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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

NOVEMBER 17, 1995

(AFTERNOON SESSION)

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

NOVEMBER 17, 1995

MEMBERS PRESENT:

Alejandro Acosta Jr.
Charles L. Babcock
Pamela S. Baron
Hon. Scott A. Brister
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo
Hon. Sarah B. Duncan
Anne L. Gardner
Hon. Clarence A. Guittard
Charles F. Herring
David E. Keltner
Gilbert I. Low
Hon. F. Scott McCown
Russell H. McMains
Robert E. Meadows
Harriett E. Miers
David L. Perry
Luther H. Soules III
Stephen D. Susman
Stephen Yelenosky

MEMBERS ABSENT:

Prof. Alex Albright
David J. Beck
Ann T. Cockran
Michael G. Gallagher
Michael A. Hatchell
Donald M. Hunt
Tommy Jacks
Franklin Jones Jr.
Joseph Latting
Thomas S. Leatherbury
John H. Marks, Jr.
Anne McNamara
Richard R. Orsinger
Hon. David Peeples
Anthony J. Sadberry
Paula Sweeney

EX OFFICIO MEMBERS:

Honorable Nathan L. Hecht
David B. Jackson
Doris Lange
W. Kenneth Law
Michael Prince
Hon. Paul Heath Till
Bonnie Wolbrueck

EX-OFFICIO MEMBERS ABSENT:

Hon. Sam Houston Clinton
Hon. William J. Cornelius
O. C. Hamilton, Jr.
Paul N. Gold

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

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

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

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

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

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

CHAIRMAN SOULES: Justice Duncan.

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

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

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

PROFESSOR DORSANEO: Well,

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

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

CHAIRMAN SOULES: Anne Gardner.

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

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

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

MS. GARDNER: That would work.

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

CHAIRMAN SOULES: That's always a trial.

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

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

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

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

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

HONORABLE SCOTT BRISTER: "And if applicable."

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

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

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

HONORABLE C. A. GUITTARD: Right.

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

CHAIRMAN SOULES: Well, it also would apply --

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

PROFESSOR DORSANEO: That last part of it is certainly.

MR. MCMAINS: Yeah. Because

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

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

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

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

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

CHAIRMAN SOULES: Justice Duncan.

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

PROFESSOR DORSANEO: Uh-huh.

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

PROFESSOR DORSANEO: That is the problem.

MR. MCMAINS: It is a trial.

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

MR. MCMAINS: I mean, it is a

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

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

PROFESSOR DORSANEO: Yes.

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

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

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

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

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

pleadings.

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

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

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

relief, and directs issuance of processes if appropriate.

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

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

CHAIRMAN SOULES: Justice Duncan.

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

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

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

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

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

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

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

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

HONORABLE C. A. GUITTARD: Yeah.

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

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

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

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

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

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

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

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

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

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

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

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

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

continue the work.

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

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

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

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

PROFESSOR DORSANEO: Or its successor.

CHAIRMAN SOULES: What page are you on there?

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

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

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

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

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

CHAIRMAN SOULES: Any opposition?

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

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

CHAIRMAN SOULES: Okay.

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

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

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

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

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

MR. MCMAINS: No.

CHAIRMAN SOULES: Huh?

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

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

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

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

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

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

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

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

CHAIRMAN SOULES: Why not leave it alone?

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

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

MR. ORSINGER: Yes.

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

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

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

entitled to enter this judgment on these findings."

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

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

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

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

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

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

HONORABLE C. A. GUITTARD: Sure.

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

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

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

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

PROFESSOR CARLSON: Probably it was written --

CHAIRMAN SOULES: Elaine.

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

CHAIRMAN SOULES: I agree with that.

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

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

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

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

CHAIRMAN SOULES: Justice Duncan.

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

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

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

CHAIRMAN SOULES: That's what this says.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN SOULES: Okay.

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

PROFESSOR DORSANEO: You have to conform to the pleadings.

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

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

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

No objection? Unanimous to repeal.

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

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

MR. ORSINGER: Okay.

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

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

CHAIRMAN SOULES: What page?

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

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

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

CHAIRMAN SOULES: Any objections to repealing 311?

No objection. That will be our recommendation.

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

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

HONORABLE PAUL HEATH TILL: It is.

PROFESSOR DORSANEO:

-- including the county court appeal.

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

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

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

CHAIRMAN SOULES: So we are

going to move this from 300 something to 700 something?

PROFESSOR CARLSON: The 500 series.

CHAIRMAN SOULES: 500 series?

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

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

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

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

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

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

CHAIRMAN SOULES: What do you propose?

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

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

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

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

MR. MCMAINS: Right.

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

MR. MCMAINS: I understand that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

think that that necessarily is one of them.

CHAIRMAN SOULES: Richard Orsinger.

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

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

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

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

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

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

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

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

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

HONORABLE C. A. GUITTARD: No. No.

CHAIRMAN SOULES: What?

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

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

CHAIRMAN SOULES: Okay.

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

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

HONORABLE C. A. GUITTARD: Yeah. Right.

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

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

entitled to a directed verdict.

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

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

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

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

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

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

one of the two.

CHAIRMAN SOULES: Richard Orsinger.

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

MR. MCMAINS: Right.

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

CHAIRMAN SOULES: Without objecting to the charge.

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

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

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

PROFESSOR DORSANEO: What you

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

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

PROFESSOR DORSANEO: But what you are really --

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

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

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

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

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

CHAIRMAN SOULES: Justice Duncan.

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

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

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

CHAIRMAN SOULES: No.

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

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

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

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

Duncan.

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

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

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

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

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

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

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

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

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

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

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

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

additional time.

