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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE
NOVEMBER 23, 1996
(SATURDAY SESSION)

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Taken before William F. Wolfe,
Certified Court Reporter and Notary Public in
Travis County for the State of Texas, on the
23rd day of November, A.D. 1996, between the
hours 8:00 o'clock a.m. and 12:00 o'clock
noon, at the Texas Law Center, 1414 Colorado,
Rooms 101 and 102, Austin, Texas 78701.

COPY

NOVEMBER 23, 1996

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Sarah B. Duncan
Michael T. Gallagher
Honorable Clarence A. Guittard
Tommy Jacks
Joseph Latting
Gilbert I. Low
Russell H. McMains
Anne McNamara
Robert E. Meadows
Richard R. Orsinger
Honorable David Peeples
Luther H. Soules III
Paula Sweeney
Stephen Yelenosky

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Doris Lange
Bonnie Wolbrueck

MEMBERS ABSENT:

Alejandro Acosta Jr.
Charles L. Babcock
David J. Beck
Hon. Ann T. Cochran
Prof. William Dorsaneo III
Anne L. Gardner
Michael A. Hatchell
Charles F. Herring, Jr.
Donald M. Hunt
Franklin Jones Jr.
David E. Keltner
Thomas S. Leatherbury
John H. Marks, Jr.
Hon. F. Scott McCown
David L. Perry
Anthony J. Sadberry
Steven D. Susman

Hon Sam Houston Clinton
Hon William Cornelius
Paul N. Gold
O.C. Hamilton
David B. Jackson
W. Kenneth Law
Mark Sales
Hon. Paul Heath Till

NOVEMBER 23, 1996

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1 CHAIRMAN SOULES: Good morning,
2 I appreciate everybody being here punctually
3 this morning. It's indeed an imposition on
4 everyone to be here on these Saturday
5 mornings. We will adjourn at noon wherever we
6 may be in the process so that everybody can
7 get back home to their families and so forth.

8 MR. LATTING: My children were
9 crying as I drove off.

10 CHAIRMAN SOULES: I'm sure they
11 were, and you as well.

12 Okay. We have the summary judgment rule
13 that was overnight drafted by Judge Peeples
14 and committee, and I really appreciate their
15 work. I have read it. I'm sure all of you
16 need an opportunity to look at it. Let's just
17 stand still here for a second and everybody
18 will get a chance to look at it.

19 Okay. Is everybody ready to go? Who
20 want to speak first? David, do you want to
21 lead off here?

22 HON. DAVID PEEPLES: Me lead
23 off?

24 CHAIRMAN SOULES: Yes, sir.

25 HON. DAVID PEEPLES: Well,

1 Tommy Jacks drafted something, and then three
2 or four of us looked at it and made minor
3 changes, and I typed it up last night, and
4 that's what you have before you. I did add a
5 little bit to the comment that Tommy had
6 proposed, but the text is verbatim or close to
7 it. And this was our best effort to put into
8 words what we had voted on of the several
9 motions yesterday.

10 HON. C. A. GUITTARD:

11 Mr. Chairman.

12 CHAIRMAN SOULES: Judge

13 Guittard.

14 HON. C. A. GUITTARD: One

15 matter that I'm concerned about has to do with
16 the certificate. It seems to me that if the
17 attorney who makes the certificate has made a
18 thorough investigation himself and he has, for
19 instance, a statement in his file by one of
20 the witnesses that would support a fact issue,
21 then he can make this affidavit and say,
22 "Well, the discovery reveals no evidence,"
23 when he knows there is evidence available that
24 would prove the respondent's case.

25 It seems like to me he ought to be

1 required to make a certificate that would
2 negate that sort of situation, so I don't know
3 exactly how would you do that, but I suggest,
4 and I move this as a friendly amendment, that
5 in the attorney's professional opinion neither
6 the discovery nor the attorney's investigation
7 of the facts reveals evidence to support the
8 specified elements.

9 CHAIRMAN SOULES: Okay. Judge,
10 I think we voted this rule down along those
11 lines yesterday and only voted for it after
12 Judge Peebles made an amendment to eliminate
13 that, but I may be wrong.

14 HON. DAVID PEEPLES: That's
15 exactly right.

16 CHAIRMAN SOULES: Does anybody
17 want to revote on that issue other than Judge
18 Guittard?

19 HON. DAVID PEEPLES: I don't
20 think any of us want that to happen, but when
21 you draft it the way you suggested and it was
22 voted down yesterday, then I think there was a
23 feeling that you'd put a burden on a lawyer
24 that's more onerous than we want to do.

25 CHAIRMAN SOULES: Joe Latting.

1 MR. LATTING: I have a
2 question. Do we need any statement about
3 against whom attorneys' fees might be
4 assessed; that is, under the rules would the
5 judge have the authority to assess them
6 against the party or only against the lawyer,
7 or do we need to address that?

8 HON. SCOTT A. BRISTER: Well,
9 that's the problem with putting sanctions
10 rules in various places around the rules and
11 why the Sanctions Committee tried to pull them
12 out of all the rules and put them in one
13 place, because you have due process concerns,
14 and what you've got now is the hearing, you've
15 got when is the notice, what's the record,
16 what's the standard. And I mean, I understand
17 wanting to emphasize that in this particular
18 portion, but understand there is a down side
19 every time you put just sanctions in another
20 rule: Does this mean this is a different kind
21 of sanction subject to different procedures
22 than other sanctions or the same?

23 MR. LATTING: I'm not
24 suggesting one way or the other. I'm just
25 asking a question.

1 CHAIRMAN SOULES: Do you have a
2 motion?

3 MR. LATTING: No.

4 CHAIRMAN SOULES: Then make a
5 motion.

6 MR. LATTING: No, I'm asking
7 the committee to discuss the issue. If
8 attorneys' fees are granted under this rule,
9 for example, because of a nonmeritorious
10 motion for summary judgment, is the judge
11 empowered to require the payment of those
12 attorneys' fees before the case proceeds?

13 CHAIRMAN SOULES: Under this
14 rule.

15 MR. LATTING: Or under the
16 rules as we -- in this rule in conjunction
17 with the other rules we've suggested. What's
18 the law?

19 CHAIRMAN SOULES: Well, the
20 answer is it doesn't say so. Now, if anybody
21 wants to move to amend this in some way or
22 another --

23 MR. LATTING: Should we clarify
24 that, then, is my question?

25 CHAIRMAN SOULES: Buddy Low.

1 MR. LOW: My question is just
2 that judges aren't going to be given much
3 guideline on when they should award attorneys'
4 fees, and maybe this is the best way to do it,
5 but does it mean just that it's overruled and
6 they automatically may do it? Some of them
7 just do it if it's overruled, even though it's
8 a close question. Or does it have to be
9 something that the judge found was filed in
10 bad faith or something like that? It doesn't
11 give them a guideline. It just says it may
12 award it if it's overruled, and I wonder if
13 that's the way we want it. I raise the
14 question. I'm not advocating what to put in
15 it, but I just raise that question.

16 CHAIRMAN SOULES: Steve
17 Yelenosky.

18 MR. YELENOSKY: I guess I want
19 to know from Judge Brister what the proposed
20 Sanctions Rules would do and whether it
21 provides variable standards, because even if
22 you have a sanctions rule, is the standard the
23 same in all instances? So you still may need
24 to state, as Buddy is suggesting, some kind of
25 standard here, and then just refer to the

1 sanctions rule.

2 CHAIRMAN SOULES: Well, the
3 only problem here is there is only one
4 sanction, attorneys' fees for the defense of
5 the motion, not --

6 MR. YELENOSKY: But the
7 standard upon which it would be granted, is it
8 a "knew or should have known," or does your
9 rule take care of that?

10 HON. SCOTT A. BRISTER: Well,
11 the discovery rule doesn't because this
12 wouldn't be discovery. This would be
13 Chapter 10, motions, so if Chapter 10 applied,
14 you would have to show groundless bad faith,
15 groundless purposes of harassment. I would
16 think, just presented with this, I would
17 construe none of that is necessary. You
18 presented the motion and you lost. I would
19 still sometimes award it; sometimes not. I
20 can assure you some of my colleagues would
21 consider it to be mandatory and automatic that
22 if you lose this motion, you pay.

23 MR. LATTING: Well, then I'm
24 going to have a motion. If it's to that
25 point, then I would like to make a motion.

1 HON. DAVID PEEPLES: Well,
2 let's keep talking about it.

3 CHAIRMAN SOULES: Does anyone
4 else want to speak to this? Richard.

5 MR. ORSINGER: Well, let's not
6 forget that we will not have Rule 13 under our
7 vote, that we have Chapter 10, and that this
8 appears to offer an attorneys' fee award
9 that's independent from the sanction rule, but
10 that if the court felt like that the sanction
11 statute had been violated, I would think that
12 the standards of the sanctions statute would
13 still be available. So to me this is a self-
14 contained cost shifting or fee shifting
15 proviso that doesn't have any of the criteria
16 of either our old Rule 13 or the new
17 Chapter 10.

18 And I also think, based on discussions
19 yesterday, that some people wouldn't vote for
20 this whole rule if we didn't have some really
21 serious impediment to misusing this procedure
22 in my view more serious than Chapter 10.

23 CHAIRMAN SOULES: Well,
24 focusing on this again, and the language here
25 does not limit the application of this

1 procedure to what we talked about yesterday,
2 and I propose language for that, but we're
3 talking about a motion for summary judgment
4 where the trigger is simply filing. The
5 plaintiff has no evidence of Element A(2) or
6 whatever, 1, 2, 3 of their claim, or defendant
7 of the defense, period, no evidence is shown.
8 That's why we put the baggage here. That's
9 the only place where this is to apply. It
10 doesn't say that, but I will provide language
11 that I think limits it to that. There are
12 probably better words you can put in place,
13 and we'll get there. I think we're going to
14 get to where the words in this rule (i) or
15 paragraph (i) clearly make it limited to that
16 circumstance, so that's what we're talking
17 about when we're talking about sanctions.
18 Now, that's why it passed yesterday.

19 But we're not talking about these
20 attorneys' fees as being spread over
21 paragraphs (a) through (h) as summary judgment
22 practice is conducted today. It's only under
23 paragraph (i).

24 HON. DAVID PEEPLES: Well, the
25 last sentence itself says, "If a motion under

1 this paragraph is denied, attorneys' fees," so
2 that would limit attorneys' fees to this.

3 Go up one sentence to right in the
4 middle, "The motion shall identify the
5 discovery." We could say, "The motion made
6 under this paragraph shall identify" and so
7 forth, have a certificate, and that would
8 limit the certificate and so forth to this
9 kind of motion. I mean, I think we all want
10 to do that.

11 Now, as far as attorneys' fees, you know,
12 what I would like to see, I want to penalize
13 the lawyer who files an objectively
14 unreasonable motion. I don't want inquiry
15 into his state of mind, but if a reasonable
16 person objectively can say, "You know, this
17 motion isn't even close," I have no problem
18 with that person paying the attorneys' fees it
19 cost to defend it.

20 But on the other hand, I don't want to
21 chill and scare people into not bringing good
22 faith, you know, in-the-ballpark motions under
23 this rule. And so I think I would like to say
24 something about, you know, attorneys' fees if
25 it was objectively unreasonable. And I'm not

1 sure that's the wording, but that's what I
2 would want.

3 And frankly, I think the attorney ought
4 to be the one to pay it and he shouldn't have
5 to pay it until judgment and it ought to be
6 reviewable on appeal.

7 MR. LATTING: I would like to
8 enthusiastically agree with almost all of
9 that. I'm not sure that I would only want the
10 attorney to be the one to pay it.

11 Think about this: In a big serious case
12 where there's a huge record, do we want -- I
13 don't think it's a good idea for this
14 committee to recommend to the Supreme Court to
15 do anything which is going to chill the filing
16 of a motion for summary judgment that is
17 reasonable, because as I understand it, our
18 mission here is to try to hold down defense
19 costs, and we want these motions to be filed
20 if they are bona fide. And so I don't want to
21 have to be looking at a 50,000-page record on
22 discovery and then make my decision, well, I'm
23 going to file a motion for summary judgment in
24 Goldthwaite, but if I'm wrong, my law firm may
25 be looking at a \$10,000 attorneys' fee.

1 I think we do need to have some objective
2 standard to tell a judge when he can award
3 attorneys' fees. And I would say that the
4 appeal -- when it's paid on appeal and so on
5 is okay, but I wouldn't want to limit it only
6 to the attorneys, because why not make Exxon
7 pay it, if I'm representing them, or American
8 Airlines?

9 CHAIRMAN SOULES: Well, who is
10 driving the motion? I mean, if duPont makes
11 the decision to go with it and takes the risk,
12 that's what ought to happen. The lawyer ought
13 to say, "A little shaky here, but it's" --

14 MR. LATTING: And we file a lot
15 of motions where we do say exactly that.

16 CHAIRMAN SOULES: Buddy.

17 MR. LOW: And Luke, remember we
18 had the discussion about how it would create a
19 conflict between the client and the lawyer.
20 "Well, you didn't tell me to do that."

21 "Yeah, I did."

22 And we've had discussions before that,
23 then, if you tax it against that party and it
24 was the lawyer's fault, nowadays the client, I
25 can tell you, doesn't mind coming back and

1 telling the lawyer, "You owe me because that
2 was your mess-up." There's no real
3 embarrassment to do that these days, and so I
4 think that would iron itself out.

5 CHAIRMAN SOULES: Steve
6 Yelenosky.

7 MR. YELENOSKY: Well, I guess,
8 as you discussed earlier, if we separated out
9 and excised any reference to evidence which
10 was not already in the record, in other words,
11 the attorney is not attesting that there's no
12 evidence out there, he's just saying, "I've
13 reviewed the record," I'm just wondering sort
14 of out loud when you say, well -- I mean, he's
15 attesting, according to this, according to his
16 professional judgment, he's looked at the
17 discovery and it ain't there. Well, if he's
18 wrong, he either missed something in discovery
19 or his professional judgment as to what is no
20 evidence is wrong. That seems to me to have
21 been his fault.

22 But on the other hand, I can see, you
23 know, the countervailing issue here. But we
24 have separated out the situation where Exxon
25 just hasn't told the lawyer, because if it's

1 not in the discovery, you know, he hasn't done
2 anything wrong.

3 CHAIRMAN SOULES: Judge
4 Brister.

5 HON. SCOTT A. BRISTER: I think
6 the concern is bad faith. The concern is an
7 attorney who knows there's something out there
8 and just files the blunderbuss motion, "I
9 don't have any evidence of anything," and that
10 is groundless and it's in bad faith.

11 Just as another situation that's going to
12 come up, the defendant in medical malpractice
13 says, "You've got nobody to prove causation."
14 And up to that point they didn't. So the
15 plaintiff more than 30 days before trial goes
16 and hires a new expert. Now, that motion gets
17 denied. But at the time it was filed it was
18 correct. Surely we don't want anybody to
19 award attorney's fees to that guy. But if a
20 motion under this paragraph gets denied, the
21 court may award reasonable attorneys' fees for
22 the defense of the motion.

23 CHAIRMAN SOULES: Okay.

24 HON. SCOTT A. BRISTER: Well, I
25 can tell you my colleagues who would. I could

1 give you their names.

2 CHAIRMAN SOULES: Rusty.

3 MR. McMAINS: Well, my concern
4 is, and there obviously are some people
5 missing today, but in the relatively close
6 votes we had yesterday, the vote was to take
7 out any of those standards in the attorneys'
8 fees. I mean, that was the vote we took, was
9 to just leave it up to the judge's discretion,
10 if it was denied, to assess attorneys' fees,
11 and that's exactly what we proposed to do.
12 Anything else, I think, alters the vote we've
13 already taken on this issue, and you know,
14 it's basically just a complete rehash.

15 HON. DAVID PEEPLES: I don't
16 remember that being --

17 CHAIRMAN SOULES: Yeah. As I
18 review the bidding on yesterday, I'm not sure
19 that ever really got to the focus of a vote.
20 I mean, we did vote that attorneys' fees only
21 would be the consequence.

22 MR. McMAINS: We voted to take
23 the costs out, but we also voted to take the
24 standards, to just leave it to the discretion
25 of the judge. That was part of Tommy's

1 motion.

2 MR. YELENOSKY: I think that's
3 right.

4 MR. JACKS: Sarah's language
5 was essentially the "knew or should have
6 known" language, and that vote failed.

7 CHAIRMAN SOULES: Well, Judge
8 Brister, are you making a motion that would
9 put a groundless and brought in bad faith
10 standard into paragraph (i)?

11 HON. SCOTT A. BRISTER: Well, I
12 mean, I agree to some extent, but we did
13 discuss this yesterday. I mean, definitely
14 I'll move for whatever it's worth.

15 CHAIRMAN SOULES: Well, anybody
16 that's not here today was invited, and if they
17 want to protect their interest and their
18 position, they can be here.

19 HON. SCOTT A. BRISTER: Then I
20 move for the --

21 MS. SWEENEY: Well, for the
22 record, it's incredibly foggy, and at least
23 one person, Paul Gold, is trapped in an
24 airport in Houston. He has been trying to get
25 here. His flight has been canceled. There

1 are planes not landing here and not taking off
2 from Houston. And so despite the generosity
3 of the invitation, he is trying his darnedest
4 to get here and is avidly interested in this
5 issue.

6 Excuse me, I just wanted to get that on
7 the record.

8 CHAIRMAN SOULES: Well, he was
9 here yesterday, so let's go forward.

10 HON. SCOTT A. BRISTER: Yeah, I
11 would propose that it be the way that David
12 had it yesterday, which is the motion is
13 subject to sanctions under Chapter 10.

14 CHAIRMAN SOULES: Well, that
15 was plainly voted down, because that's the
16 whole array of whatever the judge wants to
17 award.

18 HON. SCOTT A. BRISTER: How
19 about attorneys' fees pursuant to the
20 standards set in Chapter 10?

21 CHAIRMAN SOULES: Tommy Jacks.

22 MR. JACKS: I'd like to propose
23 some language that Sarah crafted that I think
24 is pretty good. After the phrase "If a motion
25 under this paragraph is denied," insert "and

1 the court finds that the motion was
2 objectively unreasonable at the time it was
3 filed."

4 MS. SWEENEY: Say it again.

5 MR. JACKS: And the court finds
6 that the motion was objectively unreasonable
7 at the time it was filed.

8 MR. LOW: I'll second that.

9 MR. LATTING: I have a
10 question.

11 CHAIRMAN SOULES: Moved and
12 seconded. Discussion. Joe.

13 MR. LATTING: What's the
14 difference between "unreasonable" and
15 "objectively unreasonable"? And I'm not
16 trying to be funny, I just --

17 MR. JACKS: As I understand it,
18 Joe, the difference is you're not trying to
19 say --

20 MR. LATTING: Does that mean
21 clearly unreasonable?

22 MR. JACKS: No. It means if
23 viewed as a reasonable person standard, as
24 opposed to what was in the mind of the drafter
25 of the motion.

1 CHAIRMAN SOULES: Excuse me,
2 Judge Peeples just articulated it a minute
3 ago. You're not going to probe the subjective
4 beliefs or strategies of the lawyer making the
5 motion, you're going to look at it facially
6 and objectively --

7 MR. LATTING: Okay. I just
8 didn't understand what that meant or if
9 everybody knows what that means. Okay.

10 CHAIRMAN SOULES: -- to make
11 the determination.

12 Okay. Moved and seconded. Any further
13 discussion?

14 MS. McNAMARA: Are we talking
15 about the lawyer paying the fee or the
16 client?

17 CHAIRMAN SOULES: No, we're not
18 talking about that right now. We're talking
19 about adding a phrase, a parenthetical phrase
20 that Tommy just stated.

21 MR. YELENOSKY: Before we vote,
22 can I ask what the next vote is going to be,
23 because I'd like to just leave it like it is.
24 So if this doesn't pass as it is, then I'd
25 vote for that. I mean the whole thing.

1 CHAIRMAN SOULES: Moved and
2 seconded. Any further discussion? Those in
3 favor show by hands.

4 PROFESSOR ALBRIGHT: Are we
5 voting for the change?

6 MR. YELENOSKY: Yeah, the
7 change.

8 CHAIRMAN SOULES: 12. Those
9 opposed. Four. 12 to four, that phrase will
10 go in.

11 Now, I would like to offer -- or Judge,
12 you can read it, but I don't know if anybody
13 should read all that -- but I have proposed
14 language to make this clearly applicable only
15 in the circumstances where a plaintiff or a
16 movant pulls the trigger without any
17 supporting evidence to show that they're
18 conclusively correct and puts the respondent
19 to the defense of a motion as we talked about
20 yesterday. I can read it, or Judge, maybe you
21 can read it if you can read my handwriting.

22 HON. DAVID PEEPLES: The
23 purpose of it is to make clear that you've got
24 the old kind of summary judgment motion under
25 the old rules, and then in addition, you've

1 got this one, which is a separate creature.

2 What Luke has is as follows: In addition
3 to the other procedures available under
4 paragraphs (a) and (b), by further compliance
5 with this paragraph (i), a movant may seek a
6 summary judgment on the ground that the
7 respondent has no evidence of one or more
8 essential elements of a claim or defense
9 without presenting any summary judgment
10 evidence to support the motion on such ground.

