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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE
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MARCH 16, 1996
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19 Taken before William F. Wolfe,
20 Certified Shorthand Reporter and Notary Public
21 in Travis County for the State of Texas,
22 on the 16th day of March, A.D. 1996, between
23 the hours 8:05 o'clock a.m. and 12:00 o'clock
24 noon, at the Texas Law Center, 1414 Colorado,
25 Rooms 101 and 102, Austin, Texas 78701.

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MARCH 16, 1996

MEMBERS PRESENT:

Alexandra W. Albright
Charles L. Babcock
Hon. Scott A.Brister
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo III
Hon. Sarah B. Duncan
Anne L. Gardner
Hon. Clarence A. Guittard
Michael A. Hatchell
Donald M. Hunt
Joseph Latting
John H. Marks, Jr.
Russell H. McMains
Anne McNamara
Richard R. Orsinger
Hon. David Peeples
Luther H. Soules III
Stephen Yelenosky

EX OFFICIO MEMBERS:

Hon William Cornelius
O.C. Hamilton
David B. Jackson
Hon. Paul Heath Till

MEMBERS ABSENT:

Alejandro Acosta Jr.
Pamela Stanton Baron
David J. Beck
Hon. Ann Tyrrell Cochran
Michael T. Gallagher
Charles F. Herring Jr.
Tommy Jacks
Franklin Jones Jr.
David E. Keltner
Thomas S. Leatherbury
Gilbert I. Low
Honorable F. Scott McCown
Robert E. Meadows
David L. Perry
Anthony J. Sadberry
Stephen D. Susman
Paula Sweeney

EX-OFFICIO MEMBERS ABSENT:

Hon. Sam Houston Clinton
W. Kenneth Law
Paul N. Gold
Doris Lange
Michael Prince
Bonnie Wolbrueck

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1 CHAIRMAN SOULES: We'll be on
2 the record. It's about five after 8:00 on
3 Saturday morning here.
4 MR. HUNT: Mr. Chairman,
5 yesterday we progressed to 304(e)(1) and had
6 just approved that. We are now at the
7 ellipses. There's no change in (2). That's
8 been previously approved. Let me see if I can
9 cover 304(e)(3) and (4) in one fell swoop.
10 CHAIRMAN SOULES: All right.
11 MR. HUNT: The only changes in
12 those two is to be consistent grammatically to
13 say "notice to each party or party's
14 attorney." Otherwise, it's about the same as
15 the current rule slightly rewritten. We have
16 approved the prior rewriting, and the change
17 this time is grammatical only.
18 CHAIRMAN SOULES: Any
19 opposition to 304(e)(2), (3) or (4)? There
20 being none, they all pass.
21 MR. HUNT: Now, look at (5) on
22 the next page. There's something in there
23 that we have never talked about, even though
24 we have been this way before. And what we
25 have never talked about is in connection with

1 the setting.

2 Previously this rule just said the trial
3 judge shall find the date. There was at least
4 a problem occasionally when a trial judge
5 would not set a hearing and would not find a
6 date, or if a hearing was set, would then not
7 rule, so I struggled to figure out some sort
8 of a way to cause a trial judge to act, and I
9 couldn't think of one unless we want to build
10 in some other kind of a trap, so I simply said
11 the trial judge shall promptly set the motion
12 for hearing, and after conducting a hearing on
13 the motion, should find the day, or at least
14 put in some language that an appellant could,
15 if faced with a trial judge who refused to
16 act, could point to the rule and say the judge
17 should have exercised discretion and get the
18 appellate court to force the judge to do
19 something or to say it was error not to
20 exercise discretion, not to act.

21 CHAIRMAN SOULES: Any
22 opposition to 304(e)(5)? There being none, it
23 passes.

24 MR. HUNT: There really is no
25 change in (6) except to correct the rule.

1 That's made necessary because we changed some
2 numbers.
3 In (7), all that's really happened is
4 that we have struck the words "served by
5 publication" and just made it "citation by
6 publication" in two places.
7 CHAIRMAN SOULES: Any
8 opposition to (6) or (7), 304(e)(6) or (7)?
9 There being none, it --
10 MR. HATCHELL: Luke, can I just
11 ask for a point of clarification? Isn't
12 subdivision (6) now in the Appellate Rules?
13 MR. HUNT: Probably so, but --
14 MR. HATCHELL: We're going to
15 have it in both places?
16 MR. HUNT: You mean 306(a) in
17 the Appellate Rules?
18 MR. HATCHELL: Uh-huh.
19 MR. HUNT: I don't know. That
20 was one of those things that I think we
21 decided.
22 MR. HATCHELL: So it's in both
23 places?
24 HON. C. A. GUITTARD: If it's
25 in the Appellate Rules, it ought to be here.

1 And I think maybe this is one of those --
2 MR. HUNT: I know Judge
3 Guittard and Professor Dorsaneo had a
4 discussion about the kinds of rules that ought
5 to appear in both places. Some appear in
6 appellate, some appear in trial, and this
7 affects both, and maybe it ought to go in
8 both, but I hope we've got the language the
9 same.
10 MR. HATCHELL: Well, that's
11 what I was leading up to. I have a copy of
12 Appellate Rule 5(d) which says "No Notice of
13 Trial Court Judgment in Civil Case," and I
14 just think they ought to be the same.
15 Lee, I guess you would know the answer to
16 this question. Are they in both places now?
17 MR. PARSLEY: Well, both rules
18 speak to it, but this one says and the
19 Appellate Rules say now in Rule 5 "as provided
20 in these rules," which "these rules" I would
21 assume means the Civil Rules, and the
22 Appellate Rules when it says "these rules" as
23 it applies to the Appellate Rules. The idea
24 being that they would -- each rule would then
25 be the same, but they would apply to -- one

1 would apply to the Appellate Rules and one
2 would apply to the Civil Rules, right?
3 CHAIRMAN SOULES: Timetables.
4 But they should be the same.
5 MR. HUNT: There was no intent
6 to make an effort to -- most of the editing on
7 what is 306(a) here came from Lee in the draft
8 that I thought they were working with in the
9 TRAP Rules. But there was no attempt to make
10 them different, and I hope I haven't ended up
11 that way. But I will at least verify that
12 before we present them for final approval.
13 CHAIRMAN SOULES: Okay.
14 Subject to that check, is there any opposition
15 to 304(e)(6)? It passes. How about
16 304(e)(7)? It also passes.
17 MR. HUNT: Then we come to (8),
18 the premature filing. We've visited that
19 twice, and the vote has been the same each
20 time. It's included only now because I've
21 included the words "motion to modify
22 judgment." We've talked about these two
23 postjudgment motions, and we're focusing here
24 on the occasions where counsel may file a
25 motion after judgment, but that's not the

1 problem. The problem is where the counsel
2 intends to file it after judgment but gets it
3 filed before judgment.
4 And the typical scenario is that the
5 winning party sends the judgment over to the
6 judge and a copy to the losing party, and the
7 winner asks the judge to sign it in five days,
8 if there's no objection. The loser doesn't
9 object. The loser thinks it's been signed.
10 The loser runs over there with a motion to
11 modify and a motion for new trial, or he runs
12 over there with a document that has a
13 proliferation of titles and you just don't
14 know what it is. Even after you read it,
15 you're not sure whether it's a motion for new
16 trial or a motion to modify or something
17 else.
18 If we're going to do this, if we're going
19 to say that premature filing of any
20 postjudgment motion, we better deal with both
21 of these postjudgment motions that can trigger
22 a timetable, because what we're trying to do
23 here is say that any prematurely filed motion
24 that's filed before judgment, in other words,
25 doesn't trigger the timetable. It doesn't get

1 you any extra time, it's just overruled as of
2 the day the judgment is signed. So you're
3 still right there on the 30-day timetable
4 until you do something else.
5 Any opposition to putting in the motion
6 to modify?
7 CHAIRMAN SOULES: Any
8 opposition to that? Mike Hatchell?
9 MR. HUNT: And Alex is
10 speaking.
11 CHAIRMAN SOULES: Alex
12 Albright, do you want to speak?
13 PROFESSOR ALBRIGHT: Well, it
14 just seems to me that when people file a
15 motion for new trial they're primarily doing
16 it to get time additional time, and why have
17 it overruled as of the date the judgment is
18 signed instead of just saying all motions for
19 new trial extend the deadline?
20 CHAIRMAN SOULES: I think
21 we've -- that was the architecture of the
22 timetables that we settled on a couple of
23 meetings ago.
24 MR. HUNT: That was settled in
25 November, and there was no desire to revisit

1 it in January, even though Dorsaneo thought it
2 was wrong, and I'm not particularly happy with
3 it, but this group has twice said that
4 prematurely filed postjudgments motions are
5 just not going to get you a new timetable.
6 CHAIRMAN SOULES: They preserve
7 error, but they do not extend the appellate
8 timetable.
9 PROFESSOR ALBRIGHT: A
10 prematurely motion for new trial?
11 CHAIRMAN SOULES: Right.
12 MR. LATTING: What was the idea
13 behind that?
14 CHAIRMAN SOULES: I don't know,
15 but we're not going back to it.
16 MR. LATTING: Okay.
17 CHAIRMAN SOULES: We've done
18 that and talked about it and beat it to death.
19 HON. C. A. GUITTARD: I don't
20 remember the discussion on that.
21 CHAIRMAN SOULES: Well, it was
22 about two and a half hours of ideas or three.
23 It would be hard to repeat them all.
24 MR. LATTING: Okay.
25 CHAIRMAN SOULES: Any

1 objection, then, to -- or any further
2 discussion on the adding of "motions to
3 modify" to, what is it, 304(e)(8).
4 Yes, sir. Chip Babcock.
5 MR. BABCOCK: You may have a
6 word dropped in the next to last line.
7 "Judgment extends the trial court's plenary."
8 Shouldn't it be "power"?
9 MR. HUNT: It sure should.
10 MR. McMAINS: Luke.
11 CHAIRMAN SOULES: Rusty.
12 MR. McMAINS: I'm not
13 attempting to revisit the issue of the
14 effectiveness of premature filing, but there's
15 one issue that I'm not sure is clear in our
16 rules for that purpose.
17 CHAIRMAN SOULES: Okay.
18 MR. McMAINS: And that is that
19 our rules, I believe, by and large say that
20 something is filed that is -- or deemed filed
21 when it's mailed, if it's mailed timely.
22 Okay. It's deemed in compliance with. Now,
23 it is not unusual for people to file things on
24 the date that the judgment is entered. Now,
25 the question is, when you're there and you're

1 filing something on the same date that the
2 judgment is entered, is that -- or you mail it
3 maybe on the same date that the judgment is
4 entered, sometimes perhaps by accident. Maybe
5 the judge has already told you he's going to
6 enter judgment on X date, and therefore you do
7 it, which is not an unusual occurrence that
8 the judge actually doesn't do it.
9 At any rate, my concern is that if there
10 is a date that -- you know, if it's the same
11 day, whatever the act, the operative act of
12 filing is the same day, I am of the opinion
13 that we should not treat that as a premature
14 filing; that we should treat that as having
15 been filed after the judgment in order to give
16 it the effect on the timetable, because we
17 have lots of cases that are out there which
18 basically say the time stamps on the clerk's
19 office don't make any difference really; that
20 you're just talking about dates, you know, and
21 that's when you tender it to the clerk, not
22 when they stamp it, because a lot of clerks
23 stamp it at different times. Sometimes they
24 don't stamp it until the next day.
25 I mean, I understand why we did what we

1 did, but I don't think we gave any
2 consideration to the problem or the issue
3 which, because of what we did, means you get
4 no extension of time even if you file it, or
5 at least arguably, even if you file it after,
6 unless you have some independent proof that it
7 was actually after the act.
8 MR. HUNT: All you really want
9 is another sentence that says a motion filed
10 on the same day the judgment is signed is not
11 premature.
12 MR. McMAINS: Right. I mean
13 that's --
14 MR. ORSINGER: I would move we
15 add that sentence.
16 MR. McMAINS: I think that
17 generally would solve that issue.
18 CHAIRMAN SOULES: Don't we have
19 that in the rehearing rules coming from a
20 court of appeals somewhere?
21 MR. McMAINS: What?
22 CHAIRMAN SOULES: The language
23 that something filed on the same day shall be
24 deemed filed after. I mean, we've got that
25 same concept somewhere in the Appellate Rules,

1 and I'm trying to remember where it is.
2 MR. McMAINS: Of course, that
3 used to be our premature filing time; that is,
4 anything that was filed prematurely was deemed
5 filed on the date of the act, the act that is
6 the subject of the complaint, so that's where
7 the concept -- that's the concept that we
8 changed.
9 CHAIRMAN SOULES: Okay. So we
10 can just go back and pick up that same
11 language except that it would be anything
12 filed on the date of the judgment or other
13 appealable order shall be deemed filed after
14 the judgment.
15 MR. HUNT: Or you can just say
16 it's not premature, either way.
17 CHAIRMAN SOULES: Okay.
18 MR. HUNT: That's not what
19 we're talking about. We're saying it's the
20 same time as and not premature.
21 With that addition, then we can move on
22 to the plenary power.
23 CHAIRMAN SOULES: Okay. With
24 that addition, is there any opposition to
25 (8)? Okay. It passes.

1 MR. HUNT: Plenary power was
2 approved last time, but (c) has been changed.
3 We had a discussion about sequencing and how
4 to be certain that we built in the plenary
5 power to take care of the three special
6 circumstances that we have in the current law,
7 and that's reflected in 305(c)(1).
8 Now, I will say to you frankly, though,
9 that each time we have considered plenary
10 power the group has been small and the will to
11 go over it at length weak, and we may want to
12 at least take a moment to read this and be
13 certain we're not building in anything we
14 don't intend, because much of this comes from
15 329(b) and is not new. Much of Rule 305 comes
16 from it.
17 HON. C. A. GUITTARD: Let me
18 ask --
19 CHAIRMAN SOULES: Judge
20 Guittard.
21 HON. C. A. GUITTARD: -- about
22 subdivision (4), (c)(4), may also file
23 findings of fact and conclusions of law. Why
24 do we have there "within the time allowed by
25 Rule 97"? It doesn't change the judgment.

1 Why can't he do it at any time? Particularly
2 if he fails to do it and the appellate court
3 sends it back to him and tells him to do it,
4 don't we have a problem there? I don't know
5 of any reason why it should be filed within
6 that time since it's not dispositive; it's
7 merely explanatory.
8 MR. ORSINGER: You know, under
9 the current case law, the court can file
10 findings out of time, and that's not erroneous
11 unless it prejudices some party because it is
12 so late that it affects their ability to
13 brief. So right now I feel like the court --
14 I know courts sometimes do file findings well
15 after the 10-day, the last 10-day deadline, so
16 really I don't think we ought to limit it to
17 just within the timetable of Rule 97.
18 MR. HUNT: I think that's the
19 current rule, but we can certainly change it.
20 The whole idea here is to recognize in
21 (a) and (b) that plenary power has a duration
22 and that there's a way and time you can
23 exercise it. (c), although it's labeled
24 "Expiration," really is a list of those
25 occasions where a court has less than plenary

1 power. It's a recognition that the court has
2 partial power instead of complete full power.
3 It's a recognition that the trial court can do
4 certain things and those things will be
5 recognized, such as declaring a void judgment
6 void. So I don't know if there's any magic in
7 trying to limit the findings within the time
8 allowed by Rule 297, but how do you limit it?
9 CHAIRMAN SOULES: What are you
10 suggesting, Richard? Should we just put a
11 period after "conclusions of law"?
12 MR. ORSINGER: Yeah, that's
13 what I would suggest. And I don't think that
14 it's going to lead to an abuse, because I
15 think the case law right now permits a late
16 filing. And if anyone is aggrieved by it,
17 they either ask for additional time to brief
18 or they raise as a point of error that these
19 findings shouldn't be considered because they
20 were filed so late. But I've seen a number of
21 cases where findings were filed a month or two
22 after they were due, but it's still a couple
23 of months before the briefs are due and the
24 appellate courts don't care.
25 MR. LATTING: They can be filed

1 in the appellate court --

2 CHAIRMAN SOULES: Judge

3 Cornelius.

4 JUSTICE CORNELIUS: We

5 frequently abate cases for the trial court to

6 file findings of facts and conclusions of law

7 after the appeal has already been perfected.

8 CHAIRMAN SOULES: Rusty.

9 MR. McMAINS: Luke, I don't

10 have a problem with that aspect of it, except

11 that when you go back to the (a) portion,

12 duration of plenary power, the duration in

13 section (3) basically says if the judge

14 exercises any discretion that he has the power

15 to do, now, if you give him unlimited power to

16 exercise discretion on doing findings of fact,

17 then basically it has -- you kind of never end

18 the plenary power of the trial court. It

19 gives 30 days on every time he does anything.

20 Every time he modifies the findings of fact,

21 then he gets more time, and you just keep

22 going.

23 Now, unfortunately, I don't think I was

24 here and I'm not sure -- I'm positive Hatchell

25 wasn't here either whenever the Committee

1 discussed this plenary power duration issue.
2 I do not understand what (c) is there for
3 or exactly what the scope of it is, because
4 there are times when the court has the power
5 to exercise discretion on things like -- you
6 know, that have nothing to do really with
7 necessarily the substance of the judgment.
8 For instance, he can modify or he can
9 correct the record, and that's really a
10 discretionary act. He doesn't have to correct
11 the record, but he could correct the record
12 and speak the truth, what we used to call nunc
13 pro tunc, at any time, and that's an exercise
14 of discretion.
15 CHAIRMAN SOULES: And that's
16 (c)(2).
17 MR. McMAINS: Huh?
18 CHAIRMAN SOULES: That's
19 covered by (c)(2).
20 HON. C. A. GUITTARD: Yes.
21 MR. ORSINGER: Rusty, that's
22 only relevant if the court has plenary power
23 at the time of that exercise, because if you
24 look at (a)(3), for 30 days after the judge
25 signs an order exercising judicial discretion

1 if the judge had plenary power at the time of
2 signing. So theoreticlly, if your findings
3 are submitted after the court has lost plenary
4 power, (a)(3) shouldn't recreate --
5 MR. McMAINS: You can timely
6 file your motion -- if he had plenary power at
7 the time of -- I mean, he can file one -- I
8 mean, you can file one at the very tail-end or
9 you do one at the very tail-end and then
10 you've got 30 more days. You could file
11 another. He can grant another one at the end
12 of that 30 days. You've got more 30 days.
13 MR. ORSINGER: I see what you
14 mean.
15 MR. McMAINS: I mean, this is
16 kind of -- it could keep it alive forever, and
17 I don't understand why, exactly why that's
18 there or why it is that -- or what it is that
19 we're trying to achieve by it.
20 MR. HATCHELL: Well, the source
21 of the problem is that we now give an
22 automatic 105 days, which has never been the
23 rule at all. And then we add on (3) that says
24 on the 104th day the judge can exercise any
25 act of discretion and get 30 more days, and

1 then on the 30th day of that period, he can do
2 another act of discretion and get 30 days, and
3 plenary power never ends. And it used to
4 never extend beyond 105 days. This is an
5 open-ended plenary power.
6 MR. HUNT: Well, not
7 necessarily, because what you're dealing with
8 here on Day 104, for example, is the power
9 since Day 75 to grant a motion for new trial
10 or to render a new judgment. And when you
11 render a new judgment you start all over.
12 That's the way it exists now. Up until
13 Day 105, the judge can do -- assuming there
14 wasn't an overruling of the motion for
15 rehearing before, or a motion for new trial
16 before Day 75.
17 If there's a timely filed motion under
18 the current law on Day 75, assuming it's
19 overruled, on Day 104 the court can withdraw
20 that order on the new trial and do something
21 else, and that extends it for 30 more days. I
22 think that's the current law, isn't it?
23 MR. HATCHELL: No.
24 MR. McMAINS: No. Yeah, I
25 mean, I agree if what in fact he's doing is

1 kind of continuing to modify the judgment.
2 MR. HATCHELL: If he modifies
3 the judgment.
4 MR. McMAINS: Then you do have
5 that. Now, I can't -- the problem is this
6 exercise of discretion. What bothers me is
7 that looks to me like this may be a change in
8 the law where what he can't do now is he can't
9 vacate his order on a motion for new trial and
10 then beyond 30 days from that reenter a
11 judgment on the same verdict. I mean, there
12 are limitations, it seems to me, when you
13 start doing that. I don't know if we
14 considered that or not, not being here, I must
15 confess.
16 MR. HUNT: No, that was not
17 considered.
18 MR. McMAINS: But I mean, these
19 are fairly esoteric issues of, you know,
20 whether you can revive a prior verdict once
21 you've granted a new trial. Current law
22 basically is that you can't do that outside
23 the -- if you're granted a new trial, you
24 can't do it outside a certain period. You
25 don't just keep it along forever, and I'm not

1 sure the Supreme Court has written on that
2 issue. I know there are two or three court of
3 appeals opinions on that issue of whether or
4 not he can just vacate his order granting a
5 new trial and when can he do that and what
6 does that do.
7 But I just have a problem with it being
8 to so open-ended about him entering anything,
9 you know, exercising his discretion. I mean,
10 obviously he has discretion in postjudgment
11 discovery stuff, and that may actually extend
12 beyond his plenary power, you know.
13 You have supersedeas modifications that
14 he has the discretion to exercise during the
15 course of the appeal. He can monitor the
16 supersedeas situation during the course of the
17 appeal. And it's kind of self-repudiating to
18 suggest that he doesn't -- that somehow he
19 doesn't have plenary power, because plenary
20 power means the power to act, I think. At
21 least, we haven't attempted to define it any
22 differently.
23 Now, if you want to say within the
24 periods prescribed in (2) in the third part,
25 or if you want to confine what it is that he

1 is acting on in some fashion, then maybe we
2 could get it.
3 MR. ORSINGER: Can I comment?
4 CHAIRMAN SOULES: Yes. Richard
5 Orsinger.
6 MR. ORSINGER: I don't see that
7 we need to add any more time to the 105th day
8 unless something happens to the judgment. I
9 can't imagine why we need to add 30 days on to
10 105 days for anything other than an amended
11 judgment or a judgment that's been set aside.
12 MR. McMAINS: Well, I think
13 what this is designed to do is to preserve the
14 current law insofar as, if he modifies the
15 judgment within the initial period of the
16 plenary power, then the times starts over.
17 That is what our current law is, and so that's
18 what they're trying to do.
19 But then you're trying to also
20 accommodate the problem of, well, he's got
21 to -- and courts that have somehow gotten
22 confused about whether or not he can do
23 findings of the fact and conclusions of law
24 when his plenary power has expired. And
25 they've always -- most of the time they've

1 always done findings of fact and conclusions
2 of law when their plenary power has expired.
3 Our time limits -- unless you file a motion
4 for new trial, our time limits are always gone
5 by then. Bills of exception were beyond the
6 plenary power, if you didn't file a motion for
7 new trial when they are filed. He acts on
8 these things; these are discretionary acts.
9 The time limits were just operated so
10 that they were beyond the 30-day period, but
11 it was never broad enough to say "any act of
12 judicial discretion that he has the power to
13 do extends the time." Now, that to me is a
14 serious problem of an extension of plenary
15 power.
16 CHAIRMAN SOULES: Richard
17 Orsinger.
18 MR. ORSINGER: I'd like to
19 propose that we consider dropping (3) and
20 change (2) to say 105 days after a final
21 judgment or amended judgment is signed. That
22 way, if a judgment is amended, you always have
23 105 days of plenary power. Now, does that do
24 damage to something important?
25 MR. HUNT: No. But that's

1 covered back in 304(e)(6) where you restart
2 the clock if there's a modified judgment.
3 MR. ORSINGER: Then we don't
4 need to say that, so then I'm in favor -- I
5 would propose that we consider dropping
6 Paragraph 305(a)(3), then, on the theory that
7 everything we know of now that's important is
8 probably going to be handled within the first
9 105 days and we don't need this additional
10 30-day add-on.
11 MR. HUNT: Well, there was no
12 intent to change the law on that part; there
13 was an intent to clearly express it. The
14 current law talks about 30 days after a
15 judgment is signed or you do something with
16 the judgment, and Rusty is correct there. It
17 probably is a little broader. But that's all
18 that was intended, was to codify that language
19 or to repeat that language, repeat the power
20 in slightly different language that it's
21 recognized that when a judge has plenary power
22 and exercises the plenary power to do
23 something with the judgment to get to -- that
24 it's okay. So I don't know whether you want
25 to leave it as it is now or you want to change

1 it.