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

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

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

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

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

HONORABLE C. A. GUITTARD: Well --

CHAIRMAN SOULES: Why now?

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

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

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

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

PROFESSOR DORSANEO: That's right.

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

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

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

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

doing it alone.

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

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

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

CHAIRMAN SOULES: Richard Orsinger.

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

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

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

HONORABLE C. A. GUITTARD: Yes.

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

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

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

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

MR. ORSINGER: -- we are asking

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

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

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

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

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

change in nomenclature.

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

MR. MCMAINS: Yes.

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

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

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

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

MR. MCMAINS: Well, I disagree with that.

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

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

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

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

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

HONORABLE SARAH DUNCAN: See.

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

HONORABLE SARAH DUNCAN: That is the question.

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

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

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

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

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

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

MR. ORSINGER: Luke?

CHAIRMAN SOULES: Yes, sir.

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

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

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

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

I think the risk would be worth the

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

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

MR. MCMAINS: Are you changing the timetables?

PROFESSOR DORSANEO: Yes.

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

PROFESSOR DORSANEO: No.

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

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

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

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

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

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

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

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

HONORABLE C. A. GUITTARD: Right.

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

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

HONORABLE C. A. GUITTARD: Modify it.

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

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

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

that's neither here nor there.

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

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

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

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

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

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

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

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

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

CHAIRMAN SOULES: Discussion? Who goes first? Rusty.

MR. MCMAINS: About what?

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

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

CHAIRMAN SOULES: Okay.

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

PROFESSOR DORSANEO: Well,

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

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

PROFESSOR DORSANEO: True.

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

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

more time than that anyway.

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

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

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

CHAIRMAN SOULES: For filing a motion for new trial?

MR. MCMAINS: Yes.

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

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

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

MR. MCMAINS: Right.

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

MR. MCMAINS: Right.

CHAIRMAN SOULES: Either of

those two.

PROFESSOR DORSANEO: Right.

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

MR. MCMAINS: Yeah.

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

MR. MCMAINS: Right.

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

MR. MCMAINS: That's right.

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

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

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

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

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

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

MR. ORSINGER: Well, yes. I

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

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

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

MR. MCMAINS: Right.

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

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

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

MR. ORSINGER: The JNOV is not,

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

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

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

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

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

MR. MCMAINS: Yeah.

CHAIRMAN SOULES: But will it preserve appellate?

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

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

MR. MCMAINS: I agree.

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

MR. MCMAINS: I am not saying

that there aren't people that have that --

CHAIRMAN SOULES: David Keltner.

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

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

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

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

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

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

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

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

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

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

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

MR. KELTNER: Yeah.

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

MR. KELTNER: Yes.

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

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

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

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

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

treaties to the trial court.

MR. KELTNER: Right.

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

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

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

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

MR. ORSINGER: Renewed.

HONORABLE SCOTT BRISTER: Rehearing.

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

MR. KELTNER: I think that's fine.

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

MR. KELTNER: Right.

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

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

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

MR. KELTNER: Unless ruled upon earlier.

CHAIRMAN SOULES: Unless earlier ruled upon.

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

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

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

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

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

MR. KELTNER: That's right.

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

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

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

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

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

CHAIRMAN SOULES: Stop right there.

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

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

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

CHAIRMAN SOULES: Different, same or different drafts.

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

CHAIRMAN SOULES: Well, you said the same grounds.

PROFESSOR DORSANEO: He meant it.

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

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

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

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

days.

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

MR. MCMAINS: Preserve.

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

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

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

CHAIRMAN SOULES: 16 to 1.

MR. MCMAINS: Sixteen to a half.

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

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

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

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

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

CHAIRMAN SOULES: Within the 30 days.

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

CHAIRMAN SOULES: Even if it's been overruled.

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

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

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

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

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

MR. MCMAINS: Yeah. At least 30 days.

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

CHAIRMAN SOULES: Yeah. Postjudgment motions that preserve error.

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

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

Okay.

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

PROFESSOR DORSANEO: So you agreed with us all along.

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

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

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

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

trial.

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

CHAIRMAN SOULES: Okay. Those who say "yes" show by hands. Anybody opposed?

No one is opposed to that. Okay.

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

HONORABLE C. A. GUITTARD: Right.

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

CHAIRMAN SOULES: Let me -- can

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

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: Or vacate.

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

CHAIRMAN SOULES: Why as a matter of law?

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

CHAIRMAN SOULES: Or motion to vacate or modify.

MR. KELTNER: Yes. That's right.

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

MR. MCMAINS: I would like -- Luke?

CHAIRMAN SOULES: Rusty.

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

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

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

are challenging.

HONORABLE C. A. GUITTARD: Right.

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

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

MR. ORSINGER: I had a different point.

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

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

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

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

MR. MCMAINS: Right.

MR. KELTNER: That works.

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

MR. MCMAINS: That's right.

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

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

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

MR. MCMAINS: Whatever you call it.

HONORABLE C. A. GUITTARD: I agree.

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

substitute for it.

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

CHAIRMAN SOULES: And to vacate.

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

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

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

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

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

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

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

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

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

be filed within 30 days.

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

MR. MCMAINS: For preservation purposes.

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

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

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

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

HONORABLE C. A. GUITTARD: If

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

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

PROFESSOR DORSANEO: He can't do it.

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

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

CHAIRMAN SOULES: That's probably right.

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

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

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

MR. KELTNER: Right.

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

and you can't do that.

MR. KELTNER: Can't do that.

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

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

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

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

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN SOULES: Findings.

MR. MCMAINS: Jury findings.

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

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

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

MR. MCMAINS: I understand that.

PROFESSOR CARLSON: Yeah.

CHAIRMAN SOULES: Buddy Low.

