MINUTES OF THE
SUPREME COURT ADVISORY COMMITTEE
JANUARY 19-20, 1996

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock on Friday, January 19, 1996, pursuant to call of the Chair.

Friday, January 19, 1996:

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

Members present: Luther H. Soules, III, Prof. Alexandra W. Albright, Charles L. Babcock, Pamela Stanton Baron, Honorable Scott A. Brister, Professor William V. Dorsaneo III, Sarah B. Duncan, Michael T. Gallagher, Anne L. Gardner, Hon. Clarence A. Guittard, Michael A. Hatchell, Charles F. Herring, Jr., Donald M. Hunt, Tommy Jacks, David E. Keltner, Joseph Latting, Gilbert I. Low, John J. Marks, Jr., Hon. F. Scott McCown, Russell H. McMains, Anne McNamara, Robert E. Meadows, Richard R. Orsinger, Hon. David Peeples, David L. Perry, Stephen D. Susman, Paula Sweeney and Stephen Yelenosky.

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

Members absent: Alejandro Acosta, Jr., David J. Beck, Prof. Elaine A. Carlson, Ann T. Cochran, Franklin Jones, Jr., Thomas S. Leatherbury, Harriett Miers, and Anthony J. Sadberry.

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

Others present: Lee Parsley (Supreme Court Staff Attorney).

Chairman Soules brought the meeting to order.

A discussion was had regarding the changes to 166a, subdivision (a).

Justice Guittard proposed changing the language that says "the motion shall be filed at least 21 days before the hearing" to "shall be heard at least 21 days after it is filed". Discussion followed. The subcommittee accepted the change. Judge Guittard also proposed that the 21 day provision should go down in subdivision (d). Discussion followed regarding same.

Professor Dorsaneo proposed eliminating the first paragraph, put the first sentence of the first paragraph in the second paragraph (b) and move the rest of it down to (d) and re-word it so

it would say "a party may move for summary judgment on all or any part of a case at any time before the adverse party has appeared" and then continue on with the rest of paragraph (b). Then when you get down to the hearing, change the sentence to talk about the hearing and the notice of 21 days and then talk about the response being due.

Rusty McMains pointed out that if you get 21 days notice of the hearing on a summary judgment, then this rule does not accomplish that. Discussion continued.

Judge Brister proposed using language like the language in Rule 87 on motions to transfer venue which says "except on leave of court each party is entitled to at least 45 days notice of a hearing on the motion to transfer."

Justice Duncan brought up the fact that in paragraph (c) the part has been left out that states that the motion and any supporting affidavits shall be filed and served. Discussion followed.

Scott Brister made a motion to move the first sentence of (a) to become the first sentence of the next section, which will become (a), and then in the first sentence of (d) or the section on hearing will be "except on leave of court", language to the effect of each party is entitled to a 21 days notice of hearing on the motion for summary judgment.

Chairman Soules asked why should the court be entitled to shorten that. Discussion continued.

David Perry commented it was his understanding that the primary reason for looking at this rule was to deal with the burden of proof issues that are in subdivision (e) and that the idea of over all reorganizing and rewriting the rule perhaps is unnecessary. Discussion followed regarding same.

Justice Duncan commented there needs to be some room in the rule to affirm a summary judgment on a ground not specified in the motion when it has been litigated by the parties or established and it is dispositive of a cause of action. Discussion followed.

Chairman Soules commented the way he understood the architecture of this rule to respond to the burden of proof problem is that prior to the discovery cutoff the present Texas rule applies, but after discovery cutoff the Federal Celotex rule applies. Discussion followed.

Paula Sweeney inquired what the "problem" is that we are trying to fix.

Chairman Soules indicated the court and some members of the bar, and maybe only some members of the court, feel that the summary judgment practice in Texas should be more aligned to the federal practice so that summary judgments are more easily obtained, and the impetus is to move to the federal rule. There is a good bit of resistance on the committee to doing that at least while discovery is available. Discussion followed.

Chairman Soules inquired whether this rule provides that the Judge can grant additional time for discovery in the interest of justice. Discussion followed.

Steve Susman pointed out that in paragraph (d) it says "the court may continue the hearing pursuant to Texas Rules of Civil Procedure 251." Discussion continued.

Professor Dorsaneo inquired whether is it the case now across the circuits that the Plaintiff must produce in order to raise a fact issue, admissible evidence, or evidence that is in a form that's admissible at trial? Professor Dorsaneo advised he will not vote for a rule that forecloses a plaintiff on that technical basis when they could provide information that should be satisfactory to the court that would indicate that they will survive a directed verdict motion at trial by calling a particular witness and asking that witness questions. Discussion followed. Discussion was had regarding affidavits and admissible evidence.

Professor Dorsaneo commented summary judgment was meant to be hard to obtain and the burden was on the movant. If we are now going to change it around, the strictness that protected the non-movant, it hurts the non-movant. Discussion continued.

Joe Latting proposed adding in subdivision (e)(2) as a new last sentence "upon proper motion the court shall extend the discovery period with the limited purpose of responding to that". Discussion followed. Discussion continued regarding the discovery window.

David Keltner commented we are going to have to have something in this rule to give the trial judge an opportunity to re-open the discovery window specifically in the summary judgment rule because of the switch of burdens.

Judge McCown proposed adding a sentence to subdivision (e) along the lines of "leave to take additional discovery outside the discovery period may be granted or shall be granted when a respondent shows that it may be responsive to the claim of no evidence". Discussion continued.

Chairman Soules indicated under Texas rule there is an expressed provision that the judge may permit further discovery before ruling on the motion and thinks we want to preserve that.

Judge Peeples commented he thinks the court ought to have the discretion not to have to wait for the discovery period. Discussion continued regarding the summary judgment rule.

Buddy Low asked if there was a reason that the subcommittee omitted the provisions regarding when affidavits were unavailable.

Steve Susman indicated that it was deleted, but it was probably a mistake and that they can put it back in. Steve Susman asked for a straw poll to find out what the sense of the committee is on whether they prefer (1) Celotex; (2) the compromise; or (3) the current rule. Discussion continued on the pros and cons of the three options.

Richard Orsinger proposed rather than having three alternatives, the Committee should vote on offering this compromise with the discovery safety valve clause written in this rule, not in the general discovery rule, because he would feel much more comfortable voting for the compromise knowing that there was a sentence that the court has the discretion to permit discovery on certain issues that were raised in the summary judgment proceeding.

Chairman Soules called for a vote on how many feel that there should be available to the parties a motion for a limited reopening discovery in the face of a summary judgment. A vote was taken and everyone was in favor of that. Chairman Soules called for a vote on a compromise that shifts the burden to a Celotex concept after the discovery period closes, but prior to the closure of the discovery period which preserves the current Texas practice. Chairman Soules again reiterates the proposed change to the rule is to basically preserve the current Texas practice up to the close of discovery and after the close of discovery to change to the Celotex rule on the burdens of the respective parties and summary judgment practice. A vote was taken on the proposal and by a vote of 14 to 10, the proposal was approved.

