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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE
9
NOVEMBER 22, 1996
10
(MORNING SESSION)
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19 Taken before William F. Wolfe,
20 Certified Court Reporter and Notary Public in
21 Travis County for the State of Texas, on the
22 22nd day of November, A.D. 1996, between the
23 hours 8:35 o'clock a.m. and 12:30 o'clock
24 p.m., at the Texas Law Center, 1414 Colorado,
25 Rooms 101 and 102, Austin, Texas 78701.

COPY

NOVEMBER 22, 1996

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Charles L. Babcock
Pamela Stanton Baron
David J. Beck
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo III
Sarah B. Duncan
Michael T. Gallagher
Anne L. Gardner
Honorable Clarence A. Guittard
Tommy Jacks
Joseph Latting
Gilbert I. Low
Russell H. McMains
Anne McNamara
Robert E. Meadows
Richard R. Orsinger
Honorable David Peeples
David L. Perry
Luther H. Soules III
Paula Sweeney
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta, Jr.
Hon. Ann T. Cochran
Michael A. Hatchell
Charles F. Herring, Jr.
Donald M. Hunt
Franklin Jones, Jr.
David E. Keltner
Thomas S. Leatherbury
John H. Marks, Jr.
Hon. F. Scott McCown
Anthony J. Sadberry
Stephen D. Susman

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Hon Sam Houston Clinton
Paul N. Gold
Doris Lange
Mark Sales
Bonnie Wolbrueck

EX OFFICIO MEMBERS ABSENT:

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

NOVEMBER 22, 1996
MORNING SESSION

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Evidence Report	6234-6387
TRCE 606	6236-6239
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TRCP 177a	6250-6260; 6274;6279

1 INDEX OF VOTES

2

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

5 6239
6246
6 6247
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7 6279 (two votes)

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1 (Meeting convened at 8:36 a.m.)
2 CHAIRMAN SOULES: I want to
3 welcome all the members. I appreciate your
4 punctuality this morning. Especially I want
5 to recognize Justice Hecht, our liaison member
6 of the Supreme Court for this committee, and
7 Judge Clinton. We are somewhat saddened by
8 the fact that Judge Clinton, this is going to
9 be his last meeting. He is retiring, as you
10 know, from the Court of Criminal Appeals.
11 We'd like to say to you, Judge, that if
12 you're ever inclined to help us, we would love
13 to have you. And we have appreciated your
14 contributions for several years here going
15 back to your membership as one of the original
16 committee persons on the Texas Rules of
17 Appellate Procedure and the guidance that you
18 gave on that. That would not have happened if
19 you had not been there to help make it happen
20 in a big, big way. I say "help," but it was
21 not just help, but really giving it a lot of
22 motivation and drive, and I think we have you
23 to thank for that; and also for the efforts to
24 merge the Rules of Evidence together and for
25 your assistance in the revision of the Rules

1 of Appellate Procedure.
2 I guess you people have got the
3 preliminary draft of that. It's back on the
4 table to my right. There are several boxes,
5 and it's about an inch-thick document that the
6 Supreme Court has returned to us.
7 We have a full agenda I think for this
8 meeting, particularly since we've got the
9 Rules of Appellate Procedure back to visit
10 about. I think we will use all of today and
11 all of the hours scheduled for tomorrow before
12 we're able to get done.
13 Justice Hecht has contacted me in the
14 interim about summary judgments and also about
15 the Rules of Appellate Procedure. The Court,
16 I know, is looking at a number of matters that
17 we have sent to them. I don't know exactly
18 which ones at this point, but they've done
19 some looking at discovery.
20 And if it's not an imposition on you,
21 Justice Hecht, if you could maybe introduce to
22 us at the meeting today what you see we may
23 need to accomplish and maybe let us know the
24 status of the Court on several of our work
25 products.

1 JUSTICE HECHT: All right.
2 First of all, with respect to the Appellate
3 Rules, as Luke says, there is a draft
4 available in the back. This is the
5 recommendations that the committee sent to the
6 Court with some modifications made by the
7 Court and style edits made by Bryan Garner.
8 And the Court has not gone back through the
9 style edits or other modifications that were
10 made in that process to look at all those
11 changes for one last time, but it's scheduled
12 to do that a week from Tuesday, next Tuesday,
13 which is the first Tuesday in December. And I
14 hope at that conference in early December the
15 Court will look at all of the proposed
16 Appellate Rules and essentially sign off on
17 them, subject, however, to additional comments
18 that we get from you.
19 We have been working in this process, as
20 I hoped we would, with Bill Dorsaneo and Mike
21 Hatchell, Clarence Guittard and others, I
22 don't want to leave anybody out. But a number
23 of people from the committee who worked on the
24 draft and the recommendations originally have
25 been in constant contact with us through the

1 editing process so that we think we have a lot
2 of comments from the committee already taken
3 into account in the draft that you have. But
4 as I hoped when we started, we do want to give
5 every member of the committee some time, as
6 much as we can afford, to look through this
7 and to make any, absolutely any comments that
8 you have, be they great or small, as to
9 substance or style. Whatever they may go to,
10 please send them in to us.
11 Now, our schedule is we would hope to
12 meet the mid January deadline for publishing
13 the proposed changes in the March issue of the
14 Bar Journal, which would then give an
15 effective date to the rules of June the 1st of
16 1997, so that's the schedule we want to try to
17 keep to.
18 There's not another scheduled meeting of
19 the committee between now and then, so we
20 really need your comments, if we can, in
21 writing. Then if you'll send them to me or to
22 Lee or to Luke, we'll get them together. To
23 the extent you need to see copies of them, we
24 will be happy to distribute them, but we need
25 to move this process along so that we can

1 hopefully get to a completion date toward the
2 end of December.
3 We just got these copies back from the
4 State Bar yesterday or this morning, so
5 they're hot off the press. The Court of
6 Criminal Appeals has not seen them. They have
7 sent us some suggestions, which we were happy
8 to include, and have made some other
9 suggestions that are mostly as to their rules
10 which, of course, we're anxious to incorporate
11 in the draft. And we hope to be on kind of a
12 parallel course with our sister court in
13 trying to finalize these revisions as quickly
14 as we can.
15 So please send in your comments, but
16 probably the last date that we can hear from
17 you and do much about it before they go in the
18 Bar Journal is the first day or two of
19 January.
20 So that's all I have on that, Luke.
21 CHAIRMAN SOULES: Okay. Judge
22 Clinton, could you give us any insight into
23 the progress of the Court of Criminal Appeals
24 on these Appellate Rules? Are we --
25 HON. SAM HOUSTON CLINTON:

1 We've been kind of waiting for the final
2 product. I've circulated early on all of the
3 drafts that you had, and I assume the judges
4 have been looking at them at their will, but
5 we've not taken any united action on them.
6 CHAIRMAN SOULES: Will these go
7 through your advisory committee, or has that
8 not been decided?
9 HON. SAM HOUSTON CLINTON: Our
10 advisory committee has waned to the point
11 where I'm not sure there's much left of it, to
12 tell you the truth, so that's going to be up
13 to the PJ, and we haven't discussed it. I
14 would recommend no. I would recommend the
15 judges, our own internal committee of three or
16 four judges take a look at it and skip through
17 whatever is left of our advisory committee.
18 CHAIRMAN SOULES: So the
19 approval in your court is likely to happen
20 while you're there before the end of the year,
21 do you think?
22 HON. SAM HOUSTON CLINTON: No,
23 I doubt that. I think chances are you'll see
24 the three new judges come on board before too
25 much is done about it. It seems like it's

1 kind of fair, too, to let them have a crack at
2 it, too, to kind of get initiated.
3 CHAIRMAN SOULES: Okay.
4 HON. SAM HOUSTON CLINTON: But
5 I'll try to move it along. I'm not going to
6 be very sanguine about getting it done, now,
7 but I'll try.
8 CHAIRMAN SOULES: Well, of
9 course, it's your court. I'm not trying to
10 set that schedule. I'm just asking for
11 information.
12 Okay. Justice Hecht, next, so our
13 responsibility will be to get to the Supreme
14 Court in writing all comments by -- did you
15 say early -- by the end of the year, I think?
16 JUSTICE HECHT: That would be
17 best, yes.
18 CHAIRMAN SOULES: So by
19 December 31st. And if you will, please, if
20 you will copy me, if you send anything
21 directly to the Court, because I try to keep
22 the records of the committee, and I would like
23 to have a complete set of all comments in our
24 files just for legislative rule making
25 background purposes, if anyone wants to look

1 into that. People frequently call us, and
2 sometimes it seems it's easier for us to find
3 things for people than sometimes it is for the
4 Court, as Lee is pretty busy with all of his
5 work. So if you will copy me, I would
6 appreciate it.
7 Anything else on the Appellate Rules,
8 Judge, then?
9 JUSTICE HECHT: No, sir.
10 CHAIRMAN SOULES: Okay. Let's
11 go to work. Next, you had called me and asked
12 to put the summary judgment rule on the front
13 burner for this meeting, and maybe if you
14 will, please, give us some background on that.
15 I'm passing the signup list here for the
16 meeting as we begin.
17 JUSTICE HECHT: As you know,
18 the State Bar Court Rules Committee has done
19 quite a bit of work on the summary judgment
20 rule in the last couple of years, I guess, and
21 has sent their draft over here along about the
22 spring or summertime. I think this committee
23 discussed the rule, and it was assigned to
24 Steve Susman's subcommittee. Then work got
25 delayed on it, in part I suppose because Steve

1 has been in trial quite a bit for the last
2 several months.
3 But it's very likely that bills will be
4 introduced in the upcoming legislative session
5 to enact a summary judgment rule, and the
6 Court would rather not see that aspect of our
7 rules ceded to the legislature. And my sense
8 is that it's fairly likely that a bill to
9 change the summary judgment rule will pass,
10 but I leave that to people who are more
11 familiar with that process than I am. But in
12 any event --
13 CHAIRMAN SOULES: Did you say
14 it's likely or unlikely?
15 JUSTICE HECHT: My sense is
16 it's likely.
17 CHAIRMAN SOULES: Okay. Excuse
18 me.
19 JUSTICE HECHT: And I think
20 it's also fairly likely that if it passes, the
21 governor will sign it. So I would encourage
22 the committee to finish its work on the
23 summary judgment rule at this meeting so that
24 we can have the benefit of your thoughts prior
25 to the beginning of the session. And my sense

1 was we were fairly far along until we got
2 derailed, so I hope we can make some progress
3 at this meeting.
4 CHAIRMAN SOULES: Can you give
5 us the status on the other rules? Obviously
6 the Court has been working on Appellate Rules
7 and may not have given its attention to some
8 of the other issues yet, but if you can help
9 tell us where we are.
10 JUSTICE HECHT: We are ready to
11 give final approval, subject to editing for
12 style, of the Jury Charge Rules and I think
13 probably the Sanction Rules, and there's
14 really a small amount of work left on those.
15 And the Court intends to turn with full
16 energy to the Discovery Rules next, and I
17 think we'll start work on those in the next --
18 well, before Christmas, and hope to have those
19 back to the committee in the first couple of
20 months of next year.
21 Bill Dorsaneo has shown me this morning
22 some of the drafting in the first series,
23 first several hundred rules of the Civil
24 Rules, and they're pretty far along, so it's
25 possible that to incorporate the Discovery

1 Rules in those and maybe have those ready by
2 the middle part of next year is my sense of
3 it.
4 CHAIRMAN SOULES: The late 200s
5 and early 300 series of rules, those haven't
6 really reached the Court's attention at this
7 point, is that correct?
8 JUSTICE HECHT: That's correct.
9 CHAIRMAN SOULES: Okay. We
10 have a meeting schedule that we're passing
11 around. As I understand it, Judge, in spite
12 of the fact that our terms officially end on
13 the 31st of December, I think all members'
14 terms, we can anticipate that there will be
15 some extension of those terms for everyone?
16 JUSTICE HECHT: Yes, or penalty
17 or whatever it is. No, we don't want to
18 change horses in the middle of the stream
19 here, so if we can impose upon all of you to
20 stay a little while longer at least until we
21 get to another stopping place, then I'm
22 certain the Court is going to do that. Some
23 of you have served for years on this group,
24 and it's become almost slavery, I'm afraid,
25 but it's your choice, and we greatly

1 appreciate that effort.
2 But we really -- there are several
3 vacancies on the committee. It's up to about
4 half a dozen now, and we have resisted filling
5 those vacancies because we didn't want to
6 bring in people who would be literally
7 starting from scratch as to all of the work in
8 progress, so we've tried to keep the basic
9 group together here. So if we can impose on
10 you -- and Luke, on you to continue to chair
11 the meetings -- I think the Court would like
12 to continue over the terms until we get to a
13 stopping spot.
14 CHAIRMAN SOULES: Okay. Having
15 that information ahead of time, I proposed a
16 meeting schedule, again, every other month
17 through 1997. We may not need all those
18 meetings, but they begin with -- they're in
19 the same months in '97 that we had them in
20 '96, so I have passed out a meeting
21 schedule. Pam Baron.
22 MS. BARON: Every year in March
23 we schedule our meeting right at spring
24 break. Is there a way to move it back a
25 week? It happens every year.

1 MR. JACKS: It also coincides
2 with a State Bar seminar that at least a few
3 of us are involved in every year.
4 CHAIRMAN SOULES: What's that,
5 I'm sorry, Tommy?
6 MR. JACKS: Luke, it also
7 coincides with a State Bar advanced med mal
8 seminar which is at that same time every year.
9 CHAIRMAN SOULES: So you're
10 talking about having it --
11 MR. JACKS: There are a few of
12 us who at least frequently are speakers at
13 that seminar.
14 MS. BARON: The 22nd or 23rd
15 maybe.
16 CHAIRMAN SOULES: That's also
17 spring break.
18 MS. BARON: Well, it's not in
19 Austin, I guess.
20 CHAIRMAN SOULES: That's the
21 problem. We can probably do it on the 8th and
22 9th.
23 MS. BARON: That would be the
24 7th and 8th.
25 CHAIRMAN SOULES: 7th and 8th.

1 MS. BARON: How about the 27th
2 and 28th?
3 PROFESSOR CARLSON: That's
4 Easter.
5 CHAIRMAN SOULES: How about
6 going to the 29th?
7 MS. BARON: Well, that
8 apparently is Easter.
9 CHAIRMAN SOULES: 7th and 8th.
10 March the 7th and 8th. Okay. So the meetings
11 will be January 17 and 18, March 7 and 8,
12 May 16 and 17, July 18 and 19, September 19
13 and 20, November 14 and 15 in 1997. They will
14 all be in the Law Center. We will advise you
15 of the rooms. Probably they will all be
16 either here or over in the Directors Room.
17 They will all be in Austin, so if you can make
18 your reservations ahead of time to be sure you
19 have the quarters that you want.
20 Any other logistical things?
21 Okay. At Justice Hecht's request, I put
22 the summary judgment rule to the front. Judge
23 Clinton, this is probably going to take a
24 while, and we welcome you here for all of it.
25 I know you're more interested in the Rules of

1 Appellate Procedure and the Rules of
2 Evidence. We can call you when we get done
3 with the summary judgment rule, if you're not
4 here, and we'll check to see, but we
5 appreciate your participation on all of these
6 issues, but we don't want to impose on you. I
7 had the committee doing the Appellate Rules
8 and Rules of Evidence first to give you the
9 opportunity of scheduling, but I have
10 rescheduled this at the Court's request.
11 HON. SAM HOUSTON CLINTON:
12 Well, I thank you for that consideration.
13 JUSTICE HECHT: Could I say
14 that I do hope we get to the Evidence Rules,
15 because I think as far as they are along and
16 as much work as the Court of Criminal Appeals
17 has done on those, we can put those on a
18 pretty fast track, too, once the committee
19 gets done.
20 CHAIRMAN SOULES: Buddy, what
21 do you think the prospects are of us getting
22 the Rules of Evidence done this morning, if we
23 take it up, the joint rules issues?
24 MR. LOW: What has happened,
25 see, is Lee had someone do an extensive amount

1 of work on combining them and they were put
2 into categories where there were, you know,
3 different style changes and not really any
4 substantive changes, so we went through, there
5 were whole categories, and my committee has
6 considered those we might need to then go back
7 and just take a final reading of, but I think
8 we can get that together.
9 Let me -- I'm going to have to
10 reorganize. I'm not organized for that right
11 at this minute. I'm looking at summary
12 judgment. But in about three minutes I can be
13 ready if that's what you want to do first.
14 CHAIRMAN SOULES: I think if we
15 can get it done by the end of the morning that
16 gives us plenty of time to get the summary
17 judgment issue resolved and then get on to
18 other business.
19 MR. LOW: Let me change
20 briefcases then.
21 CHAIRMAN SOULES: Let's do
22 that.
23 While Buddy is getting organized, let me
24 ask you this: Judge, is your court far enough
25 along with the Joint Rules of Evidence that

1 they might -- do you think your court is far
2 enough along on the Joint Rules of Evidence
3 that they might get it out by the end of the
4 year?
5 HON. SAM HOUSTON CLINTON:
6 Well, we can try, but I don't -- I can't give
7 you much surety.
8 CHAIRMAN SOULES: Just
9 curious. Okay. Are we ready to go?
10 MR. LOW: Yeah, ready to go.
11 CHAIRMAN SOULES: Okay. Buddy
12 Low on evidence.
13 MR. LOW: Okay. First of all,
14 I prepared -- you probably have a chart here
15 showing action. I try to keep up with what
16 actions or report back to you the actions that
17 we take just to keep me accurate. The action
18 that we took at our last meeting in September
19 was on 606, the first item. We wanted that to
20 be consistent with Rule 327 that was
21 previously amended by that committee.
22 I do find one correction that we need to
23 make, and I've done so. In combining the
24 rules, we should have put "indictment" in
25 another place as just a housekeeping matter

1 down in the body, where it says
2 "impeaching" -- if you will go to -- do you
3 have that?
4 CHAIRMAN SOULES: Is it behind
5 Tab 2?
6 MR. LOW: Behind, yes. It's
7 behind the action that we took on the first
8 page.
9 CHAIRMAN SOULES: Okay. Tab 2
10 is the action taken, and then next is
11 Rule 606.
12 MR. LOW: The first page shows
13 an item of correction that we had suggested
14 that was picked up, and Rule 327 made the same
15 correction.
16 MS. SWEENEY: Hey, Buddy, can
17 you speak up?
18 MR. LOW: Okay. I'm sorry.
19 The first page shows a correction that was
20 made which, at the time we made it, was
21 different from Rule 327, but Rule 327 picked
22 that up where it says, "as influencing any
23 other juror's assent," but we didn't want it
24 to influence that juror's assent either, so we
25 picked that up.

1 And in going through this the other day,
2 I found one place here where we put "verdict"
3 and we should have put "or indictment," and
4 let's see what page that's on.
5 All right. At the end of the first
6 sentence where it says "or emotions as
7 influencing any juror's assent or dissent from
8 the verdict" and we should have put "or
9 indictment" as well. And I'll have a clean
10 draft of that.
11 CHAIRMAN SOULES: Buddy, is
12 this on the same page as where you struck
13 "other"?
14 MR. LOW: It is. But right
15 behind it is a clean version.
16 CHAIRMAN SOULES: Where did you
17 add that?
18 MR. LOW: Okay. Look, it will
19 be one, two, three, four, five, six, seven,
20 lines down.
21 MS. BARON: In (b)?
22 MR. LOW: Yeah.
23 CHAIRMAN SOULES: Verdict or
24 indictment.
25 MR. LOW: Yeah. It should be

1 "or indictment."

2 CHAIRMAN SOULES: Okay. That's

3 in 606(b), line 7, at the very end?

4 MR. LOW: Yeah. And Luke, I do

5 have a clean copy of that.

6 CHAIRMAN SOULES: Okay.

7 MR. LOW: And I'll get it and

8 make it available. I haven't segregated that

9 out. All right. The next thing is --

10 CHAIRMAN SOULES: Okay. Any

11 opposition to adding "or indictment"? That's

12 done.

