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BEFORE THE  
SUPREME COURT ADVISORY COMMITTEE  
AUSTIN, TEXAS

VOL. 2

FEBRUARY 16, 1990

Austin, Texas

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HEARING HELD IN AUSTIN, TEXAS, ON FEBRUARY 16, 1990

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R-E-F-O-R-E

LUTHER H. (LUKE) SOULES, III  
CHAIRMAN

\* \* \* \* \*

SUPREME COURT:  
Justice Lloyd Doggett  
Justice Nathan Hecht

COARCE CHAIR:  
Doak Bishop

OTHER COMMITTEE MEMBERS:  
Gilbert T. Adams, Jr.  
Pat Beard  
Elaine Carlson  
John E. Collins  
Tom H. Davis  
J. Hadley Edgar  
Charles F. Herring  
Franklin Jones, Jr.  
Russell McMains  
Charles (Lefty) Morris  
Tom L. Ragland  
Broadus A. Spivey  
Harry L. Tindall  
Anthony J. Sadberry  
Kenneth D. Fuller  
David J. Beck

Sam D. Sparks (San Angelo)

OTHER SPEAKERS:  
Pat Hazel  
Tom Leatherbury

P R O C E E D I N G S

Friday, February 16, 1990

Afternoon Session

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6 CHAIRMAN SOULES: Let's see if we can get this  
7 166(b)(5), the last of this done up or down. We have got a  
8 proposal that Rusty drafted. I am not sure where it is. Did  
9 we make copies of it?

10 MR. MORRIS: We did, and they have been passed  
11 out.

12 CHAIRMAN SOULES: It looks like it is sideways  
13 on a piece of paper. And then there is one on 640 that -- I  
14 don't think you would probably have both of them. You would  
15 want to do one or more or the other or neither. We have had  
16 a chance to look at them. Does anybody have a motion?

17 Being no motion, there will be no consideration of  
18 this. All right.

19 MR. McMAJNS: Had we laid a bed in the overall  
20 proposal just general issue of discovery?

21 CHAIRMAN SOULES: We are not revisiting that  
22 now. I think we have done what we are going to do to it.

23 MR. McMANS: That is all this was designed to  
24 deal with is if -- was to try and avoid dealing with  
25 discovery until the sealing order rule -- trying to deal with

1 it here. And --

2 CHAIRMAN SOULES: So are you-all satisfied  
3 that you worked this some other way, Chuck, Lefty? I don't  
4 know. Is that what I am hearing?

5 MR. HERRING: I think the action that we had  
6 on 166(b)(5) took care of Rusty's concerns here and took care  
7 of most discovery, 76(a).

8 CHAIRMAN SOULES: Any further motions on  
9 166(b)(5)? All right, let's move in the agenda then to TRAP.  
10 Rusty.

11 MR. McMAJNS: Luke, I do have one -- and I am  
12 not trying to reinvent the wheel, but I mentioned it to  
13 several other people on the Committee who have actually -- we  
14 never exactly took a vote on this subject, and --

15 CHAIRMAN SOULES: Okay, let's articulate the  
16 subject.

17 MR. McMAJNS: The subject is this entire  
18 sealing orders jump through the hoop stuff in order to get  
19 stuff sealed.

20 And my basic -- this rule creates -- and I am  
21 talking now about what our -- you know, the expanse of its  
22 application in terms of all court records as they are  
23 defined.

24 I, personally, have a serious problem with regards  
25 to applying that presumption of family law matters because I

1 think the legislative enactment of the Family Code recognizes  
2 a number of things that are designed, really, to secure  
3 privacy for the parties' anonymity and confidentiality, and  
4 I, for one -- and I think it could be done just in the  
5 definition of court records relating to cases that are filed  
6 pursuant to the --

7 MR. TJNDALL: Family Code.

8 MR. McMAJNS: I would, frankly, exempt family  
9 law cases from having to jump through that. I visited with  
10 several members of the Committee who have roughly the same  
11 attitude, if it could be done expeditiously.

12 CHAIRMAN SOULES: What about other partnership  
13 dissolutions?

14 MR. McMAJNS: See, I don't have a problem with  
15 anything that, as Tex was pointing out, any -- virtually any  
16 other private dispute we are talking about can be by resolved  
17 by agreement without the intervention of the court. Now, you  
18 just can't do that in a divorce or in a parent/child  
19 relationship situation. You have got to have stuff done at  
20 the courthouse. It doesn't matter how much you want to agree  
21 to it, there is stuff finally going to get done in the  
22 courthouse, and it is going to be there. And I just think  
23 that that -- I disagree with the presumption that this 76(a)  
24 creates that family law matters are presumptively knowable  
25 and the business of the public at large.

1           That is what we have done in the delcarations we  
2 make in 76(a), and placing the burden on a party not wanting  
3 disclosure. We have presumptively made that publicly  
4 accessible. I don't believe, frankly, that the majority of  
5 this Committee really believes that the public access should  
6 be guaranteed to family law matters.

7           CHAIRMAN SOULES: Hadley Edgar.

8           MR. EDGAR: I propose the same thing, Rusty,  
9 that you said for certain probate matters too, guardianships  
10 or matters like that.

11          MR. BECK: Or patent matters.

12          MR. EDGAR: I am not speaking against what you  
13 are saying. I am thinking that, perhaps, there are other  
14 areas that might fall in the same general area.

15          MR. MORRIS: Luke, we are reinventing the  
16 wheel here. Chuck and I worked -- he doesn't want to hear  
17 about it -- but we worked hard to try to come up with one  
18 exception, and you end up swallowing the rule. And the  
19 problem is that last week when we decided -- if you will  
20 remember, there was a vote here that deleted specific  
21 interests because we decided that the best way to go is on a  
22 case-by-case basis and let the people go through the rule.  
23 But through this rule -- at least I think I can speak for  
24 Chuck -- is he and I intended it, it is clear as we said last  
25 week, and I think if you have a purely personal matter,

1 family law matter, then I think that those records will be  
2 sealed.

3 MR. HERRJNG: Let me add, there are lots of  
4 folks who came before the subcommittee and said we ought to  
5 have exceptions, and I promise you the rule we adopted is  
6 going to drive the intellectual property bar crazy, and I  
7 hope the Supreme Court will publish this rule before it  
8 adopts it so they get some input from members of the bar that  
9 are not represented here. But I don't think we should carve  
10 a bunch of exceptions out at this point.

11 CHAIRMAN SOULERS: We are not going to at this  
12 meeting. The Chair is not going to entertain it until -- at  
13 least until we get through with the charge rules and the rest  
14 of the rules that we worked on. And we have had some of that  
15 debate before we ever voted over the history of it. So that  
16 is all out of order. That is foreclosed. That issue is  
17 closed.

18 I think while we have as many people here as  
19 possible we ought to take up the charge rules. That is  
20 probably the most important item left.

21 And we now have -- 271 is on the floor and, Hadley,  
22 you are recognized -- 271 through 275.

23  
24  
25

1 (At this time there was a brief  
2 discussion off the record, after which time the hearing  
3 continued as follows:)

4  
5 MR. EDGAR: If you will turn to the -- if you  
6 will turn to the eight or nine-page document without any  
7 heading on it, reading Rule TRCP 271. It looks like this.  
8 This is the front page. It was passed out to you this  
9 morning. You will not find it in the book.

10 CHAIRMAN SOULES: It is on your desk in front  
11 of you. It says TRCP 271, "Charge to of the jury court."

12 MR. EDGAR: Anybody not have a copy? It was  
13 passed around.

14 CHAIRMAN SOULES: It was passed out and the  
15 copies were left around everywhere.

16 MR. EDGAR: All right, you will recall that  
17 last week the Committee unanimously recommended or approved  
18 the form of the change of rule -- of these rules in the form  
19 in which they are now consolidated into Rules 271 to 275.

20 The problem concerned the method of preserving  
21 error, and the Committee overwhelmingly approved the concept  
22 that preservation of error be -- that a request be required  
23 if an entire ground of recovery or defense was omitted from  
24 the charge, or if the court had ordered a party to -- that  
25 had the burden on a question or issue -- question, definition

1 or instruction, to, in the face of an objection, write out a  
2 proper question, definition or instruction.

3 Now, <sup>that</sup> that was the charge that the Committee was  
4 given. And Luke did most of it, and discussing it with  
5 Elaine and me, came up with the proposal that you have in  
6 front of you.

7 Now, to show you how that is applied, you need to  
8 first look at Rule 272(5). Incidentally, every underlined or  
9 additionally heavily underlined word that you see here is a  
10 change from the rule that you had before you last week. But  
11 the major changes -- we go through the individuals later  
12 on -- but the major change is here in Rule 272(5), providing  
13 that if someone objects to a question, definition or  
14 instruction, then the court may order the person that has the  
15 burden on that to ride it out. That way the trial judge has  
16 before him or her in writing what that party that has the  
17 burden thinks it ought to be.

18 This meets the trial judges' concern that they have  
19 to rely on oral objections and they can request in writing  
20 under the penalty of waiver. And that is what 272(5) does.  
21 It imposes that burden on the party that has the burden or  
22 that relies upon the question, definition or instruction.

23 Now, if you will then move over to 273(1), this  
24 carries out the thought that we were charged with with  
25 respect to the preservation of error.

1            "To preserve error to either the omission of  
2            an entire ground of recovery of defense or to an  
3            objection when the trial court has ordered a party  
4            to tender a request under Rule 272(5)," of which  
5            reference was just made, "a written request is  
6            required to preserve error if it is a matter relied  
7            upon by the complaining party as a part of that  
8            party's cause of action or defense."

9            And then it goes on and talks about the techniques  
10           or the mechanics of that request.

11           Then, also, you then need to look at Rule 273(4).  
12           This simply provides that in all other types of cases, an  
13           objection will preserve error. Basically, that is the  
14           change. And that was the charge that we were given. And  
15           Luke and Elaine and I have gone over this, and we feel that  
16           this effectuates the will of the Committee, and I move its  
17           adoption.

18           JUSTICE HECHT: Hadley, is there any change,  
19           really, in what our general understanding is of the law as it  
20           is now under existing rules?

21           MR. EDGAR: The problem is there is some  
22           dispute about what the law is now.

23           JUSTICE HECHT: I know, but isn't it as  
24           amorphous and confused under the proposed rule as it is under  
25           our existing rule?

1                   MR. EDGAR: I don't think so because this  
2 does, I think, eliminate the problem, the problem that we  
3 were confronted with because of our current broad form system  
4 and the interrelation of a broad form question with  
5 instructions, and I think it does clear that problem up. And  
6 that was really one of the concerns that prompted us to take  
7 another look at this whole situation concerning preservation  
8 of error.

9                   CHAIRMAN SOULES: Rusty.

10                  MR. McMANS: But Hadley, in all candor, when  
11 it says the court may order a party relying on a question,  
12 instruction or definition as part of that party's cause of  
13 action or defense. Now --

14                  MR. EDGAR: What specific -- tell me what you  
15 are talking --

16                  MR. McMANS: On (5) on 272(5) where you are  
17 talking about giving the power to the judge to make a  
18 request. And I think this was what Justice Hecht was talking  
19 about. You are saying that the court's power is limited to  
20 those situations in which it is part of that party's cause of  
21 action or defense.

22                  And all I am trying to get at is aren't there some  
23 things, a la inference or rebuttal, what we frequently call  
24 defenses, that it ain't all that clear. And we never had to  
25 figure out whose part of the case it was under the other

1 rule. If it was an instruction, and inference or rebuttals  
2 handled by instructions, it had to be requested by whoever  
3 was trying to get it in. And that is the way inference and  
4 rebuttal matters are treated. We didn't call them defenses.  
5 It was inference or rebuttal matters.

6 Now, here we are now calling it a claim or a  
7 defense. Now, here is something that the courts hold  
8 generally you have got to plea. But the plaintiff has the  
9 burden of proof on it as part of his cause of action.

10 MR. EDGAR: He has a burden to negate it.

11 MR. McMANS: That is right, he has a burden  
12 to negate it. And my question is what is an inference or  
13 rebuttal when it says a party relying on a question,  
14 instruction or definition as a part of that party's cause of  
15 action for defense.

16 MR. EDGAR: If I may respond to that, to me,  
17 there is no question in my mind about that, that that is  
18 going to be the defendant's burden, because the defendant is  
19 the only one that stands to gain by the insertion or the  
20 inclusion of an inference or rebuttal in the charge.

21 MR. McMANS: In our ordinary classic  
22 inference or rebuttals, that may be true, but we also will  
23 have defensive matters too what, in essence, are defenses.

24 MR. EDGAR: Now you are talking about  
25 avoidance matters is what you are really talking about, and

1 avoidance matters, if a plaintiff was attempting to avoid a  
2 defense, then that is traditionally a burden of plaintiff.  
3 And I don't think there is any question about that either.

4 MR. McMANS: You think that is part of his  
5 cause of action?

6 MR. EDGAR: Of course it is.

7 MR. McMANS: You think it is going to be that  
8 clear under there.

9 MR. EDGAR: I certainly do.

10 MR. McMANS: I disagree in terms of what I  
11 think the courts can do with it.

12 MR. EDGAR: As an example, if a defendant  
13 pleads a statute of limitations and otherwise establishes a  
14 statute of limitations, and the plaintiff attempts to avoid  
15 the effect of the statute by some proper avoidance doctrine,  
16 then the plaintiff, to me, has always had the burden of  
17 proving that avoidance, and heretofore, they had the burden of  
18 submitting the question on it. Now, if that is to be handled  
19 by an instruction, and it might be -- properly be an  
20 instruction, then that is part of the plaintiff's burden. To  
21 me, that is just a matter of substantive law and never has  
22 changed.

23 CHAIRMAN SOULES: Justice Hecht.

24 JUSTICE HECHT: Let me get at a very  
25 intentionally practical point. If a trial judge simply has a

1 blanket order in every case that every lawyer is supposed to  
2 submit everything in writing, then is the practice under  
3 these proposed rules to the extent that we can tell what it  
4 is any different from what we think it is right now?

5 CHAIRMAN SOULES: Yes.

6 JUSTICE HECHT: How is that?

7 CHAIRMAN SOULES: It means that everything has  
8 to be requested in writing and in substantially correct form,  
9 everything. There is not any decision about whether you  
10 perfect by objection or by request because you do -- the only  
11 way you can perfect -- well, to me, if a judge orders you to  
12 do something in writing, you are probably going to have to do  
13 it.

14 JUSTICE HECHT: Why would a judge under any  
15 circumstances not request everybody to put everything in  
16 writing under this rule? It seems to me that he has put the  
17 most -- he has raised the most obstacles to appeal, and there  
18 is less likelihood that he will ever be reversed if he says  
19 to everybody in the case "Put everything in writing about the  
20 charge, and then if you screw it up, you are going to lose  
21 your appeal."

22 Now, why would a trial judge not do that in every  
23 case unless he had a mad on for somebody in the case the way  
24 they tried the case and he liked the other guy, and so he  
25 says, "Okay, you have to put yours in writing, but I will

1 just take yours orally, and that way, if you want to appeal,  
2 you don't have the additional impediment, but if you want to  
3 appeal, you better by God have it in the record." Now that  
4 is my problem with that.

5 MR. EDGAR: Well, and I don't know that I can  
6 respond to that adequately except to say that there is one  
7 limitation, and that is that you only have to request those  
8 matters upon which you have the burden. I mean you don't  
9 have to also make a written tender of matters upon which you  
10 do not have the burden.

11 JUSTICE HECHT: Well, it actually says "may  
12 order a party relying on a question, instruction or  
13 definition as part of that party's cause of action or  
14 defense," and even though foreseeability, as an element of  
15 proximate cause, is part of the plaintiff's cause of action,  
16 if I am defending it, I am certainly relying on it to be in  
17 the charge.

18 MR. EDGAR: It is not part of your cause of  
19 action or defense.

20 JUSTICE HECHT: It is in the sense that I am  
21 arguing there wasn't foreseeability, or cause in fact or  
22 whatever.

23 MR. EDGAR: From my own personal vantage  
24 point, foreseeability, in the event there is no allegation of  
25 contributory negligence involved in the case, the plaintiff

1 has the burden of establishing the defendant's foreseeability  
2 in order to establish proximate cause, and therefore, it is a  
3 part of the plaintiff's case. Now, that is just the way I  
4 would interpret that, Judge Hecht.

5 JUSTICE HECHT: All right.

6 CHAIRMAN SOULERS: The other language that was  
7 put in here to try to address that -- and we are all  
8 realistic enough to understand a trial judge can do pretty  
9 much whatever he may choose to do, but we put in that to  
10 order someone to make a 272(5) request was, quote, "to cure a  
11 particular objection made," close quote.

12 MR. FULLER: If this is not going to change  
13 the law -- and that is what I hear you all saying -- why are  
14 we doing it? Or why is it proposed? Just because we like  
15 this form better rather than the narrative form that was in  
16 the book?

17 CHAIRMAN SOULERS: Well, right now --

18 MR. FULLER: If it is not going to change the  
19 law involved, why are we doing it?

20 MR. EDGAR: Ken, I can't really say that it is  
21 not going to change the law because the law is really  
22 unsettled.

23 MR. FULLER: We are going to try to make law.

24 MR. EDGAR: But we discussed -- we went into  
25 detail about that at our last meeting, and at our meeting

1 last year, we went into this. And I think the debate  
2 reflects the fact that the law is unsettled, and this is an  
3 effort -- and perhaps it might be imperfect and the Committee  
4 may not want to adopt it -- but this was our attempt to try  
5 and make it clear, the situation under which a party had to  
6 request an order to preserve error on the one hand and simply  
7 object on the other.

8 CHAIRMAN SOULS: It does change the law  
9 because right now you cannot preserve error by an objection  
10 if the appellate court doesn't want to let you, not even if  
11 the trial judge agrees with it. Because you can't tell when  
12 something is supposed to be an instruction or a question, and  
13 no one knows. I mean until the appellate court tells you  
14 where it should have been, you don't know.

15 So, therefore, if you are a careful lawyer today,  
16 you preserve everything by making a request for submission in  
17 substantially correct form on every complaint to the charge.  
18 You don't have an alternative. This, unless -- if the judge  
19 will let you, if the trial judge will leave you alone, you  
20 can perfect error in a charge by objection under these rules,  
21 and I don't know whether the trial judges are going to react  
22 to this as we may anticipate has been discussed here or not.

23 JUSTICE HECHT: Why should it be their choice?

24 CHAIRMAN SOULS: This is Justice Hecht's  
25 concern.

1 JUSTICE HECHT: I was a trial judge for five  
2 and-a-half years. Why should the trial judge get to decide  
3 whether you are going to appeal or not? I mean I just don't  
4 understand. It looks to me like all the trial judge has is  
5 the inconvenience of retrying the case which, after all, he  
6 is paid for doing, and it seems to me that the inconvenience  
7 to the parties is they may or may not lose a valuable right,  
8 depending on whether or not they are able to read this rule.

9 CHAIRMAN SOULES: Franklin.

10 MR. JONES: Mr. Chairman, I am sorry because I  
11 was out and I have got to leave and I know that I am vitally  
12 concerned with this. Could I ask the Chair where we are on  
13 this?

14 CHAIRMAN SOULES: Where we are on it now is  
15 the Committee voted to, I think, to adopt these rules if we  
16 put in that you had to request in order to preserve a  
17 complaint that an entire ground of recovery or defense was  
18 omitted. Now you couldn't get to that with just an  
19 objection. And if we put in there that the trial judge could  
20 call upon the parties for written requests, so long as it was  
21 that party's -- the party had the burden on whatever it was  
22 that he was objecting to. Okay, we have done those two  
23 things, and they are here.

24 And Justice Hecht is focusing us back on the  
25 question of whether to give the judge the authority to call

1 for a written request in response to an objection made at the  
2 charge conference.

3 MR. JONES: Really, what we are doing is  
4 revisiting the question of whether or not the fundamental  
5 vote that we took Saturday -- or was it Friday, I don't  
6 remember -- changed.

7 JUSTICE HECHT: I can't quite hear you, Frank.

8 MR. JONES: Is that essentially right?

9 CHAIRMAN SOULES: To that extent. Would you  
10 articulate that again so --

11 MR. JONES: We are revisiting the fundamental  
12 question of whether or not the vote that we took last week  
13 stands, and that is, as I recall, we voted -- a consensus of  
14 the Committee was that the trial judge should have the  
15 authority to protect himself in the charge process instead of  
16 requiring the submission of a substantially correct issue,  
17 definition or instruction. Now we are back to that point and  
18 we are debating that issue again. Is that right?

19 CHAIRMAN SOULES: We are addressing that  
20 issue.

21 MR. JONES: Well, I -- and I have heard  
22 Justice Hecht --

23 JUSTICE HECHT: Well, I am only raising it  
24 tangentially, Franklin, although the Committee has  
25 flip-flopped on it now two or three times in a row. I do

1 think there ought to be some limit on how many times we can  
2 change our minds on this issue, or on any other one for that  
3 matter, but my broader concern is why -- what we voted on  
4 Saturday was to try to go with the proposed change in the  
5 rule, but by making some changes in it so that sometimes you  
6 had to request things. And then my question today is now  
7 that those changes been made, why should we engage in this  
8 kind of broad change rather than just leaving it like it is?

9 MR. JONES: The way it was submitted and  
10 written to us last week?

11 JUSTICE HECHT: No, I mean the way it is in  
12 the rule book.

13 MR. JONES: The way the rules are now?

14 JUSTICE HECHT: Yes.

15 MR. JONES: I have no quarrel with that  
16 position.

17 MR. BEARD: I think it cracks the matter,  
18 really.

19 MR. JONES: I appreciate it. I was advised  
20 last week to articulate the position that some 36 trial  
21 judges have made known to us, and that is, they don't want  
22 this rule to change, or if it is changed, they don't want to  
23 be deprived of what they already have, and that is this  
24 protection to have submitted to them a proper issue,  
25 definition or instruction, and I can live with staying with

1 the rule as it is, or I can live with the rule -- I can  
2 better live with the rule that Hadley has written, or I can  
3 live with the rules some real lawyers in my office have  
4 submitted.

