1 AFTERNOON SESSION

2

3 CHAIRMAN SOULES: The materials that

4 we're going to talk about now have been sent out

5 twice, once in this book and once earlier. So, if

6 you didn't bring your materials that were

7 distributed earlier, these will be the Evidence

8 Rules and they're about in the middle of the very

9 last group of materials. They start with a letter

10 on State Bar of Texas stationery that is signed by

11 Newell Blakely. And it is a letter of transmittal

12 for certain proposed changes in Rules of Evidence.

13 MR. NIX: One more time, Luke, what

14 portion of the book?

15 CHAIRMAN SOULES: All right. If you go

16 all the way to the back, it's a supplement that we

17 sent out. And each topic that we're going to

18 address is separated by a blue sheet. So, between

19 the last blue sheet and the back cover, about

20 halfway, you find a letter on State Bar of Texas

21 stationery, and behind that are the proposed Rule

22 of Evidence changes. And -- well, before Newell

23 starts, we have so few people here, I hate to do

24 that to him. Let me make a different -- take a

25 different position on the agenda.

1 I will take volunteers now for persons who
2 are willing to serve on the Trial Court
3 Administration Committee to deal with this Court
4 Administration Bill and the mandates thereunder.
5 MR. NIX: I'd like to work on that one.
6 CHAIRMAN SOULES: All right. Let me --
7 Jim Kronzer, Sam Sparks.
8 Steve, were you one of the volunteers on that
9 or who -- let's see.
10 MR. NIX: Tom Ragland.
11 CHAIRMAN SOULES: Judge Thomas, Judge
12 Linda Thomas.
13 MR. NIX: Tom Ragland.
14 CHAIRMAN SOULES: Tom Ragland. Who else
15 would like to serve on this committee to address
16 the Legislature's mandate and the Court
17 Administration Bill? All right. I would think
18 Judge Hittner would be helpful on that. He's not
19 here.
20 JUDGE HITTNER: I'll serve on the
21 committee.
22 CHAIRMAN SOULES: Okay. Judge, I'm
23 sorry, I didn't see where you were sitting. I
24 didn't see you in view. But would you help on
25 that?

1 JUDGE HITTNER: Yes, sir.
2 CHAIRMAN SOULES: I think your experience
3 would be very helpful.
4 Okay. That gives us two district judges.
5 Let's put Pat Beard -- my view -- what is the
6 feeling of the people here about the size of that
7 committee? It seems to me like that committee is
8 dealing with so many fundamental concepts, that the
9 size of it should be large at first and then maybe
10 be revised later, but try to get as much as a cross
11 section as we can for input. How does that suit
12 you all?
13 Jim, how do you feel about that?
14 MR. KRONZER: I think that you ought to
15 try to get as many people from different parts of
16 the state, too. Because the practice is so
17 dissimiliar in different parts of the state. And
18 those rules, as I quickly looked at that act, don't
19 really apply to all parts of the state.
20 CHAIRMAN SOULES: Bill Dorsaneo.
21 PROFESSOR DORSANEO: I really agree with
22 that. I think we need to have some people from
23 Dallas and some from San Antonio and not a
24 preponderance of people from Houston because that's
25 a bad place.

1 CHAIRMAN SOULES: We've got Pat Beard
2 from Waco. I'm going to ask Judge Casseb to serve
3 on that because he was so instrumental in what is
4 now the San Antonio practice. That gives us a
5 judge from San Antonio, a judge from Houston, a
6 judge from Dallas. We're going to need very much
7 to interface with the Committee on Administration
8 of Justice Subcommittee that's handling this. And
9 Judge Thurmond from Del Rio is the spearhead of
10 that. And that will give us a rural judge. Then
11 Sam from El Paso. Tom Ragland from Waco. I would
12 say Hadley Edgar to get a professor, plus another
13 West Texan from Lubbock. And I'm listening. I
14 want to hear any suggestions that ya'll have.
15 MR. KROZNER: Well, Luke, I'm satisfied
16 from talking with Judge Hill during the noon hour
17 that he's going to be very actively interested in
18 the almost a day by day progress of all of the work
19 of that committee. And that probably is going to
20 necessitate some breakdown into subcommittees
21 dealing with court administration, power of the
22 chief under it to unitize the judicial system, and
23 a lot of different aspects of it, the visiting
24 judges and all the other things. And so, I think
25 it ought to be large enough to where it can be

1 broken off into those subcommittees also if he
2 wants to study those sections, too.
3 CHAIRMAN SOULES: Is that the consensus
4 here? It seems to me that we need a large
5 committee because there are so many topics to be
6 addressed.
7 JUDGE HITTNER: Mr. Chairman, if it's
8 that complex and I don't doubt what Mr. Kronzer
9 says is correct, maybe we ought to just have a
10 committee as a whole. It seems to be that way the
11 more we talk about it.
12 CHAIRMAN SOULES: Let me say this by way
13 of trying to organize it. We're probably not going
14 to be able to have another meeting of this
15 committee until September or October. What I would
16 like to do is appoint maybe eight or ten, at least,
17 to meet, divide up the subjects, each of them
18 become the designee to head up a second tier of
19 subcommittee. Let me know what that report is and
20 any suggestions that you may have for drafting
21 people to help on the second tiered subcommittees,
22 and I will assign not only those you request, but
23 also additional people to help until we have used
24 the entire personnel.
25 Now, who will -- this is going to be a big

1 undertaking. Who will be a second tiered committee
2 chairman? I'm going to assume everybody that has
3 volunteered so forth is interested enough to do
4 that. So --
5 JUDGE KRONZER: Make it Sam Sparks. Make
6 him come all the way from El Paso.
7 CHAIRMAN SOULES: Jim Kronzer, Sam
8 Sparks, Judge Linda Thomas, Tom Ragland.
9 MR. NIX: Put me on, Harold Nix from
10 Daingerfield, I want to serve on that committee and
11 take care of my piece of Texas.
12 CHAIRMAN SOULES: Harold Nix. Okay.
13 MR. KRONZER: Reasoners gone. Why don't
14 you put him on it?
15 PROFESSOR WALKER: He's not here.
16 MR. KRONZER: Make him the chairman.
17 He's good at that.
18 CHAIRMAN SOULES: Lefty? Is he here? Do
19 you want to be a second tier subcommittee chairman
20 for part of this effort?
21 MR. MORRIS: We're going to have to be
22 reporting back when?
23 CHAIRMAN SOULES: Well, I'd like for
24 ya'll to either meet by telephone or what have you,
25 after you have a chance to review this bill and

1 divide it into sections and let me know which
2 section each of you is going to take and who you
3 want on your team. And I'd say I'd like to hear
4 that by the end of June.
5 MR. MORRIS: I'll do it.
6 CHAIRMAN SOULES: Are there any other
7 people then -- we're now talking about the Court
8 Administration Bill; and, of course, it's very
9 diverse and has many subjects.
10 MR. CASSEB: I'd like to serve on that.
11 CHAIRMAN SOULES: Good, because you got
12 drafted while you were gone, Judge, with the
13 compliment of what you did in San Antonio
14 organizing that.
15 MR. KRONZER: He organized Houston, too.
16 CHAIRMAN SOULES: Well, I meant the court
17 system, Judge, I didn't mean the rest of the City.
18 I have then people who are willing to take a
19 part of that and then work with the subcommittee to
20 be subsequently appointed; Jim Kronzer, Sam Sparks,
21 Judge Linda Thomas, Tom Ragland, Judge David
22 Hittner, Pat Beard, Judge Casseb, Hadley Edgar,
23 Harold Nix, is that right?
24 MR. NIX: Yes.
25 CHAIRMAN SOULES: And Lefty Morris.

1 Now, this is going to be critically important
2 to how the administration of justice proceeds from
3 this point forward in this state and as Judge
4 Hill's lead horse as far as administrative
5 revision. So, if anybody else wants to have a
6 subcommittee, let me know now. All right. Would
7 you all meet on a coffee break, those 11 people --
8 Hadley's not here -- and decide among yourselves
9 who you'd like to have to be the overall chairman
10 of this effort and let me know. And in that same
11 organizational meeting, try to pick a date that
12 ya'll will meet and divvy up the projects under
13 this bill. And then I'll know who's the chairman
14 and what day you're supposed to meet. We'll
15 probably take a coffee break around 3:30.
16 All right. We will then proceed with Newell
17 Blakely. Did someone else --
18 MR. SPARKS: It looks to me like -- I
19 don't know what the rules of the committee are, but
20 it looks to me like we might ought to try to
21 solicit a couple of lawyers who practice in the
22 criminal field to be on that committee. And I can
23 certainly speak for myself, the only criminal
24 things I do are appointed; and I try to get out of
25 that best I can. But we're going to need some

1 insight in that area, obviously, from what I've
2 read of it.
3 CHAIRMAN SOULES: Well, we certainly are.
4 And I think that the subcommittee chairman -- I'll
5 declare that you're free to consult all available
6 sources for input into what we should do. And if
7 you can solicit help from someone active in the
8 criminal practice, then your subcommittee, if you
9 need that, should pursue that.
10 Mr. Chief Justice, we just named a committee
11 who will meet on the coffee break and pick their
12 chairman and pick a date when they will meet. It's
13 Jim Kronzer, Sam Sparks, Judge Linda Thomas, Tom
14 Ragland, Judge David Hittner, Pat Beard, Judge Sol
15 Casseb, Professor Hadley Edgar, Harold Nix and
16 Lefty Morris.
17 MR. JONES: Mr. Chairman.
18 CHAIRMAN SOULES: And they are going to
19 meet and divvy up the subjects that are covered by
20 that bill and become second tier subcommittee
21 chairmen and then we'll appoint people to fill out
22 their committees and go to work on this with your
23 permission.
24 CHIEF JUSTICE HILL: Oh, absolutely. I'm
25 going to look to Judge Wallace, of course, on this.

1 I want to be personally involved in it, but he is
2 our person on rules and he is -- I can't tell you
3 -- I can't lay enough good words on my colleague.
4 He's a marvelous person, a great judge, and he's
5 done a real good piece of work in this rules area.
6 And he knows a lot of my thinking and I think
7 shares most of it. And so, let's start trying to
8 flesh it out. And there's some rules in Ohio, I
9 believe, that might be helpful to look through. I
10 really don't know. This is going -- it puts us
11 really on the cutting edge of being right out in
12 front. I'm not even sure any state has the detail
13 of rules for administration that we contemplate
14 coming out of it.
15 And, again, I recognize that the lawyers who
16 tend to their business, who take care of their
17 business and get their cases ready and get them to
18 trial, have very little involved. And I just hope
19 that they will not, though, be an opposition force,
20 because it's here. And we need to be as true to
21 what they're saying to us, in my judgment, as
22 possible, without being ridiculous, without getting
23 to the point where lawyers can't live with it. And
24 it may be a little unfair to -- Houston, of course,
25 is our number one area of concern. You can go out

1 to San Angelo and they'll say, "Hey, we -- just
2 everybody's current." A lot of people will tell you
3 they're current. And what they don't tell you is
4 they're current if the lawyers want to get the
5 cases to trial.
6 The one thing that has to be appreciated for
7 this thing to make any sense is the concept is that
8 every litigant who files a case is entitled for the
9 court to take responsibility for it. And that's
10 the concept. If you can't buy that, we're in
11 trouble going out of the blocks. It's a custodial
12 sort of thing. A ward -- a litigant is kind of a
13 ward of that court, and it's that court's
14 responsibility, with the lawyer that's not getting
15 their job done, to see that that case moves along
16 to some sort of disposition. And so, we're then to
17 be the guardians here of saying "Now here's the way
18 you can get that job done. Here are the kind of
19 rules that if you utilize them and be true to them
20 and be faithful to them, they'll work." They won't
21 hurt the people in San Angelo. If they're already
22 doing all that anyway or don't need them, it's
23 there.
24 But in the area -- I don't think that --
25 Lefty, for example, might not share this, being in

1 practice up here in Austin. My experience in
2 Austin, when I practiced here, was not as good as a
3 lot of the people are telling me it is. Maybe I
4 just got jinxed.
5 MR. MORRIS: Well, It's gotten better.
6 Harley Clark has really gotten after it over there.
7 We went through a real sag, John, but it's gotten a
8 lot better.
9 CHIEF JUSTICE HILL: I'm delighted to
10 hear that. David can testify that Houston is
11 moving now. A lot of things are happening. Maybe
12 this is all a part of the tide that we're catching
13 in anticipation of this or maybe trying to
14 forestall it. I don't know. But there are some
15 good -- Dallas, for example, was very inconsistent
16 the way I found it, Frank. It depended on kind of
17 which court you were in. What sayeth thou about
18 Dallas today?
19 MR. BRANSON: Well, I think that's pretty
20 accurate, John. There were some really progressive
21 judges there who run the docket real well. And
22 then there was basic intellectual pockets of
23 poverty among the Dallas trial bench, some of which
24 have been recently cured by the electorate.
25 CHIEF JUSTICE HILL: Over Sols way --

1 every time I mention anything about dockets, anyone
2 from San Antonio -- and I'll direct this to Sol,
3 they just say, "Please leave us alone. We are just
4 doing super in San Antonio. We just love our
5 dockets and nothing could work better." But the few
6 times I went over there, it just looked like -- I
7 don't know, just absolute bedlam. Maybe I was just
8 in the wrong -- maybe I just, you know, was in the
9 wrong court, wrong place. But what sayeth thou,
10 Sol Casseb, about San Antonio? Are ya'll really
11 doing all that good?
12 MR. CASSEB: As far as the jury dockets,
13 we are doing exceptionally well. If you want a
14 trial, you get a trial within four to five months.
15 Our difficulty now, which needs to be brought
16 current and I'm hoping that it can be done, is we
17 have all of the cases, domestic cases as well as
18 any other type of case all go to one judge, and it
19 needs to be segregated out because of the influx of
20 more divorce cases that you have now. And that's
21 why you see it so crowded every morning because you
22 have got 150 divorce cases that shouldn't be
23 mingled in with the other type of cases; that that
24 needs to be straightened out locally and if it
25 cannot be done locally, you got the vehicle right

1 here to do it.

2 CHIEF JUSTICE HILL: But, Sam, you know

3 what I'm talking about.

4 MR. SPARKS: We have eight different

5 sets.

6 CHIEF JUSTICE HILL: They kind of want

7 somebody to say, "This is the way it's going to

8 be." Now I don't know that you share that. What do

9 you say about El Paso?

10 MR. SPARKS: No, no. I think all the

11 lawyers that try lawsuits on the both sides of

12 docket would encourage that. Because we do. We

13 have eight separate sets of district court rules.

14 JUDGE HITTNER: You ought to try in

15 Harris County. We have 25 different sets.

16 MR. O'QUINN: I'm glad you're the one

17 that said that, Judge.

18 JUDGE HITTNER: Well, I'll say it,

19 because it's the truth. We have one general set of

20 rules, and every other court is doing it

21 differently. Monday dockets now are still Monday

22 morning and a bunch of them Friday afternoon,

23 Friday morning. I mean literally 25 different set

24 of rules.

25 CHAIRMAN SOULES: Judge Hittner?

1 JUDGE HITTNER: Yes, sir.
2 CHAIRMAN SOULES: I just conferred with
3 Judge Wallace. He said you don't have 25. They
4 haven't been approved, and they're not going to be.
5 MR. O'QUINN: Thank you, thank you.
6 JUDGE HITTNER: What I'm talking about,
7 of course, are the individual court rules when we
8 have Monday dockets versus Friday dockets on
9 motions and everybody does it differently and it's
10 a real problem for the practicing lawyer.
11 CHIEF JUSTICE HILL: The home town of
12 lawyers that get their cases dismissed because of
13 rules they don't even know about, they're not even
14 in writing, and other things that happen, have got
15 to stop. We've got to have uniformity about our
16 local rules as much as possible. And we need to
17 approach this task with a feeling that it can be
18 done is all I'm saying. And let's don't go into it
19 with "Oh, that's a bunch of hogwash." Let's just
20 take off our coats and get down with it and see if
21 we can't come up with something that would really
22 be a fresh new day for moving our dockets in this
23 state.
24 Now, I've been all over Texas and I'm fully
25 aware that Texas has tremendous variety and you

1 can't put a blanket over it and say it's this way
2 here. Because things are different and we've got
3 to take that into account. There's got to be some
4 flexibility here.
5 But at the same time I think the message has
6 got to go out just like we did in that writ refused
7 case. The docket -- we just got to say -- that the
8 public is demanding that we do a better job of
9 getting our whole docket moved out in a reasonable
10 length of time. That's the basic message. No case
11 should be withheld from trial that needs to go to
12 trial for justice sake. One day it should not be
13 delayed, whatever, if it's been on file two months.
14 If justice demands that the case be tried and
15 litigated, we ought to work to produce a system
16 that will not deny justice to people because of the
17 system itself.
18 JUDGE HITTNER: Well, Mr. Chief Justice,
19 let me add one thing to that. That's assuming
20 you've got competent judges down below, and that's
21 a real problem we have throughout the state.
22 CHIEF JUSTICE HILL: Well, you're going
23 to help us with that one because we've got
24 mandatory judicial education now. We've just
25 received the funding for it. That is one piece of

1 good news about this session. And Judge Gonzales
2 will be our liaison on the Supreme Court for the
3 program. And we need the David Hittners to get the
4 program design and make it substantive and
5 meaningful. I don't hear anything about corrupt
6 judges.
7 JUDGE HITTNER: No, sir.
8 CHIEF JUSTICE HILL: That ought to be a
9 given that we don't have corrupt judges. We ought
10 not to even have to discuss it or debate it. I do
11 hear questions of competency raised in occasional
12 places. And we need to address that just like we
13 need to with lawyers while we're on that subject.
14 I tell you very frankly that I intend to plug
15 for mandatory CLE, and don't turn me off until
16 you've given me a hearing. Don't throw me out
17 until you've heard me out. It's a signal. Even if
18 we don't need it, it's a signal. We need to start
19 sending these strong signals that we're serious
20 about competency of our professional brethren and
21 sisters and we're serious about competency of
22 judges. I didn't mean to get into my bar
23 foundation speech. But, yes, I hear you.
24 And there's a lot of exciting things right
25 now in the judiciary. There's a time for

1 everything in public affairs. And we may be very
2 close to the time when the administration of
3 justice is going to come to the forefront. If
4 we'll work hard these next two years, it's very
5 possible that we could emerge as the highest
6 priority in the next legislative session. It's
7 just possible. We need to raise up a few more
8 friends. We need to get our homework done a little
9 bit better. We need to precondition the
10 Legislature. We need to politic a little heavier.
11 We need to get our judges more involved and our
12 lawyers more involved. But it's out there. We
13 want to go for it, in my opinion. The climate is
14 just about right. Maybe we had to go through this
15 session this time and take a few lumps to buy some
16 credibility, to learn all over again what I knew
17 from seven years ago. And the time just sort of
18 erased it from my mind. You have to politic.
19 I said I was going to set an apolitical tone
20 for this court and I definitely mean that in terms
21 of the court, itself and its processes and our
22 work. We would not want it any other way. But
23 I'll tell you, I'm going to be very political when
24 it comes to working with that Legislature in trying
25 to get this ball across the goal line that we need.

