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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

SEPTEMBER 19, 1997

(MORNING 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 19th day of September, A.D. 1997, between the hours 8:45 o'clock a.m. and 12:30 o'clock p.m., at the Texas Law Center, 1414 Colorado, Rooms 101 and 102, Austin, Texas 78701.

SEPTEMBER 19, 1997

MEMBERS PRESENT:

Professor Alex Albright
Pamela Staton Baron
Hon. Scott Brister
Prof. Elaine Carlson
Prof. William V. Dorsaneo
Charles F. Herring
Tommy Jacks
Gilbert I. Low
John H. Marks Jr.
Russell H. McMain
Robert Meadows
Richard R. Orsinger
Hon. David Peeples
Luther H. Soules III
Paula Sweeney

MEMBERS ABSENT:

Alejandro Acosta, Jr.
Charles L. Babcock
David J. Beck
Ann T. Cochran
Hon. Sarah B. Duncan
Michael T. Gallagher
Anne L. Gardner
Hon. Clarence A. Guittard
Michael A. Hatchell
Donald M. Hunt
Franklin Jones Jr.
David E. Keltner
Joseph Latting
Thomas S. Leatherbury
Hon. F. Scott McCown
Anne McNamara
David L. Perry
Anthony J. Sadberry
Stephen D. Susman
Stephen Yelenosky

EX-OFFICIO MEMBERS PRESENT:

Carl Hamilton
Hon. Nathan L. Hecht
David B. Jackson
Doris Lange
Mark K. Sales
Bonnie Wolbrueck
Paul Womack

EX-OFFICIO MEMBERS ABSENT:

Hon. William J. Cornelius
W. Kenneth Law
Paul N. Gold
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:

(Meeting called to order at 8:45 a.m.)

CHAIRMAN SOULES: Okay. Let's be in order and go to work. Thanks to all of you for being here today in what I think is going to be our last regular session of this series of Supreme Court Advisory Committee meetings. I did a little calculation, which Paula heard me talk about in Dallas, that probably makes us all feel a bit tired to start the day, but it's interesting. My calculation indicates that we've had in the past -- we started this process in November of 1993, Holly?

MR. PARSLEY: That's right.

MS. DUDERSTADT: What?

CHAIRMAN SOULES: 1993.

MS. DUDERSTADT: November of 1993.

CHAIRMAN SOULES: The Supreme Court Advisory Committee process, and that's after, of course, all of the task forces or most of the task forces have done their work. We've had 24 meetings, a day and a half each, and by my calculation we've been in session in

the Committee as a whole 12,000 lawyer hours, which converts to six 2,000-hour associate years that we have spent in session here. And more than that time has been spent in interim meetings of subcommittees and drafting committees, so probably it amounts to more than 10 lawyer years that we've worked on these rules, and I want to thank you all for that work.

And I feel confident that the Supreme Court will appreciate the work that we've done. What they do with our work product, of course, is their decision.

We have several things on the agenda. I think that they will go fairly smoothly, but of course, we don't want to make mistakes, so we need full debate. Buddy Low is the first item on the agenda, but his air travel access to Austin is such that he cannot be here until at least 9:30, maybe a little bit later. And so I thought we would just go to No. 2 on the agenda, Alex Albright's report on venue, and work on that until we're done. Mark has to leave around noontime, and of course, we want him here while we're talking about these

evidence issues, so we'll probably follow Alex with Buddy Low. And then I'm not sure what we'll do after that. We'll kind of see where we are. We're not going to necessarily follow the agenda item by item.

So Alex, why don't you give us -- I think we had two issues remaining for resolution on venue. Let's get to those.

PROFESSOR ALBRIGHT: Okay. The two issues we had remaining on venue, there was concern about fraudulent joinder of parties and claims that would establish venue in a case, and there was a lot of discussion about how to allow the trial judge to determine the fraudulent joinder issues so that it would not affect the venue determination or that the judge could reconsider or somehow take that into account in the venue determination.

So what we talked about in the last meeting in which we talked about this, which was the March meeting, there was -- we talked about whether the trial judges could reconsider or rehear previously denied motions to transfer when facing reversal on appeal.

And we also -- the Committee also asked us to consider a non-waiver provision that would allow the trial judges to decide motions like joinder motions, severance motions, summary judgment motions before the motion to transfer venue was decided. So we looked at all these, and actually we started working off of Bill Dorsaneo's draft, so this is the first time I've looked at the revised draft.

If you look at it, this is Rule 25, Presentation of Defense; Motion Practice, so pull that piece of paper out. Okay. Has everybody got that?

Okay. This is section (d) on page 2, paragraph (1) at the bottom of page 2. Is everybody looking at it? I don't want to --

MS. SWEENEY: What does it look like on the front?

PROFESSOR ALBRIGHT: It has "Rule 25, Presentation of Defenses; Motion Practice."

MR. HAMILTON: Is that today's handout?

PROFESSOR ALBRIGHT: It's today's handout.

MS. SWEENEY: It's here.

CHAIRMAN SOULES: If you don't have one, they will be behind the Chair here on the tables. Okay. We're on page 2 at (d)(1), right?

PROFESSOR ALBRIGHT: Right.

CHAIRMAN SOULES: Okay.

PROFESSOR ALBRIGHT: You will see here that this is the due order requirements in the venue part of this rule, and it says that you have to file your motion to transfer first, except for a challenge to personal jurisdiction or special appearance. And then we have a sentence that begins at the end of page 2, "The movant's subsequent filing of other motions, pleas and pleadings before the motion is determined will not waive the motion to transfer venue."

And then later on -- Bill, is this right? Does this have something to do with it? On a motion of any party or on the court's initiative the trial court may defer the hearing on the motion to transfer and conduct other proceedings in the case without prejudice to any party's venue rights. That's

at the end of Section 1.

So this is language that says that the judge can consider other motions before deciding a motion to transfer or a party can request the judge to do it. Actually the subcommittee that discussed this decided that we did not recommend that this be included in the rule, but Bill left it in the rule so that you all could look at the language in case you all disagreed with us.

Now let's move -- before we talk about that, let's move to section 8 -- wait, Bill, I need some help. Is that in (8)?

PROFESSOR DORSANEO: Yes, it's in (8), the last sentence.

MR. McMAINS: Can I ask a question first? When you say the committee recommended not to do that, not to do what?

PROFESSOR ALBRIGHT: Not to have a non-waiver provision. We felt -- I'll explain it all in a minute, but what --

CHAIRMAN SOULES: What you're looking at is a proviso that starts -- it's on page 3 in the fourth line starting with "provided that."

MR. McMAINS: Oh, okay. That's what I was trying to get at. Is it just the "provided" language that you're talking about leaving out?

PROFESSOR ALBRIGHT: Bill?

PROFESSOR DORSANEO: Yes.

PROFESSOR ALBRIGHT: Okay. Yeah, because the first part on page 2 is okay.

MR. McMAINS: That's what I was asking, is that the part about the movant's subsequent filing of other motions will not waive gets left in?

PROFESSOR ALBRIGHT: That's fine. I'm sorry, I just haven't read this draft until right this second. So it is at the end of this where the committee has decided that we don't want to have other hearings on other motions first. One concern is that it doesn't fit with the traditional notion of venue being somewhat jurisdictional. And secondly we were concerned that it violates the statute that precludes venue decisions based upon the merits of a cause of action, because if you're

deciding a motion for summary judgment first before you decide the venue motion, you dismiss a claim on a motion for summary judgment, then decide a venue motion, you are deciding that venue motion based upon the merits of the cause of action. And that was a concern because there is a statutory prohibition to doing that.

If you then look at section (8), which is on page 4 --

PROFESSOR DORSANEO: It's really just the last sentence, Alex.

PROFESSOR ALBRIGHT: "Nothing in this paragraph precludes the trial court from reconsidering the denial of a motion to transfer." What this does is let the judge, as the case goes on from -- it allows the judge to reconsider the motion to transfer; to take issues such as fraudulent joinder into account when the judge feels like there is reversible error on appeal, that the judge is going to be reversed. We felt like this was adequate to deal with the fraudulent joinder problem, and that doing both was not merited, and so we -- our proposal is that we do just

the sentence on paragraph (8) and not do the sentence, the proviso on paragraph (1), and I think that adequately took care of the problem.

CHAIRMAN SOULES: Discussion. Rusty.

MR. McMAINS: Well, the reason for the no-rehearing rule was not really designed to afford how it had ultimately been interpreted. The reason for the no-rehearing rule was the idea that venue needed to be determined as early in the game as could be and you'd go on, and rather than it being a live issue at all times that the case is pending. The problem that I have with the idea that says that the judge may reconsider it is, if the judge can do it, there will be people that will move for it all the time.

And frankly, when we wrote this rule at the last minute, and it was not the Supreme Court Advisory Committee that wrote it, but what was then the Administration of Justice Committee that wrote it right after the legislation -- I mean, right after the Supreme Court had decided to do it. And after the

legislation as well, we implemented rules for it. We didn't know any other way to preclude this continually coming up than to say once you've made the decision, then that was it, because we were trying to discourage people from filing motions for reconsideration on a regular basis or revisiting the issue as the lawsuit might evolve, since venue was something that should have been determined at the first and not on a continuous basis.

Now, the reason for that is because the statute, one of the compromises that's precisely in the statute is, if venue is bad, then there's automatic reversible error. You don't have to show anything else. And so if venue is bad, it's bad. Venue doesn't become bad. Venue is bad or it's not bad. And if as a result of later developments or whatever, venue is bad, frankly, a plaintiff is faced with very little alternative, it seems to me, other than to agree to transfer the case, which the court -- which can be done under the current rules, or suffer the fact that he cannot possibly sustain a judgment.

Now, I recognize the problem with not --

you know, with tying the trial judge's hands, but it seems to me that we compound the one other problem that has come to fore in the Texas Lawyer, reported in the Texas Lawyer recently, and that is the battle of judges, because what happens in these cases is -- or I mean, most cases pend in the big districts for a number of years. You have new judges coming in. One way to clear his docket is to go back and revisit all the venue issues, or when you have a new judge, people will come back and say, "Well, let's revisit the venue issues." Or when you want to challenge a judge, when they decide after the judge has ruled in a certain way, and if things start going badly for you, then you decide to recuse that judge. You go to another, and either he does or he doesn't, but you go through all of that rigmarole, and then you go through the reconsideration process again.

Now, the penalty is severe enough if you have done it wrong. And the idea in terms of the fraudulent joinder, that's been addressed as much as it could ever be addressed by the new rule -- by the new statute. I mean, the

new venue statute basically says -- I mean, it really frankly doesn't matter who you join, because you've got to have venue independent about everybody. You've got to make that proof. If you haven't made that proof, and if you try and join them later, then you have the possibility of having interlocutory appeal on that issue. That is not --

PROFESSOR ALBRIGHT: Rusty, that's just for joinder of plaintiffs. That doesn't count for fraudulent joinder of defendants.

HON. SCOTT A. BRISTER: What's good for one is good for all for defendants.

MR. McMAINS: What?

HON. SCOTT A. BRISTER: If you've got venue on one defendant, you can join all the defendants you want.

CHAIRMAN SOULES: Not under the new rule, not under the new statute, arising out of the same transaction or occurrence.

HON. SCOTT A. BRISTER: Yes.

PROFESSOR DORSANEO: Which is the standard for joinder of new defendants to begin with.

HON. SCOTT A. BRISTER: Yes. They've got to have something to do the case, but that's not too hard to make, you know, happen.

MR. McMAINS: All I'm saying is that a general notion of fraudulent joinder is in my judgment unwarranted and improper. Now, if you want to define specifically that you don't have to prove a cause of action, you do have to prove that they were involved in the transaction or occurrence, I mean, I don't have a problem if you want to put that into the venue rule itself. That is, that they were, you know, at least present or present through an agent or had something to do with it. Not that you have to plead or establish a cause of action, but that they in fact not only exist in the county of suit but also had something to do with the occurrence, now, that was the fraudulent part that Bill and I were concerned about right after the passage of these things; that we saw that there was a hole. But the mere notion of fraudulent joinder in general resurrects the merits problem of having to prove the merits of your

cause of action. And I don't think that that's fixed by saying that we just allow the judge to revisit the issue at any time that he wants to.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, also in terms of history, under the former regime, before May of 1983, venue was determined at the beginning of the case because of the interlocutory appeal mechanism. And the venue ruling itself became final much like judgments become final under our current way of operating. So it is troublesome that venue stays around as an issue throughout the trial, but it does seem to stay around as an issue throughout the trial under the current statute, which takes into account what happens at the trial in evaluating the propriety of the venue determination.

So I agree with Rusty, but I come out differently. I think the trial judge ought to be able to do a reconsideration when it becomes clear that the venue determination was wrong and that it's something that needs

reevaluation. Now, pushing against that, I don't think trial judges have much to fear in terms of reversal, because under the Ruiz case, if there is any legally sufficient evidence to support the venue determination, even if that evidence turns out to be evidence that the judge would not himself or herself credit on reevaluation, there will be an affirmance rather than a reversal.

And the last point I would make, the minutes do reflect the last time we considered this, that Paul Gold recommended that if we do something like this that there be some outer limit put on it, you know, sometime there needs to be a stop to this reconsideration. We did not put an outer limit on it because we don't know how to do that. We don't know what the outer limit would be. And that's not -- you know, that's not in this draft. I guess, then, the last point is, if this sentence is not in the rule, that may be the law anyway, but it's unclear. To really do what Rusty wants to do, we would have to say, you know, may not be reconsidered at some point.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Well, the current rule, it is true, if you take out that there will be no motion for reconsideration and just leave it naked and don't affirmatively say it, you may have -- as you say, you probably have not -- you basically have accomplished just as broad a change as if you had put this in, because the only limitation now is because the rule says there shall be no reconsideration of the issue.

PROFESSOR DORSANEO: One reason to leave it out would be kind of like you don't tell kids not to put beans in their ears.

PROFESSOR ALBRIGHT: If I could just respond real quickly to that.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: The rule originally, I think, did say "No reconsideration." If you read the language of the rule right now, it's rather ambiguous as to what it means.

PROFESSOR DORSANEO: The rule said "No rehearing" in its title originally.

The text didn't say that.

PROFESSOR ALBRIGHT: Right. Now it says "Motion for rehearing," which seems to indicate that you can have one, that it's promoting such a motion. I think it's really ambiguous right now whether there is a prohibition or not.

And there is some case law. Sarah Duncan has an opinion that says so long as the court has plenary jurisdiction over the matter, the court can reconsider it and change the ruling.

CHAIRMAN SOULES: Okay. In the first part of (8), we've got the protection written for the defendant who is subsequently joined.

PROFESSOR DORSANEO: Right.

CHAIRMAN SOULES: So that problem is not in the purview of the current discussion. We're just talking about something new, something that the judge has a revelation or something new and important comes up and the judge decides that he'll reconsider, he or she will reconsider. And do we -- is that policy we want or not? Richard Orsinger.

MR. ORSINGER: It seems to me that what's driving this is the fact that the appellate court can consider all of the record including the trial in deciding whether venue is right or wrong. And of course, I disagree with the Supreme Court ruling that that's proper, even though it follows the statute, because that makes the appellate court, if it's looking at more than what the trial court did, it makes it a nisi prius trial function rather than an appellate function. It's not actually sitting in the view of what the judge decided based on what the trial judge had. It's deciding for the first time stuff that the trial judge didn't have before him at the point of venue. But if we open the door up to permit venue to be raised at any time out of recognition that there may be a decision that's acknowledged to be wrong based on later developments but we still are compelled to try the case, send it up, have it reversed, sent back with venue transferred and the case retried, which is I think something we need to avoid, we're going to introduce into this process the question of does that mean at the

conclusion of the plaintiff's case not only is there going to be a motion for a directed verdict but there's going to be a motion to transfer venue based on the evidence that was presented in the plaintiff's case. And if that's going to be a permitted procedure, is that going to be a required procedure? Because if your error is preserved at the venue hearing based on the venue evidence, and the ruling was correct on that, but in the plaintiff's case there's evidence that comes in that shows that the venue decision was wrong, doesn't the defendant have to move for a new decision from the trial judge based on the new evidence in order to argue on appeal that the venue error was wrong? And that perhaps maybe error is not preserved unless you move for a transfer of venue at the close of the plaintiff's case and then again, if you put rebuttal evidence on, you're going to have to move at the close of the whole case, and then maybe you're going to have to move to disregard the jury verdict.

I feel like we're going to compel defendants to move for a change of venue at

every critical stage in trial where preservation of error occurs. So if we in fact say that it can be revisited, which I feel like the Legislature has forced us to say, I think we're saying that they're required to revisit it in every case or else they've waived it.

PROFESSOR DORSANEO: I think that's where we are now.

MR. ORSINGER: You think we're there anyway whether we say it or not? Well, I don't think many people understand that's where we are.

PROFESSOR DORSANEO: Well, there are a lot of things that are like that.

CHAIRMAN SOULES: Judge Brister.

HON. SCOTT A. BRISTER: The cases do say you can reconsider, but the rule does not. The rule says...

PROFESSOR DORSANEO: It doesn't say anything about it, Judge, anymore.

MR. McMAINS: It says you can't file a rehearing.

