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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

NOVEMBER 22, 1996

(AFTERNOON SESSION)

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Taken before D'Lois L. Jones, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 22nd day of November, A.D., 1996, between the hours of 1:00 o'clock p.m. and 5:30 o'clock p.m. at the Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78701.

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

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INDEX OF VOTES

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

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HONORABLE SARAH DUNCAN: Luke, we are not -- this isn't all we get to do, right? I mean, there are a couple of things I would like to propose that are additional changes to the rule, but not necessarily to the burden aspect of it.

CHAIRMAN SOULES: Yes, that's right. No, it's not all we are going to do. We are trying to address first the motion for no change at all to 166a and then we will just step through these four items that Tommy put in his next motion, and that hopefully will develop most of what we need to develop about burden. Maybe it will, maybe it won't. We will see where we are when we get to the end and then go to other features of 166a. I think that's my plan, unless somebody has a different approach.

Okay. The motion has been made and seconded, no change at all to 166a. Does anybody have anything new to say on this broad subject?

Okay. Justice Hecht has requested that the Court receive on this motion a roll call

vote so that the ayes and nays will be --

MR. GALLAGHER: Can we put that to a vote?

CHAIRMAN SOULES: -- identifiable. So I guess we will start.

MR. ORSINGER: Are we going to vote on whether to have a roll call vote or not?

CHAIRMAN SOULES: No. We don't get to do that.

MR. BABCOCK: Ashamed of your vote?

MR. ORSINGER: No. I'm not.

CHAIRMAN SOULES: Robert Meadows.

MR. MEADOWS: The problem with this vote is that it's different than the vote we took last time, which was, well, you have one of three choices, no change, Celotex or compromise; and it seems to me we are getting it out of order because if we can articulate what the compromise is then I think we should have that vote, I mean, that choice.

MR. GALLAGHER: A man of courage.

MR. MEADOWS: I mean, I can say that I would like to see a change in Rule 166a, but I'm not for Celotex. So if I've got to vote, I mean, I can vote on this up or down; but I think most of us or a number of us are interested in a compromise but the compromise may not have been articulated.

MR. GALLAGHER: May I just say something along that same line, Luke? If what we are dealing with here is an attempt to empower the trial court with the authority to grant a summary judgment in a circumstance in which after --

CHAIRMAN SOULES: That's Mike Gallagher, not Rusty McMains.

MR. GALLAGHER: -- conclusion of the evidence -- I will be if I keep eating that salad.

CHAIRMAN SOULES: His sign is getting closer in front of you.

MR. GALLAGHER: Put it in front of David Perry. He doesn't care.

CHAIRMAN SOULES: Okay. Go ahead.

MR. GALLAGHER: If what we are

trying to do is to empower the court with the authority to grant a summary judgment when at the conclusion of the evidence there -- at the conclusion of discovery, there is no evidence on material fact, then I don't think there is anybody around here that disagrees with that proposition.

However, as is often said, the devil is in the details, and I think before we have to have a record vote on some issue, we really need to have, as Robert says, a proposal before us on which we can vote. Because I might prefer that system over current Rule 166a if the trial judges union, as Tommy refers to them, feels that they need that authority and that power, and I would like to hear specifically from Judge Brister on this, having missed the last meeting, with regard to what the problem is that we are attempting to resolve.

CHAIRMAN SOULES: Well, we have been doing that half the morning. Anybody have anything -- if the motion --

MR. GALLAGHER: Well, no, we haven't been doing it, Luke.

CHAIRMAN SOULES: The first made motion is pending. It was seconded. We have been talking a lot about it. Does anybody have anything new on that issue?

MR. ORSINGER: Well, but, Luke, the only problem with your motion is, is that there are some people around the table that might want to change 166a in ways that we haven't even discussed, but you are forcing us to say that we want to support the rule --

CHAIRMAN SOULES: I'm not forcing it. That's the motion.

MR. ORSINGER: The vote is forcing us to say -- when what we are really voting on is this burden question, but the motion is all-encompassing for all changes, even changes we haven't discussed, and everybody needs to understand that.

MR. LOW: But there is some people here -- I want to go on record for changing nothing, like it is, and I want a chance to vote at that, and that gives me a chance.

MR. JACKS: Richard, I really intended -- because we were being confined to

burden issue I intended when I say, "Don't change the current rule" to mean don't change the burden issue of the current rule. I didn't mean to foreclose any discussion of any other change to Rule 166a, and if that's not clear, well --

CHAIRMAN SOULES: There is a clarification.

MR. ORSINGER: Yeah. I would prefer to vote on that question.

CHAIRMAN SOULES: Okay. The motion has been made to make no change at all to 166a relative to burden on the parties, movant and respondent. Okay. Those in favor of the motion show by -- I've got to call roll. Bill.

Who's keeping this? Are you keeping this?

MR. PARSLEY: Yes, I am.

CHAIRMAN SOULES: And we are not supposed to wait for this either, so...

Bill Dorsaneo.

PROFESSOR DORSANEO: Pass.

MR. ORSINGER: Yea.

CHAIRMAN SOULES: Richard

Orsinger.

MR. ORSINGER: I vote in favor of the motion.

CHAIRMAN SOULES: Chip Babcock.

MR. BABCOCK: I vote against the motion.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: Against.

CHAIRMAN SOULES: Judge Guittard.

HONORABLE C. A. GUITTARD: Against.

CHAIRMAN SOULES: Elaine Carlson.

PROFESSOR CARLSON: Against.

CHAIRMAN SOULES: Anne McNamara.

MS. McNAMARA: Against.

CHAIRMAN SOULES: David Beck.

MR. BECK: Against.

CHAIRMAN SOULES: Tommy Jacks.

MR. JACKS: For.

CHAIRMAN SOULES: Bonnie

Wolbrueck.

MS. WOLBRUECK: Pass.

MS. LANGE: Abstain.

CHAIRMAN SOULES: Doris abstains. David Perry.

MR. PERRY: Vote aye.

CHAIRMAN SOULES: Mike Gallagher.

MR. GALLAGHER: Vote for.

CHAIRMAN SOULES: Robert Meadows.

MR. MEADOWS: Against.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: For.

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: For.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: Against.

CHAIRMAN SOULES: Anne Gardner.

MS. GARDNER: Against.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: For.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: Against.

CHAIRMAN SOULES: Pam Baron.

MS. BARON: For.

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: Against.

CHAIRMAN SOULES: And Buddy Low.

MR. LOW: I'm for the motion.

CHAIRMAN SOULES: What's the tally?

MR. PARSLEY: 9 for, 11 against.

CHAIRMAN SOULES: 9 for and 11 against.

MR. PARSLEY: And three passes.

CHAIRMAN SOULES: And three passes. Any of the passes want to vote now?

PROFESSOR DORSANEO: For.

MR. ORSINGER: So it's 10 to 11.

MR. PARSLEY: 11 to 10.

CHAIRMAN SOULES: The vote is 11 to 10, so now we go to the next motion. 11 to 10, and that would indicate that 11 people think there should be some change in the burden. Ten feel there should be no change in the burden. Is that the way you got it, Lee?

MR. PARSLEY: Yes. That's right.

CHAIRMAN SOULES: Okay. Next is the adoption of a burden rule with four features. And someone asked -- I believe it was Justice Duncan asked that the features be voted on separately. Any disagreement with that? Tommy, is that okay with you? It's your motion.

HONORABLE SCOTT BRISTER: We haven't even discussed some of the -- the days, we haven't talked a moment about that.

CHAIRMAN SOULES: That seems probably right. I mean, to ball them up and try to talk about them all at the same time may be difficult.

MR. JACKS: Luke, I'm trying to think of the most efficient way to get the job

done. It may make some sense to have brief discussion on it one at a time, but then vote on them as a group. I mean, certainly they were -- the motion was for all of those features as opposed to one or more but not all.

CHAIRMAN SOULES: Okay. Well, maybe we can get sort of a consensus as we go along about each one.

MR. JACKS: Yeah.

CHAIRMAN SOULES: And we will get the package together and then we can vote it up or down.

MR. JACKS: I think that makes sense.

CHAIRMAN SOULES: Okay. The first feature is, I say -- I wrote it down, "a fair time." 12 months was proposed with some possible slippage for additional discovery where a party can convince a judge to do that. Is that essentially it, Tommy?

MR. JACKS: It is.

CHAIRMAN SOULES: Okay. Discussion on that? Richard Orsinger, and I will go around the table.

MR. ORSINGER: I want to be sure that we all are reading from the same page, when the defendant wants to file a motion that's based on concrete proof that negates an element of the plaintiff's claim, that they do not have to wait 12 months to do that. Or establish an affirmative defense. If I can conclusively show that the plaintiff fails because of some element of his case, I should be able to do that when I file my answer.

Now, we haven't discussed that, and I don't think Tommy is meaning to exclude that, but I think we need to be sure that we are not.

CHAIRMAN SOULES: What changes?

MR. JACKS: You're correct. I don't mean to exclude that. That's the current law, and it's only this so-called Celotex aspect that -- you know, what's the trigger for this new feature to the rule?

CHAIRMAN SOULES: As I understand what this is about, this is 166a for 12 months, and then something different. Is that what you are saying?

MR. JACKS: Yes.

CHAIRMAN SOULES: And the something different we haven't articulated. Is that right or not?

MR. JACKS: Well, we haven't gotten to it yet, but it's among the four.

CHAIRMAN SOULES: Okay.

MR. JACKS: By the time you get to the bottom of the list you will have articulated it.

CHAIRMAN SOULES: But I am correct that you are saying 12 months as current 166a?

MR. JACKS: Yes.

CHAIRMAN SOULES: And then a change to something more burdensome on the respondent.

MR. JACKS: Yes.

CHAIRMAN SOULES: Okay. That's what we are talking about. Chip Babcock.

MR. BABCOCK: Yeah. I understand what Tommy is trying to get at, and I agree with all parties being protected in this way, but I think having a bright line date is going to lead to a lot of mischief;

and in some counties, small counties where the trial settings are quick and in Dallas County, there is not a case in Dallas County that doesn't have a trial setting within 12 months; and I don't think that that's fair to the litigants in that county or in other counties where you have quick trial settings; and I think it's just going to lead to a lot of mischief.

The second thing, I have heard the Federal rule being trashed a lot both in these letters and comments that people are making. I practice a lot in Federal court, and I have in almost 20 years never had a dispute with an opposing party about getting everybody's discovery done before the summary judgment is ruled upon by the court. Never.

And I was on the Civil Justice Reform Act committee that studied the problems of delay and expense in Federal court, and at least the Northern District committee I don't recall identified the summary judgment practice as one of the problem areas for delay and excessive expense, and I would bet that if we looked at the Civil Justice Reform Act plans

of all the districts in Texas and in the country that summary judgment played a very small role.

Whatever we do about this burden issue, I'm against having a bright line, 9 month, 12 month, 18 month, whatever rule it is, but rather think that we ought to have the Federal standard which vests with the trial judge the discretion to grant more time if any party needs it to complete the discovery in order to fairly and adequately respond to the summary judgment.

Richard's hypothetical about how the defense lawyer is screwing him around on discovery is certainly not unknown to any of us, but I have yet to meet a judge who would not be sympathetic to letting Richard get the discovery he feels he needs in order to respond to the summary judgment.

Now, on the other side of the coin, I predominantly do defense work. I have been screwed around by plaintiffs lawyers who after two or three years of discovery and after trying to get a summary judgment hearing set two, three, four times will file a motion for

continuance and say, "Oh, we got to do more discovery," and more often than not that's what happens. There is abuses that go on both ways, but generally judges if they have the tools will be responsive and respectful of people getting a fair shot at either avoiding or getting their summary judgment. So I am against this 9 to 12-month deal.

CHAIRMAN SOULES: I think it's obvious, but in this feature there are two different standards for how to grant a summary judgment, one that goes awhile and then another one that takes over at that point, at some point. Okay. Next after Chip? Come back to you. Justice Duncan.

HONORABLE SARAH DUNCAN: Well, what you just said is my problem with this. If the vote is on having two different standards, one for a period of time, in this instance 12 months, and one after, I'm against it. If the vote is to have an exception to the Texas summary judgment rule that is very narrow and very circumscribe, I could be for that; but that to me is two entirely different things; and I would just echo what Chip has

said. I don't think a bright line rule is going to work.

There are too many situations that we can't foresee right now when 12 months is too long or 12 months is too short, and I think the trial judge needs to be able to have discretion on that, and that the devil in the details there is writing the rule so that the trial court has adequate but not too much discretion.

CHAIRMAN SOULES: Anyone else down this side of the table to Tommy Jacks?

MR. JACKS: I have a question of Sarah, and that is, if it were worded in terms of completion of discovery -- I'm trying to find some point in time about which there will be agreement that that point has arrived, and that's why I lean toward the bright line.

The problem I have with adequate discovery is that that's a very fuzzy line because you say, "It's adequate." I say, "No, it's not adequate. We haven't done this, this, that, and the other."

In many cases, whether we have a discovery period under the rules as things

develop in the Supreme Court or not, in many cases we do at least have the discovery cutoff that's imposed by scheduling order; and I could see making that contribute to time because the parties know when that happens; and it varies from case to case; and the court has discretion.

Would that -- Sarah, at least in those cases where there is a scheduling order would that solve your problem?

HONORABLE SARAH DUNCAN: If there were an escape valve going both ways effectively?

CHAIRMAN SOULES: I didn't hear what you said.

MR. JACKS: If there were an escape valve going both ways so that a movant could move -- could seek leave to move earlier than the discovery cutoff.

MR. ORSINGER: What is that, an abuse of discretion standard on whether you reverse the burden after six months or seven months? I mean, what a quagmire. I'm going to shut down and just handle summary judgments from now on. I can get rich.

CHAIRMAN SOULES: David Perry.

HONORABLE SARAH DUNCAN: You skipped Judge Guittard.

CHAIRMAN SOULES: Oh, I'm sorry. Judge Guittard, I will come back to you and then we will get to David Perry.

David.

MR. PERRY: It seems to me that it should be very clear that if we are going to have this at all that if there is a discovery cutoff deadline or if there is a discovery period in the case, that everybody should get to do the discovery for that period of time or up until the deadline before you deal with this particular type of summary judgment.

I think I agree with Sarah Duncan that it is confusing to have two standards, but I think that it would be -- the problem we are going to see that I think we have all recognized is that if we go to the second standard as an opportunity, we are going to be faced with the vice of having it abused much more than it is used properly; and one of the ways to prevent that abuse and one of the ways

to be fair to all sides is to let everybody do the discovery that they are ordinarily entitled to do before they are required to marshal their evidence to defend the motion.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: I think one of the problems with a motion for summary judgment when I have encountered it is when it comes out of the blue. All of the sudden you're doing discovery, and here comes a motion for summary judgment.

One of the things that we might consider is tying it in with the discovery -- well, tying it more directly into the discovery stick rule that we came up with in the subcommittee, such as go back to the nine months, which I think is the automatic closure unless there is an agreement; and then if there is an agreement, add to the list of things that have to be agreed upon as a date by which summary judgments would be filed, with cooperation of the court, so that everybody has an idea about when that period is going to be.

And then barring that, if an agreement

can't be reached, then have as a default -- in other words, either you're in this discovery period or if you opt out of the discovery period, then you are in this free area which you agree; but if you can't agree, then you've got Judge Brister's compromise, which would be no later than 120 days before trial.

I mean, I grant it it's a little bit more complicated than, you know, at this period or this period; but it has the benefit of the parties being able to agree on a date that might be reasonable and at least afford everybody a period at which point they know this new procedure is going to be activated. I don't know. Maybe something like that or some variation on that would work.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: Several things. No. 1, in talking with my colleagues, our worst fear is the adequate time for discovery. Now, I'm told that's not a problem in Federal court, but my suspicion is that's because Federal judges can do anything they want to with summary judgments,

and nothing is going to happen to it on appeal. That's not going to happen to me.

Adequate time for discovery, you may say it's my discretion, but it ain't going to be reviewed like most abuse of discretion. It's going to be reviewed with whether I should have allowed more discovery or not, and let me give you an example, though. Since this is not the law, there is no specific examples, but the CBI vs. National Union case was in my court, whether a pollution -- it's escape of hydrochloric acid. 3,000 people filed claims that they were gassed, and so the facility sues their insurers. The question is whether the pollution exclusion clause applies.

Now, the First Court of Appeals 3-0 reversed my summary judgment. I looked at it. I said, "Looks like pollution escaping to me, summary judgment granted," with stacks of affidavits, we should continue and need to do this discovery and that, and I was reversed 3-0 by the first court, saying "need time for discovery, not enough time for discovery," who was reversed 9-0 by the Supreme Court saying, "That's a patent -- there is not patent

ambiguity."

So it was on the grounds of whether the clause was ambiguous or not, but really the issue is do you need more time to do discovery on this; and the point I want to make from that is I've got to guess. I can tell you the names of the judges on the First Court of Appeals who when they get an appeal from my court will say I should have given more time for discovery, period, whatever the facts are.

I can tell you the names of the others who will say that was enough time for discovery, and I have no way to predict, and we are not talking about now whether we need to do more discovery or not. We are talking about what is the burden of proof at my hearing, floating out here with this standard.

A distinction I think people are missing here, the nice thing about a bright line, the bright line we are talking about is when does the burden of proof change, not whether you can still get a continuance of the hearing. We are just talking about at this date the burden has changed if such a motion is filed.

That does not mean that in the tenth

month if the motion is filed you can't come in and say, "We recognize the burden is shifted. We are not asking to throw into question what the burden is going to be on this hearing, which we won't find out until appeal. We are just saying we need to do these specific items of discovery," the advantage of that being we have got a lot of law on continuances of the motion for summary judgment hearing. We have been doing those for a long time. It's part of the current rule. If you haven't had enough time for discovery, when you come into the hearing you file a motion, do this.

So what you want is -- we all know then what the burden is as of a hard date, and I have gone back and forth about the whether you measure it back from trial or forward from the filing. Some people say forward from when the defendants are served. I think I agree with Luke just because of the -- that probably it's nine months from the start, because the question really is largely going to be a plaintiff's question, has the plaintiff had enough time to get organized and do their work; but the good thing about the hard line

is we know what the burden is.

Now, if you come in after that date and the plaintiff hasn't had time to do the discovery, then we do the thing that trial judges in Texas do not do in discovery, which is, "Tell me what it is you need to do specifically." Before that date -- and really since the vast majority of us don't oversee discovery, don't do these discovery plans, that's your job, we don't make any ruling about what discovery is really necessary and really not.

The advantage of coming in on the summary judgment hearing, we know what the standard is, we know what specifics they are alleging, and I can make a call whether this is some blanket, prophylactic, "You don't have any evidence of negligence, proximate cause, damages, or anything else," or whether this is, "Judge, the plaintiff's designated experts have said they can't establish causation." Now, that's specific, and if they have said that and you can't find an expert to say there is causation, we ought to end this thing now.

But those things will determine what

depositions, and we can discuss, "Well, what is it you need to still do?"

"Well, I'm having trouble with them because I have asked for this guy for six months." I say, "Well, okay. That, when are we going to do that?" We do the things which I don't want to do, we don't have time to do on all our cases, but on this case we can do it on what specific discovery needs to be done, when are we going to have our hearing, who is going to do what by when, and get the discovery that you say you have to do to prove whatever the element is we agree there is a no evidence -- a potential no evidence problem on.

So I'm strongly -- on behalf of my colleagues, don't throw us into this, not just appeal whether we should have given you more time, but we don't even know until it gets on appeal what the burden was at the hearing. Give us a hard and fast date, but leave in the stuff, and the safety valve is come in and move for continuance. "I still need to do this, that, and the other," and that can be ruled -- handled under the standards that we

have all played with for a long time.

CHAIRMAN SOULES: Anne Gardner.

MS. GARDNER: Well, I'd just like to throw my two cents worth in, that I -- in my experiences in Federal court practice and the research that I have done on the issue, that Federal courts have a very liberal policy on allowing continuances and invoking that, what is our subsection (g), if a party can show specific additional discovery that they need; and I just think that that's the safety valve, as Judge Brister puts it, for any plaintiff that's confronted with one of these summary judgment motions, and that I would disagree with having a bright line date at which the burden shifts, whether it's nine months or a year or six months.

I just think that having the dual system or a two-tier system is very confusing because of reasons that have been expressed around the table. I think also one year or even nine months may present too much time and too much opportunity if it's truly a case that is unmeritorious and ought not to be there and if there is a discovery cutoff deadline or if

there is a discovery period in the case, that everybody should get to do the discovery for that period of time or up until the deadline before you deal with this particular type of summary judgment.

I think what the Supreme Court said in Celotex and what I believe Alex has in her draft would be sufficient, together with subsection (g) of the rule as it is. Thanks.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: Well, you know, I think this raises the issue that we talked about at the beginning, is, one, are we going to have a discovery period or not? Lee and I were just talking, and he thinks that we are going to have some sort of discovery period in the new discovery rules, so maybe what we should do is think about, one, if we have a discovery period, is the close of that discovery period a good time to do it; and then if we don't have a discovery period then figure out another time.

CHAIRMAN SOULES: Anyone? Judge Peeples.

HONORABLE DAVID PEEPLES: Two or three things. I think we are making a mistake in having a one size fits all approach here. We are all thinking about the cases we handle, and I handle all kinds, and 12 months in some cases would be way too long because in Bexar County you get to trial in seven months; and so if you have a rigid, unbending period that long then it never would apply to a lot of the cases that I handle, and so I would be in favor of some -- I think that, on the other hand, there needs to be a fixed limit because I don't think lawyers ought to be faced with a rule that doesn't tell them one thing about when it's okay to file your motion, except "adequate discovery."

So there ought to be some kind of time period which the court can bend in either direction for good cause, I think, but this one size fits all approach I think is horrible, and you also have the problem of when do you start counting in a multiple defendant case. I guess when the defendant files an answer or something, but that's something we would have to decide.

CHAIRMAN SOULES: Well, let me be sure I understand. As I understand it, this says anybody can file a motion for summary judgment and have it heard any time under 166a.

HONORABLE DAVID PEEPLES: Under the old system, yeah.

CHAIRMAN SOULES: But if they are going to -- okay. Bill, you had your hand up, and I'm back to you now.

PROFESSOR DORSANEO: The cases that we have, actually, in terms of somebody asking for more time, when you read the opinions they say something like, "Well, this case has been pending for about a year and plaintiff hasn't really been doing that much discovery and now they want to do it, and they are through." They end up being about a year anyway, some of them, but yet our rule and the Federal rule talk about filing the motion and the timing thing way too early.

I want to change the rule to take out the suggestion that these motions can be filed, you know, at the very beginning of the case, which the rules now, I think, say, and then I

would be happy to go with adequate time for discovery rather than a specific time period; but I do like the specific time period as an indication to a defendant that it's not appropriate to file these motions right at the threshold on the chance that you might be able to get a hearing.

