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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

MAY 10, 1996

(MORNING SESSION)

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Taken before William F. Wolfe, Certified Shorthand Reporter and Notary Public in Travis County for the State of Texas, on the 10th day of May, A.D. 1996, between the hours 8:45 o'clock a.m. and 12:20 o'clock p.m., at the Texas Law Center, 1414 Colorado, Rooms 101 and 102, Austin, Texas 78701.

MAY 10, 1996

MEMBERS PRESENT:

Alejandro Acosta Jr.
Prof. Alexandra W. Albright
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo III
Sarah B. Duncan
Honorable 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
Honorable David Peeples
David L. Perry
Anthony J. Sadberry
Luther H. Soules III
Stephen D. Susman
Paula Sweeney
Stephen Yelenosky

MEMBERS ABSENT:

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

EX OFFICIO MEMBERS:

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

EX-OFFICIO MEMBERS ABSENT:

Hon Sam Houston Clinton
W. Kenneth Law
Hon Paul Heath Till

Also Present:

Rosemary Kanusky

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OF COUNSEL:
ROBERT L. ESCHENBURG II

July 9, 1996

Honorable Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Re: Supreme Court Advisory Committee

Dear Justice Hecht:

Enclosed is your copy of the transcript of the May 10-11, 1996, Supreme Court Advisory Committee meeting.

Sincerely,

Holly H. Duderstadt
Legal Assistant

/hhd
Enclosures

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MAY 10, 1996
MORNING SESSION

INDEX OF VOTES

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

CHAIRMAN SOULES: Good morning. Are we ready to come to order? Why don't we come to order and we'll get right to our business. We appreciate everybody being here. We welcome, of course, Judge Clinton in particular, who is our member from the Court of Criminal Appeals, and I believe Justice Hecht will be here shortly to join us also. There will be an attendance list I'll send around for sign-ups in a few minutes.

The Court has sent back to us the Jury Charge Rules and sort of a second installment of the Appellate Rules. You have an agenda that's dated April the 29th, and I hope you've brought all your materials. I never know whether we're going to get involved in some particular thing that's going to take a lot of time or whether -- in some of these meetings we've had periods where we've gone pretty quickly through a lot of information, so it's important to bring everything that you've received to all of the subsequent meetings so that we can, if we sort of get a rush of work, get through as much as we can.

Paula, Lee, I know, has been in touch

with the Court on the two Jury Charge Rules. Would it make sense for him, Lee Parsley, to state what he believes the Court did in terms of changes from what we sent there, or do you want to do that? It's up to you.

MS. SWEENEY: It would make sense to me, I'm reading them for the first time, having received it yesterday right in the middle of the day --

CHAIRMAN SOULES: Okay.

MS. SWEENEY: I'm not -- so far I'm just parsing through them to see what the changes have been, because we don't have red-lines.

CHAIRMAN SOULES: Okay. Well, we did not get red-lines and did not in our office prepare them for you.

Lee, why don't you tell us then. Give us your analysis of the changes from what we sent to the Court sometime back to what they've returned here.

MR. PARSLEY: Rules 226 and 236 are essentially parallel rules that have to do with the oath to the jury panel. As you will recall, the current rule discusses giving the

jury panel an oath and does not provide in any way for jurors who are unable to take an oath because of their conscience or for some reason will not take an oath. 226 and 236 have now added a paragraph (b) that provides for an affirmation in lieu of the oath, which I think and the Court was of the opinion adopts really what is the current law; that if a person cannot because of their conscience take an oath, they still should be able to serve on a jury panel and do something in lieu of the oath. So that's in 226 and 236(b), and they are essentially parallel provisions.

Rule 226a, there were some very technical changes in a few parts of 226a but nothing of substance. The Committee voted to substitute "judge" for "court" throughout the rules. The Supreme Court I think thought that the reference to "court" was not causing any particular problem and liked it stylistically, and so these rules reflect the decision by the Supreme Court to go back to using the term "court" instead of "judge" in most instances. I don't think that is of any substance particularly, but that was the

decision of the Court that's reflected here.

The item that probably deserves the most attention by the Committee is in Rule 278 on Page 8 of what you have regarding preservation of appellate complaints.

Paragraph (a) of that rule provides that "a party shall submit to the court in writing the questions, definitions and instructions requested to be included in the charge on any contention that party was required to plead. The request must be sufficient to provide the court reasonable guidance in fashioning the charge."

And here is the change that's of the most importance: "Failure to comply with this paragraph shall not preclude the party from assigning error in the charge if an objection is made pursuant to paragraph (b)."

Therefore, I believe that reflects that the Court has chosen to go to a practice requiring an objection only, although a request is -- you are asked to prepare a request, but you preserve error through an objection only.

The Notes and Comments on Page 9 provides

that paragraph (a), failure to comply with this rule shall not preclude the party from assigning error in the charge if an objection is made pursuant to paragraph (b), but that the court may sanction a party who fails to comply with the rule.

So you can preserve error by objection only, but the court can, if you don't provide them with a written request, the court can impose some sort of appropriate sanction according to the --

MR. LATTING: Do what?

MR. ORSINGER: Submit your proposed charge, right?

MR. PARSLEY: I don't -- the comment doesn't say, and I don't think the Court wants to say what sanction is appropriate. I think the comment just is to give some guidance that they're serious about the requests, but preservation of error is only through an objection.

And I think that in sum is the major changes that you all might want to consider.

CHAIRMAN SOULES: Okay. My understanding of what the Court has done here

is they've considered the rules textually that we've sent up there and found not any real objection to the text other than change "judge" to "court." The affirmation probably is not of any real consequence to this Committee.

Nobody has got an objection to that, do they? If they do, hold your hand up. There is no objection, so the affirmation in lieu of oath is not objectionable to this Committee.

And then more importantly, though, the Court received from this Committee our recommendation for a policy relative to preservation of error, and the Court disagreed. And they have sent back to us what they are going to use as a policy for preservation of error, so it's not for us to redebate that. They've looked at it and changed to an object -- well, maybe to an object-only policy. I think there's some question about that, which I would like to raise, but our job now is to advise the Court whether we feel that the policy that they have committed themselves to is articulated in a workable way in the language of this rule.

That's our charge.

The thing that I alluded to that I say may be object-only, if you look at the last sentence of (a), "failure to comply with this paragraph shall not preclude a party from assigning error in the charge if an objection is made pursuant to paragraph (b)," that may suggest that if you do comply with (a), you don't comply with (b), you still may be able to assign error because you complied with (a), although the first sentence in (b) is inconsistent with what I just said because it says, "A party may not complain of any error in the charge unless that party objects," so that's the only thing I see where there may be some possible inconsistency, and maybe it's not.

Paula, why don't you speak first since you're the chair of the subcommittee, and then I'll take others.

MS. SWEENEY: Mr. Chairman, before I chaired the subcommittee I sat on the task force, which served for a couple of years and met a number of times and spent hundreds of hours composing this rule. The

subcommittee then followed up, and without redeciding any policy issues here, but just so that the body will remember, the decision of all of those folks and of this Committee was that object-only permitted parties to lay behind the log, not submit a correct charge on their own issues, and then at the last minute object; thereby, quote, unquote, preserving appellate error; thereby sandbagging the trial court; thereby sandbagging opposing counsel; thereby ensuring appeals; thereby not giving the trial court guidance as to what a proper submission of the issues on which that party has a burden ought to be. And the very considered decision and in fact the whole thrust of what the task force and the subcommittee and the Committee decided was to the contrary.

Reading this rule as it is -- and I would also say that I don't think anybody here appears to have had the opportunity to read it, much less compare it to the draft, much less do any analysis at this time. I know I haven't, since I didn't get it until yesterday, and I don't think anybody else did

either that I know of.

But what this rule does is provides that a party has a duty to submit questions on their issues, but if they don't, then all they have to do is object. The only recourse that the court has is, quote, unquote, a sanction, and the sanctions provision is not part of the rule, it's just a comment to the rule, so I don't know procedurally the effect of that other than as a suggestion.

THE REPORTER: I can't hear him.

CHAIRMAN SOULES: I know. I guess he's not intending for you to hear because he's not speaking loud enough.

HON. SCOTT A. BRISTER: Well, I didn't want to interrupt. I'm just saying it's not a part of 215 because it's not discovery. It's not a part of 13 because it ain't a pleading. I suppose this is an inherent power sanction. They ought to think about whether they're impliedly endorsing inherent power sanctions, which I think probably some members don't intend to be doing that. There is no rule providing for

sanctions for not objecting or requesting proper form and other -- for not filing a pleading. Okay.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, I have studied these for several weeks.

MS. SWEENEY: How did you get them? Excuse me.

PROFESSOR DORSANEO: Because I got them earlier than the rest of you.

And this change strikes me as no particular big deal, and I'll tell you why. The first paragraph still makes it mandatory that the party with the burden to plead make a request, and it still provides that requests and objections may be made contemporaneously in its first line. Granted, the objection preserves the complaint if counsel doesn't do what's mandated by paragraph (a), but if you think about this operationally, the type of objection that would be required to take the place of the request would be essentially equivalent to what the written request would provide, and to me all we're talking about is

whether somebody does it in writing or does it orally with about the same degree of detail.

I might suggest that the Court consider adding a little bit of language to the second sentence in paragraph (b) to make the interpretation I just gave of paragraph (b) clearer, and this would match up to what Paula said a minute ago about the reasonable guidance point.

I would perhaps suggest that the second sentence say an objection must, one, identify the portion of the charge to which complaint is made; two, be specific enough to enable the trial court to make an informed ruling on the objection; and add this or something like this, borrowing from paragraph (a), "and provide the court reasonable guidance in fashioning the charge."

Then all we're talking about for sure, and I think if you thought about it, you would have to conclude that that's implicit in the second sentence anyway, but then all we would be doing for sure is saying, if you screw up and you don't make your request but the trial judge is fully aware of exactly how you want

the charge changed because you've said so, then you're okay and you're not just aced out because of a technical failure to make a written request. And otherwise I don't think it's really a big deal.

CHAIRMAN SOULES: So what is your specific suggestion again, Bill?

PROFESSOR DORSANEO: To take that language that's in the fifth line of paragraph (a), "provide the court reasonable guidance in fashioning the charge," and add it to the end of the second sentence in (b).

CHAIRMAN SOULES: Discussion? Richard Orsinger.

MR. ORSINGER: Bill's suggestion makes me uncomfortable because I think it could be interpreted as requiring that an objection also include the proposed language. If the objection must give reasonable guidance in fashioning the charge, then you've got to do more than point out a defect in my view; you have to pose a solution.

PROFESSOR DORSANEO: That's what I would require, yes.

MR. ORSINGER: Okay. Well, see, first of all, I think that goes against the thrust of what the Supreme Court said, which is that you don't have to propose a solution in order to be able to complain on appeal firstly; but secondly, if we are in fact going to require people to propose a solution, we ought to have them do that in a proposed solution rather than an objection.

To me the purpose of an objection is to point out a complaint, not necessarily to propose a solution. And to say that we're going to take part (a), which has to do with the duty to submit proposed language, and put it over and make it part of (b), which is stating an objection to the way the court has done something, is worse than what we sent the Supreme Court to begin with.

And it frightens me because I think a lot of people are -- an objection has just got to be criticism without a proposal of a replacement, and if you put your language in there, it could be interpreted to require a proposal.

CHAIRMAN SOULES: Rusty, and

then I'll get back to you, Judge Guittard. I didn't mean to skip you.

MR. McMAINS: Well, I think that Bill's suggestion is more hurtful than even the Supreme Court's because of what the -- the thrust of what we did initially was to say that we were trying to remove the substantially correct language in -- and make the objection practice being the preservation engine, as it were. But if you add reasonable guidance to the requirement for the sufficiency of any objection, regardless of whether you have the burden to plead it or not, then you have basically then repudiated the limiting notion that we had when we initially formulated this rule where we don't have to tell people how to submit their case. We can tell them what's wrong with it, but we don't have to try and tell them how to change it and how to make it right.

CHAIRMAN SOULES: That's right.

MR. McMAINS: That was a lot of the thrust of this entire exercise in changing the Charge Rules in the first place. If you put that reasonable guidance baggage on to the

sufficiency of the objection, then you are right back where you started, and all you've done is you've just expanded the objection to include a request, so you've adopted basically Corpus Christi's view of the law, which I think is wrong and is not what we were supposed to be doing and not what we should be doing.

CHAIRMAN SOULES: Judge Guittard.

HON. C. A. GUITTARD: I have another suggestion here when the time comes.

CHAIRMAN SOULES: Go ahead.

HON. C. A. GUITTARD: To resolve the problem that you raised earlier, I would suggest that in the first sentence of (b) it be made to 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" and so forth.

MS. SWEENEY: Say that again, Judge, please.

HON. C. A. GUITTARD: "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" and so forth, so that you can preserve the error either by a request or by an objection, and that's to respond to the problem that you've raised.

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: I'm afraid, Judge Guittard, I have to disagree with that suggestion. I think that would double-sandbag the court, because you can have a party impliedly going along with the court's charge without objecting to a final product and relying simply on the fact that they had submitted something different without bringing it to the court's attention.

The whole purpose of a big part of this was to be sure the court knew what it was doing and knew if there was in fact an objection so there wouldn't be sandbagging; that the court wouldn't think that folks were acquiescing to charge problems that they weren't, so I think that would even be double worse than what the Court has already done.

HON. C. A. GUITTARD: Well, it's got to go one way or the other, it seems like to me.

CHAIRMAN SOULES: I think the intent here is, do you have to object in order to preserve error. That's the policy that the Court has articulated. It just may not be as clear as it needs to be. Maybe I'm the only one that has a problem with it, and if that's the case, then we can move on. Paul Gold.

MR. GOLD: I just have a question about the last sentence of (a). Is it possible to interpret (a) of that sentence to mean that if someone made one objection, but not an objection to every aspect of the charge, that they would preserve error as to all?

CHAIRMAN SOULES: I don't understand what you're -- I'm sorry, I'm not following you. Will you give me a little bit more help?

MR. GOLD: "Failure to comply with this paragraph shall not preclude the party from assigning error in the charge if an objection is made pursuant to paragraph (b)."

I don't know. I'm looking at that and I'm thinking someone could read that to mean if they made one objection --

MR. LATTING: Well, except, Luke --

CHAIRMAN SOULES: Well, (b) is much more specific than one objection preserves every error in the charge. It's much more focused. The objection under (b) has criteria.

MR. GOLD: If any objection has been -- well, then I guess I don't --

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: Well, if you have to make the objection pursuant to paragraph (b), and (b) says an objection must identify that portion of the charge and so on, then you have to make the objection pursuant to paragraph (b) in order to complain of the charge. And paragraph (b) says that an objection must identify that portion of the charge to which complaint is made and be specific enough and so on.

CHAIRMAN SOULES: Okay.

MR. LATTING: So I'm agreeing

with you on that.

CHAIRMAN SOULES: There's no problem. Richard Orsinger.

MR. ORSINGER: To address a point you raised, Luke, I think, and to get to the level that Paula was talking about involving the task force, normally we preserve complaints by objections, but the trial judges very much wanted to force advocates to give them proposed language, and their argument was that they didn't have staff attorneys like the federal judges did that could do their work for them and they needed the lawyers do the work for them, and therefore the only way we could force people to give the trial judges proposed language was to say that you don't preserve error over the exclusion of your language unless you propose it.

And then we had this argument of, well, who has the duty to propose, because the burden of proof may switch in the middle of the jury verdict depending upon whether there's a fiduciary relationship found or whatever in jury deliberations.

And so what we finally ended up doing was

saying, well, whoever has the burden to plead has the burden to tender or submit, and if you have the burden to plead, you have the burden to tender or submit, and then if you don't tender or submit, then you can't complain.

And then another problem developed because the courts of appeals said, well, if you tender or submit but you don't use substantially correct language, then you haven't preserved error. Well, what happened was people were waiving error all the time by not tendering in substantially correct form, even though they were making a good faith effort, and yet the only reason that we were making them tender a requirement at all was to just motivate them to give the court something to act on.

It seems to me what the Supreme Court has said here is that we can motivate the lawyers to submit language by ordering them to submit language and then threatening to punish them if they don't submit language, and that we don't need to complicate the preservation of error with the effort to motivate lawyers to submit. And that makes life simpler because

then we completely divorce ourselves from this substantially correct submission law that's existed for so long that everyone is dissatisfied with.