11 MR. JACKS: And that goes at
12 the beginning?

13 CHAIRMAN SOULES: Right at the
14 beginning.

15 MR. JACKS: Could you read it
16 one more time?

17 HON. DAVID PEEPLES: In
18 addition to the other procedures available
19 under paragraphs (a) and (b), by further
20 compliance with this paragraph (i), a movant
21 may seek a summary judgment on the ground that
22 the respondent has no evidence of one or more
23 essential elements of a claim or defense
24 without presenting any summary judgment
25 evidence to support the motion on such ground.

1 MR. LATTING: And what's the
2 purpose of that, Luke?

3 CHAIRMAN SOULES: To make this
4 apply to that circumstance only, which is what
5 we talked about yesterday.

6 MR. JACKS: Luke wants to make
7 sure this doesn't apply to his car being at
8 Red McCombs and him being in Idaho.

9 CHAIRMAN SOULES: Let me give
10 you an example. I get sued for professional
11 malpractice. Buddy is my lawyer. Buddy files
12 a motion for summary judgment. He's got my
13 affidavit saying I didn't do anything wrong.
14 Joe Latting has 20 vicious affidavits, and
15 they don't come with an affidavit. Now, right
16 now the way this is written, this rule can
17 apply in that situation, even though that's
18 already available and this rule is not in
19 place.

20 Now, if what we talked about yesterday is
21 a circumstance, where instead of bringing
22 forth affidavits in my defense, Buddy just
23 says, "We've done discovery. They haven't
24 proved anything, and I want a judgment." And
25 he doesn't offer anything. That's what this

1 motion is designed to do.

2 MR. LATTING: And this will
3 apply to that situation?

4 CHAIRMAN SOULES: This will
5 apply to the second situation. The way it's
6 written, it also applies to the first. My
7 language is to give a line of demarcation so
8 it doesn't apply to the first. It only
9 applies where a motion is filed without
10 supporting evidence.

11 HON. DAVID PEEPLES: I think
12 everybody would agree to that, Luke. And this
13 is enough of a change, and people who don't
14 understand that, I have no problem with saying
15 that, even though I think it's clear anyway
16 since we mean to do that. I say go ahead and
17 do it. I think this could be boiled down to
18 half its length, though.

19 CHAIRMAN SOULES: As long as we
20 say it clearly, I don't care what words we
21 use.

22 HON. C. A. GUITTARD: I think
23 "other" is unnecessary, just "in addition to
24 the remedies under (a) and (b)."

25 CHAIRMAN SOULES: Well, I don't

1 care how it's written. I just want to be sure
2 that that language is in this paragraph so
3 that we know this is new and different and it
4 doesn't affect anything else.

5 MR. LOW: But to me it's more
6 than "in addition." We want to know that this
7 one doesn't relate back to the other, don't
8 we? So your language will do that, not just
9 say this is additional, but this is a separate
10 animal right here and it doesn't apply
11 anyplace else. It's not just additional,
12 though, so I think we need to do more than
13 that.

14 MR. LATTING: Would it be
15 better to do that in a comment?

16 CHAIRMAN SOULES: No.

17 MR. LATTING: No? All right.

18 MR. JACKS: So moved.

19 MR. LOW: Second.

20 CHAIRMAN SOULES: Seconded.

21 Discussion.

22 All in favor show by hands. 14.

23 Opposed. There's no opposition, so
24 that's unanimous.

25 MR. ORSINGER: Luke, can I

1 comment?

2 CHAIRMAN SOULES: Yes. Richard
3 Orsinger.

4 MR. ORSINGER: I can foresee
5 situations where after the discovery window is
6 closed there might be a combined motion where
7 some aspects of the motion are based on
8 specific summary judgment proof and some
9 aspects are based on an allegation that the
10 respondent has no proof. And in the situation
11 like that, it seems to me that the certificate
12 of the lawyer would apply only to the portion
13 of the motion that is relying on a mere
14 allegation of no proof, and that the award of
15 fees based under this rule would not apply to
16 the portion of the motion that is based on a
17 conventional summary judgment proof. Is that
18 understood by everybody?

19 CHAIRMAN SOULES: That's the
20 reason I used "ground" in the language I
21 proposed. And I see that "ground" is in the
22 language that Judge Peeples -- let's see, bear
23 with me.

24 MR. JACKS: The last sentence
25 limits the judge's authority to motions filed

1 under this paragraph.

2 MR. ORSINGER: Well, I know.
3 But if I have a motion that's partially under
4 this paragraph and partially not under this
5 paragraph, I would want to know whether or not
6 the court is going to single out whether I was
7 right or wrong on my Celotex approach rather
8 than right or wrong on my conventional
9 approach.

10 MR. JACKS: If the court did
11 not deny the part of your motion that was
12 under this paragraph, the court cannot award
13 attorneys' fees against you.

14 MR. ORSINGER: Okay. Good.

15 MR. JACKS: Now, I think that's
16 clear from the language. I don't think it
17 needs further explanation.

18 MR. ORSINGER: Maybe you should
19 say if a motion -- the last sentence ought to
20 say, "If a motion or a part of a motion" --
21 well, see, the motion may be denied, Tommy,
22 but it may be a legitimate dispute, a summary
23 judgment traditional denial as to part and it
24 may be a Celotex analysis.

25 MR. JACKS: But unless he

1 denied the part that -- I mean, you've had to
2 identify a part of your motion as a
3 paragraph (i) motion because you've had to
4 make a special certificate for that part of
5 your motion. And unless the court denies that
6 part of your motion, the court can't award
7 attorneys' fees against you. I think that's
8 pretty clear.

9 MR. ORSINGER: Okay.

10 CHAIRMAN SOULES: I guess it
11 is.

12 CHAIRMAN SOULES: Okay. Rusty.

13 MR. McMains: Just for the
14 record, would this rule, do you think,
15 authorize in the event that the court were to
16 grant the Celotex motion and it go up to be
17 reversed on appeal? Would the appellate court
18 have the authority to award attorneys' fees
19 based on the fact that it should have been
20 denied?

21 MR. ORSINGER: I don't see how
22 the fees could be proven in the appellate
23 court.

24 MR. McMains: Well, you could
25 make your proof at the time that the order was

1 entered, if you were confident that you were
2 going to reverse it.

3 HON. DAVID PEEPLES: If a trial
4 judge granted it, how can you say it wasn't
5 objectively reasonable?

6 MR. McMAINS: It depends on the
7 the judge.

8 CHAIRMAN SOULES: It depends on
9 the objectivity of the trial judge.

10 MR. JACKS: If it's one of
11 Judge Brister's colleagues that he talked
12 about.

13 MR. McMAINS: Especially if
14 they don't have to go through anything.

15 CHAIRMAN SOULES: Tommy Jacks.

16 MR. JACKS: I woke up early
17 this morning realizing that I left out a
18 clause. Odd the things you think about. I
19 had intended that the -- we have a (1) and a
20 (2) for time periods. My intention was that
21 if there is a discovery period, whether it's
22 by court rule or by a scheduling order in the
23 particular case, that this motion couldn't be
24 filed until after the expiration of the
25 discovery period.

1 Clause (2) was meant to apply if there
2 was no discovery period, either because our
3 Supreme Court doesn't pass those rules and
4 there is no scheduling order or for some other
5 reason. But a party who wants to file a
6 paragraph (i) motion, they then go to the
7 judge and say, "Judge, tell us what the date
8 is after which we can file one," and the court
9 sets such a date, and that's what (2) is
10 supposed to be.

11 To make that clear, I propose inserting
12 after the (2) in parentheses and before the
13 words "a date set," the following: "If no
14 definite discovery period has been prescribed,
15 a date set by the court which allows adequate
16 time for discovery."

17 CHAIRMAN SOULES: Okay. If no
18 discovery period has been what?

19 MR. JACKS: If no definite
20 discovery period has been prescribed. And I
21 use "definite" because, I mean, there is a
22 discovery period in every case under the
23 rules. I mean, it may run up to and through
24 the trial, but there is a discovery period.

25 HON. DAVID PEEPLES: Can I ask

1 a clarifying question?

2 CHAIRMAN SOULES: Well, do you
3 want to use "definite" in the first one, "the
4 expiration of any definite discovery period"?
5 That word is odd to me.

6 MR. JACKS: Luke, I don't have
7 any strong feelings. I mean, definite is the
8 opposite of indefinite. And if you're
9 operating under the rules, you have a
10 discovery period, but it's an indefinite one
11 because it has no date at which it ends.

12 CHAIRMAN SOULES: I guess I'm
13 not following what you're saying. Okay.
14 "After (1) the expiration of any applicable
15 discovery period," and you say there is an
16 applicable discovery period in every case. If
17 so, we don't need number (2).

18 MR. YELENOSKY: Well, there's
19 no applicable definite discovery period.

20 MR. JACKS: Then you need
21 "definite" in both cases, but that's
22 confusing.

23 CHAIRMAN SOULES: That makes it
24 more confusing to me, but that's okay. I'm
25 easily confused.

1 MR. JACKS: I mean, here is the
2 situation: Right now we're writing on a slate
3 in which our rules do not prescribe a
4 discovery period, true?

5 CHAIRMAN SOULES: Right.

6 MR. JACKS: We know that in
7 some cases courts order a discovery cutoff
8 date. That to me is an applicable discovery
9 period. We know in other cases the court
10 cannot do that and you're operating under the
11 rules, and your discovery can go right up to
12 the time of trial or beyond.

13 CHAIRMAN SOULES: Or beyond. I
14 don't think there is an applicable discovery
15 period in every case. That's what I'm getting
16 at. I don't think there is one. There's a
17 duty to supplement at some place, but that
18 doesn't stop discovery.

19 MR. JACKS: Well, then perhaps
20 we need to repair (1) as well. But right now
21 I'd like to focus on (2), and then we can come
22 back and fix (1).

23 CHAIRMAN SOULES: How about
24 just if there is no applicable discovery
25 period?

1 CHAIRMAN SOULES: Okay.

2 HON. DAVID PEEPLES: Can I ask
3 a question, Luke?

4 CHAIRMAN SOULES: Okay. Tommy,
5 you've made a motion. Is there a second?

6 MS. SWEENEY: Second.

7 CHAIRMAN SOULES: Okay.
8 Discussion. Judge Peeples.

9 HON. DAVID PEEPLES: Okay.
10 Situation one, it seems to me, is if the
11 Supreme Court adopts the Discovery Rules and
12 we've got that kind of discovery rules.

13 CHAIRMAN SOULES: Or a 166
14 order.

15 HON. DAVID PEEPLES: Situation
16 number two is when there is a pretrial order,
17 a docketing order or whatever you want to call
18 it.

19 CHAIRMAN SOULES: No.

20 HON. DAVID PEEPLES: Well, I'm
21 saying out in the world, if we're classifying
22 situations, one is when we've got the rules
23 that the Supreme Court may do; and whether
24 they do that or not, some cases are going to
25 have pretrial orders, but a lot of them

1 don't.

2 My question is, in a case in which there
3 has been a lot of discovery and the trial is
4 pretty close but there's no order and the
5 Supreme Court didn't adopt the Discovery
6 Rules, what does the movant have to do? Does
7 the movant have to first go and get an order
8 from the court saying --

9 MR. JACKS: It would be
10 incumbent upon the movant to have the court
11 set a date after which this motion could be
12 filed.

13 HON. DAVID PEEPLES: So one of
14 these motions can't be filed unless the court
15 has expressly ruled that there's been enough
16 discovery?

17 MR. JACKS: That's correct.

18 CHAIRMAN SOULES: Yeah. And
19 that's another curious thing here that we
20 haven't focused our attention on between
21 moving and hearing. What this rule says,
22 paragraph (i), which is fine with me, you
23 can't even file a motion until you're beyond
24 the period.

25 HON. DAVID PEEPLES: Well, I

1 guess the next question is, can you file a
2 motion at the same time, a motion to rule that
3 there's been enough discovery and have them
4 both heard on the same day?

5 MR. JACKS: There's nothing in
6 this rule that would preclude you doing that.

7 MR. ORSINGER: Well, as long as
8 you're discussing simultaneity, am I going to
9 now have a court reporter there because I want
10 to prove up my attorneys' fees in the event
11 that the motion gets denied, or am I going to
12 have to do that by affidavit in a response, or
13 do I do that later?

14 HON. DAVID PEEPLES: I would
15 have the hearing without a court reporter, and
16 then if I denied the motion and thought it was
17 in the ballpark, let people testify about
18 attorneys' fees.

19 MR. YELENOSKY: Is this a one-
20 shot deal? Can you do successive motions on
21 different elements?

22 CHAIRMAN SOULES: Before we go
23 on with this, let me get one thing out of the
24 way here just simply in terms of
25 housekeeping.

1 Is there any opposition to adding "if
2 there is no applicable discovery period" after
3 number (2) in the second line?

4 There's no opposition. That will be
5 done.

6 Okay. Now, what else on this rule?

7 MR. YELENOSKY: Can you file
8 successive motions? Can you file on one
9 element and say, "There's no evidence for
10 this," lose that, and then file on another
11 element?

12 MR. JACKS: If you're fool
13 enough to do that, yes.

14 MR. YELENOSKY: Okay. So
15 nobody is going to do that?

16 MR. JACKS: Well....

17 CHAIRMAN SOULES: Oh, yeah.

18 MR. JACKS: I mean, we can't
19 accommodate every aspect of foolish behavior.

20 CHAIRMAN SOULES: Okay.

21 Anything else on this?

22 MR. ORSINGER: I'd like to find
23 out for sure whether it's contemplated that
24 attorneys can be sanctioned under this rule.
25 Is that clear? Does everyone understand that

1 attorneys can be or the client can be, or is
2 it just the client? That last discussion left
3 me unclear.

4 CHAIRMAN SOULES: It doesn't
5 say.

6 MR. ORSINGER: So presumably
7 either could be sanctioned?

8 CHAIRMAN SOULES: Right.

9 HON. DAVID PEEPLES: Don't our
10 Discovery Rules in some places say "either
11 or"?

12 CHAIRMAN SOULES: That doesn't
13 apply to this rule.

14 HON. DAVID PEEPLES: I know.
15 But we've done it before, and when we wanted
16 to do that before, we've said so.

17 MR. ORSINGER: See, I mean, I
18 think I could argue --

19 CHAIRMAN SOULES: Does anybody
20 have a motion to make on this?

21 MR. LATTING: I think it should
22 be "either or," and I think we should say
23 that, and I so move. If it's not clear
24 already under the rules, I think the court
25 ought to be able to, in an appropriate

1 situation where he thinks that there's been an
2 innocent client but a crazy lawyer, it ought
3 to be awarded against the lawyer. And where
4 he thinks it's a client moving situation, he
5 ought to be able to do it against the client
6 or both.

7 CHAIRMAN SOULES: This is
8 carrying us to a discussion that we had under
9 the sanctions rule, of course, where all the
10 tension that had been put between a lawyer and
11 his client to come before the judge to sort
12 this out. So this is not an easy issue. It
13 can be done quickly or it can be done some
14 other way, but it is not -- I don't want us to
15 rush into this issue without recalling the
16 debate we've had before about the tension
17 between the lawyer and client when we get into
18 this situation. It's fine with me, whatever
19 you want to do. Anne McNamara.

20 MS. McNAMARA: Keeping with
21 that subject, I think the biggest problem with
22 it is that the big clients will always pay
23 their lawyers for something like that. So
24 that kind of rule would have a
25 disproportionate effect on the little guy, the

1 one whose lawyer, you know, isn't going to be
2 able to extract from the client the additional
3 money. So you know, for the Exxons, the
4 American Airlines, you're going to want your
5 lawyer to move for summary judgment. And if
6 the judge hits you with a fine, you're going
7 to pay it. But it's at the smaller end of the
8 scale that it would have an effect.

9 MR. LATTING: So what are you
10 suggesting?

11 MS. McNAMARA: I'm just
12 suggesting that you not focus on the lawyer,
13 not necessarily on the lawyer, because I think
14 it's adding a level of complexity and it's not
15 going to accomplish its intended goal.

16 MR. LATTING: What do you do
17 when you have a situation where you have,
18 let's say, a small case and you have small
19 individual clients and you get a nutty lawyer
20 who is clearly the problem?

21 MR. JACKS: With a small mind.

22 MR. LATTING: Or with a big
23 mind. I mean, big mind, small integrity, and
24 he does all kinds of crazy things. It seems
25 to me that Judge Peeples ought to be able to

1 say, "I'm going to award \$10,000 in attorneys'
2 fees, and I want you to pay it, not your
3 client." And if we're not going to do that, I
4 think we ought to say so. I think this ought
5 to be clearer.

6 CHAIRMAN SOULES: Richard
7 Orsinger.

8 MR. ORSINGER: I'm so
9 incredibly troubled by the conflict problem,
10 because the rule you just described is going
11 to put me in a situation where I, as an
12 individual lawyer, have to defend myself from
13 an effort to make me write a check out of my
14 earnings when in reality it's my client that
15 wanted the motion filed and I had advised the
16 client that it was risky and x, y and z, and
17 all of that is a confidential communication,
18 and now I'm in a position where I might have
19 to write a check. And I'm not in a position
20 where I can say it was my client who was the
21 one that wanted to do that and that I gave
22 them fair warning that the sanction might be
23 levied against them. And now it's levied
24 against me?

25 MR. YELENOSKY: You shouldn't

1 have filed it.

2 MR. ORSINGER: What?

3 MR. YELENOSKY: You shouldn't
4 have filed it. It's your certificate.

5 MR. ORSINGER: I've got a
6 conflict of interest with my client. If I
7 advise my client that it's a risky motion to
8 file, and the client says, "You're my lawyer.
9 I want you to file it," then I've got to
10 either withdraw from the case or I've got to
11 go into court with the trial judge saying, "I
12 want you, Richard Orsinger, to pay these
13 sanctions," and I can't even tell him that I
14 told the client that he probably wouldn't win.

15 MR. YELENOSKY: Yeah, but the
16 conflict is intrinsic to the whole certificate
17 idea, which is why I spoke against it, just
18 from that perspective. But we've gone with
19 it, and if you go with it, this sort of goes
20 with that.

21 MR. ORSINGER: I don't agree it
22 goes with that.

23 CHAIRMAN SOULES: Tommy Jacks.

24 MR. JACKS: We've only got
25 three choices. We either empower the judge to

1 assess fees against the lawyer, against the
2 party, or against either one depending on
3 which seems more appropriate.

4 I mean, one way to solve your conflict
5 problem is just make it the lawyer in every
6 case. And then if the lawyer were made by
7 Ford Motor Company to file this motion even
8 though he's told them it's a loser, and what's
9 more, we may get sanctioned, he can sort that
10 out with the client. If you make it against
11 the party in every case, then in those cases
12 that Joe described, a client is unfairly being
13 made to pay because of a lawyer's either
14 foolishness or lack of integrity. My own vote
15 would be to give the court the discretion to
16 sort it out.

17 MR. ORSINGER: How does the
18 lawyer protect himself, since the client
19 controls the attorney-client privilege and the
20 lawyer can't speak to what the dynamic was on
21 the decision to file?

22 MR. JACKS: He says, "I'll pay
23 it, Your Honor," and then he sorts it out with
24 his client.

25 MR. ORSINGER: I dislike that.

1 That's inherently unfair to the lawyer, and
2 it's going to lead to a lot of lawyers having
3 to withdraw from employment.

4 MR. JACKS: What do you do with
5 the client in the case with the nutty lawyer?
6 How do you protect --

7 MR. ORSINGER: You let the
8 client --

9 CHAIRMAN SOULES: We can't make
10 a record on this. I'm not interrupting you,
11 I'm letting you talk back and forth, but only
12 talk one at a time.

13 MR. ORSINGER: You let the
14 client sue the lawyer if the client gets
15 sanctioned for the lawyer's malpractice.
16 That's the normal remedy for bad legal advice,
17 not having the lawyer in there writing checks
18 to the judge and having his hands tied behind
19 his back when he's trying to defend what he
20 did in good faith. That's my view.

21 MS. SWEENEY: But you can't
22 file a malpractice case over \$10,000. You
23 just eat it.

24 CHAIRMAN SOULES: You can file
25 a grievance.

1 MR. JACKS: I have suggestion,
2 and that is just to kind of take a straw vote
3 on who we would rather it be, A, the lawyer
4 only; B, the party only; or (c), either or
5 both depending on the circumstances.

6 CHAIRMAN SOULES: Or silent?

7 MR. JACKS: Or silent. I guess
8 that's the fourth choice.

9 MR. GALLAGHER: What was the
10 fourth choice again, Luke?

11 CHAIRMAN SOULES: Silent.

12 MR. JACKS: Say nothing. Just
13 leave it as it is right now.

14 CHAIRMAN SOULES: Okay. I
15 don't know, this is probably going to get to a
16 plurality.

17 MR. JACKS: Well, let's just
18 see where the wind is blowing.

19 HON. SARAH DUNCAN: Can I
20 suggest that we do silence versus something,
21 that that be the first vote?

22 CHAIRMAN SOULES: Okay.
23 Silence versus something. Those who think we
24 leave the rule silent on whether the sanction
25 is imposed against the lawyer or the party or

1 both, show by hands. 13.

2 Those who feel we should address that
3 issue with express words in the rule show by
4 hands. Two.

5 13 to two. The rule will not have a
6 mention or a reference to against whom the
7 sanction may be imposed.

8 Joe.

9 MR. JACKS: Sarah, that was a
10 very good idea.

11 CHAIRMAN SOULES: I'm trying
12 make a record of the vote and you're talking
13 and the court reporter can't hear what I'm
14 saying, so we've got to keep this better
15 organized.

16 So by a vote of 13 to two the rule will
17 not express against whom the sanction may be
18 imposed, whether the lawyer, the party or
19 otherwise. Okay. Next. Tommy Jacks.