HON. SCOTT A. BRISTER: If

venue has been sustained, and yeah, the title, motion for rehearing, that's a reconsideration, and if you -- no further motion shall be considered. And so it does come up, you know, when you get the case on a recusal, and you know, judges do funny things on these. We do funny things for funny reasons. And you know, I've had a case where both sides agree the prior judge's ruling made no sense because of two defendants in exactly the same position with virtually identical facts and the transfer was granted as to one and denied as to the other, and one of those is wrong. But if plaintiffs vigorously objected to any rehearing at all -- because that's what the rule says, and that means, you know, I have to go to trial on a case that everybody says is wrong one way or the other? You know, that -- surely I get a chance to at least look at it myself and rule on it once.

I'm not -- again, I'm not -- people raising the same thing over and over and people filing standard motions, I don't have a big problem with that. I mean, unless you've got -- I mean, if you've got a judge who is

going to agree with whoever the last one to talk to him, then, yeah, that's going to be a problem. But I don't think for most judges in Texas that's a big problem. And you know, we can handle that.

But gosh, if we have to go all the way through trial on a case that I -- because I feel bound and I can't reconsider it -- I have second question I wanted to address also to Alex, which is the severance question, you know.

Some cases gets around the problem by severing out this fraudulently joined defendant and transferring everybody else, which as I read the due order pleadings you can't do. You can't rule on severance and then rule on transfer, you've got to rule on transfer. Is that -- which way does this draft go?

PROFESSOR ALBRIGHT: Well, we did deal with severance as to multiple plaintiffs and late added plaintiffs. That's a different issue. We did not deal with severance here. We just decided not to deal with all of those issues because they could go

on forever and ever, and so we just said the judge can reconsider it and then it's just going to have to be worked out.

HON. SCOTT A. BRISTER: Well, it says you've got to have -- well, let's see. Okay. So your due order in this draft is just as to special appearances, not as to --

PROFESSOR ALBRIGHT: No. Oh, there's still due order as to filing the motion to transfer, but then I thought your question was and then you sever out a bunch of -- okay. You have your hearing and you decide venue is proper here because we have all these parties here. Later on you end up severing a bunch of parties out and transferring them away, you know, dismissing their cases. The rule says you can reconsider the motion whether -- what you can take into account in that reconsideration we don't know. Can you take into account your earlier summary judgments? Can you take into account severances? Can you take into -- are you only looking at will I be reversed on appeal?

We've tried to write it limiting this

reconsideration, and every time we do, we get into a big discussion of we don't know how to write that. And we may be limiting it too much, so we decided to just leave it open and let it work itself out.

CHAIRMAN SOULES: On Judge Brister's first point, the odd thing to me about the way this works is that the trial judge who has made a mistake on a venue ruling cannot ever fix it. You can't fix it by mistrial, by starting over. You can't fix it by new trial after verdict or after judgment because the case remains in that court, and that venue hearing is already there from the beginning years ago. It must go to an appellate court to get fixed. It cannot be fixed at the trial court level.

So I guess the only way to fix it is the trial judge just says, Okay, we're going to have a one-hour trial and I'm going to enter a judgment, and you're going to get reversed because I'm not going to waste my time and I'm not going to let you waste your time, and we're going to kick this venue issue to the court of appeals. And it doesn't make any

difference what other error I've made by not letting you put on any evidence, plaintiff, or not letting you put on any evidence, defendant. All of that error is irrelevant because this is going to go up and they're going to bust the venue, so this is going to move pretty fast. And you're set for trial, and I'm not going to let you pick a jury. I'm not going to let you do anything. I'm going to let you show up in my court and I'm going to say the trial is over and the judgment is a take-nothing judgment, and let the court of the appeals go fix venue.

Now, that's about the only way that a trial judge can get rid of a problem that the trial judge honestly tried to fix to do right to begin with but now realizes it was a mistake. So I'm sympathetic with what Richard says that in order to preserve, then, you may have to do it at a dozen places. I don't know what the right policy is, but as long as we have all the factors on the table, we can recommend to the Supreme Court what we think the policy should be. Alex.

PROFESSOR ALBRIGHT: Just about

the issue of do you have to file a motion for reconsideration to preserve error, I would take the position that you do not have to file that motion because the statute tells the court of appeals that they have to look at the entire record in determining whether there was an error in venue.

CHAIRMAN SOULES: Well, that's what I think. But Bill thinks otherwise.

PROFESSOR ALBRIGHT: So I just wanted to say that on the record so that it doesn't appear that we think you have to make this motion to preserve error. I do not think you have to.

CHAIRMAN SOULES: I think you're right, but Bill thinks you're wrong, and Bill is a hell of a lot smarter than I am.

MR. ORSINGER: But that's contra to the philosophy that's certainly in the rule philosophy that you have to tell the trial court about the complaints before you can bring them on appeal.

PROFESSOR ALBRIGHT: But we're dealing with a venue statute that's contra to every philosophy of appellate procedure,

period.

MR. ORSINGER: Yeah. But it doesn't matter.

PROFESSOR ALBRIGHT: I don't think we can solve that problem. All I'm saying is I think we can disagree over that. I would hate to have the record reflect that we all agree when we don't.

MR. ORSINGER: Well, that's fine. But there are lots of statutory complaints that you can waive if you don't raise them, and I don't know why venue is better than the rest.

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: Luke, the concern that is being voiced about, you know, what happens if later on down the road you figure out the judge made a mistake, you know, the hypothetical of you get a 10-minute trial, you're going up anyway, that seems to me to be a rarer situation and one that confronts us a lot less often than would the situation if we changed the rule of repeated reurging of the motion at every opportunity. I mean, that

seems to be creating interminable mischief and work and repetition, cost, expense in every case where there's a venue question versus the very few cases where you figure out on down the road, whoops, we made the wrong decision. And that does not seem to be a good way to balance those factors.

CHAIRMAN SOULES: Okay. Let's talk about the policy, because I think the issue is pretty clearly drawn, either reconsideration or none.

I see that Justice Enoch is here today, and I welcome you, Judge. Did you want to address this in any way? I want to welcome you to our meeting.

JUSTICE ENOCH: Not in the middle of this discussion. But no, I heard, it was reported that this is sort of coming to the end of a lot of the work that you've been doing for a number of years, and I just wanted to come say thank you. I got the invitation to the dinner tonight at Alex's house and unfortunately I'm in San Antonio tonight so I can't be there. But other than that commitment, I would have been, because you all

have been great really. And I don't think you get told that enough, so I won't take up your time. I just wanted you've been great. You've been a great help to the Court, and I know it's been a great sacrifice, so thank you and I'm sorry I cannot be with you tonight.

CHAIRMAN SOULES: Thank you, Justice Enoch.

Rusty, did you have some additional input on this?

MR. McMAINS: Well, I guess the problem I have on this is because of the statutory scheme that was originally enacted in '83, automatic reversal is only available if it's transferred to an improper county in terms of the plaintiff. The problem I have is if you give -- if you basically have the trial judge with continuing authority to transfer the case, then at some point in time the judge may decide, for reasons wholly irrelevant to the venue issue, "I want to get rid of this case." There is no question that proper venue would lie in another county, and so he transfers the case to another county.

Even without a motion to transfer, what

difference does it make? There's no reversible error presumed in the statute for him doing that. The only presumed reversible error is for transferring to an improper county. Now, we have one case which suggests that if it's transferred improperly, that that meets the statute, and therefore maybe that is automatic reversible error.

PROFESSOR DORSANEO: That's a Supreme Court case.

MR. McMAINS: No.

PROFESSOR DORSANEO: Yes, it is.

MR. McMAINS: No.

PROFESSOR DORSANEO: Hadley's case that he won in the Supreme Court; that if it's transferred improperly, then it's reversible.

MR. McMAINS: And what we're going to do is make any transfer proper. Under the statute, if you say that you can reconsider at any time a venue determination, then you can transfer as to people who didn't file venue motions and you can transfer the entire case or not transfer the entire case.

And if you transfer to a proper county, find me a place in the statute where you're protected.

CHAIRMAN SOULES: What if you leave it in the county where it's filed but that's wrong?

MR. McMAINS: That's if it's an improper county. If it's an improper county, it's presumed reversible error, yes.

CHAIRMAN SOULES: Okay. You said "transfer." You don't mean that.

MR. McMAINS: No, what I'm saying is, if you give him the power to -- if you say, we'll just leave that open and let a judge, be it a new judge, old judge, recused judge, I mean, what it does is it just means that all issues are alive and well throughout the entire thing including the venue issue. And the real reason that we did the rule in the first place, to say that no reconsideration, by and large was because of the fact that venue used to be decided and over with. It was all done, wrapped up and decided early on. We substituted this process and said we're not going to have those

interlocutory appeals but we're going to do it, you know, as early in the game, certainly at least, you know, significantly before trial or else it was waived, was the way that the statute dealt with it. And then once that decision is made, that's the decision on the venue unless there's a new party and there's a mandatory venue issue involved.

Now, all I'm saying is that's why the rules were drawn the way they are, is because of the way that the statute had adjusted those obligations with the party. If you reinject it and simply say that as a part of plenary power the judge may always transfer, he simply has the power to do that, to just look at it and say, "Well, maybe I made a mistake," or "Maybe you should have pled this." I mean, it may be that the motion is defective, didn't even plead the right grounds for a transfer, but the right grounds come up in the course of the proceedings.

And now we have one that says that you can file supplemental things, and so -- amendment motions with regards to the venue issues. And so people come up and say, "Hey,

you know, I forgot about this and I forgot about that," just later on. You wind up basically with an ability to transfer to a county that is proper under the statute, and I don't think you have any statutory protection whatsoever with regards to that.

CHAIRMAN SOULES: All right. Let me ask you this question: Does anyone disagree with having the rule say one way or the other, either no motion for reconsideration is necessary to preserve on appeal and no motion for reconsideration will be heard by the court, if that's what we think the law is; or leave it here this way where it can be reconsidered? Does anybody have any objection to saying it one way or the other?

Okay. Now let me get a consensus to see how divided the house is, because if this is really one side or the other, then we need to go on and debate it, but -- if it's a close call, we need to go ahead and debate it, but if it's not, we may not.

How many feel that the rule should provide that there be neither a motion or a hearing to reconsider venue once it's been

determined except for the addition of additional parties? Seven.

Okay. How many feel that there should be reconsideration of venue through the trial process? Five. Well, that's pretty close.

PROFESSOR ALBRIGHT: I think I'm lost on what we just voted on.

CHAIRMAN SOULES: We voted on the policy, reconsideration or not, and whichever way we go, we write it.

PROFESSOR ALBRIGHT: Okay. That's not what I thought we had voted on.

CHAIRMAN SOULES: Okay. Let's vote again.

PROFESSOR ALBRIGHT: I thought you were voting on procedure.

CHAIRMAN SOULES: All right. Let's just make it simple. Reconsideration after ruling on venue or not, those who feel there should be.

MR. ORSINGER: But Luke, except out the added parties.

CHAIRMAN SOULES: Well, yeah. Assuming we leave the added-party provision that's in (8) as it is here, that that's going

to be in the rule, reconsideration or not. Those in favor of reconsideration show by hands. Okay.

MR. MARKS: So those in favor of reconsideration?

CHAIRMAN SOULES: Reconsideration. Reconsideration. Okay. Eight.

Those opposed. Five.

MR. McMAINS: We lost some people in the process.

MS. SWEENEY: Change the order again.

PROFESSOR DORSANEO: Let's just send it up and let them decide.

CHAIRMAN SOULES: Okay. Assume you must vote. You must decide one way or the other on this. Nobody can stay on the fence. Okay. Those in favor of reconsideration, show by hands. 11.

Those opposed. Five.

11 to five for reconsideration.

MR. JACKS: Let's don't have any more votes.

HON. SCOTT A. BRISTER: Two or

three more and it would be unanimous.

MR. McMAINS: Then we don't have to worry about it.

CHAIRMAN SOULES: In fairness I want to ask the Committee do you feel it would be productive to have any further debate on this? Does anyone feel that way?

MS. BARON: Not really.

CHAIRMAN SOULES: Okay. The 11 to five vote in favor of reconsideration stands, and we would then leave the sentence in as written in the last sentence of paragraph (8).

MR. McMAINS: May I ask one question?

CHAIRMAN SOULES: Yes, Rusty.

MR. McMAINS: Do we call the motion to transfer for convenience of the parties, I mean, is that embraced within the motion to transfer?

PROFESSOR DORSANEO: Yes.

MR. McMAINS: See, the problem I have is that the motion to transfer for inconvenience of the parties, that's not subject to appellate review at any level.

Now, if you include that in a reconsideration as distinguished from the venue determination otherwise, then you really have just absolutely gutted any remedy whatsoever for a judge who just wants to chop a case.

PROFESSOR DORSANEO: Well, you mandamus.

MR. McMAINS: No, you can't mandamus. The statute says you can't do anything if he does it on the convenience of the parties. If you allow him to reconsider that once he's made a ruling on that, then there is absolutely no appellate remedy, there is no mandamus remedy, there's no nothing, and he can did do it at any time, and that's just --

PROFESSOR DORSANEO: It's a terrible statute.

CHAIRMAN SOULES: Okay. So Rusty is suggesting that the issue of transfer of venue for inconvenience be, I guess, an exception to the reconsideration. Alex.

PROFESSOR ALBRIGHT: I was going to suggest that before we took the last vote. I really have a problem with making

this totally open, but every time I've attempted to draft limitations, it's gone down the tubes very quickly. But I do think that's something that we had not really thought about until Rusty brought up these issues a little while ago.

I do not think if you limit it to statutory venue or to proper or improper venue that the judge can just get rid of the case just because he wants to by transferring it to a proper county. I don't think the current law allows that. But I think what does make it dangerous is the inconvenience stuff, is the judge says, "Gee, you know, I think the convenience factors have changed so I'm taking it out of here."

I would have no problem with limiting that, you know. I haven't thought through it completely. Maybe there are situations where convenience factors might make a difference. I mean, this is all a very new part of the law, and I would defer to --

PROFESSOR DORSANEO: All we need to do is just add language made under paragraph (2).

CHAIRMAN SOULES: Okay. Those who -- and then that would limit it to -- that would take inconvenience out of the reconsideration.

PROFESSOR DORSANEO: Or made under paragraph (3), pardon me, improper venue.

MR. McMAINS: Improper venue.

CHAIRMAN SOULES: We're not going to get probably to specific language. And other ideas may occur to you as to exactly how this should be fixed, Bill, if the vote goes that way.

Those who believe that a denial of a transfer for inconvenience should not be within the power of the court to reconsider, show by hands.

HON. SCOTT A. BRISTER: Wait, wait, wait. Can I ask one quick -- so let's say you've filed suit against one party, and you know, they file a nonconvenience. Then add 100 more all from another part of the state. And because one has been filed, I can't --

MR. McMAINS: No. The statute

says that everybody that is joined for the first time has the right to file such a motion.

CHAIRMAN SOULES: But the defendant doesn't have the right. Does the defendant have the right to file such a motion as plaintiffs are added?

MR. McMAINS: No, I don't think so, but --

PROFESSOR ALBRIGHT: The plaintiffs have to individually establish venue.

MR. McMAINS: But each one of them has to independently establish venue in order to be added.

CHAIRMAN SOULES: All right.

PROFESSOR DORSANEO: That still could be inconvenient.

MS. SWEENEY: But if venue is inconvenient to this defendant already, how could it be less convenient because a new plaintiff is added?

CHAIRMAN SOULES: Well, if the defendant is sued by one plaintiff in Maverick County and then 1,000 plaintiffs who are in

Dallas County are joined, but I guess they can't --

PROFESSOR DORSANEO: That would be improper, yeah.

HON. SCOTT A. BRISTER: Never mind. Never mind.

CHAIRMAN SOULES: Okay. The vote is whether or not to include the ground of inconvenient venue in the reconsideration. Those who believe it should not be included, inconvenience, show by hands. 14.

Those who feel it should be? None.

So write that out, and then I think that's the end of discussion on reconsideration of venue. Is there anything more on that?

PROFESSOR DORSANEO: Well, I don't know if it's exactly our function, but it seems to me that, you know, we have -- that it's now turned out to be an odd idea that we don't have an interlocutory appeal on venue rulings. We have interlocutory appeals of rulings on jurisdictional challenges. What made the venue ruling final at the threshold under the prior regime was the ability to have

an interim appeal. And I would go on record as saying that we might recommend to someone to consider another amendment to Civil Practice and Remedies Code Section 51.014, but as in other contexts as well as this one, staying the trial pending the interlocutory appeal is something that we might not be willing to buy into, you know. Why did the Legislature not include venue? Probably it's because we abolished interlocutory appeals in venue matters, and now we're headed in the other direction.

MR. McMAINS: Well, but it's also because we put in various things such as a presumption of reversible error. Now, if you want them to revisit the venue statute, I don't have a problem with that, and I'll be delighted to have an interlocutory appeal if you have a bona fide venue statute that isn't top heavy in one way or another that is designed basically to screw one side of the docket. But that's not what we have now, and I think adding an interlocutory appeal to the burden that we have under the new statute in 1995 is just icing on the cake. It's

something the tort reformers would probably just love, but it's totally irrelevant.