13 Striking "other"? That's done.

14 Okay. Those are all approved.

15 MR. LOW: Next was Rule 702.

16 We prepared no rule on this. That's -- excuse

17 me, that rule went through. We already -- it

18 was prepared and I believe approved.

19 CHAIRMAN SOULES: Okay. So

20 that's all done. Okay.

21 MR. LOW: And then 503(a)(2),

22 we made no change in the existing rule.

23 Rule 504 as drafted by the Evidence Committee

24 was adopted.

25 New 1009 was sent back to my committee,

1 and we'll discuss that. We've done work on
2 that.
3 CHAIRMAN SOULES: That's Tab 1
4 and we'll get back to that.
5 BUDDY LOW: Right. And
6 then the last thing is the unification and
7 there are a number of things on that to
8 discuss.
9 CHAIRMAN SOULES: All right.
10 Next.
11 MR. LOW: And that takes care
12 of what we did last time. Now let me go to
13 the next tab, and this will be the one
14 entitled "Agenda November 15th." All right.
15 The first is Rule 1009.
16 CHAIRMAN SOULES: Okay. That's
17 behind Tab 1 in this book?
18 MR. LOW: Right. What we did,
19 we met again and tried to address -- I got --
20 Mark took the lead on that in making a draft
21 and we met and then had correspondence after
22 that making certain changes. And finally
23 also, Luke, you sent me a couple of cases that
24 discuss the need for that. We didn't see any
25 of those cases as setting forth any standard

1 or anything that just brought up the need for
2 it, is what we saw, so 1009 is attached, and
3 you'll see following that are notes that
4 concerned the redraft and the reasons for it.
5 Tommy had some -- where is Tommy?
6 MR. JACKS: Right here.
7 MR. LOW: All right. Tommy, a
8 lot of this expresses your concerns. Do you
9 want to speak to that?
10 MR. JACKS: Sure. The only
11 sentence we grappled with, and we both wanted
12 to say the same thing and we had some
13 difficulty in figuring out how to say it, and
14 that was in subsection (d), "Effect of
15 Objections or Conflicting Translations," and
16 particularly the latter clause, that is,
17 clause (b), "the court then shall determine
18 whether there is a genuine issue as to the
19 accuracy of a material part of the translation
20 to be resolved by the trier of fact."
21 In other words, if there are opposing or
22 dueling translations and it's about something
23 that matters, rather than the judge decreeing
24 that this or that translation of the language
25 that presumably the judge doesn't speak either

1 is correct, that's something that the jury
2 gets to hear both translators' sides of it and
3 then they believe whichever one they want to
4 believe like they would any other conflicting
5 evidence.
6 What we also wanted to make clear is that
7 they don't get an issue about that; that is,
8 they're not directly asked the question of
9 which translator is correct, it's just among
10 the evidence that they're sifting through. I
11 think probably the language that's proposed
12 here takes care of that okay and I don't have
13 any serious problems with it. I have proposed
14 some alternative language which is set out on
15 the following page, but I think it's of no
16 great consequence.
17 MR. LATTING: I've got a
18 question, Tommy.
19 CHAIRMAN SOULES: Joe Latting.
20 MR. LATTING: What do you do
21 when "which translation is correct" is
22 dispositive of the case about not having an
23 issue? For example, we have a document, a
24 contract in Chinese, and we know that the
25 goods were delivered within 30 days but not

1 within 15 days, and the case turns on whether
2 the contract calls for that. Doesn't the
3 trier of fact need to have an issue on that in
4 some cases?
5 MR. JACKS: That is, could the
6 translation also coincide with the ultimate
7 issue?
8 MR. LATTING: Yeah.
9 MR. JACKS: I guess there could
10 be a case where that could happen. I can't
11 say there never could be.
12 MR. LATTING: Well, in contract
13 cases it seems to me it not only could but
14 probably will happen, so it disturbs me a
15 little to have it say that there won't be an
16 issue on it.
17 MR. JACKS: Well, I guess that
18 argues for a comment.
19 MR. LATTING: Okay. That's all
20 right.
21 MR. JACKS: I think in most
22 cases the translation may be material but may
23 not really go to a submitted issue, and that's
24 not to say that there could not be a case
25 where it does go to the ultimate issue. And

1 maybe the way to solve this is to leave the
2 language as is, because the word "resolved" I
3 think gives you enough latitude to apply it in
4 either circumstance. And then by a comment
5 say that ordinarily the trier of fact will
6 merely sift through this conflicting evidence
7 as they do the other conflicting evidence, but
8 that there could be a case such as a contract
9 case in which the language itself is central
10 to an issues that the jury must answer in
11 their verdict.
12 MR. LATTING: Well, is there
13 any language in here that precludes an issue
14 from being submitted?
15 MR. JACKS: No.
16 MR. LATTING: Well, then I'll
17 withdraw my concern.
18 MR. JACKS: No, I don't think
19 this precludes an issue from being submitted.
20 MR. LOW: One of the things
21 that we were discussing and one of the drafts
22 made it appear like you might submit that to
23 the jury, in other words, submit it as a
24 question. We didn't mean that. We meant it
25 be submitted just like any other evidentiary

1 issue, so I think we've drafted it so that it
2 could apply either way. Don't you feel so,
3 Tommy?
4 MR. JACKS: I believe that's
5 true.
6 MR. LATTING: I think that's
7 what this says. I didn't see anything
8 precluding a submission. I just wondered if I
9 missed it.
10 CHAIRMAN SOULES: Okay.
11 Anything else on this, Buddy?
12 MR. LOW: That was the main --
13 I mean, you can see what we were dealing with
14 here. There were some people suggesting --
15 well, I think we cured all of the objections
16 that we had last time, and only certain areas
17 were in question and we addressed those. So
18 without going back into each paragraph, I
19 think this is in keeping with what the
20 committee suggested. What's your feeling on
21 it, Mark?
22 MR. SALES: I think, if I
23 recall from the last meeting, there were a
24 number of minor things about the timing
25 coinciding with some of the other changes in

1 the rules, which we did, the 45 days and the
2 15 days. There was a question about could the
3 court or the parties change the time limits,
4 and I think we've clarified that in part (f)
5 here as well.
6 And then I think the main thing that we
7 wrestled with was what Tommy and Buddy were
8 talking about, and I think the attempt here
9 was to make it pretty clear that the court is
10 going to have to make a decision, if that
11 becomes an issue, but it will be submitted to
12 the trier of fact like any other evidence
13 would be if there's a conflict. So I believe
14 that this is in keeping with what we discussed
15 at the last meeting and hopefully resolves the
16 last few issues that were there.
17 CHAIRMAN SOULES: Okay. Is
18 everybody ready to vote on this? Those in
19 favor of 1009 as presented by the subcommittee
20 show by hands. Okay. 16 in favor.
21 Those opposed. None opposed, so that
22 passes without opposition. Next.
23 MR. LOW: Next was 509, a
24 question of whether to add in the
25 physician-patient privilege to add dentists.

1 Buchanan vs. Mayfield gave rise to that
2 question. And the committee felt that
3 although the Court certainly has the power to
4 do that that we didn't feel the change should
5 be made. The legislature has drawn this
6 Dental Practice Act and it's not included in
7 that, so we felt that if there should be such
8 privilege, we would leave it to the
9 legislature to do it. That was the
10 recommendation of the committee.
11 Now, I mean, dentists -- there's no
12 logical reason, I guess, because there could
13 be some real tricky or personal things that
14 your dentist would know or in your dental
15 records or something, but that was our view.
16 CHAIRMAN SOULES: Okay. The
17 committee recommends no change?
18 MR. LOW: Right.
19 CHAIRMAN SOULES: Any further
20 discussion? Those in support of the
21 committee's recommendation show by hands. 13.
22 Those opposed. None opposed. There will
23 be no change, and there's no dissent from that
24 vote.
25 MR. LOW: Luke, you're going to

1 have to give me -- I've got about -- on the
2 new -- on combining the rules it will take me
3 about -- I have about 30 minutes of things I
4 think the committee can finish, but I need to
5 go back, because I wasn't thinking I was going
6 to do this first this morning, and I need to
7 go back and be excused for a few minutes and
8 get it together to where I can do it in a more
9 organized fashion, if you don't mind.
10 CHAIRMAN SOULES: Okay.
11 Do you want to stand down for a minute.
12 MR. LOW: Yeah, if you don't
13 mind.
14 CHAIRMAN SOULES: You bet.
15 It's like going to docket call 12th on the
16 docket and finding you're number one. He's
17 ready.
18 MR. LOW: I have it outlined
19 here, but I'd rather -- so if you'll go to
20 something else, I'll --
21 CHAIRMAN SOULES: Sure.
22 MR. LATTING: It's kind of a
23 dangerous precedent to have to have your
24 thoughts organized before you talk to this
25 committee.

1 MR. ORSINGER: Luke, there's
2 one issue that's kind of a stand-alone issue
3 for us, and that's whether we ought to adopt
4 the offer-of-judgment rule in a state
5 proceeding like we have in federal court.
6 It's kind of a stand-alone deal, and we could
7 talk about it for -- our subcommittee's view
8 was that we would just lay the federal rule
9 out and see if anybody wants to adopt it.
10 That might be of sufficiently limited duration
11 to fit in this hole, if you want. I have the
12 federal rule here to pass out. It's up to
13 you.
14 PROFESSOR DORSANEO: I don't
15 want to get into that.
16 MR. ORSINGER: Bill doesn't
17 like that. Okay. Bad idea.
18 CHAIRMAN SOULES: By way of
19 response, if we could focus the discussion on
20 whether, up or down, we take the federal rule,
21 that would be one thing, but we could discuss
22 for hours what changes should be made to the
23 federal rule to make it work a way that
24 someone else thinks it should work.
25 MR. ORSINGER: Too

1 controversial. Okay. We'll revisit that
2 later.
3 CHAIRMAN SOULES: Okay. By way
4 of logistics, apparently we've got a
5 facilities problem on July 18 and 19 and we
6 need to make a change. Let's move that to
7 July 11 and 12, so what I said on the record
8 earlier about the '97 meeting in July is
9 changed. It will not be on the 18th and 19th,
10 it will be on the 11th and 12th, and March is
11 the 7th and 8th.
12 Okay. Richard is going to pass
13 out something that we can probably deal with
14 quickly. It's called "Citations in Suits for
15 Delinquent Ad Valorem Taxes." It's been
16 okayed by Oliver Heard as being workable in
17 that practice, and Richard will give us a
18 report on it, and maybe we can take care of
19 this.
20 Did everybody sign up here for the
21 meeting?
22 Okay. Richard, you have the floor for
23 Rule of Civil Procedure 117a.
24 MR. ORSINGER: This is a
25 proposal that I got from a lawyer in Oliver

1 Heard's office who is probably I guess the
2 head person for this kind of analysis.
3 CHAIRMAN SOULES: We directed
4 you there, did we not?
5 MR. ORSINGER: Right. And
6 because that law firm does most of the
7 ad valorem tax collections, probably more so
8 than anyone, although there are certainly
9 competitors. But the problem that they found
10 on citation by publication in ad valorem tax
11 collection suits has to do with the ability to
12 post at the courthouse steps when it's too
13 costly to publish in the newspaper.
14 Now, from a practical standpoint, the
15 truth is that the delinquent landowners
16 probably won't see either notice, either at
17 the courthouse steps or in the newspaper. But
18 from a practical standpoint, there are so many
19 hundreds of thousand of these suits that are
20 filed that the money that flows out from the
21 government to the publishing organ is a
22 significant amount of money.
23 Now, the way the rule is written right
24 now, you're supposed to do citation by
25 publication unless certain financial

1 conditions obtain. And in that situation then
2 the government entity is permitted to post a
3 notice at the courthouse steps. Now, that's
4 been working well because there's a condition
5 here that if the publication of citation
6 cannot be had for a fee which is low enough,
7 they say the maximum fee for publishing the
8 citation shall be the lowest published word or
9 line rate of that newspaper for classified
10 advertising. And if the newspaper is not
11 willing to publish on that basis, then they
12 can post a notice.
13 Now, what has happened is that some
14 newspapers are willing to publish on that
15 basis and under the rule they also have to be
16 willing to wait until sale to collect their
17 money, so that the government doesn't have to
18 front the money for the advertiser's expense,
19 that you can take the money from the sale and
20 at that time you can pay the citation by
21 publication cost, and that works fine if there
22 is a sale and there is enough money to pay the
23 newspapers.
24 But sometimes nobody will bid on this
25 property because it's subject to superior

1 liens or whatever, and in that situation the
2 government just has to buy it in itself at the
3 sale and no money is generated. And so some
4 newspapers will not agree to wait past the
5 sale date for payment, putting the government
6 agency in the position of having to fund that
7 expense, even though no money has been
8 generated from the public or from a purchaser
9 to do that.
10 Now, if this proposed rule change would
11 occur, it would just say that "Should the
12 newspaper require advance payment of
13 publication fees or payment other than on a
14 contingency basis if and when the fees are
15 collected as costs," then you would carry on
16 with "or if the publication of the citation
17 cannot be had for the lowest published word or
18 line rate."
19 That second change is just to clarify the
20 language. The first change is designed to
21 address this situation where the sale occurs,
22 under the current language of the rule payment
23 is due at that time, and the government agency
24 then could say, "Well, we want your payment to
25 be contingent on us being able to sell the

1 property to an outsider, and if it doesn't
2 sell to an outsider, we want you to either
3 waive the fee altogether or wait until it is
4 sold, and if you won't do that, then we want
5 to post it at the courthouse steps."
6 This is the proposal, and I don't think
7 that it really is going to affect taxpayers --
8 I mean, it's not going to affect property
9 owners, but it will affect the taxpayers. It
10 will reduce the cost. It will permit them to
11 implement posting notice rather than
12 publication notice when there is no outside
13 money coming into the sale.
14 CHAIRMAN SOULES: Any
15 opposition to this?
16 HON. C. A. GUITTARD: Richard,
17 if your --
18 CHAIRMAN SOULES: Justice
19 Guittard.
20 HON. C. A. GUITTARD: If your
21 premise is correct that taxpayers don't see
22 these things anyway, why don't we just
23 eliminate the newspaper publication and post
24 it in all cases?
25 CHAIRMAN SOULES: Well, they

1 haven't asked for that, for one thing.
2 MR. ORSINGER: Well, I think
3 that we ought to consider whether our citation
4 by publication is in fact a realistic effort
5 in this day and time to get notice out to
6 people generally. I mean, we've discussed
7 that at our Rule 15 subcommittee level. And
8 you know, it's probably more likely somebody
9 would find out about it if the State of Texas
10 published it at its web site and you could put
11 your name in and turn the computer loose and
12 find out what had happened to you.
13 But I don't have a problem with that
14 suggestion. Do you want me to get on the
15 telephone and find out what they think about
16 it down there? But I can tell you right now
17 that they'll agree that we're just saving
18 money. I mean, right now we're paying for the
19 newspaper publication. And how many
20 delinquent property owners are reading those
21 legal notices to find out if they're being
22 foreclosed on?
23 CHAIRMAN SOULES: Well, let me
24 see how simple this can be, because we're
25 trying to make some progress here. If we

1 eliminate all newspaper requirements, it looks
2 to me like we just start at the top of the
3 page where it says, "The citation shall be
4 published in the English language." Start
5 with "the" at the very first of that and
6 strike all the way down to, I'm going to count
7 from the bottom, 10 lines from the bottom of
8 that paragraph, and the paragraph would just
9 start "Service of the citation may be made by
10 posting a copy at the courthouse door," and
11 just take the all the rest of that out. Is
12 that how simple it is?
13 MR. ORSINGER: That's how
14 simple it is.
15 MR. BABCOCK: What is the
16 factual basis for saying that people don't
17 read the newspaper?
18 MR. ORSINGER: That's just my
19 belief, but I think that it's pretty
20 self-evident. If you believe to the contrary,
21 I'd like to know why you think that.
22 MR. BABCOCK: As opposed to --
23 I know a lot of people who read the newspaper
24 that don't go down to the courthouse to check
25 out foreclosure notices.

1 CHAIRMAN SOULES: But we're
2 talking about delinquent ad valorem taxpayers
3 who the county has tried to reach so they can
4 get paid their taxes.
5 MR. ORSINGER: They've tried to
6 serve them with -- it's always better to serve
7 somebody with process than it is to cite by
8 pub.
9 CHAIRMAN SOULES: Is there a
10 requirement that there be first an effort to
11 serve personally?
12 MR. ORSINGER: Well, I'll have
13 to get the rest of the rule. I think there
14 is. I didn't anticipate this.
15 CHAIRMAN SOULES: I think the
16 rule begins where any defendant in a tax suit
17 is a nonresident or is absent or is a
18 transient or is unknown, so that's the class
19 of people that we're talking about whether or
20 not they read the newspaper.
21 MR. BABCOCK: Probably not too
22 many of them are reading the paper.
23 CHAIRMAN SOULES: Probably not
24 many of those. I think it's really a due
25 process question, I think. Judge Peeples.

1 HON. DAVID PEEPLES: Could I
2 suggest, if this is what the people who are
3 doing this kind of work want, could we go
4 ahead and approve this, and then ask them if
5 they would like to have straight publication
6 outdoors?
7 MR. ORSINGER: I will go call
8 them right now and find out.
9 CHAIRMAN SOULES: Bill
10 Dorsaneo.
11 PROFESSOR DORSANEO: The
12 newspapers that these are published in are
13 like special purpose newspapers that have, you
14 know, people publishing them and they have
15 subscribers. Now, whether those newspapers
16 need to be paid this extra fee in order to
17 conduct this business or whether they would go
18 ahead and conduct the business anyway even if
19 they weren't paid a fee is completely unknown
20 to me. But what we're doing is having these
21 little commercial enterprises perform a part
22 of our governmental activity on a private
23 basis, and I certainly don't know enough about
24 this business to be putting them out of
25 business in favor of just having things posted

1 at the courthouse door.
2 If all we're dealing with here are some
3 particularly intransigent publishers who want
4 to be paid by their subscribers and also by
5 the government regardless of whether any money
6 is being generated, I would suspect that there
7 probably aren't that many of these people,
8 because this must be a legitimate type of
9 business that's financed by more than just
10 governmental, you know, fees paid for these
11 advertisements.
12 CHAIRMAN SOULES: It seems to
13 me that our purpose is to provide notice that
14 will meet the due process challenge to these
15 people who are never going to know.
16 MR. ORSINGER: Further
17 remembering that you have a right of
18 redemption --
19 CHAIRMAN SOULES: Basically
20 they're not going to know anyway. And if the
21 cost to the government of doing anything more
22 than that is significant and the likelihood of
23 doing that, accomplishing much better notice,
24 is miniscule, then why put the government to
25 that expense? Judge Peeples.

1 HON. DAVID PEEPLES: Luke, I
2 want to respectfully suggest that one reason
3 we don't get through our agendas fast enough
4 is that we get sidetracked on things like this
5 where the firm that does more of this than
6 anybody in the state and knows 100 times as
7 much as this room put together, all they've
8 asked for is this right here (indicating).
9 MR. ORSINGER: Yeah, but David,
10 I didn't tell them that it was possible to
11 eliminate publication altogether, so I'd be
12 happy to go call them.
13 HON. DAVID PEEPLES: Then we
14 ought to ask them if they want it instead of
15 kicking it around here at the expense of other
16 things on our agenda.
17 MR. ORSINGER: Well, let me
18 excuse myself and I'll return with an answer.
19 CHAIRMAN SOULES: Does anyone
20 else have something they want to bring up
21 while two subcommittee chairs are in caucus?
22 JUSTICE HECHT: Buddy is here.
23 CHAIRMAN SOULES: Buddy, are
24 you ready to pick the jury? Buddy, thank
25 you.

