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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

NOVEMBER 17, 1995

(AFTERNOON SESSION)

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Taken before D'Lois L. Jones, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 17th day of November, A.D., 1995, between the hours of 12:30 o'clock p.m. and 5:00 o'clock p.m. at the Texas Law Center, 1414 Colorado, Rooms 101 and 102, Austin, Texas 78701.

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PROFESSOR DORSANEO: Well, I will attempt to add in a definition of final judgment, which may be the last sentence, or it may begin "a final judgment is rendered." I'm inclined to think that it will be easier to do it the second way than the first way.

That takes us to paragraph (b). Now, paragraph (b) is meant to be the beginning part of current Rule 301, although the genesis of its creation really is by reference to current Rule 306, which begins, "The entry of the judgment shall contain the full names of the parties, for and against whom the judgment is rendered," with the notion being that this would probably begin a final judgment and with the idea also being, as David Keltner suggested, that we would provide a separate definition for the term "order." I move the adoption of paragraph (b) with respect to the form and substance of a judgment, that is to say, a final judgment.

My own on-horseback thought is that to the extent there is difficulty in defining a final judgment we would at least provide to the person who thinks that that's what he or

she is drafting an instruction about how to draft it and that you might end up meeting yourself by reference to satisfying the formal requirements on the way back to actually having a final judgment. The one difficulty to point out is that not every last piece of paper will look like what this form of a final judgment is, at least in any detailed way, but I suppose we have that problem anyway.

Discussion?

HONORABLE SARAH DUNCAN: I think we have a problem.

CHAIRMAN SOULES: On (b)? Okay. I'm sorry. Was that you, Justice Duncan? You want to speak about (b) or something else?

HONORABLE SARAH DUNCAN: (B).

CHAIRMAN SOULES: (B). Okay.

HONORABLE SARAH DUNCAN: This may be what you just said, Bill, but I didn't connect. This is using judgment in the sense of a judgment following a trial.

PROFESSOR DORSANEO: Yes. Which is consistent with what Rusty says about Rule 301, which I think is right, that when

the term is discussed there it's talking about all of the relief to which somebody is entitled and the nature of the case proved and the verdict, and all of that suggests the end.

And all we're saying is that it has the names of the parties, say what the relief is, and talk about writs and processes as appropriate, but not more than that. So we say, well, what is left out that we might want to put in the judgment? Well, recitals, findings of fact, even though they are not supposed to be in there, a lot of razzmatazz about service of process to avoid collateral attacks, et cetera; but all of that is just a matter of your own taste and what the judgment is required to have in it, names of the parties, relief, and process.

MR. ORSINGER: May I ask a question?

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: Bill, if there is, say, a promissory note lawsuit and a partial summary judgment is granted on the note but there are other claims that are not

severed, you have a judgment under the definition of (a), but we really can't issue execution on it yet because it's not final in the sense that it can lead to collection. Are we not colliding with our own definition of "order" in (a) to be saying --

PROFESSOR DORSANEO: Our own definition of "judgment" in (a)?

MR. ORSINGER: Yeah. Or is this okay? I mean, we could go ahead and provide for the issuance of a writ, but we all know secretly that you can't really issue the writ until after it becomes final.

PROFESSOR DORSANEO: Well, that's true for some writs but not for others.

MR. ORSINGER: Okay.

PROFESSOR DORSANEO: And this may get into this final order problem, and maybe it's that we should just say "a judgment shall contain (1), (2), (3)," and have the final judgment -- Rusty, what do you think about this -- have the final judgment concept located in the second sentence. "The final judgment shall conform to the pleadings, the nature of the case proved, the jury's verdict,

and the judge's findings of fact." Maybe we could say, "A judgment or order shall contain the names of the parties specified on relief."

No, David?

MR. KELTNER: I think you really want to keep this final judgment.

CHAIRMAN SOULES: Well, it's the second sentence should be disassociated from the first because the first covers the judgments we define in (a), and the second doesn't cover all of those. Is that what I am hearing?

PROFESSOR DORSANEO: Well, the second one is obviously more concerned with what will become the definition of final judgment than the first necessarily is. Because you could have, you know, relief, interlocutory relief, a temporary injunction which would direct the issuance of writs for enforcement. Right?

CHAIRMAN SOULES: I think the first sentence covers everything that we have contemplated that (a) would cover, but the second one probably doesn't.

PROFESSOR DORSANEO: But the

second one is probably congenial with this definition to be prepared of final judgment.

CHAIRMAN SOULES: I think that's right, the way it looks to me. So what do we do?

PROFESSOR DORSANEO: I can draft it that way, and it will all match.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: Doesn't that depend on how -- if an order of nonsuit is the order that renders -- that establishes a final judgment, does the order of nonsuit have to conform to the pleadings, the nature of the case proved, and the jury's verdict or the findings and conclusions? I mean, clearly it doesn't.

CHAIRMAN SOULES: That's why it needs to be separated.

HONORABLE SARAH DUNCAN: That's why it depends on the definition of a final judgment. I mean, if we are talking here just about a judgment following a trial then the second sentence in (b) --

PROFESSOR DORSANEO: Well,

that's the problem. We have that problem now. The question is whether we live with it, continue to live with it, or try to figure out a way to fix it. Rule 301 says something very much like that second sentence. "The judgment of the court shall conform to the pleadings, the nature of the case proved, and the verdict, if any; and it shall be so framed as to give the party all the relief to which he may be entitled either in law or in equity." And that's not even as accurate as this sentence, really.

HONORABLE SARAH DUNCAN: I understand, but in the rules as they exist now we haven't defined judgment to include orders. Expressly.

CHAIRMAN SOULES: Anne Gardner.

MS. GARDNER: I was just going to put in my two cents worth. That goes back to reading the current rule, back to Rule 300 again. Judgment there is defined as one being rendered after verdict or after a nonjury trial. It's not -- well, in effect, it limits it to those types of judgments. I just feel like we are embarking on a whole different

course by getting off on all of these other things in this series of rules, and I think that the more I hear and think about it, the more problems it seems to be running into, and I feel that it would be better to stay with the original concept of a judgment after a trial on the merits.

PROFESSOR DORSANEO: So you would suggest modifying this second sentence if we don't stick with the exact language we have in the current rules and don't bother changing it at all, a reference to probably a conventional trial.

MS. GARDNER: That would work.

MR. ORSINGER: Well, this should apply to a summary judgment that disposes of the case, too, shouldn't it?

CHAIRMAN SOULES: That's always a trial.

MR. ORSINGER: The term "conventional trial" includes a summary judgment?

PROFESSOR DORSANEO: Unconventional trial, that is to say, not a trial.

HONORABLE SARAH DUNCAN: Luke, I mean, that's really not true. We just got through saying that after summary judgment the court isn't required to make findings or conclusions. So this sentence wouldn't apply. This sentence would only apply after a jury trial.

MR. ORSINGER: And summary judgment would certainly apply to the first sentence but it wouldn't apply to the second -- well, part of the second sentence would apply. It needs to conform to the pleadings and the proof by affidavit or admission or whatever. It's really just the findings that doesn't apply to the summary judgment; isn't that right?

CHAIRMAN SOULES: Right. I mean, you could repunctuate this second sentence and make it apply universally, I think.

HONORABLE SCOTT BRISTER: "And if applicable."

CHAIRMAN SOULES: Just say, "The judge of the court shall conduct the form of the pleadings," and then insert "and," and

don't put any punctuation in all the rest of the sentence. "The nature of the case proved, the jury's verdict, or the judge's finding of fact unless the judgment is rendered as a matter of law." Because "form of the pleadings," that will take care of a nonsuit.

MR. ORSINGER: Well, maybe we don't have a problem because of that last phrase because judgment is a matter of law in summary judgment, isn't it?

HONORABLE C. A. GUITTARD: Right.

MR. ORSINGER: And so the "unless" clause means "the findings unless." You get no findings on a directed verdict. You get no findings on a summary judgment. So maybe that "unless" clause saves us.

CHAIRMAN SOULES: Well, it also would apply --

MR. MCMAINS: Well, of course, that last sentence is related to changes that are proposed in the new Rule 301.

PROFESSOR DORSANEO: That last part of it is certainly.

MR. MCMAINS: Yeah. Because

the new NOV stuff is now called motions for judgment as a matter of law, and it's an attempt to federalize the NOV practice, and that's what that relates to, and that doesn't -- and I mean, I think reasonably when you say "unless a judgment is rendered as a matter of law" that you would go over and look over here, especially in that same section, and look in the Rule 301 which talks about "motion judgment." I suppose that's supposed to be "motion for judgment as a matter of law."

MR. ORSINGER: So it wouldn't necessarily be interpreted to include summary judgment?

MR. MCMAINS: In fact, I don't think it is. I mean, I think a motion for judgment as a matter of law is given the term -- our definition is in Rule 301.

PROFESSOR DORSANEO: It would embrace summary judgments, although there is not a specific reference, and a summary judgment is a motion for judgment as a matter of law just as much as any other motion is a motion for judgment as a matter of law. One

of the reasons for embracing that lingo at the Federal level, we are not attempting to embrace the Federal practice, just the language, just the term "judgment as a matter of law."

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: It seems to me the only problem here, it doesn't -- the problem in (b) does not necessarily that we back down on the idea of defining judgment or when a final judgment is rendered. It just means that the last sentence in (b) needs to be restricted to judgments following trial.

PROFESSOR DORSANEO: Uh-huh.

MR. MCMAINS: Well, except what about a default judgment? Is that a trial?

PROFESSOR DORSANEO: That is the problem.

MR. MCMAINS: It is a trial.

PROFESSOR DORSANEO: We don't know. We have different ideas about what's a trial.

MR. MCMAINS: I mean, it is a

trial in the sense that if you find out about it in time, you can file a motion for new trial. So I guess the assumption is that if there it's a new trial, there had to be an old trial. You may not have been there, and it may have been very short. It may have been had before the court reporter.

CHAIRMAN SOULES: Well, all judgments have to conform to the pleadings, don't they?

PROFESSOR DORSANEO: Yes.

HONORABLE C. A. GUITTARD: Unless they apply to the final.

MR. ORSINGER: Well, that would be the debate. These proposed rules I think --

CHAIRMAN SOULES: That's only if you waive pleadings.

MR. ORSINGER: Yeah. These proposed rules don't make you replead just because you have tried something by consent; isn't that right?

CHAIRMAN SOULES: Well, you don't have to replead it in a trial by consent anyway, unless somebody objects to my

pleadings.

PROFESSOR DORSANEO: The sentence actually is not particularly helpful except to the extent it helps someone. From a legal standpoint it probably does grasp the idea that when the judge is making a judgment the judge is supposed to do that in conformity with the jury's verdict unless judgment is rendered as a matter of law in accordance with the proper procedures for getting one of those, which is what originally 303, No. (1) said. You are not supposed to render judgment contrary to the verdict just for grins, but as with many of these sentences, you know, every time you write something down you end up having a little bit of a trouble with it. We could put in there "a conventional trial or trial" without losing anything, and perhaps we gain that as a matter of clarification.

CHAIRMAN SOULES: The only thing we lose is that what does a judgment look like that's not after a conventional trial?

PROFESSOR DORSANEO: Well, it contains the names of the parties, specifies

relief, and directs issuance of processes if appropriate.

CHAIRMAN SOULES: It doesn't have to conform to the pleadings?

MR. ORSINGER: We have a rule that says findings and conclusions are not proper in the summary judgment proceeding. We just stuck that in 296. Maybe we don't need to worry about repeating that here because we have already just completely banned them altogether from summary judgments. They are not proper. "A request for findings of fact is not proper and has no effect."

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: If the concern is that all judgments, orders, and decrees should conform to the pleadings, all we need to do is put "shall conform to the pleadings" to the first sentence and restrict the second to trial.

PROFESSOR DORSANEO: Anne Gardner's suggestion is really 300 says that. I mean, I don't disagree with her it says it defines judgment, but it certainly talks about

when a special verdict is rendered or conclusions of fact found by the judge are separately stated, the court shall render judgment.

That kind of gets it backwards as to that, but it does contain this idea that we are talking about a case tried to a jury or bench tried in the sense that it's one where you would be entitled to the findings of fact and conclusions of law which, you know, it would say after -- "in a case tried to the court or in a jury case the judgment shall conform to the pleadings, the nature of the case proved, the jury's verdict, or the judge's findings of fact unless judgment is rendered," if we take the matter of law, formulation as a matter of law, "unless judgment is rendered NOV or disregard the findings."

I don't think that accepting Anne Gardner's clarification does anything more than make it more faithful to what the rule book says now.

CHAIRMAN SOULES: What do you suggest we do about (b)?

HONORABLE C. A. GUITTARD: Well, if you are going to put in a requirement about after a trial you need to put that in (a) it seems like to me, rather than (b). (B) has to do with what a judgment should contain.

PROFESSOR DORSANEO: Yeah, maybe. Maybe that's the definition of a judgment.

HONORABLE C. A. GUITTARD: Yeah.

PROFESSOR DORSANEO: We discussed that, Judge, and we put it here because we decided that it would go, without any real assurance that it goes here any better than if it goes somewhere else.

MR. ORSINGER: Well, the purpose of paragraph (a) is to simply clarify renditions signing and entry. That's all that was supposed to do. It wasn't supposed to be the Christmas tree where we put on all the ornaments of what a judgment must contain.

So I think Judge Guittard's point is valid, but maybe what we ought to do is have a paragraph that's a separate paragraph about standards by which the judgment is measured

that have nothing to do with the contents of the judgment.

HONORABLE C. A. GUITTARD: Perhaps if we want to define "judgment," we ought to start out by defining a judgment and take that last sentence of (a) and put it before all the rest and come to a -- and if we can define a judgment, define it in (a); and then when it makes more sense to say it, come down and say "a judgment is rendered when" -- that's the judgment already defined -- "is signed by the judge," you see.

PROFESSOR DORSANEO: Would you be happy if we moved that second sentence to (a) and talked about trials?

HONORABLE C. A. GUITTARD: Well, that raises problems in cases where people say, "I never had a trial. It was a default judgment." And we don't want to provide an opportunity for that kind of controversy.

CHAIRMAN SOULES: This is going to have to go back to subcommittee.

MR. ORSINGER: I have a proposal. Let's add in a new paragraph (c)

that's called "requisites of a judgment" and then say, "In cases in which disputed facts were resolved" or some manner in which we indicate that there was a resolution of disputed fact issues --

HONORABLE C. A. GUITTARD: Suppose there is no disputed facts. The judge has rendered as a matter of law.

CHAIRMAN SOULES: We can't draft these rules as a committee in the whole, and that's kind of where we have gotten to, and we have got too much work to do. The subcommittee is going to have to approach this. So why don't we -- Bill, you tell us what you want us to give you direction about. If this has matured to the point where you think the committee as a whole can help you and give you guidance then let's go about it.

If you don't think it's matured that far then we need to leave it in the subcommittee, and I don't really know where you are because I am not nearly involved in the process as you are. Maybe we -- I think we should go all the way through the 300 series, and you tell us where you need guidance conceptually to

continue the work.

PROFESSOR DORSANEO: That's fine. Let me just report -- to finish up what we were doing, I think that the second sentence of (b) needs to either be in (a) or in a separate section and will so draft it. I am not confident myself that these can be drafted in this committee, in a subcommittee, or by one individual sitting by himself alone, but it certainly does not make sense to take up the full committee's time for what maybe can't be done at all.

(C), just to report, amalgamates a series of one sentence rules that relate to, in our judgment -- meaning the two subcommittees that have worked on this -- specific judgments and what they should say. I would invite any comments that anybody here has now or any comments about the way these are drafted and revised to not use precisely the same language as the current rules, and beyond that I don't have anything else to say. If any other subcommittee members have something specific they would like to raise, I would invite their input at this point.

Obviously there have been a lot of changes in the way that the drafting is done, and I don't remember the interstices of every point of discussion that we had, but that's the general idea. Getting a tiny bit ahead of the game on that, there are other rules in the same part of the rule book such as Rule 308(a) and Rule 307 that we recommend be repealed. Perhaps we could talk about 308(a) now since that's an easy one to talk about. It talks about suits affecting the parent/child relationship, and the subcommittee voted to eliminate that rule because the problem of suits affecting parent/child relationships and child support orders is something that is dealt with in Chapter 14 of the family code.

MR. ORSINGER: It no longer exists. It's now Chapter 100 something.

PROFESSOR DORSANEO: Or its successor.

CHAIRMAN SOULES: What page are you on there?

MR. ORSINGER: 19 and 20. If I can speak to that, Rule 308(a) was for many years the sole authority the court really had

to appoint indigents -- to appoint a lawyer to represent indigents. And the idea was that the lawyer would not charge the indigent, or this person who they were appointed to represent, a fee independent of whatever the court permitted by court order; and subsequent to the adoption of this original rule, Title 2 of the family code was adopted that put a lot of legislation on it, and then it just blossomed.

So now the family code is almost twice as thick as it was 10 years ago, and in addition to whatever the Texas Legislature has done the United States Congress has passed all kinds of laws about the enforcement of child support and the states will lose their welfare funding if they don't implement these Federal standards. So we have a lot of stuff in our family code about child support enforcement that is dictated by Federal law. Although it's not by preemption, it's by threat of losing our funding, it's forced just the same.

So what happens now is we have an entire statutory scheme to cover all of this and regulations by the Feds in their funding and

everything, and I think there is really no reason to have this rule. Let's just get rid of it. It kind of exists in parallel, maybe in conflict. We now have 4(d) agencies that are required to be appointed. The governor has picked the attorney general's office, blah-blah-blah-blah, and this has just been overtaken by events, and I think we ought to get rid of it.

CHAIRMAN SOULES: Any opposition?

No opposition. It's deleted. Every piece of it, the complete Rule 308(a)?

MR. ORSINGER: Yeah. I think that the family code gives us absolutely total, complete, wall-to-wall coverage on this issue.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: While we are on page 19, a similar recommendation for different reasons related to what we discussed earlier is made with respect to Rule 307, which if you read it literally requires an exception to the judgment in a nonjury case and in a jury case when the judgment does not

correspond with findings of fact or with the findings of the jury. In subcommittee we concluded that this would come as a surprise to many people and that this rule is completely unnecessary. Justice Duncan, if I didn't state that exactly right, I would ask for your assistance on it.

HONORABLE SARAH DUNCAN: I think you did great. It's a trap waiting to be sprung.

PROFESSOR DORSANEO: Stated a different way, we deal with this subject of findings of fact and conclusions of law in the subject of the jury charge and preserving complaints elsewhere, and this is over here mostly ignored, potentially to cause trouble if discovered.

CHAIRMAN SOULES: Was the case law basically abolish this rule and --

MR. MCMAINS: No.

CHAIRMAN SOULES: Huh?

MR. ORSINGER: The judgment is required under the rule we just debated to --

MR. MCMAINS: The judgment is required to be in conformity with the

pleadings and the verdict. What this rule was designed to do was to authorize you to appeal directly with no record, no other part of the record, and to say that these findings do not authorize this judgment. That's what this was basically intended to do, is to eliminate kind of the other steps that you had to go through.

I mean, obviously you have to go through it to appeal, I mean, in terms of perfecting the appeal; but you don't have to file a motion for new trial. You don't have to file a motion to modify. You can except to the judgment that doesn't conform to the verdict, which was also a basis for a writ of error under the old practice. You could do the same thing now with regards to a default judgment that did not conform to the pleadings, got different relief than what you asked for, and would not have to have any other part of the record other than what was necessary to show jurisdiction.

I don't read this rule and never have read this rule as being a requirement in order to make that complaint but merely one that was permissive that you didn't have to do all the

other stuff if, in fact, the judgment doesn't conform to the verdict.

Now, does that alter the practice? I don't know anybody who has ever done it this way.

MR. ORSINGER: In my view this rule states something that everyone agrees is the law that we don't know. The Supreme Court has said several times, in one case Segrest V. Segrest, that if you are attacking the judgment on a question of law or on the -- whether the judgment is supported by the findings, you don't have to bring the statement of facts up to do that. If you are going to challenge the evidence of this court for the findings, you have got to have a statement of facts; but if you are going to challenge the fact that the judgment doesn't conform to the findings, you can do that off of the transcript. This rule says that; the Supreme Court says that; logic says that.

CHAIRMAN SOULES: Why not leave it alone?

MR. ORSINGER: It's just it's like an appendix. What do you need it for?

HONORABLE C. A. GUITTARD: Well, that language in there about accepting means it might -- although not intended -- be interpreted as requiring some sort of formal exception that we want to dispense with, don't we?

MR. ORSINGER: Yes.

MR. MCMAINS: Well, except that, Judge, actually what it says in context is it says "may have --" may have -- "noted in the record an exception to said judgment and thereupon taken an appeal or writ of error, where such writ is allowed, without a statement of facts or further exceptions in the transcript, but the transcript in such cause shall contain the conclusions of law and fact or the special verdict and the judgment rendered thereupon."

HONORABLE C. A. GUITTARD: Why do you have to note an exception in the record?

MR. MCMAINS: Well, the point is it's in lieu of doing anything. You are just saying, "Judge, you can't enter this judgment on this verdict" or "You are not

entitled to enter this judgment on these findings."

HONORABLE C. A. GUITTARD: But in order to object to that must you make some sort of formal exception?

MR. MCMAINS: It just says "make an exception noted on the record."

MR. ORSINGER: Well, Appellate Rule 52 requires you to present your complaints to the trial judge before they are preserved for appeal. So it would be my view, subject to correction from all the people around here, that if the judge does enter a judgment that deviates from the verdict or the findings you damn well better file something; call it an objection to the judgment, call it a motion to modify, call it an exception but you need to say, "Wait a minute, you deviated. Change your judgment." And then if you fail to do that, I don't know that you can raise that in a point of error for the first time in your court of appeals brief.

CHAIRMAN SOULES: Justice Duncan, what is the trap that is ready to spring here?

HONORABLE SARAH DUNCAN: Well, the concern that we talked about in subcommittee was that let's say you do that, you file a motion to modify or you file an objection to the judgment or whatever you choose to call whatever you file, and somebody then comes in and says, "No, you have got to have an exception." That was our concern.

MR. ORSINGER: In my view, this rule doesn't eliminate the requirement that you call it to the attention of the trial judge. But if there is anyone that disagrees with me, you know, perhaps that isn't required; but I would see that it is.

HONORABLE C. A. GUITTARD: Sure.

MR. ORSINGER: Yeah. So I always complain if they do this. This doesn't eliminate the requirement they complain. It just eliminates the suggestion that the complaint is called an exception.

HONORABLE C. A. GUITTARD: I don't see that the rule does anything that can't be done otherwise except that it requires under certain circumstances something

called an exception to be done, which I don't think we want to require.

MR. MCMAINS: I don't really care. All I'm saying is this rule is written in the affirmative and not in the negative. It is not a requisite to make this compliant. It's a permissive manner and mechanism. It probably has some historical basis that nobody here has any idea what it's about or cares.

PROFESSOR CARLSON: Probably it was written --

CHAIRMAN SOULES: Elaine.

MR. MCMAINS: On the other hand, I am terribly -- I am concerned repeatedly now about the courts that continue to say that there are -- we need to presume things that aren't in the record support something.

CHAIRMAN SOULES: I agree with that.