20 MR. JACKS: I have two editing
21 changes which I regard as housekeeping. In
22 the sentence that begins "The motion shall
23 identify the discovery that has been
24 completed," et cetera, and I think Judge
25 Peebles suggested this but I'm not sure it got

1 done, if we can change that to say, "A motion
2 filed under this paragraph shall identify,"
3 just to make clear again that this is a
4 feature only of a paragraph (i) motion.

5 CHAIRMAN SOULES: The language
6 that I proposed says, "By compliance with this
7 paragraph (i)" and goes forward, so that's
8 another piece of making this only attach to
9 those circumstances.

10 MR. JACKS: I suppose when
11 those who are going to edit and make this
12 finally right look at it, if it looks okay
13 without this, then that's fine. And I'm
14 content to leave it to the discretion of the
15 draftsman.

16 CHAIRMAN SOULES: Anytime that
17 there is vagueness about whether anything in
18 this rule might apply to something else, we
19 ought to fix it so that it's clear.

20 MR. JACKS: Well, that's the
21 intent of this.

22 CHAIRMAN SOULES: Right.

23 HON. DAVID PEEPLES: Is there
24 any reason not to do what Tommy said?

25 CHAIRMAN SOULES: No.

1 HON. DAVID PEEPLES: I second
2 the motion.

3 CHAIRMAN SOULES: Moved and
4 seconded. Those in favor show by hands. 13.

5 Those opposed. None opposed. That's
6 done. It passes.

7 MR. JACKS: The other
8 suggestion I have, and this is a pet peeve of
9 Judge Guittard's and mine, and that is to
10 change the word "nonmovant" to "respondent" in
11 the third from the last line. I know that we
12 use "nonmovant" in other places in the summary
13 judgment rule, but there are nonmovants in the
14 case who have nothing to do with the motion.

15 CHAIRMAN SOULES: Any
16 opposition to that? That passes.

17 MR. JACKS: I'm also reminded
18 by Buddy Low that it's in the caption of the
19 paragraph, and I would change it there too.

20 CHAIRMAN SOULES: Any
21 opposition to that? That passes.

22 HON. C. A. GUITTARD: Thank
23 you, Tommy.

24 CHAIRMAN SOULES: Anything else
25 on paragraph (i)? Alex Albright.

1 PROFESSOR ALBRIGHT: This is
2 not on paragraph (i). This is on something
3 else.

4 CHAIRMAN SOULES: Paula
5 Sweeney.

6 MS. SWEENEY: Paul Gold called
7 a moment ago and said he could not be here and
8 asked me to express on his behalf this
9 suggestion, with which I concur, that we add
10 at the end of the paragraph, or somewhere in
11 the paragraph, language to provide that the
12 standard of appellate review for overturning
13 or for reviewing one of these summary
14 judgments shall be the scintilla of evidence
15 rule, specifically using the word "scintilla"
16 and not the phrase "no evidence," which seems
17 to be in considerable flux.

18 CHAIRMAN SOULES: All right.
19 Let me see if I can articulate that without
20 saying my position on it.

21 I guess it would say, "The court shall
22 grant the motion unless respondent produces
23 more than a scintilla of evidence raising a
24 genuine issue of material fact," in the next
25 to the last sentence.

1 Now, that's a way to get there. You're
2 moving that that be done, Paula?

3 MS. SWEENEY: Yes.

4 CHAIRMAN SOULES: Is there a
5 second?

6 MR. McMAINS: Second.

7 CHAIRMAN SOULES: Moved and
8 seconded. Any discussion? Richard Orsinger.

9 MR. ORSINGER: I think I
10 understand what Paul is doing, because he
11 feels like the concept of no evidence is a
12 moving target. But I'll tell you that if a
13 scintilla needs to be a moving target, it will
14 also move, so I don't think we accomplish a
15 damn thing.

16 CHAIRMAN SOULES: Any other
17 discussion? Joe Latting.

18 MR. LATTING: I would be
19 opposed to that. I think it's needlessly
20 cluttering our rules with clutter.

21 CHAIRMAN SOULES: Any other
22 discussion? Those in favor show by hands.
23 One -- those in favor show by hands. I think
24 you seconded it. Are you for it? One, two,
25 three, four. Four.

1 Those opposed. 13 are opposed, so the
2 motion fails.

3 Anything else on paragraph (i)? Tommy
4 Jacks.

5 I'm sorry, Elaine, you had your hand up.
6 We haven't heard from you. Please go on, and
7 then I'll get back to Tommy

8 PROFESSOR CARLSON: Just two
9 points of clarification, Judge Peeples. In
10 the second to --

11 CHAIRMAN SOULES: Silence,
12 please. We've got to make a record.

13 PROFESSOR CARLSON: In the
14 second to the last sentence when we're talking
15 about the nonmovant producing evidence, are we
16 talking about competent summary judgment proof
17 as provided under paragraph (c) of this rule?
18 Did I understand that yesterday? We're
19 cross-referencing back? We're not talking
20 about necessarily evidence admissible at
21 trial?

22 MR. JACKS: That's what the
23 comment says in its last paragraph, "The
24 existing rules continue to govern what
25 constitutes appropriate summary judgment

1 evidence."

2 HON. DAVID PEEPLES: We
3 certainly intend that. At least I do.

4 CHAIRMAN SOULES: And that was
5 part of our vote yesterday when we were up
6 there talking about would it be admissible at
7 trial and so forth. Okay. Tommy.

8 MR. JACKS: In that regard, I
9 think the comment should --

10 CHAIRMAN SOULES: Okay. We
11 stand adjourned for five minutes. Everybody
12 get done talking, because the court reporter
13 cannot take the person that has the floor's
14 comments when there is a clutter of noise in
15 the background.

16 MR. JACKS: Can we please not
17 take a break, because I'm already on borrowed
18 time with my wife. I mean, I was supposed to
19 leave --

20 CHAIRMAN SOULES: Well, we'll
21 try it without a break, but I don't know
22 whether it will work. Okay.

23 MR. JACKS: My suggestion is
24 that the last sentence of the comment be
25 broadened somewhat by saying the existing

1 rules continue to govern the general
2 requirements of motions for summary judgment,
3 including what constitutes appropriate summary
4 judgment evidence. My point is you've got
5 other things like time limits for filing the
6 motions and how many days before the hearing
7 and responses to court orders, and those, too,
8 apply to a paragraph (i) motion. That
9 language may not be the most artful way of
10 saying it, but it gets the idea across, and
11 again, the draftspersons can refine it.

12 MR. LOW: I'll second that
13 motion.

14 CHAIRMAN SOULES: Okay. Any
15 dissent? Okay. That will be approved.

16 Anything else on paragraph (i)? Elaine
17 Carlson.

18 PROFESSOR CARLSON: Just one
19 other last point of clarification. The
20 movant's attorney does not have to be the
21 movant's attorney in charge, is that correct?

22 CHAIRMAN SOULES: Correct.

23 MR. JACKS: It just has to be
24 an attorney on his behalf.

25 CHAIRMAN SOULES: It will be

1 someone who becomes counsel of record by
2 filing a motion for summary judgment for the
3 first time.

4 MR. McMAINS: Someone
5 expendable.

6 CHAIRMAN SOULES: Anything else
7 on paragraph (i)? Justice Duncan.

8 HON. SARAH DUNCAN: As long as
9 Elaine has brought up the point, I guess there
10 is no sentiment, is what we're hearing, that
11 it has to be the attorney in charge?

12 MR. ORSINGER: I would vote for
13 that. No? All right.

14 MR. GALLAGHER: We couldn't
15 hear you.

16 HON. SARAH DUNCAN: I guess
17 there's no sentiment that the person signing
18 this no-evidence summary judgment motion
19 should have to be the attorney in charge for
20 that party and not someone who is brought in
21 just to sign this motion?

22 MR. JACKS: On behalf of the
23 attorneys in charge, I think.

24 MR. GALLAGHER: I think anybody
25 ought to be able to sign it.

1 CHAIRMAN SOULES: One at the
2 time, please. Would anybody like to speak to
3 Justice Duncan's suggestion? Tommy Jacks.

4 MR. JACKS: Not necessarily
5 endorsing the system, but acknowledging the
6 system, that in the real world it is
7 frequently not the attorney in charge who
8 would be able to say honestly that he or she
9 has reviewed all the discovery in the case in
10 the certificate. I think we ought to leave it
11 as it is.

12 CHAIRMAN SOULES: Buddy Low.

13 MR. LOW: Oftentimes there are
14 three or four of us on the pleadings that have
15 different roles. Like I have cases with
16 Ernest Kennedy, and he's the lead counsel, but
17 I sign most of it because I know more.

18 I mean, I just think we took it out of
19 Rule 8. We redid Rule 8. It used to be
20 "attorney of record" and we've gone through
21 all of that. I wouldn't go for "attorney in
22 charge." I think it should be attorney of
23 record, but we don't find it anymore.

24 CHAIRMAN SOULES: Anyone else?
25 Does anyone want to make a motion? No motion

1 is on the floor. We'll move on. Anything
2 else on paragraph (i)? Richard Orsinger.

3 MR. ORSINGER: I'd like to find
4 out who is going to do the final draft and
5 when.

6 CHAIRMAN SOULES: Anything else
7 on paragraph (i) before we go to logistics?

8 PROFESSOR ALBRIGHT: I have
9 something on a different paragraph in the
10 summary judgment rule.

11 CHAIRMAN SOULES: Okay. Did
12 you have something else, Paula, on
13 paragraph (i) before we go to logistics?

14 MS. SWEENEY: Only,
15 Mr. Chairman, to note that all of the votes
16 that have been taken -- and I'm just doing
17 this because I don't want to waive objection,
18 because some of the votes I have felt have
19 been analyzed retrospectively differently than
20 they were made prospectively. All of the
21 votes at least that I have made on this rule
22 are subject to protest or to objection that I
23 think this is a terrible rule that we
24 shouldn't have, and the fact that we've worked
25 to draft something that has as few warts on it

1 as possible shouldn't be construed as
2 endorsing the rule. Thank you.

3 CHAIRMAN SOULES: Okay.
4 Justice Duncan.

5 HON. SARAH DUNCAN: In the
6 comment, fourth line, can we add "an element
7 of" between "for" and "a"? "The motion must
8 be specific in challenging the evidentiary
9 support for an element of a claim or defense."

10 MR. JACKS: For an element of a
11 claim or defense?

12 HON. SARAH DUNCAN: Yes

13 CHAIRMAN SOULES: Okay.

14 MR. JACKS: I'll second that.

15 CHAIRMAN SOULES: Any objection
16 to that? There's none. That will be passed.
17 It will be approved.

18 Okay. Anything else on paragraph (i)?
19 Okay. Who -- Judge Peeples, you've had
20 control of the draft. That's certainly fine
21 with me, unless you want to cede it to someone
22 else.

23 HON. DAVID PEEPLES: I'll be
24 glad to do it. If I can get the names of
25 anybody that wants it, I can do all this and

1 fax it by noon Monday to the people, and they
2 can look at it. I'm doing nonjury this week,
3 Thanksgiving week, and it would be great to --

4 MR. ORSINGER: Aren't you going
5 to need the transcript of the hearing, or do
6 you have all of these edits down?

7 HON. DAVID PEEPLES: Well, I've
8 been writing down what we're doing.

9 CHAIRMAN SOULES: All right.
10 Who wants to get the earliest draft in order
11 to give comments back to Judge Peeples?
12 Richard, Alex, Joe, Tommy, Sarah, and Scott
13 Brister. Anybody else? Okay. If you can run
14 the traps, then, with them on your draft to
15 get that back, and then if you will send it to
16 me, I will send it to the entire committee.

17 HON. DAVID PEEPLES: You just
18 want the final product?

19 CHAIRMAN SOULES: Well, I want
20 your --

21 HON. DAVID PEEPLES: Whatever
22 we end up with?

23 CHAIRMAN SOULES: Right.

24 HON. DAVID PEEPLES: I'll pass
25 around a sheet in a minute and you all put

1 your fax numbers on it and I'll put mine.
2 Whatever you send to me has got to have my
3 name it because I share a fax with a bunch of
4 people. And what I have in mind is you
5 getting back to me and I'll just keep hitting
6 you with drafts, and then by Thanksgiving
7 we'll have something, if you all are as fast
8 as I'm going to be.

9 CHAIRMAN SOULES: Okay. So by
10 Wednesday you're going to have something
11 probably over my fax machine. Okay.

12 MR. ORSINGER: Now, Luke, would
13 you contemplate, then, that that would come
14 back up for committee vote at the January
15 meeting and then get forwarded to the Supreme
16 Court?

17 CHAIRMAN SOULES: Yes. But
18 because of the timeline that we seem to be
19 confronted with, I think when you get this
20 rule from me, everybody please look at it. If
21 you've got anything to say about it, write me
22 back. Let's try to get it done ahead of the
23 meeting and then spend as little time as we
24 can, because we've got a lot of work to do on
25 other issues and everybody is going to have

1 anxieties about getting this out in a correct
2 way, so let's get as much of it done in
3 advance of the meeting as we possibly can.

4 Alex, now, you had something else
5 elsewhere in the summary judgment rule?

6 PROFESSOR ALBRIGHT: Right. As
7 I understand it, you all decided to leave the
8 rest of the summary judgment rule the same.
9 And the only thing I want to point out is if
10 you look at (e) of Rule 166a, you can see it
11 on the red-lined draft, I gave it to you all
12 yesterday, "Case Not Fully Adjudicated on
13 Motion." What this does is it allows the
14 judge to ascertain what material issues exist
15 without substantial controversy and what
16 material facts are actually and in good faith
17 controverted.

18 Oh, I'm sorry, it's on Page 3 of the
19 red-lined draft. It is old (e), new (h), the
20 way I have redrafted this. It says "Order,"
21 and then crossed out, "Case Not Fully
22 Adjudicated on Motion."

23 So it allows the judge, if you look down
24 to the bottom part of that paragraph where
25 it's crossed out, it allows the judge to

1 determine what issues exist without
2 substantial controversy and which ones are in
3 good faith controverted. And it allows the
4 judge to make an order specifying the facts
5 that appear without substantial controversy
6 and to direct at the trial that those cases
7 are not at issue.

8 Well, under our procedure, the judge
9 cannot take a fact issue out of the case
10 because it does not have substantial
11 controversy. It's got to have no evidence or
12 conclusive evidence, so this is wrong. I
13 imagine this came out of the federal rule
14 many, many years ago and no one ever did
15 anything to it.

16 So I would propose that we change this
17 paragraph as it appears on my red-lined draft
18 which makes it clear that the judge can --
19 that in effect the judge can determine what
20 facts actually are established as a matter of
21 law and can direct the trial accordingly, but
22 the standard is the legal sufficiency of the
23 evidence and not without substantial
24 controversy.

25 MS. GARDNER: I'll second that.

1 HON. SARAH DUNCAN: I've always
2 wondered about that paragraph.

3 HON. SCOTT A. BRISTER: So just
4 drop "substantial."

5 PROFESSOR ALBRIGHT: Well, if
6 you look at the red-lined draft, this is
7 pretty much -- you and I had pretty much the
8 same language on this.

9 CHAIRMAN SOULES: Can we get
10 past the first sentence then?

11 PROFESSOR ALBRIGHT: Yeah, take
12 out that first sentence. But the redraft of
13 the existing paragraph --

14 CHAIRMAN SOULES: This really
15 just conforms to -- old paragraph or existing
16 paragraph (e) -- to what the real-world
17 practice is.

18 PROFESSOR ALBRIGHT: To what
19 the law is.

20 CHAIRMAN SOULES: Yeah. Okay.
21 It's been moved and seconded that the language
22 that has been proposed as paragraph (h) on
23 Page 3 of the red-lined Draft 1 be substituted
24 for the old paragraph (e); that is, that
25 paragraph (e) be modified as shown here except

1 for the first sentence of the proposed (h).
2 Moved and seconded. Any discussion?

3 Any opposition? No opposition. That
4 passes. Rusty.

5 MR. McMAINS: Luke, I was only
6 concerned about one thing in this (i), other
7 than the whole thing, and that is the
8 paragraph towards the bottom that says, "The
9 court shall grant the motion unless." That
10 appears to be mandatory, and I'm not sure
11 that -- I mean, there will be people,
12 especially nowadays, that will take the
13 position the third time on mandamus on the
14 denial of such a motion --

15 MS. GARDNER: Rusty, the
16 original --

17 CHAIRMAN SOULES: Let Rusty
18 finish. Go ahead, Rusty.

19 MR. McMAINS: Well, I don't
20 believe that this is -- I don't have a problem
21 with it saying that the motion should be
22 granted, may be granted, the court has
23 authority to grant such a motion unless, but
24 any directive of "shall," which incidentally
25 we're taking out of most of our rules anyway

1 due to Mr. Garner and his crowd, but that is
2 going to be used as a basis for a mandamus on
3 a denial of a summary judgment, especially
4 after Tilton, and I think this is a serious
5 mistake to use that word in this context.

6 CHAIRMAN SOULES: Okay. Note
7 that in paragraph 166a(c) the language is
8 there "The judgment sought shall be rendered
9 forthwith," even, it says, but whether we --
10 okay. So Rusty, what's your proposal?

11 MR. McMAINS: That the court
12 may grant the motion or should grant the
13 motion unless. I think "should." I don't
14 like the word "shall."

15 CHAIRMAN SOULES: So the court
16 should grant the motion. "Should" instead of
17 "shall." You're moving to substitute
18 "should" instead of "shall." Is there a
19 second?

20 MS. SWEENEY: Second.

21 CHAIRMAN SOULES: Moved and
22 seconded. Discussion. Judge Peeples.

23 HON. DAVID PEEPLES: Our whole
24 history is of courts being reluctant to grant
25 summary judgments. It's already in the rule.

1 And if the Tilton case is moving toward
2 mandamus, that's for the Supreme Court, but
3 why in the world would we take out -- I think
4 judges need to be told, "You're supposed to do
5 this if this is the state of the evidence."
6 If a judge doesn't want to grant a summary
7 judgment, as I understand the law, that's not
8 appealable or mandamusable anyway, and so I
9 just think you need to tell people that if
10 that's the way the evidence comes out and
11 everything is done right, you're supposed to
12 grant it.

13 CHAIRMAN SOULES: Anne Gardner.

14 MS. GARDNER: Well, I just
15 agree with Judge Peeples that our rule has
16 always said the judgment shall be rendered
17 forthwith if it's established. And if we
18 change it in (i), then we ought to change it
19 in the whole summary judgment rule.
20 Otherwise, if we change it to "may" or
21 "should" in paragraph (i), we might as well
22 omit paragraph (i) altogether.

23 CHAIRMAN SOULES: Paula.

24 MS. SWEENEY: If we leave
25 "shall" in, we're opening the door to another

1 cottage industry, which is going to be the
2 mandamus on denial of summary judgments,
3 whether they have any merit or not. You build
4 in delay. You build in expense for the other
5 side. It's another way to abuse the process.
6 I don't see any reason to encourage that.
7 There's enough vice in the system as it is.

8 CHAIRMAN SOULES: Richard
9 Orsinger -- Anne Gardner.

10 MS. GARDNER: Excuse me, it's
11 already worded that way in paragraph (c) as
12 you've pointed out.

13 CHAIRMAN SOULES: Richard
14 Orsinger.

15 MR. ORSINGER: As much as I
16 would like to see that mandamus practice open
17 up, maybe the better way to do this is to just
18 drop one at the end saying that except where
19 otherwise provided by law, the refusal or the
20 denial of a motion for summary judgment is not
21 subject to mandamus review. Now, we know that
22 it is under the Civil Practice and Remedies
23 Code when it's a first amendment defendant,
24 media defendant, I believe. But in other
25 circumstances, why don't we call a spade a

1 spade instead of fooling around with words
2 that have one meaning at the trial level and a
3 different meaning at the Supreme Court level?

4 CHAIRMAN SOULES: Any other
5 discussion?

6 MR. ORSINGER: I would move
7 that as an alternative to your motion. I don't
8 know if that's proper procedure.

9 CHAIRMAN SOULES: Well, let's
10 see where the vote goes.

11 MR. McMAINS: I don't think we
12 have the power to tell the Supreme Court what
13 they need to do.

14 MR. ORSINGER: The Supreme
15 Court is telling everyone else that if they
16 adopt this rule. It's not us telling them.

17 CHAIRMAN SOULES: Elaine
18 Carlson, did you have a comment?

19 PROFESSOR CARLSON: I just
20 wanted to say everything that I've read about
21 Celotex emphasizes in the federal system that
22 the court still has a measure of option and
23 discretion whether to grant the motion, and I
24 think it's a very different kind of motion
25 than the traditional motion, and I would be in

1 favor of Rusty's proposal.

2 CHAIRMAN SOULES: Anything
3 else? Those in favor show by hands. Five.

4 Those opposed. Eight. The motion fails
5 eight to five. Richard Orsinger.

6 MR. ORSINGER: I'd like to move
7 that we add a separate proviso after the
8 appeal proviso saying that except for
9 otherwise provided by law the denial of a
10 motion for summary judgment is not subject to
11 mandamus review.