1 MR. LOW: Thank you. You
2 should have something entitled Unified Rules,
3 a work done by Lee Parsley and his staff.
4 CHAIRMAN SOULES: What does it
5 look like on the front page?
6 MR. LOW: Well, I'm not sure
7 how it went out. This is what I referred to
8 (indicating).
9 CHAIRMAN SOULES: That will be
10 right behind Tab 3. This is what's behind
11 Tab 3.
12 MR. LOW: Right. We can breeze
13 through these pretty easily because -- let me
14 summarize. There were different things that
15 Lee and his people changed like changing "he"
16 to "the judge" and things like that that
17 weren't really -- and others where you kind of
18 have to organize the rules but don't change
19 the substance of the rules.
20 Now, in the end there are some things
21 that Mark's committee is considering, but they
22 won't consider those for a while, so my
23 recommendation is going to be, I'll point
24 those out to you, that we unify the rules.
25 But these rules are going to be changed from

1 time to time, and those are changes that can
2 be made, you know, after they are unified. In
3 other words, it's not something that is so
4 urgent right now, and I think we can get to
5 that.
6 All right. The first thing, Judge, you
7 have --
8 CHAIRMAN SOULES: Let me try
9 this procedure and see if it works. If it
10 doesn't, we'll go back to our usual
11 procedures. But to start with, I'm just going
12 to let Buddy run with his report, and if
13 anybody wants to stop him or if anybody feels
14 in disagreement about something that's going
15 on or needs further clarification, raise your
16 hand and I'll try to keep an eye out for it.
17 And we just won't stop you unless somebody has
18 an issue they want to raise, and then we'll
19 vote on those issues as they come up and then
20 at the end.
21 MR. LOW: Okay. On Page 1, you
22 notice that when you refer to Page 1 of Lee's
23 report --
24 CHAIRMAN SOULES: This is
25 behind Tab 3?

1 MR. LOW: Yeah. 503(a). And
2 all they did was change "he," "him," all of
3 that. You'll see on Page 1, No. 3, the same
4 thing. No. 4, Page 2, all of those. Page 2,
5 No. 5, you see the suggestion there for
6 consistency. That was done. These don't
7 reflect any changes in substance.
8 And Page 2, No. 6, lawyer-client
9 privilege, they talk about whether you're
10 using a slash or a dash, those kinds of
11 things. I mean, it's nothing that's real
12 earth-shaking.
13 Page 2, No. 7, they did want to refer it
14 to the Court of Criminal Appeals, and maybe I
15 can deal with Justice Clinton in handling
16 that. I'll take care of that. I don't think
17 we need to bog down on that. Let me make
18 myself a note. That was No. 7 on Page 2, and
19 that's basically whether the court may direct
20 or shall direct.
21 CHAIRMAN SOULES: Okay.
22 MR. LOW: And that was
23 someone's suggestion, but I'll get with
24 Justice Clinton on that.
25 Now come on down to Page 2, No. 9.

1 That's the balancing test, and again, a
2 question of combining the rules.
3 And then come down to the typographical
4 errors. If anybody has a question about
5 those, there's no change on those.
6 MS. SWEENEY: Could you speak
7 up again, Buddy?
8 MR. LOW: I'm sorry.
9 Typographical errors were the next category of
10 comments, and that's just -- there's no
11 substantive change.
12 Then when it comes down to -- let me show
13 you some things that we did do.
14 CHAIRMAN SOULES: Now, these
15 comments are referring to the rules that are
16 provided behind Tab 4?
17 MR. LOW: The Unified Rules are
18 following Lee's comments. These rules were
19 unified and work was done in these areas I'm
20 telling you about, and then Lee and his people
21 went by and they went over them pretty
22 carefully and had some suggestions, do we do
23 this, do we do that, change "he" to "judge"
24 and things like that.
25 CHAIRMAN SOULES: I know that,

1 but I'm looking at No. 9, 705(d). I can't
2 find a 705(d) in the Unified Rules. What I'm
3 trying to do is follow this before we get to a
4 specific rule.
5 BUDDY LOW: Where is that
6 referred to?
7 CHAIRMAN SOULES: It's referred
8 to on Page 2, Item 9. And 705 is on Page 32
9 behind Tab 4.
10 MR. SALES: I think that's
11 supposed to be a (b), not a (d).
12 CHAIRMAN SOULES: (b) as in
13 boy?
14 MR. SALES: (b) as in boy. I
15 think this is one of the issues that was
16 referred to our committee to look at whether
17 there really should be any difference between
18 the criminal and the civil, and we've got a
19 subcommittee looking at that. I think we had
20 the same problem. We saw that, and I think
21 it's (b), referring to everything under (b).
22 CHAIRMAN SOULES: Okay. Thank
23 you. That supposed to be (b).
24 MR. LOW: Okay. There are some
25 changes here. Go to Page 3, No. 3. Okay.

1 Rule 405(b), they speak in terms of "in which
2 character or character trait of the persons
3 involved." We changed that to "character or a
4 trait of character," and that's -- I mean, we
5 changed it to "character or character trait,"
6 I'm sorry, instead of changed it from
7 "character or a trait of character." Our
8 committee voted to change that. We thought
9 that the suggested language was a little
10 awkward, and we voted to change it to
11 "character or character trait."
12 The same thing on Page 3, No. 4.
13 HON C. A. GUITTARD:
14 Mr. Chairman, does the Supreme Court really
15 want us to go over these stylistic things that
16 don't have much to do with --
17 MR. LOW: That's what most of
18 this is, Judge. We just changed a few words.
19 If you want to get down to the --
20 HON. C. A. GUITTARD: Do we
21 need to do this?
22 CHAIRMAN SOULES: It won't take
23 us very long.
24 MR. LOW: No. We're running
25 through it. There's really nothing to it.

1 MR. JACKS: Buddy and John
2 Marks and Prince and I spent a whole day doing
3 this, and we're going through it under the
4 theory that misery loves company.
5 HON. C. A. GUITTARD: If you've
6 done it, that's fine.
7 CHAIRMAN SOULES: All right.
8 Buddy, go right ahead.
9 MR. LOW: And like another one
10 goes to a corrected statute, and I'm going to
11 get to that in the end. In the end we're
12 going to be sure that we go to the education
13 code or the -- you know, bring those up to
14 date. That's one of the housekeeping measures
15 we'll just have to do, but we won't do it
16 here.
17 Again, character or character trait.
18 Page 8, No. 31, "testifying to a
19 statement" was changed to testifying --
20 CHAIRMAN SOULES: Where are you
21 now, I'm sorry?
22 MR. LOW: Right down at the
23 end. Go down to Page 9, No. 36.
24 CHAIRMAN SOULES: Okay.
25 MR. LOW: All right.

1 "Testifying to a statement" was changed to
2 "testifying concerning a statement."
3 The last thing, the only thing really,
4 and you'll see the work we recommend, but
5 again, those things can be done. The only
6 thing I think we need to do, I need to get
7 with Justice Clinton on the matter I referred
8 to. It's on Page 16 of this, and it should be
9 changed.
10 CHAIRMAN SOULES: Page 16 of
11 what?
12 MR. LOW: Of the Unified Rules.
13 CHAIRMAN SOULES: Okay.
14 MR. LOW: The reason for that
15 is when they were combining the rules somehow
16 we overlooked the fact that the criminal rule
17 deals with the privilege -- the privilege
18 itself not to communicate and the privilege
19 not to testify, right? So somehow it was
20 overlooked in molding these together that
21 there was a difference, so we just drew -- put
22 that in as it is existing today and made that
23 privilege, you know, read the same as the
24 privilege not to testify.
25 You'll remember we made some changes

1 because of the statute or the Rule 38 of the
2 Code of Criminal Procedure, I believe it was,
3 Judge, and so that was already voted on by
4 this committee, so all we did here was make
5 the privilege consistent with that. Isn't
6 that it?
7 CHAIRMAN SOULES: This is in
8 the husband-wife privilege?
9 MR. LOW: Yeah -- no, on the --
10 yeah.
11 CHAIRMAN SOULES: Okay.
12 MR. LOW: And basically that's
13 it. These other things you can see we can
14 follow up on, but it doesn't prevent us from
15 going ahead and unifying the rules.
16 We can substitute this Page 16. I think
17 I sent it in my letter of November 13th to
18 you. Is that in the attachment?
19 MS. DUDERSTADT: This is the
20 new Page 16 (indicating).
21 MR. LOW: Okay. And that's
22 basically it.
23 CHAIRMAN SOULES: Okay. Is any
24 further discussion necessary on this? Those
25 in favor of the Unified Rules as presented

1 behind Tab 4 with the one clarification that
2 Buddy is going to make with Judge Clinton show
3 by hands. Any opposition at all to this? No
4 one is opposed? Okay. Then that passes
5 without dissent. I'm sorry, did I miss a
6 hand? Okay. Let me count again.
7 Those in favor show by hands. 19 for.
8 And those opposed. One. Okay.
9 19 to one it passes. This then will go
10 to the Supreme Court.
11 We've got a little logistical problem
12 we're trying to resolve, excuse me. We can be
13 off the record for a moment.
14 (At this time there was a
15 discussion off the record.)
16 CHAIRMAN SOULES: Buddy, help
17 us for a minute, if you will, please. There
18 are two Page 16s. We've got the old one and
19 then the new one. Which is the right one to
20 include?
21 MR. LOW: The new one.
22 CHAIRMAN SOULES: But I don't
23 know which it is. Our copy clerk put them
24 both in.
25 MR. LOW: Here is the one I put

1 in right there (indicating).

2 MR. YELENOSKY: It's got to be

3 the first one; it's a fax.

4 MR. LOW: This is the correct

5 one.

6 CHAIRMAN SOULES: Okay. It's

7 the first one.

8 MR. JACKS: It's the one with

9 the fax number at the top.

10 CHAIRMAN SOULES: Okay. Bear

11 with me here so you'll know the bidding. The

12 first Page 16 stays in, and the very last

13 sentence of the second Page 16 stays in.

14 MR. LOW: All right.

15 CHAIRMAN SOULES: So we get on

16 the first Page 16, which is the correct one,

17 it goes down through 505(a)(1). 505(a)(2)

18 then is on the second Page 16. I'm going to

19 call it 16a. And that's already passed.

20 MR. LOW: Right.

21 CHAIRMAN SOULES: Okay.

22 PROFESSOR DORSANEO: I hope

23 there's not more of that in there somewhere.

24 CHAIRMAN SOULES: Well, that

25 occurred because our copy clerk -- I see what

1 Bill is saying. If we had taken out 16
2 altogether we would have lost paragraph (2),
3 but that's the only substitute page that we
4 received in the interim.
5 MR. LOW: That's my mistake.
6 I'm sorry.
7 CHAIRMAN SOULES: But that's
8 the only page that you sent as a substitute
9 page, isn't it?
10 MR. LOW: That's right. He's
11 correct. And the only change is that one
12 about the communication privilege.
13 CHAIRMAN SOULES: Okay.
14 Anything else on the Rules of Evidence? Mark
15 Sales.
16 MR. SALES: Mr. Chairman, in
17 light of the 1009, I don't know, that's not in
18 this draft, is that right?
19 MR. LOW: One of the things in
20 the housekeeping chores as I've listed it, and
21 I didn't go over it here because we needed to
22 get to other things, is that we need to go
23 back and be certain that we have included in
24 these Unified Rules the changes we've made.
25 And I've got a history of everything that

1 we've done, and of course, I don't have a
2 history of what was done today because I
3 didn't know what was going to be done.
4 MR. SALES: And I was just
5 going saying that the draft that we're
6 approving has 1009 behind it, but that's not
7 the one that we approved.
8 CHAIRMAN SOULES: The 1009 that
9 is on Page 47 or 48 of the Unified Rules is
10 not approved, and in its stead is the 1009
11 that we voted on behind Tab 1, so that will
12 need to be done.
13 MR. LOW: But I will, Luke, go
14 back. This should reflect all of the changes
15 we voted on today, but not this one, but I
16 will go back over my history of the rules to
17 be sure, because I've kept a history of what
18 we've done. That's why I report each time, to
19 make sure of those changes. And then the
20 other work I've outlined in the statutes are
21 correct and things like that, just
22 housekeeping work.
23 CHAIRMAN SOULES: All right.
24 And then Lee, can you help Buddy with getting
25 a final draft to me? And I'll send it to the

1 Court after you all have tallied and all the
2 prior votes of the subcommittee are into the
3 Unified Rules that we have voted for them to
4 be proposed to the Court up to now.
5 MR. LOW: We can do that
6 shortly. That's housekeeping work.
7 CHAIRMAN SOULES: When I get
8 that from you, I will send it to the Court,
9 and also we'll circulate it to everybody on
10 the committee. If you pick up something, any
11 errors, then let me know right away and I'll
12 run it by Buddy and send corrections to the
13 Court. Is that okay with everybody? Okay.
14 All right. On to summary judgments.
15 MR. ORSINGER: Luke, do you
16 want to take up the property tax rule?
17 CHAIRMAN SOULES: Okay. The
18 property tax rule, while it's fresh on our
19 minds.
20 MR. ORSINGER: Okay. I have
21 additional information now talking to my guy
22 over there at the collection law firm.
23 Earlier in Rule 117a it is provided that
24 it is only in the event that you are unable to
25 make personal service and that the person

1 representing the governmental agency swears
2 out in an affidavit that they have attempted
3 and are unable to that you are permitted to do
4 cite by publication. And he can see no down
5 side to eliminating the requirement of
6 citation by publication other than the
7 economic effect on the legal newspaper
8 publishers losing this revenue.
9 Now, in addition to that, if there is a
10 foreclosure sale, there are rights of
11 redemption under the property tax code. If it
12 is nonhomestead property, you have the right
13 to redeem up to six months after the
14 foreclosure sale by paying all of the money
15 that has been incurred by the government in
16 connection with it, which would include the
17 full amount of the tax penalties and interest
18 plus the cost of sale plus a 25 percent
19 penalty. You can do that up to six months
20 after the foreclosure sale and you get your
21 property back. If it's homestead property,
22 you can do that up to a year after the
23 foreclosure sale, so this is perhaps not as
24 severe as a default judgment in a money
25 judgment case where you might have to file a

1 bill of review or take a writ of error appeal
2 up on a default judgment record, so that may
3 be something to consider.
4 If you're concerned about the due process
5 aspect of this, is that the new owner will
6 have acquired it, maybe moved in, take over,
7 evicted somebody. Well, if it's homestead,
8 they have up to a year to redeem. If it's
9 commercial, they have up to six months to
10 redeem. And so he thinks it's a good idea for
11 us to eliminate it, other than for the effect
12 on the legal newspaper publishers, which is
13 basically just a subsidy of an industry, is
14 what it is.
15 CHAIRMAN SOULES: What do you
16 recommend, Richard?
17 MR. ORSINGER: I recommend that
18 we follow the proposal. We would take the
19 first sentence here, "Citation shall be
20 published in the English language," period,
21 and then strike everything out all the way
22 down to "service of the citation may be made
23 by posting a copy at the courthouse,
24 et cetera."
25 CHAIRMAN SOULES: Discussion.

1 Second? Is there a second to the motion?
2 HON. C. A. GUITTARD: I second
3 it.
4 CHAIRMAN SOULES: Moved and
5 seconded. No further discussion. Bill, do
6 you have something you want to say? Those in
7 favor --
8 PROFESSOR DORSANEO: Well, I
9 don't see the need to subsidize these
10 newspapers, but I don't see it being harmful
11 to anyone and it being possibly helpful to
12 someone if these notices are published in
13 these newspapers and these newspapers continue
14 on exist. I'm fearful that if it just talks
15 about posting, then the newspapers will be out
16 of that business, and that's all that will
17 happen. I guess they could go down and pick
18 up these notices themselves and publish them
19 that way, but I almost would rather go with
20 their original deal, if that would be adequate
21 for them.
22 CHAIRMAN SOULES: Steve
23 Yelenosky.
24 MR. YELENOSKY: I just have a
25 question. Who is subscribing to these

1 specialty newspapers you're talking about?
2 PROFESSOR DORSANEO: People
3 that deal in property.
4 CHAIRMAN SOULES: Property
5 handlers.
6 MR. YELENOSKY: People who want
7 to buy. I mean, so whether they live or die,
8 I assume, has nothing to do with our due
9 process concerns.
10 MR. ORSINGER: Furthermore, the
11 people who want to buy are going to get the
12 tax foreclosure sale notices directly from the
13 government agency, if they're not available,
14 because people rip them off of the courthouse
15 and they get replaced every day. I mean, if
16 you walk out to the south end of your
17 courthouse on the first Tuesday and Monday,
18 you will see all the vultures circling.
19 MR. YELENOSKY: If there's a
20 buyers industry that wants this information
21 and is willing to pay for it, that's one
22 thing, but if we're really concerned about the
23 due process issue, I've heard it whispered
24 around here it ought to be on TV. I mean,
25 that's where it would go. So I don't know why

1 we would have any concern about those who
2 subscribe to property newspapers.
3 CHAIRMAN SOULES: Any further
4 discussion on Richard's motion? Those in
5 favor show by hands. Nine.
6 Those opposed. 11. The motion fails by
7 a vote of nine to 11.
8 Now, going back to the issue of just
9 doing what the law firm requested, which is
10 reflected on the handout, those in favor show
11 by hands. 19.
12 Those opposed. One. 19 to one that
13 passes.
14 Okay. Now are we ready to to summary
15 judgments? Okay. Summary judgments.
16 Somebody hold up their hand who wants to start
17 this. Alex Albright.
18 PROFESSOR ALBRIGHT: I'll start
19 this with kind of a summary of where we are on
20 the summary judgment rule.
21 In the January 1996 meeting, we
22 considered the Celotex standard for granting
23 summary judgments for defendant's motions for
24 summary judgment with the allegation that
25 plaintiffs had no evidence to prove their

1 cause of action, and so it would be to get a
2 directed verdict at the trial stage. So what
3 we focused on was at what point should we
4 require plaintiffs to come forward with
5 affirmative summary judgment evidence to
6 defeat a defendant's summary judgment motion.
7 The current Texas rule is that plaintiffs -- I
8 mean, that the defendant movant has to
9 conclusively negate at least one element of
10 the plaintiff's cause of action to get a
11 summary judgment.
12 We voted conceptually to change the
13 burden of proof after the close of the
14 discovery period, and we also voted to
15 consider a redraft of 166a provided that we
16 had a red-lined copy of that redraft. We
17 didn't do -- the subcommittee didn't do any
18 more work on that. For one reason, we were
19 waiting to hear what the Supreme Court was
20 going to do with our discovery period. If we
21 were not going to have a discovery period, we
22 could not have the summary judgment burdens
23 focused on when the discovery period ended.
24 But now what's happened is that Justice
25 Hecht has asked us to consider the summary

1 judgment motion, although we do not have any
2 further guidance on the Discovery Rules.
3 What I have done over the last couple of
4 months is redraft the rule that we considered
5 in January of 1996, and if you look at what is
6 called Draft 1 in your packet -- there are
7 many, many pages of summary judgment
8 information up there in the handouts.
9 CHAIRMAN SOULES: It looks like
10 that (indicating).
11 PROFESSOR ALBRIGHT: Draft 1 is
12 a redraft of the entire summary judgment rule,
13 Rule 166a. There is also a red-lined draft of
14 that Draft 1 which is in a separate stapled
15 group of papers. I propose that we take up
16 the redraft last and we first focus on the
17 burden of proof.
18 MS. SWEENEY: Can someone hold
19 up what we're supposed to have in front of
20 us?
21 PROFESSOR ALBRIGHT: It says,
22 "Draft 1, Burden: Celotex version, no
23 Discovery Period." Some of you all got faxes
24 of these drafts. It's the same one that I
25 sent out earlier in the week, but I think I

1 renumbered the versions for purposes of this
2 meeting.
3 CHAIRMAN SOULES: Everything is
4 back here, if somebody doesn't have one. It
5 says, "Draft 1, Burden: Celotex version, no
6 Discovery Period," and it's a clean copy. And
7 then accompanying that is a document with the
8 same title that's got red-lining on it.
9 MR. McMAINS: Luke, even before
10 the January meeting I thought we had taken up
11 this issue before and voted on the issue of
12 essentially adopting the federal rule more
13 directly and voted that down. I know we've
14 done so on numerous occasions since I've been
15 on the committee.
16 CHAIRMAN SOULES: The issue
17 that I recall still being live is, and I think
18 got a favorable vote, although I'm not clear
19 on that, was it would be that the Celotex
20 trilogy be the governing law after the
21 discovery period closed. But there's never
22 been a confirmation that there will be a
23 discovery period, so in the absence of that we
24 really don't have any decision really made.
25 And I may be wrong about that one, but I think

1 that's where we are.