CHAIRMAN SOULES: I'm going to move that topic to the end of the agenda so we can get on with other issues.

We've got this proviso at the end of paragraph (d)(1) that begins on page 2 and goes over to page 3. Now, here is the issue on that --

PROFESSOR DORSANEO: It's just the proviso actually.

CHAIRMAN SOULES: It's just the proviso that we're talking about. And I don't know that this proviso really gets to my worry that I experience frequently: Can a party who has filed a motion to transfer venue file a motion to quash citation? And I don't care where it's filed, before or after the motion to transfer venue, and have that motion to quash citation heard without waiving venue? How about a recusal motion, can a party file a recusal motion and have that heard before the motion to transfer venue is heard without waiving the motion to transfer venue? You're asking for relief. How about an abatement for

a prior suit pending in which there's dominant jurisdiction? Can you have that heard? You're seeking relief from the trial judge to abate that case, the second-filed case. That's seeking affirmative relief. If you've got a motion to transfer venue on file, do you waive your motion to transfer venue when you file your plea and abatement due to dominant jurisdiction, severance, the list of dilatory pleas? I don't know the answer to that.

I take the risk of filing a recusal. I take the risk of filing a quashed citation. I take the risk of filing an abatement, because it doesn't make any sense that I've got to go forward in the case on a motion to transfer venue when I've got those motions with valid predicates, factual predicates present. I just can't imagine an appellate court is going to say I waive venue, but it's a risk because it's not decided anywhere that I know of. And this law of waiving the motion to transfer venue if you seek any affirmative relief in the trial court is a problem, I think. At least it's a worry that I have. If the minds hear say not to worry, not to worry, but

that's why --

MR. ORSINGER: Luke, what about a motion for continuance on the venue hearing?

CHAIRMAN SOULES: Motion for continuance on the venue hearing.

MR. McMAINS: No, I don't think that's --

MR. ORSINGER: This rule might make that a waiver. This rule says "any motion."

CHAIRMAN SOULES: How about a motion for continuance of a certification of a class action that a judge has set ahead of my motion to transfer. I think I could go and defend any motion because I'm not seeking affirmative relief. I can go fight the class action, the plaintiff's effort to get a class-action certification, but what if it's set so quick I can't get ready and I have to go and ask for a continuance of the hearing on certification. Okay. I get some relief. Does that waive venue, my motion to transfer venue?

Of course, this says provided on motion

of any party or on the court's initiative, it may defer the hearing on the motion to transfer venue and conduct other proceedings. Maybe it needs to be made clearer that the court must determine the transfer of venue before ruling on --

PROFESSOR DORSANEO: Summary judgments.

CHAIRMAN SOULES: -- other matters. Whatever. Yeah, summary judgment. The 45-day rule on the motion to transfer venue can really be used mischievously because you file that motion to transfer venue and then a whole lot of things can happen in 45 days, because there are a lot of shorter fuses than that that are mischievous procedurally and even maybe dispositively in the case.

MR. ORSINGER: In an injunction suit, Luke, you might have a temporary hearing that's appealable on a temporary injunction before you ever have your hearing on your venue.

CHAIRMAN SOULES: What if your request for injunctive relief is by way of

counterclaim? You want a transfer of venue, but you also want some injunctive relief as a defendant. What happens? I mean, right now, with this waiver for seeking affirmative relief, that's -- I think that ought to be just flat written out that you don't waive your motion to transfer venue by seeking affirmative relief in the trial court other than on the merits of the case. Something like that. That's what my concern is that gave -- that's the genesis of this proviso which may or may not really get at it.

Judge Brister.

HON. SCOTT A. BRISTER: Shouldn't you to have decide in your first 30 days or so whether you're going to try it here or somewhere else? I mean, not me decide it as the judge. There's a lot of case where I don't -- even the hearing gets put off and the case has been on file six, eight months or a year before we decide the venue. But shouldn't you as a defendant decide whether it's proper here or not proper here very early on.

CHAIRMAN SOULES: I've got no

problem with that. I've got to file that motion first. But I've got to have it heard before I can seek any other affirmative relief or I waive it.

HON. SCOTT A. BRISTER: This doesn't say you have to have it decided before you --

CHAIRMAN SOULES: The case law says that.

PROFESSOR DORSANEO: And this now says it too.

MR. McMAINS: Well, this says it because the case law says it.

PROFESSOR DORSANEO: Right.

HON. SCOTT A. BRISTER: Oh, well, because the current rule just says you've got to decide it promptly. I don't have to decide it before other stuff under the current rule.

CHAIRMAN SOULES: But under the case law, if I come to your court and I seek any affirmative relief as a defendant, I waive my motion to transfer venue because I have submitted to your honor's rulings.

MR. McMAINS: Well, not seek,

but present and have ruled upon basically.

CHAIRMAN SOULES: Well, okay. Whatever.

MR. McMAINS: I mean, you can file one --

CHAIRMAN SOULES: If I file a motion to recuse, it's because I want to win it, and now I've waived venue. If I file a motion for continuance in a class action certification, I want to win it. I get it. I waive venue.

MS. SWEENEY: There's even people who think if you sign an agreed scheduling order you waive venue.

MR. ORSINGER: Do you waive it by filing something or do you waive it by having a hearing on what you --

CHAIRMAN SOULES: By having a hearing -- by presenting it. But that doesn't help that, that distinction doesn't help.

MR. ORSINGER: No, I agree.

CHAIRMAN SOULES: Alex.

PROFESSOR ALBRIGHT: I've looked at those cases for special appearance, and the special appearance cases under venue

cases, I think, are pretty consistent. They say you can have a hearing or have the court rule on issues that are not inconsistent with your claim; that the court doesn't have power over those controversies, whether it be special appearance of personal jurisdiction or venue. I'm not sure that's really the best way to say that in the rule or maybe it is. But like you said, maybe we could say the venue motion has to be determined prior to any pleading or motion concerning the merits of the cause of action, but I'm not sure that's really broad enough. Do we need to say, I mean, develop some kind of language that is more like the cases that are out there.

CHAIRMAN SOULES: What I'm suggesting is that the motion to transfer venue is not waived by seeking affirmative relief other than the merits of the litigation.

PROFESSOR ALBRIGHT: What about joinder issues or severance?

CHAIRMAN SOULES: Well, those are not all -- those may not be initiated by the defendant, but when they are initiated by

the plaintiff, the defendant then must scramble to get some affirmative relief from early setting or a lot of things that may happen.

PROFESSOR ALBRIGHT: Well, what if the defendant wants a motion to sever and that then affects the venue ruling?

CHAIRMAN SOULES: I don't think that ought to -- well, let me see.

HON. SCOTT A. BRISTER: See, that would defeat that venue good for one defendant is good for all. You just sever out the one with good venue and then you're free to move all the rest of them.

PROFESSOR ALBRIGHT: So you could say except for those concerning joinder of parties and claims or the merits of the cause of action. Is that broad enough?

CHAIRMAN SOULES: I don't know. Rusty.

MR. McMAINS: Well, one of the problems is, of course, you have a new -- under the new contribution, you know, under the new joint and several liability bill, the defendants who are late brought in, for

instance, they have to join third parties if they want submission as to those parties. They have to join. If the statute of limitations is otherwise run, they've got to join them within a very short period of time, like within 20 days, 30 days, so I don't think that there is -- I mean, I can't imagine that that would be a waiver of your venue rights. I mean, here you are, the defendant. You're sued, and you want to sue somebody else that otherwise the statute of limitations is run. You've got to be able to both file your venue plea and join the other party, and you have the right to join as a matter of right under the statute now.

CHAIRMAN SOULES: As I understand, it's not a problem. It's only if you ask for affirmative relief from the judge and maybe get it. Rusty is saying you might have to get it. But just to file pleadings that join new parties is not that sort of activity in my concept. Maybe in yours it is. Richard.

MR. ORSINGER: I would support your proposal that we just make it clear that

we have to file the due order of pleading but we don't have to have it ruled on in the due order. And if this is left in the way it is, I'm a little bit worried that 120a specifically excepts discovery including, I believe, motion to compel for failure to give discovery, and they say that doesn't waive your 120a special appearance, and we don't say anything similar to that on venue.

MR. McMAINS: Yeah. It's in the discovery practice.

MR. ORSINGER: It is?

MR. McMAINS: It's in seven.

MR. ORSINGER: Well, then I withdraw that comment. I stand on the idea that I support that we ought not to be listing that these other things have to be ruled on first, because I think there will be exigencies that require different cases, rulings on other matters that are not dispositive and that you're going to be in conflict. If the judge will not set your venue hearing, then you're effectively suspended from doing anything in the lawsuit of any consequence.

CHAIRMAN SOULES: What if the plaintiff won't waive the 45-day notice required on the motion to transfer venue but wants to go forward right now on their class certification? There's no answer to that unless we do something of this nature. Bill Dorsaneo.

PROFESSOR DORSANEO: Listening to the discussion, I think it is clear that after the word "proceedings" we do need to put a limit. And I would suggest that this may be the kind of thing that would work. Say other proceedings not involving an adjudication of the merits in this case, comma, without prejudice to any party's venue rights, because I don't think we want somebody moving for summary judgment, for example.

CHAIRMAN SOULES: I agree.

PROFESSOR DORSANEO: And there may be a better way to put that, but I don't know a better way to put it right now. And the term "adjudication of the merits" is a procedural term that is used and is reasonably well understood.

PROFESSOR ALBRIGHT: But what

about joinder? What about severance?

MR. McMAINS: I think the cases are very clear with regards to when you're asking to sever, consolidate. Those are things that don't necessarily -- I mean, I don't think that people would perceive those as being an adjudication of the merits.

PROFESSOR DORSANEO: I don't either.

MR. McMAINS: And yet those very clearly should be in essence waivers. You're invoking the power of the court to add people, subtract people or whatever.

PROFESSOR DORSANEO: But that's only conceptually to me. That's only conceptual. It doesn't strike me that there's anything wrong with doing that, you know, before deciding venue, except someone could say it could affect the venue determination.

MR. McMAINS: Sure.

PROFESSOR DORSANEO: And that doesn't strike me there's anything wrong with that either particularly. I haven't thought about it for days and days.

CHAIRMAN SOULES: Carl

Hamilton.

MR. HAMILTON: I don't think the proviso clause goes far enough. It requires a motion or a hearing and the court can or cannot grant it. I don't see any real reason for the waiver. I think if the pleading is filed timely that anything ought to be heard including a motion for summary judgment.

We have a case now over in Duval or Starr County, three or 400 plaintiffs, three or 400 defendants. Many, many of the defendants should never have been joined in the lawsuit, and even the plaintiff admits that. But they've had to go through enormous expense, hearings and hearings after hearings, because they've all filed motions to transfer venue. The court can't rule on anything. All we've been doing is the discovery, because the court can't rule on anything until we get to the motions to transfer venue. And many of those defendants would have been out of the case a long time ago on a motion for summary judgment but for the waiver problem. So I don't think it ought to be limited to anything. I think

it ought to be open just like any other motion and everything can be heard.

CHAIRMAN SOULES: Anybody can set a motion to transfer venue.

MR. HAMILTON: Right.

CHAIRMAN SOULES: On 45 days' notice. Richard.

MR. ORSINGER: I want to restate my concern about the discovery. I've looked closely after Rusty pointed out paragraph (7), and while paragraph (7) clearly permits you to engage in discovery, our proviso here says that you must rule on venue before you rule on any other motion. So I think that taking a deposition or sending interrogatories doesn't waive your venue problem, but a motion to compel apparently can't be ruled on until after the venue has been ruled on. And so if you have a noncooperative opponent, your motion to compel is not waive it, but you can't get it resolved apparently.

CHAIRMAN SOULES: Your motion for protection also waives it.

MR. ORSINGER: Well, it may not

waive it, but the court can't grant it until after it rules on the venue according to the proviso.

PROFESSOR DORSANEO: No. According to the proviso the court can. According to the sentence, according to the language before the proviso, the court can't. So it's up to the court. I mean, isn't that right? I mean, it says, provided the judge can do something else. Okay? But I think the something else -- you know, I think Carl makes, you know, an arguable point. And I think the "something else" may be too broad in this. And of course, we could limit it not to just merits but to joinder of claims and parties, if that was a concern. Maybe we're better off just sticking with the current language and leaving it to the case law, you know, to be decided promptly in a reasonable time before trial, period.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: Luke, it looks like what Bill suggested like on the merits, that might not be the proper term, but it looks like what we're trying to do is not -- is be

able to have the judge rule on things that are nondispositive motions as to the party seeking venue. In other words, he ought to be able to rule on nondispositive motions, any of them, that don't involve the party seeking -- in other words, he can't seek summary judgment, but rather than on the merits, because it might be the merits of some other party that hasn't even filed, but it would seem to me that the person that filed the motion, the court ought to be able to rule on nondispositive matters.

CHAIRMAN SOULES: I think we've got three positions. And I haven't heard anybody yet speak in favor of maintaining the waiver status of the law that we have right now. Some may feel that. But that's one. The other is to have nondispositive, what, nonadjudicate -- motions not adjudicated over the merits, is the phrase that Bill used, which has the right interpretations to --

PROFESSOR DORSANEO: I think that's the jargon that you're talking about, nondispositive.

CHAIRMAN SOULES: And then just

permit any proceedings without waiver.

Okay. First, does anyone favor maintaining the present status of waiver if affirmative relief is sought before the venue --

MR. McMAINS: Can we have some discussion about it?

CHAIRMAN SOULES: Sure. I thought we had it.

MR. McMAINS: Well, no, I meant in terms of just leaving it as it is, which is kind of unarticulated. I mean, I do realize that there is a concern that if you -- with trying to frame where we are in a rule; that we may have either gone too far or not far enough in terms of where the cases are.

The problem I have is that historically the entire notion of due order of pleading was not just the order that the pleading was made but also embraced within it these waiver principles. That's what was carried forward in the statute in 1983, and that was retained in spite of the fact that there was opposition to it at the time. I mean, that was part of the compromise, was we're going to keep this

as an early determination; we're going to basically keep our law with regards to you've got to assert it first thing or it's gone. That's a part of what the compromise version was. Now to say we're going to go back and basically undo a lot of the things that were done under the '83 act, I mean, I think that's the reason the courts have continued it, because it's in the statute.

CHAIRMAN SOULES: The waiver is not in the statute.

MR. McMAINS: Due order is in the statute.

PROFESSOR DORSANEO: But the statute is unclear as to whether it means determination or just filing.

MR. McMAINS: I understand.

PROFESSOR DORSANEO: But you're right. It probably does mean both.

MR. McMAINS: All I'm saying is that the concept that was postulated was we're going to keep basically the procedure that we had under the old rules. All I'm saying is I don't have a problem with leaving the statute the way it is in terms of what has been

developed. I have some problem with any of the language that has been suggested, and I'm not sure I could fix it immediately.

But I do have a problem with severance. I mean, I think conceptually it makes -- it's not just an adjudication on the merits, it's not just a dispositive motion that should be postponed. When you are seeking the judge's help in sculping the lawsuit, what claims are involved, what parties are involved, those sorts of the things, that is an invocation of judicial power that is inconsistent with the suggestion that he shouldn't be making those decisions.

And I'm not sure that we can articulate a rule that simply says this is inconsistent with this position. Careful lawyers that haven't been able to get their venue matter heard always file motions, whatever they may be, usually saying "subject to our motion to transfer," so that they never have a question that just because they file a motion that somehow that would be a waiver, which I don't think is the current status of the law. Do they need to have some determination earlier?

It requires a weighing of whether or not you should go forward, push forward with a motion to transfer. Are there some circumstances that are exceptional? Perhaps. Can we provide for them, or could the courts provide for them in the waiver provision and say this was really urgent; they had to go forward with the temporary injunction. This person beat them to the courthouse door. In the other place it was a necessary counterclaim. Can he go forward with a temporary injunction even though he's got a motion to transfer that he can't get heard in 45 days? I think the courts would be lenient to that, but I'm not sure that they would with the rule sitting there saying, you know, one way or the other.

CHAIRMAN SOULES: Tommy Jacks.

MR. JACKS: I've got a concern too, and it's similar to but a little different from Rusty's, and it is that the proviso, whether as you wrote it or as Bill or Buddy proposes to change it, could establish it as a fairly routine matter that motions to transfer venue don't get determined until pretty far along in the case. And I think

that's bad. I don't think that's good policy. I think that it is good policy to have incentives or disincentives to force that decision early on.

And the only thing you mentioned, Luke, of the examples you gave, and maybe it's because of our experience that this is a tender spot with me, on recusal I'd be willing to, where we have the exception for challenge of the court's personal jurisdiction, to include recusal or at least disqualification of the judge.

CHAIRMAN SOULES: What about quashing the citation or abating the case --

MR. McMAINS: No, but quashing the citation --

CHAIRMAN SOULES: Of course, the plaintiff controls the timing of the termination of the venue just as much as the defendant does. Anybody can set that motion on 45 days' notice.

