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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JANUARY 19, 1996

(AFTERNOON 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 19th day of January, A.D. 1995, between the hours of 1:15 o'clock p.m. and 6:00 o'clock p.m., at the Texas Law Center, 1414 Colorado, Rooms 101 and 102, Austin, Texas 78701.

JANUARY 19, 1996

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Charles L. Babcock
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. William V. Dorsaneo III
Sarah B. Duncan
Michael T. Gallagher
Anne L. Gardner
Honorable Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring Jr.
Donald M. Hunt
Tommy Jacks
David E. Keltner
Joseph Latting
Gilbert I. Low
John H. Marks Jr.
Honorable F. Scott McCown
Russell H. McMains
Anne McNamara
Robert E. Meadows
Richard R. Orsinger
Honorable David Peeples
David L. Perry
Luther H. Soules III
Stephen D. Susman
Paula Sweeney
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta Jr.
David J. Beck
Prof. Elaine A. Carlson
Hon. Ann T. Cochran
Franklin Jones Jr.
Thomas S. Leatherbury
Harriet E. Miers
Anthony J. Sadberry

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Hon William Cornelius
Paul N. Gold
David B. Jackson
Doris Lange
Michael Prince
Bonnie Wolbrueck

EX-OFFICIO MEMBERS ABSENT:

Hon. Sam Houston Clinton
O.C. Hamilton Jr.
W. Kenneth Law
Hon. Paul Heath Till

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MR. HUNT: May we please be back in session. In order that some of these rules will be used during our lifetime, we need to begin again this afternoon.

HON. C. A. GUITTARD: I have a proposal.

MR. HUNT: Justice Guittard has a proposal. Before we do that, let me call to all of your attention some questions that have arisen during the break, and it has to do with the philosophy of this Rule 300(b).

Keep in mind the purpose for which we are trying to define "summary judgment." Are we trying to define it for execution, for appeal, for clerks giving notice, or for all of these? With that thought in mind about where we might be headed, let's call on Justice Guittard.

HON. C. A. GUITTARD: This proposal does not deal with the question of whether some sort of order should be signed that gives a definite signal that says this is final. Now, apart from that question, the proposal is this: "A judgment is final for the purpose of determining the times for

postjudgment and appellate proceedings when it disposes of all parties and issues in the case expressly or impliedly. When the final judgment consists of a series of orders, the time for all postjudgment and appellate proceedings begins on the signing of the order disposing of the last remaining party or claim."

MR. HUNT: Okay. Does everybody get that, or do you wish it read again?

MS. SWEENEY: Again, please.

MR. HUNT: Read it again a little more slowly, Judge.

HON. C. A. GUITTARD: "A judgment is final for the purpose of determining the times for postjudgment and appellate proceedings when it disposes of all parties and claims in the case expressly or impliedly. When the final judgment consists of a series of orders, the times for all postjudgment and appellate proceedings begin upon the signing of the order disposing of the last remaining party or claim."

MR. HUNT: Questions.

HON. SARAH DUNCAN: Well, I had also suggested, and we might want to take this as a separate issue, tacking on to the very end "whether by order granting summary judgment, severance, or nonsuit or otherwise."

HON. C. A. GUITTARD: Okay. That's fine. Add that.

MS. LANGE: I would like to amend it to say "written order."

MR. HUNT: The suggestion is made to include the word "written" before "order."

MR. McMAINS: Do you mean when you say the last order, the last written order?

HON. C. A. GUITTARD: Why don't we say the last signed order?

MR. HUNT: The last signed order. Would that be --

HON. C. A. GUITTARD: Signed order would necessarily be written.

MR. HUNT: Last signed order.

MR. LOW: Can I ask a question?

MR. HUNT: Buddy Low.

MR. LOW: When you say postjudgment proceeding, would that be broad enough to include execution as well as the postjudgment discovery and everything? That's what you intend, right?

HON. C. A. GUITTARD: Right. It all ought to be the same.

MR. LOW: All right. I don't want to argue about it, I just want to be sure that we're on the same wavelength.

MR. McMAINS: The first sentence you have is an attempt at limiting what the effect is, rather than defining final judgment?

HON. C. A. GUITTARD: Yes. It may be final for other purposes that we don't talk about.

MR. McMAINS: Well, what I was getting at, though, is, remember, we both -- we have two prematurely filed rules, and both of those rules use the term "final judgment," and whether or not it is a prematurely filed document, you know, when it is filed is in fact on the date of the, quote, final

judgment. Now, I don't think that a prematurely filed rule is a posttrial proceeding or anything else, so I mean, we have uses for the term "final judgment" for other -- that are in there for other purposes.

And I think what Bill was trying to do was define the term "final judgment," what we meant by the term "final judgment," however it appeared in the rules; and that as being the thing that disposes, finally disposes of all parties and issues, then we use the term "final judgment" in a lot of other places, I suspect.

MR. HUNT: That to me is a philosophical question that we have to decide. Are we trying to define "final judgment" for all purposes, or are we simply trying to describe something about a final judgment for purposes of appeal or at least postjudgment or postverdict motions?

Go ahead, Rusty.

MR. McMAINS: Well, I just think that we need it defined obviously for purposes of both the attachment of appellate

jurisdiction and the termination of trial court jurisdiction, you know, in the sense that this is what starts in essence the thing downhill, where you go to the appeal process and determine when the trial court finally loses any kind of jurisdiction, because the entire notion of plenary jurisdiction assumes that you start with something that's going to expire.

When we say you have plenary jurisdiction 30 days after the motion for new trial is overruled, well, that assumes that the motion for new trial was from a final judgment, because if it wasn't from a final judgment, it hasn't terminated plenary jurisdiction.

You need to know or have that descriptive purpose of the final judgment for essentially all jurisdictional purposes, so there's a dividing line between trial and appellate courts, as well as for concocting the appellate timetables, as well as for other remedies that attach to a final judgment.

MR. HUNT: Well, are you saying we need to define "final judgment" for all purposes then? Justice Duncan.

HON. SARAH DUNCAN: I don't think we can. I know we can't define "final judgment" for all purposes in the same way. For instance, a judgment may be final for purposes of appeal or a judgment may be final for purposes of collateral estoppel and not be final for some other purposes. But I think we can and should define "final judgment" for purposes of the rules.

And for clarification, neither Civil Procedure Rule 306c nor TRAP Rule 58 refers to "final judgment." Other rules do, and it is not a difficult matter with computer search technology to find wherever the rules use the term "final judgment." And if it doesn't mean what we have decided to define it to mean, then it needs to be changed, because it's confusing right now, because what a final judgment is is basically what we've defined it to be.

MR. HUNT: Judge Brister.

HON. SCOTT A. BRISTER: On a signed order, do people in other places -- I get a Rule 162 notice of nonsuit that takes care of the last law's thing. I don't sign

it.

MR. McMAINS: It does not start the appellate timetable under the Supreme Court decision recently, if that's all there is.

HON. SCOTT A. BRISTER: If the last -- if assigned for 11 parties and it sits around for a year and then they nonsuit it, then it runs from when?

JUSTICE DUNCAN: Whenever that order is signed granting a nonsuit, whenever that is.

HON. SCOTT A. BRISTER: It has to be done. Okay.

MR. McMAINS: It doesn't ever run until you sign something.

HON. C. A. GUITTARD: That's the way it should be.

MS. SWEENEY: That's the current law?

MR. McMAINS: Unfortunately.

MS. SWEENEY: Is that new or is that --

MR. McMAINS: Well, since last summer.

MS. SWEENEY: So a notice of nonsuit I can't --

MR. McMAINS: It effectuates the nonsuit, but it does not render the judgment final for appeal purposes.

MS. SWEENEY: Well, let's change that.

HON. C. A. GUITTARD: Well, that's another question.

MR. McMAINS: I don't think we have the votes in the Court to change that.

MR. HUNT: Well, what's your pleasure? Go ahead, Rusty.

MR. McMAINS: I was not trying to suggest that we say that "final judgment" means this and nothing else, you know, as to whenever "final judgment" might appear in the case law or whatever. But we know what final -- actually what we have described as the conditions of the final judgment in here is a spectacle of what a final judgment is anyway for purposes of -- any purposes by and large that we wish to use.

But when we say that -- when we try and confine its purposes, that infers that there

is another meaning of final judgment somewhere that might be imported, if it's not for these limited purposes, and I --

HON. C. A. GUITTARD: Well, I don't know if --

MR. McMAINS: And that's what I'm concerned about.

HON. SARAH DUNCAN: But for instance --

HON. C. A. GUITTARD: I don't know if -- go ahead, Sarah.

HON. SARAH DUNCAN: Well, if I have two pending suits against the same governmental employee arising out of the same facts and I get an order denying my motion on official capacity grounds, I think that is probably final for collateral estoppel purposes in another suit, but it's not a final judgment in the sense that we've written it here. And I don't know that it's final for purposes of collateral estoppel, even though --

MR. McMAINS: Collateral estoppel is not a term, not something we use in the rules. What I'm saying is that anytime

we use that term "final judgment" in the rules, it ought to mean the same thing.

HON. SARAH DUNCAN: And that's what I would like it to say, is --

MR. McMAINS: And not just for limited purposes in the rules. That's all I'm concerned about. If somebody wants to say that there is an overriding concept or an overarching concept of finality that may apply in some context that relate to case law or a particular procedural malaise at the time, that's fine. But if you're talking about in these rules, when we use the term "final judgment," we ought to know what it means.

MR. HUNT: Are you suggesting, then, that we need a preface at the beginning, "As used in these rules, a final judgment"?

MR. McMAINS: These rules and the rules of appellate procedure.

HON. SARAH DUNCAN: What I would suggest is that we do pretty much what we talked about before lunch with Rusty's addition, but this is different from Judge Guittard's first sentence, and then just say when used in these rules a, quote, final

judgment, closed quote, is the order, written order or series of orders, disposing of all the parties and issues in the case expressly or impliedly, and then just do a search through all the rules for "final judgment."

MR. McMAINS: And I think the judge's suggestion that for purposes of calculating the times it is the last order signed, that's okay. And it's necessary because I don't think you can define "final judgment" to include a series of orders and not say which one starts the period.

HON. SARAH DUNCAN: Right.

MR. McMAINS: You need to be able to do that. And then you can then say, "For purposes of the time period, it is the last signed order."

HON. SARAH DUNCAN: And his rule does that.

MR. McMAINS: Yeah. And your rule did do that. And I don't have an objection to that, but --

HON. C. A. GUITTARD: Now, there's a situation where, for instance, an oral judgment of divorce is rendered, and

before a judgment is signed a party dies. Is the party divorced or not? Is there a judgment divorcing the party?

Well, I understand the current law as that the parties are divorced, even though no judgment is signed before the death of the party. Now, we weren't trying to define finality in that context which might be different.

MR. McMAINS: But is there anything that is involved in the holding of those cases that depended upon, quote, the rules?

MR. ORSINGER: I don't think -- pardon me, Richard Orsinger -- I don't think that concept of finality, which I call noninterlocutory, is controlled by the language in the rules. I think that's just the judicial perception that the operative event is the oral rendition; the written judgment is just the memorandum of that. And if the operative event, the oral rendition, is noninterlocutory, it solidifies everyone's rights, even though it may not be appealable yet. And we get into a lot of trouble because

we call it final, and I think we're going to continue to have trouble by having this definition of final until we start calling the other noninterlocutory, but the rules don't govern that. That's just --

MR. McMAINS: But we're saying it's final for purposes of -- a final judgment means for purposes of these rules. And the question is --

MR. ORSINGER: I think it really is different from the point you're making, but look at the language. Even the language in (b) continues this confusion because it says, the last sentence, a final judgment -- pardon me, the second sentence: "When a judgment on the merits is rendered, it is presumed that the trial judge intended the judgment to be final." Now all of a sudden we've mixed an orally rendered order with this concept of finality, even though we've defined finality to only apply to a written order.

So once again this intellectual confusion we have in our minds between oral rendition and noninterlocutoriness is colliding with the

word finality, because there's no way that a judgment rendered can be final and it's only when he signs a judgment.

MR. HUNT: Well, is your concern that that second sentence lacks in that it doesn't use "written" or "signed"?

MR. ORSINGER: I would eliminate the concept of rendition, which is frequently going to be oral and not written, and just say when a judgment on the merits is signed after a conventional trial on the merits, so and so is presumed. And let's not introduce the concept of rendition in the middle of this paragraph that has nothing to do with rendition and everything to do with signing.

HON. C. A. GUITTARD: I have some problem with the term "presumed that the judge intended." Now, what the judge intended is not the point. The question is, what does the judgment say. If the judgment disposes of all the parties and claims and it's rendered, that is, all the claims in the sense that they are --

MR. McMAINS: Well, isn't this

an attempt, and maybe I've misunderstood, but I thought that the purpose of this sentence was to carry the presumption further than the case law does now.

MR. HUNT: It's right out of Aldridge.

MR. McMAINS: Well, except, no, no, I think Aldridge depends in part on the boilerplate language, or at least an argument could be made that without -- or some courts have done that. I mean, it seems to me that you don't even have an argument with this language that the absence of a boilerplate doesn't make any difference. But --

MR. HUNT: Judge Peeples.

HON. DAVID PEEPLES: Can I go back to the basics here? What is the problem with existing law that we're trying to fix? That would help me in analyzing these issues.

MR. HUNT: We would have to return to the November meeting, at which I was absent, when we voted to try to draft this, because the subcommittee didn't present you with one in November, and this body voted to try to draft it and Bill Dorsaneo has tried to

draft it. So we return to the concept of do we want to try to draft final judgment or not. And it seems to be the sense of this group today that we want to try, if we can get close enough to doing it.

And at least part of our problem is we don't know whether we're trying to define it for all purposes or define it for purposes of starting timetables or just what.

HON. DAVID PEEPLES: But I guess my question is, why are we doing any drafting at this point? I mean, it's not in the rules, it's in the case law, but --

HON. SARAH DUNCAN: It is in the rules. Right now there are several places in the rules, particularly the Rules of Civil Procedure in the 300 series, that purport to sort of define what a judgment, an appealable judgment is, and they are wrong and they are misleading.

MR. McMAINS: Well, they do have "final judgment" --

HON. DAVID PEEPLES: Well, I guess my question is, what injustice is happening in appreciable numbers that we seek

to correct by these rules on the floor right now?

HON. SARAH DUNCAN: People are losing their appeals because they don't realize that the appellate timetable commences when a procedural kind of motion is signed or when a summary judgment is signed disposing of the last remaining party or claim; and they think that there's going to come a time when we're going to get something called judgment or final judgment.

HON. DAVID PEEPLES: How many times have you seen this since you've been on the court of appeals this year, Sarah?

HON. SARAH DUNCAN: About five this year.

HON. DAVID PEEPLES: Where somebody tried to appeal and the time had run because a mop-up order was signed?

HON. SARAH DUNCAN: Because of a mop-up order -- well, an order, yeah.

HON. DAVID PEEPLES: So it was done right; they just didn't know the law. Okay.

MR. HUNT: Richard Orsinger.

MR. ORSINGER: David, I think the reason we're where we are today, this is just my conception of it, was that these judgment rules were kind of fractured and said a judgment has to do this and it can't do that and it needs to have this little thing in it and it can't have these three things in it and it was a hodgepodge about what a judgment did or didn't do or could or couldn't have. But nowhere did we ever say what a judgment is.

And I remember Bill Dorsaneo's speech of why don't we write these rules so that somebody can come to a rule and say, "I'm going to draft a judgment, and it says right here I've got to have the following things in it."

And (b) is not the following things. (c) is where we start listing what you've got to put in your judgment. But I think (b) is an effort to say this is the final judgment we're talking about and we're about to tell you everything that has to be in it, but the first thing we're going to do is we're going to define it, and the thing that makes it final is that it's the end of the litigation. And

having made that statement, then you necessarily fold into the appellate timetable because the appellate timetable tags on to the back of finality.

And then that gets you embroiled in this discussion about noninterlocutory, which means that litigation at the trial level is effectively finished but that you haven't started the appellate process yet because you don't have a written final judgment. And that's why I think we're here.

I know that it's -- I'm not sure that there's a particular harm that's being addressed in my view so much as a philosophy that the rules are like a bunch of prohibitions that have been enacted to eliminate the prevailing practices and never do we ever tell somebody this is what you are aspiring to do. We just say you can't do this any more, you can't do this any more, you can't do this any more. And for those of us that learned how to practice after those prohibitions went into effect, we didn't even know that that was permitted.

And I think it's more not solving an

injustice; I think it's more of a philosophy about this whole series of rules, which is let's write down that this is what you're supposed to do now. We're telling you what you can do. Here is the list, and you can read it and understand it.

MR. HUNT: David Perry.

MR. PERRY: Looking at the existing rules, it looks as if the existing rules sort of assume that at the conclusion of the case a judgment is supposed to be entered. Now, if a judgment is entered and someone appeals from it and it turns out that that judgment failed to dispose of all of the parties and claims and therefore is not appealable, the problem that Sarah is concerned about really hasn't happened. A different problem has happened, but that one hasn't.

The problem that Sarah is concerned about is when an order that is not entitled "judgment" is entered and accidently turns out to be a judgment without -- is not obviously a judgment but it is a judgment.

Now, maybe that could be resolved simply

by saying that in order to be an appealable judgment, simply saying in effect that at the end of the case the court must enter a document that is a judgment and that is what one appeals from, that until you have that, you don't have anything to appeal from.

MR. McMAINS: Well --

MR. HUNT: Rusty.

MR. McMAINS: Well, the problem, of course, is that labeling something a judgment under the case law doesn't make it so. I mean, it doesn't make it a final judgment.

MR. PERRY: Labeling it a judgment might not make it a judgment, but failing to label it a judgment would clearly make it not a judgment.

MR. McMAINS: Yeah. But that shouldn't -- just because you don't put a label on it, it seems equally silly to me to --

MR. LOW: In federal court it doesn't matter. You can enter a judgment -- doesn't the clerk in federal court just issue a few-sentence judgment and that is the

judgment? Don't they enter -- you know, I know I've had several that --

MR. McMAINS: The federal rule says they may. It does not require them to.

MR. LOW: I've had it happen before.

MR. McMAINS: Yes, I know. They are supposed to do it upon request, but they frequently will not do it until the trial judge tells them to do it.

MR. LOW: Right. But then --

MR. McMAINS: Of course, the clerk enters everything, and your times in federal court run from entry, not from rendition or signing or whatever else, which is a different format as well, not the way our rules are designed. It's an act of the clerk there. It's not an act of the clerk that starts the process.

MR. HUNT: Richard, let's see if we can make some progress on this, because we've about philosophized it to death. Bring us some light, Richard.

MR. ORSINGER: Well, this is the second time that somebody has proposed

having a judgment that merges together all of the previously existing partial judgments, and actually I think that's the cleanest way out of this predicament we find ourselves in.

And we can do it very easily by saying that an order that is not within its own four corners dispositive of all parties and issues is not a judgment. And you can't take two or three or four documents, none of which are dispositive, and plug them together in some clever way and concoct a final judgment out of it.

And if we use that approach, we end up with something that doesn't make any sense, like that the final judgment is a series of things that may have been signed over two or three years if you're clever enough to find them all and fit them together, and just say that none of them -- if they're not fully completely dispositive on their face, then they can't be put together and come up with a final judgment; that if you have all these partial orders, you need to bring them all together in one document that, if you will, merges them all into something that everyone

knows is a final judgment and then you take it up on appeal.

And to me, even though I know that's different from our prevailing practice, if we adopted that rule, I think after a while lawyers and judges would realize that their case isn't going to be final until they take the four or five orders together and merge them into one. And once the lawyers have gotten used to doing that, then how simple everybody's life is going to be from that point forward.

MR. HUNT: Are you saying that we should have some language which begins "No judgment is final or appealable until," and then describe what must occur before you're dealing with finality or appealability?

MR. ORSINGER: That would be a way to do it. And then you might have to do a restated order that includes a special exceptions order, a summary judgment order and a severance order, but it's very simple. You can't mistake it, and all you have to do is realize that you've got to draft it in order for your judgment to go final on you.

MR. McMAINS: But the question I have, though, is what happens -- because I see this happening immediately -- is what happens if you leave an order out?

MR. ORSINGER: It's not part of the judgment. The judgment is going to be --

MR. McMAINS: All right. But it purports to be and it is intended to be by the parties a final judgment but they have left an order out. Are you telling me then that if, I mean, there is an order in the transcript that is a disposition of a claim or a party and it is not incorporated in the final judgment that is labeled as a final judgment, and the question is, everybody takes it up to the court of appeals, does the court of appeals get to say, "I'm sorry, this is not appealable because you don't have every little order in there that you were supposed to"?

MR. ORSINGER: No. The test is whether what you took up finally disposes of everything, whether it accurately restates previous rulings or not.

MR. McMAINS: Well, but it won't dispose -- if you take the position that

there is a claim there that was in the case that is not brought forward in this judgment and therefore not disposed of, then the question is, what do you do with that claim?

Is that -- that renders it interlocutory, and that is the current -- that would be the current law if you tried to address that without the presumptions that we currently have.

MR. ORSINGER: Unless you put an Aldridge clause in your final judgment, in which event it supervenes this forgotten order.

MR. HUNT: David Perry.

MR. PERRY: The problem that Sarah Duncan is trying to resolve or trying to solve is to create an obvious event that must happen in order to start the running of the appellate timetable. And if we focus on that, we can write a rule that says that at the conclusion of the case the court must enter a judgment and all appellate timetables will run from the date the judgment is signed, or it could be any document that says this and everything before it is a judgment or

whatever.

But what Sarah is really wanting, as I understand it, is some obvious fact regardless of the content of it that says this case is over and, if you want to appeal from it, you should start now.

HON. SARAH DUNCAN: Can I clarify my position?

MR. HUNT: Let's let Justice Duncan clarify, and then we'll come back to Anne Gardner and Buddy.

HON. SARAH DUNCAN: I'm happy to do what David is suggesting. All I'm really asking at this point is that there be notice in the rules that that's -- it's not so much that I'm asking for an obvious event as it is I'm asking that we put in the rules what may be obvious to the rest of us sitting around the table, except that the more we talk and the more I talk with the clerks that are here, the more I'm convinced that it is not just the five people in our case that lost their appeals that are having problems with this. It's people all over the state. And maybe we need a closing memorandum or an

obvious event or whatever.

MR. HUNT: Anne Gardner.

