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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JANUARY 17, 1997

(AFTERNOON SESSION)

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Taken before William F. Wolfe, Certified Court Reporter and Notary Public in Travis County for the State of Texas, on the 17th day of Janaury, A.D. 1997, between the hours 1:15 o'clock p.m. and 5:30 o'clock p.m., at the Texas Law Center, 1414 Colorado, Room 104, Austin, Texas 78701.

JANUARY 17, 1997

MEMBERS PRESENT:

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

MEMBERS ABSENT:

Alejandro Acosta, Jr.
David J. Beck
Ann T. Cochran
Hon. Clarence Guittard
Charles F. Herring, Jr.
Franklin Jones, Jr.
David E. Keltner
Thomas S. Leatherbury
Gilbert I. Low
John H. Marks, Jr.
Hon. F. Scott McCown
David L. Perry
Anthony J. Sadberry
Stephen D. Susman

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Paul N. Gold
O.C. Hamilton
David B. Jackson
Bonnie Wolbrueck

Hon. William Cornelius
Doris Lange
W. Kenneth Law
Mark Sales
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:

CHAIRMAN SOULES: We're on the record. Okay. Well, I'm at something of a loss here to try to figure out what's the right thing to do with everybody. We've got a three-way impasse.

MR. YELENOSKY: Shall I go out in the hall and tell people?

CHAIRMAN SOULES: Yeah.

MR. GOLD: No, let's take a straw vote first.

CHAIRMAN SOULES: We'll vote again. As long as you tell them we're voting again, if they don't come in, that's okay; I guess they don't care.

MR. GOLD: Where is Paula?

CHAIRMAN SOULES: There she is.

MR. GOLD: Oh, there she is. Okay. Now we can vote.

MR. ORSINGER: Can we have some discussion before we vote?

CHAIRMAN SOULES: Well, what new can be said? For at least an hour there was nothing new said.

MR. ORSINGER: Well, Bill and I have a disagreement as to whether two and

three are closer to together or one and three are closer together.

CHAIRMAN SOULES: I know. I heard the two of you.

MR. ORSINGER: That's a new discussion.

PROFESSOR DORSANEO: Nobody is interested in that, Richard.

MR. ORSINGER: But if we would be permitted to do that, because if you decide to combine one and three, to me, that's not as logical as if you combine one and three.

MR. GOLD: So you would say summary judgment evidence, discovery product information, and no time?

MR. ORSINGER: I think two and three are closer because they don't require you to spend money to get something authenticated that everybody knows what it is but it's not in summary judgment form. To me, that's a complete waste of money. And one should not be in the running.

MR. JACKS: What if we were to have a heads-up vote on two combined with three against one; that is, instead of three

choices you only get two choices. Your first choice is the old one; your second choice is a combination of the old two and the old three again.

CHAIRMAN SOULES: Well, the problem is that both of those have a time delay built into them, which I think is probably one of the reasons why the second alternative was preferred by some.

MR. GOLD: Wait, I thought No. 2 was --

MR. JACKS: Luke, I guess all I'm saying is that we might find out something that we don't know now in terms of where people are.

MR. GOLD: Wasn't No. 2 no time? You've got summary judgment evidence, discovery product, but no time. So what you're saying is make the choice summary judgment evidence, discovery product information, and no time? Why do you need additional time if you've got --

MR. ORSINGER: You don't need additional time if information is okay in unauthenticated form.

MR. GOLD: Right. So that could be a compromise on that.

MR. ORSINGER: It could be. And I think two and three are closer together than one and three.

MR. GOLD: Does that make sense, Tommy?

CHAIRMAN SOULES: There may be one way to get at this, I don't know if this is acceptable, which would be to just take a show of hands of whether the Committee, the majority of the Committee, feels that there should be any mandatory time required of the judge.

HON. SCOTT A. BRISTER: That's why I voted the way I did. This would be the only area I'm aware of know of that has a mandatory continuance. I mean, every other continuance depends on the facts.

MR. ORSINGER: How I feel about time depends on how broad your pool is and the condition the evidence has to be in in order for you to survive. So to me, they're interrelated.

MR. GOLD: I agree with

Richard.

CHAIRMAN SOULES: Well, let me first just take another vote, because some people, after seeing the way it voted, have a different idea. Maybe not. But let's just try it.

Okay. Summary judgment evidence plus mandatory time to get other evidence, other information in summary judgment evidence form. How many like that?

HON. SARAH DUNCAN: We can only vote once, right?

MR. ORSINGER: That's Proposal 1.

MR. JACKS: We're doing exactly the same vote we did before?

CHAIRMAN SOULES: Same vote. We're just taking another look at it.

MR. JACKS: Can't we just ask if anybody has changed their mind?

CHAIRMAN SOULES: Has anybody changed their mind?

MS. GARDNER: I may have changed my mind, and I might veto on my vote for that one. May I say why, because it's a

little bit of a different slant. How would you make the time mandatory for a continuance? I think it might be impossible to formulate a test for when the continuance would become mandatory, because you would have to somehow formulate a test for what is the threshold showing for -- to get that mandatory continuance. And then I think people are thinking about mandatory continuances so they can go get a petition for writ of mandamus, or a writ of mandamus, but what would you show to enforce that?

I think it might be unenforceable, and I really am in favor of the alternative of a continuance plus limiting the evidence that the nonmovant gets to summary judgment evidence, but I just don't think that you can do it, so I'll withdraw my vote.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Well, there is another issue we haven't discussed yet. In any of the mandatory time notions, what happens if you get the time, you go get some information, and you still don't get it in admissible form? I mean, but it's still

information, you know, it's still out there, but maybe you're another step away. I mean, how often -- is it kind of your first one is mandatory and the rest of them are discretionary, or do you get three or four cracks to get it right, or is every crack entitled to a mandatory continuance? I mean, this seems kind of never ending on that note.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Well, it seems, from what I remember from last time, the reason that was articulated for doing anything in this way was, and what I think I heard from some of the judges, perhaps Judge Brister, was that there was no mechanism for getting rid of these cases that everybody would agree ought to be gotten rid of because there's no evidence in any form. And so it seems to me to be kind of a waste of time to worry about writing about what form it should be in if all we're really trying to get are those cases where they don't have anything and they ain't going to have anything, so that it should be written to be most favorable, just say that --

most favorable to the plaintiff or the respondent by saying that if they come forward with any evidence or any information, rather, in any form that that would defeat a no-evidence point, if we're truly trying to get after only those tip-of-the-iceberg cases where the person has got nothing.

CHAIRMAN SOULES: Well, that got defeated 12 to four.

MR. YELENOSKY: Well, maybe so.

CHAIRMAN SOULES: I think that seemed to make the most sense, too, but --

MR. YELENOSKY: Well, I mean, I just think we're forgetting where we started because we've been through this arduous task, but isn't that where we started?

CHAIRMAN SOULES: Anne McNamara.

MS. McNAMARA: Luke, I may be responsible for the germ of the idea that started this discussion. I never intended mandatory. I was trying to respond to the concerns that were being voiced that once discovery has closed, it's closed, and you can't go back and correct the unauthenticated

contract or whatever sort of formal defect you have in your evidence. If the mandatory aspect of this is creating a lot of problems for people, there's no reason not to use language which talks about the judge's discretion and in the interest of justice and all sorts of other somewhat difficult to interpret phrases.

The whole idea is if you're going to be badly hurt because the discovery window has closed and you just failed to do something you should have done like you should have done the company associate but didn't do that deposition by mistake, just give the person the chance to do that, but don't make it mandatory.

MR. ORSINGER: Luke, what about the possibility of forcing everyone that voted for one to choose between two and three, everyone that voted for two to choose between one and three, because we may find --

CHAIRMAN SOULES: So vote on your second choice?

MR. ORSINGER: Yeah. Because we may find that there is a predominant second

choice that would obviate further discussion.

MR. JACKS: Why not combine two or three and vote that heads up against one?

MR. ORSINGER: I think that's good too. How do you combine it?

CHAIRMAN SOULES: You can't combine them, because one has time and one doesn't have time, mandatory.

MR. GOLD: What if we combined them such that three would be or four would be summary judgment evidence, discovery product, information, and no additional time? I mean, if you had information that defeated it, if you had discovery product or if you had summary judgment evidence, that would be it.

CHAIRMAN SOULES: Here is another problem: Suppose the plaintiff does not produce something that's pertinent to a summary judgment that's not produced in discovery because the defendant never asked for it?

MR. GOLD: Well, that would be summary judgment evidence.

MR. ORSINGER: Because what you could do is, the minute they file their motion

for summary judgment you could produce it, and all of a sudden it migrates from being information to being discovery.

CHAIRMAN SOULES: Produce it even though it's not been asked for?

MR. ORSINGER: We don't even need the information category, because you have the power to make all your own information discovery. You put it in an envelope and mail it to the other side and it's discovery.

CHAIRMAN SOULES: How is it discovery? It's not responsive to any request.

MR. ORSINGER: Well, I haven't been in a lawsuit that didn't ask me for everything I had.

HON. DAVID PEEPLES: If it's your own information, why can't you just prove it up it?

MR. ORSINGER: Well, you could do that too.

MR. GOLD: That's what I'm saying. If you've got it and never produced it in discovery, then it becomes summary

judgment evidence.

CHAIRMAN SOULES: Chip Babcock, any suggestions on how to get past this impasse?

MR. BABCOCK: Well, I don't know if we can get past the impasse. But the no additional time, to me, is not workable, number one; and number two, it could work injustice.

CHAIRMAN SOULES: No mandatory additional time.

MR. BABCOCK: No. I took the proposal to be just, you know, you're out of time.

CHAIRMAN SOULES: No. It's no mandatory time required.

MR. ORSINGER: It's discretionary with the trial judge.

MR. BABCOCK: And Rule 252 gives you additional time too. You move for a continuance. A summary judgment hearing is a trial. And if you want to say, "I've got this witness, this witness, and this witness," Rule 252 let's you do that anyway.

HON. SCOTT A. BRISTER: Luke.

CHAIRMAN SOULES: Judge Brister.

HON. SCOTT A. BRISTER: We've gotten off of the issue of what kind of responsive evidence do you need and gotten on the issue of the time. Now, I don't think you can have either a rule of no time or a rule of mandatory time, and you just have to think of a couple of examples: I've got the affidavit on file, but the copy I filed happened to be the one that was unsworn. The secretary made a mistake, and here is the one right here. Sorry, too late to amend the record, because it's a no-time rule. That obviously would be crazy.

On the other hand, a mandatory time has the problems we already discussed. Now, the rule says what to do on that, and it works perfectly well. If it appears to the satisfaction of the court that any of the affidavits, just make that summary judgment evidence, presented -- I'm sorry, that present an affidavit that the party opposing the motion cannot for reasons stated present by affidavit facts essential to justify his

opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained. The long history of what that means, and in some circumstances currently, it probably is mandatory today, but it just depends so much on what we're talking about that I don't think there's a rule or a way to write the rule other than a discretionary continuance.

And then if a judge -- if you've got an expert report and an expert designated and the judge says, "No, that ain't enough to oppose the summary judgment, and no, I'm not giving you a week to get your expert to sign an affidavit saying that that's his or her opinion," I have little doubt the court of appeals is going to find it easy to reverse that. I just think if we start down the road of trying to say when you have to and when you don't, the rule becomes unmanageable.

The question ought to be focused back on what kind of evidence can you use, and we ought to do what we do now, which is if the other party objects to some formal thing, you

say, "Okay. Fine. We're putting off your trial. We're putting off the continuance. I'm extending discovery, and I'm going to make you," if you don't have some good reason to doubt that they can authenticate these records, "keep track of your time," and I'm going to make him pay for it.

MR. GOLD: Now, that's an interesting concept.

CHAIRMAN SOULES: Let me just approach this time thing. I think that the possibility of getting a mandatory time imposed on trial judges in connection with a summary judgment, it's mandatory you must give a party time to do something, that doesn't have a snowball's chance of going through the Supreme Court of Texas. And if they pass it, there's going to be a ground swell of trial judges raising hell about it, and it's going to come back down and they're going to back off of it. And they, the Supreme Court, probably won't let it happen.

But there is a clear precedent in which the Supreme Court has proposed rules, even adopted rules, and a big ground swell comes

back from the trial judges, or actually it was a pretty small ground swell came back from the judges, and they backed off. They said, "Okay. We won't do it."

This mandatory time thing to me is a red herring and it's not going to happen, and I think we ought to be talking about this in the reality, what I think is the reality, that the trial judge is going to have the discretion to grant or not grant additional time for a respondent to do something that they need to do to defeat a summary judgment.

Now, does anyone disagree that that's the reality with which we're faced?

MR. BABCOCK: That's right.

CHAIRMAN SOULES: All right. So let's forget about mandatory time. Let's take it off the table, because it isn't going to happen. Now we're down to summary judgment evidence, which we voted down, so we can take that one off the table, unless somebody wants to go back. I'll just leave it there. Just leave these in here with no mandatory time. Now we've got summary judgment evidence, summary judgment evidence plus the discovery

pool less the burrs; summary judgment evidence plus the same discovery pool, plus information that can be made admissible.

MS. McNAMARA: Luke, just a clarification, are you just changing one by taking "mandatory" out, or are you --

CHAIRMAN SOULES: Yes. We already voted on that. That's (j).

MR. GOLD: So No. 3 is --

CHAIRMAN SOULES: Does anyone disagree with just taking summary judgment evidence out, because we've already voted that down 12 to four?

MS. McNAMARA: Luke, I'm sorry, if you narrow it down to two alternatives, and in the first alternative you had mandatory times --

CHAIRMAN SOULES: There are no mandatory times left in any of them.

MS. McNAMARA: Okay. But the first of the three which had mandatory times remains, you just took "mandatory" out of it?

CHAIRMAN SOULES: Right. We did that by a vote of 11 to seven a while ago.

MR. BABCOCK: Right. But it

had "mandatory" in it.

CHAIRMAN SOULES: That was back when we took four out of seven. We voted that down.

MR. JACKS: May I raise something, which is, if you take mandatory out of all of them, then you can combine two and three, because that was the only thing that made them incompatible.

MR. GOLD: That's right.

CHAIRMAN SOULES: No, that's not right.

MR. JACKS: I think it is, Luke.

CHAIRMAN SOULES: No, it's not right.

MR. JACKS: Well, let me --

CHAIRMAN SOULES: And I can tell you why, because I've got my notes here. Information that can be made summary judgment is in three and not in two.

MR. JACKS: Well, let me say it another way. At this point I think three subsumes two.

MR. ORSINGER: That's true.

CHAIRMAN SOULES: It includes two, that's true. But two does not include all of three.

MR. JACKS: Well, let me -- I'm trying to cut through the business here and see if we can get something that a majority of this Committee can agree on and move on.

If we take -- I think we've kind of got a couple of schools here. If we take, and I want to see if I can state this right, essentially three without mandatory time, that is, summary judgment evidence plus discovery pool without the burrs --

MR. GOLD: Burrless.

MR. JACKS: -- plus the other information, isn't that the old three without the mandatory time?

CHAIRMAN SOULES: Yes.

MR. JACKS: All right.

MR. ORSINGER: Choice one is summary judgment. Choice two is summary judgment plus discovery, and choice three is --

MR. JACKS: No, no. I'm not saying any choices.

MR. ORSINGER: Oh.

MR. JACKS: I'm saying this is a proposition that I would like to put to a vote, pro and con, and see --

CHAIRMAN SOULES: Well, I'm not going to do it that way, Tommy.

MR. JACKS: All right.

CHAIRMAN SOULES: I'm going to take a division of the house on two alternatives and see what we come up with, because I want people to be able to express themselves between the two and not just vote against one or the other.

MR. JACKS: Okay.

CHAIRMAN SOULES: All right. Does anyone want to revisit the vote on restricting the available proof on this party with the burden to summary judgment evidence? Okay. Then we will. Vote just once on each of the three alternatives.

One is to limit the available proof to meet this party's burden to summary judgment evidence. Those in --

HON. SCOTT A. BRISTER: That's not really fairly stated, because the rule has

a provision for getting a continuance if you need to get --

CHAIRMAN SOULES: With the rest of the rule in place. Okay?

HON. SCOTT A. BRISTER: So it's really you're limited to summary judgment evidence with discretionary time to get it that way if you need it.

CHAIRMAN SOULES: All right. Let me --

MS. GARDNER: Even if discovery is closed.

CHAIRMAN SOULES: Okay. The first is the party resisting the summary judgment has the rights of a present party in a motion for summary judgment evidence or a summary judgment practice and no others in terms of putting on proof. Those in favor --

MS. McNAMARA: Are you assuming the discovery window is closed, because we've got a changeable discovery window?

HON. SCOTT A. BRISTER: Either way.

MS. McNAMARA: Is this a new one?

CHAIRMAN SOULES: Either way. Either way. That's -- just what is the pool of evidence or possible evidence that a party has access to or can use that a party can use to defeat a summary judgment under (i), that's one, summary judgment evidence.

No. 2 will be summary judgment evidence plus anything out of the discovery pool after we take the burrs off of it.

Three, summary judgment evidence plus anything out of the discovery pool plus -- I may have not these words right, but it gets the idea -- plus information that can be reduced to a form that would be admissible at a trial.

MR. JACKS: Luke, last time we did that it was not "admissible at trial," it was "summary judgment evidence form."

CHAIRMAN SOULES: May be reduced to summary judgment form?

MR. JACKS: Yeah.

MR. ORSINGER: Yeah. And that would include affidavits, Luke, if you do the other --

MR. HAMILTON: May I ask a

question, Luke?

CHAIRMAN SOULES: Yes, sir.

MR. HAMILTON: Is there any difference in any of those three if you had what Judge Brister said with the understanding that the trial judge always has discretion to allow you to reduce it to summary judgment evidence? That would apply to the discovery pool or other information, so what's the difference?

CHAIRMAN SOULES: Well, the difference is what the judge must consider regardless of whether the judge grants any time. That's what we're talking about here.

MR. ORSINGER: There's another difference too, Luke, and that is that in some instances you're just not going to spend the money to reduce it to summary judgment evidence form. For example, their expert's unsworn report, I will not have to take their deposition under two or three; I will have to take their deposition under one.

CHAIRMAN SOULES: Okay. No. 1, summary judgment evidence and available remedies under the present practice.

Restricted to that, those in favor show by hands. One, two. Two.

No. 2 would be summary judgment evidence plus the discovery pool without the burrs. We can talk about what those are, but probably they're answer to requests for admissions, a party's own answers to requests for admissions and possibly a party's own answers to interrogatories. But anyway, that. It's one plus anything in the discovery pool that we don't exclude.

How many favor that? Five.

And the last is the first two plus information that can be reduced to summary judgment evidence form. It's those two plus that. Those in favor of that show by hands. 11.

MS. DUDERSTADT: 12.

CHAIRMAN SOULES: 12. Okay. The third one carries by a vote of 12 to seven on the other two combined. Okay. So I don't think we need to take another vote because we've got a majority.

So it will be, Judge Peeples, summary judgment evidence unless the respondent

produces summary judgment evidence --

HON. DAVID PEEPLES: Excuse me, Luke, what Richard said was on Line 13, unless the respondent points to discovery or produces summary judgment evidence.

MR. ORSINGER: I think "pointing to" is important.

HON. DAVID PEEPLES: Yeah. This is just the flipside of what the movant is supposed to negate. The movant is supposed to say, "There isn't anything in the discovery," and the respondent says, "Hey, there is, and it's right here."

CHAIRMAN SOULES: I'm on a different problem now.

MR. ORSINGER: Proposal 2 is the flipside. Proposal 3 is broader.

HON. DAVID PEEPLES: Yeah, that's right. But this part of it is the flipside.

CHAIRMAN SOULES: Well, aren't you talking about "submits discovery"? What does "point to" mean anyway?

HON. DAVID PEEPLES: Points out to it. The deposition of Joe Jones, page so

and so, lines so and so.

CHAIRMAN SOULES: Okay.

HON. DAVID PEEPLES: Or the memo from defendant's corporate office dated so and so, Bates numbered this and that.

HON. SCOTT A. BRISTER: You can just identify it the same as you do when you make the movant do it in Line 9.

HON. DAVID PEEPLES: The hard part of this is "information that could be put into summary judgment evidence form."

MR. ORSINGER: Luke, we have a provision for pointing to unfiled discovery right now.

CHAIRMAN SOULES: Where is that?

MR. HATCHELL: (d).

MR. ORSINGER: (b) as in boy?

MR. HATCHELL: (d).

MR. ORSINGER: (d) as in dog.

MR. HATCHELL: That's why I don't understand the distinction between summary judgment evidence and discovery pool. In (d) -- the only place in the whole rule where the words "summary judgment evidence"

are used is in (d), which relates to all discovery products.

MR. ORSINGER: Well, Mike, would you think that an unauthenticated business record is --

MR. HATCHELL: Absolutely. That's what (d) says.

HON. SARAH DUNCAN: Yeah.

MR. ORSINGER: -- summary judgment evidence?

HON. SARAH DUNCAN: This has been my problem all morning, and I've gone and read on it, is that I don't understand why, if the expert's report is produced in response to a request or a deposition, it's under subsection (b), isn't it?

MR. HATCHELL: You write them a letter in intention, and it is, quote, summary judgment evidence.

HON. SARAH DUNCAN: Okay. I don't care. Now I understand.