2 MR. McMAINS: Well, actually

3 let me ask this: If you take that out

4 altogether, you have the (b) part exercised

5 which says Regardless of whether an appeal has

6 been perfected, the trial court has plenary

7 power to grant a motion to modify or a motion

8 for new trial or to vacate within 30 days

9 after the judgment is signed; and grant a

10 motion to modify or a motion for new trial or

11 to vacate until 30 days after all of those

12 motions are overruled, either by signed order

13 or -- does that take care of the extensions

14 that we're concerned about? If it takes care

15 of the extensions, obviously, for it being

16 overruled by operation of law, then that tells

17 you you get the extra 30 days, or by order you

18 get the extra 30 days.

19 MR. HUNT: Well, let me read

20 the current Rule 329(b)(e). "If a motion for

21 new trial is timely filed by any party, the

22 trial court has plenary power to grant a new

23 trial or to vacate, modify, correct, or reform

24 until 30 days after all such timely filed

25 motions are overruled either by written or

1 signed order or by operation of law, whichever
2 occurs first."
3 That was an attempt to repeat that, and
4 if we do it with the wrong language, let's
5 change the language. And maybe exercising
6 judicial discretion is not the way to do it.
7 MR. McMAINS: Well, I think --
8 as I say, I think the problem is we have tried
9 to bring forward this findings of fact and
10 conclusions of law in there, and it creates a
11 pragmatic problem, then, that we don't want
12 appeals to be sent back just because the judge
13 hasn't done his job on the findings. I mean,
14 the judge needs to have the power to do the
15 findings even out of time so as not to waste
16 anybody's time. But we don't want that
17 renewing his power to mess with the judgment,
18 and that's where the -- that's why I object to
19 the breadth of the issue of exercising
20 judicial discretion.
21 CHAIRMAN SOULES: Rusty, what
22 do you propose that we do to fix that?
23 MR. McMAINS: First maybe --
24 well, Sarah suggests we delete the (ii).
25 CHAIRMAN SOULES: Under?

1 MR. McMAINS: Yeah, that's a
2 start. It still doesn't deal with this
3 exercising of judicial discretion, but I would
4 say if the judge has -- let me take a crack at
5 this. If the judge had plenary power, what I
6 want to say is pursuant to the provisions of
7 (a)(1) and (2), at the time of signing; in
8 other words, confining it to the two periods
9 that we mentioned in (1) and (2).
10 CHAIRMAN SOULES: Okay. Where
11 do you add that language?
12 MR. McMAINS: Well, the judge
13 signs an order exercising discretion, judicial
14 discretion if the judge had plenary power
15 pursuant to, and you know, I don't know
16 whether you want to say the above sections (1)
17 and (2) or 305(a)(1) and (2), but that's the
18 concept at the time of signing.
19 CHAIRMAN SOULES: All right.
20 HON. C. A. GUITTARD: Would it
21 change --
22 CHAIRMAN SOULES: Help me get
23 to the point where you're -- which one of
24 these portions or provisions of Rule 305 are
25 you looking at where you want to insert

1 language?

2 MR. McMAINS: 305(a)(3).

3 CHAIRMAN SOULES: Okay.

4 MR. McMAINS: And I want to

5 eliminate the (1) and (2) or eliminate (ii)

6 altogether -- I mean, you eliminate the number

7 (i) or whatever you want to call it.

8 CHAIRMAN SOULES: Okay. Start

9 with -- (a)(1) is okay?

10 MR. McMAINS: Yeah. I'm not

11 changing (1) or (2).

12 CHAIRMAN SOULES: (a)(2) is

13 okay?

14 MR. McMAINS: Yeah. I'm just

15 talking about (3).

16 CHAIRMAN SOULES: Now we're

17 down to (a)(3), and what do you want to do

18 with that?

19 MR. McMAINS: Say for 30 days

20 after, eliminate the (i), say the judge signs

21 an order exercising judicial discretion if the

22 judge had plenary power pursuant to sections

23 (1) and (2) above at the time of the signing.

24 Now, I've split an infinitive there, so I

25 don't know how much you want to say, but the

1 notion is that plenary power that we're
2 talking about is that plenary power designated
3 in (1) and (2), not any other exercise of
4 discretion. Now, I don't know whether that's
5 sufficiently limited or not.
6 MR. HUNT: Well, what that does
7 is it eliminates this language of 329(b)(e)
8 that talks about the 30 days to do something
9 after all timely filed motions are overruled
10 either by written or signed order or by
11 operation of law. See, that's really all (ii)
12 is for, is to get in the signed order and
13 operation of law.
14 MR. McMAINS: Yeah, except
15 that's covered in (b). I mean, (b) -- that is
16 all (b) is. It says regardless of whether an
17 appeal has been perfected, the trial court has
18 plenary power to (1) grant a motion to modify
19 or a motion for new trial, or to vacate the
20 judgment within 30 days after the judgment is
21 signed, and grant a motion to modify or a
22 motion for new trial or motion to vacate until
23 30 days after all those timely motions are
24 overruled, either by signed order or by
25 operation of law, whichever occurs first. So

1 (b) does extend the power now exactly the way
2 329(b) does.
3 CHAIRMAN SOULES: Do you agree
4 with that, Don?
5 MR. HUNT: Yeah. It's there.
6 MR. McMAINS: The only problem
7 is, I guess, is people might claim that it's a
8 little bit misleading because the duration is
9 actually extended in the (b) section when we
10 captured the exercise rather than the
11 duration.
12 CHAIRMAN SOULES: Richard
13 Orsinger.
14 MR. ORSINGER: I'd like to go
15 back to my proposal that we eliminate (3)
16 altogether. I don't think we need (3),
17 because if you look under Rule 304,
18 Timetables, subdivision (c) on this motion to
19 modify judgment and motion for new trial, if
20 you don't overrule it by express order within
21 75 days of the judgment, then on the 75th day
22 it's overruled by operation of law. And then
23 we've already built in the additional 30 days
24 to get us to 105, so we don't need to add
25 30 days.

1 Let's say the judge signed an order
2 overruling it on the 100th day, even though
3 it's already been overruled by operation of
4 law. Well, now, all of a sudden we're out for
5 plenary power for 130 days and we don't need
6 to be, because the motion for new trial was
7 overruled by operation of law at the 75th
8 day. Why do we need this extra floating
9 30 days?
10 MR. McMAINS: Let me tell you
11 why I think we did that. I believe -- and I
12 think we knew we did that, though it's dim in
13 the recesses as to why we did it, but I
14 believe that the concern in part was this
15 concern about when you take the findings of
16 facts and the second motions and all this kind
17 of stuff, that you go beyond the 75 days; but
18 that 105 days was sufficient. And so I think
19 what we were doing was kind of basically
20 saying, okay, let's take it out to the full --
21 to just 105 days, even though we're adding
22 30 days to the total plenary power that we now
23 get to draw on, in order to give them adequate
24 time to do findings of fact and conclusions of
25 law within that framework, because we've

1 got -- you've got to file your request within
2 20 days. The court is supposed to get 30 days
3 to answer it. Then they get another 10. Then
4 you can file additional findings, and then
5 that number takes you beyond the 75 days.
6 And even though -- you know, so if you
7 don't file a motion for new trial and you
8 don't -- and there's nothing in here that says
9 if he hasn't done everything on the request
10 for findings that they're deemed overruled, so
11 you don't have a deemed overruling issue to
12 give them the additional time pursuant to the
13 (b) portion.
14 So I think the reason that we put 105 in
15 there was to make sure that all the times
16 basically had run on doing the findings of
17 fact and conclusions of law. That's what I
18 think our reasoning was.
19 MR. ORSINGER: Well, we don't
20 need that. We don't need that, because with
21 our amendment to (c)(4), the court now has the
22 power to do findings even outside its plenary
23 power. And I don't see what (a)(3) adds at
24 this point or why we even need to perpetuate
25 it. And when we take it out, then we can quit

1 this discussion.

2 HON. C. A. GUITTARD: I second

3 the motion.

4 CHAIRMAN SOULES: The motion is

5 to delete 305(a)(3)?

6 MR. ORSINGER: True.

7 CHAIRMAN SOULES: What do you

8 think, Don? Your committee has given this a

9 lot of focus.

10 MR. HUNT: Oh, I have to

11 confess to you we haven't. Most of the focus

12 has been given by me, and I sent it around to

13 the committee and we haven't had much

14 feedback. We have discussed it a time or two,

15 and we've discussed it here, but this is the

16 most in depth discussion that we've given it,

17 and it's part of the reason why I wanted

18 everyone to talk about it this morning.

19 I'm not trying to create any new concepts

20 here. I'm trying to express settled concepts

21 in one rule that defines plenary power in a

22 way that we already treat it. And if we don't

23 need (3) to do that, then let's vote it up or

24 down. I am a little troubled by the (c)(4)

25 amendment, because I don't know quite yet what

1 that would be.

2 CHAIRMAN SOULES: I think

3 Richard is just talking about dropping "if

4 within the time allowed by 297," and otherwise

5 leaving that in place, and deleting 305(a)(3)

6 so that findings of fact and conclusions of

7 law are something that the judge can do at any

8 time but that doesn't affect plenary -- other

9 things that we think of that a judge can do in

10 the traditional concept of plenary power.

11 MR. HUNT: Is that generally

12 your thought?

13 MR. ORSINGER: That is exactly

14 my thought.

15 CHAIRMAN SOULES: Alex

16 Albright.

17 PROFESSOR ALBRIGHT: Well, Don,

18 if you didn't want to change anything, I see

19 another change in here that, if you do have a

20 motion for new trial that is expressly

21 overruled, you have an order on Day 35 or 40,

22 then you still get 105 days of plenary power,

23 where under the current law you only get

24 30 more days. If it's overruled, expressly

25 overruled on Day 40, then you have until

1 Day 70.
2 MR. HUNT: Well, let me take
3 that back and say that pursuant to discussion
4 that we have had here, that the movant ought
5 to own the motion, and the other side ought
6 not to be able to go in and stick in an order
7 overruling the other side's motion in order to
8 trigger the timetable.
9 PROFESSOR ALBRIGHT: Okay. So
10 that was intentional?
11 MR. HUNT: That was intentional
12 on the belief that if you filed the motion
13 particularly to get the extra time for the
14 court reporter, the other side ought not to be
15 able to prank with it.
16 PROFESSOR ALBRIGHT: So as I
17 understand it, then, the 105-day time, anytime
18 you file a timely motion for new trial, which
19 means after the judgment is signed, then you
20 get 105 days of plenary power?
21 MR. ORSINGER: True.
22 PROFESSOR ALBRIGHT: And then I
23 agree with Richard. I don't think that
24 30 days, this additional 30 days is needed.
25 CHAIRMAN SOULES: Judge

1 Peeples.

2 HON. DAVID PEEPLES: On that
3 same topic, I can see how (a)(2) does that,
4 but (b)(2) seems to say your plenary power
5 runs out 30 days after the court overrules
6 whatever was filed.

7 PROFESSOR ALBRIGHT: Right.

8 HON. DAVID PEEPLES: Well, that
9 conflicts with (a)(2), doesn't it?

10 MR. HUNT: Yeah. Well,
11 let's --

12 HON. DAVID PEEPLES: (a)(2) and
13 (b)(2) seem to me to conflict.

14 MR. HUNT: What I was trying to
15 do, and you help me if I've not done it, is
16 I've tried to fix in (a) an absolute
17 termination point and just simply say that in
18 (b) there is a method by which one may extend
19 it from Day 75 to 105 or, if something is done
20 on 104, it can still be extended. Now, to
21 that extent it is a duplication of what I
22 tried to do in (3), and (3) I guess does need
23 to be cut out.

24 But if we've got (a) now correct,
25 remember the language in (b). We're talking

1 about regardless of whether an appeal has been
2 perfected, because there was some thought
3 early on, even before the current Rule 329(b),
4 that if an appeal has been perfected, the
5 trial court lost power.
6 HON. DAVID PEEPLES: That
7 language is in (a)(2) and (b)(2).
8 MR. HUNT: Yeah. So (b) was
9 really to preserve what we now have in 329(b),
10 (d) and (e).
11 CHAIRMAN SOULES: Okay. Before
12 we get too far off on dropping (3), let's see
13 if there's any problem with doing that, and if
14 not, do it. If so, articulate what the
15 problem is and let's see what part or all of
16 this needs to be preserved. Steve Yelenosky.
17 MR. YELENOSKY: I may be
18 missing something here, but it sounds like the
19 tail is wagging the dog, because everybody is
20 conceding that the motion for new trial is to
21 extend the time line and that we need to
22 recognize that that's what it's done for. And
23 of course, the filing of a request for
24 findings of fact can do the same thing. Why
25 is it so important to keep that bifurcated

1 system? Why don't we just change it to
2 90 days for everything?
3 CHAIRMAN SOULES: Because we
4 already voted for 105.
5 MR. YELENOSKY: Well, or 105
6 for everything. Why do we have to shorten the
7 period when everybody is filing a motion for
8 new trial or requests for findings to get the
9 extension?
10 MR. HUNT: Because some cases
11 lend themselves uniquely to doing it on a fast
12 timetable, and both sides want it so you can
13 get the transcript and Q and A there.
14 Take, for example, a summary judgment
15 where you're not going to get findings, where
16 you don't need the court reporter to have any
17 extra time, and all you want to do is get on
18 the court of appeals. The appellant can get
19 on with getting there by Day 60.
20 MR. YELENOSKY: But that's the
21 minority of cases now.
22 PROFESSOR ALBRIGHT: And also
23 if you have a settlement you want the order to
24 get final without the judge having plenary
25 power for 105 days.

1 CHAIRMAN SOULES: How is this
2 germane to (a)(3)?
3 MR. YELENOSKY: Well, it just
4 seems to me that the whole problem with (a)(3)
5 and the whole discussion revolves around
6 people trying to figure out a longer time
7 frame, and that seems to be the vast majority
8 of the cases rather than the exception.
9 MR. HUNT: That's correct. But
10 why not leave a little there for the few
11 cases -- we're not hurting anybody.
12 MR. YELENOSKY: Well, there are
13 other ways to do that.
14 CHAIRMAN SOULES: We've done
15 this. We're past this point now in our
16 process. Rusty.
17 MR. McMAINS: Well, the problem
18 I have, the additional problem I have with
19 (a)(3) is that if you don't have any
20 limitation on the plenary power, that is, as
21 referring to the plenary power designated in
22 the preceding sentences basically, then the
23 problem you get is that (b) definitely
24 conflicts with this in those cases that we've
25 dealt with earlier on in the situation where

1 you don't get notice, the 306(a) problem,
2 because we made the determination that that
3 doesn't extend anybody else's time. It only
4 extends that person's power to file a motion.
5 But (b)(2) actually says he has plenary
6 power. It says regardless of whether there's
7 an appeal, the trial court has plenary power
8 to grant a motion, et cetera, until 30 days
9 after all those are overruled, either by
10 signed order -- and (3) basically says any
11 time he signs an order exercising
12 discretionary power, then it extends his
13 plenary power again, so you basically can have
14 an out-of-time motion for new trial filed by
15 somebody else under the provisions of 306(c)
16 with a designated time, and then you get
17 extensions, and maybe all of a sudden you're
18 back in the trial court.
19 CHAIRMAN SOULES: Does anybody
20 want to speak in favor of retaining (a)(3)?
21 Sarah Duncan.
22 HON. SARAH DUNCAN: (a)(3) goes
23 to any order, whether it's an order granting
24 or denying a motion to modify or a motion for
25 new trial.

1 (b)(1) and (2) only go to granting a
2 motion to modify or a motion for new trial,
3 and I don't -- this is dependent upon -- it
4 only makes a difference depending on (2), but
5 maybe I just am just not remembering it. I
6 don't remember talking about changing the law
7 as to just adding 30 days of plenary power in
8 Alex's situation, once the trial court signs
9 an order denying a motion for new trial or a
10 motion to modify.
11 CHAIRMAN SOULES: We did that.
12 MR. McMAINS: It's actually
13 more than 30 days conceivably, because if
14 you -- if, for instance, it's an agreed
15 judgment or something that you wanted --
16 CHAIRMAN SOULES: (a)(3).
17 Let's focus on (a)(3) so we can move this
18 along. Does anyone want to speak in favor of
19 retaining (a)(3)? Any further discussion on
20 that? Okay. Those in favor of (a)(3) as
21 written show by hands.
22 Those opposed show by hands.
23 MR. HUNT: You can't even sell
24 me.
25 CHAIRMAN SOULES: 13 to

1 nothing, (a)(3) comes out.
2 MR. HUNT: It's already gone.
3 CHAIRMAN SOULES: Okay. Then
4 305(a)(1) and (2), is there any opposition to
5 that? Judge Peeples.
6 HON. DAVID PEEPLES: I'm
7 concerned that we are going to create more
8 problems from this general rewrite than there
9 are. I mean, if legal history teaches one
10 thing in this drafting area, it is that when
11 you do a major rewrite there are unforeseen
12 problems. And here we've got the 105-day
13 problem. There's an inconsistency in the rule
14 as written, you know. I'm growing convinced
15 that there's not enough problem with the rules
16 that are in the book to justify this
17 tinkering, and I think we ought to get the
18 consensus of the house and vote on whether we
19 even rewrite the thing.
20 It's just that we are not smart enough,
21 none of us, collectively or individually, to
22 do major rewrites without creating unforeseen
23 problems. We can't do it. Why are we trying,
24 if there's no problem out there that needs
25 fixing?

1 MR. LATTING: Hear, hear.
2 CHAIRMAN SOULES: The Committee
3 is way down the track on this.
4 HON. DAVID PEEPLES: Pardon?
5 CHAIRMAN SOULES: The Committee
6 is way down the track on this. I mean --
7 HON. DAVID PEEPLES: If you
8 start down the wrong road and you realize it,
9 you stop. You don't keep going.
10 CHAIRMAN SOULES: Those in
11 favor of 305(a)(1) and (2) show by hands.
12 Six.
13 Those opposed.
14 Hold them up again. Get your hands up
15 again. I think I missed some.
16 HON. DAVID PEEPLES: For or
17 against?
18 CHAIRMAN SOULES: For 305(a)(1)
19 and (2). Six.
20 Okay. Those opposed. Nine. Nine
21 against. It fails.
22 Does that pretty well kill the entire
23 305?
24 MR. HUNT: Yeah.
25 CHAIRMAN SOULES: Okay.

1 MR. ORSINGER: And not only
2 that, Luke, we're going to have to rewrite a
3 lot of rules. It's more than just this one
4 rule now.
5 HON. DAVID PEEPLES: I want to
6 be reasonable about this. I don't want to
7 sabotage the project, but honestly, you know,
8 my experience with these rules is every time
9 something major is redone, whether it's
10 discovery, plenary power or whatever, a new
11 rash of cases come up to try to interpret what
12 was redone. I really question whether it is
13 wise for us to try to rewrite things to
14 restate law that is working okay the way it's
15 written.
16 MR. HUNT: Let me just respond
17 to that and say that other than the taking
18 away of the power of a nonmovant to control
19 the signing of the order overruling, there's
20 no change intended. If you will compare the
21 language, this is borrowed in large measure
22 from 329(b) and 329. That's where all the
23 language comes from.
24 Now, once we take out (a)(3), (a)(3), I
25 will admit, was a duplication of really what

1 was in (b)(2). And I didn't intend that, and
2 that's been corrected. But we've done very
3 little other than to organize it in a slightly
4 different way.
5 Now, if the present version of 329(b) is
6 preferable, then tell me that, because we're
7 not doing that much to 329.
8 But for example, I'm trying to collect in
9 one place the exceptions to expiration of
10 power. We have two of them now in 329(b), and
11 the other one is in 329, but now they're all
12 collected in one place. That's not a change
13 except in location, and it is an improvement,
14 I think, in clarity. So I recognize what
15 you're saying, Judge, that new language gives
16 fertile minds new opportunities.
17 CHAIRMAN SOULES: Richard.
18 MR. ORSINGER: What 305(a)(1)
19 and (2) did was to eliminate uncertainty about
20 when plenary power cuts off, because right now
21 somebody can run down there and get an order
22 signed on a motion overruling -- I mean, an
23 order overruling a motion for new trial, and
24 all of a sudden, you don't have 105 days. Now
25 you only have 45 days or 35 days or whatever.

1 And it was -- the reason I was supporting this
2 change was that we didn't have to worry and
3 people didn't have to puzzle through when they
4 lost plenary power. It either was over at the
5 end of 30 days or it was over at the end of
6 105 days, and it was easy to figure out which
7 it was. And you would never abruptly discover
8 that the court lost plenary power on the
9 43rd. And to me, that clarifies things. That
10 doesn't make things harder to understand.
11 If we go back to the old rule, we're
12 still going to have this varying concept of
13 plenary power, and I think that we're going to
14 have to rewrite some other rules that were
15 premised on the idea that we had a locked-in
16 expiration date at either the end of 30 days
17 or the end of 105 days.
18 I also don't think in connection with
19 that that (b)(2) conflicts with (a)(1) and
20 (2), because (b)(2) says that you have plenary
21 power for 30 days after those motions are
22 overruled. Well, I would remind you that the
23 motions are overruled no later than the 75th
24 day anyway.
25 HON. DAVID PEEPLES: What if

1 there was a written order overruling that?

2 MR. ORSINGER: It's

3 irrelevant. (b)(2) says you've got plenary

4 power for 30 days after you overrule it, even

5 if you overrule it the 60th day. But (a)(2)

6 gives you 105 days anyway, so in my opinion we

7 don't even need (b) at all. All we need is

8 (a)(1) and (2). (a)(1) says if there's no --

9 CHAIRMAN SOULES: Wait a

10 minute, unless somebody who voted in the

11 majority wants to move to reconsider, this is

12 a dead issue. We voted nine to five that it's

13 out. Do I hear now that -- Sarah Duncan.

14 HON. SARAH DUNCAN: I don't

15 have anything.