MR. MCMAINS: And one of the problems, if you don't take a record up and your basic view is, your position is, look, this case -- this judgment is not supported by the pleadings or by the verdict and the other

side says, "Oh, but it's supported by a stipulation that's in the record," you didn't take the record up. Rather than going to get the record, as they could do -- and people that try and basically say, "I can make up something that is there that would obviate this complaint somewhere, where you have tried it expressly."

MR. ORSINGER: That is ameliorated somewhat under our new concept that the record includes what's left even back down at the trial court's level and that the court of appeals by letter can reach out and grab it. Under our new appellate rules, we shouldn't have these, "You're dead because we can imagine something you might not have brought forward."

MR. MCMAINS: Yeah. I understand that we have tried to ameliorate those presumptions.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: Reading this rule literally, I think it's just not true. Where you have got a jury verdict

and the jury verdict doesn't support the judgment that's rendered, you can take an appeal under this rule with just the jury verdict and the judgment.

Well, what about the motion to modify and the motion to disregard and the stipulation that was contrary to a jury finding? We are saying that you can appeal with just the jury verdict and the judgment, and we will say that that's erroneous without knowing all of the other things that happened in that case.

CHAIRMAN SOULES: That's what this says.

MR. MCMAINS: That is absolutely right. That is what this is designed to do.

HONORABLE SARAH DUNCAN: Well, I don't think we want to permit that.

MR. ORSINGER: Sarah, it doesn't say that. It says that you can take it without a statement of facts, but it doesn't say you can take it without an adequate transcript.

MR. MCMAINS: Well, you need to perfect the appeal, but what it says is you

don't need other exceptions in the transcript, and in context historically what that means is you didn't need bills of exception, need to do formal bills of exception or any of that kind of stuff nor did you even need to do a motion for new trial; but you did.

Because remember when this rule was first put in you had to do a motion for new trial for anything that happened prior to the rendition of the judgment, absolutely had to be in the motion for new trial. And so it just made clear -- I mean, this rule really was kind of -- before that it just said, look, it's not supportable by the verdict if you can't render this judgment on it. This is all you need.

Obviously you have to perfect the appeal. You actually need a cost bond and, you know, and that will be in the transcript. It's just saying you don't need any other preservation documents and you don't need a statement of facts, anything more than that.

HONORABLE C. A. GUITTARD: The rule is obsolete since you can do that by other means now.

CHAIRMAN SOULES: Well, can you? And I think that's what, I think, Justice Duncan is saying, that she feels she cannot; this says you can. If this says you can then it ought to be left in the rule book and followed.

HONORABLE C. A. GUITTARD: If the judgment doesn't conform to the verdict, you can file a motion to correct the judgment, to modify the judgment; and if you don't do it, perhaps you ought not to -- you have waived that, and this rule doesn't help any.

HONORABLE SARAH DUNCAN: This rule doesn't incorporate any of the cross-designation rules of the appellate rules. I mean, if Rusty wanted to take up a judgment and a verdict and says the judgment doesn't conform to the verdict and that's his transcript, that's fine under the appellate rules, generally speaking. I can show that, you know, really there was a motion to modify and to disregard 7 of the 11 jury findings and that's the reason we have got the judgment we do. And I am not saying that this rule shouldn't be interpreted to do just that.

All I am saying is nobody seems to know what it means, and some appellate court is going to -- or lawyer is going to latch onto this, and we are going to all find out what it means, I'm afraid; and it may have nothing to do with what the rule was intended to do back when we had exceptions.

CHAIRMAN SOULES: Well, if the only issue is that the trial judge won't conform the judgment to the verdict and one party has been harmed by that fact, that's it. Why doesn't this work?

HONORABLE SARAH DUNCAN: Maybe the reason the trial judge won't conform the judgment to the verdict is because there is no evidence to support an essential element of a cause of action, and that's why the trial court renders the judgment he does.

CHAIRMAN SOULES: All I am saying is he reads the verdict, and he writes this judgment, and the trial judge says, "This judgment fits this verdict," and the complaining party says, "No, it does not, and I want that reviewed," and that's the whole dispute. That's what this says. You can take

it up, and you can have an appellate court say the trial judge didn't do what he was supposed to do, conform his judgment to the verdict, and here is what the corrected judgment is, and it's over without a statement filed and the cost of appeal, which is enormous.

PROFESSOR DORSANEO: Let me ask this: Why couldn't you and wouldn't you if you were doing it use a motion to modify the judgment to preserve that complaint?

CHAIRMAN SOULES: Well, I think you would; but this to me, I don't read that the "have noted in the record an exception" is something that's a structural necessity. You could change that word to just say "make an objection" so that it goes to 52; but what it really does, it says you can take an appeal in these circumstances on a record that's two pieces of paper, and that ruined the intent of the rule. Take it up on the verdict and the judgment.

MR. ORSINGER: I disagree that it says that. I think all it says is you are not required to take up the statement of facts, but it doesn't tell you that the

verdict and the judgment is enough to get a reversal. It says you can't get a reversal without the verdict and the judgment, and it says you can get a reversal without the statement of facts, but it doesn't say you can only take up two pieces of paper and get a reversal.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: To me the -- you see the difference there?

PROFESSOR DORSANEO: You have to conform to the pleadings.

MR. ORSINGER: Basically it's saying you don't have to take up the statement of facts, but you must at least take up your verdict and your judgment. Now then, maybe you need to take something more and we are not saying it.

PROFESSOR DORSANEO: It seems to me that likely 308(a) is the reason I think that these, together with subsequent events, have made this unnecessary and not helpful.

CHAIRMAN SOULES: All right. The subcommittee asks that it be repealed. Is there any objection to that?

No objection? Unanimous to repeal.

MR. ORSINGER: Before we go on, Luke, on 308(a) this is probably of no consequence, but there are two paragraphs stuck in there that are not part of 308(a) that we show that we are deleting, and I am wondering if that means something should be somewhere else.

PROFESSOR DORSANEO: No. There are other mistakes on this page in this draft. I will make note of that.

MR. ORSINGER: Okay.

PROFESSOR DORSANEO: Again, we are going to do two more, sort of on a roll here. Chief Justice Phillips likes to get rid of some of these rules if we don't need them anymore.

311 in this draft, it says "proposed for transfer to Judge Till." Judge Till will probably be pleased to hear that that is not the actual proposal. The actual proposal is to transfer this to the trash.

CHAIRMAN SOULES: What page?

PROFESSOR DORSANEO: It's on 20, but that won't help you. The rule reads,

"Judgment on appeal or certiorari from any county court sitting in probate shall be certified to such county court for observance." Now, not a particularly easy sentence to understand, but what I think it meant is that if there was a case appealed from the county court to the district court under prior practice or sent by certiorari to the district court under prior practice when the county court was sitting in probate, it's to be certified to the county court for observance by the district court and the district court's functionaries.

That rule has no subject matter on which to operate since no probate order is appealed -- unless I am wrong, and I don't think I am -- from county courts sitting in probate to district courts anymore. That's a practice that has been gone for a long time.

CHAIRMAN SOULES: Any objections to repealing 311?

No objection. That will be our recommendation.

PROFESSOR DORSANEO: Now, Judge Till, if you are ready, we do propose that

312, judgment on appeal or certiorari from a justice court shall be enforced by the county or district court rendering the judgment, be transferred to the justice court rules because in our review of the justice court rules that subject is covered, correct me if I am wrong, the whole shooting match --

HONORABLE PAUL HEATH TILL: It is.

PROFESSOR DORSANEO:

-- including the county court appeal.

HONORABLE PAUL HEATH TILL: It would be appropriate to put it in the section that we have on appeal right now, and there is a section in the back of the rules, in the 500 series rules, that covers it now.

PROFESSOR DORSANEO: So you agree with us that it should be in your district?

HONORABLE PAUL HEATH TILL: Yeah. Yeah. I have to constantly make an index of this particular rule for the other justices because they don't think to look over here to find it.

CHAIRMAN SOULES: So we are

going to move this from 300 something to 700 something?

PROFESSOR CARLSON: The 500 series.

CHAIRMAN SOULES: 500 series?

HONORABLE PAUL HEATH TILL: 500. My committee task force has dealt with that, and our report does just exactly that, also.

PROFESSOR DORSANEO: Okay. Back to page 4, Rule 301. Now, the key -- I on purpose took some things in the middle that I thought we could deal with so you would feel better.

And back to 301, the motion for judgment as a matter of law paragraph and the motion to modify judgment paragraph, paragraphs (b) and (c), involve the same type of thing. I am not really sure which one it would be easiest for the committee as a whole to take up first, but I will take up (b) first because it is first in the alphabet.

Now, as Rusty McMains indicated, there is an attempt to federalize the nomenclature but not, as I tried to indicate, the standard. We

have in Rule 301 now a proviso that upon motion and reasonable notice the court may render judgment non obstante veredicto, with some definition of what that means, if the directed verdict would have been proper, as well as the subsequent proviso for disregarding jury findings that have no support in the evidence.

This is an effort by Don Hunt's subcommittee to draft that same concept or those same concepts in a rule that talks about motion for judgment as a matter of law. So the first issue is whether we want to embrace the notion that we should speak about judgments as a matter of law, or do we want to use the language that we have used for a long time in Rule 301?

CHAIRMAN SOULES: What do you propose?

PROFESSOR DORSANEO: Well, I think the committee proposes that we go with the flow and use the more modern procedural language since that's how everybody is trained once they get started now, and that's the recommendation.

CHAIRMAN SOULES: Any objection to changing our terminology to "judgment as a matter of law" rather than "judgment non obstante veredicto"? One objection. Rusty.

MR. MCMAINS: Are you just talking about -- I mean, what about a motion to disregard? Are you talking about just leaving that out as well or --

PROFESSOR DORSANEO: No. I think with a motion for judgment as a matter of law now, whether -- when it says, "on a claim or defense," whether that's too narrow. Okay. That might be too narrow. Right?

MR. MCMAINS: Right.

PROFESSOR DORSANEO: That's not how I drafted it. All right. It may be on an issue.

MR. MCMAINS: I understand that.

PROFESSOR DORSANEO: But all I'm trying to say at the outset is do we mind going with the terminology where we --

MR. MCMAINS: The problem is I think it's inaccurate. I mean, you are saying motion for judgment as a matter of law does

imply -- you know, implies the notion that, okay, notwithstanding -- I don't have a problem that that term embraces, to me, the same thing as an NOV does, perhaps; but it does not embrace at all the term of a motion to disregard it.

Because you may still be entitled to some judgment, and I may well still be opposed to the part that you are still going to be entitled to, but I also may be very strongly believing that I am entitled for them to disregard one or two grounds upon which that judgment could be reviewed, or I am entitled to complain about some aspects of it that I don't think you are entitled to, but that doesn't get me a judgment.

And I think it is, frankly, an anomaly or a misnomer as to what -- as to calling it a motion for judgment on the verdict, and I realize that the Federal notions are that you just kind of call it that, and you put anything in there, and the court is supposed to sort it out. Our courts aren't inclined to do that for practitioners, and I really believe that, first of all, that for a while

it wouldn't change the practice at all, and secondly, I am not sure how the courts will react to it. Okay.

CHAIRMAN SOULES: You said "motion for judgment on the verdict," and we are on this paragraph (b), motion for judgment as a matter of law.

MR. MCMAINS: Well, either one. Either motion for judgment as a matter of law or later on when you start talking about -- I mean, you may want to take -- if you disregard one issue, I might be entitled to the judgment as a matter of law. Now, where do I fall? Is that a motion for judgment as a matter of law, or is that in a motion for judgment on the verdict?

If you disregard the contrib finding, I may be entitled to a judgment. If you don't, I ain't. Now, do I file two motions? Do I file one motion and call it both? What do I do? And why do I want to bring myself into the ambit of the courts that have held that if you move for judgment on a verdict then you have ratified the verdict? And do we fix all of those problems by saying, well, we could

move for judgment on the verdict and not ratify the verdict? We can have it both ways. Are we going to try and do that somewhere in here?

These are enormous procedural problems that in my judgment are not -- you can't just wave a magic wand and change the title of it and think that you have fixed it like the Feds do.

HONORABLE C. A. GUITTARD: Mr. Chairman, the concept of motion for judgment as a matter of law would include both before and after the verdict. The idea of a directed verdict, of course, is obsolete; so therefore, you get a motion -- instead of a motion for directed verdict you have a motion for judgment in the matter of law because of the evidence.

Likewise, non obstante veredicto or notwithstanding the verdict, there is a question of whether you do that before or after the verdict or before or after the judgment. If you call it a motion for judgment as a matter of law, it eliminates those distinctions.

Now, I agree with Rusty that there is something missing here, and that has to do with disregarding a particular jury finding or finding by the judge, and it does not deal with a motion before judgment to establish a certain issue as a matter of law and not send it to the jury, even though other issues go to the jury. So and that, I think that problem was dealt with at an earlier stage of our committee work, and I think perhaps we ought to still give some attention to it.

PROFESSOR DORSANEO: Well, this question that I was raising was a more simple one; and without regard to the words "on a claim or defense" in that opening part of (b) which may be too narrow, all the committee wanted to know is should we use the old vernacular because it's comfortable and a little Latin is always nice, makes something that sounds stupid and ignorant sound better, or should we go perhaps contrary to our own instincts with Arthur Miller's language about judgments as a matter of law?

Now, I think that there are, you know, complexities here, of course; but I don't

think that that necessarily is one of them.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: It seems to me that the concept of the motion for judgment as a matter of law is a valid concept and brings to it all of these motions that really are as a matter of law, but Rusty still would need a separate motion to disregard where it may get a judicial declaration that the judgment is not founded on certain findings but it's still a judgment that's adverse to you.

PROFESSOR DORSANEO: Well, that's potentially true, and I am not completely wed to this draft. All right. And it's really not -- it is, frankly, not the Federal language, which is more faithful to what I think you would like; but if we took out "on a claim or defense" from the opening part of this then we would be talking about a particular issue of fact. Okay.

MR. ORSINGER: You are still going to have to allow for a procedure to attack a finding even though it may not result in a favorable judgment to you. That's going

to have to be a separate motion. You can't ever --

PROFESSOR DORSANEO: I will accept that that needs to be drafted in here more explicitly. Okay. And actually the Federal rule says -- or at least in my prior draft based on it says that "If the evidence is not legally sufficient for a reasonable jury to find against the movant on a particular issue of fact, the judge may declare the issue" -- maybe we, say, make that mandatory -- "to be established in the movant's favor as a matter of law for all purposes in the pending suit"; and then it says, "And if under the controlling law a judgment cannot properly be rendered against the movant then the court may grant a motion for judgment as a matter of law in the movant's favor on that claim."

All right. It talks about two things, not just, you know, one thing. It talks about you do this, and then if that takes you here then you do that. I will talk to Don Hunt about that glitch, which I see as a definite glitch; and as I understand, Justice

Guittard's point is the same as Russell McMains' point on it.

HONORABLE C. A. GUITTARD: If he's talking about before and after the verdict, I agree.

CHAIRMAN SOULES: But that Federal language that you just read does a lot more to our practice, too. That moves the line on factual sufficiency.

HONORABLE C. A. GUITTARD: No. No.

CHAIRMAN SOULES: What?

HONORABLE C. A. GUITTARD: I mean, just because we use the Federal language of "judgment as a matter of law" doesn't mean that we adopt the Federal standard as to when such a judgment shall be rendered.

PROFESSOR DORSANEO: We don't intend to do that.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: Now, the other point that perhaps will be more comfortable was the second paragraph (2), "if the application of controlling law otherwise determines the claim or defense as a matter of

law." Maybe we want to determine an issue, claim, or defense as a matter of law.

HONORABLE C. A. GUITTARD: Yeah. Right.

PROFESSOR DORSANEO: And right now our rules do not, correct me if I am wrong, talk about that exactly because 301 is talking about no evidence complaints rather than controlling issue of the law. Now, I can think about one in terms of the other, but it's awkward.

MR. MCMAINS: Well, there is -- and I don't know whether this was intentional or not intentional or unnoticed. The current Rule 301, as limited as it is, establishes the standard upon which you can move for judgment notwithstanding the verdict; that is, if you could have done so at the close of the evidence, period. Our motion to disregard practices evolved, however, into different notions in the sense that -- and there are courts that treat things differently depending upon the structure of the questions that are asked, because it is one thing to say that you are entitled to NOV if you would have been

entitled to a directed verdict.

Now, the question that one has is, okay, let's put us back to the point of a directed verdict. Maybe there are fact questions I could have submitted, and you may not be entitled to a directed verdict, you know, but I didn't submit them. I don't get a directed verdict. Then we submit the fact questions, and we get a determination, and maybe there are facts to support those questions, but your position is that they are legally insufficient, but your objections to the charge are wrong.

Bill and I have had this conversation on a number of cases; and that is, do you and can you under the structure of our charge rules -- and you can, I suspect, under our present structure -- waive the law that makes the determination such that it will in some manner affect your ability to challenge by NOV what you clearly could have challenged by directed verdict? Is there a conscious or unconscious attempt to change the focus on the timing of the analysis that is in Rule 301, is my basic question. This doesn't clear it up

at all, and it doesn't even refer to it. It treats it as if there is no difference. That's not really true under our current rule. It is treated differently in terms of what it says. Now, whether it was intended to have an effect or not, I don't know.

MR. ORSINGER: No. I don't think so.

MR. MCMAINS: But our current Rule 301 says, "Provided that upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper." Now, he could have done it if a directed verdict would have been proper, but if a directed verdict would not have been proper, that's not the remedy. You then move to the disregarded, which is a different issue because then you are analyzing what was, in fact, tried and submitted to the jury.

Okay. Now, I realize that is a fairly esoteric notion, but it is a distinction that has grown in our practice and in our cases, and I think that either we need to leave it alone or address it and intentionally fix it,

one of the two.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: Rusty, are you saying that if the judge submits the law incorrectly and you fail to object to that submission --

MR. MCMAINS: Right.

MR. ORSINGER: -- that you can come along postverdict and move for a judgment under the correct version of the law?

CHAIRMAN SOULES: Without objecting to the charge.

MR. ORSINGER: Even though you have failed to object to the charge and your verdict is now --

MR. MCMAINS: Answer, I mean, my judgment under the current law and the current rules is, no, you cannot do that; but under this revised motion for judgment as a matter of law I think you could.

MR. ORSINGER: Well, it was no conscious effort, at least that I am aware of, to make that permissible.

PROFESSOR DORSANEO: What you

would say is we need to modify (b)(2) to make it clear that there is waiver, in effect.

MR. MCMAINS: See, it says "if the evidence at the close of the adverse party's evidence" and then the rest of it is an "or."

PROFESSOR DORSANEO: But what you are really --

MR. MCMAINS: And then it says "is legally insufficient to support a particular issue of fact in favor or conclusively establishes a particular act in favor of the movant, and the particular issue of fact of the controlling law determines the claim or defense; or --" and this is totally disjunctive -- "if the application of controlling law to a claim or defense otherwise determines the claim or defense as a matter of law."

So the argument under (b) -- under (2) is I don't care what the charge says; I am going to go back to the close of the evidence, and my position is total sandbag. This is what you should have submitted; you didn't submit it. No, I didn't object; no, it's not

necessary. Doesn't make any difference. The way the law existed at the time, even though we tried the wrong issue, that we haven't waived anything. The charge rules don't make any difference because we are expressly authorized under this rule to make a challenge based on the way things existed at the end of the evidence with regards to the law in the abstract, without regard to anything happening in the interim.

I do not think that's our current practice, but I do think that this is a radical change in terms of what it would allow.

PROFESSOR DORSANEO: We could write waiver into that if somebody wanted it in there.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: I was going to say if the only problem is Allen then it seems to me all you would have to say -- and if we want to codify that, it seems to me we would just say at the end of (2) "unless the movant waived application of controlling

law by failing to preserve error in the court's charge."

PROFESSOR DORSANEO: I think that's a good point, you know. I think that would be current law, and I think it ought to be in there. And what we need, in terms of what we otherwise need guidance on -- I know the Chair's getting anxious.

CHAIRMAN SOULES: No.

PROFESSOR DORSANEO: Would relate to this same idea in (c) and --

CHAIRMAN SOULES: Could somebody just -- I mean, we have got Federal Rules of Appellate Procedure; we have got Texas Rules of Appellate Procedure. They work sometimes; they don't work sometimes. It looks to me like we are rewriting a new set of rules that cover most of the same things that we already have covered, and are we really doing anything here other than writing a bunch of new rules?

HONORABLE SARAH DUNCAN: If I can respond to that --

CHAIRMAN SOULES: Because we are writing a lot of rules. Okay. Justice

Duncan.

HONORABLE SARAH DUNCAN: If I can respond to that, part of the impetus for these rules was that we really don't have rules governing most of this stuff. We have one very antiquated rule on a JNOV motion. Nobody ever tells you until you are into your third or, you know, fourth year and you just happen to be reading the digests about motions to disregard and how it all fits together, how if you move for a judgment on some but not all of the findings where does that leave you. This is not something that really has ever been explicated in the rules, and it's -- I mean, just from the discussion today it's not simple.

MR. ORSINGER: There is another thing, if I might say, is that our postverdict rules have kind of grown up as being existing practices with rules that change those existing practices by banning them or altering them or something like that, and you end up with a series of rules here that tell you that you can't do things that you would have never even known you could do unless you were

practicing law in 1947, and they tell you that there are certain things that you have standards of, but they don't even really tell you that the motion exists.

You know, part of the effort here was to say, well, let's go back to ground zero. What are the things that you can do? Why don't we say you can attack the verdict based on factual insufficiency; you can attack a verdict based on some law; you can even avoid going to a jury based on some kind of ruling based on the law; and set out what you can do and then explain what those things contain instead of having this hodge-podge of historically developed exceptions to existing practices that's now so convoluted that no one reading it could understand it.

HONORABLE SARAH DUNCAN: And part of the -- if I can tag onto what Richard was saying --

CHAIRMAN SOULES: I will withdraw my question. I don't want to waste any more time on it.

HONORABLE SARAH DUNCAN: Part of the impetus for that was that the motion to

modify and the motion for judgment NOV can serve the same purposes and yet have radically different effects on the appellate timetable and on preservation; and if we don't fix the JNOV rule, we can't fix the motion to modify rule.

CHAIRMAN SOULES: All right. Well, apparently I am the only one that --

PROFESSOR DORSANEO: I had the same feelings as you have, but one thing leads to another.

MR. MCMAINS: If I may respond briefly to the Chair's point, all of the concerns they have about wanting to fix or amplify on the motion to modify rule and the NOV rule stem from the fact that the NOV or motion to disregard or whatever you want to call it does not extend the plenary power and appellate timetables.

That's really all what it stems from. I mean, all of the so-called problems of, well, is it a motion to modify, is it a motion for NOV, can somebody lose their appeal because of what you call it and you miscall it, stems from the fact that an NOV doesn't give you

additional time.

If you fix that then you don't have any more traps. So the trap part is over, as long as it's an NOV. The only thing you really need to do with an NOV is make it subject to Rule 329(b). From the standpoint of giving the additional time, that's one of the motions you can file. Now, that changes the practice because that means you don't get to do new ones necessarily. You only got 30 days to do it unless you get leave to amend.

