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HEARING OF THE SUPREME COURT
ADVISORY COMMITTEE

NOVEMBER 18, 1994

(MORNING SESSION)

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Taken before William F. Wolfe, Certified Shorthand Reporter and Notary Public in Travis County for the State of Texas, on the 18th day of November, A.D. 1994, between the hours of 8:55 o'clock a.m. and 12:10 o'clock p.m., at the Capitol Extension, Room E1.002, 1400 North Congress Avenue, Austin, Texas 78701.

SUPREME COURT ADVISORY COMMITTEE
NOVEMBER 18, 1994
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NOVEMBER 18, 1994 MEETING

MEMBERS PRESENT:

Alexandra Albright
Pamela Stanton Baron
David J. Beck
Honorable Scott A. Brister
Professor Elaine A. Carlson
Professor William Dorsaneo III
Honorable Sarah B. Duncan
Michael T. Gallagher
Anne L. Gardner
Honorable Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring, Jr.
Donald M. Hunt
Russell H. McMains
Anne McNamara
Harriet E. Miers
Richard R. Orsinger
Honorable David Peeples
Anthony J. Sadberry
Luther H. Soules III
Paula Sweeney
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta, Jr.
Charles L. Babcock
Ann T. Cochran
Tommy Jacks
Franklin Jones, Jr.
David Keltner
Joseph Latting
Thomas S. Leatherbury
Gilbert I. Low
John Marks, Jr.
Honorable F. Scott McCown
Robert E. Meadows
David L. Perry
Stephen D. Susman

EX OFFICIO MEMBERS PRESENT:

Justice Nathan L. Hecht
Honorable Sam Houston Clinton
Honorable William J. Cornelius
W. Kenneth Law
David B. Jackson
Doris Lange
Bonnie Wolbrueck

EX OFFICIO MEMBERS ABSENT:

Doyle Curry
Paul N. Gold
Thomas C. Riney
Honorable Paul Heath Till

Also present:

Lee Parsley, Supreme Court Staff Attorney
Holly Duderstadt
Denise Smith

MORNING SESSION

(Hearing Convened 8:55 a.m.)

CHAIRMAN SOULES: Let's get started. Some people apparently are getting in by air today, so I guess they'll be delayed.

First, I think we ought to congratulate the judges, the newly elected judges and reelected judges and clerks. I think, Doris, you had a race but it was unopposed. Bonnie Wolbrueck also had a race but it was unopposed. That's the best way.

MS. WOLBRUECK: That's the best way.

CHAIRMAN SOULES: Judge Peeples will be a new district judge in San Antonio having served his tenure on the court of appeals, and being a people person, he'll return to the trial bench.

Sarah Duncan, congratulations on her first election.

Judge Brister was reelected, but not unopposed.

MS. DUNCAN: He's the one that threw the court reporters out.

HONORABLE SCOTT BRISTER: That's right.

CHAIRMAN SOULES: Sarah will be a justice on the Fourth Court of Appeals in San Antonio.

And our esteemed liaison with the Supreme Court of Texas, of course, was reelected. Congratulations.

If I've missed anybody, I apologize, but congratulations to everybody.

We're passing around a sign-up list. It will have to come around a couple of times probably since we have a lot of people absent or running late in travel.

I think probably we ought to go ahead and start with the agenda, though, which, Judge Guittard, really your appellate rules agenda is the first thing this morning. Why don't I just leave it to you to go through this as you think we should approach it.

HONORABLE C. A. GUITTARD: All right. I hope all of you have -- are you ready to go?

CHAIRMAN SOULES: Yes, sir.

HONORABLE C. A. GUITTARD:

Okay. I hope all of you have the latest version of our cumulative report which is dated November the 14th. If you don't have that and you have an earlier one, I think perhaps it would be helpful to refer to that.

Let me direct your attention first to Page 5 down at the bottom about the attorney in charge.

We had a provision, Subdivision (b) of the filing rule, Rule 4, which had something about -- had this provision about the attorney in charge, but we concluded that it was inappropriate to have it there and it's better to put it over here in Rule 7.

Now, Rule 7 heretofore had -- Rule 7(a) concerned appearance of counsel, but it would seem that our attorney in charge rule would supersede that, so we propose to eliminate the former provision from Rule 7 and substitute instead the fifth provision from which has been in our report as Subdivision (b) of Rule 4 and put that as Subdivision (a) in Rule 7, and we're adding this language simply for clarification.

The first sentence: The attorney in

charge for a party is the attorney to whom orders and notices to that party should be sent -- (interruption). That doesn't sound like an airplane, does it?

The attorney in charge for a party is the attorney to whom orders and notices to that party should be sent and on whom papers and copies of papers should be served.

The rest of it is the same as it was in Rule 4(b), so Mr. Chairman, I move the approval of that recommendation.

CHAIRMAN SOULES: Okay. Let's see, the corresponding trial rule is, what, eight?

MR. HERRING: Eight, yeah.

HONORABLE C. A. GUITTARD: And we are proposing -- we might as well consider that at the same time, and the corresponding trial rule is Rule 8, which is in the cumulative report on...

MS. DUNCAN: Page 62.

HONORABLE C. A. GUITTARD: 62. What we wanted to make sure there was that the designation of an attorney in charge from the appeal -- for the appeal would have nothing to

do with or wouldn't change the attorney in charge in the trial court, so we propose to amend Rule 8 of the trial rules to provide that -- to provide simply that, to add to that Rule 8 the designation or redesignation of the attorney in charge on appeal does not constitute the redesignation of the attorney in charge in the trial court. And I move the approval of that recommendation as well.

CHAIRMAN SOULES: Judge, this is obviously nitpicking, but is it possible that two lawyers could sign a notice of appeal?

MS. DUNCAN: Yes.

HONORABLE C. A. GUITTARD: I guess so.

CHAIRMAN SOULES: The reason that we use this -- let's see, in Rule 8, the attorney whose signature first appears on the initial pleadings is -- you say "the attorney whose signature first appears." That means just going down the page to the first person, if we could just change that.

HONORABLE C. A. GUITTARD: That would be all right.

CHAIRMAN SOULES: And then if we had multiple signatures there's a way to decide who is in charge, if that makes any difference to anybody. It may not make a difference to anybody.

HONORABLE C. A. GUITTARD: I think in the second sentence there under Rule 7(a), instead of "the attorney who signed the notice of appeal," say "the attorney whose signature first appears on the notice of appeal." Would that get it?

CHAIRMAN SOULES: Yes, sir.

HONORABLE C. A. GUITTARD: Okay.

CHAIRMAN SOULES: Is anyone opposed to Rule 7(a) and the additional sentence in Texas Rules of Civil Procedure 8?

Being no opposition, that's unanimously approved.

HONORABLE C. A. GUITTARD: On Page 12, with respect to notices of appeal, it -- on the contents of the notice, it appears that it would be -- we concluded it would be useful to have that notice state that in a case of an accelerated appeal that it was

in fact accelerated; that that would help the clerk and help all the parties, so we propose to add there to Subdivision (2), (a)(2), of Rule 40, the fifth phrase down there. That's where we have "in accelerated appeals, that the appeal is accelerated."

Mr. Chairman, I move the adoption of that recommendation.

CHAIRMAN SOULES: Okay. This is on Page 12?

HONORABLE C. A. GUITTARD: Yes. Rule 40(a)(2).

CHAIRMAN SOULES: 40(a)(2). Any opposition to that? Any comment? Okay. There being none, that will stand unanimously approved.

HONORABLE C. A. GUITTARD: All right. The next has to do with criminal cases on Page 14. We have a -- that subdivision has been rewritten and that appears now -- let me read that and see if it's complete. Let's see what's been stricken out there.

Instead of the former provision, it would read, this is for criminal cases, "Appeals in Habeas Corpus and Bail; Criminal Cases.

Notice of appeal in habeas corpus and bail proceedings shall be given in writing, filed with the clerk of the trial court, within 10 days after the judgment or order is entered by the trial court, either in writing or in open court. The transcript and the statement of facts, if requested by the applicant or the state, shall be filed in the appellate court within 15 days after notice of appeal is filed. The applicant's brief shall be filed within 10 days after the record is filed and the state's brief shall be filed within 10 days after the applicant's brief is filed. The appellate court may shorten or extend the time for filing the record or the briefs upon written notice of a party setting out a reasonable explanation for the need for such action."

CHAIRMAN SOULES: Okay. Does this change come from the court of criminal appeals?

HONORABLE C. A. GUITTARD: One of the criminal appeal practitioners on our committee drafted this.

Judge Clinton, do you have any problem

with it?

HONORABLE SAM HOUSTON CLINTON: I haven't really studied it, to tell you the truth. But it shortens the time period, I can see that.

HONORABLE C. A. GUITTARD: Yeah. That -- is there any problem there?

HONORABLE SAM HOUSTON CLINTON: I don't know. I suppose not. I've seen lawyers have a lot of difficulty getting them done in 10 days, but that's the nature of the lawyer.

HONORABLE C. A. GUITTARD: The question is how urgent are these appeals that they should be shortened like that.

HONORABLE SAM HOUSTON CLINTON: They start out urgent, but it's been my experience they never continue to be urgent once they get in there among the bodies of the cases that the appellate court has to work on.

HONORABLE C. A. GUITTARD: Judge, would you mind looking over this and giving it some thought during the course of this meeting?

HONORABLE SAM HOUSTON CLINTON:

Not at all.

HONORABLE C. A. GUITTARD: And then perhaps later we could come back and talk about it.

HONORABLE SAM HOUSTON CLINTON: I'd be glad to do that.

HONORABLE C. A. GUITTARD: So we'll defer action on that.

CHAIRMAN SOULES: Right. And in the event that Judge Clinton feels that he should discuss it further with members of his court, we'll just defer action until he gives clearance, because obviously this is more your business than our business, although we want the appellate rules to obviously be consistent throughout, so Judge Clinton, if you could tell us about what you think or if you want to take it back to your court before we pass on it, that's fine.

HONORABLE SAM HOUSTON CLINTON: I'll give you my thoughts on it in just a minute.

CHAIRMAN SOULES: Okay. Judge Guittard.

HONORABLE C. A. GUITTARD: And

similarly with respect to the criminal practice, Rule 57, which has to do with docketing statements, that's on Page 29 of the report, it was thought that this information required by the docketing statement wouldn't be helpful in criminal cases, so we propose to limit Rule 57 to civil cases. Perhaps if there's a need for a docketing statement in criminal cases, well, that can be added as subdivision -- as another subdivision of the rule. But it's doubtful if anything at all is needed in criminal cases, so Mr. Chairman, I move that Rule 57 be limited to civil cases.

And the easiest way to do that, I suppose, is right there at the beginning, (a), "In civil cases, upon receipt of a notice of appeal." I move the approval of that recommendation.

CHAIRMAN SOULES: Well, didn't the other 57 had "CV" for civil cases and "CR" for criminal cases?

HONORABLE C. A. GUITTARD: No.

CHAIRMAN SOULES: Then it wasn't stricken through in here, in the old rule?

HONORABLE C. A. GUITTARD: Oh, that's -- the old 57 has Subdivision (a) there, but of course the docketing has been included in the present -- in our proposed 56, which has already been approved by this committee. Subdivision (b) has to do with the attorney which would -- and has been superseded. That was transferred in our former Court Rule 7, and now we propose, and by the action taken in the first item this morning, we've deleted that and substituted in fact the provision for attorney in charge, so that doesn't have any relation.

The old 57 doesn't have any relation to Rule 57, to the present Rule 57. It was just that after having eliminated the provisional Rule 57 we had an extra number, and we used that for this docketing statement.

CHAIRMAN SOULES: Okay.

JUSTICE CORNELIUS: I certainly don't want to go against the report of my subcommittee here, but I've just been thinking and I was just confronted with it this morning as I came in. It seems to me that we ought to have a docketing statement in criminal

appeals.

I know a lot of the information set out here for the docketing statements would not be applicable to a criminal appeal, but some of it would be. And I think our intent was to allow the courts of appeals to design their own format for the docketing statements, and it seems to me that we ought not to exclude criminal appeals from the docketing statement.

HONORABLE C. A. GUITTARD: Well, our -- the action we just took would leave open putting in further provisions in the rule with respect to criminal docketing statements. And the court rules -- our present Rule 57(a), Subdivision 13, provides for any other information required by the court of appeals. I would suppose that we could look at this rule again with respect to the criminal -- a criminal docketing statement, and perhaps it would be best to have another subdivision for criminal cases that would usually require different information, so let's leave that part of it open.

CHAIRMAN SOULES: Okay.

JUSTICE CORNELIUS: Well, that would be all right with me, but then we'll have to draft a rule on it.

HONORABLE C. A. GUITTARD: And if you want to draft something on that, well, that would be fine.

CHAIRMAN SOULES: So what the committee is proposing is that -- or the subcommittee is proposing is that Rule 57 as presented on Page 29 and 30 be approved by the Advisory Committee with the understanding that your subcommittee is going to add an additional subdivision to deal with the docketing statement for criminal cases?

HONORABLE C. A. GUITTARD: Right. And that the present items here would be limited to civil cases.

CHAIRMAN SOULES: And that these items be limited -- a, b, c and d -- be limited to civil cases?

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: Okay. Is there any opposition to that? Any comment? Okay. That will stand unanimously approved.

We certainly want to get the criminal docketing statement cleared with the Advisory Committee or with the court of criminal appeals, however that comes through; certainly through Judge Clinton.

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: I don't know if -- we got into a situation right after the Texas Rules of Appellate Procedure were adopted by both courts. I think the Supreme Court made some changes to the Texas Rules of Appellate Procedure that only affected civil cases. But for whatever reason, the court of appeals, the court of criminal appeals, was not asked for concur with those changes at that time. I think it was just because it was the first pass after we had merged the rules and we kept on kind of doing business as usual as we had before. So then once the rules came out published the next time, the Supreme Court had one rule for governing civil cases and the court of criminal appeals had another rule for governing civil cases because they had not approved the amendment. Now, we don't want to

get into that again, so it's very important that we, when we're done with this, that we remind our Court that both courts have to concur on all the amendments.

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: And it would be important, I think, in that context that we have the court of criminal appeals' blessing on what we do that's going to affect criminal cases up front so that we don't wind up with a miscommunication.

HONORABLE SAM HOUSTON CLINTON: With a what?

CHAIRMAN SOULES: So we don't wind up with some sort of miscommunication with your court.

HONORABLE SAM HOUSTON CLINTON: Oh, miscommunication.

CHAIRMAN SOULES: Yes, sir. Is that the process you would like for us to follow, Judge?

HONORABLE SAM HOUSTON CLINTON: Oh, yes.

CHAIRMAN SOULES: Okay. Good.

HONORABLE SAM HOUSTON CLINTON: I just wanted to hear what you said.

CHAIRMAN SOULES: Okay. Yes, sir.

HONORABLE C. A. GUITTARD: The next proposal also relates to criminal cases, Rule 87. 87(b)(1). 87(b) has to do with enforcement of judgment, and there are some requirements here, and I don't know whether they're ever --

CHAIRMAN SOULES: It's on Page 39.

HONORABLE C. A. GUITTARD: On Page 39. And there are some requirements here that -- I don't know if they're actually observed or not, but Judge Nye from Corpus Christi suggested that clerk acknowledgments are unnecessary and that's the part which is to be eliminated.

In other words, look at Subdivision (b)(1) on the top of Page 39. It says "When the judgment" -- and this has to do with criminal cases. "Judgment of Affirmance. When the judgment of the appellate court affirms the judgment of the court below in a

case in which bail has been allowed, the clerk of the trial court shall send an acknowledgment to the clerk of the appellate court of the receipt of the mandate and --" and the thought was that that was unnecessary; it didn't help the appellate court to have an acknowledgment of the receipt of the mandate.

And likewise, the last sentence of the rule, "The sheriff shall notify the clerk of the trial court and the clerk of the appellate court when the mandate has been carried out," we propose to delete the provision "the clerk of the appellate court." I don't think the appellate courts are interested in that, and it doesn't help them any, and Mr. Law concurs with that. So I approve the -- I move the approval of that recommendation.

HONORABLE SAM HOUSTON CLINTON: That rule originated right in -- jumped right out of the minds of the clerk of our court. And the reason is, he claims that if he never hears back, he sits up there ignorant and doesn't know what's going on with the case so he doesn't know what to do about it. He doesn't know, for example, whether the sheriff

has ever executed a capias. You don't know what to expect. The guy is just lost out there somewhere in the maze of the procedure. At least as far as our court and the court of appeals should be concerned about whether their order is being executed or not, that was the concern.

HONORABLE C. A. GUITTARD: Well, if that's something that's of real help, well, let's leave it like it is.

HONORABLE SAM HOUSTON CLINTON: Obviously, I have not been in a position to know whether it's of help or not. But I'm just telling you that our clerk was very concerned about that, and he represented that other clerks were as well, so we want to know what has happened to the order that went out. Has anything been enforced, has it been served, has it been executed or anything like that. And if they would just, you know, send the postcard back, that would be nice.

HONORABLE C. A. GUITTARD: Mr. Law, would you confer with the clerk of the court of the criminal appeals and see what --

MR. LAW: Do you want me to talk to her?

HONORABLE C. A. GUITTARD: Well, I want the input from both the court of appeals level and the Supreme Court level so that we could -- but let's reserve action on that until we get --

HONORABLE SAM HOUSTON CLINTON: So when you say "appellate court," you're implicating our court?

HONORABLE C. A. GUITTARD: It would. Yes, indeed, it would. If indeed the court of criminal appeals wants that and the courts of appeals don't, well, we could write it that way, so let's defer action on that for now.