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

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

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

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

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

HONORABLE SCOTT BRISTER: Wait

a minute. Wait a minute.

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

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

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

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

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

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

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

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

in places that we are now using it.

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

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

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

CHAIRMAN SOULES: Buddy Low.

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

CHAIRMAN SOULES: Sure.

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

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

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

CHAIRMAN SOULES: Sometimes they sit on them a year.

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

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

Those in favor show by hands.

PROFESSOR CARLSON: On a motion to vacate?

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

come in behind him, that's fine with me.

CHAIRMAN SOULES: That might be good because the Supreme Court has got the discovery rules, and if we are prompted to do anything about them by what Steve has done in the interim, we probably need to go ahead and address that. And this is your report here?

MR. SUSMAN: Yeah. Yes.

CHAIRMAN SOULES: Okay. Steve.

MR. SUSMAN: We were asked to -- by you, Luke, the subcommittee to meet again, which we did on October 21st to review three volumes of letters that you had received and members of the Court had received on the subject of the discovery rules. What we discovered as we went through them is that the vast majority of them were dated before the summer of '94 when we really began our work and were not directed to any particular thing but more a general --

CHAIRMAN SOULES: I'm sorry. I can't hear you, Steve.

MR. SUSMAN: They were more general. They were not directed to anything in particular we were doing. They were kind

of general comments, and as to those we thought it would be a waste of time for you or us or anyone to go through them one by one and try to explain either why we took their thing into consideration or didn't or how it shows up in our materials, that the preferable thing with those people who sent you a letter prior to the time we began working is simply to draft a letter to them, which we suggest the text of, that says, you know, "We read your letter before we sat down and did our work," which is true. We had that all before us.

"Here is a copy of the proposed rules. Please come back to us with some particular issue if you have one in mind, if we haven't dealt with it." So they can refer us to a particular provision or a particular element. I mean, the first issue, I guess the first question, is that okay? I mean, really I couldn't get the subcommittee, frankly, to sit down and go over all those old letters. They are just so old. They go too far back.

MR. ORSINGER: It would seem to me it would be a complete waste of time to address complaints about a set of rules that

are no longer even going to be in effect. Isn't that what it amounts to?

MR. SUSMAN: That's basically it. Yeah. I mean, they aren't even commenting on the proposed rules or anything even like them. Then what we did is we looked at --

CHAIRMAN SOULES: Well, that's not altogether the case. I mean, people have concerns that are -- they are practice issues, and they may be directing it at a problem with the rule; but if we haven't addressed the issue in the new rules, the problem is still there, and they still might have that concern. So we have got to look at these. We can't just say, well, that's history, and we are not going to deal with it. Because they may have a very good cogent issue that we haven't worked on.

MR. ORSINGER: Would we do that by the letter by letter analysis of it, or would someone go through and say --

CHAIRMAN SOULES: Letter by letter.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: That's not what Steve has done but we --

MR. SUSMAN: I am merely suggesting that these people took the time to write, and we ought to write them and tell them the truth, which is "We read your letters before we sat down and did our work, but we didn't have them before us one by one as we went through them. Okay. Now, we have finished our work. Here is a copy of the proposed rules. Have we satisfied your complaint? If not, please write us again and point us to the particular provisions that you object to that need changing; and if you want to add something, tell us where to add it," which is much more constructive and easier than going through and trying to figure out these old letters.

HONORABLE SCOTT BRISTER: Here, here.

MR. KELTNER: Here, here.

MR. SUSMAN: I mean, I don't care to do it. I mean, we sat down. I couldn't get the group to -- it was a Saturday morning. I mean, they thought their work was

done when they submitted their proposed rules, and obviously it wasn't. So let me go on to the next point, if we can come back to that.

There were letters received since May which we did review in our disposition table. In my handwriting it is attached to the letter. Just in a nutshell they fall into three categories. These people were aware of our work, and there are three categories of the letters we received.

The one comes from the insurance defense Bar that basically objects to the notion of time limits, and that is a standard -- the letters may be in several variations, but it's all basically the same letter. "We represent defendants in personal injury cases," and their basic objection is to any kind of time limits. And that's the letter that appears at SP-199201, and we would propose then sending to these people a standard letter that would be -- call it PID, personal injury defense letter, which would be a form letter that Paul Gold has agreed to prepare to be sent to people who have the same general problem. It's all the same general problem. "We don't

like any time limits. We like things to control our own destiny."

The second category we had letters from were from family lawyers, and I have indicated those are the FL numbers down there on the right, the bottom of the first page of the disposition table, and these are -- Alex Albright is persuaded that she has satisfied the family lawyers. She met with them. She talked to them. You-all remember that as good as I do. I don't know whether that happened or not, but she was going to write a family law letter for Luke to send to the family lawyers telling them how we think we have dealt with their problem.

And the third category is -- and really the most serious attack to the rules comes from the State Bar Committee on Rules, State Bar CRC I call it on this, and their latest that we have -- it's repeated many times through here, State Bar Committee on Rules, and the latest iteration from the State Bar committee is dated September 13th, 1995, and it seems to me we know what they are. They have gone to the Supreme Court, the State Bar

committee's position. We certainly considered them as we went along. A member of the State Bar committee served on our committee.

And I think the main thing that I can -- what's going to happen here is David Beck has requested that Mr. Hamilton and I write an article that will appear in the December Bar Journal critiquing each other's proposed rules. He will critique the Supreme Court Advisory Committee's proposal, and I will critique his critique, and that's due to the printer on Monday. So I have basically written it.

And you-all know the -- I mean, in a nutshell we both agree -- both the State Bar committee and we agree that the best thing in the world is to have a judge who will enter a carefully hand-crafted discovery control plan. They call them something else under their thing, but it's the same thing, that that's the ideal situation and that situation should apply in complex big cases.