Chip Babcock requested a vote on the three possibilities: (1) current practice; (2) compromise; and (3) Celotex.

Anne Gardner commented there is another middle ground between the compromise and Celotex and that's the Court Rules Committee proposed rule which just shifts the burden of proof without regard to the discovery period, but it does have the opportunity for additional discovery whenever the motion is filed. It shifts any time, but it presupposes you will have adequate time for discovery or else you would get a continuance with an additional opportunity for discovery. This is not the same as Celotex because Celotex goes further than Texas law in some other respects.

Chairman Soules advised we have a unanimous directive that there be available a motion for limited additional discovery in the face of a summary judgment motion. Does the State Bar Rules

Committee basically adopt the Celotex burdens at all stages for summary judgment practice? Anne Gardner advised that yes it does and the feeling of the Court Rules Committee was that the whole reason for shifting the burden of proof or adopting the Celotex approach is to make a summary judgment motion a more efficient vehicle for eliminating unmeritorious claims and defenses. The cost of litigation is not going to be cut down if you have to go through an entire discovery period before you can invoke the Celotex type motion. Discussion continued regarding the three options.

Chairman Soules again indicated what the three options are. One will be to (1) preserve the Texas practice at all stages; (2) compromise that we voted on 14 in favor of; and (3) would be to change to the Celotex burdens at all stages. A vote was taken on (1) to preserve the current Texas practice at all stages, 10 in favor; (2) moving to the Celotex burdens at all stages, 9 in favor; and (3) the compromise package, 7 in favor.

Judge Peeples proposed sending the court the compromise and some language where they can go with Celotex or the Court Rules Committee's rule and let them decide.

Justice Duncan suggested we assume that the court is going to move away from current summary judgment practice. Do you prefer Celotex or the compromise? A vote was taken and there were 8 in favor of Celotex at all stages and 18 in favor of the compromise. Chairman Soules stated that the consensus is we have the discovery part and then we have the compromise and that that be sent to the Court as our recommendation.

Steve Susman asked for a straw vote as to whether people think the correct approach in drafting is to rewrite the whole thing as we have done or to leave everything as is except introduce the compromise. Discussion followed.

Judge Scott McCown proposed at the next meeting (1) taking the present rule and making the one change by adding the compromise and (2) take the rewrite with the compromise and provide the redline that way next time we can go with the present rule with the compromise in it or the rewrite if you are convinced after looking at a redline that the rewrite was enough of an improvement to justify doing it.

Professor Albright proposed doing a disposition table so that they can focus on what is being left out and what isn't.

Justice Duncan pointed out a problem in subsection (b). As now written, it entirely changes the burden.

Judge McCown advised that that came out at the subcommittee level. He doesn't know why it's in the draft, but it will come out.

Sarah Duncan also advised in subsection (e) one of the most common grounds for motion for summary judgment and statute of limitations and we need to either include in (e)(1) affirmative defenses to affirmative defenses or otherwise deal with it. Also in subsection (e) the way it's written now, if you just plead the statute of limitations, you have forced the responding party to raise a fact issue when the current rule is that not only do you have to plead the statute of limitations, but you have to prove it. That will then shift the burden to responding party to raise the fact issue either as to my statute of limitations defense or as to an affirmative defense to my affirmative defense and this version doesn't deal with that. Discussion followed.

Professor Dorsaneo indicated that he feels that (e)(1) accurately states the law. He probably wouldn't use the words "to avoid judgment", but in substance it does state the law accurately.

Scott McCown indicated the change will be made by putting a comma after the word "defense" and taking out "to avoid judgment", then period".

Richard Orsinger brought up a discussion regarding a problem with the word "credible" in paragraph (f). He also points out in paragraph (a), second line, the current language of 166a talks about summary judgments on claims, counterclaims, or cross-claims and our paragraph we now talk about any part of the case. Mr. Orsinger explained why he has a problem with that. Discussion followed.

Justice Cornelius advised he agrees with Richard that "credible" should be taken out because it goes against current case law on the point. He would add a comment that neither the trial court nor the appellate court is allowed to conduct a waiving of the evidence or to judge the credibility of testimony on summary judgment.

Judge Brister proposed dropping (f) entirely and explained why. Discussion followed.

Judge Peeples suggested taking a show of hands to see if we wanted to take on a total rewrite of 166(a) or deal with the problems and send them to the Supreme Court and move on to something else.

Chairman Soules indicated he is going to take a vote on how many feel we should attempt to rewrite the rule and incorporate the consensus of the committee or how many feel we should just essentially leave the rule as is and then draft the consensus of

the committee to the old rule first. There were 10 favor of a total rewrite. There were 15 who felt we should engraft changes on the current rule. By a vote of 15 to 10, the committee is being asked to engraft the changes on the current rule and otherwise leave it alone.

Professor Dorsaneo presented the report on Rules 296 through 331. Professor Dorsaneo advises that on paragraph (b), Premature Filing, the first line should be changed to read "a request for findings of fact and conclusions of law is effective." And in the next sentence add the word "premature" after "A". Professor Dorsaneo explained the two alternatives for Rule 296, Request for Findings of Fact and Conclusions of Law. His recommendation is the second alternative. Professor Dorsaneo indicated that paragraph (c) "tried to a jury in which ultimate issues by law must be tried to the court" deals with Richard Orsinger's problem. Professor Dorsaneo indicated it's addressed in the first alternative also. Professor Dorsaneo indicated that the underlined language in paragraph (a) of alternative one should also be in alternative two as a subparagraph (d) of subparagraph (a). Therefore, Professor Dorsaneo changed his recommendation. He recommended both alternatives.

Justice Duncan proposed that in (b) and (c) and alternative two that "the ultimate issues" should be changed to "one or more ultimate issues". That was acceptable to Professor Dorsaneo.

Chairman Soules restated Professor Dorsaneo's recommendation that we adopt alternative two, modified to move the sentence from alternative one, the second sentence that starts "trial of an issue" and ends "provided in Rule 279" to follow "conclusions of law" in the fifth line of (a) and before "such requests shall be entitled." In the second line of (a) to change the word "the" to "one or more" before "ultimate issues" and then in (b) to change the word "are" to "is". In the second line of (b) after "a" insert "premature" before "request for findings". At the beginning of the third line of (b) strike "shall be" and change that to "is". There being no opposition to those changes, the rule was approved unanimously.

Professor Dorsaneo explained the changes to Rule 297, Filing Findings of Fact and Conclusions of Law. There being no opposition, Rule 297 as written was approved unanimously.

Professor Dorsaneo explained the changes to Rule 298, Additional or Amended Findings of Fact and Conclusions of Law. There being no objection, Rule 298 was approved unanimously.