Okay. Now, look down further on Page 39, Rule 100. It actually goes on to Page 40. Add to that rule, "Any party" -- add this -- "to the trial court's final judgment desiring a rehearing," making sure that anybody that's before the court of appeals, whether or not they've filed a brief, should have the right to file a motion for rehearing in the court of appeals. We move the adoption of that

recommendation.

CHAIRMAN SOULES: Any opposition? Any discussion? Okay. That stands approved as presented unanimously.

HONORABLE C. A. GUITTARD: Now, we have rules, some rules of civil procedure, that are postjudgment and relate to matters that concern mainly appeals, concerning what's to be done in the trial court in preparation for appeals. I'm not sure whether that's within our -- within the scope of our subcommittee or not, but our section committee of the Appellate Practice and Advocacy Section has purported to draw up some amendments there, and if you think that it's appropriate for us to present that, we'll do that.

CHAIRMAN SOULES: Why don't we do that, Judge. I think that's good.

HONORABLE C. A. GUITTARD: Okay. Look at Page 64, Rule 298 -- 296.

CHAIRMAN SOULES: Page 64, Rule 296? The pages may be mixed up here.

MR. ORSINGER: They are. It's Page 65.

CHAIRMAN SOULES: Three pages

are out of order here.

HONORABLE C. A. GUITTARD: Well, this is a later edition than the one that we -- that I have made my notes from, so there may be some slight variation on the pages.

Here we are on Page 65. Now, there has been some division of opinion in the courts of appeals as to whether in a summary judgment case a request for findings and conclusions would extend the appellate timetable. And I think the Supreme Court probably recently resolved that matter, and has decided that since that really applies only to fact findings, and no fact findings are made in a summary judgment, that that shouldn't extend the appellate timetable. It shouldn't have any effect at all; in other words, that in such a case, a request for findings is just a nullity and shouldn't be considered for the purpose of the appellate timetable, and I think the Supreme Court decided that.

But in order to make that clear, we propose adding to Rule 296 the last sentence there, "Such a request for findings of fact

and conclusions or law is proper only after a plenary trial before the judge without a jury, and shall have no effect with respect to any matter determined in response to a motion for summary judgment."

And Mr. Chairman, I move the adoption of that recommendation.

MS. GARDNER: May I ask a question?

CHAIRMAN SOULES: Yes. Anne Gardner.

MS. GARDNER: Yes, Anne Gardner. In Rule 42 -- I'm sorry that I'm probably wasting time because I wasn't here last time, but on mandatory disclosure under appeals where, for example, there's an appeal of a temporary order granting a temporary injunction, the rule as currently written allows for the discretion of the trial court to file findings of fact and conclusions of law.

THE REPORTER: Speak up a little bit, please.

MS. GARDNER: Okay. Rule 42, as it's currently written, makes it

discretionary with the trial court whether to file findings of fact and conclusions of law in connection with an appeal of an interlocutory order such as an order granting or denying a temporary injunction. And I'm wondering if this -- since it says "proper only after a plenary trial before the judge without a jury," how does that -- how do those interplay together?

CHAIRMAN SOULES: Sarah.

MS. DUNCAN: I think we may have the same problem with sanctions where you're going to want findings of fact, and I assume that --

MS. GARDNER: But it's not a plenary trial.

MS. DUNCAN: But it's not a plenary trial.

HONORABLE C. A. GUITTARD: There are several related questions there that our committee hasn't addressed, and those problems probably should be considered separately.

With respect to the interlocutory appeals, perhaps the findings of fact should

not delay the appeal or perhaps it should. That's a question that we need to decide.

With respect to such matters as the orders on sanctions, maybe there ought to be some separate provisions with respect to that.

But what we now propose is that with respect to summary judgments that a request for findings should not affect the appellate timetable.

CHAIRMAN SOULES: Could we fix it just by doing that, Judge? In other words, say "Such a request," and strike the words "for findings of fact and conclusions of law," or leave that in, or anyway, take out "is proper only after a plenary trial before the judge without a jury." That doesn't really -- that's not important to the message you're sending here, is it?

MS. DUNCAN: That's the troublesome part.

CHAIRMAN SOULES: Take that part out. What we're saying is when they don't work instead of saying when they do work.

JUSTICE CORNELIUS: Just say they're not proper in summary judgment.

HONORABLE C. A. GUITTARD: "Such a request for findings of fact or conclusions of law shall have no effect" -- and strike the rest, strike what's in between there -- "shall have no effect with respect to any matter determined in response to a motion for summary judgment."

Okay. I would accept that amendment.

JUSTICE CORNELIUS: Or we might just delete the word "plenary." That ought to take care of it, because the other things, be they interlocutory matters or sanctions or whatever, would constitute a trial before a judge.

HONORABLE C. A. GUITTARD: Well, do we want -- I don't know whether we want --

JUSTICE CORNELIUS: Really what you're aiming at is summary judgment, so that would probably be the best way to do it.

MS. GARDNER: Shall have no effect with respect to -- at least the last part would take care of it.

CHAIRMAN SOULES: What does that mean, "any matter determined in response to a motion for summary judgment"?

HONORABLE C. A. GUITTARD: In other words --

JUSTICE CORNELIUS: Well, that would be either granting it or denying the motion.

CHAIRMAN SOULES: But the judge is not responding.

JUSTICE CORNELIUS: No. But he determines the response to the motion.

CHAIRMAN SOULES: What about "any matter determined by summary judgment"?

JUSTICE CORNELIUS: No. That would not include a denial of a summary judgment.

HONORABLE C. A. GUITTARD: That's the reason we put in there "in response to," because --

JUSTICE CORNELIUS: Maybe you could say "determined on a motion for summary judgment" or "with respect to a motion for summary judgment."

CHAIRMAN SOULES: Okay.

Richard.

MR. ORSINGER: Let me make a specific comment and then a general comment. Specifically, would it be better if we said "with respect to any appeal from the granting of a summary judgment"?

MS. DUNCAN: No.

MR. ORSINGER: Or "shall have no effect with respect to any appeal from the granting of the summary judgment"?

MS. DUNCAN: No, because you're --

HONORABLE C. A. GUITTARD: Or just "from a summary judgment," because if there is a summary judgment, it's been granted.

JUSTICE CORNELIUS: The denial is not appealed.

MS. DUNCAN: Yeah, it is.

JUSTICE CORNELIUS: Well, sometimes.

MS. DUNCAN: Yeah. That won't work. You can appeal the denial of immunity to a governmental employee.

MR. ORSINGER: That's true.

You sure can. "On appeal from the grant or denial of a summary judgment."

CHAIRMAN SOULES: I've got two concerns. Number one is getting this stated the way it should be in Rule 296, if it goes there; but also putting it at the place, and maybe we've got it there, where the rules say that filing a request for findings of facts and conclusions of law extends the time to perfect an appeal, because that's not a part of 296.

MS. DUNCAN: No, it's not.

CHAIRMAN SOULES: We'll say it both places, or at least we ought to say it in the other place for sure.

HONORABLE C. A. GUITTARD: Well, the theory is, the reason why it doesn't affect the appellate timetable is because it's a nullity; it means nothing. That's what the courts have said. And if it's a nullity and it means nothing, the theory is that putting it in this rule, saying "don't do that," doesn't mean anything.

CHAIRMAN SOULES: Okay. What should we say? Does anybody else have a

problem with the words "in response to a motion for summary judgment"?

MS. DUNCAN: Uh-huh.

CHAIRMAN SOULES: Okay. Then how should we fix that? Elaine Carlson.

PROFESSOR ELAINE CARLSON: Well, you might just back up for a minute. Judge, my recollection of the committee's concern was that this was a trap for the bar, because at the time the Supreme Court had not enunciated whether or not the request for the findings in connection with a summary judgment would or would not serve to extend the appellate deadline.

I suppose another avenue that we might pursue or another option is to say that any -- the opposite approach. Any bona fide attempt to obtain findings of facts and conclusions of law serves to extend the appellate deadlines as provided in TRAP whatever. I mean, to me that's really more consistent except for this little blip on the screen of this summary judgment/finding of fact ruling.

HONORABLE C. A. GUITTARD: In other words, just take the opposite view; that

it does extend the appellate timetable. And the question there would be, if, as a matter of fact, we don't want people to file those things because they don't mean anything, then they shouldn't be able to file it just for the purpose of getting an extension of the timetable.

PROFESSOR ELAINE CARLSON: And that's exactly the policy decision.

CHAIRMAN SOULES: Where is that rule in the TRAP rules?

MR. McMAINS: 329(b). You're talking about the extension?

CHAIRMAN SOULES: Right.

MR. McMAINS: That's 329(b).

MR. ORSINGER: That's plenary power. But the perfection deadline is in Rule 41, I believe.

HONORABLE C. A. GUITTARD: Rule 41, right.

MR. ORSINGER: So you've got to handle it every place that there is a timetable that theoretically has been extended.

MR. McMAINS: But doesn't

329(b) say proper requests, timely or proper requests, under extension of time, and that's why we did it? That's why we put that language in there, I think.

MR. ORSINGER: Richard Orsinger. It's in 329(b), subdivision (e) -- no, not subdivision (e).

CHAIRMAN SOULES: 329(b) what?

HONORABLE C. A. GUITTARD: I think the other rule follows -- it's probably Rule 41 of the appellate rules.

MR. ORSINGER: I don't think -- maybe it doesn't extend plenary power.

MS. DUNCAN: It does.

HONORABLE C. A. GUITTARD: The thought is that if we put it in 296 and just say it doesn't mean anything, then it doesn't mean anything anywhere else and we don't have to worry about what other rules might be implicated.

CHAIRMAN SOULES: Sarah Duncan.

MS. DUNCAN: What concerns me about even if we narrow it down to summary judgment proceedings is it seems to me there may be situations, claims decided on summary

judgment, in which you nonetheless will have findings of fact and conclusions of law, like whether there was service, whether service was timely, whether there was adequate notice of the hearing, whether certain evidence was properly included in the summary judgment record or not included.

And what we're saying now is, I think, that you might -- that you shouldn't even ask for those findings in the context of a summary judgment proceeding.

HONORABLE C. A. GUITTARD: That's why we put in there "in response to a motion for summary judgment." Maybe that wording isn't the best, but that doesn't exclude requests for findings where part of the case was decided on summary judgment and part of it was decided, say, by the judge on the facts. In that kind of a case you can have findings and conclusions on those matters that are not determined in the summary judgment proceedings.

MS. DUNCAN: But what I'm saying is that even as to claims that are decided on summary judgment you still may have

findings of fact as to procedural matters.

For instance, one side says, "I attached this proof, summary judgment proof to my motion." The other side says "No, you didn't." The judge may under some weird sort of circumstances have to decide whether that proof is properly in the summary judgment record.

HONORABLE C. A. GUITTARD: How would you --

JUSTICE CORNELIUS: If there's a fact issue as to that point, then summary judgment is not proper.

MS. DUNCAN: Well, I don't think --

CHAIRMAN SOULES: What the judge has done is make a preliminary finding, Judge Cornelius, that he does or does not consider that evidence.

MS. DUNCAN: Right.

CHAIRMAN SOULES: It's a preliminary fact finding that he may or may not consider this summary judgment proof, so it isn't really going to the genuine issues and theories.

HONORABLE C. A. GUITTARD: I guess that's why this language was put in there that we decided to strike out, "after a plenary trial before the judge."

CHAIRMAN SOULES: Chuck Herring.

MR. HERRING: Just another little minor twist. Under 166(a)(h), which is the sanctions provision under summary judgment procedures that allows the court to impose sanctions if an affidavit is presented in bad faith or for a delay, is it your intent, if you ended up with the language you have here, that in response to a motion for summary judgment there were findings entered by the trial judge, a bad faith affidavit, and sanctions imposed as a result of that, which is really attorneys' fees, is what it amounts to, that that would be excluded? I mean, that could be in response to a motion, I suppose, in one sense, because the motion has an affidavit that's there for bad faith.

HONORABLE C. A. GUITTARD: It is intended not to --

MR. HERRING: -- not to

extend.

HONORABLE C. A. GUITTARD: -- not to extend it there. And that's why we put in that language that we struck out, "plenary trial before the judge without a jury," so that some preliminary matters wouldn't be considered findings of fact for the purpose of extending the appellate timetable.

CHAIRMAN SOULES: The concern I have, and then I'll get to Richard, is that sometimes requests for findings of fact are made after a jury trial where, for whatever reason, essential facts were not submitted to the jury, and I think in those circumstances the request for findings of the fact extends the appellate timetable.

HONORABLE C. A. GUITTARD: Yeah.

MS. DUNCAN: And that's proper.

CHAIRMAN SOULES: So here you've eliminated that because you're saying it has to be tried by the judge without a jury. What if we tried it to a judge with a jury but you need some more findings of fact, particularly if you lost and you don't want to

deem, or you think you're going to lose and you don't want to deem, and you start that proactive process of trying to protect yourself. So that was my concern about trying it -- about that request for findings of facts and conclusions of law is proper only after the plenary trial before a judge without a jury.

HONORABLE C. A. GUITTARD: Yes. And then you can put that perhaps the finding should extend the timetable, because that's what we're trying to exclude.

CHAIRMAN SOULES: Even in a jury trial?

HONORABLE C. A. GUITTARD: Yes.

CHAIRMAN SOULES: In other words, if there's a jury trial and additional facts are needed from the judge, the request for findings of fact would not extend the appellate timetable?

HONORABLE C. A. GUITTARD: No, it would. See, we're excluding it from the exlusion in other words.

MR. ORSINGER: Luke.

CHAIRMAN SOULES: Richard

Orsinger.

MR. ORSINGER: The way Rule 41(a) is written right now, it only extends the time for perfecting appeal. Now, mind you, every single deadline has to be evaluated independently because we don't have one central timetable rule. But in 41(a), the perfection of appeal is extended only if it -- if a request for finding is filed after -- in a case tried without a jury. That's the current language. So that would appear to suggest that if you -- which happens frequently in family law matters.

You might try custody to a jury and property to the judge. A request for findings of fact and conclusions of law on the property, even if you're not appealing the custody, has no effect to delay the time to perfect.

I'm also -- I should know this because I'm an expert in this area, but I'm not sure that it extends plenary power. I can't find it in 329(b) that it extends plenary power. Does anyone have an opinion on that?

MR. HERRING: I think it does

not.

MR. ORSINGER: Okay. So right off the bat here we have a question of what do you do if some issues are tried to the court and some are tried to the jury, and then even if it's all tried to the jury, for some deadlines it extends it and for others it doesn't. And for those who do non-jury appeals, we really ought to probably just have one rule on what a request does in the way of delaying deadlines. And we ought to say in that rule that a timely filed request for findings has the same effect on plenary power and the appellate deadlines as the timely filing of a motion for new trial. That will greatly alleviate the confusion that we've had around the table this morning. We can't even find where it is in some of these rules.

The second point I'd like to make is there is a problem with appealing a case where you try some issues to a jury and the rest of them to a judge. And there's about four cases that say if you try anything to a jury, even if you lose on a directed verdict on that issue, you're not entitled to findings on

anything. So that means you've got to take the appeal up with no fact findings.

The El Paso court has said that can't be right, and if you try some issues to a jury and you submit the rest to the judge, the judge should do fact findings on the things the judge found facts on and let the jury verdict reflect the things that the jury found the facts on.

We're not fixing that, and I think we should, and I'm sorry I didn't raise this earlier in the process, but it's particularly a problem with divorce appeals which predominate, I think, the non-jury appeals, and they are frequently tried some to a jury and some to a non-jury, and we ought to fix both of them by having one new Rule 99(b), or whatever you want to call it, and let's have a uniform effect on all deadlines from the proper filing of a request. And if you want to exclude summary judgments there, let's do it there. And then let's also say that if you try some issues to the court, you get findings on those to augment the jury findings.

CHAIRMAN SOULES: Why exclude

summary judgments? What difference does it make? You've got a lawyer who is scrambling and he finds a way to stay in court, keep his party in court.

HONORABLE C. A. GUITTARD: Well, the reason for it is --

CHAIRMAN SOULES: I realize it's ridiculous but --

MS. DUNCAN: -- who cares?

HONORABLE C. A. GUITTARD: Why should the law require -- why would it require a meaningless act or allow a meaningless act to affect the timetable?

MS. DUNCAN: But we do that all the time. I mean, most motions for new trial that are filed that I've seen are purely preservation tools. Nobody is looking at them after they get out of the word processor and filed. And I agree with Elaine, that if somebody wants to extend the appellate timetable by filing a request, let them do it.

HONORABLE C. A. GUITTARD: Let them file a motion for new trial.

CHAIRMAN SOULES: Why does that work?

MS. DUNCAN: They can do that too. But why should they be able to file a motion for new trial and extend the appellate timetable, but if they file a request for findings and conclusions, which intuitively seems to me makes more sense to people who don't know one way or the other, we're going to throw them out of court?

CHAIRMAN SOULES: Rusty McMains.

MR. McMAINS: The problem I have in part with the notion of a request for findings in generic operating on the appellate timetable, remember that we also have a prematurely filed rule. Now, it is not unusual for that matter in any kind of motion practice, in the divorce area in particular, anytime a judge does something, they file requests for findings, motions for new trial, motions for rehearing.

Now, if you start just having this request for findings generically extend time, then you -- it operates with the prematurely filed motion rule, or it may operate without it, but when there is ultimately a judgment,

it may well be that there's -- that -- the question is, does that operate to extend the time because he made a request for findings with regards to a motion that was determined some months before the trial? And that's silly. I mean, that's one of the problems we had with the prematurely filed motion rule anyway. I mean, we're looking at dispositive decisions, whether it's tried to a jury or tried to a judge or whether it's disposed of wholly by summary judgment.