MR. JACKS: I understand that. But if the defendant is itching to do other business which would require going to the court and seeking affirmative relief, they

then need to make the decision under current practice which is more important to them, whether it's being in some other county or whether it's doing what they're going to do. I mean it builds in a disincentive to letting the motion to transfer venue ride with the case, and that's what concerns me about the proviso is letting it ride with the case. We get way down the road and then all of a sudden we find out we're going to get shipped off to some other county where we get put to the back of the line, lots of delay, lots of expense and have to start all over. That's what bothers me. So I guess if I'm put to those three choices, I'll stick with the current law.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Luke, I have one question. Is there a case or are you aware of a case that says going forward with a recusal motion waives the venue?

CHAIRMAN SOULES: No. The cases just say if the defendant seeks affirmative relief.

MR. McMAINS: Yes. I

understand. All I'm saying is it seems to me that it's perfectly consistent with the position that we ought not to be trying the case in your court or in this court. I mean, filing a recusal motion is not an affirmative indication of that judge's jurisdiction. I cannot imagine a court saying that going forward -- because the recusal motion requires that you file it and then certain things automatically happen after it's filed, whether you push them forward or not, before the first hearing.

Well, you can't possibly have a venue hearing before you file a recusal. I mean, if your grounds for recusal exist at the time, you've waived your recusal if you went to the hearing on the motion to transfer. I mean, our system can't work that way. It's very clear to my that a recusal motion -- if you want to write it into the rule and say it doesn't apply to recusals, that's fine. But I don't think it applies now under existing case law either.

CHAIRMAN SOULES: What about dominant jurisdiction?

MR. McMAINS: Oh, yes, I think a plea in abatement -- yes, I think if you're trying to abate, that is a request for a judgment in reality, and therefore that is an implication of the court's affirmative jurisdiction.

CHAIRMAN SOULES: And waive venue?

MR. McMAINS: And if you go forward with the hearing on the plea in abatement, yes, and have a determination of it. There are some cases that suggest that even having a hearing is not a waiver but the determination of it is without objection.

CHAIRMAN SOULES: Richard.

MR. ORSINGER: Well, it's evident to me that one of the negative consequences about starting the list is the argument over how long the list ought to be and what's on it. And that's probably, if we can resist the temptation to answer all questions because we might answer some of them wrong, that's probably something that's better left to the case law to decide on a case by case basis. Once we start to list, anything

we don't list is going to be seen as not on the list, even as a matter of case law probably. And so I think that's a consideration we ought to give; that we'll probably -- what we choose to put on this list may in fact be everything that's ever on this list without regard to how things work in particular cases. And there might be something we haven't even thought to mention today.

CHAIRMAN SOULES: Well, it's pretty -- I think there's a fairly clear definition of what's adjudicated under the merits of the motion.

MR. ORSINGER: Well, if you mean by that something like dismissing the case, granting a summary judgment, entering a final judgment, probably everybody will agree with that. But then I just heard some comments that a plea in abatement is dispositive, which to me is not dispositive. All it does is delay the outcome. But on the other hand, if you're abated for 10 years, you may as well have been dismissed.

CHAIRMAN SOULES: You're abated

because another judge has jurisdiction.

HON. SCOTT A. BRISTER: I've had a motion to compel arbitration and motion to transfer venue. Now, which one of those do you decide first?

MR. ORSINGER: Well, you mentioned another one that we probably ought to debate about putting on the list.

HON. SCOTT A. BRISTER: I called up the judge in Midland and we decided it together. I mean, what are you going to do?

CHAIRMAN SOULES: I don't have a bias from a plaintiff or defense side of this at all. I don't -- you know, I'm not coming from any particular point. I'm just -- we've got these things that come up. I have to go tell my client, you're going to be in that venue maybe, if I file a motion to compel arbitration and it fails, if I file a motion to abate because there's a prior suit pending. And these are solid motions, but anything can happen, and now you're going to be in X county if I do that or you probably will be.

Anyway, any other discussion on this? Maybe it's just a bad idea. Whatever. Okay.

Those in favor of the present practice of waiving venue --

PROFESSOR DORSANEO: Well, why don't you just say those in favor of having it be the language of the current rule, because you're -- even with what you're saying you're assuming worst case, when really the current rule is just unclear.

CHAIRMAN SOULES: All right.

HON. SCOTT A. BRISTER: But the current rule is not what you said that law is, not in my court anyway, and we all know that.

PROFESSOR DORSANEO: Doesn't it just say, Judge, just promptly and in a reasonable time before trial.

HON. SCOTT A. BRISTER: Reasonably prompt time, and you know, there's a lot of other stuff I decide --

PROFESSOR DORSANEO: And all of these issues we've been discussing are just not on the face of the rule.

CHAIRMAN SOULES: I know that. Waiver is a problem.

PROFESSOR DORSANEO: Well, it's probably not on the face of the rule because somebody else before couldn't figure out how to write it down either.

CHAIRMAN SOULES: Okay. Those in favor of no change in the current rule show by hands. 11.

Okay, those who feel otherwise? Three.

11 to three it stays as is.

PROFESSOR DORSANEO: And that would mean we're going to rewrite the whole last sentence to be just the current rule.

MR. MARKS: Can we rephrase that question?

CHAIRMAN SOULES: No. You're just going to have to take the risk. Okay. Anything else on venue then? We're going to rewrite the last sentence at the top of page 3 to be the current rule, and we're going to leave in reconsideration. Otherwise, this rule has been voted on by the Committee. All the rest of the rule has already been voted on by the Committee; isn't that right, Bill?

MR. HAMILTON: What's the last sentence going to say then, the proviso

sentence?

CHAIRMAN SOULES: It's going to be whatever the current rule is on the hearing, timing for the hearing.

MR. McMAINS: Luke, is (7), the discovery rule, is it the same as our current rule more or less in regards to discovery practice?

PROFESSOR DORSANEO: I think it is, Rusty.

MR. ORSINGER: I can show you the rule if you want to compare them.

PROFESSOR DORSANEO: It's this sentence, the first sentence of 87(1).

MR. McMAINS: Yeah.

PROFESSOR ALBRIGHT: Bill, you might want to look at the language in the special appearance. Isn't there some of that in there too? The issuance of process for witnesses, the taking of depositions, the serving of request for admissions and the use of the discovery process, it says in connection with objection to the court's jurisdiction does not constitute a general appearance. But for venue don't you want to

say that --

PROFESSOR DORSANEO: -- it does not waive venue.

CHAIRMAN SOULES: Paragraph (7) on page 4 is just like 88, current 88.

PROFESSOR ALBRIGHT: Does discovery have to be related to venue? I wouldn't think it would, because you're just transferring the case to a different county and you could still be taking depositions on the merits of the case. So it seems like we should make that -- we might want to look at (7) and just make sure that there's no waiver.

PROFESSOR DORSANEO: Do you want to take a vote on that to put that sentence in there? Why don't you make that a motion, Alex?

CHAIRMAN SOULES: What sentence?

PROFESSOR DORSANEO: It's the sentence that's in the current special appearance rule that says that you can do discovery without waiving -- without making a general appearance. Do we want to say that explicitly somewhere in this venue provision?

MR. McMAINS: Doesn't this rule particularly, I mean, apply to both special appearance and --

PROFESSOR DORSANEO: Yes. But in separate subdivisions.

MR. McMAINS: I understand. But I'm saying can you redo number (7) to basically apply equally to the motion to transfer and the special appearance rule?

PROFESSOR DORSANEO: Well, frankly, this sentence in (7), discovery will not be abated or otherwise affected by the pendency of a motion to transer, means maybe even more than that other sentence. And I think that's a Luke sentence from sometime back. Isn't it, Luke?

CHAIRMAN SOULES: I don't know.

PROFESSOR DORSANEO: Well, he won't take credit for that.

CHAIRMAN SOULES: I don't know. It may be.

MR. McMAINS: Well, it says here issuing process to take depositions will not constitute a waiver of motion to transfer venue. And I'm just saying if you just apply

Rule 7 or there's some way to just say under Rule 7 that discovery doesn't waive your special appearance.

PROFESSOR DORSANEO: It says that in the special appearance rule too.

MR. HAMILTON: Where does it say that?

MR. ORSINGER: Well, look at subdivision (2), (c)(2), on page 2.

PROFESSOR DORSANEO: Yeah. There's not a separate part on discovery.

MR. McMAINS: Okay. All right.

PROFESSOR DORSANEO: And maybe there should be, but you know, at some point --

CHAIRMAN SOULES: Okay. Anything else on 25? Okay. Is anyone opposed to 25 as we've modified it today? No opposition. It will passed.

Buddy Low, let's get to your -- Buddy, before you got here Mark Sales told me that he needs to leave around noontime and wanted to be here for the presentation of the evidence issues, so if we could go ahead and get that done. Are you ready to go? Speak up.

THE REPORTER: Maybe if he could come down here? I can't hear him.

CHAIRMAN SOULES: Buddy, the court reporter needs you down here. There's a vacant chair down here by Lee. If you don't mind my asking you to come down here to make your report, I would appreciate it.

MR. LOW: Fine. First let me report on 503. We were requested that National Tank, the control group test, our committee voted not to change that. And you'll see from the history that I've reported, the reason was we voted, the full Committee voted on September 20th of '96 to make no change. It was brought up again. It was again voted by majority on March the 7th of '97 to make no change. We again recommend no change. But we have a feeling the Court will probably make some change.

MR. McMAINS: What is this rule, Buddy?

MR. LOW: The control group test, National Tank.

MR. MARKS: And the agreement was not unanimous.

MR. LOW: Pardon?

MR. MARKS: The agreement was not unanimous.

MR. LOW: Yeah. I mean, well, you dissented all the way on that.

MR. MARKS: Thank you, Buddy.

MR. LOW: But I'm not reporting -- that was the reason we did that. Now, whether somebody wants to bring that up again, we have no rule on it. It's been discussed. We could go back to that if we choose to do so.

MR. McMAINS: What's the issue precisely.

CHAIRMAN SOULES: It's the control group. It's National Tank.

MR. LOW: Witherspoon, Meredith. Mark is probably more familiar with it than I am, I know.

CHAIRMAN SOULES: It's Upjohn vs. National Tank and --

MR. SALES: The issue is the wording of 503(a)(2) and the Supreme Court's decision of National Tank to read that to mean that attorney-client privilege is basically

communications with the upper echelons of corporate or organizational management, is the issue. And the question is whether to make that change. The control group test is at best a very strong minority view.

And the federal courts go with the Upjohn test, which is sort of like subject matter, but it's ad hoc in the sense that the court requires each communication to be evaluated in whether the privilege is being furthered in that particular instance or not. So that's sort of been the debate.

The State Bar Committee had made a recommendation a couple of years ago, which is the one I think was voted on, to make a change.

MR. LOW: And Sutton had his own deviation from Witherspoon.

MR. SALES: Dean Sutton is the state bar's deal, which was the test in the Meredith decision that sided with Upjohn, which is slightly narrower than just a pure subject matter test. It basically requires that there be authority for the attorney to communicate with the lower level employees on

a particular representation and that that be within the course and scope of that employee's duties.

MR. LOW: And I think the vote -- there was a lot of discussion, but the vote against it was that, I think, that was just too broad; you can just designate, you know, somebody way down the line. And also the rule as drawn we feel was just real clear. So whatever you want to do, I mean, it's...

CHAIRMAN SOULES: So the committee recommends no change?

MR. LOW: Well, two to one.

CHAIRMAN SOULES: Two to one.

MR. McMAINS: Overwhelmingly.

CHAIRMAN SOULES: Those in favor of the committee's recommendation show by hands. Six.

Those opposed. Three. Six to three no change. Six to four no change. Next.

MR. LOW: All right. 702. To go back to the history of 702, we met, the full Committee met on September the 20th of '96 and voted to make no change or additions

to 702, the Dupont at that time, now Havner. But it's been considered again since that time. There have been additional requests. There was a request by Justice Gonzales in one of his concurring or dissenting opinions, I can't recall, that it be back to this Committee. And so each time we meet, it comes back to this Committee, even though there was a vote September the 20th of '96.

We met, my subcommittee met, and let me say, the recommendation that we made, we felt the Court has come back so many times and the Court -- we get a strong feeling that the Court does want a rule on this.

Now, we didn't really. So what we tried to do was draft a rule that included the elements of Havner, Dupont, an all inclusive rule. It's a little more inclusive than the state bar rule, but we really did not vote as a subcommittee that whether or not just even to have a rule. I think basically we would favor not having a rule. But we felt our task was to draw a rule. So if you want to vote on whether or not to have a rule or any addition to 702, that might be the appropriate thing to

do before we get into the details. And then if the Court -- if we vote not to have one and the Court wants to consider it, we've got a rule we drew, which is all inclusive and probably can be cut down some; one that Mark's committee drew that I don't disagree with. It was drawn before Havner and they cite Kelly with the court of criminal appeals. We predicated ours by the elements of Kelly, the DNA case. And so that's really the only addition plus some maybe other elements.

Richard Orsinger can report as to what the Family Law Council -- I didn't get his stuff until yesterday, so I really -- my committee didn't have a chance to, you know, discuss his ideas. So I think the first vote would be whether or not this Committee wants to recommend to the Court a rule change.

CHAIRMAN SOULES: Discussion on that topic. Bill Dorsaneo.

PROFESSOR DORSANEO: Well, I think that we should, because you can read the Supreme Court opinions much more broadly than they probably were meant to be read. And I think you possibly could read them to say that

a medical doctor cannot testify in an ordinary case based upon his knowledge of medicine and his experience with a particular patient. I mean, it looks like they require a study for everything in some sense or two studies. So this rule is a lot better than that, and it's more understandable.

MR. LOW: Let me respond just a minute to make it complete. We felt that the Court in drawing this did not want to limit this, pursuant to Justice Gonzales' opinion, just to junk science. We felt that 702 goes to, as it exists now, goes to the qualifications of the expert and whether he meets that test. And we felt that this rule then goes to his opinions, not his qualifications, and what he's done and so forth, but his opinions and any studies or works he bases his opinion on, not his personal qualifications, and that was our view.

And we felt that -- and maybe this is wrong -- we felt that the Court wanted a rule for all these things, not just junk science, but I mean, there could be junk medicine as

well, you know, or junk psychiatry.

CHAIRMAN SOULES: As Lee Ware said, junk judges.

MR. LOW: Who said that?

CHAIRMAN SOULES: Lee Ware.

MR. LOW: It wasn't me.

CHAIRMAN SOULES: Nor me.

MR. LOW: So I'm sorry, Bill, I understand what you're saying. The case Havner and Dupont, as I understand it, really were kind of a junk science. Dupont was whether or not the opinion should have been admitted. Havner was -- well, it was admitted. There wasn't any question about that. So Havner -- and the court said Dupont, you know, was discretion, discretion, abuse of discretion. They didn't use that in Havner because it wasn't before the court. What was before the Court was whether it was any evidence. And so again, let me just say this again and I won't stay it anymore. It wasn't this Committee's idea in drawing this rule. We tried to put every element in there.

CHAIRMAN SOULES: In the notes and comments?

MR. LOW: Right. Not that we -- we felt that if you wanted just a rule, and I talked to Mark right before the meeting, that the judge should be a gatekeeper, you know, period, and then just kind of cite generally, you would have that to do that. But if you wanted to combine some or all of the rules or the elements we felt came from these two cases, they are in this rule and can be cut. So that was our purpose. We're not married to the wording, you know. I'm sorry, I'll let someone else speak now.

CHAIRMAN SOULES: The underscored portion of the rule that you've written here, the underscored portion of the first paragraph, are the standards for gatekeeping.

MR. LOW: Right. And the first three things came from Kelly, which would almost meet --

CHAIRMAN SOULES: You're talking about in the notes and comments?

MR. LOW: No. No. In the rule itself.

CHAIRMAN SOULES: All right.

MR. LOW: That the underlying theory must be valid, you know, that's pretty generic; the technique applying the theory has got to be valid and it must have been applied properly. That was Kelly's DNA, which is kind of general without getting into all the elements you consider and so forth.

And so we are not -- again, we're not asking you to accept everything we've written here. We put some things we expected to be modified. If we have a rule cut out or maybe made clearer, like Mark's committee did, that all of these elements don't apply in every case, we just put in there and other elements that may be relevant. So there is room for improvement, and you're not going to hurt our feelings.

CHAIRMAN SOULES: Now, where does it say other elements? Okay.

MR. LOW: Now, Luke, one other thing, I'm sorry. Mark's committee put down there the 403 and then they put 401, 402 on relevance, but we think we covered that. We didn't feel we needed to refer to that. And 403 is just prejudice outweighing the

effects. And the court in Dupont says that once you do that, you've have got to go there. So that's why we put that. And then review by abuse of discretion we, because of Dupont -- now, don't ask me what is the difference between discretion and no evidence because really --

PROFESSOR DORSANEO: There is no difference.

MR. LOW: Well, now, that's what I was afraid or, but I wasn't going to be using --

PROFESSOR DORSANEO: If there's no evidence, you abuse your discretion if you find that way.

CHAIRMAN SOULES: All right. Let me just ask a question or a clarification on structure here that seems to me to be apparent from what you have brought in here, and I think Justice Hecht has some remarks on this.

The way this is structured, the rule itself, and I guess the top two thirds of the first page, that's going to be Rule 702, right?

MR. LOW: Yes, that is 702.

CHAIRMAN SOULES: If we pass it. So that will be the rule, and you've got these general criteria (1), (2) and (3) that are pretty much universal in whatever case it might be.