1 This is -- we'll never have a better time in our
2 state, in our time to really improve the
3 administration of justice for all of our people,
4 than we'll have over the next five or ten years, in
5 my opinion. This is just part of it. It's being
6 thought out, see. We're not just talking smoke
7 anymore. We're not just talking generalities.
8 We're talking specifics now. Just like this bill
9 is very specific. And education of judges is
10 mandatory, that's very specific. Our new rules of
11 discipline are very specific. Our new judicial
12 conduct code is very specific. Our commission is
13 not a mirage, it's very much real. Our court
14 reporter problems are getting identified. They're
15 very real. But they're very specific. The Board
16 of Law Examiners -- Judge Kilgarlin did his
17 yeomanship work over there this time. We're
18 keeping them in business. We almost lost. The law
19 schools -- we're getting very specific about the
20 curriculum and what we can do to make better
21 lawyers. The admissions committees are more at
22 work out there. They're really taking their jobs
23 seriously.
24 So, there's just a multitude of things that
25 we've got emerging along this course. So, we can

1 do better. We've got a good thing going. We've
2 got a good profession. We've got a good system.
3 But we just need to -- care, nurture and guidance,
4 just a little care, nurture and guidance is what --
5 that's the era that we're in right now. And it
6 will happen if we want it to happen. We won't
7 agree on everything and I'll get out ahead of you
8 on some things and you're going to have to pull me
9 back sometimes and say, "No, that's not the way we
10 want to move." But let's do move and address these
11 problems while we've got a chance.
12 I really thank you for the opportunity of
13 serving in this office.
14 CHAIRMAN SOULES: Judge, I think that
15 certainly sets the tone for our committee, and
16 we've got the bill -- several copies of the bill
17 here. And when we take our coffee break, if you
18 people who are on the committee will pick up a copy
19 of it so that you can see it and study it before
20 you meet again, I would appreciate it.
21 Franklin, did you have something?
22 MR. JONES: I walked in about halfway
23 through this discussion and I think you had already
24 appointed this committee. And my friend Sam Sparks
25 punched me and said, "Volunteer to serve on it." I

1 don't know what he's getting me into. But I'd do
2 anything he asked me to even if I thought it was
3 wrong. So, what I'm saying is put me on there, if
4 you don't mind.
5 CHAIRMAN SOULES: Thank you. I
6 appreciate that.
7 MR. JONES: Now that I've got you
8 interrupted, Mr. Chairman, I wanted to speak up
9 before the noon hour when you were asking if there
10 were any other issues or questions which also
11 should be assigned to what I'm going to call the
12 Branson Committee or the Bill Dorsaneo Committee
13 that you appointed just before lunch to study this
14 -- these rules.
15 There was something I wanted to speak about
16 at that point, but I wanted first to be sure I
17 wasn't getting out on a point where the court
18 didn't want me. And so I didn't say anything about
19 it. But at this point in time, I'd like to bring
20 it up because I'm satisfied that I'm not going to
21 be going against the wishes of the court. And that
22 is I think that committee should be charged -- or
23 subcommittee should be charged to also study the
24 question, the overall question, of blindfolding of
25 juries in civil trials in Texas. And by that I

1 mean the prohibition, if it still exists, I'm not
2 sure it really does under the new rules. But if it
3 does still exist, I think this subcommittee ought
4 to study where Texas is with respect to the main
5 stream of the jurisprudence of this country on the
6 question of telling a jury they're not allowed to
7 know the effects of their answers. And telling
8 lawyers that you're not allowed to tell them the
9 effect of their answers or telling the judges
10 you're not allowed to tell them the effect of their
11 answers. And I would like to see that issue
12 referred to that subcommittee for their
13 consideration along with the other matters you've
14 got them charged with.
15 CHAIRMAN SOULES: Are you not talking
16 about -- you're not talking about the Appellate
17 Rules Committee or is that the one you do have in
18 mind?
19 MR. JONES: I don't see why they couldn't
20 do just as well as anybody else.
21 CHAIRMAN SOULES: I think we're going to
22 -- we will take up new matters in a little while,
23 Franklin, and let me put that down to assign a
24 subcommittee to it.
25 MR. JONES: Would the chair like a

1 motion?

2 CHAIRMAN SOULES: I will assign that out.

3 Why don't you be thinking about who else you want

4 on your committee.

5 MR. O'QUINN: He's going to make you the

6 chairman of that.

7 MR. JONES: I like that committee you

8 already had and I'm not on.

9 CHAIRMAN SOULES: I know, but that's

10 really not an appellate issue, Franklin, in my

11 judgment. And that committee is really going to be

12 saddled with a lot of work, and I don't want to

13 assign something, in addition to their appellate

14 work, to them. I'd rather have that be a smaller

15 committee of one or two or three to report back.

16 Yes, Rusty.

17 MR. McMAINS: Luke, I've been out of the

18 room for a minute, so I really don't know exactly

19 where you are and maybe I'm out of order as I

20 usually am. But I've been in the Supreme Court

21 Advisory Committee a couple of times, at least, by

22 appointment. And it seems to me that we spent a

23 lot of time frequently at these meetings talking

24 about, you know, appointments of ad hoc

25 subcommittees with regards to particular rule

1 situations. It would seem to me to be a better use
2 of manpower if -- because right now most of the
3 communications of recommendations, either from
4 administration of justice, or wherever, will go to
5 Judge Wallace and then to you. And then you have
6 to basically or seem to be basically having to wait
7 until we have a full meeting before we do any work
8 on it. It seemed to me that if we had some more
9 formal standing subcommittees, as it were, in the
10 areas, for instance, one on discovery, one on
11 appellate rules, one, you know, in that specific
12 area, rather than all of us having to go through
13 and volunteer for where we're going to put any of
14 these things, then any requests or recommendations
15 could be channeled through Judge Wallace and to you
16 for your assignment to a particular standing
17 subcommittee, which in my judgment should be
18 regional. I mean, basically, pick out three
19 lawyers on this committee that are on a
20 subcommittee that are more or less in the same
21 vicinity, that they can get together periodically
22 and hammer something out and cull through them and
23 the ones that aren't worth a darn. I mean, they
24 can show them to the rest of committee or be
25 responsible for communicating with the rest of the

1 committee, but their position is, "It ain't worth
2 working on." And it would seem to me to be a more
3 efficient use of personnel rather than an ad hoc
4 subcommittee bases.
5 I just throw that out. It may be, as I say,
6 out of order, but otherwise you're talking about
7 trying to, I think, assign all of these evaluations
8 to that same type of thing. And in light of what
9 Justice Hill indicated, we've got a lot of work
10 that needs to be done in a lot of areas, and I
11 think that we need to streamline this committee as
12 well as we need to do anything.
13 CHAIRMAN SOULES: This committee has
14 typically met once a year or less frequently.
15 MR. McMAINS: Right.
16 CHAIRMAN SOULES: It has not had standing
17 subcommittees. It hasn't had subcommittees except
18 in rare instances.
19 MR. McMAINS: I understand that.
20 CHAIRMAN SOULES: This year, in 1985,
21 we're going to meet twice. Normally it meets with
22 no preparation except in a few instances where
23 large matters have been assigned previously. The
24 second time it meets in 1985, it will meet prepared
25 because all of the matters before us will have been

1 assigned to committees for study.

2 Now, we have an awful lot of matters before
3 us and whenever -- at the COAJ, as you know, we did
4 establish standing committees. Maybe that's the
5 right way to go about organizing it. But,
6 essentially, today's meeting is going to be an
7 input and organizational meeting looking towards
8 really getting some work done in September.

9 As things have gone and since -- for the most
10 part since I've been on this committee, we would
11 wind up today and we wouldn't meet again for
12 another year. And we would simply have to pass on
13 these rules just as we see them and as fast as we
14 can get through them today whether we're going to
15 recommend them or not. And I don't feel like
16 that's really the best approach.

17 We did decide on this meeting on a bit of a
18 short order and I got the agenda to you late. I
19 confess that. But for the next meeting, we would
20 have had -- this will be the agenda for the next
21 meeting with a few additional items that may come
22 in in the interim.

23 MR. McMAINS: Well, I wasn't being
24 critical or anything in terms of this committee,
25 you know, of it's being handled or the necessity

1 for everybody's total input.
2 CHAIRMAN SOULES: I'm not being defensive
3 about that either. We had one extremely organized
4 meeting that had an agenda that went out ahead of
5 time. And it was really the last meeting. We
6 never could have gotten all that work done without
7 it, but we didn't have very active subcommittees
8 before that meeting. And it was the best organized
9 meeting, I think, that we'd had since I was on the
10 committee. And I'm trying to take that one step
11 beyond now and not only have a booklet before
12 everybody with all the rules in them in the order
13 we're going to address them, but also have reports
14 that have been assigned out to various people for
15 our September, October meeting. I think it is a
16 good idea to establish standing committees. But
17 are you suggesting that we do that now and then as
18 these rules may fall, they'll be assigned to those
19 particular committees?
20 MR. McMAINS: The way we were proceeding,
21 it appeared that you were basically asking for
22 volunteers on an ad hoc basis. It would seem to me
23 that if, as a committee, we could come up with what
24 would probably be logic components of standing
25 subcommittees and members to be assigned, then it

1 would be a fairly clerical job to go through here
2 and send these things to those people and maybe
3 even conceivably have time for the subcommittees
4 together -- to get together and start dividing up
5 the work themselves today.
6 CHAIRMAN SOULES: Well, let's -- let me --
7 MR. McMAINS: I throw that out, but --
8 CHAIRMAN SOULES: Let me ponder on that a
9 bit while we hear Newell's report on the Rules of
10 Evidence and see if I can adjust to do it that way
11 and see if that's a better way to do what I was
12 going to do. It may be.
13 PROFESSOR BLAKELY: May I be recognized?
14 CHAIRMAN SOULES: Yes, sir, please. Mr.
15 Blakely.
16 PROFESSOR BLAKELY: Judge Wallace's
17 office sent out an envelope with two documents.
18 One of these is entitled "Agenda for Meeting April
19 12, 1985." That was the meeting of the State Bar
20 Committee on the Administration of Rules of
21 Evidence in Civil Cases. And obviously not
22 everything in there is before this committee. A
23 bunch of those proposals were rejected. And I
24 passed it along to the Supreme Court simply as
25 background and so on. But nevertheless, it was

1 sent out to you. And to avoid confusion, if you've
2 got that document, you may want to put it under
3 something, so that you won't be confused by it.
4 He also sent in that same envelope a document
5 entitled "The 1984, '85 State Bar Committee on the
6 Administration of Rules of Evidence of Civil Cases
7 recommends to the Supreme Court of Texas the
8 following changes in the Rules of Evidence." And
9 that's dated May 1, 1985. There are 13 proposed
10 changes here. They came from that State Bar
11 Committee on the Rules of Evidence from our April
12 12 meeting.
13 Now, in your hard bound book that was passed
14 out this morning, you find a cover letter from me
15 to Chief Justice Hill. Right behind that you find
16 11 pages, numbered 1 through 11, and those are the
17 proposals that we're now going to consider.
18 Beginning immediately after that, you have a number
19 of unnumbered pages without a title to it. And I
20 can see, because of my familiarity with it, that
21 it's a part of that agenda. A few pages are
22 missing there at the first, one or two. Somebody
23 ought to take a black crayola and go through and
24 mark out those pages. Either that or put in the
25 missing pages, so you'd have a packet. I'm scared

1 to death that the Supreme Court may go back there
2 and pick up something and enact it and promulgate
3 it, thinking that they're getting proposals from
4 the Evidence Committee.
5 All right. So I'm looking now at an 11-page
6 document, that the pages are numbered 1 through 11.
7 These are the proposed changes in the Rules of
8 Evidence. Rule 509, of course, is the
9 Physician/Patient Privilege. And 510 is the mental
10 health privilege, the Psychiatrist/Patient
11 Privilege. Both of those, of course, have a list
12 of exceptions. Both have an exception that might
13 be referred to as the litigation exception. And
14 our committee considered those two together. This
15 would be on Page 1 of your document. That would be
16 509(d)(4). The litigation exception to the
17 Physician/Patient Privilege. And on Page 3,
18 510(d)(5) -- you have to skip a proposal on Page 2.
19 510(d)(5) is the litigation exception to the
20 Psychiatrist/Patient Privilege. And we're
21 recommending changes in both beginning here on
22 509(d)(4) on Page 1. And by the by, we adopted the
23 convention of bracketing deletions and underlining
24 new language.
25 And looking at the bracketed language there,

1 we recommend elimination of that second sentence
2 "Any information is discoverable in any court or
3 administrative proceeding," so forth, so forth, so
4 forth. That sentence really simply refers you to
5 the Rules of Civil Procedure. And the Rules of
6 Evidence, as presently written, are pretty well
7 clear of discovery matters. We've tried to stay
8 out of discovery, and this reference really is a
9 reference for discovery purposes. It would change
10 nothing to delete that sentence. It will simply
11 clean it up. And we don't have that sentence, you
12 see, in all the other privileges. And, of course,
13 you look to the Rules of Civil Procedure for
14 discovery. So, that's one reason we want to change
15 that.
16 Now, the first sentence we would strike also.
17 For one thing, the -- as presently written, 509 is
18 more protective of the Physician/Patient Privilege
19 than 510 is of the Psychiatrist/Patient. And that
20 shouldn't be so. They either ought to be the same
21 or the Psychiatrist/Patient should be the more
22 protective. We are going to recommend, do
23 recommend, that they be exactly the same.
24 A problem arose -- Jim Parsons, up at
25 Palestine, got involved in a will contest case, and

1 he was claiming that the testator was incompetent
2 and he was met -- the person representing him
3 asserted the Patient/Physician Privilege. Here's
4 the person, person's representative, who is apt to
5 benefit the most in our not getting at the truth in
6 a situation like that. He felt that some change
7 ought to be made, and this change would accommodate
8 his grievance in that particular case.
9 There is something to be said for uniformity
10 between the litigation exception on
11 Physician/Patient and the litigation exception on
12 Psychiatrist/Patient. It's confusing to have them
13 different. Sometimes it's difficult to decide
14 which really is involved, Physician/Patient or
15 Psychiatrist/Patient. So, this proposed change
16 would make them uniform.
17 We propose that it read as you see underlined
18 there on Page 1. The condition of the patient,
19 physical, mental or emotional, would have to be an
20 element of the cause of action or defense. In
21 other words, it would have to be central to the
22 case. If it is, there would be no privilege. If
23 it's simply relevant in the case, some other issue,
24 then it would be privileged. That is the effect of
25 it.

1 So, Luke, I don't know whether I'm going to
2 run till somebody objects, or whether you want to
3 have a motion on each one of these.
4 CHAIRMAN SOULES: As you proceed to
5 finish any grouping, let's go ahead and debate.
6 PROFESSOR BLAKELY: All right. I'll move
7 approval of the proposed change on Page 1,
8 509(d)(4) as recommended by the Evidence Committee
9 and approval on Page 3 of 510(d)(5).
10 MR. McMAINS: Seconded.
11 CHAIRMAN SOULES: Okay. That motion has
12 been made by Newell Blakely and seconded by Rusty
13 McMains and we're now open for discussion of those
14 changes. Bill Dorsaneo.
15 PROFESSOR DORSANEO: Why are the three
16 words "an issue of" located in the second line
17 looking at Page 1, the language there?
18 PROFESSOR BLAKELY: Probably a historical
19 explanation. It may have -- I don't know where it
20 came from. It could have come from the original
21 statute or some prior wording. I see it is in the
22 -- it was in the Psychiatrist/Patient Exception
23 510(d)(5) as presently written. So, it probably
24 came from the original statute. It may not be
25 necessary.

1 PROFESSOR DORSANEO: My question would be
2 does it mean anything? I can think of various
3 things it could mean. And I don't see any reason
4 to have that word -- those words in there, any good
5 reason.
6 MR. FRANK BRANSON: May I address this
7 for a moment? One way to deal with it is becoming
8 relevant in the practitioner area is the tort
9 litigation. The insurance carriers are using this
10 provision as carte blanche to talk to the
11 plaintiff's doctors other than merely getting
12 written records from them. And I think perhaps
13 that provision regarding discoverability may be the
14 basis of that current conflict within the trial
15 law, because plaintiff's lawyers don't generally
16 take too kindly to that.
17 MR. McMAINS: But he's just talking about
18 the word, the issue.
19 MR. O'QUINN: He's just talking --
20 PROFESSOR DORSANEO: The relevant issue
21 of physical, mental or emotional.
22 MR. BRANSTON: I'm sorry. I thought he
23 was --
24 MR. McMAINS: No, he's not talking about
25 the first part.

1 CHAIRMAN SOULES: He's talking about just
2 deleting "an issue of" so that the language would
3 be "as to a communication or record relevant to the
4 physical, mental or emotional condition." What's
5 the necessity for those three words, "relevant to
6 an issue of the physical," and so forth.
7 MR. BRANSON: I was addressing the
8 discoverability portion.
9 MR. McMAINS: I suppose if there were to
10 be an argument made, it would probably be the -- if
11 the condition, is itself, undisputed in one form or
12 another, then there might be no reason for the
13 discoverability of it. That is, it is an issue
14 when it is drawn as an issue. Whereas, the other
15 way it would always be relevant to the condition as
16 to what that condition was. But the fact that that
17 condition exists is -- it may not be an issuable
18 for either for purposes of discovery or trial, if
19 it's undisputed. So, why embarrass the patient
20 with a particular revelation of a communication
21 with a doctor that isn't disputed by anybody. I
22 don't know if that's the reason for it, but that
23 may be.
24 PROFESSOR BLAKELY: I can't explain it
25 other than just the history of the words.

1 MR. TINDALL: Can we move the question on
2 this one?
3 CHAIRMAN SOULES: If there's no further
4 discussion. Is there any other -- Frank.
5 MR. BRANSON: Could we -- could I just
6 ask Dean Blakely -- I missed the Rules of Evidence
7 meeting where this particular provision came out
8 originally. Was there a discussion as to whether
9 or not it was intended to be used in discovery for
10 the purposes I previously addressed?
11 PROFESSOR BLAKELY: The intent is simply
12 leave it to the discovery rules in the Rules of
13 Civil Procedure. The evidence rules are not
14 answering the question, they're simply referring
15 you to the Rules of Civil Procedure. Of course, if
16 it's privileged, then it's not discoverable.
17 MR. BRANSON: I think it's as you
18 addressed earlier, by leaving the word "discovery"
19 in the rule, it is being used on a regular basis to
20 allow open communication between the adverse
21 attorney and the doctor. Was that the intention of
22 the rule?
23 PROFESSOR BLAKELY: No, no. The
24 intention there is simply to refer to the Rules of
25 Civil Procedure, it seems to me.