16 CHAIRMAN SOULES: Okay. It's

17 out. And that completes your report, does it

18 not, Don?

19 MR. HUNT: Well, no.

20 CHAIRMAN SOULES: Have you got

21 something on 311?

22 MR. HUNT: Yes. I want to

23 report to the Court on 311 that I dutifully

24 called Harper Estes, and he had never used

25 this in his practice. I researched this. It

1 took about 30 seconds. There is no reported
2 case on 311. There is no reported case on the
3 predecessor to 311. 311 has never been
4 invoked by any court or lawyer since
5 Runnymede.
6 The same can be said for Rule 312.
7 I haven't heard back from Judge Till, but
8 I wrote Judge Till on 312, and I'd like to
9 know if he has any concern about repealing
10 that.
11 CHAIRMAN SOULES: Judge Till.
12 HON. PAUL HEATH TILL: It's
13 never been used that I know of, and it's
14 adequately covered somewhere else. There's no
15 reason not to repeal it.
16 CHAIRMAN SOULES: So you move
17 to repeal 311 and 312, is that right, Don?
18 MR. HUNT: Yes.
19 CHAIRMAN SOULES: Any
20 opposition? No opposition. We'll recommend
21 their repeal.
22 PROFESSOR DORSANEO: We've done
23 that several times.
24 HON. PAUL HEATH TILL: We just
25 did it again.

1 MR. HUNT: Now, Mr. Chairman, I
2 need some direction on what we do with
3 Rule 305. Do we just plug 329(b) back in and
4 eliminate the conflicts or what?
5 CHAIRMAN SOULES: Well, I don't
6 think -- I think we've spent many days --
7 HON. DAVID PEEPLES: I'm
8 willing to revoke what I --
9 CHAIRMAN SOULES: We've spent
10 many days and many hours getting through the
11 105 days and eliminating the trap when some
12 lawyer goes over and gets an order overruling
13 a motion for new trial and never tells anybody
14 it's been overruled. The appellate timetable
15 starts ticking. It's dead. All those kinds
16 of things that we have spent hours talking
17 about, and so I guess we just leave it. I
18 don't know there is any direction, unless
19 somebody has anything --
20 MR. HUNT: Judge Peeples wants
21 to speak.
22 HON. DAVID PEEPLES: Well,
23 look --
24 MR. MARKS: I move to
25 reconsider.

1 HON. DAVID PEEPLES: I'll move
2 that too, although I'm not sure how I'm going
3 to vote. But what is the answer to the
4 general proposition that just tinkering with
5 something that is working okay is an
6 irresponsible thing to do?
7 CHAIRMAN SOULES: There were
8 some things that were not working okay,
9 Judge.
10 HON. DAVID PEEPLES: Well,
11 let's fix them with a rifle shot instead of a
12 general rewrite, which I guarantee is going to
13 take judicial and rule committee fixing for
14 the next decade. I mean, hopefully things get
15 fixed, and you rifle shot the problems instead
16 of a general rewrite.
17 MR. LATTING: Well, it's like
18 taking one part out of a car. When you take
19 that one part out or change it, then you've
20 got to change the one that's next to it. You
21 just can't put in one new gear, you have to
22 put in a whole new transmission. When you do
23 that, then you start having the problem of a
24 new transmission that breaks. And unless this
25 is a serious problem for the jurisprudence of

1 the state, we ought not to fool with it or
2 anything else. If there's a serious
3 day-to-day problem in the way these rules are
4 working, we ought to change them. Otherwise,
5 we're not doing the lawyers or the people of
6 the state any service by giving them some new
7 rules to try to figure out what they mean over
8 the next five or 10 years.
9 CHAIRMAN SOULES: Well, over
10 the course of revision of the Appellate Rules,
11 going back to early '80s when Judge Guittard
12 really started getting some support to do
13 that, there's been an effort at
14 simplification. And that's what the 105 days
15 was all about, because things were happening
16 in that 105 days that were traps and they
17 didn't need to be. And that generated our
18 discussion to try fix that problem so that
19 things couldn't happen in 105 days that were
20 traps.
21 Then there are some other things that
22 have to be done if that simplification is made
23 to make the rest of the rules fit that
24 simplification, if it is a simplification.
25 And I think that's what this is really about,

1 so I don't have any real issue. Mike.
2 MR. HATCHELL: Well, I
3 appreciate very much any attempt to eliminate
4 traps, but to underscore what Judge Peeples is
5 saying, I'm just sitting here trying to read
6 these redrafts. And I hear what Richard is
7 saying. We want to give 105 days so we know
8 when plenary power is, but Alex brought up an
9 interesting point.
10 Now, look at (b)(2). We grant plenary
11 power to modify -- to grant a motion to modify
12 or a motion for new trial, to vacate, until
13 30 days after all those timely filed motions
14 are overruled either by signed order or
15 operation of law.
16 Well, now, take Alex's example. We think
17 that we have 105 days. But assume you get a
18 judgment on Day 1, a motion for new trial on
19 Day 10. It's overruled by signed order on
20 Day 15. And under (b)(2), there's 30 more
21 days. But then we say that he has 105 days.
22 Well, what does he do -- what is the plenary
23 power in this gap period? We're just changing
24 these concepts just wildly by this rewrite.
25 CHAIRMAN SOULES: Well, (b)(2)

1 is a mistake. It should say he can do it in
2 105 days, because that's what we've said
3 elsewhere.
4 MR. ORSINGER: I have a simple
5 fix for that.
6 CHAIRMAN SOULES: And we have
7 not got into -- we just stopped at (a)(1) and
8 (2), which eliminates the need to consider any
9 of the rest of the rule.
10 There are some problems with 305, some
11 specific problems that we get into. It does
12 not yet fit the work that we've done over
13 several months, but it can be made to fit if
14 we want to make it fit. But it's up to you
15 all whether we want it to fit.
16 MR. ORSINGER: I've got a
17 simple proposal that eliminates this, I
18 think. Let's just kill (b) altogether, except
19 that it will say that the perfection of an
20 appeal does not affect the trial court's
21 plenary power, period. That's all this is
22 supposed to do, is to be sure that perfecting
23 an appeal doesn't cut off the court's right to
24 set aside its own judgment. So let's delete
25 everything that's in (b). Then all of you who

1 have trouble with it are no longer troubled
2 with it. Plenary power is either 30 days or
3 105 days, and it doesn't matter if you perfect
4 your appeal or not, it doesn't affect plenary
5 power. And then doesn't all the confusion go
6 away?
7 MR. HATCHELL: Huh-uh.
8 MR. ORSINGER: Why not?
9 MR. HATCHELL: Because you've
10 eliminated the definition of plenary power
11 when you do that, and that's part of what Luke
12 is talking about. Was plenary power a power
13 to vacate? Well, we have to put that in the
14 rules. I mean, there is no definition of
15 plenary power if we do what you're saying.
16 PROFESSOR ALBRIGHT: Can I
17 offer a suggestion? What if you just you say,
18 "Exercise. Regardless of whether an appeal
19 has been perfected, the trial court has
20 plenary power to grant a motion to modify or
21 motion for new trial or to vacate the
22 judgment," period, and cross everything else
23 out. Then you have defined what the judge has
24 the plenary power to do.
25 MR. ORSINGER: Okay.

1 CHAIRMAN SOULES: Alex, say
2 that again.
3 PROFESSOR ALBRIGHT: Okay.
4 What you do is you take (b), take out the
5 colon at the end of that first line.
6 CHAIRMAN SOULES: Okay.
7 PROFESSOR ALBRIGHT: And take
8 out the number (1) in the parentheses. Go to
9 the next page, and put a period after
10 "judgment."
11 CHAIRMAN SOULES: "Judgment" or
12 "signed"?
13 PROFESSOR ALBRIGHT: After
14 "judgment," period.
15 CHAIRMAN SOULES: Judgment,
16 period. Okay. The judgment.
17 PROFESSOR ALBRIGHT: And then
18 you cross everything else out.
19 CHAIRMAN SOULES: Okay. What
20 about that, Don?
21 PROFESSOR ALBRIGHT: Yeah,
22 after the first "judgment," cross everything
23 else out.
24 CHAIRMAN SOULES: And you would
25 strike "within 30 days after judgment is

1 signed"?

2 PROFESSOR ALBRIGHT: Your time
3 periods are set out in (a), so all (b) does is
4 define what a judge can do after the final
5 judgment is signed during this period of
6 plenary power.

7 MR. HUNT: I'd certainly accept
8 it.

9 CHAIRMAN SOULES: Okay.

10 MR. HUNT: Because that does
11 get it simpler, but it does retain what we
12 have now. But I'm not necessarily an exponent
13 for retaining it.

14 PROFESSOR ALBRIGHT: Well, all
15 we're trying to do is make it show that a
16 judge, whenever a motion for new trial or a
17 motion to modify is filed timely, the judge
18 has 105 days of plenary power. And this
19 does -- if you want to cut off that plenary
20 power 30 days after an order is signed, this
21 doesn't do it. But as I understood it, we
22 wanted to kill the end of plenary power being
23 30 days after a signed order.

24 CHAIRMAN SOULES: Elaine.

25 PROFESSOR CARLSON: Wouldn't it

1 be better to just start the rule with the
2 definition of plenary power that you just
3 espoused?
4 MR. ORSINGER: Can I propose an
5 amendment, Alex? I would propose that we just
6 start rule (a) with your language. Just say,
7 "The trial court has plenary power to grant a
8 motion to modify or a motion for new trial or
9 to vacate the judgment: No. 1, for 30 days
10 after final judgment is signed; No. 2, for
11 105 days."
12 PROFESSOR ALBRIGHT: That
13 doesn't do your regardless of whether an
14 appeal has been perfected.
15 MR. ORSINGER: Start the
16 sentence off with, Regardless of whether an
17 appeal has been perfected, the trial court has
18 plenary power to grant a motion to modify,
19 motion for new trial, or motion to vacate: (1)
20 and (2).
21 PROFESSOR ALBRIGHT: That
22 sounds fine to me.
23 MR. YELENOSKY: Is that all of
24 plenary power? Because the sentence doesn't
25 make clear that's everything. If you mean

1 that that's the definition of plenary power,
2 then you ought to have a definition.
3 Otherwise, the sentence leaves open the
4 possibility that those are just some of the
5 things which are plenary power.
6 MR. ORSINGER: Well, the truth
7 is that the court has power to do anything it
8 wants during its period of plenary power,
9 anything, sign orders, you know, you name it,
10 have hearings.
11 CHAIRMAN SOULES: So what
12 Richard we really suggesting is that we start
13 out with a parenthetical: The trial court has
14 plenary power, regardless of whether an appeal
15 has been perfected, to grant a motion and so
16 forth, grant a motion to modify or motion for
17 new trial or to vacate the judgment: (1) and
18 (2)?
19 MR. ORSINGER: Right.
20 CHAIRMAN SOULES: Justice
21 Duncan.
22 HON. SARAH DUNCAN: I agree
23 with Judge Peeples strongly that if it's not
24 broken, don't fix it. Where all of this has
25 come from is, as I understand it, from the

1 problem that we have that arises out of
2 distinguishing types of --
3 THE REPORTER: Excuse me, I
4 can't hear you.
5 CHAIRMAN SOULES: You're all
6 going to have to conduct your discussion
7 someplace else because the court reporter
8 can't pick up the debate.
9 Go ahead, Justice Duncan.
10 HON. SARAH DUNCAN: -- post-
11 trial, postverdict, postjudgment motions.
12 There were some courts that were taking a
13 motion that was entitled "motion to modify"
14 and saying it was a motion for judgment
15 notwithstanding the verdict, which didn't
16 extend the appellate timetable. That is what
17 I thought we discussed, not whether we're
18 going to expand plenary power under the
19 current rules.
20 To do that is very simple. 329(b) is
21 fine in its context, but it doesn't work in
22 the context of what we've done now, because we
23 don't even -- we've changed the types of
24 motions. We no longer have motion for
25 judgment NOV. If it is prejudgment, it's a

1 motion for judgment as a matter of law. If it
2 is postjudgment, it's a motion to modify.
3 And when I say I don't remember, I mean,
4 I really do not remember that we voted to
5 expand the trial court's plenary power from
6 what it is right now. What we voted on was
7 that we weren't going to treat types of
8 motions differently.
9 CHAIRMAN SOULES: Bill
10 Dorsaneo.
11 PROFESSOR DORSANEO: I agree
12 with that. The only problem of real
13 significance where it's really broken in
14 329(b) is the fact that it doesn't cover
15 everything, and it is arguable from case to
16 case about whether you're controlled by 329(b)
17 or just not within its confines. That does
18 not require a complete revision of all of
19 everything about plenary power.
20 And I don't think that I can say with
21 certainty that 329(b) could be put in this
22 305 without real difficulty, but I'm inclined
23 to think that the rest of the things that were
24 done do not depend upon a complete alteration
25 of the plenary power rule, just an extension

1 of it to the motions that we wanted to cover.
2 And frankly, they end up being motions for new
3 trial and motions to modify anyway. So if we
4 don't do anything, I don't think that it's a
5 great catastrophe or a destruction of this
6 scheme. Am I wrong, Don?
7 MR. HUNT: I don't think so.
8 We're really talking about language and
9 clarity of thought and whether we accomplish
10 greater clarity by retaining the 329(b)
11 language or we express it in terms that I
12 think are easier to understand.
13 PROFESSOR DORSANEO: Well --
14 MR. HUNT: Rule 329(b) now is a
15 hodgepodge, because it's been tinkered with
16 several times. And while it's nice to say
17 that rifle shots are all that we need to cure
18 it, after we get so many rifle shots in there,
19 they're no longer rifle shots. What we have
20 is a series of fixes, and after too many fixes
21 the language becomes less than absolutely
22 clear.
23 PROFESSOR DORSANEO: Well,
24 maybe because I've been the main tinkerer, at
25 least I've done all the manual tinkering,

1 recognizing it's not any kind of a perfect job
2 that's been done mainly by Judge Guittard and
3 myself in an earlier period when we were less
4 astute, but it's about how to draft. Okay?
5 It doesn't have titles, right, for the
6 separate subparagraphs, and it's not as well
7 crafted from that standpoint, but that's --
8 MR. HUNT: Well, that's all
9 I've tried to do.
10 PROFESSOR DORSANEO: But I
11 don't think it's a hodgepodge. I think it has
12 this problem that it covers motions for new
13 trial and motions to modify, and we have
14 motions for judgment NOV, now motions for
15 judgment as a matter of law, that are not
16 covered by it. They should have been covered
17 by it or by some rule, and by reorganizing our
18 motions, we've got them in there now. And we
19 could make it a more attractive rule in terms
20 of giving it subheadings and things like that,
21 but it's not an unworkable rule. I think it
22 will do fine.
23 And I think the language that we have
24 now, maybe because of how it was written and
25 who worked on it, is clearer than your

1 language, quite frankly, and not the other way
2 around. At least, I'm fairly comfortable that
3 I understand the current one.
4 CHAIRMAN SOULES: Rusty.
5 MR. McMAINS: Well, I agree
6 that our principal problem, I think, and the
7 principal vote that we took was that we treat
8 all motions alike. Anything that's
9 post-trial, I mean, I think the way we fixed
10 it was to say if you file anything, or
11 anything that's postjudgment, you file it
12 within 30 days. You put a 30-day cap right on
13 the motion for judgment NOV in terms of having
14 any effect on your appellate timetables or
15 preserving error for that matter, although the
16 trial judge can do something if he had a mind
17 to during its plenary power, but it didn't
18 have any effect on your appellate timetables.
19 That was what we were trying to accomplish.
20 And that's where the system was broken,
21 because we were distinguishing between things
22 that the courts had difficulty distinguishing,
23 for good reason, because sometimes they're not
24 artfully drafted and they aren't correctly
25 labeled. Many of the motions to modify were

1 motions for NOV by any reasonable standard.
2 That's what that were. We were trying to fix
3 them all of that.
4 Now, there is another problem with this
5 attempt to globally state plenary power, which
6 we have not attempted to do in the past. One
7 of the problems is that, because of our
8 treatment under the 306(a) scenario, that is,
9 where we get extensions based on no notice of
10 the judgment as to particular parties, we
11 actually, in essence, voted to say that that
12 doesn't affect anybody else's deadlines or
13 anybody else's times.
14 And so we are attempting in that context
15 to restrict a notion of plenary power that is
16 inconsistent with an attempt to globally
17 define it, because if we say that so long as
18 there is a timely filed motion, which, if you
19 have eliminated (3) and (b) in this Rule 305,
20 then a timely filed motion from a final
21 judgment because of the deemed date of
22 signature in a situation where you didn't get
23 notice of the judgment, is going to be
24 anybody's motion who didn't get notice of the
25 judgment that's filed when the judge makes a

1 determination as to what the date of notice
2 was, and which then conceivably extends the
3 court's plenary power over everything to a
4 period vastly beyond 105 days.
5 And we are tinkering with two mutually
6 inconsistent concepts when we're dealing
7 with -- now, that is not an insignificant
8 problem in South Texas. There are at least a
9 dozen counties in South Texas that I know of
10 that never send out notice of the final
11 judgment. You can give it to them and they
12 won't send it out. Okay? You can send it out
13 yourself, but you can't get them to send it
14 out under their cover, and they don't want to
15 spend their budget on mailing on that. They
16 don't think that's their job, and they won't
17 do it, regardless of what you tell them in the
18 rules, because we've told them in the rules to
19 do it, and they still won't do it. We've told
20 them it has an effect. Every case you have in
21 South Texas, unless you personally take care
22 of proof of actual notice, somebody doesn't
23 have notice by the clerk, actual notice of the
24 entry of the judgment or the signing of the
25 judgment. This is not an insignificant issue

1 in South Texas.
2 And it's the interaction of those two
3 problems with an attempt to globally define
4 plenary power, restricted in some fashions,
5 expanded in other fashions, and then work in
6 these, quote, exceptions to plenary power,
7 that has not been given sufficient thought, I
8 think, in trying to draft an overall plenary
9 motion.
10 I'm not saying we haven't thought about
11 it. We have some kind of general idea of what
12 objectives we want. Our problem in part is
13 just inherently linguistic, because the notion
14 of plenary power, as Richard and Mike have
15 indicated, is basically the power to do
16 anything he wants to. It's kind of a
17 universal power; that if he has that global
18 jurisdiction to do any of these things, he has
19 global jurisdiction to do anything.
20 But we did not want to give that to him
21 in the situation for an out-of-time appeal as
22 to everybody, as to people who didn't get
23 notice and try and take advantage of that
24 rule, well, which is inconsistent with the
25 notion that if he has the power to do

1 anything, that's plenary, and he therefore has
2 the power to do everything.
3 So there are times when we're trying to
4 carve back on that, and I don't think we have
5 thought through sufficiently how it is that
6 one does that, because they are literally
7 inconsistent to try and attempt to make a
8 global definition of plenary power, because if
9 he has the power to consider such a motion,
10 then that power is plenary.
11 That is not what we said and not what we
12 voted on in the 306(a) like situation. We
13 voted just the contrary; that we did not want
14 the judge to be able to messing with anything
15 other than the one person, and we didn't want
16 the times extended.
17 CHAIRMAN SOULES: Message
18 delivered three times. Anything else, Rusty?
19 Okay. Any further comments on this?
20 HON. C. A. GUITTARD: Well,
21 Mr. Chairman, maybe since this has been the
22 most thorough discussion of this, somebody
23 ought to take all these considerations and
24 look at this thing again and then bring back
25 to the Committee a revised version. So I move

1 that we recommit the question of plenary power
2 under Rule 305.
3 PROFESSOR ALBRIGHT: Second.
4 MR. ORSINGER: And Don thought
5 he was out of the woods.
6 CHAIRMAN SOULES: Well, let me
7 get a sense of the Committee whether there's
8 any real interest in having the Committee
9 continue with this. There may not be.
10 HON. DAVID PEEPLES: Well, we
11 are at the very end of Don's handout, and
12 that's a reason we should go ahead and finish
13 it, finish what's been done.
14 But does the Supreme Court -- what do
15 they want us to do, Luke? Do they want us to
16 just rifle shot problems, or do they want us
17 to range around and tidy things up? I mean,
18 do we know from them what they want from us on
19 this and other areas? If we don't, I wonder
20 if we ought to ask.
21 CHAIRMAN SOULES: Well, I think
22 we sometimes do, and well, I can't answer your
23 question.
24 HON. DAVID PEEPLES: Well,
25 would it be out of line for some of us to

1 ask?

2 CHAIRMAN SOULES: Yes.

3 HON. DAVID PEEPLES: It would

4 be out of line?

5 CHAIRMAN SOULES: I think so.

6 HON. DAVID PEEPLES: To ask the

7 Supreme Court to tell us what they want us to

8 do?

9 MR. HUNT: Mr. Chairman --

10 CHAIRMAN SOULES: Don't,

11 please.

12 HON. DAVID PEEPLES: Okay.

13 MR. HUNT: The problem, I

14 think, is that we all have our oxes to gore,

15 and for some of us we see different writing as

16 improvement, and for others we see different

17 writings simply as tinkering with something

18 that ain't broke, and we sometimes want to

19 cure something because we've had an experience

20 over the years.

21 Well, I assure you, my attempt on 305 was

22 not brought about by any adverse experience

23 with plenary power. It was brought about by a

24 desire to keep absolutely as much of 329(b) as

25 we could and have some definition of it.

1 And if you recommit it, I'll certainly
2 take another shot at it, and I'll try to cure
3 what Rusty has suggested which can be done
4 with one clause, because it's a problem I've
5 thought about, and I consciously chose the
6 words I chose because I thought it made a neat
7 fit with the other two exceptions we have in
8 the current rule.
9 But it can be handled easily enough based
10 on what you've said today, if you want us to
11 recommit it, because we've got to come back in
12 May anyway with the rest of it for the final
13 version.
14 HON. DAVID PEEPLES: Well, I'd
15 like to second Judge Guittard's motion to
16 recommit it and take another look at it. And
17 I guess that gives us the right to reconsider
18 that nine to five vote that we had on (a)(1)
19 and (2). I think we've gone this far, we
20 ought to let the Supreme Court look at it.
21 CHAIRMAN SOULES: Any dissent
22 on that? Richard Orsinger.
23 MR. ORSINGER: May I comment?
24 I don't want to dissent.
25 CHAIRMAN SOULES: Sure.

