MINUTES OF THE
SUPREME COURT ADVISORY COMMITTEE
MAY 10-11, 1996

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock on Friday, May 10, 1996, pursuant to call of the Chair.

Friday, May 10, 1996:

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

Members present: Luther H. Soules, III, Alejandro Acosta, Jr., Prof. Alexandra W. Albright, Honorable Scott A. Brister, Professor Elaine A. Carlson, Professor William V. Dorsaneo III, Sarah B. Duncan, Hon. Clarence A. Guittard, Michael A. Hatchell, Donald M. Hunt, Tommy Jacks, David E. Keltner, Joseph Latting, Russell H. McMains, Anne McNamara, Robert E. Meadows, Richard R. Orsinger, Hon. David Peeples, David L. Perry, Anthony J. Sadberry, Stephen D. Susman, Paula Sweeney and Stephen Yelenosky.

Ex-officio Members present: William Cornelius, Paul N. Gold, O.C. Hamilton, David B. Jackson, Doris Lange, Michael Prince and Bonnie Wolbrueck.

Members absent: Charles L. Babcock, Pamela Stanton Baron, David J. Beck, Ann T. Cochran, Michael Gallagher, Anne L. Gardner, Charles F. Herring, Franklin Jones, Jr., Thomas S. Leatherbury, Gilbert I. Lowe, John H. Marks, Jr., and Hon. F. Scott McCown.

Ex-Officio Members absent: Hon. Sam Houston Clinton, W. Kenneth Law, and Hon. Paul Heath Till.

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

Chairman Soules brought the meeting to order.

Lee Parsley provided a report regarding the changes made by the Supreme Court of Texas to the Advisory Committee's Proposed Jury Charges Rules.

A discussion was had regarding Rule 278 and the fact that the Court has chosen to go to a practice requiring an objection only. Chairman Soules advised that it is the charge of the committee to advise the Court whether we feel that the policy they have committed themselves to is articulated in a workable way in the language of this rule. Paula Sweeney addressed the issue as Chair of the subcommittee.

Discussion continued.

Professor Dorsaneo proposed taking the language that's in the fifth line of paragraph (a) "provide the court reasonable guidance in fashioning the charge" and adding it to the second sentence in (b). Discussion followed.

Justice Guittard proposed that the first sentence of (b) read "A party may not complain of any error in the charge unless that party makes a request as provided by paragraph (a) or objects thereto before the charge is read..." Discussion followed.

Discussion continued regarding Rule 278 and the sanctions issue.

David Keltner proposed eliminating the sanction provision in the comment. He indicated that if the Court wants a situation where we preserve by objection he suggested leaving (a) as is and make Professor Dorsaneo's changes in (b).

Joe Latting made a motion to suggest to the Court that it remove the reference to sanctions in the comment and let the rule stand as it is otherwise. Judge David Peeples seconded the motion. Discussion followed.

A vote was taken and the committee voted unanimously to recommend to the Court they delete the comment.

Richard Orsinger brought up a problem with a parallel construction issue. Mr. Orsinger proposed adding the word "written" in (b). A vote was taken resulting in a vote of 2 to 2.

Professor Dorsaneo brought up the discussion regarding the reasonable guidance standard. Discussion followed.

Judge David Peeples proposed adding on line 28 after "paragraph (b)" the following language "which gives the court reasonable guidance."

Professor Bill Dorsaneo made a motion to add in the fourth line of paragraph (b) after "An objection must...complaint is made" the following language "and provide the court reasonable guidance in curing the error." David Keltner and David Perry seconded the motion.

A vote was taken and by a vote of 8 to 7 the motion failed.

Richard Orsinger seconded David Peeples motion to add the duty of reasonable guidance to paragraph (a). Paula Sweeney seconded the motion.

Judge David Peeples amended his motion to say "in an objection which gives the court reasonable guidance is made pursuant to paragraph (b)." Discussion followed.

A vote was taken on Judge Peeples motion and by a vote of 14 to 4 the motion carried.