And I think what the Supreme Court is saying is that let's just treat it like other objections. You can preserve by objecting, and if the court needs help, they should order the lawyers to give help; and if the lawyers don't give them help, then they ought to punish the lawyers, and to me that's a sensible approach to this. And the only opposition that I've ever heard so far is trial judges being opposed to not having the hammer to force lawyers to help them, and the Supreme Court is now saying sanctions are your hammer.

CHAIRMAN SOULES: Yeah. The Supreme Court has articulated, has signaled what its policy is going to be. Let's focus the debate on what's back on our table, and that is, does the language in this rule articulate in a workable way the policy that the Supreme Court has adopted? Judge Brister.

HON. SCOTT A. BRISTER: Yeah, I mean, this is no new signal. They tried to signal this the last time, and my colleagues screamed and yelled so loud and threatened rebellion that they backed down on it. And I'll bet you they're going to do the same thing again.

Let me see if I understand the way this works. So plaintiff comes in and says, "I object. You haven't put a RICO charge in there."

And I say, "I don't know RICO from anything. It's not in the PJC, and I don't know what to submit. Give it to me."

And they say, "No."

And I say, "I'm going to sanction you."

And they say, "Well, what are you going to sanction me with?"

Well, the only punishment that would fit that crime is "If you don't give it to me, I'm not going to submit it." But that's the one I can't give. That's the sanction that I cannot give, the one that fits the crime. So what sanction am I going to give them? I'm going to cut your argument time to five minutes? I

appreciate the hammer, but I don't know what it is.

MR. GOLD: Don't let them argue at all.

HON. SCOTT A. BRISTER: That's the only punishment that fits that crime, that if you don't give it to me, I ain't submitting it, but that's the one that's specifically prohibited.

CHAIRMAN SOULES: Does the language in this rule articulate in a workable way the policy that the Supreme Court has committed itself to? That's what's before us. We can't redebate that it ought to be a different policy.

HON. SCOTT A. BRISTER: And I'm saying the sanction does not. It tells me I can't use the one that makes sense to use, but I have no idea what I am supposed to use.

CHAIRMAN SOULES: Okay. Justice Duncan.

HON. SARAH DUNCAN: Well, I think I'm on record as fully supporting this, so I won't surprise anyone when I say I think it's a great rule. I think it is written in a

way that can be implemented easily, and I have to disagree with Scott.

The failure to comply with paragraph (a), the failure to make a request, may not -- will not preclude assignment of error as to that omission from the charge, but it may very well be that your sanctions order will preclude the ability to assign error to it.

And I think by leaving it open, the Court, in leaving it in a comment, these aren't hard and fast rules, and there may be extenuating circumstances where someone doesn't make a request and it hasn't caused any harm. It's a PJC charge and people have it on their shelves. It leaves it flexible for the trial courts to work with.

I think if a trial court has a pretrial order that says, "You will request your proposed charge by x, y and z date," a failure to comply with a direct court order opens a large range of possible sanctions, and it may not be that failure to submit is the appropriate sanction in a particular case. It may be that some other sanction is a better sanction.

HON. SCOTT A. BRISTER: Such as?

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: I agree with Judge Brister with respect to the sanctions. I think it's antithetical to the whole concept that the Supreme Court has been moving to with regard to sanctions in discovery; that if you're going to impose a sanction on someone, that it's defined what the sanction is for due process purposes and so that the court can structure the appropriate sanction.

Here there's absolutely nothing in that regard. There's no structure for the judge. There's no structure for the attorneys. There's this amorphous concept that if you don't do it something bad will happen to you, but what's to define whether the judge went to the least -- I forget what the Transamerica is, but I wonder if they would apply Transamerica to this concept that you start with the least stringent sanction and work your way up. I think that is a problem. I think they need to clarify what the sanction would be.

CHAIRMAN SOULES: Well, one of the obvious responses for the trial judge is to say, "You say RICO. Who is RICO? I don't have enough information to rule on the objection. I need more information. If you will provide me with that information, I will make an informed ruling on your claim, but is RICO a citizen of this county?"

I mean, you've got to have enough information under the objection. It articulates, it has criteria, and beyond that, what?

Rusty, and then we'll come around the table, and then we need to move on.

MR. McMAINS: Well, the principal problem, one of the principal problems I have with this so-called recast of the rule is that there is nothing in the rule to that gives the sanction. It's in the comment. Now, we have never done that before in the history of this Committee. We've never had, and certainly not in regards to creating a new power of the trial court to sanction, we've never put that in a comment as opposed to in the body of rule and relate it to

something.

Whenever in the past we have ever attempted to put in sanctions somewhere that was a little bit unusual that was outside of the discovery area, we put it in. We said pursuant to the Rule 215 you can impose sanctions under Rule 215 for a violation of whatever type of rule.

I mean, there will be courts on this comment that will construe that you can go straight to the sanctions rule and apply it to any of the sanctions there, which will have the same or actually a worse effect, perhaps a more devastating effect than merely a claim of waiver, because they can make under the list of sanctions a determination that an issue is determined a particular way based on their conduct in terms of what alternative lists of sanctions they can do, if they have all of those.

And then you're relegated to the question of whether it was an abuse of discretion of the trial court to sanction rather than dealing with the appropriate issue, which is whether or not the judge knew what was going

on and why he was not given the charge.

CHAIRMAN SOULES: What are we talking about? Please, help me. Are we talking about perhaps telling the Court that they ought to delete the language in the comment that the court may sanction the party who fails --

MR. McMAINS: No. What I'm saying is --

CHAIRMAN SOULES: I want something specific. We've got a lot of do here. We can't just sit around and beat this --

MR. McMAINS: You asked me what was workable. There is nothing in (a) that authorizes a sanction for its violation.

CHAIRMAN SOULES: So what are we going to do about it?

MR. McMAINS: And there's nothing in the comment that identifies where the hell there's any authority to sanction.

CHAIRMAN SOULES: Well, what would you do about it?

MR. McMAINS: Well, if you're going to put a sanction ability in, it needs

to be put in. And then you have to do something in terms of telling procedurally or get somebody some notice of what the hell the sanctions are, what it is that's available to them. Is it the full range in 215? Do we just go to the 215 categories and say that they can impose any of those? Because if he has the power, he can damn sure get a submission by somebody if he says, "I have the power to determine that issue adversely to you as a matter of sanction. Now, do you want that, or do you want to submit me something?" Now, that will probably be fairly effective.

But I agree with him that the entire notion here of there not being a waiver of error or whatever and you have a right to complain by objection is kind of antithetical to that notion, so it's inconsistent. But if that's what they want to do, then they at least need to spell it out, because there's no notice whatsoever in this rule as to what it is a trial judge can do to you or do to a party for not doing something.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: Luke, I have two suggestions. The first suggestion is that we eliminate the sanction provision in the comment or suggest to the Court that they ought to consider it, and I take it we're sort of talking to the Court through the transcript here.

My point would be this: The Supreme Court has told us that what they want is uniformity in the way cases are submitted through the charge submission rules; and that we make that easier so not only a dozen lawyers in Texas know how to do it, which has been the -- which I've heard at least the Chief Justice say it in the hall. If that's the case, the sanction rule is likely to be applied not in a uniform way. It is much more likely, and I think the experience throughout the state is, trial judges look at sanction rules differently from their fellow judges down the hall, and whether that be good or bad, that's the practical effect.

And I think putting sanctions in a comment causes even worse problems, and I would eliminate or I would ask the Supreme

Court to consider eliminating the sanctions provision in the comment to the rule.

That leaves only one issue at least in my mind, because the Supreme Court has told us philosophically what they want to do. They want to have a situation where we preserve by objection. And if that's the case, my suggestion would be leave (a) as it is, but go to (b) and make Bill Dorsaneo's change.

I disagree with what Richard Orsinger said respectfully, because I do admit that there might be some problems, but I think we need to make clear or the Court needs to make clear to the practitioners that the objection needs to be specific and point out with reasonable clarity what the problem is.

But I think maybe in a comment the Supreme Court ought to consider saying that that doesn't mean that they have to tell you exactly how to solve the problem. But I think Bill Dorsaneo's proposed change is workable and is something that will put this issue to rest and not do bad harm.

CHAIRMAN SOULES: Well, Rusty -- I don't know if you -- Rusty made the

point that our Committee, I guess the Supreme Court may have heard it, I don't know, that we didn't want to have to write the adversary's charge.

MR. KELTNER: Luke, I understand that, and I think that Rusty makes a very good point. There is no doubt, though, that, again, I see the Supreme Court saying two things. An objection is good enough, so we're going to -- you don't have to submit it in substantially correct form.

Remember, most of our discussion was really, on that issue, Rusty, was over substantially correct form, and that's where the problems really came. If you're making an objection and you have to be, one, specific, and reasonably tell the court what the basis for your objection is, and maybe that's the language we ought to have, the basis for the objection, that doesn't seem to me to tell the court or tell the other side how to do the charge.

But Luke, even if it did, the truth of the matter is we ought not to have somebody hiding behind the log saying, "I see something

wrong. I'm not going to tell you what it is. I see something wrong, and Judge, if you don't change it, na-na-na, I'm going to reverse you on appeal." Anybody would find that situation laughable that wasn't a lawyer, and no one loves lawyers more than I, but that is silly.

We ought to get over the idea that we're trying lawsuits just for ourselves, and we ought to try the charge deal one time and one time only and not have reversals on that basis, even though it will cost me a lot of business, so I'd go with Bill Dorsaneo's change.

CHAIRMAN SOULES: An objection could be made, for example, plaintiff submitting the incorrect measure of damages that's out of pocket and not benefit of the bargain. That's my objection. Now, that probably doesn't provide the court reasonable guidance in fashioning the charge because it doesn't have enough words, but it's an adequate objection, isn't it?

MR. KELTNER: But my point is the language ought to be more. The specific language ought to reasonably inform the court

of the basis of your objection.

CHAIRMAN SOULES: That's what this says has to happen in (b).

MR. KELTNER: But if that's the case, Luke, I don't think I've got to tell you precisely how to solve it, I've just got to tell you why I am upset, which means more than "I object, he has the wrong measure of damages."

CHAIRMAN SOULES: David Perry.

MR. PERRY: The objection ought to give the court reasonable guidance as to how to cure the error that is being complained of. I agree very much with what David Keltner says, that the object is to get a correct charge. The object is not to lay the basis for an appeal.

The public is demanding that trials be more efficient and that the legal system be more efficient, and the objective of this whole procedure should be to arrive at a reasonably correct charge that will stand up on appeal rather than to lay the basis for an appeal. The gamesmanship that is inherent in the concept that one side does not have to

write the other side's charge is not something that is in the public interest.

I personally have no problem with the old rule that you had to submit a substantially correct request of that part of the charge that was yours, but if we are going to go away from that, and if we are going to go to an objection-only procedure, then the objection needs to not only inform the court as to the basis for the objection, but it should also give the court reasonable guidance as to how to cure the objection and get to a correct charge.

CHAIRMAN SOULES: Judge Peeples.

HON. DAVID PEEPLES: I have several points. On sanctions, I think that the sanction provision is just useless. I wouldn't be the slightest bit interested in exercising that power. I agree with the criticisms that have been made that there's nothing in the black letter of the rule and we shouldn't say something in the comment, so I would join the efforts to recommend that the Supreme Court take that out.

Now, point two, to me the important language in this context is the middle sentence in (b), lines 32 to 34, which say that an objection must be specific enough to enable the trial court to make an informed ruling on the objection. I will grant you that there will be some appellate cases that will have to say, you know, it wasn't specific enough, but that doesn't bother me.

I think that, you know, judges are going to have to dialogue with lawyers, Luke. If somebody says I want out of pocket or loss of bargain or something, what's wrong with the judge saying, "Well, what do you mean by that?" or "Where can I find one of those?"

And I think that in PJC cases this is not going to be a problem, because in my mind if someone says, "I want section so and so of the PJC," that ought to be enough. That ought to be specific enough to preserve error.

Now, on RICO, Scott, I think frankly that if someone said, "I want a RICO charge," I just can't believe that the appellate courts are going to say that's specific enough to try it in court, you know. Reasonable --

HON. SCOTT A. BRISTER: The objection is "you haven't included a RICO charge in the charge." That is specific enough to let me know what I'm doing wrong.

HON. DAVID PEEPLES: Yeah. But can always say, "Do you have one? Where would I find one?"

And if they say, "I want the one that's on page so and so of this case from the Fifth Circuit," that might be good enough. But this is going to make it a little bit more difficult for trial judges to handle it, but I think we can live with it. If someone says, "I want a fraud definition that's out of the Supreme Court case of so and so," well, that's -- we can live with that.

This is not going to be a problem in PJC cases, which is the great bulk of what we do. And in other cases, I can't believe that the ultimate decision by the appellate system is going to be all you've got to do is say, "I want a RICO charge," and the case gets reversed if it should have been submitted and that's all we've got. I mean, that won't happen.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: It seems to me the Supreme Court is very clear about what it wants from the Committee, and the question is what are we going to do about the sanctions footnote or comment. And I think we should encourage the Court not to have a comment about sanctions unless we spell it out in the rule what the criteria are for that sanction.

So I'm going to, at an appropriate time, move that we suggest to the Court that it remove the reference to sanctions in the comment and let the rule stand as it is otherwise.

CHAIRMAN SOULES: Okay. Do you want to do that now and we'll see if there's a second? We can at least do that now.

HON. DAVID PEEPLES: I'll second it.

CHAIRMAN SOULES: Okay. It's been moved and seconded that we delete, I guess, the last --

HON. SCOTT A. BRISTER: Drop the comment.

CHAIRMAN SOULES: Delete the

comment entirely?

MR. LATTING: Yes. Well, at least as it has to do with sanctions.

HON. SARAH DUNCAN: That's all it is.

HON. SCOTT A. BRISTER: Luke, may I say on that --

CHAIRMAN SOULES: Okay. And it's been moved and seconded. Discussion. Judge Brister.

HON. SCOTT A. BRISTER: I'm going to join on that, but I would say that my vote in favor for moving this is not a vote in favor that the trial judge can't do anything. So if somebody says, "Well, I want you to add this to the charge," and you know, we're at the end of a three-day trial and they know what it's about and they're just not organized, they don't have it ready, they don't know what they want me to submit, you know, "Judge, I need" -- here, let me write it down for you, and they waste 30 minutes of the jury's time, which, from a trial judge's perspective, the worst thing you can do is leave the jury sitting out in the hall while

the judge and the lawyers are bickering about some procedural matter. And somebody is going to pay for it, and it ain't going to be me, so I'm going to take that time out of closing arguments.

I don't want a rule that says that, because I'm concerned about, you know, that somebody is going to grab that rule and just direct the verdict, and we'll save a lot of time. We'll just end the case right now. And I don't want that kind of a rule.

But I do want -- I'm going to still take some time out of closing arguments if I have to waste time writing somebody's charge rule when they're too lazy to do it. Nobody in this room, but it happens all the time. They're too lazy or disorganized to do it. That's fine. I'll do it. No problem, but I'm going to take it out of their closing argument.

And so I don't want my vote to be interpreted that just dropping this is a vote that the judge shouldn't be able to do nothing to somebody.

CHAIRMAN SOULES: Elaine.

PROFESSOR CARLSON: Joe, was your suggestion to remove the comment and then include language pertaining to that, or nothing?

MR. LATTING: No, just to drop the comment, because if we include language, I think that we are bound by Transamerican to state how the sanction should be applied and when, and as Paul said, instructions about trying the least intrusive sanction, and we're going to get into a mess that we would never get out of.

PROFESSOR CARLSON: Do you agree with Justice Duncan, then, that it's a Rule 166 matter as far as sanctions?

MR. LATTING: Why do I feel like I'm being cross-examined all of a sudden?

PROFESSOR CARLSON: Because you're the sanctions guru.

MR. LATTING: Let's see, I don't know. No, it's not a 166, is it? That's discovery.

MR. ORSINGER: It's pretrial, a pretrial order.

MR. LATTING: Well, I guess if

there was a pretrial order in place that it could be handled that way, but --

HON. SCOTT A. BRISTER: I've never seen a case that said, okay, you have to bring your jury instructions to the pretrial conference, but if you don't, you don't get to submit. Then, you know, everybody is going to say that the operative time on the charge is when the evidence is closed before the jury comes in. I can't imagine I'm going to be able to not submit it because he didn't bring it a week before trial at the pretrial conference.