12 HON. C. A. GUITTARD: That will
13 help the courts of appeals.

14 MR. LOW: I would second
15 anything that discourages mandamus, so I'll
16 second.

17 CHAIRMAN SOULES: I guess this
18 is kind of a snide comment, but isn't Tilton
19 the law?

20 MR. ORSINGER: Tilton may not
21 be valid if the Supreme Court accepts this
22 suggestion.

23 CHAIRMAN SOULES: Except as
24 otherwise provided by Tilton?

25 MR. ORSINGER: I don't know how

1 to draft around that. But I would think that
2 if the Supreme Court adopts this rule it will
3 be a signal to everyone that nobody is going
4 to be getting mandamused except for what the
5 Civil Practice and Remedies Code says.

6 CHAIRMAN SOULES: Okay. So
7 Richard moved. Buddy, do you second?

8 MR. LOW: After -- yeah, I'll
9 second it.

10 CHAIRMAN SOULES: Okay. Any
11 more discussion? Those in favor show by
12 hands. Seven.

13 Those opposed. Four.

14 So it passes by seven to four.

15 MS. SWEENEY: Could you read it
16 one more time, please, Richard?

17 CHAIRMAN SOULES: Richard.

18 MR. ORSINGER: Except as
19 otherwise provided by law, the denial of a
20 motion for summary judgment is not subject to
21 mandamus review.

22 CHAIRMAN SOULES: And is that a
23 new paragraph?

24 MR. ORSINGER: I'd drop it on
25 as a separate paragraph after "Appeal."

1 CHAIRMAN SOULES: It's a new
2 (j)?

3 MR. ORSINGER: Yeah.

4 CHAIRMAN SOULES: Anything
5 else? Judge Guittard.

6 HON. C. A. GUITTARD: There is
7 one sentence in the old (b), now (c), I guess,
8 that has always struck me as odd, and I think
9 it needs to be clarified. It says, "A ground
10 for summary judgment not expressly presented
11 in a motion or response shall not be
12 considered." And I think my concern has been
13 taken care of if this language is inserted:
14 "or for denial of the summary judgment."

15 I want to make sure that that point has
16 been passed on and recommended by the
17 committee, "a ground for summary or for denial
18 of a summary judgment not expressly presented
19 in a motion or response shall not be
20 considered," because it doesn't make any sense
21 to say, "A ground for summary judgment not
22 presented in a response," when the respondent
23 is not going to present any ground for summary
24 judgment.

25 CHAIRMAN SOULES: Doesn't that

1 go against the vote we took yesterday --

2 HON. C. A. GUITTARD: Does that
3 change it?

4 CHAIRMAN SOULES: -- that we
5 would not change -- didn't we vote yesterday
6 not to change the right to legally contest a
7 motion for summary judgment on any ground,
8 anything you want to raise on appeal that
9 attacks the legal sufficiency? That really
10 goes to that issue, I think, Judge.

11 HON. C. A. GUITTARD: Well, if
12 that's the case, we should strike out "or
13 response," if you don't want it. If that's
14 the view that the committee takes, then that
15 means you strike out the words "or response,"
16 because you can't raise -- you don't raise a
17 ground for summary judgment in a response.

18 HON. DAVID PEEPLES: Can I ask
19 where this is in the existing rule? I've been
20 trying to find it.

21 HON. C. A. GUITTARD: It's in
22 (c), I believe. Let's see, well, what it says
23 is a little bit different language in the
24 present rule, "Issues not expressly presented
25 to the trial court by written motion, answer

1 or other response shall not be considered."

2 Now, does that --

3 CHAIRMAN SOULES: That language
4 is there and it's been interpreted.

5 HON. C. A. GUITTARD: Is there
6 any problem about that?

7 MR. LOW: No.

8 CHAIRMAN SOULES: It may be
9 that the language is not consistent with the
10 appellate decisions or the appellate decisions
11 are not consistent with the language, but
12 everybody knows what they are, I think.

13 Does anyone need to change? Does anyone
14 feel it needs to be changed? Okay. No change
15 there.

16 Anything else on summary judgments?

17 Okay. Judge Peeples, it's in your able
18 hands then, you and your group, and we'll see
19 that midweek next week.

20 Let's see, Richard, I think you're on
21 deck.

22 MR. ORSINGER: Okay. We were
23 in the middle of Section 3 yesterday, but I
24 think it would be better to have Bill continue
25 with that since he's the actual draftsman of

1 the changes, and I think Austin is fogged in
2 and he's not here right now.

3 So I would propose that we move to the
4 Clerks Rules which Bonnie has drafted, which
5 we discussed last time, and we have come back
6 with changes, and it's a packet that's
7 entitled Clerks Committee Report to Supreme
8 Court Advisory Committee on Rules 15-165,
9 Bonnie Wolbrueck, dated 11-22-96. It's at the
10 end of the table here, and I'm going to ask
11 Bonnie to take us through and talk to us about
12 the changes that we made.

13 MS. SWEENEY: The end of which
14 table where?

15 MR. ORSINGER: We've got a
16 limited number of copies, so look and see if
17 you've got it in your packet. It's Rules 15
18 through 165.

19 CHAIRMAN SOULES: Let me pass
20 something out that Judge Evans sent so you can
21 have it. Bring it with you next time.

22 MR. ORSINGER: Okay. Is
23 everybody situated? Then I guess we can go
24 on, Bonnie.

25 MS. WOLBRUECK: Okay. I would

1 just note the corrections made since the last
2 Advisory Committee meeting.

3 Beginning on Page 4, number (h), Transfer
4 of Venue Change, there were just a couple of
5 words that were changed to take out the words
6 "a transcript of" all original papers on the
7 third line. And there was also some concern
8 during the last Advisory Committee meeting of
9 an interlocutory appeal and any reference to
10 that in regards to the clerk's duties on the
11 transfer of the record, and that information
12 was found to not be necessary to be included.

13 MR. ORSINGER: Let me comment
14 on that. David Keltner said he was going to
15 look into it and then later on sent a letter
16 to Bonnie withdrawing his concern. And I
17 think in our discussions we recognized that
18 there is not an interlocutory appeal from the
19 denial of a venue transfer. It's from the
20 denial of the opportunity of a party to
21 intervene.

22 Alex, are you listening? Did I say that
23 right?

24 You don't have an interlocutory appeal
25 from the granting of a venue transfer. You

1 have an interlocutory appeal from the refusal
2 to permit a party to intervene.

3 PROFESSOR ALBRIGHT: To either
4 intervene or an additional plaintiff to join.
5 So venue is proper in this case, in this
6 county, over one plaintiff, so one plaintiff
7 can establish venue as proper in this county.
8 So we can try this case with this plaintiff
9 and these defendants in this county. The
10 question is whether we are going to allow
11 other plaintiffs who cannot independently
12 establish venue to join in this lawsuit. So
13 the issue is not whether this case is going to
14 be transferred someplace else, the issue is
15 whether we're going to let these plaintiffs in
16 or make them go file their lawsuits someplace
17 else.

18 MR. ORSINGER: So under that
19 analysis, we're never going to have a
20 situation where there's an interlocutory
21 appeal after the papers have been transferred
22 to another court. It's going to be out of the
23 same court that denied the intervention.

24 PROFESSOR ALBRIGHT: Or granted
25 the intervention.

1 MR. ORSINGER: Or granted the
2 intervention, so that's a non-issue. We've
3 decided not to worry about that. We're not
4 ever going to be shipping papers out to
5 another court when interlocutory appeal is
6 available under the current statute.

7 CHAIRMAN SOULES: Okay.

8 MS. WOLBRUECK: Going on then
9 to Page 5, we had some discussion on the
10 disposition of exhibits and depositions and
11 discovery by the clerk. And the discussion
12 was around the factor that the party that
13 offered an exhibit should be allowed to obtain
14 that exhibit first, so in the first paragraph
15 on Page 5 we have made reference to that.

16 The underlined portion says, "If a party
17 requests any exhibit, deposition or other
18 discovery, the clerk of the court may, without
19 court order, release such to the party that
20 offered the exhibit or filed the deposition or
21 other discovery after the required time period
22 stated in this rule. If the party that
23 offered the exhibit or filed the deposition or
24 other discovery does not want such, the clerk
25 of the court may release it to any party upon

1 request."

2 Okay. I think that takes care of the
3 matter that we discussed at the last meeting.

4 CHAIRMAN SOULES: Okay.

5 MS. WOLBRUECK: Going on to
6 Page 6, the Appealable Order, No. 2, we made
7 reference to that according to the view of
8 Rule 304, I think it is, and made clear that
9 the notice shall go to each party or the
10 party's attorney. That was the only change in
11 that.

12 Going on to No. 3, Disposition Notice, we
13 have rewritten this to clarify it: "The clerk
14 of the court may include in the default
15 judgment notice of the appealable order
16 notice, a disposition notice that all exhibits
17 and discovery will be disposed of by the clerk
18 of the court according to the procedures and
19 time periods in this rule."

20 I think that there was some concern over
21 the previous wording, and we just have
22 clarified that the clerk may include the
23 disposition notice in with the other notice.

24 Going on to Page 7, we had quite a bit of
25 discussion on the fax filing rule, and we have

1 changed this in regards to the direction of
2 the last committee meeting. The changes are,
3 basically there was some discussion over the
4 fee and payment, and now under number (3) the
5 only thing that is stated there is that "Court
6 costs and fees shall be paid by a payment
7 method authorized by the clerk of the court."

8 And the other discussion stemmed around
9 filing. And we have changed number (8), which
10 now reads, "Each page of any document received
11 by the clerk of the court will be
12 automatically imprinted with the date and time
13 of the receipt. The date and time imprinted
14 on the first page" -- and there was a great
15 deal of discussion about that, about
16 transmissions prior to 5:00 o'clock that ended
17 after 5:00 o'clock. "The date and time
18 imprinted on the first page of the document
19 will determine the time of filing, if received
20 during a normal business day before 5:00 p.m.
21 Transmissions received after 5:00 p.m., on
22 weekends or holidays shall be deemed filed on
23 the first day the clerk of the court's office
24 is open for business following receipt of
25 transmission."

1 So basically fax filing would be treated
2 as mail or hand delivery filing.

3 CHAIRMAN SOULES: No, the
4 mailbox rule is --

5 MS. WOLBRUECK: Well, mailbox
6 is different, that's correct.

7 CHAIRMAN SOULES: Fax filing
8 will be like actual come-to-the-counter --

9 MS. WOLBRUECK: Actual over-
10 the-counter filing, right.

11 HON. SARAH DUNCAN: Can I just
12 suggest a comma. Subsection (8), line 4,
13 where you say "after 5:00 p.m., on weekends or
14 holidays," it seems to me that would be
15 clearer if you put the comma in after "on
16 weekends," as in a series, so that nobody
17 interprets that to mean only after 5:00 p.m.
18 on a weekend or only after 5:00 p.m. on a
19 holiday.

20 CHAIRMAN SOULES: How about "or
21 on weekends or on holidays"?

22 MS. SWEENEY: Yeah, that's
23 best.

24 CHAIRMAN SOULES: With the
25 comma?

1 MR. ORSINGER: Shouldn't there
2 be a comma after holidays?

3 HON. C. A. GUITTARD: If you
4 have a comma before, you ought to have it
5 after.

6 CHAIRMAN SOULES: Not in a
7 series, Judge.

8 MR. ORSINGER: It's not right
9 to put a comma after "holidays"?

10 CHAIRMAN SOULES: It's okay.

11 MR. YELENOSKY: It's
12 permissible.

13 CHAIRMAN SOULES: It's not a
14 parenthetical, it's a series.

15 HON. C. A. GUITTARD: Take out
16 the first comma.

17 CHAIRMAN SOULES: Okay.
18 Anything else, Bonnie?

19 MS. WOLBRUECK: Okay. The next
20 change is on Page 11, just a minor correction
21 on -- this is in regards to Rule 99 on the
22 issuance and form of citation. Number (11),
23 to clarify on the very last sentence of number
24 (11), was "The notice should contain," and it
25 now says in the very last sentence after

1 "default judgment," it says, "for the relief
2 demanded in the petition." And we had failed
3 to include that in the last draft, and so
4 that's just a minor correction that was made
5 there.

6 CHAIRMAN SOULES: Somebody is
7 going to have to get on a word processor after
8 our votes of yesterday, because I think this
9 is now called a complaint --

10 MR. ORSINGER: It is.

11 CHAIRMAN SOULES: -- and not a
12 petition, so we'll need to scrub through that.

13 MS. WOLBRUECK: I'll make those
14 corrections in here wherever "petition" is
15 stated.

16 CHAIRMAN SOULES: Okay. Next.

17 MS. WOLBRUECK: Okay. We did
18 the same thing on Page 18, just corrected it
19 in the citation by publication rule, added
20 that. And we'll have to go through those also
21 and pick up the "complaint" instead of the
22 "petition."

23 We did the same thing on Page 19, the
24 form of the citation for out of state. We
25 added that verbage in there also.

1 Then on Page 21, Rule 142, Security for
2 Costs, we had tried to change this rule
3 according to the last direction of the
4 committee. "All statutory filing fees that
5 are required to be collected by the clerk of
6 the court are due at the time of filing or
7 request for services. The clerk of the court
8 shall require from a party fees before
9 performing any other services or issuing any
10 process."

11 And hopefully that takes care of all the
12 issues that we discussed at the last meeting.

13 CHAIRMAN SOULES: It seems to
14 me it does. Do you agree, Richard?

15 MR. ORSINGER: Yes, I do.

16 CHAIRMAN SOULES: Steve
17 Yelenosky.

18 MR. YELENOSKY: There were just
19 a couple of stylistic things I noted in here
20 and I don't know whether that's in order or
21 not, but I can point to them specifically.

22 CHAIRMAN SOULES: Go ahead.

23 MR. YELENOSKY: But generally I
24 noted a number of places where the term "such"
25 was used, which at least in my writing I try

1 to disfavor. I don't know if other people
2 feel that way or not, but I think it could be
3 replaced wherever it's used with another
4 word.

5 On the first page, the part (b),
6 Assignment of Case Numbers, the second line,
7 "which shall be known as the case number," I
8 think is self-evident. That can be taken
9 out.

10 On Page 5 -- oh, that was just the "such"
11 appeared, and I noted it again on 15 and I
12 think a couple of other places, but those are
13 just stylistic comments.

14 MS. WOLBRUECK: I think that
15 probably Bill Dorsaneo will go back through
16 these and rework the words.

17 HON. C. A. GUITTARD: Or Bryan
18 Garner.

19 MS. WOLBRUECK: Yeah, or Bryan
20 Garner.

21 MR. ORSINGER: Steve, do you
22 have your edits on paper?

23 MR. YELENOSKY: Those, yeah.
24 But it was just random where I saw "such." I
25 didn't do a word processor search for it, but

1 that's what I would do.

2 HON. C. A. GUITTARD: Bryan
3 Garner will take out all those "suches."

4 MR. ORSINGER: Is Bryan Garner
5 going to look at these?

6 CHAIRMAN SOULES: I don't know.

7 MS. WOLBRUECK: Those were all
8 the corrections that I had from the last
9 committee meeting.

10 CHAIRMAN SOULES: Okay. We
11 have before us, then, the Clerks Committee
12 Report to Supreme Court Advisory Committee on
13 Rules 15-165, with the parenthetical that it
14 includes corrections. It's by Bonnie
15 Wolbrueck, dated 11-22-96. We've been through
16 the work which is Pages 1 through 22.

17 Does it stand approved? Does anyone
18 disagree? Okay. This stands approved in its
19 entirety.

20 MR. ORSINGER: Okay. Luke,
21 another issue that's important to us is the
22 recusal disqualification. However, the
23 proposed language we were going to discuss is
24 language prepared by Judge Brister. Judge
25 Brister is not here. I'm not sure exactly

1 what wordings he made in the justification for
2 it, and I'm going to suggest that we put that
3 off until Judge Brister is here.

4 CHAIRMAN SOULES: Okay. Put
5 165a on the January agenda specifically for
6 Judge Brister -- I'm sorry. 18a and 18b.

7 MR. ORSINGER: And since Bill
8 Dorsaneo has not yet arrived, I would suggest
9 we take up our agenda where we left off before
10 and continue with that. And if we get that
11 exhausted, we either decide that I'll give
12 Bill's presentation or we'll move on to what's
13 next on your list.

14 CHAIRMAN SOULES: Okay.

15 MR. ORSINGER: I'm prepared to
16 do Bill's agenda, but I didn't make the
17 changes and so I may not articulate them and
18 explain them as well as Bill can.

19 CHAIRMAN SOULES: Okay. So
20 we're on our disposition chart?

21 MR. ORSINGER: We're moving to
22 our disposition chart that's dated as of
23 September 20, 1996, for this Rule 15-16a
24 subcommittee. And just so you'll know, when I
25 say "as of September 20th," that means as of

1 the votes we took on September 20th.

2 We want to go to Page 12 of this
3 disposition chart, and the very last item at
4 the bottom of it is the next item for us to
5 consider, Rule 156 on Page 274 of the original
6 Volume 1. I think you call this the agenda?

7 CHAIRMAN SOULES: Right.

8 MR. ORSINGER: Okay. So we're
9 all together on this, we're on Page 12, we're
10 on the bottom entry, which is Rule 156, and
11 we're on Page 274 of Volume 1 of our agenda.

12 Now, this is a proposal from Kim Spain
13 that in some places in our rules we use the
14 term "nonjury" without a hyphen and in some
15 places we use the word "non-jury" with a
16 hyphen, and he wants us to be consistent. And
17 the subcommittee recommends that we go with
18 "non-jury" throughout the rules.

19 CHAIRMAN SOULES: Any
20 objection? It stands approved.

21 MS. SWEENEY: Boy, I'm glad we
22 got that done.

23 HON. SARAH DUNCAN: Feels good,
24 doesn't it?

25 CHAIRMAN SOULES: Next.

1 MR. ORSINGER: Page 13,
2 Rule 162, Page 275 of the agenda is a
3 submission without explanation of a photocopy
4 of a news announcement of an amendment to the
5 federal rules regarding directed verdicts.
6 And this has nothing to do with nonsuits,
7 which Rule 162 would relate to nonsuiting,
8 dismissal or nonsuit, so we would reject the
9 suggestion as to the dismissal of nonsuit
10 issues and don't think that the federal
11 provisions are pertinent to our motion for
12 directed verdict or motion for judgment
13 practice, so we recommend no change.

14 CHAIRMAN SOULES: Any
15 objection? No change is approved.

16 MR. ORSINGER: Next pertains to
17 Rule 165, Page 276 of the agenda. These are
18 proposals that the notice of dismissal of a
19 suit for want of prosecution should be pushed
20 out far enough in advance to permit someone to
21 request a trial setting which in a non-jury
22 matter requires 45 days' notice for your
23 initial trial setting. And the proposal was
24 that we ought to mandate that more than
25 45 days' notice is given of docketing the case

1 for dismissal so that someone can secure a
2 non-jury trial setting before that time or
3 even a jury trial setting, I suppose, but at a
4 minimum 45 days' notice of trial.

5 And our subcommittee felt like this was a
6 reasonable recommendation and that we ought to
7 require 60 days' notice of docketing a case on
8 the dismissal docket which then would permit
9 someone to set it for trial before then.

10 CHAIRMAN SOULES: How would it
11 work?

12 MR. ORSINGER: Well, what we're
13 proposing is that there would be some kind of
14 language in Rule 165a for dismissals for want
15 of prosecution saying that there would be a
16 minimum of 60 days notice before dismissal.

17 It says here in subpart (1) of the rule,
18 the first sentence says, "A case may be
19 dismissed for want of prosecution. Notice of
20 the court's intention to dismiss and time and
21 place shall be sent by the clerk to each
22 attorney of record." And we could say "at
23 least 60 days in advance of the hearing."

24 CHAIRMAN SOULES: Okay. Well,
25 we've got a party with a presumably inactive

1 case, although sometimes other cases get
2 caught up in the process of dismissal, which
3 has not made a jury demand or may have, and
4 who gets given a DWOP notice, which is in
5 effect a trial setting.

6 MR. ORSINGER: Well, I don't
7 know. It depends on what court you're in. In
8 Bexar County a DWOP setting is a special
9 docket and you can't show up and try your case
10 on that day. You have to show up and beg them
11 not to dismiss your case while you have it
12 pending over on the other docket, the trial
13 docket.

14 CHAIRMAN SOULES: I guess my
15 question here is, is this broke? We had a lot
16 of DWOP problems before we went into 165a and
17 had the motion to reinstate, and that notice
18 had to actually be mailed to the parties and
19 things like that. And also we had pretty much
20 a pervasive statewide problem of undisposed of
21 cases, I mean, huge dockets of old stale cases
22 that really have gotten pretty much cleaned
23 up, as I understand it. So do we want to add
24 some additional feature to this? You have to
25 have 45 days. I believe you have to have

1 45 days' notice.

2 MR. ORSINGER: You're saying
3 that the trial setting rule would require
4 45 days' notice of the DWOP?

5 CHAIRMAN SOULES: I think so.

6 MR. ORSINGER: Well, that's
7 interesting.

8 MS. SWEENEY: I know we get
9 notice on less than that that you've been set
10 on the dismissal docket.

11 CHAIRMAN SOULES: Okay. Well,
12 I guess I'm coming from a misconception. I've
13 always thought you had to have 45 days' notice
14 of a disposition as with your trial, and I
15 thought that 45 was fine, but maybe that's --
16 if there's no time period, then if we want to
17 set one, let's set it.

18 So you're proposing that we put a 60-day
19 period of notice into paragraph (1) of 165a,
20 right? That's your committee's
21 recommendation?