CHAIRMAN SOULES: Justice Guittard.

HONORABLE C. A. GUITTARD: I think we are making an unnecessary complication of this problem to fit complicated cases when most of the summary judgment cases are simple cases and should have expeditious remedies, like a suit on a note with an allegation of fraud that's clearly unfounded, ought to be able to get rid of that within three months after the thing is filed.

Now, it's unnecessarily complicated to have two different standards. I would propose having no particular time specified here, having the same standard apply to all, perhaps doing something with the burden that's reasonable for both parties, and then on this

time for discovery we might want to amend paragraph (g), which has to do with the motion to get more time. Perhaps we should put in there rather than anywhere else a reasonable time for discovery.

So I would oppose the specific time for anything here. I would oppose two standards. I would provide for a reasonable standard that applies from the very beginning of the case up until the time of trial.

CHAIRMAN SOULES: Tommy Jacks.

MR. JACKS: The discussion has been helpful, to me at least. I'm persuaded by the observation that one size doesn't fit all, and that so much may be reasonable in one case in one county but unreasonable in another case in another county, and the same would be true for a year or nine months or six months, whatever you chose.

I would amend, therefore, this part of my motion as follows: Either -- I mean, if there is a discovery period, either because the Supreme Court has adopted rules that says there is or because there is a court order which establishes it in that case, then I

would say the completion of the discovery period is the time in that case when this new type of summary judgment motion could first be filed. If there is not an applicable discovery period --

CHAIRMAN SOULES: Is that what you mean, not filed or the burden changes to a new standard?

MR. JACKS: Well --

MR. YELENOSKY: You can always file a 166a.

CHAIRMAN SOULES: I just want to be sure I understand what you're saying.

MR. JACKS: I think it's a new creature we are creating here, Luke, because it doesn't require the same kind of supporting materials that other kinds of summary judgment motions do; but whether you term it in terms of it being filed or it being filed with a different burden, whatever the thing is we are creating doesn't apply in a case until the discovery period; and then if there is a discovery period, whether it's because the Court says there is or because the trial court has entered an order establishing discovery,

if there is no applicable discovery period, then I would say that the court -- that it's upon a date which the court determines to be a date which has allowed for adequate discovery.

I think the parties cannot be in a position of knowing -- of not knowing when it is that this burden kicks in in their case, and that's why I don't think you can just say at whatever time there has been adequate discovery or adequate time for discovery. So I think the court is going to have to fix a date if the court hasn't already set a discovery period or the Supreme Court hasn't entered rules which declare a discovery rule, simply because the parties need to know when the rules change for their case.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: I'm persuaded by that. I think that there needs to be probably if it -- and I don't think it's already in the Rule 166 -- 166 is pretrial order?

MR. JACKS: Yeah.

MR. GOLD: 166, just amend 166 to state that the court may or shall set a deadline or a time by which the burden of

proof in a summary judgment proceeding will shift in that particular case.

I mean, docket control orders are being issued all over the state. They are all form. Just add another line to the thing that talks about summary judgment, but I agree that I think the parties have to know with regard to the burden of proof, when that burden is going to shift, and I don't disagree with the concept that you can't have a -- just one deadline for all of these cases because the counties change, the cases change, the way they are handled changes, and they shouldn't be too long, they shouldn't be too short. So I think that allows the judge, with the input of the parties, to come up with a date based upon what the parties represent the issues in the case are going to be.

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: We are talking about burden of proof as though a plaintiff or the nonmoving party has a burden of proof during discovery, and we are being very careless with that. No one has a burden of

proof during discovery. We have burdens of proof at trial.

I know what I have to prove at trial. I may very well choose to do no discovery on some element of what I have to prove at trial because I know where the proof is, I know I can get it. I may have someone I'm going to subpoena. I may get it from the defendant, whatever; but I may choose to conserve my time, my money, my resources, my evidence, and my trial strategy for trial and not do discovery on that issue; and I think that that is in part what the court wants and what everybody wants in terms of saving money and reducing discovery, is for people not to do unnecessary depositions and unnecessary discovery.

If you are going to shift the burden at some point in discovery, if the burden is going to be shifted to the responding party to make proof with some sort of a discovery vehicle, then it is entirely conceivable that we get to the end of this discovery window, everybody stop discovery, or we get to the trigger point or we get to the 120 days or we

get to the time sufficient or the court's deadline or however we are going to trigger this change in burdens; and we get there and a point that has not been seriously contested but also has not been discovered suddenly becomes the basis for an MSJ; and the responding party hadn't done any discovery because this isn't seriously contested and I can prove it at trial; but I may not have any evidence suitable for a summary judgment.

I may not be able to get an affidavit. I certainly can't get one from the defendant. I may have chosen to take a short deposition from the defendant so as not to show him what I'm going to do to him at trial, and I'm saving time, and I'm saving my precious 40 hours of depositions for something else, so I don't want to waste nine hours asking him everything under the sun. Well, what I didn't ask him I know I can get at trial because it's going to be adverse. I can't now go back and get an affidavit. I already deposed him. Discovery is closed.

We are creating a burden of proof in discovery, No. 1, that is totally contrary to

the stated policy of everything else that we have done in this committee for several years.

Secondly, and it's a small remedy, but if we are going to do this and if we are going to draft this thing, then I think that the language has to include that upon motion by the responding party to do additional discovery in order to respond, the court shall grant time for that discovery to be done. It may be reopen the discovery window, it may be change the deadlines, whatever needs to be done, because otherwise it's easy to lay behind the log.

It's easy for the moving party to say, "Well, I'm just going to sit here, and if they don't do discovery on every element, if they don't spend money on every element and take time on every element and consume resources on every element, then I hit them with an MSJ." They can't respond because the window is closed. They have the burden. They lose. Aren't we great?

And I think that would be a farce. We have got to make it mandatory that in those cases where a party can bona fide show the

court, hey, this is what I have got to go do to respond to this. Not just generically, "Gee, I might need more discovery," but when a party makes a showing they need more discovery the court shall grant time for that discovery to take place, but fundamentally -- and I would certainly ask that that be included in any language.

Fundamentally, we are throwing around this burden of proof language. There are already courts that are saying you are going to do discovery in such-and-such order and tender your experts first because you have the burden of proof in discovery. That's not right, and creating this other burden of proof in discovery that we have done now is worse. It's contrary to all that we have been doing for years, and at least I would build in that little safety valve.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: Well, I just wanted -- two things. I wanted to make sure that the judge sets the date doesn't go back to the old judges have the whole pretrial

conferences in all cases. If you will recall, that was the proposal of the State Bar court rules committee, and we discussed that. The answer is we ain't going to do it. So -- not because it wouldn't be great, but, you know, we have a thousand cases filed in my court every year; and if I call them all in to discuss this, I mean, I'm just going to have to pick some arbitrary dates.

Now, if this committee can pick an arbitrary date or I can put one in the computer and pick an arbitrary date, but it ain't going to be any less arbitrary the fact that you let us in Harris County pick a different one from San Antonio. It's still going to be an arbitrary date.

No. 2, remember, we are talking about the -- generally speaking, and I think the impetus behind this -- I don't know anything about Dangerfield other than what I read in that wonderful legal and always accurate source Texas Monthly, but "Why People Hate Lawyers," now, this is with my daughters at the checkout stand what I see, and the answer is because, according to the article, eight

years into the case there is still bunches of these 3,000 people that have no doctor, no -- nobody has said what it's about.

That's why we have to worry about things like the legislature deciding to take back 50 years of our power to write rules because telling a judge in that situation -- I don't know anything about the case, that judge, or anything, but that problem is not fixed by saying "and the local judge can set a date that he or she deems appropriate to switch this burden." That is not going to affect the problem.

We need a rule that says -- back when I did medical malpractice we always claimed -- this was my friends on the other side of the Bar, always claimed this was the hardest kind of case to get the discovery on, because of the conspiracy of silence. The legislature has now said you have to have the proof in an affidavit before you file the case. We wouldn't have voted for that around this committee, but that's too bad because that is now the law.

What we are -- I know it's a lot. It is

very different from what we have ever done before to just say, okay, six months into the case you got to have some little bit of fact, not even admissible, to support your case. Not even admissible, to say, "I'm going to actually be able to prove this RECO claim that I have made on this case.

Or not even that much. "If you will give me another two months to take the following ten depositions, I can get a fact on that." That is not that much to ask. That's really not that bad. I know it's different from everything we have ever done, but there is more at issue here than just is this what we have done before or are some of our colleagues going to be confused by this.

I mean, we are talking about a system where people in our society are opting at -- why do we not see security cases anymore? Because security cases have been removed from the system because they don't trust us with us anymore, and they are all in arbitration; and workers' comp, the same; and you can go down the list; and some day we are going to be left with a system we like with no

cases left. They will have left us. This is not that much to ask. Give me six months, nine months. I mean, I will go 12 months, but in my court 12 months is not going to do you any good. We will have tried it by then; but, you know, it's not that much to ask.

MR. JACKS: I don't disagree.

CHAIRMAN SOULES: Go ahead, Alex.

MR. JACKS: It's just we have got no --

CHAIRMAN SOULES: Alex has the floor. Alex has the floor.

PROFESSOR ALBRIGHT: Paula, I'm sympathetic with the point you were making, and one question I have is, could you come up with inadmissible evidence of those fact issues, some evidence to show the judge, "Judge, I'm going to bring this evidence up at trial"? Can you sign an affidavit, or can you bring the letter? Can you bring a letter that says, you know, "This guy told me this"?

I mean, that kind of evidence. Is that going to be available to you if we don't require admissible evidence so you don't have

to have that witness' affidavit or that witness' deposition; but can you bring something to the judge that says, "Judge, I'm going to have this evidence at trial. This is a case where there is going to be a fact issue, and it's not appropriate for someone to ask that."

MS. SWEENEY: I'm trying to think how. I mean, I don't know. I don't think we want to go the way of having lawyers do affidavits, this is what I'm going to prove. That sounds like a bad way to go.

PROFESSOR ALBRIGHT: I agree.

CHAIRMAN SOULES: We can't hear you-all because of this noise. You need to speak up.

MS. SWEENEY: I don't know. I'd have to think about that. I mean, what I see as the problem is not necessarily something that I see that as being a solution to, but I will think on it.

CHAIRMAN SOULES: Let me see if I can focus on what I think is the issue here. We are talking about changing the summary judgment burden to something that may go as

far as the Federal, but it's going to go beyond Centeq Realty. I don't know if there is very much between those two, but the present rule incorporates Centeq Realty and then the Federal. Now, that is going to increase the burden on the respondent, usually the plaintiff. We have a concern that the effect of that will be unfair to some plaintiffs because they are in a situation where they don't have a sufficient control of the facts early on to be able to defend a motion for summary judgment.

Now, that's some of them. Most plaintiffs probably will have sufficient control of the facts at the time they file their lawsuit to defend the summary judgment, but some may not, and Tommy once mentioned to me some problems with products cases where this could occur; but we are really fixing trying to come up with a rule that's fair to a very small number of cases, but we are spreading it out over a lot of cases, every case; or am I wrong about that?

MR. JACKS: You're right about that.

MR. ORSINGER: You're right, but if you do have your case, it's easy to refute the Celotex motion. If you do have the facts, like in an automobile case and you have got an eyewitness that the light was red, affidavit. You beat the motion.

CHAIRMAN SOULES: David.

MR. PERRY: Well, that's sort of true in theory, Richard, but I don't think it's -- it's not going to be as true in practice if the new discovery rules are adopted. One of the things we have got to remember, we have sent to the Supreme Court rules that limit the number of hours you can spend taking depositions. Part of the rationale for that was you don't need to depose everybody in the world. If you already know about a witness and you know what the witness is going to say, you don't need to take his deposition. Let the other side take his deposition.

Now, let's say that I have got a case that depends on I know of a witness, the witness is going to say the light was red. I don't need to take his deposition. I can find

him. I can bring him to trial, but if a motion for summary judgment is filed, and I have to have -- I have to meet the burden of the present rules of having admissible record evidence to defeat the summary judgment, then I do have to either take his deposition or I have to get an affidavit.

If I haven't taken his deposition and the motion for summary judgment is filed, now I have got 21 days to get the affidavit; and so you get caught into the box of you need to go make a record on everything; and if you haven't made a record on everything, then you need the ability that Paula talked about to come back and reopen the discovery.

The problem that I see is that we are building a system that's going to have a tremendous impact on a large number of cases in order to solve a problem that only affects a very small number of cases.

Now, one thing that I think would be helpful, maybe, the only cases in which this new type of summary judgment need apply is a case in which neither side has any evidence on a given point. If the movant has evidence on

the particular point at issue, the movant has the right now to file the traditional motion and claim that that evidence is uncontroverted and proved beyond dispute, that he wins. So the only time we need this new kind of motion is if the movant has zero evidence on this point.

Now, I think if we were to start from the premise and say this new kind of summary judgment will be allowed when, and only when, the movant by affidavit says, "We have no evidence on this subject. We will have no evidence on this subject at the time of trial. We cannot find any evidence on this subject."

That would limit it to being filed in a comparatively few number of cases in which it would be appropriate, and then maybe people could relax in the other cases.

CHAIRMAN SOULES: I guess what I -- I should kind of finish my train of thought there. If we have that, we are down to that small number of cases where the plaintiff at the time of filing the case doesn't have sufficient control of the facts to defeat a motion for summary judgment. The

plaintiff should know that right then, and probably it's a case that they can anticipate there is going to be a motion for summary judgment filed in for the same reason.

If we do this, even with an arbitrary deadline -- I don't care whether it's 6, 9, or 12 months -- doesn't that just build in a strategic issue into the pursuit of the case? I better be ready in nine months to have enough evidence to defeat a motion for summary judgment because at that point -- a Celotex type motion or whatever this new motion is, and I need to get with it. That is a live problem in this case, and I need to pursue that from the beginning as a matter of my preparation strategy; and if that's the case, why doesn't an arbitrary deadline work?

MS. SWEENEY: You're saying discovery evidence, not evidence for trial. You are building a burden of proof at the discovery stage by your definition.

CHAIRMAN SOULES: Right. Because you are likely to be confronted with a legal sufficiency summary judgment in this case unless you can get some control of some

facts that will defeat it, and that then becomes a priority early on. I don't know.

Paul. We will go around the table again.

MR. GOLD: Okay. Then let's go with apostasy here. If we are going to do that then let's go to mandatory disclosure, because what should happen then -- if everybody is really sincere about all of this and cut through all the politics on this thing and all the tactical maneuvering, and everybody is really interested in disposing of the frivolous cases, then fine. Make the defendant, make the plaintiff disgorge all the evidence or all the potential evidence that substantially bears on the case immediately, and then let's talk about Celotex.

But it is a ruse to sit here and talk about efficiency through summary judgment when we all know we are going to keep this discovery system that allows everybody to play hanky-panky with the facts, even the defendant who will stand up in court and say there is no material fact issue here when they know they are sitting on the facts because the plaintiff hasn't asked the right question or the court

hasn't ordered them to produce it or they have just flat lied, which has happened.

So if we are really going to get after this, let's do it right. Let's talk about the Federal system, and that's what this whole thing is -- that was an introductory statement here. You can't not just extract from the Federal system some little plum that you like because you think that it's going to be efficient and disregard everything else. It works as a system, and in Celotex they said that, and if you want this Federal summary judgment rule to work, then make everybody disgorge all of the evidence at the beginning and then let's talk about whether there is a material issue of fact or not.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I agree so totally with Judge Brister I don't know how to express it that it --

HONORABLE C. A. GUITTARD: You already have.

MR. ORSINGER: To me, to say that the burden of proof on a summary judgment

disposition of a case without a jury trial is going to depend on some discretionary decision as to how far discovery has progressed is indefensible as a premise for a legal system because the question of what right you have to have evidence and to have a jury and all of that is going to be judged by a floating standard; and it's going to float according to what the trial judge thinks or wants; and then there is going to be a court of appeals that's going to reverse them or affirm them basing on whatever the standard floats through their head; and if it gets reassigned from the first court to El Paso, you may follow 14 published opinions from your court, and you may get reversed by the El Paso court of appeals, and how can you premise a judicial system on that?

To me, you have got to have a clear defined line of when your standard of proof changes from X to Y or every single case is going to be appealed. I cannot tell somebody that they don't have a chance of reversal of their summary judgment because the trial judge abused the discretion about deciding when the burden was suddenly against them instead of

for them. Every single granted summary judgment will be appealed, and you don't know whether it's going to get reversed or not.

CHAIRMAN SOULES: Legal sufficiency based on Celotex, every one of them gets appealed.

MR. ORSINGER: I don't see -- I mean, there are a lot of appellate lawyers around here. Is there anybody here that's going to tell your client that you shouldn't appeal if the judge puts a Celotex burden on you and there is some plausible argument that there is discovery yet to do? You can't tell them that. You have got to tell them there is a shot at getting it reversed, so how have we helped anything?

I mean, I really feel like the plaintiffs ought to have a deadline, and they ought to bust their ass and get a prima facie case. Now, Paula, you don't have to win your case in discovery. You just have to make a prima facie case in discovery. You might have some of your best evidence, and you might hold it back so that they don't see it, but you do have to disclose enough to be more than a

scintilla.

Now, I'll grant you that right now you don't have to even show more than a scintilla, but you don't actually have to try your case in deposition. You just have to show more than a scintilla, and I understand your concern, but I think that, you know, even if I'm on the plaintiff's side of a case that I can be consciously aware of whether I am making a prima facie showing or have more than a scintilla on every single element, and maybe I will take a deposition that David wouldn't normally take or get an affidavit that I wouldn't normally bother to get sworn to. I'd just take a written statement that's unsworn, just because I know that I will have that little piece of scintilla to add to beat the Celotex motion. Pass.

CHAIRMAN SOULES: Chip.

MR. BABCOCK: Richard, you're assuming that there is going to be a date where the system is -- and Paula is, too, where the system is going to shift. That is not necessarily true. I mean, you can have a rule, as the Federal courts have, where there

is just one, there is one standard, and it's a standard that applies all the way through the case, and you get to do your discovery and make a motion if you haven't gotten a chance to do enough.

Paul's argument about how the Federal system is a system and different than ours, which I have heard from others, I think is a little bit of a red herring because Celotex was decided long before there was Rule 26 disclosures, before Rule 26 was changed; and the business about how, well, you have got to specifically admit or deny every single allegation in a complaint, well, that's true; and you admit that you are -- you know, you have been properly named as the defendant and you admit that you do business in Dallas County, and you don't admit a whole lot else in a Federal complaint, at least most people I see don't.

I don't think that the systems are as different as we are making them out to be, and I'm not going to repeat all the things I said before, but I think it is very unwise to have two sets of rules and have a bright line

arbitrary date when the rules change. I just don't think it's workable, and Judge Brister gets reviewed for abuse of discretion all the time, and that's just what happens, and we don't always like what the courts of appeals do; but if they don't do it on this subject, they are going to do it on some other; and, you know, to me that's not a reason not to have this rule.

CHAIRMAN SOULES: Judge Guittard.

HONORABLE C. A. GUITTARD: I agree with what Chip says. I agree with what David Perry says. The only manner in which I disagree with David is that to make the lawyer sign an affidavit.

Now, that's contrary to our general approach here, and I would say that there ought to be just one fair rule, and I suggest that in place of this second sentence here on Draft 1, subdivision (b) the following: "However, the movant may move for" -- "A party may move for summary judgment, and summary judgment may be granted on a matter on which the respondent has the burden of proof based

on a certificate by counsel that after a diligent investigation," describing it, "in counsel's professional opinion there is no evidence to prove one or more essential elements of the respondent's claim or defense."

And then as for the time element I would amend subdivision (g) where it says, "cannot for a reason stated present by affidavit facts essential to justify his opposition," insert this language, "or that the respondent has not had sufficient time for discovery."

CHAIRMAN SOULES: David Beck.

MR. BECK: Frankly, Paula has raised a point that I hadn't really focused on, and that is if our lawyers are making strategic decisions not to take discovery because they don't want to incur the expense because they know the evidence is there, the one thing we don't want to do is to encourage people to go out and take discovery that they otherwise would not involve themselves in; but in trying to look at the examples, at least that Paula gave -- I don't see her here -- the current rule as it presently exists at least

addresses that in part because it specifically says under subdivision (g) that the court can grant a continuance or allow a deposition if an affidavit is unavailable or the summary judgment evidence needed to respond is unavailable.

The problem arises, though, as Paula said, is if she knows she can get that evidence from a party and somehow she can't get the affidavit from the party, well, again, under the current rules she can get a deposition from the other side; but frankly, I think that the suggestion Tommy made, which is getting some type of affidavit from the party that's moving saying that they are unaware of any such evidence, ought to take care of that problem, but I do think she's raised a good point that we ought not to lose sight of.

CHAIRMAN SOULES: Anyone else on this? Paul Gold.

MR. GOLD: Yeah. Chip makes a good point on the thing about disclosure. You're right. Celotex is decided before the disclosure rules. However, the Federal court system also has other procedures in place that

balance some of this. For instance, in Federal court, even back in 1983, 1985, '85 when Celotex was decided, the defendant had to specially deny allegations.

You have got a difference in Texas, and I guess what bothers me about this isn't what -- I understand what Judge Brister is saying, and I agree. At a certain point you should be able to say what your case is about. That isn't this. It's a question of just fairness; and I think, you know, in this climate, just to be honest, I think that's gotten thrown out the window; and I don't think people are really that much concerned with the fairness issue in this thing; and that is, is that a defendant doesn't have to specially deny in Texas, a defendant doesn't have to do anything; and what this rule is going to encourage defendants to do is avoid the laudatory purpose of it; and that's going to be a sideline.

The practical effect is every single defendant will file at the earliest moment a motion for summary judgment to finesse the plaintiff into filing all -- disgorging all of

their evidence without the defendant ever having to do the same. Now, this affidavit proposal might be a pretty decent way of balancing that, but I would encourage everybody to look into their hearts on this thing in terms of fairness, and it's tilting very seriously in Texas the balance toward one side and away from the other needlessly, I think.

I think the system that we have got right now works remarkably well and can be fine-tuned to deal with a lot of the problems; but to adopt the Federal rule, which is what the rumbling is finally coming around to, which is, well, rather than just having the state rule for a little while and then the Federal rule, why don't we just have the Federal rule all the way across, I think we need to look at the differences between our system and the Federal system and how the thing is balanced in the Federal system and how it would be out of balance in our Texas system when we are talking about all of this; and that's just a concern I have got.

CHAIRMAN SOULES: Anyone else?

Anne Gardner.