But it doesn't really, frankly, change the real practice anyway. Most people do NOVs either before the judgment or right thereafter, and they may do more than one, and one question may be do we really want to encourage them to be doing multiple -- why don't we just have them do one when we finally go to the hearing, and that's it.

HONORABLE C. A. GUITTARD: Well, one thing we wanted to do is make sure that the judgment -- and motion for judgment NOV is something you do before judgment is rendered, and afterwards what you do is move to modify the judgment. Of course, a motion

for judgment NOV doesn't extend anything because it's something that you are supposed to do before judgment.

MR. MCMAINS: But you never had to do it before judgment under our rules specifically.

HONORABLE C. A. GUITTARD: Well --

CHAIRMAN SOULES: Why now?

MR. MCMAINS: So why should we make anybody do it before judgment?

HONORABLE C. A. GUITTARD: If you do it after judgment, you want to modify the judgment; and why don't you call it that?

PROFESSOR DORSANEO: Well, that is an introduction to paragraph (c).

MR. MCMAINS: Well, I understand, but now -- but the problem is that, again, if what you want is to disregard or to want a judgment notwithstanding whatever those findings are, you are now telling me that if the judgment has already been entered I shouldn't be labeling it as an NOV.

PROFESSOR DORSANEO: That's right.

CHAIRMAN SOULES: And if you do, it won't preserve any appellate complaint. That's ridiculous.

HONORABLE C. A. GUITTARD: Well, you can call it a motion to modify the judgment. You can say, well, we can call it a motion NOV, but we regard it as a motion to modify the judgment.

MR. MCMAINS: Well, I understand, but I am saying that you could fix the problem of nomenclature in 329(b). The only thing that you are required to do in order to accommodate that consistent with the other motions dealt with is to make it subject to the same time periods; that is, you have got to do it within 30 days.

PROFESSOR DORSANEO: I think what the committees that have been working on this and drafted it would say is that it is one thing to say that all you need to do is this and quite another thing to do it, and we have done it one way. It could be done other ways. Frankly, the way that I am presenting it here is not necessarily the way that a great many of people would do it if they were

doing it alone.

And we could say that a motion for judgment NOV is what you file before or after verdict, and it doesn't matter to me what the nomenclature is. (C), however, attempts to deal with the specific problem that when -- I think Justice Guittard probably would take the main credit for trying to -- for getting the ball rolling to solve the problem. When the motion to modify was added into the rule book it was not clear in the rule book as to what it would be for, and although it's clear when you file it under 329(b), it is not clear that you can challenge the judgment on the basis of a challenge to a jury finding that has no support in the evidence, and the courts have had trouble with that.

Now, the particular solution that the committees have come up with is that if it's after judgment you should use a motion to modify the judgment, but a motion to modify the judgment is an all-purpose motion which can be based on the legal sufficiency or insufficiency of the evidence to support a particular jury finding.

Now, if the committee wants to tell us, "Call it a motion for judgment NOV after verdict" and have a separate paragraph, we could do that; but I don't know if that makes that much difference; and I would hope that it's not going to make any more difference now, which then or later what you call it than it would now, but the specific issue would be should the motion to modify be clarified such that it can be used for things that a motion to disregard a jury finding made after a judgment would be used for now, and I think that's our specific proposal.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I think that our postverdict practice traditionally was dominated by the motion for judgment NOV and the motion for new trial and that those two vehicles became the vehicles to raise complaints, but in the process of time they are used probably in ways that don't make logical sense if you divorce yourself from the history of what we did and just kind of analyze it.

For example, you can find lots of case law, including Supreme Court of Texas case law, saying that a motion for new trial is a good place to preserve a complaint on the legal sufficiency of the evidence. The Supreme Court decided about four or five years ago if you do it only there, you get only a new trial, even though it was a legal sufficiency complaint.

I know why the Supreme Court said that. Because in the old days you had to file all of your legal sufficiency, didn't you?

HONORABLE C. A. GUITTARD: Yes.

MR. ORSINGER: I think you had to restate them in your motion for new trial. The motion for directed verdict had to be restated in the motion for new trial.

MR. MCMAINS: In the objection to the charge, yes.

MR. ORSINGER: Okay. That's what I am talking about. So all of the sudden we have this wacky world where --

MR. MCMAINS: Motion for directed verdict had to be in there.

MR. ORSINGER: -- we are asking

for a new trial when what we really wanted was a different judgment. We are asking for the court to enter a judgment based on something, but the judgment has already been entered, and what has happened here is we have gotten so focused on the way we do things that we see this vehicle for asserting legal claims is the JNOV, and the vehicle for asserting complaints that would get us a new jury trial is the motion for new trial, and we don't even care whether the judgment has been signed or not or anything.

It's not logical. What you should do is you should say there are reasons why a judgment should or should not be entered, and that ought to be a motion that asks the court to enter a judgment in a certain way or not enter a judgment a certain way. When the judgment has been signed there are reasons why the judgment should be set aside, and you ought to try the case. And there are other reasons why the judgment should be changed without having a new trial, and we ought to call that a motion to modify the judgment or a motion for a new trial, but we shouldn't just

mix them all up together and you have to really comprehend all of this stuff all the way back to justice -- the article on factual sufficiency of the evidence by Justice Calvert that you have to read ten times before you can make sense out of any of this.

It's very simple, and we are not changing any law. We are not changing the kinds of things that would entitle you to a judgment as a matter of law or what would entitle you to a new jury trial. We are just putting them in vehicles that make logical sense, considering whether they are before or after judgment and whether they are asking for a new jury trial or just asking for a modified judgment. And it's difficult for those of us who have been practicing law this way to think, well, what I have always used a JNOV for now I am going to use it as JNOV if it's before signed, but it's a motion to modify if it's after signed. That seems to me to be a small price to pay to have procedures that make sense.

MR. MCMAINS: Well, except that I disagree that the motion to modify is any clearer as a result of this practice or this

change in nomenclature.

CHAIRMAN SOULES: My concern is that as we -- as Susman says, the devil is in the details. As we look at the writing on each of these rules, that seems to have substantial substance to it that they generate as many questions as they answer.

MR. MCMAINS: Yes.

CHAIRMAN SOULES: And so here now with a bunch of new rules the appellate courts are going to have to be applying new words to old situations, and as we apply new words to old situations, we are liable to have in our faces many -- a whole array of new traps that after we have lived through, what, almost 60 years with these rules that somehow by this patchwork we have more or less eliminated or by cases where they just say, well, we are not going to let that trap exist any longer.

But now we are going to be applying new words to old situations, and what's going to come of that, and are we really doing a service? And that's -- I don't know, and I am only reacting to this after a couple of hours

of trying to deal with these issues and seeing that some people here feel that there are a lot of questions raised by these rules that seem somehow to have been answered or we have passed them by in the appellate practice, and we have gotten -- they are behind us. Even if they are not articulated to be behind us, in reality they seem to be behind us. That's my concern, and we don't want to damage the practice. We want to try to improve the practice; and if we are doing that, great; and if we are not, let's face it.

PROFESSOR DORSANEO: It would improve the practice to know what a motion to modify the judgment is for, and we don't now know that.

MR. MCMAINS: Well, I disagree with that.

HONORABLE SARAH DUNCAN: And it would be an improvement to the practice to know when you have to file a motion to modify; and if you file it at Point A, it extends the appellate timetable; but if you file it at Point B, it doesn't. And at this point in time I don't think we know that.

MR. MCMAINS: Where is there any authority to file a motion to modify outside of 30 days?

HONORABLE SARAH DUNCAN: If you call it a JNOV, you can.

PROFESSOR DORSANEO: It's called a JNOV where it's outside of 30 days.

MR. MCMAINS: And it's not a motion to modify, and it doesn't extend the timetables, and that's what the rule says.

HONORABLE SARAH DUNCAN: See.

PROFESSOR DORSANEO: Well, what you say begs the question.

HONORABLE SARAH DUNCAN: That is the question.

MR. MCMAINS: No, it doesn't. No, it doesn't. That's why I said that if you can fix it, if you want to put a 30-day timetable on an NOV, and then you don't have a problem. Now, what you instead do, and this is so -- this is a wonderful way to define motion to modify. Let's look at the clarity.

"A party may move to modify a judgment, render the judgment that should have been rendered." No. 3, "If the judgment should be

modified, corrected, or reformed in any respect," and that's a real clear explanation.

PROFESSOR DORSANEO: That's what 329(b) says now.

MR. MCMAINS: I know it does, and that's the point. You haven't defined anything. You have merely put some things in it and then you added everything else.

CHAIRMAN SOULES: Rusty, there is no you's. There is we's, we. We are trying to do this together.

MR. ORSINGER: Luke?

CHAIRMAN SOULES: Yes, sir.

MR. ORSINGER: I think that your stated concern is a very important concern, which is that if we really try to revamp the way things are said we may create problems that we don't anticipate because we didn't think it through, and some appellate court will, and they will think that the law has been changed, and everything is topsy-turvy. That could be said about this whole rule process.

PROFESSOR DORSANEO: It's time to sock it up, if that's what you --

MR. ORSINGER: You know, one thing I would say about this is that one of the reasons that we have a large committee, one of the reasons that we fight through all of this stuff and have Rusty over here punching holes in it all day long is to be sure that when it hits the road it's going to roll straight, and it may be that this is too dangerous. Maybe this area is so fraught with danger that if we rewrite it we are going to create 30 years of litigation to figure out what these words mean.

But I can see, to balance against that risk, a valid concern that our rules are a result of historical accident and cases that were decided that are no longer controlling law; and we end up in this place that is not intuitive, what this means, how it fits together. And we could probably go out and have a fist fight over some of these things we have talked about today, and I think it's a risky process, but on the last analysis I think we have to balance whether the risk is worth the reward or not.

I think the risk would be worth the

reward if we are careful that we don't change the law. And if we inadvertently change the law then we need to fix it as quickly as we can, but I wouldn't say that in the face of that risk that we ought to do nothing but perpetuate JNOVs and motions for new trials as the catch-all legal attack versus factual attack.

PROFESSOR DORSANEO: The counterproposal that's been made intellectually is that we should clarify the timing for motions for judgment NOV when they are made after judgment, and in a more complicated way that's what we are trying to do, and if the committee wants to direct us to just simply do that, we could start discussing that.

MR. MCMAINS: Are you changing the timetables?

PROFESSOR DORSANEO: Yes.

MR. MCMAINS: So, I mean, you do have a 30-day time limit to file?

PROFESSOR DORSANEO: No.

MR. MCMAINS: You don't have a 30-day time limit?

PROFESSOR DORSANEO: No. Or yes and no would be the proper --

CHAIRMAN SOULES: That ought to be a real picture of clarity.

MR. MCMAINS: Well, that's a real clarification.

HONORABLE C. A. GUITTARD: If we have both the judgment for -- motion for judgment NOV and a motion to modify after judgment, we have two overlapping concepts that confuse me. I don't know whether they confuse anybody else.

PROFESSOR DORSANEO: Well, they confuse the Dallas Court of Appeals. Not to say that their decision is the wrong policy decision, but it's different there than other places.

HONORABLE C. A. GUITTARD: And so we ought to provide it one way or another right here.

MR. ORSINGER: Well, the simple answer is, is that anything you can raise by JNOV before the judgment is signed you can raise by a motion to modify after the judgment is signed.

HONORABLE C. A. GUITTARD: Right.

MR. ORSINGER: And the question here is, is that do we want to give up our birth association with this concept of JNOV and that phraseology and the familiarity that everyone has with it?

PROFESSOR DORSANEO: Especially if you change it to motion for judgment as a matter of law. I in my brain have trouble moving for judgment as a matter of law after I already have a judgment, but I want to change it. That's what I am asking for. I want you to change it.

HONORABLE C. A. GUITTARD: Modify it.

CHAIRMAN SOULES: As long as the words don't trap the unskilled lawyer who uses the wrong words.

PROFESSOR DORSANEO: The only ones who are in jeopardy are the ones who insist upon the old words.

CHAIRMAN SOULES: And there will be many. There will be people using motion for JNOV even though -- well, anyway,

that's neither here nor there.

MR. MCMAINS: You say there is not a 30-day time -- I mean, where is there a --

PROFESSOR DORSANEO: Let me talk about timing, the last thing we need guidance on. All right. Really the last thing that is making things really difficult for this committee that I am helping by -- or hurting today in making a presentation -- is the timetable business, and it is related to what you can do in a motion to modify and the relationship of a motion to modify judgment to a motion for judgment NOV practice after judgment. It's all related.

Right now it is clear you can file a motion for new trial and that you must file a motion for new trial or a motion to modify or both 30 days after the judgment is signed. It is unclear when you can file a motion for judgment NOV after judgment. I believe, without being completely confident that I am going to state it accurately, that in Dallas a motion for judgment NOV is considered to be a motion to modify the judgment; therefore, it

must be filed within 30 days after the judgment is signed.

In other parts of the state there are different conceptions about how much time you have to file a motion for judgment NOV. Some of our committee members had proposed, exactly as Rusty suggested, that the 30 days should be the timetable for making the complaint, although all of the subcommittee members ended up believing that when it's after judgment the complaint should be called a motion to modify rather than a postjudgment motion for judgment NOV.

A number of subcommittee members believe that if the court has had its plenary power extended beyond 30 days by a motion that does that, a motion for new trial or a motion to modify, that there is no harm in allowing more time than 30 days for other complaints to be lodged in an amended motion if that's how you think of it, in a separate motion if that's how you think of it; and if it's a different party, that's when it would be thought of. And the proposal received a lot of acceptance that if there has been a motion filed that

extends plenary power, there would be some more time to preserve complaints by other motions that hadn't been filed within the 30-day time period.

Now, my own personal practice and experience is that most good trial judges will rule upon those out of time complaints when the court has plenary power and that that takes care of the problem, and that let's the trial judge kind of be a dispatcher of what will be taken into account or not taken into account, and that's probably fine with me personally, but it is true that under our current rules the trial judge can tell you to take a hike on a complaint that's not made within 30 days, even though there is no reason other than you were out of time for that approach to be taken to the problem.

And that's -- the other thing we need guidance on, Mr. Chairman, is whether it's 30 days or something more than 30 days because the court has plenary power over the judgment when the court has been given that plenary power by a postjudgment motion that accomplishes that result.

CHAIRMAN SOULES: Discussion? Who goes first? Rusty.

MR. MCMAINS: About what?

CHAIRMAN SOULES: About the extending -- I think the issue that I am hearing is if a party files something, the effect of which is to extend the court's plenary power, within the extended plenary power should the rules permit the filing of other things that would be foreclosed from filing but for the extension of the plenary power by the first filing?

MR. ORSINGER: Well, that's overstated. The only thing that can be filed out of time is something that would modify the judgment, not something that would get you a new trial.

CHAIRMAN SOULES: Okay.

MR. MCMAINS: Well, and the question is why don't you do it the other way? The judge always has the power in the plenary period if he does make a modification of the judgment in any respect. Then that starts the period over under our current rules.

PROFESSOR DORSANEO: Well,

that's true, but we are operating under the assumption that the judge doesn't want to do anything but deny relief.

MR. MCMAINS: And, well, I understand, but what I am saying is that if he wants to do something or if he does something to you where things aren't fixed then you get to start over anyway.

PROFESSOR DORSANEO: True.

MR. MCMAINS: But I think that the question -- you know, why is there that you need more time to juggle with it at the time, or why should you be entitled to more time with regards to if you are only going to leave him 30 days to do the motion for new trial, which is I think justifiable and historic, that you ought to be able to figure out within 30 days what your reasoning is.

PROFESSOR DORSANEO: Well, I don't have a disagreement with that, and Judge Guittard doesn't either, and a lot of people don't, but the argument contrary to that would be, well, if it's a motion for judgment NOV type of thing, a motion for judgment as matter of law, in most places in the state you have

more time than that anyway.

MR. MCMAINS: Well, I think that you do have more time than that. I think you have it as long as the court has plenary power from a standpoint of getting it filed and ruled upon under the current practice. What I am saying is it seems to me that there is no problem in going ahead and putting it back to the -- that you have got 30 days to do it in terms of filing it, but you also would impose all of the other things which would clean up one other area of our practice, and that is to say that it was overruled even if the judge didn't rule on it, which is not the law right now, at least in large measure; that is, it requires an actual ruling by the court.

Now, if you are going to change the motion to modify, the motion to modify in the current rules, the way it is written, then you get a deemed determination basically that it was overruled, which was an action without actual action by the court. All right. Now, so by redefining these motions for NOV that we now have as motions to modify you get the benefit of a presumption of it being overruled

that isn't true now. If you want that presumption, that's fine. Go ahead and put them within the 30 days. So in 30 days the judge has everything that he needs to have, and if it's not ruled under our current rules you could extend the time -- I guess you can only extend it up to the 30 days, right, or do we remember?

CHAIRMAN SOULES: For filing a motion for new trial?

MR. MCMAINS: Yes.

CHAIRMAN SOULES: Can't be filed after 30 days.

MR. MCMAINS: It can be amended within the time if it's been already acted upon only with order, I guess is what the current rule is.

CHAIRMAN SOULES: I think you cannot amend a motion for new trial if it's been overruled --

MR. MCMAINS: Right.

CHAIRMAN SOULES: -- or if 30 days have passed.

MR. MCMAINS: Right.

CHAIRMAN SOULES: Either of

those two.

PROFESSOR DORSANEO: Right.

CHAIRMAN SOULES: 30 days has passed, no ruling, it can't be amended.

MR. MCMAINS: Yeah.

CHAIRMAN SOULES: Within 30 days if the judge promptly acts, you are out. You cannot -- no. We are only talking about preserving appellate complaints. We are not talking about convincing the trial judge to do something.

MR. MCMAINS: Right.

CHAIRMAN SOULES: Because if you can convince the trial judge to do anything within the period of its plenary power, he can do it. He can change the judgment, vacate the judgment, sit on it for a year.

MR. MCMAINS: That's right.

CHAIRMAN SOULES: Grant a new trial, vacate the judgment and send you to mediation. I mean, there are all kinds of things that you may be able to convince the trial judge to do. So we are not talking about filing something that the trial judge

must ignore because it's too late. We are talking about filing something which preserves appellate points, right?

So we know now in the motion for new trial practice what we just said. I happen to not like the part that you can't amend it if the judge overrules it because sometimes it happens like that and you really haven't had time to think about it. You have got a motion in that extends the appellate timetable but you -- so what do you do? Wait 'til -- what do you do?

But anyway, now, do we want to spread this time that you shoot at the trial and preserve error for appellate review across the entire expanse of plenary power, or do you want to confine it to some shorter period?

MR. MCMAINS: I don't think we -- the proposal does not purport to do that with anything other than what is currently viewed as a motion for NOV, right?

CHAIRMAN SOULES: Which is to change the judgment because the law requires a change.

MR. ORSINGER: Well, yes. I

mean, there are -- in nonjury cases you might raise certain complaints in a motion to modify that would not be appropriate for a JNOV because you didn't have a jury. So what you said is not exactly right. In a jury case what you said is right.

MR. MCMAINS: Yeah. Okay. It would be a -- yeah. A judgment as a matter of law or a modification.

MR. ORSINGER: Well, sometimes in nonjury trials the judge doesn't make the mistake until he or she renders judgment, and then the first chance you have to object to it is post-rendition, and that's probably by motion to modify.

MR. MCMAINS: Right.

CHAIRMAN SOULES: Okay. Now, in the present practice there is no limit during the period of plenary power when a judge -- when do you file a motion to modify?

MR. ORSINGER: No. It's the 30-day deal.

MR. MCMAINS: Under the current practice it's 30 days.

MR. ORSINGER: The JNOV is not,

but you don't have a JNOV in a nonjury case, but in a jury case you --

MR. MCMAINS: Well, but you might have that. You might have --

CHAIRMAN SOULES: One at a time because the court reporter is getting it.

MR. MCMAINS: I'm sorry. You might have a motion for judgment. You could still make a motion for a judgment as a matter of law even afterwards under Rule 301.

MR. ORSINGER: Even more than 30 days after the judgment is signed?

MR. MCMAINS: Yeah.

CHAIRMAN SOULES: But will it preserve appellate?

MR. MCMAINS: I think so, but I think it would be treated as a Rule 301 motion.

MR. ORSINGER: Well, if it's overruled, it preserves error; but if it's not ruled on then --

MR. MCMAINS: I agree.

PROFESSOR DORSANEO: Dallas court thinks you can't even rule on it.

MR. MCMAINS: I am not saying

that there aren't people that have that --

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: It seems to me, I think what we are doing, Luke, is giving -- the committee has asked for guidance. I will float this suggestion. I think that all posttrial motions preserving error should be filed in 30 days. That would be motion to modify, motion for new trial, and whatever, after the judgment is entered. I think that those, all of those, ought to extend the time period for pursuing the appeal.

I would take JNOV out of the practice. If you want to leave it in, leave it in only for that time period when we are asking the judge before judgment is entered to do something. The thing I worry about is your draft now talks about rendition, and your rule about JNOV talks about rendition. Rendition could be immediate, immediately after the verdict is returned, giving you no opportunity to file a motion JNOV to preserve error, and I worry about that part. That's why I worried

about rendition, but I think we ought not to cut off the idea of telling the judge what judgment he ought to enter.

I think we ought to extend the appellate time period for any posttrial filed motion. I think we also ought to say that it is deemed overruled if the judge doesn't act on it. That would cure up one problem. Now, this is how it changes the law in my opinion. Motion to modify now would have to be within 30 days, taking care of that split of authority. It would not have to be ruled upon, taking care of that split of authority. It would be simple and easy to follow, and we would use words that mean what they say instead of the JNOV to make other law points.

Quite frankly in many instances, I mean, I think -- let me justify this. I think, first, no one is more interested in a case than the losing party after judgment is entered. As a result it gets the biggest, hardest look. At that point 30 days is a fair time to do things in.

Second thing, and I think equally as important, it is sometimes difficult to get

trial judges to hear and enter orders on motion to modify. That's why we ought to go ahead and have a time period that you have a deemed overruling. In the meantime, any other motion can be filed. The court out of time in plenary power, let's say the Supreme Court hands down a new decision and indicates the trial judge is wrong. That can be raised. Does it preserve an appellate complaint? No. But the trial court can review and undo what he or she did. That way we have got, I think, everything basically taken care of.

We will know what's -- then we are going to have to reach the issue of what should be -- what has to be included in a motion for new trial. Seems like that's done well. Do we want to address what needs to be included in a motion to modify? Probably so. I think some people who get judgment want to modify the judgment they got.

So I think it ought to be either party doing it, and that's a little bit foreign to the way the rules are written now, and that is the scenario I would have for all of this. I think that takes care of most of the problems

that are out there now. It keeps the theory of the rules that we have currently. It is not going to cause a lawyer who didn't read the rules and the opinions carefully any real problem, and I think it's pretty workable.

PROFESSOR DORSANEO: That is possible to draft that, too.

MR. KELTNER: Yeah.

CHAIRMAN SOULES: You are saying that from signing a judgment, going out 30 days, all motions that are going to preserve error must be filed?

MR. KELTNER: Yes.

CHAIRMAN SOULES: And whatever they are called they still preserve error.

MR. KELTNER: Right. I also, by the way, would put in that you can amend them during that period of time as well.