Where we differ is what happens if neither the parties agree or the court takes the time to enter such an order or the court

enters an order, even their rules proposes deadlines but doesn't deal with things like the length of deposition, conduct during deposition, the number of interrogatories, what can be asked in interrogatories.

I mean, it doesn't -- their rules don't cover a lot, all of which can be changed under our rules by the court, but I doubt a court is going to be entering a discovery control plan, are going to necessarily unless the parties persuade them to change what lawyers can say during depositions, when they can confer with their clients, when they can stop depositions, the rules for getting a deposition quashed because it wasn't noticed in enough time or at the wrong place.

There is a lot of changes we make in our rules that I suspect will not be opted out of even in those cases where there is a discovery control plan. The State Bar says that, you know, after the state court judge enters what's essentially a scheduling order or docket order, we get them all now, which is time for amending pleadings, adding parties, changing experts, notifying each other of who

the trial witnesses are going to be, and blah-blah-blah.

The State Bar says that once the court does that, that's enough; and if the court doesn't do that, it's back to the same-old same-old; and as you know, our committee, the Supreme Court Advisory Committee, opted for the decision that if the court doesn't do that, it's not back to the same-old same-old. It's back to something different, which is limits on the use of discovery vehicles. That is basically the difference between the two positions.

So they have under their theory of things it was only necessary for them to have one rule, and that is essentially within the first 120 days of the time the defendants appear the court will enter a scheduling order. That seems to me as quite late in the game for the court to be intervening, four months after the defendant answers. I mean, under our regime, in fact, discovery will be two-thirds complete usually by that time. I mean, not two-thirds complete but well down the road by that time. So those are the differences, and they only

have one rule, which is a pretrial rule. They don't have other rules. So I propose to get that article off and done on Monday.

But we have -- and the others are just simply variations of a theme, and I have put the initials by -- Luke, each of the members of the committee have agreed to respond to a particular letter in there and to get them to you by the end of the month, drafts for these letters. Insofar as the kinds of things that we suggest doing, the subcommittee suggests that we do, to facilitate moving these rules forward, they are basically suggested at the bottom of page two of my letter to you and then over on page three, and that's basically where we stand. And I would be glad to entertain questions.

HONORABLE SCOTT BRISTER: Steve, what about the ones on your attachment, for instance, 166(a), summary judgment, wasn't covered in any of the discovery rules, and nothing is noted here as responding to these.

MR. SUSMAN: You mean 166 -- these, all these were in the category of prior to May of '94.

HONORABLE SCOTT BRISTER: Well, yeah, but your rules didn't do anything about summary judgments. I understand not fooling with request for admissions letters because of the change in those, but that ain't --

MR. ORSINGER: This starts with 166(a), right?

CHAIRMAN SOULES: Steve starts with 166, his committee.

MR. ORSINGER: I never comprehended that Steve's committee was even addressing summary judgment.

MR. SUSMAN: We didn't address summary judgment. These letters, they were not -- you have got to look at the volume. I mean, if the rule deals with 166 and there is a discovery issue in the text of the letter that is written, someone has gone through it and has written on it "discovery." The letter may deal with other subjects, summary judgment, pretrial, or something else that's not within the prerogative of our committee, and then -- I guess this is what they did, Luke. You had someone categorize them so that the letter shows up -- the same letter will

show up in a lot of different places. The same letter will show up about six times or eight times even in the material that was discovery.

HONORABLE SCOTT BRISTER: Sure.

MR. SUSMAN: Because it dealt with one of the discovery rules and then another discovery rule. So --

HONORABLE SCOTT BRISTER: All I am saying is when are we going to talk about the summary judgment rule and when are we going to talk about the pretrial conference rule and whose committee is looking at like Anne's article, which I just looked at about suggested changes to the summary judgment rule?

MR. SUSMAN: And very importantly is the pleadings. I mean, we let you know that was one of the very important parts of the discovery package was -- and I told everyone if anyone has concern about the rules, it's one of the trade-offs for doing things in a short period of time and completing them. In other words, at some point in time the plaintiff has got to put up

or shut up.

CHAIRMAN SOULES: We have voted not to change 166, and that is -- Steve's jurisdiction starts with 166 and ends at 209 and includes summary judgments.

MR. ORSINGER: There has been no committee work on summary judgments, right, Steve?

MR. SUSMAN: We have not done anything on summary judgments.

CHAIRMAN SOULES: No, I know. But that's what we have to move through now. The discovery part of your work we hope is done, and that gives us the answers to a lot of these letters which I have to get out, and 166 has been done, but --

MR. SUSMAN: 166 was not --

HONORABLE SCOTT BRISTER: My recollection was we just pulled it off the table.

MR. SUSMAN: Yeah.

CHAIRMAN SOULES: We voted no change.

HONORABLE SCOTT BRISTER: No. I don't think so. Because I sure didn't vote

for it because I wanted to make some significant changes on it.

MR. SUSMAN: The footnote, you know, Luke, the footnote that's in the rules that went to the Supreme Court says, "This rule" -- on 166, pretrial conference. "This rule is no longer part of the discovery subcommittee's report. It is included to show changes made during the July SCAC meeting, but the rules should go to the appropriate subcommittee for review."

That's what we decided. I mean, we discussed it. People did have changes, and they are reflected in this draft that went to the Supreme Court but with the promise that some other subcommittee is going to look at it. And we have the same things on Rule 63, 66, 67, and 70, which are, we say, "tentative drafts of new amendment and pleadings rules that will work with the discovery rules, but the subcommittee that is to address pleadings is to consider these rules in light of the discovery rules."