MS. GARDNER: Well, I'd just like to go back to the timing question for just a second. It seems to me from listening to Paula and a couple of the others that there are two issues about the time. One is that discovery might be closed by the time the defendant filed their motion for summary judgment precluding the plaintiff from going back and doing more discovery, and the other one being the issue of being caught by a surprise too soon without having adequate time to do the discovery in the first place.

And to remedy the second one, the court rules committee had a real concern with not having adequate time, and so we just proposed extending the time from 21 days to respond to 45 days in all motions for summary judgment, which might in and of itself take care of a lot of the problem with being caught by surprise when one is filed too quickly. 45 days is a pretty long time to have an opportunity to go conduct discovery and get affidavits and so forth.

The problem of discovery already being

closed and not being able to -- to ask the judge to reopen is an entirely separate question, and I don't have an answer for that, but I just wanted to point out the possibility of extending time to respond to 45 days.

CHAIRMAN SOULES: Okay. Anything else on this?

Okay. Well, the motion is to provide a rule that changes the burden somehow, as yet undefined, at the end of 12 months from the filing of the lawsuit with a provision for allowing for additional discovery where necessary.

MR. JACKS: I actually amended it. That's not what it says anymore.

CHAIRMAN SOULES: Okay. Give it to me.

MR. JACKS: You got to be quick.

CHAIRMAN SOULES: I'm not quick enough today. Sorry.

MR. JACKS: No. I was persuaded that you couldn't have one time period that would apply statewide to all cases and, therefore, amended it to say if there is

a discovery period, it's at the end of the discovery period when this motion with its attached burdens or lack thereof could be considered by the court.

CHAIRMAN SOULES: Otherwise what? No change?

MR. JACKS: No. Otherwise it would be a date set by the court, but I think the parties need to know when it is that this new set of rules does or doesn't apply.

CHAIRMAN SOULES: Okay. Is there a second for that?

MR. BECK: Second.

MR. LOW: Can I ask a question about the motion? I'm not clear.

CHAIRMAN SOULES: Yes, sir.

MR. LOW: Does that mean I can't file -- it doesn't mean that I can't file -- you just sue me, and I just can't file a summary judgment right then.

MR. JACKS: It does not mean that.

MR. LOW: Okay. As long as you aren't cutting that off. I just don't want that.

HONORABLE SARAH DUNCAN: If you were in Idaho, you could still file.

MR. JACKS: It's just this new way of motion, whatever it --

HONORABLE SARAH DUNCAN: Call it an exception to the Texas summary judgment standard.

CHAIRMAN SOULES: As I understand the motion, it is that the summary judgment practice would not be changed as far as the burden is concerned until the end of a discovery period or a date set by the court for changing the burden, that there would be some available remedies of additional discovery where necessary, and that's what we are now voting on.

PROFESSOR DORSANEO: Why don't you just say the end of the discovery period? You don't mean the date set by the court before the end of the discovery period, do you?

MR. JACKS: Well, no, but --

PROFESSOR DORSANEO: Well, then why don't you just say whenever the judge wants to change the standard?

MR. JACKS: Bill, the latter was --

HONORABLE SCOTT BRISTER: That's right.

MR. JACKS: -- in the event there is no discovery period; that is, if the court doesn't by rule establish a discovery period and the trial court has not by order established a discovery period. I mean, the long and short of it is if I want to file one of these exceptional motions for summary judgment and there is no discovery cutoff date, well, then is it coming on me to get the court, you know, a scheduling order to say as of X date --

MR. YELENOSKY: I have some language, if that will help.

MR. JACKS: -- Lawyer Jacks can file his motion.

CHAIRMAN SOULES: Let's try to get -- if we start trying to rough draft this then I'm afraid we are going to get hung up again. Richard.

MR. ORSINGER: I probably have forgotten, Tommy, but I thought that there was

always a discovery cutoff. It's just that the rules provided it unless you opted out to some kind of agreed or court regulated discovery cutoff.

MR. JACKS: I don't think that's true.

CHAIRMAN SOULES: Well, his point is that we may not get that out of the Supreme Court. There may not be a discovery cutoff in the rules.

MR. ORSINGER: Okay. So what are you going to do when some district judge says the Celotex rule applies from answer date forward?

MR. JACKS: Well, Richard, I guess -- and I'm not trying to draft it, but I think the rule has to say that the judge has to set a date that contemplates that there has been adequate time for discovery. The parties need a date. Either the date's going to be set by court order through the statute, or the discovery period has been set by the rules because the Supreme Court has decreed a discovery period or the judge is going to have to gut up, like it or not, and set a date that

the judge thinks is reasonable in that case to allow this kind of a motion to be filed and heard. Now, that's going to need some drafting to say it, but that's the concept.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Well, I mean, I will just say what I think he's saying. "At the close of any discovery period or if there is no discovery period, a date set by the court to allow adequate discovery."

MR. JACKS: That's getting there.

HONORABLE SARAH DUNCAN: That's the concept.

HONORABLE DAVID PEEPLES: Two questions occurred to me. No. 1, if some innovative court wants to just decide in my court the date is six months, nine months, and so forth or so many months in certain kinds of cases and a different period in other cases, for all cases, I assume that would be okay. If you can set it in one case, why can't you set it in all?

MR. JACKS: I would assume you

could.

HONORABLE DAVID PEEPLES: Yeah. Failing that, I guess you've got to have a motion by some -- no court is going to just go over the docket and decide this looks like a good one to set a period. Like I said, it will have to be a motion before the motion for summary judgment to declare it right for Celotex.

MR. JACKS: I think you have to have the court establish a date as far as when it is that these exceptions start to take effect.

CHAIRMAN SOULES: Okay. Anything new on this?

Those in favor of the motion show by hands.

MS. SWEENEY: Can we demonstrate by our vote that we still oppose this concept?

MR. GOLD: Do it this way. (Indicating)

MS. SWEENEY: I'm holding my nose.

MR. YELENOSKY: I assume our

roll call vote takes care of that.

CHAIRMAN SOULES: 15 in favor. And those opposed? Five. To five.

MR. GOLD: Now, the same people have to vote on each issue.

MR. YELENOSKY: Or otherwise it's just some plurality.

CHAIRMAN SOULES: I apologize, but I'm going to need about five minutes here.

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

CHAIRMAN SOULES: Jacks' Point No. 2. Okay. Point No. 2 is that there would be accompanying the motion for summary judgment that we just talked about -- or maybe all motions. I don't know exactly how broad this is. There would be an attorney's -- some verification by the attorney that there is no evidence to support the respondent's case or the respondent's side of the issue, summary judgment issue, and that somebody or everybody -- I don't know exactly how broad it is -- knows of no such evidence. That's the next, Point B. Richard Orsinger.

MR. ORSINGER: It seems evident to me that we can't ask a lawyer to swear to what the client knows or doesn't know, especially if it's a corporate client and has 50 employees or 5,000 employees, nor I think that could you certify that; and so I think if we are going to put a burden on a lawyer, that the burden has to be very circumscribe, particularly if it has to be supported by affidavit, and then you have to ask yourself whether the lawyer has to make some good faith effort to inquire or whether the lawyer who signs the affidavit is the lawyer who has been cloistered so that he hasn't interviewed any employees or witnesses so that he can truthfully swear that he hasn't seen any evidence to that effect. I mean, we have a very delicate problem here because you are asking the lawyer to swear to stuff that really his client may be not disclosing.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: I think there are two other problems that we need to consider on this point. One is that a

substantial section of the Bar thinks that the standard for no evidence is changing fairly rapidly, so there is a question as to how does one certify that there is no evidence when whether there is no evidence is a question of law that may or may not stay the same.

The second consideration, it seems to me, is the difference between evidence and inferences and inference stacking. Causation may be proved by a very reasonable inference even though there is no direct evidence of causation, and to say there is no evidence simply says there is no direct evidence. It doesn't say there is not a reasonable inference of the fact that direct evidence could be used to prove if there were any, and I think we have got to take those two considerations, in addition to the ones that Richard noted ,into consideration when drafting any type of certification rule.

CHAIRMAN SOULES: Okay. Steve Yelenosky.

MR. YELENOSKY: I understand the purposes of this, and I guess I'm troubled by it, too, because it does put the lawyer in,

I think, the only situation in which a lawyer is in a position to essentially state his or her belief or his or her judgment as to the law and the facts and swear to it, and that does involve a question of law.

It also raises the issue -- it also puts you in a funny position with your client with respect to how much they might tell you, whether that client might say, "Well, you know, why won't you give me that certificate, you know, maybe another lawyer will," and if I'm the plaintiff's lawyer and David Beck doesn't file that motion, then I have got a sense that he knows about some evidence that maybe I haven't found yet, and I'm just kind of curious whether he would be concerned about that or defense lawyers would. When you're not filing them doesn't that signal something to the plaintiff's lawyer who may be fishing around.

Normally I'm not concerned about that, but I'm just curious what -- since I am usually on the plaintiff's side, always on the plaintiff's side, but I'm curious what the defense lawyers think about that. That would

be a pretty strong signal to me if I were the type of plaintiff's lawyer who wanted to go fishing that if they were not filing that motion, they must know something, but so I am just concerned about putting the lawyer in that position.

MR. BECK: Luke, two things.

CHAIRMAN SOULES: David Beck.

MR. BECK: One, I mean, using the example that Steve uses, the defendant. I mean, it's the defendant's case, and I don't think the lawyer ought to be required to come forward and give some type of testimony about the defendant's case unless it happens to be a very narrow area that only the lawyer may know about.

But secondly, and perhaps more importantly, I think it creates some real ethical problems for the lawyer because it creates an inherent conflict situation between the client and the lawyer, because if the client knows -- and, believe me, clients get pretty sophisticated these days -- that they cannot tell their lawyer certain things and then push the lawyer out there and get them to

do certain things that they otherwise wouldn't do if they were candidly told what the facts were, then they get the best of all worlds. Yet it's the lawyer who's out there with the affidavit. So I would be against the lawyer being required to make the affidavit.

MR. LOW: In Federal courts lawyers don't hardly swear to anything. They have gotten away from all that. State courts always have. There is no sworn lawyer pleadings, and if we are going to follow a Federal burden, then why -- I mean, I think that's wrong to do it.

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: I was going to suggest that unless Tommy finds at least one other person who is willing to support this proposal that it be dropped.

MR. YELENOSKY: Which part, the lawyer's signature or --

HONORABLE DAVID PEEPLES: The lawyer vouching for what the client knows.

MR. YELENOSKY: But you are not saying the --

HONORABLE DAVID PEEPLES: No, not the other part.

CHAIRMAN SOULES: I don't want to make a preemptive strike on this, but I guess, is there any real sentiment that a lawyer should make an affidavit in a legal sufficiency sort of a motion for summary judgment or any other as to the merits of the motion? One. Anyone else?

MR. JACKS: Well, I want to talk for a minute. That's why I'm raising my hand.

CHAIRMAN SOULES: Okay. Go ahead, Tommy.

MR. JACKS: All right. I will grant I'm not keen on lawyers having to swear to things and particularly things their clients may know and may be lying to them about or not disclosing. In some fashion if you are going to allow a party to obtain a summary judgment with nothing more than an unsupported pleading that there is no evidence to support an opponent's element of the opponent's claim or defense, I think you must somehow up the ante enough so that before it

is filed someone knows they must think twice about it.

Now, you could say that it has to be sworn to by the client. That takes care of the problem of the lawyer having to swear to something that the client may not be disclosing to them, as David was raising as a concern and Richard was raising as a concern. A problem with that is that in many cases it's the lawyers who really know far more about certainly the discovery facts than the clients do. The lawyers are taking the depositions. The lawyers are reviewing all the documents. The client may well not have anyone working there who knows nearly as much about the facts of the case as the lawyer.

Perhaps you could get there through a certificate approach as opposed to a swearing approach, but it seems to me that you need something beyond just filing an unsupported piece of paper. You know, maybe we will get to the next element, which is Sarah Duncan's proposal about the cost being shifted. Maybe that's all that's enough, but this is what I'm searching for.

CHAIRMAN SOULES: Okay. Justice Duncan.

HONORABLE SARAH DUNCAN: I wonder if what Mike -- I mean, I agree with you that this type of a motion could be abused, and if there's a way to discourage that, we need to do it.

What about a certificate from the lawyer that says, "I, or a person under my direction and control at my instruction, have reviewed the discovery in this case, and in my professional opinion there is no direct evidence or reasonable inference of," whatever the essential element is, and then something from the lawyer that also says -- or maybe this would be from the -- something from the lawyer, "And to my knowledge, there is no evidence available to prove that essential element," and make it just a certificate like a certificate of service rather than an affidavit and make it confined to the body of discovery, which that lawyer should know about, if he doesn't, and you know, "am not aware of any other."

MR. JACKS: I think that's a

possibility. I think you could also say, "After reviewing the evidence and after having made reasonable diligent inquiry with my client," so you are not vouching for your client telling you the truth, but you are vouching that you at least asked him the pointed questions about where the truth lies.

HONORABLE SARAH DUNCAN: This would be a pleading. We already have a requirement that you make an investigation into the basis of any pleading you are going to file, and I don't know why that would be that much more onerous or that much more conflict causing than what we already have.

MR. JACKS: Well, you have got a point there, and I think that -- I would rather have that certificate than not have anything other than the lawyer's signature.

CHAIRMAN SOULES: Well, you know, we are headed for an era, unless the legislature does something about it, where there is no sanction for frivolous pleadings except in tort cases, because Chapter 9 only applies to tort cases, and Rule 13 we said to repeal.

PROFESSOR ALBRIGHT: But we have Chapter 10.

CHAIRMAN SOULES: Chapter 10. Okay. I guess that gets it. I'm wrong.

Richard.

MR. ORSINGER: Well, what Sarah said is interesting because it started out saying, "I have examined the discovery," and then it ended up saying, "I know of no other evidence." You know, it's important that we decide whether the lawyer is just vouching for having studied the discovery or whether the lawyer is vouching for having done personal investigation of undiscovered stuff.

And it's also important, for example, what if I have a consulting witness that has told me that my client is liable, could be on proximate cause or negligence, could be on products liability, could be anything; and that's a consulting expert. I have another expert that's a testifying expert that doesn't agree with that. They believe that my client is not liable.

Now, could I sign that certificate knowing that they will never know what my

consulting expert told me, but I know it? Should we be limiting it to discoverable information so that all of our privileges -- what about disclosures that are made under attorney-client? I mean --

MR. YELENOSKY: It's really fundamental because, I mean, you may -- I mean, it's really a fundamental issue, and I think people will disagree on it. I know what I think, but it has to do more with a criticism of the adversary system than this little part; but earlier on I think David Beck said, for instance, a lawyer shouldn't be filing this motion if he knows the evidence is out there; but I think David would also say forgetting summary judgment if you go through trial and the other side doesn't find that evidence, you are entitled to your judgment.

So in the one instance you're saying you can't file this motion if you know it's out there, whether they have found it or not, it's come up in discovery and it might have been found; but in our justice system when you go to trial if they haven't found it, you are entitled to your judgment and you are entitled

to your res judicata. So that's a fundamental point, and I think there is a disagreement on this.

I think under Celotex, which I have read for the first time today, my understanding is it's not clear to me that the court was saying what David said. It's not clear to me that the court is saying we are only going to grant summary judgment when the plaintiff just has -- not only hasn't revealed the evidence, but we know it isn't out there.

I think they are saying what they are saying, you know, that you've had enough time and you haven't found it. You should be able to bring something forward, if not in admissible form, something to indicate that there is going to be something to try.

Now, that, to me, may be a fundamental philosophical difference about our justice system, how it should operate, and how to reach truth. If we are going to go -- I mean, we can discuss that, but I think we have to realize that's what we are talking about.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: Refresh my record. It seems to me the concern about this new type of motion is twofold: One, that people will just file them on everything. You don't have any evidence of negligence, da-ta-da-ta-da, proximate cause, damages, anything. So you can just spit it off your word processor and impose a lot of costs to the other side. I don't see how any part of that, what we are discussing, would not already be covered by Rule 13.

MR. ORSINGER: There is no Rule 13 now.

CHAIRMAN SOULES: Or Chapter 10.

HONORABLE SCOTT BRISTER: Chapter 10. And so -- or Rule 13 to the extent, I guess, it's not in conflict with Chapter 10; but in any event, I mean, that's if it's groundless, if there is -- I mean, you know, that's not going to be hard for me if they just put every item of the plaintiff's petition in there and that this is groundless and it's brought in bad faith or for purposes of harassment.

Now, the other concern -- so if that's the concern, I don't think we should do anything. If the other concern is that people who know that the other side has a good case but know that the other side doesn't know it yet have some duty or should be scared away from doing something. You better think long and hard about that, because you are talking about the foundation, like it or not, of the American adversarial system.

Now, you want to change that, there is a strong argument for it, but you are going to have to go to the barrister system where you really are a professional, and you ain't an advocate in the way that everybody in this room thinks of an advocate.

MR. YELENOSKY: That's right.

HONORABLE SCOTT BRISTER: Because you can't come in here and say something just because the other side hadn't proved it yet. I mean, what are the criminal defense Bar going to do if that starts applying to them? That's a big step, and I think we ought to hesitate before throwing that in.

CHAIRMAN SOULES: David.

MR. BECK: Luke, at least the way I understand what Tommy is trying to do here, and conceptually I agree with him, is that because we are creating in effect a new motion or a new way of motions, as people keep referring to it, what we want to do is put some added burden on the part of the movant to make certain they don't just file some frivolous motion for summary judgment in almost every case. I don't see any problem with that, to make sure it's a bona fide legitimate motion.

Now, there are two things that you are addressing here. One is after a full period of discovery is there anything in the discovery record, if you will, that shows that there is a fact issue; and if the lawyer believes that there is nothing in the discovery record which creates a fact issue or shows that there is any evidence on a critical part of the respondent's case, then the lawyer by signing the motion is in effect certifying that there is nothing in that record that the respondent can use to defeat a motion for

summary judgment.

I think Chapter 10 -- I think Judge Brister is right -- speaks to that. Now, if there is a concern that somehow lawyers still won't do it, I mean, refer to Chapter 10 in the motion for summary judgment rule. I don't care.

The other part has to do with evidence within the movant's possession, custody, and control and that I think ought to be the affidavit of the party. I don't think the lawyer ought to have anything to do with that, because of the conflict situation and a lot of ethical problems you are going to create that we are all aware of.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: I see some merit in David's suggestion there. I want to go back, though. I don't think that Rule 10 or Rule 13 have much bite, particularly compared to Rule 11 in the Federal court. For instance, there is a paragraph in a Texas Supreme Court case called Service Lloyd's vs. Harbison in which the Texas Supreme Court says there is a remedy for people filing frivolous objections to

discovery, and I doubt there has been a trial court one that has ever imposed that sanction, and every single set of discovery that is transmitted in this state right now probably has in it standard boiler plate objections.

Now, what I'm leading to on that is if you don't go and get rulings on each of those objections then the objections are good, and people can sit on potential evidence, individuals with knowledge of relevant facts, documents that are relevant. All they have got to do is object that the request was overbroad, overburden, whatever, and they don't produce anything.

Well, now we are going to have to get hearings on each of those, not only for trial but for summary judgment, unless we have something such as what Tommy and David are talking about where the person says, "Regardless of the state of discovery answers there is no evidence that I'm aware of and the client states that they are not aware of," because if you merely rely on discovery, right now and even under our new rules, very seldom is all of the discoverable information

disgorged without hearings; and I can just foresee something like train wreck here with all the types of hearings you have to have to finesse all of this out.

So I think that the affidavit from the attorney and the affidavit from the party have definite benefits in our system that you don't have in the Federal system because I think the Federal system's Rule 11 has so much more bite behind it than our frivolous lawsuit rules, 10 and 13.

CHAIRMAN SOULES: Okay. Anyone else?

MS. McNAMARA: Let me just say one thing that's probably very unpopular.

CHAIRMAN SOULES: Anne McNamara.

MS. McNAMARA: Sitting here listening to the debate I'm having trouble understanding why there should be a greater burden imposed in front of a summary judgment motion than a complaint. In each case you are imposing some degree of burden on the system and some costs and all of that. We don't ask the attorney to do an affidavit with respect

to a complaint saying that he investigated and confirmed that there is no evidence out there that would work against it.

We are sort of saying that a summary judgment is a particular burden on the system, and it really goes to Tommy's other point, the loser pay issue. I think society -- the country has rejected the idea of loser pay at the Federal level in terms of what to do about the burdens our system of litigation imposes. I don't see why summary judgment should be different.

CHAIRMAN SOULES: Okay. Anyone else? Tommy.

MR. JACKS: Well, summary judgment is different because litigants are deprived of the right to try their case in court, and I think that is a difference fundamental to our system, and I think that it's a fundamental difference between summary judgment procedure which cuts off that right and the other aspect of our pretrial procedures which don't.

Luke, I think what I'd like to do with my motion on this particular point is to hold it

in reserve and go on and talk about the next -- what I believe to be the next point, which I think is a related point, and that is Sarah Duncan's idea that in the event a party has abused this process that there is a cost shifting sanction that applies. I do agree that while Section 10, Rule 13 applies, I also think that it's so ineffectively applied by courts that it's of no use as a practical matter in this situation and something we need to put in the rule about it. So if it's all right with the Chair, I guess essentially I'm asking to table this part of my motion until we can discuss the other ones because I think they are related.

CHAIRMAN SOULES: Any objection to that?

Okay. Then we will move to the question of cost shifting to the losing movant; is that right?

Could I get some clarification of exactly what sort of motion we are talking about here? If the motion that's filed is one on which the movant tenders summary judgment proof and says that that proof is conclusive, and that the --

well, that that's conclusive, does all of this baggage go on that motion?

MR. JACKS: No.

HONORABLE SARAH DUNCAN: No.

CHAIRMAN SOULES: It's just if you file one of these triggers where the motion is filed, says there is no evidence on this essential element of the plaintiff's case, and we are talking about possibly shifting the burden to the other side based just on that kind of a trigger?

MR. JACKS: Yes.

MR. GOLD: Yeah. That's all right.

CHAIRMAN SOULES: This may all be academic, but I'm not sure what would pull that trigger.

MR. JACKS: I think you are right, but essentially we are talking about cases in which if they proceeded to trial the defendant would be entitled to instructed verdict because the plaintiff cannot after adequate discovery prove their case.

CHAIRMAN SOULES: Well, there are a lot of reasons for an instructed

verdict.

MR. JACKS: There are, but this reason is that the plaintiff has not induced evidence on an essential element of the plaintiff's cause of action. I mean, these are the cases we are really shooting at here. It's the Celotex type of situation when they are saying, "We have been at this two years, the plaintiff still has no proof that they were ever exposed to asbestos, to our product," and that's the classification we are talking about.

We are not talking about the garden variety Texas 166a motion for summary judgment. What's different about this one is all the defendant has to say essentially is "Prove it. Show me your proof, plaintiff."

