

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

* * * * *

HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JANUARY 18, 1997

(SATURDAY SESSION)

* * * * *

 Taken before D'Lois L. Jones, a
Certified Shorthand Reporter in Travis County
for the State of Texas, on the 18th day of
January, A.D., 1997, between the hours of 8:00
o'clock a.m. and 11:35 a.m. at the Texas Law
Center, 1414 Colorado, Room 104, Austin, Texas
78701.

COPY

JANUARY 18, 1997

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo III
Sarah B. Duncan
Michael T. Gallagher
Donald M. Hunt
Joseph Latting
Russell H. McMains
Robert E. Meadows
Richard R. Orsinger
Luther H. Soules III
Paula Sweeney
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta, Jr.
Charles L. Babcock
David J. Beck
Ann T. Cochran
Anne L. Gardner
Hon. Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring, Jr.
Tommy Jacks
Franklin Jones Jr.
David E. Keltner
Thomas S. Leatherbury
Gilbert I. Low
John H. Marks, Jr.
Hon. F. Scott McCown
Anne McNamara
Hon. David Peeples
David L. Perry
Anthony J. Sadberry
Stephen D. Susman

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Paul N. Gold
O.C. Hamilton
David B. Jackson
Bonnie Wolbrueck

Hon. William Cornelius
Doris Lange
W. Kenneth Law
Mark Sales
Hon. Paul Heath Till

JANUARY 18, 1997

<u>Rule</u>	<u>Page(s)</u>
Report of Subcommittee on TRCP 15-165a	7217-7378
TRCP 86 (Venue)	7295-7367; 7370-7378
TRCP 98a	7217-7219
TRCP 107	7219-7224
TRCP 165	7224-7240
TRCP 257	7367-7370
TRCP 53, 54, 55, 56 (New Rule 22: Pleading Special Matters)	7241-7242
TRCP 50, 58, 59, 78, 79, 83 (New Rule 23: Form of Pleadings, Motions and Other Papers)	7242-7288
TRCP 57 (New Rule 24: Signing of Pleadings, Motions, and Other Papers; Sanctions)	7288-7289
TRCP 99 (New Rule 25: Presentation of Defenses; Motion Practice)	7289-7295
TRCP 622	7378-7389
Rules regarding the Eviction Process	7389-7392

INDEX OF VOTES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Votes taken by the Supreme Court Advisory Committee during this session are reflected on the following pages:

- 7223
- 7229 (2 votes)
- 7242
- 7267
- 7268
- 7272
- 7279
- 7280
- 7289
- 7293
- 7303
- 7348
- 7353
- 7354
- 7358
- 7389 (2)

1 *--*--*--*--*

2 CHAIRMAN SOULES: Okay. We are
3 ready to go.

4 MR. ORSINGER: We are going to
5 pick up with the supplemental disposition
6 table that we were looking at yesterday. This
7 is the, what we call, portrait version of our
8 disposition for Rules 15 through 165a
9 subcommittee. We are going to go to page
10 236-239 of the agenda.

11 MR. HAMILTON: Which agenda?

12 MR. ORSINGER: Well, the agenda
13 would be the first agenda, Volume 1, dated
14 1993. This particular item, comment on Rule
15 99a, Hugh Hackney proposes that offer of
16 judgment rule. Our subcommittee is interested
17 in crafting such a rule but does not want to
18 just copy the Federal rule because of some of
19 the Federal case law interpreting the Federal
20 rule that has arrived at surprising results.

21 So Bill Dorsaneo has just handed me the
22 Committee on Court Rules' version signed by
23 Shelby Sharpe, April 17, '96. So that's
24 fairly recent considering a lot of what we
25 have been looking at.

1 PROFESSOR DORSANEO: Shelby has
2 a complete -- a relatively complete file on
3 developments in that area, and I will get that
4 from him and provide it to you.

5 MR. ORSINGER: Well, what we
6 would propose is that the subcommittee would
7 report back in a subsequent meeting on
8 language that we craft because this is perhaps
9 a worthy procedure to have available in state
10 court, but I don't know that anyone on our
11 subcommittee wants to just adopt the Federal
12 rule per se. So could we table this until a
13 future meeting, Luke?

14 CHAIRMAN SOULES: Okay.

15 MR. LATTING: Well, could I ask
16 a question?

17 MR. ORSINGER: Yeah.

18 MR. LATTING: Just briefly,
19 what are some of the problems with the Federal
20 decisions that you perceive? I would just
21 like to know the --

22 PROFESSOR DORSANEO: Speaking
23 in general terms, the interpretation of it is
24 a restrictive interpretation.

25 MR. LATTING: Okay.

1 PROFESSOR DORSANEO: Making it
2 a less useful vehicle to dispose of litigation
3 than you would think that it should be if you
4 wanted to have such a rule.

5 MR. LATTING: Okay. Thank you
6 very much.

7 MR. ORSINGER: The next item is
8 agenda page 569 through -71 relating to
9 Rule 107, and it has to do with the
10 requirement that the return of citation be on
11 file for ten days before a default judgment
12 can be taken, and a concern was raised in the
13 letter that under the Texas Family Code if you
14 have a proceeding involving family violence,
15 and that means some kind of either threat of
16 violence or actual violence inside a residence
17 relationship and notice is given to the person
18 accused of having committed family violence
19 and they do not appear, the Family Code
20 permits the court to grant a protective order
21 by default, and this can happen within a
22 matter of a few days.

23 In fact, this needs to happen within a
24 matter of a very few days, and there was a
25 concern that the rule of procedure required

1 the return to be on file for ten days before
2 the default could be taken, and they propose
3 language that would acknowledge that this
4 requirement did not apply to those family
5 violence proceedings in the Family Code, and
6 it was our committee's recommendation that we
7 adopt that language, and it goes, on page 571
8 of the agenda, "The court may grant a default
9 judgment in a suit for protective order
10 against family violence brought under Chapter
11 71 of the Family Code in the manner provided
12 by that chapter."

13 Now, I don't particularly like tying it
14 down to a specific chapter because they are in
15 the middle of recodifying the Family Code, and
16 while Chapter 71 was not changed in the last
17 session, it's possible it might be renumbered
18 in this session, and I would, therefore,
19 suggest that we refer generally to protective
20 order against family violence brought under
21 the Family Code.

22 CHAIRMAN SOULES: How does that
23 work? Is there a -- Family Code says you have
24 got a shorter time to answer than the Monday
25 next after 20 days?

1 MR. ORSINGER: Yes. It permits
2 you to have an immediate hearing if you have
3 actual notice.

4 CHAIRMAN SOULES: Well, you can
5 have an immediate hearing on actual notice for
6 a TRO.

7 MR. LATting: Yeah.

8 MR. ORSINGER: Well, I know,
9 except that it talks in -- I don't have the
10 Family Code with me, Luke, I'm sorry, but it
11 talks in terms of the court granting a
12 default. So this correspondent was worried
13 that there appeared to be an apparent
14 conflict.

15 MR. LATting: Luke, question.

16 CHAIRMAN SOULES: Joe Latting.

17 MR. LATting: I don't want to
18 stray, but I have a question about the
19 underlying requirement of the citation being
20 on file ten days. What is the purpose of
21 that? I never have understood that. Is there
22 any good reason for that?

23 CHAIRMAN SOULES: Write it up
24 and send it in.

25 PROFESSOR ALBRIGHT: We

1 discussed this in our subcommittee meeting.

2 CHAIRMAN SOULES: Time out.

3 MS. LATTING: Can't answer

4 that?

5 MR. ORSINGER: Let's stay on
6 track. We've got to try and get this work
7 done.

8 PROFESSOR ALBRIGHT: Well, I
9 think this is on track because we discussed in
10 our subcommittee do we want to just delete the
11 ten-day rule, and we decided we didn't because
12 there is a legitimate reason for it. If you
13 represent a corporation that gets served
14 through the Secretary of State it may take
15 several days for you to even get notice that
16 the Secretary of State has been served.

17 MR. LATTING: Okay. All right.
18 I don't mean to stray.

19 MR. ORSINGER: So it's our
20 recommendation that we adopt language --

21 CHAIRMAN SOULES: I want to see
22 the Family Code.

23 MR. ORSINGER: Okay. I can't
24 do that. So let's table it. I don't have it
25 with me, Luke. I didn't bring it.

1 CHAIRMAN SOULES: Anybody have
2 the Family Code?

3 Table that, too.

4 MR. ORSINGER: Well, I say
5 that. Wait a minute. I probably have it over
6 here.

7 Okay. I do have the Code.

8 CHAIRMAN SOULES: It doesn't
9 say anything about a default judgment.

10 MR. ORSINGER: You're right.

11 CHAIRMAN SOULES: I oppose a
12 change. I don't think it's necessary.

13 MR. ORSINGER: You don't think
14 there's a conflict?

15 CHAIRMAN SOULES: It doesn't
16 say a word about a default judgment.

17 MR. ORSINGER: No.

18 CHAIRMAN SOULES: It says, "The
19 court may issue an order," well, that gets you
20 a TRO.

21 MR. ORSINGER: Okay.

22 CHAIRMAN SOULES: Okay.
23 Rejected.

24 MR. ORSINGER: See, if you go
25 back up to Family Code Section 71.08, "A

1 respondent served with notice of an
2 application for protective order may, but is
3 not required, to file a written answer to the
4 application. The answer may be filed at any
5 time before the hearing."

6 Under 71.09, "Unless a later date is
7 requested by the applicant, the court has to
8 set the hearing not later than 14 days after
9 the filing of the application."

10 PROFESSOR ALBRIGHT: It's just
11 a different procedure.

12 MR. ORSINGER: So there is not
13 a conflict. In our view there is no conflict
14 then, and the committee will recall its
15 recommendation and recommend no change. Thank
16 you for pointing that out.

17 Okay. The next item is agenda page 276
18 and -77. Howard Hastings has raised a
19 complaint that under the dismissal procedures
20 in San Antonio your case can be put on the
21 dismissal docket like on two weeks' notice,
22 and you don't have the opportunity to get a
23 trial setting, which requires 45 days notice,
24 and he wanted to lengthen the period of time
25 between the giving of notice of the dismissal

1 hearing and the actual dismissal docket to
2 permit someone to schedule the case for a
3 trial.

4 And we kicked that around on the
5 subcommittee and thought that there really was
6 nothing wrong with giving somebody one last
7 chance to get their case set for trial before
8 they get dismissed, and recognizing that there
9 are different approaches to the dismissal
10 docket around the state, Bonnie Wolbrueck said
11 that while this would require them to carry
12 the dismissals a little bit longer on the
13 docket than they normally do as the district
14 clerk, that she didn't really think that was
15 going to be a problem for them, and our
16 feeling is that we want to distinguish between
17 individually targeted dismissal notices and
18 the idea that you have a general docket once a
19 month or once every three months with a
20 standing order or a local rule that says that
21 if you do not appear your case is subject to
22 being dismissed for want of prosecution.

23 We don't want to interfere with the
24 judges who have the standing docket call where
25 they run all their pending cases and then

1 dismiss the ones that are not represented. We
2 don't want to interfere with that procedure at
3 all. We are talking about where a case is
4 individually targeted, that your case is set
5 on the dismissal docket at such-and-such time.
6 We wanted a minimum 60 days notice.

7 Now, Bonnie, can you share with us the
8 practical effect of that on the dismissal
9 system?

10 MS. WOLBRUECK: Like I said,
11 the only issue would be that, you know, some
12 of the clerks that are not computerized that
13 this doesn't just normally generate -- pull
14 those files, literally go through them, keep
15 them in a separate section until the dismissal
16 date, and that would be the only conflict, is
17 the longer period of time that was required
18 for storage and, you know, keeping those out
19 of the general system or something; but, you
20 know, I don't see where it would cause that
21 many conflicts.

22 MR. ORSINGER: Well, our view
23 is, is that this is a disposition on the case
24 on other than the merits, and it is possible
25 that somebody may have a good case that just

1 through neglect is being swept away, and it
2 may be that getting a trial setting is not
3 going to keep it from being dismissed, but at
4 least it's offering some last hope of due
5 process before they are dismissed. So that
6 was our recommendation.

7 CHAIRMAN SOULES: I think there
8 is a major trade-off here, and I would like to
9 articulate it before we go on. The courts
10 have got to be able to sweep their dockets,
11 and a lot of cases get settled and no orders
12 are brought in. A lot of other cases are
13 worthless, and nobody is going to pursue them,
14 and occasionally a good case does get
15 dismissed, and there are a lot of protections
16 that we have put into 165a on how to get a
17 case back, reinstated if it gets dismissed
18 when it shouldn't have gotten dismissed.

19 And I think that the -- of course, you
20 could always ask for the dismissal judge to
21 set the case for trial, and in many cases they
22 will. Sometimes they won't, but if there is
23 any good reason, judges nearly always set a
24 case off the dismissal docket for a short
25 trial on some short notice that's consistent

1 notice under the rules, and even some of these
2 dismissal dockets they call them "try or
3 dismiss dockets," is the phrase that they use
4 as opposed to "dismissal for want of
5 prosecution." So, actually, if you show up
6 for one of those and you say you're ready for
7 trial, you can go to trial, but I guess that
8 has to be done on 45 days.

9 Anyway, I'm concerned that if we give a
10 period of time in the rule that brackets the
11 minimum 45 days, and of course, we've got a
12 case that's never been set for trial because
13 just assuming that you have to have -- the
14 parties have to have the 45 days. So it's an
15 old case that a lawyer has never put on a
16 trial docket; and I'm concerned that if we
17 bracket the 45 days, every lawyer who's trying
18 to escape a malpractice problem is going to
19 file one of these requests for setting; and
20 the inference is going to be that if the
21 lawyer does that, that the judge can't dismiss
22 the case. So we are going to have a buildup
23 of worthless cases, and to me the transaction
24 cost of doing this, time and judicial effort,
25 is not worth what the parties -- the advantage

1 that the parties get out of it. Okay. Enough
2 said, but that's what I think.

3 PROFESSOR ALBRIGHT: I agree.

4 MR. ORSINGER: You agree, Alex?

5 PROFESSOR ALBRIGHT: Uh-huh.

6 MR. ORSINGER: Well, Bill, what
7 do you think?

8 PROFESSOR DORSANEO: I tend to
9 agree.

10 MR. ORSINGER: Okay. I think
11 we are going to withdraw our recommendation
12 and recommend no change.

13 CHAIRMAN SOULES: Any
14 objection? No change.

15 MR. ORSINGER: Page 280,
16 Professor Hadley Edgar from Tech Law School
17 has noted that in our dismissal rule we talk
18 about reinstatement within 75 days after the
19 judgment, and he suggests that we say "within
20 75 days after the order of dismissal," which
21 we think is the appropriate language and would
22 recommend that we adopt the change.

23 CHAIRMAN SOULES: No objection?

24 MR. ORSINGER: Next item is
25 page 281.

1 MR. ORSINGER: I'm sorry. Yes,
2 Rusty.

3 MR. McMains: Well, I just have
4 one question. Some courts or some
5 jurisdictions seem to have a practice of,
6 like, having a date for dismissal that they
7 will publish, and yet they don't actually --
8 and they -- if you don't appear on that date
9 then by the terms of that document they
10 basically say the case shall be deemed
11 dismissed, if you do not appear, and then they
12 subsequently don't -- will have a global
13 judgment or order that may actually take
14 several of those time periods.

15 Now, my question is if you start -- if
16 you change that from "judgment" to "order of
17 dismissal," I mean, without a -- you've got a
18 signed order. The only signed order -- I
19 mean, you have got two signed orders in those
20 cases. One is an order that says that --
21 that's really prospect, says, "Your case shall
22 be dismissed if you don't do something by this
23 date."

24 There will be courts, it seems to me, if
25 you change that nomenclature to "order of

1 dismissal" that will treat that first order as
2 the order of dismissal and not the order which
3 actually is the one that they globally dispose
4 of all these cases, and I have a problem with
5 it from that standpoint.

6 MR. ORSINGER: Hmm. Don.

7 MR. HUNT: I also have a
8 problem with it. In the rules that we have
9 sent to the Supreme Court in connection with
10 judgments we are trying to use just two terms,
11 "final judgment" and "appealable order," to
12 indicate that we are really dealing with
13 something that can be appealed and those
14 orders that are not final that can be
15 appealed, and any time we start dealing with
16 just orders of this and orders of that, I'm
17 not sure we add much, and judgment has
18 finality to it, and these orders of dismissal
19 are just that. They're final judgments.

20 CHAIRMAN SOULES: It is a
21 judgment.

22 MR. HUNT: And we ought to
23 leave it as judgment.

24 MR. ORSINGER: Well, I concur
25 on that, too. I don't know. Bill, what do

1 you think?

2 PROFESSOR DORSANEO: Well, the
3 only reason it says "judgment" in subdivision
4 (3) of reinstatement is that I copied this
5 language more or less verbatim from Rule 329b,
6 and I can see where Professor Edgar has a
7 point when he says really you should be
8 talking about an order of dismissal. Maybe
9 "judgment of dismissal" would be appropriate.

10 MR. McMAINS: Again, the
11 problem is I think that you are talking
12 about -- in Don's language you really are
13 talking about it either being a final judgment
14 or appealable order, because you could have,
15 for instance, a dismissal of -- I mean, you
16 could have several consolidating claims.

17 It's not unusual to have these claims --
18 have the lawsuit consolidated with several
19 others and only one of those be the subject of
20 a dismissal for want of -- but they are filed
21 at different times and different rules, and
22 you are not -- you don't want to have -- you
23 know, if there is no severance then there
24 isn't anything to be appealing from. Your
25 time shouldn't start running. It shouldn't be

1 different than anything else.

2 If you suggest that your time to get
3 anything done runs from the, quote, order of
4 dismissal, whatever judicial act that is,
5 without regard to whether or not that's a
6 final judgment -- for instance, there might be
7 a counterclaim, cross-claim,, no notices to
8 that claim. There are all kinds of
9 possibilities, it seems to me, that courts may
10 take that as an assumption that, "I'm sorry,
11 you just don't have plenary power to reinstate
12 it."

13 The court of appeals might say it's not
14 appealable, trying to protect their bailiwick.
15 The trial court may say, "Well, I don't have
16 jurisdiction to do anything about it because
17 it's more than 75 days after I did it," and
18 either you use the term "final order of
19 dismissal" or "final written order of
20 dismissal," "appealable order," whatever, but
21 just to say "order of dismissal" I think has
22 too much room for mischief in it.

23 MR. ORSINGER: Sarah.

24 HONORABLE SARAH DUNCAN: Is
25 this a problem? I mean, I would think that

1 this has meaning under the case law, and if
2 it's not a problem and the meaning of it is
3 always correct, why don't we just leave it
4 alone?

5 MR. ORSINGER: Well, we have to
6 adjust something because earlier up in
7 paragraph (3) of 165a where they first talk
8 about the motion for reinstatement they say,
9 "It shall be filed with the clerk within 30
10 days after the order of dismissal is signed,"
11 and then down here it says that the
12 motion -- that "if the motion to reinstate is
13 not decided within 75 days after the judgment
14 is signed." So we actually refer to the same
15 piece of paper as an order of dismissal in one
16 part of the rule and a judgment in the other,
17 and so if -- we ought to conform them at
18 least, and then conform them one way or the
19 other.

20 PROFESSOR DORSANEO:

21 Mr. Chairman?

22 CHAIRMAN SOULES: Yeah. Bill
23 Dorsaneo.

24 PROFESSOR DORSANEO: I actually
25 think that this part of subdivision (3)

1 talking about the overruling of the motion by
2 operation of law, which contains the word
3 "judgment" has no place in this Rule 165a and
4 that when I put it in here I failed to
5 recognize that this is the type of motion that
6 probably needs to be presented to the trial
7 judge before the complaint concerning its
8 overruling is preserved because it's a
9 Craddock type motion.

10 So I would suggest that what really we
11 have here is that Professor Edgar's suggestion
12 is part of a larger problem that the committee
13 maybe needs to address further. I don't know
14 if I'm ready to say right now that this entire
15 paragraph that contains the word "judgment"
16 should be deleted, but I'm inclined to think
17 that I might think that after further
18 consideration.

19 CHAIRMAN SOULES: You're
20 talking about paragraph (3)?

21 PROFESSOR DORSANEO: The
22 unnumbered third paragraph of subdivision (3).
23 And my first point is --

24 CHAIRMAN SOULES: That was a
25 policy -- a strong policy paragraph that

1 basically drove the revision of 165a when it
2 was revised.

3 PROFESSOR DORSANEO: Well,
4 we've had the case of Cecil vs. Smith decided
5 subsequently, and among other things, that
6 case indicates to me by footnote that if it's
7 the type of a motion for new trial, if you
8 like, that requires the presentation of
9 evidence, a Craddock type motion, that it
10 needs to be presented to the trial judge for a
11 ruling and just simply letting it be overruled
12 by operation of law doesn't preserve the
13 complaint, and this paragraph of subdivision
14 (3) contradicts that philosophy.

15 MR. ORSINGER: Well, I'd like
16 to make another suggestion, which is what
17 would be wrong with taking this paragraph and
18 moving it to 329b, which is the same?

19 PROFESSOR DORSANEO: It's
20 already in there.

21 MR. ORSINGER: It's already in
22 329b?

23 PROFESSOR DORSANEO: Yes. The
24 reason why it's duplicated is that under the
25 case law a motion for new trial is considered,

1 some of the time at least, to be an entirely
2 different animal from a motion to reinstate
3 under Rule 165a, and that's why this companion
4 language was repeated in Rule 165a rather than
5 just leaving the matter to be covered by 329b.

6 MR. ORSINGER: I can't find it
7 in 329b.

8 PROFESSOR ALBRIGHT: It
9 concerns motions for new trial in 329b. The
10 75 days overruling by operation of law.

11 MR. ORSINGER: But I don't see
12 anything in 329b. For example, they say -- it
13 starts out by talking about new trials and
14 motions to modify and then it tells you all
15 the stuff about new trials and then has a
16 paragraph that says the same stuff applies to
17 motion to modify.