CHAIRMAN SOULES: Well, let's get on with it. I guess this is still on sanctions. Is there anything else on whether or not to recommend to the Court they delete the comment?

Okay. Those in favor of deleting the comment show by hands.

Is anyone opposed?

It's unanimous that we recommended to the Court that they delete the comment.

Okay. Anything else on the Charge Rules? Richard Orsinger.

MR. ORSINGER: I noticed a parallel construction issue here. On paragraph (a), we say that you're entitled to various things if they're raised by the written pleadings, but in paragraph (b) we say that you submit questions raised by the pleadings. I think maybe we ought to use the word "written" in (b) so that there's no confusion about whether an oral amendment or trial amendment or something like that might be sufficient.

MR. YELENOSKY: Is that a pleading?

MR. ORSINGER: (b) as in boy.

MR. YELENOSKY: Yeah, but is something that's not written a pleading, or is that just redundant?

MR. ORSINGER: I think there's a lot of confusion right now whether you can make an oral trial amendment in trial and then have a jury charge based on the judge granting your oral amendment. (a) makes it clear that you must get your trial amendment reduced to writing before you go to the jury. (b) leaves it a little bit floating, I think.

MR. YELENOSKY: Well, is an oral trial amendment a pleading? I mean, I just hate to complicate language. If "pleading" entails writing, as I think it should, then perhaps we shouldn't refer to an oral trial amendment as a pleading, and maybe we don't.

MR. ORSINGER: Well, we have (a) that talks about you're entitled only when it's in the written pleadings, and (b) says you're entitled in the pleadings, and then that leads us to the debate of whether an oral amendment granted is a pleading or not. It ought to be consistent. Why create an argument?

CHAIRMAN SOULES: Those in favor of adding the word "written" in the second line of 277(b) show by hands. Two.

Those opposed. Two.

Okay. Two to two.

MR. LATTING: This is a hotly debated issue here.

MR. ORSINGER: Not a very important point, eh?

CHAIRMAN SOULES: Okay. Does

anyone else have any motions that you want to make?

PROFESSOR DORSANEO: I do.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, I've listened to what everybody said about my initial suggestion, and I still believe that the reasonable guidance standard ought to be in the second sentence of paragraph (b) of Rule 278. I'm not altogether sure about whether the words "fashioning the charge" capture what I think should be added or go too far, so let me try to move this adjustment: "An objection must" -- and I'm now reading the second sentence of paragraph (b) -- "an objection must identify that portion of the charge to which complaint is made," now insert, "provide the court reasonable guidance in curing the error, and be specific enough to enable the trial court to make an informed ruling on the objection."

I'm not wedded to the specific language, I'm just making it in a specific form for the purpose of getting the motion made. My idea

would be that that makes your objection about the measure of damages good enough because you identify the kind of change you want. You want it to be benefit of the bargain rather than out of pocket or vice versa. That gives reasonable guidance to somebody who is capable of being guided.

And Justice Peeples' comments about what he thinks would be helpful and adequate, that to me is reasonable guidance, some sort of reasonable guidance about what to do.

CHAIRMAN SOULES: Joe, and I'll go around this way.

MR. LATTING: Well, with due respect, we're just going back to -- we're trying to fuzz the issue there. Either you do have to submit it or you don't. And the Supreme Court is telling us you don't have to submit the other person's case. Now, maybe that's good or bad, but when you say, "give them reasonable guidance," what does that mean? Does that mean show me an issue? When Scott Brister says -- I mean, how much do you have to say in your objection? The Court is saying an objection is good enough, and if we

say reasonable guidance, it seems to me we're asking for a reasonable submission of the issue. And if we don't mean that, why are we saying it?

PROFESSOR DORSANEO: I would at least say that the Court needs to resolve this controversy that we have here in the Committee. We're either going to be working together to do a charge that is an adequately accurate fair charge, or we're going to be encouraging both lawyers and judges to say, "I'm smarter than you are, and I'm on this path, and unless you can really be precise enough to point out exactly how it should be done, then good luck to you," which is our practice now in some places.

CHAIRMAN SOULES: Judge Peeples.

HON. DAVID PEEPLES: I want to focus on reasonable guidance. It is ironical for a request to have to give reasonable guidance but an objection concerning an omission of an instruction would not have to give reasonable guidance. There's something wrong with that.

Could we not cure that problem by adding the following language on line 28: "objection is made pursuant to paragraph (b) which gives the court reasonable guidance." In other words, that would require, if you're going to have an objection to take the place of a request, it has to give reasonable guidance, and that would strengthen it a little bit, but that wouldn't require that an objection to something already in the charge give reasonable guidance.

CHAIRMAN SOULES: Well, the difference between (a) and (b) is that in (a) you only have to do that if you have the burden to plead; (b), you have to do that whether or not you have the burden to plead.

PROFESSOR DORSANEO: Well, I don't think that should make any difference.

MR. LATTING: But that's the philosophical question.

CHAIRMAN SOULES: But there is a difference, so whether -- and I guess the debate is should it be, should it make a difference.

Going around table here past Judge

Peeples, anyone else here? Paula Sweeney.

MS. SWEENEY: If you do what's been suggested and incorporate the reasonable guidance standard into the objection, since you've taken the drafting standard from the issue that you have the burden on, which is the reasonable guidance, you've taken the drafting standard and you've incorporated it into the objection and made it the standard for the objection, we're right back to writing the other side's issues.

CHAIRMAN SOULES: That's right.

MS. SWEENEY: And the Court has said we're not going to do that. We're not even going to have to write our own, much less the other side's, so I think that would really be contrary to the policy that's been enunciated.

PROFESSOR DORSANEO: If you look at their decisions like the Payne decision, the Payne decision simply says you don't have to do it with a red hat on, you know, with sunglasses. You just have to provide the court with enough information so the court can see what the complaint really is

so that the court can make a ruling. And if it's done this way or that way or all together, in the context of trial court proceedings, that's good enough.

CHAIRMAN SOULES: All right. Is there any second to Bill's motion?

MR. KELTNER: Second.

MR. PERRY: Second.

CHAIRMAN SOULES: Bill's motion is -- will you state again what you want added and where.

PROFESSOR DORSANEO: "An objection must" -- I want to add the words "and provide the court reasonable guidance in curing the error" after the word "made" in the fourth line of paragraph (b).

CHAIRMAN SOULES: Okay. Is that what you seconded?

PROFESSOR DORSANEO: Yes. And put a comma after it.

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

MR. McMAINS: Can we have some discussion?

CHAIRMAN SOULES: Well, we've

had a lot.

Seven.

Those opposed. Eight.

It fails by a vote of eight to seven.

MR. ORSINGER: I would like to second David Peeples' proposal that you add the duty of reasonable guidance to (a) which limits it to the party who has the burden to plead but doesn't permit them to completely escape the responsibility of giving the trial court some guidance.

PROFESSOR DORSANEO: To where?

MR. ORSINGER: To the end of (a), line 28.

As I understood David's proposal, he was suggesting that we end up that paragraph (a), which has to do with the party that has the burden to plead, that they can get by with just an objection as long as their objection gives reasonable guidance.

CHAIRMAN SOULES: That's the same thing we just voted on.

MR. ORSINGER: No, it isn't. It's entirely different, because it only puts the duty of reasonable guidance on the party

with the burden to plead, and it doesn't require the defending party to give the guidance for the other side, an entirely different policy, and in my opinion more consistent with the Supreme Court's view, and I would vote for that. I voted against the other.

MS. SWEENEY: I second that.

MR. LATTING: You have to do that one more time.

CHAIRMAN SOULES: Okay. Let me see if I can get that. So we're going to have different standards for objecting. In order to have an adequate objection to preserve appeal, we're going to have different standards applied to those who have the burden to plead than those who don't have the burden to plead. That's what the effect of this is. Now, you're going to have to learn that if you have the burden to plead you have an elevated standard for your objection.

PROFESSOR DORSANEO: It's the same standard that operates differently depending upon who you're talking about.

CHAIRMAN SOULES: All right.

So what are the words? It's been moved and seconded, and I need to get them in here.

HON. DAVID PEEPLES: At the end of line 28, "pursuant to paragraph (b), which gives the court reasonable guidance," period.

CHAIRMAN SOULES: Reasonable guidance in fashioning the charge?

HON. DAVID PEEPLES: Well, that's --

MS. SWEENEY: Put it before "is" instead.

HON. DAVID PEEPLES: Yeah. After "objection" on line 27?

MS. SWEENEY: Yeah.

HON. DAVID PEEPLES: "If an objection which gives the court reasonable guidance is made pursuant to paragraph (b)." That's better.

CHAIRMAN SOULES: Reasonable guidance in fashioning the charge or what?

HON. DAVID PEEPLES: Well, it's obvious that it refers back to that. I don't know why you want to have that parallel.

CHAIRMAN SOULES: I don't. I'm just asking the question.

HON. DAVID PEEPLES: I would just say "an objection which gives the court reasonable guidance is made pursuant to paragraph (b)."

CHAIRMAN SOULES: Okay. Discussion. Rusty.

MR. McMAINS: Well, I just want to make an observation in good conscience that that comes close to being what we sent the Court in the first place.

MR. ORSINGER: Why did you have to say that?

MR. McMAINS: Well, because I think that -- I mean, what happened the first time was we said that -- we actually said do you have to do this as a prerequisite to being able to make an objection, they have to have submitted something, and the Court took that out. And by changing the nature of the objection to do the same thing, you're really accomplishing more or less the same thing.

Now, maybe that's -- and if that's what we want to do, that's fine, but I think that's not why they changed it and sent it back to us.

PROFESSOR DORSANEO: I bet it is.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: Well, I certainly don't know what's in the collective Supreme Court mind, but my problem with doing that is from an appellate perspective you are once again recreating what I think the primary charge preservation problem is now, which is that it depends on what court you're in, what judges you're before, whether you're representing a plaintiff or a defendant, whether it's a commercial case or a personal injury case. And that's why I have consistently been in favor of taking out anything that looks like substantially correct, reasonable guidance, request plus object, request or object, and making it a simple standard that the courts can't manipulate to achieve particular results.

HON. DAVID PEEPLES: Luke.

CHAIRMAN SOULES: Judge Peeples.

HON. DAVID PEEPLES: We've

already got the reasonable guidance language on line 26. It's there. We've already got what is close to reasonable guidance in lines 32 through 34, must be specific and the court makes an informed ruling. The language I suggested I think just tightens it up a little bit. We're voting on it, and let's move it on. It's not the end of the world if this things goes down.

CHAIRMAN SOULES: Are you saying that what you're adding doesn't change what's already in 32 through 34? And if so, why do we add it?

HON. DAVID PEEPLES: I think it strengthens it a little bit for somebody who preserves, you know, what used to be preserved by a request and they don't request, and they preserve by an objection. I think this tightens it up a little bit more and requires them to give a little bit more guidance, but I think it's already good enough the way it is. This just helps you to tighten it up.

CHAIRMAN SOULES: Any further discussion? Those in favor show by hands.

PROFESSOR ALBRIGHT: This is in

favor of David Peeples' language?

CHAIRMAN SOULES: Yes. 14.

Those opposed. Four.

13 to four, that suggestion will be sent to the Court.

Anything else on the Charge Rules? Bill.

PROFESSOR DORSANEO: Since we are, as David Keltner said, talking to the Court through the record, I would like to state at least for the record that Rule 277, paragraph (b), continues at least to me to create interpretive difficulties in its last three sentences. These difficulties have been discussed by us a lot, but I think they've been possibly exacerbated by collapsing together some of the separate paragraphs that we had. And although I don't plan on debating this all over again, we would be a lot better off, for the record, if we just pitch those last three sentences into the trash can; otherwise, I predict there will be a fair amount of appellate activity about their meaning and whether an inferential rebuttal defense can be submitted in the same question as a ground of recovery possibly repealing or

overruling Lemos vs. Montez.

CHAIRMAN SOULES: Anything else on the Charge Rules? Paula Sweeney.

MS. SWEENEY: The question -- and this is directed to Lee, and I don't know if -- the new sentence that's added to that paragraph (b) in 277, "A proper disjunctive question that submits a defensive theory as an alternative to a claimants theory is not an impermissible inferential rebuttal submission," maybe that is a model of clarity and I'm just dense today, but I don't understand what that's about.

MR. PARSLEY: We didn't add it. That came from the Committee.

MS. SWEENEY: Really?

PROFESSOR DORSANEO: Yes, that did come from the Committee, but the "However, inferential rebuttal questions shall not be submitted" was moved into paragraph (b) from a separate paragraph about inferential rebuttal questions. But I think that points up the problem altogether.

MS. SWEENEY: Yeah.

MR. PARSLEY: My recollection

about that is that all we did was collapse a series of paragraphs into paragraph (b) there that were in the proposals that came from this Committee, a series of subnumbered paragraphs, but all of that came from the Committee except for being collapsed together. I may be wrong, but that's what I recall.

MS. SWEENEY: I think until that sentence I was with you. It was just a collapse, a collapsation, but that's the one that I don't find in any committee draft and which confuses me a little bit.

CHAIRMAN SOULES: Anything else? Carl Hamilton.

MR. HAMILTON: Paragraph 278(e) says that a claim that there's no evidence to support the submission can only be made after the verdict. Does that mean that that's not a proper objection under 278(b)? You don't have to make that anymore?

CHAIRMAN SOULES: It doesn't say it may only be made, it may be made.

MR. HAMILTON: May be made for the first time after the verdict?

CHAIRMAN SOULES: That there's

no evidence, correct.

MR. McMAINS: That's always been the law.

MR. HAMILTON: But you don't make a no-evidence objection if there's no evidence to submit an issue?

CHAIRMAN SOULES: You can make it then.

MR. LATTING: You don't have to, though, to preserve error.

CHAIRMAN SOULES: But you don't have to, right, to preserve error.

MR. LATTING: But that doesn't change the law.

MR. ORSINGER: No. That's what a JNOV is.

CHAIRMAN SOULES: Anything else? Okay. We've got, then, two -- one change to send to the Court in 278(a); otherwise -- and another to delete the Notes and Comments after 278, and we will send that to the Court and they will take final action on the Charge Rules.

Okay. We were asked to take up these rules on petition for review on an expedited

basis as I understand that, Lee, is that right?

MR. PARSLEY: Well, the petition for review rules, if I can take just a second, Judge Guittard did the original drafting on it, and then I have done subsequent drafting on it which substantially changes what he did, so I don't think I can blame it on him at all.

HON. C. A. GUITTARD: Thank you.

MR. PARSLEY: And the Court has looked at these rules and would like for the Advisory Committee to look at it and give us some both substantive guidance and technical guidance on what it is the Court is thinking about doing here. This is the proposal that the Court has created outside of the Committee, and we would like to give it to the Committee to talk about, to debate it, to do what you all do about these kind of things.

CHAIRMAN SOULES: Would it be helpful to have this done while Justice Hecht is here so that he can tell us maybe where the Court stands on this?

MR. PARSLEY: I think so.

CHAIRMAN SOULES: I mean, I don't know whether the Court is asking us to comment on the underlying policy or the fundamentals of this change from our current practice to this kind of a practice, or whether the Court has already made up its mind that we're going to go to this practice and abandon the previous practice; and therefore, if they just want our input on how to get to this position because they're going there anyway, I don't know what really our charge is in this regard.

MR. PARSLEY: Well, Judge Hecht is supposed to be here.

CHAIRMAN SOULES: I'm sure he will be. I'm not commenting about that.

MR. PARSLEY: So maybe we should wait for him to get here and let him give the Committee some guidance, because I'm a little uncomfortable in doing that. I think it would be best if he told the Committee where he thinks the Court is going on this and what he would like for the Committee to help us on.

CHAIRMAN SOULES: Well, maybe we ought to postpone this until we can get a comment from Justice Hecht. That makes sense. Lee says it does, so it does as far as I'm concerned.

Bill, do you have an interim report on the Appellate Rules? Bill Dorsaneo.

PROFESSOR DORSANEO: No, other than the report that we received back, the first 24 rules from LawProse. And comments have been made with respect to that first package by Mike Hatchell, myself, and Justice Guittard, but there's nothing really to report with this Committee even about those first 10 or 12 rules.