CHAIRMAN SOULES: Okay. Go on to cost shifting, and I guess that's next. Tommy, is that where you want to go?

MR. JACKS: Yes.

MR. BECK: Could we restate the motion, Luke?

CHAIRMAN SOULES: Pardon?

MR. BECK: Could we restate

this part of the motion so we know what we are talking about?

CHAIRMAN SOULES: Okay. As I understand this part of the motion, based on some standard not yet articulated a movant files a motion that triggers a summary judgment practice where it's just the raw motion, not supported by something they contend is conclusive proof, thereby putting on the respondent the burden to essentially marshal their evidence and show their case in order to stay in court; but if the movant stays in court, the cost gets shifted -- or that if the respondent stays in court, the cost, respondent's cost of doing so gets shifted to the movant.

MR. BECK: Is this an automatic shifting, or is this a discretionary part of that?

CHAIRMAN SOULES: That's not resolved, unless Tommy thinks it is, and if so, it should be a part of the motion.

MR. JACKS: I think the language that Sarah had read which I had embraced required a determination out of the

party who filed the motion knew it wasn't so or they should have known it wasn't so. Is that essentially correct?

HONORABLE SARAH DUNCAN: The way I read it initially is that they would have discretion without any showing at all because -- and the reason I put that in was just because I'm not sure that I can foresee the circumstances where this might arise. I mean, it may be that they didn't know and shouldn't have known that there was evidence, but for some other reason the motion was brought for an improper purpose.

So I've got it two-part. One, "If the motion is denied, the trial judge may..." And two, "If the motion is denied and the trial court finds that the defendant knew or should have known, they must..."

CHAIRMAN SOULES: Okay. Richard Orsinger.

MR. ORSINGER: Well, I don't even know where to start. Is that going to be --

CHAIRMAN SOULES: Putting your hand up.

MR. ORSINGER: Is that a separate fact hearing where I am entitled to testify after I've lost as to why I have filed it, and I'm subject to cross-examination, or do I go ahead and file my affidavit as a lawyer together with my reply to the motion for summary judgment? Am I entitled to have other lawyers come in and testify that in their opinion I was reasonable or not?

And if this is not based on a fact hearing, then the lawyers are going to be subject to punitive sanctions in the form of money without, you know, having the right to defend themselves, and if the amount of money we are talking about is significant, like -- which I will get to in a second -- 15, 20, $25,000, am I entitled to a jury, or is this strictly a matter of law for the court, and how many witnesses? Can I call everybody that I want at my hearing to justify?

Okay. No. 2, what is cost? Let's say that the plaintiff has been cooking along here. It's not a medical malpractice case. Let's say it's a legal malpractice case so they don't have to have an expert in hand

before they file, and they haven't gotten an expert in nine months, so I file a motion for summary judgment saying, "You haven't produced any evidence that the lawyer was negligent."

Well, is it now part of my -- I mean, is part of their cost is going out and hiring an expert to testify that my client, the defendant, was negligent? Is that part of the cost? Because I'm going to lose my motion now. Now that I've filed it, my Celotex motion, they have hired an expert. They have got an affidavit that it was negligent, so I lose. Now, according to Paula's rationale, they were really forced to do that discovery by my motion. They might be forced to take three or four depositions of witnesses that they have written statements from because of my motion.

Do I pay for their depositions? Do I pay for the cost of the expert's time? You know, how far do we go on what the costs of the motion for summary judgment is? Or is it just the attorney time in filing the response, but not the associated discovery that develops your response? You know, these are very

problematic issues for me.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: I am not for a moment suggesting that they are not problems, and we have all talked about sanctions for weeks and weeks and weeks, but if you don't -- in my view, if you don't have some type of cost shifting mechanism in this rule, it is going to be abused horrendously, and there are plaintiffs who are going to be bankrupted with serial motions for summary judgment on a specific element.

Every one of them is going to have a specific element; but there are going to be 30 of them; and I'm going to have to go through disks of 75 depositions and find the piece of evidence that answers that particular motion; and you can be talking easily about tens of thousands of dollars, one, in attorney time; and if it is a large case, it can cost, as it did in one case I was involved in, thousands of dollars just to get the response copied and served to everybody in the lawsuit; and in my view, I'm not saying there are not problems

with this and that it doesn't have to be carefully done. I'm just saying if you don't have it, it is not going to be a fair system.

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: All this just convinces me we are all thinking about different things. I don't have in mind that kind of procedure at all, Sarah. What I have in mind is the kind of thing where the defendant thinks there is not evidence in the discovery of an element, as pointed out; and, you know, if you can't go to the deposition and find something crucial to your case like that and have one page of it for the court, you are in trouble.

HONORABLE SARAH DUNCAN: There is not one deposition. There are hundreds.

HONORABLE DAVID PEEPLES: This, you know, thousands and thousands of dollars, I think that's not --

HONORABLE SARAH DUNCAN: And one of them lasts eight months.

CHAIRMAN SOULES: Just a minute. One at a time.

HONORABLE DAVID PEEPLES: I don't think that's what is involved. The cases I have seen are -- I had one just the other day where some blood got tested by several people for AIDS and somewhere along the line got switched, and the guy at the end of the line tested it correctly, but there is an allegation that maybe they switched it.

They are saying, "We didn't switch it, but we can't prove as a matter of law we didn't switch it," and there is no summary judgment in that case because the plaintiff has no evidence that the guy at the end of the line switched it, but you have got an interested witness saying, "We didn't switch anything."

That's going to be an instructed verdict at trial, and unless we change the law there is no remedy for that litigant that's been hauled into court on this, and I want to ask the people, I mean, who are against any change, what do you do about the Dangerfield type case? I mean, really, what do you do about that, and what do you do about the kind of case where many causes of action are

pleaded, and I have had hearings like this where the defendant moves for summary judgment but doesn't quite negate as a matter of law anything, and I say to the other lawyer, "What about it?"

"Judge, I don't have the burden. I don't have the burden to show evidence at this stage. This is summary judgment."

"Well, are you going to have any evidence at trial?"

"All I can say is I don't have that burden right now."

Now, unless we do something, there is no remedy for the litigant who is faced with that, and it is not unreasonable after there has been a fair amount of time to say if it's going to be an instructed verdict case, you shouldn't have to even go part of the way into the jury trial.

CHAIRMAN SOULES: Buddy Low. I'm sorry, Judge. Were you done?

HONORABLE DAVID PEEPLES: Go ahead.

MR. LOW: I agree with Richard. I mean, I don't see this concept of spending

millions of dollars to defeat a summary judgment motion. I mean, it doesn't take but -- all the evidence. You don't weigh it like you would trial, I might spend that much. So it looks like to me all this stuff you are doing would be something you would want to spend in trial, and I don't think somebody ought to have to pay, you know, for something they really are going to need in trial and say, "Well, I needed it for summary judgment. I needed these 10,000 things," when all you need is one witness to say, "Yeah, that was the cause." I mean, I just don't see that.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: But I think the passionate argument that Judge Peeples made is a passionate argument for having a no evidence summary judgment motion, and I have already said I agree that we ought to have some remedy for the defendant faced with a case that can't be proved but can't be negated.

The problem is when we -- if this rule is passed, this rule is not just going to apply

only in the cases that it should be applied in. It's going to be potentially applicable in every single case on file, and if there is not some disincentive built into the rule to file no evidence summary judgment motions, they are going to get filed, just like continuances get filed because everybody knows this plaintiff is running out of money.

HONORABLE DAVID PEEPLES: I guess my point is it doesn't cost much to dig out one scrap of evidence viewed favorably to the proponent, disregarding everything else, to raise a fact issue.

MR. GALLAGHER: Question.

HONORABLE DAVID PEEPLES: If you have got it.

CHAIRMAN SOULES: Mike Gallagher.

MR. GALLAGHER: Yeah. Our real concern, this is a defendant/plaintiff issue, and our real concern has been that the motion gets filed immediately, there is no time to -- you haven't had time to properly discover the case, but in a circumstance I agree with you.

In the circumstance where at the conclusion of discovery everybody has had ample time to discover the case and you can't find one damn fact anywhere to warrant not granting that motion for summary judgment, then you are in a heap of trouble; and if that's all we are trying to fix, which is what I got from the two of you awhile ago, then that can be fixed without messing with the entire summary judgment practice.

MR. LOW: Right.

MR. GALLAGHER: And that's where I think we ought to be, and that's what I was saying awhile ago when I wanted to hear from them. I didn't think anybody had a real clear understanding as to what it was that we were trying to fix.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Well, the only problem, I don't necessarily disagree that there might should be some remedy, but I share serious concerns that they are going to be abused. We argued for months, the courts argued for years about whether or not people have to marshal evidence in relation to

discovery, that they are asked to do; and yet, that is exactly what a no evidence summary judgment will be used for if you have got any kind of general language at all that says you can file it.

That's what they will be used for by sophisticated defense lawyers, at a regular batter, to force people to marshal evidence at every stage on particular elements. They will focus on one of them at one time, and they will focus on another element another time, and basically that means that one side gets a tactical and strategic advantage the other side doesn't have any other resort to in the rule, and I just think that that is a pure plaintiff's/defendant's marshal evidence issue.

If they want to marshal evidence, that's fine, but let's both of us be able to do it and not just one side, and that in my judgment is what the product of having a simple no evidence painless and focused attack. "Where is your evidence of this," and if you are not one who is confident that the judge is going to rule in your favor, you are going to put

all of the evidence that you can think of in there, and basically that's, you know, another vehicle for discovery that we already rejected.

CHAIRMAN SOULES: Tommy Jacks.

MR. JACKS: Again, I have learned a lot by listening to people talk about this, and I'd like to try to amend these two elements that we have got alive at this point, and see if it's something we can now vote on.

The rule should include a feature in which the lawyer who is filing this no evidence motion for summary judgment certifies that the lawyer has, A, reviewed the discovery; B, having done so has found no evidence to support this element. Bear in mind we have incorporated the first two sentences of Judge Peeples' paragraph (i) which says they have to list which elements it is they are attacking; and, three, that after reasonable inquiry the lawyer is aware of no evidence responsive to any outstanding discovery request that would support it.

This is to get to two things: One,

Richard Orsinger's concern, "Well, does that mean if I have a consulting expert that they can't discover it, and I know he might say something that would help them out on their causation issue?" The answer to that is "no."

But if, as is usually the case, you've gotten a bunch of obfuscated discovery responses where they don't really button down saying, "We have given you everything there is in response to this that you are entitled to," the certificate would cover that.

The other feature that I would incorporate, and I think I would simplify it just by leaving discretion with the trial judge that if the trial judge denies a no evidence motion, the trial judge may award costs including the attorneys' fees associated with the defense. The attorneys' fees may not be great. In some cases they will be considerable, depending upon the number of issues involved in the case and the number of elements in those issues, respecting which the defendant has filed their motion.

If it's not a big deal, the parties aren't going to fight about it. If it is a

big deal, the court ought to be able to have discretion to do that, and I think it ought to be in the rule because I think there ought to be some onus on -- you know, I am not offended by this motion; and I don't have any quarrel with the idea that as you get up, you take your discovery, the plaintiff can't put on any particle of evidence about an element, that's no problem; but we need to do something to see that this is not abused because otherwise it's going to be.

CHAIRMAN SOULES: Let me try to focus once again. We are talking about a case where the discovery is mature.

MR. JACKS: Yes.

CHAIRMAN SOULES: Where in the mature discovery there is no evidence to support the plaintiff's case.

MR. JACKS: That assertion is made in the motion.

CHAIRMAN SOULES: Okay. It's made in a motion. The consequence of that is that the -- and we don't know how often it's going to be used, but it could be used pervasively in all cases, but where it's

really supposed to be used is in a case where there really isn't any evidence --

MR. JACKS: Yes.

CHAIRMAN SOULES: -- in the mature discovery. So we have now invited this process to be in all cases, although it's directed -- really supposed to be used only where the mature discovery shows no evidence.

MR. JACKS: Yes.

CHAIRMAN SOULES: Now, in most of those cases where it's supposed to be used, don't those cases settle or go away?

MR. YELENOSKY: Yeah. Exactly.

CHAIRMAN SOULES: I mean, they are not pushed. Who is going to push that case? Now, there is abhorrent behavior, we know that, out there in our profession where for the purposes of harassment the things that are condemned by Chapters 9 and 10 and Rule 13, that there are abuses that occur; but are we passing some kind of summary judgment practice to get at the abhorrent behavior where somebody who is not going to settle a worthless case or abandon a worthless case just keeps on pushing? Isn't that really the

universe of cases that we are really trying to deal with here?

MR. GALLAGHER: Yes.

MS. SWEENEY: Yes.

MS. McNAMARA: No, it's not.

CHAIRMAN SOULES: And is that universe of cases, fixing -- trying to find some way to fix what I think is a small universe of cases and in the big picture of all the money spent in Texas on legal fees, probably not much, although it's burdensome on the parties to that particular case. Are we overlaying a practice that's going to cost multiple of that to fix abhorrent behavior in a few cases that shouldn't be pursued but are being pursued?

MR. ORSINGER: Yes.

MS. SWEENEY: Yes.

MR. ORSINGER: We ought to do it, though.

CHAIRMAN SOULES: Why are we doing it?

MR. ORSINGER: Because 11 people voted for it and 10 voted against it.

CHAIRMAN SOULES: Well, we

didn't exactly vote for --

MR. GALLAGHER: Well, that was nine and a half.

MS. McNAMARA: Can I respond to your --

CHAIRMAN SOULES: Anne McNamara.

MS. McNAMARA: And I think in terms of absolute numbers of cases, you're right. It's a very small minority of cases we are talking about. The problem is there are some very high profile cases and ones that involve great sums of money, and it's not that it's a case that is, quote-unquote, worthless, and therefore, the lawyer who is espousing it is really wasting everyone's time.

It is often a case that is very, very complicated where the person who was advocating that position is confident or at least believes in their ability to persuade a jury that sums of money should be paid to their client, and it's not that the thing has no monetary value.

It may be actually a very high value case, given the provable damages if you follow

the theory that's being espoused, so that while it may be in terms of the vast number of cases filed in Texas a very small percentage, they really are the cases that I think get the media attention. They are the cases that get people to say they don't want Texas law to comply in contracts, and so if we want to address the problem, we probably need to keep marching along and not just say, "This ain't broke."

CHAIRMAN SOULES: The problem with the Lone Star case, I mean, how can we fix the fact that a judge who's sitting on the bench does what the judge does because of whatever influences are influencing the judge at the moment? And there are some cases where they just get into one devil of a shape for those kind of reasons, but I don't know how we can fix that either. It shouldn't happen, but it does.

Justice Duncan.

HONORABLE SARAH DUNCAN: Well, we can't fix that, obviously, but we have got a trial judge here who is saying, "I have got a problem, and I need help from the rules to

deal with this problem," and that we can respond to, and I think we should respond to.

CHAIRMAN SOULES: My question is --

HONORABLE SARAH DUNCAN: I agree with Anne that a lot of these are complicated cases, and they are some very novel theories out there, and I think part of the problem is the contraction of the good cases out there that people can make some money on and the numbers of lawyers there are to have those cases. I mean, that's just an inevitable -- it's not inevitable, but it's a very real part of our system right now.

I think we are seeing cases that are being pushed that would not have been pushed ten years ago because they would have known they couldn't have got any money off those cases, and we have got to consider that. We can't just thumb our nose at it and say...

CHAIRMAN SOULES: Buddy Low.

I guess we get back to the point then of -- or whatever. Tell me what you are thinking.

MR. LOW: Right. No. The

confusion is it looks like we divided summary judgment into two phases, and they talk about a no evidence summary judgment. Well, I get to the fact and say I get sued. I settle a case for a hundred million dollars, and they say, "Well, that's not enough now." Well, I want to file a summary judgment, get me a Law Review saying, "My God, there is no way" and see if there is some fool that's going to say, "Yeah, it's worth more than that."

I mean, well, they are not going to find one. So that's a no evidence. Why do I have to wait through a discovery when they say, "Well, let's take this, let's take that"? I mean, why divide it?

That's the problem in messing with what we have got now, but so I'm just confused, and I sat hear and heard some learned speeches, and these people who are going to read whatever we come out with are not going to have the benefit of that, and I can guarantee you some of them will be dumb as I am and are going to be terribly confused when we change this rule.

CHAIRMAN SOULES: I am just

going to the point of cost, Buddy. Is cost worth the cure? I don't know.

MR. LOW: I understand. I just had to say it.

CHAIRMAN SOULES: Richard.

MR. ORSINGER: I would like to get a better grip on what costs are recoverable. Is it just the attorneys' fees in responding, or does that also include the attorneys' fees in taking depositions or hiring private investigators to get sworn statements or what? Because that makes a big difference to me.

MR. JACKS: Richard, I think if you -- I don't know exactly how you word it because I'm not a gifted enough draftsman to do that on the spot here. Essentially it's the attorneys' fees associated with having to defend against the motion.

MR. ORSINGER: So that could be five depositions and 15 affidavits.

MR. JACKS: I think any member of the trial judges union has enough judgment to know what's fair and what's not, or should, and can exercise discretion given in that

regard, but I cannot tell you in your case whether it's going to include taking that deposition or not.

CHAIRMAN SOULES: How about "the reasonable expenses incurred by the other party because of the filing of the motion, including reasonable attorneys' fees"?

MR. ORSINGER: But who here has the guts to file a motion with that sanction rule?

CHAIRMAN SOULES: Well, it's here, in Rule 10, already.

MR. ORSINGER: I don't think it's here. Because we are talking about a no evidence motion for summary judgment, and this is talking about some kind of pleading that you file based on an assertion fact. We are asserting a nonexistence of a fact. I'm troubled by whether 10 even would apply, and maybe somebody that's smarter than I am can read me this and explain it to me, but it looks to me like 10 is supposed to be where I'm asserting something and it turns out to be groundless, whereas on a no evidence motion for summary judgment I'm saying there is an

absence of something.

MR. JACKS: Well, if it's a case that 10 doesn't apply then it's all the more important, in my opinion, that we have it in this rule.

MR. ORSINGER: I agree, and I think that if you don't have any some kind of governing mechanism, some kind of punishment mechanism, this will be abused. That's why I voted against the whole concept.

MR. JACKS: Yeah. Me, too.

MR. ORSINGER: But on the other hand, it bothers me because I think an artful respondent, which would typically be a plaintiff, could shift the cost of developing the whole case to the defendant.

You know, "Hey, I didn't get my expert until after they filed their motion for summary judgment so now I had to hire a guy in New York City that cost me $15,000. I beat their summary judgment, and I had to do all of that because they filed their motion."

MR. JACKS: I think all you can do is leave it up to the trial courts to exercise good judgment based on the facts of a

particular case. I just think there needs to be something in the rules that makes the filing party seriously regard the consequences of their filing what is otherwise an unsupported motion.

MR. YELENOSKY: May I ask a question about your motion?

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Tommy, I think you amended it to say that "I don't know if" -- "I have reviewed the discovery, and there is no evidence that I can find, and I am not aware of any evidence that's responsive to any outstanding discovery request."

MR. JACKS: Yeah.

MR. YELENOSKY: Okay. Would that include discovery requests to which you have objected?

MR. JACKS: Well, it could if you filed --

MR. YELENOSKY: I mean, you haven't had a hearing.

MR. JACKS: I mean, Steve, the practice I'm trying to get at here is the all

too common practice of getting discovery responses from which you cannot tell if the other party is hiding something that is not subject to a privilege or an exemption --

MR. YELENOSKY: Privilege logs.

MR. JACKS: -- and they have given you a vague answer. They have said, you know -- they have pled five privileges, and they say, "Subject to privileges, see Attachment A," and Attachment A has one document.

So you cannot tell from that response whether there is also a dozen other documents which aren't subject to any claim of privilege but which they didn't attach, and the only way you can do that is to go back and forth, which we have all had to do, to nail them down and make them button up their responses saying, "Okay. In addition to Attachment A there is also these other five documents, and here is our privilege log, and we are claiming they are privileged, and there isn't anything else but those six things"; and, again, it's just that game playing that goes on.

But if you have got a lawyer who's

saying, "I'm entitled to a judgment in this trial because I say there is no evidence to support this" and that lawyer at the same time is hiding discoverable evidence responsive to the other side's request, that's wrong, and that's what I'm trying to get at here.

MR. YELENOSKY: Oh, I'm jsut saying -- I'm just saying in terms of if we are going to shift the burden in that kind of position, there may be litigation about it; but if you have objected to -- if you say that they have to say, "I'm aware of no evidence that's responsive to any discovery request," whether or not they have objected to it, I don't know that you want to go that far, you know.

MR. JACKS: Well, I mean, again, you are getting down to the drafting process. Maybe you have to say it's not responsive to their discovery request, and I haven't claimed it to be privileged, either.

MR. YELENOSKY: Yeah.

MR. JACKS: I don't know, but this is the practice I'm trying to get at.

CHAIRMAN SOULES: Okay. Maybe

we can get at least some show of inclination here. Those who believe that the attorney or -- you say the lawyer, Tommy, would file a certificate?

MR. JACKS: It's the lawyer's certificate.

CHAIRMAN SOULES: Lawyer's certificate, that a no evidence motion for summary judgment based on legally insufficient evidence should be accompanied by an attorney's certificate to the general effect, without trying to be comprehensive, that the lawyer has reviewed the discovery, there is no evidence in the discovery of particular elements which are identified, and that there is no other evidence outside the discovery.

MR. ORSINGER: Better say "unprivileged" or something.

MR. JACKS: I mean, basically that's right.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: Unprivileged evidence.

MR. JACKS: Basically he's not sitting on the evidence that is discoverable.

CHAIRMAN SOULES: Okay. Those in favor show by hands. Seven.

Those opposed? Okay. Ten to seven that fails.

HONORABLE DAVID PEEPLES: Okay. Now, Luke, I voted against that because of a couple of details that I wanted to come around and go over with you.

CHAIRMAN SOULES: Okay. What are those?

HONORABLE DAVID PEEPLES: No. 1, the way you have rephrased it it didn't say the third thing the lawyer has to swear to is, "After reasonable inquiry I'm not aware of any evidence." I think you didn't have the reasonable inquiry in there.

CHAIRMAN SOULES: Okay. Put that in.

HONORABLE DAVID PEEPLES: And that's important to me. And the second, I don't think we ever nailed it down on costs and so forth. You know, we assess attorneys' fees all the time.

CHAIRMAN SOULES: We haven't gotten there yet.

HONORABLE DAVID PEEPLES: That's not part of this?

MR. JACKS: Well, it's supposed to be, but the Chair apparently segregated it.

CHAIRMAN SOULES: I'm just now talking about the certificate piece of it.

HONORABLE DAVID PEEPLES: Okay.

CHAIRMAN SOULES: Okay. Add "after reasonable inquiry" and see if that changes the vote.