22 MR. ORSINGER: That's right.
23 And you need to understand that in the context
24 of this, it is also our recommendation that if
25 you have a regularly scheduled docket call and

1 standing order that if you fail to appear your
2 case may be called for trial or dismissed and
3 you don't appear for that, then independent
4 notice is not required.

5 CHAIRMAN SOULES: Well, that's
6 right. That's the first sentence of
7 paragraph (1) of 165a.

8 MR. ORSINGER: We don't mean to
9 change that. If these rural counties have
10 docket calls once a month and they drop the
11 case if the lawyer doesn't show, we don't mean
12 to affect that. We're talking about where a
13 case is specifically targeted for dismissal
14 that the notice that's sent out saying "You're
15 targeted for dismissal" should go out 60 days
16 before the dismissal date.

17 CHAIRMAN SOULES: All right.
18 Do we have a consensus to do this? Does
19 anyone disagree?

20 Write it up in red-line, if you will, and
21 bring it back so we can take a look at what
22 you've come up with.

23 MR. ORSINGER: Will do.

24 CHAIRMAN SOULES: To accomplish
25 what you said, we don't change the first

1 sentence but we put a 60-day fuse into a
2 dismissal docket.

3 MR. ORSINGER: Okay. The next
4 item is submitted by Professor Hadley Edgar,
5 which is the word "judgment" should be
6 replaced by the words "order of dismissal" in
7 the first sentence of the last paragraph. And
8 the first sentence of the last paragraph says,
9 "In the event for any reason the motion to
10 reinstate is not decided by signed written
11 order within 75 days after the judgment is
12 signed," and he is saying it ought to say
13 "order of dismissal."

14 CHAIRMAN SOULES: Any objection
15 to that? No objection. The change is
16 approved.

17 MR. ORSINGER: The next item
18 moves to the supplemental agenda, Page 28.
19 That is actually a letter from me, and that's
20 already been acted on. That has to do with
21 revisions to the pleadings rules, which is
22 something we've discussed, and we now have
23 stated that clear and concise and we have
24 examples like plaintiff sues defendant for
25 negligent operation of a vehicle. This has

1 already been taken care of.

2 CHAIRMAN SOULES: Okay.

3 Page 14 then.

4 MR. ORSINGER: Paula.

5 MS. SWEENEY: I'm not sure
6 exactly what you mean by "this has already
7 been taken care of." What exactly would this
8 change here require? That summary is a little
9 brief for me.

10 MR. ORSINGER: Well, my
11 proposal, which has been subsumed now in
12 something that's been accepted by the entire
13 committee, was that we go a little bit further
14 in requiring pleaders to state the legal basis
15 for their claim so that you understand
16 conceptually whether they're suing on a
17 contract or negligence or negligence per se
18 under the Deceptive Trade Practices Act or
19 whatever.

20 And that led to discussions about what
21 the pleading requirements ought to be, which
22 led into discussions about special
23 exceptions.

24 And what has resulted in that is that we
25 now have tightened up the language in the

1 rules as to what you must plead, although the
2 procedure professors felt like we were doing
3 no more than stating current case law
4 requirements. However, we voted to put a
5 comment on there to show by way of example how
6 the requirement could be met.

7 And we discussed that yesterday when Bill
8 was talking, for example, of an allegation on
9 damages, was that we're seeking damages for
10 \$100,000. You may remember the conversation.
11 This suggestion here led to that
12 implementation which has already been approved
13 by committee. Did I answer your question?

14 MS. SWEENEY: How is your
15 suggestion -- no. Well, sort of. How is your
16 suggestion here different from existing law?
17 That's what I'm not grasping.

18 MR. ORSINGER: In my view my
19 suggestion is more exacting than the existing
20 language in the rules of procedure but is not
21 more exacting than the requirements
22 articulated by appellate courts as to what
23 those rules mean. So as a practical matter,
24 the idea was that at some point in your
25 pleading you have to identify the legal

1 concept you're relying on.

2 CHAIRMAN SOULES: We passed
3 yesterday a rule that articulates the standard
4 to be applied to pleadings. This is a
5 standard that is similar to what we passed
6 yesterday, but we passed yesterday what the
7 standard is going to be.

8 MR. ORSINGER: It was in
9 Section 3 on Page 1 and 2. And the functional
10 part of it was the comment saying, for
11 example, plaintiff sues defendant for
12 negligent operation of a motor vehicle or
13 plaintiff seeks recovery of attorneys' fees
14 under Civil Practice and Remedies Code
15 Chapter 38, et cetera.

16 So as a proponent of this change, I'm
17 satisfied with the product that the Advisory
18 Committee has approved.

19 CHAIRMAN SOULES: Okay. 14.

20 MR. ORSINGER: Okay.

21 CHAIRMAN SOULES: Page 14.

22 MR. ORSINGER: All right.

23 Page 14 of the disposition chart moves us to
24 Page 32 of the agenda, and this was a proposal
25 from Wendell Loomis who wanted to amend

1 Rule 87(2), which is on motions to transfer
2 venue. His proposal was, there appears to be
3 a conflict as to who has what burden of proof
4 when one party appears to have the burden to
5 show venue is proper in another county while
6 the other party has the burden to show that
7 venue is maintainable -- pardon me. One has
8 to show that venue is proper in the current
9 county and one has to show that venue is
10 proper in the target county, and he asks is
11 that a conflict, and we're saying possibly,
12 but the language is going to have to be
13 rewritten anyway. It's in the process of
14 being rewritten, and so we're just going to
15 carry it out.

16 MR. GALLAGHER: Richard,
17 question. Is the burden placed at all in
18 Chapter 15 of the Civil Practice and Remedies
19 Code?

20 MR. ORSINGER: I'm going to ask
21 Alex to comment on that.

22 PROFESSOR ALBRIGHT: The burden
23 in venue cases?

24 MR. GALLAGHER: Yes. Does
25 Chapter 15 address the burden of proof?

1 PROFESSOR ALBRIGHT: I think
2 that's in the rules. The burden of proof is
3 in the rules. It's Rule 86.

4 MR. GALLAGHER: Okay.

5 MR. ORSINGER: I want everyone
6 to understand that we're in the process of
7 rewriting the venue rules, but we've gotten
8 slowed down by writing the summary judgment
9 rules and a bunch of other things.

10 My subcommittee is reconstituted of
11 members of other committees whose other
12 commitments have slowed down our ability to do
13 this committee's job, so we haven't got to
14 them before. But perhaps by January, I think
15 by January we will have a venue rule that we
16 can put here for evaluation.

17 So our suggestion is to table that, Luke,
18 until we bring up our venue proposal.

19 CHAIRMAN SOULES: Okay. Let's
20 do that.

21 MR. ORSINGER: The next item is
22 Rule 162 on the supplemental agenda, Page 35,
23 and this has to do with a letter that Justice
24 Hecht submitted after the Moriel case and
25 bifurcation as a result of -- well,

1 bifurcation related to the punitive damages
2 component of a case being tried on motion of a
3 party after the liability issues were tried
4 and the actual damages have been determined.
5 And the issue that Justice Hecht raised was
6 how does our nonsuit rule apply if someone
7 tries to nonsuit after they get a verdict in
8 on the first phase of the trial, because if
9 you read the nonsuit rule, it says that you
10 can nonsuit up until you rest on your case in
11 chief.

12 And from one standpoint you could say you
13 haven't rested in your case in chief until
14 after you've rested on the second phase of the
15 trial. And we recognize that as a problem and
16 have proposed language that the plaintiff can
17 only nonsuit having tried the first part of
18 the trial to verdict or actually past the
19 nonsuit point of the first phase, that any
20 nonsuit after that point could only apply as
21 to the second phase, so that if a party tried
22 to nonsuit after the nonsuit point in the
23 first phase, that nonsuit could only apply as
24 to the second phase of the trial, and that
25 would also apply to separate trials.

1 And we have language which is in our
2 proposed materials which Bill Dorsaneo is in
3 the middle of explaining that would implement
4 this concept that if you're trying separate
5 trials and you get past the nonsuit point in
6 one phase of the trial, you can't use the
7 pendency of other phases of the trial to go
8 back and nonsuit the first phase.

9 CHAIRMAN SOULES: May I
10 suggest, if this works for you, where Bill has
11 already drafted something to address these
12 particular issues, and we're not going to talk
13 about Bill, just tell us that it's being
14 carried until Bill reports?

15 MR. ORSINGER: Okay.

16 CHAIRMAN SOULES: And then
17 we'll have the specific language in front of
18 us to deal with it. Okay?

19 MR. ORSINGER: Will do. We'll
20 move on then.

21 CHAIRMAN SOULES: So this is
22 being carried. Rule 162, Supplemental Page 35
23 is being carried until Dorsaneo's later
24 report?

25 MR. ORSINGER: Right.

1 CHAIRMAN SOULES: Okay. Second
2 Supplemental Page 47 through 49 would be next.

3 MR. ORSINGER: Okay. This is a
4 letter from Jim Parker at formerly Johnson &
5 Wortley, and this has to do with recusal.

6 We've been through quite a bit of recusal
7 stuff, we did at this last meeting, and the
8 upshot of it was that Judge Brister agreed to
9 rewrite the recusal rules. And as we just
10 announced earlier, since Judge Brister is not
11 here to defend them, we're going to take them
12 up in January. So we would propose this as
13 the core of the issue that we've been talking
14 about constantly about where the grounds for
15 recusal occurs after your cutoff, 10 days
16 before hearing or trial. And there's no point
17 in debating it now because we have a specific
18 rule to look at that we've agreed we'll look
19 at it in January when Judge Brister is here to
20 defend it.

21 CHAIRMAN SOULES: Okay. Can we
22 have a red-lined version of 18(a) and (b) to
23 look at so we don't inadvertently miss
24 something?

25 MR. ORSINGER: Okay. I will

1 take Judge Brister's proposal and prepare a
2 red-lined version of it.

3 HON. DAVID PEEPLES: Question.

4 CHAIRMAN SOULES: Judge
5 Peeples.

6 HON. DAVID PEEPLES: Is he
7 doing that on his own? Is anyone helping him
8 on that, Richard?

9 MR. ORSINGER: I'm not aware of
10 what input he had. He just made that
11 proposal, and I got it a few days before this
12 hearing, so it has not passed through our
13 subcommittee.

14 HON. DAVID PEEPLES: I looked
15 through his proposal, and I have this
16 concern: I just hate to see repeated changes
17 almost sentence by sentence in a rule unless
18 there's a really good reason for making the
19 changes. And I would rather see us look at
20 identified problems in the recusal rule and
21 deal with those instead of trying to make it
22 perfect. I mean, that's very important.

23 MR. ORSINGER: Does that sound
24 like an offer to do another David Peeples like
25 you did for the --

1 CHAIRMAN SOULES: I wish you
2 would.

3 Here is what happened: When 18a was
4 written, it was a pretty good flow of words
5 that came together and it was worked on
6 extensively by this committee. Then the
7 Supreme Court didn't want the Code of Judicial
8 Conduct be have the grounds for recusal over
9 there because of whatever its reasons, so they
10 got folded in to what was just a procedural
11 rule and then it became to some extent
12 substantive because the grounds got folded
13 in. And additional grounds got folded in
14 which include disqualification. Well, the
15 concept of disqualification doesn't fit
16 recusal, because a judge can't be acting
17 within 10 days or any other time if he's
18 disqualified. So the folding in of the
19 grounds out of the CJC and the folding of --
20 first of all, that made it substantive, and I
21 don't think that was a particular problem.

22 From what I see of that, it seems to be
23 okay, although it got divided. It was 18a.
24 Now it's 18a and 18b. I think maybe that's
25 okay, too, or make it one rule. That doesn't

1 make too much difference.

2 But what the problem got to be was that
3 the recusal procedure doesn't really fit the
4 concept of disqualification. It could, I
5 think, with very slight modification, but it
6 really doesn't, and it wasn't looked at for
7 that purpose when disqualification got folded
8 in. So that's really the only problem with
9 the recusal rule.

10 HON. DAVID PEEPLES: Well, if
11 that's the only problem, then we ought to
12 limit it and focus our efforts on that.

13 CHAIRMAN SOULES: It's a tough
14 rule. Everybody knows how hard it is to get
15 that done, and everybody knows it really needs
16 to be done sometimes. And if the tool we've
17 got is getting the tough cases done enough
18 times to help the parties, I would hate to see
19 it changed, too.

20 But anyway, I would like to see an
21 alternative that does very little to the
22 existing language except fix that problem and
23 any other real problem that we have.

24 Could you take a shot at that, Judge
25 Peeples?

1 HON. DAVID PEEPLES: I'd be
2 glad to talk to Judge Brister about it. And
3 if the committee would allow it, I would like
4 to talk to presiding judges and just see if
5 they know of some procedural problems that the
6 people who make all these assignments and deal
7 with recusals, who assign the judges to hear
8 them and so forth, if there are some things
9 that are not working. I think we ought to
10 find out from them and try to fix them.

11 If, on the other hand, they say, "Hey,
12 it's working pretty well," that says something
13 to me. I want to hear what lawyers and
14 everybody else says about it too, but if the
15 people that deal with this across the state
16 don't have a problem with the procedures, I'm
17 just reluctant to tamper with it.

18 MR. ORSINGER: Well, David, the
19 whole reason that we even brought up this rule
20 was because of the problem about the event
21 that occurs after the 10th day before the
22 hearing or trial. And we fought, fought,
23 fought, fought, fought, and finally ended up
24 with this compromise that you should be able
25 to raise those matters, but that it's going to

1 be a parallel proceeding that will not stop
2 the trial. And that's to take away the
3 incentive from specious motions being filed at
4 the last minute just to secure a continuance.

5 Now, the committee can change its mind at
6 any time, but we have fought that and decided
7 that the best compromise is to permit you to
8 raise something late but not to stop the trial
9 by raising it late, and that takes the
10 incentive away from specious motions.

11 CHAIRMAN SOULES: And that's
12 all we really addressed, and then we got into
13 a complete rewrite.

14 MR. ORSINGER: Yeah. Then we
15 realized that we mixed recusal and
16 disqualification grounds, and the truth is we
17 can't put time deadlines on disqualification
18 grounds because it's a constitutional issue
19 and the judgment is void, so why do we pretend
20 like we are? So then one thing leads to
21 another and it's like the tar baby in the
22 Uncle Remus story.

23 CHAIRMAN SOULES: Okay. So
24 we'll postpone Rule 18a to the next meeting.

25 MR. ORSINGER: And David, if

1 Scott revises his rule, have him fax it to
2 me. I don't want to be red-lining a rule that
3 he's not even proposing.

4 CHAIRMAN SOULES: Try to get
5 that done by the end of the year to you, and
6 then if you'll get it to us, we'll mail it out
7 before the meeting.

8 MR. ORSINGER: Okay. The next
9 item is on the second supplemental agenda,
10 Pages 50 through 53. And this is a letter
11 from Justice Guittard, and you'll see there
12 are a number of them right here in a row, in
13 which Justice Guittard is suggesting that we
14 have a unified rule that would apply to both
15 trial and appellate rules when they're on the
16 same grounds, rather than having parallel
17 rules.

18 Our subcommittee feels like that's a
19 worthy endeavor; however, the Appellate Rules
20 have already been shipped off and are close to
21 being finalized, and so as a practical matter,
22 probably just by the sequence of events we're
23 stuck with stand-alone Appellate Rules; and
24 therefore, we have to continue our separate
25 and parallel Trial Rules and really all we can

1 do is just be sure that they're consistent,
2 rather than unify them at this point.

3 HON. C. A. GUITTARD: We have
4 to make an allowance for the shortness of
5 life.

6 MR. ORSINGER: So this will
7 come up several times. That would be Proposed
8 General Rule 9, Proposed General Rule 5. So
9 we're recommending against that just because
10 of that practicality.

11 CHAIRMAN SOULES: Okay. Any
12 opposition? No change will be made then
13 there.

14 MR. ORSINGER: Now then, that
15 takes us to the top of Page 15, a comment by
16 Kim Spain on the supplemental agenda that we
17 give notice to the AG anytime that -- or the
18 city attorney or other appropriate person when
19 the constitutionality of a statute, rule or
20 ordinance is called into question. I realize
21 now that the subcommittee hasn't voted on
22 that. I don't know why, Luke. I've read this
23 disposition table a hundred times and I'll
24 just have to apologize. I don't know why it
25 slipped through the cracks.

1 CHAIRMAN SOULES: Postponed.

2 MR. ORSINGER: We'll endeavor
3 to have that resolved before the next meeting.

4 CHAIRMAN SOULES: Isn't that a
5 matter of statute anyway?

6 MR. ORSINGER: Well, I think
7 that the law does require that the AG be given
8 notice. I don't know about city attorneys and
9 all of that.

10 CHAIRMAN SOULES: Yeah, you're
11 right.

12 MS. SWEENEY: I'm sorry, I may
13 have missed something, like a whole year of
14 law school. Are you saying if somebody wants
15 to challenge the statute of limitations as
16 being unconstitutional or punitive damages as
17 being unconstitutional, they have to write a
18 letter to the AG telling them that's in their
19 pleadings?

20 CHAIRMAN SOULES: Right.

21 MS. SWEENEY: That's the law?

22 CHAIRMAN SOULES: I think so.

23 MR. GALLAGHER: We think so?
24 Mike Gallagher. We currently are involved in
25 challenging the constitutionality of some

1 legislative enactments last session, and there
2 are three lawyers on the pleadings, and none
3 of us have even given a thought to notifying
4 the AG's office. If that is the law, I sure
5 would like some clarification.

6 MS. SWEENEY: Where is that
7 law? I mean, I'm sorry if --

8 CHAIRMAN SOULES: I don't want
9 to do the research on it, but I know that I've
10 been in a number of cases where constitutional
11 challenges to statutes have been raised and
12 the AG has always gotten notice.

13 MR. LOW: I know a lawyer that
14 has gotten caught on that.

15 CHAIRMAN SOULES: Anyway, this
16 has been postponed. We'll be back to it next
17 time.

18 MR. ORSINGER: Okay. Well,
19 we'll all learn a little bit out of it.

20 The next item is supplemental agenda
21 Page 64. This is a letter from Jim Parker
22 suggesting that telefax transmissions should
23 be effective when the last page is sent. We
24 have supplanted all of this with the debated
25 rule, and we've come back with revisions and

1 they were just approved about 10 minutes ago,
2 so this has been overtaken by events. And we
3 did not in fact do this. We're now going
4 by -- well, wait a minute, that's not right.

5 What we talked about was filing with the
6 clerk, which is entirely different than with
7 another lawyer. We could be inconsistent. We
8 could say that service on a lawyer is
9 effective with the last page, even though
10 filing with the clerk is effective at the time
11 of the first page. I would think we ought to
12 be consistent about that, and so therefore I
13 don't know.

14 The subcommittee voted on this before we
15 made our changes to the effective filing time
16 of a fax filing with the district clerk. I
17 would propose without the authority of my
18 subcommittee that we be consistent and go with
19 the first page.

20 CHAIRMAN SOULES: Any objection
21 to that? That will be done.

22 MR. ORSINGER: Okay.

23 Supplemental Page 66 is another letter from
24 Justice Guittard about a unified rule, and the
25 same problem exists, the Appellate Rules are

1 out, so let's make them consistent but not
2 combine them.

3 HON. C. A. GUITTARD: Well, do
4 we need to make any effort to look at them and
5 see whether they are inconsistent?

6 MR. ORSINGER: I think we
7 should.

8 HON. C. A. GUITTARD: Well,
9 then does that mean that since the Appellate
10 Rules are already out we should look at them
11 and make the Civil Rules conform?

12 CHAIRMAN SOULES: I think so.

13 MR. ORSINGER: Okay.

14 CHAIRMAN SOULES: I mean, we at
15 least --

16 HON. C. A. GUITTARD: Who is
17 going to do that?

18 CHAIRMAN SOULES: Well, Judge,
19 in response to the question do we make the
20 Civil Rules conform, I don't think we're going
21 to give a general position on that, but we
22 certainly need to take up all inconsistencies
23 and determine whether they should be made to
24 conform.

25 HON. C. A. GUITTARD: That was

1 one reasons for the proposed General Rules,
2 was to make sure.

3 MR. ORSINGER: Let me say that
4 our subcommittee will undertake in each of
5 these events where Justice Guittard has
6 suggested a unified rule that we'll compare
7 the appellate rule to the trial rule and then
8 come back with recommendations on conformity.

9 HON. C. A. GUITTARD:
10 Excellent.

11 CHAIRMAN SOULES: Great. So
12 assigned.

13 MR. ORSINGER: Okay. Agenda
14 Page 68 is another such letter from Justice
15 Guittard, so same ruling on that, I guess.
16 Same vote on that?

17 HON. C. A. GUITTARD: Yeah.

18 MR. ORSINGER: Luke?

19 CHAIRMAN SOULES: Right. No
20 change, but review for consistency.

21 MR. ORSINGER: Okay. Then that
22 moves us to Second Supplemental Page 70, which
23 is an issue about whether the deadline for
24 amending pleadings ought to count back from
25 trial and whether it ought to be 30 days. And

1 the Rules Committee wants trial related
2 deadlines that are longer in advance of trial
3 than they currently are, but the Discovery
4 Subcommittee has suggested cutoffs that relate
5 to the discovery window.

6 Our subcommittee believes that we ought
7 to go with the subcommittee's recommendation
8 of leveraging off of the closure of the
9 discovery window, since amending pleadings can
10 require the reopening of discovery and what
11 have you. But until we know the status of the
12 discovery window, we don't feel like we want
13 to lock ourselves into a deadline for amending
14 pleadings, so we want to carry that.