5 But I would like to see this Committee go on record  
6 again, if necessary, before I have to leave, which is pretty  
7 soon, reaffirming the protection of the trial judge in having  
8 the power to require litigants to give him substantially  
9 correct submission when he asks for it. I don't think that  
10 is unreasonable at all.

11 I think we ought to listen -- and I don't know of  
12 any trial judge that said that we shouldn't give them this  
13 protection, and I made a list of the ones that asked that we  
14 do. And the ones that I know personally, we have that  
15 wild-eyed liberal Larry Starr up in Longview who says we  
16 ought to have that protection, we have that wild  
17 conservative, Bonnie Leggat in Marshall who says she ought to  
18 have it. And in between, we have got Chief Judge Stolhandske  
19 who lives in San Antonio, all of these judges competent,  
20 hardworking trial judges are asking for that protection, and  
21 I don't think this Committee ought to take that away from  
22 them at all, and if we do take it away from them, I think it  
23 ought to be after they have had an opportunity to be heard on  
24 the subject.

25 MR. DAVIS: You want to give them the

1 authority to require a lawyer to make a written request in  
2 substantial form on any part of the charge, or do you put  
3 that limitation only when it accrues to his side of the case?

4 MR. JONES: My feeling would be that the judge  
5 would get it on any part of the case.

6 MR. DAVIS: In other words, make you put it in  
7 the form of the defendant's issue.

8 MR. JONES: If I am going to complain about  
9 it. I am in the minority on that, I think. You know, I  
10 would like to win that issue, but if I can't win that one, I  
11 certainly think that you ought to have the authority to apply  
12 the substantial definition --

13 CHAIRMAN SOULES: Well, I think that  
14 particular question did get foreclosed. It would be just  
15 against a party with the burden of proof. But I don't know,  
16 I mean that seemed to me like that was pretty much the  
17 consensus of everyone when we got to this.

18 Sam Sparks. I am sorry. Franklin.

19 MR. JONES: The consensus is here all the way  
20 around.

21 CHAIRMAN SOULES: I guess that is right the  
22 way we are moving back and forth on this question.

23 MR. SPARKS (SAN ANGELO): Earlier today,  
24 something -- I went over Rule 166 again because it was under  
25 a table to motion not to a time certain in the future, just a

1 motion to table, and I think that is permissible.

2 But it seems like, although I may not like the  
3 results of it, we voted last week to change this with Judge  
4 Peeples' limitation and with the limitation that we don't  
5 have to do someone else's work.

6 In other words, it has to be your cause of action.  
7 So the way I see it, it is either Pat Hazelton's proposition  
8 or the one you drafted -- I mean some proposition to  
9 accomplish what we have already voted on. Are we going to go  
10 back and reopen and rehash what is there?

11 CHAIRMAN SOULES: Elaine and Hadley and I did  
12 this together. So this is not mine.

13 MR. SPARKS (SAN ANGELO): I understand. I  
14 just used that as a method of identifying the two.

15 CHAIRMAN SOULES: There has been a motion that  
16 this be adopted, be recommended, and I don't know whether  
17 there is a second to that. Is there no second?

18 MR. EDGAR: Sam, aren't you going to second  
19 it? This is what you wanted last week.

20 MR. SPARKS (SAN ANGELO): Yes, but I like it  
21 the way Pat Hazleton drew it up.

22 MR. EDGAR: All right. Now, let me speak to  
23 that. We have to do that. Let me just say, in all candor, I  
24 have not had an opportunity to really sit down and read and  
25 think about the way that Pat has done it and organized it,

1 and it might well be possible, because I know in drafting  
2 these things from my own personal experience, it is easy to  
3 leave something out when you start from scratch.

4 And I am unwilling, and I will adamantly oppose,  
5 any consideration of a wholesale redraft of this without  
6 full, fair consideration in the future, because this is  
7 really too vital. This is something the courts get very ancy  
8 about, trial courts, and I don't want to do anything to take  
9 a wholesale reorganization, approve it and recommend it to  
10 the court, and then realize that something was inadvertantly  
11 omitted.

12 Now, we have all looked at this draft that we have  
13 before us. We have had it for months, and we approved it in  
14 principle, and we are satisfied that we have incorporated all  
15 of the basic concepts under Rules 272 through 279. And so --  
16 and I am certainly not speaking to the merits of Pat's  
17 proposal. I want to make that very clear. But I am just  
18 unwilling to adopt that without substantial study.

19 MR. SPARKS (SAN ANGELO): You have solved the  
20 two things that Peeples brought up during the part, I think,  
21 I was discussing.

22 MR. EDGAR: That was our change, and we hope  
23 that we have done that, Sam.

24 MR. SPARKS: My only thought was that reading  
25 Hazleton's, it is much easier to read, fine. If you think it

1 is a substantial change --

2 MR. EDGAR: No, wait a minute. I want to make  
3 it clear. I didn't say it was a substantial change. I said  
4 the form in which it is presented makes it very easy to omit  
5 something that you, in retrospect, realize that you omitted.  
6 I am just unwilling to adopt that without giving it  
7 substantial thought and study.

8 CHAIRMAN SOULES: Anything else on this? Does  
9 anyone want to second Hadley's motion?

10 MR. BECK: Second.

11 CHAIRMAN SOULES: It has been moved and  
12 seconded that we recommend these changes to the Supreme Court  
13 that are in the latest draft. Rusty.

14 MR. McMAINS: Can we have some discussion  
15 about just some little bitty details about --

16 CHAIRMAN SOULES: Discussion, yes, sir. Sure.

17 MR. EDGAR: Because we recognize that there  
18 might be something that needs to be changed, as well.

19 CHAIRMAN SOULES: Okay.

20 MR. McMAINS: There is one little part in here  
21 that you deal with that is new and that looks funny.

22 CHAIRMAN SOULES: Where is it, Rusty?

23 MR. McMAINS: It is in the preservation part,  
24 the part we are all worried about, Rule 273, where it  
25 treats -- 273(4), I guess -- treats a request as an

1 objection. But there is another part of the rule that  
2 requires the request to be separate, which is in the end of  
3 Section 1 from the objection. See what I am talking about?

4 CHAIRMAN SOULES: Yes.

5 MR. McMANS: 273(1), the last sentence says  
6 "Requests shall be made separate and apart from objections,"  
7 and then 4 says "A request voluntarily made by a party shall  
8 be considered as an objection."

9 I am just trying to figure out how do you think  
10 those two interact? I mean if a request is considered a  
11 part -- does it cease to be a request if it is voluntary?

12 CHAIRMAN SOULES: No. You know, if an  
13 objection is required and somebody makes a request, are the  
14 appellate courts going to say "What do you waive?"

15 What we have tried to do is think of every kind of  
16 waiver and try to address that with something that says that  
17 you didn't waive when you requested and didn't appeal. It is  
18 voluntarily made, and it meets, whenever you say considered  
19 as an objection, an objection is considered on the  
20 criteria --

21 MR. McMANS: I understand.

22 CHAIRMAN SOULES: -- that are raised there.  
23 And so if somebody tries to help the trial judge by  
24 requesting an instruction instead of objecting to the  
25 omission of that instruction, and then doesn't also object,

1 that request preserves the error, and that is what this says.

2 MR. McMAJNS: I understand Frank did it.

3 CHAIRMAN SOULES: Okay.

4 MR. McMAJNS: What I am suggesting to you --

5 CHAIRMAN SOULES: Help us do it better.

6 MR. McMAJNS: No, all I am suggesting to you  
7 is that we used to -- the last sentence is an attempt to keep  
8 what used to be in our rule, the requirement that the request  
9 be separate from the objections.

10 Since we now are going to treat requests as  
11 objections, shouldn't you just delete that sentence because  
12 the source of waiver is that rule. The court has never held  
13 that it would waive because it was in the objections, except  
14 because the rule said it was. And all I am saying is that  
15 you are now going to treat the request as an objection.

16 Why require that it be made separate and apart?

17 CHAIRMAN SOULES: So your proposal is -- your  
18 suggestion is that we may want to consider deleting the last  
19 sentence -- one, two, three, four, five, six, seven -- on the  
20 eighth page?

21 MR. McMAJNS: Yes.

22 CHAIRMAN SOULES: In 273(1)?

23 MR. McMAJNS: Assuming that is what you want  
24 to do, I mean, assuming that you want to treat a voluntary  
25 request as an objection.

1 CHAIRMAN SOULES: I don't have any problem  
2 with that. Do you, Hadley?

3 MR. EDGAR: I don't either.

4 CHAIRMAN SOULES: Okay.

5 MR. EDGAR: I am just sitting here waiting to  
6 say something. I don't have any problem.

7 CHAIRMAN SOULES: We will accept amendment,  
8 then, that that last sentence be deleted.

9 MR. DAVIS: Would you direct me to it again,  
10 please?

11 CHAIRMAN SOULES: It is at the top of the  
12 eighth page, and it is in Rule 273(1).

13 MR. EDGAR: The last sentence.

14 CHAIRMAN SOULES: Anything else on this?

15 David --

16 MR. EDGAR: There is one thing I would like to  
17 talk --

18 CHAIRMAN SOULES: Hadley and then David.

19 MR. EDGAR: There is one thing that I would  
20 like to call to the Committee's attention.

21 If you will look on the second page, on the second  
22 page, No. 7, the statute, rule -- Rule 277 now talks about  
23 negligence or causation.

24 MR. McMAJNS: Right.

25 MR. EDGAR: And causation has been substituted

1 for responsibility.

2 Now, I don't know whether you compare  
3 responsibility or not, or whether you just compare  
4 negligence. But the purpose of this was to recognize the  
5 comparative responsibility statute. But we have eliminated  
6 causation and substituted responsibility. And I just wanted  
7 to call that -- of course, that had not been discussed. This  
8 is a change that was made this week and was not brought  
9 before the Committee earlier.

10 MR. McMAJNS: Do you think that there might be  
11 some comparative causations?

12 MR. EDGAR: Well, that is why I wanted you to  
13 pay attention to what I was saying.

14 MR. McMAINS: I personally think it is. An  
15 argument can be made that Duncan applies in those cases which  
16 Chapter 33 don't deal with, and a classic example is an  
17 economic loss case of some kind.

18 MR. EDGAR: Then perhaps out of an abundance  
19 of precaution we should say "compare of negligence,  
20 responsibility or causation."

21 MR. McMAINS: Yes.

22 MR. EDGAR: And that way, we don't have any  
23 problem.

24 CHAIRMAN SOULES: Okay, I am going to put  
25 "causation" in after "negligence". "Negligence, causation or

1 responsibility."

2 MR. EDGAR: I am sorry, David.

3 MR. BECK: I just had a question, Hadley.  
4 Look at 272(4). I want to make sure I understand what this  
5 means. This is not intended to take away the objection,  
6 "I object to Special Issues 1, 2 and 3 because" --

7 MR. EDGAR: This is verbatim of existing  
8 statute. Whatever the law is with regard to the  
9 interpretation of that provision now would apply to this.

10 MR. McMAINS: Yes.

11 MR. EDGAR: I mean there was no -- there is no  
12 change there.

13 MR. McMAINS: That is firm.

14 CHAIRMAN SOULES: Those words are right out of  
15 the case law. We didn't even reorganize those words.

16 MR. BECK: It was out of the rule.

17 CHAIRMAN SOULES: Well, the case --

18 MR. McMAINS We have a rule already that says  
19 we can't adopt --

20 MR. EDGAR: Now, I haven't answered your  
21 specific question because I don't know whether that objection  
22 meets the requirements or not, but whatever the law is, it is  
23 unintended to be changed.

24 CHAIRMAN SOULES: Any further discussion?

25 Okay, those in favor of recommending these rules to

1 the Supreme Court show by hands -- one, two, three, four,  
2 five, six, seven, eight, nine, 10, 11, 12, 13.

3 Opposed? To one.

4 JUSTICE DOGGETT: Was that to adopt Hadley's?

5 JUSTICE HECHT: Yes.

6 CHAIRMAN SOULES: Okay, Ken. Why don't we  
7 take up your 167(a), or, Harry, is this yours? I don't know.

8 MR. TINDALL: Yes, Ken and I worked on this  
9 together.

10 CHAIRMAN SOULES: Okay.

11 MR. TINDALL: Do all of you have -- this is  
12 the psychologist change.

13 MR. EDGAR: What are we discussing?

14 MR. TINDALL: It is Rule 167(a), physical and  
15 mental examinations of persons.

16 MR. EDGAR: Is this a handout?

17 MR. TINDALL: Yes, it should be there. Do all  
18 of you have it? I will walk you through.

19 I think it was virtually unanimous last week that  
20 based on McConnico's work that -- and Franklin Jones -- that  
21 it was the vote of the Committee that you could not appoint a  
22 psychologist unless the other party responding to the motion  
23 had listed a psychologist as an expert who would testify. So  
24 that is the first add-on from the -- from last week's vote.  
25 And that is the underscored part, Subpart (a).

1 I worked with Ken on this when he added  
2 "conservatorship" because we had terminology in our -- we  
3 really prefer conservatorship, and I added that in.

4 The other change, there is one correction. The  
5 caption on (b) --

6 CHAIRMAN SOULES: Do you have anymore copies,  
7 Harry? Or has anybody seen extra copies?

8 MR. TINDALL: I think I handed out all of my  
9 copies. Here is one if you want to.

10 CHAIRMAN SOULES: Pat is going to let me use  
11 his. We can look at it together. Thanks.

12 MR. TINDALL: Okay.

13 MR. BEARD: I have already read it.

14 CHAIRMAN SOULES: Have you? Okay.

15 MR. TINDALL: Just a housekeeping matter, the  
16 phrase "or psychologist" should be underscored in the caption  
17 to (b).

18 The other change that I made that was not voted on  
19 by the Committee, but I, in studying the rule, if all of you  
20 will turn to page -- if you have your red book here.

21 When we adopted the physical examination of the  
22 parties back in 1973, we deviated from the federal rule by  
23 saying you couldn't tell the jury "Well, they had a chance to  
24 examine me and they didn't do it." That is kept out. But we  
25 didn't give a caption to that subpart. So I just put in on

1 (c) a caption to go that rule. It just says "Effect of No  
2 Examination."

3 And then (d) is -- what I got pulled into on this  
4 rule is the excluding family law cases from it, and that  
5 is -- the first part is that the employment of a psychologist  
6 primarily comes up in child custody cases, and two, as I  
7 looked at this rule, we have always had this residual problem  
8 on blood tests. They are really not conducted by physicians.  
9 They are conducted by Ph.D. geneticists. So I dealt with  
10 that problem, and that language is straight from the -- about  
11 body fluid, tissue samples and so forth -- is straight from  
12 the Family Code.

13 The other policy decision that I made for your  
14 discussion is that the draft we have in our book -- and let  
15 me point you to that. Can you-all help me find where it is  
16 in the book? I think it is on 288 to 292. Let me -- because  
17 I went and pulled the -- if you would, look on 289. This is  
18 what we voted on last fall had out in the bar journal.

19 If I looked at the federal rule, their definition  
20 of psychologist is what I have here on our redraft. It says  
21 "For purposes of this rule, a psychologist is a psychologist  
22 licensed or certified by a state or the District of  
23 Columbia."

24 The proposal from Steve's committee was "a  
25 psychologist is a psychologist licensed by the state of

1 Texas."

2 I asked him about that, and unfortunately, he is  
3 not here, and he said he could not remember the deliberations  
4 of the Committee on that point. I don't remember it.

5 MR. FULLER: I know where that came from.

6 MR. TINDALL: You do?

7 MR. FULLER: That was submitted to me  
8 originally by the psychologist association who complained  
9 about the rule in the Whittington case originally --

10 MR. TINDALL: Okay.

11 MR. FULLER: And since they were the  
12 proponents, they wanted Justice Peeples and their association  
13 to be --

14 MR. TINDALL: Okay, that seemed -- to me, I  
15 think the federal rule may be better here if you have a party  
16 out of state. So I took the federal rule, and that is our  
17 proposal.

18 Ken has got some housekeeping changes to point out  
19 to me that when I say "cases arising under Title II Family  
20 Code," that we need to use the same phrase on 1 and 2 because  
21 a caption of the rule doesn't tell you what the rule says.

22 So I folded that in and then -- and he is correct  
23 in child custody cases, it is typically on the court's own  
24 motion or the motion of a party the court will appoint a  
25 psychologist, and I folded that in. And then the

1 examination, of course, is for the children and the parties  
2 to the suit, and I have added those little phrases in if you  
3 want to look at that. With that, that is our report, and I  
4 would move its adoption.

5 MR. FULLER: Second.

6 CHAIRMAN SOULES: Moved and seconded.

7 Discussion. Elaine.

8 MS. CARLSON: I don't have strong feelings  
9 about this, Harry, but a lot of people did when we were  
10 discussing this, whether the psychologist should be someone  
11 licensed by the state of Texas because of the lack of  
12 knowledge of licensing requirements in other jurisdictions.

13 There were some very strong sentiments expressed at  
14 the Committee's hearing in August on this. And I don't have  
15 strong feelings, but I just --

16 MR. TINDALL: Steve couldn't remember. I  
17 didn't remember anything from the discussions. The federal  
18 rules at -- and after talking to Steve, I thought the federal  
19 rules would be better.

20 In our work in divorce, the wife may be -- and take  
21 one in our office right now -- may be in Oregon. I don't  
22 know what their licensing requirements are. And the court in  
23 Texas would be hogtied. You may have personal jurisdiction  
24 over the husband, but how do you order him to do something in  
25 Oregon if it is only the state of Texas?

1 MS. CARLSON: I can see the point.

2 MR. TINDALL: So I thought that it should be  
3 like the federal rule.

4 MR. RAGLAND: I have a question on that.

5 CHAIRMAN SOULES: Tom Ragland.

6 MR. RAGLAND: Yes, this underlined portion,  
7 the last sentence of Paragraph (a) --

8 MR. TINDALL: Yes.

9 MR. RAGLAND: -- talks about appointing only  
10 when the parties respond to the motion to listen to  
11 psychologists.

12 What is the reason for having "appointing" in  
13 there?

14 MR. TINDALL: What would be the word you would  
15 use?

16 MR. RAGLAND: Well, I wouldn't use any of  
17 them, but since we are talking about this --

18 MR. FULLER: Tom, the whole subject here deals  
19 with appointed psychologists. That is the reason we are  
20 talking about appointing. We are not talking about --

21 MR. RAGLAND: I understand it does in family  
22 law, but it doesn't in others. And I don't want to be faced  
23 with someone requesting or, you know, that they have my  
24 client examined by a psychologist and then come in under the  
25 auspices of it being a court appointed.

1 MR. TINDALL: No, no, no. What this is is you  
2 absolutely cannot get a psychologist in a standard damage  
3 suit case. You can't get them period unless you intend to  
4 bring one in yourself.

5 MR. RAGLAND: I understand. But this says  
6 appointing them here, see, and that means that rather than it  
7 being your psychologist, it is the court's psychologist,  
8 which makes it all together different as far as the jury is  
9 concerned.

10 MR. SPARKS (SAN ANGELO): The word appointed  
11 is what he is talking about.

12 CHAIRMAN SOULES: May I suggest this: "Except  
13 as provided in Subpart (d) of this rule, a psychologist  
14 examination may be ordered only when" --

15 That is the gist of the it anyway, isn't it?

16 MR. TINDALL: Yes, a psychological exam may  
17 only be -- "an exam by a psychologist may only be ordered."

18 CHAIRMAN SOULES: Okay, may be ordered only.

19 MR. TINDALL: Would that answer your concerns?

20 MR. RAGLAND: That would ease it some, yes.

21 MR. SPARKS (SAN ANGELO): Then they are going  
22 to argue "This is the court ordered" --

23 MR. EDGAR: Well, the whole subject of this is  
24 order for examination is -- what we are talking about is an  
25 order.

1 Read that again.

2 CHAIRMAN SOULES: Okay, the last sentence  
3 would read,

4 "Except as provided in Subpart (d) of this  
5 rule, an examination by a psychologist may be  
6 ordered only when a party responding to the motion  
7 has listed a psychologist as an expert who will  
8 testify."

9 MR. TINDALL: That is acceptable.

10 David Beck has got one further change. And I sent  
11 this by Jack Sampson, who also made the same comment on (e)  
12 under the definition.

13 "A psychologist is a psychologist," sort of a  
14 topological type sentence, and it probably should read  
15 "A psychologist is a person licensed or certified."

16 Federal rules said a psychologist is a  
17 psychologist. So --

18 MR. EDGAR: A person licensed is a  
19 psychologist.

20 CHAIRMAN SOULES: In some cases, it probably  
21 needs -- probably needs to say that, otherwise, it might not  
22 be.

23 MR. BECK: But you follow it up by saying a  
24 person licensed or certified by a state or district as a  
25 psychiatrist -- psychologist, excuse me.

1 MR. TINDALL: If you want to say "A person  
2 licensed or certified as a psychologist" would be better  
3 English.

4 CHAIRMAN SOULES: Where is it?

5 MR. TINDALL: On (e).

6 CHAIRMAN SOULES: Is a what?

7 MR. TINDALL: "Is a person licensed or  
8 certified by the state or District of Columbia as a  
9 psychologist."

10 CHAIRMAN SOULES: All right, anything else on  
11 this?

12 MR. TINDALL: That is our report.

13 CHAIRMAN SOULES: It has been moved and  
14 seconded this be recommended to the Supreme Court for  
15 adoption. Those in favor say "Aye."

16 (RESPONDED AYE)

17 CHAIRMAN SOULES: Opposed?

18 MR. RAGLAND: No.

19 CHAIRMAN SOULES: House to one.

20 Okay, let's go to Page 465 in the TRAP rules.

21 Okay, TRAP 465.

22 Rusty, can you help us with Bill's report on this?

23 MR. McMANS: Yes, everybody should have a  
24 copy, I think.

25 CHAIRMAN SOULES: There is is a long version

1 and a short version.

2 MR. McMAJNS: Dated February 13th.

3 CHAIRMAN SOULES: Yes. February 14th.

4 MR. McMANS: The front cover says  
5 February 14th.

6 CHAIRMAN SOULES: It is a short -- just a few  
7 pages.

8 MR. McMANS: This is in addition to what he  
9 did before.

10 MR. EDGAR: Do we need both of them? Do we  
11 need the one he submitted to us last week and this one as  
12 well?

13 MR. McMANS: Now, I have not looked at the  
14 one last week. We dealt with most of the issues, but I am  
15 not sure we dealt with all the issues on the one last week,  
16 Luke.