MR. ORSINGER: Well, then summary judgment evidence is broad enough to include the discovery pool.

MR. HATCHELL: Read (d).

MR. ORSINGER: Well, I read (d), and it's not as clear to me as it is to you, but then that doesn't surprise me.

MR. HATCHELL: Well, the answer to your question, Richard, is in (d).

MR. ORSINGER: What if there's a hearsay objection?

CHAIRMAN SOULES: Well, I don't know whether we need to do anything -- in light of (d) -- whether we need to do anything about discovery products, but the operative -- the verbs in (d) are better than "points to," I think.

HON. DAVID PEEPLES: Okay. How about "makes specific reference to"?

CHAIRMAN SOULES: "Copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed," so you're either given copies or given notice of copies of where it is. So it may be that all we're talking about is summary judgment evidence in light of the breadth of (d), as Mike understands it anyway, and the thing

we're adding is, I guess, material --

MR. JACKS: May I try some language out on you?

CHAIRMAN SOULES: Okay. Go ahead, restricted to the information, the kind of information we need.

MR. JACKS: Well, what I suggest is -- I mean, the dilemma here is that (d) appears to say that if it's discovered information, then it's summary judgment evidence. But I know plenty of trial judges who will say, if I attach documents that I obtain in discovery but with no authenticating affidavit because they're the other side's documents and I can't authenticate them and without going out and taking depositions I can't make them authenticate them, and if there's an objection filed, they say, "Well, Counsel, that's not summary judgment evidence and I'm not going to consider it."

And that's why, Mike, I for one would be reluctant to say that (d) takes care of me.

So what I propose is to say, change the period at the end of the sentence that ends on Line 13 to a comma and say "or" -- and the

verb I use is "produces" and if we want to come up with another one, that's fine, but I don't think it's burdensome to produce it if you've got it by virtue of discovery -- "or produces other information, including information obtained in discovery, which raises a genuine issue of material fact even though not in proper form for summary judgment evidence."

That includes discovery information and non-discovery information. I'm also assuming that we will continue to assert the words "summary judgment" before the word "evidence" on Line 13.

CHAIRMAN SOULES: Okay. Read it to me again, Tommy.

MR. JACKS: Okay. Let me read -- all right. Starting at the beginning of Line 13, "respondent raises summary judgment evidence raising a genuine issue of material fact, or produces other information, including information obtained in discovery, which raises a genuine issue of material fact even though not in proper form for summary judgment evidence."

Well, the word "including" means including but not limited to, I think. I mean, I think we can assume that without having to say --

MR. HAMILTON: Luke, can I try something out?

MR. JACKS: Well, the reason I think you need it is because I think otherwise you've got a question of whether (d) gets you there or not, and this makes it explicit that (d) does get you there without having to prove it up in authenticated form.

MR. GALLAGHER: Tommy, listen to this and see if this gets us to where we're trying to go.

MR. JACKS: Yeah.

MR. GALLAGHER: The court shall grant the motion unless the respondent produces summary judgment evidence, then beginning here, or other information which, if in summary judgment evidentiary form, would raise a genuine issue of material fact, or other evidence which, if in summary -- or other information which, if in summary judgment evidentiary form, would raise a

genuine issue of material fact.

MR. ORSINGER: You don't need your "which" clause. It doesn't add anything, does it?

MR. GALLAGHER: Well, they were trying to limit it somewhat to avoid "I know that there's an expert out there somewhere who can controvert or who will raise an issue of fact as to the question of defect."

MR. ORSINGER: Maybe you need to say "which can be reduced to summary judgment evidence form" or "could be reduced."

CHAIRMAN SOULES: Let me try this. Okay. Right where Tommy started and Mike too, "produces summary judgment evidence," after that, "or discovery product or other information that can be reduced to summary judgment evidence form," and then pick up "raising a genuine issue of material fact." I think that --

MR. GOLD: Would you read that one more time?

CHAIRMAN SOULES: Okay. We're going to modify "evidence" with "summary judgment," okay, evidence. So it will be

"summary judgment evidence" right there after that word which is now the third word of 13, "or discovery product or other information that can be reduced to summary judgment evidence form." That's it.

HON. DAVID PEEPLES: Question.

CHAIRMAN SOULES: Judge Peeples.

HON. DAVID PEEPLES: The respondent says, "I'm going to be able to get a witness to testify to that. I've talked to an expert, and I'm going to be able to get him. I haven't done it now."

Now, that's information that, if you can get it, you can get it in summary judgment form.

MR. GALLAGHER: No, no. Can I try to speak to that?

HON. DAVID PEEPLES: Yeah.

MR. GALLAGHER: There is no way you can put that information in summary judgment form. So what if I write a letter saying, "I'm going to get a witness, Judge, that is going to establish defect or medical causation." There's nothing I can do to

refine that or ever get that in admissible form.

Now, conversely, if I have a letter from an expert that says there's a product defect or that the injury was caused by the negligence of the treating physician and I offer that at a summary judgment hearing, now, that's evidence that can be reduced to summary judgment form.

HON. DAVID PEEPLES: It's got to be specific.

MR. GALLAGHER: If I only say I'm going to go find somebody like that, I can never reduce the substance of that statement to admissible form.

HON. DAVID PEEPLES: That is specific information.

MR. ORSINGER: How about existing information?

MR. GOLD: I think that's important, and that's what Judge Brister was bringing up before, and I think there's a real important distinction to make. And I think that Mike is right, is, in response to Judge Brister earlier, if you have a hospital

emergency room record that has a statement by a nurse with initials or whatever that says, you know, somebody said this or whatever, that would be information that isn't in admissible form but could be reduced to admissible form through a deposition or something.

But I agree with everybody who is saying, you know, what happens if the attorney says, "Oh, I can go out and get it." I think without any specific item showing that something probably exists out there, that doesn't cut it. That doesn't cut it. I agree with that.

CHAIRMAN SOULES: Well, how about this: The present rule on the discovery not on file, which obviously has some limitations, but it speaks about "material." I guess under the present practice, if you don't have deposition testimony and what you're trying to do is either sustain or defeat a motion for summary judgment with testimony, you've got to do it with an affidavit because there's going to be testimony. What's wrong with leaving that as it is?

MR. GOLD: Say that again. What rule are you reading?

CHAIRMAN SOULES: Well, it's under (d). But if you -- there really isn't a place other than in affidavits to augment deposition testimony with other testimony.

MR. ORSINGER: Luke, I may not understand your proposal, but I certainly wouldn't want to be limited to choosing between an affidavit or a deposition, because that would force me to get a deposition of everyone that is not under my control, even if I have demonstrable evidence of what their information is.

CHAIRMAN SOULES: Well, that's the material that I think of when it's talking about material, documents or something. In other words, if we say "discovery product or other material that can be reduced to summary judgment form" and not information, "material" then being a narrower category, something probably physically existing as opposed to --

MR. ORSINGER: But it would include an unsworn statement in writing or a tape recording or an expert's report or an

unauthenticated business record?

CHAIRMAN SOULES: Yes, I think so.

MR. ORSINGER: If it includes all of that, I'm happy with that.

MR. HAMILTON: Why don't we just use the word "evidence"? Evidence can be reduced to admissible form.

MR. GOLD: I think "evidence" creates a whole panoply of problems. I mean, that's what we've been trying to gravitate away from, is the term "evidence," because of the connotation that it is something that is admissible at trial.

I think Richard's suggestion is very efficient. I think that it gets done what we need to get done, is that we have something that can be reduced to admissible form in support of the summary judgment.

CHAIRMAN SOULES: The issue here is whether that has to be something that physically exists or something that's just a statement, "I have a witness." If it's just a statement, "I have witness," that guts this whole thing.

MR. GOLD: I agree.

CHAIRMAN SOULES: It makes (i) basically useless, and that's not going to fly.

MR. GOLD: I don't think anyone disagrees with that.

MR. ORSINGER: What if a party is willing to swear that a witness who has not been deposed for which there's no written statement told them X, is that material? If the plaintiff says undeposed, no written statement, "Witness Y told me so and so," is that enough to beat a motion?

CHAIRMAN SOULES: It would be if it was in a deposition, I guess.

MR. ORSINGER: Or in an affidavit? It would be hearsay, because my client is repeating what someone told them, but it's under oath in an affidavit and presumably hearsay is not a problem at that point.

CHAIRMAN SOULES: I don't know. I don't know. I'm not going to -- that's a knotty question. I don't know how to deal with that. I don't know what the answer

to that is.

MR. ORSINGER: That's a burr that Judge Brister is going to file off.

CHAIRMAN SOULES: All right. Or discovery product or some other something that can be reduced to SJE form. Is that something going to be information, material or some other word?

MR. GOLD: Data?

MR. JACKS: No. "Data" is pretty specialized. I mean, it connotes something that's quantitative.

MR. GOLD: Items? I can't think of --

MR. JACKS: I think "material" is not a bad stab at it.

MR. GOLD: Actually "material" is probably a pretty good word, because testimony and stuff like that isn't going to support it anyway, oral testimony. "Material" gives the connotation of something that is tangible, physical, a document or thing.

MR. JACKS: Yeah.

CHAIRMAN SOULES: Okay. Vote on this: The court should grant the motion --

or must grant the motion, I guess.

MR. JACKS: Yeah.

CHAIRMAN SOULES: The court must grant the motion unless the respondent produces summary judgment evidence or discovery product or other material that can be reduced to summary judgment evidence form raising a genuine issue of material fact.

Those in favor show by hands. 13.

Those opposed. One.

13 to one. Okay. That takes care of that. Now, going to Chip's -- I don't know whether to take Chip's burr first or Judge Brister's burrs or Paul's.

MR. GOLD: I'll defer to Chip.

CHAIRMAN SOULES: Do we want to except from this sentence, express an exception in this sentence, responses to requests for admissions, a party's own responses to requests for admissions? Is anybody in favor of that?

HON. SCOTT A. BRISTER: Luke, I mean, the vote is that we take summary judgment evidence or information? Is that what we just voted for?

CHAIRMAN SOULES: Material.

MR. McMAINS: Or discovery product.

HON. SCOTT A. BRISTER: Or discovery product. Okay. Because if we're staying with summary judgment evidence, I don't know why, but it's pretty clear to me that your denial of your own request for admission is not summary judgment evidence but the other side's denial is. And if we're not tinkering with what we've all understood to be summary judgment evidence before, then we don't need to write a bunch of rules to reinvent the wheel now.

But to the extent we're adding -- kind of the reason we're doing (i) rather than revamping the rule, like I wanted to do, is if we're adding fewer new things, then I don't feel the need to go into all the burrs, as you call them, because those burrs are not currently a problem. We all know what is and what ain't summary judgment evidence.

CHAIRMAN SOULES: Well, just leave that for defintion under 166a(c) and (d), and there is no exception expressed in

those right now.

HON. SCOTT A. BRISTER: I was just concerned that when you add the language "discovery products" that hasn't been there before, then that raises the question, "How about my denial to requests for admissions?"

MR. GOLD: May I address that?

CHAIRMAN SOULES: Well, it says that the judgment sought shall be rendered forthwith if other discovery responses are referenced. It doesn't say except anything. That's in (c).

MR. ORSINGER: But isn't it inherent that a denial of a requested admission proves nothing, it just refuses to admit something?

CHAIRMAN SOULES: This is what it says right now, "discovery responses on file can be used," and the law is some can't. Why don't we just leave it alone?

MR. ORSINGER: Then we have a problem already.

MR. GOLD: The only other clearer way to do it would be just make it clearer in the law that a denial cannot be

used as either evidence at trial or summary judgment evidence.

CHAIRMAN SOULES: If we tinker with that, we're going to get back into 166a(c), and we've decided to leave the summary judgment rule alone. So we're either going to have different words here or we're going to say summary judgment evidence is what it is in (c) and (d) and go on with it, whatever it is under the current law. Is it okay to leave it alone?

MR. ORSINGER: I think so.

CHAIRMAN SOULES: Does anybody disagree? Okay. That's going to be left alone.

Next is -- Paul, I've forgotten what your other issue was.

MR. GOLD: If I had an issue, it's gone. Judge Brister said something a while ago that at some point it would be interesting pursuing and it probably ties in with Chip, which is if somebody who is moving moves to force someone to reduce something to summary judgment evidence when it was clear, obvious, that it could be that similar to a

request for admission the party should have to pay the expense of that. But that ties into what Chip has to say, so that's the only thing I would say.

CHAIRMAN SOULES: Okay. So now we go to Chip on attorneys' fees. Chip.

MR. BABCOCK: Well, what Paul just said is different. You know, I think that the rules probably ought to discourage chicken-shit conduct, but that's not what I view this thing as. This sentence talking about awarding attorneys' fees if the motion did not have an objectively reasonable basis is a deterrent to filing motions for summary judgment of that this type. And we've put a lot of bells and whistles on this rule that are making it more and more unattractive for anybody to even want to mess with trying to file a motion for summary judgment on this basis. I mean, you've got to wait until discovery is over. You may not even get it heard before the trial date. If you do get it heard, it may be right bumping up on trial. There are a lot of reasons why you wouldn't even mess with subpart (i).

And an additional one is this attorneys' fees thing. It seems to me that we have provided in the rules in general and now there's even a part of the Civil Practice and Remedies Code that provides a remedy if somebody thinks that a frivolous motion or a motion that deserves being sanctioned is filed by a party to a litigation. This thing is going to create more litigation and I think it's going to discourage some motions being filed.

CHAIRMAN SOULES: Okay. Well, without this sentence there, (i), that was a piece of the boilerplate that was put on (i) in order to get anything passed. The Committee would not have passed it otherwise.

Does anyone want to change their position on that?

MR. BABCOCK: Well, there have been a lot of compromises that were struck that have been discarded today.

CHAIRMAN SOULES: In light of a compromise, does anyone want to change their position on this?

Okay. I hesitate to do this, but it

seems to me to be appropriate. In light of the fact that we're opening up for material that can be reduced to summary judgment evidence form, should the last sentence include the possibility of sanctions against a respondent? Does anyone have any interest in talking about that? No one does.

HON. DAVID PEEPLES: For doing what?

CHAIRMAN SOULES: If the response did not have an objectively reasonable basis at the time it was filed.

MR. ORSINGER: Well, your response is not an allegation. Your response is pointing out specific existing stuff.

CHAIRMAN SOULES: Okay. Does anyone have any interest in doing that? No one does, so we don't need to talk about it.

Okay. Those in favor -- well, we'll figure out what it to call it in a minute. Those in favor of (i) as now modified show by hands. 13.

Those opposed. One.

Okay. We have a vote of 13 to one.

Do you like -- those in favor -- there

are two titles here, Motion Asserting Respondent's Liability to Raise Fact Issue after Discovery Period; No-Evidence Motion after Discovery Period. These in favor of the first show by hands.

MR. YELENOSKY: What was that?

CHAIRMAN SOULES: Look at the top in bold, the alternative titles. Those in favor of the first show by hands.

Those in favor of the second show by hands.

Okay. There were no votes for the first. The second carries.

MR. YELENOSKY: Could you read the final language we came up with again?

CHAIRMAN SOULES: There were votes for the second.

Now, the comment, I guess, needs a little bit of modification, but other than to modify it to take care of the changes that we made, does anyone have any other requests or comments about the comment?

Okay. There are none. And Judge Peeples, if you can just make that fit the changes we've made, then that's unopposed as

well.

MR. HAMILTON: Luke, I'm wondering if that word "period" in the title ought to be taken out, because there's two kinds of discovery, not just a discovery period.

CHAIRMAN SOULES: The way this is -- "period" is used in both places, any applicable discovery period, or after a period set by the court. So it's either going to be --

MR. HAMILTON: So it can be any period then?

CHAIRMAN SOULES: Either way it's going to be a period. Does that answer your question? Is that helpful?

MR. HAMILTON: Yes.

CHAIRMAN SOULES: All right. We have a summary judgment rule, and that will not come back to the Committee unless somebody disagrees with that, and we will get the final product from Judge Peeples incorporating these changes and send it to the Supreme Court. Is there any objection?

HON. DAVID PEEPLES: Could I

have the sentence at Lines 12 and 13 read verbatim one more time, please?

CHAIRMAN SOULES: This is it: Beginning just to the left -- or to the right of the middle of Line 12 with the words at the first of the sentence, "The court must," picking up the language, "grant the motion unless the respondent produces," insert the words "summary judgment," and then leave your word "evidence," followed by this insertion, "or discovery product or other material" --

HON. DAVID PEEPLES: Materials?

CHAIRMAN SOULES: Other material. One material.

HON. DAVID PEEPLES: Okay.

CHAIRMAN SOULES: I mean, it's singular in the other rules. That's what I'm referring to.

HON. DAVID PEEPLES: Okay.

CHAIRMAN SOULES: -- "that can be reduced to summary judgment evidence form."

PROFESSOR ALBRIGHT: Excuse me, Luke, can you repeat that, please?

CHAIRMAN SOULES: In a minute. The other change will be to change "paragraph"

to "subdivision," change "shall" to "must" where appropriate. Otherwise, it's as written.

Okay. Judge Peeples, you have that, don't you?

HON. DAVID PEEPLES: I think so.

CHAIRMAN SOULES: Okay. Now I'll read the sentence. "The court must grant the motion unless the respondent produces summary judgment evidence or other" -- I'll start over.

"The court must grant the motion unless the respondent produces summary judgment evidence or discovery product or other material that can be reduced to summary judgment evidence form raising a genuine issue of material fact."

The sentence runs from beginning to end with no punctuation except for a period at the end.

Okay. Now let's go to the --

MR. ORSINGER: Well, before we leave it, can we request that the final version be distributed to the Committee at the

same time that it's forwarded to the Supreme Court?

CHAIRMAN SOULES: Absolutely, sure. Holly will make a note to do that. When we send it to the Court, we'll send you a copy of the transmittal. And if you find a flaw, let us know and I'll correct it and resubmit it.

Okay. 18a. We'll go to maybe another noncontroversial subject. We have two versions. We have the subcommittee version and Judge Brister's version. I guess in deference to the subcommittee chair, who wants to report on the subcommittee's version? Is that your responsibility, Richard?

MR. ORSINGER: Yeah, it is my responsibility. But the subcommittee's version caught so much flak that Judge Brister came up with the alternative, and I think that our focus was to look at his alternative rather than looking at the subcommittee's version.

Now, you asked me to do a red-line of Judge Brister's version, but when I sat down to try to do that, it was so radically

different from 18a or 18b that it would be pointless or even impossible to do a red-line. So Luke, I feel like we need to just look at his version and compare them as best we can, because it's a consolidation of two long rules, a mixture or consolidation, so I couldn't do a red-line.

HON. DAVID PEEPLES: Where is your version?

MR. ORSINGER: Well, I don't know that I made more than two copies of it.

HON. DAVID PEEPLES: Okay.

CHAIRMAN SOULES: What was the controversy over the subcommittee's version?

MR. ORSINGER: Well, Lee drafted that, and --

HON. SCOTT A. BRISTER: Most of the things are addressed in my letter to you or some of them. Some of them are listed in that letter to you that I have tried to address.

CHAIRMAN SOULES: Let's see if I have that. "Enclosed please find my redraft," and then sort of where you go paragraph by paragraph, is that it, Judge?

HON. SCOTT A. BRISTER: Right. As you recall, Lee had the subcommittee version that had lots of footnotes, and I tried to address those footnotes as well as a couple of other things in my letter.

CHAIRMAN SOULES: Well, I think there are some material omissions, Judge Brister, in your draft.

HON. SCOTT A. BRISTER: That's great.

CHAIRMAN SOULES: For example, it doesn't say what happens when there is an emergency that has to be addressed by a court whenever the trial judge can't serve.

HON. SCOTT A. BRISTER: Sure it does.

CHAIRMAN SOULES: Where?

HON. SCOTT A. BRISTER: Interim proceedings, (d)(3).

CHAIRMAN SOULES: (d)(3)?

HON. SCOTT A. BRISTER: I'm sorry, it's -- well, hang on a second, you may be right.

MR. ORSINGER: I'm not sure I understand the situation you're describing.

CHAIRMAN SOULES: Years ago when we did this there were a lot of concerns. One of the concerns was, and it was articulated in terms of family law practice and then in terms of TROs and that sort of thing, where there is no other judge, except the judge who has been challenged, to do something that has to be done.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: And this says, the old rule says that if the judge states his reasons in his order, he can do that.

MR. ORSINGER: I see.

CHAIRMAN SOULES: And it also says that the regional judge can do that. Either one of those judges can act in emergency circumstances to take care of a party who is in need.

MR. ORSINGER: And that's essential.

CHAIRMAN SOULES: I think it is essential.

HON. SCOTT A. BRISTER: I agree. I don't know what I did with it.

CHAIRMAN SOULES: And that's what --

HON. DAVID PEEPLES: Well, there's also a statute that says you can go across the county line and find a neighboring judge.

CHAIRMAN SOULES: Okay.

HON. SCOTT A. BRISTER: Here you go, it's (d)(4), under "Hearing." It says the regional judge assigns somebody, sends notice, and may make such other orders including interim or ancillary relief as justice may require.

CHAIRMAN SOULES: Okay.

HON. SCOTT A. BRISTER: And my thought on that was, well, that's just carried over from the current rule.

CHAIRMAN SOULES: But it doesn't say that the challenged judge can act in an emergency.