And if you start allowing summary judgments -- I mean, one of the problems is our rules theoretically allow partial summary judgments too. We may have 12 of those. Now, does a request in regards to any one of them extend the time? I mean, this to me rather overcomplicates the issue.

HONORABLE C. A. GUITTARD: What would you propose, Rusty?

MR. McMAINS: Well, I mean, I agree with what you said about it's silly if our standard on summary judgment is that there are no fact questions but you have a request for findings of fact. That's just silly. And

no judge should be required to respond to it. And he ought to be able to look at our rules and say, "This is dumb, you don't get to do this," I mean, and not have to argue about it with anybody.

CHAIRMAN SOULES: Who is arguing? The trial judge? Who is arguing?

MR. McMAINS: The trial judge is not going to do anything about it.

CHAIRMAN SOULES: And he doesn't have to.

MR. McMAINS: But the other party has got to be -- is the one who then has to pay attention to it or worry about it or deal with it. And then the court clerk has to figure out whether or not that has any effect on anything with regards to the timetable.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I would like to float an idea that got shot down at the subcommitte level but will eliminate all this argument, and that is, why don't we just eliminate the 30-day nonextended appellate timetable and let's just run with the 60 and

90 and 120-day deadlines. Then we don't have to fool around with whether a motion for new trial extends or requests for findings or anything else.

Personally, in my opinion, the fact that the record is in at the end of 60 days instead of at the end of 120 days does not appreciably affect how quickly justice is dispensed by the courts of appeals. There are a lot of lawyers who lose a lot of sleep, myself included, about which timetable we're on, and then you're not even sure for sure, so you go ahead and meet the early one anyway. Why don't we just forget all of that, never argue about it any more, and just have one set of timetables.

Even if you're on the 30-day timetable and you don't file a motion for new trial, you're still going to get an extension on your statement of facts from the court reporter because they can't possibly get it done. They can't even get it done in four months now, much less than two months.

Why don't we do away with the short timetable and just adopt our current 90-day

perfection deadline, 120 days on the record, and then we can just quit arguing about this and go talk about something important.

CHAIRMAN SOULES: Sarah Duncan.

MS. DUNCAN: The counter-argument to that, I think, is that as things stand now, you get judgment, you wait 30 days, if something is filed within that 30-day period, you have to question the finality of the judgment. But if nothing is filed within the 30-day period, you know you have a final judgment. And what we're talking about is extending the question of finality in divorce cases, custody cases, promissory note cases, all of those, to 75 or 90 days.

HONORABLE C. A. GUITTARD: We argued that in our committee, and I think Sarah's point of view prevailed.

MR. ORSINGER: As I pointed out.

MS. DUNCAN: You're totally honest.

MR. ORSINGER: This is an appeal.

MS. DUNCAN: Which track are

you on on this appeal?

HONORABLE C. A. GUITTARD: I think this committee, if you would like us to, might consider that question.

CHAIRMAN SOULES: Does anyone else want to speak in support of Richard's motion or Richard's comment?

MR. ORSINGER: Can I respond to Sarah?

CHAIRMAN SOULES: Yes.

MR. ORSINGER: We could maybe have our cake and eat it too by saying that if you're going to -- that you must take some action to keep the judgment from going final within 30 days, but if you do take that action, then all the deadlines are the same regardless of whether they filed a motion for new trial or filed their notice of appeal. In other words, make them file something like the notice of appeal within 30 days, but if they do, then you get your standard deadline.

What I'm trying to avoid is fights over what deadline you're under and the kind of confusion we've had here this morning, because we've got a lot of rules to deal with where

deadlines -- different deadlines are running at different times depending on what you do, and some courts don't even agree when some deadlines run.

CHAIRMAN SOULES: That's true. Okay. Then where are we? Judge Guittard, you are proposing that this -- I lost it. Here on Page 65 --

HONORABLE C. A. GUITTARD: Yes, Rule 296.

CHAIRMAN SOULES: You are proposing that Rule 296 be passed as written?

HONORABLE C. A. GUITTARD: Yes.

CHAIRMAN SOULES: Okay. Any further discussion on that?

MR. ORSINGER: Well, I'd like to avert to this question of trial before the court. This is the perfect time for us to do something about cases that are one issue is tried to the jury and the rest is tried to the court. And the way it says it now, where you're talking about your plenary trial, I think you're condemning -- you're overruling the El Paso Court of Appeals in condemning everyone to have no findings on the judge-only

issues.

CHAIRMAN SOULES: Well, particularly in family law cases. I mean, there are issues that you cannot have a jury decide; for example, the enforceability of a prenuptial or postnuptial agreement. That doesn't go to a jury at all. It cannot go to the jury. Is that correct?

MR. ORSINGER: And the property division cannot either. Characterization of value goes to the jury but the property division does not.

CHAIRMAN SOULES: So you've got situations where you are foreclosed from trying a piece of the case to the jury, and it still has to be tried. It's not something that somebody forgets to try. It has to be tried. These rules, both 41 and 296, are broken when you try to apply them to those situations.

HONORABLE C. A. GUITTARD: But this proposed amendment to 296 would apply only with respect to those matters determined in summary judgment. And in a summary judgment proceeding, if there's part of the

trial that was not a summary judgment proceeding and there was in fact a trial before the judge without a jury, then fact findings would be proper and requests for findings would be proper and should have the effect of any other request for findings.

CHAIRMAN SOULES: Well, what about a case that was tried before a judge and a jury? This says that findings of facts and conclusions of law would not be proper under those circumstances.

HONORABLE C. A. GUITTARD: Well, with respect to -- I guess that's a little too broad. With respect -- perhaps it ought to have -- ought to say something that -- or the plenary trial provision had something -- made sure it wasn't just some preliminary matter.

JUSTICE CORNELIUS: I thought we had agreed to take that out anyway.

HONORABLE C. A. GUITTARD: Yes. Well, we did.

JUSTICE CORNELIUS: And just say findings of facts and conclusions of law are not proper in connection with any matter

determined in response to a motion for summary judgment.

CHAIRMAN SOULES: Okay. After that was -- that was followed by some discussion and it was revised in conversation and in debate, and I wasn't sure we even resolved that or not.

HONORABLE C. A. GUITTARD: The question arose as to whether some preliminary matter in connection with a summary judgment that would -- whether that would properly apply.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: I think the source of Richard's concern and the issue of the El Paso court is not in this sentence, obviously, since it's a new sentence. It's in the first sentence. Our rule on requests for findings says in any case tried without a jury, and it's that interpretation that the courts have basically said you're not entitled to fact findings on cases that are tried both to a jury and non-jury, and there are a number of those cases. So we're actually talking about revising a different part of the rule,

if you're trying to fix the thing that Richard is talking about.

And that part is broken, I think, as a practical matter; that is, if what you are looking for is in fact an opportunity to request findings of fact in an area that actually the judge is actually making findings of fact.

CHAIRMAN SOULES: Sarah Duncan.

MS. DUNCAN: This may be precipitous, but my proposal would be to delete from Rule 41 "in a case tried without a jury," to delete in Rule 296 "without a jury," and to delete the last proposed amendment sentence.

HONORABLE C. A. GUITTARD: So that the request for findings would always have the effect of extending the deadline?

MS. DUNCAN: Uh-huh.

MR. ORSINGER: But it goes beyond that, Judge Guittard. It also would indicate that you can secure findings on a trial that's partly to a jury and partly to the court but obviously only as to the matters that the trial judge found and not as to

matters that the jury found.

MS. DUNCAN: And my response to some extent to what Rusty was saying is that if the learned trial judge knows that a request for findings and conclusions isn't proper after a summary judgment and the litigant's attorney doesn't, then what is so bad about requiring an order denying the request for findings and conclusions because this is a summary judgment proceeding but you haven't affected the timetable and you haven't thrown somebody out of court because they weren't aware of this particular nuance in the rules?

CHAIRMAN SOULES: Well, if the trial judge does nothing in response to requests for findings of facts and conclusions of law and the case gets appealed and that's reviewed for harmful error, how in the world could it be harmful error if the judge doesn't make findings of fact and conclusions of law in a summary judgment? It just takes care of itself under the appellate decisions.

HONORABLE C. A. GUITTARD: Mr. Chairman.

CHAIRMAN SOULES: Judge Guittard.

HONORABLE C. A. GUITTARD: There are several other issues that have been raised here that our committee hasn't fully considered. It may be that we can study the whole range of issues involving requests for findings, with respect to plenary power, with respect to issues tried partly before a jury and partly resolved by summary judgment and partly by a jury, and make a review of all those matters and report back to this committee.

CHAIRMAN SOULES: Don Hunt.

MR. HUNT: Perhaps the committee would consider striking the word "case," and instead of dealing with case, cure the problem that Rusty and Richard have observed. For example, if the first clause of the first sentence read "on any issue tried in the district or county court without a jury," we could put that same language in 41 and we could have that same language with respect to the amendment here but still make it clear that we don't need findings on summary

judgments.

CHAIRMAN SOULES: Does an issue include an omitted element?

MS. DUNCAN: Right. What if you don't have actually a trial but you have a determination of an issue?

CHAIRMAN SOULES: Rusty McMains.

MR. McMAINS: That's the point. There is a difference between having agreed to try an issue to the judge and then not being able to get findings of fact, which is the problem that we have, and of trying a case to the jury and inadvertently trying it to the judge, which is the entire concept of deemed findings and waived grounds, et cetera.

All of those rules have to be rewritten if you're going to try and bring in a request for findings rule. We have the findings practice articulated in the deemed findings/waived grounds rule.

CHAIRMAN SOULES: Right.

MR. McMAINS: Okay. And the judge doesn't have to do anything if they don't have any effect. If he doesn't do

anything, in other words, without answering them, and once the judgment is done, then they are deemed found, and that's it. You aren't entitled to findings. That's what our rule has been, and thus far, you know, the committee has always held to that end.

Now, so that the request -- it's not just solved by saying "in any issue," because the problem we have is that you may be trying issues not knowing you're trying issues to the judge, obviously, if you -- if you're in the deemed findings area. If you're trying a case to a jury and you just forget to submit an element, that's the one area. That's the deemed findings/waived grounds argument.

Then we have Richard's area, which is you have actually tried an issue to the judge and you're still not going to get findings. Now, that's different. And especially when you can't try anything anywhere but to a judge, now, that really is silly, to suggest that you can only try it to a judge and you're not entitled to know what he found.

And I don't think there's any -- I haven't heard anybody from the committee

dissent that if you have agreed to try and actually have tried something to a judge, you ought to be able to find out what the grounds of the opinion were, and I don't think anybody opposes that.

But there are -- but little quick fixes are going to affect other aspects of the rules. It's not something that you can just jump into and say let's do it this way about an issue, because we have issues that are tried by consent to a judge by omission that we would have to totally revisit.

CHAIRMAN SOULES: I think Rusty's point here is that if you've got a charge problem, if you're in the 270 series, whatever relief you hope to find to get from a judge, you have to get it before the judgment is signed or you've got to deem findings. That's what the rule says.

But the 296 series, the 290 series, they're all talking about a request practice after judgment, and I'm curious how that works in the divorce practice. Do you get the request practice prior to judgment or after judgment?

MR. ORSINGER: Normally what happens is you get an oral rendition at the end of the case, and some lawyers will request findings -- well, the family code requires you to request child support findings between rendition and signing, so you've got one whole round of finding requests that relate to what goes into the decree relating to child support.

Then you've got the separate Rule 296 findings that ordinarily are not filed until after the judgment is signed, because usually the lawyer who tried the case is not an appellate lawyer and it's not until they really start thinking about an appeal that they find that. And that routinely happens after judgment and within 20 days. Well, I should say sometimes it doesn't happen within 20 days, but there's nothing we can do about that other than to extend that 20-day deadline. But at any rate, it works like you would expect other than in child support.

CHAIRMAN SOULES: Is there a consensus that Rule 296, I guess, and Rule 41 at least need to be looked at so that they can

be amended and tailored to fit the practice that has come into being probably since these rules were promulgated, where some matters are tried to the judge and some matters are tried to the jury, and by statute have to be, in the same trial? I think we've got a consensus that that needs to be worked on.

And Richard has got it in focus. You've got the problem in focus. You're on the Appellate Rules Subcommittee --

MR. ORSINGER: I would be happy to submit it. I can assure you --

CHAIRMAN SOULES: We don't want you to do needless work, just --

MR. ORSINGER: I know lots of family law practitioners that have lots of ideas about this. I'll be happy to undertake this and submit them quickly.

CHAIRMAN SOULES: Is that agreeable with everybody, that Richard should undertake that?

MR. GALLAGHER: One quick fix maybe. Mike Gallagher. In any case in which some or all of the issues are submitted to the court for resolution. "Submitted to the court

for resolution" takes care of your waiver or deemed findings.

CHAIRMAN SOULES: Does anybody else have any suggestions for Richard to take into consideration?

Okay. That piece of it, then, should be sent back to subcommittee for consideration.

MR. ORSINGER: Let me ask this.

CHAIRMAN SOULES: Judge Guittard, is that all right with you, that suggestion?

HONORABLE C. A. GUITTARD: That's fine.

MR. ORSINGER: Can we include within the scope of this mandate normalizing the effect of a finding on the appellate timetables?

CHAIRMAN SOULES: That's the next thing. I want to get a consensus on that because that's a different issue.

Okay. Let's debate whether or not a request for findings of fact and conclusions of law should extend the timetable in any case, even a summary judgment case.

And I'll start. I've filed motions for

new trial in summary judgment cases where I knew there was no way I was going to change anybody's mind. I didn't even present the motion for new trial before the judge. It was just to get more time to get ready for the appeal. So what?

MS. DUNCAN: It happens every day.

CHAIRMAN SOULES: So you use something else. A request for findings of fact or conclusions of law would do the same thing. So what? There may be a lot of good reason why not. But anyway, let's get a consensus on that because the rules can certainly be written either way.

HONORABLE C. A. GUITTARD: I would propose, although this has always been in the minority, that we just abolish these meaningless filings for the purpose of extending the timetable. We really ought to go either to Orsinger's suggestion about having the timetable the same in all cases, or we ought to make every motion, every action that would extend the timetable, meaningful in themselves; such as requiring a motion for new

trial to be presented and ruled on or it's waived. But I see I'm not in the majority with respect to that, so let's go on to something else.

CHAIRMAN SOULES: All right. Are we ready for the question on this?

Okay. How many feel -- I'll just put it, I guess, in focus -- that requests for findings of fact and conclusions of law, along with other post-trial motions, should extend the appellate timetable in all cases including summary judgment cases?

Okay. That's one, two, three, four, five, six --

HONORABLE C. A. GUITTARD: No. I misunderstood the question.

CHAIRMAN SOULES: Okay. One, two, three, four, five, six. Six.

Okay. Those opposed? Seven.

HONORABLE C. A. GUITTARD: Well, maybe you ought to present that again. There were lots of nonvoters.

MR. ORSINGER: Can I refine that, Luke?

CHAIRMAN SOULES: Refine it.

Maybe I didn't say it properly.

MR. ORSINGER: I think you got some negative votes that I don't -- I think it's unnecessary baggage by putting up the summary judgment situation involved. I'd like to find out if there isn't a consensus here that a request for findings of fact, which means that someone is intending to appeal a non-jury issue, should extend the timetables just like a motion for new trial does.

Let's debate later about whether a motion for new trial or request should or should not in summary judgments.

CHAIRMAN SOULES: Okay. State the proposition.

MR. ORSINGER: The rule as it presently exists is that it apparently extends the deadline for perfecting an appeal and extends the deadline for filing the record, but it doesn't extend the deadline for formal bills of exception, plenary power, limited appeals, so it extends some and not others and it's a trap for the unwary. That's the way it is right now.

I would advocate that we have some

provision that a timely filed request for findings has the same effect on the appellate timetables as a timely filed motion for new trial.

Let's debate separately about whether there are some instances where it should have no effect.

CHAIRMAN SOULES: Any discussion on Richard's point?

Those in favor show by hands. 12.

Those opposed? Well, that's unanimous. All votes are in favor.

MR. GALLAGHER: Show me feeling very strongly both ways.

MR. ORSINGER: Luke, then that leaves us with the issue about what do we do where you have a case that's solely a jury case and you know you have no right to findings or it's a summary judgment and you know you have no right to findings, and what do you do about a request for findings there.

In fact, what do you about a motion for new trial, like in a summary judgment, where it doesn't perfect any error unless you fail to show up for your hearing and you want to

show why you didn't get notice or something. Other than that, you don't need to file a motion for new trial to protect error -- preserve error on a motion for summary judgment.

CHAIRMAN SOULES: What's your proposition?

MR. ORSINGER: I don't care. I can live with that because that's not screwing up cases real badly.

CHAIRMAN SOULES: So no change? No one wants to advocate a change in that regard?

MR. McMAINS: No change in what? I'm not sure I understand what you're changing.

MR. ORSINGER: If you file a request for findings when you're not entitled to one, i.e., after summary judgment, then I guess under Judge Guittard's analysis, if you file a motion for new trial when there's no error that can be perfected thereby, should that extend your appellate timetable or not? Isn't that kind of what you're saying?

HONORABLE C. A. GUITTARD: Or

the judge ought to at least make a finding on -- well, let's don't debate something that we're not going to pass on.

MR. McMAINS: Okay. I don't understand the motion for -- your inclusion of the motion for a new trial is what I don't understand.

MR. ORSINGER: Well, then leave it out. I only included it because Judge Guittard included it.

MR. McMAINS: I know. But all I'm saying is that -- I mean, it's very clear now. I don't think we have any question that if you file a motion for new trial timely that it extends your time periods.