17 CHAIRMAN SOULES: Well, let's just see them as  
18 we go. Let's start with TRAP No. 4.

19 I think the easiest thing is you go down his report  
20 first because essentially what he is doing is recommending we  
21 reject everything else except for these.

22 CHAIRMAN SOULES: Okay, well, let's take them  
23 one at a time because that is the way I have to, of course,  
24 make a record on them. And we will start with TRAP 4 on 465.

25 MR. McMANS: Yes, the question that is --

1 that, basically, Bill proposes is that we add the telephonic  
2 transfer under the manner of service part of the rule, which  
3 is Rule 4(f).

4 The suggestion was made by Judge Nye that you add  
5 the sentence which says "Service by telephonic document  
6 transfer is complete on receipt."

7 Do you have -- the last sentence of the rule now  
8 talks about service by mail is complete on mailing. That is  
9 on Page 466 if you are looking at the (f) part of the rule.

10 We have authorized the telephonic document  
11 transfer, but we haven't said when it is complete.

12 MR. DAVIS: We have said after five o'clock,  
13 consider them the next day. That was one of our changes,  
14 wasn't it? Somewheres -- I have forgotten now which one it  
15 was.

16 MR. EDGAR: I think it is back on Rule 4 about  
17 general rules, isn't it?

18 MR. BECK: Rule 21(a), I think.

19 MR. McMANS: It never got into TRAP rules,  
20 did it?

21 MR. EDGAR: But the Rules of Civil Procedure  
22 don't govern the Rules of Appellate Procedure.

23 MR. McMANS: I understand. That is what I  
24 said.

25 MR. EDGAR: I think there is a conflict.

1                   MR. McMANS: No, there is not a conflict. It  
2 is just a question of whether or not you want to have two  
3 different rules, I guess.

4                   MR. COLLINS: Appellate lawyers have to work  
5 past five o'clock, I guess.

6                   MR. DAVIS: What times start when, say, the  
7 brief is made? You say service by mail is complete on  
8 mailing. What time starts -- you don't have a three-day  
9 rule.

10                  MR. BECK: Rusty, why do we need that? What  
11 does that do?

12                  MR. McMANS: It just doesn't say -- I mean  
13 the point is that we have specifically addressed when service  
14 by mail is complete. Obviously, service by delivery is  
15 complete upon receipt.

16                  We talk about -- I mean that is what this rule is.  
17 It is talking about what the manner of service is to  
18 specifically authorize the telephonic document transfer, but  
19 we haven't told them when it is complete.

20                  MR. BECK: We haven't done that in our  
21 Rule 21(a), either. We haven't said when it is complete. It  
22 just simply says, you know, you must be served in this  
23 manner, and you certify that you have served.

24                  We haven't taken the final step of saying that  
25 service is complete. I mean implicit in the existing rule --

1 I am not talking about the appellate rule now -- is that when  
2 you serve them, it is complete. Why do you need to say that?

3 MR. BEARD: That is a conclusion we reached in  
4 our subcommittee.

5 MR. McMAINS: You know what you do when you  
6 mail something.

7 CHAIRMAN SOULES: Pat says that is the  
8 conclusion they reached in the subcommittee was to leave it  
9 alone. Is that right, Pat?

10 MR. BEARD: Right. We voted it.

11 MR. EDGAR: It is the intent of this to allow  
12 service of a brief by FAX.

13 CHAIRMAN SOULES: Sure.

14 MR. EDGAR: Is that the purposes of this?

15 CHAIRMAN SOULES: Anything.

16 MR. McMAINS: It is actually probably  
17 contemplating motions more than it is briefs, but it could  
18 easily apply to briefs.

19 MR. EDGAR: Well, I don't think that an  
20 appellee ought to have to work with a FAX copy of somebody  
21 else's brief. I don't think the briefs ought to be  
22 transmitted by FAX.

23 MR. BECK: Except as a courtesy.

24 MR. EDGAR: I don't care. I don't think they  
25 ought to have to do that. I don't think that is necessary is

1 what I am trying to get at.

2 MR. FULLER: Well, I was of the opinion  
3 originally when we were talking about giving notice by FAX  
4 and all that, I still think it ought to have to be backed up  
5 by hard copy.

6 MR. EDGAR: We don't provide that now.

7 MR. FULLER: I know. But I think that is  
8 what -- it is the same reason you are talking about.

9 MR. DAVIS: I have something germane to this  
10 subject.

11 CHAIRMAN SOULES: Yes, sir, sure. Tom Davis.

12 MR. DAVIS: You educated me. What time  
13 periods start upon the service, say, of an appellant's brief?  
14 What time periods -- when do they start? Like so many days  
15 after appellant's brief and appellee's brief --

16 MR. EDGAR: So many days after it is filed in  
17 the court of appeals.

18 MR. McMANS: No, actually, everything is file  
19 dated.

20 MR. EDGAR: Filing date in the court of  
21 appeals -- brief filed.

22 MR. DAVIS: Filing with the court, not service  
23 under this rule with the opposing attorney.

24 MR. McMANS: There is no alteration in the  
25 filing.

1 MR. DAVIS: I understand, but I just wanted to  
2 know what it was. It might have something to do with whether  
3 I want to FAX or not.

4 MR. McMains: We specifically dumped the issue  
5 of filing by FAX.

6 MR. DAVIS: In other words, it doesn't make  
7 any difference when it is mailed or when I received it by  
8 FAX, my time starts by something else?

9 MR. EDGAR: Well, the appellee's brief  
10 commences -- the time commences on the date that the  
11 appellant's brief is filed in the court of appeals.

12 CHAIRMAN SOULES: Is there any need to write  
13 anything here? I mean FAX technology is advancing very  
14 rapidly, Hadley. We have plain paper, it looks just like a  
15 Xerox machine now. I mean I understand that the old stuff  
16 that sticks to your hands -- that is all -- that is going to  
17 be history in short order.

18 MR. McMains: The principal problem -- the  
19 reason for this rule, theoretically, is because the courts of  
20 appeals now -- some of them even have FAX. And what their  
21 experience is is people claim they have sent them, and their  
22 little machine may even give them something. They didn't get  
23 them. It didn't get through the wire on the other end.

24 CHAIRMAN SOULES: All right, well, let's put  
25 it in here.

1 MR. McMANS: That is why they are just  
2 saying -- what they are trying to say is that certifying that  
3 you put it in the machine, you know, and sent by a FAX is not  
4 exactly the same thing as certifying that you have mailed it,  
5 even if it didn't get there. We at least know what the mails  
6 are supposed to -- how they are supposed to work.

7 It just says you haven't really complied with the  
8 service requirements unless it is received. And it is real  
9 easy, I mean, because that is what usually does happen is  
10 they call and confirm that there is receipt of it, and they  
11 didn't have to --

12 CHAIRMAN SOULERS: Somebody moved to add this  
13 sentence, and we will vote it up or down.

14 MR. McMANS: That is Dorsaneo's motion, so as  
15 Dorsaneo -- speaking for Dorsaneo, I will sponsor it.

16 CHAIRMAN SOULERS: Is there a second? Dies for  
17 lack of a second.

18 Next item is 5, TRAP 5 on Page 7 -- wait a minute.  
19 I am not in the right place. It is 5 on Page 471.

20 MR. McMANS: The proposal that --

21 JUSTICE HECHT: Maybe we better have somebody  
22 else present this.

23 MR. McMANS: Why don't you just vote them  
24 down now and I will go home.

25 JUSTICE HECHT: Maybe you and I ought to step

1 out of the room, Rusty.

2 MR. McMAJNS: This is the issue, the kind of  
3 equivalent 306 procedure in the sense that you can -- it  
4 talks about when it is that -- what they are looking for and  
5 what the complaint is, that they need to have an order that  
6 specifies the actual date.

7 The proposal is -- this is 5 now -- of the --  
8 (b)(5), which was not previously required to be changed.

9 CHAIRMAN SOULES: Okay, well, we will take  
10 that up later.

11 MR. McMAJNS: That is the problem.

12 MR. BECK: Are you moving its adoption?

13 CHAIRMAN SOULES: No. It is out of order at  
14 this time right now.

15 We have got a -- there is a typographical  
16 complaint, let's see, Saturday, Sunday or legal holiday or  
17 what is this -- where is that?

18 MR. McMAJNS: I thought it had already been  
19 corrected.

20 CHAIRMAN SOULES: Okay, we fixed that. Okay,  
21 that is fixed.

22 Okay, the next one is Page 476.

23 MR. FULLER: Are we voting on these as we go?

24 CHAIRMAN SOULES: I have already fixed that.  
25 All that was was typographical.

1 MR. FULLER: Okay.

2 CHAIRMAN SOULES: And this one is a new  
3 suggestion never seen before. When we get through with these  
4 TRAP rules, we start all over again with a new --

5 All right. Well, I can tell you what -- the next  
6 ones are going to be TRAP 9. This is from Judge Enoch to  
7 Judge Hecht, and it says we did a good job. Anybody opposed  
8 to that?

9 MR. BECK: Second.

10 CHAIRMAN SOULES: Okay, this one is okay as  
11 is.

12 Next one was Page 478.

13 MR. McMANS: Luke, on the -- just in the  
14 start of his report, you note a number of the rules that are  
15 criminal oriented are just up there, that I think he was  
16 already clear with Judge Clinton, and primarily to make sure  
17 there is conformity with the orders that were passed by the  
18 court of criminal appeals.

19 CHAIRMAN SOULES: Okay.

20 MR. McMANS: Talking about the second  
21 paragraph of his report. There is just a whole bunch of  
22 them. They are all just --

23 CHAIRMAN SOULES: Well, I am taking the rules  
24 one at a time as they come in our agenda. So the next rule  
25 is on 478.

1 MR. EDGAR: Luke, I don't see anything in  
2 Bill's letter to us referring to TRAP 12.

3 CHAIRMAN SOULES: Unfortunatley, we don't have  
4 a Committee report, and we have got public comment here. So  
5 there is nothing here.

6 Is there anyplace that says don't worry about the  
7 rest of them?

8 MR. McMAJNS: Yes, basically.

9 CHAIRMAN SOULES: Where is it?

10 MR. McMAJNS: I mean his last thing says -- on  
11 Page 3 -- just says a number of other complaints have been  
12 received.

13 So I don't recommend anything except the ones that  
14 he has talked about.

15 CHAIRMAN SOULES: Well, we have looked at  
16 every one of these individually, and maybe it is going to be  
17 a little tedious, but we can get through them, and it won't  
18 take that long. So let's look at them.

19 TRAP 12. I guess no change there 9 or 12 or 20.  
20 Typographical error, we fixed that.

21 MR. EDGAR: What page in our agenda book are  
22 you on now?

23 CHAIRMAN SOULES: This is Page 481. The  
24 clerk's office will have to be told that they are to continue  
25 refusing to file any motion for leave to file an amicus if it

1 is less than 50 pages long, but they are, however, to require  
2 a motion if it is longer than 50 pages.

3 MR. McMAINS: Just put the 50-page length in  
4 the rule. Some of the comments are we already require them  
5 to comply, so it is unnecessary. But it does allow leave of  
6 court to extend it too. Just going to clutter the appellate  
7 court dockets.

8 CHAIRMAN SOULES: What is this suggestion  
9 about the clerk's office will have to be told that they are  
10 to continue refusing to file any motion for leave if the  
11 brief is less than 50 pages?

12 MR. McMAINS: Well, this arises from the last  
13 sentence of our proposed change. It says, "The court may  
14 upon motion and order permit a longer version." So that the  
15 suggestion is that if an amicus wants to file longer than a  
16 50-page brief, he has the right to go to the court of appeals  
17 and ask to do that even though the brief is not filed.

18 CHAIRMAN SOULES: If it is under 50, he can't  
19 file at all and he can't even ask for leave to file it.

20 MS. CARLSON: Well, no briefs are filed.  
21 Amicus briefs are not filed. They are received.

22 MS. CARLSON: Look at the first sentence of  
23 TRAP 20.

24 MR. DAVIS: That is not an error.

25 MR. EDGAR: That is a law.

1 MS. CARLSON: Will receive but not file amicus  
2 brief.

3 CHAIRMAN SOULES: Well, maybe a longer brief  
4 to be received, I guess is what the point is. Let's see, we  
5 we add the words "to be received" at the end of Rule 20?

6 MR. BEARD: I don't really think it is  
7 necessary.

8 CHAIRMAN SOULES: I can't understand what  
9 Judge Enoch is getting at here on Page 484.

10 MR. BEARD: If you will take a motion, I move  
11 we just leave the rule as it is. It is clear enough to me.  
12 It doesn't say anything has to be filed. It has been a long  
13 week. That died for lack of second.

14 MR. EDGAR: The concern, I think, arises over  
15 his assumption here after the colon. It says "How can we  
16 refuse to accept a motion for leave to file an amicus brief  
17 of less than 50 pages." And I don't know whether there is  
18 any provision in the rules that you have to file a motion for  
19 leave to file amicus because you don't file them anyhow.  
20 They are just received. So I question the basic premise that  
21 I just quoted from his letter, and I don't understand it.

22 CHAIRMAN SOULES: Okay, we don't have anybody  
23 here who has studied it enough to have an understanding. Is  
24 that right?

25 MR. BEARD: It doesn't say anything about

1 filing.

2 MR. EDGAR: It is from Chief Justice Enoch,  
3 but it was written by -- based upon a research attorney's in  
4 the Fifth Court of Appeals to Justice Enoch.

5 CHAIRMAN SOULES: Is there any motion to  
6 change what we did in TRAP 20 originally?

7 MR. BEARD: I move we leave it the same.

8 CHAIRMAN SOULES: Okay, those in favor say  
9 "Aye."

10 (RESPONDED AYE)

11 CHAIRMAN SOULES: Okay, the next is a TRAP 40  
12 on Page 485.

13 MR. McMAINS: Bill has proposed an amendment.  
14 But I am not sure -- once again, it is addressed in that.

15 CHAIRMAN SOULES: Okay. Bill says that on  
16 40(a)(3) --

17 MR. McMAINS: Luke, the problem is that in the  
18 bound docket that you have, this is the problem why you are  
19 not corresponding with Bill's letter.

20 On January 18th, you sent him all of the letters  
21 received by Justice Hecht, a goodly number of them from  
22 Judge Nye from the 13th Court.

23 CHAIRMAN SOULES: Right.

24 MR. McMAINS: This stuff ain't in here. It  
25 ain't in the docket part, but that is what you asked him to

1 review and report on, and that is what this report is. It is  
2 all stuff that ain't in here. Okay?

3 CHAIRMAN SOULES: Well, it is in here, I  
4 think. But it is in the second agenda.

5 MR. McMANS: Oh, it is in the back, 749.

6 CHAIRMAN SOULES: Well, let's just finish  
7 this. Does anyone have anything on TRAP -- on the --

8 MR. McMANS: It is not in this one at this  
9 part.

10 MR. EDGAR: Well, I am looking on Page 486,  
11 Luke, and that is in -- on our docket, and I really haven't  
12 had time to figure out what Justice Enoch is trying to fix  
13 because it refers to 40(a)(3)(b), and 40(a)(3)(b) is not on  
14 Page 485 because we weren't messing with that rule.

15 CHAIRMAN SOULES: It will be at Page 745. And  
16 all of Justice Nye's stuff is in here.

17 MR. EDGAR: No, we did not recommend an  
18 amendment to TRAP 40(a) --

19 CHAIRMAN SOULES: Let me clarify this. What  
20 we are looking at right now is reaffirming or altering,  
21 adjusting what we have done in 1989. And that takes us  
22 through the index to Page 595 --

23 MR. EDGAR: Yes, but, Luke --

24 CHAIRMAN SOULES: Then we start over again,  
25 and you will find this suggestion back at Page 795.

1 MR. EDGAR: If you will look on Page 486 of  
2 our docket --

3 CHAIRMAN SOULES: Right.

4 MR. EDGAR: -- a letter from Justice Enoch  
5 requests revision of TRAP 40(a)(3)(b).

6 CHAIRMAN SOULES: Okay.

7 MR. EDGAR: But we never did consider any  
8 revision to 40 (a)(3)(b).

9 CHAIRMAN SOULES: Okay, so no change to  
10 TRAP 40.

11 MR. EDGAR: This is something that was outside  
12 the suggested rules to become effective this year.

13 CHAIRMAN SOULES: Okay, so no change.

14 MR. EDGAR: I don't know what business that  
15 falls in, but I don't really think it is before us at this  
16 time.

17 CHAIRMAN SOULES: No change then to Page 485.

18 Next is Page 490, TRAP 41. 41(a)(1). Now, there  
19 is a suggestion on that one.

20 Okay, do you understand that one, Hadley?

21 MR. EDGAR: I haven't looked. I just found  
22 it.

23 CHAIRMAN SOULES: 492, delete the first  
24 line --

25 MR. EDGAR: What Bill is suggesting then is we

1 change in the third line of (a)(1) the word "filed" to  
2 "submitted" and delete the last sentence. Isn't that  
3 basically his suggestion?

4 CHAIRMAN SOULES: This is Judge Nye's, I  
5 guess.

6 MR. EDGAR: I am looking at Bill Dorsaneo's  
7 suggestion on Page 2.

8 MR. McMANS: No. 4.

9 MR. EDGAR: No. 4, Paragraph No. 4.

10 Now, I don't know whether that cures Judge Nye's  
11 problem, but that is the Committee recommendation.

12 CHAIRMAN SOULES: Well, that is the same  
13 thing, it looks like.

14 MR. EDGAR: No, he is changing the word  
15 "filed" to "submitted". That is the only change I see. If  
16 you will look at 40(1)(a)(1), third line, the third word says  
17 "filed".

18 CHAIRMAN SOULES: Okay.

19 MR. EDGAR: He is suggesting, as I understand  
20 it, that that word be substituted -- that the word  
21 "submitted" be substituted for "filed".

22 CHAIRMAN SOULES: Okay.

23 MR. EDGAR: And that the last sentence of that  
24 rule be deleted. And I don't know what that means, but I  
25 think --

1 MR. McMAINS: What he has done, Hadley, there  
2 are a couple of other --

3 MR. EDGAR: Maybe so. All right.

4 MR. McMAINS: What he is doing is putting in  
5 the cash deposit -- the bond affidavits in lieu of bond or  
6 cash deposit --

7 MR. EDGAR: You are right, okay.

8 MR. McMAINS: -- shall be submitted to the  
9 clerk within 90 days after the judgment.

10 CHAIRMAN SOULES: Okay, it is a housekeeping  
11 point. We would say "When security for costs on appeal is  
12 required, the bond affidavit" --

13 MR. McMAINS: "In lieu of bond."

14 CHAIRMAN SOULES: -- "in lieu of bond" -- "the  
15 bond affidavit in lieu of bond or cash deposit shall be  
16 submitted to the clerk" and so forth.

17 MR. EDGAR: The problem is you file bonds and  
18 affidavits, but you submit cash deposits.

19 MR. McMAINS: Yes, that is it.

20 MR. FULLER: You file bonds and affidavits and  
21 you deposit the cash.

22 MR. EDGAR: You submit it to the clerk. The  
23 clerk deposits it.

24 CHAIRMAN SOULES: All right, does anyone --  
25 what is the proposition on 41, leave it as is or change it?

1 MR. EDGAR: I think the way it is worded  
2 carries into effect what is supposed to happen.

3 CHAIRMAN SOULES: All right, is that -- you  
4 move to leave it alone?

5 MR. EDGAR: Yes.

6 CHAIRMAN SOULES: Second?

7 MR. FULLER: Second.

8 CHAIRMAN SOULES: Opposed? I mean those in  
9 favor say "Aye."

10 (RESPONDED AYE)

11 CHAIRMAN SOULES: Opposed? Okay.

12 MR. McMAJNS: Luke, there is another inquiry  
13 that is on that rule that Bill didn't deal with.

14 CHAIRMAN SOULES: We are going to get through  
15 this agenda first.

16 MR. McMAJNS: This is on our change.

17 CHAIRMAN SOULES: Oh, it is on our change.  
18 What is it?

19 MR. McMAJNS: The point is made -- I don't  
20 know if we have to deal with it. But remember we have the  
21 extension based on the timely filed requests for findings of  
22 fact?

23 I guess we kind of all assumed that meant properly  
24 filed. Justice Enoch, however, has a problem in that they  
25 frequently request files where they ain't proper. They are

1 timely, but they don't belong in the case, such as a summary  
2 judgment.

3 He is trying to figure out if this misleads people  
4 into thinking that if you file a requested findings of fact  
5 and conclusions of law within the time allowed, even though  
6 it doesn't have to be authorized -- are we --

7 CHAIRMAN SOULES: Is that a problem?

8 JUSTICE HECHT: Well, it might be. I hadn't  
9 thought about that.

10 CHAIRMAN SOULES: Let's think about that for a  
11 minute.

12 MR. McMAINS: This is a summary judgment, but  
13 it is not --

14 CHAIRMAN SOULES: Let's think about that for a  
15 minute.

16 MR. EDGAR: Where would you insert the word  
17 "properly", Rusty?

18 MR. McMAINS: Well, he doesn't actually have a  
19 proposal, but that is the problem.

20 JUSTICE HECHT: Yes, that would be bad.

21 MR. FULLER: You can say "if a party has  
22 properly and timely filed."

23 CHAIRMAN SOULES: I think we may have a  
24 problem here that we have got to cure.

25 JUSTICE HECHT: Why did we extend it in

1 nonjury cases anyway? I don't recall that discussion.

2 MR. RAGLAND: Because it gave them more time,  
3 Judge, to respond --

4 MR. McMAINS: We changed the nonjury docket

5 MR. RAGLAND: -- requests from 10 to 20 days.

6 MR. McMAINS: We are trying to postpone the  
7 necessity of perfecting appeal until you find out what the  
8 basis of the appeal might be. So we basically gave, in the  
9 plenary rules, the same effect of extensions as timely filed  
10 requests for findings.

11 JUSTICE HECHT: Well, this is going to be a  
12 real trap, isn't it, for some poor devil that gets poured out  
13 on summary judgment and he thinks he has extended his right  
14 to appeal for a whole lot longer than it turns out he did.