1 MR. ORSINGER: It seems to me
2 that in this instance as well as with many of
3 these instances that there's a tension between
4 those of us who are already familiar with the
5 existing language and believe we know what it
6 means and those who don't know what the
7 existing language means. And there are a lot
8 of people practicing law that don't know what
9 the existing language means, and there are law
10 students all the time that are trying to learn
11 what that language means, and it may take them
12 five or 10 years.
13 And I sympathize with Don's philosophy
14 that while we may have figured out what 329(b)
15 means -- and Bill, I looked, and it looks to
16 me like that rule has been amended every time
17 amendments have been handed down.
18 PROFESSOR DORSANEO: It was
19 rewritten basically one time.
20 MR. ORSINGER: Well, '55, '61,
21 '67, '73, '78, '81 --
22 PROFESSOR DORSANEO: Well, you
23 can forget all of '55 and '61, because
24 anything before '78 doesn't matter.
25 MR. ORSINGER: All right. The

1 point I'm making is this rule is a hodgepodge,
2 and it may be a wonderfully written hodgepodge
3 by extremely intelligent authors, but it has
4 taken me a long time to figure this out, and
5 I've been through the school of hard knocks.
6 Now, this may be the only opportunity we
7 have to write some rules clearly from the
8 start. It's kind of like making the decision
9 to tear down an old house and build a new one
10 from scratch rather than just adding a room
11 onto the garage and then a room onto the side
12 of the house. And I think it's an inherent
13 tension, because if we do change the language,
14 then everybody has to go through a learning
15 process, even those of us who feel like we
16 know. But it makes it easier for those in the
17 future who are learning if we write it
18 clearly, and I think that's a tension that's
19 going through this whole rules process that we
20 just have to balance.
21 And I think this is a very troublesome
22 rule, and I support the idea that if we can
23 rewrite it in a more clear way with more
24 elemental building blocks that we can save a
25 lot of trouble for those who don't understand

1 it and those who have not yet learned it.
2 PROFESSOR DORSANEO: Well, I
3 think we ought to stick with the rule now and
4 do as we were directed to do, or as was
5 suggested to the summary judgment people to
6 do, and that is, if we want to take the rule
7 and make adjustments to it, let's do it and
8 deal with the existing language and redline it
9 and show how it was changed, so that we don't
10 inadvertently create through clarification
11 some sort of a thing that ends up with a very
12 different plenary power concept than we have
13 now.
14 I don't see a problem with 329(b)'s
15 individual paragraphs, except the word
16 "overruled" in paragraph (e), for example,
17 probably should not just simply be overruled
18 for the additional 30 days. Okay? That's a
19 debate.
20 Now, there are some other things.
21 Judge Guittard had written an article about
22 329(b) at the time we did it way back when
23 about whether to modify, correct, reform or
24 vacate, whether there's a motion to vacate.
25 We've had a lot of comprehension of this rule

1 at this point, and I might be ready to say,
2 instead of saying all that stuff, that we say
3 just "change," because that's all plenary
4 power is, is the power to make a judicial
5 change; that modify, correct, reform, vacate,
6 all of that, those words strung together,
7 that's not a definition. Those are just words
8 strung together.
9 But that can be done on the basis of the
10 existing rule, and it's not like some of these
11 rules that have been kind of added to here,
12 there and everywhere. It was redrafted
13 basically one time, and we didn't do it
14 probably perfectly. Certainly we didn't do it
15 perfectly, but it's still serviceable.
16 CHAIRMAN SOULES: Okay. Back
17 to committee. And who wants to assist on
18 this? Don, you have your committee as
19 presently composed.
20 MR. HUNT: And Judge Guittard
21 and Judge Dorsaneo -- I mean, Bill Dorsaneo.
22 HON. C. A. GUITTARD: Professor
23 Dorsaneo.
24 MR. HUNT: Yes. We have plenty
25 of good folks. In fact, most of the people

1 that have worked on it are on that
2 subcommittee, I mean, who have spoken today
3 and who have been a part of it over the
4 years. So if we only have one rule to tinker
5 with, we've done a good job. I thank you for
6 your effort.
7 CHAIRMAN SOULES: You have done
8 a good job, and we appreciate it very much.
9 Richard, you're on that committee, right?
10 MR. ORSINGER: I am, yes.
11 CHAIRMAN SOULES: And Justice
12 Duncan and Rusty.
13 MR. ORSINGER: We're here
14 fighting over our own subcommittee work, Luke.
15 PROFESSOR DORSANEO: What I
16 heard us being told here is a couple of
17 things. People do not want a wholesale
18 revision, if it's unnecessary, just to make it
19 clearer or simpler to some of us who think
20 that we're able to do that. And the second
21 thing that I'm hearing is that we want to
22 solve the problems that exist rather than to
23 try to change the entire scheme on some
24 philosophical basis that doesn't involve those
25 specific problems.

1 CHAIRMAN SOULES: Does anybody
2 disagree with that?
3 MR. ORSINGER: That's what our
4 vote of nine to six stands for.
5 CHAIRMAN SOULES: Okay. Rusty.
6 MR. McMAINS: Luke, at the risk
7 of being held out of order, which I usually am
8 out of order, it's my organizational --
9 CHAIRMAN SOULES: We share of
10 some of that.
11 MR. McMAINS: -- disadvantage,
12 but when we voted -- and not to try and tell
13 you that there's a lot more work left to be
14 done. But when we voted on these earlier
15 rules, which, if I can put my -- where we were
16 talking about the judgment, the alternative
17 judgments and so on that -- is it Rule 300?
18 As we kind of went through there, when we
19 adopted alternate 2 and all of those aspects
20 of it, there's one aspect, I think, one issue
21 that we have not addressed that I do consider
22 to be a problem that I would like to raise,
23 because I think it can be fixed perhaps by a
24 sentence in the rule.
25 CHAIRMAN SOULES: This is

1 Rule 300?

2 MR. McMAINS: Yes. It's in the

3 Rule 300, because the alternate that we

4 adopted, basically it doesn't matter which

5 one, because the language is then the same.

6 It is in each one. It says final judgment may

7 incorporate, by reference, provisions of an

8 earlier signed interrogatory, but if any

9 provision of the earlier order conflicts with

10 the final judgment, the final judgment

11 controls.

12 Now, the problem I have is that what the

13 standard practice now is the, quote, Mother

14 Hubbard clause, and you know, where you

15 basically say that if there's anything that

16 conflicts with this judgment, then that it's

17 expressly or all relief that is not expressly

18 granted herein is denied. That fits the

19 definition, then, of a disposition by express

20 determination, as is basically the holding

21 in -- that's not an implication. That's an

22 express disposition. That expressly deprives

23 you of any affirmative relief the court had

24 granted in the interim if it's not in the

25 judgment.

1 And my concern, especially because of the
2 fact that we -- there's not really anyplace in
3 here where a party who might have gotten
4 affirmative relief, such as a partial summary
5 judgment, he's gone, hadn't gotten severance.
6 That's not an unusual occurrence. Just kind
7 of parked out there, basically not paying any
8 attention, not even monitoring the files
9 frequently, and may not get notice of the
10 trial setting for that matter. That case is
11 set for trial, goes to trial, and all of a
12 sudden the judgment comes along, and it
13 doesn't mention anything and basically has
14 this Mother Hubbard provision which says
15 everything not granted is denied.
16 Well, now you have -- okay. You have
17 denied -- you've not granted the summary
18 judgment. That was carried forward. If it's
19 not in this judgment, it's denied. That means
20 you've denied the summary judgment, and you
21 create a lot of these problems all over
22 again. Have you not disposed of that party?
23 Has that party lost its summary judgment?
24 What happens if the party decides to render
25 some affirmative relief against you, which is

1 obviously inconsistent with the rendition of
2 judgment. You've had no notice of it.
3 I believe -- it's not something I don't
4 think we addressed or that the Committee
5 addressed, but I think we -- and this is my
6 personal opinion of where this -- that any
7 affirmative relief that the court has
8 previously granted by order should not be
9 undone by some general Mother Hubbard clause
10 or otherwise without notice to the party
11 specifically granted that relief, without
12 notice and opportunity to be heard. It
13 shouldn't be done either by implication or by
14 a general Mother Hubbard clause, and that's
15 the kind of sentence that I would like to see
16 in there.
17 CHAIRMAN SOULES: May I ask a
18 question about that?
19 MR. McMAINS: Yes, sir.
20 CHAIRMAN SOULES: Why do you
21 stop there? Why should we permit the earlier
22 granted relief to a party, who now thinks
23 they're out of the case, to be changed by an
24 express provision in the final judgment that
25 says they are now stripped of their earlier

1 order --

2 MR. McMAINS: Well, because --

3 CHAIRMAN SOULES: -- without

4 notice to them?

5 MR. McMAINS: Because of the

6 nature of plenary power. That's the problem.

7 I mean --

8 CHAIRMAN SOULES: We're just

9 talking about --

10 MR. McMAINS: If the concept of

11 plenary power is that the court -- it's an

12 interlocutory -- it's the whole notion of an

13 interlocutory order. It's interlocutory, so

14 the judge can change it. I don't know any way

15 to restrict the power to tell the judge that

16 he can't change it --

17 CHAIRMAN SOULES: Okay.

18 MR. McMAINS: -- because it's

19 an interlocutory order. But it seems to me

20 unfair, and it has happened, and it is

21 something that -- a lot of times it just comes

22 to you and you say, "Well, I'm sorry." But

23 you've been screwed and it's too late.

24 HON. C. A. GUITTARD:

25 Mr. Chairman, I think Rusty has a good point,

1 and I would like to see some language that
2 would accomplish what he's proposing.
3 MR. McMAINS: I would be happy
4 to attempt to draft it --
5 CHAIRMAN SOULES: And you if
6 you will do that --
7 MR. McMAINS: -- to propose
8 it. I just didn't want that to be a
9 foreclosed subject next time, because a lot of
10 these things, that's one of the things that
11 concerns me that's going on, because the
12 Mother Hubbard --
13 CHAIRMAN SOULES: Okay. I'm
14 going to ask the subcommittee to take that
15 under advisement. Rusty, if you will provide
16 the initial language to be a change to
17 Alternative No. 2 on Page 3 of the current
18 handout, and we'll look at that next time.
19 MR. McMAINS: Okay.
20 MR. HUNT: Now, Mr. Chairman,
21 do you want to consider the inquiry
22 disposition chart, or do you want to go on to
23 some of these others, since we're going to
24 revisit this?
25 CHAIRMAN SOULES: Richard, do

1 you all need some direction for that?
2 MR. ORSINGER: We would
3 particularly like some guidance on our venue
4 statute. We don't need so much guidance on
5 our agenda. The venue statute is something we
6 need to discuss, and we also have some
7 publication rules that we're prepared to
8 present to the Committee and tell us whether
9 we're in the right direction or not, you know,
10 and the venue in particular.
11 We've already settled on the cameras in
12 the courtroom rule. That's what I meant by
13 "publication," cameras in the courtroom.
14 But we are not settled on where we ought
15 to go with venue, and we would like to present
16 Patrick Hazel's proposal, our thinking, and
17 then get a direction of the Committee on that.
18 CHAIRMAN SOULES: My feeling is
19 in order to accommodate the interim work of
20 the subcommittee that we pass to Richard's
21 subcommittee, particularly on the venue rules,
22 and if we have time, come back to the inquiry
23 disposition table later at this meeting or get
24 to it at the next meeting.
25 MR. HUNT: No problem. Because

1 most of these in this series of rules do not
2 take up any of the problems that we've been
3 concerned with. They are minor problems, and
4 they're mostly all solved anyway.
5 CHAIRMAN SOULES: All right.
6 MR. ORSINGER: Luke, before we
7 get to the venue, I want to ask Chip, if you
8 could, in just a couple of minutes, share with
9 everybody our cameras in the courtroom
10 concept, and let's be sure that we're on path
11 here.
12 CHAIRMAN SOULES: Have you done
13 some writing, drafting on that?
14 MR. BABCOCK: We passed it out
15 two meetings ago, but I've got another copy,
16 if anybody wants it. This will be 18c.
17 CHAIRMAN SOULES: Rule 18c.
18 This is going to be Rule 18c, which is a
19 handout.
20 MR. BABCOCK: There is an
21 existing Rule 18c which allows cameras in the
22 courtroom under certain limited circumstances,
23 one, for ceremonial proceedings; two, if
24 everybody that's going to touch the courtroom,
25 including the witnesses and the lawyers and

1 the parties, agree to it; and then three,
2 pursuant to countywide rules that have been
3 approved by the Texas Supreme Court.
4 Over the past six or seven years, a
5 number of counties have come up with rules
6 that have been sent to the Texas Supreme Court
7 and have been approved by the Court, and so
8 that these rules are now operating in those
9 counties.
10 The rule that you have before you is
11 derived predominantly from the Dallas and
12 Harris County rules that have been approved by
13 the Supreme Court and are currently in
14 operation in those counties.
15 My experience with this is that on the
16 civil side, which is all we were talking about
17 here, this is not a very big deal, because I
18 think in the six or so years that the rules
19 have been in place in Dallas and Harris County
20 there have been very few televised
21 proceedings. I'm talking about televised
22 trials. It's much more hot on the criminal
23 side where, other than in Harris County where
24 the criminal judges have adopted rules very
25 similar to these, there are no statewide or

1 even countywide rules. So that's a little bit
2 of the background.
3 The subcommittee has made certain
4 changes, recommended certain changes to the
5 Harris/Dallas County rules, the subcommittee
6 consisting of Alex Albright, Mike Prince,
7 Richard, myself and Bill Dorsaneo. And I'll
8 just run through these real quickly, if that's
9 all right with you, Luke.
10 CHAIRMAN SOULES: Sure.
11 MR. BABCOCK: The first
12 paragraph is "Construction." In the Dallas
13 and Harris County rules it says "Policy," and
14 we've tinkered with the language. But really
15 it just sets up the two competing interests,
16 which are allowing access for electronic media
17 coverage on the one hand, but not screwing up
18 the dignity and the decorum of the courtroom
19 on the other side.
20 The definitions I think are pretty
21 straightforward. We didn't mess with those.
22 Paragraph 3, Electronic media coverage
23 permitted. We did change the rule slightly in
24 Paragraph 3.3 to provide for a time certain
25 for a motion to be made by the media agency or

1 the media to be permitted to cover the
2 proceeding. And then we tightened up the
3 objections language a little bit.
4 "Electronic media coverage prohibited"
5 is not -- we didn't change anything, although
6 Paragraph 4.3 probably would more properly be
7 as Paragraph 3.4. We recognize -- in fact,
8 this was a sentence that was in the earliest
9 draft of the Dallas County rules, which were
10 the first rules passed by the Supreme Court,
11 that in family cases there are probably going
12 to be a lot of additional concerns that are
13 not going to be present in your run-of-the-
14 mill civil case; and that the family courts
15 can and maybe even should come up with
16 additional safeguards if they are going to
17 allow electronic coverage.
18 Paragraph 5, Equipment and Personnel, I
19 think is pretty straightforward. The idea is
20 to limit the number of cameras and people in
21 the courtroom so that you don't have a circus
22 like atmosphere. And as you'll see here, if
23 there is going to be a television camera and a
24 still camera, you can only have one TV camera
25 and one still camera, unless there's going to

1 be a lengthy proceeding, in which case you can
2 have an unmanned second television camera, if
3 the trial judge thinks that's appropriate.
4 Paragraph 7, we really probably spent
5 more time on Paragraph 7 than we did any other
6 paragraph, I'm talking about the subcommittee,
7 and that is the concept of pooling. That is
8 the one area that I have been informed there
9 has been some trouble with the countywide
10 rules. There are now some competing
11 companies, Court TV, and there's a cable
12 channel in Harris County that is televising a
13 lot of proceedings, and then you've got some
14 of the other networks like the Spanish
15 network.
16 In the Selena trial there was a little
17 bit of a jump ball about which media company
18 was going to be the pool. Most media
19 companies don't want to be the pool because it
20 takes a lot of time and effort and personnel
21 to be the person or the company manning the
22 actual equipment in the courtroom. But in
23 this case there were three companies that
24 wanted to be the pool, and we changed this
25 just to say that the court has got to -- if

1 there's a dispute about it, the court is going
2 to select the pool coordinator, and they're
3 going to try to pick the person that is most
4 experienced and is most competent to carry out
5 the job so that there's going to be minimum
6 controversy.
7 No controversy about Paragraph 8,
8 Official record. The videotaping is not the
9 official court record.
10 Paragraph 9, Enforcement. This was
11 something that some of the judges in Dallas
12 County felt very strongly about. I happen to
13 believe that the last sentence of that
14 paragraph could lead to some mischief if, for
15 example, a judge got irritated by a particular
16 media outlet, a particular television station
17 or a particular network. This sentence seems
18 to suggest that maybe that media outlet could
19 be barred from the courtroom, and that raises
20 some problems. But there have been no
21 problems with Paragraph 9 that I'm aware of,
22 and I think I would have been aware of them if
23 there were.
24 So basically this rule has been in
25 operation, seldom utilized, very few problems

1 emanating from it that I'm aware of, and
2 that's that.
3 MR. ORSINGER: Bill.
4 PROFESSOR DORSANEO: Don't the
5 judges who like this enforcement paragraph
6 want it in there so they can use it to show
7 the media they better behave?
8 MR. BABCOCK: Oh, yeah. Yeah.
9 I think that's the reason for it, Bill. And
10 really, you know, it's harmless, except in the
11 instance where a judge really has some
12 vendetta against a particular agency. It has
13 really very little to do with their conduct in
14 the courtroom.
15 MR. ORSINGER: Joe.
16 MR. LATTING: Well, I may be
17 behind the times here, and I hope I'm not out
18 of order, but has this Committee expressed its
19 approval of the basic concept of this rule?
20 MR. ORSINGER: No.
21 MR. LATTING: And do I
22 understand by this rule that a person can be
23 sued and then, over that person's objection,
24 the media may cover the trial and broadcast
25 such portions of it as the media chooses?

1 CHAIRMAN SOULES: That's in the
2 courtroom.
3 MR. ORSINGER: That depends on
4 the trial judge. The courts are not mandated
5 to permit media coverage, right, Chip, but
6 they can --
7 MR. BABCOCK: Yes.
8 MR. LATTING: But they may over
9 the objection of the litigant?
10 MR. ORSINGER: True.
11 MR. LATTING: Well, I'm
12 appalled at that, and I'll say that I hope
13 that this Committee is not going to do
14 anything to promote that kind of direction for
15 our judicial practice.
16 MR. ORSINGER: Well, you
17 understand that this is already true in Dallas
18 and Harris County?
19 MR. LATTING: I don't care if
20 it's true everywhere. It ought not to be.
21 And I hope we will go on the record as
22 strongly opposing it.
23 MR. ORSINGER: Let me ask a few
24 questions to draw out the proposal a little
25 bit.

1 Does this apply in any way to print
2 media?
3 MR. BABCOCK: No.
4 MR. ORSINGER: Does it apply to
5 artists?
6 MR. BABCOCK: Well, I take that
7 back. It applies to print media if they have
8 a still camera. Yes, it would.
9 MR. ORSINGER: Okay. But you
10 would have the maximum number of people,
11 three, five, seven people in there making
12 notes and running out to the newspaper?
13 That's not --
14 MR. BABCOCK: No, that wouldn't
15 affect that.
16 MR. ORSINGER: And artists that
17 recreate what went on in the courtroom, that
18 is not affected?
19 MR. BABCOCK: This doesn't
20 apply to sketch artists.
21 MR. ORSINGER: Okay. Now,
22 then, is there any provision in here for any
23 kind of interlocutory appellate review either
24 by appeal like under 76a or mandamus?
25 MR. BABCOCK: No.

1 MR. ORSINGER: Why not?
2 MR. BABCOCK: Well, perhaps
3 there should be. But the only appellate
4 efforts that have been made have come -- that
5 I'm aware of have come in the criminal context
6 where they have attempted to do it by
7 mandamus.
8 Court TV wanted to do the Kay Bailey
9 Hutchison criminal trial, which, of course,
10 never came into being, but they didn't know
11 that at the time, and they filed a motion for
12 relief to file a writ of mandamus with the
13 Texas Court of Criminal Appeals. It was
14 denied without opinion. And I believe there
15 was one other criminal case that they tried to
16 get up on that basis.
17 MR. ORSINGER: What is the
18 specific procedure for the media wanting to
19 broadcast a trial? What do they do and what
20 is the parties' recourse if the media wants to
21 do that?
22 MR. BABCOCK: If the media
23 wants to broadcast a proceeding, they file a
24 motion with the presiding judge. If anybody
25 opposes that, then they file an opposition

1 with the court, and the judge makes a ruling.
2 MR. ORSINGER: Okay. What is
3 your response to Joe's attack on the whole
4 idea that parties could be forced against
5 their will to have their civil litigation be
6 broadcast or rebroadcast.
7 MR. BABCOCK: Well, I'd respond
8 to Joe if he wanted to hear it.
9 MR. LATTING: I'm listening.
10 I'm all ears.
11 MR. BABCOCK: There are several
12 responses. Number one, the courts of this
13 state are largely open to that situation as we
14 sit here today, which may be a good thing or
15 it may be a bad thing, and I guess maybe we
16 don't need to debate whether the Supreme Court
17 was right or wrong when they started this
18 project to begin with.
19 But on a more fundamental point, the
20 courts of our country are open to the public.
21 That is a matter of constitutional right under
22 the First Amendment as expressed by the United
23 States Supreme Court and as expressed by our
24 State Supreme Court under Article 1, Section 8
25 of our state constitution.

1 There's no question that unlike in olden
2 times when, 200 years ago, when everybody in
3 the community would go down and watch trials,
4 we don't have the ability to do that today.
5 And the media is the surrogate for the public
6 attempting to inform themselves about what
7 goes on in the courtroom.
8 The print media has unfettered access to
9 the courtroom in terms of going in there,
10 taking notes, sketch artists, et cetera. Like
11 it or not, we are moving into a communications
12 age where the video image is going to
13 supplant, sadly, the printed word and the
14 printed image.
15 And I believe that our society is
16 bettered by the public being aware through the
17 media of what goes on in our governmental
18 institutions, be it the legislature or be it
19 the judicial system.
20 I recognize, and I think this rule
21 recognizes, Joe, that we are dealing with a
22 different animal when we are talking about
23 cameras and video coverage, and that is why
24 this rule gives the trial judge an enormous
25 amount of discretion, and in fact it gives him

1 so much discretion that Judge Latting would
2 probably never allow a camera in his
3 courtroom, and there's very little that the
4 media could do about it under this rule.
5 But I think it would be a mistake as a
6 matter of policy for us to draft a Rule 18c
7 that says no cameras, no way, under no
8 circumstances in our courtroom. And frankly,
9 I don't think that that is the sense of the
10 Texas Supreme Court today, because they have
11 themselves drafted and I think are getting
12 ready to pass a rule for cameras for appellate
13 proceedings regardless of whether the parties
14 object to it or not.
15 MR. ORSINGER: John Marks.
16 MR. MARKS: Well, anybody that
17 watched any part of the O. J. Simpson
18 proceeding, I think, or even thought about
19 what was going on would say that maybe cameras
20 aren't such a good idea after all, because
21 everybody was posturing to the camera,
22 including the judge, and we question whether
23 there was real justice done in that
24 situation.
25 Secondly, I think litigants, private

1 litigants, the person who gets sued, I agree
2 with Joe, ought to have the right to say, "I
3 don't want this televised." And trials have
4 not been televised in this country forever,
5 except in California and some other places
6 like that, so I don't think a rule included in
7 Rule 18c that says that if a party objects to
8 televising a proceeding in a civil case, the
9 court cannot order it, and I would move that
10 we change this to incorporate that language.
11 MR. BABCOCK: Well, John, you
12 may have misapprehended what this rule says.
13 And number one, there have been probably 25 or
14 30 trials televised in Texas alone in the last
15 five years, so it's not just California. But
16 beyond that, this rule does allow a party to
17 object.
18 MR. MARKS: I don't mean
19 object, I mean a party to say, "I don't want
20 this trial in front of a television set."
21 MR. BABCOCK: When you say
22 object, you mean object as a matter of right?
23 MR. MARKS: That's right.
24 CHAIRMAN SOULES: Veto.
25 MR. BABCOCK: Veto?

