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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

SEPTEMBER 16, 1995

(SATURDAY 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 16th day of September, A.D., 1995, between the hours of 8:00 o'clock a.m. and 12:00 o'clock a.m. at the Texas Law Center, 1414 Colorado, Room 104, Austin, Texas 78701.

SEPTEMBER 16, 1995

MEMBERS PRESENT:

Charles L. Babcock
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Sarah B. Duncan
Anne L. Gardner
Honorable Clarence A. Guittard
Donald M. Hunt
Joseph Latting
Russell H. McMains
Anne McNamara
Robert E. Meadows
Richard R. Orsinger
Honorable David Peeples
Luther H. Soules III
Paula Sweeney
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta Jr.
Prof. Alex Albright
David J. Beck
Hon. Ann T. Cochran
Prof. William Dorsaneo III
Michael T. Gallagher
Michael A. Hatchell
Charles F. Herring
Tommy Jacks
Franklin Jones Jr.
David E. Keltner
Thomas S. Leatherbury
Gilbert I. Low
John H. Marks Jr.
Hon. F. Scott McCown
Harriett E. Miers
David L. Perry
Anthony J. Sadberry
Stephen D. Susman

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
O.C. Hamilton
David B. Jackson
Hon. Paul Heath Till
Bonnie Wolbrueck

Hon Sam Houston Clinton
Hon William Cornelius
Paul N. Gold
Doris Lange
W. Kenneth Law
Michael Prince

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CHAIRMAN SOULES: Good morning, everyone, and thank you for being here this morning. It's about ten after 8:00, and we had at the conclusion of our session yesterday voted to recommend the changes to Rule 320 subpart (a). I think we had finished that subpart. Had we not, Don?

MR. HUNT: Yes, we have.

CHAIRMAN SOULES: Okay. And we are now ready to proceed with your report, Don Hunt, on the subsequent provisions of Rule 320.

MR. HUNT: The proposed new Rule 320(b) is for the most part bits and pieces of two old rules in the shaded form, and the struck out represents either unnecessary language or language that's some other place, but the idea was simply to remind practitioners that complaints in general terms would not be considered and that it's sufficient in motion for new trial if the complaint is understood by the judge, and that's about all there is to it.

CHAIRMAN SOULES: Any discussion on this? Any opposition? It will

be passed.

MR. HUNT: Subdivision (c) concerns affidavits. We have never had, I don't think, a rule that expressly stated what had to be accompanied with a little bit of swearing, and this simply details four instances where supporting affidavits must be attached or supported or included in the record in some way if it's not otherwise shown; jury misconduct, newly discovered, equitable grounds, and then citation by publication.

If there are any others that we need to list we may want to consider that. We talked yesterday about legal grounds for setting aside a default judgment. Most of the legal grounds that I know about don't require an affidavit or taking of evidence or that kind of thing. It's some problem with service or some problem with the petition. Does anyone know of any legal grounds to set aside a default that requires an affidavit?

MR. LATTING: Why do we need affidavits for things like this?

MR. HUNT: The case law says

you do on all of these things, and I am merely trying to list those things that we know need affidavits.

MR. ORSINGER: I can tell you one, one instance where you would want affidavits. If the trial court doesn't give you a hearing on your motion for new trial and allow you to develop the facts through sworn testimony, you have to take your case to the appellate court on the basis of your affidavits. That's your dead issue.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: I thought, and I could be terribly wrong, the law was that you can attach affidavits. In the absence of an objection the judge can consider those. If you don't have affidavits and you want to preserve your complaint then you are going to have to -- I am talking about other than jury misconduct. Then you are going to have to have testimony at a hearing to support it. Am I right?

MR. HUNT: I think that's correct, but we are trying to make a list here

and tell practitioners it would be a good idea to have it. Now, maybe we don't want to use the verb "required."

HONORABLE C. A. GUITTARD: Mr. Chairman?

CHAIRMAN SOULES: Is that your point, Justice Duncan, that there are alternatives to affidavits, and this rule changes that?

HONORABLE SARAH DUNCAN: Yes.

CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD: Mr. Chairman, there is two points to be made there. One is that we haven't undertaken to change the law here. Now, if this committee wants to change the law with respect to those things, well, I think we ought to consider it. The second point is --

CHAIRMAN SOULES: This does change the law, Judge.

HONORABLE C. A. GUITTARD: What?

CHAIRMAN SOULES: This 320(c).

HONORABLE C. A. GUITTARD: In which respect?

CHAIRMAN SOULES: You don't have to file affidavits to get a default judgment set aside on equitable grounds. You can do it through an oral hearing.

HONORABLE C. A. GUITTARD: Yeah. Well, you may be right about that. The point I wanted to make is that the purpose of requiring affidavits, for instance, for jury misconduct and other items here is that you want to make sure there is somebody that will swear to that before you convene the court and have a hearing.

In other words, is this a serious motion that somebody is willing to swear to? Otherwise, you don't even need to hear it.

CHAIRMAN SOULES: And that is a change in the law.

HONORABLE C. A. GUITTARD: Well, in some respects. It isn't with respect to jury misconduct or newly discovered evidence.

MR. HUNT: Well, may I suggest, too, that the thinking was that even on equitable grounds it says "not otherwise shown of record." That if a person is certain that

they are going to get an oral hearing and wants to forego an affidavit, that's fine because it gets otherwise shown of record. The idea was to tell practitioners that unless you can get it on the record these are four instances in which an affidavit is required in order to preserve error.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: I'd like to say that it seems to me -- and I may be missing something, but it seems to me that affidavits are sort of an anachronism. Affidavits to me are something that come up when I prepare a motion and then think is this something that we need to have an affidavit attached to, and then if it is, we run jump through all the hoops. Affidavits never make any substantive difference in my life at all except they are one more thing you have to do.

Do we need affidavits for things like this? It seems like this is just one more thing that you have in the law that people have to do, and if they don't have it, they haven't touched second base.

CHAIRMAN SOULES: There are

some trial judges who will not give you a hearing after a judgment, period, even if it's a dismissal, a DWOP. That's why we fixed 165(a) to require the judge give you a hearing, and the Supreme Court says it's mandatory.

So if he doesn't, you get to go back and have a hearing; and the affidavits, there are Supreme Court -- I think a recent case that held that if the affidavit is filed with a motion for new trial after a default judgment are sufficient to raise -- to make a prima facie case, then the trial judge should reverse, and so you have got an opportunity as a lawyer to make your appellate record even if you have an obstinate trial judge who will not give you the opportunity to do so, and there are some of those people out there.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: I hate to disagree with Joe, but I sort of do on this one because to me we are moving towards using affidavits rather than live testimony and not away from it, and my understanding of that

recent Supreme Court case was if you have got an affidavit, it says what needs to be said to preserve the complaint. You don't have to have live testimony, and the trial court has to consider the affidavits, and it's certainly in most instances a lot cheaper and more efficient to get an affidavit than it is to fly someone in to give live testimony.

MR. LATTING: My comment is that -- or it may be an assumption that it's either an affidavit or live testimony. I'm saying why have to have an affidavit at all? I found out a month ago to my surprise that in the federal statutes there is a federal statute that's not in the rules. It says anywhere an affidavit is required a declaration may be used. You don't have to make any affidavits in the federal practice. You just have to have a lawyer say this is what somebody will say.

What it is to me is running around and getting red wax and candles. I mean, if a lawyer says this is what my witness will say, I will represent to the court that these are the facts. I am just saying I think the days

of affidavits are anachronistic, and I think we ought to get rid of them and make some kind of formality, but all the pictures and different things that you have to put on there and the stamps and all that kind of stuff...

CHAIRMAN SOULES: Well, Judge Cornyn did that right at the end. He eliminated affidavits in all cases.

MR. LATTING: Well, why don't we help him out?

CHAIRMAN SOULES: All you have to have now for a paper that carries the significance of an affidavit is an acknowledgement, according to the Supreme Court of Texas. But anyway, anything else on 320(c)? Richard Orsinger.

MR. ORSINGER: This conduct by the current Rule 327 is required to be supported by an affidavit, and setting aside a judgment after citation by publication on subdivision (4) requires an affidavit under Rule 329, and I believe that the case law requires an affidavit for (2) and (3). So if we decide to abandon affidavits then we are changing both existing rules and case law, as

I understand it; and I am not saying we shouldn't; but I think we ought to be aware that we are going to be changing the practice.

MR. LATTING: It's high time.

MR. ORSINGER: If we do that.

CHAIRMAN SOULES: Anything else? Those in favor of 320(c) as written show by hands. 13.

Those opposed? Okay. It passes 13 to nothing.

MR. HUNT: Now, we move to jury misconduct, and this was relabeled, "Procedure for Jury Misconduct." Now, ignore the footnote that you see on page 5 for just a moment and let me tell you all that we did do in the revision of this rule, and most of this work represents Bill Dorsaneo's work.

We simply rephrased it without substantive change to make it read a little easier. Every change in here was for the purpose of making it more grammatically correct and to read a little easier.

CHAIRMAN SOULES: And you are talking about now all sections of 320(d)?

MR. HUNT: Yes.

CHAIRMAN SOULES: Okay. The two sections.

MR. HUNT: We just gave a different title to it, but it's the same as the old 327.

CHAIRMAN SOULES: Okay. Any discussion about proposed 320(d)? Richard Orsinger.

MR. ORSINGER: The first line there, "supported by affidavit" is redundant under the structure of (c) because (c) says that jury misconduct has to be supported by affidavits. So I would propose that we delete "supported by affidavit" from (d)(1).

CHAIRMAN SOULES: Any objection to that? What do you think, Don?

MR. HUNT: The reason why it's left there is because it's been there for some time, and if you take it out, somebody may miss (c). It is not anything but a reminder. We have in the law in a of number cases as we have gone through these rules left in reminders to counsel to keep all of us from malpractice. It's probably redundant, particularly considering its location, but it

doesn't hurt anything. So I don't care.

CHAIRMAN SOULES: Does that satisfy you, Richard?

MR. ORSINGER: No. I'd like to take it out.

CHAIRMAN SOULES: Okay. Motion to take it out or leave it in. Those in favor of taking it out. Seven.

Those who want to leave it in? Five. Five to seven it comes out.

MR. HUNT: Now, if you would, direct your attention to the end of subdivision (2) where the footnote is.

MR. ORSINGER: Well, Luke, I have got another comment on (d)(1).

CHAIRMAN SOULES: Okay. 320(d). Any other comments on 320(d)?

MR. ORSINGER: (D)(1).

CHAIRMAN SOULES: (D)(1). Okay.

MR. ORSINGER: The very last line, "injury probably resulted to the complaining party" is something we talked about yesterday afternoon, for those who were not here, could arguably state the harmless

error rule in different words from the conventional wording, and we made changes yesterday to allow for this.

CHAIRMAN SOULES: Don, would you accept substitute words there, "probably caused rendition of an improper judgment" as we --

MR. HUNT: Sure. That's no problem.

CHAIRMAN SOULES: -- straighten things to like we did yesterday.

MR. HUNT: We may be talking about a slightly different animal when we are talking about trying to review what a jury would have done, but I think it's still a harmless error, or it's a harmful error rule.

CHAIRMAN SOULES: Is that what you are suggesting, Richard, that we substitute "probably caused rendition of an improper judgment"?

MR. ORSINGER: I do, but let me find out, Don, do you think that the test is slightly different about when you should grant a new trial, on this ground would be different from the harmless error rule normally?

MR. HUNT: No, I don't. The discussion, and this was private with just two or three of us, was about the problem that comes up where you don't get a peremptory -- or challenge for cause granted on voir dire and how you preserve that and how you predict what would have happened had you had some other juror on the panel rather than the one that you had.

And that test may have to be different, and that caused me to rethink whether we needed the typical language that we have used for harmful error or whether we needed to leave it in terms as it's expressed here. You had probable injury because the jury didn't hear something it should have heard because you don't know that if they had heard it it necessarily would have resulted in a different verdict and a different judgment, but you're trying to predict that your ability to persuade the jury was lessened without this evidence, or in this case it would be different if there had been no jury misconduct, if they had not received extraneous information. I don't know. I

think it's the same, but --

MR. ORSINGER: Well, you know, in those cases where you have error in the alignment of the parties for strikes and whatnot the standards they articulate is something like in a close case there is presumed harm, and they don't really go so far as to say that probably resulted in an improper judgment, and so maybe there is a reason to articulate it differently.

CHAIRMAN SOULES: Elaine Carlson.

PROFESSOR CARLSON: I think what you're thinking about is the misallocation of peremptory strikes where the courts have said the test is did it result in a materially unfair trial, looking at the factors that are sharply conflicting proof and whether it was a unanimous jury verdict or not. So that is a little bit different spin on the usual harmless error standard, but I don't think it applies right here.

MR. ORSINGER: No. But the concept does, which is that you may have a juror who lied in voir dire, and that's going

to be picked up right here. And you know, is the test that you have to show that it probably resulted in an improper judgment, or are you entitled to some kind of presumption of harm or something like that? It may be a little bit different rule.

I am going to withdraw my request that we change the language, but I'd be curious to hear what anybody else thinks about that.

CHAIRMAN SOULES: Well, with this language, as I am understanding Don, the language "that injury probably resulted to the complaining party" is in the current rule, right?

MR. HUNT: Right.

CHAIRMAN SOULES: So we don't change anything if we leave it there.

MR. ORSINGER: That's true.

MR. HUNT: But you see on 320(a)(5) where we talked about our laundry list of matters to put in a motion for new trial, we changed that tag line. On page 3, 320(a)(5), tag line on subdivision (5), we changed that to probably did -- or "probably caused rendition of an improper judgment." I

don't see any problem in changing it here. I think there may be a real problem in the area where Elaine talks about.

CHAIRMAN SOULES: Well, if you take a juror, if you have to take a juror in the face of a challenge for cause and then you win -- then you lose but he's against you anyway, I guess that's -- I don't know how you --

MR. ORSINGER: I'm bothered by the change we made yesterday in light of this conversation that Don had because I do think that the Supreme Court articulates error in jury selection differently from the normal harmless error rule.

CHAIRMAN SOULES: You suggest we put 320(a)(5) back to the way it was?

HONORABLE C. A. GUITTARD: Well, they ought to be the same either way.

CHAIRMAN SOULES: Yeah. I agree.

HONORABLE SARAH DUNCAN: The conversations have gotten me concerned such that since Richard has withdrawn his motion I am going to assert it now. Because to me if

it didn't probably result in an improper judgment, it should not cause a court to go through the entire process again, and your example, Luke, is an illustration of that.

HONORABLE C. A. GUITTARD: Is that the same thing with respect to a juror that hadn't made proper answers?

HONORABLE SARAH DUNCAN: Yeah. To me, my opinion only, under a proper harm analysis if a juror's wrong answers have not probably resulted in a wrong judgment, I don't think -- in my opinion you should not go through the entire trial process again.

HONORABLE C. A. GUITTARD: If we want to change the law in that respect, fine.

HONORABLE SARAH DUNCAN: I think that -- I thought it was as Elaine said, that there was a difference between the structure of choosing the juror and the individual error in choosing a juror and that the Supreme Court's opinions had applied a different harm analysis to the structure of choosing the juror.

MR. ORSINGER: From whether a

juror lied in voir dire, for example?

CHAIRMAN SOULES: Elaine Carlson.

PROFESSOR CARLSON: What if a juror lied on voir dire and it turns out they should have been struck for cause -- grounds, and they served anyway and you had a 10/2 verdict?

HONORABLE SARAH DUNCAN: In my understanding that was still subject to the regular harm analysis. Maybe I'm wrong.

PROFESSOR CARLSON: I'm not sure about that.

CHAIRMAN SOULES: There are many places where the Supreme Court cases just don't go through the harm analysis. When they don't want to do it, they don't do it. Whenever the problem is one that they want to fix, they will worry about it; and whenever the problem is one that just smells bad on its face, they don't worry about it. Like a juror lying on a material matter that would have been a disqualification, they just seem to -- you know, that smells so bad we are not going to really get into this harmful error

analysis.

And, for example, with distributing strikes cases. The problem is that getting into the harmful error issue is just too hard to do. It's almost impossible to do. How do you penetrate this layer of noninformation? So you kind of do it on instinct rather than really doing it with the algebraic analysis.

And I don't -- it seems to me like where you have got some kind of poison in the jury that you do have that somewhat of a hermetic seal on really getting to the issue of did it really cause an improper judgment, for whatever it's worth. Richard.

MR. ORSINGER: If you have some tainted juror, it's more than just the vote of that juror that's at stake. It's also the deliberation of the jury and the impact that that juror had, and since we can never ask any questions or get any affidavits considered on who said what and what effect it had, you are left with the idea that someone maybe who has a burning prejudice against one of the parties was on that jury poisoning the whole deliberation, and I don't know how you

ever -- I mean, the Supreme Court gets into this business about weighing whether the case was close or not, but you know, there are some cases that are won that are not close, and there is a surprising victor and a surprising losing party, and I think that there is a reason to articulate the test differently from the normal types of error that lead to reversal.

CHAIRMAN SOULES: And then who wins and who loses? I mean, this person who's putting the poison in the jury may be in my tent, but my damages may be one-tenth of what I expected to recover. So now what? Did the error in him being on the jury, was it cured by his vote for him, or was it not cured by his vote against me? Because I don't know whether he voted for me or against me. He was for me on liability, but he killed me on damages. Maybe that's the deal he cut. I mean, just how do you get to the issue here?

HONORABLE C. A. GUITTARD: Well, it seems like to me that's a pretty difficult area, and I'm not prepared to get into all the questions of what effect this

might have. It seems like to me the committee would do better to stick with the language that's now in the rules so we don't create uncertainty in the law.

CHAIRMAN SOULES: Do you want to speak to that, Sarah? It was your motion to change it.

HONORABLE SARAH DUNCAN: No.

CHAIRMAN SOULES: Anything else on this? Okay. Those in favor of leaving the rule as written by Don that is on page 5. We are talking about 320(d)(1). Show by hands. 12.

Those who prefer to substitute traditional language of "probably caused rendition of an improper judgment" in lieu of that. Two. Okay. So the vote was, what, 13 to 2?

MS. DUDERSTADT: Twelve.

CHAIRMAN SOULES: 12 to 2 to leave it as proposed. Should we also go back then and fix (5)? Because they are the same thing.

MR. HUNT: Have to.

HONORABLE C. A. GUITTARD: So

moved.

CHAIRMAN SOULES: So moved. Any objections? No objection. So 320(a)(5) will then be made to conform to the vote we just took.

Anything else on 320(d)? Carl Hamilton.

MR. HAMILTON: Bottom of page 4, we took out communication on No. (5). Do we want to take it out there, too?

HONORABLE C. A. GUITTARD: Of course, its being here is why it was put in (5).

MR. ORSINGER: Richard Orsinger. When we took it out yesterday it was because we were making reference to this rule, and this is where we need to leave it so that subdivision 320(a)(5)(1), or little (i) I guess I should say, says "misconduct of the jury." You have to come over here to this rule.

CHAIRMAN SOULES: Misconduct is defined someplace, isn't it?

MR. ORSINGER: This is the rule.

MR. HUNT: This is the rule,

but you don't really get into misconduct until you get to subdivision (2) where it indicates that to which a juror may testify because that's where you really identify the evidence that's admissible. That's right out of 606(b).

MR. HAMILTON: Well, subdivision (d) starts with what the grounds for the motion are, communications, but under (a) we are talking about grounds, and we took that out. So it seems to me it ought to come out here, too.

CHAIRMAN SOULES: That's right.

MR. HUNT: Well, one of the reasons perhaps for leaving it in here would be because it was ambiguous when we put it in before. It was included within the big umbrella of jury misconduct; and we know that one form of jury misconduct certainly is this extraneous outside influence that's brought to bear on a juror; and so when the motion attempts to set up this kind of outside influence as a result of a communication, this authorizes it; but this subdivision (d) circumscribes what kind of communication will

be admissible; and that's what 320(a) didn't do. It gave you no real parameters. The communication fits under jury misconduct where it's explained here as being the kind of communication identified in subdivision (2).

CHAIRMAN SOULES: I can't see why you would treat the rules differently. If there is some ambiguity or vagueness that needs to be fixed in (d)(1), that same vagueness is present in (a)(5). They are exactly the same.

MR. HUNT: That's correct.

CHAIRMAN SOULES: So we ought to either take it out both places or fix it.

Aren't we really talking about improper communication made to the jury?

MR. HAMILTON: It's not any communication. It's improper communication.

CHAIRMAN SOULES: Improper communication. And if that's something that should be articulated because otherwise it might be thought to be omitted then we ought to articulate it somehow.