15 CHAIRMAN SOULES: How do we deal with this?

16 MR. McMAINS: You want to say in cases tried  
17 nonjury? I guess that may not make any difference, but a  
18 trial certainly is --

19 MR. EDGAR: What rule are you focusing on,  
20 Rusty?

21 MR. McMAINS: It is 41(a), our language.  
22 41(a)(1), which says, with the bracket language which we  
23 added, which gives the extensions of time and changes the  
24 times if a party has timely filed a request for findings and  
25 conclusions of law in a nonjury case.

1           The point is, there are nonjury cases that you  
2 aren't entitled to to --

3           JUSTICE HECHT: Well, do we cure it if we just  
4 said "in a case tried without a jury"? That cuts out the  
5 summary judgments and the injunctions and -- wouldn't cut out  
6 injunctions.

7           MR. FULLER: Why wouldn't properly and timely  
8 filed cure it?

9           JUSTICE HECHT: Because somebody is not going  
10 to -- I can't tell you how many times findings are requested  
11 in a summary judgment case, and if the lawyer thinks that he  
12 has extended his right to appeal, then he is just going to  
13 lose his right to appeal. And maybe that is all right but --

14           MR. EDGAR: The courts frequently use the term  
15 bench trial. Would that help us any?

16           MR. McMAINS: Well, we use nonjury.

17           MR. EDGAR: I know you do. I am acknowledging  
18 the fact that the term bench trial does not appear in the  
19 rules anywhere, but I am just trying to cure --

20           MR. McMAINS: Why don't we just say timely  
21 filed a request for findings of fact and conclusions of law  
22 pursuant to Rule 296, Texas Rules of Civil Procedure 296.

23                   Isn't that where our request is?

24           MR. EDGAR: I will have to look.

25           MR. McMAINS: I mean --

1 CHAIRMAN SOULES: Well, how about just saying  
2 in a nonjury case other than a summary judgment case?

3 MS. CARLSON: It is more than that.

4 CHAIRMAN SOULES: Is it more than that?

5 MS. CARLSON: I think so.

6 MR. McMains: Yes. There are other cases that  
7 you are not -- temporary injunctions, they are not entitled  
8 to those, not entitled to them because of another rule is  
9 what I mean.

10 MS. CARLSON: 296 doesn't really tell you  
11 that.

12 MR. McMains: Well, that is true, but --

13 MR. EDGAR: You just might say TRCP 296-298.

14 MR. McMains: But what she is saying is it  
15 doesn't really tell you what a nonjury case is.

16 MR. RAGLAND: 296 says a case tried in  
17 district and county court without a jury.

18 MR. McMains: Yes. We intend to assume we  
19 know what a trial means. But apparently that is --

20 MR. EDGAR: Well, I don't -- anybody that has  
21 a problem with that ought to not have a license to practice  
22 law.

23 MR. McMains: Why don't you say in a case  
24 tried without a jury? I mean that is our language in 296.  
25 "If a party has timely filed a request for findings of fact

1 and conclusions of law in a case tried without a jury."

2 JUSTICE HECHT: I think that is right.

3 MR. FULLER: I have got another idea. How  
4 about tried on the merits without a jury. Would that help  
5 any?

6 MR. McMANS: That is the language. The  
7 language I just gave is the language out of Rule 296.

8 CHAIRMAN SOULES: Tried without a jury seems  
9 to be acceptable to Judge Hecht. Do we want to give the  
10 Court any further advice on that?

11 JUSTICE HECHT: Don't give that  
12 recommendation.

13 CHAIRMAN SOULES: Okay, how many in favor of  
14 dropping "nonjury" and having "tried without a jury" after  
15 the word "case"?

16 All in favor say "Aye."

17 (RESPONDED AYE)

18 CHAIRMAN SOULES: Opposed? That change will be  
19 made, and TRAP 41 will be the same except for that.

20 Okay, the next item is TRAP 46 on Page 497.

21 MR. FULLER: Luke, we are on 46 now, TRAP 46?

22 CHAIRMAN SOULES: TRAP 46 on Page 497. It  
23 says, "It is not clear who must give the notification of the  
24 filing of a bond."

25 MR. McMANS: The question was whether or

1 not -- what happened is that in the original draft,  
2 apparently, "by counsel" when it came out in the bar journal,  
3 "counsel" being scratched out up here. There was a "by  
4 counsel for each appellant," and the "by" got dropped and so  
5 somehow the "counsel" looking there didn't look right. So  
6 somebody scratched out "counsel." As a consequence, the  
7 rule -- it just says that the "appellant shall give" as  
8 opposed to "counsel".

9 MR. EDGAR: Wait a minute now. This 46(d) on  
10 Page 497 says that notification shall be given the appellant.  
11 That means given "by" the appellant, and the word "by" is in  
12 our rule now, and that is the problem. This is erroneous.

13 CHAIRMAN SOULES: Okay, I restored that. Any  
14 objection to restoring that?

15 There being none, it will be done.

16 MR. EDGAR: It says "by each appellant." Is  
17 that your --

18 MR. McMANS: Right.

19 CHAIRMAN SOULES: Yes.

20 MR. EDGAR: All right. Now let's address the  
21 problem that is raised. I don't know what --

22 MR. McMANS: "By each appellant, by serving a  
23 copy hereof."

24 MR. EDGAR: That "by" is already there.

25 CHAIRMAN SOULES: That is all right, isn't it?

1 TRAP 47 on Page 499.

2 MR. DAVIS: Just a minute. Am I reading  
3 something into his proposal here on 46 that should be sent --  
4 no, it is the same. I am sorry.

5 MR. McMANS: Yes, it is the same.

6 CHAIRMAN SOULES: Okay, 47. Let's see, this  
7 is from Senator Parker, and he wants us to revisit some of  
8 these.

9 The -- let's see what I did here. What I did, I  
10 got Senator Parker's letter, which is on 502 and 503, and  
11 then I wrote him back on 504 and 505, and with that, I sent  
12 to him 506 and 507 with the question, "Does this fix what you  
13 were concerned about?" I did not hear back from him. But it  
14 seemed to me like it did. And so if someone can see these  
15 three -- they are fairly small changes, but they are here,  
16 one on 506 and 507.

17 MR. EDGAR: Well, apparently, Elaine has had  
18 some correspondence with him. Is that right, Elaine?

19 MS. CARLSON: Not recently.

20 MR. EDGAR: I am looking at his letter on  
21 Page 503.

22 MS. CARLSON: That was like 1987.

23 MR. EDGAR: So then perhaps he hasn't read his  
24 mail then, and apparently we did meet the concern he had,  
25 then, by the proposed amendment. Is that what -- that is

1 what I am asking.

2 CHAIRMAN SOULES: Yes. And if you will see --  
3 if you go back to 47 on 499, it may be a little easier for me  
4 to show you here. But anyway, it says "amount or type."  
5 "Type" got cut off on 506, but that was his -- see "amount or  
6 type"?

7 MS. CARLSON: Oh, I see.

8 CHAIRMAN SOULES: So it is supposed to be a  
9 full amount of money judgment, and they decided to let you  
10 post a piece of property or something like that, and he  
11 wanted that in there, and then that posting security in  
12 order.

13 Does anyone have any objections to the changes  
14 shown on 506, 507?

15 Okay, there being none, those will be made  
16 responsive to Senator Parker and in hopes that they do  
17 address his concerns. That was their function.

18 MR. DAVIS: How do we know if he is --

19 CHAIRMAN SOULES: Me, and I did ask him that  
20 if he has got any work he plans -- we have had a good  
21 relationship with Senator Parker. If he has got anything  
22 else, we certainly will adjust accordingly.

23 MR. SPARKS (SAN ANGELO): I notice that your  
24 letter is actually such an excellent suggestion to Senator  
25 Parker.

1 CHAIRMAN SOULES: Pretty good suggestions.

2 49, the same -- I made the similar response. And  
3 on 514, I wanted to make it clear in response to  
4 Senator Parker's inquiry that we recognize there is a statute  
5 out there that influences how the court may act under 49.

6 And any objection to that being expressly  
7 recognized here in the rule where it needs to be?

8 No objection, that will be done.

9 Okay, 51.

10 MS. CARLSON: Luke, Carol Baker made a  
11 suggestion on 515 to just strike the word "to" under (b) in  
12 the second line, the word t-o, "to spending enforcement of  
13 judgment" on TRAP 49.

14 CHAIRMAN SOULES: I see. Let's take it out.  
15 I agree.

16 Okay, 51. What is it about, Elaine? Can you see?

17 MR. FULLER: Designate transcript.

18 MS. CARLSON: This is having to do with the  
19 fact that there was not the content of the transcript ordered  
20 yet from the --

21 CHAIRMAN SOULES: Well, the San Antonio court  
22 held that if you didn't request a transcript or statement of  
23 facts on a timely basis, you couldn't file it even on time.

24 MR. EDGAR: I think that is right probably as  
25 to the transcript unless you get permission to late file.

1 But I don't think that applies to the statement of facts.  
2 That part of the opinion is erroneous.

3 CHAIRMAN SOULES: They filed it on time.

4 MR. EDGAR: I know. But the purpose of giving  
5 notice to the reporter is to give the reporter an opportunity  
6 to contest if the amount of the bond is inadequate. And as  
7 long as you make arrangements with the reporter and get the  
8 statement of facts filed on time, it is my opinion that a  
9 late request is not jurisdiction.

10 Now, the transcript falls into a different  
11 category. But I really question that part of the court of  
12 appeals' opinion talking about statement of facts.

13 CHAIRMAN SOULES: Judge Enoch says this is a  
14 good idea, the way I am reading his letter.

15 MR. EDGAR: Well, his concern, though, as I  
16 look at his letter on Page 517, is not being critical of  
17 TRAP 51, but talking about the late filing -- of the late  
18 request of the statement of facts, because the suggested  
19 change on Page 516 seems to take care of a late request for  
20 the transcript. So we need to go back and look at the  
21 statement of facts provisions if we want to make a change.  
22 Isn't that the way you read it?

23 CHAIRMAN SOULES: Yes.

24 MR. EDGAR: See, he talks about 51(b) and 51,  
25 but he is not recommending any change to our proposed rule on

1 that.

2 CHAIRMAN SOULES: Okay, so 51 stays as is?

3 MR. EDGAR: Well, I haven't looked at these  
4 rules before, Luke. I am just trying to go over them for the  
5 first time. But I think that is what he is saying.

6 CHAIRMAN SOULES: I think so. Maybe we do  
7 something about that over at 54(c).

8 MR. EDGAR: Well --

9 CHAIRMAN SOULES: Why don't we take them one  
10 at a time. 52.

11 MS. CARLSON: What is that -- hyphen or not in  
12 nonjury?

13 CHAIRMAN SOULES: Okay, that has been referred  
14 for further study to a subcommittee. So we will leave this  
15 as is.

16 Next is 53 on Page 520.

17 MR. EDGAR: That deals with the issue that I  
18 just talked about.

19 CHAIRMAN SOULES: Okay, and we unanimously  
20 approved this last time.

21 Does anyone recommend any change to 53?

22 Okay, that will stay unanimously, then, as is.

23 Next is 54.

24 MR. McMANS: Do we have the same problem that  
25 we changed there?

1 CHAIRMAN SOULES: Where should that be fixed,  
2 if it should be?

3 MR. EDGAR: In the underlying portion where it  
4 says "In a nonjury case and in a case tried without a jury."

5 CHAIRMAN SOULES: Thank you, I have got that  
6 right there at the end of the underscored portion.

7 With that change, all in favor of TRAP 54 as is,  
8 say "Aye."

9 MR. DAVIS: Do you want another recommendation  
10 here?

11 CHAIRMAN SOULES: Opposed? What is the other  
12 one?

13 MR. DAVIS: There is another recommendation  
14 here, Luke.

15 CHAIRMAN SOULES: What is it now?

16 MR. DAVIS: This is the on copy --

17 MR. McMANS: That is on the back log. His  
18 deal is on Judge Nye's second --

19 MR. DAVIS: 54(c).

20 MR. McMANS: That is here in the second  
21 agenda.

22 CHAIRMAN SOULES: See, that is a new -- that  
23 is in the second agenda.

24 MR. DAVIS: Okay, I don't pay any attention to  
25 that right now even though it is the same rule.

1 CHAIRMAN SOULES: 57.

2 MR. FULLER: Where are you, boss?

3 CHAIRMAN SOULES: We are on Page 529 now.

4 Okay, apparently, we say -- that is in 57(a)(1). We didn't  
5 touch that one either. That will come up later. This is  
6 okay as is.

7 TRAP 57(a) is okay as is.

8 TRAP 72.

9 MR. EDGAR: Luke, now, on Page 530 --

10 CHAIRMAN SOULES: Okay.

11 MR. EDGAR: -- and I presume -- oh, that is  
12 right, I apologize. I withdraw that.

13 MR. FULLER: On 529, is there a typo here  
14 down -- yes, the name of each attorney -- oh, signing. I got  
15 it now. I missed a word. Pardon me.

16 CHAIRMAN SOULES: 72. Why is this rule  
17 necessary? There was just some language awkwardness that we  
18 corrected.

19 Any objection to leaving this as is?

20 Being no objection, it will be left as is.

21 TRAP 74. Okay, apparently we have got in the  
22 one -- in the two, three, four, five, six, seven, eighth  
23 line, we require a list of the names of all the parties and  
24 their lawyers. And then in the last part of that same  
25 paragraph, we say "So that the court of appeals may properly

1 notify the parties and their counsel, if any." And and they  
2 are saying that that ought to be "or" so that the court  
3 doesn't have to give notice both to counsel and the party.

4 Any objection to that?

5 MR. FULLER: So moved.

6 CHAIRMAN SOULES: Elaine has her hand up.

7 MS. CARLSON: When we talked about this idea  
8 of parties who could be affected by an appeal --

9 MR. EDGAR: Can't hear you, Elaine. Sorry.

10 MS. CARLSON: Oh, I am sorry. When we talked  
11 about this last summer, the thought was that a party may have  
12 been represented by counsel at the trial court, but they  
13 aren't anymore. And I thought the idea was to make sure that  
14 all parties who potentially might be affected, even though  
15 they may not be in the appeal, but could be affected by the  
16 appeal, got notice of what was going on.

17 I think that is what the comment suggests on 534.  
18 You know, I think there was a reason we did "and". I am not  
19 sure if we still agree with our reasoning, but there was a  
20 reason.

21 CHAIRMAN SOULES: Motion to change it to "or".

22 MR. EDGAR: All right, now, let's stop and  
23 think about that. If a party has been represented in the  
24 trial court by counsel, and the case then is appealed while  
25 there is still representation by counsel, then until an order

1 with -- counsel to withdraw has been filed with the court of  
2 appeals, I think the court should continue to send it to  
3 counsel.

4 If the withdrawal has occurred prior to the appeal,  
5 then the party is going to come up pro se. And therefore,  
6 the judgment or order or whatever it is should be directed to  
7 the party.

8 MR. FULLER: Now I know what our discussion  
9 was.

10 MR. EDGAR: So if you say or, I mean -- I  
11 think "and" does create a problem. I have some problem with  
12 that.

13 MR. McMAINS: Well, the problem with "or"  
14 though is that it allows them to send notice of something to  
15 the party and not to the counsel, which --

16 MR. BECK: Well, but I think, doesn't it say,  
17 Rusty, "or counsel, if represented"?

18 Read that again, Luke.

19 CHAIRMAN SOULES: "And their counsel, if any."  
20 It is on Page 533.

21 MR. BECK: Or counsel, if any.

22 MR. McMAINS: No, I understand that, but then  
23 the comment over here was talking about they shouldn't have  
24 to do both. They should be able to do "or".

25 Now, I understand if they don't have counsel they

1 ought to send it to the parties. But if they have got  
2 counsel, they ought to send it to the counsel. And the "or"  
3 doesn't do that. The "or" gives them the right to send it to  
4 the party, and that is what you didn't want to happen.

5 MR. EDGAR: Neither "and" nor "or" do that.

6 MR. McMAINS: You get it too.

7 MR. EDGAR: Yes, but I don't think that is  
8 desirable. I don't think the court should be required to  
9 send notice to counsel and the parties.

10 MR. McMAINS: And what you would have to say  
11 is that they "may properly notify the parties of the trial  
12 court's final judgment by notifying their counsel".

13 MR. FULLER: You can say "if any," and  
14 otherwise, then to the party.

15 MR. BECK: Or if no counsel, then the party.  
16 Is that correct?

17 MR. McMAINS: "And if without counsel, by  
18 notification of the parties."

19 MR. FULLER: "To the trial court's final  
20 judgment, your counsel, if any; otherwise, notice shall be  
21 forwarded to" or whatever.

22 CHAIRMAN SOULES: Somebody make a suggestion.  
23 I think -- well, Ken, you have suggested that we change the  
24 word -- let me see, in the underscored words, the last  
25 language in the rule says,

1           "and so the clerk of the court of appeals may  
2 properly notify the parties to the trial court's  
3 final judgment and their counsel," the "and" there  
4 be changed to "or".

5           Any further discussion?

6           MR. EDGAR: No, if we say "or", then Rusty's  
7 comment is that the court could notify the parties, and their  
8 counsel might not learn of it.

9           CHAIRMAN SOULES: "Or their counsel, if any."

10          MR. EDGAR: Well, it still doesn't cure the  
11 problem.

12          CHAIRMAN SOULES: How do we cure it?

13          MR. McMANS: Well, that is the point. You  
14 can't cure it with an "or".

15          CHAIRMAN SOULES: How can we cure it?

16          MR. EDGAR: You are going to have to say "May  
17 properly notify the counsel to the parties if" -- or "and  
18 then if not, to the parties themselves."

19          MR. BECK: "Or if not represented, to the  
20 parties themselves."

21          MR. FULLER: "To the counsel of the parties,  
22 if represented. If not, then to the parties personally."

23          MR. BECK: Luke, I think everybody has agreed  
24 on the idea. It is just a question of putting it into  
25 precise words.

1 MR. McMAINS: Actually, in looking at Rule 74,  
2 all that is is telling you why you are putting the  
3 certificate of parties in. That doesn't actually require the  
4 clerk to do any of that.

5 MR. FULLER: That is just sort of preparatory  
6 language, really.

7 MR. McMAINS: That just says that is the  
8 reason we are requiring to you do this.

9 CHAIRMAN SOULES: Why don't we leave it in?

10 MR. McMAINS: So, I mean, I don't see that  
11 there is any real -- this doesn't really require the court to  
12 do anything yet. Now, we may have done that somewhere else  
13 but --

14 CHAIRMAN SOULES: Well, then, doesn't an "or"  
15 fix it? Got to notify one or the other so that they can  
16 notify one or the other.

17 MR. FULLER: Yes, I think it helps because I  
18 was thinking this was mandatory language. Really, it is just  
19 explanatory, isn't it?

20 MR. McMAINS: This just explains why we put  
21 the stuff at the front of the brief.

22 MR. FULLER: So the "or" isn't going to hurt.

23 CHAIRMAN SOULES: Okay, we will change it to  
24 "or".

25 MR. FULLER: I think "or" would fit under

1 these circumstances.

2 CHAIRMAN SOULES: Any objection? That will be  
3 done. Otherwise, 74 is approved as drafted. Is that  
4 correct? We do have a couple of other things to look at.

5 Look on on Page 541. Has that got any merit?

6 "Appellant shall file his brief within 30 days  
7 after both transcript and the statement of facts  
8 have been filed."

9 Is that in something we have written about? We  
10 haven't done anything on that, have we, Rusty?

11 MR. McMANS: No.

12 CHAIRMAN SOULES: Well, let's take it up --

13 MR. McMANS: That is the rule.

14 CHAIRMAN SOULES: It will come back, it will  
15 come back back in the back, I think.

16 MR. McMANS: It already says -- our rule says  
17 after the filing of the transcript and the statement of  
18 facts.

19 CHAIRMAN SOULES: "And," conjunctive.

20 MR. McMANS: Yes, it says "and". And the  
21 courts uniformly interpret that to mean both of them. Nobody  
22 requires the brief to be done any other time.

23 MR. BISHOP: I don't think we need to make  
24 that change.

25 MR. McMANS: No.

1 CHAIRMAN SOULES: There is a good deal of  
2 complaint about the fact that we are going to --

3 MR. McMANS: It is slightly ambiguous. I  
4 think that just -- you are stretching it.

5 CHAIRMAN SOULES: Okay, we are at TRAP 90.  
6 That is Page 543. Recommends TRAP 90 remain unchanged. The  
7 COAJ says don't change it.

8 And we got Judge Enoch here -- he seems to like it,  
9 on Page 548.

10 MR. McMANS: Apparently, the counsel with the  
11 courts of appeals don't much like our rule.

12 CHAIRMAN SOULES: Here is a -- well, I guess I  
13 can't say who told me this, but somebody told me this that  
14 sits on one of those courts, and apparently, they write a lot  
15 of cases they are not all that proud of and they don't -- and  
16 some of them are even, you know, not published. And they  
17 write them not for publication, and they think they are in  
18 safe harbor when they write them not for publication, and  
19 then whenever the writ gets granted, then there is some --  
20 maybe just say like it is -- it may embarrass them if they  
21 didn't do a better job writing it. And that is what they are  
22 sensitive about.

23 Now, this Committee discussed that some and said,  
24 well, it is important sometimes to look back to the court of  
25 appeals opinion, and if it is unpublished, you can't find it.

1 And so -- but the judges on the courts of appeals feel like  
2 they are going to be maybe always under scrutiny and at risk  
3 of publication of every opinion that they write if this is  
4 the rule, because when the writ gets granted, the light of  
5 day sees this unpublished opinion. That is the complaint  
6 in a nut shell.

7 MR. FULLER: Well, you know, I don't have a  
8 great deal of sympathy for them. I would like to cover up  
9 all my malpractice too.

10 CHAIRMAN SOULES: Well, the fellow that was  
11 talking to me had a lot of sympathy for it.

12 MR. FULLER: You know, Luke, it just seems to  
13 me --

14 MR. BECK: When you are talking about the  
15 Supreme Court writing on something, you know, they refer to  
16 what the court of appeals did in many instances, and a lot of  
17 times it is difficult to understand what the court did unless  
18 you have got the opinion.