MR. LOW: Right.

CHAIRMAN SOULES: Then following that there are notes and comments about what sorts of things might be considered that collect, as best you can, the cases, some of which may be applicable in some cases and some may not be applicable in some cases and otherwise and vice versa.

MR. LOW: Right.

CHAIRMAN SOULES: So instead of writing 10 or 13 criteria into the rule and then writing a rule that can't work in some cases, because you can't consider something in some cases that you may consider in others, you've limited that down to about three things or to three things that are somewhat universal in all cases; and then giving guidance in the comments --

MR. LOW: Right.

CHAIRMAN SOULES: -- of what the collective cases say may be relevant in a particular case.

MR. LOW: Right. Now, we have not stated it maybe as well as we should. We might put something in there that all elements might not apply in every case.

CHAIRMAN SOULES: Well, the rule is going to apply in all case, 702, as written.

Now, does everybody understand the structure that the committee has proposed, just as to the structure without regards to the merits, because I want to let Justice Hecht lead off here on whatever he wants to say about this. Carl Hamilton.

MR. HAMILTON: I just had a question. Exhibit No. 1, is that -- what is Exhibit No. 1? Is that the state --

MR. LOW: Exhibit No. 1 is the state bar --

MR. SALES: That's the State Bar Committee's recommendation.

MR. LOW: That's their committee, and they've done, I think, a good

job. I don't have that much quarrel with that.

MR. SALES: I was just going to, if I could, Luke, just --

CHAIRMAN SOULES: Okay. Mark.

MR. SALES: -- quickly distinguish between the two before we open it up for general debate, because I've looked at Buddy's, and the State Bar Committee has favored a rule change for a while. This is actually the second version of the one submitted by the state bar that's attached behind Buddy's letter.

The State Bar Committee actually derived it's proposal here from one that Buddy came up with originally about a year ago, and they are very similar in that the two recommendations, the difference is, I think, just to point them out, are that Buddy actually has a part of his up in the main rule. The State Bar Committee sort of favored it generally in the form a comment as opposed to expanding and making it a longer rule at the top.

And then if you really get into the substance of the two, I think the two big

things, I think, that are different that I would just note is that I think the State Bar Committee really points out that these various factors may not all be relevant in a particular field of expertise. In other words, there's a long list of criteria you can pull from Kelly and from Robinson and from Daubert that may apply in all hard science type issues but may not apply on some kind of social science issue.

And so our proposal in part was in response to, I think, Justice Gonzales' concurrence in the SVRV case where we need to figure out how these criteria may apply in a given situation. Our view was to try to make it clear that the trial court has not necessarily got to focus in on these if they're not relevant to a particular field. So that was one significant difference.

The other, I think, our opinion, although Buddy has done sort of a separate rule, was to make it clear in our comment that this is something that ought be done in advance of trial whenever possible. And you know, not to say that there aren't circumstances where it

might need to come up at trial, but really to advise the court to try to do this pursuant to Rule 104(a) early on to resolve it.

And I think the other comment, I think, you know, Buddy's list is probably a little more extensive because he's pulled all of the the factors, I think, that are from all three cases. Our initial version was not to try to list them all, but just to say for guidance of a nonexclusive list of factors, see Robinson, see Kelly, and see Daubert. So we then went to more of a list like he has in our second version.

And the last comment I would make is on the rule that Buddy came up with in the main body, and I think those three criteria came from Kelly where they mentioned scientific theory. And ours makes it clear that it's not just the theory, it's the methodology. I mean, you may have a valid theory, but Robinson and a lot of these cases are not just related to theory. It's also related to the methodology and reasoning by which the expert came up with his opinion.

And those are the distinctions, and I get

into the debate of which is better. They are very similar, and I really think just looking at what Buddy has done with the few differences, that it's a pretty good version.

MR. LOW: See, we felt technique included methodology, you know; that "technique applied" means "methodology" without changing any words from the court of criminal appeals, and that was why.

CHAIRMAN SOULES: Justice Hecht.

JUSTICE HECHT: Well, let me make clear that our Court does not have firm views on whether there should be a rule or not or whether there should be a comment or not. I think we all agree with Judge Gonzales, with the views that he has expressed, that there should be some clarification as much as possible as soon as possible. But by the same token, this is an area of the law that is in considerable flux, not just in Texas but throughout the United States, and so query how much can we do to put definition to it and how much can we do in a rule. And so I spoke with the Court in the last couple of weeks on this

subject, and they very much want to hear what the views of the Committee are because they just don't have a clear idea on whether there should be a change or not.

CHAIRMAN SOULES: Okay. We'll go around the table here. First you're up, Richard Orsinger.

MR. ORSINGER: Well, I am keen on what Justice Hecht just said. The area is in flux, and in my view it's way too early in the formative stage for us to put anything in concrete. And while there are parts of both of these proposals that I can agree with and disagree with, I think that it's unwise for us to set anything in concrete when things are so uncertain.

The Kelly test, which was developed by the court of criminal appeals and which is apparently in Buddy's draft, predated Daubert before even the U.S. Supreme Court and anticipated them, although they arrived at it probably maybe in a more practical way than all the theory that the U.S. Supreme Court relied on. However, the court of the criminal appeals has been in action since then.

The Kelly case came up, and it involved hard science. The Daubert case came up, and it involved physical science. The Robinson case came up, and it involved physical science, but it was novel science in some respects. And recently within the last few months the court of criminal appeals has ruled that the Kelly test applies to all science, not just novel science, and they extended it to breathalyzer tests and reversed and remanded a conviction of DWI because the breathalyzer was taken 45 minutes after the man was removed from the road and there was not a sufficient scientific explanation of the projection of the blood alcohol content at the time he got out of the car versus 45 minutes later when he was at the station and blew the tube. And that's presenting a lot of practical problems.

I'm just doing a nose count among some judges, and some of our county judges in Bexar County are granting directed verdicts because the state isn't able to prove that blowing a test 45 minutes or an hour later tells you anything at all about where they were when

they were behind the wheel.

Now, the court of criminal appeals -- the Supreme Court has not moved from novel science to ordinary science yet. The federal courts are all over the place. Some of them will -- well, almost everybody is saying that we have to reevaluate the admissibility of lie detector tests, which is what the Pride case came from anyway, the forerunner of the lie detector. And in some cases they are coming in and in some cases they are not. But that's probably the intended purpose of Daubert, is to revisit these apreori rules that something as a matter of law is not admissible no matter what the circumstances are. But at the lower levels of the federal system, they're struggling to what extent these principles that make sense in hard science, such as peer review, worldwide falsification testing and things that you get out of these classical scientific areas, to what extent do they apply to other areas?

An area where it's real questionable is what Justice Hecht said in his concurring opinion on rehearing in SV vs. RV, which is

that if you took the Robinson standards and applied them to the mental health sciences, you probably couldn't get there, particularly if you consider it from a falsifiability standpoint.

If you actually read what the scientists say about this, this philosopher of science Karl Popper, the Englishman who the United States Supreme Court relied on his interpretation of the scientific process, in his classic work on the subject treated mental health sciences as a classic example of something that was not subject to falsifiability and therefore was not science. So by his definition of science, Freudian psychoanalysis and the derivative doctrines are not science.

Now, if that's true and they're not science, does that mean that they could come into evidence, or does that mean that they have different standards of admissibility of whether you admit them, which is one reason why I like the comment of Mark's committee, which is you can't take the hard science standards that come out of chemistry and apply

them to soft sciences like political science or mental health science and have them make any sense.

But the federal courts are also grappling with issues like we have someone who is going to testify in an area that's not characteristically science but they still have these reliability criteria. And in the family law area we address these a lot. Valuation is a big issue in divorce cases. You're not going to find peer reviewed articles on how you value a motel, but we have to value a motel in a divorce case that involves a motel.

There are no peer reviewed articles on how you value an automobile dealership that's subject to a franchise from Ford Motor Company, but we have to do it, and we do it in different ways.

You've got the lowest level, least education, but perhaps the most useful opinion is a business broker who actually buys, helps to buy and sell these things. And they can come in and tell you that motels sell based on a multiplier of gross rental income per month. And automobile dealerships are done in

a different way and different things are done in a different way. And you bring in somebody that's in the marketplace where they are traded. Or you could bring in a valuation expert that belongs to three or four national organizations and has a bunch of initials behind his name, and they have standardized valuation methods that they've gone to classes on and they may even be specially certified in, which is more removed than the business broker, but not as removed as the third category typically, which is just your average CPA who comes in and looks at any kind of business as a profit machine.

They project future earnings, apply a discount rate and come up with the value of the business, which in the typical divorce is zero on one side and a million dollars on the other side using the same methodology but recognizing that each person has to have certain subjective factors that they take into consideration.

Well, that's all further complicated by the fact there's a lot of legal litigation, case law, and Internal Revenue Service regs

that impact valuation. So let's take the valuation of a closely held business. By definition, if it's closely held, there's no market trading, so you can't look at the New York Stock Exchange yesterday and find out what the stock is worth. And if it's truly closely held by a family, it will never have been traded. And so all you can do is try to find businesses that are similar, and usually you can't find one that's very similar, because the businesses are different, the families are different, what have you.

And so you're kind of thrown back on using valuation techniques that the Internal Revenue Service promulgated in Revenue Ruling 59-60. That's become an article of faith for the valuation of closely held businesses. It's been litigated in federal court for estate tax purposes. It's been litigated in divorce cases and everything else. It probably establishes the methodology that is most widely recognized at proper to value closely held businesses. There is no peer review of that. You can hardly find any kind of organized journal in the area. But its

parameters are established by the Internal Revenue Service regs and by federal court litigation and state court litigation.

So this entire list of factors here that we are appending to either version of this proposal is going to have almost no application in an area where you have a lot of case law and Internal Revenue Service regs that tell you what you're supposed to be doing and what you're not supposed to be doing.

Well, I'm sorry I'm going on for a long time, but I'm trying to lead to something and I'll try to speed it up for those of you who have heard enough.

The Family Law Council is very concerned about the scope of this principle that started out in hard science and we don't know where the limit of it is. And what we've done is instituted a committee, an ad hoc committee to evaluate the impact and reliability standards insofar as it falls on family law. And it can be quite complicated.

The Family Code specifically says that paternity testing reports by a qualified expert are admissible. Okay. They don't say

anything about reliability. They don't say anything about peer review. It says that a verified paternity testing report of a qualified expert is admissible. Now, there's probably some reliability aspect behind it, but the legislature has stepped right in the middle of that and impacted it. We also have another provision that the court can order a social study, which is typically someone who has social work background but not necessarily a degree or a certification. Very fuzzy standards.

Our Department of Human Services has standards that they promulgate. I'm not sure to what degree they're binding on everybody, but the standards promulgated by the Department of Human Services probably will set the standard for what reliability is in that area. So when you bring these concepts and apply them to family law, it can get pretty complicated. We're trying to put a committee together or have put a committee together that's interdisciplinary in the sense that it involves practicing lawyers, law professors, psychologists and valuation experts to try to

grapple with this issue of reliability and the standards of acceptability as it impacts the area of expert testimony in the family law arena.

Now, that leads me to the resolution of the Family Law Council that is on that table over there, and you may have a copy. It's a one-page thing, and it says "Resolution of Family Law Council, September 15, 1997." And in short, this resolution was a response to Mark's committee's recommended comment to Rule 702, which was derivative, I believe, of a letter that Dean Sutton wrote that was more or less what this proposal is. And this resolution passed by fax vote essentially unanimously with only one council member voting against it. And it stands for the proposition that the Texas Supreme Court has not extended the Robinson reliability standards beyond physical science, and that that should not occur for the first time in a comment to Rule 702. And now having seen Buddy's proposal, I would say that the same philosophy would apply to extending it to an actual change in Rule 702, which we didn't

have before us when we were doing our fax vote, but I think if we were to have had Buddy's proposal, we probably would have objected to (1), (2) and (3) being folded into Rule 702 because it extends the reliability standards that now exist in civil litigation in Texas only in hard science. It extends it to all expert testimony. And we're concerned that things are too much in flux.

The court of appeals in San Antonio in the Hartman case didn't think that Kelly applied to standard science. They believed it applied to new science. The court of criminal appeals told them, said no, it applies to all science, not just new science. I'll bet you there are lots of court of appeals judges right now that don't think it applies to nonscientific evidence at all. Well, the Texas Supreme Court and the court of criminal appeals are going to tell us that. But to me, that's something that comes better out of the common law process of adjudicating specific rulings and specific cases based on the evidence in that case and the way it impacted the result than if we sit down now and say we

have the Kelly concept; let's apply it to all experts and all areas of expertise. And then we just have to scramble to figure out what the standards of liability are and the degree in which they're impacted by legislation and by federal regs and things of that nature.

So the bottom line of the resolution is that we shouldn't, through a comment, do something to extend Robinson further than the Supreme Court has said. And I believe the same principle would apply to doing it in Rule 702.

CHAIRMAN SOULES: 10 minutes. Be back at 11:00 o'clock.

(At this time there was a recess.)

MR. ORSINGER: I wanted to say that I've checked for the results on the Family law Council resolution, and the final vote was 25 in favor of it and three against it.

CHAIRMAN SOULES: Okay. Buddy, is your committee recommending the draft rule or recommending no change or some other change?

MR. LOW: Well, I'm going to speak without having voted on that and say we recommend no change. I mean, it's been done once before, and I know of two people that were there, John Marks and I, so there weren't but three, but we say we recommend no change.

CHAIRMAN SOULES: Recommend no change either by way of rule or comment?

MR. LOW: Right.

CHAIRMAN SOULES: Okay. Discussion. Rusty.

MR. McMAINS: Well, based on that recommendation, I may not have much discussion.

CHAIRMAN SOULES: Any discussion?

MR. ORSINGER: You ought to, because the Supreme Court may consider it.

MR. McMAINS: But I think that the Supreme Court -- I mean, what I understand is the Supreme Court wanted to know what we thought. My personal opinion is, when I read this rule, if it's a change to Rule 702, whether it be either in comment form or written into the rule, it basically is a

holding by rule that these principles applied in every conceivable expert witness universally. Now, some of them obviously apply more than others with regards to criteria, but that is a holding that -- for instance, in a medical malpractice case, that you're a doctor, is that any of the expert doctors are going to have to comply with these principles.

Well, I mean, they don't do peer reviews on whether or not an accident caused a certain disability or whether that disability is permanent or temporary. That's just silly. And yet that's what's going to happen, is we're going to have Robinson hearings in routine expert cases.

I've had several cases in the past, including a major decision in the Texas Supreme Court in the Cessna vs. Smitson case, questioning whether or not an airplane pilot testifying what pilots make. That's expert testimony, because it's not something within the common knowledge of the case, because it is particular expertise, and the question was whether or not he should have been disclosed

more than 30 days based on the rule because he was an expert, not because of something he had in his factual background.

Now, what is an expert? Expert testimony and the scope of it is something that the committees had never undertook to define before other than just kind of generically like this. If you say that anybody who might conceivably be construed as an expert is subject to this kind of procedure and this kind of pretrial potential harassments from either side, I mean, it doesn't matter. This is a burden on any party who is going to introduce something that isn't direct testimony of what happened. If they're talking about what the procedures are, how do you make one thing or another, those are all experts. And the notion that that is universally applicable I frankly find to be ludicrous in terms of workability.

I don't think that the Supreme Court will ultimately hold that. I think there will be narrowing of it. I'm not saying it's narrowed to junk science, but it certainly would be narrowed more to hard science and hard

scientific methodology as opposed to not just soft science, but other kinds of expert testimony. And the problem -- like this rule, which is what our expert rule is designed to do, it says, "scientific, technical or other specialized knowledge." Now, these principles don't have any application whatsoever almost to a single one, to other specialized knowledge. Now, that doesn't make those other people, such as the pilot testifying about what pilots make, that doesn't make him a non-expert. It just makes this rule impossible to have any application to it. And I oppose changing a rule to make it universally applicable because I don't think ultimately that's where the Court is going to come down, to make it universally applicable.

Now, I have very little comfort as to where to draw a line, you know, in terms of scope of it. I don't know what the scope will be. We only know what we have, and we have some suggestions maybe that it's universal. We have some suggestions. Judge Spectre's opinion in Havner that this opinion was only good for this case. We have the dispute in

the SVRV between Justice Cornyn and Justice Gonzales as to whether or not social science is involved in this issue, because I don't think that's something that is universally recognized. I mean, Justice Gonzales suggested the committee do something. I think Justice Cornyn indicated that this doesn't necessarily apply; that while it applied in this particular case, that the positions of Robinson don't necessarily apply universally to all social science questions.

So I think until we know more about the scope that we should not write a rule that is of general applicability until we have some idea what the limitations of it are. Now, that said, I do think that there is some concern about the willy-nilly use of Robinson type hearings during trial. And the question of whether or not, if there is such a hearing authorized, we should have a rule that would require that that be presented prior to the start of trial. That I have less problems with. When a hearing to determine qualifications is appropriate with reference to the cases, that it should be done and

determined prior to trial. That seems to me to have some utility. But again, I don't want to make it universally applicable, just you know, people have to do some lawyering to figure out whether or not it's something legitimate.