2 HON. SCOTT A. BRISTER: The
3 vote a year ago, we had three proposals. One
4 was do nothing. Two was go straight to
5 Celotex. And three was do something in
6 between where for a while it's the same rule
7 and then it shifts to Celotex. And on the
8 vote on those three options the compromise
9 proposal came in third and last, and then you
10 suggested we eliminate that, and everybody, of
11 course, that preferred the two options said
12 no, no, no, because the other side might win
13 on the all-or-nothing Celotex and everybody's
14 second choice was the halfway in between. And
15 so when given the proposal, you know, of what
16 if you might lose the vote of whether it's up
17 or down on Celotex, the answer was always
18 we'll take half a loag other than one.

19 PROFESSOR ALBRIGHT: I have the
20 votes written down from the transcript.

21 CHAIRMAN SOULES: Okay. What
22 is it, Alex?

23 PROFESSOR ALBRIGHT: The votes
24 between the three possibilities of 166a, as it
25 now is written, Celotex, or the compromise,

1 was 10 to leave it the same, nine for <u>Celotex</u>,
2 and seven for the compromise. Then as between
3 <u>Celotex</u> and the compromise it was eight for
4 <u>Celotex</u>, 18 for the compromise. Between the
5 compromise and leave it the same, it was 14
6 for the compromise, 10 for the same.
7 So I think as I read the transcript it
8 was that there was a substantial number of
9 people who did not want to change the rule,
10 but there was discussion that if appeared that
11 the Supreme Court might want to change the
12 rule and we decided that we should send a
13 compromise that most of our group liked at
14 least better than full <u>Celotex</u>.
15 CHAIRMAN SOULES: Paul Gold.
16 MR. GOLD: Yes, I got the
17 transcript and I read it as well. And it's
18 clear that we rejected in January the proposal
19 to change the rule. The vote was not to
20 change the rule. Then the second vote was,
21 okay, if we were going to change the rule,
22 which would we prefer. And we had some
23 discussion about two different compromises,
24 two different proposals, either to do <u>Celotex</u>
25 at all levels or <u>Celotex</u> at 120 days or

1 Celotex at some other point. But I'm curious
2 why having voted it down once already we're
3 revisiting it again simply because the
4 legislature has given some ostensible
5 indication that they might take it up.
6 CHAIRMAN SOULES: That's not
7 where we are, Paul. We have got a strong
8 signal from the Supreme Court that they want
9 Celotex in place, or my understanding through
10 Justice Hecht is they want Celotex or
11 something comparable to that in place at some
12 point in the trial process. Now, do we give
13 them input or do we leave it up to them to do
14 what they want to do without our input? And
15 that's what got us to the second set of votes,
16 and we never have gotten to -- we've done --
17 there's been a good bit of drafting, you can
18 see Judge Brister has some got work here here,
19 too, over time. We just never have brought it
20 to focus because we've been waiting for some
21 indication about whether there's going to be a
22 discovery window or period, which I think
23 would have a big influence on the decision, if
24 not Celotex from the beginning, then when does
25 Celotex commence.

1 Now, that's where we are, and I don't
2 want to debate anymore where we are, but
3 that's where we are.
4 We're going to have to focus on the
5 substance of summary judgment. We may get
6 back to the point where we say we want no
7 change after we get to the drafting, but we
8 need to get to the drafting.
9 MR. GOLD: Just so I know, so
10 I'm not totally out of line all day long, is
11 the discussion, then, about whether there
12 should be a change, whether there's any need
13 for any type of change, foreclosed today, or
14 is that open?
15 CHAIRMAN SOULES: It's open,
16 but I don't think it necessarily should be --
17 I mean, if we keep revisiting that issue all
18 day long, it's going to prolong getting to the
19 compromise.
20 We can tell the Court, "If you're going
21 to change to Celotex at any point in time,
22 this is what we prefer, but we prefer that you
23 not change the 166a practice." We can
24 certainly send that message to the Court, and
25 maybe that's what they will do. But if they

1 ignore that we don't want it to change at all
2 or disagree with us, which, of course, they're
3 the Court, they can do whatever rule making
4 they wish, then I think we want them to have
5 our input as a backstop. Joe Latting.
6 JOE LATTING: Luke, I
7 understood Paul to be saying that he thought
8 we had already made the decision that our
9 recommendation to the Court was that we not
10 change anything. However, in light of the
11 fact that the Court wants our input on a rule
12 change, if one occurs, I understood that we
13 are now discussing, if they decide to change,
14 here is what we would suggest they change to.
15 CHAIRMAN SOULES: Right.
16 MR. LATTING: So we're not
17 still debating the issue which you brought
18 up.
19 HON. SCOTT A. BRISTER: And
20 also the vote just listed is not a vote; I
21 mean, there is a plurality for not changing
22 the rule. It ain't a majority, though. If
23 you add the compromise and the Celotex votes,
24 that's a majority in favor of changing the
25 rule. That's exactly what we voted for,

1 though there was no agreement. There was
2 nothing but a plurality for any of those
3 views.
4 CHAIRMAN SOULES: Rusty.
5 MR. McMAINS: Well, my concern
6 is, I guess, the timing of this thing being
7 brought up at the last minute and thrust upon
8 us ostensibly because of some veiled or overt
9 threat of legislative action. And I am not
10 aware, and have other information with regards
11 to whether or not legislators have made
12 contact with the Court certainly as a whole;
13 that they in fact have not been told that this
14 was a done deal in the legislature, nor have
15 they been approached by -- and certain members
16 of the Court are unaware of anybody being
17 approached by anybody in the legislature. And
18 I just think this is a politicization of this
19 process and I'm very troubled by that.
20 Even if a legislator just kind of walks
21 in and says, "Well, if you all don't do
22 something about this rule, we're going to put
23 a bill in the hopper and make some change in
24 it" and all of a sudden it gets on our agenda
25 overnight and they want us to make a decision

1 on it immediately, I think that's a totally
2 inappropriate politicization of the committee
3 practice.
4 And I understand if the Court is
5 sensitive to, you know, if in fact they've
6 been invaded by the legislature who basically
7 are saying, "We're going to do something if
8 you don't." But by the same token, I think
9 that going in the ordinary processes we
10 basically determined last time that there was
11 no sentiment on this committee, no significant
12 sentiment on this committee to make a change
13 in the rule until we had a clarification of
14 what the discovery process and its ending
15 process was going to be. And as we've heard
16 earlier, we're six months away from that
17 probably, or certainly three months away from
18 it. And now to just discuss it in the dark, I
19 think it's putting the cart before the horse
20 for the wrong reason.
21 CHAIRMAN SOULES: Justice
22 Duncan.
23 HON. SARAH DUNCAN: Well, I
24 would just like to echo what Judge Brister
25 said. I think that that is not my

1 understanding of the vote as reflected in
2 Alex's note and in the transcript. The
3 discovery window came into play only as a part
4 of a compromise. It doesn't change the vote.
5 Of the 26 people voting at that meeting, it
6 appears that 16 believed there should be some
7 change. 16 is greater than 10; therefore, a
8 majority of the committee voted that there be
9 some change.
10 Now, I don't have any objection to
11 revisiting that vote, but I do think we ought
12 to be clear about what the vote was. And I,
13 for one, am ready to change my vote on that
14 particular vote, but that's not either here
15 nor there, but it does appear a majority of
16 the committee wanted a change. The question
17 is, what is the change going to be.
18 CHAIRMAN SOULES: Richard
19 Orsinger.
20 MR. ORSINGER: I consider this
21 to be one of the most controversial things
22 that this committee has looked at it or will
23 look at. And I say that partly because I
24 shared a copy of Luke Soules' letter and
25 proposed bifurcated rule with the members of

1 the Appellate Practice and Advocacy Council,
2 because I serve as chair of that section this
3 year and I'm keeping them apprised of what
4 we're doing down here that's going to affect
5 their practice. And to my great surprise, I
6 started receiving faxes by the hour almost of
7 people who were upset at the proposed change.
8 Now, they may have been upset at the
9 specific framework of Luke's proposal, which
10 was, if you will, just to get something down
11 on the table real quickly for us to start
12 thinking. But I can tell by looking at these
13 letters, some of whom are from appellate
14 lawyers who exclusively represent defendants,
15 many of whom practice in both state and
16 federal court, some of whom are plaintiffs
17 lawyers or who represent plaintiffs on
18 appeals, that they don't think that the
19 Celotex rule is a good rule to implement
20 implement in Texas for a number of reasons,
21 including the fact that the Celotex rule has
22 all the other federal rules to go along with
23 it, like no general denial, and answers that
24 specifically admit or deny allegations, and
25 the practical effect that a federal judgment

1 will sit on a summary judgment motion for a
2 long time and sometimes it's very difficult to
3 get a hearing on it at all, compared to
4 San Antonio where you can get a hearing on a
5 summary judgment 21 days after you file it,
6 and if we adopt the federal rules, 10 days
7 after you file it.
8 Now, having said all that, it's not in
9 the interest of appellate lawyers to keep this
10 rule the same. If we introduce a new rule,
11 appellate lawyers are going to make a hell of
12 a lot of money, so I mean, this is like a
13 cloud with a silver lining, so I think when
14 the appellate lawyers, even on the defense
15 side, that are writing in saying this is not a
16 good idea, this is probably speaking against
17 their particular financial interest and really
18 has something to do with the merits of the
19 case and not just the fact that they represent
20 plaintiffs of defendants.
21 Now, having said that this appears to be
22 controversial -- it's just passing around
23 Houston. It hasn't passed around Dallas yet.
24 I don't have any idea what they're going to
25 say. It hasn't passed around San Antonio. It

1 occurs to me that we're on a hurry-up schedule
2 because of the fact that the legislature
3 starts in the middle of January.
4 However, as a realistic matter -- and I
5 have followed the legislature for a number of
6 years because of my involvement in the family
7 law section, and the family law section is
8 frequently threatened that if certain things
9 don't happen there's going to be a certain
10 bill that does X, Y and Z. And I have watched
11 many bills go down in flames either in the
12 calendars committee or not be able to get to
13 the floor for a senate vote and whatnot, and
14 I'm not particularly concerned of a threat at
15 this stage of the legislature that the
16 legislature is going to do X if we don't do it
17 to ourselves.
18 Now, realistically speaking, a lot of the
19 bills, if not most of the bills, come out in
20 the month of May and even in the last half of
21 May, so we don't have to actually decide today
22 in order to pretermit adverse legislation. We
23 could decide in my opinion at the January 17th
24 meeting and that would still be early enough
25 to pretermit it, and we could even decide at

1 the March meeting and probably head off a bill
2 before it got voted on on either floor and
3 maybe even in the May meeting, although May,
4 you know, it's possible, if there's a lot of
5 push behind it, it will get voted on before
6 that time.
7 So because it appears to be so
8 controversial, because it appears to be
9 concerned both from the plaintiff side and the
10 defense side, and because this is rushed as
11 opposed to being deliberated greatly like many
12 of our issues have been, I'm in favor of doing
13 what we have to do today and then putting that
14 out for public comment in some informal way.
15 And let's just find out what the people say
16 and let the Supreme Court know when we come
17 back in January or March, you know, that we've
18 either got a solution that people are
19 accepting or we're being inundated by letters
20 or whatever. But we're on such a timetable
21 that I'm afraid we're not getting adequate
22 input for this very controversial change.
23 CHAIRMAN SOULES: Mike
24 Gallagher.
25 MR. GALLAGHER: There are two

1 groups that traditionally propose legislative
2 reform in both procedural and substantive
3 areas, and neither of those groups has this on
4 their legislative agenda. A bill was
5 introduced last session by Representative
6 Nixon from Harris County. It never got a
7 hearing in committee. There's absolutely no
8 legislative movement related to revising
9 Rule 166a.
10 CHAIRMAN SOULES: Which two
11 groups are you referring to?
12 MR. GALLAGHER: Texans for
13 Lawsuit Reform and the Civil Justice League.
14 CHAIRMAN SOULES: Alex
15 Albright.
16 PROFESSOR ALBRIGHT: While
17 we're on the subject of whether Celotex is a
18 good idea or not, I'd like to point out that
19 Judge Scott McCown has written a rather
20 lengthy letter that rather eloquently states
21 the reasons against adopting Celotex in
22 Texas.
23 And I think what Rusty was saying about
24 summary judgment being an integral part of our
25 whole discovery practice I think is very

1 important to think about. If you read
2 Celotex, Celotex says summary judgment
3 procedure is properly regarded not as a
4 disfavored procedural shortcut but rather as
5 an integral part of the federal rules as a
6 whole.
7 And then I looked up -- James & Hazard
8 has a hornbook on federal civil procedure, and
9 I just looked up summary judgment. It says,
10 "Rule 56 contemplated that summary judgment
11 would be a readily available procedural device
12 used in conjunction with the broad discovery
13 afforded by the federal rules."
14 Well, when you think about it, everything
15 that we've been doing with discovery a year
16 ago was to shrink discovery so discovery would
17 not be so broad. One thing Scott points out
18 in his letter, and I think is true, is if you
19 have these Celotex motions for summary
20 judgment, you are going to require parties to
21 take a lot of discovery that we were trying to
22 discourage. So I think that's one thing that
23 we need to carefully think about when we're
24 talking about our summary judgment rule. It
25 may be that we can figure out a way to shift a

1 burden at some point in the proceeding, which
2 is I think what we were trying to do in our
3 compromise that we talked about in January.
4 But I think just to adopt Celotex as some
5 of these drafts do, and I think the
6 legislative version and Court Rules Committee
7 version goes beyond Celotex and I can talk
8 about those later, but I think it would be a
9 big mistake to adopt them. But I do think we
10 need to very carefully consider how the
11 summary judgment practice molds into the rest
12 of our discovery, and we don't know what
13 discovery is going to be because we don't know
14 how the Supreme Court is going to deal with
15 our discovery proposal.
16 CHAIRMAN SOULES: Judge
17 Peeples.
18 HON. DAVID PEEPLES: As I view
19 my role on this committee, when the Supreme
20 Court asks us to draft something, we ought to
21 do it. Now, after all is said and done, if we
22 want to tell the Supreme Court, "We don't like
23 this and we recommend that you not make it a
24 rule," we can do that. But frankly, if the
25 Supreme Court asks us to do something, I find

1 it shocking that we would even consider not
2 putting our shoulders to the oar and doing it,
3 and I think we ought to move on to it.
4 MR. BABCOCK: I second that
5 statement.
6 HON. SARAH DUNCAN: Second, or
7 third, I guess.
8 CHAIRMAN SOULES: Paul Gold,
9 and then moving around the table.
10 MR. GOLD: I want to pick up on
11 what Alex Albright was talking about. One of
12 the things I have a concern about is that -- I
13 wasn't at the January meeting. I couldn't be
14 at the January meeting. But I was at the
15 December subcommittee meeting when we took up
16 this issue at the request of the Supreme Court
17 to draft a modification, and there was quite a
18 bit of discussion at that time. Judge Brister
19 produced his compromise at that time, and we
20 did a lot of discussion about it, and we
21 discussed it at length in January, I believe,
22 at that time.
23 One of the things that I want to point
24 out here, and I just want to make sure that
25 everyone is on the same wavelength, because I

1 was under a misconception, and I want to make
2 sure that no one is sharing that same
3 misconception, which is that when we use the
4 shorthand "Celotex", what it is we're talking
5 about -- I spent the last week reading more
6 summary judgment opinions and Law Review
7 articles than I have in my entire practice,
8 probably more than I want.
9 But what I came to the conclusion on is
10 that in Celotex, under the federal rule, what
11 you have to do, if you are the movant and you
12 do not have the burden of proof at trial and
13 you are attempting to establish that the other
14 side, the nonmovant, has no evidence on
15 material issues of fact, it is that in the
16 first instance the moving party has to
17 demonstrate that all of the potential evidence
18 that the nonmoving party has listed in answers
19 to interrogatories, requests for production,
20 requests for admission, depositions, the
21 potential evidence, that there is no way that
22 any real evidence on material issues of fact
23 can be generated from those sources. That is
24 the initial burden of the movant. That is a
25 formidable burden, and I think that a lot of

1 courts misunderstand that. I don't know if
2 we're fully discussing that.
3 The proposals that I've seen that say
4 we're adopting Celotex say nothing about
5 that. It isn't until the movant satisfies
6 that burden that the nonmoving party then must
7 produce evidence of material issues of fact.
8 Now, what does that mean? That supports
9 the issue that Alex is discussing, is that
10 what we have in this proposal to change is a
11 counterargument to this issue about reducing
12 discovery, because what it will force the
13 movant to do is take the deposition of all of
14 the individuals who the plaintiff lists as
15 having knowledge of relevant facts and examine
16 all the documents that the plaintiff lists as
17 having relevance to the case on particular
18 issues. It will generate a ton of discovery.
19 But at the same time, we're limiting
20 depositions. We're limiting the discovery.
21 We're limiting the ability to "go fish," I
22 think is the phrase.
23 So when you take and you extract from the
24 federal system a major component of the
25 federal system and engraft it into a Texas

1 system that at present is in a state of flux
2 because we are going an opposite direction, we
3 don't have mandatory disclosure, we don't have
4 a pleading requirement that requires the
5 defendant to specially deny, we've got
6 inherent in our system differences from the
7 federal system that make this a potentially
8 terrible situation.
9 I brought "Jurassic Park" today because
10 "Jurassic Park" is founded on the premise of
11 the chaos theory. And what we're all ignoring
12 here, I think, when we talk about this change,
13 is how the court, the trial court is going to
14 deal with it.
15 In truth, I think that it is predictable
16 that a plaintiff wanting to prove a material
17 issue of fact is going to generate a lot more
18 paper than a defendant having to prove that no
19 issue exists. It just stands to reason that
20 it's the trial court that's going to be
21 burdened with all this paper, and the trial
22 courts don't want to be burdened with it now,
23 and that's why we have the problem, not
24 because of some arcane wording in the rule or
25 whether the Supreme Court decides to interpret

1 the federal rule one way as opposed to
2 another.
3 The difference is that in federal court
4 you have a federal judge, one or two
5 magistrates, and a legion of law clerks who
6 can read through all of that, and a Rule 11
7 that condemns people to the deepest parts of
8 hell if they file something frivolously. Rule
9 13 wouldn't come anywhere near that.
10 All we are setting up by adopting _Celotex_
11 in whole, in part, part of the way through,
12 almost to the end, anywhere, without adopting
13 the entire constellation of federal rules, I
14 think is just to create a tremendous
15 quagmire. And the articles that talk about
16 _Celotex_ talk about all of the unanswered
17 questions from the United States Supreme Court
18 and _Celotex_ regarding burden.
19 So I just want to make sure that when we
20 talk today about adoption of _Celotex_ that
21 we're clear about what we contemplate by that
22 term, because to merely give it an arbitrary
23 shorthand or a shorthand that isn't well
24 thought out I think could compound the
25 disaster that will result from the adoption of

1 any proposal to change to the federal rule.
2 CHAIRMAN SOULES: Justice
3 Duncan.
4 HON. SARAH DUNCAN: Well, I
5 sort of started out this week when the fax
6 machine between Richard's office and some
7 places in Houston and my office started
8 moving. And I have to respectfully disagree
9 with Paul as to the meaning of Celotex, but I
10 have to agree with him that we all need to get
11 clear what it is before we decide whether to
12 adopt it.
13 In my view, there are two primary
14 differences between the burden under the Texas
15 summary judgment stage and the federal summary
16 judgment burden as announced in Celotex and
17 the related cases. The first difference is
18 that in the federal system, unlike the state
19 system, if a plaintiff is pleading and
20 responding to a statute of limitations motion
21 for summary judgment, the burden is on the
22 plaintiff to raise a fact issue. In the
23 federal system, the burden is at the summary
24 stage exactly as it is at trial. That is a
25 big difference. The Fifth Circuit pointed out