19 Secondly, all of the work we do is exposed. I  
20 mean, you know, everything a lawyer does is right there in  
21 the appellate books. I mean I don't know why a court  
22 shouldn't stand behind their work.

23 MR. COLLINS: Mr. Chairman, point of inquiry.

24 CHAIRMAN SOULES: Yes?

25 MR. COLLINS: Have we voted on whether or not

1 to publish all courts of appeals opinions lately?

2 MR. BECK: Well, Justice Hecht is out of room  
3 and Judge Peeples isn't here.

4 CHAIRMAN SOULES: They are not going to do  
5 that anyway. Hadley.

6 MR. EDGAR: What portion of Rule 90, which  
7 begins on Page 543, does COAJ complain of on Page 546?

8 Now, you see, there are a number of changes  
9 proposed in TRAP 90.

10 CHAIRMAN SOULES: Well, they are talking about  
11 the public -- standards for publication.

12 MR. EDGAR: Well, they are talking, then,  
13 about all of these changes?

14 CHAIRMAN SOULES: Yes.

15 MR. McMAINS: Yes.

16 CHAIRMAN SOULES: And, you know, I mean  
17 Judge Peeples is head of COAJ, and I am sure he gave them  
18 some leadership, and that is all right. He is not here to  
19 defend himself, but I urged him to come.

20 MR. EDGAR: Well, I think that the conditions  
21 that have to exist before an unpublished opinion shall be  
22 ordered published is reasonable -- are reasonable.

23 CHAIRMAN SOULES: Anybody disagree with that  
24 that is here today? Elaine.

25 MR. COLLINS: I am for publishing all of them.

1 That is my position.

2 MR. FULLER: I am going to be equally  
3 obnoxious and agree with John. We are not going to get  
4 anywhere with it but --

5 MR. EDGAR: I move TRAP 90 be adopted as is.

6 MR. BECK: Second.

7 CHAIRMAN SOULES: Moved and seconded. All in  
8 favor say "Aye."

9 (RESPONDED AYE)

10 CHAIRMAN SOULES: Elaine, go ahead and give us  
11 your view.

12 MS. CARLSON: Well, no, I have no -- as far as  
13 just burying all these comments. We need to close the  
14 parenthesis in (c).

15 CHAIRMAN SOULES: In (c). Where is that?  
16 What page?

17 MS. CARLSON: 90(c), according to --

18 CHAIRMAN SOULES: On Page 543? We did that  
19 already, I think. Where --

20 MS. HALFACRE: We got it.

21 CHAIRMAN SOULES: We did it, okay.

22 Now we are going to -- we had a lot of discussion  
23 from the courts on publishing unpublished opinions. It  
24 goes --

25 MR. McMAJNS: -- justices that opposed it.

1 CHAIRMAN SOULES: Every court sent us their  
2 views. So much for that I guess.

3 Now we go to -- what is it -- 91 on 560, or did we  
4 just do that? Oh, I missed that one.

5 91 on 560. What is this about?

6 MR. EDGAR: COAJ is concerned with the  
7 substitution of a word on Line 12. Apparently, the bar  
8 journal said delivery shall be made "on counsel" rather than  
9 should be "to counsel", and I think -- no, I am sorry --

10 CHAIRMAN SOULES: I guess we are on Page 560.

11 MR. EDGAR: "To counsel" is the way it  
12 appears. Let's see if the bar journal is incorrect. That  
13 might be a bar journal error.

14 CHAIRMAN SOULES: Well, this is what is in the  
15 machine on 560. This is what is going to the Court if we  
16 don't change it.

17 MR. EDGAR: Yes, but I think letter, though,  
18 might be directed to the bar journal.

19 CHAIRMAN SOULES: Oh, okay. It is supposed to  
20 be in Lines 12 to 14.

21 MS. CARLSON: No, it does say in the bar  
22 journal, "

23 Delivery on a party having counsel indicated  
24 of record shall be made on counsel."

25 MR. BISHOP: I suggest we say it too.

1 MR. EDGAR: All right, in the bar journal, it  
2 says,

3 "Delivery on a party having counsel indicated  
4 of record shall be made on counsel."

5 We say "to counsel", and he is saying that "to  
6 counsel" should be proper. So this is just simply a bar  
7 journal error.

8 CHAIRMAN SOULES: Help me find where that is.

9 MR. FULLER: It is underlined about the middle  
10 of the page in brackets.

11 MR. EDGAR: In the bar journal it says "on".

12 MS. CARLSON: Page 560 looks great.

13 CHAIRMAN SOULES: Okay, we will change it.

14 MR. FULLER: Luke, he is saying we done did  
15 good and we can go on.

16 CHAIRMAN SOULES: Okay, okay as is on 91.  
17 That is unanimous.

18 The next one is on page -- TRAP 100 on 563. A  
19 complaint there is --

20 MR. FULLER: Here is a note on this pirated  
21 version that I have from Holly. A stick'em here says "add  
22 No. 1 DOR report is last sentence to (g)." That is a sticky  
23 she has got here. I don't know what it means.

24 MS. HALFACRE: You have got my agenda.

25 CHAIRMAN SOULES: Oh, he does?

1 MR. FULLER: Well, I didn't have a hymnal, and  
2 I couldn't sing without one. I am going give it back,  
3 though.

4 Does that have meaning, though? It sounds like  
5 there is something that needs to be added.

6 MS. HALFACRE: What rule?

7 MR. FULLER: 100, and it may apply to the  
8 comments. It looks like you have got it at the comments  
9 section here.

10 CHAIRMAN SOULES: Well, the only thing that we  
11 did here was this was an artificial limitation. They didn't  
12 follow it, saying that they had to have on (inaudible)  
13 carriers within 15 days. Well, he was saying anytime within  
14 the plenary file we were without a motion.

15 Any reason to change that anybody can see? Okay, I  
16 am going to mark that okay as is.

17 All in favor say "Aye."

18 (RESPONDED AYE)

19 CHAIRMAN SOULES: That is unanimous.

20 MS. CARLSON: Luke, are we still on 100?

21 CHAIRMAN SOULES: We can be on 100. What is  
22 next?

23 MS. CARLSON: I had 100(f), the next three  
24 letters on 565, 566 and 567 all point out that we  
25 inadvertently strike the word "within" in TRAP 100(f) in the

1 third sentence -- in the first sentence where it says "within  
2 should be reinstated before 15."

3 CHAIRMAN SOULES: No, I think we have got  
4 that. Look at Page 563. Haven't we already fixed that?

5 MS. HALFACRE: Yes.

6 CHAIRMAN SOULES: We fixed it. Okay, so 563  
7 stands.

8 MR. FULLER: When I struck out 15 days, got  
9 "within the said period."

10 CHAIRMAN SOULES: "Within the period." The  
11 bar journal could not load our disk. So they had to  
12 re-input. And what was published by the bar journal was not  
13 exact. And that is one reason Carol Baker has got so many  
14 changes. Some of them were in our product, some of them were  
15 in the bar journal.

16 Okay, now we are down to 130 on Page 569. It says  
17 Judge Enoch says he thinks it is sufficiently clear. COAJ --  
18 let me see, Judge Hecht wrote us on this. Now, what does he  
19 say here on Page 570 -- Page 570? Oh, we have done this. We  
20 have approved that. We have already acted and approved on  
21 that. So see next page.

22 MR. FULLER: Are we supposed to be able to  
23 understand it even though we have done it?

24 CHAIRMAN SOULES: I don't know. But we did  
25 act on that the first day when Dorsaneo was still here.

1           Next is 131 on Page 574. The comment comes from  
2 Judge Nye, doesn't like notifying all the trial parties. We  
3 have already passed on that.

4           Anyone want to make a change here? Unanimously,  
5 then, that will stay as is.

6           The next rule is 132 on Page 578, and it is the  
7 same complaint. Anyone care to change this rule as  
8 submitted? Being no one wanting change, that is unanimously  
9 approved as is.

10           Next is 133, and we have done that already when  
11 Bill was here.

12           MR. EDGAR: Luke, look on Page 581.

13           CHAIRMAN SOULES: Page 581.

14           MR. EDGAR: Talking about the motion for  
15 rehearing problem, and I haven't had -- I haven't thought  
16 through this. But he is simply saying that the language that  
17 we have included in 130(b) and 130(2)(a) do not overcome the  
18 rules problem. And I think that was one of the purposes that  
19 this amendment was attempting to achieve. Isn't that right,  
20 Rusty?

21           MR. McMANS: Yes.

22           MR. EDGAR: And we ought to stop and take a  
23 look at that.

24           CHAIRMAN SOULES: Sure.

25           MR. McMANS: And he emphasized when the court

1 finally overrules all kinds of filed motions. You see, 132,  
2 the first changed language says "after the court of appeals  
3 has ruled on them," and he, apparently, is suggesting that it  
4 should be -- has "overruled" rather than "ruled".

5 MR. McMAINS: No, I think --

6 MR. EDGAR: Isn't that what he is saying? I  
7 don't know.

8 MR. McMAINS: What he is actually saying is  
9 that might have some rulings -- you might have ruled on all  
10 of them, but there might be another one coming. And that  
11 really was why we said that -- of course, if there is anybody  
12 that has a right to file another one, and that is a timely  
13 filed motion. That is why we said all timely filed motions.

14 MR. EDGAR: But his concern, I think, Rusty,  
15 is that it should be after the court of appeals has overruled  
16 all timely filed motions for rehearing.

17 MR. TINDALL: How about "disposed of"?

18 MR. McMAINS: No, it is not -- it is not  
19 necessarily overruled.

20 MR. TINDALL: How about "disposes of"?

21 MR. EDGAR: Here we are talking about  
22 applications for writ of error, and they have got to be  
23 overruled.

24 MR. McMAINS: They could have granted them in  
25 part, and you don't have to file if your complaint is not

1 addressed to that. And that is a ruling that activates this  
2 as well.

3 So I mean it is -- what this really is is wait --  
4 you essentially, what it is going to do, is install basically  
5 a 30-day time period. You get 15 days plus a motion for  
6 extension, I suppose, that you could do. I -- because, see,  
7 it says after the court of appeals has ruled on all timely  
8 filed motions for rehearing.

9 If they revised the opinion, then they really have  
10 got to wait to see if there is another one. As a practical  
11 matter, this is a direction to the clerk to wait and see if  
12 another one comes down the pike.

13 CHAIRMAN SOULES: Is this okay as is?

14 MR. EDGAR: I just read that a moment ago, and  
15 I said we don't want to create problems, we want to try and  
16 solve them. That is fine, yes.

17 CHAIRMAN SOULES: You think it does fix the  
18 rules problem. Is that right?

19 MR. EDGAR: I hope it does.

20 CHAIRMAN SOULES: Do you think so, Rusty?

21 MR. McMANS: I don't know any other modifier  
22 we could use is the problem. You could say "finally ruled",  
23 but I don't know that that adds anything.

24 CHAIRMAN SOULES: Okay, then we have got 133,  
25 and we fixed that on 584, and then -- that is, we corrected

1 the problems in TRAP 133 by adopting what is on Page 584, and  
2 then we did 170. And then 181 is on Page 587.

3 MR. TINDALL: They don't read their rulings in  
4 the morning? I am sorry, I haven't been there in a couple of  
5 years, Luke. The court doesn't read their rulings in the  
6 morning?

7 CHAIRMAN SOULES: No.

8 MR. TINDALL: Okay.

9 CHAIRMAN SOULES: To be consistent with other  
10 references to the clerk --

11 MR. EDGAR: What page are you on?

12 CHAIRMAN SOULES: I am on Page 587 and 588.  
13 "The clerk of the Supreme Court." Should we change "clerk"  
14 to "clerk of the Supreme Court" -- "clerk of the Court".

15 MR. EDGAR: You could say announced through --

16 CHAIRMAN SOULES: It says "through the clerk  
17 of the Court." No change.

18 MR. TINDALL: Luke, back on 181 for a minute,  
19 on Page 587, if they don't read their opinions -- I mean --  
20 not read their opinions -- if they don't pronounce their  
21 rulings in open court, we have sort of emasculated the  
22 caption of the rule.

23 CHAIRMAN SOULES: What page?

24 MR. TINDALL: Page 587. Judges in open court.  
25 We just said they are going to do them through the clerk.

1 CHAIRMAN SOULES: "Announcement of judgments"?

2 MR. TINDALL: That is fine.

3 MR. EDGAR: Yes.

4 CHAIRMAN SOULES: All right, we will change  
5 that.

6 Usually we get a real big crowd in there for the  
7 reading of orders.

8 Well, I commend you all for all the great work you  
9 have done.

10 That completes the work we did for 1989, plus the  
11 charge rules which was part of that, plus sealed records  
12 rule, plus the cameras in the courtroom.

13 And I guess why don't we just stop and stand up and  
14 give ourselves a little hand, and then we will get back to  
15 work on these new ones. But I commend every one of you guys.  
16 Powerful piece of work that you-all have done.

17  
18 (At this time there was a brief  
19 recess, after which time the hearing continued as follows:)

20  
21 CHAIRMAN SOULES: Okay, we start with the  
22 section constables would like to serve on Sunday.

23 MR. TINDALL: What page? I am sorry.

24 CHAIRMAN SOULES: Page 594 and 5, constables.  
25 Let me get kind of a test vote on this. One thing

1 that may help us move along, which is not necessarily  
2 something that is very important, but if it should be  
3 important, would be to look at these suggestions that were  
4 not -- never had been on our agenda prior to the time the  
5 court took public comment -- and decide which of them raise  
6 questions that probably, really, need prompt attention, and  
7 which of them really don't raise questions that need prompt  
8 attention. And if they are in the latter, sort of refer  
9 those to subcommittees for study in next biennium and  
10 effective dates in 1992.

11 MR. SPARKS (SAN ANGELO): Luke, outside of  
12 that, I had one more something on something we did, and I  
13 think we did it. That was on the multiple filing of  
14 interrogatories admissions.

15 CHAIRMAN SOULES: We did that.

16 MR. SPARKS (SAN ANGELO): We covered that  
17 interrogatories are going to be filed.

18 CHAIRMAN SOULES: You can file the group ones,  
19 combined ones.

20 MR. MORRIS: We did that.

21 MR. SPARKS (SAN ANGELO): On the combined ones.

22 MR. SPIVEY: We did that while you were in the  
23 hallway.

24 MR. EDGAR: May I speak to what you just said?  
25 I think -- and I would like to get out of here tonight

1 probably just as much if not more than anybody, but we  
2 announced in -- the court announced in the bar journal that  
3 it invited comments, and if we don't respond to those  
4 comments now, I think somebody is going to be subjected to a  
5 lot of criticism.

6 CHAIRMAN SOULES: Well, the court invited  
7 comments to the rules proposals.

8 MR. EDGAR: That is correct, but if we don't  
9 address those comments --

10 CHAIRMAN SOULES: We have addressed every one  
11 of them already.

12 MR. SPIVEY: Not directed at the practicing  
13 lawyers, not us who don't practice but do this kind of silly  
14 stuff. Really, now, aren't we supposed to have done our work  
15 and aren't their comments directed at us as much as the  
16 Court?

17 MR. EDGAR: Well, I think that is right, and I  
18 think we have an obligation to respond to the public comments  
19 and all of the comments in writing that were engendered as a  
20 result of that. And we haven't done that yet, I don't think,  
21 Luke.

22 CHAIRMAN SOULES: Well, let me tell you what  
23 we have done. The Court asked for comments to the proposed  
24 rules, and we have addressed every one of those.

25 Now we are addressing comments that came in that

1 were not directed to the proposed rules. They were directed  
2 to some other rules.

3 MR. COLLINS: Just kind of out of the blue.

4 CHAIRMAN SOULES: It not only drew comments  
5 about what we had done, but comments about the whole rules  
6 from A to Z, John, and we finished the agenda of all the  
7 public commentaries to the work product that we did in 1989.

8 MR. EDGAR: And all of the letters that were  
9 engendered as a result of that?

10 CHAIRMAN SOULES: Every comment made orally or  
11 in writing to our 1989 work product has been addressed by  
12 this Committee in this session, this one and last weekend,  
13 and disposed of.

14 We are now to comments that deal with something  
15 other than our 1989 work product. That is why we start a  
16 second list of rules in the index. If you will go to the  
17 index, you will see how we organized this.

18 MR. MORRIS: What page are we on, Luke?

19 CHAIRMAN SOULES: Let's go to the third page  
20 of the materials. Here is the third page. Has everybody got  
21 the third page of the materials? You see "Index, written and  
22 oral comments to these rules."

23 Now, this has -- for two and-a-half pages is a list  
24 of the comments to our 1989 work product. Then we start over  
25 again with TRCP 6.

1           It says "Comments on and proposals for rules not  
2 addressed by the Committee in the 1989 meeting." So  
3 everything after this has to do with something other than  
4 what got published in the bar journal.

5           MR. BEARD: Shouldn't it be referred to the  
6 committees for recommendation before we try breaking those  
7 things up?

8           CHAIRMAN SOULES: The committee process is  
9 something new. These meetings until -- what? -- two three  
10 years ago, never had subcommittee meetings. We just came  
11 here and did these things.

12           So what I would like to do is turn through these  
13 and decide which ones of them raise issues that we need to  
14 deal with now, if we can deal with them now, and which ones  
15 of them can wait for subcommittee study.

16           If we have done that, then at least we have acted  
17 responsibly to the additional comments we received. Is that  
18 all right with the Committee? Does everybody agree to so  
19 proceed?

20           MR. FULLER: I will endorse that.

21           MR. EDGAR: Mr. Chairman.

22           CHAIRMAN SOULES: Yes, sir.

23           MR. EDGAR: One question. This escaped me  
24 earlier, but in Bill Dorsaneo's memo to us dated February  
25 13th, he says this: "The Committee should recommend that the

1 Supreme Court adopt the amendments to the rules promulgated  
2 by the Court of Criminal Appeals on June 5, 1989," and we  
3 haven't done that.

4 CHAIRMAN SOULES: Okay, do you so move?

5 MR. EDGAR: I do.

6 MR. DAVIS: Second.

7 CHAIRMAN SOULES: Moved, seconded. All in  
8 favor say "Aye."

9 (RESPONDED AYE)

10 CHAIRMAN SOULES: Opposed? No. That carries.  
11 Okay, let me see, with Holly gone -- let me see,  
12 let me make myself a note on that.

13 MR. McMANS: They are identified in that  
14 second paragraph.

15 CHAIRMAN SOULES: Where is that in the  
16 materials?

17 MR. EDGAR: It is loose leaf, and I will give  
18 you mine if you want it.

19 MR. McMANS: It is Bill's report.

20 MR. EDGAR: Bill's report, if you have it. It  
21 is right there on this page right here. "The Committee  
22 should recommend" --

23 CHAIRMAN SOULES: Okay. Thank you, Hadley.  
24 Is there anything else of a housekeeping or, of  
25 course, that is substantive nature.

1 MR. HERRING: Luke, let me -- I hate to even  
2 mention the words, but it has been brought to our attention  
3 a couple of housekeeping matters on the sealing rule --

4 CHAIRMAN SOULES: All right.

5 MR. HERRING: And we have a print out from  
6 Holly that did not get the change made in (b)(1). I know it  
7 will show up in the final dealing with affidavit evidence.

8 CHAIRMAN SOULES: Okay.

9 MR. HERRING: That is, we had agreed to change  
10 that to provide

11 "At the hearing, the court must consider all  
12 evidence presented, which may include affidavit  
13 evidence if the affiant is present and available  
14 for cross-examination."

15 I just wanted to be sure that is in the record. And  
16 then in (a)(2), on the second page, the reference in the last  
17 sentence of that paragraph to public health "and" safety  
18 should be public health "or" safety.

19 CHAIRMAN SOULES: Would you mark that up and  
20 send it to Holly and tell her to please correct it?

21 MR. HERRING: Sure will. And at the end of  
22 that clause, that same clause, it should refer to  
23 administration of public office "or" the operation of  
24 government.

25 CHAIRMAN SOULES: Is that agreeable with

1 everybody? Okay.

2 If you will send those changes through to Holly and  
3 tell her that we approved them.

4 MR. HERRING: I will do it.

5 CHAIRMAN SOULES: I would appreciate it.

6 Okay, Constable Renken wants to be able to serve  
7 papers on Sunday, probably not any reason not to, but it is  
8 probably something we can take time to think about. Is that  
9 all right?

10 Okay, I am going to put down here "refer to  
11 subcommittee." Okay, subcommittee on that one.

12 Then Ken Fuller.

13 MR. DAVIS: What are you reading from, Luke?

14 CHAIRMAN SOULES: This is on Page 597.

15 MR. FULLER: I didn't see fit to undertake  
16 that. That is a whole bucket of worms.

17 MR. McMANS: That is the sanctions rule.

18 CHAIRMAN SOULES: Shall we refer this to  
19 subcommittee?

20 MR. FULLER: So moved.

21 MR. TINDALL: Second.

22 CHAIRMAN SOULES: Refer that to subcommittee.

23 We will just take these one at a time. Guy Jones.

24 Can we be off the record for a minute.  
25

1 (At this time there was a brief  
2 discussion off the record, after which time the hearing  
3 continued as follows:)

4  
5 CHAIRMAN SOULES: Next is Hugh Harrell's  
6 comment on 13. That has already been referred, and then,  
7 David, you have a docket here. Well, David had to leave.

8 MS. CARLSON: I can speak for the  
9 subcommittee.

10 CHAIRMAN SOULES: Okay, will you do that,  
11 please?

12 MS. CARLSON: Yes.

13 CHAIRMAN SOULES: As we turn through the  
14 pages, tell us what to take up and what maybe to refer.

15 MS. CARLSON: If you look on Page 602 of the  
16 materials, the subcommittee felt that the rule, perhaps, was  
17 outdated, and David makes a statement in our report on 601  
18 that unless there is some reason why this rule should exist,  
19 maybe we should consider repealing it.

20 MR. TINDALL: I noticed a comment. Bill Coker  
21 says he has never been offered the opportunity to sign the  
22 minutes of the court.