HON. SCOTT A. BRISTER: Yeah.

CHAIRMAN SOULES: And state the reason in his order.

HON. SCOTT A. BRISTER: And that's one of the things we need to discuss.

It was my thought that if the judge -- especially if the judge is disqualified, you know, say, "Oh, well, you go ahead and do it anyway because you really need to," as opposed just to saying, you know, the regional judge, this is what they're paid -- how much, David? 30 percent extra?

HON. DAVID PEEPLES: I don't know.

HON. SCOTT A. BRISTER: To be available for that stuff.

MR. ORSINGER: Whatever it is, it's not enough.

HON. SCOTT A. BRISTER: But that's one of the things we do need to discuss.

CHAIRMAN SOULES: Well, notwithstanding this rule, if that judge acts, he has already ordered it. What about a recused judge?

HON. SCOTT A. BRISTER: Well, can we --

CHAIRMAN SOULES: Okay.

HON. SCOTT A. BRISTER: It seems to me we need to address this and go

through this.

CHAIRMAN SOULES: Okay.

HON. SCOTT A. BRISTER: As well as lots of other questions. If I could make just a brief introduction.

CHAIRMAN SOULES: Let's do that.

HON. SCOTT A. BRISTER: It's best to look at the one that's November 7th, my letter to Luke. And for comparison, the second and third pages from the back have the existing rule on the left and the proposed redraft on the right.

Two things primarily were focused on. One was the problem from the attorney's perspective of what to do when it comes up at the last minute, the perceived problem with the 10-day cutoff. You have to recuse more than 10 days before the hearing.

Number two is, I have redrafted a bunch of stuff, and I think part of it was to make it shorter or simpler. If I could just say, this is a big-city judge thing. It's a bit difficult for me to explain to you why this needs to be done if you're not a big-city

judge because you probably don't see it that much. We see this a lot. We see it not from people like the people in this room. We see it from the people -- they tend to be filed by the scofflaws and the problem people who are not on this Committee, and it's a big problem.

If I could give you just a brief example without naming names, we have a new administrative presiding judge, not in Harris County, and the first few months when he took over, these things -- the hearings were set months off. This was no big deal until on one of the cases where the recusal came up the second time similar to the grounds of the first time when it was denied along with a motion to recuse the new judge that -- recuse the judge that we lost on before as well as the new judge who would be assigned to hear it as well as the presiding judge from assigning anybody to do it. Well, by that point the administrative judge is getting the picture that this is a game in many circumstances, it and has to be treated differently in the city than it is in the country.

So with that background, probably it would be best to go through the letter because that follows the order.

One of the problems with the order is -- you know, it's two different rules now that's recusal, not one. It's 18a and 18b, and nobody evers remembers which one is which. But they're backwards, because the grounds for disqualification is the second rule and how to do it is the first rule, so all the definitions are after the procedures on how to do it. And it seems to me that ought to be the other way, so that's the way I've listed them on that comparison, 18b first and 18a second.

The first proposal was to replace or just to switch the term "economic interest" for "financial interest." That's because the definitions in the rule are taken almost word for word from the Code of Judicial Conduct, except the Code of Judicial Conduct is -- uses the term "economic interest." And that's just to make it parallel with -- because all of these things are very parallel.

Obviously, in circumstances -- this is

closely tied with the Code of Judicial Conduct because if I'm not supposed to be acting for ethical reasons then I ought to be recused for procedural reasons and vice versa, so the two ought to at least use the same term, especially if they're defining it in the same way.

Do you want me to go through all of these or do you want to just see if there's discussion on each one or what?

MR. McMAINS: Let me ask you, doesn't the current rule use "financial interest"?

HON. SCOTT A. BRISTER: Yes.

MR. McMAINS: And that's because the current rule -- because that is in the Constitution. Isn't that the reason?

HON. SCOTT A. BRISTER: The Constitution is on the last page of that letter, and it does not say "financial" or "economic." It just says "interest."

MR. McMAINS: Wasn't there a Supreme Court case that said it meant financial interest?

CHAIRMAN SOULES: Said what,

Rusty?

MR. McMAINS: I mean, I thought the reason that that term was used was because there was a Supreme Court case saying that means a financial interest.

CHAIRMAN SOULES: That's right.

MR. McMAINS: I'm not saying that it's any different, I'm just saying that if you're wondering why we used a term that may be different than the judicial canons, my recollection when we first did this rule is we tracked the Supreme Court case that says this is what the Constitution means.

HON. SCOTT A. BRISTER: But this is not a tricky deal. There's no hidden agenda. If you want them both to be economic interest or if you want them both to be financial interest, it doesn't matter to me. It just seems like if they're identical they ought to be identical.

MR. McMAINS: My concern, I guess, would be, and I don't know the answer to this, but to me, an economic interest is perhaps a broader interest than a financial interest in my just gut perception. I tend to

think of a financial interest as someone who has a financial interest in the outcome of a particular case, whereas a person may have an economic interest if it affects a general area.

Let's say it's an oil and gas case and the person has oil and gas royalties that have nothing to do with this particular case. You can have an economic interest in the outcome of a particular suit, but I'm not sure that you would necessarily have a financial interest in my perception of that term.

And I don't know if that's -- I don't know that "financial" is really such a word of limitation as I'm suggesting, but I seem to think that "economic" -- I mean, it just strikes me that "economic interest" is a slightly broader notion or would appear to broaden the notion.

MS. GARDNER: Luke, this is Anne Gardner. May I speak?

CHAIRMAN SOULES: Yes. Anne Gardner.

MS. GARDNER: I just think from the average practicing lawyer's point of view

that if they see that a change in terminology has been made, judges and lawyers who are not privy to this Committee's thinking will automatically assume that there is a reason for the change and will make a distinction, even if it's not there.

HON. SCOTT A. BRISTER: Well, if there is a distinction, you've got a problem, because it's unethical, but I can still rule on the case? I mean, if you can't rule -- the rules about what you can and can't do power-wise ought to be the same as the rules for what you can and can't do ethical-wise.

CHAIRMAN SOULES: I don't think there is an ethical issue on this anymore, Judge. I think 3(c) of the Code of Judicial Conduct was repealed, and that's why we have (b) out of order with (a), because (b) was created after (a) when 3(c) was still in place, and the Court wanted to move 3(c), wanted to delete 3(c) and take it out of the ethical issues and just make it a recusal question.

HON. SCOTT A. BRISTER: Well,

the voluminous definitions that are currently in 18b are word for word from the Code of Judicial Conduct right now.

The definition of "fiduciary" -- I mean, (d) defines financial interest using the same terms that the code does to define economic interest. I'm puzzled how anybody would find a distinction when the definitions are identical.

CHAIRMAN SOULES: Okay. Let me see that. Is there a Code of Judicial Conduct rule on this anymore? I don't think there is. It used to be 3(c). I don't know whether that really matters, but I don't think it's an ethical violation for a judge to serve when he should be recused anymore, at least not under the CJC.

And then getting to Rusty's point, this Cameron vs. Greenhill says it is set in principle, this is a constitutional case, that the interest which disqualifies a judge is that interest, however small, which rests upon a direct pecuniary or personal interest. That's a Supreme Court case.

MR. McMAINS: Actually, Luke, as

I look a little closer, is this 18b? Isn't this, Judge, our current rule? Isn't that right?

CHAIRMAN SOULES: Yes.

MR. McMAINS: We actually didn't qualify interest at all when we dealt with the disqualification issue initially. And 18b(1), those are straight out of the Constitution. We don't attempt to define it. That's where we had the debate. We had a debate as to whether to define the interest as pecuniary or personal or economic or whatever, and we didn't define it there because the language in the Constitution was simply "interest."

And I think that we didn't put a limitation on it there, although we did -- although I guess you did over here.

HON. SCOTT A. BRISTER: I have suggested doing that. That's old No. 2.

CHAIRMAN SOULES: It's in 18b now.

HON. SCOTT A. BRISTER: In the recusal, but not in the disqualification.

MR. McMAINS: It's not in the

disqualification.

HON. SCOTT A. BRISTER: This is another problem with 18b and 18a. Nobody can find anything in them. It's like current Rule 215; it's been added on to so many times it's hard to follow.

CHAIRMAN SOULES: Yeah.

HON. SCOTT A. BRISTER: "Financial interest" appears in 18b(2)(e).

MR. McMAINS: Right. But that's under recusal, and not disqualification

HON. SCOTT A. BRISTER: Right.

MR. ORSINGER: Is it agreed that financial interest is a constitutional ground for disqualification?

HON. SCOTT A. BRISTER: Now, "interest" is.

MR. McMAINS: Yes. But it is also probably more than that, because a personal interest is also a ground for disqualification.

CHAIRMAN SOULES: It is.

MR. ORSINGER: Because the Constitution just says "interest" and doesn't say economic, financial --

MR. McMAINS: Because it says "interest," and because the Supreme Court case he just talked about said pecuniary or personal. And that's the reason why we didn't limit it to financial or economic the first time we wrote it.

CHAIRMAN SOULES: That's correct.

MR. ORSINGER: So personal might be if the judge's child was a party and even though he may not be liable --

MR. McMAINS: Or his great-great-great-great-grandchild.

HON. SCOTT A. BRISTER: Look at the next section. Drop ahead to No. 3 on the next section where I proposed changing the disqualifications to be in line with the case if financial. Cameron vs. Greenhill is where the Court approved the fee added to the State Bar fee to build the building we're sitting in. And a lawyer who didn't want to pay the extra fee moved to recuse the court because they approved the fee and he thought it denied his rights, et cetera, and moved to recuse them because they had an interest, not a

financial one; they didn't gain anything directly financially. And the court said no, that's not the interest we're talking about.

In Belo vs. SMU, the judge was a member of the Pony Club or -- what is it, Bill?

PROFESSOR DORSANEO: The Mustang Club.

HON. SCOTT A. BRISTER: Okay. And because he was an SMU booster, it was alleged, well, he can't be fair on the case against SMU because you're a booster and it has to do with athletic improprieties, and the Court said no, there's no pecuniary interest. Just being interested in seeing the Ponies do good is not the interest that the Constitution is talking about.

So I agree with Rusty, the term in the Constitution is "interest," but it has in all cases been defined by the Court to be financial or economic interest, so whichever one you want to call it.

MR. McMAINS: Well, except that the actual language in Greenhill is pecuniary or personal.

HON. SCOTT A. BRISTER: Direct.

MR. McMAINS: I understand.

MR. ORSINGER: The language where?

MR. McMAINS: I mean, I don't know what a direct personal interest is, but --

CHAIRMAN SOULES: Cameron vs. Greenhill.

HON. SCOTT A. BRISTER: I think they say that because they don't want to get in the taxpayer problems. In the taxpayer cases you do have an infinitesimal pecuniary interest, but they've always held that the judge can rule on the taxpayer cases anyway because it's too remote.

MR. McMAINS: Too remote, yeah. But that's the direct motivation, that's not the personal or pecuniary.

HON. SCOTT A. BRISTER: That's the direct question, yes.

CHAIRMAN SOULES: Richard.

MR. ORSINGER: Can I ask for an example of what a personal interest would be that would disqualify that is not consanguinity or affinity?

MR. McMAINS: Well, it could be a stepson or a stepdaughter.

MR. JACKS: A girlfriend.

MR. McMAINS: Or whatever. I mean, somebody that's not related that's an adult that's not living in the home, you know. It could be from a divorce. I mean, you wouldn't be in the same degree of consanguinity or affinity.

CHAIRMAN SOULES: Let me say this: Say it's a direct pecuniary, if you use these words, direct pecuniary or personal. Okay? The judge is construing a mineral deed or a royalty deed which is identical to a mineral or royalty deed which is in the judge's chain of title for his financial interest. And if he rules one way, his chain is good. If he rules the other way, his chain is bad.

HON. SCOTT A. BRISTER: Interestingly, the --

CHAIRMAN SOULES: It's not his direct interest in this case.

MR. ORSINGER: Would that be personal?

HON. SCOTT A. BRISTER: Interestingly, the Court has held no problem. There was a condemnation case where the judge was allowed to preside over the condemnation when he had the neighboring property with the same highway or whatever it was going through and he was allowed to preside over the neighbor's condemnation case as to the value of the land condemned because it had no direct financial or pecuniary, et cetera, interest. Well, it seems to me, remember, we're just talking about constitutional disqualification. There's still recusal for a list, a long list of reasons that may or may not apply.

CHAIRMAN SOULES: Okay. To bring this into focus, what we're talking about is, do we modify the word "financial"? Do we want modify the word "financial" in the rule given that it's not modified in the Constitution? That's the issue. Anne Gardner.

MS. GARDNER: Well, if the word "financial" is not in the Constitution --

CHAIRMAN SOULES: Yes, it is.

It's in Article 5, Section 11, I think.

HON. SCOTT A. BRISTER: No, it's not.

CHAIRMAN SOULES: Oh, it just says "interest."

HON. SCOTT A. BRISTER: In the first line, the judge is not interested in the case.

CHAIRMAN SOULES: Interest. If I said "financial," I misread this.

MR. ORSINGER: If I understand this, what Judge Brister has done is he has said the Constitution says only "interest," but the cases seem to limit it to economic interest, and therefore, he has taken the license of putting "economic" on there because the Supreme Court appears to have done that.

HON. SCOTT A. BRISTER: That's correct. I am trying to conform it to existing law, not change it.

MR. ORSINGER: So in my view the debate here is whether this ought to be in the language of the Constitution or in the language of the Constitution as it appears to have been interpreted by the Supreme Court.

To me, that's the choice.

MR. McMAINS: The problem is, whatever the rule says, the court doesn't have -- theoretically doesn't have the power to change the Constitution.

MR. ORSINGER: That's right.

MR. McMAINS: So if somebody wants to take the position that a judge is disqualified on a constitutional basis --

MR. ORSINGER: -- this rule is irrelevant.

MR. McMAINS: -- based on an interest and he moves for an interest that is not economic, then he would still have the capacity to complain that "You can't hear my case. You have no power to rule in my case under the Constitution." And what the rules say doesn't make any difference once the court is faced with that issue.

MR. ORSINGER: That's correct. This paragraph (a) is only in here for informational purposes. It doesn't really affect the legal issues. We could add 15 paragraphs and it wouldn't affect the legal issues.

CHAIRMAN SOULES: So the question is, do we put any modifiers in front of "interest" or do we just say "interest"?

MR. ORSINGER: That's what I think.

CHAIRMAN SOULES: What?

MR. ORSINGER: That's the question.

CHAIRMAN SOULES: That's the question. Okay. Those in favor of --

HON. SCOTT A. BRISTER: It's like with 215, the argument for putting Transamerican into Rule 215 is because it's the law, and if you just read the rule, you're getting the wrong idea of what the law is. The argument for putting "financial" in here is not to take anything away that the Constitution gives you but to inform you of what the law is.

CHAIRMAN SOULES: Okay. That's the argument. Let me just see -- okay. In (a)(2) the fifth word, economic, first of all, regardless of the debate whether it's financial or economic, let's vote whether there should be any modifyier.

Should there be any modifyier ahead of the word "interest" under (a)(2)? Those who think there should be show by hands. Three.

Those who are opposed show by hands. Seven. Seven to three, no modifyier.

MR. ORSINGER: Luke, are (1) and (3) true to the Constitution as written, or do they have embellishments?

HON. SCOTT A. BRISTER: I'm fixing to get to that.

MR. ORSINGER: Okay.

HON. SCOTT A. BRISTER: I'm assuming we're just skipping whether to use financial interest or economic interest?

MR. ORSINGER: Right.

CHAIRMAN SOULES: Yes.

HON. SCOTT A. BRISTER: Okay. The next section then, as it says on paragraph (a), the annotation, the current rule extends the disqualification to former law partners. The Constitution does not cover people you practice with, but the current rule does. And my proposal retains the current rule's extention.

Similarly, the second one, the current

rule extends to any matter that the lawyer handles, so for instance, if you handled the title deed search, you can't handle the case about whether the title is good. The Constitution only says case, not matter, but obviously it seems to make sense. It ought to -- again, all of these are what the law already is, but just the first two keep the rule as the law already is, although they extend it beyond the Constitution.

MR. ORSINGER: "Already is" by virtue of a Supreme Court opinion?

HON. SCOTT A. BRISTER: Already is in the rule that's been around.

MR. ORSINGER: Okay. Well, that's different.

HON. SCOTT A. BRISTER: Any discussion on that?

CHAIRMAN SOULES: Richard.

MR. ORSINGER: I think that it is misleading for us to purport to inform the people what's in the Constitution and then to misinform them.

HON. SCOTT A. BRISTER: It is not unconstitutional to add grounds that they

be disqualified.

MR. ORSINGER: I don't consider that a disqualification, because disqualification connotes voidness, and everything you're talking about connotes something that's not void, it's something that's waivable, it's something that can be, if you don't preserve it on appeal, it's lost. There's a distinction in my view, and we shouldn't mislead people.

I'm not opposing the idea that we should have "matter" instead of "case." I just think "matter" ought to be under recusal and not disqualification.

CHAIRMAN SOULES: Now, there's the debate, and it's not -- it's a fairly deep issue, because that's exactly what Richard said. If a judge is constitutionally disqualified, he doesn't have the power to act. But he's only constitutionally disqualified if he's acting contrary to what the Constitution says, and he's not constitutionally disqualified otherwise.

HON. SCOTT A. BRISTER: But what says the Supreme Court can't make rules

of procedure that make you disqualified in additional circumstances?

CHAIRMAN SOULES: Well, they can, but the consequence of that --

HON. SCOTT A. BRISTER: -- is severe.

CHAIRMAN SOULES: -- shouldn't be that the judge does not have the constitutional power to sit, because the judge does have the constitutional power to sit. It's just somebody is saying, "I don't care if you've got the constitutional power to sit. You're disqualified anyway."

And the voidness consequence of disqualification emanates from the lack of constitutional power, not because the Supreme Court says you shouldn't, but because the Constitution says you can't, or it's not because the Supreme Court says you can't, it's because the Constitution says you can't. That's the problem.

And this was not done right. This Committee did not do 18b, but it was not done right. We've got the chance to do it right now, whatever the right way is. At least I

don't think it was done right for the reasons that there are constitutional issues, and then there are other issues. I don't know if anyone disagrees with that, but speak up. Anne Gardner.

MS. GARDNER: Well, I agree with you. I think we should change it and do it right, just reiterate what the Constitution says and go on.

CHAIRMAN SOULES: And that's disqualification or what? Judge Brister.

HON. SCOTT A. BRISTER: But you're going to fly in the teeth of a lot of problems if you cut back. Remember, the law is currently, the rule has been currently for 10 years or whenever this was done, if you were in the office when the case was in the office, you're disqualified. Why? Because the law, not just of recusal but of attorney-client privilege, assumes that you heard privileged information while you were in there. Now, do you want to reverse all of those if we make that -- you know, this has lots of other effects that have been picked up, other counsel disqualification, privilege

questions. And if it's fine that I was in the office, so I leave -- and everybody practices this way.

I mean, every judge, when they leave the big law firm in Houston and go on the bench, they don't take that law firm's cases for a while. I mean, that's always been the practice. If you change this back to you had to handle it personally, then you leave the bench, you go to the court, and you start trying that firm's cases. And you can say, well, you know, you can get recused, by why cut back on that?

CHAIRMAN SOULES: Okay. Anything else on this? Richard Orsinger.

MR. ORSINGER: Luke, to me what Richard Brister is talking about is focusing on the remedy and what you're talking about is focusing on the law that causes the disqualification. And to me there is a distinction. And what is happening is that the grounds for disqualification and the remedy are being fused into one debate when really there are two different things.

It is possible to have a

nonconstitutional disability in those instances where the rule has expanded beyond the Constitution but not have it subject to all of the waiver of procedures of recusal, so that we actually have three categories; one that is constitutional disqualification; one that's rule based; and then one that's recusal together with all of its procedural waivers and everything.

But I truly think that we can't -- I mean, I think it's misleading to call it "disqualification" when everyone agrees that that connotes unconstitutionality and voidness if it doesn't.

CHAIRMAN SOULES: Judge Brister's paragraph (a) is something very few people, I think, realize. This is in his letter to me. The three exceptions that are in the current rule, applying to law partners and "matter" not just the "case," most of the people --

HON. SCOTT A. BRISTER: Now, again, the matter exception, before this rule was written, the Supreme Court said the title deed case, you're disqualified.

I don't want to feel put upon, but I feel like when I propose to change something, I get voted down, and when I propose to keep something the same, I get voted down. Just because I'm for this, this is not -- this is exactly what we've been for 50 years. Why is everybody -- you know, if somebody else wants to present this, I'm really not trying to get anything over on you. This is what the law has always been.

MR. GOLD: Now you know how I feel. Ask Richard to do it.

CHAIRMAN SOULES: Judge, we have the same problem with your draft and the existing rule both, or those of us that have any problems do, and it's not this draft or your work in any way that we're criticizing.

Anyway, Tommy Jacks.

MR. JACKS: Well, there comes a time when those of us who grew up in McLennan County have to stick together, and I'm going to come to Judge Brister's aid here.

It seems to me that we really are letting theory -- and I don't deny that the theory is interesting and maybe even important, but I'm

not bothered, as Richard says, by confusing, if that's what we're doing, the origin of the offense, be it constitutional or rule based on the one hand and the remedy on the other.