And the trial judge should have the power not to grant such a hearing if it's absolutely obvious that the standard rules don't have any application, I mean, that the Robinson rules don't have any application to this particular testimony.

CHAIRMAN SOULES: Anybody else down Rusty's side of the table? Okay. Paula Sweeney.

MS. SWEENEY: Well, I concur with what Rusty says wholeheartedly, since we're expressing our opinion for the record. But I would also add this: That the test that's been set out, for instance, in Havner, particularly in the peer review area and the requirements that are placed there, is a test that's impossible for defendants in malpractice cases to satisfy when they seek to testify as experts. If they seek to testify

as to what their opinion may be, as to what the standard of care may be, as to what may or may not have caused the plaintiff's injury, unless they themselves, the defendants, have been peer reviewed or can demonstrated that their opinion is supported in the literature or that there have been studies and the other requirements, they are estopped.

And what that points out is, as Rusty says, the ridiculous extreme to which we risk taking this if we write a rule that purports to apply to all cases where experts are used. It simply cannot. And the current requirements that are going back and forth between the cases and evolving, I think, are not susceptible at this point to being codified in a way that purports to reach all cases.

So I would suggest to the Committee that at this stage it would be a bad idea to try to do that, and that the rules ought to remain analogous to where they are now, which is that an expert is someone who possesses knowledge and experience not available to the average lay person who may assist the jury as fact

finders in reaching their conclusion in the appropriate case subject to the guidelines set forth for scientific testimony in the appropriate fields, but certainly not in all cases.

CHAIRMAN SOULES: John Marks.

MR. MARKS: Well, there may be two questions here. While we may not want to make any changes in Rule 702 or add any notes and comments, the Court may very well want us to. And I don't know how we deal with that. But do we put together something that would be acceptable to us, assuming that's what the Court wants and that's what the Court is going to do? That way we will have some input into what the rule is going to say and what the notes and comments are going to say. Or are we just going to stick our heads in the sand and say, "We recommend no change." That's the first comment.

Secondly, although I participated in drafting the Rule 702a, I do not agree that we should have any sort of rule that limits the time, when and how a defendant or a party can object to the admissibility of expert

testimony. I think that just about anything we do as I see it would be almost inconsistent with what the Court is trying to accomplish here. So my thought would be that any effort to do something like that would be damaging to a party who feels that an objection under Robinson is appropriate in any case.

CHAIRMAN SOULES: Anyone else? Buddy Low.

MR. LOW: One thing I would point out to Rusty, and I agree with Rusty overall, but I want to make some comments. He was talking about the term "other specialized knowledge." Of course, that's in 702 now.

MR. McMAINS: No, I understand that.

MR. LOW: Yeah. And so that's where that came from. With regard to the idea that every element ought to apply, we did not draw that purposely. Mark's committee made that very specific, and that was language that could be taken from his committee; that it did not, every one of them did not apply.

As far as to eliminate these useless hearings in doctors cases and so forth, what

we do here by voting no rule is not going to eliminate that, because you have hearings on the head of the department at MIT on metallurgy. You're going to have -- the thing I do agree with Rusty on, too, is it's very disruptive to have your witnesses scheduled and everything and then everybody you put up they have one of these hearings on. And I do believe that the trial judge should make you do that prior or unless, as Paul Gold pointed out, he may not want to bring his expert down here and go to that expense. And he may choose to want to do that.

So when we drew a rule, we put that it should be heard prior to trial except leave of court, you know, somebody obtained. So again, I favor no change, but I did want to make those comments for the record.

CHAIRMAN SOULES: Any other comments? The committee recommends no change.

Those who agree show by hands. 11.

Those otherwise show by hands.

11 to two, no change.

Okay. Anything else, Buddy, on evidence?

MR. ORSINGER: Luke, are you going to leave Mark's other comment that -- I mean, John's other comment that should we say something in the event someone wants to, or should we just leave it alone?

CHAIRMAN SOULES: Well, as I got Justice Hecht's comment, they're not pushing for any particular input other than what our remarks have been here today on the subject. Is that correct, Justice Hecht?

JUSTICE HECHT: Yes.

MR. LOW: And for the record, Luke, can I say that if the Court did, they could eliminate my rule and just put down here something about the trial court should make the threshold determination, you know, just put something in there like that and possibly when he should do it. But I mean, I'll say no more.

CHAIRMAN SOULES: Well, to some extent I think we have to --

MR. SALES: Luke, could I just -- just for the record, I would note that I voted the way I did. Our committee was unanimous, and that was probably about 30

people who voted for the state bar proposal that was there, and it was across the board unanimous for some type of rule change. So I want to make that clear.

CHAIRMAN SOULES: In terms of the timing, it may be important to at least say that we have to keep in mind that universe of cases that makes up a high percentage of most of the cases tried in the district courts where a whole lot of preliminary pretrial litigation doesn't take place. So setting up a timing that requires pretrial litigation may or may not be wise given the volume of cases where this may have some effect.

Okay. What's next, Holly?

MS. DUDERSTADT: Justice Abbott is here.

CHAIRMAN SOULES: Oh, okay. Justice Abbott, I noticed you joined us here today. We appreciate your coming and welcome you to our meeting. Actually it's your committee's meeting so I don't have to welcome you, but I do so. And if you have some words for us today, we would love to hear them.

JUSTICE ABBOTT: Well, I

stopped by to get educated. And my only words are that when I was in private practice I didn't have time to do anything like this, and I'm sure you all don't either. And I just wanted you to know that I appreciate you all taking the time out of your schedules to help us and guiding us with these new rules, and I appreciate it.

CHAIRMAN SOULES: Well, we're pleased to have you with us, Justice Abbott. Thank you.

Okay. Now we go to Bill Dorsaneo with recodification. Where do we start?

PROFESSOR DORSANEO: Well, I think that probably the easiest way to start would be to start with the earliest number, so the agenda jumps around, but we'll start with Rule 7.

At the last meeting various people were assigned the job of doing little pieces of additional work on individual rules. Also since the last meeting a disposition table was done, a revised disposition table comparing the current Texas Rules of Civil Procedure with the recodification draft. Jeffrey Kyle,

who is an L at M student, did most of the work on that. He's sitting next to me at my right. It's a lot of work. And that turned up a few things too. So this is really cleanup work. And most of these rules should go relatively quickly because they're either obvious omissions or corrections based upon what was decided at the last meeting.

The first one is No. 7. And if you look at each of these packages, you will see that the current draft as redrafted is stapled to or paper clipped to -- stapled to, not in mine but in the ones you have, the earlier one. So you can look back and forth to see the specific change by putting your thumb in the right place.

On Rule 7 the main change is the addition of subdivision (b). Subdivision (b) is added because, when the disposition table was done, it became clear that certain provisions were left out, basically the first paragraph of Civil Procedure Rule 124, which says in current language in no case shall judgment be rendered against any defendant unless upon service or acceptance or waiver of process or

upon am appearance by the defendant as prescribed in these rules except where otherwise expressly provided by these rules. This language may, frankly, not technically be necessary, but there's an historical reason for it being here. And the better part of valor is to add it in in slightly modernized verbage in the first sentence of new subdivision (b).

Similarly, Rule 123 turned up as missing in the disposition table, and it is the important rule added for the first time in the revised civil statutes of 1879 by an unknown person where the judgment is reversed on appeal or writ of error for want of service or because of defective service of process. No new citation shall be issued or served, but the defendant shall be presumed to have entered his appearance in the term of the court in which the mandate sahll be filed.

And that is in there in the second sentence of subdivision (b) in modified form. The largest modification is to stop at the word "general appearance" rather than to say his appearance to the term of the court at

which the mandate shall be filed, it being my view that it's not necessary to talk about that, and to replace the term "writ of error" with "restricted appeal." Frankly, you could just say reversed on appeal, but appeal or restricted appeal might be clearer to people at least for the time being.

CHAIRMAN SOULES: Any opposition, then, to including 7(b)? No opposition. That's approved.

MR. McMAINS: Luke, I have only one question here.

CHAIRMAN SOULES: Rusty, I'm sorry.

MR. McMAINS: And it may have been under the other, but this says if the judgment is reversed on appeal for want of service, defendant will be presumed to have entered a general appearance. It doesn't say when he has entered a general appearance. My concern is when you take the mandate stuff out, then you kind of like don't have any notice that you've entered a general -- I mean, it's like if it's the minute that the court reversed the case, then you've entered a

general appearance. Then to me that creates some problem. I mean, I would prefer that the general appearance not be deemed to have occurred until the issuance of the mandate. That gives you a couple of weeks in case you want to file something else.

PROFESSOR DORSANEO: Okay.

PROFESSOR ALBRIGHT: Bill, do we want to allow a motion to transfer venue? Does a general appearance prevent a motion to transfer venue or a new trial?

PROFESSOR DORSANEO: Well...

MR. McMAINS: We have the problem now. I mean, whatever -- this is the current rule, sort of, except I think doesn't the current rule talk about mandate?

PROFESSOR DORSANEO: Yes. It talks about "to the term of the court at which the mandate shall be filed."

MR. McMAINS: Yes, which is kind of irrelevant now.

PROFESSOR DORSANEO: What it does suggest is that it's later, and when the mandate is filed.

MR. McMAINS: Yeah.

PROFESSOR DORSANEO: We could add when the mandate is filed in the trial court.

PROFESSOR ALBRIGHT: Well, isn't it an issue that you need to know to file a general denial so you don't get defaulted?

MR. McMAINS: Yeah. The problem is that you could be defaulted -- well, not actually defaulted, because you've made an appearance. But there could set -- you basically could have a trial based on the idea that you haven't filed an answer and therefore you don't have anything to say.

PROFESSOR ALBRIGHT: Do we want to say it's deemed filed if you file a general denial? You may want to test the issue of whether you want to file a motion to transfer.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: What about the situation where I don't get served. I don't know anything about it. I find out about it. I have to go up and reverse it. Well, the case shouldn't have been here. Venue didn't belong here. If I've made an appearance, I've

blown that. I can't file. I can't come back and say, you know, my right has been gone. I just sue somebody. Don't serve them. Venue is not there. Okay. I'll just get it reversed, pay the cost of that. Come back. Now I've got the case where I want it. What are you going to do about that?

PROFESSOR DORSANEO: Well, the post Civil War people who put this in there wanted it to be here like this so it was a general appearance. Now, we may think otherwise.

MR. LOW: Well, there were a lot of things good before the Civil War and some things are better now.

MR. JACKS: Buddy remembers.

MR. LOW: Who said that? I've read a lot.

CHAIRMAN SOULES: All right.

MR. HAMILTON: The rule doesn't make much sense. If you complain about improper or no service, what's the point in doing it if you get reversed and then there's a general appearance?

PROFESSOR DORSANEO: Well, I'm

sure that came as a big surprise to a lot of Yankees, carpetbaggers. Okay?

MR. LOW: What if you said that upon reversal there will be at that particular point deemed service, and then you take it up from there just like you got served. And then you have all your rights to file any motions you want to.

CHAIRMAN SOULES: Well, then you get into the loop of another default deemed served and you don't answer. That's a problem we used to have.

MR. LOW: Well, if he appealed and you don't have sense enough to answer --

CHAIRMAN SOULES: Well, we had a rule that you were deemed served sometime after remand, and there were defaults being taken, removal to federal court, remand back, default judgment, because there was no answer filed anywhere, just removal and remand. And we changed that to protect people.

MR. MARKS: What good is this rule?

CHAIRMAN SOULES: Let me see if we can get at it this way: We could add after

general appearance without waiver of the defendant's rights under all that due order of pleadings rule.

PROFESSOR DORSANEO: Well, to me, if you want to do that, just take the sentence out.

MR. McMAINS: Well, but the purpose of the rule is that you can't do anything with regards to a party without citation or proper service. You are appealing, claiming that you have been improperly served. Okay. You've been improperly served. That's fine. That's taken care of. There's no reason to go through the service nonsense again. You know about the lawsuit. You've been there. You've been through the appellate court. You have notice of it. It's silly to require that you be served with another citation or to require that the plaintiff's go through that process again.

PROFESSOR ALBRIGHT: You just need an appearance date.

MR. McMAINS: Yeah. But the problem is, if you have an appearance date,

then you do create the risk of a default. This rule doesn't give you a default as such, because you have appeared. You've made an appearance, and so you can't be defaulted as such. But all I'm saying is that at least if you did it to -- the only suggestion I had is if you have the mandates, you have at least 14 days' and usually more notice that you're going to be deemed to have made an appearance. If there's something you the want to do before you're deemed to have made an appearance, you've got several weeks to do it in. I mean, I don't know whether there's anything you want to do, and I'm not sure that the motion to transfer venue is automatically -- would be considered overruled under these circumstances.

PROFESSOR DORSANEO: No, I'm not either. But if you want to say, and it seems to be the sentiment, instead of saying "presumed to have entered a general appearance," say that the defendant need not, you know, be served with citation. And then we could add language, which probably could be cleaned up and made simpler, and may defend by

filing a responsive pleading within 20 days after the mandate is filed in the trial court.

MR. LOW: You don't even have to do that. Just put upon mandate he has the first Monday after such and such to appear as appears in rule such and such when you're regularly served.

PROFESSOR DORSANEO: Right. Just refer to Rule 25, the first subdivision of Rule 25.

MR. HAMILTON: Why not just say has entered an appearance and filed an answer, is deemed to have filed an answer.

PROFESSOR DORSANEO: But you don't want to make -- file a general denial. That's what this says now, is general appearance.

MR. McMAINS: Yeah. It's not even a general denial. It's just I'm here, you can shoot at me.

CHAIRMAN SOULES: How about this: Shall be deemed presumed to have filed a general denial 30 days after the mandate issues.

MR. McMAINS: But you don't --

I mean, you may not want to be filing a general denial.

CHAIRMAN SOULES: But you've got 30 days to get something in ahead of the time you're deemed to have filed a general denial.

MR. JACKS: So it's a rebuttal of presumption, if you file something other than a general denial.

CHAIRMAN SOULES: Well, a motion to transfer venue, contest of a special appearance.

MR. McMAINS: Plea in abatement.

PROFESSOR DORSANEO: Why not just say that, then, say that you can do that. If that's what we want to allow somebody to do, just say you can do that, and key it to when the case gets back to the trial court. That doesn't bother me any.

MR. McMAINS: That's fine.

CHAIRMAN SOULES: Elaine.

PROFESSOR CARLSON: Can you raise the special appearance after you appeal?

PROFESSOR ALBRIGHT: Not if

you're issued a service of process.

PROFESSOR DORSANEO: Well, I think that's a nice hard question, but I would say probably not.

PROFESSOR CARLSON: I would think we would want to say something like the defendant will be presumed to have been validly served but may not thereafter assert a special appearance. Or maybe you can. I mean, there are cases that say post-default judgment and you can specially appear.

MR. McMAINS: But that's a different.

PROFESSOR ALBRIGHT: Well, that would be like as a motion for new trial or bill of review. This means you've gone --

PROFESSOR CARLSON: Because I think that's the reason for the language general appearance, is to make clear that you cannot specially appear.

PROFESSOR ALBRIGHT: This is like a motion to quash kind of thing.

MR. McMAINS: It includes any defect in service that's reversed on appeal, whether it's a direct appeal or a restricted

appeal.

CHAIRMAN SOULES: I think what Alex is saying is, and in our current rules right now, we've got you move to quash and you're successful, you're deemed to have filed a general appearance 20 days after your motion to quash --

MR. McMAINS: Absolutely.

PROFESSOR ALBRIGHT: And what it says is your appearance date has been moved -- it's like you're served the date the order to quash is signed. What this seems to be trying to do here is set your essentially quashed service in effect on appeal, so we're just setting in motion the whole thing again so we don't have to serve them again.

CHAIRMAN SOULES: Well, whatever somebody can do after they quash service they can do here, is I think what's wrong with that.

PROFESSOR CARLSON: Can you move to quash service and then move to transfer venue?

CHAIRMAN SOULES: That's what we talked about a while ago.

PROFESSOR CARLSON: I know.

CHAIRMAN SOULES: Which the Committee voted --

MR. McMAINS: Because once again, I don't think --

CHAIRMAN SOULES: Which the Committee voted heavily not to worry about. Buddy Low.

MR. LOW: His suggestion would answer all situations. If you put in there deemed to have filed a general denial in 30 days unless pleadings were filed prior thereto; in other words, he can file something prior thereto, but you point out that if you filed a venue motion and other things and an answer set for venue, then you don't deemed filed a general denial. But if he does nothing, then it would be appropriate pleadings filed prior thereto. In other words, you wouldn't then deem him to file a general denial if he's already filed some other thing.

CHAIRMAN SOULES: My idea first was to say entered a general appearance without waiving the rights under Rule 25.

However, that would take -- that would give an open-ended period for the defendant to come in and specially appear and transfer venue and all that. So what I'm trying to do now is say general appearance or a general denial which preempts those pleadings. But let that occur after some window of time in which an alert party can act under Rule 25.

MR. LOW: But I don't think it was intended that somebody just plain was not served and you reverse it on that basis and it's in the wrong county. I don't believe that that's a waiver of venue. I mean, he doesn't even know he's been at the dance until somebody tells him and the music has already stopped, and now he's gone to appeals, and he can't come back and transfer venue.