CHAIRMAN SOULES: And they can be freely amended within the 30 days.

MR. KELTNER: Regardless of the trial court's ruling in the other.

CHAIRMAN SOULES: And then after the 30 days they don't preserve error. They are just appeals to the trial court,

treaties to the trial court.

MR. KELTNER: Right.

HONORABLE SARAH DUNCAN: How can you amend a motion that's been denied?

MR. KELTNER: Sarah, here is the problem I think that happens, and Luke brought it up, but what happens is --

HONORABLE SARAH DUNCAN: I know the problem. I am just asking how conceptually --

CHAIRMAN SOULES: Change the name. You could file a new motion for new trial.

MR. ORSINGER: Renewed.

HONORABLE SCOTT BRISTER: Rehearing.

CHAIRMAN SOULES: You can file as many motions for new trial as you want to within 30 days.

MR. KELTNER: I think that's fine.

CHAIRMAN SOULES: So you don't have to amend or renew or do anything. File as many as you want in the 30 days.

MR. KELTNER: Right.

CHAIRMAN SOULES: File one, it gets overruled, file another one.

MR. MCMAINS: Well, we do have to change the -- we do have to make sure that we have the rule on the execution rule written to the right thing because if you file your first motion for new trial and it's overruled, you take it and say, see, that one was overruled 30 days ago, and you have got others pending.

CHAIRMAN SOULES: I understand there is an issue on execution. I have been trying to clarify what David was saying. And then all of those motions that are filed in the 30-day period are deemed overruled by operation of law at the same time motion for new trial is now deemed overruled.

MR. KELTNER: Unless ruled upon earlier.

CHAIRMAN SOULES: Unless earlier ruled upon.

MR. KELTNER: And that takes care of the execution problem in part, Rusty.

MR. MCMAINS: Yeah. I agree, and let me make this absolutely clear from the

standpoint of the liberality of the rule. I believe that one of the problems that we have all confronted, people who do appellate work have confronted, is people have filed motions before judgment that look awfully much like motions for new trial that are, in fact, overruled already, and you get into this problem of here is a motion before the trial that has to change the numbers.

MR. KELTNER: Let me suggest what would take care of that problem then.

MR. MCMAINS: And I am just saying, well, I don't think it matters. As long as you can file new ones --

MR. KELTNER: That's right.

MR. MCMAINS: -- it doesn't make any difference. So as long as you don't have a limit then you have got 30 days basically in which to file all the motions you want to attack the judgment, which I think actually does simplify everything. As a practical matter, the judge is probably not going to set them until the 30 days is over and you are through filing. Okay. Are you-all through? And then they say, "All

right. Let's hear it all at one time."

HONORABLE SCOTT BRISTER: That's one of the benefits.

MR. MCMAINS: Right. I agree. You don't have to keep coming up all of the time.

HONORABLE C. A. GUITTARD: Let's take a vote on these two separate questions: One, should any posttrial judgment be a -- a motion be available to preserve an appellate complaint if made after 30 days? Second --

CHAIRMAN SOULES: Stop right there.

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

CHAIRMAN SOULES: That's No. 1. Okay.

HONORABLE C. A. GUITTARD: And the second question would be whether if a motion is overruled it then may be -- a new motion may be made on the same grounds within the 30 days.

CHAIRMAN SOULES: Different, same or different drafts.

HONORABLE C. A. GUITTARD: Same or different drafts. Well, it might be different ruling if it's on the same draft. In other words, why permit a party to raise the same grounds again after it's already been ruled on?

CHAIRMAN SOULES: Well, you said the same grounds.

PROFESSOR DORSANEO: He meant it.

CHAIRMAN SOULES: Maybe you meant different. I don't know. That's what I am trying to understand.

HONORABLE C. A. GUITTARD: Well, I mean that it can -- well, what I really was trying to get at was a broader question of whether or not a motion once ruled on precludes any further motion even within the 30 days. That's a separate question. I think we ought to vote on them separately.

CHAIRMAN SOULES: No. 1, again, is --

HONORABLE C. A. GUITTARD: Is whether or not all effective motions as far as appeal is concerned have to be filed within 30

days.

CHAIRMAN SOULES: Okay. The proposition, all motions to perfect appellate points --

MR. MCMAINS: Preserve.

CHAIRMAN SOULES: To preserve appellate points must be filed within 30 days. Those who say "yes" hold up your hands. 16. Okay.

Those opposed? No one is opposed to that. So that's unanimous.

HONORABLE SARAH DUNCAN: I am opposed to it. I didn't vote in favor of it, but I am not voting opposed to it either.

CHAIRMAN SOULES: 16 to 1.

MR. MCMAINS: Sixteen to a half.

HONORABLE SARAH DUNCAN: Yeah. I am not going to make an issue of it.

CHAIRMAN SOULES: Proposition 2 is motions filed even if overruled do not preclude further filings during a 30-day period.

MR. MCMAINS: Of the same type of motion basically.

CHAIRMAN SOULES: Well, the overruling of any motion doesn't preclude the filing of any other motion, including one just like the one that got overruled.

MR. PRINCE: If he's up within the 30 days?

CHAIRMAN SOULES: Within the 30 days.

HONORABLE SCOTT BRISTER: The first vote was you have to file them within 30 days. This one is you get at least 30 days to file whatever it is.

CHAIRMAN SOULES: Even if it's been overruled.

HONORABLE SCOTT BRISTER: Whatever it is, you get at least 30 days to file that regardless of what the judge may do before that.

CHAIRMAN SOULES: Right. Those who say "yes" hold up your hands. 14.

Those opposed? Okay. No one is opposed. To one. 14 to 1.

MR. ORSINGER: Luke, I need to say that on that first vote although the proposition that was voted on was that all

motions that preserve error must be filed within 30 days after the judgment is signed, that assumes that there are going to be some motions like directed verdicts and whatnot that will also preserve error that are filed before the judgment.

MR. MCMAINS: Yeah. At least 30 days.

MR. PRINCE: No later than 30 days after the judgment.

CHAIRMAN SOULES: Yeah. Postjudgment motions that preserve error.

PROFESSOR DORSANEO: Now, to revisit that issue, and maybe it will be less uncongenial to everyone, if you do it like that, the easiest way to draft it is to call the motions for judgment NOV that are after or motions for judgment as a matter of law that are after judgment motions to modify.

Now, we could call them and revise 329(b), you know, motions to modify, motion for judgment as a matter of law, or motion for new trial, but it just seems easier to call them motions to modify because then we will know they are overruled by operation of law.

Okay.

MR. MCMAINS: I don't have any problem with the change in the nomenclature if, in fact, you have now created the presumption that they are overruled. Once you treat them all alike it doesn't really matter what they are called.

PROFESSOR DORSANEO: So you agreed with us all along.

MR. MCMAINS: No. No. That's not right.

CHAIRMAN SOULES: Let me get a consensus on this overruled because David proposed that, but that was not one of the things Judge Guittard asked for a show of strength on.

MR. MCMAINS: I think it creates a trap, seriously, if we say everything has got to be filed in 30 days but only certain things have to be ruled upon.

CHAIRMAN SOULES: Everything gets filed within 30 days. Proposition this: Everything that gets filed within 30 days if not ruled upon sooner is deemed overruled as a matter of law, as are today motions for new

trial.

MR. MCMAINS: And motions to modify filed within 30 days.

CHAIRMAN SOULES: Okay. Those who say "yes" show by hands. Anybody opposed? No one is opposed to that. Okay.

PROFESSOR DORSANEO: Now, Mr. Chairman, we need to redraft the motion to modify and the motion for judgment as a matter of law to take care of the problems raised by Rusty and others.

HONORABLE C. A. GUITTARD: Right.

PROFESSOR DORSANEO: And we can redraft those or Don Hunt's subcommittee can redraft them, I think, in a way that will probably pass muster. The timetable problem, which is a more serious monkey wrench if the vote had been otherwise, is relatively easily resolved by the votes taken. So whatever anybody thinks about the progress, there has been substantial progress by securing those items. Now, with respect to the remainder of this --

CHAIRMAN SOULES: Let me -- can

I get back now to the JNOV, the terminology issue where probably some of these votes have relieved the tension on terminology, if I understand them, and I may not. Do we need to have anything called a judgment non obstante? Can they all just be called motion for judgment or motion to modify?

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: Or vacate.

MR. ORSINGER: Motion for judgment as a matter of law or motion to modify.

CHAIRMAN SOULES: Why as a matter of law?

MR. KELTNER: Well, I think you call them motions for judgment, Richard, and the reason for that is there can be reasons in law not relating to the verdict that you could move for the motion. So I think a motion for judgment, a motion to modify judgment once entered is all we need, and the JNOV idea we can scrap.

CHAIRMAN SOULES: Or motion to vacate or modify.

MR. KELTNER: Yes. That's right.

CHAIRMAN SOULES: Because I guess a complete go away of the judgment would be more than modification.

MR. MCMAINS: I would like -- Luke?

CHAIRMAN SOULES: Rusty.

MR. MCMAINS: An issue that has not been addressed in these particular rules but seems to me would be helpful to be addressed is precisely the issue of those -- if there are some findings you like and some you don't or if, for instance, you are entitled largely to a judgment but maybe not everything, and so you don't move for judgment for all of these cases, I don't think that's fixed here yet.

HONORABLE C. A. GUITTARD: He's going to fix that.

MR. MCMAINS: Okay. I think that needs to be addressed and fixed as well, but you should not be prejudiced by seeking the fruits of what it is you did win, shouldn't have to ratify those things that you

are challenging.

HONORABLE C. A. GUITTARD: Right.

MR. MCMAINS: Anything that you -- and that kind of law ought to be clarified and stricken out, in my judgment.

CHAIRMAN SOULES: How do we deal with that? Who's got a suggestion? Richard.

MR. ORSINGER: I had a different point.

MR. MCMAINS: Judge Guittard says he thinks that Bill is going to fix that.

PROFESSOR DORSANEO: Well, that's partially addressed in this draft on page six, motion practice. There is an attempt to do that. I am not sure if that's exactly finished.

HONORABLE C. A. GUITTARD: But I think Rusty and I are agreed, and I think that perhaps Luke would agree that there ought to be -- that the motion for -- that the points about motion for judgment as a matter of law is too restrictive. It ought to be not just where we have directed verdict under

present law but where you are entitled to disregard part of the verdict or if you are entitled before verdict to withdraw the issue from the jury.

MR. MCMAINS: Right.

MR. KELTNER: That works.

MR. ORSINGER: Well, the problem, we go back to the same problem, which is that you may be moving to disregard even though you are not entitled to a judgment, and so we can't call it a motion for a judgment.

MR. MCMAINS: That's right.

MR. ORSINGER: It has to be a motion to disregard.

MR. MCMAINS: I think that we are incomplete in our practice without having a motion to disregard in the practice.

HONORABLE C. A. GUITTARD: Either a motion --

MR. MCMAINS: Whatever you call it.

HONORABLE C. A. GUITTARD: I agree.

MR. MCMAINS: We need to have a substitute for it. I mean, we need to have a

substitute for it.

MR. KELTNER: I agree, and by saying what I said earlier I didn't mean to the contrary. I think what I am trying to say is we can get rid of JNOV if we have a motion to disregard, motion for judgment, motion to modify. It seems to me it would take care of taking one archaic part of our procedure out.

CHAIRMAN SOULES: And to vacate.

PROFESSOR DORSANEO: I don't like vacate. I am being quiet about it, but I don't like talking about it.

HONORABLE C. A. GUITTARD: If you vacate a judgment, what happens? Do you get a new trial?

CHAIRMAN SOULES: You don't have a judgment. Somebody enters another judgment. Well, another judgment has to be rendered.

MR. ORSINGER: Before it gets dismissed for want of prosecution, yes, but that's about the limit and --

MR. MCMAINS: No. That depends. There is a -- if you are saying that

if the judgment is vacated, can you re-enter it on the same verdict? Not outside the expiration of the plenary power in the current case.

CHAIRMAN SOULES: Well, you can't render the same judgment on the same verdict, but you can render a different judgment on the same verdict for a long time.

HONORABLE C. A. GUITTARD: Maybe we ought to clarify that point. Maybe we ought to clarify that point because I haven't understood what a motion to vacate does when you can make it. If you are going to say that a motion to vacate restores the situation as it was before the judgment was rendered so that it permits you to render another judgment, but we ought to say that. Perhaps a motion to vacate a judgment might be construed to mean the verdict and everything. So you really have -- only the result is a new trial, but whatever it is, we ought to say what it means.

MR. MCMAINS: The problem I have with that is that we have now said that anything that we file postjudgment has got to

be filed within 30 days.

HONORABLE C. A. GUITTARD: Well, a motion to vacate --

MR. MCMAINS: For preservation purposes.

HONORABLE C. A. GUITTARD: A motion to vacate, there is a question as to whether it should ever be an error-preserving device. Maybe it's only addressed to the trial judge. I don't know what it is. Let's define it.

PROFESSOR DORSANEO: Well, I propose that we allow a motion to modify to seek that relief as well as modification, correction, or reform and that --

MR. ORSINGER: Is a motion to vacate or modify?

PROFESSOR DORSANEO: No. I just want to call it a motion to modify. You can move to modify it if it should be vacated, modified, corrected or reformed in any respect. Presumably when you are moving to vacate it you have something in mind that will ultimately happen.

HONORABLE C. A. GUITTARD: If

you move to vacate it, if you vacate, then are you modifying something when you are wiping it out? I guess in a sense you are, but on the other hand, there is some logical problem about that, and it might be misunderstood, and I think we just ought to define the motion to vacate; either that or we ought to just eliminate it.

CHAIRMAN SOULES: Well, I mean, that may be right. Maybe if the judge vacates the judgment and doesn't render the same judgment later for the primary purpose of extending the appellate timetable, that line of cases --

PROFESSOR DORSANEO: He can't do it.

CHAIRMAN SOULES: He can't do it. But if he vacates and sends it to mediation and then enters another judgment later, that's slightly different. It's a new judgment, a new day.

MR. ORSINGER: It seems to me that that procedure ought to be addressed to the trial court, but it shouldn't serve any function for the appellate complaint.

CHAIRMAN SOULES: That's probably right.

MR. KELTNER: That's exactly right. Motion to vacate, if we are going to have that, should only be made to the judge, not to write a complaint. Remember, all the cases you are talking about about getting the judgment removed and then the problem with reinstating the judgment are motions for new trial cases in which a new trial is granted, so it takes you back past the verdict, and that's the problem. A motion to vacate probably ought to take you back only to the postverdict stage, and that makes a whole lot of sense.

That's why, Bill, your motion to modify probably ought to cover it, but I think that's an issue we probably ought to look at.

CHAIRMAN SOULES: Well, the motion to vacate cases have one other piece of the problem, not just where motion for new trial has been granted.

MR. KELTNER: Right.

CHAIRMAN SOULES: And then they try to ungrant it after plenary power is gone,

and you can't do that.

MR. KELTNER: Can't do that.

CHAIRMAN SOULES: But also where they vacated them, I guess some lawyer comes in and says, "I am under a lot of work. How about giving me 60 days before my appellate timetable starts or something," and the judge vacates it and then re-enters it later. I mean, there are some cases that suggest something happens to cause the judge to vacate and then re-enter, and they said you can't do that either, but anyway.

PROFESSOR DORSANEO: Does anything need to be done on motions for -- I wasn't here for this, motions for new trial, but it's my understanding that the committee has already considered 302.

MR. ORSINGER: Before we go on I would like to get a clarification.

CHAIRMAN SOULES: Okay. Yeah. We are going to have a motion for judgment, a motion to disregard.

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN SOULES: Findings.

MR. MCMAINS: Jury findings.

CHAIRMAN SOULES: And the motion to modify the judgment. Those are going to be the three vehicles that postverdict --

MR. MCMAINS: We can't put in a motion to disregard judge findings and make it subject to the 30-day period because we ain't going to have the findings in 30 days.

MR. ORSINGER: Well, we have a conundrum altogether by saying the judgment must conform to the findings because the judgment is already written about a month or two before the findings.

MR. MCMAINS: I understand that.

PROFESSOR CARLSON: Yeah.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: What would you want him to vacate and do? In other words, if he grants the new trial, that judgment is vacated. If he modifies it then that judgment is vacated. So you are wanting him or -- I mean, why? What purpose? The other rules would be setting it aside because when you set it aside you either want him to enter a

judgment for you, which you would make a motion for judgment, or you would want a new trial. So you want some kind of judgment entered. So why wouldn't those two take care of the motion to vacate?

CHAIRMAN SOULES: Well, I see two reasons for the judge to vacate. One is the parties come in and say, "We need time to mediate. We understand what you have done, but we want some time to mediate," and that does happen and not infrequent.

The second one is the judge gets all of these papers. He starts looking at them. He or she starts looking at them and says, "I am not so sure anymore, but I need some time, and I am not going to start the parties' appellate timetable 30 days from the day I sign this judgment because I have a lot of trepidation about whether the judgment is right or wrong. I am going to vacate my judgment, and I am going to read these papers and work on my judgment some more."

MR. LOW: Lawyers can get their work done in 30 days. The judge ought to.

HONORABLE SCOTT BRISTER: Wait

a minute. Wait a minute.

CHAIRMAN SOULES: But we don't try cases everyday, and we have more time to maybe look at the papers than the judges do who are trying cases everyday. So there is a legitimate reason to vacate a judgment, for the trial judge to vacate a judgment.

HONORABLE C. A. GUITTARD: Then we ought to put that in the rules somewhere and say under what circumstances it can be done.

CHAIRMAN SOULES: He can do it if the judge wants to.

PROFESSOR CARLSON: Well, that's what it is now.

HONORABLE C. A. GUITTARD: But, as David says, a motion to vacate can never be effective on appeal.

MR. ORSINGER: Why do we even need to mention it then? Why don't we just let them file it and let them mention grounds?

CHAIRMAN SOULES: I don't know that we need to talk about it.

HONORABLE C. A. GUITTARD: Well, then we ought to not use it in the rule

in places that we are now using it.

MR. ORSINGER: True. I mean, if this is just addressed to the trial court's discretion, you can go in and get -- make an oral argument and no motion to get the judge to set aside. We don't need to --

CHAIRMAN SOULES: Well, other parties are always there, unless everybody is dead.

HONORABLE C. A. GUITTARD: If we use the term "vacate" in the rules, we ought to define it.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: Could we have -- now to keep things moving we have things overruled by operation of the law. What's going to happen if a judge vacates it? I mean, can he sit on it a year?

CHAIRMAN SOULES: Sure.

MR. LOW: That's just wrong. I wouldn't give him a chance to do that.

HONORABLE C. A. GUITTARD: That's the point.

MR. ORSINGER: Luke, can I get a clarification?

CHAIRMAN SOULES: Sometimes they sit on them a year.

MR. LOW: I understand, but we are going to give them a chance to --

CHAIRMAN SOULES: But they don't see the posttrial motions in general. As a general rule they don't see the posttrial activity until after a judgment has been rendered. Okay. Consensus, we are going to have at least three. We may or may not deal with motion to vacate, but we are going to have motion for judgment. Either side can file it. Motion to disregard jury findings, either side can file it. Motion to modify, either side can file it. That's going to be three things we are going to have and right now nothing else, unless maybe a motion to vacate. If somebody can think of a good reason to do it, do it. If not, don't.

Those in favor show by hands.

PROFESSOR CARLSON: On a motion to vacate?

CHAIRMAN SOULES: No. Just the three, for judgment, to disregard, and to modify the judgment.

MR. ORSINGER: And those are, if you will, legal complaints that the new trial addresses. We were also going to put in new trial for those other kinds of complaints.

CHAIRMAN SOULES: Okay. New trial, for judgment, disregard jury findings, to modify judgment. That's going to be the four things that embrace all postverdict complaints that preserve error. That's the proposition. Okay. Those that say "yes"? Six.

Those opposed? There is no opposition, but we don't have what we are going to call it. Now the devil is back in the details.

MR. KELTNER: The devil is in the details.

HONORABLE C. A. GUITTARD: Mr. Chairman, we need also to address the filing before the verdict. Now we are talking about things you file after verdict or after judgment. Now, we want to say that before verdict we have a judgment as a matter of law before verdict instead of what we now call a motion for directed verdict. We ought to have a motion to withdraw an issue from the jury

and determined as a matter of law before we submit it to the jury, and we have that now under, I guess, common law; but we ought to put it down in the rules.

So we ought to have different provisions for motions before verdict and after verdict perhaps.

MR. ORSINGER: Well, the prejudgment motions on the verdict don't affect plenary power or the timetable unless they are prematurely filed postjudgment motions.

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

MR. ORSINGER: Isn't that right?

MR. MCMAINS: No, no, no, no.

MR. ORSINGER: That's one major distinction. No?

MR. MCMAINS: If you get a prematurely filed motion, it is not necessarily a postjudgment motion. It can be a postverdict motion.

MR. ORSINGER: Well --

MR. MCMAINS: I mean, the

prematurely filed rule is not limited to things that are filed after the judgment but before they are -- it includes if you file it before the judgment.

MR. ORSINGER: But the distinction is the directed verdict motions and the motions to enter judgment don't affect plenary power and don't affect the appellate deadline. So that's one big difference between the prejudgment and postjudgment motions.

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: Right. We are not changing that.

MR. MCMAINS: Correct. But you can make a motion for judgment as a matter of law or whatever, however it is that you have now attempted to call it, that in reality is an attempt to disregard that is before the judgment; and it will have an extension of power, the plenary power, if it's treated as a prematurely filed motion.

HONORABLE C. A. GUITTARD: But you ought not to do that. You ought not to

call it a prematurely filed motion if it's a motion for judgment before a judgment is rendered.

MR. MCMAINS: Well, but the point is how is it that we can -- I mean, what are we going to do with our prematurely filed motion rule? Because we can file motions for new trial prematurely now.

HONORABLE C. A. GUITTARD: And that's about the only thing then.

CHAIRMAN SOULES: Well, the Federal practice generates a whole lot of paperwork that, to me, is unnecessary. You file motions and then you have got to file a new motion. Every time something happens you have got to file a new JNOV or whatever it's called.

MR. MCMAINS: You have to file a motion for leave to file a new motion.

CHAIRMAN SOULES: Motion for leave to file a new motion, and you know, parties shouldn't have to file these motions but once, and if they are clearly something that's prematurely filed, that was designed to eliminate a trap that was unacceptable to this

committee and the Supreme Court at the time they passed the rules.

HONORABLE C. A. GUITTARD: Well, if you are entitled to a judgment as a matter of law at the close of the evidence then you ought to be able to move for that. You ought not to call it a directed verdict and have the jury come back and tell them, "You are no good for us -- no use to us anymore. You can go home." But there ought to be something in the rule that says you can do that.

CHAIRMAN SOULES: Well, write it up, and we will take a look at it.

HONORABLE C. A. GUITTARD: Okay.

CHAIRMAN SOULES: Now, Bill, let's get to -- now that we have gotten some concepts for the form here --

MR. MCMAINS: Now, you are talking about -- excuse me. Judge, you are talking about before verdict? I mean, before it even goes to the jury?

HONORABLE C. A. GUITTARD: Either then or after verdict and before

judgment. Neither of those motions extend the timetable, but they certainly would be a predicate for an appeal.