Professor Dorsaneo brought up for discussion Rule 277(b) and advised that it continues to create interpretive difficulties in its last three sentences. Discussion followed. Lee Parsley advised that this language is that which was submitted to the Court by the Committee with the exception of the fact they collapsed a series of paragraph into paragraph (b).

Carl Hamilton brought up a question regarding Rule 278(e) saying that a claim that there's no evidence to support the submission can only be made after the verdict. Discussion followed.

Chairman Soules advised the Committee will send the changes voted on to the Supreme Court so they can take final action on the Jury Charge Rules.

Professor Bill Dorsaneo and Lee Parsley provided an interim report on the Appellate Rules and the work being done by LawProse and Bryan Garner.

Justice Cornelius inquired whether the correspondence from the Beaumont Court of Appeals had been considered regarding Rules 4(e), 74(a) and 91 regarding the requirements that all parties to the trial court's judgment be served with all papers and orders and briefs even though they may not be parties on appeal. Lee Parsley advised that the Supreme Court had discussed the letter but has not concluded what to do.

At the suggestion of Richard Orsinger and Mike Hatchell, Chairman Soules requested that Lee Parsley provide a memorandum of policy differences between what the Supreme Court is sending to Mr. Garner and what the Advisory Committee send to the Supreme Court.

Chairman Soules also requested Mr. Parsley identify the still open issues which the Supreme Court is considering.

Don Hunt provided the report on Rules 296-300.

Mr. Hunt explained the changes to TRCP 297(c). There being no opposition the changes were passed unanimously.

Mr. Hunt explained the changes to TRCP 299(b). Discussion followed. There being no opposition the changes were passed unanimously.

Mr. Hunt explained the changes to TRCP 300(b)(3). There being no opposition the changes were passed unanimously.

Mr. Hunt explained the changes to TRCP 300(c) and the differences between alternatives 1 and 2 to 300(c)(3). Discussion followed. Professor Dorsaneo proposed deleting the word "final" in the first line of (c) and changing "The judgment" to "A judgment". The subcommittee recommended Alternative 2. A vote was taken and by a vote of 13 to 2 the recommendation was approved.

Mr. Hunt explained the changes to TRCP 301(b)(2). Discussion followed. Professor Dorsaneo proposed using "inaccurately states controlling law" rather than "fails to express." Mr. Hunt made a motion to change the language to read "unless the movant waived the application of controlling law by failing to preserve a complaint that the court's charge inaccurately expresses controlling law." Professor Dorsaneo proposed "affirmatively misstates" instead of "inaccurately expresses". Discussion followed. Mr. Hunt accepted the proposal. Discussion continued.

A vote was taken on substituting "affirmatively misstates" for "fails to express". There being no opposition the changes were approved.

David Keltner made amotion to remove the entire "unless" clause. Professor Alex Albright seconded the motion. A vote was taken and by a vote of 9 to 7 the "unless" clause will remain.

Mr. Hunt explained the changes to Rule 302(d)(2) including the fact that it is a rewrite of Rule 327. Discussion followed. There being no opposition the changes to Rule 302(d)(2) were approved.

Mr. Hunt explained the changes to Rule 304(e)(8). Justice Guittard pointed out that alternative 1 (which was previously approved) to paragraph 8 was in conflict with TRCP 47(c) therefore they have an alternative 2. Discussion followed. Mr. Hunt removed alternative 2 from the table.

Mr. Hunt explained the changes to Rule 305 including Alternatives 1, 2 and 3. Discussion followed. Professor Dorsaneo moved for the adoption of Alternative 3. Mr. Hunt seconded the motion. Discussion continued. Richard Orsinger commented that the request for findings of fact and conclusions of law after a nonjury trial gives you the extended appellate timetable but it doesn't give you the extended plenary power, which it should. Mr. Orsinger asked what's the logic in saying that a request for findings has the same effect on the appellate timetable as a motion for new trial, a motion to modify or a motion to reinstate but it doesn't have the same effect on the trial court's plenary power. Discussion followed.