CHAIRMAN SOULES: Well, that's the same thing that happened in motion to quash.

MR. LOW: Well, if that's the law, it ain't right.

CHAIRMAN SOULES: You've got a return of service saying the party was served and the party wasn't served. Huh?

MR. LOW: I said if that's the law, it ain't right.

CHAIRMAN SOULES: Okay. How do we fix this? Somebody come up with an idea so we can get on with it. We've got a lot to do. Carl Hamilton.

MR. HAMILTON: I think there's some difference in the plea for want of service and a defective service. If there's no service at all and then you find out there's a judgment against you so you appeal it and it gets reversed because there's no service at all, you ought to be able to start over. You get served. Do your special appearance or do whatever you want to do. I think there's a difference in that and just a defective service because somebody didn't sign it right or whatever. Why should you be precluded from a special appearance or motion to change venue or anything else when you never got served?

CHAIRMAN SOULES: Well, I don't think you should. But the balance is in one, this person has already used the court system, the appellate court system, so now then they

escape from that and then they escape to Mexico and you can't serve them. So if they've been here, they know there's a lawsuit against them. Are they in the lawsuit? Yes. Do they have the rights of whatever, special appearance, venue and all that? They ought to. But they shouldn't be able to run for the border and not get into a position where you can't ever serve them, I think.

MR. MARKS: Well, what if a special appearance would have been appropriate in the first place and a judgment is taken against them, a default judgment of some kind. How is this person going to protect himself now if there's no jurisdiction whatsoever?

CHAIRMAN SOULES: If we give a window after the mandate issues, before a general denial is deemed to be on file, then in that window they can do anything they want to do.

MR. MARKS: Including a special appearance?

CHAIRMAN SOULES: Anything. I guess anything. Alex.

PROFESSOR ALBRIGHT: In the interest of not trying to solve every problem by rule, can't we just do like we do for motion to quash, that the party is deemed served on, pick a date, the date the mandate is issued. And then they have to respond in however many days, 30 days or maybe the next 20 days following that day, and then it can be worked out in that case whether they're entitled to a special appearance or a motion to transfer or whatever. We don't have to solve that problem now because we don't have that case in front of us right now.

CHAIRMAN SOULES: I don't know where in these rules, the proposed rules, we've got the motion to quash.

PROFESSOR DORSANEO: Well, it's in 25, but I know notice that --

MR. MARKS: -- that you left that part out too.

PROFESSOR DORSANEO: Well, it's really the same issue, I guess --

PROFESSOR ALBRIGHT: But that's on appeal.

PROFESSOR DORSANEO: -- as to

whether you enter your appearance.

The motion to quash rule, which is right there alongside Rule 122, is the one that says you enter your appearance, you know, 20 days after the service or the citation was quashed.

CHAIRMAN SOULES: That's current Rule 122?

PROFESSOR DORSANEO: Current Rule 122. Both 122 and 123 are zingers that were added in here on some basis right after the Civil War and the first recodification. And they are, you know, general appearance rules with a vengeance. And frankly, both of them were left out. But I think it's the same issue, you know. If you do a motion -- if you get the thing quashed either in the trial court or on appeal, what should happen? Should you be able to argue anything other than the merits? And you know, under both of these rules as now you've made a general appearance.

PROFESSOR ALBRIGHT: But is that for us to decide right now? It seems like we have a special appearance rule and all the waiver provisions that are caught up in

the case law and in the rule there. We have venue rules and all the waiver rules that are caught up there. So is it for us to decide that issue right here? Why can't we just say you are served as of this day, and then all the rules that relate to special appearance and motions to transfer then start kicking in, and you may have waived it or you may not have.

PROFESSOR DORSANEO: Well, if that's what you want to do, that's clearly different. Because now if you attack the citation in the trial court or if you attack it and you win, then you've made an appearance. If you attack it on appeal or restricted appeal and you win, you've made a general appearance.

PROFESSOR ALBRIGHT: Well, I think you have. See, I think you have waived your special appearance. I'm not sure whether you've waived your motion to transfer.

PROFESSOR DORSANEO: But should that be? That's the point. Should you waive it or should you just get a chance to say, okay, then we go to the next argument.

PROFESSOR ALBRIGHT: Well, that's the whole issue with the special appearance, isn't it?

MR. LOW: Well, the problem I have is just what was stated. There may be a difference. I mean, you can make an attack in the trial court, but if you just plain weren't serve, I think once they say the ball game has started, you know, you ought to have every right.

PROFESSOR DORSANEO: Well, under our practice, if you weren't served right, you were plain not served.

MR. LOW: Well, you've got --

MR. MARKS: What if a default judgment was taken against you?

MR. McMAINS: That is where all the law comes from.

PROFESSOR DORSANEO: That's where it comes from. That's for the appeal of writ of error.

MR. MARKS: So now you get it reserved because you weren't served. Where are you then?

PROFESSOR DORSANEO: Under our

practice you're going to defend that on the merits, even if you're from Mozambique.

MR. MARKS: What if the merits would have protected you in the first place?

PROFESSOR ALBRIGHT: Then you should have filed your -- that's in the bill of review.

PROFESSOR DORSANEO: That's the penalty for attacking it late, and also the weird penalty for moving to quash and winning that argument.

MR. McMAINS: But the whole point again being that the purpose of the citation is to give you notice of the suit with regards to the motion to quash, for instance. Well, now, once you have notice of the suit, even if they may have served it defectively or whatever, that issue is gone. You ought not to have to go through that process again. I mean, that's all --

PROFESSOR DORSANEO: I agree. Service ought to be fine.

MR. McMAINS: That's right. The service part is okay because the people are there or whatever.

PROFESSOR DORSANEO: Even if you quashed it. .

MR. McMAINS: Even if they quash, they're there. It takes the place of service. The problem is that many notions of jurisdiction with regards to presiding jurisdiction are also related to questions of service under our particular statutes with regards to, you know, having to make a particular allegation with regards to really --

PROFESSOR DORSANEO: But we really don't think of it anymore. We think of the technique of service as being different from jurisdiction.

MR. McMAINS: Well, we try to, but the cases don't really in many respects. So I don't think it's just that simple to say, well, we should be able to file a special appearance or whatever, because a lot of things that you -- in terms of not having complied with our long-arm statute that are in fact or could be jurisdictional if you're violently laterally attacking in another state or even in this state at a later time, are

different when you're doing it on a direct attack. I mean, that's the way our practice has always been. You directly attack it. Then the service issues are gone.

Now, what other issues remaining? You know, it's hard to tell. Certainly nobody should be getting an advantage, and I wouldn't think that anybody is going to be given an advantage ultimately in the court system; that is, with regards to venue, for instance, by not serving as opposed to serving. I'm not going to serve you and therefore I have an advantage.

CHAIRMAN SOULES: Let me try to --

MR. McMAINS: You don't have to establish venue because I didn't serve you.

CHAIRMAN SOULES: Let me try to organize this a little bit. Question: Should a defendant be subject to default judgment for failing to answer, file an answer, after either a citation has been quashed or he has successfully appealed for lack of service and the case has been remanded. Should the defendant then be subject to a default

judgment if the defendant does not file an answer?

Is there anyone who feels that the defendant should be subject to default judgment? Okay. Oddly enough, 122 now makes them subject to default judgment, the second half of it.

MR. McMAINS: On the motion of quash.

PROFESSOR DORSANEO: So probably does 123.

CHAIRMAN SOULES: Well, we can't tell about 123; maybe, because it doesn't say.

MR. McMAINS: It's not a default judgment.

CHAIRMAN SOULES: But anyway, so we've got that behind us. Now, that means that whatever this rule says, this defendant has got to be protected both following a motion, a successful motion to quash, and a remand from appeal from a subsequent default judgment for failing to file an answer. So we've got to write that down.

Now, we've got to figure -- okay. Next

question: How many feel that the defendant who successfully moves to quash or successfully reverses a judgment because he was not served should have the opportunity to file Rule 25 due order of pleadings pleadings.

PROFESSOR DORSANEO: Can I add something about that, because I thought about it further. May I?

CHAIRMAN SOULES: Yes.

PROFESSOR DORSANEO: Under Rule 25 you do have to do a special appearance motion first. Now, under our current practice you have to do a special appearance motion first. I do not know, when I read, you know, 122, how this case comes out. You file a special appearance motion. It's overruled. You file a motion to quash. It is granted. I don't know whether you've waived your special appearance. I hope not. Okay? But the reason that comes up is that you must in your mind think that you've already either waived your special -- you know, you've either made your special appearance or you haven't.

CHAIRMAN SOULES: When you file a motion to quash?

PROFESSOR DORSANEO: Yeah. You shouldn't be getting to the motion to quash unless you have waived your special appearance.

CHAIRMAN SOULES: We've already decided not to worry about that, Bill. It's a big worry, but we're not going to worry about it. Okay?

So those who feel that there should be due order of pleadings pleadings available after a successful motion to quash or remand for lack of service show by hands.

MR. McMAINS: But what --

CHAIRMAN SOULES: All of it. All Rule 125 due order of pleadings.

MR. McMAINS: I know. But I don't think there has been sufficient discussion about that in terms of including everything.

CHAIRMAN SOULES: Well, the discussion has been so amorphous and so time consuming that I'm trying to get some focus to it because we've got a lot to do. And somehow we can't debate forever some of these issues, I guess.

Okay. How many believe that Rule 25 due order of pleadings pleadings should be available in those circumstances show by hands. Six.

Those who feel otherwise. Five.

Six to five they're available. Okay.

PROFESSOR DORSANEO: We'll draft it either way.

MR. ORSINGER: Can I interject a comment?

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: Do we want to address the issue of a default judgment that's reversed on a motion for new trial and then on appeal? Frequently those people are found to have made a general appearance by filing a motion for new trial. As long as we're fixing injustices, we might want to consider that. Or maybe the penalty for allowing a default is that you waive your special appearance. I don't know.

CHAIRMAN SOULES: Does anybody have a motion on that? No motion. Okay.

We're going to fix this. The vote of the

Committee was six to five. That's the way you draft it, Bill, because we're not going to get back together.

PROFESSOR DORSANEO: And that in fact is a very hard thing, you know, revisiting issues that were dealt with years ago.

CHAIRMAN SOULES: Next in trying to get this focused and organized, how much time -- those who feel that the time to file Rule 25 due order of pleadings pleadings should be limited show by hands. Four.

MR. HAMILTON: Limited to what?

CHAIRMAN SOULES: Limited. Right now they come back, these come back, and these pleadings are all available and nobody does anything, but they can't be defaulted, so there ought to be -- maybe there should be a limit.

MR. HAMILTON: So something specified?

CHAIRMAN SOULES: Just some limitation.

MR. ORSINGER: Time to file a

general denial, Luke?

CHAIRMAN SOULES: Nine. Those opposed. Okay. There's going to be a time limit, a time limit after the motion to quash is granted or a time limit after -- what would the triggering event be on appeal? The issuance of mandate? Okay. Does anybody disagree with issuance of the mandate being the trigger on remand?

MR. ORSINGER: Trigger to do what, Luke?

CHAIRMAN SOULES: Trigger to file a Rule 25 pleading.

MR. ORSINGER: Well, you better not say by the time of the mandate because you can't file --

CHAIRMAN SOULES: The trigger that starts the period.

MR. ORSINGER: Oh, gotcha.

CHAIRMAN SOULES: The trigger that starts the period. Okay. The trigger that starts the period, then, is going to be the issuance of the mandate or the order quashing citation. Now, how long?

MR. ORSINGER: Answer date.

Same as the answer date. 30 days.

CHAIRMAN SOULES: 30 days. The answer date is 30 days. Okay. 30 days it is.

MR. MARKS: Luke.

CHAIRMAN SOULES: John Marks.

MR. MARKS: We talked about this a little earlier but I don't know how we resolved it. At the end of 30 days, if nothing is done, is it going to be a default or you're going to consider -- it will be considered to have filed a general denial?

CHAIRMAN SOULES: All right. It looks to me like it has to be a general denial to bring closure to this. Does anybody disagree?

Okay. So 30 days after the triggering events, if nothing has been filed, it's a deemed general denial, which will --

MR. ORSINGER: That waives all your due order stuff, but it keeps you from suffering a default judgment.

CHAIRMAN SOULES: Correct. And the rule may need to say that during that 30 days, no default judgment. I don't know. But that's something you can keep in mind,

Bill.

PROFESSOR DORSANEO: Well, that might have well have meant that from the beginning, entering a general appearance might well have meant that.

CHAIRMAN SOULES: Except that --

PROFESSOR DORSANEO: We haven't interpreted it that way.

MR. ORSINGER: You can default somebody --

CHAIRMAN SOULES: The general appearance is for the interval before answer day in 122. That's probably what it means. Okay. Anything else on this subject? Okay. That one is closed. Next?

PROFESSOR DORSANEO: 38, Derivative Proceedings. Now, I'm reluctant to say that this is not going to take a lot of time, but the reason for it is that Article 514 of the Texas Business Corporation Act was amended, and the language in that statute appeared to me to require a few little changes. The changes are, I don't think in any way shape or form significant in (1).

(2), the statute requires, you know, a written demand filed with the corporation setting forth with particularity the act, omission or other matter that is the subject of the claim or challenge, and a request that the corporation take suitable action, rather than what is talked about in our current rule, which has been carried forward into this proposed Rule 38 under (2), you know, just the efforts of the plaintiff to have suit brought for the corporation. In other words, the statute requires specific efforts, not just efforts. And the statute doesn't appear to allow those efforts not to be undertaken on any basis. In other words, under current law you could say, well, it would have been useless to do that. Okay. Under the statute that does not appear to be so.

Okay. The last thing I would say is the statute does not apply to cases involving closed corporations, or when it applies, these requirements do not apply, so you know, this is in an effort to make the rule conform to the statute. Maybe it goes further than the statute in the case of closed corporations,

but the further that it goes is that last point, when the efforts would have been useless, and these efforts don't seem to be that onerous as procedural requirements to me anyway.

MR. LOW: Luke.

CHAIRMAN SOULES: Any problem with 38? Does anybody have any comment on 38? It stands approved.

PROFESSOR DORSANEO: 41. The only change is I added the word -- Bonnie, are you here on this?

MS. WOLBRUECK: Yes.

PROFESSOR DORSANEO: We were talking about, you know, what was called scira facies and the death context, and I put this back on the agenda because I'm uncomfortable with the requisites of citation. The citation and return of service must conform. The current draft says must conform with the requisites of citations, et cetera.

I really -- did the other one say "generally" too? I don't think so. I think we have two of them, but I don't think we have the earlier one here, Jeffrey. I thought I

added the word "generally."

CHAIRMAN SOULES: Here is the old one.

PROFESSOR DORSANEO: Yeah. These are not old and new. These are new and new. The word "generally" is added to conform generally to the requisites of citation. And that's so to give the clerks some latitude on making them a little different if that's appropriate.

MS. WOLBRUECK: And the clerk makes that determination. Is that correct?

PROFESSOR DORSANEO: Well, a clerk or whoever does it.

MS. WOLBRUECK: I had some problems with Rule 154 previously because of the prerequisites of the citation and putting in that "You have been sued" section and then requiring the answer when an answer has already been filed. And I think there's some case law that says there's no requirement of an answer.

PROFESSOR DORSANEO: Of an answer.

MS. WOLBRUECK: Yes. And so we

have changed citations to reflect if the answer has already been previously filed.

PROFESSOR DORSANEO: So I have covered you with "generally"?

MS. WOLBRUECK: With "generally," yes. I think you have covered it. You have helped me out.

MR. McMAINS: Must sort of conform?

PROFESSOR DORSANEO: Well, does anybody have a problem? It's just the same as it was before. Just it doesn't have to conform exactly.

MR. LOW: I move.

CHAIRMAN SOULES: That stands approved unless there's an objection. No objection. It's approved.

MR. ORSINGER: Is the version that's approved the first one or the second one?

CHAIRMAN SOULES: The first one, I think.

PROFESSOR DORSANEO: The first one.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: Rule 72. One of the rules that disappeared was 248. 248 is a favorite rule of some members of the Committee and it's an important rule. I put it back in.

CHAIRMAN SOULES: Any objection? No objection.

MS. SWEENEY: Wait, we're still trying to find it over here.

CHAIRMAN SOULES: Oh, sorry.

MR. ORSINGER: You're talking about Rule 72?

PROFESSOR DORSANEO: Yes.

MR. ORSINGER: Does this mean that you can't raise a question of law by motion for directed verdict when the plaintiff rests for the first time?

CHAIRMAN SOULES: No.

PROFESSOR DORSANEO: It doesn't mean that now.

MR. ORSINGER: Okay. As long as it doesn't mean that, I don't have a problem with that.

CHAIRMAN SOULES: This is exactly the old rule. No word changes right

now.

MR. ORSINGER: Okay.

PROFESSOR DORSANEO: Well, there's a little bit of word change, but not, you know -- the current rules says that "when a jury has been demanded," rather than "in jury cases." Okay?

MR. LOW: Demanded you have a trial on it?

CHAIRMAN SOULES: Okay. Any objection to 72? No objection. It's approved.

PROFESSOR DORSANEO: Lee, what's 73? What did you do with that? Is that yours?