1 JUSTICE WALLACE: And your recommendation
2 is that any information that is discoverable will
3 be taken out and will no longer be in the rules.
4 PROFESSOR BLAKELY: Yes. And then you go
5 to the Rules of Civil Procedure. And, of course,
6 it's privileged. It's not discoverable. It's kind
7 of a run for it there. It's kind of a blindfold
8 there, but it shapes it up.
9 PROFESSOR DORSANEO: These communications
10 would clearly be discoverable under the discovery
11 rules unless these privileges makes it
12 nondiscoverable.
13 PROFESSOR BLAKELY: That's right.
14 CHAIRMAN SOULES: Any further discussion
15 on this? Sam Sparks.
16 MR. SPARKS: I have one question that may
17 be -- it appears to me that you can read the
18 amended or the proposed rule in such a way that you
19 can enlarge upon the old rule because it is "of a
20 patient in any proceeding in which any party
21 relies," where the patient can be a witness rather
22 than a party. I'm not opposed to that. I'm sure
23 Frank might be, but I'm not. But is there -- was
24 there any thought in the committee that perhaps
25 we're enlarging upon in the rule that we're looking

1 at, to change "the patient was the party." In the
2 proposed change, "the patient," as I read it, is
3 not necessarily the party.
4 PROFESSOR BLAKELY: I think that's right.
5 A party has got to rely upon the condition. It's
6 got to be a material proposition in the case. But
7 it need not be the patient who is relying on it.
8 PROFESSOR DORSANEO: The patient could be
9 a witness, like a bus driver who can't see.
10 PROFESSOR BLAKELY: Could be.
11 MR. SPARKS: Doctor who can't see.
12 CHAIRMAN SOULES: Any other question or
13 discussion?
14 PROFESSOR DORSANEO: This condition would
15 have to be put in issue somehow.
16 PROFESSOR BLAKELY: Yes. Under the
17 substantive law governing the case, it would have
18 to be an element of the cause of action or an
19 element of the defense. Material proposition. In
20 other words, it would have to be central in the
21 case and not merely evidentiary.
22 CHAIRMAN SOULES: Any other discussion?
23 Any other questions?
24 Bill, are you making any suggestion as to
25 those three words?

1 PROFESSOR DORSANEO: Not really, Luke. I
2 have trouble with the words "to an issue of." I
3 understood -- that's what Rusty said is what I was
4 thinking. It seems to me that if we're going to
5 require somebody to do something to put this in
6 issue -- this condition in issue, I have a little
7 trouble with -- I understand the concept of it
8 being important to the case, but "relies upon the
9 condition as an element of his claim or defense" I
10 have a little trouble with that language, but I
11 can't improve on it.
12 MR. O'QUINN: Why should it be where the
13 condition is relevant -- where the condition is
14 relevant to an issue in the case?
15 PROFESSOR DORSANEO: That's what I would
16 think. They obviously --
17 MR. O'QUINN: All it has to be is
18 relevant to the case.
19 PROFESSOR BLAKELY: Then you might as
20 well throw the whole thing out. You're simply down
21 to a question of relevancy. If it's relevant, it
22 comes in. You have no privilege at all.
23 Obviously, these changes would shrink the coverage
24 of the privilege, but it's still there to some
25 extent. And if you just want to say it's

1 admissible if it's relevant, then there is no
2 privilege at all. And that may be your position.
3 PROFESSOR DORSANEO: I guess I'll file
4 something that says this condition is an issue in
5 the discovery content. This condition is an issue
6 in the case because if I rely on the condition as
7 an element of my claim of defense, and then what
8 does somebody say back?
9 PROFESSOR BLAKELY: What somebody would
10 say back -- look -- outline your cause of action
11 there or outline your defense. What are the
12 elements of it. And you don't have the say so.
13 The substantive law gives the answer to that,
14 substantive law in your pleadings. What are the
15 elements of respondeat superior? What are the
16 elements of negligent entrustment? You don't have
17 any say so, the substantive law answers that for
18 you.
19 PROFESSOR DORSANEO: Not as to factual
20 theories that -- look up -- I wonder if this means
21 anything different from "relevant to an issue in
22 the case." I can see that it's trying to be
23 narrower than that, but I can't identify its
24 contours by reading it. That's probably okay
25 because it's a very difficult thing to resolve.

1 MR. O'QUINN: Let me take his example of
2 the bus driver with bad eyesight. Where are you
3 going to be if you're met with an objection that
4 his eyesight is not an element of the case? The
5 element of the case is, was the bus driver's
6 negligence in lookout. I don't know what the
7 element of the case is. Did he negligently drive
8 the bus that day? Dorsaneo wants to argue, "Yeah,
9 the reason he did bad is because he can't see," or
10 whatever. He's got bad eyesight, I guess, is what
11 you're talking about.
12 PROFESSOR DORSANEO: That's right. I
13 said that's relevant to negligence.
14 MR. O'QUINN: Why shouldn't the jury know
15 about that?
16 PROFESSOR DORSANEO: But -- no. But I
17 can't see where you ever stopped it. If it's not
18 relevant to an issue in the case seems to be what
19 he's getting at, but he's trying not to get that
20 far.
21 MR. O'QUINN: But what you're saying --
22 if I hear you right, you're saying, Professor, that
23 even though it's relevant to the case, there can be
24 occasions in which you can't get it in because
25 somehow it doesn't meet this test of being the

1 central issue.

2 PROFESSOR BLAKELY: Yes, it's not an

3 element of the cause of action. Not an element of

4 defense.

5 PROFESSOR DORSANEO: Well, somebody's

6 physical condition never is an element of defense

7 unless it's negligence.

8 MR. O'QUINN: How can it be relevant

9 unless it's raised by the pleadings, is what I

10 don't understand. And pleadings raise the defense

11 is then cause of action.

12 PROFESSOR BLAKELY: Well, all kinds of

13 evidence becomes pertinent to prove some material

14 proposition, and you didn't have to plead your

15 evidence.

16 MR. BRANSON: Would a general denial be

17 sufficient to allow the defense to use this

18 provision since there really are not many elements

19 to it?

20 PROFESSOR BLAKELY: I don't know. It

21 doesn't sound like it.

22 PROFESSOR WALKER: All of the evidence is

23 admissible under a general denial.

24 PROFESSOR BLAKELY: But just take the

25 lack of competency of the testator. I take it that

1 might put his mental condition -- make his mental
2 condition of material proposition in a will
3 contest.
4 MR. TINDALL: I see what you --
5 PROFESSOR BLAKELY: There would be no
6 privilege there, you see.
7 MR. TINDALL: This rule has always
8 created problems in divorce cases where a party's
9 claiming they cannot work and they want a greater
10 division of the marital estate. And yet because
11 the rule is now limited to damage suits, you can't
12 get to the evidence.
13 MR. O'QUINN: I don't conceive of -- you
14 probably have one, but I don't conceive of the
15 example where something could be relevant, which
16 means in my mind has to be raised by the pleadings
17 and yet not be an issue in the case.
18 MR. TINDALL: If it's relevant it's going
19 to be discoverable and admissible.
20 CHAIRMAN SOULES: Unless it's privileged.
21 MR. O'QUINN: Yeah, but we're saying if
22 it's relevant, it's no longer --
23 PROFESSOR BLAKELY: You've got all kinds
24 of lawsuits where there is no material proposition
25 in there consisting of a person's mental, physical

1 or emotional condition.

2 MR. O'QUINN: Sure. Contract.

3 PROFESSOR BLAKELY: And even if a

4 person's mental, emotional or physical condition

5 might tend to prove something in the case, it might

6 be relevant, nevertheless it would not be a

7 material proposition in the case. It would not be

8 an element of the party's cause of action or

9 defense.

10 MR. O'QUINN: My problem is I don't

11 conceive of a case where it would be relevant to

12 prove something and it wasn't raised as an issue in

13 the case.

14 PROFESSOR BLAKELY: It's not enough that --

15 MR. O'QUINN: If it's not an issue in the

16 case, how can it be --

17 PROFESSOR BLAKELY: It's not enough that

18 the party's condition is relevant to an issue in

19 the case. The issue has to be his condition. That

20 has to be a material proposition.

21 MR. O'QUINN: What you're saying in his

22 bad eyesight case, that if somebody alleges the bus

23 company negligently hired this man with bad

24 eyesight, it comes into evidence. But if somebody

25 just claims that he had a bad driving day and one

1 of the reasons he had a bad driving day is because
2 he's got terrible eyes, is not going to come in.
3 PROFESSOR BLAKELY: You tell me the
4 substantive law in the area and maybe I can --
5 MR. O'QUINN: The issue is, did he
6 negligently drive the bus in the second example.
7 The issue in the first example, did they
8 negligently hire him with bad eyesight.
9 PROFESSOR BLAKELY: Outline the elements
10 of the cause of action. State what the material
11 proposition is. Not your evidence, but your --
12 MR. O'QUINN: Did the bus company
13 negligently hire him with bad eyesight? Was that a
14 proximate cause of the accident? That's the first
15 case. The second case: Did the bus driver
16 negligently drive the bus? Is that a proximate
17 cause of the accident?
18 MR. KRONZER: So, John, on your supposed
19 example, his eyesight has still got to be causing
20 it.
21 MR. O'QUINN: You mean either way?
22 MR. KRONZER: Either way.
23 MR. O'QUINN: You're right. I left out
24 issues. Did they negligently hire him with bad
25 eyesight? Secondly -- well, he had a proximate

1 cause. But I don't see why it should come in one
2 case and not come in the other. I don't understand
3 the difference there.
4 PROFESSOR DORSANEO: I think saying that
5 the substantive law provides us with the answer
6 makes us avoid deciding the issue, because the
7 substantive law probably doesn't provide us with
8 the answer. We spend a lot of time thinking about
9 causes of action, elements, but it's a lot more
10 complicated than that. I suppose one could read
11 this to say that the only time that the party
12 relies on a condition as an element of his claim of
13 defense, with respect to the claim, I suppose,
14 would be -- what element, damages.
15 MR. O'QUINN: Physical condition,
16 incompetency.
17 PROFESSOR DORSANEO: Yeah, or something
18 like that. Or defense. When does somebody rely
19 upon the condition, physical or mental, of the
20 person as an element of his defense read in a very
21 strict sense.
22 MR. ADAMS: What so the plaintiff?
23 CHAIRMAN SOULES: Avoidance of a
24 contractual obligation.
25 PROFESSOR DORSANEO: I guess. And I see

1 this could either be read as broadly as an issue in
2 the case or in some narrow way that is unknowable.
3 MR. O'QUINN: You might have the defense,
4 I think, in a tort case. Maybe the defense was
5 that the plaintiff was intoxicated. Somebody wants
6 to get at the medical records of him immediately
7 after to prove that the records of the treating
8 doctor showed he was intoxicated.
9 PROFESSOR BLAKELY: Suppose somebody
10 pleads statute of limitation on a cause of action.
11 MR. O'QUINN: All right.
12 PROFESSOR BLAKELY: And then the
13 plaintiff alleges that the plaintiff was non compos
14 mentis during a period. And thus toll the -- the
15 statute was tolled during that period. Would that
16 -- I don't know whether that's -- I guess that's an
17 offensive use in a sense. That might be considered
18 part of her cause of action.
19 MR. O'QUINN: What I'm having a hard time --
20 MR. KRONZER: That wouldn't be, Dean,
21 that only arises if it's pled defensively. And
22 that's an avoidance of defensive plea. It's not
23 part of the --
24 PROFESSOR BLAKELY: We should perhaps --
25 should have put in a rebuttal, element of rebuttal.

1 MR. KRONZER: That's what that would be.

2 PROFESSOR BLAKELY: You could argue that

3 it's an element of cause of action if it's a

4 rebuttal element, technical rebuttal. Surely our

5 choice is not to abolish the privilege altogether

6 or have it -- have no exceptions to it, no

7 litigation exception to it. Surely those are not

8 our options.

9 MR. REASONER: Dean, I think it might

10 have helped me if you would indicate what is it

11 that you wish to avoid by putting in this last

12 phrase "which any party relies on upon the

13 condition as an element of his claim or defense."

14 What are you worried about coming in if you simply

15 say, "relevant to an issue of the physical, mental,

16 emotional condition of a patient in any

17 proceeding?"

18 PROFESSOR BLAKELY: Well, it seemed that

19 that issue is broad. I suppose we offer A to

20 prove, B to prove, C to prove, D maybe. And we saw

21 this as the ultimate -- as the end of the line.

22 The condition would have to be the end of the line

23 in that chain of proof material proposition.

24 MR. REASONER: I guess my problem is that

25 our jurisprudence is so murky on what a cause --

1 what the elements of a cause of action are, that
2 that's still not really much guidance, it seems to
3 me.
4 PROFESSOR DORSANEO: That's what I was
5 trying to say.
6 PROFESSOR BLAKELY: And it wouldn't --
7 you would say then it doesn't improve it in the set
8 of conditions we said. A material proposition
9 relies upon the condition as a material proposition
10 of his claim or defense. That would be a
11 synonymous term.
12 MR. O'QUINN: It's getting worse.
13 MR. REASONER: I'm not familiar with any
14 cases defining what a material proposition is.
15 MR. O'QUINN: That's only part of an
16 element of a cause of action.
17 MR. ADAMS: Something like relevance. You
18 just have to say relevance.
19 MR. SPARKS: Yeah, what if you change
20 "as" and then you -- instead of saying, "an element
21 of," are you talking about as evidentiary to a
22 claim or defense?
23 PROFESSOR BLAKELY: No. It's not merely
24 evidentiary. It's got to be --
25 MR. SPARKS: So you're talking about

1 something more broad, more limited?

2 PROFESSOR BLAKELY: Yes. It doesn't do

3 -- it's simply circumstantial evidence in the case.

4 It's got to be -- if you outline your cause of

5 action, or outline your defense -- and I think of

6 substantive law in those terms, over in the

7 criminal law field, it's fairly easy to see the

8 elements of crime or the elements of the defensive

9 theory. It's more difficult, I suppose, in civil

10 cases, but I still think in terms of cause of

11 action or --

12 MR. REASONER: Well, would this be

13 designed to prevent you from using it for

14 impeachment purposes?

15 PROFESSOR BLAKELY: Yeah, it wouldn't be

16 useable for impeachment purposes, no.

17 MR. O'QUINN: What if the testate -- what

18 if somebody came in and said the testator was

19 competent, you couldn't get the record to impeach

20 that. What if a doctor got on the stand and said

21 that the testator was --

22 PROFESSOR BLAKELY: Well, then --

23 MR. O'QUINN: Could I get his records to

24 impeach him?

25 PROFESSOR BLAKELY: If there was an issue

1 of competency, it really wouldn't be an element of
2 issue. This is one of the requirements of
3 substantive law, that he be competent.
4 MR. O'QUINN: Okay. But you could use it
5 -- so really you're back to whether it's a crucial
6 issue in the lawsuit.
7 PROFESSOR BLAKELY: Yeah.
8 MR. O'QUINN: To me, just here thinking
9 about it -- to me the thing about information that
10 my doctor has, or things of that nature, mainly I
11 don't want that out. I don't want somebody
12 discovering it. That to me is the point of that
13 privilege. That's personally between he and I,
14 what we've talked about. And that should not be
15 discoverable.
16 Leaving aside this, I think once it's
17 discoverable, I don't see what the big policy
18 argument is about not letting the jury hear it. I
19 mean, it's already discovered. It's out. It's
20 known. And to me it's -- the privilege is a public
21 policy. We're excluding the truth. And any time
22 you exclude the truth, it seems like to me you've
23 got to have a counter weight of public policy. And
24 to me the public policy is, don't let anybody
25 discover my medical record because that's a

1 personal thing between me and the doctor. But if
2 there's some issue in the case that warrants
3 discovery of that information, I don't see why it
4 shouldn't then come on in, assuming that it still
5 is relevant to the lawsuit. But I'm just saying
6 that the lawsuit -- that's irrelevant.
7 CHAIRMAN SOULES: Dean, the concept of
8 waiver of a privilege by an issue injection is one
9 that we saw recently in a Supreme Court case where
10 they got the woman's mental records.
11 PROFESSOR BLAKELY: Ginsberg (Phon.)
12 CHAIRMAN SOULES: Ginsberg. Discovering
13 privileged matter, of course, is prohibited unless
14 there's been a waiver. Does that law -- does that
15 new case take care of this rewrite? Do we need the
16 writing in view of Ginsberg? Are we going to say --
17 PROFESSOR BLAKELY: You probably don't
18 from the plaintiff's standpoint. She was going to
19 use it, the court said, as a sword.
20 CHAIRMAN SOULES: That's a waiver by the
21 party who could claim the privilege by injecting
22 the issue. Either side, defense or plaintiff,
23 either as a sword or as a shield, if they put that
24 issue in evidence under Ginsberg, they waive it.
25 And the waiver takes care of the discoverability of

1 it, it seems to me, at that juncture. I don't know
2 whether we still need a rewrite, which obviously is
3 difficult, or whether we think we can rely on that.
4 And what I'm really headed to here is, do we
5 believe that today, around this table, we're going
6 to be able to make an informed vote on whether to
7 recommend these changes to the Supreme Court or do
8 we feel they need further study by people like
9 O'Quinn and Branson and Newell.
10 MR. O'QUINN: I'm already staying.
11 CHAIRMAN SOULES: A lot of these things --
12 see, this committee has not met for -- didn't meet
13 in all of 1984 and probably hasn't met in 18
14 months. And so we've got a lot of backlog, but
15 things that need study, we should study, I feel.
16 And I don't know whether this is one of them. Let
17 me get a consensus on that.
18 How many feel that we're going to get this
19 resolved if we keep working on it here? On the
20 other hand, I'm going to say how many feel it
21 should be referred for further analysis and report
22 next time? How many feel we should continue to
23 work on it now? Raise your hands. Seven. All
24 right. How many feel it should be referred to
25 committee? Okay. Well, we'll keep working on it

1 then. What further discussion do we have?

2 MR. BEARD: Why should we not be able to

3 have discovery to impeach a witness? He says he

4 saw or he heard, the medical record showed that he

5 was 2500 or couldn't hear. Why shouldn't that be

6 disclosed?

