 them to the appellate court, and we thoroughly
13 discussed that when we were going over the
14 appellate rules and decided that we were going
15 to leave the district clerk as the permanent
16 repository of the exhibits but that the court
17 reporter would have the duty to check them out
18 from the district clerk to forward them to the
19 appellate court.

20 So we feel like this concern has been
21 accepted and that the necessary changes have
22 been made to make the problem go away. I
23 apologize for not having a page reference to
24 the specific letter.

25 CHAIRMAN SOULES: Okay.

1 MR. ORSINGER: But at any rate,
2 his problem has been cured. Do you want to
3 try to hunt that down, Luke?

4 CHAIRMAN SOULES: It's on page
5 five or seven in the main agenda.

6 MR. ORSINGER: In the main
7 agenda?

8 CHAIRMAN SOULES: Yeah.

9 MR. ORSINGER: Okay. I'm
10 sorry.

11 CHAIRMAN SOULES: The page is
12 way up at the front.

13 MR. ORSINGER: All right.
14 That's my confusion. I should have just saw
15 what it said.

16 CHAIRMAN SOULES: And you are
17 talking about the very last paragraph?

18 MR. ORSINGER: Yes. His letter
19 was a multiple subject letter, but the one
20 that comes up at this part in the rule
21 chronology was noting an apparent discrepancy
22 that exhibits are filed with the trial court
23 clerk and that the trial court clerk must
24 prepare the transcript, and he says that is
25 odd because the court reporter has to forward

1 them.

2 Well, we have thoroughly discussed that,
3 and it's appropriate. The court reporters
4 come and go all the time, but there is
5 continuity among district clerks, even if they
6 retire or lose the election. So the permanent
7 repository of exhibits should be the district
8 clerk, but the party responsible to get the
9 statement of facts to the appellate court is
10 the court reporter, and therefore, under the
11 TRAPs, the court reporter is charged to go to
12 the district clerk, get the exhibits, and be
13 sure they get filed in the court of appeals,
14 but in between times the district clerk is the
15 custodian of the records.

16 CHAIRMAN SOULES: And that's
17 been done?

18 MR. ORSINGER: That's been done
19 in the TRAPs.

20 CHAIRMAN SOULES: Okay.

21 MR. ORSINGER: Okay. The next
22 one is page 201 of the agenda, Bernard
23 Fischman, and he's raised an issue that came
24 up in a court of -- a Houston court of appeals
25 issue, a case, which is in the agenda here on

1 page 205; and he comments that 76a, which has
2 to do with sealing the files, suggests that
3 you can appeal from a temporary sealing order
4 even though it's based upon an affidavit or
5 verified pleading. He suggests that we make
6 the rule clear that the temporary sealing
7 order is analogous to a T.R.O. and cannot be
8 appealed.

9 And it was the subcommittee's view that
10 any order sealing a file, regardless of
11 whether it's based on the hearing or whether
12 it's based on affidavits, should be subject to
13 appellate review, and we recommend no change
14 in the rule because of the whole context of
15 76a is that you can get immediate appellate
16 court review of the decision, and we think
17 that's fine, and we realize it's unorthodox to
18 make, if you will, the equivalent of a T.R.O.
19 based on an affidavit appealable; but it's
20 unorthodox to have an interlocutory order like
21 this appealable anyway.

22 So we thought about it and would like it
23 to be reviewable on appeal even if it's just
24 based on an affidavit, so we recommend no
25 change.

1 CHAIRMAN SOULES: No change.
2 Any objection to that?

3 Okay. It stands approved. Your
4 recommendation stands approved for no change.

5 MR. ORSINGER: Okay. Then this
6 court of appeals case says that 76a does not
7 apply to protective orders, and a protective
8 order would be an order that prohibits a party
9 from disseminating information obtained
10 through discovery, did not particularly
11 suggest a change, just called that to our
12 attention.

13 The subcommittee's recommendation is that
14 we change 76a to provide that a
15 confidentiality order relating to unfiled
16 discovery is not a 76a order subject to appeal
17 unless the order is contested based on Rule
18 76a; and if the 76a issue is raised, then even
19 if it's styled as a confidentiality order
20 instead of a sealing order, it's subject to
21 the interlocutory review; and if it's just a
22 request for confidentiality and no one has
23 raised the 76a rights, then it would not be
24 subject to interlocutory appeal.

25 And we feel that the rule needs to be

1 clarified to define "court records" as
2 excluding unfiled discovery for which a
3 protective order is sought and there is no
4 claim that 76a applies.

5 HONORABLE SCOTT BRISTER: No
6 claim by who?

7 MR. ORSINGER: No claim by any
8 party, because routinely confidentiality
9 orders are litigated between parties, and the
10 extent of them are litigated between parties
11 and no one is invoking the public's right to
12 know.