HONORABLE C. A. GUITTARD: It says "when the ground of the motion is

communication made by the jury." Of course, if it's not an improper communication, it's not a ground.

CHAIRMAN SOULES: Well, we talk about misconduct of the jury, not just conduct of the jury.

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: Misconduct of the officer, improper communication. I've said enough, I guess. Anne Gardner.

MS. GARDNER: Well, I agree with the motion to change it if there is a motion to eliminate it here because I think the same problem does exist as existed with the rule that we were discussing yesterday, in that if there was an improper communication then it did constitute an outside influence; and therefore, it did constitute misconduct. So it's really duplicative.

HONORABLE C. A. GUITTARD: Now, just a minute. Let me ask this: Suppose there is some sort of improper communication made to the jury. Suppose somebody tells the jury, "Decide for the plaintiff because the

defendant's insured," and it's not misconduct of the jury. It's just some communication made to the jury, and it might not necessarily be an influence, of course, but if the jury overhears somebody say that the defendant has insurance or this is an insurance company defending this suit or something like that, that might not be considered an outside influence, but it might be an improper communication.

CHAIRMAN SOULES: Well, see, you have to go through a couple of steps here, and I am not sure everybody goes through those steps, and you are not going through them, and I probably wouldn't go through them, too. If the jury, having received that improper communication considers it, it's jury misconduct.

HONORABLE C. A. GUITTARD: Yeah. But you can't prove whether they did or not.

CHAIRMAN SOULES: When we took the vote yesterday to delete "any communication made to the jury" I thought there was some place in these rules that

defined jury misconduct and made improper communication jury misconduct and that it was articulated, and that apparently is not the case.

MR. ORSINGER: Luke, it does by inference. Old Rule 327, which has the same language, was entitled "For Jury Misconduct," and then it started out, "where the ground for the motion is misconduct of the jury or an officer in charge or because of a communication or a juror lied," blah-blah-blah-blah.

Now, the text did not say jury misconduct means improper communication, officer, whatever, but the title of the section said "New Trial for Jury Misconduct," and so it kind of inferentially said that what's in this rule must all be jury misconduct.

CHAIRMAN SOULES: But that's not all brought forward in this new scheme.

MR. ORSINGER: No. The language of the text of the rule is brought forward, but the title is changed from "For Jury Misconduct" to "Procedure for Jury Misconduct," and what we really ought to have

is a definition or description of jury misconduct in the text. Then you will have exactly what you want.

CHAIRMAN SOULES: I don't know whether we could ever outline every -- let me just ask this question: Should the rules articulate that improper communication made to the jury is a ground for a motion for new trial? How many feel that the rules should articulate that? Show by hands. 15.

How many feel otherwise? One. 15 to 1. So that would suggest that we change (a)(5), little (3), put it back in and say "improper communication made to the jury."

HONORABLE C. A. GUITTARD: Okay.

MR. ORSINGER: All right.

CHAIRMAN SOULES: Okay. Anybody that would change their vote on this proposition if we put that language back in a (a)(5)?

MR. ORSINGER: Are you taking the word "any" out, or is it going to say "any improper"?

CHAIRMAN SOULES: Yes. I am

taking the word "any" out, and I am substituting the word "improper" for "any."

Then we get to, let's see, 320(d)(1), and the same thing. "Improper" for "any" in the last line on page 4.

HONORABLE C. A. GUITTARD: Why don't we take the -- as long as we are changing that why don't we take out "made"? It doesn't add anything. "Improper communication to the jury."

CHAIRMAN SOULES: Any objection to that? No objection. It's done. Both places?

HONORABLE C. A. GUITTARD: Yeah.

CHAIRMAN SOULES: Okay. Anything else on 320?

HONORABLE DAVID PEEPLES: Luke, we are talking about an outside communication, aren't we? Somebody says "Juror No. 1 made an improper communication," we don't mean to breach that, do we? Juror No. 1 talked about insurance to the other eleven.

CHAIRMAN SOULES: Well, you can't prove -- on No. (2) here it says what

you can and cannot get to through the testimony of the jurors.

HONORABLE DAVID PEEPLES: I mean, it's understood we are talking about an outside communication, isn't it?

MR. ORSINGER: It is understood, but it doesn't say that.

HONORABLE DAVID PEEPLES: It doesn't say it. Yeah.

MR. ORSINGER: It sure doesn't.

MS. SWEENEY: Well, are you-all at the point of considering the footnote yet on page 5?

CHAIRMAN SOULES: I didn't hear you, Paula.

MS. SWEENEY: Are you-all at the point yet of considering the footnote on page 5 because that's right in the middle of what you are talking about?

CHAIRMAN SOULES: Well, I think what Judge Peeples is suggesting is that we change both those places to say "improper outside communication to the jury."

HONORABLE DAVID PEEPLES: If that's what we mean to do, we probably ought

to say it. If that's not what we mean to do, let's just leave it alone.

MR. YELENOSKY: We don't know what we mean to do until we look at footnote number -- or on page 5, Footnote No. 1, because it addresses the question of whether we do want to allow testimony from the jury as to the things that are not outside.

CHAIRMAN SOULES: Okay. Judge Peeples, can you hold that thought, I guess, 'til we get to that point.

HONORABLE DAVID PEEPLES: Sure. Sure.

CHAIRMAN SOULES: And when that's resolved call it back to my attention, and we will deal with it then. What else on this, Don? Anything else on 320(d)? Any further discussion on 320(d)?

MR. ORSINGER: Well, the footnote is part of (d)(2).

CHAIRMAN SOULES: I am talking about all, not just (d)(1) but also (d)(2).

MR. ORSINGER: Well, then it's time to talk about Footnote 1.

CHAIRMAN SOULES: All right.

Let's proceed.

MR. HUNT: The purpose for Footnote 1 was not to recommend anything to this committee. It was a matter of discussion, and the thought was that if we did a little briefing and looking to see the difference in the federal rule and the criminal rule we could lay out for you reasons for changing it if anyone wanted to. Now, the prerogative it seems to me to change this rule belongs not so much to my subcommittee but to the evidence subcommittee.

I visited with Michael Prince and indicated to him that I would share this with him and intended to send it to him, but I didn't get it to him until yesterday, but the analysis here is that under the federal rule you can occasionally set aside a verdict for jury misconduct, and most of those set asides in the federal case take place under that language of extraneous prejudicial information was improperly brought to the jury's attention.

Now, that's what I think the outside communication that was in the federal rule

that we copied meant, and that's the reason why there is at least some interest among the commentators to change the Texas rule and maybe go back to the federal language, or not go back to but use the federal language.

As I understood it when we adopted the Texas Rule of Evidence we took out that extra language. We didn't adopt it from the federal rule because there was the thinking that it was a duplication, and apparently it's not. It made a real difference because I don't know of any Texas cases in the last few years that have been reversed for jury misconduct, and that's the purpose to look at it, if we want to, or refer it to the evidence committee.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: Well, I'd like to remind the committee and, Judge Guittard, you might correct me on this, but I think that this was very, very carefully considered by the Supreme Court, and I remember hearing Jack Pope say that the day when we are going to have a trial and then we are going to have a trial of the jury about the trial is over, and we want to foreclose any inquiry as to what

went on in the jury room except for outside corruption, and we do not want jurors being interrogated about "What did you say? Did you talk about insurance? Did you do this or that?"

And so this is not some inadvertent thing that happened because what had grown up was we would have our trial, and the losing side would then immediately go and start polling the jurors, the ones that would talk, and say, "Would you be willing to talk about what the deliberations were?" You have got a $7 million verdict.

"Well, I believe there was some mention of insurance."

"Oh, really," and so on and so on. Not only did you you have your discovery litigation, then you had the litigation-litigation. Then you had the jury litigation after that, and the Supreme Court said, "Enough of that. Unless it's corruption, we are not going to talk to jurors about what they talked about." Corruption being outside. So if we are suggesting this to the Court, we are suggesting a going back

to a practice that was very carefully taken out of the law. Am I correct about that?

HONORABLE C. A. GUITTARD: That's exactly right. The practice was if you lost a verdict, the lawyer, the losing lawyer, was practically guilty of malpractice if he didn't go around and interview the jurors and see if he could develop jury misconduct. I can remember doing that myself, and it was one of the most distasteful things I ever undertook to do. Although it might in some cases result in injustice, I was glad to get rid of it, and I think the Bar generally was, too.

MR. LATTING: I never actually had to do it myself, but I heard it caused a lot of trouble.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: In agreement with that, it seems to me one of the most valuable things about the Texas jury system is that the lawyers do talk and jurors talk to lawyers after the verdict and explain why they did what they did. If you do -- and

I tell jurors after the verdict, "Look, we told you not to do all of this stuff, but the fact of the matter is even if you went out back in there and rolled the dice to reach this verdict, you can tell the lawyers that because it's not going to make any difference because I can't hear anything about it. So have no hesitations here. Tell them exactly how you reached your verdict."

It's part of the dispute resolution mechanism where people face reality of the verdict that they really did -- this is why they reached the verdict. Obviously I am going to change that if we change this and tell them, "Don't you dare say anything to the lawyers," and we have to remember in federal court concomitent with the different federal rule is also severe restrictions on what the lawyers can talk to the jurors about.

CHAIRMAN SOULES: Like nothing.

HONORABLE SCOTT BRISTER: Like nothing. An absolute gag, and so I am not sure how these lawyers did this to find out this information, but I would prefer to go with the complete immunity to jurors, let them

talk about anything they want, and it's just sorry if they rolled the dice. They sure shouldn't have done it, but I am going to sign the judgment.

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: This may be a minority view, but what you just said is to me chilling. It's frightening that we would have the attitude that, well, if they went back and rolled the dice and they told us about it, there is not a dang thing you can do.

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

MR. LATTING: That's right.

MS. SWEENEY: And I realize that is the state of the law, and it has always appalled me. Why can't we do something about that? That's wrong. It's shocking. It's egregious. It's improper, and it happens, and you are stuck after, you know, your client has spent $400,000 getting ready for trial and going to trial on something that's important to them, and they may have lost a great deal of money or whatever as a

result of the verdict.

It's just astonishing to me that we should say, well, we shouldn't have such a burden on the system if the jury chooses to misbehave in that fashion, and we live in a time where, you know, it may be that we have to consider that under egregious circumstances like that where it is misconduct, not some shade or nuance or discussion or whatever, but where it's overt misconduct that there be some recourse.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Well, I haven't really handled many jury trials at all, so I don't speak from experience. I guess my question would be -- and this is weighing two evils against one another -- would be, I'm sure it doesn't happen very often that they actually admit to the attorneys, "We rolled the dice." So that's the egregious example that we all agree was improper. It seems to me almost everything else can be an argument about whether or not it was misconduct; and therefore, in the vast majority of cases you

are going to have a trial of the jury, as it's been suggested.

So the evil on one side is the egregious point that we all agree on and how often that happens versus trying every jury to find that one or two few instances; and secondly, when I look at the footnote down here it's unclear to me -- and again this may be because of my inexperience with juries, in the last paragraph with all of the examples it's unclear to me which of those would be considered outside influence improperly brought to bear and which of those would be considered extraneous prejudicial information improperly brought to the jury's attention. It seems to me you could argue both ways on a lot of those examples. So those are my two comments.

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: Is it understood that the trial court still has the power to grant a new trial for a reason that's not listed in sub (a) and --

MR. ORSINGER: Yes. We added

one yesterday afternoon.

HONORABLE DAVID PEEPLES: -- you don't have to give a reason, and you can't be mandamused or appealed on it?

CHAIRMAN SOULES: We have got No. 11 now which says "Such other grounds as warrant a new trial in the interest of justice."

HONORABLE SCOTT BRISTER: So you can't prove to me that you rolled the dice, but if you tell me that's what one of the jurors is saying, I am going to grant a new trial.

HONORABLE DAVID PEEPLES: I can still grant it if I want to, if it's bad enough.

CHAIRMAN SOULES: Yes.

HONORABLE PAUL HEATH TILL: But you won't be trying the jury.

HONORABLE SCOTT BRISTER: I am going to decide whether to take your word for it.

HONORABLE DAVID PEEPLES: And it's still going to be the law that you don't have to state your reasons for granting a new

trial.

MS. SWEENEY: That's a pretty thin layer of protection for the party that just got bombed by a jury that was in there talking about insurance or tort reform or rolling the dice or whatever it was they were in there doing.

CHAIRMAN SOULES: Anything else on this? Is there a motion to add this language "a juror" and so forth from the federal rule?

MR. HUNT: Mr. Chairman, let me assure the committee that the subcommittee has no agenda here. This footnote was put on here to call to your attention to what we thought to be the problem that's related to this business of "any communication," but when the Texas rule was taken from the federal rule and we kept in the "any communication" but took out the "extraneous prejudicial information was improperly brought to bear" that we didn't quite have a conformity of language.

If we want to have conformity of language, we may need to tinker some more with the language, but we may have done that when

we put in the word "improper communication," but the subcommittee doesn't recommend that you do this or not do this. It's just simply that it's almost impossible to get a motion granted for jury misconduct anymore, and if that's what we want then let's keep it. If we want to make a change for the reasons that Paula has articulated then let's consider it, but there is no agenda.

CHAIRMAN SOULES: Okay. We have no motion other than a motion that we adopt Rule 320(d) as presented by the committee except for the changes that we have already voted on in paragraph (1). Those in favor show by hands.

MR. LATTING: Question. How am I voting on what Don just said? I am against --

CHAIRMAN SOULES: Joe, there is no motion on that. We are voting now to approve the language as it presently is in the Texas practice.

MR. LATTING: Okay.

MR. HAMILTON: Luke?

MR. LATTING: Okay. That was

my question.

CHAIRMAN SOULES: Yes.

MR. HAMILTON: It seems to me the term "improper communication" is ambiguous. It either means extraneous prejudicial information under the federal rule or it means outside influence under the state rule, but which does it mean, or can it mean both?

CHAIRMAN SOULES: Okay. It can mean anything, but you can't prove it by a juror. That's what these rules rely on.

HONORABLE SCOTT BRISTER: It could mean either one.

CHAIRMAN SOULES: If you can prove it some other way but by the juror, you can prove it. You just can't prove it with a juror.

MR. MEADOWS: So if you find the lawyer's investigator who talked to the juror, you have proved it?

CHAIRMAN SOULES: It would probab ly be hearsay. I don't know how you would get that evidence in.

MR. YELENOSKY: Right.

MR. HUNT: You may get the bailiff to fess up.

MS. SWEENEY: Fat chance.

CHAIRMAN SOULES: Okay. Those in favor of 320(d) as modified in our deliberations so far this morning show by hands. 16.

Those opposed? There is no opposition. 320(e).

MR. HUNT: We now move to Rule 320(e), excessive damages, remittitur. Subdivision (2) is old Rule 315 word for word, no changes. It simply has a new title, new rule number, new subdivision number.

(1) is brand new. There is no current rule that matches 320(e)(1), but the thought was and, Judge Guittard, help me on this, please, is that we put this in here to reflect what is current practice.

HONORABLE C. A. GUITTARD: And to sort of define the current practice, yes. We set up a standard.

CHAIRMAN SOULES: This just articulates what's happening in the real world.

HONORABLE C. A. GUITTARD: Yeah.

CHAIRMAN SOULES: It seems to me. Anybody see that differently?

MR. HUNT: Read it carefully because while that's Bill Dorsaneo's language -- or is it yours, Judge?

HONORABLE C. A. GUITTARD: Probably mine.

MR. HUNT: It's probably Judge Guittard's language. It is not mine. Some of this language is certainly mine, but --

HONORABLE C. A. GUITTARD: Most of it's mine, as a matter of fact. Most of the shady language here.

MR. ORSINGER: Shaded rather than shady.

CHAIRMAN SOULES: Any opposition to 320(e)(1)? Sarah Duncan.

HONORABLE SARAH DUNCAN: I don't have any opposition, and this may be picky. It bothers me that we are using -- creating a new standard, reasonably sustainable, and I would suggest that maybe it should be the same old standard. The judge

may determine the greatest amount of damages sustainable by legally and factually sufficient evidence and on through the rule.

CHAIRMAN SOULES: You're saying --

HONORABLE SARAH DUNCAN: Reasonably sustainable, I'm not sure if that's somewhere in between legal and factual sufficiency or something other than legal and factual sufficiency.

HONORABLE C. A. GUITTARD: We would accept the amendment, wouldn't we, Don?

MR. HUNT: Sure.

CHAIRMAN SOULES: Delete "reasonably." Is that what you are suggesting? Just delete that one word?

HONORABLE SARAH DUNCAN: Delete "reasonably" and "sustainable by a legal and factual sufficient evidence." Of course, it's supported by factually sufficient evidence, but just say "factually sufficient evidence."

CHAIRMAN SOULES: "If the judge is of the opinion that the damages found by the jury are not supported by legally or factually sufficient evidence."

HONORABLE C. A. GUITTARD: "And factually."

CHAIRMAN SOULES: "The judge" --

HONORABLE SCOTT BRISTER: No. I think you would want "legally or..."

MR. LATTING: How about if we say "supported legally or by factually sufficient evidence"?

"And by factually sufficient evidence."

HONORABLE SCOTT BRISTER: No. "Legally or factually sufficient evidence."

CHAIRMAN SOULES: Let's see. "The judge may determine the greatest amount of damages sustainable by the evidence and may" and so forth. So we just delete "reasonably." Is that all we are going to do? Those in favor show by hands, deleting "reasonably."

HONORABLE PAUL HEATH TILL: You are going to make it unreasonably?

CHAIRMAN SOULES: I'm sorry. Get your hands up so I can count. Nine. Those opposed? Ten to one.

MR. YELENOSKY: Why are we

using "sustainable" as opposed to "supported by"? If it's not -- if the first part is not supported by then aren't we saying we want to award what is supported?

CHAIRMAN SOULES: I was understanding from Justice Duncan that sustainable is already somewhere in the jurisprudence, but I am not sure.

HONORABLE SARAH DUNCAN: No. My problem was "reasonably sustainable" as opposed to "legally and factually sufficient evidence," and I agree with Stephen.

MR. YELENOSKY: I mean, "sustainable" as I understand it is not in the current rule. So that doesn't matter. It doesn't have a history.

MR. ORSINGER: You should say "supported by..."

MR. YELENOSKY: "Supported by..." Right. Because you say at the beginning if the damages found are not supported by then the judge may determine the greatest amount of damages which are supported by.

CHAIRMAN SOULES: Okay. So we

would say "damages supported."

HONORABLE SCOTT BRISTER: And doesn't "by the evidence" necessarily refer back to the previous phrase, "legally or factually sufficient evidence"?

MR. YELENOSKY: Right. I think you can say "damages which are supported."

CHAIRMAN SOULES: Okay. Substituting the word "supported" for the words "reasonably sustainable," those in favor of 320(e) show by hands.

MR. ORSINGER: Wait. I have another point.

CHAIRMAN SOULES: You have something else? Okay.

MR. ORSINGER: I want to open a discussion because I am not sure what my opinion is on the fact that we are using the word "legally" in there. It's my conception that if the evidence is legally insufficient, that that should be cured by a rendition, like on a motion for judgment NOV or something of that nature and not by a new trial.

Now, I will grant you David Peeples always has the power to grant a new trial any

time he wants, but normally motions for new trial are addressed to factual insufficiency and not legal insufficiency, and here we are saying that you can have a remittitur based on legally insufficient evidence, condition the granting of a new trial, when really I think I have a question about whether we are mixing metaphors here.

CHAIRMAN SOULES: Judge Guittard.

HONORABLE C. A. GUITTARD: There may be cases where part of the damages, there is a damage finding. Part of it is just against the law. It's just not supported by the law. It's just against the law; whereas the rest of it may be evidentiary supported. That would be an instance it seems to me where the -- that would not be an occasion for the rendition of a judgment because part of the damage finding is supported by evidence, but if part of it is under the law and can't be recovered then a remittitur is in order.

CHAIRMAN SOULES: In other words, it may not be redundant. It may be redundant, but if it may not be redundant, why

don't we leave it in so that somebody can use it if they find a need for it.

HONORABLE SCOTT BRISTER: Let me just explain what that may mean. I am just thinking outloud. Parkway V. Woodrift case, your house floods. The jury gives you 150,000 for repairs for your house and 120,000 for emotional anguish. Now, the Supreme Court has determined that wasn't enough to be emotional anguish, that that wasn't emotional language.

So one thing I can do is sign a judgment, render 150,000. That's your damages. On the other hand, I could do it by remittitur to avoid being reversed in this case, say, "Plaintiff, if you want your 150 for your repairs, you are going to have to accept a remittitur of the 120,000 emotional anguish and waive that emotional anguish issue," because this -- what's emotional anguish and isn't, we are all going to be dealing with this for a while. I just want to make sure everybody understands you are giving me that option to protect myself, but I am going to force you to waive your argument for appeal. I am happy to have the power, but I just want

to make sure you understand that's what you would do.

