MINUTES OF THE
SUPREME COURT ADVISORY COMMITTEE
MARCH 15-16, 1996

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock on Friday, March 15, 1996, pursuant to call of the Chair.

Friday, March 15, 1996:

Supreme Court of Texas Justice and Liaison to the Supreme Court Advisory Committee, Justice Nathan L. Hecht was present.

Members present: Luther H. Soules, III, Prof. Alexandra W. Albright, Charles L. Babcock, Pamela Stanton Baron, Honorable Scott A. Brister, Professor Elaine A. Carlson, Professor William V. Dorsaneo III, Sarah B. Duncan, Anne L. Gardner, Hon. Clarence A. Guittard, Michael A. Hatchell, Donald M. Hunt, Joseph Latting, Gilbert I. Low, Russell H. McMains, Anne McNamara, Richard R. Orsinger, Hon. David Peeples, Anthony J. Sadberry and Stephen Yelenosky.

Ex-officio Members present: Hon. Sam Houston Clinton, Hon. William Cornelius, O.C. Hamilton, David B. Jackson, Hon. Paul Heath Till and Bonnie Wolbrueck.

Members absent: Alejandro Acosta, Jr., David J. Beck, Ann T. Cochran, Michael Gallagher, Charles F. Herring, Tommy Jacks, Franklin Jones, Jr., David Keltner, Thomas S. Leatherbury, John H. Marks, Jr., Hon. F. Scott McCown, David L. Perry, Stephen D. Susman and Paula Sweeney.

Ex-Officio Members absent: W. Kenneth Law, Paul N. Gold, Doris Lange and Michael Prince.

Others present: Joe Crawford (Committee on Administration of Rules of Evidence), Lee Parsley (Supreme Court Staff Attorney), and Holly H. Duderstadt (Soules & Wallace).

Chairman Soules brought the meeting to order.

Joe Crawford advised where the State Bar Rules of Evidence Committee is on their work.

Gilbert I. Low presented the report on the Rules of Evidence Subcommittee.

Mr. Low brought up TRCE 606, Competency of Juror as a Witness, for discussion.

Mr. Low proposed deleting the words "on which he has sat on", or end with "the juror is sitting" and take out "or has sat". There being no opposition the proposal was adopted.

Mr. Low brought up the discussion on impeaching the verdict. Discussion followed.

Justice Guittard proposed that Rule 327 and Rule 606 say the same thing. Discussion followed.

Chairman Soules indicated that the proposal is to change 606(b) to track Federal Rule 606 and to add the sentence "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Discussion continued.

Chairman Soules asked if anyone felt that we should have in Rule 606 the "extraneous prejudicial information". There was no support so the language was deleted.

Discussion continued. There was no objection to making the rule gender neutral.

Discussion was had regarding adding as the last sentence the following language: "A juror may be called to testify concerning the question of whether or not the juror was qualified to serve." There being no opposition the sentence was approved.

Mr. Low brought up for discussion the changes to TRCE 204, Determination of Texas City and County Ordinances, the Contents of the Texas Register, the Rules of Agencies Published in the Administrative Code, suggested by Charles Spain.

A vote was taken on whether "Texas Register" and "Administrative Code" should be deleted. By a vote of 14 to 4 the language was retained.

Mr. Low brought up for discussion the changes to TRCE 407(a), Subsequent Remedial Measures; Notification of Defect, as suggested by R. Doak Bishop which was to delete the last sentence pertaining to strict liability products case. Discussion followed. A vote was taken on retaining the last sentence. By a vote of 13 to 1 there will be no change to TRCE 407(a).

The suggestion of Doak Bishop to have a new rule (Rule 413) that would say no evidence of Defendant's net worth or wealth is admissible until liability for exemplary damages are found. Discussion followed. A vote was taken and the committee voted unanimously to reject the proposal.

The suggestion by Peter Chamberlain to amend Rule 510(d), Confidentiality of Mental Health Information, to provide protection of psychological records of counselor or experts was brought up for discussion.

Richard Orsinger proposed delaying action while the Family Law Council attempts to define a class of individuals to which the exception (d)(6) would apply and then everybody else would be excluded from (d)(6). Discussion continued. There being no opposition this issue was tabled.

