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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

NOVEMBER 17, 1995

(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 17th day of November, A.D. 1995, between the hours of 9:00 o'clock a.m. and 11:55 o'clock a.m., at the Texas Law Center, 1414 Colorado, Rooms 101 and 102, Austin, Texas 78701.

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(Meeting called to order at 9:00 a.m.)

CHAIRMAN SOULES: Okay. I sure appreciate everybody being here; obviously the weather is not good. I'll try to muddle through this as best I can without Holly, which won't be easy for me. It is imminent that we're going to have a junior member of this Committee. If it didn't happen last night, it's going to be happening soon, so Holly's not able to be here. So anyway, we all wish her well.

On our agenda this morning we're going to begin with Steve, Item No. 2 instead of Item No. 1. Don Hunt is not able to be here. Bill Dorsaneo will give that report on 300 through 331, but he'll give it after we talk about Steve's Rule 145. Steve.

MR. YELENOSKY: Ready?

CHAIRMAN SOULES: Yes, sir, ready.

MR. YELENOSKY: I've handed out 145 as it was when it went to Richard Orsinger's subcommittee. And there they made some minor changes which are really mostly

labeling changes, and one thing in a later paragraph, the drafting of an earlier paragraph. And maybe I should just start by dictating the changes, if you want to mark them or just listen. I have no problem with the changes.

What it will say now is "Rule 145, Affidavit of Indigency," instead of "Inability," which seems to make a lot more sense. And then the first paragraph has the subheading now labeled (a) for consistency with the other rules, (a) Affidavit, and then there's no other change in that first paragraph.

The second paragraph now has the label "(b) Contents of Affidavit," and there's no other change in that paragraph, of course, other than the changes that are noted already. And then the next paragraph is relabeled instead of (2) as (c); the next one, of course, (d).

And there is a change in (d). If you'll look down one, two, three, four lines where there's a parenthetical, it reads now, and this is the language from the current rule

which I hadn't changed, "Other than a party receiving a governmental entitlement." If you'll look back up to the first paragraph, it talks about receiving a government entitlement based on indigency. And the subcommittee, I think quite correctly, thought that the "based on indigency" language should be tacked on in that parenthetical as well.

And then, of course, paragraph 4 is renumbered or renamed subparagraph (e). So that's the rule as passed by the subcommittee and without any objection by me.

CHAIRMAN SOULES: Okay. Any discussion? Judge McCown.

HON. F. SCOTT McCOWN: I was wondering what was the thinking behind the last sentence on the IOLTA certificate, that a party's affidavit of inability accompanied by an attorney's IOLTA certificate may not be contested?

MR. YELENOSKY: Well, that was the nut of the whole thing, was that we, back when I was at Legal Services and still since then, we were getting feedback from private attorneys who were getting referrals, that

they were happy to take referrals and do cases for indigents, but they were getting caught up with challenges to the affidavit of inability on some simple cases where they thought it was frivolous; but nonetheless, people were entitled to file it.

The thinking was that when we get attorneys who are willing to volunteer their time, which is going to be increasingly important given cutbacks in Legal Services, if the person has already been screened by an agency or a nonprofit that has been essentially approved for IOLTA funding by the IOLTA board, and approved because it has and follows a screening procedure that specifies up to, I think, 125 percent of the poverty level, that that was enough of an insurance that it ought to be the policy of the Supreme Court essentially that those private attorneys as well as the attorneys working directly for those nonprofits should not have to go through dealing with the contest to an affidavit.

CHAIRMAN SOULES: Judge Till.

HON. PAUL HEATH TILL: That means the party on the other side, the one

that's being sued, would not be able to contest it?

CHAIRMAN SOULES: Correct.

MR. YELENOSKY: That's correct.

HON. PAUL HEATH TILL: Well, is that considered to be a proper procedure for the rights of the people that are being sued?

MR. YELENOSKY: Well, I don't think it's --

HON. PAUL HEATH TILL: Should they not also be able to contest it if they feel that it's improper?

MR. YELENOSKY: I don't think anybody has a right not to be sued by -- has a right to be sued or not to be sued based on the other person's indigency.

HON. PAUL HEATH TILL: That's not the issue, whether they have a right to be sued or not to be sued. The issue is whether or not the affidavit that is filed and that is underlying the suit is proper and correct or not. I think they've got every right to be able to contest that, if that is the issue.

MR. YELENOSKY: I actually --

CHAIRMAN SOULES: Well, let me

just get a show of hands. That is the very policy that we voted on in order to do this at all, and that is, if a party has been through an IOLTA screening, does the lawyer who accepts that pro bono work have to deal with the contest of an affidavit of inability. And this Committee voted no by a very one-sided vote that they do not have to contend with that. So that's why we have this on the table today. Now we're down to words.

Now, does anyone feel like that a lawyer who takes -- let me just state the proposition. The proposition is, a lawyer who takes an IOLTA referral on a pro bono basis does not have to contend with a contest of the affidavit of inability. Does not have to.

HON. F. SCOTT McCOWN: Luke --

CHAIRMAN SOULES: How many agree? Show by hands.

HON. F. SCOTT McCOWN: Before we vote, can I ask something, Luke?

CHAIRMAN SOULES: Show by hands please. One, two, three, four, five, six, seven, eight, nine, 10, 11, 12, 13, 14, 15, 16. Those opposed.

HON. F. SCOTT McCOWN: Could I ask a question?

CHAIRMAN SOULES: If it doesn't get back into that debate, because that's settled. But if you have a question that does not get back into the debate of that issue, then absolutely, please, speak.

HON. F. SCOTT McCOWN: Well, I know sometimes we do go back into things that are settled.

CHAIRMAN SOULES: Not this time.

HON. F. SCOTT McCOWN: But I have a question, which is, could a compromise be worked out that the attorney's IOLTA certificate creates a presumption, without going so far as to say that there can never be a contest? Because --

CHAIRMAN SOULES: Those in favor of that show by hands.

HON. F. SCOTT McCOWN: Luke, could we discuss --

CHAIRMAN SOULES: Those opposed show by hands.

HON. F. SCOTT McCOWN: Luke,

could we discuss this, please?

CHAIRMAN SOULES: No. It's been discussed, Judge. And we can't keep going back and going back to things for people that weren't here. We've got to go forward with this docket. I think we have demonstrated that the consensus of this Committee is no contest of any kind.

HON. F. SCOTT McCOWN: Well, I'd like to note my dissent, and I will write on that separately to the Court.

CHAIRMAN SOULES: Okay.

HON. C. A. GUITTARD: Mr. Chairman, may I suggest for the record that this standard or whatever it is that applies to the trial court ought to be incorporated into the TRAP Rule 45; and also that, if we adopt general rules, certain portions of this ought to be put in the general rules?

CHAIRMAN SOULES: Okay. If you would go ahead and propose that, I think it probably makes sense.

Any opposition to what Judge Guittard just said?

HON. SARAH DUNCAN: Can we hear from Bill?

CHAIRMAN SOULES: Okay. Then we will proceed in that way, Judge.

PROFESSOR DORSANEO: At our subcommittee meeting, Judge, on this particular rule, that matter came up, and Richard Orsinger indicated that there was some substantial opposition to the IOLTA certificate procedure, if that's what you're talking about, for appellate practice. And I think, without being certain, that I would be opposed to the IOLTA certificate in the context of the court reporter preparing the statement of facts.

CHAIRMAN SOULES: Well, it sounds like that's got some more issues to it, so let's just leave that aside.

MR. ORSINGER: When this first came up, we agreed that it wouldn't apply to the appeals.

MR. YELENOSKY: Right. I agree with that. And Luke, if I could just say one other thing.

CHAIRMAN SOULES: Anything else

on Rule 145? Steve Yelenosky.

MR. YELENOSKY: Yeah. Just to address in part your concerns, Judge McCown, without suggesting a further compromise, initially this was drafted where there would be an IOLTA certificate -- and this came out of the State Bar Subcommittee for Legal Services to the Poor. Originally it was drafted where there would be an IOLTA certificate and there would not be an affidavit at all. And one of the compromises that I thought was appropriate in the last Committee meeting was to have the certificate simply accompany the affidavit, and I think Judge Brister suggested that, so that a person who filed an affidavit, even if it was accompanied by an IOLTA certificate, and the affidavit turned out to be false, was still subject to perjury. And I think that's appropriate.

What we're talking about here, though, is a policy question of whether, you know, the game is worth the candle. Most of the time you've got pro bono attorneys who aren't going to be doing it unless they think at some level

the person is indigent, and so should we have a policy that better serves a service to most of the people who are indigent, although it's imperfect.

CHAIRMAN SOULES: Okay. With these changes you move the adoption of this Rule 145?

MR. YELENOSKY: Yes.

CHAIRMAN SOULES: Is there a second?

MR. BABCOCK: Second.

CHAIRMAN SOULES: Those in favor show by hands. 16.

Those opposed. 16 to two. It carries 16 to two.

Okay. Next we'll go to the 300 or 331 report. Bill, you're going to handle that, aren't you, for Don?

PROFESSOR DORSANEO: Yes, sir. All of you have the document that was mailed by Don Hunt. There are some extra, not very many, copies up here.

CHAIRMAN SOULES: It's under a letter of November 13, 1995.

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: Styled "Redline Version, Rules 296 through 331."

PROFESSOR DORSANEO: The first thing you will note is that --

CHAIRMAN SOULES: And then a clear version behind that and a disposition table behind that. That's what's here (indicating).

PROFESSOR DORSANEO: The first thing you will notice is that Don Hunt's committee assumed jurisdiction over Rules 296 --

HON. SARAH DUNCAN: Luke gave jurisdiction.

PROFESSOR DORSANEO: Pursuant to the suggestions of the Chair, among others. (Continuing) -- over Rules 296 through 299a. And that's the first little chunk that I want to present.

I will remind the Committee that we have been through a substantially similar version of these proposals once before when the substantially similar version was presented by the Subcommittee on Appellate Rules. At the direction of the Chair, after our initial

consideration, the matter was referred to the subcommittee for further action. This is the further action and further consideration, and I suppose it would be fair to say what we have here now is the proposal being returned to the full Committee for further, if not final, consideration.

The Rule 296 proposal, as I think you will recall our discussion, is designed principally to do two things. One, to clarify when findings of fact and conclusions of law are appropriate in a case that's partially bench tried and partially tried to a jury. The first two sentences are designed to deal with that problem, which I recall was primarily presented by Richard Orsinger, based on his experience with family law cases.

The second change is the addition of a final sentence that we worked on at some length previously concerning whether a request for findings has an effect on an appeal of a summary judgment. You will recall that there is Supreme Court authority for the proposition that since a request for findings of fact is not appropriate in a summary judgment case,

the request does not extend the appellate timetable. Whether that concept is an appropriate concept to begin with is still up for consideration, as well as where the matter should be articulated. Perhaps it should be in the perfection of appeal provisions of the Appellate Rules, if it's to remain.

So on behalf of Don Hunt's subcommittee, I move the adoption of Rule 296 in substantially the form that it's worded here. I say that because I don't think personally it's necessary to make reference to Texas Rule of Civil Procedure. I think our convention has simply been to talk about "Rule," and if it's a rule under Texas Rules of Civil Procedure, people would know that that's the rule we're talking about, as opposed to the Rules of Appellate Procedure or the Oklahoma Rules of Procedure or some other book.

CHAIRMAN SOULES: Is there a second?

HON. C. A. GUITTARD: Second.

MR. McMAINS: Can we have some discussion?

CHAIRMAN SOULES: We should

have discussion. Rusty.

MR. McMAINS: My recollection of our problem with Rule 296 when we were dealing with it before, and I don't know where we wound up, I mean, or exactly where we left off when we kind of gave up and said, "Let somebody else work on it awhile," is the problem of exactly what does trying an issue to the court -- or how is it that we define that differently from a case that was tried to a jury but one or more elements were omitted and therefore are deemed to have been tried to the court. And while you can request findings under our deemed findings rule, the judge is not required to do them. And now all of a sudden we have a rule which says on an issue tried to the court, which is exactly what the nature of deemed findings is, that you are entitled to make that request. And there now appears to be a requirement that they actually do them, as opposed to the way the deemed findings rule has always operated in this state.

As I recollect, our problem was we were trying to figure out whether it was -- whether

parties agreed to try an issue or part of the claim to the court or whether it had -- whether it had merely done it -- you know, we were trying to distinguish between where it was a nonjury and a jury trial on certain issues, with the notion that people had to -- the judge needed to know in advance that he was going to have to make a finding on something. And if it was on a part of the case that was going to the jury, the deemed findings rule somehow didn't apply to it.

Now, there's nothing in this rule that exempts the deemed findings rule, and when -- and there, rather, all it just says is that if it's where -- "in which an issue of fact was tried by the judge," in the past tense. It's kind of you look at it after what's tried by the judge. Then it says, "Trial of an issue of fact to a jury in the same case does not excuse the judge from making findings of fact on an issue tried by the judge." Well, now, wait a minute. That's what deemed findings/waived grounds notions are.

In fact, can you actually -- I'm concerned about whether or not an argument

could be made that, well, we actually tried the so-called waived ground to the judge, asking him to make a finding on that. There wasn't any issue submitted to the jury. I mean, we're going to have an argument on whether or not the judge was going to make a decision on certain issues.

And it's this interplay with the deemed findings rule that was giving us the problem in terms of the drafting, because we couldn't figure out how it was that everybody knew that this was an issue that the judge was going to decide that was different. And I don't see any real language in this rule that makes that distinction.

PROFESSOR DORSANEO: I suggest that we add the words "except as provided in Rule 279" after the sentence that begins "trial of an issue of fact to a jury."

HON. SCOTT A. BRISTER: Let me add something to that.

CHAIRMAN SOULES: Judge Brister.

HON. SCOTT A. BRISTER: Issue of fact, so there's a dispute about whether

discovery was supplemented within 30 days. Now, I decide that issue. It seems like the fact issue -- I sure don't want to do findings and conclusions on everybody that doesn't designate an expert. To me, the struck language where you tried a case, that's pretty clear. That means it was a trial. And the issue of fact, I decide those by the dozens every Monday, and I sure don't want to do findings and conclusions on all of those.

There's some way we need to make clear that we're talking about trials. We're not talking about all the other issues of fact. Admissibility of every exhibit is basically an issue of fact decided by a judge.

PROFESSOR DORSANEO: The word -- the current rule and this draft use the word "tried," and that under the case law --

HON. SCOTT A. BRISTER: It uses "case tried," not "issue of fact tried."

PROFESSOR DORSANEO: "Any party in a case in which an issue of fact was tried." The word "tried" --

HON. SCOTT A. BRISTER: Well,

the struck language is "case was tried without a jury."

CHAIRMAN SOULES: Well, that could be put back in, except for delete the words "without a jury," and then rewrite the first sentence, and it will work. Put "In any case tried in the district or county court," so it has to be that kind of a situation, and then start the rest of the sentence.

Richard Orsinger.

MR. ORSINGER: A possible fix for Judge Brister's concern would be "findings of fact on an ultimate issue tried by the judge." The case law says you're only entitled to findings on ultimate issues. And I think that something that's peripheral, like evidentiary or even the admissibility of testimony from a witness at all, wouldn't be considered an ultimate issue.

HON. SCOTT A. BRISTER: Well, if it's their only expert in a medical malpractice case --

MR. ORSINGER: The ultimate issues are the issues you can submit to a jury. That's what "ultimate" means, if you

look up the definition of "ultimate."

HON. SCOTT A. BRISTER: Yeah. I'm going to be faced -- I'm going to get 100 demands for it anyway.

MR. ORSINGER: Don't give it to them.

HON. SCOTT A. BRISTER: Well, that will be fine. But that doesn't mean -- the idea is not to create more trouble, more motions and more appeals.

MR. ORSINGER: If your lawyers don't understand what the law is, you just have to tell them and then stand by it.

HON. SCOTT A. BRISTER: Sure. And on summary judgment that's fine. But this -- I'm saying this is going to create an ambiguity that was not there when you're talking about a case tried without a jury. Everybody knows that is a nonjury trial and a nonjury trial only. But an issue of fact tried by a judge could be any one of a hundred things.

HON. C. A. GUITTARD: Not if it's ultimate.

CHAIRMAN SOULES: Bill

Dorsaneo.

PROFESSOR DORSANEO: Well, under the case law, "tried," perhaps unfortunately, means trial of the merits.

HON. C. A. GUITTARD: Not decided, but tried.

CHAIRMAN SOULES: Where is the word "ultimate" in the 270 series? It's somewhere, isn't it?