MR. ORSINGER: Okay.

MR. McMAINS: And I don't know why we -- you know, the idea that a motion for new trial has got to be a good motion for new trial only complicates things.

MR. ORSINGER: Well, I think it's the same complication if you make that differentiation for requests for findings, because there's going to be a court of appeals somewhere that says you weren't really

entitled to findings in the situation; therefore, your appeal is dismissed for want of jurisdiction.

MS. DUNCAN: That's right.

MR. ORSINGER: Why involve them? I mean, this is just an esoteric problem that creates problems for innocent people.

CHAIRMAN SOULES: The factor that requests for findings of facts and conclusions of law is a nullity in a summary judgment context can spread beyond the summary judgment context because it's also a nullity in a lot of other contexts.

HONORABLE C. A. GUITTARD: Maybe we should adopt Richard's suggestion and say that instead of 30 days, just have a -- that the proposed appellant should have to file something that says "I want the appellate timetable extended" and that extends it.

MR. ORSINGER: How about a request for extended appellate timetable? I think that that will make it much simpler for everybody than to have to learn all this stuff, because here sitting around a table we

can't even agree on how to say it.

MR. McMAINS: Well, the problem is that that's not the only problem with regards to the extension of plenary power. There are revisions that occur to the judgments. I mean, there are all kinds of things. You do not solve this by simply giving a single time for, quote, perfecting appeal, because you still have a problem of when does it start and when did it change. And we have fixed a lot of these problems already.

But the one problem that I think that substantively we have not fixed is how do you deal with a case that is by intent and consent of the parties, if not required by the legislature, tried both jury and non-jury. And you ought to be able to -- you ought to have a right to findings of fact in those areas that you can challenge specifically without having to make up all of the facts that might be found and challenge those. That's a problem that we do have, and it ought to be fixed, and clearly in those cases those two ought to extend the plenary power for the

same reason. And I agree, I'm not sure if they do now.

And I think the request for findings probably -- so long as that timetable is running, that plenary power should be extended, because you always have the problem of what if the judge -- if the judge actually does make a finding that might authorize the change in the judgment but he does so at a time when the plenary power has expired, then you really are wasting a lot of time. That's kind of silly. But that's where we are now. You don't file a motion for new trial.

Requests for findings don't extend the plenary power, but they do extend your perfection period. So even if in the first 30 days you don't do anything, and then the judge -- and for various reasons you don't have to have findings of fact, even if you're entitled to have them filed within that period, and then you do get them filed after that period and all of a sudden the judge wakes up and says, "Oh, well, having found that, maybe I should change the judgment," he doesn't have the power to do that. Now,

that's kind of silly as well, I think.

MR. HUNT: Well, doesn't Mike Gallagher's suggestion take care of that?

CHAIRMAN SOULES: Don Hunt and then Elaine Carlson.

THE REPORTER: Say that again.

MR. HUNT: Doesn't Mike Gallagher's suggestion take care of that?

MR. McMAINS: No. It takes care of saying that there's a response.

MR. GALLAGHER: The dichotomy, yeah.

MR. McMAINS: Yeah. It takes care of the dichotomy of a partial trial to a jury. It doesn't take care of extending plenary power. We have not done that yet anywhere in the rules on the requests for findings.

CHAIRMAN SOULES: Elaine, did you have a comment?

PROFESSOR ELAINE CARLSON: I'd just like to address what Rusty raised and get the sense of the committee on the plenary power issue.

MR. McMAINS: That is a

distinct issue from the others that we've talked about.

CHAIRMAN SOULES: Someone state a proposition and we'll get it on the table.

MS. DUNCAN: I thought we just voted on that, that the request would have the same effect.

MR. ORSINGER: The same effect on plenary power and appellate deadlines as the timely filing of the motion.

MS. DUNCAN: We've passed that.

HONORABLE C. A. GUITTARD: Is that before the committee for a decision? I don't know of any proposal actually before the committee that has to do with that. Now, we could get some consensus that we could work on, but as far as final decisions, I would suppose that we'd want to go through the regular procedure and have a draft before us.

CHAIRMAN SOULES: Absolutely. And that's all we're talking about here to do, is should the appellate rules subcommittee and this committee undertake to do that, because if we're not interested, there's no sense in going through the work. And if we are, then

we need to try to get the work done so that we can see if we can straighten the problem out.

Is the consensus that we should address that? I think we voted for that.

MR. ORSINGER: 12 to zero.

CHAIRMAN SOULES: 12 to zero, with Mike Gallagher voting both ways.

PROFESSOR ELAINE CARLSON: But that vote was to extend the appellate deadline and to extend plenary power by a proper request for filings of fact, or by any request for filings of fact?

CHAIRMAN SOULES: Any.

PROFESSOR ELAINE CARLSON: Any?

CHAIRMAN SOULES: We'll leave that to the subcommittee.

MR. ORSINGER: Well, we were voting separately on whether a summary judgment would or would not --

CHAIRMAN SOULES: Okay. Let's move on now with the appellate rules report. I think we've got those assignments made.

MS. DUNCAN: But wait a minute.

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: I want to say I voted for it as everyone else did. But plenary power is such a fundamental aspect here, I'm not sure I'm willing to say we ought to let a motion for -- I mean, a findings of fact request extend it in all situations. You know, you've got modifications, and I would rather have the committee come back after having thought about that and where four or five of them can talk about it. That would be pretty radical, and I'm not sure how I would come out on it, but I just don't know if we've thought it out as we should.

In other words, I would like for us to let the committee go back and talk about this and come back to us with some proposals, and I think they've got enough of a sense of the house to do that.

CHAIRMAN SOULES: Yeah. That's the committee's assignment.

HONORABLE C. A. GUITTARD: If he could give us a report, a verbatim report of this proceeding as soon as possible so we can work on it.

CHAIRMAN SOULES: We will have it to you.

MS. DUNCAN: May I ask a question?

CHAIRMAN SOULES: Sarah Duncan.

MS. DUNCAN: Is the first vote that we had -- when we got down to these three votes, is it the committee's intent that motions for summary -- motions for summary judgment -- the subject matter of a motion for summary judgment should be excluded from the request for findings and conclusions procedure --

CHAIRMAN SOULES: I think that's going to be --

MS. DUNCAN: -- or vice versa?

CHAIRMAN SOULES: We had a division of six to seven on that. They're going to look at it.

HONORABLE C. A. GUITTARD: Are we ready to go?

CHAIRMAN SOULES: Ready to go.

HONORABLE C. A. GUITTARD: This next proposal may be related; in fact, I'm sure it is. But look at Rule 297 with respect

to the court's -- this has to do with the findings and conclusions and plenary power and would say that the court's authority and duty to file findings and conclusions are not affected by expiration of the court's plenary power over the judgment. This, of course, assumes that the request for such findings would not extend plenary power.

The thinking behind this is that so long as findings simply state what the judge found and don't change the judgment, they ought to be -- they ought not be limited by the plenary power. In fact, in cases where the court hasn't made findings after a proper request, the appellate courts say that rather than reverse the case or go to trial on that, you just send it back and let the trial court makes its findings and conclusions, send it back up and finish the appeal.

So far as the findings don't affect the judgment, then they ought not be limited to the plenary power, which is a power of disposition, a power of the case, rather than simply telling the appellate court what the judge had on his mind.

If, as a matter of fact, the judge decides to make a finding that would not support the judgment, then that's a matter that would be dealt with on appeal perhaps. And if the party asks for the finding that would change the judgment, he would perhaps under this rule have a duty to file a motion to modify the judgment, if he really thinks that the judgment should be changed and the judge could make a finding, and that would in fact change the judgment.

Otherwise, this amendment would say that the request for findings -- that a -- that findings could be filed after the expiration of the plenary power and for whatever effect it might have. Okay?

CHAIRMAN SOULES: Okay. Discussion. Richard Orsinger.

MR. ORSINGER: I completely support the proposal, and would point out also that if a motion for new trial is ruled on fairly quickly after it is filed, plenary power could easily expire before you've hit your deadlines for filing findings, or at least by the time the trial judge gets around

to it. It's not always the 105th day. It's 30 days after the motion for new trial is overruled.

I'd like to inquire about the last comment to the committee, though, that the whole practice is unsatisfactory and perhaps we should consider the federal practice. I'm not familiar with the federal practice. What is the federal practice on findings? Does anyone know?

CHAIRMAN SOULES: Sarah Duncan.

MS. DUNCAN: Well, we looked at it just briefly, just at the rules just briefly, and it's simply that they make them. You don't have to ask for them. They're a trial judge, and if they've made findings, they need to say what they are orally on the record or written.

HONORABLE SCOTT BRISTER: Yeah. They've got five law clerks working for them.

CHAIRMAN SOULES: Judge Brister, what did you say?

HONORABLE SCOTT BRISTER: When somebody files a request for findings and conclusions, I -- it's me or the attorneys

have to write it. And if it's me, I have to type them myself because I don't have a secretary, so I'm not going to make them unless I have to make them.

MS. DUNCAN: Well, part of what we discussed was that in --

CHAIRMAN SOULES: Sarah Duncan.

MS. DUNCAN: We thought in most cases that were bench trials there probably wouldn't be an appeal and there probably wouldn't be a request for findings and conclusions and that the parties could also on the record waive the right to findings and conclusions as they can do in federal court.

HONORABLE C. A. GUITTARD: Mr. Chairman.

CHAIRMAN SOULES: Justice Guittard.

HONORABLE C. A. GUITTARD: The committee has held the opinion that the present findings and conclusions practice is unsatisfactory. We've had several proposals before that committee, none of which we've found acceptable.

One proposal was that the request for

findings should come before the judgment and so then the judge would require -- made to act sort of like a jury and make his findings and then render judgment on the findings that he's made if anybody requested it. And we looked at some rules that would say that. That didn't seem to be satisfactory.

We also considered the question of -- we drew some drafts that would -- that in effect adopted the federal practice. We didn't like that either. So we finally decided that for the present go-round let's just leave that alone and go to something else, and that's where the thing stands.

Now, perhaps this Rule 297 amendment about the authority to not affect the expiration of the court's plenary power, maybe that should be considered along with these other matters that have been referred to the committee. Perhaps we should have a vote from this committee as to whether, if they don't extend the -- if it doesn't extend the plenary power, if the request doesn't extend the plenary power, should the court have the authority to make the findings after

expiration of the plenary power. That's the only question raised by this proposal to amend Rule 297(b).

CHAIRMAN SOULES: Okay. The suggestion from the chair is that this be resubmitted to the subcommittee to be reconsidered with the other issues on 296 and 297.

Judge Brister.

HONORABLE SCOTT BRISTER: Did you all consider whether I should just answer the same questions the jury had answered? Skip findings and conclusions entirely. Both sides tender to me do I find whose negligence, if any, proximately caused the accident; what percentage. Why is it my findings should be any more detailed than the jury's if the parties decided they wanted me to do it rather than the jury? Why? Because findings of fact is -- the first three pages of it is background of who did what to whom on what date. That's irrelevant, but everybody requests them because they feel like they need their whole case put in the findings and conclusions.

The bottom line is whether my conclusion that the wreck was your fault or not is supported by -- is against the greater weight and preponderance or no evidence or something like that.

HONORABLE C. A. GUITTARD: We would be willing to consider something like that if the committee wants us to. We tried to, but it just didn't --

HONORABLE SCOTT BRISTER: The trial judges would love it, I'm sure.

CHAIRMAN SOULES: Mike Hatchell.

MR. HATCHELL: Luke, would it be appropriate for you to take a straw vote of the committee as a whole as to whether or not the committee is interested in having the plenary power of the court extended to the same extent it would be if a motion for new trial is filed when a request for findings is made?

We have -- I've proposed this for quite some time, and the reason is, we have a tendency to treat the request for findings and conclusions as just sort of a perfunctory

matter and the judge is just going to lay something on the table. But bear in mind that the findings process in Texas includes an objection to findings after they're made and the opportunity to request additional findings.

Let's suppose that the judge sustains an objection to a finding or proposes an additional finding that will require an amendment to the judgment but he doesn't have any power to do that. And I just -- I have never understood why there is this mismatch.

CHAIRMAN SOULES: Anne Gardner.

MS. GARDNER: Well, I've never understood it either, and I would just like to throw in that I agree with the subcommittee entirely. I think the whole thing needs to be looked at and that the present system is unsatisfactory.

One comment in connection with what Mike said is that I don't think there is any provision in the rules for objections. There is for amended and additional findings requests, but there's really nothing in the rules that requires you or allows to you make

objections or states when the objections shall be made or how they shall be ruled on by the court. And I make them, but I usually make them at the time that they're posed and findings are submitted by the other side before the judge enters them, to try to get the judge to enter what I think is going to be correct.

And if we had a system where -- since the effect of findings and conclusions is supposed to be the same as jury findings once you get up into the appellate court, maybe it would be appropriate to consider a system where the requests and objections submitted to the judge are done before judgment, like the jury findings are, so that we can have two parallel systems, both of which end up with the same effect. I would like to see that studied.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: Two things that, number one, about Anne's proposal, we need to be careful of is that if we do permit objections to findings, we should not require

them. Because right now you can attack the sufficiency of the evidence of the fact finding in a non-jury trial for the first time on appeal without preservation, the theory being that why call it to the judge's attention since the judge is the one that made the fact finding in the first place. And if you have an objection system, you need to be sure you're not required to make them for fear that you'll be back to preserving error of non-jury factual sufficiency again.

And secondly, remember that probably statistically a very small number of non-jury trials are appealed relative to jury trials, just because of the kinds of matters that are tried non-jury. And in a lot of matters that are tried non-jury, my experience is that the custom is that the judge will render judgment at the conclusion of the evidence on the contested issues. And I think that we would probably affect justice negatively if we made the judge wait on rendering after a non-jury trial until after both sides have submitted proposed findings, because the judge will not have that evidence fresh in their mind.

If you've just tried a three or four-hour or even 10-hour divorce case, that's the best time for the judge to decide what's separate, what's community and what the child support is and everything else; whereas if you put that off two weeks and allow findings from both sides to come in, then the judge is going to have tried maybe three or four divorce cases, or maybe not that much, but maybe two or three divorces cases or one or two jury trials in between times and now those facts are not fresh any more, and it may cause a deterioration in the quality of the adjudicating that goes on in non-jury trials.

Now, I don't think that's true in jury trials because the judge constructs the rendition off of the jury verdict, which is in writing while it's fresh in everybody's mind. In this scenario you won't have anything in writing while it's fresh in anybody's mind, so I think it's risky.

MS. GARDNER: I would just add one more thing to that.

CHAIRMAN SOULES: Anne Gardner.

MS. GARDNER: I would just add

one comment. I'm not arguing in favor or in opposition of it. I was just suggesting it might be looked at; that in many cases now in jury trials the judge is requiring the parties to submit their proposed special-issue jury questions and definitions and so forth before the trial starts or at some date prior to trial, and perhaps the same thing could be done with findings and conclusions.

HONORABLE C. A. GUITTARD: Mr. Chairman.

CHAIRMAN SOULES: Judge Guittard.

HONORABLE C. A. GUITTARD: I think we've strayed somewhat from the issue before us here. If it's the consensus of the committee that we undertake a study for the purpose of revising the whole findings and conclusions practice, well, I guess the committee is willing to do that, although we've tried and failed. If we can get some more ideas, some more proposals, some more drafts, we would be glad to work on them, so I would like, if there is a consensus of this committee that that whole matter be studied --

well, we stand ready to do it. Perhaps the committee should tell us whether we should or not.

CHAIRMAN SOULES: Okay. Someone make a proposition to that. Should that be reviewed A to Z by the subcommittee of this committee? Sarah Duncan.

MS. DUNCAN: I don't mean to get off of working on this as a member of the appellate rules committee, but it does seem to me that, you know, we're composed primarily of appellate lawyers and appellate judges and yet this is something that is happening in the trial court. And if the appellate rules subcommittee is to be involved, it seems to me that it should only be involved as a part of the process.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: I can assure you that there's a lot of sentiment among trial judges to just -- I bet if you polled them -- to just do broad-form submission to trial judges on bench trials.

CHAIRMAN SOULES: Richard

Orsinger.

MR. ORSINGER: That's the current law, only it's case law; that is, findings are required on ultimate issues, not evidentiary issues. And that works real well when you have a pattern jury charge case. But in a divorce case where you might have to characterize five pieces of real estate and put a value on five pieces of assets, some courts have said that's just evidentiary and you're not entitled to findings on that; others have said that you can't appeal a divorce case without knowing the character and value of assets.

And if you put a rule in here that says only ultimate issues, then it's going to have a significant impact on the divorce practice, which I think, and I may be wrong, but I think that's the bulk of the non-jury appeals; they're coming out of the divorce area.

And I would be fearful of putting a rule in here that you get them only on ultimate issues unless we somehow protect the conventional practice in family law of getting characterization and valuation on your

important issues so that you can show what the property division was on appeal.

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: As this goes back to committee, I would say if it's not broken, we shouldn't tamper with it. I would be opposed to some grandiose reshaping of the rules if there's not a problem to be addressed.

And second, I think the main thing that findings of fact and conclusions of law seek to do is to make it easier on the appellant so that he or she doesn't have to refute every possible basis for the opinion. That's what we really ought to be going after.

I mean, if there are 10 causes of action pleaded, you know, and there are no findings of the fact, you know, your burden is incredible. And the findings serve to narrow it down to what the judge really did, and that's what we ought to be focusing on here.

HONORABLE C. A. GUITTARD: As an appellate judge, I've never found that those findings were much help. It seems to me

that they're sort of after-the-fact rationalizations of the judgment, and I don't know that the practice would suffer if we just abolished them.