The suggestion by Stephen A. Mandel to amend TRCP 168 to conform to TRCE 703 was brought up for discussion. The Subcommittee recommended no change. There being no opposition the subcommittee's recommendation was approved.

The suggestion by Judge Michael Schattman to amend Rule 902(1) to be consistent with Section 18.001 of the Civil Practice and Remedies Code. The Subcommittee recommended no change. There being no opposition the Subcommittee's recommendation was approved.

The suggestion of David Beck to write a new rule regarding privilege for self-critical analysis was brought up for discussion. Chairman Soules advised that this issue will be tabled until the State Bar Rules of Evidence Committee makes its report. Richard Orsinger requested a description of what the self-critical analysis would be. Discussion followed.

Buddy Low brought up for discussion amending TRCE 509(d) and 510(d) to be consistent with Section 5.08, Article 4495(b). The Committee voted that the two rules should be consistent. The Committee voted whether to delete "or administrative proceedings" from 509, or add it to 510. By a vote of 7 to 1 the language will be added to TRCE 510 and kept in TRCE 509.

Chairman Soules advised that TRCE 412 and TRCE 702 are tabled in deference to the State Bar Rules of Evidence Committee.

The suggestion by Judge Kevin R. Madison to write a new rule (TRCE 182) to provide for a procedure when using firearms and ammunition as evidence in a civil case was brought up for discussion. The Subcommittee recommended no change. A vote was taken and by a vote of 8 to 0 the Committee voted to approve the Subcommittee' recommendation.

The suggestion of Fred Maddox to amend Rule 504 to do away with the privilege not to be called as a witness against a spouse with regard to crime threatened or committed against a spouse was brought up for discussion. The Subcommittee recommended no action. Chairman Soules requested that Mr. Low make a note to include this issue in the merging of the civil and criminal rules.

Judge David Peeples presented the report on TRCP 216-295.

Rule 292, Verdict by Portion of Original Jury, was brought up for discussion on the issue of allowing a judge to excuse a juror because of a natural disaster. The Subcommittee recommended no change.

The Subcommittee recommended that Rule 292 be amended to allow a judge to excuse a juror because of serious illness or death of a near relative. Discussion followed.

Justice Duncan brought the natural disaster issue back up for further discussion.

The discussion continued regarding illness or death of a near relative.

A vote was taken on whether to amend the rule by adding the last sentence or not.

By a vote of 16 to 2 there will be a change. Discussion continued on how to change the rule. Judge Peeples made a motion to vote on the language as proposed. Joe Latting seconded the motion.

Judge Brister suggested splitting the vote between the natural disaster issue and the illness of a near relative rule. Discussion continued.

A vote was taken on the proposed last sentence but deleting the word "properly". By a vote of 11 to 6 the proposed amendment passed.

Richard Orsinger brought up the discussion regarding returning a 5 out of 6 verdict.

A vote was taken on the natural disaster issue which resulted in a vote of 10 to 3 against.

Discussion continued regarding the revisions to Rule 292.

The suggestion by Luke Soules to delete the words "on the non-jury docket" in Rule 216(a) was brought up for discussion. There being no opposition the amendment was approved.

Bonnie Wolbrueck proposed changing the rule regarding the jury fee to say "the fee required by statute shall be deposited." Discussion followed.

Judge Peeples brought up for discussion Rule 226(a) regarding asking the jury panel about felony convictions. The Subcommittee

recommended that the proposal to change 226(a) be withdrawn and no change be made.

The suggestion by Charles Spain to amend Rule 237a so that when a case is remanded from federal court you have 30 days to make objections on the basis of privilege that you didn't get to make in federal court was brought up for discussion.

Joe Latting proposed no change to the rule. Discussion continued. A vote was taken and by a vote of 14 to 0 the Committee voted unanimously for no change.

Judge Peeples brought up the proposal to change "non-jury" to "nonjury" throughout the rules. There being no opposition the proposal was unanimously approved.

The suggestion of James Holmes to amend Rule 239 to conform to the Lawyers Creed was brought up for discussion. The subcommittee asked for guidance on this issue. Discussion followed.

A vote was taken on amending Rule 239 to add language from the Lawyers Creed. By a vote of 10 to 1 the suggestion failed.

Judge Peeples brought up for discussion whether or not the Committee should write a rule on the Batson procedure.

A vote was taken and by a vote of 11 to 6 the committee voted to write a rule. A discussion was had regarding how to write the rule.