Richard Orsinger proposed the following change in Rule 305, Alternative 3, paragraph (b)(2). Take the "or" out of the second line where it says "the judgment, or motion to reinstate", so that language would read "motion to reinstate a judgment after dismissal

for want of prosecution, or a proper request for findings of fact." Discussion followed. A vote was taken and the committee voted unanimously for those changes.

A vote was taken on Alternative 3 of Rule 305 with that change but otherwise in its entirety. There being no opposition Rule 305 was approved.

Chairman Soules advised that Rules 296-331 have been finished.

Justice Nathan Hecht presented the report on Section 9, Petition for Review and Response in the Supreme Court". Discussion followed. Don Hunt proposed changing the title of paragraph (b)(5) to "Jurisdictional Basis" and limit it to a very simple statement of the statute that gives you jurisdiction. Discussion continued.

Chairman Soules proposed "A statement concerning jurisdiction is not to exceed one page". Discussion followed.

Justice Guittard commented that he felt it ought to be made explicit in paragraph (c)(5) that the respondent may assert independent grounds of affirmance. Discussion followed. Elaine Carlson proposed "indicating the legal basis supporting jurisdiction." Discussion continued.

Steve Susman commented that when talking about length we should say what is included within the 15 pages rather than what is excluded. Discussion continued.

Rusty McMains brought up the discussion of amicus briefs and commented he would favor a system which says "The Court will not receive or file amicus briefs on the petition." Discussion followed.

Don Hunt asked for confirmation that the process is going to be that if the court of appeals makes the error for the first time you must file a motion for rehearing there. Justice Hecht confirmed that is the process. You have to preserve all the errors all the way up at the level at which it occurs. Discussion continued.

Carl Hamilton commented that paragraph (b)(6) should state "motion for rehearing for matters that originate in the court of appeals." Discussion continued.

A report was given by Justice Hecht on the timetables for approval of the appellate rules.

Chairman Soules asked for any other comments on the functioning of the petition for review process.

Mike Hatchell commented he felt that there should be a limited eight-page general reply to the petition and that the Court should have the record. Discussion followed.

Chairman Soules asked if there was anything in the rule where it says if the error is new in the court of appeals there has to be a motion for rehearing filed. Discussion followed. Justice Duncan advised that the committee had previously voted and the consensus was to continue to require motion for rehearing. Chairman Soules indicated that the Supreme Court says they are going to change that, that they are going to eliminate it sometimes. Chairman Soules asked that given the change does the Committee want to make a different recommendation. Discussion continued.

Professor Dorsaneo recommended leaving (b)(6) alone but be clear that it does not require a motion for rehearing because the error originated in the court of appeals. Discussion followed.

Chairman Soules proposed putting in a sentence that says no motion for rehearing in the court of appeals would be required as a prerequisite to filing a petition for review. Justice Duncan made a motion adopting that language. Discussion continued.

Chairman Soules called for a vote to get a consensus on who agreed that the motion for rehearing in a court of appeals should never be a jurisdictional prerequisite to a petition for review. The committee voted 11 to 3 to do away with motion for rehearing as a prerequisite to petition for review.

Mike Hatchell brought up for discussion the fact that he feels the record should go up with the petition for review. Chairman Soules asked whether the Court would entertain a procedure by which either party could send the record if it chose to. Justice Hecht didn't know. Discussion continued.

Chairman Soules called for a vote on the proposition that the record would never go to the Supreme Court unless the Supreme Court requested it, but that the parties could prompt consideration of a transfer of the record to the Supreme Court by a motion. The committee voted 7 to 4 in favor of the proposition.

Chairman Soules indicated there was a problem in Rule 130(d). Discussion followed.

Justice Duncan asked if there was a reason for choosing good cause rather than reasonable explanation in the amendment provisions. Discussion followed.

Justice Guittard asked why we don't adopt the same procedure and standard here as in the court of appeals regarding when a petition or brief is not prepared in conformity with the rule. Discussion followed.

Mike Prince commented he felt that the 15 pages is too short and urged that consideration be given to 25 or 20 for the petition.