Professor Dorsaneo explained the changes to Rule 299, Omitted Grounds and Presumed Findings.

Justice Guittard inquired as to what "embraced therein" means and proposed that it be stricken. There was no opposition to doing that. There being no opposition to Rule 299 as modified, the rule was unanimously approved.

Rusty McMains inquired about the addition of "necessarily referable" and explained what his problem was regarding same. Discussion followed.

Professor Dorsaneo proposed drafting a sentence to add a subparagraph (c) to Rule 297 modeled on the first sentence of Rule 277. There being no one opposed, that was approved.

A vote was taken on Rule 297 as amended and there being no opposition, was passed.

Professor Dorsaneo explained the changes to Rule 299a, Findings of Fact to be Separately Filed and Not Recited in a Judgment. Discussion followed. There being no opposition to 299a, the rule was unanimously approved.

Professor Dorsaneo explained the changes to Rule 304, Timetables, paragraph (d) Effective Dates and Beginning of Periods, subparagraph (8), Premature Filings. Professor Dorsaneo indicated this is still a live issue that's not finished being debated. (Professor Dorsaneo had to leave the meeting so Don Hunt continued presenting the report.)

Justice Duncan brought up a problem with Rule 300, Judgments, Decrees and Orders, subparagraph (b) Final Judgment Rule. It was her recollection that we agreed that the appellate timetable would begin to run on the date that the last order disposing of the last claim or party is signed because the way it's written here, there isn't a beginning date of the appellate timetable. Chairman Soules proposed the following language "the final judgment for purposes of appeal and the trial and appellate timetables is the order or the last of a series of orders." Justice Duncan proposed "the order or the last order disposing of a party."

Judge Brister proposed "last of the series of orders."

Justice Duncan commented that the troubles are (1) the definition of a final judgment and (2) when the timetable commences to run. We are trying to put both of these concepts into one sentence and that's what's causing the confusion. Justice Duncan proposed leaving out "an appellate timetables" in the second sentence, make the first sentence say "a final judgment for purposes of appeal and the trial is the order or series of orders disposing of all parties and issues in the case", and have a second sentence that says "for purposes of the appellate timetable the order or the last order in the series of orders disposing of the parties and the claims." Justice Duncan proposed leaving out "for

purposes of appeal and the trial on appellate timetables" and saying "a final judgment is the order or series of orders disposing of all the parties and issues in the case."

Judge Brister proposed "trial on appellate timetable shall run from the last of any such orders."

Justice Guittard commented he is not sure that it is wise to take "for purposes of appeal" out because a judgment can be final in one sense and still not be final for the purpose of an appeal.

Chairman Soules read the proposed language as follows: "a final judgment for purposes of appeal is the order or series of orders disposing of all the parties and issues in the case expressly or impliedly."

Richard Orsinger commented that he doesn't want the word "written" in here because you can have an order that's final in the sense that it is not interlocutory, it's non-interlocutory and yet it doesn't trigger the appellate timetable. Discussion continued.

Chairman Soules read the proposed language as follows: "is the written order or series of written orders disposing of all the parties and issues in the case expressly or impliedly." Sentence number 2 would read: "The appellate timetable commences upon the signing of the written order or the last of a series of written orders disposing of all the parties and issues in the case expressly or impliedly." Discussion continued regarding requiring a trial judge to sign a document called "final order".

Richard Orsinger suggested not using "final judgment" and instead saying "a judgment is appealable" or "an appealable judgment is that written order or series of orders that disposes of the parties and issues in the case expressly and impliedly." Discussion continued.

Don Hunt questioned whether or not the committee wants to have a rule that defines what a final judgment is or what an appealable judgment is. Discussion followed.

Justice Duncan proposed the following language: "Final judgment for purposes of appeal is the written order or series of written orders disposing of all the parties and issues in the case, whether expressly or impliedly. When the final judgment consists of a series of orders, the appellate timetable commences upon the signing of the order disposing of the last remaining party or issue, whether by order of severance or non-suit or otherwise."

Justice Duncan suggested that since the purpose of this is to try to codify the law in a way that people are given notice in the rule of the commencement of the timetable that subsection (b) be

titled something like "final judgments in the appellate timetable." Discussion followed.

Donald Hunt asked the committee to keep in mind the purpose for which we are trying to define "summary judgment." Are we trying to define it for execution, for appeal, for clerks giving notice, or for all of these?

Justice Guittard indicated that he has a proposal which does not deal with the question of whether some sort of order should be signed that gives a definite signal that says it is final. His proposal is as follows: "A judgment is final for the purpose of determining the times for post-judgment and appellate proceedings when it disposes of all parties and issues in the case expressly or impliedly. When the final judgment consists of a series of orders, the time for all post-judgment and appellate proceedings begins on the signing of the order disposing of the last remaining party or claim." Discussion followed.

Justice Duncan proposed adding to the very end "whether by order granting summary judgment, severance, or nonsuit or otherwise."

Doris Lange proposed "written order."

Justice Guittard proposed "last signed order." Discussion continued.

Rusty McMains proposed having a preface at the beginning that says "as used in these rules and the rules of appellate procedure, a final judgment ..."

Justice Duncan proposed "when used in these rules a "final judgment" is the order, written order or series of orders, disposing of all the parties and issues in the case expressly or impliedly."

Richard Orsinger proposed in paragraph (b) eliminating the concept of rendition and just saying when a judgment on the merits is signed after a conventional trial on the merits, so and so is presumed. Discussion continued.

Judge Peeples inquired what the problem with existing law is that we are trying to fix. Discussion followed.

Richard Orsinger commented that we should say something like an order that is not within its own four corners dispositive of all parties and issues is not a judgment. Discussion continued.

Donald Hunt inquired whether Richard was saying that the language should read "no judgment is final or appealable until ..."

and then describe what must occur before you're dealing with finality or appealability. Discussion continued.

Anne Gardner expressed a concern about using the words "expressly or impliedly." Discussion continued.

John Marks made a motion to leave the rule like it is with no definition. To take (b) out entirely.

Rusty McMains pointed out that the problem is that our current rules say that there shall be one final judgment, which is not the law in the sense of what final judgment means for any other purposes in these rules when we're calculating the timetable. Discussion followed.

Donald Hunt requested, John Marks moved, and David Keltner seconded the motion to eliminate the proposed draft of Rule 300(b) to eliminate the definition of "final judgment." Discussion continued.

John Marks amended his motion and now wants to eliminate Rule 300 as proposed and keep it like it is in the rules right now. Discussion continued.

Donald Hunt explained what they have tried to do. In subparagraph (a) we define rendition, signing and entry. In (b) the subcommittee was trying to define "final judgment." In (c) and (d) they were trying to keep the present law and reproduce it in a slightly simpler language. A discussion was had regarding the fact that the words "final judgment," "judgment," and "rendition" are in other places throughout the rules. The discussion continued regarding Rule 300 in general.

