May 17, 1986

SUPREME COURT ADVISORY BOARD MEETING
Held at 1414 Colorado,
Austin, Texas 78701
May 17, 1986

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CHAIRMAN SOULES: We are going to start with Proposed Rule 364-A, which that may not be the best number for it, but that's the way we called it so far. That information is set out at Page 445. Actually, it would be a new rule. It's on 446. And Hadley has had a subcommittee working on this and, as you know, it is my judgment to step aside while it's being debated so that there wouldn't be any question about where somebody was coming from.

So, let me turn that over. The reason I'm taking this out of order is there's a TTLA meeting here in Austin today where some of our members need to go, and we're going to try to get this out of the way within an hour, if possible. Maybe it won't take that long, maybe it will take longer -- so that they can, when it's done, go forward to their other meeting. And with that, Hadley, it's your report.

PROFESSOR EDGAR: I wish Rusty were here. Maybe he'll come in while we're talking about it and I'll tell you somewhat of his position in just a minute.

In reading the minutes of the last meeting, our committee concluded that, really, what we are

supposed to do was to look at this rule and determine whether it might be a proper rule without regard to the constitutional acts that might be being held over our current rule.

And so, in order to do that, we looked at the second circuit opinion in the Pennzoil case, and some of the members of this committee were very helpful in providing me with information which they had already obtained.

Luke gave me some information, Harry Reasoner gave me some information, Kronzer did, Jim Sale did. And we tried to compile all this information, and I have it available for anybody that wants to inspect it.

But after looking at all of this, our committee was of the view that, as I stated in my letter to Luke, the committee was unanimous in concluding that a rule of this general nature is desirable; I'm talking about Rule 364-A.

Now whether it takes the precise form that we have it in now is something that we really didn't consider because that had already gone through the Committee on Administration of Justice, and I thought that would be more properly the subject of debate here in this committee.

But as far as the philosophy of allowing the Court to, in certain cases, not require a supersedeas bond of the type we now have, we felt this was a desirable rule.

Now, that's basically what we have done. Sam, have I correctly stated our position?

MR. SPARKS (EL PASO): That's right.

PROFESSOR EDGAR: Broadus isn't here yet but he has concurred in this also.

Now, let me say that Rusty had some serious questions about Proposed Rule 364-A. And I just had an opportunity to talk to him about it very briefly yesterday, and I really feel I would not be doing him justice if I tried to speak for him. But I just want to state that he does have some question about it.

CHAIRMAN SOULES: Okay. Hadley is going to conduct the debate if there is any debate because I'll be identifying people to speak. Rather, you would, so we're sure no question that someone besides me has recognized all speakers who care to address the issues.

PROFESSOR EDGAR: Is there any discussion?

MR. MORRIS: Hadley, let me just

comment. I'm awfully unknowledgeable, I guess is the word that's used, regarding this whole issue. Could you just kind of educate me a little bit about what the Court has said and what problems you're trying to cure?

PROFESSOR EDGAR: Well, of course, the origin of 364-A as you see here on Page 446 was something that was in the mill long before there was ever a Texaco/Pennzoil case. And this had gone through the Committee on the Administration of Justice, and they have proofed it and sent it to us for consideration.

During that period, Pennzoil vs. Texaco held in part that our statute as applied in that case was unconstitutional. And I have a copy of the opinion here if you want to take a look at it. At least, that's the way we interpret it.

There's another kicker to that, though: that the Court really spoke not only to the supersedeas bond aspect, but also to the fact that once a judgment is abstracted, it then becomes a debt of the company.

And, therefore, in the Texaco case, the supersedeas bond coupled with the abstract of judgment, simply precluded Texaco from obtaining a

line of credit from anybody because they now had an 11 billion dollar debt. So those coupled together, the Court said, rendered the supersedeas bond unconstitutional as applied in that case.

MR. SPARKS (EL PASO): I don't know if they really said "unconstitutional." What they did say was that their 1985 theory, it was a taking of property without due process to execute the judgment or to abstract the judgment you had to use state officials, so it was under state law and under the Equity Relief of 42 United States Code, 1985. An injunction was appropriate in this case.

They go on to talk about a lot of big numbers, which, of course, that case has. But really, the logic to it, I don't think, is differentiated between whether it's 11 billion dollar judgment that one person or one firm has trouble paying or 100 dollar judgment.

MR. SPARKS (SAN ANGELO): It shouldn't be.

PROFESSOR EDGAR: That's right, logically it shouldn't make any difference. And also, there are, I think, approximately 35 states, and I have the statutory references here if you

want to examine them, which have a provision similar to our current rule.

So I guess, if our statute is unconstitutional across the board, then so is everybody else's. I don't know whether misery loves company is a comforting thought, but any how, I'll just give you that information as well.

But in spite of all of that, it was our committee's view that we should have some provision in our rule that in certain types of cases the Court may do something other than require a bond equal to the amount of the judgment.

JUDGE WOOD: Let me ask you this question: What would the proposed rule would do under this situation? I know a case where a man worth $200,000, and that's all, is being sued for 4 million. The plaintiff probably doesn't have 200,000.

Now, the judgment is taken for, say, 1 million or 500,000, or whatever it is. My man simply, I say "my man", couldn't supersede it, no way in the world. And, on the other hand, if he doesn't, if his stuff served on his 200,000 is gone in the hands of his plaintiff, and by the

time he reverses it, if he does, why, that's gone.

Would this rule address that, that he ought to be able to put up everything he's got and hold it for a while.

CHAIRMAN SOULES: Yes.

PROFESSOR EDGAR: Well, I would think so.

JUDGE WOOD: I would assume that's the purpose of it.

PROFESSOR EDGAR: Yes.

JUDGE WOOD: But I'd be for such a rule, of course.

MR. SPARKS (EL PASO): Well, what's been happening all over the state, but I know I've got six or eight cases just in our firm even before Texaco, is if you get a large judgment, there are two ways to do it. You can make an agreement with the appellee. Now, usually when the plaintiffs lose, they don't lose a million dollars. When they lose, you're usually talking about defendant.

But you can make an agreement for cash consideration, or some type of thing, they'll agree not to execute during the appeal. And

that's not really good because usually it has, at least, a theoretical conflict between the party and his lawyer whose getting the money or getting part of it.

Or what has been done far more frequently in large judgment cases is you go into reorganization, get an injunction. And I know that we had, our business lawyers had, six entities including the Texas Association of Realtors in a reorganization until some -- these were anti-trust cases -- got included into the fifth circuit.

All of them were reversed but none of them could have been appealed. And so we find that with the sophisticated client that does have a lot of assets, your playing a lot of games in bankruptcy. And for the nonsophisticated client who doesn't have a lot of assets, they just go under, and there's no relief.

And the federal system -- I lost a case for a couple million dollars two years ago and got it reversed in the fifth circuit. And I tried every way in the world not to put a supersedeas. It was Jefferson Standard Life Insurance Company. They could have one, but the premium was $68,000 a

year.

And so they finally cut a deal by putting up some security with a company and got one issued. But I tried every way in the world, even to put up a CD in escrow for the appellee, and they wouldn't do it because, of course, they were trying to negotiate a settlement. And that's not criticism, they just wouldn't do it. It's just their own strategy.

But in a federal court you can get it back. I just got a check from them for $16,000 on that supersedeas. But there's no relief. But the relief, even if we gave relief in the State court, doesn't eliminate the problem as Judge Wood is saying, and it's forcing lawyers, in my judgment, to play games with the bankruptcy court. There's not as much tarnish because every other person is in bankruptcy now anyway it seems like.

But you go in, you convince the judge of the situation, you get a stay ordered and it just remains dormant for eight months, a year, however long your appeal is. Something really needs to be done, I think.

MR. BEARD: It looks like the courts are going to have to have some guidance. One of

the problems that the plaintiffs are going to face is that anticipating an adverse judgment, the defendant, one, prefers himself. He puts a lien, if he's got that, to his company for his corporation. He puts liens on all the property to himself. He's the guarantor. He makes sure the banks are covered if he hadn't up to that time.

And the preference time is running. So without guidance to the courts, they have got a lot of problems to try to face. Is the party seeking this relief going to file a schedule showing what preferences made within the last year? It's almost like you're going to force them to file a Chapter 11 or bankruptcy petition as part of the proceeding, because a whole lot goes on when the parties are anticipating an adverse judgment.

MR. SPARKS (EL PASO): There's one other problem, too. And that is, even if you've got the money and the assets for security, insurance companies don't want to sell a supersedeas anymore. The judgments are getting large. You've got the exemplary damage, you've got judgment, prejudgment and postjudgment interest. There are very few companies that would

write supersedeas above $500,000 now in the United States.

MR. BEARD: We all know one of the ways you settle in a case in Texas you cannot collect from this defendant if you don't have an insurance. So you settle or else, because we'll see you never collect any money. And in Texas, that's generally true; they're very difficult to claim.

PROFESSOR EDGAR: We're talking about Rule 364-A, Rusty. We just passed it. And I stated that you had some concern about it.

CHAIRMAN SOULES: First of all, I'd like to have the committee's view as to whether or not David and I and Rusty should even speak to this. We all have some history with it, which we might want us to share. But I don't want to start that unless the committee is willing. Could you see that, at least, Hadley?

PROFESSOR EDGAR: I'm recognizing that you do have a professional interest in a case involving this subject. I think we can take that into consideration and listen to what you have to say.

MR. NIX: I'd like to hear from you on

the experience part of it. After all we're looking for an equitable solution.

MR. SPARKS (EL PASO): Just for the record, there's not a rule that goes by here that every lawyer in here doesn't have some interest in at any time.

MR. SPARKS (SAN ANGELO): I want to hear what you've got to say. I recognize bias and prejudice.

CHAIRMAN SOULES: Well, I was biased and prejudiced on this about two and a half years ago when it started. So that was before I had the case. And that was coming out of another case, actually. The realization that we discovered at that time and I don't know exactly how many million it is -- I think it's like 100 million, but it may be a few hundred million dollars is all the supersedeas money there is in the world. That's all of it. So if it's a few hundred million, we're now talking about seeing verdicts at least that may exceed that.

For example, in the construction of nuclear power plants, you run through a few hundred million in a hurry, as everybody at this table knows, because we're probably all serviced by

Texas utilities, or most of us, that are involved in those kinds of construction plants right now.

And just the world is getting bigger and the numbers are getting bigger. So, even if you could make a supersedeas bond, there are going to be cases that there's not enough supersedeas money in the world to make.

But beyond that, in a smaller case, people had a nice business; they got sued. The trial went very close both ways on the evidence. Jury finally came in with a small seven-figure number. And those people could not make that bond and lost their business, and the case was reversed.

Just like Judge Wood's $200,000, it didn't make any difference. That was the kind of money that a lot of people look at, a couple of million dollars. And they lost their business and when the case was turned around, there was no way to recover their losses. They could not put Humpty Dumpty back together again.

So, this rule really starts from a different place than the litigation that's on file in New York. It came through the Committee on Administration of Justice. It was not in this form at all when it started. And it took about a

year there. When it did come out of the Committee on Administration of Justice, there was a very heavy majority, very few dissents, concerning whether or not this rule should be recommended.

And the debate had to do primarily with the last paragraph, trying to get words that would impose on the judge that was reviewing the question of supersedeas, whether it be in the trial court or whatever court it's pending in at the time, whether it be in the trial court or the appellate court, to preserve the plaintiff's rights, the plaintiff who has the judgment to the fullest extent possible by language and rule; and we so we got into this.

It says, "An order granting, limiting or modifying a stay must provide sufficient conditions for the continuing security of the adverse party to preserve the status quo and the effectiveness of the judgment or order appealed from."

Now, for example, a receiver could be appointed for that corporation that was lost. Of course, that corporation would have to pay the bills. And there would have to be some showing that the cash flow of the corporation could pay

the bills without reducing its assets in an interim period.

An accounting firm or some organization would make reports, frequently, monthly, perhaps, on profits and losses and balance sheets. Those reports to go to the secured party, the judgment creditor and to the Court. At any time that's reviewable under this rule, whether or not the status quo is being preserved and the effectiveness of the judgment is being preserved.

Pat Beard's point earlier about, do they have to file schedules? That can be one of these conditions required to be sufficient for the continuing security and to preserve the status quo.

MR. BEARD: Luke, aren't you just talking about a Chapter 11. Why should our courts run Chapter 11?

CHAIRMAN SOULES: We're not talking about a Chapter 11 because --

MR. BEARD: You're asking the State Court to run the equivalent of 11.

CHAIRMAN SOULES: No, I'm not, because I'm not putting every one of that party's creditors into a bankruptcy situation. I'm not

putting a party into the bankruptcy situation. I don't have a situation now where the secured creditors come in and want lists of stays to foreclose on the company's real estate asset.

All I'm saying is, the company is going to have to -- one of the things may be that this judgment creditor gets a lien of record on all of the assets of that company so that notice to creditors is given.

Maybe there's something in lieu of that where the lien does not go of record but the Court and the judgment better monitor the business affairs on a monthly basis or frequent basis. And if it should ever become apparent that there is change, those things would then go of record. And there would be an injunction punishable by contempt against the company and all of its officers that they shall not borrow money without leave of the Court and mortgage any of their assets.

MR. BEARD: But it's substantially equivalent of 11 and 13.

CHAIRMAN SOULES: It's just not, Pat. Because whenever you go into 11, you have to pull in everybody into that proceeding that touches that business and make them parties. You don't

have to do that under 364-A.

MR. BEARD: But still the Court is going to have to consider the effect of -- if somebody's out there foreclosing on you, you've got a million dollar equity. You know, somebody has got to consider what the effect of that is going to be on this judgment creditor. I'm just saying, I think it's practically 11 or 13 that you're talking about.

CHAIRMAN SOULES: Well, I don't, but it may be. This is a much narrower proceeding in the sense that it goes to just one debt and preserving the status quo for one debt. And it is not the broad proceeding where every debt there is now has to come in, assert its rights of record. This proceeding could be relatively inexpensive compared to an 11 proceeding.

MR. BEARD: Well, I think there's no way that you can handle one debt. All creditors are affected when you do that. And that's why my comment to begin with is this Court would have to have a great deal of guidance. They really would have to have schedules.

CHAIRMAN SOULES: Well, maybe.

MR. BEARD: A list of questions.

CHAIRMAN SOULES: I'll finish and then I'm not going to chair this part of it. Then we've got the situation where there's a million dollar judgment against the party that's got $200,000. There's a hearing and the Court concludes that's all there is.

The plaintiff is not going to get more than $200,000. That's the status quo, and that's all the security there is for his judgment. Once that is covered then the Court could rule that that's adequate under this rule.

Now if the judgment creditor finds that there are other assets, then Court might rule that full discovery, postjudgment discovery, proceeds so that they can attempt to come back and show the Court there really is more. And if they find some more, do that too.

There could be part supersedeas. If the party could show I can supersede to the extent of $100,000, I can afford that. And I can lien the $200,000 worth of assets that I have, but I can't make more than $100,000 supersedeas; so there can be part.

And then the final one, if the parties have hidden assets in anticipation of judgment, the

effectiveness of the judgment to preserve that, the Court would have to enter an order that permitted the freezing of those assets where they are.

And that might require the agreement of the persons holding those assets to freeze them. Because if they were not frozen there and if there was not some alternative relief granted, that judgment creditor could file suit to set aside those transfers in violation of rights of creditors immediately upon the getting of the judgment.

So the courts say, "Look, either you get those frozen where they are, and the Court monitors them, or I'm not going to give you any relief." You can either file supersedeas bond or the plaintiff is going to be able to go after those assets.

Now, all of those types of things and anything else that you can imagine that would go towards preserving the status quo assets held wherever they are, and not subject to diminution, and the effectiveness of the judgment, that is, preserve the ability to pay that judgment in the same shape it's in when the judgment is granted,

would fulfill the two points that are mandatory. They're not discretionary; they're mandatory in this third paragraph.

Now, as far as reviewability is concerned, what the trial court does is reviewable in the Court of Appeals by the express language of this order of this rule. Because either the party from which an appeal is taken or to which the appeal is taken has the power to monitor for preservation of the status quo and the preservation of the effectiveness of the judgment at all times.

So that's, in a nutshell, I think, a couple of years' work in the COAJ, and that's the end of it.

PROFESSOR EDGAR: Sam, do you want to speak?

MR. SPARKS (SAN ANGELO): Yes. I've got a basic, just a philosophical problem. I've noticed that courts and juries sometimes disagree on their feelings about how a case should turn, at least, start off with that premise.

But I keep hearing about the person that loses that gets it reversed later on. What about the man that wins and it's appealed and he still wins? I haven't had this situation myself.

But you take a fight over a closely held corporation or a partnership and one man has been excluded and he tries it in court and he wins. And a stay is issued by the Court because the judge might have thought the other party -- you know, but a jury disagrees. That man is being deprived of his winnings for the next two or three years, if you want to put it that way. And he wins on appeal.

And yet while it's going on, the other person that he's been fighting has been paying himself a half million dollar year salary -- I mean the money -- you are getting into Chapter 11, just like Pat's talking about.

And then it gets down to preferential payments and you say, "well, the guy has got to pay it back." He doesn't have it. He's in the Caymen Islands, you know. There are problems on both sides of this thing, is what I'm saying.

The person that prevails at the trial court level and gets a judgment would seem to have some rights, too. In my opinion, more so than the man that loses because I believe in our system of trials and juries.

MR. LOW: The only experience I've had with that -- Gilbert and I were just talking. We've had a rule like this in Beaumont that judges at least on one or maybe more occasions, have applied, and the other side just decided not to mandamus him. We had a situation where it was a pretty closely held company. And just like Sam was talking about, one side won.

And this fellow who is still a judge there right now made him put up 100,000 supersedeas and he said, "I'm going to keep everything at status quo. You're not going to pay yourself anymore," and any details. So it would just be maintained like it was rather than coming in and interrupting and have, you know, somebody else taking over the business that other people might not want to deal with just to keep it running as smooth as it could.

That plaintiff prevailed on appeal. He ended up getting it. But in the meanwhile, he got, you know, the whole thing. I'm not saying it works that way everytime but it sure did that time, didn't it, Gilbert?