7 JUDGE HITTNER: And usable.

8 MR. BEARD: And usable.

9 CHAIRMAN SOULES: Does that go to the

10 issue of whether there should be a privilege at

11 all? Your question, Pat.

12 MR. BEARD: Well --

13 MR. KRONZER: But it depends what the

14 issue is.

15 MR. BEARD: I don't think discovery

16 should completely go on the relevancy issue, but I

17 don't see why you should not be able to impeach a

18 witness to show he couldn't see or hear what he was

19 claiming he was.

20 CHAIRMAN SOULES: What's your input, Mr.

21 Kronzer?

22 MR. KRONZER: What is an issue in Texas?

23 Does it have to be the elements of a substantive

24 cause of action or are you talking about something

25 like Pat's talking about? And that does pretty

1 much away with the whole privilege, if you're
2 talking about that.
3 PROFESSOR BLAKELY: You're two poles, of
4 course, are no privilege, one pole. The other is
5 complete blanket privilege, no exceptions.
6 MR. BRANSON: Dean, didn't that privilege
7 come out 4590(i), originally?
8 PROFESSOR BLAKELY: Yes.
9 MR. BRANSON: Had the Legislature already
10 addressed the issue? The chairman asked us whether
11 we need to deal with the privilege.
12 PROFESSOR BLAKELY: Well, the Supreme
13 Court, when it promulgated the Rules of Evidence,
14 repealed that statute insofar as the civil cases
15 are concerned. So this is it. This is the
16 controlling -- this is the control.
17 PROFESSOR DORSANEO: Isn't there a middle
18 pole like the one that's used for trade secrets?
19 Granted, it's a little bit sloppy.
20 PROFESSOR BLAKELY: Well, in that case --
21 PROFESSOR DORSANEO: If the allowance and
22 the privilege will not tend to conceal fraud or
23 otherwise work injustice involve the balancing
24 conflict.
25 PROFESSOR BLAKELY: Now or otherwise work

1 injustice.

2 MR. O'QUINN: I love that.

3 PROFESSOR BLAKELY: You want to say

4 element of a cause of action is vague, how about

5 injustice.

6 MR. O'QUINN: Well, we deal with that all

7 the time. We know how to handle that.

8 MR. McMAINS: Justice is losing.

9 PROFESSOR DORSANEO: Listen to me here

10 for a minute. It seems to me that this is the kind

11 of thing -- we're going to have it not be

12 absolutely privileged and it's just not going to be

13 absolutely privileged. Then this is going to --

14 why wouldn't it be a good idea to have it decided

15 on an individual case basis as to whether this is

16 just the kind of thing that ought not to be

17 discoverable because its relevance as to an issue

18 in the case is marginal and disclosure of it would

19 be really harmful? Is that adding too much

20 procedure in this?

21 MR. McMAINS: Let me ask you this. Use

22 of the term "records". Use the term "relevance"

23 that is here, but carry forward the relevance that

24 is in terms of the legal relevance that's used in

25 the code.

1 PROFESSOR BLAKELY: If your only
2 limitation is relevancy, then you have no
3 privilege.
4 MR. KRONZER: That's right. We're
5 already subject to that.
6 MR. BRANSON: Bill, read that language
7 again down in the trade secrets.
8 MR. McMAINS: No, you know what I'm
9 talking about, the section in the Rules of
10 Relevance that says --
11 PROFESSOR BLAKELY: 401.
12 MR. KRONZER: I'm not sure in some of my
13 cases I want to limit this.
14 MR. McMAINS: The relevance is so slight,
15 it can't cause harm or whatever.
16 PROFESSOR BLAKELY: 403.
17 MR. McMAINS: That's admissibility.
18 JUDGE HITTNER: Excuse me. I know the
19 problem the court reporter's facing because they
20 get this every day in trial. When they start
21 throwing their hands up, that means everybody's
22 talking at the same time. So really, if we want to
23 get it down --
24 I gather that was your position, right?
25 They can only take one at a time. I have

1 nothing else to say.

2 CHAIRMAN SOULES: All right. What

3 language are we going to use? Are we going to vote

4 on this language or does somebody have a change in

5 language or are we going to refer it to the

6 committee? I either want a change in language or

7 vote on this language or refer it to a committee.

8 JUDGE HITTNER: Mr. Chairman, can we have

9 -- sum it up -- a couple of sentences to each side?

10 CHAIRMAN SOULES: Fine. Who wants to --

11 Newell, why don't you speak for the proposition.

12 PROFESSOR BLAKELY: Probably it's not

13 necessary. I'd simply repeat -- I sit here

14 thinking of causes of action being made up of

15 elements. I'm thinking about "Prosser on Torts" or

16 something and defenses being made up of elements

17 And the substantive law as pled in the case. So,

18 the pleading might -- the pleading selects the

19 particular cause of action or the theory of the

20 cause of action. And the condition of the patient

21 would have to be an element, either the cause of

22 action or the defense for the privilege to go.

23 Otherwise it would be privileged. It's merely

24 evidentiary, merely logically relevant for

25 something in the case. That wouldn't do.

1 CHAIRMAN SOULES: All right. Let's have
2 the counter of that.
3 MR. O'QUINN: Let me ask Bill something.
4 What word would you remove, Bill? Because I don't
5 want to speak against the issue generally, because
6 I think the privilege ought to be straightened out
7 anyway. I agree with the basic premise, I'm saying
8 whether you have a counter proposal.
9 PROFESSOR DORSANEO: I'm not going to
10 make a counter proposal. I think different wording
11 could be used, but I think this is a difficult area
12 and I'm just going to defer to the evidence,
13 Professor, on it. I mean, I'd like to ask him is
14 it not true that in many modern codes of evidence
15 they treat this on a balancing kind of basis,
16 rather than trying to make some sort of a rule
17 oriented -- take some sort of a rule oriented
18 approach?
19 PROFESSOR BLAKELY: I'd hesitate to say
20 so. I know very often the clergy privilege is on
21 the balancing sort of thing and the trade secrets
22 on a balancing sort of thing and so forth. I don't
23 know if it's Physician/Patient,
24 Psychiatrist/Patient. It may be their
25 jurisdiction.

1 PROFESSOR DORSANEO: The difficulty that
2 I have is knowing what is the better policy choice
3 either from a personal perspective. And I do think
4 this is -- that this coordination of 509 and 510
5 and the elimination of the discovery language, I
6 think this is a definite improvement over what we
7 have now. And I'd be reluctant to be too critical
8 of it because I can't suggest how it could be
9 improved and I don't necessarily think that the
10 balancing approach is the appropriate one. But I'm
11 not certain about it.
12 MR. O'QUINN: Let me ask this question,
13 Bill. To me the problem is what Harry Reasoner
14 kind of mentioned is trying to figure out what
15 these elements are. Why don't we just say "as a
16 part of the claim of defense?" We don't get caught
17 up in the legalism about what are elements or not.
18 Would that be a problem?
19 PROFESSOR BLAKELY: Well, does part mean
20 more to you than elements of cause of action?
21 CHAIRMAN SOULES: Steve McConnico, do you
22 have a question?
23 MR. McCONNICO: I just didn't understand
24 what his "part" was?
25 MR. O'QUINN: "Part of a claim of the

1 defendant."

2 PROFESSOR DORSANEO: I like that better

3 myself because the term "cause of action" has so

4 many cases. I could talk for about a half an hour

5 about all the different definitions of all the

6 various professors over the years, defined in one

7 way or the another. You could read Page Keeton's

8 early article on this subject. And we would

9 probably be better off to stay the heck away from

10 all that. And I think it would be no great damage

11 done to the principal by saying "part of", and I

12 don't think saying "an element" solves any problems

13 for us. I think it sends us off into a lot of

14 technicalities that don't really have much to do

15 with the thrust of the proposal.

16 CHAIRMAN SOULES: Is there a Motion to

17 Amend to change "an element" to "a part"?

18 MR. O'QUINN: I move.

19 CHAIRMAN SOULES: Second?

20 PROFESSOR DORSANEO: Second.

21 MR. KRONZER: What's the Motion? Excuse

22 me.

23 MR. McMAINS: Motion is to change the

24 word "element," basically, "an element" to "a

25 part."

1 MR. KRONZER: Well, I know that -- if I
2 may speak -- I know that Professor Dorsaneo has
3 blessed it with there being some perceptable
4 distinction between the two, however, I need an
5 explanation of that. The difficulty following how
6 you can counsel these angels standing on different
7 pinpoints.
8 MR. McMAINS: I think he said there is an
9 imperceptible distinction.
10 MR. O'QUINN: What he's saying -- as I
11 understand what he's saying is, that we don't get
12 caught up in esoteric arguments about what are the
13 elements of the cause of action. In other words,
14 if the matter involves part of somebody's claim or
15 somebody's defense, then it's involved in their
16 claim or defense, then the condition -- information
17 about the condition should be told to the jury.
18 MR. BRANSON: But then aren't you really
19 bringing it back to relevancy and doing away with
20 the frivilous?
21 MR. O'QUINN: No, not entirely, because
22 one thing he was concerned about is if somebody was
23 testifying and somebody wanted to find out if a
24 person was even a competent witness, go get all his
25 medical record and see if he's got degenerative

1 brain disease where he maybe can't recall events
2 correctly. He didn't want all this type of stuff
3 coming in.
4 MR. KRONZER: But you're not going to let
5 the bar down for that. That would get me.
6 CHAIRMAN SOULES: All right. We have
7 other matters here that we have to deal with and
8 there are a lot of them. So, I'm going to split
9 the vote three ways. Those in favor of the
10 proposition -- well, first of all those in favor of
11 the amendment? And unopposed? And then with --
12 without the amendment as that vote goes. Those in
13 favor of the recommendations, those against
14 recommendations and those in favor of further
15 study. So, those in favor of the amendment to
16 substitute "a part" in the place of "an element,"
17 please raise your hands. That looks like 13.
18 Those opposed -- there are 6. Those in favor of
19 the recommendations, please raise your hands.
20 MR. TINDALL: As amended?
21 CHAIRMAN SOULES: As amended.
22 MR. TINDALL: One question here before we
23 vote. I notice we seem to be dissecting this code.
24 Should we put by any chance "to the party's claim
25 or defense"?

1 CHAIRMAN SOULES: In favor of that, say
2 aye. Opposed? With those two amendments, those in
3 favor of the recommendation, please show your
4 hands.
5 PROFESSOR BLAKELY: I thought we were
6 still discussing. He asked a question.
7 MR. TINDALL: I asked a question. Should
8 we use "the parties claim or defense."
9 PROFESSOR BLAKELY: Now, "the party"
10 would refer back to the party with the condition.
11 And as it's worded, any party relies.
12 MR. O'QUINN: Let's don't get caught up
13 in dissecting.
14 MR. TINDALL: I thought you were trying
15 to get rid of his and hers through this.
16 MR. O'QUINN: Well, an occasional his --
17 MR. TINDALL: I'm not going to play those
18 language games, but later on we vote on one like
19 that.
20 MR. O'QUINN: How about a claim?
21 MR. TINDALL: The claim or defense.
22 MR. O'QUINN: Okay. The claim.
23 MR. REASONER: I don't understand the
24 problem using party, you've already used party in
25 the phrase.

1 MR. SPARKS: You used patient earlier.
2 MR. O'QUINN: So, what do you want to
3 say, "of the party"?
4 MR. TINDALL: Parties claim for defense.
5 MR. McMAINS: You want "the" or "a"? It
6 should be "a".
7 MR. BRANSON: Does the party there refer
8 to the party of litigation or the party of the
9 condition?
10 PROFESSOR BLAKELY: Party in the
11 litigation.
12 MR. O'QUINN: That's right.
13 MR. BRANSON: So, if you had a witness
14 who's competence came into being, this would not
15 apply?
16 MR. O'QUINN: Right. Would not apply.
17 Because it's not a part of a claim or defense.
18 MR. BRANSON: But just out of curiosity,
19 why not? If you've got someone who alleges to have
20 seen something, that's blind as a bat.
21 MR. O'QUINN: If I understand what
22 Professor Blakely says, we're not going to let the
23 bars down entirely. We're not going to let
24 everything come in just because it's relevant to
25 something. We're going to have to kind of let the

1 bar down a little bit.
2 MR. KRONZER: He didn't inject the issue,
3 Frank. The party or the witness didn't inject, he
4 was drug in there.
5 MR. BRANSON: Sometimes he's drug in
6 early enough, you can find out about his record.
7 MR. KRONZER: That's true.
8 MR. O'QUINN: Did you move to change
9 "his" to "a party"?
10 MR. TINDALL: "A party" or "the party's"
11 claim or -- it would be "a party's."
12 JUDGE HITTNER: P-A-R-T-Y-'-S?
13 CHAIRMAN SOULES: All right. Those in
14 favor of changing "his" to "a party" or "the
15 party."
16 MR. TINDALL: "A party's" apostrophe S.
17 CHAIRMAN SOULES: "A party's" apostrophe
18 S, say Aye. Opposed? Okay. With those two
19 changes, those in favor of the recommendations for
20 changes to Rule 509(d)(4) and 510(d)(5), please
21 hold your hands up. 17 in favor. Those opposed?
22 One. Does anyone -- that's a majority. That makes
23 a majority without taking a third count. All
24 right.
25 Dean, if you'll go forward then with the next

1 recommendation.

2 PROFESSOR BLAKELY: If you'll turn back

3 to Page 2. If you'll turn back to Page 2, we're

4 back on Physician/Patient again and a different

5 exception, 509(d)(5). And as that reads presently,

6 a doctors done something wrong and hears an

7 investigation under the Medical Practice Act and so

8 on. The privilege has to give way there, the

9 present rule says. You have the same problem on

10 the investigation of a nurse. And as the

11 reporter's note says down there, that problem was

12 brought to the attention of the committee by

13 counsel to the Board of Nurse Examiners. And

14 there's the same need to provide an exception when

15 you're investigating a nurse. So, I recommend the

16 approval of that new language underlined at the

17 bottom of Page 2. So moved.

18 PROFESSOR DORSANEO: Second.

19 CHAIRMAN SOULES: Was that Bill Dorsaneo?

20 PROFESSOR DORSANEO: Yes.

21 CHAIRMAN SOULES: Does this need

22 discussion? Okay. We're ready to vote. Those in

23 favor, say aye. Opposed? There are none. That

24 carries.

25 PROFESSOR BLAKELY: On Page 4 is a

1 competency problem. We set up in 601 incompetency
2 -- certain incompetency provisions with respect to
3 children -- (a)(2), 601(a)(2), "children or other
4 persons who, after being examined by the court,
5 appear not to possess sufficient intellect to
6 relate transactions with respect to which they are
7 interrogated." That came from the Code of Criminal
8 Procedure, and the Code of Criminal Procedure also
9 had provided "or who do not understand the
10 obligation of an oath."
11 A bill was dropped into the Legislature by
12 Representative Mike Toomey to provide -- let me see
13 here where I -- that would amend our evidence rule
14 as well as the Code of Criminal Procedure.
15 "However, no child nine years of age or younger may
16 be excluded from giving testimony for the sole
17 reason that such child does not understand the
18 obligation of an oath."
19 Well, the liaison committee that originally
20 proposed the Rules of Evidence started to do away
21 with this competency thing altogether. The federal
22 rules do away with it and simply leave it to the
23 attorney. If he wants to put the person on, all
24 right, and leave it to the jury to evaluate the
25 testimony. But our committee decided, the liaison

1 committee, the Supreme Court promulgated the Code
2 of Criminal Procedure provision.
3 But in the light of this proposal by
4 Representative Toomey raising the problem, we
5 decided it wouldn't cost anything to throw out "or
6 who do not understand the obligation of an oath."
7 If a child has sufficient intellect to grasp the
8 situation and say something sensible about it, the
9 jury wouldn't be misled. In all likelihood he has
10 some elementary grasp of the difference between
11 truth and a story. And if he likes one, he would
12 like the other. So, it probably is not costly to
13 eliminate that, and the committee just decided to
14 go ahead and make that change. So, we would
15 eliminate that bracketed language "or who do not
16 understand the obligation of an oath."
17 Move for approval, Mr. Chairman.
18 MR. CASSEB: I second it.
19 CHAIRMAN SOULES: Judge Casseb seconds.
20 Does this need discussion? Those in favor, say
21 aye. Opposed? There are none. That carries.
22 PROFESSOR BLAKELY: On Page 5 here is
23 Rule 610. This was recommended to the Supreme
24 Court by the original liaison committee. It's
25 copied from the federal rules. "Evidence of the

1 beliefs or opinions of a witness on the matters of
2 religion is not admissible for the purpose of
3 showing that by reason of their nature his
4 credibility is impaired or enhanced." This really
5 had come to be the common law practice. Here we
6 are, a small community, let's say of Baptist, and
7 we want to show this witness is a Catholic because
8 we hold Catholics in our little community in low
9 esteem and whatever they would say would be
10 unreliable, and so on. That has felony disuse of
11 common law, and the federal rules prohibit it and
12 we so recommended to the Supreme Court. The
13 Supreme Court dropped it. And did not promulgate
14 it. I do not know why. So, at our meeting of the
15 Evidence Committee, it was recommended that once
16 again we try with the court to put in 610.
17 It may be that the court thought that the
18 constitutional provision, which provides, "No
19 person shall be disqualified to give evidence in
20 any of the courts of this state on account of his
21 religious opinions or for want of any religious
22 beliefs." Thought that that had covered it. But it
23 does not. That constitutional provision simply
24 provides that no person shall be incompetent, it
25 doesn't say about impeachment.

1 Also there's a Statute 3717, "No person shall
2 be incompetent to testify," so forth, so forth.
3 That, too, deals with incompetency. It does not
4 deal with impeachment. The way the rule is worded
5 -- proposed rule is worded, it would allow you to
6 impeach to show bias or prejudice. This plaintiff
7 is -- here comes a witness, testifies favorable to
8 the plaintiff, very favorable. Shouldn't the jury
9 know that both of them are on the Board of Deacons
10 down at the 142nd Baptist Church. Sure. A member
11 of the same little group.
12 And so you could use it to show bias. You
13 would not be using it to show that by reason of the
14 nature of their particular religious belief that
15 their credibility is impaired or enhanced. So, the
16 committee decided to try the court once again on
17 this. It would mean renumbering 611, 12, 13 and
18 14, and that would put it back in sync with the
19 federal rules. We got out of number alignment with
20 the federal rules when the court dropped 610. So,
21 it would mean renumbering those.
22 I recommend approval, Mr. Chairman.
23 CHAIRMAN SOULES: Frank Branson.
24 MR. BRANSON: Dean, I understand the
25 reasoning behind the recommendation for the

1 standard organized religions and the regional
2 differences. But the definition of religion has
3 occasionally caused the court some problems. Let's
4 assume you have a rather unorthodox religious
5 organization. Is that not the type of thing that
6 would be reasonable to question the witness about,
7 such as the airline pilots who set up a church to
8 avoid paying taxes?
9 JUDGE HITTNER: I think this is only
10 geared toward credibility, though, isn't that
11 correct?
12 PROFESSOR BLAKELY: Yes.
13 JUDGE HITTNER: Am I correct in saying if
14 there's any other reason to go into this, it would
15 not be prohibited? You're talking just about basic
16 credibility as a human being testifying from the
17 witness stand?
18 PROFESSOR BLAKELY: Yes.
19 MR. BRANSON: Well, let's assume the
20 organized religion that believes in human
21 sacrifice.
22 MR. ADAMS: So what?
23 MR. BRANSON: Is that contradicting
24 religion?
25 PROFESSOR WALKER: That's your religion.