CHAIRMAN SOULES: Tell us what the process is that you're about at this time so that we can understand what's churning behind the scenes and what we may anticipate.

PROFESSOR DORSANEO: Well, Lee can correct me on this, because I'm not completely sure exactly how the process works at the Court's level, but the Court went through the Appellate Rules that this Committee proposed to the Court for adoption

and made adjustments here and there. And then the Court's draft was submitted to LawProse, which is a legal writing organization headed by Bryan Garner, to revise the drafts that had gone through us and through the Court to put them in better language.

I might add, you may have noted that the Federal Rules of Appellate Procedure are going through the same kind of process. If you looked at your last United States Supreme Court Reporter, you could see that they are being clarified and cleaned up in the same manner.

Bryan Garner and his staff went through one package of 10 or 12 rules and made stylistic changes, perhaps a few inadvertent nonstylistic changes that have been identified, and now have gone through the first 24 rules, which really gets us into the main operational rules for the first time, and actually maybe not quite, and that's the process.

Now, we, Mike Hatchell, Justice Guittard and myself, are reviewing that work. We have not sat down and discussed among ourselves

what should be done to Bryan Garner's work, basically because it hasn't gotten far enough along for us to get together, and I suppose it probably is pretty close to that now.

CHAIRMAN SOULES: Lee, I understand the Court either has or intends to give Bryan Garner a deadline by which his work must be completed. Is that right?

MR. PARSLEY: Yes. Bryan doesn't know that yet, so I probably should rush to the phone and call him so he doesn't hear it secondhand. But yes, the Court is going to ask that Bryan complete his work before the Court takes its July break, which will be somewhat faster than he has proceeded so far, but that's -- the idea is that we want Bryan to complete it by next July.

MR. HATCHELL: I talked to him on the phone, and he --

CHAIRMAN SOULES: Speak up, Mike, so we can get you.

MR. HATCHELL: I talked to Bryan on the phone yesterday, and he supposedly has a major portion sent to you as of yesterday.

CHAIRMAN SOULES: Okay. So we're still in progress on that.

PROFESSOR DORSANEO: Through Rule 24.

CHAIRMAN SOULES: We've received through Rule 24. And are you saying more is in the mail as you're understanding it, Mike?

MR. HATCHELL: When did you get this (indicating)?

MR. PARSLEY: Yesterday.

MR. HATCHELL: So this is it? This is all? Oh, this is 11 through 24.

CHAIRMAN SOULES: What is that?

MR. HATCHELL: That's 11 through 24.

CHAIRMAN SOULES: 11 through 24. Okay. That's the next, quote, major installment. Okay.

MR. ORSINGER: He needs to be working overtime.

CHAIRMAN SOULES: All right. So we're still making progress, but nothing back on our agenda yet for us to look at.

PROFESSOR DORSANEO: Now,

frankly from a timing standpoint the Appellate Rules need to move a little more quickly. A more significant concern that I have is that this timetable, or even the accelerated timetable, will be very slow if everything goes through the same process. I mean, we'll finish in about 2000.

JUSTICE CORNELIUS: Luke.

CHAIRMAN SOULES: Chief Justice Cornelius.

JUSTICE CORNELIUS: I'd like to ask Bill Dorsaneo or someone on the Appellate Rules Subcommittee if the correspondence from the Beaumont Court of Appeals has been considered. They wrote about Rules 4(e), 74(a) and 91. Did you get that?

PROFESSOR DORSANEO: Yes. I think I have, and Lee can talk about this too. That's something we talked about.

JUSTICE CORNELIUS: They're concerned about the requirement that all parties to the trial court's judgment be served with all papers and orders and briefs and everything, even though they may not be parties on appeal. And I wondered if anything

had been done about that.

MR. PARSLEY: We, the Court, have seen the letter from the Beaumont Court of Appeals, and we discussed it, the Court discussed it in conference and is sympathetic to the Beaumont Court of Appeals' problems. Very sympathetic, as I remember.

And then the problem is, how do you take care of that? And that becomes complicated because then you get into what this Committee already has decided, which was whether to name appellees in the notice of appeal or not, because if you don't name the appellees in the notice of appeal and everyone is an appellee once the appeal is perfected, then everyone is entitled to copies. So the question is, how do you narrow the number of parties in the appellate court if you don't name them in the notice of appeal, which is a proposal that failed in this Committee.

And so, as I said, the Court was sympathetic, and we have not, I guess, substantively, the court has not concluded what to do with the Beaumont Court of Appeals' letter, because it would require changing what

I think this Committee very clearly voted against, or else we haven't found another solution in our discussions with the Court about that. And I've discussed it with I guess Judge Guittard and Bill and maybe others.

PROFESSOR DORSANEO: And Mr. Chairman, we would like to have a timetable for when -- frankly, we haven't met as a committee. We've just kind of dawdled along here and felt no need to meet. But speaking personally, I would like to know something about when we're going to come to closure on the Appellate Rules and perhaps other things, because the movie "Ground Hog Day" is more and more on my mind as we come to these meetings.

CHAIRMAN SOULES: Well, I sympathize with that and I agree. The Court, as I understand it, has looked at all of these Appellate Rules and sent them all to Bryan Garner, right?

MR. PARSLEY: That's correct.

CHAIRMAN SOULES: That's correct. So by the end of July, Garner is

going to be ordered, or commanded anyway, to get his product back. What timetable is functional for the Appellate Subcommittee, then, after we get Bryan Garner's work back?

It's coming directly to, what, the three of you?

PROFESSOR DORSANEO: It goes to Lee.

CHAIRMAN SOULES: It goes to Lee, and then you distribute it to Hatchell, Guittard and Dorsaneo.

MR. PARSLEY: And you.

CHAIRMAN SOULES: And me. And then they do whatever they do, and then, what, it goes back to the Court for final approval, or it comes to this Committee for final approval?

MR. PARSLEY: The process so far is somewhat informal, but it is a give and take in that we received the first 10 rules from Bryan Garner and I distributed them to Judge Guittard, Bill Dorsaneo and Mike Hatchell. I received comments back and I also made comments then to Bryan Garner. Mike Hatchell made some substantial comments

directly to Bryan Garner regarding those rules, and so Bryan and LawProse will make some adjustments, I think, on what they did based on those comments. And so there is some working back and forth, and we are checking I think very carefully to make sure that what comes from LawProse is substantively correct. As I said, Mike Hatchell has spent a good amount of time doing a rather lengthy letter to LawProse with regard to what they had done.

And so that's the process right now, is to try to work with LawProse to make -- once we get a draft back, to respond to that draft, to suggest changes, and ultimately, it is -- the Court's break at the 1st of July is when they were asking LawProse to finish its work. The court is going to break before the 4th of July, and by then is when they would like for LawProse to finish its work, and so that maybe the subcommittee could meet sometime in July and have a report to this Committee for this Committee's July meeting. That's quick. Now, whether we can get that done or not I don't know, but we feel that that would be, I would

think, the quickest timetable we could be on at this point.

CHAIRMAN SOULES: Well, I'm hearing moans from --

MR. ORSINGER: That's unrealistic.

CHAIRMAN SOULES: -- from quarters nearby. Can we expect to have a complete set of Appellate Rules as the Court will adopt them in our hands by the 1st of September? If so, then we can probably reasonably deal with them in the September meeting.

I think it's somewhat of an imposition on all of you to get rules Wednesday for a Friday meeting, but that's not -- that's just something that has happened this time. We ought to try to avoid it later. At least give us a couple of weeks, particularly something as massive as the Appellate Rules.

We're going to meet the second or third weekend of September, I don't know which one it is, so no later than the 1st of September we would need those rules, unless we're going to be in a crunch again in September.

PROFESSOR DORSANEO: It can be done, assuming --

MR. ORSINGER: We meet on September 20th.

CHAIRMAN SOULES: September 20th. All right.

PROFESSOR DORSANEO: Assuming we don't have any major policy changes. If the Court decides that everybody is going to need to perfect an appeal by giving a notice of appeal, then we have a lot of other things to worry about. Okay? But if there aren't a lot of other changes, and I think we can digest this petition for review thing by that time, if we don't get a lot of other things, and if LawProse can meet that other schedule, I don't see why it would take us more than a week, you know, of subcommittee time to go through it and get it into respectable shape for presentation here.

CHAIRMAN SOULES: Does the Court intend to work on these rules during recess, the summer recess?

MR. PARSLEY: Yes.

CHAIRMAN SOULES: Okay. So if

Garner gets done by June 30, if they take a month, that's the end of August. And if you all get a month, that's the end of September, if we can get through it at the September 20th meeting. Okay. That's not a deadline, but it's an ambitious schedule.

PROFESSOR DORSANEO: It's a guideline.

CHAIRMAN SOULES: It's a guideline. Justice Duncan.

HON. SARAH DUNCAN: I just lay my bets. I'll lay my bets.

MR. ORSINGER: Now, Luke, the Bryan Garner -- whatever these gentlemen negotiate with Bryan Garner is going to come back to this Committee and then go to the Supreme Court?

CHAIRMAN SOULES: The Court first, I would think.

MR. PARSLEY: I don't think we've ever done this before.

CHAIRMAN SOULES: No.

MR. PARSLEY: So we are working without a road map, but it is right now, as I said, a give and take between the Court, which

is Judge Hecht and I mostly; Bryan Garner; Mike Hatchell, Bill Dorsaneo and Judge Guittard. And we all have copies and all -- it's kind of all comments -- the comments are all going between us all, I suppose, and so I think that what will happen is that ultimately, when we get Bryan Garner's final report, it will already include the Court's comments and Bill's comments and Mike's comments and Judge Guittard's comments as part of his final report, so it won't really stop with the Court particularly on the way here for more work from the Court.

The way it's going now, I think that all of that will be done in the process with Bryan, so that when it comes to the Court from Bryan Garner as a final product, we'll pass it right on through to this Committee to go to a subcommittee meeting for a report here. So I anticipate the final report from Bryan Garner won't need to stop with the Court for any reason.

CHAIRMAN SOULES: How massive are the changes?

MR. PARSLEY: Well...

CHAIRMAN SOULES: Are we going to just see, if we get a red-lined version, is it going to be everything is out, all new in, in different words or what?

MR. PARSLEY: The changes will be --

CHAIRMAN SOULES: That's what we're going to see? That's what I figured.

MR. PARSLEY: The changes will be significant, but I hope the Committee is not disheartened but is heartened by this project, because I believe that the Appellate Rules, when it goes through this project, will be better, more understandable. The substantive law will be changed only in places where this Committee wanted the substantive law or the Court wanted the substantive law changed, and I can't guarantee that, but I really would like for the Committee to have some faith that this process is not the end of the world.

I mean, we are fairly careful, I think, in trying to communicate among people who are experienced in appellate law to make sure that the product that comes from LawProse and comes

back to the Court, although there will be quite a bit of change in language, is not going to change appellate procedure in Texas except where we want it to.

CHAIRMAN SOULES: Let me ask a specific question then. How helpful would a red-lined version be, red-lining what we get next time against what we sent to the Court?

MR. PARSLEY: I can do that, will do that, and if -- I --

CHAIRMAN SOULES: No, my question is how helpful. Is it going to be so radically different that it's really not going to be helpful?

PROFESSOR DORSANEO: Bryan has almost prepared -- it is kind of -- it's a substitute for a red-line. It's a side-by-side comparison. If anybody looked at the Supreme Court Reporter, they can see exactly how the Federal Rules of Appellate Procedure are being redesigned. You can identify the change. This is the equivalent of, if not better than, a red-line.

CHAIRMAN SOULES: If anybody hasn't seen this, I'm going to pass this all

the way around the room so you can get an idea of what's happening (indicating).

MR. ORSINGER: Luke, if can I ask a question.

CHAIRMAN SOULES: If we could just pass this around just quickly to take a look at it.

MR. ORSINGER: It would be helpful to me if we could provide some kind of summary of what the Supreme Court has done with our original proposal. The way I'm looking at this is that Bryan Garner isn't changing the substance of anything unless he does it accidentally, but the Supreme Court may have changed the substance of a lot of things.

The only thing I know of that the Supreme Court has substantively changed is our recommendation to eliminate writ of error appeals to the court of the appeals; I know now or I see now that they're probably going to on their own in this petition for review. If we could get an outline, maybe even just two pages long, of the substantive changes that the Supreme Court has made, then it can

be percolating in our heads right now of what our reaction is going to be and what kind of consequential changes need to be made to our original proposal.

MR. PARSLEY: We can. I have on my computer both clean and red-line copies of what the Supreme Court has done. The red-lining is against the current rules, not against what this Committee submitted. I can go back through and red-line against what this Committee submitted, and will do that, if that's what you all would like. If you would prefer red-lining against and I distribute red-lining against the current rules, I can do that. I'll do what the Committee wants in regards to distributing it and when.

And always I have provided copies of these things freely to anybody who calls me and asks and will continue to do that. It's just that in our trying to work through them it is a little more helpful to have a set group that I can distribute to regularly and get comments from regularly, as opposed to having a mailing list of 30 people and I spend all my time mailing stuff out and very little

time doing anything substantively. We've tried to narrow it a little bit, but I'm happy to provide anybody copies of any of this at any time, if you will call me, and I will prepare, if the Chairman would like for me to, a red-lined version. In fact I can do the red-lined version for tomorrow. I will go to the office and copy it tonight and then hand it out, if that's what you all would like.

CHAIRMAN SOULES: Well, let me ask you this: Is the Court working from the current rules to new rules, or working from what we sent in to new rules?

MR. PARSLEY: Working from what this Committee sent in to new rules.

CHAIRMAN SOULES: Okay.

MR. PARSLEY: It's just that the red-lining, you know, is done against the rules. But the Court took what this Committee sent as the basis from which the Court has worked.

CHAIRMAN SOULES: Okay. Well, I think what I'm hearing here is that our Committee wants to be staged to react to and assist the Court with the Appellate Rules by

doing some homework before we get into Committee session so that we can be more productive in Committee session. A couple of ways, a couple of things might help us. It may be premature to -- well, has the Court finished its work on the Appellate Rules?

MR. PARSLEY: Well, not -- I'd like to say we've finished, but the Beaumont Court of Appeals wrote its letter kind of late in the process and has identified a problem, and so the Court -- that's percolating at the Court. I don't know what the answer is, but that is there. These petitions for review rules have been percolating at the Court for several months, and we haven't really declared that finished either, so there are some issues there that the Court has not decided how to handle them.

CHAIRMAN SOULES: Other than those two issues, do you know of any other open issues?

MR. PARSLEY: No.

CHAIRMAN SOULES: Okay.

MR. PARSLEY: Not anything of substance.

CHAIRMAN SOULES: Okay. Mike.

MR. HATCHELL: If I can make a suggestion, I think that Richard Orsinger's original request that Lee prepare a summary of how the Supreme Court changed our package would be a lot more useful than a red-lined version, because I've seen Lee's red-lined versions and they're really -- it really gets to be confusing. It's not Lee's fault. It just is.

The other comment, Luke, if you remember, we didn't work on every appellate rule. But Bryan Garner, he is editing every appellate rule. And Bill Dorsaneo is correct, what he gives us, a side-by-side comparison, is much better than a red-line.

So what I would like to see is Lee do a summary of changes to our package and then everybody get the side-by-side comparison, and I think that will be much easier.

CHAIRMAN SOULES: If you -- if it's -- I know how burdened you are because you don't have any help, Lee, but if you will instruct me to distribute copies to the membership of something you want distributed,

we'll do that in my office. You've been doing a lot of that out of your office, which is helpful from time to time because it doesn't have to go to San Antonio and get through there. But when we're not tight on time, we'll be happy to take care of the duplication and mailing and get that off of your plate. So why don't -- but just remind me so that I know that I'm sending it to everybody.

But we should send to everybody, I guess, every increment of the Bryan Garner work product that comes out so that everybody gets that, Bill?

PROFESSOR DORSANEO: Yeah.

CHAIRMAN SOULES: Or do we wait for you all to act and then send it out? I mean, the committee of three is going through and spot checking for where Garner accidently, to use Richard's words, makes a substantive change.

MR. HATCHELL: That's correct, Luke. Just bear in mind that that's also the first time that we have ever seen some of these changes, because as I said, these are rules that neither this Committee nor the

subcommittee has ever worked on.