Justice Duncan requested a vote on whether to leave Rule 301 as it is now written. If a majority says we're going to keep it then send it back to the subcommittee to rewrite the entire series of rules to incorporate Rule 301 and the misleading concept of one final judgment.

Donald Hunt inquired whether John Marks and David have withdrawn their pending motion. They indicated that they were.

Justice Duncan restated her motion that Rule 301 as now written be deleted and that a new rule that correctly states the law as it relates to the finality of judgment for purposes of post trial and appellate timetables be written. Justice Guittard seconded the motion. By a vote of 18 to 1 the motion was approved. Discussion continued on how to rewrite the rule.

Justice Duncan proposed language for subdivision (b) as follows: "Final Judgments and the Appellate Timetable. A final judgment for purposes of appeal is the written order or series of

written orders disposing of all of the parties and issues in the case, expressly or impliedly. When the final judgment consists of a series of orders, the appellate timetable commences upon the signing of the order disposing of the last remaining party or claim, whether by order granting summary judgment, severance or nonsuit or otherwise. When a judgment on the merits is signed after a conventional trial on the merits, and no order for a separate trial has been made, the judgment is presumed to be a final and appealable judgment. The final judgment that is signed in a case tried to the court or jury shall conform to the pleadings, the nature of the case proved, and the judge's findings of fact or conclusions of law or the jury's verdict, unless a judgment is rendered as a matter of law."

Justice Duncan rephrased her motion to approve this in concept subject to specific redrafting by the subcommittee. Judge Brister seconded the motion. Discussion continued.

Justice Duncan commented that at this point we can go in one of two directions. We can codify existing law which is what the current subsection (b) is trying to do or we can revitalize the one final judgment rule. Discussion continued.

Paul Gold proposed "all relief not previously granted or granted herein is denied."

Justice Guittard proposed "an earlier interlocutory order disposing of a party or claim is included by implication in the last signed order, except to the extent that it is in conflict with the last signed order. If the case has been tried on the merits in a conventional trial all relief not expressly granted is denied."

Richard Orsinger proposed that they go with the one final judgment concept with Judge Guittard's suggestion that an interlocutory disposition of a party or claim would be impliedly carried forth unless it is expressly overruled in the judgment. Paul Gold seconded the motion. Discussion continued regarding the rewrite of 300(b).

Richard Orsinger indicated that he would like to include in his proposal the language "unless specifically reconsidered and made a part of or disposed of ..."

Anne Gardner proposed using language like that in the case law. Richard Orsinger restated his motion as follows. We will try to reinvigorate the one judgment rule with the proviso that any interlocutory adjudications of the rights or parties or claims are impliedly merged into the final judgment unless the final judgment explicitly and specifically overrules them, not by a catch-all clause, but by some clear intent to specifically overturn the prior order. A vote was taken and the proposal was unanimously approved.

Chairman Soules requested Mr. Hunt to identify for the record the people who had specific input so they could get together and work on the language. Mr. Hunt identified those people as Rusty McMains, Judge Guittard, Justice Duncan, Paul Gold, John Marks, David Keltner, Bonnie Wolbrueck, and David Perry.

Rule 300(a), Rendition, Signing and Filing, was brought up for discussion. Richard Orsinger proposed the deletion of the language "for entry in the minutes of the court" in the second sentence. Discussion followed.

Rusty McMains brought up a concern regarding the language "judgment" as used in these rules in the last sentence. Discussion followed.

Doris Lange made a motion to remove "for entry in the minutes of the court." from the third sentence. Discussion followed.

A discussion was had regarding what was included with the "record" entered into the minutes of the court. Richard Orsinger advised that his subcommittee is rewriting that rule.

Richard Orsinger proposed deleting the word "entry" from the title of (a). Discussion followed.

Justice Duncan proposed "Rendition, Signing and Filing." Discussion continued.

Justice Guittard proposed deleting in subdivision (a) "Minutes" and inserting "Permanent Record." A discussion was had regarding whether or not judgments are to be filed.

Don Hunt indicated the proposal is that in Rule 300(a) change the title to "Rendition and Signing" and change the third sentence so it would read, "A signed judgment shall be promptly filed with the clerk of the court."

Chairman Soules indicated the title should read "Rendition, Signing and Filing." There being no opposition, that was unanimously approved.

Rusty McMains commented he still had a problem with "judgment" where it says "as used in these rules." He proposed saying "judgment as used in this rule." There being no opposition, that motion was approved.

Donald Hunt explained the changes to Rule 300(c), Form and Substance: General.

Justice Guittard proposed changing (2) to read "specify the relief granted to each party."

Richard Orsinger proposed "granted or denied." Discussion followed.

Richard Orsinger proposed deleting the language "to each party." Therefore, the sentence would say: "specify the relief granted or denied." Discussion continued.

Chairman Soules proposed changing the word "specify" to "state." He also indicated he doesn't think we ought to have "to each party" there. Discussion continued. A vote was taken and there being no opposition, Rule 300(c) was unanimously approved.

Judge Brister inquired as to whether or not the date signed needed to be in there. Discussion was had regarding same.

Richard Orsinger proposed that Rule 300(a) shall be reduced in writing, dated, and signed by the judge. Discussion continued.

Donald Hunt explained the changes to (d), Form and Substance: Specific. There being no opposition Rule (d)(1) was unanimously approved.

Judge Scott Brister proposed dropping "Plaintiffs" from paragraphs (i) and (ii) and paragraph (d)(2). There being no opposition, the proposition was approved. There being no opposition to Rule 301(d)(2), it was unanimously approved.

A discussion was had regarding Rule 301(d)(3). Judge Guittard pointed out that in the last sentence the word "executor" has been stricken by accident. It should be reinstated.

The changes to Rule 302, Motions for New Trial, were brought up for discussion. A discussion was had regarding (a), Grounds. Pam Baron indicated in subsection 11 there is a grammatical error. The word "warrant" should be changed to "warrants." A vote was taken on Rule 302(a). There being no opposition, it was unanimously approved.

The changes to Rule 302(b), Form, were brought up for discussion. There being no opposition, the rule was unanimously approved.

The changes to Rule 302(c), Affidavits, were brought up for discussion. There being no opposition, the rule was unanimously approved.

The changes to Rule 302(d), Procedure for Jury Misconduct, were brought up for discussion. There being no opposition, it was unanimously approved.

The changes to Rule 302(e), Excessive Damages; Remittitur, were brought up for discussion. David Perry indicated he thinks we

should have provisions for additur. Justice Duncan agreed. Chairman Soules indicated if somebody wanted to propose that kind of a change, they need to write it up and send it in to him. There being no opposition to 302(e), it was unanimously approved.