MS. GARDNER: Well, as an appellate lawyer that gets hired by trial lawyers to help them with their cases, the lawyers all over the state that I see don't know what a final judgment is. That's one point. I think that what you're seeing is a problem, but I don't see how you can deal with defining what a final judgment is for the purposes of your problem without also at the same time dealing with what happens if you accidently fail to get a final judgment.

I mean, it's like the two questions are the other sides or different sides of the same coin. If you come up with a rule that labels something as a final judgment, you're going to have situations where you accidently don't have one because there's going to be an undisposed of claim or issue left out, and so I think you have to deal with both of them at the same time.

And I'd like to go back to what I see as a problem with the first sentence. In this final judgment rule as drafted, those last two

where it says "expressly or impliedly" at the end of that sentence, if I were an average lawyer in this state reading this rule for the first time, the way that sentence is drafted to me is telling the lawyers of this state that a final judgment may dispose of all of the -- any final judgment, whether it's from a default, a summary judgment, as well as a judgment after an actual trial, and that a final judgment may expressly or impliedly dispose of all of the parties and issues in the case.

So I think we're accidently in the way it's drafted right now dealing with the accidently undisposed of claims and parties as well as trying to define what is in a final judgment.

MR. HUNT: Your concern is that you can't have implication in a default situation; you can't dispose of claims and parties by implication in certain kinds of cases?

MS. GARDNER: Right.

MR. HUNT: So do you have a suggestion for us?

MS. GARDNER: Well, if you're going to continue using this as a drafting guide, I would start with leaving out "expressly or impliedly" at the end of that sentence and not try to deal with that aspect of final judgments at least at that stage and just try to define it for the purpose of appeal and trial and appellate timetables and work on defining whether it's an order or the last in a series of orders or whether it's signed, you know, the technical aspects of it, but not try to get into expressly, impliedly, presumably or so forth, dealing with Aldridge or all of that part of the problem.

MR. HUNT: Okay. Buddy.

MR. LOW: If you're just worried about knowing when to appeal and people -- you know, they don't know when to appeal or whatever, people file motions for judgment quite often. I mean, if that's the real problem, file a motion for certification of appealability and have the judge enter an order that it's appealable. And if there's a question, you can show, well, this has happened, that's happened, and he certifies it

just like he enters a final judgment, and then nobody can question it. You know that it's appealable then.

MR. HUNT: Yes.

MS. WOLBRUECK: Bonnie Wolbrueck. As Justice Duncan mentioned, the clerks have a great deal of difficulty determining when a case is actually final for several different reasons, not only the notice that has to be mailed out, but if the case is actually disposed of or not, which many times we will ask the attorneys or the judge, and he'll say, "I don't know. Ask one of the attorneys." And the attorney says, "Well, ask the judge," because, as you know, there are many claims and many issues, and nobody is really sure if the case is -- if we can put it in the disposed of file or not.

I've also had difficulty with execution. I've had an attorney request me to execute on what was a judgment along with including attorney fees that were included in an order which appeared to be duplicated in an order, another final order, and so there was a great deal of conflict over do we execute with the

attorney fees that have been included in one order that was entered and another one, cumulative, that both of them were to be included or not.

And you know, clerks have these issues statewide, and execution is probably the major issue that clerks address whenever coming to the issue of a final order, what do we include in an execution, abstracting a judgment or issuing the execution.

So again, you know, I've been a clerk long enough to remember when days were simple and we had final judgments, and you know, you could look at a judgment and you knew that this disposed of the case. I know that litigation has become much more complicated, but if we could provide some type of a rule to give all parties, everybody, every attorney involved in the case, the judge and the clerk, some definition of when this case is final, and you know, how the clerk may define that in execution.

MR. HUNT: Thank you. Mike Hatchell.

MR. HATCHELL: I think in

drafting we need to fully understand that we now have a rule that, as I read it, requires the judge to collect all the interlocutory orders in one judgment. It's in Rule 300. It says there can only be one final judgment in the case. And yet the problems that we have that we're discussing here today are the result of poor construction or the failure to follow that rule. So if we're going to draft such a rule, it needs to be ironclad and not just more words that further confuse people and lead to further people losing their appeals because of the way courts construe it.

MR. HUNT: Can we come to some sort of a resolution on this? Is there a consensus? There doesn't appear to be any building here. I can think of three or four things on which we might be able to vote, but I don't want to cut off anybody's right to discuss anything. But we do need to make some progress here, either to kick this concept out or leave it to the courts, or we need to give more direction on the drafting.

I want to call on Rusty and then John Marks, and then we'll see if we can have a

motion on the floor.

MR. McMAINS: Are you asking me for a motion?

MR. HUNT: No, for whatever your comment is.

MR. MARKS: I've got a motion.

MR. McMAINS: Well, for clarification purposes, the suggestion of whether or not we are to do it in terms of unless the judgment has this in it it's not final, and the problem that I see there is that people leave things out accidently or may not even have any idea that that was a disposition of a claim, like when they specially except and therefore they changed their pleadings and just dropped it. I mean, is that order something that is dispositive?

And you -- and there's an incredible mass of potential litigation, which I see a lot of lazy courts -- no offense, there probably are none here -- of appeals, saying, "Ah, it's not final," and throwing it out so they won't even have to deal with the issue. So that's one concern.

Or you take the opposite and say, well,

we'll presume that this is final, and if it's not in there, then it isn't there and it's governed by the boilerplate language, which means that a party who procured a summary judgment earlier on and therefore is no longer a party has all of a sudden lost that altogether because it was now overruled as a result of the final judgment, because that relief is not carried forward into him. I mean, he's gone home, but he hasn't been severed.

And so now if you say, well, if it's not in there, then it's presumed overruled. What's presumed overruled when it was his motion? He got the relief. He went home. He didn't exactly finish his job because he didn't get a severance, but nobody was complaining about that.

You cannot construct an entire system on any kind of an assumption either way in my judgment, and that's why I suggest that you can't just say it's got to all be in one place, because it may not be, and especially in litigation that lasts, some of it, 10 years. I mean, that's just too hard and

too likely to create problems. Nor can you assume that if it's not important that we're going to assume that, whatever the relief was, it's overruled, because there are collateral estoppel implications with those things as well.

But for the purposes of appeal and the appellate timetable and effectively for the purposes of the rules, whenever we use the term "final judgment," we need to know what we're talking about. And for purposes of starting time periods, it should be the last order that was necessary. We don't have to incorporate any other orders. It just needs to be the last order in my judgment.

MR. HUNT: Do we have a movant?

MR. MARKS: Well, actually I'm not sure it's proper to move, but my suggestion is that we just leave it like it is and don't mess with it. That's my motion.

MR. HUNT: Well, what do you mean by that? Leave it like it is with no definition?

MR. MARKS: No definition.

MR. HUNT: Take (b) out entirely?

MR. McMAINS: The problem we have is that our current Rule 300 or 301, or is it 300, does say that there shall only be one final judgment, which is not the law in the sense of what final judgment means for any other purposes in these rules when we're calculating the timetable. Our rules are currently deceptive. That is the problem that we are attempting to address. It is a lie to say that there can only be one final judgment in the sense that -- in terms of how it applies in the rule.

What we have essentially come up with is holdings repeatedly that there is no final judgment; that since there can only be one and this ain't it, there ain't one. And that's what the courts continue to do.

MR. HUNT: Of course, the rule says only one final judgment shall be rendered except where it is otherwise specially provided by law. Now, what does that mean? Does it mean all the things that Rusty just talked about, that we have all these --

specially provided, does that mean --

HON. SARAH DUNCAN: That means the probate cases.

MR. McMAINS: Yeah.

MR. ORSINGER: And real estate partition cases.

MR. McMAINS: It meant only special things that are dealt with in our rules as well.

MR. HUNT: Then maybe what we need is a rule here, as has been suggested, that attempts to define "final judgment" only for purposes of appellate finality and timetables.

HON. C. A. GUITTARD: No. Also postjudgment proceedings.

HON. SARAH DUNCAN: We have the same problem with execution. The execution rule is one of the rules that uses the term "final judgment" to determine when your writ of execution can issue. So to define it for appellate purposes is great, but to leave it undefined for purposes of execution is not terribly helpful.

MR. MARKS: Was my motion

proper? I got a second on it.

MR. HUNT: The motion has been made. Who seconded it?

MR. KELTNER: Second.

MR. HUNT: John Marks moved, David Keltner seconded, to eliminate the proposed draft of Rule 300(b), to eliminate the definition of "final judgment." Is that correctly stated?

MR. MARKS: That sounds pretty good.

MR. HUNT: Any further discussion?

HON. SARAH DUNCAN: Are we going to eliminate just the first sentence? Is that right?

MR. HUNT: The whole rule.

HON. SARAH DUNCAN: Well, can I point something out to you all that I'm not sure you're aware of? If you eliminate all of subsection (b), you no longer have a rule that says that a judgment shall conform to the pleadings, the nature of the case proved or whatever. That's just --

MR. KELTNER: Well, I frankly

misunderstood John's motion. I was suggesting that the aspect -- I wouldn't be for just eliminating (b). I've got more problems with (a) than with (b), so in that regard I guess maybe we don't agree.

It would seem to me that under our current practice we have two problems. One problem is when is it a final judgment, and oftentimes we're finding it's not. Seldom do we find the other, that it is, when we didn't know it. And so parties in the first instance are protected; parties in the second instance may lose some rights.

It seems to me that maybe we can redo the deal that there's one final judgment per case. We can roughly define "final judgment" for appellate purposes and execution purposes and just leave it alone, but that could be very close to what we have now in the rules, and then stop.

MR. MARKS: Well, I'll amend my motion to just say we eliminate Rule 300 as proposed and keep it like it is in the rules right now.

MR. HUNT: The motion has been

made and seconded to eliminate Rule 300(b) as proposed, except to retain the concept included in the last sentence that the judgment shall conform to the pleadings, the nature of the case proved, et cetera.

HON. SARAH DUNCAN: Wait a minute, I'm confused. I thought, John Marks, you said you wanted to eliminate all of Rule 300?

MR. MARKS: Yeah, the whole thing.

HON. SARAH DUNCAN: And keep --

MR. MARKS: Leave it just like it is in the rules. Don't mess with it.

HON. SARAH DUNCAN: Leave Rule 301?

MR. MARKS: Right.

HON. SARAH DUNCAN: And 300? 300 and 301?

MR. MARKS: Yeah.

MR. McMAINS: Except that there are other rules that were imported into this rule.

MR. KELTNER: Yeah. John, we're going to have problems with that, with

the other rules that have been --

MR. McMAINS: The rules that are subsequent to this are in the rule book. They're just numbered and they're in different places.

HON. SARAH DUNCAN: Right.

MR. MARKS: Well, David, you state the motion.

MR. KELTNER: I'm not sure I can do any better than what you're doing. That's why I -- I mean, I thought you were in the lead.

HON. SARAH DUNCAN: I'll state it, but I won't move it.

MR. MARKS: I'll move to the back seat.

MR. KELTNER: Well, let me think for a minute and I think I can get it.

Actually 300 is key to everything you've done after this too, isn't it?

MR. HUNT: Yes. Because if you'll notice what we tried to do, we tried to with (a) say something about rendition, signing and entry, and we define that; in (b), the subcommittee eschewed trying to define

"final judgment"; but what we have done in (c) and (d) is to try to keep the present law but reproduce it in slightly simpler language.

The thing that is perhaps most difficult to do is read all the current language spread throughout several different rules, and we've merged it all under Rule 300, so that's the reason why I was trying to do something with 300(b), John, and not crank with the rest of it. Because if your concern is to deal with that language about a single final judgment based on the pleadings, the nature of the case proved, verdict, that kind of thing, that ought to be in there.

Richard.

MR. ORSINGER: Just a small detour. I looked at Rule 621a on executions, and of all things it says, "At any time after rendition of judgment," so whoever has Rule 621a --

MR. HUNT: Well, 627 has "final judgment," so you have the words "final judgment" and you have the word "judgment" running throughout the rules, and that's part

of the purpose here, is to --

MR. ORSINGER: And you've got "rendition," which we've all agreed is often oral and clearly couldn't support a writ of execution.

MR. McMAINS: Yeah. But there's also a provision which says that you cannot execute until 30 days after motion for new trial is overruled.

MR. KELTNER: With two very important exceptions --

MR. McMAINS: Correct.

MR. KELTNER: -- that are devastating for judgment debtors.

I think what John Marks and I were both saying is that under the current law with the current 300 series that basically things aren't as bad as maybe the cure that we are getting at, and I still seem to feel somewhat that way.

I would admit that what you say about current Rule 300, that there's only one final judgment per case, is, one, misleading and two, as a matter of law incorrect in some cases. It probably is correct for 98 or

99 percent of the cases. My question is, we've got a whole lot of problems that none of us seem to have agreed on in the last two hours. If we need to give guidance to the Committee, is there a consensus on what guidance we would give?

I mean, for example, my problem is with rendition. I don't like the concept of an oral rendition, especially when it implies that it -- when it might turn the appellate timetable, one, and execution, two, which it does.

I mean, how bad are the problems now? I don't seem to think they're that bad. There are not that many people that are losing cases because they didn't know when to appeal. I think there are many more cases that are appealed that are not final, and while that's a waste of time, no one loses rights in that.

MR. HUNT: Isn't there a difficulty really here that we need to know when something is final for purposes of appeal and execution, those two things more than anything else? And if we take a stab at getting some bit of finality into the rules

for those two purposes, we then leave open the Dunn against Dunn situation of where the good judge pronounces divorce and the husband dies that night.

Justice Duncan.

HON. SARAH DUNCAN: Could we take a vote on whether the rules should address -- I'll put it this way: Whether to leave Rule 301 as it is now written, and Rule 301 is the rule that says there shall only be one final judgment, which, of course, we all know is not true, but can we vote on whether to keep that? And if a majority says we're going to keep it, then send it back to the subcommittee to rewrite the entire series of rules to incorporate Rule 301 and the misleading concept of one final judgment, which means I guess basically we would take out all the rest of the stuff. Can we vote on whether the rules should continue Rule 301 as now written or not?

MR. HUNT: John Marks and David, have you withdrawn your pending motion right here?

MR. MARKS: Yeah. We're

withdrawing. I mean, I do. I withdraw my motion.

MR. HUNT: Okay. Well, let's get a motion on the floor, and then we'll see if Richard seconds it or has comments on it. I'm not sure I understand it.

HON. SARAH DUNCAN: Well, I can't move it the way they wanted it moved. The way I want to move it is I move that Rule 301 as now written in the Rules of Civil Procedure be deleted and that a new rule that correctly states the law as it relates to the finality of judgments for purposes of posttrial and appellate timetables be written.

HON. C. A. GUITTARD: Second the motion.

MR. HUNT: All right. The motion has been made. Is there a second?

HON. C. A. GUITTARD: Second.

MR. HUNT: The motion has been made and seconded that we define final judgment for purposes of posttrial and appeal. Is that generally what it is? Okay. Is there a second to that?

HON. SARAH DUNCAN: Judge

Guittard seconded it.

HON. C. A. GUITTARD: I seconded it.

MR. ORSINGER: I would favor that, and I think the fact that we are having the difficulty we are today in even agreeing on how to say what a final judgment is is proof that we desperately need to write a rule we can agree on so that everyone else can read it and figure it out. If it takes four hours for everyone in this room to finally figure out what a final judgment is, imagine what it's like for the lawyers and clerks and judges who are out there without having the benefit of this conversation and all of this cumulative legal knowledge and experience. I think we desperately need to agree on what it is.

MR. HUNT: The motion has been made and seconded to rewrite Rule 301 to define "final judgment" for purposes of posttrial execution and appeal. Is that correct?

HON. SARAH DUNCAN: That's correct.

MR. HUNT: Any further discussion? All those in favor of the motion. 18. Those opposed. 18 to one.

HON. DAVID PEEPLES: I'm not against it.

MR. ORSINGER: It's another Dallas lawyer deal.

MR. MARKS: I voted for it. Did you vote against it, David?

MR. KELTNER: That was our side, David.

MR. MARKS: Oh, I'm sorry.

MR. GOLD: It was A or B.

MR. HUNT: Henceforth, we'll have signs instructing the Dallas lawyers when their side is being voted upon.

MR. MARKS: We've got to get our signals together.

MR. HUNT: Justice Guittard has the floor.

HON. C. A. GUITTARD: If we're going to rewrite the rule as the majority seem to -- as the members seem to think, perhaps we ought to clarify it further. And this business of this disposition by implication

after a conventional trial as stated in the Aldridge case, we ought to perhaps abolish that too, and provide simply that a judgment is final when it disposes by its terms of all parties and claims, and until that is done, there's no final judgment. And the only problem about that would be that some judgments may not be final and the court would have to say, "We have no jurisdiction. Go back and get a final order."

MR. LOW: Sarah, do you second that?

HON. SARAH DUNCAN: Ugh.

MR. HUNT: Justice Duncan had a reaction.

HON. DAVID PEEPLES: I think that we may be creating problems by trying to define judgment, a final judgment, instead of simply saying when this happens, the timetables start to run.

HON. C. A. GUITTARD: Okay.

HON. DAVID PEEPLES: I don't think you have to define what a final judgment means in order to answer the question. The timetables start when this has happened.

HON. C. A. GUITTARD: You have to do it unless you revise all of the rules that refer to final judgments like the execution rule and the garnishment rule to incorporate all of that language. It would seem to be simpler just to say a judgment is final for procedural purposes or for purposes of these rules when certain things have been done.

MR. McMAINS: For all practical purposes, though, the statutes on jurisdiction of the appellate courts depend upon -- I mean, you only have two different ways to go through the appellate process. One is a final judgment, and so we need to know, and that's why we do know from discussions because that is a question of substantive appellate court jurisdiction. It is in the constitution. That's why we can't really change what is meant by the concept of final judgment. A lot of it is constitutionally based with regards to who has jurisdiction over what. We're merely trying to state a lot of different rules in one place to assimilate them.

HON. DAVID PEEPLES: But the

problem that we supposedly have been spending this time on is the one identified by Sarah Duncan, the poor litigant who doesn't know the law. If you simply say the timetables start to tick when this has happened, we solve that problem, if they read the rule.

MR. McMAINS: But the point is that I don't think we can say arbitrarily the timetables are -- or that you can perfect an appeal from this document that does not bind the appellate court if in fact it's not a final judgment. And that's why I think we might as well declare what is in fact the law as to what the final judgments are and how we get that determination for purposes of being able to establish what the jurisdiction is under the statutes.

MR. HUNT: David Perry.

MR. PERRY: I think the rules contemplate that the case will end with a document which is a judgment which has certain attributes about it, including disposing of all of the parties and the claims, and I think it is good to say that in the rule.

I think the rules should also state that

if that document fails to dispose of all of the parties and claims that you can look to other documents previously signed in aid of finality, but you cannot take and cobble together a number of documents, none of which purport to be a final judgment, in order to make them into a final judgment; that in order to have a final judgment, you must have some document that on its face purports to be a judgment.

I thought the purpose of the vote before was to rewrite the rule, was to clarify the rule.

MR. McMAINS: It is.

HON. SARAH DUNCAN: If I can respond to what Judge Guittard says, and he's usually right and I'm usually wrong, but if we require a judgment to dispose of all claims and parties, our court at least is going to start spending a whole lot more money and time reversing and remanding cases because they're not final on their face, the judgments aren't final on their face.

I mean, I kind of lived with Roger and Ben litigating Mafridge, and it took years to

get the summary judgment rule that we now have that we can say all relief not expressly granted is denied on the summary judgment, and by God, that thing is final and it's appealable and we don't have to go figure out all the little pieces of paper that could be construed to render it nonfinal or how many claims are actually being stated in a particular petition. And I'd hate to see us go backwards from there because, I mean, we do a jurisdictional check, an extensive jurisdictional check on every case, but it still just costs a lot in time and money to reverse and remand for you to change six words in a judgment.

MR. HUNT: You would rather it be reversible, because if it isn't, then you wouldn't have jurisdiction.

HON. C. A. GUITTARD: I'm willing to stick with our Aldridge rule, if it's restated.

MR. HUNT: All right. John Marks.

MR. KELTNER: Now, John, be careful.

MR. MARKS: I'll be careful.

MR. KELTNER: And don't say Yogi Berra, when it's over, it's over.

MR. MARKS: You know, I started to say that. And maybe this is just outrageous, but perhaps we should look at it from a different angle, and that is, maybe make the jurisdictional requirements not so stiff and not so deadly, so that where there is confusion as to whether there's a final judgment or not, either allow some latitude in the timetables, allow, you know, to go back into the record, clean it up and bring it back up while it's on appeal, something along those lines, so then you wouldn't have to worry so much about whether you've got one or not. You've got a way to cure it.

MR. HUNT: Anne Gardner.

MS. GARDNER: Well, we already have that in the appellate rules, I think it's Rule 58, that if judgment is not final, the appellate court can direct the parties to go back to the trial court and then fix it and have a supplemental transcript brought forward if they need to get a severance or take a

nonsuit as to the claim that wasn't disposed of to do that.

MR. MARKS: What about the other way, when it is final? It's not clear. There's nothing you can do.

MR. McMAINS: There's no fix for that.

MR. MARKS: Not when it's a final judgment.

MR. HUNT: Rusty said it most briefly: There's no fix. Because appellees have rights, too, and we need finality more than we need some other things for those who fail to know the rules and know that it's final and know that they have lost their right of appeal. The best we can hope to do, as Justice Duncan indicates, is to write rules that educate them. We didn't take them to raise.

Can we come to closure on this? So far as I understand the vote, you have commanded the committee, the subcommittee, to rewrite and to try to bring some more sense to this, and the subcommittee will so do.

Now, do we have any more comments on

Rule 300(b), or can we move on?

HON. SARAH DUNCAN: Can I ask a question?

MR. HUNT: Yes.

HON. SARAH DUNCAN: Now that we have the vote of 18 to one or two, depending on how one views it, can't we just vote on the language that we talked about previously which I think accomplishes the purposes that we just voted on?

MR. HUNT: All right. Let's do that. Restate it then.

HON. SARAH DUNCAN: Okay. Subdivision (a) stays basically as it is now.

MR. MARKS: But we haven't talked about (a) yet.

HON. SARAH DUNCAN: Okay. Then let's just talk about subdivision (b). Can I just make a proposal, because I'm going to add a few little things?