Justice Guittard brought up a discussion regarding a problem with Rule 134(7) regarding settlement provisions. Mike Hatchell raised the question that if some phase of the controversy is settled all parties ought not to be required to join in the motion. Discussion followed. Justice Duncan commented that the whole business of settlement within the appeal context is something that needs to be worked out in more detail than in this rule or the court of appeals rules. Discussion followed.

Mike Hatchell explained this provision is expanding the court's power, it is codifying what has existed in miscellaneous orders and patterns you could follow for actually granting the application and sending it back to implement a settlement that needs implementing and not just perfunctorily gotten out of the system. Discussion continued.

Chairman Soules assigned the appellate subcommittee to submit a rule.

Don Hunt presented the report on the Disposition Chart on Rules 296-331.

The suggestion by Judge Reiter regarding Rule 296-299a to have a charge conference before findings are really made and before there is a judgment was brought up for discussion. Justice Guittard also made a recommendation for findings before there is a judgment. Mr. Hunt indicated this was rejected in the January meeting.

Don Hunt advised that the subcommittee recommends no action in response to Judge Reiter's inquiry on the basis we have addressed the process of findings of fact procedurally and to require the timing that Judge Reiter suggests is something we would find as much resistance to as acceptance in the trial bench.

There being no opposition there will be no action.

The suggestion by Lewis Kinard that there is ambiguity in 299a was brought up for discussion. Mr. Hunt advised the subcommittee recommended no action because the concern has been addressed in the rewrite of Rules 299 and 299a.

Mr. Hunt advised that the suggestion regarding Rule 301 and the proposed 1990 amendment does not need to be addressed because the amendment never went into effect.

Mr. Hunt brought up for discussion the suggestion to amend Rule 306a so that anyone may send out notice of the judgment. Mr.

Hunt advised that current Rule 306a and the amended Rule 304(c)(3) provides that the clerk gives notice of the judgment.

Mr. Hunt advised that the suggestion by Charles Spain regarding conforming "nonjury" and "non-jury" has already been cured.

Mr. Hunt advised that the suggestion by Judge Max Osborn regarding Rule 324a has been cured by the amendments to TRAP 52a. Judge Osborn also commented that too much time was being used on appeal and that the time limits could be shorter. The subcommittee did not agree and recommended no change.

Mr. Hunt advised that the subcommittee recommended no change regarding the suggestion by Martin Peterson on Rule 329b, vacating the judgment, because we have cured the problems in the rewrite.

Mr. Hunt advised that the amendments today to Rule 305 have cured Charles Spain's Casebolt problem.

Damon Ball's request that Rule 320 be amended to require a motion for entry of a default judgment was brought up for discussion. Mr. Hunt advised that the subcommittee did not feel an amendment was worthwhile. Discussion followed. A vote was taken and by a vote of 14 to 1 the subcommittee's recommendation for no change was approved.

Mr. Hunt advised that Charles Spain's suggestion for a general rule on plenary power has been addressed by todays work.

Mr. Hunt brought up for discussion Charles Spain's suggestion that a broader rule is needed on the terms of court to take care of the problem when terms end and how that applies to Rule 330. The subcommittee recommended to action. There being no disagreement there will be no action.

Don Hunt advised that the suggestion by Thomas B. Alleman that we need rules on control of visiting judges does not need to be addressed.

Professor Dorsaneo provided an update on the status and goals of the Recodification of the Rules of Civil Procedure.

Professor Dorsaneo brought up for discussion the changes to New Rule 30, Parties, subparagraph (a) Real Party in Interest. Chairman Soules asked should the assignee or subrogee be required to identify the real party in interest in the pleadings? Nobody disagreed with that.

Chairman Soules brought up the discussion on whether the assignor or subrogor should get notice.

Discussion continued regarding the proposed changes to Rule 30(a).

Professor Dorsaneo explains what they are trying to do with the recodification of the rules and how that project comes into play with the drafting of this rule.

Professor Dorsaneo explained Rule 30(b), Capacity to Sue or Be Sued in Assumed Name. Professor Dorsaneo advised this is current Rule 28. Discussion followed.