The changes to Rule 302(f), Partial New Trial, were brought up for discussion. There being no opposition, it was unanimously approved.

Bonnie Wolbrueck requested to revisit 301(e), Motion for Judgment Nunc Pro Tunc, and inquired does that statement state that all clerical errors shall be corrected by nunc pro tunc and explains the problems that she's having. Discussion followed. Chairman Soules indicated if somebody wants to write up something and propose a change to do so.

The changes to Rule 303, Preservation of Complaints, were brought up for discussion. Paragraph (a), General Preservation Rule, was unanimously approved. Paragraph (b), When a Motion for New Trial is Required, was approved unanimously. Rule 303(c), Non-Jury Cases: Legal and Factual Sufficiency of Evidence, was unanimously approved. Rule 303(d), Informal Bills of Exception and Offers of Proof, was unanimously approved.

The changes to Rule 303(e), Formal Bills of Exception, were brought up for discussion. Donald Hunt explains why the footnote is still there.

Judge Brister requested they go back to paragraph (d) and requests that on page 10 in the last two lines, the language: "or at the request of a party shall" to be deleted. Discussion followed.

Chairman Soules indicated that this is verbatim to TRAP 52(b) which has already been sent to the Supreme Court for approval. Discussion continued.

Judge Brister proposed changing the language to read "request of the objecting party" and sending a letter to the Supreme Court regarding TRAP 52. Discussion continued. Chairman Soules called for a vote and by a vote of 11 to 7 the language stays as is in Rule 303(d).

Discussion continued regarding Rule 303(e).

Justice Duncan proposed deleting the sentence in subsection (11) that says "or within 90 days after sentence is pronounced or suspended in open court in a criminal case." There being no opposition, the language was deleted.

Chairman Soules indicated that in the first sentence the language "or within 60 days after the sentence is pronounced or

suspended in open court in a criminal case" needs to also be deleted. Justice Duncan proposed also deleting "in a civil case." There being no opposition, Rule 303(e) with those changes was unanimously adopted.

The changes to Rule 304, Time Tables, were brought up for discussion. David Peeples indicated there are two problems with subparagraph (a), Motion for Judgment Disregarding a Jury Finding or an Issue as a Matter of Law. (1) It suggests that you can file a motion to disregard a jury finding after the other side has rested which is not what we mean, a motion to disregard a finding before there's even been a jury finding. There's too many things packed into one sentence here. (2) On line 5, "shall not be considered waived" that predicate does not have a subject. Discussion followed.

Chairman Soules indicated what we need to do is make the first sentence into two sentences, one that contemplates something happening before the verdict and the second one for things that happened after there is a verdict.

Justice Duncan proposed changing on the last line the language which reads "when a judgment is signed that does not grant that relief" to say "when a judgment denying the requested relief as signed." Discussion continued regarding Judge Peeples indicating there needs to be a word between "and" and "shall".

Justice Guittard proposed "and the motion". The discussion continued.

Justice Duncan proposed deleting "or to disregard a jury finding on an issue as a matter of law", delete "and shall not be waived if not presented earlier" and adding "a motion for judgment as a matter of law at the close of the adverse party's evidence is not a prerequisite to filing a motion for judgment as a matter of law at the close of all the evidence or after verdict." And then pick up with motion to disregard after verdict language.

David Perry made a motion to send this back to the subcommittee. Discussion continued.

Richard Orsinger proposed changing the title of subparagraph (b) to post-judgment motions. Discussion continued.

Richard Orsinger again proposed changing the title to paragraph 2. There being no opposition that is done. Richard Orsinger commented subparagraph 3 needs a title to be consistent. Discussion continued. Richard Orsinger explained the problems that he has with subparagraph (3). Discussion continued. A discussion was had regarding the note that is found on page 13 regarding Rule 304 subparagraph (b)(3). A discussion was also had regarding paragraph (3).

Chairman Soules indicated that we are trying to get something like writ of error in, which is a modification of what the vote was. We are not going to have 306(a) in here, so we've got writ of error in and 306(a) out. Discussion continued. Chairman Soules indicates we need to try to accomplish what we voted on last time and that was unlimited motions within 30 days of the signing of the judgment, all overruled by operation of law at the same time. Discussion continued.

A discussion was had regarding whether a prematurely filed motion extends plenary power. Donald Hunt indicated that the consensus of this committee is still to eliminate the writ of error appeal.

Richard Orsinger indicated that we had a vote last time that we were going to provide an alternative to the Supreme Court. Discussion continued regarding the three concepts they are trying to accomplish in Rule 304.

Justice Duncan indicated it is merely a matter of resequencing the rule so that it reads more logically and things are in better sequential order. Discussion continued regarding Rule 304(b)(3) regarding the court's plenary power, default judgments, extension of the period.

Chairman Soules asked whether we should table this until we see what the court is going to do regarding repealing writ of error.

Richard Orsinger indicated at the last meeting we voted that we were going to do what we're doing. Discussion continued.

Justice Hecht advised that it was his recollection that the distinct majority of the court is against repealing the writ of error. A discussion was had regarding putting the writ of error procedure back into place and how to go about doing that.

Chairman Soules asked for a consensus on whether we should in addition to having a writ of error practice, should we also have something in the rules to take care of a non-participating party other than in Rule 306(a). By a vote of 9 to 1, the consensus is that we should not. Therefore, we don't have to worry about the 6 month issue in the rules of civil procedure which means all of (3) is deleted.

Rusty McMains brought up a question on Rule 304(b)(4) and asked are we talking here only about a default judgment rendered on citation by publication.

Donald Hunt indicated the language was borrowed from Rule 329. Donald Hunt questioned whether we need (4) here or whether it is

better taken care of in some other place like (d) under effective dates and beginning of periods.

Richard Orsinger indicated we have it in both places.

Don Hunt asked if we need it in both places. Discussion followed. Donald Hunt proposed getting rid of (4).

Chairman Soules proposed striking in Rule 304(b)(4) the words "unless a motion has been previously filed."

Justice Guittard proposed saying "unless a motion has been previously filed pursuant to paragraph (c)(1) or (c)(2) of this rule by the defendant in person or attorney of his choice." There being no opposition, that is approved with the change that (c)(1) should be deleted and it only referred to (b)(1).

Richard Orsinger proposed changing the language "motion for judgment nunc pro tunc" to "motion to correct the judgment record". Justice Guittard seconded the motion. A vote was taken and by a vote of 7 to 0 the substitution will be made.

Richard Orsinger advised where the changes need to be made.

Chairman Soules indicated that Rule 304 is done and that we will look at the language at the next meeting and discuss whether or not the changes meet the debate.

The changes to Rule 305, Plenary Power of the Trial Court, were brought up for discussion.