PROFESSOR DORSANEO: No. It's simply in the case law. And I, as spokesperson for this committee, would embrace Richard Orsinger's suggestion, because it would give the trial judge something clearly to point to and say, "No. All that you're only talking about is ultimate issues involving the merits, not about satellite disputes and satellite litigation involving procedure."

MR. PERRY: Rule 279 speaks to independent grounds for recovery or defense. Maybe that language could be used.

PROFESSOR DORSANEO: Well, it speaks to those in the first sentence, but it's primarily about deemed issues.

Rusty, would it be satisfactory simply to say "except as provided in Rule 279" or words to that effect for that first problem that you identified, which I do think is a problem?

MR. McMAINS: Yeah. I guess the problem is where you put it, so long as we make it clear. Our problem was before, as I say, was I think that -- I mean, that may make it clear to us, but in reality I'm not sure it's going to make it clear to the court, is what the problem is. Because the truth of the matter is that deemed findings are kind of something that don't come up until you get to the appellate court. So the problem is, by and large, that nobody is going to contend that there is one, except that it may be that as a prophylactic measure now what will happen is that parties would just file a request for findings. And somebody will -- some appellate lawyers will just put that in their paraphernalia, and immediately after a trial and before the judgment you will get a request for findings.

And I don't -- you know, I don't know what that's going to do, because it's one

thing to say that it excuses him from having to do it, but if he even -- you know, but if they're entitled to request it or are signaled to request it, then it's probably going to be done in every case.

CHAIRMAN SOULES: The standard in our Charge Rules now is material issues of fact raised by the pleadings and the evidence. That's what the judge is going to find if the jury doesn't. I mean, of course, pleadings and evidence, I guess, could relate to getting into a discovery fight.

MR. McMAINS: Yeah. The problem is that two of the predicates frequently are actually factual determinations by the court in the course of making evidentiary decisions. But you clearly are not -- and that even may be an abstract term, an issue of fact, but it's not an ultimate issue. I mean, I think that "ultimate issue" comes closer to fixing that problem than anything.

PROFESSOR DORSANEO: Ultimate. And then the other word in the jurisprudence is "controlling." And all we're trying to do

is to give a signal that we're talking about the merits of the case and the elements of claims and defenses and not about anything else.

And I think just using the word "ultimate" would clarify that second problem raised by Judge Brister. And I understand what Rusty is saying, that maybe the exact words "except as provided in Rule 279" don't quite accomplish the task. But for our purposes now, would it be acceptable, so we can move on, would it be acceptable to you that we develop language that makes it clear that you do not, when a judge makes a deemed finding or more likely when the judge does not make a deemed finding, go back to the trial court in order for there to be an express finding; that it is the "presumed found in support of the judgment" part of Rule 279 that's retained --

MR. McMAINS: Yeah.

PROFESSOR DORSANEO: -- when we refer back to 279?

CHAIRMAN SOULES: I see, Rusty, the tension here. I mean, we don't want the

judge trying, after the trial is over, independent grounds of recovery or defense. That's got to be eliminated.

MR. McMAINS: Right.

CHAIRMAN SOULES: But what's wrong with asking the judge to make findings of fact and conclusions of law whenever you've realized that you're confronted with deemed findings?

MR. McMAINS: You're not. You're authorized to do that, but you have to do it before the judgment. See, it's a different timing. You're authorized to request a finding on an omitted element, assuming it is an omitted element otherwise necessary in order to get to a jury verdict, in Rule 279.

CHAIRMAN SOULES: All right.

MR. McMAINS: But this is the procedure for after the judgment. And the point is that it's directly -- you don't -- you're not entitled -- he's already done it. The judgment is a doing of it. What you're not entitled to do is to enforce any kind of request procedures ex post facto, after the

judgment.

CHAIRMAN SOULES: But why not permit it as a matter of policy?

MR. McMAINS: Well, because the rule says he's made that finding in accordance with the judgment.

CHAIRMAN SOULES: Well, if he signs the judgment, then every finding that supports the judgment is deemed to have supported the judgment.

MR. McMAINS: Right.

CHAIRMAN SOULES: And if he doesn't make findings of fact and conclusions of law in the face of a request, he may not get overturned anyway.

MR. McMAINS: But the point is that he doesn't --

CHAIRMAN SOULES: So then you just go along and assume that everything is in support of --

MR. McMAINS: But the timing to make that request, you don't have a right to make that request under our operation of Rule 279 after the judgment.

CHAIRMAN SOULES: I'm not

asking a question about timing. We can fix timing. I'm asking why not permit postjudgment requests for findings of fact and conclusions of law where some of the findings have been deemed as a result of the judgment.

MR. McMAINS: Because it's a direct repudiation of what the notion of deeming is.

CHAIRMAN SOULES: It also causes --

MR. McMAINS: It means that -- because the whole notion of the deemed findings rule is that these are issues that should have been tried to the jury. And what you did by not submitting it or by somebody not objecting to it, to its omission, is that the parties waived it at that point and waived that determination, you know, as opposed to it being a --

CHAIRMAN SOULES: You mean they waived a jury trial?

MR. McMAINS: Yes, waived their right to a trial by jury on that. And basically the judge is not encumbered by -- these, of course, are helpful for presumptions

from the appellate court standpoint primarily.

CHAIRMAN SOULES: Well, this is not a new puzzle for me today. To me, it has always made sense that we should have a rule that permitted a lawyer to go to the judge and say, "Judge, you've made a deemed finding when you signed the judgment. I want to ask you -- you know, I want to request an opposite finding." That does focus the judge on what the consequence of his judgment is as a matter of fact finding and --

MR. McMAINS: But the point is, you're really not --

CHAIRMAN SOULES: Maybe I'm completely out of step. And if nobody else agrees, I'll shut up. I don't need to be the only one, the odd man out.

David Perry.

MR. PERRY: Isn't the intent of this particular rule to deal with a situation where you intend to have an independent ground of recovery or defense tried nonjury to the court and have other things tried to the jury?

MR. McMAINS: Correct.

MR. PERRY: And if that's the case, the deemed findings situation happens when you have a ground of recovery or defense that is tried to the jury but an essential element is not submitted to the jury so that the court can make a deemed finding. So they're just two separate situations. It would seem to me that we might write into this rule that this rule would apply. Instead of using the old language about any case tried without a jury, substitute language that any independent ground of recovery or defense that is tried to the court without a jury then triggers this procedure. And I think that language would tend to distinguish it from the deemed finding situation.

CHAIRMAN SOULES: Richard, and then I'll get back to Rusty.

MR. ORSINGER: Well, what started us down this road, I think, was a lot of problems that occur in family law litigation, because that's where you often find you don't want to try custody to the jury and the property division to the judge or whatever.

But if we were to adopt your proposal, it probably wouldn't fix the problem in family law, because in family law -- let's say, for example, the character of an asset as found by the jury is binding on the judge. And I believe that the value of an asset is binding on the judge, but a recommendation on the division is not. So we have jury findings that a jury might try the characterization of three assets, but everything else is submitted to the court. But none of them are independent grounds of recovery because they all fall into one relief, which is the property division on divorce.

So if you were to put your language on there that we would get our written findings only for an independent ground of recovery that wasn't submitted to a jury, it's going to torpedo the effect on family law, because we will continue to have jury findings on value or character, and yet it's not independent from the rest of the findings that we want that the judge would do 296 findings on.

MR. PERRY: Well, you're having ultimate elements that are by agreement

submitted to the court, where other ultimate elements are submitted to the jury.

MR. ORSINGER: Well, you might say that they're by agreement. But the case law has made it such that the ultimate, ultimate, ultimate issue in property division is not a jury question, which is the property division. But preliminary ultimate issues of characterization and value are jury questions.

MR. McMAINS: Penultimate issues.

MR. ORSINGER: Penultimate issues. And so these rules kind of break down in a divorce, but this is -- the problem is ocurring often in a divorce, because in a divorce it is inevitable that you can try only some issues to the jury and you must try certain issues to the court.

And some courts of appeals have said, "I'm sorry, you asked for a jury on the value of the business. You don't get findings on anything else. We can't review your property division. Affirmed." And we've got to fix that problem.

PROFESSOR DORSANEO: Well, I

don't know whether it's appropriate for me to make another suggestion, but I'll do it anyway. How about for this first problem something like this: After that "trial of an issue" sentence, assuming that Perry's suggestion doesn't work, although it sounded pretty good to me as a way to cure the problem, we say this: "Except in the case of a deemed finding as provided in Rule 279." The idea there would be simply that the judge does not need to make an express finding when the deemed finding part of Rule 279 operates. And this sentence does not require --

MR. McMAINS: The problem is, I think you also have to include the waived ground. I mean, I'm not sure you can include it right there, well, because, you see, the problem gets into -- and where we got into the problem before was, how do we know that there is going to be a trial of an issue to the court, of an issue, ultimate or otherwise, to the court?

We started out by saying, okay, well, somehow the parties are supposed to know that an issue -- and we're really talking about

you're entitled to findings when everybody knows what's going on, not when it happens by accident. So that, again, to enforce the policy that's behind Rule 279, and which has been in our jurisprudence all along, is you go to trial with a jury trial. And it turns out that some of the defenses that you have plead, may even have evidence on, you didn't submit.

You do not want to be in the position of repudiating the notion that, well, actually that means that we had actually agreed to try that to the judge, and we let the judge decide it, and now the question is, suppose the judge says, "Oh, yes, I remember that decision," but it's nowhere on the record, and he doesn't?

Now, my problem is that unless we have some way of knowing in advance what it is that's going to be required of us, that you are going to be confronted with the potential for a situation of new Rule 279's policies not being implemented. And this was our problem and our hang-up before, is how do we know that this was going to be an issue tried to the court.

In the DR area, we don't have a problem because there are certain things that can't be tried to a jury. You know that those are going to be tried to the judge. There are some things that can be tried to the jury, and you designate what those are. So the ultimate issue, fix, assuming that, I guess, the value stuff is deemed by the case law to be an ultimate issue in terms of a jury determination of it, even though it's not the ultimate issue in the case, that may fix your problem.

But unless you include the fact that this rule should not trump the waived grounds or deemed findings part of Rule 279, because the judge is not even under Rule 279 entitled to make any findings on a waived ground, it's waived; it does not exist in the case any more. I mean, that's what that means. When the jury is -- when it's submitted to the jury and they come back with an answer, that's it.

There may be lots of grounds floating around for a judgment, but what ain't in the charge isn't one of them. And you don't want to resurrect that or resurrect the possibility

of that, it seems to me, unless we have a clear dividing line of knowing when it is that we're going to have to worry about this.

CHAIRMAN SOULES: Anybody else? Elaine Carlson.

PROFESSOR CARLSON: David, I was a little bit confused by your suggestion. Are you suggesting that 279 would apply to express agreements to try an independent ground or grounds, independent grounds that weren't submitted in the charge without objection or request?

MR. PERRY: It sounds to me like, listening to the discussion, that there are three situations where it would be intended to apply.

One would be where there is an agreement in effect to try some grounds of recovery to a jury and others to the court nonjury. The second situation would be where there is an agreement in effect to try some elements of a ground of recovery to the court nonjury. And the third would be a situation where some elements as a matter of law must be decided by the court, although the rest of the case is

decided by the jury.

PROFESSOR CARLSON: Okay.

PROFESSOR DORSANEO: One more try. Unless -- I'm thinking -- unless the ground, whether we need to say "of recovery or defense," has been waived, or a finding, perhaps one or more, has been deemed or should be deemed in support of the judgment as provided in Rule 279, we can capture all of Rule 279 in English language.

MR. McMAINS: That's fine.

CHAIRMAN SOULES: So let me see if we've got a consensus on this. 296 is to cover circumstances not embraced by 279 and never to address the circumstances that are addressed in 279. Is that -- those that are in favor of that show by hands. 15.

Those opposed. Okay. There's no opposition to that. So 279 covers the circumstances as described there. This covers -- this does not interfere with that or with --

MR. McMAINS: This covers when there's a trial. It's just a question of we need to know -- we can't seem to describe when

there is a trial.

CHAIRMAN SOULES: When there is a trial. I think -- let me try this first. What kind of case are we talking about? Well, the old rule did part of that, but I think we are talking about in a case tried on the merits in the district or county court. That's one element of it, describing the case, isn't it? Okay. So we could put those words back in. "In a case tried," insert "on the merits in a district or county court." Delete "without a jury," because that's confusing. That's causing problems.

The next element of the type of case we're talking about is "in which an issue of fact was actually tried by the judge on the merits." Is that right?

HON. SCOTT A. BRISTER: Do you need to add "ultimate" there or not?

CHAIRMAN SOULES: On the merits. Tried by the judge on the merits.

MR. McMAINS: Well, once again, the problem is that by operation -- and I realize we're going to try and exclude 279 later from your predicate language, but that's

what Rule 279 does.

CHAIRMAN SOULES: Well, that's out. Bill, the master of English, is going to cause our English to work and take that out. So we've got that part for the moment.

MR. McMAINS: Okay. Well, I --

CHAIRMAN SOULES: And we do need your input whenever that's addressed obviously, Rusty.

MR. PERRY: Luke, why don't you leave in the "tried without a jury" phrase, because one whole category of cases that this is supposed to cover is if the case is tried without a jury.

CHAIRMAN SOULES: Well, okay.

MR. PERRY: And then say "or."

CHAIRMAN SOULES: That's exactly what's been causing our problems, David. Let's go on. Maybe we can fix that, though, in phrase number two, "in which one or more issues of fact."

MR. ORSINGER: Now, Luke, that might -- in deference to Judge Brister's comment, maybe you should say "ultimate issues of fact" there as well as in the next

sentence.

CHAIRMAN SOULES: "One or more ultimate issues of fact" -- and I don't know whether the verbage is "was" or "were," if it's one or more.

HON. SCOTT A. BRISTER: Ask your English expert.

CHAIRMAN SOULES: I'll ask my English expert. (Continuing) -- "were actually tried on the merits."

MR. ORSINGER: Now, the word "actually" there is supposed to avoid "deemed"?

CHAIRMAN SOULES: Yes.

HON. SCOTT A. BRISTER: Yes.

MR. ORSINGER: Well, since we're avoiding "deemed" with all this other wording, why use "actually"?

CHAIRMAN SOULES: Take that out. We'll let Bill work his spin on that part.

MR. McMAINS: The "deemed" is a mythical trial.

MR. ORSINGER: It's a virtual trial.

MR. McMAINS: Cyberspace.

CHAIRMAN SOULES: Now, that's the kind of case we're talking about, right? It's in any case tried on the merits in a district or county court in which one or more ultimate issues of fact were tried by the judge on the merits. So we're talking about the case has been tried on the merits and this issue has been tried on the merits.

MR. ORSINGER: I would suggest that "on the merits" is unnecessary if you use the word "ultimate" before "issues." Because it's inherent, isn't it, that ultimate issues are only determined in a trial on the merits?

CHAIRMAN SOULES: Well, what I'm trying to get to and get around there is Rusty's comments that if you strike all the experts, that's pretty ultimate. And I don't know whether that's anything we need to worry about or not worry about, but --

MR. ORSINGER: For anyone that knows what the law is, that's not a problem. For people that don't know what the law is, they probably have that problem and other ones as well.

CHAIRMAN SOULES: All right. Well, I don't care whether those words are there or not.

MR. McMAINS: Well, if they've got their experts struck, they've got plenty of problems.

CHAIRMAN SOULES: If I didn't say "ultimate" as I read it the last time, let me do it again. "In any case tried on the merits in a district or county court in which one or more ultimate issues of fact were tried by the judge." I don't care whether you put "on the merits" or not. If it's redundant, don't use it; if it's clarifying, use it maybe. And then "any party in the case may request" and so on and so forth.

HON. C. A. GUITTARD: Now, does that cover the situation where you have some issues tried by the jury and some by the judge?

CHAIRMAN SOULES: Yes, sir.

MR. McMAINS: Well, yes. It does in the sense that right now our predicate to the rule is "in a case tried without a jury," and that's the language that the courts

have held means that if there's a jury involved at all, you're entitled to use this rule.

CHAIRMAN SOULES: Well, we've also got sentence 2, "Trial of an issue of fact to a jury in the same case does not excuse the judge from making findings of fact on an issue," and I said, "tried on the merits by the judge."

MR. McMAINS: And that's the place where you've got to reserve 279.

CHAIRMAN SOULES: And we're going to do that.

MR. McMAINS: So if you make those two combinations of changes, theoretically that may fix it.

CHAIRMAN SOULES: So would we want to say, "Trial of an ultimate issue of fact to a jury in the same case does not excuse the judge from making findings of fact" --

MR. ORSINGER: No, no. We better not use the word "ultimate" there.

CHAIRMAN SOULES: All right.