MR. ORSINGER: I don't think it waives it. I think you have the right to accept the remittitur and still complain on appeal that it was forced on you.

HONORABLE SCOTT BRISTER: Not unless the other side appeals first and you remit.

CHAIRMAN SOULES: Don Hunt.

MR. HUNT: Let me explain the reason that I understand we have "legally and factually sufficient evidence" in the first part. Take the case where you have evidence to 100,000-dollar amount. There is legally and factually sufficient evidence for the jury to award a 100,000-dollar amount, but the jury comes back and awards $150,000. Nobody testified to 150. No expert testified to it. There is no document. There is no list of repairs that would permit a jury to make an inference of that.

So the trial judge must say, it seems to me, that there is legally insufficient evidence to support $150,000. Now, if there

were evidence there to support $90,000 and the judge felt that it was insufficient to support the whole hundred to which the witnesses testified then the judge would have the shot at setting this at $90,000. So both would operate in one situation, and that's the reason why you need both.

Part of the damages may be supported by zero testimony, and so the judge functions to knock out that part which is supported by no evidence, and in that sense it's a rendition, but in the sense that there is some evidence to support some amount, then the judge has to come in and function to set the greatest amount of damages supported by the evidence, and that's how I understand it works.

HONORABLE SARAH DUNCAN: Now, I guess I am getting confused because my understanding is that the standard of review for remittiturs is sufficiency of the evidence.

MR. ORSINGER: "Factual sufficiency."

MR. HUNT: Right.

MR. ORSINGER: Not legal.

HONORABLE SARAH DUNCAN: Right, factual. So how can you condition a new trial on legal sufficiency when there is no interplay between the two standards?

CHAIRMAN SOULES: Well, you can get a new trial for legal insufficiency, and if the only place you raise legal insufficiency is in your motion for new trial then that's all you get from the appellate court. You don't get a rendition.

HONORABLE SARAH DUNCAN: That's right, but if you raise it in a proper instrument, you are entitled to rendition.

MR. HUNT: But not in the example I gave. You wouldn't be entitled to rendition there. All you could do is attack the 150,000-dollar finding as being supported by no evidence. You would still get a new trial.

HONORABLE SARAH DUNCAN: You are entitled to rendition as to that finding that is not supported by legally sufficient evidence. You are entitled to rendition on it.

CHAIRMAN SOULES: No, I think

not.

MR. HUNT: Not when there is some evidence to support some amount. You get a new trial.

CHAIRMAN SOULES: There is factual -- legal and factually sufficient evidence to support damages at level X, but there is no evidence to support an additional increment of damages X plus Y, the Y part of it. The trial judge could not render a take-nothing judgment.

HONORABLE SARAH DUNCAN: No. But the trial judge can grant a motion for JNOV and give you only -- make a judgment only for the amount of damages that is supported by legally sufficient evidence. Now, if they choose to go forward and grant a motion for remittitur or motion for new trial on factual sufficiency grounds, they can do that, and they can condition the new trial ruling on that, but if there is no evidence of mental anguish then you are supposed to grant -- you are supposed to render judgment, take nothing on mental anguish damages, and we are sort of getting remittitur and rendition, factual

sufficiency and legal sufficiency into the same process.

CHAIRMAN SOULES: Well, take Don's example where it's all just one damage blank and it's cost of repairs and there is evidence of 90,000, but there is not evidence of 150,000 to support the jury. I wasn't aware that a trial judge could NOV that back to $90,000.

HONORABLE SARAH DUNCAN: Uh-huh.

HONORABLE SCOTT BRISTER: Yeah. I do. I do. I hope it's all right.

MR. HUNT: This merely gives a way to do it.

CHAIRMAN SOULES: This gives them a way to do it.

MR. ORSINGER: No, no. This doesn't.

HONORABLE SARAH DUNCAN: This does not.

MR. ORSINGER: This suggests that they need to grant a new trial, not that they should be granting an NOV, which they should be.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: They should be granting an NOV if there is no evidence for the difference between 90 and 150, and we are telling them -- the only thing we are telling them is that you can grant a new trial conditioned on remittitur, and we are not telling them you can NOV it, and that bothers me a little bit.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: And what bothers me, it just dawned on me what's happening here. I finally soaked through what Scott and Richard said. What we are allowing is we are allowing a judge to enter what really amounts to an NOV but make you give up you're right to appeal that in order to get you to do it. You are nodding your head and so is David nodding. This is a bad idea. You don't like this, Richard.

No, really. Because that's what's going on because if they are going to do it on legal insufficiency, it ought to be as an NOV. Not say, "Okay. Well, you get a judgment, but it's going to be in the form of a remittitur."

So you are put to this Hopson's choice you shouldn't be put to, of either agreeing with that.

MR. ORSINGER: I agree.

HONORABLE SARAH DUNCAN: Absolutely.

CHAIRMAN SOULES: Well, you don't have to agree if the judge is saying "Look, if you want to NOV that, that's fine, but I am not going to agree to remittitur because I am going to take it up on appeal."

MR. ORSINGER: But, no, you can't take it up on appeal because he is going to grant a new trial, and you are never going to get your judgment up.

HONORABLE SCOTT BRISTER: We are going to do it all over again.

MR. ORSINGER: So the trial judges like it because they force the winner to accept a partial victory in lieu of being punished by a new trial. The litigants don't like it because under the law they are entitled to a correct judgment, and they are entitled to appeal it if they don't get it.

MR. LATTING: Yeah. Right.

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: If we take out the word "legally," can't a trial judge do the same thing we are talking about?

MR. LATTING: Yeah, but he is not encouraged to.

HONORABLE DAVID PEEPLES: Okay. I think if a judge wants to do that, he can still do it if the word "legally" is taken out.

HONORABLE C. A. GUITTARD: What about a case where --

CHAIRMAN SOULES: In the context of a motion for new trial a judge can do anything he wants to do three times.

HONORABLE DAVID PEEPLES: Yeah. Yeah.

HONORABLE C. A. GUITTARD: What about a case where there is a 100,000-dollar verdict and one of the elements in the damages is legally improper? Suppose it's a case where they detailed mental anguish damages, and that's not a proper recovery in this economic case, whatever it is. Then can the

judge -- the judge can't grant a remittitur. I mean, the judge can't grant the judgment NOV in that sort of a case. He can take the whole thing away and in particular an ascertainable part of it.

So but the judge can look at the thing and say that the evidence, though there is some evidence of damages under proper legally or factually sufficient evidence, there is some evidence of damages that are sustainable, this element, which we don't know the amount of, was not proper. So I will just give a remittitur that will take care of that. Can he do that?

CHAIRMAN SOULES: Again --

HONORABLE SCOTT BRISTER: I think Luke's right. You can do whatever you can get by with, and just say, "Look, I am going to take 20,000 off. I will sign the judgment. Do you want it or a new trial?" And you have got to put you to it. I agree with the judge. I think there may be situations where judges need to do just that on that basis. That example he posits on appeal, you certainly can't reverse it because

the appellate court is going to say, "We can't tell which part of this is emotional anguish. The jury may have done the right thing. If it's a broad form submission, it's just one damages amount; therefore, since you didn't ask for separate jury blanks on these things it's waived," et cetera, et cetera, but a judge can take care of all that problem by saying, "I am going to cut 15,000 off of it."

HONORABLE SARAH DUNCAN: But it's not authorized now. If you as a trial judge call legally sufficient evidence insufficient evidence, what is really no evidence factually sufficient evidence and, you know, suggest a remittitur that's fine; but then if I go up on appeal and you deny my motion for judgment as a matter of law because there is, in fact, no evidence of that element of damages, I am entitled to rendition on appeal; but here we are making it authorized so that if you call no evidence factually insufficient evidence and deny my motion for judgment as a matter of law, it was an error because this rule says you can't suggest a remittitur on legal insufficiency grounds.

MR. ORSINGER: If I can comment, Sarah, I don't think you will be able to take your appeal because they will knock you out with a motion for new trial, and you will never get to the court of appeals with that argument unless the other side appeals, and you can raise it as a cross-complaint.

CHAIRMAN SOULES: Well, as I am understanding the discussion, there is a feeling, although we have no motion yet, that the words "legally or" in the second line of (e)(1) be deleted.

MR. LATTING: Yes.

CHAIRMAN SOULES: Okay. And we have discussed that. Now, anyone have anything new to say about deleting that language?

MR. ORSINGER: Well, I would like to say this, that everyone knows that legal sufficiency is properly challenged through other rendition points and not remand points, and I think this is very confusing to put a rendition point in a remand procedure.

CHAIRMAN SOULES: Anything else? Anything else that's new on this? Anne

Gardner.

MS. GARDNER: Well, I guess it's not new. I was just going to reiterate what you said. If that's the first place you raise it, is in a motion for new trial, then that's what you're entitled to even though it would otherwise be a rendition point, but you could raise a legally insufficient point in your motion for new trial and only get a new trial.

CHAIRMAN SOULES: If that's the only place you do it.

MS. GARDNER: If that's the only place you raised it.

CHAIRMAN SOULES: Okay. Those who prefer to delete the words "legally or" show by hands. Ten.

Those opposed? One opposed. So by a vote of ten to one the words "legally or" come out.

Any other discussion on 320(e)(1)? Those in favor of 320(e)(1) as modified by our discussion today show by hands. 15.

Those opposed? There is no opposition to that. Any other discussion? Any other

discussion about (e)(2)? That's the law we have today. Judge Duncan.

HONORABLE SARAH DUNCAN: This has always bothered me in this rule. In the last line of subdivision (2), "Execution shall issue for the balance only of such judgment." It makes it sound like it's mandatory that it issue, and I know we all know that it's not mandatory, that you still have to -- it's a question of "execution can issue."

MR. LATTING: "May."

MR. ORSINGER: "May."

CHAIRMAN SOULES: Well, what it was really intended to say is "execution may issue only." Well, it says "for the balance only."

HONORABLE SARAH DUNCAN: But "only" needs to be moved by -- "shall" should be changed to "may" in my view, and "only" needs to be changed either to after "issue" or to the end of the sentence, and I'm sure Judge G. would know which one was absolutely proper, but I don't.

MR. ORSINGER: I would move that we put it after "issue."

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

Is there any opposition then to (e)(2)? There is none. So that's done. That takes care of 320(e).

HONORABLE SARAH DUNCAN: Can I ask a question? Did the subcommittee consider additur?

HONORABLE C. A. GUITTARD: Consider what?

HONORABLE SARAH DUNCAN: Additur.

HONORABLE C. A. GUITTARD: Additur, no. It's not in our practice now, and if this committee wants to consider it, fine, but we did not consider it.

CHAIRMAN SOULES: Elaine Carlson.

PROFESSOR CARLSON: I was reading an article the other day on a jury charge, and they were describing the facts in Westgate. They described the facts, and I did not go back and verify it, but I think it's right, where the trial judge did add damages based upon a sufficiency basis, and that

wasn't the basis for ultimately the reversal because it went to the broad form submission question, but that kind of made me think maybe we do have additur, and we are just not saying it.

HONORABLE SARAH DUNCAN: I think I have seen it a few places. I thought we did have additur procedures. It's just not really used.

HONORABLE C. A. GUITTARD: It's not spelled out in the rules, in any event.

MR. LATTING: Brister knows how to do it.

HONORABLE SCOTT BRISTER: Yeah. Like Luke says, I tried one case in Bryan. The judge wrote me after my 12/0 jury verdict for the defendant doctor, "If you pay the plaintiff 10,000, I won't grant the new trial. If you don't, I will."

I said, "He can't do that. That's an additur." Appealed it, mandamused all the way. "Nah, it's a new trial. It's a new trial." We already have it, but I wouldn't add a rule to it.

CHAIRMAN SOULES: I don't think

the Supreme Court --

HONORABLE SCOTT BRISTER: Because I was furious.

CHAIRMAN SOULES: I don't think the Supreme Court in its current posture would pass a rule for it.

MR. YELENOSKY: So basically you are in negotiations with the judge as to whether you are going to settle for a new trial.

HONORABLE SCOTT BRISTER: The judge can grant a new trial or anything they want.

CHAIRMAN SOULES: Let's go to 320(f), partial new trial.

MR. HUNT: Proposed Rule 320(f) is nothing more than old Rule 320 slightly rewritten.

CHAIRMAN SOULES: Any opposition to 320(f) as written, as proposed? Being none, that's done.

MR. HUNT: Now we come --

CHAIRMAN SOULES: Rule 321.

MR. HUNT: Now we come to the new Rule 321 where we attempt to track for the

most part what was done in the TRAP rules.

Rule 321(a), general preservation rule, and I want to explain the shading and the strikes. What this represents is 320 -- it represents TRAP 52 as it is now written. The strikes are the strikes that this committee approved and sent to the Supreme Court for new TRAP 52. The shading is, likewise, the same with the exception of the last two sentences. The last two sentences have been added because of the case of Wilson against Dunn. Is that the case, Judge?

HONORABLE C. A. GUITTARD: I think so.

MR. HUNT: And the problem there. And it was added, I think, at the concern of Justice Hecht, and it expresses what now we think is the existing practice. Now, whether the Court adds that, those two sentences, to TRAP 52(a) ought to control what we do here. So we may want to send it up, if we send it up, with the request that the Court either put on these two sentences or leave them off, if it takes like action on proposed TRAP 52. Otherwise it's the same thing that

this body has already done.

CHAIRMAN SOULES: Okay. Any discussion on this? Richard Orsinger.

MR. ORSINGER: I would disagree with the footnote that this second to last sentence codifies the existing practice because I think there is really two lines of case authority on writ of error appeals about whether an absent party waives all evidentiary or most, particularly objections to hearsay.

Now, the practical effect that I see of this sentence is that if you are taking a writ of error appeal, which means that you were -- usually that you were a party but you didn't participate in the trial then you cannot make objections after the fact such as to hearsay or to attack the sufficiency of the evidence when it's based on hearsay because you were not there and didn't make an objection. It just comes in.

Hearsay comes in as probative even though we know it's normally not probative if objected to, and this is going to mean that people can try defaults by affidavit, and it may also mean that people can try defaults and

prove up their defaults with unsworn testimony possibly because it may be that unsworn testimony is such a severe lack of legitimacy that it would -- that it's not waivable, but certainly other forms of hearsay like letters and affidavits and whatnot are going to come in, and I think this is going to have an effect if we adopt this rule on the prove-ups in defaults, that we are going to have a much less serious effort to put on real live testimony to prove up a default.

HONORABLE C. A. GUITTARD: I think the thinking behind this was that a person ought not to gain an advantage by staying away from the trial, that he ought not to be in a better position staying away than he would if he had been there and then not objected.

Now, of course, it's properly -- that is if he's been properly notified, and that's what the rule says. "A person properly notified but absent from the trial waives these objections." If he is properly notified, he stays away, he ought not to be able to make an objection after the trial that

he would have to make at the trial if he were there.

MR. ORSINGER: Can I pose a question, Luke?

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I am proving up a default judgment. I bring in unsworn letters from a half dozen witnesses. I don't put anybody under oath, including my client. Mark them all, offer them, and write myself a judgment for a million bucks. They take it up either on a direct appeal or on a writ of error appeal, and they complain, "Wait a minute. There wasn't a jot or tittle of sworn evidence to support this judgment." Have I waived my right to complain about that because I wasn't there to object it was hearsay and unsworn?

HONORABLE C. A. GUITTARD: The standard then would be whether or not the evidence is sufficient to support it. I guess the court could look at it and say, "Well, this isn't reliable evidence. It's not sufficient to support it, and we will

reverse."

CHAIRMAN SOULES: Well, I think the answer to Richard's question is, "yes," because if I call a witness at trial and the witness is not sworn and you don't object, that witness' testimony comes in.

MR. ORSINGER: Well, then I agree entirely with the policy, but as Rusty said, when we killed writs of error, which I very violently disagree with, is that if you don't even bother to show up, you ought not to have a better shot at reversal than if you do show up and make your diligent objections.

On the other hand, if this becomes our rule of law then there is really going to be no controlling mechanism, even the oath requirement, in a prove-up on a default; and that bothers me because people may say things that are not truthful, knowing that they are not under oath, that they wouldn't say when they are under oath; and this may affect what default is given, the amount of the judgment that's given; and it's a policy issue with me, and it bothers me.

CHAIRMAN SOULES: You are aware

that the Supreme Court in July passed on that policy issue?

MR. ORSINGER: I am embarassed to say I am not. What do you mean?

CHAIRMAN SOULES: The Supreme Court held in a case in July, that won't come to mind right now, that a document filed in a discovery hearing was valid to show the facts of the discovery hearing even though it was not under oath. It just had an acknowledgement on it, and I guess we are going to see that in summary judgments, too, because it doesn't make any difference. They say it's an affidavit if it's got an acknowledgement on it.

MR. ORSINGER: Did they know they were saying that?

CHAIRMAN SOULES: They sure did. It appears right on the face of the opinion. It's a unanimous opinion by Judge Cornyn.

MR. ORSINGER: Well, notwithstanding, it seems to me that there is a valid public policy in saying that at the very least the evidence supporting a default

judgment ought to be sworn to, even if you are going to have a -- waive all other complaints because people will not be able to resist taking advantage of an absent party by putting on unsworn testimony if you can get away with that.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Well, if it's something that shouldn't be waived because you are absent but it's something that is waived if you are present and don't make the objection, it seems to me if your argument is that's something that essentially should never happen, the testimony shouldn't come in, it shouldn't require an objection even when you are there.

I mean, you could list the things that just should never come in. An unsworn document should never come in. If you're present, the judges shouldn't allow it because it doesn't matter whether you are there or not. What you're saying is it's so fundamental.

MR. ORSINGER: Steve, I don't

think you can do that because we have now lived with the rules of evidence that say that unobjected to hearsay comes in as substantive evidence, even though before that it wasn't.

MR. YELENOSKY: Right.

MR. ORSINGER: But I am talking now about a policy that I think goes beyond the rights of the parties against each other. We all know that when you are entering a default judgment you are taking advantage of somebody in a way where you probably couldn't do it if they were there and had a lawyer and made you really put on bona fide proof; and that's the price you pay for not filing an answer, is that people write in their own monetary amounts and everything else; but from the standpoint of the government, not just the rights of the party, do we really want to be signing judgments if they are not based on something that someone is willing to swear to?

MR. YELENOSKY: I agree, but the same could be said if the attorney is there and just misses it and fails to object. The parties could say, "Why should I be prejudiced by the fact that my attorney failed

to object," in the same way the person can say, "This is so fundamental it shouldn't have happened even though I wasn't there." I mean, the argument is the same. So why --

CHAIRMAN SOULES: Judge Peeples. Excuse me. Steve, did you finish? I didn't mean to cut you off.

MR. YELENOSKY: Yeah. I just don't see that the argument is any stronger if you are absent than if you are present and your attorney screws up.

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: Under the rule as written if the evidence at a default judgment is a lawyer just saying what eight or ten witnesses would have testified to, the witnesses are not there; there is no documents; it's just a lawyer talking. Now, you would make an objection to that if you were there to do it, but under this rule wouldn't that be enough?

HONORABLE C. A. GUITTARD: I think not because of the last sentence. "An absent party does not waive a lack of proper

record of the trial," and if the record of the trial shows that the evidence is not sufficient to support the judgment, and that would be true if it's just the lawyer talking about what he expects to prove.

HONORABLE DAVID PEEPLES: Well, I see that last sentence as saying the court reporter has got to be there.

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

HONORABLE DAVID PEEPLES: And you don't waive that.

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

HONORABLE DAVID PEEPLES: But I think an appellate court would look at this rule as written and say, "You waived the right to object that this lawyer didn't have personal knowledge and wasn't under oath, and that's enough evidence and tough luck. You should have answered." I don't think we mean to do that.

HONORABLE C. A. GUITTARD: Maybe.

CHAIRMAN SOULES: Justice

Duncan.

HONORABLE SARAH DUNCAN: Maybe I am all off base, but I thought there were waivable defects in a proceeding, and there were nonwaivable defects in a proceeding, and something like an oath and evidence, factually or legally sufficient evidence, were not waivable defects. I mean, either you have them or you don't. I mean, I guess I am concerned that Judge Peeples is right, that this would take things that I at least considered to be nonwaivable defects in any proceeding and make --

HONORABLE DAVID PEEPLES: I think the oath is waivable.

HONORABLE SARAH DUNCAN: -- them waivable.