Those in favor of the certificate show by hands. Eight in favor.

And those opposed? Ten. Ten to eight it fails. No certificate.

Next, cost shifting, assuming we can come to some definition of what those costs will be --

MR. JACKS: Essentially the language you read out of Rule 10, which I gather is debatable whether it applies here.

CHAIRMAN SOULES: Well, it says "to any motion" so I don't know how it can be debatable, but maybe.

MR. JACKS: Well, Richard debated it.

HONORABLE SARAH DUNCAN: He'd debate anything.

MR. JACKS: So I guess it must be debatable.

MR. ORSINGER: It's not the clearest statute that's ever been written.

CHAIRMAN SOULES: Now, we are talking about a specific cost shifting statute or rule in addition to this.

MR. ORSINGER: Sure.

CHAIRMAN SOULES: Those in favor show by hands.

HONORABLE DAVID PEEPLES: Okay. Exactly the --

MR. BABCOCK: Yeah. Could you restate the --

MS. SWEENEY: What are we in favor of?

CHAIRMAN SOULES: All right. It's a cost shifting to a losing movant, always at the discretion of the court, a cost shifting to the losing movant that would be mandated essentially if we --

MR. JACKS: No. I didn't put that in.

CHAIRMAN SOULES: Oh, you didn't?

MR. JACKS: No, sir.

CHAIRMAN SOULES: Okay. Always discretionary with the court.

MR. JACKS: "The court may" and then the language you read out of 10.

CHAIRMAN SOULES: "Award these" -- you want me to re-read that?

MR. ORSINGER: Yes.

MR. JACKS: Yeah.

CHAIRMAN SOULES: "Pay the other party the amount of the reasonable expenses incurred by the other party because of the filing of the motion, including reasonable attorneys' fees."

MR. JACKS: Right.

MR. BABCOCK: When you say "the other party," Luke, is this going both ways, so if the movant wins, then the nonmovant pays?

CHAIRMAN SOULES: At this time it's only the movant that's subject to having the fees shifted to the respondent.

MR. BABCOCK: All right.

CHAIRMAN SOULES: Those in favor show by hands. Ten.

Those opposed? 12 to 10 it fails. No cost shifting, no certificate --

MR. BECK: Luke, can I just say something? I know these are difficult issues we are dealing with, but frankly the way the issue is framed in large measure determines how the hands go up and down. I mean, there is a lot of this thing that I am in favor of --

HONORABLE DAVID PEEPLES: Me, too.

MR. BECK: -- but because of the way the motion was framed I voted against it. I mean, there is some parts of the certificate I am in favor of.

CHAIRMAN SOULES: Make a new motion.

MR. BECK: I mean, so I guess what I'm saying is I don't think we should simply take these votes as a mandate that this committee is against, you know, cost shifting, against certificate, and against these other elements.

CHAIRMAN SOULES: Well, we have the Chapter 10 cost shifting in place.

MR. BECK: I agree.

CHAIRMAN SOULES: Okay. If anybody wants to make another motion, that takes care of that, of Tommy's pieces of that, because I think we articulated it in a way that was acceptable to you before the vote.

MR. JACKS: No. There is one other element that you haven't gotten to yet.

CHAIRMAN SOULES: All right. What is that?

MR. JACKS: Well, and that is, you know, we were working off of Draft 1, and there is the language that I pointed out in Draft 1 that I think doesn't belong in there about "evidence admissible at trial."

CHAIRMAN SOULES: I haven't gotten there yet. That's next. That's coming up.

MR. JACKS: Okay. Well, I think it's directly related to the burden is why I bring it up.

CHAIRMAN SOULES: Okay. Now we will go to that part of this, and that is, I

think, the last part of Tommy's motion that has to do with the phrase, "facts as would be admissible in the evidence."

HONORABLE DAVID PEEPLES: Could I ask a question? Is there some reason that we slipped right past David Beck's plea that we maybe talk about this a little more and --

CHAIRMAN SOULES: No. I said make a motion.

HONORABLE DAVID PEEPLES: Well, I had my hand up and --

CHAIRMAN SOULES: Okay. Make a motion.

HONORABLE DAVID PEEPLES: Okay. I will move -- this is a modified Tommy Jacks motion -- that the attorney making the motion, a certificate, affidavit, whatever it is, that says, "I've reviewed the discovery in this case, and there is no evidence to support Element A" of whatever it is that he's attacking; and that leaves out the "after reasonable inquiry" part.

CHAIRMAN SOULES: Okay. Motion is made. Is there a second?

MR. JACKS: Second.

MR. BABCOCK: Can I make a friendly amendment to it, which is picking up on Justice Guittard's language that "in the professional opinion of the lawyer..."

HONORABLE DAVID PEEPLES: That's fine. Yeah.

MR. BABCOCK: Okay.

CHAIRMAN SOULES: Is there a second?

MR. JACKS: Second.

MR. BABCOCK: Second.

CHAIRMAN SOULES: In favor, show by hands. 17.

Those opposed? None opposed. Oh, one. One. 17 to 1.

MR. ORSINGER: So what did we just vote? This is very important.

CHAIRMAN SOULES: Whatever is on the record.

MR. ORSINGER: Okay. Let's go on.

CHAIRMAN SOULES: Well, we are at 3:30 and have got to make some progress somehow. We have got other business to do, and I know this is important --

HONORABLE DAVID PEEPLES: I'd like to make another motion.

CHAIRMAN SOULES: -- but we just can't keep jousting back and forth.

Go ahead, Judge.

HONORABLE DAVID PEEPLES: Okay. We just voted down the attorneys' fees and costs provision. I will move that the court be given the discretion to assess reasonable attorneys' fees against the movant, the unsuccessful movant, reasonable attorneys' fees incurred in defending the motion.

CHAIRMAN SOULES: Second?

MR. GALLAGHER: Second.

HONORABLE DAVID PEEPLES: Nothing else but attorneys' fees.

CHAIRMAN SOULES: Those in favor show by hands. 13.

Those opposed? Three. 13 to 3 it passes. Okay.

JUSTICE HECHT: Committee, recognize Judge Peeples for another motion.

CHAIRMAN SOULES: Any other motion?

MR. ORSINGER: He's on a roll.

CHAIRMAN SOULES: Facts as would be admissible in evidence.

HONORABLE DAVID PEEPLES: While we're talking, Luke --

CHAIRMAN SOULES: Okay, Judge. What have you got? Judge Peeples.

HONORABLE DAVID PEEPLES: Okay. I was just going to say both to sell this once it gets through the Supreme Court presumably to the Bar and for us to agree on it, there is a lot to be said for leaving the rule that we have the way it is and then tacking on something at the end of it, the way I have got it here. I'm not -- you know, no pride of authorship here, but that's not going to scare people with the idea that everything has changed, we are adopting the Federal system, and all of this other scary stuff if they can look at it and see the regular rule with one more paragraph tacked on that deals with Celotex. So...

MR. ORSINGER: Second.

HONORABLE SARAH DUNCAN: Second.

MR. GALLAGHER: I second that.

MR. ORSINGER: Second that.

HONORABLE DAVID PEEPLES: So, I mean, I think we need to at some point to think about that.

MR. BECK: Keep going, David. Keep going.

HONORABLE DAVID PEEPLES: Judge Brister and Alex and all of those committees have done excellent work here, and as I said in my cover memo, there is a lot that needs to be tidied up in this rule; but I don't think we have got time to do it; and, you know, we need to deal with the Celotex issue and tack it on to the rest of the rule so when it goes out in the Bar Journal people aren't going to think the sky is falling, and they can deal with it, like it or not, but they will know what they are dealing with.

MR. JACKS: Not only second, but Amen.

MR. YELENOSKY: We will all leave the room, and if you would just finish this up.

HONORABLE SARAH DUNCAN: Can we take a vote on that?

CHAIRMAN SOULES: Okay. Now --

MR. ORSINGER: He made a motion and there has been five people second it.

HONORABLE SARAH DUNCAN: He made a motion, and I'd like to vote on it.

CHAIRMAN SOULES: Those in favor? Anyone opposed?

No opposition.

HONORABLE DAVID PEEPLES: I've got another one.

CHAIRMAN SOULES: Go ahead. Yes, sir.

HONORABLE DAVID PEEPLES: Okay. Tommy and several others pointed out the problem with admissible evidence which is in the next to the last sentence of my rule. I didn't mean that it had to be something that would, you know, be admissible at trial, but that phrase is used -- the term "admissible" is used a couple of times in the existing rules, and what I had in mind was proper summary judgment proof. I don't think that a mere letter, for example, that's hearsay ought to raise a fact issue. If it's legitimate, you ought to be able to get whoever signed it

to sign an affidavit.

MR. JACKS: Could we use the current language?

HONORABLE DAVID PEEPLES: Yeah. I would be willing to say "summary judgment proof" or something like that that incorporates what presently is okay in a summary judgment hearing.

CHAIRMAN SOULES: Why do we even need to address that in the context of this last paragraph when we are leaving it as is and the description of what constitutes summary judgment proof is not being changed in the other rule?

MR. BABCOCK: Good point.

CHAIRMAN SOULES: It would seem to me that the last point Tommy made is taken care of by the vote we just took if you are going to tag on something about Celotex and --

MR. BABCOCK: Yeah.

CHAIRMAN SOULES: -- the rest of the competency of the evidence and objections and all of that other sort of thing stays the same.

HONORABLE DAVID PEEPLES: But

in Celotex itself there was some letter from some insurance person, you know --

CHAIRMAN SOULES: We are not going to go to Celotex.

HONORABLE DAVID PEEPLES: Well, but I don't want for that kind of evidence to raise a fact issue. It seems to me it ought to be something real that otherwise would be all right in a summary judgment.

CHAIRMAN SOULES: Well, why even address --

HONORABLE DAVID PEEPLES: Okay. If you're satisfied that we have got that --

CHAIRMAN SOULES: -- the type of evidence in this paragraph, this last paragraph that we are going to write? Is there any reason to do that?

MR. BABCOCK: No.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: What comes out? What comes out of his language?

CHAIRMAN SOULES: Well, I don't know whether any of his language is going to be used at all.

MR. BABCOCK: Yeah. This is

just --

MR. ORSINGER: Okay.

CHAIRMAN SOULES: It's going to be -- we are going to have a paragraph that deals with a no -- with a legally insufficient evidence motion for summary judgment that picks up these features that we voted on, and I guess we are going to get that maybe tomorrow to look at.

Bill Dorsaneo.

PROFESSOR DORSANEO: I'm not sure that I'm following how all this works at this point. If I put it into specific context, let's say I have an unsworn statement from a witness, and I guess the defense lawyer has that statement, too.

Now, the defense lawyer does a motion for summary judgment and says there is no evidence that the policeman was in the store. Can he say that if there is a witness statement, unsworn witness statement that he knows about?

CHAIRMAN SOULES: Who wants to answer that? No answer. Next.

PROFESSOR DORSANEO: Well, if he can't say that then the unsworn witness

statement has to be enough to defeat the summary judgment. When I bring it in and say, "Bullshit, I've got a statement here" and --

CHAIRMAN SOULES: Off the record.

PROFESSOR DORSANEO: -- you can't win on a technicality.

Pardon my expression.

MR. JACKS: It seems to me that's covered under the current rule, (g), which Dave Beck referred to previously which says if you can show the court that there is evidence that's not admissible form and you need to go take the deposition and put it into admissible form, that's something the court is supposed to let you do. I don't see that as anything that the current rule doesn't accommodate.

CHAIRMAN SOULES: Okay. Now, what is the respondent's burden on this?

PROFESSOR DORSANEO: More Celotex than Celotex.

CHAIRMAN SOULES: Well, now we are getting down to where the rubber meets the road I think. We know that just saying there

is no evidence over a certificate that we have described is the trigger that puts the burden on the respondent, and if the trigger is pulled wrongfully, there is going to be cost shifting of legal fees. Okay. So now the trigger has been pulled. What does a respondent have to do?

Justice Duncan.

HONORABLE SARAH DUNCAN: I think the respondent has to raise a triable issue of fact, produce evidence that will raise a triable issue of fact as to the element that is being challenged. It's not a burden of proof. It is a burden of production.

CHAIRMAN SOULES: Tommy Jacks.

MR. JACKS: I propose the language that is in Draft 1, which is, "The respondent shall have the burden to produce evidence showing that there is a genuine issue of material facts to avoid summary judgment."

CHAIRMAN SOULES: All right. So moved?

MR. JACKS: So moved.

MR. GALLAGHER: Second.

PROFESSOR DORSANEO: Why not make it clear and say, "evidence that's admissible at trial in an admissible form"?

MR. JACKS: No. We have already subscribed, I believe, to the idea that it's -- whatever summary judgment evidence now is summary judgment evidence under this tacked on new paragraph.

HONORABLE SCOTT BRISTER: And the way it works under the existing rule is you file, you attach your unsworn statement. If the other side wants to make an issue of it, they have to object that it's hearsay, and then I at the hearing decide whether to rule on that; and if I look at it and go, "Come on, he can go get an affidavit form. We are wasting our time," or if this person doesn't exist anymore then I may sustain the objection and make you do it, come back.

You know, I mean, that will depend. That's something we do all the time right now, and it's basically on the -- it's on the other party's duty to object if they think you can't do it, but basically they waive it if they don't. No basically about it. They do waive

it if they don't make that objection.

PROFESSOR DORSANEO: Well, there are at least a number of cases that say that unsworn statement is not just formally defective. It's just not --

HONORABLE SCOTT BRISTER: Well, you know, I can see that but, you know --

PROFESSOR DORSANEO: -- evidence.

HONORABLE SCOTT BRISTER: How about if the plaintiff comes in on a medical malpractice case and says, "I heard a doctor say that they committed negligence." Well, unadmissible but it is some -- you know, I mean, you know, what are we just going to let, you know, everything in the world in on this, or a good thing with sticking with the current rule is if it's something that you think they can't -- that they are just making up then you want to object to it, and you go through the step of proving it; but that's just jumping through an unnecessary hoop. Then I'm just going to deny the motion. That's it.

CHAIRMAN SOULES: Okay. The trigger is pulled and then the respondent

shall have the burden to produce evidence showing that there is a genuine issue of material fact to avoid summary judgment. That's moved and seconded. Any further discussion?

Those in favor? 12.

Those opposed? One. Two.

PROFESSOR CARLSON: Two.

CHAIRMAN SOULES: I'm sorry, Elaine. I didn't see you there.

HONORABLE SARAH DUNCAN: Oh, well, make it three because I am opposed, but I won't make a big deal out of it.

HONORABLE DAVID PEEPLES: If there is a good reason for opposing that, I'd like to hear it. I might have voted on it, but I'm willing to be persuaded. I don't see what the reasons are.

PROFESSOR CARLSON: Well, I concur with Bill that what we have just suggested is more onerous than the majority held in Celotex. Celotex recognizing, of course, is taking away someone's right to trial. Specifically, I'm reading Justice Rehnquist, "does not mean the nonmoving party

must produce evidence in a form that would be admissible at trial to avoid summary judgment," and I think it a very harsh thing.

MR. YELENOSKY: Why would that support it?

PROFESSOR CARLSON: Because of the -- as Bill was saying, the unsworn statement, for example. There is case law that it's been said, well, that really is not the type of summary judgment proof that constitutes any proof.

MR. YELENOSKY: Uh-huh.

MR. JACKS: If, I mean --

MS. GARDNER: Couldn't they use it to go get their continuance with and --

PROFESSOR CARLSON: Possibly.

PROFESSOR DORSANEO: You won't get the continuance from the same judge who takes the former attitude, and say, "This case has been pending for a year already. If you were a good lawyer, you would have already gotten this in admissible form. You're through."

HONORABLE DAVID PEEPLES: Is there any excuse for not having deposed a

crucial eyewitness when you don't have any other evidence of it?

PROFESSOR CARLSON: Well, I was listening to Paula's suggestion.

MS. SWEENEY: Yes. Yes. We don't have to take depositions. It is not mandatory. We are trying to eliminate unnecessary depositions.

HONORABLE DAVID PEEPLES: This is somebody that you can't get to vouch for his own statement.

HONORABLE SCOTT BRISTER: Maybe, maybe the --

CHAIRMAN SOULES: Okay. Order. Anything else on summary judgment?

HONORABLE SCOTT BRISTER: Maybe the people in this room make strategic decisions like that, but the folks with the car wrecks and the slip and falls and everything else, they just take depositions of who they need and they --

CHAIRMAN SOULES: We have debated this. This has all been articulated before. It's on the record. Anything new on summary judgment?

Justice Duncan.

HONORABLE SARAH DUNCAN: In my view, the burden of production at summary judgment is not really the problem that I at least have been having with summary judgments, most of the time. Most of the time the problem is one of two things.

Under our current rules the nonmovant is not required to file a response at all to challenge the legal sufficiency of the motion and the supporting proof on appeal. That's the only place that I'm aware of in the rules where we permit lawyers to sandbag the trial judge and opposing counsel, and what happens is the nonmovant knows there is something wrong with the motion or the proof but doesn't say anything, thinking the trial judge is just going to deny it. The trial judge surprises him and doesn't deny it.

It goes back up on appeal. He will point out what's wrong with that motion and that proof, maybe one or two things, enough to get it reversed. Then it gets remanded. The movant fixes whatever that problem is, and you are going to go through the whole process

again. I would like a rule, as the court rules committee's proposal included, requiring a response; and if the motion or the proof is legally insufficient with some respect, I really believe the nonmovant ought to point that out to the trial judge.

That bears directly upon all the discussion and the faxes this week about how understaffed the trial judges and the courts of appeals are. What really is time-consuming and difficult, to me, is measuring the legal sufficiency of the motion in proof, not determining whether the nonmovant has brought forward enough evidence to raise a fact issue. That's pretty simple.

So I think we ought to require a response that points out any deficiencies in the motion or the supporting proof, plus the Clear Creek, what we have got now under Clear Creek.

Second, the other big problem I see, is that if you can come in, as you can now, seven days before the hearing with a whole new pleading without leave of court and without good cause, you can change the entire scope of the lawsuit and make everything that's

happened up to that point in the summary judgment proceeding absolutely worthless, and I think there ought to be a date upon which the pleadings close, as there generally is in Federal court, absent some extraordinary circumstance. Then a motion for summary judgment can be intelligently prepared.

MS. GARDNER: If that's a motion, I will second it.

CHAIRMAN SOULES: You're looking at the Clear Creek holding that even if not contested at the trial court an appellant can attack the legal sufficiency of the grounds expressly raised by the movant, and you want that to be first grounded on a response in the trial court? Any attack on the legal sufficiency of the grounds raised by the movant must be made first at the trial court?

HONORABLE SARAH DUNCAN: Or the movant's proof.

HONORABLE DAVID PEEPLES: Can I ask, are you talking about summary judgments generally or this Celotex --

HONORABLE SARAH DUNCAN: No.

I'm talking about summary judgments generally.

HONORABLE DAVID PEEPLES: Generally, okay.

CHAIRMAN SOULES: Okay. Moved and seconded.

HONORABLE DAVID PEEPLES: Can I just ask a clarifying question?

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: Okay. You have got a motion for summary judgment that, as it turns out when we analyze it, is legally insufficient, but there is no response to it. Under present law if it gets granted, that would be reversed. You want to change it so that the nonmovant is negligent, I guess, and doesn't respond?

HONORABLE SARAH DUNCAN: The nonmovant's not even being negligent under current law.

HONORABLE DAVID PEEPLES: Well, he just doesn't file a response --

HONORABLE SARAH DUNCAN: They are being smart.

HONORABLE DAVID PEEPLES:

-- which your rule would say he has to.

HONORABLE SARAH DUNCAN: Uh-huh.

HONORABLE DAVID PEEPLES: Then that will be affirmed on appeal, if it's granted.

HONORABLE SARAH DUNCAN: Uh-huh.

MS. SWEENEY: So the new burden would be raise a fact issue and critique the motion on points of law?

CHAIRMAN SOULES: If the movant moves on five grounds and the respondent responds on four and the motion is granted, it's an automatic affirmance through the appellate courts because one ground was not contested by the respondent, and you know not which ground it was on, even if that ground is a legally improper, insufficient, flawed ground. That's it.

Judge Peeples.

HONORABLE DAVID PEEPLES: As intriguing as that is, I want to oppose it, and I think, Sarah, for two reasons. No. 1, you sprang it on us right now, and we haven't

had a chance to think about it.

HONORABLE SARAH DUNCAN: It's in the court rules committee draft.

HONORABLE DAVID PEEPLES: But, second, and possibly more important, if we are going to go with the Celotex thing we just did, we shouldn't dismantle the procedure that everybody knows and has been living with in other ways. It seems to me that just gives more targets for people to shoot at. That's a big change.

HONORABLE SARAH DUNCAN: It's really not for good lawyers.

HONORABLE DAVID PEEPLES: We are talking about defeating a cause of action as a matter of law, and if you haven't done it in your motion, why are you entitled to do it just because they don't reply to it?

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: I don't think it is that big a change because I think most good lawyers are doing it now. They don't want a summary judgment granted against them because they don't want to absorb

the cost of getting it reversed. The problem is the lawyers that aren't so hot aren't doing it, and they are just kind of screwing around in the trial court.

When it gets up on appeal, they will hire somebody else or they will get somebody else to start paying attention to the case for the first time, and then they will spring all of these legal insufficiencies in the motion or in the proof, none of which were ever pointed out to the trial judge, and I just -- I don't think that's fair.

I don't think its fair, and I don't think its -- I think it's part of what has caused summary judgments in Texas to not work very well. Either you can get one and it just gets reversed or you can't get it at all, and I would like to see us get to the point that if you get a summary judgment it has meaning, and it will -- you know, has a good chance of getting upheld on appeal, and I don't think with this laying behind the log stuff we are going to get to that point.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: One of the things that troubles me about that proposal is, is that some of these motions for summary judgment may not be all that clearly drafted, and they may roll three or four or five legal theories into one paragraph, and you may think you are responding to what their legal argument is, and you may realize on appeal that there was a concept in that sentence, there were three concepts in that sentence, and you only responded to two and then you just got killed dead.

I think that we can't assume that everything is going to be crystal clear at the trial court level, and if you say that if you can find somewhere in that motion a legal concept that wasn't specifically controverted in the reply, this reminds me of the field code in 1860 where you had to traverse the allegation, trespass on the case, and all that. A slight drafting error pours you out of court.

PROFESSOR DORSANEO: It was before the field code.

MR. ORSINGER: It was before

the field code. I'm sorry. I shouldn't have tried that with all these procedures professors here.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: Well, it may be edicted, but that's already the law under the Supreme Court's opinion in McConnell, that if it's unclear you need to specially except to that motion for summary judgment and get it made clear, and all I'm saying is that where it is clear what the grounds are and it is clear what the proof is, I think you have a -- we should have a responsibility to point out to the trial judge, "Here is why you shouldn't grant that motion, whether I bring forward any evidence at all because it is deficient in this respect."