MR. ORSINGER: Because somebody

may inadvertently try a nonultimate issue to a jury, and then someone is going to say, "Hey, then you don't get any finding. You all screwed up."

CHAIRMAN SOULES: So do we say, "Trial of an issue of fact to a jury in the same case does not excuse the judge from making findings of fact on ultimate issues" --

HON. SCOTT A. BRISTER: -- "tried by the judge."

CHAIRMAN SOULES: -- "issues tried on the merits by the judge." I don't know whether we should use "on the merits" or not.

HON. C. A. GUITTARD: It's redundant.

CHAIRMAN SOULES: I don't think it's redundant, but Judge Guittard thinks it is.

MR. ORSINGER: Well, let's put it in one place and not the other.

CHAIRMAN SOULES: Just like cascarones, just throw them up in the air and see where they land.

Okay. Assuming we can protect 279 from

the operation of anything in this rule by other words, will that work?

Justice Duncan.

HON. SARAH DUNCAN: As an alternative, I think we're trying to embed too many concepts and too many rules in a couple of sentences. And I think we're all pretty clear on the three or so situations that we're trying to cover.

We're all exceptionally clear that we're not in any way trying to affect a case where a ground of recovery or defense has been waived or a finding deemed under 279. And I think we ought to just say that more explicitly, (a) in a case tried without a jury; (b) in a case where certain issues are tried both to the jury and other issues are tried to the court, here is what you get; in a summary judgment, here is what you get. Now, if you're entitled under (a), (b) or (c) to make a request for findings, here is how you do it, because, I mean, "ultimate issues on the merits," I mean, is getting really complicated. I mean, it's not even grammatically correct.

When you say "in any case tried in the

district or county court in which," the "in which" describes court. It doesn't go back and describe case. And I think that is happening because we're trying to embed so much law in one sentence.

MR. McMAINS: Luke, I think there's --

CHAIRMAN SOULES: Okay. Rusty.

MR. McMAINS: I think there's merit to what she says in terms of it being ease of application and also to apply it specifically to fix Richard's problem and Judge Brister's problem, because I think that we really are talking about situations in which a case is tried to the court without a jury. Everybody knows when that's going on.

Then we know that when there's a case that is tried to the jury that this doesn't have any application to the situation in Rule 279 as to waived grounds/deemed findings, because that's elsewhere.

But it also has application to the situation in which part of the case is tried to the judge on the merits and part of it is submitted to the jury. And this rule is

designed to cover part 1, part 3, exclude part 2, because any request you need to make in the part 2 part is done pursuant to Rule 279.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: You need a further refinement, though, because part 3 is divided into two parts, one were you intentionally tried part to the jury and one where you unintentionally -- I mean, one where you intentionally tried part to the judge and one where you unintentionally tried part to the judge.

MR. McMAINS: Why is that a problem?

MR. ORSINGER: Because we're excluding the part -- we're excluding from this rule the part that you unintentionally tried to the judge.

MR. McMAINS: Well, yes. Under 279.

MR. ORSINGER: That's right. So you really have four areas, two of which are excluded, two of which are included.

MR. McMAINS: Yes, Judge. Judge Guittard.

CHAIRMAN SOULES: Judge Guittard.

HON. C. A. GUITTARD: I would suggest an addition to this language in the rule: "This rule does not affect deemed findings of fact as provided by Rule 279."

CHAIRMAN SOULES: Well, Bill is going to work on that. I mean, that's complicated, apparently somewhat complicated, and we're going to write language for that. But now we're trying to deal with --

HONORABLE C. A. GUITTARD: Well, I'll submit this for his consideration then.

CHAIRMAN SOULES: We're trying now to write the rule to take care of, as I understand it, three things. There may be more. If so, speak up. One is where the case is actually tried to the judge; no jury has anything to do with it. Second is where the law requires some of the case to be tried to a jury and some to a judge, as in family law matters. The third one is where the parties

consent basically -- for example, the issue of attorney's fees may or may not be submitted to the jury.

And if you tell the judge -- as a matter of fact, that practice is going on right now, where if you tell the judge you're going to try attorneys' fees to the court, then 279 mystically leaves the courtroom as far as deemed issues, and there's no real statement anywhere in the rules that it leaves, but it does leave, and you can still get your judge trial on attorneys' fees.

So this is where the parties either consent or by operation of law try the case to -- parts to the judge and parts to the jury and where the case is entirely tried to the judge.

MR. McMAINS: I believe so. I'm not sure what Richard is talking about when he says -- trying to make a further distinction of intentional or unintentional, because it seems to me that it's pretty -- if you walk in and there's not a jury in the box, you know pretty well you've tried it to the court. And I don't know how you

unintentionally try something to the court. I mean, that was our problem in the beginning. We didn't want "unintentionally." The only unintentional trying to the court we have is under Rule 279, and that's because there's a jury sitting there. You're not realizing that he's deciding that.

CHAIRMAN SOULES: Let me ask Richard a question. Is unintentionally trying something to the judge equivalent to some oversight in your --

MR. McMAINS: -- in your practice.

CHAIRMAN SOULES: -- charge request?

MR. ORSINGER: This never happens in family law, that you unintentionally try stuff to the court. I mean, you intentionally try stuff to a jury, and then everything else by process of elimination is tried to the court.

But Rusty was worried about the wording of our rule impacting his kind of cases, where someone inadvertently fails to submit an ultimate issue to the jury. And that's what I

mean by "unintentionally trying something to the court."

MR. McMAINS: Yeah. But you didn't -- that's not an unintentional trial to the court.

CHAIRMAN SOULES: So Rusty's approach to that is --

MR. ORSINGER: Someone may want to do that on purpose?

MR. McMAINS: No, no. It's treated as a waiver. I mean, it may be -- it is a waiver by rule. The rule says that it's a waived ground. If there is no element submitted to the jury and you have a jury trial, then it ain't been tried at all, and he ain't entitled to try it.

MR. ORSINGER: That's right.

MR. McMAINS: Okay. So it's not a question of having unintentionally tried it to the judge. It wasn't tried, and it ain't going to be tried.

MR. ORSINGER: Well, the only thing that's unintentionally tried to the judge is an omitted element --

MR. McMAINS: That's right.

MR. ORSINGER: -- on otherwise submitted issues.

MR. McMAINS: Right.

MR. ORSINGER: And that's why I said your last category -- you said there's three categories, where there's no jury at all, where everything is tried to the jury, and where part of it is tried to the court and part of it is tried to the jury. And all I said is in that last category where part of it is tried to the court and part of it is tried to the jury, sometimes inadvertently the part that's tried to the court is an omitted issue which you're trying to exempt from Rule 296, and that's why I made that clarification.

MR. McMAINS: What I was saying is, though, that if we provide in there the "intentional" part, that if you've got a jury in the box and everyboby thinks they're going to be deciding it, then whatever part is tried by the judge is controlled by Rule 279.

MR. ORSINGER: That's right.

MR. McMAINS: The only category, I think, that we were trying to fix with this rule is the part where there was in

fact an intentional decision to try part of the case to the judge by the parties.

MR. ORSINGER: Right.

MR. McMAINS: And in that case this rule is intended to apply and supplant the current practice.

MR. ORSINGER: Right.

MR. McMAINS: And I don't think anybody has any problem with that. And it's in that context that I don't see that there's an unintentional trying of anything.

MR. ORSINGER: Well, then forget it.

MR. PERRY: But thanks anyway.

CHAIRMAN SOULES: Okay. So how do we say all that?

PROFESSOR DORSANEO: How about this -- I don't care about the beginning part about whether it refers to district or county court -- but how about "A party in a case in which an ultimate issue of fact" -- which I understand the one thing that's been decided is we use the word "ultimate" to modify "issue of fact" in the first sentence and sometimes in the second sentence -- "was tried" at the

Chair's suggestion "on the merits," despite the fact that it's redundant, but a little redundancy is sometimes a good thing when you're dealing with people whose heads are thicker than others, "may request the judge to state in writing findings of fact and conclusions of law. The trial of an issue of fact to a jury in the same case does not excuse the judge from making findings of fact on an ultimate issue tried on the merits by the judge, unless the ground to which the issue is referable has been waived, or an omitted element is deemed found as provided in Rule 279."

Now, we could add more words. We could say, "deemed found in support of the judgment" or whatever else, but you'd have to be pretty unimaginatve not to be able to fill in those blanks.

CHAIRMAN SOULES: And then Justice Duncan would, I think, choose to articulate more clearly the types of cases that we're actually talking about, right?

HON. SARAH DUNCAN: From what I have been able to see, people have a lot of

problems with this. They don't know when it's appropriate and when it's not, and I don't see any reason that it needs to be complicated.

MR. McMAINS: I hate to complicate things further, but --

CHAIRMAN SOULES: Well, let -- and what would you do to fix that, other than pretty much what you said before, Justice Duncan? Articulate it again, please.

HON. SARAH DUNCAN: And I believe David Perry has come up with at least a beginning.

MR. ORSINGER: I have David's proposed language. Can I read it?

CHAIRMAN SOULES: Read it, please.

MR. ORSINGER: This has got an (a), (b) and (c). "In any case (a) tried to the court without a jury, (b) tried to a jury in which specific ultimate issues of fact are tried to the court by agreement, or (c) tried to a jury in which specific ultimate issues of fact by law must be tried to the court, then" -- and we lead into the rule.

So he's got three categories of cases

there, tried without a jury, tried to a jury where some ultimate issues are intentionally tried to the judge, and tried to a jury in which by law certain issues must be tried to the judge. Then the rule is triggered.

CHAIRMAN SOULES: Isn't that what -- does anybody see any other place where the Committee would intend this to apply? Rusty.

MR. McMAINS: Well, the reason this didn't come up before is because we didn't have the statute before. You know, we now have the Tort Reform Venue Statute. There are -- that is, that venue issues are issues that are -- you don't get jury trials on them. They are only decided by the judge, and they aren't ultimate issues in any sense.

But there are clearly some aspects of the venue determination that require findings, so now we need to provide a procedure for that, and yet not bring in all of the other pretrial stuff. Maybe we should just try and fix -- you know, put that in the venue stuff.

MR. ORSINGER: I would support that.

MR. McMAINS: And take it out of here, and just maybe this will make it clear that you don't use this rule for that purpose. But I am -- but there are specific requirements of the judge to make determinations in the venue rules, in the new venue statute, and we don't have any procedure that comports with that, unless you would use this rule.

CHAIRMAN SOULES: Okay. Well, let's incorporate what -- is anybody opposed to incorporating what David suggested? Is there no opposition to that?

PROFESSOR CARLSON: Is that on top of Bill's suggestion?

CHAIRMAN SOULES: Right. I mean, Bill is still proposing Rule 279 language to get it out of --

MR. ORSINGER: Right. It's almost as if it's a replacement for the first sentence.

MR. McMAINS: Right.

HON. C. A. GUITTARD: Mr. Chairman, I would suggest --

CHAIRMAN SOULES: Judge

Guittard.

HON. C. A. GUITTARD: I would suggest and I would confirm what Sarah and Richard have said about having separate sections applying to these different situations. I don't think they ought to be complicated by putting an exclusion or an exception on them. Let's make those sentences simple and clear. But after it's all said, then, after it's all said about what is included, then let's have a sentence that says what is not included; and that is, where there's an unsubmitted element of a ground of recovery or defense within Rule 279.

PROFESSOR DORSANEO: Well, I can draft all of this to say the same thing several different ways. I think it will be improved. I'm happy to do that. I think with respect to the yellow draft, which might have been penned by --

MR. ORSINGER: -- David Perry.

PROFESSOR DORSANEO: All right. (Continuing) -- and which was edited, that it might not be necessary to say "issues of fact" as distinguished from "issues" all

the time when something is tried to the court, because we get into a question as to whether or not it's an issue of fact or an issue of law. But it's sometimes called an issue of law when it's no different than an issue of fact. It's just tried by the court because it's supposed to be, like a special defect in a tort claims case.

And I don't know whether it's necessarily a good idea to say "specific" before "ultimate issues," because that kind of gets us into -- maybe it kind of gets us into special issues or that kind of thing. Maybe some other wording would be necessary. Maybe it would work with no modifyier at all necessary. I would be perfectly happy to send it to you to see what maybe -- Rusty and Richard -- to see what you think.

CHAIRMAN SOULES: And Justice Duncan.

PROFESSOR DORSANEO: And Justice Duncan, yes.

CHAIRMAN SOULES: Okay. Any further guidance from the Committee to the subcommittee on 296? Richard Orsinger.

MR. ORSINGER: I would like to revisit an issue that we haven't talked about since this came up a long time ago; and that is, there is a dispute in the courts of appeals right now as to whether valuations in a divorce are ultimate issues or not. And some courts of appeals say they are not, which almost makes the divorce decree bullet-proof, because you don't know what the value of anything is. Others seems it think that valuation is an ultimate issue, even though we know it's really just a penultimate issue, as we established a minute ago. And I would love to be able to fix that here, but I don't really know how, other than to have a sentence that applies to this one problem in divorce.

And I know that in writing these rules we've tried not to specifically target application problems in specific areas, but I think probably we could all agree that valuations should be findings.

MR. McMAINS: Suppose we simply work into the rule a notion that any issue that you are entitled to try or submit to a jury is an ultimate issue.

MR. ORSINGER: That would solve it, because clearly the Supreme Court, I think, has --

MR. McMAINS: And that might, you know, fix some other problems too, because it would not surprise me to see ultimately the Supreme Court suggesting that maybe there are some preliminary issues that may not be ultimate issues that would have to be submitted to a jury. It would at least give flexibility. I mean, I don't think it will hurt or damage the rule in any way. But that would fix it in a more general term than just in your case.

MR. ORSINGER: Would you say something like "For purposes of this rule, an ultimate issue is an issue that would be submitted to a jury in a jury trial" or something like that?

MR. McMAINS: Yeah.

CHAIRMAN SOULES: It could be.

MR. McMAINS: Yeah, that you are entitled to, that is, that you're legally entitled to submit to the jury.

CHAIRMAN SOULES: Okay. Any

issue that could be submitted to the jury.

PROFESSOR DORSANEO: Well, you're really talking about four.

MR. ORSINGER: Well, that would certainly fix Judge Brister's problem in spades, because, you know, nobody is entitled to a preliminary finding on the admissibility of an expert's testimony by way of a jury issue.

CHAIRMAN SOULES: That's probably a good idea. Is there any opposition to that? Okay. There is none.

PROFESSOR DORSANEO: I don't agree to draft it.

CHAIRMAN SOULES: Okay. Richard, will you draft that?

MR. ORSINGER: I'll draft that sentence and add it on to the rest of what Bill drafts.

CHAIRMAN SOULES: Okay. You're responsible for drafting that piece of it, you and Judge Brister.

HON. SCOTT A. BRISTER: What?

CHAIRMAN SOULES: Since that's really addressing two concerns, one on the

part of each of you.

Does anybody have a problem with deleting in the third line from the bottom and then in the second "in accordance with Texas Rule of Civil Procedure 21a"? The service rule is a general rule, and we're trying to -- we had tried to take out that kind of process.

MR. McMAINS: Let me ask you, just out of -- Richard may know what the state of the jurisprudence is now, if there is this required service. We use the term "shall." Does that mean that if you don't serve the request on the party, I mean, or if there is somehow a contest that you didn't do it, does that disentitle you to the claim?

MR. ORSINGER: I've never seen an appellate opinion on that.

MR. McMAINS: Well, I don't know whether it's -- what our current rule is. I haven't tried to compare it.

PROFESSOR DORSANEO: Well, actually you don't even need the whole sentence if you're going to do that.

HON. SCOTT A. BRISTER: Drop the sentence.

PROFESSOR DORSANEO: Rule 21a says everything.

HON. SCOTT A. BRISTER: Yeah. Everything that's filed has to be served, so --

CHAIRMAN SOULES: Strike the entire sentence? Okay. We'll strike "The party making the request shall serve it on all other parties in accordance with Texas Rule of Civil Procedure 21a." That will come out unless there's opposition. Is there any? There is none.

PROFESSOR DORSANEO: Can we have a vote on the last sentence? The reason why I'm asking that, Mr. Chairman, is that as I understand it, although there is a Supreme Court opinion that --

MR. McMAINS: I agree.

PROFESSOR DORSANEO: -- that holds that way, that a request for findings is not proper and does not give you an extended timetable, despite what the Appellate Rules otherwise say, the Supreme Court itself is not certain that it likes that to be the rule, as distinguished from a rule that would just

simply say the request for findings is something that extends the appellate timetable whether or not it's a proper request for findings or not, which, as I understand it, is the approach taken with a motion for new trial. And a motion for new trial, or not whether it's an appropriate motion, extends the appellate timetable because it does.