Richard Orsinger suggested that in subdivision (c)(1) the language "the time allowed by law" be changed to "within four years". Discussion followed. Richard Orsinger withdrew his suggestion. Richard Orsinger proposed in paragraph (c)(2) changing "judgment nunc pro tunc" to "render corrected judgment".

Donald Hunt indicated that will be done.

Chairman Soules disagreed and proposed striking "and render judgment nunc pro tunc". Discussion continued.

Donald Hunt inquired whether the committee wishes to put in the development of plenary power concepts, anything about the two-year appeal after publication or does the language about when we start counting time control it? Discussion followed.

Justice Duncan proposed not putting anything here.

Donald Hunt concurred. With those changes, Rule 305 was unanimously approved.

Chairman Soules indicated that Rule 306 has been moved. Rule 306a has been moved. Rule 306b was previously repealed. Rule 306c has been moved. Rule 306d has been previously repealed. Rule 307 has been proposed for repeal. There being no opposition, that rule will be repealed. Rule 308 has been moved. Rule 308a has been proposed for repeal. There being no opposition, the rule was unanimously repealed. Rule 309 has been moved. Rule 310 has been moved, which brings us to Rule 311, on appeal from probate court has been proposed for repeal. Discussion followed. Don Hunt advised they would get a better handle on this rule and report back.

Rule 312, on appeal from justice court, is referred to Judge Till subcommittee. Rule 313 has been moved. Rule 314 is proposed for repeal. Discussion followed. There being no opposition, Rule 314 is repealed unanimously.

Chairman Soules indicated that Rules 315 and 316 have been moved. Rules 317, 318, and 319 were previously repealed. Rules 320, 321, and 322 have been moved. Rule 323 was previously repealed. Rule 324 has been moved. Rule 325 was previously repealed and Rule 326 is proposed for repeal. Discussion was had regarding repealing Rule 326. A vote was taken on Rule 326 and by a vote of 8 to 3, it is repealed. Chairman Soules indicated that Rule 327 has been moved. Rule 328 has been previously repealed.

Rule 329, Motion for New Trial on Judgment Following Citation By Publication, was proposed for repeal in part and proposed to be moved in part. Discussion followed.

Richard Orsinger proposed in (b) changing the first clause to read "execution of such judgment is suspended if the party applying therefore."

Chairman Soules suggested "shall be suspended". Discussion continued.

Richard Orsinger indicated maybe we ought not to say "filed".

Chairman Soules proposed the following language "execution of such judgment shall be suspended when the party applying therefore tenders a good and sufficient bond to the clerk payable to Plaintiff in the judgment, in an amount fixed in accordance with the appellate rules." Discussion continued.

Justice Duncan commented she feels that it should state "execution shall not be suspended unless."

Chairman Soules called for a vote on how many feel that the filing of a motion for new trial should suspend execution following citation by publication. By a vote of 5 to 4, it will stay the way it is. Discussion continued on how to change the rule. Chairman

Soules proposed the following language "execution of such judgment shall be suspended only when the party applying therefore files a good and sufficient bond . . ." Discussion continued.

Justice Duncan suggested that we go back to where we authorized this type of motion for new trial and have what we frequently have in the rules or at least in Rule 47. Discussion continued.

Richard Orsinger suggested the proposition should be stated in the affirmative.

Chairman Soules proposed "execution of such judgment shall be suspended only when the party applying therefore . . ." Discussion continued.

Richard Orsinger made a motion to eliminate the supersedeas procedure.

Don Hunt seconded the motion. There being no opposition, Rule 329(b) is repealed.

The changes to Rule 329(c) were brought up for discussion.

Justice Duncan made a motion to repeal paragraph (c). Discussion followed. There being no opposition, paragraph (c) is unanimously repealed.

Richard Orsinger asked whether we should say in our motion for new trial rule that the mere filing of a motion for new trial does not suspend execution. Discussion followed.

Chairman Soules indicated that there is no change to Rule 329a and Rule 329(b) has all been moved to someplace else.

The changes to Rule 330, Rules of Practice and Procedure in Certain District Courts, were brought up for discussion.

Judge Peeples inquired as to why we are moving some of these provisions to the government code and how you move a rule to a statute.

Donald Hunt responded that you don't, that we are just recommending that it be put in the government code. Discussion continued.

Chairman Soules indicated that we have to leave them as is until we get them in the government code. Discussion continued regarding the proposed recommendation.

Donald Hunt made a motion to keep Rule 330 where it is without change.

Rusty McMains seconded the motion. A vote was taken and it was voted unanimously to leave Rule 330 as is in its current rule.

The meeting is adjourned until 8:00 o'clock on Saturday morning.

Saturday, January 20, 1996

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

Members present: Luther H. Soules, III, Pamela Stanton Baron, Honorable Scott A. Brister, Professor William V. Dorsaneo III, Sarah B. Duncan, Hon. Clarence A. Guittard, Michael A. Hatchell, Donald M. Hunt, Tommy Jacks, Joseph Latting, John J. Marks, Jr., Russell H. McMains, Anne McNamara, Robert E. Meadows, Richard R. Orsinger, Hon. David Peeples, Paula Sweeney and Stephen Yelenosky.

Ex-officio Members present: Hon. William Cornelius, David B. Jackson, Michael Prince, and Bonnie Wolbrueck.

Members absent: Alejandro Acosta, Jr., Professor Alex Albright, Charles L. Babcock, David J. Beck, Prof. Elaine A. Carlson, Ann T. Cochran, Michael T. Gallagher, Anne L. Gardner, Charles F. Herring, Jr., Franklin Jones, Jr., David E. Keltner, Thomas S. Leatherbury, Gilbert I. Low, Hon. F. Scott McCown, Harriett Miers, David L. Perry, Anthony J. Sadberry and Stephen D. Susman.

Ex-Officio Members absent: Hon. Sam Houston Clinton, Paul N. Gold, Carl Hamilton, Doris Lange, and W. Kenneth Law.

Others present: Lee Parsley (Supreme Court Staff Attorney).

Chairman Soules called the meeting to order.

Richard Orsinger presented the report on Rules 15-165a.

Rule 18a was brought up for discussion to respond to a letter from Judge Charles Bleil. Discussion followed.

Chairman Soules asked that we address Judge Bleil's issue which is should there be a safety valve or escape valve which he calls good cause for late filing if it is granted on reasons not known or with due diligence knowable until after the time for filing to recuse has passed. Justice Cornelius moved for the adoption of the subcommittee's recommendation on that point. Discussion continued.

Chairman Soules read Judge Bleil's proposal as follows: "The court shall allow the filing of a motion after the expiration of

ten days. If the motion is granted for reasons not known within the ten day period and upon a showing of good cause."

The committee proposed to say that after the ten days, a party can only raise matters subsequently arising.

Richard Orsinger proposed changing that to "subsequently arising or discovered."