The fact is that there should be, in my opinion at least, as someone who has been in this position, and Luke Soules was there with me, of having a judge whose former law partner is the guy I'm suing, and after having been fornicated upon in the rear end time after time after time and finally getting him disqualified under this rule and freely admit to a bias, it belongs under disqualification in my opinion.

I think -- let's look -- I mean, step back and look at how it looks to the litigants, the people who come into our courts, if a judge's former law partner is a party and he's able, before you can get him recused, to make all sorts of rulings of an outrageous nature that are unfair, clearly slanted the way of his former law partner. That's ain't right, no matter how you slice it or dice it. It should be disqualification. It's been in the rules that way a long time.

I don't see any overriding need to change it.

MR. ORSINGER: Tommy, would one of these expanded grounds make all the previous work void? Like in your case, you had that disqualification, you just didn't invoke it, and that meant that everything that judge did was void?

MR. JACKS: No. In that case it -- yeah. In that case, the eventual result was that the judge who heard the motion, our motion for disqualification or recusal, held that, A, he should have recused himself; and B, he was disqualified as a matter of law; and that C, the consequence of that was that his orders in the case to that date were indeed void.

MR. ORSINGER: Okay.

HON. DAVID PEEPLES: But you raised it? You didn't wait until later?

MR. ORSINGER: No, he did wait until later. He waited until after he had been ruled against and then he disqualified him.

HON. DAVID PEEPLES: Really?

MR. ORSINGER: That's what you

just said.

MR. JACKS: Yeah. We --

CHAIRMAN SOULES: I think we weren't able to get the evidence for some time that showed that the judge had represented the party and had tried lawsuits for the party --

MR. JACKS: Yeah. We had a particularly difficult --

CHAIRMAN SOULES: -- and practiced law with the executor. This was an estate. The party is the executor. The executor is the judge's former law partner. The judge, while he was a law partner, represented the executor in litigation involving this estate and in litigation involving the subject matter, the same property that was at issue in this estate, some rotten refineries.

MR. JACKS: And in prior litigation against the estate he had recused himself voluntarily.

CHAIRMAN SOULES: And in another case he had recused himself voluntarily.

MR. JACKS: And we tried to get

him to, and he refused. Meanwhile, he had made some orders, and by the time we could get the hearing on disqualification, we had practically been ruled all the way out of court.

CHAIRMAN SOULES: Yeah.

HON. DAVID PEEPLES: I'd like to know who did that.

CHAIRMAN SOULES: Well, I'll tell you. I'm not going to tell you on the record here because I don't think we ought to make it part of the record, but we don't mind telling you what judge did it. He did a rotten thing.

Okay. Except for the addition of the word "economic," Judge Brister, your recitation of the grounds for disqualification are exactly like the ones in the present rule, is that correct?

HON. SCOTT A. BRISTER: Yes. Though, for instance, you can compare it with the first. One you can say, "or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter," by saying, "practiced law with

someone while they acted as counsel in the matter," less words. Other than that, there's no change.

MR. ORSINGER: I'm going to withdraw my opposition to expanding beyond the Constitution. If everyone is comfortable with court declared voidance, then I'm comfortable with it.

CHAIRMAN SOULES: Okay. So take out "economic" and 18a(a) -- everybody is in agreement with it? Nobody is now opposed so that passes -- two opposed. Then let's take a vote.

Those in favor show by hands. 11 for.

Those against. Two.

MR. McMAINS: Luke, I was asking a question, if you don't mind.

CHAIRMAN SOULES: I'm sorry, I was counting you as against. You had your hand up. I apologize.

MR. McMAINS: Are you trying to get through the entire rule on disqualification?

CHAIRMAN SOULES: I mean, frankly --

MR. McMAINS: Was that vote intended to get us through the entire rule?

CHAIRMAN SOULES: What? Get us through the whole rule?

MR. McMAINS: Was that vote intended --

HON. SCOTT A. BRISTER: Goodness, no. I've got pages and pages of stuff.

MR. ORSINGER: No, just (a).

MR. McMAINS: So just disqualification?

CHAIRMAN SOULES: Yes. That was just 18a(a).

MR. McMAINS: Because the reason I ask, our current 18b does track the Constitution in that the judge has to know he has an interest. His proposed rule doesn't require that the judge know that he has an interest, only that he has an interest.

Now, that's a fairly significant broadening of the disqualification, because there are many people that might own a stock portfolio that might conceivably be a direct interest in something. But he has to know it

in order to be disqualified. And that's not to say that's not mandatory grounds for recusal if it's brought up, but again, to kind of wait until long after the fact and having not complied with any of these procedures based on any lack of knowledge, that's --

CHAIRMAN SOULES: But that's another problem that's in conflict with the Constitution. The Constitution says "has an interest." He doesn't have to know it.

HON. SCOTT A. BRISTER: You don't have to know it in the Constitution.

MR. McMAINS: I thought the Constitution said "knows."

CHAIRMAN SOULES: No, it does not. It does not say "knows." It does not. "No judges shall sit in a case wherein he may be interested." And that's the end of it.

HON. SCOTT A. BRISTER: And as I'll get down to it, I am -- as we get down to it, because it's much more prominent on what the judge knows in recusal, and I'm very uncomfortable with letting the judge off the hook as long as the judge claims they didn't remember it.

I mean, number one, that means you've got to put the judge, who may end up being your trial judge, on the stand and cross-examining him. That's a problem in itself. It ought to be what are the facts, not what did the judge know and when did the judge know it. That's going to be an inherent problem with the "know" problem.

And number two, you know, well, that ought to be handled by the cure suggestion which I'll do later, but the Constitution does not require that it be known. And it sure doesn't look any less unsavory to the parties that the judge is going to get rich off of this when the judge says, "I didn't know about it."

MR. ORSINGER: I don't think that's a problem.

MR. McMAINS: But I don't know that we have the power to do that. I mean, I guess that is the question. I mean, we don't have the power probably to change the Constitution theoretically.

CHAIRMAN SOULES: We don't have the power to change anything.

MR. ORSINGER: Yeah. We can't limit it to knowing. By using "knowing" we're trying to limit the Constitution.

MR. McMAINS: Huh?

MR. ORSINGER: By using "knowing," we're limiting the Constitution.

MR. McMAINS: No, I understand. That's why I said I don't think we have the power to do that.

CHAIRMAN SOULES: Okay. Can we get past that?

MR. ORSINGER: Yeah.

CHAIRMAN SOULES: Is there anything else on that? Let's get past that unless there's anything else on it. Okay.

HON. SCOTT A. BRISTER: Moving to (b).

CHAIRMAN SOULES: (b).

HON. SCOTT A. BRISTER: A technical thing on (b)(1), you see that (2)(a) says "impartiality might reasonably be questioned." I would suggest adding "impartiality might reasonably be questioned by a reasonable member of the public." And that's just, by definition, anybody that files

a motion to recuse is questioning your partiality, and the question is whether it's reasonable. And Judge Enoch in his recent opinion says it's the public's viewpoint. But that's just a suggestion. I don't care one way or the other, in case that influences your vote.

CHAIRMAN SOULES: Are there any other changes in (b)? Are there any other changes in (b) from the current rule?

HON. SCOTT A. BRISTER: Yes. That's (b)(1). I've got (b)(2), (b)(4), (b)(7), (b)(8).

CHAIRMAN SOULES: Okay. Let's see what those are.

HON. SCOTT A. BRISTER: (b)(2) is suggesting that the judge has a personal bias or prejudice, and we discussed this somewhat. My suggestion is that it be the judge's actions or statements other than rulings on the case demonstrate a bias or prejudice.

In the draft we discussed making it that the judge's rulings on the case are not grounds for recusal but may be evidence

supporting other grounds for recusal.

CHAIRMAN SOULES: Where is that?

HON. SCOTT A. BRISTER: That was in Lee's draft. Let's see --

CHAIRMAN SOULES: But it's gone; it's not in here now?

HON. SCOTT A. BRISTER: Right. And this is because of the problem -- the problem, the cases say this, I mean, you know, your remedy for a bad ruling is appeal. That's why they have appellate courts, to straighten out my bad rulings.

MR. ORSINGER: If I may, Luke, a prior incarnation of this, the subcommittee's prior incarnation before we went into Lee's which then led us into Scott's had the sentence, "The judge's ruling shall not be used as the grounds for the motion but may be used as evidence supporting the motion." And that was based on a Supreme Court Advisory Committee vote.

CHAIRMAN SOULES: That's right. It was by this Committee, this session.

MR. ORSINGER: And our whole version has gone into the toilet, but that concept didn't go in the toilet.

HON. SCOTT A. BRISTER: And I don't mind putting that concept back in.

CHAIRMAN SOULES: Well, we voted to leave that in. Mike.

MR. GALLAGHER: Well, appellate relief from a bad ruling applies to the litigation perhaps in which that occurred. This may be subsequent litigation.

And I'm just asking, point of information, if you're talking about bias or prejudice, why would we not be able to demonstrate that bias or prejudice through a prior ruling of the court?

CHAIRMAN SOULES: This language was compromise language reached by this Committee sometime in the last year and a half, the effect of which we thought was to say you can't prove a judge's bias or prejudice just from the judge's rulings. But if you have other evidence of that, you can augment that evidence by showing how the judge has ruled in the case. Carl Hamilton.

MR. HAMILTON: Well, you could also use the other rulings to prove (b)(1), that he was impartial, right? You're not precluded from using other rulings to prove (b)(1), are you?

HON. SCOTT A. BRISTER: All this is saying is your motion to recuse based on bias can't cite only statements and rulings made in court. That's all I intended to say. I didn't intend it to be used as anything but support.

MR. HAMILTON: The language that Richard has got would cure the problem.

CHAIRMAN SOULES: That's right. And we voted to keep that in, so we want that back, and Judge Brister has agreed to it.

HON. SCOTT A. BRISTER: That's fine. On (b)(4), I just suggest that we make it -- this is the one about whether the judge has personal knowledge of the case. Let's see, it's under 18b(2)(b), the second half of the bias, prejudice, "has personal knowledge of disputed eveidentiary facts concerning the proceeding."

Now, what if the disputed evidentiary facts are evidence as to what was done for sanctions, you know, what opposing counsel did in court or for contempt or --

MR. ORSINGER: Gained prior to filing the motion or gained prior to filing the lawsuit?

HON. SCOTT A. BRISTER: Either one. I was just trying to show that --

MR. ORSINGER: There's a big difference.

HON. SCOTT A. BRISTER: There will be -- there are a lot of things I ruled on that are based on what I saw in court, but I don't think anybody means that to be bias or it to be a ground for recusal, do they?

CHAIRMAN SOULES: I don't think a judge is precluded from a jury view. A judge view. Go out and look at the intersection. Does any of this stuff make sense? A jury can't go, but the judge can.

MR. ORSINGER: If we interpret "filing" to mean the filing of the lawsuit, that's going to exclude judges who, because of their community involvement or whatever, are

aware of the issue before a suit is even filed. Those would be the judges we would want out, wouldn't we?

CHAIRMAN SOULES: Yeah. This means before filing the suit.

MR. ORSINGER: Okay.

HON. SCOTT A. BRISTER: And it's personal knowledge, not something you read about in the paper.

MR. HAMILTON: Before the -- is the word "filing," is that filing of the suit or filing of the motion?

HON. SCOTT A. BRISTER: I think it was suggested that it be filing of the suit. I intended it to be filing of the suit, but --

MS. GARDNER: Luke, this is Anne Gardner.

CHAIRMAN SOULES: Anne Gardner, thank you. Excuse me.

MS. GARDNER: I just wanted to make a comment about the personal knowledge that I had on a case that happened where the judge during the trial spoke with a member of the community while he was off the bench,

while the case was in recess or over the weekend, and acquired some knowledge, some personal knowledge based on which he granted a new trial after judgment, after verdict had been rendered for the party that I was going to represent, and then recused himself. And there was nothing we could do, because I didn't get hired until after 75 days, so I just wanted to mention that.

I mean, it could happen during the trial but outside of open court or outside of the trial proceedings that a judge could acquire personal knowledge that could bias him.

HON. SCOTT A. BRISTER: I don't have a strong feeling. I'll leave it the way it is if people feel more comfortable doing that. I just thought there was a potential problem there in doing that.

CHAIRMAN SOULES: If you leave it the way it is, this No. 4 would stop where?

HON. SCOTT A. BRISTER: It would read just like the second half of current (2)(b), so it would say, "The judge has personal knowledge of disputed evidentiary facts concerning the proceeding." Change

"gained prior to filing" to "concerning the proceeding," and just leave it as is.

CHAIRMAN SOULES: Okay.

HON. SCOTT A. BRISTER: The next one is --

CHAIRMAN SOULES: What's the Committee's pleasure on that, leave it as is or change it to this language?

Those in favor of leaving it as is. Four.

Those who want to change it. Four. Okay. It's a tie vote. No change.

MR. ORSINGER: Oh, I think we ought to have some discussion about it then.

CHAIRMAN SOULES: Well, that's what we've been talking about.

MR. ORSINGER: I mean, it seems to me that the current language on its face is not workable, because if the judge were to see a contemptuous act committed in his presence and wanted to include that in a motion for sanctions or something, he couldn't do it because it's personal knowledge.

HON. SCOTT A. BRISTER: What raised this in my mind is occasionally you see

the bad actors who have gotten crossways to the judge, or maybe it's a bad judge, whichever one, and in the move to recuse him, they name the judge as a witness to the bad things that have been done to them in court. And then they naturally move to recuse the judge because the judge now has personal knowledge of evidentiary facts. That clearly seems to be an abuse.

And I don't sense that the judges ruling on those are having problems seeing that as an abuse, but technically the rule does say evidentiary facts concerning the proceeding.

CHAIRMAN SOULES: Okay.

HON. SCOTT A. BRISTER: Do you want to just hold it and think about it?

MR. ORSINGER: Well, I would like to raise the issue of whether we ought to call it "material facts." Maybe we don't need that, because if it's the current language and if it's not broke, maybe we don't need to fix it. But to me, the facts ought to be material before they would work a recusal.

In a small town you're going to have lots of knowledge of facts, but they're not

necessarily going to be material. You may know -- like in a divorce case, this quite often happens in the rural counties, that they know both the husband and the wife, but they don't recuse just because of that, because they don't have a lot of detail about the community assets and stuff like that. And to me, there is a reason to make it material before it works a recusal.

MR. McMAINS: Well, actually now it says "disputed evidentiary facts," right?

MR. ORSINGER: Well, maybe it's not a problem, because if that's our current language, it doesn't appear to be broken. But if I were writing this rule, I would want it to be material before you would recuse.

CHAIRMAN SOULES: Well --

MR. McMAINS: Are you talking about material in lieu of disputed facts?

MR. ORSINGER: No. In addition to.

MR. McMAINS: So material in addition to?

MR. ORSINGER: In addition to.

MR. McMAINS: Because you have to do a lot to dispute immaterial facts.

CHAIRMAN SOULES: I mean, the way the rule -- I don't know if anybody knows where this stuff came from, from the original rule, but it came right out of the CJC 3(c). The language in the rule today, unless 3(c) of the CJC has been changed, is universally used across the United States.

MR. ORSINGER: Well, then how come we're --

CHAIRMAN SOULES: That's why I puzzle about using all this time to rewrite 18a and 18b when they don't seem to be really a problem.

HON. SCOTT A. BRISTER: Because it's not a problem for you, Luke, it's a problem for me. It doesn't hold you up. I have been patient listening to the rules that you care about. I'm telling you, this is the one my colleagues care about. I have three 10-page requests of how we should change this rule from my colleagues.

CHAIRMAN SOULES: Okay.

MR. McMAINS: And they want to

repeal the Constitution, too, don't they?

HON. SCOTT A. BRISTER: Well, one is from P. K. Reiter, who hears most of these in Houston, because of just the suggestions I'm raising. He sees these constant problems.

CHAIRMAN SOULES: All right. What do we do with (b)(4)? Let's do something and get on with it. Carl Hamilton.

MR. HAMILTON: I make a motion we let it read, "The judge has personal knowledge of material evidentiary facts relating to the dispute between the parties," and leave out the "gained prior to filing" part.

CHAIRMAN SOULES: Second?

MR. JACKS: Second.

HON. SCOTT A. BRISTER: I'll second that.

CHAIRMAN SOULES: The Committee has accepted it. Okay. The judge has personal knowledge of material evidentiary facts?

MR. HAMILTON: Material evidentiary facts relating to the dispute

between the parties.

CHAIRMAN SOULES: Okay. Does anyone object? It's done.

HON. SCOTT A. BRISTER: Next is my (b)(7), which you compare to the 18b(2)(e) and (f)(ii). The judge is recused for financial interest of family members, this is not the judge but family members, only if they're known. And as I described earlier, I think, number one, that means you to have call the judge as a witness, with all of the problems that entails for the future, to show when the judge did or did not know. And if the interest is substantial, it's not any less unsavory that my daughter is going to make a ton of money off of this that I purport not to have known about it.

The current rule says -- then you also compare on the second page of the comparison No. 6 in the current rule under "Waiver and Cure." The current rule has a perverse incentive. If I say I don't know about it and I'm deeply into the case, then I can sell the interest and keep the case. I'm not sure why that's better if I've already made a bunch of

rulings to keep on than if I haven't even started.

My suggestion is that, you know, if the judge's family has a financial interest, he ought to be recused and the new judge ought to look at the previously made rulings and decide if we need to revisit those or not. That is just, you know --

CHAIRMAN SOULES: It takes out what concept?

HON. SCOTT A. BRISTER: It takes out the concept of getting to keep the case if you say you didn't know it and you worked on it a long time. My case, if it's just a financial interest, it takes out having to have any discovery about what the judge did know and when did they know it, and that focus is it's not going to read good in the Wall Street Journal if the judge's cousin gets rich off of this case and we all throw up our hands and say, "Oh, well, he didn't know about it."

CHAIRMAN SOULES: Okay. That's out. And then anything else?

HON. SCOTT A. BRISTER: Okay. (b)(8).

CHAIRMAN SOULES: Okay. Now, help me with this. I'm not really following this.

HON. SCOTT A. BRISTER: Sure.

CHAIRMAN SOULES: "A judge must recuse in the following circumstances: The judge or the judge's spouse is related by consanguinity or affinity within the third degree to anyone with an economic in the matter" -- is that supposed to be "or to a party"? I'm having trouble really with the words here.

HON. SCOTT A. BRISTER: Are you looking at (2)(e) in the current rule?

CHAIRMAN SOULES: No, (b)(7).

HON. SCOTT A. BRISTER: Oh, my (b)(7)?

CHAIRMAN SOULES: Your writing on (b)(1). The judge or the judge's spouse is related to anyone with an economic interest in the --

HON. SCOTT A. BRISTER: It's an economic in the matter or an economic interest in the party. In other words, if you're a share -- that's where it comes up. You got --

it turns out you've got 100 shares of HL&P and HL&P is a party.

CHAIRMAN SOULES: So it's an economic interest in a party?

HON. SCOTT A. BRISTER: That's what I intended it to say.

CHAIRMAN SOULES: An economic interest in -- how can you have an economic interest in a party?

MR. ORSINGER: If it's a corporation or a partnership.

CHAIRMAN SOULES: Oh, okay. In a party. Or, what, has any other interest?

MR. ORSINGER: It would have to have the word "has."

MS. GARDNER: Or "with."

CHAIRMAN SOULES: To anyone with an economic interest in the matter or a party, or any other interest -- or with any other interest. Isn't that supposed to be "or with any other interest that could be substantially affected."

HON. SCOTT A. BRISTER: The current rule says have an -- has an -- have an -- has an -- have an interest, but "with"

is fine, whatever.

CHAIRMAN SOULES: With. Okay. With an interest that could be substantially affected.

Okay. And then the next one is, what, (8)?

HON. SCOTT A. BRISTER: The next one is (8). And this is -- the current rule bars spouse, bars lawywer, hearing a case where the lawyer is first-degree related. So that means I can hear a case with my brother as a lawyer, and that's just a policy question. It seems -- I'm suggesting in this day with as many judges and visiting judges as we've got it ought to be the same as it is for parties. So the question is straight up and down. Do you want the judge hearing the case when the brother -- when the opposing side hires his brother? I wouldn't, but maybe you do.

CHAIRMAN SOULES: What degree is a brother?

HON. SCOTT A. BRISTER: A brother is second degree.

CHAIRMAN SOULES: And a child

is first?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: And we've got this going to the third?

HON. SCOTT A. BRISTER: You've got to go to a common ancestor.

CHAIRMAN SOULES: Well, you know, I have some problems with this in the rural areas.

MR. JACKS: Isn't there a statute that passed in the ninety -- Mike, are you still here? There was a statute passed in the '93 session, I think, which dealt with this issue and it passed despite the concerns of rural judges whose relatives practice in their court on a regular basis. I can't give you a reference to it, but I think there's something on the books about it.

HON. SCOTT A. BRISTER: Yeah. I mean, this doesn't affect you all, this affects my daughters. I mean, for crying out loud, do you want to try a case against my daughter or my sister or my brother? I mean, my daughter would be excluded, but you know --

MR. JACKS: I was thinking

about hiring her actually.

HON. SCOTT A. BRISTER: Or my daughter's kids, when I'm a visiting judge and my daughter's kids come in and try the case against you? It's fine with me if it's fine with you.