15 CHAIRMAN SOULES: Action
16 postponed. Okay.

17 MR. ORSINGER: That jumps us up
18 to Page 80 of the agenda, and that's going to
19 be a letter from Justice Guittard on a
20 proposed combined rule, and the same would
21 apply to that, as well as to Justice
22 Guittard's letter on Page 82. So the
23 subcommittee will evaluate and conform.

24 Luke, is that agreeable?

25 CHAIRMAN SOULES: Yes, correct.

1 MR. ORSINGER: Move on to
2 Page 84 of the second supplement, and this is
3 an issue of uniform statewide rules on audio-
4 video cameras in the courtroom. And we have
5 brought that up for discussion and vote on a
6 Saturday morning when, I believe, there were
7 six or seven people here. And at that time,
8 the vote was not to implement statewide rules.

9 And as I recall, Joe, you were a great
10 proponent of that; that we would actually
11 change the existing Rules of Procedure to
12 prohibit media in the courtroom unless you had
13 the consent of both parties.

14 Now, that was a skeletal crew at that
15 time, and I plan to take that issue up, if
16 permitted, for reconsideration. But at the
17 present time, uniform standards based on an
18 amalgamation of all of the existing rules have
19 been implemented, and there are many of us who
20 feel very strongly that if this Advisory
21 Committee recommends to the Supreme Court to
22 change existing rules which give the court the
23 power to do this and take that power away from
24 the trial court, we are going to ask that the
25 Court not to follow through on that.

1 We feel like we shouldn't change the
2 existing rules that have been in place that
3 are working. All we want to do is provide
4 uniform rules. But the actual vote that was
5 taken on that Saturday morning was to forget
6 the uniform rules and put another rule in that
7 you can't have media unless everyone agrees,
8 which basically is going to ban media in most
9 cases.

10 MR. YELENOSKY: Cameras. TV
11 media is what I remember. We weren't planning
12 to ban the paper.

13 MR. ORSINGER: No, you can't
14 ban someone who is taking notes. But I think
15 you can ban a camera, a television camera, and
16 you can ban a microphone. That's the way I
17 understood it.

18 CHAIRMAN SOULES: Where is the
19 rule that requires both parties and the
20 witness to agree before being televised live?

21 PROFESSOR ALBRIGHT: We just
22 talked about that in a meeting one Saturday
23 morning.

24 MR. YELENOSKY: We voted on it.

25 CHAIRMAN SOULES: Yeah, there

1 is a rule someplace about that.

2 PROFESSOR ALBRIGHT: There's no
3 rule in the rules.

4 MR. YELENOSKY: There were some
5 proposed rules that we considered at the
6 time. And I don't remember it being that
7 skeletal. There were more than a few people
8 here, because there was discussion about the
9 intrusiveness of the cameras, and I know Chip,
10 of course, spoke against it, and so --

11 MR. LATTING: He spoke for the
12 admissibility of --

13 PROFESSOR ALBRIGHT: We were
14 talking about a draft that Chip had of 18c.

15 CHAIRMAN SOULES: We presently
16 have 18c, the trial court may permit
17 broadcasting, televising, recording or
18 photographing of proceeding in the courtroom
19 only in the following circumstances. It's
20 there. 18c.

21 MR. ORSINGER: But it doesn't
22 require --

23 MR. YELENOSKY: -- consent of
24 both parties.

25 MR. ORSINGER: Let's see, I

1 thought it was broader than that.

2 CHAIRMAN SOULES: According to
3 the guidelines of the Supreme Court; "and the
4 parties have consented, and consent to being
5 depicted is obtained from each witness whose
6 testimony will be broadcast, televised or
7 photographed." If everybody says it's fine,
8 what's wrong it?

9 MR. LATTING: What if not
10 everybody says it's fine?

11 CHAIRMAN SOULES: Well, that's
12 what 18c requires at this time.

13 MR. ORSINGER: Well, the
14 problem with 18c is that all of the
15 independent large media communities have their
16 own rules, and they've had problems that are
17 created by local competition, and they've had
18 the -- our proposed rules, which are different
19 from the issue that Joe raised, had to do with
20 having a pool and giving the court the
21 authority to decide who will maintain the pool
22 camera and permitting all media to have access
23 to the pool camera, which is an amalgamation
24 of the rules in Fort Worth, Houston, Dallas
25 and whatnot, and those were salutary

1 regardless of whether you have to have the
2 consent of everybody.

3 MR. YELENOSKY: Well, whether
4 or not we're going to revisit this, I mean, we
5 weren't any more skeletal then than we are
6 now, and I wouldn't want to discuss this
7 without at least going back and looking at the
8 transcript of that discussion, because it was
9 a fairly extensive discussion.

10 MR. ORSINGER: I know that.
11 I'm not proposing that we redebate this now.
12 We've reached this point on our agenda. We
13 have a subcommittee recommendation that we
14 took up out of order of the agenda, out of
15 order of this disposition chart, and we had
16 that vote. We can look back and see what the
17 vote was and how many people were here and
18 whether we want to reconsider it, I guess.
19 But at this point I don't know for sure where
20 we are on all of our mechanism.

21 Regardless of whether it requires the
22 consent of everybody, people may still feel
23 like the mechanism that we proposed based on
24 an amalgamation is a good thing to do
25 regardless of the consent issue.

1 CHAIRMAN SOULES: Okay. So
2 we'll postpone it.

3 MR. LATTING: Until when?

4 CHAIRMAN SOULES: I don't know
5 until when. Do you have those rules ready?
6 Have they already been looked at? I can't
7 remember the status of it.

8 MR. ORSINGER: Luke, I'm going
9 to have to go back and look and see. We have
10 a set of rules that Chip drafted that I would
11 like him to explain, because he's the one that
12 drafted them and he's the one that represents
13 these media defendants in both Dallas and
14 Houston. And I think the only controversy
15 that we really had that was important was this
16 issue of can the court permit the taping when
17 somebody objects.

18 MR. LATTING: May I make a
19 request, please, Luke?

20 CHAIRMAN SOULES: Sure.

21 MR. LATTING: If there's going
22 to be any effort, direct or sideways, to take
23 up that issue again, I would like to be
24 notified before it comes up.

25 MR. ORSINGER: Well, Joe, we're

1 getting to the end. My subcommittee is
2 getting to the end of its work. We've got
3 Bonnie's work behind us now. We're almost
4 through Bill's work, so if we're on the agenda
5 for the January meeting, we'll probably put
6 everything we have on the table at the January
7 meeting.

8 MR. LATTING: Okay.

9 CHAIRMAN SOULES: Well, is
10 there a consensus that 18c stays as is but
11 it's okay to have some sort of a direction to
12 the trial judge that he can pool? Just
13 because you get the agreement of the parties
14 and each of the witnesses, that doesn't mean
15 that five TV cameras can rush the courtroom.

16 MR. LATTING: I'm fine with
17 that. I have no problem with that.

18 MR. ORSINGER: Okay.

19 CHAIRMAN SOULES: Alex
20 Albright.

21 PROFESSOR ALBRIGHT: I don't
22 really think this is the time to discuss that,
23 because as I recall, Chip had a very involved,
24 detailed rule that we were talking about, and
25 I don't think any of us really remember what

1 the resolution was at that meeting when it was
2 discussed. I kind of vaguely recall he was
3 going to go back and redraft his rule based on
4 our discussion. I don't think he liked the
5 result of our discussion, and so it may be
6 just that he decided, I think, he was happier
7 with 18c as it exists now than what we were
8 talking about maybe. But I don't think we
9 should start over now without the information
10 in front of us.

11 It seems like what we should do is ask
12 Chip to review that transcript and come up
13 with something.

14 CHAIRMAN SOULES: What we're
15 going to say on 76a is that the record is
16 vague, and if the record was dispositive, it
17 has been disposed of unless it's reoffered.

18 MR. ORSINGER: Well, I don't
19 think the record will have disposed of the
20 mechanisms. It will only have disposed of the
21 issue of consent.

22 CHAIRMAN SOULES: Okay. And if
23 it does dispose of that, we can go to that.
24 So that's all on 76a.

25 Let's go to 86.

1 MR. ORSINGER: Let's move on to
2 second supplement Page 124, and this was a
3 letter from Lee enclosing an article out of
4 the "Texas Lawyer" -- Lee Parsley, I'm
5 sorry -- about how we have to rewrite the
6 venue rules. "Waiver of venue change of one
7 defendant shouldn't waive it for all
8 defendants." That's the article by Susan
9 Fortney. And our subcommittee says that we
10 have to rewrite all of these, and we're
11 presently under construction.

12 CHAIRMAN SOULES: Postponed.

13 MR. GALLAGHER: What did the
14 Chair say with regard to that?

15 CHAIRMAN SOULES: Postponed,
16 because we do have to get the rules lined up
17 with the new amendments, and they're working
18 to do that and they will get it done. Okay.

19 MR. ORSINGER: Supplemental
20 Agenda Page 128, a letter from Doyle Curry,
21 1994, wanting special exceptions to be heard
22 not less than 30 days before trial. And you
23 will recall from yesterday that we left a
24 blank in there for special exceptions. I
25 believe that blank is still in there.

1 CHAIRMAN SOULES: Yes, it still
2 is.

3 MR. ORSINGER: And I think
4 that's pending also some determination on
5 discovery, is it not?

6 CHAIRMAN SOULES: Right. So we
7 might as well just put that postponed, because
8 that will remind us to fill in the blank at
9 some point.

10 MR. ORSINGER: Supplemental
11 Agenda 137 had to do with an instance where
12 Larry Gollaher from Dallas became aware that a
13 private process server served the defendant
14 and then interviewed the defendant about the
15 circumstances of the lawsuit and then
16 testified against the defendant before he had
17 a chance to talk to a lawyer or anything, and
18 he thought it was despicable and should be
19 eliminated and all that.

20 We think that it is an abhorrent
21 practice, but that we can't effectively
22 prohibit that by rule.

23 CHAIRMAN SOULES: Any
24 objection? It stands with no change.

25 MR. ORSINGER: Second

1 Supplement Agenda Page 187 was a letter from
2 Earl Bullock, Dallas County clerk, in which he
3 was saying that county clerks should be
4 permitted to contest affidavits. And our new
5 Rule 145 permits county clerks to do that.

6 CHAIRMAN SOULES: So that's
7 already approved. Okay.

8 MR. ORSINGER: Second
9 Supplement Agenda Page 193 is also relating to
10 affidavits of inability, and we have a well
11 crafted Rule 145 that supersedes all of these
12 suggestions. These were proposed, by the way,
13 by Justice Guittard. We now have the final
14 product that months ago we approved and
15 everybody seems to be happy with.

16 CHAIRMAN SOULES: Well, we've
17 assimilated what the committee wanted to use,
18 and Justice Guittard's suggestions, I guess,
19 got into the rule?

20 MR. ORSINGER: Yes. I don't
21 know that Justice Guittard has compared his
22 letter to the rule, but I know that Justice
23 Guittard has been here when we had the
24 discussions under Rule 145 contesting paupers
25 oaths.

1 CHAIRMAN SOULES: Okay.

2 MR. ORSINGER: And then the
3 last item on the disposition chart is Second
4 Supplement Page 196, which is a letter from
5 Carl Hamilton enclosing a letter from Richard
6 Worsham saying you ought to consider the
7 merits of the case before it's put on the
8 dismissal docket and subsequently dismissed.
9 And our view is that we shouldn't change the
10 current practice but that we should increase
11 the notice to give somebody an opportunity to
12 secure a trial setting before they're
13 dismissed.

14 CHAIRMAN SOULES: You recommend
15 no change?

16 MR. ORSINGER: No change.

17 CHAIRMAN SOULES: Any
18 opposition? There will be no change.

19 MR. ORSINGER: Okay. That's
20 the end of the disposition chart, and that
21 leaves us then with Bill's changes to the
22 pleadings.

23 CHAIRMAN SOULES: Let's take
24 about 10 minutes here and let the court
25 reporter rest, and then we'll get to those.

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(Recess.)

CHAIRMAN SOULES: Okay. 216 to 299(a). Who wants to do this? Paula.

MS. SWEENEY: Well, let me lead off and report to the remaining two members of the committee that are here.

CHAIRMAN SOULES: We're on the record. We're on the record. Okay.

MS. SWEENEY: I mean, really, Judge Peeples and Joe Latting and I will report to each other. We had previously gone through a vast majority of the items on the disposition chart in the full committee. We've reported, and there have been votes. And we had a few remaining items that needed other work, needed something else done to them or whatever.

The first is on Page 2 of the disposition chart, Rule 232. This is, here we go again, Batson. Every time we've ever had a Batson discussion in this committee it's been with a less than skeletal crew, and we're doing that again.

But what we decided -- there has been a new Jury Task Force appointed by Justice

1 Cornyn that is considering a whole host of
2 jury issues such as what was brought up in the
3 Arizona article that was circulated earlier,
4 jurors' rights, don't waste time, let them ask
5 questions, et cetera, et cetera, a whole host
6 of issues involving the jury. I have been
7 told that that group has taken Batson under
8 it's purview and effectively, since we didn't
9 already have a Batson rule, subsumed or taken
10 that out of our purview.

11 In addition to that, the Supreme Court,
12 and Elaine has been following this course very
13 closely, has a case up right now on Batson,
14 and we didn't think there was much point in us
15 writing law pending what -- we thought maybe
16 we should wait and see what it was.

17 So I think it would be premature at this
18 point to -- and is that --

19 JUSTICE HECHT: I think that's
20 right.

21 MS. SWEENEY: Might we get some
22 insight from --

23 JUSTICE HECHT: Well, the issue
24 in Goode vs. Shoukfeh was what the procedures
25 ought to be in Batson cases.

1 MS. SWEENEY: So it would seem
2 really premature of us to be writing that rule
3 with that issue being up for consideration
4 right now maybe. So Batson, our subcommittee
5 has decided, needs to simply be tabled until
6 and unless we get some guidance from the Court
7 certainly, and it would also help to get some
8 guidance about whether or not it even should
9 be part of this committee's work, given the
10 other task force that's at work on the jury
11 charge.

12 CHAIRMAN SOULES: Will the Jury
13 Task Force submit its report to the Advisory
14 Committee?

15 JUSTICE HECHT: I don't know.

16 CHAIRMAN SOULES: I haven't
17 seen an order on that like some of the others.

18 JUSTICE HECHT: Well, some of
19 it, the early -- I mean, they've just barely
20 started. And some of their work they think
21 may require changes in statutes, and others
22 may be changes in rules. I feel certain that
23 if they want rules changes, they'll submit it
24 through us, through this committee. But if
25 it's statutory or other stuff, they may not.

1 CHAIRMAN SOULES: Well, the
2 Chair will entertain a recommendation that
3 there be no change in response to this request
4 and that we wait for some other vehicle to
5 come to the committee, some other source of
6 recommendation, so that in effect we dispose
7 of this item while waiting for another item to
8 come at a later time.

9 MS. SWEENEY: So moved.

10 CHAIRMAN SOULES: Any objection
11 to that? Okay. No change in response to this
12 then.

13 MS. SWEENEY: All right. The
14 next item that is hanging out there is on
15 Rule 241. It's been discussed before, but
16 it's come to us again. Judge Peeples, are you
17 ready to report on that?

18 HON. DAVID PEEPLES: Yes. In
19 1989 Judge Bill Coker of Dallas wrote a letter
20 saying basically this, saying Rule 47 allows
21 the plaintiff or requires the plaintiff in an
22 unliquidated case, you know, not to name an
23 amount. And then when there was a default
24 judgment, he said, "It's hard for me to" -- "I
25 can't grant it without a hearing, because, you

1 know, the defendant faced a petition that
2 didn't mention a number." So he wants Rule 47
3 changed and Rule 243 also to make it easier to
4 grant default judgments. It can be done by
5 computer and so forth.

6 We recommend against that change. I
7 remember hearing Jim Kronzer's letter say that
8 the reason for Rule 47 was that they didn't
9 want in unliquidated damage cases for the
10 plaintiff to name an astronomical figure that
11 gets in the newspaper and everybody says, "Oh,
12 my gosh, look at this."

13 So the decision was made to require
14 damages to be pleaded generally in excess of
15 the jurisdictional limits of the court and
16 then upon special exception name a specific
17 amount. And our subcommittee does not want to
18 revisit that decision, and we're not convinced
19 that there is a big burden on trial courts in
20 having to at least consider some evidence when
21 granting a default judgment in unliquidated
22 damage cases.

23 CHAIRMAN SOULES: So you
24 recommend no change in response to Judge
25 Coker?

1 HON. DAVID PEEPLES: Yes. Now,
2 we got this morning a letter dated November 21
3 from Judge David Evans in Dallas, which I
4 think we need to take a look at.

5 He says that he would like to have
6 Rule 243 changed so that you can -- once the
7 answer date has come and gone and there's no
8 answer filed, the judge can take affidavit
9 testimony and people don't have to show up
10 live. I think we should take a look at that.

11 CHAIRMAN SOULES: I don't think
12 this changes the law, but it does clarify it,
13 because unobjected to hearsay can be the basis
14 for a judgment. An affidavit is hearsay. But
15 then apparently there are -- and I've heard
16 this concern other than just from Judge
17 Evans. Some trial judges are still maybe
18 remembering the law before unobjected to
19 hearsay could be probative, because there was
20 a time when if the record had nothing but
21 hearsay in it, you could raise it JNOV.

22 MR. LATTING: Texaco vs. Lee.

23 CHAIRMAN SOULES: Whatever it
24 is, Joe has got the case. We changed that in
25 the Rules of Evidence. But Judge Evans

1 suggests that we add to 243, I hope you've got
2 this before you, I'm going to read the words
3 that are already in the rule: "If the cause
4 of action is unliquidated or be not proved by
5 an instrument in writing, the court shall hear
6 evidence as to damages," and he wants to add
7 either "on the record in open court or by
8 affidavit testimony submitted without further
9 record," that ends his insertion, and picking
10 up the rule, "and shall render judgment
11 therefor unless the defendant shall demand and
12 be entitled to a jury trial," and so forth.

13 Why don't we go ahead and announce that
14 in the rule if we believe it is the case and
15 eliminate the confusion or the concern?

16 MR. LATTING: Well, can we say
17 either on the record in open court or by
18 affidavit testimony or both?

19 MS. SWEENEY: You want it
20 and/or?

21 MR. LATTING: Yeah, because you
22 might have a situation where you had a rather
23 complex default judgment and you wanted to
24 prove it with some testimony and some
25 affidavits. And if we're going to make it

1 clear, we might as well make it clear.

2 MS. SWEENEY: So you would take
3 out "either" and have it say say "on the
4 record in open court and/or"?

5 MR. LATTING: Yeah.

6 HON. C. A. GUITTARD: I object
7 always to "and/or."

8 MR. LATTING: Overruled. Then
9 if we can say "either" --

10 CHAIRMAN SOULES: Why don't we
11 just take out "either"?

12 MS. SWEENEY: There you go.

13 CHAIRMAN SOULES: Evidence as
14 to damages on the record in open court or by
15 affidavit testimony.

16 MS. SWEENEY: Or both, is what
17 Joe's -- that's the tenor of your suggestion,
18 isn't it?

19 MR. LATTING: Yes. It's not a
20 big deal, but it's clarifying it.

21 HON. DAVID PEEPLES: It's a
22 very thoughtful letter. My inclination is to
23 always think about things at least until the
24 next meeting before doing anything. I can't
25 think of a good reason not to do this right

1 now, though.

2 CHAIRMAN SOULES: Okay. So you
3 want to table this?

4 HON. DAVID PEEPLES: I just
5 think what we're doing here is serious
6 business, and as smart as all of us are,
7 sometimes if you've got time to think about
8 something or talk to some people who do this,
9 you know, collection work, you might come up
10 with a reason not to do it.

11 CHAIRMAN SOULES: Next
12 meeting. Okay. That will be on the table, on
13 the agenda for the next meeting.

14 MS. SWEENEY: And I would point
15 out we've already amended 243 in one
16 particular, which is we've already agreed
17 unanimously to delete the "writ of inquiry"
18 provision since no one knows what that is.

19 CHAIRMAN SOULES: We'll find
20 out once it's gone.

21 MS. SWEENEY: That's true.
22 Suddenly it will become important.

23 CHAIRMAN SOULES: Okay. 241,
24 no change, right?

25 MS. SWEENEY: Correct. All

1 right. The next area, flipping through your
2 syllabus, where we have not already had full
3 committee discussion is on the second to the
4 last page. I'm sorry they're not numbered,
5 but it's Rule 221 to Rule 236. I did not have
6 that on the agenda until this morning, and I'm
7 just flagging it for you.

8 Bonnie this morning handed me a couple of
9 pages of comments. Now that she's had a
10 chance to go through -- if you'll recall, we
11 discussed these rules in full committee at
12 some considerable length two years ago about
13 jury lists in different counties, jury
14 shuffles, how they're drawn and all of that.
15 And Bonnie has gone through the rules and
16 identified some reference areas where we need
17 to look back at, you know, other rules that
18 may be affected and so on, so I just am just
19 flagging that. We are not final on those
20 rules as of what she handed me this morning,
21 but we don't have anything else to tell you
22 right now because I haven't even fully
23 digested what she gave me, much less have we
24 discussed it.

25 CHAIRMAN SOULES: This is on

1 221 through 236?