CHAIRMAN SOULES: That's not in these rules right now, is it?

MR. ORSINGER: Well, it's part of our definition of motion for judgment as a matter of law. It's what we used to call a motion for directed verdict.

HONORABLE C. A. GUITTARD: I think in the timetable it says that a motion for judgment as a matter of law may be filed before or after the verdict. Now, what my problem is, that it doesn't extend to these parts of it, and it should.

MR. LOW: Why couldn't you change the rule and do it like you do summary judgment, a partial summary judgment, or you know, directed on part or all of the case? Why couldn't you just change it and say it doesn't have to be the whole thing? It can be any part of it and just do the rule like that rather than redrawing a new rule for it. Just put a few words in the old rule.

HONORABLE C. A. GUITTARD: I

think that will do it.

CHAIRMAN SOULES: Okay. Good idea. Now, Bill, where do you need guidance? I know the Court wants to see these rules pretty soon because they want to flange them up to the appellate rules where they need flanging. Where do you need help or do you think Hunt needs help at some further level of detail or some other general concept?

PROFESSOR DORSANEO: Let me see if I can figure out where I don't need help first. 302, motions for new trial, that's been gone through, right? Pages 6, 7, 8 and much of 9.

HONORABLE C. A. GUITTARD: There is one point that I want to raise with respect to motions for new trial, and I think that's just a matter of drafting. Rule 302(a)(11), when a case has been dismissed for want of prosecution. Now, all the other subdivisions in that paragraph have to do with whether certain grounds exist for a new trial, and we don't want to imply and I don't think we intend to say that a new trial may be granted whenever the case has been dismissed

for want of prosecution. We don't want to -- what we want to say is something like this: "When a case has been dismissed for want of prosecution and good cause exists for reinstatement."

PROFESSOR DORSANEO: That raises the other issue, whether this should be talked about in the motion for new trial rules at all or whether it should be left over in 165(a), which parallels 329(b) and has its own other problems.

HONORABLE C. A. GUITTARD: Well, the problem about that is does a motion for new trial -- for reinstatement after dismissed for prosecution, is it governed by the new trial rules? And I think probably there are some cases say it is and some cases say it isn't. I think we should probably provide one way or another, and I would prefer that it be treated as a motion for new trial for our purposes, and maybe this would do that.

CHAIRMAN SOULES: Judge, we struggled with the injustices, some of them outrageous, with the dismissals for want of

prosecution and trying to get those handled under the motion for new trial practice, and 165(a) was written to put some burdens on the trial judge in connection with the motion to reinstate, and I think we want to preserve that.

HONORABLE C. A. GUITTARD: Well, I wouldn't disagree with that. I just want to make sure that it's subject to the new trial rules with respect to timing and so forth.

PROFESSOR DORSANEO: It would be better off to take (11) out. There are a number of reasons. The main reason is it's dealt with elsewhere in Rule 165(a), and that requires -- well, for one thing, verification of the motion, and it's just different.

MR. MCMAINS: Of course, it also doesn't -- this is not an exclusive list anyway.

PROFESSOR DORSANEO: No.

MR. MCMAINS: So taking it out doesn't mean anything.

CHAIRMAN SOULES: If (11) is retained, it ought to simply say "pursuant to

Rule 165(a)."

HONORABLE C. A. GUITTARD: That would be fine.

CHAIRMAN SOULES: Or take it out.

PROFESSOR DORSANEO: 165(a) has its own plenary power deal and its own overruling by operation of law and its own requirements for the motion. It's self-contained.

CHAIRMAN SOULES: Any opposition to deleting it?

Gone. No opposition.

PROFESSOR DORSANEO: But I wasn't here for the whole meeting when this 302 was gone through.

MR. ORSINGER: Well, we are going to have to take out (c)(3) then because (c)(4) is dismissal for want of prosecution.

HONORABLE C. A. GUITTARD: Right.

MR. ORSINGER: Is a correlative affidavit.

CHAIRMAN SOULES: Anybody in disagreement with that? No disagreement.

It's gone. It's on page 8.

PROFESSOR DORSANEO: So I am asking for guidance on 302 and 303 on the assumption that those have been dealt with already at the last meeting.

CHAIRMAN SOULES: Where is 303?

PROFESSOR DORSANEO: It begins on page 9. It is the analog to Appellate Rule 52, which is probably the main place where we need to have correspondence.

CHAIRMAN SOULES: And this tracks what was submitted with the appellate rules?

PROFESSOR DORSANEO: I hope.

CHAIRMAN SOULES: That's the plan.

HONORABLE C. A. GUITTARD: That's the intent.

PROFESSOR DORSANEO: That was my plan. This is not my draft, so I don't know what it says. I'm sure it does, but I can't -- don't quote me on it.

CHAIRMAN SOULES: If it doesn't, let's be sure they say the same thing unless there is some reason to have a

difference, and I don't think so.

PROFESSOR DORSANEO: I think Professor Parsley here will make deadly certain that they correspond one with the other.

CHAIRMAN SOULES: Well, is there any reason for any variation between 303 and 52? Anyone have any reason for variation? Okay. No -- Richard Orsinger.

MR. ORSINGER: Not that. A different point.

CHAIRMAN SOULES: Okay. No one sees any reason for a variation. So they should be verbatim.

MR. MCMAINS: Whatever the -- I just want to point out that both this and Rule 52, to the extent we are expanding the nomenclature on postjudgment motions that are presumptively overruled without an express order, that that needs to be in both preservation rules. Right now we have -- there are two labels in the preservation rules, and they are straight out of 52. We are talking about motion for new trial, motion to modify.

Now, if we are going to capture everything as being one of those two then this is right, but if you remember, you were talking about a motion for judgment, motion for some other things. So we would assume that any of those things you were talking about going to be in that rule are going to be presumptively overruled.

MR. ORSINGER: Okay. Now, yeah. I have got something to say about that then. We voted on four motions, two of which were prejudgment and two of which were postjudgment. Now, what Rusty just said, which I think is something that I wanted to discuss independently, is that all four of those motions are presumptively overruled by the 75th day if they are not ruled on expressly. But in my view the 75th day should only apply to the postjudgment motions, and the prejudgment motions should be impliedly overruled if at all by the signing of the judgment that's contrary to those motions and not by the passage of time.

PROFESSOR DORSANEO: I was going to ask for guidance on that once we got

up to page 13.

MR. ORSINGER: It seems to me that if I make the request that a judgment look like X and I don't ever get a hearing on that but the judge signs a judgment that looks like Y, then I think that the signing of the judgment that looks like Y should overrule my motion for a judgment that looks like X; and it doesn't have anything to do with the 75th day or whether a motion for new trial is even filed, and it seems logical to me that if you ask the court to make the judgment look a certain way and the court makes it look another way, that should inferentially overrule your motion.

And then the motions that are going to affect the appellate timetable, the motions that will be overruled by operation of law, ought to be motions that are filed to attack the judgment. Whether they are prematurely filed or whether they are filed properly after the judgment is signed, if they are attacking a judgment, then they are postjudgment. They are 75th day overruled.

CHAIRMAN SOULES: Other than

theory what difference does it make in terms of preserving appellate complaints?

MR. ORSINGER: Other than theory what I just stated is what the law is today, and if you say this other proposal is not what the law is today, it's different. Right now if I move to enter judgment in a certain way and the judge signs a judgment to the contrary, I think that I have preserved error on what was in my motion for judgment.

CHAIRMAN SOULES: Well, even if you think that, it's inferential the way -- if we put all of those motions in 303(a) and 52(a), they are going to be overruled by operation of law for sure, and it doesn't really make any difference, does it?

MR. ORSINGER: Other than just a logical difference it doesn't.

CHAIRMAN SOULES: Just a logical -- you might like to reason through it, but why not put them in here so that we know that by some expiration date those have been ruled on by the court?

MR. ORSINGER: Before I agree to that I want to know what you are going to

do about whether my motion to disregard or my motion for judgment extends plenary power and gives me an extended appellate timetable or not.

PROFESSOR DORSANEO: That's what the difference it makes is.

MR. ORSINGER: Because if you are telling me that if they are all overruled by operation of law means that plenary power is extended and the deadlines are extended then I have got a completely different feeling about it. Because I think that the prejudgment, postverdict motions should have nothing to do with the appellate timetable and plenary power.

MR. MCMAINS: I agree.

MR. ORSINGER: And yet they are being --

CHAIRMAN SOULES: Yeah. Okay.

MR. ORSINGER: You see what I am saying? So if you will commit on one, I will vote on the other.

PROFESSOR DORSANEO: If you will look on page 13, the motion for judgment as a matter of law as drafted by Don Hunt says

that a ground for the motion for judgment as a matter of law, which would be meant to cover a motion to disregard a particular jury finding as well as the entire verdict or some larger segment of it, and is overruled by operation of law where a judgment is signed which does not grant that ground. I might say "relief" or some other similar language, but do you want it to be then?

And the difference it makes is that it's overruled and it doesn't have an affect on plenary power. Only postjudgment motions to modify would have an affect on plenary power, and you would have to file one, and there might be some difficulty if someone said, "Well, I have filed a motion for judgment as a matter of law, and that should extend plenary power because it's a prematurely filed motion to modify the judgment"; and I would say, "No, it isn't, because of this sentence." But it needs to be decided one way or the other. I mean --

MR. ORSINGER: I would propose that we broaden the concept that the signing of the judgment inferentially overrules a

motion to enter any other version of the judgment. Any motion, whether it's a motion to disregard, whether it's a motion to enter a judgment consistent with the verdict or partially consistent with the verdict or whatever, I would suggest that the entering of a contrary judgment inferentially overrules all of those motions as of the time the judgment is signed, and then we quit talking about them. We quit thinking about them. We quit calculating on them, and then we move on with postjudgment motions, if any.

MR. KELTNER: What's wrong with that? That seems to me to be a good, good dichotomy. It keeps what we need to preserve postjudgment in one rule and keeps the other in a previous rule and prior to the entry of judgment. I think that makes a lot of sense.

CHAIRMAN SOULES: So the idea is that motions filed prior to judgment are deemed overruled at the time the judgment is signed.

MR. ORSINGER: I think that's a little overbroad because you may have a prematurely filed postjudgment motion, but if

it's a prejudgment motion such as a motion to enter on the verdict or a motion to disregard then that would be correct.

MR. MCMAINS: In other words, you want to keep the prematurely filed concept but only apply it to ones that should be after the judgment.

MR. ORSINGER: Yeah. That actually talk about attacking a signed judgment even though it may not have been signed yet.

PROFESSOR DORSANEO: I can do that. Okay. It's prejudgment --

MR. ORSINGER: That's the logic of calling it prematurely filed, Rusty, is that --

MR. MCMAINS: No. I agree wholeheartedly.

HONORABLE C. A. GUITTARD: Well, let's look at that provision that has to do with prematurely filed motions. It doesn't include all of what we have been talking about. It just includes motion for new trial, does it not?

CHAIRMAN SOULES: That's what I

thought.

MR. KELTNER: That is correct. He's going to have to change his concept on that.

HONORABLE C. A. GUITTARD: Where is that?

PROFESSOR DORSANEO: 306(c).

HONORABLE C. A. GUITTARD: 306(c).

CHAIRMAN SOULES: Does it need to apply to anything other than motion for new trial?

MR. ORSINGER: Motion to modify. It needs to apply to a motion to modify. It needs to apply to a request for findings of fact.

HONORABLE C. A. GUITTARD: How can you file a motion to --

MR. ORSINGER: How can you file a motion for new trial, which we all agree is a way to attack a judgment, when the judgment hasn't been signed yet?

HONORABLE C. A. GUITTARD: How can you file a motion to modify judgment that hasn't been signed, hasn't been entered?

MR. ORSINGER: But the court is bound to enter a judgment on the verdict if it has more than legally sufficient evidence, even if the court fully intends to grant a new trial based on factually insufficient evidence.

HONORABLE C. A. GUITTARD: Sure.

MR. ORSINGER: Or so the law says, and so if somebody files a motion for new trial before the judgment is signed, and you know, technically the court is required to deny that, sign the judgment, and then set it aside, I mean, to me the defining distinction here is whether you are asking the court to enter a judgment in a certain way or whether you are asking the court to set aside a judgment or alter it, one that has been signed.

Sometimes people file those attacks on the judgment before the judgment is even signed and then they put us in this logical impossibility, and so we help ourselves over it by saying, well, we are going to pretend like you filed that on the day the judgment

was signed immediately after the judgment was signed, and then our system makes sense. And it's just a patch so that it all makes sense, and to me it's a valid distinction that if you are attacking the judgment, your postjudgment timetables and everything are all affected by that, and if you are urging the court to enter a certain judgment before one's been signed, it ought to have nothing to do with the appeal timetables.

CHAIRMAN SOULES: Didn't we have a prematurely filed motion for new trial rule because of the logic that the judge must enter a judgment before he can grant a new trial; therefore, if you are asking for a new trial before he has ever entered a judgment, rendered a judgment, you are asking for something the judge can't do, but we are going to carry it forward because we are going to pretend it was done after judgment?

Now, other error, other error in moving for judgment that the judge doesn't give you, that doesn't have to be after judgment. That can be preserved by a prejudgment filing or a motion to disregard by a prejudgment. All of

those things may be filed before a judgment and preserve the complaint. So really it's only the motion for new trial that this fiction has to exist for, and I think that's why it's restricted to that because that's the only fiction that we need.

I have one other concern about this. What if somebody calls a motion -- we have a judgment, but they move for a judgment. A, is it off with their head because they called it the wrong thing? B, maybe I am doing this all wrong, but I have filed postjudgment motions to disregard jury findings and to modify the judgment. So those get filed on both -- at least in my practice, which may be altogether wrong, but they do get filed on both sides of the judgment.

So to start defining things as we understand them in this room and making them technical issues on whether preservation has occurred, I am very reluctant to do that.

HONORABLE C. A. GUITTARD: But if you file a motion after judgment to disregard a jury finding, that's of no effect unless the judge modifies his judgment, is it?

CHAIRMAN SOULES: I think it is.

HONORABLE C. A. GUITTARD: I mean, if he --

CHAIRMAN SOULES: I may be wrong. I mean, it's always coupled with a motion to modify.

HONORABLE C. A. GUITTARD: He can't grant that motion without modifying the judgment.

MR. ORSINGER: Well, he could, but there could be two independent grounds to support the judgment and he decides to disregard one of them but leave the judgment in place.

CHAIRMAN SOULES: That's right.

HONORABLE C. A. GUITTARD: But if the judgment says, "I disregard" or doesn't say, "I disregard" and you want to make it say "disregard," you modify the judgment without modifying the result of the judgment.

CHAIRMAN SOULES: So you have got a one-ground case.

HONORABLE C. A. GUITTARD: Yeah.

CHAIRMAN SOULES: And you move after the judgment to disregard the verdict.

HONORABLE C. A. GUITTARD: Yeah. But after motion for judgment as a matter of law.

CHAIRMAN SOULES: Well, you are permitting it to be called something else. I just don't want to put labels on things. Maybe you-all do. If you do, that's fine. I hope, I hope, that we don't put labels on things that cause us to set more traps because somebody didn't use the right label.

HONORABLE C. A. GUITTARD: I don't think there ought to be -- it ought to be controlled by the label, but if the motion says, "Disregard this finding and change your judgment," that's a motion to modify the judgment, whatever you call it, and should be governed by the motion to modify rule and be overruled by as a matter of law within the usual time.

CHAIRMAN SOULES: Okay. The intention -- and then I will get to Buddy Low. The intention is that Richard wants to take certain filings and have them overruled by the

trial court's judgment, which I agree with.

MR. ORSINGER: Assuming they have been filed before the judgment is signed.

CHAIRMAN SOULES: Filed before the judgment is signed and have them overruled, but by their very nature of having been filed, they should be appellate predicates at that moment and not extend -- and those motions don't extend the plenary power of the trial court.

MR. ORSINGER: That's right.

CHAIRMAN SOULES: However, if we call those a prematurely filed postjudgment motion --

HONORABLE C. A. GUITTARD: No. Don't call it that.

CHAIRMAN SOULES: -- then they are going to extend.

HONORABLE C. A. GUITTARD: You don't want it to do that.

CHAIRMAN SOULES: And we don't want to do that. So I guess we are going to keep the prematurely filed rule restricted to motions for new trial.

HONORABLE C. A. GUITTARD:

Right.

CHAIRMAN SOULES: Anybody disagree with that?

MR. MCMAINS: In one respect. What about -- our current rule deals with request for findings.

MR. ORSINGER: See, I am troubled by that, Luke, because a lot of people go ahead and request their findings when the judge renders against them, and you get into this really scary deal that the judge may or may not mail you a copy of the judgment. You know, you don't know when you are going to get it, and a lot of people file their request the minute they know they have lost.

CHAIRMAN SOULES: But the only consequence, the only appellate point for not getting findings of fact and conclusions of law is remand, isn't it?

MR. ORSINGER: Well, the theory is that you are going to -- your opportunity to request findings will have passed you by before you are alerted to the signing of the judgment.

MR. MCMAINS: And you have only got 20 days if you don't know that the judge --

CHAIRMAN SOULES: But doesn't that rule take care of itself? It says that prematurely filed request for findings of fact and conclusions of law will be deemed timely filed.

MR. MCMAINS: I was just looking to try and find it. I don't see it.

MR. ORSINGER: It's under 306(c).

PROFESSOR DORSANEO: 306(c), yeah. Really probably the findings of fact reference should be in the finding of fact rule.

MR. MCMAINS: I think that makes sense, that it should be in that rule.

PROFESSOR DORSANEO: And the reason for it is a secure thing. One of my favorite old case book cases is a case where somebody bought some chinchillas that didn't perform as warranted or something, and after somehow losing that case in a bench trial there was a premature request for findings of

fact, which turned out to be a nullity, and that meant that there were no findings of fact, and that ultimately meant that the judgment was affirmed. So we say that a premature request for findings works to deal with the chinchilla problem, not really for any other purpose.

MR. ORSINGER: Why don't we eliminate this rule and stick the prematurely filed motion for new trial as a paragraph under the motion for new trial rule and the prematurely filed request for findings under the request for findings rule?

PROFESSOR DORSANEO: That's what I was going to do whether you talked about it or not anyway.

CHAIRMAN SOULES: Anybody disagree with that? Okay. Buddy you had your hand up.

MR. LOW: I agree with it under Richard's theory, and I agree with it when you say that a judgment that's inconsistent with relief sought in a motion is overruled by the judgment. You want to include in there that if you want to get in an argument whether

something is inconsistent or not -- that's inconsistent and doesn't include, in other words, the relief sought in that motion, and that would take care of it. You wouldn't have to decide what's inconsistent and what's not.

If that judgment doesn't have something in it that grants it -- I mean, you know, I am not trying to imagine the fact situation that would exist where that would be, but if there could be then you would want to say not only that's inconsistent, the judgment is inconsistent with the relief sought, but doesn't include it, and then you couldn't get it involved.

And No. 2, and I will be quiet. Someone said, well, you don't want to get in the complaint of calling something this or that, and forgive me for quoting Federal courts because every now and then they do something right, but don't they operate on the theory that it doesn't matter what you call it? You look at the motion and relief sought to determine what it is, and are there any Texas cases that's inconsistent with that? So I worry about that.

CHAIRMAN SOULES: That's what they say. Now, we have put -- because of logic the rules have had in them such things as "inconsistent with" or "not given by the trial court" because it just seems like logically you ought to have that there, and then those words have created appellate litigation.

MR. LOW: Right.

CHAIRMAN SOULES: And to me an answer to that is don't put those words in there. Nobody is going to complain on appeal about something they asked for and then got in the judgment. So they just say, "The motions are overruled."

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: And then period, regardless of -- and not talk about inconsistent or what's the meaning of it or whatever.

MR. LOW: I was not suggesting we include those. I was going to say if we do include those, you better put something so you don't get into litigation of what's inconsistent and what's not.

CHAIRMAN SOULES: Do you have any problem just saying, "The motions are overruled," period?

MR. ORSINGER: Every single motion, postverdict motion, is just overruled always, in every case?

MR. MCMAINS: Of course, the only problem is -- with any of them, is that frequently we ask for inconsistent relief within the motion. So that's --

MR. ORSINGER: Well, it's all overruled anyway, Rusty. So it doesn't matter.

CHAIRMAN SOULES: Well, we deemed the trial court ruled on it so that we can -- this is another fiction. We could say if you want to complain about this and there is a question about whether it was presented to the trial court, we are going to fix that. We are going to say it was deemed presented and overruled so that you have your complaint. If it was granted, you don't have a complaint because it went away.

PROFESSOR DORSANEO: That will work. I can draft that. That solves my

timing problem. If you talk about it anymore, you might make me another problem.

CHAIRMAN SOULES: All right. Does anybody disagree with that approach? Does anybody disagree with that approach as a consequence of the trial court signing the judgment? It just overrules the previous motions. Okay. Richard.

MR. ORSINGER: You have to address the situation where you file your motion --

CHAIRMAN SOULES: No disagreement. For the record, there is no disagreement on that.

Richard Orsinger.

MR. ORSINGER: We have to address the situation that you described where you file a motion to disregard after the judgment is signed because we haven't provided for it to be overruled by operation of anything now.

MR. MCMAINS: Correct.

MR. ORSINGER: Isn't that right?

MR. MCMAINS: That's correct.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: And if you want to continue that practice then you had better overrule that somehow by operation.

CHAIRMAN SOULES: Well, anything that's filed in those 30 days gets overruled by operation of law when the motion for new trial would get overruled by operation of law. The only problem is -- and here's the tricky part. If you filed a motion to disregard before the judgment was signed, you do not extend plenary power. If you file it afterwards, you do.

MR. ORSINGER: That's an easy rule to understand, isn't it?

CHAIRMAN SOULES: That's pretty easy.

MR. ORSINGER: You can just look at the date of the judgment and the file stamp on your motion, and you know whether it's extended plenary power or not.

MR. MCMAINS: Not if it's the same day.

CHAIRMAN SOULES: Well, you may have to go to the clerk's file and see what

the file stamp says. Now, you know, that's simple, but is it what we want to do? Anybody disagree with that? Rusty.

MR. MCMAINS: Yes. My real problem is that the prematurely filed -- the reason we changed in the current Rule 306(c) the prematurely filed request for findings of fact and conclusions -- I mean, prematurely filed rule to include request for findings is because we also included them in the extension of plenary jurisdiction.

Now, once we have -- since it has the same effect on the -- since the request for findings timely made properly extends the plenary power, or the appellate deadlines rather, not plenary jurisdiction but the appellate deadlines. So it seems to me if we are trying to treat all of these things alike that, frankly, anything that is going to have the same operational effect if filed after the judgment if it's filed prematurely should have that same effect, and that would include a motion to disregard or a motion to modify, you know, identifiable instruments that theoretically are postjudgment, but by

definition that's what a prematurely filed motion is.

And because otherwise you are going to get -- and I think that what will happen initially anyway if you go to this practice is a lot of people will file something that is collective. I mean, they may file three or four instruments in the same instrument with one title that may not even be the right title, and I don't think that we should have to go -- and I'm sure the clerks don't want to have to go through there and figure it out. If your complaint is one that in making of the motion that could be made in any of these formats that has the extension of the appellate timetables then that ought to do it, and they ought to just go with that timetable. Because otherwise you --

HONORABLE C. A. GUITTARD: Well, do you apply that to the overruling of as a matter of law as well?