MR. HUNT: Sure. Do it slowly.

HON. SARAH DUNCAN: Okay. Final Judgments and the Appellate Timetable is the title of the subsection. A final judgment for purposes of appeal is the written order or

series of written orders disposing of all of the parties and issues in the case, expressly or impliedly. When the final judgment consists of a series of orders, the appellate timetable commences upon the signing of the signed order disposing of the last remaining party or claim.

HON. C. A. GUITTARD: Signing of the order.

HON. SARAH DUNCAN: Signing of the order, whether by order granting summary judgment, severance or nonsuit or otherwise. When a judgment on the merits is signed after a conventional trial on the merits, and no order for a separate trial has been made, the judgment is presumed to be a final and appealable judgment. The final judgment that is signed in a case tried to the court or jury shall conform to the pleadings, the nature of the case proved, and the judge's findings of fact or conclusions of law or the jury's verdict, unless a judgment is rendered as a matter of law.

MR. HUNT: You've heard the reading of the proposed amendment replacing

existing 300(b) with that language. Is there a second?

HON. C. A. GUITTARD: I want to study it some more. It may well be right. When we rewrite it, I think we ought to have that before us. I don't think that's contrary to what we're --

HON. SARAH DUNCAN: Can I rephrase my motion a bit? This is going to sound like Susman. In concept, subject to particular fiddling with words, is that basically where we're headed, or does the subcommittee need to head in a different direction?

MR. HUNT: The motion has been made to approve this in concept subject to specific drafting by the subcommittee. Is there a second to that?

HON. SCOTT A. BRISTER: Second.

MR. HUNT: The motion has been made and seconded. Is there further discussion?

HON. C. A. GUITTARD: I'd like to deal with the question as to whether we're going -- I'm not satisfied yet as to whether

we're going to follow the present rule about the series of orders, or shall we require a final order which in some fashion embraces them all, or go back to the original one judgment rule, one final judgment rule. I'm not satisfied about that and I want to think about that some more.

HON. SARAH DUNCAN: Can we change that?

HON. C. A. GUITTARD: Yeah. Why not?

MR. McMAINS: Well, you can. I mean, as I said, I think you can go back, I mean, or you can try and reinstitute, if you will, what we have long since abandoned in terms of a one-final-judgment rule. But you must then decide what happens to the unmentioned orders in the sense of are those no longer the case or are they construed a particular way or are they part of the judgment even though you can't see them?

I mean, it's one thing to say that if you don't specifically mention a prior order then it's carried forward as if it were there. Now, that may be one fix that we can do. If

you don't specifically address it, it's still there. The only problem I have with that is it potentially then could conflict with the judgment, because the judge, if it's interlocutory, has the ability to kind of ignore that order. Maybe he sustained a special exception to a pleading back here but considered it on a trial amendment with some new evidence here, you know, without really ever specifically setting aside any previous order.

So to me those are the choices that you have to make, that you either presume that you carry forward the prior orders, unless they are expressly dealt with and without having to set them forth, but they are there anyway. They're deemed there for purposes of having one final judgment or they're not -- or if they're not there, they're not there at all.

Now, the problem with that one is you're going to have to create some other presumption that -- but that won't allow you to attack the finality of it; that is, if a party disappeared because of it, he doesn't reappear because he's not in the final order. Do you

see what I'm saying?

So I think that that part of the process, the idea that if it isn't there, if you can't read it in one document, then it didn't happen, is a bad idea, because if there's too much that happened and then people go on about their way, I think that creates a serious problem.

The other part about you just bring forward all other orders, that's fine, except now you have to have a question of -- you can't do that if it conflicts with the judgment actually rendered. And maybe you can put that in the rule and say it brings forward all other orders to the extent they don't conflict with the relief that is granted, and maybe you can preserve all orders previously rendered by doing it that way.

But that to me -- those are the difficulties you have in trying to devise a system that works, because you're going to have to deal with these problems by implication.

HON. C. A. GUITTARD: And that's what we need to consider in working out

the rule.

MR. McMAINS: Right. It seems to me that those are the only two ways basically that you can go on.

Yeah, Paul.

MR. GOLD: If you followed the proposition of bringing forward all the prior orders to the extent they did not conflict with the final judgment, would you also have a provision, then, and I'm trying to figure out if it even makes sense, that to the extent that they're dealt with in the prior judgment then they would take precedent over the prior orders?

MR. McMAINS: Yes. In other words, if you expressly deal with -- like, for instance, if you decide to set aside a prior interlocutory order and you do so in the judgment, then the prior interlocutory order ceases to have any impact. But if you don't set it aside and it does not conflict with the judgment, then it's there, even though you can't see it for purposes of making a determination of finality.

In other words, if you have a document,

you can even require that the document, in order to be a final judgment, be labeled "final judgment" in order to be appealable. That doesn't offend me, as long as you have a system whereby you actually can get that accomplished. And I don't think you can have that system unless you deal with those issues.

What do you do with the stuff that is ruled on that ain't there? Because that is going to happen, and you have to deal with that, and you either have to say it didn't happen, which I think is a mistake, or that it did happen and it's carried forward to the extent it doesn't conflict with what we're doing.

MR. GOLD: What's the down side of doing the last option that you've recommended, the bringing forward of the prior orders?

MR. McMAINS: I don't know that there is a down side, but it is, you know, clearly a change in the law, is what I'm saying.

MR. GOLD: Well, I think we've

already discussed that. We're together on that.

MR. HUNT: David Perry.

MR. PERRY: I think we have basically a strategic choice to either revitalize or clarify the one-final-judgment rule or else to abandon it entirely. Now, if we abandon it entirely, you end up in the situation where you have a complete loss of focus about what is or is not the final judgment and you leave people at liberty to try to cobble together finality and appealability out of any imaginable combination of unrelated orders. And I think there is a very great deal of danger in going off in that direction.

On the other hand, if we go back and try to revitalize and clarify the concept of one final judgment, I think there are some fairly simple and definitive ways in which the problems that Rusty is raising can be lined out. And I think that if you abandon the one-final-judgment rule in its entirety, you just end up reading a great deal of confusion into the law.

HON. SARAH DUNCAN: Can we take that vote?

MR. HUNT: Well, let's see if we can clarify what we voted on. I thought at least in part that the 18-to-one vote was a vote to try to divorce ourselves from that language of current Rule 301 and to rewrite the proposed Rule 300(b) in a way to define "final judgment" for specific posttrial purposes. And if that wasn't correct, you need to help me out.

MR. McMAINS: That was the vote.

HON. SARAH DUNCAN: But I think the question now is, having decided that, we can go in one of two directions. We can codify existing law, which is basically what the current subsection (b) is trying to do, or we can go off, as David says, and revitalize, which basically means raise from the dead, the one-final-judgment rule. And the subcommittee can't do anything until we know which of those two directions to take.

MR. HUNT: I welcome back the Chair, and am pleased to announce that he's

missed nothing.

MR. McMAINS: We have made no progress and are at an impasse.

CHAIRMAN SOULES: It was said at the back of the room that you've been moving at the speed of summer lightning. I'm glad to hear that you've passed over or that you've done Orsinger's and Buddy's and you've decided to come back to this for a revisiting.

MR. HUNT: Richard Orsinger.

MR. ORSINGER: I'm in favor of the final proposal that Rusty had articulated that we define this judgment as a -- this final judgment as this last event and that we carry forward any rulings that are not explicitly overruled so that, if you will, it's an amalgamation kind of cobbling together, but it does eliminate the problem of inadvertently by silence undoing something that no one intended to undo.

MR. McMAINS: Yeah. Let me make one further clarification, though, of those choice issues too, because right now we have the problem anyway of when you put in the final judgment the language of not all relief

granted herein -- that's not expressly granted herein is expressly denied. You still have a propensity and probably will have a propensity of people that put that in.

So in the situation I'm talking about you have a situation where maybe a party got relief, disappeared, because he got a summary judgment or whatever, and nobody that's affected by the judgment that's left cares what that party's rights are, and then -- so that the mere use of the words "that doesn't conflict with the judgment" aren't really sufficient to deal with that boilerplate language. I mean, that's the reason I didn't want to formulate it as saying, you know, this is a categorical absolute now, because that's the problem that we have right now that is lurking out there and has been raised in some cases, is what happens when you put this boilerplate language in there but yet you have had specific relief granted that may have been the subject of extensive litigation previously.

And then you get down to the final judgment, and you say -- and it's not there

because those people aren't there or that claim isn't there, and then say not all -- you know, all relief not granted as to any party on any issue is expressly denied. Well, that's a complete revision. The judge has power to do that, but there's nobody that's interested in preserving that that's there. Now, it doesn't affect us for finality purposes, but it may affect us for these other purposes.

HON. SARAH DUNCAN: But by the same token, I mean, I guess that's the option that you were proposing that Paul was talking about, and I don't think that we should permit a lawyer who is drafting a judgment, a trial judge who is signing a judgment, to intentionally or inadvertently change a prior ruling without notice and hearing.

And if I was the person who had gotten that summary judgment and you all decided that you just didn't like me or you wanted to cause me some problems and you're going to put in the judgment that my summary judgment is now reversed without notice and hearing to me, surely we're not going to draft a rule that

says you can change prior rulings simply by a slip of the pen in a judgment.

HON. C. A. GUITTARD: That would be subject to revision on appeal, though, would it not?

MR. GOLD: I know I'm out of my depth on this, but wouldn't the simple fix for that be "all relief not previously granted or granted herein is denied"? I mean, why couldn't you merely make reference to the fact that you're bringing forward these prior orders and that to the extent prior relief has been granted it is recognized; and to the extent that it's in this judgment that that's all the relief that's being granted. You're not doing anything with that prior order.

MR. HUNT: A new Mother Hubbard is what you're proposing?

MR. McMAINS: No, I don't --

MR. HUNT: It sure sounds like it.

MR. McMAINS: That's right, I think that is.

MR. GOLD: Well, given everything else, Mother Hubbard is a small

thing. You know, I mean, why not say in the judgment that merely -- or have something in the judgment that recognizes that you're bringing forward all prior orders unless expressly dealt with in the judgment and all relief not granted in the judgment or by the prior orders is denied? Why not just have something like that?

CHAIRMAN SOULES: It's what you're supposed to do.

MR. GOLD: Pardon?

CHAIRMAN SOULES: It's what you're supposed to do. That's what we do, but not very many people know to do that.

HON. C. A. GUITTARD: Let me propose this: An earlier interlocutory order disposing of a party or claim is included by implication in the last signed order, except to the extent that it is in conflict with the last signed order. In a case tried after a conventionally -- tried in a case tried -- after the case, well --

MR. McMAINS: You're talking about a conventional trial on the merits?

HON. C. A. GUITTARD: Yeah. On

a case on which -- tried in a conventional case on the merits -- if the case has been tried on the merits in a conventional trial, all relief not expressly granted is denied.

MR. McMAINS: Yeah.

MR. HUNT: What's your reaction to that? We tend to have bogged down here with a variety of suggestions, and I want to get us back on track if I can. We've had two suggestions here about phrasing in the rule or phrasing at the end of the judgment to possibly solve some of these problems, but until you vote definitively and stick with the vote you haven't helped the subcommittee much.

MR. GOLD: Well, doesn't Richard have a motion on the floor?

MR. HUNT: He may have, but I missed it.

MR. ORSINGER: I would be happy to -- I would propose that we go with one-final-judgment concept with Judge Guittard's suggestion that an interlocutory disposition of a party or claim -- and I don't mean just some kind of partial thing, I mean somebody's cause of action was knocked out,

some party was either given an interlocutory judgment or dismissed from the suit -- would be impliedly carried forward, unless it's expressly overruled in the judgment.

MR. GOLD: I would second that.

MR. HUNT: The motion has been made and seconded. Is there any further discussion as we attempt to rewrite 300(b) in those terms?

MR. McMAINS: And I would only suggest that we add that when you say "expressly" that that does not include the Mother Hubbard clause; in other words, that a general statement that "all relief not granted or denied is expressly overruled" is not good enough, is not express enough to prevent the earlier orders from being carried forward.

MR. GOLD: Yes.

MR. McMAINS: Because that's really one of the things you're trying to fix.

CHAIRMAN SOULES: Unless specifically --

MR. McMAINS: Unless it is specifically set aside.

CHAIRMAN SOULES: Unless

specifically reconsidered and made a part of and disposed of.

MR. ORSINGER: I would like to include that in my proposal.

MR. HUNT: Anne Gardner.

CHAIRMAN SOULES: Quickly. And then let's vote.

MS. GARDNER: When it's carried forward, I think the only case law says it's merged into the final judgment, which is consistent with having one final judgment. And I would suggest that in rewriting it the subcommittee look at the language of those cases and use the language to kind of -- so that the lawyers looking at the rule will not think that there's a new rule but will see that it's consistent with the old law.

MR. HUNT: Any further thoughts? The motion has been made and seconded. Richard, restate your motion, please.

MR. ORSINGER: That we will try to borrow David's phrase, was it "reinvigorate," the one-judgment rule with the proviso that any interlocutory

adjudications of the rights of parties or claims are impliedly merged into the final judgment unless the final judgment explicitly and specifically overrules them, not by a catchall clause, but by some clear intent to specifically overturn the prior order.

MR. HUNT: Any further discussion? All right. All those in favor raise your right hand or left hand.

CHAIRMAN SOULES: I've got 18.

MR. HUNT: 18 for. Any against?

CHAIRMAN SOULES: None against.

MR. McMAINS: We lost the one.

MR. HUNT: Why did it take two hours to get to unanimity?

MR. MARKS: Most of us didn't understand the motion.

MR. HUNT: We have achieved unanimity on some score. Perhaps all that we have said will help the subcommittee in rewriting and returning with it next time.

CHAIRMAN SOULES: I would like to have you identify for the record, Don, those people that have had real specific input

on this and then have them at least on a conference call before the next meeting so that you can all come together on language to be presented. Who would those be? Rusty?

MR. HUNT: Rusty McMains, Judge Guittard, Justice Duncan, Paul Gold, John Marks and Keltner, who is from Dallas. Or are you from Fort Worth?

MR. KELTNER: Yes, sir. Fort Worth.

MR. ORSINGER: You ought to have Bonnie Wolbrueck in there.

MR. HUNT: Yes. Okay. Bonnie and David Perry.

MR. PERRY: Just let Orsinger talk for me.

MR. HUNT: Okay. No David Perry. Orsinger.

MR. ORSINGER: I'll send him a courtesy copy of my letter.

MR. HUNT: Is that all? Anne Gardner, do you want to be included?

MS. GARDNER: No. You've got my comment. Thanks.

MR. HUNT: We'll try to get you

a draft, and then to the extent we can get all of you on a conference all, because, folks, we need to bring this to resolution and conclude with some sort of a definition on final judgment and get on with life, because we cannot keep thrashing with one subparagraph.

Any further comments? We, I thought, last time had covered Rule 300(a). I even had the sense that we had covered Rule 300(b). I was wrong on that. Do any of you all want to discuss Rule 300(a)? Let's jump back and pick that up. Are you unhappy with 300(a)?

CHAIRMAN SOULES: That's already been approved.

MR. HUNT: It's already been approved, the Chair says.

MR. McMAINS: Well, what's the current -- excuse me, can I see the current rule in terms of the judgment rule being defined as an order?

MR. ORSINGER: While Rusty is looking that up, Luke, can I make a comment?

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: The second

sentence in there says that a signed judgment shall be promptly filed with the clerk for entry in the minutes of the court. And I would suggest that we just say filed with the clerk, period, because I think we're going to have other rules at the end of the rules of procedure that the clerks look to for their direction. My committee is writing those rules, and I don't see why here in the rule for lawyers we ought to say that it should be filed with the clerk so they can put it in the minutes. We're going to have a separate rule that requires the clerk to put all judgments in the minutes, so why not just end it with "filed with the clerk," period?

MR. HUNT: The reason that it's there is to make the distinction that the cases make that you're really dealing with four different things. You're dealing with announcement, rendition, signing and entry. And the proposal was to include in one rule those four things, and that's the only reason why it says "entry" --

MR. ORSINGER: Okay. Well, I think that's a valid reason.

MR. HUNT: -- in order to make clear that what we think of as entry in the state court system is what the clerk does, memorializing it in the minutes, to differentiate it from what the federal clerk does, which has appellate implications.

With that in mind, can we stand by the prior approval of Rule 300(a)?

MR. McMAINS: My only concern is that we define "judgment" in the last sentence. It says "as used in these rules." Now, number one, I'm not sure whether that just means the Rule 300 series or whether that means all of the rules. But to include a decree or an order that disposes of a claim or defense, I'm just --

CHAIRMAN SOULES: What do you want to do?

MR. McMAINS: Well, what I'm just concerned about, I mean, we do not now in our current rules define a judgment as an order. See, one some of the problems -- some of our rules are in terms of -- like the prematurely filed rules talk about whether you file something before or after a judgment.

Well, if you make an order a judgment and it may dispose of the claim but not all of the claims, well, it's not the final judgment. Now, our prematurely filed rules need to be talking about the final judgment rather than a judgment.

HONORABLE C. A. GUITTARD: It could be an interlocutory judgment.

MR. McMAINS: Well, that's right.

HON. SARAH DUNCAN: Or a summary judgment.

MR. McMAINS: Well, it could be a summary judgment.

HON. SARAH DUNCAN: That doesn't necessarily mean it's a final appealable judgment.

MR. McMAINS: All I'm saying is we define "judgment" for these purposes, and I'm wondering is it just for purposes of distinguishing when there's a rendition, a signing, an entry, what you do, or is it for all of the other purposes in the rules?

MR. HUNT: The reason why that sentence is in there is to make clear that an

order which disposes of a claim or defense is a judgment. That sentence was put in by the subcommittee before we ever tried to include 300(b) defining final judgment. It was to clarify that "judgment" included any order which was dispositive. Now, if we're going to take a shot at final judgment in 300(b), perhaps that can be changed or come out.

The purpose of that -- and it was used advisedly. The word "final" wasn't in front of "judgment" and it was put in quotes so that the reader would understand that if it's an order disposing of a claim or a defense it's a judgment, without trying to say anything else. Does that help or hurt?

HON. C. A. GUITTARD: I think that's the Committee's -- that's what the Committee wanted to do.

MR. HUNT: Yeah.

CHAIRMAN SOULES: Well, there's been no motion to change the last sentence, so it stands unless there's a motion. It stands.

MR. HUNT: Okay.

MS. LANGE: I'd like to go back to that other sentence, "for entry in the

minutes of the court." As Mr. Orsinger said, the clerks as a practical matter do not have minutes of the court any more. We all microfilm or whatever and record that whole jacket and there's not manual entries done, and I'd like to propose that the "for entry in the minutes of the court" be removed.

CHAIRMAN SOULES: Does the statute require minutes? Does any statute require minutes?

MS. WOLBRUECK: No, because we've looked that up before as far as the definition of "minutes," and that definition is -- there's 254 different definitions right now as to what really the minutes are, other than what's related here in these rules whenever it talks about something in these rules.

MS. LANGE: Years ago, when you typed the order or the final judgment into a bound book, you know, then yes, you did enter it into a different book. But that is no longer the practice of case.

MR. HUNT: Well, help me out here. What do you do when you do that

photocopying now? Don't you call that a name?

MS. WOLBRUECK: And some clerks are still doing that. Some clerks will enter, will photocopy what's called "into the minutes of the court." And that's defined from county to county as to exactly what they enter. Many clerks are now microfilming the entire file, and the entire file then, quote, can become the minutes of the court, just for the fact of being -- of becoming permanent record.

And we can discuss "permanent record" also, because that's another issue that clerks have to define as to what should be kept permanently. Minutes of the court shall be kept permanently.

MS. LANGE: And some do call it "enter into the minutes of the court" because of some places like this which says it, so they cover themselves by calling that book that, but it isn't.

MR. HUNT: Would it be just as well to say "entered in the records of the court"? Does that satisfy the problem, or does it create --

MS. WOLBRUECK: Does it need -- do you mean to define that it's entered? I mean, it needs to be filed with the clerk, but --

MR. HUNT: You may be correct, Rusty.

MR. ORSINGER: Our subcommittee is rewriting Rules 15 to 165a that include many of these instructions to the clerk about what to do with judgments and things that are signed, and because of these comments that there doesn't appear to be minutes any more, since a lot of clerks are just microfilming everything, not just judgments but everything, we've been staying away from the word "entering" in our rules. And maybe we ought to just dispense with the whole concept of entering and just say that the judgment is to be filed with the clerk. Then we have a rule in process that we could discuss today but won't -- that says what the court record is and what's permanent and what's not permanent, and perhaps we don't need this whole word "entry" any more.

MR. HUNT: Let me see if I've

got the sense of what you're suggesting and see if there's any opposition to this proposal: Change the title from its current status to just read "Rendition and Signing," period.

MR. ORSINGER: Or filing.

MR. HUNT: And that a signed judgment shall be promptly filed with the clerk, period.

HON. SARAH DUNCAN: I think we need to say "Rendition, Signing and Filing."

CHAIRMAN SOULES: I can't remember the rule that used to be. I think it used to say that the clerk shall enter something, an order or judgment or whatever, in a well bound book.

MS. WOLBRUECK: Yes, that is what it said.

CHAIRMAN SOULES: What rule is that?

MR. ORSINGER: We're eliminating that rule.

MS. WOLBRUECK: It's in the government -- I think it's been eliminated in these rules as far as the well bound book

also.

CHAIRMAN SOULES: I know. But what -- well, we didn't -- all we did was strike "well bound book." We didn't strike the other part.

MS. WOLBRUECK: We've addressed that before.

MR. ORSINGER: I'll find that for you here, Luke. It's one of the ones that we struck out.

MR. McMAINS: Let's substitute it with "poorly bound book."

CHAIRMAN SOULES: David Garcia said that they're using computers and that was good enough; they didn't need a well bound book.

MS. WOLBRUECK: It was either Rule 25 or 26.

HON. C. A. GUITTARD: I have a question.

CHAIRMAN SOULES: Okay. Justice Guittard has a question.

HON. C. A. GUITTARD: My question is whether we ought to relieve the clerks from filing the whole record or

reproducing the whole record for the purpose of the records of the court. We have all these things filed. Presumably they are permanently filed until the time comes to dispose of them. But in some way we ought to be able to define what the court -- what things go in the permanent record of the court. And that ought not to be the whole file including pleadings and all of that. It ought to be simply the orders of the court.