The problem that I have about distributing Bryan's work piecemeal is, Lee, I don't know what happens to our comments when we make them. I mean, I'm only commenting on LawProse's drafts. I don't know what happens to those comments.

CHAIRMAN SOULES: What does happen to them, Lee?

MR. PARSLEY: They go to LawProse. In my conversation with Bryan last week, he had your comments, said that your comments were accurate, and he needed to incorporate them. And so I assume that was only on the first 10 appellate rules, and I assume we will get a subsequent draft out of LawProse on the first 10 appellate rules that incorporate Mike Hatchell's comments, so it all sort of clears through me, and maybe that's an inefficient way to do it, but I try to keep the three people that we've been working with here and Bryan Garner and Judge Hecht, all of us, with everything mailed, but maybe I'm not as efficient as I ought to be in terms of getting the mail out sometimes, but

other than that, it all goes out to where it's supposed to go.

CHAIRMAN SOULES: Well, I think the timetable needs to be changed, then, because we get into a new factor that I haven't focused on. We need Bryan Garner to work by the end of June. We need Bryan Garner's revised and final, the last we're going to hear from LawProse, by the end of June -- July.

PROFESSOR DORSANEO: July.

CHAIRMAN SOULES: By the end of July. So we're going to get what he does and thinks he does right by the end of June, and then Mike and Bill and whoever else wants to, maybe we need some more people, to go through there and look for these accidents and try to fix them, and get Bryan to quickly react to fixing the accidents that he had and then get back to us with the last word from them by the end of July. Okay? And then you all take one more pass at it and get it to us by the end of August.

That's what we need to do, because what you're getting from Bryan is what sounds to me

like -- what the Court really expects to get from Bryan by the end of June is going to include all these accidents, and that's got to be cleaned up first before this Committee should be involved as a whole, because we've got this talent that's going through and finding these problems.

Okay. Then what we need to do is distribute to the Committee as a whole what we get back from Garner at the end of July and probably nothing before, because it's going to be full of accidents and everybody is going to be worrying about those accidents that a few people are already fixing, so let's get those accidents fixed by the few before we distribute it to everybody, unless somebody wants to -- and anybody that wants to be on this --

HON. SARAH DUNCAN: -- accident reconstruction team?

CHAIRMAN SOULES: -- accident reconstruction team, yeah. They need help. We need help, so who wants to help?

MR. ORSINGER: I'll help.

CHAIRMAN SOULES: Richard will

help. Sarah will help.

MR. ORSINGER: Elaine's hand is up.

HON. SARAH DUNCAN: Elaine's hand is up.

CHAIRMAN SOULES: David Keltner will help, and Elaine will help. Okay. So Bill, do you have those people?

MR. PARSLEY: Got 'em.

CHAIRMAN SOULES: Lee has got it.

MR. ORSINGER: Now, Luke, that means he's going to do about 120 rules in 45 days when he's done the first 20 rules in three months?

CHAIRMAN SOULES: Yeah. Fat chance, but we'll see.

MR. PARSLEY: Well, he may have another big packet on the way. We're hopeful maybe that's it. According to Mike, there's something else in the mail.

CHAIRMAN SOULES: Okay. Does everybody agree with that timetable? That's about as fast as we can hope to have them done, and then if we do, we can get them to

them in January.

Does anybody need anything before we get to the last of the LawProse revised project?

MR. ORSINGER: I would like to go back to my suggestion of a short summary of the Supreme Court implemented --

CHAIRMAN SOULES: Well, I'm trying to take this one at a time.

MR. ORSINGER: Oh, I thought that was included in this.

CHAIRMAN SOULES: That wasn't responsive, but my question was too narrow.

Okay. That's what we're going to do with LawProse.

Okay. Now, Lee and Bill, we would like to have a memorandum of policy differences between what the Supreme Court is sending to Garner and what we sent to the Supreme Court. That's part (a) of what we need.

Part (b) of what we need is an identification of the still-open issues which the Supreme Court is considering so that we kind of get an orientation of what's going on. And in a week, 10 days, two weeks, something like that, wherever you can fit it

in, if you can get that to me. Instead of sending it to everybody, send it to me, and I'll get it to everybody. That's what you want, Richard, right?

MR. ORSINGER: Yes, it is.

CHAIRMAN SOULES: And I think we all want that. Justice Duncan.

HON. SARAH DUNCAN: Luke, when are you talking about that?

MR. ORSINGER: A week or two.

CHAIRMAN SOULES: 10 days, two weeks, something like that. Lee has got so much on his plate. He's going to have to do this summary, and I don't want him to feel like he's got to do more than he can possibly manage, but I know, given his efficiency, we're going to get it as soon as we can.

A couple of weeks would give you time to fit it in, do you think?

MR. PARSLEY: Yes.

CHAIRMAN SOULES: Okay. Will that work for you, Justice Duncan, within a couple of weeks?

HON. SARAH DUNCAN: Sure. I just have a paper due and I was wondering how

much of this I was going to be able to include in it, and I apologize.

CHAIRMAN SOULES: Well, as I understand it, they've decided to preserve writ of error, so that doesn't -- unless they've changed it. And they're struggling with whether everybody has got to perfect an appeal or how they're going to deal with that in light of the --

HON. SARAH DUNCAN: We've gone through and identified what we've noticed as the significant changes. I was just being greedy. Sorry.

CHAIRMAN SOULES: Just try to be helpful, if you want to be.

Anything else now on the Appellate Rules? Any other questions about where they are? Any other suggestions on how we can better build efficiency into the process and accuracy, anything?

Do you have any other requests, Bill, from us?

PROFESSOR DORSANEO: You're going to do this petition for review, right?

CHAIRMAN SOULES: Not until

Justice Hecht gets here to tell us what our charge is. I don't know whether this is a fait accompli, they're going to do this, they just want our help in implementing it, or whether they want us to comment on whether they should do it. And I think we probably need to know that, because we could debate maybe all day on one of those questions and it may be a closed issue.

Okay. Appellate Rules, and thank you all very much. Let's take a short break here of about 10 minutes until 10:40.

(At this time there was a recess.)

CHAIRMAN SOULES: Don Hunt, do you have a full grasp of plenary power now to share with us?

MR. HUNT: Yes, I do.

CHAIRMAN SOULES: All right. Then let's find out about it. The next item pending on our agenda pending the arrival of our liaison member will be Don Hunt's report.

Don, do you have some new papers for us?

MR. HUNT: Mr. Chairman, there are three new papers for you.

CHAIRMAN SOULES: Okay. Are they all up here?

MR. HUNT: Yes.

CHAIRMAN SOULES: Has everyone picked up a new paper?

MR. HUNT: The first is a red-lined version with a little bit fancier cover. Then there is a clear version, which is the same as the red-lined except for the red-lines, of course; and then the inquiry disposition chart, which is only two or three pages and is reasonably short.

My hope is that we can march through these with dispatch and spend the only deliberative time in connection with Rule 305, the plenary power rule, which this Committee requested us to redraft slightly and continue our work.

The other changes that have been made since last time have all been shown by boxes which appear in the red-lined version, and my hope is that we can march through these box by box and get to Rule 305, because until we get for to Rule 305 there's not much in controversy.

There are a couple of suggestions that are made in here that have come primarily from Justice Guittard about changes, because we may have made a mistake or two as we were going through the first time, a comment or two that's required by recent cases.

But with those general comments in mind, Mr. Chairman, let me direct the attention of the Committee to the red-lined version, and going just box to box turn to the first box on page 2, which deals with Rule 297(c).

Rule 297(c) was the rule that dealt with the form of the findings of fact. That's that new rule we voted to tinker a little with on the language. The tinkering has been done, and the only purpose for even calling it to your attention is to be certain that the present version is faithful to the drafting we did last time.

CHAIRMAN SOULES: Does everybody agree with the rewrite of 297(c)? Does anyone disagree? There's no disagreement. It passes unanimously.

MR. HUNT: The next one is on Page 3. It deals with Rule 299(b) on presumed

findings. Stephen Yelenosky suggested a grammar change. That's been made. I can't even find the old version of this, but he did improve the language slightly to make it clear that it is the finding that is presumed and not the request that is presumed. Unless there is some problem there, I ask that that be approved too.

CHAIRMAN SOULES: Okay. Does everyone agree, then, with the rewrite on 299(b)? Does anyone disagree? Richard.

MR. ORSINGER: Let me make a comment. I just realized for the first time that our deemed finding rule under the jury part, which we just got through looking at, permits a deemed finding when the evidence is both legally and factually sufficient. This language permits a deemed finding in nonjury cases when supported by factually sufficient. "Factually sufficient" probably tacitly includes legally sufficient. The language is not parallel, but the concepts are probably parallel.

CHAIRMAN SOULES: Does anyone disagree with 299(b) as written by the

committee? No disagreement. It passes unanimously.

MR. HUNT: The next is on page 4. This is in the definition of final judgment. We have made no changes to it except to add the language on Rule 300(b)(3), the very last language, the "except" language. I think this is language suggested by Rusty McMains and drafted by Judge Guittard. It's clarifying only.

CHAIRMAN SOULES: Okay. Does everyone agree with the rewrite on 300(b)(3)? Does anyone disagree? No disagreement. It passes unanimously.

MR. HUNT: The next change is on Page 5. It also deals with Rule 300, it's Rule 300(c), the form of the final judgment. If you recall last time, if you will look at the top of Page 5, we changed slightly the language in subparagraph (3). We reduced it to where it originally talked about relief and for and against and that kind of thing, we reduced it just to "dispose of all parties and claims."

While we were taking that action in

subcommittee, the Amarillo Court of Appeals was writing an opinion that said that what we did was not final judgment. While this is an unpublished opinion, it came into my hands, and I sent a copy of it to Judge Guittard, and what's expressed there in the box is about the whole of the opinion, and the whole of the trial court's judgment.

The trial court's judgment just simply said one side's motion for summary judgment is granted; the other side's motion for summary judgment is denied. That disposed of all claims and all parties. Amarillo said that wasn't a final judgment because you could not read that judgment and know what had happened. It's possible to go back and read the transcript and look through the motions and see what must have been at issue, but this points out the problem that we've talked about here when we talked about finality.

You need finality for the purpose of being able to execute on something. In order to be able to execute, you need to be able to know what has been ordered one way or the other, or you need to know what relief has

been granted or denied. And that was the reason why at Justice Guittard's suggestion and because of this case I have gone back to some slightly different language that we had in before, and that's expressed in Alternative 2. And it's more like the current rule anyway.

CHAIRMAN SOULES: What makes the Amarillo court right?

MR. HUNT: Because it was impossible to read that final judgment and know what one could do under the judgment. All one knew was that a motion had been granted and a motion had been denied.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: Well, I question whether that would make it nonfinal as opposed to erroneous or not capable of execution. But it seems to me that we're going to cause a lot of judgments to not be final if we make this Alternative 2 part of the rule with express reference in documents generated by this Committee to the Amarillo case.

CHAIRMAN SOULES: I didn't hear the last part.

HON. SARAH DUNCAN: With documents generated by this Committee and reviewed by this Committee and discussions within this Committee to the Amarillo opinion in Burleson vs. City of Houston.

CHAIRMAN SOULES: Judge Guittard.

HON. C. A. GUITTARD: Mr. Chairman, this rule does not define final judgment in form and substance generally. It just says what should go into a judgment. There may be some difference between what should go into a judgment and what makes a judgment final. This language in the Alternative 2, state the relief, either in law or in equity, granted or denied, to or against each party, is nothing new. In fact, it's a paraphrase of the present rule. And I see no reason why it should not be in there. I think we would make a mistake by saying, by omitting the provision that the judgment should state what relief is granted.

CHAIRMAN SOULES: Justice

Duncan.

HON. SARAH DUNCAN: And I certainly don't disagree with that in concept if it's clear within the Committee that we are not saying that that is a necessary requirement for finality. What concerns me is that we were considering a document that says, and I quote, "Without a requirement that a judgment state that the relief given to each party, the judgment is not final pursuant to such cases as Burleson vs. City of Houston," which appears to me to codify that holding. At least that appears, that sort of looks like it's the intent of the Committee. But I'm not disagreeing with what Judge Guittard says.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, I don't want to revisit this, but I like the description including (3), but I don't like the "and Substance" part of the title or the word "final" before "judgment." We have a separate paragraph on final judgment and that seems to be adequate in and of itself. Do we need to talk about final judgment in the next

paragraph?

If you go down to -- maybe I don't mind the "and Substance," but if you go to "Form and Substance: Specific," it says, "Personal Property. A judgment for personal property." We don't say there "a final judgment." So my specific point is why don't we take the word "final" out of the first line in (c).

CHAIRMAN SOULES: Any objection to that? Any discussion of that? The word "final" in the first sentence of 300(c) is stricken. It now reads "(c) Form and Substance: General. The final judgment shall:" It will read "(c) Form and Substance: General. The judgment shall:" That passes unanimously.

PROFESSOR DORSANEO: The only other thing I would say is you could say "a judgment" to make it completely parallel.

CHAIRMAN SOULES: Any objection to that? It will read "a judgment" instead of "the judgment." It's unanimous. Unanimous consent on that. It will say, "(c) Form and Substance: General. A judgment shall:" and so forth.

PROFESSOR DORSANEO: And I move the elimination of this reference to Burleson vs. City of Houston. I haven't read it, and I don't want to embrace it if it means more than what the Committee has proposed.

CHAIRMAN SOULES: I think that's just --

HON. C. A. GUITTARD: It's just an explanation.

CHAIRMAN SOULES: -- that's just assistance for the Committee. That's not being published anywhere other than outside of this, is that correct?

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

MR. HUNT: That's correct.

CHAIRMAN SOULES: Okay. So we've got (c)(1) is okay; (2) is okay. Which (3)?

MR. HUNT: Yes, which (3). That's all we're concerned with here.

CHAIRMAN SOULES: You recommend, the committee recommends Alternative 2, is that correct?

MR. HUNT: That's correct.

CHAIRMAN SOULES: It doesn't need a second. Any discussion? Those in favor of show by hands. Those opposed.

13 to two it passes.

MR. HUNT: The next question arises from page 7. This is in connection with the motions before and after judgment, Rule 301. Turn if you would to 301(b)(2) on page 7. The box identifies the "unless" language which has been slightly edited. That was edited because the way it was expressed previously was not crystal clear in my judgment, so I talked with Bill Dorsaneo, and this language seemed to make clear what was the purpose of the "unless" clause, simply to say that where a charge expresses the law and both parties fail to object to the expression of the law in the charge, that becomes the controlling law in that you can't later complain about the charge not expressing the controlling law.

Does anyone have any problem with that slight rewording in (b)(2) and the inclusion of the "unless" language in (c)(2)? The inclusion in (c)(2) is only for the purpose of

making them parallel.

CHAIRMAN SOULES: Does everybody agree, then, to the rewrite of 300(b)(2) and 300(c)(2) as shown on page 7?

MS. SWEENEY: I'm sorry, I have --

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: I'm trying to be sure that this in some way dovetails with what we just did with the Charge Rules, and this is the first time I've ever seen this, so I don't have any idea. Have you all given some thought to that, and can you talk about that with what we just did?

CHAIRMAN SOULES: I don't think it's affected by that, is it, Richard?

MR. ORSINGER: In my view, Paula, it's not a problem, because we don't say how they preserve it, for example, by requesting or whatever, and under the Charge Rules they preserve it by objecting.

MS. SWEENEY: But does the objection -- this says that the court's charge fails to express controlling law. Is this a

more specific requirement than what we just put in the Charge Rules? Is it a less specific requirement? Is it the same requirement for what the objection should state?

MR. HUNT: In my judgment, Paula, it doesn't touch how one preserves. It just simply says if there is a failure to preserve, it's to eliminate those who lie behind the log when the charge expressly spells out what the law is that applies to this case that's about to be submitted to the jury. If both parties remain silent, they can't come in later at the motion stage and say, "This charge was wrong"; that where it spells out the definition of negligence, the definition is just flat wrong of what negligence is. You can't complain later on that the charge didn't properly define negligence when the trial court and both counsel let it go. There's got to be something done at the preservation of error stage. You can't do that kind of error at the motion stage. That's what it all means.

CHAIRMAN SOULES: Okay. Any

other questions? Rusty.