1 MR. BRANSON: But the problem that I had
2 with it is not the general proposition that you
3 gave, but there are a lot of potential exceptions
4 and a lot of legal opinions that are going to have
5 to be written, I suspect, to define religion.
6 MR. TINDALL: It's been in the federal
7 rules how many years, ten?
8 PROFESSOR BLAKELY: Well, I think it's
9 been -- in the federal rules? Oh, yes, since '75.
10 ten years.
11 MR. TINDALL: Has it created any cases in
12 ten years, that you know of?
13 PROFESSOR BLAKELY: Not that I know of.
14 And it's conceivable that the absence of it
15 wouldn't change the question very much.
16 Nevertheless, the sponsors of it, before our
17 committee, felt very strongly about it.
18 PROFESSOR DORSANEO: Why did they feel
19 that?
20 PROFESSOR BLAKELY: Some of them are
21 school teachers and they find it uncomfortable to
22 have to keep on saying Federal Rule 11 -- Texas
23 Rule 11, Federal Rule 12, you know.
24 PROFESSOR DORSANEO: That's what I
25 thought.

1 PROFESSOR BLAKELY: That's part of it.
2 CHAIRMAN SOULES: There's a motion. Is
3 there a second?
4 MR. ADAMS: Second.
5 CHAIRMAN SOULES: Okay. It's been moved
6 and seconded that we adopt this change. Any
7 discussion of these changes, that is, to add 610
8 and to renumber the rest of the six hundred series
9 accordingly? Those in favor, say aye. Opposed?
10 There are none. That carries.
11 PROFESSOR BLAKELY: On Page 6, Rule
12 610(c). We are recommending that we add to 610(c)
13 "except as may be necessary to develop his
14 testimony." The federal rule reads "Leading
15 questions should not be used on the direct
16 examination of a witness, except as may be
17 necessary to develop his testimony." The reason the
18 federal rule has that additional language, and that
19 additional language, by the by, was recommended to
20 the Supreme Court, originally, is to take care of
21 those situations where the -- if you're dealing
22 with a child, you've asked the question six
23 different ways. You cannot elicit the testimony.
24 You know he knows. You need to lead him. You ask
25 the Court's permission. Or you come at an adult

1 witness six different questions. You know he
2 knows. You've been unable to elicit. You need to
3 refresh his memory. You get the court's
4 permission. Someone who has difficulty with the
5 language, he's a farmer, so forth, so forth. There
6 are those situations where you need to lead,
7 they're exceptional, you get the court's
8 permission.
9 I would say that under our present language
10 the Texas court does not have the discretion to
11 permit leading in those situations. You say, "Why,
12 yes, it does." Where does he get it? Here's a flat
13 prohibition against leading questions on direct.
14 But the common law practice permitted leading in
15 those special situations, and I think we ought to
16 bring forward the common law practice with that
17 amendment.
18 I so recommend -- or I so move.
19 MR. BRANSON: Second.
20 CHAIRMAN SOULES: Okay. That's been with
21 regard to Rule --
22 MR. KRONZER: You can't ask questions
23 without leading language. You've got to have
24 something.
25 CHAIRMAN SOULES: Okay. That's with

1 regard to --

2 PROFESSOR BLAKELY: 610(c).

3 CHAIRMAN SOULES: Is that going to still

4 have -- will that be numbered 610(c) after the last

5 change?

6 PROFESSOR BLAKELY: No, it would have to

7 be renumbered accordingly.

8 CHAIRMAN SOULES: Renumbered 611(c).

9 PROFESSOR BLAKELY: But I do not want to

10 assume that the court had bought our 610.

11 CHAIRMAN SOULES: That's proposal on

12 610(c), which if the other change was made, it

13 would be 611(c). Just trying to keep my notes

14 straight. Moved by Dean Blakely. And who was the

15 second on it? Frank Branson. Okay. Those in

16 favor, say aye. Opposed?

17 MR. SPARKS: Opposed.

18 CHAIRMAN SOULES: One opposed. Jim

19 Kronzer's opposed.

20 MR. KRONZER: No, I did not oppose that.

21 Let's get the record straight, Mr. Chairman.

22 CHAIRMAN SOULES: I'm sorry. Who was it?

23 Sam Spark's opposed.

24 MR. SPARKS: Just changed one rule to the

25 other.

1 which the actual writing is admissible. And for
2 goodness sake, it might contain all kinds of
3 objectionable matter, and you'd be getting it in
4 despite those objections or whatever they might be.
5 It might be a copy. It might be a false
6 instrument. You can even use an instrument known
7 not to be so to refresh somebody's memory.
8 MR. KRONZER: We're talking about two
9 different things, Dean.
10 PROFESSOR BLAKELY: Well, we're talking
11 about the purpose for which the writing would be
12 admissible.
13 MR. KRONZER: But if that writing comes
14 forth as an otherwise admissible document that's
15 generated through this device that you've got
16 because the witness used it for --
17 PROFESSOR BLAKELY: Well, if it's
18 otherwise admissible, there is no objection to it.
19 MR. KRONZER: No, no.
20 PROFESSOR BLAKELY: He wouldn't have to
21 have --
22 MR. KRONZER: No, sir. These cases hold
23 that even if it was a privileged attorney/client
24 protected document, and you've used it for purposes
25 of refreshment, that comes forward, and for the

1 first time it becomes probative in the case -- I'm
2 talking about the federal cases interpreting the
3 very rule we're talking about -- you just let your,
4 I'll say, drawers down when you've done that.
5 Now, a lot of times the witness says, "I
6 didn't look at the document." That's something
7 else. But we've seen this in the last three and a
8 half years in many, many ways. What I'm saying an
9 attempt to prescribe the usability of a document
10 that comes forward is a dangerous game to play or
11 to impose upon the federal practice that we're
12 trying to adopt wherever we can. And that was my
13 objection then and it is now.
14 CHAIRMAN SOULES: Frank Branson.
15 MR. BRANSON: Dean, isn't there some
16 merit in the way the rule reads now in letting the
17 lawyer who is giving material to the witness to
18 review, make the decision and take the good with
19 the bad if he's going to give the witness the
20 document? Which is really, as I understand it,
21 what the federal rules have historically done,
22 rather than having --
23 PROFESSOR BLAKELY: Well, you can make
24 the argument, but isn't the right to cross-examine
25 from the document a sufficient offsetting feature?

1 Why do you have to go so far as to say the
2 document, itself, which no one has put in and which
3 may have objectional matter in it, why should the
4 document, itself, be admissible except for
5 impeachment?
6 MR. KRONZER: I'm not suggesting that if
7 the document is otherwise subject and debilitated
8 for other reasons, Dean, that it doesn't fail.
9 PROFESSOR BLAKELY: Jim, I think you're
10 arguing unless you put this limitation. And, see,
11 the rule presently says you can get in the writing
12 -- the opposing side can get in the writing without
13 limitation. He can put it in as substantive
14 evidence to prove what he says.
15 MR. KRONZER: No, it doesn't say so.
16 CHAIRMAN SOULES: Dean, it doesn't -- it
17 says, unless there's something that was failed --
18 that was not underscored or not bracketed. It says
19 "those portions which relate to the testimony of
20 the witness." That's the only thing that's
21 admissible.
22 PROFESSOR BLAKELY: Yes.
23 MR. KRONZER: And it doesn't say it's
24 probative evidence. I'm not --
25 PROFESSOR BLAKELY: Well, fine.

1 MR. KRONZER: -- saying to expand it or
2 to limit it or to change any other rule. I'm
3 merely saying that when the discovery of that
4 documentation, what he's looked at, leads you in
5 that document, itself, or into the documents he's
6 looked at, to those, otherwise are usable and would
7 not have been otherwise usable, then they are
8 probative evidence and should not be limited to
9 impeachment value. And they are not in the federal
10 practice. Once you get them out of that lawyers
11 pocketbook, you got you some evidence.
12 PROFESSOR BLAKELY: Now, Jim, when you
13 say is otherwise admissible, you mean if -- suppose
14 we just struck altogether -- you read -- this would
15 read "and to cross-examine thereon" period. Now,
16 if you stopped right there and eliminated all the
17 balance, would that change the law? Would that let
18 in the writing? The writing wouldn't come in,
19 would it?
20 MR. KRONZER: Because of the rule if it
21 didn't otherwise more than impeachment value, it
22 wouldn't.
23 PROFESSOR BLAKELY: So, this must be --
24 this must intend when it says "and to introduce in
25 evidence those portions which relate to the

1 testimony of the witness," must mean here is
2 permission to override what would otherwise be
3 objectionable matter.
4 MR. KRONZER: Are you then -- take the
5 contrary to that, the converse. Are you suggesting
6 that we should limit any testimony so received and
7 so developed to only having impeachment value?
8 PROFESSOR BLAKELY: No, the writing.
9 Limit the writing.
10 MR. KRONZER: I'm saying the writing.
11 PROFESSOR BLAKELY: To impeachment, yeah.
12 MR. KRONZER: And regardless of whether
13 it, itself, as a matter of original impression,
14 would have probative value?
15 PROFESSOR BLAKELY: If without reference
16 to whether it had been used to refresh and so on,
17 is admissible anyway. If there's no objection to
18 it, then you don't need this.
19 MR. KRONZER: If the lawyer has not --
20 either by foolishness or whatever the reason, did
21 give him that, it might be privileged, but whatever
22 the reason, but it has now become open game, I'm
23 saying to you it is then admissible and
24 introducible in evidence in the federal practice
25 and under the federal rule. And you want to limit

1 that by this change.

2 MR. McMAINS: But privilege -- the Texas

3 practice, as I understand it, does not make it

4 non-probative. It may make it non-discoverable,

5 but it's not going to make it non-probative.

6 MR. KRONZER: But he's saying it would,

7 Rusty.

8 MR. McMAINS: No, I don't think so. He's

9 saying if it's probative, it's probative. All he's

10 suggesting is that you don't toss in the writing

11 just for the fun of it.

12 MR. KRONZER: Well, I didn't understand

13 that to be the case. He's saying it's impeachment

14 only and comes from that source.

15 JUDGE HITTNER: I believe what Mr.

16 Kronzer is saying, that once you bring your witness

17 into trial and if he doesn't have it up in his

18 head, you're going to hand it to this person, then

19 it's fair game.

20 MR. KRONZER: No, the federal -- Judge

21 Hittner, the federal cases are uniformly holding

22 that it does not make any difference at which time

23 you refreshed your memory. You could have done it

24 back in your office.

25 PROFESSOR DORSANEO: That's what it says.

1 MR. KRONZER: The old state rule is gone.
2 It's gone now in Texas. And that you have to bring
3 those documents forward. Now I'm saying that the
4 federal practice that we are purporting to adopt
5 says those documents are admissible when you bring
6 them forward. And they don't purport to classify
7 them as probative or impeachment value. That is
8 for the court to do depending on other rules, but
9 not by prescribing or limiting them in this rule.
10 And that's my objection. And we ought not to be
11 just lollygaging around with the federal rules just
12 every time we think we're going to adopt some new
13 things in the state practice.
14 MR. REASONER: Dean, are there any
15 examples that have been problems in the federal
16 practice?
17 PROFESSOR BLAKELY: I cannot give you
18 examples. I do not say there are none.
19 MR. REASONER: I understand. But it does
20 seem to me that there is merit in keeping our rules
21 congruent with the federal practice unless we have
22 a good reason to change it.
23 MR. WELLS: I move we reject this
24 proposal.
25 CHAIRMAN SOULES: I have one other

1 question before we went to that. Since the rule
2 has been held to apply to the deposition practice,
3 too. So, for example, if an attorney has done a
4 memorandum of the facts, turns that over to his --
5 foolishly or otherwise, as Jim said, shows that
6 work product to his client or to a witness, or to
7 his client for purposes of preparing the client for
8 deposition, that work product then is discoverable.
9 Because --
10 MR. BRANSON: And is admissible.
11 CHAIRMAN SOULES: What? Pardon me?
12 MR. BRANSON: And is admissible.
13 CHAIRMAN SOULES: And admissible. Now,
14 if we change this to limit the admissibility to
15 impeachment -- there is some rationale in the cases
16 that impeachment -- matters discovered for
17 impeachment only are not relevant to the subject
18 matter. Therefore, they're not discoverable
19 because discovery is based on -- is limited -- the
20 scope of discovery is limited to matters that are
21 relevant to the subject matter. Would the addition
22 of this language protect that work product that's
23 been shown for purposes of preparing the witness to
24 testify, from discovery, since it would then be
25 used only for impeachment? That's just a thought.

1 I don't know whether it's worth even talking about.
2 MR. McMAINS: The cat's already out of
3 the bag by the time you get to this decision.
4 CHAIRMAN SOULES: Well, not if it's only
5 impeachment, it may not be discoverable because --
6 MR. McMAINS: No, but I mean the rule of
7 admissibility doesn't come into play until it's
8 produced and physically there. So you've got it
9 under either change.
10 CHAIRMAN SOULES: Well, I'm talking about
11 discoverability, though. It's discoverable if the
12 witness admits that he looked at his lawyer's
13 memorandum before he testified in order to refresh
14 his recollection. I thought his memorandum was
15 indiscoverable. I'm saying if the use of that
16 memorandum is limited to impeachment, it may not be
17 discoverable.
18 All right. The motion was made by Dean
19 Blakely and seconded, I believe, by Judge Tunks
20 that this recommendation be received. And
21 obviously there is some opposition to it. Are we
22 ready for a vote on the subject? All right. Those
23 in favor, say aye. Opposed? All right. I'm going
24 to need a show of hands on that, please. Those in
25 favor, raise your hands, please. Four. Opposed?

1 12. 12 opposed. That then failed.

2 PROFESSOR BLAKELY: Mr. Chairman,

3 beginning at the bottom of Page 7 and running on

4 over to the top of Page 8 is a proposed change on

5 801. 801 defines hearsay, and as we know (a), (b),

6 (c), and (d), in Texas, define hearsay, but then

7 when you come to (e), you begin taking out

8 statements that otherwise would be hearsay. So,

9 you start taking them out. And at the top of page

10 8, (e) starts taking out -- (e) "A statement is not

11 hearsay if-- (1) prior statement by witness. The

12 declarant testifies at the trial or hearing --" so

13 he's there live. "-- And is subject to

14 cross-examination concerning the statement --" He's

15 made a prior statement, you see. "-- And the

16 statement is inconsistent with his testimony..."

17 The proposal would be to stop right there and

18 delete a limitation that's found under federal

19 rules. The federal rules are "(A) inconsistent

20 with his testimony and was given under oath subject

21 to the penalty of perjury at a trial, hearing, or

22 other proceeding." Now, this is not a use of a

23 prior inconsistent statement to impeach. It's the

24 use of a prior inconsistent statement as

25 substantive evidence on a theory that the reasons

1 for the hearsay rule there are weak. This fellow's
2 on the stand. He's made this prior inconsistent
3 statement. You can ask him which one is true. You
4 now can cross-examine him, although it's stale
5 cross. His statement was made six months ago, a
6 year ago. You can now observe his demeanor and
7 he's now under oath and so on.
8 The rule, as we're proposing the change, was
9 adopted by the U.S. Supreme Court originally, but
10 Congress put the limit on it "and was given under
11 oath subject to the penalty of perjury at a trial,
12 hearing, or proceeding." But our committee felt
13 that this should come in as substantive evidence
14 even though it was made on a street corner. A few
15 states have adopted that position. It, of course,
16 is contrary to the majority position in the
17 country. So, we're recommending that the bracketed
18 language be deleted. And I so move.
19 CHAIRMAN SOULES: Is there a second?
20 MR. CASSEB: Seconded.
21 MR. TINDALL: Why are we -- what's the
22 push for deviating, again, from the federal rule?
23 CHAIRMAN SOULES: That was moved by Dean
24 Blakely and seconded by Judge Casseb. All right.
25 Discussion?

1 MR. TINDALL: What's been the push to
2 change, again, from the federal rule? I asked the
3 same question as Jim Kronzer.
4 PROFESSOR BLAKELY: Well, you see, in the
5 reporter's note, that is explained. It says that
6 Congress added that limitation for criminal case
7 purposes. The federal rules, of course, control
8 criminal cases as well. And the person who
9 recommended this change -- our rules, which apply
10 only to civil cases, should permit this substantive
11 use of prior inconsistent statements and so forth.
12 That this is a position -- well, let me read this
13 last sentence. "There is absolutely no reason in
14 civil cases not to implement fully this reform of
15 the common law that was avidly supported by
16 Wigmore, Morgan, McCormick, Holmes, Learned Hand
17 and, so far as we know, every other reputable
18 authority on the law of evidence."
19 CHAIRMAN SOULES: Harry Reasoner.
20 MR. REASONER: Dean, this would apply to
21 an oral statement that anybody else claimed they
22 heard on the street corner?
23 PROFESSOR BLAKELY: Yes, yes.
24 CHAIRMAN SOULES: Jim Kronzer.
25 MR. KRONZER: Mr. Chairman, I -- they put

1 that same argument on me then, the reputable
2 authority argument. And I don't fall in the
3 category of reputable authority. And I opposed it
4 vigorously then and I do now. Even though it would
5 basically be more helpful to plaintiffs, I suppose,
6 than defendants. But it has not been the common
7 law of Texas prior to the promulgation of our new
8 rules. An out of court statement not signed, not
9 under oath, has never been probative in Texas
10 unless the witness admitted to the truth of that
11 statement while on the stand. If he disavowed it
12 or denied it, it was impeached, impeachment value
13 and all. Now, what this purports to do is to let a
14 statement, taken anywhere, under any circumstances,
15 from a witness, whatever his pressures may have
16 been and to then have him called as a witness when
17 those pressures may have changed for whatever
18 reason. I don't need to get in -- everybody here
19 who's a litigator knows how those things happen.
20 And yet that evidence, that statement, that is
21 unsworn to, unverified, at a place and time where
22 you had nothing to say about it, becomes
23 substantive, probative evidence in that lawsuit.
24 Now, that is not the common law of Texas.
25 And I read McCormick's book again. I don't find

1 that in McCormick. I don't find it in McCleary on
2 McCormick. So, I'm not the reputable authority,
3 but I don't agree with Professor Walker that it's
4 all that clear.
5 But what is also important, the federal rules
6 never adopted that. The judicial conference didn't
7 and the Congress didn't. And the Congress didn't.
8 I say that's letting the bars down to let in pure
9 ex parte statements taken under questionable
10 circumstances become proof to support findings and
11 elements in any case. I think that's wrong,
12 whoever it helps or hurts.
13 MR. TINDALL: Now in federal civil cases
14 this is not permitted, right, these out of court
15 statements?
16 PROFESSOR BLAKELY: That's right. The
17 Congress put the limitation on there for the
18 federal rules, whether civil or criminal.
19 MR. TINDALL: That's right. But it
20 applies clearly to civil and criminal in a case.
21 PROFESSOR BLAKELY: Yes.
22 JUSTICE WALLACE: Dean, I have one
23 question working toward these Uniform Rules of
24 Evidence. In fact, I already got a draft out
25 between us and the Court of Criminal Appeals.