MR. BEARD: We have a bench of trial level and appellate level that substantially knows

nothing about bankruptcy law. All this bankruptcy litigation and all has really come along since most of the members of the court went on the bench.

You know it's only since '73 or '74 that so much of your bankruptcy litigations began for this part of the country, as far as I'm concerned. The Court is going to have a difficult time understanding just what all the problems are.

I guess what I'm saying is, the threshold issue that the courts should decide is that Chapter 11 and 13 is not an appropriate remedy. And, you know, it can be that a company or a man cannot operate under 11 or 13 for whatever reasons, but that they have to cross that threshold. That's not a proper remedy before we apply these.

MR. BRANSON: I had a question. Did we cross the threshold question of whether we we were going to address this issue?

PROFESSOR EDGAR: Yes. This was placed on the floor as the first item of business.

MR. BRANSON: I know. But last time it was tabled because we had several members of

the committee who had involvements and we didn't want to do anything, even though proper in nature, that might appear or have the appearance of improprieties. Did we address that issue already?

PROFESSOR EDGAR: Yes. At the last meeting the committee appointed the subcommittee of which I was Chairman, and Broadus Spivey and Sam Sparks of El Paso were members. And we made a report before you got here. And now we're addressing the issue. So it is an item which was placed on the floor for this meeting. Is that your question?

MR. BRANSON: Yes. And I'd like to go on record opposing that. Because I really don't think it's appropriate with the high percentage of members on this committee who have involvement in that case for the committee to make recommendations to a court who has no involvement in the case.

Even though I agree that all the members of this committee, particularly those who have interest in the case, are really above reproach on the issue in the political times in which we exist, I just think appearance could cause damage

to the reputation of the committee and perhaps the Court.

MR. NIX: Hadley, you mentioned earlier that Rusty had some problem of a constitutional nature. Did you say --

PROFESSOR EDGAR: I just said he had a question about it that I wanted him to address.

MR. NIX: All right. I see.

MR. SPARKS (EL PASO): Before you got here several people stated that we would like to have everybody's input if they felt like they could give it. Because I don't think there's a rule that comes up where every person sitting at this table doesn't have a case that relates to either the rule, even in discovery, or, I bet, everybody at this table has some potential case right now, if not an actual case, that involves Rule 364-A.

CHAIRMAN SOULES: Let me make this clear right now on the record. Since Frank Branson made the remarks that he has just made and gone on record in the way he has, I'm going to leave this meeting. And I'm not coming back until this issue is resolved. Because I don't want there being anything in any brief that quotes that

that record that's just been made, without it being clear, that when it was made, that this Chairman left this room. So I'm gone.

MR. BEARD: Well, I think the record should be clear that we asked for your opinion recognizing your conflict.

CHAIRMAN SOULES: But that was before Branson's comment, and I can't stay here after that. I'll see you. Let me know when this issue has been resolved.

JUDGE WOOD: Well, if that's the case, I've got a situation just the same way involving exactly the same manner. So I guess I ought to leave too.

MR. MCCONNICO: I guess I was going to say exactly what Sam said. Everyone of us has an experience on this rule, and I think that's why we're here. We're not here to speak about our cases, just our experience on how this proposal might help the law of the State of Texas.

And what I was going to respond to, what Pat was saying, is, this isn't going to stop people from going into bankruptcy. If it's to their advantage to go into Chapter 11, they're going to go into Chapter 11 regardless of this rule.

My experience with this, a little variation of this rule, it's been very easy to enforce. We've had oil and gas cases where there's been a reservoir being drained. And the only thing the person draining the reservoir, the only asset they had was that reservoir. And the only thing the plaintiff had was the judgment for the drainage.

Well, if you let -- the party draining the reservoir could not put up a supersedeas bond. And so what happens is then, are you going to continue to allow the defendant to drain the reservoir? Because if he does, the plaintiff doesn't have a judgment. It's no good. He's out.

So the Court has put in an injunction and said, "No. You're not going to continue draining the reservoir while it's on appeal." It's very simple and everybody was satisfied. So I think in a practical situation where we've applied this rule, it's worked. And, of course, we've never had this rule, but to be honest about it, we've all had variations of this rule applied in practice.

PROFESSOR EDGAR: Any further discussion?

MR. MCMAINS: Let the record reflect, as everybody has probably noticed, that I am still in the room. In regards to Steve's last comment, our supersedeas rules have been developed extensively over the years to accommodate situations in which monetary damages was not the only thing in the judgment.

If there's anything else in the judgment, there are all kinds of discretionary rules that apply with regards to injunctions, et cetera; that's already in the rule. We're talking about a monetary judgment and what is the protection.

For the record, I was on the subcommittee that examined this rule for the Appellate Rules of Procedure, in fact, when we were going to put them in, which examination was done in the spring, summer and fall. Our last subcommittee broke, and, in fact, I think Steve was there, in September long before any of us, at least, any of us in this room at the present time, were involved in Texaco/Pennzoil litigations.

And my feeling at the time was antagonism to the rule, both philosophically, and the merits of this rule as written, which I find to be rather markedly deficient in standard. And the

subcommittee voted it down.

Now, I'm not sure whether Steve dissented or not; I don't remember. But we had Steve there, we had Judge Guittard there, we had Judge Tunks there. Bill Dorsaneo, myself. And the committee substantially voted not to recommend the adoption of the rule for a number of various specific reasons.

And it's only to give you the flavor of those reasons that I can stay. And if the committee would like me to leave, then I'll take my cigar with me and I'll be glad to do so.

My concern from a philosophical standpoint of this rule is much in line with Pat's. And that is, that there are federal remedies, in terms of bankruptcy, for what happens when somebody gets in deep water in debt, whether it results in a judgment or doesn't result in a judgement, whether it's early on in the game or late in the game.

And the federal bankruptcy courts are set up to manage that to protect all the creditors' relative rights. I think, just from what you heard Luke's description of what he expected our trial courts to be doing, it gives you an idea of the incredible administrative task with virtually

no guidelines, no rules. At least the bankruptcy courts have rules; they may not follow them very often. But they have a whole bunch of them and the people who practice in those courts have some good idea of what's going on. And they have some pretty hard clashes on procedural things that occur with regard to everyday transactions.

But the example that I heard which I didn't hear the complete of was somebody could only afford $200,000 so you put up $200,000 and that maintains the status quo. Well, they inherit a million the next week. But your judgment stayed; you haven't bothered to look. You don't know about it. And you find out about it when the guy has left for Monte Carlo. You don't have -- unless you appoint a receiver in every case, that you don't get a supersedeas bond. And, in essence, a bankruptcy trustee and closely administered.

I just tell you my experience, which has been some more substantial than I wanted to be recently with defendants in bankruptcy court, has been rather atrocious in terms of being able to get much done. But that's the reason that there's so much protection. And they're geared and set up

for that. And if that is, in fact, a remedy that is available to a judgment debtor, you cannot otherwise secure a supersedeas bond if it's only a money judgment.

Now, I want to make just one point. I'm not attempting to prejudice anybody or any statement. I think the committee has already concluded, the subcommittee, as I understand it, was charged with the idea of examining constitutionality of these rules, and determined that you didn't have any problems with -- or didn't think that was an issue, essentially.

And I agree because a lot of people have, while they criticize or not have understood the Texaco/Pennzoil litigation -- the fact of the matter is the essence, as I perceive it, of the inadequacy of post-appellate stay procedures in Texas, was not just the supersedeas bonds. In fact, that wasn't even the principal problem.

The principal problem is the statute. It's abstracting judgments, which gives you an immediate lien which puts companies that have any substantial debt or any substantial agreements not to create debt in default immediately.

So that the only remedy they have then is a

Chapter 11 proceeding. That's fine if a Chapter 11 proceeding will give you the protection. It doesn't give you international protection. So in a multi-national corporation there are some problems with regards to exactly how you've administered it.

And that's really -- generally, we're not going to be talking about -- and I think that the Texaco case was kind of a one in a billion, if you will. But in terms of a multi-national corporation not being able to make supersedeas on money judgment, the -- whenever I reviewed this on the subcommittee -- we are not unusual, this state is not unusual, in terms of requiring a supersedeas bond or other security to avoid a stay in the full amount of the judgment of a monetary judgment. That is the rule rather than the exception across the state.

The Rule 41 procedure in Federal Court is substantially different and substantially not used. I think Buddy probably, in all his experience, very seldom has had a stay of judgment without full protection in terms of the level of the bond. And this rule almost encourages its regularity of use which is what gets the courts in

administrative postures that they ought not be in right now.

But the final philosophical problem I have with it is just from a standpoint of what type of litigation that I do. And this is purely personal, purely prejudicial, I suppose and bias, and I throw it out with that exposure and reference.

Most of the litigation in this state involving people who want to partially supersede are not private litigants. They're insurance company representatives. They're individual defendants who are represented by an insurance company who's got limited coverage, who basically, at least in my experience in all the cases that I have that are extra limits cases on appeal, every single one of them could have been settled within limits.

And what you're doing, basically, is with those, you essentially relieve all of the pressure, or substantially diminish the pressure, that is put on the movement of litigation in the first place.

That is the risk of a trial of a case in a limit situation in an insurance policy situation.

That is the precise place where movement of litigation through the courts by settlement, which is the thing that I think basically is the only way we're going to get out of a lot of fixes that we have, in terms of the docket load. That's where it ought too come in, is from that.

And, like I say, this is a pure-docket oriented problem. But when an insurance company is controlling the handling of litigation, knowing full well that they have the availability of remedies, post-judgment for the ostensible protection of the insured and the actual protection of them, that basically postpones all efforts at maintaining any kind of a Stowers (phonetic) action or anything else for the pendency of the appeal, which these days in Corpus Christi, Texas in significant cases means, basically, it takes me three years to come anywhere close to getting through the Supreme Court, because I'm in the Court of Appeals fighting around for 18 months.

Now, we don't even know, in terms of subtantive law, when the statute of limitations starts to run on a Stowers (phonetic) claim. You may have to be trying to litigate that at the same

time that the other case is on appeal if there is no supersedeas. So there is arguably some damage to the rights of the insured if he's subjected to receivership or something. I suppose that's damage that could give rise to a Stowers claim.

But at any rate, from a standpoint of the insurance docket, and from giving insurance companies the benefit of their handling and or alleged mishandling of lawsuits, ostensibly protecting the little men, I am really offended by that notion and from a philosophical standpoint.

PROFESSOR EDGAR: I want to call on David next. But first, I don't know whether you intended this, Rusty, but in response to your remark about Steve's case, even in Steve's case, under current law, a bond is required. And I don't think he meant to imply that only cases involving money judgments required bonds.

MR. MCMAINS: No. What I'm saying is there is much discretion, much supplemental orders that can be done, and the parties have much broader view to working with each other when they're talking about, in general litigation matters, in specific performance or injunctive relief or that sort of thing or even modifications

of the bond.

MR. MCCONNICO: In my example, that's not injunctive relief. You know, that is a money damage. If you sue someone on drainage of an oil and gas field, what you get is a money damage. So we're talking about the same money damage award that you would get in a PI case.

MR. MCMAINS: But, of course, you have a remedy of putting them into the receivership anyway if there's not a posting of the supersedeas bond. That's what I mean.

We have available remedies for the judgment debtor if there's not protection by the bond. You have alternatives either receivership or force them into a Chapter 11 which will give them the capital.

MR. MCCONNICO: But that's the problem; we don't want to put them in Chapter 11. So we have been using a variation of this proposal in the past and it's worked.

And, you know, I can give two examples of drainage cases in South Texas that I'm very familiar with. One of them I worked up the case and tried and the other one's in our law firm. And we use both of these and it worked in both cases.

We're just saying, you know, "You're going to stop draining this oil field, although you cannot put up two and a half to three million dollars during the pendency of the appeal."

MR. MCMAINS: But as you point out, it's a fact that you have the leverage that you had, is the point that would make them be reasonable, is what I'm saying. They would have -- with the existence of this rule, you would have been fighting in court in my judgment on adversarial levels for something they could have kept a whole lot more.

Maybe your judge wouldn't have given it to you, but maybe he would. Maybe he would have done a lot worse for you and you wouldn't have been able to do it. It's the leverage that you have that gives you the ability to agree. There's always the ability to enter into some kind of waiver or an agreement under the situations. But without the absolute rules that are available in monetary judgment cases you don't have a bargaining position to accommodate from. You end up fighting it out in front of the trial judge, who has a tendency, first of all, not to have time to want to consider it, and certainly not to have

time to put somebody into receivership to report to him all the time.

If there were to actually be implemented substitute remedies to absolutely preserve the priority of that judgment in time, it would require regular monitoring of virtually every defendant's activites -- defendant judgment.

Anything less than that is not full protection. And that's just not anything different than appointing a receiver in every case. As it stands, we don't have hardly any guidance. We have no standards for appellate review. Good cause for modification, I don't know what that means.

MR. MCCONNICO: Well, this rule does not take away any leverage from a plaintiff if you compare it to a personal injury situation than a plaintiff in a commercial case that I was just talking about.

This rule doesn't take away, that I can see, any leverage from someone that has a judgment. He still has his judgment. All he's trying to do is to make sure he can execute on that judgment. And it's a lot harder to execute once somebody's in Chapter 11.

If what we're trying to do here is to prevent defendants from going into Chapter 11, all we're doing is writing something in the long run that can benefit both plaintiffs and defendants.

MR. MCMAINS: But what I am telling you is that I disagree wholeheartedly if you say that this does not reduce your leverage. Because I think that you're going to go to the courthouse first with this. Right now you know what the alternative extremes are. You execute immediately or provide for your post-judgment remedies immediately unless they post on a full bond, or they go to Chapter 11.

If neither one of you want that to happen, then you've got something to work out. You know what your positions are and you know what the ultimate -- what's going to happen to you if one or the other step has to be taken.

This is going to mandate the litigation of that issue and not the negotiation of the issue. And that's what I contend is going to happen.

MR. BECK: I have two questions, one to you and one for Rusty. The question to you is, is it your notion that if this committee recommends a rule of this type to the Supreme

Court, that it would or would not affect cases presently on appeal?

PROFESSOR EDGAR: I have no thought on that. I haven't thought of it. I don't know.

MR. BECK: I guess my comment would be that if there's the concern among the members of the committee along the lines of that expressed by Frank, one way to handle that, that is, the high visibility of the Pennzoil case and possible reverberations in the media about us tampering with rules that affect such a highly visible case.

One way to handle that would be to make any rule inapplicable to cases in which appeals have already been perfected. My question to Rusty is, Rusty, do I understand then that you, conceptually, are just opposed to any rule which would provide for any stay of enforcement of any judgment?

MR. MCMAINS: Do you mean as a money judgment for less than posting of either money substitute securities?

MR. BECK: Right.

MR. MCMAINS: See, I don't have a problem with the substitute security rule in terms

of stock or other liquid assets. We made a move in that in our Appellate Rules for the first time. It required something other than cash as a possibility, but it still had to be government bank instruments. You could use CD's.

There may be alternative liquid-type security that could be devisable, but anything less than the full amount of the judgment -- I fear the same as San Angelo Sam pointed out, that a trial judge who differs from a jury, whichever way, could well substitute his judgment in bonding requirements and have the same impact as if he just --

In fact, from your standpoint, I'm not sure -- and I just throw this out from a defendant's philosophical standpoint. If you've got somebody that's able to pay, although, like I say, an insurance company who has agreed to sign on the hook. But by the same token, the insured doesn't. And this is talking about a judge of debtor. The insurance company is not a judge of debtor. If you get that kind of relief, that may well discourage courts, trial courts, from genuinely considering remittitur points and saying, "Well, we'll just wait and see what has happened," because I'll make that argument in this rule.

I'll say, "You don't have to mess with this; no hardship on anybody. We won't require supersedeas. We'll just go ahead and let it go up, or you can agree to this modification and that modification."

I think it distorts, really, the function of the trial courts, what they should be, considering the real impact of the judgment is.

MR. BRANSON: What is the history of this rule? When did the current rule come into existence?

PROFESSOR EDGAR: The rule we now have?

MR. BRANSON: Yes.

PROFESSOR EDGAR: It came from the statutes.

MR. MCMAINS: It was by statute prior -- it's been in, I know, at least since 1911, and I'm sure it was before that.

PROFESSOR EDGAR: It was Article 2270 2271, probably at least by about 1925.

MR. BRANSON: What are the philosophical reasons for the rule having been passed some 60, 70 years ago and having been in existence that long? Why have we needed it all

that long on something we don't need?

PROFESSOR EDGAR: Judge Wallace wanted to say something.

JUSTICE WALLACE: One thing that I think we ought to consider and it's just a choice to be made, and that is, what are you going to do on appellate review once this trial judge, if he's the one who determines the substitute security?

Because the only review you have is abuse of discretion. We've said abuse of discretion is a violation of the clear principles of the law. And there's no clear principles of any kind in the rules. So, in effect, you've got no appellate review, as I see it, as the rules are written now. And I wanted to throw that out to you.

MR. MCMAINS: Another comment that I have about the form of this rule: This rule allows you to go for the first time to the Court of Appeals or the Supreme Court because it's whatever court it's appealed to and just ask them to do something. And it increases the original motion practice, which basically is a fact-finding power in the Appellate Court which, is a very strange animal to me.

I don't imagine any of our courts or appeals

want that power, frankly, and I don't think the Supreme Court does. And I'd assume that at the very minimum any fact findings or anything else in fact determinations would have to be made at the trial court level first before you bothered to go upstairs. And then as you say, we've got problems with how it is that you review it.

MR. SPARKS (EL PASO):

Philosophically, I have to say that I've always been opposed to Rusty's theory of abandoning the remedies of trial on appeals with regard to, if insurance companies have enough coverage, it ought to be settled and get the dockets in current shape.

But I've got two questions because it appears to me that some type of security under this rule as proposed or a similar rule puts a judgment creditor in better shape than if the party goes into bankruptcy. I pose that as a question because I don't do any bankruptcy law, but everything I hear from my bankruptcy law partners makes me think that there's not anything very fair over there.

And the second comment is: Rusty said something about the federal courts having this

similar ruling. I know in the Western District the judges will not do anything unless you have a supersedeas bond because of the Texas rule. They just won't let you have any. I've tried equal security and an escrow account with a national bank.

MR. MCMAINS: I'm just saying it is in the rule. I mean, it is a federal rule.