Now, Richard, does your order -- does your committee deal with that question?

MR. ORSINGER: Yes, sir. We have now defined what is called the "record," which is -- we just have a definition under rule -- under duties of the clerk of the court, and we have a definition of the clerk's record.

And just briefly, the record shall be kept by the clerk of the court for each case. The record shall include the case number, names of parties, attorneys, in brief form, including date and chronological listings of all proceedings, all appearances, pleadings, motions, writs, process, issues, returns,

verdicts, judgments, notices, taxable court costs. Upon order of the court, the clerk shall modify the records to reflect redesignation of a plea or pleading. That's the definition of the record.

Then we have another subcategory called "permanent record." The clerk of the court shall permanently preserve a record for each case reflecting the case number, the names of the parties, their attorneys, the final judgment or other court order disposing of any party, claim or case, any writs of execution and returns; also permanently maintain an index described in subdivision 5, and the index is a defendant/plaintiff index.

So this rule purports to describe what you file with the clerk and calls it a record, and then it says of those things, some of them will be maintained forever, and the rest implicitly are disposed of under the local government code according to standards set by the state library.

HON. C. A. GUITTARD: And so should we then in this subdivision (a) delete "minutes" and insert instead "permanent

record"?

MR. ORSINGER: That's fine, except we don't need to put it there. If the word "entry" is no longer going to be used in legal parlance, we don't need to keep it in this rule to distinguish it from signing. And as I understand it, Don's rationale to have rendition, signing and entry is so people wouldn't confuse entering with signing. But if we're going to abandon entry because the clerks don't want to be --

HON. C. A. GUITTARD: Well, why don't we just say "included," filed with the clerk and included in the permanent records of the court?

MR. ORSINGER: We don't need to say that if we already say that up here in rule whatever this is. My proposal is, if we have another rule that tells the clerks to keep it in their permanent record, why do we need to put it in the rule that the lawyers are going to read that the clerks will keep it in the permanent record?

HON. C. A. GUITTARD: But this rule says what the judge shall do with the

judgment when he signs it.

MR. ORSINGER: I think he should file it with the clerk, period.

HON. C. A. GUITTARD: Okay.

MR. ORSINGER: And then we have another rule that says what the clerk does with what's filed.

Now, there's a debate as to whether judgments are filed. Bexar County won't file a judgment. They consider it to be a judicial act, an act of the court that doesn't -- they won't file stamp it. Other counties do file stamp them, and there is a debate to engage in about whether you, quote, file a judgment. I think you ought to file everything.

But at any rate, we certainly don't need to have instructions to the clerk in the rule that the lawyers are reading, it seems to me, if we're not going to maintain this concept of entry at all.

MR. HUNT: Have we reached consensus here on 300(a) to change the title to "Rendition and Signing" and to change in the third sentence to "a signed judgment shall be promptly filed with the clerk of the

court"? Is anybody opposed to that?

CHAIRMAN SOULES: How about Rendition, Signing and Filing? Because that's what's going to take the place of entry.

MR. HUNT: All right. The Chair suggests the title ought to be Rendition, Signing and Filing.

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

CHAIRMAN SOULES: Is that unanimous? Any opposition?

MR. McMAINS: Well, not on that.

CHAIRMAN SOULES: Thank you. Okay. Rusty.

MR. McMAINS: But I still have a problem with "judgment" here where you say "as used in these rules." All of your subsequent things -- for instance, on the motion for new trial you file a motion for new trial from a judgment, and then you talk about filing a motion for new trial from the judgment. And then you have now defined a judgment to mean any decree or order that is remotely claim dispositive or party

dispositive. And even though it may be partial, it's clearly interlocutory and you don't need to do a motion for a new trial on an interlocutory judgment until the whole thing is over.

I mean, a lot of these rules don't distinguish between a final judgment and a judgment. They kind of assume that we're -- most of our posttrial rules are assuming that we're dealing with a judgment.

Why don't you say just "for this rule." I mean, I don't have a problem with it for this rule. It ought to be filed. We do want to know when it's rendered. We do want to know that it disposes -- you know, what's supposed to be filed is what disposes of the claim or party. But for purposes of this rule, when you say "these rules," then you incorporate any decree or order. You move them over into all of the subsequent rules that talk about judgments.

CHAIRMAN SOULES: Okay. You're moving that we substitute --

MR. McMAINS: -- "this" for "these."

CHAIRMAN SOULES: That this rule --

MR. McMAINS: Judgment as used in this rule.

CHAIRMAN SOULES: "This rule" as opposed to "these rules." Any opposition to that?

Don Hunt.

MR. HUNT: The purpose, in case any of you are interested, was to talk about judgment generally in (a), and then leave out the definition of final judgment, and then when we got to the timetables talk about final judgment or appealable order. And we're probably better off by what we decided today, so with that in mind, let's move to 300(c).

HON. C. A. GUITTARD: I have a minor suggestion. At subdivision -- at (c)(2) it says, "A judgment shall specify the relief to which each party is entitled." Now, a judgment is not merely a declaration of the relief to which the party is entitled. It is an order granting the relief. So I would suggest instead "specify the relief granted to each party."

MR. McMAINS: I agree.

MR. ORSINGER: Should we put in the concept "or denied," granted or denied to each party?

HONORABLE C. A. GUITTARD: Well, that's another matter.

MR. McMAINS: If you grant relief to one party, you have denied it to the other.

MR. ORSINGER: Well, maybe it's unnecessary.

MR. HUNT: "Specify the relief to which each party is entitled" retains some current language.

HON. C. A. GUITTARD: I know. And I think it's improper as being declaratory rather than dispositive.

CHAIRMAN SOULES: What is it again, Judge Guittard?

HON. C. A. GUITTARD: "Specify the relief granted to each party," and you can put "or denied" in there if you want to. That would be fine. Granted or denied to each party.

MR. HUNT: Okay.

MR. ORSINGER: Do we need to have "to each party," or can we just say "specify the relief granted and denied" or "granted or denied"?

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

MR. McMAINS: The problem is, if you have more than one party, you would like to know who the relief is against or in favor of.

HON. C. A. GUITTARD: I guess that's right. In other words, you could just say --

MR. McMAINS: Rather than just say, "I'm going to grant you a judgment for X millions of dollars," and you have specified who the parties are but don't specify -- I mean, aren't you kind of implying that it's against the party specified as the defendant?

CHAIRMAN SOULES: Well, "specified" isn't right either.

HON. C. A. GUITTARD: Well, if you say "the relief granted," you necessarily would have to specify to whom it's granted and against whom it's granted.

MR. McMAINS: Except I'm not sure that's -- when you say "specify the relief granted," it doesn't say against somebody. It doesn't mean, you know, I'm going to give him a million dollars.

HON. C. A. GUITTARD: Well, if you say -- well, we should say -- or if we say "for," we should also say "against," I guess.

MR. McMAINS: Right.

HON. C. A. GUITTARD: Specify the relief granted to or denied to each party.

MR. ORSINGER: Granted or denied to each party.

MR. McMAINS: I don't know where the "to" goes. I cease being a grammarian at this stage.

CHAIRMAN SOULES: And "specify" should be changed to "state."

HON. C. A. GUITTARD: Okay.

CHAIRMAN SOULES: I mean, the Mother Hubbard is not specific.

HON. C. A. GUITTARD: And against -- let's see, well --

CHAIRMAN SOULES: I don't think we ought to have "to each party" in there. I

think that starts clouding up the Mother Hubbard. And I guess if our current rule has it, it can't be too cloudy.

HON. C. A. GUITTARD: Why don't you just say "state the relief granted or denied."

CHAIRMAN SOULES: State the relief granted or denied?

MR. ORSINGER: I like it.

CHAIRMAN SOULES: Okay. And shouldn't the judgment tax costs?

MR. ORSINGER: That's part of the relief granted, isn't it, or denied?

HON. C. A. GUITTARD: Yeah.

CHAIRMAN SOULES: I don't know. What do the clerks say about that? Should the form and substance of the --

MS. LANGE: In your order you're going to say who pays the court costs. I mean, we had a case once where the attorney forgot to ask for fees for himself. He didn't get them. Then after a while -- so you know, if it's not in there, you don't get it. But under (2) I think you cover the court costs.

CHAIRMAN SOULES: Okay.

HON. SCOTT A. BRISTER: Date? Doesn't the date signed need to be in there?

HON. C. A. GUITTARD: That's somewhere else, isn't it?

CHAIRMAN SOULES: Okay. Anything else on 300(c)? Any opposition? No opposition. It's done. It's passed.

MR. ORSINGER: Well, it really isn't in any of these rules that you date the judgment on the date that it's signed that I can find.

HON. SCOTT A. BRISTER: Is that somewhere else, Judge Guittard?

MR. ORSINGER: That ought to be in 300(a), is where it ought to be, shouldn't it, Judge?

HON. C. A. GUITTARD: Which rule is that, is it 306 or something or other, that requires the parties or the court to date the judgment and so forth?

MR. HUNT: The current rule now is 306a(1), "Beginning of Periods. The date of judgment or order is signed as shown of record." So that's where it is there now, and it's carried forward later into another one of

these rules.

MR. ORSINGER: I would propose that we put it it in 300(a) where it says shall be reduced to writing, dated and signed by the judge, or reduced to writing -- reduced to writing, dated and signed by the judge.

HON. C. A. GUITTARD: Where is it carried forward?

MR. ORSINGER: I don't see it in this.

HON. SCOTT A. BRISTER: It is on page 14, the last paragraph.

HON. C. A. GUITTARD: It certainly should be carried forward. I assumed that it was. There's "Date to Be Shown."

MR. ORSINGER: Well, we don't need that here if we're saying it up in 300.

CHAIRMAN SOULES: Let's don't waste time with that. It's okay. It says what you want. "All judgments, decisions, and orders of any kind shall be reduced to writing and signed by the trial judge with the date of signing expressly stated in it."

HON. C. A. GUITTARD: That's

okay. All right. It's in there.

JUSTICE HECHT: Mr. Chairman, I'm beginning to despair getting through these.

CHAIRMAN SOULES: We've got to move.

JUSTICE HECHT: Let's go. Let's get going here.

CHAIRMAN SOULES: I don't think we can make them foolproof.

MR. ORSINGER: Well, I would move the adoption of (c), if we need that.

CHAIRMAN SOULES: Okay. There was no opposition to (c), so it's done.

MR. HUNT: Well, let me tell you briefly about (d). While it's called "Form and Substance: Specific," no change was intended from current practice, only elimination of unnecessary words. I hope we have faithfully done that.

CHAIRMAN SOULES: Okay. Any opposition to (d)(1)? I'll give you a couple of seconds to look at it. Any opposition? There's no opposition. It's unanimously approved.

(d)(2). Any opposition to (d)(2)?

HON. SCOTT A. BRISTER: Drop "plaintiff's" from (i) and (ii), just the word "plaintiff's."

CHAIRMAN SOULES: Drop that? Is that your suggestion?

HON. SCOTT A. BRISTER: Yes.

CHAIRMAN SOULES: So it says, "recovery of the debt, damages and costs?"

HON. SCOTT A. BRISTER: Right. And in the section --

CHAIRMAN SOULES: Any opposition? Okay. That's done.

Next up. Same thing?

HON. SCOTT A. BRISTER: Same thing. Foreclosure of the lien.

CHAIRMAN SOULES: Foreclosure the lien. Any opposition? No opposition. That's done.

Any other changes on (d)(2)? Is there anybody who hasn't had an opportunity to read it? No hands are up. It's done. It's unanimously approved.

Any opposition to (d)(3)? Is there anyone who hasn't had a chance to read it?

No hands are up. It's approved.

HON. C. A. GUITTARD: In the last sentence there --

HON. SCOTT A. BRISTER: Something got cut out by accident.

HON. C. A. GUITTARD: -- you cut out "executor" and should not have, "hands of the independent executor."

CHAIRMAN SOULES: Okay. We'll restore the word "executor."

Do you see that, Don, right here, "independent executor"?

HON. C. A. GUITTARD: The very bottom line.

MR. HUNT: We'll correct it.

CHAIRMAN SOULES: We'll put that back in.

301. To my knowledge, 301 was unanimously approved. Does anyone disagree with that?

That takes us to 302 on page 6, "Motions For New Trial." I'm going to take "Grounds" up first. And I'll ask you this question, that's 302(a) and all subparts, any opposition to 302(a)?

MR. HUNT: I think we've gone through this twice.

CHAIRMAN SOULES: Is there anyone who hasn't had a chance to read it? Okay. Pamela.

MS. BARON: In subsection (11) there's a grammatical error.

CHAIRMAN SOULES: I can't hear you.

MS. BARON: In (11), subsection (11), there's a grammatical error.

CHAIRMAN SOULES: Please point it out and tell me what it is.

MS. BARON: It says "any other ground warrant."

CHAIRMAN SOULES: "Any other ground warrant." We'll change that to "warrants."

HON. C. A. GUITTARD: No. It's i-n-g, warranting, isn't it?

CHAIRMAN SOULES: Warranting a new trial. I-n-g.

MR. ORSINGER: No. It's "warrants" plural.

HON. C. A. GUITTARD: Oh,

"warrants" is right, yes.

CHAIRMAN SOULES: Okay. Mr. Orsinger.

MR. ORSINGER: I notice that Bill Dorsaneo used the term "motion to correct judgment record" in the presentation that he made earlier today in lieu of "motion for judgment nunc pro tunc." And I suppose that it was in an effort on his part to modernize that language, and I liked it. In what Bill presented before he left this morning, which he jumped ahead, do you remember, to rule -- one of these rules.

CHAIRMAN SOULES: Okay. Now I'm on 302(a).

MR. ORSINGER: I'm referring to, well, I guess -- I'm sorry, I guess I retrograded to 301(e).

MR. HUNT: Let me give you the answer to that, Richard. The current rules label it "nunc pro tunc" and then in the text talks about "correct the judgment record." What I attempted to do was to change both the label to match the language. Now, Bill changed back the labels this last time around

so that it would be clear that by label we're really talking about judgment nunc pro tunc, and he's left the language the same as it is now, which is a motion to correct the judgment record, because that's really what you're doing. You're not correcting the judgment, you're correcting the recordation of the judgment.

CHAIRMAN SOULES: Okay. 302(a), any opposition? No hands are up. That's unanimously passed.

302(b). Any opposition to 302(b) on page 7? No hands are up. That's unanimously passed.

Any opposition to 302(c)? Has everybody had a chance to read it? No hands are up, so that's unanimously approved.

Now we're to 302(d). 302(d) is "Procedure for Jury Misconduct." Any opposition to 302(d)? Anyone who hasn't had a chance to read it? No hands are up. No opposition, so that's unanimously approved.

302(e), Excessive Damages; Remittitur. David says there's no such thing as excessive damages, right, David?

MR. PERRY: I think we need a provision for additur.

HON. SARAH DUNCAN: I actually do think we need such a thing.

CHAIRMAN SOULES: Whoever wants to do additur --

MR. PERRY: Well, some states have additurs. You have cases occasionally reversed because the amount of damages were inadequate, so why not let the court add to them.

CHAIRMAN SOULES: If somebody wants to propose additur, write it up and send it in.

MR. GALLAGHER: To whom?

CHAIRMAN SOULES: To me. And I will promptly redistribute it to Don.

Okay. Any opposition to 302(e)? Then that's done.

Now we're to 303, Preservation of Complaints.

HON. SARAH DUNCAN: What happened to (f)?

CHAIRMAN SOULES: Pardon me?

MR. HUNT: You left out (f).

CHAIRMAN SOULES: I apologize, I missed (f). 302(f), Partial New Trial. Any opposition to 302(f). No opposition. It's unanimously approved.

HON. C. A. GUITTARD: Isn't it amazing what a few words from on high, what an effect it will have.

CHAIRMAN SOULES: Now --

MS. WOLBRUECK: Mr. Chairman.

CHAIRMAN SOULES: Bonnie Wolbrueck.

MS. WOLBRUECK: I apologize, I want to go back to one issue on page 6, the motion for judgment nunc pro tunc. Does that mean that all clerical errors shall be corrected by nunc pro tunc?

CHAIRMAN SOULES: Bonnie, point out to me where you are.

MS. WOLBRUECK: Page 6, the second paragraph, Motion for Judgment Nunc Pro Tunc.

CHAIRMAN SOULES: Okay.

MS. WOLBRUECK: Does that statement state that all clerical errors shall be corrected by nunc pro tunc? The reason I

ask that question is I have had some difficulty with attorneys coming in and pulling a judgment that was entered last month or two months ago and taking it to the judge to make some corrections of clerical errors. And you know, that's a major problem because we've already issued certified copies, you know, and did everything possible on that judgment or even issued execution on it. And I realize that a judge should not do that, but the attorney should not offer it to the judge either.

Shouldn't there be something that clearly states that any clerical errors must be entered by judgment nunc pro tunc, or is that understood by everybody?

CHAIRMAN SOULES: Well, I understood that any change in the judgment had to be -- everybody had to have notice of it. And then you run into all of the other things about plenary power and nunc pro tunc and all of the procedures that flow from that, but you have to start with notice, and not just --

MS. WOLBRUECK: I know. But I'm sure I'm not the only clerk that has that

difficulty, and I know you're concerned about attorneys that don't practice law the way they're supposed to, so --

MR. ORSINGER: Bonnie, you're talking about the judge taking a pen and changing it out?

MS. WOLBRUECK: Yeah. And it's just a clerical error.

MR. ORSINGER: They're conceiving a new judgment with a new date that declares that it's in error, and Bonnie is talking about just marking one up.

MS. WOLBRUECK: I mean, it might have been a minor clerical error, but clerks have a real concern with that because we possibly have issued certified copies of it and then the judgment gets changed.

MR. ORSINGER: Maybe we should provide that it may be changed only by motion with written notice.

HON. C. A. GUITTARD: What if you leave out an "S" or something like that?

HON. SCOTT A. BRISTER: Change "may" to "must" in 301(e).

MR. HUNT: Mr. Chairman, before

we go too far on this, let me point out that Rule 301 with which we're dealing is an attempt to define all of those motions that are in existence. It is not an attempt to control the trial judge who errantly does things, and I'm not sure we can. But we're trying to be instructive here to the bench and bar that these are the types of motions that are available postverdict, these and only these. And if we try to get into corraling the trial judges, we are doing some things that the current rules are doing today that try to do too much in one rule.

CHAIRMAN SOULES: If somebody wants to write up something and propose a place for it that says that no judgment shall be altered in any way except on notice to the parties, I don't know where it would go, but something to that effect, we would certainly entertain it. And we'll have time to send it to Don with a recommendation about where it ought to go, and then --

MS. WOLBRUECK: I know that I'm not the only one that has had difficulty with it, so that's the reason I wanted to bring it

to this Committee's attention.

MR. PERRY: Do you have problems with other filed documents as well that lawyers try to change, the pleadings or anything like that?

MS. WOLBRUECK: No, we haven't had that. It would just be a minor clerical error. I mean, it could be something very minor and the attorney doesn't want to have to go through the motion and prepare another judgment. And he'll take it to the judge and say, you know, "Would you please just correct this? You know, we just failed to add this," or something. That's what happens.

CHAIRMAN SOULES: Okay. So we're to -- we did (f). Now we're to 303(a).

MR. HUNT: Which is TRAP 52(a) now as written.

CHAIRMAN SOULES: Okay. Any opposition to 303(a)? Being none, it's unanimously approved.

303(b) on page 10, any opposition?

MR. HUNT: It's unchanged since the last time you approved it.

CHAIRMAN SOULES: It's been

unanimously approved.

303(c), any opposition? None. It's unanimously approved.

303(d), any opposition? There's none. It's unanimously approved.

303(e) on page 11. Any opposition?

MR. HUNT: Mr. Chairman, this still contains the footnote down there, and the proposal was taken out of 302 to fold in to the motion for new trial practice the business of dismissal for want of prosecution that's currently in Rule 165a. If we do that, then there's nothing that needs to be changed to subparagraph 11. And I simply call that to your attention for purposes of clarity, since we had previously decided not to put the 165a practice in the motion for new trial rule.

HON. SCOTT A. BRISTER: Luke.

CHAIRMAN SOULES: Judge Brister.

HON. SCOTT A. BRISTER: I was trying to find where this was, and it's in (d), the last two lines on page 10, "The judge may, or at the request of a party shall, direct the making of the offer in question and

answer form." And the only time I see this come up is when an attorney wants to punish the judge for excluding it and will insist, he or she, "Well, I want to ask every one of my questions, and I'm going to force this witness who needs to leave, in question and answer that may take hours," when the point of what they're trying to prove can be stated in a paragraph, a minute.

Why is it that this is what the current rule says? The only time anybody ever insists on questions and answers is when they want to abuse it, has been my experience.

CHAIRMAN SOULES: Where is that, Judge?

HON. SCOTT A. BRISTER: It's the last two lines on page 10.

CHAIRMAN SOULES: The last two lines on page 10?

HON. SCOTT A. BRISTER: I would propose dropping out the parenthetical or between, whatever you call it, between the commas.

CHAIRMAN SOULES: Any opposition to that? David Perry.

MR. PERRY: If you drop that out, a person who is about to have some evidence excluded has an absolute right to define entirely what that evidence would be; whereas, it's very common that the witness wouldn't really testify exactly to that. And if you have to make a bill, you will see that the testimony that is offered is very highly qualified in some way or another, and that information may be important for an appellate review.

And I think that what you're doing is you're giving a person who is about to have some evidence excluded an opportunity to create reversible error when there very likely may not really be reversible error there.

HON. SCOTT A. BRISTER: My thought is that the only time this has happened is the judge has decided something is irrelevant, excludes it from the case, et cetera. And if somebody states it, state on the record what you're going to prove, if they state it in a way where they throw in a bunch of stuff to try to get me reversed, I'm going to say no, no, no, no, no. This, that

and that is fine. You've gone into that already. You can go into it. But to the extent you're doing this, you know, presenting this issue is excluded.

And I suppose if the other side is afraid the judge is wrong and so they want to make the people offering ask the questions to show that they can't get it, you know, I mean, honestly, if that has arisen, maybe I'm just unusual.

The only time I've ever seen this used at all is somebody wants to punish opposing counsel or the judge or everybody. I'm going to go through this line by line and it's going to take a long time if you don't let me do it.

CHAIRMAN SOULES: Buddy.