MS. SWEENEY: So potentially there are different standards at the motion stage? You don't think so?

CHAIRMAN SOULES: Rusty.

MR. McMAINS: The only question I have, I suppose, is -- I mean, Allen is a very specific application of a problem in that there was basically a burden assumed and otherwise arguably not required to be assumed of something that was in the charge. Of course, we have different rules of when something was not in the charge, letting the trial judge make the addition. And we also have -- that's in our -- it used to be in 279, whatever our numbers are now, that you have deemed findings, waived grounds type arguments. And I guess what this is is an attempt to basically say in general that you waive the application of controlling law if you don't make an objection?

CHAIRMAN SOULES: That's what it says.

MR. McMAINS: Whereas, historically when we say that no-evidence

objections can be made for the first time after verdict and there's not anything in the charge specifically that would indicate that the parties have agreed that the law is a certain way, is this an attempt to basically repudiate the notion that you can preserve the claim that this is not a legally cognizable claim by NOV, which we have always been able to do in spite of Allen?

I mean, Allen does not hold that you can't make a no-evidence complaint, a no-duty complaint, those types of things, without having to make any objection to the charge or any kind of preverdict motion. I'm a little bit unclear. I guess what I'm saying is I think this does more than Allen does, because Allen is a situation where the parties basically submit something agreeing that this is going to control the outcome of the case. That's the basis for Allen, whereas -- yeah, but it's not a holding that they waive. It's not actually -- Allen doesn't hold that they waive the law per se. It just says that they -- as you point out, that they sandbag the court and say, "This is the controlling

issue in the case, and way it was submitted was we're going to determine the evidence based on that."

But I think if you've got, for instance, a legitimate no-duty argument, I mean, nobody is going to complain about the submission of negligence under the PJC. I mean, why should you have to complain about no duty in a negligence submission? I think people will be using this to argue that you can't argue no duty unless you've made that argument in the charge.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, I think I'm understanding what you're saying, and the language that I find perhaps a little bit overbroad beyond Allen is the "fails to express" rather than saying something like "inaccurately expresses." I think Allen is an affirmative misstatement.

MR. McMAINS: Correct.

PROFESSOR DORSANEO: Because it adds "should have known" to "knew." That is frankly a little more narrow than this, and I

would suggest that the Committee speak about "inaccurately states controlling law" rather than "fails to express," which --

MR. HUNT: That's a good change, Mr. Chairman. I would move 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."

CHAIRMAN SOULES: Rusty, does that get at your issue?

PROFESSOR DORSANEO: How about "affirmatively misstates," because "inaccurately expressing" could be leaving something out.

MR. ORSINGER: Why does it need to be affirmative? Why can't it just misstate it?

PROFESSOR DORSANEO: I'm trying to align it as closely as I can to Allen.

CHAIRMAN SOULES: Yeah. Well, I think that's important.

MR. HUNT: I will admit that affirmatively misstates is --

CHAIRMAN SOULES: Affirmatively misstates --

MR. HUNT: "Affirmatively misstates the controlling law," substitute that for "fails to express."

CHAIRMAN SOULES: In both places?

MR. HUNT: In both places.

CHAIRMAN SOULES: So in 300(b)(2), the last line, and in 300(c)(2), the words "fails to express" will be deleted and the words substituted in their place "affirmatively misstates."

MR. KELTNER: Luke, I think we're talking about 301, are we not, not 300?

MR. HUNT: Yes, 301.

CHAIRMAN SOULES: 301. I'm sorry, 301(b)(2) and 301(c)(2), those changes that I just mentioned.

Richard Orsinger.

MR. ORSINGER: I would express some concern about the use of the words "affirmatively misstating," because to me, the difference between affirmatively misstating and misstating it not affirmatively

is to make a statement that's wrong versus making a statement that omits something that's right. And if you charge a jury on, say, some law but you leave out one element of the recovery and the party has waived the right to complain about that omission, I think they should be bound by that statement of the law.

To use the word "affirmatively" means that if I leave out something, this rule doesn't apply, but if I put in the wrong word, this rule does apply. And I'm troubled by that distinction, because if you have a duty to object to the omission of some concept and you don't, I think you're bound by the charge, even if it was something that was dropped out rather than something that was said wrong.

PROFESSOR DORSANEO: But normally the omission will be dealt with by Rule 299 -- 279. And that's the difference between something that's defective and something that's omitted, you know, which is you're dancing around with yourself after -- once you get to the really hard cases. But the omitted stuff is going to be dealt with by Rule 279 in one way or another.

MR. ORSINGER: But aren't you preempting 279 in this rule by permitting someone to move for a judgment on the ground that something was omitted when they've actually waived the right to complain that it was omitted? Isn't that what this rule says, that even if I have waived the right to complain from the omission in the charge, I can come along in a postverdict motion and complain that it was omitted and I'm home free, even though I've had my free shot at the jury and I've lost?

It seems to me that whether I'm bound to the jury charge because it affirmatively misstates or I'm bound because it omits something, then either way I ought to be bound. I shouldn't have an after shot.

PROFESSOR DORSANEO: I disagree with that. I think it's much harder to see something that's missing than it is to see something that's affirmatively misstated, and if we're going to impose any threshold duty, it should be on the affirmative misstatement, and the deemed finding rule is about things that nobody remembered to put in there, and

that's how our system has dealt with that.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: I just want to second that statement by Bill, because that is what deemed findings are, is when you are talking about an omitted element of a ground of recovery or defense that is otherwise submitted, you're not bound by the jury's determination of the incomplete issue, you are -- and otherwise have waived your right to trial by jury if no one has complained about it. But the judge by virtue of his judgment makes the determination, and he can do it by either making an affirmative finding or he can do it by simply entering a judgment for whichever party he wants to win on that issue and then determine it on that basis.

CHAIRMAN SOULES: But aren't you all saying the same thing conversely, you all and Richard? What Richard is saying is that you have to complain about an omitted element to keep it from being deemed.

MR. McMAINS: No, no, no. What Richard is suggesting is that you should be bound; that is, in other words, if you've

omitted something, that you're stuck with the jury's answer regardless of what their answer is. The deemed findings rule merely says you waive the right to try it to the jury. You haven't waived the right to challenge the judgment --

CHAIRMAN SOULES: Okay.

MR. McMAINS: -- on the determination. There's a big difference. I mean, you still have the right. Like if you submit a standard negligence/proximate cause case and leave out proximate cause, under what Richard wants is he wants to be able to say, well, it's obviously defective, and if you didn't complain on the omission of proximate cause, then you're not entitled to move for judgment, even if you've got -- I mean, you're not entitled to move for judgment or oppose the entry of judgment on that issue.

And that's exactly what our deemed findings rule does allow. You can say there's no evidence of proximate cause and ask the judge, or that the evidence supports a finding of no proximate cause, and the judge can make a judgment either way because you've waived

the right to try that issue to the jury by the omission.

MR. ORSINGER: To me this rule doesn't impact that at all, because what Rusty is talking about is when there is some evidence in the record and the trial court makes the finding. This rule is talking about winning as a matter of law without regard to what the evidence is. This is a motion to get a judgment as a matter of law without regard to the evidence, and I don't think that what I'm proposing about this rule affects deemed findings at all, because you're not entitled to judgment as a matter of law if there's factually sufficient evidence to support a deemed finding, so to me, my proposal doesn't step on Rusty's toes at all.

CHAIRMAN SOULES: That's what I'm sensing. Really what are we saying here? You can move for judgment as a matter of law if the controlling law is determinative of the claim or the defense, unless you didn't make a complaint. And if you didn't make a complaint, yeah, unless you waive that controlling law by failing to make a

complaint. So the judge says this is the controlling law in the instruction and these are the elements, and you don't complain. Then what? There are so many negatives in here I'm having trouble getting through the logic of it.

MR. McMAINS: Well, I understand that this is an amendment to Rule 301, but historically we've always been able to make 301 motions after the evidence, after the verdict, on a no-evidence ground, which would include a lot of legal grounds. I mean, the notion of no evidence has included a number of "you're not entitled to judgment as a matter of law." A lot of no-duty stuff has been incorporated into that.

And you can't say that you can't move for -- you can't say in one part of the Charge Rules that says you can make a no-evidence complaint after verdict and then put this in here which suggests that you have to make some kind of a complaint about duty or whatever in order to preserve the complaint. I mean, that to me is inconsistent.

CHAIRMAN SOULES: Alex

Albright.

PROFESSOR ALBRIGHT: I think what Rusty is saying is let's don't include the "unless" clause. And I think the "unless" clause, that whole "unless" clause would be a big mistake, because just sitting here we can't figure out what it means and we are concerned that it may mean more than it's supposed to mean, and I'm not sure it's right.

I am not familiar directly with this Allen vs. American National Insurance Company case, so I don't know if this says what that case says or not, but it seems to me that we cannot write these rules where we're going to codify every single opinion that the Supreme Court has ever written.

We have a general rule here. There is a Supreme Court opinion that, from what I hear, dealt with a pretty specific situation that does not occur very often, and it seems like that case should take care of that specific situation. And if we try to write it in the rule, then what we're doing, what Rusty and I are concerned about, is we are dealing with

more issues and more situations than that opinion was intended to encompass, so I think it creates more problems than it solves.

CHAIRMAN SOULES: Justice Duncan, you had your hand up. Any comment.

HON. SARAH DUNCAN: Well, I was thinking about fraud, and I believe that's what Allen was actually concerned with, if I remember correctly. And let's say that someone omits reliance. You can have deemed findings that are at the extreme ends of the no-evidence, insufficient evidence spectrum, and I don't think we need to include those or exclude those from JNOV motions, is I think what Rusty is saying.

MR. McMAINS: Well --

CHAIRMAN SOULES: Mike Hatchell, and then I'll get to you, Rusty.

MR. HATCHELL: I'm also very concerned, and perhaps the draftsmen can help me, about the interrelationship between this rule and a motion for a directed verdict, because I understand that this clause says that in some limited instances the substantive controlling law can be changed by the failure

to object to the charge. Well, what if I move for a directed verdict under the controlling law? Does this change mean, then, that my complaint on appeal of the failure to grant my directed verdict is tested by one body of law and my motion for judgment as a matter of law is tested by a different body of law?

CHAIRMAN SOULES: Rusty, you had your hand up. Any further comment?

MR. McMAINS: Well, again, because we have changed the Charge Rules in part, I'm not sure if this concept of sandbagging, if you will, is as sufficiently preserved as you may think. I don't have a problem with the "unless" clause properly framed, because I think that if you allow a charge to go to the jury that has an error in it and therefore obviously is not consistent with controlling law in the abstract, you should not be able to complain that the other side has either waived something or that -- I mean, you're going to get some advantage as a result of the jury not having been asked the right question or having been asked an affirmatively wrong question, a la perhaps a

misplacement of the burden of proof. There are all kinds of things that you can see that are defects.

It seems to me that if you consented to those defects by not having brought that out in the charge, that's really what Allen is getting at. The actual facts of Allen were in fact a fraud defense with regards to an insurance policy, and what happened specifically in Allen is that the issue was submitted in terms of did the applicant who did the insurance, applied for the insurance policy, did he know or should he have known the statements were fault; whereas, the statute very clearly says you have to prove intent; you have to know that what you said was false, so it's the wrong standard, but nobody noticed.

The trial court NOV'd it because it was the wrong standard. The court of appeals affirms. The Supreme Court says no, you can't do that. You do not have the power to NOV it, because that's the standard that was submitted and nobody complained about it, and so that's the standard that's going to apply to this

case whether or not it happens to be inconsistent with controlling law.

But it clearly does deal with an affirmative misstatement of the law and not with just something that happens to be left out or something that might be inconsistent in the overall, like in duty concepts, with the application of controlling law.

I mean, I fear that if we don't put the limitation about an affirmative misstatement, that we then expand Allen to encompass things it wasn't intended to do. But I also think if we leave it out, that we also create the harm that we encourage sandbagging. And basically people will just take the position of, well, that's not the controlling law but I didn't have to do anything to tell them about that. Maybe that kind of moots the entire relevance of the charge and what lawyers are supposed to be doing about the charge.

CHAIRMAN SOULES: Let's take an easy next step from Allen. The charge submits the wrong measure of damages. The parties are bound by that because nobody objects, clearly a misstatement of the law, an affirmative

misstatement of the law, but they are bound to it. I think we all agree that's the way it looks like it ought to be.

Let's take a different situation. The trial court submits negligent infliction, the only cause of action, jury verdict, damages are awarded to the plaintiff. No one objected to the submission of the negligent infliction. The trial judge back in chambers says, "By God, I'm going to submit it. I don't care what you say." And so everybody relaxes. "I'm going to take care of that on NOV." But there was no objection at the charge stage that submitting negligent infliction law in a question was an improper cause of action in this state. Now, is the plaintiff entitled to a judgment on the verdict who can't complain at NOV because the charge affirmatively misstated Texas law by not submitting the question at all? I don't think we intend for it to go that far.

PROFESSOR DORSANEO: I do.

CHAIRMAN SOULES: Bill says he does. Richard.

MR. ORSINGER: I'd like to

phrase the proposition a little bit differently, and I think that I would like Rusty to listen closely to this because I want to find out what his reaction is.

If we use the word affirmatively in the "unless" clause, then, for example, if you submit a negligence case with a definition of "producing cause," we have affirmatively misstated the law because negligence would require proximate cause. So if it's going to the jury with "producing cause" in there and I fail to object that they use "producing" instead of "proximate," then I'm bound with the law that it's "producing," even though it's wrong, and I can't come in on an NOV and get the whole thing set aside.

Now, if I have a jury charge that asks for negligence and damages and completely omits causation, not even mentioned at all, then I have a jury charge that let's the jury get to a recovery without a finding of proximate cause, but it's an omission rather than an affirmative misstatement of the law. If it's an omission, then theoretically this rule would permit me to come in on NOV and

say, if it says that I can only NOV on an affirmative misstatement, then if it's completely omitted, I can make no complaint as as a matter of law, but if it's -- because without objecting --

PROFESSOR DORSANEO: No, that's not right.

MR. ORSINGER: What did I say wrong?

PROFESSOR DORSANEO: If you're leaving it out of the charge, then nothing is waived except the right to a jury trial, so all of your complaints about everything else are still available to challenge a finding, even a deemed finding.

In this system, if something is left out, there are three ways to handle it. If it's the plaintiff's something, let's say proximate cause, you can follow the traditional approach that was followed before Rule 279 was adopted, and that is rule against the plaintiff because the plaintiff didn't tag third base.

You could go the completely opposite way and say if the defendant didn't raise the matter about proximate cause being in the

case, then the defendant waives that legal requirement and loses. Okay? And I think that would be the result if you didn't have an "unless" clause.

Or you could have a deemed finding approach that waives the right to a jury trial and substitutes a finding in support of the judgment if it's consistent with factually sufficient evidence and no one raised the matter by objection or request.

Aside from Mike Hatchell's point about the, quote, directed verdict motion which might require some more thinking, I'm completely positive that if it doesn't say "misstates" or "affirmatively misstates" or "expressly misstates," then we do create conflict; otherwise, it just fits.

CHAIRMAN SOULES: But you're saying that this compels the complaint that a judge is submitting a cause of action not recognized under Texas law; that that requires that that be made at the charge stage or it's waived?

PROFESSOR DORSANEO: Or I would allow somebody to make it by a, quote, motion

for directed verdict at the close of the evidence, and I don't think this is --

MR. ORSINGER: Or by special exception.

PROFESSOR DORSANEO: Or by special exception.

MR. ORSINGER: If you make a special exception and it's overruled, you're going to have that on appeal regardless of what happens during your jury trial, I think. And if you move for a directed verdict on the grounds that they haven't proven a cause of action when the plaintiff rests and the judge overrules that, you know, I think you can argue that the denial of the directed verdict was error even if you don't object to the charge that was submitted.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: I have to say, as long as Allen is now on the table, I have always been confused by Allen. I do not to this day know the parameters of Allen. It gets argued by a lot of people in this state for a lot of things that I don't think just

make common sense, and maybe it's a good time to talk about if Allen should be the law. If there is no evidence to support an essential element of a cause of action, why are we shifting it to a malpractice case against the lawyer rather than saying, "You don't have a cause of action"?