1 MR. MARKS: Yes.
2 MR. LATTING: I won't have any
3 objection to the rule if you do that, although
4 I will say that your announcement that
5 television is about to replace the printed
6 medium, if that's true, then none of this
7 matters anyway because society is just going
8 to be dismal. It's not going to be worth it.
9 CHAIRMAN SOULES: Mike
10 Hatchell.
11 MR. HATCHELL: Chip, I notice,
12 which is of some concern to me, that "court"
13 is defined as a master, and it seems to me in
14 this state that the use of masters in all
15 kinds of proceedings is diffuse and, although
16 very widespread, I would not think it's a very
17 good idea to vest as much control as this rule
18 gives in a private attorney who is appointed
19 by a judge who may be holding proceedings in
20 his office. And we also don't find courtrooms
21 to simply be able to summon the media to
22 something like that outside the control and
23 discretion of the judge of the court, so I
24 would suggest, if this rule is passed, that
25 "master" be eliminated and we define

1 "courtroom" in some way.

2 CHAIRMAN SOULES: Justice

3 Duncan.

4 HON. SARAH DUNCAN: Regarding

5 the comment that was made earlier about

6 whether we want to have an appellate procedure

7 in this rule, interlocutory appeals seem to me

8 to be very much in vogue right now. I think

9 we're quickly going to get to the point that

10 all the court of appeals is going to be doing

11 is official immunity, venueing, certification

12 of classes, and broadcasting interlocutory

13 appeals.

14 Be that as it may, if the notice of

15 broadcasting is filed by 1:00 p.m. the day

16 prior to trial and the hearing on broadcasting

17 is held on the day of trial, that may be the

18 shortest accelerated appeal timetable on

19 record, and there may need to be some

20 consideration taken about that.

21 MR. BABCOCK: My feeling about

22 this is just that we don't need to clutter up

23 either the appellate courts or the rules with

24 an appellate remedy in this instance. I

25 think, frankly, because of the feelings that

1 John and Joe express, which I think are shared
2 by many people, that this rule should be a
3 discretionary matter for the trial judge. And
4 if some media organization wants to take a
5 shot at mandamus or abuse of discretion, then
6 let them have at it. But on the criminal side
7 that has been fruitless so far.
8 CHAIRMAN SOULES: Joe Latting.
9 MR. LATTING: The fundamental
10 problem I have with this rule is that it's not
11 a matter of discretion, appeal, mandamus; it
12 is the notion that a private citizen of this
13 state can be subjected to the circus of media
14 coverage which then broadcasts sound bytes and
15 snippets over that person's objections.
16 The idea, for example, that someone could
17 be sued for an alleged sexual abuse of a child
18 in a civil proceeding, and a judge who is
19 interested in publicity and a plaintiff's
20 lawyer who is interested in publicity decide
21 that ought to be televised. The hapless
22 defendant objects to that. His objection is
23 overruled, and then every day on the 6:00
24 o'clock news we'll see snippets within the
25 control of the television station being

1 broadcast, and that's just an awful idea.
2 There ought not to be a way, over a
3 person's objection, that he or she be
4 subjected to being televised, and to say that
5 it should be done in a noncircus-like
6 atmosphere is just silly, to put television
7 cameras in the courtroom over a litigant's
8 objections and that litigant has no control.
9 And I hope the rule -- I hope we're not about
10 to do anything like that.
11 CHAIRMAN SOULES: Chip Babcock.
12 MR. BABCOCK: Joe, I suppose
13 you could make the same argument that if
14 you're a defendant in a child abuse case, you
15 wouldn't want the newspapers in there either
16 having snippets of your testimony in
17 quotations in the newspaper articles in the
18 morning with a picture of you leaving the
19 courtroom with your lawyer and with the media
20 circus outside the courtroom doors, which they
21 are, of course, permitted to be, interviewing
22 the plaintiff's lawyer and interviewing your
23 lawyer, if he'll comment, and taking video of
24 you. Nobody who is in that circumstance is
25 happy about being in that circumstance, but it

1 is quite clear that you can't keep the press
2 from covering the trial, because it is a
3 public trial.
4 MR. LATTING: I have no
5 objection to that.
6 MR. BABCOCK: Well, this is a
7 matter of degree; it is not an all-or-nothing
8 thing. And what you're talking about when
9 you're talking about video, yes, it's edited,
10 as all things are edited, but it is at least
11 the most accurate rendition of what has gone
12 on in the courtroom. I mean, how many times
13 have you seen a reporter, a print reporter,
14 cover a trial and try to take down testimony,
15 you know, on a shorthand note pad and then
16 reprint it in the paper the next day. It's
17 oftentimes not as accurate as a video camera,
18 not to diminish the fact that television is a
19 powerful medium, but it is not as black and
20 white as you're painting it.
21 CHAIRMAN SOULES: John Marks.
22 MR. MARKS: I'd like to refine
23 on my motion, and I don't know if I got a
24 second or not, but I move that in the first
25 sentence of the rule we start it out by saying

1 "on agreement of the parties."
2 MR. LATTING: I second it.
3 CHAIRMAN SOULES: Okay. Moved
4 a second. Any discussion?
5 MR. LATTING: Yeah. Only on
6 agreement of the parties.
7 MR. MARKS: Only on agreement
8 of the parties.
9 MR. LATTING: Second.
10 CHAIRMAN SOULES: Okay.
11 HON. DAVID PEEPLES: Luke, I've
12 been waiting patiently to the say a bunch of
13 things. It's not really on that, it's kind of
14 on the whole general thing.
15 CHAIRMAN SOULES: Judge
16 Peeples.
17 HON. DAVID PEEPLES: I've had
18 probably 10, maybe 15 cases in which the
19 electronic media were interested enough to
20 come. And let me just say that I probably
21 speak for 99 percent of the trial judges in
22 Texas, all of whom run for elections, that we
23 love it when they want to come cover our
24 trials and put our name on the 6:00 o'clock
25 news. Okay? So I think judges are going to

1 want to have the news media come around.
2 Let me say also that -- you said
3 25 trials have been televised in Texas,
4 criminal, gavel to gavel?
5 MR. BABCOCK: Mostly -- yeah,
6 Court TV. Mostly criminal; some civil.
7 HON. DAVID PEEPLES: I think
8 it's going to be a rare civil case in which
9 any TV station is going to be willing to do it
10 gavel to gavel.
11 MR. ORSINGER: No question
12 about it.
13 HON. DAVID PEEPLES: It
14 probably will not happen in our lifetime, and
15 so --
16 MR. BABCOCK: Ann Cochran had
17 one.
18 HON. DAVID PEEPLES: Did she?
19 MR. BABCOCK: Yeah.
20 HON. DAVID PEEPLES: They're
21 just too long and they can't do it. What they
22 do is come in and they get snippets, that's
23 right, and I think that's inevitable. The
24 newspapers can do it, and what the TV stations
25 will do, if you let them, is come in and crank

1 about five minutes' worth and then leave, pack
2 up and leave, and go -- and then they write a
3 story.
4 And let me say I've seen a few stories in
5 the newspaper about things that I know what
6 was happening in the courtroom, a few stories
7 that I think were fair efforts to summarize
8 what happened that day. Usually, it's just
9 sensationalism, you know. And they've got
10 several trials to cover, and I'm not faulting
11 the reporters, but there's just no way that
12 they can, with the docket that they have of
13 cases to cover at the courthouse, that they
14 can give a real summary of what happened that
15 day.
16 Now, if this is to foster better public
17 understanding, I just have to question -- I'm
18 not sure how it will come out of the rule, but
19 I do have to question whether electronic media
20 coverage of trials, civil trials, the bits and
21 pieces, fosters public understanding. You
22 know, to take a sentence or two out of
23 context, and it's got to be out of context,
24 and put that on the news is not fostering
25 public understanding of what happens in civil

1 litigation. So the premise of this whole
2 thing may be flawed.
3 What happens in San Antonio, which is not
4 a bad accommodation, is that the TV cameras
5 show up and they say, "I understand you're
6 trying so and so today. Can we come in and
7 get some footage?" And before the trial
8 starts, you let them come in and they crank
9 for two or three minutes, they maybe get the
10 judge, they maybe lawyers, the courtroom or
11 whatever, and then they leave. And there's a
12 story on the news, and it maybe shows the
13 courtroom or the lawyers walking in, or you
14 know, whatever they took, and the rest of the
15 story is just people talking and --
16 CHAIRMAN SOULES: -- reporters
17 talking.
18 HON. DAVID PEEPLES: Yeah,
19 reporters talking, or maybe they interview.
20 MR. ORSINGER: Maybe some
21 interviews.
22 HON. DAVID PEEPLES: Yeah.
23 Now, I don't know, I mean, I think that's the
24 real world that we're dealing with.
25 And Joe, the answer to the newspaper -- I

1 mean, Chip says, well, newspapers have the
2 right to do snippets. Yes, they do, and
3 there's nothing we can do about that. But it
4 doesn't follow that we have to let cameras
5 come in and get out-of-context testimony,
6 which is much more powerful when you see it,
7 and then the public thinks, "You mean the jury
8 did that, when we saw the testimony?" In a
9 five-day trial they saw 45 seconds' worth of
10 it. Just because the newspapers can do it
11 doesn't mean that we have to let the
12 electronic media do it. Now, that's just been
13 my experience.
14 CHAIRMAN SOULES: Judge Till,
15 you had your hand up first. Then I'll get to
16 the others.
17 HON. PAUL HEATH TILL: I've had
18 several cases where the media has been very
19 keen on being in my court. And at first I was
20 amenable to do that -- and I'm standing up
21 because my back says that I can't sit any
22 more. I don't mean anything otherwise.
23 And I tried to make it to where it would
24 be undisruptive. I tried to make it where
25 they would be background, you know, not

1 foreground. I couldn't do it. No matter how
2 hard I tried, I just could not do it. They
3 became the pivotal point of everything that we
4 were doing. These were especially on trials
5 that concerned dangerous animals like pit
6 bulls or things like that. The reason you
7 didn't see it on television was because I
8 wouldn't let them in the last time. I
9 refused, because they tend to be the driving
10 force of what happens.
11 And certainly they can interview outside
12 the courtroom. No problem. They can do what
13 they wish. But inside the courtroom they
14 proved to be a very disruptive and very
15 central force that a lot of times interfered
16 with my ability and the two sides' ability to
17 present their case. Very quickly they were
18 speaking to the camera not to each other, and
19 the whole thing tended to get out of hand.
20 I don't know, but if the written media
21 could be as discreet and as observable as --
22 or the camera media, excuse me, can be as
23 discreet as the written media, then I don't
24 think we would have any problem, but they're
25 not. And the reason that we're not too

1 worried about the written media right now is
2 just look at the publication distribution for
3 written material as opposed to television
4 coverage. Television coverage is much
5 higher. So trying to equate those two in my
6 mind is a mistake.
7 And anybody that's ever been to a
8 criminal trial, and the state got the bloody
9 pictures in, those are the difference between
10 telling about it and seeing it. The visual is
11 much better and much more prone to
12 distortion. He's absolutely correct. If you
13 really want to distort it, the idea that the
14 camera doesn't lie, I don't know who said
15 that, but he obviously was a cameraman,
16 because it lies worse than anything.
17 I feel like that on the civil side of it,
18 and in these foreclosure hearings that I have
19 on animals are on the civil side, that it
20 should be with the consent of the two
21 parties. If either party objects -- the state
22 never will, but it if the defendant objects,
23 then I think they should have the right to
24 preserve that for no other reason than to try
25 to foster the idea of having a fair trial.

1 MR. LATTING: Hear, hear.
2 CHAIRMAN SOULES: Okay. Go
3 ahead, Anne.
4 MS. McNAMARA: I guess I agree
5 with the two judges. When you've got the
6 camera, it's obvious that the jury knows that
7 they're there. We had a very highly
8 publicized case a few years ago in Galveston.
9 The day our CEO testified, the jury all
10 dressed differently. They all came in, the
11 guys wore suits and ties. That was the one
12 day they did. They knew they were going to be
13 on TV.
14 If you start having trials televised,
15 those of us who are hiring lawyers are going
16 to hire totally different people, you know.
17 All of a sudden it's going to be like --
18 MR. BABCOCK: Joe likes the
19 rule all of a sudden.
20 MR. LATTING: My fellow
21 Americans -- I'll have to dye my hair.
22 MS. McNAMARA: All of a sudden
23 you're going to be looking for photogenic
24 people, not just people who are smart and
25 articulate and who can talk well and think on

1 their feet, you're going to be looking for
2 somebody who photographs well, and that's kind
3 of silly.
4 CHAIRMAN SOULES: Anne Gardner,
5 would you like to speak? You had your hand up
6 a moment ago.
7 MS. GARDNER: I would join in
8 with what has already been said. I have a
9 problem with the second entire sentence of the
10 first paragraph for the same reason. To the
11 extent that it would imply that somehow
12 electronic media coverage does facilitate the
13 free flow of information and fosters better
14 public understanding, I disagree for the same
15 reasons. I think it does not.
16 I think it demeans the dignity and
17 decorum of the courtroom, of the court
18 proceedings, and I think that, as Anne said,
19 about it being similar to the political arena,
20 I think it has been demonstrated that
21 sound-byte media coverage has vastly changed
22 the way elections are conducted in this
23 country. And it does anything but foster a
24 free flow of information and better public
25 understanding.

1 I would add to John Marks's motion, or
2 propose to add, that somehow the sentence --
3 that the first paragraph be changed to not
4 only limit any expression of policy to allow
5 coverage only where both parties agree, but to
6 somehow maybe say "and only to facilitate the
7 free flow of information" or something to that
8 effect. And I don't have the exact wording in
9 mind, but I just don't want it to sound like
10 we think that this paragraph is true. Either
11 that or I would eliminate the entire second
12 sentence. I think we should eliminate the
13 entire second sentence.
14 CHAIRMAN SOULES: Well, does
15 the electronic media today have the same
16 access to the court as the print media?
17 MR. BABCOCK: In terms of
18 people, sure. They just can't tote a camera
19 in without --
20 CHAIRMAN SOULES: Well, the
21 print media can't tote a camera in there
22 either.
23 MR. BABCOCK: Right.
24 MR. ORSINGER: When you say
25 they can't, they can unless somebody stops

1 them, which is the judge. I mean, right now,
2 the judges can either let them do it or not
3 let them do it. And some judges let them do
4 it and some don't. And Houston and Dallas
5 have decided that they're going to standardize
6 it according to essentially these rules, with
7 some modifications that the subcommittee has
8 made, and those are the two largest counties
9 in Texas, aren't they, Chip?
10 MR. BABCOCK: Yeah, I think
11 so. Luke, you know, I'm not shelling for the
12 media, even though I represent a lot of them.
13 But this rule is the result of a bunch of
14 people's input. In fact, the language that
15 you're talking about, Anne, was written by
16 Bill Rhea, a district judge in Dallas County.
17 But we can tinker with the words, but it
18 sounds to me like the sense of this Committee
19 is that we shouldn't have a cameras rule at
20 all, which, if that's -- you know, we don't
21 need to spend a bunch of time fussing with
22 this if that's what we're going to do.
23 MR. LATTING: I'm not willing
24 for that to happen. I want to have a cameras
25 rule to cover the whole state, and I want it

1 to say that you can't have them unless you
2 have the consent of all the parties.
3 MR. BABCOCK: We have that now.
4 MR. LATTING: We do have that
5 now? That's the law now?
6 MR. BABCOCK: Yeah, that's
7 correct. That's Rule 18c now.
8 HON. PAUL HEATH TILL: That's
9 what it is.
10 MR. MARKS: Consent of the
11 attorneys?
12 MR. BABCOCK: Yeah. Rule 18c
13 says you can have camera coverage under three
14 circumstances: Ceremonial proceedings; with
15 the consent of the parties and the witnesses;
16 and pursuant to local rule promulgated by the
17 Texas Supreme Court. Anybody who is reading
18 the rule will say that's not exactly what it
19 says, and I agree with that, but that's how
20 the Supreme Court has interpreted it.
21 MR. MARKS: Well, I agree with
22 Joe. I think, then, that we ought to change
23 the rule to make it clear that you cannot have
24 televised media in any courtroom in this state
25 unless the litigants agree to it.

1 CHAIRMAN SOULES: We have that
2 rule now. It's 18c. There's one additional
3 factor, and that is that each witness whose
4 testimony is to be broadcast must also
5 consent.
6 MR. MARKS: But does it allow
7 local courts like Dallas County to have a
8 different rule.
9 CHAIRMAN SOULES: It says "in
10 accordance with guidelines promulgated by the
11 Supreme Court for civil cases." So the
12 Supreme Court can permit that to happen, and
13 there's not anything we can do to keep the
14 Supreme Court --
15 MR. LATTING: What you can
16 do --
17 MR. YELENOSKY: Luke.
18 MR. LATTING: What you can do
19 is recommend --
20 MR. YELENOSKY: I've had my
21 hand up for a while.
22 CHAIRMAN SOULES: I'm sorry.
23 Steve Yelenosky.
24 MR. YELENOSKY: And you're not
25 calling on people anymore, so I don't know

1 whether to continue to keep my hand up or not.
2 CHAIRMAN SOULES: Go ahead,
3 Steve. I apologize.
4 MR. YELENOSKY: I just want to
5 say, since we're creating a record on this,
6 I've heard a couple of things that concern me,
7 not about the television coverage, and I'll
8 say what I think about that, but first about
9 the print media.
10 I just want to make sure that at least
11 it's on record that I don't have a problem
12 with the print media. I think some of the
13 comments were along the lines that, well, we
14 can't do anything about the print media.
15 People have -- there's a First Amendment issue
16 there, but I got the sense that some people
17 would like to exclude the print media, if they
18 could. And I've had things covered in print
19 and on television, and I never liked exactly
20 what they wrote, but I was glad that it was
21 covered, and of course, I'm glad that I'm able
22 to read coverage of other court cases, so I
23 just wanted to get that on the record.
24 But at the same time, I don't think in
25 any of the cases that I've had covered, which

1 have just been of local importance, where
2 there has been both television coverage and
3 press coverage, all the television coverage
4 was outside the courtroom, and I don't think
5 anything would have been added to it by
6 television coverage in the courtroom.
7 And if things aren't covered in the
8 snippet and they're covered gavel to gavel,
9 the only people that have time to watch that
10 are choosing between that and daytime
11 television, and they're looking for
12 entertainment. So I don't see the value of
13 that, and so actually, as much as I'm in favor
14 of print coverage, if people are truly
15 interested in learning about what's going on
16 in the courtroom, there are ways to do that
17 without television coverage.
18 CHAIRMAN SOULES: Okay. Let's
19 take about 10 minutes here, and be back just
20 after 10:30, please.
21 (At this time there was a
22 recess.).
23 CHAIRMAN SOULES: Okay.
24 Richard Orsinger.
25 MR. ORSINGER: Okay. Well,

1 Chip has had to catch a plane. He wanted me
2 to assure Joe that he was not turning tail and
3 running. He told me before we even started
4 that he was going to have a limited amount of
5 time, and I said, well, this is probably only
6 going to take five minutes anyway.
7 And also I'd like to say that our
8 subcommittee also had Rusty McMains, Elaine
9 Carlson and David Perry and Bonnie Wolbrueck
10 on it, whom Chip did not mention.
11 And since -- I don't have real strong
12 feelings about this, but since everybody has
13 been ventilating against the role of
14 television in our society, which I think is
15 what this is more than cameras in the
16 courtroom --
17 HON. SCOTT A. BRISTER: Not
18 everybody.
19 MR. ORSINGER: Not everybody;
20 some. But in reality, I think that the
21 ubiquity of television is unstoppable, and
22 that people are becoming more television
23 oriented. And now they're going to be more
24 computer oriented and more getting stuff on
25 line, and that I really -- I'm not that upset

1 about the idea that people might get snippets,
2 because right now people are getting less than
3 snippets, and if they have snippets, maybe
4 they will have a little more interest or a
5 little more understanding.
6 And I think this is a good idea. I would
7 be in favor of it, but not necessarily as
8 strongly as everybody else seems to be against
9 it.
10 CHAIRMAN SOULES: Yes, sir,
11 Judge Brister. You have a local rule.
12 HON. SCOTT A. BRISTER: We do.
13 And unfortunately I don't have that with me.
14 We changed it after the O. J. We had had it
15 set up kind of like this, where there was a
16 presumption that you would let the cameras
17 come in; that then for a sufficient showing it
18 could be stopped. And we've now switched it
19 to where there was a presumption to where they
20 would be out, with the burden on the media to
21 prove why they wanted to come in and under
22 what circumstances, which is one thing I think
23 we ought to consider.
24 I do favor -- I do oppose consent of the
25 parties, because, of course, the reason no

1 cameras are anywhere except Dallas and Houston
2 is the parties never consent. You may as well
3 not have a rule if you have a requirement of
4 consent because you simply will have none
5 broadcast.
6 I do think there's -- I think you would
7 be standing and trying to avoid the inevitable
8 by prohibiting TV. I mean, the federal
9 courts, or the appellate courts are going to
10 start having this stuff. This is the
11 inevitable future.
12 I think the disruption caused in the
13 publicized trials is separate and apart from
14 the TV cameras. The O. J. case would have had
15 what happened to it regardless of whether --
16 there would have been a million journalists
17 around whether there were cameras in the
18 courtroom or not; and that the hubbub, to the
19 extent it affects the verdict, is unavoidable
20 in those kind of cases with or without without
21 cameras, and the judge is just going to have
22 to make a call, when you see the verdict, if
23 it's a civil case, to say was this a fair
24 trial or not, and if not, we're going to do it
25 again, because the second time around, like

1 the Menendez case, people ain't as interested
2 in watching it moment by moment as they were
3 the first time around.
4 And I think it serves -- especially gavel
5 to gavel, which is not likely to happen, as
6 David said -- serves a tremendous value,
7 because the one thing about the O. J. trial,
8 every other verdict that seemed crazy to a
9 large majority of Americans in recent history
10 was immediately defended by the bar or the
11 attorneys who had a self-interest involved by
12 saying, "Well, if you had been there and heard
13 all the evidence, you would have a different
14 opinion," which to me always sounds like the
15 same old thing we always tell lay people: "If
16 you were as smart as us and knew what we knew,
17 you would agree with us. It's just because
18 you're ignorant and uninformed." We couldn't
19 trot that out on the O.J. case, "Well, if you
20 had been there and heard it," because a
21 million Americans had heard all the evidence.
22 They had seen every moment of it. They were
23 not fooled by what the evidence was and could
24 not be put off that we are just doing a great
25 job.