CHAIRMAN SOULES: Well, your jurisdiction is 166 through 209, and we have

dealt with the discovery.

MR. SUSMAN: Well, we will go back and do this. Well, you have -- if you want to talk about, I mean, 166 that you see here in our July 27th draft is what this committee proposed, and somehow -- we thought that, too, Luke, but somehow at the meeting, I don't know. Do you-all remember what happened? Someone like said it --

HONORABLE SCOTT BRISTER: My recollection was it was getting too complicated, and I thought it was you, Luke, but it may have been somebody else suggested this was not at the heart of what you were trying to do with the subcommittee stuff, why don't we basically just table it and put it off and we would discuss it another day.

MR. SUSMAN: Maybe ours is the appropriate subcommittee.

CHAIRMAN SOULES: We will find out. We will find out. We will get the record on that and get it cleared up, but I mean, that doesn't stop anything. But we have got this so-called dated information, which is not even on the list here. We have got these

many letters plus the supplemental letters. (Indicating)

MR. SUSMAN: What's that?

CHAIRMAN SOULES: There is this many letters that are dated back '91, '92 that we have got to -- '93 that we have got to get at, if I have your whole report. Does your report start at 166(a) supplement page 229?

MR. SUSMAN: No. It goes back. I took that page off. There was -- Luke, there was more pages --

CHAIRMAN SOULES: Okay.

MR. SUSMAN: -- there that were sent to me to complete. I don't know where they are. I can probably find them somewhere.

CHAIRMAN SOULES: See, I had Holly go through all the agendas and make everybody a grid that --

MR. SUSMAN: They go back earlier. There was another page like this or maybe two pages, but they are all in the same category, all back to 1992, February '92.

MR. KELTNER: And, Steve, the task force answered some letters, a significant number, well over a hundred I

would say, telling them that we were going along with those things. So I think probably a number of those letters have already been responded to in one way or another that predated the subcommittee's report.

MR. SUSMAN: Luke, could I get a couple of things clarified? No. 1, do we want -- I mean, I could make a copy so you-all could all get a copy. I can go right out now and make a copy of 166 as we proposed it, and we can talk about it tomorrow and finish it, if that's within our jurisdiction. I mean, it's one page here, and that's what we went over and proposed but got pulled off. I guess that was the reason. Leave that, it's not correctly part of -- we were hot in the middle of some other debate, and we can finish it up.

And then the second question is pleadings. Who does pleadings, amended pleadings?

MR. ORSINGER: I do pleadings, and we have already looked at it, Steve, and Alex is on my subcommittee --

MR. SUSMAN: Good.

MR. ORSINGER: -- as a helping

agent but not as a principal weight lifter, and we are coordinating those preliminary rules and deadlines for special exceptions, amended pleadings, and we are using discovery cutoff period. We are counting back from the discovery cutoff period, not back from the trial date.

MR. SUSMAN: Good.

MR. ORSINGER: And the rules committee of the State Bar is counting back from the trial date. And so my subcommittee report is going to be, to lay it before this committee, are we going to count backwards from the discovery cutoff, or are we going to count backwards from the trial? That's a very important distinction, and it's interrelated to the discovery rules.

CHAIRMAN SOULES: Well, so I am clear on this, I need direction from your committee how to handle every one of these letters, each individual letter, and every subcommittee chair has that responsibility. Because we have to --

MR. SUSMAN: I have given you what I prefer doing, what I think if I were

you what I would do. If you want me -- if you don't want to do that --

CHAIRMAN SOULES: To just write them and tell them it's --

MR. SUSMAN: A nice letter. You put it on a machine that's just personally addressed "Dear Joe: We have studied your letter of so-and-so addressed to so-and-so." You fill in the blank, "that was submitted to the subcommittee, which began its work after your letter was received. They have produced the enclosed" -- hell, I wrote the letter, I mean.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: I mean, that's what I would do now. If you want me -- I don't even want to suggest that because I don't want to say "no."

HONORABLE SCOTT BRISTER: Yeah. Don't volunteer.

MR. LOW: Can I make a suggestion on this letter?

HONORABLE SCOTT BRISTER: Luke, I would suggest -- I don't know if it's another subcommittee would be appropriate or

not, but I know I have read and heard various proposals about summary judgment, and I sent, you know, just a two-line to you last week, which is incredibly late; but it's just based on things I have heard around, and somebody needs to look at this and draft some stuff.

You know, I mean, I have even heard rumors, you know, the question of should we go to some or all part of the Federal standard, and you know, we need to discuss that and maybe get together some drafts in case we want to shift some burdens on summary judgments.

And my personal pet peeve, that we should change the rule that tells me don't dare put a reason I'm granting the summary judgment order in it, because if I do that and I am wrong on that one but right on another one, we are going to get to do it all over again, which has become the foundation for teaching judges at new schools -- at new judges school never to give any reason for anything you do, and it seems like to me we need a subcommittee to draft that, and I don't think it's -- they have worked enough extra weekends. Maybe somebody else ought to pick up that duty.

CHAIRMAN SOULES: That's fine, I mean, if Steve prefers that these other areas be done by a different subcommittee.

MR. SUSMAN: Is that within my -- is the summary judgment rule within my area?

MS. GARDNER: Yes.

CHAIRMAN SOULES: Right, 166(a).

MR. SUSMAN: Hell, we would love to do it. I mean, we just didn't know. It is?

CHAIRMAN SOULES: Yes. But you have done a hell of a lot of work.

MR. SUSMAN: No. I'd love to do it.

CHAIRMAN SOULES: Nobody is questioning that.

MR. SUSMAN: I mean, I'd love to be involved in it, and I think the committee would be happy to do it, but we just haven't known that that was part of our deal. It's not part of, quote, "discovery."