13 HONORABLE SCOTT BRISTER: I
14 thought that was -- I agree with that. The
15 problem is that, you know, the people that
16 want to know is the papers.

17 MR. ORSINGER: Well, I think
18 they need to get down there and raise a 76a --

19 HONORABLE SCOTT BRISTER: Their
20 argument is going to be they can't get down
21 there unless you go through the posting of
22 notice.

23 CHAIRMAN SOULES: That's right.

24 MR. ORSINGER: Well, if that's
25 true then you are going to have to consider

1 the possibility that any confidentiality order
2 is by automatic operation a 76a order and you
3 have to go through all of that rigmarole.

4 CHAIRMAN SOULES: Bobby, you do
5 some of this work. How do we deal with this
6 problem?

7 MR. MEADOWS: I don't know.
8 And I was going to -- no one ever cares about
9 them when I -- that I ever see, and I enter
10 them all the time.

11 HONORABLE SCOTT BRISTER: I
12 used to enter them all the time until I got
13 slammed in the paper for doing it. Now they
14 all have to post, and nobody ever appears and
15 nobody cares, but -- and it's a dumb rule, but
16 it is a court record, and you are sealing it.
17 I guess --

18 PROFESSOR ALBRIGHT: This issue
19 was supposed to be argued to the Supreme Court
20 last year and then they found out the day
21 before the argument that it had been mooted;
22 but, you know, there is an issue as to whether
23 it's a -- is it a court record. You know,
24 does it fall within the definition of court
25 record, or does that determination have to be

1 a 76a order or hearing?

2 HONORABLE SCOTT BRISTER: I
3 guess what I'm saying, I agree with the
4 committee. I think what we all call standard
5 confidentiality orders after the case is
6 settled shouldn't have to go through the
7 rigmarole, but that's not what the papers are
8 going to say, and that is contrary to what I
9 think the folks that passed 76a meant it to
10 be.

11 CHAIRMAN SOULES: Well, looks
12 to me like what the confidentiality order
13 ought to include is a finding that what is
14 being protected by the confidentiality order
15 is discovery not filed of record, but which
16 does not have a probable adverse effect upon
17 the general public health or safety or the
18 administration of public office or the
19 operation of government; and if that finding
20 is made, it's not a court record under 76a.

21 PROFESSOR ALBRIGHT: I think
22 what Scott's saying is the papers are going to
23 say that they should be in on that finding.

24 CHAIRMAN SOULES: Well, if that
25 finding is made then no notice is required.

1 76a is not triggered.

2 PROFESSOR ALBRIGHT: That's the
3 way I would read the rule.

4 CHAIRMAN SOULES: Yeah.

5 MR. ORSINGER: What you're
6 saying, Luke, is 76a(2)(c), which says,
7 "Discovery not filed of record concerning
8 matters that have a probable adverse effect,"
9 so-and-so, that if the court makes a
10 determination that it's discovery not filed,
11 it's not a court record. The rule already
12 says that, doesn't it?

13 CHAIRMAN SOULES: If it's
14 discovery not filed of record, that does not
15 have -- that is not under (c).

16 MR. ORSINGER: So you are
17 requiring or you are saying that the notice
18 requirements are obviated if the
19 confidentiality order specifies that it fits
20 under 76a(2)(c)?

21 CHAIRMAN SOULES: Right.

22 MR. ORSINGER: And if the trial
23 judge is not willing to put that into the
24 record, into the order, then you have your
25 notice requirements.

1 CHAIRMAN SOULES: Probably.

2 MR. ORSINGER: Well, that's a
3 way to satisfy somebody, but it doesn't -- I
4 mean, that's not a change in the current rule,
5 really. That's putting that conclusion on
6 paper.

7 CHAIRMAN SOULES: But we
8 cannot -- I mean, it would strip 76a of some
9 of its original purpose, with which I have
10 some pretty strong disagreement,
11 notwithstanding the fact that one of which was
12 that it was lobbied by the interested parties
13 someplace besides in this room, and it was the
14 only rule ever in the 20 years I have known
15 anything about this where that has occurred
16 and brought in and done, including a deal made
17 with the family lawyers that if they would
18 vote for it, they would get exempt from it,
19 and that's how they put the majority together.

20 MR. ORSINGER: That was an
21 awful sweet deal. That's hard to turn down.

22 CHAIRMAN SOULES: That's the
23 truth, but if we just permit the parties to
24 come up with a confidentiality order that
25 protects anything, then that takes the teeth

1 out of 76a, and it is a rule.

2 HONORABLE SCOTT BRISTER: And
3 it's a problem, you know, because the parties
4 that are settling want to be gone, and they
5 are always willing to say, "This product
6 liability case ain't going to affect" -- and
7 you know, then what am I supposed to do?