Joe Latting presented the report on Rule 13 and Rule 215.

Mr. Latting advised that the proposed changes recommended by Shelby Sharpe, Luke Soules, Karen Johnson, and Professor J. Hadley Edgar have been addressed by the amendments already made to Rules 13 and 215.

The suggestion by Michael Pezzulli to write a rule that will regulate RICO cases in State Court was brought up for discussion. The subcommittee recommended no action. There being no opposition the recommended change was rejected.

Joe Latting advised that the issues raised by Ken Fuller and Guy Jones have been addressed by the amendments to Rule 13.

A discussion was had regarding the use of the words "other papers" versus "pleading and motion."

The suggestion of Bruce Anderson to amend the discovery rules so that identification of a person is someone with knowledge of relevant facts or an expert witness by any party shall suffice was

brought up for discussion. Joe Latting advised the discovery rules have taken care of Mr. Anderson's problem.

Joe Latting advised that the suggestion by Judge Brent Keiss that there by severe limitations on discovery has been taken care of by the proposed discovery rules.

Joe Latting advised that the suggestions by Shelby Sharpe to clarify Rule 215 has been taken care of by the rewrite of Rule 215.

Joe Latting advised that the suggestion of James R. Bass to simplify discovery to avoid mandatory exclusion of evidence has been taken care of by the proposed discovery rules.

Joe Latting advised that the suggestions submitted by Stephen R. Marsh, Sidney Floyd, T.B. Wright, James V. Hammett, Judge Pat Baskin, Steve McConnico and Judge William Kilgarlin have been taken care of by the amendments to the discovery and sanction rules.

Joe Latting advised that the suggestions by Dan Price, Phil Gilbert and Luke Soules have been taken care of by the rewrite of the sanctions rule.

The suggestion of Robert Barfield to amend Rule 13 to deal with abusive motions in limine was brought up for discussion. A subcommittee was appointed to write a motion in limine rule.

The suggestion by Justice Guittard to reconcile the provisions of the trial rules with those of appellate rules and raised the question of whether the same provisions in the trial rules concerning the effect of citing papers should also apply on appeal was brought up for discussion. Justice Guittard suggested rewriting TRAP 5 to incorporate the Rule 13 standards or provide a general rule that applies both to trial and appeal that will set out the standards. Discussion continued.

Justice Guittard will attempt to conform TRAP to TRCP 13. Discussion continued.

The suggestion of Tom Boundy to rewrite Rule 13 has already been taken care of.

Joe Latting advised that the State Bar Court Rules Committee's rules have all been taken into consideration.

Don Hunt presented the report on TRCP 296-331.

Mr. Hunt explained the changes to TRCP 296 and made a motion for its adoption. There being on opposition the changes were approved.

Mr. Hunt explained the changes to TRCP 297. Discussion followed. Chairman Soules read the proposed language as follows: "The judge shall, whenever feasible, state the findings of fact on all independent grounds of recovery or defense raised by the pleadings and evidence in broad form in the same manner as questions are submitted to the jury in a jury trial." Discussion continued.

Richard Orsinger proposed the following language: "The Judge shall state the findings of fact, whenever feasible in broad form..." Discussion continued.

Chairman Soules read the proposed language as follows: The judge shall state the findings of fact on all independent grounds of recovery or defense raised by the pleadings and the evidence in broad form, whenever feasible, in the same manner as questions are submitted to the jury in a jury trial."

Professor Dorsaneo proposed deleting the word "independent". Justice Duncan proposed deleting "in the same manner." Discussion continued.

Chairman Soules read the proposed language as follows: "The judge shall state the findings of fact on all grounds of recovery or defense raised by the pleadings and evidence in broad form, whenever feasible, in the same manner as questions are submitted to the jury in a jury trial. A vote was taken and there being no opposition, the amendment was approved.

A discussion was had regarding the second sentence of TRCP 297. Don Hunt advised the word "independent" needs to be deleted. A vote was taken and there being no opposition the second sentence as amended was approved.

A discussion was had regarding the third sentence of Rule 297. Mr. Hunt advised "independent" should be deleted. Chairman Soules indicated "on an ultimate issue of an independent ground or defense" should also be deleted.

Richard Orsinger proposed "each" should be changed to "all" in the second sentence. There was no opposition to this change.