MR. LOW: But where it really arises is they will say, okay, I'm going to prove that the railroad has hired back people with similar everything, and you're going to find that they're people of the same quality or something like that. You have to bring that out on cross to show that the judge was correct in excluding that.

HON. SCOTT A. BRISTER: But does the judge exclude that? Judges don't exclude things because he thinks the witness is not going to say that. The judge excludes things because even if the witness is going to say that, it ain't coming in.

MR. LOW: I know, that's true. But because it's not admissible but you show for further reasons -- in other words, you want to go to the appellate court with a solid record rather than one that's halfway solid.

CHAIRMAN SOULES: We've already sent this to the Supreme Court. I think you all voted on it.

HON. SCOTT A. BRISTER: No. I remember specifically there was a meeting when I wanted to discuss this and we didn't get this far.

MR. HUNT: Well, this is our TRAP rule.

CHAIRMAN SOULES: This is 52(d) verbatim -- no, I'm sorry, 52(b) verbatim that we've already sent up.

MR. HUNT: And that's the difficulty in making changes now, unless we

intend to change the TRAP Rules too.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: If I could just point out, the one time I've ever had this on appeal, the defendant wanted to introduce evidence of the defendant's reputation for truth and veracity in the community in response to our having introduced evidence that he was in bankruptcy and he was a scoundrel and he was a jerk and he was everything else. The defendant tried to do it informally, and we said, "No, we want you to do it by question and answer form."

They did it by question and answer form. Didn't lay the right predicate. The court held that it was admissible in response to the bankruptcy evidence, but that he hadn't laid the proper predicate in his formal bill so it was not error to have excluded it. So that's just one instance where the fact of a formal bill saved the judgment, where an informal bill would probably have gotten reversed and remanded.

HON. SCOTT A. BRISTER: Or from

the other side, you could say this is an instance where I got tripped up because I didn't go into enough detail in my formal bill of exceptions. I mean, this is an informal bill. If you want to do a formal bill, fine. This is an informal bill.

MR. HUNT: It's informal.

HON. SARAH DUNCAN: No, this was --

HON. DAVID PEEPLES: Would it solve everyone's problem if the objecting party is the one who insists on Q and A? Your abuse isn't in the offering party. You're concerned that the objecting party ought to be able to --

MR. GALLAGHER: I think that fairly states the concern of several of us. We wouldn't mind offering our evidence in a summary form, but would want to have the right to cross-examine the other party's witness where they were attempting to offer it in summary form, because there might be some reason other than that which has provided the basis for the court's ruling that would come out in the course of cross-examination that

might show that maybe the witness didn't qualify. Maybe that would be better used.

HON. SCOTT A. BRISTER: Well...

MR. ORSINGER: Isn't that still pending?

MR. GALLAGHER: Yeah, we're on it.

MR. ORSINGER: Oh, you are.

MR. LATTING: Let's do that. Let's do what you said.

HON. SCOTT A. BRISTER: Well, I would propose inserting then "request of the objecting" for "a party" and also make a note to that effect, send a letter to that effect on TRAP 52. Honestly it is really a potential for big abuse.

MR. GALLAGHER: By that you still give us the right to cross-examine the witness under circumstances on which they are offering an informal bill.

MR. ORSINGER: Mr. Chairman.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: Being a practitioner who also handles appeals, I

develop my bill of exceptions through examination of witnesses. And I don't do it to harass the court, I do it because that's the best way to develop it. And I'm worried that if I just summarize it briefly in two minutes under pressure that I may not develop accurately or fully what I could dealing with the witness directly. And I don't like the idea that the judge has excluded the testimony that I think is important and has also impaired my ability to demonstrate what it would be to the appellate court so that I can get him reversed for doing it. So --

HON. SCOTT A. BRISTER: No. The judge just tells you to do it on your own time.

MR. ORSINGER: Well, that's an entirely different question. And then I would like to address the question of whether you can cross-examine the witness on a bill. I've had trial judges that say, "You cannot cross-examine a witness on a bill. The bill is an offer of what the evidence is that I've excluded and we're not getting into cross-examination by the other parties."

And I don't know what case law says that you can or can't cross on a bill, but I think that something important is about to happen here and I don't like it and I'm going to speak against it. I think that the party who is a proponent should be able to develop in Q and A form, and if it's a burden to the trial judges, I couldn't care less whether the trial judge listens to the bill. I'm not talking to the trial judge at that point, I'm talking to the appellate court.

So I've always been of the view that the judge could let me do my -- offer proof to the court reporter even outside the presence of the court. But then that's a controversial issue, because there are some cases that suggest that you have to reoffer your bill at the conclusion of it, and if the judge didn't hear it, then you've waived your error.

I think we ought to be able to do our bill the way we want to to the court reporter during a recess or after 5:00 o'clock when the jury is let go, but don't cut in to my ability to show how convincing my evidence was.

MR. LOW: Luke, I've had it

where you're doing that and the judge might change his mind or something may come up sometimes that the judge says, "Well, wait a minute, I understand that." So lawyers sometimes want to do that. And certainly you don't call it cross-examination. You qualify the bill to show -- I mean, the judge will let you do that.

CHAIRMAN SOULES: Okay. Judge Brister suggests that we substitute "the objecting party" for the article "a," a party, in the second line from the bottom of 10, that we substituting "the objecting" for "a." Is that correct, Judge, or do you want to take it all out?

HON. SCOTT A. BRISTER: No. That's correct.

CHAIRMAN SOULES: And we've heard the pros and cons on that. Those in favor show by hands. Seven.

Those opposed. 11. It fails by a vote of 11 to seven, so it stays as is, 303(d).

So we're back to 303(e), Formal Bills of Exception. Any opposition to this?

HON. SARAH DUNCAN: Can I

make --

CHAIRMAN SOULES: Sarah Duncan.

HON. SARAH DUNCAN: -- one comment? In subsection (11) on page 12, this was taken from the TRAP Rules which cover both civil and criminal trials. Rules of Civil Procedure only cover civil trials. In subsection (11), the last clause of the next to the last sentence governs criminal trials, and it ought to be deleted.

CHAIRMAN SOULES: Okay. Help me with this, Justice Duncan.

HON. SARAH DUNCAN: Subsection (11) on page 12.

CHAIRMAN SOULES: Okay.

HON. SARAH DUNCAN: The last clause in the next to the last sentence, "or within 90 days after sentence is pronounced or suspended in open court in a criminal case," I think needs to be deleted.

CHAIRMAN SOULES: Delete all of that. Does everybody agree? Okay. It's out, "or within 90 days after sentence is pronounced or suspended in open court in a criminal case," so that it will end with the

words "civil case."

Now, Don's point is, "If a motion to reinstate is considered a motion for new trial per proposed TRCP 302(a)(11) and (c)(4), then this should be changed." Now, that is in No. 11, formal bills of exceptions.

Now, what about -- is this in the TRAP -- this is in the Rules of Civil Procedure. Why do we have anything about the TRAP Rules in the Rules of Civil Procedure?

MR. ORSINGER: Well, we borrowed it from the Rules of Appellate Procedure, which serve a dual purpose, and we used the same thing.

CHAIRMAN SOULES: So we're going to say, "Formal bills of exception shall be filed in the trial court within 60 days after the judgment is signed in a civil case," and we're going to strike this criminal stuff in here?

HON. SARAH DUNCAN: Yeah.

HONORABLE C. A. GUITTARD: Well, let me raise this question: The court of criminal appeals has rule making power in posttrial proceedings including bills of

exception, does it not?

CHAIRMAN SOULES: But these are in the Rules of Civil Procedure. This is not the TRAP Rules.

HON. C. A. GUITTARD: Well, does it --

HON. SARAH DUNCAN: But it's still in the Rules of Appellate Procedure. We're just putting it in both places, right?

HON. C. A. GUITTARD: Right. In other words, the court of criminal appeals might conceivably enact this rule for criminal cases in the posttrial rules, but since the Appellate Rules say posttrial and appellate procedure, then the TRAP Rules will take care of it, right?

HON. SARAH DUNCAN: Right.

CHAIRMAN SOULES: Right. This language is in proposed TRAP 52(c). We're taking it out of the Rules of Civil Procedure, however, because it doesn't have anything to do with the Rules of Civil Procedure, but we're leaving it in the Rules of Appellate Procedure because there it has a function.

HON. SARAH DUNCAN: And for

that reason you can also take out "any civil case," as these rules only apply to civil cases.

CHAIRMAN SOULES: Formal bills of exception shall be filed in the trial court within 60 days after the judgment is signed, period?

HON. SARAH DUNCAN: No, not period.

CHAIRMAN SOULES: Okay. Signed, comma. Okay. Let's leave it like that until we get to -- or have we already gotten to 302(e)(11)?

MR. ORSINGER: It's 303.

CHAIRMAN SOULES: Oh, this is a misprint, a typo here?

MR. HUNT: Yeah. We've already covered that.

CHAIRMAN SOULES: And what did we do to it?

MR. HUNT: We decided last time not to prank with 165a and include it in the motion for new trial practice. So if your judgment is consistent you may ignore the footnote, which should have been taken out

this time.

CHAIRMAN SOULES: Ignore the footnote and leave 11 as we've just modified it, including the underscored language about 165a, leave that alone?

MR. HUNT: Right.

CHAIRMAN SOULES: Okay. With that, any opposition to 302(e)? No hands up. It's unanimously adopted.

MR. ORSINGER: Luke, that was 303(e).

CHAIRMAN SOULES: Pardon me. Thank you for helping me keep the record straight. 303(a) is unanimously adopted.

MR. HUNT: 303(e).

CHAIRMAN SOULES: 303(e), that's right.

Now we go to 304 on page 13. David Peeples.

HON. DAVID PEEPLES: The first sentence of sub (a) has got two problems. Number one, it suggests that you can file a motion to disregard a jury finding after the other side has rested, which is not what we mean, a motion to disregard a finding before

there's even been a jury finding. I mean, too many things are packed into one sentence here.

And the second problem is on, let's see, line 5, "shall not be considered waived" does not have a subject. I mean, that predicate doesn't have a subject.

We all know what we mean to do here, and I don't think we ought to draft on the floor, but that sentence has got two major problems. I think the Committee ought to, you know, do it in twos and threes and fours and report back to us.

CHAIRMAN SOULES: Do you see what he's talking about, Don?

MR. HUNT: Sure. Let me get the judgment of this group quickly, if we can, because what Dorsaneo has done is include the language about disregarding where this rule was designed to really be when you file a motion for judgment as a matter of law. And you're correct that you cannot do that before -- you can't set aside a jury finding before there is a jury finding.

HON. DAVID PEEPLES: Don, the

problem, I think, is he tried to pack too many things into different parts of the sentence, and it needs to be sorted out. And then we need to have a subject for the last half of that sentence.

CHAIRMAN SOULES: Okay. So what we need to do is make the first sentence, make it two sentences, one that contemplates something happening before the verdict; and the second, do the same things that happen after there's a verdict. Okay.

HON. SARAH DUNCAN: Well, just one other little language suggestion. On the last line, "when a judgment is signed that does not grant that relief," the "that" is misplaced. "When a judgment denying the requested relief is signed," I think is better.

CHAIRMAN SOULES: Okay. And then spare me just a minute, Justice Duncan.

Judge Peeples, your second -- besides splitting that up so it covers the two time periods and logically fits, then what?

HON. DAVID PEEPLES: Well, the last about 10 words of that first sentence,

"and shall not be considered waived," I think we mean to say that the point or the motion shall not be considered waived. I don't think that independent clause has a subject to go along with the predicate. I may be just reading it wrong.

HON. SARAH DUNCAN: It doesn't have a subject, and I'm not sure why it's necessary. If you can move -- the rules expressly state that you can move at any one of these times. Why do we also have to say it's not waived if it's not presented earlier?

CHAIRMAN SOULES: I see what Bill is saying. He's saying that -- it's just belt and suspenders. If you don't do it at the first available place, are you then precluded? And he's saying no, expressly no.

HON. DAVID PEEPLES: And I think we all agree with that. It probably needs to be said, but we need to have a word between "and" and "shall."

HON. C. A. GUITTARD: "And the motion."

HON. DAVID PEEPLES: And the

motion, yeah.

CHAIRMAN SOULES: Okay. So do you see that, Don?

MR. HUNT: Yes. Shall not be --

CHAIRMAN SOULES: "Shall not be considered waived if not presented earlier" needs to be the end of a third sentence --

HON. C. A. GUITTARD: The motion is not considered waived.

CHAIRMAN SOULES: -- that begins with something which describes these motions.

MR. PERRY: Can I ask a question about the intent of that, Luke?

CHAIRMAN SOULES: David Perry.

MR. PERRY: Is that intended to mean that if the defendant does not make a motion for directed verdict at the end of the plaintiff's case but goes ahead and puts on their evidence and loses a jury verdict, that the defendant can then make a motion for directed verdict as if it had been made at the end of the plaintiff's case and take up on appeal that he should have gotten it at that

time?

CHAIRMAN SOULES: It should not mean that, because if it does, it changes the current practice dramatically.

MR. PERRY: Well, I was a little concerned about the business of "shall not be considered waived," because I'm afraid it might be subject to that construction.

MR. HUNT: The idea was to be clear that we were not adopting the federal practice; that we were preserving the nonwaiver that's in the current practice. You move for a directed verdict at the conclusion of the plaintiff's case. You don't get it. You put on your own case. You can move at the end of the whole case. If you get it or don't get it then, the error is preserved or not based on what the status of the record is at the end of the case.

CHAIRMAN SOULES: What we're really talking about is that any of these motions will not be prejudiced by the filing or failing to file any other motion.

MR. HUNT: Yeah.

CHAIRMAN SOULES: That's what

we're really talking about. I don't know how to articulate that very well, but that's the concept.

MR. McMAINS: I think David's concern, though, which I think is accurate, is that if you make a motion for directed verdict at the close the plaintiff's case, and maybe in the abstract that's good, it's a good motion then. But maybe you forgot to prove something but the case goes on and continues and the proof gets in either by rebuttal or otherwise, and you can't make an appellate complaint under the current practice that he should have granted my directed verdict back then even though I fixed it during the course of the case.

MR. LATTING: But that's the law now.

HON. C. A. GUITTARD: That doesn't mean that the motion is considered waived or is not well taken if it's been tried and a jury verdict is rendered.

MR. McMAINS: Well, except that the notion that you look at what the condition of the motion is at the time, the statement

that Don was making that it was our intent to look at the condition of the things at the time it's made is not really true in the sense that it can be cured after the fact as long as you fix it sometime before everybody has closed the evidence, because once -- I mean, a motion for directed verdict basically doesn't preserve anything.

You don't ever narrow the record down as a result of making a directed verdict under our current practice until the evidence -- you know, when the evidence is continuing on, then that motion just kind of goes by the boards, because --

MR. PERRY: Well, I'm not sure that that problem is in here. But I think it's clear that the law, when you don't intend to change it --

MR. McMAINS: Right.

MR. PERRY: -- is that a defendant's motion for directed verdict, if it's not good then and it's cured later, is waived.

HON. C. A. GUITTARD: It's not waived; it's just no good.

MR. PERRY: Well, it's no good any more. You can't complain about it if it's cured later.

HON. C. A. GUITTARD: It's not waived.

MR. ORSINGER: It's abandoned.

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

CHAIRMAN SOULES: Let me see about the architecture here. We're talking about something that can be done at the close of the adverse party's evidence. Now, that's really talking about something done at the close --

MR. McMAINS: That's a directed verdict notion.

CHAIRMAN SOULES: That's a plaintiff's motion.

MR. McMAINS: Although you can move for a directed verdict on a counterclaim as well, even though there are still some other parties in the case too.

MR. PERRY: What we really mean to say is that the failure to make a motion for directed verdict does not waive a motion to set aside the verdict thereafter.

CHAIRMAN SOULES: That's not what I'm getting at. Any motion for judgment that's made before all of the evidence closes becomes a nothing when the evidence begins again. Is that right?

MR. McMAINS: Well, I mean, I think that --

CHAIRMAN SOULES: It doesn't preserve error.

MR. McMAINS: -- the argument by Justice Guittard, which may be right, I haven't attempted to -- is if you didn't fix it -- no, that's not right; that is, if you made a motion for directed verdict and it isn't ever fixed, the fact that you didn't make another one at the close of all of the evidence doesn't have any impact. That's what he's arguing. Frankly, my reading of the cases is otherwise.

CHAIRMAN SOULES: Mine too.

MR. McMAINS: That is, if you don't make it after the close of all the evidence, you know, then you have to do something else. Now, you could all kinds of things, and --

MR. PERRY: But the formulation that Luke said a minute ago was that the failure to make another motion at an earlier time does not waive your right to make one of these motions at an appropriate time.

MR. McMAINS: Right.

MR. PERRY: And I think that's what we intended to get at, isn't it?

MR. McMAINS: Yes.

HON. DAVID PEEPLES: There are a number of ways to preserve a no-evidence point. You don't have to make one earlier in order to make one later.

MR. McMAINS: Right. Failure to have done it at the earliest possible time does not effect your ability to do it at any of these other times.

CHAIRMAN SOULES: Okay. I'm drawing a new line on mine here to see if this isn't an easier way to do it. I'm saying before the evidence closes we don't even use this "shall not be considered waived if not presented earlier," because if it's presented and overruled and the evidence commences again, it's gone. And we're really talking

about "shall not be considered waived if not presented earlier" when we're talking about motions made after the evidence closes.

So we write one sentence for what you can do before all the evidence is closed, and that doesn't have anything about "shall not be considered waived." And then after the evidence is closed, you can do these other things, and they're not waived for failure to do them earlier.

MR. PERRY: I think we need one sentence that says what you can do when, and another sentence that says the failure to do one of them at the appropriate time doesn't prevent you from doing the others at their appropriate time.

CHAIRMAN SOULES: To me, the "shall not be considered waived if not presented earlier" is just confusing --

MR. PERRY: Yeah.

CHAIRMAN SOULES: -- if you let it have any effect on a motion that's filed before the close of evidence. It just confuses that.

MR. ORSINGER: Then take it

out.

CHAIRMAN SOULES: So just have motions that deal with -- have a sentence that deals with motions before the evidence is closed and don't even talk about whether they get waived, or just say they are, whichever way you want to go.

But then these motions that are after the close of evidence, it should say that they're not waived for failure to make them earlier.

The thing that's driving me is the "shall not be considered waived if not presented earlier." Whenever you put that in the context of a motion filed prior to the close of evidence, it gets confusing. I don't know whether that has any value or not.

Justice Duncan.

HON. SARAH DUNCAN: What if we just delete "or to disregard a jury finding on an issue as a matter of law," delete "and shall not be waived if not presented earlier," and where that phrase was, add "A motion for judgment as a matter of law at the close of the adverse party's evidence is not a prerequisite to filing a motion for judgment

as a matter of law at the close of all the evidence or after verdict," and then pick up with motion to disregard after verdict?

CHAIRMAN SOULES: Okay. Well, I'm not trying to write it, because that's going to take some people looking at it, I think.

MR. McMAINS: Well --

MR. PERRY: I move we send this back to the subcommittee.

CHAIRMAN SOULES: All right. And I just want to get -- for example, do we want to say -- do you write a sentence that deals with what you can do before the evidence closes? And then we either do or don't say -- we either don't say anything about it or we say it's waived if the evidence continues or it's a nullity if the evidence continues. I don't care about that part.

Then we write another sentence that says what you do after the evidence closes, and there we need this, because if you don't move for a directed verdict when you can at the close of evidence, someone might contend that if you move to disregard a jury finding,

you've waived it because you didn't move for a directed verdict. This is really only talking about it.

MR. PERRY: What you want to say is that the failure to make the motion before the evidence closes is not a prerequisite to making the motion after the verdict.

MR. LOW: Or after the evidence closes.

MR. PERRY: The failure to make a motion before verdict is not -- making a motion before verdict is not a prerequisite to making a motion after verdict.

CHAIRMAN SOULES: Okay. Well, you can look at this transcript, I think, and pretty much figure out what you need.

MR. HUNT: Yeah.

CHAIRMAN SOULES: Okay.

MR. HUNT: As far as I'm concerned, there's no disagreement here on what is to be done. It's only that we need to draft it so that we can understand.

CHAIRMAN SOULES: Okay. Richard and then Rusty.

MR. ORSINGER: I'm a little worried about using the phrase "at the close of the adverse party's evidence," because in my experience closing is the last thing you do before you start the charge conference.

I would think it would be more consistent to say when the adverse party rests and then talk about the close of all evidence. I looked at Rule 265, Order of Proceedings on Trial by Jury, and they don't use the word "rest" and I don't think they use the word "close" either.

But in common -- I mean, in my experience, "close" is what you do at the end of the case; "rest" is what you do when you're finished with your phase of the case, and I don't like the use of that word "close" there.

The next thing I would like to say is, in the next sentence we're saying that if it's after judgment the motion should be presented in a motion to modify within the time allowed. Is that just wishful thinking, or are we just encouraging people to do this, or do we have rules of procedure here? We should

tell them that they must.

HON. SARAH DUNCAN: No.

MR. ORSINGER: No? Should?

HON. SARAH DUNCAN: What happens if somebody doesn't know that we've gotten all these new rules and they file a motion for judgment notwithstanding the verdict or judgment non obstante veredicto? Are we going to kick it out because they don't call it a motion to modify judgment?

MR. ORSINGER: I'm not saying you should kick it out, but I think it looks a little odd to say that you should do the following. It's like we've got all these rules that you have to follow and then you should also do this other thing.

HON. SARAH DUNCAN: But once we say "must" or "shall," there's going to be a court out there that says, "Well, it's mandatory and you didn't do it, so it is a nullity," was the thinking of the subcommittee.

MR. ORSINGER: Why do we even bother to say what they should do? If they don't have to do it, then let's not say it.

CHAIRMAN SOULES: We need to give the court reporter a break. Let's take 10 minutes. Be back here at 10 after 4:00.

(At this time there was a recess.)

CHAIRMAN SOULES: Okay. Are there any other recommendations to the subcommittee as they embark on their new effort? Richard Orsinger.

MR. ORSINGER: I'm a little curious about the last sentence where the motion for judgment as a matter of law is overruled by operation of law. I understand how that works where it's filed before judgment is signed. But if it's filed after judgment is signed, is it part of (d)(2) that gets overruled by operation of law at the end of 150 days, or is this not overruled by operation of law ever if it's filed after judgment is signed?

MR. McMAINS: No. It's part of (b)(2).