1 that verdict in FDIC vs. Schrader & York. But
2 under all of the proposals that have been
3 circulated, that difference is eliminated, I
4 think correctly, but that's a big difference
5 and we need to talk about it.
6 The second big difference between the
7 federal standard and the state standard in my
8 view is that what Celotex does is change the
9 triggering mechanism to shift the burden.
10 That's the basis of Justice White's
11 concurrence. What the Court says in the
12 plurality opinion, "The burden on the moving
13 party may be discharged by showing, that is,
14 pointing out to the district court, that there
15 is an absence of evidence to support the
16 moving party's case."
17 Justice White concurs and says, "But the
18 movant must discharge the burden the rules
19 place upon him. It is not enough to move for
20 summary judgment without supporting the motion
21 in any way or with a conclusory assertion that
22 the plaintiff has no evidence to prove his
23 case. The basis of the dissent is effectively
24 the Texas standard, that the movant must show
25 conclusively and as a matter of law no genuine

1 issue of material fact entitled to judgment as
2 a matter of law."
3 It's the triggering mechanism in the
4 federal standard that shifts the burden that
5 in my view causes a lot of the advantages and
6 a lot of the disadvantages of Celotex -- of
7 the federal standard.
8 I have completely changed my vote in the
9 last week. I started off saying when we took
10 this vote initially that I was in favor of
11 Celotex. And when the fax machine started
12 whirring I said okay, and I started calling
13 people around the state, as I'm sure you all
14 have, and I asked, "What is so wrong with
15 Celotex?" And nobody could ever give me an
16 answer that I was helpful to me, until
17 yesterday morning when I was thinking about it
18 and I realized that to me it changes the
19 entire fundamental underlying premise of our
20 judicial system, the way the Texas standard is
21 written, if we presume a plaintiff has a
22 meritorious case unless the defendant proves
23 otherwise.
24 Under a pure Celotex system, we presume
25 the plaintiff doesn't have a meritorious case

1 until he proves to us that he does by raising
2 triable issues of fact. And I am
3 fundamentally opposed to changing that
4 underlying premise of the system. At the same
5 time, I do think there are cases in which
6 there is no evidence of a particular element
7 and the defendant ought to be able to get a
8 summary judgment. How we do that, I
9 personally prefer Judge Peeples' proposal, but
10 how we do that is a whole other question.
11 I would like us to start over again and
12 vote change versus no change. If there's
13 going to be a change, then we can figure out
14 what that change ought to be.
15 CHAIRMAN SOULES: Chip
16 Babcock.
17 MR. BABCOCK: Justice Duncan,
18 if I could ask a question based on what you
19 said, it seems to me that under Texas law we
20 presume that the plaintiff's case is filed in
21 good faith. But I don't -- maybe you can
22 explain why the presumption is that the
23 plaintiff's case is meritorious since the
24 plaintiff has the burden to prove their case
25 at some point in time. And what you are

1 talking about, it seems to me, is when that
2 burden comes into play, whether it's at
3 summary judgment or whether it's later at
4 trial. But maybe you could explain the
5 fundamental thought that has changed your mind
6 apparently that in Texas we presume that
7 plaintiffs have meritorious cases.
8 HON. SARAH DUNCAN: I think
9 that's the whole basis of the burden in the
10 summary judgment rule. The shorthand way to
11 me of classifying the difference in the burden
12 between federal and state practice is that
13 under state practice the defendant has to make
14 a legally sufficient motion before the burden
15 ever shifts. That is not the case under
16 Celotex. The defendant does not have to have
17 a legally sufficient motion. All they have to
18 do is point out to the district court upon
19 what element there's no evidence. And I think
20 that's the only way we got a summary judgment
21 rule in the first place, is my understanding
22 in Texas, because of that fundamental premise,
23 that is, the plaintiff has filed a meritorious
24 case and is going to be entitled to go to a
25 fact finder unless the defendant conclusively

1 establishes that he shouldn't be able to. And
2 I think that's a reflection of the broader
3 right to trial by jury in the State of Texas,
4 the fact that we have an open courts provision
5 which is not in the federal constitution.
6 CHAIRMAN SOULES: Steve
7 Yelenosky.
8 MR. YELENOSKY: Well, you used
9 the term "meritorious" or the question of
10 whether or not we presume it's meritorious.
11 What I think we presume, and I think Justice
12 Duncan referred to it at the end of her
13 comment there, is that you get to go to a
14 jury.
15 Now, you might define "meritorious" one
16 way or another, but if you mean by
17 "meritorious" that you get to go to a jury, I
18 think that that is the presumption. But to
19 put it explicitly, I think we do have a
20 presumption that you have a trial by jury.
21 And a summary judgment in favor of a defendant
22 cuts that off, so it does switch that
23 presumption. Whether or not there's a
24 presumption that you have a case that's
25 meritorious in the sense that you're more

1 likely than not to win is irrelevant. The
2 question is whether or not you get to go to a
3 jury.
4 HON. SARAH DUNCAN: But I want
5 to clarify. I mean "meritorious" in the sense
6 of a triable issue of fact.
7 CHAIRMAN SOULES: Joe Latting.
8 MR. LATTING: At some point you
9 have to fish or cut bait, though. Once a
10 plaintiff gets through putting on the
11 evidence, then a motion for summary
12 judgment -- I mean, a motion for instructed
13 verdict is that he didn't come up with any
14 evidence. And the question is, when should we
15 put a plaintiff to that task? Do you get to
16 go ahead and pick a jury, go through all the
17 expense of putting on a case in front of a
18 jury if there's no evidence to support the
19 plaintiff's case? And I don't think that
20 there's any presumption that a person is
21 entitled to present his or her case to a jury
22 or to have it go to the jury. Only if there
23 are material disputed fact issues do you get
24 to go to a jury. And that's -- we're begging
25 the question. The question here really is one

1 of timing: At what point should the plaintiff
2 have to fish or cut bait?
3 CHAIRMAN SOULES: Well, Sarah
4 is right as far as getting to a summary
5 judgment, possibly a sustainable summary
6 judgment on a pretty rudimentary practice in
7 federal court. It can happen. And then if we
8 look at our Texas practice, I think there is
9 little doubt that our Supreme Court of Texas
10 cases are much better articulated than Liberty
11 Lobby, Matsushita and Celotex. What those
12 three cases mean, like a lot of things the
13 Supreme Court of United States writes, you
14 just keep probing and you just can't find it.
15 But our cases have come lightyears from
16 Gulbenkian vs. Penn to Centeq Realty. And
17 they came through a transition where first
18 they talked about how a defendant could
19 establish an affirmative defense and then the
20 plaintiff has to come forward and somehow show
21 that there's a genuine issue of material fact
22 on the affirmative offense or you go down the
23 tube.
24 Centeq Realty is different. It's the
25 next step, and it takes us pretty close to

1 what I think the trilogy of federal cases say,
2 because there, if the defendant shows by
3 summary judgment proof that the plaintiff
4 cannot proof at least one essential element of
5 plaintiff's case, then the plaintiff has to
6 come forward with some summary judgment
7 evidence and say, "Yes, I can prove that." So
8 we've moved to the point where the plaintiff
9 has to support the plaintiff's case to avoid a
10 summary judgment on the merits of the
11 plaintiff's case in <u>Centeq Realty</u>. That's
12 there.
13 The difference that I see, however, is
14 that for a plaintiff or a defendant -- I mean,
15 it's easier to talk in terms of the defendant
16 being the movant, for example, but the
17 plaintiff could be negating an affirmative
18 defense too. It could be a lot of things.
19 Okay. That having been said, we still are
20 focusing in Texas on raising a genuine issue
21 of material fact by showing some evidence, a
22 scintilla of evidence, which is the same
23 standard by which you get to a jury. That's
24 not what's happening in the federal courts,
25 and I think this is a fundamental difference.

1 In the federal courts they articulate
2 that could any reasonable jury, looking at all
3 of this evidence, come to a different
4 conclusion than the plaintiff loses. And that
5 is in the federal cases, and of course,
6 federal judges have enormous power. And if
7 you get to the point of instructed verdict in
8 a federal case and that goes up on review, the
9 standard is much different. The federal
10 judge's ruling is given a lot more deference
11 on appeal, in fact, than a trial judge, a
12 Texas trial judge's ruling on an instructed
13 verdict is given. So to me it's the concept
14 that the federal judges use, could any
15 reasonable jury looking at all this evidence
16 reach but one conclusion, rather than by a
17 scintilla of evidence has the plaintiff raised
18 a genuine issue of material fact. Now, those
19 are pretty strong differences.
20 PROFESSOR DORSANEO: More than
21 a scintilla.
22 CHAIRMAN SOULES: More than a
23 scintilla, yes.
24 MR. LATTING: Is that before us
25 today, though?

1 CHAIRMAN SOULES: Well, that's
2 the difference, I think, between the federal
3 trilogy of cases and the state court practice.
4 Now, how are going to deal with that?
5 JUSTICE HECHT: Luke, I move to
6 respond.
7 CHAIRMAN SOULES: Justice
8 Hecht.
9 JUSTICE HECHT: I'll try to
10 respond intermittently through the day to all
11 of the statements that are made.
12 I appreciate the Chair's view, I take it
13 on behalf of the whole committee, that our
14 Court is light-years better than the U.S.
15 Supreme Court, and I'll convey that opinion to
16 my colleagues.
17 And my fax machine has not been that busy
18 in the last couple of weeks, so I've not been
19 aware of all of the dialogue that has
20 apparently gone on. I do want to say that
21 someone one said earlier that the Court is
22 responding to either pressure from legislators
23 or, worse, from groups other than the
24 legislature, and I think, as far as I know,
25 that that is not the case. I have not been

1 contacted by a legislator on this subject and
2 I would think it unusual that I would be,
3 although Representative Nixon called me a
4 couple of years ago and asked me whether the
5 Court would support his bill or not, and we
6 told him no. We just wouldn't take a position
7 on it one way or the other. And I guess the
8 Court will have to revisit that if it happens
9 again.
10 I have heard from rumors that there will
11 be a significant effort to pass this summary
12 judgment rule this session, and maybe Mike is
13 right about the TLR and the Civil Justice
14 League, but time will just have to tell.
15 There is a bigger issue here for the
16 Court, and it is an issue all nine justices
17 share regardless of their perspective on this
18 subject, and that is a little more than
19 50 years ago the Court was given the power by
20 an overwhelming regard of the legislature to
21 make rules of practice for civil cases. And
22 that Enabling Act that made that change
23 recites that the legislature believe that
24 their efforts to do that in the past had not
25 been very fruitful and had resulted in a good

1 deal of chaos in the system. Since then, our
2 Court has had that prerogative to suggest
3 changes in procedure in the first instance.
4 And that power that the legislature ceded
5 to the Court went untrammeled for about
6 45 years, and in the last several sessions of
7 the legislature, the legislature has expressed
8 an interest, more of an interest in the Rules
9 of Procedure in civil cases than it ever has
10 before. And in the last session there were
11 more bills having to do with Rules of
12 Procedure in the civil courts than there have
13 been since the Enabling Act was passed.
14 So our concern is that, number one, we
15 show that the Court is responsible; is able to
16 respond timely and responsibly to changes that
17 are proposed by the bar; that the Court is
18 mindful of its responsibility in this area.
19 And frankly, we simply can't, Richard, go
20 over to the legislature in March and say,
21 "Well, we haven't talked about because we
22 thought maybe you would flub it up." Whether
23 the Court chooses to go in this direction or
24 not is not something that we can just kind of
25 hope for the best on.

1 And so more than a year ago, the question
2 about should anything be done to the summary
3 judgment rule, and if so, what, was surfaced
4 here in this committee, and the Court Rules
5 Committee at the State Bar had been talking
6 about it for a long time before that, and a
7 considerable amount of work was done here.
8 And the Court would still like to have the
9 views of this committee. The Court is not as
10 much interested in the vote of this committee
11 as it is in the considered views, whatever the
12 reasons are that underlie the vote, whether a
13 change should be made, and if a change is made
14 in the direction of the federal standard, what
15 that change should be. And I think that all
16 nine of us -- whether we support that change
17 or not, and I really don't know what the
18 judgment of the Court would be on that
19 subject -- but all nine of us would like the
20 view, the views, of this committee on whether
21 any change should be made, and if so, what,
22 and if not, why. And that was where we
23 started earlier and have made some progress on
24 this until things happened.
25 Now, I appreciate the concern that has

1 been expressed that uncertainty about the
2 Discovery Rules clouds this issue as well, but
3 it can't be a complete cloud. The Court has
4 in mind the discovery period cutoff that this
5 committee recommended. It has some concerns
6 about whether there should be an absolute
7 period, and if so, what it should be. But
8 whether there is an absolute period of
9 discovery and a particular cutoff, as this
10 committee has recommended, or whether there is
11 a more flexible approach that at some point
12 discovery is expected to be completed, it
13 shouldn't impede the committee's advice to us
14 on how the summary judgment rule should
15 operate in either setting. And frankly, it is
16 no more helpful to the Court to say that
17 summary judgment depends upon discovery than
18 to think the opposite, that discovery may
19 depend upon how summary judgment functions.
20 So I think we have to take these as a
21 unit and consider them together, but to be
22 prepared for the eventuality, as unlikely as
23 Mike says it will be, that a significant
24 effort will be made to pass summary judgment
25 legislation.

1 The Court would like to have the views of
2 the committee. Now, I don't think we're
3 hurrying you up too much, since you've had it
4 under advisement for a year, but I don't want
5 to look at our own docket and make any
6 comparisons. But I do think we need your best
7 shot on it, if not at this meeting, and we
8 really do need it at this meeting, but
9 certainly at the January meeting.
10 CHAIRMAN SOULES: Who wants to
11 speak? Tommy Jacks.
12 MR. JACKS: I don't feel
13 hurried. I mean, I think this is something
14 that's been on our minds. And I think since
15 the Court has requested our input on, A,
16 whether there ought to be a change at all; and
17 then, B, if so, which kind of change do we
18 prefer, I think the Court ought to get it,
19 agreeing with Judge Peeples, that one of the
20 things we're here to do is to answer the
21 questions that are put to us.
22 Buddy has his hand up.
23 CHAIRMAN SOULES: Are you done?
24 MR. JACKS: No, I'm not.
25 CHAIRMAN SOULES: Well, keep

1 going.

2 MR. JACKS: I thought maybe you

3 needed to go to the bathroom.

4 MR. LOW: No, no, I'm just

5 asking you a question.

6 CHAIRMAN SOULES: Go ahead,

7 Tommy.

8 MR. JACKS: I mean, I've sorted

9 through the various drafts we've got here, and

10 I'm one who is of the view that the rule

11 should not be changed.

12 The reason I think the rule should not be

13 changed is I think under the current practice

14 parties who are indeed entitled to judgment

15 either on the whole case or on a part of the

16 case without a trial get that most of the

17 time, if they, in fact, are entitled to it

18 under the state of the evidence at the time

19 when the court is ready to hear summary

20 judgment matters.

21 At the same time, our practice is less

22 burdened by making motions for summary

23 judgment a matter of course than is the

24 federal practice. It costs more to litigate

25 cases in federal court than it does in state

1 court. I don't blame all of that by any means
2 on the summary judgment rule, but I do say
3 that one of the reasons that's the case is
4 because it is almost a checklist item in
5 federal court for there to be motions for
6 summary judgment, even if they are of the kind
7 that say there's no evidence to support the
8 claim of defect, there's no evidence to
9 support this, that and then so on down. They
10 almost become like another kind of discovery
11 device as opposed to a seriously motivated
12 dispositive motion. And I think that's bad
13 for litigants because it raises the cost of
14 the litigation, I think it's bad for lawyers
15 because we've got too damn much on our
16 platters as it is trying to serve the clients
17 we've got, and I think it's a burden on the
18 court.
19 And as some of these letters that have
20 been circulated point out, our state courts at
21 the trial level are certainly less well
22 equipped from a staffing standpoint than the
23 federal courts to deal with a motions
24 practice.
25 Of the choices, they seem to break down

1 into a couple of categories with some
2 variation. And they really are what we've
3 labeled here as the compromise approach and
4 the Celotex approach, as best I can tell. I'm
5 locking in to the Celotex approach, A, the
6 federal rule, which is the second half of the
7 draft Luke circulated, simply Celotex applies
8 as to the federal rule; that if we apply the
9 federal rule, we apply Celotex.
10 The drafts that require that the evidence
11 adduced in response to a claim of no evidence
12 be sufficient evidence to get to a jury I put
13 in a separate category from those drafts which
14 say there's a burden to raise a fact issue. I
15 think there is a difference there. And so the
16 drafts that I put in the former category,
17 which I am calling the Celotex category,
18 include the state bar approach, the State Bar
19 Committee's approach, the draft that Luke
20 circulated.
21 And I'm putting the draft that Judge
22 Peeples circulated in that category. I notice
23 it also requires that the evidence be
24 admissible and legally sufficient, which does
25 raise still some other nuances; that is, are

1 we to have a doubt appearing as a necessary
2 prerequisite to a summary judgment hearing in
3 order to divest any experts, as it were, whose
4 affidavits were offered in support of summary
5 judgment, because if they don't pass muster
6 under Daubert, then they're not legally
7 sufficient and therefore they wouldn't apply
8 under this rule.
9 Under our current practice, as you know,
10 it's not even essential that the expert whose
11 affidavit is offered at summary judgment be an
12 expert who is designated for trial, it could
13 be a different person altogether, although his
14 affidavit does have to show that he is
15 qualified, he or she is qualified to offer an
16 opinion.
17 In the compromise category, I was
18 putting, I guess, essentially the drafts that
19 Judge Brister circulated, the draft labeled
20 the January 16, '96, Advisory Committee draft,
21 and then the draft that Alex has handed out to
22 us, the Draft 1. And so it seems to me that
23 our choices basically are the same three as we
24 had in January.
25 I'm not offended by the idea of voting

1 again, because it certainly would wouldn't be
2 the first time this committee had to do that.
3 We bitch about it every time we have to do it,
4 but nonetheless, we gut up and do it if we
5 have to.
6 I understand the Court's sensitivity to
7 the legislative encroachment on the Court's
8 prerogative of governing the rule making
9 process. I think it's valid and important
10 that the Court defend that turf. It is my own
11 impression, as one who follows the
12 legislature, that there is not serious
13 interest in that body for monkeying with this
14 rule. I won't say there's not a serious
15 interest in monkeying with some rules, because
16 they find a way to do that every session in
17 some form or another.
18 So to sum up my position, as I guess I
19 should do, I'm against any change. If there
20 is to be a change, it ought to be something
21 that looks more like one of the compromise
22 drafts than what I would call the pure federal
23 rule or Celotex. Thank you.
24 CHAIRMAN SOULES: Bill
25 Dorsaneo.