Chairman Soules proposed "known or should have known". Chairman Soules reiterates that the subcommittee on Judge Bleil's point is recommending a known or should have known standard coupled with good cause to file within ten days a motion to recuse and that the trial judge can proceed to trial or to dispose of a hearing even in the face of a motion to recuse filed within ten days. A vote was taken and the motion failed by a vote of 9 to 6.

Richard Orsinger brought up for discussion Rule 20 and a recommendation from David Beck that we eliminate the requirement that a special judge sign the minutes of the proceedings before him. Discussion followed. Richard Orsinger made a motion to eliminate Rule 20. There being no opposition, it is unanimously approved to repeal Rule of Civil Procedure 20.

Larry Wise/Richard Orsinger brought up for discussion a suggested change that Rule 21 and 21a be altered to show to whom the service was made and the address, date, and manner of service, whereas the present requirement is just that service was made with no explanation upon whom or the manner. The subcommittee recommended adoption of the suggested change including a provision that the receiving party could rebut the recital of the manner of service if it says it was hand delivered on a certain day and in fact you got it the next day or received it by certified mail. Discussion followed.

Judge David Peeples proposed leaving the rule alone.

Chairman Soules called for a vote for those in favor of changing Rule 21 to require specific detail as suggested by Larry Wise. By a vote of 11 to 4, there will be no change.

Richard Orsinger brought up for discussion the proposed suggestions for changes to Rule 21a. The first suggestion was made by Wendell S. Loomis who indicated that Rule 21a permits service upon a party or his attorney of record. Service should be on the attorney and not the party once a party has a lawyer. The subcommittee felt the rule should be changed to make it clear that once a lawyer learns that the opposing party is represented by counsel, then service in the lawsuit be upon counsel and not party directly. Discussion followed.

Richard Orsinger indicated they would write the language so that it's clear that this has to do with a pending lawsuit and the services on an attorney of record once one appears rather than on a litigant. There being no opposition, that amendment is approved.

Richard Orsinger brought up for discussion the suggestion by Chairman Soules that we eliminate the provision that fax filing after 5:00 p.m. is effective the next day. The subcommittee recommended rejection of the suggestion. Chairman Soules called for a vote and the suggestion was opposed unanimously. Therefore, there will be no change.

Judge Guittard suggested that we make sure that this is parallel with the appellate rules. Discussion followed.

A discussion was had regarding the different methods of service whether by fax, hand delivery, etc.

Chairman Soules calls for a vote on those who are in favor of deleting the provision that fax service after 5:00 is deemed served the following day. By a vote of 9 to 5, the provision will be deleted.

Richard Orsinger brought up for discussion the suggestion by Jose Lopez II that we eliminate service by telefax altogether and advised that the subcommittee rejected the suggestion. A vote was taken and the committee voted unanimously for no change.

Richard Orsinger brought up for discussion the suggestion by Ken Fuller to require lawyers to include on the pleading a telefax number for service and if no telefax number is given, then you cannot serve by telefax unless you have a Rule 11 Agreement. The subcommittee voted to reject the suggestion. Discussion followed.

Chairman Soules proposed saying that there is a fax number on the pleading, that the fax service can only be to that number. Discussion continued.

Chairman Soules called for a vote on eliminating fax service altogether. The vote was unanimous for no change, fax service will be retained.

A discussion was had regarding amending the rule to require fax service to be to the fax number designated on the pleadings. By a vote of 10 to 8, it will be the fax number as given on the pleadings. Discussion continued regarding this matter.

Richard Orsinger called for a reconsideration, a new vote was taken, and by a vote of 13 to 4, the proposed amendment failed.

Richard Orsinger advised that the letter found at pages 159 through 161 do not relate to Rule 21b as indicated. This letter is

regarding service upon counsel, and if no counsel, upon the party. Richard Orsinger indicated we have already taken care of this.

Richard Orsinger brought up the recommendation by H. Norman Kinzy wherein he recommends that we fold Rule 21a(b) into a consolidated rule on service.

Justice Duncan indicated that what Mr. Kinzy is talking about is that 21a is confusing because it talks about the party's last known address not the lawyer's last known address. He suggested using the same language that you use for fax service and that is to the "recipients last known address". There being no opposition, that will be done.

Chairman Soules indicated the other issue that Mr. Kinzy had was in Rule 21(a). He would like to see change the language "attorney of record" to "attorney in charge". There being no opposition, that will be done. A discussion followed regarding making this change and what the definition of attorney in charge is.

Richard Orsinger indicated that the present rule says service on the attorney in charge. Richard Orsinger indicated that it appears we have a conflict between Rule 8 that requires you to serve everything on the attorney in charge and Rule 21(a) which says served on the attorney of record. Discussion continued. A vote was taken on changing the language to "attorney in charge" and by a vote of 5 to 4, the proposed amendment passed. Discussion continued regarding making this change.

Chairman Soules indicated there was apparently a tie vote in the last vote so he calls for a new vote regarding changing 21a from "attorney of record" to "attorney in charge". By a vote of 16 to 1, that amendment passed.

Richard Orsinger brought up for discussion a letter from John Appleman, Jefferson County District Clerk, regarding Rule 21(3). The subcommittee determined that he really doesn't have a problem since the random case assignment has to do with the court it is assigned to not the cause number that it is given. Discussion followed.

Justice Hecht brought up an issue regarding writing a rule to prevent form shopping. Discussion followed regarding same. A vote was taken and the committee voted unanimously not to change Rule 23.

Richard Orsinger advised the committee that his subcommittee would draft something in response to Justice Hecht's comments. A discussion was had and suggestions were made as to how to write the rule.

Mr. Orsinger brought up for discussion the inquiry from Bill Willis regarding Rule 26 asking whether record keeping under Rule 26 includes JP Courts or just District and County Courts. It is the subcommittee's view that the JP's are required to do this also. Richard Orsinger advised that they are referring many of the JP issues to Judge Till's subcommittee. The subcommittee recommended no change to Rule 26 and a response to Bill Willis that the advisory opinion is that Rule 26 includes JP's. The committee voted unanimously for no change to Rule 26.

Richard Orsinger brought up for discussion the letter submitted by Professor Jack Ratliff wherein he criticized the joinder/party's language as being too confusing. It is the subcommittee's opinion that it is difficult to understand and the subcommittee is undertaking to rewrite the joinder rules. Discussion followed.

The subcommittee proposed postponing a decision regarding this matter until after the joinder rules have been revised.

Richard Orsinger advised that the request letter found at pages 170-172 were not regarding Rule 46, but regarding Rule 146 so the matter has been referred to Judge Till's subcommittee.

Justice Duncan requested that Judge Till's subcommittee also look at Rule 571 which seems to require a bond that's double the amount of the judgment and double the amount of the incurred costs which is in conflict with Dillingham v. Putnam.