MR. ORSINGER: Then (2) should not be a subdivision of (b) then. It ought to be on the level of (c), because it's going to

apply to both (a) and (b), right?

HON. SARAH DUNCAN: I think the problem is in the title of (b), not in the placement of (2).

MR. ORSINGER: Well, there is a logic to (b), and that is that those are postjudgment motions. Maybe we ought to just call it "Postjudgment Motions."

MR. HUNT: Let me tell you what has happened here, and this is a dichotomy that exists on the subcommitte that we haven't worked out. I thought we had it worked out, but this draft shows that it's not.

The dichotomy is, to deal with motions for judgment as a matter of law before the judgment is signed, then that makes sense that what is not included in the judgment overruled the motion as a matter of law. Then as part of the motion to modify, as originally drafted, one could seek to disregard an issue. Then if we did that, we remove from (a) and we remove from (b) most of the problems that we're having now.

But it's the joinder of the before and after in one motion that has created the

problem. And the subcommittee needs to revisit that separation, and once we make that separation, then the problems with timing will disappear.

CHAIRMAN SOULES: And you're going to do that separation?

MR. HUNT: Yes. And that's because we were drafting in two separate places.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: In reality I think that (a) should be subdivided anyway because it actually doesn't just describe the motion. And when it's made to have some things in it like the "is overruled by operation of law," and you know, what it is that's overruled by operation of law, when it is that you file them, there are a lot of things that that deals with. And it seems to me that that could be subheaded where, you know, each sentence is basically given its own direction.

HON. SARAH DUNCAN: That's what I was going to ask.

CHAIRMAN SOULES: Sarah

Duncan.

HON. SARAH DUNCAN: I thought (a) was supposed to be directed to motions for judgment as a matter of law --

MR. HUNT: Correct.

HON. SARAH DUNCAN: -- when filed prior to judgment.

MR. HUNT: Correct.

MR. McMAINS: Or to disregard a jury finding.

HON. SARAH DUNCAN: If that's so, we also need a comparable subdivision, motions for judgment as a matter of law filed after judgment and calling a motion to modify and when they're overruled by operation of law, et cetera, et cetera.

MR. HUNT: That's the way we left it in Dallas at our last subcommittee meeting. But since November, Bill has redrafted some that has undone some things which create some new problems which I think we should solve before we can solve it again. Let us take a shot at it, but we can't do it today.

CHAIRMAN SOULES: Okay.

Anything else on 304(b)?

MR. ORSINGER: (b)? You're moving to (b) now?

CHAIRMAN SOULES: Yes. Okay. Richard.

MR. ORSINGER: I would suggest we change the title to Postjudgment Motions, because in the current title, Motions for New Trial and Motions blank, there's really only one continuity in the whole thing and that is that they're all postjudgment motions, even if they're postjudgment motions to disregard a jury verdict. And then that will dovetail better with the overruling by operation of law in subdivision (2).

CHAIRMAN SOULES: Any opposition to that? There is none, so that's a directive to the subcommittee.

MR. ORSINGER: Then in subparagraph (3) I think we ought to put a title in there to be consistent, but I'm bothered not by concept, because I favor the concept, but if we're going to permit a motion for new trial to be filed up to six months, we're going to have to change the plenary

power rule, because in a default judgment plenary power will expire 30 days after the default judgment is signed, and yet someone might four months later file a motion for trial.

And so we've permitted them to file a motion for new trial, but in another rule we've already terminated the court's plenary power. So we need a parallel paragraph on plenary power or else we're permitting a motion to be filed after the court has lost control over the judgment. Isn't that right?

MR. HUNT: You're correct. And again, that's something that got taken out since November. It wasn't intended to be taken out.

CHAIRMAN SOULES: Well, let's see --

HON. SARAH DUNCAN: Well, actually I think this was something that was added in November. And we did then also add a provision to 305(a) on page 16 extending plenary power once we gave them the six-month motion for new trial option.

CHAIRMAN SOULES: What's the

latest under 306(a) you can file a motion for new trial?

MR. HUNT: With the extended timetable it's 90 days.

MR. ORSINGER: So it may even be 89 days. Don't you turn into a pumpkin on the 90th day?

MR. HUNT: Well, at midnight.

MR. ORSINGER: So you can file on the 90th day?

MR. HUNT: I think so.

MR. McMAINS: You can file by mail, can't you?

Richard, is what you're saying that there's a conflict between (1) and (3)?

MR. ORSINGER: No. What I'm saying is that (3) is nonsensical unless we somehow give the court plenary power to consider the motion, because in a default judgment situation under Rule 305 plenary power is going to cut off 30 days after judgment is signed, and yet we're permitting a motion for new trial to be filed up to six months after the judgment is signed if these criteria are met. So we're permitting you to

file a motion for new trial after plenary power is expired, and we don't want to do that, and it would be a useless act if we did permit it.

I mean, we want -- I think we want the court to have plenary power. The whole concept is if there's error in the judgment let's bring it to the trial court's attention, not to the court of appeals' attention. And that's why we want to be able to do it by motion for new trial, because if you're going to get a reversal, why not have a trial judge set it aside rather than a court of appeals.

However, if you want the court to have the power to set it aside with all the criteria for writ of error met, then they've got to have plenary power to do it.

MR. HUNT: Mr. Chairman, Richard is correct that we need to be certain that when we get to the plenary power rule in 305(c) that we include the plenary power for the folded back in six-month writ of error appeal and also for the 329 two-year motion by publication rule. We need to include both of those, and that's easily done.

MR. McMAINS: What is the "Note" here? I mean, what I'm trying to figure out is, I don't recall us doing this. This looks to me like an effort to reinstate the six-month writ of error.

MR. HUNT: It is.

HON. SARAH DUNCAN: There's a little problem in the way it's written. "In the event the Court wants to give a defaulted party," there shouldn't be a period, and that should a little "i" in "in." It's if the Supreme Court wants to continue a six-month writ of error concept, then this subsection is recommended, even though we have voted --

MR. McMAINS: We had voted -- I mean, the point is that this is written like we -- it's part of the rules. I mean, the reason I think we didn't -- that a lot of this isn't fixed in the plenary power rule stuff is that this is another injection of the six-month writ of error that went by the board.

HON. SARAH DUNCAN: Well, actually the vote was in November, was that if the Court is not going to accept this

Committee's -- if they want to continue that in some way, then we recommend still that the Court get rid of the six-month writ of error appeal and instead make it part of the motion for new trial practice, just extend it through the six months that you would have to file a writ of error.

HON. C. A. GUITTARD: In other words, require the party to bring it to the trial court first. If you want to give him six months, give him six months to file his motion for new trial under those circumstances.

MR. McMAINS: I understand. But what I'm saying is that -- so we're dealing with this as a counterpart to -- I mean, I don't understand why in terms of the numbering it just -- there's nothing in here that signifies that this isn't part of the proposed rule, and it's not, as I view it, as I understand it, what we have recommended. It's -- that's just an alternative.

HON. SARAH DUNCAN: Well, it's an alternative. "In the event the Court wants to give a defaulted party additional time in

resolving the writ of error controversy, see page 3126 of" -- and then the rest of it is missing.

MR. PERRY: No, it's right there (indicating).

HON. SARAH DUNCAN: But it's in the event the Court wants --

MR. McMAINS: I understand. But what I'm saying is the way it's now presented to us this looks like this is our rule. And I'm saying that's not our rule.

MR. ORSINGER: We voted to offer this up to the Supreme Court because the elimination of the writ of error appeal was drawing some serious flak. And in the event the Supreme Court doesn't go with the Committee recommendation, we've offered them an alternative which we think is better than the writ of error appeal, which is the motion for new trial argument in the trial court --

MR. McMAINS: I understand. But what I'm saying is the rest of the rules were drafted with the assumption that there isn't one. That's why when you just stick it in here as number (3) as if it's there it

doesn't work.

HON. SCOTT A. BRISTER: Can you put it in brackets?

MR. McMAINS: That's what I'm getting at it, is, I mean, the reason it doesn't fit together is because it was an alternative that required some other fixing too. And the notion was, well, what would make sense is if you had one set of rules the way they would look as we were recommending them and the other set if they wanted to give the six months.

HON. C. A. GUITTARD: Well, why doesn't it work all right in this place? Because the problem is that we give them six months to file their motion for new trial under these circumstances. So it makes sense, then, to say that under these circumstances where the default has been rendered and the party didn't participate, then instead of these other provisions as to the time of filing a motion for new trial, they get this back.

MR. McMAINS: The reason it didn't work is because the rule itself was

supposed to be labeled Motion for New Trial and Postjudgment Motions, which is actually what we ruled on before. And the first thing on Time to File says you've got 30 days. File as many of them as you want to when you're going to do something after the judgment. And then we talk about when it's overruled, and then all of a sudden we're talking about other things that you can file that are called the same thing. And that ain't right, and that's not what we're -- that's not the way it was supposed to be.

HON. SARAH DUNCAN: My memory was -- and I'm sure somebody has looked at the transcript -- my memory was we were just going to send a letter to the Court saying in the event the Court rejects the Committee's recommendation of abolishing the six-month writ of error appeal, then the Committee would alternatively suggest a six-month motion for new trial procedure rather than the current -- I didn't -- did we agree that we were going to put it in the rule?

CHAIRMAN SOULES: Buddy.

MR. LOW: I've got something

with the whole form of it. I mean, (1) is time to file. There are three things that tell you time to file that are different things. Then "When Motion Overruled" is not a thing, a time to file. I think that it's all -- they don't fit in, because, look, time to file, it says 30 days for this. Then you come down here and it says shall default so many days, then (4), time to file. And then they address -- I think "Time to File" should be up at the top and should tell you time to file this, that, and the other. Then the last should be when the motion is overruled. I mean, it's just not in order.

HON. SARAH DUNCAN: Right.

CHAIRMAN SOULES: Let me see.

MR. ORSINGER: You're right.

MR. LOW: It's kind of hard to organize if it's not organized.

MR. ORSINGER: Yeah. Just put one, two, four --

MR. LOW: And then put the other -- put time to file and then when it's overruled.

MR. McMAINS: My recollection

of our last meeting, at the tail-end, at our principal vote, was that all of the postjudgment motions were going to be filed for -- if there were going to be any preservations for appellate purposes, you were going to have to file them within 30 days. File as many as you wanted to. You can file 38 of them. But they're going to have to be done within 30 days if they're going to preserve error for appeal.

And then -- and that's including motions for judgment NOV, which then we didn't have to worry about what you called it, whether you called it the wrong thing, any postjudgment motion which seeks to do anything with the judgment had to be done within 30 days for purposes of preserving error, and also they were all overruled by operation of law at the same time. So you never had any dual-track concerns or any considerations like that. That's the principal thing that we were supposed to be getting done, is my recollection, and --

CHAIRMAN SOULES: Precisely, yes.

MR. LOW: And this doesn't do it.

MR. McMAINS: Yeah. But we've got some other stuff in here that seems to complicate that.

CHAIRMAN SOULES: Well, we're trying to wind a couple of things together. We've got one thing in and one thing out. We've got -- we're trying to get something like writ of error in, which is a modification of what that vote was, and a needed one, whatever it may be. And we're not going to have 306(a) in here. It's out. So we've got writ of error in and 306(a) out.

MR. McMAINS: You mean in terms of what happens in the event of -- in terms of getting notice?

CHAIRMAN SOULES: Yeah.

MR. McMAINS: Well, that's in here, but it's later on. It's in (d).

CHAIRMAN SOULES: (d)?

MR. McMAINS: (d)(4). (d)(3) and (4) are Notice of Judgment and No Notice of Judgment and the procedure to gain additional -- I mean, all of the stuff is

there. It's just moved around.

HON. C. A. GUITTARD: Are we now talking about substance or form?

MR. LOW: We're talking about both.

MR. McMAINS: Well, 306(a) is the thing that gives you the extension of time when you're gone, and we need that, and that's here. That's where that is.

CHAIRMAN SOULES: I don't think there's any place in the rule where the court's plenary power is extended to deal with 306(a). It's just implied.

MR. HUNT: Well, the reason for that is there is no rule now that talks about the plenary power of the court. And that's what the attempt of Rule 305, which we'll get to next, does, which is attempt to define plenary power.

And if we want to deal with all of these variety of motions under a motion for new trial scheme or a motion to modify scheme and we're going to have some of them filed after day 30, then we need to make clear that there's plenary power to deal with the writ of

error, if that's our judgment, or a two-year judgment by publication, if that's our judgment, or we could even codify the bill of review. As far as I know, there's no desire to codify the bill of review in these rules.

CHAIRMAN SOULES: Okay. Let's try first to accomplish or see what it would take to accomplish what we voted on last time, and that was unlimited motions within 30 days of the signing of the judgment, all overruled by operation of law at the same time.

MR. HUNT: Day 75.

CHAIRMAN SOULES: Day 75. Okay. What do we do to get there? And then we can started writing the Rule 306(a), exceptions, the six-month exception rule and so on. What do we need to do to get there? I think this is an effort to get there, and where does somebody see its shortfall?

MR. ORSINGER: Well, that's what (b)(2) does for you, doesn't it? I mean, it should say if a postjudgment motion is not determined by order signed within 75 days, the motion shall be considered overruled upon the expiration of that period.

CHAIRMAN SOULES: Okay. Did we vote that the prematurely filed motion does not extend plenary power?

MR. ORSINGER: That's right. It may preserve appellate complaint. But one thing is for sure: If you want an extended timetable, you need to file something after the judgment is signed.

MR. McMAINS: That's what Bill, when he left, was suggesting, that maybe you want to reconsider. And I'm not suggesting that we reconsider it, but that was what he was talking about.

CHAIRMAN SOULES: Well, we had a very clear division of the -- I mean, it was strong that a motion filed prior to judgment did not extend plenary power. Unlimited motions within 30 days, all of which -- all overruled within the 75th day. Okay. Where -- what do we need to do? Just give -- shoot comments at Don's committee to conceptually get this where those three objective are accomplished.

Richard, you just had one.

MR. ORSINGER: I think they are

met.

CHAIRMAN SOULES: Okay.

MR. HUNT: Well, we put out three, as I understand it. That's the vote that -- the consensus of this Committee is still to eliminate the writ of error appeal.

MR. ORSINGER: Well, we had a vote last time that we were going to provide an alternative to the Supreme Court. Now, if we're going to revote that again, then let's debate and revote it. But we voted last time to do this, I think.

CHAIRMAN SOULES: I'm parking writ of error, 306(a), and just trying to get a plain vanilla reading of those three objectives. Is there any place that this needs adjustment --

HON. SARAH DUNCAN: Yes.

CHAIRMAN SOULES: -- in order to articulate those three concepts? Because they're all new, at least in part new, so the bar and the bench need to be able to understand them clearly. Justice Duncan.

HON. SARAH DUNCAN: I don't think the problem is that those objectives are

not at some place met in this rule. For instance, the premature filing rule is the last sentence of subdivision (8) on 16. I do think, though, that it could be organized better, and maybe I don't think doing it off the cuff here is necessarily the appropriate way to do it.

CHAIRMAN SOULES: I agree.

HON. SARAH DUNCAN: But it would not be a difficult thing at all to take the rule and just draft an outline of where things need to go. Rule 304, Timetables, (a), give a title where it is now; (b), a title, and all that. And people can do that overnight and submit them to Don.

CHAIRMAN SOULES: Okay. You're on this committee?

HON. SARAH DUNCAN: Yeah.

CHAIRMAN SOULES: So it's a matter of resequencing this so that it reads more logically and things register sequentially better. Okay? So we're going to do that.

Okay. Anything else for meeting those three objectives? No one sees anything else

that needs to be done? Okay. Congratulations. Good job.

MR. HUNT: Thank you.

MR. ORSINGER: Well, I have a comment on (c). Are you leaving these rules behind now?

CHAIRMAN SOULES: Well, I wanted to talk about (b)(3), because those three objectives, other than sequencing for better logical presentation or articulation of the rule, is done. And we're going to get to whatever the court's plenary power is, either ignore it or do it later.

In a default judgment -- and I guess my first question is, will the extended period, whatever that period may be, whether it's six months or something else, apply to only default judgments, or will it also apply to cases where the party did not participate? Because I think some of those cases where the party did not participate are a little different than a default judgment; like Texaco sits there and doesn't do anything, but they're watching.

HON. C. A. GUITTARD: Yeah.

The question is whether a party that knows of the setting and doesn't come, whether he should have more time.

CHAIRMAN SOULES: He doesn't participate.

HON. C. A. GUITTARD: Yeah.

CHAIRMAN SOULES: He does come, but he just doesn't participate.

HON. C. A. GUITTARD: Or doesn't come.

CHAIRMAN SOULES: Either way.

HON. C. A. GUITTARD: Either way, he shouldn't have any more time.

CHAIRMAN SOULES: I'm taking it to a more extreme level.

HON. SARAH DUNCAN: Well, you're also taking it to the extent of a pending case, and I don't know that we should try at this point to decide how far default judgments and writs of error should go. And that's why I would prefer that if we think that this is an appropriate alternative for the Court to consider, that we simply take it all the way out of the rules, put it in a separate letter, and explain to the Court, as

everybody on the Court already knows, that if the Court adopts this alternative, all sorts of changes are going to have to be made in the rules to accommodate it.

But to try to decide who should get the right of a six-month motion for new trial in a default or nondefault setting when we don't even know that the Court is going to not want to completely reject the six-month error writ of appeal, which would render the whole thing moot, I don't think we can do that and I don't think we should be doing that in this Committee now.

CHAIRMAN SOULES: For what reason?

HON. SARAH DUNCAN: Well, one, there's a pending case and we don't know how the Court feels about it, which might have a great deal to do with it. Two, it's rendered moot if the Court gets rid of sixth-month error writ of appeals completely, as this Committee has recommended, because then it doesn't apply to anybody, whether it's a default judgment case or not.

CHAIRMAN SOULES: Unless we

write it back in. Maybe I'm missing the point.

MR. McMAINS: But we've already voted on that. All she's saying is why should we give the Court recommendations on things we've already voted down.

MR. ORSINGER: We've already voted on that.

CHAIRMAN SOULES: But remember, the strongest argument that I heard for doing away with the writ of error appeal was that it should be replaced with something that calls that error to be brought first to the trial judge so the trial judge could deal with it. And that was Judge Guittard's strong appeal, that you shouldn't be able to not show up and then get appellate review without ever going to the trial judge and getting the trial judge to look at it somehow. So give the trial judge -- give the party long enough to discover it, and then give the trial judge a chance to look at it.

MR. McMAINS: Of course, the problem is that the six-month writ of error right now is not -- doesn't give the trial

judge the power to --

HON. C. A. GUITTARD: That's the trouble. That's right.

CHAIRMAN SOULES: That was Judge Guittard's strong argument to us, that the trial judge -- that there should be something that happens in the trial court before the appellate court gets a writ of error.

MR. McMAINS: Well, the entire problem that we've always had with notions of plenary jurisdiction is if you try and truncate it and say, well, you have plenary jurisdiction for some parties but not for others -- because that's kind of a contradiction in the terminology of what plenary jurisdiction is supposed to be. So it means if you ever have a default judgment, I mean, how do you extend partial plenary power, because --

CHAIRMAN SOULES: Well, you have plenary power forever almost in some family law cases about some things.

HON. C. A. GUITTARD: Plenary power is determined by the rules. We've

always -- we have that rule that defines it. We can define it any way we want.

MR. McMAINS: Well, it emanated from the case law from Transamerica. It was never in the rules, never had been in the rules until we objected, thinking we knew what it was.

CHAIRMAN SOULES: Mike.

MR. HATCHELL: I think what we're doing in (3) is we're not only bringing back the writ of error practice but we're bringing back a very strange concept of plenary power. It's now a six-month motion for new trial, and we're allowing people to assert grounds six months after the judgment that they cannot now, because equitable grounds for a new trial and default judgment is not in this motion for new trial.

But I think what Rusty is getting at, Luke, is this: Let's say you have a multiple party situation where you have one party who is defaulted, and just to complicate it there are actions over against that party such as contribution and indemnity and the like. Now, how do you ever know when plenary power

expires until somebody -- apparently the defaulted party has got six months. All the other parties are bound by a shorter plenary power period, and when do you appeal?

It's just to me kind of an unworkable concept, because you're trying to take those formally on appeal and turning it into some kind of trial court proceeding.

CHAIRMAN SOULES: Okay. I mean, default judgments scare the devil out of me.

MR. HATCHELL: Yeah.

CHAIRMAN SOULES: And to be relegated to a constitutional due process basis as the only escape after 30 days is frightening to me.

MR. McMAINS: But that's not the only escape under our rules now. It's only in terms of notice. If you've got notice that the judgment is entered within 20 days -- if you don't have notice, you have extended time periods already under our rules.

HON. SARAH DUNCAN: And that was the primary argument --

MR. McMAINS: That's right.

HON. SARAH DUNCAN: -- at least since I have been sitting on the Appellate Rules Subcommittee for eradicating the six-month writ of error, is that there were generous notice allotments apart from six-month writ of error --

MR. McMAINS: Right. What happened before -- I mean, before, the reason and one of the thrusts and the whole reason we had this debate in the beginning was that because we had a specific provision in our 306(a) rule that said that failure to get notice of the judgment does not affect any of the appellate timetables. When we changed that and it does change it so that you now do have -- you've got notice of the judgment. The clerk sends you notice of the judgment. Then you -- your times start. But if you don't get any notice of the judgment within 20 days and you prove that, you get additional time. You get until -- you know, the judgment isn't signed until -- deemed signed until you get the notice. That's the way those rules operate.

HON. SARAH DUNCAN: The only

point I'm trying to make is, without knowing that the Court is going to reject this Committee's recommendation, why are we going to try to figure out when you do and when you don't get this motion for new trial and what it does to plenary power and what it's going to have to do to all the rest of the rules?

If the Court wants to adopt this as an alternative to the six-month writ of error, they'll send it back to us and tell us, "This is what we want to do. Make the rest of the rules match up."

CHAIRMAN SOULES: And there's a lot of controversy, and I think the Court is getting lots of input from various quarters on whether or not writ of error should be repealed, and maybe they won't do it. If they don't do it, then we're making work.

Shall we table this until we see what they do, I mean the six-month default judgment, and just leave it to be dealt with in 306(a) until we find out whether they do or don't do -- whether they repeal or don't repeal writ of error?