8 I mean, the way I have decided to do it
9 is just to say, "Tough. I'm not making that
10 finding." Push -- issue the notice because
11 the papers won't come in. They are not going
12 to care. We all know that, but you know, it's
13 always med-mal cases, product liability cases,
14 and they are saying it doesn't have a probable
15 adverse effect, and I'm saying, "Gee whiz, how
16 do I -- I don't even know what's in -- by
17 definition this is stuff I've never seen.
18 It's stuff you have got at your office, and
19 I'm going to find that this is the case,
20 therefore, we don't have to tell the papers?"
21 And it came back and bit me, and so I don't do
22 it anymore.

23 CHAIRMAN SOULES: Yeah. Well,
24 mine is financial records and customer lists
25 and things that --

1 MR. MEADOWS: Right.

2 CHAIRMAN SOULES: -- really
3 legitimately are not in (c). They are really
4 off the radar screen of (c), and so it
5 could -- that is a way to do it, and I suppose
6 if I were in your court and convinced you that
7 this is just a fight between, you know, two
8 businesses trying to compete with one another,
9 and one says it's unfair, we might get there;
10 but in a products liability case I don't know
11 how you could get there. I don't think you
12 can, because if the product is unsafe, it
13 probably has an adverse effect upon the
14 general public health or safety, even if
15 that's an issue.

16 HONORABLE SCOTT BRISTER: Well,
17 that's the thing. It calls for me to decide
18 how the case would have come out. It's a
19 probable adverse effect.

20 CHAIRMAN SOULES: Another
21 problem is that confidentiality orders are
22 usually done upfront before the discovery is
23 actually made so that you can stamp everything
24 consistent with it. I don't think we can fix
25 that problem unless they want to change 76a.

1 MR. ORSINGER: Well, the court
2 opinion that they are talking about here that
3 sponsored the letter was an unpublished
4 opinion in which the First Court of Appeals
5 says that 76a doesn't apply to confidentiality
6 orders for unfiled discovery, which is clearly
7 wrong if the unfiled discovery touches on
8 matters of public interest.

9 CHAIRMAN SOULES: That's right.

10 MR. ORSINGER: So the 1st Court
11 was just wrong in an unpublished opinion, and
12 you know, we don't need to change the rule to
13 make them -- I mean, the rule is pretty clear.
14 They just misunderstood it. So that doesn't
15 mean we have to rewrite it. That just means
16 we have to educate them what it means; but
17 then this other implication arises, which is,
18 you know, is there going to be a situation
19 where you have a confidentiality order where
20 it clearly doesn't involve public interest and
21 we don't have to go through the publication
22 rigmarole; and if we are going to do that, do
23 we make the judge make a finding that it
24 doesn't have public interest?

25 HONORABLE SCOTT BRISTER: I

1 mean, I would prefer to propose you drop (c),
2 but stuff that never gets filed with the court
3 is not sealed court records.

4 I mean, there was a big hubbub about this
5 at the time that the stuff in the lawyer's
6 office is considered a public record.

7 PROFESSOR DORSANEO: Huh-uh.

8 MR. ORSINGER: That's a big
9 change.

10 HONORABLE SCOTT BRISTER: And I
11 don't think that's a very popular provision,
12 and I think the best way to get at what you're
13 talking about, which is where the case is
14 over, and we just promise not to go around
15 telling our friends so they can bring the same
16 suit, is you just declare the discovery -- you
17 drop that provision. Court records is what we
18 think of as court records, the stuff at the
19 court.

20 MR. ORSINGER: I don't have a
21 problem seconding that, but I will tell you
22 Lloyd Doggett isn't going to like it.

23 HONORABLE SCOTT BRISTER: Well,
24 you know, or the papers, but I guarantee you
25 90 percent of the lawyers -- and, you know,

1 this was a five to four approval by the court,
2 wasn't it?

3 MR. MARKS: It was.

4 HONORABLE SCOTT BRISTER:
5 Wasn't this rule passed five to four by the
6 court?

7 MR. MARKS: Yes.

8 HONORABLE SCOTT BRISTER: You
9 know, I --

10 CHAIRMAN SOULES: I suggested
11 to one of the people in the four that it be
12 changed a year later, and he said, "No, it's
13 already there, and we will live with it."

14 CHAIRMAN SOULES: The four has
15 now turned into seven or eight.

16 HONORABLE SCOTT BRISTER: Yeah.
17 Yeah. I mean, I'm getting in arguments over
18 this with lawyers when I tell them -- when I
19 insist that they go through the procedure, and
20 they say, "But, Judge, it's just our
21 standard" -- I say, "I'm not getting slammed
22 by the paper by this again. Once was enough."