My own view has been that that Supreme Court opinion is logically sensible, but harmful in practice.

MR. McMAINS: Are you suggesting that we take this sentence out?

PROFESSOR DORSANEO: Yes. I'm suggesting that we have a vote on whether such a concept should be Texas procedural law or not.

HON. SCOTT A. BRISTER: The whole sentence, or just the last half?

PROFESSOR DORSANEO: Well, probably just the last half.

HON. SCOTT A. BRISTER: Yeah. It's still a good idea to have in there that it's just not proper with summary judgment.

CHAIRMAN SOULES: So what are

you saying? And why don't we have "or conclusions of law," just "a request for findings of fact or conclusions of law is not proper."

MR. McMAINS: Yeah, that's fine.

MR. ORSINGER: Well, you should say "and," Luke, because the rule proscribes the document to be filed as a request for findings and conclusions, quote, unquote.

PROFESSOR DORSANEO: I think the reason why we don't sometimes refer to conclusions is, and we should probably never refer to conclusions, but sometimes when we do, that is to say, the conclusions are immaterial, what conclusions are reached doesn't matter. If the judgment is different, that's just different.

CHAIRMAN SOULES: Justice Duncan, and then I'll get to Rusty.

HON. SARAH DUNCAN: If all we do is take out the last clause, "and has no effect," then the Supreme Court opinion will be in place and it will be the law that a request for findings and conclusions after a

summary judgment has no effect on the appellate timetable. So if the view of the Committee is that that law is not working fairly, then we need to expressly say that somewhere.

PROFESSOR DORSANEO: Somewhere, yeah.

HON. SARAH DUNCAN: But I, too, would like to suggest that discussion.

CHAIRMAN SOULES: Okay. And we will have it. Rusty.

MR. McMAINS: Okay. Well, I'm on the other end of that, I guess. My problem is that if you encourage people to file requests for findings when they aren't authorized to be filed and treat that as being a premature filing, even though it was like, let's say, for instance, you requested findings of fact and conclusions of law on a motion, on a discovery motion, clearly improper, clearly silly, clearly not authorized, but it's not specifically said not to effect any of the appellate rules or whatever, then if what you're trying to accomplish is to say that if you do that then

you just automatically get the extension at the end of the period, because we also have prematurely filed motion rules, then that will give you the benefit of that, even if you happen to have filed it four years before the case was tried. Now, that's silly to me.

And that's what the Court is saying, is that, look, we've got certain things here we're supposed to be doing and certain things that it just doesn't make any sense to treat those that way.

And I am totally opposed to the notion that we not go ahead and tell people that this does not have any effect on your timetable. Do not file stupid motions and think that they're going to have some logical effect.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: I think part of what the Supreme Court was wrestling with in that case was that the rules -- and what -- part of what Rusty would be -- Rusty's concern would be alleviated. Here we have it in the rules that this isn't proper. That's a big difference, it seems to me, from it not

being anywhere in the rules and people being sort of led to believe that a request will extend the timetable. And even with my liberal view of all of this, I think I could live with it being in the rule; that you just can't do this, and if you do it, it doesn't have any impact.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I don't have a problem with saying that it's not proper. But I think that this is the wrong place to talk about what affects the appellate deadlines.

And this kind of gets back to what Bill is saying. If the Supreme Court, in reevaluating how you're going to trigger the extended appellate timetable, is going to be focusing on the Rules of Appellate Procedure that say that, then perhaps this sentiment should be put in a rule that would create the extended deadline by saying, "However, this does not apply to findings or motions for new trial filed in a summary judgment proceeding" or whatever.

But here we have in the middle of the

trial rules a proviso that affects plenary power at the trial level, presumably, and also the appellate timetable.

MR. McMAINS: Well, except that we have lots of rules that are on the -- that are in the trial rules that have effects on appeals. I mean, Rule 279 is talking about what the effects are on appeals.

HON. SARAH DUNCAN: That's right. But we have a new Rule 304 that's going to be proposed that's expressly labeled "Timetable" and has a separate dedicated section on plenary power. And I don't think it would hurt to stick it in there.

CHAIRMAN SOULES: Put it in 304?

HON. C. A. GUITTARD: Put it in both places.

CHAIRMAN SOULES: Well, it sounds to me like the discussion is over whether we include or exclude certain words that are already here.

Richard, if I'm following you, you would say that we would use just these words, "A request for findings of fact is not proper

with respect to a summary judgment"?

MR. ORSINGER: Yes. And then handle the effect on the appellate timetable later.

CHAIRMAN SOULES: Don't do it? Don't do it in that paragraph?

MR. ORSINGER: Don't do it here.

MR. McMAINS: Why do you leave out the "and has no effect"?

MR. ORSINGER: As long as you're not leveraging that into an appellate timetable rule, I don't have a problem with it here. But I really --

MR. McMAINS: Because, I mean, I think that what you are trying to say is that -- and there are a lot of requests that are filed sometimes when you've lost that are probably improper, but people file them anyway. And some judges feel compelled to rule on them.

CHAIRMAN SOULES: All right. Well, let's change it to say that the only words that are to be deleted would be those three words from the last line, "and appeal

of."

HON. C. A. GUITTARD: That's okay.

PROFESSOR DORSANEO: What about the larger issue?

MR. McMAINS: Yeah. That's what I was going to say. Now, I think that what we have done addresses the issue that Richard has of not talking about appeals in the middle of the trial rules, but it doesn't change the law. And now we have not told the trial practitioner that if you do this, don't count on it doing something else over here, because it ain't going to work.

CHAIRMAN SOULES: Rule 304 is where? I guess it's in here somewhere.

MR. ORSINGER: It's Page 13.

PROFESSOR DORSANEO: I had not planned on presenting 304 in a detailed way.

HON. SARAH DUNCAN: You haven't?

MR. ORSINGER: That's one of the most significant rules we talked about.

CHAIRMAN SOULES: Okay. Well, I guess we'll talk about the issue, then,

which is whether to delete the words "and appeal of" in that sentence. Any further discussion on that? Justice Duncan.

HON. SARAH DUNCAN: I thought we needed to talk about the larger issue about whether there should or shouldn't be an effect.

CHAIRMAN SOULES: Should or shouldn't be what?

HON. SARAH DUNCAN: An effect.

CHAIRMAN SOULES: An effect?

HON. SARAH DUNCAN: Right.

CHAIRMAN SOULES: Okay. I see the difference between what you're saying and what I'm saying. I didn't really mean it to be different, but I see the difference.

Should a request for findings of fact and conclusions of law extend the appellate timetable for a summary judgment?

HON. C. A. GUITTARD: Mr. Chairman?

CHAIRMAN SOULES: Justice Guittard.

HON. C. A. GUITTARD: I agree with Rusty, and I agree with Sarah, that it

should not and it's silly. I also agree that the Supreme Court's concern about the confusion that has heretofore existed, which has supposedly dissolved that case but some people might not have read, would be relieved by putting this sentence in there and expressly warning people "Don't do this; it doesn't mean anything."

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: And if I could add one thing to what Rusty and Judge Guittard have said. I mean, I could live with it either way. But the purpose of the summary judgment is to be summary. And once we subject it to requests for findings and conclusions, even if we're doing that now with motions for new trial and motions for reconsideration, we're drastically extending the time for filing an appeal when there is no statement of facts to be prepared.

I mean, I don't know about the other courts, but I don't know that we've had -- other than one in South Texas that I'm aware of just in the few months that I've been on

the court of appeals -- we don't have transcripts that take more than 30 days to prepare. It's the statement of facts that takes more than 30 days to prepare, and you don't have that in a summary judgment.

MR. McMAINS: Well, that depends.

HON. SARAH DUNCAN: 99 percent of them. 99 percent of them. I'm not saying that a good lawyer wouldn't request one. All I'm saying is that in the bulk of summary judgments that go up, I don't think people have statements of facts.

MR. McMAINS: Well, just as an example, I just got through with a summary judgement on an issue in which there was, you know, 10,000 pages of testimony.

HON. SARAH DUNCAN: Right.

MR. McMAINS: So I mean, it was attached as exhibits.

CHAIRMAN SOULES: Okay. Let's --

MR. McMAINS: Not by me, of course.

CHAIRMAN SOULES: Okay.

Somebody make a -- I mean, we can debate this. Should requests for findings of fact and conclusions of law --

HON. SCOTT A. BRISTER: I move we leave it like it is.

CHAIRMAN SOULES: Pardon?

HON. SCOTT A. BRISTER: I move we leave it like it is.

MR. McMAINS: Second.

CHAIRMAN SOULES: Okay. Well, does it compel the trial judge to make findings of fact and conclusions of law, but it doesn't make any difference on appeal?

HON. SCOTT A. BRISTER: Absolutely not. I mean, as it is now, it just says they file it. I say it's not proper. It has no effect. We disregard it, and everybody knows that. I cite the last sentence of this rule, and that's the end of it.

CHAIRMAN SOULES: But that's only with respect to the appeal, the way this is written. It doesn't say anything about the trial court.

HON. C. A. GUITTARD: Well, strike out --

HON. SCOTT A. BRISTER: No. The fact that it's not proper -- I mean, I get these about four times a year after a summary judgment. Somebody wants findings and conclusions on it, and you just ignore it.

CHAIRMAN SOULES: Okay. Let's just leave it like it is.

MR. ORSINGER: That's why we don't even need this sentence. I mean --

HON. SCOTT A. BRISTER: Well --

MR. ORSINGER: If this happens four times a year and he denies it and nobody does anything other than to --

HON. SCOTT A. BRISTER: Oh, I bet they probably appeal from my denial. I mean --

MR. ORSINGER: Well, then let's don't -- I mean, why do we decide that this is the one stupid mistake that we're going to cure in the rule and not all the other ones?

HON. C. A. GUITTARD: Because there's too many.

PROFESSOR DORSANEO: You're beginning to sound more and more like Judge

Calvert.

CHAIRMAN SOULES: Okay. So Judge Brister moves that we leave the last sentence just as it's written, with maybe a comma after "proper."

MR. PRINCE: Mr. Chairman, does that mean that includes after "findings of fact" the insertion "and conclusions of law"? Because that's different from the way it's handled now.

CHAIRMAN SOULES: Okay. That's --

HON. C. A. GUITTARD: I'll accept that.

MR. McMAINS: Yes.

CHAIRMAN SOULES: Okay. How about a comment after "proper"?

HON. SARAH DUNCAN: No.

HON. C. A. GUITTARD: No.

MR. ORSINGER: Well, Luke's problem is that if you read it all as one sentence you could argue that it is only improper --

MR. McMAINS: -- with respect to an appeal.

MR. ORSINGER: -- insofar as an appeal. But maybe it has some trial effect.

MR. McMAINS: Yeah. I don't disagree with that.

MR. ORSINGER: Now, I don't know that there's an effect at trial.

MR. McMAINS: I don't think a comma or an omission of it necessarily fixes things. But I don't have any problem with putting a comma there.

PROFESSOR DORSANEO: Comma in.

CHAIRMAN SOULES: Comma in. And a comma before "a summary judgment." Okay. Fine.

Anything else on this? Okay. As far as utilizing the last sentence as modified with a couple of commas but otherwise intact, those in favor show by hands. 13.

Any opposed?

MR. ORSINGER: One.

CHAIRMAN SOULES: One. 13 to one it passes.

PROFESSOR DORSANEO: 297, two changes. The first one is that the -- although it is not noted in your draft -- is

that the time is extended, right, within 20 days? Is that right?

HON. SCOTT A. BRISTER: No. That's the same.

HON. C. A. GUITTARD: No. That's 298, isn't it?

PROFESSOR CARLSON: That's the amended one you're talking about.

PROFESSOR DORSANEO: I see. All right. I'm ahead of schedule.

Okay. One change, the last sentence. This is probably the law now, but people like to talk about it. The idea simply is that after the plenary power expires that the judge can make findings and conclusions kind of out of time.

From my standpoint that makes sense, because what the appellate court is supposed to do, if the judge was supposed to make these findings, is to send it back to the trial judge to make the findings. So why not let that be done out of time in order to avoid the directive to do the same thing.

CHAIRMAN SOULES: What if he decides to make findings of fact and

conclusions of law on a motion for rehearing in a court of appeals?

HON. SCOTT A. BRISTER: Why would you want to do that? My experience is nobody wants to do these at all, only does them when you have to. Why would I wait around for a year, and "Oh, I know, I'll write some findings and conclusions today."

MR. ORSINGER: To avoid a remand. To avoid a remand.

CHAIRMAN SOULES: I'll be the bad guy in this, and Judge X can be maybe a bad guy, but I just suffered a reversal at the court of appeals. And I say, "Those dummies don't understand what this case is all about."

And I go back to my friend the trial judge, and I can say, "Can you please help me tell the court of appeals what this case is all about by signing these findings of fact and conclusions of law so that I can send these up to the court and make them understand?"

Now, to me, just because the court of appeals can remand for findings of fact and

conclusions of law, that's their jurisdiction to do that, the trial court, once it loses its plenary jurisdiction, shouldn't be doing this unless asked to do it by the court of appeals. But that's just another view of Bill's. I guess that draws the distinction.

HON. C. A. GUITTARD: Well, theoretically, the judge isn't changing any judgment. All he's doing is explaining it. And is there any problem about his explaining it after the period of his plenary power?

CHAIRMAN SOULES: He doesn't get to file a brief.

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

CHAIRMAN SOULES: Judge McCown.

HON. F. SCOTT McCOWN: I have trouble with that too. Suppose the judge doesn't like the court of appeals' decision and the case is going forward to the Supreme Court. And he wants to add in some additional findings and conclusions that he thinks will help get the court of appeals reversed. I think once your power is gone, the file is

closed and you ought not be mucking around in it.

CHAIRMAN SOULES: In the context of habeas corpus, we know that a trial judge can't fix a bad order while it's pending in the appellate court. The judge has got to wait and have the person released and start all over again. But that's the only context I know where it's been clearly articulated.

MR. McMAINS: Well, what is the reason for this?

MR. ORSINGER: Rusty, I can explain that.

CHAIRMAN SOULES: Okay. Richard Orsinger.

MR. ORSINGER: The way the timetables work on requests for findings, it's possible that they won't even be due or filed before you lose plenary power, depending on how soon the motion for new trial is filed and how soon it's overruled.

MR. McMAINS: Well, except for --

CHAIRMAN SOULES: Rusty.

MR. McMAINS: I'm sorry. But

didn't we change the plenary power extension rule to apply to requests for findings? It extends it to run the same time as if there's a motion for new trial filed.

MR. ORSINGER: Bill just told me that we didn't.

MR. McMAINS: Huh?

MR. ORSINGER: Bill just told me that we didn't. And I can't remember independently, Rusty.

MR. McMAINS: Well, we had to, or else the Supreme Court would never have had to face this issue of a request for finding on a summary judgment not giving you additional time.

MR. ORSINGER: Well, the current rulings do not extend plenary power merely because you request a finding. And I'm not aware that the Supreme Court has addressed the issue of whether you can or can't file findings after the loss of plenary power.

HON. SARAH DUNCAN: I believe 305(a)(2) on Page 18 extends the plenary power for 105 days if a request is filed.

HON. F. SCOTT McCOWN: I think

306(a)(1) has findings and conclusions as something which extends the court's plenary power, or it requests --

CHAIRMAN SOULES: Where is that, Judge McCown?

HON. F. SCOTT McCOWN: 306(a)(1).

CHAIRMAN SOULES: In the current rules?

HON. F. SCOTT McCOWN: Yeah.

MR. ORSINGER: In the current rules.

HON. F. SCOTT McCOWN: Yeah. It's on Page 93, Rule 306(a)(1).

MR. McMAINS: Well, that just says it determines it.

HON. F. SCOTT McCOWN: Yeah.

MR. McMAINS: It determines the beginning date for making the requests.

MR. ORSINGER: Well, I think that it's probably undisputed that a request for findings itself alone doesn't affect plenary power. Under the current rules as they now exist that's one of the famous appellate traps, at least among nonjury

appellate lawyers.

But I see now on Page 17 of the subcommittee report that we are extending plenary power if you timely request findings, and so therefore that gives the judge 105 days to file the findings and amended findings. And that ought to be enough time, because even if the motion for new trial is overruled --

HON. SCOTT A. BRISTER: The longest you can be is 60 days.

MR. ORSINGER: So what happens if a motion for new trial is filed within three days and overruled within six days of when the judgment is signed? Does plenary power still extend 105 days, or does it extend until 30 days after the motion for new trial is overruled?

MR. McMAINS: 30 days after the motion for new trial.