MS. McNAMARA: The Wall Street Journal will love it.

HON. SCOTT A. BRISTER: The Wall Street Journal would eat it up.

MR. JACKS: I'm not arguing with you. I'm on your side. I just think there may be a statute that touches on this.

PROFESSOR DORSANEO: The statute says first degree.

MR. JACKS: Is that all?

PROFESSOR DORSANEO: That's why it says first degree there.

CHAIRMAN SOULES: Not in (8). It says third degree.

HON. SCOTT A. BRISTER: That's my proposal, is to extend it to third degree.

MR. ORSINGER: That's the current rule, Luke.

CHAIRMAN SOULES: The current

rule says first degree. Okay.

PROFESSOR DORSANEO: First degree is stupid.

MR. ORSINGER: It's not broad enough?

PROFESSOR DORSANEO: We always say third degree in every other circumstance.

MR. JACKSON: The court reporter is the third degree.

MR. McMAINS: Well, you witness the third degree all the time.

MR. JACKS: Well, I'm in favor of it. Whether it's in statute or not, I'm in favor of it.

MR. ORSINGER: Me too.

CHAIRMAN SOULES: Third degree. Two brothers are practicing law. One of them gets an opportunity to be the judge. He's the only person who wants to be the judge, but he can't take the job because if he does, he puts the brother out of business. Everything the brother wants to do they have to get a visiting judge to come in.

MR. ORSINGER: If my choice is to go against that brother in that court, I

would rather have what you just said than to fight regularly the judge's brother in all my cases.

HON. SCOTT A. BRISTER: He doesn't have to go out of business. The other side files a motion for recusal, which can be waived, this is recusal, they can try it if they want. If they don't try it, there's only about a million visiting judges that are begging for business that can come in and hear them.

MR. ORSINGER: Not only that, but it opens up a secondary market of people hiring the brother to disqualify the judge, so he may make more money with less work.

PROFESSOR DORSANEO: What about the argument of what's the point of being a judge unless you can rule in favor of your brother?

CHAIRMAN SOULES: What if we would have had this one, Tommy? We could have hired the judge's brother, we hire the judge's brother and say, "Judge, you're recused because your brother is our lawyer."

MR. JACKS: Yeah. Of course,

the other side in that case might have figured that --

CHAIRMAN SOULES: -- they already had the brother.

MR. JACKS: Yeah, that's right.

HON. SCOTT A. BRISTER: They might have waived it.

MR. JACKS: They might have figured that it trumped the brother.

CHAIRMAN SOULES: All right. What do we want to use? First, second, third or what?

MR. ORSINGER: Three.

CHAIRMAN SOULES: Okay. The third degree. Next, Judge.

MR. HAMILTON: Luke, I have a question on No. 7.

CHAIRMAN SOULES: Yes, Carl.

MR. HAMILTON: Is (7) intended to state that if the judge's spouse is related in the third degree to a party --

HON. SCOTT A. BRISTER: That's the current rule.

MR. HAMILTON: But it says

there has to be an economic interest to the party. What if there's just a relation but no economic interest?

HON. SCOTT A. BRISTER: Well, the spouse is now -- well, let's see, that is in (6), the paragraph before. The judge or the judge's spouse is relate by consanguinity or affinity within the third degree to a party or an officer, director, or trustee of a party.

CHAIRMAN SOULES: Okay. Next.

HON. SCOTT A. BRISTER: (c), the waiver and cure, is the same with the exception that, as I indicated, if you drop the knowing, the -- drop the knowing -- well, the way I suggested doing it in the waiver and cure is if you sell the economic interest you can continue on the case but any rulings made prior thereto are voidable.

CHAIRMAN SOULES: Is that a rule now?

HON. SCOTT A. BRISTER: The current rule is that if you divest the interest you can keep the case, but only if you're knee-deep in it, if you've ruled on

lots of rulings on it.

MR. ORSINGER: Voidable by who?

HON. SCOTT A. BRISTER: Well, I didn't say that, did I?

CHAIRMAN SOULES: By that judge. He's the judge.

HON. SCOTT A. BRISTER: Well, what I explained earlier was different from what I've got written here, which is just that basically you can't divest. If you've got an interest, you need to recuse.

And the question is, what arises when you find out there's a car wreck with an HL&P van, minor injuries, $100, 100 shares of HL&P stock. Can you sell the stock, keep the case? Or should you just be automatically recused?

And I'll go with whatever everybody agrees or thinks is best on that, but it doesn't seem to me to make sense to say -- to make a distinction between judges where -- between cases where you've made lots of rulings and cases where you haven't started yet as far as how it's going to look. And

especially if you haven't given the question of whether and what the judge knew. I think most judges would just assume not take the stand. And if they own stock, for crying out loud, if you own stock in one of the companies, you get somebody else to hear it.

HON. DAVID PEEPLES: How does this work, Scott? If I make a ruling in a good-sized case, the party that lost starts looking around and finds that I've got a sister in Fort Worth who owns some stock in a company that was a party and I didn't know about it, I didn't even think about it, and over on the next page you can make a motion at any time. Can they come back in and void what I've done?

HON. SCOTT A. BRISTER: They can come back in and move to recuse. And the question is, have you devoted substantial time and did you know that? You, of course, say you don't. They, of course, are going to say you did or should have.

HON. DAVID PEEPLES: And where is knowledge in your rule?

HON. SCOTT A. BRISTER: I've

dropped it.

HON. DAVID PEEPLES: Okay. Well, if it can be strung out that far, I think that may be too much.

MR. ORSINGER: It can be.

HON. DAVID PEEPLES: Stock ownership does bother me on this. I don't know what stock my wife has got or my brothers and sister or my brother-in-law.

HON. SCOTT A. BRISTER: What would be the harm if they come in and do that and you pass it off to somebody else who decides to revisit your ruling?

HON. DAVID PEEPLES: Oh, so the only thing at stake is they see if the second judge agrees with the rulings?

HON. SCOTT A. BRISTER: In recusal that's always the case. Nothing is void under recusal. It just goes to a new judge, and the new judge, of course, can always revisit it.

MR. ORSINGER: Well, then "voidable" means voidable by the new judge, not voidable by the sitting judge.

MR. JACKS: That's right.

HON. SCOTT A. BRISTER: No. Well, not in the way I originally drafted it.

CHAIRMAN SOULES: Well, we either leave --

MR. McMAINS: "Voidable" sounds to me like that it's basically at the election of whoever it is that lost the ruling.

CHAIRMAN SOULES: It's just a motion for reconsideration.

MR. McMAINS: Well, I mean, if all you're saying is that the new judge has plenary power to change the other rulings, that's always the case.

CHAIRMAN SOULES: That's right. Well, do we want -- I guess the substantive issue, one of the substantive issues here is, if the parties discover it, and whether or not the judge knew, they bring to the judge's attention a disqualification for the economic interest of a person with a third degree of relationship, does the judge or must the judge recuse even if the judge is deep in the case? Judge Peeples.

HON. DAVID PEEPLES: See, I don't have any problem with forcing a recusal

when it's brought to the judge's attention early on. But after somebody has lost the rulings who goes snooping around and finds out that the third degree of consanguinity and it's a distant relative that owns some stock in a company, I just think that goes way too far.

MR. MEADOWS: I have to say I agree with that. If you've got a situation where your spouse owns 200 shares of Exxon, and as you say, deep in the case your opposing lawyer turns that up to turn out that judge, and all the rulings and all the effort that's gone into making those rulings is just wasted. It seems to me that that invites gamesmanship in a situation where the stock ownership is absolutely inconsequential, and so I don't --

MR. HAMILTON: But what if she owns 200,000 shares?

MS. McNAMARA: The securities laws define beneficial interest in stock. If you take care of the judge and his beneficial interest in stock, it will include the spouse. And say if that beneficial interest

exists, whether it's 200 shares or 200,000 shares, he should step aside. And then don't make the judge worry about what his brothers and sisters own. The problem is, I don't think I know what my brother owns.

HON. SCOTT A. BRISTER: Well, you have to. The code of -- the Canons of Ethics say the judge, let me see, I had it a second ago, shall be informed about the judge's personal economic interest and make a reasonable effort to be informed about the personal economic interest of any family member residing in the judge's household.

HON. DAVID PEEPLES: Well, that's different. That's very different.

MR. MEADOWS: But I think the distinction between my example and Mike's example is that the judge that owns 200 shares and the spouse that owns 200 shares and they are involved in the case and don't feel they should be recused will sell the stock. That judge or that judge's spouse are not going to sell 200,000 shares with those kind of profits at stake. They're going to recuse themselves. So it's only going to really

be -- come into effect if you've got a situation where the stock ownership really doesn't matter and the judge will divest.

MR. GALLAGHER: Well, in that circumstance I tend to agree. But there was one over which Judge Bunton just presided in West Texas in which a brother owned a substantial ownership in a defendant company and refused to recuse himself. He ultimately did, and then Judge Bunton was appointed to revisit the question and all the rulings. But that was a case in which the brother had a substantial interest in the stock ownership of the defendant corporation. And that's a little frightening to know that your brother has a big, huge financial interest or know that the brother, the judge, has a huge financial interest in Exxon or Shell or whoever it might be.

MR. MEADOWS: Yeah, I'll agree with that.

MR. GALLAGHER: So not a wife where it's community property or a husband where it's community property, but a brother.

CHAIRMAN SOULES: Richard.

MR. ORSINGER: It seems to me that if you're -- on this issue of being far into a case and it's called to your attention that this exists, particularly if it's outside your household, that the issue of knowledge is really important, because if the judge didn't know it, there's no way for it to have prejudiced the judge's rulings and there's no reason to go back and set aside orders. If the judge did know it, there is reason to suspect that the rulings were prejudiced and therefore ought to be retroactively invalidated if the judge is recused.

So it seems to me that if we're going to grapple with this issue about a well developed case and an economic interest that surfaces after the case is developed that knowledge ought to be back in it. And if there was knowledge, let's assume prejudice. And if there wasn't knowledge, let's assume no prejudice.

HON. SCOTT A. BRISTER: But the judge is going to say "I didn't know." Now, are you going to take that on face value?

MR. ORSINGER: I don't know

what my alternative is.

HON. SCOTT A. BRISTER: Well, you could depose him, subpoena him, have him testify at a hearing. And if you lose, this judge you just cross-examined is now still your judge. I agree with you in theory. I'm just saying in practice --

MR. ORSINGER: Well, in practice --

HON. SCOTT A. BRISTER: -- in a day when we don't have a problem with lots of other judges who can hear the case, it seems to me the balance of I'm going to keep on the case. Now I know for sure that my family is going to make a lot of money on this case, but because you can't convince my colleague who has been appointed to hear this case that I knew before, which remember, for him or her who is reviewing that, they're going to have to call me a liar and find that I did know it when -- and I now am going to keep on the case, our family is going to make millions of dollars, and it's no problem when we have all these other judges who can hear it, it ain't worth fighting over.

MR. MEADOWS: But I think it might be worth fighting over. If you've got a more benign situation in the example I gave where the judge's spouse owns 200 shares and that only becomes an issue when you're deep in the case and the opposing counsel discovers it to get out of those rulings and get out of that court, then I don't think it's just a matter of, well, there are a lot of other judges. One of the parties is going to be seriously adversely affected by this change.

HON. SCOTT A. BRISTER: Only if the new judge voids the rulings. Nothing requires the new judge to do that. I sure wouldn't revisit them all unless there was something that smelled.

CHAIRMAN SOULES: Judge, why not this approach: Say the judge -- make the rule say the judge has to get out. A lot of judges step into cases where there have been lots of rulings, and I don't know whether there is going to occur more frequently than a judge dying on the bench, but unfortunately, we have judges die on the bench way into the case, sometimes way into the jury trial of the

case. The judge comes in, the parties get him up to speed and finish the case. Okay. So what? What's the big deal of just saying the judge has to get out, and then don't even talk about voidness.

HON. SCOTT A. BRISTER: That's fine with me.

CHAIRMAN SOULES: So that a party that wants to come in and say, "I got a bad rap from the judge because he was biased and I want you to reconsider this," they can file that motion.

HON. SCOTT A. BRISTER: I would second that.

MR. MEADOWS: So we're doing away -- just so we have it clear, we're doing away with the ability to cure by selling the stock?

CHAIRMAN SOULES: Right. That's what this would do.

MS. McNAMARA: And you're doing it both for spouses and for sisters?

CHAIRMAN SOULES: Well, this goes further than that.

MR. ORSINGER: Yeah. This goes

to nieces and nephews and brothers of your wife and a lot of people who you don't have any idea what they own.

MS. McNAMARA: It seems to make sense to carve out for these people other than spouses something short of a controlling interest. I mean, they ought to be able to own less than a controlling interest in a publicly traded company. The idea that your brother owns 200 shares of Exxon and he didn't tell you about it, that just seems --

CHAIRMAN SOULES: Well, what's spouse and children, is that first degree?

HON. SCOTT A. BRISTER: Spouses and children are first.

MR. ORSINGER: No, spouses are affinity, and children are first degree of consanguinity.

CHAIRMAN SOULES: But they're still first degree.

MR. ORSINGER: Yes. First degree of consanguinity.

CHAIRMAN SOULES: Why not say recusal pursuant to subparagraph (b)(7) is not required except for the first degree? Then

you've got the brother problem, right?

MS. McNAMARA: If your brother has control of the company, he's got an ownerhip in a closely held company, there's an opportunity for abuse. But if he holds 200 shares of Exxon, I think the opportunity for abuse is pretty much attenuated.

MR. ORSINGER: Did we not say a brother is second degree?

PROFESSOR DORSANEO: You have to go up and then down again.

MR. ORSINGER: So if your line is first degree, your brother is on the other side of that line, but the wife is on the inside of that line and your mom and your dad and your kids are on the inside of that line.

HON. SCOTT A. BRISTER: Let me point out that ownership -- in the code, ownership of a financial interest does not include mutual funds, so this is -- you know, if you personally own the stock, you're the record holder. It's not, you know, you've got a mutual fund that may own something, so it's not all that many of us that play particular stocks. Most of the people in this room, but

not that many people in general.

MR. ORSINGER: Well, after the judicial raises go through, there will be more.

CHAIRMAN SOULES: Okay. What are we going to do with this? Somebody come up with an idea. Are we going to leave it the same, recusal pursuant to subparagraph (b)(7) is not required if the economic interest is divested, but any rulings made prior thereto are voidable?

I think at least the last clause ought to come out. Okay. The last clause goes for sure. Leave that to motions to reconsider or whatever somebody wants to do.

Okay. Are we going to say recusal is not required if the economic interest is divested? Okay. If it's within the third degree, the brother is not going to sell his major interest in a publicly held corporation.

HON. SCOTT A. BRISTER: Well, in my redraft -- you will either vote for the same current rule, which is you can cure if you prove you didn't know and you divest and you're not deep into it, or you are deep --

I'm sorry, or you can cure if you didn't know -- you are deep into it and you sell. And my proposal would be no cure, and you're recused if it's shown that the family had a financial interest.

CHAIRMAN SOULES: All right. Let's take that. I think Anne disagrees with that, so there is disagreement, but I think we know what it is. Those who agree with Judge Brister show by hands. Nine.

Those who agree with Anne. Two.

Nine to two. Okay.

HON. SCOTT A. BRISTER: So drop on my paragraph (c) "and Cure" and drop the last sentence entirely.

HON. DAVID PEEPLES: The last sentence?

MR. ORSINGER: What do you mean, drop "and cure"? Drop it out of the title?

MR. McMAINS: Yeah, because there's not a cure. There is no cure.

MR. ORSINGER: Okay. You can't cure anymore.

HON. SCOTT A. BRISTER: Next.

MR. ORSINGER: Well, before we leave this section, I want to say something.

CHAIRMAN SOULES: Okay. Just a minute, let's not -- that's not the only way -- okay. Let's go on and maybe it will get into the next.

HON. SCOTT A. BRISTER: Next is the thing we discussed in detail before, the 10-day cutoff.

MR. ORSINGER: Well, I would like to discuss something more about (c) before we go on. Can I do that?

CHAIRMAN SOULES: Well, does it have to do with you can also waive if you don't make a timely filing?

MR. ORSINGER: Yes.

CHAIRMAN SOULES: Okay. I think that may get cured in the next part. If it doesn't, we've got to come back to it.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: That was my reasoning for why I was going on with it. Okay. Judge Brister.

HON. SCOTT A. BRISTER: The next one is the time of filing question. The

current rule is there's a 10-day cutoff, and if you're -- at least in the rule, if the motion is filed less than 10 days before the hearing and you knew about the hearing more than 10 days before, it's thrown -- it can be thrown -- well, not thrown in the wastebasket, but you don't have to pay any attention to it. There's a couple of cases that made exceptions to that, and the compromise proposal we voted on last time was, since the concern of my colleagues about doing anything to the 10-day cutoff, is the motion that's filed in the middle of a pretrial conference or when a motion for continuance is denied, so you can get an automatic continuance while it goes up to the regional judge, et cetera. And the compromise was, well, we'll allow you to file it late, but it doesn't stay the case.

And as I say in my little paragraph there, if you can file it late but it's not going to stay the case, you don't need a time requirement at all.

CHAIRMAN SOULES: What paragraph are you looking at, Judge?

HON. SCOTT A. BRISTER: That's

my -- it's 18a, current 18a(a), and it's my paragraph -- well, there's no time limit in mine because I'm proposing dropping it, but the important thing is in my paragraph (d)(3), Interim Proceedings. A judge may proceed with the case if a motion to recuse alleges only grounds listed in (b)(1), (2) and (3). And that is the ones that are always listed in these motions, that you're biased, that you're prejudiced, or that you're a witness to your own bias or prejudice.

Now, that would still mean two days before the trial you can file a motion saying the judge's spouse has stock and the case will be automatically stayed, but as we discussed last time, those aren't the problem. These last minute things that are just a last minute way to get an automatic continuance are always one of the first three, because, of course, you've got to actually have some proof on all of the rest of them.

CHAIRMAN SOULES: Well, okay.

HON. SCOTT A. BRISTER: But if you wanted leave the 10-day time limit in, that's fine. I just don't see any point if

the deal is you can file before it or you can file after it. I suppose the distinction might be that if they file a bias or prejudice motion more than 10 days, if you have a 10-day motion, then it would automatically stay, but if it was less than 10 days, then it wouldn't.

CHAIRMAN SOULES: Well, isn't it the law now that if a judge acts while he's under a recusal challenge and it's not in an emergency and stated in the order that the order is an invalid order?

HON. SCOTT A. BRISTER: Right. But if the motion is filed in less than 10 days, within 10 days of trial, it's not referred, it is ignored, because it is not a proper motion. A proper motion has to be filed more than 10 days before.

CHAIRMAN SOULES: Unless.

MR. YELENOSKY: You didn't get 10 days' notice.

CHAIRMAN SOULES: Right.

HON. SCOTT A. BRISTER: No, that's what happens. Now, you may on appeal convince two out of three appellate judges that we should make an exception for this

case. But let me tell you, 100 percent of the time, when a case is set for trial six months in advance trial, you show up at trial and you don't like the way it's going and you file a handwritten motion to recuse, it is ignored.

CHAIRMAN SOULES: Disregarded. Okay. Carl Hamilton.

MR. HAMILTON: I think Judge Hedges' court of appeals over there rewrote this rule for the Court Rules Committee. I don't know whether she gave you a copy of hers or not, but we submitted one. I don't have a copy of it, but I think we left the 10 days in there with an exception that if you only discovered the grounds for recusal within that 10-day period.

HON. SCOTT A. BRISTER: But that's what we voted down last time.

MR. HAMILTON: Okay.

HON. SCOTT A. BRISTER: That's what we voted down, because the problem is they will say, "I didn't discover you were biased and prejudiced against me until I started seeing the way you were ruling."

MR. HAMILTON: But you say most

of them are based on (1), (2) or (3) and so that really eliminates the purpose of the rule. If you're right about that, the case goes on anyway, you haven't accomplished a whole lot if you have a good recusal but the case goes on.

HON. SCOTT A. BRISTER: Right, which makes it no fun to file that motion.

CHAIRMAN SOULES: Okay. Let's take 10 minutes. The court reporter needs a break. We'll be back here at 10 minutes to 4:00.

(Recess.)

CHAIRMAN SOULES: All right. Let's go to work. I know everyone is getting tired, but we've got lots of work to do.

Okay. Judge Brister, I'm more concerned about the concept of (3) than the details right now, and I'd like to get that out on the table, if we can, for discussion.

We have a judge who is facing the challenge of a recusal motion. This judge is a judge whose impartiality is reasonably questioned by a reasonable member of the public. This judge is also a judge who, by

his actions or statements, has demonstrated a bias or a prejudice concerning the subject matter or a party, and this judge is also a material witness, formerly practiced law with a material witness and is related to a material witness and such witness' spouse within the third degree.

Now, that's the judge that we have on the bench at this moment, and that judge gets 20 days to rap your body without any constraints. Is that what we want?

HON. SCOTT A. BRISTER: Well, most of those -- well, let's take those one by one. How are you going to -- you just can't put that laundry list of allegations. The motion has to state it specifically.

CHAIRMAN SOULES: Well, I've stated them all, and they're all true.

HON. SCOTT A. BRISTER: All right. So you've got proof that the judge has these investments or the spouse has these investments?

CHAIRMAN SOULES: No, it doesn't have anything to do with investments. It's (1), (2) and (3).