HONORABLE DAVID PEEPLES: That doesn't bother me very much at all. The horrible hearsay bothers me. A lot of times a lawyer is just testifying as to what his file shows.

CHAIRMAN SOULES: How do we deal with this then? Anne Gardner.

MS. GARDNER: Well, a couple of

other problems that we were talking about were the defect in pleadings yesterday when we discussed them in default judgments that we had a question about whether all defects were waived by default, all defects in pleadings, and being properly notified the party may be -- this is just another point.

A party properly notified may nevertheless have equitable grounds to set aside the default, and I would agree that these last two sentences do seem very confusing because, for a third reason, a proper record not being waived doesn't seem to me to help any because it could be a proper record of virtually nothing, if it's just a lawyer up there talking and not under oath. So I would move that we delete those two sentences because they may not properly reflect the law, and I don't think we mean to change the law.

HONORABLE SARAH DUNCAN: I would also say -- and Judge Guittard will correct me, I'm sure. This was not the problem that I understood Justice Hecht to be concerned about. What was the name of the

case?

HONORABLE C. A. GUITTARD: Wilson against Dunn. Actually, I think that Wilson against Dunn is taken care of in (b).

CHAIRMAN SOULES: In what?

HONORABLE SARAH DUNCAN: In (b)?

HONORABLE C. A. GUITTARD: In (b).

CHAIRMAN SOULES: In 321(b)?

HONORABLE C. A. GUITTARD: Yeah.

CHAIRMAN SOULES: As proposed? If I am understanding your footnote --

MR. HUNT: Ignore the footnote. Ignore the footnote. That was my own fertile imagination when I had forgotten why we added that language.

CHAIRMAN SOULES: Well, did we add these two sentences to 52(a) and send it to the Supreme Court?

MR. HUNT: No. No.

CHAIRMAN SOULES: We did not.

MR. HUNT: No, no, no. These are added to what was submitted.

HONORABLE SARAH DUNCAN: A specific example -- I'm sorry.

CHAIRMAN SOULES: These were added to what was submitted?

HONORABLE C. A. GUITTARD: Yes.

CHAIRMAN SOULES: And how were they added?

MR. HUNT: The subcommittee drafted them.

MR. ORSINGER: They were not added to the appellate rule.

MR. HUNT: No.

MR. ORSINGER: They were added to the trial rule. The appellate rule is still what we think it is.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: And it does not include these two sentences.

CHAIRMAN SOULES: Okay. Justice Duncan.

HONORABLE SARAH DUNCAN: I think this is right. Default appeal, whether it's writ of error or whatever, factual sufficiency of the evidence to support a damage finding, you would have to raise that

in a motion for new trial. Legal sufficiency, you might have to raise in the charge error stage or whatever. Just because you don't participate doesn't mean you waive it; isn't that right?

PROFESSOR CARLSON: Well, it's how you interpret these words at trial. I just assumed that was a post-trial motion that you could make even if you didn't participate. Maybe I'm reading this incorrectly, Don.

CHAIRMAN SOULES: Anne Gardner. Then we will go around the table. Steve, I will get you next.

MS. GARDNER: Rule 90 regarding waiver of defects in pleadings, the last sentence says specifically that it is provided that this rule shall not apply to any party against whom default judgment is rendered. So the waiver provision in the last two sentences that we are considering would conflict with that sentence in Rule 90.

CHAIRMAN SOULES: Steve.

MR. YELENOSKY: I guess maybe I can refine my point as I have thought about it because what we are thinking about is somebody

who is absent versus somebody who is present with a -- let's say not just competent but infallible attorney and even assuming all attorneys were infallible perhaps the best comparison would be somebody who is absent versus somebody who is present and acting pro se. Somebody who's present and acting pro se may not know at all about hearsay objections. If they are present, they go through the trial, and at the end of it if they haven't made hearsay objections under the current evidentiary rules, they have waived them. The same person who didn't show up hasn't waived them is what I guess you're suggesting, Richard, and I don't know how you really fix that, but it doesn't seem that that would be a fair result.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I'd like to respond first to Sarah and then to Steve. If you make your -- regardless of whether Elaine is right about whether this rule applies to motions for new trial or not, if you do your prove-up to a judge nonjury you can attack

sufficiency of the evidence for the first time in your brief. So the only time it's really going to hurt is where they go ahead and impanel a jury to prove up a default, which they have to do, by the way, if you have filed an answer and requested a jury but failed to show up for trial.

CHAIRMAN SOULES: No.

MR. ORSINGER: Or you think the jury is waived by your failure to show?

CHAIRMAN SOULES: The Supreme Court has ruled on that in the last year.

MR. ORSINGER: All right. Well, excuse me. I guess I am not reading my journal closely enough, but at any rate if they do the prove-up to the jury, you have to file a motion for new trial to attack factual sufficiency, and if you come in before a new trial deadline runs, you can; but if you come in on a writ of error appeal, which won't exist under these new rules anyway, you can't. So we probably ought to have an understanding as to whether someone can challenge the legal and factual sufficiency of the evidence if there is a jury trial on a default just by

virtue of not showing up.

CHAIRMAN SOULES: Judge Duncan.

HONORABLE SARAH DUNCAN: This brings up my whole problem with 52(a), these last two sentences. I think preservation is entirely too complicated to be encompassed within one rule. I doubt I will convince the committee to just delete all of 52(a). So can I just move that the last two sentences be stricken if that hasn't already been moved?

CHAIRMAN SOULES: Is there a second?

MS. GARDNER: I will second.

CHAIRMAN SOULES: Any further discussion on this, anything new? Those in favor of Justice Duncan's motion to omit show by hands. Are you voting, Chip? 12.

And those opposed? To two. 12 to 2 the last two sentences come out.

MR. HUNT: Otherwise this is Rule 52(a), TRAP 52(a), and I am not sure we have any business of changing it. Unless there is opposition, Mr. Chairman, I'd ask that 321(a) be approved.

CHAIRMAN SOULES: Any further

discussion on this? Those in favor show by hands. 11. Those opposed?

HONORABLE PAUL HEATH TILL: Excuse me. Did we just say that an absent party doesn't waive a right to a proper record? Are we saying that an absent party doesn't have a right to a proper record?

MR. ORSINGER: No.

HONORABLE PAUL HEATH TILL: Did we cut that out, too?

MR. ORSINGER: Paul, the last sentence was necessary because of the second to last sentence. Because the second to last sentence would suggest that you have even waived the right to a court reporter, but if we take the second to last sentence out we don't need to put the last sentence in because case law already says that.

HONORABLE PAUL HEATH TILL: Gotcha.

CHAIRMAN SOULES: The vote in favor of 321(a) was 11 unopposed to 1. 11 to 1 it passes.

HONORABLE SARAH DUNCAN: Can I point something out?

CHAIRMAN SOULES: Yes, ma'am.

HONORABLE SARAH DUNCAN: I believe this is the Wilson V. Dunn problem. In subparagraph (6) we have just indicated, I think, that you can preserve a complaint that was waived during trial by putting it in a motion for new trial.

CHAIRMAN SOULES: Where is that?

HONORABLE SARAH DUNCAN: And I thought that was the Wilson V. Dunn.

HONORABLE C. A. GUITTARD: Wilson against Dunn held as I recall --

CHAIRMAN SOULES: Okay. Now we are going to 321(b). We only have passed on 321(a).

HONORABLE C. A. GUITTARD: Right. Wilson V. Dunn held --

CHAIRMAN SOULES: And, Don, give us 321(b) and then we will get to the discussion on it.

HONORABLE C. A. GUITTARD: Okay.

MR. HUNT: This is an attempt to say when a motion for new trial shall be

required. It's not an attempt to break any new ground. There are some differences in wording from what we understand the current law to be, but other than that this is for the most part current Rule 324(b). That's it.

CHAIRMAN SOULES: Okay. And your committee moves that we adopt this rule?

MR. HUNT: We do.

CHAIRMAN SOULES: Discussion?

HONORABLE C. A. GUITTARD: Mr. Chairman?

CHAIRMAN SOULES: Judge Guittard. Then I will get to Judge Duncan.

HONORABLE C. A. GUITTARD: Wilson against Dunn held that there was a defect in service, but the defendant came in any way and filed a motion for new trial, a timely motion for new trial, and he didn't raise the defect in service in his motion for new trial. Judge Hecht held, and he thought he had to under current rules, that he didn't have to raise the defect in service on his motion for new trial, even though he came in, appeared, and filed a motion for new trial; and Judge Hecht suggested that that problem be

cleared up by the rule.

Now, the problem was the old rule said a point in a motion for new trial is not a prerequisite to a complaint on appeal in certain instances, but the new rule gets around that problem by saying that what shall be included in a motion for new trial rather than saying what need not be included in a motion for new trial, and so under this rule, under Rule 321(b), any complaint not otherwise ruled on by the trial judge has to be raised some way in the trial court before you get up on appeal, including failing to -- including defective service.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: Maybe I am just reading it incorrectly but my reading of (b)(1)(6) is that you shall -- just reading the beginning, "As a prerequisite to appellate review the following complaints shall be made in a motion for new trial: any complaint not otherwise ruled upon by the trial judge."

Now, that suggests to me that even though

you waived it during trial, let's say it's a hearsay objection, that some people, I think are going to read this to say, well, but if I put it in my motion for new trial I preserved it, and I don't think we want to be suggesting that.

HONORABLE C. A. GUITTARD: Well, that may be a possible interpretation. That's not the intent. Now, I don't know how we could fix it to say that you have to raise it some way in the trial court, and if you haven't raised it otherwise, you have to raise it in a motion for new trial. That's not to say that you may not have waived it by not raising it earlier.

HONORABLE SCOTT BRISTER: What kind of complaints would be under (6) that wouldn't be under (1) through (5)?

HONORABLE C. A. GUITTARD: Let's see. Well, what about this defective service?

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: Scott, you may not do a lot of nonjury trials, but in the

family law area almost all of our trials are nonjury, and frequently the only important error that occurs in a family law trial is going to occur at the time of rendition of judgment, and the judge is going to make a decision that something is separate when it's really community or vice versa or something of that nature.

Now, in my view the proper cure for that is not a new trial. If the judge makes a mistake at rendition, the proper cure is to modify the judgment, and I have been a big proponent for years that we are pretending like the motion for new trial is the dustbin where we toss all of our complaints in order to preserve them, even though some of the complaints are addressed to a modified judgment and not to a new trial with new evidence and everything else.

But I can tell you if this is adopted, most family lawyers are going to waive error in their case because no one's psychologically adjusted to thinking that an error that the trial judge makes in rendition, not having a jury verdict in front of him or anything, all

have to be listed in the motion for new trial, and you don't even want a new trial anyway. What you want is you want him to move black acre from separate to community, or you see what I am saying.

And so I have a problem with adding (6) on here because before under 324 the things that had to be in a motion for new trial were things that really could only be cured by having a new jury and new evidence with new witnesses, et cetera; but by adding (6) on here that means every rendition problem that could be cured by a new judgment with no new evidence has now got to be in a procedural tool that gets you only new evidence and not a modified judgment.

Now, there might be some way for us to fold motions to modify judgment in here somehow, and truthfully, I think we ought to get out of the habit of thinking that motion for new trial is the dustbin for all otherwise unpreserved errors. It should be the dustbin for all otherwise unpreserved errors that requires a new trial, and the motion to modify ought to be the dustbin for all otherwise

unpreserved errors that would require a modified judgment. And so I really oppose (6) because it has ramifications that are severe.

MR. LATTING: Here, here. Well said.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: This was my understanding of the problem. The way 324(a) now reads a point in a motion for new trial is not a prerequisite to a complaint on appeal except as provided in subdivision (b). So if it's not in (b), you don't have to put it in a motion for new trial. Service, to me that is something that evidence has to be heard on in order for the trial judge to rule intelligently on it, and it is subsumed in (1), "any other complaint on which evidence may be heard."

CHAIRMAN SOULES: Unless it's apparent on the face of the record.

HONORABLE SARAH DUNCAN: But even then don't you have to bring it to the trial judge's attention or ask that he take judicial notice of the file?

CHAIRMAN SOULES: No. I don't think you do. I don't think you have to put on any evidence at all. For example, if there is no sheriff's return on file, just not there.

HONORABLE SARAH DUNCAN: Well, then --

CHAIRMAN SOULES: I mean, you have to raise it by a motion maybe or motion to modify, motion for something, but you don't have to --

HONORABLE SARAH DUNCAN: Well, don't you have to call it to their attention?

CHAIRMAN SOULES: Right. But you don't have to put on evidence.

HONORABLE SARAH DUNCAN: Okay. Well, if you have to call it to their attention why isn't it subsumed in 52(a), and why should it be in (b)?

HONORABLE C. A. GUITTARD: Let me call your attention --

CHAIRMAN SOULES: Let me see if I can understand Sarah's point here. What was the question again?

HONORABLE SARAH DUNCAN: Well,

if no evidence is required but you do have to point out with some particularity to the trial judge, "Here is the specific problem I am talking about," it seems to me that's covered by (a), and it shouldn't have to be covered in (b).

CHAIRMAN SOULES: Right. Right. I agree with that. Now I understand what you're saying. Judge Guittard, did you have something to add?

HONORABLE C. A. GUITTARD: Yes. I wanted to call your attention to Judge Hecht's opinion in Wilson against Dunn. In that case the Supreme Court held that a defendant against whom a default judgment had been rendered was not required to raise the issue of defective service in a motion for new trial. In a footnote Justice Hecht observed "Rule 324 states that no complaint other than those specified in the rule need to be raised in a motion for new trial as a prerequisite for appeal.

"The rule was amended in 1978 and 1981 to limit the use of motion for new trial to preserve error. However, Texas Rules of

Appellate Procedure 52(a) provides that a complaint is not preserved for appellate review unless it is presented to the trial court and a ruling obtained. This rule serves the salient purpose of requiring that all complaints to be urged on appeal first be presented to the trial court so that any error can be corrected without appeal if possible.

"How Rule 52(a) applies to complaints which cannot be raised prior to judgment but are not specifically required by 324 to be raised in a motion for new trial is unclear. On the one hand, if Rule 52(a) requires that such complaint be raised by some means tantamount to a motion for new trial but simply not called by that name then Rule 324 amended would be deceptive and its policy impaired.

"On the other hand, if Rule 52(a) does not apply to such a complaint then its language is overbroad and its policy undermined. These problems should be considered in future amendments to the rules.

In a letter dated May -- and then that's the end of his quotation. But this is added

in this comment, "In a letter May 26 to the chairman of the Appellate Rules Committee of the Appellate Practice Advocate Section," that's me, "Justice Hecht makes several suggestions concerning the amendment of the appellate rules including the following: Clarify that even if a motion for new trial is not required under Texas Rule 324(4) presentation of complaints to the trial court by some means is always required by Rule 52(a). The tension in these provisions should be relieved," and he says, "See Wilson against Dunn."

CHAIRMAN SOULES: Well, what is his general language for what this kind of problem is? May I look at the decision?

HONORABLE C. A. GUITTARD: This is the --

CHAIRMAN SOULES: Richard Orsinger.

HONORABLE C. A. GUITTARD: The quoted material is from Justice Hecht.

MR. ORSINGER: I think that (b)(6) is in the wrong place. It shouldn't have anything to do with a motion for new

trial. It is in 321(a), and it is in Rule 52, and if we add the (6) on here we are now requiring everybody to put all of their modification issues in a motion for new trial when they don't even really want a new trial.

CHAIRMAN SOULES: I don't see any real disagreement that No. (6) is too broad, but is there some need for it, and can it be articulated in a narrower way? Rusty.

MR. MCMAINS: Well, one of the ones that apparently is left out that previously has been covered in the catch-all provisions in our rules as it currently stands is incurable jury argument. Because the argument on incurable jury argument where there is no objection made, under our current practice it does have to be in a motion for new trial if you are going to make that argument.

HONORABLE C. A. GUITTARD: Right.

MR. MCMAINS: That's not otherwise anywhere in there, and it's not covered by 321. I mean, you don't have to object to it if it's an incurable jury

argument, and so clearly whenever we have been listing in all of our various preservation papers to the various organizations that we have done, we have always put in that basically this means factual sufficiency of the evidence, complaints, the excessiveness type complaints, any complaint that you had to take evidence on, and incurable jury argument. That's not there.

CHAIRMAN SOULES: If we take Wilson V. Dunn, would the catch-all work if it said "complaints seeking a new trial which cannot be raised prior to judgment"? That's what Wilson V. Dunn is talking about.

MR. ORSINGER: Sure.

MR. LATTING: Yes. Yes.

CHAIRMAN SOULES: And then this becomes much narrower because it talks about new trial points and points that come up after judgment.

MR. ORSINGER: Yes. Good.

CHAIRMAN SOULES: I don't know. Does that --

MR. MCMAINS: What do you mean "cannot be raised"? Where is incurable?

Where does incurable jury argument come in by "cannot be raised"? Because obviously you can raise it -- you could have objected to it at the time, but you don't have to.

CHAIRMAN SOULES: Okay. I think that point needs to be taken up. That's a specific item that may need to be put on the laundry list here. What about a catch-all, though, in terms of --

MR. ORSINGER: I like your language.

CHAIRMAN SOULES: That's the language from Wilson V. Dunn.

MR. ORSINGER: Well, I like his language.

CHAIRMAN SOULES: It said, "Complaints which cannot be raised prior to judgment," and we are talking here about complaints seeking a new trial.

HONORABLE C. A. GUITTARD: If you so leave it (6) then the old (5) ought to be restored, and that would take care of Rusty's problem.

CHAIRMAN SOULES: Okay. What about that, Rusty? The (5) that's been

stricken through on page 8.

MR. MCMAINS: Yeah.

MR. HUNT: The reason for striking (5) was not to eliminate it from the jurisprudence but because of the presence of (6).

MR. MCMAINS: I understand.

MR. HUNT: And if we put this back in we should put back (5). Read that again.

CHAIRMAN SOULES: It says, "Complaints seeking a new trial."

HONORABLE C. A. GUITTARD: Why don't we say "grounds for new trial"?

CHAIRMAN SOULES: "Which cannot be raised prior to judgment."

HONORABLE C. A. GUITTARD: Yes.

HONORABLE SCOTT BRISTER: How about "that cannot"?

HONORABLE C. A. GUITTARD: "That."

CHAIRMAN SOULES: Pardon?

HONORABLE C. A. GUITTARD: "That."

HONORABLE SCOTT BRISTER:

"That" instead of "which."

HONORABLE C. A. GUITTARD: Right.

HONORABLE SCOTT BRISTER: I can't help it.

HONORABLE SARAH DUNCAN: Not if it doesn't follow "complaints." It's misplaced.

CHAIRMAN SOULES: Help me write this then. I'm sorry. "Complaints asserting grounds for new trial"?

MR. HUNT: No. That's subsumed in the heading.

MR. ORSINGER: The introductory sentence says, "The following complaints shall be made in a motion for new trial."

CHAIRMAN SOULES: Well, but we are saying complaints in order to get away from what we once had I don't know how many years ago, a long time ago, there was a big concern that you had to have everything in a motion for new trial that you were going to put in a JNOV or anything else, and so your motion for new trial was this horrific thing that really all you did was duplicate when you

got to your law points later. How we reasonably changed Rule 324 was to eliminate that duplication of asserting law points in motion for new trial unless they are new trial type points, and so it's not redundant in this rule to say "seeking a new trial."

MR. ORSINGER: No, I agree.

CHAIRMAN SOULES: "Or urging grounds for new trial." It's limiting.

HONORABLE C. A. GUITTARD: Well, if you say it that it cannot be raised before judgment, that wouldn't take care of the Wilson against Dunn case because, of course, you could raise lack of service before a judgment. Why don't we say "grounds for new trial not raised before judgment"?

CHAIRMAN SOULES: Well, then that gets to Sarah's issue of does this revive points that have been waived during trial? Wilson V. Dunn is a default case, isn't it?

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: Well, if there is a default, it seems to me like the message here is that you cannot raise it prior

to judgment if you weren't there.

MR. ORSINGER: What if you said "unwaived complaints seeking a new trial."

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

MR. ORSINGER: Or "were not raised prior to judgment."

HONORABLE SARAH DUNCAN: Is that a legal ground?

MR. LATTING: Richard's got the way to do it right here.

CHAIRMAN SOULES: Okay. Let me write it down and then, Richard, tell me your approach to this.

MR. ORSINGER: "Unwaived complaints seeking a new trial that were not raised prior to judgment."

HONORABLE C. A. GUITTARD: "Unwaived grounds for new trial." Would that do?

MR. ORSINGER: Grounds. Grounds.

HONORABLE C. A. GUITTARD: "Unwaived grounds for new trial."

MR. ORSINGER: "Unwaived

grounds for new trial that were not raised prior to judgment."