Professor Dorsaneo explained Rule 30(c), Next Friends and Guardians Ad Litem, paragraph (1), Next Friends. Professor Dorsaneo advised this is current Rule 44. Discussion followed. Professor Dorsaneo suggested deleting "dismiss or" from the second sentence. Justice Duncan commented we need to say the judgment has the same binding effect or lack of effect as any other judgment, if you get court approval.

Professor Dorsaneo explained Rule 30(c)(2), Guardians Ad Litem. Discussion followed. Professor Dorsaneo advised that this is current Rule 173. Paula Sweeney inquired why "plaintiff" was left out. Chairman Soules asked why "who is a defendant" is in there. Justice Guittard pointed out that the next friend represents the plaintiff. Chairman Soules suggested "a person who has no guardian." Professor Dorsaneo suggested deleting "is a defendant". Discussion continued. Professor Dorsaneo proposed the language to read "A court must appoint a guardian ad litem to represent a minor or incompetent person who (1) has no guardian or (2) who was represented by a guardian or next friend who appears to the court to have an interest adverse to the minor or incompetent person. Mike Prince said it should be "has no guardian or next friend." Discussion continued.

Carl Hamilton brought up a problem with courts appointing a guardian ad litem when its not necessary and paying them big fees. Judge Scott Brister advised that there is a task force looking into that.

Paula Sweeney proposed changing "who appears to the court to have an interest adverse" to "potentially has such an interest" or "a possible conflict." Justice Guittard proposed inserting the word "potentially" after "interest". Discussion followed.

Professor Dorsaneo explained Rule 31(a), Joinder of Claims. Professor Dorsaneo advised that this is current Rule 51. Discussion followed. Chairman Soules asked if we want the Committee to proceed so that it's a matter of discretion with the trial court to join an unrelated claim by a plaintiff against one defendant or whether its foreclosed by a rule. A vote was taken and by a vote of 11 to 1 it should be discretionary with the trial judge.

Justice Guittard asked if the words "legal or equitable" are obsolete. Discussion followed. Justice Guittard made a motion to delete "legal or equitable". Don Hunt seconded the motion. A vote was taken and by a vote of 9 to 1 the language will be deleted.

Professor Dorsaneo explained Rule 31(b), Joinder of Contingent Claims. He advised this is current Rule 51(b). Discussion followed.

Judge Peeples inquired if the last sentence of (b) applies to whole rule or just to (b). If it speaks to the whole rule he suggested making in a separate paragraph (c). Discussion followed.

Paula Sweeney inquired whether there was any sentiment in deleting the last sentence of (b). Chairman Soules indicated it should say "This rule does not permit the joinder of the claims against the liability or indemnity." Professor Dorsaneo indicated he felt the sentence is in the wrong place and should be in New Rule 33. Chairman Soules proposed putting it in both rules. Justice Guittard proposed changing "against a liability or insurance company" to "a claim on a liability or insurance policy." Discussion followed.

Paula Sweeney asked if they have figured out how to deal with the new statute regarding responsible third parties. Professor Dorsaneo advised it is on the list of things to do.

Professor Dorsaneo explained New Rule 32, Joinder of Persons Needed for Just Adjudication. He advised this is current Rule 39. Discussion followed.

Judge Brister commented that the language "not to be at a time nor in a manner to unreasonably delay the trial of the case" needs to be in here somewhere, maybe at the end of paragraph (a), or a separate paragraph. Discussion continued. Professor Dorsaneo suggested maybe putting it in New Rule 33.

Professor Dorsaneo explained New Rule 33, Permissive Joinder of Parties (current rules 40 and 41) and New Rule 34, Consolidation, Separate Trials and Severance (current rules 40(b) and 174). Professor Dorsaneo explained that some of the language from the current rules has been moved to an unnumbered rule entitled "Voluntary Dismissal of Nonsuits."

Paula Sweeney brought up for discussion the difference between current language of Rule 41 that says "Any claim against a party may be severed and proceeded with separately" and the language in New Rule 33(b) that says "Any claim against a party who has not been properly jointed may be severed and proceeded with separately." Discussion followed. Chairman Soules proposed "A party who has not been properly joined" rather than "a claim

against a party who has not been properly joined." Judge Brister proposed "claims against a party." Discussion continued.