1 And if you believe, as I do, that there
2 are big problems with the criminal justice
3 system in general, and in California in
4 particular, you are not going to change that
5 by counting on a couple of editorial writers
6 or some tort reform group or whoever has got
7 an ax to grind in the process to gain, you
8 know, financially from it, hoping that they
9 are going to change things. People have to
10 see it.
11 And when normal -- if there's something
12 really wrong and people really see it, then
13 people will really want to change it. That's
14 what's going to change things in the areas
15 that need to be changed in the law.
16 So I am against putting in a pure "only
17 when all the parties agree" requirement, but I
18 do think the burden ought to be put on the
19 media to show why they want to come in, how
20 they're going to do it, why it's necessary,
21 what conditions they're willing to agree to,
22 rather than, as this rule seems to do, which
23 gives them a right to do it, that then other
24 people have to argue against.
25 CHAIRMAN SOULES: Joe Latting.

1 MR. LATTING: John Marks has a
2 motion on the floor. I'm not going to -- I
3 disagree with all of that, especially the
4 inevitability part. Nothing is inevitable
5 unless we succumb to it, and I think in our
6 profession it's irresponsible to say what's
7 inevitable just so that we don't have to do
8 anything. I think we should try to prevent
9 things that are bad.
10 You have a motion on the floor that says
11 only with the consent of the parties, and Anne
12 suggested -- did you suggest an amendment to
13 that that would remove our endorsement of the
14 notion that the presence of television
15 promoted --
16 MS. GARDNER: Remove the second
17 sentence.
18 MR. MARKS: How about remove
19 the whole thing?
20 CHAIRMAN SOULES: We have 18c.
21 What does this --
22 MR. MARKS: I mean remove
23 Paragraph 1.
24 CHAIRMAN SOULES: Paragraph 1?
25 MR. LATTING: And then you

1 would add -- and then does your motion also
2 add that we would have only coverage with the
3 consent of all parties?
4 MR. MARKS: Yes.
5 MR. LATTING: Well, I second
6 that.
7 MR. MARKS: Okay. There's one
8 other thing. Carl, where is it that --
9 MR. HAMILTON: As far as the
10 written objections?
11 MR. MARKS: Right. You don't
12 need to have a written objection as long as
13 you state in open court that you object to
14 having television. That should be enough,
15 without any kind of a written instrument being
16 filed. So where is that, Carl?
17 MR. ORSINGER: 3.3.
18 MR. HAMILTON: Page 1, 3.3, the
19 third line from the bottom.
20 MR. MARKS: Okay. I move that
21 that sentence be deleted as part of my motion.
22 MR. HAMILTON: Second.
23 CHAIRMAN SOULES: Okay. As I'm
24 understanding your motion, John, you're moving
25 that this rule with these changes be adopted

1 in place of the current Rule 18c?
2 MR. MARKS: Yes.
3 CHAIRMAN SOULES: You like this
4 rule better than Rule 18c, the current 18c?
5 MR. MARKS: Yes.
6 MR. ORSINGER: Before we vote
7 on the entire rule, Luke, I would like to
8 address Mike's comment about master. I think
9 it was our conception that "master" meant one
10 of the governmentally employed masters or
11 associate judges that are governed by the
12 statute that go to the courthouse and have a
13 courtroom and serve a judicial function, not
14 masters that are appointed ad hoc on a
15 case-by-case basis. Now, if we clarify that,
16 that we're talking about real, permanent
17 full-time court masters here, would you be
18 comfortable with the word "master"?
19 MR. HATCHELL: And I think we
20 should define "courtroom" also.
21 HON. DAVID PEEPLES: Mike, are
22 you concerned that elected judges are going to
23 let masters have one of these media cases?
24 MR. HATCHELL: I think they
25 would have the discovery aspects of it, some

1 of which, quite frankly, could be more
2 troubling particularly where you have
3 proprietary material involved. I'm concerned
4 that the power you give them to summon the
5 media to an off-premises place, if you don't
6 define "courtroom" and define what a "master"
7 is, if it's -- I really think candidly,
8 Richard, that if a judge wants to allow a
9 master to -- I mean, the filming of a master's
10 hearing, that's fine. I just think that it
11 ought to be the judge who is in control of
12 that courtroom.
13 Now, if you say masters can in some
14 locales exercise local power independently as
15 judicial officers, I guess that would not be
16 too troublesome.
17 CHAIRMAN SOULES: Well, aren't
18 they magistrates rather than masters?
19 MR. ORSINGER: No. There's a
20 special master under Rule of Civil
21 Procedure -- Bill?
22 PROFESSOR CARLSON: 171.
23 MR. ORSINGER: 171, Elaine?
24 But then there are also governmentally
25 specified, full-time court masters jobs.

1 They're hired by the district judges. Every
2 single family judge in Dallas, Houston,
3 Fort Worth, they all have a master; each one
4 of them has a master. San Antonio has two
5 masters, one for 4(d) child support cases, and
6 one to assist in general family law
7 litigation. They're full-time, they're
8 selected by the local judiciary, and they have
9 courtrooms, and so clearly, you know, they are
10 tantamount to judges.
11 And I don't know whether Mike is saying
12 he's uncomfortable with one of those people
13 making their own decision and whether it ought
14 to be an elected judge and maybe not a retired
15 judge. I mean, I guess we haven't even really
16 explored what if it's a retired judge that's
17 sitting in the case. Shouldn't that person
18 have control? So maybe what we need to do is
19 define the terms a little more clearly.
20 CHAIRMAN SOULES: Justice
21 Duncan.
22 HON. SARAH DUNCAN: I don't
23 want to speak in favor or against broadcasting
24 court proceedings because I think both
25 arguments have been put very persuasively

1 today, but I would like to pose the question
2 of whether we really want the parties to be
3 able to agree that their case will be
4 broadcast.
5 Having watched the ninth circuit on TV
6 every Saturday night, the television clearly
7 affected three judges on a federal court of
8 appeals every time they were broadcast. They
9 did not behave the same way that they do if
10 you just go without cameras in the courtroom.
11 Given the impact --
12 HON. SCOTT A. BRISTER: Are
13 they better or worse?
14 HON. C. A. GUITTARD: Better or
15 worse, that's the question.
16 HON. SARAH DUNCAN: Well, I
17 think that depends on your perspective.
18 MR. LATTING: Nice to the
19 lawyers.
20 HON. SARAH DUNCAN: But given
21 that broadcasting in all likelihood will
22 affect the conduct of the judge, the witnesses
23 and the jury, do we want to put that power in
24 the hands of the parties? Do we really want
25 to say, "Plaintiff and defendant, if you want

1 to try your case in the media and put that
2 kind of pressure on the jury, we will let you
3 do it, and we will abdicate any judicial
4 control or responsibility whatsoever"?
5 MR. MARKS: No. No. The judge
6 has to go along with it too.
7 HON. SARAH DUNCAN: If I'm --
8 CHAIRMAN SOULES: Time out.
9 Let me see if I can get to what you're talking
10 about. Are you suggesting we're saying only
11 on agreement of the parties and with leave of
12 court?
13 HON. SARAH DUNCAN: No. What
14 I'm suggesting is -- and we've all heard Judge
15 Peeples say that the judges would love to be
16 broadcast because it is effectively
17 campaigning. How many judges are going to be
18 able to say to the lawyers who elect them and
19 the parties who are generally constituents, if
20 you want to say that judges have constituents,
21 "No, you all may agree that we're going to be
22 broadcasting this, but I'm going to say no"?
23 I really question how often the trial court is
24 going to veto the agreement of the parties.
25 And I'm not saying that there is -- that I

1 have an answer to this one way or the other,
2 because I haven't worked it out in my own
3 mind, but I just want to raise that question
4 because I think it is to some extent an
5 abdication to the parties on how the trial can
6 be conducted.
7 CHAIRMAN SOULES: Joe Latting.
8 MR. LATTING: With brief in
9 file, I don't think there's anything we can do
10 about it, Sarah. If the judge, the plaintiff
11 and the defendant and the media all want to
12 broadcast it, then I don't think there's
13 anything -- there's nothing you can do about
14 that, and that removes my real concern about
15 the protection of some party who doesn't want
16 to be subjected to that.
17 CHAIRMAN SOULES: Justice
18 Duncan.
19 HON. SARAH DUNCAN: Well, I
20 think there is something the Supreme Court can
21 do.
22 MR. LATTING: The Supreme
23 Court?
24 HON. SARAH DUNCAN: And I'm not
25 saying that the Supreme Court should, or what

1 they should do, but I think if the Supreme
2 Court, for instance, were to promulgate an
3 order that said broadcasting will only be
4 permitted in these types of cases with these
5 controls with the consent of the parties and
6 the trial court.
7 MR. LATTING: I sure don't
8 object to that.
9 HON. SARAH DUNCAN: And I'm not
10 proposing that. I'm just saying I don't think
11 we've thought about all of the ramifications
12 here and all of the ways that this rule could
13 be manipulated. I'm not saying that I favor
14 current 18c. I just think this is a
15 tremendous step to be taking with what I
16 consider to be inadequate consideration.
17 CHAIRMAN SOULES: Well, this
18 rule is either history at this meeting or it's
19 going back to committee. I mean, it's either
20 not going to survive the action of today or
21 it's going to go back to committee, because
22 it's got to have some more work done on it.
23 And let me see if I can -- those who feel
24 like we should continue to work on a
25 replacement of 18c, show by hands. Okay.

1 Well, that's pretty much everybody.
2 Now, those who feel that the use of
3 television or other photography in the
4 courtroom should be limited to situations
5 where all parties agree, show by hands. 12.
6 Those opposed. Six. 12 to six, it will
7 be limited to where the parties agree.
8 Those who feel we should define what is
9 meant by the term "courtroom" show by hands.
10 Is anyone opposed to that? No one is opposed
11 to that.
12 How about those who feel that we need to
13 better define any class of decision makers
14 other than judges, show by hands. 12.
15 Those opposed. Okay. 12 to one.
16 HON. DAVID PEEPLES: Back to
17 the courtroom, how can I control what happens
18 outside of the courtroom?
19 CHAIRMAN SOULES: Well, this is
20 for televising or broadcasting inside a
21 courtroom, and courtroom --
22 HON. DAVID PEEPLES: We're
23 going to define what a courtroom is?
24 CHAIRMAN SOULES: Well, and
25 that doesn't define what a courtroom is.

1 HON. SCOTT A. BRISTER: Well,
2 it may need more, because the canons of ethics
3 require me to prevent telecasting in or in the
4 vicinity of the courtroom, so the typical deal
5 where they shoot through the windows I'm
6 supposed to stop. And to my knowledge, nobody
7 but me has ever stopped it, but you're
8 supposed to stop that.
9 CHAIRMAN SOULES: Justice
10 Duncan.
11 HON. SARAH DUNCAN: Is my
12 understanding correct from the first vote that
13 if a public official is accused of stealing
14 public funds in a civil embezzlement, let's
15 say, or some type of civil action, that that
16 public official can veto a public televised
17 trial of his case?
18 MR. ORSINGER: Yes. That's
19 what that vote is.
20 CHAIRMAN SOULES: Now, those
21 who feel that we should delete the first
22 paragraph show by hands.
23 MR. MARKS: Do you mean
24 Paragraph 1?
25 CHAIRMAN SOULES: Yeah,

1 Paragraph No. 1, Construction. That's what
2 I'm talking about.
3 Okay. Let me see your hands again after
4 I've clarified what we're voting on. 13.
5 Those opposed. Three. 13 to three to
6 delete. Are there any other points that --
7 HON. SCOTT A. BRISTER: Luke,
8 my suggestion about switching it to make it a
9 presumption of -- in other words, who has the
10 burden of proof of televising. Do the parties
11 have -- I guess, of course, if it's parties'
12 consent -- my question is whether we should
13 make it clearly -- because when you do the
14 order like this, you've got to state the
15 reasons why you're not doing it, would be to
16 shift the rule so the burden is on the media
17 to show why they should do it rather than on
18 the judge to show why they're not going to be
19 allowed.
20 MR. LATTING: Does it matter if
21 the parties agree?
22 MR. ORSINGER: It's irrelevant.
23 HON. SCOTT A. BRISTER: Sure,
24 I've still -- as I understand the rule, I've
25 still got a say-so if all the parties want to

1 agree, and I still think it's not a good idea.
2 MR. LATTING: Would it not be a
3 good idea, though, for you to tell them why?
4 If the media and the parties want to do it,
5 wouldn't that be a safeguard for the judge to
6 be able to say, "I'm not not going to allow
7 it, and here is why."
8 HON. SCOTT A. BRISTER: All I'm
9 doing, if I don't -- I'll tell you from
10 personal experience, if I don't let the press
11 in, I'm going to get harangued and crucified
12 by the press for not letting the press in.
13 That's their only interest in the proceeding,
14 and they can do that, and what can I respond?
15 Not a thing. I can't have a press conference
16 to correspond to it, and I sure can't count on
17 the attorneys to defend me, because they've
18 got their own paying clients. So I don't like
19 this, you know, that it's the judge that's got
20 to state why he's closing out the poor media
21 people, rather than the aggressive media
22 people who are more than capable of defending
23 themselves.
24 MR. LATTING: Well, let's take
25 Scott off the hook.

1 HON. SCOTT A. BRISTER: They
2 should have to bear the burden of proof, and
3 then I can simply say they haven't shown
4 sufficient preponderance of the evidence.
5 CHAIRMAN SOULES: Okay. Those
6 who agree with Judge Brister's position on
7 this point show by hands.
8 MR. MARKS: Can I put it
9 halfway up?
10 CHAIRMAN SOULES: 13. Those
11 opposed. No one is opposed, Judge Brister,
12 so -- what paragraph is that?
13 HON. SCOTT A. BRISTER: It
14 would be in several places. You would
15 probably need to add something back in on
16 Paragraph 1. Then you would need to change
17 what the order has to say. We've -- it is in
18 the Harris County rule to that extent, and
19 I'll forward that on to --
20 MR. ORSINGER: -- Chip.
21 HON. SCOTT A. BRISTER: -- to
22 Chip. Okay.
23 MR. ORSINGER: He'll do the
24 initial rewrite.
25 CHAIRMAN SOULES: With a copy

1 to Richard.
2 HON. SCOTT A. BRISTER: Okay.
3 CHAIRMAN SOULES: Judge
4 Peeples.
5 HON. DAVID PEEPLES: Those of
6 you who voted for the litigant veto, if the
7 judge wants to let the TV cameras come in and
8 just pan the courtroom for three minutes
9 before the witness is sworn and before
10 anything happens and then pack up and leave,
11 do you all want to prevent that too?
12 MR. MARKS: Well, this says
13 "proceedings."
14 HON. C. A. GUITTARD: Those are
15 not proceedings.
16 CHAIRMAN SOULES: Okay.
17 Anything else on this? We need to get to
18 venue pretty quick, but I'm not trying to stop
19 you from musing. Bill Dorsaneo.
20 PROFESSOR DORSANEO: Well,
21 after listening to what everybody has had to
22 say about it, one question I had is, in the
23 Harris County rule, what kind of things are
24 taken into account? Presumably they would
25 have to be other than matters -- although the

1 court proceeding is a more private concern
2 than public concern, presumably it would be
3 something that would be of interest to Justice
4 Duncan in the case.
5 Listening to what other judges have said,
6 it wouldn't make a difference to me whether
7 somebody is planning on conducting a more
8 comprehensive or fair coverage of an entire
9 proceeding, you know, rather than trying to
10 develop something to put on the television for
11 the purpose of that type of business, you
12 know, today.
13 And I think those kinds of things could
14 be identified, maybe they are identified in
15 the Harris County rule, and put in such a
16 paragraph talking about the presumption. I
17 think that would be a good idea.
18 In the context of defamation law, it
19 strikes me that it is not completely clear
20 that you are on totally safe ground by
21 reporting something in a public record when
22 that's only a very small part of the story and
23 there is a lot more to it.
24 Maybe, and I'm not even going to make a
25 suggestion, but maybe the veto rights of the

1 parties could involve some sort of a
2 presumption if it's -- if the party's veto
3 would have presumptive weight in the case,
4 well, of an essentially private concern, but
5 if it was of public concern, the judge could
6 override the parties, you know, under those
7 kinds of circumstances. That would be a
8 sensible compromise, but you know, beyond
9 that, I don't have a specific suggestion as to
10 doing anything with it.
11 CHAIRMAN SOULES: Well, I think
12 we ought to have those thoughts in mind, and
13 also Justice Duncan's concern.
14 PROFESSOR DORSANEO: It's the
15 same concern.
16 CHAIRMAN SOULES: That brings
17 us -- some of the same concern. Okay.
18 HON. C. A. GUITTARD:
19 Mr. Chairman, I'd like to ask whether anybody
20 has any objection to televising appellate
21 proceedings, and if so, what regulations or
22 what kind of provisions should be made for
23 that?
24 CHAIRMAN SOULES: Isn't there
25 something in the appellate rules now about

1 that?

2 HON. C. A. GUITTARD: Did we

3 pass a rule on that?

4 MR. ORSINGER: It's my

5 understanding that the Supreme Court has taken

6 under advisement its own set of publication

7 rules, and that they have semi-formulated

8 their position.

9 Lee, do you know about that?

10 MR. PARSLEY: We did in house.

11 The current appellate rule is very small, just

12 like 18c is, and we did, as part of our work

13 on the Appellate Rules, write a rule on

14 broadcasting appellate court proceedings,

15 which I think I provided it to Chip. And some

16 of you all's concerns today may be applicable

17 to that rule. We may need to revisit it,

18 probably the Committee does, but there is a

19 draft in the Appellate Rules.

20 MR. ORSINGER: And has the

21 Court not acted on that proposal yet?

22 MR. PARSLEY: Yes. They

23 tentatively approved it, but all of that is

24 subject to this Committee giving us more

25 advice on it.

1 CHAIRMAN SOULES: Well, I think
2 we have a rule that --
3 HON. SARAH DUNCAN: It's
4 Rule 21.
5 CHAIRMAN SOULES: Rule 21, and
6 it does not require the consent of the parties
7 for the appellate --
8 MR. McMAINS: Yeah, it does.
9 CHAIRMAN SOULES: Does it?
10 Rule 21?
11 Mr. McMAINS: I mean, it does
12 in part, but you can't tell what part.
13 MR. LATTING: Well, that's
14 clear, as long as it's there somewhere.
15 CHAIRMAN SOULES: Well, I guess
16 it does.
17 MR. ORSINGER: Well, this rule
18 applies to trial and appellate courts, Luke,
19 and it talks about witnesses, so this is a
20 combined rule that exists independently from
21 18c apparently, "any trial or appellate court
22 in (b)(1) whose parties have consented and
23 consent from each witness," so this appears to
24 overlap 18c.
25 CHAIRMAN SOULES: Okay. We

1 need to go to venue, because -- I mean, I'll
2 go along with this, but I know that our
3 subcommittee wants some help and some
4 direction on venue and we'll need to be doing
5 some work on that in the two months prior to
6 our May meeting, so if anybody has any more
7 suggestions, let's get them on the record and
8 then get to venue. Is there anyone else?
9 Sarah Duncan.
10 HON. SARAH DUNCAN: Can I just
11 say in response to Judge Guittard's question
12 that El Paso is currently videotaping and
13 selling the videotapes to lawyers and others,
14 so they may have rules in place.
15 HON. PAUL HEATH TILL: What are
16 they videotaping?
17 HON. SARAH DUNCAN: Arguments.
18 CHAIRMAN SOULES: Okay.
19 MR. LATTING: Thanks for the
20 time to talk about this. I think it's an
21 important issue and something that this
22 Committee needs to be talking about, so I
23 appreciate the Chair's time.
24 CHAIRMAN SOULES: And we're not
25 done with it by any means. We just want to

1 get to what guidance the subcommittee feels
2 they need as far as their work in the
3 two-month interim here.
4 Richard, take us to wherever you need
5 help.
6 MR. ORSINGER: Okay. There's
7 two handouts on venue. One is a memo from
8 Alex Albright dated March 14, two pages long,
9 and with that, a kind of nice printing version
10 of Patrick Hazel's proposed venue rules that
11 has a box on the front, "Proposed Revisions to
12 Rules Relating to Motion to Transfer Venue."
13 They were passed out earlier, if you were
14 here. If not, they're on the table over here.
15 And what has happened is that Alex has
16 undertaken to draft our subcommittee's
17 proposal of what to do with the venue rules,
18 and we also have Patrick Hazel's independent
19 work. Pat was not working directly with the
20 Committee, but has come up with his own
21 viewpoint, and Alex is going to explain to us
22 what some of the issues are for us to
23 consider.
24 CHAIRMAN SOULES: Okay. Alex.
25 PROFESSOR ALBRIGHT: Okay. Pat

1 Hazel has worked on venue a whole lot in the
2 past year and knows a whole lot about venue,
3 and I have been talking with Pat and working
4 with Pat on my version as well, and Pat and I
5 are actually planning to talk after this
6 meeting before I found out that I was to
7 report on this today.
8 But I don't know how familiar you all are
9 with the new venue statute, but as I see it,
10 there are really two issues that we need to
11 address substantively in the new venue statute
12 that need to be added to the rules.
13 One is the motion to transfer for reasons
14 of inconvenience to parties and the witnesses
15 and in the interest of justice, which has now
16 been added as a grounds for transfer in the
17 venue statute.
18 And the second one is joinder issues.
19 The statute says that plaintiff may not join
20 and maintain venue unless they can
21 independently establish venue without relying
22 on another plaintiff establishing venue, and
23 unless they can prove up some other kind of
24 convenience or fairness criteria.
25 So these need a procedure to get these

1 different ideas put into our venue practice.
2 The first one I want to address is the
3 motion to transfer venue for reasons of
4 convenience and justice. The first issue that
5 needs to be addressed is the burden of proof.
6 Everywhere else in the venue statute the
7 burden of proof is prima facie proof. The
8 statute does not address the burden of proof,
9 it just says that the court shall transfer the
10 case for reasons of justice and inconvenience
11 if the court finds the following. And so it
12 doesn't tell us what the court is to consider
13 or the burden of proof issues.
14 What the subcommittee decided was that we
15 should keep the decision based upon affidavit
16 proof only and not live testimony, because the
17 statute elsewhere says that venue is to be
18 determined solely the basis of affidavits and
19 not live testimony.
20 Pat Hazel disagrees. Pat Hazel thinks
21 that these issues must be decided on the basis
22 of live testimony presented at a hearing.
23 The subcommittee felt that this is more
24 like federal venue. Federal courts decide
25 federal venue issues based on affidavits all

1 the time. And besides that, in the statute,
2 if the judge decides to transfer or not
3 transfer a case upon reasons of convenience
4 and justice, it is not reviewable at all and
5 cannot be grounds for reversible error, so it
6 seemed to us that this is the sort of thing
7 that a judge has total discretion as to
8 whether to transfer or not. We might as well
9 just keep it in the affidavit practice without
10 live testimony, and there's no reason to add
11 another live testimony for a judge to have to
12 sit through.
13 As I said, Pat Hazel disagrees with this,
14 and an alternative that would be kind of in
15 the middle is to say that, well, everybody
16 present their proof based on affidavits, and
17 then if the judge wants to hear live
18 testimony, the judge could hear live
19 testimony.
20 Also whether this is prima facie proof or
21 preponderance of the evidence, this does not
22 appear to me to be an issue that you could
23 have a decision based on prima facie proof.
24 It needs to be preponderance of the evidence.
25 But once again, since the judge is the one to