CHAIRMAN SOULES: Tommy Jacks.

MR. JACKS: I simply want to underscore what Richard Orsinger said. I recently received a motion for summary judgment that with the briefing and attachments, which were incorporated by

reference, although they all were a part of the motion, was maybe twice the size of this folder I'm sitting here with on my desk.

The respondent would essentially as a matter of avoiding the malpractice trap that this creates have to go through and set out virtually every sentence and respond to it bit by bit, even if 80 percent of it is, off the record, bullshit.

We don't want to do this. Again, you are creating expense for litigants. You are wasting time. The idea that a party should be able to get an affirmance on a legally insufficient ground because one "i" wasn't dotted or "t" crossed in response is ludicrous. We shouldn't do that.

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: You know, the other part of that is you get a motion and it's the opposite. It's three little skinny sheets of paper with the little affidavit that you hadn't raised an issue, and when you read the paragraphs it's really hard to tell what the complaint is. It looks like negligence or

it looks like, you know, standard of care or it looks like duty.

You get to the hearing and they plunk down their brief and a whole bunch of other stuff, which in a lot of places is exactly how it gets done; and when you read it sitting there at the table waiting for the judge to come in, you realize, well, I'll be danged, that's not what that motion was about after all; and you don't have a chance to respond to it, you know; and we are going to -- that already exists. We are going to make it infinitely worse under the scenario that we are talking about.

CHAIRMAN SOULES: Okay. Well, there were two parts to your motion, Justice Duncan. We have talked about the if you don't specifically contest, you waive. Let me take that up first. Those in favor of that part of it show by hands.

MR. JACKS: I couldn't hear you, Luke.

CHAIRMAN SOULES: It's either -- the part we have just been talking about, that if you don't specifically --

HONORABLE SARAH DUNCAN: Well, I think it would fail for a second, Luke.

CHAIRMAN SOULES: Was there no second to that?

HONORABLE SARAH DUNCAN: I think Paula seconded it, and she would withdraw it.

CHAIRMAN SOULES: I'm sorry?

HONORABLE SARAH DUNCAN: I don't think there is a second.

CHAIRMAN SOULES: Okay. Fails for lack of a second. Now, do you want to state the second part of it again? Because we really haven't talked about that, and I have lost it in my mind.

HONORABLE SARAH DUNCAN: No. It's just having a pleading, a definite pleading dead -- I mean, it's really not even part of the summary judgment rule except that they are so intimately related.

Under our rules right now we are changing pleadings until seven days before a hearing on a summary judgment or seven days before trial, and that causes a lot of problems with summary judgments because it completely renders

worthless everything that's been done up to that point.

CHAIRMAN SOULES: If seven days ahead they amend their pleadings.

MR. ORSINGER: Add a cause of action that's not in your motion.

CHAIRMAN SOULES: Yes.

MR. ORSINGER: That's an old trick. I use it myself.

CHAIRMAN SOULES: All right. It does bring sometimes respondents face to face with their pleadings in the course of their 14 days of their remaining life, and I guess that's the issue. Anne Gardner.

MS. GARDNER: That was the portion of her two suggestions that I seconded or that I intended to second awhile ago. The court rules committee had a sentence that they added to their proposed amendment to Rule 166a in section (c) that would say, "Amendment to pleadings within seven days of the date of the hearing or thereafter may be made only with leave of court and for good cause shown."

And the purpose of that was to try to freeze the pleadings and keep people from

adding the claims and counterclaims within seven days or even after the hearing sometimes and either causing summary judgments to be rendered where a claim is not addressed by the motion that's been added or where the claims don't dispose all.

In the first case it's reversible, and in the second case it's not a timely judgment, and it seems to be creating a lot of problems on appeal, a lot of unnecessary reversals; and our effort was to try to freeze the pleadings at the seven-day point and also to take care of the second problem that there is a presumption that the trial court has considered the pleading unless there is an order striking it on the record, which is the reverse of the presumption from response; and that's very, very confusing; and so we wanted to have an order from the court granting leave to file if it was to be allowed in seven days to be filed and also that good cause be shown.

CHAIRMAN SOULES: What rule has the seven-day pleading rule in it?

PROFESSOR DORSANEO: 63.

MS. GARDNER: 63.

CHAIRMAN SOULES: 63.

HONORABLE SCOTT BRISTER: And the problem is not that you need to have leave within the seven days before summary judgment. That's the law right now. The problem is the presumption the courts have thrown on top of it that if they filed it downstairs in the clerk's office I must have, No. 1, known about it; No. 2, seen it within the two days it was filed, both of which are impossible; and No. 3, if they presumed that I granted leave on it. Another time I was reversed was --

MR. BABCOCK: Not that you remember it.

HONORABLE SCOTT BRISTER: Someone comes in on the workers -- the workers file a lawsuit. The defendant comes in, workers' comp Bar, we win, and I grant it, and sure enough, three days before the summary judgment hearing the plaintiff's attorney who didn't even show up at the motion for summary judgment hearing filed a new pleading and added a phrase that they negligently hurt the worker or intentionally, and that is reversed and sent back to me on whether they

intentionally caused -- the employer poured the water in front of the time clock at the Red Lobster so their waitress would slip on it and hurt her back.

Now, I never would have granted leave to add that. They didn't mean for me to grant leave because when it came back they filed the motion again, and he still didn't show up, and I granted it again; but meanwhile two and a half years went by having to do with a pleading filed two days before that nobody saw and it was presumed that I granted leave to file it, which is totally ridiculous.

CHAIRMAN SOULES: The Supreme Court has applied, in 1995, applied the seven-day rule to summary judgments.

HONORABLE SARAH DUNCAN: It's in those summary judgment rules.

HONORABLE SCOTT BRISTER: The summary judgment, anything filed with less than seven days if it's a response to the summary judgment, they presume I did not grant leave to file, unless I say so. If it's a pleading, they presume I did grant leave to file it, unless I specifically say so; and of

course, the answer is frequently we don't even know these things are filed.

MS. GARDNER: It's the presumption that's the problem.

HONORABLE SCOTT BRISTER: The law is clear I have to give them leave to file that pleading within seven days. It just presumes I did.

CHAIRMAN SOULES: Okay. So is that in a Supreme Court case?

PROFESSOR DORSANEO: Uh-huh.

MS. GARDNER: Chesser case.

HONORABLE SARAH DUNCAN: Geswomi vs. Metropolitan Life.

PROFESSOR DORSANEO: Geswomi.

MS. GARDNER: Geswomi.

PROFESSOR DORSANEO: Boy, I know my trivia, don't I?

MR. LOW: You taught that trivia.

MR. McMAINS: It's not in the rule. It's in the case.

HONORABLE SARAH DUNCAN: I don't want to detract from that being a problem. That actually wasn't the problem I

was talking about.

CHAIRMAN SOULES: What problem are we --

HONORABLE SARAH DUNCAN: Well, if that's the problem people want to talk about, I'm happy to talk at that level.

CHAIRMAN SOULES: Well, if there is another reason for doing the same thing, maybe we ought to hear it.

HONORABLE SARAH DUNCAN: Well, the problem that I am talking about is actually the seven-day rule itself, because if I have to give 21 days notice of the hearing on my motion for summary judgment then I must have prepared my motion for summary judgment more than 21 days before the date set for the hearing, so I do that.

You come in on the seventh day -- eighth day before the hearing. You can amend your pleadings without leave of court, without a showing of good cause, and completely change the scope of the summary judgment proceeding. That's what happened in Kiefer and add five causes of action.

Now, the presumption is another problem.

We are going to presume that that amended pleading was considered by the trial court, but the real problem, to me, it seems, is that we shouldn't be preparing motions for summary judgment unless we know what the case is about; and if you can change the pleadings after the motion for summary judgment is filed, we don't have any business filing motions for summary judgment to begin with.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: Well, I'm greatly troubled by that proposal. That means that I don't know when my pleading deadline is until after it's already gone.

HONORABLE SARAH DUNCAN: No. I am not suggesting that the motion for summary judgment freezes the pleadings. I'm saying what I have been saying all along about our pleading system. There ought to be a date that is not keyed to a summary judgment hearing or a trial that closes the pleadings, absent extraordinary circumstances.

MR. ORSINGER: Then that's getting altogether to, like, moving the

pleading deadline back to like three months before trial or six months before trial.

CHAIRMAN SOULES: Well --

HONORABLE SARAH DUNCAN: But we can talk about the problem they have raised.

CHAIRMAN SOULES: You are talking about putting something into the 166a or the summary judgment rule on this or it needs to be fixed in the pleadings rule or what?

MR. ORSINGER: Sarah is not saying that it should be relative to the date that motion for summary judgment is filed. True?

HONORABLE SARAH DUNCAN: True.

MR. ORSINGER: So it really has nothing to do with summary judgments. It has to do with how long after the discovery window or how long before the trial, or when is the pleadings deadline? When is the cutoff for amending pleadings? That's what Sarah is raising.

CHAIRMAN SOULES: We are going to get to that on your watch; isn't that right?

MR. ORSINGER: Yes. And all of our recommendations are relative to the close of the discovery window. The proposals have all been --

CHAIRMAN SOULES: Okay. So can we pass that at this juncture?

HONORABLE SARAH DUNCAN: Well, no. Then let's talk about the problem that Anne has raised and Scott, and that is the presumption that the amended pleading was considered when, in fact, the trial judge has never seen it.

CHAIRMAN SOULES: "When the record is silent of any basis to conclude that an amended petition was not considered, and the nonamending party does not show surprise or prejudice, leave was presumed, inside of seven days." That's Geswomi. What do we need to do with that?

HONORABLE SCOTT BRISTER: David has got language in his -- since David is on a roll I will put his proposal forward. It's on his paragraph (c) underlined. I would maybe suggest, David, that we need to say it's on -- with written leave of court or leave of

court signed.

CHAIRMAN SOULES: Where is it in Judge Peeples' proposal?

HONORABLE DAVID PEEPLES: Right in the middle of paragraph (c), page two.

CHAIRMAN SOULES: Oh, yeah. Okay.

HONORABLE SCOTT BRISTER: I'm just concerned, you know, this accurately states current law, but it needs to say something that the leave was granted, or we are not going to presume the leave, or leave was granted in writing.

HONORABLE DAVID PEEPLES: "Written leave of court" is fine with me. "Written leave of court"?

HONORABLE C. A. GUITTARD: "Express leave of court."

PROFESSOR CARLSON: How about "express"?

HONORABLE DAVID PEEPLES: "Express."

CHAIRMAN SOULES: Well, this has got two things in it. It's also got "upon a showing of good cause," which is a big

change in the burden to amend pleadings.

HONORABLE SCOTT BRISTER: Not within seven days.

CHAIRMAN SOULES: Oh, yes, of course.

MR. ORSINGER: Surprise. The standard is surprise.

PROFESSOR DORSANEO: Surprise.

CHAIRMAN SOULES: Surprise or prejudice.

HONORABLE SCOTT BRISTER: Leave the standard the same.

MR. JACKS: Yeah.

CHAIRMAN SOULES: Okay. Any objection to that?

HONORABLE DAVID PEEPLES: Take out "good cause" you mean?

CHAIRMAN SOULES: Yes.

HONORABLE SCOTT BRISTER: Whatever the current standard is for within seven days. Don't you think?

MR. ORSINGER: You don't need to repeat it, do you?

CHAIRMAN SOULES: We wouldn't put any standard in here, is what the motion

is.

MR. JACKS: So we are saying "with leave of court expressly granted" or words to that effect?

HONORABLE SCOTT BRISTER: In writing.

HONORABLE DAVID PEEPLES: Doesn't that mean you can just file your amended pleading a day or two before?

MR. ORSINGER: The ninth day before?

HONORABLE DAVID PEEPLES: A day or two before the hearing, if all you have got to show is no surprise. I mean, there is no good cause requirement.

MR. ORSINGER: You know, if you can amend your pleading after the jury verdict comes back, how come you can't amend your pleading three days before a summary judgment hearing?

CHAIRMAN SOULES: With leave of court.

MR. ORSINGER: Right. In either event it's with leave of court, but if we are at the end of the trial and I can still

amend as long as there is no surprise then why is --

HONORABLE DAVID PEEPLES: You have to start --

MR. ORSINGER: -- summary judgment so horrible.

CHAIRMAN SOULES: Just a minute. We need to make a record here. Who wants to speak?

Tommy Jacks.

MR. JACKS: I would suggest rather than saying "in writing" to say "except with leave of court expressly granted." The reason for that is you may orally grant the filing of the amended pleading, but a written order may not follow until sometime thereafter, under conventional practice.

HONORABLE SCOTT BRISTER: But how is the appellate court going to know? There is no hearing at the summary judgment, no --

MR. ORSINGER: It could be in the --

HONORABLE SCOTT BRISTER: -- record at the summary judgment.

MR. ORSINGER: It has to be in your summary judgment order or in a formal bill of exception or on a written order.

HONORABLE SCOTT BRISTER: That means it's got to be in writing.

MR. ORSINGER: True.

MR. JACKS: Well, I mean, I suppose if the hearing were transcribed at which you granted the motion that would be --

MR. BECK: Would that be on your docket sheet?

MR. JACKS: It should be.

HONORABLE SCOTT BRISTER: Again, again, the problem is when they have got an entry record on appeal, what do they presume? What I'm trying to undo is they presume it was granted if there is nothing express -- if there is any question about it, they assume it was granted.

MR. YELENOSKY: Well, all you can do is assume it wasn't granted until he came forward with something in writing or the transcript, a recorded transcript if it was an oral order.

MR. JACKS: Well, your

proposal, Scott, was "written leave of court"?

HONORABLE SCOTT BRISTER: Yeah. Just because -- let's not change and encourage people to record summary judgment hearings, and that's -- the deal has been it's got to be in writing, and what Bill's court looks at is the file, hand me the file. It's a summary judgment. "Don't hand me the statement of facts. Hand me the file."

MR. JACKS: Okay. I'm persuaded. "Written leave of court."

MR. ORSINGER: Let me suggest our appellate rules have some language along the lines of "reflected in the record." You know, every ruling has to be -- and I think the words are "reflected in the record." Why don't we pick up the appellate rules language and use it here?

CHAIRMAN SOULES: Can I be the devil's advocate on this? Okay. I have got a summary judgment pending. I'm served with the pleading inside of seven days, and I don't like it. All right. Either I can say nothing, in which event I'm going to be stuck with it under Geswomi on appeal, or I can

bring it to the trial court's attention.

I can say, "They filed a pleading, an amended petition within seven days, and it should not be considered." And the judge can say, "I'm either going to consider it or I'm not." Why shouldn't the movant have to call -- I mean, we are in a summary judgment context here. The movant knows the pleading is there --

HONORABLE SCOTT BRISTER: No.

CHAIRMAN SOULES: -- because presumably he's been served.

HONORABLE SCOTT BRISTER: No. My Red Lobster case, specifically the only -- it's filed two days before -- my hearing is on Monday. It was filed Friday and sent to you in the mail. You and I went to a summary judgment hearing, and we had no idea because nobody told us that it had been filed. And no question about it, absolutely that is considered I have granted leave to file it, and it's reversed and comes back. It's easy if I know about it, but there is no way I know about it.

CHAIRMAN SOULES: If we go to

what Judge Peeples has proposed, we are going to be making the consideration of amended pleadings more difficult in the summary judgment context than for a trial on the merits.

Oh, yes, because inside of seven days to amend the pleadings on a trial on the merits you have got the Greenhall and those cases, and they are --

HONORABLE SCOTT BRISTER: Which say you have to have leave of court, which has to be granted unless there is surprise.

CHAIRMAN SOULES: Right.

HONORABLE SCOTT BRISTER: So say the same thing.

CHAIRMAN SOULES: Well --

HONORABLE SARAH DUNCAN: Your argument doesn't prove that the rules we have now are good.

CHAIRMAN SOULES: No.

HONORABLE SARAH DUNCAN: It simply proves that they are the same. My point, that's my whole point, is that the rules we have now aren't any good, whether you are talking about seven days of trial or seven

days of a summary judgment hearing.

MR. ORSINGER: Well, Sarah is not proposing that a different rule be applied from summary judgments as trials. Sarah's point is, is that we ought to do something other than our current rule on amending pleadings before trial, be it summary judgment or trial on the merits, and that is not a debate that we need to fight right now, is it?

CHAIRMAN SOULES: I'm hearing -- okay. I mean, if nobody wants to do it, that's fine with me. I'm hearing that they want to reverse the presumption in Geswomi, which is of assistance to a respondent to a summary judgment in a way more than a party going to trial gets assistance.

HONORABLE SCOTT BRISTER: If you decide something at the last minute and want to amend your pleadings, you file a motion for leave to do it, don't you?

CHAIRMAN SOULES: Sure.

HONORABLE SCOTT BRISTER: And bring it to my attention, but there is nothing in the summary judgment presumption that gives you any encouragement to do that; and, in

fact, it encourages you to file it secretly and never set it for hearing because then it will definitely -- you win automatically if you do it that way.

CHAIRMAN SOULES: That's only because of Geswomi because --

HONORABLE SCOTT BRISTER: Well, I take it that's the law.

CHAIRMAN SOULES: -- Geswomi had said 63 applies, period. Summary judgment is just a trial. 63 applies, no leave, no amendment, he's out; but they didn't. They took a different course, and that's the problem.

Maybe we don't -- I don't particularly care whether it gets fixed or not, but -- or it can be something that can be approached -- it could be approached in the general rules, but in a summary judgment case the court has said pleading amendments are treated differently in summary judgment cases, and I guess that means we got to do something about the summary judgment rule or leave it the way it is and be stuck with Geswomi.

Pam Baron.

MS. BARON: I just want to point out there is a difference between a trial amendment, because usually you have been going through trial, the issues have been raised, and you are just making the pleadings reflect what you have been doing. In a summary judgment proceeding the only place the issues have been raised is in the petition, and you are --

CHAIRMAN SOULES: I'm only talking about the seven days before trial.

MS. BARON: Right.

CHAIRMAN SOULES: That should be the same for both.

MS. BARON: Well, no. I'm saying maybe it should be and maybe it shouldn't, but they are different because the way you are getting to your hearing is different. In summary judgment you only have one document. You are working from that. You are responding to that, assuming that it's not going to change. There is no gradual change or there is no ongoing trial in which these issues have been presented.

CHAIRMAN SOULES: Tommy Jacks.

MR. JACKS: To fix the presumption problem, if David is willing to amend his language to take out the good cause requirement, and to add in --

HONORABLE DAVID PEEPLES: Sure.

MR. JACKS: Scott, does "reflected on the record" language satisfy your view, or do you feel it needs to say "written"?

HONORABLE SCOTT BRISTER: I think, I mean, why not say "written"?

MR. JACKS: Okay.

CHAIRMAN SOULES: Why not say?

MR. JACKS: If David would be willing to say, "Amended pleadings may not be filed within seven days of the hearing except with written leave of court," period.

HONORABLE DAVID PEEPLES: Yes.

MR. JACKS: That's something I would vote for.

HONORABLE DAVID PEEPLES: Yes. Done.

MR. JACKS: I might ought to ask David to make the motion because he seems to have a lot better luck doing it, and I will

second it.

HONORABLE DAVID PEEPLES: So moved.

CHAIRMAN SOULES: Motion is moved and seconded.

HONORABLE SARAH DUNCAN: Can we have just a small amount of discussion on the "written" part?

CHAIRMAN SOULES: Yes. And here is the motion, that the sentence, underscored sentence on the second page, I guess it's the second page of Judge Peeples' proposal -- no, first page of the rule.

"Amended pleadings may not be filed within seven days of the hearing except with written leave of court." That's the motion, right? Okay. Discussion.

Justice Duncan.

HONORABLE SARAH DUNCAN: So under this rule if I -- I understand that you do not want to encourage people to get their hearings recorded on a summary judgment motion, but let's assume that I'm just a very contrary appellate lawyer, and I always do that because I never know if someone is going

to waive something or concede something.

So you rule on the record that my amended pleading -- leave to file is granted, my amended pleading, but there is no written order in the record. Even though you rule on the record that leave to file was granted, leave to file won't be granted under this rule, and we have created a conflict between this rule and the new 52a rule in the TRAP Rules that we spent so much time on because of the problem with the directed verdict and requiring a written order on that, and I am opposed to having the written requirement in here. If the judge rules on the record that leave to file is granted, that ought to be good enough.

MR. JACKS: So will you take "reflected on the record"?

HONORABLE DAVID PEEPLES: Judge Guittard said a few minutes ago, "express leave of court" instead of "written." Why wouldn't that have it?

MR. YELENOSKY: Well, he's worried about encouraging people to just record it.

HONORABLE DAVID PEEPLES: Well, you don't record the whole hearing just for that little ruling, do you?

HONORABLE SARAH DUNCAN: It's not what -- I don't think we are going to encourage people to record summary judgment hearings one way or the other with this rule. It seems to me we just ought to say, "Amended pleadings may not be filed within seven days of the hearing, except with leave of court," period. "Leave of court will not be presumed," period.

MS. GARDNER: The rule with respect to filing responses within seven days just says "except on leave of court it cannot be filed." It must be filed -- yeah. Okay. It just says "except on leave of court" and that presumption is the reverse. So...

PROFESSOR DORSANEO: Let's say "which may not be presumed."

MS. GARDNER: Wouldn't you want to use the same language for both?

HONORABLE SCOTT BRISTER: I would settle for "may not be presumed."

HONORABLE SARAH DUNCAN: That's

fine with me.

CHAIRMAN SOULES: Most of what we are saying is already in Rule 63.

HONORABLE SCOTT BRISTER: But it's just this anomaly that only applies to summary judgment.

CHAIRMAN SOULES: In order to fix Geswomi I think we would say, "Leave of court to file an amended pleading within seven days may not be presumed" or something like that; and what I was trying to do is pick up the standard of 63, which is "unless there is a showing that such filing will operate as a surprise to the opposite party."

In other words, the standard for leave of court should be granted unless the Greenhall decisions that apply to an amendment seven days ahead of a trial, to me should at least be there seven days ahead of a summary judgment, which is a termination of the case without a trial, and I'm trying to nullify the presumption but preserve the standards for amended pleadings.

MR. JACKS: Could you put a sentence in the --

MR. YELENOSKY: "Geswomi bad." That's succinct as you can get.

MR. JACKS: The current rule has that paragraph that covers appeals. Could you add a sentence there saying what Luke just said, which is "leave of court for the filing of any pleadings within seven days of the hearing may not be presumed on appeal" or words to that effect?

CHAIRMAN SOULES: Where is the paragraph on appeals?

PROFESSOR DORSANEO: There isn't one.

CHAIRMAN SOULES: I don't think there is one.