CHAIRMAN SOULES: Right. But your subcommittee has always been 166 to 209.

Discovery has been obviously the focus of it because the first thing we had to do was get through the task force --

MR. SUSMAN: We will go ahead -- we will do it.

CHAIRMAN SOULES: -- and generate the issues and generate the work product the Supreme Court wanted on discovery.

MR. SUSMAN: We will give you a report by the next meeting. Brister, you can come.

CHAIRMAN SOULES: I am not willing to --

MR. SUSMAN: I don't want this project to fall in the wrong hands, Brister. You can come as an ad hoc committee member. This is not going to fall into the wrong hands.

MS. GARDNER: Luke, there is already -- excuse me.

CHAIRMAN SOULES: Go ahead.

MS. GARDNER: There is already a proposed new Rule 166(a) drafted that's in the materials.

CHAIRMAN SOULES: Right.

MS. GARDNER: By the rules committee.

CHAIRMAN SOULES: By the court rules committee?

MS. GARDNER: Right.

MR. SUSMAN: What is that?

MS. GARDNER: There is a proposed rule that's drafted that's in the materials for 166(a) that the rules committee has proposed. So that's a good start. I think it's a good rule.

MR. SUSMAN: Okay.

MS. GARDNER: A good proposed rule, myself.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: Luke, without addressing the summary judgment and other things, may I make this suggestion? I notice in Steve's letter he invites them to comment. It's easy to comment and say, "Well, you don't give enough time for this or that," but if somebody is interested in it, they should then state what it is they object to and correct it rightly the way they say it should be because it's so difficult to hit a sprinkler, and you

have covered everything.

We do that in the ethics. We get these wild inquiries and so forth and say, "Great. Brief it for us and tell us. Write an opinion." Well, sometimes we don't hear back. So they shouldn't be able to just criticize. That's easy to do, but they should be required to take time and then when they get the letter we can respond to it.

With regard to whether Steve should have to address each issue that the State Bar committee on their rules, that's pretty impossible because it's so broad. It's each rule, and if the Supreme Court wants both suggestions, they can. If they want a subcommittee, like the House and the Senate get together, to examine, they can. But this committee started out with the rules based on the way they were, so it would be difficult to show how this differs from theirs, theirs differs from this. They are not numbered. It would be a timeless task, a hopeless task, and fruitless, and I don't think they ought to have to do it. That's it.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: Well, so could I suggest this, Luke? Could I make a copy of this 166, and we discuss it tomorrow morning?

CHAIRMAN SOULES: No.

MR. SUSMAN: You don't want to do it?

CHAIRMAN SOULES: I am going to decide what to do about the agenda and what to do about the situation of handling these letters. This is not the State Bar Rules Committee. The State Bar Rules Committee has a representative on this committee, and they are getting information or it's available as it develops. I am more concerned about, you know, the letter from Tony Lindsay, a judge of a district court who may or may not still be a judge. I don't know.

HONORABLE SCOTT BRISTER: Yes.

CHAIRMAN SOULES: Here's one from Tom Fleming at Atlas & Hall, making some suggestions about 166. Here is one from Jon Nichols, Piro, Nichols & Lilly.

These people have taken their time --

MR. SUSMAN: I will be glad to do it.

CHAIRMAN SOULES: -- to ask us to look at a problem that they felt they had. Now, I realize that is probably back in '90 and '91 and '92, but the committee did not meet until '94 or '93. I can't remember when we started.

MR. SUSMAN: I will be glad to take the whole bunch and do it and prepare a response.

CHAIRMAN SOULES: Just whatever you suggest we say to these people.

MR. SUSMAN: Okay.

CHAIRMAN SOULES: And that's what these grids are that Holly sent out, is it takes you right to the page and whatever volume it is and, you know, what do you recommend we do and why and then we can write these people and tell them what we did.

MR. SUSMAN: Fine.

CHAIRMAN SOULES: And we have got to do that across the board because I think we want to encourage people if they have a problem, this committee has always -- the Court has always been open to inquiries and suggestions about how to improve the practice,

and some of these people have probably forgotten that they wrote, but we shouldn't forget that they wrote.

MR. KELTNER: Luke, just again so you know, everything that was done on the task force I wrote them back or called them, one of the two. So everything that comes up through the end of our report I think has already been done, and some of them would say, "Thank you for your suggestion. We will be considering it," and we probably at this point need to tell them what we have done. But a lot of them, the ones -- especially the ones, the epistles, we called and told them what the thought process was and what we did.

Now, the problem is the task force is different, and obviously radically different, from what the subcommittee did. Maybe we owe those people that wrote in '92 and '93 an additional letter at this point saying, "Here is the rule. See what you think. Let us know." And perhaps the Court wants us to do that, a second letter to them as well.

MR. ORSINGER: If I can toss in two cents here, it seems to me we have got two

different things we are doing. No. 1, we are acknowledging the time that they took to write the letter to let them know that the Supreme Court is listening to their concerns about law practice, and that's an important political or social aspect of what we are doing.

The other -- which is addressed by letters that David's task force wrote, but the other part of it that's not addressed by the task force letters is, is there a kernel of good thought in there that a problem has been presented that is not cured even under our new discovery rules and that if we read that letter we would say, "Damn, you know, that was a problem under the old rules, but it's still a problem under the new rules, and we ought to fix it by doing the following." And relying on David's previous letters, it will make them feel good, but it won't be sure that we are evaluating the continuing vitality of their suggestion.

CHAIRMAN SOULES: That's right. Both of those things are very important, and so we have got to get to -- as I have said for a long time, we have got to get to this agenda

and understand it and respond to it, and if it causes us to change some things we have previously recommended while we have been focused on dealing with task force recommendations then we need to get that information to the Court before the rules are promulgated.