HONORABLE DAVID PEEPLES: But if they mean that you can focus on two issues instead of eight, that is helpful.

HONORABLE C. A. GUITTARD: I never have found that kind of case.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: And that's contrary to the drift in jury and the reason -- part of the reason you go to broad form is so you don't have a bunch of -- spend a bunch of time on technical issues and arguing about them and understanding that sometimes the jury is going to lob stuff together and say "This is what we're finding and we don't have to explain why."

But I as a trial judge have to explain why, get reversed on some technical part of it perhaps, and try it all over again because I've made the right result but on the wrong reason and I didn't make a finding of fact on

what the appellate court thinks ought to be the right reason.

HONORABLE C. A. GUITTARD: You have been reversed in that situation?

HONORABLE SCOTT BRISTER: Well, it's so rare, I'm trying to think. I don't want to say anything on the record about that without careful reflection.

CHAIRMAN SOULES: Well, maybe the subcommittee can give it some thought. We're going to have to work with Paula Sweeney's committee too, because she's in charge of these trial rules, but if you give that some thought, we'll see if we think these really need to be overhauled dramatically.

I had one other question on this suggestion on 297. Why shouldn't the court's authority and duty to file findings and conclusions after the plenary power be restricted to findings and conclusions in support of the judgment?

HONORABLE C. A. GUITTARD: Well, that would be a question. How is that to be decided? If he makes a finding that doesn't support the judgment, well, then there

may be arguments one way or the other. And perhaps the appellant should just have the option to complain on appeal the findings don't support the judgment; therefore, we should reverse the decision, so that would be one way of handling it, or reverse it and -- or modify the judgment or something like that. So that's what some of us have thought about in respect to this amendment.

CHAIRMAN SOULES: What happens if a trial judge makes a finding of fact that's not in support of the judgment but is contrary to the judgment on appeal? I haven't seen an appellate decision that articulates that.

MR. ORSINGER: Well, the judgment must be based on the findings. And if they're not, the appellate court can reform the judgment to conform to the findings. And if there's a factual attack on the findings, then they may evaluate the findings themselves. But the trial judge is locked in by its fact findings to the kinds of relief it can grant. And if it granted relief that's inconsistent with its own fact findings, it's

going to get reversed by the appellate court. It may not be a revamp; they may just render for the opposite party based on those findings.

CHAIRMAN SOULES: Okay. What's next?

HONORABLE C. A. GUITTARD: Next is Rule 298, and it simply would extend the time for filing a request for additional findings from 10 to 20 days. It's been pointed out that in some cases 10 days may be a trap. I think Elaine Carlson has noted that trap, and what I'd like for Elaine to respond to is whether to extend the 10 to the 20 would take care of that in most cases.

CHAIRMAN SOULES: Elaine Carlson.

PROFESSOR ELAINE CARLSON: I'm trying to recall our conversation on this, Judge. There's a circumstance that was brought to my attention by a practitioner, and it may be fairly case-specific, but who had made a premature request, I think, for findings of fact, as Rusty was alluding to earlier, and was assured that -- by the court

that no -- by the court's clerk that no such findings were made and then subsequently discovered they were and then got caught in that time period of not being able to extend the plenary power because of that misrepresentation or because of that mistake.

CHAIRMAN SOULES: Anne Gardner.

MS. GARDNER: Well, I've seen a situation where the judge actually did not mail out the findings that he had signed until so close to the 10-day period that the attorney didn't receive them in time to respond. I think that happens.

HONORABLE C. A. GUITTARD: I move the approval of this recommendation.

CHAIRMAN SOULES: Does going from 10 to 20 days on 298 change anything else or put the deadline beyond some other cutoff? That's the only question I have. Apparently not.

MR. ORSINGER: Well, possibly only on this plenary power issue, which I think is a non-issue. I think you can do them anyway even if you don't amend the rule, even outside of plenary power. But that's the only

one I can think of.

CHAIRMAN SOULES: Okay. Any opposition to changing 10 days to 20 days in Rule 298? Any further discussion? Okay. That stands unanimously approved.

HONORABLE C. A. GUITTARD: The next proposal has to do with Rule 627 with respect to the time for issuance of execution. I believe that's on Page 74.

CHAIRMAN SOULES: That's Page 75, Judge. Rule 627. That's at the bottom of Page 75 in this.

HONORABLE C. A. GUITTARD: Yes. And that would simply add that if a timely motion for new trial or in arrest of judgment or motion to vacate or modify the judgment is filed, the clerk shall issue the execution and so forth. In other words, the motion to vacate or modify the judgment as well as the motion for new trial would modify the time for issuing the execution.

CHAIRMAN SOULES: Any opposition to that? Any discussion? Okay. That stands unanimously approved, Rule 627, as proposed.

HONORABLE C. A. GUITTARD: The next one has to do with --

CHAIRMAN SOULES: Don Hunt.

MR. HUNT: Excuse me, Luke. Haven't we changed most of the language in the other rules to just read motion for new trial and motion to modify to eliminate motion to correct, and do we need the language "or in arrest of judgment" and vacate?

HONORABLE C. A. GUITTARD: Well, perhaps we don't. That was just in there, and we didn't know any good reason to take it out. I don't know that it means anything in a civil case. Most of it today, I guess, they have in the criminal cases. I don't know what a motion in arrest of judgment is.

CHAIRMAN SOULES: Well, under Rule 329b, unless this has already been changed, we say in (c), motion for new trial or motion to modify, correct or reform.

MR. HUNT: I understand that, Luke. But the proposed Rule 322, which codifies prior changes of the committee, leaves it motion for new trial and motion to

modify, putting under the word "modify" all of the other prior motions so that we don't have six labels for one motion.

CHAIRMAN SOULES: That's under 322.

MR. HUNT: Yes, sir. The page before on 74, it's --

HONORABLE C. A. GUITTARD: You notice we didn't say modify, correct or -- what was that other one?

MR. ORSINGER: Reform.

HONORABLE C. A. GUITTARD: Or reform. We just said modify, and I think this committee voted a long time back just to simplify that to make that "motion to modify" apply in those all those cases.

CHAIRMAN SOULES: That's fine.

HONORABLE C. A. GUITTARD: And that's just -- that's probably language taken from some Supreme Court opinion, and the Supreme Court sometimes is not above a little redundancy, so we decided to eliminate the redundancy involved as far as the rules are concerned.

MR. HUNT: Well, does this rule

apply to criminal cases too? Do we need arrest of judgment and motion to vacate?

CHAIRMAN SOULES: Judge Clinton.

HONORABLE SAM HOUSTON CLINTON: No. It's a civil rule.

HONORABLE C. A. GUITTARD: Well, it's the execution --

HONORABLE SAM HOUSTON CLINTON: Isn't it?

JUSTICE CORNELIUS: Right.

HONORABLE C. A. GUITTARD: I don't see any problem in weeding out "arrest of judgment" because I don't understand what it means or under what circumstances such a motion would be filed, if any, in a civil case.

CHAIRMAN SOULES: Okay. Don, are you suggesting that we take out the words "or in arrest of judgment"?

MR. HUNT: And "motion to vacate." Just leave it motion for new trial or motion to modify so that it comports with the new Rule 322.

CHAIRMAN SOULES: Okay. Any

opposition to that? Can you make that amendment to your --

HONORABLE C. A. GUITTARD: I think that's all right. I think there are some cases which invoke a motion to vacate and some cases in which those other motions might be filed.

Mike, do you have some thoughts about that?

MR. HATCHELL: No.

HONORABLE C. A. GUITTARD: Well, I'd just as soon take it out.

CHAIRMAN SOULES: Are we satisfied that a motion to modify includes a motion to vacate? Is that the consensus of the committee?

HONORABLE C. A. GUITTARD: Well, actually a motion to vacate simply means to vacate; it doesn't mean to modify. And I don't know under what circumstances a motion would be made to vacate. That's not a familiar motion to me. Perhaps it's used sometime, and I guess it could be. I don't know.

CHAIRMAN SOULES: Richard

Orsinger.

MR. ORSINGER: Can I inquire, when do we vacate a judgment or when do we request that a judgment be vacated? Is this a practice that anyone uses anymore? Because I don't recall seeing one in 19 years of doing this.

HONORABLE C. A. GUITTARD: I don't know.

CHAIRMAN SOULES: Yes. We've -- I've used it twice to vacate a judgment because the parties have decided to mediate and they don't want the appellate timetable running and they jointly moved the trial court to vacate its judgment. The verdict is still there, and everybody pretty well knows what the judge is going to do, but there may be enough underlying possible appellate error that the case is worthy of mediation. We move, the judge vacates, and there's nothing there then that can start the appellate timetable running until the judge enters a new judgment.

Now, whether that has any -- all that does is just vacate all the possible things

and dates from running or periods from running, so it may not really have any purpose in the context of these rules, which are to only delay as far as a specific time maybe the running of the appellate timetable. But anyway, that's the only function that I know of where it's been used.

Ken Law.

MR. LAW: Mr. Chairman, it seems I have seen an appellate decision where the trial court was ordered to vacate. Sometimes it happens.

JUSTICE CORNELIUS: We do that on occasion.

MR. ORSINGER: If there's no jurisdiction in the trial court, you would direct them to vacate their judgment, wouldn't you?

CHAIRMAN SOULES: Judge Cornelius.

JUSTICE CORNELIUS: That's generally -- that's generally when a case has settled. After that, and it's been up on appeal, we will sometimes order the trial court to vacate its judgment.

CHAIRMAN SOULES: Mike Gallagher, you had a comment.

MR. GALLAGHER: I was just asking Rusty a question about vacating a judgment which the court didn't have jurisdiction to enter originally.

HONORABLE C. A. GUITTARD: In any event, there's no problem with allowing a motion to vacate to delay the timetable or delay the execution, so why don't we just leave that in there.

JUSTICE CORNELIUS: I would.

CHAIRMAN SOULES: Is that all right with you, Don?

MR. HUNT: Yeah. Arrest of judgment is the one that bothered me.

CHAIRMAN SOULES: Okay.

MR. HUNT: There's some other vacation language in there, and I don't have a problem with it, but arrest of judgment doesn't seem to fit civil cases.

CHAIRMAN SOULES: Okay. So now we have, as I understand it, in Rule 627 as proposed, except for deleting in the fourth line the words "or in arrest of judgment."

Otherwise, the proposition is to approve the rule as presented, Rule 627.

Any further discussion? Any opposition? Having no opposition, that stands unanimously approved, Rule 627.

HONORABLE C. A. GUITTARD: The next rule is 634, and that's on Page 76.

CHAIRMAN SOULES: 634 is at the top of 76 of the November 18, 1994.

HONORABLE C. A. GUITTARD: Yes. One of the Houston courts, the first district, in Texas Employers vs. Engelke, held that when a supersedeas bond has been filed after execution has been issued and, I guess, levied but before sale, that -- that is, the execution process has already started, that the filing of the supersedeas bond doesn't stop it. And there are those who think that whenever you file a supersedeas bond it ought to stop it. And this proposal would take a different view and change the rule in that respect and provide that if a supersedeas bond is filed and approved at any time during the appellate process, the clerk or justice of the peace shall immediately issue a writ of

supersedeas, which shall suspend all further proceedings under any previously issued writ of execution or other enforcement process.

I move the approval of that recommendation.

CHAIRMAN SOULES: Any discussion? Anyone opposed?

Rusty McMains.

MR. McMAINS: I'm not sure I'm opposed, but I'm just trying to figure it out. You say "suspend all further proceedings under any previously" -- I mean, what happens if a sale has taken place with no supersedeas but then a supersedeas is filed?

MS. DUNCAN: Where are the -- where are the --

MR. McMAINS: Is it effective? I mean is that what --

MR. HATCHELL: The sale is effective.

MR. McMAINS: The sale is effective?

MS. DUNCAN: Where is the money from the sale?

MR. McMAINS: That's what

I'm --

MS. DUNCAN: What happened in Engelke was that there had been an execution and the money was in the registry of the court, and the question was, are we going to turn the money in the registry of the court over to the plaintiff and his attorney, or does the supersedeas stop things? And Engelke held that it doesn't stop things and you still turn the money over.

MR. McMAINS: I'm not saying --

MS. DUNCAN: Which is not to me what the rule said.

MR. McMAINS: All I'm saying is what happens if the sale has already been accomplished and the money has already been turned over and then a bond --

MS. DUNCAN: Then there are no further proceedings.

CHAIRMAN SOULES: We've got to talk one at a time for the court reporter to make a record. Who wants to speak? Sarah. Sarah Duncan.

MS. DUNCAN: If there's been a

sale and the money has been turned over from the sale, it's out of the registry of the court, there are no further proceedings under the writ of execution, it's a done deal, and there's nothing for the supersedeas to stop, unless there are further execution proceedings aside and apart from that sale.

MR. McMAINS: Well, the problem with your assumption is that you execute, sale, turn it over, and that's it. Sometimes you can execute on non-cash items. You, for instance, execute on something involving an assignment, so you maybe able to coerce or enforce an assignment that may actually occur. But the actual thing that is assigned may still be in process.

Now, is that a further -- see, that's why I'm having difficulty with the notion of further proceedings and why I need the clarification.

You're saying -- it says "further proceedings under any previously issued writ of execution or other enforcement process," and I'm not sure what "further proceedings" really means. Do they mean judicial

proceedings? Do they mean administrative proceedings?

CHAIRMAN SOULES: It means it stops the forced satisfaction of the judgment in its tracks wherever it is at the moment. That's the way I'm reading it.

HONORABLE C. A. GUITTARD: When it's over, it's over.

MS. DUNCAN: But that's --

CHAIRMAN SOULES: If it's done, if it's completed, it doesn't stop it.

MR. McMAINS: Well, I just have difficulty with the notion of a proceeding, because a proceeding to me sounds more like a hearing, a something, an event, as it were.

HONORABLE C. A. GUITTARD: Well, what do you think it should suspend, Rusty?

MS. DUNCAN: Can we say "further steps"?

HONORABLE C. A. GUITTARD: Or further collection efforts?

CHAIRMAN SOULES: Actions to satisfy the judgment?

MR. GALLAGHER: Isn't that

what -- Mike Gallagher.

CHAIRMAN SOULES: Mike Gallagher.

MR. GALLAGHER: It seems like that's exactly what you're trying to do, and that says exactly what the purpose of the rule is.

CHAIRMAN SOULES: What do you think about that, Rusty?

MR. McMAINS: What actions?

CHAIRMAN SOULES: Suspend all further actions to satisfy the judgment.

MR. McMAINS: But you -- but you're --

CHAIRMAN SOULES: Or all further actions --

MR. McMAINS: But further actions by whom, is what I guess I'm getting at.

CHAIRMAN SOULES: Anybody.

MS. DUNCAN: Everybody.

CHAIRMAN SOULES: I guess everybody. It probably should say "all further actions to enforce or satisfy the judgment."

MR. McMAINS: Well, let me give you another example. What about an attempt to make an out-of-state collection and filing a supersedeas bond here?

CHAIRMAN SOULES: I think that's stopped, but I don't know that.

MR. McMAINS: Well, I mean, but that's going to be determined by the other state, and I guess this is an -- is this an attempt to basically say you can't do -- you can't register a judgment in another state? You see, you can take the position that's a proceeding to enforce, that the registration is a proceeding to enforce, even though it may or may not be. I mean, it may be a prerequisite to enforcement, but it's -- it may not be a proceeding to enforce in the sense of an actual execution and sale, such as the registration of a judgment for purposes of affixing a lien on property that is out of state.

CHAIRMAN SOULES: You can't do that if it's been superseded.

HONORABLE C. A. GUITTARD: Yes, you can.

MR. McMAINS: Yes, you can. In other states you can, and it's got to be determined in the other states, and that's the problem. I mean, that's the question I have, is what right do we have to tell another state that they can't do that?

HONORABLE C. A. GUITTARD: That's the question. Now, what's the answer?

CHAIRMAN SOULES: Doesn't the uniform enforcement of judgments cover this?

MS. DUNCAN: Yes.

CHAIRMAN SOULES: That is, if a judgment gets suspended in the --

MS. DUNCAN: -- state of issuance.

CHAIRMAN SOULES: -- the court of judgment, the court that heard the judgment --

MR. McMAINS: That is not enacted by everyboby. Not everybody has passed that. Okay? A goodly number of states have not passed it and don't recognize it.

CHAIRMAN SOULES: Well, we're talking about --

MR. McMAINS: We confronted

that issue in the Texaco litigation, you know.

CHAIRMAN SOULES: If we can't influence the state of whatever to, we can at least influence the parties to stop, because the judge has got jurisdiction over the parties. The trial judge has got jurisdiction.

MR. McMAINS: Yeah. But what I'm saying is I'm not sure it's a legitimate -- that it's necessarily a proceeding to enforce. That's what why I'm -- I mean, it is a -- you're trying to get a lien attached.

CHAIRMAN SOULES: That's to satisfy the judgment.

MS. DUNCAN: That's an enforcement process.

MR. McMAINS: Well, but that doesn't necessarily mean you're going to execute. It just means you want to maintain some security interest there because the property is up for --

MS. DUNCAN: But that --

CHAIRMAN SOULES: Richard, you've had your hand up for some time.

MR. ORSINGER: I wanted to speak to this full faith and credit issue. I think that we are entitled to define the limits of the enforceability of a Texas judgment after a supersedes bond is filed, and in my view every other jurisdiction in the United States is bound by that, because under the full faith and credit clause they have to give the judgment the same effect in their state that a court in this state would give to the judgment. So I feel like if we say that you can't take further action to make liens or issue writs of garnishment or whatever, that that would have an effect even as against property in another state.