23 CHAIRMAN SOULES: He does have
24 a pretty good idea, pretty good thought here,
25 though. The temporary sealing order is

1 done, let's see, under (5), and the temporary
2 sealing order has to direct a movement to give
3 notice. It can be modified, and what he wants
4 to say is that -- he wants the rule to change
5 so that the temporary sealing order is not
6 appealable. It's only the order after a
7 hearing that is appealable.

8 MR. ORSINGER: Well, how soon
9 are you going to get your hearing? "Open
10 court as soon as practicable, but not less
11 than 14 days." So during that whole period of
12 time your public record is sealed. Maybe you
13 want to publish the story before an election
14 or who knows what, and you are cut off from
15 your access to a public record, and there is
16 not anything you can do about it because the
17 trial judge won't set you a hearing, and so
18 you have to go mandamus him after it's not
19 practicable anymore.

20 I mean, it's certainly workable, but you
21 can see how it could make it very difficult
22 for you to get out a record by just having a
23 temporary order, and that's not reviewable
24 until you get a mandamus that will require a
25 hearing, and how many newspapers are going to

1 do that? I don't know. Maybe the same ones
2 that would appeal might go get a mandamus and
3 then appeal. I don't know.

4 CHAIRMAN SOULES: So you
5 recommend no change?

6 MR. ORSINGER: The committee's
7 feeling was, is that if this rule can be
8 interpreted to permit an interlocutory appeal
9 of a temporary sealing order, that we would,
10 and that if you are going to get a hearing
11 quickly enough on the temporary order, that
12 you are not going to need to appeal it. You
13 won't even have time to appeal it if you are
14 going to get a hearing pretty quickly, and if
15 the hearing is going to be delayed long enough
16 to where you could actually get an appeal up
17 there, well, that means somebody is sitting on
18 it.

19 So our feeling was to just leave the
20 language the way it is, which says, "Any order
21 relating to sealing or unsealing," and it
22 doesn't say that it has to be an order after a
23 hearing, but the sentence does say "appealed
24 by a party who participated in the hearing."
25 So maybe that inferentially says you can't

1 appeal it. I don't know.

2 CHAIRMAN SOULES: Okay. Anyone
3 want to change this? Anyone want to make a
4 motion to change Rule 76a?

5 HONORABLE SCOTT BRISTER: I
6 would like to move that the committee consider
7 dropping (c). I don't want to vote on the
8 motion with the number of people we have got
9 here because this is a controversial matter,
10 but I would move that the subcommittee
11 consider whether we limit court records to
12 court records.

13 CHAIRMAN SOULES: Okay.

14 PROFESSOR ALBRIGHT: I will
15 second that.

16 CHAIRMAN SOULES: Okay.

17 MR. ORSINGER: Why don't we
18 just table that motion until the next meeting?
19 You don't need to assign it to us. We have
20 got a motion on the floor to drop (c), and
21 let's just table it.

22 CHAIRMAN SOULES: To drop (c).
23 Okay.

24 MR. ORSINGER: Drop (c). Let's
25 just table it, and bring it up at the next

1 meeting when we have got more people here.

2 CHAIRMAN SOULES: Will you put
3 that on your agenda so that --

4 MR. ORSINGER: Will do.

5 CHAIRMAN SOULES: -- whenever
6 you are called when we get to this point
7 again, we will address the motion?

8 MR. ORSINGER: So we have
9 approval of the no change on whether or not a
10 temporary sealing order is appealable, which
11 is not totally clear, and we are going to
12 table for later full committee consideration
13 of dropping (c).

14 CHAIRMAN SOULES: Everybody in
15 agreement on that?

16 HONORABLE SCOTT BRISTER:

17 That's fine.

18 MR. MEADOWS: Yeah.

19 CHAIRMAN SOULES: No
20 disagreement. Everybody agrees.

21 MR. ORSINGER: Okay. The next
22 agenda item is on page 211, and Rule 86
23 reference I believe is going to be a venue
24 rule.

25 CHAIRMAN SOULES: Yeah.

1 MR. ORSINGER: Motion to
2 transfer venue. And the part of his letter
3 relating to that has to do with the Civil
4 Practice and Remedies Code, Section 15.063(2)
5 that requires a motion to transfer venue based
6 on impartial trial to be filed with or before
7 filing an answer, and the only reference to
8 time for filing the motion in the rules of
9 procedure is Rule 86 which cross-refers to
10 Rule 257, and Rule 257 contains no timetable.

11 And Hadley Edgar, who was a professor at
12 the time at Texas Tech, "Sufficed to say, we
13 need to get our act together or convince the
14 legislature to amend the statute or both.
15 This requires some coordination between your
16 subcommittee and mine." And this was written
17 back in 1990, so I guess Hadley was the chair
18 of a subcommittee of this committee at the
19 time.