2 MS. SWEENEY: Yes, sir.

3 CHAIRMAN SOULES: Can we get
4 this resolved in January?

5 MS. SWEENEY: Yes. We'll
6 discuss it between now and then. I'll
7 circulate what she gave me. And Bonnie, what
8 we'll do is, we meet by conference call, and
9 we'll conference you in so you can explain
10 your notes to us.

11 CHAIRMAN SOULES: Okay. So
12 that is on our January agenda.

13 HON. DAVID PEEPLES: Well, we
14 have what's on Page 869 of Volume 2 of the
15 original materials, and I'm trying to find it
16 on this sheet, but it deals with Rules 290 to
17 295.

18 MS. SWEENEY: The rules are in
19 chronological order. It's on the sixth page.

20 HON. DAVID PEEPLES: Yes. 290
21 to 295. John Chapin writes in and says the
22 federal rules were changed to change judgment
23 NOV to judgment as a matter of law, and why
24 don't we do that. And in addition, there's
25 some language in the federal rule that he

1 quotes that says the judge can just enter
2 judgment as a matter of law at any time during
3 a trial wherever a party has fully been heard
4 and so forth, which just blows my mind.

5 I don't think any of us want to do that,
6 if it means what it seems to means, which is
7 just make a decision in the middle of the
8 plaintiff's case in chief. And so our
9 committee thinks there's no reason to make
10 either that substantive change or to change
11 our terminology to judgment as a matter of
12 law.

13 CHAIRMAN SOULES: Any
14 opposition?

15 HON. C. A. GUITTARD: That
16 change has already been made in Rule, what,
17 300 and something, when we considered
18 judgments and postjudgment motions. We
19 abolished judgment NOV then, and we adopted a
20 rule that would apply either before or after
21 verdict, judgment as a matter of law, either
22 before or after verdict, so that takes care of
23 that problem.

24 HON. DAVID PEEPLES: So...

25 CHAIRMAN SOULES: So no further

1 change in response to this inquiry?

2 HON. C. A. GUITTARD: But it
3 should be conformed.

4 CHAIRMAN SOULES: Well, this
5 was in a Don Hunt set of rules that we did
6 that, right?

7 HON. C. A. GUITTARD: Yes.

8 CHAIRMAN SOULES: So no further
9 change in response to this particular
10 inquiry. We've done what we're going to do
11 already in the Don Hunt set of rules,
12 correct?

13 HON. DAVID PEEPLES: That's in
14 the Appellate Rules?

15 CHAIRMAN SOULES: No, it's in
16 the late 200, low 300 series, Don Hunt's
17 report. Okay.

18 MS. SWEENEY: So other than
19 conforming that, then that is all from our
20 group that has not been previously addressed.
21 So what we have to talk about at the next
22 meeting is the area from Bonnie that I
23 flagged, jury shuffle, et cetera.

24 HON. DAVID PEEPLES: Rule 243,
25 the letter from Judge Evans in Dallas.

1 MS. SWEENEY: And Judge Evans'
2 letter.

3 HON. DAVID PEEPLES: About
4 affidavit testimony in a default judgment.

5 CHAIRMAN SOULES: Those two
6 items. Okay. We'll have those specifically
7 on, and I don't know what else will flow in
8 between now and then.

9 MS. SWEENEY: Other than that,
10 our subcommittee is done.

11 CHAIRMAN SOULES: Great. Thank
12 you. Congratulations. Okay. What's next,
13 Holly?

14 MS. DUDERSTADT: All we had
15 left was Sadberry, and he's not here.

16 HON. C. A. GUITTARD: I'd like
17 to ask Lee and Judge Hecht about Shelby
18 Sharpe's proposal, the proposal of his
19 committee concerning frivolous appeals. Is
20 that to be considered before the Appellate
21 Rules are promulgated, or is that to be left
22 for some future revision? What is the
23 situation there?

24 JUSTICE HECHT: Well, Lee and I
25 have thought about it and studied it and read

1 the Baylor article that was associated with
2 it, and I know of at least two other judges
3 that have read the article. I'm not sure
4 they've looked at Shelby's proposal, but I
5 think the Court will look at it before it
6 takes final action on the rules. I don't know
7 how much more they think needs to be done than
8 what we've done already.

9 MR. LATTING: What is the
10 current status of things, just to remind us?

11 JUSTICE HECHT: Of the TRAP
12 Rules?

13 MR. LATTING: Yes.

14 JUSTICE HECHT: A final copy is
15 available here. It has not been finally
16 approved by our Court or the Court of Criminal
17 Appeals or Bryan Garner or this committee.

18 MR. LATTING: What do they say
19 in substance about frivolous appeals?

20 JUSTICE HECHT: They say that
21 they relax the standard for imposition of
22 sanctions by the court of appeals and relax or
23 change the damages, I think, from 10 times
24 cost to such as are just or whatever has been
25 the standard for our Court for the last

1 several years. I think we find that it's a
2 fairly simple rule. It just says if the court
3 of appeals determines that an appeal is
4 frivolous, it may on motion of any party or on
5 its own initiative after notice and a
6 reasonable opportunity for response, award
7 each prevailing party just damages. It
8 incorporates the requirement of notice and an
9 opportunity to be heard.

10 I think the two things that the Court
11 sees in the lower court opinions is that they
12 rarely award sanctions for fairly frivolous
13 appeals, and when they do it, the first time
14 the party knows about it is when they get the
15 order in the mail. And they probably ought to
16 have a chance to say, "Hang on, let me be
17 heard on this." So those are the proposed
18 changes.

19 CHAIRMAN SOULES: Okay. But we
20 don't have those on our docket at this time?

21 JUSTICE HECHT: No.

22 CHAIRMAN SOULES: Okay. We're
23 going to go to the disposition chart for 527
24 to 734, and I'm going to try to give this
25 report. One of our members has not been able

1 to or hasn't attended on a regular basis, and
2 I think we can get this done, famous last
3 words, in the time we have remaining here this
4 time.

5 MS. SWEENEY: Could you wave
6 that at us?

7 CHAIRMAN SOULES: Holly is
8 passing it out now. We may have to share
9 copies.

10 MS. DUDERSTADT: We've got
11 plenty.

12 CHAIRMAN SOULES: We've got
13 plenty. Okay. We've got about, it looks
14 like, three items.

15 MS. SWEENEY: Should it have
16 tabs on it or not have tabs?

17 CHAIRMAN SOULES: It has tabs.

18 MS. DUDERSTADT: There are two
19 of them. There's a disposition and then a
20 supplemental disposition.

21 CHAIRMAN SOULES: The one I
22 want to go to first is the one that has the
23 tabs, because these are more specific. At
24 least they appear to me to be.

25 Rule No. 539 would change the justice

1 court rule to allow reasonable notice and not
2 have any particular time. They're now
3 governed by the 45-day rule. Apparently this
4 is causing some delay in the justice court
5 system which is unnecessary to the work of
6 those courts. And they believe that the
7 45-day-first-trial-setting fuse is unnecessary
8 and it's burdensome on their case disposition
9 and they want it changed to simply say a
10 reasonable notice.

11 That seems to me to be reasonable, but if
12 we need to do any debating on it, let's
13 proceed.

14 Does anyone have an objection to going to
15 a reasonable trial notice in the justice trial
16 courts rather than the 45 days? No objection,
17 so that's approved.

18 Next is Rule 680. This is not a justice
19 court rule, it's just these rules pick up not
20 only justice courts but some of the
21 extraordinary writ rules. This is a request
22 by James Holmes to add the language right
23 behind Exhibit B, the tab that says Exhibit B,
24 that's underscored, "a certificate of
25 reasonable effort to contact the adverse party

1 or counsel for party prior to obtaining TRO or
2 temporary injunction without notice." He says
3 this brings it into line with the Lawyer's
4 Creed.

5 The subcommittee opposes any requirement
6 for contact with party who is not an attorney
7 or who does not have in-house counsel. I
8 gather, then, that the subcommittee's
9 recommendation is that we not make the
10 change? Anne Gardner.

11 MS. GARDNER: Tony drafted this
12 proposed language that's underscored in
13 Exhibit B which just requires reasonable
14 effort to the party, adverse party or attorney
15 representing the party, if known. His view
16 and our view was that it created some ethical
17 problems to require an attorney to contact a
18 party who is not represented by counsel, and
19 that we not go so far as to require it,
20 because of a lot of potential ethical problems
21 that a party without counsel might later take
22 the position that the attorney had given them
23 advice or something to that effect.

24 CHAIRMAN SOULES: Okay.
25 Recommend no change. That's the

1 subcommittee's recommendation. It doesn't
2 require a second. Discussion. Steve
3 Yelenosky.

4 MR. YELENOSKY: Well, I just
5 want to ask, Luke, just what is on the agenda
6 here? Because the justice court rules
7 obviously are of real importance in certain
8 types of cases, and some Legal Services
9 attorneys have talked to me about some of
10 these issues, and Judge Till had told me, you
11 know, he would be sending me some more stuff.
12 I got some stuff early on. I haven't gotten
13 anything in a while, and then --

14 CHAIRMAN SOULES: Well, this is
15 not a justice court rule.

16 MR. YELENOSKY: I know that one
17 isn't, but in general there are ones here. So
18 what are we purporting to do today? Because
19 this says an introductory report on some -- I
20 mean, some these rules cover justice court
21 rules.

22 CHAIRMAN SOULES: Right. What
23 I want to do is act on these specific requests
24 to change the rules or not change the rules
25 that we presently have so we get them off of

1 our docket. Someday, I understand, we're
2 going to get a report from a Justice of the
3 Peace Task Force.

4 MR. YELENOSKY: I just wanted
5 to know if that was still coming.

6 CHAIRMAN SOULES: And we're
7 going to have to figure out what to do with it
8 whenever it gets here. Anne Gardner.

9 MS. GARDNER: Luke, my
10 understanding, again, from Tony, and he
11 couldn't be here today, is that Justice
12 Hill --

13 CHAIRMAN SOULES: Till.

14 MS. GARDNER: -- Justice Till,
15 I'm sorry. Justice Till has done a final
16 report from his task force and has given it to
17 Justice Hecht.

18 JUSTICE HECHT: It's on its
19 way. It's not there yet, but Paul called and
20 said it's on its way.

21 MS. GARDNER: And Judge Till
22 feels that his tenure as the head of that task
23 force is over and that they have accomplished
24 what he feels they were asked to do, and that
25 was to make their report. And they have -- he

1 spent several months, a tremendous amount of
2 work. Their task force undertook to write an
3 entire separate set of justice court rules.

4 Our subcommittee, which is composed of
5 lawyers who primarily practice in district
6 courts and appellate courts, voted to support
7 and back the task force. We did not feel that
8 we were in a position to contradict them. We
9 voted to back them completely in the direction
10 they were going and support them in their
11 decision to rewrite these justice court rules.

12 And if the Supreme Court votes and
13 decides to send it back to this committee,
14 then we'll do what we're directed to do. But
15 it's my understanding that those rules are
16 going directly to the Supreme Court.

17 CHAIRMAN SOULES: Okay. Now,
18 specifically to Holmes' recommendation.

19 HON. DAVID PEEPLES: Yeah.
20 I've read the explanation in the right-hand
21 box that says we want to require notice to
22 counsel but not to a pro se litigant. But the
23 language underscored seems to require notice
24 to the adverse party or attorney. It doesn't
25 square with what they're telling us in this

1 box.

2 CHAIRMAN SOULES: I agree. Joe
3 Latting.

4 MR. LATTING: I have a question
5 and a concern, and that is, if the Lawyer's
6 Creed requires this notice, which I think that
7 it does in spirit anyway, if we put this in
8 the rule after it's already in the creed, are
9 we imposing another requirement in order for
10 there to be a valid injunction? And my
11 concern about putting it in the rule is, is
12 that going to be another basis for appeal or
13 some kind of appellate action to overturn
14 injunctive relief if there was a failure to
15 follow this? If it's just predicatory, it's a
16 good idea to do this, and I think we've
17 already got it, so it seems to me we're adding
18 something that doesn't really add anything to
19 the law or the operation of the injunction
20 rules. And if by putting it in there we're
21 confusing the situation, I would be against
22 it, unless somebody could tell me why that's
23 not right.

24 HON. DAVID PEEPLES: Can I
25 speak to that?

1 CHAIRMAN SOULES: Yes, sir,
2 Judge Peeples.

3 HON. DAVID PEEPLES: First of
4 all, this applies to TROs, which would be, you
5 know, 14 days. And second of all, I think
6 it's healthy to tell lawyers, "Don't come over
7 here and try to get ex parte relief unless you
8 try to talk to the other side."

9 It's also helpful to tell judges you're
10 not supposed to just sign these things with no
11 questions asked. Admittedly, if a lawyer
12 doesn't do this and a judge signs the TRO,
13 that's enforceable. But I think it's kind of
14 salutary to put this in.

15 MR. LATTING: I agree it's
16 salutary, but we've already said it in the
17 Creed. So how many places do we need to
18 remind us to have good manners?

19 HON. DAVID PEEPLES: The
20 unfortunate fact is that the lawyer who is
21 getting the TRO or injunction is going to look
22 in the Rules of Procedure and not the Lawyer's
23 Creed.

24 MR. LATTING: And what about a
25 failure to do it? And you can sometimes

1 appeal a TRO in an emergency situation. You
2 can move to stay it. I'm just concerned about
3 a claim on appeal that there wasn't any
4 showing or attempt to make contact and it
5 invalidates a restraining order. It's not a
6 big deal. If you want it in there, I'll vote
7 for it. It just comes to mind, though.

8 CHAIRMAN SOULES: Well, we're
9 talking about something that can arise in
10 literally emergency circumstances and putting
11 some baggage on there that might be a big
12 problem to do, because sometimes, maybe a lot
13 of times, I don't know, there's an abuse of
14 the TRO process. But we've got family
15 violence and a lot of things where you get a
16 call at 3:00 o'clock in the afternoon and you
17 have got to separate two people and you've got
18 to get an order. And to have this baggage in
19 the rule to me is dangerous, and to tell
20 somebody they should do it as a matter of
21 practice and creed is one thing, but to make
22 it mandatory, there just may not be time.
23 That's my feeling about it, but let's discuss
24 it.

25 MR. YELENOSKY: Well, I think

1 the judge can make that determination. We
2 wouldn't go in on a TRO where we knew where
3 somebody was and had an attorney and we could
4 get ahold of him, because the judge is going
5 to or should say, "Have you tried to get ahold
6 of him?"

7 HON. C. A. GUITTARD: Some
8 don't.

9 MR. YELENOSKY: Well, but the
10 judge can then say something.

11 MR. LATTING: Well, one more
12 thing on this while we're on the subject.
13 It's part of our local rules in Travis County
14 and it's part of good practice, and it doesn't
15 seem to me that unnotified lawyers in TRO
16 situations is a big problem in the
17 jurisprudence of this state. It's not only
18 baggage to a rule, it doesn't have any --
19 we're not going to attach any sanction for its
20 disobedience. And why change a rule when
21 we're really not changing the law? And it
22 seems to me that it confuses, but I could be
23 wrong. It's not a big thing one way or the
24 other.

25 CHAIRMAN SOULES: Okay. So

1 those in -- I'm just going to ask, does anyone
2 favor a change on this? One.

3 Others who say no change. Okay. The
4 house to one no change.

5 Okay. That takes us to Dick Brown,
6 Rule 684, who wants to allow cash deposit in
7 lieu of a bond for a TRO. The committee says
8 that we have passed 14c, which I think is
9 consistent with my memory, that cash --

10 MR. LATTING: We have done
11 this.

12 CHAIRMAN SOULES: -- cash can
13 always be used in lieu of a bond.

14 MR. LATTING: That's correct.

15 MS. GARDNER: Luke.

16 CHAIRMAN SOULES: Anne
17 Gardner.

18 MS. GARDNER: 14c is a generic
19 rule that allows the use of a cash deposit, as
20 it's currently written, in lieu of a bond
21 anywhere where a bond is required under the
22 Rules of Civil Procedure. The problem is that
23 this lawyer that wrote in about this, and
24 probably I guess a lot of other lawyers, don't
25 realize that 14c is even there. And our

1 thought was to refer this to --

2 MR. YELENOSKY: Send them to
3 CLE.

4 MS. GARDNER: Send them to
5 CLE. No, send it to Bill Dorsaneo's
6 subcommittee for some consideration, maybe
7 putting a comment below other rules where
8 bonds are mentioned or something to refer
9 lawyers to 14c. Or if there's going to be a
10 general catch-all section of the rules at the
11 beginning for general provisions, that 14c be
12 kept there with some comment, rather than the
13 only other choice which is to add on a
14 provision like 14c to every rule where bond is
15 required. There is already Rule 14c.

16 CHAIRMAN SOULES: Okay. So the
17 committee recommends no change. If we do put
18 a change in, it's just going to be a
19 repetition of what 14c says?

20 MS. GARDNER: Correct.

21 CHAIRMAN SOULES: Apparently,
22 Dick Brown, who is a pretty knowledgeable guy,
23 feels that -- a pretty knowledgeable lawyer,
24 feels this is needed. The subcommittee feels
25 otherwise. Let's discuss it and dispose of

1 it. Alex Albright.

2 PROFESSOR ALBRIGHT: When the
3 rules are reorganized, I'm hoping that it will
4 be more obvious that there are general rules
5 that apply to all other rules. And so maybe
6 this won't be as much of a problem as it is
7 now.

8 MR. YELENOSKY: This was in our
9 little subcommittee where we did one to 14,
10 and I can't remember exactly, but Alex
11 remembers us conforming it to the Appellate
12 Rules on the bond issue, so we have touched on
13 this rule already.

14 CHAIRMAN SOULES: Okay. No
15 further change. Is that unanimous? Okay. No
16 further change.

17 634. I guess this is Exhibit D.

18 HON. C. A. GUITTARD: Now,
19 there has been a change made in the TRAP rule
20 that would have this same effect, but I think
21 it would be appropriate to put it here too.

22 PROFESSOR ALBRIGHT: Justice
23 Guittard, in the Rule 1 through 15
24 subcommittee we made this rule identical to
25 what we had put in the TRAP rule.

1 HON. C. A. GUITTARD: Good.

2 That takes care of that.

3 CHAIRMAN SOULES: Okay. Have
4 we already done this? Did someone say we've
5 already done this?

6 HON. C. A. GUITTARD: On the
7 Rule 657 and following, we already presented
8 them to this committee. They came from,
9 perhaps inappropriately, but from the
10 Committee on Appellate Rules of the appellate
11 practice section. Sarah Duncan was the one
12 that authored these changes, none of which I
13 think is controversial. And I think that they
14 passed this committee really without any
15 discussion or any opposition, and they were
16 postponed because there was some question of
17 revising certain of the execution rules, and I
18 don't know just what the status of that is.

19 But I haven't reviewed this to make sure
20 that those things are taken care of, but in
21 other words in, any event, these garnishment
22 judgment rules or garnishment rules have been
23 submitted to this committee and have been
24 approved, as I recall.

25 CHAIRMAN SOULES: Okay. We

1 have the vote of the full committee on January
2 the 20th approving a change to 634 that says,
3 "The filing and approval of a supersedeas
4 bond immediately suspends commencement or
5 enforcement of any proceedings or official
6 action to enforce the judgment by execution,
7 garnishment, or otherwise."

8 So do we need to add this language in
9 634, or has that already been done? I'm not
10 sure. Lee says it's been done, so I guess
11 this has been done, by a general rule as
12 opposed to a specific rule. Is that correct,
13 Lee?

14 MR. PARSLEY: Yes. But we did
15 it -- this committee approved 634, and it's
16 behind Exhibit D. The first page is No. 1.
17 The next page is No. 85. The next page is
18 No. 86. You'll see at the top that page
19 number, 86. That's exactly what Anthony
20 Sadberry says.

21 CHAIRMAN SOULES: Okay. So
22 this has already passed the committee?

23 MR. PARSLEY: This passed the
24 committee in January of '95, I think. I think
25 him saying January of '96 is wrong. I believe

1 it was January of '95 when it passed the
2 committee.

3 CHAIRMAN SOULES: Okay. So
4 that's done.

5 Now we get to 657 through 677.

6 HON. C. A. GUITTARD: That was
7 approved also, was it not, Lee?

8 MR. PARSLEY: That's right.

9 CHAIRMAN SOULES: Okay. So
10 that's done.

11 146. Now, what is this one about? I
12 guess we're going to have to get the -- this
13 doesn't say what agenda it comes from. 170.
14 Let's get that out. We can't tell from this
15 what the problem is.

16 MR. YELENOSKY: It's about a
17 separate set of justice court rules, if you
18 look at the comment.

19 CHAIRMAN SOULES: 146 and 148
20 have to do with deposits for cost.

21 MR. YELENOSKY: Oh, I'm sorry,
22 I'm looking at -- well, no.

23 CHAIRMAN SOULES: That's the
24 rule number, and this is the page number.

25 Well, let's put this on the side while

1 Holly is looking at it, and let's go to the
2 next report. Where should we start on this
3 report, Anne, do you know, the one that does
4 not have tabs?

5 MS. GARDNER: The one that does
6 not have tabs was prepared by Tony, so -- no,
7 Anthony Sadberry. And it goes through the --
8 I guess let's start at the beginning. It goes
9 through the requests that were made in the
10 agenda. The page numbers are referred to
11 there beside the rule, so that serves a
12 purpose too.

13 Almost everything was either referred to
14 Judge Till's task force, or we recommended no
15 change.

16 MS. SWEENEY: Could we get a
17 little more elaboration on that?

18 MS. GARDNER: Well, I would
19 love to, but I did not have a chance to go
20 back through here and review the page numbers
21 of the agenda before today's meeting.