HON. SCOTT A. BRISTER: I thought you were saying some of the investment stuff. It's just bias and prejudice?

CHAIRMAN SOULES: Is a witness, is related to witnesses, and this judge has got 20 days to rock and roll, no constraints except some other judge eventually taking that judge's place and having to go back.

The present law is, when that judge is confronted with a motion to recuse, that judge has to rein up on the case. If the judge does anything, the judge has to find this is an emergency, something needs to be done, it's that important, and only grant relief sufficient to endure the emergency. Anything beyond that is invalid from the time or from the moment the motion is filed, but that's the current rule. This other law is what I said, or this proposal. Is that what we want?

HON. SCOTT A. BRISTER: No. Let me -- my original position was don't change the rule. Let me still have the 10-day automatic. I thought the deal was this was a compromise that David Beck and others were saying we can't have a blanket 10-day. It's

too late -- excuse me -- and so the compromise was, okay, you can file it late (coughing).

MR. YELENOSKY: Now they're putting stuff in your drink.

HON. SCOTT A. BRISTER: Yeah. Let me go get a drink, but that -- if you want to go back to the current, I'm happy with it, but I want -- the problem is the three days before trial. If that doesn't stay it, that doesn't even get considered right now. If you want to leave it that way, that's fine with me too.

CHAIRMAN SOULES: Well, now, you've got one -- well, let's give Judge Brister a second here.

(Pause.)

CHAIRMAN SOULES: Okay. Now, the present rule was written with a deliberate drop-dead on motions to recuse. If you've got 10 days' notice of a hearing or a trial, the judge proceeds. And you still can review that ruling on appeal and say "I got hosed," but you cannot stop it. It's going to happen.

HON. SCOTT A. BRISTER: Right. So the trade-off was --

CHAIRMAN SOULES: 10 years ago that was the compromise people made, and 10 days was short but long enough. People ought to know their rights by then or have to go through the pain of a biased hearing that they might be able to get relief on appeal. Okay.

HON. SCOTT A. BRISTER: And we took a vote on that.

CHAIRMAN SOULES: So old rule or new rule? And then you do have one point in here that may have some merit on either case and that is suppose the ground doesn't come up. No one could have known about it until 10 days because the ground didn't exist until 10 days. That might be something we could consider even in the old-rule circumstance. Other than that, it's either old rule or new rule sort of up or down. Is that the way you see it, Judge?

HON. SCOTT A. BRISTER: Yeah. You've either got to have a cutoff when there's no stay or no cutoff but no stay.

CHAIRMAN SOULES: That's right. And that was clear when the first rule

was passed. 10 days was a drop-dead rule.

Does anyone have any objection to voting up or down, old rule, new rule?

Okay. Those in favor of the old rule show by hands. Five.

Those in favor of the new rule show by hands. What?

PROFESSOR ALBRIGHT: I misunderstood.

HON. DAVID PEEPLES: Just on this issue here?

CHAIRMAN SOULES: On the issue of 10 days, drop dead, the old procedure, just this particular part of it. Does everybody understand what that is?

MR. ORSINGER: Yeah, but when you say "new rule," I get confused.

CHAIRMAN SOULES: The new rule is what's written here.

MR. ORSINGER: You understand we've already voted that for matters that arise within 10 days you can file them within the 10 days. Scott has got a proposal on the table that's different even from an earlier vote.

CHAIRMAN SOULES: Well, I'm not talking about that particular point right now.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: Does the judge have to stop, but the consequence of that is there's a 10-day drop-dead?

MR. ORSINGER: Right.

CHAIRMAN SOULES: Or do we go with the new proposition here without regard to whether a ground that comes up within 10 days can be raised? We'll get to that later.

Okay. Right now, as far as old rule or new rule, those in favor of the present rule show by hands.

MR. HAMILTON: That's the old rule, folks.

CHAIRMAN SOULES: Four. Old rule. Four.

Those opposed, or those in favor of the new rule show by hands. Seven. Okay.

MS. DUDERSTADT: Eight.

CHAIRMAN SOULES: Eight. Eight in favor of what Judge Brister has proposed.

MR. ORSINGER: Well, gosh,

Luke, that wasn't the way I -- that wasn't why I voted negative. We really have three choices. We have the previous choice that we had considered, which is that you are required to raise something that exists and you know about it. You are required to raise something that exists more than 10 days in advance of the hearing. You are required to raise that more than 10 days in advance. If it occurs after the 10th day, then you are free to raise it later.

CHAIRMAN SOULES: Well, that was parked on the side for this last vote.

MR. ORSINGER: Pardon me.

CHAIRMAN SOULES: Okay. So the judge has 20 days and no restraints on his actions in those 20 days. Okay.

MR. ORSINGER: Maybe this is out of order, but if there is something that a party has known about for six months, I don't think they should be able to file it on the first day of trial. It seems to me that there ought to be -- but that vote has been subsumed in another vote, or have we not yet discussed that?

HON. SCOTT A. BRISTER: This is an issue that will or will not stop the trial. They know that the judge owns stock, but they --

MR. ORSINGER: Well, the thing that occurs to me about the difference between your draft and what our subcommittee had done is that you do not say someone has waived a complaint by failing to raise it 10 days before even if they knew about it 10 days before. We did. Our subcommittee said if you knew about it and you didn't do something about it, you waived it. But if it came up within the 10-day period, then you didn't waive it.

So now lots of people are going to be filing things at the last minute, and the judge is going to have the power to continue on and you won't know until the trial is over whether it's a good trial or not. Or do I misunderstand the mechanism?

HON. SCOTT A. BRISTER: Well, I mean, what comes up at the last minute? That the other side hires the judge's son?

MR. ORSINGER: Yeah. That's

what got us off on this, was Judge Bleil's --

HON. SCOTT A. BRISTER: Well, that stopped. That ain't bias, prejudice or material witness. That's family is a lawyer.

MR. ORSINGER: And therefore the judge cannot continue on?

CHAIRMAN SOULES: It doesn't say that.

HON. SCOTT A. BRISTER: No, that's exactly what it does.

CHAIRMAN SOULES: Well, where does it say that?

HON. SCOTT A. BRISTER: It says under "Interim Proceedings, A judge may proceed with the case if a motion to recuse alleges only grounds listed in (b)(1), (b)(2) or (b)(3). If you allege something in (b)(8), which is they hired the judge's son, which is other grounds, the judge must take no other further action, just the same as it is.

MR. ORSINGER: And you're comfortable if someone knew that one of those other grounds existed even for six months? You're comfortable with them raising that on the day of trial and bringing everything to a

screeching halt?

MR. HAMILTON: Well, it doesn't bring it to a halt.

MR. ORSINGER: Yeah, it does. The only thing he can proceed on is impartiality, statements, biased, material witness. But if you had knowledge that the judge expressed an opinion concerning the matter while an attorney general or consanguinity or something like that, it does bring it to a screeching halt.

HON. SCOTT A. BRISTER: Well, several things. Number one, most of the things other than (1), (2) or (3) I already know about. It's not a surprise that -- you know, maybe, you know, there is with the stock of my cousin or something; but number two, if you get into the "what did you know and when did you know it," then the main witness at these hearings is opposing counsel. And one thing that judges who try these things tell me is the thing that's distasteful about them is all the witnesses are not people who have any knowledge of the facts, it's just calling the judge and harassing opposing counsel and all

of the things that make satellite litigation bad to get into what somebody knew and when they knew it.

So you know, and again, if the judge's son is on the case, number one, I probably knew it before; but number two, even if I didn't, you know, we need to think about that before we reach a verdict on that and come up with another Texas justice for sale deal.

MR. ORSINGER: Well, the truth is, you're more concerned about abuse of this as a disguised motion for continuance than I am.

HON. SCOTT A. BRISTER: Yes.

MR. ORSINGER: If you're comfortable that you can withstand people trying to stop your trial on those grounds,, you know, they knew it six months in advance, then I don't care. But it just seems to me it's still subject to that abuse, but if you're not concerned about it, I'm going to shut up.

HON. SCOTT A. BRISTER: The things other than the first three, Judge Peeples hit it exactly right, those always

come up after the trial when you lose. That's when they start looking around for that stuff. They don't -- you know...

MR. ORSINGER: Then I'm going to withdraw my concerns, because apparently they're not well placed.

CHAIRMAN SOULES: Anything else on this, Judge, that we need to look at?

HON. SCOTT A. BRISTER: Just a few others. On (d), which is the equivalent of 18a, the procedure, that replaces the correct title of the presiding judge.

Yes. The time limits on (d)(4) requires -- well, (d)(2) says the judge that the motion is filed on recusal has to rule promptly. (d)(4) says the presiding judge has to set a hearing within 20 days. And I thought I had a requirement for how fast the ruling had to be made, but maybe I don't.

CHAIRMAN SOULES: Okay. If the judge who is challenged under (1), (2) and (3) decides "I'll wait a couple of weeks to send this over," and he calls the regional judge and says, "Why don't you wait until the 20th day," I've got 34 days. I can get this case

tried by then.

HON. SCOTT A. BRISTER: I don't mind making them shorter.

CHAIRMAN SOULES: Well, there's no time for the trial judge who is challenged to send the motion to the regional judge.

HON. SCOTT A. BRISTER: I don't -- you know, if you want to say that same day, that's fine with me.

MR. ORSINGER: How about immediately? If they refuse to recuse or disqualify, the judge must immediately refer the motion to the presiding judge.

HON. SCOTT A. BRISTER: Well, the problem is the case that says, well, the judge can hold a hearing, and he takes it under advisement and says, "Well, I'm thinking about." You can drag that out for a long time. I don't mind making them do it that day. I just thought, you know, we may run into problems from the regional judges who say, "I've got to docket of my own to deal with."

CHAIRMAN SOULES: Carl Hamilton.

MR. HAMILTON: We discussed this in Court Rules, and our version of the rule requires the filing of the motion with the district clerk and a copy served or delivered to the presiding judge by the lawyer who files it, and then the time started to run from that time.

HON. SCOTT A. BRISTER: Time for what? For the trial judge to rule?

MR. HAMILTON: For the presiding judge to appoint somebody.

MR. ORSINGER: The problem with that, though, Carl, is that you involve the presiding judge even in cases where the trial jude recuses. It would seem to me that if the trial judge is going to recuse, you shouldn't need to bother the administrative judge, because you don't need the administrative judge unless they refuse to recuse.

CHAIRMAN SOULES: Okay.

MR. HAMILTON: Well, I think we had a time limit on that, didn't we, Lee? I think there was a time limit of no more than five dates or something that the trial judge had to make the decision under recusal.

CHAIRMAN SOULES: There's no incentive for a quick resolution here like there is under the 10-day rule. Under the 10-day rule, there is an incentive. If the judge wants to get on the case, he's got to get it done. And if the other party wants to get on that case, they've got to get it done. In this case, the case goes on no matter what nonstop.

MR. ORSINGER: Well, the delay is not going to occur at the stage of failing to rule on the recusal because the judge is prohibited from taking other action.

CHAIRMAN SOULES: Not under (1), (2) and (3). He can do anything he wants to do.

MR. ORSINGER: No. Look at (d)(2), "The judge must rule on the motion promptly and prior to taking any other action on the case." Now, that requires them to rule if they want to go on. So the danger of delay occurs between the refusal of the recusal and forwarding the issue to the presiding administrative regional judge.

MR. HAMILTON: Oh, yeah, it

sure does.

MR. ORSINGER: So you've still got to get a quick ruling from your trial judge, where your delay is pulling in the administrative reagional judge. And if you say that the trial judge must immediately inform the regional judge and then put the regional judge under a 10- or 20-day time table, then you're moving about as fast as you can, I would think.

HON. SCOTT A. BRISTER: You might ought to put -- just one horror story. The one I gave last time as a horror story where the five-year-old case, the motion to recuse was filed last June. The presiding judge appoints somebody to hear the case after Thanksgiving, which is a month after the case was set for trial. And sure enough, at the hearing held at Thanksgiving, the judge said he was going to take it under advisement, take briefs, and would rule two months from then, at which point I finally said I recuse myself voluntarily not even knowing what the case was about anymore. There was no just reason because of me to make a five-year-old case

become a six-year-old case. But it is a visiting judge and he's arranging his schedule around when he's going to be in Houston to rule on these things. And you know, if that was me on the receiving end of that, one of the litigants, I would be furious.

CHAIRMAN SOULES: What is that time period where the judge must refer the motion?

MR. ORSINGER: Why not immediately? What's the delay?

CHAIRMAN SOULES: But what is immediately? Is that this week or next week week?

MR. ORSINGER: I see. Within 24 hours.

HON. SCOTT A. BRISTER: You're assuming I get it within 24 hours.

CHAIRMAN SOULES: "Must refer the motion" -- I'd say, "If a judge refuses to recuse or disqualify, the judge on the date of the ruling must refer the motion."

MR. ORSINGER: In my view that would mean orally denying the motion from the bench, because really who cares how long it

takes to write up the denial and recusal. All we care about is that the judge says, "I'm not recusing," and then he calls the administrative judge on the phone and says, "We're going to have to have another judge in here."

CHAIRMAN SOULES: So if the judge wants to do a written order, the judge is stayed until the judge gets the written order written and signed.

MR. ORSINGER: I don't think it should be. I think the minute the decision is made, it ought to be off to the administrative judge.

CHAIRMAN SOULES: But what if the judge says, "I'll give you my decision in writing"?

MR. ORSINGER: And takes it under advisement? He can't take any other action in the case until he rules.

CHAIRMAN SOULES: He is stayed until he rules?

MR. ORSINGER: Yeah.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: But we need to

make it clearer under (3) that we're talking about a judge who declines to recuse or disqualify so that there's no confusion. It's after you refuse to disqualify or recuse on grounds (1), (2) or (3) that you can then go forward with the case.

CHAIRMAN SOULES: Well, if you do recuse, you can't go forward.

MR. ORSINGER: I know. But if you deny a recusal -- but see, it's a little bit ambiguous, because here it says you have to rule before you take other action, but down here it says you can proceed if it's under grounds (1), (2) or (3). Actually the only judge that can proceed under grounds (1), (2) or (3) is the judge that has already refused to recuse or disqualify. All I'm suggesting is that under (d)(3) we say, "A judge who refuses to recuse or disqualify may proceed with the case if a motion"...

HON. SCOTT A. BRISTER: That's fine.

MR. ORSINGER: But we don't even need "disqualify," do we? We don't need "disqualify" there.

CHAIRMAN SOULES: Where, Richard?

MR. ORSINGER: In (d)(3). You would just say -- because this only occurs on recusal grounds (1), (2) and (3), so a judge who refuses to recuse may proceed with the case.

HON. SCOTT A. BRISTER: That's fine.

MR. ORSINGER: Do you see that on (d)(3)?

CHAIRMAN SOULES: Yeah.

MR. HAMILTON: Luke, back up there under "Referral," if the judge, the trial judge cannot do anything until he rules, if we make his ruling when he signs a written order, that still gives you protection because he can't do anything to until he signs the written order.

MR. ORSINGER: What's the point in the delay between the oral ruling and the written signing?

MR. HAMILTON: Well, there isn't any point, except that it's just you don't have the confusion of verbal

transmissions to the presiding judge. You actually get an order.

HON. SCOTT A. BRISTER: How about the judge must enter an order ruling on the motion promptly prior to taking any other action or must sign an order?

MR. HAMILTON: Sign an order, yeah.

HON. SCOTT A. BRISTER: So now (2) would read, "The judge must sign an order ruling" --

MR. ORSINGER: Put "promptly" in front of "sign," must promptly sign.

HON. SCOTT A. BRISTER: No. You can't split the verbs.

MR. YELENOSKY: Must sign promptly.

MR. ORSINGER: It's not an infinitive. You can only --

HON. SCOTT A. BRISTER: You're still not supposed to split the verbs.

MR. ORSINGER: I thought you couldn't split an infinitive.

HON. SCOTT A. BRISTER: You're not supposed to split either. Ask Bill.

Right? "Must promptly sign" splits the verb. You're not supposed to do that.

CHAIRMAN SOULES: "Must rule," is that a verb?

MR. ORSINGER: "Must" is not a verb.

MS. BARON: "Must" is a helping verb.

MR. ORSINGER: Are you splitting a verb there? Is that bad?

MS. BARON: I think it's not preferred.

HON. SCOTT A. BRISTER: You could do worse things, Richard.

HON. DAVID PEEPLES: Sometimes it's okay.

MR. HAMILTON: How do you not promptly sign? Do it slowly?

CHAIRMAN SOULES: Why don't we leave it up to the judge to figure that out.

HON. SCOTT A. BRISTER: Okay.

CHAIRMAN SOULES: When the judge rules, that day it has to go. The judge ought to be able to figure out if the judge wants to make a written order.

Okay. Well, a party that really needs to stop a judge is just going to drop down to (4) through (8) and figure "I'll take my chances on one of those."

MR. ORSINGER: Don't we require it to be verified, though, or not?

CHAIRMAN SOULES: Yeah.

MR. ORSINGER: They're taking more than just that chance then.

HON. SCOTT A. BRISTER: No, you don't have to verify it.

MR. ORSINGER: You don't? You don't have to verify?

HON. SCOTT A. BRISTER: You've got to state it specifically, why do you think the judge has a financial interest. You cannot just say because the judge has a financial interest. There are several cases on that.

MR. ORSINGER: "A motion to recuse must be verified." Right there, (d)(1), the last sentence.

HON. SCOTT A. BRISTER: Never mind.

MR. ORSINGER: So they're

taking -- somebody is taking a risk, because a verification is an oath, right?

HON. SCOTT A. BRISTER: Right. Now, you can do it upon information and belief if the grounds of such belief are stated specifically. That's taken entirely from the current rule.

MR. ORSINGER: Well, that guts the verification requirement then.

HON. SCOTT A. BRISTER: Somewhat. But then you've got, you know, why specifically upon information and belief do you think I own stock in HL&P. I mean, that's a risky -- people don't do that. People don't say this unless they have some proof of that. They say bias and prejudice.

CHAIRMAN SOULES: Okay. Anything else on this?

MR. HAMILTON: Are you on "Hearing" yet?

CHAIRMAN SOULES: Yeah, we're down to there.

MR. HAMILTON: Well, I have a couple of things on that.

CHAIRMAN SOULES: Okay. What

are they?

MR. HAMILTON: First of all, I'd like to see the 20 days changed to 10 days. And then the other problem that was brought up that seems to be the major problem in the recusals even in Houston is that the presiding judge assigns the matter to a colleague that sits on the bench with the judge that's being challenged, and the rulings are always in favor of the judge who is being challenged. So it's kind of a farce.

HON. SCOTT A. BRISTER: Actually in Harris County they all go to visiting judges.

MR. HAMILTON: Is that right?

HON. SCOTT A. BRISTER: Yeah.

MR. HAMILTON: Well, the suggestion has been made that they go to out-of-county judges to hear recusals so that you don't have brother-in-law type results.

HON. SCOTT A. BRISTER: You need to talk to the county commissioners before we do that, because they've got to pay for those visiting judges.

MR. HAMILTON: Even if it's a

sitting judge in another county that the presiding judge sends over there?

HON. SCOTT A. BRISTER: Well, then you've got to talk to -- well, when I have to go to another county to hear an attorney discipline case, I get paid for it, my expenses, my travel, by that region. That money comes, again, from the county.

Now, again, that is our practice, to use visiting judges in Harris County, but that's because we always have scads of visiting judges there every day anyway. In other counties they don't have that. But they do cost money.

MR. HAMILTON: There's a statute on lawyers, for example, that if a lawyer is being tried for some disqualification or disbarment or something, there's a requirement that the judge be from another county that hears that, so it does seem like we ought to have the judge come from a different area than the same county as that judge.

HON. DAVID PEEPLES: I guess how you feel about it depends upon how serious

you think most of them are. Some of them, if it's just for delay, to bring in somebody from out of county to hear that gives in to the delay. A serious one ought to be taken seriously, of course.

HON. SCOTT A. BRISTER: What do you think about the 10 or 20 days, David?

HON. DAVID PEEPLES: I think 10 is fine. I'm for short timetables on these.

HON. SCOTT A. BRISTER: Should we have a time limit on how fast the assigned judge has to have a hearing and rule?

MR. ORSINGER: Well, you do, because the presiding judge sets the hearing for the assigned judge.

HON. SCOTT A. BRISTER: But you know, for my cases, the presiding judge assigns that for three and a half months off.

MR. ORSINGER: Then you're going to have to mandamus him. This rule says the presiding judge must immediately assign and shall set a hearing within 20 days of the referral. So you're actually making the presiding regional judge set the hearing for the new judge who is coming in.

HON. SCOTT A. BRISTER: That's the current rule. I think there's actually a statute that requires that.

MR. ORSINGER: So you do not need to be concerned about how soon the new judge is set. You just need to be concerned about continuances or whatever he might grant.

MR. HAMILTON: Or how soon he rules.

MR. ORSINGER: And then how long he takes it under advisement.

HON. DAVID PEEPLES: That's not the way it works where I come from. The judge that's assigned to do it gets the assignment and then sets the hearing. You know, you might appoint somebody that's got all kinds of business and can't do it right now. And it's inconceivable to me that the presiding judge is going to say this is going to be heard on Wednesday at 1:30 without checking with whoever you're going to appoint. So the easiest thing to do is to assign them and let them set the hearing.

