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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

November 17, 2000

(MORNING SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in Travis County for the State of Texas, reported by machine shorthand method, on the 17th day of November, 2000, between the hours of 9:04 a.m. and 12:54 p.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

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CHAIRMAN BABCOCK: Okay. We're on the record, and it's our last meeting of the year. Where did Carrie go? Our next meeting is going to be on January 12th and 13th. We will send out notice. We have tentative dates for the rest of the year, but we're trying to make sure that the Bar Center is available, that the hotel is available, and that there are no football games or anything conflicting. We're trying to make sure that the Bench/Bar conference is not conflicting with these dates, so we will get you the meeting dates for the remainder of 2001 shortly, as soon as we know something, but the next meeting is going to be here January 12th and 13th.

Carrie says -- as you know, we have a deal with the Four Seasons where since we have such a large block of rooms that we reserve we get a reduced rate, but there is something about if we don't tell them that you're with the Supreme Court Advisory Committee, we don't have sufficient numbers to get our rates, so explain that, Carrie.

MS. GAGNON: Well, they call it attrition, and so if your travel agent or your secretary calls in and they don't say it's with the Supreme Court Advisory Committee then we don't get credit for it, and it counts

against us, and if we don't fill the number of rooms that we're contracted to then we have to pay a fee, and it's like 400 bucks. So we need really a hand count for next year of who is really staying at the Four Seasons so that when we work our deal we can base it, you know, more closely so we don't have some kind of fee, and then also to make sure that your people that are making your reservations say it's with this group so we get credit.

CHAIRMAN BABCOCK: We will have to do the hand count by e-mail because everybody is not here, but just keep that in mind.

MS. McNAMARA: Carrie, can we help you with respect to this weekend? Is there anything you need from us today?

MS. GAGNON: No, no. We are just trying to work out everything with the Four Seasons for next year and give them our dates, and that's just one of the issues that came up. Thanks.

CHAIRMAN BABCOCK: Okay. The first item on the agenda is the report from Justice Hecht as to what the Court's view is on the rules that we have sent to them, which are parental notification, voir dire, summary judgment, and TRAP 47.

JUSTICE HECHT: We have -- the Court signed an order November 8th approving the parental notification

rules changes, and it will be in the December Bar issue to take effect March 1st. The only changes that we made from the recommendations that we received from the committee were we used a shortened version of 1.4(b), which we didn't think changed it substantively but did shorten it somewhat.

We noticed in working on Rule 1.9 that it allows an appeal by the state from an award of attorney fees and costs but does not allow appeal by the -- anybody else, the attorney ad litem or the guardian, so we -- that was just an oversight the first go-around, so we made it work either way.

And then the Court wanted to clarify in Rule 1.10 that clerks of appellate courts have to tell appellants, minors, that there are amicus briefs that have been filed and afford them the opportunity to look at the briefs and make copies, so we just added a sentence or so to that; and, otherwise, I think they're virtually identical to what you sent over. We changed the form 2g a little bit with the concurrence of the Department of Health, just to make it easier and plainer to use.

On Rule -- TRAP Rule 47, I sent out a letter last week to all of the active and senior appellate justices soliciting their views on the proposal and, as Jan Patterson said, identifying the culprits in the

process so you would know who to blame; and I have gotten back about eight, six or eight, e-mails and one letter, and most of the comments are positive. A couple of judges have expressed some reservations, but all the rest of them have been just simply positive. And then on summary judgment, the Court hasn't taken it up and neither has it taken up voir dire yet.

CHAIRMAN BABCOCK: Okay. On TRAP 47, I don't know if anybody else on the committee has received feedback, but I have gotten a lot, like maybe a dozen responses, and everybody has been -- everybody that has talked to me has been overwhelmingly in favor of what we recommended. Anybody else gotten any? Alex?

PROFESSOR ALBRIGHT: Just the same thing. Everybody thinks it's great.

CHAIRMAN BABCOCK: Yeah. I wouldn't have thought that TRAP Rule 47 would provoke that kind of reaction, but, Steve.

MR. TIPPS: I flew up this morning with still Justice Eric Andell, soon to be a lame duck --

CHAIRMAN BABCOCK: Yeah.

MR. TIPPS: -- and he told me that from his lame duck perspective he felt the proposed rule change was great.

CHAIRMAN BABCOCK: Judge Patterson.

HONORABLE JAN PATTERSON: The uniform question that comes up is what happens to the citability, if you will, of prior unpublished cases, and everybody seems to be very interested in that.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I have heard some negative feedback with respect to the effect of the publish everything rule on the viability of the precedent system, the idea being that if we have so much information that needs to be synthesized and processed in order figure out what the law is that it will, you know, be functionally impossible to accomplish that objective, causing the precedent system to fall of its own weight.