HONORABLE SARAH DUNCAN: So if I don't know whether a complaint was properly preserved during trial, I now have to include it in a motion for new trial, too.

MR. ORSINGER: You may want to, but if you have waived it, it's useless.

CHAIRMAN SOULES: Well, but Justice Duncan in a previous prior practice is hired on appeal and doesn't know whether something has been waived.

MR. ORSINGER: Well, you know all evidentiary complaints have been waived, don't you?

HONORABLE SARAH DUNCAN: No. It depends on what some appellate court says as to whether it's been waived.

CHAIRMAN SOULES: Let's see. "Unwaived grounds for new trial," why not "cannot be raised"?

HONORABLE C. A. GUITTARD: That wouldn't get the Wilson V. Dunn question.

CHAIRMAN SOULES: Well, it does, Judge.

HONORABLE C. A. GUITTARD: Unless you say it cannot be raised because he wasn't there, and I don't believe that's what you mean.

CHAIRMAN SOULES: Must be what they mean.

MR. HAMILTON: Luke?

CHAIRMAN SOULES: Carl Hamilton.

MR. HAMILTON: Aren't we talking about what goes back to (a)? We are talking about requests, objections, and motions. Shouldn't it be "requests, objections, or motions not otherwise ruled on by the trial court"?

CHAIRMAN SOULES: Carl, where are you reading from? I'm sorry. Let me catch up here.

MR. HAMILTON: 321(a).

CHAIRMAN SOULES: And what line?

MR. HAMILTON: Third line, "A timely request, objection, or motion must appear in the record to have that complaint in the motion for new trial." So aren't we

talking about those requests, objections, or motions that have not been ruled on by the trial judge? If you haven't made them, they're waived.

CHAIRMAN SOULES: Well, but this motion for new trial is the motion in the third line of (a) that gets it to the trial court; isn't that right?

MR. HAMILTON: I don't think so.

CHAIRMAN SOULES: That's what we are trying to do is to tell the Bar there is this way that's in the jurisprudence by a motion for new trial to get compliance with 52(a) and 321.

MR. HUNT: How about this?

CHAIRMAN SOULES: Sarah has her hand up. I will give Carl an opportunity to think through that. Sarah.

HONORABLE SARAH DUNCAN: Well, in my view the tension that Justice Hecht was talking about in Wilson V. Dunn comes from the fact that the way under the current scheme 52(a) and 324 are divorced. We are now bringing them together into one rule, and I

don't think we can go -- I don't think we know all of the things that should be covered by a catch-all, but we do know that it needs to be timely. We do know that it needs to be request, objection, or motion, or whatever, but that's covered in that, in (a).

And now that we have merged 324 and 52(a) I think all we need to do is have the general preservation rule and then title (b) "Complaints that must be preserved in a motion for new trial," and then we have said, "Okay. Here is the general rule. Here are the things we know have to be in a new trial motion."

If it's not in (b), it's in (a), and you are at your own risk as to whether it's timely, whether you could have raised it before trial, after trial, before judgment, after judgment, whatever; and if there is something specific that we want to add to the list in (b), that's fine; but I don't think there is any catch-all that is going to both be sufficiently inclusive and sufficiently exclusive.

HONORABLE SCOTT BRISTER: I will second that.

MR. ORSINGER: I agree with that, too.

HONORABLE C. A. GUITTARD: Well, let's think about this language along the line of what Richard was suggesting. Change subdivision (6) to read, "Any unwaived complaint for" -- "any unwaived ground for new trial not otherwise ruled on by the trial judge." It seems like that would get Sarah's point about -- "Any unwaived ground for new trial" --

HONORABLE SARAH DUNCAN: No.

HONORABLE C. A. GUITTARD: -- "not otherwise ruled on by the trial judge."

HONORABLE SCOTT BRISTER: But that kind of passes the buck. I mean, are you creating here -- if this creates a resurrection, it's not waived because it's now resurrected.

HONORABLE SARAH DUNCAN: That's right. For all trial error it seems to me we now have two preservation requirements. One, you have got to preserve it at trial. If you do preserve it at trial, it is only preserved

for appellate review if you include it in a motion for new trial.

HONORABLE C. A. GUITTARD: No. No.

MR. LATTING: I hope we are not doing that.

HONORABLE C. A. GUITTARD: No.

MR. ORSINGER: I don't think we are.

HONORABLE SARAH DUNCAN: I can tell you that I would not file a motion for new trial without putting anything in that I think occurred during the trial because I don't know if it's waived or unwaived, and if it's arguable, I might help myself on appeal by putting it in a motion for new trial and explaining to the judge, well, here's why it wasn't waived.

CHAIRMAN SOULES: I think this may meet your concern, Sarah. I'm sure of it. What does it say?

MR. ORSINGER: "Grounds for a new trial that are not" --

CHAIRMAN SOULES: "Are not waived."

HONORABLE C. A. GUITTARD: "Otherwise."

MR. ORSINGER: "That are not waived and were not raised prior to judgment."

CHAIRMAN SOULES: "Grounds for a new trial that were not waived and were not" -- "that are not waived."

MR. ORSINGER: "And were not raised prior to judgment."

CHAIRMAN SOULES: "Raised prior to judgment."

HONORABLE C. A. GUITTARD: You don't need "were."

"And not raised prior to judgment."

MR. LATTING: Sarah, wouldn't that cover what you just mentioned? You don't have to raise it twice, do you, if the judge overruled?

CHAIRMAN SOULES: If it's been raised prior to judgment, it doesn't have to be raised again.

HONORABLE SARAH DUNCAN: What if I put one of my new trial points inadvertently in my motion to modify or my motion for --

HONORABLE C. A. GUITTARD: "Are not waived and not raised prior to judgment."

MR. ORSINGER: Okay.

HONORABLE SARAH DUNCAN: It's now not preserved.

MR. LATTING: It hasn't been raised before?

HONORABLE SARAH DUNCAN: No. Let's say a defect in service, and I am just a numb-nut, and I call it motion to modify the judgment, and I say "defect in service." It's now not preserved for appellate review because I called my motion wrong.

HONORABLE SCOTT BRISTER: I have a question.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: I mean, we are doing here a list of things to put people on notice that you have to have a new trial. If in Wilson V. Dunn raised the lack of service or defects in service in a motion to modify or a motion to set aside or something that wasn't called a motion for new trial, do we care about that?

That satisfies 52(a). It's brought to the trial judge's attention. He rules on it. Who cares what it's in? These are things that we have to have evidence on so we care what specific vehicle they are in because we need affidavits or testimony, et cetera. But if it's not one of those things that we don't have to have affidavits and testimony on, maybe we need to reference the fact that -- you know, repeat again at 52(a) the trial judge needs to have a first look at everything, but I don't see why -- I would move we drop the catch-all.

CHAIRMAN SOULES: Justice Duncan. Then I will get Richard.

HONORABLE SARAH DUNCAN: I guess this is my fundamental problem with what we are doing. We have a new case that says if you don't put it in the right instrument, it's waived, and I guess my fundamental disagreement with what we are doing here is we are increasing the chances for waiver because somebody doesn't include it in the right instrument with the right title, and I just think that's silly.

I mean, if I give it to you and it's called a motion to set aside, the fact that it's not called a motion for new trial should not mean that I have waived my point on appeal, and under 52(a) I wouldn't because it would have been timely. I would have told you what the problem was, and I would have told you what I wanted.

HONORABLE C. A. GUITTARD: Well, I disagree with that because if it's put in a motion to modify the judgment, for instance, and the judge rules on it, then it wouldn't come under (6). We wouldn't have to put it in new trial because the judge otherwise ruled on it.

CHAIRMAN SOULES: And a motion to set aside is a motion for new trial.

HONORABLE SARAH DUNCAN: Only on some points. A motion for JNOV is a motion for JNOV in some courts, and in other courts it's a motion to modify, and you can end up waiving every point of error you have got if you end up in the wrong court with a document by the wrong title, and we are just creating another place for courts to do that.

CHAIRMAN SOULES: Okay. The Supreme Court says these problems should be considered in future amendments to rules. We are here talking about future amendments to the rules, and what the Supreme Court is saying we should consider is complaints which cannot be raised prior to judgment, and complaints that 52(a) contemplates must be raised by some means tantamount to a motion for new trial.

So that's what we are talking about, and so we are asked to consider in future amendments having 324 speak to complaints which cannot be raised prior to judgment. That's the limitation of Wilson V. Dunn. Whether we want to go beyond that is something else.

HONORABLE C. A. GUITTARD: I don't know whether he really means that because, of course, at least in one sense a lack of service is not a complaint that can't be raised before judgment, and the Wilson against Dunn case is the one he's talking about.

CHAIRMAN SOULES: That's right.

And I guess one -- and this is just for purposes of stimulating discussion. One response to Justice Duncan is do we say nothing to the Bar so that they don't know where this should be, or do we say to the Bar "grounds for a new trial not waived and not raised prior to judgment" and tell them that's where you are supposed to do it and then give them that much instruction? That's really the policy I guess that we are talking about here.

MR. LATTING: May I speak a minute?

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: Well, what I think we should do is two things. I think we should not go back to the old bad practice of having to fill up a motion for new trial with all your grounds for appeal.

HONORABLE SCOTT BRISTER: Everything that happened at trial.

MR. LATTING: Everything that happened. We don't want that, and that's one thing we ought to do, and another thing we ought to do --

CHAIRMAN SOULES: And we get to

that by saying "unwaived grounds for new trial."

HONORABLE C. A. GUITTARD: And "not otherwise ruled on."

CHAIRMAN SOULES: This particular point that he just raised gets addressed with the "unwaived grounds for new trial."

HONORABLE C. A. GUITTARD: Yeah.

CHAIRMAN SOULES: We are just talking about new trial points.

MR. LATTING: The other thing, and just as important to me, is that we must advise the Bar close by that this doesn't mean that they didn't have to raise issues with the trial judge in some fashion; that is, we don't want to put it over in the appellate rules, oh, you complied with this rule but you didn't comply with Appellate Rule 52.

CHAIRMAN SOULES: Okay. Now, we deal with that with the word "unwaived."

MR. LATTING: Okay. So we comply with that.

CHAIRMAN SOULES: So now what?

MR. LATTING: Then we are okay. So it's not a problem.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I disagree with Sarah. I don't think putting "unwaived" in there invites everyone to make their evidentiary objections and everything else in their motion for new trial. We have pretty well established rules of waiver. If you have a complaint about the array on your jury panel, you have got to raise that in front of the judge that puts the array together. If you have a complaint about strikes, you have to do that at the time.

If you have a complaint about evidence coming in, you have to object to it immediately, or you waive it. If you have evidence that you have offered and the judge has kept it out, you have got to make your bill before the verdict is read -- before the charge is read to the jury.

We have got hosts of rules about when things have to be done in a timely way in order to preserve error, and I don't think

that putting "unwaived" so-and-so here means that anyone can argue that they now have either an opportunity or an obligation after the judgment is signed to go back and raise those things that were either preserved or not preserved at the time they happened. So this doesn't scare me that much.

HONORABLE SCOTT BRISTER: But we do have hosts of cases about what was waived and what was not waived. Parties disagree about that all the time, and you're adding that dispute at the new trial stage. Did we waive the jury charge error with that objection or not? And I am going to have to determine that; and another point for appeal, not only did they waive the jury charge objection, but if there is any question about whether they had waived it, they should have raised it at new trial because that's for anything that's unwaived.

HONORABLE C. A. GUITTARD: But it also says "not otherwise ruled on by the trial judge." So if the trial judge has made an error in the charge and has overruled any objection, it wouldn't have to be made in a

motion for new trial because this says not.

CHAIRMAN SOULES: Well, I have a big problem with that "not otherwise ruled upon" because we have got a lot of rules that take care of when judges won't rule or don't rule. The only thing, you have to present the complaint.

HONORABLE SCOTT BRISTER: Present it to the trial judge.

CHAIRMAN SOULES: To the trial judge. But you don't have to get a ruling.

HONORABLE C. A. GUITTARD: "Not otherwise presented to the trial court for a ruling."

CHAIRMAN SOULES: It works out, "Grounds for a new trial not waived and not presented prior to judgment."

HONORABLE SCOTT BRISTER: But then you are back into the "unwaived." Did you really present that objection to the charge? Was it clear enough to have been presented?

HONORABLE C. A. GUITTARD: Well, that's always a problem for motion for new trial, isn't it?

CHAIRMAN SOULES: Well, that's right. It either was waived or wasn't waived at the charge conference.

HONORABLE SCOTT BRISTER: All I'm saying is, you know, I don't think there should be anything suggesting I want to hear anything about the charge conference at a new trial stage. It is too late for the charge conference. We are talking new trial now. Don't even suggest we need to revisit the charge conference or the jury selection.

CHAIRMAN SOULES: Wouldn't the answer to that, Judge Brister, be, "Look, you either presented it or didn't present to the court your charge complaints at the charge conference, and if you didn't, they are waived, and if you did, they are preserved, and I am not going to listen to that part because it's either under this rule, which says 'grounds for a new trial not waived and not presented prior to judgment.' You are in one place or the other from the charge conference on that. So these points are not required in a motion for new trial."

HONORABLE C. A. GUITTARD: That

sounds right.

CHAIRMAN SOULES: "And I am not going to hear them." They are not a section (6) complaint, if we have a section (6). Anne Gardner.

MS. GARDNER: Since part of the problem we are talking about sounds like a problem of timeliness, and we don't want to create the impression that it's timely when, in fact, it should have been raised at the time of the charge conference or the time the evidence was presented, would it help to add a word indicating something like "any timely complaint not raised prior to judgment" or words to that effect?

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: After your colloquy with Judge Brister you may have solved the "waived." You may have solved the "prior to judgment," but I don't think your suggestion addresses the fact that by adding a new subdivision (6) we are telling people that an unspecified list of things must be included in a document called a motion for new trial,

and if they are not in that document, they are not preserved for review, and I thought the whole shift of what we have done in the appellate rules throughout is to say we are not going to trap you with technical requirements that you have to make this document entitled this, ending with these lines, and have 45 lines in between. What we are saying is make the judge understand what your complaint is and how to fix it, and by adding subdivision (6) we are going completely contrary to that trend.

CHAIRMAN SOULES: Okay. And, Pam, I will recognize you in just a minute.

Is the message to the Supreme Court going to be we considered this and decided to do nothing about it?

HONORABLE C. A. GUITTARD: No.

CHAIRMAN SOULES: Because they tell us to consider it, and -- or we can't do anything about it because it's too hard or whatever?

HONORABLE SCOTT BRISTER: No. Because (a) says -- I mean, we put in the -- I mean, these are right next to each other now.

HONORABLE SARAH DUNCAN: Right.

HONORABLE SCOTT BRISTER: We are not talking about look back in TRAP and you see one requirement and look up in the rules, you know, 120 pages apart there are things that may conflict. We have got bumped right up, No. 1, let the trial judge know about it. If you didn't have to let the trial judge know about it, you waived it.

Now, No. 2, these things have to be -- you have to let them know that in a motion for new trial, (a), (b), (c), (d), (e). I think that takes care of it. Then when Wilson V. Dunn comes up you look at this rule and say, "You had a chance to let the trial judge know about it and you didn't," whether you called it a new trial or not. Easy ruling.

CHAIRMAN SOULES: Pam.

MS. BARON: I agree with Sarah. I agree with Scott, and I think the concept we are trying to get across is that any complaint properly raised for the first time after the judgment can be either in a motion for new trial, motion to modify, any post-judgment

motion. We don't care where it is, and why can't we just say that?

MR. YELENOSKY: Just say it's post-judgment.

CHAIRMAN SOULES: Okay. How do we say that, Pam?

MS. BARON: Well, basically "any complaint properly raised for the first time after judgment is preserved if brought in a post-judgment motion, whether it be new trial or other." That's not perfect but it's --

CHAIRMAN SOULES: Okay. Judge Guittard.

HONORABLE C. A. GUITTARD: After hearing the discussion here, maybe this subdivision (6) is redundant in this sense. The problem in Wilson against Dunn was Rule 324 that said that "no motion for new trial is required except..."

Now, we have changed that so that (b) says, "The following complaints shall be made in a motion for new trial." Because that in essence takes care of the Wilson against Dunn problem and then as suggested you go back to

(a), and it says that the complaint must have a timely request, objection, or motion must appear of record, and maybe that takes care of the situation, and we don't need (6).

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: I think that's right. The only reason I would disagree with Pam on putting something into (a), the problem in Wilson V. Dunn is just one of the hundreds of thousands of conceivable permutations of timely, and if we are going to say we are going to start using 52(a) or 320(a) to tell people when objections, requests, and motions are timely, we will spend the next year on that.

CHAIRMAN SOULES: Okay. So was there a substitute motion that we delete (6)?

MR. ORSINGER: I would move that.

CHAIRMAN SOULES: And add (5) back in.

HONORABLE C. A. GUITTARD: Right. I will concur on that.

CHAIRMAN SOULES: Don, is that

acceptable to your committee?

MR. HUNT: (Nodding affirmatively.)

CHAIRMAN SOULES: Sorry.

MR. LATTING: Yes. He says "yes."

CHAIRMAN SOULES: Yes. Okay. All right. Any opposition to that?

MS. SWEENEY: We are going to add old (5) as (6) and take out (6)?

CHAIRMAN SOULES: Right. Let me give a summary here of where we are and then we can talk about anything else. 321(b) would be as presented by the subcommittee, (1) through (4), from beginning through (4). The stricken through language that was (5) would be reinstated, and the committee's (5) would be changed to (6), and the committee's (6) would be deleted.

Any opposition to that? There being no opposition, that's done. Anything else on 321 before we take a break? Justice Duncan.

HONORABLE SARAH DUNCAN: Maybe we could just mention this before break, go on break, and then get back. New subsection (6),

"material and irreconcilable conflict in jury findings," it's been my understanding that you had to raise that before the jury was released, or are we talking about fatal conflicts?

CHAIRMAN SOULES: Good point. Let's take ten and think about that one.

MR. ORSINGER: That's new, isn't it? That's not in the rule right now?

CHAIRMAN SOULES: Be back at 10:35.

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

CHAIRMAN SOULES: Okay. We are on the record. It's 10:35. Thank you for returning promptly. On the break it was suggested that No. (6) be changed to say, "The verdict will not support any judgment."

MR. HUNT: How about "a jury verdict"?

CHAIRMAN SOULES: Okay. That's what I mean, jury verdict.

MR. ORSINGER: Would you say that again, please?

CHAIRMAN SOULES: "The jury verdict will not support any judgment." That would, of course, presuppose that the proper preservation after conflict had occurred at the trial. So now you are to the point where you have got a situation where you read the judgment. Everything has been done, I mean, the verdict, and everything has been done that has to be done to preserve error in it, and it just won't support any judgment.

MR. LATTING: Why don't you make a motion to modify the judgment then instead of a motion for new trial?

MR. ORSINGER: It won't support any judgment, meaning for the defendant or for the plaintiff.

CHAIRMAN SOULES: That's right.

HONORABLE SARAH DUNCAN: That's the definition of a fatal conflict.

MR. ORSINGER: You have to have a new trial because you can't pick a winner.

CHAIRMAN SOULES: That's right.

MR. LATTING: Okay. All right.

MR. HUNT: No judgment left.

MR. LATTING: So you can't have

a judgment.

CHAIRMAN SOULES: Can't have a judgment.

MR. LATTING: That won't support any judgment. All right.

MR. ORSINGER: Doesn't that mean plaintiff loses?

MR. HAMILTON: That's what I would think.

MR. LATTING: Not necessarily. I don't think it does. No. I don't believe it does.

HONORABLE C. A. GUITTARD: It doesn't support a judgment for the defendant either.

CHAIRMAN SOULES: Probably because there has been a conflict. The jury has gone -- you have done all the things you have to do. You have raised conflict. The judge has told the jury to go back and resolve the conflict. They come back. They don't do it.

MR. ORSINGER: What do you do, Luke, when we write this in the rule and then somebody doesn't put it in their motion for

new trial, and then a judgment is signed and gets up to the appellate court? Does that mean whatever judgment the judge entered is irreversible?

HONORABLE GUITTARD: Yes.

CHAIRMAN SOULES: Well, we have got exactly the same problem here that we discussed in the (6) that came out, and that is we are now saying that you must raise something in a motion for new trial that you can now raise there or a motion to modify, a motion to vacate, and a lot of other places. Sarah Duncan.

HONORABLE SARAH DUNCAN: I was just thinking about a for instance that if you're in a charge conference and there are two questions that the court is proposeing to submit that you believe will result in a fatal conflict, and you object to that at the charge conference, and then the verdict comes back and sure enough everybody decides you were right. This was a fatal conflict. In my view that's already been preserved.