1 make the decision and it's not reviewable, I
2 think it's a matter of forum, and the judge is
3 going to be able to make the decision on
4 whatever the judge wants to make a decision
5 on.
6 So what I would propose is that we write
7 motions to transfer for justice and
8 convenience with a preponderance of the
9 evidence burden of proof with both parties
10 able to submit affidavits, and the court is to
11 consider all of the evidence presented on
12 affidavits and make a decision as to whether
13 to transfer the case or not based upon reasons
14 of convenience and justice.
15 MR. ORSINGER: Alex, does
16 affidavits include excerpts of depositions
17 taken?
18 PROFESSOR ALBRIGHT: Right.
19 The way the rule is now written, and in my
20 proposal is carried forward and in Pat's as
21 well, is you can use any depositions or other
22 discovery products, but they have to be
23 attached to affidavits under the current rule.
24 MR. ORSINGER: So it's kind of
25 like a summary judgment, only there's actually

1 a weighing of evidence?
2 PROFESSOR ALBRIGHT: Right. It
3 would be -- on this motion to transfer for
4 justice and convenience, it would be just like
5 the current venue practice, except the judge
6 can consider both sides of the evidence, which
7 under the current venue practice, the judge,
8 as long as there is prima facie proof that
9 there is some evidence to support venue, then
10 the issue is complete, and the judge has to
11 keep the case in that county.
12 But under this different standard of
13 convenience and justice, which is a completely
14 different venue standard than we have ever had
15 in Texas before, the judge could consider both
16 sides of the evidence for convenience and
17 justice, which necessarily seems to be a
18 balancing process, so it seems that the judge
19 needs to consider both sides of the evidence
20 to make this decision.
21 HON. DAVID PEEPLES: How does
22 this blend in with the forum non conveniens
23 statute?
24 PROFESSOR ALBRIGHT: This is
25 different from forum non conveniens. Forum

1 non conveniens is dismissing a case and
2 sending it to a different judicial system,
3 sending it to a different state or sending it
4 to a different country. This is like forum
5 non conveniens, except county to county. It's
6 venue, so venue within the Texas civil justice
7 system. So what the judge is doing is
8 determining is it more convenient and does
9 justice require that it be tried here where it
10 is filed, or is it better that it be tried in
11 Houston or someplace else. So it does let the
12 judge take these traditionally forum non
13 conveniens factors into account and then
14 deciding venue motions.
15 HON. DAVID PEEPLES: Has the
16 legislature authorized this?
17 PROFESSOR ALBRIGHT: Yes.
18 MR. McMAINS: It's in the
19 statute.
20 PROFESSOR CARLSON: Afraid so.
21 PROFESSOR ALBRIGHT: I'm
22 surprised you haven't heard of these motions
23 already.
24 PROFESSOR DORSANEO: What does
25 the forum non conveniens statute say about the

1 procedure and the evidence, though? Does it
2 say anything about it at all?
3 PROFESSOR ALBRIGHT: I can't
4 remember.
5 PROFESSOR DORSANEO: I can't
6 either. That's why I asked.
7 PROFESSOR ALBRIGHT: I think
8 there's a preponderance of the evidence
9 standard in the forum non conveniens statute.
10 PROFESSOR DORSANEO: We don't
11 know whether it's an affidavit practice or
12 live testimony or a 120(a) combination?
13 PROFESSOR ALBRIGHT: I don't
14 think the statute says one way or the other.
15 MR. MARKS: I think it's by
16 affidavit.
17 PROFESSOR DORSANEO: Well,
18 isn't the federal practice in this area that
19 it's affidavits; and then if the judge wants
20 more, more.
21 PROFESSOR ALBRIGHT: I believe
22 so. But the one thing that we have here
23 that's different from the federal practice and
24 different from the forum non conveniens
25 statute is that in the venue statute there is

1 a provision that says the venue decision will
2 be made only on the basis of affidavit.
3 And Pat has a footnote, I think it's
4 Footnote 10, where he has developed an
5 argument that says that actually the statute
6 requiring the decision to be made only by
7 affidavit does not apply to this particular
8 section, so I think you can make that
9 argument.
10 I tend to think that the statute requires
11 affidavits, that decisions be made only on
12 affidavits for determining venue, and this is
13 one of the general rule venue provisions, so
14 it is one of the proper venue defining terms,
15 so I think it's included in that part of the
16 statute.
17 I don't think -- I think if we want to go
18 the alternative route and allow live
19 testimony, it's not going to make any
20 difference, because once again, the judge
21 can't be reversed, so so what.
22 MR. LATTING: All the judges
23 are laughing.
24 CHAIRMAN SOULES: Well, I think
25 judges are actually hearing testimony on 257

1 motions right now.

2 PROFESSOR ALBRIGHT: Well,

3 that's -- okay. Rule 257 is a different venue

4 grounds. I mean, that is a completely

5 different motion to change venue.

6 This is, what we're talking about here

7 are motions to transfer on statutory venue

8 grounds, and the statutory venue grounds are

9 what have been put in the statute, and this is

10 now a statutory venue rule.

11 MR. ORSINGER: Luke, these

12 rules don't cover 257. In a previous meeting

13 we mentioned whether we ought to consolidate

14 them all into the area, and I recall I think

15 you said that it might be profitable to keep

16 them separate. But we have not attempted fold

17 257 into this.

18 PROFESSOR ALBRIGHT: What I was

19 going to do is draft the motion to change

20 venue for unfair forum separately and consider

21 those separately. This does not have anything

22 to do with those types of motions, so I would

23 prefer to just -- let's just talk about

24 conforming the rule to the statute.

25 CHAIRMAN SOULES: Well, if

1 interest of justice doesn't reach 257, I agree
2 with you, but I don't know.
3 MR. ORSINGER: Well, I guess
4 it's up to us to decide to do away with 257,
5 but no one has ever suggested that.
6 PROFESSOR ALBRIGHT: Can we not
7 talk about that right now? That gets us on a
8 whole different track.
9 CHAIRMAN SOULES: Okay. Are
10 you saying that you have a burden of proof
11 here for convenience of parties and in the
12 interest of justice, that is, a preponderance
13 of evidence, or you don't have that?
14 PROFESSOR ALBRIGHT: I do have
15 it as a preponderance of the evidence based
16 upon affidavits submitted by all of the
17 parties.
18 CHAIRMAN SOULES: What is that
19 in then?
20 PROFESSOR ALBRIGHT: That is
21 in -- actually I realized my numbers are all
22 screwed up. It's on the first page under 6,
23 Burden of Proof to Transfer pursuant to Civil
24 Practice & Remedies Code Section 15.0002(b).
25 And I must tell, in you reading this

1 over, this is not -- this is a draft, and I
2 think this is not drafted well, so what I
3 would like some direction on is what direction
4 you all want to go.
5 I did not intend for this draft to be
6 seen as a final draft. In fact, the whole
7 committee has not looked at it. Michael
8 Prince and I have looked at it, and we have
9 not had a subcommittee meeting since then.
10 PROFESSOR CARLSON: Alex, are
11 you saying the preponderance of the evidence
12 standard is folded into this Paragraph 6?
13 PROFESSOR ALBRIGHT: No. I
14 think Paragraph 6, when I read it, it is not
15 in there, and I need to put it in there.
16 CHAIRMAN SOULES: Oh.
17 PROFESSOR ALBRIGHT: What I
18 would like to do is -- I mean, I would rewrite
19 this to include a preponderance of the
20 evidence standard and make it clear that the
21 judge is to look at affidavits submitted by
22 both parties.
23 MR. McMAINS: Rusty, did you
24 want to speak?
25 MR. McMAINS: Well, I have

1 mixed emotions about this obviously, but with
2 regards to the practice of affidavits in the
3 general rule or in the general statute, I'm
4 sure you remember that Justice Polk was the
5 one who carried this first venue change to the
6 legislature, and the precise purpose of that
7 change was to eliminate evidentiary hearings.
8 I mean, that's what he said was a waste of
9 time, that these were being conducted as
10 discovery mechanisms in the courtroom and was
11 a lot of waste of judicial time, because there
12 weren't very many of them getting reversed,
13 and they were primarily being used as just a
14 stalling tactic or supplemental discovery
15 tactic, so the principal thing that they were
16 trying to accomplish was, one, the case was to
17 be tried -- all the cases were to be tried in
18 one county, whichever county that was. It was
19 going to be a proper county, but they were
20 going to try and keep them all together unless
21 there was some problem with splitting them
22 apart because of mandatory reasons.
23 Second, that it was to be done by
24 affidavit. That's the way you made your
25 proof.

1 And third, that you didn't have to prove
2 a cause of action, you only had to allege.
3 And basically that was it.
4 Now, conceptually I can understand the
5 notion that, well, we want to take a position
6 that this is a preponderance of the evidence
7 because it's not reviewable, so we need to
8 make sure that the judge knows that he's
9 supposed to have some evidence in.
10 By the same token, I have a problem in
11 saying that affidavits can ever constitute a
12 preponderance of the evidence. I mean, I can
13 see how they have prima facie in the sense
14 that they can raise a question for the judge
15 to determine. I'm not sure that they really
16 kind of fit into the notion of what a
17 preponderance of the evidence means. I mean,
18 you can throw them down the stairs and see
19 which one goes further, or exactly what -- I
20 mean, frankly I think this choice of standard
21 is irrelevant if it's not subject to being
22 reviewed anyway, so I'm not sure there's any
23 justification for, quote, deviating from the
24 basic general practice of prima facie. I
25 don't know if it makes any difference, but --

1 PROFESSOR ALBRIGHT: The only
2 concern with prima facie proof is that if
3 there's any evidence the judge may, sitting
4 there, may think, well, if there's any
5 evidence that it's convenient for somebody to
6 try this case in Houston, then I've got to --
7 MR. McMAINS: No, he doesn't
8 have to. And I think that we should make
9 clear that he has the discretion to make the
10 decision. That's fine. But I think that's a
11 different deal than saying that there's --
12 that the burden is on the preponderance of the
13 evidence.
14 CHAIRMAN SOULES: I think what
15 she's trying to get at is that for a motion to
16 transfer for convenience, that that shouldn't
17 be done just because the defendant files an
18 affidavit and makes a prima facie case that it
19 ought to be transferred. There should be a
20 balancing of what both, all parties say in
21 that regard.
22 How that gets articulated, whether it's
23 with the term "preponderance of the evidence"
24 or what, are we in agreement that a transfer
25 for convenience or in the interest of justice

1 should involve the judge balancing or
2 considering the array of evidence and not just
3 looking to see if the defendant has a prima
4 facie basis for doing so, and if so, it goes?
5 I think everybody agrees to that, right?
6 So the judge is going to weigh the
7 evidence, in whatever its form, for one of
8 these convenience and interest of justice
9 transfers, which is different from proper
10 county, mandatory county venue, before '95,
11 right? Does anybody disagree? Bill Dorsaneo.
12 PROFESSOR DORSANEO: One of the
13 things that's missing from this kind of an
14 evaluation that exists at an actual trial on
15 the merits, or at least I think it's more
16 rare, is that the credibility questions are
17 less evidence because the facts about
18 jurisdiction and about where people are and
19 this and that are not normally in controversy,
20 the evidentiary facts anyway. They don't need
21 to have somebody decide who is telling the
22 truth and who isn't telling the truth about
23 where the plant is, or you know, where the
24 accident occurred or where the witnesses or
25 any of that kind of business. The judge

1 doesn't need to hear witnesses. He just needs
2 to have information.
3 But there may be a case where somebody
4 says, well, that affidavit, that's just not
5 so, that didn't happen there, or something
6 like that, and then a hearing might be
7 required on that case. And I think that's how
8 the federal law hashes it out, and I don't
9 think I've ever seen a federal hearing on any
10 of these things.
11 CHAIRMAN SOULES: Carl
12 Hamilton.
13 MR. HAMILTON: Pat Hazel met
14 with the Court Rules Committee on two
15 occasions on this, and Alex, I don't know how
16 long since you've talked to him, but I think
17 he's backed off of his position that there
18 should be evidence and proof on this
19 convenience thing. But the problem still is
20 there as to the standard of proof, because
21 while there's no interlocutory appeal, you can
22 still complain on appeal if it's improper
23 venue, and so if you don't have life testimony
24 and you put everything that you would have as
25 live testimony into an affidavit, and you have

1 affidavits on both sides saying the opposite
2 things, then there needs to be some standard
3 of proof.
4 Now, we don't know what happens, for
5 example, under the multiple plaintiffs and
6 intervening plaintiffs. There is an
7 interlocutory appeal there. There the
8 legislature has said that on appeal the
9 determination of whether the joinder
10 intervention is proper is based on an
11 independent determination from the record and
12 not under an abuse of discretion or
13 substantial evidence standard. Nobody knows
14 what that means either, so we don't know
15 whether that sort of standard is what's going
16 to be looked at on appeal on a venue
17 determination, even though it's not
18 interlocutory. So maybe the committee does
19 have to come up with some basis for it.
20 PROFESSOR ALBRIGHT: Except,
21 Carl, the statute --
22 CHAIRMAN SOULES: I was
23 hearing, though, that on a transfer for
24 convenience or in the interest of justice,
25 that was not reviewable by interlocutory

1 appeal and it was not reviewable on appeal on
2 the merits. It is not reviewable at all.
3 PROFESSOR ALBRIGHT: Here is
4 the statute right here: A court's ruling or
5 decision to grant or deny a transfer under
6 subsection (b), which is this ground, is not
7 grounds for appeal or mandamus and is not
8 reversible error.
9 MR. HAMILTON: That's right.
10 It's not grounds for appeal.
11 MR. ORSINGER: Which statute is
12 that?
13 PROFESSOR ALBRIGHT: This is
14 the venue statute.
15 MR. ORSINGER: Which section
16 number?
17 PROFESSOR ALBRIGHT: 15.002(c).
18 CHAIRMAN SOULES: Once again.
19 PROFESSOR ALBRIGHT: 15.002(c).
20 CHAIRMAN SOULES: Thank you.
21 PROFESSOR ALBRIGHT: So it
22 sounds to me like this is not reviewable at
23 all, and it may be that the better way to
24 differentiate it from prima facie proof may be
25 to put it at the discretion of the trial

1 judge.

2 CHAIRMAN SOULES: Justice

3 Duncan.

4 HON. SARAH DUNCAN: That was my

5 understanding, was that it's not reviewable at

6 all, anytime, anywhere. And if that's true --

7 and Rusty was saying the statute simply said

8 that the trial court is to find --

9 PROFESSOR ALBRIGHT: It says

10 "where the court finds," and then it has

11 three different findings that the court may

12 take: maintenance of the action in the county

13 of suit would work an injustice to the movant

14 considering the movant's economic and personal

15 hardship; the balance of interests of all of

16 the parties predominates in favor of action

17 being brought in another county; and the

18 transfer of the action would not work an

19 injustice to any other party.

20 HON. SARAH DUNCAN: Given that

21 formulation, I question whether the court even

22 has the authority to impose a burden against

23 the movant. If it's simply that the trial

24 court finds it and that's not reviewable, then

25 isn't adding -- and I know that -- I'm not

1 saying this doesn't sound ridiculous, but I
2 always thought we had a constitutional right
3 to appeal also. But it seems to me that
4 imposing a burden of proof on that statute is
5 effectively adding a requirement, one; and
6 two, a sort of nonreview, prereview review.
7 PROFESSOR ALBRIGHT: But
8 doesn't that -- to make a finding, doesn't the
9 judge presumably need some evidence before him
10 or her?
11 HON. SARAH DUNCAN: Not under
12 that statute. Under that statute, I don't --
13 PROFESSOR ALBRIGHT: I guess
14 it's only if the judge thinks he or she --
15 HON. SARAH DUNCAN: -- would
16 like to hear evidence or lack of evidence.
17 CHAIRMAN SOULES: One at a
18 time.
19 PROFESSOR ALBRIGHT: Well, I
20 guess this is kind of like the sanction
21 statute. Do we want to try to impose some
22 reason on the statute or not?
23 HON. SARAH DUNCAN: If the
24 legislature has made it, as they seem to have
25 done, completely unreviewable, it seems to me

1 that we should be -- presuming, I mean,
2 because what we would be doing by imposing
3 these types of evidentiary limitations and a
4 particular burden of proof, is we are
5 effectively reviewing it without it being
6 subject to appeal, because we're saying that
7 you can only do at trial courts under these
8 circumstances, one, you have affidavits or
9 live testimony, whichever you choose; and two,
10 you have preponderance of the evidence or
11 substantial evidence for whichever purpose you
12 would use, neither of which would seem to be
13 contemplated in a decision that is totally
14 unreviewable.
15 PROFESSOR ALBRIGHT: Well, then
16 do we want to have the -- I think what the
17 rule needs to do is tell parties what they
18 have to do to raise these grounds for
19 transfer, and it seems like, one, they have to
20 raise it; two, they have to prove that the
21 transfer to which they seek transfer is a
22 county of proper venue; and three, somehow
23 they have to tell the judge that these
24 interests are such that it should be
25 transferred. The judge should make these

1 findings.

2 CHAIRMAN SOULES: Our rule
3 could include a requirement that there be a
4 hearing, for example, because that statute
5 says a judge has to make findings, and there's
6 nothing inconsistent with our rule saying that
7 there has to be a hearing.

8 PROFESSOR ALBRIGHT: And I
9 don't think there's anything inconsistent with
10 saying you have to present affidavit proof.

11 CHAIRMAN SOULES: And can I add
12 this: To me, the burden of proof could just
13 be articulated by repeating what the statute
14 says the judge has to find. It says the judge
15 must find this, without saying on what basis
16 that decision is noodled through his mind or
17 her mind.

18 But are we going to permit -- and the
19 evidence is not laid out, what type have
20 evidence is not laid out in the statute. So
21 the rule could say only by affidavit, or it
22 could say only at an oral hearing, or it could
23 say something like the federal rule; it could
24 require a hearing or no hearing.

25 I mean, those are all pieces of a rule

1 that we could write that compliment the
2 statute; our effort would be to compliment the
3 statute and not be conflicting with the
4 statute, so there are decisions that we could
5 make.
6 And if we want to -- I think Alex was
7 saying that we probably want to direct the bar
8 and the courts what sort of a process should
9 there be leading to the judge making findings,
10 these three findings.
11 So should we have a process articulated
12 in the rules or not? How many feel we should
13 have a process articulated in the rules? 14.
14 Those opposed. Okay. Well, everyone feels we
15 should have a process articulated in the
16 rule. Now the question is what should it be.
17 Richard.
18 MR. ORSINGER: Even though this
19 is not reviewable, I think we still have an
20 obligation to the litigants to provide what we
21 would consider to be due process of law. And
22 due process of law means notice and an
23 opportunity to be heard. And to me, clearly
24 you ought to be able to be heard by having
25 your advocate appear in court and advocate and

1 then also to present some kind of evidence.
2 And I don't know that due process would
3 distinguish that the evidence has to be live
4 rather than by affidavit, but I think that the
5 fact that this is not reviewable on appeal
6 doesn't mean that we shouldn't make these
7 decisions for everybody, because this is --
8 probably we need it more than ever, because
9 there is no appellate oversite on what happens
10 to these people when they get into this
11 situation, so I feel like we should very
12 definitely decide what due process this state
13 is going to offer people and put it in the
14 rule so that the trial judges know and will
15 know that this is all there is, is what's in
16 our rule.
17 PROFESSOR ALBRIGHT: Luke,
18 could we focus maybe on whether we want live
19 testimony or just affidavits?
20 CHAIRMAN SOULES: That's a
21 start. Who wants to speak first? Carl
22 Hamilton.
23 MR. HAMILTON: Well, the
24 statute 15.064 says in all venue hearings no
25 factual proof concerning the merits shall be

1 required. The court shall determine venue
2 from the pleadings and affidavits.
3 MR. McMAINS: The purpose of
4 that statute in terms of no factual proof of
5 the merits is to eliminate the requirement to
6 prove a cause of action. That's when that
7 statute was passed. That's what it's for, and
8 that's what our current rules accommodate.
9 That does not say you don't have to prove
10 the venue facts, and our rules dealt with
11 that. Our rules do deal with that too, and
12 they did in fact amplify what a venue fact
13 means, and it does not mean the merits in
14 terms of the cause of action. That's
15 different from saying that the venue facts and
16 that these findings aren't in fact in essence
17 venue facts that do have to be substantiated.
18 PROFESSOR ALBRIGHT: Yeah, they
19 do have to be proven, but the question is by
20 affidavit --
21 CHAIRMAN SOULES: What Carl has
22 just said is two things. There are two things
23 there. You don't have to prove a cause of
24 action, or you can't prove a cause of action
25 by any means, by affidavits, oral testimony or

1 otherwise. And then, number two, whatever is
2 offered by way of evidentiary support must be
3 by affidavit. That's the second thing.
4 MR. McMAINS: Correct.
5 CHAIRMAN SOULES: And it's the
6 second part, I think he's reading it to us, to
7 suggest that that covers every venue hearing
8 that could arise under Texas Civil Practice &
9 Remedies Code.
10 MR. HAMILTON: That's what it
11 says.
12 CHAIRMAN SOULES: If that's the
13 case, we don't have anything to talk about,
14 because it's going to be affidavit, and that's
15 it. The legislature has said so.
16 Now, who disagrees with the statute where
17 it requires proof only by affidavit covers all
18 of that?
19 MR. McMAINS: I don't disagree
20 with it to the point that you're talking
21 about, those venue hearings. What went on
22 simultaneously with the passage of this
23 statute and the drafting by the Committee of
24 the initial venue rules, which are now our
25 venue rules, Rule 86 and so on that the

1 Supreme Court passed, was that there were a
2 lot of things that the legislature thought
3 they were doing that they didn't do. We fixed
4 them to the extent that we possibly could in
5 those rules. They are an amplification, and
6 they are slightly different.
7 One of those is the fact that the 257
8 practice was totally different and was always
9 different in that an affidavit -- in that we
10 had Supreme Court authority basically which
11 essentially said that 257 motions, once they
12 were filed with an affidavit, that got you a
13 hearing, but then the affidavit went away.
14 You had to put on evidence. That was
15 inconsistent with this entire notion. It had
16 nothing to do with the merits. It had to do
17 with this whole process.
18 CHAIRMAN SOULES: Well, our
19 assumption is that we're not dealing with 257
20 issues. We're dealing with non-257 issues.
21 MR. McMAINS: I understand.
22 But what I'm saying is, that section of the
23 statute is there simultaneous with a section
24 of the statute above it, which hasn't been
25 changed, which says one of the grounds of

1 transfer of venue is essentially the Rule 257
2 practice.
3 CHAIRMAN SOULES: Alex says
4 not.
5 MR. McMAINS: Huh?
6 PROFESSOR ALBRIGHT: No, it
7 does.
8 MR. McMAINS: No, it does.
9 PROFESSOR ALBRIGHT: But I just
10 don't want to get into -- I think that's a
11 different issue which we can address with
12 Rule 257.
13 MR. McMAINS: What I'm saying
14 is we already addressed it. That's why we did
15 what we did with the rule. Nobody -- and the
16 reason for that is.
17 PROFESSOR ALBRIGHT: But
18 what --
19 CHAIRMAN SOULES: Hold on.
20 Rusty speak, and then back to Alex.
21 MR. McMAINS: But the reason
22 that we dealt with it at the time was because
23 our rules preserved -- I mean, the statute
24 specifically said that the way that you
25 preserve your right to transfer venue is you

1 have to file a timely motion; that is, it has
2 to be preserved by due order of filing. That
3 didn't make any sense in a 257 context, so
4 that's why we basically took it out.
5 PROFESSOR ALBRIGHT: Rusty, do
6 you --
7 CHAIRMAN SOULES: Now Alex.
8 PROFESSOR ALBRIGHT: Rusty, do
9 you favor only affidavits, or do you want live
10 testimony for these proceedings?
11 MR. McMAINS: No. For these
12 proceedings I don't have any problem with only
13 affidavits. But what I'm saying is, I do not
14 think we want to express an opinion that 257
15 is governed in the same manner, and I do not
16 believe that we should take the position that
17 a statute that was passed in 1982 that was
18 amended without change to those sections
19 should be broader interpreted than when it was
20 done at the time of that passage along with
21 those -- other words, I don't know want people
22 to take the position you can't get --
23 CHAIRMAN SOULES: Time out.
24 Does anyone disagree that the proof in a Texas
25 Civil Practice & Remedies Code transfer of

1 venue shall be limited to affidavits?
2 MR. ORSINGER: Well, I think we
3 need to discuss whether affidavits include
4 depositions testimony, because the proposal
5 has been made that we interpret the word
6 "affidavit" to include deposition testimony.
7 PROFESSOR ALBRIGHT: Current
8 practice is that affidavits can include
9 deposition testimony. The deposition just has
10 to be attached to an affidavit that proves up
11 the deposition.
12 MR. ORSINGER: Okay. Well, I
13 want to make that clear, because a lot of
14 people think an affidavit is something you
15 type up and swear in front of notary public,
16 and we're using a special meaning that
17 includes --
18 CHAIRMAN SOULES: No, we're
19 not. We're saying that you can have exhibits
20 to an affidavits, which can include deposition
21 testimony.
22 MR. ORSINGER: Okay.
23 MR. McMAINS: The affidavit is
24 the method to authenticate the otherwise filed
25 material or even unfiled discovery.