18 PROFESSOR ALBRIGHT: Right.
19 And so what Bill's saying is that it's not
20 specifically in there, but that's where it
21 should be. A motion to reinstate is really
22 like a motion for new trial.

23 MR. ORSINGER: I know. And
24 what I'm wondering is why don't we just say
25 that in Rule 329b?

1 PROFESSOR DORSANEO: Because
2 what I'm saying now is it's not like a motion
3 for new trial. It needs to be presented, and
4 under the case law as I'm reading it this kind
5 of motion needs to be presented, and if you
6 don't present it to the trial judge and get a
7 ruling on it, the complaint is, you know,
8 waived like the normal rule rather than the
9 exceptional circumstance involving motion for
10 new trial overruled by operation of law.

11 MR. ORSINGER: But 329b doesn't
12 distinguish a Craddock motion for new trial
13 from an ordinary motion for new trial. So --

14 PROFESSOR DORSANEO: The cases
15 do that.

16 MR. ORSINGER: Well, sure. But
17 the same rule, 329b, provides a procedural
18 framework for a Craddock motion as for a
19 motion after a jury trial.

20 PROFESSOR DORSANEO: Yeah. But
21 it's less troublesome that the Craddock motion
22 is an exception than it is for this rule,
23 which is merely a Craddock motion to
24 articulate the principle of overruling by
25 operation of law.

1 PROFESSOR ALBRIGHT: But still
2 don't you need the overruling by operation of
3 law simply to get it going, so then it's over
4 eventually?

5 PROFESSOR DORSANEO: No. As
6 Justice Duncan said, this is misleading. I
7 mean, if you let it be overruled by operation
8 of law, then you're through.

9 HONORABLE SARAH DUNCAN: You
10 may have preserved the complaint, but you have
11 no complaint because there is nothing to --

12 PROFESSOR ALBRIGHT: Right.
13 But what if you never get it set for a
14 hearing? Is it just going to sit there with
15 the motion for reinstate pending forever and
16 ever and ever?

17 HONORABLE SARAH DUNCAN: No.
18 The trial court's plenary power still ends
19 when it ends.

20 CHAIRMAN SOULES: Ends when?

21 HONORABLE SARAH DUNCAN: When
22 it ends.

23 PROFESSOR ALBRIGHT: 30 days --

24 CHAIRMAN SOULES: No.

25 PROFESSOR ALBRIGHT: 30 days

1 after the motion --

2 MR. ORSINGER: To reinstate is
3 overruled by operation of law. Right.

4 PROFESSOR ALBRIGHT: Right.

5 PROFESSOR DORSANEO: 30 days
6 after the judgment is signed.

7 PROFESSOR ALBRIGHT: And so I
8 guess then you say the motion to reinstate
9 does not extend the court's plenary power.

10 PROFESSOR DORSANEO: Right.

11 PROFESSOR ALBRIGHT: So you
12 have got to get your deadline in that 30 days.

13 MR. ORSINGER: It sure should.

14 PROFESSOR DORSANEO: Well,
15 that's why I think let's study this more and
16 see if we want to adjust this paragraph but
17 leave out the overruled by operation of law
18 part, which I don't think is appropriate at
19 all.

20 CHAIRMAN SOULES: Let's rework
21 that and figure out what to do with order of
22 dismissal versus judgment and visit this
23 problem here as well. We have probably got as
24 many people here now as we are going to get,
25 so why don't we go to the venue rule with

1 Bill, Alex, and Richard.

2 MR. ORSINGER: Well, now, Bill
3 had a few procedural things that we wanted to
4 take up before we --

5 PROFESSOR DORSANEO: This won't
6 take long, but in section (3), which --

7 MR. ORSINGER: We are talking
8 about these rules that were passed out here in
9 section (3), pleadings and motions.

10 PROFESSOR DORSANEO: Not
11 everybody was here when I passed them out.
12 Where are they?

13 MS. DUDERSTADT: They are on
14 the table back there.

15 PROFESSOR DORSANEO: The venue
16 rules are in this part of the proposed
17 recodification in section (3), pleadings and
18 motions, as a part of Rule 25. We have been
19 going through this section (3) during the last
20 several meetings, and where we are according
21 to Holly's notes, memorialized in minute form,
22 is through Rule 21. So if you look at Rule
23 22, we can dispose of, I believe, Rules 22,
24 23, and 24 pretty quickly on the way to
25 getting to the main subject for discussion,

1 venue.

2 Rule 22 is simply a combination of
3 current Rules 54, 55, and 56 without material
4 change. I think I changed the word plead,
5 spelled p-l-e-a-d, to "pleaded" in 22(b), but
6 beyond that as we have partially discussed
7 before, Rule 22 is simply a combination of
8 three short one-paragraph rules already in the
9 rule book in the same order as they are in the
10 current rule book as Rules 54, 55, and 56. So
11 I move the adoption of Rule 22.

12 CHAIRMAN SOULES: Any
13 objection? No objection. It will be done.

14 PROFESSOR DORSANEO: Rule 23,
15 and I had thought that we discussed Rule 23
16 altogether before, but I know that this
17 paragraph or rather subdivision (a), heading
18 "Names of Parties" is a redraft as a result of
19 discussions conducted here before this
20 committee. Paragraph (b) is taken from Civil
21 Procedure Rule 50, and paragraph (d) was taken
22 from Rule 58.

23 The most significant change in this
24 proposed Rule 23 from the current rule book
25 involves the last sentence of subdivision (c),

1 which is designed in the same manner as the
2 Federal rules to handle the problem to replace
3 the larger Rule 59 in our civil procedure book
4 by just simply stating that a copy of any
5 written instrument which is an exhibit to a
6 pleading is a part thereof for all purposes.

7 Our rule goes to some length to talk
8 about this subject, and the committee believes
9 it does so unnecessarily. So because we have
10 discussed this before in terms of subdivision
11 (a) and I thought also subdivision (c), I will
12 just move the adoption of Rule 23.

13 CHAIRMAN SOULES: Rusty. I'm
14 sorry. Justice Duncan, go ahead.

15 HONORABLE SARAH DUNCAN: What
16 happens if I don't put one or more of these
17 items on my pleading or if I put one or more
18 incorrectly?

19 PROFESSOR DORSANEO: I'm not
20 understanding. In the subdivision (a) in the
21 heading?

22 HONORABLE SARAH DUNCAN: Yeah.
23 As I understand it right now, there is nothing
24 in the rules that requires me to put a file
25 number on a pleading, and my question is --

1 PROFESSOR DORSANEO: Actually,
2 in rule seventy --

3 HONORABLE SARAH DUNCAN: Is
4 there something?

5 PROFESSOR DORSANEO: -- eight.
6 No. It's not 78. Where is it? It's -- maybe
7 you're right.

8 HONORABLE SARAH DUNCAN: And my
9 concern is that -- obviously because of my
10 past experiences, that courts might read this
11 rule to say if you don't put all these items
12 on your pleading or you put one or more
13 incorrectly that it's not filed. I mean, I've
14 had that happen to me, and I'm just somewhat
15 wary.

16 PROFESSOR DORSANEO: No, I
17 understand. I remember that experience, as a
18 matter of fact.

19 Well, it's the first sentence that would
20 give you the most trouble because that
21 sentence I do believe is new, taken from
22 Federal Rule 10a.

23 HONORABLE SARAH DUNCAN: If you
24 would just like to state on the record that
25 there is no penalty for omitting or

1 incorrectly stating any one of these items, I
2 would be happy.

3 PROFESSOR DORSANEO: There is
4 no penalty for not including one of these
5 items. These are formal matters that --

6 MR. ORSINGER: I would say in
7 my view, also, the remedy is to file a special
8 exception complaining about the defect, secure
9 an order requiring the defect be cured, and
10 then if you refuse to cure it then you might
11 be at risk for something.

12 HONORABLE SARAH DUNCAN: Well,
13 but my concern is just that -- I mean, our
14 clerk would -- David Garcia would certainly
15 never do this, our district clerk, but my
16 concern is that a clerk if it doesn't contain
17 all these items or doesn't contain them
18 correctly could use this sentence either to
19 refuse to file or a court could say that it
20 wasn't filed.

21 MR. ORSINGER: Well, there is
22 no rule that permits a clerk to refuse to file
23 something because of a defect of form; is that
24 not right, Bonnie?

25 MS. WOLBRUECK: That's correct.

1 MR. ORSINGER: And so what is
2 the practice around the state? Are there
3 clerks that reject filings because they don't
4 like the form?

5 MS. WOLBRUECK: I hope not.

6 MR. ORSINGER: Now, the
7 original pleading obviously isn't going to
8 have a cause number on it until after its
9 stamped.

10 MR. McMANS: It will when they
11 put one on it.

12 MR. ORSINGER: Yeah.

13 PROFESSOR ALBRIGHT: I have
14 another question. Didn't we talk at one point
15 about whether if you leave off names of
16 parties if that's in effect nonsuiting those
17 parties and if you accidentally leave off
18 somebody's name?

19 I can't remember how we ultimately came
20 out on that, but here it says, "A pleading
21 that contains a claim for relief must state
22 the names of the parties in the heading,"
23 which seems to indicate that you've got --
24 that any of your amended pleadings you have to
25 be sure you put in the heading all of the

1 plaintiffs and all of the defendants, and if
2 you drop one out then maybe that's a nonsuit,
3 and I just don't remember how we ultimately
4 came out on that in our discussion, whenever
5 it was. Does anybody remember that?

6 PROFESSOR DORSANEO: Yes.
7 That's covered in party section, and we were
8 thinking about inadvertent omission, then only
9 of defendants, but I think since then the
10 committee has voted, although it hasn't been
11 presented here, to treat the inadvertent
12 omission of a plaintiff or a defendant the
13 same way.

14 PROFESSOR ALBRIGHT: And that
15 is?

16 PROFESSOR DORSANEO: In saying
17 that if you put them back in then the
18 re-insertion relates back to the original
19 pleading that they were in to begin with such
20 that you don't have any limitations problem
21 from a plaintiff's standpoint or a defendant's
22 standpoint, and that we believe is a
23 codification of a recent Texas Supreme Court
24 decision.

25 CHAIRMAN SOULES: Paul Gold.

1 MR. GOLD: Just as a procedural
2 matter, when you in subsequent pleadings add
3 parties or intentionally delete parties are
4 you supposed to change the style or is it -- I
5 was talking with Bonnie about this, I guess
6 last meeting, or are you supposed to leave the
7 style as it's originally filed, because I've
8 heard it both ways?

9 I've heard some district courts or
10 district clerks complain when you change the
11 style during the litigation because it screws
12 them up, and in our office, for instance, my
13 old office, our rule was never to change the
14 style no matter what we did. If we dropped
15 people, we could drop people, but we couldn't
16 add people to the style.

17 PROFESSOR DORSANEO: I think
18 it's fair to say I had forgotten that this
19 paragraph, subdivision (a), comes largely from
20 Federal Rule 10a, and we do not have a rule
21 that addresses these matters, and this is a
22 stab at having one that is at least trying to
23 address these matters, which I think is better
24 than just leaving it up in the air.

25 MR. GOLD: Does that address

1 this, that question I just raised?

2 PROFESSOR DORSANEO: I can't
3 imagine why you would leave the names of
4 people in the style who are no longer in a
5 case.

6 MR. GOLD: No. What if you add
7 people? Are you supposed to add them to the
8 style?

9 PROFESSOR ALBRIGHT: According
10 to this --

11 PROFESSOR DORSANEO: It would
12 seem to me. Yes.

13 PROFESSOR ALBRIGHT: According
14 this you do.

15 PROFESSOR DORSANEO: But if you
16 didn't and they were in the first unnumbered
17 paragraph, it wouldn't strike me as any big
18 deal, and there are some, I think, relatively
19 goofy cases that say the style doesn't matter
20 and neither does the first paragraph. It has
21 to be a paragraph with a number. Right?

22 Yeah. The Dallas court has held that.

23 HONORABLE SARAH DUNCAN: This
24 is why we are just a little concerned about
25 this paragraph. That's a good summary.

1 MR. GOLD: So never number the
2 first paragraph.

3 PROFESSOR DORSANEO: Well,
4 always number it if you want it to count.

5 PROFESSOR ALBRIGHT: But I
6 think what you're saying, Paul, is if you
7 dropped your first named defendant, if you
8 have Jones versus Smith and eight other
9 defendants.

10 MR. GOLD: Take the situation
11 where you are adding rather than subtracting
12 because if I subtract them, I pull them off,
13 but if you add parties, we don't typically add
14 them to the style. We add them to the first
15 paragraph, but not to the style.

16 PROFESSOR ALBRIGHT: And this
17 says it has to be in the heading.

18 MR. GOLD: Okay.

19 PROFESSOR ALBRIGHT: Wouldn't
20 that be interpreted that way?

21 MR. GOLD: Heading is the
22 style?

23 PROFESSOR DORSANEO: Yeah.

24 MR. GOLD: Okay. All right. I
25 have just always been curious about that.

1 CHAIRMAN SOULES: You would
2 have to change the caption.

3 PROFESSOR DORSANEO: We changed
4 the word "caption" to "heading." That's
5 Richard's suggestion because --

6 CHAIRMAN SOULES: That's fine,
7 but under that second sentence if the
8 plaintiff is suing a defendant, a new
9 defendant, adds a defendant, and is seeking
10 relief, they have to be added.

11 MR. GOLD: Okay.

12 PROFESSOR DORSANEO: I mean,
13 that's a fair rule, isn't it?

14 CHAIRMAN SOULES: Yeah.

15 PROFESSOR DORSANEO: If you
16 have a claim for relief that you should
17 identify who you are claiming the relief from
18 in the heading.

19 MR. GOLD: Oh, I don't have any
20 problem with it, but the reason that we didn't
21 do it is because we had district clerks
22 complaining that when you changed the style it
23 screwed them up in their bookkeeping or
24 whatever it was.

25 CHAIRMAN SOULES: Carl Hamilton

1 and then Joe.

2 MR. HAMILTON: You know, I
3 thought there were some cases that held that
4 the style is the style how it's originally
5 filed and that should never change. If you
6 want to change parties, you change them in the
7 first paragraph.

8 PROFESSOR DORSANEO: There may
9 be, Carl, but that strikes me -- doesn't that
10 strike you as strange?

11 MR. HAMILTON: No. Because
12 like Paul says, the clerks get upset when you
13 do a change in the style on them, especially
14 if you leave -- if you dismiss the first two
15 or three named defendants and they have been
16 going by Jones versus Smith and now suddenly
17 it's Jones versus Brown, and it gets things
18 all screwed up.

19 PROFESSOR ALBRIGHT: So like
20 the name is the name you call Zebra.

21 MR. ORSINGER: Well, doesn't
22 everything go by the cause number anyway?

23 MR. HAMILTON: Well, cause
24 number and name.

25 MS. WOLBRUECK: If it's on the

1 pleading.

2 MR. ORSINGER: If the cause
3 number is on the pleading. Okay.

4 PROFESSOR DORSANEO: Well, what
5 do you want to do? I don't care.

6 MR. LATting: Well, I have a
7 question over here. Luke?

8 CHAIRMAN SOULES: Joe Latting.

9 MR. LATting: I've got a couple
10 of cases in my office that have several
11 hundred parties, and we get mailings that
12 literally have, I think, five pages of style
13 before you get to anything. Do you have to do
14 that to practice law?

15 PROFESSOR DORSANEO: Well, this
16 rule attempts to relax that by saying that
17 that only has to be done in a pleading that
18 contains a claim for relief. Now, that could
19 be cut down to say, you know, in the first
20 pleading that makes a claim for relief, but
21 that gets complicated because your claims for
22 relief could change.

23 MR. LATting: Yeah. Every time
24 you file an amended petition you have to --

25 PROFESSOR DORSANEO: But it

1 says here, "In other pleadings it is
2 sufficient to state the name of the first
3 party on each side with an appropriate
4 indication of other parties," like, you know,
5 and "et al."

6 PROFESSOR ALBRIGHT: Why isn't
7 that appropriate for all pleadings?

8 MR. LATTING: Yeah.

9 PROFESSOR DORSANEO: Well,
10 because it's not very informative. If I'm a
11 defendant I want to see my -- you know, if I'm
12 looking at it, I want to know whether I'm in
13 there.

14 MR. LATTING: Well, if I show
15 you one of these pleadings, I'm going to
16 promise you it won't be informative. Your
17 eyes will glaze over at page two, and you
18 won't ever finish reading this style.

19 PROFESSOR DORSANEO: Oh, I bet
20 you if I'm reading it and I look through those
21 names that my eyes get big when I see my name
22 there. I guarantee you that will happen.

23 PROFESSOR ALBRIGHT: Don't you
24 think you are going to read the entire
25 pleading to find out what they are saying

1 about you?

2 PROFESSOR DORSANEO: I may not
3 read the whole darn thing if I'm not listed
4 there in the beginning.

5 MR. GOLD: So if I understand
6 what Joe is saying, is after you file the
7 original petition or whatever or you are
8 filing discovery or what have you, you can
9 shorthand the style, just say the first
10 plaintiff, et al., versus the first defendant,
11 et al., and you don't have to use a whole
12 page.

13 MR. LATTING: Pages.

14 MR. GOLD: I have seen them
15 where it's just pages.

16 PROFESSOR DORSANEO: As I'm
17 reading, this would allow that because that's
18 not a pleading that contains a claim for
19 relief.

20 MR. LATTING: But if I file an
21 amended petition, I have to go back to the --

22 PROFESSOR DORSANEO: Right.

23 MR. LATTING: -- five pages
24 worth of style.

25 PROFESSOR DORSANEO: Right.

1 MR. GOLD: Okay. I understand
2 that.

3 PROFESSOR DORSANEO: I think
4 that's fair.

5 MR. LATTING: I don't think
6 that makes any sense.

7 PROFESSOR DORSANEO: I think it
8 does, because you are going to change a lot of
9 things -- you may change a lot of things in
10 your petition, not just make some clerical
11 change. You may change the nature of your
12 claims. You may change the amount of money.
13 To say that it's an amended petition doesn't
14 mean it's going to bear any resemblance or
15 much of a resemblance to the one you filed to
16 begin with.

17 MR. LATTING: I'm going to send
18 you some of these pleadings and let you read
19 them.

20 PROFESSOR DORSANEO: Oh, I see
21 them. Those are the only kind of cases I'm
22 in.

23 MR. HAMILTON: I was thinking
24 there was even some cases that held that in
25 your opening paragraph that was the

1 controlling part of the document that decided
2 who the parties were. It doesn't matter what
3 was in the style. If you didn't have them
4 named in the opening paragraph, they weren't
5 parties.

6 MR. ORSINGER: This rule, if
7 adopted, is going to change that.

8 MR. HAMILTON: I know.

9 CHAIRMAN SOULES: I have never
10 seen those cases, but they may exist.

11 MR. LATTING: Not to beat a
12 dead horse, but does this mean that if we file
13 an amended petition that we risk dismissing
14 someone by not naming them in these five pages
15 of style?

16 PROFESSOR DORSANEO: No. I
17 think all this means is that you would -- in
18 construing who the parties are you would also
19 look at the heading. I'm not thinking that
20 you would only look at the heading.

21 MR. LATTING: Okay. I'm not
22 trying to be difficult.

23 PROFESSOR DORSANEO: You would
24 look at the heading, you would look at the
25 first paragraph, you would look at the whole

1 thing; but somebody ought to be entitled to
2 look at the heading and to see whether they
3 are a party when it's a claim for relief. I
4 mean, that would be my position. Otherwise,
5 why do we have headings? If we have them just
6 for clerks, why don't we just have them, you
7 know, whatever the clerks want them to say.

8 CHAIRMAN SOULES: Don Hunt.

9 MR. HUNT: Is there any penalty
10 under this rule for failing to relist all the
11 parties on an amended petition where you
12 change a little bit?

13 PROFESSOR DORSANEO: I would
14 think it would be a matter of construction of
15 the amended petition. If the amended petition
16 did, in fact, when read as a whole leave
17 somebody out, they would be out.

18 MR. HUNT: Okay.

19 PROFESSOR DORSANEO: But the
20 fact that they were out of the caption, the
21 heading, would not be determinative. It would
22 be relevant but not determinative.

23 MR. HUNT: If there is no
24 penalty for doing that, and maybe Bonnie can
25 help us with this, but I think 98 percent of

1 the Bar will do just like Joe Latting and have
2 Smith against Jones on everything after the
3 original petition or original complaint.

4 CHAIRMAN SOULES: Not to stop
5 you, but the conversation at the end of the
6 table is distracting the -- Mike Gallagher,
7 your conversation is loud, and it's
8 interfering with the court reporter being able
9 to get the dialogue, so please hold it down.

10 MR. GALLAGHER: Okay. Pardon
11 us.

12 CHAIRMAN SOULES: Thank you.
13 Go ahead, Don.

14 MR. HUNT: It seems to me that
15 most lawyers will in every document after the
16 original complaint or petition put Smith
17 against Jones and not five pages that Joe
18 Latting tells us about, and if that's the case
19 then the rule doesn't accomplish much because
20 there is no penalty, there is no teeth; and if
21 the purpose is to give notice that here you
22 are filing an amended petition or complaint,
23 amended claim for relief that changes
24 something, and what's really controlling is
25 the text after the title then the rule doesn't

1 do much.

2 I would prefer a rule that said that
3 after the initial filing that you can use a
4 shorthand version and narrow them out and keep
5 that. The practice that I have run into in
6 the Federal court is it doesn't matter if you
7 drop the first named defendant, the first
8 named defendant stays on there even through
9 appeal. You can talk to the clerk of the
10 Fifth Circuit until you're blue in the face,
11 and you don't get to take that named party
12 off, even though they are not an appellant or
13 appellee and no relief was granted against
14 them. It's still the first named claimant
15 against first named defendant. That caption
16 is fixed forever.