Don Hunt proposed changing "all" to "each" in the first sentence also.

There being no opposition Rule 297 was approved as amended.

Don Hunt explained the changes to Rule 299b. Discussion followed.

Chairman Soules proposed that the last sentence should read "No finding, however, shall be presumed on an omitted element for which a finding has been requested." Discussion continued.

Chairman Soules proposed "No finding, however, shall be presumed on an omitted element when a finding has been requested, and (1) the request had been denied, or (2) the judge failed to make additional findings" or "failed to make a finding". Discussion continued.

Don Hunt said just to add "to make a requested additional finding". Richard Orsinger said it should say "the additional finding." Discussion continued.

Chairman Soules read the proposed language as follows: "No finding, however, shall be presumed on an omitted element for which a finding has been requested and (1) the request has been denied or (2) the judge failed to make the requested finding." Discussion continued.

Chairman Soules proposed "(2) the judge failed to act on the request."

Justice Guittard proposed "The judge fails to make a finding on the requested element." Richard Orsinger proposed "failed or refused to make". Mr. Hunt pointed out "refused" doesn't add anything. What we are dealing with is the failure. Mr. Hunt read what he believed was the language the Committee was trying to get at, as follows: "No finding, however, shall be presumed on an omitted element for which a finding has been requested and, (1) the requested finding has been denied, or (2) the judge has filed to make a requested finding."

Discussion continued.

Judge Guittard proposed that paragraph (2) read "or the judge failed to make a finding on the omitted element." Richard Orsinger proposed changing (1) to read "the judge refuses to make a finding or...". Mr. Hamilton proposed the following language "If the judge upon request is given an opportunity to make a finding on such element." Discussion continued.

Chairman Soules proposed "No finding, however, shall be presumed on an omitted element for which a finding has been requested." Richard Orsinger proposed "properly requested." Don Hunt proposed "timely". Discussion continued.

Mike Hatchell commented it should at least read "an omitted element" and that in the last phrase take out the word "unrequested" at the end of the second line.

Anne Gardner inquired whether we have approved a rule that's going to require us to make initial requests for specific findings. Discussion followed regarding same. Ms. Gardner indicated its confusing unless you put something in to say you are talking about additional findings. Richard Orsinger proposed fixing her problem by saying "for which an additional finding has been requested."

A discussion what had regarding what is in the current Rule 299.

Chairman Soules proposed having an additional first sentence or a new paragraph (b) that would read "Waived Grounds. Upon appeal all grounds of recovery or defense not conclusively established under the evidence and no element of which has been submitted or requested are waived."

Rusty McMains proposed "no element of which has been requested or found." Professor Dorsaneo proposed taking out the words "not conclusively established."

Chairman Soules reads the proposed paragraph (b) as follows: "Upon appeal all grounds of recovery or defense no element of which was found by the judge or requested was waived." Carl Hamilton proposed putting "not conclusively established" back in.

Discussion continued.

Don Hunt made a motion to amend the draft to include a new (b) and change current (b) to (c) and the new (b) would be "Waived Ground or Defense. Upon appeal a ground or defense not conclusively established under the evidence, no element of which has been requested or found, is waived."

Don Hunt advised that (a) would read "When findings of fact are filed with the trial judge they shall form the basis of the judgment upon which all grounds of recovery or defense. The judgment may not be support upon appeal by a presumed finding upon any ground of recovery or defense, no element of which has been included in the findings of fact." Discussion continued.

Richard Orsinger proposed taking the last sentence of (a) out and say you waive it if you don't get a finding on it.

Don Hunt proposed amending Rule 299(a) to read as follows: "(a) Omitted Grounds or Defense. When findings of fact are filed by the trial judge, they shall form the basis of the judgment upon all grounds of recovery and defense. Upon appeal a ground or defense not conclusively established under the evidence, no element of which has been requested or found, is waived."

Don Hunt explained the proposed changes to TRCP 300(a). There being no objection the changes to paragraph (a) were approved.

Mr. Hunt explained the proposed change to TRCP 300(b). Mr. Hunt explained that (b)(1), (b)(2) and alternative 1 to (b)(3) represent the current case law. Alternative 2 represents a different version of (3) which has been included at Justice Guittard's request. Justice Guittard provided a historical background for the changes proposed. Justice Guittard made a motion that Alternative 2 be recommended. Discussion followed.

