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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

MARCH 15, 1996

(AFTERNOON SESSION)

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Taken before D'Lois L. Jones, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 15th day of March, A.D., 1996, between the hours of 1:00 o'clock p.m. and 5:35 p.m. at the Texas Law Center, 1414 Colorado, Room 101 and 102, Austin, Texas 78701.

MARCH 15, 1996

MEMBERS PRESENT:

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

MEMBERS ABSENT:

Alejandro Acosta, Jr.
David J. Beck
Ann T. Cochran
Michael Gallager
Charles F. Herring
Tommy Jacks
Franklin Jones, Jr.
David Keltner
Thomas Leatherbury
John Marks
Hon. F. Scott McCown
David L. Perry
Stephen Susman
Paula Sweeney

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Hon Sam Houston Clinton
Hon William Cornelius
O.C. Hamilton
David B. Jackson
Hon. Paul Heath Till
Bonnie Wolbrueck

EX-OFFICIO MEMBERS ABSENT:

W. Kenneth Law
Paul N. Gold
Doris Lange
Michael Prince

ALSO PRESENT:

Joe Crawford, Committee on Administration of Rules of Evidence

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AFTERNOON SESSION

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INDEX OF VOTES

Votes taken by the Supreme Court Advisory Committee during this session are reflected on the following pages:

CHAIRMAN SOULES: Well, let's skip to the last one, Judge, because I don't think it's going to take a lot of work on this one. Do we want "nonjury" one word or a hyphenated word?

HONORABLE DAVID PEEPLES: I think it ought to be one word, and it ought to be done the same throughout the rules.

CHAIRMAN SOULES: That's a proposition. Any objection? Being no objection, "nonjury" will be one word, no hyphen, and consistent throughout the rules. Where is Holly?

Holly, we need to get on our data base on this "nonjury." This is what we are going to use. "Nonjury" like that, not hyphenated and fix it every place in the rules. Okay?

MS. DUDERSTADT: Okay.

CHAIRMAN SOULES: Okay. And I will just do that. Maybe the Court will pass this on administrative orders, so it's not -- figure out some way to handle that.

Okay. Now, to 239.

HONORABLE DAVID PEEPLES: On page 441 of the second supplement is a letter

which says that the Lawyers Creed says lawyers will not take a default when they know who the lawyer is on the other side and James Holmes says, "Do we want to conform the default judgment rules to the Lawyers Creed?"

MR. LATTING: No.

HONORABLE DAVID PEEPLES: Your subcommittee asks for guidance.

CHAIRMAN SOULES: No recommendation?

HONORABLE DAVID PEEPLES: No. I think it would be -- I'm personally not in favor of it, but I wanted to hear what people say.

CHAIRMAN SOULES: Okay. Joe Latting.

MR. LATTING: I'm certainly in favor of the Lawyers Creed, but I would not be in favor of conforming the rules. I think we have got a body of law about default judgments that's well-understood and functions well, and I think if we get into this business of you know who the lawyer on the other side is it's going to get -- that's fraught with difficulties in what constitutes knowledge.

If you have talked to somebody on the phone that said, "I'm going to be representing these people," is that knowing who the lawyer on the other side is? There is no appearance, there is nothing official, and it seems to me that it causes more problems than it would solve, and while my personal practice would not be to take a default --

CHAIRMAN SOULES: Buddy Low.

MR. LATTING: -- under the circumstances I don't think we ought to change the rule.

CHAIRMAN SOULES: I'm sorry, Joe. I thought you were finished. Now, Buddy Low.

MR. LOW: The Beaumont local rules, they had drawn something from the Lawyers Code, and that had to be stricken before the Supreme Court would approve it. So it indicated to me how they felt about that. So I wouldn't move we put that in our rules.

CHAIRMAN SOULES: Anyone want to add this to the rules? No one? Those opposed --

HONORABLE SARAH DUNCAN: I'm

sorry. I do.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: You asked if anyone does. I do.

CHAIRMAN SOULES: Do you want to speak to the issue?

HONORABLE SARAH DUNCAN: I don't think there is a point in speaking to it.

CHAIRMAN SOULES: Okay. Those who I guess favor amending Rule 239 to add language from the Lawyers Creed or the concept from the Lawyers Creed show by hands. Those in favor?

Those who are opposed? Fails by a vote of 10 to 1.

Okay. Anything else, Judge?

HONORABLE DAVID PEEPLES: The only other thing is do we need to see if the committee wants us to draft a Batson procedure? Has that been decided?

MR. LATTING: We voted on that. I don't know what we voted, but we voted.

MR. ORSINGER: Well, I don't

think that we voted on some issues like, for example, whether the cure is to impanel the improperly struck juror or to bring in a new panel. It was not my recollection we actually resolved that by committee vote.

MR. LATTING: No, we didn't. I thought we voted not to attack it at all. I thought we voted not -- we affirmatively voted not to draft anything about this at this time.

MR. ORSINGER: I don't remember that.

HONORABLE DAVID PEEPLES: The question is whether to try to summarize the procedural law in a rule or leave it to the cases.

CHAIRMAN SOULES: Well, why don't we just get a consensus on that? Regarding Batson --

MR. ORSINGER: We might remember, Luke, that the legislature has passed a Batson statute for criminal proceedings that does have some procedures in it that has no effect on civil litigation.

CHAIRMAN SOULES: Do we want to write a rule that sets out a procedure for

Batson challenges or not?

Okay. Those in favor of writing a rule show by hands. Five.

Those opposed? Two. Okay. We have got more than ten people in the room, so everybody vote. Take a position.

Those in favor of a Batson procedure in the rules show by hands.

MR. LATTING: Now, this is to do what? Against it?

MR. ORSINGER: No. This is in favor of a procedure.

HONORABLE SCOTT BRISTER: For a procedure.

CHAIRMAN SOULES: To write a procedure. 11. Those opposed? Six.

11 to 6 we will write a procedure. So if your committee will proceed with that, and I know, Elaine, you have done a lot of work on this. Maybe you can consult with their committee.

PROFESSOR CARLSON: I am.

HONORABLE DAVID PEEPLES: She has been.

CHAIRMAN SOULES: Oh, you

already are. Great.

MR. ORSINGER: But, Luke, in that regard I would like to say that my vote was on a procedure and not to try to put the constitutional standards in the rule because I think they are too fluid.

HONORABLE DAVID PEEPLES: We are doing that.

MR. ORSINGER: Okay.

HONORABLE DAVID PEEPLES: That's all from my subcommittee, Luke.

CHAIRMAN SOULES: I think that may be the hardest thing to draft, though, and that is, when do you use the rule on Batson procedure? When is it available?

MR. ORSINGER: We shouldn't try to say that in the rule because the Supreme Court of the U.S. may back off. They moved to religion. They may back off of religion. You know, who knows? And if we lock the rules in when it's so fluid -- the Court of Criminal Appeals extended it to religion. There was an election and then they took it away from religion.

So if our rules are fixed in place and

the constitutional concepts are moving all around, we ought not to say it. We ought to just say when a Batson charge is made then it's done in this way and not say when it's appropriate to make one.

CHAIRMAN SOULES: What is a Batson charge?

MR. ORSINGER: Batson challenge.

CHAIRMAN SOULES: What is a Batson challenge? Are we going to just say that in the rule? "When a Batson challenge," that's what the Texas Rules of Civil Procedure are going to say? Or are we going to say "when a challenge is based on," and if so, what is it going to be based on?

I am not talking about whether it's gender, race, religion. It's just what? And it's not equal protection because equal protection is already bigger than Batson probably. I mean, I think that's the toughest part of writing this rule, and are we going to make it apply to every peremptory challenge?

No. Just some.

HONORABLE SCOTT BRISTER:

Constitutionally infirm peremptory challenges.

PROFESSOR CARLSON: I think that's the language that we used.

CHAIRMAN SOULES: Constitutionally infirm peremptory challenges. Okay. Maybe that language works.

PROFESSOR CARLSON: That's how we did it.

CHAIRMAN SOULES: Huh?

PROFESSOR CARLSON: I think that's how it's currently being drafted.

CHAIRMAN SOULES: Okay. Anything else, Judge? Judge Peeples?

HONORABLE DAVID PEEPLES: No.

CHAIRMAN SOULES: Okay. Thanks for that report, and you're still drafting on these items, so we will have you on the agenda again next time, your committee.

Now we go to -- you're going to give the 166 to 209 report, right, Joe?

MR. LATTING: Yes, sir.

CHAIRMAN SOULES: Joe Latting. The 166 to 209 report.

MR. LATTING: We mailed this out once before, and I brought copies for

those who don't have them. Holly, you want to hand those around the other side?

CHAIRMAN SOULES: Is this the same thing that was distributed --

MR. LATTING: Yes.

CHAIRMAN SOULES: -- on November the 16th?

MR. LATTING: Well, no. Let's see. March, January probably. Yeah.

CHAIRMAN SOULES: Oh, I'm sorry. This is 13 to 215. 13 and 215.

MR. LATTING: 13 and 215.

CHAIRMAN SOULES: 13 and 215. And it's about a four-page handout? That's it?

MR. LATTING: No. It's maybe -- well, I have got copies of the rules. It's just a little more actually than you need.

CHAIRMAN SOULES: I will get it from Holly. It's dated November the 8th, '95?

MR. LATTING: Well, I don't know when we sent out this. That's perhaps true. I was thinking it was last time, for January.

CHAIRMAN SOULES: Okay. On both the clean version and the redlined version of the rules they are dated November 8th, '95, at the bottom.

MR. LATTING: Okay. Then behind that is our disposition table.

CHAIRMAN SOULES: Okay, sir. We are ready.

MR. LATTING: As you will be able to tell from many of these -- do we need to take these up one at a time if there are a group of them that are essentially the same, Luke? How do you want to do that? For example, page 38 and pages 42 and 73 and are the same issue.

CHAIRMAN SOULES: Okay.

MR. LATTING: Shelby Sharpe, for example, on page 38, which is in Volume 1, suggests that we undertake extensive revisions of -- "What action, if any," he says, "did the Supreme Court Advisory Committee take on Rule 13 and Rule 215, which the committee on administrative justice recommended be substantially rewritten?" And we have amended both of those rules, as shown in the "reason"

column, that we have substantially rewritten them. So we have agreed with his suggestion.

CHAIRMAN SOULES: Okay. So that's done.

MR. LATTING: That's done.

CHAIRMAN SOULES: Okay.

MR. LATTING: This is a letter from you. Actually, it's a note from you. That's what will happen. These people will send Luke a note, and he writes on them what should happen here, and we have added a safe harbor provision to Rule 13. We say that it's amended to conform to the new statute.

As you will recall in our discussions, we weren't sure as a committee whether that, in fact, conforms to the new statute since the statute -- Scott's over there grinning his possum grin.

HONORABLE SCOTT BRISTER: No. We agreed to agree that it did conform to the statute.

MR. LATTING: That's right. We agreed that it does conform to the statute and, therefore, is not in conflict with the statute.

MR. McMAINS: Therefore, it's not in nonconformity.

MR. LATTING: That's right. So that's what we did all right. So we have done that. Then the next item is on page 42. Karen Johnson from the State Bar wrote us and asked us about making Rule 13 conform to Federal Rule 11, and we have taken the same action as we said before. We have written Rule 13 to conform to Chapter 10 of the Civil Practice and Remedies Code. Ditto, the question on page 74. Professor Edgar asks us the same thing essentially, and we have done that.

Now, the next one is a suggestion, and a very long suggestion may I add. As you can see there, it's pages 75 to 106. It comes out of a letter from a man named Michael Pezzulli from Dallas who wrote to Judge John McClellan Marshall in Dallas to write a rule that will regulate the handling of RICO cases which are filed in the state court, and it needs to deal with sanctionable conduct and all sorts of things as set forth in this letter. And the members of the committee recommend no action,

and the reason that we think none is needed, we don't perceive this to be a problem in the jurisprudence of the state and just didn't feel that it was worth writing a rule about.

CHAIRMAN SOULES: Is there some special way RICO cases are handled in Federal court?

MR. McMAINS: Yeah.

MR. LATTING: Yeah. They are pretty draconian statutes or rules about what you have to show. They are not the same as class action, but they are sort of along that lines. There are a lot of requirements that you don't have to do in a normal civil case. I don't know what they all are, but I just don't think it's -- I never did see that this --

CHAIRMAN SOULES: Do the Federal procedures, are they supposed to apply if the RICO case is filed in state court?

MR. LATTING: I wouldn't think so.

MR. McMAINS: No.

MR. LATTING: And by the way, in his letter, as Pam has just pointed out, in

his letter Mr. Pezzulli says, "The problem with RICO cases being filed in state court surrounds the fact that we do not have a corresponding Rule 11," and he says, "Without these rules the state courts don't have the capability of sanctioning parties and attorneys for improperly filing a RICO case," and I think we have got plenty of sanctions now with the Chapter 10 and with our revised Rule 13. So we didn't feel like we needed to do that.

CHAIRMAN SOULES: Anybody disagree with that? Okay. No change then pursuant to Mr. Pezzulli's...

MR. LATTING: Page 107, Mr. Fuller recommends amending Rule 13 to deal with frivolous pleadings, the same as we have said before. Guy Jones, Judge Guy Jones, on page 108 recommends that we amend 13 so that judges can have a tool to deal with frivolous cases, and we have got that now in Rule 13, Chapter 10.

The next issue has to do with Rule 215, as you can see. Let me look at this letter here just to remind myself of the situation.

It's on page 682.

MR. McMAINS: Is the court -- under this Rule 13 is the determination -- is that (d) section on sanctions, is that straight out of the statute?

MR. LATTING: Oh, let me see, Rusty.

MR. McMAINS: The preliminary remarks, that is, "A court that determines that a person has presented a" --

HONORABLE SCOTT BRISTER: You mean the sua sponte court's initiative?

MR. McMAINS: No. It says -- yeah. Where it says, "A court that determines a person has presented a pleading, motion, or other paper in violation of paragraph (a) may impose a sanction on the person." I mean, is that part or is the (a) part itself presenting the court a pleading, motion, or other paper?

HONORABLE SCOTT BRISTER: Other paper is not.

MR. McMAINS: That's what I'm trying to figure out.

PROFESSOR ALBRIGHT: The statute says "pleading."

HONORABLE SCOTT BRISTER: The statute was "pleading and motion," and we had the discussion and the vote about whether "other papers" should be in there or not and voted that it should be.

MR. McMAINS: That's fine. This is more than what the statute requires in some regard.

HONORABLE SCOTT BRISTER: In some respects.

MR. LATTING: In that respect, it is.

MR. McMAINS: What I am also trying to figure out is, does this rule then apply to 215? I mean, to discovery?

PROFESSOR ALBRIGHT: Yes.

MR. McMAINS: Is that what our 215 says basically?

PROFESSOR ALBRIGHT: Except, Rusty, if you look at (e), exception, this rule is inapplicable to discovery requests and responses, including objections and claims of privileges. Those are handled only by Rule 213.

MR. LATTING: Which is now 166.

PROFESSOR ALBRIGHT: I don't know where it is now.

MR. LATTING: It's going to be 166d, I believe.

CHAIRMAN SOULES: Okay. So you are on Bruce Anderson's recommendation.

MR. LATTING: Yes. And Mr. Anderson recommends that -- my problem here is that the pages that I have got in my book are not -- I must not be looking in the right book. I have the wrong volume.

CHAIRMAN SOULES: It's Volume 2 of the original agenda.

MR. LATTING: Volume 2?

CHAIRMAN SOULES: In the original agenda. Yeah.

MR. LATTING: Yeah. In the book I was looking at it's a memo from Judge Guittard to Lee Parsley.

CHAIRMAN SOULES: No. It's going to be Volume 2 of the original agenda, and he complains that he's 31 days before trial and he's just had to spend all of his time with --

MR. LATTING: Now, I remember.

Yes. And what we said was we have addressed all of that in the discovery rules. We have supplemented in the -- that's all been changed and dealt with by Mr. Susman's committee, so his suggestions are just incorporated. They are not all followed exactly, but it's been dealt with by the things we have debated for so long. So that's the action we have taken.

CHAIRMAN SOULES: I think the one thing he raises that's new is what you have got noted here, and that is, should any party designate somebody as a person with knowledge of relevant facts, if any party designates someone that anyone -- that party and anyone else can call them.

MR. LATTING: I just don't remember what we have done about that.

CHAIRMAN SOULES: I don't think we have talked about that particular issue.

PROFESSOR ALBRIGHT: Luke, I think what this -- in the discovery rules the exclusion rule that we adopted we did not say that explicitly that if someone has identified some -- if one party has identified someone as a person with knowledge of relevant facts then

the other party can use that person as a witness explicitly, but we did include in the exclusion sanction the prejudice and surprise element, so that would take care of a lot of those situations.

CHAIRMAN SOULES: Okay. That makes sense. Anything else on this suggestion by Bruce Anderson? So you see nothing further needed on this, Joe?

MR. LATTING: No. I don't think so. I think we have addressed it one way or another, either me or the discovery committee.

CHAIRMAN SOULES: Okay. 684, you have already talked about that.

MR. LATTING: Yeah. 684, we have already talked about that. Let's see. 686, the 686 is the beginning page of a -- well, it's a letter to you from Judge Hecht, and he says, "I enclose a copy I received from Tarrant County court judge, court at law judge, R. Brent Keis," and that's a several-page article that is entitled "The Discovery Process: Have We Misdiagnosed the Disease?" And this article raises a number of

approaches to discovery, and I don't think -- I think that all we can say is that we have dealt with -- Mr. Susman's committee has dealt with the approach recommended for discovery.

I will say that we didn't go through this article and pick out piece by piece every point he raises. I don't think that we need to do that. He says, for example, "We must come to the inevitable conclusion that discovery abuse is not the disease. The disease is the discovery process itself." I don't quite know what to do about that. It may be true, but I don't -- cut out discovery? So what I say here is that we passed new discovery rules.

CHAIRMAN SOULES: Alternative Cure No. 1 is no discovery then; No. 2, limiting discovery to judicial discretion; No. 3, limiting discovery and limited court discretion. Okay. His is a rather general article about discovery criticisms, and we have dealt with those issues, right?

MR. LATTING: Yes.

CHAIRMAN SOULES: Okay.

MR. LATTING: I think that I

can say we spent hours and hours talking about everything that he touches on.

699. I don't mean to gloss over this. I just don't know what else to say about it.

CHAIRMAN SOULES: Well, I'm through. I think that's right. 699?

MR. LATTING: 699, yes. Shelby --

CHAIRMAN SOULES: Well, these are specific fixes to what was going through the court rules committee at the time.

MR. LATTING: That's right. And we have redone Rule 166d so extensively that these are more grammatical, as you say, specific fixes. I don't think that we need to do anything further on that.

The next thing that makes a suggestion is the suggestion to simplify discovery to avoid mandatory exclusion of evidence. I don't know that that is a simplification of discovery. This is a letter from Mr. Bass, and the supplementation rules have been amended by the discovery committee, and Alex was just talking about -- we have talked and there is no suggested automatic exclusion necessarily, so

we have dealt with that. We have talked about it, and it's covered in the discovery rules.

CHAIRMAN SOULES: Now, where are you? 719?

MR. LATTING: Yeah. I am looking at 719, which is a letter from Stephen Marsh to Judge Kilgarlin, and this is a letter that -- well, I think it's summed up in the next to last paragraph where he says, "I feel that the rules should provide guidelines that would allow for serious sanctions without court order if the party had taken serious nonjudicial steps to obtain the discovery" and then he gives examples.

Well, we talked about this for hours and hours starting back -- when did this committee start meeting? Was it '95 or '94?

HONORABLE SARAH DUNCAN: '93.

CHAIRMAN SOULES: Yeah.

MR. LATTING: Anyway, this is what occupied seemed like the first three or four meetings we had, was whether to require prior orders in order to get sanctions or not. So we have debated this extensively, and we have our recommended Rule 166d that we finally

came out with.

CHAIRMAN SOULES: Okay.

MR. LATTING: So we have very carefully considered that. The same thing could be said for page 724 to amending Rule 215 to avoid what sometimes turned out to be too unfair -- harshly unfair sanctions. That's taken care of by the proposed rules, and we have done that both by sort of codifying TransAmerican and the discovery rules on exclusion with a nonautomatic exclusion and so on. So we have addressed that.

Same thing is true about what Alex just mentioned on page 726, which is a letter from T. B. Wright to Judge Phillips, and I just have to add as a note of personal privilege it's ironic that he has a nerve writing this letter when he successfully kept out a witness one time that I wanted to call that he knew about. I hadn't thought about that 'til I just put all of that together. I hate to agree with him on it, I guess, but he's right. I wish Judge Lowry had seen this letter about five years ago. He wrote it about five years

ago, come to think of it.

MR. ORSINGER: He probably wrote it when he got back to the office and was loathing.

MR. LATTING: Well, he must have. He must have. He must have felt so bad about it that he wrote this letter. I hadn't even thought about it. Anyway, okay. Well, that I guess is over with, and then here is another letter from Jimmy Hammett. Some of these we had noted in our jurisdiction that just didn't fall within our jurisdiction, so we just assumed they were typographical or clerical mistakes. For example, this one on page 728, it's about private process servers and doesn't apply to sanctions and sanctionable conduct by lawyers in discovery.

Next thing, Jimmy Hammett wrote a letter page 730.

CHAIRMAN SOULES: We are going to forward this to -- this is out of place, and I will --

MR. LATTING: There is an earlier one, too.

MR. ORSINGER: This is going to

fall in my subcommittee.

MR. LATTING: I had it noted. I can't remember where it is right now.

CHAIRMAN SOULES: Okay. We will send a copy of this to Richard Orsinger's subcommittee, 728 and 729. What other one was out of place?

MR. LATTING: Well, I noted one on page 699, and I said, "These pages do not contain any question or request, so no response is necessary."

CHAIRMAN SOULES: Well, he was writing about 215. This is Shelby Sharpe writing about 215 on 699.