22 MR. YELENOSKY: Well, this
23 looks duplicative of what we just looked at.

24 CHAIRMAN SOULES: While we're
25 trying to find the agenda, let's turn over to

1 the page where there's a chart back here. And
2 it this looks like to be to some extent
3 duplicative of what we've already looked at
4 but maybe not altogether, because I don't see
5 a 662. We've done Dick Brown's.

6 MS. GARDNER: Well, without
7 having the page numbers before us of the
8 agenda and without having an explanation of
9 the agenda set out on the chart, it looks like
10 it would take more time than it's worth to go
11 through it.

12 CHAIRMAN SOULES: Well, we're
13 going to go through it sometime. We've got
14 45 minutes here to do it. Let's get the
15 agendas out and work on them and try to get
16 this done. Sooner or later we're going to
17 have to do them.

18 Okay. The last one, the one with tabs,
19 has to do with 146. Herb Finkelstein says,
20 "There is no provision relating to justice
21 courts to prevent a defendant against whom a
22 judgment has been rendered to appeal by making
23 a cash deposit. 46b and 48 provide for the
24 making of a deposit in lieu of a bond, but
25 strangely enough there is no comparable

1 provision for appeals from judgments in the
2 justice court. I suggest the rules relating
3 to appeals from judgments in the justice
4 courts been amended to provide for a cash
5 deposit in lieu of a bond."

6 MS. SWEENEY: Mr. Chairman,
7 this might be out of order, but on all of the
8 justice court rules, I would propose we bypass
9 those, since they've all gone to the special
10 set of rules, and that we talk about the
11 things that haven't gone there, unless I'm --
12 it's possible I'm completely out of order and
13 confused, but --

14 MR. YELENOSKY: Well, one of
15 the issues that I would like to have a chance
16 to discuss is whether there should be a
17 separate set of justice court rules, and now
18 may not be the time. But wherever there is a
19 justice court rule here as opposed to a
20 particular one there, I think, as Anne said,
21 it defers to the task force and the fact that
22 there will be a separate set of rules and that
23 the task force will take care of recommending
24 those. And we don't have that report before
25 us, do we?

1 MS. SWEENEY: Didn't we get
2 that report?

3 MS. GARDNER: No.

4 CHAIRMAN SOULES: No.

5 MS. GARDNER: It went to
6 Justice Hecht.

7 CHAIRMAN SOULES: He's talking
8 about 146, I guess, because 46b and 48 don't
9 seem to have anything to do with bonds. He
10 says that there is no provision for appeals
11 from judgments in the justice courts. You can
12 appeal by making a cash deposit.

13 Where is the provision for appealing a
14 justice court judgment? Somebody on the
15 subcommittee help us with that.

16 PROFESSOR CARLSON: I thought
17 it was like 571.

18 MR. PARSLEY: 573.

19 CHAIRMAN SOULES: 573. Well,
20 tell me, if we look at 573, when the bond or
21 the affidavit in lieu thereof has been filed,
22 the appeal shall be held to be perfected. And
23 we have put in 14c, as I understand it, that
24 any time a bond is required, a cash deposit
25 can be used. Well, that's in lieu of a surety

1 bond, and I guess this is an appeal bond.

2 HON. C. A. GUITTARD: I think
3 that's in 571.

4 CHAIRMAN SOULES: Well, it says
5 in double the amount of the judgment, so that
6 is supersedeas. I think 14c takes care of
7 this problem.

8 PROFESSOR CARLSON: I agree.

9 CHAIRMAN SOULES: Okay. No
10 change. Refer to 14c.

11 Okay. That takes care of everything in
12 the tabbed portion.

13 Now we need the original agenda. Is that
14 what this is? The original agenda, 906 to
15 918. This is from Judge Tom Lawrence, who at
16 least on December the 10th of '92 was a JP in
17 Houston. 523 to -- (reading) "I believe you
18 can rescind 523 to 591 as separate rules for
19 the justice court and relocate them to the
20 General Rules section. One of the problems of
21 leaving 573 to 591 unchanged is Rule 523
22 defies precise interpretation."

23 What does 523 say? I hate to be doing
24 work of the subcommittee here, but we've got
25 to get this done, so --

1 MR. YELENOSKY: 523 says that
2 the rules that apply to district and county
3 courts also govern the justice courts, which
4 also is that whole issue again of a separate
5 set of rules.

6 MR. PARSLEY: He wants to get
7 rid of that.

8 CHAIRMAN SOULES: Okay. So is
9 your recommendation, Lee, that we do nothing
10 on this and see what comes from the task
11 force?

12 MR. PARSLEY: Yeah. I think
13 the task force is dealing with what he wanted
14 to do.

15 CHAIRMAN SOULES: Okay. On 523
16 to 591 this committee will make no change.
17 Any objection to that?

18 Okay. Now we go to 525. Is that another
19 part of this same -- that's on Page 919.

20 MR. YELENOSKY: That's part of
21 the justice court rules as well.

22 CHAIRMAN SOULES: Okay. Now we
23 go to 919 from Judge Hawkins who wants to
24 determine whether the justice court pleadings
25 should be oral or written. "With minor

1 exceptions, justice court rules should be the
2 same as county and district court rules. The
3 same is true of statutes on venue,"
4 et cetera.

5 These two judges, at least in '92, were
6 of the view that we ought to eliminate the
7 special justice court rules and just have the
8 regular rules. However, it seems that the
9 momentum has gone the other way in Justice
10 Till's task force. Elaine, can you comment?

11 PROFESSOR CARLSON: Yeah.
12 Justice Lawrence contacted me. He's a very
13 fine judge who headed up the state bar
14 section, and I've heard from several other
15 JPs, and I think there is sort of a mixed
16 sense among that bar or judges. And I would
17 hope that when and if that issue is brought up
18 here that we have enough lead time so we can
19 hear from different judges on that perspective
20 or at least receive input to consider.

21 MR. YELENOSKY: Luke, I mean,
22 there is an important issue there, and I don't
23 feel fully briefed to address it right now,
24 but what we're being asked to do now is look
25 at a disposition chart, which basically

1 whenever a justice rule comes up it says
2 there's a task force, but we don't have the
3 task force report. And I don't think in any
4 other situation have we gone through a
5 disposition chart where we haven't seen the
6 report. So these issues are coming up, and
7 then there's some recommendation from the task
8 force report that we don't have before us, so
9 it's kind of the cart before the horse.

10 MS. GARDNER: Yeah, I agree.
11 Being a member of the subcommittee, I defend
12 our subcommittee. Ours is the only one that
13 had a task force appointed at the same time
14 the subcommittee was created and was working.
15 They were working on their proposal at the
16 same time we were here, as opposed to all the
17 others who took the task force reports and
18 went from there.

19 We did not feel comfortable or that it
20 was productive to be taking action on the very
21 same issues that were being dealt with by the
22 task force at the same time. So subsequently
23 we referred everything that had to do with the
24 justice court to the task force, and that's
25 where it is. That's where it stands.

1 CHAIRMAN SOULES: Well, 534
2 requires the justice or his staff to in effect
3 document into a citation the plaintiff's
4 claim.

5 PROFESSOR CARLSON: Right.

6 CHAIRMAN SOULES: That's
7 different, but that seems -- why isn't that
8 sufficient? Why does Judge Hawkins not find
9 that sufficient? Pleadings should be oral,
10 525, or written, 534. 534 is a citation.
11 It's not a pleading. And the citation,
12 though, says the defendant has to file a
13 written -- I guess he's talking about the
14 defendant's pleadings. The citation requires
15 the defendant to file a written pleading,
16 whereas 525 says pleadings shall be oral
17 except where otherwise specifically provided.
18 526 says an answer shall be in writing.

19 MS. GARDNER: Luke, may I --

20 MR. YELENOSKY: Luke, can I
21 make a motion that we defer any consideration
22 of the justice court rules until we have the
23 task force report?

24 PROFESSOR ALBRIGHT: I second
25 that.

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MR. YELENOSKY: Luke?

CHAIRMAN SOULES: All right.
Well, then, let's go to 662 and see if we can figure out what this is.

We will -- okay. On 525 we will postpone -- I guess we can do one of two things. We can do what you say, Steve, or we can do no change. We're going to have to see these -- okay. We'll just postpone them.

MR. YELENOSKY: Right. I would like to use --

CHAIRMAN SOULES: Postpone 525.

MR. YELENOSKY: I would like to use the time, too, but I just don't see how we can use it productively for this.

CHAIRMAN SOULES: 528. Okay.
534, 536, 542, postpone 544 and 574a, postpone without reference to the merits.

And now that gets us to 662 at Page 940.

MR. YELENOSKY: And that's ancillary proceedings.

CHAIRMAN SOULES: This is delivery of writ of garnishment. It says the writ of garnishment shall be dated and tested as other writs, and may be delivered to the

1 sheriff, constable, or authorized person by
2 the officer who issued it, 662, or he may
3 deliver it to the plaintiff.

4 The sheriff and constable are already
5 there. All they're adding is "or authorized
6 person" by the officer who issued it. So what
7 they're adding is "or authorized person" to
8 this.

9 A writ of garnishment is just a
10 pleading. It's not an attachment. It's not
11 an execution. It's just handing over a piece
12 of paper like handing over a citation. And we
13 have somewhat drawn the line as to what
14 process servers could serve or should serve or
15 shouldn't serve. Is there any activity
16 connected with the service other than the
17 delivery of the paper? And I don't see any
18 problem with process servers serving a writ of
19 garnishment. All it does is require it
20 doesn't take over any property. It doesn't
21 sieze a person. It doesn't do anything like
22 that.

23 Is there any opposition to this? Okay.
24 That stands approved, 662.

25 663. This is execution and return of

1 writ. Same issue.

2 Any objection to that? Approved.

3 684. We already looked at that a moment
4 ago. No change. See 14c.

5 688. Page 943. Clerk to issue writ.
6 This is, what, a writ? 688. This is a writ
7 of what? This is an injunction, a writ of
8 injunction. "Deliver same to the sheriff or
9 any constable of the county of the residence
10 of the person enjoined, or shall deliver such
11 writ to an authorized person." It's the same
12 issue.

13 Any objection? It stands approved.

14 689 on Page 944. This is also
15 injunction. Same issue.

16 Any objection? That's approved.

17 MR. YELENOSKY: To no change?

18 MS. SWEENEY: To no change?

19 CHAIRMAN SOULES: No. To allow
20 a process server to serve it.

21 MR. YELENOSKY: Oh.

22 MS. SWEENEY: So we're going
23 against the subcommittee's recommendation?

24 CHAIRMAN SOULES: Yes. Yes,
25 because I don't think they focused on what the

1 issue is. The issue here is, can an
2 authorized person, can a process server serve
3 a writ so long as there's not any other
4 activity collateral to it.

5 MS. SWEENEY: Like interviewing
6 the defendants?

7 CHAIRMAN SOULES: Like
8 interviewing the defendants or picking up
9 property or anything that might otherwise be a
10 breach of the peace where a state officer
11 should be doing that probably.

12 So we're back to 571, which I guess goes
13 back to the justice court rules again.

14 MS. SWEENEY: What about 696,
15 698, the back of the page?

16 CHAIRMAN SOULES: Did I skip
17 something? Oh, thank you. 945. Okay.
18 Clarify the sequestration. Doris Lange.

19 MS. LANGE: The only comment I
20 would like to make, Mr. Chairman, is by
21 letting another person serve these, the clerk
22 will not be able to answer any questions the
23 attorney or defendant may ask in regards to
24 the writs. Right now we know who we gave the
25 writ to or the service to and can follow up on

1 it for you. If it's whoever wants to take it,
2 we will not be able to do that. And I just
3 wanted to point that out, that by making these
4 changes what could happen.

5 CHAIRMAN SOULES: Well, the
6 clerk is supposed to deliver it to the
7 authorized person, so they would have to show
8 authority. It's just like if you gave it to
9 the sheriff or constable. The giving is not
10 changed. The transfer from the clerk to the
11 server is still in the rule. It's just adding
12 another class of people to whom you may
13 transfer the item to be served.

14 MS. LANGE: I understand. But
15 if you call and there's been no service, I
16 know where to find my constable or my, you
17 know, whoever. I do not know where to find
18 whoever, Anne Gardner, where she is, whoever
19 else is picking it up. And it doesn't matter
20 to me. I just wanted to point this out.

21 HON. C. A. GUITTARD: Can't the
22 clerk make a record of who the process is
23 delivered to?

24 MS. LANGE: No.

25 MS. SWEENEY: Why no?

1 MS. LANGE: Because we know
2 what all of our citations go to the constable;
3 we know what papers go to the sheriff and
4 which go to the constable, and we keep a
5 copy. I keep a copy. Not all clerks do, but
6 I keep a copy of what I send out until the
7 original comes back. But you know, if you
8 have someone else, or you have the attorney
9 asking for something, if he asks, "Have they
10 served it?" I have no record of who is serving
11 it.

12 CHAIRMAN SOULES: Okay. 696 on
13 Page 945. All right. Does anybody understand
14 what this is? Let's see, the subcommittee
15 didn't give us an explanation of what they
16 think this is about, so we'll have to look at
17 it.

18 The amount of the bond for sequestration
19 set by the court, and the plaintiff replevies,
20 bond for sequestration is not fairly nominal.
21 What should be the amount of the penalty if
22 combined with the replevy bond? Are we in the
23 trespass to try title rules here, 696?

24 PROFESSOR CARLSON: No.

25 HON. C. A. GUITTARD: This is

1 sequestration.

2 CHAIRMAN SOULES: What does
3 that have to do with sequestration?

4 HON. C. A. GUITTARD: You can
5 sequester real estate on a claim within the
6 jurisdiction of the justice court.

7 CHAIRMAN SOULES: Well, all of
8 these rules provide for a bond amount -- in
9 the amount fixed by the court's order. That's
10 a sequestration bond.

11 HON. C. A. GUITTARD: Yeah.

12 CHAIRMAN SOULES: Then you've
13 got to reduce or increase the bond, and then
14 you can replevy by giving a bond payable to
15 the plaintiff in an amount fixed by the
16 court's order. So that's not any fixed sum
17 either. I think he's right. I think he's
18 missing something, and that is that the trial
19 judge can decide how much protection the bond
20 needs to give. And that really runs through
21 all of these extraordinary writs. We worked
22 hard to get that done in the very beginning.

23 I agree with the committee. I don't
24 think any change is necessary here.

25 Does anybody object? No change to 696.

1 698 is probably the same issue, I think.
2 I agree with the subcommittee. I think that's
3 the same. No change.

4 708. Page 947.

5 MS. GARDNER: Those are all
6 duplications.

7 CHAIRMAN SOULES: 708 is
8 probably a different extraordinary writ. No,
9 it's the same. It's still sequestration.
10 They're all the same thing. No change. No
11 change on 696, 698 or 708.

12 And then we get to 523, which is small
13 claims court. Well, let's look and see what
14 he's saying, Jeffrey Mahl. The subcommittee
15 says that small claims court is governed by
16 Chapter 28 of the Government Code and the
17 Texas Rules of Civil Procedure do not apply.
18 This looks like something we ought to postpone
19 consistent with what we said earlier about the
20 justice rules. I'm not sure.

21 Holly, would you bring me the supplement,
22 Page 428, please.

23 MR. PARSLEY: I think he wants
24 to add small claims court to Rule 523.

25 CHAIRMAN SOULES: Okay.

1 Jeffrey Mahl. It is my impression from this
2 judge, he says, he doesn't say which one, that
3 in a small claims court no rules apply. Judge
4 Prather writes him and says, "Concerning your
5 letter requesting a hearing, I refer you to
6 Rule 2, which lists the courts that are
7 controlled by the rules. You will note that
8 small claims court is not listed. It is a
9 separate and distinct court from justice court
10 which hears all other civil cases. Your case
11 was filed in small claims court and is not
12 bound by the rules. Therefore, your motion
13 for attorneys' fees and your request for a
14 hearing are denied."

15 Okay. Should small claims court be
16 governed by the Rules of Civil Procedure or
17 can they even be under the Government Code?
18 Let's see --

19 MR. YELENOSKY: We addressed
20 that in our subcommittee as well and
21 recommended against that. We recommended
22 against any change on the theory that small
23 claims court is precisely for people who
24 aren't represented by counsel and it shouldn't
25 go under the rules. That's what justice court

1 is for.

2 CHAIRMAN SOULES: Okay. Let me
3 see, I'm just wondering if the Government Code
4 provision is in here. We may not even be able
5 to get there. Chapter 28 is not in my book,
6 so I can't --

7 PROFESSOR CARLSON: I have it
8 here, Luke. And it's largely jurisdictional
9 and provides that the justice court sits or
10 presides over small claims court. I'm not
11 sure that's the right cross-reference or not.

12 I know I've read statutes other than this
13 that do provide that the Rules of Procedure
14 and Evidence are basically relaxed, gone. And
15 I think that is appropriate. There's a
16 limited number of cases that can be filed in
17 small claims. They would be overly burdensome
18 and expensive, those proceedings, to tie them
19 back into the state rules.

20 MR. YELENOSKY: They're
21 typically small consumer claims. If you're
22 evicting somebody, it has to be in the justice
23 court, so those rules apply.

24 CHAIRMAN SOULES: Okay. No
25 change. So be it. That gets us to 571

1 through 73, which are justice rules, right?
2 Postponed.

3 PROFESSOR CARLSON: Luke, can I
4 just raise one question before we go on?

5 CHAIRMAN SOULES: Of course.

6 PROFESSOR CARLSON: Do I
7 understand that what we just said, that there
8 could be service by an independent process
9 server for the writ of garnishment and the
10 writ of injunction, is the intent to just
11 track the language in Rule 103, a person
12 authorized by written court order? Is that
13 how it ought to be stated?

14 CHAIRMAN SOULES: I think so,
15 yes. Okay. Bonnie.

16 MS. WOLBRUECK: I'm sorry, I
17 just realized that you had one more to go
18 through, but since you're in this writ
19 section, I have a concern that comes to clerks
20 in regards to executions that I am wondering
21 if the rules should clarify, and that is if
22 more than one writ of execution can be issued
23 at the same time.

24 CHAIRMAN SOULES: What's your
25 concern? It's not clear at this time?

1 MS. WOLBRUECK: It's not clear
2 at this time in the rule. And I have had some
3 attorneys tell me, in fact, in some sessions
4 to clerk, that only one writ of execution can
5 be issued at one time. And it's not clear in
6 the rule, so I'm wondering if it should be
7 clarified so that clerks know that more than
8 one writ of execution can be issued.

9 CHAIRMAN SOULES: Would you
10 prepare a change that says that?

11 MS. WOLBRUECK: I will do
12 that.

13 CHAIRMAN SOULES: We're through
14 at trial, we're to a judgment that is mature,
15 not superseded, and they say you can't get but
16 one execution at a time so I can go get my
17 property hid. That leaps the lines at that
18 point, I think, to enforce the judgment,
19 right? Okay.

20 MS. WOLBRUECK: That's the way
21 some clerks read it. And like I said, we have
22 had an attorney give a presentation to us
23 before on executions who said only one could
24 be issued, so I feel like it needs to be
25 clarified.

1 CHAIRMAN SOULES: If you will
2 prepare something for us, we will certainly
3 work that through.

4 Okay. 571 to 73 is back in the justice
5 rules, right?

6 MS. DUDERSTADT: Correct.

7 CHAIRMAN SOULES: So we'll
8 postpone that without reference to the merits.

9 609(d). That's Supplemental Page 435.
10 In Kleberg County, proposed change to 609(d).
11 Juvenile adjudications.

12 MR. PARSLEY: Okay. That's a
13 rule of evidence.

14 CHAIRMAN SOULES: Okay. Refer
15 this to Buddy Low's committee. Holly, will
16 you take care of that and tell him to address
17 this? That will come back then, and we'll put
18 it on our agenda as a specific item so we'll
19 know where it is.

20 684. This is Dick Brown again. We've
21 handled that. Refer to 14c.

22 Miscellaneous justice court rules. We'll
23 postpone that without reference to the
24 merits. The same with 525, 534 and 546, 554
25 556, 568 and 574(a). Those are all postponed

1 without reference to the merits pending our
2 consideration of the task force when we get
3 it.

4 Now we're to 680. This is in the second
5 supplement, Page 496 to 499.

6 PROFESSOR CARLSON: That's the
7 same thing we looked at before.

8 CHAIRMAN SOULES: Okay. This
9 is James Holmes, the thing we just talked
10 about, notice and the Creed. No change.

11 And that's it, isn't it? Anne, does that
12 wrap it up? You're on the committee.

13 MS. GARDNER: That's it.

14 CHAIRMAN SOULES: So we've done
15 all the rules in that area except the mistaken
16 assignment of a rule of evidence and the
17 justice court postponements.

18 Is there anything else left here? Does
19 anybody see anything else here that we haven't
20 covered? I want to be sure that if we have
21 parked something that I've got it on the
22 agenda to get back to. Nothing?

23 Well, thanks for your endurance and your
24 help and your contribution. I think we made a
25 lot of good headway here at this meeting. And

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I believe I can see light at the end of the tunnel, and it doesn't seem to be the train.

Thank you all. We will see you in January. Merry Christmas, happy holidays, and I hope you find time to enjoy them.

(HEARING ADJOURNED 12:00 NOON.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

I, WILLIAM F. WOLFE, Certified Court
Reporter, State of Texas, hereby certify that
I reported the above hearing of the Supreme
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