CHAIRMAN SOULES: Now, that draws the issue. Rusty is saying even if they are filed before verdict -- before judgment, they extend the plenary power.

MR. MCMAINS: No. I am saying you treat it as -- if it is something that if the motion and the relief that is requested is properly addressed, you know, to correlate to whatever the postjudgment motions that you allow; that is, you are saying that there is a -- you know, let's be classic about it. We want to disregard the jury's finding. It may be after the judgment. I mean, or after the verdict, but before the judgment.

Well, you can clearly do that after, and if you do it after, after the judgment, and you extend the time, it makes no sense to me that you have to do it again. If that's really all you are going to be filing, you just have to file the same motion twice if you don't give it a premature ruling effect.

CHAIRMAN SOULES: Okay.

MR. MCMAINS: And, you know, I don't know any other way to get around that. Now, I am not really trying to talk about preverdict motions like a motion for directed verdict before submission to the jury. I guess I am talking about something that happens postverdict may be where we start our

calculations from the premature standpoint.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: Well, to me, a lot of what we are doing doesn't make any sense. I still don't understand why a trial court can have plenary power over its judgment, and you can't file a motion that will preserve error after 30 days. So assuming that a lot of what we are doing doesn't make any sense, it doesn't -- it really doesn't make any sense to me that either of the lawyers, any of the lawyers, or the judge should have to go through paragraph by paragraph a combined prejudgment motion and determine whether any paragraph extends the appellate timetable because of a premature filing rule.

And I think we are going to see if we have such a rule in virtually every case above a simple case we are going to have a motion to the trial court or a motion to the appellate court to determine the appellate timetable and I -- as long as what we are doing doesn't make sense in some other respects, I would be in

favor of saying if you file it before judgment and a judgment is then entered, if you want the same relief, you have got to file it again after judgment. Because that gives a date certain, a bright line test, and I just don't know how the other is workable.

CHAIRMAN SOULES: Richard articulate for us, if you will, why you feel that a motion for judgment or a motion to disregard filed prior to judgment shouldn't extend the court's plenary power. Should not.

Because I think what Rusty is saying is they should be considered prematurely filed for appellate purposes, right? And you feel somehow otherwise.

MR. ORSINGER: I think it's just an arbitrary decision, but I think that under the current law motions that would influence the court in what judgment to enter based on the verdict traditionally have not extended plenary power and affected the appellate timetables.

MR. MCMAINS: Except let me give you a classic example, and there is jurisprudence on this. It is not unusual to

see immediately after you get a big damage award, the defendants to haul off and file a motion for remittitur. All right. Now, in reality that's a motion for new trial. I mean, that's how you accomplish remittitur. The judge doesn't get to change the numbers.

MR. ORSINGER: That's right. That's right.

MR. MCMAINS: The judge gets to say, "Okay. If you won't accept the change in the numbers, we will grant a new trial." So that is a new trial motion. Now, under our current practice, therefore, that's a prematurely filed motion for new trial.

Now, under your basis that means that if you change it and say anything that's filed beforehand is overruled by the judgment if you don't get that relief, well, obviously he can't give you that relief in the judgment anyway, but it's not going to be in there. It doesn't tell him that he has 30 days to remit or anything like that. So it's not there. That means it's overruled right then, but it doesn't extend any of your timetables.

MR. ORSINGER: No. I disagree.

My conception was that the things that are overruled by the signing of the judgment are the motions that request the judgment look in a certain way and that the things that are overruled by operation of law via the 75 days are the things that would cause the court to alter a judgment it's signed.

Now, that's a real simple dichotomy until you introduced into it, oh, well, somebody may file a motion to alter the judgment after it's signed, before it's signed; and then we have this prematurely filed rule that says, well, then if that happens, we are going to pretend like you filed it on the day the judgment was signed but after the judgment was signed. Using my dichotomy, your motion for remittitur would not be affected by the signing of the judgment in the full amount of the jury verdict because that would be a prematurely filed motion for new trial because the remittitur is nothing but a disguised effort to get a new trial conditioned on remitting part of the damages.

But this gets us into what Sarah was complaining about of having to sort through

these motions to find out what they ask for, and that's the cost.

MR. MCMAINS: But the point is that it is not unusual when I get in these cases to see somebody moving for judgment or not, you know, moving to disregard or whatever before judgment and including remittitur requests in them.

MR. ORSINGER: Well, see, I think that's bad. I agree with Sarah.

MR. MCMAINS: I agree wholeheartedly, but it is not a new --

MR. LOW: I don't see anything wrong with combining simplicity with doing the right thing. I mean, if you take and you file -- just to keep it simple, because I have to think in those kind of terms, you take a motion for new trial. All right. It's prematurely filed. You say, "Well, wait a minute. If you say it's overruled with the judgment then the judge can't grant it; so therefore, he has got to overrule it in order to grant it," you know, so -- but not so.

The judge has the right to grant it. He knows what he is doing. He thinks, "I'd like

to grant it, but I have got to grant a judgment, then I am going to" -- he's had the same thing presented to him. So he can then grant it. All right. Now, if you take it and say, okay, the day after the judge signs the judgment then that's when your appellate starts, when all of these motions are overruled.

Well, the judge, if he does his job, he has these motions in mind. He still has the power to grant them. They are there before him. So why not keep a definite timetable instead of making it complicated? Give the judge a chance to get it right, because all the motions that are before him, he knows what to do and how to handle relief, whether it's remittitur or what, and then you have got a definite timetable when your appellate process starts running.

So you enter a clean slate. These motions right here that are premature, they are overruled the day after the judgment; but the judge has 30 days. If he's read those, he can still grant that kind of relief, but yet you have got a definite date when your

timetable runs for appeal. What would be wrong with that? Maybe I just don't understand what's going on.

CHAIRMAN SOULES: Another piece of this, too, in almost every case the motion for judgment is filed before the judgment. So why not just extend the court's plenary power from 30 days to 75 days? I mean, that's a rhetorical question obviously, but that's what we are basically doing, is if we make these prejudgment motions all prematurely filed or postjudgment motions, basically we just might as well do it a lot simpler. Rather than having to go through the gyrations, just extend his plenary power out to wherever it would be by any postfiled motions, and I don't think that's what we really intend to do; but if it is, let's do it; and if it's not then let's figure what the alternative is.

HONORABLE SCOTT BRISTER: Well, except that it is only in the big case that you have any kind of postverdict motions. Car wreck and a slip and fall, you enter judgment, and that's the end of it. It's only the cases that they call you guys in that we get the

flood of posttrial, postverdict motions; and once you guys are in I need a little more time to deal with you than I do with my car wrecks.

MR. ORSINGER: What's the harm in keeping the car wreck case open an extra 45 days?

HONORABLE SCOTT BRISTER: It just makes life slower, slower verdict. Injured person, longer 'til they get paid.

CHAIRMAN SOULES: Okay. It's 3:20. Let's break 'til 3:30, give the court reporter a chance to rest and get back to work.

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

CHAIRMAN SOULES: There was another suggestion to perhaps simplify this, and that would be just to write into the rule that no prejudgment filing extends plenary power. That's only a byproduct of our premature filing rule anyway. It was not a purpose. The purpose was to be sure somebody hadn't waived the error that was in a premature filing and that it operated to

extend the appellate timetable. So if I filed my motion for new trial prematurely, my error was preserved, and I could function in an appellate timetable, assuming that I had a motion for new trial on file. So I didn't fool myself, but the extension of the trial court's plenary power was just a byproduct of that.

MR. LOW: What's wrong with that?

CHAIRMAN SOULES: So we could simplify this by saying that no prejudgment filing extends the trial court's plenary jurisdiction. It doesn't affect preservation of error. I mean, the error is still preserved. The appellate timetable still operates, but the plenary jurisdiction doesn't change.

HONORABLE C. A. GUITTARD: I don't see any problem with leaving the rule just like it's been in 306(c) and as it's carried forward here on page 17, premature filing. Just restrict it to motions for new trial and request for findings.

CHAIRMAN SOULES: Well, we

tried to, but maybe that's even more complicated than it needs to be.

HONORABLE C. A. GUITTARD: Well, maybe it just ought to be motion for new trial. That would be fine with me.

CHAIRMAN SOULES: We are saying no prejudgment filing extends the trial court's plenary power. If you are going to extend the trial court's plenary power, you have got to file something after judgment.

MR. LOW: Let's vote on it before Rusty gets in.

CHAIRMAN SOULES: Buddy Low. What?

MR. LOW: I said let's vote on it before Rusty gets in. I move -- I am being facetious really.

Sounds good to me. It sounds simple and does the job. I don't see any harm to it. I don't see any harm.

PROFESSOR DORSANEO: Well, the only cases -- I was trying to think about these rules and where they came from and how they were split up; and frankly, at this point of working on these things for more than 10

years I have forgotten what some of the things were meant to achieve to begin with; but it seems to me that 306(c), which is the current rule we are talking about, was primarily originally designed to deal with somebody who got into an appellate problem rather than a plenary power problem. It was meant to deal with somebody who did something prematurely that ended up being a nullity, and that something was something that was necessary in order to get on a longer track.

So I don't think I have any problem with this suggestion at all. There may be something that needs to be done in the appellate rules to talk about the appellate part of this problem, which I think 306(c) still addresses because it talks about when something is considered done, and that would affect the appellate timetable as well and --

HONORABLE C. A. GUITTARD: I don't want to lose whatever advantage we gain, if we get any, when we adopted 306(c).

PROFESSOR DORSANEO: Well, I don't see a problem with having the plenary power concept differ from whether you are

entitled to the extended appellate timetable; and so, no, I don't see a problem with requiring you to file something after in order for plenary power to be extended.

CHAIRMAN SOULES: If something is not filed after judgment within 30 days, the trial court loses plenary power. If he is not asked to do something in that 30-day period, it's over.

MR. LOW: And we have already voted that within that time you can file renewed motions or whatever you want to. So the lawyer has a chance to call his attention and file five pounds of paper, but then there is a definite time. So long as you know something is definite, give us something clear, all of us can follow that. I think it's good.

CHAIRMAN SOULES: Pam.

MS. BARON: Well, Luke, is it heresy to suggest that perhaps all appeals should be on an extended appellate deadline and then we wouldn't have to play this game, that everybody has the same time schedule whether there is a motion for new trial or

anything? It sure would make it easy.

MR. LOW: But the timetable is keyed to something, keyed to the judgment, I guess.

MS. BARON: It's keyed to the judgment.

HONORABLE C. A. GUITTARD: I am worried about the case where the lawyer has filed his motion for new trial after the judgment draft has been submitted to the judge, and he hasn't really opposed it, the draft, and he files his motion for new trial, and then the judge signs the judgment, and then 30 days goes by, and the moving party says, "Judge, I want a hearing on my motion for new trial," and the judge says, "Oh, you can't do that. That's beyond plenary power now."

CHAIRMAN SOULES: "It was overruled when I signed the judgment."

HONORABLE C. A. GUITTARD: Yeah. And the judge says, "Well, that was overruled when I signed the judgment."

Well, that tripped him up. He should have -- I guess you would say he should file

it again, but that sounds illogical. If he made a mistake by being too diligent and filed it too soon, well, that's bad, too. I don't like that either.

PROFESSOR DORSANEO: Well, as long as it preserved the complaints what --

HONORABLE C. A. GUITTARD: Well, how can --

CHAIRMAN SOULES: Pam is right on the same point, and what she is suggesting is that you not have two different start dates for the appellate process depending on whether you have filed something postjudgment so that you don't have that trip either, that hurdle.

PROFESSOR DORSANEO: Is Richard Orsinger in the room? If he was here, he would jump right on that.

MR. LOW: I don't know.

CHAIRMAN SOULES: His coat is here.

PROFESSOR DORSANEO: It would have to be the longer track.

MS. BARON: Right. Exactly. But we would have fewer people who have their, you know, whatever -- we are going to have

notice of appeal, I guess. There are so many cases where people get thrown out because they are either a day off or they are maybe even 30 days off because they think they have the extended deadline, and they don't.

CHAIRMAN SOULES: Don't the appellate deadlines --

MS. BARON: And it would eliminate that.

CHAIRMAN SOULES: I didn't hear what you said last. I stepped on you, and I apologize.

MS. BARON: Oh, and it would just eliminate that problem of people who aren't sure what track they are on. They think they are on one track, and then they find out their motion for new trial was filed one day too late, and therefore, they are on the short track instead of the long track, and now their appeal is gone, too.

CHAIRMAN SOULES: Don't our appeals, except for the briefing, don't they still run from judgment? Everything runs from judgment except briefing?

PROFESSOR DORSANEO: Except we

have the fast track.

CHAIRMAN SOULES: If there is no posttrial motion.

MR. KELTNER: Posttrial motion, Luke, only extends the time for filing something. Instead of running for 30 days it runs from different -- postjudgment runs from another period. Everything is keyed to the judgment, okay, but how many grace days you get from the judgment depends on whether you have a timely filed motion for new trial or findings of fact and conclusions of law.

PROFESSOR DORSANEO: And as far as the record getting up there, under our proposal that 30-day/90-day concept is totally meaningless.

MR. KELTNER: So Pam's suggestion would work. There is one other thing, is an appellant who wanted to hurry up that time could do so by filing the brief early.

MS. BARON: Right.

MR. KELTNER: So it doesn't really shut down the appeal for a period of time as it ordinarily would, and maybe that

takes care completely of the appellate timetable problem, and that would mean that the only thing we would have to consider in all of this is whether or not -- or what motions postverdict will preserve error.

CHAIRMAN SOULES: If a judge signs a judgment and nothing happens in 30 days, his plenary power is over.

MR. KELTNER: That's right. And then that doesn't -- you don't have to mess with plenary power.

CHAIRMAN SOULES: If they do and they are asking the trial judge to do something, he's got to have time to do it.

MR. KELTNER: That's right.

CHAIRMAN SOULES: So we extend his plenary power to permit that.

MR. KELTNER: So you go ahead and extend the plenary power, but what you do is make sure the appellate timetable, which is the whole reason I think we have 306 -- in any event was that what had happened is they went on the regular time period instead of the extended time period, and what we do is just say everything is the extended time period.

The appellant, the disappointed party, gets to speed that up if they want to.

CHAIRMAN SOULES: What's the difference in the no move for motion for new trial and motion for new trial?

MR. KELTNER: I would have to look, but it's at least 60 days.

PROFESSOR DORSANEO: Yeah. It's 30/90.

PROFESSOR CARLSON: It's 30/90.

CHAIRMAN SOULES: 30/90. Okay. So what Pam is proposing is they are all 90.

MS. BARON: Uh-huh.

PROFESSOR DORSANEO: Did you hear that, Richard?

MR. ORSINGER: No. And that's just as well.

MR. KELTNER: Quick, let's vote before he finds out.

HONORABLE C. A. GUITTARD: Well, we considered in our committee whether just having one timetable would be advantageous. Of course, it has certain advantages to do it that way. We concluded that there are so many cases where you don't

file a motion for new trial, and you ought not to hold up the effectiveness of the judgment beyond 30 days in this large majority of cases. You ought to be able to go ahead and get your execution or whatever.

CHAIRMAN SOULES: You can.

HONORABLE C. A. GUITTARD: Or go on appeal or whatever. If nothing is done within 30 days, the case ought to be over in the trial court.

PROFESSOR DORSANEO: Well, it could be over in the trial court but still not be over in the appellate court.

HONORABLE C. A. GUITTARD: Yeah.

CHAIRMAN SOULES: The architecture that we are talking about now, Richard -- and I have got to get you up to speed on this -- is to say that no prejudgment motion will extend the trial court's plenary power. That seems to be fair because after judgment if nobody asks him to do anything within 30 days, his plenary jurisdiction ends; and if they do ask him to do something within those 30 days then he needs more time to do

it. So you extend the plenary power to give him time to do it. That's plenary power. And then but we are saying that those motions filed prior to judgment would nonetheless preserve error.

MR. ORSINGER: Right.

CHAIRMAN SOULES: So there is no consequence in terms of failing to preserve error as a result of having filed them early.

MR. ORSINGER: What about the appellate timetable?

CHAIRMAN SOULES: Then we are now to the appellate timetable and that then becomes a treacherous area for some people, and Pam's suggestion is just put the appellate timetable on a 90-day fuse instead of a 30-day fuse and eliminate that one, too, and --

MR. ORSINGER: I like that. I was in favor of that two years ago.

CHAIRMAN SOULES: Anybody opposed to it?

Elaine.

PROFESSOR CARLSON: I don't know if I am opposed to it, but I think Justice Guittard raises a very valid point.

In most cases it's the policy in favor of finality. If we say after 30 days most people want this to be done with, and they want to know either we are appealing or we are not in the vast majority of cases, not the cases we deal with but in a lot of cases; but now for John Doe in the public you really are extending the time that their lawyer has to act. You are putting additional time for the court to consider things that maybe we really don't want to do. I don't know.

CHAIRMAN SOULES: Could we put the notice of appeal at 30 days after judgment, no matter what, so that if you don't do that, that's final?

MS. BARON: No.

CHAIRMAN SOULES: No. Why not?

MS. BARON: It's just the same problem. It's just that --

CHAIRMAN SOULES: Well, the tension here is knowing whether or not the party is going to appeal.

MS. BARON: Right.

CHAIRMAN SOULES: At least give notice at the end of 30 days.

MS. BARON: Well, are you going to have them have to file their supersedeas bond at the time, too?

CHAIRMAN SOULES: Sure.

PROFESSOR DORSANEO: Well, I think a number of us have been in favor of this for a while, but based upon what I have received, the Court is about to finish going through the appellate rules that we recommended to them, and I don't think any Court member has raised this as a concern, and I would like to finish working on this at some point before I lose all of my hair.

CHAIRMAN SOULES: And sanity.

MR. ORSINGER: Boy, that puts us on a real tight timetable.

HONORABLE C. A. GUITTARD: It seems like that's such a radical change that's not been recently considered by any committee. It hasn't been considered by this committee or anything proposed to this committee, and if we are going to consider it, we ought to refer it to a committee and have it studied further and report back, but just to haul off and say, well, let's change that at this stage, well, I

am not comfortable with that.

CHAIRMAN SOULES: All right. Well, take out that part of it and say we don't address Pam's concern and just separate that from it. Assume that the appellate timetable still has a 30-day and a 90-day fuse and that we do create this hurdle or this drop dead if we say that these motions don't extend plenary power or the appellate timetable.

HONORABLE C. A. GUITTARD: Well, what do you do about the situation where the fellow has filed his motion for new trial the day before the judgment is signed, and he doesn't know just when the judgment is going to be signed, but that turns out the way it is, and then it comes up he thinks he's extended the time. He, of course, files a ruling on the motion for new trial. He wants a hearing on motion for new trial, and the judge tells him, "Well, the judgment overruled that, and it's beyond my plenary power." I am not comfortable with that. Is that what you intend?

CHAIRMAN SOULES: Well, there is a drop dead deadline somewhere.

HONORABLE C. A. GUITTARD: Well, sure. We have had drop dead deadlines. It's just a question of are we changing it in some radical form that nobody thought about before?

CHAIRMAN SOULES: We are talking about putting in a rule that says any motion filed prior to judgment does not extend the trial court's plenary power and does not extend the appellate timetable, and we just tell everybody that, and if they trip over it, they trip over it, but it's clear as -- it can't be articulated any clearer.

Richard Orsinger.

MR. ORSINGER: That addresses Sarah's concern that if we are going to permit prematurely filed postjudgment motions to extend the appellate timetable then we are going to in some situations put the burden on everybody to sort through a motion that's poorly worded, filed at the wrong time and has the wrong title on it, to see what relief they are requesting to find out when really the appellate deadline is. And that's a lot of judgment calls, and different courts of

appeals might rule differently on the same motion.

The advantage to this rule is that it's crystal clear, I guess, except if you file it on the day of the judgment, and then you have got to go look at the times, I guess. It's like Rusty said, but this is a simple rule to apply, and anybody can apply it, and once people learn it they will never run afoul of it, I think. Now, there may be a period of time when --

HONORABLE C. A. GUITTARD: Once they lose a case they will never forget it.

MR. ORSINGER: Well, I'm sorry for the ones that lose a case, but we ought to put the word out that this is real simple, but it's a new rule; and the rule is, is that if you want to extend, you better file something after the judgment is signed. And that's such a simple rule to apply that I can't think that it will be a problem for very long, and it has the virtue of being a simple rule to apply.

CHAIRMAN SOULES: Anne Gardner.

MS. GARDNER: If I could just add a comment that the way the rules are

written now it's unclear -- in addition to the reasons that have already been discussed, it's unclear what effect -- well, you have the opportunity to file a motion for new trial before judgment is signed because Rule 320 or 324 is written that way. I can't remember which one it is, and that in and of itself creates a problem or creates a question, and then that creates all the subsequent problems of, well, okay, if you do it then what happens and what effect is there after judgment.

I don't have a problem with it if this rule is made clear that you have to file something after the judgment in order to extend the appellate timetable, if the rule is made clear and it's the same for all postverdict and postjudgment motions. I had a real problem with having just one exception, the motion to disregard, because I think that creates a trap.

And the law as it is currently is very -- I think is very confusing for the average practitioner or for me to try to remember, well, okay, this was filed by the trial lawyer before judgment was entered. How does that

affect -- or what's the status of things now? Should I file a new motion for new trial? And even after the Supreme Court's 1994 decision on that issue I still think there is some questions not resolved. So to make the law clear I think it will be beneficial.

MR. ORSINGER: If I could, Anne was probably referring to 329(b)(a) which says, "A motion for new trial if filed shall be filed prior to or within 30 days after the judgment."

MS. GARDNER: Yeah. I guess that's it.

MR. ORSINGER: So we expressly authorize premature filings of motions for new trial.

MS. GARDNER: Uh-huh. And I have had one or two granted before by judges because if the judge knows a verdict is wrong, and I mean, why go to the trouble to have to enter judgment before you grant a new trial?

CHAIRMAN SOULES: Okay. So what's on the table then is that all motions filed prior to judgment are deemed overruled at the time of judgment; that they will

preserve -- motion for new trial prematurely filed prior to judgment will preserve the error; same, findings of fact or conclusions will operate however they operate; that no motion filed prior to judgment will extend the court's plenary power.

If the court's plenary power is to be extended, it's to be extended by a motion filed after judgment and on or before the 30th day following judgment, in which event the court needs time to consider it, so plenary power is extended; and that no motion filed prior to judgment extends the appellate timetable. To extend the appellate timetable that requires something filed after judgment on or before the 30th day.

That's the proposition. Those in favor show by hands. 13.

Those opposed? Two. Did you vote both ways, Judge Brister?

HONORABLE SCOTT BRISTER: No, no. Not on that. No. I would extend them whether -- if it's a postverdict motion I would let them all extend the timetable, but that's obviously not --

CHAIRMAN SOULES: Well, the real problem with that is the appellate rules are already gone and the train has left, and that's a pretty serious chain of -- it's not anything we can't change later if we find that this creates a problem or a lot of problems.

HONORABLE SCOTT BRISTER: No. It's easy to implement, I think.