MR. LATTING: Through 711. Oh, well, I know what. Yeah. All right. He furnishes this, Rule 215, and we have already addressed this.

CHAIRMAN SOULES: But that's the only one so far?

MR. LATTING: Yeah. So far that's the only one out of place.

CHAIRMAN SOULES: Okay.

MR. LATTING: Same thing is true about the next one. Page 732 is the same

proposal by Judge Pat Baskin. He proposes softening the exclusion rules, and we have talked about that, and Susman's committee has acted on that.

Steve McConnico writes a letter on page 742. Yeah. It's about severe sanctions. We have discussed this over and over and over again, so it's been addressed and voted on. Same thing by Judge Kilgarlin on page 743.

Now, Dan Price wrote a letter at page 744, and I can't recall why we didn't think action was necessary on it. It has to do with untimely evidence, and we didn't feel that he needed a direct response. He's deceased, and we also couldn't respond to him obviously. And the letter raises issues which we have addressed under the rules on exclusion of evidence and sanctionable conduct. So we have discussed it and taken action on the issues raised in that letter. And I might add, the letter is not complete, but there is only one page of it reproduced, so I take it there was nothing else but a signature page. Anyway, we have already acted on it.

CHAIRMAN SOULES: Well, there

is some other stuff on 273, Rules 273 and 296, that are elsewhere in the book.

MR. LATTING: I see. Okay. All right. Same thing, Phil Gilbert wrote a letter on page 245.

CHAIRMAN SOULES: 745?

MR. LATTING: 745 is what I meant to say. 745, "Unless corrected, the problem of improperly applied sanctions would act like a cancer on our state's jurisprudence." We have addressed all of these things and talked about them in connection with Rule 166d and to some extent about Rule 13, but mainly Rule 166d. And the next thing is a letter from you, Luke.

CHAIRMAN SOULES: It's all been done.

MR. LATTING: It's all been done?

CHAIRMAN SOULES: Yeah. You-all have done a great job on this.

MR. LATTING: And then the next thing is page -- let's see, "SPG" is supplement page 25. If I can find that, I would like to look at that one.

CHAIRMAN SOULES: Robert Barnfield.

MR. LATTING: I have to say that I think that we have amended Rule 13 to conform to the statute, and I suppose that the statute and the rule might cover this, "any pleading or motion." I don't know if it's the place of this committee to do it, but I guess it is. I'm personally -- I don't know what to say -- tired of, or I wish the practice would be discouraged of filing what I call boilerplate motions in limine. It seems now that every trial that I go to I get a 22-page motion that asks that I be forbidden from ridiculing the opposing counsel or for asking for anything from the opposing counsel's file or for offering any evidence that's not admissible or offering any evidence that's based on hearsay or offering --

HONORABLE SCOTT BRISTER: Every trial I have the plaintiff's attorney says, "Don't go into unrelated medical records." The defense attorney objects saying, "But I want to go into related ones," and then the plaintiff says, "But I'm not talking about

related ones. I'm talking about unrelated ones." And then the defense attorney says, "Oh, well, as long as we modify it to relate only to related ones." Every trial I have that conversation with people. Without exception, I have had that 200 times.

MR. LATTING: Even if there aren't any medical records, right?

HONORABLE SCOTT BRISTER: Even if there aren't any medical records.

MR. LATTING: And then don't you also have every trial where they say, "We don't want either lawyer to offer any evidence that's not" --

HONORABLE SCOTT BRISTER: 40 percent of the trials they ask them not to go into hearsay unless there is an exception. Okay.

MR. LATTING: And then the judge will turn to me and say, "Mr. Latting, do you have a problem with any of these?" Well, I have a problem in being ordered not to do things that I wouldn't do anyway and that are silly, and I really do think this committee ought to say something to the Bar

about not filing boilerplate, useless limine.

Limine is something, it seems to me, that is so prejudicial that the jury shouldn't even hear about it or it's going to alter the outcome of the trial. You don't want to talk about the drug paraphernalia in the back of the car until such-and-such happens or you don't want to mention insurance until such-and-such happens. Those are legitimate limine topics, but this stuff about not offering inadmissible evidence is just absurd, and I think it ought to be put a stop to. There. Thank you for the hall.

MR. LOW: Luke, let me respond.

CHAIRMAN SOULES: Buddy, please go ahead.

MR. LOW: That's true there is too much of that, but there is a lawyer -- he's from another town, not Beaumont -- that comes to Beaumont, and he's gotten reversed in three or four cases for violating motions in limine, but you better think of everything because, I mean, he will just go into them. Somebody objects and he says, "Well, that's relevant. That's as

relevant as all of his drug charges and everything else." So I know -- I'm being serious.

So, I tell you what, man, when I have got a case with that lawyer, I mean, I just try to think of the most absurd thing I can think of, and I file a motion in limine on it because the judge will order him not to do it, or he would do it otherwise. So really there is too much of that, but there is a certain element of the Bar that fall beyond the category of being a gentleman maybe.

MR. LATTING: Yeah. Ladies, for one.

MR. LOW: Well, or ladies, either. I'm sorry.

MR. LATTING: Well, maybe you have to designate three lawyers that you could file these motions against.

HONORABLE SCOTT BRISTER: I'm not convinced you can do anything about it. I have had a rule for two years saying, "Don't give me anything in your motions in limine except something that you specifically think is going to come up with this case," and over

half the time I still get at least 36 items on every motion in limine.

CHAIRMAN SOULES: Richard Orsinger.

HONORABLE SCOTT BRISTER: It's in the word processor. It's easier just to put the style on it and print it out in all of their cases.

MR. LATTING: I'm not going to give up on that basis, though. This committee ought to say that we think it's a bad practice, and I think it's a bad practice and I think it ought to be officially discouraged by the courts. There is just no sense in having -- there is no reason in having these nonsense motions filed in every case.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I think it's a difficult practice to regulate. I mean, I am just sitting there thinking about Buddy. There is a trial lawyer that I frequently go against in San Antonio if I don't have this in a motion in limine always tells the jury, "Maybe it's because I was born poor and I had

to walk to elementary school without any shoes but --" and then he leads on into whatever it is. So I have a specific paragraph to prohibit him from saying, "Maybe it was because I was born poor." I have got about four or five that is in every time I have a case with him, and if I don't have it in the motion in limine, he will do it.

And how can you regulate that? You are not supposed to make references to outside the evidence in the record, and we all know you are not supposed to do that, but then you can't just get up and object constantly in a closing argument. The best way to take care of that is in a motion in limine, but if you write a rule that I can't have odd prohibitions in my motions, then how am I going to protect myself from that?

MR. LATTING: I think you can only have odd prohibitions. That's what I'm saying. If you have a basis for doing it, there would be no problem.

MR. LOW: But what our judges do, they make us go over and say, "Tell me only about the ones you have a problem with"

and they don't argue about the others and you better not say, "Well, I have got a problem with this one," you know, because they are not going to believe you. So it ends up where only about two or three legitimate ones you argue with. It accommodates the word processor, accommodates the billing practice, and a lot of those things, see, but yet it doesn't take up that much time of the court.

MR. LATTING: I hope that's not on the record, what you just said.

MR. LOW: But it's true. I will go on record and say that it is true.

MR. LATTING: Well, that's my argument for taking it out.

CHAIRMAN SOULES: I don't think a motion in limine is even mentioned in the rules.

PROFESSOR CARLSON: They aren't in the rules.

MR. LOW: McCartle is one of the first ones I remember talking about. McCartle vs. McCartle.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: I probably shouldn't even weigh in on this since I never was and never wanted to be a trial lawyer, but I do remember being told as an associate, you know, "You need to prepare our motion in limine or you need to defend -- you know, write me a brief defending against each one of these items in the motion in limine" and going and looking forever for a rule, and there was nothing that said what was an appropriate motion in limine and what was inappropriate.

So then you go to the digests and you go to Westlaw and you start looking and there really isn't much guidance out there as to what is appropriate in a motion in limine. And it's real hard arguing in front of some of our less esteemed judges as to why this is an appropriate motion in limine point when there is no law on it anywhere. You know, like the hearsay one, well, I think that sounds silly, but how do I explain to a judge why that's -- not you, Judge Peeples. How do I explain to some judges why that's silly when there seems to be hardly anything written on

what's appropriate in a motion in limine.

I think Joe is right. I think we might should consider a rule on motions in limine, maybe not going into banning particular practices but sort of saying what the purpose of one is, and as long as we are going to do that, let's put in there what some people seem to be having a terrible problem with and have for decades, and that's not understanding that, you know, how you preserve error as to something that's in your motion in limine because that doesn't seem to be getting through.

CHAIRMAN SOULES: Okay. Joe's committee is open for business.

MR. LATTING: I think we ought to address motions in limine because I think that they are misused and I think they are misunderstood by enough trial courts that they treat them sort of as motions to quash evidence when they are not that, really.

HONORABLE SCOTT BRISTER: And a lot of people think they are summary judgments.

MR. LATTING: Yeah. Well, they

do, sure enough.

CHAIRMAN SOULES: Okay. Well, if anybody wants to volunteer to be on a motion in limine committee, let's do it now, and I am not being facetious about that. I'm serious about that, if somebody would like to undertake this.

MR. LATTING: I want to do something about it.

CHAIRMAN SOULES: Okay.

MR. LATTING: And I want Buddy Low on my committee.

MR. LOW: No.

MR. ORSINGER: No. Buddy is against it.

CHAIRMAN SOULES: Okay. Time out. Who wants to help Joe?

HONORABLE SCOTT BRISTER: I will do it.

CHAIRMAN SOULES: Judge Brister. Anyone else?

Okay. Joe and Judge Brister can take a shot at that. Next is supplemental -- that's what we just looked at, so this is going to be referred to subcommittee on the motions in

limine. Latting is the chair and Brister is the member. No other volunteers at this time, right?

MR. BABCOCK: I will help them out.

CHAIRMAN SOULES: And Chip Babcock is a member, and Elaine is a member, Elaine Carlson.

MR. LATTING: Okay. Chip, Elaine, Scott, and I. Okay.

CHAIRMAN SOULES: Okay. Next is second supplement, 393.

MR. LATTING: Okay. Let's see what that one is.

CHAIRMAN SOULES: This is from Judge Guittard.

HONORABLE C. A. GUITTARD: Mr. Chairman, this was an effort to reconcile the provisions of the trial rules with those appellate rules and raised the question of whether the same provisions in the trial rules concerning the effect of citing papers should also apply on appeal. Now, the particular draft here was one made without the benefit of any suggestions of Joe Latting's committee and

should probably be revised in connection with any suggestions that that committee makes, but the point is simply to make a rule -- raise the question as to what extent should this Rule 5 in the appellate courts be the same as Rule 13 in the trial courts or to what extent does Rule 13 apply in the appellate courts. And some attention ought to be given to that, and of course, our solution was -- my solution was to have a set of general rules including those provisions that apply both on trial and on appeal.

MR. LATTING: Is there any reason why the same standards shouldn't apply on appeal as in the trial court?

HONORABLE C. A. GUITTARD: I don't see why it should not.

MR. LATTING: I don't either.

HONORABLE C. A. GUITTARD: But the proposals now, Rule 5 as it has gone to the Supreme Court, doesn't conform to that, and I think that if the provisions of Rule 13 should apply, well, they should apply. They should be incorporated in Rule 5.

MR. LATTING: Well, it seems to

me that the provisions of Rule 13 ought to apply.

HONORABLE C. A. GUITTARD: Yes. I agree.

MR. LATTING: And let me --

HONORABLE C. A. GUITTARD: And if so, the --

MR. LATTING: Where do we need to say that? I'm assuming the committee wants to do that.

HONORABLE C. A. GUITTARD: Well, there is two ways to do it. You can rewrite TRAP 3 to incorporate the Rule 13 standards, or you can provide a general rule that applies both to trial and appeal that will set out the standards.

CHAIRMAN SOULES: TRAP 5?

HONORABLE C. A. GUITTARD: Yes.

CHAIRMAN SOULES: Okay. I think you said TRAP 3, but you mean TRAP 5.

HONORABLE C. A. GUITTARD: Yes. TRAP 5.

CHAIRMAN SOULES: Okay. Well, let's get the appellate rules back from the Court. I know they are coming back, and I

don't think that's going to be very controversial with the Court, how we handle TRAP 5, if we decide to make it conform or go to general rules. And so --

HONORABLE C. A. GUITTARD: This was just an attempt to make them conform to what was already in the rules.

CHAIRMAN SOULES: I mean, we have spent a lot of time doing Rule 13, more time than we did on TRAP 5.

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: It's probably more refined and reflective of the views of this committee, 13 is. So we could probably make Rule 5 conform and then if we ever get to general rules, pull them both out and put them in the general rules because they would be -- lend themselves to that process.

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD: This is just an example of a number of rules that might be given that treatment.

CHAIRMAN SOULES: Okay. Judge, would you then try to take a shot at rewriting Rule 5 to, as closely as possible, verbatim track Rule 13. It's in a different context, so there may have to be some new words.

HONORABLE C. A. GUITTARD: That's right. There is. It has to be done carefully. Now, do we have an official approved proposal with respect to Rule 13 that I would look to?

CHAIRMAN SOULES: Yes.

HONORABLE C. A. GUITTARD: And is that what we have before us here today?

CHAIRMAN SOULES: Well, it's gone to the Court.

HONORABLE SCOTT BRISTER: Yeah. And it is what's on the front of this.

CHAIRMAN SOULES: Let me see where it is, Judge.

HONORABLE SCOTT BRISTER: It's on the front of Joe's report.

HONORABLE C. A. GUITTARD: Well, okay. That's clear then. I will undertake to do that and make it conform, make the Rule 5 conform to the extent that it's

applicable.

CHAIRMAN SOULES: Now, let's see. We have got two -- I think I wrote the Supreme Court that we were changing these words. We have two changes, and I am not sure you have this, but Judge Guittard, on the clean version of Rule 13 on the second page of the text of the rule, four paragraphs up from the bottom, it starts "the record." "An order under this rule shall contain," second line where it's says "(1), the conduct meriting" was changed to "warranting." "Meriting" was changed to "warranting."

HONORABLE C. A. GUITTARD: All right.

CHAIRMAN SOULES: And on the next page, well, that's 166d, so you don't have to worry about that one. So Judge Guittard then will do a rewrite on that. Richard Orsinger.

MR. ORSINGER: Before we get too far down the road I wanted to sound a note of opposition. I think that Rule 13, we did the very best we could with a totally dysfunctional statute that I don't think makes

grammatical sense or has meaning, and I felt like we had to do that because it was a statute, and we don't have to do that with the appellate rules. I am troubled by what it means that you can recover costs of delay and all of those things that we never were able to resolve here, and if we take the problems that we have with the language of the statute and move it into the appellate arena, we are just compounding it.

Furthermore, we have existing rules about sanctions for frivolous appeals, and those are standards that exist independently. There is a separate set of rules. There is one rule for the Court of Civil Appeals or Court of Appeals, pardon me, one rule for the Supreme Court, and we have already made amendments about how those penalties can be visited upon the litigants, and so in my view we shouldn't just take Rule 13 and plug it into the appellate rules.

HONORABLE C. A. GUITTARD: Well, I agree to that. It has to be limited to those things that are common to the trial and appellate practice. If there is different

kind of sanctions, different procedure in trial than there is on appeal, well, that should be separately provided in the trial and the appellate rules, but if there is a standard that is applicable to both, then that could be done in a common rule.

CHAIRMAN SOULES: Let Judge Guittard take a stab at that maybe.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: And would you send that over to Richard whenever you have it drafted? Particularly send it to Richard Orsinger so he can try to get the dysfunctional aspects of Rule 13 and you can both try to figure out how to get that out of what we may put in the appellate rules.

MR. ORSINGER: And also with some sensitivity to the fact that if you are hired as an appellate lawyer, you are going to be filing motions and motions for new trial and things based on what people are telling you they remember about what happened that hadn't been reduced to writing. You haven't seen the statement of facts yet. There is lots of times when I have to go ahead and just

make the assumption that I have good information, and then when I read the statement of facts, I find out that it's bad information, and there is not a thing I can do about it. I don't have three months to investigate that. Sometimes my deadlines are running three days after I get hired and I think we have to have some sensitivity to the fact that a trial lawyer may have months to investigate something before they file a pleading and an appellate lawyer may have to file something within a few days of when they are hired before they have really had an opportunity to read anything.

CHAIRMAN SOULES: Okay. Second supplement, 395.

MR. LATTING: By the way, Buddy Low has agreed to be on the motion in limine committee.

CHAIRMAN SOULES: Okay.

MR. LOW: And I had to promise him I would get him a tie just like this to get on it.

MR. LATTING: The State Bar proposed rules on signing papers and other

pleadings. We have covered -- we have already dealt with it all, this letter from Shelby Sharpe, and we have dealt with it, as we say there.

CHAIRMAN SOULES: Wait a minute. That's 395 and 96 and 97 and 98. Then there is a -- I think you have got a skip in your process here, Joe. It looks like there is another letter on 399.

MR. LATTING: Yeah. But doesn't it cover the same thing here?

CHAIRMAN SOULES: Is that the same letter?

MR. LATTING: Well, if it's not the exact same letter, it's the same subject, 396.

CHAIRMAN SOULES: Okay. Okay.

MR. LATTING: More again about sanctions and the effect of signing pleadings, motions, and other papers, Rule 13.

CHAIRMAN SOULES: Okay.

MR. LATTING: It's all the same subject. At least as I looked at it, it was.

CHAIRMAN SOULES: And this was the State Bar rules committee input on

sanctions, and we did consider that --

MR. LATTING: Yes.

CHAIRMAN SOULES: -- in the process of generating the rule we sent to the Court, right?

Okay. Now, we are over then to 415?

MR. LATTING: Yes.

CHAIRMAN SOULES: From Tom Boundy.

MR. LATTING: Yeah. What we say here, I don't have independent recollection of this, but as you can see, his letter says, "As you can see, the court has ruled the Texas Rules of Civil Procedure are unconstitutional as a matter of law," which is interesting. He says that's what the Dallas Court of Appeals did. He proposes a revised Rule 13, and we have revised Rule 13 and then I have a note here and I can't vouch for the accuracy of this, but I believe that it's correct. It says, "The Dallas decision relates to the court's contempt powers and not to sanctions powers."

MR. ORSINGER: Well, it was a follow-up. In other words, the trial judge

assessed a penalty. It was not paid, so the trial judge held the person in contempt for not paying the penalty and then they filed a writ to get him out of jail and the Dallas court let him out. So it's actually the follow-up enforcement after a sanction was levied.

MR. LATTING: I don't think we need to do anything about that other than what we have already done, unless anybody feels different.

CHAIRMAN SOULES: This is an opinion by a now Supreme Court justice.

MR. LATTING: Huh?

CHAIRMAN SOULES: This is a decision by a now Supreme Court justice, Justice Baker. But what he's saying here is that the court ordered the party to pay discovery costs and attorneys' fees and that is a debt, not a fine, and that you can't use habeus -- you can't use contempt to enforce that kind of an order.

Well, contempt may not be appropriate for a lot of violations of a number of kinds of orders. It has to be used when contempt can

be used. I don't agree with his conclusion that the court held the Texas Rules of Civil Procedure were unconstitutional as a matter of law. It just held that he couldn't jail this errant party for not paying discovery sanctions, for not paying attorneys' fees and costs, because that's imprisonment for debt. Okay.

MR. ORSINGER: What he should have done is held him in contempt and then probated his commitment conditioned on him paying the fee. What he did was he imposed a fee and then he held him in contempt for not paying the fee; whereas, he probably could have held him in contempt initially but just said, "I won't put you in jail unless you pay," and that might be constitutional.

CHAIRMAN SOULES: Anyway, I don't think this requires any rewriting of the rules.

MR. LATTING: I don't either. I think we have already done it, and that's why we say we recommend no action.

CHAIRMAN SOULES: Okay. That gets us to four --

MR. LATTING: That gets us to 425, which is -- once again, it's a State Bar rules committee letter from Shelby. He says, "Rule 215 is poorly organized, lacks sufficient guidelines." I'm reading from the concluding paragraph of his letter on page 430 "and instructions for the Bench and Bar to be justly implemented to comply with due process," and then he has sent recommended changes in Rule 215, which we have considered in detail and have argued about ad infinitum and have included in our rule, proposed Rule 166d, and so we have considered these changes and in part have adopted them and have acted on all of them. We rejected some of the ideas after due consideration at bay.

CHAIRMAN SOULES: Okay. Does that wrap up your report?

MR. LATTING: That concludes my report.

CHAIRMAN SOULES: Okay. Unfortunately for you and everybody we continue to receive mail on these rules, all the rules. There probably will be a third supplement before we finally conclude our

years of work, but you're done now from the beginning agenda all the way through the second supplement, correct?

MR. LATTING: That's right.

CHAIRMAN SOULES: Thank you very much.

MR. LATTING: You're welcome.

CHAIRMAN SOULES: I see no reason to address the Supreme Court with any information derived from these recommendations.

MR. LATTING: We didn't think so.

CHAIRMAN SOULES: No need to go back to the Supreme Court on Rule 13 and 215 as presently submitted. Do you agree with that?

MR. LATTING: We think so. I would agree with that.

CHAIRMAN SOULES: Anybody disagree with that? Okay. So from these suggestions we have nothing to add to what we have sent to the Supreme Court, so I will let it stand as it's submitted.

And that gets us to Susman who -- are you

going to make that report, Alex?

PROFESSOR ALBRIGHT: I didn't know we had a report.

CHAIRMAN SOULES: Okay. We have still got to get through all of the grid for 166 through 209. We haven't gotten that done, and I think Steve was going to try to have a meeting. Maybe he wasn't able to.

PROFESSOR ALBRIGHT: Are you talking about the letters?

CHAIRMAN SOULES: Yeah.

MR. ORSINGER: Yeah.

PROFESSOR ALBRIGHT: I know we did that. I thought we had already -- we had a meeting where we talked about those, and I thought he had sent it to you. I'm not sure I ever saw a final disposition table.