Professor Albright commented what we should do is take the implication out and require Mother Hubbard for a final judgment. Don Hunt advised that (b)(2) defines disposition by implication. Discussion continued.

Justice Duncan proposed in paragraph (b)(2) changing "A claim is disposed of" to "Claims and parties are disposed of..." Discussion followed.

Discussion continued regarding the two alternatives.

Professor Dorsaneo proposed deleting the words "expressly or by implication" in Alternative 2. Discussion continued.

Judge Peeples advised they ought to go with Alternative One which restates the present law.

Discussion continued regarding all aspects of the proposed changes to Rule 300(b).

Professor Dorsaneo proposed a vote on whether or not there is a motion in opposition to the original decision to put a definition of "final judgment" in this rule.

A vote was taken on the proposed changes to Rule 300(b)(1) and by a vote of 6 to 3 the changes were approved.

Don Hunt proposed changing "A claim is disposed of ..." to "A claim or party is disposed of..." in (b)(2).

A discussion was had regarding the severance language in Rule 300(b)(2). Chairman Soules indicated that "severance or" should be deleted. Professor Dorsaneo indicated he doesn't think that is a good idea and explained why. Discussion followed.

Don Hunt reads the proposed language in Rule 300(b)(2) as follows: A claim or party not expressly disposed of is disposed of by implication if a judgment is rendered on the merits after conventional trial and no severance or separate trial of the claim has been ordered."

A discussion continued regarding the severance issue.

A vote was taken on Rule 300(b)(2) as modified and by a vote of 9 to 4 the changes were approved.

A vote was taken on alternative one to Rule 300(b)(3) with 5 members voting in favor of alternative one.

A vote was taken on alternative two to Rule 300(b)(3) with 9 members voting in favor of alternative two.

Rusty McMains inquired where the language went that required any party receive a copy of a proposed judgment. Professor Dorsaneo explained that it is now in Rule 305. Discussion followed. Don Hunt advised that the 21a service language has been removed from all of these rules because it is now in the general service rules. Discussion continued. Don Hunt commented they needed to put the language back in. Discussion continued. Mr. Hunt will add language to Rule 300 that if a proposed judgment is submitted without a motion that the proposed judgment be served.

Don Hunt explained the proposed changes to Rule 300(c), Form and Substance: General. Discussion followed.

A vote was taken on Rule 300(c)(1), there being no opposition the proposed changes were approved.

Judge David Peeples brought up the discussion of what happens if the final judgment is not done right under 300(c). Does the trial judge have jurisdiction to change the final judgment? Richard Orsinger proposed adding a sentence that says something like "The failure to comply with this rule is correctable on appeal but shall not render the judgment interlocutory." Discussion followed.

Richard Orsinger proposed that we say that an error regarding (1) and (2) does not affect the finality of the judgment. Discussion continued.

Richard Orsinger proposed that (c) ought to require the judgment to dispose of all parties and claims. Chairman Soules indicated that 300(c)(3) would therefore read "disposes of all parties and claims."

A vote was taken on Rule 300(c) and by a vote of 4 to 2 the amendments were approved.

Don Hunt explained the changes to Rule 300(d)(2). A discussion was had on whether or not "an order to sell" should say "seize and sell". Mr. Hunt advised that that language was previously struck from the rule. There being no objection the proposed changes were approved.

Don Hunt explained the changes to Rule 301(b) and 301(c). There being no opposition to Rule 301(b) and Rule 301(c) the changes were approved.

Don Hunt explained the changes to Rule 301(e). There being no opposition the changes were approved.

Don Hunt explained the changes to Rule 301(a)(5). There being no opposition the changes were approved.

Don Hunt explained the changes to Rule 301(c)(4). There being no opposition the changes were approved.

Don Hunt explained the changes to Rule 303(e)(10) and 303(e)-(11). There being no opposition the changes were approved.

Don Hunt explained the changes to Rule 304(a). There being no opposition the changes were approved.

Don Hunt explained the changes to Rule 304(b). There being no opposition the changes were approved.

Don Hunt explained the changes to Rule 304(c). Discussion followed. There being no opposition the changes were approved.

Don Hunt explained the changes to Rule 304(d). There being no opposition the changes were approved.