Richard Orsinger also indicated that the request letter found at pages 178-180 do not refer to Rule 48, but refer to Rule 148. This letter has also been referred to Judge Till subcommittee.

Richard Orsinger brought up for discussion the letter from Broadus Spivey regarding Rule 47 wherein he has pointed out that the current ban against stating the unliquidated damages your seeking can affect the question of county court jurisdiction. The subcommittee recommends no change because they don't see this.

Richard Orsinger advised that his subcommittee is revising this rule so that it complies with the discovery tier rules.

Richard Orsinger brought up for discussion a letter from Pat McMurray regarding Rule 47 regarding the problem with a party forum shopping by filing a pleading seeking an indefinite amount of damages and then amending to assert a recovery in excess of the county court at law's jurisdictional limits. The subcommittee does not see this as a practical problem even though it is a theoritical problem and recommends no change. The committee voted unanimously for no change to this rule.

Richard Orsinger brought up for discussion the letter from Glenn Wilkerson regarding Rule 63. Mr. Wilkerson would like to change the deadline for amending pleadings from 7 days prior to trial to 30 days prior to trial. Mr. Orsinger indicated the State Bar Rules Committee has also made the same suggestion. It is his subcommittee's view that we should count backwards from the close of the discovery window and that his subcommittee is making a recommendation that the deadline for amending pleadings be 45 days before the discovery date cutoff. A discussion was had regarding what they had decided earlier during the discovery rules discussions on what the change to this rule should be and how many days it should be.

Chairman Soules believes the consensus was that 45 days would be sensible because that would give somebody 15 days to get additional discovery out and the response back before the discovery window closes.

Joe Latting indicated his recollection is that it was 60 days.

Judge Brister proposed tabling this and going back and looking to see what the record shows what the vote was.

Justice Duncan asked when our expert is going to be designated and how is that going to tie into this. Justice Hecht commented he thought the proposal was 75/45.

Richard Orsinger proposed that there be no vote on this right now, that they will bring back a rule and the debate on the exact language could take place then.

Tommy Jacks asked whether it would have a provision that scheduling orders can provide different deadlines in the case being governed by a scheduling order.

Judge Brister indicated we probably need to make some reference to the discovery plan. Discussion followed.

Richard Orsinger proposed using the language "subject to Rule 166." Discussion continued.

Chairman Soules indicated that Rule 63 will be postponed.

Justice Hecht advised the committee that the Supreme Court intends to start considering the discovery rules on February 20, that they are going to have a meeting between 3 and 5 to hear Steve Susman and a representative of the State Bar Court Rules Committee to present their opposing views and to answer questions from the Court.

Paul Sweeney presented the report on TRCP 216-295.

Paul Sweeney brought up for discussion Rule 223.

Alex Albright submitted Donna Bobbit's article which suggests that the jury shuffle be eliminated since it seems to be in conflict with the U.S. Supreme Court's holding in Batson. The subcommittee was divided on what to do with the jury shuffle. Ms. Sweeney provided the views of both sides of the subcommittee. Discussion followed.

A vote was taken and by a vote of 17 to 2 the jury shuffle procedure will stay.

The letter submitted by Luke Soules regarding a conflict between Rule 230, Certain Questions Not to Be Asked, and Article XVI, §2 of the Constitution was brought up for discussion.

Judge David Peeples proposed adding an instruction to 226a that would say "If any person on this panel has been convicted of a felony when we take a recess approach the baliff and ask to talk to me." Paula Sweeney agreed with this suggestion. Discussion continued.

Judge Scott Brister proposed dropping Rule 230. Discussion continued.

A vote was taken on repealing Rule 230 and by a vote of 17 to zero Rule 230 is repealed.

A vote was then taken on whether we should do nothing other than repealing Rule 230 versus putting an instruction in Rule 226a. By a vote of 13 to 5 the subcommittee will draft an instruction in Rule 226a.

Rule 241, Assessing Damages on Liquidated Damages, regarding Judge Coker's suggestion that the rule be repealed was brought up for discussion. The subcommittee recommended no change to Rule 241. A vote was taken and the committee voted unanimously for no change.

Rule 243, Unliquidated Demands, regarding Bruce Miller's suggestion that the phrase "writ of inquiry" be removed because the term has become obsolete was brought up for discussion. Chairman Soules proposed deleting everything after "and shall render judgment". Professor Dorsaneo proposed deleting just "a writ of inquiry awarded." The Subcommitee agreed with Professor Dorsaneo's suggestion and made a motion for the change. Justice Guittard seconded the motion. Discussion continued. Richard Orsinger commented that Rule 243 should be part of Rule 241. Professor Dorsaneo advised the task force on the rules of civil procedure is revising these rules. Richard Orsinger suggested Paula Sweeney's subcommittee look at the task force rule and report back. Discussion continued.

A vote was taken on deleting "a writ of inquiry awarded" and there being no opposition that was approved.

Rule 257, Granted on Motion, regarding J. Hadley Edgar's comment that there is no provision in the TRCP mandating the time for filing a motion to transfer venue based on the inability to obtain an impartial trial, was brought up for discussion. Richard Orsinger advised his subcommittee was rewriting the venue rules and maybe this should be part of that. The committee voted unanimously for no change to Rule 257.

Rule 292, Verdict By Portion of Original Jury, was brought up for discussion. There were two suggestions submitted regarding Rule 292. One from W. James Kronzer stating that Rule 292 conflicts with itself and with the extra juror statute because an extra juror is not one of the "original ten." Pam Baron advised that the concept they are trying to protect by the changes to the rule is that an alternate juror has the same right to vote among the 12 as the original 12. A vote was taken and there being no opposition the concept was approved unanimously. The subcommittee will redraft the lanauge and bring it back to the committee.

The other suggestion regarding Rule 292 was submitted by Evelyn Avent on behalf of the Court Rules Committee advising that the phrase "or be discharged from further service for any reason" be added to the second sentence of Rule 292. The subcommittee felt the court rules committee's language was too broad. The subcommittee recommended adding disqualification as a ground on which jurors may be excused.

Discussion followed regarding both suggestions.

A discussion was had regarding what the definition of "disabled" was.

Chairman Soules requested the subcommittee add the language "illess of the juror or a near relative."

A vote was taken on the proposed changes to Rule 292 except for the last sentence. There being no objection those changes passed.

A discussion was had regarding the last sentence which reads "The trial court may properly determine that a juror is disabled because of the death or severe illness of the juror or near relative." Pam Baron advised they need to work on the language but that is the concept. Discussion continued. Chairman Soules requested that the subcommittee write something up and we will look at it next time.

The recommendation from the subcommittee that the rule be amended to provide for disqualified jurors was brought up for

discussion. Judge Peeples advised what this would do is give the judge the right to decide to go with a 10-1 verdict. A vote was taken on the concept of if a juror is disqualified the judge can shrink the jury down.

The meeting was adjourned.