MR. ORSINGER: Then we haven't solved the problem. If you have a quick motion and a quick overruling, then we're going to run out of plenary power before we get to our probable likely filing dates on findings. And then you're left in an awkward

position where, if it's true that the court can't file findings after losing plenary power, the appellant has to take an appeal up with one point of error principally, which is the failure to file findings upon proper request, the reponse to which is, "Well, we ran out of plenary power."

And the appellate court's answer is, "Well, that's because the Supreme Court Advisory Committee adopted this dumb rule."

So we're going to abate the appeal, remand it back, require findings, let everybody rebrief, and then we're going to take the appeal up a month or two later.

HON. F. SCOTT McCOWN: Well, let me --

PROFESSOR DORSANEO: The difference is -- and I'm almost persuaded by Judge McCown -- the difference is that the appellate court has to ask.

MR. ORSINGER: But it shouldn't in the ordinary course of things. We shouldn't -- just because somebody gets a hurry-up motion for new trial overruled, we shouldn't be stripping the court of its

inherent power to file its initial findings according to the expected timetable.

HON. F. SCOTT McCOWN: Well, isn't the easy fix to this just to go the other direction and say that a request for findings and conclusions extends the plenary power? Because for one thing, it's in the doing of the -- it's in the answering of the request that one thinks through and double-checks one's thinking. You don't want to be in a box where all you can do is write down your bad reasons that led you into error. You want to -- if you write them down and are convinced they don't lead to the right conclusion, you want the authority to reform your judgment.

So why don't we just go the other direction and let a request for findings and conclusions act like a motion for new trial in terms of its effect on the plenary power of the court.

MR. ORSINGER: It does. The question comes, though, is there a conflict between the rule that says plenary power expires 30 days after the motion for new trial

is overruled and the idea that a finding might independently create an extended appellate deadline?

In other words, the timely motion for new trial gave you extended plenary power. The timely request for findings gave you extended plenary power. But does the overruling of the motion for new trial cut it short? We have to look and see what the rule says.

HON. SCOTT A. BRISTER: How about if you just --

HON. F. SCOTT McCOWN: Well, we can fix that problem.

MR. McMAINS: Well, the only problem with that, again, is that I suppose if -- to say that you have 105 days -- I mean, things change in terms of or based on the expiration of plenary power right now based on the overruling of a motion for new trial in the sense that you've got an extra 30 days after -- 30 days after a motion for new trial is overruled. So I have some question as to whether or not I want to put off the possibility of enforcing the judgment as opposed to, you know, just because the judge

has got some findings to do.

And to say that somehow I'm going to, or create the possibility that I'm going to go out and enforce the judgment and then the judge is going to come in thereafter and make some findings and decide to change the judgment, I mean, I don't think you can reconcile our current enforcement mechanisms and postjudgment relief mechanisms with the notion that it's an automatic extension of full plenary power.

I think the rule very clearly says that he's got the right to make the findings within a certain period; that even after the plenary power expires, he clearly can make the findings, because he can make the record speak the truth, it seems to me, at any time in terms of what the truth of his basis for his ruling is. But I don't know about just automatically extending the plenary power on the basis of a request for findings --

HON. F. SCOTT McCOWN: Well, maybe --

MR. McMAINS: -- being made alone without regard to the other thing that

triggers all our other postjudgment remedies.

HON. F. SCOTT McCOWN: Well, maybe the compromise is to leave it the way it is but take out this last sentence that flags and suggests that it can be done whenever and for whatever.

CHAIRMAN SOULES: The -- we're not talking about shortening the time to file appellate jurisdictional steps, the way I understand it.

PROFESSOR DORSANEO: Right.

CHAIRMAN SOULES: We're only talking about when in that time period the judge's plenary power can end.

MR. McMAINS: I know. But I was addressing the suggestion that you extend the plenary power based on the request.

PROFESSOR DORSANEO: Yeah. That's what I was --

HON. SCOTT A. BRISTER: Either you extend it that way or you -- as I understand it, all this is intended to say is, look, as long as you get it done 40 days after the request, that's okay. And it doesn't matter that the plenary power may or may not

be gone by then. Go ahead and make the findings. And so can't we just say --

MR. McMAINS: Rather than talking about it -- oh, go ahead. Sorry about that, Judge.

HON. SCOTT A. BRISTER: Can't we just say that, you know, the findings and conclusions, so long as they're filed in accordance with the time periods in this rule, which takes care of the problem of doing it two years later when it's on appeal, you do them within the time periods in this rule, it doesn't matter, it has nothing to do with the plenary power of the court?

MR. McMAINS: Don't we really mean to be saying that as long as they're done in time to be included with the transcript?

MR. ORSINGER: Well, the current case law is more liberal than that. You can file them out of time so late as it doesn't prejudice a party's right to present their appeal. And you will find sometimes that these judges get them in after four months, but it's before appellant's brief has been filed and there's no harm done.

And if we do what Judge Brister just said, we're changing -- we are changing the existing developed common law on that. I have an open mind about it. Not everybody makes these deadlines, I assure you.

HON. SCOTT A. BRISTER: Yeah. But the problem is, if you want to, you can either eliminate the problem, if it is a problem, that judges actually write these two years later to try to get back at appellate courts, I've never felt there was much to be gained by trying to do that, since they could reverse me more often than I can reverse them, but if that is really the problem, then we're going to have to cut it off earlier, which is -- you know, maybe that's the question. Is this really a problem that judges are doing that that late?

PROFESSOR DORSANEO: Well, it depends on what case you're on.

CHAIRMAN SOULES: It's not a problem.

PROFESSOR DORSANEO: I mean, I've had one case where I would like the trial judge to have power in perpetuity to make more

findings. I had another case where the last thing I would ever want to ask anybody is to get that judge to make more findings. And I think on balance, the idea that this could be done way after has caused me to oppose this sentence as currently drafted.

And I just don't think that this sentence does it, whatever might be otherwise drafted to deal with this problem. And not as the substitute chair for this subcommittee, but my own view is that this is a bad sentence as drafted, and I would vote against it.

CHAIRMAN SOULES: David Keltner, do you have your hand up?

MR. KELTNER: I thought better of it. People are -- no.

CHAIRMAN SOULES: He pulled it down. Okay. Richard Orsinger.

MR. ORSINGER: Perhaps a better deadline is prior to submission of the case on appeal.

CHAIRMAN SOULES: How about prior to filing of the transcript?

MR. ORSINGER: Well, that could be within the three weeks of when you post

your appeal bond.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: The point, though, is, I am concerned about the problem that you need to know whether you've got findings of fact and conclusions of law and what they are by the time you perfect your appeal. Now, you're going to have 90 days, if you've got a motion for new trial, you know, that's filed, regardless of whether it's -- of when it's acted upon. You've got 90 days.

I mean, we impose all kinds of potential sanctions on things being frivolous. And if in fact you're sitting there and you're wrestling with the judge trying to get findings of fact and conclusions of law and you have a good ground that he hasn't given you any and you perfect the appeal and then during the course of the appeal or maybe even after you write your brief he files some and then they want to say, "Well, it's frivolous in light of the findings of the fact," well, you know, you can't be judged by things that happened before. I mean, it may be that you're forced to appeal because you don't have

findings of the fact. You might win on one theory and lose on another, depending on what the record is, and the judge won't tell you what you won or lost on, and you're entitled to know.

So I really think if there is a time, it is the time that -- it is perhaps the time that the appeal is perfected, but certainly by the time that the transcript is due.

MR. ORSINGER: Well, Rusty, in my experience I almost always submit my findings by supplemental transcript. And I don't know why that is, but it just seems like it works out that way. But what about picking a deadline like 60 days or 75 days, because you've got --

CHAIRMAN SOULES: Beyond the judgment?

MR. ORSINGER: Yeah. (Continuing) -- because you've got 20 days to request, you've got 20 days for the judge to sign. That's 40. You add 10 days to remind. That's 50. And then 10 days to file it. That's 60. So you legitimately run out of time at 60, even though a lot of judges maybe

don't make that cutoff.

And then, Bill, I noticed in here that -- I thought one deadline was changing 20 to 30 days.

HON. C. A. GUITTARD: 10 to 20.

MR. ORSINGER: 10 to 20? Well, okay.

CHAIRMAN SOULES: Why don't we count those up.

MR. ORSINGER: All right. Under the new rules --

CHAIRMAN SOULES: Okay. We're at judgment, and these new proposed rules say judgment is --

MR. ORSINGER: There's 20 days to request.

CHAIRMAN SOULES: 20 days to request?

HON. SCOTT A. BRISTER: No. There's 20 days to remind, is the change.

CHAIRMAN SOULES: Okay. Right.

MR. ORSINGER: Okay. 297(a) is 20 days to request.

HON. SCOTT A. BRISTER: And that's the same.

MR. ORSINGER: And then (b) says 10 more days as well.

CHAIRMAN SOULES: 10 days to remind.

MR. ORSINGER: Yeah. But that's 30 days after filing the original request.

HON. SCOTT A. BRISTER: That's in case the judge signs the request real quick. So you're not going to be shortened less than 60 days or 70 days under the new rule.

MR. ORSINGER: Well, let's refer it to the judgment. Can't we -- I mean, we should refer it to the judgment.

HON. SCOTT A. BRISTER: No, no. This was all changed to make it -- because the judgment was unclear, this was all changed three or four years, five years ago to make everything run from the request, which was --

MR. McMAINS: Yeah. We do it backwards. It's reversed.

HON. SCOTT A. BRISTER: It used to be judgment, but now --

CHAIRMAN SOULES: Bonnie Wolbrueck.

MS. WOLBRUECK: Just only from the clerk's point of view, I would prefer that it would run within the time period of the date the transcript is due, due to the fact of the additional duty placed and the work placed on the clerk in doing the supplemental transcripts.

MR. ORSINGER: Well, let's run the request timetable and see if it's inside the transcript timetable.

CHAIRMAN SOULES: All right. What is it?

MR. ORSINGER: Well, the request deadline must be 20 days.

HON. SCOTT A. BRISTER: 20 days after judgment.

MR. ORSINGER: So that's J plus 20. But that's really request made, and then you have -- then they're due --

HON. SCOTT A. BRISTER: -- 20 days after that for the judge to make them.

MR. ORSINGER: Then request plus 30 is the deadline for the reminder. And

if it's timely reminded, then another --

HON. SCOTT A. BRISTER: -- 10.

HON. SARAH DUNCAN: That's 50.

MR. ORSINGER: R plus 40 for the filing.

HON. SCOTT A. BRISTER: For the amended filing.

HON. C. A. GUITTARD: The proposal from 298 would say -- would change that to 20 days for the request for additional findings.

HON. SCOTT A. BRISTER: Yeah. So it adds 10 more to that.

MR. ORSINGER: So it's R plus 50 then. And since R is J plus 20, then that's J plus 70. So it's R plus 50 and J plus 70.

MR. McMAINS: It's always within the transcript time.

MR. ORSINGER: Now then, when those findings, late findings are filed, you still have time to request amended findings and additional findings. That's got to be done within 10 days.

PROFESSOR CARLSON: No. 20.

CHAIRMAN SOULES: Well, this is after the judge makes --

MR. McMAINS: You make it 20 days after the original filing.

HON. C. A. GUITTARD: Yes.

MR. McMAINS: So in other words, you've got 70 -- let's suppose that drags it all the way out to the --

HON. SCOTT A. BRISTER: -- longest possible time.

MR. McMAINS: -- to the longest possible time, yeah, which is the 70th day. And then you've got 20 more days. It says to request for additional findings you've got 20 more days.

CHAIRMAN SOULES: Then how long does the judge have until --

MR. McMAINS: Then he has -- it says the judge shall file within the appropriate --

HON. C. A. GUITTARD: 10 more days.

MR. ORSINGER: Within 10 more days.

MR. McMAINS: So that adds

10 more days.

CHAIRMAN SOULES: So it's 100 days.

MR. McMAINS: So that's 100 days.

MR. ORSINGER: R plus 80 or 100 days.

MR. McMAINS: Which is still time for the transcript.

MR. ORSINGER: That's the max, max, max.

MR. McMAINS: We've got 120 days in your ordinary -- I mean, in one with a motion for new trial. What's our original one?

HON. SARAH DUNCAN: 60.

MR. McMAINS: Without a motion for new trial it's 60.

HON. SARAH DUNCAN: 60.

MR. McMAINS: It's kind of twice as long, is what -- it's twice as long if there's not a motion for new trial.

MR. ORSINGER: That's not bad. That's 20 days before the transcript is due.

HON. C. A. GUITTARD: Can we

avoid these problems by just adding to this last sentence which, as it stands, says, "The judge's authority and duty to file findings," say, "The judge's duty and authority to file timely requested findings"? That would limit it to the other times.

CHAIRMAN SOULES: It seems to me like there's a built-in conflict in these rules. If the judge -- if the findings of fact and conclusions of law process is articulated in the rules in such a way that it operates from judgment for 100 days and yet we say somewhere in the middle of that the guillotine drops because the judge loses plenary power, that's ridiculous. It's misleading.

MR. ORSINGER: It's going to lead in to a lot of unnecessary reversals too.

CHAIRMAN SOULES: We should at least give the judge the plenary power to do what the rules permit him to do up to 100 days, shouldn't we?

MR. ORSINGER: Yes.

CHAIRMAN SOULES: Okay. So how do we do that? Does anyone disagree with

that?

MR. McMAINS: Well, when you say plenary power to do what the --

CHAIRMAN SOULES: To make findings of the fact.

MR. McMAINS: To respond to the --

CHAIRMAN SOULES: Yeah.

MR. ORSINGER: Why don't we just divorce it from plenary power.

MR. McMAINS: Yeah, I think that's a good idea.

MR. ORSINGER: And let's just say the court has the power to file findings under these Rules 296 through 298 regardless of the expiration of the court's plenary power.

HON. C. A. GUITTARD: That's what the last sentence here says.

MR. McMAINS: That's what it says.

HON. SCOTT A. BRISTER: Yeah. And that was that problem with -- okay. Then two years later --

MR. ORSINGER: No. But then

it's not in accordance with this timetable. You've got to have that concept in there.

HON. SCOTT A. BRISTER: Yeah. And I agree with that. But the problem is, then, if it's one day late, it's gone. If it has to be in strict accordance with this rule, if it's one day after that, then it's worthless.

MR. ORSINGER: I don't like that either, because it's inevitably going to be one day late.

HON. SCOTT A. BRISTER: Well, you've got to pick one.

HON. F. SCOTT McCOWN: Well, is one day late really a problem? Because all it's going to require is a motion to the court of appeals for an order to the trial judge. So it's not an extensive proposition, and their staff attorney can crank out that order. So if you're going to have to face a rock and a hard place, it's not really that hard a place in terms of time or expense.

CHAIRMAN SOULES: I would think that the courts of appeals, if they're presented with findings of fact and

conclusions of law one day late, are going to want to have them.

HON. SCOTT A. BRISTER: The other side is going to object, saying they're out of time, beyond -- "You can't consider them, Court of Appeals."

CHAIRMAN SOULES: And then you would have to make a motion that the court consider them.

MR. McMAINS: I don't know any court of appeals that would sustain such a motion if the motion is one day late.

CHAIRMAN SOULES: A motion to strike them, Rusty?

MR. McMAINS: Yeah.

CHAIRMAN SOULES: I don't think so either, because many times they remand for just that purpose.

MR. McMAINS: Yeah. They remand and then they --

HON. SCOTT A. BRISTER: But aren't you getting into discretionary -- okay. How about 10 days? How about two months?

CHAIRMAN SOULES: Well, the

court of appeals can do that.

HON. SCOTT A. BRISTER: And so every one of these -- what our rule is, really, is the judge can make them anytime he wants and the court of appeals can consider them anytime they want.

MR. ORSINGER: Well, what's wrong with the law right now? I mean, who has ever had a problem? Right now the rule doesn't say anything. We've got all this case law that if it's filed so late that it prejudices somebody the court of appeals will ignore it. Where are all the bodies? You know, who has been injured by this rule and why are we creating all these problems?

PROFESSOR DORSANEO: The problem is that people do not know what you know.

MR. ORSINGER: Well, we're going to spend a lot of time if we're going to put all of our knowledge into these rules of procedure.

PROFESSOR DORSANEO: I'm ready to vote against this sentence.

CHAIRMAN SOULES: Judge

Brister, I think in response to your question, I mean, the court of appeals, as long as it has jurisdiction, can remand the findings of fact. If they want to bypass that somehow or technically comply, they can always look at findings of fact and conclusions of law if they're tendered late and they can decide what they want to do with them.