CHAIRMAN SOULES: Well, we will have to wait 'til he's here then I guess to get that. Let's skip him then and go to Don Hunt.

Don, you have a new handout, right?

MR. HUNT: Yes, indeed. We have two handouts, in fact.

CHAIRMAN SOULES: And you have

excluded everything we have already voted on so as not to go back and revisit those.

MR. HUNT: That's true. You have an 11-page handout which is entitled "Redlined Version of Rules 296 through 331" that contain only the items still pending action by this committee, and the second handout is the inquiry disposition chart, most of which has already been done in one way or the other and contains very few action items by this committee, but the redlined version, the 11-page version, does require that we at least talk about a few of these rules.

Now, what I want to do, with your permission, is to take you through each of the rules on these 11 pages and attempt to tell you about changes that have been made for grammar or for clarity and to the extent that there is only a change for grammar or clarity just tell you what I have done, unless there is objection to pass on from that. Because we have about two areas on which we need to vote after some discussion.

With that in mind, let me begin with the Rule 296(a) and (b). All that has been done

to (a) and (b) since you last approved it is to put in the word "final" because we now have a definition of "final judgment." That's down there about four lines up, five lines up, from the bottom of (a). The word "final" has now been included there. The word "premature" has been added to the second sentence of 296(b). Other than that, this is the same rule you considered two months ago and to which there was no objection. Unless there is some need to discuss that, Mr. Chairman, I ask that we move on to the next rule.

CHAIRMAN SOULES: Any opposition to 296 as presented?

No opposition. That's approved.

MR. HUNT: The committee asked that we draft a new rule, which would be Rule 297(c), and to try to be instructed as to the form in which findings and conclusions should be made. Because this is new drafting and that the only command was that we should attempt to do it like Rule 279, this presents some little bit of a drafting challenge for two or three different reasons. Let me walk through it.

The first sentence isn't too different from what we see with respect to jury trials. "The judge shall, whenever feasible, state the findings of fact in broad form on the ultimate issues of all independent grounds of recovery or defense raised by the pleadings and evidence. Now, that's not too difficult, I think.

The real problem comes when we get to the next several sentences. The failure to make a finding ought to be reviewable on appeal, indeed another rule so states. It ought to be reversible or at least the appellate court ought to send it back to the trial court to make a finding. That's the reason why this first sentence includes the word "shall." "The judge shall, whenever feasible, state the findings in broad form," and the requirement is made to state it on all elements of independent grounds or defenses, but here we come to conclusions, and I have used the word "should."

We first had in there the word "may." I don't know whether "may" or "should" is better because we know from the cases that the

failure to correctly make a conclusion of law is not reviewable. Conclusions are there to help the appellate court understand what the trial judge was thinking, but if there is any reasonable basis in law on which the findings will support the judgment then the appellate court ought to uphold it.

So, Luke, I don't know whether to put "should" or "may" or even try to address it, but at least I want to put in a sentence that said "Trial judges, you should attempt to make a conclusion of law on every ground or defense, but if you don't do it, it isn't error" because I didn't want to draft anything that would be a new basis for claiming there was an error when the practice right now is reasonably well-settled.

The last sentence, of course, is simply to say that these findings and conclusions should be in separate numbered paragraphs, and with that, let me move the adoption of (c) and see if we need a discussion.

CHAIRMAN SOULES: Okay. I think that the charge rules have been purged of the word "issue" or "issues," and we now

talk about "elements." Would that be a better word in the second line or not?

MR. HUNT: Probably.

HONORABLE SARAH DUNCAN: Excuse me.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: Is the point to have a finding on each element of the cause of action or defense or to have what the jury answers, which would be not each element but the global of the ultimate issue?

MR. HUNT: The point is to make them in broad form. I don't know whether you talk issues or elements.

HONORABLE SARAH DUNCAN: Well, but for instance, we could ask the jury, "Who's negligence, if any, was a producing cause of plaintiff's injuries? Joe, Mary, and Scott." That combines elements, but it's a broad form question, and we need to be clear I think what we are asking the trial judges to do, make a finding of fact on each element or on the ultimate global issue in the cause of action or defense.

MR. HUNT: As I view it, you would be asking the trial judge to say, No. 1, Mary was negligent; No. 2, Mary's negligence was the proximate cause of the accident; No. 3, damages are whatever; but the fact that we say broad form I don't know necessarily tells us a whole lot more because today we still submit questions in whose negligence and then go to proximate cause and go to damages and sometimes we break them up and sometimes we don't, but I guess it could be done. A judge could make a finding that Mary's negligence proximately caused the accident, and that's a function of ultimate drafting on what the trial judge would want to do or would sign.

HONORABLE DAVID PEEPLES: Don, maybe you have been addressing this. I don't understand why since we have "broad form" in there "ultimate issues" needs to be there. Can you explain that again?

MR. HUNT: I don't know that I can, except that I was trying to be faithful to the command to go back and look at elements or issues because we have dealt with it in the

charge.

MR. ORSINGER: Can I comment on that, Luke?

MR. HUNT: If we just want to make it broad form on all independent grounds of defense or recovery, it's satisfactory with me. It may be clearer.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: The word "ultimate issue" in this context exists in the case law as a way to differentiate requests that are purely evidentiary from ones that are ultimate. And someone will say, "Well, I want you to make a finding on a certain point" and that point may be preliminary to the ultimate issues and it may be important to know what the answer was, but you're not entitled to evidentiary points, and so the cases say you are entitled to findings on ultimate issues.

Now, in divorce cases this is a particular problem because some courts of appeals have ruled that the value of property is not an ultimate issue, that it's just evidentiary, and therefore, you are not

entitled to findings on value. The El Paso Court of Appeals says, "How can you appeal a divorce case and show an abuse of discretion if you can't prove what the value of the assets were that the husband got and what the wife got?" So they say you are entitled to it, and I am troubled by this constantly. In fact, just two days ago I sent a letter to the Family Law Counsel Legislative Committee asking that they adopt a statute that would require the judges in divorces to find values on significant assets, but I think the reason "ultimate issue" is in there is because of this idea that we don't want a multiplicity of evidentiary findings, may be 50 of them or 25 of them, when they all really boil down to whether there is liability or not.

HONORABLE DAVID PEEPLES: My question is with the word "broad form" employed here doesn't that mean ultimate issues and not evidentiary findings?

CHAIRMAN SOULES: Or does it mean broader than -- what I'm trying to get at is, is "ultimate issues" too narrow? If we struck out -- for example, this, Richard, if

we struck out the words "the ultimate issues of" and it just read, "The judge shall, whenever feasible, state the findings of fact in broad form on all independent grounds of recovery or defense raised by the pleadings and evidence."

MR. ORSINGER: Well, let me say that I would like that if that means that you are entitled to a finding every time you are entitled to a jury question. Like in a divorce case some jury questions are advisory only, and they are not required to submit them. Some are binding, and they are required to submit them. Evidentiary -- I mean, valuation questions are binding and you are bound to submit them, and if this rule is written so that every time I'm entitled to a jury question I'm entitled to a finding, then all of my problems are cured and probably everybody's problems are cured.

So if what you say is broad form, maybe if you could add a word consistent with Rule 278 or something to make us piggyback on the existing procedure in jury questions then to me that cures all of the problems.

CHAIRMAN SOULES: Buddy.

MR. LOW: But would it cure them, Richard, in a personal injury case? Does the judge have to say, "I find so much for pain and suffering and so much for this," or does he just have to say "damages X dollars"? In your case does he have to find that the 2 million-dollar ranch house is worth X in that, or does he just have to find total value?

See, in a personal injury case I'm not sure whether the trial judge -- does he have to make findings on each element of damage, or can he just say, "Damage is X dollars"?

MR. ORSINGER: Well, under the statute that exists now you definitely have to make findings, because your punitive damage caps are based on economic injury and whatnot, so we are forced to break some of those out, and then in some of them prejudgment interest is calculated differently.

MR. LOW: I understand, but not every one is an exemplary damage case, not every one is a -- I mean, you can have just a

plain automobile case, just ordinary negligence. Does the judge have to make findings? And I don't know. I'm asking because I don't know. Does he have to make findings? And I ask for pain and suffering, lost wages, and -- not enjoyment of life, but what do the plaintiffs lawyers call it? And can he just get by with just total damages? I don't know.

MR. ORSINGER: Well, but it seems to me that if we treat nonjury findings the same as jury findings, that eliminates a lot of the trouble we have with nonjury findings, and the question you just asked would apply to both nonjury finding and jury findings.

MR. LOW: Right. That's what I'm saying. Quite often they will submit not each element. They will say, "You may consider the following elements and none others, zap-zap-zap-zap, X dollars." All right.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN:

Actually, I think there is sort of a conflict. As I remember the Supreme Court's opinion in Westgate, they reversed the entire jury award because they couldn't tell how it was segregated and what was proper and what was improper. And I may be getting these wrong, but I think there is sort of a conflict in discussion going on. I believe the 4th Court last week or last month sometime affirmed an award because there was some evidence to support one element of damages, so it's all okay.

MR. LOW: See, that's what the problem you get into when you have broad issues. You know, you say, "You may consider this act or that," and then what if there is not evidence of that, but I'm saying in a lot of personal injury cases we don't submit how much for pain and suffering, how much for that. So you consider the following elements and none other and just add dollars.

And if Richard goes to that where he said he wants to know how much the ranch is worth, how much a Xerox copier is worth, and all of that, and you wouldn't get it if you follow

what we do sometimes in personal injury cases.

CHAIRMAN SOULES: Let me try something else here. This is more conceptual than real. We say, "The judge shall, whenever feasible, state the findings of fact on all independent grounds of recovery or defense raised by the pleadings and evidence in broad form in the same manner as questions are submitted to the jury in a jury trial."

PROFESSOR DORSANEO: Mr. Chairman, I think that approach is preferable to the use of the words that have caused us difficulty in the past.

CHAIRMAN SOULES: Such as "issues"?

PROFESSOR DORSANEO: Such as "issues," such as "independent."

MR. ORSINGER: Well, you don't even need to say "broad form" if you are going to say "in the manner you would submit it to a jury" because that refers you back to rule two seventy-seven and eight, and they tell you "broad form" anyway, don't they?

CHAIRMAN SOULES: Yeah, but I think we need to say "broad form."

MR. ORSINGER: You have got to repeat that here?

CHAIRMAN SOULES: Right.

MR. ORSINGER: Okay.

HONORABLE DAVID PEEPLES: When you are trying to eradicate an intrinsic practice you bludgeon it with black letter law.

PROFESSOR DORSANEO: There are two tactics used in bench trials to make it hard on the appellant. One is to make a zillion little findings and the other is to make great, huge, opaque findings and I think that your sentence deals with that as well as anything can.

MR. HUNT: Say it once more, Luke.

CHAIRMAN SOULES: Okay, Don. Let me just give you words where they go, and I will read it in its entirety. "(C), Form. The judge shall, whenever feasible, state the findings of fact," and we are going to move "in broad form."

MR. ORSINGER: You better move "whenever feasible," too, because the duty to

give findings is not based on feasibility. It's the broad form that's based on feasibility.

"The judge shall, whenever feasible, state the findings of fact in broad form" could mean that "whenever feasible" has to do with your right to get findings at all. I would move, "The judge shall state the findings of fact, whenever feasible," or "whenever feasible in broad form." Do you see what I'm saying?

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

PROFESSOR DORSANEO: And, of course, it's always feasible, so one wonders whether that's necessary here or in Rule 277.

CHAIRMAN SOULES: Okay. So we are going to move "whenever feasible," too. So it will say, "The judge shall" -- we are going to move "whenever feasible" -- "state the findings of fact." We are going to move "in broad form."

We are going to strike -- no. We are going to leave "on" there. Strike "the ultimate issues of," pick up "all independent

grounds of recovery or defense raised by the pleadings and evidence."

After "evidence" we will say "in broad form, whenever feasible, in the same manner as questions are submitted to the jury in a jury trial."

MR. McMAINS: Do you mean same manner or same form?

CHAIRMAN SOULES: I don't know. That puzzles me, too, exactly what the words are. I am just trying to get a concept out now, Rusty, and I have struggled with "manner," "form," what.

MR. McMAINS: Well, my problem with "manner" is it means that you have got to make requests, specifically -- this is the judge.

MR. LOW: But if you do "form" then does the judge has to fill out a jury verdict.

CHAIRMAN SOULES: So it says, "The judge shall state the findings of fact on all independent grounds of recovery or defense raised by the pleadings and the evidence in broad form, whenever feasible, in the same

manner as questions are submitted to the jury in a jury trial." And then after that anybody can suggest language that is more appropriate.

PROFESSOR DORSANEO: Do you need the word "independent"? "Independent" was a word that caused trouble in Island Recreations. The idea was it's kind of an independent thing, an independent matter, so it needs an independent question.

CHAIRMAN SOULES: So you think we ought to take out "independent"?

PROFESSOR DORSANEO: I don't think it adds anything. I think if the findings fairly address all of the claims and defenses, I don't think they need to be numbered independently.

CHAIRMAN SOULES: Well, I don't have a problem with taking out "independent." It would then read, "The judge shall state the findings of fact on all grounds of recovery or defense raised by the pleadings and the evidence in broad form, whenever feasible, in the same manner as questions are submitted to the jury in a jury trial."

PROFESSOR DORSANEO: In the

same manner, what you are really talking about is degree of detail. I think "in the same manner" covers that.

HONORABLE SARAH DUNCAN: If you just substitute "just" instead of "or in the same manner" doesn't it get you to the same place? "In broad form, whenever feasible, just as questions are submitted in a jury trial."

CHAIRMAN SOULES: All right. Just take out "in the same manner."

HONORABLE SARAH DUNCAN: Right.

CHAIRMAN SOULES: "Whenever feasible as questions are submitted to the jury in a jury trial."

HONORABLE SARAH DUNCAN: I thought the "just" just kind of provided a little better transition from --

MR. LOW: But you are wanting the judge to address the same things that would have been raised but not necessarily in the form where the judge has to fill out a verdict or in the manner, but you are asking him to address those things that would have been addressed in a jury verdict.

HONORABLE SARAH DUNCAN: Uh-huh.

CHAIRMAN SOULES: More discussion?

MR. ORSINGER: I think that this is desirable to make the finding practice parallel to the jury question practice because really the role of the judge as a fact-finder is identical to the role of the jury as a fact-finder and we want the appellate court to know what the answer to the essential questions are, but we don't need to know any more about it from the judge than we do from the jury. So I like this idea that the degree of specificity that's required is the same whether it's jury or nonjury.

CHAIRMAN SOULES: Sarah says to use "just." Bill seems comfortable with "in the same manner." Rusty is concerned about "in the same manner." I don't think it's particularly artful either, if there is better words to use, and I am open to --

PROFESSOR DORSANEO: You could say "detail" instead of "manner."

"Manner" is fine.

HONORABLE C. A. GUITTARD: You don't have to say either one. "In broad form as questions are submitted to a jury in the jury case."

CHAIRMAN SOULES: And there is another approach. I'm trying to kind of scan the jury rules here to see if there is any other word that pops out.

Okay. Leave it like I said. I'm going to read it. If anybody wants to propose an amendment, do it. "The judge shall state the findings of fact on all grounds of recovery or defense raised by the pleadings and evidence in broad form, whenever feasible, in the same manner as questions are submitted to the jury in a jury trial."

Any proposed amendment to that? Those in favor show by hands. Eleven.

Those opposed? No opposition. Eleven to zero that passes. And then the second sentence, "The judge should or may" --

MR. HUNT: "Should" is put in for the reason that it is at least a suggestive kind of thing that the trial judge should be instructed to do it, but the failure

to do it doesn't mean much; or what is really correct is that when the judge makes a conclusion that's just incorrect or wrong, it doesn't matter. And the language I think is critical, but the failure to do so shall not be error is what conforms it to the present law.

CHAIRMAN SOULES: Okay. Any opposition to the second sentence as written? Okay. Any other comment? Richard.

MR. ORSINGER: I would comment that this is really an invitation for judges not to do conclusions and I don't particularly consider that to be harmful because I don't think they contribute anyway and perhaps an argument could be made that we should eliminate the practice altogether, but I certainly don't mind saying that you can give conclusions if you want, and I don't think this changes the law at all.

CHAIRMAN SOULES: Any other discussion? Those in favor -- oh, Chip Babcock.

MR. BABCOCK: On that point I have seen instances where the judge's making a

conclusion has been helpful on appeal because the judge has viewed a case, particularly in the injunction setting, because of an interpretation of a Supreme Court or appellate court ruling, and that influences the whole rest of the deal. So I think there are circumstances where it could be helpful.

MR. ORSINGER: Well, it does as a practical matter, but then the appellate court, if you look at the opinion, they will say, "Well, we don't care if the judge made the decision on the wrong basis, if using the judge's findings we use the correct law and we get to the same result, we are going to affirm."

So that's why I say as a practical matter it doesn't much matter what's in the conclusions other than that it helps to show the thinking of the trial court, but even if it's completely 100 percent stipulated wrong, if the findings will still support the judgment, you are going to get affirmed anyway.

MR. LOW: But it gives a better road map. What if you have like a waiver and

the judge says, "Okay, all of these facts, but I don't find for you on waiver, but I find that" -- at least it tells the appellate court -- I think the appellate court can put the puzzle together. They are all smart enough, but you ought to give them a little help on it.

CHAIRMAN SOULES: My problem is I never do know whether it's -- in many cases I can't tell whether it's a conclusion of law or finding of fact, so I wind up just duplicating most of them both places.

MR. ORSINGER: Then you have to do that when you are attacking it. There is at least one case where a finding was dressed up to look like a conclusion. They didn't attack the conclusion, and it was held by the appellate court that the finding was -- the finding that was dressed up like a conclusion was binding on the appellant because they didn't attack it. It's a dangerous thing, so I always attack all of the conclusions with their associated findings out of fear that there may be a finding in the form of a conclusion.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: Well, it seems to me now if we are going to have broad form findings, that's really a mixed question of law and fact anyway. I mean, Richard Orsinger was negligent and his negligence was a producing cause of Sarah's injuries.

MR. ORSINGER: It would be proximate if it was negligent.

HONORABLE SARAH DUNCAN: Proximate, excuse me. And Sarah's damages are a million and she wants her money now, but that's really a mixed question of law and fact anyway.

What would happen if we just didn't -- if we said that you just have "Findings of Fact and Conclusions of Law" as the heading. You have one through however many you have. No repetition, no duplication, and it is what it is in whosever view is looking at it.

MR. LOW: Yeah.

HONORABLE SARAH DUNCAN: Because part of the problem, too, is that you

end up with -- because people do, they repeat them and then you end up with -- you know, we have got one right now that's like 60 pages of findings and conclusions, but all the findings are duplicated as conclusions and that's what 30 pages of it is.

MR. LOW: But you are saying if one is incorporated under the wrong category you will treat it as being --

HONORABLE SARAH DUNCAN: No. I'm saying we don't have categories.

MR. LOW: Well, what I mean is if it's stated here it doesn't have to be repeated no matter where --

HONORABLE SARAH DUNCAN: What I am saying is that you only have --

MR. LOW: One.

HONORABLE SARAH DUNCAN: -- one title, "Findings and Conclusions," and you only have one list. So every finding is a conclusion, and every conclusion is a finding.

MR. LOW: Like now on request for admissions, if it's mixed things that doesn't matter, we call it admission of fact. So here it won't matter. You just put it all

under one category, and you just list it once. What's wrong with that?

CHAIRMAN SOULES: Okay. Any other discussion on this? Those in favor of sentence two, second sentence, as written.

MR. HUNT: With the elimination of "independent"?

CHAIRMAN SOULES: Pardon?

MR. HUNT: We need to eliminate the word "independent" again.

CHAIRMAN SOULES: With the elimination of "independent." With that change, those in favor show by hands. Thirteen.

Opposed? It passes by 13 to nothing.

MR. HUNT: The third sentence should be almost automatic because if we take out the word "independent," it says nothing other than these things should be in separate numbered paragraphs.

CHAIRMAN SOULES: Well, that's what -- but we need to take out a lot of language here. "Each finding of fact should be stated by a separate numbered paragraph" is all you need to say, isn't it?

Because if we are going to take out "on an ultimate issue" and "of an independent ground or defense," it gets to be "Each finding of fact and each conclusion of law should be stated by a separate numbered paragraph," and we would delete "on an ultimate issue of an independent ground or defense." That would all be taken out.

As modified, any opposition?

MR. ORSINGER: Can I make a comment?

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: Sentence one is now not parallel construction to sentence two and three because sentence two and three talk about each ground -- well, the first one talks about all grounds. The second sentence talks about each ground, and the third sentence talks about each finding and each conclusion. I guess the third sentence is okay, but why are we talking about findings on all grounds but conclusions on each ground?

CHAIRMAN SOULES: Change "each" to "all" in the second sentence? Any

opposition to that?

MR. HUNT: Let's change "all" to "each" in the first sentence.

HONORABLE SARAH DUNCAN: Yes.

CHAIRMAN SOULES: Change "all" to "each" in the first sentence.

MR. HUNT: "Each ground."

CHAIRMAN SOULES: "Each ground." Okay. Any opposition to 297? 297 passes.

MR. HUNT: Now we come to 299b. You will recall we were dealing with the issue of what happens with presumed findings, and we needed to make some kind of statement that there will be no presumed finding where an element has been omitted after there has been a request made for a finding and that request has been denied. And the same thing is true, that is, no presumed finding, where the judge exercises discretion and declines to make an additional finding on the basis that the initial findings are sufficient.

I have tried to add that language in the simplest manner possible, and if anybody sees anything wrong with it, sing out, because I

didn't intend to do anything but put in exactly what the committee said should be included.

CHAIRMAN SOULES: Do you mean in (ii) there "by any failure of a judge to make additional findings when requested to do so"?

MR. ORSINGER: Doesn't it go without saying that you don't have to make the additional findings unless the request is made for them? Or how about "make a requested additional finding"?