1 PROFESSOR DORSANEO: It's
2 usually helpful when these materials are
3 covered historically to compare the Celotex
4 case with the predecessor primary federal
5 authority, Adickes vs. Kress. And I'm really
6 echoing here what Tommy said here in terms of
7 the drafts.
8 In Adickes vs. Kress, it's a 1983 case,
9 it had to be shown that the store was acting
10 under color of state law because it was
11 dealing with police officials in arresting
12 Mrs. Adickes for having lunch in the store
13 with black people. The issue in her complaint
14 was that there was a policeman in the store,
15 but she didn't have any admissible evidence to
16 that effect. She had an unsworn statement;
17 and then in her own deposition she had said
18 that one of the students who was with her told
19 her that he saw a policeman in the store.
20 Summary judgment was considered to be
21 inappropriate by the United States Supreme
22 Court on the basis that at that time it was
23 necessary for the store to prove a negative,
24 and the store's proof didn't negative the
25 existence of a policeman in the store or some

1 sort of arrangement between a policeman and
2 the store and some lower level Kress
3 official.
4 Under what Tommy is calling Celotex,
5 which I don't think is Celotex, the unsworn
6 statement and the statement in the deposition
7 would not be sufficient for Mrs. Adickes today
8 to survive summary judgment and I think that
9 that would be an entirely inappropriate
10 consequence.
11 So I like, if we're going to make a
12 change, something like this Draft No. 1 where
13 it would not be necessary to avoid a summary
14 judgment to come up with admissible evidence
15 to establish that you could survive a directed
16 verdict motion at trial. And I think the
17 drafts that go that far along the line are
18 going way too far, probably further than they
19 need to go, in any fair system and further
20 than a fair reading of Celotex. But I don't
21 have a big problem with requiring a plaintiff
22 to come up with something at some stage in the
23 proceeding.
24 Celotex itself is an asbestosis case
25 where after two years the plaintiff couldn't

1 establish any evidence of any exposure to
2 asbestos. Well, at some point you do have to
3 fish or cut bait. And the comparison to fact
4 patterns in the two cases is very illuminating
5 to me. Perhaps to me the issues are what
6 would the plaintiff have to come up with in
7 order to avoid summary judgment, and I
8 wouldn't require much. It wouldn't be
9 required to be admissible.
10 And then the other issue is timing. The
11 other issue is timing. And granted, you know,
12 sometimes on the face of the pleadings you can
13 determine that there's no case and there
14 shouldn't be any discovery, but I don't know
15 whether we need to change the standards for
16 that in terms of burdens. I think maybe we're
17 all right there, when the plaintiff pleads
18 himself out of court now and summary judgment
19 is appropriate as distinguished from our
20 special exception practice. Maybe some kind
21 of drafting needs to be done on that. But you
22 know, this Draft No. 1 is a good starting
23 point for all of these matters.
24 CHAIRMAN SOULES: Bill, you're
25 talking about evidence doesn't have to be such

1 as would be admissible in evidence in your
2 reference to Adickes. Our rule already
3 provides that "Supporting and opposing
4 affidavits shall be made on personal
5 knowledge, shall set forth such facts as would
6 be admissible in evidence, and shall show
7 affirmatively that the affiant is competent to
8 testify to the matters stated therein." So we
9 have supporting and opposing affidavits.
10 PROFESSOR DORSANEO: But that
11 was the Adickes -- that was the problem in
12 Adickes. The argument was that once the
13 burden to establish entitlement to judgment as
14 a matter of law is satisfied, then the
15 plaintiff must come up with admissible
16 evidence. But before then, before -- it has
17 to do with, you know, this question of what
18 does the defendant have to show. It's what
19 Paul was talking about. But it's a dynamic
20 process. It involves -- Paul would say you
21 haven't negated that unsworn statement. If
22 you haven't negated that hearsay statement in
23 the deposition, you haven't met your burden as
24 a defendant to show entitlement to judgment as
25 a matter of law.

1 Now, in the dynamic process of it, the
2 way it would be argued, Mrs. Adickes' lawyer
3 would say, "You shouldn't grant summary
4 judgment against me. I have this unsworn
5 statement. I have this statement in the
6 deposition. I don't have it in admissible
7 form yet, but what difference does that make
8 at this stage?"
9 CHAIRMAN SOULES: Okay. The
10 court reporter needs a break. Let's take
11 10 minutes, and then we'll come back and I'll
12 call on the hands.
13 (Recess.)
14 CHAIRMAN SOULES: All right.
15 We're convened, and let's get back on the
16 record. Hands were up. Let's see them.
17 Okay. David Perry.
18 MR. PERRY: Mr. Chairman, I
19 agree very much with those who have said that
20 we owe the Supreme Court our advice.
21 Apparently, it is not clear what the group
22 feels in terms of whether there ought to be a
23 change or not, and if there ought to be, the
24 direction that that change ought to go. And I
25 find that there can be a lot of confusion

1 generated by broad discussions that say,
2 "Let's do Celotex," or "Let's do semi-
3 Celotex," or "Let's do a Celotex compromise,"
4 as opposed to discussions that focus on
5 specific language.
6 In the various drafts that are proposed,
7 I see that most of those drafts have a lot of
8 changes in the rule other than the burden of
9 proof issue that almost all of our discussion
10 has enclosed. I guess I would invite those
11 who believe -- I would invite someone who
12 believes that there should be a change in the
13 burden of proof to present the committee with
14 a specific proposal, perhaps conceptual,
15 perhaps subject to later drafting, but with a
16 specific proposal on what they believe ought
17 to be done so that we can have something on
18 the table and debate it specifically and give
19 the Supreme Court our judgment as to whether
20 we believe that proposal ought to be adopted
21 or not.
22 Now, if it's felt that even if we believe
23 it shouldn't be adopted, we ought to go ahead
24 and draft it, of course. I think that might
25 be a good idea, because if it's believed that

1 the Court would like to have a draft even with
2 a recommendation that that it do not pass, I
3 think that's fair. But I think we owe it to
4 the Court to go ahead and give them our
5 collective judgment.
6 CHAIRMAN SOULES: So you want
7 to invite the members of the committee to
8 address the burden issue in particular?
9 MR. PERRY: It appears to me
10 from the discussion that 95 percent of the
11 discussion has to do with burden of proof,
12 should we change the burden, and when and how
13 should the burden change. And I suspect that
14 the Supreme Court may find it frustrating that
15 we take a long time sometimes to get to the
16 point, and if we are a little bit under the
17 gun for whatever reason, maybe we could cut to
18 the chase by somebody making a proposal on the
19 burden of proof issue and see what people
20 think about it.
21 CHAIRMAN SOULES: Does anyone
22 want to take that?
23 PROFESSOR ALBRIGHT: I have a
24 proposal.
25 CHAIRMAN SOULES: Alex

1 Albright.

2 PROFESSOR ALBRIGHT: I propose

3 Draft 1.

4 CHAIRMAN SOULES: And how does

5 it operate?

6 PROFESSOR ALBRIGHT: Draft 1(b)

7 says that "After adequate time for discovery

8 the movant can seek summary judgment on a

9 matter upon which the respondent has the

10 burden of proof at trial by demonstrating the

11 absence of a general issue of material fact."

12 So that makes clear that the movant still

13 has the burden of demonstrating the absence of

14 a genuine issue of material fact.

15 And then, "The respondent shall have the

16 burden to produce evidence showing that there

17 is a genuine issue of material fact to avoid

18 summary judgment."

19 This language comes from Celotex, and it

20 is meant to make clear that the movant has a

21 burden of showing that there's no genuine

22 issue of material fact that has come forward

23 in the discovery done at that time, and if the

24 movant has satisfied that burden, then the

25 respondent then has the burden to produce

1 evidence showing there is genuine issue of
2 material fact. It specifically does not say
3 that the movant has a burden to present
4 admissible evidence sufficient to enable that
5 party to go to the jury if they were at
6 trial. It has the burden to present evidence
7 that will convince the trial judge that there
8 is an issue of material fact.
9 In Celotex, for instance, the
10 defendant -- the plaintiff's evidence was a
11 letter from an official of one of the
12 decedent's former employers, whom the
13 petitioner planned to call as a trial witness,
14 and a letter from an insurance company to the
15 respondent's attorney all tending to establish
16 to the decedent had been exposed to Celotex's
17 Asbestos products in Chicago during
18 1970-1971. The Supreme Court in Celotex
19 remanded to the court of appeals to determine
20 whether this was sufficient to show that there
21 was a genuine issue of material fact.
22 And Bill Dorsaneo has told me that on
23 remand the court of appeals said that it was
24 error to grant summary judgment with this
25 evidence. Is that correct, Bill?

1 PROFESSOR DORSANEO: I don't
2 remember, but I think that's right.
3 PROFESSOR ALBRIGHT: Okay. So
4 what this would do is give the trial judge and
5 the court of appeals judge discretion to look
6 at what the plaintiff brings forward to decide
7 if there is an issue of material fact. And
8 even if the evidence is not in admissible form
9 at the summary judgment stage, then the
10 summary judgment motion can be denied if the
11 judge feels that there is a genuine issue of
12 material fact.
13 MR. YELENOSKY: How does the
14 burden on the movant differ? I mean, it just
15 literally says no genuine issue --
16 CHAIRMAN SOULES: Speak up,
17 Steve. You're asking a question we all may
18 want to hear.
19 MR. YELENOSKY: Yeah, well, I'm
20 just having trouble seeing how this language
21 or how this burden differs on the movant. In
22 the first sentence it says, "establishing that
23 there is no genuine issue of any material
24 fact," and then in the second it says,
25 "demonstrating the absence of a genuine issue

1 of material fact." Is there supposed to be a
2 difference between those two?
3 PROFESSOR ALBRIGHT: Yeah. The
4 burden of establishing no genuine issue of
5 fact would be the conclusion or negation of
6 the claim. That is the current standard.
7 What this does is, say you --
8 MR. YELENOSKY: In the second
9 instance it says burden of demonstrating. Is
10 it demonstrating the absence of evidence?
11 PROFESSOR ALBRIGHT: The
12 absence?
13 MR. YELENOSKY: I mean --
14 PROFESSOR ALBRIGHT: It would
15 be in all of these cases in the federal
16 system, as I understand it, that you say we
17 have taken all this discovery, all these
18 depositions, looked at all the --
19 MR. YELENOSKY: -- and there's
20 nothing there.
21 PROFESSOR ALBRIGHT: -- and
22 there's nothing there, right.
23 MR. YELENOSKY: Well, I'm
24 having trouble seeing how the phrase
25 "establishing that there is no genuine issue

1 of material fact" and the phrase
2 "demonstrating the absence of a genuine issue
3 of material fact" are in any way distinct.
4 CHAIRMAN SOULES: They say the
5 same thing, don't they?
6 MR. YELENOSKY: From what I'm
7 hearing they're not meant to say the same
8 thing, and my understanding of the whole
9 conversation is that in the second instance
10 the movant has less of some burden than they
11 do in the first instance. In the first
12 instance you're establishing that there is no
13 genuine issue of material fact by negating the
14 fact. And in the second instance, you're
15 basically saying this guy has got no proof.
16 Is that right? And if that's right, how does
17 this language make that distinction? It
18 doesn't seem to unless you say in the second
19 instance, "by demonstrating the absence of
20 evidence of a genuine issue of material fact."
21 PROFESSOR DORSANEO: I think
22 that's right. And I think the language, the
23 beginning part is a little bit opaque. It's
24 meant to cover both situations; inclusively
25 negating, the way it is now, or you know, as

1 Rehnquist's opinion says, or by showing that
2 there's no -- showing the absence of evidence,
3 of summary judgment evidence, you know, at
4 this stage of the proceeding. It's in Celotex
5 itself. He says how you carry the burden.
6 CHAIRMAN SOULES: Alex, so
7 these are not meant to say the same thing?
8 PROFESSOR ALBRIGHT: Well, the
9 problem that we're dealing with is the federal
10 rule and the state rule that set out the
11 standard for summary judgment are exactly the
12 same; they are interpreted differently. So
13 what we're trying to do is say the same thing
14 that the federal rule does, keep our standard,
15 our summary judgment standard, but then also
16 make clear that we want to interpret that
17 standard differently than we have been up to
18 this point.
19 I am open to other ways to write this. I
20 was trying to --
21 MR. YELENOSKY: Yeah, and I
22 think that is the problem. And you know, I'm
23 prefacing all of this like a lot of people by
24 saying I don't think we should change the
25 rule.

1 But if we are suggesting language that
2 would change the rule, then this doesn't seem
3 to do it, because if we're mixing the state
4 language and the federal language and the real
5 distinction is in the interpretation of the
6 language, that's fine. If you're talking
7 about the language in state court and it's got
8 got its interpretation, and then you're in
9 federal court and you're talking about that
10 language which is almost the same and it has
11 got a different interpretation, but when you
12 put them together, they've got to be
13 different.
14 CHAIRMAN SOULES: Alex, let me
15 ask you a question, because I'm having trouble
16 understanding this and maybe everybody else
17 understands it. What is the difference
18 supposed to be between "establishing that
19 there is no genuine issue of material fact,"
20 that language, and the language "demonstrating
21 the absence of a general issue of material
22 fact"?
23 PROFESSOR ALBRIGHT: Well,
24 maybe there isn't. All I'm saying is this is
25 the best I could come up with the day I was

1 sitting at my computer.
2 CHAIRMAN SOULES: But is there
3 supposed to be a difference?
4 PROFESSOR ALBRIGHT: All I'm
5 trying to do is make it clear that the movant
6 has more of a burden than writing a half-page
7 motion for summary judgment and saying,
8 "Plaintiff, you don't have any evidence. You
9 better show me what you've got or you lose."
10 CHAIRMAN SOULES: Okay.
11 PROFESSOR DORSANEO: You have
12 to add the word "evidence," "absence of
13 evidence of a genuine issue of material fact,"
14 to get to Celotex.
15 PROFESSOR ALBRIGHT: Okay.
16 Absence of evidence establishing?
17 MR. YELENOSKY: Evidence of.
18 MR. ORSINGER: Is this in the
19 second line or the second sentence?
20 PROFESSOR DORSANEO: No, it's
21 in the "however" line.
22 PROFESSOR ALBRIGHT: Fifth
23 line.
24 MR. YELENOSKY: Has the burden
25 of proof at trial by demonstrating the absence

1 of evidence of a genuine issue of material
2 fact.
3 HON. C. A. GUITTARD: You don't
4 have evidence of issues, you have evidence of
5 facts. So it should be "evidence establishing
6 the absence of a genuine issue of material
7 fact."
8 CHAIRMAN SOULES: Or evidence
9 raising.
10 PROFESSOR DORSANEO: Raising.
11 HON. C. A. GUITTARD: Okay.
12 PROFESSOR ALBRIGHT: Absence of
13 evidence raising a genuine issue of material
14 fact.
15 CHAIRMAN SOULES: Right.
16 MR. ORSINGER: But the first
17 sentence still needs surgery.
18 PROFESSOR ALBRIGHT: No, the
19 first sentence I specifically did not conduct
20 surgery on, I don't believe, because I did not
21 want to -- there was a big discussion at the
22 last meeting that we not change things that
23 have judicial gloss on them. And I believe --
24 I mean, I did this several -- you know, a week
25 or so ago, but I believe that I tried to leave

1 it like the current rule so that you couldn't
2 say that we're changing the standard for every
3 motion for summary judgment. So let me look
4 through the --
5 CHAIRMAN SOULES: Okay. Is
6 this right, that the first sentence is
7 designed to say that where you've got a legal
8 issue that's dispositive of the case, you take
9 it to the court?
10 PROFESSOR DORSANEO: That's
11 also the same as the directed verdict
12 standard, which we talked about, at trial.
13 CHAIRMAN SOULES: Okay. And
14 the second sentence is the directed verdict
15 sentence.
16 PROFESSOR DORSANEO: No.
17 CHAIRMAN SOULES: That's not
18 right?
19 PROFESSOR ALBRIGHT: No.
20 MR. ORSINGER: The first
21 include includes both a legal argument and a
22 no-fact, I believe.
23 PROFESSOR ALBRIGHT: Okay. The
24 first sentence is the same standard that is in
25 the rule right now.

1 MR. ORSINGER: Where is it in
2 the rule?
3 PROFESSOR ALBRIGHT: Look at
4 the red-line version.
5 PROFESSOR DORSANEO: It's in
6 paragraph (c).
7 PROFESSOR ALBRIGHT: It's on
8 Page 2. It's in paragraph (b) or (c), I can't
9 remember which.
10 PROFESSOR DORSANEO:
11 Subdivision (c).
12 PROFESSOR ALBRIGHT: It says in
13 the part of the rule that talks about the
14 judgment shall be rendered if the deposition
15 transcripts, et cetera.
16 MR. JACKS: (d) on Page 2 of
17 the red-line.
18 PROFESSOR ALBRIGHT: Yeah.
19 "There is no genuine issue as to any material
20 fact and the moving party is entitled to
21 judgment as a matter of law on the issues
22 expressly set out in the motion," et cetera.
23 So I took the language, "there is no genuine
24 issue as to any material fact and the moving
25 party is entitled to judgment as a matter of

1 law," directly out of that, because I think we
2 do want summary judgment to remain exactly the
3 same in every situation except these where the
4 defendant is filing a motion for summary
5 judgment and claiming that the plaintiff has
6 no evidence. Those are the only ones that we
7 are changing under this rule or where -- I'm
8 not -- where the party is claiming that the
9 party that has the burden of proof at trial
10 has no evidence.
11 CHAIRMAN SOULES: Well, doesn't
12 this say -- maybe if I can get my question
13 articulated differently.
14 The first one clearly includes where you
15 have a legal basis to dispose of the case.
16 PROFESSOR DORSANEO: Right.
17 CHAIRMAN SOULES: The second
18 sentence seems to say that if you're going to
19 raise a no-evidence summary judgment issue,
20 you've got to do that after the time for
21 discovery.
22 PROFESSOR ALBRIGHT: Right.
23 CHAIRMAN SOULES: So that's an
24 additional burden on that kind of a motion for
25 summary judgment.

1 PROFESSOR ALBRIGHT: Right.
2 CHAIRMAN SOULES: Meaning that
3 no-evidence motion for summary judgment.
4 MR. ORSINGER: Luke, I don't
5 think that first sentence is limited to a law
6 point. The language that Alex left in the
7 state rule and didn't carry over is more
8 important in my opinion than the language she
9 brought over.
10 PROFESSOR ALBRIGHT: What do
11 you mean?
12 MR. ORSINGER: Because the
13 first one says that you have to -- the state
14 rule that you abstracted this concept from
15 says that you have to demonstrate it from the
16 written discovery. The sentence that you have
17 written does not say that based on the written
18 discovery you must show no genuine issue. And
19 I think that it is very arguable that someone
20 could just make an assertion under your first
21 sentence.
22 PROFESSOR ALBRIGHT: Yeah.
23 MR. YELENOSKY: But I look.
24 PROFESSOR ALBRIGHT: But if you
25 look at "Supporting Materials" under part (d),

1 it was intended that (d) establishes what you
2 to have put in and what you have to use to
3 support your summary judgment.
4 MR. ORSINGER: But it just says
5 that you may support it with that if you
6 want. The problem I have with your first
7 sentence is that it doesn't require you to win
8 based on the discovery, and I think that
9 it's --
10 MR. YELENOSKY: Read in
11 conjunction with the next sentence --
12 CHAIRMAN SOULES: Steve, wait a
13 minute, let Richard finish, and then I'll give
14 you one more shot. And then I'll get around
15 the table.
16 MR. ORSINGER: I'm finished.
17 CHAIRMAN SOULES: Richard, are
18 you done? Okay. Steve, excuse me.
19 MR. YELENOSKY: Well, I mean,
20 the first sentence, when you read it in
21 conjunction with the second sentence, whether
22 or not the first sentence would encompass both
23 of those things, the second sentence makes
24 clear that it's only after adequate time of
25 discovery. And that by implication means that

1 before adequate time for discovery this ain't
2 a way you can do it.
3 MR. ORSINGER: The word "only"
4 that you just used is not in this rule.
5 CHAIRMAN SOULES: That's right.
6 MR. YELENOSKY: Well, then
7 maybe we need to add that word.
8 MR. ORSINGER: I think it needs
9 surgery.
10 CHAIRMAN SOULES: Paul Gold.
11 MR. GOLD: I've got two
12 things. Number one, on this issue, it seems
13 as though I've seen wording before and the
14 wording should go into this sentence, the
15 first sentence, that the party having the
16 burden of proof burden at trial, or something
17 to that effect, moving for summary judgment
18 has the burden of establishing that there is
19 no genuine issue of material fact and that
20 that moving party is entitled to judgment as a
21 matter of law. That would encompass both a
22 plaintiff, if the plaintiff was moving for
23 summary judgment, and a defendant on an
24 affirmative defense if the defendant were
25 moving. Then you don't need all the

1 discovery. That would be the statute of
2 limitations issue or whatever. At that stage
3 the person moving for summary judgment would
4 have to establish with evidence that they're
5 entitled to the ruling as a matter of law, as
6 opposed to the instance where the movant is
7 saying that the nonmovant has insufficient
8 evidence on a point on which the nonmovant has
9 the burden of persuasion. That's number one.
10 Number two, and I just want to make sure
11 when we're drafting this, I think it's going
12 to be critical somewhere, and I'm not wedded
13 to putting it in the rule, but I think it's
14 going to be critical, that if we're going to
15 go with a Celotex version, and I'm on the
16 record opposed to that, that there be some
17 description of how the moving party in the
18 second sentence goes about demonstrating the
19 absence of a genuine issue, because that is
20 the gut-level critical question here.
21 Is it merely adequate for the moving
22 party in a no-evidence type of situation to
23 say in a conclusionary fashion that the
24 plaintiff has no chance of putting on any
25 evidence on this point or has no evidence on

1 this point? Or do they have to go further and
2 say, "We have challenged all of the
3 plaintiff's alleged potential bases of
4 evidence on its elements that it must prove at
5 trial, and subject to Rule 11 in federal court
6 we're saying there is no chance of there being
7 any evidence on this point"?
8 But I'm merely saying that in the second
9 sentence, either by comment or by rule or by
10 something, there would have to be laid out to
11 avoid a great deal of controversy and
12 confusion how it is that the movant
13 demonstrates the absence of a genuine issue of
14 material fact, because that was a major issue
15 in Celotex and it is the muddiest portion of
16 Celotex.
17 CHAIRMAN SOULES: David Beck.
18 MR. BECK: Yeah. Alex, can I
19 ask a clarification question? On the second
20 sentence under (b), if I move for summary
21 judgment today on behalf of the defendant
22 under our current rule and I'm seeking summary
23 judgment on a matter on which the respondent
24 has the burden of proof at trial, why can I
25 not get a summary judgment?