MR. SPARKS (EL PASO): The judge's don't intrepret it that way. But my question is, if you have an individual security circumstance on a particular judgment, and I'm asking the plaintiff's lawyers, primarily, aren't you better off than in the federal court, in a general reorganization? It seems to me it would be; I don't know.

MR. LOW: Let me add to one thing that Frank said. And I'm not making a suggestion; I'm just bringing it out. The Pennzoil/Texaco case has gotten down to the point they're even attempting to attach records of what Judge Casseb said, put everything in the record.

And I have no doubt but what they would some way attempt to put the record of the recommendation of this committee in there to show,

well, if you change it -- they knew it was wrong, they wouldn't change it. I mean, you know, they may not. I'm just saying that's just something you may want to consider. I'm not saying that I would vote to not do something now, but that's one thing going through my mind.

Because you've raised a good point that almost any rule which passed has cases pending on it. But most of them aren't focused upon just like this one, and I'm afraid they would even attempt to attach to the records of this proceeding of the recommendation of this Committee just to show that the Supreme Court Advisory Committee, regardless of the people being on it, I'm not saying that the Supreme Court Advisory Committee knew something was wrong with it and recommended it.

PROFESSOR EDGAR: Are you moving to table?

MR. LOW: No, I'm not moving. But I'm not sure that's what I'm saying. I'm just simply saying that's something we ought to consider.

MR. SPARKS (SAN ANGELO): Hadley, I'm kind of like everybody at Texaco. It doesn't bother me or Pennzoil or either one of them. If

you've got rules that need to be changed, they need to be changed. I just don't think this one needs to be changed, and I wanted to respond to what Steve was saying.

Steve, in your cases on the drainage of the fields, if you win, you've got a choice. You're making a conscious negotiating decision for your client or your client is participating in it. Whether to just shut the field down and not drain it anymore.

But if you've got this rule into effect, you've got a judge that says, "shut the field down." And the plaintiff, if that was done three years ago, oil was $45 a barrel and now it's 12. And he's lost a fortune when he wins on review; because oil may never get to 45 again. So you have imposed, as Judge Wallace says, a discretionary call by a trial judge that costs your client a fortune. I agree it may be happening right now, but your clients did it by negotiation by choice. It wasn't just imposed upon me. And it's that philosophical difference that bothers me.

MR. MCCONNICO: Sam, you still in my situation, the fact situation I gave, we have to

go to the trial judge and ask for that injunction. It's not a decision that we make. We're the plaintiff. We're being drained by someone else.

Now, that someone else cannot put up the bond. There's no way they can make the bond to cover our judgment. The only thing they have is that field. And since they can -- if it goes up on appeal, they're allowed to continue draining the field. The only asset that we ever have we can collect on is gone.

So we make the choice, the plaintiff makes the choice to enjoin the drainage, and to ask the Judge to enjoin the drainage. But, yes, the plaintiff is making that choice, okay.

Because at least there we can recover something. We can have something we can hold on to. And to me this rule is giving the same situation because you're going to have a lot of people -- like Luke said before he left, there's only so many millions of dollars out there for bonds. And there are a lot more judgments floating around than there is money to put up those bonds.

MR. BRANSON: I don't believe that.

Statistics do not bear that out. That is a part of this alleged crisis we're hearing it is absolutely crap. A Pennzoil bond may not be able to be made. We've managed to practice law in this state under this rule for 76 years before Pennzoil and Texaco started screwing each other. They happen to have done it at higher levels than the ordinary citizen in this state is accustomed to.

And I do not believe there are more than hundreds of millions of dollars worth of judgments -- pendings out there that an insurance company cannot write a supersedeas bond for and for a premium won't do it. And there are no statistics before this committee that bear that out.

MR. SPARKS (EL PASO): Let me provide some. I've got cases right now where companies who are worth far more than the judgment can't buy a supersedeas because insurance companies aren't selling supersedeas right now.

MR. BRANSON: Perhaps the thing to do is address the insurance problem rather than attempting to reform the substantive law of the state.

MR. SPARKS (EL PASO): The problem is, if you can't buy a supersedeas bond, even if you

could afford to do so, we've got a rule that just leaves the problem impossible. That's what we're doing.

MR. BECK: I don't think we're going to solve the alleged or actual court reform problems today. And I would suggest that we may have discussed this point enough and hope that somebody would move the question or move something so we can --

MR. BEARD: Let me point out, you know, later on today if we get to it, under my subcommittee we have a proposal to change 621-A, which allows discovery as soon as the judgment is rendered, so long as no supersedeas bond has been posted.

Now, I recommended to my subcommittee that we not change that rule, and no one responded to the contrary. So you have a corollary -- you know, somebody doesn't want any discovery once they get the judgment.

PROFESSOR EDGAR: Is there any further discussion. All right, Gil.

MR. ADAMS: I move we reject this proposed rule.

PROFESSOR EDGAR: Is there second?

MR. BEARD: Second.

PROFESSOR EDGAR: All right. Is there any further discussion?

MR. BECK: I would like the record to reflect that I'm not participating in the vote.

PROFESSOR EDGAR: The record will reflect that David Beck and Rusty McMains have excused themselves while this vote was being taken. Judge Wood has also excused himself and that Luke Soules has left the room and will not be voting.

All right. All those in favor of the motion to reject this rule, raise their hands. 8 in favor of the motion. All against raise their hands. 4. The motion passes 8 to 4. All right. Next item of business, let's get Soules in here.

(Off the record discussion ensued.

CHAIRMAN SOULES: Okay. Let's get back on the record now. Of course, I've been out of the room until we resumed at this point. I want to make that clear.

MR. SPARKS (EL PASO): I have a motion. I don't even know if it's in order; you

can make it in order. But I move that the transcript of the discussion on Rule 364-A not be prepared.

CHAIRMAN SOULES: That's overruled. I'm just not going to agree to it. I want it prepared for me if it's not prepared here, because if it's stricken, it's just going to look worse, and I just don't want it done.

MR. SPARKS (SAN ANGELO): In response to that --

MR. LOW: Well, I think what Sam's getting at is it not that it not be prepared, but it not be getting into the hands of just everybody.

CHAIRMAN SOULES: No way.

SAM SPARKS (SAN ANGELO): I object to this whole line of discussion. I think everything we're doing here is above board and certainly can be seen by anybody in the world.

CHAIRMAN SOULES: Absolutely.

(Off the record discussion ensued.

CHAIRMAN SOULES: When I was driving up this morning, I got to thinking about the

Administrative Rules aspects. And it is troublesome to me, the point that was raised late. And I'd like to get your input on whether we should have a special subcommittee on this. We may or we may not have a chance to look back at those rules.

What is most troublesome about it to me is, as I think I about Rules 3, 4 and 5, I'm more impressed with the fact that those do belong in the Rules of Civil Procedure as they give guidance to lawyers about how they're supposed to conduct their civil proceedings.

On the other hand, they do not contain much about -- that directs trial judges, how they handle the problems that are there in 3, 4 and 5. And it seems to me that we may need a committee to carefully look at those, and to the extent they are, indeed, administrative, leave them in, those parts that are administrative and directed to judges who are the administrators; the lawyers are not.

And then the other parts of those rules that are instructive to lawyers as to how you handle civil proceedings, before those judges who are administrative, be put in the rules. And that's

not going to be an easy task. But I'm troubled by not having directives to lawyers in the Rules of Civil Procedure, and the Administrative Rules then can tell the judges how they're supposed to run their dockets and handle any business. And I do want your input.

MR. SPIVEY: Luke, would that mean that a subcommittee would study the rules with a limited suggestion you'd made or, are we going to get an opportunity to have some substantive debate about the rules themselves?

CHAIRMAN SOULES: Well, we've had that, and we can have it some more if we get a chance. But this is a troublesome aspect to me that we just have not dealt with. And we are a rules committee first and foremost, although, obviously, our jurisdiction runs all the way to helping locate facilities for the Court.

I'm talking about a committee to do that narrow thing, which is going to be a big job. But it's a narrow assignment in the sense that the scope of the assignment is one thing, but it's a lot of work, probably will be a lot of work. What's your view on that?

MR. SPARKS (EL PASO): Luke, it seems

to me, and following up what Broadus was saying, that no matter how you isolate the portion of those rules which anybody thinks should be in the Rules of Civil Procedure, then what do you do with it? It seems like it would have to come back to the committee.

CHAIRMAN SOULES: That's what I mean. I mean an interim committee to say that the rules that deal with the assignment of cases should be put in the Rules of Civil Procedure where the rules now deal with assignment of cases. And the rules that affect discovery be put in the discovery rules, either in scope or maybe a new timing provision. And the ones that go to 166 be put in 166.

And I'm not identifying all the points because I haven't had time to. But we now have leg traps here, the Administrative Rules traps. We now have leg requirements in the Administrative Rules for lawyers representing clients that have serious consequences if they're not observed, and they're not in the Rules of Civil Procedure.

And when driving up here today, it occurred to me that they're really not administrative; they're directive to the lawyers how you handle

your cases. On the other hand, how judges are to administer their dockets, I guess, is administrative. And I think if the rules come down, one of the biggest contributions that we may be able to make is to get those rules where they may belong to give guidance to the practice of law as opposed to maybe things creating some confusion.

MR. MORRIS: The only thing I'm thinking, Luke, is, of course, that this whole Task Force thing is in response to some legislation. And there are going to be hearings at the State Bar Convention on this matter. And I think there's a tremendous amount of controversy about whether any of this is desirable by people from all walks of life, no matter what side of the docket.

And I would hate to see it be in any way where part of that was peeled off and put over in here as if it was a regular Rules of Procedure amendment. But it's really being perceived as a real major change in the way we handle our cases. And I'd hate to see -- there's already a lot of comment and a lot of criticism, frankly, that this thing is being handled in a rather high-handed

fashion at the Task Force level.

CHAIRMAN SOULES: Lefty, I'm sorry to interrupt you. We debated that on Thursday. And if you have a point to make about whether we ought to do, what I'm asking, that we've got a lot of other work to do, and we can't redebate.

MR. MORRIS: I'm trying to make my point. And maybe I'm not doing a very good job of it. I'm not being critical of anyone, Luke. The point I'm trying to make is that perception out there in the Bar is that this thing has been on the fast track anyway. So I think that until some hearings have been held, and further determination has been made whether we should go further with it, that our committee shouldn't pick to get involved in it.

CHAIRMAN SOULES: A view may prevail that these rules be effective before the legislature convenes. I'll just tell you this. So, if we're going to do this, we need to do it by September, what I'm talking about right now.

Whether it goes hand and glove with the legislative hearings, whether it goes hand and glove with the promulgation of the Administrative Rules, whether we tell the Court that we want to

do this job and we would like to have an opportunity to get it done by September before they promulgate these rules to be effective before the legislature convenes, we have got to make that decision today. Because if we don't, we may not have the opportunity to make it again.

And whichever way it goes is fine. I just do want us to make a decision whether this committee wants to -- you know, subject to the imposition of these rules, if you'd want to call it imposition, do we want to scrub through to separate them, as I've indicated, between now and September, or do we just not want to take that task?

MR. MCMAINS: We can align with that. I don't know whether this is exactly what you had in mind. But I would certainly move or be in support of a motion of proclamation, or whatever, of this committee, that we are prepared in both subcommittee and full committee forum, to attempt to do something insofar as making some Administrative Rules that, in our judgment, are of some help.

I think that the time -- what I would like to do is to move, basically, to make our views known to the Court that we would like an opportunity to

review anything that comes out of these hearings with carte blanche to amend them insofar as making them and fashion them to where they really accomplish what we think and what the committee thinks are the problems and the problems that we can realistically address.

I'm not trying to supersede the Task Force, and it may not be appropriate. I think, however, that there is input that the lawyers are going to give, and in order for that to be meaningful at the Bar Convention, is at least I'm sure a lot of them are going to the Bar Convention thinking that input is going to be made. But I don't think we should be pretentious enough to try to do anything before then, but that we should after that input is taken, and if there is something that comes out of that in terms of proposed revisions then this committee should be willing to get high behind to do whatever anybody wants to do to try to put something together that works. And I'm perfectly supportive of that. I think everybody's position was that what's recommended we don't think will work.

MR. BEARD: I think we should assume that Chief Justice might prevail and start to work

on trying to coordinate it and put it over in the rule. I guess everybody that sat on the Task Force has some idea how strong the Chief Justice feels. And I think we ought to be taking that assumption that something is going to come out similar to this and then start to work on it. Because the Chief Justice feels strongly that if something isn't done by the time the legislature meets, then the problem will be taken away from the Force.

MR. LOW: I think Justice Wallace was smart in philosophy; he's going to return to the court and, obviously, tell the Court that this committee voted, you know, that we don't like the rules. But then what effect that is going to have, we don't know. So if it has an effect, then it won't be a problem. It appears that it may not have an effect, and I agree with both Pat and Rusty to some extent, I think, that we need to have the Court aware of the fact that we think strongly that some of these rules are not just Administrative Rules; they are Rules of Civil Procedure. And the ones that affect, are they -- ask us to dovetail with the rules, ought to go into the rules. And we should have a subcommittee

or somebody prepare to move forward as soon as possible and advise the Chief Justice of that.

CHAIRMAN SOULES: Any further debate on the question?

MR. SPIVEY: Buddy, isn't the problem that any move that we make would, number one, be futile, and number two, wouldn't be material until after we get the inputs from the Bar?

I wouldn't have any objection. I thnk it would be proper to create such a committee, but it's my understanding, not to commence deliberations until after they've heard the input from the general Bar, because we're probably going to get some good suggestions.

MR. LOW: I'm not disagreeing with you, but I think we should let the Chief Justice know that we don't like what they're doing, but we're prepared to pick up the task and go forward. Because it would be wrong to just make a separate set of rules and call these Administrative Rules when they're really Rules of Civil Procedure.

MR. SPIVEY: I agree with you.

MR. LOW: That's all I'm saying.

CHAIRMAN SOULES: Let me have a show of hands. How many of the people here are willing

to start work right now to separate out what seems to be Civil Procedure from what's Administrative and then to revise that based on what we get at the Bar Convention and thereafter? Are there any people willing to do that? Okay. I'm going to go to work on it because I think it's important, but whether I have help or not is a different story.

MR. BRANSON: Luke, let me ask you a question. Having sat through the Task Force and having seen some problems brought to bear, some of which looked more real than others, there might well be several members of this committee who would be interested in working with people like Judge Casseb to look at what areas of the state, such as Harris County, seem to be really having problem with docket control, and attempt to address pockets of problems with recommendations to districts, rather than attempting to revise an entire Rules of Civil Procedure and create new Administrative Rules. Is that something that you're envisioning within your request?

CHAIRMAN SOULES: No.

MR. BRANSON: Or are we talking about merely taking Dean Friessen's package and trying to separate it out and use is it in terms of Civil

Procedure Rules and Administrative Rules. Because I think several of us really were not responsive to Dean Friessen's approach.

CHAIRMAN SOULES: I'm talking about taking the draft that we started with on Thursday, as we marked it up through the day on Thursday, and separating out what we feel is Rules of Civil Procedure from what's really Administrative Rules and trying to integrate the Rules of Civil Procedure that we identify into the present rules, you know, on condition, or whatever, that they come out that way so that we are heard by the Chief Justice, if this is going to happen anyway, if the Court is going to do it anyway, then let's get them in the right place. That's all I'm talking about.

MR. BRANSON: Luke, maybe I'm not perceiving what this committee's marching orders are. If you are telling us as Chairman of the committee, that without regard to our input, those rules or some form of those rules are going to be done anyway?

CHAIRMAN SOULES: I'm not telling you that. I don't know that.

MR. BRANSON: Okay. That's one

matter. If on the other hand you're saying, are you all willing to sit down and attempt to address the problems that were discussed within the Task Force, then I submit you find a different responsiveness to this committee than someone saying that the Court or the Chief Justice has said these rules are going to pass.

CHAIRMAN SOULES: I didn't say that. I am not saying it, and will not say it.

MR. BRANSON: Didn't we vote at the meeting the day before yesterday that we would not pass those rules even in the amended form, or they did not pass our scrutiny, and therefore wouldn't it be better for us to, perhaps, look at it, as Broadus suggested, with the input of the Bar at the Bar Convention, some alternative ways of addressing the same problem?

CHAIRMAN SOULES: What I'm troubled by is that these rules come down in a confusing way. And I want to get that addressed by this committee so we can at least, if they do come down, try to prevent that from happening.

PROFESSOR EDGAR: Let's try and place this in kind of an overall perspective and think about what our role really is.

Now, the Supreme Court could go ahead and promulgate these rules tomorrow if it wanted to, and we all know that. They have asked us for our input. And I think that we would not be performing our responsibility if we didn't give them the benefit of our input.

I'm not talking about philosophical input. You've already told me what you think about that. But if they're going to do it, then I think it's certainly to our advantage and our responsibility to prepare these in a way that will implement the philosophy which the Supreme Court might say is going to be utilized in this state.

Now, my concern, though, is that if we're going to have this public hearing at the Bar Convention, is it likely that some change in these proposed rules will emanate from that public debate.

Now, if it's not likely that they're going to emanate, then I think we might as well go ahead and get to work now. On the other hand, if the purpose of this is to get input and possibly result in some change, then I think it's probably not productive for us to volunteer to get the work until we see what the changes are.

And I'd like to know, really, whether or not this public debate is one in which change will be seriously considered or, perhaps, ignored. Now, that to me is a basic question, and I don't have the answer to that.

CHAIRMAN SOULES: I don't have any answer but in my view, it's like approaching trial preparation. I really don't know what my adversary is going to do. But when it comes time to pick the jury, I want to be as prepared as I possibly can, because from that day forward I'm on a fast track.

And that's all I'm saying is, do we want to address the possibility of a fast track by having our view heard that certain of these rules be in the Rules of Civil Procedure. That view will be heard.

PROFESSOR EDGAR: Well, some of these rules should be in the Rules of Civil Procedure if we're going to have it.

CHAIRMAN SOULES: No question about it.

PROFESSOR EDGAR: And I think we're in a better position to recommend to the Court the form in which those rules could take than simply

saying, "Okay, Court, we're not going to do that. We're going to leave it up to you to do it good, bad or indifferent." I think we would shirking our duty if we did that.