HON. SCOTT A. BRISTER: Yeah, I agree with that, David. The current rule --

the reason we do it that way is the current Rule 18a(d) in the middle says the presiding judge of the district shall immediately set a hearing. So I just carried that over.

MR. ORSINGER: Well, how do they do it over in Harris County?

HON. SCOTT A. BRISTER: Our administrative judge calls up a visiting judge and says, "When can you hear this?" And they chat, and then the administrative regional judge sends out a notice for a hearing before the assigned judge on X date at X place.

MR. HAMILTON: That's because there's no limitation here on when it has to be set.

HON. SCOTT A. BRISTER: Yeah. And sometimes that's months off.

MR. ORSINGER: Well, as a practical matter, wouldn't the presiding judge call the judge they're going to bring in and talk to them about availability before they pick the date and time?

HON. SCOTT A. BRISTER: Yeah. But David's point is, why shouldn't he just assign it to them and let them pick a date if

you've got some time limit that makes them do it quicker.

MR. ORSINGER: I see.

HON. DAVID PEEPLES: This provision for telephone hearings that you've got in here may cut down on some of these delays, Scott.

HON. SCOTT A. BRISTER: Yeah. That was another suggestion. I think that was in the subcommittee's proposal as well. All of the judges I've talked to want to do that.

HON. DAVID PEEPLES: Yeah. And faxing documents.

MR. HAMILTON: How do you do that when you have witnesses?

HON. SCOTT A. BRISTER: Telephone conferences.

MR. HAMILTON: And they're not sworn or anything?

HON. SCOTT A. BRISTER: Yeah. You have the court reporter where the witness is swear them in.

HON. DAVID PEEPLES: By definition, you've got a courthouse situation where the case is, and if the judge is in a

different county or somewhere, you get the witnesses and whoever is in Harris County in the courthouse there and have somebody put them under oath and get them on a speakerphone. I mean, in a complicated case it would be hard to do. But in some of these frivolous things, just a standard telephone hearing is wonderful where there are not a whole lot of witnesses and it's just kind of trumped up.

CHAIRMAN SOULES: Anne Gardner.

MS. GARDNER: I had a question about the last -- well, maybe I'm getting off on an another subject. But in connection with the hearing and the presiding judge's role, the last sentence of (d)(4) -- no, the next to the last sentence where the presiding judge may make such other orders including interim or ancillary relief.

What happens if there is a requirement of discovery in connection with the recusal hearing or discovery rulings that need to be made by the -- it seems that this is saying that the presiding judge will take care of

matters like that, and it seems like the presiding judge might be busy and that it would be better handled by the judge that's assigned to hear the recusal motion.

I'm just curious to know if that contemplates that the administrative judge will handle that. It seems like it's saying that the administrative judge will handle matters like that.

CHAIRMAN SOULES: Two judges are empowered to do that at that time, the judge who has been challenged and the presiding judge of the region. They both can do it.

MS. GARDNER: Okay. And this just says "and may make such other orders."

MR. ORSINGER: Well, should we be limited to those two, or should the presiding judge be able to pick another local judge to handle the interim problem until the visiting judge comes in?

CHAIRMAN SOULES: Well, the judge on the bench has the power to run his court. We haven't stopped him, except long enough to make a ruling. Why should a

presiding judge interfere with his progress if he says, "I'm not recused and I'm not moving"?

MR. HAMILTON: But he can't rule except under (1), (2) or (3). Under (4) through (8) he's automatically stopped.

CHAIRMAN SOULES: That's right.

MR. HAMILTON: That's why the presiding judge has to be able to make any emergency rulings in the interim.

HON. SCOTT A. BRISTER: And I would think when it says that the --

CHAIRMAN SOULES: That's not the case under the present rule.

HON. SCOTT A. BRISTER: No, that is the case under the present rule.

CHAIRMAN SOULES: No, the judge who --

HON. SCOTT A. BRISTER: Oh, I'm sorry. Yeah.

CHAIRMAN SOULES: Even if a judge voluntarily recuses --

HON. SCOTT A. BRISTER: With regard to the trial judge, yeah.

CHAIRMAN SOULES: Even if he voluntarily recuses or if he says no and he

sends the motion forward, he can act in emergency circumstances.

MR. ORSINGER: Is that better?

CHAIRMAN SOULES: You voted.

HON. SCOTT A. BRISTER: Well, that's -- you know, I don't know that much about family law and I'm usually against making any exceptions for family law, but again, if you make the process go fast enough, well --

MR. ORSINGER: This depends so entirely -- I mean, like in San Antonio with our central docket, if you've got a recusal against one judge, you just trot down the hallway and get another one. No big deal. And I would hate to think that because somebody filed a recusal against the judge in one Bexar County district courtroom that we therefore have to find David Peeples, and if he's off in Hawaii, then I can't get another district judge in the whole courthouse to hear an emergency temporary orders hearing or something. It seems to me that --

HON. SCOTT A. BRISTER: No. Why couldn't -- if the presiding judge can

make such other orders including ancillary relief include an order that so and so make interim ancillary orders in my absence?

MR. ORSINGER: Well, I would suggest that we say the presiding judge or other judge selected by the presiding judge.

CHAIRMAN SOULES: Okay. Let's pick a point and stay on it.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: What do we want to take up first?

MR. ORSINGER: 10 or 20 days.

CHAIRMAN SOULES: Okay. 10 or 20. Those in favor of 20?

10?

All the votes are for 10.

HON. SCOTT A. BRISTER: Next was whether you have a time limit on how fast the assigned judge has to hear or decide the motion.

CHAIRMAN SOULES: Well, it says shall set a hearing within -- or I thought you --

HON. SCOTT A. BRISTER: And that's not a time limit. That could be set a

year away.

MR. ORSINGER: No, I don't think so.

HON. SCOTT A. BRISTER: Oh, I see.

MR. ORSINGER: If it's within 10 days shall set a hearing --

CHAIRMAN SOULES: Set a hearing to commence before such judge. That's what we mean, isn't it?

HON. SCOTT A. BRISTER: Yes. That's fine.

CHAIRMAN SOULES: And within 10 days of the referral.

HON. SCOTT A. BRISTER: So it's just you have a time limit on how fast that judge has to decide.

CHAIRMAN SOULES: All right. Those in favor of a time limit show by hands.

Those opposed.

All are for a time limit. How long?

HON. SCOTT A. BRISTER: Any reason for any more than 10 days? Again, this is going into your concern about the case running amuck while this is going on.

HON. DAVID PEEPLES: You know, I kind of think that the frivolous one that's almost obviously for delay, you've just got to rely on people to give a quick hearing on that one. I mean, I would be reluctant to set a short, short time fuse and then have it apply to some series motion to recuse that might take some preparation. I'm not sure that one size fits all in this situation.

CHAIRMAN SOULES: The idea of this pretty much now is the way these work.

HON. DAVID PEEPLES: Oh, for taking it under advisement and ruling? Oh, I see.

MR. ORSINGER: Or why not grant a continuance or two or three continuances?

CHAIRMAN SOULES: As far as preparation is concerned, the lawyers that do this in a serious way know they've got to be prepared when they file the motion. You've got to have your ducks in a row because it's probably going to happen fast. They usually happen fast. But with no incentives for it to happen fast, you probably need to put in something that sets the outside deadlines

maybe.

Okay. How long? Rule within how many days of the hearing?

MR. HAMILTON: Five days.

HON. DAVID PEEPLES: This is after the hearing you've got to rule? It ought to be immediate.

MR. HAMILTON: Immediately? Three days?

MR. ORSINGER: Well, I think we ought to use a deadline from the original setting of the administrative judge so that you don't have a problem of three or four resets.

CHAIRMAN SOULES: Set a hearing to commence.

MR. ORSINGER: Well, I know. So if the lawyer is in a jury trial at the time of that thing, then you're going to have the hearing in their absence?

HON. SCOTT A. BRISTER: That was our discussion. The deal was it would not interfere with the trial and it would take place, for instance, after 5:00 o'clock.

MR. ORSINGER: No. I mean in

another trial.

HON. SCOTT A. BRISTER: Yeah. If you want to file that bias and prejudice thing, then you're the one that has to scramble instead of everybody else. Again, it's only bias and prejudice motions.

MR. ORSINGER: Well, if I have a heart attack and I'm in the hospital, then my client is pro se.

Well, I mean, if we write a rule that the judge can't grant a continuance no matter what, what if we have a tornado or an explosion that destroys the courthouse? I mean, I guess we can do it, but --

CHAIRMAN SOULES: Go back to the old rule.

MR. ORSINGER: What if there's an earthquake?

CHAIRMAN SOULES: Do you want to go back to the old rule?

PROFESSOR DORSANEO: Maybe we ought to write the rule again.

MR. ORSINGER: No, no, no. I think that there ought to be some discretion to grant a continuance, but --

MR. YELENOSKY: Don't you have a due process argument at that point?

MR. ORSINGER: I guess you do. You always do. You can always have a revolution too.

CHAIRMAN SOULES: How many days? How many days?

MR. HAMILTON: Back to Richard's point, maybe we could say that it has to be set within 10 days and shall not be continued except for emergency reasons or something like that.

MR. ORSINGER: Or could we not say that it will be resolved within 10 days of that original setting or something like that? Shall set a hearing to commence before such judge within 10 days, and the assigned judge shall resolve the motion within 10 days.

MR. HAMILTON: That's all right. That gives a 10-day leeway in there.

HON. SCOTT A. BRISTER: 10 days of what?

MR. ORSINGER: Within 10 days of that setting.

HON. SCOTT A. BRISTER: Within

10 days thereafter?

MR. ORSINGER: So that would give you a maximum of 20 days if everybody was stretching it.

CHAIRMAN SOULES: All right. So the assigned judge shall rule within 20 days of the referral?

MR. ORSINGER: No. That's possible, but I would say within 10 days of when the presiding judge sets it.

CHAIRMAN SOULES: Well, he's got to --

MR. ORSINGER: He could set it in three days, in which case you're looking at 13 and not 20.

CHAIRMAN SOULES: I'm trying to take care of the continuance problem as well. He can set it in three and pass it twice but it's still got to be ruled on within 20 days.

MR. ORSINGER: I can live with that. I can live with that.

MR. HAMILTON: And if it isn't ruled upon, it's automatically granted.

CHAIRMAN SOULES: That sounds like a great idea.

HON. SCOTT A. BRISTER: So within 20 days --

CHAIRMAN SOULES: Why not?

HON. SCOTT A. BRISTER: So within 20 days of the referral or the motion is granted?

MR. ORSINGER: Because the original judge is going to light a fire under the assigned judge or else he's going to look bad.

CHAIRMAN SOULES: Or the motion will be deemed granted.

MR. ORSINGER: That will get it done.

CHAIRMAN SOULES: Now, what's wrong with that?

MR. ORSINGER: Nothing. That's a brilliant idea.

HON. SCOTT A. BRISTER: My colleagues ain't going to like that.

CHAIRMAN SOULES: That's a pocket veto. That gives the assigned judge a pocket veto, which he might want. What's wrong with that? Is anybody opposed to that?

MR. ORSINGER: I think the

original judge is going to be damn sure that it gets ruled on within 10 days, is what I think.

CHAIRMAN SOULES: Or the motion is deemed granted.

HON. SCOTT A. BRISTER: Well, the original judge -- believe me, I was as incensed as everybody else was by this six-month delay. But I can't call up the assigned judge or my presiding judge and say, "What do you think you're doing? Rule on this faster."

MR. ORSINGER: You could tell him, "If you don't rule on it, I'm going to be recused by operation of law." That's a legitimate thing to say to a colleague.

HON. SCOTT A. BRISTER: I can't light a fire under anybody or risk I'm going to be called as a witness as proof of my bias that I'm trying to ramrod these people.

CHAIRMAN SOULES: Let's get a handle on this. Rule within 20 days of the referral. Does anybody disagree? Nobody disagrees.

Okay. Or the motion shall be deemed

granted. Does anybody disagree with that?

No disagreement.

HON. DAVID PEEPLES: Deemed granted by operation of law.

CHAIRMAN SOULES: Okay. Anything else on this?

MR. ORSINGER: Well, I would like to make it clear that the presiding judge can assign him or herself, right?

CHAIRMAN SOULES: Yeah.

HON. DAVID PEEPLES: Right.

CHAIRMAN SOULES: That's clear.

MR. ORSINGER: Well, it says "another judge." That means another besides the trial judge and that includes him or herself, right?

HON. DAVID PEEPLES: Do we want to say anything about the right to object to an assigned judge as opposed to filing a motion to recuse?

CHAIRMAN SOULES: Well, that's by statute.

HON. SCOTT A. BRISTER: Not in this circumstance, I don't think.

CHAIRMAN SOULES: Well, yeah.

HON. DAVID PEEPLES: Does somebody have the right under the existing law, Luke, to object to the presiding judge himself if he assigns himself?

CHAIRMAN SOULES: Sure.

HON. DAVID PEEPLES: On what grounds? This rule predates 74. This was the law before 74 ever came in.

HON. SCOTT A. BRISTER: That visiting judge thing refers specifically to visiting judges and this ain't a visiting judge. This is an assigned judge, and it's not assigned under that Government Code section.

MR. ORSINGER: But if your presiding judge is a retired or former judge, does the statute not apply?

HON. SCOTT A. BRISTER: That's an interesting problem about visiting judges. The practice in Harris County has been you can't -- that this procedure is governed by 18a and 18b and you can't object to the regional judge; you can't object to the assigned judge. I suppose you could -- well, I suppose you could object to the assigned

judge if the assigned judge was disqualified or recused under the rule itself.

MR. ORSINGER: Well, sure.

HON. DAVID PEEPLES: But object is different from recuse, you know; you file a motion.

MR. ORSINGER: But what makes you think that a rule means -- that a statutory right that you're given by the legislature is trumped by a rule?

HON. DAVID PEEPLES: Richard, that says when judges are assigned under Chapter 74 you've got a right to object. It doesn't say whenever. I mean, election contests, for example.

MR. ORSINGER: Okay.

HON. DAVID PEEPLES: You had assigned judges before Chapter 74 ever was enacted, and there was no right to object.

CHAIRMAN SOULES: Okay.

HON. DAVID PEEPLES: And you had contempt hearings.

Now, the Supreme Court did hold a few months ago, when there was a recusal motion filed and the presiding judge sent in a

visiting judge, I think it was a defeated judge, I think, somebody who hadn't served very long, they held there was a right to object to him.

MR. HAMILTON: I think that's right, they did.

HON. DAVID PEEPLES: Yeah. But that wasn't the presiding judge, it wasn't an active judge, it was somebody who had lost an election not too long before. So I'm just wondering if we ought to try to deal with that here.

I personally think that there has to be somebody who can go in and hear these things and not be hassled with an objection. I don't go so far as to say that anybody that the presiding judge wants to assign, you know, you can't object to him. But there's no end to it if they can just say, "Well, I object to you."

"Here is somebody else."

"Well, I object to him too."

MR. ORSINGER: Well, I mean, you only get one -- if it's a former judge, you can only strike one of them.

HON. DAVID PEEPLES: And here is the problem on that: If it's a multiparty case, you can say, "Okay. Now, Plaintiff A is objecting to so and so, and defendant so and so" -- in big cases this can be a problem where there are a lot of parties.

CHAIRMAN SOULES: Everything that's important we need to do. We have piles of work to do. We can continue to have ideas about how to fix this that are not here now or we can go on with this, Judge, but we've got gobs of work to do.

HON. DAVID PEEPLES: Well, Luke, let me just tell you, you're talking about importance, and I raised this with the nine presiding judges, and that was one of the top two things they were interested as far as parties, the ability to send somebody in who can't be objected to. Recused, yeah, if there are grounds for recusal. But the person who is trying to delay something has every incentive to just keep on objecting. And if it's a multiparty case, they've got more than one objection. And here is somebody that's traveled in to hear the thing, and "Well, we

object to you."

CHAIRMAN SOULES: Well, it looks to me like under 74.121 -- is that it? No.

HON. DAVID PEEPLES: I think it's 054 or 056.

CHAIRMAN SOULES: It's 053. If it's an assigned judge other than a former judge or justice who is not retired, this chapter probably doesn't apply. But it looks like paragraph (d) is not burdened with whether it's assigned under this chapter. I guess it's up to the Supreme Court to decide.

HON. DAVID PEEPLES: Well, they didn't talk about that. They just didn't recognize there was an issue. But they did hold, and I think it's Flores vs. Banner, that the person, you know, who filed a motion to recuse had the right to object to a former judge.

CHAIRMAN SOULES: Okay. So what's the proposition so we can get on with this?

HON. DAVID PEEPLES: Well, if you just look at the side by side thing that

Scott Brister has got, the original (c) -- well, let's see, no. (d) says the presiding judge can send himself in. I don't think we've got that expressly in the rewritten rule, do we?

MR. ORSINGER: No. That's why I asked is it inferential that they can assign themselves.

HON. SCOTT A. BRISTER: Yeah. And we can add that back in.

MR. ORSINGER: Because it does say "another judge," and does "another" mean another besides the trial judge or another besides the presiding judge?

HON. SCOTT A. BRISTER: Give me a better way to say it then.

HON. DAVID PEEPLES: Well, look at original (d) or existing (d), the second half of that.

CHAIRMAN SOULES: I can do it with one word. In paragraph (4), "The presiding judge of the region shall immediately hear or assign another judge to hear the motion."

MR. ORSINGER: All right.

That's good.

HON. SCOTT A. BRISTER: Fine.

HON. DAVID PEEPLES: Good.

CHAIRMAN SOULES: Okay.

HON. SCOTT A. BRISTER: I only have one more substantive thing, if you're ready for that.

CHAIRMAN SOULES: Okay.

HON. SCOTT A. BRISTER: And that is the one all of you all that were preaching to me about the Constitution and that we stick with their language, I want to see how you handle this, and that is in (5).

The Constitution says for a fact that if the judge is disqualified, the parties can consent to appoint a proper person to try the case, and only if they fail to do so is somebody else assigned to hear their case. Now, that is not what the current rule says, but that is without a doubt what the Constitution says.

CHAIRMAN SOULES: Do you have the reference to that constitutional provision, Judge?

HON. SCOTT A. BRISTER: It's on

the next page right behind my side by side.

MR. ORSINGER: What does that mean?

HON. SCOTT A. BRISTER: "When a judge of the District Court is disqualified by any of causes above stated, the parties may, by consent, appoint a proper person to try said case."

MR. ORSINGER: So that means without the approval of the presiding judge?

HON. SCOTT A. BRISTER: It doesn't say anything about that, Richard, but that's what it says.

HON. DAVID PEEPLES: From 1891.

MR. ORSINGER: Does it have to be a lawyer?

HON. SCOTT A. BRISTER: It just says "a proper person." It doesn't have to be a judge, I wouldn't think.

CHAIRMAN SOULES: I don't think so. I don't think any person is competent, but maybe it is. I don't know. Well, that's there. We can't amend that.

So what is your concern, Judge?

HON. SCOTT A. BRISTER: I've

written it into my new rule. "The parties may by consent appoint a proper person to try the case."

MR. MEADOWS: Does that mean by agreement?

HON. SCOTT A. BRISTER: By consent, yeah. They've got to agree on somebody to try the case.

MR. ORSINGER: The truth is, doesn't it take the act of some judicial officer to empower someone to do this?

HON. DAVID PEEPLES: The Constitution has already done it.

HON. SCOTT A. BRISTER: All I'm telling you is what the Constitution says, and it says "the parties may appoint."

MR. HAMILTON: I think that's a good provision. As a practical matter, the presiding judges usually try to get the parties to agree to avoid all of these objections under the government code. If everybody agrees, they just appoint him, and then that saves a lot of problem. So I don't see any problem with having that in there. It encourages the parties to agree on something.

MR. ORSINGER: I would like to ask, we've got the district court language in here, and surely this is not limited for any particular reason to district courts. It ought to just be "If a judge is disqualified."

CHAIRMAN SOULES: No. This constitutional provision only applies to district judges.

MR. ORSINGER: Is that true?

CHAIRMAN SOULES: Yes.

MR. ORSINGER: Well, then how is anybody going -- is a district judge ever going to be replaced? Because the second sentence is derivative of the district court too.

CHAIRMAN SOULES: "Failing such consent and in all other instances," so that would be all over.

MR. ORSINGER: Okay. So you're saying that "provided the parties" only applies to a district judge and not a county court at law judge?

CHAIRMAN SOULES: That's what it says.

HON. SCOTT A. BRISTER: Well,

the second sentence applies to all the appellate courts.

CHAIRMAN SOULES: Well, have we rewritten 18c? Isn't that the one that goes to -- no. That's over in the Appellate Rules now. Okay. What else?

HON. SCOTT A. BRISTER: That's it.

PROFESSOR DORSANEO: When the term "district court" is used in the Constitution, that's not altogether clear that it means exclusively, you know, a district court denominated as such and not legislative courts exercising district court jurisdiction. So maybe we read too close to the page when we read the term "district court."

CHAIRMAN SOULES: I guess we're using the term "district court" in the same way here as in the Constitution.

MR. ORSINGER: So it could mean a statutory county court exercising district court jurisdiction, you think?

PROFESSOR DORSANEO: I think, yes.

CHAIRMAN SOULES: Or an El Paso County Court at Law which has concurrent jurisdiction with the district courts.