20 CHAIRMAN SOULES: I don't
21 remember, but he was active on the committee.

22 MR. ORSINGER: Okay. So we are
23 in the process of rewriting the venue rules,
24 and we believe that everything should be
25 brought into conformity with the venue

1 statutes, but that we want to remain general
2 enough that changes in the legislature don't
3 require complete rewriting of the rules of
4 procedure relating to venue, and we are
5 expecting to have a presentable version of the
6 venue rules at the November meeting.

7 CHAIRMAN SOULES: Okay. If a
8 CPRC doesn't unmistakably address the unfair
9 forum question -- and I have kind of heard
10 that discussed both ways, and I'm not sure
11 where it is -- then I would like to see a rule
12 that doesn't put a timetable on that because
13 we can't go contrary to the --

14 MR. ORSINGER: No.

15 CHAIRMAN SOULES: -- statute
16 but --

17 MR. ORSINGER: If you read the
18 statute, it says, 15.063, "The court on motion
19 filed and served concurrently with or before
20 the filing of the answer." Now, that seems to
21 me to mean that you can't file it after, the
22 day after your answer is filed.

23 CHAIRMAN SOULES: One idea on
24 that is that that really is talking about
25 plaintiff's selection of venue, mandatory

1 venue, proper venue, the usual, you know,
2 choice of venue provisions and not a -- what
3 is it? Not an 86 question, you can't get a
4 fair trial in the venue.

5 MR. ORSINGER: Well, look at
6 the statute because that appears to be the
7 second ground, and it may be that Hadley Edgar
8 was just saying that, you know, we ought to
9 decide if this statute gives us a deadline,
10 then the rule ought to say it.

11 CHAIRMAN SOULES: Yeah. That
12 is in here.

13 PROFESSOR ALBRIGHT: There are
14 several places like that in the statute. I
15 had a student write a paper on it several
16 years ago. There are three or four places in
17 the statute where it appears that the
18 legislature is preventing things on motions to
19 change venue when really when the legislature
20 was passing the statute in 1980, whenever it
21 was, they were only addressing statutory
22 venue, and they were not addressing motions to
23 change venue for an impartial trial.

24 So there have never been any cases that
25 have been decided that have set a deadline on

1 those motions to change venue, and even the
2 Moy case, that Lone Star Steel vs. Moy or
3 whatever it is, I think it was a late filed
4 motion that the Supreme Court considered, and
5 they didn't even address the issue because it
6 was filed late, and some people have said that
7 having a trial in an impartial forum would
8 violate your Constitutional right to due
9 process, and so you couldn't have a deadline
10 on them.

11 CHAIRMAN SOULES: That Moy case
12 was probably filed before this venue change
13 were made, too. That's that Lone Star Steel
14 over in East Texas, isn't it?

15 PROFESSOR ALBRIGHT: Right.
16 But I think it was filed -- when were the
17 venue changes, '83 or something?

18 CHAIRMAN SOULES: '85.

19 PROFESSOR ALBRIGHT: They were
20 like in '83 or '84, so it was a long time ago.

21 CHAIRMAN SOULES: Okay.

22 PROFESSOR ALBRIGHT: But when I
23 am looking at the venue statute, Richard, I
24 will be glad to look at all of that, to pull
25 his paper out so you-all can at least look at

1 it.

2 MR. ORSINGER: All right.

3 Well, then I would propose that the agenda
4 items on page 211 and 212 through 16 which has
5 to do with venue, that we not debate that now.
6 Let's wait and see what our rule looks like.

7 CHAIRMAN SOULES: Okay.

8 MR. ORSINGER: Because the next
9 proposal on page 212 is someone that wants to
10 have a preponderance of the evidence proof of
11 certain venue facts, and frankly, I'm not sure
12 at all that it's any of our business to be
13 talking about the standard of proof under the
14 Civil Practice and Remedies Code stuff, but we
15 just have to look at it because we have to
16 integrate with the statute because the
17 legislature has intervened so seriously in
18 such detail here --

19 CHAIRMAN SOULES: That's right.

20 MR. ORSINGER: -- that I think
21 that we have to be careful what rewrite, and
22 we also have to make a philosophical decision
23 that we don't want to get so specific in our
24 procedures that changes in the legislature
25 make all of our venue rules unworkable.

1 You know, there is some wisdom in having
2 rules that are general enough that if the
3 legislature makes a change, we still have a
4 functioning procedure, because it may be,
5 like, now. It might be some years later after
6 the statutory amendment before the rule change
7 ever occurs. So then if we do that then we
8 are going to table the proposal on page 211
9 and 212 until the next meeting.