It's always been -- and maybe it's just my problem, but you know, waiver just to me ought to take you only so far, and I'm not sure it should take you all the way to establishing a cause of action that you don't have.

CHAIRMAN SOULES: I agree with that.

MR. ORSINGER: But the problem with that is that we gut our rules on preserving error in the jury charge if we take the "unless" clause out.

HON. SARAH DUNCAN: We're not talking about -- what we're talking about is measuring the evidence against the charge. We're not gutting charge preservation to say that the sufficiency of the evidence stands on its own two feet, to me.

CHAIRMAN SOULES: Go ahead, Justice Guittard.

HON. C. A. GUITTARD: We don't have to write in the rules every time under what circumstances something is waived.

JUSTICE CORNELIUS: Exactly.

HON. C. A. GUITTARD: And so why should we do it here? If Allen says that that is a waiver and this language leaves out the "unless" clause, would it still be a waiver? I don't know why the "unless" clause is really necessary.

PROFESSOR DORSANEO: It was put in there because the Committee voted to put it in there the last time we went by this path. I don't think it needs to be in there either really.

MR. ORSINGER: Well, this is new language in the rules. How does anyone know that this rule isn't made to overrule Allen?

CHAIRMAN SOULES: But this seems broader, I think, than -- I don't think you have to preserve an appellate complaint that the plaintiff doesn't have a cause of

action under negligent infliction anytime prior to getting an NOV. If you raise it at JNOV and he doesn't have a cause of action under Texas law, you don't prove it or explain it, you just wait until it's over and it's over. And you may want to do that, because if you go to plead a special exception, I may plead a cause of action that he does have one. Strategy. Okay? But he never does.

It's his job to do his job, not your job to do his job. If he doesn't have a cause of action plead under Texas law, when it's all over, it's over. And you can say, "There's no cause of action under Texas law. You can either agree with me or not agree with me, Judge, but when I get to the appellate court, they're going to agree with me."

Now, this is broad enough to include that circumstance.

MR. ORSINGER: It sure is.

CHAIRMAN SOULES: And that is too broad, it seems to me.

PROFESSOR DORSANEO: No.

CHAIRMAN SOULES: Bill says no.

MR. KELTNER: Let's take it

out.

CHAIRMAN SOULES: And I respect Bill's opinion an awful lot more than I respect my own sometimes, so I want to make that clear. Rusty.

MR. McMAINS: I think that, you know, the judge's point is frankly not correct under our -- under the new Charge Rules. That is to say, I don't think that the waiver that was effective in Allen would be recognized in light of this -- if you took the "unless" clause out, and given our new Charge Rules, because the old Charge Rules had a specific provision, and Allen is based on that specific provision that says no objection -- I mean, an objection as to form or substance not made is waived, and that's the theses behind Allen. That's what it's about. It's an objection to form or substance. Now, so that's what -- and that's how they got off into the issue of saying, you know, okay, we have to apply that part of the Charge Rule here.

Now, in our current Charge Rules we don't have that language in there anymore. Our current Charge Rules don't have the no

objections as to form. We have some stuff about objections, but we don't ever have anything that talks specifically about waiver if it's not made at the time in terms of form or substance, and so we lose all precedential basis for the holding in Allen if you take the "unless" clause totally out. And I am of the opinion that by and large what you do not want to do is you do not want to be in a position to where somebody can concoct something, put it in the charge, and even at the invite of the other side say, "Oh, yeah, that's the issue," and then afterwards sandbag you and say, "Oh, no, that's the wrong question. That issue is absolutely and totally immaterial." I mean, that's the kind of sandbagging basically that they said they didn't want to go on, and that's what Allen was about.

Now, but there is a difference between -- in spite of the hypothetical that was attempted to be drawn, there is a difference between an omission and an affirmative misstatement of the law, and our rules treat omissions differently. And we've always gone the middle ground in this issue of does the

plaintiff win, does the defendant win -- I mean, does the defendant lose if there's no objection, or does the judge get to make the decision when you're dealing with an omission. The judge gets to make the decision if you waive your right to trial by jury, and that's what the charge is for, is to submit the issues to the jury. You don't have a right to a jury trial anymore.

But I don't think, and perhaps maybe I disagree with Bill's interpretation, if that's your -- if your interpretation is that no cause of action in the negligent infliction argument is waived, I don't read the rule with the "unless" in terms of an affirmatively misstatement as waiving that, because I think that you can make -- if your point is that there is no controlling law ever that was going to be recognized, and there is actually appellate law to the contrary, I think you can make that for the first time after verdict, regardless of whether the "unless" clause is in there or not.

But in the producing clause example that he gave, that one is a different deal. Wrong

causation standard. You've acceded to it. You don't have the right to take the position that there's no evidence afterwards or to make a challenge that he's waived something because there's no proximate cause, because you didn't make any kind of complaint, didn't object, and that's the causation standard that was submitted. I don't have a problem with how that's inequitable, or how all that will be that much more difficult to apply.

MR. HUNT: Mr. Chairman, can we vote on this?

CHAIRMAN SOULES: Okay. It's been moved and I think seconded that we substitute "affirmatively misstates" for those words, the words "fails to express" in 301(b)(2) and 301(c)(2). Those in favor show by hands.

PROFESSOR ALBRIGHT: In favor of?

CHAIRMAN SOULES: 16.

Those opposed. Okay. No opposition, so it's unanimous.

MR. KELTNER: Luke, I thought there also was a motion to remove the entire

"unless" clause.

CHAIRMAN SOULES: It's been so moved. Is there a second?

PROFESSOR ALBRIGHT: Second.

CHAIRMAN SOULES: Moved and second. Those in favor show by hands. Seven.

Those opposed. Nine.

Nine to seven it will remain.

MR. HUNT: Mr. Chairman, we now move to page 11. This is the rewrite of Rule 327. It now is a part of Rule 302. It's 302(d). This is exactly what we approved last time. The box here on page 11 is only for the purpose of being certain that it meets the Evidence Subcommittee's blessings.

Buddy Low and I corresponded and talked on this. It may be that the Evidence Subcommittee's version of 606(b) may come out a little differently, but I have it there only for the purpose of calling it to your attention, and the members of the Evidence Subcommittee may respond if they so choose.

CHAIRMAN SOULES: It squares with 606(b) as presently in the book, right, in the rules?

MR. HUNT: No.

CHAIRMAN SOULES: It does not?

MR. HUNT: Because we added the phrasing about the juror was qualified to serve.

CHAIRMAN SOULES: Oh, yes. Okay.

MR. HUNT: And of course, this revision has been made to slightly clarify the language.

CHAIRMAN SOULES: Okay.

MR. HUNT: I guess what Bill Dorsaneo did early on in working on this was to do some LawProse-type editing which changed the grammar a little bit, clarified it a little bit. It doesn't quite meet 606(b) now, but the purpose of the exchange with Buddy Low was to try to get our versions together. I don't know if we've accomplished that or not because he's not here.

CHAIRMAN SOULES: Well, we voted to do this, and he's going to have to carry that forward in the Rules of Evidence.

Okay. Any opposition, then, to the rewrite of -- let's see, what is this, Don?

302 --

MR. HUNT: Yes.

CHAIRMAN SOULES: -- (d)(2), correct?

MR. HUNT: Correct.

CHAIRMAN SOULES: Any opposition? It's unanimously approved.

MR. HUNT: Now we move to page 19. This is part of Rule 304. You will recall that we revisited Rule 304(e). 304(e) is what is now 306(a), that rule that deals with the dates, how you count. Then we had this paragraph (8) as shown on page 19 of your text. Alternative 1 was approved previously. We tinkered with the language just slightly last time, and that was the way it was left until Judge Guittard pointed out that it was in conflict with TRAP 47(c) which had been sent to the Supreme Court.

And for that reason Justice Guittard and I felt that it should be called to your attention, and the Committee permitted it, to revisit the decision of whether we really wanted to deal with prematurely filed motions for new trial and motions to modify as we had

previously voted, so that's the concern and the choice for this Committee.

Judge Guittard.

HON. C. A. GUITTARD: I want to add this comment that it doesn't seem right, regardless of the conflict, and I think it does conflict, but regardless of the conflict, if a party files a premature motion for new trial or files a motion for new trial that's premature because the judge hasn't signed the judgment. He doesn't know just when the judge is going to sign the judgment, and if it happens that the judge has already signed the judgment, then that's -- we have one result.

If the judge hasn't already signed the judgment and does sign the judgment after the motion is filed, then the motion is overruled already and it messes up the appellate timetable, and counsel may not know about that.

So this is an occasion for a trap that is contrary to our user-friendly approach, and a motion for new trial, whether premature or not, ought to have the same effect and take effect as if filed on the date that the

judgment is signed.

CHAIRMAN SOULES: Well, why are these two rules inconsistent? They look to me like they could both be applied.

HON. SARAH DUNCAN: The conflict is between Appellate Rule 41(c) and and Alternative 1. A motion for new trial filed prior to signing the judgment under Alternative 1 doesn't give you an extended timetable.

CHAIRMAN SOULES: Right.

HON. SARAH DUNCAN: Unlike current law and unlike 41(c), Alternative 2, if you file your motion for new trial or motion to modify before the judgment is signed, you get the extended timetable, period. And that's current law, and that's what's in 41(c).

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I'm not sure that this is part of the conflict. It seems to me that the conflict is the idea that the motion for new trial is overruled by operation of law at the time the judgment is signed.

But the second part of that is equally important to me, and that is that if you file a motion for new trial prematurely that it doesn't give you your extended plenary power and your extended appellate timetable.

The reason we voted to do that was because sometimes people will file motions before trial that are not -- motions before judgment that are not called motion for new trial but they have a paragraph in there that requests some relief like a remittitur or something, you know, between verdict and the signing of judgment. And rather than having to sort through everything that was filed and see if someone unconsciously filed what's the equivalent of a motion for new trial or maybe they've filed it intentionally without labeling it as such, we just came down with a simple rule that if you file it before the judgment is signed, it doesn't affect plenary power; and if you file it after the judgment is signed, it does affect plenary power. To me, that's a separate question from whether it's overruled, a premature motion is overruled on the date the judgment is signed,

or overruled on the 75th day after the judgment was signed.

And I'd like to keep that distinction between no plenary power extension if it's prematurely filed. You must file a motion after the judgment is signed to get an extended appellate timetable or extended plenary power.

CHAIRMAN SOULES: Well, we voted on that and passed it.

MR. ORSINGER: But this goes against that.

CHAIRMAN SOULES: Well, I know, and it would be taking that out. And I don't see that that's inconsistent with 41(c). It may be inconsistent with the way 41(c) is now applied, but that's not what 41(c) says here as written. Just look at the words. "No motion for new trial or motion to modify judgment shall be held ineffective."

MR. McMAINS: Alternative 2 is not 41(c).

MR. HUNT: Correct.

MR. McMAINS: That's his revision to conform with 41(c).

HON. SARAH DUNCAN: Right.

MR. McMAINS: What does 41(c) actually say? I'm not sure that I understand what rule that is anyway.

CHAIRMAN SOULES: 41(c) in the new proposals that we sent them?

HON. C. A. GUITTARD: I don't think we changed 41(c), did we?

MR. McMAINS: I don't know.

MR. ORSINGER: 41(c) reads awfully like Alternative 2, only Alternative 2 is limited to new trials and motions to modify judgment; whereas 41(c) talks about limitation, notice of limitation of appeal and some other things.

MR. McMAINS: It says what?

MR. ORSINGER: Well, 41(c), the first sentence of 41(c) is "No appeal or bond or affidavit in lieu thereof, notice of appeal or notice of limitation of appeal shall be held ineffective because prematurely filed." It doesn't even mention --

HON. SARAH DUNCAN: Wait, there's another one.

MR. ORSINGER: Okay. Then the

next sentence -- no, that doesn't talk about it either.

HON. SARAH DUNCAN: There's another rule that deals with --

CHAIRMAN SOULES: The new 41(c) --

HON. SARAH DUNCAN: Rule 58(a) says, "Pleadings relating to an appeal need not be considered ineffective because of prematurity if a subsequent appealable order has been signed to which the premature proceeding may properly be applied."

My understanding is the way that's been interpreted is if you file a motion for new trial prior to the date the judgment is signed, that motion for new trial relates to that judgment and it's not overruled on the date the judgment is signed, it's overruled -- it's deemed to have been filed on the date of but subsequent to the signing of the judgment, and it is deemed overruled within just the usual 75-day rule.

CHAIRMAN SOULES: Just a moment, I've got 41(c) here and I'm trying to compare them. Subsequent to what?

HON. SARAH DUNCAN: It's 58.

MR. ORSINGER: The comment is incorrect. It ought to say TRAP 58.

CHAIRMAN SOULES: They're basically the same. Do you want to see it?

Well, what's written here basically tracks 41(c) that we sent to the Supreme Court.

HON. SARAH DUNCAN: That's true.

MR. ORSINGER: The problem with this, Luke, is 41(c) talks about perfecting the appeal, and this rule talks about motions for new trial.

CHAIRMAN SOULES: No.

MR. ORSINGER: I agree. I mean, 41(c) deals with --

CHAIRMAN SOULES: 41(c) deals with the notice of appeal and the notice of the limitation of appeal. That's all it deals with.

PROFESSOR DORSANEO: And 58 deals with the rest.

HON. SARAH DUNCAN: Everything else.

CHAIRMAN SOULES: Okay. Let's look at Rule 58 then.

HON. C. A. GUITTARD: And they may deal with different subjects, but they ought to be parallel to avoid confusion.

CHAIRMAN SOULES: 58 is not changed from the existing rule.

HON. C. A. GUITTARD: Right.

CHAIRMAN SOULES: No part of 58 is changed from the existing rule. No change recommended to 58.

MR. McMAINS: Luke.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Rule 58 really talks about that there's not anything about prematurity that's going to affect the appellate court's jurisdiction. But the effect of this rule is that it may make something late. I mean, what we voted on was basically to say you need to know that if you file something, and it was as Richard said, we voted on it, and we had a rather lengthy debate like for an entire meeting, that we treated all motions alike. Motions for NOV, which the courts have been in conflict as to

whether or not an NOV was a motion to modify and whether it was overruled by operation of law, whether it needed an order and so on and so on, we rolled them all in and said, okay, you've got 30 days, and you can amend it as many times as you want to. You can file as many of them as you want to 30 days after the judgment is signed.

Whatever you filed beforehand doesn't affect the preservation of error, and if you want to prematurely perfect your appeal, if you want to file a cross-bond before the judgment, that's all 58 is talking about, and that's no problem. Then in that case you don't have any problems anyway about when the plenary power is extended. But all we said is if you want to extend the court's plenary power, the motions to do that start from the judgment.

CHAIRMAN SOULES: Well, that's right.

MR. McMAINS: And that's what we did. And I don't think it conflicts with 58 at all. What 58 simply says is if you file a motion for new trial before the judgment and

a bond before the judgment and a judgment is subsequently signed, then 30 days later you have an appealable order. All that changed is the time.

CHAIRMAN SOULES: Alternative 1 was passed by this Committee by about a two-to-one vote. Alternative 2 takes that away, and we're not going to go back and redo that. We did it. I understand that there are people on the Appellate Subcommittee that disagree with it, but it's over. It's already gone away, and so --

MR. HUNT: Mr. Chairman, let's take that off the table, because the purpose was not to revisit the vote of the Committee but merely to point out what we might have done. And if in our collective wisdom here we believe that what we previously have done does not conflict with anything we have sent to the Supreme Court on what this Committee has acted, then there's no need to consider it further.

CHAIRMAN SOULES: Okay. It's off the table, Alternative 1.

MR. HUNT: Now, we come to

Rule 305, and if you would, do something that's a little difficult to do: Don't think about elephants. Do not think about paragraph (a). Paragraph (a) to the three alternatives to Rule 305 is a definition that is my language, my brain child. Justice Duncan thought we probably needed one, but that's not what the Committee asked us to do, so ignore that for a moment and deal with what Judge Guittard and I have attempted to do in conformity with the Committee vote; that is, give you three alternatives. Alternative 1, ignoring (a), deals with the present rule with minor changes. That's one choice you have.

Then Alternative 2, again ignoring (a), deals with the present rule, except it's just more comprehensive. It's a little more wordy about what happens after expiration.

And Alternative 3 is the rule that gives you the 105 days automatically.