17 PROFESSOR DORSANEO: Well, we
18 could certainly make that adjustment without
19 difficulty by saying in the second sentence
20 "an initial pleading that contains a claim for
21 relief," and then we might need to change the
22 third sentence to make it clear that we are
23 talking about amended pleadings when we are
24 talking about other pleadings. I wouldn't be
25 troubled by that, although it wouldn't be my

1 preference.

2 CHAIRMAN SOULES: Joe Latting.

3 MR. LATTING: How about this?

4 Would this help you, if we added a party to a
5 pleading, an amended pleading seeking relief?
6 In other words, if suit is Smith versus Jones
7 and then we add Jackson in an amended
8 complaint, for that complaint we could add
9 Jackson to the style to serve it on Jackson
10 and then thereafter we could go back to Smith
11 versus Jones.

12 Would that help you out? So that a
13 person who was being sued would get something
14 with his name or her name in the style to
15 alert them, if it's a notice issue with you.

16 CHAIRMAN SOULES: That's
17 getting pretty complicated.

18 MR. LATTING: Well, no, I --

19 CHAIRMAN SOULES: Bonnie
20 Wolbrueck, you had your hand up before Joe
21 started talking and I want to get to you.

22 MS. WOLBRUECK: I guess I would
23 only comment for the clerks that there be
24 sufficient information on that pleading so
25 that the clerk knows exactly what case file to

1 put it into, and that's my main concern.
2 Common practice, of course, is everybody
3 includes the case number. If it's in the rule
4 or not, that's the common practice.

5 We always -- clerks have to double
6 reference the case number in case that it's
7 been transposed or it's the wrong number with
8 the style, and that usually goes back to the
9 original style. So that would be my only
10 concern, that if you want your documents
11 placed into the proper file, we get thousands
12 of documents, and to make sure that there is
13 some proper reference to that.

14 CHAIRMAN SOULES: And really
15 for you to do that the first named defendant
16 and first named plaintiff need to be
17 consistent unless there is something
18 special --

19 MS. WOLBRUECK: Unless there is
20 something -- you know, occasionally parties
21 are re-aligned or whatever and then the case
22 file itself, everything has to be re-aligned
23 and indexed differently and the like so that
24 the clerk can find it, and that does happen.
25 That's usually done through court pleadings

1 and the like and by court order.

2 HONORABLE SCOTT BRISTER:

3 Usually we're the ones that -- you know, you
4 want to amend the citation, you sever it out,
5 and you want to give it a new case number, you
6 want to re-align the parties or you have got
7 somebody that you've settled with and you want
8 to drop their name from the pleadings,
9 normally it's my understanding I had to do
10 that by order. You couldn't just -- you
11 certainly can't assign a new case number. You
12 certainly can't re-align the parties. So it
13 would seem to make sense to me that you just
14 freeze it unless somebody wants to move to
15 change it.

16 CHAIRMAN SOULES: Okay. Well,
17 what do we do?

18 PROFESSOR DORSANEO: Somebody
19 make a motion to change it somehow.

20 MR. LATTING: I move that we
21 leave the style unaltered except that after an
22 initial pleading that the parties can use an
23 abbreviated version of the style.

24 MR. HUNT: Second.

25 HONORABLE SARAH DUNCAN: So

1 will you accept a friendly amendment?

2 MR. LATTING: Yes.

3 HONORABLE SARAH DUNCAN: So
4 long as the first name on each side doesn't
5 change so that the clerk will have a
6 definitive, constant name.

7 MR. LATTING: Yes.

8 PROFESSOR ALBRIGHT: How about
9 we say it can't change except by court order?

10 HONORABLE SCOTT BRISTER:
11 Except by court order.

12 HONORABLE SARAH DUNCAN: Right.

13 MR. LATTING: That's fine. I
14 agree with all that.

15 MR. HUNT: Good.

16 PROFESSOR DORSANEO: The
17 practical effect of that is, is that whatever
18 the plaintiff's original petition has as a
19 party is frozen unless it's changed by order
20 of the court?

21 MR. LATTING: Yeah.

22 HONORABLE SCOTT BRISTER: Yes.

23 MR. ORSINGER: And then, let's
24 say, if the defendant cross-claims against a
25 third party, does the plaintiff's pleadings

1 pick up the cross-claim or just the answer
2 picks up the cross-claim?

3 PROFESSOR ALBRIGHT: The name
4 is still the same. The cross-claim has to be
5 stated in the body of the pleading.

6 MR. ORSINGER: But it's an
7 initial claim against that third party
8 defendant. By cross-claim I meant a claim
9 against a non-party, a defendant against
10 another non -- so typically what I see is
11 plaintiff versus defendant versus third party
12 defendant, carried in everybody's pleadings;
13 but under your rule the plaintiff would carry
14 the pleadings, the plaintiff versus defendant,
15 and the defendant would carry those pleadings
16 but probably also carry the third party claim
17 in its heading so that the pleadings are not
18 going to match, or no?

19 HONORABLE SCOTT BRISTER: Yeah,
20 but why do they need to do that? It's not a
21 separate case. It doesn't have a separate
22 case number.

23 MR. ORSINGER: So in other
24 words, the third party defendant gets served
25 with what is to them an original petition that

1 has other people's names in the heading and
2 their name is not there.

3 HONORABLE SCOTT BRISTER: Sure.

4 MR. ORSINGER: And that makes
5 sense?

6 HONORABLE SCOTT BRISTER:
7 People get served with things with their names
8 wrong in the petition.

9 PROFESSOR DORSANEO: That does
10 make sense to me. This A versus B versus C
11 practice is something that people do, but
12 there is no requirement that it be done like
13 that. It's just people were making up these
14 rules as they go along because there aren't
15 any rules.

16 PROFESSOR ALBRIGHT: Because
17 the purpose of the caption is simply to
18 identify the case, right?

19 MR. LATTING: Yeah. Yeah.

20 PROFESSOR ALBRIGHT: It gives
21 it a name so that the clerk can check the name
22 and the number and make sure everything is
23 filed in the right place.

24 CHAIRMAN SOULES: Okay. Well,
25 you-all can, I assume, write a rule that takes

1 care of that problem.

2 MR. LATTING: We didn't ever
3 vote on the motion.

4 CHAIRMAN SOULES: Oh, okay.
5 You want to restate your motion, Joe?

6 MR. LATTING: Well, I think I
7 remember it, but that in the initial pleading
8 the parties be stated and that thereafter the
9 parties may use an abbreviated style of the
10 case and that after the initial pleading the
11 official style of the case does not change
12 except by court order.

13 Did I get that right? I believe that was
14 the motion that was seconded.

15 CHAIRMAN SOULES: Is there a
16 second?

17 PROFESSOR ALBRIGHT: Second.

18 CHAIRMAN SOULES: I believe
19 Justice Duncan seconded it anyway before. Any
20 further discussion? Those in favor show by
21 hands.

22 Opposed? Ten to three. Passes. Four.
23 Ten to four it passes. Justice Duncan.

24 HONORABLE SARAH DUNCAN: I'd
25 like to make another motion. If we are going

1 to have this 23 subparagraph -- Rule 23
2 subparagraph (a), I move that the subparagraph
3 also contain a sentence to the effect that the
4 failure to include or the incorrect inclusion
5 of any one of these items does not affect the
6 status of the document that's filed, or
7 something to that effect.

8 I'm just trying to get to -- I just think
9 if we're going to include this new rule in
10 light of the history that we've had in the
11 Philbrook vs. Berry kinds of cases that we
12 need a statement in the rule negatizing any
13 attempt to make this a prerequisite of filing
14 at all.

15 PROFESSOR DORSANEO: That's
16 easy enough to do.

17 CHAIRMAN SOULES: Anybody
18 disagree? Okay. Try to do that, too.

19 Anything further on 23?

20 MR. McMAINS: Luke?

21 CHAIRMAN SOULES: Rusty.

22 MR. McMAINS: Yeah. I have
23 just -- I'm sure this is straight out of our
24 rule and/or the Federal rule, the adoption by
25 reference rule in (c) and the exhibits.

1 PROFESSOR DORSANEO: Yes.

2 MR. McMAINS: The thing about
3 it is it appears to say and does say that you
4 can adopt by reference a pleading that hasn't
5 been superseded. Well, most people file -- I
6 mean, there are a lot of people that file
7 supplemental pleadings, but there are a lot of
8 people that just go ahead and file amended
9 pleadings trying to adopt by reference a prior
10 pleading, you know, whether they do it by
11 force of habit or whatever.

12 More importantly, the rule also would
13 appear to say that you can't adopt the
14 exhibits in a prior filed pleading if it's
15 been superseded. Now, if I'm suing somebody
16 on a declaratory judgment on an insurance
17 policy that frequently is five inches thick,
18 talking about saving the trees, if every time
19 I have to file that turkey I have to file a
20 new copy of the exhibits, none of that makes a
21 whole lot of sense to me.

22 It seems to me that we should have -- our
23 incorporation by reference rule should be
24 broad enough where we can incorporate by
25 reference any previously identified pleading,

1 whether it is a live pleading or a dead
2 pleading. It becomes a live pleading by our
3 inclusion here so long as it exists somewhere
4 and is easily referable along with any
5 exhibits or attachments. Does anybody have a
6 problem with that?

7 MR. ORSINGER: Well, Rusty, we
8 debated that two and a half years ago, and the
9 argument on the other side is that it becomes
10 difficult for someone to reconstruct what the
11 current state of the pleadings is,
12 particularly the trial court, if you have to
13 look through six volumes of files and you are
14 not even sure that you have gotten everything,
15 and, now, that's the only argument I --

16 MR. McMAINS: I understand.
17 I'm not saying that you don't effectively
18 supersede the prior pleadings with an
19 amendment pleading. All I'm saying is that if
20 you say, "I'm going to incorporate in this
21 amended pleading," in the live pleading,
22 incorporate by reference whatever my
23 allegations are, whether it be in the original
24 pleading or whatever they were. I mean, not
25 that you are incorporating by reference

1 everything that I have ever pled before.

2 MR. ORSINGER: No. But what
3 you have is -- you might have the final
4 pleadings you go to trial on might be in six
5 different files. Two paragraphs in this file,
6 four paragraphs in this file, eight paragraphs
7 in this file, and then if you can keep that
8 all straight, you know, then you can somehow
9 put it together, but it's not in one --

10 MR. McMAINS: The only thing
11 you have to do is require a specific
12 reference. I mean, it must be in -- in order
13 to incorporate it by reference, you need to
14 identify it.

15 CHAIRMAN SOULES: Rusty, would
16 you be satisfied if we had a compromise on
17 this that an amended pleading can adopt by
18 reference exhibits to a prior pleading?

19 HONORABLE SCOTT BRISTER: In
20 other words, you can't reference just the
21 pleading language, but you can reference the
22 exhibits, the attachments.

23 CHAIRMAN SOULES: Right.

24 MR. LATTING: Yeah. That seems
25 reasonable.

1 CHAIRMAN SOULES: Because this
2 committee has debated the issue of what to do
3 about amended pleadings, whether to make them
4 comprehensive or something you can refer to,
5 and we have always come down comprehensive.
6 That doesn't mean we can't do it different
7 today, but it's been debated several times,
8 but the exhibit issue I don't think has really
9 come up, but it is an issue.

10 MR. LATTING: Let's do that,
11 what you said.

12 CHAIRMAN SOULES: You know, the
13 breast implant litigation in Houston, Judge
14 Steiner was tired of people filing stuff
15 constantly. There were probably ten bankers
16 boxes full of exhibits that were master
17 exhibits, right, Mike? And you could refer to
18 them in a pleading and everybody understood
19 they were in a master court. You could just
20 give a number, and you didn't have to attach
21 anything. It worked good.

22 Okay. Well, any further discussion on
23 this? You can't adopt allegations or the
24 content of the pleading, but you can adopt
25 exhibits. Is that all right with everybody?

1 Any disagreement? Sarah, is your hand up to
2 disagree?

3 HONORABLE SARAH DUNCAN: Yes.

4 CHAIRMAN SOULES: Okay.

5 HONORABLE SARAH DUNCAN: I
6 would rather see a rule like what you did in
7 the breast implant litigation because what's
8 going to happen is when people start trying to
9 put together transcripts you're going to have
10 to figure out which superseded pleadings
11 something was an exhibit to, and that
12 superseded pleading will have to be included
13 in the transcript so that the attached exhibit
14 gets included in the transcript, and I don't
15 think our district clerks are really up for
16 that, and I don't think lawyers are really up
17 to that, and I would rather see a rule where
18 you can file something as an exhibit. Right?

19 I can file my contract as the contract in
20 the case and then I can reference that in all
21 subsequent pleadings, apparently the way
22 you-all did in the breast implant litigation,
23 but if we permit people to adopt by reference
24 exhibits attached to superseded pleadings, I
25 don't think it's going to work very well for

1 purposes of putting together transcripts.

2 MR. ORSINGER: There might be a
3 couple of countervailing considerations.
4 No. 1, under the new TRAPS it's not a
5 drop-dead rule if you fail to take something
6 up to the appellate court anymore because the
7 appellate record is defined to include what's
8 still back down at the district clerk's
9 office. In the old days if you failed to take
10 something up, it might result in an
11 affirmance.

12 What?

13 HONORABLE SARAH DUNCAN: I
14 don't believe -- I don't think that's in the
15 appellate rules that are currently
16 circulating.

17 MR. ORSINGER: That got dropped
18 out? The proviso -- we redefined the
19 appellate record to include what was still
20 down in the trial court clerk's office on the
21 idea that the court could summon up something
22 that was omitted rather than having to affirm
23 the case.

24 HONORABLE SARAH DUNCAN: Pam
25 says it's still in there. Excuse me.

1 MR. ORSINGER: That's No. 1.
2 No. 2, if it's central enough to your case for
3 it to be attached to your pleading, it
4 probably got marked as an exhibit and put into
5 evidence in the statement of facts.

6 HONORABLE SARAH DUNCAN: If
7 there is a statement of facts.

8 MR. ORSINGER: If there is a
9 statement of facts. Well, if they are not
10 going to take a statement of facts up, they
11 are probably not going to win.

12 HONORABLE SCOTT BRISTER: They
13 are not serious anyway.

14 HONORABLE SARAH DUNCAN: There
15 are a lot of cases that they don't need a
16 statement of facts.

17 MR. ORSINGER: Okay. Well, if
18 it's a summary judgment, I don't think you can
19 win or present or defend a summary judgment by
20 reference to your pleadings, so you're going
21 to have --

22 CHAIRMAN SOULES: Just so you
23 know, the Supreme Court took that out.

24 MR. ORSINGER: It's gone?

25 CHAIRMAN SOULES: Gone.

1 MR. ORSINGER: The record no
2 longer includes --

3 HONORABLE SARAH DUNCAN: What
4 is wrong with a rule that permits -- that
5 explicitly, expressly permits doing what they
6 have done in the breast implant litigation,
7 which sounds like a wonderful idea to me,
8 which is that you would have a core set of
9 exhibits for a case. You only file those
10 once. You know they are going to get included
11 in the transcript or in the file sent to the
12 trial court for whatever hearing you're going
13 to have. I think that's a great rule. I
14 think it would be a great rule. We could save
15 volumes and volumes of transcripts if we would
16 do that.

17 CHAIRMAN SOULES: Paul Gold.

18 MR. GOLD: Yeah. I think it's
19 a great idea. I think that, just
20 pragmatically, I don't know if the place to
21 try and formulate that as a rule would be this
22 morning or whether we should probably have a
23 group see how that could be drafted and how it
24 could be implemented in all this, but I think
25 that -- I know it can be instituted on an ad

1 hoc basis per case, and I have done that.

2 We have had document repositories in
3 airplane crashes and things like that, but it
4 would be a wonderful idea, and it makes total
5 sense. Just say at the very beginning of the
6 case you file -- you set up a depository that
7 has a master set of documents. The judge
8 knows where to go to find the document. Each
9 of the party refer to it. You don't have --
10 in a motion for summary judgment you could
11 have everybody attaching to their motion and
12 their response the same documents. You wind
13 up with all this. You just go, Exhibit, you
14 know, 2. You know, I agree with you. I think
15 it would be a phenomenally efficient idea.

16 HONORABLE SCOTT BRISTER: Luke?

17 CHAIRMAN SOULES: Judge

18 Brister.

19 HONORABLE SCOTT BRISTER: I
20 don't want to be a wet rag, but all of my
21 colleagues are moving the opposite direction.
22 We are trying to get less stuff filed, less
23 paper filed in the courthouse rather than
24 more. Dallas has passed local rules that you
25 don't file discovery except by court order,

1 and my colleagues are about to pass the same
2 thing, and the idea that we are going to
3 start -- I mean, this is going to be an
4 invitation not just to file what you would
5 attach to your pleadings, which most cases
6 nothing is attached to the pleadings.

7 This is going to be an invitation early
8 in the case to file all the exhibits you may
9 refer to later on, and my impression from the
10 big city clerks and my colleagues was that
11 just means we have to have more staff to file
12 more paper. We are warehousing stuff in the
13 hallways. The place looks like a bus station
14 or a warehouse, and we don't want more stuff
15 filed. We want less stuff filed. We are
16 moving towards paperless.

17 CHAIRMAN SOULES: Well, you
18 know why interrogatories went back to the
19 files? Because the district judges, some
20 district judges, said that the interrogatories
21 were so interesting to them and they always
22 read them before the case started to trial and
23 that not having answers to interrogatories on
24 file was interfering with the trial judge's
25 ability to get prepared and try the case, and

1 they wanted them back in the clerk's record,
2 and the Supreme Court changed our rule from no
3 filing to filing because of that.

4 MR. ORSINGER: Luke, they
5 shouldn't be reading interrogatories before
6 the trial. That's receiving evidence.

7 CHAIRMAN SOULES: Well,
8 whatever.

9 MR. LATTING: They don't
10 consider it. They just read it.

11 MR. GOLD: They just review it.
12 They don't rely on it.

13 CHAIRMAN SOULES: Okay. How
14 many feel that there should be some provision
15 in a rule to allow the filing of some
16 repository set of exhibits that can be
17 thereafter referred to in the pleadings?

18 PROFESSOR ALBRIGHT: How about
19 studying?

20 MR. GOLD: Studying.

21 CHAIRMAN SOULES: What?

22 PROFESSOR ALBRIGHT: Studying
23 it

24 CHAIRMAN SOULES: Nine. Those
25 opposed? To one. Nine to one.

1 PROFESSOR DORSANEO: Studying
2 or doing it?

3 CHAIRMAN SOULES: Writing it.
4 Writing it. And we will take a look at what
5 you write.

6 PROFESSOR DORSANEO: I have a
7 question about the other paragraphs, and I'm
8 sorry. Excuse me.

9 MR. ORSINGER: I don't think
10 that that obviates the need for us to discuss
11 pleadings -- incorporation by reference of
12 previous exhibits because it's going to be
13 rare cases --

14 CHAIRMAN SOULES: I'm getting
15 to that right now.

16 MR. ORSINGER: -- where you are
17 going to set up a third party repository, and
18 the average case is just going to have a
19 contract or two, and we still need to get back
20 to that.

21 CHAIRMAN SOULES: Yes, and I
22 appreciate that. Those in favor of permitting
23 adoption by reference of exhibits to
24 superseded pleadings but not the content of
25 superseded pleadings show by hands. 11.

1 Okay.

2 Those opposed? 11 to 3 it passes. All
3 right. Anything else on Rule 23?

4 PROFESSOR DORSANEO: Well, I
5 have one question. I'm here fiddling with
6 this subdivision (a). Was the sense of the
7 vote that was taken that it's really the
8 initial original petition which now would be
9 the complaint? The initial complaint would be
10 what would be used for the heading unless the
11 court orders otherwise, with the exception
12 that you could shorthand the parties in
13 subsequent pleadings, but it's not an initial
14 pleading that contains the claim for relief.
15 It's the initial complaint. Right? It's the
16 same for all documents.

17 CHAIRMAN SOULES: There is two
18 things you don't know. You don't know the
19 cause number when you file a complaint, and in
20 Harris County you don't know the court even
21 when you file the answer. They don't put a
22 court on the plaintiff's petition or on the
23 citation with which a defendant is served, and
24 I don't know when they go and pick up, but
25 they issue citation with a copy of the

1 petition on the citation without
2 assigning -- before they pick a court.

3 MR. ORSINGER: Hmm. I guess
4 they wait to see who the defendant hires as a
5 lawyer.

6 CHAIRMAN SOULES: Well, I think
7 it's just the logistics. People are standing
8 there. They want their citation, and the
9 gumball machine over there blowing polo balls
10 is another step down the line in getting that
11 out, blowing Ping-Pong balls or however you
12 select what court it goes to.

13 HONORABLE SCOTT BRISTER: Very
14 expensive computer randomization.

15 CHAIRMAN SOULES: Anyway, but
16 we're saying that it's of no consequence to
17 fail to put these things in the pleadings.

18 PROFESSOR DORSANEO: No. I'm
19 just talking about the names of the parties.
20 The initial complaint controls unless the
21 judge orders otherwise.

22 HONORABLE SCOTT BRISTER:
23 Plaintiff's original petition unless the judge
24 orders otherwise.

25 PROFESSOR DORSANEO: Okay.

1 CHAIRMAN SOULES: Really what
2 we are talking about is the parties --

3 PROFESSOR DORSANEO: All right.
4 Boy, this is a --

5 CHAIRMAN SOULES: Aren't we
6 saying that after the original complaint is
7 filed, a pleading, any pleading, can be filed
8 in which the name of the case --

9 PROFESSOR DORSANEO: Is
10 abbreviated.

11 CHAIRMAN SOULES: -- is the
12 name of the first plaintiff only and the first
13 defendant only?

14 PROFESSOR DORSANEO: Right.

15 CHAIRMAN SOULES: First named
16 plaintiff only and the first named defendant
17 only.

18 PROFESSOR DORSANEO: Unless the
19 court orders otherwise.

20 HONORABLE SCOTT BRISTER:
21 Right.

22 CHAIRMAN SOULES: Unless the
23 court orders otherwise.

24 MR. ORSINGER: And with some
25 indicator that there are others. Like,

1 et cetera or et al. I think that's part of
2 it, isn't it, to indicate that there is more
3 than just one?