CHAIRMAN SOULES: Maybe. That's the only question I have. If it's adequate the way it is, so be it.

MR. ORSINGER: Well, I'm a little bit troubled by the use of the word "additional" because if the trial court -- if you make a general request and the trial court gives you no finding then you would not be requesting an additional finding. You would be reminding the judge that they made no finding and we shouldn't presume a finding and maybe this -- maybe it doesn't do this, but we obviously shouldn't presume a finding if the

judge gives no findings at all.

If the judge gives so much as one finding, then you have to come forward with a request for additional findings. So I guess it logically could never happen that you would have a deemed finding unless there was at least one finding of fact given, because otherwise -- I'm going to withdraw my sentence. I think it would be impossible for that to occur, so forget it.

MR. HUNT: Rule 298(c) now says that the refusal of the judge to make a finding requested shall be reviewable on appeal. So we would pass that language. It's in the current rules, and I don't think it could occur, either.

CHAIRMAN SOULES: Let me ask you this. Okay. What if that last sentence just said, "No finding, however, shall be presumed on an omitted element for which a finding has been requested," period? It won't make any difference whether it was denied or ignored.

MR. HUNT: Well, we talked about that at some length last time about the

necessity to deal with the situation that there has been a request and the judge will not do anything about it or the request has been expressly denied. You don't want a finding where it's been expressly denied, and that's what I'm trying to make clear because we actually used language to that effect and wanted it in and that's the reason why I had included it to -- but I think the vote of the committee last time was to include the language about requests and denial.

MR. ORSINGER: Well, clearly you shouldn't deem something found when the judge has specifically rejected a finding to that effect. So I think that that -- you know, (i) is essential; and then (ii), the failure of the judge to make additional findings, that, in fact, is what's going to normally happen. Normally the judges don't refuse to give you findings. They just let them go.

MR. HUNT: True.

MR. ORSINGER: You know, your requested additional findings are due within ten days. There is no follow-up procedure if

you don't get them. They are just not in the record.

CHAIRMAN SOULES: Let me try one other shot at this. Let's extend the preamble to say, "No finding, however, shall be presumed on an omitted element when a finding has been requested, and (1), the request has been denied, or (2), the judge failed to make additional findings" or "failed to make a finding."

MR. HUNT: I would be happy to change it. I'm not sure I see the difference.

CHAIRMAN SOULES: I'm just trying to get the requested part clearly into the second piece of it.

MR. HUNT: Well, if you want to do that, just add the word "to make a requested additional finding."

MR. ORSINGER: And it ought to be -- it shouldn't be "any additional finding." It ought to be "that additional finding," shouldn't it?

MR. HUNT: Yeah. (A), to make -- "By a failure of the judge to make a requested additional finding."

MR. ORSINGER: Well, no. It ought to be "the additional finding" because -- well, I don't --

CHAIRMAN SOULES: I think it's important to communicate that we are talking about two things here, denial and failure to make. I will buy what you have said there on that and to say so. So if we say, "No finding, however, shall be presumed on an omitted element for which a finding has been requested, and (2), the request has been denied," or "(2), the judge failed" -- aren't we going to say "the finding has been denied"? That's what we are really talking about, isn't it? Not the request but the finding? "The finding has been denied or the judge failed to make the finding."

MR. ORSINGER: Well, not necessarily the finding is denied, Luke. If you -- my practice is to request a finding. I don't propose that the judge agree to my finding. I just request that the judge make a finding on this point. If you say that the finding is denied, you're kind of implying that --

CHAIRMAN SOULES: Okay.

MR. ORSINGER: -- I have typed up a sample finding and I submitted it and they rejected it.

And I think it can be an open-ended process of you give me a finding on this question and I am not going to put the words in your mouth. In that event it's the request that's denied, not the finding that's denied.

CHAIRMAN SOULES: Okay. So, "No finding, however, shall be presumed on an omitted element for which a finding has been requested and, (1), the request has been denied, or (2), the judge failed to make the finding"?

MR. ORSINGER: I would say "the requested finding."

PROFESSOR DORSANEO: Yes.

MR. ORSINGER: The judge failed to make the requested finding.

PROFESSOR DORSANEO: Rather than "additional." "Additional" is too narrow.

CHAIRMAN SOULES: Well, why wouldn't it be instead of "the request has

been denied," be the "requested finding has been denied"?

MR. ORSINGER: Well, it might have been denied or they might have let it go unanswered. There is only three things that can happen. They either give you the finding you want; they say, "I'm not going to give you the finding that you want"; or they don't do anything and the record doesn't reflect anything.

CHAIRMAN SOULES: I guess I'm going back to that discussion just a moment ago about whether it should be finding or request in (i)(1), but shouldn't that say, "The requested finding has been denied, or (2), the judge failed to make the requested finding"?

MR. HAMILTON: What's the difference?

MR. ORSINGER: I think that that's close enough that no one will misunderstand it --

CHAIRMAN SOULES: Okay.

MR. ORSINGER: -- but to me there is a distinction. To deny a requested

finding is to imply that someone has set a finding out and asked for it to be approved. To deny a request for a finding is to say someone has asked me as a judge to render a finding and I have refused to do that, but I don't think anyone will misunderstand it whichever way we write it, so I don't really have a position.

CHAIRMAN SOULES: Well, if you are going to cover the situation where the judge fails to do anything, you are going to have to submit requested findings.

MR. ORSINGER: That's true.

CHAIRMAN SOULES: And you don't know whether the judge is going to deny it or fail to act, so you are going to have to make requested findings or (2) won't work ever.

MR. ORSINGER: You are going to have to request additional findings, but you don't have to propose what the findings will be. That's my view and maybe I am wrong, but I have never been burned by it.

CHAIRMAN SOULES: Okay. The last three words in the sentence that as now composed is "the requested finding." That

means there has to be a proposed requested finding before the judge.

MR. ORSINGER: I agree.

CHAIRMAN SOULES: If that's going to work.

MR. ORSINGER: Maybe we ought to say, "The court has failed to act on the request."

CHAIRMAN SOULES: That's all fine with me. I'm just trying to get --

MR. ORSINGER: I see your point.

CHAIRMAN SOULES: -- what we are trying to get at.

MR. ORSINGER: I see your point.

CHAIRMAN SOULES: I don't know which is better. Which should it be? Anybody have a suggestion? Hatchell, you haven't talked all day. Help us out.

MR. HATCHELL: What's the issue? I'm lost. I can't hear you.

MR. HAMILTON: What's the way you have it written last?

CHAIRMAN SOULES: "No finding,

however, shall be presumed on an omitted element for which a finding has been requested and, (1), the request has been denied, or (2), the judge failed to make the requested finding," and that has problems. It seems to me like if we are going to get -- if we are going to avoid a presumed finding, we ought to tell the judge what finding we want.

MR. ORSINGER: I hope you don't suggest that that's what the rule is because then we are going to get trapped in a bunch of stuff like, well, they didn't request it in exactly the right way, and the judge was justified in denying it.

CHAIRMAN SOULES: Yeah.

MR. ORSINGER: I think it's just a lot better to just ask the court, "You know what your thinking was. Tell us."

CHAIRMAN SOULES: So you're saying to leave it "the request has been denied, or (2), the judge failed to act on the request." What about that?

MR. ORSINGER: I like it.

PROFESSOR CARLSON: Yeah.

CHAIRMAN SOULES: Nobody cares?

HONORABLE C. A. GUITTARD: Luke, why don't we just say, "The judge fails to make a finding on the requested element"?

MR. ORSINGER: How about "failed or refused to make a finding"?

HONORABLE C. A. GUITTARD: Okay.

MR. HUNT: "Refused" doesn't add anything. It's still a failure. It's the failure that we are dealing with.

MR. ORSINGER: Okay.

MR. HUNT: Let me try this on for size. I think I have tried to write everything down that everyone has said to make the last sentence read, "No finding, however, shall be presumed on an omitted element for which a finding has been requested and, (i), the requested finding has been denied, or (ii), the judge has failed to make a requested finding."

CHAIRMAN SOULES: All right. That brings us right to focus of the debate that we have got going right now because Richard doesn't want to use "the requested finding" for fear that that's going to get

into appellate scrutiny that says, "Well, the judge didn't have to make that requested finding because it was not precise." It's not precisely what the law is. It's not in substantially correct form.

MR. HUNT: Yes, but there is nothing in the rules now or as proposed that requires a person requesting that the court state findings of fact give the judge the proposed findings. There is something in the law that says the counsel should give a requested question and instruction. That's the difference right there, that all you say is "Please state the findings and conclusions," and that's what you are really talking about on requested findings.

Now, if you want to come back and you haven't got enough, you may in order to properly preserve error on additional findings spell out, "Judge, please state a finding on proximate causation," but once you have made that, it's either approved or not approved, denied or nothing happens, but either way there is a failure of the judge to find if the judge takes no action.

CHAIRMAN SOULES: Okay. I think the difference, as I'm perceiving it, between what you are saying and what Richard's saying is that you think asking the judge to -- you say, "I request a finding on the element of proximate causation," asks the judge to make a finding that we can call "the finding."

Richard feels like asking the judge to make a finding on proximate causation doesn't give him the finding you are asking him to make and that using the words "the finding" here makes it incumbent upon the lawyer to actually put to the judge the finding you want him to make, as opposed to the request. I don't know.

MR. ORSINGER: Don's proposed language was to make "a finding."

CHAIRMAN SOULES: I thought he said "the."

MR. ORSINGER: No. I think you said "a finding," didn't you?

MR. HUNT: "A."

MR. ORSINGER: And so that would mean that the door would still be open

to ask for a finding and you didn't get a finding, not meaning the one you specifically requested.

MR. HUNT: Yeah. All --

CHAIRMAN SOULES: What's your words after little (i)? Is it "a requested finding has been denied"?

MR. HUNT: I left that "the." "The requested finding has been denied," or we can make it "a requested finding has been denied, or (ii), the judge has failed to make a requested finding."

HONORABLE C. A. GUITTARD: I'm inclined to agree with Richard that you ought not to require the lawyer to make a specific request for a -- a request for a specifically phrased finding. You ought to just require him to make a finding on the element, on the omitted element, so that the double (ii) should read "or the judge failed to make a finding on the omitted element."

CHAIRMAN SOULES: All right. That probably works.

MR. ORSINGER: And you could change the first one to "The judge refuses to

make a finding or" --

MR. HAMILTON: How about just saying, "If the judge upon request is given an opportunity to make a finding on such element"?

MR. ORSINGER: Why does it matter if he refused to do it by order or if he just failed to do it through inattention? Can we just say that it shouldn't be presumed on an omitted element that has been requested where the court made no finding on the requested element, or Judge Guittard's language? Do we need to -- do we need to care whether he did it explicitly or implicitly?

MS. GARDNER: I have never seen a case where the judge did anything in writing that indicated he was expressly denying or refusing requested or additional findings of fact and conclusions of law. I'm wondering if by putting in language about requests at all or refusals or denials we are going to create a question about whether there is a requirement now that we get a refusal in writing of a request, as in a jury finding request.

MR. ORSINGER: Well, I am sympathetic with that concern because it's a little unclear right now whether you have to file a bill of exception to show that you never got your additional findings or not. You know, it used to be that you absolutely were required to do that, and then the Supreme Court handed down a case where they permitted a lawyer's uncontested assertion in a brief to be evidence that it was not done.

And so most nonjury appellate practitioners now are not bothering with the formal bill on the failure to give and everyone just assumes that if they had been given the appellant wouldn't be saying that they weren't or else the appellee would be saying that they were and "Here's a copy," and I wouldn't want to reopen that. Do we need to distinguish whether there is a formal refusal, which I think almost never occurs -- like Anne, I have rarely seen it -- and the one that just fails to do it? All we care about is that there isn't one in the record.

PROFESSOR CARLSON: The court declines it.

MR. ORSINGER: What?

PROFESSOR CARLSON: When the court declines it.

MR. ORSINGER: So why do we -- why make the distinction? Why don't we just say, "You will not deem it where it's been requested and the court hasn't given it"?

CHAIRMAN SOULES: So, "No finding, however, shall be presumed on an omitted element for which a finding has been requested"?

MR. ORSINGER: "And no such finding given" or "no finding given."

CHAIRMAN SOULES: "And not made by the judge"?

MR. ORSINGER: Yeah. To me that gets it.

MR. HUNT: Do we even need (i) and (ii)? Do we need to deal with this request for additional findings? Maybe that's back to where you started, Luke.

CHAIRMAN SOULES: Well, I mean, if the judge makes a finding then we don't have the omitted element anymore, so why not have -- can we just stop if we say, "No

finding, however, shall be presumed on an omitted element for which a finding has been requested," period?

MR. ORSINGER: "And none given."

CHAIRMAN SOULES: Well, if it was given then it's no longer omitted.

MR. ORSINGER: Oh, I see. You don't need to say that because otherwise you wouldn't even be reading this.

CHAIRMAN SOULES: Yeah.

MR. ORSINGER: Okay. I see what you're saying.

CHAIRMAN SOULES: Kind of like you can't deem a finding on an element of a jury case if there has been a requested question or instruction. All you have got to do is request and that stops the presumption.

MR. ORSINGER: Well, that's right. We don't need the rest of that sentence at all, do we? Because you won't even be reading this sentence if he gives you a finding, and if he hasn't given you a finding, we don't care whether he did it explicitly or implicitly.

CHAIRMAN SOULES: What do you think, Don?

MR. HUNT: I agree.

CHAIRMAN SOULES: Okay. So where we are now is the last sentence of 299b, "No finding, however, shall be presumed on an omitted element for which a finding has been requested."

MR. ORSINGER: Do you want to use the word "properly" or is that unnecessary? Because there are timetables here.

CHAIRMAN SOULES: I didn't -- I'm sorry. I didn't get the word.

MR. ORSINGER: I said do you want to use the word "properly requested" because there are timetables that if you miss your request is no longer proper?

MR. HUNT: How about "timely"?

MR. ORSINGER: "Timely"?

CHAIRMAN SOULES: "When timely requested"?

PROFESSOR DORSANEO: Why is that necessary? We are talking about --

MR. ORSINGER: It's not

necessary?

PROFESSOR DORSANEO: -- when we are not going to presume. Why would we presume that there was a finding with respect to an untimely request?

CHAIRMAN SOULES: I don't think it's necessary. Everything has got to be done timely or we have a lot of timely's in here, if we put that in place.

PROFESSOR DORSANEO: Frankly, on this presumed finding business the situation under the case law wouldn't sensibly be that you could presume any particular finding from a failure to find a request on an issue as distinguished from a specific request for a particular finding. I mean, what in the world would you presume? If you ask the judge to find on the issue of causation and the judge made no finding, causation or no causation, or whatever you like.

CHAIRMAN SOULES: New trial.

MR. ORSINGER: Is it a new trial or a reverse and render? If you failed to get enough findings to support your claim, have you waived your claim?

CHAIRMAN SOULES: In the old days most charge defects went back for new trial, but that's now worrisome.

Okay. "No filing, however, shall be presumed on an element for which a finding has been requested." Those in favor of 299 show by hands.

MR. HATCHELL: Whoa-whoa-whoa-whoa.

CHAIRMAN SOULES: Mike. Hey, he woke up. The bear woke up.

MR. HATCHELL: Look in the second line where we talk about -- where we get to omitted elements. We talk about an omitted unrequested element, and that's what starts all the problems. Well, my problem is that when I read these rules and I -- you know, I see I have got to make a request, and I read the duties of the judge to find on everything when somebody makes the request.

How can there ever be an omitted unrequested element? He wouldn't have made findings at all if he hadn't been requested, and my request is -- the initial request is that he find everything. So --

MR. McMAINS: Yeah. It's just a request for findings in general.

MR. ORSINGER: That's true. That's a good point.

PROFESSOR CARLSON: Especially with broad form.

MR. HATCHELL: So, Luke, it at least should read "an omitted element," and then certainly I think in the last phrase it shouldn't talk about just "unrequested," I mean, an unrequested finding on an omitted element.

CHAIRMAN SOULES: Okay. Mike, start with (b), presumed findings. When, what? What do you want to change?

MR. HATCHELL: I would just take out the word "unrequested."

CHAIRMAN SOULES: Okay. "Unrequested" at the end of the second line?

MR. HATCHELL: Yeah.

CHAIRMAN SOULES: And I guess elements --

MR. HATCHELL: I can take your language on the other, but I just want to make sure that request, that you are talking about

to protect against a deemed finding is a request on an omitted element.

CHAIRMAN SOULES: Okay. And then "elements" is plural, first word in the second line. I think that's wrong.

MR. ORSINGER: Well, there is a strike over there, but you can't see it because it's in the middle of the S that has a curve that's almost horizontal.

CHAIRMAN SOULES: Okay. So we are going to take out "unrequested" in the second line. Otherwise, as modified, those in favor of 299 -- oh, I'm sorry. Anne Gardner.

MS. GARDNER: Well, Luke, I am really confused. Have we adopted or approved a rule that's going to require us to make initial requests for specific findings?

MR. ORSINGER: No.

MS. GARDNER: I mean, right now the initial request for findings is just a request for findings and conclusions, period. We don't request any -- or at least I don't request anything specific if we are the losing party, and the prevailing party, you generally ask the judge to prepare the findings and

conclusions, and they are not filed. They are sent to the judge and then he signs them and files them, but are we now going to be filing our proposed -- proposed findings and conclusions, each side does that like in the jury trial, as I guess was the suggestion up here in the grid? Or I mean, where are we going to get requested findings, unless it's going to be like I think I overheard Rusty McMains say, in the request for additional findings? That's the first time I know of that specific requested findings are actually made and filed by a party. Am I off base here?

CHAIRMAN SOULES: No. I think that's a good question.

MR. ORSINGER: Well, I can respond to that, Luke, and this may or may not satisfy you, Anne, but you don't get to the last sentence of (b) unless you already have your first set of findings because you don't have a deemed finding unless you have at least one set of partial findings. And so, to me, that last sentence can only apply to a request for an additional finding because otherwise

there wouldn't be a threat of deemed findings.

So if what we have is we have a broad request and no findings are filed at all then we have a complaint, if properly preserved, that no findings at all were given; but if we have just one finding, even if it's just the plaintiff's name, then somebody has a duty to request additional findings. So, to me, we don't have that risk that you have because you don't get to the last sentence unless you already have your first set of findings, but then again, I don't know if that allays your concern completely.

MS. GARDNER: Well, I understand your explanation, but I'm afraid that if I were reading this as a lawyer in the general population of lawyers in a rule book that I would not understand that and that I would think that a burden was now on me to additionally request findings somehow. It's just confusing unless you put --

MR. ORSINGER: "An additional finding has been requested."

MS. GARDNER: -- something in there to say that you are talking about

additional findings. It's just kind of quirky.

MR. ORSINGER: You could eliminate her problem by changing the last phrase to say "for which an additional finding has been requested." Isn't that right?

MS. GARDNER: Yeah. I think so.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Well, under either of those scenarios, though, it still doesn't deal with another situation, which is what do you do with an omitted ground unlike our -- a ground of defense or recovery, unlike our jury practice.

Specifically, let's suppose that a judge makes a finding of negligence or proximate cause damages and awards damages. There is a pleading of contributory negligence and no finding.

MR. ORSINGER: You have waived it. The plaintiff has waived it. I mean, the defendant has waived it. Pardon me.

MR. McMAINS: Well, the defendant can do it on the initial -- you say

that, but where is that true?

MR. ORSINGER: Well, the case law says that if you don't get saved by this deemed finding rule then if you don't get the finding, you can't rely on it.

MR. McMAINS: But except that Rule 299, which we ain't changing, which is only omitted findings -- I mean, the part that is the ellipsis is what's not clear by these statements. The current Rule 299 is what is represented by the ellipsis, I take it. Right, Don?

MR. HUNT: Right. Correct.

MR. McMAINS: This first one. And it says, "Shall form the basis upon the judgment upon which all grounds of recovery and of defense embraced therein. The judgment may not be supported upon appeal by a presumed finding upon any ground of recovery of defense, no element of which has been included in the findings of fact; but when one or more elements have been omitted unrequested elements when supported by evidence will be supplied by presumption in support of the judgment."

Now, the question is, is contrib an element of the primary negligence finding?

MR. ORSINGER: Well, that's the question of this "element found to which it is necessarily referable." If you have a finding of the defendant's negligence is the --

MR. McMAINS: You don't have a finding, defendent's negligence. It's not there.

MR. ORSINGER: I thought you said you didn't have a finding on contributory negligence.

MR. McMAINS: Yeah.

MR. ORSINGER: That's the plaintiff's negligence.

MR. McMAINS: You have got a finding --

MR. ORSINGER: So you have got a finding on the defendant's negligence, so the question you are asking, isn't it as to whether contributory negligence is an element necessarily referable to the defendant's negligence? Isn't that the question you are asking?

MR. McMAINS: Or the negligence

claim. I mean, it's a defense, not a ground of recovery. I mean, it's not an element of the ground of recovery. I mean, you are not shifting the burden to the plaintiff to disprove, so it's not really an element. I mean, in the jury practice, if we are trying to analogize this to the jury practice, the place you do fix that is you deal specifically with the notion of waived grounds; and I am not sure that our current Rule 299 deals specifically with the waived grounds unless -- I mean, and if we are dealing with it, we ought to tell everybody that the additional findings really do mean something because that's where you notice that he didn't make a finding on a defense that you had and you better put that in there.

MR. ORSINGER: Well, I think that's definitely the law, Rusty, because that happens in cases all the time. When I am preparing findings sometimes I will omit a defensive issue or an opposing party's issue, and the burden is on them to request them or they have waived them.

CHAIRMAN SOULES: Rusty, why

isn't that covered by 299 where it says, "The judgment may not be supported upon appeal by a presumed finding upon any ground of recovery or defense, no element of which has been included in the findings of fact"? So we have got no element of contrib, the plaintiff's negligence found.

MR. McMAINS: That says, "A judgment may not be supported." It does not say, "A judgment may not be attacked."