HON. SCOTT A. BRISTER: So doesn't that argument say and what this last sentence should be is that the judge's authority is not affected by plenary power so long as those are made in accordance with the time periods in these rules?

CHAIRMAN SOULES: I don't have a problem with that. I think that makes a lot of sense.

MR. ORSINGER: Then you're changing the existing case law that if you're a little bit late and it doesn't prejudice anybody, no sweat; and if you are late, the court of appeals will ignore it. Now we're saying that if you're a little bit late you've got to go through some kind of appellate process of filing a motion, getting

permission, getting a semi-remand for purposes of permitted findings under the authority of the court of appeals, all of which is probably unnecessary.

PROFESSOR DORSANEO: In cases that I have where there are these findings that are made late, the party who doesn't like the finding says, "You can't do that." And the response is "Oh, that's fine." And I don't think anything has ever come of it. I've never had one where it's been so close to the appeal or while the case was under submission that the appeal court would feel that its jurisdiction was being interfered with and the ability to prosecute the appeal was impaired at all. I don't that it's really a problem area.

CHAIRMAN SOULES: Okay. So, Bill, your motion is to take it out?

PROFESSOR DORSANEO: I think it says way too much.

MR. ORSINGER: Second.

CHAIRMAN SOULES: It's been moved and second. Is there any further discussion on whether we either -- I know some

are for it and some are against it. The motion is to delete it. Any further discussion? Those in favor of deleting the last sentence which is highlighted under 297(b), to delete it, show hands. 12.

Those in favor of keeping it in the rule, show by hands. Okay. 12 to two. It will come out.

PROFESSOR DORSANEO: The only other matter other than changing "trial court" to "judge" is on the next page, which finishes up the findings of fact and conclusions of law rule, and somebody correct me if I'm wrong, is the change from 10 to 20 days in the second sentence of Rule 298 concerning a request for additional or amended findings.

Currently this has to be made within 20 days after the filing of the original findings -- I mean, within 10 days of the filing of original findings. We suggest that 10 days is -- I think both committees, the Appellate Rules Committee and the committee particularly involved in these rules, think that 20 days would be better.

CHAIRMAN SOULES: Any

opposition to that? There's no opposition.

We've got this service sentence in here again. I guess we should take it out.

MR. ORSINGER: Let's take it out.

CHAIRMAN SOULES: And everywhere it says "the judge files" is wrong. The judge may sign them, but the judge doesn't file them.

MR. McMAINS: Well, but it's always said that.

CHAIRMAN SOULES: It's always been wrong.

MR. McMAINS: It's always said that.

MR. ORSINGER: Why do you say the judge wouldn't file it? The judge tenders it to the clerk of the court, and that's not considered filing?

CHAIRMAN SOULES: Well, maybe. They don't file judgments.

MR. ORSINGER: Yeah. That's because judgments go into the minutes of the court. But this goes into the transcript with a file stamp on it.

HON. C. A. GUITTARD: Judgments are entered, not filed.

CHAIRMAN SOULES: Okay. Maybe it's right.

Okay. Anything else on 298?

MR. McMAINS: Just out of curiosity, does anybody -- have you had a problem with this which requires that the judge cause a copy?

CHAIRMAN SOULES: That the judge what?

MR. McMAINS: That the judge cause a copy to be mailed to each party. What happens if he doesn't do that?

MR. ORSINGER: I've had the problem that it sits around for three or four days before it gets mailed, and then when you receive it, you've got 24 hours to get your amended findings in. The extra 10 days would help out a lot.

PROFESSOR DORSANEO: This is a problem. I don't know what "court" meant or means in the current rule. We have this problem, for example, in Rules 245 and 246 that talk about giving notice of trial

settings. I don't know whether this means the district judge or whether it means Bonnie or whether it means --

HON. SCOTT A. BRISTER: Bonnie, definitely.

PROFESSOR DORSANEO: -- or whether it means the court administrator, if you're in some other part of the country where they have those people. I'm not sure that this change in this draft systematically from "court" to "judge" is necessarily a good idea, and I think that's what you're saying, Rusty. I don't -- I just was saying, well, that's fine with me if you want to say "judge" instead of "court," but I'm not sure that clearing up that ambiguity doesn't change the practice.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: I'd like to second that. I don't really care who within the judge's chambers gets the things filed.

HON. SCOTT A. BRISTER: Well, the judge --

HON. SARAH DUNCAN: But I would

also like to comment on what Luke said about not filing judgments. There are cases in which judgments are signed on a particular day and sit around on the judge's desk or on somebody else's desk and they don't get filed. And it's the signing date that determines the appellate timetable. I thought that was the reason that these rules said that the trial court has to file their findings, and I think the judgment rule should say the same thing.

It should not be that a judge can mess with the appellate timetable. I mean, the clerk doesn't know to give notice to the parties that a judgment has been signed if the judgment hasn't been filed with the clerk. So if what you're saying, Luke, is that the judgment rule doesn't require that it be filed, I think that's a problem.

HON. C. A. GUITTARD: Look at Rule 300. It says, "A signed judgment shall be promptly filed with the clerk for entry in the minutes."

HON. SARAH DUNCAN: Okay.

MR. McMAINS: But that has

never been done before. And I strongly suspect the clerks, by changing this rule, may not be doing it.

CHAIRMAN SOULES: Let me back up to 297. Those in favor of 297 with the last sentence deleted show by hands.

MS. WOLBRUECK: Some do and some don't.

CHAIRMAN SOULES: I need to get a vote on that.

HON. SCOTT A. BRISTER: No, no. The last sentence --

CHAIRMAN SOULES: -- deleted.

HON. SCOTT A. BRISTER: Yeah. Okay. Right.

CHAIRMAN SOULES: 13. Those opposed. Okay. That's approved unanimously.

Okay. Those in favor of 298 with the last sentence of the first paragraph deleted show by hands. 16.

Opposed. No opposition. That is passed unanimously.

Okay. 299. Any opposition to the changes in 299? No opposition. That's unanimous.

Let's go to 299(a). Any changes?

MR. ORSINGER: Yeah. This seems to me to go against what Bill was saying earlier, Bill, because we don't talk about the rules as Texas Rules of Civil Procedure as opposed to the Oklahoma or New York Rules, and yet --

PROFESSOR DORSANEO: I think "rules" is fine. They're just rules.

CHAIRMAN SOULES: Okay. Does anybody want to change Rule 299(a)? No one wants to change it, so it stays as is.

Rule 300 on Page 3.

PROFESSOR DORSANEO: All right. This is a new topic; this is a new chunk. So we have just successfully navigated through one part of this project.

CHAIRMAN SOULES: Except for 296, which still has to be worked on. Okay.

PROFESSOR DORSANEO: You've seen some of this before. I think we just need to take it rule by rule.

Rule 300 is largely a recodification of an existing one-paragraph rule, except that the first two paragraphs are trying to be more

informative about the judgment making process.

If you look at our current rule book, there is not a lot of information about what judgments should contain or in terms of how they should be drafted or any real information of this type. I just think we should take it sentence by sentence.

"A judgment is rendered when the judge orally announces it in open court or, if not so announced, when a judgment is signed by the judge."

After much discussion, the various committees that have worked on this believed that this codifies existing law about the subject of rendition being either oral rendition or -- and our debate here involved whether that should be in the courtroom or could it be somewhere else, with the conclusion being that it's in the courtroom, presumably from the bench. And then the alternative would be the signing of a draft of the judgment.

We didn't feel it necessary, as the case law does, to use the words "a draft" or "a

written draft," so the first sentence is made to codify existing law that you render judgment orally or when you render judgment in written form.

MS. BARON: Bill?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: Pam Baron.

MS. BARON: This isn't for starting the appellate timetable, is it? It's just a date for rendition, but not a date for your timetable starting, right?

PROFESSOR DORSANEO: No. This is about rendition.

MS. BARON: All right.

PROFESSOR DORSANEO: The second sentence is actually not completely new. The sentiment of it, if not the wording of it, comes from current Rule 306(a), if my memory serves me correctly.

CHAIRMAN SOULES: Before we pass that first sentence, so if the judge announces, with all the parties present in his chambers, announces the judgment, it's not binding until he walks out into the courtroom and says it there?

PROFESSOR DORSANEO: What?

MR. ORSINGER: That's right.

MR. KELTNER: Say again, Luke.

CHAIRMAN SOULES: If a judge is hearing a temporary injunction or, say, a temporary restraining order in chambers, it's not binding on the party restrained unless he walks out into the open courtroom and says it?

HON. C. A. GUITTARD: Or signs it.

CHAIRMAN SOULES: Or signs it.

MR. ORSINGER: You've restated it differently from what you originally stated. What you restated would be an order that's not a judgment. And even though this section says "order," this is really just a judgment. And I would think that a temporary injunction would not be impacted by (a). In fact, I'm wondering why the title of it is "Orders." Aren't we in fact dealing with orders that are not judgments in this rule?

MR. McMAINS: Yes.

MR. ORSINGER: Or are we dealing only with judgments?

HON. SARAH DUNCAN: Luke?

PROFESSOR DORSANEO: I would have answered the Chair's question yes.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: I would think -- I mean, I thought what we talked about was that a request for a temporary injunction or temporary restraining order would be a claim. And if it's disposed of, it would be a judgment under this (a).

MR. ORSINGER: Even though it's interlocutory in the nature of it's only temporary?

HON. SCOTT A. BRISTER: It's appealable, so it's got to be a judgment.

CHAIRMAN SOULES: It's an interlocutory judgment.

MR. ORSINGER: Well, then this rule is now doing different duty from what it did before we made this change then, because we're now making orders judgments, and we never have before.

PROFESSOR DORSANEO: Well, the difference between order and judgment and

finality and all that aside, I think that if you're going to order somebody to do something, determine something of consequence with respect to them, that you should do it in open court or you should do it in writing, period. I think doing it in chambers or doing it in the hallway or in the bathroom is not enough.

HON. SCOTT A. BRISTER: And you mean on the record too?

PROFESSOR DORSANEO: Huh?

HON. SCOTT A. BRISTER: "In open court" means --

MR. ORSINGER: No. The court reporter doesn't need to be there.

HON. SCOTT A. BRISTER: How are you -- so we're going to have where one side says, "He said judgment is rendered," and the other side doesn't, and there's no court reporter and that's okay? That's going to be the judgment?

MR. ORSINGER: There's no requirement in the rule right now that a court reporter be present.

HON. SCOTT A. BRISTER: I

didn't say there was. I'm just saying that when you say "open court," don't you mean on the record?

PROFESSOR DORSANEO: I mean that it can be on the record if somebody -- I mean, it is on the record, just whether somebody is memorializing the record is different.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: I think you may be confusing two concepts, and it's important, I think, to keep the two apart.

First, the 300 series as currently in the rules traditionally dealt solely with judgments and has been so applied. I think that a different rule ought to exist for judgments than orders, because in many instances a trial court, on temporary orders like a TRO or a temporary injunction, may be hearing those very quickly with or without his or her staff, can get the appropriate finality, for example, and we all know how there are special rules for those orders in common law about how they're communicated.

Actual knowledge of the TRO is not enough by common law, and I think we ought to treat those separately.

The second point I would make is I am very much against any idea even of rendition on a judgment, and we're talking about a judgment now. I think a judgment has to be as formal as it can possibly be. I take that to mean in my mind in writing and signed. And I know this doesn't affect the appellate timetable, but I've been in situations where the court said at the end of a case after the verdict was returned, "It is my intention to enter judgment on the verdict." And thereafter a number of objections to what the defendant did thereafter, saying they weren't timely, even though no judgment was entered, and the motion for JNOV is filed, all of those administrative filings, even after judgment, and they still say, "Wait a minute, you're too late. You didn't do them on time."

I think an order is a different thing from a judgment, number one, and the rules ought to recognize that. And secondly, I think a judgment ought to be and should be as

concrete as possible.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Well, I think part of the problem is, because of the way that this rule is drafted, it expands over what the current rule is focused on, which is this rule says judgment decrees an order as it's newly drafted.

What they eliminated totally was the concept that's in the old Rule 300. The old Rule 300 is talking about rendering a judgment after a trial. I mean, it's -- a trial has occurred. Now what do we do about it? And that's what the 300 series was supposed to be dealing with. The problem is, when you start talking about a judgment includes, for instance, a decree or an order that disposes of a claim or defense, you are all of a sudden talking about summary judgments; you could be talking about a special exeption; you could be talking about a sanction; you could be talking about a number of things. And that's not really what we should be talking about in this section of the rules in my judgment. We should be talking about something that is

after the case is tried on the merits.

I mean, what do you do to bring closure when the case has been tried on the merits either nonjury or jury? And that's what this series of rules was supposed to be dealing with, I thought.

CHAIRMAN SOULES: Richard.

MR. ORSINGER: I sat through that whole Committee deliberation thinking that this meant exactly what Rusty said, and I'm surprised to find out now that it applies to these other kinds of orders. And I have problems with it if it does.

I would like to respond to what David Keltner said about making rendition even harder to get. The way I see this, this eliminates letters from rendition and it eliminates docket entries from rendition. But I never thought that conversations in chambers were rendition, but maybe that was just my confusion.

I'm not in favor of requiring a written document by way of rendition, because of the special problem in family law cases, which represent 45 percent of our trial docket. No

family law deal ever sticks together more than 30 minutes after the people leave the courthouse, because the wife goes directly home and calls a friend and the husband goes directly home and calls a friend and they both find out that they either gave too much or didn't get enough and the deal falls apart. And so the only safeguard you have actually settling the family law case is to get everybody in front of the judge browbeaten down to the point where they agree to the Rule 11 agreement, and then have the judge grant judgment, gets rendered judgment, now present, in hoc verbae, et cetera, et cetera, and then you're beyond changed minds.

And if we go as far as what David is talking about, then we are going to pay the price, or at least some of us are going to pay the price.

MR. KELTNER: Richard, I surrender. You have convinced me.

PROFESSOR DORSANEO: And that was actually done by the court requiring a written judgment, and it was undone because of that exact conversation or something very

similar.

CHAIRMAN SOULES: That's right. Okay. So what do we do to make this say in everybody's mind what everybody seems to mean it to say?

PROFESSOR DORSANEO: Well, what's wrong with having it -- if you're going to say "done in open court," if you want it in chambers, just say "officially in chambers," but you can't just leave it where it's orally announced wherever. It's got to be formal. I mean, that was the idea. It's got to be formal so the judge has some sense of what she's doing and so that the parties know that this is serious.

HON. SCOTT A. BRISTER: It's got to be real specific words. I mean, there are 30 cases, including one in the Supreme Court within the last year, as far as, you know, which precise words have to be used.

CHAIRMAN SOULES: But what about -- I'm sorry, Judge. Go ahead.

HON. F. SCOTT McCOWN: Why not say "on the record"? "A judgment is rendered when the judge orally announces it on the

record or, if not so announced, when a judgment is signed by the judge."

HON. SCOTT A. BRISTER: And I can foresee a settlement that you might want to do in chambers on the record rather than in open court. But I definitely think it ought to be on the record so you don't prove this up by some kind of bystander bills that the --

PROFESSOR DORSANEO: Do you want to do it somewhere other than in chambers on the record?

CHAIRMAN SOULES: Yes.

HON. SCOTT A. BRISTER: I don't want to do it in chambers. I can imagine people who are -- I don't want to do anything in chambers.

CHAIRMAN SOULES: Well, our visiting judges try lawsuits in the jury rooms.

MR. ORSINGER: That makes it open court.

HON. F. SCOTT McCOWN: Why tie it to the place? Why not just say "on the record"?

MR. ORSINGER: It's a small

court, but it's a court.

HON. C. A. GUITTARD: If you open the door, is it open court?

PROFESSOR DORSANEO: Well, I'm sure the Committee will accept "on the record."

MR. ORSINGER: Well, I want to know if "on the record" means with the court reporter present and taking notes, because --

HON. SCOTT A. BRISTER: Yes.

MR. ORSINGER: It does mean that? Then I think that's a pretty big change in our existing practice, just to be aware of it. I'm not saying that I can't live with it, but --

HON. SCOTT A. BRISTER: Which judgments are rendered orally without being on the record? Is that what you all do in family?

HON. F. SCOTT McCOWN: No. Richard, nobody in family law would go over and put in an agreement and have the judge render judgment without the court reporter being there.

MR. ORSINGER: Oh, it happens.

Well, in my experience it happens all the time. You've got about five yellow pages with scrawling and scratch marks and arrows going in every direction, and they walk up in front of the judge and everybody swears to it, and then that's your decree. And then you amplify it from there.

In San Antonio, as a matter of fact, and I don't want to make local practice in my area important just because it's my area, but you can't prove up a default judgment to a sitting judge. They make you go back into chambers and prove up your evidence to the court reporter outside the presence of the judge.