4 PROFESSOR DORSANEO: I'm fine
5 on subdivision (a). Subdivision (c) I will
6 have to read the minutes and see what to do
7 about that. So I guess with those adjustments
8 23 is sent back to the drawing board.

9 MR. ORSINGER: Can we clarify,
10 Luke, this repository of voluminous exhibits
11 is not necessarily with the clerk of the
12 court, right? It could be one of the parties
13 or a court reporter or something like that, or
14 does it have to be the court clerk?

15 CHAIRMAN SOULES: Well, I think
16 it has to be -- I don't know.

17 MR. GOLD: I think the parties
18 should be allowed to agree on that. I don't
19 think they will, but I think they should be
20 allowed to.

21 MR. ORSINGER: In other words,
22 I don't care whether it's agreed to or not,
23 but are we empowered to have someone besides
24 the court clerk do it? Could the court have a
25 hearing and say, "Court Reporter X is your

1 repository"?

2 HONORABLE SCOTT BRISTER: It's
3 already done. That's what they do in Dallas.

4 MR. ORSINGER: Well, we are
5 writing a rule right now that may change that.
6 So we ought to --

7 HONORABLE SCOTT BRISTER: There
8 is a local rule that says you -- parties keep
9 it, and unless the court orders you to do it,
10 it's all yours. You need to -- need some
11 order on a discovery, you file it with your
12 motion. "Here's what I sent them. Here's
13 what they sent me. Here's what I want you to
14 do." That's the first time you see it.

15 MR. ORSINGER: David.

16 MR. JACKSON: It doesn't even
17 have to be a court reporting firm. It can be
18 a records service or archive place, anywhere
19 you want to go to do it, just as long as the
20 attorneys agree. We have done it in several
21 cases where we have kept all the original
22 exhibits, and any time anybody needed an
23 exhibit, anything, they just call us, and we
24 send it over.

25 MR. ORSINGER: Okay. So the

1 repository can be someone other than the court
2 clerk obviously. Right?

3 MR. GOLD: I would think.

4 MR. ORSINGER: Okay.

5 CHAIRMAN SOULES: Well, we can
6 write these rules to micromanage down to the
7 point where there is no imagination left
8 maybe, if we spend long enough time on it.

9 MR. ORSINGER: Well, we are
10 making this rule up for the first time, and I
11 think we ought to specify whether it's a
12 government official -- it has to be a
13 government official or not.

14 PROFESSOR DORSANEO: Judge
15 Brister, I could look in the Dallas
16 proposed -- the new local rules to have a
17 start on this?

18 HONORABLE SCOTT BRISTER:
19 Uh-huh.

20 PROFESSOR DORSANEO: Why don't
21 you let me try it, and then it's going to be
22 discussed again. Richard.

23 MR. ORSINGER: Yes.

24 PROFESSOR DORSANEO: Let me try
25 to do it based on the Dallas rule, and I will

1 correspond with Judge Brister, and we will see
2 if we can advance this the next time.

3 CHAIRMAN SOULES: We could send
4 you the Dallas rules. We have got those
5 rules. They are approved by the Supreme
6 Court, notwithstanding they contradict all of
7 the Texas Rules of Civil Procedure and there
8 is a rule that says no local rule can do so,
9 and the Supreme Court just signed off on them,
10 and away they went and they --

11 HONORABLE SCOTT BRISTER: And
12 my colleagues can't wait to jump on the same
13 bandwagon.

14 CHAIRMAN SOULES: You say, "How
15 did that happen?"

16 "No comment." That's the answer, "no
17 comment." Just did.

18 MR. ORSINGER: They are the
19 court of last resort, Luke.

20 CHAIRMAN SOULES: They are.
21 The authority of last resort. Okay.

22 MR. GOLD: Is the proposal
23 merely that the rule will say that it may be
24 done that way or that in all instances it will
25 be done that way?

1 MR. ORSINGER: God, I would
2 strenuously oppose all instances because --

3 CHAIRMAN SOULES: It's just
4 going to be permissive.

5 MR. GOLD: Okay. Good.

6 CHAIRMAN SOULES: It may or may
7 not say where it can go. If the inference is
8 it's in court then the parties are going to
9 have to -- to the court or the clerk, then the
10 parties are going to have some agreement,
11 maybe a Rule 11 agreement, to do it outside.
12 Why do we need to micromanage?

13 The rule has already got a lot of room in
14 there how the parties have to be creative when
15 they have special problems, it seems to me.
16 So, you know, we are burning daylight, and
17 Bill's got to have some work -- some help on
18 these things in order to work between now and
19 March. What else do you need help on, Bill?
20 Do you want to go to 24?

21 PROFESSOR DORSANEO: 24. 24 is
22 the same as 57 in terms of paragraph (a), and
23 paragraph (b) does the same thing the Supreme
24 Court did in the other context in which the
25 matter came up, and that's just simply to

1 refer the reader to Chapter 10 of the Civil
2 Practice and Remedies Code.

3 CHAIRMAN SOULES: Okay. Any
4 opposition to 24? It's passed.

5 PROFESSOR DORSANEO: 25,
6 paragraph (a). Subdivision (a). I will never
7 get that straight in my head. I don't
8 remember whether this was brought up before
9 for vote, but the subcommittee at least
10 decided that instead of having answer date be
11 the first Monday after the expiration of 20
12 days that an answer to a complaint should be
13 filed within -- there is a bracket around the
14 number 30 here, but we decided 30 days after
15 the date of service. I thought we discussed
16 this at this committee meeting.

17 MR. LATTING: We did.

18 PROFESSOR DORSANEO: But I may
19 be wrong. The 30 days is better than 20 days
20 because if somebody screws up and plays by the
21 old rule, they will be okay if it's 30 days,
22 but they won't be okay if it's 20 days.

23 CHAIRMAN SOULES: Carl
24 Hamilton.

25 MR. HAMILTON: I have a

1 question on this counterclaim. I think under
2 the present rules you don't have to reply to
3 the counterclaim, do you? Is this changing
4 that?

5 CHAIRMAN SOULES: Don't we
6 have -- I remember something I read in, I
7 thought, Bill's work product that said that --
8 that carried forward the notion that --

9 MR. ORSINGER: Yeah. It's
10 called a deemed --

11 HONORABLE SCOTT BRISTER:
12 Deemed general denial.

13 CHAIRMAN SOULES: Where is
14 that?

15 PROFESSOR DORSANEO: Well, it's
16 in here.

17 MR. McMAINS: It should be
18 thirty whatever it is. 38.

19 MR. ORSINGER: It's on page
20 five, deemed denials of counterclaims or
21 cross-claims.

22 MR. HAMILTON: Is that
23 inconsistent then with 25 where you say you
24 have to file an answer to a counterclaim?

25 MR. LATTING: Should we say "if

1 required" in No. 25?

2 PROFESSOR DORSANEO: No. I had
3 some other reason for saying it this way. I
4 may be wrong, but it's --

5 PROFESSOR ALBRIGHT: What it's
6 saying is you just have to file it any time,
7 so there is no surprise.

8 HONORABLE SCOTT BRISTER: How
9 about "if any"?

10 PROFESSOR ALBRIGHT: So I guess
11 it's like --

12 PROFESSOR DORSANEO: The idea
13 here is that if you do file an answer, okay,
14 that, as Alex said, if you do file one that
15 the time -- maybe it should say "may." Okay.

16 MR. ORSINGER: What if you say
17 "any answer to a cross-claim or reply to
18 counterclaim must be filed"?

19 CHAIRMAN SOULES: What this is
20 designed to do, as I read it now, is if there
21 is going to be a special denial or an
22 affirmative defense or something like that
23 contained in an answer to a cross-claim or
24 counterclaim, it must be filed before the
25 rules close the pleadings in the case.

1 MR. ORSINGER: Exactly.

2 PROFESSOR DORSANEO: Right.

3 CHAIRMAN SOULES: That's not a
4 bad rule.

5 MR. ORSINGER: No. It's a good
6 rule.

7 PROFESSOR DORSANEO: That's
8 what I had in mind, but now I'm looking at it
9 after time passes, and you begin to wonder
10 what it means.

11 CHAIRMAN SOULES: Okay. So
12 back to 30 days. 30 days, 20 days, 50 days,
13 100 days. How many days?

14 PROFESSOR ALBRIGHT: No. I
15 think that's the way it should be. It should
16 be "any answer, or an answer or reply, if
17 any."

18 HONORABLE SCOTT BRISTER: Do
19 "if any" because everybody knows "if any"
20 means maybe none.

21 CHAIRMAN SOULES: Okay. "If
22 any."

23 MR. ORSINGER: You put the "if
24 any" after reply --

25 MR. GOLD: That's why I get

1 that in all of my responses and requests for
2 production. "All documents, if any."

3 CHAIRMAN SOULES: Excuse me,
4 Paul.

5 MR. GOLD: Sorry.

6 PROFESSOR DORSANEO: Or just
7 "any," "any."

8 CHAIRMAN SOULES: Okay. In the
9 first sentence how many days?

10 HONORABLE SCOTT BRISTER: 30.

11 CHAIRMAN SOULES: Those in
12 favor of 30 show by hands.

13 Any opposed? No one is opposed. 30 days
14 it is, Bill.

15 PROFESSOR DORSANEO: Okay. And
16 (b), I do remember now that we did discuss
17 this subpart. We had a due order issue in
18 that last unnumbered paragraph of (b). I
19 expressed the due order concept. Maybe it
20 could be done better, but the idea simply is
21 that lack of jurisdiction over the person and
22 improper or inconvenient venue. Maybe
23 inconvenient venue is not something in due
24 order. I don't know, but it probably is, you
25 know, must be made in due order.

1 Now, here there is just a cross-reference
2 to the subsequent subdivisions, and maybe
3 that's not appropriate, and maybe the thing to
4 do at this point is simply to refer the
5 discussion to Professor Albright to discuss
6 the venue rule so we can hook these two things
7 together.

8 CHAIRMAN SOULES: Okay.

9 MR. ORSINGER: The only thing I
10 would say, Bill, is, is that perhaps we
11 shouldn't put subject matter jurisdiction as
12 No. (1) if, in fact, the due order is that a
13 special appearance is No. (1) and venue is
14 No. (2), because some people may be sucked
15 into an assumption that we have ordered them
16 into due order.

17 PROFESSOR DORSANEO: Uh-huh.

18 MR. ORSINGER: I know subject
19 matter jurisdiction is probably more
20 fundamental, but maybe we ought to move that
21 to after No. (4) or after No. (3), after
22 improper or inconvenient venue.

23 PROFESSOR DORSANEO: I don't
24 have a problem with that. I thought about
25 that myself.

1 CHAIRMAN SOULES: So No. (1)
2 becomes (3).

3 MR. ORSINGER: Uh-huh.

4 CHAIRMAN SOULES: Okay. (2) is
5 (1). (3) is (2), and (1) is (3) and so forth.

6 MR. ORSINGER: And this
7 paragraph down here changes. "The defenses
8 described in (1) and (2) must be made in the
9 due order."

10 PROFESSOR DORSANEO: Yeah. And
11 I may reword this paragraph that has to do
12 with the venue, this unnumbered paragraph in
13 subdivision (b).

14 CHAIRMAN SOULES: Okay. Alex
15 on venue.

16 PROFESSOR ALBRIGHT: Okay. On
17 venue you should have two sets of papers. One
18 is a stapled page that says "Rule 86, improper
19 or inconvenient venue," and it's several pages
20 long. Another one is a single page, front and
21 back, and it's "Rule 86, improper or
22 inconvenient venue, 1-13-97 revision."

23 MR. GOLD: Were those here
24 yesterday?

25 PROFESSOR ALBRIGHT: They were

1 here yesterday. Yes. They are on the back
2 table if you need them.

3 Okay. First look at the multipage
4 stapled document. It has first a clean draft,
5 dated 1-6-97, of a rule for improper or
6 inconvenient venue. Then it has a back draft
7 redlined from the current rule and then
8 following that it has the 1-6-97 draft
9 redlined from the 4-14-96 draft, which was
10 the -- and that's April. We meet in March, so
11 that must really be the March draft. This is
12 the redline from the last draft we talked
13 about in this committee, which was in March of
14 '96, not April of '96.

15 And then the other separate piece of
16 paper is a redraft of the January 6th draft
17 that makes some changes based upon our
18 subcommittee discussion, and these two
19 different drafts represent two different
20 approaches to objections to joinder or
21 intervention of multiple plaintiffs under the
22 statute, which I will talk about at the end.
23 I want to talk about some other things first.

24 Okay. First of all, this rule applies
25 only to statutory grounds for venue. It's

1 statutory venue, improper venue under the
2 statute, or inconvenient venue under the
3 statute. This rule does not address motions
4 to change venue because of an impartial forum,
5 an unfair forum. Those are a different motion
6 which Bill has redrafted and his rules will
7 talk about later from Rule 257. So this is
8 statutory venue.

9 The 1995 legislature passed the statute
10 that now adds to improper venue also grounds
11 to transfer for inconvenient venue, and we
12 discussed this at our March 1996 meeting. We
13 decided at that meeting -- I got Holly to send
14 me the transcript -- that all venue proof of
15 statutory venue must be made by affidavit
16 because it's compelled by statute. We decided
17 that, and that's the way this is drafted.

18 We also spent lots of time on the burden
19 and the judge's basis for decision on
20 inconvenient venue grounds for transfer, and I
21 put the language that we drafted in the
22 committee meeting in section (5) of this rule.
23 So this is the part that says that "The party
24 seeking transfer for the convenience of
25 parties and witnesses and in the interest of

1 justice pursuant to Section 15.002(b) of the
2 Civil Practice and Remedies Code must present
3 proof that transfer is justified on such
4 grounds, regardless of whether the adverse
5 party specifically denies the movant's
6 allegation.

7 "The nonmovant may present opposing proof
8 that the court shall also consider in
9 determining whether transfer is justified."
10 So we have made it clear here that it's not a
11 prima facie proof burden as it is with proper
12 venue.

13 The court -- both sides introduce
14 evidence on the convenience issue. "The judge
15 may transfer the case for convenience and in
16 the interest of justice after reviewing all of
17 the evidence filed in support of and opposing
18 the transfer and making the finding set forth
19 in the Section 15.002(b) of the Civil Practice
20 and Remedies Code by the preponderance of the
21 evidence."

22 So that's the language that we drafted
23 and we voted on in the March meeting, but this
24 is different from proper and improper venue
25 that you only have to prove up by a prima

1 facie proof. In this instance the court looks
2 at evidence on both sides, affidavit proof on
3 both sides of the issue, and determines the
4 issue by a preponderance of the evidence.

5 The statute says that this decision is
6 not reviewable and is not reversible, so
7 actually ultimately the way the trial judge
8 decides this is going to be up to the trial
9 judge, I suppose. Yes, Rusty.

10 MR. McMAINS: I have not read
11 the entire rule proposal, but do you retain
12 the obligation that any order of transfer for
13 whatever reason needs to be to a proper
14 county?

15 PROFESSOR ALBRIGHT: Right.

16 MR. McMAINS: Because, I mean,
17 that section (5) didn't say that.

18 PROFESSOR ALBRIGHT: Yeah.
19 Because if you go to transfer, I think that's
20 actually in (8) and (9).

21 CHAIRMAN SOULES: On page two?

22 PROFESSOR ALBRIGHT: On page
23 two. If the party seeking to -- if you read
24 all of (8) it always refers to a transfer to a
25 county -- another county of proper venue, and

1 then (9) says -- that just says it shall not
2 be dismissed but shall transfer to a proper
3 court as provided in the clerk rule; but if
4 you read (8), it says, "If the party seeking
5 to maintain venue has established proper
6 venue, the case will not be transferred unless
7 the court finds that the transfer to another
8 proper venue for the convenience of justice is
9 warranted, and if the party seeking to
10 maintain venue fails to establish proper venue
11 the case shall be transferred to the county in
12 which transfer is sought if the movant has
13 established proper venue in that county."
14 Unless you have the intervenor issue.

15 Yes, Carl.

16 MR. HAMILTON: Are you saying
17 in (5) that proof is by something other than
18 affidavits?

19 PROFESSOR ALBRIGHT: No. It's
20 only by affidavit.

21 MR. ORSINGER: But affidavit
22 includes depositions attached to your
23 affidavit.

24 PROFESSOR ALBRIGHT: Right.
25 Products of discovery attached to the

1 affidavits. If you look at (7), proof is made
2 by filing and serving an affidavit or any duly
3 proved attachment thereto, et cetera.

4 CHAIRMAN SOULES: Elaine.

5 PROFESSOR CARLSON: On No. (6)
6 are you suggesting -- it's not clear to me
7 when I read it that in any case in which the
8 defendant contests venue the plaintiff, any
9 plaintiff, when there is multiple plaintiffs
10 cannot --

11 PROFESSOR ALBRIGHT: Elaine,
12 can we wait and discuss section (6) later?

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

15 PROFESSOR ALBRIGHT: So section
16 (5), I guess I'm finished with section (5). I
17 don't know if you want to take it up section
18 by section or discuss the whole rule at once.

19 CHAIRMAN SOULES: Okay. Any
20 comments on section (5)?

21 PROFESSOR CARLSON: I have one
22 other comment on this. This may be different,
23 but on the first page at the bottom of your
24 multiple page Rule 86, paragraph (5) refers to
25 venue in accordance with section (5) of this

1 rule. Should that be (4)?

2 PROFESSOR ALBRIGHT: Oh, right.
3 That was just based on -- I didn't get that.
4 Thanks. Right. So on section (5) on the
5 first sentence should read, "In addition to
6 the burden of proof of proper venue in
7 accordance with section (4) of this rule."

8 MR. ORSINGER: Are we going to
9 call it a subdivision (4)?

10 PROFESSOR DORSANEO: I'll
11 change that.

12 PROFESSOR ALBRIGHT: Well, I
13 mean, yeah, I didn't mess with that because we
14 don't know if this is going to be a separate
15 rule or part of Bill's long rule or whatever.

16 MR. ORSINGER: Okay.

17 CHAIRMAN SOULES: Anything else
18 on subdivision (5) of the rule?

19 PROFESSOR CARLSON: One other
20 just quick suggestion, and I don't know if
21 this is a matter of drafting, but in the last
22 sentence, Alex, would you like it to say the
23 court shall make this as set forth in 15.002
24 of the Civil Practice and Remedies Code when
25 supported by a preponderance of the evidence?

1 PROFESSOR ALBRIGHT: Yeah. I
2 worded it this way because this is the way the
3 committee told me to word it. So --

4 MR. ORSINGER: What's the
5 distinction you are drawing, Elaine?

6 PROFESSOR CARLSON: It's just
7 it seems to me that you make findings in that
8 section when it's supported by the
9 preponderance of the evidence. You don't make
10 the findings by the preponderance of the
11 evidence.

12 PROFESSOR ALBRIGHT: That's
13 fine with me.

14 CHAIRMAN SOULES: Or when
15 established by a preponderance of the
16 evidence.

17 PROFESSOR CARLSON: That would
18 be fine.

19 CHAIRMAN SOULES: Anything else
20 on section (5)?

21 Okay. Anyone opposed to section (5) as
22 presented? No opposition. That's passed.

23 PROFESSOR ALBRIGHT: Okay. The
24 next thing this committee decided to do was to
25 add a section making it clear that if a motion

1 to transfer affects one party and not other
2 parties then severance and transfer as to
3 the -- a transfer of the severed claim is
4 appropriate, so I put that in section (9).

5 The second sentence of that section, "If
6 the motion to transfer is granted as to one
7 party but not as to other parties," I actually
8 thought that should be "as to one or more
9 parties, but not as to other parties, the
10 claims by or against that party shall be
11 severed and only the severed cause shall be
12 transferred."

13 HONORABLE SCOTT BRISTER: Alex,
14 how do you do that? I thought if venue was
15 good to one, it was good to all.

16 PROFESSOR ALBRIGHT: Well,
17 except there are situations when you're in the
18 intervenor situations and the multiple
19 plaintiff situations you're now going to be
20 transferring part of it, and also, this is
21 another issue -- if you look on your single
22 page paragraph (9), at the end of paragraph
23 (9) we have also added "unless section 15.004
24 of the Civil Practice and Remedies Code
25 applies."

1 HONORABLE SCOTT BRISTER: What
2 is that?

3 PROFESSOR ALBRIGHT: Which is a
4 section that says, "In the suit in which a
5 plaintiff properly joins two or more claims or
6 causes of action arising from the same
7 transaction, occurrence, or series of
8 transactions or occurrences, or one of the
9 claims or causes of action is governed by
10 mandatory venue, the suit shall be brought in
11 the county required by the mandatory venue
12 provision."

13 We discussed that this is not necessarily
14 clear as to whether you transfer the whole
15 case against multiple defendants who are
16 affected by mandatory venue or you transfer
17 all of the claims against the mandatory venue
18 of defendant. So we decided to just say that
19 to have an exception for this statutory
20 provision, whatever it means; and then I think
21 the issue at this point, when we had this
22 discussion, there were -- I think the fear
23 was, is that some claims might be dismissed
24 rather than severed and transferred, and so
25 that's why you-all wanted this provision in

1 here. If there is a situation where only part
2 of a case is being transferred, it should be
3 severed and transferred and not dismissed.