23 MS. CARLSON: Apparently, Rule 20 does not  
24 reflect --

25 MR. EDGAR: Elaine --

1 MS. CARLSON: Pardon?

2 MR. EDGAR: Isn't the origin of this that we  
3 didn't have continuous term courts?

4 MS. CARLSON: Right.

5 MR. EDGAR: And therefore it was required.  
6 But don't we still have some courts that are not continuous  
7 term courts?

8 MR. FULLER: I believe we do.

9 MR. EDGAR: I think we do. And we have got to  
10 be very careful. I suggest this be referred to subcommittee  
11 for study.

12 CHAIRMAN SOULES: Okay, that will be referred  
13 to subcommittee.

14 Next is Page 604, 605. Elaine.

15 MS. CARLSON: This had to do on Page 605 under  
16 Suggestion 10 of our subcommittee report that David  
17 suggested, there was some question on whether Rule 57 should  
18 permit the filing of a copy of an original signed pleading as  
19 opposed to an original, apparently because of some  
20 inconsistency in the rule numbers that he sets forth there,  
21 45, 57 and 74.

22 CHAIRMAN SOULES: This is a matter that we  
23 need to deal with. It doesn't look like it from here, but as  
24 we get into this, you will see.

25 What people are trying to get approval for -- and

1 it is pretty much unanimous -- is FAX filing. The clerks are  
2 ready to put in FAX machines and they are ready to take  
3 things over a FAX. And there are even shops now that are  
4 open, and one of them is in these materials here where we  
5 can -- Tom Davis can FAX something to my little business  
6 which is across the street from the Bexar County Courthouse,  
7 and I can then take it and file it -- not on that bad FAX  
8 paper. You know, you got to xerox it once so you get it on  
9 good paper. Then take it and file it.

10           The Rules of Civil Procedure, most of them don't  
11 say what kind of a signature has to be filed. But in order  
12 to support FAX filing, we have got to say "an original  
13 signature or a copy thereof" because then copy -- some clerks  
14 won't take a pleading that has got to have a signature on it  
15 unless it has got an original signature on it. Other clerks  
16 don't care, they don't care what kind of signature is on it.  
17 It could be a copy of a signature.

18           And so what this does on 45 is start the concept  
19 that a copy of a signature is okay. And then we are going to  
20 see some rules that follow that.

21           All right, let me see about this second part. When  
22 a copy is signed, the original is tendered for the -- is  
23 required to maintain the signed original, and then if a copy  
24 is filed, then the party or the lawyers have got to keep the  
25 original in case the authenticity is questioned. So that is

1 45.

2 Discussion. Excuse me just a second.

3 MR. FULLER: Luke, I don't have any problem,  
4 and I would move that the changes for Rule 45 be approved as  
5 recommended.

6 CHAIRMAN SOULES: Second?

7 UNIDENTIFIED: Second.

8 MR. TINDALL: Well, that includes 57, doesn't  
9 it.

10 CHAIRMAN SOULES: We are taking them one at a  
11 time.

12 MR. EDGAR: I don't have any problem with  
13 that, but the way (e) is worded, it doesn't -- it isn't (e).  
14 It ought to be a separate paragraph, because you say  
15 "pleadings shall" and then you say "when a copy is signed,"  
16 and when you look at -- (e) doesn't track (a), (b), (c) and  
17 (d). And you just might as well make it a separate  
18 paragraph.

19 MR. FULLER: Make it a separate paragraph  
20 without a heading.

21 MR. EDGAR: That is right, separate paragraph  
22 without a heading.

23 MR. FULLER: I accept that amendment.

24 MR. McMANS: Luke, the question that really  
25 hasn't been addressed in the entire FAX notion, though, is

1 what do you do with the requirements of verification?

2 I mean you require verification on certain types of  
3 pleadings or certain verified denials or certain signatures  
4 on sworn accounts.

5 MR. TINDALL: It would still be required. You  
6 just keep it in your office.

7 MR. ADAMS: You keep the original.

8 MR. FULLER: Keep it in case they question the  
9 authenticity.

10 MR. McMAINS: There are an awful lot of rules  
11 that talk about filing the verification, and I am just saying  
12 this: All of the sudden it says "copy of," and they are not  
13 going to dovetail in the places that require that you file --

14 MR. FULLER: Well, aren't we going to have to  
15 change the rules that authorize filing of copies, then,  
16 before this can actually legitimately be done? Do we have a  
17 rule that says you can file a copy?

18 MR. McMAINS: No.

19 MR. FULLER: Okay.

20 CHAIRMAN SOUTER: I think the intent of this  
21 is that copies of verifications are fine too. That is what  
22 we are trying to get at. Or that is what these people are  
23 trying to get at.

24 MR. McMAINS: Something needs to be said, "A  
25 copy of a verified pleading shall for all purposes be treated

1 as a verified pleading."

2 MR. TINDALL: Rusty, we could, if it would be  
3 acceptable to the author, said "when a copy of the signed  
4 original tendered for filing, including any verification."

5 MR. FULLER: Let me tell you, you-all are sort  
6 of mixed up. If you will read 45 here, 45(d) requires filing  
7 the verification.

8 Now, my understanding of what we are talking about  
9 in (e) -- soon to not be (e) but to just be a statement -- if  
10 we are just laying the ground work for the day when  
11 nonoriginals or electric filing can be done, but under the  
12 proposed Rule 45, it requires signed original.

13 MR. TINDALL: Or copy of --

14 MR. McMANS: We just changed it. That is the  
15 whole point.

16 MR. FULLER: It has been a long day, I am  
17 sorry.

18 I would see no reason then why a copy of a  
19 verification would not be just as valid as the one itself,  
20 and the burden would be on --

21 MR. EDGAR: Doesn't that wording take care of  
22 your verification problem? It says that the pleading shall  
23 be in writing signed by the party, and it is. I mean you  
24 have got the original signed. You just haven't sent it to  
25 the clerk. And it says "and the signed original or copy be

1 filed with the Court."

2 MR. DAVIS: The verification part.

3 MR. EDGAR: It seems to me if the verification  
4 is part of what you are filling, it authorizes a copy of the  
5 verification to be filed.

6 MR. DAVIS: Copy of the pleading and  
7 verification --

8 MR. EDGAR: I think it is covered, Rusty, in  
9 (c), I mean in (d), 45(d).

10 MR. McMAJNS: I am just saying that the Rule  
11 93 deals with pleadings to be verified. You have got the  
12 (inaudible) rules, you have got the venue rules. All of them  
13 speak in different terms about what it is that is being  
14 filed, verification requirements.

15 CHAIRMAN SOULES: Let me see if I can fix this  
16 right here. Take the underscore where it says,  
17 "a signed original or copy of said original be filed with the  
18 court." Let me just try to get this made express --

19 "The signed original and any verification or  
20 copy of said original and copy of any verification  
21 will be filed with the court." Then that says it.

22 MR. FULLER: If it feels good, do it.

23 CHAIRMAN SOULES: Well, that says it. That  
24 eliminates the question.

25 MR. RAGLAND: Before we get any further,

1 Luke --

2 CHAIRMAN SOULES: Yes, sir, Tom Ragland.

3 MR. RAGLAND: I notice that this draft on  
4 Page 604 has dropped the last paragraph in the existing  
5 Rule 45.

6 CHAIRMAN SOULES: I just made a note to put  
7 this paragraph between -- just ahead of that paragraph.

8 MR. RAGLAND: Where it says "all pleadings  
9 shall be construed so as to produce substantial justice"?

10 CHAIRMAN SOULES: Yes, and leave that in.

11 So it is new paragraph back to the margin before  
12 the last paragraph is where I would put this (e). Is that  
13 all right?

14 MR. EDGAR: Yes, but he is saying that somehow  
15 on Page 604 we dropped this last sentence in the current  
16 rule. And he just wants to make sure it is there.

17 MR. RAGLAND: It doesn't show that it was  
18 deleted intentionally.

19 CHAIRMAN SOULES: Okay, I will make a note to  
20 type that in because that is the way things get lost at West.  
21 Just a second.

22 Okay, Lefty or Tom.

23 MR. MORRIS: Tom Leatherbury needs to leave,  
24 and he has been waiting very patiently this afternoon on one  
25 matter. Do you mind if he --

1 CHAIRMAN SOULES: I don't mind taking it up.  
2 What is it, Tom?

3 MR. LEATHERBURY: Luke, it is correlary,  
4 Rule 76(a) for the TRAP rules, but it just references 76(a)  
5 and I can -- I don't know whether it was passed around. I  
6 can read it. It is about two sentences long, and I have  
7 shown it to some people and gotten some comments already. It  
8 is just a first cut, but I want to throw it out before the  
9 Committee's consideration.

10 It starts out tracking the language from the Open  
11 Records Act and says,

12 "All final opinions, including concurring and  
13 dissenting opinions, as well as orders made in the  
14 adjudication of cases, are specifically made public  
15 information subject to public access and inspection  
16 and shall never be sealed."

17 Then the second sentence goes on to say,

18 "All other records, including applications,  
19 motions, briefs, exhibits filed with any Texas  
20 Court of Appeals, Texas Court of Criminal Appeals,  
21 or the Supreme Court of Texas, are subject to Texas  
22 Rule of Civil Procedure 76(a), provided, however,  
23 that all evidence offered in connection with the  
24 sealing motion shall be by affidavit."

25 MR. RAGLAND: I thought we dealt with that

1 rule.

2 CHAIRMAN SOULES: Motion is --

3 MR. LEATHERBURY: I was asked to draft a  
4 correlary to put in the TRAP rules, and that is my first cut.

5 CHAIRMAN SOULES: Is there --

6 MR. RAGLAND: Move we refer it to committee.

7 MR. BEARD: Taking it off the record in the  
8 lower court.

9 MR. HERRING: You had an example.

10 MR. BEARD: Give us an example.

11 MR. LEATHERBURY: Yes, sure. In the  
12 Tuttle v. Jones case which involved the psychologist  
13 malpractice up in Dallas where the trial records were sealed,  
14 there were motions filed in the appellate court to seal off  
15 the briefs, and those motions were denied. But that is one  
16 example of a case where parties came up to the appellate  
17 courts seeking to seal records that are ordinarily public.

18 They also filed a motion to close oral argument,  
19 which was denied as well, but that is not the problem here.

20 MR. EDGAR: Mr. Chairman.

21 CHAIRMAN SOULES: Yes.

22 MR. EDGAR: I certainly -- I think I  
23 understand the substance of Tom's proposal, and I am inclined  
24 to agree with it, but just like some other things that I am  
25 really hesitant in the Committee approving something until we

1 have it -- we can study a little bit. And I suggest that  
2 that simply be referred to the TRAP Committee.

3 MR. RAGLAND: So moved.

4 CHAIRMAN SOULES: Mr. Leatherbury, could you  
5 send to me -- apparently, you said that is your first cut.  
6 Does that indicate that you expect to do some additional work  
7 on the proposal?

8 MR. LEATHERBURY: No, it indicates that it was  
9 a first cut, and I got some comments and did some scribbling  
10 on it today.

11 CHAIRMAN SOULES: Do you want to do some more?

12 MR. LEATHERBURY: No, sir, I am happy to cut  
13 it loose and give it to you as is.

14 MR. SPARKS (SAN ANGELO): It is your last cut.

15 MR. LEATHERBURY: First and last.

16 CHAIRMAN SOULES: You may be the only lawyer  
17 in this room that is going to get paid for any of this.

18 MR. BEARD: Would it be your idea that you  
19 have got to give another notice and go through all that  
20 procedure again in appellate court?

21 MR. McMAJNS: Yes, that is what he is saying.

22 MR. LEATHERBURY: The only variation would be  
23 affidavit evidence only, rather than an evidentiary hearing.

24 CHAIRMAN SOULES: All right, and you are  
25 submitting that for our action at this time?

1 MR. LEATHERBURY: Yes, sir, I will give it to  
2 you or type it up, however you want it.

3 CHAIRMAN SOULES: Mail it to me, and I will  
4 send it to Bill Dorsaneo, and we will refer it to Committee  
5 for study. If that is -- I think I heard a motion from Tom  
6 Ragland to do that. Is that a second from Hadley?

7 All in favor say "Aye."

8 (RESPONDED AYE)

9 CHAIRMAN SOULES: Opposed? Okay.

10 MR. COLLINS: Mr. Chairman --

11 CHAIRMAN SOULES: John Collins.

12 MR. COLLINS: Since everyone on the Committee  
13 is interested in that, could we have that circulated to all  
14 the Committee members.

15 MR. FULLER: Since it is not that voluminous.

16 MR. COLLINS: Yes, since it is just one page.

17 CHAIRMAN SOULES: Do you have a list of all  
18 the membership?

19 MR. LEATHERBURY: I will get it from you.

20 John, I will do that.

21 CHAIRMAN SOULES: Thank you, Tom.

22 MR. LEATHERBURY: Thank you very much.

23 Appreciate being able to be here.

24 CHAIRMAN SOULES: We appreciate all your work.

25 Let's go to Page 618, Rule 57. This is along the

1 same lines as 45. There are three rules we need to look at.  
2 Let's just try to get them all done.

3 This looks like it doesn't need anything else, but  
4 you-all look at it and see what you think.

5 MR. DAVIS: You want to add "and  
6 verification"?

7 CHAIRMAN SOULES: Well, the original signed  
8 pleading -- they won't all be verified.

9 MR. DAVIS: It would be consistent with the  
10 words you used in 45.

11 CHAIRMAN SOULES: And any verification.

12 MR. EDGAR: Including verification was the  
13 term we used, wasn't it?

14 CHAIRMAN SOULES: Nope, "and any  
15 verification."

16 That is what we used twice before.

17 MR. TINDALL: These are cumulative amendments,  
18 right, because I know we are amending 57 in our earlier --

19 CHAIRMAN SOULES: Yes.

20 MR. TINDALL: Okay. I know we have amended it  
21 earlier.

22 CHAIRMAN SOULES: Then the next one is 74,  
23 which is on Page 624, 624. "When a copy of the signed  
24 original is tendered for filing for party 'or' his attorney."  
25 That should be, I guess,

1 "filing such copy is required to maintain the  
2 signed original for inspection by the court or any  
3 party interested should it be requested."

4 Signed original --

5 MR. TINDALL: Including any verification.

6 CHAIRMAN SOULES: Okay.

7 MR. DAVIS: This is the same language in 25,  
8 isn't it? Or did he say 45.

9 CHAIRMAN SOULES: Yes, I will make it the  
10 same.

11 Okay, I have made that conform by putting the same  
12 words in the same two places in the first sentence. And,  
13 okay, all in favor of 45, 57 and 74 as changed, say "Aye."

14 (RESPONDED AYE)

15 CHAIRMAN SOULES: Opposed? Was there a vote  
16 for opposition? Okay, then that is unanimous.

17 MR. RAGLAND: May I point out a typo?

18 CHAIRMAN SOULES: Yes.

19 MR. RAGLAND: Line 5, I don't know. Is this  
20 the one that is going to the -- anyway, Line 5, it says shall  
21 "not" thereon and should be "note" thereon.

22 CHAIRMAN SOULES: Where is that? Line 5,  
23 shall "note". Thank you.

24 And then there is one down there about the party or  
25 his attorney as well.



1 MR. McMains: Why are the brackets there?

2 MR. RAGLAND: I don't know if the brackets  
3 have any significance.

4 MR. McMains: Brackets are not in the original  
5 rule.

6 CHAIRMAN SOULES: The brackets are  
7 superfluous. This is already the rule.

8 MR. FULLER: That is already in.

9 CHAIRMAN SOULES: Yes, that is already in the  
10 rule. So we will just take the brackets out.

11 Okay. 47 and 47(a) is on Page 613.

12 MR. DAVIS: That is a new rule, entirely new?

13 MR. McMains: Yes.

14 MR. DAVIS: What is its purpose?

15 MR. BEARD: I move we reject that.

16 CHAIRMAN SOULES: Refer to subcommittee.

17 MR. BEARD: It has already been to it.

18 CHAIRMAN SOULES: We have had these on a short  
19 fuse. We just had this --

20 MR. McMains: You cannot not state an amount  
21 and then require them to state an amount.

22 CHAIRMAN SOULES: I agree.

23 MR. McMains: That is silly.

24 MR. BEARD: I move we reject it because you  
25 don't know when you are going to get a default judgment. You

1 would have to plead it every case.

2 CHAIRMAN SOULES: Okay. All in favor of  
3 rejecting 47(a) as proposed say "Aye."

4 (RESPONDED AYE)

5 CHAIRMAN SOULES: Opposed? That is  
6 unanimously rejected. (f)(7), we did.

7 63 on 622.

8 MR. TINDALL: Refresh our memory, Luke. Did  
9 we not go to 30 days on any pleadings?

10 CHAIRMAN SOULES: Yes, we did. Let's refer  
11 this because it looks like it has got some things in it.  
12 Some of this seems to have already been done. But he has  
13 also got something about the burden here for other filing.

14 MR. DAVIS: Move we refer.

15 CHAIRMAN SOULES: All right, the same on 67 on  
16 623. Refer. This is similar concept, it looks like. 74 on  
17 624, we did. We will get to offer of judgment, and I think  
18 that is going to be referred. That is a fairly thorny --

19 MR. McMANS: What page?

20 CHAIRMAN SOULES: We are on Page 631. We took  
21 a shot at this about six years ago and got nowhere, but maybe  
22 it will get somewhere this time, but it is -- there are a  
23 whole lot of considerations going to this offer of judgment,  
24 and what the penalty is if you offer more than -- if J, as  
25 the defendant, offer more than Lefty gets as a plaintiff, is

1 it legal fees, is it costs of court, is it -- what is it that  
2 happens? There are a lot of questions in this offer of  
3 judgment thing.

4 MR. BEARD: Federal practice.

5 CHAIRMAN SOULES: Federal practice really  
6 doesn't help much because I think that is just costs.

7 MR. BEARD: You don't want to file federal  
8 practice.

9 CHAIRMAN SOULES: Is there motion to refer  
10 this to proper subcommittee?

11 MR. RAGLAND: So moved.

12 MR. BEARD: Second.

13 CHAIRMAN SOULES: What is the proper  
14 subcommittee? We don't have it, probably around -- somewhere  
15 in the trial rules. I guess it is David Beck's.

16 MR. DAVIS: He isn't here.

17 MR. FULLER: Yes, he is not here to defend  
18 himself.

19 CHAIRMAN SOULES: Parker County, Rule 103.

20 MR. TINDALL: I move that that be rejected.

21 MR. BEARD: Second.

22 MR. EDGAR: You have been reading fast, Harry,  
23 or is this your committee?

24 MR. TINDALL: I get beady eyed on this one.

25 CHAIRMAN SOULES: What is it about?

1 MR. TINDALL: Good cause for service by  
2 private process server.

3 CHAIRMAN SOULES: Move to be rejected. All in  
4 favor, say "Aye."

5 (RESPONDED AYE)

6 CHAIRMAN SOULES: All right, that is rejected.

7 MR. TINDALL: Let the record reflect it was  
8 apparently rejected unanimously.

9 CHAIRMAN SOULES: Any opposed? It was  
10 rejected unanimously.

11 MR. TINDALL: Luke, may I come out of order  
12 very briefly. I have got a plane commitment, but all of the  
13 ones in my subcommittee, nothing is urgent, and would ask  
14 that they be --

15 CHAIRMAN SOULES: Can you just give me the  
16 numbers and pages?

17 MR. TINDALL: Yes, they start on Page 700 and  
18 goes through to 713.

19 CHAIRMAN SOULES: It is just -- all you got is  
20 Rule 324.

21 MR. TINDALL: It is 315 to 324.

22 CHAIRMAN SOULES: So the only --

23 MR. TINDALL: Or 315 to 330 is my  
24 subcommittee.

25 CHAIRMAN SOULES: Okay, so the only one that

1 is raised is 324, and that is on Page 700.

2 MR. TINDALL: Right.

3 CHAIRMAN SOULES: Let me look at it so I can  
4 do a little bookkeeping.

5 MR. TINDALL: Rusty, help on this. When do  
6 you have to raise a no evidence point? Can you raise it for  
7 the first time on appeal and want to revisit that whole  
8 script of points raised by Judge Osborne.

9 MR. EDGAR: I read his letter, and I know the  
10 general problem, but he really doesn't offer any suggestion.  
11 And I, frankly, don't think it is a problem. He is talking  
12 about the --

13 MR. McMANS: Talking about a nonjury case.

14 MR. TINDALL: No, a jury case, there is no  
15 evidence point. You don't object when it is tendered, you  
16 don't object when the jury returns a verdict, you don't  
17 object n.o.v., you don't object at entry of judgment. And  
18 for the first time on appeal, you finally wake up and think,  
19 "Well, maybe there is no evidence."

20 CHAIRMAN SOULES: Refer that to subcommittee.  
21 That is your recommendation?

22 MR. TINDALL: Yes.

23 CHAIRMAN SOULES: Any opposition to that? It  
24 will be referred.

25 MR. EDGAR: But anyhow I think it ought to go

1 to Committee.

2 MR. McMANS: Not under TRAP Rule 52. You  
3 can't.

4 CHAIRMAN SOULES: Okay, did we do 98(a) on  
5 630. That is the offer for judgment. Okay, then we went to  
6 634 and then to 636.

7 MR. BEARD: Move that be rejected.

8 CHAIRMAN SOULES: 634(c) rejected.

9 JUSTICE HECHT: 636.

10 MR. BEARD: Move 636 be rejected. It just is  
11 trying to limit the service appeals of private --

12 MR. EDGAR: What page are we on?

13 MR. BEARD: 636.

14 CHAIRMAN SOULES: Well, I think we ought to  
15 send that to subcommittee, myself.

16 MR. BEARD: It is just another effort of the  
17 constables to keep --

18 MR. EDGAR: I am not for rejecting the thing  
19 out of hand until the subcommittee has had a chance to take a  
20 look at it.

21 MR. BEARD: We did, and we rejected it.

22 CHAIRMAN SOULES: You think that whatever they  
23 charge, somebody ought to have to pay?

24 MR. BEARD: The court can refuse to assess it  
25 at cost is the position we took. It is excessive, but not to

1 limit it.

2 CHAIRMAN SOULES: Motion has been made to  
3 reject 148, or which would say fees charged by private  
4 process server in excess of the -- what? -- maximum fee  
5 authorized to be charged. Those in favor of rejection  
6 say "Aye."