If they repeal writ of error, then -- if

they don't repeal it, then default judgment people have six months just like they always. But if they do, then we might decide that the 90 days in 306(a) is inadequate in those circumstances and we need to do something about it, either extend that 90 days in 306(a) or write something different. And we can do that and go on.

And I'm not suggesting that we duck this. I'm not quacking. I'm just saying maybe that's the best thing to do at this time because we don't know what they're going to do about writ of error.

Richard Orsinger.

MR. ORSINGER: We took a vote on this in the last meeting, and what we're doing right now is redebating that vote. Okay? We took a vote that we were going to do this. I don't think it's a big monumental task.

When we have citation by publication, we create what is going to be effectively a default judgment, and we solve all of our problems over here on page 16 under subdivision (7) by just simply saying that for

purposes of all of our timetables we're going to treat the judgment as if it was signed on the date that the motion for new trial is filed, and then let your normal timetable apply. So we could do a fix for a writ of error motion for new trial in the same way and then we just fit into our normal timetable from then on.

I'd like to also say that the Civil Practice and Remedies Code Section 51.012, which is the legislature speaking, says that you can appeal from a judgment by appeal or by writ of error to the court of appeals. So what this Committee has voted to do is to repeal an existing statute that affords this legal remedy -- well, it's actually I guess a legal remedy since it's in the statute. And I'm not sure that we can do that constitutionally, just repeal that remedy by passing a rule taking it out of the Rules of Civil Procedure.

And the third point, if I understood Justice Guittard's original presentation many months ago, the writ of error appeal existed in common law. And if the writ of error

appeal was a remedy that existed in common law, it's my understanding that the open courts section in the Texas Constitution may give someone a constitutional right to the common law remedy, even if the legislature tried to take it away, which it hasn't done. The legislature has affirmatively given it.

So I think the -- besides which, two sections of the state bar have passed resolutions opposing the revocation of this available procedure.

And I think that we're in a very shaky area here, and I don't have any discomfort at all sending some language to the Supreme Court for them to consider if they want to consider this alternative to the current law or eliminate the current law.

HON. C. A. GUITTARD: Well, if that argument is correct, then that statute way back there which said that the writ of error is available only when the party has not participated in the trial, that would be contrary what to the open courts state, which I don't think we would agree with, but it's the same problem.

CHAIRMAN SOULES: But Richard, why write it now when we -- we're going to see those appellate rules. I think that the Court, as I understood from Lee and from Justice Hecht, I'm sure Justice Hecht informed me about this, that the appellate rules are going to the draftsman --

MR. ORSINGER: Brian Garner.

CHAIRMAN SOULES: -- Brian Garner for review and then back to us. You all are virtually done with them, are you not, Judge?

JUSTICE HECHT: Yes.

CHAIRMAN SOULES: And so how long will Mr. Garner probably have those rules before we can see them back?

JUSTICE HECHT: Well, we hope to be most of the way through them by the next meeting.

CHAIRMAN SOULES: Of course, the rule making function of the Court is not a confidential procedure or process. Can you share with us where the Court stands today on the writ of error practice?

JUSTICE HECHT: I'm trying to

remember what the vote was.

Do you remember what it was?

MR. PARSLEY: They decided not to accept the Committee's recommendation.

JUSTICE HECHT: Yeah. We decided to leave the writ of error appeal intact. It was not unanimous, but it was not close, as I recall.

CHAIRMAN SOULES: So the distinct majority of the Court is against repealing the writ of error, correct?

JUSTICE HECHT: That's my recollection.

CHAIRMAN SOULES: Well, there's our answer.

MR. McMAINS: Then you're going to have to redraft. There's a lot of redrafting that's got to be done.

CHAIRMAN SOULES: So we will have the writ of error practice.

MR. ORSINGER: Then all we need to do is put our writ of error procedure back in place. That's just one rule.

MR. McMAINS: Well, that's in the appellate practice rule. That's not here.

MR. ORSINGER: Well, I know. But the Court -- this raises a different issue. The Court has just told us we still have an appellate remedy called writ of error appeal. So Justice Guittard's proposal that we make it also a motion for new trial remedy in addition to that is still a valid consideration, but it's not -- I mean, whether we do that or not, we still have to stick an appellate rule back in there to govern writ of error appeals.

CHAIRMAN SOULES: Well, we'll be having that opportunity, I'm sure. But we don't -- I would say we don't need to have anything here about the six-month relief for a defualted party not participating, because that's going to be taken care of just like it always has been.

MR. ORSINGER: Well, now, wait a minute. Justice Guittard's proposal is really different, Luke. Even if we have writ of error appeals, there's still the valid argument of why present that argument to the court of appeals and not the trial court. I think we ought to have a vote on that and only

put it to bed if we vote it down.

CHAIRMAN SOULES: In other words, have both?

MR. ORSINGER: I mean, I think Justice Guittard's proposal exists independently from whether the appellate procedure exists. I mean, I don't mean to speak for you, but --

HON. C. A. GUITTARD: Well, in other words, the nonparticipating party, if he wants to, can present it to the trial court under the Committee's proposal.

MR. ORSINGER: And that's different. Even if we take it as a given that we have the appellate remedy, we still have to decide whether we want a motion for new trial remedy or not.

MR. McMAINS: Well, what that means is that the so-called "equitable grounds" that previously would have to be done within the 30 days in a motion for new trial, that you're now going to give people six months in addition to the writ of error on a different grounds.

CHAIRMAN SOULES: Let me get a

consensus. Okay. We have information from the Court that the writ of error practice will not be repealed. Should we also have something in the rules to take care of a nonparticipating party other than in 306(a)? Those who think we should show by hands. One.

Those who think we should not show by hands. Nine. Nine to one. So we don't have to worry about this six-month issue in the Rules of Civil Procedure, and that gets us -- and so that takes care of (3). It's out, right? All of (3) goes out.

All right. Anything else now by way of direction to the Committee on 304, any part of it? Rusty.

MR. McMAINS: Well, let me -- this may be -- that rule may be, the one on citation by publication, that rule may be taken straight out of our rules. I don't remember. But aren't we really talking here only about a default judgment rendered on citation by publication?

MR. HUNT: The language is borrowed from 329.

HON. C. A. GUITTARD: Well,

it's not a defualt because the attorney --

MR. McMAINS: An attorney ad litem is appointed. I see. That's right.

HON. C. A. GUITTARD: So this is not a default judgment.

MR. McMAINS: Okay.

MR. HUNT: The question I have, though --

MR. McMAINS: That concerned me, though.

MR. HUNT: The question I have is whether we need (4) here, or is it better taken care of in some other place like in (d) under Effective Dates and Beginning of Periods?

MR. ORSINGER: We have it in both places, Don.

MR. HUNT: I see that we do. And so do we need it in both places?

MR. ORSINGER: Well, this is the rule that tells you when you can file a motion for new trial, and this is a motion for new trial that you can file, and so it's logical to have it in this rule.

The other rule is a timetable rule that

says the timetable starts when the motion for new trial is filed, so it seems to me you should authorize the motion and then under Timetables explain the effect of the motion.

CHAIRMAN SOULES: Where is the motion authorized again?

MR. ORSINGER: The motion is authorized on page 14 at top paragraph (4). No, I'm sorry, that's the timetable.

MR. HUNT: It's authorized in 302(a)(8), page 7.

MR. ORSINGER: Yeah, that's right.

MR. HUNT: So the authorization is in 302. The timetable is supposed to be in 304, but we have the business about the judgment rendered on citation by publication in two places in the timetables, 304. My question is, do we need it in two places?

CHAIRMAN SOULES: There's -- I think why not. Not all of the language in (8) authorizes the motion.

MR. McMAINS: Nor does (4).

CHAIRMAN SOULES: And (4) says when the motion is authorized it has to be

filed within two years. (4) has most of the same words as (8).

MR. McMAINS: Although what this does, too, is this says unless a motion has previously been filed.

MR. HUNT: You could find out within 30 days and file it under the 30-day rule.

MR. McMAINS: Yeah. But if we're talking about the procedure he's talking about so that you've got an attorney ad litem that's appointed and he files a motion --

CHAIRMAN SOULES: You've got trouble in River City.

MR. McMAINS: -- that means there isn't. You've list the two years for individual filing, which is probably not the result now. Is that right?

MR. ORSINGER: That's pretty dangerous.

MR. HUNT: I do not know.

MR. McMAINS: Well, I mean, isn't the current rule that the real party or its designated attorney has two years regardless of what the guy that's appointed

does and regardless of whether or not you even -- is that true even if he decides to take an appeal and loses?

HON. C. A. GUITTARD: Well, why is this "unless" clause proper here?

MR. McMAINS: That's what I was asking.

MR. ORSINGER: Rusty, under Rule 306(a)(7), process served by publication, it says with respect to a motion for new trial filed more than 30 days after the judgment was signed, then you compute as if the judgment was signed on the day of filing, and it doesn't say assuming there was no motion for new trial timely filed within the first 30 days. It doesn't say it there anyway.

MR. McMAINS: Okay. That's our current rule.

MR. ORSINGER: That's 306(a)(7).

MR. HUNT: Let's get rid of (4) then.

CHAIRMAN SOULES: Well, then what gives you the two years?

MR. McMAINS: Nothing.

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

MR. McMAINS: I mean, you don't have the two years. That's what I guess I'm trying to get to.

MR. ORSINGER: That's probably under the citation rule.

HON. SARAH DUNCAN: This (indicating).

MR. McMAINS: Oh, I see. Okay.

HON. C. A. GUITTARD: What page is that on?

MR. McMAINS: Well, 16. If you look at 16. Is that right?

MR. HUNT: Yeah.

MR. McMAINS: (7) is where it has "For a motion for new trial filed within 30 days but within two years... when process has been served by publication, the periods shall be computed as if the judgment were signed on the date of filing the motion," which means that if you are appointed as an attorney ad litem and you file it timely, that there is no more two-year period, if we were to take (4) out, or leave it the way it is, in

fact.

HON. SARAH DUNCAN: Isn't this really just a resequencing problem once -- if we're all agreed that the defendant served by publication can file a motion even if another party has already filed a motion and we're agreed that we've already authorized this motion under the previous rule, then this is a question of a time for filing the motion. And isn't that just a sequencing problem in terms of how we order the rule logically?

MR. McMAINS: Richard, you were going to read the rule, the current rule.

MR. ORSINGER: Current Rule 329 says, its title is Motion for New Trial on Judgment Following Citation by Publication. And it says, "In cases in which judgment has been rendered on service of process by publication, when the defendant has not appeared in person or by attorney of his own selection."

MR. McMAINS: Yeah, which is what this is.

MR. ORSINGER: Yeah. Then they start the list. "The court may grant a new

trial upon petition of the defendant showing good cause, supported by affidavit, filed within two years after said judgment was signed."

CHAIRMAN SOULES: Period.

MR. ORSINGER: Well, there are some other conditions about execution, property sold under judgment. And then you get down to paragraph (d) where it says, "If the motion is filed more than 30 days after the judgment is signed, the time period shall be computed under 306a(7)," which says timetables are treated as if the judgment is signed on the date that the motion is filed.

So this doesn't preclude any out-of-time filing.

MR. McMAINS: You mean our current law?

MR. ORSINGER: Our current law to me doesn't preclude a bona fide defendant filing it, even if his punitive attorney ad litem had timely filed one and even conducted an appeal.

MR. McMAINS: Right. But the proposed rule does.

MR. ORSINGER: I agree.

MR. HUNT: The reason for the "unless" language is not to do that at all, but to recognize that the real defendant might have discovered it particularly when we were talking about a relaxed timetable of doing things up to 105 days. But that was scrapped last time when we voted to do all posttrial motions within 30 days. And sticking with that, then we don't need the "unless a motion has been previously filed."

CHAIRMAN SOULES: Strike it. Any opposition?

HON. C. A. GUITTARD: Well, one possibility is to carry forward what the previous rule said. You can say, "Unless a motion has been previously filed pursuant to paragraph (c)(1) or (c)(2) of this rule by the defendant in person or attorney of his choice."

CHAIRMAN SOULES: That makes sense. Any problem with that?

MR. ORSINGER: No problem.

CHAIRMAN SOULES: All right. Let's do it that way. Any opposition? Okay.

That will be the way (4) will stand then. Pursuant to (c)(1) or (c)(2) of this rule by the defendant or by an attorney selected by the defendant, period.

MR. HUNT: And the nomenclature is just (b)(1). All we need is (b)(1). We don't need (c) because we've scrapped (c) and relabeled it, so it's just (c)(1) -- (b)(1).

CHAIRMAN SOULES: Okay. So pursuant to paragraph what?

MR. HUNT: (b)(1).

CHAIRMAN SOULES: (b)(1) of this rule -- and I was looking for (c). Where is (c)?

MR. HUNT: (c) is below it.

CHAIRMAN SOULES: Right here? (b)(1).

MR. HUNT: Yeah (indicating).

CHAIRMAN SOULES: Okay. Anything else on 304? Richard Orsinger.

MR. ORSINGER: On paragraph (c) we talk about a motion to correct nunc pro tunc, and on (d)(1) we have a listing of the motions and in the sixth line we've got motion for new trial or motion to correct the

judgment record. And then, as I said earlier, there's another place over here where we call it a motion for judgment nunc pro tunc. That's on page 6, paragraph (e), which would be Rule 305 -- I'm sorry, Rule 301(e) refers to motion for judgment nunc pro tunc.

I would propose that we get rid of that archaic language just like we threw out motion for judgment NOV and now we're talking about motion for judgment as a matter of law. And I would say "motion to correct the judgment record" should be used in both the text and the titles rather than referring to it as "nunc pro tunc" in the titles and "motion to correct the judgment record" in the text.

CHAIRMAN SOULES: Well, nunc pro tunc means correction of the record or information in the judgment for clerical mistakes.

MR. ORSINGER: That's what the motion to correct the judgment record is, only those are the words we use to describe it textually but not from the standpoint of labeling the section heads.

HON. C. A. GUITTARD: Second

the motion.

MR. ORSINGER: It's archaic language. The idea is that we're correcting the judgment record to reflect accurately the judgment that was rendered by the court orally.

CHAIRMAN SOULES: How big a deal is this?

MR. HUNT: Not a big deal.

MR. ORSINGER: Well, it doesn't change any procedures. It just eliminates a Latin phrase that substitutes an English phrase that we use in the text anyway.

HON. C. A. GUITTARD: Let Brian Garner do it.

CHAIRMAN SOULES: Does anybody want to delete "nunc pro tunc" and substitute what Richard said or not? Those who favor deleting "nunc pro tunc." Seven. Those opposed. Nobody is opposed.

MR. ORSINGER: Judge Cornelius.

CHAIRMAN SOULES: Judge Cornelius.

JUSTICE CORNELIUS: It's my

favorite term. I don't want to get rid of it.

CHAIRMAN SOULES: I think we've used it a long time.

JUSTICE CORNELIUS: It's a wonderful term.

CHAIRMAN SOULES: I mean, it's just not worth -- I mean, we're probably going to work until 6:30 tonight. We're going to finish these rules tonight. We will finish these rules.

HON. SARAH DUNCAN: Well, if we're going to work until 6:30, we need to move our cars.

CHAIRMAN SOULES: Okay. We'll move our cars at what time?

HON. SARAH DUNCAN: Before 6:00.

CHAIRMAN SOULES: Let's see, where is Lee Parsley?

HON. DAVID PEEPLES: He's in the hall.

CHAIRMAN SOULES: Okay. When Lee comes back in, we'll ask him how long they can keep the garage available for our cars.

Okay. Richard, tell us where it is and

what you want to call it, and we'll get through it. Orsinger?

MR. HUNT: No. If you've voted on it, I know what to do with it. You don't need to ask him.

MR. PARSLEY: They lock at 6:00.

CHAIRMAN SOULES: Well, ask them how long they're going to have somebody here, a caretaker or somebody, that we can leave our cars downstairs. If it's 6:00, it's 6:00.

How many places do you see it, Richard?

MR. ORSINGER: Page 14, paragraph (c); and page 6, paragraph (e).

CHAIRMAN SOULES: Page 14, paragraph (c). What do you want to call it?

MR. ORSINGER: Motion to correct judgment record.

CHAIRMAN SOULES: Where else?

MR. ORSINGER: Page 6, paragraph (e).

CHAIRMAN SOULES: Motion for what?

MR. ORSINGER: Motion to

correct judgment record.

CHAIRMAN SOULES: Where else?

MR. ORSINGER: I don't see it any other places.

CHAIRMAN SOULES: If you find another place, please tell Don.

MR. HUNT: I've already got it.

CHAIRMAN SOULES: Anything else on Rule 304? Okay. Then that's the debate on 304, and we will look at the language the next time and discuss whether or not the changes meet our debate at this meeting. But we're not going to redebate the wisdom of these changes. The record speaks for itself, and Don is going to work on it, and there will be some resequencing, and so 304 is done.

305. Any opposition to 305?

MR. ORSINGER: A comment.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: Subdivision (c)(1), bill of review, middle of page 17, "sufficient cause filed," and I would suggest that we say within four years, because I think the case -- I think you fall back on your

four-year statute of limitations as your authority.

MR. HUNT: That was in an effort to retain the present language of 329(b), because the present language 329(b) does not refer to the four-year statute, nor do we try to determine in these rules any statute of limitation. That's the reason why we don't have it.

MR. ORSINGER: I see.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: My memory may be wrong, but I thought the probate bill of review was two years.

MR. ORSINGER: I didn't know. Is it in the criminal code? Okay. Bad idea.

HON. SARAH DUNCAN: Yeah.

CHAIRMAN SOULES: Okay. Leave it like it is. Okay. Anything else on 305? Richard Orsinger.

MR. ORSINGER: On (c)(2) I would propose that "judgment nunc pro tunc" be changed to "render corrected judgment."

MR. HUNT: Done.

MR. ORSINGER: And then we've got to do something about the cross-reference to 302(f), if I understand it correctly.

CHAIRMAN SOULES: I disagree with that. I think it ought to say -- we ought to strike "and render judgment nunc pro tunc," all of that, and not just say "and render judgment," because that might invite a change other than to correct a clerical error in the record. So just say the trial judge may at any time correct a clerical error in the record of the judgment pursuant to 302(f).

MR. ORSINGER: Well, 302(f) is not correct, because that's the partial new trial rule.

CHAIRMAN SOULES: Okay. What rule do we recite?

MR. HUNT: It's sequencing.

CHAIRMAN SOULES: It's pursuant to rule blank, and we'll find the blank and just say "may correct a clerical error in the record of the judgment pursuant to rule blank."

MR. ORSINGER: I believe that rule is 300(e).

CHAIRMAN SOULES: But he's going to be resequencing it, so it may get lost.

Okay. Anything else on Rule 305?

MR. HUNT: Do we wish to put in the development of plenary power concepts anything at all about the two-year appeal after publication, or does the language about when we start counting time control it? I know what we've done, I just don't know whether anybody believes we ought to do it here too, include a reference to the court having power.

HON. SARAH DUNCAN: Luke.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: I would propose that we not put anything here, because I think it confuses the power to do a particular act, which is grant a motion for new trial, with plenary power, which lets the court do whatever it wants to do to reach judgment. I don't perceive the rule by publication to be plenary power. It is specific power granted by the rules to do a

particular thing.

CHAIRMAN SOULES: That makes sense.

MR. HUNT: I concur.

CHAIRMAN SOULES: Okay. Anything else on Rule 305? 305, then, with the change in (c)(2) is unanimously approved.

And let me request, Don, that when you bring this back that those items that have been unanimously approved not even be included in the package. Don't even present them. Just bring the stuff back that you have to rewrite.

MR. ORSINGER: You don't trust us.

CHAIRMAN SOULES: No new eyes. That takes us, as I'm seeing it, to 311. Is that right?

MR. HUNT: Right.

MR. ORSINGER: I think we should scratch out the text in 311. Shouldn't we strike it out?

CHAIRMAN SOULES: Is 311 to be repealed?

MR. HUNT: It was proposed to

be repealed, but part of the problem is that we didn't know whether anybody wanted to repeal it, because it was different enough, since you're really dealing with a certiorari appeal from the county court to the district court, and I don't think it belongs here.

CHAIRMAN SOULES: Let me see if I've skipped something. Okay. 306 has been moved. 306a has been moved. 306b was previously repealed. 306c moved. 306d, previously repealed. 307, proposed for repeal.

Any objection to repealing 307? It's unanimous that it be repealed.

308 has been moved. 308a, proposed for repeal.

Is there any objection to repealing 308a? Unanimously repealed.

309 moved. 310 moved. 311, proposed for repeal, and we are now there, Don. Go ahead.

MR. HUNT: That simply wasn't struck out because it dealt with this certiorari business from the county court. All of these other items we were relatively certain were no good. We don't know about

this one. We take no position on it. It's probably useless, but I don't do appeals from county court to district court.

CHAIRMAN SOULES: Although I think -- doesn't this just apply to appeals from constitutional county courts that are still exercising probate jurisdiction?

MS. LANGE: Yes.

CHAIRMAN SOULES: Then it probably has a function, because we have nonlawyers running those courts, not that they don't do a good job.

MS. LANGE: Well, regardless, we have an attorney as county judge, but we've had appeals to district court.

CHAIRMAN SOULES: There must be some provision for this. Leave it?

MR. HUNT: Well, let's get a better handle on it, and I'll report back to you.

CHAIRMAN SOULES: Okay. So that's referred for more information.

And who has got a real strong probate section in their law firm? Does anybody here have a real good strong probate section where

Don can call and find out what this is all about?

HON. SARAH DUNCAN: Fulbright does a lot of probate litigation. I don't know if they -- but they've got probate courts in Houston, so...

MR. LATTING: You should call Houston for that.

HON. SARAH DUNCAN: But they've got specialized probate courts, not constitutional county courts sitting in probate.

CHAIRMAN SOULES: Well, Fulbright operates in the whole state.

HON. SARAH DUNCAN: I mean, that's the only place I know that has a lot of probate litigation.

CHAIRMAN SOULES: You probably know somebody who does probate in the rural areas, don't you, Don?

MR. HUNT: We'll look into that some.

CHAIRMAN SOULES: 312, you propose to transfer that to Judge Till's subcommittee. Any objection to that? Okay.

Would you write Judge Till and tell him that that's being referred to his subcommittee, unless he sees a reason why we need to deal with that, and if so, he should be able to explain it.

Rule 313 has been moved. 314, proposed for repeal.