4 Yes, Rusty.

5 MR. McMAINS: Well, I probably
6 was not here for that discussion but --

7 PROFESSOR ALBRIGHT: No, you
8 were.

9 MR. McMAINS: Well, I may have
10 been in the vicinity. Clearly when our venue
11 rules were changed the notion was, as Judge
12 Brister has indicated, we are not going to be
13 transferring cases helter-skelter all around
14 the state. They are going to stay in the same
15 place. If you can maintain venue as to
16 anybody, you can maintain it for everybody.
17 That's one of the things we did when we
18 changed the rules.

19 Now, I understand when they did the tort
20 reform thing they decided, okay, when you've
21 got new plaintiffs, intervenors, additionally
22 added plaintiffs, we've got some new sets of
23 rules; but that's no reason to go back and
24 change the rules the way they were that did
25 not permit this kind of activity in your

1 ordinary case where you've got a plaintiff
2 that files against 12 defendants and he's able
3 to maintain venue as to any of them because
4 you do have deferential treatment. You did
5 have in the original venue bill, the
6 trade-off, and that is that if the plaintiff
7 is able to establish proper venue under the
8 proper procedure, he gets to keep the case,
9 but he has the risk on appeal if he's wrong,
10 that he's going to -- that it's going to be
11 reversed and remanded automatically, but he
12 gets to keep the case.

13 Nothing about the tort reform legislation
14 in '95 that changed any of that in the
15 fundamental phase, and to put in a general
16 severance provision vastly broadens what was
17 done by the legislature and is a change, in my
18 judgment, of what was bartered for at the
19 time.

20 PROFESSOR ALBRIGHT: So you're
21 saying what you fear is that it can be
22 interpreted to say you can grant one
23 defendant's motion to transfer and sever them
24 out.

25 MR. McMAINS: Absolutely.

1 That's what it says.

2 HONORABLE SCOTT BRISTER:

3 That's what I think, looking at this.

4 MR. McMAINS: And I don't mind
5 you saying that as to the intervention stuff,
6 you know, the intervention, new multiple
7 plaintiffs, carved out stuff that was in the
8 tort reform, but not in terms of your
9 ordinary -- your ordinary cases that we had
10 before. That is a change, it seems to me, and
11 a broadening of the statute.

12 PROFESSOR ALBRIGHT: I think
13 that's a valid -- let's talk about the joinder
14 and intervention situation. It may be that we
15 can just move this and it will handle it
16 better.

17 CHAIRMAN SOULES: Let me see if
18 I can catch up to the conversation here
19 because I'm trying to keep up with the
20 discussion. Under the new venue rules every
21 plaintiff has to establish that plaintiff's
22 right to venue; isn't that right?

23 PROFESSOR ALBRIGHT: But we're
24 not there yet.

25 MR. GALLAGHER: Sort of.

1 PROFESSOR ALBRIGHT: We're not
2 there yet. I'd like -- well, we can talk
3 about that right now.

4 CHAIRMAN SOULES: Well, I
5 thought that is this paragraph.

6 HONORABLE SCOTT BRISTER: Sure,
7 but not as to each and every defendant. You
8 have to establish it as to one defendant, and
9 if it's a joint cause of action, everybody
10 else is -- if it's good for one, it's good for
11 all.

12 PROFESSOR ALBRIGHT: Right.

13 HONORABLE SCOTT BRISTER: As to
14 defendants.

15 MR. ORSINGER: What's good for
16 one defendant is good for all defendants, but
17 each plaintiff must meet --

18 HONORABLE SCOTT BRISTER: Not
19 so for plaintiffs.

20 CHAIRMAN SOULES: But the last
21 sentence is written in terms of parties, not
22 defendants. The last sentence of (9).

23 HONORABLE SCOTT BRISTER: And
24 that's the concern.

25 MR. GALLAGHER: A plaintiff

1 does not have to independently of other
2 plaintiffs establish their right to maintain
3 venue. They can show that if venue is proper
4 as to one plaintiff, Luke, that if they
5 satisfy the (1) through (4) sections then they
6 can join in that litigation.

7 PROFESSOR ALBRIGHT: Why don't
8 we go -- let's move to this since we are
9 getting involved in this. Let's move to this
10 part of the rule and then we can talk about
11 all of this together. Okay. Because the next
12 thing that I did is the primary part that was
13 left open. In the previous rule we considered
14 it did not have the intervention and joinder
15 issues addressed, so you can see where I put
16 that in in section (6).

17 HONORABLE SCOTT BRISTER: (6).

18 PROFESSOR ALBRIGHT: No, wait.
19 Let's look at section (2) first, the motion.
20 Okay. This is where we have two separate ways
21 to handle this. Okay. What the statute says
22 is that in a suit with more than one
23 plaintiff, either multiple plaintiffs are
24 joined originally or later plaintiffs come in
25 and intervene, so you have multiple

1 plaintiffs. Each plaintiff must independently
2 of other -- any other plaintiff establish
3 proper venue.

4 If they are unable to establish proper
5 venue, they may not join or intervene or
6 maintain venue unless they establish four
7 criteria that are set out in the statute.
8 There are two ways that you can procedurally
9 approach this. The first draft, the January
10 6th draft, addresses it like any other motion
11 to transfer venue.

12 The defendant comes in and files a motion
13 to transfer venue, says "Plaintiff No. 3
14 cannot independently establish venue from any
15 other -- apart from any other plaintiff. The
16 case against me from Plaintiff 3 should be
17 transferred to Dallas County, which is a
18 county of proper venue," and they set forth
19 the venue facts for why Dallas County is a
20 county of proper venue.

21 The plaintiff then has the opportunity to
22 come -- to, one, establish that that plaintiff
23 can establish proper venue independently in
24 the county of the suit or establish the four
25 criteria. If the plaintiff cannot do either

1 one of those then the case gets transferred to
2 Dallas, which is the county that the defendant
3 picked, just like any other motion to transfer
4 venue. If plaintiff can't establish proper
5 venue, the transfer goes to the county -- the
6 proper county that the defendant picks.
7 That's the way part one works. I mean,
8 version one works.

9 Version two works a little differently.
10 It says defendant comes in and says, "Motion
11 to transfer. Plaintiff can't establish
12 independent venue," period. I don't have to
13 do anything else. I just object to you being
14 here because you can't establish venue. Then
15 the plaintiff comes in and says either "I
16 can't establish venue" or "I can prove up my
17 four criteria."

18 Then if the plaintiff cannot do either of
19 those, the issue becomes where does the case
20 go. Under version two what the subcommittee
21 said they wanted to do is say, well, it can go
22 anywhere where there is proper venue. It
23 shouldn't necessarily go to where the
24 defendant wants it because if you dismiss --
25 if you struck an intervention, for instance,

1 then the plaintiff could refile the case
2 wherever they want to refile the case. They
3 get the second choice of venue. If the
4 plaintiff is originally joined and you severed
5 and transferred, I think you could make an
6 argument that the plaintiff shouldn't get that
7 second choice of where the case should be
8 transferred.

9 So what Version No. 2 does is it says
10 everybody gets together at the hearing and the
11 judge says, "I think the plaintiff needs to go
12 somewhere else. Where should the plaintiff
13 go?" And everyone talks about what are other
14 counties of proper venue. The judge may send
15 it to where the plaintiff wants it. The judge
16 may send it to where the defendant wants it,
17 but there is no procedure in here that
18 expressly says what county the case against
19 the multiple plaintiff is -- where it's going.

20 It also then says that a motion
21 challenging an intervention, if that motion is
22 granted, the court can either transfer, sever
23 and transfer to another proper county, or the
24 judge can simply strike the intervention and
25 say, "This is like any Rule 60 intervention.

1 I'm striking the intervention. Plaintiff, you
2 go file someplace else."

3 The plaintiff may then say, "Wait, judge,
4 please don't strike it. Please sever me and
5 transfer me because if you strike my
6 intervention I have a statute of limitations
7 problem." So that's the thinking behind
8 version two. So you-all may actually want to
9 take a minute and read these and think about
10 it.

11 Lee Parsley has also been working on a
12 draft that has the same -- it reaches the same
13 ultimate conclusion as the second draft here.
14 There was a Court Rules Committee meeting
15 where the Court Rules Committee said that they
16 thought the objection to joinder or
17 intervention should be simply an "I object to
18 your being here," period. "Now, plaintiff,
19 it's your burden to prove up whatever you have
20 to prove up," and so I think there were some
21 procedural differences as to what the motion
22 would look like, but that's -- so that's
23 another way, but it ultimately comes out the
24 same way about -- as our second draft.

25 So if you-all want to -- maybe what we

1 should do is if you-all want to ask some
2 questions and talk about it for a little bit
3 then maybe we can take a break and let
4 everybody read it more carefully and then talk
5 about it again. Does that sound --

6 CHAIRMAN SOULES: That's fine.
7 Any questions at this time for clarification
8 purposes?

9 PROFESSOR CARLSON: Is the
10 January 13th draft what you referred to as
11 version two?

12 PROFESSOR ALBRIGHT: Yes.
13 January 13 is version two, and the reason it's
14 drafted like it is instead of a complete draft
15 is this was during the freeze, and I did not
16 have my version one on my home computer.

17 CHAIRMAN SOULES: Any questions
18 at this time?

19 Okay. Why don't we stand down for about
20 ten minutes. Be back at five after 10:00
21 o'clock.

22 (At this time there was a
23 recess, after which time the proceedings
24 continued as follows:)

25 CHAIRMAN SOULES: Okay. Bill

1 has to leave at 11:00 and so our input to him
2 is over at that time.

3 PROFESSOR DORSANEO: I'm done.

4 CHAIRMAN SOULES: Are you done?

5 PROFESSOR DORSANEO: I don't
6 need input.

7 CHAIRMAN SOULES: How about all
8 this venue stuff?

9 PROFESSOR DORSANEO: Yeah. But
10 I'll get that from Alex.

11 CHAIRMAN SOULES: Oh, okay.
12 Okay. Let's go forward then. What do you
13 recommend, Alex?

14 PROFESSOR ALBRIGHT: Well, I
15 guess I have mixed views on it. I think just
16 as -- if you want a simpler procedure that is
17 consistent with our traditional venue
18 practice, or our traditional venue practice
19 since 1986, version one is more consistent
20 with that, except it does prevent the
21 plaintiff from having a second choice at venue
22 if they lose that motion, but that's the way
23 our venue practice has worked for years, so it
24 doesn't really offend me.

25 But I also understand that plaintiffs

1 would be -- would not like that, that they
2 would think, Okay, I had a reason to try to
3 get here and if you are not going to let me
4 stay here, I should get a second chance; and
5 the second version gives them a potential
6 second chance to moving the venue. I guess as
7 a proceduralist I like version one, but I can
8 also see version two as well. So I have a
9 hard time making a recommendation.

10 MR. McMAINS: Well, Alex,
11 version one, which is this January 6th draft,
12 right?

13 PROFESSOR ALBRIGHT: Right.

14 MR. McMAINS: Are you basically
15 relying on (9), kind of moving from (6) to (9)
16 to say that they will transfer?

17 HONORABLE SCOTT BRISTER: Yes.

18 MR. McMAINS: I mean, that's
19 what you are doing, right?

20 PROFESSOR ALBRIGHT: No, wait.
21 I didn't hear your -- tell me your question.

22 MR. McMAINS: The reason that
23 it's different in terms of that you don't have
24 the option to -- I mean, you basically just
25 don't have a dismissal option in (9).

1 PROFESSOR ALBRIGHT: And
2 it's -- right.

3 MR. McMAINS: And you do in the
4 other, right?

5 PROFESSOR ALBRIGHT: Right.

6 MR. McMAINS: Now, am I
7 incorrect? Doesn't the statute say that the
8 judge may dismiss it, or does it not?

9 PROFESSOR ALBRIGHT: The
10 statute says -- see, I think the statute can
11 be read to just say -- it says that they shall
12 not intervene, they shall not be able to join.
13 So under our joinder rules we do not dismiss
14 for improper joinder. We sever, in which case
15 you would sever and transfer to a proper
16 county if they were improperly joined, but
17 intervention, our rules do something
18 different. They let you -- you strike an
19 intervention.

20 You don't sever out an intervention. You
21 strike it, and we have discussed at various
22 times in this committee that perhaps striking
23 an intervention is not appropriate, that
24 severance is more appropriate, but because we
25 have been talking about statute of limitations

1 problems and that helps the plaintiff in a
2 statute of limitations problem, but this
3 situation is different. You have got venue,
4 and if you are severing and transferring under
5 our traditional venues procedure, you sever
6 and transfer to a proper county that the
7 defendant picked.

8 So as a plaintiff under this venue
9 statute, I might prefer to be -- if I didn't
10 have a statute of limitations problem, I might
11 prefer to be dismissed and then I go file the
12 lawsuit again, but where in other situations
13 we've talked that the plaintiff would probably
14 rather be severed so they don't have a statute
15 problem, and so the way the subcommittee ended
16 up on that is we -- at the subcommittee
17 telephone meeting where we were discussing
18 this I think everybody kind of thought, well,
19 it's going to be -- there is going to be
20 different considerations in different cases.
21 Let's just leave it up to the discretion of
22 the trial judge and have the trial judge send
23 it to the appropriate proper county, whatever
24 that may be under the circumstances.

25 CHAIRMAN SOULES: Carl

1 Hamilton.

2 MR. HAMILTON: As I read the
3 statute there is two kinds of plaintiffs.
4 There is the plaintiffs that are in the
5 original suit when it's filed and then there
6 is plaintiffs that seek to intervene, and as
7 to those that seek to intervene, I think that
8 the ordinary intervention rules apply and you
9 file a motion to strike.

10 PROFESSOR ALBRIGHT: Right.
11 That's why we have put in there dismissal.

12 MR. HAMILTON: It's not a
13 matter of transferring it. It's a matter of
14 striking it.

15 PROFESSOR ALBRIGHT: And that's
16 why we put the dismissal. In version two we
17 let the judge dismiss an intervention, but we
18 also felt like if that plaintiff has a statute
19 of limitations problem, maybe intervention --
20 I mean, striking the intervention may not be
21 appropriate.

22 MR. GALLAGHER: And there is
23 some merit to treating it differently now
24 because under the old law the burden that the
25 plaintiff had to discharge in order to

1 intervene was much less than that that they do
2 now because you, by virtue of Chapter 15, have
3 engrafted into what is normally an
4 intervention right a question of venue, and
5 now if you don't satisfy subdivisions (1)
6 through (4), your intervention can be
7 stricken, and this is a new basis for striking
8 interventions that did not previously exist.

9 And your point was well taken that the
10 plaintiff faces a real dilemma of when they
11 attempt to intervene in an existing case, and
12 the intervention is stricken because they have
13 not discharged subdivisions (1) through (4) of
14 Chapter 15, and there should be some relief
15 granted to a plaintiff in that circumstance.
16 Intervention rights are different now than
17 they have been in the past.

18 PROFESSOR ALBRIGHT: And
19 subdivisions (1) through (4) are not anything
20 that's very predictable. As a plaintiff you
21 may well think you can satisfy them and then
22 the trial judge says, "Nope, I'm not
23 convinced." Those are -- they are like the
24 convenience issues.

25 It's joinder or intervention in the suit

1 is proper under the Texas Rules of Civil
2 Procedure, which just means it's same
3 transaction or occurrence, maintaining venue
4 in the county of suit does not unfairly
5 prejudice another party to the suit, there is
6 an essential need to have the person's claim
7 tried in the county in which suit is pending,
8 and the county in which suit is pending is a
9 fair and convenient venue for the person
10 seeking to join in or maintain venue for the
11 suit and the persons against whom the suit is
12 brought.

13 So I think you can have a good faith
14 belief that you should be able to maintain
15 venue under those criteria in this particular
16 lawsuit, but the judge may say, "No," and then
17 if you have a statute of limitations problem
18 and you're dismissed, you're stuck. If you're
19 severed and transferred then the plaintiff
20 gets sent to the defendant's forum, and is
21 that fair?

22 MR. HAMILTON: Well, what if
23 the defendant doesn't file a motion to
24 transfer but only a motion to strike?

25 PROFESSOR ALBRIGHT: Well, see,

1 that's the other alternative. You can put
2 these -- at one point in time I thought about
3 putting these rules relating to the joinder
4 and the intervention in the joinder and
5 intervention rules, so you say one of the
6 bases for seeking severance of an originally
7 joined party is the inability to establish
8 venue and then you would sever and transfer,
9 or if they are intervening, you would have a
10 motion to strike the intervention on the basis
11 of venue in which you would strike, and then
12 the plaintiff can refile.

13 And I think what happens is you still
14 have the situation where you were treating
15 originally joined plaintiffs differently from
16 intervening plaintiffs, and is that what we
17 want to do, or should they be treated the
18 same?

19 CHAIRMAN SOULES: Mike
20 Gallagher.

21 MR. GALLAGHER: Because you
22 have created a body of substantive law that
23 gives a defendant a right now to strike an
24 intervention that did not previously exist, it
25 would appear to me that there needs to be some

1 kind of tolling provision, and I know that
2 opens up a whole can of worms, but the
3 legislature has created a whole new set of
4 problems, and the intervention right could not
5 be stricken previously for these reasons. So
6 something -- either an intervening plaintiff's
7 case must be transferred -- we need to deal
8 with statute of limitations. I'm not sure
9 exactly how to deal with it.

10 PROFESSOR ALBRIGHT: And that's
11 the thing that version two does. It does just
12 say, you know, the court decides what to do
13 with the case based upon the circumstances of
14 the case, and if there is a statute of
15 limitations situation, the judge doesn't have
16 to strike the intervention. The judge can
17 sever and transfer.

18 CHAIRMAN SOULES: The judge can
19 always do that.

20 PROFESSOR ALBRIGHT: And the
21 next issue is where does the case get
22 transferred to. So I guess there are two
23 issues here.

24 CHAIRMAN SOULES: Well, the
25 judge can always sever instead of strike.

1 PROFESSOR ALBRIGHT: Well,
2 except for intervention.

3 CHAIRMAN SOULES: And
4 intervention.

5 MR. GALLAGHER: Well, but if
6 your relief being sought is a motion to strike
7 the intervention and that is the only relief
8 that the defendant is seeking then the judge
9 would not have that alternative available.

10 CHAIRMAN SOULES: He does
11 expressly in the rule because the rule
12 provides that the judge may sever sua sponte
13 on his own motion.

14 PROFESSOR DORSANEO: And why
15 couldn't the plaintiff just say in response to
16 that, "Well, don't strike, but if you are
17 inclined to think that I'm in the wrong place,
18 then how about" --

19 HONORABLE SCOTT BRISTER: Throw
20 me into the right place.

21 PROFESSOR DORSANEO: --
22 "sending it somewhere else instead of granting
23 their motion?" I don't think a defendant
24 could just say, "Well, I'm moving to strike;
25 therefore, the court's only option" --

1 CHAIRMAN SOULES: Well, the
2 rules --

3 PROFESSOR DORSANEO: -- "is to
4 strike."

5 CHAIRMAN SOULES: That's right.

6 PROFESSOR ALBRIGHT: Well,
7 there is some ambiguity in there.

8 CHAIRMAN SOULES: Not any
9 ambiguity in that the judge can sever sua
10 sponte. It's subject to being stricken, but
11 the judge is always subject to severing, too,
12 because of the other rule.

13 MR. GALLAGHER: Well, you have
14 created a new right, and under the old law the
15 plaintiff's burden was much less onerous than
16 it is today, and there is much less
17 uncertainty about whether or not an
18 intervention is going to prevail. I mean, I
19 don't know quite how to discharge the burden
20 of proof that imposes upon me a necessity for
21 proving that there is an essential need to
22 have my case tried in a county where another
23 plaintiff's case is pending, and I don't want
24 to leave it and I do not recommend that this
25 committee leave it to the devices of a

1 district judge to determine that a case should
2 be -- the intervention should be stricken even
3 though they have the prerogative to dismiss.

4 CHAIRMAN SOULES: I want to go
5 back two or four months, and these particular
6 points were not made, but I proposed that the
7 consequence of an improper intervention be
8 severance and not strike, that that rule be
9 changed, and this committee voted me down.

10 PROFESSOR DORSANEO: They voted
11 to give it strike or sever.

12 CHAIRMAN SOULES: Strike or
13 sever. Okay. So, now, is that the way it's
14 written now?

15 PROFESSOR DORSANEO: Yes.

16 MR. GALLAGHER: Well, wisdom is
17 not to be despised because it's late in
18 coming.

19 HONORABLE SCOTT BRISTER: That
20 was different.

21 CHAIRMAN SOULES: What?

22 HONORABLE SCOTT BRISTER: That
23 was different because if you are not in a
24 venue problem context, that just means you
25 jump in to get to forum shop. Assuming there

1 is no other venue problem, you jump into the
2 judge in Houston that you want and then the
3 judge only severs you but keeps the case. You
4 have got your forum shopping. So outside the
5 context of there is no venue of the case it
6 makes perfect sense to say you have the -- the
7 judge either severs or strikes, but this case
8 if you sever, it's going to have to go. You
9 don't get your thing anyway. So it's
10 different. Different equities apply.

11 CHAIRMAN SOULES: Okay. Paul
12 Gold.

13 MR. GOLD: Just out of
14 curiosity, isn't there a provision in the
15 Federal rules that if you file in Federal
16 court wrongfully, you don't have jurisdiction,
17 the statute of limitations is --

18 HONORABLE SCOTT BRISTER: Well,
19 we have got that in the state --

20 MR. GOLD: -- virtually
21 expired?

22 HONORABLE SCOTT BRISTER: --
23 but it's a court without jurisdiction and
24 that's --

25 MR. GOLD: That it extends your

1 time period. What is that?

2 PROFESSOR CARLSON: 60 days.
3 60 days as long as you refile.

4 HONORABLE SCOTT BRISTER: But I
5 would have jurisdiction, just not venue.

6 CHAIRMAN SOULES: Why is it a
7 consequence of a severance that the case
8 remain in the case -- that the new filed case
9 has to be filed where the old case was filed?
10 Is that just local rule?