CHAIRMAN SOULES: All right. That gives you some help, I guess.

PROFESSOR DORSANEO: Well, I have really one more item.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: Well, really two items. I have got a 5:00 o'clock plane, which is unfortunate, but if I can raise them I maybe won't be here for the whole discussion of it. On page 15 in (5) at the top of the page is -- (c)(5) is probably the main one. The other one is more moving something than otherwise. This deals with the writ of error problem, and there has been a lot of discussion in the committees that have dealt with this about an extended period for attacking certain kinds of judgment.

Judge Guittard drafted a comprehensive proposal that's in the supplemental agenda, but the issue is simply whether we ought to have something like this in the motion for new trial rules in lieu of a writ of error appeal or because there will be no writ of error appeal under the rules as revised, and it really speaks for itself. Is it judgment by default for someone who did not participate in person or by attorney in the actual trial of the case? Is one of the parts of writ of error appeal giving six months after the judgment to file a motion for new trial? The idea -- and then there is "unless a motion has been previously filed" kind of an idea, which I think is self-explanatory.

The simple concept is this: For those people who are concerned about writ of error appeals being eliminated -- and there is some legitimate and substantial concern, if we are going to have any extended period, it ought to be a motion for new trial period rather than a writ of error appeal time period for a variety of reasons.

Judge Guittard, did I say that clearly

enough, or could you help me?

HONORABLE C. A. GUITTARD: Well, yes. I think that's fine. The motivation for putting this in the new trial rules rather than allowing a six-month appeal without any motion for new trial is in line with the general policy of the law to require the complaining party to present his complaint in the trial court where the error can be corrected rather than to take it immediately to the court of appeals where the trial court had no opportunity to consider it, and this would give just as much time as the writ of error provision does now in present Rule 45, but it would give the complaining party additional time to present his matter to the trial court and get it ruled on there, where it should probably be ruled on according to the theory behind this amendment.

PROFESSOR DORSANEO: Now, if I can jump on to (6), just to talk about them together a little bit, we do have a Rule 329 without a small (a) after it that does provide for an extended motion for new trial practice when there is a different situation, you know,

a judgment following citation by publication; and that's currently two years after the judgment was signed. And maybe if somebody wanted to do something about these kinds of situations, they would do something more temporally harmonious; you know, maybe two years and six months, you know, separate are fine, but these are similar problems; and that's why the committee has ended up putting them in the motion for new trial rule.

HONORABLE C. A. GUITTARD: An alternative to that would be to --

MR. MCMAINS: We already have that rule.

PROFESSOR DORSANEO: Yes.

HONORABLE C. A. GUITTARD: An alternative would be to amend Rule 306(a) or our new equivalent of that about no notice of judgment, which says that in no event shall the periods begin more than 90 days after the original judgment or other appeals where order was signed and put that to six months rather than 90 days. Would that give the same relief to the same parties that are now afforded relief under the writ of error rule?

MR. MCMAINS: Why do you need six months?

HONORABLE C. A. GUITTARD: Well, I am not saying we do. All I am saying is there is such an outcry about people that want six months we ought to give it to them in a better fashion than to let them have a direct --

MR. MCMAINS: I understand, but the point basically is if you have got notice of the judgment, I mean, under the current rules the way they currently operate then you are operating -- I mean, why should it be that because it's a default judgment you get to wait another four months?

HONORABLE C. A. GUITTARD: I would --

MR. MCMAINS: That's silly to me, you know, whether it's a postanswer or not, I mean, if you have notice of the judgment; and if you don't have notice of the judgment, you get the extension that anybody else who doesn't have notice of the judgment gets.

HONORABLE C. A. GUITTARD: That

makes sense to me.

CHAIRMAN SOULES: I don't understand what you are saying, and then I want to get to Justice Duncan. What are you --

MR. MCMAINS: What I am saying is that it doesn't make any sense to me to try and back door in the six-month writ of error practice into a motion for new trial practice because the one example they try and use is in a default judgment situation. They are saying that if there is a default judgment, you have got six months to file a motion for new trial as long as you didn't file one. It doesn't have anything to do with whether or not you knew there was one filed -- you knew there was a default judgment the very next day, and I am just saying there is no reason to treat default judgment any different than anybody else.

It is likely, or quite likely, that you didn't get notice of it within the 20 days that you are supposed to get notice of the judgment; and if you don't under 306(a), whether you were there participating or not,

you have got until -- as long as you go through the procedures in 306(a) your times don't begin to run until -- for filing anything until the day that you --

MR. ORSINGER: No, no. Until the 90th day. If you are just default altogether, your timetables are running against you beginning the 90th day.

MR. MCMAINS: Oh, no, no. I agree that they will run ultimately at that point, but the point is if you knew about it earlier, they start to run then. They run from the time that the judge determines that you knew. Okay. Or in no event more than 90 days in terms of the beginning of the period, but the fact that even if the 90 days expires it doesn't matter, you still have additional time; but that just starts the beginning of the period because that's the judgment. You see. It's the beginning of the period, not the end.

CHAIRMAN SOULES: Is that the way it's written in the new --

MR. MCMAINS: It's the way it's written now. 306(a) now operates you have got

90 -- you know, it's got 90 days more in terms of when the period begins.

MR. ORSINGER: So it ends up being 120 days before your judgment goes final if you didn't receive notice of it.

MR. MCMAINS: And well, but then you have got 30 days to file a motion for new trial and then you get all the new times.

CHAIRMAN SOULES: That's only if you do something within 90 days.

MR. MCMAINS: What?

MR. ORSINGER: No. Your timetable starts --

MR. MCMAINS: No. It starts running.

MR. ORSINGER: -- running at the 90th day and then expires on the 120th day.

MR. MCMAINS: That's right.

PROFESSOR DORSANEO: Not exactly.

CHAIRMAN SOULES: Actually there is a case that says you have got to do something within 90 days in order to get the 30.

PROFESSOR DORSANEO: The

rule --

PROFESSOR CARLSON: It just says it can't run after the 90th day.

MR. MCMAINS: Yeah. It says the period doesn't run after the 90th day. That doesn't mean that you can't --

MR. ORSINGER: There was a supreme case that --

MR. MCMAINS: -- do something and make it run.

MR. ORSINGER: -- dealt with that.

CHAIRMAN SOULES: And I think it says that if you don't do something within the 90th day, the 91st day you are out of it. You don't start your appellate timetable after the 90th day. You can't do anything in that 30 days. You are out. After the 90 days you are gone if you didn't do something. If you do something on the 90th day, you have got 30 days. If do you something on the 91st day, you're history.

MR. ORSINGER: It's too late. Yeah.

MR. MCMAINS: But what you do

on the 90th day gets you another 30 days; is that right?

CHAIRMAN SOULES: Because you are filing a motion for new trial.

MS. BARON: Yes. That's right.

CHAIRMAN SOULES: Okay. Justice Duncan.

MR. MCMAINS: I don't think that's what that case precisely says.

HONORABLE SARAH DUNCAN: This committee debated -- all of the committees have debated at length whether to eliminate the six-month writ of error appeal, and this committee in a deeply divided vote recommended to the Supreme Court that the six months writ of error appeal be eliminated. There is substantial opposition to that. Fine.

I don't think that requires that this committee go back and redebate the whole thing, but I do think that we should -- the Supreme Court is going to decide that up or down. I think it would be a good idea if we suggested to the Supreme Court that if they believe the six-month should not be eliminated, contrary to this committee's

recommendation, then it should be a new trial procedure and not a different appeal procedure.

So I don't think we should decide now again whether we think the six months writ of error or six months new trial motion should be permitted or not permitted. I think we should decide that if the Supreme Court decides to reinstate something like the writ of error, we recommend that it be within the confines of a motion for new trial for the reasons that Judge Guittard said rather than in a six months writ of error appeal as it is now.

HONORABLE C. A. GUITTARD: I so move.

HONORABLE SARAH DUNCAN: And that's my motion.

MR. ORSINGER: Do you want to move that until --

HONORABLE SARAH DUNCAN: I second.

MR. ORSINGER: -- the Supreme Court has acted before we tell them about this?

HONORABLE SARAH DUNCAN: No. I

think we already know that there is substantial opposition, however illegitimate it may be, to eliminating the six months writ of error appeal, and I say that with a smile, for the record. But I think all we need to do is write the Supreme Court a letter and say, "We understand there is substantial opposition. In the event the Court decides not to eliminate that type of proceeding, the committee recommends that it be in the form of a motion for new trial filed within six months of judgment rather than in a writ of error appeal."

MR. ORSINGER: Can we send them this language as an exhibit?

HONORABLE SARAH DUNCAN: Sure.

MR. ORSINGER: So that they would see what it would look like.

HONORABLE SARAH DUNCAN: Or we could put brackets around this with an explanatory note. I am not trying to suggest the form. I am just suggesting that we not go through the writ of error debate again.

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: Okay. And I don't think we are.

HONORABLE SARAH DUNCAN: We were.

CHAIRMAN SOULES: We are not going to go through writ of error because it's up there and gone. I mean, the writ of error is broader than a judgment, quote, "by default."

HONORABLE C. A. GUITTARD: Right.

HONORABLE SCOTT BRISTER: Oh, sure. Anything.

CHAIRMAN SOULES: And this is limited to by default. So it's narrower than a writ of error in that respect. On the other hand, it is broader than a writ of error in another important respect, and that is that in a writ of error the error has got to be apparent on the face of the record, and here we are giving a party six months for a new trial on Craddock V. Sunshine Buslines grounds or any other ground that would support a new trial.

MR. ORSINGER: Newly discovered

evidence.

CHAIRMAN SOULES: Well, that's broader.

HONORABLE C. A. GUITTARD: And that's different because that "face of the record" means nothing if, as the Supreme Court has held, you can look at a statement of facts. If "the record" means including the statement of facts, on the face of the record, all it means is as shown by the record; and there has been a lot of confusion about that that we are trying to eliminate.

CHAIRMAN SOULES: Okay. Well, as long as -- that's two differences. This isn't just a replacement of the writ of error practice.

HONORABLE SARAH DUNCAN: In terms of how this is more limited than the writ of error practice, it's my understanding -- and Judge Guittard and Bill and Lee will know better than I. It's my understanding that most of the opposition to deleting the six months writ of error appeal is in default cases.

HONORABLE C. A. GUITTARD:

That's correct. And that's the reason this is limited so. Because it is, frankly, a compromise proposal, and it's designed to meet the concerns of those that are opposing the repeal of old Rule 45.

CHAIRMAN SOULES: Okay. Those in favor of this No. (5) in the event that the Supreme Court wants to continue some relief for a six-month period to a defaulted party.

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: Show by hands.

Those opposed? There is no opposition to that.

HONORABLE SARAH DUNCAN: Rusty.

MR. MCMAINS: I am opposed to it.

CHAIRMAN SOULES: Oh, I'm sorry. I didn't see your hand, Rusty. I apologize. It's 15 to 1 to pass.

HONORABLE SARAH DUNCAN: But only if the Supreme Court decides to reinstate a writ of error appeal.

HONORABLE C. A. GUITTARD: We

are not going back on our previous decision. Right.

MR. ORSINGER: Well, that gets to the question of when do we let them know we have had this vote? Do we tell them in a letter?

CHAIRMAN SOULES: Lee will probably tell them.

PROFESSOR DORSANEO: Lee is right here.

CHAIRMAN SOULES: He can tell them this week.

MR. ORSINGER: Justice Hecht is not here. Does that mean I can't mention it to him when he comes back later?

CHAIRMAN SOULES: No. You can tell him what this vote is at any time.

MR. KELTNER: You just did.

CHAIRMAN SOULES: He may just be committed to other things at the moment.

PROFESSOR DORSANEO: Subject to being corrected by Don Hunt, I believe the remainder of the things in this package such as, for example, the rule on --

CHAIRMAN SOULES: Before that,

Buddy Low had his hand up, and I wasn't seeing him.

MR. LOW: I was just going to say, don't we operate on the premise if they are going to accept our -- I mean, they know if they reject them, I mean, we have got to pass our rules assuming they are going to pass them the way we have done because if they change them, a lot of other things are going to need to be changed. I mean, they are smart enough to understand that. So we have got to assume that it will. Of course, and the record shows what is said here.

CHAIRMAN SOULES: Okay. Bill, did you want to look at anything else? You have got to go to the airport.

PROFESSOR DORSANEO: No. You can look at the -- please feel free to look at anything else, but I think the plenary power rule -- I think it's debatable whether we need one, but if this one in that draft needs to be redrafted given all the other things we have discussed, there wouldn't be any point in going through it now, and I think that's the only one left; is that right, Lee?

MR. PARSLEY: I think so.

PROFESSOR DORSANEO: There may be something else there.

HONORABLE SARAH DUNCAN: There is some little stuff.

PROFESSOR DORSANEO: Well, Rule 330 is there, and I want to look at Rule 330 again. Other committees have voted on occasion to recommend that Rule 330 be repealed and that it be included in the Court Administration Act because it really is talking about exchange of benches and that kind of thing. It's kind of an odd bird at the back of the civil procedure rules, and so I don't think there is anything that's in this package that needs consideration now or that would even be worth considering now.

HONORABLE C. A. GUITTARD: But do we delete this contingent upon the legislature enacting that as an amendment to the code?

HONORABLE SCOTT BRISTER: Yeah. I wouldn't want to delete it and not have it go into the government code because we do need sometimes to sign orders for each other,

et cetera.

CHAIRMAN SOULES: All right. Then the committee has its direction, and we hope to conclude this at our January meeting and send it to the Court, and I know that's probably going to take some stewardship. I hope you will help me.

Next is Richard Orsinger. Richard, do you want to --

MR. ORSINGER: We can talk about anything you want.

CHAIRMAN SOULES: Steve, are you going to be here tomorrow?

MR. SUSMAN: For about an hour and a half, or two hours actually. I will be here 'til 10:00.

CHAIRMAN SOULES: Where is your -- are you ready to complete your report, Richard?

MR. ORSINGER: I am not ready to complete my report, but I am ready to bring back what we have done, which is more than enough to finish today and maybe even tomorrow, and so if you want to take Steve up this afternoon and finish him off and then I

come in behind him, that's fine with me.

CHAIRMAN SOULES: That might be good because the Supreme Court has got the discovery rules, and if we are prompted to do anything about them by what Steve has done in the interim, we probably need to go ahead and address that. And this is your report here?

MR. SUSMAN: Yeah. Yes.

CHAIRMAN SOULES: Okay. Steve.

MR. SUSMAN: We were asked to -- by you, Luke, the subcommittee to meet again, which we did on October 21st to review three volumes of letters that you had received and members of the Court had received on the subject of the discovery rules. What we discovered as we went through them is that the vast majority of them were dated before the summer of '94 when we really began our work and were not directed to any particular thing but more a general --

CHAIRMAN SOULES: I'm sorry. I can't hear you, Steve.

MR. SUSMAN: They were more general. They were not directed to anything in particular we were doing. They were kind

of general comments, and as to those we thought it would be a waste of time for you or us or anyone to go through them one by one and try to explain either why we took their thing into consideration or didn't or how it shows up in our materials, that the preferable thing with those people who sent you a letter prior to the time we began working is simply to draft a letter to them, which we suggest the text of, that says, you know, "We read your letter before we sat down and did our work," which is true. We had that all before us.

"Here is a copy of the proposed rules. Please come back to us with some particular issue if you have one in mind, if we haven't dealt with it." So they can refer us to a particular provision or a particular element. I mean, the first issue, I guess the first question, is that okay? I mean, really I couldn't get the subcommittee, frankly, to sit down and go over all those old letters. They are just so old. They go too far back.

MR. ORSINGER: It would seem to me it would be a complete waste of time to address complaints about a set of rules that

are no longer even going to be in effect. Isn't that what it amounts to?

MR. SUSMAN: That's basically it. Yeah. I mean, they aren't even commenting on the proposed rules or anything even like them. Then what we did is we looked at --

CHAIRMAN SOULES: Well, that's not altogether the case. I mean, people have concerns that are -- they are practice issues, and they may be directing it at a problem with the rule; but if we haven't addressed the issue in the new rules, the problem is still there, and they still might have that concern. So we have got to look at these. We can't just say, well, that's history, and we are not going to deal with it. Because they may have a very good cogent issue that we haven't worked on.

MR. ORSINGER: Would we do that by the letter by letter analysis of it, or would someone go through and say --

CHAIRMAN SOULES: Letter by letter.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: That's not what Steve has done but we --

MR. SUSMAN: I am merely suggesting that these people took the time to write, and we ought to write them and tell them the truth, which is "We read your letters before we sat down and did our work, but we didn't have them before us one by one as we went through them. Okay. Now, we have finished our work. Here is a copy of the proposed rules. Have we satisfied your complaint? If not, please write us again and point us to the particular provisions that you object to that need changing; and if you want to add something, tell us where to add it," which is much more constructive and easier than going through and trying to figure out these old letters.

HONORABLE SCOTT BRISTER: Here, here.

MR. KELTNER: Here, here.

MR. SUSMAN: I mean, I don't care to do it. I mean, we sat down. I couldn't get the group to -- it was a Saturday morning. I mean, they thought their work was

done when they submitted their proposed rules, and obviously it wasn't. So let me go on to the next point, if we can come back to that.

There were letters received since May which we did review in our disposition table. In my handwriting it is attached to the letter. Just in a nutshell they fall into three categories. These people were aware of our work, and there are three categories of the letters we received.

The one comes from the insurance defense Bar that basically objects to the notion of time limits, and that is a standard -- the letters may be in several variations, but it's all basically the same letter. "We represent defendants in personal injury cases," and their basic objection is to any kind of time limits. And that's the letter that appears at SP-199201, and we would propose then sending to these people a standard letter that would be -- call it PID, personal injury defense letter, which would be a form letter that Paul Gold has agreed to prepare to be sent to people who have the same general problem. It's all the same general problem. "We don't

like any time limits. We like things to control our own destiny."

The second category we had letters from were from family lawyers, and I have indicated those are the FL numbers down there on the right, the bottom of the first page of the disposition table, and these are -- Alex Albright is persuaded that she has satisfied the family lawyers. She met with them. She talked to them. You-all remember that as good as I do. I don't know whether that happened or not, but she was going to write a family law letter for Luke to send to the family lawyers telling them how we think we have dealt with their problem.

And the third category is -- and really the most serious attack to the rules comes from the State Bar Committee on Rules, State Bar CRC I call it on this, and their latest that we have -- it's repeated many times through here, State Bar Committee on Rules, and the latest iteration from the State Bar committee is dated September 13th, 1995, and it seems to me we know what they are. They have gone to the Supreme Court, the State Bar

committee's position. We certainly considered them as we went along. A member of the State Bar committee served on our committee.

And I think the main thing that I can -- what's going to happen here is David Beck has requested that Mr. Hamilton and I write an article that will appear in the December Bar Journal critiquing each other's proposed rules. He will critique the Supreme Court Advisory Committee's proposal, and I will critique his critique, and that's due to the printer on Monday. So I have basically written it.

And you-all know the -- I mean, in a nutshell we both agree -- both the State Bar committee and we agree that the best thing in the world is to have a judge who will enter a carefully hand-crafted discovery control plan. They call them something else under their thing, but it's the same thing, that that's the ideal situation and that situation should apply in complex big cases.

Where we differ is what happens if neither the parties agree or the court takes the time to enter such an order or the court

enters an order, even their rules proposes deadlines but doesn't deal with things like the length of deposition, conduct during deposition, the number of interrogatories, what can be asked in interrogatories.

I mean, it doesn't -- their rules don't cover a lot, all of which can be changed under our rules by the court, but I doubt a court is going to be entering a discovery control plan, are going to necessarily unless the parties persuade them to change what lawyers can say during depositions, when they can confer with their clients, when they can stop depositions, the rules for getting a deposition quashed because it wasn't noticed in enough time or at the wrong place.

There is a lot of changes we make in our rules that I suspect will not be opted out of even in those cases where there is a discovery control plan. The State Bar says that, you know, after the state court judge enters what's essentially a scheduling order or docket order, we get them all now, which is time for amending pleadings, adding parties, changing experts, notifying each other of who

the trial witnesses are going to be, and blah-blah-blah.

The State Bar says that once the court does that, that's enough; and if the court doesn't do that, it's back to the same-old same-old; and as you know, our committee, the Supreme Court Advisory Committee, opted for the decision that if the court doesn't do that, it's not back to the same-old same-old. It's back to something different, which is limits on the use of discovery vehicles. That is basically the difference between the two positions.

So they have under their theory of things it was only necessary for them to have one rule, and that is essentially within the first 120 days of the time the defendants appear the court will enter a scheduling order. That seems to me as quite late in the game for the court to be intervening, four months after the defendant answers. I mean, under our regime, in fact, discovery will be two-thirds complete usually by that time. I mean, not two-thirds complete but well down the road by that time. So those are the differences, and they only

have one rule, which is a pretrial rule. They don't have other rules. So I propose to get that article off and done on Monday.

But we have -- and the others are just simply variations of a theme, and I have put the initials by -- Luke, each of the members of the committee have agreed to respond to a particular letter in there and to get them to you by the end of the month, drafts for these letters. Insofar as the kinds of things that we suggest doing, the subcommittee suggests that we do, to facilitate moving these rules forward, they are basically suggested at the bottom of page two of my letter to you and then over on page three, and that's basically where we stand. And I would be glad to entertain questions.

HONORABLE SCOTT BRISTER: Steve, what about the ones on your attachment, for instance, 166(a), summary judgment, wasn't covered in any of the discovery rules, and nothing is noted here as responding to these.

MR. SUSMAN: You mean 166 -- these, all these were in the category of prior to May of '94.

HONORABLE SCOTT BRISTER: Well, yeah, but your rules didn't do anything about summary judgments. I understand not fooling with request for admissions letters because of the change in those, but that ain't --

MR. ORSINGER: This starts with 166(a), right?

CHAIRMAN SOULES: Steve starts with 166, his committee.

MR. ORSINGER: I never comprehended that Steve's committee was even addressing summary judgment.

MR. SUSMAN: We didn't address summary judgment. These letters, they were not -- you have got to look at the volume. I mean, if the rule deals with 166 and there is a discovery issue in the text of the letter that is written, someone has gone through it and has written on it "discovery." The letter may deal with other subjects, summary judgment, pretrial, or something else that's not within the prerogative of our committee, and then -- I guess this is what they did, Luke. You had someone categorize them so that the letter shows up -- the same letter will

show up in a lot of different places. The same letter will show up about six times or eight times even in the material that was discovery.

HONORABLE SCOTT BRISTER: Sure.

MR. SUSMAN: Because it dealt with one of the discovery rules and then another discovery rule. So --

HONORABLE SCOTT BRISTER: All I am saying is when are we going to talk about the summary judgment rule and when are we going to talk about the pretrial conference rule and whose committee is looking at like Anne's article, which I just looked at about suggested changes to the summary judgment rule?

MR. SUSMAN: And very importantly is the pleadings. I mean, we let you know that was one of the very important parts of the discovery package was -- and I told everyone if anyone has concern about the rules, it's one of the trade-offs for doing things in a short period of time and completing them. In other words, at some point in time the plaintiff has got to put up

or shut up.