1 CHAIRMAN SOULES: People are
2 using affidavits --
3 MR. ORSINGER: -- as a vehicle
4 for evidence. Okay.
5 CHAIRMAN SOULES: Carl
6 Hamilton.
7 MR. HAMILTON: Is Rusty saying
8 that old 257, which is now incorporated in
9 15.063 right above 064, that under that
10 provision you can still have live testimony?
11 MR. McMAINS: I think the
12 Supreme Court has so held.
13 MR. HAMILTON: Well, but it
14 doesn't say that in here. Right below it, it
15 says only on pleadings or affidavits, so all
16 of that is the same question.
17 MR. McMAINS: The Supreme Court
18 already ruled on that issue.
19 MR. HAMILTON: Excuse me?
20 MR. McMAINS: The Supreme Court
21 has already ruled on that issue.
22 MR. HAMILTON: Under this?
23 MR. McMAINS: That's not new.
24 This is what the legislature -- the
25 legislature didn't change the 257 practice.

1 CHAIRMAN SOULES: Well, 15.063
2 was amended in 1995 -- '85 to include the
3 ground that an impartial trial cannot be had
4 in the county where the action was pending.
5 PROFESSOR ALBRIGHT: That is --
6 MR. HAMILTON: The next one
7 said --
8 MR. McMAINS: And it is
9 subsequent to that that --
10 PROFESSOR ALBRIGHT: That is a
11 problem with the statute, and I think
12 everybody --
13 PROFESSOR DORSANEO: Let me
14 explain.
15 PROFESSOR ALBRIGHT: And I
16 think everybody would agree that it really
17 doesn't make any -- I mean, I guess there is
18 an issue as to whether to separate the
19 Rule 257 process from the Civil Practice &
20 Remedies Code process. I think it is
21 something to debate, but I think we can debate
22 that when we take up Rule 256 and -- I mean,
23 Rule 257 instead of right here. I don't think
24 it affects what we're doing right here.
25 PROFESSOR DORSANEO:

1 Mr. Chairman.
2 CHAIRMAN SOULES: Bill
3 Dorsaneo.
4 PROFESSOR DORSANEO: It took me
5 a long time to say this: 15.064 and 15.063
6 reference an unfair trial practice and creates
7 an interpretive difficulty, just as 15.063 is
8 referenced to due order and to transfers by
9 consent casts some doubt on 15.063's role in
10 this process and its relationship to 15.064.
11 I argued Union Carbide vs. Moye in the
12 Supreme Court, a case in which these issues
13 were squarely raised, you know, and the Court
14 had a lot of difficulties with it. And
15 basically the main guidance you get from the
16 Moye opinion about what to do was from Justice
17 Hecht's concurrence, I believe, where he says,
18 well, maybe this is the kind of thing where
19 the trial judge can do it on the basis of
20 affidavits or live testimony, if he wants to,
21 like the way Rule 120(a) is worded now.
22 Union Carbide vs. Moye does not stand at
23 all for the proposition and 15.064 requires
24 only affidavits in a 257 context or in any
25 context other than the proper venue analysis.

1 And this, I think, is more like, although it's
2 different from, 257 than it's like proper
3 venue, despite the location of the numbers in
4 the statute.
5 PROFESSOR ALBRIGHT: It is --
6 this convenience and justice grounds is
7 included in the defined term "proper venue" in
8 the venue statute, so it is a statutory
9 grounds for venue separate from changing your
10 forum because it's an unfair forum.
11 Can I move the question on affidavits
12 versus live testimony?
13 CHAIRMAN SOULES: Well, I think
14 that's what we're trying to get at. Are you
15 including --
16 MR. ORSINGER: 257, no.
17 CHAIRMAN SOULES: -- for
18 15.063, section (2)?
19 PROFESSOR ALBRIGHT: No. For
20 15.002(b) grounds, only for inconvenience and
21 in the interest of justice.
22 PROFESSOR DORSANEO: One
23 principal way to draw a distinction is, and
24 one of the problems in the Moye case, is that
25 the defendants had difficulty getting

1 affidavits from the claimants, whereas in
2 these kinds of cases presumably you'll be able
3 to come up with an affidavit that will
4 indicate the basis of your argument as to
5 whether it's fair or unfair, because you can
6 have your own people who can do that. So
7 there is a principal distinction between the
8 two procedures, because 257 may require you to
9 get an affidavit from an unavailable source.
10 CHAIRMAN SOULES: Okay. So you
11 want a show of hands on whether to limit proof
12 to affidavits in the traditional proper venue,
13 mandatory venue, and also on the convenience
14 of the parties and in the interest of justice,
15 right?
16 PROFESSOR ALBRIGHT: Right.
17 CHAIRMAN SOULES: And only on
18 that at this time?
19 PROFESSOR ALBRIGHT: Correct.
20 CHAIRMAN SOULES: Okay. Those
21 who say it should be limited to affidavit show
22 by hands. Does anyone disagree? Okay
23 everyone says affidavits.
24 HON. DAVID PEEPLES: Quick
25 question. If the judge wants to hear live

1 testimony at a hearing, can he or she do
2 that?
3 CHAIRMAN SOULES: We said
4 limited to affidavits.
5 MR. ORSINGER: We just voted
6 no.
7 MR. McMAINS: That hasn't
8 stopped --
9 HON. DAVID PEEPLES: Well, if
10 the rule says you can't take it into account
11 and it's not appealable --
12 MR. McMAINS: Well, it's not
13 appealable and it's not mandamusable either.
14 So I don't think --
15 MR. ORSINGER: Wait a minute,
16 wait a minute --
17 CHAIRMAN SOULES: Are we off
18 the record? Do you all want to go off the
19 record and chat, or do we want to debate this
20 on the record? Okay. Richard Orsinger.
21 MR. ORSINGER: I'm not
22 convinced that mandamus isn't available if the
23 trial judge is not following the proper
24 procedures. I'm convinced that if they're
25 following the proper procedures, you can't

1 mandamus the outcome, but if a court is
2 hearing live testimony in contravention to a
3 rule in a statute that prohibits it, I think a
4 mandamus can stop that. That's just my
5 opinion, and we've got lots of experts around
6 the table.
7 CHAIRMAN SOULES: Okay. What's
8 next, Alex?
9 PROFESSOR ALBRIGHT: I guess
10 the next is do we want to put a standard of
11 proof in the rule? Do we want to put
12 discretion, preponderance of the evidence, or
13 what do we want to do about that?
14 CHAIRMAN SOULES: Why don't we
15 just use the judge shall make findings and
16 repeat what those findings are and put them in
17 the rule. It doesn't make any difference what
18 standard the judge uses. He just has to make
19 findings.
20 PROFESSOR ALBRIGHT: Judge
21 Guittard --
22 MR. ORSINGER: Luke, it does
23 make a difference to the judge if the judge
24 wants to know what standard to use. I know as
25 a practical matter they can do it on arbitrary

1 reasons, but I think that we may have a duty
2 now, since there isn't going to be any
3 appellate review to say that it's either going
4 to be addressed to the discretion and not tell
5 them, or whether they ought to weigh the
6 evidence and go with the preponderance or
7 whatever.
8 CHAIRMAN SOULES: Why don't we
9 say the judge shall can you consider and weigh
10 all of the evidence and make a finding.
11 PROFESSOR ALBRIGHT: Judge
12 Guittard --
13 CHAIRMAN SOULES: Judge
14 Guittard.
15 HON. C. A. GUITTARD: On the
16 question of burden of proof, I think probably
17 some provision with respect to the burden of
18 proof would be helpful to the trial judge to
19 know what he's supposed to do. Even though
20 it's not reviewable, he may not follow it, and
21 he might not be reviewed if he doesn't follow
22 it. But I can see how a judge, if he's
23 balancing the evidence or whether he says one
24 side or the other doesn't have any evidence,
25 he might want to know where he ought to come

1 down on the burden of proof question, so I see
2 no inconsistency with prescribing a burden of
3 proof even though his decision is not
4 reviewable.
5 CHAIRMAN SOULES: Okay. How
6 about this: "The judge shall weigh and
7 consider all of the evidence and make findings
8 by a preponderance of the evidence that," and
9 then follow it by whatever those are. Would
10 that work?
11 PROFESSOR DORSANEO: Yes.
12 CHAIRMAN SOULES: Does anybody
13 have a different suggestion?
14 MR. ORSINGER: Now, have we
15 allocated the burden of persuasion in that
16 clause or -- assuming that someone does not
17 show something by a preponderance, who wins?
18 The county of current venue wins unless the
19 party seeking the change convinces the judge
20 by a preponderance to go to the new county?
21 PROFESSOR ALBRIGHT: Right.
22 MR. ORSINGER: Okay. So we
23 would write it that the party seeking the
24 change must convince the court by a
25 preponderance; otherwise, the change is

1 denied, right?

2 CHAIRMAN SOULES: Burden of

3 proof is on the party seeking the transfer.

4 PROFESSOR DORSANEO: Now, you

5 want a burden in there too for the trial

6 judge's benefit so that the trial judge can

7 say, "I had to send it," or "I had to keep

8 it," rather than saying --

9 HON. C. A. GUITTARD: Right.

10 CHAIRMAN SOULES: That's the

11 same issue that Judge Brister had earlier.

12 PROFESSOR DORSANEO: That

13 relates to that other rule about the press.

14 CHAIRMAN SOULES: Okay.

15 HON. DAVID PEEPLES: Question.

16 The burden is on the movant in the

17 inconvenience situation only? We're not

18 talking about venue generally, are we?

19 PROFESSOR ALBRIGHT: Right.

20 CHAIRMAN SOULES: And also the

21 preponderance of the evidence is on

22 inconvenience only, because we've got this

23 prima facie, what is it, Ruiz vs. Conoco,

24 that's already in place on what is proper

25 versus mandatory and all that.

1 MR. ORSINGER: Well, the burden
2 is still on the party seeking transfer to a
3 county of proper venue to prove by prima facie
4 evidence; isn't that right?
5 CHAIRMAN SOULES: To present
6 prima facie evidence.
7 MR. ORSINGER: Yeah. The
8 standard that you have to meet is prima facie,
9 but you have a burden to meet it or else it
10 stays where it's filed.
11 CHAIRMAN SOULES: Under Ruiz
12 vs. Conoco, yes.
13 MR. ORSINGER: And under the
14 proposed rule also, I believe, the way Alex
15 wrote this.
16 PROFESSOR ALBRIGHT: Under the
17 way the proposed rule is being written and
18 current practice, Ruiz vs. Conoco, everybody
19 has a burden of presenting prima facie proof
20 that their county is a proper county. If
21 there is prima facie proof that the country in
22 which the suit is filed is proper, then it
23 stays in the county.
24 CHAIRMAN SOULES: If they're
25 denied, if the venue facts are denied. Okay.

1 PROFESSOR ALBRIGHT: Now, do
2 you all want to go to the joinder issues? I
3 guess the decision here is more the mechanism
4 for objecting to plaintiffs that are already
5 joined or who are attempting to intervene who
6 cannot independently establish venue.
7 What my thinking is is that if the
8 plaintiff is already joined, is already a
9 plaintiff, then you file a motion to transfer
10 venue as to that plaintiff's claim. Then if
11 an additional plaintiff intervenes late in the
12 suit, your vehicle is filing a motion to
13 strike the intervention on venue grounds.
14 What you're doing is you're saying, "Judge,
15 don't let this plaintiff come into this
16 lawsuit because this plaintiff cannot
17 independently establish venue." So you file a
18 motion to strike the intervention.
19 I think the way Pat Hazel has it written
20 is that even on the intervention grounds, if
21 he has a motion to transfer venue, that's
22 filed late in the lawsuit.
23 CHAIRMAN SOULES: What number
24 is the intervention rule?
25 PROFESSOR DORSANEO: 60.

1 CHAIRMAN SOULES: 60. It would
2 be a motion to strike, because 60 says, "Any
3 party may intervene by filing a pleading,
4 subject to being stricken out by the court for
5 sufficient cause on the motion of any party."
6 So if we follow that rule, it would be a
7 motion to strike.
8 PROFESSOR ALBRIGHT: I would
9 just amend Rule 60 to include venue as a
10 grounds for a motion to strike.
11 PROFESSOR DORSANEO: The only
12 concern I would have would be the potential
13 case where somebody could get messed up by the
14 limitations if you do it like that, because
15 we've struck them and you're in effect
16 dismissing their case, and then if their case
17 was dismissed and they had to file it over
18 again, then it would be a day late and at
19 least a dollar short.
20 PROFESSOR ALBRIGHT: The
21 alternative, then, is a motion to transfer and
22 to sever. You sever that plaintiff out and
23 then transfer that case.
24 PROFESSOR DORSANEO: I would
25 think it might be a motion to strike or to

1 transfer in terms of transfer, but....

2 CHAIRMAN SOULES: Well, the

3 risk you're talking about is already present

4 in other circumstances where venue is not the

5 question. If a party seeks to intervene and

6 the judge strikes them and the limitations are

7 gone, it's gone for any reason. Maybe the

8 judge just doesn't want to try that many

9 people in the case.

10 PROFESSOR DORSANEO: But our

11 intervention rules are so generous normally.

12 This would be -- I don't know if I'm speaking

13 for all the times, but this is a serious

14 impediment to intervention that doesn't

15 otherwise exist. What difference does it

16 make, though, which way we do it, transfer it

17 or sever it?

18 PROFESSOR ALBRIGHT: Before I

19 started the drafting process, I just wondered

20 if anybody felt strongly one was or the other.

21 MR. McMAINS: Well, the problem

22 is the timing of what you do in terms of being

23 able to appeal it once there's a

24 determination. It's based on something

25 mythical. I mean, it's based on the fact of

1 the intervention; that there's some action by
2 the trial judge allowing the intervention, and
3 in truth, there isn't any action by the trial
4 judge allowing the intervention other than
5 overruling the motion to strike.
6 CHAIRMAN SOULES: Actually
7 Rule 60 ought to be changed to say "subject to
8 being severed by the court."
9 PROFESSOR ALBRIGHT: Right now
10 you dismiss the plaintiff instead of severing.
11 MR. ORSINGER: That's true.
12 CHAIRMAN SOULES: That's what
13 should be done. The pleadings shouldn't be
14 striken, because they may have a perfectly
15 good case right there in that county but the
16 judge just doesn't want to take it on in this
17 particular cause number, and yet the rule says
18 it gets stricken and dismissed.
19 PROFESSOR DORSANEO: It's
20 especially true in Rule of Civil Procedure 41,
21 which has exactly the opposite philosophy. It
22 says it won't be dismissed but it will be
23 severed.
24 CHAIRMAN SOULES: My concept of
25 an answer to this is to change Rule 60 to say

1 the judge severs an intervention that they
2 don't want present in the cause number, and
3 that there would be a severance and a motion
4 to transfer. However, now we're going to have
5 to change -- we're going to have to have a due
6 order of pleading, I guess, in the case of
7 interventions?
8 PROFESSOR ALBRIGHT: I think
9 what you do is you just have to have a
10 deadline. After the intervention you have to
11 have filed this motion within a certain period
12 of time. Pat's draft has a 20-day -- he
13 picked 20 days, I think just out of the sky,
14 just as the period after which you cannot
15 object to that intervention any further.
16 PROFESSOR CARLSON: And what's
17 the appellate deadline?
18 PROFESSOR ALBRIGHT: The
19 appellate deadline is 20 days after the order
20 is signed for the interlocutory appeal.
21 CHAIRMAN SOULES: And the
22 motion to sever doesn't prejudice the motion
23 to transfer?
24 MR. ORSINGER: It shouldn't.
25 CHAIRMAN SOULES: It shouldn't,

1 but it would under the present case law. The
2 motion to transfer comes only behind a 120(a)
3 motion, and if you've got a motion to sever in
4 front of it, you're in court and you waive
5 venue.
6 MR. ORSINGER: I see what
7 you're saying. So the parties filing late
8 should be permitted to file a motion to sever
9 before the venue determination is made;
10 otherwise, they've lost their venue
11 determination.
12 CHAIRMAN SOULES: Or coinciding
13 with it, because the severance has to come
14 before the motion to transfer.
15 MR. ORSINGER: Yeah.
16 CHAIRMAN SOULES: Okay.
17 PROFESSOR ALBRIGHT: I think
18 what you can do is you can have a motion to --
19 if it's an initially joined plaintiff, you can
20 have a motion to transfer as to that
21 particular plaintiff, and then the judge
22 severs and transfers in that same order. If
23 you have an intervening plaintiff later on,
24 you file a motion to strike the intervention
25 on severance grounds -- I mean, on venue

1 grounds.

2 CHAIRMAN SOULES: But you would

3 need to say that a motion to sever filed with

4 a motion to transfer doesn't prejudice the

5 motion to transfer.

6 PROFESSOR ALBRIGHT: If

7 somebody is intervening, it could be long

8 after the original motion to transfer is

9 heard, or who knows what else is going on, so

10 this cannot be a motion that is prejudiced by

11 that.

12 CHAIRMAN SOULES: Maybe.

13 PROFESSOR ALBRIGHT: If

14 somebody intervenes six months into the

15 lawsuit --

16 CHAIRMAN SOULES: You're going

17 to have to create a mechanism for handling an

18 intervention.

19 PROFESSOR ALBRIGHT: Right.

20 CHAIRMAN SOULES: Which is

21 going to include the right of the defendant to

22 file another motion to transfer venue for a

23 new party.

24 PROFESSOR ALBRIGHT: That's why

25 I would prefer to call it a motion to strike

1 the intervention on a venue ground.
2 CHAIRMAN SOULES: Then we've
3 got this limitation problem, which probably
4 should be revisited upon maybe.
5 MR. ORSINGER: No.
6 PROFESSOR CARLSON: No.
7 CHAIRMAN SOULES: I mean, it's
8 a pretty draconian concept.
9 MR. ORSINGER: There's no
10 reason, there's no public purpose to support
11 that penalty.
12 PROFESSOR ALBRIGHT: Let me
13 work on the drafting. It sounds like -- I
14 think I have a sense of what you all are
15 worried about.
16 CHAIRMAN SOULES: It looks like
17 intervention, it's late, so it can't be the
18 only motion to transfer venue. It's going to
19 be a new motion to transfer venue that's
20 tolerated somewhere into the case. And it's
21 going to be filed together with or subsequent
22 to a motion to sever which can't prejudice
23 that motion to transfer. Those are the
24 problems that have to be dealt with maybe
25 among others.

1 MR. HAMILTON: Why would you
2 need a motion to sever? If the motion to
3 transfer is granted, it's severed. If it
4 isn't granted, it isn't going to be severed.
5 CHAIRMAN SOULES: I don't
6 know. What happens whenever a plaintiff sues
7 several defendants and one defendant has a
8 valid motion to transfer? Can you have that?
9 Up to now you couldn't have that.
10 PROFESSOR CARLSON: Now one
11 waiver doesn't operate from one defendant to
12 another.
13 PROFESSOR ALBRIGHT: Under the
14 statute one defendant can't waive venue for
15 any other defendant.
16 CHAIRMAN SOULES: Well, this
17 process is going to have to go right up to the
18 front motion to transfer, for severance and
19 transfer. The answer, Carl, is it's a brand
20 new problem, and unless the transfer makes an
21 automatic severance of some kind, there would
22 have to be a motion to sever, unless the
23 motion to transfer includes a severance. Up
24 until now, if you had venue over one, you had
25 venue over all, so you didn't split them up.

1 Now we've got a new problem.
2 MR. ORSINGER: Then we should
3 write the procedure that if the motion to
4 transfer is granted as to one party, that that
5 effects a severance of that party from the
6 remainder of the lawsuit.
7 CHAIRMAN SOULES: That could be
8 another way to handle it.
9 MR. ORSINGER: I don't see why
10 you need to file two motions. It's really
11 just the disposition that we're worried about,
12 isn't it?
13 CHAIRMAN SOULES: That's
14 another way to handle it, but we all see the
15 problem.
16 Well, it's noon, and I appreciate all the
17 work that you all have done on this, another
18 arduous session. We'll be back on May the
19 10th, I misstated earlier on the record when
20 we would come back, and we'll go from there.
21 (MEETING ADJOURNED.)
22
23
24
25

1 -

2 CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

3 -

4

5 I, WILLIAM F. WOLFE, Certified Shorthand

6 Reporter, State of Texas, hereby certify that

7 I reported the above hearing excerpt of the

8 Supreme Court Advisory Committee on March 16,

9 1995, and the same were thereafter reduced to

10 computer transcription by me.

11 I further certify that the costs for my

12 services in this matter are $1,123.00,

13 charged to Soules & Wallace, P.C.

14

15

16 Given under my hand and seal of office on

17 this the 8th day of April, 1996.

18

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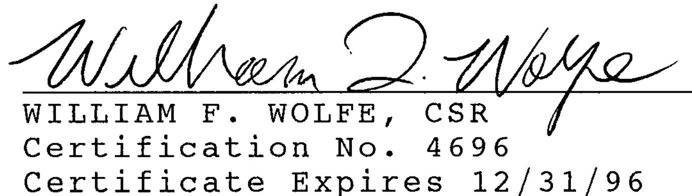

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