10 CHAIRMAN SOULES: Right.

11 MR. ORSINGER: Moves us on to
12 page 217, which is another proposal by Hadley
13 Edgar that says -- has to do with special
14 exceptions being presented prior to trial in
15 order to avoid waiver, and we have debated
16 that, and we have new pleadings rules with
17 deadlines, and we have had lengthy debates on
18 that, and Bill Dorsaneo is working on a set of
19 revisions to reflect the committee's previous
20 wisdom on this, and I would ask that we
21 basically table this recommendation until we
22 can have the writing in front of us.

23 CHAIRMAN SOULES: Okay.

24 MR. ORSINGER: Okay. If that's
25 fine.

1 CHAIRMAN SOULES: Okay. We
2 will hold on that.

3 MR. ORSINGER: Okay. Move on
4 to 222, which is a letter that says that it
5 relates to Rule 91, but I don't believe that
6 it does and, therefore, have nothing to say
7 about it. I think Mr. Loomis has written
8 multiple letters, and it may be that his "Re:"
9 line was partially from an earlier letter or
10 something, but I haven't found anything in
11 here that relates to -- it says, "Proposed
12 changes to Rule 21 and 91," but I really don't
13 find anything in here about Rule 91.

14 CHAIRMAN SOULES: Okay. I
15 agree.

16 MR. ORSINGER: Okay. Then page
17 226, Broadus Spivey wanted special exceptions
18 resolved ten days prior to trial. We are in
19 favor of resolving them before trial, but the
20 subcommittee's preference is to do that with
21 reference to the closure of the discovery
22 window because that's when pleading deadlines
23 are occurring under our recommendation,
24 relative to the closure of the discovery
25 window, and so that would be pending whether

1 we do have a discovery window. If there is no
2 discovery window, we would approve of a period
3 in advance of trial by which your exceptions
4 have to be presented or they are waived.

5 CHAIRMAN SOULES: Okay. So we
6 will hold on that until we know the answer to
7 the discovery window question.

8 MR. ORSINGER: Page 228 is
9 another special exceptions. They want to go
10 back 30 days. Same thing happens on that, and
11 page 230 is a letter from Bruce Pauley that
12 relates to TRAP 91, not TRCP 91. So it's not
13 relevant to our consideration.

14 CHAIRMAN SOULES: Okay.

15 MR. ORSINGER: Then 232 is a
16 comment about how the notes and comments
17 following Rule 93 refer to letter paragraphs
18 in the rule, whereas the rule has numbered
19 paragraphs, and this occurred in the awful
20 year of 1983 when rule amendments got messed
21 up and were not completely fixed, or so he
22 says, and we agree that we need to coordinate
23 between the comments and the numbering.

24 The next item is 236, and this was a
25 letter to Judge Peeples, for some reason, from

1 Charles Hayworth, enclosing a letter from Hugh
2 Hackney; and the letter from Hugh Hackney had
3 to do with offer of judgment, and it's not
4 totally clear, but I believe that what he is
5 referring to is the Federal Rule of Civil
6 Procedure that permits you to offer a judgment
7 in advance of -- or early on in the case, and
8 if they don't accept it and then their
9 recovery is for less than, then I believe you
10 might have to pay the defendant's attorneys'
11 fees. Does anyone remember if that was the
12 parameters of rule?

13 HONORABLE DAVID PEEPLES:
14 Something like that.

15 MR. ORSINGER: And, you know,
16 we think that's a very commendable procedure.
17 It may not be often used. It doesn't exist
18 under state law, but it might be salutary; and
19 so our idea is, is that we wanted to consider
20 this proposal. If anyone was interested in
21 it, we would draft a rule.

22 HONORABLE DAVID PEEPLES: I
23 think you ought to do it.

24 MR. MEADOWS: I do, too.

25 MR. HAMILTON: For whatever

1 it's worth, we debated that for two meetings
2 in court rules committee, and finally the
3 committee just decided to vote it down.

4 MR. ORSINGER: Why?

5 MR. HAMILTON: I guess the
6 plaintiffs bar doesn't like it, more than
7 anything else.

8 CHAIRMAN SOULES: Well, from
9 the plaintiff's point of view the issue is
10 whether or not that has a preclusive effect on
11 access to the courts, and it's been debated
12 here. We had a serious pass at this, I don't
13 know how many years back, starting with
14 Federal Rule 68, I think is the rule, and then
15 I think Federal Rule 68 only covers costs. I
16 don't think it covers attorneys' fees, but I'm
17 not sure of that, and there was discussion
18 whether to add attorneys' fees, other costs on
19 top of that, to do nothing, didn't really
20 matter whether a party got their costs back;
21 but there was quite a bit of debate about it,
22 and it was finally voted down.

23 But the real arguments were then -- and
24 some people said, well, it wouldn't really
25 make much difference because many plaintiffs

1 had nothing anyway, and they would just wind
2 up with a judgment against them that would be
3 uncollectable, and then somebody talked about,
4 well, make the lawyers pay it because they are
5 contingent fee lawyers anyway. That didn't go
6 very far, but it has been debated, but we
7 could do it again. I mean, we have got an
8 obviously different legal and court
9 environment now than we had then. So it might
10 be time to take another look at it.