7 (RESPONDED AYE)

8 CHAIRMAN SOULES: Opposed? It is unanimously  
9 rejected. And the next is Rule 156 on Page 639. That is the  
10 non-jury/nonjury. That has been referred to subcommittee.

11 Referred to a dictionary, Pat said.

12 166(b). We will refer this to a subcommittee on  
13 page, then, on Page 640, 641.

14 MR. EDGAR: We have already referred this in  
15 another context to a subcommittee, Mr. Chairman. I move we  
16 do the same here.

17 CHAIRMAN SOULES: It is referred. Then 642,  
18 subcommittee. 643.

19 MR. EDGAR: Subcommittee. It is too detailed  
20 for us to consider now.

21 CHAIRMAN SOULES: That is a pretty good idea,  
22 but I subcommittee on that. It is more than we can handle  
23 today, isn't it?

24 167 on Page 647. What is the action you want on  
25 that one on Page 647, refer?

1 MR. EDGAR: Refer.

2 CHAIRMAN SOULES: Okay, if anybody disagrees  
3 with the recommendation made from the floor, let me know,  
4 otherwise, we will just go right on.

5 At Page 657 Rule 168.

6 MR. EDGAR: Same, refer.

7 CHAIRMAN SOULES: That is referred too. Okay,  
8 Rule 169 at 664.

9 MR. BEARD: We spent a lot of time on that,  
10 parties sign a request for admissions.

11 CHAIRMAN SOULES: Okay, this is Page 664.  
12 Subcommittee.

13 MR. EDGAR: 664.

14 CHAIRMAN SOULES: 664 to subcommittee. 669 is  
15 176, Rule 176, that is 669. This is something that needs  
16 fixing. This is a civil rule.

17 MR. EDGAR: Part of the problem here is that  
18 under Rule 188 when the commission is issued by the clerk,  
19 the answers and the depositions are to be returned to the  
20 clerk, and we no longer permit filing of those documents with  
21 the clerk.

22 CHAIRMAN SOULES: Where does it say -- and I  
23 know it does, but I am just not finding -- where does it say  
24 they are returned to the clerk?

25 MR. EDGAR: Look on Page 671, and you see

1 where he circled that language?

2 CHAIRMAN SOULES: Yes.

3 MR. EDGAR: And I don't know whether that is  
4 all the problem because I haven't read any of this yet, but I  
5 think that is part of it, and I think it is something that  
6 needs fixing. But I don't think that we can sit here today  
7 and do it.

8 CHAIRMAN SOULES: Do you recommend that going  
9 to a subcommittee?

10 MR. EDGAR: It does need to be fixed.

11 CHAIRMAN SOULES: Okay, then 180 -- Page 670,  
12 that is it -- 188. Page 672, Rule 206. This needs to go to  
13 that same subcommittee.

14 Who is on the subcommittee to try to figure out how  
15 long we keep records as lawyers?

16 MR. BEARD: Put it to two committees --  
17 McConnico and Beck -- is my recollection both of them.

18 CHAIRMAN SOULES: Wasn't it somebody over here  
19 that was on it. Are you?

20 MR. RAGLAND: I don't see what problem is  
21 being addressed here.

22 CHAIRMAN SOULES: This is a case that I --  
23 letter that I had referred to earlier that I knew was in here  
24 but couldn't find.

25 Ray Perez at Tinsman & Hauser has given a document

1 request that has served a custodian of the records request  
2 for the depositions, I think, in the hands of Tom Cogland of  
3 two doctors.

4 MR. RAGLAND: Well, that is just going to the  
5 rule, deposition rule. That is what we intended to do. I  
6 don't see what the complaint is here.

7 MS. CARLSON: Is it in the same case?

8 CHAIRMAN SOULES: I think these are in the  
9 same case. Of course, what is the aggravating -- Eddie  
10 Morris says that by this device, new lawyers are getting  
11 copies of Eddie's transcripts by just copying them on a Xerox  
12 machine, and Eddie wants to sell them one as a court  
13 reporter.

14 MR. RAGLAND: I move we reject that.

15 CHAIRMAN SOULES: Well, it has got broader  
16 ramifications. Let's put it to that same subcommittee, Tom,  
17 if you don't mind. What he wants is to limit access by one  
18 lawyer to another lawyer's file, and I think that is --

19 MR. RAGLAND: Not any of his business, as I  
20 see it.

21 CHAIRMAN SOULES: But it has been our  
22 business, and apparently, we want to do it or consider it.  
23 What is the Committee's pleasure? It has been moved that  
24 this be rejected. Should it be rejected or referred?

25 MR. DAVIS: Which one are we talking about?

1 CHAIRMAN SOULES: 672, 673. It does point up  
2 a problem.

3 MR. EDGAR: I move we refer.

4 CHAIRMAN SOULES: Those in favor of referral  
5 show by hands -- one, two, three, four, five, six.

6 Those in favor of rejecting it show by hands. To  
7 two. It will be referred.

8 Then 676, Rule 215. Boy, I agree with this one,  
9 but I don't know how we can do it today.

10 This Committee in 1983 sent to the Supreme Court a  
11 rule that was worked on for two years in the Committee on  
12 Administration of Justice, and a year here, that gave  
13 sanctions other than attorneys fees, that those could only be  
14 considered for violation of a court order. And the first  
15 tier sanctions was limited to award of attorneys fees. And  
16 that was one of the hardest debated and finally got a heavy  
17 consensus at the COAJ and the SCAC, and then without ever  
18 referring back to this Committee a whit, they took that out  
19 and Kilgarland was one of the leaders that took it out, and  
20 made first phase sanctions all the way to dismissal with  
21 prejudice. And here is his letter saying to go back to a  
22 two-step process and make heavy sanctions only where there  
23 has been a violation of a court order. I guess the worm  
24 turns.

25 MR. EDGAR: The chairman of our committee on

1 Page 676, that subcommittee, recommends it be submitted to  
2 the COAJ for further study, and perhaps it should be  
3 submitted also back to this subcommittee for further study.

4 CHAIRMAN SOULES: Let's go ahead and submit  
5 all these rules to the COAJ. All these are before the COAJ  
6 because as soon as they come in, I send them to the COAJ. So  
7 I will ask them to study that too. But I mean there is some  
8 real -- there is some terrible things out there.

9 MR. SPARKS (SAN ANGELO): Luke.

10 CHAIRMAN SOULES: Yes, sir.

11 MR. SPARKS (SAN ANGELO): Right quick  
12 something that struck me is in regard to this back on  
13 Page 658, 659, but he suggested that requests for admissions  
14 and discovery production should be answered on the same  
15 number of the question like the interrogatories, and it is  
16 instead of flipping back and forth, I thought we did that.

17 CHAIRMAN SOULES: We did that on  
18 interrogatories. If we are going to do that on the rest, it  
19 will be coming out of subcommittee the way we have left this.

20 MR. SPARKS (SAN ANGELO): That seems pretty  
21 simple. Why does that have to go to subcommittee?

22 CHAIRMAN SOULES: This Committee looks at the  
23 words in order before we ever vote, and I guess it is just a  
24 matter of whether we take time to write that now.

25 MR. SPARKS (SAN ANGELO): Thank you for

1 answering my question.

2 CHAIRMAN SOULES: Okay, Page 681, Rule 216.

3 MR. EDGAR: I will make a quick report, if I  
4 might. On Page 681, there is request Rule 216 be modified to  
5 parallel the request for jury trials in the federal system.  
6 And I, personally, don't see any compelling reason to change  
7 that at this time, but if the Committee wants this to be  
8 reviewed by the subcommittee again and report at our next  
9 meeting, we will do so.

10 CHAIRMAN SOULES: Why don't we do that? We  
11 are going to have a bigger committee next time.

12 MR. EDGAR: Very well.

13 CHAIRMAN SOULES: I hope we have better  
14 attendance next time.

15 MR. EDGAR: On Page 683 to 95, Judge Coker, I  
16 believe it is, suggests that the whole process of default  
17 judgment, Rules 241 through 243, be -- well, 241 and 243 be  
18 repealed, and to add a Rule 242 which would eliminate the  
19 dichotomy of proof between liquidated and unliquidated  
20 damages on default judgment.

21 He also proposes that that rule would be trial  
22 court discretion of whether to require proof on all or any  
23 part of either type of claim. This would require, I think,  
24 substantial, in-depth study, and I don't even know whether or  
25 not we want to consider revising our default judgment rules.

1 But again, this is something we can't do at this meeting.

2 CHAIRMAN SOULES: Let's refer it, if that is  
3 all right.

4 MR. EDGAR: All right, then on Pages 696, 697,  
5 there is a suggestion -- and I think this deserves some  
6 merit -- that we create a rule to provide specifically for  
7 motion in limine practice.

8 CHAIRMAN SOULES: Did we skip a bunch of rules  
9 there?

10 MR. SPARKS (SAN ANGELO): No, it was all the  
11 same.

12 MR. EDGAR: No, I went through all these  
13 before I came, and I am just trying to hurry through.

14 CHAIRMAN SOULES: Well, I am sorry. On 684,  
15 that got referred to subcommittee. Right?

16 MR. EDGAR: 683 to 695, that concerns the  
17 default judgment proposal, and that has been referred to  
18 subcommittee.

19 CHAIRMAN SOULES: Hold on. Let me catch up  
20 with you on my record.

21 MR. EDGAR: 683 to 695 has been referred to  
22 subcommittee.

23 CHAIRMAN SOULES: Let me just put a sticker on  
24 each one because they are different rules.

25 So that is 241, 242 --

1 MR. EDGAR: 242 has been repealed. We don't  
2 have a 242 right now, but he suggested one be created and  
3 abolish and repeal 241 and 243. Are you with me?

4 CHAIRMAN SOULES: Are we to 696? Is that  
5 where we are?

6 MR. EDGAR: 696 --

7 CHAIRMAN SOULES: I am caught up. Thank you.

8 MR. EDGAR: 696 and 697 suggest the creation  
9 of a motion in limine group. I think that merits  
10 consideration. Certainly, it will take some time to analyze  
11 and formulate it. But I raise the initial question about --  
12 and our subcommittee will undertake it, but it seems to me  
13 that this more logically belongs in the pretrial practice  
14 rules, perhaps as Rule 70 which was repealed in 1984.

15 CHAIRMAN SOULES: Okay, I will assign it to  
16 Rule 70 subcommittee.

17 MR. EDGAR: Rule 170 subcommittee.

18 CHAIRMAN SOULES: The Rule 170?

19 MR. EDGAR: Yes.

20 CHAIRMAN SOULES: Rule 170 subcommittee. The  
21 materials on 696 and 697 are referred to the Committee that  
22 includes Rule of Civil Procedure 170.

23 MR. EDGAR: All right, then on Pages 698, 699,  
24 we have the spelling of "nonjury" again.

25 CHAIRMAN SOULES: Okay, that is subcommittee.

1 MR. EDGAR: All right, then I don't know  
2 whether it is in the book because I haven't looked yet, but  
3 Franklin Jones raised questions about Rules 245 and 298 which  
4 we took care of earlier today.

5 CHAIRMAN SOULES: They are not in the  
6 materials.

7 MR. EDGAR: Well, we have already taken care  
8 of them anyhow.

9 CHAIRMAN SOULES: All right.

10 MR. EDGAR: And that completes our report.

11 CHAIRMAN SOULES: All right, the next one then  
12 is Page 716, Rule 533. Didn't we fix that?

13 MR. BEARD: We already fixed that.

14 MR. EDGAR: Yes, I think this letter probably  
15 came in after our subcommittee meeting, and Tony probably  
16 didn't have that before him. But we took care of that  
17 earlier today.

18 CHAIRMAN SOULES: Okay. 719 -- let me see.

19 MR. RAGLAND: We have already done that too.

20 MR. EDGAR: Yes, we took care of that last  
21 week.

22 CHAIRMAN SOULES: And we did this. We did  
23 this in response to Larry Niemann's letters, I think.

24 Okay, next is Page 722 and Rule 696 and 698 and  
25 708. What is this about?

1 MR. DAVIS: Refer.

2 CHAIRMAN SOULES: Refer it.

3 MR. EDGAR: Second.

4 CHAIRMAN SOULES: Okay, next is 739 on page --  
5 Rule 739 on Page 725. That is done, isn't it? And then 744  
6 on 726.

7 MR. EDGAR: Doesn't that again relate back to  
8 five -- five day requirement?

9 CHAIRMAN SOULES: Yes. I tell you what, let's  
10 subcommittee this because he is raising something new that  
11 doesn't seem to be really affected by us. But I will give  
12 that to a subcommittee because that last sentence on  
13 Page 726 --

14 Okay, and 727 is Rule 748. We did that.

15 Then we get to Rule 792 and 798 on Page 730.

16 MS. CARLSON: Can I address that?

17 CHAIRMAN SOULES: Yes, ma'am, please do.

18 MS. CARLSON: The correspondence on Pages 731  
19 and 732 from Eugene Pittman suggests that the modifications  
20 that we made to Rule 792 back in 1987 are such that that rule  
21 no longer precisely dovetails with Rule 793. Rule 793  
22 proscribes the form of an abstract of title and refers solely  
23 to documentary or written evidence instruments.

24 But the Rule 792, which sets forth the court's  
25 authority to punish a party who fails to timely file an

1 abstract simply states as we amended, and you can see part of  
2 this on Page 730 that the court, when a party fails to timely  
3 file an abstract, an order that no evidence of the claim of  
4 title be introduced.

5 His suggestion is that we make the modification  
6 that is set forth on Page 730, and that the punishment for  
7 failing to timely file the abstract is that the court can  
8 order that no written instruments.

9 So you can't put into evidence what you would have  
10 put apparently in your abstract of title.

11 CHAIRMAN SOULES: Did we do that?

12 MS. CARLSON: We didn't. It just seems that  
13 way when you are talking about JP rules.

14 CHAIRMAN SOULES: Okay, so we are going to  
15 refer this to a subcommittee.

16 MS. CARLSON: We have looked at it, and we  
17 recommend the change on Page 730 unless there is some  
18 contrary suggestion.

19 CHAIRMAN SOULES: Okay. Those in favor of  
20 making the change on Page 730 to Rule 792 say "Aye."

21 (RESPONDED AYE)

22 CHAIRMAN SOULES: Opposed? That is  
23 unanimously approved.

24 Now, there is something I can't find in here that  
25 Judge John Specia asked me to bring, and I don't see it in

1 here. We are at the TRAP rules now. This is a trial rule.  
2 There is a new code of criminal procedures statute that says  
3 that a subpoena can be served on a minor by serving --

4 MR. DAVIS: That is behind us, we passed that.  
5 I saw it, and I remember it.

6 MR. McMains: We passed that some time ago,  
7 Luke.

8 CHAIRMAN SOULES: Did we do that? Good.

9 MR. McMains: You didn't deal with it.

10 MR. DAVIS: I don't think we dealt with it,  
11 but we went by it, if that is what you are looking for.

12 CHAIRMAN SOULES: I would like to see if we  
13 can find that because that is kind of a quick matter.

14 MR. McMains: Well, what happened is Hadley  
15 went to the deposition --

16 MR. DAVIS: Page 669.

17 MR. McMains: Hadley went to the letters  
18 interrogatory stuff and we skipped over the other page.

19 CHAIRMAN SOULES: Hadley gave us a diversion.  
20 Okay.

21 MR. McMains: There isn't a letter, there is  
22 just this act and a scribble.

23 CHAIRMAN SOULES: That is all he gave me was  
24 this. He said "You need to do this in your rules."

25 "If a witness is younger than 18 years, the

1 court may issue a subpoena directing a person  
2 having custody, care control of the child to  
3 produce the child in court."

4 "If a person without legal cause fails to  
5 produce the child in court as directed by the  
6 subpoena issued under this article, the court may  
7 impose upon the person penalties for contempt  
8 provided by statute."

9 I guess we would have to strike that.

10 MR. McMAINS: Yes, but that is the Code of  
11 Criminal Procedure, and I guess he is just wondering whether  
12 or not we should be able to do that on the civil side.

13 CHAIRMAN SOULES: "The court may also  
14 issue a writ of attachment for the person and the  
15 child in the same manner as other writs of  
16 attachment are issued."

17 MR. EDGAR: I don't know that there is any  
18 prohibition under our current rules to prohibit a subpoena  
19 issuing to a child under 18. I don't know why we need this  
20 in a civil practice, if that is the intention.

21 CHAIRMAN SOULES: Well, I don't think it --  
22 the code -- I don't know that the Code of Criminal Procedure  
23 prohibits serving a subpoena on a child under 18. But this  
24 gets it two ways. You either serve the child, or you serve  
25 the parent. And what Specia was saying is that, you know, if

1 you need a 10-year-old child in court and you go serve that  
2 child with a subpoena, is that sort of nonsensical, or is it  
3 intrusive, is it something that is -- that we ought to  
4 provide for another way?

5           Go serve the parent, tell the parent to bring the  
6 child in rather than go serve the child.

7           MR. EDGAR: Let's refer it to subcommittee  
8 rather than trying to work on it today.

9           CHAIRMAN SOULES: Okay. That will go to the  
10 subcommittee.

11           Okay, now we are back to TRAP rules. I hope I  
12 haven't skipped something else. I may have. If so,  
13 whatever -- if anything shows up in here that has been  
14 skipped in this afternoon, I will refer it to subcommittee so  
15 it doesn't get lost, or at least I will try to get that done.

16           Okay, TRAP -- the new recommendations for the TRAP  
17 rules begin at Page 738. No, it is 733.

18           MR. EDGAR: 733 pertains to electronic filing  
19 generally in all courts, and while we have dealt with it in  
20 the trial court, we haven't dealt with it in the appellate  
21 courts. And it seems to me that that aspect of it should be  
22 referred to the subcommittee on appellate procedure.

23           CHAIRMAN SOULES: Okay, we will refer that  
24 then to subcommittee.

25           I am trying to run through my mind if there was an

1 easy way to get this fixed because we have got a Government  
2 Code obligation to do it.

3 MR. EDGAR: We are doing it, we just can't do  
4 it quickly.

5 CHAIRMAN SOULES: We have got it fixed at the  
6 trial court level. We have changed all those things about  
7 original signatures, the FAX that would accommodate this FAX  
8 filing.

9 JUSTICE HECHT: We did. All right, missed  
10 that.

11 CHAIRMAN SOULES: But we haven't done any of  
12 that for the appellate courts and we are now seeing the  
13 Government Code directed both ways. Can we do that in the  
14 interim, work it out for what we do for appellate courts?

15 JUSTICE HECHT: Yes.

16 CHAIRMAN SOULES: Anybody see an easier way to  
17 do this where we could do it today?

18 MR. ADAMS: It ought to be consistent.

19 MR. McMANS: The only place you can do it,  
20 Luke, is on the original rule. I mean, in our original rule  
21 book, we have a Rule 4(b) on filing. It says,

22 "The filings of records, briefs and other  
23 papers in the appellate court as required by these  
24 rules shall be made by filing them."

25 And I mean that is where you got to do it is in that rule.

1 Now, if we didn't have records there, we could put copies.  
2 But the records, you don't put a copy of the record.

3 CHAIRMAN SOULES: There is nothing in 4(b)  
4 that prohibits the clerk permitting electronic copy filing,  
5 is there?

6 MR. McMAJNS: Well, except that it just says  
7 all applications, briefs, petitions and motions and other  
8 papers shall be printed or typewritten.

9 CHAIRMAN SOULES: Yes, that is probably more  
10 complicated. Let's refer that to subcommittee. Is that all  
11 right?

12 Judge, if there is any feeling on the Court that we  
13 ought to do this quicker, I guess we can have a TRAP  
14 subcommittee meeting or maybe an abbreviated meeting of some  
15 kind and deal with it.

16 JUSTICE HECHT: That is not a major --

17 CHAIRMAN SOULES: If it weren't for the  
18 Legislature's --

19 JUSTICE HECHT: If you-all addressed the  
20 policy issues, then changing the TRAP rules I don't think is  
21 a big problem.

22 CHAIRMAN SOULES: Well, the Committee voted to  
23 file copies of signatures if there is no problem. The  
24 parties have to keep the originals in case there is a  
25 question of authenticity on the rules exactly like they were

1 proposed.

2 JUSTICE HECHT: All right, good.

3 CHAIRMAN SOULES: Okay. Then next is 737.

4 Refer that -- that doesn't really have anything.

5 MR. EDGAR: What page are you on, Luke?

6 CHAIRMAN SOULES: 737. It is more a  
7 question -- a statement of concerns and a statement for some  
8 particular change.

9 MR. EDGAR: Move to refer it.

10 CHAIRMAN SOULES: TRAP -- it looks to me like  
11 TRAP 3(b) ought to be changed as indicated on 738.

12 MR. McMANS: Luke, that is what this  
13 paragraph is that is --

14

15 (At this time there was a brief  
16 discussion off the record, after which time the hearing  
17 continued as follows:)

18

19 CHAIRMAN SOULES: What is it, Rusty?

20 MR. McMANS: In Dorsaneo's report in that  
21 second paragraph on the first page of this report where it  
22 says "It is recommended these amendments as proposed by the  
23 Corpus Christi Court," and he has recommended those, which  
24 are Rule 3(b), 4(c), 40(b). They are all the criminal stuff  
25 that he cleared with Judge Clinton.

1 CHAIRMAN SOULES: All right, will you give  
2 them to me one by one so I can make notes for Holly so she  
3 can duplicate them, and the rule number and the page number.

4 So we have got -- what -- 3(b), 4(c). Does that go  
5 (5)(b)(5)?

6 MR. McMAJNS: No, it does not go. That is a  
7 different one.

8 CHAIRMAN SOULES: How about --

9 MR. McMAJNS: He has a report on that one.

10 MR. EDGAR: 4(c), 40(b).

11 MR. SPARKS (SAN ANGELO): No, it is 3(b).

12 MR. EDGAR: It is 3(b), 4(c), 40(b).

13 CHAIRMAN SOULES: 40(b) is where?

14 MR. EDGAR: It just says appeals in criminal  
15 cases.

16 MR. McMAJNS: It is 101 --

17 MR. EDGAR: It is in his letter of  
18 February 13th.

19 MR. McMAJNS: And Judge Nye says -- it is  
20 kind of stream of consciousness of Judge Nye's.

21 All of those changes, Luke, that are in this  
22 letter, if you parallel the changes that are done by the  
23 court of criminal appeals, which we have already voted on, it  
24 will help us with all of these things.