PROFESSOR DORSANEO: That language is modified anyway, isn't it, Don? I mean, the trouble I'm having is that I don't remember what paragraph (a) of revised Rule 299 says and I don't think it says the same thing as current Rule 299 and I think this whole discussion is artfully infected by these ellipses here in this draft because people are only reading part of the story and they feel that there is something missing.

MR. McMAINS: There is. That's what the ellipsis is there for. It's like an omitted element. We have findings of fact in the ellipsis.

MR. HUNT: In answer to Bill's

question, the only changes made in the first sentence of Rule 299 had to do with "court" to "judge" and then we struck "embraced therein." It's the same as it is now. So there is very little in the way of changes that you made when you drafted it, Bill, and put the first sentence in (a). We didn't change much, and it's still the same. (A) deals with omitted grounds. (B) deals with presumed findings.

PROFESSOR DORSANEO: So it at least has a title, "Omitted Grounds," and it does say or suggest very strongly that they are waived, right?

MR. HUNT: Correct. Now, 298(c) contains that language that "refusal of a judge to make a finding requested shall be reviewable on appeal."

CHAIRMAN SOULES: May I propose that we have an additional first sentence or -- and maybe this would be a (c) and what I'm talking about would be a (b), that says "waived grounds" and we just use the first sentence of 279, "Upon appeal all independent grounds of recovery or defense" -- I don't know whether you want to use "independent."

"Upon appeal all grounds of recovery or defense not conclusively established under the evidence and no element of which has been submitted or requested are waived."

MR. McMAINS: "No element of which has been requested or found."

CHAIRMAN SOULES: Yeah. It would have to be modified to fit this process. Then you have got parallel -- really parallel to the jury charge practice.

PROFESSOR DORSANEO: The one little, tiny problem that remains -- although I think that's a good idea -- in relation to the bench trial practice and the jury trial practice is that there really is a split of authority on whether the judge is supposed to make a finding on something that's established one way or the other conclusively. You wouldn't have the jury doing that because, in fact, the judge does that part of the job in a jury case.

It makes better sense to have the findings on issues, one way or the other, not depend upon whether something is conclusively established or not established at all because

the judge is doing the job of the jury as well as the job of the judge in dealing with the elements of claims and defenses, and I think there is some question about whether there is a duty to make a finding under the case law, whether there is a duty to make a finding on something that's established conclusively or not, but I think the overview was that you have the judge supposed to make findings on everything so he could see the entire picture from the standpoint of the findings.

CHAIRMAN SOULES: Okay. Modify my suggestion and say -- this would be (b).

PROFESSOR DORSANEO: Well, I guess what I would be saying is that I would take out the "not conclusively established."

CHAIRMAN SOULES: That's what I was going to do.

PROFESSOR DORSANEO: Yeah.

CHAIRMAN SOULES: So the first sentence of 279, we would transpose that into a paragraph (b) under 299 and say, "Upon appeal all grounds of recovery or defense for which" -- or "no element of which was found by the judge or requested are waived." So we

would take out that part.

MR. HUNT: Are you saying put that in (b) or have it (c)?

CHAIRMAN SOULES: Well, I think the omitted grounds ought to be (b) and presumed findings ought to be (c), but I am not trying to architect this thing. Does that respond to your problem, Rusty?

MR. McMAINS: Well, partly. I mean, my concern there was let's suppose that somebody does stipulate to something and because you have a stipulation nobody thinks to put it in the findings. Under that structure of the rule then that stipulation has been waived, which is -- I mean, right now, I think with conclusions, I mean, that's really the function, to conclusively establish things or actually should be, in essence, what are conclusions of law now. You can try cases frequently on agreed facts and/or stipulated facts, which many nonjury trials are more directed in that order anyway. There may well be disputes as to what the legal effect of particular things are, and that's what the essence of the case is tried on. It's not

exactly parallel to the jury trial.

CHAIRMAN SOULES: Okay. What do we do?

MR. HAMILTON: Put the "not conclusively established" back in.

CHAIRMAN SOULES: Carl says put the "not conclusively established" back in.

PROFESSOR DORSANEO: In terms of what we do, I think we are messing with it too much, and actually, I think that whatever the first part is that's covered by this ellipse, if it says "omitted grounds" maybe it should say "waived grounds" by way of a heading, but it's kind of awkward the beginning of Rule 299 that we have now may not be something that we can improve on without creating additional difficulties.

Maybe we should just stick with it. It does clearly mean that if the ground is omitted from the findings then it's out of -- you know, out of the case, and frankly, now I'm dissatisfied with my own comments about something being conclusively established by the evidence or not, and I'd be willing to continue to live with the confusion that I

have about it because something more would have to be said if you do that.

And, my goodness, maybe that is a problem in the part that we just voted affirmatively on by making the practice be parallel to jury cases because if it's completely parallel to the jury case there wouldn't be a submission of something that's conclusively established by the evidence, but maybe that was just about detail or form rather than the evidence. So I'm thinking we are not making a lot of progress by going back and working on these things that are things that we have dealt with a couple of times before already.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: So I think that means that your proposed language would be okay then at that end of the table.

CHAIRMAN SOULES: I don't think we need anything out of 279 without -- with the first part of 299, which says a judgment may not -- we are talking about supporting a judgment with presumed or deemed findings. 299 says, "The judgment may not be supported upon appeal by a presumed finding upon any

ground of recovery or defense, no element of which has been included in the findings of fact."

MR. McMAINS: And what I am saying is if you just take that for a minute, take the very simplest automobile accident case in which there is primary negligence down, proximate cause, damages awarded, and a judgment rendered, and that's it. And there is contrib pled, but there is no request for additional findings on any of the contrib, and you say a judgment cannot be supported by a presumed finding of no contrib? See, that's not an element of my claim part of it.

CHAIRMAN SOULES: What?

MR. McMAINS: It's an element of defense. To say that a judgment cannot be supported by a presumed finding of no contrib, the plaintiff has just made a general request for findings. The trial judge looks at, says, "Broad form, okay, primary proximate cause damages," and it goes up on appeal. And the defendant says, "A-ha, I had a contrib issue and there is no finding on that," and you can't support that judgment on a presumed

finding.

PROFESSOR DORSANEO: Why does there need to be a finding on it if it's not in the case anymore?

MR. McMAINS: Well, except that you could then make the argument under Chapter 33 that in order to recover liability I have got to establish that he is more negligent or less negligent than I am. It's my burden.

MR. ORSINGER: But, Rusty, in that situation hasn't the defendant waived his contributory negligent claim?

MR. McMAINS: We don't have anything in here about waived grounds. We have nothing in here that talks about that. I mean, I think where that's handled now if you would say that you wanted to parallel the practice, it would be in the additional findings.

MR. ORSINGER: Their failure to make an additional finding request waives it.

MR. McMAINS: Requested. You get these findings and you say, "Wait a minute, Judge. You didn't make a finding on the issue of contributory negligence on his

defense."

MR. ORSINGER: But before the defense would impeach the judgment there would have to be a finding that the defense was valid, so if the plaintiff wins then the plaintiff is not looking to ever show that the contributory negligence defense was valid. The plaintiff would be wanting to show that the contributory defense was not valid, so the plaintiff would never need to rely on the contributory negligence defense to support the judgment.

MR. McMAINS: We have in our rules now the ability to say that you can make an attack on a judgment that is nonjury without ever having made any other complaint in the trial court. If you want to make a complaint of the failure of the trial judge to make any determination on contributory negligence, error and harmful error.

MR. ORSINGER: You can only do that if he fails to do it and then you make an additional request.

MR. McMAINS: No, you don't. No. This thing says you cannot support a

judgment with an omitted finding and what I'm saying is I'm the plaintiff. I've said, "Wait a minute. I didn't do nothing. I just asked you to make these findings." I mean, yeah, he wants to support the judgment with a presumed finding of no contrib or a waived ground, if you will. There isn't a provision for a waived ground. There isn't anything that says that that's waived. It says this is all designed to protect us against presumptions in support of the judgment.

CHAIRMAN SOULES: Here's the problem. Let me see if I can articulate it. We don't have anything here that says how the plaintiff -- how the defendant preserves error that the court did not make contrib findings when he's entitled to a contrib finding one way or the other because if it were a jury he would ask for contrib.

MR. McMAINS: It's not so much a question of preserving error, but this rule says you cannot support the judgment with a presumed finding. That's what this rule says. Even our current rule. I know that, and it says you can't support the judgment with a

presumed finding and you have a -- and I agree with the initial comment that was made by several people, I think, about the fact that when you talk about an omitted unrequested element you initially now just make a request for findings. It's the defendant. If he finds out he is going to get a judgment, he is going to make a request. He has got pleadings there. This rule does not give you a presumption in support. If that's not -- if the absence of contrib is not an element of your claim then you get no presumption.

MR. YELENOSKY: Why wouldn't you argue that it is an element of the claim in the sense that it's important to this rule?

MR. McMAINS: What I'm saying is it isn't -- in fairness and in parallel to the jury shouldn't we be saying that if it's something relating to a defense and it's omitted, that it's there because the plaintiffs may not submit it.

CHAIRMAN SOULES: Okay. We can muse about this 'til midnight three days from now. We need fixes. Somebody who is musing about this offer a way to fix the problem that

they are musing about. Don Hunt.

MR. HUNT: I move we amend what we have before us now to include a new (b) and change (c) -- change current (b) to (c), and the new (b) would be "Waived Ground or Defense. Upon appeal a ground or defense not conclusively established under the evidence, no element of which has been requested or found, is waived."

See, that folds in. We are dealing in (a) with omitted grounds or defenses. We are dealing in (b) with waived grounds or defenses and in (c) with presumed findings. It makes it parallel and covers the waterfront as far as I can tell.

PROFESSOR DORSANEO: Don, what does (a) say in your draft now?

MR. HUNT: "When findings of fact are filed with the trial judge they shall form the basis of the judgment upon which all grounds of recovery or defense. The judgment may not be supported upon appeal by a presumed finding upon any recovery" -- "ground of recovery or defense, no element of which has been included in the findings of fact."

PROFESSOR DORSANEO: So that second sentence in there that Rusty was troubled with, his judgment may not be supported on appeal, is in (a).

MR. HUNT: Right.

CHAIRMAN SOULES: Yes.

PROFESSOR DORSANEO: I don't know what that language was ever meant to mean, "judgment may not be supported upon appeal," but I don't think it's -- I don't think it helps us and I think your new (b) is trying to say the same thing as these sentences that are now in (a) better and I'm not sure we need all of what you have in (a) if we add your new (b).

MR. ORSINGER: Why don't we just take the last sentence of (a) out and replace it with (b)? Because if you waive it, obviously you can't support the judgment with a waived claim or defense.

PROFESSOR DORSANEO: Yeah.

MR. ORSINGER: So let's just take the last sentence of (a) out, and let's say you waive it if you don't get a finding on it.

MR. HUNT: That will work.

PROFESSOR DORSANEO: And I have come around to the view that it probably is better to make it more like jury practice and not require the judge to make findings on things that are conclusively established.

MR. HUNT: Mr. Chairman, I propose we amend Rule 279(a) to read as follows: Make it, "(a) Omitted grounds or Defense. When findings of fact are filed by the trial judge, they shall form the basis of the judgment upon all grounds of recovery and defense," period. "Upon appeal a ground or defense not conclusively established under the evidence, no element of which has been requested or found, is waived." Then we go to printed (b).

CHAIRMAN SOULES: Okay. Any further discussion? Steve Yelenosky.

MR. YELENOSKY: Well, this is just a comment on language and maybe a clarity on the way the printed (b) is written, so I can tell you now or I can tell you after you deal with the subsequent issues you are dealing with.

CHAIRMAN SOULES: Aren't you talking about (b) as we modified in our previous discussion, Don?

MR. HUNT: Yes.

MR. YELENOSKY: Yeah. I am talking about what we have got here.

PROFESSOR CARLSON: Which is now (c).

PROFESSOR DORSANEO: He's talking about (c).

MR. YELENOSKY: I'm sorry. Which is now (c). I'm sorry. You're right.

MR. ORSINGER: Well, but (c) just went away. Don just folded (b) into (a).

MR. YELENOSKY: Oh, okay.

MR. ORSINGER: We only have (a) and (b) now and (b) is what we have printed and amended here and (a) is what Don just read.

CHAIRMAN SOULES: Okay. Those in favor show by hands. Eight.

Those opposed? Eight to one it passes.

MR. YELENOSKY: Luke, can I --

CHAIRMAN SOULES: Don, if you will, please read to me -- read into the

record the second sentence of 299(a).

MR. HUNT: "Upon appeal, a ground or defense not conclusively established under the evidence, no element of which has been requested or found, is waived," period.

CHAIRMAN SOULES: Okay. 300.

MR. YELENOSKY: Luke, can I -- I mean, I didn't get an answer, I guess, to my question, which was -- I had a point on the language that's not substantive.

CHAIRMAN SOULES: Check with Don. If he buys it, you've sold it.

MR. YELENOSKY: Okay.

MR. HUNT: We come to Rule 300. 300(a) has been changed to add filing, as requested last time. I have arbitrarily omitted the last sentence that we had in there. That last sentence said that this (a) should apply only to Rule 300. That was the sentence originally drafted when we didn't have any final judgment rule. Now that we are trying to draft the final judgment rule we no longer need that last sentence of (a). So if there is no objection let's pass on from (a) and deal with (b).

CHAIRMAN SOULES: Any objection? There is none. Pass to (b).

MR. HUNT: What we have here is an attempt to give you the final judgment rule as it now exists from the case law. (D)(1) and (2) and alternative one of (3) represent what I understand to be the current case law. These were drafted by Judge Guittard.

Alternate two represents a different version of (3), and the important language of which is found right in the heart of it, reading as follows: "None of the orders are final until a judgment is signed that disposes of all parties and claims expressly or by implication." The distinction there is subtle, but it really reverses the current case law in the sense that when you are dealing with separate orders and no order, no single order, by its terms disposes of all parties and claims, then you don't have a final judgment until you have a judgment that disposes of all orders or claims expressly or by implication.

Judge Guittard requested that that be included simply so that we could take a final

up or down vote on it. We have discussed this at some length, and we have at least tentatively voted to go with the law as it now is, but at Judge Guittard's request alternative two has been included. And if I may, Mr. Chairman, I want him to at least announce the thinking about why it ought to be reconsidered.

CHAIRMAN SOULES: Okay. Do we need to go to (3) before we deal with (1) and (2)?

MR. HUNT: Probably.

CHAIRMAN SOULES: Okay. Judge Guittard.

HONORABLE C. A. GUITTARD: Let me give a little historical background here. As I understand it, it used to be the law that you didn't have a final judgment unless you had a document to dispose of all claims and all parties; and if you didn't have that kind of a document, you have to get one before you can appeal. Now, the Supreme Court and some of the other courts began to say that, no, you don't have to have a final -- a complete judgment if you have a series of judgments

which taken together dispose of all claims and all parties.

Now, that kind of holding came up in cases where there was a contention that the appeal ought to be dismissed because there was no final judgment that disposed by its terms of all claims and all parties. Now, there came before the Dallas Court of Appeals a case where they had the opposite situation in Runnymede against Metroplex Plaza. In that case they had one summary judgment disposing of one party, a second summary judgment disposing of the other party, which didn't refer to the first one, and then later another judgment which embodied both of the previous judgments. And the contention was made there that that bill ought to be dismissed because the second order was final and, therefore, the bond had to be filed within 30 days after that judgment, that the last judgment was, in effect, a nullity.

Now, as I sat on the court that considered that case it appeared to me that there hadn't been any case which actually said that a case had to be dismissed in that

situation because it wasn't filed in time. However, I felt bound by the other cases to hold that the case had to be dismissed because a second order was valid, was final, and I was not satisfied with that disposition of the case, so I wrote an opinion in Runnymede which put it right straight to the Supreme Court as to whether or not this case had to be dismissed because it had not been -- the bond had not been filed within 30 days after the second order. And I was hoping I would get reversed, but the Supreme Court refused without qualification.

MR. ORSINGER: So you wrote a Supreme Court opinion.

HONORABLE C. A. GUITTARD: So I think that nobody has -- none of these decisions has actually analyzed the question from the point of view of principle and policy, which is a sounder rule. It seems to me that if you follow the rule that the last judgment has to embody all of the provisions of the previous judgment, either expressly or by implication, then if you have the situation that prevailed in these earlier cases there is

no great harm done because if the judgment is not final, you send it back and you can get a final order. Nobody is hurt very much.

Whereas, in the second situation where there is an order that disposes of the second of two separate claims and then a subsequent order which embodies both if -- in that situation if the losing party doesn't take an appeal from that second order, which he might have not have really understood was the final order, he's out. He's completely gone. And so it seems like to me that the preferable rule would be to require a final judgment which embodies all claims and all parties and then it's clear to everybody that that's the judgment that the appeal ought to be taken from and that that's more a user-friendly rule than the rule that the Supreme Court has developed in these other cases. So I move that the second alternative as stated here be recommended.

CHAIRMAN SOULES: Discussion? Alex Albright.

PROFESSOR ALBRIGHT: Judge Guittard, I have a question. How does it

dispose of all parties by implication if there are all of these previous orders? It seems like by implication if it disposes of the last party or the last claim it may by implication be a final judgment, which is not --

HONORABLE C. A. GUITTARD: In the Runnymede case there is one summary judgment disposing of one defendant, another summary judgment disposing of the second defendant that says nothing about the first. Now, would you say that in that case the second order disposes of the first claim by implication?

That would be sort of a stretch. I would think that it would have to be some sort of language in the second judgment which could be interpreted by implication as disposing of that first claim.

CHAIRMAN SOULES: But could a Mother Hubbard, all other and further relief sought by any party in this cause --

PROFESSOR ALBRIGHT: But it seems like that is expressly. That is expressly disposing of all claims and parties, so maybe what we should do is take the

implication out and require Mother Hubbard for a final judgment.

HONORABLE C. A. GUITTARD: Okay. I wouldn't object to that.

CHAIRMAN SOULES: Don Hunt.

MR. HUNT: (B)(2) defines disposition by implication. We need to look back to that --

PROFESSOR ALBRIGHT: Oh, okay.

MR. HUNT: -- and see that what we are really talking about there is the conventional trial on the merits, and that's what we mean, and that's what ordinarily happens and what we understand when we go to trial on the merits with the jury and it all gets merged and --

PROFESSOR ALBRIGHT: So this would only be -- so I guess what alternative two would do is require a Mother Hubbard clause if there is not a trial on the merits.

HONORABLE C. A. GUITTARD: Yes. (B)(2) says, "Claim is disposed of by implication if a judgment is rendered on the merits after a conventional trial and no severance or separate trial of the claim has

been ordered." So that would take care of that problem, it seems like to me.

PROFESSOR ALBRIGHT: Okay. So "by implication" is a defined term.

HONORABLE C. A. GUITTARD: Yes.

CHAIRMAN SOULES: Justice Duncan, and then I will get to the others.

HONORABLE SARAH DUNCAN: (2) doesn't take care of, does it, a party that was not expressly dealt with in a judgment after a conventional trial on the merits?

We just applied Aldredge to a bonding company, so if it doesn't include it --

MR. McMAINS: Well, it takes care of it if it's a conventional trial on the merits.

HONORABLE SARAH DUNCAN: Right.

MR. McMAINS: It doesn't take care of it if it's summary judgment.

HONORABLE SARAH DUNCAN: But this just says "claim." This doesn't say, "claim or party," and I am just questioning whether "or party" should be added.

CHAIRMAN SOULES: Sarah's question is under (b)(2), disposition by

implication, whether we should say "a claim" --

HONORABLE SARAH DUNCAN: "Claims and parties."

CHAIRMAN SOULES: "Claims and parties are disposed of by implication if a judgment is rendered on the merits" and so forth.

PROFESSOR DORSANEO: I don't understand how parties are disposed of. It's claims.

MR. McMAINS: There have been a few parties I would like to dispose of.

CHAIRMAN SOULES: Mike Hatchell.

MR. HATCHELL: Let me add to that and ask Judge Guittard this question. I think the presumption of disposition by implication is that there is a disposition in some way, and I remember one time I asked Judge Calvert about the Aldredge case. I said, "Judge, I understand that you presume these things are disposed of," but I said, "In what way do you presume they are disposed of?"

And he said, "If you ever find the answer

to that question, I wish you would let me know." And I mean, I really am troubled by the disposition by implication, but I don't know in what way a claim or a party has been disposed of. I mean, how is that handled?

PROFESSOR DORSANEO: I think it's disposed of for purposes of appeal and finality, not really disposed of at all otherwise.

MR. McMAINS: I disagree. I think it's disposed of in terms of there is no -- that all affirmative relief is denied. Even if you don't have a Mother Hubbard clause I think if it's a conventional trial on the merits and you didn't get something from somebody, then you ain't got nothing and --

PROFESSOR DORSANEO: Well, Aldredge says --

MR. McMAINS: -- you ain't going to get nothing.

CHAIRMAN SOULES: Just a moment. The court reporter can't take that.

PROFESSOR DORSANEO: Aldredge says "for appeal purposes only," and there is case law saying not necessarily that that

would be dispositive or better than your reasoning, that it's not disposed of in any particular way.

MR. McMAINS: I understand.

CHAIRMAN SOULES: Richard Orsinger.

PROFESSOR DORSANEO: It's just a rule for appeals.

CHAIRMAN SOULES: What did you say, Bill? I stepped on your words.

PROFESSOR DORSANEO: It's just a rule for appeals so that you don't have to dismiss the appeal. Since nobody --

MR. McMAINS: Well, it's really related to jurisdiction.

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: In that last scenario, Bill, if I represent a party that wasn't disposed of except for purposes of appeal can I then set a trial in my version of the same case, or do I have to file a new lawsuit and then argue that the old judgment is not res judicata?

MR. McMAINS: That's what they are saying.

PROFESSOR DORSANEO: Something like that.