Having said that, I also would like to ask does the term "enforcement process" here include turnover proceedings in court? And if so, I want it clearly in this record that it does, because the enforcement process -- this is all in the area where we're talking about writs of execution in the rules of procedure, and I think it's Section 3, Executions.

Someone could reasonably argue that this is only meant to affect executions and it

should also affect, it seems to me, postjudgment turnover proceedings that are proceeding through the court as well as garnishments and every other enforcement alternative.

But I just -- maybe that requires changes in other areas as well or maybe we ought to put this under a supersedeas rule that's not just limited to writs of execution.

CHAIRMAN SOULES: Isn't the turnover statute limited to certain stances where execution is still viable? I thought it was, but I don't have it in my --

MR. McMAINS: It's not viable.

MS. DUNCAN: No. It's limited to assets that are not subject to execution.

MR. McMAINS: That are not readily subject to execution.

CHAIRMAN SOULES: I understand the purpose of turnover, but does it have to occur in a time period where execution could occur if there were assets that could be executed on? You can't get a turnover after a supersedeas has been filed.

MR. McMAINS: Oh, I would agree

with that.

CHAIRMAN SOULES: That's what the statute says, right?

MR. McMAINS: Yeah, I don't disagree with that. I thought you were saying something else.

CHAIRMAN SOULES: I was, I'm sure, but I didn't mean to.

MR. McMAINS: No. I mean, you can -- the rule that we have that talks about you to have wait 30 days or -- until after a motion for new trial, that doesn't apply.

MS. DUNCAN: It may or may not.

MR. McMAINS: Granted. But I mean, it's been held not to apply in some cases.

CHAIRMAN SOULES: It doesn't apply to garnishment either.

Sarah Duncan.

MS. DUNCAN: In the research that I've done, those states -- it's a generalization. As a general rule, those states that have not adopted the Uniform Enforcement of Judgments Act, relying on the full faith and credit clause, have effectively

adopted maybe not the procedural steps but the main thrust of the Uniform Enforcement of Judgments Act.

And as far as the titles, Section 3, Execution, Section 4, Garnishment, in my view, all of the enforcement rules and statutes need to be fixed and they need to be separately codified or something, because the way they are now, the rules are all over the place, the statutes are all over the place, and we're talking about people's property, which is very important to them. But assuming that can't be done now, there are some things that need to be fixed immediately or as immediately as this committee and the Supreme Court and the court of criminal appeals can act.

And I would hope that we would not delay doing the things we know we need to do just because the rules and statutes right now aren't anywhere close to perfect.

And as far as the lien situation and filing the judgment, as I at least intended it, that's the reason "or other enforcement process" is in there, is that enforcement includes anything that you do with a judgment

after it's rendered to achieve security, to enforce or to satisfy.

CHAIRMAN SOULES: Okay. I want to propose that we insert for the word "proceedings" the following words: "actions to enforce or satisfy the judgment." If anybody has got any better words than that, not that those are great words, but if anybody has got any different words that they think better describe what we're trying to get at, please articulate them.

HONORABLE C. A. GUITTARD: Let's consider modifying the proposal to say "shall suspend any enforcement process including execution."

CHAIRMAN SOULES: The problem there is I'm not sure that -- I mean "process" does have definition.

HONORABLE C. A. GUITTARD: That's right. And it's used here, and I don't see anything wrong with the thing as it is.

CHAIRMAN SOULES: Is "turnover" process?

MS. DUNCAN: Well, if you're talking about the narrow definition of

"process," I don't think that even covers turning over funds in the registry of the court to an attorney or litigant. I mean, if process means writs and that narrow definition, I don't even thing it covers the Engelke situation. There was no process issued in turning over funds from the registry of the court to the attorney.

MR. McMAINS: And no order required actually.

MS. DUNCAN: And no order required. Well --

MR. McMAINS: That was the argument.

MS. DUNCAN: That --

MR. ORSINGER: Luke, Sarah -- Richard Orsinger -- Sarah is using the word "process" in the sense of writ basically, which is what it normally is. When you issue process, it's a writ of some kind, if it's postjudgment. And this isn't supposed to be that narrow. If you posted a supersedeas bond, theoretically that guarantees the judgment will be paid and therefore we shouldn't be taking property, we shouldn't be

putting liens on property, we shouldn't be garnishing accounts, we shouldn't be forcing turnover of monies or anything else.

MR. McMAINS: Do you want to say "procedure"? Enforcement procedure, is that --

MS. DUNCAN: Uh-uh.

CHAIRMAN SOULES: What's wrong with "actions"? I mean, that's the broadest word that I can think of. Actions. Suspend all further actions.

MR. McMAINS: Well, the problem I have with an action, once again, is that -- or the notion of action is that something that has commenced. I mean, if you look under -- if you at actions, these are things that are commenced. You're actually talking about any acts of any party or officer of the court.

CHAIRMAN SOULES: Okay. Shall suspend all further acts to enforce or satisfy the judgment; all further behavior to enforce or satisfy the judgment?

JUSTICE CORNELIUS: How about efforts?

MS. DUNCAN: That was the

problem in rewriting the rule, was that some of us thought it was clear to begin with. And to rewrite it to be clearer than it was was difficult and is probably not perfect and it never will be.

MR. ORSINGER: Luke, Richard Orsinger.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: What if you just said "suspend further enforcement of the judgment"? Is that broad enough? Is that too broad?

MS. DUNCAN: It can't be too broad.

MR. ORSINGER: "Suspend further enforcement" would mean no matter what you can think up as a remedy, it's not allowed.

MR. McMAINS: Well, now, let me just make an observation there in the context of, for instance, insurance litigation practice. Let's suppose that there was a denial of coverage in a particular liability situation but the individual did post a supersedeas bond.

MR. ORSINGER: Okay.

MR. McMAINS: Under the language of policies and practice, you could proceed against the insurer anyway because you have a right under the insurance policy. He's denied coverage, and you as a judgment creditor have a right. If you say suspend the enforcement of the judgment, you would be now basically saying that right doesn't exist; that is, you could not independently pursue claims against the insurance carrier simultaneously. You would have to wait until the appeal was all the way over, and that is a substantive change.

CHAIRMAN SOULES: Let me understand that. You're saying that the plaintiff can execute on an insurance policy even if the defendant posts a supersedeas?

MR. McMAINS: Yes. Yes, because it's -- because the policy says you have rights to the enforcement. These are the literal terms of the policy under the, quote, no-action clause; that you have a right, right then and there, as a judgment creditor. Once you have a judgment, then you may go after the

insurance policy unless they have done something. What I'm saying is the insurance company in this context will not have done something. Maybe the individual would have done something, and so you could not do that if the insurance company itself had accepted coverage and posted the supersedeas bond, but you can do it if they are denying coverage at that time under existing rights that may be enforced at that time in my judgment.

CHAIRMAN SOULES: Okay. I don't know how you would fix that.

MR. McMAINS: Do you see what I'm saying?

MR. GALLAGHER: That's a big problem, and I just dealt with it.

CHAIRMAN SOULES: How about if we say the enforcement of the judgment against the parties that posted the supersedeas?

MR. McMAINS: Yeah, that's true. That's actually another point, because with multiple defendants and joint and several liabilities, one defendant posts a supersedeas bond, and that does not stop the enforcement of the judgment.

CHAIRMAN SOULES: If he's careful and says, "This is only for me."

MS. DUNCAN: Right.

MR. ORSINGER: What was your language?

CHAIRMAN SOULES: I've got two. Let me get at this one first: Further enforcement against the party that posted the supersedeas. I added the word satisfaction or satisfy because I'm not sure. At some point it may become a satisfaction issue as opposed to an enforcement issue.

Suppose the money is in the registry of the court. If the court is ready to pay that out in satisfaction of the judgment, maybe nobody is seeking any longer to enforce it. I don't know whether there's really a distinction between enforcement and satisfaction or not. If there's not, obviously that word doesn't need to be in there.

MS. DUNCAN: To me there is a difference. I mean, I would consider filing the judgment to affect a security interest enforcement, but it may never reach this level

of satisfaction if you don't foreclose on that lien.

CHAIRMAN SOULES: Okay. So I'm going to propose this: "Shall suspend all further enforcement or satisfaction of the judgment against the party that posted the supersedeas."

MR. ORSINGER: But Luke, we have to be careful about the technicality of the fact that a writ of execution is now in the hands of an officer who has a duty bound to execute, and we previously said issue of supervening writ or supersedeas that calls back the writ of execution. We've now stated what our policy is, but we haven't told them to issue a piece of paper to call back the process, and I think that we probably should, because the constables or the sheriff's deputies that are out here doing these sales, unless they get something from some court or some court clerk, may continue with their duties to post and sell.

CHAIRMAN SOULES: Is this only in the justice courts?

MR. ORSINGER: No. This is in

all courts. This rule applies to district courts and county courts as well.

CHAIRMAN SOULES: Well, the judge is to issue a writ of supersedeas to the sheriff. That's in the rules. I can't tell you what rule it is, but I'll find it in a minute.

MR. ORSINGER: Well, it was in this rule right here. Look at it. It says "shall immediately issue a writ of supersedeas." Rule 634. It's the writ that you issue to call back a writ of execution that's already out, and it's still here.

MS. DUNCAN: That's in this. It says "shall immediately issue a writ of supersedeas."

CHAIRMAN SOULES: The writ of supersedeas suspends.

MR. ORSINGER: I'm sorry?

MS. DUNCAN: One problem with this is if enforcement does include liens, we've just bypassed the statutory procedure for liens.

CHAIRMAN SOULES: For what?

MS. DUNCAN: For having a

supersedeas bond preclude or pull back a lien.

CHAIRMAN SOULES: I know you can get the liens dissolved after you post a supersedeas.

MR. McMAINS: But you have to go through --

MS. DUNCAN: But you still have to go through that process.

MR. McMAINS: And there's the statute which we have enacted in the rules --

MS. DUNCAN: No, that part is not in the rules.

MR. McMAINS: -- outlining the statutory procedure as to how that is done or says that the judge has the power to do it or whatever. And to suggest that it's done automatically is actually, I suppose, what Sarah is getting at, in conflict with the statute.

CHAIRMAN SOULES: That ought to be a wrongful lien in my judgment. A lien properly under a supersedeas bond --

MS. DUNCAN: No. But at this point it's not a wrongful lien so long as you have not gone through the statutory procedure

for either preventing a lien for attaching or removing it once attached.

CHAIRMAN SOULES: Well, this change would probably make it a wrongful lien.

MS. DUNCAN: Which is fine with me.

CHAIRMAN SOULES: Fine with me. The money is up. Why should you have --

MS. DUNCAN: And I don't see why we can't propose to the Supreme Court that they go further than the legislature has gone in the property code sections, but I just wanted to clarify that if we pass this as written, we would be proposing that the court do that.

CHAIRMAN SOULES: Rusty McMains.

MR. McMAINS: One of the problems that I have about "proceedings" is that a lot -- if, for instance, you're in another state, a lot of states will just register the judgment and that's all that's going to happen, so there wasn't anything going to happen. So I mean I'm not sure that our -- if you use "proceedings" or that sort

of thing, when we say "further," the use of the term "further acts" or whatever does not really do anything to undo what's already been done --

CHAIRMAN SOULES: Right.

MR. McMAINS: -- by way of the liens. So I mean to that extent maybe it doesn't conflict with the statute.

MS. DUNCAN: That's true.

MR. McMAINS: But it also doesn't fix the issue if your position that this means a lien is by definition ongoing and therefore if you're trying to cut it off, if that's what you're trying to do, I'm just not sure that this does it.

CHAIRMAN SOULES: You just can't foreclose on it. It's stopped everything in its tracks wherever you are at the time the bond is posted.

MR. McMAINS: I understand. But you recognize, of course, that the problem frequently is with the lien itself. And it doesn't have anything to do with whether it's enforceable or not; it has to do with the perception of it.

MS. DUNCAN: That's right. But you still have the statute.

CHAIRMAN SOULES: Are you talking about a lien that's already been filed?

MR. McMAINS: Yeah.

CHAIRMAN SOULES: Well, you have to undo those. This doesn't change the present practice.

MS. DUNCAN: Right.

CHAIRMAN SOULES: But the party couldn't --

MS. DUNCAN: -- file a new one.

CHAIRMAN SOULES: -- continue to perfect the lien abstracting in other counties or whatever after the supersedeas is filed the way this is written.

Let me try it one more time: Shall suspend all further acts to enforce or satisfy the judgment against the party that posts the supersedeas bond. Actually, it has to -- the word "acts" could go in the place of proceedings. It would be "acts under any previously issued writ of execution or other

enforcement process to enforce or satisfy the judgment against the party that posts the supersedeas bond."

Richard Orsinger.

MR. ORSINGER: My comment, Luke, is going to relate back to the fact that this was originally a way to undo a writ of execution that's already out and it's now been changed to a general supersedeas rule, which it needs to be. We need to have a general supersedeas rule. However, I would question the logic of issuing a writ of supersedeas unless there's a writ of execution that's already out.

This rule came into being to undo a writ that's out of the hands of the constable or a deputy sheriff. It's now been generalized to suspend all collection efforts, whether it's garnishment, abstracting judgments, turnover proceedings through the court or whatever, so we definitely need to take it out of the execution section and put it up in the front of all of these.

But I think we also ought to consider what to do with that previously issued

execution previously issued which used to be in the rule and is no longer in the rule, because a writ of supersedeas is only necessary to call back some collection writ that's already out. And I wouldn't want someone to argue that you can't stop a turnover proceeding unless you get a writ of supersedeas issued. The writ of supersedeas has one job, and that's to call off a writ of execution, and so by having "shall immediately" --

MS. DUNCAN: No.

MR. ORSINGER: What other job does it do? What other job does it do?

MS. DUNCAN: I'm sorry. I'm sorry. I apologize.

MR. ORSINGER: What other job does the writ of supersedeas purport?

CHAIRMAN SOULES: I think it calls back a writ of garnishment, although --

MS. DUNCAN: I think it calls back any non-lien enforcement process.

MR. ORSINGER: I wish you would show me the rule that says that.

MS. DUNCAN: Well, that's part

of the problem --

MR. ORSINGER: Okay.

CHAIRMAN SOULES: Sarah, I don't -- go ahead.

MS. DUNCAN: -- is that none of the rules are written to recognize enforcement procedures that grew up after a writ of execution. I mean, this whole area is a mess.

MR. ORSINGER: I go back to my original point. My original point --

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: -- is that we have now taken out of the rule the language that when a writ of execution has been issued, then we issue a writ of supersedeas. And perhaps we should say if any collection writ has been issued, we ought to issue a writ of supersedeas. But we should not require a writ of supersedeas to suspend collection efforts in mid track. The writ undoes the other writ. Am I making myself clear?

PROFESSOR CARLSON: No.

MR. ORSINGER: Okay. I'm

sorry.

MS. DUNCAN: Okay. What's wrong with having --

MR. ORSINGER: The rule as originally written was to instruct the court to issue a writ of supersedeas to suspend an outstanding writ of execution. And I agree that that probably came into being when a writ of execution was the only way to enforce a judgment. We now have engrafted garnishments and --

MS. DUNCAN: -- turnover.

MR. ORSINGER: -- the injunctions and attachments and receivers and everything else, and we really should be suspending all of that. And we ought to have a rule that generically applies to all of that and suspends all of that, but it should not require the issuance of a writ of supersedeas to suspend all of that.

MS. DUNCAN: But how else are you going to tell someone in the process of collecting on a turnover order to stop? You need some piece of paper, and I don't care what anyone calls it.

MR. ORSINGER: I don't have a problem with issuing a writ of supersedeas to interfere with any outstanding process. What I have a problem with is in a turnover proceeding, if I come to court with a supersedeas bond, that ought to stop the turnover proceeding. But under this rule I've got to come to the court with a supersedeas bond and a writ of supersedeas to stop it, the way this new language is written.

CHAIRMAN SOULES: May I ask you a question just for clarification on that, Richard? Does the turnover statute say that the posting of a supersedeas bond stops the proceedings under that statute?

MR. ORSINGER: I've heard several people here say it does. I'm not aware of the language that says it doesn't, and I don't have the rule.

Do you have it there, Judge?

CHAIRMAN SOULES: Okay. That aside, if we don't know, you've commanded a sheriff or whoever under either a writ of garnishment, writ of attachment, whatever may be the process, to do something. That sheriff

has been told to do something, and until that sheriff has been told to stop, that sheriff is supposed to go forward, and that's why you have to have a writ of supersedeas in any context.

MR. ORSINGER: Absolutely.

CHAIRMAN SOULES: So when you go -- to me, when you go with a supersedeas bond, the paper right behind it or right in front of it is always the writ of supersedeas.

MR. ORSINGER: That's only if the writ of execution or garnishment is out. You're requiring somebody to pay for the issuance and theoretically the service or something of this writ of supersedeas, and if there's no collection writ out, why are we doing that?

MS. DUNCAN: Because --

CHAIRMAN SOULES: Because there's a turnover.

MS. DUNCAN: And we want to know -- I mean, there are several ways you can do it, but we want to know that the clerk has received, filed and approved and accepted your supersedeas bond before we stop the

turnover proceeding.

MR. ORSINGER: Do you have to issue a writ in order to determine that?

MS. DUNCAN: I don't know. Different people do it different ways. But if I have a supersedeas bond that I file, and some clerks will argue with me about it, but I can finally convince them, and I ask them to sign that it is approved, file stamp it and give me a copy, and I'm happy. You know, it's fine to say you go into your turnover proceeding with a supersedeas bond that conforms to those requirements. But whatever it is, you should have to do something more, I mean.