MR. SUSMAN: We will do it.

CHAIRMAN SOULES: Let me try to think what's -- I think, Steve, before we get -- we can get into some new issues in your subcommittee, but maybe the first ought to be to go through this history of letters and report to us what you think we ought to do about it, any changes in the discovery rules that we sent to the Court. If there is anything in there, as Richard said, a kernel of wisdom that we should utilize, and if so, where so we can -- because I think the Supreme Court has not yet dug in seriously into the discovery rules. Is that right?

JUSTICE HECHT: No, we haven't.

CHAIRMAN SOULES: They haven't had an opportunity. They have been working on the appellate rules very diligently.

JUSTICE HECHT: Probably next month. But they have asked me about the summary judgment rule a couple of times. So I am glad to know that Steve is going to go to work on that.

MR. ORSINGER: Luke, I am prepared to pass out my disposition chart.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: At least then people could take it home with them. I suppose everybody is probably going to do something besides study that.

CHAIRMAN SOULES: All right. You have got Rules 15 to 165, right?

MR. ORSINGER: Do you need to say something by way of introduction, Luke?

CHAIRMAN SOULES: Only that I think this and the 300 series rules probably need to be prioritized, along with the review of the letters for the discovery because that's gone to the Supreme Court. So we need to get that current. Judge Guittard's review of the appellate grid for the same reason, the appellate rules have already gone, and we need to -- or maybe someone else is looking at

that. And the -- well, to me the items that have priority are the 15 to 165, the 300 series, and the letters that address the rules that we have already sent to the Court. Then we can take the others up on a more casual basis, on a more delayed basis. So I think we ought to get to yours right away, Richard.

MR. ORSINGER: Let me respond to that by saying that our committee had dwindled down in membership and was just reinnervated at the last Supreme Court Advisory Committee meeting, and we have met twice as a subcommittee, but we have not been able to do all of our work. So this disposition chart here has explained every single letter, but it doesn't have recommended actions on every single letter. It just has recommended actions on a lot of the letters and then our next subcommittee meeting we will try to get recommendations on all of the letters.

Now, having said that, these letters in my view don't really address the big problems we have between Rules 115 and Rule 165(a), and I think that those problems are being

generated by the subcommittee analysis process and the fact that we have decided to build upon Bill Dorsaneo's rules task force recommendations. And the rules task force recommendations call for a restructuring of the rules in a way that gathers together rules that have been splintered throughout over history and consolidating all of the rules that affect the district clerks and putting them in one area where the district clerks can deal with them and the lawyers don't deal with them.

And that's a rewrite process that is going to be a lengthy process and will not be finished by the next Supreme Court Advisory Committee meeting. So if this is a big priority to get this to the Court, I am going to have to apologize right now that we can share our progress as we go, but it's not going to be finished in 60 days, and that doesn't mean that we don't have a lot to talk about and can't accomplish a lot. I just think that our task will not be completed until after we have basically gathered rules together, convinced everybody that we have

assembled them in a sensible way, that we have consolidated them without changing the law hopefully, and I think that may be as difficult a process as the discovery.

CHAIRMAN SOULES: What guidance do you need from the committee on any issues?

MR. ORSINGER: Well, what I would like to do is present to the committee the work that we have done and find out whether we have acceptance or rejection on that, and it's not -- obviously we can't do that this afternoon, but we can go into that tomorrow.

Let me just tell you from the standpoint of highlights of actual proposed rule language that we have Bill Dorsaneo's overall task force reorganization plan, which I would like for Bill to describe tomorrow and tell everybody what the rules task force thought about the structure of the rules and how we ought to restructure them so that they are easier to read and easier to use and then see if we can get a consensus on that.

Now, I was told earlier today that this full committee had already, if you will,

adopted the new structure of Bill Dorsaneo's task force. I didn't remember that. Maybe it would have been two years ago or something like that, but at least we ought to revisit it for purposes of remembering it; and if not, then maybe take a vote on it to see because our subcommittee has voted to take the task force recommendations about restructuring the rules not as a article of faith that we have to slavishly follow but as a working hypothesis that we are going to use, and I wanted Bill to present that.

Luke, your letter that you sent out for this meeting contained -- at least my copy of it contained Bill Dorsaneo's letter to Justice Hecht back in June of '92, I believe it was, or well, I had that out a minute ago, and I apologize. Here it is. July 7th of '92 was kind of a summary enclosure from the task force to Justice Hecht, and then later on Bill submitted his final task force, and that was November 8th of '93. So that was almost a year and a half later.

Now, I don't know for sure that everybody got this, but I would be curious to know.

It's dated July 7, 1992, to the Honorable Nathan Hecht from William V. Dorsaneo, Chairman, Task Force on Revision of Rules, and its probably about -- well, it's 43 pages long. Does anybody get that? Do you remember, Luke, if you mailed that out to everyone?

HONORABLE SCOTT BRISTER: No.

CHAIRMAN SOULES: I don't.

HONORABLE SCOTT BRISTER: No.

MR. ORSINGER: Okay. Then you don't have that to work with, but what I do have is I have Bill's later report that while it was a thick task force, it was probably an inch thick, it did have a letter cover letter on it that explained the basic suggested structure. And that's only five pages long, and I have copies here for everybody, and I thought that we would look at that and listen to Bill about his explanation of the new structure of the rules and then decide whether we want to go down this road or not. Because the subcommittee is prepared to go down this road using this structure if the full committee will buy it.

Okay. The next thing is we have taken on individual rules that we can discuss. One of them is the rule on recusal of judges that was prompted by the very first item in the disposition chart here about matters for recusal.