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

MR. ORSINGER: Let me say you can. I mean, if you really want to make a scene of it, if you really want to be an ass, you can make the judge listen to your prove-up, but they might make you wait for three or four hours. Normally the condition in San Antonio -- Luke, don't you agree, is --

MR. McMAINS: Well, who puts the numbers in, the court reporter or the

judge?

CHAIRMAN SOULES: Well --

MR. McMAINS: Seriously.

MR. ORSINGER: The plaintiff's lawyer.

MR. McMAINS: Oh, I see.

CHAIRMAN SOULES: Suppose there's a dispute about whether the judge rendered. Does the judge get to say "I rendered" without a record?

HON. SCOTT A. BRISTER: Not the latest -- my recollection is, on the most recent Supreme Court case out of San Antonio, the judge later said, "I intended to render back then," but his words at the time were not "I render judgment," they were "or I'm going to render judgment." It wasn't good enough, what he said later, for obvious reasons.

HON. C. A. GUITTARD: If he says, "I will give judgment for the plaintiff," that doesn't mean "I give judgment."

HON. SCOTT A. BRISTER: That ain't the same thing.

PROFESSOR DORSANEO: Or we

could add in some other words. We could say "announces in present rendition on the record" or some words to that effect.

HON. SCOTT A. BRISTER: There are plenty of cases explaining what you have to say and don't have to say. I wouldn't want to put all that in the rule. But I am more concerned about the not on the record, since there's always a big fight about what precise words were used. If it ain't even on the record, how can you possibly decide that?

MR. ORSINGER: It happens all the time. Maybe not in your court, because you put everything on the record, but justice is arrived at in those situations in some way.

PROFESSOR DORSANEO: It's easy. He's only got a tape recorder.

HON. SCOTT A. BRISTER: That's right. I just turn it on.

CHAIRMAN SOULES: Doris Lange, please.

MS. LANGE: As a little court, we don't have a court reporter there unless you request a court reporter at the county court level. So when you're saying "on the

record," you know, and saying that this means "court reporter," it doesn't necessarily mean court reporter in our county or in a lot of counties. We don't have one there unless it's requested, but yet we have a record and we have everything else. You need to watch the wording of it there.

HON. SCOTT A. BRISTER: I don't want to impose a court reporter on something that happens a lot and is not a problem on appeal. But the problem with any oral rendition is it has to be very precise words. And there's always a fight over that, and it's supposed to be formal, and it seems to me "on the record" is what all of those -- that's the whole -- that's why we have a court reporter there, to make it formal, to make it no dispute about who said what, and to take care of those problems.

MR. ORSINGER: If I can respond, Judge Brister. In the kind of cases you handle it may be easy to render a judgment because somebody may be getting a money judgment and you define them out. But if you're going to try to prove up terms of a

joint managing conservatorship agreement or a property division that has contingencies on who gets what depending on what the house sells for and everything else, it's always an argument as to what judgment was rendered. And this is just a condition of life that family lawyers live with.

And if you require -- I mean, if it has to be in front of a court reporter, that's going to support the contention that if the judge didn't utter the word, that somehow it's not part of the rendition. And then the next thing you know, we're going to have three-hour renditions to just get a simple agreed divorce that we can now do in 15 minutes, and then we argue over -- the lawyers argue for weeks and weeks and then have four or five hearings and then settle it. And it's going to be counterproductive in the family law area. It really will be, because you simply can't cover all the grounds that you need when you're dividing all of the property that everybody owns and all of the weird agreements they arrive at in order to settle custody, visitation and child support.

CHAIRMAN SOULES: Okay. So "open court" is fine with you, Richard, but you don't want to take it beyond that as to what's open court and what's not open court?

MR. ORSINGER: That's what I feel like.

HON. C. A. GUITTARD: That's the law now.

CHAIRMAN SOULES: Okay. Does anybody else have any problems with the first sentence? Those in favor of the first sentence the way it's written show by hands.

Those opposed. One. Okay. So we've passed that point.

PROFESSOR DORSANEO: Okay. The next two sentences, without pointing out where they are, seem to be less controversial to me than the first sentence, I say with some trepidation, just kind of moving for their adoption to kind of move things along.

CHAIRMAN SOULES: All right. Any opposition to Rule 300(a) as written?

MR. ORSINGER: Oh, I'd say I have a problem, you know, especially if this means special exceptions. I have a real

problem with this.

PROFESSOR DORSANEO: You mean the last sentence?

MR. ORSINGER: Yes.

MR. McMAINS: Yeah. We can't move that fast.

CHAIRMAN SOULES: Any problem before the last sentence? There is none.

The last sentence, then, let's debate it. Elaine, did you have comments about that?

PROFESSOR CARLSON: Well, what is the thought of the Committee on expanding it to include decrees or other orders?

PROFESSOR DORSANEO: Well, the thought is -- first of all, the thought was, and maybe this is a little bit opaque, is that it would be nice if we had some definition, which we don't, despite the fact that a lot of people have a lot of understandings about what the 300 series of rules are about.

And the word "includes" is not meant to be exclusive. That was a concept that may not be a good concept. The operative legal concept in terms of content would be that this

thing disposes of a claim or defense. Now, that's perhaps a little bit inartful, because something could be disposed of but not perhaps in perpetuity finally in the trial court or otherwise; because what distinguishes orders that don't dispose of claims or defenses from orders that do? And that was as much as we could manage. It's a very difficult thing that say what a judgment is.

HON. C. A. GUITTARD: Would "finally" help, "that finally disposes of"?

PROFESSOR DORSANEO: To me it doesn't help. I mean, I just know it's sufficiently important that it deals with a claim or a defense and it disposes of it.

CHAIRMAN SOULES: But what's the problem with that complying to special exceptions?

MR. ORSINGER: Well, let's say that somebody gets some special exceptions granted one third of the way through the case, and then pleadings are amended, because that's what you have to do when your claims have been struck. And then you go ahead and you have a trial on the remaining claims, and then you

sign a final judgment. This rule says you now have two final judgments. You have one judgment that took care of the claims that were disposed of by a special exception which was signed one third of the way through the case. And then you have another judgment which took care of the rest of the claims signed at the end of the case.

CHAIRMAN SOULES: Let me --

PROFESSOR DORSANEO: Well, there is a sentence --

CHAIRMAN SOULES: Pardon me, let me ask a question. Isn't 300(a) intended to include interlocutory judgments?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: So it's not just final then. You can have several judgments.

MR. ORSINGER: I don't mean "final" in the sense of interlocutory versus noninterlocutory. I mean, if this definition of "judgment" works, then you might have three judgments in the case. You might have an order granting special exceptions, you might have an order granting a partial summary

judgment, and then you might have a judgment on the case on the merits at the trial that doesn't repeat either one of those other two, and so then you've got three judgments.

PROFESSOR DORSANEO: That did not trouble us. And we decided to remove or recommend the removal of the sentence that says there needs -- there cannot be more than one final judgment, which struck us as a completely stupid sentence.

MR. ORSINGER: Well, that's an entirely different problem then.

HON. SARAH DUNCAN: It's not true.

CHAIRMAN SOULES: Okay. Sarah Duncan. Justice Duncan.

HON. SARAH DUNCAN: An order granting a nonsuit following -- if you've got four claims, two are disposed of by summary judgment, two are nonsuited, that nonsuit order is a judgment, and it renders the previous order final, and both are appealable.

MR. ORSINGER: You can't appeal a voluntary nonsuit.

HON. SARAH DUNCAN: Yeah. If

there's something going on -- take an example other than a nonsuit. But the rule that there can only be one final judgment is very misleading to people, because they think if it doesn't say "final judgment," then there's nothing to appeal and they can just kind of hang around and wait for a final judgment.

PROFESSOR DORSANEO: Whatever that rule meant, it's misleading now. I think it may once upon a time have meant it, but the only thing you can do is grant a new trial after there's been a final judgment, but we're way past that. I mean, final judgments now consist of a series of orders disposing of claims until you finish.

HON. C. A. GUITTARD: But why can't you appeal?

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: Bill, I think that's right. And I think there's no doubt that that's the way the rule previously worked. The only worry I have is, we are actually trying to give some formality or required formality to all of these orders and

judgments.

I worry about, for example, the temporary retraining orders where you go present your evidence to a judge on Friday afternoon to stop something, and the judge quite often in my experience says, "I'm going to get back with you in a couple of hours. I want to look at a couple of things." And then he calls you. Now, the TRO is exceedingly important, but I don't think it has to happen in open court. In fact, in my experience quite often it does not. And I would not want the same degree of formality with those types of orders that I would want with any series of the judgments that would eventually cause the whole case to be disposed of. That's my only concern with this.

The Rule 300 series now deals with a completely different situation. I think we ought to break judgments out or maybe even not even handle them. We don't have a problem with them currently, based on what I can tell, and we have certainly a whole line of common law that deals with it. And that's my only problem with the last sentence.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: I think a temporary retraining order in my mind is a prime example of something that should either be in open court or it should be written down. You're telling somebody you either can or you can't do something. And they should either be there and hear those words, have it be on the record somewhere, and I wouldn't mind putting "in open court" or "on the record" despite the objections, or it should be in writing so that they can be charged with notice of it.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: Luke and Sarah, in brief response, I think you're right, but remember what we're talking about here is rendition. And the truth of the matter is that a temporary restraining order is generally not written down because it's one of those orders that the judge has to draft him or herself to really cut down the relief generally that the movant is making.

And remember, the law is that actual notice is enough to bind the party. So the truth of the matter is, although it must eventually be written down and have all the formalities, when it is actually rendered, and we have now defined "rendered" as an act that is important, it's done in a different way.

And that's the reason why I would be in favor of making the distinction and taking "orders" out of this rule and perhaps handling them differently, because I think there are finer lines we can draw with orders than we need to draw with judgments.

CHAIRMAN SOULES: Judge McCown.

HON. F. SCOTT McCOWN: Well, I mean, I don't know what the experience is elsewhere, but I have never granted a TRO where the party didn't have the written order prepared. And like David said, there may have been fine tuning, but it would have been in the way of striking out and interlineating and signing something that they walked away with right then or where they might leave it with you and you give them notice over the phone

that "I've just now signed it and filed it."

But the concept that you could have an injunctive type of order that was rendered over the air where you don't have a record or you don't have have written documents, I don't know, that's kind of scary to me.

HON. C. A. GUITTARD: Yeah.

HON. SARAH DUNCAN: Me too.

CHAIRMAN SOULES: Rusty McMains.

MR. McMAINS: Again, and perhaps we have been operating on a misassumption as to what the Rule 300 series was, but like I say, Rule 300 disappears in this rewrite, you need to understand, and Rule 300 was the one that talked about what you do after you get a verdict or make findings, you know. It made a determination as to who is going to win in terms of the final disposition of the case. That's gone now from this concept, and we just kind of start out with judgments. This is what a judgment is. And a judgment includes any order, and that's basically what this says.

HON. C. A. GUITTARD: Disposal

of a claim.

MR. McMAINS: Well, I understand that it includes a decree, but the title is actually "Judgment, Decrees and Orders." It actually isn't limited to decrees and orders that are judgments.

HON. C. A. GUITTARD: It's limited to an order that disposes of a claim.

MR. McMAINS: I understand what limits it internally. But if you're going to look in our rules trying to find out what the definition of "order" is, the people at West, who do the ordinary indexing, they're going to send you here.

HON. SARAH DUNCAN: But that can be easily resolved by putting "disposing of claims or defenses" into the title.

MR. McMAINS: All I'm saying is, the point is that this brings in a lot of previous decision making with regards to orders that are either on special exceptions, sanctions orders, all kinds of orders, as being a judgment, which I'm going to tell you, we use the term "judgment" to mean other things in a lot of places in these rules. And

I do not believe this Committee has gone back to see where all the "judgments" are.

And to say that we're going to eliminate the concept of "final judgment" ignores the work that we did that took us at least three sessions on 306(a) in regards to what happens when you don't get notice of a final judgment. You don't have to get notice of anything other than a final judgment, and the clerk is not supposed to send notice of anything but a final judgment. And to say that we don't have a concept of final judgment also ignores the Constitution. And I just think that's just silly to say that we don't have one and therefore we just delete it out of the rule.

HON. SARAH DUNCAN: I guess that brings up the further question. In my view, if an order disposes of a claim or defense, a party should get notice.

MR. ORSINGER: Can I respond? Sarah, how is the district clerk going to even know that an order on special exceptions is something that they have to mail notice of to the parties?

HON. SARAH DUNCAN: But that's a different question, how is it that we describe it so that somebody can understand what they're supposed to do. But as far as the basic question, if special exceptions finally dispose of a claim --

MR. McMAINS: There you go using "final." The point is that it's never finally done until there's a judgment.

HON. SARAH DUNCAN: And so I would say that special exceptions don't fit this definition.

MR. McMAINS: No. It is an order. It says, "'Judgment' as used in these rules includes a decree or an order that disposes of a claim or defense."

HON. SARAH DUNCAN: I see what it says.

MR. McMAINS: It does not say "finally." And it's the final concept that he's objecting to, and that's why I say when you -- once you have taken the word "final" out, you have changed the thrust of what the whole 300 series of rules has done.

HON. SARAH DUNCAN: Can I get a

clarification from Bill that that is what he objects to, if it is?

PROFESSOR DORSANEO: Well, yeah. I mean, I don't -- "final" means different things, and nothing is final in a broad sense. When a court determines, let's take it specifically, that a special exception should be sustained, the order will say whatever it says. If it says that, perhaps inappropriately, that in a given case that the claim for negligent infliction of emotional distress is stricken on the basis that there's no such claim under controlling legal principles, I suppose that claim is disposed of and determined.

Now, it's not that -- if finality has to do with appealability in one sense, if there are other claims, it's not final. If finality has to do with plenary power, if there's a motion for new trial filed, even if it's otherwise final, it's not final. I don't think that the concept of finality helps me when I'm considering the disposition of a claim or a defense, because it has to do with a whole bunch of other things that I can't

really grasp.

And if there are separate trials, I mean, an order with respect to what was tried separately is in a sense final with respect to what was tried separately. If there's a partial summary judgment that's disposed of, that disposes of a claim. If it disposes of a claim, then a partial summary judgment, an interlocutory summary judgment, is as good as it turns out to be when we finally find out the end result.

So unless -- to me, unless we're going to change, and I wouldn't necessarily be against this, our idea about a series of orders amounting to a judgment, once you finish the last step in the process of disposing of parties and claims, I wouldn't be against that, you know, saying that judgment is the last piece of paper which has to be drafted as such. But unless we're going to do that, "final" doesn't help me. And that's why -- that's the conception I bring to this. Maybe I'm not thinking clearly enough.

CHAIRMAN SOULES: Let me try a couple of things here. One, if a judgment,

decree or order disposes of a claim or a defense, what's wrong with requiring it to be made in open court or signed, written down and signed?

MR. McMAINS: Nothing.

CHAIRMAN SOULES: Okay. That's (a). Now, we have not addressed the final issue. Okay. To deal with that, why don't we define "final judgment" as it is in the cases at the end of this language and say, "A final judgment is a judgment that disposes of all parties and claims," or whatever words you want to use, if you want to elaborate on those words, and then say, "Only one final judgment shall be rendered in the cause."

Doesn't that step through most of the problems that we're dealing with here?

MR. McMAINS: No, because they have defined "judgment" inclusively.

CHAIRMAN SOULES: But I'm talking about now we're going to define "final judgment" too.

MR. McMAINS: But it doesn't matter. The problem is not from -- the problem that I see that we're going to create

is not from the inclusion of a definition of "final judgment." It is the fact that they are including nonfinal judgment notions and nondispositions after the trial on the merits in this rule.

CHAIRMAN SOULES: Okay. What's wrong with that?

MR. McMAINS: Well, look at what (b) is. Look at the (b) part of the rule in the clean copy, is what I was looking at. It talks about form and substance. The judgment shall contain the names of the parties, specify the relief to which each party is entitled. I mean, clearly this section is trying to deal with an ultimate, or if you wish to call it a penultimate act of the court in consolidating all of the relief that has been granted along the way in order to make something that is going to be ultimately the subject of being appealed.

That's not to say, obviously, that there are not interlocutory orders that are appealable and that there are not interolcutory judgments, if you will, that are appealable. But the notions that we have

tried to embrace in the Rule 300 series, as indicated by this part as well as all that follows it, are notions of a trial -- I mean, of a judgment after a determination of all issues on the merits and not any issue on the merits. And if you try to claim that a disposition of any issue on the merits is a judgment, then you have changed, in my judgment, a concept that otherwise has gone through these rules unchanged.