MR. ORSINGER: Well, I am troubled because limitations will have run in almost every instance by the time you finally get around to getting this dangling conclusion, and if what you are saying is that the Supreme Court Aldredge concept only applies for purposes of appeal, how do we know that the other lawsuit -- the other portion of the lawsuit isn't still pending in the trial court?

I mean, if it's final for purposes of the court of appeals but not for purposes of the parties who are still in the trial court who are not up on appeal then I guess I can just set my trial, right? I mean, if that's, in fact, what that means, then that is so difficult it doesn't fit our procedure, and I think you could argue backwards from that result that it is impossible to say that it isn't final for all purposes. It would be res judicata. You know, if you were seeking

affirmative relief and that judgment went final and you didn't get your relief, you're out of court forever, it seems to me.

CHAIRMAN SOULES: If it went final.

MR. ORSINGER: Well, it went final because Aldredge says it goes final, and these rules basically are attempting to fix the problem of a dismissal for a lack of jurisdiction, but the price we pay is that we cut off arms, legs, and heads of people that were not there for the final trial so that whoever was there for a final trial doesn't suffer the inconvenience of having to go draft a noninterlocutory judgment and then file their same brief a second time, and that troubles me and that's why I like Justice Guittard's second alternative better because anybody who wants to go to the court of appeals has to give all of these other floating people notice that their claims are being adjudicated, and if they don't like it, they better jolly well get involved.

HONORABLE C. A. GUITTARD: Right.

MR. ORSINGER: And, to me, if you are going to resolve the problem of dismissals for interlocutory judgments, I think the better way to do it is to make everyone be included rather than to default people out when they don't even realize it's happening to them.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: We talked about this so extensively last time that I hesitate to say anything, and I understand Scott McCown's comment that was repeated by others that it is a large -- a big burden on trial judges to put together a judgment that expressly deals with all parties and claims. He suggested the case memorandum idea. We spend an unbelievable amount of time arguing about this and dismissing appeals and totally screwing up the entire course of that case for subsequent appeals.

And, you know, there is a Dallas opinion now relating back a statement of facts to a previously filed appeal that was dismissed for want of jurisdiction because they knew they

had already bought the statement of facts. They knew it was in the courthouse in Dallas, but it was now under a different cause number in the court of appeals.

And the Mother Hubbard clause, I have been Shepardizing -- I guess we all have -- Mafrige ever since it came out trying to figure out exactly what it means. It means very different things in different courts and in some cases in published opinions versus unpublished opinions and we are just -- you know, I didn't realize that's what the series of orders came from, was Judge Guittard, and I don't mean any disrespect at all since he was bound, and that's admirable that he followed something he thought was wrong and tried to get the Supreme Court to reverse him, but it creates unbelievable problems, and we are not fixing it with Mother Hubbard clauses.

We are creating a whole new set of problems that may be worse than the problems that we -- you know, before we just dismissed for want of jurisdiction. Now, for instance, in Houston in several cases they have reversed and remanded partial summary judgments, which

means you lose your partial summary judgment. So I just -- that's a long way of saying that I want to support what Judge Guittard has said and let's not even have the "by implication." Let's just tell the trial judges to dispose of all parties and all claims in a document.

HONORABLE C. A. GUITTARD: Well, that's fine, but I'm concerned that unless we do that we are repealing Aldredge, and if we want to do that, fine, but when we drafted this we didn't have the problem of changing Aldredge.

HONORABLE SARAH DUNCAN: I understand. And that may be too far. That may be further than the committee wants to go but --

PROFESSOR DORSANEO: Maybe I'm not following, but I think the only thing -- because of the way that (b) is worded and it just talks about purposes of post-trial and appellate procedure. It doesn't talk about under principles of res judicata. It's just talking about disposition in some way for the judgment to be final to have the things roll forward. I'm not sure I heard everything that

everybody said up there.

I think the only thing that needs to be done if you wanted to go with the alternative in three is to take out expressly or by implication because it's just, frankly, unnecessary to say anything about it. If you have already mentioned it, obviously preserving Aldredge and just extending it to post-trial purposes -- that is to say filing postjudgment motions, which is probably plausible. That's probably what Aldredge meant for appeal purposes anyway. It probably meant for purposes of doing things with respect to attacking the judgment.

HONORABLE C. A. GUITTARD: So you would simply omit from alternative two the language "expressly or by implication"?

PROFESSOR DORSANEO: Because it's already in there, and it's a separate problem. The series of order problem is a separate problem.

HONORABLE C. A. GUITTARD: I would accept that.

PROFESSOR DORSANEO: And I would support the suggestion that the series

of orders is the right way to do things, and frankly, I think the Supreme Court's most recent statement on this subject, wasn't it -- I forget its name. There was a case where there was an argument that because somebody had taken a nonsuit a judgment had gone final.

HONORABLE C. A. GUITTARD: That takes care of part of the problem.

PROFESSOR DORSANEO: I think that philosophy, the philosophy that made them come to that decision is much more consistent with your alternative suggestion than with your other views expressed in earlier writing.

CHAIRMAN SOULES: Okay. Justice Duncan.

HONORABLE SARAH DUNCAN: Just to point out one thing, it's not just a question of Aldredge. Aldredge is I think just a -- it's a procedural presumption. But when you take Aldredge in the context of Bar vs. Resolution Trust on transactional approach to res judicata we can be affecting an awful lot of people by a piece of paper that never names them. And it seems to me that if we are going to be rendering final judgments or

judgments that are dispositive of claims that aren't mentioned in the judgment --

PROFESSOR DORSANEO: Well, but it's just disposed of. It's not disposed of for res judicata purposes. The case law now is when there is an express disposition of a claim only by virtue of a Mother Hubbard clause rather than a specific decretal treatment of that claim, that that's not even res judicata. Yes, indeed. The Supreme Court has so held.

HONORABLE C. A. GUITTARD: Well, what's happened to the old theory that --

PROFESSOR DORSANEO: I don't remember the case now. It's in the case book.

HONORABLE C. A. GUITTARD: -- you have to assert every claim that you have or that you have -- you're precluded as to any claim you presented or could have presented in that context in that supplement.

HONORABLE SARAH DUNCAN: Arising out of that transaction.

HONORABLE C. A. GUITTARD: Well, and that's part of this question.

That's part of this question.

CHAIRMAN SOULES: Let's try to advance the ball here. Judge Peeples.

HONORABLE DAVID PEEPLES: Two points. Sarah, you're concerned about the problems you have in the appellate courts and I want to suggest that one reason you-all have those problems is that all of this law is scattered throughout the cases and a lot of people don't know it, and if we combine and summarize the case law in the rules as the majority of the committee has done, some of those problems may go away. Because when it's laid out in black and white like this people might comply with it better. Okay. That's point one.

Now, point two, you have talked about the problems in the appellate court. I want to suggest that if we go with Judge Guittard's rule, it seems to me that if you have got a series of orders that adds up to complete relief but there is no one instrument that says, "I'm a final judgment," it's still pending in the trial court for years potentially in all of those cases. You know,

one percent are appealed. The 99 percent are still pending. I have still got jurisdiction to change it, if I change my mind. Somebody can come in and appeal years after they thought it was over. And so I think that we pay a big price with the Guittard proposal, and I think we can solve some of the problems that you say occur in the appellate courts if we have a nice, tight rule that people can understand and know what the law is.

HONORABLE SARAH DUNCAN: You're right.

MR. HUNT: So what are you suggesting?

HONORABLE DAVID PEEPLES: I think we ought to go with the one that I take it your majority drafted. In other words, the one that basically restates what the law is now.

MR. HUNT: No. There is no majority or minority.

HONORABLE DAVID PEEPLES: Okay. Well, then I'm saying alternative one, which as I understand it, restates the present law.

MR. HUNT: Correct.

HONORABLE DAVID PEEPLES: Instead of alternative two, which we would come up with a rule that says you have got to have something that either says, "I am a final judgment" or incorporates all that went before.

HONORABLE C. A. GUITTARD: That presents the issue.

HONORABLE DAVID PEEPLES: Okay. Am I right that if you have got a series of orders as you had in Runnymede vs. Metroplex that disposes of everything expressly but the final order doesn't say -- the last one in the sequence doesn't say, "We have got a final judgment here" or something like that, it's still pending in the trial courts? Can't they appeal?

HONORABLE C. A. GUITTARD: Well, of course, in Runnymede there was a final order that summarized it all, and we held that was a nullity because of these other decisions.

HONORABLE DAVID PEEPLES: Okay. But the flip side of that is that when you have got a series of orders that adds up to

total relief but you don't have that final one that says, "We have the sum total," which is the final judgment, it's interlocutory and still pending. Plenary power still exists under probably a lot of judgments, a lot of cases.

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

HONORABLE DAVID PEEPLES: I think that's a big price to pay.

PROFESSOR DORSANEO: When you are in the trial court wouldn't you be taking care of that problem? Wouldn't you be finalizing these cases? Isn't that your job, kind of?

HONORABLE DAVID PEEPLES: Well, as a practical matter lawyers write the judgments and we sign what they bring. I guess whatever we come up with here people will conform to it and learn to live with it.

HONORABLE C. A. GUITTARD: Well, that's right.

HONORABLE DAVID PEEPLES: Either way.

CHAIRMAN SOULES: I doubt if

they will ever learn to do it.

HONORABLE DAVID PEEPLES: Well, you may be right.

CHAIRMAN SOULES: But this means that a final judgment is going to require the tracking back over a court clip to bring the orders to a single document that gets signed that disposes of all parties and claims. That's what this alternative two says, and there is not anybody in this room that can't do that, but I mean, the family law bar, for example, and those cases can be multiparty cases and some of those parties get nonsuited. Some get summary judgments, and there may or may not be certain lawyers with a sufficient level of sophistication to bring those orders together at the end.

And the trial judges don't have time to do that. They probably can't do it because the district clerk's file is in such disarray that if they even tried they could never get the whole -- every order that's been entered where there has been a series of dispositive orders on claims or parties, and that's -- I realize we have appellate -- but that's

another set of appellate problems and that is do we -- if I can go back and find where a -- I represent the wife in a divorce case; I sue the husband and a series of corporations, all of which I think the husband has substantial interest in. I find that one corporation he doesn't have any interest in and I nonsuit that corporation. For whatever reason the case lingers and two years later it goes to trial and I have a final judgment and I forget to go back and pick up that that corporation was nonsuited two years ago. I just forgot about it.

PROFESSOR ALBRIGHT: But, Luke, that would be the disposition by implication.

MR. ORSINGER: No. The nonsuit would take care of that, Luke. If you nonsuited them, they are out of the case.

PROFESSOR ALBRIGHT: And as long as you had a trial --

CHAIRMAN SOULES: No.

HONORABLE SARAH DUNCAN: Not under alternative two.

CHAIRMAN SOULES: Not under alternative two because --

PROFESSOR ALBRIGHT: But if you have had a trial, if you have had a trial and you have a final judgment, then it disposes by implication all the parties. All of the parties are disposed of and you have a final judgment. If you have nonsuited a bunch of parties, you have got summary judgment on a bunch of parties, you still have some parties there and you have a trial, a conventional trial on the merits. The judge signs a document called "final judgment," then that is a final judgment, and it's final for appeal.

The only time that it's a problem is when you don't have a trial and you have nonsuits and summary judgments and default judgments, then you have to get them all together. Isn't that correct, Judge?

HONORABLE C. A. GUITTARD: (Nods affirmatively.)

PROFESSOR ALBRIGHT: That's going to be the situation. We are not talking about every single case on every judge's docket. We are talking about cases where there hasn't been a trial.

HONORABLE DAVID PEEPLES: Can I

reply to that?

PROFESSOR ALBRIGHT: Is that right?

CHAIRMAN SOULES: Judge Peeples. I don't see that but --

MR. ORSINGER: That's the Aldredge rule, but that's not this language on this piece of paper. There is nothing about final trial here.

PROFESSOR ALBRIGHT: But the Aldredge rule is in part (2), disposition by implication. That was my initial question.

MR. McMAINS: Right. That's where it is.

PROFESSOR ALBRIGHT: Yeah. (B)(2) is disposition by implication. It says, "A claim is disposed of by implication when a judgment has been rendered on the merits after conventional trial." So any time you have a final judgment after a conventional trial it is final for purposes of appeal.

HONORABLE DAVID PEEPLES: Can I say, when there has been a conventional trial on the merits that's the least of our problems because the lawyers and the legal system have

given attention to that case and they have probably done it right, but the problem that's out there is in default judgments and summary judgments and settlements that wind up a case and they are kind of done quickly, not much judicial attention given to them.

And I fear that if we have alternative two, a lot of those are going to still be pending and not disposed of because people didn't do it right when they did the final judgment or failed to do it, but the conventional trial and disposition by implication I think most -- when a judge and the lawyers have given attention to it, they have looked at their file and the judge has probably leafed through the file while trying the case and that's probably going to be done right most of the time. It's these defaults, summary judgments, settlements and so forth that are lurking out there.

MR. ORSINGER: I would ask, if you have a Mother Hubbard clause at the end, that's not disposition by implication; that's express disposition, right? Or wrong?

PROFESSOR ALBRIGHT: Right.

CHAIRMAN SOULES: Is it?

PROFESSOR DORSANEO: Sure. All relief is expressly denied.

MR. ORSINGER: Okay. So by its own terms it's express. So in order for this to even be an issue it's going to have to be a judgment that is disfigured by all of these partially resolved claims that is not concluded by a judgment that contains a catch-all clause. Right?

PROFESSOR ALBRIGHT: Right.

MR. ORSINGER: And then we have got a rule here that tells -- at least subdivision (1) says we are talking about finality for purposes of appeal, but what David is talking about is finality for purposes of res judicata, which Bill says is not the same as finality for purposes of appeal and then --

PROFESSOR DORSANEO: So we are talking about a third one, the third finality, and that's final in the sense that the trial judge can't mess with it.

MR. BABCOCK: Right.

MR. ORSINGER: For loss of

plenary power.

PROFESSOR ALBRIGHT: And then also, you know, like when David is talking about he has these cases that are slogging around. People have settled, and it's never final. They can come in and start undoing it or trying to undo it, where if it's a final judgment then it's final. You tell them to go file an appeal.

HONORABLE DAVID PEEPLES: Somebody can come in and appeal it three years after everyone thought it was all over, and there is a jurisidiction in the appellate courts.

MR. BABCOCK: Or worse than that, say you get a change in election or a judge dies, you get a new judge.

PROFESSOR ALBRIGHT: Or Judge Peeples is off and they say, "Well, let me try again with the next one."

MR. BABCOCK: That's right.

HONORABLE SARAH DUNCAN: I'm convinced.

MR. ORSINGER: Well, we may not be solving the problem if Bill is right that

finality for purposes of appeal is not finality for purposes of litigating, and we have got -- the first sentence suggests that we are only talking for purposes of appeal and post-trial procedure. Now, that first sentence is only on subdivision (1). Does it apply to (2) and (3)? I don't know, but if we are trying to solve your problem then we maybe ought to reconsider this language about for purposes of appeal and post-trial.

PROFESSOR ALBRIGHT: Bill, this definition is the same for res judicata. This says a final judgment for res judicata is a final judgment in a trial court. It's not a final, final judgment, meaning that no one can undo it. A judgment on appeal is -- has res judicata because it's final in the trial court.

MR. ORSINGER: Well, paragraph (1) ought not to say "for purposes of post-trial and appellate procedure" if what we are really doing is leveraging this rule into a rule for res judicata and to let plenary power expire and to be sure that people can't refile.

PROFESSOR ALBRIGHT: We are not leveraging. There is an opinion that says when a judgment is final in the trial court, which would be this definition, which as I understand it is a final judgment under the current law, we are not changing anything.

There is an appellate opinion that says -- a Supreme Court opinion that says when a judgment is final in the trial court then it has res judicata effect. Even if it's on appeal it is still final in the trial court.

MR. ORSINGER: I agree. That's the Scurlock Well Company case.

PROFESSOR ALBRIGHT: Right.

MR. ORSINGER: We are writing a rule, though, that changes all of that by saying that our rule only applies for purposes of appeal.

PROFESSOR ALBRIGHT: No. Because res judicata is a whole different area of law, and I don't see why Scurlock Oil wouldn't still be the law.

MR. ORSINGER: We haven't defined "a final judgment" for purposes other than for purposes of appeal.

PROFESSOR ALBRIGHT: Well, because the res judicata law says final judgment for res judicata means final judgment in the trial court, and that's what this says.

CHAIRMAN SOULES: We don't have a rule now that's the equivalent of Scurlock Oil which, for whatever it may be worth, is a collateral estoppel case, not a res judicata case.

MR. BABCOCK: For the record.

CHAIRMAN SOULES: Anyway, we don't have a rule now that even speaks to that, and that is substantive law.

PROFESSOR ALBRIGHT: Right.

CHAIRMAN SOULES: It's affirmative defenses and substantive law rather than procedural law.

MR. ORSINGER: Well, does this alternative one solve David Peeples' problem or not? Because if it doesn't, maybe he will support alternative two.

HONORABLE DAVID PEEPLES: Don't we mean to say in (b)(1), definition, "A final judgment for purposes of the plenary jurisdiction and appellate timetables"? Is

that not what we mean to do?

PROFESSOR ALBRIGHT: Yeah.

MR. BABCOCK: Yes.

HONORABLE SARAH DUNCAN: Huh-uh.

HONORABLE DAVID PEEPLES: No?

CHAIRMAN SOULES: Well, you have got a lot of timetables that run from the judgment, not just plenary power but motion for new trial, all of that stuff.

HONORABLE DAVID PEEPLES: Well, that's an appellate timetable, isn't it? Well, it's both, actually.

CHAIRMAN SOULES: Yeah. So it's really all post-trial.

HONORABLE C. A. GUITTARD: Post-trial has to do with plenary power, does it not?

HONORABLE DAVID PEEPLES: Well, if it does then that solves my problem.

MR. McMAINS: Yeah.

CHAIRMAN SOULES: But not only plenary power.

HONORABLE SARAH DUNCAN: Right.

MR. ORSINGER: Motion for new

trial deadline, for example.

HONORABLE DAVID PEEPLES: Yes.

CHAIRMAN SOULES: Right.

MR. ORSINGER: Request for findings of fact deadlines.

PROFESSOR DORSANEO: I think the plenary power concept embraced in the current 329b is probably essentially the equivalent of saying preclusion principles come into operation unless it's explained otherwise. I don't think it's essential to think of claim preclusion and plenary power as being counterparts of each other, but it's difficult to separate them. I don't like the idea that this claim is disposed of for res judicata purposes. I guess that means it's denied if the relief wasn't granted, when it's not addressed. I feel the way I think Justice Duncan felt about it, and I don't like that, but I think that's what Justice Calvert's opinion in Aldredge was doing.

HONORABLE SARAH DUNCAN: Well, that's Bar vs. Resolution Trust, though. That's taking a transactional approach to res judicata.

PROFESSOR DORSANEO: Well, but it wouldn't necessarily -- like in the Aldredge case what you are talking about is a third party claim against another entity, and I don't think that that is embraced by the Resolution Trust transaction thing.

CHAIRMAN SOULES: Does that have anything to do with this rule?

PROFESSOR ALBRIGHT: Yeah. That's an issue of how you apply res judicata and collateral estoppel.

PROFESSOR DORSANEO: Well, I think this is a larger thing than I thought it was when we first started talking about it because it does involve this issue of if we say for, not just appellate, but for postverdict rules in the trial court the judgment is final by -- you know, by implication. I think that suggests strongly that the claims are barred. I don't know whether I want to do that.

I don't know what's the worst evil, having the case be pending in the trial court when it was over and maybe somebody being able to take another swing at it or throwing

somebody out of the appellate court because they were waiting for the final order and there was a final order already or having somebody be bound by res judicata under circumstances where they didn't realize that there was a -- that they were in that risk.

I mean, I think these are all awful alternatives, but the one that troubles me the least is that the trial judge might find out that she still has jurisdiction over the case and would have to dispose of it finally now.

HONORABLE SARAH DUNCAN: Bill put my problem much more eloquently.

HONORABLE DAVID PEEPLES: Luke, on the res judicata problem, I trust that none of these people's rights have been adjudicated and they didn't know about it. I mean, you had notice of the summary judgment. You were cited and didn't answer on the default judgment. So people have had due process of law. It's just when does the appellate timetable start to run or the plenary jurisdiction timetable, and therefore, the clock is ticking on them. That's all we are talking about here, isn't it?

MR. ORSINGER: No. I mean, I can imagine an instance where a defendant, say, got an affirmative recovery for sanctions for bringing them into the suit. You are out. You have got your thing for $15,000 or whatever and then you are sitting around there and two years later a judgment is entered on no notice to you that resolves only the claims between those left in the lawsuit and that all other requested relief is denied. And so your sanctions judgment just went away and nobody even told you to come to the courthouse and fight for it and you never found out about it and now you have got your due process, but it didn't end up in the final judgment.

HONORABLE DAVID PEEPLES: Well, why would you be entitled to the final judgment signing but not to some other final order in the case? I mean, it seems that person probably should have had notice that the last order was signed.

MR. ORSINGER: I agree.

HONORABLE DAVID PEEPLES: And if they are not going to get it then, why are they going to get it under alternative two?

MR. ORSINGER: Well, they can always come in and say, "You can't say that that final judgment adjudicated my judgment, my preliminary judgment, because it didn't mention my preliminary judgment."

CHAIRMAN SOULES: We need to take a break. The court reporter needs to change paper. Let's be back in ten minutes, at 4:35. We will work 'til 5:30.

(At this time there was a recess, after which time the proceedings continued as follows:)

MR. HUNT: Mr. Chairman, can we get a vote on this? We have talked it to the point where we may need to take a vote, if there is any way we can.

CHAIRMAN SOULES: Okay. We are on Rule 300. Any opposition to (a)? There is none. It passes.

Any opposition to (b)(1)? (B)(1).

PROFESSOR DORSANEO: I'm going to vote whether or not there is a motion in opposition to the original decision to put a definition of "final judgment" in this rule.

CHAIRMAN SOULES: Okay.