MR. BEARD: In that public debate, why should we not express an opinion from this committee that certain parts of 3, 4 and 5, a great deal of it belongs over in the Rules of Civil Procedure as part of that public debate?

PROFESSOR EDGAR: That's just a housekeeping chore; if it belongs in the rules, it belongs in the rules. I don't really know if that makes any difference in the public debate.

MR. SPARKS (EL PASO): I think what you're suggesting is, that I feel -- the only thing that concerns me is that Dean Friessen did -- they had the concept of all of the "Administrative Rules" in one package so that everybody can absorb them at the same time. And I wonder if somebody might think that we're being even more critical by suggesting that we pull out or recommend a pull-out of those portions of the rules that we think ought to go in the Rules of Civil Procedure.

I would be inclined, through Justice Wallace,

to ask Chief Justice Hill if he wants us to do that, and if we do, to have a subcommittee and a place to do it.

I think that in the June hearing, we're going to hear a lot of just "I-don't-like-this" type of thing. And, you know, it's going to cause sensitivity again, but I think that if the Court and Judge Hill wants us to do that, we ought to be ready to do it.

CHAIRMAN SOULES: The organizational problems can be handled. They can be published in the Bar Journal, as here the new Administrative Rules and here are the consequential changes to the Rules of Civil Procedure, and they can be all in one place, and they can be published in pamphlets all together.

The organization of getting them all before the public or the Bar in a single series can be handled. But whether three or four years from now lawyers looking in the Rules of Civil Procedure feel like they found the answers, not knowing that they ought to also be looking some place else, I don't know, and that's my concern.

MR. BRANSON: Would it be possible, Luke, since the committee did vote overwhelmingly

to object the proposals even after our amendments to get a charge from the Court, at this point, as to whether they would prefer us to go back and work on that set of rules, redrafting the entire method of law practice in this state, or whether they would like to take a different approach and look at the individual problems of some of the court dockets in the state on an individual basis, as opposed to an overall system form?

And you're really dealing now, I think, with philosophical approaches to the problem. You can either throw the wash out and hope you don't throw the baby with it, or you can go back and attempt to spot clean the problem.

And having witnessed the Task Force, I left with an impression that a spot cleaning would be a much more logical and efficient approach to the problems than an overall system form.

CHAIRMAN SOULES: Well, I think, you know, we can ask for that explanation and ask that it be a part of the agenda at the Bar Convention where the Chief Justice addresses the entire Bar Association and ask that he speak to that issue and have it available for debate.

MR. BRANSON: Without regard to the

Chief's position, could we get a feel from the Court whether the Court would like an overall attempted change from this committee or whether they'd like to look at the individual problem?

In the end, it's going to end up in the Court's lap, and that's a decision they're going to have to make. It would sure assist this committee in our work if we then join in.

CHAIRMAN SOULES: Well, I'll ask Justice Wallace to forward your inquiry then to the Court and get us a response, if the Court would like to respond, to the questions you've just asked.

MR. BECK: Luke, I was not here Thursday, but by the tenor of the comments, I detect that there's not a lot of enthusiasm of doing what you want to do, basically, for two reasons. One, there seems to be some sentiment that by doing that, we're somehow acquiescing in those rules when, philosophically, this committee seems to be opposed to it.

The second objection seems to be logistical, and that is, why begin work on something that may be radically changed at the State Bar Convention? I guess my response to all that is that I think we

may be able to resolve all those problems.

One, if you want to appoint a group to do this, why not have them begin work after the State Bar Convention so that they've got something tangible to work with? And with respect to any suggestions that this committee makes, we can still in the recommendation make very clear that this is in nowise to be construed as acquiescence in the concept which this committee opposes.

And that way, I think we solve our responsibility to the Court of advising them with respect to the Rules of Civil Procedure, but at the same time go on record as being philosophically opposed to what Dean Friessen recommended.

CHAIRMAN SOULES: I think that's a very good approach.

MR. SPARKS (SAN ANGELO): I wholeheartedly agree with what David just said. And I was here during the whole, but I did not vote, and I think Broadus did not either and maybe Mr. Nix didn't.

But I will go ahead and go on record as joining that vote on the majority side being opposed to the Administrative Rules presented to

us even as amended and cleaned up. And I think that's necessary because Judge Wallace is supposed to be reporting back and I join that viewpoint.

CHAIRMAN SOULES: I'm sure that our Thursday action is going to be reported back. Let me try to straighten this and one single thing up with David Beck.

The track that I have been given to understand by Chief Justice Hill -- and I don't know what form these rules are going to take or whether they will pass -- but it is that soon after the Bar Convention input is received by the Court, the Court intends to address these rules and perhaps promulgate them.

Our input is today, or was Thursday. And the Bar Convention input is coming then and then the Court plans to go to work on these rules. So this gets right to your point of scheduling, David. I'm not sure that we will have a redrafted work product to look at after the Bar Convention and before it becomes more finalized. So it's only a matter of time.

MR. BECK: Luke, what you could do is you can put your committee in place today. They don't need to begin work until after the State Bar

Convention. And depending upon what happens at the State Bar Convention and what the Supreme Court wants us to do, you may need to call a special meeting.

CHAIRMAN SOULES: We won't have a work product that comes out of the Bar Convention. There will be a lot of hearings.

MR. BECK: I understand.

CHAIRMAN SOULES: But we won't have a different work product to work with. If we haven't worked in the interim, we may never have a work product that inputs into the final rules.

PROFESSOR EDGAR: Then my question is, if you're saying that a different work product will not emindate from this hearing then why have the hearing? I mean, the purpose of the hearing must be to the possibility --

CHAIRMAN SOULES: It's a question of whether or not there will be an interim work product before the final work product comes down. That's the point I'm making. After the Bar Convention, there may not be an interim work product between that convention and the action of the Supreme Court. The next action may be -- Judge Wallace, did you have a comment to make?

JUSTICE WALLACE: It seemed like what I have told the Task Force everytime we met, and what I said here Thursday, it seems to be falling on deaf ears. And that is that what I report to the Supreme Court is what I honestly feel to be the feelings of the practicing Bench and Bar.

Now, the State Bar Board of Directors recommended -- so I got a call from Ed Koltis (phonetic) yesterday, that not only we have these public hearings at Houston, but you have some of them around the state. And I wanted to get you-all's input because you-all do pretty well represent the state geographically. And I'm sure you've heard comments on this project from your people.

Would the Court be better informed if we had some of these public hearings around the state as opposed to that one in Houston?

CHAIRMAN SOULES: How many feel the Court would be better informed and should conduct hearings around the state on this? That's unanimous. How many opposed to that? That's unanimous.

JUSTICE WALLACE: And another thing: Now, the Chief Justice and myself are probably the

only members of the court who have given a whole lot of attention to this so far. Everybody, as you know, over there has administrative duties. This happened to be mine, the whole rule gamut. And everybody else has their own job, and they've got more to do than they got time to do, and they haven't focused in on this as yet.

I know the one that has campaigned for office has heard a lot about it. And I assure you that they are -- if you-all could set through one Tuesday over there when we're discussing opinions, you'd know that there are nine strong independent voices over there and it takes 5 to pass anything.

And I don't see any indication that these Administrative Rules are going to be different than anything else. You know how the Chief Justice feels. And he's the Chief over there. And the Chief usually carries more weight than any of us. But you still come down and it's going to take five votes out of that nine to pass anything.

And my concern is to find out what the practicing Bench and Bar of the state feels about these, and to transmit all that information

possibly, including a complete transcript of what's gone on here these three days and what's gone on in Houston in any other hearing we've had have, and make sure every member of the court has that information, and it is discussed before we vote. Now, that's my viewpoint of that, and you-all make your decision from that.

CHAIRMAN SOULES: We've heard that clearly now from you, Your Honor, and through the days, that not only gives us a lot of comfort to know that that will be the case. Any other comment on that?

MR. MORRIS: I have one. I think what I didn't say very well earlier, and that prompted me to be able to say it a little better, is that if they're having trouble with Administrative Rules that are really going to affect a major change in the way law is practiced in Texas and can't get it done through the right hand, that is, the Administrative Rules change then I don't, at this stage, want to be a party of effectuating change through the Rules of Civil Procedure, that really are, in effect, making the major change that the Task Force was set out to do.

And the reason I wanted to wait and hold off

until after all of the hearings before we do anything is for my fear that if we get off into a Rules of Civil Procedure change, we've really circumvented the process that was set up by the legislature, and that was, it called for a Task Force by the Chief Justice.

PROFESSOR EDGAR: Well, I want to pick up what David said earlier. If the Court, after the hearing at the Bar Convention, wants a subcommittee of this committee to examine those rules to see which ones, if any, might be more appropriately placed in the Rules of Civil Procedure, then I would be happy to serve on such a committee. But I would kind of like some expression from the Court that that's what they want us to do, and that it be done after we have the public hearings.

CHAIRMAN SOULES: All right. Should we go on record as seeking leave from the Court to give us the opportunity to look at any proposed or tentatively adopted rules for that purpose?

MR. LOW: Having made a motion, I second it.

MR. BRANSON: I'm not sure I understand Hadley's motion.

PROFESSOR EDGAR: Well, I just said I'd be willing to serve on such a committee. I really didn't make an motion.

CHAIRMAN SOULES: I think the difference between what Hadley is saying and what I'm saying is that Hadley has indicated that we would want to hear from the Court that they want the work done.

My approach is, do we want to tell the Court that we would like to have an opportunity to do the work if these rules are going to pass to try to clean them up?

MR. SPARKS (SAN ANGELO): You're saying that although we're very opposed to it, if we're going to have to have it anyway, let us get in a workable form?

CHAIRMAN SOULES: That's right. That's exactly; that's well put. Is that a motion?

MR. BRANSON: My only question is I don't perceive from what Judge Wallace said that, number one, we're going to have to have them anyway. And number two that at this point, it does us much good to go on record requesting that opportunity until after the Bar has had an

opportunity, either at the public hearings throughout the state or at the Bar Convention, to address it. Because I don't know the experience of the other members of this committee, but any time practicing members of the Bar or Bench have surreptitiously found out I was on this committee or on the Task Force, they have come near lynching me with regard to my involvement in the recommendations of Dean Friessen.

And so I perceive the vast majority of the Bar, based on their response to me, is going to be more inclined to want to put these in the garbage can than in the Rules of Civil Procedure.

CHAIRMAN SOULES: Well, I guess we've asked this enough. I don't know whether we're going to get any consensus, but I want to hear Broadus because his hand is up.

MR. SPIVEY: I rise the point of order, Luke, and I want you to hear what I'm saying because this is addressed to you in the most respectful manner. I thought I heard you say that regardless of our unanimous vote a while ago, to wait until after the Bar input, that you were going to go ahead and work on it anyhow.

And I think you shouldn't do that, in all

candor. Because you're the Chairman of this committee, and I don't think you ought to take action contrary to this committee's desire.

I want to stress that I haven't perceived from the other advocates' pleadings here that they are against change. I simply heard them say that they are strongly against what has been proposed now. But we've invested a lot of our time, a lot of our effort in something that we'd all like to see something come out of. And I think we ought to turn this to a constructive approach, and that will be, if we listen to the lawyer. And there's another aspect I've got to address; let me finish up. Listen to the lawyer at the Bar Convention. I think that's an absolute prerequisite to getting anything done constructively.

Secondly, it must be stated that the objection is not just coming from practicing lawyers. I practice in as many courts in this state as any lawyer I know of. I have heard almost unanimously from the trial judges dissent against what's coming out of the Administrative Rules.

I think we should listen to these objections and rather than just saying, "Well, it's no good;

let's just a abandon it," simply take that as a constructive suggestion and go back and maybe take the approach that Branson was suggesting, and that is, address the specific problems.

Just because the problem is hard, it doesn't mean that we're going to get frustrated and throw up our hands. But I think the Chief Justice needs input from us that he can effectively carry through, because nobody has heard more than Chief Justice Hill. If he makes an effort that falls completely flat on his face, it's not just an embarrassment, you know; it's a mandate.

And I think if we don't get that input from the Bar at the Bar Convention, and listen to it, and poll the judge, the judges that have the problems, that experience problems, then we've simply built a beautiful doll that maybe pleases us or the Chief Justice, but neither the practicing Bar nor the judges, and it won't pass.

CHAIRMAN SOULES: Anyone else? Okay. Judge Thomas, you've got a report to make on these earlier rules and the Rules of Civil Procedure.

JUDGE THOMAS: There are a couple of things, Luke.

CHAIRMAN SOULES: Maybe you can direct

us to the pages. I'm not sure that I've got them turned to the right page.

JUDGE THOMAS: Sure. We need to move up to the ones that I think that I would like to get a consensus of opinion from the committee. And that really starts at Page 86 of Rule 8 where we start talking about attorneys in charge. And Pat Beard brought up yesterday morning the problem of exactly what constitutes the attorney. Is it the individual or is it the law firm?

And what I'm asking for is a consensus from the group, recognizing I have a feeling I know what everyone is going to say. Is it the law firm or is it the attorney signing the pleadings? And we need to resolve that before we can get into the other issues of notice, where does notice go and so forth, being the background behind the proposed rules changes in Rule 8, 10, and so forth.

Right now we have a Rule 8 and we have a Rule 10. Rule 8, as presently written, is "leading counsel" is defined. Rule 10, "attorney of record" is defined. Rule 8, you will find on Page 86 some changes -- proposed changes on 86 in your book as well as Page 104. Rule 10 proposed changes you will find on Page 90 and Page 105 in

the book.

Obviously, all of this comes about as a result of some confusion and some concern about where notices are sent, which attorneys get noticed, which ones get to play ball, and, of course, the problem that Pat brought up yesterday, and that is, if you're in trial some place else, can they just call and say, "Well, it's your law firm that was hired; somebody get your buns down here and go to court"?

MR. SPARKS (EL PASO): I'd like a rule that says they can't do that. But I don't know how in the world -- you know, in the federal courts and even in our state district courts, we are required to file a certificate as to the attorney responsible for that case. And this appears to really conform that local rule. I think it's a good rule, the one that is proposed on Page 86.

CHAIRMAN SOULES: We had a letter from Reese Harrison citing the Scopeland Enterprises vs. Tindall (phonetic), January of 1985 case, where the -- and then also stating one of his personal experiences where the Court said, "Well, if the law firm is on the pleading, somebody else

from the law firm can come try the case."

MR. BRANSON: How do you address the problem, though, of one or two lawyers with an active trial practice, perhaps, letting their bulldog mouth overload their pekingese ass and taking on a bunch more lawsuits than they ever get tried, and always presenting that they're in trial some place else when depositions need to be taken, when trials need to occur? And from the practicing lawyer's standpoint with the larger firms, that's not an infrequent occurrence.

And the truth of the matter is, in the vast majority of those cases, the lawyer who is "lead counsel" really doesn't touch the file. The associates and junior partners work the file up and do 98 percent of the work.

CHAIRMAN SOULES: That may be part of the frustration where these judges were coming from in these particular cases, Frank.

MR. LOW: That is a problem, and I see it a little different on procedure. But I know, like in my firm, I'm the only person that handles claims cases, and if they ask my partner and if I'm in trial, they say "He's got to try it." I just have to increase my malpractice insurance.

But I put my number on there when I sign it.

General Motors for a good while, until they got smarter, wouldn't let anybody in the firm but me try their cases, and it was presenting a real problem. So, I think where you have a genuine situation the courts and the lawyers just have to deal with, where you've got a situation if the Court finds it's being evasive to keep from going to trial, that's something else, and the individual courts have to deal with that.

But I think it would be wrong to say that a particular client should not have the lawyer of his preference because that's who he's hired. And I think if the lawyer signs the pleadings and he puts his State Bar card on there that that's truly his case. Now, if they're Mickey Mousing around with it, well, that's something else.

JUDGE THOMAS: Well, I think the letter, Luke, that you refer to on Page 111, 112 and 113 in the book also points out an additional problem, and that is, if you're going to consider that it is "the law firm," quite often the notices go to the law firm and you never see it.

MR. SPARKS (EL PASO): It takes three days to get it to the right lawyer, the

memorandum.

JUDGE THOMAS: A three-day notice motion has been sitting some place for four days. So that's why I say that I think the issue of definition of the attorney needs to be addressed before we can really address the issues of where the notices go.

CHAIRMAN SOULES: David, maybe you could help us on this. I know some of the, of course, big clients hire a law firm. Maybe they hire Fulbright; they don't hire some individual in Fulbright. And then whatever XYZ law firm, they sign the pleading, XYZ law firm by one of the lawyers. At that juncture the law firm has become counsel of record, I guess, because that's the way they signed it.

MR. BECK: That's not the way our clerks treat it over there at the courthouse. They look to the person who has signed the pleading, and they list that person as the attorney that they send all their notices to. So it doesn't matter whether it's Fulbright and Jaworski by, or I sign my name, attorney in charge; as long as I sign that pleading, I get all the notices.

MR. BEARD: Well, I hire a lot of defense counsel for clients and I try to hire a specific lawyer because I don't find a uniform --

CHAIRMAN SOULES: Well, those are two different approaches in the way the pleadings are signed and that's what I'm really trying to get at. We can sign them individually. Our practice is that the lawyer that's going to handle a case or be responsible to see that it proceeds, signs it and we put "of counsel" and the name of the firm. But that's only there of counsel; it's not of record on the signature line. But perhaps General Motors doesn't want to hire an individual lawyer in Fulbright; they want to hire Fulbright itself. I'm just trying to get into how that works.

MR. BECK: There are couple of different problems, and I think the judge is right. You start first with who is the attorney. And the federal courts have long had a rule where you had to designate the attorney in charge, and that's never really caused us any problem at all.

You then get to the next step which is, what happens when one attorney is always tied up in a matter and you can't somehow get your case moving?

That's a separate problem. I know in Harris County, as Judge Tunks knows, the way we help with that is we passed a local rule which said that if a lawyer is trying to get a case to trial and the opposing counsel is unavailable because he is in trial, you can use that excuse two times, and if it comes up a third time, then the court can require anybody in that law firm to try the lawsuit. And as far as I know, it works fairly well, doesn't it, Judge?

JUDGE TUNKS: Well, it has, except it makes a lot of lawyers mad.