The meeting was adjourned until Saturday morning.

The Advisory Committee of the Supreme Court of Texas convened at 8:00 o'clock on Saturday, May 11, 1996, pursuant to call of the Chair.

Saturday, May 11, 1996

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

Members present: Luther H. Soules, III, Prof. Alexandra W. Albright, Honorable Scott A. Brister, Professor Elaine A. Carlson, William V. Dorsaneo III, Sarah B. Duncan, Hon. Clarence A. Guittard, Donald M. Hunt, Joseph Latting, Russell H. McMains, Anne McNamara, Anthony J. Sadberry, and Paula Sweeney.

Ex-officio Members present: Hon. William Cornelius, O. C. Hamilton, Doris Lange and Michael Prince.

Members absent: Alejandro Acosta, Jr., Charles L. Babcock, Pamela Stanton Baron, David J. Beck, Ann T. Cochran, Michael T. Gallagher, Anne L. Gardner, Michael A. Hatchell, Charles F. Herring, Jr., Tommy Jacks, Franklin Jones, Jr., David E. Keltner, Thomas S. Leatherbury, Gilbert I. Low, John H. Marks, Jr., Hon. F. Scott McCown, Robert E. Meadows, Richard R. Orsinger, Hon. David Peeples, David L. Perry, Stephen D. Susman and Stephen Yelenosky.

Ex-Officio Members absent: Hon. Sam Houston Clinton, Paul Gold, David B. Jackson, W. Kenneth Law, Hon. Paul Heath Till, and Bonnie Wolbrueck.

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

Chairman Soules brought the meeting to order.

Professor Elaine Carlson presented the Subcommittee Report on Rules 737-813.

The issue brought up by Judge Paul Heath Till and Judge Tom Lawrence regarding the application of TRCP 4 to TRCP 739 and 744 was discussed. The subcommittee recommended rejected Judge Till's proposal and adopting Judge Lawrence's proposal.

Chairman Soules asked if there was any objection to adding Rule 744 to Rule 4. There being no objection the proposal was unanimously approved. Professor Albright commented that we need to

consider putting "forcible entry and detainer" in to catch people's attention that when you're filing forcible entries and detainers that's specifically where these exempt proceedings are.

The suggestion by Larry Niemann to amend rules 742 and 742a to allow service by other "authorized persons". The subcommittee recommended deleting the word "officer" and substituting "sheriff, constable or other authorized person". Discussion followed.

Chairman Soules proposed "sheriff, constable or person authorized by Rule 103". There being no objection the change was unanimously approved.

The problem raised by Keith Baker regarding Rule 747a and whether agent representation by a non-attorney constitutes the unauthorized practice of law was brought up for discussion. The subcommittee recommended adding a comment that would say: "Authorized agent" for purposes of the landlord should be construed to mean owner, employee of owner, managing company hired by owner or realtor retained by owner. For purposes of the tenant "authorized agent" should be construed to mean tenant, employee of tenant or occupant of the premises as defined in the lease. Discussion followed. A vote was taken and by a vote of 5 to 3 to subcommittee's recommendation was approved.

Justice Guittard made a motion that the comment be incorporated into the rule. Justice Cornelius seconded the motion. A vote was taken and by a vote of 8 to 1 it will be written as part of the rule.

The letter from Bill Willis advising that "contested by appellee" in Rule 749a should be "appellant" was brought up for discussion.

Lynn Sanders proposal to modify rule 749b was brought up for discussion. The suggestion was to modify the rule to allow for payment of the fair market value of the rent by a tenant seeking to remain in possession while appealing the unsuccessful judgment. The subcommittee recommended adopting Lynn Sanders suggestion. Discussion followed. A vote was taken and the committee voted unanimously for no change.

Bryan Sanford's proposal to modify Rule 749b(3) by changing "writ of restitution" to "writ of possession" was brought up for discussion. A vote was taken and the committee voted unanimously to adopt the proposal.