MR. HUNT: The subcommittee could find within our collective memories no occasion of this having ever occurred. Defendants just don't line up and say, "Please take a judgment against me."

HON. C. A. GUITTARD: But shouldn't they be allowed to if they want to?

MR. LOW: If you call these malpractice carriers, they might know about some.

HON. DAVID PEEPLES: I volunteer to run that docket every day.

CHAIRMAN SOULES: Any opposition to repealing Rule 314? It's unanimously repealed.

315 was moved. 316 moved. 317 to 319 previously repealed. 320 moved. 321 moved. 322 moved. 323 previously repealed. 324

moved. 325 previously repealed. 326 is proposed for repeal.

Okay. Why is 326 proposed for repeal?

MR. HUNT: It seldom happens. And the reason why it seldom happens is if a trial judge wants to give a new trial, he'll give a new trial or she will. Somebody will give a new trial. You're only going to get a new trial when somebody says I'm giving -- this rule only works when the judge twice says, "I'm giving a new trial for insufficiency or weight of the evidence." All it does is trap dumb judges.

MR. ORSINGER: Not even that. It's dumb lawyers that give them dumb orders.

MR. HUNT: Yeah. It's a good idea, but it's a worthless rule.

CHAIRMAN SOULES: And that's because they've got so many ways to -- other bases.

MR. ORSINGER: In the interest of justice they just grant a new trial with no explanation.

MR. McMAINS: I'm not sure when it says "either party," does that mean that

each gets two? You don't get but five new trials altogether?

CHAIRMAN SOULES: Okay. So...

HON. SARAH DUNCAN: There's also that equitable reason that I guess isn't popular with anyone here, but if the evidence isn't sufficient to support the verdict, even if it's your 105th trial, why do you have to live with a judgment that's not supported by the evidence?

HON. C. A. GUITTARD: Because you've had your chance.

HON. SARAH DUNCAN: Well, you've had your chance, but you still haven't proved it to the satisfaction of the appellate courts. But forget about that equitable reason. There is the other reason, that if a court can grant a new trial for no reason an infinite number of times without review --

HON. C. A. GUITTARD: You have to make some allowance for the shortness of the life.

CHAIRMAN SOULES: I would say not more than two new trials shall be granted any party.

MR. ORSINGER: Well, what are you going to do when somebody brings malpractice insurance in front of the jury in the third trial?

CHAIRMAN SOULES: Appeal it.

MR. ORSINGER: I'd rather have my third motion for new trial granted. I mean, if you say you can't grant a third new trial no matter what horrible thing has happened in the trial, you've taken away a lot of judicial discretion that might be needed, although it's highly unlikely you'll ever have three trials.

HON. SARAH DUNCAN: And you might have granted -- and Luke won't like this alternative -- you might have granted the appellate court the discretion to simply render judgment against the plaintiff. If you didn't get it right after two times, just forget it. Go home.

MR. ORSINGER: In an unpublished opinion.

HON. SARAH DUNCAN: I'm laughing, for the record.

CHAIRMAN SOULES: Well, I know

that third trial is going to be rock and roll. That's going to be a lot of fun.

Okay. Is anyone opposed to repealing 326? Mike Hatchell. Speak up why, now.

MR. HATCHELL: No, I'm not opposed to it. I just think that if you can't convince the trier of facts that there's enough evidence to support a judgment twice, why should this case continue to clutter up the system? And I also take the position that it applies to appellate courts as well, and I've made that argument.

MR. McMAINS: Right. I'm not sure that's true.

MR. HUNT: It may be a different rule.

MR. McMAINS: Right. We may need to unify the rules.

MR. HUNT: It may be a different rule if it's a command to an appellate court. If it's a command to a trial court, it's a different deal. But the reason why it's proposed for repeal here is because we're dealing with trial rules.

MR. ORSINGER: Well, it may

have a psychological effect on some judge that it's prohibited, even if they don't get caught doing it.

CHAIRMAN SOULES: This only works I guess on the defendant's motion anyway.

MR. ORSINGER: No. When it says "weight of the evidence," I think it means against the greater weight and preponderance of the evidence, which means the party with the burden of proof.

CHAIRMAN SOULES: Okay. Those in favor of repealing 326 show by hands. Eight. Those opposed. Three. It's repealed.

Okay. 327 moved. 328 previously repealed. 329.

MR. ORSINGER: I have some comments on this.

CHAIRMAN SOULES: "In part proposed for repeal and in part proposed for move."

Okay. Let's talk about that, Richard.

MR. ORSINGER: Under (b) I would change the first clause to say "execution of such judgment is suspended if

the party applying therefor." To me, to say that "it shall not be unless" does not mean that "it must be if," and that this ought to be mandatory, that the writ of supersedeas would issue if the bond is filed.

And then in the third to last line I think --

CHAIRMAN SOULES: Where is it? In (b)?

MR. ORSINGER: Yeah, (b). "Execution of such judgment," kill "shall not be suspended unless" and change it to "is suspended if."

CHAIRMAN SOULES: Shall be suspended?

MR. ORSINGER: Shall be suspended.

CHAIRMAN SOULES: When?

MR. ORSINGER: When...

CHAIRMAN SOULES: When the party applying therefor gives a good and sufficient bond filed -- what?

Well, does the approval come before filing? Let me talk with the clerks now. Your approval of the bond is required before

it's filed?

MS. WOLBRUECK: Yes.

CHAIRMAN SOULES: Okay. So if it's --

MR. ORSINGER: You can refuse to file stamp the bond just because you don't approve of it?

HON. SARAH DUNCAN: Yes.

MS. WOLBRUECK: No, but there is some case law that you can -- that even a file stamp can designate approval.

MR. ORSINGER: So you can refuse to touch the piece of paper if you don't like it?

MS. WOLBRUECK: That's right.

MR. ORSINGER: Is that the only document you can reject because you don't like it?

MS. WOLBRUECK: I think so.

MR. ORSINGER: How can you ever show the appellate court that you've tendered bond if it's not in the custody of a government agency?

MS. WOLBRUECK: Possibly it can be included in the file without a file stamp

on there, but there has been some case law that said if the clerk has file stamped it, it is the same as approved it.

MR. ORSINGER: My goodness, so I have a piece of paper here that I can't ever show the appellate court that I tried to file because it's never in the transcript?

HON. SARAH DUNCAN: No, no. All you need to do -- I mean, I think it's a horrible, horrible, horrible rule that puts upon the clerks the decision as to whether a supersedeas bond is good or not. But that's what we've got. All you've got to do is have it marked received. If you come in and want to file a brief in our court and we don't know if it's timely, we'll mark it received, but we won't file stamp it until it's been determined to be timely.

MR. ORSINGER: Maybe we ought not to say "filed" then, Luke.

CHAIRMAN SOULES: That's what I'm saying here. "Execution of such judgment shall be suspended when the party applying therefor tenders a good and sufficient bond to the clerk payable to plaintiff in the

judgment, in an amount fixed in accordance with the appellate rules."

What's wrong with that? Rusty.

MR. McMAINS: Well, this rule is designed to supersede the judgment until you get your new trial here, and that's all. I mean, interestingly, this doesn't even deal with your appellate remedy.

MR. ORSINGER: You still have your appellate remedy.

MR. McMAINS: Well, I understand, but I mean, it would appear that you have supersedeas rights under the existing appellate rules if it hadn't -- if the execution hadn't already taken place.

MR. ORSINGER: Well, you can't perfect your appeal before your motion for new trial -- well, that's not true. You could perfect your appeal before a motion for new trial is ruled on.

MR. McMAINS: All I'm trying to -- I mean, this rule -- I've never done this practice on citation by publication, but I mean, the rule itself, the condition of the bond appears to me -- I mean, what bonding

company in their right mind is going to write you a bond that says if you lose your motion for new trial I'm going to pay it immediately? I mean, pragmatically I'm not sure anybody will write such a bond.

CHAIRMAN SOULES: Well, I think Lee has just made a point here, that this probably doesn't add anything to Rule 47(a).

MR. ORSINGER: Because you can post your supersedeas -- you can post your appeal bond the moment a judgment is signed and then supersede pursuant to your appeal bond.

HON. SARAH DUNCAN: Excuse me, this is something completely different from 47(a). 47(a) only applies to final judgments that are being appealed. And there are some courts that have even held that absent an appeal you don't even get to supersede, which kind of causes a problem in that little window between judgment and perfection. All this rule is speaking to is, one, motions for new trial after judgment on publication; and two, what you're going to do when -- nobody has even thought about appealing, they're just

trying to get a new trial; and three, I don't think we should change the practice relating to supersedeas bonds in this one little tiny area and leave it the same in all other areas.

I mean, this is just -- I bet you all don't get two of these types of bonds a year. This is not a supersedeas bond following a judgment, a normal judgment. This is only the supersedeas that you're required to file after a judgment on a publication when we could be talking about two years from the date of judgment.

MR. ORSINGER: But if you look at this mechanism, however, you've got a judgment that's executable, and then all of a sudden somebody files a motion for new trial and you've got a rule that says we're going to pretend like your judgment was signed on the day your motion for new trial was filed, which means that you can't have a writ of execution until 30 days after the motion for new trial is overruled. And that would, if you will, seemingly automatically revoke an outstanding writ of execution by the mere filing of a motion for new trial.

And this is saying no, it doesn't. The mere filing of the motion for new trial doesn't make you bring your writ of execution back in. You have to file a motion for new trial and post some kind of security, or else the writ will be out and being executed while your motion is pending.

HON. SARAH DUNCAN: But that's what I'm saying, is there may already be a writ of execution out there, and we're dealing with an unusual situation. And unlike you, I think it ought to stay with the burden flipped from what it is normally, "execution shall not be suspended unless," because that demonstrates that the motion for new trial isn't going to have to have anything to do with execution. But my question is --

CHAIRMAN SOULES: Well, let's deal with that right there. Should the filing of the motion for new trial suspend execution following citation by publication? How many feel that it should? Four. How many feel it should not? Four.

HON. SARAH DUNCAN: Well, I'll vote against it and break the tie.

CHAIRMAN SOULES: Okay. Then we'll probably leave it like it is.

MR. HUNT: Where do we put it, though? We haven't proposed to amend it but just proposed to move it, but it may more properly belong --

MR. McMAINS: But it's a trial court rule, is the problem.

MR. ORSINGER: Luke, I don't like rules that say a practice is prohibited when they don't even say that you can do the affirmative. We have an exception to an unstated rule here, don't we? There's --

MR. McMAINS: No, it's not unstated; it's just moot.

MR. ORSINGER: Well, I mean, there's some -- isn't there some kind of tacit assumption that the filing of the motion for new trial does suspend the writ of execution if a bond is posted, and aren't we saying -- I mean --

HON. SARAH DUNCAN: A writ of execution --

CHAIRMAN SOULES: This says no. That's why -- the way Sarah -- the way

it's written without any modificationa as you and I were doing a moment ago, it says no suspension of writ of execution unless you post a security. So the filing of the motion for new trial would not, because this rule says it does not, the way it's written. And that's what Sarah's argument is. She feels and the Committee has voted five to four that the filing of the motion for new trial should not suspend execution.

MR. ORSINGER: Well, then you're impliedly saying that the filing of a motion for new trial will lead to suspension if coupled with a supersedeas bond?

CHAIRMAN SOULES: Only through this rule does it suspend execution.

MR. ORSINGER: I know. I know. The problem I have is that if you're saying that someone has a right to suspend, you ought to tell them they have the right and that it's there just as a matter of phraseology, rather than saying that you don't have the right unless you do so and so. You ought to say you do have the right if you do so and so. I'm not changing the law, but it's

just logical, it seems to me.

CHAIRMAN SOULES: All right. Let me see if Sarah will accept this: "Execution of such judgment shall be suspended only when the party applying therefor files a good and sufficient bond" and so forth?

HON. SARAH DUNCAN: Well --

MR. ORSINGER: Well, you can also file your appeal bond and then post a real supersedeas bond.

CHAIRMAN SOULES: Well, if you transition to the appeal, then you've got different rules.

MR. ORSINGER: But we can't say that you can only suspend it by filing one of these supersedeases, because we all know that you can file an appeal bond and file a real supersedeas and suspend.

HON. SARAH DUNCAN: What I would suggest is that we go back to where we authorize this type of motion for new trial and just have what we frequently have in the rules or have at least in Rule 47 --

CHAIRMAN SOULES: Okay. Where

do we go to?

HON. SARAH DUNCAN: Well, we authorize this type of motion on page 7 in subparagraph (8).

MR. McMAINS: 302(a)(8).

HON. SARAH DUNCAN: And I think we should put when we authorize it, not at some -- not after we've had 10 more rules, that such a motion will not operate to suspend execution of the judgment and then just refer to our regular supersedeas rules in 634, 35, et cetera. I mean, you can have all sorts of judgments on publication, and you may be under a sepecific -- like a delivery bond rule.

CHAIRMAN SOULES: Okay. We're going to resequence this and couple it up with one or two of the places that we have talked about, judgments after citation for publication.

And Richard, state what it is that you want this to say.

MR. ORSINGER: The proposition should be stated in the affirmative. I mean, I would be more radical and say why don't we just prohibit this supersedeas procedure

altogether and let them file an appeal bond and supersede. If we don't want to go that far, let's just state the proposition in the affirmative.

CHAIRMAN SOULES: Does this work: "Execution of such judgment shall be suspended only when the party applying therefor" and so forth?

MR. ORSINGER: The only problem with that is that we know that that's not true. That statement is false because we know they can file an appeal bond and then supersede in the ordinary way.

CHAIRMAN SOULES: They can file an appeal bond as well as a motion for new trial?

MR. ORSINGER: Sure.

MR. McMAINS: But my question is, maybe this practice -- and since I've never done it, I don't know if anybody here has ever done it, and I'm sure it derives from a statute, I'm not sure that what we haven't done when we have then done this citation by publication stuff is that when we molded it back into our rules on notice and allowed an

appeal from the trial judge's action, I'm not sure that's what the current rule really does when you look at what this is.

In other words, it looks to me like what you actually have created is a special practice to go before the trial judge in addition to having an immediate appellate remedy; that is, they might have gone up on appeal. I'm not sure this isn't a special practice because, like I say, I don't see how when you get a supersedeas -- because this is where this was, in Rule 329.

MR. ORSINGER: It says the source is article 2236, and it's had two amendments that don't relate to what we're talking about.

MR. McMAINS: But I'm just wondering if in fact you go to a motion for new -- if you go file a motion for new trial in the trial court, and under this rule you supersede it when it requires you to perform the judgment of the trial court, period. So that it looks to me like if you don't get a new trial, then it's over. I mean, the notion is it's over on a supersedeas bond.

MR. ORSINGER: You can't -- you forfeit this bond even if you try to post a supersedeas in your appeal?

MR. McMAINS: Yeah. That's what it said.

MR. ORSINGER: I'm in favor of eliminating this procedure.

MR. McMAINS: And that obviously is what the practice is. It just came straight out of the current rules.

MR. ORSINGER: Well, no one will ever do that.

MR. McMAINS: All I'm saying is that I'm not sure that anybody -- you know, that this procedure ever operated the way we have now constructed it back into our practice, that is, to where you could then appeal from the trial judge's denial of the two-year late filed motion for new trial.

HON. C. A. GUITTARD: Why not?

MR. McMAINS: Well, I don't know. That's what I'm saying, is I don't know. There is nothing in our rules that authorized the appeal from that order or in that practice.

MR. ORSINGER: I would like that to move that we eliminate this supersedeas procedure because it will never be done by anyone. It will happen in one out of a thousand cases, and in those cases no one will ever supersede just a motion for new trial. They'll supersede the judgment and appeal.

MR. HUNT: Second.

HON. SARAH DUNCAN: And actually I think there's already a provision for enjoining enforcement of a judgment in certain really rare situtations, and we might just let that cover for this.

CHAIRMAN SOULES: Moved and seconded. Anyone opposed? No opposition. It's repealed. So 329(b), part (b), is repealed.

Part (c).

HON. SARAH DUNCAN: I would also move to repeal part (c). I think it's unnecessary. If the property has already been sold, clearly you're either going to get money -- the judgment is going to have to be reduced for the proceeds of the property. No?

MR. ORSINGER: This is talking about if a motion for new trial is granted and they didn't have a right to come and sell your property, then what happens.

CHAIRMAN SOULES: It's conversion, and you get the market value.

MR. McMAINS: Of course, the problem is it doesn't say that either. This doesn't say if it's been granted, it just says if it's been sold you get a judgment.

HON. SARAH DUNCAN: It's a great rule. It's a great rule.

MR. McMAINS: I don't really think that is what the law is.

MR. HUNT: Listen to the language here. It says if it's sold under a judgment and execution before the process was suspended, it's talking about suspension under (b).

CHAIRMAN SOULES: So repeal. Any opposition? Unanimously repealed. Okay.

MR. ORSINGER: Luke, should we not say over in our motion for new trial rule earlier that the mere filing of a motion for new trial does not suspend execution?

HON. SARAH DUNCAN: It never does. You don't even get a writ of execution until 30 days after the motion for new trial is overruled.

MR. ORSINGER: But since this motion for new trial is going to be filed after the writ has already been issued, does the filing of this motion automatically lead to a writ of supersedeas or not? It seems to me like back at our motion for new trial we ought to say the mere filing of this motion does not revoke outstanding writs.

HON. SARAH DUNCAN: I don't care.

CHAIRMAN SOULES: Okay. Any opposition to that? Okay.

Don, have you got that clearly where it's authorized? And then we'll say the mere filing of that motion for new trial will not suspend any outstanding writs and processes for collection of the judgment.

MR. HUNT: Got it.

CHAIRMAN SOULES: Okay. Part (d), does that stay?

MR. HUNT: It's just moved.

Yeah, that stays.

CHAIRMAN SOULES: This is already moved?

MR. HUNT: Uh-huh.

CHAIRMAN SOULES: Okay. 329(a), no change. 329(b) has all been moved.

330, our last rule apparently. Any opposition to Rule 330?

HON. DAVID PEEPLES: I have some questions about the last several of these.

CHAIRMAN SOULES: Judge Peeples.

HON. DAVID PEEPLES: Why are we moving some of these provisions to the government code, and how do you move a rule to a statute, like in the last four or five sections?

MR. HUNT: Obviously you don't. The legislature does that. All we can do is recommend that it be put in the government code. But it was a matter that almost all of the requirements now between county and district courts and how the rules of procedures fit together are in the

government code. And it seemed to the committee or the subcommittee that these are the same kinds of things that need to be in the statute and not here. If we can get somebody to take them, we would like to get rid of them here, because they don't fit really, because we're trying to deal with what happens posttrial, preparatory to appeal.

HON. DAVID PEEPLES: Well, I kind of like having these rules regarding the transfers among judges in a big county somewhere, you know, in a book that everybody has got on the bench. I mean, I think it's because these rules are here that these issues never come up, trading benches, transferring benches, cases transferring cases between judges. It's just not a big issue. I'm just wondering why we're doing that.

MR. HUNT: Well, I'm comfortable with leaving them.

CHAIRMAN SOULES: Well, we've got to keep them until we get them in the government code, I guess, because supposedly they seem to be serving a function.

HON. DAVID PEEPLES: They

certainly don't seem to be hurting anything in present Rule 330. If we want to change the numbering, that's fine.

CHAIRMAN SOULES: Where should they be relocated?

HON. DAVID PEEPLES: Once they get --

MR. McMAINS: Well, the basic problem is that they don't sequentially -- we want to find where the district court jurisdiction ends, which is when the appellate rules take off. And actually these rules go after that in terms of where they're numbered.

HON. DAVID PEEPLES: Once these leave the rules and go to the statutes, we can't change them without dealing with the legislature. Why would we want to do that?

JUSTICE HECHT: Let me just say I think it's highly unlikely that the Court will take the risk that the workable rules would ever come become workable statutes, so I wouldn't be spending too much time on this.

CHAIRMAN SOULES: All right. It's just that --

MR. McMAINS: We need to figure

out a place to put them.

CHAIRMAN SOULES: We'll just put them at the end where they are. They're under a whole subdivision (K) after (J).

MR. ORSINGER: Well, we don't need to make that decision, because Dorsaneo's task force proposals are being considered by my subcommittee and we're going to come to a proposal about all of this administrative stuff being at end of the rules of procedure.

MR. HUNT: Well, on behalf of the subcommittee, I move to keep 330 where it is without change.

MR. McMAINS: Second.

HON. DAVID PEEPLES: Fine.

CHAIRMAN SOULES: Now, you're talking about all of it?

MR. HUNT: Yeah, every bit of it.

MR. ORSINGER: Why don't we just leave it here for the time being? I think we made a comment to the proposal for restructuring the rules.

HON. C. A. GUITTARD: That makes an allowance for the shortness of life.

Leave it there.

CHAIRMAN SOULES: Okay. So on 330 you're not going to delete what you've stricken through here?

MR. HUNT: No. The business about striking is only necessary if we transfer the rest of it.

CHAIRMAN SOULES: And the proposed transfer to Judge Till, you're not going to do that?

MR. HUNT: Leave it there.

CHAIRMAN SOULES: (b) was repealed, so I guess you will reletter some of them maybe or not, or it doesn't matter?

Okay. So any opposition to leaving 330 just the way it is today? No opposition.

Okay. It's unanimously voted to leave as is in current rules, and we did get through.

HON. C. A. GUITTARD: Congratulations.

MR. ORSINGER: What are we going to do in the morning, Luke?

CHAIRMAN SOULES: It's almost 6:00 o'clock. In the morning, since Buddy is not here I would like to do your report.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: And Paula's. Paula Sweeney is going to have a subcommittee meeting this afternoon or tomorrow morning.

HON. C. A. GUITTARD: Is there a copy of that report available, Orsinger's report?

CHAIRMAN SOULES: Yes. Richard's report is back here and available.

HON. DAVID PEEPLES: Luke, are we off the record?

CHAIRMAN SOULES: We're off the record. The meeting is adjourned until 8:00 o'clock in the morning.

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, WILLIAM F. WOLFE, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on January 19, 1996, Afternoon Session, and that the same were thereafter reduced to computer transcription by me.

Given under my hand and seal of office on this the 8th day of February, 1996.

ANNA RENKEN & ASSOCIATES
925-B Capital of Texas Highway
Suite 110
Austin, Texas 78746
(512) 306-1003

WILLIAM F. WOLFE, CSR
Certification No. 4696
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