11 HONORABLE SCOTT BRISTER:
12 That's all severance means. Severance is not
13 a transfer to another judge. Severance just
14 takes one case and makes it two.

15 CHAIRMAN SOULES: It creates a
16 new case that could be assigned to any judge.

17 HONORABLE SCOTT BRISTER: Only
18 if there is a transfer. You have to have a
19 transfer from one court to another. If you
20 just sever it out without a transfer, it's
21 severed out in the same court.

22 CHAIRMAN SOULES: Then it gets
23 refiled as a new case.

24 HONORABLE SCOTT BRISTER: No,
25 no, no.

1 PROFESSOR CARLSON: Luke, I
2 thought we talked about this, and I thought
3 Bonnie said that it really changed by area on
4 whether they end up re-assigning it to a new
5 judge or not.

6 CHAIRMAN SOULES: That's right.
7 That's because it is a new case, and they can
8 go to the old judge or to a new judge.

9 PROFESSOR ALBRIGHT: This is
10 water under the bridge.

11 CHAIRMAN SOULES: Anyway.
12 Okay. Getting to the nuts and bolts of this,
13 it has always been the case that the plaintiff
14 was at some peril in selecting venue. If they
15 picked right or if they picked wrong then they
16 went where the defendant designated a place of
17 proper venue, even if there were multiple
18 places of proper venue.

19 MR. GALLAGHER: That's not
20 true. The remedy was transfer.

21 CHAIRMAN SOULES: Transfer to a
22 place of proper venue.

23 MR. GALLAGHER: Transfer to
24 another county. If the remedy here -- if we
25 are adding a remedy of dismissal, Luke, we

1 have changed. If we strike the intervention,
2 you have changed the import of misjoinder.

3 CHAIRMAN SOULES: All right.

4 So --

5 PROFESSOR ALBRIGHT: Except if
6 you're stricken and you don't have a statute
7 of limitations problem then you may have an
8 advantage that you get to pick Wharton County
9 instead of Matagorda County, where if you were
10 severed and transferred you would end up in
11 Dallas.

12 MR. GALLAGHER: I understand
13 that if there is a resolution within the
14 statutory period, but this provision also
15 contains the section in the Civil Practice and
16 Remedies Code, also provides for an expedited
17 appeal, which I think is like within a
18 six-month period.

19 MR. McMAINS: It requires a
20 decision.

21 MR. GALLAGHER: Yeah.

22 MR. McMAINS: That the
23 appellate court decide.

24 MR. GALLAGHER: And if you fail
25 on appeal to maintain and satisfy a judge that

1 there was an essential need to have your case
2 tried in the county in which you have
3 intervened then that right that you may have
4 to refile somewhere else is fairly hollow.

5 PROFESSOR ALBRIGHT: Okay.
6 Yeah. So, see, if plaintiffs are not
7 worried --

8 MR. GALLAGHER: We're worried.

9 PROFESSOR ALBRIGHT: Well, I
10 mean, if it's okay for plaintiffs to get
11 severed and transferred, I like version one
12 because it's traditional venue.

13 MR. GALLAGHER: I do, too.

14 PROFESSOR ALBRIGHT: Okay. So
15 I think our concern in the committee was, you
16 know, are we taking something away from the
17 plaintiffs that they have that they feel very
18 strongly about?

19 CHAIRMAN SOULES: Okay. Let's
20 vote version one or version two. Anything new
21 on this before we vote? Justice Duncan.

22 HONORABLE SARAH DUNCAN: Well,
23 I guess I don't understand version one.
24 Assuming you're talking about version one that
25 gives the defendant the right to choose venue,

1 right?

2 PROFESSOR ALBRIGHT: Right.

3 HONORABLE SARAH DUNCAN: I
4 guess I don't understand that because I
5 don't -- nobody has shown under this statute,
6 under subsections (1) through (4) of section
7 15.003 -- it's not that anyone has shown that
8 the county in which the intervention was filed
9 was a bad county, right?

10 PROFESSOR ALBRIGHT: No.

11 HONORABLE SARAH DUNCAN: They
12 could show simply that there is not an
13 essential need to have a person's claim tried
14 in the county in which the suit is pending.

15 PROFESSOR ALBRIGHT: Right.
16 Well, do you want me to explain how version
17 one would work?

18 HONORABLE SARAH DUNCAN: Well,
19 if you look at it, it says, "The defendant
20 challenging venue will designate the county in
21 which the plaintiff's case should be sent if
22 the motion is granted."

23 PROFESSOR ALBRIGHT: Yeah.
24 Right. So if the plaintiff cannot
25 independently establish venue is proper in the

1 county of the suit and the plaintiff cannot
2 satisfy those four criteria, the judge says,
3 "Nope, there is not an essential need to have
4 this case here." Then the question is where
5 do we transfer it to.

6 Under version one the defendant has said,
7 like in all motions to transfer venue, "This
8 is not a proper county. Dallas County is a
9 proper county, and that's where the case
10 should be transferred" and proves up, if
11 necessary, it's proper in Dallas County. So
12 under this situation the plaintiff
13 has -- judge says, "I'm granting the
14 defendant's motion because plaintiff shouldn't
15 be here. I'm transferring this case. I'm
16 severing and transferring this case to Dallas
17 County."

18 Plaintiff says, "Wait, I'd really rather
19 be in Houston than in Dallas County."

20 "Too bad. The motion to transfer is to
21 Dallas County. You got your first choice and
22 you lost it. You're going to Dallas."

23 HONORABLE SARAH DUNCAN: I
24 understand that, but in the usual case the
25 first choice doesn't have the other

1 considerations that are independent of venue.
2 If I intervene in a pending suit with claims
3 of my own related to the same subject matter,
4 let's say, that's an independent -- a reason
5 independent of venue that, at least from my
6 perspective, it makes real good sense to try
7 my case there, but I get shut out under
8 15.003. That's not what's happening in a
9 regular venue situation.

10 PROFESSOR ALBRIGHT: Well, now
11 it is happening in a regular venue situation
12 under the new venue rules.

13 HONORABLE SARAH DUNCAN: No,
14 no. What I'm saying is that consideration
15 that there is already a pending suit to which
16 my claim relates is not a part of the regular
17 situation where the plaintiff just goes and
18 files a suit in Grayson County.

19 PROFESSOR ALBRIGHT: Okay. But
20 I think --

21 HONORABLE SARAH DUNCAN: And to
22 me that's a good reason that the rule
23 shouldn't be in these types of cases the way
24 it is in the usual case. Because there is a
25 reason, however much we may disagree with it,

1 for the plaintiff having tried to intervene in
2 this pending lawsuit, and I don't think that
3 should not come out of their first choice of
4 choosing venue.

5 PROFESSOR ALBRIGHT: But I
6 think what Mike is saying is he doesn't care.
7 It doesn't bother him that he brought it.

8 HONORABLE SARAH DUNCAN: I
9 understand that. We disagree on this point.

10 CHAIRMAN SOULES: All right.

11 MR. GALLAGHER: Well, the thing
12 that you have to understand is that under the
13 old law if two people were injured by virtue
14 of the exact same transaction and their
15 operative facts are exactly the same and their
16 injury is precisely the same, they could join
17 their case, and common sense dictates that it
18 be joined; but now we have engrafted, because
19 the legislature does not always function at
20 the kind of level that gives consideration for
21 those kinds of thoughts, a need on my part to
22 prove that there is an essential need to have
23 my case tried there.

24 It's no longer enough that I satisfy the
25 intervention rules. We now have engrafted in

1 addition to that other considerations, and
2 that's why the effect of the ruling is so
3 important now. I understand what you're
4 saying. I don't want the defendant to select
5 my venue either, but I don't want to find
6 myself six months later being overruled by the
7 First Court of Appeals, and I have to go call
8 St. Paul Fire and Marine and tell them the
9 statute limits.

10 HONORABLE SARAH DUNCAN: But
11 you certainly wouldn't object to the second
12 alternative which permits the plaintiff --

13 MR. GALLAGHER: No, I would
14 not.

15 HONORABLE SARAH DUNCAN: If
16 their intervention is transferred, the
17 plaintiff still gets to choose the next county
18 of proper venue.

19 MR. GALLAGHER: If their
20 intervention is denied? No, I would not, but
21 that's not under consideration here.

22 HONORABLE SARAH DUNCAN: No.
23 Alex has just expressed a preference for one.
24 I'm expressing a preference for two.

25 MR. GALLAGHER: Well, I agree

1 with you also.

2 HONORABLE SARAH DUNCAN: And I
3 wouldn't think you would disagree with me.

4 CHAIRMAN SOULES: Carl
5 Hamilton.

6 MR. HAMILTON: There is two
7 situations. Let's take situation one. You
8 have four plaintiffs. They join and file a
9 lawsuit. There are existing plaintiffs in the
10 lawsuit. If the defendant thinks venue is
11 incorrect as to any of those plaintiffs, he
12 has to file a motion to transfer venue at that
13 point. He doesn't file a motion to strike.
14 It's not an intervention, so the court decides
15 whether venue is proper as to those four
16 original plaintiffs.

17 Now, six weeks into the trial plaintiff
18 five comes along and intervenes. Now, he's
19 got to establish his right to intervene. He's
20 got to establish venue, and he's got to
21 establish a right to intervene.

22 So if the defendant at that time wants to
23 simply file a motion to strike his
24 intervention under the ordinary rules, he can
25 do that; and then if the court wants to sever

1 him out because the intervention is improper,
2 that can be done; or the defendant can say in
3 addition to that or in the alternative, "If
4 you are going to leave him in, Judge, he's in
5 the wrong venue," but I think he has to file
6 the motion to transfer venue before the judge
7 would have the automatic right to transfer the
8 venue if he grants the motion to strike.

9 PROFESSOR ALBRIGHT: Well,
10 under our current intervention rules you have
11 a right to intervene, subject to the motion to
12 strike. So the plaintiff, intervening
13 plaintiff, does not have to come forward with
14 anything showing why he has a right to
15 intervene under our current practice.

16 MR. HAMILTON: Right.

17 PROFESSOR ALBRIGHT: So you
18 have to have some motion by the defendant. It
19 could be just -- one alternative way to write
20 this rule is to say in Rule 60 it's a motion
21 to strike on venue grounds, or the way I have
22 written it here, within 20 days or 30 days,
23 however many days after the intervention, the
24 defendant has to file a motion to transfer as
25 to that particular plaintiff.

1 MR. HAMILTON: See, the motion
2 to strike can be on something other than
3 venue.

4 CHAIRMAN SOULES: Let me try to
5 get this to focus. Presently you intervene,
6 subject to being stricken. You file a motion
7 to strike. The judge, I think, can strike or
8 sever, and that's all over whether or not the
9 claim, intervening claim, is sufficiently
10 related to the claims that are already in the
11 case.

12 And then now we have got the venue
13 statute that says not only does the
14 intervention claims have to be adequately
15 germane to the existing claims, but there has
16 got to be venue, too, for that or you have got
17 to go through this convenience stuff before.

18 The way Alex's No. 1 works is if the
19 intervention fails for venue failure the judge
20 severs, does not strike, and then you're in a
21 situation where traditional practice would
22 cause the judge to send the case, the severed
23 portion, to the proper county that the
24 defendant has designated.

25 The way No. 2 works, the judge could

1 strike. If the judge strikes, there is no
2 case, and the plaintiff can choose again.

3 MR. GALLAGHER: If within the
4 statutory period.

5 CHAIRMAN SOULES: Well, can
6 choose venue again. It may have a bar. It
7 may have a barred defense, but as I'm
8 understanding Mike, he feels safer with the
9 judge not having the power to strike if the
10 intervention failure is due to a failure of
11 venue.

12 MR. GALLAGHER: If those are my
13 only two choices. I don't like either one of
14 them, but if those are my only two choices, I
15 feel safer without the intervention being
16 struck, or stricken. However --

17 CHAIRMAN SOULES: And Sarah
18 wants to say, well, if the failure of the
19 intervention is due to venue failure, the
20 plaintiff ought to be able to choose venue
21 again. Now, the plaintiff is already in a
22 situation where the intervention -- the
23 intervening plaintiff chose a wrong county,
24 unless they can meet four criteria. If it
25 weren't for the four criteria -- and the

1 plaintiff has chosen to attempt to try the
2 case in a county of improper venue through an
3 intervention.

4 Now, that is one of the policies. I
5 mean, a policy of this statute was to try to
6 limit those interventions. That's why this
7 came about, all the interventions of
8 plaintiffs cases in Maverick County.

9 MR. GALLAGHER: Eagle Pass.
10 This is the Eagle Pass bill.

11 CHAIRMAN SOULES: Eagle Pass.
12 This is the Eagle Pass bill.

13 MR. GALLAGHER: The only one
14 against it was the mayor of Eagle Pass.

15 CHAIRMAN SOULES: All right.
16 Now, so I think this all boils down to a
17 question of, after all the discussion, if the
18 plaintiff's intervention fails for venue
19 reasons only, do we believe the plaintiff
20 should get to choose venue again, or does a
21 plaintiff go where the defendant has
22 designated a proper county? Either-or. It
23 really comes down to that.

24 If the -- okay. And then most of these
25 other questions virtually fall out once that

1 decision is made. Why don't we vote on that?

2 MR. PARSLEY: Luke, can I -- I
3 try not to interfere in you-all's business,
4 but can I speak to this just briefly?

5 CHAIRMAN SOULES: Sure.

6 MR. PARSLEY: I think it's
7 incumbent upon the Supreme Court very clearly
8 under this bill to not do anything that would
9 contravene what's in the statute. They said
10 so, and so I think that it is incumbent upon
11 the Court to try to determine what the
12 legislature intended and then to do it.

13 So to the extent the committee is voting
14 on something else, I'm not sure the Court
15 could ever approve that anyway. If the
16 legislature intended -- when they passed this
17 bill intervention had been in the rules for a
18 long time, and intervention said that you
19 intervene subject to being stricken, and there
20 is no evidence that I know of -- it's hard to
21 ascertain the legislative intent. You-all
22 know that as well as I do.

23 The intent depends on who you're talking
24 to on any given day, but if you just read the
25 statute, it talks about intervention, and if

1 the intervention is wrong, they shall not
2 maintain venue and so forth, and there is no
3 evidence that I know of that says that the
4 legislature didn't understand when they wrote
5 about intervention that the remedy for a
6 failure of intervention was to be stricken.

7 So to the extent that we are trying to
8 change what the legislature -- or the
9 committee is proposing to change what the
10 legislature intended, I think we should be
11 uncomfortable with that.

12 Now, I'm not saying that we can't do what
13 has already been proposed, which is to change
14 the intervention rule, and then this would be
15 an intervention like any other intervention,
16 which is subject to being stricken or severed
17 like any other intervention that's wrong, but
18 I think right now to try to create a new idea
19 for intervention on venue, it seems to me
20 might very well contravene what the
21 legislature specifically put in the statute.

22 I'm not trying to ascertain their intent
23 by going there. I just read the statute. It
24 talks about intervention, and when they wrote
25 the statute intervention was subject to being

1 stricken, and so it seems to me we've got
2 to -- that's got to overlay this discussion,
3 is we've got to try to figure out what the
4 legislature said and adapt our rules to apply
5 to that.

6 CHAIRMAN SOULES: When the
7 legislature passed the statute intervention
8 was subject to either being stricken or
9 severed. Under the Texas Rules of Civil
10 Procedure. Either-or. Now --

11 MR. PARSLEY: Under the case --

12 CHAIRMAN SOULES: Under the
13 rules, on the facial statement of the language
14 of the rules themselves.

15 HONORABLE SARAH DUNCAN: Luke?

16 MR. PARSLEY: All I'm saying is
17 if that's what the law was when the
18 legislature passed this bill talking about
19 intervention then that's fine, but to the
20 extent we are trying to make this something
21 different then I am concerned that we
22 interfere with the legislature, and I don't
23 think the Court wants to do that. I think
24 the --

25 MR. GALLAGHER: I understand

1 your concern.

2 CHAIRMAN SOULES: Does the
3 statute -- let me ask a specific question.
4 Does the statute say what happens whenever the
5 plaintiff has selected an improper venue?

6 HONORABLE SARAH DUNCAN: No.

7 MR. GALLAGHER: It does not.

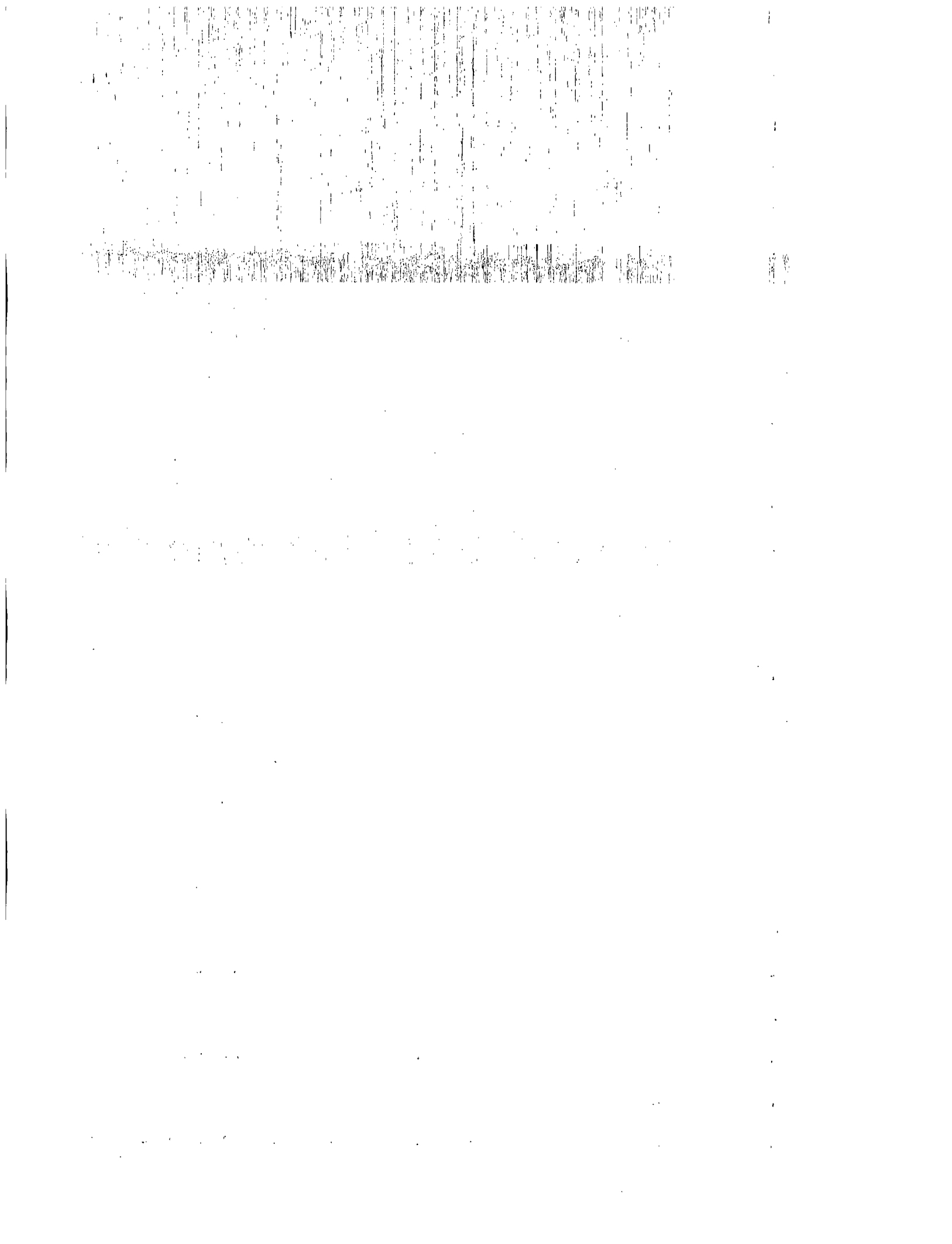
8 CHAIRMAN SOULES: It does not.

9 MR. GALLAGHER: So how you
10 discern legislative intent from that silence
11 is something that I'd be interested in finding
12 out.

13 HONORABLE SARAH DUNCAN: It
14 also indicates --

15 CHAIRMAN SOULES: Hold on just
16 a minute. Everybody is talking at one time,
17 and the court reporter can't get it. Justice
18 Duncan.

19 HONORABLE SARAH DUNCAN: It
20 also, I think, indicates on its face that the
21 legislature did not understand that in Texas a
22 plaintiff or a party intervenes subject to
23 being stricken, because Section 15.003
24 subsection (d) says, "A person may not
25 intervene unless they put venue in" and these



1 other things.

2 Well, under Texas they do intervene.
3 It's just that they may be stricken or they
4 may be severed into a separate suit. So I
5 don't want to do anything that contravenes
6 legislative intent, but when a statute is
7 silent on what happens after an intervention
8 is severed, as in where is the case going to
9 be transferred from there, I don't think we
10 are.

11 MR. GALLAGHER: 15(b) sort of
12 addresses intent, Luke, if you look at section
13 15(b) of the Civil Practice and Remedies Code,
14 15.002(b).

15 "A court may transfer an action." An
16 action would include an original petition, an
17 intervention, a joinder, and look at 15.002(b)
18 and I think you see what was intended by the
19 author there. I don't think a dismissal was
20 the intent of the legislature.

21 CHAIRMAN SOULES: Okay. I
22 don't, either.

23 Let me read you Rule 41. "Misjoinder of
24 parties is not a ground for dismissal.
25 Parties may be dropped or added. Actions may

1 be severed and each ground of recovery set as
2 a separate suit," and so forth. "By order of
3 the court on motion of any party or on its own
4 initiative at any stage of the action," and
5 that includes in the face of a motion to
6 strike.

7 That's what's in Rule 41. The court on
8 its own motion at any stage can sever. So if
9 we say sever is the proper thing to do in
10 venue, that just limits Rule 60. You can't
11 use Rule 60 here. You got to go under Rule
12 41. I think 60 is the intervention rule,
13 isn't it?