JUDGE THOMAS: I know one of the problems, for instance, in family courts where you have a series of hearings. Take the situation where Harry Tindall in Houston has taken on a Dallas case and hires local counsel. It is not at all -- and I don't mean to indicate that Harry or Fuller or any of these have played this game.

If you're trying to get it set for trial, they don't yell and scream, "Harry Tindall is the lawyer." And yet, when they are seeking relief, Kuhns or Fuller or somebody from that firm can come down on the motions for contempt. And I think this is the frustration and the room for

abuse that we have to recognize goes on. Who is seeking the relief?

MR. BECK: Can't that be handled on a case-by-case basis, Judge?

JUDGE THOMAS: Sure.

MR. BECK: The judge in that case saying, "Well, wait a minute, Mr. Kuhns was over here two weeks ago, so he can come over here next week."

MR. SPARKS (EL PASO): You know, we've got a problem that I don't think we're facing. We're looking at it from a procedural or administration standpoint. We have to look at it, as I find, more particularly on the plaintiff's, but I certainly yield to it frequently. And that is, you've got to look at it from a client's standpoint. The client does, particularly, in a case where they have retained a lawyer to file a lawsuit. They have selected an attorney.

And I seem to be getting more and more legal malpractice cases as each year goes on. And that, to me, is a thread that's running through the sum of them. And that is, I hired John Jones and I show up at the courthouse and Tim Smith is there to try the lawsuit. In particular, when you lose

it, you've got an additional problem.

The Houston rule may make some lawyers mad, but at least it gives you a hedge of some time to rearrange to where, when you have a particular problem, that lawyer can arrange to handle that particular client. I favor the approach like Rule 86 where a lawyer is designated to be responsible.

CHAIRMAN SOULES: This new Rule 8, of course, as proposed does that, and also identifies where pleadings and service is to be made. I think that's probably what the old rule 8 was intended to do. But it's not written in modern language, if you want to put it that way, and it doesn't really say what its intent was, and I think, perhaps, the new Rule 8 as proposed does.

And new Rule 8 doesn't omit anything that the old Rule 8 has. Everything that's in the old Rule 8 is restated, perhaps, in clearer language. Plus the inference that the lead counsel is supposed to be served and so forth is expressly stated in the new Rule 8, although we changed "leading counsel" to "attorney in charge," which is a more commonly heard term. Is there any opposition to that?

JUSTICE WALLACE: I'd like to make a

suggestion on that. And the problem is, who's going to be the attorney in charge if they don't designate anybody? And just stating the rule, if an attorney in charge is not designated, the individual signing the original pleading of a party shall be the attorney in charge.

So that's for the benefit of that great majority of the Bar out there who is not going to read these rules in the next three or four years until they get caught on something like this.

And so there's no question in anybody's mind that the first person that signed the pleading for that are party is going to be the attorney in charge until it's changed, and the rule tells you how you can change it.

MR. SPARKS (EL PASO): You put that after the first sentence, Judge?

JUSTICE WALLACE: Yes. After the first paragraph, there in Rule 8 as it's now written.

CHAIRMAN SOULES: On page 86. That's a good suggestion. "If the attorney in charge is not designated the attorney" --

JUSTICE WALLACE: -- "signing the original pleading of a party shall be the

'attorney in charge.'"

MR. SPARKS (EL PASO): Don't you think it ought to go after the first sentence before the word "thereafter"?

CHAIRMAN SOULES: Yes, that's where.

JUSTICE WALLACE: Yes.

CHAIRMAN SOULES: Okay. With that change, how many favor this proposal on page 86 of our material.

MR. SPARKS (SAN ANGELO): Luke, just an observation before we vote on it.

CHAIRMAN SOULES: Sure.

MR. SPARKS (SAN ANGELO): In the realities as you come to court, and I've heard this hundreds of times in courts that have fast moving dockets where the judges push very hard, the defense counsel says, "You know, I'm sorry, I'm in trial somewhere else." And the judge says, "You've got other competent lawyers in your firm," you know, "get one of them down here" and you hash it around.

I read the proposed Rule 8 change on Page 86 as giving the trial judge the authority because it says "shall attend." I'm talking about the last sentence of the first paragraph that the lead

lawyer in charge shall attend. And then you have to read that to say, "or shall send a fully authorized" --

And to me I'm reading that to say the trial judge now has the authority to make a change of counsel regardless of what the client wants, whether it's an insurance company or a plaintiff's lawyer. I mean, that's how I'm reading that rule. And I think we need to know that that's what's happening.

MR. BRANSON: Maybe a point of inquiry might be in order. How do you perceive this rule changes the existing law or the existing rules?

CHAIRMAN SOULES: Well, what it does is it makes it clear that service is to go to the attorney in charge. And the present Rule 8 doesn't say that, and there is a problem in that if XYZ law firm signs a pleading by Luke Soules, then the pleadings are sent to the law firm. There's a contention that that service is completed, even though it's not directed to my attention.

And that's a problem that's been raised by the lawyers who have written in to us. All communications from the court or the counsel with

respect to the suit will be sent to the attorney in charge. It says that. It's not elsewhere stated.

MR. BRANSON: And that is the only change you perceive, and that is, that all correspondence would be addressed to what we've historically called "lead counsel."

CHAIRMAN SOULES: Well, that and the point that Sam Sparks has just identified, where it says that, "the attorney in charge shall attend or shall send a fully authorized representative to all hearings, conferences, and the trial."

MR. SPARKS (EL PASO): Isn't that the rule now? I mean, if you're hired, you either be there or send somebody that can act?

CHAIRMAN SOULES: The rule doesn't say that, but I certainly feel that -- well, I don't know about the "fully authorized." The authorization may not be full. It may be the authorization only to a continuance not to proceed with trial and you can move for a continuance. But if the judge doesn't grant it, then you are to announce "not ready." "Fully authorized" may be a departure.

MR. SPARKS (SAN ANGELO): Well, it

says "trial" in this one.

CHAIRMAN SOULES: Well, you still need to send a representative if the judge has overruled your motion for continuance, you just can't fail to show up.

MR. SPARKS (SAN ANGELO): Luke, the reality of life is, basically, in a plaintiff's practice, which I do. You know, I'm going to see a client once. He's heard, tries his case; he goes on.

The insurance lawyer on the other side, whether he's with Hardy Gramley (phonetic) or Fulbright & Jaworski or anybody else, wants to maintain his relationship with Aetna or Hartford, or Travelers or whoever he's doing. And if the judge just says "You're not trying this case. You will appoint somebody else, and I don't care if you're in trial somewhere else," I think the fear by the defense lawyers is they lose their client because that is a repetitive client that goes on down through time.

And it gets down to a basic question of, does a client have a right to select his own lawyer or shall he be forced to accept anybody within that firm? And I don't care; I don't think it affects

my practice. But I think it's something that Sam Sparks from El Paso, David Beck, they should be thinking about that. Because I read this rule as it says "shall attend hearings, conferences and trial."

CHAIRMAN SOULES: Well, if we took out the words "fully authorized," it really doesn't change what the practice is, does it? On the other hand, "fully authorized" may be construed to mean that you've got to send somebody fully authorized to proceed the trial.

I'm trying to hear a consensus, and I think I hear that that's not what this committee wants, to force a lawyer to send somebody fully authorized to proceed the trial. But you've got to send a representative anyway because at least you got to have somebody there --

MR. BRANSON: Whether you're in a big law firm or a small law firm, once you get more than one lawyer in the firm you're going to have some crossover on people that are working on files, and particularly, once you get associates in a firm with partners. And it's going to affect everybody, whether you've got three associates or 300, I think.

MR. LOW: I was just going to say that I don't know that the last -- it's automatic if you just put a period after "such party appearing and shall attend and send." Well, you're obligated to attend and send, and it doesn't mislead and say, "Well you've got to have a representative."

I mean, you know, everybody knows if the judge says you've got to do something, you've got to do it, and you make a bill. We tell first the attorney in charge who he is, but we don't give him his charge, "shall attend" and "representative conference," and everything. If you just stopped and left that out, where would we be? And he's responsible and then the professional's responsibility follows thereafter. And the law takes it's course, but we don't purport the court to be putting the law in the rules.

MR. SPARKS (EL PASO): I second that thought. I often wondered what "fully authorized" is. You know, in the federal courts you are fully authorized to dispose of the case. I never have been fully authorized to dispose of a case, as far as I know.

MR. BEARD: But I can tell you that

local counsel is getting to be a dangerous animal. Because local counsel hasn't been doing anything but, you know, the names on the pleadings and then all of a sudden you say "go to trial;" he's in trouble. And often, it worried me sometimes that local counsel has about the competence of lead counsel.

Anything that you can just say, "go to trial" and local counsel goes to trial, he's not ready to go to trial. He's over there telling him about a jury or something.

CHAIRMAN SOULES: Especially when you've been employed to just local counsel and to keep your fees down.

MR. BEARD: That's right.

CHAIRMAN SOULES: And then you're in trial. Well, the suggestion is then, that we delete the language in the first paragraph of the proposal that follows citations 21-B.

JUSTICE WALLACE: Are you running into a problem if you delete that and say that the attorney in charge is going to be responsible? Are you going to run into a problem where, when someone else goes over there, they can argue, "Well, he didn't have authority because the rule

says the attorney in charge is in charge of this case, shall be responsible?" And I'm asking; I'm not saying you would. Will that create a problem?

Well, the case we wrote on here not too long ago out of San Angelo -- no, Odessa, I guess it was. Some lawyer out of Dallas used an Odessa law firm's letterhead and sent a pleading over. Well, the clerk picked up the letterhead and showed the Odessa lawyer -- sent notice to the Odessa lawyer a dismissal, and the Odessa lawyer didn't know anything about it and thought it must have been sent to the wrong lawyer and threw it in the wastebasket and the lawyer in Dallas was in bad trouble.

Of course, the designation of attorney in charge would have cleared that one up. But that's the type of situation lawyers get into. And they're going to look every way they can to get out of it. And I know I would if I were in their position. So, are you leaving an opening here for the lawyer to come in and say, "I'm the attorney in charge and, therefore, this guy came over and agreed to so and so. The rules say I'm the one in charge so therefore, it's not binding on him."

MR. BRANSON: Therefore, you could use associates to work on any trial.

MR. LOW: But Judge, you've got to delegate responsibility.

JUSTICE WALLACE: I realize that.

MR. LOW: And so, we all delegate it. And this says "he shall be responsible." It doesn't say that he can't delegate some responsibility, but it doesn't require him, personally, to send a representative. The law requires that. He's responsible to see that his name -- if the rules say that notice goes to the person who was first on the pleadings; he's responsible to see that that's the one.

And so his responsibility extends fully, but it doesn't require him to send -- like in Frank's case, if he's got a clerk getting a case ready, that he doesn't have to go and try it if Frank is in trial, or this rule doesn't require it.

MR. BRANSON: Wouldn't we accomplish the same thing, Luke, if we just added the last sentence to the currently existing Rule 8, and that is, "All communications from the court or other counsel with respect to a suit shall be sent to the lead counsel"?

MR. SPARKS (SAN ANGELO): I don't see how, because how do you determine who the attorney first employed is? Rule 8 doesn't make any sense. I mean, there's no way for anybody except the client and the attorney, I guess, if you can assume that he was first employed or second employed.

MR. BRANSON: But the courts have been grappling with that all along, and when a problem came up, what they've been doing is just saying, "You're going to have to appoint a lead counsel," and you've seen it.

MR. SPARKS (EL PASO): Sure, and that's what Rule 8 does.

MR. BRANSON: But they don't make you appoint a lead counsel until they get into a problem.

MR. SPARKS (EL PASO): Well, we have designated lead counsel over both state and federal courts. We've always been in, Frank. We don't have that problem.

MR. BRANSON: I don't think I've ever had -- maybe half-dozen times, somebody asked me to designate. And that's usually when you get into an argument over who's going to do

something. Usually when two of you want to cross-examine the same witness is generally when it becomes a problem.

JUSTICE WALLACE: One problem this would continue to address, too, is on the clerk's office. Who do you send notice to, what attorneys? You've got half a dozen different names appearing throughout the file. How do they determine which one they should notify?

MR. SPARKS (EL PASO): In light of that recent case, it sure would be helpful if they notified the right one.

MR. BRANSON: But how do they handle the question you raised, Judge, and that is, lead counsel or counsel in charge has been designated as Jim Williams, and an associate in Jim Williams' law firm enters into an agreement with another party?

JUSTICE WALLACE: I think this last sentence, Frank, says, in effect, that if the attorney in charge sends another lawyer over there, he's responsible for whatever that lawyer agrees to.

MR. BRANSON: The way it's written currently.

JUSTICE WALLACE: No, the suggested change on Page 86.

MR. LOW: If you had a rule that just said that any pleading filed -- we now have to put our state bar in numbers. Somebody has to put by his name, "attorney in charge." If you had that, you wouldn't even question who the attorney in charge is. No matter how many names are on there, if you had one of them, you know, designated when he filed the pleading as "attorney in charge", then you wouldn't have any questions.

PROFESSOR EDGAR: But then, Buddy, the clerk is going to have to look through and find out which pleading has that designation on it.

MR. LOW: I know. But apparently, when they file, Hadley, they put it on the docket. That's where they pick it up. They don't go to the pleadings. And on the docket, it would be very easy to put an asterisk by that. It wouldn't be much trouble. The docket sheet is where they pick up who to mail to.

MR. SPARKS (EL PASO): This rule would really help them because in El Paso State Court, they put the first name of our firm on the docket. And it turns out that's all right in our

case because the first name of our firm is head of the trial lawyers. But had it been a business lawyer, it would have been bad.

I move for the adoption of proposed Rule 8 cutting off after the word "suit" and eliminating --

MR. BRANSON: Or how about the "parties"?

JUDGE THOMAS: "As to such party."

MR. SPARKS (EL PASO): Yes. And eliminating the phrase "and shall attend or send a fully authorized representative to all hearings, conferences and trials."

CHAIRMAN SOULES: Now, is that going to get an automatic continuance when the attorney in charge can't show up? They just come over and say, "He's in charge."

MR. SPARKS (SAN ANGELO): It's going to be just like the law is now.

MR. SPARKS (EL PASO): I can't believe in that. I want to practice in the court that says that.

MR. BRANSON: But isn't that exactly what the part we're cutting out is designed to do? And that is, keep the attorney in charge from

being able to say it's an automatic continuance.

CHAIRMAN SOULES: That's what it's for.

MR. BRANSON: The part that we're cutting out gives someone a vehicle to make that argument. And if you leave it in, it's not there.

CHAIRMAN SOULES: That's right. In other words, there's two alternatives, leave it in and drop out the "fully authorized," because that's probably beyond what any motion hearing would require, or to put a period after "party" and delete it all, or leave it in except for the words "fully authorized."

MR. BECK: The trouble with the language is that if you included your opposition to actually use that to try to force the representative to be sent over, you know, that ought not to be the way it works.

I mean, the attorney who is handling the case ought to try it. If there's an abusive situation, then I think the trial judge can handle that and require the representative to be there. But you don't want somebody to be able, when you're in trial, to say, "Well now, fine. But this rule

says that if Luke is unavailable, by God, I can require somebody in his firm to come over." And that ought not to be the rule.

CHAIRMAN SOULES: That's the issue exactly, and that's what we're going to vote on. And we've hashed it, I think. Sam, do you have anything else on that point?

MR. SPARKS (EL PASO): For example, we've got one of our district courts that has all motions for continuance Friday morning, a week before the Monday selection of the jury. And if the lawyer wants to argue a motion for continuance, right now I don't have to go. I can find out at 9 o'clock whether the motion was granted or not. This would require me to send somebody over there. Whereas my practice right now is not to go at all.

CHAIRMAN SOULES: Okay.

MR. SPARKS (EL PASO): And I'm for deletion.

CHAIRMAN SOULES: Okay. The motion is that -- before we do that, though, what Buddy was talking about there, just doing it in the pleadings is -- I have a concern. This says "each party shall." Can we just say, "On the occasion

of a party's first appearance through counsel, the attorney in charge shall be designated in writing"? That would give us the option to do it on the pleadings.

This may say that you've got to comply with attorney to show an authority; in other words, have your client's own signature on something to designate you, because it says "party" and they've talked about counsel. We've, of course, hashed that over the last couple days. But does it have to be this way? "On the occasion of first appearance by counsel, the attorney in charge", --

MR. BECK: "The attorney in charge shall be designated."

CHAIRMAN SOULES: "Shall be designated."

MR. BRANSON: But who is going to designate it with a party?

CHAIRMAN SOULES: Well, the lawyer designates himself.

MR. LOW: In other words, you sign, and say you take a case out in Marshall and, you know, you're the lead -- and you sign the petition that's got Scotty's name on there, but under your name, you've got "attorney in charge."

CHAIRMAN SOULES: Just say, "It shall be designated in writing" and leave it open how that gets done.

MR. SPARKS (SAN ANGELO): So, on the original petition, instead of putting "of counsel" under there or "counsel for the plaintiff," you just put "attorney in charge"?

CHAIRMAN SOULES: That's right.

PROFESSOR EDGAR: You can put "attorney for plaintiff" and then say "attorney in charge" underneath it or something.

MR. BRANSON: I would move an amendment to Sam's motion, who to mail it, that is, rather than stopping the party, we merely drop-out "fully authorized." That way you get away from the argument that they're talking about to continue.

CHAIRMAN SOULES: Is there a second for the amendment?

MR. BRANSON: Pardon?

CHAIRMAN SOULES: Is there a second for that amendment? Okay. That fails for lack of a second.

MR. SPARKS (EL PASO): Luke, let me say that my motion -- I don't think I stated it,

but it intended to have Judge Wallace's second sentence in it.

CHAIRMAN SOULES: Sure. Let me read it as I've got it now. "On the occasion of a party's first appearance --"

PROFESSOR EDGAR: "Through counsel."

CHAIRMAN SOULES: "-- through counsel, the attorney in charge for such party shall be designated in writing. If the attorney in charge is not so designated, the attorney signing the original pleading of a party shall be the attorney in charge."

MR. LOW: Maybe more than one signed "the attorney."

CHAIRMAN SOULES: What's that Buddy?