Now, those are the three choices there. Do you want to take 329(b) as it currently exists and express it in (b) and (c) and Alternative 1 and leave it in that general language, or do you want more expansive

language in Alternative 2, or do you want expansive language plus a 105-day clarification as in Alternative 3?

Mr. Chairman, I would like to have this body address those choices, and then we'll look and see if we need a definition.

CHAIRMAN SOULES: Okay. Discussion. Bill Dorsaneo.

PROFESSOR DORSANEO: Well, I think that I would probably prefer Alternative 1 unless I could be convinced that the other alternatives add something more than a different way of expressing the same matter. I don't believe, as I said before, that our 329(b) rule is in trouble with respect to the particular paragraphs that we have here and would like to work from it, but that's probably more a bias than it is anything else.

HON. C. A. GUITTARD: What about the problem of whether an order overruling a motion for new trial limits the duration of the plenary power?

PROFESSOR DORSANEO: With possibly that one exception, Judge.

HON. C. A. GUITTARD: That's a separate question that we need to determine.

PROFESSOR DORSANEO: I guess what I'm saying is I think I know what the problems are with the current rule, and I realize that that's one, you know, the additional 30 days only when there's an overruled motion, and I think that may have been an oversight when we drafted the thing originally. I don't remember so many years ago now at this point.

But I'm pretty comfortable with 329(b) in most respects from a plenary power standpoint, and my preference would be to work from the existing rule.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: Well, this is again one of these issues that we debated for hours, and I'm not sure how 3 is different from 2, but I think 2 is more or less what we voted on before, but there are some things in 2 that I think are worthy.

For example, a motion to reinstate after a dismissal for want of prosecution is

expressly made a basis for extended plenary power and an extended appellate timetable under version 2, but it's not under version 1, and I don't know whether it is or isn't right now under 329(b) as currently written.

PROFESSOR DORSANEO: Well, that's because the motion to reinstate rule makes it -- covers that, 165a.

MR. ORSINGER: Well, has that rule gone away, or is that a rule that is still with us?

PROFESSOR DORSANEO: It's still with us. It's in your subcommittee, and we haven't dispatched it or even mentioned it at all at this point.

MR. ORSINGER: I'm nervous because we've got a list here of everything that extend plenary power and we've just omitted something that's covered in another rule that might extend plenary power in that rule.

PROFESSOR DORSANEO: It does. 165 is exactly parallel to 329(b).

MR. ORSINGER: Okay. I think there's wisdom in listing all of these things

in the rule that governs plenary power.

I also want to say, remember the mathematics we did to figure out on the findings of fact and conclusions of law timetable, and we figured out if the judge can overrule that motion for new trial real quickly, the judge is going to run out of plenary power before the final deadline for filing findings of fact and conlusions of law. And there was some concern that a court that has lost plenary power perhaps is unable to then file the findings, and we decided I think after all of this blabber that we weren't going to let the court do a hurry-up signing of a motion overruling him, of an order overruling a motion for new trial and cut off plenary power early.

And there may be other things here that we debated and voted on, but Bill's proposal is to throw out all of that debate basically and going with our current rule, and I'm in favor of going with our last vote, which I believe to be closer to 2, or maybe 2 was our vote at the last Committee.

HON. C. A. GUITTARD: It may

be, but the idea -- but 2 does not include the idea that an order overruling a motion for new trial limits plenary power. Alternative 3 does that.

MR. ORSINGER: Well, then I like 3 better than 2 clearly.

PROFESSOR DORSANEO: Well, frankly I could go with any of the three. For purposes of debate we could get through the first one probably in relatively short order, and then we at least have one, and if we collapsed into disagreement after that, we would not do anything more except, you know, be left with what we finished.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: I may have said this once before. I understand that Bill and other people in the room have no problem understanding 329(b). It helps a lot if you wrote it. We have -- I've noticed an awful lot of trial courts that do not have Bill's complete understanding of their plenary power. I seem to have seen a lot of cases where people are signing and unsigning each

other's orders and acting outside of plenary power and refusing that because they think they don't have it. And I'm still in favor of making it somewhat more clear as to when a court has power and what it has power to do.

HON. C. A. GUITTARD: I also want to call attention to the recent opinion of the Supreme Court in the L.M. Healthcare case, which says in effect that an order overruling a motion for new trial does not limit the plenary power, and so Alternative 3 is consistent with that decision and makes that explicit.

MR. McMAINS: Alternative 3 does what, Judge? I'm sorry, I didn't understand you.

HON. C. A. GUITTARD: It's consistent with the decision in -- let's see, what's that case...

CHAIRMAN SOULES: It's L.M. Healthcare vs. Childs.

MR. HUNT: March 24 opinion.

HON. C. A. GUITTARD: Right. And it adopts the approach that apparently is adopted in that recent opinion.

MR. ORSINGER: It also has the additional benefit that plenary power doesn't vary.

HON. C. A. GUITTARD: That's right. You've got 105 days of plenary power regardless of what happens meanwhile, if there is a motion for new trial or one of those other motions.

MR. ORSINGER: But if nobody files it, then you can get execution at the end of 30 days.

HON. C. A. GUITTARD: Right.

MR. ORSINGER: So there's only two expirations, either 30 days or 105 days, and you don't have to count or watch anything.

HON. SARAH DUNCAN: Well, you do have to count.

MR. ORSINGER: You do have to count.

HON. C. A. GUITTARD: You have to count to 105.

HON. SARAH DUNCAN: Right, but no further.

PROFESSOR DORSANEO: Well, why don't we go with the third alternative?

That's really what you want to do, instead of just asking us what we would like to do.

HON. C. A. GUITTARD: That's right. I move the third alternative.

CHAIRMAN SOULES: Well, there's an interesting thing in L.M. Healthcare that says, "Only timely filed motions extend the trial court's plenary jurisdiction. A party must file a motion to modify judgment and a motion for new trial within 30 days."

HON. C. A. GUITTARD: Either.

CHAIRMAN SOULES: No. It says "and."

HON. C. A. GUITTARD: Yeah, it says "and," but it means "either."

CHAIRMAN SOULES: Well, that's not what it says. That is not what it says, and it might be changed.

MR. ORSINGER: If rehearing is still pending, we're okay. We can still change that.

CHAIRMAN SOULES: "And." You can file both --

HON. SARAH DUNCAN: Actually there's a rule of grammatical construction

that "and" can mean either "and" or "or" depending upon context.

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

PROFESSOR DORSANEO: And vice versa.

CHAIRMAN SOULES: Anyway, the motion to modify is on a track within the same period of time but independent of a motion for new trial, and that's basically what L.M. Healthcare vs. Childs upholds, so long as you file both.

PROFESSOR DORSANEO: I move the adoption of Alternative 3.

MR. HUNT: Second.

CHAIRMAN SOULES: Moved and seconded for Alternative 3.

HON. DAVID PEEPLES: Luke.

CHAIRMAN SOULES: Justice Peeples.

HON. DAVID PEEPLES: Didn't we have a pretty good discussion last meeting about whether this was broken enough to require radical fixing and whether we were just creating more problems down the road by

this massive rewrite? Or was that just --

MR. ORSINGER: That was this rule. I remember your comment.

HON. DAVID PEEPLES: I thought a lot of people --

MR. ORSINGER: Not enough to win the vote, though. A lot of people, but not a majority.

MR. HUNT: Luke, let me speak to that. Judge Peeples is correct. But look at Alternative 3 and what Judge Guittard has done there. He hasn't done any harm to current 329(b), and you don't do harm because you break things into paragraphs and refer to other rules. That's all he's done.

What you have when you look at the language under Alternative 1, when you look at the (b) and the (c), they are very similar except that it's broken out into one, two, threes rather than just listed in a series.

And this is the same kind of thing that we're getting from LawProse, and I suspect that if we don't do it now, LawProse will do it for us later and we'll have to revisit this same issue.

HON. SARAH DUNCAN: And as Elaine says, this one is free.

HON. DAVID PEEPLES: I may be thinking about the final judgment discussion we had last time.

MR. ORSINGER: It could have been.

CHAIRMAN SOULES: Richard, we've got a motion for Alternative 3. Is there a second?

MR. HUNT: Second.

CHAIRMAN SOULES: Don seconds. Richard, discussion?

MR. ORSINGER: There's one little bit that we're out of balance on here.

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. There is some logic in going ahead and saying that a request for findings of fact, which is an indication that you're going to appeal the case, should also extend plenary power as well as giving you the appellate timetable. Otherwise it's kind of a trap, because some

lawyers think that the request for findings, since it gives you the extended appellate timetable, also gives you extended plenary power and it doesn't, and probably it should.

CHAIRMAN SOULES: It doesn't presently.

MR. ORSINGER: No, it doesn't presently. And they really ought to be parallel. If it's going to affect the appellate timetable and extend it, then why shouldn't it also extend the trial court's plenary power? I just suggest that we stick that in here.

CHAIRMAN SOULES: Are you saying that we vote that requests for findings of fact and conclusions of law prior to judgment extends the appellate timetable?

MR. ORSINGER: No. The rules on findings of fact and conclusions of law say that a timely request extends the appellate timetable. It doesn't say that it extends plenary power. This is the plenary power rule. This issue hasn't been raised before, and all I'm saying is that if that's the only thing that we have that gives you an extended

appellate timetable that doesn't also give you extended plenary power, then why don't we just put it in here, and then everything is consistent.

CHAIRMAN SOULES: Does anyone want to talk about that? Don Hunt.

MR. HUNT: Mr. Chairman, in (c)(4), and we visited this last time, that anytime there's a timely request that there's still power after expiration to do it, and I think that's the answer to it. And it does deal with it in a rational way to recognize that sometimes, because of the way advocates request and trial courts react, that you may be on a little different time frame. But if the request is timely, then the trial court has plenary power even after expiration to go ahead and sign them and get them in the transcript.

CHAIRMAN SOULES: If the request for findings of fact and conclusions of law, whether initial or supplemental, is timely and the court doesn't act, this gives the court power to act within its plenary time periods, and that's what --

HON. C. A. GUITTARD: Beyond that, Mr. Chairman.

MR. ORSINGER: No, outside the plenary power. But that's a different issue. Don is addressing a different issue.

I'm saying that there really are four things that give us an extended appellate timetable, a motion for new trial, a motion to modify, a motion to reinstate, and a request for findings of fact. Only three of those also extend plenary power, and I don't see any reason why, since your request for findings is your true signal to the appellate court that you're going to appeal -- to the trial court that you're going to appeal a nonjury trial, and you don't even need a motion for new trial, because you don't have to preserve your factual sufficiency points.

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?

CHAIRMAN SOULES: Okay.

Richard, you're looking at paragraph --

MR. ORSINGER: (b)(2).

CHAIRMAN SOULES: -- (b)(2).

MR. ORSINGER: It's Alternative 3(b)(2).

CHAIRMAN SOULES: Alternative 3(b)(2). Okay. Specifically let's talk about that point then, Elaine.

PROFESSOR CARLSON: I think it just depends upon whether you view the findings of fact as purely an appellate step or if you really view it as something on which the court might change its judgment.

I think what Richard is saying, and I agree, is that most young lawyers would think a request for findings of fact is a hope one day that the judge will see the error of its wisdom and will change the judgment. And my experience with younger lawyers is it is a trap, even though more sophisticated appellate practitioners would say, no, it shouldn't really be seen as a plenary power extending instrument. I would say to remove the trap maybe it should be.

CHAIRMAN SOULES: Judge

Guittard.

HON. C. A. GUITTARD: The logic of it is, and this is not necessarily to oppose Richard's position, the logic of it is, that filing findings and conclusions is not a matter that has to be within the plenary power because it doesn't actually change the judgment; it only explains. And our current practice is to permit that to be done when it is done timely, and the appellate court can just send the case back to the trial court and tell them to make the findings and conclusions even though they didn't do it within the time.

So I guess the logic, then, is, since the filing of findings needn't be done within the plenary power period if a timely request has been made, then it's not necessary for the filing of findings to extend the plenary power.

MR. McMAINS: Well, I recognize that most people's experience with nonjury proceedings is that the judge, once he renders his judgment, really doesn't care about what the findings are. But on the theory that possibly if he discovered that he was going to

have to make a finding that somebody had requested that might alter his judgment, the idea that he doesn't have the power to do that doesn't make a whole lot of sense to me, especially if he's following the timetables and he's systematically getting ready, you know, to do it.

CHAIRMAN SOULES: To be appealed?

MR. McMAINS: Yeah. It's going to be appealed, and he looks at it and he says, "Ah, I have made an error." I mean, he could have made an error in a calculation even, but it still may be not something subject to nunc pro tunc.

If you're going to make findings, and obviously, one of the grounds you can appeal on in nonjury cases without a record even is that the judgment is not justified by the findings, if he render findings and you say that's not good enough, why shouldn't he be able to change the judgment?

CHAIRMAN SOULES: Richard, what I want -- and then I'll get to Mike, but I want you to give me the words you want

inserted and where you want them inserted so that we're really very specific and talking about something very specific.

MR. ORSINGER: In Rule 305, Alternative 3, paragraph (b)(2), take the "or" out in the second line where it says "the judgment, or motion to reinstate," just take the "or" out there, "motion to reinstate a judgment after dismissal for want of presecution, or a request for findings of fact." Well, better say -- Elaine says "proper," and we better say that, because if you're not entitled to one, it doesn't have any effect.

PROFESSOR CARLSON: Proper.

PROFESSOR DORSANEO: Why don't we use the same parallel language we used in the Appellate Rules with all these things?

CHAIRMAN SOULES: Which says what?

PROFESSOR DORSANEO: I don't have them.

MR. ORSINGER: About extending the appellate timetable?

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN SOULES: Mike, let's hear from you while they're looking for that.

MR. HATCHELL: Quickly, I just wanted to add to what Rusty was saying and have everybody remember that a request for findings and conclusions also triggers the process for requesting additional findings and objecting to the findings made. And if a trial judge either sustains an objection or makes an additional finding that would require an amendment to the judgment, under our present rules he can't do that. And so Richard's suggestion in my judgment is very well taken.

PROFESSOR DORSANEO: In the Appellate Rules I think the place where the request for findings is located is actually before a motion to reinstate pursuant to Civil Procedure Rule 165a.

CHAIRMAN SOULES: So it says new trial, modify, findings, and then reinstate?

PROFESSOR DORSANEO: Yeah.

CHAIRMAN SOULES: Okay. So put it there.

HON. SARAH DUNCAN: 41(a)(1) has it at the very end. Sorry.

PROFESSOR DORSANEO: So it's not consistent.

CHAIRMAN SOULES: Okay. Well, what words do we use?

HON. SARAH DUNCAN: Proper. A proper request for findings of fact.

MR. ORSINGER: Do we want to mention conclusions of law?

PROFESSOR DORSANEO: No.

CHAIRMAN SOULES: "Or a proper request for findings of fact." Okay. That will go to the end.

Those in favor show by hands. 16.

Those opposed.

PROFESSOR DORSANEO: And then take out (c)(4).

CHAIRMAN SOULES: That's unanimous.

And Bill, that's for after the plenary power is gone.

MR. ORSINGER: And the court may want to supplement later.

CHAIRMAN SOULES: All right.

Those in favor now with that change, those in favor of Alternative 3 of Rule 305, Alternative 3 with only that change but otherwise in its entirety as written by the subcommittee, show by hands. 18.

Those opposed.

So that's unanimous.

MR. HUNT: Now, Mr. Chairman, I'd like to vote on (a), Definition. I'd like to break that into two votes. Number one, do we need a definition; and then if we vote that we need a definition --

CHAIRMAN SOULES: Well, let me first get a clarification. Haven't we already voted on that? I think we just voted on the entire 305. That was my question, and everybody voted.

MR. HUNT: Good.

CHAIRMAN SOULES: Okay. So that's behind us.

Is there anything else we need to take up before lunch? If you have anything really controversial, let's get it now.

Let's take about 30 minutes. If anybody is not done with their lunch, we can finish

dining at the table while we work.

(At this time there was a lunch recess.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, WILLIAM F. WOLFE, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on May 10, 1996, Morning Session, and the same were thereafter reduced to computer transcription by me.

Charges for preparation of original transcript: $1,093.15.

Charged to: Luther H. Soules, III.

Given under my hand and seal of office on this the 27th day of May, 1996.

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