Bill Willis' proposal to add a comment to Rule 749c was brought up for discussion. The subcommittee recommended adding the following comment: "The requirements of Rule 749b(1) must be met by an unsuccessful tenant seeking to retain possession of the premises pending appeal and are not affected by Rule 749c." there being no objection the proposal was unanimously approved.

Leslie Sanchanowicz' suggestion to clarify the type of notice the clerk should give pursuant to Rule 751 was brought up for discussion. The subcommittee recommended adding the following language after the last sentence in the second paragraph: "Notification is sufficient by first class mail. No service of process fee shall be charged." There being no objection that proposal was unanimously approved.

Rules 814 to 822 were tabled for the time being.

Paula Sweeney presented the report on TRCP 292, Verdict by Portion of Original Jury. Discussion followed.

Alex Albright commented we need to make clearer the language that says "those remaining may render and return a verdict" to show that the verdict has to be unanimous.

Discussion continued regarding TRCP 292.

Judge Brister proposed deleting "sworn as replacements" throughout the rule.

Doris Lange proposed changing "illness of a near relative" to "immediate family".

Discussion continued.

Don Hunt proposed changing the language to "an alternate juror who replaces an original juror". Justice Cornelius proposed "used any alternate jurors as replacements."

Paula Sweeney read the proposed language as follows: "any alternative juror used as replacements."

Chairman Soules reads the last sentence as follows "including the death or severe illness of the juror's immediate family."

Carl Hamilton inquired whether we are going to add as to the nine that the verdict must be unanimous.

Discussion continued regarding TRCP 292.

Professor Albright proposed the following language "If the verdict is not unanimous, the verdict must be signed."

Paula Sweeney read the proposed rule into the record. Professor Albright suggested instead of saying "if the verdict is not unanimous", say "if any verdict is not unanimous." Justice Guittard asked would that language require an 11-member verdict be unanimous. Discussion followed. Justice Guittard proposed "Any verdict rendered by less than 11 jurors must be unanimous."

Professor Dorsaneo commented it probably should say the same 10 as to each and all answers made to the issues that are material to the judgment.

Discussion continued. Chairman Soules advised Paula Sweeney to rewrite and bring it back to the committee.

Paula Sweeney presented a report on the Batson rule. Ms. Sweeney asked for a vote on whether or not we want a Batson rule. A vote was taken and by a vote of 5 to 2 the committee wants a Batson rule. Discussion followed.

Justice Guittard pointed out in some places the word "challenge" is used and in some places "strike" is used. Deleting the word "strike" would be a solution.

Judge Scott Brister inquired what "related to the case" meant. Discussion followed.

Joe Latting brought up for discussion the sentence that read "A party that makes any of its peremptory challenges on improper grounds waives any right to make any additional peremptory strikes to replace those found to have been improper."

Chairman Soules brought up for discussion the language "if a neutral explanation is established by the evidence." Paula Sweeney suggested saying "party seeking to uphold the challenge must present a neutral explanation." Discussion continued.

Chairman Soules explained the subcommittee needs to give the subcommittee some guidance as to where the Committee feels the rule should be placed. More intrusive? Less intrusive of the peremptory challenge practice? Discussion continued.

Paula Sweeney asked if the Committee would be happy with a rule that stopped at the stage of saying to the Court that if there is any Batson challenge raised properly, if any party contests a peremptory challenge, the court shall hold a hearing and shall do so prior to seating the jury. Nobody on the Committee agreed with that.

Chairman Soules ended the discussion on Batson and advised it will be taken up again next time.

Judge Scott Brister commented he is concerned about adding "other unconstitutional basis". Chairman Soules advised that has to come out, the Committee voted not to put in grounds, just put in the procedure. "Constitutionally impermissible" is what it should say.

Professor Dorsaneo explained New Rule 33(b), Misjoinder of Parties (current rule 41) and New Rule 34, Consolidation, Separate Trials and Severance. Discussion followed.

Justice Guittard proposed changing "causes of action" to "claims" in Rule 34(c). Discussion followed. There being no opposition the proposal was approved.