MR. ORSINGER: Luke, can I add to what Rusty said?

CHAIRMAN SOULES: Yes. Richard Orsinger.

MR. ORSINGER: I agree that that has been the whole philosophy of the Rule 300 series and that we have a lot of other rules that are penned that depend on that interpretation of the Rule 300 series, including appellate timetables, including motions for new trial timetables, including motions to attack judgments, whether it's a new trial motion to modify or whatever. And if we broaden the -- if we use a definition of "judgment" that includes what traditionally

we have thought to be an order, then we have to go back and look at every single one of our judgment related rules to be sure that we don't have timetables triggered three or four times in one lawsuit.

CHAIRMAN SOULES: Well, judgment now includes orders. It includes an order on special exceptions. That's a piece of the final judgment that gets swept forward to the last day.

MR. ORSINGER: I don't think anybody around this table here is going to think that any appellate timetable runs because special exceptions were sustained against one claim in a pleading. But after this definition of "judgment" is put into effect, then there's going to be a lot of people that say, "Wait a minute, I just had a judgment signed, so where does that leave me relative to all these other rules that have timetables pinned onto them here?"

Unless you come back to --

CHAIRMAN SOULES: Because we don't use the word "final judgment" in all the other rules.

MR. ORSINGER: If we go back and use the word "final judgment" and put in your definition of "final judgment," then that's going to cure that problem, so we have to do that.

PROFESSOR DORSANEO: Well, if you want to, take a vote on whether we're going to, instead of using this definition of "judgment," use the standard definition of "final judgment," which is something that disposes of all claims and defenses. Now, the question is whether you want to add in there, you know, "expressly or by necessary implication" or the rest of it. We could do that. I don't care if we make it final. I don't -- I think that it's misleading. It probably would be -- not misleading. It probably would make us maybe more comfortable.

MR. ORSINGER: But the problem with that solution to this impasse is that sometimes you want to write a judgment that meets all the criteria of a final judgment but it doesn't resolve claims between some parties or it doesn't resolve some issues like attorney's fees. And then that issue is

removed by either a severance order or a nonsuit. And all of a sudden you do have a final judgment only because we defined it. Our criteria, the standards for judgment, the things that have to be in it, only apply if it's final and it's written. Maybe we don't have a judgment that has the necessary information.

PROFESSOR DORSANEO: I think that's our point.

MR. ORSINGER: Well, I think that's a valid point, I think. However, I think to define "judgment" to include everything that's dispositive of a claim includes things that many of us thought were just orders.

PROFESSOR DORSANEO: The other option is to do as the current rules do, and that's not to define it at all, and take out the decrees or orders and just have the rule forever to be "judgments" like it is now, have no definition of it, just like we have no definition now. And it is whatever it is either expressly or by necessary implication on one piece of paper or a stack of them, and

good luck if you can figure it out. That's the current state, and that's what we're trying to deal with.

Maybe what the Committee is telling us, maybe sensibly, is that this is a problem that is incapable of being resolved by the creation of a definition. That's fine.

MR. McMAINS: I disagree wholeheartedly that that is -- we have no problems whatsoever defining what a final judgment is, and we have ample jurisprudence with regards to the determination of it. And that is the thing that is most concerning most everybody with regards to whether or not anything else is called a "judgment." It means that you have multiple judgments ultimately merging into a final judgment. While you may worry about calling an order a judgment, it is of no consequence whatsoever, has no legal significance under the rules. In my view there is no reason to worry about calling it one way or the other. It is what it is. Why do you have to render a special exceptions order different because of the fact that it is the disposition of a claim? That's

silly. It doesn't need to read a different way. How you are supposed to write a summary judgment that is partial? It's controlled by the summary judgment rule and should not be referenced to the Rule 300 series unless you're trying to make it a final judgment.

And I don't think -- I don't think that there's any real confusion out there as to what a judgment looks like in the final analysis after there has been a disposition of the case on the merits or in the event it's a default judgment. Those things are following different rules altogether.

CHAIRMAN SOULES: Okay. Rusty, propose something in the place of (a) or propose something instead of (a) or nothing instead of (a) and we'll have nothing. I mean, how do we fix this concern that you have?

MR. McMAINS: Well, I think first of all that we should not be talking about decrees and orders in the title. And I think secondly that the only thing that we need to define is "final judgment." And I do not think that we should be defining

inclusively into the word -- into a separate term, "judgment," things that have no relevance to the issue of a final judgment, because that's what the rest of the rules deal with, especially the 306(a) series -- I mean, the 306(a) rules, which are the ones that give you additional time where you don't give notice of anything.

I don't think there is any legal significance to including a decree or order and calling it a judgment that requires any kind of definition. I don't think it makes any difference. But the term "final judgment" is a term that is used in the rules repeatedly and referred to repeatedly. And even though it is a misnomer in the sense that there are things that happen after the final judgment and the court can change it and enter a new final judgment, I do not think that is confusing.

And there are things that have to -- that I think under our rules, unless we're going to rewrite them all, that all we need to do is to be defining "final judgment" in this section of the rules.

CHAIRMAN SOULES: Okay. Really what this 300(a) is talking about is rendition. It's not talking about signing and entry. It's saying that when something is rendered --

MR. ORSINGER: Well, there is a sentence there that says the signed judgment is filed and entered. That's where it says signing and entering, the third full sentence.

CHAIRMAN SOULES: Okay. What we're saying in this 300(a) is that when a judge disposes of a claim or defense that it should be done in open court or by signed paper.

MR. ORSINGER: And I don't have a problem with that. My problem is with the last sentence where we fool with the definition of "judgment." I like everything about 300(a) except for that last sentence, and that scares me, that last sentence does.

PROFESSOR DORSANEO: Throw it out then. It's a hard sentence. But don't amuse yourselves with the idea that we have a definition that's well known.

MR. ORSINGER: Well, maybe we

ought to have a definition of "final judgment." I think that would be helpful.

PROFESSOR DORSANEO: We could put one in. But our definition of "final judgment" from the case law talks about disposing of all claims and issues. And then you look at the better case law, expressly or by necessary implication, and then you start adding in a lot of razzamatazz. Now, how much of that do you want to add? None? Some? I don't care. All of it?

HON. C. A. GUITTARD: All of it.

CHAIRMAN SOULES: Well, "judgment" does include all these things right now in the real world out there.

PROFESSOR DORSANEO: But if you want to just finish, you just take -- you just call this "judgment," take out the last sentence, and then everybody will take to the table what they think about what a judgment is, and then that will work fine. And if somebody reading (b) then says, "That means that final judgment contains the names of the parties," that's probably an improvement over

what we have now, and I think it is an improvement. But it's not -- and it's a significant improvement. But I don't have a problem with not defining "judgment" if people think that that causes more trouble than it provides assistance, and that may be right.

HON. C. A. GUITTARD: Then what is a decree?

CHAIRMAN SOULES: A divorce decree.

HON. C. A. GUITTARD: Well, can't a party say, "Well, I don't have a judgment, I have a decree"? That's the reason it says "judgment shall include decrees."

MR. ORSINGER: Yeah. It is conventional, and I think the language may even be in the family code, to use the word "decree" rather than "judgment," because we do use the word "decree."

PROFESSOR DORSANEO: If you want to do something short, you could just take out "or an order" from the last sentence. You know, take out "order." Just say "judgments are decrees."

HON. C. A. GUITTARD: A decree

or an order that disposes of a claim or defense.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: Luke, is one of the solutions perhaps -- I thought you were making headway in your suggestion earlier. I think that "decree" has got to remain in, both in the title and in the last sentence. What we're really fussing about here is orders.

I do think that we ought to try to define an order and say what an order generally has in it, and that is probably everything that is in item 3 of the current 300(b). Why don't we -- I don't mean current, I mean in the draft. In the draft.

Why can't we just say "judgment and decree," have a new (b) that talks about order, and we could even have "final judgment and decree." And we can define what that means from the case law. We can have a new (b) that would define "order," and I think that's important, because I don't think the rules do that now.

We could have what was in the draft

300(b) as "final judgment" over in (3). We could then have another subdivision, probably at this point (d), that would define what's in an order, which might be (a) and -- excuse me, (1) and (2) of current (b), and go on from there.

I've looked through the rest of the draft, and it would not do any damage to the rest of the draft if we put "final judgment or decree" where the term "judgment" applies, and it seems to me that works out the problems, and it advances the ball from where we are now.

Do you want me to -- I'll try to write it up for you and see if it works and we can go on to something else while we're doing that.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: I support what David said. I think it gets us further along the road on judgments and decrees and it does also give us a definition of "order," if we want to define an order. And it puts some minimum standards on what ought to be in an order, like the names of the parties and that kind of thing.

CHAIRMAN SOULES: Well, here we're only talking about one kind of order, and that's an order that disposes of a claim or defense, not an order compelling discovery.

MR. KELTNER: But is there any problem in maybe even defining "order" that way? Just look at item (b) in the draft, Luke, 300(b). If you say, "An order shall contain the names of the parties and specific relief from which each party is entitled," isn't that significant enough for any order?

CHAIRMAN SOULES: Yes. I think that an order should have that.

MR. KELTNER: Should it have anything else?

MR. McMAINS: What about special exceptions?

CHAIRMAN SOULES: Well, it also says, "if appropriate, direct the issuance of processes." So that wouldn't be appropriate if the judge grants special exceptions.

MR. McMAINS: Why? If you're doing a special exception or a partial summary judgment or a lot of things, it is not uncommon to see judges simply say "motion

granted," or if it's a sanctions order, they incorporate the sanctions order without having to specify all of these things.

MR. KELTNER: Well, I agree, Rusty. And I think that's a very good point. But isn't granting the relief saying, "I grant X motion"? I mean, it seems to me that this is -- I think this is pretty close, and I think the committee draft advances the ball, and with some fine tuning we can get this done.

MR. McMAINS: Well, the recitation says that the entry shall contain the full names of the parties as stated in the pleadings --

MR. KELTNER: Yeah, I understand.

MR. McMAINS: -- for and against whom the judgment is rendered.

MR. KELTNER: That's right. And if you limited that part to a final judgment, it appears not to be a problem.

MR. McMAINS: I agree.

MR. KELTNER: But I'm at the Committee's pleasure on that.

MR. McMAINS: I agree with that.

CHAIRMAN SOULES: Is there anything really wrong with what the Committee has proposed except that we need to deal with the concept of final judgment and carry it through the rest of the rules so that final judgment doesn't get confused with what judgment is?

MR. KELTNER: No.

CHAIRMAN SOULES: I mean, pieces of the judgment conform to the -- I mean, I have one concern that if we make the final judgment specify the relief to which each party is entitled, then we may be suggesting that the final judgment has to sweep backwards and pick up everything in the record that has disposed of a claim or defense along the way, and there's going to be a lot of screw-ups on that.

MR. McMAINS: I think that's the reason for the "necessary implication" language.

MR. KELTNER: But can't we do that the way we currently do it now with the

suggestion from Northeast Independent School District where we just say all relief not granted is denied? I think you need to incorporate all the other orders too, but --

CHAIRMAN SOULES: But I guess when you get to the definition of "final judgment," it shouldn't look like a piece of -- it shouldn't suggest it's a piece of paper.

MR. KELTNER: Exactly. That's a good point.

CHAIRMAN SOULES: Because you grant this last relief after all this disposition has occurred over the life of the case. And if you say all relief not granted is denied, what happens to all that relief that happened along the way in the case if it's supposed to be one piece of paper? And it's not, and it probably shouldn't be, because it's too treacherous to try to pick up everything that's happened on one piece of paper.

MR. ORSINGER: The final judgment you're just describing should be final because it resolves all remaining

unresolved issues, and the issues that have previously been resolved stay previously resolved.

CHAIRMAN SOULES: Actually the final judgment is the last judgment and all that's preceded it. That's what it really is.

MR. ORSINGER: All that's preceded it that finally has got -- that's disposed of the claim.

CHAIRMAN SOULES: Disposed of the claim, yeah. It's the last judgment that disposes of the last claims and the last parties.

MR. ORSINGER: But the thing that makes it final is that it's the last word. There may have been word number one, two and three, but this is the last word, and now we're headed up to the appellate court.

CHAIRMAN SOULES: Assuming that we're going to take care of this final judgment problem, why isn't (a) okay just the way it is?

MR. McMAINS: I'm not sure what you're -- when you say "take care of it," what do you --

CHAIRMAN SOULES: We're going to define "final judgment."

MR. McMAINS: I understand. But are you leaving "order" defined?

CHAIRMAN SOULES: Yes -- no. It's any -- yes. I'm leaving "judgment" to include any judgment, decree or order that disposes of a claim or defense in there.

MR. ORSINGER: But that's as distinguished from final judgment?

CHAIRMAN SOULES: Yeah.

MR. McMAINS: I understand what distinction you're making, but I'm not --

HON. SARAH DUNCAN: I think Luke is also talking about going through all the rest of the rules to change them to refer to final judgment, if that's what the rule is really referring to.

CHAIRMAN SOULES: Exactly. So with that understanding, those in favor, that we're going to fix that problem, those in favor of 300(a) as written show by hands. Nine.

Those opposed. Anyone else? Two. Nine to two it passes as written.

MR. ORSINGER: That's on the condition, though, that we define "final" and trigger all of our other rules on that "final."

CHAIRMAN SOULES: Absolutely on that condition. Does everybody understand that's the way you were voting? All heads are nodding yes.

HON. C. A. GUITTARD: Are we defining "final," or are we defining "order" within the term here?

CHAIRMAN SOULES: Just like it's written, Judge, except we're going to work the final judgment concept out, and then work that through all the rules where it's appropriate where it says "final judgment."

PROFESSOR DORSANEO: Now, do I understand you want me to go to the case law and take the definition of "final judgment" and you don't want me to innovate it to make it accurate?

MR. KELTNER: Innovate it.

MR. McMAINS: Meaning that you have to innovate in order to make it accurate? Is that what you're saying?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: I think we ought to get the benefit of your --

PROFESSOR DORSANEO: Well, what I'm saying is that if we're talking about something that's -- especially in the case of something that's signed, the definition of "final judgment" will not match. It will mislead. There will not be such a thing in about half of the cases.

CHAIRMAN SOULES: Well, can you explain that? What do you mean? I don't understand. I don't comprehend what you're saying.

PROFESSOR DORSANEO: Well, there is no one piece of paper that's signed that disposes of all claims, all issues and all parties. That is sometimes true, but frequently it's not true.

MR. McMAINS: Only if you're saying that it doesn't dispose of it except by necessary implication. I mean, you have to include the concepts in Northeast Independent School District vs. Aldridge.

PROFESSOR DORSANEO: Yeah.

MR. McMAINS: Or by necessary implication generally. That would have to be in there.

CHAIRMAN SOULES: And David volunteered to do that.

MR. KELTNER: Until you spoke.

PROFESSOR DORSANEO: Well, with all due respect, everybody here has a great deal of expertise, more than a nodding acquaintance with these problems, but these are problems that have caused the Court a lot of difficulty over the last 50 years, and I don't expect that there's anybody here who can actually draft this and to capture all of this.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: I guess that's why I wanted this draft to come up. It hasn't just caused the Court a lot of problems, it's caused a lot of litigants a lot of problems, and a lot of people have lost claims because of the intricacies of the final judgment rule. We just recalled a mandate because if got so messed up, which is not

necessarily anyone's fault.

But what I would like to see done is not a sentence, a very, very long sentence by Bill codifying all the intricacies of final judgment law. I would like one rule, very simple, that the court follows and the litigants follow and the clerk follows, and I frankly don't care what that rule is. I mean, I don't care what it is that makes it final. I care a lot about everybody knowing it's final and operating from that certain knowledge.

PROFESSOR DORSANEO: And the way the federal courts do it, of course, is they say that you write in there that it's final, and if it's final, it's final, whether it's final in some abstract sense or not, period.

HON. SARAH DUNCAN: And that's effectively what the court did with the Mother Hubbard clause, is they said, if it says all relief not granted is denied, that's it, it's final in a summary judgment instance. At least then the parties and the courts can look at it and say, "I know what that is. I know I

need to take steps because I know what that is." Whereas now -- I mean, it's great that everybody around the table knows that the last order that disposes of the last outstanding claim or party renders everything else part of a final judgment that is never reduced to writing. But a lot of people don't know and they get really tripped up on it.

CHAIRMAN SOULES: Let's take our lunch. Let's try to use about 30 minutes and then get back to work.

(At this time there was a lunch recess.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

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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 17, 1995, 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 $990.00.

CHARGED TO: Soules & Wallace, P.C.

Given under my hand and seal of office on this the 30th day of November, 1995.

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