Let me set the stage. Right now a motion to recuse or disqualify has to be filed at least 10 days before trial of the first hearing. An issue was raised by Justice Bleil -- I think I pronounced that correctly -- Bleil, about what happens if the issue arises within 10 days of trial. Are you foreclosed from doing it? And I believe that his court of appeals ruled that there is an unwritten good cause exception to file motions to recuse on matters that arose within 10 days of trial. He suggested a change. We have made a change on the recusal and disqualification. Actually, it goes a little bit further than that, and it may be controversial.

We have also made a change to Rule 63 on amendments and responsive pleadings, most particularly when the deadline is for that,

and I have that here. It hasn't been passed out, and I will just tell you right now that leave, you can freely amend up to the 45th day before the end of the applicable discovery period, and after that it's with leave of court. And if leave is granted, the court is authorized to permit additional discovery based on that amended pleading.

We also have an amendment to Rule 47, which is a pleading rule that states what you have to put in your pleadings, and I have a copy of that here, too, and we have added to it what we think is in the case law, a requirement that your pleading contain a short statement of the cause of action -- and this is new -- stating the legal basis for each claim and giving a general description of the factual circumstances sufficient to give fair notice. I'd like for to us look at that language and discuss it.

And then we have -- Bonnie Wolbrueck has prepared a number of consolidated rules that are of concern to the clerks' duties in connection with the filing of lawsuits, the maintaining of records, the mailing of

notices. Those rules were kind of scattered throughout. We have consolidated them down. Most of them have been run through Bonnie's connections in the district clerk area so that we know that they are acceptable to the clerks, but we have to look at them. We are completely eliminating some procedures, like reading the minutes of the court at the end of the term and stuff that nobody does anyway, but we need to look at that and see what we are doing and get approval on that.

And then the last thing that I have prepared ready to talk about is Chip brought -- did you?

MR. BABCOCK: Uh-huh.

MR. ORSINGER: Brought a proposal about uniform statewide rules on the use of cameras in the courtroom. Now, as it presently stands, cameras can be approved on a local basis subject to approval by the Texas Supreme Court, and they are -- appear to be largely patterned after the rules adopted first in Dallas. Right, Chip?

MR. BABCOCK: (Nods affirmatively.)

MR. ORSINGER: But they do vary some, and there is some desire to make them uniform across the state so you don't get these little idiosyncrasies depending on what county you go to, and so we have undertaken to write a set of uniform rules largely patterned after the Dallas rules --

MR. BABCOCK: Dallas and Houston.

MR. ORSINGER: Dallas and Houston combined, that we are going to propose would be uniform statewide, and that means we are going to be stepping on some toes. We are going to be changing some rules if we do it; but the advantage is, is that it's uniform then. It doesn't depend on local practice.

And that's all that we have that's prepared for us to talk about right now other than the disposition chart, which you can see if we can go through that, Luke, and that may take several hours in which we have characterized what the letters said; and those that we have acted on, we have made -- we have either rejected it, we have said that we agree with it and we are going to generate a rule to

reflect the change, or we have already generated the rule to reflect a change; but that's work in progress.

CHAIRMAN SOULES: Okay. Is the intervention rule and the joinder of parties, that's all in your bailiwick, right?

MR. ORSINGER: It is, and Bill Dorsaneo has prepared a handout here, which I just received this morning, that is not written from the standpoint of a new rule with a strikeout on what was the old language and an underline on the new language, but it does explain his concepts of what we do with Rule 90 and 91.

Well, that isn't joinder, is it? Pardon me. No. We don't have anything written right now on the joinder of parties. That's something that Bill is concerned with and has agreed to rewrite, but I don't have anything to give you to look at just yet, but we certainly could talk in concept about what the committee suggestions are, but I don't have the subcommittee work product in written form to hand out.

CHAIRMAN SOULES: It seems to

me probably like Richard's committee work needs to be given priority because it's got to square with the discovery regime. Joinder of parties, joinder of claims, I guess the pleadings rule really takes care of that, the concerns we had about what might complicate the operation of the discovery rules, and that's probably what we need to go into on some priority basis meeting by meeting as you can generate work for us to do.

MR. ORSINGER: Well, we can address the interface with the discovery rules probably tomorrow.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: Because we have already drafted some language, and we have some other in principle; and we could agree, for example, that the deadline for joinder is 40 days before the close of the discovery window, 90 days before, or 60 days before trial. We can vote on that and then we will go write the language later. I mean --

CHAIRMAN SOULES: Does anyone see or feel that anything else on our docket has any higher priority, or should we go right

to Richard's work tomorrow?

Richard's work tomorrow. Okay. That's what we will do, and that will probably take us the morning.

MR. ORSINGER: I can't imagine that it wouldn't.

CHAIRMAN SOULES: Because you have got a lot of work already done.

MR. ORSINGER: Right. And some of it may be controversial. Some of it may be controversial.

CHAIRMAN SOULES: We will be in this room tomorrow as far as I know, so you may leave things if you wish. We are scheduled here tomorrow, aren't we?

MR. PRINCE: 8:00 o'clock?

CHAIRMAN SOULES: 8:00 o'clock. And we will adjourn at noon. Thank you very much.

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on November 17, 1995, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $1,279.00.

CHARGED TO: Luther H. Soules, III.

Given under my hand and seal of office on this the 30th day of November, 1995.

ANNA RENKEN & ASSOCIATES
925-B Capital of Texas
Highway, Suite 110
Austin, Texas 78746
(512) 306-1003

D'Lois L. Jones

D'LOIS L. JONES, CSR
Certification No. 4546
Cert. Expires 12/31/96

#002,510DJ