1 PROFESSOR ALBRIGHT: You have
2 to conclusively negate an element of the
3 plaintiff's claim.
4 MR. BECK: But if I do that, I
5 can get it under the existing rule?
6 PROFESSOR ALBRIGHT: Right. If
7 you can conclusively negate that claim, if you
8 can present negative evidence of that element,
9 then the plaintiff has the burden of coming
10 forward and --
11 MR. BECK: Right. The
12 defendant didn't do it, no causation,
13 something like that?
14 MR. YELENOSKY: The police
15 department says in the affidavit that there
16 was no policeman there.
17 MR. BECK: Okay. Now, what
18 does this allow the defendant to do that it
19 cannot do under the existing rule?
20 PROFESSOR ALBRIGHT: It can
21 say, "I have taken these depositions, and no
22 one can identify or no one has said that
23 Celotex's asbestos was anywhere in the
24 buildings that the plaintiff worked. There is
25 no evidence that Celotex's asbestos was

1 anywhere, and I have taken all these
2 depositions, and no one has said it. I've
3 looked at all these documents and nowhere does
4 it" --
5 MR. BECK: In other words, I
6 don't have anybody that can come forward and
7 say we didn't do it. We just simply come
8 forward and say, "They don't have anybody who
9 says they did do it."
10 PROFESSOR ALBRIGHT: Right.
11 MR. YELENOSKY: Or you can't
12 come forward with an admission by the guy
13 saying, "I was never exposed."
14 CHAIRMAN SOULES: Justice
15 Duncan.
16 HON. SARAH DUNCAN: But that's
17 the question. What the court actually held in
18 Celotex was -- let me start over.
19 In my view, there is one problem with the
20 burden, and that is the problem that arises
21 when the deficiency in the plaintiff's case is
22 a no-evidence deficiency, because in Texas
23 there is a vast difference between
24 conclusively proving that the plaintiff was
25 not exposed to asbestos and proving that there

1 is no evidence that the plaintiff was exposed
2 to asbestos. That's the only thing in the
3 Texas summary judgment standard that I want to
4 fix as far as the burden goes.
5 What the court said -- and that brings us
6 to the problem that I have with this
7 language. How do I demonstrate the absence of
8 evidence raising a genuine issue of material
9 fact? That's basically the same problem we've
10 got now. What the court held was sufficient
11 in Celotex, the defendant's motion said --
12 petitioner's motion, which was first filed in
13 September of 1981, argued that summary
14 judgment was proper because respondent had
15 failed to produce evidence that any Celotex
16 product was the proximate cause of the
17 injuries alleged within the jurisdictional
18 limits of the district court. That's what the
19 court held was enough.
20 And they say on Page 325: The burden of
21 the moving party may be discharged by
22 "showing" -- that is, pointing out to the
23 district court, that there is an absence of
24 evidence to support the nonmoving party's
25 case. So what Celotex said was okay is a

1 motion that simply says there is no evidence
2 of this element. That in and of itself
3 shifted the burden to the plaintiff to bring
4 forward evidence raising a triable issue of
5 fact on the exposure issue.
6 If we're going to write it the way it's
7 written in this draft, we are not in my view
8 solving the one problem we've got with the
9 burden, which is how does the defendant prove
10 the absence of exposure or a negative.
11 PROFESSOR ALBRIGHT: I agree
12 with you completely. Give me some language.
13 HON. SARAH DUNCAN: Well --
14 CHAIRMAN SOULES: Let me try.
15 HON. SARAH DUNCAN: That's why
16 I prefer Judge Peeples' draft, is that it
17 clarifies that the no-evidence situation is
18 the single exception for the Texas standard
19 for summary judgments, because I perceive a
20 huge problem, and I've talked with a lot of
21 briefing attorneys at the court and a lot of
22 attorneys this week, if we go with a burden
23 rule that says, "Here is the burden,
24 except..." What we're going to do, if we go
25 with a nine-month, two different burdens, or

1 120 days or a discovery period or whatever the
2 difference is going to be, we're going to
3 develop two separate bodies of case law. And
4 I don't think a first-year lawyer is going to
5 be able to figure that out, and we're going to
6 end up with a huge mess.
7 If we just tack something on to the end
8 and say, "Here is an exception," I think most
9 lawyers can deal with that. I don't think
10 they can deal with two simultaneous standards.
11 MR. GOLD: Luke.
12 CHAIRMAN SOULES: Paul Gold.
13 MR. GOLD: We're getting
14 there. I think that Judge Peeples' language
15 comes a little bit closer to addressing the
16 issue, but I still have some problems with
17 it. And I'm looking particularly at -- I'm
18 looking at Judge Peeples' proposal. I'm on
19 the third page of his letter, I'm on (i), and
20 I'm on the sentence that says -- it's the
21 second sentence, I believe, or actually the
22 third after -- the third including the title,
23 "The motion shall identify the discovery that
24 has been completed." I think that would be in
25 conformance with Celotex. I think you would

1 have to identify all the discovery that had
2 been completed.
3 "And state which elements" -- this is
4 where I have a little bit of a problem -- "are
5 not supported by evidence." I think it
6 probably should say, "cannot be supported by
7 evidence," as opposed to "are not," and this
8 gets a little bit esoteric, but it got back to
9 Celotex, and that is that at this stage all
10 that the plaintiff has to do is put on
11 responses to discovery, documents, letters,
12 whatever, and it is the defendant's burden to
13 indicate that they have challenged this
14 discovery, investigated it or whatever, and
15 that it will not not yield admissible evidence
16 at trial.
17 Now, the critical thing here, and I want
18 this to be a consideration as well, is the
19 difference between Rule 11 in the federal
20 court and Rule 13 in the state court, because
21 if you start getting into merely a
22 representation, which is I believe what Sarah
23 is recommending, is a statement from the
24 responding attorney, "Judge, here is all the
25 discovery. We've investigated this

1 discovery. We've challenged this discovery.
2 We've taken depositions, and there is no
3 evidence." Well, that should be punishable by
4 death if they're wrong. If they're
5 misrepresenting that, that's a critical
6 misrepresentation, and I don't know if our
7 present system addresses that. But that would
8 address the issue about what the burden is.
9 I would respectfully disagree with that
10 sentence in Judge Peeples' proposal only to
11 the extent that it can be supported by
12 evidence or something like that. That should
13 be the word or phrase other than "not
14 supported by the evidence."
15 PROFESSOR ALBRIGHT: Paul, I
16 think that --
17 CHAIRMAN SOULES: Sarah.
18 HON. SARAH DUNCAN: I agree
19 with you. To me, I think one of the biggest
20 problems I've had in federal court is people
21 will come in, or just in the cases I've read,
22 that it's just serial motions for summary
23 judgment to flush out the evidence, bankrupt
24 the plaintiff, whatever it is.
25 I think there should be a cost shifting

1 mechanism for the cost of preparing responses
2 if the movant -- and I don't -- I mean, after
3 reading David Lopez's article, I completely
4 agree with you on our Sanctions Rules.
5 They're not adequate to do that.
6 So what I have drafted is a reimbursement
7 section that would supplement it that says,
8 "If a motion made under the subsection (i) is
9 denied, the trial court may require the movant
10 to reimburse the nonmovant for the cost
11 incurred by it in responding to the motion,
12 including the nonmovant's reasonable and
13 necessary attorneys' fees. If the trial court
14 also finds the movant knew or should have
15 known the motion lacked merit, the trial court
16 must require reimbursement," because the
17 problem we're going to have is that a
18 defendant isn't going to look at their own
19 files, at the discovery in other own files.
20 They're just going to say "no evidence," the
21 plaintiff is going to have to come forward and
22 marshal the evidence that goes to that
23 element, and that's not fair. That's just not
24 fair. And if the defendant knew or should
25 have known there was evidence on that element

1 in the discovery that that defense attorney or
2 the associates in his firm or his co-counsel
3 did, they shouldn't be able to file one of
4 these motions and get away with it, because
5 you can bankrupt a plaintiff. You can
6 literally bankrupt a plaintiff by doing that.
7 CHAIRMAN SOULES: David Perry.
8 MR. PERRY: Well, I think that
9 that brings out the vice in the whole problem,
10 and if we pursue this effort we're going to
11 end up building an elephant gun to try to
12 shoot a flea. The problem that we have,
13 whether it's a real or perceived problem,
14 let's assume it's a real problem in a very
15 narrow category of cases, one in which there
16 is an absence of evidence either way on a
17 critical point. If we pass the rule to deal
18 with that perceived problem, we are going to
19 almost certainly end up with word processor
20 motions filed in thousand and thousands and
21 thousands of cases making the motion on every
22 aspect of the case in spite of the fact that a
23 first-year law student would know that the
24 motion was not any good.
25 We still receive -- you know, the plea of

1 privilege law has not been the law in this
2 state for a long time, but the ingrained
3 response of every defendant and every defense
4 law firm for 50 years was to file a plea of
5 privilege, and so we still get motions to
6 transfer venue in cases where the defendant
7 has no desire at all, no belief at all that
8 then you should be changed, but their word
9 processor has required that something like
10 that be sent out for 50 years, so they have to
11 do it.
12 Now we're going to have a new word
13 processor form, and in order to try to avoid
14 that word processor form, we're going to have
15 to create a sanctions rule. And in order for
16 the sanctions rule to have any effect,
17 somebody is going to have to file motions for
18 sanctions, and so now we're going to not only
19 have a rule that is highly abused, we're going
20 to have a whole new series of satellite
21 litigation to try to deal with the abuse that
22 the rule will generate, and it's just not
23 worth the game.
24 CHAIRMAN SOULES: Bill
25 Dorsaneo.

1 PROFESSOR DORSANEO: Well, I
2 don't care much for the sanctions aspect, but
3 building on what Paul is saying, I would
4 change Alex's draft to add in "demonstrating
5 the absence of evidence raising a genuine
6 issue of material fact." Then I would go to
7 the other draft that I didn't have in front of
8 me a while ago, David Peeples' draft, and
9 borrow from it by saying after "genuine issue
10 of material fact," or "demonstrating the
11 absence of evidence raising a genuine issue of
12 material fact specifying that there is no
13 evidence to support one or more specified
14 elements of claims or defenses on which an
15 adverse party would have the burden of proof
16 at trial," recognizing that I've now said
17 "burden of proof at trial" twice. And that
18 satisfies the standard, and it also should
19 satisfy Paul or at least mollify him on just
20 some general form motion that says you don't
21 have a case.
22 And at that point I would put a period
23 and go to the next sentence and say, "The
24 respondent has the burden to produce
25 evidence." But I would make it clear that the

1 evidence does not need to be in admissible
2 form or admissible at trial, and then I'm
3 through until we go change supporting
4 materials to match that.
5 PROFESSOR ALBRIGHT: So Bill,
6 are you deleting --
7 CHAIRMAN SOULES: Elaine
8 Carlson.
9 PROFESSOR CARLSON: I think
10 until we clarify better than that, Bill, what
11 it is exactly the movant has to do to shift
12 the burden that all of these other problems
13 are still on the table, the potential for
14 abuse, the potential for sanctions,
15 et cetera. I think we have to identify more
16 clearly something more than state set forth --
17 I mean, that's the problem with Celotex.
18 That's the critique of Celotex.
19 PROFESSOR DORSANEO:
20 "Specifying that there is no evidence," in
21 the Peeples' draft, "to support one or more
22 specified elements of claims or defenses."
23 How could you be more specific than that?
24 PROFESSOR CARLSON: Because
25 that's a conclusory statement, and if that's

1 all that it takes, then all of the other
2 problems that we've discussed or potential
3 problems are still there. They really are.
4 HON. SARAH DUNCAN: But if you
5 don't have -- I'm sorry.
6 PROFESSOR CARLSON: It's going
7 to become a prophylactic motion and we're
8 going to end up with sanctions and we're going
9 to end up with review. And I think if we can
10 identify exactly what is that proof that has
11 to be made by the movant to shift the burden
12 in some meaningful way, I don't know...
13 CHAIRMAN SOULES: Let me see,
14 this doesn't seem that hard to me. Maybe I
15 just don't perceive the difficulty. But what
16 I think Centeq Realty means is it's the burden
17 of the movant.
18 Take an example, an intersection
19 collision, several cars. One leaves. It's a
20 blue car. Somebody writes down half the
21 license plate. I get sued because I've got a
22 blue car and that half a license plate fits
23 me, but the other half is blank, and I file a
24 motion for summary judgment. I was in Idaho
25 fishing, and my car was in Red McCombs' garage

1 being repaired, and here is conclusive
2 evidence of that, and I want out. Somebody
3 has got to come forward and show that that
4 really was my car, because I have conclusively
5 established that I wasn't at the intersection
6 at that time. Now, if the plaintiff wants to
7 haul me in, they've got to raise a genuine
8 issue of material fact by putting on some
9 evidence that I was.
10 MR. PERRY: That's under the
11 present law.
12 CHAIRMAN SOULES: Under the
13 present law, exactly. Now, that's what I
14 think this means.
15 MR. GOLD: If I can, there are
16 two things in Celotex, two things -- there are
17 two ways that you can put it --
18 CHAIRMAN SOULES: I said
19 Centeq.
20 MR. GOLD: Well, let me put it
21 into Celotex. Celotex says if you're the
22 movant on a no-evidence issue, you can dispose
23 of it two ways. You can put on evidence,
24 affidavits or whatever, "I wasn't there, I was
25 in Idaho," which finesses the nonmovant, then,

1 automatically to have to put on controverting
2 evidence, because you've put on evidence.
3 What Celotex was saying is that you don't have
4 to do that. You don't have to. You can
5 merely move to Step 2 and challenge the
6 nonmovant. But in that instance, how do you
7 do it? What do you have to do as the movant
8 if you don't have to put on affidavits? If
9 you don't have to put on evidence, what is it
10 that you have to do to activate the burden on
11 the nonmoving party? There, that's it.
12 CHAIRMAN SOULES: That's it.
13 All you have to do is plead.
14 MR. GOLD: And that raises the
15 same thing.
16 CHAIRMAN SOULES: And I don't
17 think there's any sentiment around this table
18 to make that Texas law. If there is, somebody
19 speak up, then, that it's just a matter of
20 assertion in a pleading signed by a lawyer
21 that there's no evidence.
22 MR. PERRY: Let me make a
23 suggestion.
24 MR. ORSINGER: The proposal
25 supports that view. Judge Brister's proposal

1 does that, if I'm not misreading it, and I
2 think Judge Peeples' proposal does that, if
3 I'm not misreading it, after adequate time for
4 discovery.
5 HON. DAVID PEEPLES: It does
6 what?
7 MR. ORSINGER: After an
8 adequate time for discovery, under your rule,
9 a mere assertion that there is no evidence at
10 that point puts the burden on the respondent.
11 HON. DAVID PEEPLES: If you
12 specify the element and say we've had
13 discovery and nobody has testified to this --
14 MR. ORSINGER: That's fine.
15 The point is that these proposals around the
16 table do exactly that. You make the
17 allegation at some point in time unsupported
18 by affidavits that your car was in another
19 town and that you were in another state, and
20 the burden is then on the plaintiff to come
21 forward with real evidence.
22 CHAIRMAN SOULES: Okay. The
23 consequence of that, of course, is that the
24 threshold motion basically is not even
25 supported by any supporting material. That's

1 number one, so it's real easy to do. The
2 other consequence to that is that that puts a
3 party to doing something that we voted not to
4 ever require that party to do in
5 interrogatories, and that is to marshal their
6 evidence, because I've got to come back just
7 to a raw allegation. Now, if that's the way
8 the committee wants to do it, and apparently
9 some people may, so be it. But is that what
10 we're headed to do? Let me start with Bill
11 and go around the table.
12 PROFESSOR DORSANEO: One more
13 try. If David Peeples' language on
14 specificity is not specific enough, and I've
15 heard what Professor Carlson said and it might
16 be right, the only thing to make it more
17 specific, I think, would be to say that you're
18 going to specifically negative the factual
19 theories contained in the complaint, which we
20 may end up calling a petition. And if it's
21 not enough to say there's no evidence of one
22 or more of the specified elements of the
23 claim, because that gets too abstract, no
24 evidence of negligence, no evidence of
25 proximate cause, then the only way I know of

1 to make it more specific is to make the
2 defendant negative the allegation that there
3 was no failure to keep a proper lookout and
4 maybe, you know --
5 CHAIRMAN SOULES: Negative with
6 what?
7 PROFESSOR DORSANEO: With an
8 assertion, a specific denial.
9 CHAIRMAN SOULES: Just an
10 assertion but no evidence?
11 PROFESSOR DORSANEO: Well, if
12 you're not going to do that, then you just
13 don't want to go to the other standard.
14 Okay? And that's simply it, I mean.
15 CHAIRMAN SOULES: Right.
16 That's what we're talking about, right.
17 PROFESSOR DORSANEO: Well, if
18 we're back to talking about that again, then
19 we're back to talking about that again.
20 CHAIRMAN SOULES: Well, that's
21 what it does. Okay. Richard Orsinger.
22 MR. ORSINGER: I agree with
23 your description about the car in the garage.
24 It seems to me that the burden should shift to
25 the respondent in the face of some kind of

1 proof, even if it's just an affidavit saying
2 "that's not my dog." And then when you've
3 got real evidence that the defendant is not
4 liable, then the plaintiff has got to come
5 forward with real evidence to show there's a
6 fact issue about that.
7 I don't like the idea that at any time,
8 whether it's after 30 days, after 10 days,
9 within 120 days of trial, that the defendant,
10 knowing perhaps full well that there is
11 evidence of liability that is out there to get
12 but hasn't been gotten there yet, can just
13 file a motion and say, "We say we're not
14 liable," and so the plaintiff has got to try
15 their whole case in the summary judgment when
16 we've had all these problems with discovery,
17 we've been stonewalled and we've had
18 objections that have been sustained and all
19 the rest of this stuff. And I'm concerned if
20 we're going to go with a mere allegation puts
21 the burden on the plaintiff to produce, we
22 damn well better give the plaintiff all the
23 time they need to do all the discovery that
24 they can do before we put that burden on
25 them.