MR. LOW: Sometimes we'll have a couple of lawyers actually sign, you know. Would you want all attorneys or the first? Because I've seen pleadings where there will be -- Tony and I always sign together if we've got a case together.

MR. BRANSON: Wouldn't one of them have to sign as attorney in charge?

MR. LOW: I understand. But, see, if you don't -- this deals with, if you don't, then

who is it?

MR. MCCONNICO: First.

MR. LOW: Well, that's what I'm saying. Whose name appears first?

MR. BRANSON: You can go back and change that according to this rule.

PROFESSOR EDGAR: It seems to me, though, that you shouldn't set up a rule and say it shall be done, but if it isn't done, then so and so.

MR. MCCONNICO: You don't have any choice.

CHAIRMAN SOULES: Try this: "If the attorney in charge is not so designated, the attorney first appearing in the signatures on the the original pleading of the parties shall be the attorney in charge." The top signature. Okay. At least that's an arbitrary rule and people can look at it and see.

JUSTICE WALLACE: Really, you'd be surprised at how many -- after this rule, if it's adopted, has been in effect for five years, you'll be surprised at how many of them won't bother to designate attorney in charge on the pleadings.

The lawyers in practice for 20 years are

going to continue to sign their pleadings just like they have for the last 20 years. And you're back with the problem with the clerk's office. Who is in charge?

CHAIRMAN SOULES: So we'll start on that. "On the occasion of the parties first appearance through counsel, the attorney in charge for such party shall be designated in writing. If the attorney in charge is not so designated, the attorney first appearing in the signatures of counsel on the original pleading of the party shall be the attorney in charge."

PROFESSOR EDGAR: Just say, "the signature of the counsel who first appears."

MR. SPARKS (SAN ANGELO): I think we are dealing with the English, and Hadley has got a point. You can just say, "On the occasion of the party's first appearance through the counsel, the attorney first signing shall be the attorney in charge; unless another attorney is specifically appointed."

MR. MCCONNICO: Designated.

MR. SPARKS (SAN ANGELO): Designated. You've got a "shall" followed by --

MR. MCCONNICO: You can clean it up.

MR. BRANSON: Most Bar for many, many years are not going to pick that change up, and they're going to continue to sign it not realizing they're designated attorneys in charge.

CHAIRMAN SOULES: Well, let's just get the guidelines from Judge Thomas on what we see and she can work on the language. But if that's what we're saying, you can designate, and if not, it's the attorney whose signature first appears. And then thereafter, there's no change in that down to the word "party" in the fifth line. The balance of that would be deleted in the motion. And then we would have the first sentence of second paragraph. Well, that's the only sentence that's there now. Okay. How many in favor of that?

JUDGE THOMAS: And I would suggest that instead of "will," put "shall" in that one sentence.

CHAIRMAN SOULES: Okay. Judge, we're going to leave it to you to rewrite this for our next meeting in clear language, easier understood language. With those suggestions then, are we in favor of Rule 8 as proposed? Those in favor show by hands. Opposed? Okay. That's unanimous.

PROFESSOR EDGAR: Let me just raise a question, Luke. Now, this is an example. Now, we have just given Judge Thomas some direction on how to draft this rule. She drafts it, and then the next time it comes before us, we have some members present who weren't here this time. And then we have to sit down and rehash it again and we may not ever get anything done.

And I just suggest that we establish a ground rule that once, in principle, a rule is resolved, that we don't go back and try to reinvent the wheel again. Otherwise, we'll never get anything finally out of this committee.

MR. LOW: In other words, that we vote to accept whatever she writes if it meets that principle.

MR. MCCONNICO: The principle.

PROFESSOR EDGAR: That's right. Otherwise, we'll never get anything done. And we're just getting bogged down more and more and more and more. And I suggest that we --

MR. MCCONNICO: Is that a motion?

PROFESSOR EDGAR: Yes, it is.

MR. MCCONNICO: I second it.

CHAIRMAN SOULES: Having been on this

committee many years, I just say to you this: The Supreme Court wants to hear all the debate it can on rules changes. And if somebody shows up next time that's got a hell of an idea or a real substantive point to make that counters the action of this committee at a prior time, my perception of the way the committee has always been run and asked to do its business is that the Supreme Court would want to hear that. And we have gotten a tremendous amount of work done here this time than we have in the past. I've never been at a meeting where a speaker or person who wanted input was ruled out of order because of a prior vote.

MR. LOW: Let them speak. The input goes on, but we've already voted.

PROFESSOR EDGAR: They can go ahead and talk into the record all they want to and the Court can read the record. But I'm just talking about trying to move business, Luke; that's all.

CHAIRMAN SOULES: I don't see that it's -- well, we can have a resolution. But how do we not react to a really good point? We moved business yesterday all day long.

PROFESSOR EDGAR: I know, but nothing, though, that we did yesterday is going to go to

the Supreme Court in the form that will ultimately go -- I mean, we're rehashing everything.

You see, it's going to come back to the floor of the committee in another book later on. I don't want to cut off debate, certainly. But it seems to me that if we, as a committee, are going to move business through the committee to the Court, we have to adopt some kind of internal rule that would prohibit it being rehashed again and again. And I don't mean to cut anybody off.

CHAIRMAN SOULES: All right. Well, it's been moved and seconded that we --

MR. SPARKS (SAN ANGELO): In a sense this is like almost suspending the rules and let's us do it another way, right?

CHAIRMAN SOULES: How many feel like a subsequent review should be limited to whether or not the rewrite meets the committee's past action? How many feel that the debate should be open for rewrite at the next one even if it does delay? It looks like there's a vote there, 5. I don't know whether I stated your action. You state it the way you want it.

PROFESSOR EDGAR: Well, I move that once we have deliberated a rule and we have

instructed the draft to incorporate the changes which we feel should be implemented, that there be no further discussion at a subsequent meeting on the merits of the rule that we acted upon at the prior meeting.

CHAIRMAN SOULES: If that rule passes, then what we did last time in response to Franklin Jones' proposal, which changed it dramatically, could not even have been heard. Because we gave Franklin Jones a mandate to write a rule that did a certain thing. And then next time we debated two or three hours about that, and that mandate was withdrawn.

MR. LOW: That's right, completely.

CHAIRMAN SOULES: So, anyway, there's a motion. And do you still have a second on that, Steve?

MR. MCCONNICO: No. That's not really the way I understood it, Hadley, what I was seconding. Because I didn't see that we wouldn't debate the merits. I thought the merits could come back, but what -- voting, you know, principle about the rule. I mean, I don't want to limit the debate.

CHAIRMAN SOULES: Well, what's the

difference between the principle and the merits?

MR. MCCONNICO: Well, what I'm saying is, here's the way I just heard what happened --

PROFESSOR EDGAR: I'll withdraw the motion. Let's go on about our business. We've got too much other stuff to do.

CHAIRMAN SOULES: Next item.

JUDGE THOMAS: All right. The next item of concern since the present Rule 8, as we have just talked in principle, would now talk about the attorney in charge. It is proposed that Rule 10, the present Rule 10 in the rules, be amended and actually repealed and inserted therein as a provision to withdraw counsel.

There are two different proposals in your book. One on Page 90 and one on Page 105. One of the problems that I see -- one of the ones that particularly stands out, on Page 90, would be this requirement that any substitution of counsel be signed by the client, which is the proposed rule in the book.

You will see on Page 105 that withdrawal of counsel would be upon motion showing good cause or upon presentation of a substitution, so forth, with just a statement that it is with the approval

of the client and will not cause a delay.

MR. SPARKS (SAN ANGELO): Luke, I've got a small problem with that. You go to trial and you've made a settlement offer, and you turn around to your client and say, "I recommend you take that" because you believe in it, and a client doesn't see the liability problems, and they think the case is worth a lot more than that, and they say, "You're fired."

I mean, you're standing there at the courthouse. How can I promise the Court there's no delay? My client doesn't want me trying the case. There are some problems.

CHAIRMAN SOULES: We've got a recent Supreme Court case, and I can't call it by name, where there was, on the eve of trial, the client fired his lawyer and hired another lawyer. And a motion for continuance was filed. And it was shown that the lawyer first representing the client and the client were at extreme odds, and the only inference that could be drawn from that was that the representation of that client in that case would be affected by their differences. And the client's choosing of another lawyer was appropriate, under the circumstances.

The trial judge put the case to trial. The Appellate Court reversed and said that the trial judge should have granted a continuance to permit the second counsel to be prepared for trial that one time. And almost stated that -- well, if you read it, it almost says that a client is entitled to do that one time. I mean, you don't really look deeply into the relationship between the lawyer and his first client or the lawyer and his second client on the first time that comes up because the presumption is that it's more or less done in good faith.

Now, if it happens again, and the opinion goes on to talk about how this can be abused, then you closely scrutinize them because you may have a client who has heard that this works and who just picks a new lawyer on the eve of every trial and raises hell with his last lawyer.

But the way this is written, the last sentence on 105 -- 105 may be better written. It seems to me like it probably is. But the last line contradicts that case and could probably be met with our -- what we've done in our other instances in these changes that the substitution is not being made for delay only, but that justice

may be done. If you have to show that, I think there's nothing wrong with that part of it.

PROFESSOR EDGAR: Well, on the one hand, you're dealing with the withdrawal of the attorney, and then on the other hand, you're dealing with a termination of the attorney-client relationship by the client. And somehow I can draw a distinction between -- if the attorney withdraws in that context, just with withdrawal context, that there should be no delay -- might be required. But if there is a termination, a unilateral determination, of the attorney-client relationship by the client, then it seems to me we could deal with that separately.

CHAIRMAN SOULES: Well, there may be a unilateral withdrawal of the lawyer because he has been put in such an ethic situation. His client still wants him to go forward, but he has been put in a situation where he just can't do it.

PROFESSOR EDGAR: I know, but there's a termination of -- I know what they're saying.

CHAIRMAN SOULES: But this is the only place you can get off the pleadings, right here in Rule 10. There's not a termination rule.

MR. BRANSON: Let's say the attorney

determines somehow --

CHAIRMAN SOULES: And you do withdraw from the representation whether you're forced to or elect to or however it occurs.

MR. BRANSON: Somehow ethically he can't proceed with the trial. You've got to have some --

MR. BEARD: There's no reason why the Court should do anything if the parties sign on to an agreed order. All those requirements where there are no problems you just -- I don't know.

MR. LOW: If you left it out, it wouldn't make any difference; you just go on.

PROFESSOR EDGAR: Wouldn't that fall under Subdivision A, though? If we have the lawyer and the client that just can't get along or there's an ethical problem, wouldn't that be the good cause situation?

MR. BRANSON: How do you review that on --

CHAIRMAN SOULES: That one I just gave got reviewed. It is an appellate opinion.

MR. BRANSON: Well, is it abusive discretion on the trial court for refusing to let the lawyer out?

CHAIRMAN SOULES: I guess it was from abusive discretion standard. It got to you-all, didn't it?

JUSTICE WALLACE: Yes.

CHAIRMAN SOULES: It has to be an abusive discretion to get there.

MR. BEARD: Well, a lot of substitution counsel comes -- a lawyer decides they'll represent the three parties and he decides there is a conflict. So they get another lawyer so you just have a subsitition to agree on, sign it and go on.

MR. BRANSON: Why do we want the presiding judge to pose the condition rather than the trial judge?

JUSTICE WALLACE: I think they're talking about trial judge.

MR. BRANSON: We need to be careful about that.

JUSTICE WALLACE: Oh, yes.

MR. LOW: I think we ought to be careful in all the rules to have "judge presiding" and not "presiding judge."

JUSTICE WALLACE: Particularly when you're capitalizing "presiding judge" there.

CHAIRMAN SOULES: How about just "imposed by the Court"?

MR. SPARKS (EL PASO): Yes.

CHAIRMAN SOULES: Okay. "Representation not to withdraw is sought for delay only." Okay. With that, how many favor the rule as proposed and subject to Judge Thomas' rewrite?

MR. BRANSON: We're talking about the one on 105?

CHAIRMAN SOULES: 105, that's right. Opposed? That's unanimously approved.

MR. SPARKS (EL PASO): Let me ask you, in the rewrite, should you address the "attorney in charge" problem and just simply say, "The substituted shall be the attorney in charge"? Because Rule 8, as we've talked about it, really doesn't cover it.

CHAIRMAN SOULES: Let's just leave "in charge" where it appears both times.

PROFESSOR EDGAR: And then say, "Under the state bar number of the substitute attorney, who shall become the attorney in charge."

MR. SPARKS (EL PASO): I think you ought to leave out the "in charge" where it's

knocked out because I don't think the rule makes sense. It would be a conflict with the rules. All you have to do is, getting out of the attorney in charge under Rule 8, just file another certificate and somebody else is the attorney in charge. But the substitute attorney who signs on should be the attorney in charge, and you can apply 8 if he wants to change.

CHAIRMAN SOULES: I see the problem there, and I think what we need is a sentence that says, "If the attorney in charge is the attorney that withdraws, then the attorney substituted must become the attorney in charge."

MR. SPARKS (EL PASO): I agree with that.

CHAIRMAN SOULES: All right. Then another attorney in charge must be designated because it might be some co-counsel that's already there. "If the attorney in charge is the attorney who withdraws, then another attorney in charge must be designated." Does that get at that problem?

MR. SPARKS (EL PASO): Yes.

CHAIRMAN SOULES: We'd need that in there, too, Judge Thomas.

JUDGE THOMAS: Okay.

JUSTICE WALLACE: All right. The one who substituted will be the attorney in charge unless otherwise designated.

CHAIRMAN SOULES: Well, suppose it's a co-counsel who withdraws.

JUSTICE WALLACE: The attorney in charge is what we're talking about here.

CHAIRMAN SOULES: Actually, the rule reads, "with any attorney" -- Judge, we're over here on Page 105. It's written a little bit more broadly.

JUSTICE WALLACE: Yes. They struck out "in charge." I see, okay.

CHAIRMAN SOULES: So any lawyer who gets out, another one can get in. For good cause a lawyer can get out without putting another one in. But if it's the attorney in charge who withdraws, then another -- let's just put then another -- "if the attorney in charge withdraws, another attorney must be designated as attorney in charge."

That would speak to something that is not here. And that is, if no new counsel is brought in. It could be a counsel already there. "If the

attorney withdrawing is the attorney in charge, another counsel must be designated as attorney in charge, designated of record with notice to the other parties." Okay. We'll get that transcript to you.

Now, with those changes is everybody still in favor of the change? Any opposition? Okay. That still stands unanimous. Okay. Judge, what's next?

JUDGE THOMAS: All right. Go back, if you would, to Page 94. And this is a proposed new rule -- and under the new, as we have made some amendments today, the number obviously would not be 10-A. But attorney vacations, which is, I know, the -- for instance, the Dallas courts are trying to deal with at the present time with a local rule. And that would be to assure an attorney that he or she could designate a vacation period not to exceed four weeks in either June, July or August, and you get to go on vacation without any further hassle with the Court.

MR. SPARKS (EL PASO): It's a trap. I move that we reject proposed Rule 10-A. Every local court I practice in has local rules on vacations and you work it out. If you put

something in the rules, I think it traps as much as it gives freedom.

MR. BEARD: I second it.

CHAIRMAN SOULES: Moved and seconded that proposed 10-A be rejected. Is there any further discussion? Those in favor show by hands. Opposed? That is unanimously rejected.

JUDGE THOMAS: All right, moving to Page 98. I would invite you to review this proposed 10-B, and that is "Conflicts In Trial Settings." And one editorial comment is, I certainly would not like to see number 1 go into effect. I see number 3, for instance, to be really sort of a codification of practice.

MR. MCCONNICO: Judge, what's the history of this proposed rule?

JUDGE THOMAS: Actually, this comes about from the administrative judges. And the problem being in the larger areas, the attorneys working one court against the other. And "I can't go to court; I'm in thus and so." And it really is creating a lot of problems, I understand, in the larger areas. I don't know about the smaller counties.

MR. SPARKS (EL PASO): This, again, is

a real problem for judges, in this Paragraph 4. But I just don't see how we can handle a rule like that, a rule that's not going to do anything, in my judgment, but make it worse. And this rule really doesn't do much.

MR. BEARD: I'm like Sam, I think that's a problem that there's really no way to draw a rule of the courts for abuses -- they've got all sorts of things they can do. And I move we reject this proposal.

MR. BRANSON: We might want to look at something. And I, personally, had a very unfortunate experience along these lines earlier in my practice. One of the senior partners, who had a comparable trial docket to mine, herniated a disk in his back, and I inherited the six-month period, his docket and mine, too. He was having to announce ready on Monday mornings for about that period of time on about 40 lawsuits every Monday morning. Went to trial on one Monday in a district court in Dallas, and it happened to be the district court in Greenville had docket call that Monday, so I sent an associate over to announce that I was in trial, only to have my case dismissed because I wasn't at docket call.

And when the trial judge that I was in with called and said we've been in trial here for a half a day, the judge then suggested that I probably ought to have grievance proceedings brought for having too many cases. I don't know how you'd manage that, but it certainly was an uncomfortable situation at the time.

PROFESSOR EDGAR: Well, isn't this something that Administrative Rules could more effectively deal with than the Rules of Civil Procedure?

MR. SPARKS (EL PASO): Good judges can deal with it.

PROFESSOR EDGAR: I mean, I'm talking about, for example, comity. Couldn't the presiding judge contact the local federal judges and try and work out some type of comity in trial settings rather than having something like that in the Rules of Civil Procedure?

MR. SPARKS (EL PASO): I second Pat's motion.

CHAIRMAN SOULES: The motion having been moved and seconded that this be rejected. Any further discussion? Those in favor show by hands. Opposed? It is unanimously rejected.

JUDGE THOMAS: That's it for today.

CHAIRMAN SOULES: That's all that you have, Judge?

JUDGE THOMAS: There's one other, but I'll work on it. It's one that came in like last week, and I can't find my letter.

CHAIRMAN SOULES: Here's one on Rule 3-A.

JUDGE THOMAS: Okay. Going back to Page 82. There are actually two proposed changes to 3-A. One appears on Page 82, and one appears on Page 103.

The version on Page 82 coming from the Counsel of Administrative Judges, it seems to me, what they've done is they have said, "Okay. You folks can make your local rules. You will first send them to the administrative -- the presiding judge of the administrative district, and you will do it on or before a certain day each year. The presiding judge will submit, in writing, either support or opposition to the rules to the Supreme Court on or before a certain day."