11 MR. ORSINGER: We will be happy
12 to be bring a proposal here.

13 CHAIRMAN SOULES: Just put
14 Federal Rule 68 on the table and see what it
15 draws.

16 MR. ORSINGER: It all depends
17 on who flies in, I guess.

18 MR. PARSLEY: Take it up at the
19 end of next month's agenda, and we might have
20 more attendance this time of day.

21 MR. ORSINGER: The next agenda
22 item was a letter from a lawyer named Holt
23 from Houston who was required to pay a
24 five-dollar research fee down in Galveston and
25 concluded it was the most stupid application

1 of money grubbing he had ever heard of, and
2 our feeling was that the purpose of the letter
3 was to let off steam and that it accomplished
4 its purpose and, therefore, we needed to take
5 no action on it.

6 CHAIRMAN SOULES: He wanted the
7 Galveston County clerk to look for the date --

8 MR. ORSINGER: He wanted them
9 to do research over the telephone. He lives
10 in Houston. They live in Galveston. That's
11 probably, what, a 35-mile ride or something
12 like that? And they said, "We will do all of
13 this research for you, but there is a
14 five-dollar research fee," and he thought that
15 was a stupid application of money grubbing.

16 CHAIRMAN SOULES: Okay. You
17 recommend no change?

18 MR. ORSINGER: No action
19 required.

20 CHAIRMAN SOULES: No action.
21 Any objection?

22 No action then will be the decision here.

23 MR. ORSINGER: Okay. Page 242.
24 Actually, from page 242 through page 250 all
25 relate to efforts to use the Rules of Civil

1 Procedure to regulate private process servers,
2 and you'll see that our recommendation is to
3 reject all efforts to address these problems
4 through the rules. Many efforts have been
5 made to address these problems down at the
6 legislature.

7 It's a big political question, and at the
8 present time counties have their own
9 standards. Bexar County, for example,
10 requires liability insurance. Other counties
11 don't, and some people are upset that they
12 don't want eviction notices served by private
13 process servers and whatnot, and our feeling
14 on all of these recommendations -- we can take
15 them up one by one if you would like to -- but
16 our feeling was that this is a politically
17 charged issue, that they can't resolve it down
18 at the legislature, and that it really is
19 something that's impossible for the rules
20 committee to effectively arrive at a fair
21 solution that anyone we have control over can
22 monitor.

23 I mean, if there is some kind of
24 statewide office that's going to be a central
25 approving authority, you know, can we adopt a

1 rule that requires the secretary of state to
2 do that? I don't think so. I mean, these are
3 legislative issues, it seems to me, and that
4 they seem to be on the whole working well
5 based on the local rules. The local district
6 clerks and judges seem to have orders in place
7 that they think make them happy with the way
8 that law is being practiced in their area, and
9 our feeling was it's just nothing we should
10 get into.

11 CHAIRMAN SOULES: Any
12 disagreement with that?

13 Okay. That will be the recommendation of
14 the committee, and again, we have debated this
15 several times as well, usually coming up with
16 the same -- if we set out rules, who is to
17 police?

18 MR. ORSINGER: Okay. A
19 proposal on page 253 is they want to -- this
20 proponent wants to add a clause that would
21 permit the officer who has a writ of execution
22 to fail or decline or hold off on serving the
23 writ upon oral request; and the theory was, I
24 think, that, you know, if the party who issued
25 it wants to call it back, well, let them do

1 it.

2 We are against that proposal because the
3 writ is a government process, and it was
4 issued by the clerk of the court, and it's a
5 viable document if it falls into the hands of
6 the right peace officer, and our view was that
7 if you are going to countermand a formal writ,
8 it should be countermanded by a formal order
9 or a formal counterwrit. In fact, the rules
10 of procedure say that if a writ of execution
11 is out and a supersedeas bond is filed, that
12 the clerk should issue a writ of supersedeas.
13 So you have a writ offsetting a writ there.

14 If you were to permit fact situations to
15 develop where someone supposedly called a
16 sheriff and said, "Don't sell that on
17 Tuesday," and it was a fraudulent call or
18 whatever, we are just in a nightmare. So
19 since a writ is a formal government document,
20 our feeling was if you have got a writ out
21 there, it stays out there until you get a writ
22 setting it aside or a court order setting it
23 aside.

24 CHAIRMAN SOULES: Any
25 disagreement with that?

1 That's unanimously -- your committee
2 recommendation for no change is approved.

3 MR. ORSINGER: Okay. 254, page
4 254 wants to permit service by delivery to an
5 occupant over age 16 years of age at the
6 defendant's place of abode without first
7 securing a court order for substitute service.