14 MR. GALLAGHER: Uh-huh.

15 CHAIRMAN SOULES: Yeah. But
16 still we are back down to the same question.
17 If the failure of an intervention is due
18 altogether to a failure of venue, does the
19 plaintiff get a second choice in venue, or
20 does it go where the challenging defendant
21 demonstrates there is proper venue?

22 Most of these other questions are
23 answered by, I think, the answer to that
24 question. Can we vote on that?

25 Okay. Those who feel that the plaintiff

1 should have a second chance at selection of
2 venue in those circumstances show by hands.
3 Eight. Eight votes.

4 Those who believe it should go to the
5 county of proper venue denominated by the
6 challenging defendant show by hands. Four.
7 Eight to four the plaintiff gets a second
8 chance.

9 PROFESSOR DORSANEO: Now, I
10 really think the plaintiff ought to get a
11 chance to argue it, not that either one picks.
12 I'd let the judge pick.

13 PROFESSOR ALBRIGHT: Which is
14 version two.

15 PROFESSOR CARLSON: Once the
16 intervention is improper, venue is joined
17 insofar as the proper venue?

18 CHAIRMAN SOULES: And version
19 two says --

20 HONORABLE SCOTT BRISTER: Says
21 I get to pick whether to strike or transfer.

22 CHAIRMAN SOULES: Well, really,
23 I think that's not what we intend. What we
24 intend is you get to sever and then you get to
25 pick the county of proper venue for the case

1 to go to after argument between -- well,
2 that's not right because we said the plaintiff
3 gets the sole argument on that, if we go with
4 our previous vote.

5 PROFESSOR ALBRIGHT: That's
6 what Bill was saying, that's not what he was
7 voting for. Bill said --

8 PROFESSOR DORSANEO: If I had
9 to pick between plaintiffs and defendants, I
10 would probably pick plaintiffs, but I don't
11 think it's right to pick either one. I think
12 that the parties should argue, if it turns out
13 they are in the wrong place, where it should
14 be sent, and then the judge sends it to the
15 most appropriate place. It might not be
16 Dallas or Houston.

17 CHAIRMAN SOULES: Okay. So you
18 want to --

19 PROFESSOR DORSANEO: I don't
20 want the defendant to pick. I want if it's
21 not going to be here then somebody says "My
22 second argument is" -- you know, "I would like
23 for it to be here, but I would like for it if
24 it's not going to be here to be there," and
25 the other side says, "By god, don't send it

1 there. If you are going to send it anywhere,
2 send it here."

3 CHAIRMAN SOULES: Okay. We
4 voted between the plaintiff and defendant,
5 plaintiff gets a choice. Now we are going to
6 vote between the plaintiff and the judge
7 deciding, and I don't expect in this crowd
8 today the vote's going to be very different.

9 MR. LATTING: Well, let's take
10 it anyway. I want to demonstrate the
11 absurdity of it.

12 MR. MEADOWS: Let me ask a
13 question, please.

14 CHAIRMAN SOULES: Yes, sir.

15 MR. MEADOWS: The situation as
16 it's now been established is you intervene,
17 and you intervene in a court that does not
18 have venue, but you can still maintain your
19 case there if you establish the four criteria.
20 So you are in a court. Venue is improper, but
21 you get to stay. Plaintiff has an opportunity
22 to stay there by, you know, meeting the four,
23 and if he doesn't do that, he still gets to
24 pick again.

25 CHAIRMAN SOULES: That's what

1 we voted.

2 HONORABLE SCOTT BRISTER: It's
3 worse than -- no. That's not what I voted. I
4 understood that what you were saying the
5 plaintiff gets to pick is the second option,
6 which is the plaintiff at least gets to have a
7 say rather than just Draft No. 1, which is it
8 goes where the defendant says.

9 Hypothetical. Okay. So the motion
10 jumps -- so the plaintiff intervenor jumps
11 into Eagle Pass. That doesn't work. So the
12 plaintiff says, "Okay. Sever me, but I want
13 to get sent to Matagorda County," so now we
14 send this case. It has nothing to do with
15 Matagorda County, but the plaintiff gets to
16 pick, so it goes to Matagorda County.

17 PROFESSOR ALBRIGHT: No. It
18 has to be a county of proper venue.

19 MR. GALLAGHER: It has to be a
20 county of proper venue.

21 HONORABLE SCOTT BRISTER: You
22 said -- not if Luke is saying the plaintiff
23 picks, and if that's what we voted on --

24 PROFESSOR ALBRIGHT: No, no,
25 no, no.

1 HONORABLE SCOTT BRISTER:

2 -- then the plaintiff gets to say -- can I
3 finish?

4 Go to Matagorda. Okay. That doesn't
5 work. Okay. Plaintiff says, "Now I want to
6 go to Hidalgo County."

7 No. That was not what I voted for for
8 the plaintiff picks. The plaintiff gets to
9 say under the statute what I think the --
10 where the convenience and essential need is.
11 The plaintiff doesn't get to just name a
12 county.

13 CHAIRMAN SOULES: Well, that's
14 what I'm going to get to now. Are we going to
15 have the plaintiff does get to name a county,
16 or the plaintiff gets to argue it to the
17 judge, the transferring judge for a county.
18 Does a transferring judge decide which county
19 of proper venue of an array, of the entire
20 array, to which to send the case? Okay. Or
21 does the plaintiff get to say where it goes?

22 Okay. I'm just going to ask, do it this
23 way, the plaintiff show hands, judge show
24 hands.

25 Plaintiff show hands. Two.

1 Judge show hands. Ten. Ten to two the
2 judge of the transferring court will then
3 determine to which county of proper venue the
4 case will be transferred.

5 PROFESSOR ALBRIGHT: Now, is
6 that for intervention only --

7 CHAIRMAN SOULES: For
8 intervention only.

9 PROFESSOR ALBRIGHT: -- or for
10 intervention and joinder? Why is joinder any
11 different?

12 MR. McMAINS: It should be the
13 same.

14 MR. GALLAGHER: That's a very
15 good question, because the same rule applies
16 to a joinder that the defendant contends
17 is -- a plaintiff who is part of the original
18 petition --

19 CHAIRMAN SOULES: Both. Let's
20 just say both.

21 MR. GALLAGHER: -- the
22 defendant contends --

23 CHAIRMAN SOULES: Those that
24 say both show hands.

25 Those opposed show hands. Everybody says

1 both.

2 Okay. What's next? Is there anything
3 left undecided now by virtue of those votes
4 that we have just taken on this point? Okay.
5 Nothing left.

6 PROFESSOR ALBRIGHT: Wait,
7 wait, wait.

8 PROFESSOR CARLSON: Can I ask
9 one question.

10 CHAIRMAN SOULES: Elaine
11 Carlson.

12 PROFESSOR CARLSON: Alex, the
13 way you have written this I guess is that the
14 due order of pleadings is not a problem if you
15 move to strike, and that's the way you will
16 draft it, that you can still make your venue
17 claim?

18 PROFESSOR ALBRIGHT: Right.
19 You still have -- if you have an intervention
20 problem, you have 20 days after the
21 intervention. I think if we -- I didn't
22 realize that we had changed the answer date to
23 30 days. I would say we do everything 30
24 days.

25 CHAIRMAN SOULES: Yes.

1 PROFESSOR ALBRIGHT: But, you
2 know, if it's an original plaintiff, you have
3 to file that motion, due order of pleading.
4 If it's an intervention, you have to file that
5 motion within 30 days of the intervention.

6 CHAIRMAN SOULES: Well, but
7 that's not the question, and this is a live
8 problem right now in the rules, and it's not
9 answered by any appellate decision.

10 If you file a motion to strike under an
11 intervention under Rule 60 have you waived
12 venue if you lose your motion to strike? That
13 is not decided anywhere. In having to make a
14 call, I made the call that the motion to
15 strike did not because if you win that, there
16 is no case on file, and you ought to at least
17 be able to get past that question before you
18 waive venue. Is there a case on file?

19 But, you know, I may need to call
20 St. Paul whenever that's over with because the
21 case happens to be in Hidalgo County, but it
22 would seem to me that it didn't make any sense
23 to be even talking about transferring venue
24 until the motion to strike it had been
25 decided.

1 PROFESSOR ALBRIGHT: Well, but
2 it seems like under this version --

3 CHAIRMAN SOULES: We probably
4 ought to fix that.

5 PROFESSOR ALBRIGHT: Under this
6 version all you have to do as a defendant is
7 you file your -- what I would file is a motion
8 to strike intervention and motion to transfer,
9 or motion to transfer and motion to strike
10 intervention, and say, "One, this things needs
11 to be stricken or transferred because the
12 plaintiff can't establish venue. Two, it
13 needs to be stricken because the plaintiff is
14 not properly joined" or, you know, whatever
15 other reasons you want the intervention
16 stricken other than venue.

17 I think you can put all of those
18 together, and we are not -- the burden on
19 filing this motion, the defendant doesn't have
20 to make specific denials. The defendant
21 doesn't have to state a county of proper venue
22 to which the case should be transferred. It's
23 not a complicated motion at all.

24 CHAIRMAN SOULES: Okay. I
25 think where Elaine and I are coming to is

1 probably in Rule 60 or its successor rule,
2 wherever it is, there should be a sentence
3 that says that a -- the filing of a motion to
4 strike does not waive venue, does not waive a
5 challenge to venue.

6 PROFESSOR ALBRIGHT: Well, we
7 could put it in here.

8 CHAIRMAN SOULES: Put it
9 somewhere.

10 PROFESSOR DORSANEO: Why don't
11 we work together on this and try to --

12 CHAIRMAN SOULES: But you may
13 have grounds for your motion to strike that
14 causes a case to fall out because it doesn't
15 meet the Rule 60 criteria. Then, of course,
16 if that's successful --

17 PROFESSOR CARLSON: Is it
18 really efficient to have the requirement of
19 arguing venue at the same time?

20 CHAIRMAN SOULES: Is there any
21 opposition to doing that? There isn't.

22 Okay. Anything else now?

23 HONORABLE SCOTT BRISTER: On
24 this rule?

25 PROFESSOR ALBRIGHT: Yeah.

1 There is a lot more on this rule.

2 CHAIRMAN SOULES: Directly
3 related to the issues we voted on. Have we
4 got any loose ends that we need to address?

5 I see none, but I want to be sure no one
6 else does, at least at this point.

7 Okay. What's next, Alex, on venue?

8 PROFESSOR ALBRIGHT: The next
9 point I know --

10 HONORABLE SCOTT BRISTER: Can
11 we do the rehearing question next?

12 PROFESSOR ALBRIGHT: -- Judge
13 Brister wants to talk about is the current
14 rule -- the current rule is motions for
15 rehearing, and that has been a problem for
16 many years. I have redrafted it in paragraph
17 (10), motions filed after ruling.

18 "If the court has ruled on a motion to
19 transfer venue in the case, no further motions
20 under this rule should be considered except
21 that if the prior motion was overruled, the
22 court shall consider a motion to transfer
23 venue filed by a defendant whose appearance
24 date was subsequent to the venue ruling based
25 upon grounds not asserted in the earlier

1 motion or seeking transfer for the convenience
2 of parties and witnesses and in the interest
3 of justice. Timely filed motions not
4 considered by the court will preserve the
5 movant's objection to venue for purposes of
6 appeal."

7 And this is a change from the current
8 rule because of the statute, and this is what
9 I worked on in March, and I haven't looked at
10 it since, and I can't remember exactly. There
11 is a -- the statute has a provision that
12 defendants can't waive venue for -- venue
13 challenges for other defendants, and so I have
14 tried to put that in this rule, but I think
15 Judge Brister may have a different issue that
16 you want to talk about.

17 HONORABLE SCOTT BRISTER: Yeah.
18 My concern is that this doesn't go far enough,
19 and here is the problem. I don't want to
20 revisit the same venue stuff over and over.
21 My experience has been that's true of
22 everything, and I understand the concern. You
23 don't want to keep doing venue over and over
24 and over through the case, but I don't think
25 most of my colleagues put up with that anyway.

1 The problem is because it's automatic
2 reversal if venue is wrong, there is several
3 cases -- two scenarios. One scenario is --
4 true case, motion -- case is transferred to me
5 from a recusal by another judge. The previous
6 judge has sustained venue as to one defendant
7 and transferred venue as to another. Now, we
8 all know under the rules you can't do that.
9 Venue is good to one, it's good to all, but
10 that's what the previous judge did.

11 Everybody agrees you couldn't do that,
12 and now on a long case if there is no
13 rehearing the answer is, "Tough. Go through
14 all the discovery, try the whole case, and
15 when it's reversed on appeal, go do it again
16 because you can't have a rehearing," even
17 though we all know what the previous judge did
18 was wrong, and there is a Houston case that
19 says exactly that on a Marcia Anthony
20 transferred case.

21 Everybody agrees what Marcia Anthony did
22 was wrong, but tough. No rehearing. That's
23 what she did, and so you have got to waste
24 your time, knowing it's going to be
25 automatically reversed on appeal. Obviously

1 problematic.

2 Second situation is say I've got a
3 contract case. Houston. Everybody is in
4 Houston. Everything is done in Houston, but I
5 decide I don't like those Houston judges, so
6 I'm going to allege that George W. Bush
7 tortuously interfered with this contract and
8 so filed it in Travis County.

9 Now, everybody knows this is spurious,
10 and sooner or later after it's -- within two
11 months after it's filed up here in Travis
12 County George W. Bush is struck, but if we
13 filed a motion to transfer venue because
14 George W. Bush has nothing to do with this
15 case, denied. Now George W. Bush is out.
16 There is no possibility that looking at all of
17 the facts of the case the court of appeals is
18 going to say Travis County is a proper venue.
19 No rehearing. Try it to verdict in Travis
20 County and appeal for automatic reversal,
21 transfer back to Houston, start over again.

22 There has got to be a way we can separate
23 repetitives, we-have-been-through-this-before
24 cases, from cases where we acknowledge this is
25 going to be a waste of time trying this.

1 CHAIRMAN SOULES: Justice
2 Duncan.

3 HONORABLE SARAH DUNCAN: Yeah.
4 The rule in San Antonio is now different from
5 the rule in Houston on this point.

6 HONORABLE SCOTT BRISTER:
7 Because Justice Duncan wrote an excellent
8 opinion saying that no motion for rehearing
9 does not mean no motion for rehearing, so I'll
10 let her explain it.

11 CHAIRMAN SOULES: Okay.

12 HONORABLE SARAH DUNCAN: Well,
13 actually, what we said was that a motion to
14 reconsider is not the same as the second
15 motion to transfer, and what the rule
16 prohibits is consideration of a second motion
17 to transfer, not a reconsideration of a ruling
18 on the initial and only motion to transfer.

19 It was based on a Supreme Court case
20 coming out of San Antonio where they said that
21 a judge can reconsider a prior ruling, and I
22 don't know what's happened with that case. I
23 don't know if they filed a mandamus in the
24 Supreme Court or not. I kind of think they
25 have. I'm not sure if it's been ruled on, but

1 I think it's a distinction that needs to be
2 made in the rule.

3 CHAIRMAN SOULES: Rusty.

4 MR. McMAINS: I've got to take
5 Bill to the airport, but Bill and I wrote that
6 rule. That rule was written -- I mean, all of
7 the venue rules were written by the -- not by
8 the Supreme Court Advisory Committee but by
9 the predecessor to the Court Rules Committee,
10 because they didn't have time to convene
11 anything else at the time.

12 The purpose of that rule and the no
13 motion for rehearing, with all due respect to
14 Judge Duncan, was the fact that the prior
15 venue statute and, in fact, present venue
16 statute says that if you have venue as to any
17 defendant, you have it as to all, except in
18 mandatory venue cases. So that in reality --
19 and the question was -- it was not whether you
20 had proper venue. It said if you had venue,
21 and one of the ways you have venue is when
22 somebody doesn't respond.

23 Okay. So basically and universally, or
24 more or less universally, it has been the case
25 that if you file an action against one

1 defendant and then they don't file a challenge
2 to venue then there is no point in anybody
3 else filing one because you have venue to that
4 defendant, and the entire notion of that
5 system was it was unitary. You tried a case
6 in one place.

7 Now, we found out -- just before the
8 Court passed these rules we realized that we
9 had made one big mistake, and that was we
10 didn't have any provision for fraudulent
11 allegations, and we tried to call and stop the
12 Court, and they wouldn't do it. They just
13 said, "We don't have time. We have already
14 passed it."

15 So the absence of a fraudulent
16 allegations is a problem that has always been
17 in our rule, and I don't have any problem with
18 attempting to fix that, but you can't bring
19 back in the issue of having to prove your
20 cause of action, and that's the hard balance,
21 and that's why kind of everybody just threw up
22 their hands.

23 The reason for the rehearing rule,
24 however, the no rehearing rule, to some extent
25 doesn't apply anymore because of the fact

1 there is now the specific provision of no
2 waiver. So I'm just trying to explain to you.
3 That's why the no rehearing was in there, but
4 now with the new statute it says what one
5 person does about waiving is not true as to
6 another, that that doesn't give you venue as
7 to another, that you actually have to have
8 proper venue as to the one.

9 So basically what effectively I think
10 it's done is it's put the word "proper"
11 implicitly into the thing, if you have venue
12 as to one defendant, you have it as to all,
13 which means it has to be proper venue. So you
14 could still prove proper venue as to a
15 defendant and hold the rest of it, but it
16 would have to be proper venue and not just him
17 having screwed up. Anyway, for whatever
18 that's worth.

19 CHAIRMAN SOULES: Thank you.

20 HONORABLE SCOTT BRISTER: Could
21 I move that we try to draft -- I will work
22 with Alex or with Sarah since she's written
23 more about it than anybody else, to draft a
24 way to distinguish seriatim repetitive matters
25 from matters that either the fraud exception

1 or the -- you know, I don't want to split
2 these up. I don't want to get into, well, we
3 will divide everybody up and spread them out
4 all over the state according to venue. I want
5 to try them in one place, but I don't want to
6 try them in one place when we all know that's
7 going to be a waste of time.

8 PROFESSOR ALBRIGHT: And I did
9 not even attempt to do that, so I think that's
10 great. I was just trying to keep the same
11 rule as much as possible, but I think that's a
12 good idea.

13 CHAIRMAN SOULES: Okay. So,
14 Alex, you're going to work with Justice Duncan
15 and Judge Brister to come up with language for
16 that problem; is that right?

17 PROFESSOR ALBRIGHT: Correct.

18 CHAIRMAN SOULES: All right.
19 For March. Okay. What else on venue?

20 PROFESSOR ALBRIGHT: I suppose
21 we should think about whether you-all want to
22 change the procedure for the motion to change
23 venue for an unfair forum. It's a pretty
24 antiquated procedure. Bill's rule pretty much
25 leaves it the way it is. It's another section

1 of it, but if you-all do want us to take an
2 attempt at redrafting that rule, we can. We
3 have not done it up to this point, the Rule
4 257 procedure.

5 CHAIRMAN SOULES: What's the
6 pleasure of the committee on that?

7 MR. MEADOWS: I think it's
8 worth looking at. It seems, in my own
9 practice and I think in others, more and more
10 cases are receiving public attention, media
11 attention, and I can see how there could be a
12 situation where you could seek a change of
13 venue on that basis, that a case is just too
14 widely known, been too much written about it
15 in the press.

16 CHAIRMAN SOULES: This is on
17 page 16 of Bill's drafting.

18 PROFESSOR ALBRIGHT: I'll be
19 glad to take a stab at it. I just don't want
20 to do it and then have everybody say, "No, we
21 want to leave it exactly the same." As I have
22 done on others.

23 CHAIRMAN SOULES: Does anyone
24 else feel that 257 needs to be revisited? As
25 Alex has pointed out, because of the interest

1 of one or a few people she has done a lot of
2 work and a lot of drafting on rules that when
3 the committee really becomes focused the
4 committee decides they don't want a change.

5 For example, summary judgment. She did a
6 lot of work on that, and we decided to leave
7 166a alone and just add a new paragraph (i)
8 after all that work was done. So no sense in
9 her doing work unless we feel like it's
10 necessary.

11 PROFESSOR ALBRIGHT: What this
12 procedure does, it's still based to some
13 degree on the plea of privilege procedure.
14 You have the movant files an affidavit and the
15 affidavit of three credible people in the
16 county and then there is a controverting
17 affidavit that's filed that then joins the
18 issue, which I think the way our procedure
19 works now, that's really a pretty silly way to
20 join this issue. Why don't we just have a
21 motion and then proceed with the motion,
22 assuming that someone is going to fight the
23 motion? That's what I would see, is just
24 making it a motion practice like any other
25 motion practice.

1 CHAIRMAN SOULES: Does the
2 committee feel like we will be receptive of
3 that? Anyone who disagrees?

4 Okay. Well, I don't see any problem in
5 taking out affidavit of three credible persons
6 and that sort of thing. Probably don't spend
7 days. Spend as many days as you'd like, maybe
8 is the right way of saying it.

9 Okay, Alex. What else now?

10 PROFESSOR ALBRIGHT: I think
11 that's it. Maybe what we should do is finish
12 this drafting and bring it back for next
13 meeting for a final vote.

14 CHAIRMAN SOULES: All right.
15 Having read the -- which one do you want us
16 to --

17 PROFESSOR ALBRIGHT: I think we
18 are really focusing on the 1-13-97 revision.

19 CHAIRMAN SOULES: Having
20 reviewed the 1-6-97 revision as modified by
21 the 1-13-97 revision, does anyone have any
22 further instructions to the subcommittee for
23 drafting purposes in order for them to come
24 back with what we should be able to conclude
25 on in March? Elaine.

1 PROFESSOR CARLSON: Yeah. I'd
2 like just to echo what Rusty and Judge Brister
3 suggested earlier. I think paragraph (9)
4 needs to be redone because it does give a
5 misleading import, and it should start with
6 "venue proper to one defendant is proper to
7 all except," I would think, so it's clear that
8 this is a very limited exception to be
9 splitting the case up.