Paula Sweeney asked whether or not there was a rule setting out how severance is to be accomplished. Discussion followed. Doris Lange advised that she and Bonnie Wolbrueck were working on those rules and were going to propose making it a separate number.

Professor Dorsaneo explained New Rule 35, Interpleader (current rule 43).

Professor Dorsaneo explained New Rule 36, Class Actions (current rule 42). Discussion followed.

Professor Dorsaneo explained New Rule 37, Derivative Suits (current rule 42(a)). Discussion followed.

Chairman Soules called for votes on Rule 33(b), Rule 34, Rule 35, and Rule 36. There being no objection those rules were passed unanimously.

Discussion continued regarding New Rule 37, Derivative Suits. A vote was taken and there being no objection the rule was passed unanimously.

Professor Dorsaneo explained New Rule 38, Intervention (current Rules 60 and 61). Discussion followed. Chairman Soules asked for a vote on whether, for intervention, there should be a predicate motion. By a vote of 2 to 7 there will be intervention without a motion. Chairman Soules advised "subject to being stricken" is not the right word because it should be subject to being severed.

Professor Dorsaneo advised the changes to Rule 38 are: take out "upon timely motion" in (a) and (b) and leave the procedure in (c). Professor Dorsaneo asked whether we want to talk about when intervention is appropriate. Discussion followed.

Rusty McMains asked if the currently proposed intervention rule has a service requirement. Discussion followed.

Justice Duncan commented she felt that the first sentence of (a) and the last sentence of (b) need to be segregated out into the first section. Then after we talk about intervention generally we talk about it as a matter of right or permissive. Discussion continued.

Chairman Soules asked whether it should say "when an applicant claims an interest relating to the property, transaction or occurrence. Discussion followed.

Professor Dorsaneo explained new Rule 39, Substitution of Parties (current rules 150-159). Justice Guittard proposed substituting "claim" for "cause of action." Professor Dorsaneo advised he is not ready to present this rule, that he will bring it back next time.

Professor Dorsaneo explained the unnumbered rule entitled "Voluntary Dismissals and Nonsuits" (current rules 162, 163 and 165). Paula Sweeney brought for discussion the distinction between a dismissal and a nonsuit and the effect. She asked if the subcommittee intended to do away with "nonsuit" because it is gone from the first sentence. Discussion followed. Justice Guittard asked how you can dismiss something and have an adjudication. Discussion continued.

Chairman Soules called for a vote on whether to include the word "nonsuit". There were 7 in favor and none opposed.

Professor Dorsaneo advised the subcommittee needed guidance on the language "provided that a party who abandons any part of a claim or defense contained in the pleadings may have that fact entered of record during a hearing or trial to show that the matter was not tried." Discussion followed.

Justice Cornelius indicated the omission sentence was difficult to understand. It should read something like "Dismissal is not effective as to a party omitted from the pleadings" or "as to a party not listed in the pleadings." Chairman Soules suggested "amended pleadings."

Professor Dorsaneo continued explaining paragraphs (b) and (c) the rule. Joe Latting advised he is not sure that paragraph (c) is consistent with the rule we just passed on sanctions having to do with the effect of a dismissal on sanctions orders. Discussion followed.

Justice Sarah Duncan inquired whether putting effect on summary judgments in the Effect on Sanctions Motions paragraph was considered. Discussion followed.

Paula Sweeney brought up a discussion regarding the fact that the language regarding an order has been deleted. Discussion followed.

Chairman Soules asked whether we ought to put something in the rule about a written order starts the appellate timetable. Discussion followed.

Justice Duncan commented we might want to clarify that while a nonsuit may be effective when made, there are going to be some other considerations as to when you've got a final judgment under Rule 300(b).

Carl Hamilton indicated if we are going to continue the nomenclature of voluntary dismissals and nonsuits, if they are different, let's explain why the are different in the rule.

A discussion was had regarding whether Rule 33 should be added to the first rule in the package, paragraph (a) Real Party in Interest.

The meeting was adjourned.