1 Would that have any effect on this, you think?

2 PROFESSOR BLAKELY: Well, the draft -- of

3 course, it went to the Court of Criminal Appeals --

4 followed the federal rule. It had the limitation

5 on there, the requirement that the prior statement

6 be given under oath subject to penalty of perjury

7 at the trial, hearing, or other proceeding. If

8 this committee buys this limitation, I mean this

9 change, and the Supreme Court buys it, then, of

10 course, it would be some -- the Court of Criminal

11 Appeals would be apprised of that. They might or

12 might not buy it.

13 CHAIRMAN SOULES: Orville Walker.

14 PROFESSOR WALKER: All right. Now,

15 first, I don't think we're changing anything unless

16 I'm missing something. Statements which are not

17 hearsay is a prior inconsistent statement. It's

18 never been hearsay. It is not hearsay. It's

19 offered for impeachment and not for it's truth.

20 So, that statement is -- it makes no change in the

21 common law. A statement is not hearsay if it's a

22 prior statement and it's -- the defendant testified

23 at trial and is subject to cross-examination and

24 it's inconsistent. It's impeachment and not

25 hearsay. So, there's no change.

1 problem. You never had one. But if he disavows it
2 on the stand, this would make it still probative
3 value.
4 PROFESSOR WALKER: And no predicate would
5 be required.
6 MR. KRONZER: That's correct.
7 PROFESSOR WALKER: Just put words in his
8 mouth and he's not even there to defend himself.
9 MR. KRONZER: He comes out of chute No. 5
10 on a cyclone. And then you got in evidence with
11 the court some finding that you want. And it's a
12 two-way street. This is a double cutter.
13 CHAIRMAN SOULES: Any further discussion?
14 Those in favor, say aye. Opposed? Well, the no's
15 have it. But let me take a vote on it anyway
16 because I think the Supreme Court is often
17 interested in the weighing of that. Those in
18 favor, please show your hands. One hand. I
19 thought I heard more than one voice. Those
20 opposed? Okay. That's the rest of the house.
21 Thank you.
22 PROFESSOR BLAKELY: I want the record to
23 show that I read eloquently Guy Wellburn's
24 reporter's note down here. I didn't get to vote in
25 the committee.

1 proceeding in the suit in which they were taken"
2 and so forth and so forth. And the rule had been
3 construed by the cases as not requiring
4 unavailability. Even though the deponent was
5 there, it would come in.
6 Now, 213, old 213 has disappeared into new
7 207; and this committee considered that two and a
8 half years ago or whenever it was that the
9 committee met. And a reporter's comment to new 207
10 included the statement that there was no intent to
11 change the practice on unavailability. They would
12 continue to let in depositions even though the
13 deponent was available at the trial. All right.
14 Well, what about depositions that were taken
15 in different lawsuits, that were taken in one
16 lawsuit and offered in another, or perhaps taken in
17 another jurisdiction and not in accordance with the
18 Texas Rules of Civil Procedure?
19 We contemplated when the rules were
20 originally enacted that they would be hearsay, but
21 would come in under the exception to the hearsay
22 Rule 804(b)(1), former testimony. And that would
23 require that the deponent be unavailable. All
24 right.
25 There has been some confusion on all that.

1 And so, when our committee met April 12, we thought
2 to -- we thought to clarify, not change -- not
3 change anything, but just to help try to clarify.
4 And so, we're recommending that 8 -- here at the
5 bottom of Page 8, 801(e)(3) we strike the word
6 "offered" and insert the word "used." Some members
7 of the committee thought that somehow was more
8 illuminating, that we add the comment -- comment:
9 "See Rule 207 Texas Rules of Civil Procedure
10 regarding use of depositions." And then over on
11 804(b)(1) we add the comment, at the top of Page
12 10, comment: "A deposition in some circumstances
13 may be admissible without regard to unavailability
14 of the deponent. See Rule 801(e)(3) and comment
15 thereto." And so, where all that would leave us is
16 where we were before.
17 An attorney would first look at -- if this
18 thing is admissible under Texas Rules of Civil
19 Procedure, then there is no requirement of
20 unavailability. If it's not, then you'd have to go
21 over to 804(b)(1) and try to get in over there.
22 And that, of course, would require unavailability.
23 Now, this amendment, this insertion of the
24 Rules of Civil Procedure 207 enlarges on prior
25 practice. Prior practice, the deposition was

1 admissible only in the same lawsuit as a
2 deposition. This thing enlarges 207, and it's
3 admissible -- may be used by any person for any
4 purpose against any party who was present or
5 represented at the taking of the deposition or who
6 had reasonable notice thereof. So, there's no
7 requirement that the offering party have been a
8 party to that prior lawsuit.
9 So, the effect of that and the interplay
10 between the Evidence Rules and the Rules of Civil
11 Procedure is to mean -- that means that depositions
12 are now admissible though the deponent is available
13 where they wouldn't have been admissible if you go
14 back several years. But at any rate, the whole
15 effort by the Evidence Rules and the Evidence
16 Committee is to leave it to the Rules of Civil
17 Procedure in essence.
18 I move approval of these comments and this
19 one change, delete "offered" and insert the word
20 "used."
21 CHAIRMAN SOULES: Is there a second?
22 MR. ADAMS: Second.
23 CHAIRMAN SOULES: Okay. Seconded by
24 Gilbert Adams for the suggested changes to
25 801(e)(3) and 804(b)(1). Is there discussion?

1 Bill Dorsaneo.

2 PROFESSOR DORSANEO: This is one of those

3 areas where we're dealing with the two sets of

4 rules which, if you'll go back in time to drafting

5 stage, were being drafted independently, one from

6 the other by two separate and distinct committees.

7 My basic comment is that we need to have a

8 subcommittee to actually work out the

9 interrelationship between the Rules of Procedure

10 and the Rules of Evidence with respect to

11 depositions and perhaps some other matters as well.

12 The reason why I say that is that unless we deal

13 with the two things together at some point, the

14 procedural rule people will say, "Well, this

15 admissibility question is for the Rules of Evidence

16 people." And the Rules of Evidence people will say,

17 "This is for the Rules of Procedure." And nobody

18 will ever deal with it adequately.

19 By way of example, Rule 207, Paragraph One,

20 which is entitled, "Use of Depositions," and

21 Professor Blakely talked about, was not intended to

22 broaden anything, by me at least, when I wrote down

23 that language. That was a mistake by me in my

24 judgment. Maybe the Supreme Court agrees with the

25 mistake. But that just happened. Some of those

1 things happen. I don't believe it has been
2 construed, so we don't know whether it means what
3 it says literally or not. The assumption of the
4 Evidence Committee that something was going on
5 there other than that is not necessarily supported
6 by any foundation. The foundation would have to be
7 bound by what happened in the Supreme Court because
8 in all of the committees that proceeded the
9 adoption of Rule 207 of the Rules of Procedure by
10 the Supreme Court, this matter never was discussed.
11 It essentially is worded the way it is through, in
12 my judgment, a drafting mistake committed by me.
13 PROFESSOR BLAKELY: Well, the Evidence
14 Committee didn't seem to have any problem with
15 that. It was discussed. They were aware because
16 Tom Black had proposed, "Look here, we adopted this
17 thing originally, proposed it originally on the
18 assumption that it had to be in the same lawsuit to
19 dispense with the requirement of unavailability."
20 But Tom's -- and Tom proposed that we reword to
21 retain that limitation, but the committee didn't go
22 with that. Rather it decided to do what you see
23 here before you today.
24 JUDGE HITTNER: You mean refer to -- back
25 to the rules, back to 207?

1 PROFESSOR BLAKELY: Yeah, yeah.
2 JUDGE HITTNER: Is this the only comment
3 -- or would this be the only comment in the Rules
4 of Evidence referring back to Rules of Civil
5 Procedure? Anybody recall any others?
6 PROFESSOR BLAKELY: Yes. I can't point
7 to it. I can turn some pages and find it, but
8 there are one or two instances where that's so --
9 PROFESSOR DORSANEO: Reference to Rule
10 207.
11 JUDGE HITTNER: Well, does this, in
12 effect by putting a comment in, pull the rug out
13 from No. 3? It just, in effect -- the comment --
14 is it a comment just to 3, is that correct?
15 PROFESSOR BLAKELY: In essence, yes. In
16 essence it's a reference to 207. If it fits 207,
17 fine. It's not hearsay and therefore no
18 requirement of unavailability.
19 JUDGE HITTNER: I'm not sure, for
20 interpretation purposes, it might not be best just
21 to leave it the way it is. Just to leave it with 3
22 without comment. Because now you're going from the
23 Rules of Evidence going back now to a long rule on
24 depositions. Runs about half a page, doesn't it,
25 207?

1 PROFESSOR BLAKELY: Well, Judge, you
2 presently are referring there to Texas Rules of
3 Civil Procedure without mentioning a number.
4 MR. ADAMS: You're just helping the
5 reader, directing it back to the book.
6 PROFESSOR BLAKELY: So, we're just being
7 more specific. Where in the Texas Rules of Civil
8 Procedure?
9 MR. REASONER: Dean, I'm puzzled. You
10 say that the view of the Evidence Committee that
11 "offered" is synonymous with "use", that you're not
12 making a substantive change?
13 PROFESSOR BLAKELY: No, they thought it
14 was more illuminating.
15 MR. REASONER: Well, it also seems much
16 broader to me.
17 PROFESSOR DORSANEO: It is.
18 MR. McMAINS: I think it is.
19 MR. REASONER: That's the way it seems to
20 me, but I understood Dean to be saying the
21 contrary.
22 PROFESSOR BLAKELY: At any rate, that's
23 what we recommend.
24 MR. BRANSON: Dean, how did the Evidence
25 Committee define "used"? So, the trial lawyer used

1 it to assist him in getting ready for trial, but
2 never offered it. It was intended that it be
3 usable as long as it had been taken in accordance
4 with the rules?
5 PROFESSOR BLAKELY: Jim, were you there
6 when that was being discussed?
7 MR. KRONZER: No, sir.
8 PROFESSOR BLAKELY: Gilbert?
9 MR. ADAMS: I was just trying to recall,
10 Dean. I think we thought that offered was not
11 applicable. It was sort of a -- that a person --
12 that you really need to be using it in accordance
13 with the Texas Rules of Civil Procedure and not
14 necessarily offering it. Because I don't know that
15 the rule -- the rule did -- the caption of the Rule
16 207, Paragraph One, is "Use of Depositions". And
17 it deals with the use of depositions and not the
18 offering of them. And it was sort of just a
19 misleading type of --
20 PROFESSOR BLAKELY: It may be that's
21 where we picked up --
22 PROFESSOR DORSANEO: That must be the
23 case.
24 MR. ADAMS: It wasn't -- it wasn't meant
25 to be anything more than to try to conform to the

1 same type of language that the Rules of Civil
2 Procedure used. And, see, Rule 207 says, "use of
3 depositions in court proceedings," and not offering
4 of them. It's use of them. And that really is
5 cosmetic more than any kind of substantive --
6 MR. BRANSON: Isn't it possible that the
7 committee was addressing the problem of in a
8 subsequent trial, having to go back to the
9 transcript of the trial to see whether or not the
10 previously taken deposition was, in fact, offered
11 in trial?
12 MR. ADAMS: I don't recall that
13 discussion at all.
14 MR. BRANSON: That certainly is currently
15 a potential problem. It is eliminated by the use
16 of the word "used" as opposed to "offered." It can
17 become technically, extremely difficult. You've
18 got a trial that occurred in Florida. You're
19 attempting to use depositions of the same expert.
20 You go back to the trial transcript and determine
21 whether the deposition was actually offered in
22 trial. Whereas, I assume it can be presumed if it
23 was taken, it was used for some purpose.
24 MR. ADAMS: I really think, as I recall,
25 my recollection is that it was more of a cosmetic

1 thing, that was the thought of the committee at
2 that time. That the rule says, "use of
3 deposition," it ought to be consistent with the --
4 with our language in this Rule 801.
5 PROFESSOR BLAKELY: I'm comfortable, Mr.
6 Chairman, with changing "offered" to "used" and
7 adding the two comments. Did I move for approval?
8 CHAIRMAN SOULES: Yes, sir.
9 MR. McMAINS: It was seconded.
10 CHAIRMAN SOULES: It was seconded. Is
11 there further discussion? Bill Dorsaneo.
12 PROFESSOR DORSANEO: Well, I think that
13 would be fine for now. But I do think we need to
14 address the hidden policy question in paragraph one
15 of Rule 207 of the Texas Rules of Civil Procedure.
16 Because it really had not been addressed when these
17 rules were amended April 1, 1984.
18 PROFESSOR BLAKELY: We just stumbled
19 fortuitously.
20 PROFESSOR DORSANEO: That's right. And I
21 know exactly how it happened. But the only other
22 thing I could say is that -- that comment to 804 --
23 I don't really like the way it's worded, Dean,
24 because it doesn't seem to me to -- I guess I don't
25 think it's finished yet. I think this is a problem

1 area that is definitely improved by the suggestions
2 and changes that you've proposed, but I don't think
3 it's finished sufficiently for us to think that
4 we're done in dealing with the procedural rules and
5 the evidence rules in the area of depositions. And
6 there are about four or five other things I could
7 say about it. I won't. Those are basically my
8 comments.
9 JUDGE HITTNER: May I direct a question
10 to Professor Dorsaneo? Do you think there's a
11 necessity for the comments to either rule that
12 we're talking about?
13 PROFESSOR DORSANEO: Yes, I do. I think
14 that -- professor didn't talk about some of the
15 problem language in 804. The depositions -- on the
16 unavailability requirement for depositions in the
17 same case.
18 JUDGE HITTNER: So, what is -- I didn't
19 understand your position then. You were opposing
20 the comment -- one of the comments?
21 PROFESSOR DORSANEO: The comments are
22 better, but they don't -- by virtue of the fact
23 that even -- you're commenting on what is the need
24 for the comments. The comments aren't good enough.
25 Because it would be apparent if the comments were

1 worded more clearly to indicate what the problems
2 are that are being addressed.
3 MR. McMAINS: I have one question. Is
4 there any real need in the comment -- in the second
5 comment, the one in 804, for the words "in some
6 circumstances"? I mean "may" means that anyway.
7 If you just say "a deposition may be admissible
8 without regard to unavailability" you see that?
9 Why do you need to say "in some circumstances"?
10 That seems to think that maybe there are some
11 circumstances where you qualify under 801(3), that
12 it still isn't admissible. Which isn't true.
13 PROFESSOR BLAKELY: Well, it elaborates a
14 little on the word "may". If you just say "may".
15 A deposition may be admissible without regard. You
16 see "may" as meaning, well, if it complies with the
17 other. But one -- and that's the intent, of
18 course. But one might quickly read it as thinking,
19 yeah, it is, anytime. You can go to 801 and it
20 comes in without regard --
21 MR. McMAINS: Well, then you go to
22 801(e)(3) and it says only if it's taken in
23 accordance with Texas rules. So, you're never here
24 unless -- unless you aren't there. I mean, so I
25 don't --

1 Maybe it's one entirely desirable, but if we're
2 going to recommend it, I'd like to have an in-depth
3 explanation of why it should be done.
4 CHAIRMAN SOULES: Tom.
5 MR. RAGLAND: Well, we have a joint
6 question back here. It escapes me the significance
7 of having the phrase "and used" when really the --
8 it seems to me the key to it is if the deposition
9 was taken -- the prior deposition was taken in
10 accordance with the Rules of Civil Procedure, why
11 place an additional burden on having to prove it
12 was used?
13 PROFESSOR DORSANEO: It makes sense.
14 MR. McCONNICO: If we study it, why don't
15 we just consider knocking out both "offered" and
16 "used." And just say, "It is a deposition taken in
17 accordance with Texas Rules of Civil Procedure."
18 CHAIRMAN SOULES: All right. Those are
19 the suggestions of Tom Ragland and Steve McConnico.
20 Steve, would you say again what your
21 suggestion is.
22 MR. McCONNICO: We're saying just state
23 "It is a deposition taken in accordance with the
24 Texas Rules of Civil Procedure."
25 MR. McMAINS: Yeah, but if it's another

1 case, another Texas case, it's going to be taken in
2 accordance with the Texas Rules.
3 MR. McCONNICO: Well --
4 MR. McMAINS: And that doesn't make it
5 non-hearsay in another case.
6 MR. McCONNICO: Then you have to go back --
7 MR. McMAINS: Case A in Harris County
8 does not become automatically admissible in Case B
9 in Harris County simply because Case A was taken --
10 a deposition was taken in Case A.
11 MR. KRONZER: Depending on which court
12 you're in.
13 PROFESSOR DORSANEO: But the current
14 language doesn't deal with that problem either.
15 MR. McCONNICO: We're not going to avoid
16 that problem because we still have our Rules of
17 Civil Procedure to 207 to talk about that. We're
18 not going to avoid that. I think all we're saying
19 is let's avoid trying to get into what is "used"
20 and "offered." Just avoid the whole problem of what
21 is "used"? "Used" is, maybe I read it. We took it
22 and read it, but never offered it at the
23 courthouse. Just avoid every bit of that.
24 MR. BRANSON: I have one other concern in
25 that regard. In light of the fact that we're going

1 to be dealing in this rule many times with
2 depositions taken in other states, since we're
3 really attempting to track a rule that's been in
4 use in federal courts for sometime, don't we run
5 into some difficulty by saying that the depositions
6 have to be taken in accordance with the Texas
7 Rules? Couldn't we broaden that and make it, "Or
8 in accordance with the rules of the state in which
9 they were taken"? It accomplishes the same purpose
10 in that there may be some states that don't have
11 quite the technicalities we do in some regards to
12 depositions.
13 MR. McMAINS: Well, that's true, but
14 usually you're still taking them in accordance
15 under our rules if it's a Texas case.
16 MR. BRANSON: No, we're trying a Texas
17 case, but a deposition has been taken in New York,
18 but not in a Texas manner, in a New York manner,
19 and you want to use it. As I understand the
20 federal rules, it's contemplated as usable if we
21 make that prior deposition be taken in -- pursuant
22 to our -- it's not usable, Rusty? You're shaking
23 your head.
24 MR. McMAINS: I'm not sure that it is.
25 I'm not going to say that it's not.