CHAIRMAN SOULES: On this, are we in a position more or less of having to wait on the action on the Administrative Rules?

MR. BEARD: I move we table that.

CHAIRMAN SOULES: Now, that's not the case on Page 103, which is a little different. The only thing Page 103 adds is that local rules, after they have all been approved and done like Rule 3-A now does, isn't it Judge, that they have to be published for 30 days and made available to counsel?

JUDGE THOMAS: Exactly.

CHAIRMAN SOULES: Any opposition to those changes? Those in favor of those changes show by hand.

MR. BRANSON: Will you give us just a second?

CHAIRMAN SOULES: Sure. Absolutely.

MR. SPARKS (SAN ANGELO): I don't see the changes.

CHAIRMAN SOULES: It's just that Paragraphs 3 and 4 are added.

JUDGE THOMAS: It just says that it will not become effective until at least 30 days after it's published.

MR. BRANSON: Would it be possible to just put in an automatic kicker where copies of the local rules are automatically furnished to

out-of-county lawyers that become involved with litigation? This sure would expedite a lot of things.

PROFESSOR EDGAR: How are you going to get it mailed? I mean, are you going to put that burden on the clerk of the court?

MR. BRANSON: Yes. Somebody deals with the filing. If you've got a file mark on an out-of-county lawyer, just send a copy of the local rules. See, because what happens is, you've got a copy of the local rules and they've been amended. And you're dealing under amended set. Then you're dealing under amended set. Then you're attempting to act with your old set. And if you're not in that county all the time, you probably wouldn't know about the changes and you think you've covered your backside and the client's backside by originally requesting a set of rules.

PROFESSOR EDGAR: I understand that. But are you going to ask the clerk then to go through all of the cases on file to see what out-of-county lawyers have cases pending in the court?

MR. BRANSON: Well, won't the clerk at

the time of filing know?

PROFESSOR EDGAR: I mean, I'm trying to figure out how you implement it, Frank. That's all I'm asking. How is the clerk going to know that you have a case on file without going through all the cases to see?

MR. BRANSON: How about the first time the clerk mails something to the lawyer? I mean, that's an easy time to check; they're having to address envelopes anyway.

CHAIRMAN SOULES: We're going to have problems with the clerk, Frank, if we require them to read the pleadings and decide whether or not they need to send out rules, I think; I'm not sure.

MR. BRANSON: Maybe no one else has encountered that problem. We've encountered it a time or two. And we thought we were diligent in acting under the set of rules we had and they weren't over a year or two old.

PROFESSOR EDGAR: Would it be practical to have it every time a local rule is changed to something to be published in Bar Journal?

MR. MCCONNICO: That would not be

practical.

PROFESSOR EDGAR: But I'm trying to think of a way, though, to give everybody notice of changes in local rules. And I certainly think it should be done. I think you ought to have fair notice of changes. I'm just wondering how you can do it.

CHAIRMAN SOULES: About the only way you can do it is request it whenever you send in your pleadings.

MR. BEARD: 3-A is changed by those proposed Administrative Rules. It's just another conflict we have, as they are now.

CHAIRMAN SOULES: Well, not 105. I don't think that --

MR. BEARD: Well, the proposed rule, the presiding judge must approve all local rules and all the courts in the county are supposed to get together to -- the conflict.

CHAIRMAN SOULES: Pat, not with what's on Page 103. Because it doesn't give all that schematic about how it finally gets to the Supreme Court. It just says it's got to be approved by the Supreme Court, and it's not going to be approved by the Supreme Court until it goes

through the Administrative Rules if those are ever adopted. Now, the one that's over here on 90 --

JUSTICE WALLACE: I think the Supreme Court can very easily handle these unknown changes in local rules because we can just set a policy, we will approve local rules effective such and such a date. And all that accumulates up and then they will be approved and everybody will know they've been approved until the next date that we approve local rules there won't be any.

CHAIRMAN SOULES: For example, January 1 of even years or something like that.

JUSTICE WALLACE: Yes, like we're talking about on rules.

MR. BRANSON: That's a good idea. That's a good practical suggestion. With that in mind, I don't see any problem.

CHAIRMAN SOULES: Okay. Those in favor of the changes suggested on Page 103 to Rule 3-A, show by hands. Opposed? That's unanimously adopted.

JUDGE THOMAS: That's it.

CHAIRMAN SOULES: There's a Rule 12 over here for disposition of exhibits. Judge, why don't we just leave that for you review all this?

There's quite a letter from Ray Hardy that goes from 106 to 110.

JUDGE THOMAS: It is all dealing with the matters that we took up on where notices go and so forth.

CHAIRMAN SOULES: Well, we haven't dealt with this disposition of exhibits part.

JUDGE THOMAS: Yes, that's why I was asking Edgar earlier. I thought that probably what we would want to do would be to handle exhibits much like we handle the disposition, including other things.

CHAIRMAN SOULES: Will you work with Hadley then?

JUDGE THOMAS: Sure.

CHAIRMAN SOULES: And get some sort of proposal on that for our next meeting. If you can get these proposals to me, you know, as early as you can, say 30 days. If you can get it to me by the end of July or middle of August, then I can get them in one of these books.

CHAIRMAN SOULES: Did we cover the proposed change to Rule 13?

JUDGE THOMAS: Well, what the Mesquite attorney is asking on Page 116, Rule 13 be amended

to provide for contempt in cases where pleadings are filed for the purposes of securing a delay of the trial and of any hearing of the case.

JUSTICE WALLACE: That's contempt in the presence of the court. He can deal with it right then and there.

MR. SPARKS (EL PASO): Didn't we handle that yesterday, too, on 18-A?

JUDGE THOMAS: Well, yes.

MR. BRANSON: What does Rule 2 of the Federal Rules say? Does anybody know?

CHAIRMAN SOULES: Rule 13 deals with, if you do all these things for the purpose of securing and delaying the trial for cause. He just wants that expanded to, not only trial of cause, but also any hearing in the cause, instead of just the trial of the cause. And really, Rule 13 is another one of the old rules that probably never has been amended. I don't know how you can bring a fictitious suit for the purpose of delaying a cause.

MR. BRANSON: I was going to say, it sounds to me like any time you try to change the existing law, you're in violation of Rule 13.

CHAIRMAN SOULES: But that's not what

he's saying. Do we want to expand the application of this rule in any hearing or just leave it alone?

MR. BRANSON: Without regard to his recommendation, is there a need, in all candor, to look at Rule 13?

JUDGE THOMAS: Well, see my position would be that Rule 13 doesn't really do anything for us anyway. We have the inherent power, as I understand it, by contempt.

JUSTICE. WALLACE: I mean, you can deal with it summarily right then and there if he's out of line.

JUDGE THOMAS: We have the new rules on attorneys in contempt and how you handle those.

CHAIRMAN SOULES: Okay. Is there a motion to reject this Rule 13 suggestion? It's been moved by Frank Branson and seconded by Judge Thomas. We reject the proposal to have Rule 13 as found on Page 116. Those who favor rejection? Opposed? Okay. That's unanimously rejected.

MR. BRANSON: Would it be worthwhile if we look at 13 to maybe just kick it around for a minute, Luke?

CHAIRMAN SOULES: Well, Frank, let's

try to get through with what we've got here on the docket, if you will. I mean, if you want to rewrite something about that -- I realize it's kind of an unusual rule, but let's try to get through all of Judge Thomas' docket because we wanted to -- I don't know if we'll ever get to 277 and 279 again at this meeting.

MR. BRANSON: Okay. I'll withdraw it.

CHAIRMAN SOULES: I'm just trying to get on with what is on the docket. Let's see, what is this suggestion on heritage?

PROFESSOR EDGAR: That goes back to the supersedeas bond matter we discussed earlier.

CHAIRMAN SOULES: Well, this 14-C, though, this is not just supersedeas.

MR. BRANSON: But he says which, in turn, could be used to supersede a judgment, and then he goes on to talking about supersedeas judgments, the whole problem.

CHAIRMAN SOULES: Okay. So we've rejected this submission by Jim Kronzer on Pages 118 and 119?

PROFESSOR EDGAR: In the sense that he recommended we consider something similar to

proposed Rule 364-A, which was rejected this morning, the answer is "yes."

CHAIRMAN SOULES: And that was rejected 8 to 4, as I understand it. I was not here.

MR. BRANSON: Yes. Luke, could we take just a minute and look at a housekeeping problem?

CHAIRMAN SOULES: Yes, sir.

MR. BRANSON: I notice we're down here at 20 minutes to 12 on the third day of this meeting, and our number has diminished to much less than we've had any other time. In light of Hadley's recommendation earlier that we -- and there's some merit to the proposition, that what we're doing is one set of members of this committee who are present at one meeting are making recommendations. And the next time the committee meets, a different majority is present and additional recommendations are made. Might we, perhaps, look at the issue of whether we either want to recommended, which would encourage people to remain at the meetings?

CHAIRMAN SOULES: The only thing, the Committee on Administration of Justice up until

the early 80's and for a period before that -- I don't know when it started -- became a very poorly attended session. It was an honor to be on it, but you didn't go to it and they didn't do any business. And I'll just say that was the way it was, because I was there about three years and went to the meetings.

When the meetings became more frequent and the Chair refused to entertain motions to challenge lack of quorum and business started rolling through that committee, attendance picked up. And I think it's still good. The only thing we can do, of course, is just keep having sessions and hope people will be here.

But the sense of it that we would change what we would listen to has been voted on.

MR. BRANSON: Let me give you an example. We're now about to address 277.

CHAIRMAN SOULES: No. I don't know if we're ever going to get there.

MR. BRANSON: But assume we did, Luke. That was discussed, generally, in very heated discussions before most of the full committee. Now, what we're dealing with today are really recommendations that represent a majority of the

whole committee.

And this group came down on those issues with a slightly different vote, which is certainly possible. We would then, by majority present on a subsequent date, change the wishes of the whole. And I'm not saying it's right or wrong. It's just a housekeeping problem that might be worth addressing, particularly, in light of Hadley's previous motions. Is there any feel from the Chair or any other members of the committee?

CHAIRMAN SOULES: The only feeling I have is, we can only work with the people that are here. And those that are not here -- and some of them have very good reasons that I know of. And I imagine others have very good reasons that you-all know of. But we are going to tend to our business when the sessions have been declared to be in session. And I'm not trying to be arbitrary about that, Frank; I just don't know any other way to do it.

MR. BRANSON: Well, I'm just asking --

CHAIRMAN SOULES: I think at any time that somebody feels that we don't have a representative group for a specific matter, and the specifics of that are brought to the attention

-- and a consensus -- like Franklin Jones and Jim Kronzer are not here. They were very active, the two of them and others on the charge issues. And if the committee wants to -- because I'm sure they both have good reasons for not being here. I say, let's wait until next and give them another chance to come and we table by vote any individual items. I think that's certainly something that the Chair would have to entertain, but we can hardly entertain the foregoing of business.

MR. BRANSON: That handles the problem.

CHAIRMAN SOULES: Does that handle it for you?

MR. BRANSON: Yes.

CHAIRMAN SOULES: Okay. Maybe that's the motion that you would have, and that we table to the charge issues until next time; I don't know. I mean, I'm not trying to suggest a motion, but Hadley, I know, would like to get on with it. What is the consensus? Should we go on to other matters or should we turn to those at this juncture?

PROFESSOR EDGAR: David Beck asked me earlier -- we didn't take a break, he just asked

me if I thought we were going to take them up, and I said I really didn't think we were. And he said, "Well, I sure would stay if we were."

So I would suggest that we go on to other matters if we can, and defer any consideration of those until we do have a larger committee. Because this is a very sensitive area, and I don't think that we ought to try and solve those more important problems if you can assign relative areas of importance without a larger representation.

CHAIRMAN SOULES: Which is easier for people, Saturday morning? I'm trying to figure out when in our September sessions we're going to have the most people here. Of course, that's reading the crystal ball. Do you think we'll have more people here Friday morning or Saturday morning?

MR. NIX: Friday morning.

MR. SPARKS (EL PASO): We've never had a good turn out on Saturday morning, never.

MR. SPARKS (SAN ANGELO): Luke, I don't think that answers the problem. I think you said it right on the head. Because what I see happening -- the Task Force Rules, we sat here and

talked about those all day Thursday. First thing I hear -- you got a revelation on the way down here. I mean, these things are hashed over and over and over.

Now, again, are you going to say there's more people here on Friday mornings, we're going to take up 277. I'll guarantee you that Saturday morning it will be talked about again. The answer is attendance of the meeting. I think you've said that, and I agree with you.

CHAIRMAN SOULES: I want to get a schedule on 277 and 279 at the point in time where those few of us that are left feel like we're going to have the most people. And I'll put it on the agenda first thing either Saturday morning or Friday morning so that we can get to it next time. We had other matters that were pretty much imposed on us for scheduling-wise it this time.

MR. SPARKS (EL PASO): You'll have more here Friday.

CHAIRMAN SOULES: -- has been delayed three times, and we had rules we had to get to and the Administrative Rules and now we're here. How many feel that that should be set first thing Friday morning, the charge? All right. On

September the 12th.

MR. BRANSON: Luke, it might be better to set it about 10 o'clock on Friday morning because what happens is the same thing that happened this time. Some of us were here at 8:30 and some people had airplanes that were late getting here and that has historically been the way -- generally, most people arrive by mid-morning on the first day.

CHAIRMAN SOULES: Give me this leeway. Justice Pope, of course, is still one of our representatives. He is inactive, and deservedly so in many cases. And he could not be here today at this time because of a conflict.

I will, with your permission, call him and ask him when he can be here and then say that whatever we're doing, if he can be here at all, at that time and on that day. Maybe that's the best way to do it, that we're going to take it up while he's here and let him speak to it at noon. Is that okay?

PROFESSOR EDGAR: Sure.

CHAIRMAN SOULES: Okay. And I'll try to get it, though, on Friday so that -- I think, the consensus is that we'll have more people here

Friday.

Okay. What else, Judge. We've got 27-A or B. Are those in your bailiwick?

JUDGE THOMAS: No.

CHAIRMAN SOULES: Okay. We've covered all those with Sam's report anyway. Now, let's go to -- Sam, I'm trying to get to 215. It's a suggestion by Judge Phillips. And is that the one we acted on where he just wanted to enter an order compelling discovery in the sanctions?

MR. SPARKS (EL PASO): Yes.

CHAIRMAN SOULES: So we've acted on that.

MR. SPARKS (EL PASO): Yes. And wasn't that just rejected?

CHAIRMAN SOULES: It was. We've covered all Judge Thomas' rules, and all of Sam's rules. And Franklin's we're going to delay unless --

PROFESSOR BLAKELY: Mr. Chairman, you're not assuming that you're finished with Item 6, the Evidence Committee?

CHAIRMAN SOULES: No. And that's right.

PROFESSOR BLAKELY: There's one tiny

little item.

CHAIRMAN SOULES: Let's cover that.

PROFESSOR BLAKELY: All right. This begins on Page 657. This deals with 3737-h. The 1985 legislature rewrote 3737-h and put it in the Civil Practice Remedies Code. It made no changes in substance; it simply rewrote the form as part of the legislture's continuing codification process and it does repeal 3737-h.

At the same time, the same legislature amended 3737-h as if it were alive and well, changing notice times and changing the qualifications of the counter-affiant; it upped the qualifications. Mr. Gary Beckworth wrote in, and on page 657 I've quoted the key paragraph from his letter. He says, "It appears that the repealer in the amendment pursuant to, so and so, does not preserve for causes filed after September 1 of the authority of Section 1(a)."

Well, insofar as 3737-h basically is concerned, it's now still alive over in the Civil Practice and Remedies Code. The legislative action that ups the qualifications of the counter-affiant and that changes the notice time -- lengthens the notice time, must be construed

with the Civil Practices and Remedies Code rewrite and it would prevail.

So, in essence, 3737-h is still on the books as a part of the Civil Practice and Remedies Code, but must be read with the legislative amendment with higher requirements that superimpose.

So I think the legislature has attended to Mr. Beckworth's concerns. His letter indicates that this might be a part of the Rules of Evidence. The Rules of Evidence Committee does not want 3737-h in the Rules of Evidence because it deals with sufficiency of evidence. And our effort has been to limit the Rules of Evidence to admissibility and one from sufficiency.

So I recommend that this committee tell the Supreme Court that we feel that the legislature has attended to Mr. Beckworth's concerns. And this detailed analysis that I put in over here on 659 and 660 explains all of that in more detail. So I move that this committee notify the Supreme Court. We feel that the Court should take no particular action on that.

CHAIRMAN SOULES: Second?

PROFESSOR EDGAR: Second.

CHAIRMAN SOULES: Discussion? All in

favor show by hands. Opposed? That's unanimously rejected. That is, the suggestion to be made is unanimously rejected. And the Court will be employing this. The Legislature, in our judgment, has handled the problem.

Pat, why don't we cover some of your rules. We're scheduled to be here until 1 o'clock. Can we take five minutes or ten? Let's recess until noon and then we'll spend an hour on Pat Beard's area.

(Brief recess.

MR. BEARD: Turn to Page 503.

CHAIRMAN SOULES: The exotics of extraordinary risks. Page 503.

MR. BEARD: We have Rules 657, 621-A and 696. The only changes are to change the referencing to revise the Civil Statutes to the new Texas Civil Practice and Remedies Code. I move that we adopt these amendments in all three of those rules.

CHAIRMAN SOULES: That's 657 on 503.

MR. BEARD: And 621-A which follows and 696.

MR. MCCONNICO: Second.

JUDGE TUNKS: What page is that?

CHAIRMAN SOULES: Page 503, 4, and 5, isn't it?

MR. BEARD: Right. 503, 4, 5, and 6.

CHAIRMAN SOULES: Any discussion? Those in favor, show hands. Those are adopted unanimously.

MR. BEARD: Next change here is a proposed new Rule 37, which was suggested by Jay Jogelson in Dallas, which I drafted.

John O'Quinn opposed this following the federal statute on interlocutory appeals on questions which might be resolved by an appellate ruling.