Don Hunt explained the changes to Rule 304(e)(1). Discussion followed. Richard Orsinger proposed something like "Unless the judgment is not final, the date a judgment or appealable order is signed as shown or record is the beginning ..." and having said all that say "If the judgment is not final when signed, it becomes appealable when..." and describe this removal of the impediment to finality so that our rule is saying that if the judgment in interlocutory when its signed the deadline is going to run from when it becomes noninterlocutroy. Discussion continued. There being no opposition the changes were approved.

The meeting was adjourned until Saturday morning.

The Advisory Committee of the Supreme Court of Texas convened at 8:00 o'clock on Saturday, March 16, 1996, pursuant to call of the Chair.

Saturday, March 16, 1996

Supreme Court of Texas Justice and Liaison to the Supreme Court Advisory Committee, Justice Nathan L. Hecht was present.

Members present: Luther H. Soules, III, Prof. Alexandra W. Albright, Charles L. Babcock, Honorable Scott A. Brister, Professor Elaine A. Carlson, William V. Dorsaneo III, Sarah B. Duncan, Anne L. Gardner, Hon. Clarence A. Guittard, Michael A. Hatchell, Donald M. Hunt, Joseph Latting, John H. Marks, Jr., Russell H. McMains, Anne McNamara, Richard R. Orsinger, Hon. David Peeples, and Stephen Yelenosky.

Ex-officio Members present: Hon. William Cornelius, O. C. Hamilton, David B. Jackson, and Hon. Paul Heath Till.

Members absent: Alejandro Acosta, Jr., Pamela Stanton Baron, David J. Beck, Ann T. Cochran, Michael T. Gallagher, Charles F. Herring, Jr., Tommy Jacks, Franklin Jones, Jr., David E. Keltner, Thomas S. Leatherbury, Gilbert I. Low, Hon. F. Scott McCown, David L. Perry, Anthony J. Sadberry, Stephen D. Susman and Paula Sweeney.

Ex-Officio Members absent: Hon. Sam Houston Clinton, W. Kenneth Law, Paul Gold, Doris Lange, Michael Prince and Bonnie Wolbrueck.

Others present: Lee Parsley (Supreme Court Staff Attorney) and Holly H. Duderstadt (Soules & Wallace).

Chairman Soules brought the meeting to order.

Don Hunt explained the changes to Rule 300(e)(3) and (e)(4). There being no opposition the changes were approved.

Don Hunt explained the changes to Rule 304(e)(5). There being no opposition the changes were approved.

Don Hunt explained the changes to Rule 304(e)(6) and (e)(7). Discussion followed. Mike Hatchell inquired whether subdivision (6) is now in the Appellate Rules. Discussion followed. Mr. Hunt advised he would verify that this rule and the appellate rule were not different. There being no opposition the changes were approved.

Don Hunt explained the changes to Rule 304(e)(8). Discussion followed. Rusty McMains made a motion to add the sentence "A motion filed on the same day the judgment is signed is not premature". Richard Orsinger seconded the motion. Discussion continued. With that addition there was no opposition and the changes were approved.

Don Hunt explained the changes to Rule 305. Justice Guittard asks why we have "if within the time allowed by Rule 97" in subparagraph (c)(4). Discussion followed. Richard Orsinger proposed deleting the language entirely.

Rusty McMains brought up a discussion regarding subparagraph (c)(3). Discussion followed.

Richard Orsinger proposed dropping (3) and changing (2) to say 105 days after a final judgment or amended judgment is signed. Don Hunt explained that the 105 days is covered in 304(e)(6). Richard Orsinger amended his proposal to just dropping 305(a)(3). Discussion continued.

Rusty McMains proposed changing Rule 305(a)(3) to read something like "for thirty days after the judge signs an order exercising judicial discretion if the judge had plenary power pursuant to sections (1) and (2) above at the time of signing." Discussion followed.

Richard Orsinger made a motion to delete 305(a)(3) altogether and explained why. Discussion continued. Justice Guittard seconded the motion. Discussion continued.

Judge Peeples commented that (a)(2) and (b)(2) conflict with each other. Discussion followed.

Discussion continued regarding deleting subparagraph (3). A vote was taken and by a vote of 13 to 0 subparagraph (a)(3) will be deleted.

Discussion continued regarding Rule 305(a)(1) and (2). A vote was taken on Rule 305(a)(1) and (2) and by a vote of 6 to 9 the proposed changes to the rule fail.