MR. ORSINGER: But that's not my point. My point is, you just listed what you would do, and one of the things that you did not list was that you would not request the clerk to issue a writ of supersedeas to take and show to the district judge.

MS. DUNCAN: Well, I'm not assuming there's an ongoing proceeding.

CHAIRMAN SOULES: Can I get a point of clarification here again to try to

focus this?

Richard, are you saying that you shouldn't have to get a writ of supersedeas to stop an enforcement if no enforcement has yet to come?

MR. ORSINGER: Exactly.

CHAIRMAN SOULES: Okay. So there's nothing yet. No writs of garnishment, no writs of attachment, no turnover, no writs of execution. And what this rule says is you've to get a writ of supersedeas that supersedes nothing in order to get enforcement stopped.

MR. ORSINGER: That's the way I see it.

CHAIRMAN SOULES: Okay. We've got two -- it's kind of gotten cloudy here. I think what we want to do is if there's any enforcement proceeding going on, the writ of supersedeas stops all, whatever may be its nature. But if there's not any enforcement proceeding going on, the writ of supersedeas is unnecessary and we ought to say that. Just the posting of the supersedeas bond itself prohibits further -- prohibits any

enforcement.

Now, this does contemplate that nothing stops until there's a writ of supersedeas. Why do you get one if there's nothing going on? So we need to deal with the situation where there is no enforcement in the process at the time the supersedeas is filed. Is that your point?

MR. ORSINGER: That's my point exactly.

CHAIRMAN SOULES: Okay. I agree. Does anyone disagree with that?

Okay. Well, we need to draft that so that the writ of supersedeas is not necessary unless there's some outstanding process.

HONORABLE C. A. GUITTARD: All right. The committee then will redraft that.

MR. McMAINS: It probably ought to be in the supersedeas bond rule. I mean, we have the rule on supersedeas, and we probably ought to say the effect of the supersedeas is that you don't get to go enforce the judgment.

CHAIRMAN SOULES: Actually, then, we've moved through Rule 634 into

whatever the supersedeas bond is --

MR. McMAINS: -- in the appellate rules.

CHAIRMAN SOULES: And it will state what the effect of that is. And if you have to go further and get a supersedeas bond, under what circumstances -- I mean, a writ of supersedeas. If you have to do that, under what circumstances. And then if you -- in either event, if posting the bond gets it done because there's no enforcement in the process, what the effect of that is, to stop all collection, and if something is in process, it stops everything, whatever the nature of it is.

I've said that very generally, but the -- and the recommendation -- is there any disagreement that it ought to go in the supersedeas rule?

Richard Orsinger.

MR. ORSINGER: We need to have it in the rules of civil procedure as well as in the rules of appellate procedure. Both places.

HONORABLE C. A. GUITTARD:

That's where it is.

MR. ORSINGER: It is in both places?

HONORABLE C. A. GUITTARD: It's not in the appellate procedures.

MS. DUNCAN: It's not in the appellate procedures.

MR. ORSINGER: I know. But if we put it just in the supersedeas rule, which to me is an appellate rule, then it is not in the trial rules.

CHAIRMAN SOULES: Is that not anyplace except in, what, 47 and 49 of the TRAP rules?

MR. McMAINS: Supersedeas bond is only in the enforcement, in the various mechanism rules and the civil rules. And then it's a general rule in the appellate rules. It's not in the civil rules any more.

CHAIRMAN SOULES: Judge Clinton.

HONORABLE SAM HOUSTON CLINTON: I'll tell you what you're talking about, is here you've got a final judgment in a civil case and somebody is trying to get some money

or something or other. You've not -- it's not broad enough to include, for example, a supersedeas to stop a temporary injunction, because you don't -- you can supersede a temporary injunction.

HONORABLE C. A. GUITTARD: You don't supersede a temporary injunction.

HONORABLE SAM HOUSTON CLINTON: What?

HONORABLE C. A. GUITTARD: You don't supersede a temporary injunction.

MS. DUNCAN: It's discretionary with the trial court.

CHAIRMAN SOULES: It's discretionary with the trial court, yes. Go ahead.

HONORABLE SAM HOUSTON CLINTON: I just -- you're saying things here that may be inconsistent with -- for example, the state doesn't have to file anything to supersede a temporary injunction against the state. And I just want to make sure that what you're talking about doesn't reach over and touch that situation.

I mean, I'm not necessarily a party for

the state, but I'm thinking you don't want to cloud up their right, if they have one. And it may not even deal with what you're talking about, but it just occurs to me that it does.

CHAIRMAN SOULES: I don't know where the exemption is.

MR. McMAINS: It's in the statutes.

CHAIRMAN SOULES: It's in the statutes.

MR. McMAINS: It's in the government code.

MS. DUNCAN: Well, and that doesn't -- it's still discretionary if it's a temporary instruction.

CHAIRMAN SOULES: Well, 634 -- I think Rule 634 is the supersedeas rule in the rules of civil procedure.

MS. DUNCAN: It is.

MR. ORSINGER: Luke, it is. And that's the problem, is that it was put in place to call back an outstanding writ of execution. But we've got garnishment, sequestration, injunction, receivers, turnovers, none of which have anything in

there about supersedeas.

And Judge Peeples let me borrow his book on civl practice, and I would solicit a second opinion, but I have read the statute and I don't find any reference in here to supersedeas either. It's in the turnover provisions. And I would like someone to look over my shoulder on that because I may have missed the language, but we need a generic rule in the Rules of Trial Procedure that says -- that suspend collection efforts of any kind if the bond is approved.

CHAIRMAN SOULES: The subcommittee is so charged. Okay? But there was a discussion about where to put it, and I think 634 is the place, because I think that's the only place where we talk about supersedeas.

MS. DUNCAN: Well, but that does not resolve Richard's problem.

CHAIRMAN SOULES: Well, the subcommittee has been charged with making the 634 supersedeas apply to all collection efforts of whatever nature.

MR. ORSINGER: In order to do

that, Luke, you've got to move it out of the present location, which is a subdivision of the rule that applies only to writs of execution.

CHAIRMAN SOULES: Put it where you think it should go. The subcommittee needs to figure out where it should go and propose that placement.

Does anyone else have anything on supersedeas? We've got enough of a record here and everybody's ideas are on the record, so the subcommittee has direction.

Sarah Duncan.

MS. DUNCAN: I don't even know if we even have this power. I would like for the committee to propose to the Supreme Court that it propose to the legislature that either the Supreme Court Advisory Committee or the Supreme Court itself or whomever and the legislature work together to codify the execution/enforcement/supersedeas/garnishment/attachment whatever rules and get them in one place that's easily findable. I think it's wrong to be messing with people's unique assets in the haphazard way that we're now

doing it in the rules and in the codes.

CHAIRMAN SOULES: Well, this has been a problem for decades, and it particularly became a problem whenever we wrote the rules to be -- what was it, the constitutional case that came down --

MR. ORSINGER: Overmeyer vs. Frick?

MS. DUNCAN: No. Fuentes.

CHAIRMAN SOULES: Fuentes vs. Chevron. And the legislature has never, so far as I know, never addressed Fuentes vs. Chevron, so all that due process was in the rules, but the activating writs are in the statutes, and they never have been really reconciled, but they should be.

MS. DUNCAN: And since the legislature is in the recodification process, it seems to me that now would be a good time to propose it, if the committee would propose that to the Supreme Court or the Supreme Court would just do it itself.

CHAIRMAN SOULES: Okay. Anything else on this?

HONORABLE C. A. GUITTARD: Are

you ready to go ahead?

CHAIRMAN SOULES: Ready to go forward, Judge.

HONORABLE C. A. GUITTARD: The last of these TRCP rules that our subcommittee has considered are the garnishment rules, and it's Rules 658 through 677 that appear in your cumulative report beginning on Page 76.

Several things have been done here, but one thing is that the rules have been clarified to eliminate some ambiguities. And one of the things that we talked about in these rules was defendant or plaintiff and you don't always know whether it's in the main case or in the garnishment proceeding, and that has been clarified. We now refer to the plaintiff or the defendant in the underlying proceeding or the parties in the garnishment proceeding. That's been clarified.

The other changes are mostly in Rule 657 which says that a writ of garnishment may be issued no earlier than the date -- a postjudgment writ of garnishment may issue, upon application and order, no earlier than the date upon been which a writ of execution

might issue under Rules 627 and 628 of the rules of civil procedure.

And Rule 658(a) on Page 77, which says, and I direct your attention particularly to that Subdivision (a), "A postjudgment writ of garnishment may issue upon written order granting the application, which may be ex parte and in the absence of a hearing. The court in its order granting the application shall make specific findings of fact to support the statutory grounds found to exist and shall specify the maximum value of property or indebtedness that may be garnished. No bond shall be filed for a postjudgment writ of garnishment."

And there may be some other things that are of significance here, and I would like for Sarah Duncan to comment on that since she drafted these amendments.

But I put the matter before the committee, and I move that the proposals with respect to garnishment in Rules 658 through 677, that the recommendations be approved by this committee, and so it's open for discussion. And I'd like first for Sarah to

add whatever she thinks should be added.

CHAIRMAN SOULES: Okay. Just for clarification of the record, Judge, isn't 657 the first rule in the series?

HONORABLE C. A. GUITTARD: Yes.

CHAIRMAN SOULES: Okay. 657 forward. Sarah Duncan.

MS. DUNCAN: The other somewhat substantive change in 657 is simply to conform the garnishment rule to the rule permitting alternate security. If the trial judge lets a litigant post alternate security in the type and amount required by the trial court, it seemed to us that you shouldn't be able to get a writ of garnishment if you've done exactly what the trial court said to do.

The last -- if I could just add, the last sentence about when a writ of garnishment, a postjudgment writ of garnishment can issue, I think we started out saying -- there's some confusion in the case law, and particularly I think it's a Tyler case, that says you can't get a postjudgment writ of garnishment until all appellate remedies are exhausted, which, of course,

defeats the purpose of a postjudgment writ of garnishment as a collection process in the absence of a proper bond or alternate security. So we sort of started from the premise that we've got to fix that. And then the question became, okay, if we know that you can get a writ of garnishment before appellate review is exhausted, in the absence of a supersedeas bond or alternate security, when should it issue?

And the trouble I've had and the reason that I argued for and would argue the same for turnover orders is that no execution process should issue absent particular findings. They should all issue at the same time, because the way it is now, at the moment a judgment is signed, it is theoretically possible to get a writ of garnishment or a turnover order but not a writ of execution. And since they're all supposed to be enforcement processes aimed at the same purpose, it doesn't make sense to me that you should have to post a supersedeas bond the day the judgment is signed to prevent a writ of garnishment and a turnover order, but not to have to post it until 30 or much

days later to prevent a writ of execution. It ought to all happen at the same time.

There is already a set of findings that the trial court can make to permit a writ of execution to issue sooner than either 30 days after judgment or 30 days after the motion for new trial is overruled, and this amendment would permit that to happen with writs of garnishment as well because it's tied to the execution rule.

CHAIRMAN SOULES: Okay. Discussion. Were you finished with your presentation? Okay. Any discussion?

PROFESSOR DORSANEO: I have one comment; really a question.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: That last sentence in 657, is it absolutely clear that that would not be applicable to prejudgment garnishment, because of the rule that it's in, or should we say a postjudgment writ of garnishment may issue?

MS. DUNCAN: It's fine with me if you do. We retitled the rule, but if you

want to add it in to the --

HONORABLE C. A. GUITTARD: And up there we say in the first sentence "for the purpose of postjudgment garnishment," but perhaps the last sentence should have it also.

PROFESSOR DORSANEO: I'm just fearful that someone will read only the last sentence.

HONORABLE C. A. GUITTARD: Well, I don't see any problem with putting that in there. Do you, Sarah?

MS. DUNCAN: No.

HONORABLE C. A. GUITTARD: My sentence would simply read "A postjudgment writ of garnishment may issue" and so forth.

CHAIRMAN SOULES: Well, do we want to eliminate what I think is a right to get a writ of garnishment as soon as the judgment is signed? It does tie up bank accounts; it doesn't dispossess a party such as a writ of execution does.

MS. DUNCAN: But if that's necessary, it seems to me that you should have to comply with Rule 628 on execution within 30 days. You should have to show that there

is some risk that you will not be able to collect your judgment unless you can freeze these bank accounts. Because what's happening now is you walk into court, you're going to have a hearing on your motion for judgment, a 30 million dollar case, everybody knows the defendant can get a 30 million dollar supersedeas bond, but it's going to take more than two or three hours.

And what is happening, like in the Dallas Times-Herald case, is the judgment is signed, they get a writ of garnishment, they freeze their accounts, they've got the judgment creditor on its knees and extract a settlement, and that just doesn't seem fair to me.

HONORABLE C. A. GUITTARD: In other words, are you saying that under this rule you can proceed under the execution rule and satisfy the requirements for an early execution and that this would simply -- that this would kick in at that point, so that if an execution -- if there's time to issue an -- get an execution, it would also apply to an alternative garnishment?

MS. DUNCAN: Exactly.

HONORABLE C. A. GUITTARD: Without any change in the text as you have it?

MS. DUNCAN: Exactly. The standard in Rule 628 for execution within 30 days is that the defendant is about to remove his personal property subject to execution by law out of the county or is about to transfer or secrete such personal property for the purpose of defrauding his creditors.

And I guess the short statement is that if you allow a postjudgment writ of garnishment or turnover order at the moment the judgment is signed, you have just made the process impossible in a large judgment case to get a supersedeas bond immediately on file.

CHAIRMAN SOULES: Well, doesn't a turnover procedure require notice and a hearing? I think it does.

MS. DUNCAN: Well, but you've always got the rules permitting shortening of time and everything else.

CHAIRMAN SOULES: Well, I think the judgment creditor needs to have some

avenue to get his money. I mean, he's in the driver's seat at that point once the judgment has been signed. And maybe you wouldn't think the Dallas Times-Herald would be moving their stuff out of state, but there are some other named parties that we've seen on the sheets over the years where people have taken children to England, never to be found again.

MS. DUNCAN: But if that is the case, you've got the standard in 628 and you can go get whatever process will serve your purpose.

CHAIRMAN SOULES: How do you know that you've got the standard in 628? How do you prove it? It's not easy, if you've tried it.

MS. DUNCAN: It's not easy. But should it be easy to get -- to freeze someone's assets when they can and they will post a supersedeas bond in time to stop execution?

CHAIRMAN SOULES: Well, that answers itself.

MS. DUNCAN: You're punishing the defendant with the more liquid assets.

CHAIRMAN SOULES: Maybe. Elaine Carlson.

PROFESSOR ELAINE CARLSON: I'm a little bit concerned about what you said, Luke, because Rule 628 addresses a standard from the outlook of what the defendant is doing, but of course, the creditor, the bank, may be in possession of funds that they would set off, if they knew they had this grace period, against another obligation, and it really might work to the detriment seriously of a judgment creditor in being able to freeze things in order to effectuate hopeful payment of the judgment, and that does concern me.

CHAIRMAN SOULES: Well, garnishment is a freeze. It's not an execution where you go and take the property away. Of course, you can't use the money. It's a serious problem. I'm not diminishing the size of that problem.

MS. DUNCAN: No. But garnishment is ultimately a form of execution. Once you get a judgment in the garnishment action, it's effectively a turnover of the funds that have been

garnished.

CHAIRMAN SOULES: But that's after a trial.

MS. DUNCAN: Well, but how much trial is there if there's $100,000 on deposit at "X" bank in the name of the judgment debtor and there's been a proper garnishment process and there is a valid and subsisting judgment that hasn't been superseded? That's no trial.

CHAIRMAN SOULES: It takes time to get to trial. In other words, they've got time before a hearing or trial to go and get a supersedeas bond. In the meantime, they can't use the money. That's a real problem. Turnover takes a hearing, but I think there are differences. A writ of execution, that's when the sheriff goes and seizes the property and takes it away or liens it, if it's real estate. Maybe there's not.

I just want to raise these issues because where we've been concerned about being able to satisfy a judgment, garnishment has been very, very important, because we didn't have to wait 30 days and we didn't have to go prove that they were going to go run with the money when

we weren't sure they were going to run with the money, but a lot of people will. And then when you catch them, they haven't violated any -- you can't put them in jail when there's no contempt. It's just what happened to it? Well, whatever they say happened to it.

And as long as that's on the table, the issue is should garnishment be delayed in the same context as execution or not.

HONORABLE C. A. GUITTARD: Well, all 628 says is that the plaintiff files an affidavit. Do you have to have a hearing on that?

MS. DUNCAN: No.

CHAIRMAN SOULES: Well, let me get to Richard Orsinger, and then I'll get more on this.

MR. ORSINGER: It seems to me that the writ of garnishment is more analogous to abstracting a lien in real estate than it is to executing and offering it up for sale when you -- when the functionary offers the real estate up for sale and sells it, it goes off with the third person and it never comes

back again. In a garnishment proceeding the money is just frozen and then you have to appear in front of the court in the garnishment trial to establish your right to receive the money. So to me, the serving of the writ of garnishment is more like freezing the money, kind of analogous to abstracting the judgment and getting a lien on the land. It doesn't take anybody's land away; it doesn't take anybody's money away, but it preserves your right to have that land or to have that money.

And this proposed rule that you're suggesting, Sarah, seems to me to make the garnishment, which does not forfeit the money to the garnish -- to the --

CHAIRMAN SOULES: -- garnishor.

MR. ORSINGER: -- yet it just freezes the money until you can get in front of the judge to decide what happens to the money. And so it seems to me you're talking about just kind of a cash flow problem here; that we've frozen somebody's money for as long as it takes them to post a supersedeas bond. To me, the policy behind suspending execution

versus garnishment is completely different.