8 CHAIRMAN SOULES: Anybody want
9 to allow that?

10 No support for that. It's rejected.

11 MR. ORSINGER: Okay. Page 256
12 does not refer to Rule 11, so we have taken no
13 action on that. It's listed on here as 90,
14 91, 111, and 114, and it's now coming up under
15 111, and we are not able to find a paragraph
16 in here that relates to 111, and this is a
17 letter we have discussed on the other rules
18 that were mentioned.

19 HONORABLE DAVID PEEPLES: It's
20 got TRAP 111.

21 MS. DUDERSTADT: TRAP 111?

22 CHAIRMAN SOULES: Okay.

23 MR. ORSINGER: And then 258 is
24 a letter from the same individual and it's
25 dated the same day. Yeah. It's the same

1 letter.

2 CHAIRMAN SOULES: Let's refer
3 that to TRAP, both pieces of it. Okay. We
4 will refer that to TRAP. That's not your
5 bailiwick. Our error, my error.

6 MS. DUDERSTADT: My error.

7 MR. ORSINGER: Okay. Page 260,
8 David Garcia, district clerk, Bexar County.
9 He does not like the fact that the rule
10 requires that citations be returned in 90 days
11 if unserved because it's just a lot of extra
12 work to keep re-issuing them, and what's wrong
13 with the citation? Just because it's 91 days
14 old there is nothing wrong with it.

15 So his feeling is, especially in the tax
16 cases, he says, "We file 6,600 tax suits a
17 year and re-issue ten percent of the citations
18 because of the 90-day provision." He would
19 request that we amend this rule to say that
20 if -- to delete the requirement that it be
21 returned at the end of 90 days and just let it
22 stay out in the field.

23 CHAIRMAN SOULES: That was just
24 an oversight at the time we changed the --

25 PROFESSOR ALBRIGHT: In

1 Bonnie's rules she changed it.

2 CHAIRMAN SOULES: Pardon?

3 PROFESSOR ALBRIGHT: It was
4 changed in Bonnie's rules.

5 CHAIRMAN SOULES: Yeah. That's
6 been changed in Bonnie's rule, so that's
7 unanimously approved already.

8 MR. ORSINGER: Item 262 is a
9 small error where 21a has a parenthesis around
10 it, and it shouldn't when it's referred to in
11 another Rule 124, and we agree we should
12 delete the parentheses.

13 CHAIRMAN SOULES: Okay. That's
14 approved. Any debate?

15 MR. ORSINGER: The agenda item
16 page 267 had to do with the district clerks
17 having the opportunity to challenge indigency
18 affidavits, and we have already adopted a new
19 Rule 145 that permits district clerks to
20 challenge indigency affidavits. So we have
21 acted on this, and we have gone final on it.

22 CHAIRMAN SOULES: Okay.

23 MR. ORSINGER: Agenda item page
24 180 is a reference -- a letter from Herb
25 Finklestein in Houston referencing JP

1 proceedings, and it looks like it was typed on
2 a regular typewriter and has got some typos in
3 it, and I think that either his typewriter
4 could not hit a one or he was not hitting it,
5 striking a one, because the letter does refer
6 to 146. It does refer to 46 and 48. Well, at
7 any rate, it's part of the JP practice, and so
8 we would suggest that we refer it to Till.

9 CHAIRMAN SOULES: All right.
10 And with that it's 5:30. Can we adjourn?

11 MR. ORSINGER: Sure.

12 CHAIRMAN SOULES: Pick up with
13 you --

14 MR. ORSINGER: Yeah. We have
15 got more to go. Not a lot controversial here.

16 CHAIRMAN SOULES: I don't want
17 to keep you late, but we can get this knocked
18 out next time, I think, pretty quickly. We
19 will put you up first unless we have reports
20 from appellate or evidence and Judge Clinton
21 is here. When that occurs I would like to try
22 to get that done so that he doesn't get
23 delayed, and our next meeting is November
24 22nd. Is that right?

25 MS. DUDERSTADT: November 22nd,

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23rd.

MR. HAMILTON: Is that
Thanksgiving?

CHAIRMAN SOULES: It's the
Friday and Saturday before Thanksgiving the
following Thursday. Thanks to everyone.

(Meeting adjourned.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

I, D'LOIS L. JONES, Certified Shorthand
Reporter, State of Texas, hereby certify that
I reported the above hearing of the Supreme
Court Advisory Committee on September 20,
1996, and the same were thereafter reduced to
computer transcription by me.

I further certify that the costs for my
services in this matter are \$ 1,325.75 .

CHARGED TO: Luther H. Soules, III .

Given under my hand and seal of office on
this the 30th day of September , 1996.

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