Justice Duncan.

HONORABLE SARAH DUNCAN: Then I would like to make a statement in response. I don't know that I know what the law is and I don't know that I know what the rule ought to be, but anything that generates this much controversy and discussion and confusion it seems to me is precisely the type of topic that we need a rule on.

CHAIRMAN SOULES: Okay. Since there is opposition to (b)(1), those in favor show by hands. Six.

Those opposed to (b)(1)? To three. Six to three it passes.

(B)(2), is there any opposition to (b)(2)?

MR. HUNT: Luke, could we put in and make it "a claim or party as disposed of by implication"? I think that was probably intended to be in there.

PROFESSOR ALBRIGHT: I have a question.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: Doesn't a

severance -- it says a "conventional" -- "rendered on the merits after conventional trial and no severance has been ordered."

A severance makes it two different lawsuits, so a severance shouldn't make any difference. It's just if you have a separate trial that's ordered that would keep it from being a final judgment, right? Because if you have a severance order then you have part of the lawsuit going to a different cause number, and so this part of the lawsuit can become final all by itself without having to dispose of that other part of the lawsuit.

MR. ORSINGER: Yeah.

CHAIRMAN SOULES: That's probably right.

MR. ORSINGER: Yeah.

CHAIRMAN SOULES: "Severance or" should come out, and should it start by saying, "Claims and parties are disposed of by implication"?

MR. HUNT: "A claim or a party." I'm trying to write it all in the singular.

CHAIRMAN SOULES: Okay. "A

claim or a party." Scratch "severance or."

Those in favor of (b)(2) raise your hand.

PROFESSOR DORSANEO: I don't think striking "severance or" is a good idea at all if this is going to have res judicata processes because we are going to dispose of the claim before we have it adjudicated. I mean, if you say a claim is disposed by implication after a conventional trial and no separate trial has been ordered maybe I am misunderstanding, but are you saying that "severance or" is unnecessary just because "severance or" contemplates a separate trial or that --

CHAIRMAN SOULES: No. Severance brings about two cases, so you just have one case that's gone to judgment, but that case can't go to judgment if issues in that case are subject to separate trial.

PROFESSOR ALBRIGHT: If what we are talking about are claims and parties, maybe we should say, "A claim or a party not disposed of in the judgment" or --

MR. ORSINGER: We should. Because what if it's expressly disposed of?

We are saying even if it's expressly disposed of, it's disposed of by implication.

PROFESSOR ALBRIGHT: "A claim or a party not disposed of" --

MR. ORSINGER: "Not expressly disposed of."

PROFESSOR ALBRIGHT: "Expressly disposed of is disposed by implication if a judgment is rendered on the merits after conventional trial." If there has been an order for separate trials you don't -- if there is a separate trial order then you do not want the claims that are being tried separately to be disposed of by implication.

PROFESSOR DORSANEO: And you don't want the claims that are severed to be disposed of by implication either.

MR. ORSINGER: Well, they can't.

PROFESSOR ALBRIGHT: But if the claims are severed --

CHAIRMAN SOULES: That isn't right, Alex.

PROFESSOR ALBRIGHT: -- they are not part of this cause anymore.

CHAIRMAN SOULES: That isn't right. Separate trial is a separate trial of issues. Same issues in the same case, not different cause of action, they get severed.

PROFESSOR ALBRIGHT: If they are severed they are not part of this cause anymore. They are not part of what's going to be disposed of in this judgment.

MR. McMAINS: This is why we always get trapped by finality. Somebody saying, "Oh, okay. Here is a severance" and that all of the sudden you can't do anything about it.

PROFESSOR DORSANEO: I understand what you're saying, but I think someone could read this, because it's what it says, to say that this severed claim has already been disposed of by implication.

PROFESSOR ALBRIGHT: No. I think --

PROFESSOR DORSANEO: Or is disposed of by implication, although severed.

PROFESSOR ALBRIGHT: Well, it can't be because it's a different lawsuit now.

PROFESSOR DORSANEO: I realize

it can't be, but it would be a logical --

CHAIRMAN SOULES: Okay. Specific language, if somebody has got a problem, state what it is and give specific language to fix it so we can move the train.

PROFESSOR DORSANEO: If we are going to use the Aldredge language, let's use the Aldredge language.

CHAIRMAN SOULES: Which is?

PROFESSOR DORSANEO: And not innovate on it.

CHAIRMAN SOULES: Which is?

PROFESSOR DORSANEO: Which is in my original draft, but it at least includes no severance or separate trial. It includes the word "severance."

CHAIRMAN SOULES: Okay.

MR. ORSINGER: I would speak against the word "severance." It makes no sense at all. If a claim has been severed, it's not even part of this lawsuit and isn't influenced in any way by the judgment in this lawsuit. What sense does it make to say that we are not overruling a claim that's in another lawsuit?

CHAIRMAN SOULES: Response, Bill? I see you thinking.

PROFESSOR DORSANEO: I don't really have an adequate response to that.

PROFESSOR ALBRIGHT: It seems to say that if you had a severance you cannot have a disposition by implication. Let's say some claims have been severed, some have been tried, some are just hanging out and the plaintiff didn't pursue them. You want to be able to dispose of those by implications, and just because some other claims were severed out shouldn't prevent you from disposing of those by implication.

HONORABLE C. A. GUITTARD: That's right. If a claim is severed then you don't want the Aldredge result. You want that claim to stay unresolved.

PROFESSOR ALBRIGHT: Right. But if after you have had a trial on the remaining claims and some were never addressed, you want to be able to dispose of those by implication and have a final judgment.

HONORABLE C. A. GUITTARD: So

the idea is that you want a limitation on this disposition by implication to make sure that nobody argues that a severed claim is disposed of by implication.

MR. ORSINGER: Well, they couldn't argue that anyway. It's a separate lawsuit.

HONORABLE C. A. GUITTARD: I know.

MR. ORSINGER: So it's a meaningless, stupid, ridiculous argument.

HONORABLE C. A. GUITTARD: You underestimate the resourcefulness of lawyers to make unsound and illogical arguments.

CHAIRMAN SOULES: Well, look, we are wasting time.

PROFESSOR DORSANEO: The severance can be in the final order anyway. I mean, severance could be in the order. Maybe you are saying then it's dealt with. It wouldn't be a situation for implication at all, but it's not a big point. I don't want to waste the Chair's time.

CHAIRMAN SOULES: Well, it's not wasting my time. It's just we need

to -- the side bar remarks are not advancing the ball. The remarks to the point obviously do. So we need to stay to the point. So what should (2) say?

MR. HUNT: "A claim or party not expressly disposed of is disposed of by implication if a judgment is rendered on the merits after conventional trial and no severance or separate trial of the claim has been ordered."

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

CHAIRMAN SOULES: Okay.

MR. HAMILTON: Leave "severance" in there?

MR. HUNT: Leave it in because it causes more problems than it cures.

MR. McMAINS: Now, you have added "or party."

MR. HUNT: Yeah. "A claim or party" because we have got "or party" everywhere else.

PROFESSOR ALBRIGHT: Then you need to add it down at the bottom at the end of the section, too, "claim or party."

CHAIRMAN SOULES: I can't hear you, Alex.

PROFESSOR ALBRIGHT: You need to add at the very last line it says "severance or separate trial of the claim or party."

HONORABLE C. A. GUITTARD: Well, that's the problem. How can you have a separate trial of a party without having a trial of the claim?

PROFESSOR ALBRIGHT: You don't dispose of parties without disposing of claims, either.

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

MR. McMAINS: Yeah.

MR. ORSINGER: You don't sever parties without severing the claims against those or involving those parties.

MR. HAMILTON: If you leave "severance" in there aren't you going to have a situation where you cannot have a disposition by implication of the remaining case if part of it has been severed out?

CHAIRMAN SOULES: Yes.

MR. HAMILTON: Well, that doesn't work.

PROFESSOR ALBRIGHT: Except that's what I was thinking, but if you read it -- I read it again. It says, "No severance or separate trial of the claim or party has been ordered." So it seems -- so I think you can still have disposition by implication of other claims. It's just as long as the claims -- you cannot have disposition by implication of severed claims or separate trial claims.

CHAIRMAN SOULES: That makes sense.

PROFESSOR ALBRIGHT: So you are talking about -- you look at the claims that you are trying to dispose of by implication. If they have been severed or ordered separate trials of those claims, you cannot dispose of them by implication.

CHAIRMAN SOULES: Okay.

PROFESSOR ALBRIGHT: So I think it works.

CHAIRMAN SOULES: Anything else on this? Okay. Those in favor of (b)(2) as

modified show by hands. Nine.

Those opposed? To four. Nine to four it passes.

Then we get to one and two of paragraph (3). How do you want to proceed on this, Don?

MR. HUNT: I think we just ought to take an up or down. We have spent almost all of our time talking about them. We, of course, have modified two to eliminate "expressly or by implication." We know the policy involved in each one, and if we have a clear majority, we know where we are, and if we have no majority, well, I guess we rewrite.

CHAIRMAN SOULES: You want me to ask to get a show of hands of those in favor of alternative one and those in favor of alternative two?

MR. HUNT: Correct.

CHAIRMAN SOULES: Okay. Those in favor of alternative one show by hands. Five.

Those in favor of alternative two? Nine. Nine to five alternative two passes. Alternative one fails.

MR. McMAINS: Luke, can I ask a

question of the committee?

CHAIRMAN SOULES: Yes, sir.

MR. McMAINS: You have another ellipsis here. What goes there, Don?

MR. HUNT: Where?

MR. McMAINS: After alternate two and then you have (c), the form and substance general, and then you have (b), form and substance specific, and you have (2), foreclosure proceedings. There is an ellipsis there. Is there just one?

MR. HUNT: You mean down here on (d)?

MR. McMAINS: Yeah.

CHAIRMAN SOULES: That's a rule we passed last time.

MR. McMAINS: What is it? I mean, is it (d)(1)? Is that what it is?

MR. HUNT: Yes. It's personal property, form and substance specific, personal property. There has been no change in that.

CHAIRMAN SOULES: The first (d)(1) is personal property and --

MR. McMAINS: Well, what I was

getting at is what we are voting on and have just voted on basically implants entirely Rule 300; is that right, as we now have it?

MR. HUNT: I hope so.

CHAIRMAN SOULES: Yes.

MR. McMAINS: And my point is that there is nowhere in our new rules any requirement that any party receive a copy of a proposed judgment, which is an issue that we dealt with specifically in the old Rule 300. It's nowhere in here.

PROFESSOR DORSANEO: It should be.

CHAIRMAN SOULES: Why not and why is it omitted?

MR. McMAINS: It's not there. Our current Rule 300 requires that any proposed judgment --

HONORABLE SARAH DUNCAN: 305.

PROFESSOR DORSANEO: 305.

MR. McMAINS: Oh, is it in 305?

PROFESSOR DORSANEO: That's where it is now. I'm looking to see if it's in here. Unless it's lurking in an ellipse it doesn't appear to be.

CHAIRMAN SOULES: Well, it's now in 305, and we want to preserve it, Don, so check to be sure that's preserved somewhere.

Okay. We are going now to, what is this, 300(c)?

MR. HUNT: Well, Luke, let me inquire here, please. The business about the precatory language, "a party may prepare and submit a judgment" is still there. What is not in any of these rules is the command that you send everybody a copy of things because we have taken out all of 21a, thou shalt serve, and that's the reason why that's not in there.

CHAIRMAN SOULES: You did what now?

HONORABLE SARAH DUNCAN: But it took out -- if I remember correctly, the service requirement in 305 was taken out with the understanding that proposed judgments, like any other papers, were required to be served under the general service rules.

HONORABLE C. A. GUITTARD: But can't the judge render a judgment when nobody has proposed one?

HONORABLE SARAH DUNCAN: Yes. But --

HONORABLE C. A. GUITTARD: And shouldn't that judgment be furnished to the parties?

HONORABLE SARAH DUNCAN: Yes. But if a party proposes a judgment they have to serve that proposed judgment --

HONORABLE C. A. GUITTARD: Right. Right.

HONORABLE SARAH DUNCAN: -- just like any other paper.

HONORABLE C. A. GUITTARD: Right.

HONORABLE SARAH DUNCAN: But the judge is not subject to it.

PROFESSOR CARLSON: Where is that?

HONORABLE SARAH DUNCAN: They are in the general service rules.

CHAIRMAN SOULES: Why are we taking that out? We have a lot of places in here that say something has to be served, or does that all come out of the rules everywhere?

PROFESSOR ALBRIGHT: We are taking it out.

MR. HUNT: It's come out on all of these drafts. We have struck all of the 21a language wherever we have found it.

PROFESSOR ALBRIGHT: Well, you know, now that I think about it in the discovery rules I think we would say "file and serve."

CHAIRMAN SOULES: 21a does not cover this, unless it's been amended.

HONORABLE C. A. GUITTARD: Well, it's a different matter to serve a proposed judgment and to have a copy of the actual judgment signed by --

CHAIRMAN SOULES: Judge, that's taken care of by 306a or at least the notice of judgment is in 306a. This has to do with a practice that was going on where a lawyer would draft a judgment, take it over, and give it to the judge and not share it with the other lawyers, and that was a problem. That was a specific problem that we felt needed fixing some time back, but 21a, unless we have added "proposed judgment" to the list of

things that have to be served under 21a doesn't cover a proposed judgment.

MR. HUNT: Then we need to put it back in, and Rusty is correct that the language is not contained anywhere in here. Now, where would be the proper place to put it?

CHAIRMAN SOULES: Where do we have that a party may prepare and submit a proposed judgment?

MR. McMAINS: I didn't see anything wrong with it in 305, I guess, was my -- I didn't know why it went away.

PROFESSOR ALBRIGHT: Luke, as I recall, very early on we agreed that we wanted to have a general rule that said that anything filed with the court had to be served on opposing counsel in accordance with Rule 21a, and it may be that it was never drafted or maybe it was. I don't remember, but I remember we voted on it very early on.

CHAIRMAN SOULES: Well, these proposed judgments are not filed.

PROFESSOR ALBRIGHT: Well, if you make a -- or I just can't remember what

the draft was, but it was anything you send to the court you have to serve on everybody else, was the intent as I recall.

CHAIRMAN SOULES: All right. If that's been done, it's been done, but I don't think it's been done.

MR. McMAINS: That's the way 21a reads now, and we still have 305.

CHAIRMAN SOULES: It doesn't say "the proposed judgment."

MR. McMAINS: Well, it says, "any application for relief or order." I mean, you would clearly serve -- ordinarily, I mean, you would think that if you file a motion for judgment that you would serve it, and that's covered under 21a, but our current rules have 305 in there anyway.

CHAIRMAN SOULES: Okay. That's fine with me, but these proposed judgments are often not carried by a motion.

MR. McMAINS: I agree.

CHAIRMAN SOULES: They are just carried to the judge or to his clerk, and obviously if you file a motion for judgment, you are going to have to serve it, but that's

an application to the court for relief, but just a proposed draft of a judgment -- anyway, are you saying, Rusty, that you think 21a covers this?

MR. McMAINS: What I am saying is that we argued even at the time when we wrote 305 that this shouldn't be going on because you were supposed to serve under 21a. We put it in as belt and suspenders because it wasn't going on.

CHAIRMAN SOULES: Right.

MR. McMAINS: Now all I'm saying is if you take it out, somebody is going to argue they don't have to do it anymore.

CHAIRMAN SOULES: I agree. Do we have a rule that says that a party may prepare and submit a judgment to the court for signature?

MR. HUNT: Yes.

CHAIRMAN SOULES: Where is it?

MR. HUNT: What we have done is put that in Rule 301. 301 as we have dealt with it now lists a series of motions that may be filed. A motion for judgment on the

verdict, motion for judgment as a matter of law, motion to modify, motion for new trial, motion to correct judgment record. Then we have a last paragraph dealing with motion practice, and the last sentence says, "A party may also submit a proposed judgment or order with the motion," but the language that was formerly in Rule 300 about serving the proposed judgment on anyone is omitted in the interest of striking all references to service in these series of rules. Whether that's right or wrong, I don't know. If we want to build it back in, Rusty, that's fine.

MR. McMAINS: Well, the main reason I'm concerned, because if we are changing the rules by letting the disposal by implication and, therefore, that there is a greater risk that somebody's claim is going to go away, you know, they ought to have notice that that's about to happen to them, and I don't impute most of the time that this is something a judge is going to do on his own. It most of the time comes from a party who is doing it, either intentionally or inadvertently, but at least every other party

ought to know what's being proposed so he can potentially do something about it before it happens.

CHAIRMAN SOULES: Well, if we require that a proposed judgment be submitted only by a motion then we are taken care of by 21a.

HONORABLE C. A. GUITTARD: We haven't required that, have we?

MR. HUNT: No. We have just said a proposed judgment may be submitted with a motion. It's clear if you file the motion you have got to serve it, but as it's now written it doesn't cover that. It just says, "A party may also submit a proposed judgment or a proposed order with a motion."

CHAIRMAN SOULES: Okay. So what do we want to do? This is a simple thing. Do we want to say that a proposed judgment may be -- or order may be submitted only by a motion? That's one way to do it. Or do we want to put in this language in 305 that permits a proposed judgment or order to be submitted without a motion but require that it be served?

MR. HUNT: I would prefer the latter, just build it in Rule 300 to the effect that if a proposed judgment is submitted without a motion that the proposed judgment shall be served.

CHAIRMAN SOULES: Okay. Can you take care of that then? Anybody object to that? That's what we will do.

MR. HUNT: That takes us down, I think, to Rule 300(c) which is identical to what's been approved except I added back in with zero authority the first subparagraph (1), contain the names of the parties. I did that in part because what we are trying to do if we have any kind of a final judgment rule is to remind lawyers that they should include the names of all the parties. What's troubling is, of course, it says, "The final judgment shall..."

MR. McMAINS: Yeah.

CHAIRMAN SOULES: Well, if we can do 300(3) we ought to be able to -- 300(b)(3) we ought to be able to do 300(c).

MR. HUNT: We sure ought to.

CHAIRMAN SOULES: And we voted on 300(b)(3).

MR. ORSINGER: I might add as a practical matter, you have got to have the parties names in there for the abstract of judgment. So we just simply can't let a judgment be signed that doesn't reflect who the parties are.

MR. HUNT: Well, that's not the problem. Of course, the problem is that you name all but one.

MR. ORSINGER: Name all but one?

MR. HUNT: Yeah. You forget somebody or leave somebody out. Same problem of disposing of the claim or the party by implication.

MR. McMAINS: What we just said in the first part says that you don't have to name them all.

MR. HUNT: That's true. And that's the reason why it was left out initially and what I am trying to do is suggest to you that if you want to leave that out, that's fine, but it's good practice, I

think, to tell lawyers, "Put the names of the parties in there."

MR. McMAINS: The question is whether it should say "shall" or "should."

MR. ORSINGER: You're saying that it might render the judgment interlocutory if they fail to name one party? That's the fear here?

MR. HUNT: Well, I don't know if that's the case, but I don't want to put in what is just simply good practice and have that good practice have implications, one way or the other, because the reason why you need to name the parties is because you need it in the abstract. You need to be able to deal with it. You need to have it in executions.

PROFESSOR DORSANEO: May I read something germane about that that came our way from Brian Garner when we were revising the appellate rules? It discusses the use of the word "shall," and I'm not fully conversant with this, but what he says is, "As for the word 'shall' I strongly urge the drafting committee to follow the A-B-C rule, which I explained in the DICTIONARY OF MODERN LEGAL

USAGE under 'Words of Authority.' This means no uses of 'shall' in the redrafted rules, the result being far greater clarity. I assume, however, that this point will be the subject of no small amount of committee debating before 90 percent of the committee members come around to agreeing with the recommendation." The recommendation being, correct me if I'm wrong, to use the word "should."

MR. ORSINGER: Is that an example of clear writing?

HONORABLE SARAH DUNCAN: That's what we're paying $100,000 for.

CHAIRMAN SOULES: That's right, Sarah.

Well, let's get to this (c). I mean, there is going to be a good bit of appellate, I think, litigation over what a judgment that's signed that disposes of all parties and claims means. To me that means that Mother Hubbard doesn't get that. I don't think the Mother Hubbard gets that. Some people here think it does, but that's pretty specific language. That means something to me other

than just one sentence that says there have been ten orders signed and they dispose of all parties and claims, but anyway, if we are going to -- are we saying that we are fearful that we cannot name the parties in a judgment or that some people can't name the parties to a judgment or that we don't want that to be a requirement of a judgment or that we do?

Now, all in favor of (c)(1) show by hands. Eight. Opposed? Nobody is opposed. Okay. All in favor of all of (c) show by hands.

HONORABLE DAVID PEEPLES: I have a question then.

CHAIRMAN SOULES: Okay.

HONORABLE DAVID PEEPLES: Did somebody say what happens for finality purposes if the final judgment we have got doesn't do it right under (c)? If it's final do you have an appealable judgment or not? Are we going to have litigation about that?

In other words, somebody who doesn't want it to be appealable and final can he or she come in and say, "Wait a minute. The file shows that there was a nonsuit 18 months ago

that's not recited in this final judgment." Is it a final judgment for appeal purposes or not? The same people that couldn't do it right under the old law can't do it right under this. Is it appealable or not? Do I have jurisdiction or not?

MR. McMAINS: Theoretically what we voted on on the disposition by implication is going to make that final for appeal.

HONORABLE SARAH DUNCAN: If there has been a trial on the merits.

HONORABLE DAVID PEEPLES: Oh, in one percent of the cases. What about the other 99?

CHAIRMAN SOULES: But how many of those get appealed?

HONORABLE DAVID PEEPLES: Well, none of them. Well, a few. A few. I am talking about trial court jurisdiction. Do I still have jurisdiction to do something when the final judgment didn't do it right? For somebody who wants to come in and get it changed, does the trial judge have jurisdiction to change it?

HONORABLE C. A. GUITTARD: If it's a clerical mistake, you do.