1 MR. BRANSON: What is it about these
2 rules that would prevent that?
3 MR. KRONZER: If you have unavailability,
4 it's usable.
5 MR. McMAINS: Yes.
6 PROFESSOR DORSANEO: Assuming that
7 everything else is usable.
8 MR. BRANSON: But you've added another --
9 you've added another requisite by requiring that
10 out of state depositions, before it's usable, to
11 have been taken in accordance with our deposition
12 practice, which may be an unreasonable burden on
13 the party attempting to offer it.
14 PROFESSOR BLAKELY: Of course, if it's
15 federal and used federally, you'd have to show
16 unavailability. It would have to come in under
17 804(b)(1).
18 MR. BRANSON: Yes, sir.
19 PROFESSOR BLAKELY: Now, do you want to
20 -- do you want that federal deposition admissible
21 in Texas without regard to unavailability?
22 MR. BRANSON: Well, let's assume since
23 it's out of state, unavailability is going to be
24 easy to show, Dean. All I'm saying is, are we
25 adding an unnecessary requisite, that if you've got

1 a witness who was taken originally in Michigan or
2 Florida, it's unlikely he's going to be traveling
3 through Texas at the time of trial.
4 PROFESSOR DORSANEO: But he's not
5 unavailable if his deposition could have been taken
6 in this case, under our case law, under the wording
7 of 804, if I'm right, which I'm sure I am.
8 MR. BRANSON: All right. Let's make it a
9 deposition taken when the man's dead. Is that out
10 of state testimony still going to have to --
11 MR. McMAINS: You don't have a problem if
12 you go to --
13 CHAIRMAN SOULES: I think -- let me see
14 if -- just an indication of how many feel that
15 we're going to be able to work through this today
16 or whether it should be referred to a later report --
17 referred to a committee for a report next time?
18 MR. TINDALL: I think -- I believe we've
19 come close to hammering it out.
20 CHAIRMAN SOULES: Well, let me see what
21 the feeling is. How many feel that we are about to
22 get it straightened out and we need to act on it,
23 please show your hands.
24 MR. ADAMS: I don't understand the vote.
25 CHAIRMAN SOULES: I'm trying to get a

1 consensus as to whether or not we feel this is
2 something that we can work out today and get behind
3 us or whether it's something we need to refer to a
4 committee since we need to get down the road a
5 little bit further with the agenda, if possible.
6 I'm not trying to cut this off. If we can get
7 finished with it, we can go on and work with it.
8 How many feel that we can get through if we
9 continue here for awhile on this subject?
10 MR. JONES: Can I make a point of
11 inquiry, Mr. Chairman?
12 CHAIRMAN SOULES: Yes, sir. Mr. Jones.
13 MR. JONES: I noticed when we called this
14 meeting we said we were not going to meet tomorrow,
15 we were going to quit at 5:00.
16 CHAIRMAN SOULES: That's right.
17 MR. JONES: That gives us 45 minutes. I
18 don't know how far we are on the agenda, but I sure
19 think --
20 PROFESSOR BLAKELY: I have three more
21 quick evidence rules, and I believe they'll be
22 passed in a hurry. I believe they will be
23 non-controversial.
24 CHAIRMAN SOULES: And then we're going to
25 need to at least get --

1 MR. CASSEB: Why don't you jump to the
2 three that he's got that are non-controversial and
3 let's come back to this thing, in the interest of
4 time, and see where we're at?
5 CHAIRMAN SOULES: I'm going to finish
6 responding to Franklin Jones, and then I'm going to
7 do that. After we get through with these evidence
8 rules, we're going to at least need to appoint
9 subcommittee heads and divide up the balance of
10 this work for the next session. So, we've got that
11 ahead of us, and that's going to be the rest of our
12 agenda today. We won't be able to get to anything
13 else substantively that I see.
14 All right. With that in mind, how many feel
15 that we can continue with this until we get it
16 concluded? Please hold your hands up. Five.
17 How many feel that this particular matter of
18 use of depositions, I'll describe it that way,
19 should be referred for further study?
20 Well, the latter votes have it, so it will be
21 referred for further study to whoever heads up our
22 discovery subcommittee. Well, I'll get your
23 position on that. Should it be referred for
24 further study to an Evidence Committee or to a
25 committee that handles discovery rules under the

1 deposition practice?

2 MR. McMAINS: It's not a discovery issue.

3 It's evidence.

4 CHAIRMAN SOULES: All right. It will be

5 referred to the Evidence Committee.

6 PROFESSOR DORSANEO: Well, due to the

7 fact that our rule books treat it as a discovery

8 issue.

9 CHAIRMAN SOULES: All right. We'll go on

10 then to the completion of the Rules of Evidence

11 Report.

12 PROFESSOR BLAKELY: Mr. Chairman, on Page

13 9, in the middle of the page, Rule 803(6). This is

14 the business records exception. As it presently

15 reads, it says, "All these requirements can be

16 shown by the testimony of the custodian or other

17 qualified witness." We all know that you can get it

18 in by affidavit, under 902(10). It was thought by

19 the committee that we ought to sort of make that a

20 little bit more clear, because that's not really

21 testimony when it's coming in by affidavit, by

22 adding the phrase "or by affidavit that complies

23 with Rule 902(10)." Changes nothing, just makes it

24 a little more clearly that 803(6) opens up to the

25 affidavit.

1 CHAIRMAN SOULES: All right. So, you so
2 move?
3 PROFESSOR BLAKELY: So move.
4 MR. ADAMS: Second.
5 CHAIRMAN SOULES: Okay. Gilbert Adams
6 seconds. Those in favor, say aye. Opposed? It
7 carries.
8 PROFESSOR BLAKELY: Over on Page 10 is
9 Rule 902(10)(b). This is the notary's jurat at the
10 end of that affidavit that gets in your business
11 records. Certain statutes have changed the notary
12 form. He's no longer limited to operating in and
13 for the county of such and such. He can operate
14 statewide. He's now supposed to put when his
15 commission expires. He's supposed to print his
16 name under there. So, the change here is simply to
17 throw out our old notary's jurat and put in a new
18 notary's jurat. And I so move.
19 MR. ADAMS: Second that.
20 CHAIRMAN SOULES: Moved and seconded.
21 Any discussion? Those in favor, say aye. Opposed?
22 That carries.
23 PROFESSOR BLAKELY: At the bottom of Page
24 10, with respect to Rule 1007 -- really over on
25 Page 11 -- this is -- you're over under the Best

1 Evidence Rule.

2 In common law if a party admitted that a
3 writing contained such and such, his admission
4 sufficed. You could get around the Best Evidence
5 Rule by using his admission. This rule relates to
6 that. It, of course, narrows it to his written
7 admission or his in-court admission.

8 The title to that thing is, 1007, "Testimony
9 or Written Permission of Party." It's got nothing
10 to do with anybody's permission. It's a
11 typographical error. I don't know when it got in
12 there, but we're just cleaning it up and changing
13 it to "admission." That's the title of the federal
14 rule and it was our title recommended. Move
15 approval.

16 MR. ADAMS: Second.

17 CHAIRMAN SOULES: Seconds? It's been
18 moved and seconded. Those in favor, say aye.
19 Opposed? It's carried.

20 The rest of that packet is superfluous
21 material, I guess.

22 PROFESSOR BLAKELY: If you're operating
23 in the bound book, once you pass Page 11, that's
24 just part of our committee's agenda and could be
25 marked through.

1 CHAIRMAN SOULES: Rusty, in keeping with
2 your suggestion, I tried to look through the rules
3 here and separate them into categories using some
4 of the separation that's already in the rules by
5 sectioning; and then, of course, the long section
6 on Rules of Practice in district and county courts
7 has got to be broken up some.
8 What I have come up with is the first rules,
9 Rules 1 to 14. That's not many rules, but it's got
10 the bulk of this work concerning local rules in it,
11 and so, it will be a major piece of work.
12 The next category will be Rule 15 to 215(a)
13 and this is all the pleadings, parties, joinder
14 causes of action, severance, separate trial, and on
15 through discovery before picking a jury. I don't
16 think we have an awful lot of work in that, but
17 there are a lot of rules and that seems to be
18 departmentalized into something that's manageable.
19 MR. McMAINS: It seems to me that really
20 -- from a chronological standpoint, you're talking
21 about two aspects of pretrial procedure. One is
22 discovery and one is everything else.
23 CHAIRMAN SOULES: Right, but we don't
24 have enough work to separate that into two parts.
25 I think we can just put that altogether in our

1 agenda.

2 MR. McMAINS: Well, that's probably true

3 right now on the pretrial non-discovery.

4 CHAIRMAN SOULES: Well, right now, yeah.

5 PROFESSOR DORSANEO: I think we have some

6 clean-up work to do. We have done a lot, or the

7 court has done a lot, in recent years. And we've

8 had it for awhile, but I think there are some

9 things that have occurred to people that didn't

10 occur before.

11 That package would about cover those things

12 we've just gone over that basically need a little

13 work here and there, but not too much.

14 CHAIRMAN SOULES: That's right. And

15 then, you know, the discovery. We need to address

16 the whole concept of whether discovery matters

17 should be filed or not filed in the state practice.

18 We're getting a lot of agitation from district

19 clerks and commissioner's courts, and so forth, to

20 cut down on that because it's so little used and so

21 much to store on a permanent basis. But anyway,

22 we'll have some work in that area.

23 Then the rules from 216 to 314 which cover

24 from picking a jury to the entry of judgment. And

25 then Rules 315 to 331, which are the post-trial

1 rules, remittitur, motion for new trial and that
2 sort of thing.
3 And then the courts of appeals' practice,
4 which is already a subject of the first item on the
5 agenda today, it covers Rule 352 to 472. The
6 Supreme Court rules then that cover from 474 to
7 515. And then the currently very hot topic covered
8 by 523 to 591, the justice court rules. And then
9 the ancillary proceedings which have had a lot of
10 work, may need some work. Well, actually
11 receivership has never been addressed since we
12 started revising rules; and our rules still
13 provide, I believe, for an ex parte receiver. But
14 if we're going to do some clean-up work, that could
15 get to be more of a job than what's currently --
16 what we have to do would require.
17 And then, finally, 737 to 813, which is --
18 are the -- what we call special proceedings, bill
19 of discovery and -- I don't know whether anything
20 really needs to be done in those areas. Bill of
21 discovery, F, E & D, real estate partition, quo
22 warranto, trespass to try title. I don't see
23 enough of that kind of litigation to know. I know
24 that trespass to the forcible entry and detainer
25 rules have been overhauled in view of some

1 constitutional objections.

2 So, those would be the separations that I

3 see. And the reason that I raise them is to try to

4 get some input from you as to where in that

5 separation -- well, first of all, whether you feel

6 that's logical and appropriate to separate along

7 those lines; and if so, where your interest lies so

8 that I can establish standing committees. I think

9 Rusty's suggestion is a good one. Then I can

10 proceed to go through this agenda, and by mail,

11 assign projects. And where one group is

12 significantly overloaded, maybe even call someone

13 to take on special projects to relieve that

14 overload.

15 So, as far as the general rules and dealing

16 with the attempt to get uniform local rules, who in

17 particular is interested in that area? All right.

18 I'll assign --

19 MR. JONES: Mr. Chairman, are we at an

20 appropriate point in your agenda now for me to move

21 about the question of jury blindfolding which

22 happens -- which I brought up earlier?

23 CHAIRMAN SOULES: What I was going to try

24 to do, Franklin, was maybe get through the

25 establishing of these committees and then open up

1 for discussion of any new matters that are not seen
2 in any agenda now that the committee feels like we
3 should address, so that we can add those for the
4 next meeting and assign them to committees for
5 study. And that probably will use the rest of our
6 time.
7 Since I've got this division before the --
8 topics before the group now, I'd like to try to get --
9 at least get a chairman for each of those separate
10 areas. And then I'd like to take your idea for any
11 additional item that should be on the agenda.
12 MR. JONES: I don't want to interfere
13 with your agenda. I just don't want to get away
14 without passing on --
15 CHAIRMAN SOULES: I definitely want to
16 hear -- I heard two or three suggestions for
17 matters that were -- feelings that needed to be
18 dealt with that are not in this book. And we want
19 to get all those before us prior to adjournment.
20 Thank you.
21 All right. I'm going to assign then the work
22 on the harmonizing of the local rules to Judge
23 Linda Thomas, who is not here, otherwise I'm sure
24 she'd volunteer.
25 On pretrial and discovery, the Rules 15

1 through 215(a), is there a volunteer to chair that
2 standing committee?
3 Absent a volunteer, will you do it, Sam
4 Sparks?
5 MR. SPARKS: Okay. It's hard to chair
6 from El Paso, but you say there's little work. So,
7 that's what I work in. So, I'll do it.
8 CHAIRMAN SOULES: For Rules 216 through
9 314, the trial rules, do I have a volunteer on
10 that?
11 MR. McMAINS: I have a suggestion. Why
12 don't we put Franklin as chairman of the trial
13 procedure rules, which has all the charge rules in
14 it and all the stuff about comments on the weight
15 and stuff. So, basically, he can submit his own
16 suggestions without any problem as well, from a
17 committee standpoint.
18 CHAIRMAN SOULES: Would you be willing to
19 serve on that, Frank?
20 MR. JONES: I will if nobody wants me to
21 give the trial judges a right to comment on the
22 weight of the evidence. Talk about cross-examining
23 in the federal courts.
24 MR. KRONZER: I thought that was by
25 choice.

1 MR. SPARKS: Financial necessity.

2 CHAIRMAN SOULES: All right. For the

3 post-trial -- Harry Tindall, I've already heard

4 your interest in that. Where's Harry?

5 MR. McMAINS: Harry had to leave.

6 JUDGE HITTNER: He said he would be

7 interested in that.

8 MR. KRONZER: He's going to a post-trial.

9 CHAIRMAN SOULES: Trying to lead into the

10 court of appeals rules that -- well, he was talking

11 about that. I'm going to assign him, unless

12 someone else wants to volunteer for that, assign

13 that to Harry to chair. Okay. That will be Harry

14 Tindall for Rules 315 to 331.

15 And, Bill Dorsaneo, you've already got the

16 new rules on the court of appeals. So, that's

17 really logically assigned to you in conjunction

18 with those rules, isn't it, Rules 352 to 472? 472

19 is the end of the court of appeals.

20 PROFESSOR DORSANEO: Well, you got me

21 into the Supreme Court a little bit. But that's

22 all right.

23 MR. McMAINS: Well, are you trying to

24 limit it to the court of appeals and then move to

25 the supreme court rules?

1 CHAIRMAN SOULES: Right. And I was going
2 to ask, Rusty, that you take the supreme court
3 rules.
4 So, that we've got -- Harry Tindall is
5 interested in the part about perfecting the appeal.
6 And Bill has already done so much work in the
7 middle, as have you, Rusty. I know you worked on
8 that committee, too.
9 PROFESSOR DORSANEO: We really need some
10 guidance on the appellate rules as to whether or
11 not we're supposed to consider whether the supreme
12 court rules or the court of criminal appeals rules
13 would be part of that numbering, or just let that
14 be and don't worry about it or what?
15 MR. McMAINS: I'll be glad to, if you
16 want, to call it a committee, but I think,
17 basically, we've got enough working committee on
18 the other thing.
19 CHAIRMAN SOULES: Well, they can be
20 combined, but if we could take responsibility for
21 individually reporting in those sections and y'all
22 can meet combined and work combined. I have no
23 problem with that.
24 MR. McMAINS: That's fine.
25 CHAIRMAN SOULES: Will that work out?

1 MR. McMAINS: Yeah.
2 CHIEF JUSTICE WALLACE: Was your
3 question, Bill, just continue the appellate rules
4 numbers on through the supreme court, is that what
5 you were asking about?
6 PROFESSOR DORSANEO: Yes, Your Honor,
7 whether the court wants us to think about that or --
8 CHIEF JUSTICE WALLACE: That would be
9 fine with me, appellate rules all the way through.
10 CHIEF JUSTICE HILL: Oh, yeah, I don't
11 think we need to be left out. Look at us.
12 CHAIRMAN SOULES: Well, I think that some
13 of the supreme court rules are going to key to some
14 of this harmonizing. And some changes are going to
15 have to be made there really for housekeeping.
16 And we talked before whether the Supreme
17 Court might be willing to listen to a suggestion
18 that there be separate Texas Rules of Appellate
19 Procedure, which would run numerically and
20 sequentially from wherever they start in the
21 process all the way through the Supreme Court of
22 Texas.
23 CHIEF JUSTICE HILL: I would think they
24 would be willing, because he's got the proxy.
25 CHAIRMAN SOULES: Judge Wallace is the

1 proxy and says he thinks that would be logical. Is
2 that subject --
3 MR. McMAINS: Yes.
4 CHAIRMAN SOULES: Okay. Then I don't
5 know if we need a committee on the justice courts.
6 Is anyone very excited about that topic? Does
7 anyone know of any problems?
8 MR. KRONZER: Mr. Reasoner and I --
9 PROFESSOR DORSANEO: Well, there are a
10 lot of problems.
11 CHAIRMAN SOULES: They've got a great
12 recusal rule. You challenge, he leaves.
13 MR. REASONER: That's all that's left to
14 us, Bill.
15 MR. O'QUINN: They got to go for the
16 biggest thing in Texas, the littlest small claims.
17 PROFESSOR DORSANEO: There are a lot of
18 problems because we don't -- those are pretty much
19 left alone forever. And there aren't many
20 appellate court opinions about them. And a lot of
21 them are essentially very mysterious. I'm forced
22 to teach them every once in a while, and I think
23 somebody ought to take a look at that at some
24 point. Maybe we have enough to do without worrying
25 about it.