CHAIRMAN SOULES: I would say the answer to that is maybe.

HONORABLE SARAH DUNCAN: Well, we are now adding -- for those courts in which it was preserved we are now saying it's not preserved because it has to also be raised in a motion for new trial.

HONORABLE C. A. GUITTARD: Now, the problem is --

CHAIRMAN SOULES: That's probably right.

HONORABLE C. A. GUITTARD: The problem is that you have got a verdict that won't support any judgment, and therefore, the case should be tried again. Should it have to be appealed before it's tried again if the judge won't -- if you haven't given the trial judge an opportunity to grant the new trial?

CHAIRMAN SOULES: Well, but we are calling -- Sarah's point earlier is that we call this a motion for new trial, and some courts are going to focus on that as being the only way. It has to be in a motion for new trial.

Some lawyer comes along after the judge signs the verdict or signs a judgment on the verdict that is not supported by the verdict,

and no judgment can be supported by the verdict and says that to the court, but he says it in a motion to vacate instead of a motion for new trial.

HONORABLE C. A. GUITTARD: Well, how else can you remedy it other than by a new trial?

CHAIRMAN SOULES: Well, when you vacate the judgment then you have got a live case.

HONORABLE C. A. GUITTARD: Then you have granted a new trial if you vacate the judgment.

CHAIRMAN SOULES: Well, but it wasn't in a, quote, "motion for new trial," close quotes. Therefore, some courts may say --

HONORABLE C. A. GUITTARD: Oh, if you call it a motion to vacate a judgment it's not a motion for new trial? Or why not just say "or"?

CHAIRMAN SOULES: Okay. Sarah.

HONORABLE SARAH DUNCAN: It seems to me the other part of the problem is -- I don't understand Spencer V. Eagle

Industries, but to the extent I do understand it I think there are still instances in which charge error is a rendition point and not a new trial point, and --

HONORABLE C. A. GUITTARD: In some instances that's true.

HONORABLE SARAH DUNCAN: And this could interplay with that. I could have a charge rendition point that I am now required to preserve in a motion for new trial.

HONORABLE C. A. GUITTARD: Well, Don, you were going to offer a substitute?

MR. HUNT: The chair has taken care of that, but it's the same language that we talked about.

HONORABLE C. A. GUITTARD: Yeah.

MR. HUNT: A jury verdict that will not support any judgment.

CHAIRMAN SOULES: And the tension here is do we say that has to be in a motion for new trial and give the appellate courts the opportunity to say that formality

was not followed. Even though it's raised someplace else it wasn't in a motion for new trial; therefore, it's waived.

HONORABLE C. A. GUITTARD: How would you otherwise raise it? By a motion --

MR. ORSINGER: Motion for mistrial. Isn't that legit?

CHAIRMAN SOULES: Motion for mistrial.

MR. ORSINGER: Even before a judgment is signed you can file a motion for mistrial.

HONORABLE SCOTT BRISTER: Disregard certain jury questions.

HONORABLE SARAH DUNCAN: I think it could be in a 301 motion.

CHAIRMAN SOULES: Sure. It could be raised in a lot of different ways. So do we just leave that out of (3)?

HONORABLE C. A. GUITTARD: Maybe we just leave it it out. I don't know.

HONORABLE SCOTT BRISTER: I think so.

CHAIRMAN SOULES: Any opposition to just -- what we are talking

about here is striking the words "a material and irreconcilable conflict in jury findings" and putting nothing in its place.

Any opposition to that? There is not. So that will be done. So we will restore -- good point, Justice Duncan. We will restore (5) and stop at (5). With that done --

HONORABLE SCOTT BRISTER: I'm sorry. One last --

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: No. (4), you dropped "a complaint of" and put "factual." It seems to me you are going to want if their -- factual inadequacy is a different thing from inadequacy. Factual inadequacy means there is not enough facts to support big damages. Inadequacy of damages means that damages are too small.

The current rule says "inadequacy or excessiveness," which I think is right. If the damages are either weighed against the preponderance of evidence too small or too big, you raise that in a new trial. What was the thinking on adding the "factual"?

HONORABLE C. A. GUITTARD: Well, I think that perhaps we ought to say "inadequacy or factual excessiveness" because you have that case where the verdict was excessive not because of facts but because it wasn't supported by the pleadings or something like that, and we figure that that ought not to have to be put in a motion for new trial because you ought to be able to cure it some other way. So it has to be factually excessive rather than legally excessive in order to require a motion for new trial. Now, whether that applies to inadequacy or not, I don't know.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: I don't know that this is necessarily the language that we need but what we were trying to do. There is a case out of Corpus that says where you are not entitled to an element of damages, that has to be raised in a motion for new trial under 324(b)(4), "complaint of inadequacy or excessiveness of the damages found by the jury."

I think what everybody on the appellate rules committee thought 324(b)(4) meant was that it was only in instances of factual insufficiency that it had to be raised in the motion for new trial and that if it was a legal error, that could be raised in the 301 motion. So that's what we were trying to fix. Now, whether these words fix it or not may be another question.

CHAIRMAN SOULES: Elaine Carlson.

PROFESSOR CARLSON: Why wouldn't that be covered, Sarah, by (2) and (3)?

HONORABLE SCOTT BRISTER: (2). Yeah.

CHAIRMAN SOULES: Say it again, please.

PROFESSOR CARLSON: Why wouldn't that clarification that it's a factual sufficiency complaint be covered -- it's going to damages so it would be covered already by (2) and (3)?

HONORABLE SARAH DUNCAN: So just take out (4).

MR. ORSINGER: It is.

HONORABLE SARAH DUNCAN: I think it is covered.

MR. ORSINGER: It's just traditionally been a separately stated ground, but it's really just factual sufficiency.

HONORABLE SCOTT BRISTER: Yeah.

HONORABLE SARAH DUNCAN: Of course, then we may need a comment that says by deleting (4) we don't mean to imply that you can't -- you don't have to preserve factual sufficiency points related to damages in a motion for new trial.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: But say on (2) "support a jury finding including damages" or something like that. I don't have any problem with saying it separately if you want to, but just "factual inadequacy or excessiveness" is not the way you want to say it.

CHAIRMAN SOULES: So we are talking about modifying (4) by taking out the word "factual" and the words "or

excessiveness." So it just would be "inadequacy of the damages found by the jury."

MS. SWEENEY: Why not just take out the word "factual" and leave it a balanced statement and understand that the insufficiency -- you know, that the other grounds are covered in (2) and (3)?

HONORABLE SCOTT BRISTER: Because of Sarah's problem.

CHAIRMAN SOULES: Well, is inadequacy covered by "against the overwhelming preponderance"?

HONORABLE SCOTT BRISTER: Yes. Sure. If the overwhelming preponderance of the evidence is your child died and the jury awards $20, that's against the overwhelming preponderance of the evidence.

HONORABLE SARAH DUNCAN: What I would suggest is that we delete (4), merge (2) and (3) and make (3) the standard that it actually is on appeal, which is so against the great weight of the preponderance of the evidence as to be manifestly injust. There is really -- I mean, factual insufficiency is factual insufficiency whether it is factual

insufficiency or against the great weight, and that's all (2) and (3) and (4) are trying to say.

HONORABLE C. A. GUITTARD: Mr. Chairman, this needs to be looked at in connection with 320(a)(1) and (2), grounds for a new trial. Of course, (a) has to say what are grounds for new trial, and 321 has to say what must be put in a motion for new trial. (1) says "When the evidence is factually insufficient to support a jury finding"; "When a jury finding is against the overwhelming preponderance of the evidence"; and then (3), "when the damages awarded by the jury are manifestly too large or too small because of the factual insufficiency or overwhelming preponderance of the evidence." Perhaps this 321 ought to be conformed to that, and I don't know about that.

CHAIRMAN SOULES: What's your proposition again, Justice Duncan?

HONORABLE SARAH DUNCAN: That we delete subsection (4) and merge subsections (2) and (3) to say something along the lines of that a jury finding including a damages

finding is supported by factually insufficient evidence or is so against the great weight of the preponderance of evidence as to be manifestly injust.

HONORABLE C. A. GUITTARD: Why don't we just use the language of subdivision (a)(3), "When the damages awarded by the jury are manifestly too large or too small because of the factual insufficiency or overwhelming preponderance of the evidence."

HONORABLE SCOTT BRISTER: So it would be parallel. So then 321 is parallel with 320?

HONORABLE C. A. GUITTARD: Right.

MR. HUNT: That's correct. And that would cure, I think, your problem, Justice Duncan.

HONORABLE SCOTT BRISTER: It would cure the Corpus Christi problem.

CHAIRMAN SOULES: What Justice Guittard is proposing as an alternative would be leave (2) alone, leave (3) alone, and to make (4) say "a complaint" --

HONORABLE C. A. GUITTARD:

Well, you already have "a complaint" up in the preamble, you know.

CHAIRMAN SOULES: Okay. "That the damages awarded by the jury are manifestly too large or too small because of the factual insufficiency of the overwhelming preponderance of the evidence."

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: Okay. I mean, there is some redundancy there, but maybe it's constructive.

MR. ORSINGER: Well, why shouldn't (1) and (2) be identical to -- in other words, 320(a)(1), shouldn't that be identical to 324(b)(2) since it's the same concept?

HONORABLE SARAH DUNCAN: Why do we have it at all? Why don't we just say, "As a prerequisite to appellate review any complaint listed in Rule 320(a)(1) through (11) must be stated in a motion for new trial"?

HONORABLE C. A. GUITTARD: Let's think about that.

CHAIRMAN SOULES: That's going to run right into your policy problem of having a motion for new trial encompass all of these things when they can be raised someplace else.

HONORABLE C. A. GUITTARD: Yeah. In other words, there are a lot of things you can raise by a motion for new trial that you don't want to require a motion for new trial for.

HONORABLE SARAH DUNCAN: All right. I see. I didn't realize there was --

MR. ORSINGER: Well, shouldn't the language match, though?

HONORABLE C. A. GUITTARD: Yeah.

HONORABLE SARAH DUNCAN: Can I ask a dumb question? Why is anything required to be raised in a motion for new trial?

HONORABLE C. A. GUITTARD: Because the reason for it is, is to give the trial judge an opportunity to rule on it and correct the error without an appeal.

HONORABLE SARAH DUNCAN: Okay. But we know they have to do that because that's 52(a). Are we saying that it has to be

in a motion for new trial and nowhere else can it be if it --

HONORABLE C. A. GUITTARD: It doesn't ever say nowhere else can it be. That's not what it says.

HONORABLE SCOTT BRISTER: It has to at least be in a motion for new trial.

CHAIRMAN SOULES: I think it can be read to say that.

HONORABLE C. A. GUITTARD: If some dumb courts other than the Fourth Court might say that, we ought to make that clear.

CHAIRMAN SOULES: Judge Peeples is not on the Fourth Court, is he?

MR. ORSINGER: But Sarah is.

HONORABLE C. A. GUITTARD: Sarah is. That's not what the intent is, and if that could be read that way, it ought to be fixed.

HONORABLE SARAH DUNCAN: That is one of the trends around the courts of appeals right now, is to say it's not in the proper document; and therefore, it is not preserved; and it's actually sort of trendy in the Supreme Court right now, too.

HONORABLE C. A. GUITTARD: I am familiar with the appellate judges' disinclination to decide cases and define technical reasons not to do so, invent technical reasons.

CHAIRMAN SOULES: Okay. Sarah, are you proposing that we have no Rule 321(b)?

HONORABLE SARAH DUNCAN: Yes. I believe that is exactly what I am proposing.

CHAIRMAN SOULES: Is there a second? Fails for lack of a second.

HONORABLE SCOTT BRISTER: I move we have changed 321(b)(4) to be parallel with 320(a)(3) by saying "damages awarded by the jury are manifestly too large," et cetera, through the end of that sentence.

MR. ORSINGER: Can I propose a modification to that motion? I would propose that all three of them use identical language. The first three, they are, in fact, supposed to be the same thing.

CHAIRMAN SOULES: So you are saying that (2), (3), and (4) should track the language of (1), (2) and (3)? You're suggesting that Don rewrite 321(b)(2), (3),

and (4) to track the language of 320(a)(1), (2), and (3)?

MR. ORSINGER: Yeah.

CHAIRMAN SOULES: Is there any opposition to that?

MR. HUNT: May I add that was almost done anyway?

HONORABLE SCOTT BRISTER: Yeah. That one flop of a word accomplishes that and everything she's got to say.

CHAIRMAN SOULES: That's pretty easy to do.

HONORABLE C. A. GUITTARD: In other words, instead of "when" as used in 320 you would say "that"?

HONORABLE SCOTT BRISTER: No. Don't add the that's back in.

HONORABLE C. A. GUITTARD: A complaint that the evidence is sufficient.

HONORABLE SCOTT BRISTER: (2) becomes "Evidence is factually insufficient to support a jury verdict." (3) becomes "A jury finding" -- (3) stays as-is. (4) becomes "Damages awarded by the jury are manifestly too large."

CHAIRMAN SOULES: So you just take the when's off of (1), (2), and (3) --

HONORABLE SCOTT BRISTER: Right.

CHAIRMAN SOULES: And put them in (2), (3), and (4).

HONORABLE SCOTT BRISTER: Right.

MR. ORSINGER: Well, (2) is different. The words in (2) are jumbled up a little bit different from (a)(1), 320(a)(1).

HONORABLE SCOTT BRISTER: It looks word for word on my copy.

MR. ORSINGER: On my copy (a)(1) says "when the evidence is factually insufficient" --

HONORABLE SCOTT BRISTER: Oh, yeah. Yeah.

MR. ORSINGER: -- "to support a jury finding" and (b)(2) says "factual insufficiency of the evidence."

HONORABLE SCOTT BRISTER: Just drop the when's off of 320(a)(1), (2), and (3).

MR. HUNT: They will be

parallel.

CHAIRMAN SOULES: Okay. Any opposition to that? Okay. So we are going to fix (2), (3), and (4) as we have just indicated; and now are we ready to vote on 321(b) in light of our discussion today?

Elaine Carlson.

PROFESSOR CARLSON: I would just suggest one other change on (b)(1) in the first line, "jury misconduct, newly discovered evidence," comma. I would put "equitable or legal grounds to set aside a default judgment" if we really want to reach the Wilson V. Dunn case because it was really a legal ground, defective service.

CHAIRMAN SOULES: We have got legal grounds in the "may be put in a motion for new trial." Do we want to put it in "must be raised in a motion for new trial"? That's the policy we have been talking about for some time.

HONORABLE C. A. GUITTARD: Well, if there is legal grounds, you can raise it some other way.

PROFESSOR CARLSON: So the

legal grounds would satisfy the default judgment?

HON. GUITTARD: Yeah.

CHAIRMAN SOULES: Right. Do they have to be raised in a motion for new trial, or can they be raised in a motion to vacate or some other vehicle?

PROFESSOR CARLSON: Okay. I will withdraw my suggestion then.

MR. ORSINGER: I am not an expert on this, but there are people here that probably are, on the Moriel case. As I recall, the Supreme Court requires trial judges to do some evaluation of punitive damages.

CHAIRMAN SOULES: No.

MR. ORSINGER: Is that not right?

CHAIRMAN SOULES: No.

MR. ORSINGER: It's only court of appeals judges that have to do that?

CHAIRMAN SOULES: Right. Right.

MR. MCMAINS: It says it would be a good idea, but it's not required.

MR. ORSINGER: Okay. All right. I'm wrong.

CHAIRMAN SOULES: Anything else? Okay. Those in favor of 321(b) show by hands, as modified by our discussions today. 15.

Those opposed? No opposition. It carries. 321(c).

MR. HUNT: This is new to the law; that is, at least to the rule, not to the law. The idea is to establish that a complaint that a jury finding is not based on legally sufficient evidence or that the opposite, or the finding is established as a matter of law. This is to record that it need not be made in a motion for new trial if it's otherwise shown of record and to indicate that it may be included in a motion for new trial or a motion for judgment.

I will leave you to read the exact language, but the purpose of this was to say that in jury cases there were multiple ways to raise legal sufficiency of the evidence, including putting it in a motion for new trial.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I like the idea; however, I think that we are doing a disservice to the Bar to even suggest to them that they should preserve a legal sufficiency point in a motion for new trial because it's just going to get them a remand and not a rendition, and I would suggest that we modify this to say that -- take out the reference about it need not be made in a motion for new trial and just say that it must be made in the trial court and can be included in a motion for judgment as a matter of law, and I would add an objection to the jury charge. A motion to declare an issue as a matter of law, a motion to modify judgment, and then strike out "or in a motion for new trial."

HONORABLE C. A. GUITTARD: Well, suppose you have an issue that is conditioned, and the issue upon which it's conditioned is not supported by legally sufficient evidence, but you can't render judgment under those circumstances. You have to grant a new trial, don't you?

Suppose, in other words, the jury answers "no" to the predicate issue, and there is some evidence, and there is no evidence to support a "no" issue, and the jury never does get to the next issue upon which it's conditioned. Now, you can't get a judgment because the necessary finding isn't made. All you can do is grant a new trial.

CHAIRMAN SOULES: Any other discussion on 321(c)? Anne Gardner.

MS. GARDNER: Well, if we are going to leave the language as-is and not adopt Richard's suggestion I have a question about in the third line the words "shown in the record."

"If otherwise shown in the record" seems confusing to me, and I would suggest taking out those four words, "shown in the record," and substituting the word "preserved" so that it says "need not be made in a motion for new trial if otherwise preserved."

CHAIRMAN SOULES: "Or otherwise presented to the trial court."

MS. GARDNER: "Or presented to the trial court." Right.

HONORABLE C. A. GUITTARD: "Otherwise presented to the trial court" is all right, isn't it, Don?

MR. HUNT: Sure.

HONORABLE SARAH DUNCAN: You don't have to have a ruling?

MS. GARDNER: That's why I would have suggested "preserved" because that would have taken care of both presenting and getting a ruling, and "preserved" refers you back to the words "General Preservation Rule" in 320(a).

HONORABLE DAVID PEEPLES: I am not convinced that present law is causing problems, and I think this muddies things up, and it's not worthy of our time any more on it because we don't need this. There is no problem right now. This garbles the law.

CHAIRMAN SOULES: Anything else? Those in favor of --

MR. ORSINGER: I'd like to say that if -- I think Judge Guittard has raised a valid complaint about my deleting motion for new trial entirely, but I still think that we are omitting objection to the jury charge as a

permitted way to preserve a legal sufficiency point, and I think we ought to put that in independent, and my other suggestion, and I also would like clarification, does a motion for judgment as a matter of law include a directed verdict?

HONORABLE C. A. GUITTARD: Yes.

MR. ORSINGER: Does it include a motion for judgment NOV?

HONORABLE C. A. GUITTARD: Yes.

MR. ORSINGER: So I would move that we insert an objection to the jury charge in there.

HONORABLE C. A. GUITTARD: Well, I have problems with that because I don't think that an objection to the jury charge can raise a factual sufficiency. It can raise a legal sufficiency.

MR. ORSINGER: That's what this says.

HONORABLE C. A. GUITTARD: And that's what you're talking about?

MR. ORSINGER: This is a legal sufficiency paragraph, and we are listing the ways you preserve legal sufficiency, and one

of the clearly recognized ways is that there is no evidence to support the submission of that question or instruction, and we don't tell them that, and since this is a laundry list of things to do it ought to be --

HONORABLE SCOTT BRISTER: That's the main way it's preserved.

CHAIRMAN SOULES: Before we start modifying it let's at least take a straw poll here of those who feel we should just not have any (c) because we may not be spending a lot of time. I'm not suggesting that we shouldn't work on this if the majority feels that we should have a (c), but if the majority feels that we should not have a (c) then we can go on to something else.

Those who feel we should have a (c) show by hands, should have it. Seven. Those opposed to a (c)? Eight. Eight to seven it fails. Now, we go to 321(d).

MR. HUNT: The good news here is that this language comes right out of 52(d). Again, this is the current Rule 52(d) as proposed for adoption to the Supreme Court. What is shown as struck is that which this

committee struck. What is shown as shaded is that which we rewrote and submitted to the Court.

CHAIRMAN SOULES: Any opposition to 321(d)? Okay. It's done. No opposition. 321(e).

MR. HUNT: This is new. It expresses simply what is the current law that where there is an overruling by operation of law of either a motion for new trial or a motion to modify, that's sufficient to preserve the complaint for appellate review. It contains the beginning caveat that "unless you need evidence." Otherwise, you put it in your motion. You file it. You let 75 days go by, and you are okay.