MR. PARSLEY: Nothing. You asked me to prepare 73. It is the subpoena rule approved by this Committee two years ago as part of the Discovery Rules. It's previously approved. All we're doing is bringing it in to the right spot in the recodification.

PROFESSOR DORSANEO: Okay. So what you were given in the recodification was not consistent with what we had done

previously in the Discovery Rules and this cleans that up.

MR. PARSLEY: It's exactly what we approved two years ago.

CHAIRMAN SOULES: Okay. It's still approved.

PROFESSOR DORSANEO: 85, deliberations. The disposition table work also indicated that Rule 284 was left out. 284 is judge to caution jury. If permitted to separate either during the trial or after the case is submitted, then to them the jury shall be admonished by the court that it is their duty not to converse with or permit themselves to be addressed by any other person on any subject connected with the trial. And that's added in, in fact probably too literally, but we can take care of that along the way.

CHAIRMAN SOULES: Buddy.

MR. LOW: I move it be approved.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: Is there any other change in that, Jeffrey?

CHAIRMAN SOULES: I just

have -- the only tweak I might put in here, I don't think the jurors are supposed to talk to each other either. And I guess another instruction tells them not to deliberate or discuss the case among themselves?

MS. SWEENEY: That's in the rewritten --

MR. LOW: That's already in the standard instructions.

CHAIRMAN SOULES: Okay. That's approved. 85 is approved.

PROFESSOR ALBRIGHT: This is in deliberations, so this is when they are talking.

PROFESSOR DORSANEO: 102 is Don Hunt's. Don Hunt is not here, and I thought he was going to be here to present this. So let's look at it. This is a conforming change with the Appellate Rules.

MS. SWEENEY: Can somebody just -- mine has got this red-line on it. I think they all do. It's really hard to read what's in the long red-line.

CHAIRMAN SOULES: I'll read it. If -- I'm just going to read the rule

that we would pass: If a new trial should be granted on an error that affects part of but not all the matters in controversy and that part is separable without unfairness to the parties, the judge may grant a new trial only as to that part affected by the error, period. The court may not not order a separate trial solely on unliquidated damages if liability is contested.

MR. LOW: Iley vs. Hughes. That's the law, isn't it?

MR. McMAINS: May I point out something grammatically about that rule as you've read it, and not because of your reading?

CHAIRMAN SOULES: Okay.

MR. McMAINS: Well, the part which says the judge may grant a new trial only.

CHAIRMAN SOULES: "Only" should be deleted.

MR. McMAINS: As to that part affected by the error.

CHAIRMAN SOULES: I think the "only" should be, because that seems to say

that the judge can only grant a partial new trial.

MR. McMAINS: It seems to say that he can't grant an entirely new trial.

CHAIRMAN SOULES: If you take "only" out, it says the judge may grant a new trial as to that part which makes it permissive. Okay. So let's take out "only."

PROFESSOR DORSANEO: In the third line.

CHAIRMAN SOULES: In the third line. Okay. Any other problem with 102(f)? Richard.

MR. ORSINGER: This can be done later, but this isn't actually copying the words in the Appellate Rule 44.1(b). "That" is "the," and there are a few other things. And if you want absolute conformity, we can. There are clauses in this appellate rule that say the same thing as this that we could just conform. But in substance they say the same thing. So how far do you want to go to conform them?

CHAIRMAN SOULES: If you will submit that to Bill, what you think, and as

long as it doesn't change the meaning here, that's fine.

PROFESSOR DORSANEO: Or just submit it to Lee.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: Submit it to Lee. Okay. We're going to pass 102(f) subject to conforming, not changing its substance, but permitting conformity to the appellate rule, right?

MR. ORSINGER: TRAP 44.1(b).

CHAIRMAN SOULES: It's TRAP 44.1(b). Is that it, Richard?

MR. ORSINGER: That's right.

CHAIRMAN SOULES: Okay. Rusty.

MR. McMAINS: This rule theoretically authorizes the judge just kind of on his own motion to -- I mean, it doesn't require that he be responding to a motion, right?

CHAIRMAN SOULES: Right.

MS. SWEENEY: But that's not a change.

PROFESSOR DORSANEO: No. A judge can do a new trial now on his own.

HON. SCOTT A. BRISTER: A couple of times.

PROFESSOR DORSANEO: They don't want to.

CHAIRMAN SOULES: Okay. So 102(f) stands approved as just discussed on the record. 104(e)(8), do we need to look at that?

PROFESSOR DORSANEO: I wish Don was here. I don't know why that stuff on the bottom is crossed out. I don't remember whether we voted it out and it snuck in here or what. I don't know what's going on with this.

CHAIRMAN SOULES: Well, let's take a look at it. I understand that Don is ill. Otherwise, obviously, he would be here. He's been dedicated.

PROFESSOR DORSANEO: That's why I assumed he would be here.

MR. LOW: Isn't this just an attempt to go back to some question on premature filings. In federal court they say, well, if it's premature it's just deemed to be filed at the appropriate time. You don't have

to go back and do it. Or maybe vice versa. Maybe in federal court they had something maybe just to make it clear.

MR. ORSINGER: Well, Luke, if I may, as I recall the debate, did we not decide that a prematurely filed motion could preserve error but would not extend the postjudgment timetable?

CHAIRMAN SOULES: That's right.

MR. ORSINGER: This takes this away, the clause here that says -- preserving error is still what we agreed on. But if it's prematurely filed, the part that says it does not affect plenary power has been deleted, so I think that's different from what we voted.

PROFESSOR DORSANEO: It looks to me like that's my recollection. I didn't want to say it at the threshold, but it looks to me like he wants to revisit our prior vote.

MR. McMAINS: Yeah.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: And I don't want to.

MR. ORSINGER: It was my recollection we made that distinction and we

voted it out; that it preserves error prematurely filed but it doesn't extend plenary power. Is that anyone else's recollection.

CHAIRMAN SOULES: Don Hunt requested at our last meeting that 104(e)(8) be put on the September agenda because the premature filing rule may or may not be in conflict with TRAP 27. Dorsaneo, Orsinger and Hunt were appointed to take a look at this and bring it back to report at the September meeting. So let's look at TRAP 27. I realize this is a little tedious because Don is not here, but we might as well just go through it. TRAP 27 says what?

MR. ORSINGER: 27(2) says the appellate court may treat actions taken before an appealable order is signed as relating to an appeal of that order and give them effect as if they had been taken after the order was signed. Well, that would suggest that a motion for new trial that's prematurely filed --

CHAIRMAN SOULES: -- is treated as if it had been filed.

MR. ORSINGER: -- may be treated, but doesn't say that it will or must be, but may be treated as if it was filed afterward. And under our trial rules, if it is filed afterwards, it extends plenary power, it extends the deadline for filing the record, but I don't think it extends anything else.

MR. McMAINS: It extends the perfection.

MR. ORSINGER: Yeah, your perfecting. That's what I mean.

MR. McMAINS: But it changes the time, though.

MR. ORSINGER: Perfecting and record and plenary power are what we're debating here. But this doesn't say that it automatically does. It says it may, the appellate court may.

CHAIRMAN SOULES: Well, that says the appellate court can treat it that way. What we voted in 104(e)(8) is that the trial court doesn't get extended plenary jurisdiction. That's two different things.

MR. ORSINGER: They are completely independent.

CHAIRMAN SOULES: And they are independent. So we've already debated this and decided on what we want as policy, and so let's go back to the first sentence: A prematurely filed motion to modify a judgment or a motion for new trial is effective to preserve the complaints made in the motion and is deemed filed on the day of but after the signing of the judgment and motion attached.

MR. McMAINS: All right. Well, that is a complete revisit of what we did. I mean that's why this was rewritten.

CHAIRMAN SOULES: Even the first sentence is.

MR. McMAINS: I think so.

MR. ORSINGER: One consequence of the first sentence is that you took out the fact that it's overruled by operation of law if it's prematurely filed. I don't remember how that vote went, but there was an issue that if you prematurely file something is it overruled by operation of law so many days after the judgment, and we debated the heck out of that, but I can't remember how we came down.

CHAIRMAN SOULES: We voted on all the words that have been red-lined out.

MR. McMAINS: Yeah. The words he red-lined out are the words we voted on, and that's what I was getting at, and the ones that are just red-lined or highlighted or whatever are the only words he left in.

MR. ORSINGER: Well, he's been -- this change would eliminate the idea that a prematurely filed motion can be overruled by operation of law. So that's a reversal of our earlier vote, and I don't see that that's required by the appellate rule, but I would be happy to share the rule with somebody who can look at it.

Do you want to look at it, Rusty?

CHAIRMAN SOULES: We hammered on this, and his only concern is that 104(e)(8) is inconsistent with 27. And the first sentence, like the second sentence, is not there independent, it seems to me.

Does anyone disagree?

MR. ORSINGER: Well, the issue of preserving a complaint is required by the appellate rules really, not by the trial

rules. And so if the appellate rules say that the appellate court may treat it as if it was filed afterward --

CHAIRMAN SOULES: -- may.

MR. ORSINGER: May. And then it does have appellate implications, but the result is not dictated by the rule. It's just like discretionary with the court.

CHAIRMAN SOULES: Now, we talked about how the timing in 104(e)(8) would -- there's another issue. In the first sentence, that "deemed to have been overruled by operation of law" takes away the right to amend --

MR. McMAINS: No, not under our new rules.

CHAIRMAN SOULES: -- motion for new trial. No?

MR. McMAINS: Remember, under our new rules you can file as many motions as you want, whether they've been overruled previously or not, within 30 days.

CHAIRMAN SOULES: Okay. That's right. We talked about that.

MR. McMAINS: So it just

stopped at 30 days. And the purpose of this rule as we had previously written it was to deem that one overruled so we never had to worry about the new ones that went afterwards.

CHAIRMAN SOULES: So there's not going to be any extension of plenary jurisdiction. So we have a prematurely filed motion, then a judgment. That prematurely filed motion is deemed overruled the day of the judgment but after the judgment so 30 days runs.

MR. McMAINS: Yeah. So the plenary power expires after 30 days.

CHAIRMAN SOULES: After 30 days. And that's the operation of this. And the second sentence says essentially the same thing, and that's what we decided would be the consequence of a prematurely filed motion. Now, you can file more motions, and if you file a motion after this one is deemed overruled as a matter of law and after the judgment, then you extend the appellate timetables. But if you don't --

MR. McMAINS: That's right.

CHAIRMAN SOULES: -- 30 days

and then you're out. And that was a policy decision that we made. So we would leave 104(e)(8) as it was passed before and ignore this red-lined version. Is that what we -- does anybody disagree? No disagreement. That's what we'll do.

PROFESSOR DORSANEO: In 105, those two things, just look at them, they're just quibbles. Probably it's more common to say in our recodification authorized by law, rather than by rule or statute, and they just added a "within."

CHAIRMAN SOULES: Any objection? It's approved.

PROFESSOR DORSANEO: Keep going?

CHAIRMAN SOULES: Yes, sir.

PROFESSOR DORSANEO: 130.

CHAIRMAN SOULES: Okay. Duration. 105. Is that the same thing? That's just a tweak?

PROFESSOR DORSANEO: Yeah.

CHAIRMAN SOULES: Okay. That's approved. 105(a) is approved. 105(b) is approved. And now we're at Rule 130.

PROFESSOR DORSANEO: 130. This was an instruction to some of us to conform 130 to the appellate rules. It is conformed verbatim when appropriate. The language in (b) is a combination of 6.1(a), (b) and (c): The second sentence and the third sentence are taken literally from 6.1 (c).

The last sentence, all communications, is consistent with 6.3, but the appellate rules language is more complicated because of the potential existence of trial court lead counsel. (c) is added, appearance by other attorneys, and it is verbatim to 6.2 of the appellate rules, except in the appellate rule, and Jeffrey, correct me if I'm wrong here, it says when a brief or motion is filed, 6.2, and this just says when a motion is filed.

CHAIRMAN SOULES: Wait a minute. Where?

PROFESSOR DORSANEO: The last sentence.

CHAIRMAN SOULES: Of (c). Really that means when a notice is filed, right?

PROFESSOR DORSANEO: Maybe.

CHAIRMAN SOULES: Because all you do is file a notice. That's the first sentence, motion to notice?

PROFESSOR DORSANEO: Right.

CHAIRMAN SOULES: Okay. Any objection? Motion contains the notice in 130(c). That's approved.

PROFESSOR DORSANEO: 132 is exactly 6.5 of the appellate rules, except for the deletion of the word in the appellate rules "appellate" before "court" and substituting "trial."

CHAIRMAN SOULES: Any objection? Rusty.

MR. McMAINS: I want to go back to the other rule just a second.

CHAIRMAN SOULES: Which rule?

MR. McMAINS: Just Rule 130. All I'm curious about is I guess we've never had a rule on pro hoc vici, admission in any way -- if I were a foreign attorney or out of state attorney reading this, I would see that, well, I can't be a lead attorney because I don't have a Texas ID number unless I get one. And maybe that's just kind of the way it

always has been. I didn't know we had ever tried to fix that.

PROFESSOR DORSANEO: It never has been a problem. I think there is some sort of a something that talks about that now, either a statute or something, but it's never been in our procedural rule.

CHAIRMAN SOULES: Well, why don't we let lead counsel be a Texas lawyer anyway? The court has got jurisdiction over that.

MR. McMAINS: It's the position of the Committee that lead counsel is always a Texas lawyer.

PROFESSOR DORSANEO: I would like to have a rule that would say that Texas counsel is lead counsel and the other counsel can't say anything.

CHAIRMAN SOULES: Now, that is definitely the voice of experience talking.

PROFESSOR DORSANEO: We would have a better record if that were the case.

CHAIRMAN SOULES: Okay. On to Rule 132.

PROFESSOR DORSANEO: That's

just 6.5.

CHAIRMAN SOULES: Any objection to 135? No objection. It's approved.

PROFESSOR DORSANEO: 133. We had a big discussion about it, and this is the end product. We decided, unlike the appellate rule which doesn't require filing, okay, that we would have filing. And we decided to say "and on the record" rather than some other formulation. I know this because I just read the transcript. So I submit that this is faithful to the transcript of what we decided last time. This is for a vote, but more for information unless you want to change your mind.

CHAIRMAN SOULES: Gosh, I don't remember voting that it had to be filed.

MR. ORSINGER: In the trial court?

MR. McMAINS: Yes.

MR. ORSINGER: Because we made a distinction about the appellate court.

CHAIRMAN SOULES: Okay. Any objection? 133 is approved.

PROFESSOR DORSANEO: Now, I

have a 144 here, but I'm going to defer to Richard at this point.

CHAIRMAN SOULES: Just one clarification. To be enforceable, it has to be filed. But it can filed at the time you seek to enforce it. That was our debate, right?

MR. ORSINGER: You could even file it after you file your motion to enforce.

CHAIRMAN SOULES: Make it evidence at the trial. Okay. I understand. Thank you. Next is what, Bill?

PROFESSOR DORSANEO: Well, let's see here, am I getting out of order here? We've got 144. In 144, I frankly don't know why that's still on the agenda, except I made a lot of changes in my notebook draft to conform it, I think, to Scott Brister's ultimate motion that we voted up. So this is really to make certain that 144 is right in that respect. And Richard, do you --

MR. ORSINGER: No, let me say that it was listed on my list of things to do, but I was to conform it with the appellate rule, but there is no appellate rule. I

recommended an appellate rule in this area, and it was deleted by the Supreme Court when they handed them down. So there's nothing to conform it to, so I made no changes.

PROFESSOR DORSANEO: I think that I made it consistent with the draft that we had at the meeting, because the minutes or the transcript said "make this like what we voted on this morning," and that's what I tried to do. And I'd ask Judge Brister to double-check this to make sure I didn't make a mistake.

CHAIRMAN SOULES: Subject to Judge Brister's double-check, is there any objection to Rule 144? No objection. It's approved.

PROFESSOR DORSANEO: All right. Now, the cost rules are in a package, and where is that?

CHAIRMAN SOULES: 145.

PROFESSOR DORSANEO: No. Do I have a 145?

MR. ORSINGER: Yeah. But it's labeled "Liability for Costs."

PROFESSOR DORSANEO: Oh, that's

the old one. Forget that one.

CHAIRMAN SOULES: Okay. That's disapproved.

PROFESSOR DORSANEO: That's what's been replaced. Remember when we went over these rules, I decided, yuck, these rules at the back of the book need to be looked at again before they're brought back to the Committee.

CHAIRMAN SOULES: What do we need to look at?

PROFESSOR DORSANEO: 146, 147, 148, 149, 150.

CHAIRMAN SOULES: Okay. We're going to start with something that says "146, Liability for Costs."

PROFESSOR DORSANEO: Well, I almost want to stop here and make certain these are. Yeah. These are it, aren't they, Bonnie?

MS. WOLBRUECK: Yes.

CHAIRMAN SOULES: I'll tell you what let's do, let's take 30 minutes for lunch, lunch is served in the back here, in the event Bill needs to do any reorganization.

Let's be in recess until 1:00 o'clock.

(At this time there was a recess.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

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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 September 19, 1997, Morning Session, and the same was thereafter reduced to computer transcription by me.

Charges for preparation of original transcript: $ 957.00.

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Given under my hand and seal of office on this the 2nd day of October, 1997.

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