Discussion continued regarding Rule 305. Chairman Soules advised that unless somebody who voted in the majority wants to move to reconsider this is a dead issue.

Mr. Hunt made a motion to repeal Rule 311 and Rule 312. Discussion followed. There being no opposition the motion was approved.

Mr. Hunt brought back up for discussion what he is suppose to do with Rule 305, whether he is suppose to plug 329(b) back in and eliminate the conflicts or what? John Marks made a motion to reconsider Rule 305.

Richard Orsinger proposed eliminating paragraph (b) except that it will say that the perfection of an appeal does not affect the trial court's plenary power. Discussion followed.

Professor Albright proposed the following language for (b): "Exercise. Regardless of whether an appeal has been perfected, the trial court has plenary power to grant a motion to modify or motion for new trial or to vacate the judgment", deleting the rest of (b). Mr. Hunt accepted the proposal. Discussion followed.

Elaine Carlson proposed starting the rule with the definition of plenary power. Mr. Orsinger that (a) should read "Regardless of whether an appeal has been perfected, the trial court has plenary power to grant a motion to modify, a motion for new trial or motion to vacate the judgment: (1) for 30 days after final judgment is signed; (2) for 105 days. Discussion followed.

Justice Guittard made a motion to recommit the question of plenary power under Rule 305. Professor Albright seconded the motion. Discussion continued. Judge Peeples also seconded Justice Guittard's motion. Discussion continued.

Chairman Soules advised that Rule 305 will go back to the subcommittee.

Rusty McMains brought up for discussion a problem he sees with alternative 2 to Rule 300 voted on earlier. Chairman Soules asked Mr. McMains to draft some language to fix his problem and submit it to the subcommittee for review and recommendation.

Chip Babcock presented a report on TRCP 18c and explained the proposed changes thereto. Discussion followed. John Marks made a motion to add language that says if a party objects to televising a proceeding in a civil case, the court cannot order it. Discussion continued. John Marks refined his motion by moving that in the first sentence start out by saying "on agreement of the parties". Joe Latting seconded the motion but would add "only on agreement". Discussion continued.

Anne Gardner made a motion to delete the second sentence of the first paragraph. John Marks made a motion to remove paragraph 1 and add that there will be coverage only with consent of all parties. Joe Latting seconded the motion. John Marks also made a part of his motion deleting language in paragraph 3.3 that says "Objections to media coverage must be in writing..."

Richard Orsinger commented we need to define what "master" is suppose to mean. Mike Hatchell commented we need to also define "courtroom". Discussion followed.

A vote was taken on whether or not the committee should continue to work on this rule. Everybody agreed they should continue to work on the rule.

A vote was taken on whether it should be limited to situations where all parties agree. By a vote of 12 to six it will be limited.

A vote was taken on whether we should define "courtroom". There was no opposition.

A vote was taken on who felt there was a need to better define any class of decision makers other than judges with a vote of 12 to 1.

A discussion was had on defining what a "courtroom" is.

A vote was taken on deleting Paragraph 1, Construction. By a vote of 13 to 3 the paragraph will be deleted.

A discussion was had regarding whether the burden of proof should be on the media to show why they should have access rather than the judge to show why they're not going to be allowed. A vote was taken and the committee voted unanimously that the media should have the burden of proof. Justice Brister will do a redraft and forward it to Mr. Babcock and Mr. Orsinger.

Professor Dorsaneo brought up a discussion regarding the veto rights of the parties involving some sort of presumption.

Justice Guittard inquired about a similar rule in the Appellate Rules. Discussion followed.

Alex Albright presented the subcommittee's report on TRCP 86, Venue. Discussion followed. Professor Albright advised the Chair she would like to focus on whether we want live testimony or just affidavits. Discussion followed.

A vote was taken to limit proof to affidavits in the traditional proper venue, mandatory venue, and also on the convenience of the parties and in the interest of justice. The committee voted unanimously for affidavits. Discussion continued.

A discussion was had on whether or not to put a standard of proof in the rule. Chairman Soules proposed "The judge shall weigh and consider all of the evidence and make findings by a preponderance of the evidence that..." Discussion continued. Discussion was had regarding the burden of proof.

A discussion was had regarding the joinder, severance and intervention issues.

The meeting was adjourned.