CHAIRMAN SOULES: We have voted not to change 166, and that is -- Steve's jurisdiction starts with 166 and ends at 209 and includes summary judgments.

MR. ORSINGER: There has been no committee work on summary judgments, right, Steve?

MR. SUSMAN: We have not done anything on summary judgments.

CHAIRMAN SOULES: No, I know. But that's what we have to move through now. The discovery part of your work we hope is done, and that gives us the answers to a lot of these letters which I have to get out, and 166 has been done, but --

MR. SUSMAN: 166 was not --

HONORABLE SCOTT BRISTER: My recollection was we just pulled it off the table.

MR. SUSMAN: Yeah.

CHAIRMAN SOULES: We voted no change.

HONORABLE SCOTT BRISTER: No. I don't think so. Because I sure didn't vote

for it because I wanted to make some significant changes on it.

MR. SUSMAN: The footnote, you know, Luke, the footnote that's in the rules that went to the Supreme Court says, "This rule" -- on 166, pretrial conference. "This rule is no longer part of the discovery subcommittee's report. It is included to show changes made during the July SCAC meeting, but the rules should go to the appropriate subcommittee for review."

That's what we decided. I mean, we discussed it. People did have changes, and they are reflected in this draft that went to the Supreme Court but with the promise that some other subcommittee is going to look at it. And we have the same things on Rule 63, 66, 67, and 70, which are, we say, "tentative drafts of new amendment and pleadings rules that will work with the discovery rules, but the subcommittee that is to address pleadings is to consider these rules in light of the discovery rules."

CHAIRMAN SOULES: Well, your jurisdiction is 166 through 209, and we have

dealt with the discovery.

MR. SUSMAN: Well, we will go back and do this. Well, you have -- if you want to talk about, I mean, 166 that you see here in our July 27th draft is what this committee proposed, and somehow -- we thought that, too, Luke, but somehow at the meeting, I don't know. Do you-all remember what happened? Someone like said it --

HONORABLE SCOTT BRISTER: My recollection was it was getting too complicated, and I thought it was you, Luke, but it may have been somebody else suggested this was not at the heart of what you were trying to do with the subcommittee stuff, why don't we basically just table it and put it off and we would discuss it another day.

MR. SUSMAN: Maybe ours is the appropriate subcommittee.

CHAIRMAN SOULES: We will find out. We will find out. We will get the record on that and get it cleared up, but I mean, that doesn't stop anything. But we have got this so-called dated information, which is not even on the list here. We have got these

many letters plus the supplemental letters. (Indicating)

MR. SUSMAN: What's that?

CHAIRMAN SOULES: There is this many letters that are dated back '91, '92 that we have got to -- '93 that we have got to get at, if I have your whole report. Does your report start at 166(a) supplement page 229?

MR. SUSMAN: No. It goes back. I took that page off. There was -- Luke, there was more pages --

CHAIRMAN SOULES: Okay.

MR. SUSMAN: -- there that were sent to me to complete. I don't know where they are. I can probably find them somewhere.

CHAIRMAN SOULES: See, I had Holly go through all the agendas and make everybody a grid that --

MR. SUSMAN: They go back earlier. There was another page like this or maybe two pages, but they are all in the same category, all back to 1992, February '92.

MR. KELTNER: And, Steve, the task force answered some letters, a significant number, well over a hundred I

would say, telling them that we were going along with those things. So I think probably a number of those letters have already been responded to in one way or another that predated the subcommittee's report.

MR. SUSMAN: Luke, could I get a couple of things clarified? No. 1, do we want -- I mean, I could make a copy so you-all could all get a copy. I can go right out now and make a copy of 166 as we proposed it, and we can talk about it tomorrow and finish it, if that's within our jurisdiction. I mean, it's one page here, and that's what we went over and proposed but got pulled off. I guess that was the reason. Leave that, it's not correctly part of -- we were hot in the middle of some other debate, and we can finish it up.

And then the second question is pleadings. Who does pleadings, amended pleadings?

MR. ORSINGER: I do pleadings, and we have already looked at it, Steve, and Alex is on my subcommittee --

MR. SUSMAN: Good.

MR. ORSINGER: -- as a helping

agent but not as a principal weight lifter, and we are coordinating those preliminary rules and deadlines for special exceptions, amended pleadings, and we are using discovery cutoff period. We are counting back from the discovery cutoff period, not back from the trial date.

MR. SUSMAN: Good.

MR. ORSINGER: And the rules committee of the State Bar is counting back from the trial date. And so my subcommittee report is going to be, to lay it before this committee, are we going to count backwards from the discovery cutoff, or are we going to count backwards from the trial? That's a very important distinction, and it's interrelated to the discovery rules.

CHAIRMAN SOULES: Well, so I am clear on this, I need direction from your committee how to handle every one of these letters, each individual letter, and every subcommittee chair has that responsibility. Because we have to --

MR. SUSMAN: I have given you what I prefer doing, what I think if I were

you what I would do. If you want me -- if you don't want to do that --

CHAIRMAN SOULES: To just write them and tell them it's --

MR. SUSMAN: A nice letter. You put it on a machine that's just personally addressed "Dear Joe: We have studied your letter of so-and-so addressed to so-and-so." You fill in the blank, "that was submitted to the subcommittee, which began its work after your letter was received. They have produced the enclosed" -- hell, I wrote the letter, I mean.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: I mean, that's what I would do now. If you want me -- I don't even want to suggest that because I don't want to say "no."

HONORABLE SCOTT BRISTER: Yeah. Don't volunteer.

MR. LOW: Can I make a suggestion on this letter?

HONORABLE SCOTT BRISTER: Luke, I would suggest -- I don't know if it's another subcommittee would be appropriate or

not, but I know I have read and heard various proposals about summary judgment, and I sent, you know, just a two-line to you last week, which is incredibly late; but it's just based on things I have heard around, and somebody needs to look at this and draft some stuff.

You know, I mean, I have even heard rumors, you know, the question of should we go to some or all part of the Federal standard, and you know, we need to discuss that and maybe get together some drafts in case we want to shift some burdens on summary judgments.

And my personal pet peeve, that we should change the rule that tells me don't dare put a reason I'm granting the summary judgment order in it, because if I do that and I am wrong on that one but right on another one, we are going to get to do it all over again, which has become the foundation for teaching judges at new schools -- at new judges school never to give any reason for anything you do, and it seems like to me we need a subcommittee to draft that, and I don't think it's -- they have worked enough extra weekends. Maybe somebody else ought to pick up that duty.

CHAIRMAN SOULES: That's fine, I mean, if Steve prefers that these other areas be done by a different subcommittee.

MR. SUSMAN: Is that within my -- is the summary judgment rule within my area?

MS. GARDNER: Yes.

CHAIRMAN SOULES: Right, 166(a).

MR. SUSMAN: Hell, we would love to do it. I mean, we just didn't know. It is?

CHAIRMAN SOULES: Yes. But you have done a hell of a lot of work.

MR. SUSMAN: No. I'd love to do it.

CHAIRMAN SOULES: Nobody is questioning that.

MR. SUSMAN: I mean, I'd love to be involved in it, and I think the committee would be happy to do it, but we just haven't known that that was part of our deal. It's not part of, quote, "discovery."

CHAIRMAN SOULES: Right. But your subcommittee has always been 166 to 209.

Discovery has been obviously the focus of it because the first thing we had to do was get through the task force --

MR. SUSMAN: We will go ahead -- we will do it.

CHAIRMAN SOULES: -- and generate the issues and generate the work product the Supreme Court wanted on discovery.

MR. SUSMAN: We will give you a report by the next meeting. Brister, you can come.

CHAIRMAN SOULES: I am not willing to --

MR. SUSMAN: I don't want this project to fall in the wrong hands, Brister. You can come as an ad hoc committee member. This is not going to fall into the wrong hands.

MS. GARDNER: Luke, there is already -- excuse me.

CHAIRMAN SOULES: Go ahead.

MS. GARDNER: There is already a proposed new Rule 166(a) drafted that's in the materials.

CHAIRMAN SOULES: Right.

MS. GARDNER: By the rules committee.

CHAIRMAN SOULES: By the court rules committee?

MS. GARDNER: Right.

MR. SUSMAN: What is that?

MS. GARDNER: There is a proposed rule that's drafted that's in the materials for 166(a) that the rules committee has proposed. So that's a good start. I think it's a good rule.

MR. SUSMAN: Okay.

MS. GARDNER: A good proposed rule, myself.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: Luke, without addressing the summary judgment and other things, may I make this suggestion? I notice in Steve's letter he invites them to comment. It's easy to comment and say, "Well, you don't give enough time for this or that," but if somebody is interested in it, they should then state what it is they object to and correct it rightly the way they say it should be because it's so difficult to hit a sprinkler, and you

have covered everything.

We do that in the ethics. We get these wild inquiries and so forth and say, "Great. Brief it for us and tell us. Write an opinion." Well, sometimes we don't hear back. So they shouldn't be able to just criticize. That's easy to do, but they should be required to take time and then when they get the letter we can respond to it.

With regard to whether Steve should have to address each issue that the State Bar committee on their rules, that's pretty impossible because it's so broad. It's each rule, and if the Supreme Court wants both suggestions, they can. If they want a subcommittee, like the House and the Senate get together, to examine, they can. But this committee started out with the rules based on the way they were, so it would be difficult to show how this differs from theirs, theirs differs from this. They are not numbered. It would be a timeless task, a hopeless task, and fruitless, and I don't think they ought to have to do it. That's it.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: Well, so could I suggest this, Luke? Could I make a copy of this 166, and we discuss it tomorrow morning?

CHAIRMAN SOULES: No.

MR. SUSMAN: You don't want to do it?

CHAIRMAN SOULES: I am going to decide what to do about the agenda and what to do about the situation of handling these letters. This is not the State Bar Rules Committee. The State Bar Rules Committee has a representative on this committee, and they are getting information or it's available as it develops. I am more concerned about, you know, the letter from Tony Lindsay, a judge of a district court who may or may not still be a judge. I don't know.

HONORABLE SCOTT BRISTER: Yes.

CHAIRMAN SOULES: Here's one from Tom Fleming at Atlas & Hall, making some suggestions about 166. Here is one from Jon Nichols, Piro, Nichols & Lilly.

These people have taken their time --

MR. SUSMAN: I will be glad to do it.

CHAIRMAN SOULES: -- to ask us to look at a problem that they felt they had. Now, I realize that is probably back in '90 and '91 and '92, but the committee did not meet until '94 or '93. I can't remember when we started.

MR. SUSMAN: I will be glad to take the whole bunch and do it and prepare a response.

CHAIRMAN SOULES: Just whatever you suggest we say to these people.

MR. SUSMAN: Okay.

CHAIRMAN SOULES: And that's what these grids are that Holly sent out, is it takes you right to the page and whatever volume it is and, you know, what do you recommend we do and why and then we can write these people and tell them what we did.

MR. SUSMAN: Fine.

CHAIRMAN SOULES: And we have got to do that across the board because I think we want to encourage people if they have a problem, this committee has always -- the Court has always been open to inquiries and suggestions about how to improve the practice,

and some of these people have probably forgotten that they wrote, but we shouldn't forget that they wrote.

MR. KELTNER: Luke, just again so you know, everything that was done on the task force I wrote them back or called them, one of the two. So everything that comes up through the end of our report I think has already been done, and some of them would say, "Thank you for your suggestion. We will be considering it," and we probably at this point need to tell them what we have done. But a lot of them, the ones -- especially the ones, the epistles, we called and told them what the thought process was and what we did.

Now, the problem is the task force is different, and obviously radically different, from what the subcommittee did. Maybe we owe those people that wrote in '92 and '93 an additional letter at this point saying, "Here is the rule. See what you think. Let us know." And perhaps the Court wants us to do that, a second letter to them as well.

MR. ORSINGER: If I can toss in two cents here, it seems to me we have got two

different things we are doing. No. 1, we are acknowledging the time that they took to write the letter to let them know that the Supreme Court is listening to their concerns about law practice, and that's an important political or social aspect of what we are doing.

The other -- which is addressed by letters that David's task force wrote, but the other part of it that's not addressed by the task force letters is, is there a kernel of good thought in there that a problem has been presented that is not cured even under our new discovery rules and that if we read that letter we would say, "Damn, you know, that was a problem under the old rules, but it's still a problem under the new rules, and we ought to fix it by doing the following." And relying on David's previous letters, it will make them feel good, but it won't be sure that we are evaluating the continuing vitality of their suggestion.

CHAIRMAN SOULES: That's right. Both of those things are very important, and so we have got to get to -- as I have said for a long time, we have got to get to this agenda

and understand it and respond to it, and if it causes us to change some things we have previously recommended while we have been focused on dealing with task force recommendations then we need to get that information to the Court before the rules are promulgated.

MR. SUSMAN: We will do it.

CHAIRMAN SOULES: Let me try to think what's -- I think, Steve, before we get -- we can get into some new issues in your subcommittee, but maybe the first ought to be to go through this history of letters and report to us what you think we ought to do about it, any changes in the discovery rules that we sent to the Court. If there is anything in there, as Richard said, a kernel of wisdom that we should utilize, and if so, where so we can -- because I think the Supreme Court has not yet dug in seriously into the discovery rules. Is that right?

JUSTICE HECHT: No, we haven't.

CHAIRMAN SOULES: They haven't had an opportunity. They have been working on the appellate rules very diligently.

JUSTICE HECHT: Probably next month. But they have asked me about the summary judgment rule a couple of times. So I am glad to know that Steve is going to go to work on that.

MR. ORSINGER: Luke, I am prepared to pass out my disposition chart.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: At least then people could take it home with them. I suppose everybody is probably going to do something besides study that.

CHAIRMAN SOULES: All right. You have got Rules 15 to 165, right?

MR. ORSINGER: Do you need to say something by way of introduction, Luke?

CHAIRMAN SOULES: Only that I think this and the 300 series rules probably need to be prioritized, along with the review of the letters for the discovery because that's gone to the Supreme Court. So we need to get that current. Judge Guittard's review of the appellate grid for the same reason, the appellate rules have already gone, and we need to -- or maybe someone else is looking at

that. And the -- well, to me the items that have priority are the 15 to 165, the 300 series, and the letters that address the rules that we have already sent to the Court. Then we can take the others up on a more casual basis, on a more delayed basis. So I think we ought to get to yours right away, Richard.

MR. ORSINGER: Let me respond to that by saying that our committee had dwindled down in membership and was just reinnervated at the last Supreme Court Advisory Committee meeting, and we have met twice as a subcommittee, but we have not been able to do all of our work. So this disposition chart here has explained every single letter, but it doesn't have recommended actions on every single letter. It just has recommended actions on a lot of the letters and then our next subcommittee meeting we will try to get recommendations on all of the letters.

Now, having said that, these letters in my view don't really address the big problems we have between Rules 115 and Rule 165(a), and I think that those problems are being

generated by the subcommittee analysis process and the fact that we have decided to build upon Bill Dorsaneo's rules task force recommendations. And the rules task force recommendations call for a restructuring of the rules in a way that gathers together rules that have been splintered throughout over history and consolidating all of the rules that affect the district clerks and putting them in one area where the district clerks can deal with them and the lawyers don't deal with them.

And that's a rewrite process that is going to be a lengthy process and will not be finished by the next Supreme Court Advisory Committee meeting. So if this is a big priority to get this to the Court, I am going to have to apologize right now that we can share our progress as we go, but it's not going to be finished in 60 days, and that doesn't mean that we don't have a lot to talk about and can't accomplish a lot. I just think that our task will not be completed until after we have basically gathered rules together, convinced everybody that we have

assembled them in a sensible way, that we have consolidated them without changing the law hopefully, and I think that may be as difficult a process as the discovery.

CHAIRMAN SOULES: What guidance do you need from the committee on any issues?

MR. ORSINGER: Well, what I would like to do is present to the committee the work that we have done and find out whether we have acceptance or rejection on that, and it's not -- obviously we can't do that this afternoon, but we can go into that tomorrow.

Let me just tell you from the standpoint of highlights of actual proposed rule language that we have Bill Dorsaneo's overall task force reorganization plan, which I would like for Bill to describe tomorrow and tell everybody what the rules task force thought about the structure of the rules and how we ought to restructure them so that they are easier to read and easier to use and then see if we can get a consensus on that.

Now, I was told earlier today that this full committee had already, if you will,

adopted the new structure of Bill Dorsaneo's task force. I didn't remember that. Maybe it would have been two years ago or something like that, but at least we ought to revisit it for purposes of remembering it; and if not, then maybe take a vote on it to see because our subcommittee has voted to take the task force recommendations about restructuring the rules not as a article of faith that we have to slavishly follow but as a working hypothesis that we are going to use, and I wanted Bill to present that.

Luke, your letter that you sent out for this meeting contained -- at least my copy of it contained Bill Dorsaneo's letter to Justice Hecht back in June of '92, I believe it was, or well, I had that out a minute ago, and I apologize. Here it is. July 7th of '92 was kind of a summary enclosure from the task force to Justice Hecht, and then later on Bill submitted his final task force, and that was November 8th of '93. So that was almost a year and a half later.

Now, I don't know for sure that everybody got this, but I would be curious to know.

It's dated July 7, 1992, to the Honorable Nathan Hecht from William V. Dorsaneo, Chairman, Task Force on Revision of Rules, and its probably about -- well, it's 43 pages long. Does anybody get that? Do you remember, Luke, if you mailed that out to everyone?

HONORABLE SCOTT BRISTER: No.

CHAIRMAN SOULES: I don't.

HONORABLE SCOTT BRISTER: No.

MR. ORSINGER: Okay. Then you don't have that to work with, but what I do have is I have Bill's later report that while it was a thick task force, it was probably an inch thick, it did have a letter cover letter on it that explained the basic suggested structure. And that's only five pages long, and I have copies here for everybody, and I thought that we would look at that and listen to Bill about his explanation of the new structure of the rules and then decide whether we want to go down this road or not. Because the subcommittee is prepared to go down this road using this structure if the full committee will buy it.

Okay. The next thing is we have taken on individual rules that we can discuss. One of them is the rule on recusal of judges that was prompted by the very first item in the disposition chart here about matters for recusal.

Let me set the stage. Right now a motion to recuse or disqualify has to be filed at least 10 days before trial of the first hearing. An issue was raised by Justice Bleil -- I think I pronounced that correctly -- Bleil, about what happens if the issue arises within 10 days of trial. Are you foreclosed from doing it? And I believe that his court of appeals ruled that there is an unwritten good cause exception to file motions to recuse on matters that arose within 10 days of trial. He suggested a change. We have made a change on the recusal and disqualification. Actually, it goes a little bit further than that, and it may be controversial.

We have also made a change to Rule 63 on amendments and responsive pleadings, most particularly when the deadline is for that,

and I have that here. It hasn't been passed out, and I will just tell you right now that leave, you can freely amend up to the 45th day before the end of the applicable discovery period, and after that it's with leave of court. And if leave is granted, the court is authorized to permit additional discovery based on that amended pleading.

We also have an amendment to Rule 47, which is a pleading rule that states what you have to put in your pleadings, and I have a copy of that here, too, and we have added to it what we think is in the case law, a requirement that your pleading contain a short statement of the cause of action -- and this is new -- stating the legal basis for each claim and giving a general description of the factual circumstances sufficient to give fair notice. I'd like for to us look at that language and discuss it.

And then we have -- Bonnie Wolbrueck has prepared a number of consolidated rules that are of concern to the clerks' duties in connection with the filing of lawsuits, the maintaining of records, the mailing of

notices. Those rules were kind of scattered throughout. We have consolidated them down. Most of them have been run through Bonnie's connections in the district clerk area so that we know that they are acceptable to the clerks, but we have to look at them. We are completely eliminating some procedures, like reading the minutes of the court at the end of the term and stuff that nobody does anyway, but we need to look at that and see what we are doing and get approval on that.

And then the last thing that I have prepared ready to talk about is Chip brought -- did you?

MR. BABCOCK: Uh-huh.

MR. ORSINGER: Brought a proposal about uniform statewide rules on the use of cameras in the courtroom. Now, as it presently stands, cameras can be approved on a local basis subject to approval by the Texas Supreme Court, and they are -- appear to be largely patterned after the rules adopted first in Dallas. Right, Chip?

MR. BABCOCK: (Nods affirmatively.)

MR. ORSINGER: But they do vary some, and there is some desire to make them uniform across the state so you don't get these little idiosyncrasies depending on what county you go to, and so we have undertaken to write a set of uniform rules largely patterned after the Dallas rules --

MR. BABCOCK: Dallas and Houston.

MR. ORSINGER: Dallas and Houston combined, that we are going to propose would be uniform statewide, and that means we are going to be stepping on some toes. We are going to be changing some rules if we do it; but the advantage is, is that it's uniform then. It doesn't depend on local practice.

And that's all that we have that's prepared for us to talk about right now other than the disposition chart, which you can see if we can go through that, Luke, and that may take several hours in which we have characterized what the letters said; and those that we have acted on, we have made -- we have either rejected it, we have said that we agree with it and we are going to generate a rule to

reflect the change, or we have already generated the rule to reflect a change; but that's work in progress.

CHAIRMAN SOULES: Okay. Is the intervention rule and the joinder of parties, that's all in your bailiwick, right?

MR. ORSINGER: It is, and Bill Dorsaneo has prepared a handout here, which I just received this morning, that is not written from the standpoint of a new rule with a strikeout on what was the old language and an underline on the new language, but it does explain his concepts of what we do with Rule 90 and 91.

Well, that isn't joinder, is it? Pardon me. No. We don't have anything written right now on the joinder of parties. That's something that Bill is concerned with and has agreed to rewrite, but I don't have anything to give you to look at just yet, but we certainly could talk in concept about what the committee suggestions are, but I don't have the subcommittee work product in written form to hand out.

CHAIRMAN SOULES: It seems to

me probably like Richard's committee work needs to be given priority because it's got to square with the discovery regime. Joinder of parties, joinder of claims, I guess the pleadings rule really takes care of that, the concerns we had about what might complicate the operation of the discovery rules, and that's probably what we need to go into on some priority basis meeting by meeting as you can generate work for us to do.

MR. ORSINGER: Well, we can address the interface with the discovery rules probably tomorrow.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: Because we have already drafted some language, and we have some other in principle; and we could agree, for example, that the deadline for joinder is 40 days before the close of the discovery window, 90 days before, or 60 days before trial. We can vote on that and then we will go write the language later. I mean --

CHAIRMAN SOULES: Does anyone see or feel that anything else on our docket has any higher priority, or should we go right

to Richard's work tomorrow?

Richard's work tomorrow. Okay. That's what we will do, and that will probably take us the morning.

MR. ORSINGER: I can't imagine that it wouldn't.

CHAIRMAN SOULES: Because you have got a lot of work already done.

MR. ORSINGER: Right. And some of it may be controversial. Some of it may be controversial.

CHAIRMAN SOULES: We will be in this room tomorrow as far as I know, so you may leave things if you wish. We are scheduled here tomorrow, aren't we?

MR. PRINCE: 8:00 o'clock?

CHAIRMAN SOULES: 8:00 o'clock. And we will adjourn at noon. Thank you very much.

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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 November 17, 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 $1,279.00.

CHARGED TO: Luther H. Soules, III.

Given under my hand and seal of office on this the 30th day of November, 1995.

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