MR. JACKS: I thought there was.

MR. McMAINS: No.

PROFESSOR DORSANEO: You just say "which may not be presumed on appeal."

HONORABLE C. A. GUITTARD: Or any other time.

HONORABLE SCOTT BRISTER: In Draft 1 there was one, but not in the current rules.

MR. JACKS: Well, that's true.

CHAIRMAN SOULES: Okay. What do we want to do here? Somebody articulate the right words, and somebody can find a place to put them in.

Richard Orsinger.

MR. ORSINGER: I think that we would be much wiser to say "reflected in the record" than to have rules that talk about presumptions that don't apply during the appellate process. Now, the only fly in that ointment is that "record" is defined in the appellate rules and not in the trial rules, but on the other hand, this issue is only going to be important on appeal and not in the trial court; and under our preservation of error rule, it says, "The record must show that..." and then we have a long definition of what's in the record.

And I would also point out, although it's not used very often, it is a perfectly legitimate way to cause the record to reflect something to submit a formal bill of exception after everything is finished; and if the trial judge accepts your bill it's in the record.

Now, if we require -- if we do too much with this trial rule, I don't know whether we are altering that time-honored way of causing the record to accurately reflect something that was not in the court reporter's notes and not in a signed order. So I would rather say "reflected in the record."

HONORABLE C. A. GUITTARD: "Shown by the record."

CHAIRMAN SOULES: Okay. Bill Dorsaneo.

PROFESSOR DORSANEO: It's late, and I have listened to a lot of talk about summary judgment here, and I've agreed with a great deal of it, but it seems to me that presumption is not going to go away by talking about something being reflected in the record when there isn't anything in the record.

MR. ORSINGER: If it's not reflected in the record, it wasn't granted. So how can you presume from an absent record that leave was granted?

HONORABLE SCOTT BRISTER: You just do. The same way they have for decades.

HONORABLE SARAH DUNCAN: The

problem that I think Bill has succinctly pointed out is all this rule does is say when pleadings may be filed and when they can't be and what you have to have if you try to file one within seven days. It doesn't say anything about the presumption. If you're going to reverse Geswomi, you're going to have to say, "Leave can't be presumed."

CHAIRMAN SOULES: "Leave of court to amend pleadings within seven days of the hearing shall not be presumed on appeal."

MR. ORSINGER: Isn't that just another way of saying that you have to have some evidence that it was granted?

CHAIRMAN SOULES: No. Because we are trying to fix a problem where there was no evidence. You have that rule that you just articulated.

MR. ORSINGER: Right.

CHAIRMAN SOULES: It's there, but there is nothing in the record.

MR. ORSINGER: But you just added this clause here saying that the leave must be reflected in the record.

CHAIRMAN SOULES: No.

MR. ORSINGER: Well, I'm proposing that we add that, and if we do add that, then the appellate court can't say, "Well, it's not in the record, so we are going to presume that it was done anyway," if the rule requires that the leave be reflected in the record.

That makes so much more sense than telling an appellate court what they can't presume. That's the strangest concept I've ever heard, one of the strangest I've ever heard.

PROFESSOR DORSANEO: Well, it fits the rest of day.

CHAIRMAN SOULES: What are you saying? Okay. Say it again.

MR. ORSINGER: I'm saying we ought to affirmatively say that -- put it in an order, put it in writing, or let the record reflect that it happened.

CHAIRMAN SOULES: Okay. And it doesn't happen.

MR. ORSINGER: Obviously if it's required that it be in the record for the appellate court -- for the leave to have been

granted, and if it's not in the record then they can't presume it happened.

CHAIRMAN SOULES: No. Because Rule 63 requires leave of court to amend any place.

MR. ORSINGER: True.

CHAIRMAN SOULES: But the only place this presumption applies is in summary judgments.

MR. ORSINGER: And we have negated the presumption by requiring that the record reflect that leave was granted. An absent record doesn't reflect leave was granted. An absent record leaves it unclear whether leave was granted. If you require that the record reflect that leave was granted, you have beat your presumption without telling the appellate court that it's not permitted to presume something.

CHAIRMAN SOULES: If you think that does it and the rest of them agree --

MR. ORSINGER: I mean, if everybody else disagress with that, I will just shut up.

CHAIRMAN SOULES: If you think

that nullifies Geswomi, that's okay. I don't care if Geswomi is nullified.

Okay. Rusty.

MR. McMAINS: Luke, you suggest that that presumption on the seven-day filing only applies in summary judgments. Does that case really say only in summary judgments? Because that's not what the rule -- the rule deals with any kind of pleadings, and that would apply equally in trial. That basically means that if you file a trial pleading or even a trial amendment that you -- I mean, are you talking about now you are going to have to have leave granted explicitly?

CHAIRMAN SOULES: Yes. Outside the summary --

MR. McMAINS: Because that basically modifies all of our -- because we have been liberally allowing -- we liberally allow trial amendments or trial by consent, which doesn't have anything specifically that's in it. I mean, I --

CHAIRMAN SOULES: The reason I don't want to say "leave of court" or any other baggage on amending the pleadings is

that 63 has got a lot of interpretation, and I think that interpretation should apply at least as strongly in a summary judgment setting as it does in a trial setting, but if we start saying "express leave of court," "order of the judge," "reflected on the record," then we are adding something that 63 does not now presently say as extra baggage on getting an amendment into a summary judgment, and apparently we are doing that to fix -- if we are going to do it, we would do that to fix a presumption that's in Geswomi, which is a summary judgment case. Why don't we just nullify the presumption directly?

MR. LOW: The rest say "no."

HONORABLE SCOTT BRISTER: Second.

CHAIRMAN SOULES: Okay. "Leave of court to amend pleadings within seven days of the hearing shall not be presumed on appeal."

MR. LOW: Right.

CHAIRMAN SOULES: Something to that effect. Anybody can write it better that wants to try.

MR. JACKS: Let's vote it.

CHAIRMAN SOULES: Anything else? Okay. Who wants to make a motion?

HONORABLE SCOTT BRISTER: I thought you just did. That was a great motion.

MR. JACKS: You just did. You just made it. Scott seconded it.

CHAIRMAN SOULES: Jacks so moves.

MR. LOW: Judge Peeples made it. He's pretty good.

CHAIRMAN SOULES: Judge Peeples made it.

MR. YELENOSKY: Now it's bulletproof.

CHAIRMAN SOULES: And Judge Brister seconds that, right?

MR. JACKS: Yeah.

HONORABLE SCOTT BRISTER: Yeah. That's right.

CHAIRMAN SOULES: Okay. Any further discussion? Those in favor show by hands. 13.

Those opposed?

PROFESSOR DORSANEO: Come on, Richard.

MR. ORSINGER: It's not that important.

CHAIRMAN SOULES: Okay. Anything else on summary judgments?

MR. JACKS: No.

MR. YELENOSKY: Never again.

CHAIRMAN SOULES: Okay. Now, Alex left, I guess. Who wants to be in charge of drafting this rule now? Judge Peeples?

HONORABLE DAVID PEEPLES: By when, tomorrow?

CHAIRMAN SOULES: Well --

MR. JACKS: No.

MR. ORSINGER: Yes.

MR. JACKS: No. No.

HONORABLE DAVID PEEPLES: I tell you what I can do. I can come up with something that everybody can look at tomorrow, and if we can without great discussion say, "No, no," you know, "this and that" and then come up with something by January.

MR. JACKS: We will spend the whole damn morning talking about this again.

MR. ORSINGER: The down side to not doing something concrete as a result of this meeting is that we don't become concrete until January 17th, and there is many lawyers out there that consider this to be the most important thing we have done in three years, and they won't have anything to look at between now and January 17th unless we do it tomorrow.

MR. LATTING: There might be great despair among the Bar.

MR. ORSINGER: Well, you know, maybe nobody cares, but...

HONORABLE DAVID PEEPLES: Well, I will come up with a redraft by tomorrow morning, but I would like for two or three people to stay around and help me to be sure I've got it right.

PROFESSOR DORSANEO: Just look at Joe Mixon's statute. That's what we just passed.

MR. JACKS: Not quite.

CHAIRMAN SOULES: Volunteers to help Judge Peeples?

MR. ORSINGER: I will stick

around.

MR. JACKS: I'll do it.

CHAIRMAN SOULES: Richard, Tommy. Okay. And anyone else?

MR. BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: He doesn't need me. If he needs me, I'll stay. If he doesn't need me, I won't stay.

MR. ORSINGER: Let's involve Sarah in the process. That way she won't criticize it tomorrow.

CHAIRMAN SOULES: You-all invite Sarah.

All right. Now what's next on our agenda?

MR. ORSINGER: Section 1 of the rules.

CHAIRMAN SOULES: Section 1 of the rules, and, Richard, you have --

JUSTICE HECHT: Let me say for the record, Luke, I know this is a hard issue, and the Court very much appreciates the intense deliberation that the committee has given this and your recommendations, so we are very -- I know sometimes it's frustrating, but

it's very good to have your counsel on this.

CHAIRMAN SOULES: Are we anywhere near the mark, do you think?

JUSTICE HECHT: Well, it wouldn't matter what I thought. There is still eight others to consult; but, yes, I think we are moving -- I think we are moving in a positive direction.

CHAIRMAN SOULES: Well, what I feel like we have done is surgically look at the summary judgment rule for its deficiencies in terms of the Texas practice and to try to surgically correct those deficiencies without the wholesale or rewriting of the rules that may stimulate a whole bunch of new interpretation that's somewhat settling. That's my perception of what we have done, and I hope it's satisfactory.

JUSTICE HECHT: I think a lot of wisdom has gone in the recommendations, particularly by people on -- who are opposed to compromise on both sides, and we really do respect the deliberative process that has been involved here.

CHAIRMAN SOULES: Okay.

Richard.

Thank you. Thank you, Judge.

Richard, then what's next?

MR. ORSINGER: Okay. We are looking at a 10-19-96 redraft of Section 1 of the rules, which at this point involves only Rule 1, "Objective and Scope of Rules" and Rule 2, "Local Rules." This really represents a consolidation of existing Rules 1, 2, 3, and 3a. Would you agree with that, Bill?

PROFESSOR DORSANEO: Yes.

MR. ORSINGER: And there is a lot of baggage in these first four rules regarding statutes in 1941 and a bunch of other matters like that that just seem to have no consequence, and I think this is also where the debate on special rules, special statute, special laws came up.

PROFESSOR DORSANEO: No.

MR. ORSINGER: Or, no, that's wrong?

PROFESSOR DORSANEO: Right.

MR. ORSINGER: I stand corrected. At any rate, this is not meant to change the substance of what we are doing.

It's just meant to consolidate and modernize what we are saying about the objective and scope of the rules, and then Rule 3a on local rules is continued essentially unchanged. Isn't that right?

PROFESSOR DORSANEO: That's right.

MR. ORSINGER: So our subcommittee, as you know, those of you who are still here, is responsible for aligning the rules into their final order; and this is, if you will, our suggestion of Section 1 of general rules, and then once this is approved then at least for purposes of today we will move on to Section 3 and then when we get finished with that we may or may not talk about Section 2.

MR. YELENOSKY: You have got an errant comma in that first -- in the last line of Rule 1.

MR. ORSINGER: Okay. After "county" take the comma out.

CHAIRMAN SOULES: Okay. Now, let's see. Your objective and scope, 1 and 2 are compressed into fewer words?

PROFESSOR DORSANEO: That's right. And 2 is the one that has the most words in it, and it talks about a lot of things that have now been eliminated by statutory amendments since the time 2 was drafted.

CHAIRMAN SOULES: So we don't need to preserve this part about rule of procedure and lunacy, probate proceedings?

Okay. So Rules 1 and 2 are compressed into fewer words that still have some meaning, and words that don't are gone. Three is what?

PROFESSOR DORSANEO: Three is suggested for elimination because it's ridiculous. It's called "Construction of Rules," and it says, "In these rules" -- something like this, to paraphrase it.

CHAIRMAN SOULES: Masculine, feminine, and neuter gender.

PROFESSOR DORSANEO: Masculine and feminine and neuter include each other and the plural includes the singular and the singular includes the plural, and when you read it you say, "That's ridiculous," and aside from that, there are a lot of other

construction rules that aren't mentioned.

CHAIRMAN SOULES: And we repeal Rule 3 then, and then local Rule 3a, is it reworded or not even reworded?

PROFESSOR DORSANEO: No. It's not even really reworded.

CHAIRMAN SOULES: Okay. So these two rules take the place of 1 through 3a. Any objection?

No objection.

HONORABLE SARAH DUNCAN: Excuse me. I don't know at this point that everything in 3a is in 2. Is it?

PROFESSOR DORSANEO: Should be.

HONORABLE SARAH DUNCAN: And we are just supposed to go on?

PROFESSOR DORSANEO: Let me say this. A side-by-side comparison is being prepared in the matter of the appellate rules, and if there is something that's not in 2 that's in 3a that will become evident when the side-by-side comparison is prepared, and it would have been entirely unintentional for it to be taken out.

Let me talk a little bit more about the

general rules here. In our rule book right now we have two sets of general rules. We have got the general rules for practice in all courts and then the first section of part two, which are the rules for district and county level courts, have another set of general rules.

Now, most all of those general rules in either of those two sections go somewhere else in the rule book, like the rule on computation of time and the rule on enlargement, those both go into a subsequent section of the proposed revised rule book, and then it doesn't just disappear. All of the rest of the general rules don't just disappear. They move somewhere. Mainly they move to the back of the rule book in this overall reorganization plan in a section involving courts, clerks, and that kind of a business. Sometimes they move into a specific section that follows Section 1.

One of the things about Rule 1, however, that we did decide to do at the subcommittee meeting, and it's where that errant comma is located, is to eliminate justice courts from

this package on the assumption that we will have some other way of dealing with the justice court rules.

It might be that the way of dealing with the justice court rules ultimately is to put them back into this packet and make separate little paragraphs whenever the justice rule is different, but that's probably not what the justices want and probably not what will happen. Probably they will have some other separate package of rules that somebody else will have to worry about.

So in very simple terms all we have here in this Section 1 are the first four rules in our current rule book 1 through 3a. Two of them collapsed together, one of them eliminated because it's not much of a construction of rule, construction of the rules rule because it doesn't say very much, and what it does say appears to be ridiculous.

CHAIRMAN SOULES: Okay. Any discussion?

Any opposition to Rules 1 and 2 as proposed by the subcommittee? There is none, so it unanimously is approved. Rules 1 and 2.

Next?

MR. ORSINGER: Next is Section 3.

PROFESSOR DORSANEO: Now, we have a Section 2 draft that we are not ready to present to you that concerns service that is based upon in part what we discussed at the last meeting involving Bonnie Wolbrueck's presentation with respect to duties of clerks and citation by publication.

This third section we have discussed a good bit already, and I believe we spent an entire day on pleadings and motions some months ago. This is a redraft based upon what we considered at that meeting along with some additional changes. If you will remember, we decided to rename the pleadings, complaints, and answers and to talk about a reply to an answer being a reply to an answer rather than a supplemental petition, and paragraph subdivision (a) -- I will never get over doing that, Lee.

Subdivision (a) of Rule 20 reflects that thing that was already voted on by this committee. There is a little refinement with

respect to talking about an answer including a reply to a counterclaim, such that a reply to an answer can be a reply to an answer that doesn't include a counterclaim, or it can be a reply to a counterclaim. Okay. That's what it will be called, although if somebody files an answer to a counterclaim, that won't, you know, be any big deal because it will be treated for what it should have been called.

The claims for -- that really is the only thing that I would bring to your attention in Rule 20, and I believe, you know, that was what this committee directed us to do.

MR. ORSINGER: We would then move the adoption of that proposal.

PROFESSOR DORSANEO: So I will move the adoption of Rule 20 as drafted in this form.

MR. LOW: Second.

MR. LATTING: Second.

CHAIRMAN SOULES: Okay. There is supposed to be a semicolon after "crossclaim"?

PROFESSOR DORSANEO: Yes. Semicolon after "crossclaim."

CHAIRMAN SOULES: Okay. Any opposition? Stands approved.

PROFESSOR DORSANEO: 21a we voted on and discussed at the last committee meeting. We had some discussion about the comment. We made some adjustments in the comment to try to embrace that discussion.

Examples of stating a legal theory of the claim would include in this redrafted comment "Plaintiffs sues defendant for negligent operation of a motor vehicle." That wasn't in there before. All we had was the negligence per se example. So that first example is new and descriptive.

The other change in the comment is to make the change in the next little plaintiff sues defendant for negligence per se provision to refer to the statutory provisions that exist in the transportation code rather than 6701d which is supplanted by the transportation code.

The last thing in the comment that's changed is the addition of an example of how you specify the maximum amount of damages claimed. The maximum amount of all damages

claimed is $100,000, and that pretty much matches our discussion at the last meeting about the comment.

MR. LATTING: Just a drafting point, if in Rule 20 we are talking now about a complaint instead of a petition, should we say in Rule 21a "that the pleading, whether an original complaint," as opposed to "petition"?

PROFESSOR DORSANEO: Yes. Just a "complaint." Thank you.

MR. LATTING: I guess we should conform anywhere else in the rules where it talks about petition.

PROFESSOR DORSANEO: Yes. Thank you, Joe Latting.

CHAIRMAN SOULES: Okay. Any objection to 21a? Stands approved.

PROFESSOR DORSANEO: Now, (b), and really it's this rule itself in terms of its structure that I need to talk about. When the committee worked on the draft we decided that the initial coverage of defenses was not good because the structure of the pleading process wasn't articulated clearly enough, so we added a section on defenses which is here

at (c), which has an in general provision. Then it talks about general denial, specific denials, (a), (b), (c), and (d). Then it goes to deemed denials of counterclaims or crossclaims and then to affirmative defenses.

Last time we discussed general denial very briefly and had no problem with retaining the general denial. We had a lot of discussion about the specific denial provisions and whether they should be verified or not. We discussed the affirmative defenses and replies to affirmative defenses and pretty much came to a consensus on that. And going back up to (b), we discussed the special exceptions, and with a few exceptions in terms of a very minority position in the discussion, the special exceptions provision has been modified to embrace what we did at the last committee meeting.

It's important to get a handle on this to appreciate the structure of the rule. It first talks about claims for relief. It talks about special exceptions next because special exceptions relate to claims for relief and defenses, and it wouldn't make sense to put

special exceptions just under "defenses," although it wouldn't make complete nonsense to do that because we could think of defenses differently than we think of them now. We could think of a special exception as being a defense to a defense if we wanted to, but that's harder. Okay?

And the defenses are dealt with here in one package. So somebody looking at this rule says, okay, I have got denial defenses. They are general and specific, and then I have got affirmative defenses. And it's kind of right here. You can look at the rule and go down your list as a defending party and be pretty clear what it is you have to choose from and to do.

The in general paragraph in defenses helps the defending party by telling the defending party that a pleading which sets forth a defense may contain a number of things, including special exceptions. It says they may contain dilatory pleas, and I'm not completely crazy about using that term because it's a term that not everybody has on the tip of their tongue or really understands what

that exactly means without looking it up.

CHAIRMAN SOULES: What is it?

PROFESSOR DORSANEO: A dilatory plea is a special appearance motion, a motion to transfer venue, a plea and abatement, something that doesn't have to do with the merits but deals with the problem that needs to be taken care of before you can get to the merits. You are in the wrong place at the wrong time with the wrong folks, and those are traditionally called dilatory pleas.

Rule 85 right now, where this is taken from, uses the term "dilatory pleas," and that's partially why I have stuck with it. So with that description, let's go back to the special exceptions provision which is meant to be informative, tell you what a special exception is for, how it should be done. You directed us to go back and say that it's not supposed to speak and to say what happens if the exception is sustained, and we said all of those things in this particular draft.

The second paragraph, waiver of pleading defects, is in substantially the same form that was approved last time, except the

sentence in the middle that was the subject of a lot of legal debate has been added, but, "A failure to make or present a special exception before trial does not waive an objection that a cause of action or ground of defense contained in the opposing party's pleadings has no legal basis."

And Justice Duncan particularly wanted that in there in order to make it clear that if a claim in the pleading has no legal basis, you don't have to specially except to that pleading. You can make that complaint at some other later time. This draft does not address when that some other later time is, and it doesn't address that on purpose because that's not where we are in the rule book and because that's a very debatable point that we don't need to resolve here in the rule book.

MR. LATTING: Is there question about that now under the law?

PROFESSOR DORSANEO: No.

MR. ORSINGER: There is a dispute as to whether it was when the jury charge was submitted --

CHAIRMAN SOULES: We voted on

it.

MR. LATTING: Well, all right. Okay then.

MR. ORSINGER: I would propose that we fill in the blank now.

PROFESSOR DORSANEO: Yeah. Let's fill it in now. Yeah. I was going to say that. How much time?

MR. ORSINGER: If you just pick seven days, that means you are going to be getting amended pleadings less than seven days before trial and will alter the suit.

PROFESSOR DORSANEO: When is it in Dallas now, the Dallas local rule says?

MR. BABCOCK: It's 14, I think.

PROFESSOR DORSANEO: 14? Some, you know, period like that.

MR. BABCOCK: I think so.

PROFESSOR DORSANEO: Maybe not 14. Maybe 30 even.

CHAIRMAN SOULES: How can we fill in that blank until we get a discovery window to fill it in?

MR. ORSINGER: Well, are you thinking about moving it so far back that it

would be during the discovery period?

CHAIRMAN SOULES: Yeah. If pleadings are cut off during the discovery period, shouldn't a party's objections to prior pleadings be made before pleadings are cut off? I don't know.

PROFESSOR DORSANEO: Well, maybe we can't do that.

MR. ORSINGER: If you are considering moving them that far back, like not 7 or 14 days but all the way back to during the discovery window then we need to wait.

MR. BABCOCK: Ten days.

CHAIRMAN SOULES: Well, if we get a discovery window, is the possibility that we would want special exceptions to fall sometime in the discovery period or not?

Let's leave it blank.

PROFESSOR DORSANEO: Okay. I view this (b) as being essentially redrafted following the directions of this committee.

CHAIRMAN SOULES: Looks fine. Any objection to --

MR. ORSINGER: I would make a

suggestion that just occurs to me now seeing this in final order, is that perhaps we ought to put (b) after (c) so that we have claims, defenses, and then special exceptions. That didn't become apparent to me until I see this in final form, but there is some logic because special exceptions cuts both ways.

PROFESSOR DORSANEO: It could actually even go in Rule 25. I'm not wed to that. I put it here because it's in the middle, and it goes both ways, but it could be in (c).

MR. ORSINGER: I would propose that we change it to (c) for the time being and move defenses to (b).

PROFESSOR DORSANEO: Well, I'm happy to -- you know, we could do that and see what it looks like. It's almost like rearranging the furniture. You know, you can't really decide until you see it. At least that's what happens at my house.