CHAIRMAN SOULES: Bonnie Wolbrueck, and then Steve Yelenosky.

MS. WOLBRUECK: Just in answer to Judge Guittard's question, as a clerk, this has happened to me a couple of times, where we have had affidavits filed and we have issued the execution. And that affidavit just states, as they said, it's just exactly what the rule is; that they feel that people may remove the personal property. So as a clerk, we feel that it is our responsibility to immediately issue that execution upon the filing of the affidavit.

MS. DUNCAN: That's all it requires. And my response would be --

CHAIRMAN SOULES: Steve Yelenosky, you had your hand up.

MS. DUNCAN: I'm sorry.

MR. YELENOSKY: Oh, I just had a question. You were saying, Luke, that it would be effective until the time they obtained the supersedeas. Would that automatically release the freeze, the garnishment?

CHAIRMAN SOULES: Yes.

MR. YELENOSKY: The filing of the supersedeas would automatically do that?

CHAIRMAN SOULES: And they could go to the judge and say in the procedure in the garnishment ruling with the judge and say, "Look, take something else besides our money to secure this writ of garnishment."

MR. YELENOSKY: The reason I ask is that 634 talks about immediately issue a writ of the supersedeas, shall suspend all further proceedings.

MS. DUNCAN: It doesn't say anything about unfreezing money.

MR. YELENOSKY: Yeah. The way it's written here and underlined, I'm not sure which --

MS. DUNCAN: It prevents a turnover of the money that's been garnished, but it doesn't unfreeze it. And that's part of the problem with a postjudgment garnishment proceeding, is once you've gotten the funds garnished, there are only two places to go. The money stays frozen if a supersedeas bond is filed, or the money gets turned over in a

judgment and garnishment proceeding.

And either way -- I mean, I'll take myself as an individual. If you freeze all the money in my bank accounts, I will have to start selling off assets to pay my living expenses, and it's no different with any other defendant up and down the spectrum from small to big.

MR. YELENOSKY: Well, if it isn't clear and it can simply be made clear that that would automatically -- I mean, you all have said it certainly should operate that way, and I'm not familiar with the process, but I just didn't see where it said that in 634.

CHAIRMAN SOULES: Well, you've got 664(a), which permits the newspaper to go to the court immediately and seek to vacate the writ and substitute security.

Richard Orsinger.

MR. ORSINGER: Luke, I would propose that this same group that is revising the supersedeas rule make it clear that the garnishment should be dissolved if a supersedeas bond is filed, because there's no

point in garnishing somebody's bank account if you have a complete supersedeas to satisfy the judgment.

CHAIRMAN SOULES: As long as a writ of supersedeas is issued.

MR. ORSINGER: That's right.

CHAIRMAN SOULES: The judge has the duty to issue a writ of supersedeas upon the filing of a bond.

MR. ORSINGER: But I don't think -- I don't see any logic in saying you have to substitute other collateral for your money if you have filed a supersedeas bond which is satisfactory to pay the judgment.

CHAIRMAN SOULES: That satisfies substituting collateral, the filing of a supersedeas bond.

MS. DUNCAN: No.

MR. ORSINGER: Well, really, should you have to even do that? I mean, isn't --

CHAIRMAN SOULES: I don't think so.

MR. YELENOSKY: I mean, I agree. But should it be automatic? Is that

what you're saying?

CHAIRMAN SOULES: In other words, that would be one step beyond 664(a). It would be automatic. If you put the money -- if your supersedeas --

MS. DUNCAN: 664, at least as I read it, does not make any provision for modifying or dissolving the writ once the supersedeas bond has been filed. All the garnishor has to prove is the grounds relied upon for the issuance. All the application is going to say is that there was a valid and satisfied judgment as of the day this application was made. They don't have to say anything about whether there has subsequently been a supersedeas bond or satisfaction or anything else.

Now, you know, if you want to change the rule, that's fine, but I don't think that 664(a), as it now stands, has been interpreted to require dissolution of the writ of garnishment once a supersedeas bond or alternate security is filed.

CHAIRMAN SOULES: That's right. And Richard is talking about having

our committee that's going to deal with supersedeas say that the supersedeas cancels the writ.

MS. DUNCAN: Well, no. You were saying that the difference is between automatic versus applying for a dissolution of the writ. And what I'm saying is I don't think, the way things stand right now in 664(a), that you don't even have grounds to dissolve the writ if a supersedeas bond is filed and that's proved to the trial court.

CHAIRMAN SOULES: That may be. You have grounds to get your funds released, but you don't have grounds to get the writ dissolved.

MS. DUNCAN: I don't think you have grounds to --

CHAIRMAN SOULES: Yeah. The judge can substitute collateral and release the funds. That's what 664(a) is.

MR. ORSINGER: Do you think the supersedeas bond would be considered collateral under those circumstances?

CHAIRMAN SOULES: Pardon me?

MR. ORSINGER: The supersedeas

bond would be considered that collateral?

CHAIRMAN SOULES: Yes.

HONORABLE C. A. GUITTARD: Then say so then.

CHAIRMAN SOULES: Under 664(a) the judge would have to decide that, but what better collateral than cash collateral? How could a judge not decide that? I suppose some judges could not decide that, but we could say in 634 that it automatically supersedes or cancels the writ.

Bill Dorsaneo.

PROFESSOR DORSANEO: Now, I didn't give this careful study right before this meeting, but it seems to me, as an old creditors' rights teacher, that the source of the problem is in forgetting the idea that when the term "execution" is used in procedural rule books, it encompasses every species of enforcement and not just a writ of fieri facias; and that that's what our rules originally probably were interpreted to mean, up until the garnishment rules were redrafted in such a way as to separate a postjudgment garnishment from execution from a timing

standpoint.

And it seems to me that we need to go back and work on the execution rule to make the matter clear when under our present method of thinking the supersedeas bond would suspend all enforcement and when it would not.

So I agree with the chair that this needs further study. I suspect, if we look at the structure of all of these rules, that we will conclude that the structure has been impaired by a departure from the original concept.

MS. DUNCAN: Exactly. We've got execution as enforcement all encompassing and writ of execution a specific enforcement device. And I think we --

PROFESSOR DORSANEO: Don't we have a subcommittee that is responsible for these rules? My predecessor at SMU, Roy McDonald, was the first chair of that subcommittee, so it's a very important post, and I would recommend that that group study this rather than the appellate group.

CHAIRMAN SOULES: Well, they've already -- we do have one, and that's Tony Sadberry with Chip Babcock and Anne Gardner.

They're that committe. But this committee has undertaken to approach it, and so the chair recommends that the committees need to join together, which is something I mentioned earlier. Where we're reaching across out of the appellate rules into something else, we need to involve the other subcommittee.

HONORABLE C. A. GUITTARD: I raised that question before we went into these trial rules.

MS. DUNCAN: But we don't even have the consensus on what we need to do.

CHAIRMAN SOULES: Right. But they're here and we need to talk about it and get some direction when we're joined together. I think it's a good idea to go through them because obviously we're generating a good bit of interest.

HONORABLE C. A. GUITTARD: I think then what this committee wants us to do is study this and then report our group's guidance to the trial procedure committee or subcommittee and then let them work on it or maybe have a joint meeting. I don't know.

CHAIRMAN SOULES: I think have

a joint meeting.

PROFESSOR DORSANEO: But we would be helped by a vote as to whether postjudgment garnishment is going to be more like abstracting judgments and obtaining judgment liens, or is it going to be more like execution.

MS. DUNCAN: Exactly.

CHAIRMAN SOULES: Meaning should it be delayed --

PROFESSON DORSANEO: Yes.

CHAIRMAN SOULES: -- along with the execution period?

MS. DUNCAN: Right. And that was my point to begin with, is I don't know that anyone on the committee had a particularly strong feeling about one time versus another time. Several of us had a particular feeling that whichever it was, we need to tell people so they do not continue to get trapped by this.

CHAIRMAN SOULES: Okay. Well, let's hear if anyone else wants to comment on whether or not garnishment should be delayed as execution is delayed subject to the showing

that you can make the execution proceedings to shorten the 30-day period. Does anyone else have any comment on that?

Rusty.

MR. McMAINS: Like Elaine had indicated, the one problem I have is the notion of -- and that you had indicated in garnishment, is that in a short period of time you can electronically transfer a lot of funds and they're gone. I mean, it's not like you're going to be moving house trailers and equipment and stuff like that in the execution area. But in terms of cash, that's gone. That can be gone in a hurry in a transfer. And it seems to me that that's part of why the postjudgment garnishment, which is that you can tie that up immediately, was to prevent that type of thing from happening.

And so if you add another step or two or whatever into the process, then you do run a significant risk of those people who are not going to go to supersedeas bond, moving their funds, and having no security for the judgment and effectively litigating over nothing here; it's someplace else.

MS. DUNCAN: Right.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: But aren't the bad guys going to do that before the motion to enter judgment? I mean, they're not -- if the bad guys are going to move the money out of state, they're not going to leave it there and not do anything and wait until "Oh, they're going to enter judgment against us. Well, let's move it now." I mean, it will already be gone.

MR. McMAINS: Well, that depends. It depends on how arrogant they are in the beginning and whether they think they're going to win.

CHAIRMAN SOULES: It also depends on when the plaintiff has a judgment in their pocket.

Sarah.

MS. DUNCAN: Can I propose a somewhere in between? It seems to me that the in between is you can freeze the money but only so long as there's no supersedeas bond or alternate security on file.

CHAIRMAN SOULES: I don't think that's --

MS. DUNCAN: Because if that's true, it seems to me you should also be able to start turnover and execution proceedings under the same condition. They're just -- it's not fair, it seems to me, to penalize the liquid asset cash-rich defendant in settlement negotiations. I mean, what we're basically saying is that if you've got no cash but you've got lots of property, you're safe for 30 days. But if you're in the other situation and you've got lots of cash and no assets, you get no grace period.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: My view of the execution process is that we don't permit the sale of assets to the highest bidder at a sheriff's sale until we know for sure that the trial judge is going to stand by the judgment, because you can't get a writ of execution issued absent these extraordinary -- well, maybe not so extraordinary -- affidavit. You can't get the writ of execution issued as long

as the trial court has plenary power over the judgment. That's the current rule. And the reason that I think the rule is defensible is that you can't undo a sheriff's sale once it occurs.

The writ of garnishment, all it does is bring the money under the control of the court.

MS. DUNCAN: No.

MR. ORSINGER: What does is it do beyond that?

MS. DUNCAN: You're assuming that cash is in an infinite supply and is not -- that freezing it has no effect other than it's beyond reach for a particular period of time. Cash is vital to the operations of any individual or any company, and you can have a lot more serious impact by freezing someone's bank accounts than by freezing the sale of property, which is all a lien does.

I mean, we say you can take a lien on real estate during this interim 30-day period, right?

MR. ORSINGER: Right.

MS. DUNCAN: And we're going to

prevent its sale, and then you go get your writ of execution. And if you haven't superseded, we're going to let you foreclose on that lien, we're going to sell it and take the money and distribute it.

But if you freeze someone's cash in addition to their real estate that you've just done with the lien, in most -- depending on the size of the judgment, you've totally tied the defendant's hands from operating their company. That was precisely the reason for Paragraph 7 in the Texaco judgment, was that give and take. They've got to have bank accounts open to them to continue operation of a business, to continue inflow of money so that they don't have to sell their assets.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Well, I mean, that just gets us to, I guess, the issue of fairness and a value judgment here. But I don't think you can say that it's not okay to freeze bank accounts because there are going to be some defendants who don't have them, because then you could say, well, there are

some judgment-proof defendants you can't do anything to; therefore, we shouldn't be able to do anything to people with property. So you know, I mean, you could reduce it to that.

I think you have to say that a judgment has been issued and there ought to be some consequence of that pending an appeal. With a supersedeas you can protect yourself, but I'm not sure there's anything wrong with freezing the amount of a judgment that's been properly entered by a court after a trial immediately.

CHAIRMAN SOULES: Rusty. And then I'll get to you, Judge.

MR. McMAINS: Well, one other thing, too. I think to some extent it's overblown as to, you know, how easy it is to garnish something, because you have to know where that asset is. I mean, you have to know that those people actually have to owe something. I mean, you have to either file them against all the banks or have some basis for doing it, because most of the times our discovery doesn't necessarily lead us to where these assets are until after the judgment.

And the postjudgment discovery procedures require time and require just as much time as anything else frankly.

So the only time that the problem that Sarah is talking about really is a significant problem is when you have somebody who is definitely going to file a supersedeas, haven't thought about it particularly, you know, no one has arranged it in advance, and the other side knows where its bank accounts are. And maybe that obviously was the case in the Times-Herald situation, but it's not often the case.

CHAIRMAN SOULES: The judge has to set the amount of replevy bond on the face of the garnishment order, so there is a right. But this doesn't solve your problem of how fast can you get the bond together.

And then, of course, I guess the last of among other things we could say is wrongful garnishment. If that judgment gets turned around on appeal and you've interrupted the business activities of a going business for several days, you may be subject to some big-time liability, so that's always a risk

too.

Richard Orsinger.

MR. ORSINGER: The size of the replevy bond is supposed to relate to the amount of money that you capture rather than the full judgment. Is that right?

CHAIRMAN SOULES: I don't know, Richard. I haven't looked at it. I'm sure it's here somewhere.

MR. ORSINGER: Because if the replevy bond is just to free up the amount of cash that was captured, then someone could more readily do that. Even if they had a $20 million judgment against them but you captured 75,000 in a bank account, they could free the 75,000 up by posting a replevy bond even if they hadn't posted a supersedeas bond in the full amount of the judgment. Or is that wrong?

MS. DUNCAN: Read 664.

MR. ORSINGER: 664?

MS. DUNCAN: 664 indicates or has indicated -- and I reread it right now, but it has indicated in the past to me that a replevy bond is limited to tangible property.

It's not to cover cash. It's not -- a replevy bond is something different from a supersedeas bond.

CHAIRMAN SOULES: For the value of the property or indebtedness sought to be replevied.

MR. ORSINGER: So that means that you can set the bond in the amount of the cash that was captured, couldn't you, the replevy bond?

MR. McMAINS: Right. Well, that's what it is for.

MR. ORSINGER: Well, okay. Then, you know, if you have a $10 million judgment and it's going to take you a month to get a supersedeas bond, that's fine. But if they've captured 50,000 in cash, it should be easier for you to get a replevy bond in just the amount of the cash that was captured, which would then free up your cash flow.

CHAIRMAN SOULES: That's really in the last paragraph of 664, On reasonable notice to the opposing party, which can be less than three days, the defendant -- that's not the garnishor or the garnishee, this is

the judgment debtor -- shall have the right to move the court for a substitution of property, of equal value as that garnished. Not equal value to the judgment, but the value of that garnished.

MR. ORSINGER: Well, that takes some of the urgency out of Sarah's situation because that's likely to be a much smaller bond than the supersedeas bond and can probably be arranged more quickly.

CHAIRMAN SOULES: And this is where you can substitute other property, or you might do that, if you want to put something else up. That's under 664.

But anyway, delay or no delay. I guess do we change the timing? Somebody make a motion on the issue, which is do we change the timing of the availability of a writ of garnishment --

MS. DUNCAN: Well, wait a minute.

CHAIRMAN SOULES: -- or do we set the timing from the time the judgment is signed, if that's unclear.

MS. DUNCAN: Let's clarify,

because the cases go several different ways on when you can get a postjudgment writ of garnishment.

CHAIRMAN SOULES: Should the timing of the availability of a writ of garnishment be at the time the judgment is signed or at the time execution is available?

Okay. How many feel that it should be at the time execution is available? Nine.

How many feel it should be available at the time that the judgment is signed? Six.

Nine to six for at the time execution is available.

Judge Peeples.

HONORABLE DAVID PEEPLES: Luke, and under the same circumstances, one of which is you can come in and tell the judge, "I think there's something that's going to happen here," and the judge can say, "You can garnish right now." That's what happens under 628.

CHAIRMAN SOULES: Well, I was just reading 628 again in light of Bonnie Wolbrueck's comment, and she's right. All you have to do is file the affidavit with the clerk. The judge isn't even involved.

HONORABLE DAVID PEEPLES: And you mentioned awhile back that -- you know, what proof is there going to be. This is -- nobody is going to appeal this, and if the judge thinks something is going to happen, he or she is going to let you garnish, I think.

CHAIRMAN SOULES: Well, you don't even have to go to the judge. All you've got to do is file an affidavit with the clerk.

MR. YELENOSKY: And the clerk will issue it.

HONORABLE DAVID PEEPLES: If that happens everywhere.

PROFESSOR DORSANEO: Bill Dorsaneo. Which is perhaps an undesirable methodology.

MS. DUNCAN: Except how often have you seen it?

CHAIRMAN SOULES: And Judge Guittard just inquired "Is that an invitation to perjury?"

Okay. Well, that's resolved, then, by a majority of this committee or by a majority of the votes cast that it will go to the time of

execution.

Next?

HONORABLE C. A. GUITTARD: The next thing we have to present has to do with electronic recording, and so in that connection I refer you first of all to Page 63 of the trial rules.

MR. ORSINGER: 62.

CHAIRMAN SOULES: We'll take one more rule and then we'll go eat lunch.

Is this going to take awhile? Okay. Let's break now if this is going to take some time.

(At this time there was a lunch recess.)

(HEARING ADJOURNED AT 12:10 P.M.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, WILLIAM F. WOLFE, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on November 18, 1994, Morning Session, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $1,187^{00}$.

CHARGED TO: Soules + Wallace.

Given under my hand and seal of office on this the 22nd day of November, 1994.

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William F. Wolfe

WILLIAM F. WOLFE, CSR
Certification No. 4696
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