CHAIRMAN SOULES: Okay. My only concern here is the word "properly" because we do have some leniency in construing points and predicate points in the trial court. Could we perhaps delete the word "properly" in the last line?

MR. ORSINGER: Luke, we can't do that because then all of the sudden that means that any objection you fail to make at

the time can now properly be made in your motion for new trial.

CHAIRMAN SOULES: Wait a minute.

MR. ORSINGER: It says that if you -- if I have some evidentiary error that I fail to object to at the time of the trial and I slip it into my motion for new trial and it doesn't get overruled by operation of the law, we are saying that preserves the complaint.

CHAIRMAN SOULES: But then we are talking about timely made in the motion as opposed to how it's articulated. Maybe it doesn't matter. If no one else is interested in that I will --

HONORABLE C. A. GUITTARD: The only intent here is to preserve the present law that your errors are preserved, your motion for new trial errors are preserved, if the motion is overruled by operation of the law unless evidence is required. That's the only purpose of it.

MR. LATTING: I have got a question. What if evidence is required, you file your motion, and the trial court never

has a hearing on it?

HONORABLE C. A. GUITTARD: Then you take an exception to that and get a new trial on that grounds.

MR. ORSINGER: Can I suggest an alternative? What if we just said that overruling of a motion by operation of law is equivalent to overruling by order of the court?

HONORABLE C. A. GUITTARD: Unless evidence is presented. Unless evidence is required.

MR. ORSINGER: Okay. And then we don't buy into this question about somebody trying to resurface with an already waived complaint.

CHAIRMAN SOULES: "Unless the taking of evidence is necessary for presentation of a complaint in a motion for new trial, the overruling by operation of law of a motion for new trial or of a motion to modify the judgment." Is that correct in there, motion to modify the judgment?

MR. ORSINGER: Yeah. Yeah. We would like for it to say that.

CHAIRMAN SOULES: Does that get overruled by operation of law?

MR. ORSINGER: Yes, it does. 329(b).

MR. LATTING: It says so now.

CHAIRMAN SOULES: Anne Gardner.

MS. GARDNER: This is just a housekeeping point. Can we eliminate the words "the taking of"? Instead of "unless the taking of evidence is necessary" could you say "unless evidence is necessary"?

HONORABLE C. A. GUITTARD: I agree. Strike it.

CHAIRMAN SOULES: Richard, so I can get your words down here, after "motion for new trial or motion to modify the judgment."

MR. ORSINGER: "Has the same effect."

HONORABLE C. A. GUITTARD: I don't understand your problem with the language as it stands.

CHAIRMAN SOULES: Well, if nobody else is concerned then I'm not.

MR. ORSINGER: I think it's

very dangerous in light of what Sarah was saying earlier to say that anything that's done in a motion for new trial is sufficient to preserve appellate review because you may stick stuff in that motion for new trial that's already been waived, and here we are saying but it's sufficient to preserve it, and so I think we better stay away from that language.

CHAIRMAN SOULES: Okay. How about this? "Unless evidence is necessary for presentation of a complaint in a motion for new trial, the overruling by operation of law of a motion for new trial or of a motion to modify the judgment shall have the same effect as an order overruling the motion."

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

MS. BARON: "A written order."

CHAIRMAN SOULES: So we would strike "is sufficient to preserve for appellate review the complaints properly made in the motion." Strike that. Say "shall have the same" --

HONORABLE C. A. GUITTARD: I

guess "has the same effect."

CHAIRMAN SOULES: "Has the same effect."

HONORABLE C. A. GUITTARD: Right. "As answer an order overruling."

CHAIRMAN SOULES: "As an order overruling the motion."

HONORABLE C.A. GUITTARD: Right.

HONORABLE SARAH DUNCAN: So if I have a motion for new trial and it has ten grounds in it and one of those grounds requires evidence then it can't be overruled by operation of law?

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

HONORABLE SARAH DUNCAN: None of my other complaints were preserved.

MR. ORSINGER: I don't agree that that's what that means. I think it's only the ground where evidence is required that you have waived. The other is still preserved.

HONORABLE C. A. GUITTARD: You might say "except to the extent that evidence is necessary" if that would make any

difference.

MR. ORSINGER: Okay. How about that?

MR. HUNT: Read that language once more. "Has the same effect..."

HONORABLE C. A. GUITTARD: "As an order overruling motion."

HONORABLE SARAH DUNCAN: Grammatically the way it's written if any complaint in a motion for new trial requires evidence, this rule does not apply, and it's not overruled by operation of law.

MR. ORSINGER: What if you say "except to the extent that taking of evidence is necessary"? Would that help you?

CHAIRMAN SOULES: Let's try this. Suppose we start with "the overruling." Start the sentence, "The overruling by operation of law of a motion for new trial or of a motion to modify the judgment has the same effect as an order overruling the motion except" --

HONORABLE C. A. GUITTARD: "Except with respect to grounds that require evidence."

CHAIRMAN SOULES: "Except as to grounds"?

HONORABLE C. A. GUITTARD: "Except," yeah, "except as to grounds that require evidence."

CHAIRMAN SOULES: "Grounds where evidence is necessary for presentation of a complaint and a motion for new trial." Does that get it? Let me start over again.

MR. LATTING: Why don't you just use Judge Guittard's language?

MR. ORSINGER: Judge Guittard is economizing on all that wording.

MR. LATTING: He's economized a lot of it with just "except grounds that require evidence"

"Except in respect to grounds that require evidence."

CHAIRMAN SOULES: "Except" --

MR. ORSINGER: "As to grounds that require evidence."

CHAIRMAN SOULES: "That require evidence." Okay. So we would proposition that -- our suggestion here is we take out the words "unless the taking of evidence is

necessary for presentation of complaint on a motion for new trial." That would go.

Then the rule would begin, "The overruling by operation of law of a motion for new trial or of a motion to modify the judgment has the same effect as an order overruling the motion, except as to grounds that require evidence."

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

CHAIRMAN SOULES: And I guess it should say "grounds in a motion for new trial that require evidence."

HONORABLE C. A. GUITTARD: I don't suppose there is any grounds in a motion to modify the judgment that would require evidence, are there?

CHAIRMAN SOULES: No, but I don't think we want to suggest that that's a vehicle for an evidentiary hearing.

HONORABLE C. A. GUITTARD: I guess it doesn't -- it means the same thing, I guess, because only in a motion for new trial would grounds -- would evidence be required.

MR. ORSINGER: Could you say

"except as to grounds for a new trial that require evidence"?

MR. YELENOSKY: Because you have already said that it might be somewhere other than in a motion for new trial, right?

HONORABLE C. A. GUITTARD: Yeah.

CHAIRMAN SOULES: Okay. Take out "in a motion for new trial." Okay. Again, "the overruling by operation of law of a motion for new trial or of a motion to modify the judgment shall have" -- no, "has the same effect as an order overruling the motion except as to grounds that require evidence." Any further discussion on 321(e)? Rusty.

MR. MCMAINS: Yeah. The only problem I see with that pronouncement of the rule is let's suppose you have your hearing but you don't get a ruling. Now, the way you have crafted it sounds like that you have now said that the "overruled by operation of law" applies as to everything except when you are presenting something with evidence.

Well, okay. You do have a hearing. This

is really talking about a hearing. It's really not talking so much about a ruling, and the problem I have, I can easily see a court interpreting this as saying that if you have got to present evidence, you have got to have a ruling from the trial court. Otherwise, it's being overruled by operation of law. Even if you have a ruling, it doesn't preserve your complaint, but you don't have a ruling from the trial court, and you don't get the protection of a ruling that is automatic, but you had to put on evidence. I mean, I sympathize with --

CHAIRMAN SOULES: Let me see if we can fix that.

MR. MCMAINS: We are really focusing on do we have to have a hearing, and when we convert that to say you don't, it has the same legal effect when you are -- we are talking about oranges and apples. We are talking about rulings and hearings, and we really want to say you don't have to have a hearing unless you have got to present evidence and then you have got to have a hearing, but the overruling by operation of

law applies to both. In other words, any complaints you have got in the motion. Even if you have a hearing the judge frequently may not rule. Especially if it's toward the end of the time.

CHAIRMAN SOULES: Let's try it this way. If we just add after "evidence" add the words "that was not presented to the trial court." So the only exception would be as to grounds that require evidence that was not presented to the trial court.

MS. GARDNER: It's confusing

CHAIRMAN SOULES: Well, the concept's there. The words may not be just perfect, but that's trying to get at Rusty's issue. Does that concept address the problem you are raising, Rusty?

MR. MCMAINS: What are you trying to add?

CHAIRMAN SOULES: It would say that the only exception would be except as to grounds that require evidence that was not presented to the trial court.

MR. MCMAINS: Well, but again, any time -- if you are talking about

refocusing the rule to say that the legal effect of an overruling as a matter of law is different for those complaints then I disagree. They are not different for complaints that require evidence in terms of the legal effect of it being overruled by operation of law. They are different in terms of requiring a hearing.

You do have to have the hearing. You do have to present the evidence, but the judge doesn't have to rule, and the overruling by operation of law happens automatically, and it preserves anything that is preserved.

CHAIRMAN SOULES: All right. So what about just striking the exception, and the rule would be one sentence. "The overruling by operation of law of a motion for new trial or of a motion to modify the judgment has the same effect as an order overruling the motion."

MR. MCMAINS: Well, except that the purpose of this is to identify to people there are things you do have to have a hearing on.

CHAIRMAN SOULES: Well, don't

we say that in some other rule?

MR. MCMAINS: I mean, I --

CHAIRMAN SOULES: Is that said anyplace else?

MR. MCMAINS: The problem that was attempted to be addressed here I assume is that there are a couple of cases which suggest that having not presented the motion for new trial, having never set it for hearing, that somehow you are disengaged from the overruling by operation of law rule, and I agree we don't want to do that. We want to make sure that everybody understands that's nowhere suggested in the rule, but we also don't want to trap them into thinking that you don't have to go forward to hear evidence. On those points that have to have evidence, evidence is taken.

MS. GARDNER: Luke?

CHAIRMAN SOULES: Anne Gardner.

MS. GARDNER: In 321(a) in the middle of the paragraph we do have the same language. It's on page 7 of the draft, the shaded middle portion. "The judge's ruling" -- let's see. That sentence starting with those words, "provided that the

overruling by operation of law of a motion for new trial or a motion to modify the judgment is sufficient to preserve for appellate review the complaints properly made in the motion, unless the taking of evidence is necessary for proper presentation of the complaint in the trial court." Is that the same?

CHAIRMAN SOULES: It looks to me like it's the same. I don't know.

Justice Duncan.

HONORABLE SARAH DUNCAN: This just raises to me the essential problem with what we are trying to do. As I understand it, there were two problems in post-verdict motions. They were, one, that some courts were calling 301 -- motions to modify 301 motions so that they didn't extend the appellate timetable and they had to be filed within 30 days, and two, that courts were still requiring that you have a signed written order overruling your 301 motion, and if you didn't have that, nothing was preserved.

And once again, we are trying to rewrite the rules without using redlined versions and without reference to what really is causing a

problem today, and I think this is -- I don't think this has been causing a problem, whether you have to have a hearing, whether you have to present, whether you have to get rulings, what's overruled by operation of law, and what the effect of that is; and yet, we are not fixing the current law, which I think most people think is a problem, that a 301 motion should be overruled by operation of law just like any other type of post-verdict motion.

And I'm not sure that that's a motion for anything. It's just that it's sort of in my view pointing out that we are fixing things that aren't broken, and we are not fixing the things that are broken, and what's causing us to do that, I think, is that we are not using redlined versions of the prior rules so that we can truly focus on what the problem is and what we are fixing and how to best fix it.

CHAIRMAN SOULES: Don Hunt.

MR. HUNT: (E) is a codification of Cecil against Smith, and you're correct that when we rewrite 301 we should put in something about overruling motion for judgment, motion for anything as a

matter of law, without a ruling; but this is not an attempt to do that in the motion for new trial rule because we are not dealing with motions for judgment.

We are dealing instead with codification of Cecil against Smith, as I understand it, just trying in rule version to make absolutely clear that you do not have to have an order overruling to preserve error by operation of law without having a hearing. You only have to have a hearing when you have to take evidence.

HONORABLE C. A. GUITTARD: I had to rule on a case and write an opinion where the party contended -- I think it was a case involving setting aside a judgment for equitable grounds or something like that where the party contended that even though the motion was not presented to the trial court it was overruled by operation of law and he had preserved the appeal, and I ruled that that kind of a motion had to be presented to the trial court because it required the taking of evidence to support it. Now, that's one of the -- that's the kind of a ruling that this

is intended to preserve and to avoid that kind of contention.

CHAIRMAN SOULES: Anne Gardner.

MS. GARDNER: Well, I would -- because the language, the exact language of (e), is already contained in (a) I would move that we delete (e) in its entirety.

HONORABLE C. A. GUITTARD: (E)? We are talking about (f), aren't we?

CHAIRMAN SOULES: No. We are talking about (e).

HONORABLE C. A. GUITTARD: What?

Oh, okay.

MS. GARDNER: We are still on (e).

CHAIRMAN SOULES: Don, do you see any problem with that?

MR. HUNT: No.

CHAIRMAN SOULES: Okay. Any opposition to that?

Okay. (E) is deleted.

MR. ORSINGER: Can I understand? Everyone is saying that this Cecil versus Smith issue is taken care of in

(a)?

CHAIRMAN SOULES: Yes.

MR. ORSINGER: Is it taken care of explicitly in (a) or implicitly (a)?

CHAIRMAN SOULES: It's the same words, Richard.

MR. ORSINGER: Really? Okay.

MR. HUNT: There is some duplication there, and it's only for emphasis, but it may be good to take it out.

CHAIRMAN SOULES: Anyone want to leave it in, (e)? No one wants to leave it in.

HONORABLE C. A. GUITTARD: I want to leave it in.

CHAIRMAN SOULES: Okay. Let's take a vote then. Those in favor of (e), and we will have to do some rewriting, of course, but as a concept show by hands in favor. Four.

Those opposed? Seven to four it's out.

MR. ORSINGER: Now, can I ask for someone to tell me just quickly where in (a) that concept is presented?

CHAIRMAN SOULES: Okay. I will

do it. Anne pointed it out a moment ago.

HONORABLE SARAH DUNCAN: 10th and 11th lines.

CHAIRMAN SOULES: It's on page -- what page? Seven?

MS. GARDNER: Seven.

MR. ORSINGER: Okay. I'm with you.

CHAIRMAN SOULES: And it starts, "The judge's ruling..."

MR. ORSINGER: Yes. I'm with you. I'm with you.

CHAIRMAN SOULES: Okay. Now (f), 321(f). We are going to close up here --

MR. HAMILTON: Are we going to leave that in 321(a)?

CHAIRMAN SOULES: Pardon?

MR. HAMILTON: Are we going to leave that in 321(a)?

CHAIRMAN SOULES: Right. We are going to leave -- we are going to quit at noon, and I have got about 11:30 now. So for those of you that have airplanes and what have you that's the time that we are going to quit. Paula.

MS. SWEENEY: My rules subcommittee is at a standstill, and I don't know if you want to do anything, but just FYI on this Batson stuff, we really need some input from the committee, and I know I asked you not to hear us yesterday because most of our tiny little committee wasn't here, but now that we are I don't know if you want to wedge us in or not, but at some point -- we can't really do any more on the Batson stuff until we at least talk about it.

MR. YELENOSKY: And, Luke, I have got a -- I think it's just housekeeping at this point. I ran it by Judge Brister and Bonnie Wolbrueck, a redraft from yesterday of 145, and I think that could be dealt with very quickly rather than putting the issue of affidavits of inability off another couple of months.

CHAIRMAN SOULES: Okay. We were pushing to try to complete these rules because the Court wants these rules.

MS. SWEENEY: Yeah. I just bring that to your attention. I know that you have to prioritize.

CHAIRMAN SOULES: But it's pretty apparent that we are not going to get them done anyway. So that's why these rules were a little more prioritized. Lee, do you think it's okay to go with these other --

MR. PARSLEY: Yes. I guess so. We were trying -- our goal, not to speak for the Court too much, but our goal was to bring back to the committee the appellate rules in November for really a final look before we publish them in the BAR JOURNAL, and these tie in so much with the appellate rules that we were hoping to get through this, but it looks to me that we can't possibly finish these.

HONORABLE SCOTT BRISTER: Do you want to do an interim October meeting?

MR. PARSLEY: Well, that would be up to the committee.

MR. ORSINGER: We could go past 12:00 unless somebody has to leave.

CHAIRMAN SOULES: Well, Don's got to leave and all the people from Dallas. I know anybody that's got to go to Dallas.

HONORABLE SCOTT BRISTER: This looks like more than an hour or two of work.

MR. YELENOSKY: Yeah. That's obvious.

CHAIRMAN SOULES: We have got informal bills and formal bills.

HONORABLE C. A. GUITTARD: No changes really in those.

MR. HUNT: Well, let me suggest to you that if you want to stop, the place to stop would be at Rule 322. (F), (g) are simply what we have already adopted as a part of Rule 52, and I would move the adoption of those as-is because there are no changes, and we can look at them next time if we need to.

HONORABLE SCOTT BRISTER: I have got a big proposal on (f), big to me, a big problem.

CHAIRMAN SOULES: With (f)?

HONORABLE SCOTT BRISTER: You may not think it's very big.

MR. YELENOSKY: Then let's stop now.

CHAIRMAN SOULES: Judge Brister, you say with (f) or (g)?

HONORABLE SCOTT BRISTER: With (f).

CHAIRMAN SOULES: With (f). Okay.

MR. YELENOSKY: I move we stop now then because I suspect whatever we resolve on (f) right now may be resolved differently when we come back to this next time.

MR. LATTING: I resent that.

MR. YELENOSKY: And obviously I am lobbying to get to Rule 145, but if we do this in a hurry up fashion, there is going to be a great argument for starting over with it next time anyway.

CHAIRMAN SOULES: I think there is no chance at all that the Court is going to take 145 before it takes the rest of these rules. The Court is not going to start piecemealing out one Rule of Civil Procedure and one here and one there. I mean, the Bar would get into an uproar, as they have in the past that every time they look up there is a new set of rules coming, a new rule here or a new rule there, but if it helps you to get that done --

MR. YELENOSKY: Yeah. It helps me.

CHAIRMAN SOULES: It will go with the rest of the package --

MR. YELENOSKY: Right.

CHAIRMAN SOULES: -- when the full package goes.

MR. YELENOSKY: Well, that may be, but the affidavit of inability doesn't relate to much else in the rules, and I know that the Bar president has spoken about the need for increased pro bono work, and I think it fits nicely with that. Of course, it may be that they wouldn't, but they certainly can't if we haven't finished our work here on it.

HONORABLE SARAH DUNCAN: As I understand what Lee was saying, these rules are an integral part of the TRAP rules, but these rules aren't an integral part of the TRAP rules to the extent thaat they have omitted 301 motions, which is half of post-verdict, post-judgment motion practice, and I would like to suggest when we do reconvene, whether that's tomorrow or October or November, that 301 be part -- I mean, it's all the same stuff, which is why the appellate

rules committee took up 301, 329, all of them together, is they are all post-verdict into the appellate process rules.

CHAIRMAN SOULES: Who has 301? Is that Paula?

HONORABLE C. A. GUITTARD: There are a number of suggestions which the appellate rules committee made and which was originally in our cumulative report with respect to the 301 series, and they should be considered in connection with this really, and they are in a different subcommittee, but they haven't had any recommendations on that.

HONORABLE SARAH DUNCAN: And to further point it out, we have entitled Rule 321, "Preservation of complaints." We have talked about a general preservation and then we have talked about a motion for new trial, and we have never mentioned a motion for judgment as a matter of law as though it's not even a part of the preservation process.

HONORABLE C. A. GUITTARD: Because we have other -- we have other rules that relate to it. I mean, other proposals.

HONORABLE SARAH DUNCAN: Well,

I understand that, but structurally if we are really going to be rewriting these rules this significantly, structurally a Rule 301 motion is just another way of preserving certain types of complaints in a trial court, and for it to be separated in sequence to me doesn't make a whole lot of sense.

HONORABLE C. A. GUITTARD: Well, we ought to take that up then when we consider that series of rules.

CHAIRMAN SOULES: Well, let me try to get --

MR. ORSINGER: I agree with you, Sarah.

HONORABLE SARAH DUNCAN: Thank you, Richard.

CHAIRMAN SOULES: Well, let's see. From 301 to 314, I am trying to decide. I do think that these rules need to be considered together, and Paula, has your committee done any work at all on 301 through 314?

MS. SWEENEY: No, sir.

CHAIRMAN SOULES: And Don picks up at 315.