CHAIRMAN SOULES: It really ought to go all the way to the end because special exceptions --

MR. ORSINGER: I think that

would be the end.

CHAIRMAN SOULES: Well, no, we have got defenses and we have got specific denials and then we have got affirmative defenses.

PROFESSOR DORSANEO: And then there is just some other extra stuff.

CHAIRMAN SOULES: Denials.

MR. ORSINGER: It ought to become new (e). I am going to propose that (c) become new (e).

PROFESSOR DORSANEO: Or new (d).

MR. BABCOCK: Right.

MR. ORSINGER: Which would be the last -- make (b) (e) and then move everything up one letter.

PROFESSOR DORSANEO: Well, you probably just want to put it after affirmative defenses.

MR. ORSINGER: Well, you have got the duty in current (d) -- the pleading to be plain and concise logically is the duty, and the special exception is the complaint for a violation of the duty. So you could argue

putting it after current (d). (E) is how you --

CHAIRMAN SOULES: Where do you want it, Bill? At the end?

PROFESSOR DORSANEO: I don't care.

CHAIRMAN SOULES: You want it to the end?

MR. ORSINGER: Yes.

CHAIRMAN SOULES: Put it to the end. Okay. (B) goes to the end.

MR. ORSINGER: Becomes (e) now.

CHAIRMAN SOULES: Of Rule 21. 21(b), now Rule 21(e).

Is there any opposition to that? Okay. Stands approved.

21(c). Defenses.

PROFESSOR DORSANEO: All right. The first -- all right. It would now be the first in general paragraph is just descriptive of the types of defenses except that it talks about affirmative defenses in the same way or in a very similar way that we talk about claims.

A claim, if you look back at the first

paragraph, has to be, you know, sufficient to give fair notice of legal theories and factual bases of the claims, and we believe that to make it parallel that an affirmative defense should be made by an affirmative statement in plain and concise language that is sufficient to give fair notice. Now, that is a little bit concise in and of itself, but the idea is a straight forward one that you can't just write down "contributory negligence," that you have to give fair notice of what your contributory negligence defense is.

With respect to the general denial, it was not believed that a fair notice concept has anything to do with general denials, and with respect to the specific denial paragraphs, the content of the specific denial paragraphs themselves require the pleader to include supporting particulars as are peculiarly within the pleader's knowledge in both (a) and (b) and (c), not (d). Perhaps it could be added in there. Perhaps it's not necessary at all because of the nature of the denial in (d).

The only other change in the general

denial provision, and I was going to ask people to vote on both 1 and 2 because they are not changed much from the current rule book, is to say at the beginning of the general denial provision that, "Unless a specific denial is required by law or these rules, a general denial is sufficient to put the same at issue," which I think is true, but the rule doesn't say that now; and the general denial rule now talks about plaintiffs and defendants, and this rule talks about parties and opposing parties such that we are not restricting this to a plaintiff/defendant context.

The way our rule book is written now, it says, "Pleadings in General," "Pleadings of Plaintiff," "Pleadings of Defendant," and in some circumstances it says the rules with respect to defendant's pleadings apply to plaintiffs and that you have to go back and forth and just to neutralize it, you know, makes more sense. Now, this doesn't mean that a plaintiff needs to file a general denial of an answer because that simply is, you know, not necessary.

CHAIRMAN SOULES: We have got deemed.

PROFESSOR DORSANEO: And we have deemed denials of counterclaims or crossclaims. Now, I am just thinking outloud. What I said is about a general denial of an answer not being necessary. Does it say that anywhere? Would anybody think that you need to deny a denial? Naah. Huh?

HONORABLE SCOTT BRISTER: Not a problem.

PROFESSOR DORSANEO: Not a problem. But so what we would be talking about would be a counterclaim or crossclaim or an affirmative defense, and we do have coverage of those in (4) and (5). We have coverage of deemed denials of counterclaims, and we have coverage of replies to affirmative defenses in the last sentence of what has become (b)(5) from the defenses.

CHAIRMAN SOULES: What page is that on?

PROFESSOR DORSANEO: Page 7.

CHAIRMAN SOULES: Page 7.

PROFESSOR DORSANEO: "An

affirmative defense need not be denied in a response of pleading, but an avoidance of an affirmative defense must be alleged affirmatively in a pleading to a preceding pleading," which is language we voted on last time or nearly the same language.

So I would ask people to consider for approval the in general paragraph and the general denial paragraph, which aren't really changed much from the current rule book, but they are changed a little bit.

CHAIRMAN SOULES: Any objection? Stand approved.

PROFESSOR DORSANEO: The specific denials are trickier. Last time we had a discussion about, you know, whether they should be verified or not. Some people thought they should be verified. Some people thought Chapter 10 of the Civil Practice and Remedies Code was good enough. Some people thought if they are not verified, that Rule 93 ought to be adjusted.

The committee after further discussion thought they should not be verified, and once we got to the point of thinking they should

not be verified, we concluded that they could be consolidated, amalgamated, and once we started to consolidate and amalgamate them, we decided to eliminate some of them, and we ended up with (a), (b), (c), (d), you know, rather than the longer list in current Rule 93. Our belief was and is that this subdivision, which is really something less than a subdivision, it's a subparagraph, (3)(a) combines (1), (2), (5), (6), and (14) into one paragraph.

I don't have a rule book here, but (1) and (2) are capacity. (5) and (6) are legal existence of a partnership or corporation, and (14) is assumed name. Okay. And that's all in here in compact form. Well, I wanted to see if I actually could remember all of these things.

MR. ORSINGER: You got them right.

PROFESSOR DORSANEO: And, you know, that leaves out (3) which is dealt with later, okay, in the provisions of Rule 25. So we have got (1), (2), (3), (4), (5), (6).

CHAIRMAN SOULES: Where is (4)?

PROFESSOR DORSANEO: (4) is also dealt with in Rule 25.

CHAIRMAN SOULES: Okay. We have got (5), (6), (7), and (8) in (b).

PROFESSOR DORSANEO: (7) and (8) are in (b). We concluded if it wasn't going to be sworn then failure of consideration and want of consideration are covered by the affirmative defense paragraph which has been changed to mention both of them.

CHAIRMAN SOULES: And those are what numbers, (9) and --

PROFESSOR DORSANEO: (9).

CHAIRMAN SOULES: (9).

PROFESSOR DORSANEO: (10), the denial of account which is the foundation of the plaintiff's action, although I will vote against a sworn account rule every time one is proposed, the current plan is to have a sworn account rule like Rule 185 and to put it in the pretrial section of the book, so that I guess that will be the only sworn denial. Okay? A denial of an account in the language of Rule 185. We are not getting to that yet.

Then a contract sued upon as usurious, well, that's an affirmative defense item as well.

CHAIRMAN SOULES: Yeah.

PROFESSOR DORSANEO: Notice and proof of loss or claim, that's in (d). (13), IAB proceedings, we decided that that was gone.

CHAIRMAN SOULES: What?

MR. ORSINGER: Industrial Accident Board.

PROFESSOR DORSANEO: Industrial Accident Board, and although there are still some cases that are coming out in the appellate books under the old statute, I think the old statute is probably -- is gone with respect to --

CHAIRMAN SOULES: Conduct of a trial?

PROFESSOR DORSANEO: Conduct of a trial. I'm not completely certain of that, but maybe when we finally get there it will be gone. So that's where (13) went. (14) is in here. (15) is not exactly in here in so many words. It would be arguably in here in general terms in (c).

Okay. I think (15), a trial of a case brought against an automobile insurance company, "An allegation that the insured has complied with all the terms of the policy as a condition precedent to bringing the suit shall be presumed to be true unless denied by verified pleadings."

PROFESSOR CARLSON: Bill, we said that would be in a conditions precedent rule and now that it wasn't going to be verified it would be collapsed in that rule.

PROFESSOR DORSANEO: Yeah. Yeah. It's a tiny, tiny, tiny bit different because (15) does not in so many words -- oh, it is. "An allegation that the insured has complied with all the terms." Pardon me. It is the same. It's in there exactly. Thank you, Professor.

CHAIRMAN SOULES: Where?

PROFESSOR DORSANEO: (15) is in (c).

CHAIRMAN SOULES: Okay. Yeah. Okay.

PROFESSOR DORSANEO: So everything really is in here in one way or

another except (13), which we think is gone.

CHAIRMAN SOULES: Okay. So...

PROFESSOR DORSANEO: Justice Duncan.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: Why have -- why are failure of consideration and want of consideration in the affirmative defense rule? If the plaintiff has to prove a contract, there is no contract without consideration, and are you intending to change the burden?

PROFESSOR DORSANEO: Well, if it's a written contract, the want of consideration is considered an affirmative defense, too, under our practice, not just failure of consideration but want of consideration.

HONORABLE SARAH DUNCAN: Is an affirmative defense --

PROFESSOR DORSANEO: Yeah.

HONORABLE SARAH DUNCAN: -- on which the defendant has the burden?

CHAIRMAN SOULES: To plead it.

PROFESSOR DORSANEO: To plead it and to prove it.

HONORABLE SARAH DUNCAN: I don't understand how that can be.

PROFESSOR DORSANEO: Well, just our case law said that.

MR. ORSINGER: Well, if you mark a written contract and put it in evidence, authenticate it as to signatures, you have proved your contract. It's now up to the defendant to prove that the contract is not enforceable because consideration failed or didn't exist to begin with.

HONORABLE SARAH DUNCAN: If a contract isn't enforceable, it's not a contract.

PROFESSOR DORSANEO: It's just like statute of frauds. Statute of frauds you would think somebody has to prove the contract is in writing in order to prove a contract case that requires a contract be in writing. The policy grounds, both in the Federal level and our jurisdiction, statute of frauds is put as an affirmative defense. Want of consideration was put as an affirmative

defense under our case law in the affirmative defense category, and that's just where it is.

MR. BABCOCK: Is it in the old rule?

PROFESSOR DORSANEO: It's not in the old rule. We copied our old rule from the Federal rule there, and the Federal rule takes the Fifth on that. It says, "Failure of consideration in any other matter constituting an affirmative defense, an avoidance or affirmative defense."

I'm telling you that under Texas case law want of consideration is an affirmative defense, too, when the contract is in writing. On the oral contract that wouldn't be so, and that is a little glitch there. We could take out want of consideration.

MR. ORSINGER: Well, one of the purposes of putting it in was to list the affirmative defenses.

PROFESSOR DORSANEO: Yeah. And really it is for a written contract. I have to go back and look at my -- triple check myself, go back and look at my stuff, but I'm sure that's right when it's a written

contract.

CHAIRMAN SOULES: Well, they are not all here, the affirmative defenses.

MR. ORSINGER: No.

PROFESSOR DORSANEO: If we took want of consideration out of -- now, the first one, this verified thing is only talking about a written contract. Okay. It's only talking about a written contract, that "a written instrument upon which a pleading is founded is without consideration or the consideration has failed in all or in part." Failure of consideration is and always has been in current Rule 94, which is the affirmative defense paragraph.

Want of consideration, it's my understanding we are talking about a written contract, is in there under the language, "A Matter in Avoidance." The only untoward impact of moving it into the affirmative defense provision that I can see now would be that if we say, "Want of consideration is an affirmative defense," maybe we are saying too much because we are not restricting that to a written contract.

MR. ORSINGER: Written contract.

HONORABLE SARAH DUNCAN: I don't know. Mine was really and truly a question. I didn't know.

MR. ORSINGER: Well, I think we would be changing the law if we did that, and we could avoid that by just simply saying, "Failure of consideration or want of consideration for a written contract."

PROFESSOR DORSANEO: Yeah. I would add that.

HONORABLE SARAH DUNCAN: Then "the written contract" would modify both "failure" and "want."

MR. ORSINGER: Take the comma -- that's right.

HONORABLE SARAH DUNCAN: You would need to leave the comma in and say, "failure of consideration," comma, "want of consideration if a contract -- the contract sued upon is written."

MR. ORSINGER: Well, is a failure of consideration an affirmative defense for an oral contract?

PROFESSOR DORSANEO: Yes.

MR. ORSINGER: Well, then we would want to just say want of -- inside, between commas, "want of consideration for a written contract." So it would be --

CHAIRMAN SOULES: Why is there a difference between oral and written?

MR. ORSINGER: I think that there is a concept that the written contract creates a presumption that the contract exists.

CHAIRMAN SOULES: Yes.

MR. ORSINGER: But the assertion of an oral contract --

CHAIRMAN SOULES: I see.

MR. ORSINGER: -- the contract has no verifiable externality.

PROFESSOR DORSANEO: Yeah. What you have is you have a presumption that there is consideration for a written contract, and then you have the choice of dealing with that rule by saying that there is a burden to plead in order to rebut only or a burden to plead and prove, and our Texas case law says there is -- wanting to say whenever there is a

burden to plead that there is a burden to prove, says that the burden of persuasion altogether is on the one who wants to defeat the contract claim.

HONORABLE SARAH DUNCAN: So even if under current case law -- and I am asking the question. Under current case law, even if the contract that's attached to the original petition and sued upon shows on its face illegal consideration, I bear the burden of pleading and proving failure of consideration?

PROFESSOR DORSANEO: Well, I think in that case illegality.

MR. ORSINGER: That illegality is a recognized defense that you must plead.

HONORABLE SARAH DUNCAN: I am not so worried about the pleading aspect of it as I am the proof aspect of it.

PROFESSOR DORSANEO: There aren't a lot --

HONORABLE SARAH DUNCAN: And it's in the current rule, so I guess it is.

PROFESSOR DORSANEO: There aren't a lot of cases, but the cases, from

teaching procedure over time, trying to figure out what are these other matters in avoidance; and lo and behold, one of the biggest ones you come across is want of consideration if it's a contract.

HONORABLE SARAH DUNCAN: I believe you.

PROFESSOR DORSANEO: That's an important detail, but it is more of a detail on, you know, whether we amalgamate these specific denials or not. I think they are much easier to deal with if they are amalgamated and are not required to be verified.

HONORABLE C. A. GUITTARD: I have a question about the form of these specific denials. Maybe this should be left to Brian Garner, but it seems to me that this reference to the party desired is an inappropriately subjective sort of thing.

It seems to me that what the rule ought to say is something like this: "The following defenses may be raised only by specific denial, including such supporting particulars as are peculiarly within the plaintiff's

knowledge," colon, (1), (2), (3), and all the existence of a party and so forth.

PROFESSOR DORSANEO: You may be right. The "when a party desires" language was really borrowed from the Federal rule book, which is a boondoggle.

HONORABLE C. A. GUITTARD: Oh, well --

PROFESSOR DORSANEO: That's not a reason for keeping it. That's a reason why it's here.

HONORABLE C. A. GUITTARD: That's a good reason for not putting it in.

CHAIRMAN SOULES: Okay. Now, in (c) we are not carrying forward, as I see it, the trigger.

PROFESSOR DORSANEO: That's over in the next rule, Luke.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: I put the trigger over in the next rule.

CHAIRMAN SOULES: Okay. That's good enough for me.

PROFESSOR DORSANEO: So it's really kind of in two places. Really, in our

rule books the only thing we have is the trigger, except for the uninsured motorist thing over here. We have the trigger and then we are told what happened, you know, what happens after, but it's clearer in this draft about the trigger and about the need for a specific denial.

CHAIRMAN SOULES: Okay. So specific denials and affirmative defenses, let's --

PROFESSOR DORSANEO: Well, let me say if you are going to get to the affirmative defenses, I have some more things to say about that, but not too much.

CHAIRMAN SOULES: Okay. Then list it.

PROFESSOR DORSANEO: The committee has to add some affirmative defenses that are only plaintiff's responses to a defendant's affirmative defenses, and I added one, fraudulent concealment. In looking at it again, I also took out one that was in there before, license. I took out license because I thought that that was not -- not because it's not an affirmative defense but because it was

not so important to be given as an exemplar of the types of things.

HONORABLE SARAH DUNCAN: Rather than picking out fraudulent concealment, couldn't you just track Willis on any provision tolling or suspending the statute of limitations?

PROFESSOR DORSANEO: Could. If you want to do that, we can do that.

MS. SWEENEY: Can you-all speak up? We are still down here.

HONORABLE SARAH DUNCAN: Just instead of just picking out fraudulent concealment, track the language in Willis that says something about any provision that tolls or suspends the running of the statute of limitations or pick out all of them. I just don't want somebody to get in a position that they think they have to plead fraudulent concealment but not discovery rule or not one of those obscure tolling provisions because you are out of the state or a minor or whatever.

PROFESSOR DORSANEO: We could say, you know, fraudulent could be added and

be a little less alphabetical, but it's not completely alphabetical anyway. You could say, "fraudulent concealment, any other basis for tolling limitations." Okay?

MR. ORSINGER: You don't have to say "any other basis." Couldn't you just say "tolling of limitations"?

HONORABLE SARAH DUNCAN: "Or suspending."

PROFESSOR DORSANEO: Yeah.

HONORABLE SARAH DUNCAN: Willis says "tolling or suspending" and I think that would be --

CHAIRMAN SOULES: "Nonaccrual of cause of action."

PROFESSOR DORSANEO: What's the difference between tolling or suspending?

HONORABLE SARAH DUNCAN: I don't know.

MR. ORSINGER: That sounds like legalese.

HONORABLE SARAH DUNCAN: No. There is -- there are cases that draw some pretty funky distinctions between one statute will toll, one statute will suspend. The

discovery rule delays accrual.

CHAIRMAN SOULES: They really ought to be "delay," delays a running of the limitation.

HONORABLE SARAH DUNCAN: That's what I'm saying, though, is that the cases have held that different statutes or doctrines do different things to the statute. They can delay accrual of the cause of action. They can toll the running of the statute of limitations, and I don't know the difference between suspending and tolling, but whatever.

PROFESSOR DORSANEO: Just spell it.

HONORABLE SARAH DUNCAN: In your discretion.

PROFESSOR DORSANEO: I would recommend put "tolling of limitations" rather than "tolling or suspending" and then -- but the discovery rule always troubles me whether to put that in there because that kind of depends on the nature of the proceeding you are in.

HONORABLE SARAH DUNCAN: Well, and the discovery rule doesn't toll the

statute from running. It just delays accrual of the claim, right?

HONORABLE C. A. GUITTARD: To avoid technical words like "tolling" why can't we use easily understood words like "suspend"?

PROFESSOR DORSANEO: Well, because all of these words are technical words in these affirmative defenses, and that's why they are in here.

HONORABLE SARAH DUNCAN: Fraudulent concealment, for instance, I think suspends the running of the statute during the time of the fraudulent concealment.

MR. ORSINGER: I think there may be an argument that it estops you from asserting the limitations rather than tolling the running of it. I think it's an estoppel theory.

PROFESSOR DORSANEO: But it's called fraudulent concealment and you know what it is.

MR. ORSINGER: But you are estopping --

PROFESSOR DORSANEO: I think it's fair to say that every basis for tolling

limitations is treated as an affirmative defense.

HONORABLE SARAH DUNCAN: Uh-huh. Except at summary judgment.

MS. SWEENEY: That's also not really true. For instance, we talk about the statute as to minors being tolled until they are 18, but you don't have to plead that as an affirmative defense.

MR. ORSINGER: If the defendant pleads limitations and you are representing a minor, you must plead age, or you are out. You must plead.

MS. SWEENEY: Yeah.

MR. ORSINGER: You see what I'm saying? The plaintiff has to --

MS. SWEENEY: With my Rule 13 motion. I mean, I don't want it to -- well, all right. That's fine. You're right.

HONORABLE SARAH DUNCAN: "Any basis for tolling or suspending a statute of limitations or delaying accrual of the claim."

PROFESSOR DORSANEO: I am happy to put anything in here that anybody wants.

MR. ORSINGER: Yeah. That

just -- you know, that may be supportable by the language in that Supreme Court case, but that's a lot of gobbledygook for the same concept. Do we really have to say all of that three different ways?

CHAIRMAN SOULES: I think you can just say "delay of limitations." You delay the starting or you delay it somehow in the middle.

PROFESSOR DORSANEO: Tell me what, and I will put whatever you want in here.

MR. LOW: "Delay." Make it simple.

PROFESSOR DORSANEO: If you don't tell me what I'm going to put "tolling the limitations" because that's what I like.

CHAIRMAN SOULES: Can you toll it before or after it starts?

PROFESSOR DORSANEO: After.

CHAIRMAN SOULES: Only after.

PROFESSOR DORSANEO: Well, mostly after.

MR. JACKS: No. You can also toll at the beginning of the running.

CHAIRMAN SOULES: Okay. That's fine.

(Off-the-record.)

CHAIRMAN SOULES: Okay. Use whatever words you think are appropriate, Bill, to cover that.

MR. ORSINGER: We have just completed (b), which is old (c), now (b). Can we move the adoption of old (c), now (b)?

CHAIRMAN SOULES: Specific denials, any objection to that? No?

MR. LOW: Yeah. 95 was pretty elaborate on denial of payment and in what way, and you have just got "payment." That's probably sufficient and will take care of that.

PROFESSOR DORSANEO: We voted last time that we didn't want to have that 95.

MR. LOW: Yeah. I understand. I wasn't here last time, but I wasn't objecting. I was just pointing out.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: So how about 3(a)?

CHAIRMAN SOULES: 3 is

approved. All of 3 is approved. Right? (A), deemed denials, affirmative defenses. I have lost the order here. Special exceptions, defenses.

PROFESSOR DORSANEO: I think we have talked about all the defenses.

MR. ORSINGER: We have now basically approved all of (b).

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: (D) is relettered as (c), and it's the way we did it last time, and there was an exact vote on it, no question of that.

CHAIRMAN SOULES: Any objection? No objection. It's approved.

PROFESSOR DORSANEO: (D), construction of pleadings, I added a sentence. I added the first sentence of Rule 71. I added it because Justice Cornelius made the point last time that the Texas law is now that when a party is mistakenly designated in any plea or pleading, the court of justice so requires that it must treat the plea or pleading as if it had been properly designated, and I thought that first sentence

of Rule 71 was important enough to be just carried forward and put in here explicitly.

CHAIRMAN SOULES: Any objection?

Okay. All of 21 then stands now approved.

Tommy is saying that he thinks they have got a draft ready on summary judgment. Why don't we recess now? Maybe, Richard, you and Sarah could look at that, too, and if so, probably get it typed up tonight and be back here tomorrow.

MR. ORSINGER: We are going to have to have a local lawyer on the committee to get it typed up tonight.

CHAIRMAN SOULES: Well, we've got Mr. Jacks.

MR. ORSINGER: Okay.

(Whereupon the proceedings were adjourned until the following day.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on November 22, 1996, and the same were therafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $1,302.00.

CHARGED TO: Luther H. Soules, III.

Given under my hand and seal of office on this the 9th day of December, 1996.

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