25 The point is you don't have to do these specific

1 things or the things that need to be changed in order to  
2 dovetail with the February publication by the court -- or the  
3 June publication by the Court of Criminal Appeals.

4 CHAIRMAN SOULES: Okay, I guess.

5 MR. McMANS: Okay, in the second paragraph is  
6 a letter that talks about where they are. We just need to  
7 make sure that we get those in there, that is all.

8 CHAIRMAN SOULES: Okay, I have got that  
9 marked. Okay, (5)(b)(5).

10 MR. McMANS: (5)(b)(5), probably it is a new  
11 issue, but it probably should be done.

12 MR. EDGAR: Where is that?

13 MR. McMANS: It is in Dorsaneo's  
14 recommendations. It is the second recommendation.

15 That is the one where we started realizing that  
16 this was out of order on his little report.

17 All this does is that it requires that the order of  
18 the trial judge that extends basically to times based on not  
19 having received notice of the judgment when you go through  
20 this hearing process, that the order states the date that the  
21 attorney first acquired notice because that is the date that  
22 substitutes for the date of first signing of the judgment.  
23 And they just are trying to figure out a way, you know,  
24 without having to go through the hearing, if the judge grants  
25 them the ability to appeal, they like to find out when the

1 time is starting.

2 CHAIRMAN SOULES: Where is some language for  
3 the Committee to pass on?

4 MR. McMAJNS: It is on Dorsaneo's report.

5 CHAIRMAN SOULES: Where?

6 MR. McMAJNS: Two lines.

7 MR. EDGAR: You have to look in your rule book  
8 under Appellate Rule 5(b)(5).

9 CHAIRMAN SOULES: All right.

10 MR. McMAJNS: And what he is saying is that  
11 the language he has at the bottom of that page in his letter  
12 should be added at the end of 5(b)(5) as it now appears in  
13 the rules.

14 MR. McMAJNS: Right.

15 CHAIRMAN SOULES: Okay, so --

16 MR. McMAJNS: All this does is it provides or  
17 requires that the trial judge make a finding as to the date  
18 that substitutes for the date of signing of the judgment  
19 under the rule.

20 CHAIRMAN SOULES: Okay, and this language that  
21 is in Bill's letter on the first page of Bill's letter is  
22 what we want to act on?

23 MR. McMAJNS: Right.

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

25 (RESPONDED AYE)

1 CHAIRMAN SOULES: Opposed? Okay, that is  
2 unanimously approved. So we will put this down as done.

3 Okay, 11. TRAP 11 on 741.

4 MR. McMAJNS: I think that needs to be  
5 referred.

6 CHAIRMAN SOULES: Okay.

7 MR. McMANS: The short answer to all of this,  
8 Luke, is that all of this stuff -- that is what this report  
9 is about is all of the recommendations by Judge Nye. And the  
10 only ones he thought that were of any consequence at all, the  
11 rest of them he thought ought to be either referred or  
12 rejected.

13 CHAIRMAN SOULES: Okay, so we are --

14 MR. McMANS: Those ten that are listed.

15 CHAIRMAN SOULES: Okay, I have got to take  
16 them one at a time in order to really make a record. We are  
17 getting close to done, but just while we turn through them.

18 So Rule 12 on 742 is refer. Rule 13(i) on 743 --

19 MR. McMANS: Referred.

20 CHAIRMAN SOULES: Refer. TRAP 16 on 744.

21 MR. SPARKS (SAN ANGELO): We ought to refer  
22 that one.

23 MR. McMAJNS: Yes, referred.

24 CHAIRMAN SOULES: The several on 745.

25 MR. EDGAR: All right, now, at the top of

1 Page 2 of his letter, he suggests adding language to the end  
2 of each subparagraph of 40(a)(3)(B) and (F) the words,  
3 "within the time provided by Paragraph (a)(1) of Rule 41."

4 CHAIRMAN SOULERS: Okay, do we do that now or  
5 refer it?

6 MR. EDGAR: I don't really know what it  
7 pertains to. I haven't had a chance to look at it.

8 MR. McMANS: Affidavit of inability to -- it  
9 is what happens when he loses the contest. It just refers  
10 him back and says you have got to comply with the other rule.

11 MR. DAVIS: It is in the subcommittee report,  
12 isn't it?

13 CHAIRMAN SOULERS: No. Let's refer that, and  
14 746 also.

15 CHAIRMAN SOULERS: Bill got this stuff late,  
16 and then he did a report that was -- because he got the  
17 questions late, he got this report to us late, and really,  
18 there is a lot here. So --

19 MR. DAVIS: Why don't you just move to refer  
20 all of it?

21 MR. SPARKS (SAN ANGELO): We have just got one  
22 more, 746.

23 CHAIRMAN SOULERS: 746, mark that to refer to  
24 subcommittee.

25 Okay, now 747, that is what we have already done.

1 MR. McMANS: Yes. That is unanimously  
2 approved on 747. Okay, on 749.

3 MR. McMANS: 749, refer.

4 CHAIRMAN SOULES: 749, 750.

5 MR. McMANS: Refer.

6 MR. DAVIS: Refer. 51, refer.

7 CHAIRMAN SOULES: 751, refer.

8 MR. DAVIS: 52, refer.

9 CHAIRMAN SOULES: 753.

10 MR. DAVIS: I don't know what that is about.  
11 Refer.

12 MR. McMANS: Yes. It requires the revision  
13 of three rules. So let's refer that one.

14 CHAIRMAN SOULES: Okay. Okay, and let's look  
15 at this.

16 MR. EDGAR: 340 deals with this concern of  
17 Senator Parker.

18 CHAIRMAN SOULES: Yes. I hope we have done it  
19 to suit him.

20 51(c), is that a referral?

21 MR. McMANS: Yes.

22 CHAIRMAN SOULES: Now, God, here we are back  
23 to Frank Baker's proposal.

24 CHAIRMAN SOULES: We always get suggestions  
25 that we put back on the court reporter the requirement to get

1 extensions and so forth. But no one ever writes and says,  
2 "Well, what if the reporter doesn't do it, how do we go pick  
3 out all these jurisdictional problems that we have got that  
4 surround the filing of this statement of facts or getting  
5 extensions along the way and all" because that terminates a  
6 party's appeal. So now you have got a court reporter out  
7 here who really doesn't care about anything except not going  
8 to jail, maybe, like a few of them have. They had to be put  
9 in jail to do a transcript.

10 Present company excepted, no doubt.

11 MR. DAVIS: Good reason to refer.

12 CHAIRMAN SOULES: And it is -- they say, well,  
13 let's put it on the court reporter but they don't say well  
14 how do we get it off the party, and I don't have any problem  
15 with putting it on the court reporter, but I think the  
16 appellate judges feel like they have got to hammer whenever  
17 they have got a jurisdictional consequence to a party so the  
18 party will probably be more interested in getting things  
19 filed than the other. So should we refer this? Is that what  
20 we want to do, sub C.

21 MR. McMANS: Yes.

22 CHAIRMAN SOULES: So that that is stated. I  
23 mean that is really the correlary of taking it off -- of  
24 putting this on the court reporter is how do you save the  
25 parties from disaster.

1 Next is -- what is this one -- Page 761 --

2 MR. DAVIS: Refer.

3 CHAIRMAN SOULES: Subcommittee. 762.

4 That is pretty interesting. 762 is subcommittee.

5 MR. DAVIS: Yes.

6 MR. McMAJNS: Well, in all fairness, Dorsaneo  
7 did recommend a change.

8 CHAIRMAN SOULES: Where is the rest --

9 MR. McMAJNS: All this is is the transcript  
10 request requiring that the motion for reasonable explanation  
11 for late filing include a delay, not only the request for the  
12 statements of facts or the request authorized by Rule 51(b),  
13 which is the transcript.

14 CHAIRMAN SOULES: You are talking about his  
15 recommendation, Item 7 on Page 2.

16 JUSTICE HECHT: Six.

17 CHAIRMAN SOULES: Item 6.

18 MR. McMAJNS: It is No. 6.

19 CHAIRMAN SOULES: All right. What is your  
20 recommendation on that, Rusty?

21 MR. McMAJNS: The problem is he doesn't have  
22 to request any of it. I would refer it just because I --

23 MR. DAVIS: It fits in with a bunch of other  
24 stuff we have referred.

25 CHAIRMAN SOULES: Okay, subcommittee.

1           763. I don't know what this is. Oh, we fixed  
2 this. I think this is the one where they said that the  
3 request was late and therefore he couldn't file it on time  
4 maybe.

5           Why don't we go ahead and put a subcommittee on  
6 that. I can't quite pick up what the issue was on 763.

7           765, is that a refer?

8           MR. McMAINS: Refer.

9           CHAIRMAN SOULES: 766.

10          MR. EDGAR: 766, apparently we have already --  
11 that is one of Bill Dorsaneo's -- we have apparently already  
12 approved that, haven't we? Okay, we did that, haven't we?

13          CHAIRMAN SOULES: That is done. Okay, and  
14 61 -- I mean 767, TRAP 61.

15          MR. DAVIS: Refer.

16          CHAIRMAN SOULES: Next two pages 768 and 769.

17          MR. DAVIS: Refer.

18          CHAIRMAN SOULES: Some of these are fairly  
19 inconsequential, but we are just getting them.

20          MR. McMAINS: They are talking about the  
21 supreme judicial district. I don't know what --

22          CHAIRMAN SOULES: That is what they used to be  
23 called.

24          MR. McMAJNS: Yes, I know.

25          CHAIRMAN SOULES: Matter of fact, we got a

1 letter here September 27, 198 from the First Court of Appeals  
2 for the First Supreme Judicial Districts.

3 MR. McMAINS: The 13 was called the 13th --

4 CHAIRMAN SOULES: Still called that. I don't  
5 know. At least their letterhead is.

6 MR. EDGAR: Haven't bought new stationery.  
7 Okay.

8 CHAIRMAN SOULES: Haven't changed the type  
9 style or whatever. Okay, both of these subcommittee  
10 on 770, 771.

11 MR. McMAINS: Again, he recommends --

12 JUSTICE HECHT: Judge Nye is saying change it,  
13 and it is on his own stationery.

14 MR. McMAINS: I don't think it makes any  
15 difference whether you request oral argument.

16 MR. DAVIS: Reject it.

17 JUSTICE HECHT: I think you ought to make it a  
18 certain size type and the right color, otherwise you don't  
19 get it.

20 MR. DAVIS: Do like the Fifth Circuit does,  
21 appellant's brief is one color, appellee's brief is another,  
22 and reply is another.

23 JUSTICE HECHT: We should say it should be 71  
24 degrees off of the horizon, otherwise, you don't get oral  
25 argument.

1 CHAIRMAN SOULES: Okay, we are referring these  
2 then?

3 MR. McMAINS: Yes 69 and 70, refer.

4 CHAIRMAN SOULES: 70, 71.

5 MR. McMAINS: All right, 71, while it is long,  
6 the fix doesn't sound too awfully hard.

7 JUSTICE HECHT: 70, 71 is done commonly in  
8 criminal cases.

9 MR. McMAINS: Yes, it is Rule 80. Right?

10 JUSTICE HECHT: Yes. Frequently, in criminal  
11 cases, a trial judge has not made the findings he is supposed  
12 to make on the admissibility of a confession or Batson  
13 hearing, or various different things, and so the court of  
14 appeals just abates the appeal and sends it back effective  
15 assistance of counsel, sends it back for a hearing in the  
16 trial court and then continues with the appeal.

17 Judge Cohen is suggesting we ought to do that and  
18 we ought to formalize it.

19 MR. EDGAR: This one also has another salutary  
20 effect too unless we have already cured it somewhere else,  
21 and that is where the court of appeals determines that the  
22 trial court does not have subject matter jurisdiction because  
23 of some defective pleading.

24 Now, I know the Supreme Court has spoken to that  
25 general problem lately, but there are cases that require that

1 in the absence of that, the court of appeals has no authority  
2 but to reverse and remand for a new trial rather than  
3 reversing and remanding -- or reversing and directing that  
4 the case be sent to a court of proper jurisdiction. This  
5 would allow the court to simply send it back to cure the  
6 defect rather than have to send it to the court.

7 MR. McMAINS: The problem is, I believe the  
8 court has the inherent power to do this already. This rule  
9 just says included. So --

10 CHAIRMAN SOULES: Motion.

11 MR. McMAINS: I think I would refer it anyway.  
12 It really isn't any limitation.

13 MR. EDGAR: That is true.

14 CHAIRMAN SOULES: Okay, refer that to  
15 subcommittee.

16 We have already talked about 772 and 773. Now we  
17 are at 774.

18 MR. DAVIS: Refer.

19 CHAIRMAN SOULES: Refer that?

20 MR. McMAINS: Yes.

21 CHAIRMAN SOULES: 775.

22 MR. McMAINS: Yes, his recommendation is  
23 refer.

24 MR. EDGAR: Is that Page 775?

25 CHAIRMAN SOULES: Yes.

1 MR. EDGAR: All right, now, he has already,  
2 Russ --

3 MR. McMAINS: Or did we already do that?

4 MR. EDGAR: No. But that is criminal cases.  
5 That is what I was looking at here.

6 MR. McMAINS: That is right.

7 MR. EDGAR: 87(b)(1) was the criminal cases.  
8 We have not done that in civil cases.

9 CHAIRMAN SOULES: Okay, 776. Subcommittee.  
10 More of the same.

11 What about 777?

12 CHAIRMAN SOULES: It looks like this may --

13 JUSTICE HRCHT: I believe you have done that,  
14 haven't you?

15 MR. McMAINS: Yes, we did that the first day,  
16 Luke, I think. We put the 21(c) language that we dropped out  
17 back in.

18 CHAIRMAN SOULES: So (g), that has been  
19 unanimously approved.

20 Is that what we did just in case -- I know my notes  
21 are --

22 MR. EDGAR: I don't know what happened, but we  
23 did it.

24 MR. McMAINS: I am not sure about (g), but we  
25 did do the other part that any order denying a motion shall

1 be reviewable.

2 CHAIRMAN SOULES: This speaks to 100(g).

3 MR. McMAINS: Yes, what we did was add -- add  
4 the language of this first part to (g), the offset language  
5 in the top of this letter, Page 777, was added, I think, to  
6 (g) by our actions.

7 CHAIRMAN SOULES: We did that.

8 This is what we put in the rule.

9 JUSTICE HECHT: That is all right there. We  
10 add the sentence up above it.

11 MR. McMAINS: What we did was we dropped out  
12 this language that is in 21(c) and used to be applicable to  
13 the appellate stuff as well.

14 CHAIRMAN SOULES: Okay, so this first indented  
15 paragraph that is one sentence long, close to the middle --

16 MR. McMAINS: Goes to the end of (g).

17 CHAIRMAN SOULES: Is just put down after the  
18 word "motion" right there.

19 JUSTICE HECHT: Extract the word "civil" --  
20 court of civil appeals.

21 CHAIRMAN SOULES: Up here, take out "of civil"

22 JUSTICE HECHT: No, no,  
23 "of court of appeals".

24 CHAIRMAN SOULES: Take out the word civil.  
25 Okay, so on Page 777 so the record is clear if I don't have

1 it someplace else, I have indented paragraph says, "Any order  
2 of the court of appeals" and so forth. Goes at the end of  
3 the second indented paragraph after words "the motion  
4 period". That is approved.

5 MR. EDGAR: Didn't we already act on this?

6 CHAIRMAN SOULES: Probably, but I am hazy. I  
7 am sure I have got it someplace.

8 Okay, TRAP 120.

9 MR. McMAINS: He didn't get that far, or if he  
10 did, he just rejected the rest of it.

11 CHAIRMAN SOULES: Okay, that is to go to  
12 subcommittee then.

13 And how about 140? We did that too, didn't we?

14 MR. McMAINS: We have done some of these now  
15 the first day. He may have pulled some of them out.

16 MR. EDGAR: I have got a bunch of notes on  
17 that in my book. So we have done something on it.

18 JUSTICE HECHT: Yes, we did 140.

19 CHAIRMAN SOULES: We did 140. How about 170  
20 on Page 784?

21 JUSTICE HECHT: It is -- actually, that is  
22 Page 3 and Page 2 is at 785 and Page 1 is at 786. They are  
23 in reverse order, and we did all that.

24 CHAIRMAN SOULES: It is all done.

25 MR. McMAINS: Same 786, concluded.

1 CHAIRMAN SOULES: 786, has that got done?

2 MR. McMAJNS: We did that one too. That is  
3 the per curiam stuff we did initially.

4 CHAIRMAN SOULES: 787.

5 MR. McMAJNS: That has been done already.  
6 That is conformity again.

7 MR. EDGAR: 789 is the same thing.

8 MR. McMAJNS: 791, I assume, is the same  
9 thing.

10 CHAIRMAN SOULES: What is 791? Did that go to  
11 Committee?

12 MR. McMAJNS: 791 may be a criticism of the  
13 court of criminal appeals, but it ain't our business.

14 MR. EDGAR: Why don't we defer that, Page 791?

15 CHAIRMAN SOULES: Let me give it to  
16 subcommittee and let them decide what to do with it. They  
17 may want to ask Judge Clinton about it.

18 Okay, sealing records. You-all ready to talk about  
19 that?

20 MR. DAVIS: We haven't taken that up yet, have  
21 we?

22 MR. McMAJNS: Move to reconsider.

23 CHAIRMAN SOULES: Anybody want to move to  
24 table?

25 MR. EDGAR: No, we have still got a couple of

1 other things. Look on Page 853.

2 MR. MORRIS: I am sure glad we are not getting  
3 to it right now.

4 MR. EDGAR: How far does that -- does that  
5 cover -- no, we have still got a couple of other things.  
6 Look on Page 853.

7 CHAIRMAN SOULES: Wait a minute, 800.

8 MR. EDGAR: Goes all the way over to 852, I  
9 think, Luke.

10 CHAIRMAN SOULES: No, well, we got cameras in  
11 the courtroom, but we got that done at 800.

12 Let me just put done. KRTR-TV.

13 MR. McMAINS: Can't possibly fix that. He  
14 wants us to be consistent in our numbering.

15 CHAIRMAN SOULES: I don't know why we want to  
16 do that.

17 Okay, that is all done and FOX and WFAA and K-VUE  
18 and here we go with TV, and then we get to Jim George's stuff  
19 on -- and cameras in the courtroom. That goes through all of  
20 this transcript that we got.

21 Let's see, okay, 853. Is that something?

22 MR. EDGAR: 853 is to develop a uniform system  
23 of -- we have talked about that, and I presume someday we  
24 will finally get around to it.

25 CHAIRMAN SOULES: I am going to put that on

1 the federal rules re-org committee. And then --

2 MR. EDGAR: 854 is refer. That is  
3 reorganizing the discovery rule. Refer that to the  
4 appropriate committee --

5 CHAIRMAN SOULES: 855.

6 MR. EDGAR: -- for consideration in 1992.

7 CHAIRMAN SOULES: That is the federal rule  
8 provision. Subcommittee. /

9 And, let's see, 857.

10 MR. EDGAR: We have got a whole bunch of  
11 things here.

12 CHAIRMAN SOULES: He sure does:

13 MR. EDGAR: I don't know if you can appreciate  
14 this. He has a basic distrust of the judiciary.

15 CHAIRMAN SOULES: Well, he trusts them more  
16 than administrative orders because he wants them to do  
17 de novo in administrative orders. So we will just refer  
18 these to the several subcommittees.

19 MR. McMANS: I move we adjourn.

20 CHAIRMAN SOULES: Well, let me put something  
21 on the record here again.

22 Again, I thank all of you-all for everything you  
23 have done. That completes the agenda for this meeting, and I  
24 don't know when we will have another meeting, but the  
25 Supreme Court will call usm or the Chairm or some of the

1 subcommittees will.

2 I want to thank Justice Hecht for his attendance  
3 and contribution. It was very significant in all this. And  
4 I really do appreciate Justice Hecht being here and  
5 Justice Doggett earlier.

6 I want to thank Tom Leatherbury and Jim George and  
7 the various public members that came and helped us with the  
8 sealing of the court records and the cameras in the  
9 courtroom, express my appreciation to all the subcommittee  
10 Chairs for all the preliminary work that you have done to get  
11 ready for this meeting.

12 And again, my appreciation to every person who  
13 participates because that is -- the debate and participation  
14 is important, actually, as a final work product because that  
15 gives the Supreme Court not only our conclusions but also our  
16 reasoning.

17 Thank you all, and we stand adjourned.

18 MR. DAVIS: Thank you.

19 MR. HERRING: Thank you, Luke.

20 MR. EDGAR: Congratulations to the Chair.

21

22 \* \* \* \* \*

23 ADJOURNED 5:20 P.M.

24 \* \* \* \* \*

25

1 THE STATE OF TEXAS )  
2 )  
3 COUNTY OF TRAVIS )  
4  
5

6 I, LESLIE DUTSCHKE, CERTIFIED SHORTHAND  
7 REPORTER in Travis County for the State of Texas, do hereby  
8 certify that the foregoing 340 pages constitute a true and  
9 correct transcription, to the best of my ability, of the  
10 testimony introduced and the proceedings had upon the hearing  
11 of the SUPREME COURT OF TEXAS ADVISORY COMMITTEE, which  
12 hearing was held at the Texas Law Center, 1414 Colorado,  
13 Austin, Travis County, Texas, on February 16th, 1990.

14 WITNESS my hand and signature of office this,  
15 the 22nd day of February, 1990.

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ANNA RENKEN & ASSOCIATES  
3404 Guadalupe  
Austin, Texas 78705  
(512) 452-0009 BY:



LESLIE DUTSCHKE, CSR NO. 2357  
Notary Public in and for the  
State of Texas  
COMMISSION EXPIRES: 12/31/91  
Rocky Ranch Acres II  
Box S-6  
San Marcos, Texas 78666  
(512) 353-1997

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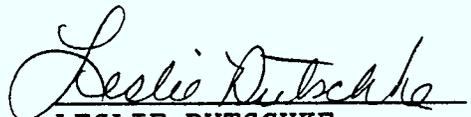
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