PROFESSOR DORSANEO: The same thing for the right to jury --

CHAIRMAN SOULES: Okay. Those in favor of 18a as modified in our discussions here today show by hands. Nine.

Those opposed.

MS. McNAMARA: Luke, can I explain why I voted against it?

CHAIRMAN SOULES: Nine to one. That's Anne McNamara, and you may.

MS. McNAMARA: What we've done here with this consanguinity business, I realized after we took the break, is that if any judge's brother-in-law has Advantage Miles, he's got to recuse himself. And if any judge's brother-in-law has Continental Frequent Flyer Miles, he's going to have to recuse himself.

We're going to have real trouble in the State of Texas, and I don't think we want to do that. And I come back to the distinction between siblings and spouses. And to me,

that's an economic interest or a financial interest. There's no way to divest because there's no after-market that's legal, so the only way to cure the problem is to talk your brother-in-law, who you may or may not be speaking to, into giving up his Frequent Flyer Miles. I don't think we intend that.

HON. SCOTT A. BRISTER: Well, the current rule is, if you bring that to the judge's attention and the judge says "I didn't know" and you're new in the case, the judge has to recuse under the current rule.

I mean, I've never thought about Frequent Flyer Miles. That's a problem, but you know, that's not a problem created by my rule, my proposals, you know, and the things we've discussed. That's just -- if that's a financial interest, I would think somebody is going to have to --

MR. MEADOWS: Is your new rule limited to first degree?

MS. McNAMARA: It's the degree issue that troubles me.

HON. SCOTT A. BRISTER: Third degree. Financial interest is third degree.

The current rule is third degree. The only change I suggested in that was to drop the distinction about knowing and not knowing about it.

MS. McNAMARA: Well, we voted, so that's all.

CHAIRMAN SOULES: Well, for the record, I think that there is certainly room to debate whether or not Frequent Flyer Miles are an economic interest. There may not even be room to debate that they are, in my judgment. I don't know the answer to that.

Okay. Let me see now, that wraps up old 18b, right?

MR. ORSINGER: (a) and (b).

HON. SCOTT A. BRISTER: 18a and 18b go into one rule.

CHAIRMAN SOULES: (a) and (b) in one rule. And we're deliberately dropping out all of the definitions in section (4)?

HON. SCOTT A. BRISTER: As I pointed out, the definitions are all word for word from the code, and I suggest just that rather than repeating them all we just have the little paragraph I put in there that the

financial interest -- I'll be happy to change it back to "financial interest" -- it means the same thing it does in the code.

CHAIRMAN SOULES: Code? Which code?

MR. ORSINGER: The Code of Judicial Conduct.

CHAIRMAN SOULES: And where is that in the Code of Judicial Conduct?

HON. SCOTT A. BRISTER: It's in Canon 8. The definitions are taken word for word from Canon 8.

HON. DAVID PEEPLES: Scott, what happened to existing paragraph (h), sanctions for frivolous motions? I meant to ask that.

HON. SCOTT A. BRISTER: Yeah, I guess that --

HON. DAVID PEEPLES: I want to reconsider my vote if that's not in it.

HON. SCOTT A. BRISTER: That -- well, that I left out under our previous discussion about whether we put sanctions in every rule or whether we put it in one general rule. I thought the decision was to put it in

one rule unless we do something like we did on the summary judgment rule today where it's a different standard in summary judgment on that (i) rule. It's just objectively reasonable or unreasonable rather than bad faith or harassment, et cetera.

MR. ORSINGER: We don't actually have a sanctions rule anymore. We let that go because we had a statute.

HON. SCOTT A. BRISTER: Well, I'm sorry, yeah. And certainly the Civil Practice and Remedies Code covers that. If this motion is filed in bad faith or for purposes of harassment, it's covered.

HON. DAVID PEEPLES: Is there any sentiment for putting (h) back into the new one? Nobody is for that?

CHAIRMAN SOULES: Okay. The vote stands. Any change? Okay. We're done with 18a and 18b.

Let me see the agenda for the meeting. Tomorrow what we've got left to do is the remainder of Richard's report, Alex's report and Paula's report. I mean, we've got 14 items. Do you think we can finish Alex's?

MR. ORSINGER: No. You can't finish the discovery agenda today, can you, Alex?

PROFESSOR ALBRIGHT: We got pretty close this morning.

MS. DUDERSTADT: She's only got 10 pages left.

MR. ORSINGER: Only 10 pages left? Oh, well, let me follow her then until we run out of time. I've got to leave tomorrow at 10:00 because I have to lecture at that course, so I'd like to try to get my agenda done. And then Alex is going to do our venue rule tomorrow. After we get through covering our dispositions, Alex will do our venue rule.

CHAIRMAN SOULES: Okay. So what's your proposal?

MR. ORSINGER: Alex will do discovery right now, the rest of discovery.

CHAIRMAN SOULES: Okay. And that's what tab?

PROFESSOR DORSANEO: And I only need one matter to be covered tomorrow to make adjustments.

CHAIRMAN SOULES: Okay. So tomorrow we're going to do Dorsaneo and then --

PROFESSOR DORSANEO: Well, really mine and Alex's are the same thing, because I have venue, and venue is the biggest part of that Section 3, but there's one other issue in there.

MR. ORSINGER: Then let's take up Bill and Alex's venue thing first and then the disposition table after that until I have to leave or until I finish.

CHAIRMAN SOULES: And you want to do your disposition table today. So we're starting right here, right?

MR. ORSINGER: We're on the second supplement now, aren't we?

PROFESSOR ALBRIGHT: We are on Page 27 of the disposition chart, Supplement Page 370.

CHAIRMAN SOULES: Okay. Here we go.

PROFESSOR ALBRIGHT: Okay. Page 370, James Guess, Texas Association of Defense Counsel, wants time limitations the

same for all parties and not by sides. We agreed to keep it by sides, but we amended Rule 1 to allow the court to modify the hours so no one side as an unfair advantage.

Page 372. This is Eric Hirtriter.

HON. DAVID PEEPLES: Alex, which one of these are you on?

PROFESSOR ALBRIGHT: I'm now on at the top of Page 28 of the Rule 166 Disposition Chart.

HON. DAVID PEEPLES: Thanks.

PROFESSOR ALBRIGHT: This is a letter concerning allowing a videographer to replace a certified court reporter. We've already addressed these issues previously, and our rules have a new rule for nonstenographic recording.

Page 377 from James Guess of Texas Association of Defense Counsel wants telephone depositions only by agreement of parties, and a video deposition should be required to have a stenographic record. We rejected this, and we now have a new rule for nonstenographic recordings of depositions.

Page 379, James Guess, Texas Association

of Defense Counsel, objects to Section 4 of Rule 204 and wants proper objections permitted without limitations. We have rejected that. We have Rule 15 of our Discovery Rules which allows only certain deposition objections.

He feels that any requirement of automatic disclosure should at least require a request and not have an automatic disclosure. Our proposed Discovery Rules do not require automatic disclosure. We have standard requests for disclosure.

Page 381, from Michael Domingue, a court reporter, proposing that we track the federal rule regarding signature by a witness. I have here that we did not address this, and to see our proposed Discovery Rule 16.

David Jackson, what do you think?

MR. JACKSON: Well, this Michael "Domingue" who is a court reporter, it's Michael Domingue.

PROFESSOR ALBRIGHT: Oh, okay.

MR. JACKSON: And it really is more an effort to sell copies, quite honestly, to try to protect the original so it doesn't get xeroxed.

PROFESSOR ALBRIGHT: Okay. So it's protection of original. And what we have done is kept it -- we've kept it so that the party with the original has to make it available for copies?

MR. JACKSON: Right.

PROFESSOR ALBRIGHT: So I guess we did address it, and we suggested no change.

MR. JACKSON: Right.

PROFESSOR ALBRIGHT: Page 672, we're now on the second supplement. We have moved to the second supplement, Page 672. This is from Michael Paul Graham of Houston. Defendant should not have to identify expert until 90 days after the plaintiff produces expert. See Proposed Discovery Rule 10, which sets out the schedule for identification of experts.

Second Supplement Page 200, Bruce Williams of Midland, we don't need our new Discovery Rules. Our response was that we feel our rules will limit the cost and the amount of discovery. We definitely addressed whether we should have no change at all.

Second Supplement Page 202, we're now to

Second Supplement Page 202. This is a letter from Jim Arnold of Austin. Summary of facts known by persons with knowledge of relevant facts should be discoverable. We've addressed that in previous letters.

Maintain 30 days before trial to lock in discovery. We have maintained the 30 days as a last time to supplement discovery, but we've also added a reasonably prompt requirement for supplementation of discovery in Rule 5.

CHAIRMAN SOULES: On No. 1 there, "Summary of the facts known should be discoverable," we put a limitation on that in the Texas rules, right?

PROFESSOR ALBRIGHT: What we done is the rule allows people to discover the identified person's connection to the case.

CHAIRMAN SOULES: Okay. Good.

PROFESSOR ALBRIGHT: The third point he raises is most cases don't need a scheduling order. Our rules don't require every case to have a scheduling order. We have our three-tier system in Rule 1.

He doesn't like the three- to six-hour deposition limit, likes the overall cap

instead. We do have an overall cap, and in subsequent rule drafts and in the one we sent to the Supreme Court, one deposition can be longer than the three- and six-hour limitation.

Page 205.

CHAIRMAN SOULES: The chair is going to assume agreement with the Committee unless someone raises an issue as we go throught the report here. That's been the case as we go.

PROFESSOR ALBRIGHT: Right. That's the way we handled it this morning.

CHAIRMAN SOULES: Okay.

PROFESSOR ALBRIGHT: Page 205. If we have $50,000 case discovery limits, we need to amend our pleading rules to allow pleaded damage amount. That has been addressed by the pleadings subcommittee.

Page 207. Gary Nickelson, concern for family law cases with discovery cutoff and deposition time limits. When this letter was received, the members of the subcommittee met with some family law representatives and reached a consensus on the application of the

Discovery Rules to family law cases. And the decision was made that family law cases are no more complex nor time sensitive than many other cases, and so we did not want to make family law exceptions.

Page 211. This letter from Jim Loveless was addressed at the same meeting. He was concerned with the new privilege rule. With our proposed Rule 4, we believe that his concerns are not well founded based upon our privilege rule, and that the information that he's worried about is protected under that rule.

Page 213, from the Locke Purnell Litigation Section, object to Proposed Discovery Rule 15, time limits and conduct limitations. We debated this issue at length, and the group voted to have the time limits and the conduct limitations to decrease the expense and amount of discovery.

Page 216, Doyle Curry for the Court Rules Committee. The Court Rules Committee proposal for discovery, we gave this rule and all of the Court Rules Committee's proposals substantial consideration. Some of the ideas

in this proposal are included in our package and some are not.

Page 225. This is another letter by Doyle Curry for the Court Rules Committee. Same response as the previous letter.

The next letter is about 166a. I'd prefer to defer this until we take the rule that we passed today and compare it to these letters, so we will defer this one.

Page 242, the Court Rules Committee's proposed amendments. It's the same response that we gave to 216. We gave these substantial consideration.

Page 246 is a letter from Cherry Williams of Corpus Christi dated July 8th, 1984. She has several different concerns about the discovery rules.

Begin the discovery period after all defendants have filed answers. We addressed this earlier and we rejected that.

Extend discovery period to one year rather than six months. Our current proposal is nine months' discovery period.

(3). No trial setting until 30 or 45 days after discovery is completed. We

addressed that one earlier. We did not address trial settings.

(4). Court modification only upon good cause without agreement of the parties. See Proposed Discovery Rule 2, modification for good reason.

(5). Doesn't like limits per side. We've addressed this several times.

(6). How to handle depositions with a translator on time limits. This was not addressed in these proposed rules, although we did discuss it. You get an agreement or court order under Proposed Rule 2 to deal with this specific problem if you have a translator in a deposition.

(7). Allow parties to adopt each others interrogatory answers. I say here "not addressed," but actually I think what that is is the same issue that we've addressed several times where our rules do require people to identify their own witnesses and own experts. This issue has been brought up in several different letters, so we rejected this proposal.

No. 8. Supplementation without

verification. We accepted that.

Time periods for experts too short --

CHAIRMAN SOULES: That's in the currently proposed rule, the supplementation without verification?

PROFESSOR ALBRIGHT: Right, that's in the proposed rule.

(9). She's concerned that time periods for experts are too short. We've addressed that earlier. We set out a deadline in our rule after substantial debate.

No. 11. Why is corporate rep provision in depositions eliminated? It was not eliminated. It's in Proposed Discovery Rule 15(2)(c).

(12). The nonstenographic recording should only be by agreement. We've addressed that in several other letters as well.

CHAIRMAN SOULES: And said?

PROFESSOR ALBRIGHT: And said we have rejected this; that you can have -- you can notice a nonstenographic recording but you can't use the transcript as evidence unless it is transcribed by a court reporter.

(13). Doesn't like deposition conduct

limits. We debated that at length and decided to have deposition conduct limits. But there were some changes since her letter.

Page 251. James Brister of --

HON. DAVID PEEPLES: -- San Antonio.

PROFESSOR ALBRIGHT: -- San Antonio suggests amending the rules to state that supplementation of discovery responses must follow the same rules and procedures as provided for the original response. We debated it and decided that supplementation need not be verified in Rule 5.

Page 253. More Court Rules Committee proposals. Once again, we considered the Court Rules Committee proposals extensively and adopted some of their proposals and some of we didn't.

Page 264. Opinion of the attorney general about stipulating that a deposition be taken by a person other than a certified court reporter when this conflicts with the Government Code. We addressed this in connection with an earlier letter. In our

rules we say that depositions can be taken before anyone as provided by law.

270 is a repeat of a previous letter.

275 through 315 are Court Rules Committee proposals. And again, we gave those substantial consideration.

Page 316. Would like to see -- this is by Leonard Cruse. Leonard Cruse would like to see some changes to control the request for unnecessary documents. We did not specifically make changes that would limit discovery of documents, but we felt like the rules as an entire package would decrease the cost and the amount of discovery.

HON. DAVID PEEPLES: But did we do anything on documents at all?

PROFESSOR ALBRIGHT: We did not do anything to limit the scope of discovery of documents, no. What we did is we made more clear when and where to respond and how to produce electronic data and that sort of thing.

HON. DAVID PEEPLES: This next -- they're on the same topic, and the next one by Mike Milligan sounds like he's

suggesting we go back to the motion to produce and put the burden on the asking party rather than the resisting party?

PROFESSOR ALBRIGHT: Right. And I think there was another request. I think Luke Soules had an earlier letter in here about changing the burden for all discovery requests, and we did not adopt that.

HON. DAVID PEEPLES: Is that something this Committee might come back to at a future date? This isn't definitive action today, is it?

PROFESSOR ALBRIGHT: As of now, the Committee action has been not to change the burden, but --

HON. DAVID PEEPLES: I just want the record to be clear that we haven't devoted very much time at all to that issue of documents. We dealt with everything but documents.

PROFESSOR ALBRIGHT: Well, in the subcommittee we did. I remember early in our discussions we talked about that this could be a possible way to address discovery reform. And our subcommittee had an initial

vote very early on in 1993 and decided to go a different way, so I think that's just how it's been.

MR. ORSINGER: Of course, as a practical matter, we've sent our Discovery Rules to the Supreme Court, so we would be -- if we were to engage in that discussion, we would be talking about changing something that's already the horse is out of the barn, right?

PROFESSOR ALBRIGHT: Right. It may be, Judge Peeples, that we see them come back again and you can raise that. The fat lady has not sung yet.

MR. ORSINGER: There are no fat ladies on that court.

PROFESSOR ALBRIGHT: That's true. Page 326. Court Rules Committee proposed amendments to Rule 167. Again, we gave their proposal substantial consideration.

Page 336. Tommy Turner from Lubbock suggests deleting the requirement that the question is to precede the answer. We've addressed that several times. In our rules, the question precedes the answer if a disk is

sent.

Page 338 to 345. These are all the same letters that have been addressed earlier at different places in this disposition table. They're just duplicates. Page 346 is a duplicate. Page 348 is a duplicate.

Page 353 is more on Rule 174, bifurcation, which we have not addressed, and Judge Brister is going to look at that for us.

CHAIRMAN SOULES: Which one?

PROFESSOR ALBRIGHT: Rule 174, down at the bottom of Page 35, Page 353.

Page 359 is a duplicate.

364 is a Court Rules Committee proposed amendment that we gave substantial consideration to.

374 is a duplicate. 379 is a duplicate.

384 is a letter from Ken Howard of San Antonio. He proposes amending the rule to clarify how a deposition should be submitted to a witness for signature. This, again, was not addressed. Is this the same issue, David?

MR. JACKSON: It's basically the same issue. The rules provide that a copy be submitted if the original never comes

back. The only hole that happens is if you've sent the exhibits out, which under the rules you're supposed to do, with the original for the witness to read and have the exhibits available to him, if the original doesn't come back, the exhibits usually don't come back either. And so when you do file the copy, you won't have the exhibits, and it will be up to the lawyers to come up with another set of exhibits.

PROFESSOR ALBRIGHT: Yeah. So we did address it.

MR. JACKSON: We did address it, and the only hole in it is really the exhibits. But a copy can be filed in lieu of the original.

PROFESSOR ALBRIGHT: Okay. So we have addressed it and it is taken care of in Rule 16.

CHAIRMAN SOULES: Well, I don't know about that problem. It seems to me like it is incumbent upon the court reporter to -- that the risk is that a duplicate -- that if a copy may need to be furnished, the court reporter should keep a copy of the exhibits at

somebody's cost.

MR. JACKSON: Well --

CHAIRMAN SOULES: Because the deposition isn't complete without the exhibits.

MR. JACKSON: Somebody will have the exhibits. We make a copy of the exhibits for you, if you've hired us to do it. You've got a set of the exhibits that we've also attached to the original deposition that went away.

What becomes a real problem, if you sent out 100 depositions a day and you copy all of those exhibits and store them, the court reporters would have to have a warehouse to keep all of those exhibits in over the years, never knowing which deposition is not going to come back.

CHAIRMAN SOULES: How does it work? You make a set of exhibits with the copy of the depo that goes to counsel?

MR. JACKSON: Right. He's got the exact same thing the witness has. The witness gets his original transcript and set of exhibits. He reviews the transcript using

the exhibits to refer back to the testimony, the things he testified from. He then signs the deposition and sends it all back to the court reporter, and it goes to the person who asked the first question, and there's no problem.

What Ken's problem with this is, if he sends that original out with those exhibits and you have the witness that refuses to return the original, his dog ate it or whatever happened, then no one has anything to file with the court. The rules now provide that a duplicate original or a copy can be prepared by the court reporter, which means he goes back to his computer archives and pulls the deposition off, reprints it, signs it and files it with his affidavit that the original didn't come back in the time limit.

That transcript is then used at court, but it won't have the exhibits attached to it. It will be up to you to use your set of exhibits that we've given you with your copy of the deposition, if you need the exhibits.

CHAIRMAN SOULES: Okay. As long as the court reporter sends a set of

exhibit copies to the custodial attorney, then that should be okay. I guess there are circumstances where the custodial attorney might not order or no attorney might order. All attorneys might say, "Don't copy the exhibits for our copies of the deposition transcript." So the court reporter then does what?

MR. JACKSON: If they say that, it's usually because they've got a set of exhibits, and that has happened too where they've copied their own exhibits and they they don't want another copy.

CHAIRMAN SOULES: So you just reconstruct it?

MR. JACKSON: Right.

CHAIRMAN SOULES: Okay. Well, if it's working, it's working.

MR. JACKSON: Yeah. It will save a lot of warehouse space.

CHAIRMAN SOULES: Okay.

PROFESSOR ALBRIGHT: Page 391. From this "declining a request for an opinion," I can't really tell what this is. But I think it's the same issue that we've

addressed in previous letters, which we've dealt with. And that's it.

PROFESSOR DORSANEO: That was a lot of work. Good job.

CHAIRMAN SOULES: Yeah, a lot of work. Does anybody know what this AG thing on 391 is?

PROFESSOR ALBRIGHT: I think it's relating to their previous letters. They're talking about a conflict between the statutes and the rules about whether you can agree to get a court reporter -- to get somebody to take a deposition other than a certified court reporter when the statutes say you have to have a certified court reporter.

We did address that in our rules, and what we said in our rules is that you can notice a deposition to be taken before anyone authorized by law.

CHAIRMAN SOULES: Okay. All right. Good job, Alex.

And unless somebody wants to work longer, it's almost 5:30. Do you want to do something, Richard?

HON. DAVID PEEPLES: Say no,

Richard.

MR. ORSINGER: Well, five minutes we spend today is five minutes we don't spend on some other day.

CHAIRMAN SOULES: Do you want to try something?

MR. ORSINGER: We've got an awfully small group. I'd hate to --

CHAIRMAN SOULES: All right. We're here in this room tomorrow. You can leave your things, if you like, and we'll be here at 8:00 o'clock and we'll adjourn at noon. I appreciate all the hard work everyone has done.

(MEETING ADJOURNED 5:30 p.m.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, WILLIAM F. WOLFE, Certified Court Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on January 17, 1997, Afternoon Session, and the same was thereafter reduced to computer transcription by me.

Charges for preparation
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Given under my hand and seal of office on this the 24th day of January, 1997.

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