I think there's some merit to that. It may be inevitable, but that's at least a consideration that I didn't think about very much last time. A little bit, but not very much, and it's something that does concern me.

CHAIRMAN BABCOCK: Okay. Anybody else? Yeah, Steve.

MR. YELENOSKY: Well, I don't know if you want to take it up under the miscellaneous docket, but that question I sent you by e-mail.

CHAIRMAN BABCOCK: Yeah. Why don't you raise that, Steve, now so we can talk about it?

MR. YELENOSKY: Well, I will try to raise it

since it was explained to me by someone else and I have never had the experience. Other people here may understand it better than I do, but the question was does our proposal have any effect on the withdrawal of opinions pursuant to a joint request for parties upon settlement, and the question was posed by an attorney who had wanted to cite an opinion that had been withdrawn.

Essentially, the party that lost the decision in the court of appeals was willing to provide more in settlement to get a joint motion so that the precedent would not get published, and he -- or a couple of people expressed that independently as an evil, didn't know if our rule spoke to that and if it should.

CHAIRMAN BABCOCK: Yeah. And I e-mailed back just my own view, which is I don't think our rule speaks to that, and I think the courts of appeals and the Supreme Court withdraw opinions all the time and certainly have the authority to do that. Whether they have the authority or should do it when it's pursuant to a private agreement of the parties is an issue beyond the gambit of this rule I think. Bill.

PROFESSOR DORSANEO: Just one other thing to say about my conversations. One thing obviously that would avoid this problem would be if the courts of appeals would write memorandum opinions. I believe that the draft

rule, you know, could be interpreted to mean that they should write memorandum opinions that would be, you know, replacements for the opinions designated not for publication now. One person who was concerned about this says, "We don't know how to write memorandum opinions. We need a model in order to feel comfortable switching to that method of behavior," and I think that might have some merit. If we want to encourage people to write -- courts to write memorandum opinions, maybe we ought to tell them how, what that would look like in some manner or another.

MR. YELENOSKY: I didn't hear what Bill said at the beginning. Did you say that speaks to the question about --

PROFESSOR DORSANEO: No. That's not about what you're talking about.

MR. YELENOSKY: Okay. Okay. So does everybody agree that withdrawn opinions is separate?

CHAIRMAN BABCOCK: Yeah. Anybody disagree with that? I mean, I don't think TRAP 47 deals with withdrawn opinions.

MR. YELENOSKY: Is it a problem?

CHAIRMAN BABCOCK: I don't know. Judge, do you think it's a problem?

JUSTICE HECHT: Well, we never -- since I have been at the Supreme Court, we have never withdrawn an

opinion for settlement, and we only rarely have been asked. We are routinely asked to vacate the court of appeals opinion when the parties have settled, and we never do. I don't think we have done it once since I have been there.

HONORABLE SCOTT BRISTER: You used to do it.

JUSTICE HECHT: We used to do it, yeah. But we have not done it in at least ten years, unless there is some supremely compelling reason that does not have to do with the settlement, but we let the courts of appeals make up their own mind if they want to withdraw them or not.

If the case is still in the court of appeals and the parties come with a joint motion and they want the opinion withdrawn and the court is willing to do it, we have never that I know of heard a complaint to us by one side or somebody else, "Oh, no, that opinion should not have been withdrawn or should not have been designated to be unpublished," so we think it would be a problem -- we think that for us to vacate opinions because the parties have settled would be a terrible problem, but if the courts of appeals want to do it themselves, we think they have to have the discretion to do it, so that's where it is. And I don't know how often they do it or whether they do it or what their policy is.

CHAIRMAN BABCOCK: And TRAP 47 I don't think

implicates it, so...

JUSTICE HECHT: No, no.

HONORABLE SCOTT BRISTER: On Bill's point, I have talked with several people that are -- for instance, does a memo opinion -- I can just first sentence say, "Since the parties are familiar with the facts, we are not going to repeat them" and go on. "First ground is no good because of this," and I have been unable to find anybody who agreed with me that that would constitute a memo opinion. It would sound -- and one thing I hate, especially in oil and gas cases where you have to read through the first four pages of family history and everything that's ever happened, everybody who's ever owned an interest in this stupid lease to try to find out where the law is in a case. It seems to me that's what a memo opinion ought to be, especially if you are just writing to the parties. Why should you repeat the facts back to them?

JUSTICE HECHT: Well, that was our idea about what it ought to be back in '90 when we changed the rule, and there was some thought at the time that the courts of appeals would be more willing to write memorandum opinions, but the thinking, as I understand it, since then has been a concern that the Bar does not appreciate short shrift and that -- and it only takes a

little longer to put in two pages of facts, so why not do it?