MR. ORSINGER: David, maybe what we ought to do is add a sentence here that says, "The failure to comply with this rule is correctable on appeal but shall not render the judgment interlocutory" or something like that. But, you know, if it doesn't grant or deny relief, it's going to be interlocutory no matter what we say.

HONORABLE DAVID PEEPLES: Well, I was concerned about this before and I asked out in the hall whether a basically one-sentence final judgment that says there is complete relief granted over the course of the months and now we have got a final judgment, whether that would get it, and the answer was "yes," but I don't think that's right.

CHAIRMAN SOULES: Somebody said, "Yes."

HONORABLE DAVID PEEPLES: Judge Guittard said, "Yes." I thought you did.

HONORABLE C. A. GUITTARD: I thought you said that if it said, "All of these previous orders are now final," would

that get it? I said, "Yes."

HONORABLE DAVID PEEPLES: But this seems to say you have got to -- you can't just refer to the orders. You have got to state what they did. (C)(3) seems to say that.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: The problem is more (3) that we passed nine to five than it is (c)(1) because if the names of the parties aren't there, how are you going to comply with (3), with (b)(3)?

MR. HUNT: Let's take out the names of the parties.

CHAIRMAN SOULES: What?

MR. HUNT: Take out --

CHAIRMAN SOULES: You are going to live with Alternative No. 2 and drop the names of the parties out of (c)? How can you do that? How can we do that?

We are recognizing that alternative two can't be complied with when we start taking things out as simple as who are the parties to the case at the time of final judgment. Too

hard. We don't want to do that. Come on.

HONORABLE DAVID PEEPLES: Somebody might not want to read the law.

MR. ORSINGER: I would suggest that if this is, in fact, of concern, which it really doesn't seem to be to me, but maybe we ought to say that an error regarding (1) and (2) does not affect the finality of the judgment or (1), (2), and (4).

HONORABLE DAVID PEEPLES: I was concerned more about (3) than (1), (2), and (4).

MR. ORSINGER: Well, first of all, would you agree that if you don't grant or deny any relief you really haven't signed a judgment?

HONORABLE DAVID PEEPLES: You know, I thought the important thing about this final judgment was everybody knows the case is over and the clock is ticking and if you want to appeal you had better get going. And you could do that with just one sentence from the judge that says, "This case is final. It's all been granted," and the appellate clock has started to tick. We don't have to recite all

of this stuff to do that if that's your goal.

CHAIRMAN SOULES: Well, we tell the clerk that -- Bonnie and Doris that they have to serve a 306a notice to all parties to the final judgment, and there are several things that have to be served on all parties to the final judgment, and we are saying that we, the lawyers representing the parties, at the time of final judgment can't get that information together or won't.

MR. ORSINGER: On (3) perhaps we should say "dispose of each claim" or something. You know, here under (b)(1) and (2) we are talking about claims being disposed of and parties being disposed of and yet here in (c) we are talking about stating relief, but we are disposing of claims sometimes implicitly, by implication.

So maybe we shouldn't say "state the relief" since, in fact, a disposition by implication is adequate. So perhaps we ought to say "dispose of all parties and claims" rather than -- well, how are you going to abstract four different documents all of which add up to together in the one judgment? I

mean, if you are going to have four or five different things, it's going to be hard either way, but the point I am making is we don't need the judgment to state the relief if the relief is implicit from the judgment under (b)(2), right? Can't we just say "dispose of all claims and parties"?

CHAIRMAN SOULES: Well, I think so, and alternative two that's what we say, "disposes of all parties and claims."

MR. ORSINGER: And (b)(1) is the same way. It has "a signed order disposing of all parties and claims," (b)(2). "A claim is disposed of by implication." So (c) ought to require the judgment to dispose of all parties and claims.

CHAIRMAN SOULES: Any objection to that? So substituting "disposes of all parties and claims" in the place of what's presently there in (3)?

Okay. Anything else on on 300(c)? Those in favor show by hands. Four.

Those opposed? Four to two it passes.

MR. BABCOCK: Do we still have a quorum?

CHAIRMAN SOULES: Well, those of you who come and work and are willing to stay and work are not going to be sent away because others won't come and work.

HONORABLE C. A. GUITTARD: Amen.

CHAIRMAN SOULES: And that's the way this committee has operated ever since I have been Chair, and the Court wants us to work. I am frustrated that we have got, what, 13 or 14 members of about a 40-person committee, 45-person committee, attending; but they are where they are and we are where we are and we are doing what the Court has asked us to do and we will continue on.

MR. HUNT: Mr. Chairman, I think we can move quite rapidly after this. (D)(2) that you see at the bottom of page 3 is a contextual change only for clarity. Where it says in (iii) "an order to sell," I changed that from "an order for sale," s-a-l-e, to make it read "an order to sell."

CHAIRMAN SOULES: Should it say "to seize and sell"? I don't know whether that matters, but that was in the old rules.

"Order to seize and sell"?

MR. HUNT: Correct. I just made it "sell."

CHAIRMAN SOULES: You don't think "to seize" is important?

MR. HUNT: We struck that already. That wasn't a change.

CHAIRMAN SOULES: Okay.

MR. HUNT: Unless there is any reason to quarrel over that change in grammar, that's done.

CHAIRMAN SOULES: Okay. Any objection to (d)(2)? No objection. It passes.

MR. HUNT: Rule 301(b) and (c). Let me tell you the change that I made in the heading of both of those. I thought that the way Dorsaneo drafted the title made it difficult to understand because he had it "A Motion for Judgment as a Matter of Law" and "A Motion to Disregard a Jury Finding as a Matter of Law." It was an elongated title and dealt with a double motion in both places.

I tried to simplify it and make it in (b) where you have a motion for judgment as a

matter of law and just say that it includes a request to disregard a jury finding. Same thing as in (c), to make (c) just a motion to modify and it includes a request to disregard a jury finding as a matter of law.

What I want to try to do overall is reduce the motion practice down to five motions: (a), which is shown by an ellipses, is just motion for judgment on the verdict; (b) is motion for judgment as a matter of law; (c), modify; and then (d) is motion for new trial and (e) is motion for judgment record correction.

CHAIRMAN SOULES: Okay. Any opposition to 301(b)? No opposition. It passes.

Don, I think it would work better if you didn't have parentheses, if you had some other punctuation.

MR. HUNT: Okay.

CHAIRMAN SOULES: Or maybe no punctuation.

MR. BABCOCK: Shouldn't the heading be "Motion for Judgment as Matter of Law"?

CHAIRMAN SOULES: "Motion for." Yeah.

MR. ORSINGER: Yeah.

MR. HUNT: Yeah. "For" has been left out. I'm sorry. I noticed that and failed to mention it. Let me tell you one other little thing I slipped in on you on (c). No one asked me to do this, but I just did it. Look on page five after subparagraph (3). A motion for judgment as a matter of law is not a prerequisite to a motion to modify judgment. I think that's what we have always intended, but I put it in here to make it absolutely clear.

CHAIRMAN SOULES: Any opposition to 301(c)?

MR. ORSINGER: I would just point out a typo in (3), "judgment" has got the "e" slipped in after the "g."

CHAIRMAN SOULES: Again, parentheses in the first sentence, which I think would be better either no punctuation or something else.

MR. HUNT: Got it marked.

CHAIRMAN SOULES: That passed.

301(e)?

MR. HUNT: That's just a change in title from "Nunc Pro Tunc" to "Motion for Judgment Record Correction."

CHAIRMAN SOULES: Any opposition? That passed.

MR. HUNT: Rule 302(a)(5) again is nothing more than a change of the location of the language, "when injury to the movant has probably resulted from." That phrasing was at the end of (5) in the previously approved draft. I have relocated it for clarity.

MR. ORSINGER: Can I inquire?

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: In 302(a), "for good cause," is that a change in the current law?

MR. HUNT: No.

MR. ORSINGER: That's the same law?

MR. HUNT: Yeah.

MR. ORSINGER: Okay. I didn't realize it.

MR. HUNT: We have simply relocated the word "good cause."

MR. ORSINGER: Okay.

MR. HUNT: See, "good cause" is shown to be struck.

MR. ORSINGER: Okay.

MR. HUNT: And at Luke's suggestion we put it at the beginning.

CHAIRMAN SOULES: Any opposition to 302(a), (a)(5)? Okay. That passes.

MR. HUNT: Then we come to (c) on the top of page six, good cause to set aside a judgment after citation by publication. I have changed the word "service" to "citation" or "process" to "citation," and that's the only change there from the last time. We have changed it two other places you see later on.

CHAIRMAN SOULES: Okay. Any opposition to, what is it, 301(c)(4)? 302(c)(4)? No opposition. It passes.

303.

MR. HUNT: I made the changes in there that we discussed last time to strike

"provided that in a civil case," et cetera, or "the criminal case." Since these apply only to civil rules we don't need any reference to civil or criminal. That's only striking as you commanded.

CHAIRMAN SOULES: That's in (10) and (11), right?

MR. HUNT: Right.

CHAIRMAN SOULES: Okay. Any opposition to 303(e)(10)and (11)? They pass.

MR. HUNT: 304(a) is brand new, something that we have all thought was the case, but it just expresses what is the current practice in the self-evident proposition that you can file a motion for judgment on the verdict any time before you get a motion -- you get a judgment signed. But what I did was include the business that if you move for a judgment on the verdict then that motion is overruled as an operation of law when any judgment is signed that doesn't grant that motion. That shouldn't be any problem.

CHAIRMAN SOULES: And does that then become an appellate predicate?

MR. ORSINGER: Yes. It does right now.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: Like if you want the interest rate of a certain amount on your judgment or whatever, you file your motion, and the court enters a judgment to the contrary, the appellate courts are saying that that's effectively overruling your request.

CHAIRMAN SOULES: Any objection to 304(a)? It passes.

MR. ORSINGER: I'd like to just point out that the word "final" in there carries over all the implications of the discussions we had about Rule 300. I guess everyone understands that.

MR. HUNT: Yes.

CHAIRMAN SOULES: (B)?

MR. HUNT: I have changed "as a matter of law" in the next to the last line to "operation of law." It's conformity only, to get the language the same.

CHAIRMAN SOULES: Any opposition to 304(b)? That passes.

304(c).

MR. HUNT: (C) was where we began to discuss last time about sequencing, and it folds in with the plenary power when we get to it. Let me tell you what I have done. I have simply tried to put motion to modify and motion for new trial together since we have built in the deadlines of you have got to do everything within 30 days and if you do one, you have got the 75-day time limit, but I simply put in the time limits there "shall be filed within 30 days after the final judgment."

CHAIRMAN SOULES: Any opposition?

MR. HUNT: And putting motion to modify and motion for new trial together. They were separate last time, I think.

CHAIRMAN SOULES: Any opposition? Excuse me.

MR. HUNT: What is new in (c) is (3), and you may want to look at that. (C)(3).

CHAIRMAN SOULES: Okay. Any opposition to 304(c)(1), (2), and (3)? Chip Babcock.

MR. BABCOCK: What are you getting at here where you say in (3), "by an attorney selected by the defendant"?

MR. HUNT: Current Rule 329 talks about citation by publication and the defendant having two years to file a motion for new trial, and we talked last time about the appointed attorney ad litem files a motion for new trial and cuts off everybody's deadlines. It's just to make clear that it's got to be that defendant's attorney who files it.

MR. ORSINGER: Why is that pursuant to (c)(1), though?

MR. HUNT: Because if the defendant finds out about the default by publication and comes in on Day 29 with his own attorney and files a motion for new trial, it's just a regular appeal.

PROFESSOR ALBRIGHT: He doesn't get to come back later.

MR. ORSINGER: Yeah. I'm with you.

CHAIRMAN SOULES: Okay. Any opposition to 304(c)? Passes.

304(d).

MR. HUNT: Change in title only.

CHAIRMAN SOULES: Any opposition to 304(d)? Passes.

MR. HUNT: (C) has some language change that I am not sure has been brought to your attention under (ii). See if you can find (c)(1)(ii).

MR. BABCOCK: You mean (e)?

MR. HUNT: (E). Yes. (E). My age just showed there or my bifocals or something. (E)(1)(ii). What we are trying to set up there is that the date of a final judgment or appealable order, the date it's signed, determines the beginning of the period during which the court may do all of this exercise of plenary power to act on all of these motions listed there, and it's also the period of time in which a party may timely file any postjudgment document necessary to preserve the rights of the party on appeal. I simply want to run that by you and see if that causes any difficulties.

MR. ORSINGER: Can I ask a

question, Don?

MR. HUNT: It's slightly rephrased from last time.

MR. ORSINGER: Under this rule as written if I have a judgment that would meet all the criteria of a final judgment except for the fact that it doesn't -- well, maybe it can't. At this point it can't be final if it's interlocutory for any reason under this current definition, so that will never occur that a judgment becomes final by a severance order or a nonsuit. That procedure is eliminated now, right?

MR. HUNT: I think so.

HONORABLE C. A. GUITTARD: Well, it could be final by a severance order, could it not? In other words --

MR. ORSINGER: Well, you know, as it presently stands we might have a judgment that we normally have considered to be the judgment from which an appeal would be taken, except for the fact that it's interlocutory because it failed to handle a claim or a party.

We have now defined finality so that if

there is an unresolved claim or party then the judgment doesn't go final. It is not a final judgment.

HONORABLE C. A. GUITTARD: It has to expressly dispose of that claim.

MR. ORSINGER: So we will never have a judgment that's signed on Day 10 that goes final 45 days later because of a severance order or that becomes final because of a severance order or a nonsuit because right now judges sign judgments and everybody thinks the timetable runs from the date that the judgment is signed, but if it's interlocutory, it's really not running yet. It starts running from the day the severance order is signed or the day the nonsuit is signed. But in light of what we have done on the definition of "finality" for judgments, that will no longer ever be the case; is that right?

MR. HAMILTON: Will you still have severance?

MR. ORSINGER: Well, it's not a final -- I mean, the problem I have is that this judgment may be signed before it's final

and it may become final because of a severance order that's subsequently signed and yet we are still telling them that it goes from the date the judgment was signed, but it wasn't final when it was signed, was it?

PROFESSOR ALBRIGHT: And it did have the magic words on it.

MR. ORSINGER: Yeah. Do we have a trap here by telling everyone that the deadline is running from the date this piece of paper is signed even though it is not, in fact, an appealable order?

PROFESSOR ALBRIGHT: Richard, doesn't Mafrige vs. Ross now say that if you have a judgment with the magic words on it even though it's really not final it's a final order and your appellate timetable runs from that date and it's up to the appellate court to sort it out?

PROFESSOR CARLSON: The judgment purports to be final.

PROFESSOR ALBRIGHT: Right. As long as the judgment purports to be final, it has the magic word that says we are disposing of everything even though it doesn't, Mafrige

vs. Ross says then it's a final judgment for appellate purposes and you have got to file your -- do all of your appellate stuff within 30 days or whatever the appellate timetable is, and the appellate court has jurisdiction but it may have to send back whatever is not final. It's a real screwy thing, but I think that's the way the Supreme Court interprets it now.

PROFESSOR CARLSON: But you know, Alex, when you look at the definition under Rule 300(b)(1) of a final judgment, it doesn't say "one that purports to dispose of all parties and claims."

PROFESSOR ALBRIGHT: But up above --

HONORABLE SARAH DUNCAN: I don't think -- and I may be wrong and I would defer to the wise ones in the room. I don't think Mafrige can survive alternative two. Because under Mafrige if you don't expressly dispose of a party by name or a claim by identifying the claim but you have a Mother Hubbard clause, it's deemed final for purposes of appeal.

PROFESSOR ALBRIGHT: But isn't that what Mafrige or --

HONORABLE SARAH DUNCAN: That's what Mafrige says, but what alternative two says is you have got to deal with those expressly.

PROFESSOR ALBRIGHT: But a Mother Hubbard clause does deal with it expressly.

CHAIRMAN SOULES: Well, that's what Judge Guittard says, but that's not what Justice Duncan thinks.

HONORABLE SARAH DUNCAN: Well, no. I am not taking a position. I was going to say the Chair has indicated he doesn't believe --

CHAIRMAN SOULES: I don't care.

HONORABLE SARAH DUNCAN: -- that a Mother Hubbard clause is an express disposition of the case.

PROFESSOR ALBRIGHT: I thought that's what Aldredge said, was that we would like you to dispose of them expressly such as using a Mother Hubbard clause.

CHAIRMAN SOULES: You have got

a different problem?

MR. ORSINGER: Yeah. I would like to say that I think we have to be very careful about overconfidence in saying that the appellate deadline runs from the date the piece of paper is signed. Maybe that's what we want to say and maybe we are not smart enough to figure out how to say something better, but I think that it's possible that this is wrong.

PROFESSOR ALBRIGHT: Maybe we have created a monster.

MR. ORSINGER: No. The monster is there right now. Right now, even as it is right now, sometimes judgments start going final on a date later than the date they were signed by the judge.

HONORABLE SARAH DUNCAN: I will give you a for instance. There was a case in Houston where there was a summary judgment. There was a Mother Hubbard clause in the judgment, ought to deal with all parties and claims under Mafrige.

After the summary judgment there was a problem with getting the statement of facts

filed within the deadline, and apparently when they realized they had this -- no, it was the transcript. They asked the clerk in Houston to please prepare their transcript because they had this summary judgment with a Mother Hubbard clause in it. The clerk in Houston says, "It's not final. It doesn't dispose of all parties and claims," so they couldn't get a transcript.

So the trial court went in afterwards and said it wasn't -- "I didn't really intend for it to be final," and the first court held that you can -- exactly what Richard is saying. You can take something that was final on the day it was signed as it existed and render it interlocutory 30 days later with a subsequent order.

PROFESSOR CARLSON: Within the plenary power.

PROFESSOR ALBRIGHT: Well, that's within the plenary power.

HONORABLE SARAH DUNCAN: I'm not sure if it was within plenary power.

PROFESSOR ALBRIGHT: See, under Mafrige it would be okay. You have got to

appeal it, but then the appellate court says, "You're right. It doesn't dispose of all claims, so we are sending it back," but if you didn't appeal it, you are stuck.

HONORABLE SARAH DUNCAN: No. No. The appellate court didn't do that. The trial court rendered an order, and I can't remember if it was within or without plenary, but the trial court -- it's exactly what Richard was saying. You have a final judgment under the rules and the case law and something happens later that renders it nonfinal. Maybe you were saying the reverse.

MR. ORSINGER: No. I'm saying something that includes that. I am going to propose for thinking purposes that we say, "Unless the judgment is not final, the date a judgment or appealable order is signed as shown of record is the beginning" so-and-so-and-so, and then having said all of that then we say, "If the judgment is not final when signed, it becomes appealable when" and then we describe this removal of the impediment to finality so that our rule is saying that if the judgment is interlocutory

when it's signed the deadline is going to run from when it becomes noninterlocutory. Otherwise, it runs from the date it's signed.

PROFESSOR ALBRIGHT: But under option two it seems like it's putting the magic words that makes the judgment final, whether it's really final or not.

MR. ORSINGER: Well, it may be, but if you don't put those magic words in there, that last document is going to be interlocutory until you go clean up the earlier documents.

JUSTICE CORNELIUS: I don't see the problem, Richard, because the rule says "the day the final judgment is signed."

MR. ORSINGER: But if the judgment is signed at a time when it's interlocutory --

CHAIRMAN SOULES: Then it's not a final judgment.

MR. ORSINGER: -- then it doesn't -- does it ever have a date that it's signed?

JUSTICE CORNELIUS: When it becomes final.

MR. ORSINGER: No, no. It was signed on whatever day it was signed. It was interlocutory. It happened to be interlocutory.

JUSTICE CORNELIUS: But it wasn't the final judgment.

MR. ORSINGER: I know that.

JUSTICE CORNELIUS: And the rule says "the date on which a final judgment is signed."

MR. ORSINGER: Well, then are you saying that if we sign it on February 1 and it becomes noninterlocutory on February 10 that we don't have a rule to govern when the appellate timetable runs? Because it wasn't final when it was signed, so that must mean we don't have a --

JUSTICE CORNELIUS: I would say that the paper that makes it final, the signing of that date.

MR. ORSINGER: That's what I'm proposing, that we ought to say that if for any reason the judgment is interlocutory when it's signed then the timetable runs from the time it becomes noninterlocutory.

CHAIRMAN SOULES: You have to redo 300 --

HONORABLE SARAH DUNCAN: Right.

CHAIRMAN SOULES: -- before you have a final judgment. You didn't have a final judgment on February the 1st. You have got to redo 300 and get one on February 11th.

MR. ORSINGER: Okay. If you redo your judgment and it's noninterlocutory, that's going to be okay.

CHAIRMAN SOULES: Well, that's what this is all about, and Judge Guittard remembers, I'm sure, when we didn't have the specific start date of when the judgment was signed. I mean, there was a morass until that was passed in, when, the early Eighties or late Seventies?

HONORABLE C. A. GUITTARD: Right. And there was a debate as to whether it should be when it was signed or when it was entered or when it was on the record or when it was rendered, and we came up with the solution that when it was signed would be the more definite and ascertainable time.

MR. ORSINGER: But you're

saying, Luke, even if we do render it noninterlocutory later on by a severance order that we still don't have a final judgment because it wasn't final at the moment it was signed by the judgment?

HONORABLE SARAH DUNCAN: That's what alternative two says.

CHAIRMAN SOULES: That's what this (3) says.

MR. ORSINGER: Okay.

MR. HUNT: Any other problems with (e)(1)?

CHAIRMAN SOULES: (E)(1)? Any opposition to (e)(1)? It passes.

MR. HUNT: Let me tell you what --

CHAIRMAN SOULES: Don, we better stop. I know some of these people have commitments, and it's past 5:30. Can you be here tomorrow?

MR. HUNT: Sure.

CHAIRMAN SOULES: Okay. We will start right here tomorrow at 8:00 o'clock.

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on March 15, 1996, and the same were therafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $1,250.50.

CHARGED TO: Luther H. Soules, III.

Given under my hand and seal of office on this the 5th day of April, 1996.

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