10 The other question I had I started to
11 voice earlier, and I'm just not clear what
12 you're thinking, Alex, here on this paragraph
13 (6). In all venue contests when there are
14 multiple plaintiffs if the defendant files a
15 motion to transfer venue, do the plaintiffs
16 have to respond with an independent basis for
17 venue, or only if the defendant challenges
18 both venue under the traditional venue rules
19 and venue under the multiple plaintiff rule?

20 PROFESSOR ALBRIGHT: Okay.
21 Under this rule all the defendant's motion --
22 if you look up in grounds for motion, all the
23 defendant's motion has to do is say, "I
24 challenge you because you can't" -- "I'm
25 challenging your joinder or intervention

1 because you can't establish independently of
2 any other claims proper venue," period. "I'm
3 putting you to your proof."

4 So then the plaintiff would have to prove
5 up proper venue or if they say, "I know I
6 can't prove up the proper venue independently
7 of anybody else, I'm going to the four
8 criteria."

9 PROFESSOR CARLSON: And the
10 reason I ask that, when I read that
11 introductory sentence under (6), "A plaintiff
12 or intervening plaintiff responding to a
13 motion under this rule must independently of
14 any other plaintiff satisfy the burden of
15 proof of proper venue in accordance with
16 section (5)," or it may be section (4). Do
17 you mean when the independent basis for venue
18 as to that plaintiff is put in issue?

19 PROFESSOR ALBRIGHT: Well, it's
20 going to always -- whenever one of these
21 motions is filed, it will be put at issue.

22 PROFESSOR CARLSON: What if
23 it's just a regular motion to transfer venue,
24 "I don't think it's proper here." Not because
25 you're a multiple plaintiff.

1 PROFESSOR ALBRIGHT: Then this
2 is only -- this is only -- paragraph (6) only
3 applies to a motion challenging a plaintiff's
4 joinder or intervention.

5 PROFESSOR CARLSON: And that
6 was what wasn't clear to me. Maybe we could
7 just redo the title because it wasn't clear to
8 me in reading it that that was the intent.

9 PROFESSOR ALBRIGHT: Maybe it
10 will help when you see the whole rule
11 together. See, because you don't have section
12 (4) and section (5), but I would be happy to
13 take drafting suggestions and --

14 CHAIRMAN SOULES: Okay. Well,
15 that's one. If it's not clear this is
16 restrictive in its application, we need to say
17 so. Okay. Anything else?

18 And, of course, we want to be absolutely
19 certain that the rule that we draft does not
20 contravene the statute or the intent of the
21 legislature, to the extent we can determine
22 that intent, in passing a statute. So be ever
23 mindful of those important considerations, and
24 I'm sure the Supreme Court will likewise be
25 mindful of those whenever they review our

1 work. So we need to be prepared, if
2 necessary, to explain any questions from the
3 Supreme Court about whether there are any
4 features of the rule that might be
5 misunderstood to be in contravention with the
6 intent of the legislature or the statute
7 itself.

8 Okay. Anything else on venue for this
9 session?

10 PROFESSOR CARLSON: Luke, I
11 just have one other question, if I may.

12 CHAIRMAN SOULES: Elaine.

13 PROFESSOR CARLSON: Alex,
14 section (12), I guess is pulling Rule 255 into
15 a main rule. It's a little bit different, I
16 think, because you require the court to
17 transfer --

18 PROFESSOR ALBRIGHT: What
19 paragraph are you --

20 PROFESSOR CARLSON: Oh, I'm
21 sorry, Alex. Maybe that went away in this
22 one. Section (12), yeah, on your 1-6-97
23 draft. It requires the court to transfer upon
24 the parties' written consent where the current
25 Rule 255, I believe is, in reading it, that

1 "upon the written consent of the court by an
2 order may transfer to where the parties have
3 agreed." Was that an intended --

4 PROFESSOR ALBRIGHT: Wait. Let
5 me look. I think I took it directly from
6 Bill's draft that we had already talked about.

7 CHAIRMAN SOULES: Where are you
8 reading, Elaine, from the old rule book?

9 PROFESSOR CARLSON: I'm looking
10 at old Rule 255, Luke, and proposed paragraph
11 (12).

12 MR. HAMILTON: Statute 15.063
13 says "shall."

14 CHAIRMAN SOULES: 15.063?

15 MR. HAMILTON: Right.

16 PROFESSOR ALBRIGHT: I'm
17 looking at my redlined draft, but it may be
18 that that didn't -- apparently that didn't get
19 into my redlined draft. I must have taken it
20 directly off of Bill's draft.

21 PROFESSOR CARLSON: Carl was
22 absolutely right. 15.063 would seem to
23 supersede the court's discretion on Rule 255.

24 CHAIRMAN SOULES: Golly. Does
25 that permit the parties if they just decide

1 they're sour on the judge and they want to get
2 out of there to just say, "Judge, we want you
3 to transfer venue of this case next door," and
4 he's got to do it? Is that what this says?

5 PROFESSOR CARLSON: "Shall"
6 means "must."

7 CHAIRMAN SOULES: All right.
8 Well...

9 MR. HAMILTON: It has to be in
10 a county of proper venue.

11 PROFESSOR CARLSON: Yeah.

12 MR. GOLD: What rule was that,
13 Carl?

14 MR. HAMILTON: 15.063.

15 PROFESSOR ALBRIGHT: To any
16 other county.

17 CHAIRMAN SOULES: To any other
18 county.

19 PROFESSOR ALBRIGHT: To any
20 other county. If you can get the other side
21 to agree, you-all can go wherever you want.

22 CHAIRMAN SOULES: Any other
23 county. That's what it says.

24 PROFESSOR ALBRIGHT: Proper or
25 improper.

1 MR. HAMILTON: Well, but the
2 first paragraph says "shall transfer to
3 another county of proper venue."

4 MR. JACKSON: Yeah. "Any other
5 county of proper venue."

6 MR. HAMILTON: It may be a
7 little ambiguous there.

8 CHAIRMAN SOULES: That's right.
9 Parties come in, and they agree to transfer to
10 a county not of proper venue, and the judge
11 says, "You're out of here, but you're going to
12 a county of proper venue. I'm going to pick."
13 I guess literal application of this rule, that
14 would be the consequence.

15 PROFESSOR CARLSON: To any
16 other county.

17 CHAIRMAN SOULES: The parties
18 say, "We'll take Bexar County," but that's not
19 a county of proper venue. Well, they have now
20 consented to another county, and the judge
21 says, "You're going to Hays County because
22 that's proper," and you're gone to Hays
23 County. If you read all of these words here,
24 that's what can happen.

25 Okay. But it does need to be "shall"

1 because that's what the legislature has said,
2 and our rules said "may" but they said
3 "shall," and I know we want to line up with
4 the legislature on the venue issues. Anything
5 else on venue for this session? Good eye,
6 Elaine.

7 Okay. That's it for venue. What's next?
8 Bonnie, can we proceed with your report?

9 MS. WOLBRUECK: Sure.

10 CHAIRMAN SOULES: Okay. We are
11 going to get to Bonnie and Elaine and try to
12 get through with their report before we leave,
13 unless there is -- do either one of you have
14 to leave right away?

15 PROFESSOR CARLSON: No.

16 CHAIRMAN SOULES: Okay. Let's
17 get that done and then I guess we're done
18 because we don't have anybody else to report.
19 All right.

20 MS. WOLBRUECK: What I have
21 done here, Luke, is given two proposals. At
22 the last meeting we discussed multiple writs
23 of execution, and just in case the committee
24 would choose not to go with that, there is a
25 proposal for a single writ on this same sheet.

1 I just wanted to tell you again that last
2 week I was in a seminar presented by UT Law
3 School, and one of the presenters was an
4 attorney that does collection laws, and she
5 had indicated and very clearly told the clerks
6 that only one writ of execution can be issued
7 at one time. So I contacted her after the
8 fact and said, "Okay, tell me where, is there
9 case law or statute or something that you are
10 aware of," and she said, "Well, I've read it
11 somewhere. Let me get back with you," and she
12 couldn't find it.

13 The only reference that there actually is
14 to one writ or a second writ is in the Civil
15 Practice and Remedies Code under 34.001, which
16 talks about dormant judgments. Under (b) it
17 says, "If a writ of execution is issued within
18 ten years after rendering of judgment, but a
19 second writ is not issued within ten years."

20 That's the only place that there is a
21 reference to the first writ and the second
22 writ, and this has -- it's happened to us a
23 couple of times where I have been in seminars
24 to where attorneys doing presentations have
25 said that only one writ of execution can be

1 issued at one time, but I have still not
2 received where the documentation is from that,
3 if it's just been common practice adopted, but
4 that's the only place that I can find
5 reference. Yes, Sarah.

6 HONORABLE SARAH DUNCAN: The
7 only question I have, and I guess I missed
8 this discussion.

9 COURT REPORTER: Speak up,
10 please.

11 HONORABLE SARAH DUNCAN: If you
12 have more than one writ of execution
13 outstanding at any given time, how do you know
14 when to stop the writs of execution? How do
15 you know when the judgment, whether for costs
16 or other aspects of the judgment, have been
17 satisfied so that you stop the other writs of
18 execution?

19 It seems to me it has to be done
20 serially, or I guess, it seems like -- I mean,
21 I can understand why you would want to issue
22 multiple executions, but unless you issue one
23 and get it served and returned and find out
24 how much you've collected from that writ of
25 execution, how do you even know that you need

1 another one?

2 MS. WOLBRUECK: I know I have
3 had attorneys request it of me, and the
4 request was, "I need this because we are
5 concerned about property being moved into
6 another county or something, and we are trying
7 to satisfy this judgment," and you know, I
8 didn't have anything that said that I could
9 not issue it. The rule is actually silent.
10 The rules there, there are rules on writs of
11 attachment, injunction, seek discretion. The
12 rule says about multiple writs to be issued.
13 The execution rule is silent.

14 HONORABLE SARAH DUNCAN: But in
15 the execution context, unlike, for instance,
16 the attachment to seek discretion, we are
17 actually going to sell this property, and if
18 we -- I mean, we could conceivably for a
19 hundred-dollar judgment get writs of execution
20 directed to all counties in which the
21 defendant had property, get all of the
22 defendant's property sold, collect hundreds of
23 thousands of dollars to satisfy a
24 hundred-dollar judgment.

25 CHAIRMAN SOULES: I know that

1 for real estate the sheriff has to post a
2 notice of sale, and then where I'm coming from
3 on this is that the levy is not the end. The
4 sheriff goes out and levies and then -- yeah.
5 Then the sheriff has got to get a notice of
6 sale, whether it's personal property or real
7 estate. The sheriff has to return execution
8 with the clerk of the court. The clerk of the
9 court -- I think what is happening here in the
10 dynamics of the execution process is that, you
11 know, assume several writs can go.

12 If those writs go and the sheriff levies,
13 at that point there is an execution lien on
14 the property, or it's in the sheriff's hands.
15 So the assets have been captured and then
16 notices of sale and that sort of thing start
17 taking place. There could be a capture of
18 property in excess of what would be needed to
19 be sold to satisfy the judgment, but that
20 could happen in one county just as easily as
21 it could happen in several counties, and the
22 return of the execution, what does that mean,
23 Bonnie? Does that mean -- does execution mean
24 that the writ of execution has been levied?

25 MS. WOLBRUECK: That's correct.

1 CHAIRMAN SOULES: But not yet
2 sold.

3 MS. WOLBRUECK: No. Whenever
4 the clerk gets the return it has been sold.

5 HONORABLE SARAH DUNCAN: And
6 you get the proceeds.

7 MS. WOLBRUECK: Yes. And we
8 get the proceeds to be distributed.

9 CHAIRMAN SOULES: Okay. Now
10 then, let me see. Okay. That's the sale.

11 MR. HAMILTON: Can they only
12 levy with one writ of execution on one piece
13 of property or on multiple pieces?

14 MS. WOLBRUECK: Multiple
15 pieces. It's my understanding it's multiple.

16 HONORABLE SARAH DUNCAN: It
17 just says go collect property.

18 MS. WOLBRUECK: Yeah. It just
19 says to go collect the property.

20 HONORABLE SARAH DUNCAN: But
21 the defendant can designate the property that
22 they want.

23 MS. WOLBRUECK: I'm not sure
24 about that. I think there is some statutory
25 provisions for that. I think some of that's

1 in the Civil Practices and Remedies Code,
2 also, the definitions for the constable's or
3 sheriff's execution.

4 CHAIRMAN SOULES: I'm not sure
5 whether having multiple writs out really
6 changes how much property gets captured.

7 MR. HAMILTON: Well, it does in
8 the sense, Luke, that if you have one sheriff
9 levying, and he knows what he's levying on and
10 how much the judgment is; but if you have got
11 several different sheriffs, they don't know
12 what the other may have levied on. So you are
13 going to have more of a chance for there to be
14 an overlevy if you have it in the hands of
15 more sheriffs than if it's just in the hand of
16 one sheriff, and the rule says, "The execution
17 and subsequent execution," and it says in
18 every case that your final judgment has been
19 rendered "shall issue execution." It doesn't
20 say "executions." It says "execution,"
21 single.

22 CHAIRMAN SOULES: I mean, after
23 a claimant has gone through all the -- all
24 that's necessary to get to a final judgment,
25 should not the execution rules favor that

1 judgment creditor over the judgment debtor?

2 HONORABLE SARAH DUNCAN: Not to
3 the extent of selling property that doesn't
4 need to be sold to satisfy the debt.

5 CHAIRMAN SOULES: But the
6 judgment debtor has got several things
7 that -- it can do things to stop those sales
8 once the judgment is satisfied, just going to
9 the judge and say, "They have sold enough."

10 HONORABLE SARAH DUNCAN: If you
11 have got multiple executions simultaneously
12 outstanding, and we know the defendant has the
13 right to designate the property that's going
14 to be executed against in order of preference,
15 I don't even know how a defendant can
16 rationally do that when there are multiple
17 executions.

18 CHAIRMAN SOULES: Well, you
19 know there is a piece of property in Jasper
20 County, and there is a piece of property in
21 Hidalgo County and a piece of property in
22 Loving County, and it takes all three, and you
23 want three writs because you want them all
24 levied on. You need a levy on all of them.
25 You know that the property is being moved from

1 Harris County to Bexar County, and you want a
2 writ of execution in every county in between
3 so that whenever you can get it stopped, the
4 sheriff can find the property in transit, that
5 sheriff can stop it and capture it.

6 To me it ought to favor the judgment
7 creditor, and the judgment debtor, it's up to
8 the judgment debtor to protect himself from
9 over-execution, but maybe that's not -- I
10 mean, that's just my view, not necessarily a
11 correct view.

12 MR. HAMILTON: I think that's a
13 good idea if there is a way to protect from
14 over-execution.

15 CHAIRMAN SOULES: Probably not
16 from overlevying, but certainly from oversale.
17 I mean, the judgment debtor can get busy
18 and --

19 MR. HAMILTON: She says the
20 sale happens before they ever get the writ
21 back.

22 CHAIRMAN SOULES: Well, but the
23 judgment debtor can take steps to know that
24 the judgment debtor's property has been levied
25 on.

1 MR. HAMILTON: If he knows.

2 CHAIRMAN SOULES: He can take
3 steps to know. Either the sheriff has seized
4 personal property of the debtor or gone
5 through what's necessary to levy on real
6 estate, and the judgment debtor ought to know
7 where his assets are and watch them get levied
8 on. They're in the best position.

9 MR. LATTING: What does that
10 entail, Luke, to levy on real estate?

11 CHAIRMAN SOULES: Well, it's in
12 here, and I think you just file something with
13 the deed records, but I'm not sure of that,
14 but it's got to be notice to the public
15 because it stops a bona fide purchaser from
16 buying the property.

17 All right. Well, this, I guess, did we
18 vote before?

19 MS. WOLBRUECK: No. You just
20 asked me to bring it back to the committee,
21 and that's the reason I gave you two
22 proposals. I really think it needs to be
23 clarified, and one is that -- basically the
24 second one just says that you cannot issue an
25 execution until the other returns, or else

1 that you can file an affidavit that the
2 execution was lost.

3 CHAIRMAN SOULES: Okay.

4 MS. WOLBRUECK: So there is two
5 provisions here, and I just think it needs to
6 be clarified. I don't have any feelings in it
7 one way or the other. I just know that clerks
8 have a concern over the fact that we can't
9 find anything except what Carl had said about
10 it says "the execution and subsequent
11 executions," which I have tried to hang onto
12 before, but I'm not sure that that is clear
13 enough when I have an attorney that says, "I
14 want two executions now," and that just
15 happened to me last week.

16 CHAIRMAN SOULES: Okay. The
17 version one at the top permits --

18 MS. WOLBRUECK: Yes.

19 CHAIRMAN SOULES: -- multiple
20 writs?

21 MS. WOLBRUECK: And that
22 language I really pulled out of another rule
23 on several writs of attachment. So I'm not --
24 it doesn't matter to me about the language,
25 but that's where that language came from.

1 CHAIRMAN SOULES: Okay.
2 Version one is multiple writs. Version two is
3 sequential writs and not multiple writs.

4 Those in favor of version one show by
5 hands. No one. Those in favor of number two.
6 Five. Okay. Version two it is.

7 okay. Anything else then, Bonnie? Do
8 you need anything further on this?

9 MS. WOLBRUECK: No, sir.
10 That's it.

11 CHAIRMAN SOULES: Okay. We
12 will send that to the advisory committee now.
13 Anybody got any issues with the words in
14 version two?

15 It's passed, and we will send that
16 forward to the Supreme Court as an approved
17 rule.

18 Now we go to Elaine.

19 PROFESSOR CARLSON: Luke, I
20 don't have a written report, but I was wanting
21 to respond very briefly to Holly's letter of
22 January 7th asking for our subcommittee input,
23 and I will send you an additional page for our
24 disposition chart, but she asked us to address
25 the supplemental -- second supplemental pages

1 500 to 509, various letters regarding the
2 eviction process, and I have looked at those
3 letters.

4 They address what appears to have been a
5 proposal to change the eviction procedures
6 that came before the Supreme Court's eviction
7 task force, particularly amongst the second
8 supplement page 506, a letter from Joe Backs
9 to everybody. He copied a number of folks
10 interested in landlord/tenant law, including
11 Justice Hecht.

12 I don't have something called the Supreme
13 Court's eviction task force report. I'm not
14 sure what that is. We do have -- Holly was
15 able to retrieve from the Court the proposed
16 Rules of Civil Procedure that Justice Till's
17 subcommittee drafted that have not yet come
18 before this group, but I did not see anything
19 in there that indicated that this proposal has
20 become a part of Judge Till's recommendation.

21 I talked to Joe Backs through voice mail,
22 and he said he really didn't know what had
23 happened with it, and I have attempted to get
24 a hold of Judge Till who is, as you know, not
25 on the bench any longer and have not been

1 successful. So I will follow up with that
2 conversation to Judge Till, but I believe
3 these letters address a proposal that that
4 task force was looking at that did not become
5 a part of their recommendation.

6 CHAIRMAN SOULES: Okay. So are
7 you suggesting --

8 PROFESSOR CARLSON: I think
9 this is going to become moot.

10 CHAIRMAN SOULES: -- that it's
11 either going to become moot or that we table
12 this until when, if ever, we get the report
13 from the justice of the peace task force?

14 PROFESSOR CARLSON: And I have
15 looked at that, and I don't see anything that
16 suggests that this proposal became a part of
17 their final recommendation, but I will confirm
18 that with Judge Till, the scrivener.

19 CHAIRMAN SOULES: Okay. "See
20 enclosed list of all the written" -- do we
21 have -- we don't even have a copy of the
22 proposition, I guess, do we?

23 PROFESSOR CARLSON: Correct.
24 It's hard to substantively respond other than
25 I can't see where it's become a part of anyone

1 else's proposal.

2 CHAIRMAN SOULES: Okay. They
3 are saying, "Existing eviction rules are
4 quick. We oppose any changes," but in our
5 agenda we don't have any proposed changes; is
6 that right?

7 PROFESSOR CARLSON: Right.

8 CHAIRMAN SOULES: The only
9 thing we have got is opposition to change,
10 right?

11 PROFESSOR CARLSON: Correct.

12 CHAIRMAN SOULES: All right.
13 They oppose a change that's not before the
14 committee, so I guess that's not a problem.

15 PROFESSOR CARLSON: Correct.

16 CHAIRMAN SOULES: Okay. Won't
17 be any change unless we get something or find
18 something that we should have and can't find,
19 can't locate.

20 All right. Anything else? Anybody have
21 anything else for the business of this
22 meeting?

23 Well, thank you all for another tough day
24 and a half of hard work, and I think we did
25 make some major accomplishments. I hope we

1 have satisfied the Court, and we will see you
2 on March -- when is our next meeting?

3 MS. DUDERSTADT: March 7th and
4 8th.

5 CHAIRMAN SOULES: March 7 and
6 8. Remember that's early in the month because
7 of the conflicts and other things that we had
8 later in the month, so we have an early
9 meeting in March. The subcommittees will need
10 to act early and be ready, and we will be here
11 in the Bar Center; is that right, Holly?

12 MS. DUDERSTADT: Correct.

13 CHAIRMAN SOULES: 8:30 a.m.,
14 Friday, March 7th. Thank you all.

15 (Whereupon the proceedings were
16 adjourned.)

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on January 18, 1997, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are \$ 1,012.00 .
CHARGED TO: Luther H. Soules, III .

Given under my hand and seal of office on this the 27th day of January, 1997.

ANNA RENKEN & ASSOCIATES
925-B Capital of Texas
Highway, Suite 110
Austin, Texas 78746
(512) 306-1003

D'Lois L. Jones
D'LOIS L. JONES, CSR
Certification No. 4546
Cert. Expires 12/31/98

#003,181DJ