It is my recommendation that we reject this proposed rule. If an interlocutory question which would dispose of the case is involved, that would mean that it's a novel question that the Supreme Court has not acted on.

The statute would not give the Supreme Court any jurisdiction except on a conflict question. If it's a novel question there wouldn't be any real conflict. So I see nothing to be gained by taking the appeal to the Court of Appeals to make

the ruling to then dispose of the case and then go back down and enter an order and then have to go all the way back up again. And, now --

CHAIRMAN SOULES: You may not have jurisdiction in the Court of Appeals for that anyway under the statute.

MR. BEARD: Well, it's my opinion that we have the power to adopt the rules to give appeals on interlocutory orders.

CHAIRMAN SOULES: Okay.

MR. BEARD: There are those who disagree with me about that, but I think we do. But, nevertheless, there's nothing to be accomplished when we really don't dispose of the case. So I move that we reject.

PROFESSOR EDGAR: I second the motion.

CHAIRMAN SOULES: Any discussion? Those who favor rejecting this, show by hands. Opposed? That is unanimously rejected.

MR. BEARD: The next proposal to amend 621-A, Rule 627.

CHAIRMAN SOULES: That starts on Page 513.

MR. BEARD: Page 513. And this is the discovery -- to stop discovery after the rendition

of a judgment. Under our present Rules, as soon as a judgment is rendered, the prevailing party, the plaintiff, I guess it would be in most cases, has the right to begin discovery, unless the supersedeas bond is posted.

I wrote to my committee that I was opposed to the proposed amendment to change and it was my opinion that we should leave the rule as it is, and for the committee to advise me if they disagreed. I heard from no members of the committee. So I move that Mr. Pace's proposed changes be rejected.

PROFESSOR BLAKELY: Seconded.

CHAIRMAN SOULES: The effect of this is to permit discovery immediately following judgment before motion for new trial or that sort of thing has been ruled on. And that's what the rules are now.

MR. BEARD: That's what the rules are now.

CHAIRMAN SOULES: And our vote would be to leave that like it is, not to change it as requested. How many feel that the practice as it is now should be retained? Show by hand. How many feel that this change should be adopted? All

right. The change is rejected unanimously.

MR. BEARD: Let me get over to the next -- repeat some of the back up. There have been several suggestions to change the rules concerning temporary restraining orders. Judge Thomas has referred to that discussion about something here, and that is the Court enters the TRO and can't find the defendant to serve him so --

PROFESSOR BLAKELY: Excuse me, Pat, what page.

MR. BEARD: It starts on page 565.

CHAIRMAN SOULES: 565, okay.

MR. BEARD: One of the suggestions was that the TRO remain in effect and that you have regular docket calls on TROs. It goes back to really, I suppose, more of a big city problem.

It would appear to me that if you can't get the defendant served with a TRO, there's not all that much necessity for that TRO because you can't find him, and he's going to be acting -- or whatever he's going to do anyway.

I realize that in domestic relation cases if you get the TRO and lay it on him, that might prevent him from going and beating up his wife or

what have you. I don't know of any way to have a uniform rule throughout Texas because these multi-county districts have no way to come back to have a hearing on a regular docket call to take care of TROs and domestic relation cases.

So in that effect, I just gave up on any practical way to do it. And it's my recommendation that we leave the rules as they are with respect to TRO's and they would expire. If you don't serve --

CHAIRMAN SOULES: Don't make any special exceptions for family matters is requested here.

MR. BEARD: I don't know how to do it in a family matter. You've got to have a time in which it's going to be heard, and you can't do that -- maybe Dallas or Houston can do that and have a judge available to hear all those TROs. There's no way to do that in most of the state.

CHAIRMAN SOULES: The Committee on Administration of Justice voted to reject these proposed changes of 680 and 683 that are contained here, except the Committee on Administration of Justice voted to change the 10 days to 14 days

because 10 days -- if you get a TRO on Friday -- let's see, how do you count the days?

I think you have to have the hearing the following Friday because you can't even make it to Monday and no one knows, really, whether the 10th day expires if it's Sunday or if it's extended to the next day, which is neither a Saturday, Sunday or a legal holiday as some things get extended.

And if you have a time period in the TRO that's 14 days, any weekday that you enter that order on or sign the order, it's going to fall on a weekday on the 14th day, and that makes sense.

MR. BEARD: That may be acceptable in domestic relation cases, but I'm opposed to extending any time to let TROs. It needs to be heard.

CHAIRMAN SOULES: Well, 10 to 14 days only -- just so we don't run into this question of exactly what day is the 10th day. We know what day is the 14th day if the thing is signed on a weekday. In other words, it would only add 4 days, Pat, it doesn't add anything else.

MR. BEARD: I am philosophically opposed to extending that time when you have those TROs without notice. I think they can be heard

because the courts tend to, you know, extend them and do all sorts of things anyway.

CHAIRMAN SOULES: Well, shall we vote on everything except whether we go from 14 to 10, because that's the only thing that was recommended by the COAJ, or do we just want to vote it all down? Let me just say, first -- let me take a vote. How many would reject these proposals except, perhaps, for extending 10 to 14? We'll take a vote on that.

MR. BRANSON: Could I hear from Judge Thomas on how -- whether or not she thinks anything can be done in the DR courts or needs to be done different?

PROFESSOR EDGAR: I'd like to hear from Judge Thomas, too.

JUDGE THOMAS: As I understand the position of the counsel to be, and all of this originated out of the family law counsel is, if they really had their wishes, I think what they would want is the family law matters actually exempted from the rule. I personally am not particularly in favor of that, but would be in favor of an additional four days.

The problems are really in the smaller

counties because the larger metropolitan areas we have our temporary restraining order dockets almost daily anyway. So it's not a problem in Dallas or Fort Worth, Houston.

CHAIRMAN SOULES: Those who would reject everything but the extension of time and then we'll get a vote on that. You may vote to reject that, too, but those who reject everything but the extension of time as suggested for 680 and 683 show by hands. Okay. Those who are in favor of adopting those? Those are rejected unanimously.

Okay. On the issue of changing 10 to 14 days, how many favor changing to 14 days? How many would keep the 10 days, would want to keep the 10 days? 5 to 3. So 10 to 14 days passes 5 to 3.

PROFESSOR EDGAR: Let's go back just briefly to Page 543 for just a minute.

CHAIRMAN SOULES: All right.

PROFESSOR EDGAR: This is rule 621 which we are voting to retain. It refers to Article 3773. Is that now part of a remedies code or anything? Should that reference be recodified in any way? I guess maybe you'll know.

PROFESSOR BLAKELY: No, I don't.

PROFESSOR EDGAR: I'm just wondering while we're cleaning that up if Rule 621-A makes reference to Article 3773-A VATS. And I'm just wondering if that statutory reference should be changed.

MR. BEARD: I don't know. Really, I did not look at it.

CHAIRMAN SOULES: We might check it. It's probably a 10-year statute, isn't it?

PROFESSOR EDGAR: I don't know, but nearly everything has been changed. And it just seems to me that --

CHAIRMAN SOULES: Would you check that, Pat?

MR. BEARD: Yes. Wicker sent those things in and I just put them in there without ever, you know, double checking it myself. I was assuming he got them all.

CHAIRMAN SOULES: Okay. Let's see. That gets us to what page, Pat?

MR. BEARD: Now, we go to Page 579. Under the present rule 685 the language is, "Upon the grant of a temporary restraining order the party to whom it is granted shall file his

petition, therefor." And the question that was raised is another big city problem, I guess, and that is that you can go select your judge first to get your TRO before you file it. And we've lived with this rule for a long time, and as far as I'm concerned, I would reject the proposed change and leave it just like it is.

MR. BRANSON: Second.

CHAIRMAN SOULES: Moved and seconded. Any further discussion? Those who would reject the proposed change to Rule 685 show by hands, please.

PROFESSOR EDGAR: Well, Keltner raises a question here, and I don't know if it's a real one or not. But at the bottom of Page 579, that this perhaps might result in a situation where you seek it and have it refused and then you go somewhere else.

MR. BEARD: Well, I think that can very well occur. I don't object to that.

CHAIRMAN SOULES: And the discussion of COAJ was, you've got only 10 now. If we can get the change to the Supreme Court 14 days, any party can file a motion to dissolve -- I mean, you can get back into court quickly if you need be and

that -- you know, maybe it's not as big of an evil as it should be because if you start trying to restrict which judge can hear these you may not get the meritorious ones acted on.

Really, this is not something that we're trying to foster, that is, go from one judge to another until you finally get your orders signed. But in order to have enough freedom to get an order signed that you may need to get signed, that's just one of evils that can be present in the event of abuse or preference.

MR. BEARD: Outside of domestic relations, you have to post a bond, you take a certain risk. In the big city you don't know what court your ending up with. I just wouldn't change it.

CHAIRMAN SOULES: Well, it was the talk; I mean, it was discussed. Okay. So that's unanimously rejected. And I got the vote.

MR. BEARD: I believe that, as far as I know, are all the matters that my subcommittee --

CHAIRMAN SOULES: Let's see. Well, we've got Wicker's --

MR. BEARD: Those are already taken

care of. You repeated some of this.

CHAIRMAN SOULES: We did?

MR. BEARD: Yes. We've got several things that are repeated. Those are matters that have already been covered. I'll have to go back and see about this reference. But those cover all the matters of my subcommittee.

CHAIRMAN SOULES: All right. What about these on 598 and 599? Is that somebody else's? These are the 7 -- yes, these are Jim Kronzer's rules.

All right. Is there any other business?

PROFESSOR EDGAR: I would like just, very briefly, to refer the committee, for no action, but simply for informational purposes, to the letter which you were given when you arrived under cover from Fulbright and Jaworski from David Beck, which was the report which was assigned to David to redraft the Rules 277, 290, whatever they are, charge rules.

And showing you how the wisdom of committee action over individual thought is a wise thing, I have to point out to you that I have to take advantage of something that -- a motion which I proposed was defeated a while ago. Because in

going back and redrafting Rule 277, as a result of this committee's decision at our last meeting, I felt that we had created a real nightmare for ourselves, in that there might be some kinds of cases which we could not submit broadly; you couldn't submit by a general charge or a checklist or by limiting instructions on a broad form, such as worker's compensation.

And so I asked David to include the sentence that appears here on the first page of Rule 277, a little below the center of the page saying, "only if required by the substantive law, such as worker's compensation is the submission of separate questions permitted." That shouldn't be "submitted"; it should be "permitted." That's a typo. Now, that is a change.

And my thought was that for us to sit here in a committee and say that broad form checklist limiting instructions would automatically submit every conceivable kind of case, may be presumptuous. And I felt that we should leave some type of escape valve; a very severe stringent escape valve. But if it's required by the substantive law, then, perhaps the separate question is going to be necessary, and I don't

know what language should be used.

I don't have any pride of authorship, but I thought of worker's compensation and I've talked to a number of lawyers. In fact, I attended the subcommittee meeting of Pat in jury charge Volume 2 the other day for one purpose, to ask them about this problem. And they unanimously told me that they did not think that you could submit a comp case either on a broad form, Nemos vs. Montez-type (phonetic) submission or a general charge or a checklist. And they thought that this language might be necessary because in trying -- they have a responsibility to try and prepare some worker's comp charges for a revision of Volume 2. And if they can only prepare them based upon the guidelines we're giving them in Rule 277, they don't know how to do it.

Now, also, I've taken a look at the charge in the Pennzoil case. Now, that was submitted on separate questions. And I don't profess to know enough about that particular area of the law to say that you could submit it on a general charge or a broad form or by checklist. I don't think you can, but all I'm saying is that, we need to think very carefully and allow some wiggle room

here and make it tight. I mean, we certainly don't want courts to be able to submit cases by separate questions, unless they just absolutely require to do so.

MR. NIX: Wiggle room, such as the language that you've talked about?

PROFESSOR EDGAR: Yes. We need to have some type of escape valve, Harold, that's all I'm saying.

MR. NIX: I understand. I certainly agree with that.

PROFESSOR EDGAR: There may not be any areas of substantive law that require separate questions, but if there are then I think that we need to provide for it. That's all I'm saying. This is a very substantial addition to what we approved last time. And because of the few people here, I certainly don't think that we should consider it today, but I did feel like I could call it to your attention now so that you could be thinking about it when we talk about it in September.

MR. BRANSON: Hadley, couldn't you handle a comp case, for example, by a general charge with special interrogatories following it?

PROFESSOR EDGAR: But once you have special interrogatories, though, then your submitting separate questions.

MR. BRANSON: Well, but the truth of the matter is you're getting -- as I have encountered special interrogatories in the federal court. You go ahead and get your charge answered, in a general charge, and then the Court follows it for it's own edification, ordinarily, with special questions to allow the Judge to draw judgment.

Well, the judge has said total -- the jury has said total and permanent from the beginning, or they've said permanent, partial; or they've said no injury. And then the Court could go back and by special interrogatories and get the beginning dates -- any date of total, the beginning date of partial, that type thing.

PROFESSOR EDGAR: Yes, but you see then you're not submitting on the broad form, nor are you submitting by checklist or by limiting instructions.

MR. BRANSON: Why couldn't you draw a checklist that would do that, though?

PROFESSOR EDGAR: Let me just say this: I talked to Franklin about this the other

day and he told me he was going to be unable to be here. I told him what I wanted to include, and he said, "I've tried to prepare a worker's comp case on a general charge and I've got to confess to you that I don't know how to do it," he said that.

MR. NIX: I did the same thing recently, Hadley, and I just simply couldn't do it either, frankly.

PROFESSOR EDGAR: And all I'm saying is that, whether a worker's comp case -- and maybe we shouldn't include such as worker's compensation here, but it just seems to me that we need to recognize that there might be some kinds of cases in which the substantive law will not permit the court to submit the way that we're proposing it be done. And we need to provide some type of relief. That's all I'm saying.

MR. BRANSON: Let me ask you a question, and it may not be relevant, but what's the problem? Why can't you -- it's been a long time since I tried a comp case, but it seems to me like if you put the definitions of total and temporary in and ask early on and define all that in the general charge and then said if you have found an injury, then do you find it to produce

any disability, permanent; or if not permanent, did it produce temporary on the ending dates?

Why can't you put all that in the general charge and then close it with some checklist-type questions? That's almost what a short form is anyway.

MR. NIX: You could do that, but that's not really what I'm considering to be a general charge.

PROFESSOR EDGAR: Me neither. Once you start including special interrogatories then you're really not talking about a general charge.

MR. BRANSON: But you're not talking about something that encourages the trial court to go back to single issue submission, either.

MR. NIX: Yes. Your point is well-taken, Frank, but it is something -- however, Hadley's point is, too, and it's something we all agree that we need to look at before --

PROFESSOR EDGAR: All I'm saying is that we need to think very carefully in thinking that we have covered all conceivable types of cases. And I don't know this much about trust or a title, either. I do know that's a statutory form of action, and I don't know whether some

types of cases you might have to ask separate questions.

MR. NIX: I don't know either.

MR. BEARD: Well, any time that your theory of the law is wrong in the way you charge the jury, the antitrust cases that clash with the Fifth Circuit reverses over and over under the general charge because the charge in the law was wrong and they couldn't tell what the net effect of the answers were, go back and try again.

MR. BRANSON: But if your charge on the law is wrong, it's going to be the same thing in special issues.

MR. BEARD: Not necessarily in an antitrust case.

MR. MCCONNICO: I think what Hadley is saying is, there's just no way we can foresee all the ways these cases are going to be submitted, and consequently we've got to have some wiggle room and just make it restricted.

CHAIRMAN SOULES: That makes sense.

PROFESSOR EDGAR: I just simply wanted to call that to the committee's attention to consider at the next meeting.

CHAIRMAN SOULES: That makes sense. I

CHAIRMAN SOULES: That makes sense. I guess one last matter, Bill Dorsaneo wrote to Justice Wallace and indicated that the Appellate Rules had a couple of very small changes that needed to be done. Just, in effect, typos.

JUSTICE WALLACE: That second paragraph, Luke, West Publishing caught that and called and told me to make that correction. I told my secretary to get in touch with the guy at West and see if they could not get those other corrections made. And I don't know what luck she's had, but I think we may have gotten that thing taken care of.

CHAIRMAN SOULES: Okay. So we put a copy of that in everybody's file and I'm sure everybody has approved them. Is there any dissent from approving these suggested by Bill? Okay. That's unanimous. And West hopefully has the directive all ready on that.

All right. Thanks for raising that, Hadley. It is an important consideration. We'll certainly have that before the committee. That's in the draft that David provided. And that will be in our materials and where that appears is behind his cover letter. That would be the same as Rule 277

in about the middle of page the. Language again is, "only if required by the substantive, such as worker's compensation, is a submission of separate questions permitted."

PROFESSOR EDGAR: Yes. And there was really another question, too, that David and I had and that's on Page 3.

He thought when he was given the charge by the Chairman, that he was to take this first paragraph on Page 3 and place it in another rule because it really doesn't concern, necessarily, the submission in cases but the form of the submission.

But then when he and I went back and looked at the minutes, they read kind of like there was a general suggestion that it should be done. And then somebody raised a question, and then the tide flowed the other way. And there never was a specific direction to him to take and try and put that somewhere else.

And so I suggested that he just kind of put a bracket around it and call it to the committee's attention that they really didn't resolve what they wanted to be done, in that regard.

CHAIRMAN SOULES: Would you be able to

present that to the committee at the next meeting?

PROFESSOR EDGAR: Yes, you bet.

CHAIRMAN SOULES: Is there any other business?

Well, thanks to all of you for being here. It's 12:30 and we're adjourned until 8:30 in the morning on September the 12th, 1986; that's a Friday. We'll work until 5:30 that day and have breaks and then resume at 8:30 Saturday morning and might work past 1 o'clock on Saturday the 13th.

(End of proceeding.

STATE OF TEXAS ><

COUNTY OF TRAVIS ><

We, Elizabeth Tello and Chavela V. Bates, Certified Shorthand Reporters in and for the County of Travis, State of Texas, do hereby certify that the foregoing typewritten pages contain a true and correct transcription of our shorthand notes of the proceedings taken upon the occasion set forth in the caption hereof, as reduced to typewriting by computer-aided transcription under our direction.

WITNESS OUR HANDS AND SEAL OF THIS OFFICE, this the 3rd day of June, 1986.

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