1 MR. O'QUINN: I think we've got enough to
2 do.
3 JUDGE HITTNER: We'll get Judge Wapner to
4 deal with that.
5 MR. O'QUINN: Judge Wapner.
6 CHAIRMAN SOULES: Well, we'll omit that
7 for now.
8 MR. McMAINS: I think you can wait until
9 you see if you've got any ground swell of --
10 CHAIRMAN SOULES: We haven't had much
11 yet.
12 MR. McMAINS: -- information and then you
13 could appoint somebody then if you needed to.
14 CHAIRMAN SOULES: What about ancillary
15 proceedings?
16 MR. McMAINS: Extraordinary remedies?
17 CHAIRMAN SOULES: Extraordinary remedies.
18 MR. BRANSON: Broadus is not here. You
19 ought to put him on the JC's.
20 CHAIRMAN SOULES: All right. That would
21 be Broadus Spivey.
22 CHIEF JUSTICE HILL: The last justice
23 court I visited was out near Garner Park. And I
24 had to go over there to try to help a young man who
25 had been busted in the park for having a beer. And

1 you ought to see where that court was being held.
2 It was a little old chicken coop in the back of
3 this fellow's house. I continued my great record
4 in the justice court, not doing any good for my
5 client. It was the maximum. But, yeah, they've
6 got some problems out there.
7 PROFESSOR DORSANEO: The courts are
8 definitely misnamed.
9 CHIEF JUSTICE HILL: I would avoid them.
10 MR. KRONZER: Luke, I would like to serve
11 on the relief committee, whatever you call it.
12 CHAIRMAN SOULES: Well, there was a lot
13 of debate about whether or not non-lawyers should
14 be allowed to represent corporations in justice
15 courts. And part of the resolution to that was,
16 "Well, if the judges don't have to be lawyers, why
17 should the representatives have to be lawyers."
18 MR. O'QUINN: Why should the lawyers have
19 to be lawyers.
20 CHAIRMAN SOULES: Is there anyone here
21 who --
22 MR. McMAINS: Judge Kronzer just
23 volunteered.
24 MR. KRONZER: I'd like to serve on the
25 extraordinary remedies.

1 CHAIRMAN SOULES: Jim Kronzer.
2 MR. KRONZER: I've seen some real -- felt
3 some of them.
4 MR. McMAINS: There're going to be really
5 extraordinary next time.
6 CHAIRMAN SOULES: And then the special
7 proceedings rules, at least we might take a look
8 through those. Who would be willing to look at
9 those, Bill of Discovery and so forth, these
10 special proceedings, quo warranto?
11 MR. McMAINS: I really think that's --
12 MR. KRONZER: That's what I'm trying to
13 say.
14 MR. McMAINS: -- really what's in his
15 area.
16 CHAIRMAN SOULES: Oh, I see. I thought I
17 understood you to say ancillary proceedings. I'm
18 sorry.
19 MR. KRONZER: Mandamus, quo warranto,
20 prohibition. I mean the real prohibition.
21 CHAIRMAN SOULES: What about attachments,
22 sequestrations, receivership and that sort of
23 thing?
24 MR. KRONZER: Oh, no, that's like that
25 justice court stuff. Let's assign that to Broadus,

1 too.

2 CHAIRMAN SOULES: Pat, you did some work

3 on this. Pat Beard did some work on this one time.

4 Pat, would you take a look at those?

5 MR. BEARD: All right. I'll look at

6 them. Matt Dawson wrote most of those things.

7 MR. KRONZER: That's why it's stayed

8 under constitutional attack. Pat Beard and Matt

9 Dawson did it.

10 CHAIRMAN SOULES: All right. Knowing now

11 the breakdown and the respective chairman, does

12 anyone want to volunteer to be put in a particular

13 slot, because everybody's going to be on -- going

14 to have to be on a committee.

15 MR. BRANSON: I'd like to be on

16 Franklin's committee.

17 CHAIRMAN SOULES: Okay.

18 JUDGE HITTNER: I'll take the 115 to 215.

19 Is that Sam Sparks' committee?

20 PROFESSOR DORSANEO: I'd like to be on

21 that one, too.

22 CHAIRMAN SOULES: Okay. That's Judge

23 Hittner and Bill Dorsaneo. In order to get some

24 temperance into Jones and Branson, I think I'll

25 assign David Beck to that group as well.

1 Yes, sir.

2 MR. RAGLAND: Sparks.

3 CHAIRMAN SOULES: And, Steve, would you

4 -- Steve McConnico, would you serve on that trial

5 group?

6 MR. McCONNICO: You bet.

7 CHAIRMAN SOULES: You've done a lot of

8 work, particularly in special issues. I know

9 you've written all in this area and that would be a

10 big help.

11 Tom?

12 MR. RAGLAND: I would like to serve on

13 Sam Sparks' committee.

14 CHAIRMAN SOULES: All right. Are there

15 any other persons who are particularly interested

16 in given areas? Pick a subject or pick your

17 chairman or get assigned, I guess.

18 MR. KRONZER: How about Dean Blakely?

19 CHAIRMAN SOULES: Okay. Now for the

20 evidence -- we do need an Evidence Subcommittee.

21 And, Newell, would you take on the

22 responsibility to chair that for us?

23 PROFESSOR BLAKELY: All right, sir.

24 CHAIRMAN SOULES: And it was Dorsaneo's

25 suggestion that we probably need a committee to

1 just oversee and interrelate Rules of Evidence
2 problems and Rules of Civil Procedure problems. Do
3 we want to do that or just --
4 MR. McMAINS: I think if you've got Dean
5 Blakely that really is on both, that you almost
6 have an overseeing effect, as it were, in that
7 connection. I mean, any problems anybody has, if
8 they are channeled to Dean Blakely, then he knows
9 both ways as to which way, you know, whether it was
10 a problem in the Evidence Committee or a problem
11 here, or nobody's thought about it.
12 CHAIRMAN SOULES: Well, that satisfies
13 me. I don't know whether Dean has got that --
14 John O'Quinn?
15 MR. O'QUINN: I'd like to work with
16 Professor Blakely.
17 CHAIRMAN SOULES: On the evidence? All
18 right.
19 Is there anyone else that would like to be
20 assigned to evidence and work with Dean Blakely, in
21 particular?
22 MR. O'QUINN: No, thanks. I said work
23 with Dean, not work for him.
24 CHAIRMAN SOULES: Okay. Franklin, let's
25 hear suggestions from you and then anyone else that

1 has any suggestions for additional topics for us to
2 take up.
3 MR. JONES: I believe, if I heard you
4 correctly, you put me on to chair the committee to
5 study the question of trial procedure and the
6 court's charge in that matter.
7 CHAIRMAN SOULES: Yes, sir.
8 MR. JONES: Well, I believe that will
9 cover the point that I have brought up because I
10 believe that's where that issue arises. It's in
11 the charge. So, I don't think you need to consider
12 it any further.
13 MR. McMAINS: I don't think we need to
14 until we see something in writing anyway.
15 MR. KRONZER: Or in 269.
16 JUDGE HITTNER: Mr. Chairman, I'd like to
17 bring up one point that apparently I'll be speaking
18 with my subcommittee on, but it's something I've
19 taken an interest in for quite awhile, summary
20 judgments. It seems as though that one loophole,
21 the only loophole left after the Clear Creek case,
22 that you've got to make all of your objections
23 known at the trial level in order to get a reversal
24 under any grounds on the appellate level. The only
25 one area left, the only one area left is

1 insufficiency as a matter of law. And it would be
2 my point to show lawyer diligence down below where
3 I've seen so many people mess up, not put a
4 response in, and then come on the appellate courts
5 screaming insufficiency as a matter of law. It
6 would be a position that I would like to at least
7 bring out at the next meeting.
8 And I will put this in writing that that one
9 last loophole left in the Clear Creek case be
10 closed, that all insufficiency, including
11 insufficiency of matter of law, be brought to the
12 court's attention down below or be precluded on
13 appeal from bringing it up. That would be a point
14 that I will be bringing up to my subcommittee.
15 CHAIRMAN SOULES: All right.
16 MR. O'QUINN: Judge, I don't want to make
17 it easier for you guys to get summary judgments
18 against me.
19 JUDGE HITTNER: Get out of here.
20 MR. O'QUINN: That's what you say, "Get
21 out of here."
22 CHAIRMAN SOULES: What is the best time
23 for you all for another meeting? We need to have a
24 meeting.
25 Judge Wallace wants to speak for a moment.

1 JUSTICE WALLACE: One thing -- and I'm
2 not sure which it would go in, the Court of
3 Appeals or the Supreme Court, or maybe both, but
4 this problem that we keep running into, the Court
5 of Appeals are right on one point, which they say
6 is positive, and comes on up to the Supreme Court,
7 and they are reversed and yet their insufficiency
8 points, or something like that. And so you've got
9 to go through the entire process again. And I
10 haven't thought this through to know what the
11 answer is. But perhaps it would be a rule that
12 says any point not raised before the Court of
13 Appeals, not addressed by them is presumed to have
14 been overruled by them. Maybe that would take care
15 of it. But get away from remanding back and then
16 come back up again. Do y'all all understand what
17 I'm talking about?
18 MR. O'QUINN: Yes, sir. It's a good idea
19 really.
20 CHAIRMAN SOULES: Would the --
21 MR. KRONZER: Of course, you can't do
22 that on the facts sufficiency.
23 JUSTICE WALLACE: No.
24 JUDGE HITTNER: As far as the chairman
25 goes, the only week that you might keep in mine is

1 that the Judicial Conference this year will be the
2 week commencing September 30th through that Friday
3 the 4th. That is the Judicial Conference in
4 McAllen.
5 MR. McMAINS: Friday, October the 4th.
6 JUDGE HITTNER: September 30th through
7 October the 4th. That week. I think really it
8 begins on Tuesday or Wednesday, by the way.
9 MR. McMAINS: Luke, there's a serialized
10 seminar by the State Bar on special issue
11 submission. In fact, Justice Pope's engineering
12 the thing all September -- I mean every Thursday
13 and Friday in September. Under those
14 circumstances, I think October is doing some better
15 from a standpoint of a lot of people I know that
16 are participating on it. They're also on this
17 committee. Some of them aren't here.
18 CHAIRMAN SOULES: There was a suggestion
19 from Justice Evans that they might have their
20 reports, as far as their preferences about this
21 harmonized rule effort, together for a meeting at
22 the Judicial Conference so that the chief justices
23 and other justices attending there could meet there
24 and do that and, I guess, then pass to us their
25 joint suggestions. If we have that promptly, we're

1 still going to need -- Bill, you're going to need
2 until at least the end of October, aren't you --
3 PROFESSOR DORSANEO: That's right. We
4 are.
5 CHAIRMAN SOULES: -- for time to digest
6 whatever it is they send in, if it has much -- if
7 there's much to it.
8 MR. McMAINS: It depends on how
9 persuasive their arguments are.
10 CHAIRMAN SOULES: But if there is a lot
11 of material, it's just going to take going through
12 it.
13 JUDGE HITTNER: Are you looking at
14 something around Friday, November 1st, something
15 like that? That's right at the end of October.
16 MR. HUGHES: That or the 25th.
17 CHAIRMAN SOULES: Does that sound -- if
18 we're shooting for effective dates of -- well, I
19 think that's going to delay the effective dates of
20 the appellate rules. Because unless we have by
21 then gotten all the input we need from the Court of
22 Criminal Appeals, it's going to be difficult. But
23 if we have it by then I guess --
24 JUDGE HITTNER: That would be about one
25 month after the Judicial Conference.

1 MR. BRANSON: Judge Hittner, November
2 1st, though, would interfere with trick or
3 treating. It's the day after Halloween.
4 JUDGE HITTNER: That's right.
5 CHIEF JUSTICE WALLACE: That Court of
6 Criminal Appeals, as far as their work on evidence,
7 if they don't do it January 1st, they aren't going
8 to get to do it. So, I'm sure they'll have it in
9 by then, according to this Bill.
10 MR. McMAINS: I see.
11 CHAIRMAN SOULES: Well, let's -- is
12 everybody, as far as you know, available on
13 November 1st, Friday, November the 1st?
14 MR. O'QUINN: Terrible for me.
15 CHAIRMAN SOULES: Pardon?
16 MR. O'QUINN: If you're taking a head
17 count, that's bad. If you're taking a head count,
18 that's bad for me. But you've got a lot of things
19 to accommodate. I know I'll be in trial. I know
20 I'm going to be in trial that whole month.
21 CHAIRMAN SOULES: You're going to be in
22 trial the entire month of November? Well, when
23 will you start trial? That's a Friday.
24 MR. O'QUINN: What day of the month?
25 CHAIRMAN SOULES: November the 1st is a

1 Friday.

2 MR. McMAINS: Friday is the 1st.

3 MR. O'QUINN: I probably won't be in

4 trial. I'll probably start the Monday after, the

5 3rd. The 3rd or the 4th, whenever it is.

6 CHAIRMAN SOULES: This still puts you in

7 a bind that close to trial, of course.

8 MR. HUGHES: The 25th is the Friday

9 before.

10 CHAIRMAN SOULES: All right. How about

11 October the 25? Friday.

12 MR. ADAMS: That's no good for me.

13 JUDGE HITTNER: No good for me.

14 CHAIRMAN SOULES: Okay. November 1st and

15 2nd, we'll have a two day session. We'll probably

16 go all day both days.

17 MR. JONES: What days of the week are

18 those?

19 CHAIRMAN SOULES: Friday and Saturday.

20 We can meet two weekdays if you prefer. Generally

21 our attendance is better if we limit it to one

22 weekday and a Saturday.

23 JUSTICE WALKER: Is there a football

24 game that Saturday here?

25 CHAIRMAN SOULES: There may be. And if

1 so, just let me know, and I'll get you reservations
2 for a hotel in San Antonio, I guess. I'll attend
3 to that. Okay. November the 1st and 2nd then will
4 be our meeting. And we will, at that point, act on
5 the merits of the entire agenda. And I'll have the
6 agenda to you -- well, let's see.
7 Bill, if we get the work product of the
8 Judicial Conference --
9 MR. McMAINS: You need at least two
10 weeks, if you can --
11 CHAIRMAN SOULES: I don't know whether we
12 can wait for them to meet at that meeting and tell
13 us one way or the other.
14 MR. McMAINS: -- to digest all that.
15 CHIEF JUSTICE HILL: If we could get a
16 combined rules work group from the Committee on the
17 Administration of Justice and this Committee for
18 the purpose of trying to work with this new Court
19 Administrator Act, if we can get our administrator
20 office to give this their priority as a work force,
21 follow-up force for the people, we might be able to
22 get our business that I'm so concerned about in
23 some kind of shape by November. It may be too much
24 to hope for.
25 But, you see, I visited -- there is a lot of

1 things -- we have to try to all work together. I'm
2 learning that this group here and this group here --
3 it's kind of like in disciplinary problems, you've
4 got the Oversight Committee over here, you've got
5 the Disciplinary Review Committee over here. One
6 of them is our committee and one is the State Bar's
7 Committee. And if you're not careful, you run the
8 risk of somebody feeling like they got shortchanged
9 or didn't get involved properly, and that creates
10 problems for us. And I'd like to avoid that here
11 by having those two committees --
12 Luke, if you and Mike Galliger (Phon.) could
13 get together and form us some sort of a task force
14 on this, and then Ray Judice and his group can be
15 -- they can be available. And the Texas Judicial
16 Counsel probably should feel a little bit left out
17 if they don't get consulted. You might ask Judge
18 Grant if he wants to participate.
19 Because I tell you, gentlemen, I hate to
20 sound like a broken record. I know we've got a lot
21 of problems and I'm more sensitive about this than
22 any of the others because of all these "shalls" in
23 here about what the Chief Justice has to do. I
24 shall I'm sure, shall do this and shall do that.
25 And so, if we could crank our business in there,

1 Luke, and maybe within the next 30 days or so have
2 a group agree to "Okay. I have." And it's got to
3 be people that know what they're doing and have the
4 time to do it. And there's no hard feelings if
5 somebody just flat doesn't have the time. I know
6 how busy you all are right now. And it may be that
7 you just have to end up with two or three that are
8 willing to say "Yeah, I'm willing to take this
9 home." Because it's going to take a heavy
10 committment of time to work out these Rules of
11 Administration and bring them back before this
12 group and get them approved, get the Committee on
13 Administration of Justice to approve them and then
14 we'll implement them as a part of the Rules of
15 Procedure of this state. And they're going to have
16 to be harmonized with local rules, and it's a big,
17 big order.
18 But anyway, I just want to get one more lick
19 in, one more closing argument on the importance
20 that we attach to this and the need for help. I
21 just can't come over there and I don't want to cry
22 on your shoulders, but, like, we get our work on
23 Thursday. We have 32 applications next week and
24 over 12 hard and heavy opinions to work through.
25 So, we really need most of our time over there.

1 And we -- there's no one -- we can't delegate that.
2 That's just our work. It's indispensable. So, we
3 just need some help here to get the administrative
4 part of our program in a little better shape. And
5 anything any of you could do to help us on that, we
6 will be ever grateful.
7 Sol, I sure wish you'd get your head way deep
8 in this thing and start trying to get your fertile
9 mind to work and see if you can't get aboard this
10 thing. And you sure would be a lot of help if you
11 could just -- because you've been there. You've
12 been a trial judge and you're a practical person.
13 And I'm really kind of fingering you right now
14 because we need somebody to just say, "Hey, I'm
15 willing to take three or four months and get this
16 thing done."
17 CHAIRMAN SOULES: Thank you very much,
18 Mr. Chief Justice.
19 I think then we'll use the last ten minutes
20 to have a short meeting of this Court
21 Administrative Bill Committee. And any of you that
22 don't want to take a section as your own
23 responsibility, can stay and hear what we resolve
24 about it or can wait to be assigned. But let's
25 see, so far the volunteers who are willing to take

1 sections of it are Jim Kronzer, who apparently had
2 to leave, Sam Sparks, Judge Linda Thomas, Tom
3 Ragland, Judge Hittner, Pat Beard, Franklin Jones,
4 Judge Casseb, Harold Nix and Lefty Morris. The
5 rest of you are certainly welcome to stay and are --
6 CHIEF JUSTICE HILL: What about our
7 cocktail hour --
8 CHAIRMAN SOULES: Our cocktail hour is
9 just on the other side of this same building. It
10 will be this same room just through the hallway
11 there, as I understand it, at 5:00 o'clock. Okay.
12 Then the committee as a whole stands
13 adjourned until 10:00 o'clock.
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17 (Proceedings recessed)
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25

1 STATE OF TEXAS)
2)
3 COUNTY OF TRAVIS)
4
5
6 I, Mary Ann Vorwerk, Certified Shorthand
7 Reporter in and for the County of Travis, State
8 of Texas, do hereby certify that the foregoing
9 typewritten pages contain a true and correct
10 transcription of my shorthand notes of the
11 proceedings taken upon the occasion set forth in
12 the caption hereof, as reduced to typewriting by
13 computer-aided transcription under my direction.
14
15
16
17 WITNESS MY HAND this the 30th day of
18 June, 1985.
19
20 Mary Ann Vorwerk
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