1 And remember this, that if the defendant
2 is permitted to make the plaintiff try their
3 case by summary judgment on a mere allegation,
4 you are inviting people to abuse that
5 procedure. But if you make them come up with
6 some affidavit before the burden is on the
7 respondent, they've got to find a witness to
8 swear to something. And if they can, they're
9 not going to get sanctioned, and if they
10 can't, rather than sanctioning them, we ought
11 to not have a motion all.
12 MR. YELENOSKY: So you would
13 vote against changing it, but we were asked to
14 draft a change. We're already beyond that. I
15 voted against changing it, too.
16 MR. ORSINGER: If we are going
17 to say that a mere allegation is going to put
18 the burden on the plaintiff, then in my
19 opinion we should guarantee that that is after
20 adequate discovery. And I don't know that a
21 vague standard like "after adequate time for
22 discovery" is very suitable, because all of a
23 sudden the motion -- whether a motion --
24 whether the plaintiff gets to the jury or not
25 is going to depend on whether the court grants

1 a continuance and how long the continuance
2 is. If I file an answer with a general denial
3 and a motion for summary judgment and it's set
4 at the end of 10 days, which is what the
5 federal rule permits, then I'm now in front of
6 a state district judge as the plaintiff
7 saying, "Judge, just give me adequate time to
8 take a few depositions."
9 "Okay. I give you 90 days."
10 You do your written discovery. You do
11 your interrogatories. I send my requests. I
12 send my interrogatories. I get back a bunch
13 of objections. I get a hearing down there. I
14 get three or four that they've got overruled
15 or sustained. Another 15 days. Then I get
16 some inadequate vague answers. So then I file
17 a motion to get more specific answers. Then I
18 take a deposition. Well, of all the
19 defendants in the lawsuit, I can't ever get
20 the lawyers to agree on when they're available
21 for a deposition. So then I just have to
22 notice a deposition, even though David Beck or
23 Steve Susman are in trial for 10 weeks in
24 federal court, and then they file or send
25 somebody down to file a protective order, and

1 then we have a hearing on when I can have my
2 deposition. In the meantime, the 90 days I
3 was given to do my discovery has been eaten
4 away, and now all of a sudden I'm down on my
5 second motion for continuance on a summary
6 judgment.
7 What is happening here is that my right
8 to my day in court is turning on whether the
9 trial judge abuses his discretion in granting
10 a continuance, and it's all interwoven with
11 discovery, cooperation on discovery, and this
12 is a tremendous -- we're changing -- when we
13 have a rule that says you can't use the
14 Celotex standard until after the discovery
15 window closes, by God, we know when that is.
16 We've got nine months. We've got to get on
17 our horse. We've got to ride. We've got to
18 get our motions filed and everything else.
19 But if we're just floating around, if we
20 can do it when we file our answer, then
21 everything turns on how many continuances and
22 how long the plaintiff gets them as to whether
23 they're ever really going to have a shot at
24 it.
25 CHAIRMAN SOULES: It is. It's

1 new gamesmanship, and this turns into
2 contention interrogatories to marshal -- to
3 make the opposite party marshal their
4 evidence, I think. Going around. David
5 Beck.
6 MR. BECK: Yeah --
7 CHAIRMAN SOULES: Or Sarah, I
8 missed you. I didn't mean to go by you,
9 excuse me.
10 HON. SARAH DUNCAN: Well, I
11 think, Luke, that's where we are. If there is
12 a view -- and I think there are trial judges,
13 I think there are appellate judges, I think
14 there are legislators, I think there are
15 Supreme Court judges that think there is a
16 problem. The problem, as I would define it,
17 is if there is no evidence on an element of
18 the plaintiff's claim, how does the defendant
19 conclusively prove the absence of evidence on
20 that element? It's great if your car was at
21 Red McCombs and you were in Idaho. That's
22 fine. We can handle that under the Texas
23 standard as it exists today. What we can't
24 handle under the Texas standard is a complete
25 absence of evidence on an essential element.

1 I perceive that to be a problem. I would like
2 to fix that problem because I think it is
3 terribly unfair to the taxpayers, to the
4 judges, to the lawyers, to everybody involved
5 in this system to make everybody go to trial,
6 get to a directed verdict stage, get a
7 directed verdict granted and then take it up.
8 I think that is a terrible waste of our
9 resources.
10 So that's the problem that I would like
11 to fix, and I think the only way you can fix
12 that problem is to let there be an assertion
13 of no evidence. And if you want to support it
14 by a lawyer's affidavit that says, "I've
15 reviewed the discovery that's been taken in
16 this case and there's no evidence of that
17 issue," that's fine. I don't care about that
18 one way or the other. But if you're going to
19 require them to demonstrate the absence of
20 evidence, we have not fixed problem and there
21 is no point in changing the standard because
22 it's the same problem that we've got now.
23 CHAIRMAN SOULES: Okay.
24 Question. If discovery has really been done
25 on that element by the defense, haven't they

1 probed the plaintiff enough to know, to get
2 some answers? The plaintiff says, "I don't
3 have anything on that," or makes an admission
4 that it doesn't exist. I mean, if something
5 has happened in the discovery, use that
6 discovery product to show that there's no
7 genuine issue of material fact, not just a
8 statement, because if the discovery really is
9 conclusive, some lawyer should have asked the
10 questions to get it there.
11 HON. SARAH DUNCAN: That
12 testimony does not establish conclusively the
13 absence of evidence. That's the problem under
14 the Texas standard right now, if what you've
15 got is a true no-evidence situation.
16 HON. DAVID PEEPLES: Summary
17 judgment gets reversed and remanded on that
18 Luke under the present standard.
19 HON. SARAH DUNCAN: That's
20 true, and it's painful.
21 CHAIRMAN SOULES: Even on an
22 admission?
23 PROFESSOR DORSANEO: No.
24 HON. DAVID PEEPLES: Not on an
25 admission. But if it's just no evidence and

1 there's not going to be, but the defendant or
2 movant can't prove as a matter of law no --
3 you know, negate the cause of action, that
4 gets tried.
5 MR. BABCOCK: And you're not
6 going to get that answer anyway. The
7 plaintiff is going to say, "Well, I don't know
8 anything, but my lawyer has done all this
9 investigation, and I'm sure he has
10 something."
11 CHAIRMAN SOULES: Okay. Going
12 around the table, who is next? David Beck.
13 MR. BECK: I assume our
14 objective is to try to get cases that can't be
15 proved out of the system and hopefully save
16 costs for everybody. I mean, I don't see how
17 reasonable people can disagree with that
18 objective. I think the key is to make certain
19 that the responding party has a fair
20 opportunity to do whatever discovery they
21 think is important to prove their case. And
22 if they've had that time and they can't
23 develop sufficient facts, then why shouldn't
24 summary judgment be an appropriate vehicle?
25 Now, there's one caveat to that. I also

1 do not believe that the movant, knowing full
2 well that evidence exists, ought to be able to
3 simply file a motion, get a court to grant a
4 motion dismissing the case when there is
5 evidence that would defeat that summary
6 judgment, because I think we ought to remember
7 what we're about here. We don't have
8 essentially a case disposition system; I hope
9 we have a justice system.
10 So I don't think somebody ought to be
11 able to move for summary judgment knowing that
12 evidence exists but the respondent just simply
13 hasn't asked the right question or the right
14 interrogatories or the right request for
15 production or what's next. I just don't think
16 that's fair. And given that situation, I
17 think that you ought to go on to trial, and
18 you know, if they still haven't developed that
19 evidence, then move for instructed verdict.
20 CHAIRMAN SOULES: Tommy Jacks.
21 MR. JACKS: I'd like to try to
22 bring this to a head. I want to discuss for a
23 minute, and then I want to make a motion, if
24 the chair will entertain a motion.
25 CHAIRMAN SOULES: Certainly.

1 MR. JACKS: I'm going to focus
2 on Draft 1 because that's where we started and
3 we've got to work from something and that's as
4 good as any to work from. I hope we will get
5 a chance to vote on whether there should be a
6 change or not, because that's one of the
7 issues that Justice Hecht laid out for us, and
8 I've made clear where I stand on that issue.
9 However, if there is to be a second vote on
10 some draft, the draft I would support would
11 have the following features.
12 First, I think the adequate time for
13 discovery standard is too much of a trigger.
14 How does the moving party know when to file,
15 when they can file, and be under that burden
16 or not? And by the nature of our adversary
17 process, one litigant's adequate time is
18 another litigant's inadequate time.
19 I would propose that the time be
20 specified. There are problems with Judge
21 Brister's 120 days before trial, because, for
22 example, in some counties you get a
23 computer-set trial date not long after you
24 file the suit and everybody knows it's not a
25 real trial date, but for purposes of this

1 rule, the rule doesn't know it's not a real
2 trial date. I think the nine months may be
3 closer to it, although I would probably say
4 that I've put in the exception, perhaps the
5 exception in the current rule is enough, but
6 that somebody ought to be able to show that
7 even though nine months have gone by there
8 still hasn't been adequate discovery done to
9 be able to trigger this burden, and that
10 should be provided for, so that's Point 1.
11 Point 2 is, and I agree that the first
12 two sentences of Judge Peeples' paragraph (i)
13 help to flesh things out, and I think fleshing
14 things out is needed. I would add two things
15 to it. One, I would make the lawyer swear to
16 it. This is the lawyer who has been going to
17 all these depositions and reading all the
18 discovery and reviewing all the documents who
19 is going to have to say, and I think have to
20 say it under oath, we've been through all this
21 discovery and there is to evidence to support
22 this critical element of my opponents either
23 claim or defense.
24 Secondly, I think to accommodate what
25 David said, because this is a process that's

1 about justice and not about gamesmanship, I
2 think further we would have to swear that my
3 client and I are unaware of any evidence that
4 would support such a claim.
5 You can see in the Celotex case, where
6 the guy was exposed, if at all, 20 years ago
7 and half the people who knew about it are dead
8 and the others they can't find and so forth,
9 in that case a litigant, I think, could say,
10 "He hasn't shown it, and we're unaware of any
11 evidence that could show it." If they can say
12 that, that's fine. But they ought to be made
13 to say it and ought to be made to say it under
14 oath.
15 And third, I think was it Sarah who read
16 out kind of the penalty language, the cost
17 shifting language. I think you need to
18 incorporate something like that, because I
19 guarantee you're going to see routinely filed
20 motions unless you build in disincentives to
21 file frivolous motions.
22 The fourth point on Alex's draft, and I'm
23 now moving from the burden point to another
24 point, but if you're going to vote on the
25 whole draft, I need to address these.

1 This draft incorporates, and I'm now in
2 in the paragraph -- let me see, I've been
3 looking at this red-lined version. Let me
4 look at the non-red-lined version of the
5 paragraph that enables the moving party to
6 file a reply to the response. Presumably it
7 can be filed within seven days before the
8 hearing, since the response, I gather, is
9 still due seven days out.
10 PROFESSOR ALBRIGHT: It's in
11 (a).
12 MR. JACKS: Yeah, and that's a
13 bad idea. And the reason I think that's a bad
14 idea is that one party gets two shots at
15 filing affidavit evidence, and the tendency,
16 or again, getting back to the gamesmanship,
17 the temptation will be to hold back only
18 what's barely necessary to file with your
19 motion. The other side responds to that, and
20 then you can dump in all your other summary
21 judgment evidence with your so-called
22 "reply." I think that's a bad idea.
23 PROFESSOR ALBRIGHT: Tommy, I
24 had thought about that. And one thing I was
25 wondering was should they be entitled to maybe

1 file a reply brief but not any more
2 affidavits.
3 MR. JACKS: I think they do it
4 anyway, whether you put it in the rule or
5 not. I would prefer not to encourage it, so I
6 wouldn't put it in the rule. I would defer to
7 the district judges union. I don't know how
8 you all feel about that. But my advice would
9 be don't encourage the filing of more paper
10 and the felling of more trees than necessary.
11 CHAIRMAN SOULES: Tommy, can
12 I -- let's try to stay -- let's try to get
13 this burden thing resolved, if you don't mind.
14 MR. JACKS: Okay. Well, if I
15 can understand that a vote for Draft 1 as I've
16 modified it is only a vote for the burden
17 part, then that's fine with me.
18 The other point I will make that is
19 related to the burden that is under
20 "Supporting Material, (d)," where it says,
21 "affidavits or any evidence admissible at
22 trial," and then when you look over, if you
23 look further down, "Objections to the form of
24 affidavits," which is in the current rule, "or
25 objections to the admissibility of

1 evidence" -- now, in reading those two things
2 together, while I don't think it was meant to
3 do this, it could be construed to mean that
4 the affidavits and the other summary judgment
5 supporting evidence must be evidence that is
6 admissible at trial and that the other party
7 can object if it's not. You could then get
8 into the scenario I described earlier, which
9 to me is nightmarish, and that is that you end
10 up at the summary judgment stage having to
11 have Daubert hearings because I filed, let's
12 say in support of my summary judgment, an
13 expert's affidavit saying X, Y and Z. They
14 file an objection that that's not admissible
15 at trial because this guy would never pass
16 Daubert, and so here the judge now has to have
17 perhaps weeks or months out from the trial
18 Daubert hearings over -- you know, in order to
19 determine whether the objection is any good,
20 in order to determine whether the evidence is
21 admissible at trial. I would take out the
22 business about it being admissible at trial.
23 What the current rule says I think is
24 fine, and that is facts -- that language
25 appears in the red-lined draft on -- oh, where

1 is it where you cut out all the -- on the
2 second page of red-lined draft under (d). Our
3 rule currently states "Such facts as" -- well,
4 I cannot find it in the language, but
5 essentially it says such facts as may be
6 admitted in trial. And I think there's a
7 difference between whether the facts would be
8 admissible and whether the particular summary
9 judgment materials would be admissible as
10 evidence, such as the opinions of an expert,
11 which is not excludable under our current rule
12 on, say, a Daubert basis at the summary
13 judgment stage.
14 PROFESSOR ALBRIGHT: Tommy, if
15 you would, the red-lined version of that is on
16 Page 3, the second full paragraph next to the
17 last paragraph. It starts out, "this goes to
18 the end of (d)."
19 MR. JACKS: Yeah, "such facts,"
20 you're right, "as would be admissible in
21 evidence" is our current rule, and I guess all
22 I'm saying is I would keep that. I would
23 strike the "objections to the admissibility of
24 the evidence," and I would strike on the
25 preceding page the phrase "any evidence

1 admissible at trial," because I think that's
2 opening up, in the words of a former speaker
3 of the Texas house, "a whole box of Pandoras,"
4 and we don't want to open that.
5 Those are my comments. My motion -- I
6 really want to make two motions, and I know
7 that's kind of out of order, but let me lay
8 out what each would be, and then I will let
9 the Chair sort out the rules.
10 I want to first move that we don't change
11 current Rule 166a.
12 MS. SWEENEY: Second.
13 MR. JACKS: And I've now got a
14 second to that, and I guess procedurally we
15 need to deal with that.
16 I will then ask to have an opportunity to
17 move, after we've voted on that notion, I will
18 ask for an opportunity to move for the
19 adoption of a rule that incorporates the
20 elements that I just outlined with the
21 understanding that someone then will have to
22 take pen in hand and make that into a sensible
23 rule incorporating it with the current rule.
24 And in connection with that motion, I
25 will have a question of Justice Hecht, which

1 question is, assuming that there were a
2 sentiment on the committee to adopt that or
3 something like it that would require
4 substantial redrafting, would it suit the
5 Court's purposes if that redrafting were to
6 take place before the mid January meeting
7 which coincides with the first week of the
8 legislative session? That's a timing
9 question.
10 JUSTICE HECHT: Yeah. I mean,
11 the sooner the better, but I don't think
12 that's too late.
13 MR. JACKS: Okay. So that's
14 where we're at.
15 CHAIRMAN SOULES: Okay. Give
16 me by number the elements without
17 embellishments so I can get them down here. I
18 think I took them down, but I want to be sure.
19 MR. JACKS: Okay. Element
20 No. 1 is don't say "adequate time for
21 discovery," instead say nine months, and have
22 an opportunity for the nonmoving party to
23 make --
24 PROFESSOR DORSANEO: Nine
25 months or more.

1 MR. JACKS: -- to make the
2 objection that there still has been -- that
3 there still needs to be more discovery before
4 the court considers it. And have a
5 bright-line version so people know when the
6 burden kicks it.
7 Two, incorporate the first two sentences
8 of Judge Peeples' paragraph (i), except adding
9 the elements, A, that it has to be sworn to by
10 the lawyer that there is no evidence to
11 support the critical element; and (b), that
12 the lawyer has to go further and say that
13 neither he nor his client is aware of any
14 evidence that would support it. That's
15 Point 2.
16 Point 3 is Sarah Duncan's language that
17 puts the cost shifting burden on the moving
18 party who either knew the motion wasn't well
19 grounded or certainly should have known it.
20 The next point that relates to the burden
21 issue is the deletion of the phrase "any
22 evidence admissible at trial" and the phrase
23 "objections to the admissibility of the
24 evidence," retaining the current language,
25 "such facts that would be admissible in

1 evidence," that is, keep the current
2 language. Don't incorporate that particular
3 new language. And I think that covers the
4 points.
5 CHAIRMAN SOULES: I didn't
6 quite get what you said about objections. Do
7 you want to eliminate objections?
8 MR. JACKS: No. Keep the
9 current rule on objections.
10 CHAIRMAN SOULES: Keep the
11 current rule, okay. A second on that?
12 MR. GOLD: Luke, will Tommy
13 entertain a friendly amendment?
14 MR. JACKS: Yeah.
15 MR. GOLD: In Justice Hittner's
16 article on this in 1989, he and Lynne Liberato
17 stated that the Texas Rule of Judicial
18 Administration 6(b)(1) and (2) gives time
19 standards for case resolution and provides
20 that all civil cases -- what it basically says
21 is jury trials, 18 months; nonjury trial,
22 12 months. Judge Hittner goes on to say in
23 most cases after 18 months the nonmovant
24 should have the burden of showing sufficient
25 evidence to establish the existence of each

1 element essential to its case which bears the
2 burden of proof at trial.
3 I would want to amend the nine months to
4 at least a year.
5 MR. JACKS: I'd agree with
6 that, frankly, because I don't know about you
7 all, but I've had some --
8 MR. ORSINGER: Can I inquire as
9 to how long --
10 CHAIRMAN SOULES: Is there a
11 second to that motion? Do you agree to or
12 accept 12?
13 MR. JACKS: I agree to the 12
14 instead of the nine months.
15 CHAIRMAN SOULES: Okay. He is
16 proposing 12. Is there a second? Fails for
17 lack of a second.
18 HON. DAVID PEEPLES: I thought
19 Paula seconded it.
20 CHAIRMAN SOULES: Oh, did I
21 hear a second? Who seconded it?
22 PROFESSOR ALBRIGHT: He
23 accepted it, so we don't need a second.
24 CHAIRMAN SOULES: No, the
25 second on Tommy's motion.

1 PROFESSOR ALBRIGHT: On the
2 whole thing?
3 HON. DAVID PEEPLES: Paula
4 Sweeney seconded it a long time ago.
5 CHAIRMAN SOULES: It's been
6 moved and seconded. The motions are pending.
7 Let's have lunch. 30 minutes.
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2 CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

3 -

4

5 I, WILLIAM F. WOLFE, Certified Court

6 Reporter, State of Texas, hereby certify that

7 I reported the above hearing of the Supreme

8 Court Advisory Committee on November 22, 1996,

9 Morning Session, and the same was thereafter

10 reduced to computer transcription by me.

11

12 Charges for preparation

13 of original transcript: $968.75.

14 Charged to: Soules & Wallace P.C.

15

16 Given under my hand and seal of office on

17 this the 9th day of December, 1996.

18

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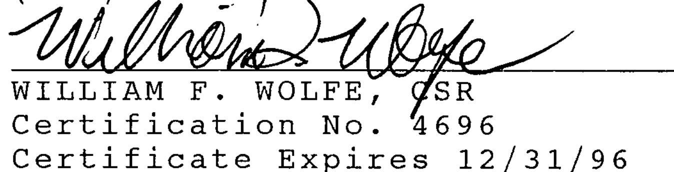

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