MR. ORSINGER: Luke, I don't know that you need to include more than just 301 in our current discussion.

CHAIRMAN SOULES: Let me see.

HONORABLE SARAH DUNCAN: Well, 302 is actually a type of 301 motion, right?

CHAIRMAN SOULES: Okay. I am going to -- if Don and his committee will accept the additional load -- transfer 301 through 314 to your committee and have Paula stop at -- well, actually 300.

MS. SWEENEY: I second that motion, and I unanimously vote it in.

So I'm stopping at 300?

CHAIRMAN SOULES: 299.

MS. SWEENEY: Anybody want to take any of the others?

MR. HUNT: We have already picked up 306(a), and many of those rules were repealed, and most of them don't need adjustment anyway. The ones that we really need to work on are 301.

CHAIRMAN SOULES: Will you accept 300 to 314 so that you're going to cover from 300 through 331?

MR. HUNT: Provided Justice Guittard and Bill Dorsaneo will be here next time because I may not be.

CHAIRMAN SOULES: All right. And then, Sarah, do you want to be on their -- are you on their committee?

HONORABLE SARAH DUNCAN: But are they going to be incorporated in the structure of what we have got now, or are we just going to rewrite 301 through 314 in a separate vacuum?

CHAIRMAN SOULES: No. I mean, it's all going to be a package from 300 through 331.

MR. HUNT: In the same package.

HONORABLE SARAH DUNCAN: I'm asking about structure.

MR. ORSINGER: Sarah's saying that 301 motions ought to be included in the preservation of error rule.

CHAIRMAN SOULES: That's fine.

MR. ORSINGER: It's a hybrid rule because we do have to get a judgment signed, and therefore, it does belong in the judgment section of the rules, and yet, these

motions are a way of preserving error, and so there is some logic in putting them in the preservation rules.

CHAIRMAN SOULES: Whatever you propose, whatever you propose, and is Sarah on -- are you on Don's committee? Will you serve on that committee?

MR. HUNT: She doesn't have enough to --

CHAIRMAN SOULES: Fails for lack of a second.

HONORABLE SARAH DUNCAN: Can I get off Batson? Can I be relieved of Batson and take on --

MS. SWEENEY: I will swap a stack of rules for a player.

HONORABLE SARAH DUNCAN: Particularly one that missed the last conference call.

HONORABLE SCOTT BRISTER: As long as it's not over the salary cap.

CHAIRMAN SOULES: Does your committee have enough people to function without Sarah?

MS. SWEENEY: Well, Pam

volunteered to join us, and I think that will help considerably.

CHAIRMAN SOULES: Who?

MS. SWEENEY: Pam.

CHAIRMAN SOULES: Pam Baron. Put her on Paula's committee. Pam, is that right?

MS. BARON: Yeah.

CHAIRMAN SOULES: You volunteered there. And move Sarah to this 300 to 331. Now, every subcommittee chair is to have at the next meeting a disposition table of every rule in the big volumes and in the supplement because Holly is going to send you a form, and it will start in the left-hand column, and it have will have the Bates numbers of the requests for your committee.

The committees are to address every one of those Bates numbers and make a recommendation and give a reason for their recommendation, and Holly will send you a form. So if you make a recommendation, it has to -- for a change it has to include a redlined version of the current rule that shows your recommendation on its face. So

there is going to be some -- she will send you a form and a diskette, which is -- we are on Word Perfect 5.1. So I don't know whether that helps you or not.

MR. LATTING: When is that coming?

CHAIRMAN SOULES: It will come out next week.

MR. ORSINGER: Now, Luke, that means all of the stuff in the three volumes of the agenda? Those are the Bates pages you are talking about?

CHAIRMAN SOULES: Exactly. She will provide the subcommittee chairs with a form that will have the Bates numbers in the left-hand column, and that is to be addressed by the subcommittee in a formal written response by the next meeting, say by two weeks prior to the next meeting, and redlined recommendations, if any change is recommended. If no change is recommended, whether or not a change is recommended a reason must be given because we have to respond to the people who have the last four years have been asking us for rule changes or to visit the rules.

That's my job to respond to them, but it's the subcommittee's job to address the rules and make recommendations or state either why or why not.

MR. ORSINGER: Luke, what about the additional correspondence that we have received over the last year and a half that's not part of --

CHAIRMAN SOULES: You are going to Bates stamp that and send that out next week?

MS. DUDERSTADT: Yes.

CHAIRMAN SOULES: Okay. That has all been assembled. There will be a second supplement mailed next week with this, and those Bates numbers of the second supplement will be included in the assignments.

MR. LATTING: Coming at the same time?

CHAIRMAN SOULES: Coming at the same time. So I don't think there is any way for this committee to meet as a whole in October because every subcommittee is going to have to be very active in October in order to

get this work done. Then hopefully by the January meeting we will have worked through this entire agenda, and we will be ready to report to the Supreme Court, but we won't be able to do that unless there is a good serious amount of organization done in October so that we can begin in November to go through all of these rules. I don't think we can get through them in one session, particularly with the 301 problems and Batson, but by the January meeting hopefully we will be done.

HONORABLE SARAH DUNCAN: Could we have an October -- I really don't want to hold up the appellate rules if we could have an October meeting just to do post-verdict motions and preservation.

MR. ORSINGER: I think that with regard to holding up the appellate rules everyone should be advised of a conversation that Justice Hecht had with a few of us here yesterday, and Lee knows more about this than I do, I'm sure, but the legislature has appropriated some money for modernization of the language of the rules, and Justice Hecht raised the question of whether the appellate

rules should go public on a tentative proposal basis for publication in the BAR JOURNAL and everything else with the anticipation that we may come along in four or five months and modernize the language according to this legislative mandate or whatever it is that we have gotten.

And Bill Dorsaneo said that he was in favor of holding the rules back and having the modernization or whatever it is done before it's published. I said I think that the substantive changes have already been agreed upon and that if we put them out for debate and then come in a little bit later and change the language that people aren't going to get too upset, and Justice Hecht did not indicate how he would decide on that, but I think there is a possibility that our appellate -- he also estimated that it might delay the release of the rules by four or five months, appellate rules now, if we were going to do this rewording.

MR. PARSLEY: That's all news to me, which is okay, but you just know more than I do about that. So if it's delayed four

or five months --

MR. ORSINGER: I had the impression they were going to hire somebody with this money from the legislature.

MR. PARSLEY: I know the legislature appropriated money, and I know that they are intending to do that. I had no idea he was talking about delaying the appellate rules.

CHAIRMAN SOULES: We had a problem with attendance at this meeting. I don't see how we can both get ready for November and have an October meeting.

HONORABLE C. A. GUITTARD: I agree.

MR. ORSINGER: That's really true from my subcommittee's standpoint.

CHAIRMAN SOULES: Now, for a clarification if anybody doesn't understand, the Bates, they may or may not bear on something we have already done. For example, all the charge -- we have got a lot of letters related to the charge.

MS. SWEENEY: You already have a chart on those.

CHAIRMAN SOULES: We have a chart on those. There are a lot of them on discovery, which Steve will have to address, and if we say we have addressed the inquiry at some earlier time by proposing some particular rule then that would be the action taken, already taken. I mean, that would be, of course, entered on your report, and if we haven't then it has to be addressed when we decide whether it's meritorious or not.

HONORABLE C. A. GUITTARD: And with respect to the appellate rules, you have already asked us to report on a good many suggestions that have come in that would bear on what's been done before, and this committee needs to consider them, I suppose, perhaps in November.

CHAIRMAN SOULES: I mean, it's to say that the appellate rules are not published is just not correct. I mean, they have been spread all over, and we are already getting comments on the proposed rules. So if the Court does publish those in their proposed form, I have no problem with the Court publishing them as proposed rules for comment

if that's what the Court wants to do. It's obviously going to -- I think that probably will take us to a March meeting before we can address the public comments.

MR. ORSINGER: Justice Hecht was talking not about publishing this committee's proposals but publishing the Supreme Court's decision on our proposals, or should it not publish that pending modernization. You see what I'm saying?

HONORABLE C. A. GUITTARD: And it should not publish them pending consideration of these subsequent suggestions that have been referred to our committees.

CHAIRMAN SOULES: The Supreme Court, in the years past the Supreme Court didn't publish rules for public comment and then later promulgate them. We made recommendations. They decided what they were going to do, and they promulgated the rules. Now we have got some additional process, may be good, may be bad. I am not suggesting which way it is, but if they are going to publish the rules in preliminary form and invite comment, that is going to delay the

promulgation of these rules until at least the spring. It just can't be avoided. You can't work any other way.

And their effective date is going to be in the fall because it takes about four months once the official rules are decided to get them published in the BAR JOURNAL and all of that sort of thing, time to go by before they are effective. I'm not criticizing any part of the procedure, but it seems to me like we have got the time as long as we get 301 through -- all of Don's work, if we get through that next time. In the meanwhile we are still going to be getting public comments on the proposed appellate rules, and then we will ask the Court to tell us what they want us to do in January.

Do they want us to go to the appellate rules and finish them, or do they want us to go on with these documents, with the documents we have got? So we will need some guidance on that, but to -- how can we expedite that process? I don't see that it can be expedited in light of what's going on.

MR. PARSLEY: I think that's

right. As I said, I think Richard knows more than I know right now, but preliminarily in my discussions with Judge Hecht were that we were going to try to send back to this committee the appellate rules for final review, that they weren't going to be published for comment, that they would be published in final form to be effective, and we wouldn't go through a comment period.

If he's thinking about a comment period then he's been thinking about that since I talked to him, and that's okay. You know, that's obviously up to the Court, but when I had talked to him earlier we had talked about moving these rules up on the agenda so that we could have them to look at and bring back to this committee in November so we would have a full package ready to go, but if that's changed then it has, and there is no reason to rush.

MR. ORSINGER: I don't know that he's saying that they are going to put the rules out for comment other than in the context that should we promulgate the rules we have decided on knowing full well that there

may be some wording changes that occur as a result of this legislative -- the appropriation of money to modernize the language in the rules or whatever it is. In which event we would have a promulgation which may be rules that go into effect and then a repromulgation of the revised version that go into effect later.

CHAIRMAN SOULES: Well, they promulgate rules to go into effect. If they do that and then they change the wording of them then they are going to have to promulgate a new set of rules.

MR. ORSINGER: That's right.

CHAIRMAN SOULES: So they have two promulgations in a series of months.

MR. ORSINGER: And the question was will the Bar be satisfied -- I mean, should we promulgate, go ahead and get the changes in effect, and then come back and promulgate with different language, or should we hold off everything until we have the different language?

HONORABLE C. A. GUITTARD: Hold off.

HONORABLE SARAH DUNCAN: I'd like to suggest that the Rules of Appellate Procedure have only existed since 1986 and that while some of the civil rules may date back to the Thirties and Forties and maybe their language is out of date. Let's spend whatever money -- could we suggest to the Court that they spend whatever money is there on the civil rules, and the appellate rules are written just fine unless you are a purist at Oxford. They don't need rewriting, and if we could -- maybe the appellate rules chair and the 301 chair, maybe they would suggest that. I mean, or maybe we could take a vote. I mean, it seems like a waste of money and time to me to have someone go through and modernize rules that have only existed for ten years, many of which have been rewritten in this session.

CHAIRMAN SOULES: Okay. Ten minutes on Batson because that committee is stuck and needs some guidance.

MS. SWEENEY: All right. We have talked about the Batson issue and the threshold question -- and let me lay out some

of the areas of question and then run through the rules really, really, really fast.

The threshold question is do we need Batson rules? Obviously the United States Supreme Court has given us Batson, and they have said initially -- and Elaine who knows more about it than just about anybody has been helping us a lot. Initially the idea was to protect the rights of the defendant by not striking everybody like him. Then it became evolved into protecting the rights of the juror so that they would have a right to serve.

So far the Court has addressed a few areas of impermissible strikes, race, ethnicity, and gender, unknown whether that's going to extend to religious preference, sexual preference, any number of other -- occupations, wealth, any number of other areas have been --

MR. LATTING: Age.

MS. SWEENEY: Age.

HONORABLE SCOTT BRISTER: Political party.

MS. SWEENEY: As it now stands

there is a Batson procedure. There is a rule. It exists, but there is nothing directing the parties or the court for how to go about exercising their challenges and then how to go about exercising their strikes and then thereafter how to go about challenging those strikes.

We took the initial sentiment of this committee some time ago, which was go draft something, and we will talk about it. So we have drafted something to talk about, which we thought was the least cumbersome way to do it, and the gist of it is you make your strikes; you give them to the court. Right now the way you know who is on the jury and the way you know who the other party struck is when they have all come back in and the court calls the first 12 unstruck folks, and right now if you want to make a Batson challenge, under many instances that's the first time you know, for instance, that all the Hispanics on the jury have been struck.

You raise your hand, and you make your objection. You ask the court to do something about it. Everybody goes back out in the

hall. You have your Batson hearing, and suddenly to the jury's perception four Hispanics are back on the jury and four other people are off the jury, and it looks funny, and it's awkward, and it's probably not a good idea.

So we suggested exchange your strikes and then before the judge actually calls the people in, the judge calls the list. Then you make your Batson objections, have your hearing. Then you bring the jury in. There are a couple of changes to what you have on your paper. Rule No. 1 at the end of the first line, it was suggested by Judge Till that it should say "tried in county or justice court" because they have the same procedures.

There is a typo in the second one, but little things like that; and then the other thing is, and this needs discussion, the court disallows the strike if it's improper, "and the" -- and I have used the word "punitively" because it's the right word, but that may be too nonmodern. I don't know. "And the punitively stricken juror shall be allowed to serve," and that's going to go in paragraph

(3) right in the middle after it says, "The court shall disallow the strike, and the punitively stricken juror shall be left to serve." And it also goes in the first paragraph on the second page after "strikes shall be removed from the prospective juror's name and the punitively stricken juror shall be allowed to serve."

So the first thing we need is guidance from the committee on whether we should have these rules. The second thing is, what does the committee feel should be the effect of an improper strike. The third thing is should the rule provide -- what we have done is right now listed what the Supreme Court has spoken on, race, ethnicity, and gender and then we have added "or other unconstitutional basis" since we don't know what that may be, and we need the committee's thoughts on whether that should be in there.

CHAIRMAN SOULES: One other housekeeping rule before we start on this matter. I do anticipate that we will have six meetings, and we will need all of 1996 just like we met this year. It's going to be

driven to some extent about Judge Till's project, but we will send you a schedule of meetings for 1996 also in the package next week. Basically it will be the same Friday that we have been on beginning in January and going through November and so forth.

The threshold issue then, Paula, is does the committee feel we need to have rules that give us guidance or give the Bar guidance on how to handke Batson hearings?

MS. SWEENEY: Yes.

CHAIRMAN SOULES: Is that right?

MS. SWEENEY: Yes.

CHAIRMAN SOULES: Discussion?

HONORABLE SARAH DUNCAN: Has this committee -- I know our subcommittee has, but has this committee voted on retaining peremptories?

MR. LATTING: What?

MR. ORSINGER: Has this committee voted on retaining jury trials?

MS. SWEENEY: Can I have just one?

HONORABLE SCOTT BRISTER: Can I

have just one maybe?

MR. LATTING: Yeah. We covered that.

HONORABLE SARAH DUNCAN: We voted on the subcommittee, and I believe the vote was fairly overwhelmingly to keep peremptories, right? But we thought that we had to at least get past that point to where we could move to where do we have rules because --

HONORABLE DAVID PEEPLES: No one has moved to get rid of peremptories. Why not just move on?

HONORABLE SARAH DUNCAN: Never mind.

CHAIRMAN SOULES: Does anyone feel we should not have peremptories? One. Those who feel we should have peremptories show by hands. Okay. It's the house to one. We are going to have peremptories, and we are not going to eliminate that. This committee is not going to recommend it.

Now, Batson, should we have -- not focusing on these particular rules and the language in these particular rules but should

we have rules that give us or give the Bar guidance on how to handle Batson issues?

MS. SWEENEY: And I think our sense was we do need some rules.

CHAIRMAN SOULES: You recommend that there be some rules?

MS. SWEENEY: Yes.

CHAIRMAN SOULES: Or your committee recommends that?

MS. SWEENEY: Yes.

CHAIRMAN SOULES: Discussion?

MR. LATTING: I would recommend that --

CHAIRMAN SOULES: Joe.

MR. LATTING: I hope we do not have a rule on it on the theory that the more we talk about it the worse it gets, that if this is going -- this is a bottomless pit, and if we start trying to draw rules about it we are going to get into that. So I hope we do not have a rule. I mean, if we try to draw one, we are just going to be publicizing to everybody that this would be a good idea to go out and start doing this, and I think the less of it the better.

CHAIRMAN SOULES: Richard.

MR. ORSINGER: Apart from the wording problems I think that are created here, the only area that I really feel in civil law that we need help on is what the cure is for Batson. It's my understanding that the legislature has enacted a rule that in criminal cases if anybody does a Batson not permitted strike then you bring in a new panel, and I think that's really stupid, and I hope that the Supreme Court of Texas doesn't do that in civil cases, but I do feel like maybe the remedy for curing it would be appropriate, but I think that to the extent that we are trying to describe how you prove it and what you have to prove, I think it's a mistake because I think that the rules of the game are being changed as we speak, and so I am against the rules generally except maybe for a cure.

CHAIRMAN SOULES: Chip Babcock.

MR. BABCOCK: There is case law, of course, on how you do the Batson challenge and what the trial judge's duty is. I would be curious to hear from the trial

judges in attendance as to whether or not there is currently any problem with effectuating the Batson mandate.

HONORABLE SCOTT BRISTER: David.

HONORABLE DAVID PEEPLES: It's come up once, and they didn't make the objection until the jury was in the box, and I said, "You waived it," and we moved on.

HONORABLE SCOTT BRISTER: And I have had it a half a dozen times. It obviously is not as pervasive in civil cases as it is in criminal, but I have had it a half a dozen times. I would favor having a rule. You are going to have a rule on peremptory challenges anyway. I would favor having Batson in there simply because if it's not in there, most of the law is Fifth Circuit law, and they don't give me federal reporter cases, and I have got to trapes over and look up this stuff of what you want me to do, and it changes, and so it makes certain sense to me to have it written down in a book that I have got.

CHAIRMAN SOULES: Sarah Duncan.

HONORABLE SARAH DUNCAN: Having just finished my 50-page Batson case for the week I would be in favor of rules because I think, okay, fine, there haven't been a lot of these in the past. They are going to become more and more and more prevalent. They were included in the advanced appellate practice seminar this week, and I would prefer not to follow the Court of Criminal Appeals rule for Batson because they change about every two weeks. For instance, the Code of Criminal Procedure provision that Richard is talking about is no longer Texas law by virtue of the Court of the Criminal Appeals case law.

MS. SWEENEY: And our sense was, no, you don't bring in a whole new panel because that gives everybody a chance to sandbag. You know, you hate the panel so you just go "I am just going to strike all of the X's," and you pretty much bait the other side into doing it and get yourself a new voir dire. We would be picking juries for the rest of our lives.

HONORABLE DAVID PEEPLES: And if it's the constitutional rights of the

improperly stricken juror that you are interested in, that person has gone home if you bring in a new panel. So the way to cure it is to let that person serve.

MS. SWEENEY: And you don't get a fresh strike is the punishment, so to speak.

CHAIRMAN SOULES: Okay. Do we want the committee to continue on with working on Batson rules or forget about it? Those in favor of a continuing effort to have Batson rules show your hands.

MR. ORSINGER: They have written the rule.

CHAIRMAN SOULES: Well, but --

HONORABLE SCOTT BRISTER: They are not finished.

CHAIRMAN SOULES: 11. Those opposed, who think we ought to just table the whole concept? 11 to 1.

It's noon.

HONORABLE DAVID PEEPLES: As a member of that subcommittee, Luke, I think we ought to revisit what Joe says. I don't want to stir up -- you know, give people the idea, you know, here is something you can do. From

what Scott says, there is a lot to it. You know, we ought to lay this out in a book that's on every judge's desk and make it clear for them, and I think a simple rule can be written, and we ought to look at it, but I may vote with Joe later.

CHAIRMAN SOULES: Okay. Thank you all very much. We will see you November 17th, 8:30.

(At this time the proceedings were adjourned.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

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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 September 16, 1995, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $ 1,147.25 .

CHARGED TO: Luther H. Soules, III .

Given under my hand and seal of office on this the 2nd day of October, 1995.

ANNA RENKEN & ASSOCIATES
925-B Capital of Texas
Highway, Suite 110
Austin, Texas 78746
(512) 306-1003

D'Lois L. Jones

D'LOIS L. JONES, CSR
Certification No. 4546
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