And I think, you know, again, that has to be left up to the court of appeals judges to decide; but on Bill's point, ideally memorandum opinions would be virtually lacking in precedent, not just because you wouldn't be able to tell from the opinion what the rule was that was being -- that was being announced; and part of the Bar's concern is, I think, as I hear them, that there are a lot of unpublished opinions or memorandum opinions that ought not to be and -- not a lot, but in their view it's a lot and that you can tell from those opinions something about what the rule is in that court of appeals, and you ought to be able to decide it.

CHAIRMAN BABCOCK: Judge Patterson.

HONORABLE JAN PATTERSON: I think there is a real fear out there that we might be moving towards the Federal system where the memorandum opinions are almost unintelligible except for the parties who receive them. I know somebody sent us a copy of an opinion the other day that said -- I don't think it was this state, but it said the part -- "The defendants argue and try to convince us that this case is distinguishable from Smith vs. Eastwick, and it's not. We aren't," and that's the opinion.

So I think that the real fear is that we

will -- I think no one dislikes the unpublished opinions except for the fact that they are unpublished, and our plan is to and our intention is -- so far is to just convert those into memorandum opinions, so we don't view it as a big change, but there is a fear I think on the Bar that it will further dilute the quality and content of what they get back after a case is fully briefed and maybe argued.

There's also a concern that it's one thing if a case is fully argued so that everyone feels as though the judges have heard the case. It's another thing if it's submitted on briefs and then you get back a memorandum opinion, and it's not a very satisfying process for the litigants, so there are those kinds of fears.

CHAIRMAN BABCOCK: We have an off-menu item today because we have neglected to include a JP matter the last two sessions, and the chair of the JP subcommittee, who is Skip Watson, has a brief presentation.

MR. WATSON: The ex-chair of the JP subcommittee.

CHAIRMAN BABCOCK: The ex-chair. This is your last official act as the chair of the JP subcommittee.

MR. WATSON: No. This is my first act as the former chair. The JP subcommittee has been asked to

look at three rules, and I -- is the stuff before them, Carrie?

MS. GAGNON: Is it before --

MR. WATSON: Are the materials in the packet?

MS. GAGNON: No. They were from last month's meeting. Do you need a copy?

MR. WATSON: Which of course we all brought.

MR. TIPPS: I did.

MR. WATSON: First of all, because I know nothing about this, my first official act was to resign as chair and act -- request that Judge Tom Lawrence, who actually knows what he's talking about, be appointed as chair of this committee. He, of course, is not present today, so this is going to be short and sweet. We're looking first at Rule 528.

(Honorable Tom Lawrence joins meeting.)

MS. McNAMARA: Skip, you're saved.

MR. WATSON: Thank you, Lord. Tom, you're on.

HONORABLE TOM LAWRENCE: Okay.

MR. TIPPS: Divine intervention.

MR. WATSON: Tom, you're really on.

HONORABLE TOM LAWRENCE: I'm really on. What am I on? 528?

MR. TIPPS: He stopped in mid-sentence when you walked in the door.

HONORABLE TOM LAWRENCE: All right. Where are we on it?

CHAIRMAN BABCOCK: We're just starting.

HONORABLE TOM LAWRENCE: Well, the problem with 528 as it exists now -- it is similar to another rule in the rules -- is that you have an unlimited number, basically, of strikes. We don't have another recusal rule in the justice courts other than 528. 18b doesn't apply. We have got a case, Crowder vs. Franks, that specifically says that 18b doesn't apply and that 528 is the sole and existing rule that we have for recusal. We have had several times in Harris County particularly, and I have heard reports of some other counties, too, where a party -- a defendant typically, and sometimes on an eviction case, which is time-sensitive -- will go in and file these motions one after another in one court. They can go to another court, and we have had them filed ten or twelve times sometimes. It just keeps on going with, of course, a normal delay each time.

Our feeling, and the JPs statewide feel pretty strongly about this, is that there needs to be a limit on that. Now, the subcommittee came up with only one can be filed, and basically that's what we would

propose to do, is just to change the wording so that there is only one time that you can exercise that.

CHAIRMAN BABCOCK: Any discussion about that? The specific language is that there be a sentence added to Rule 528 that says, "A party is entitled to only one transfer pursuant to this rule."

MR. WATSON: You might note that under Carl's comments back when the State Bar Rules Committee looked at this, apparently it had been looked at back in '96, and the decision then, as I recall, was to try to limit it to two changes and prevent those changes from being exercised on the day of the hearing. What the committee did was adopt really the recommendation by Carl's State Bar Rules Committee that dropped that language, which didn't get in, didn't get through, didn't get done, and just go to the simple "A party is entitled to only one transfer pursuant to this rule."

I don't think it's magic whether it's one or two or -- but that just sort of cut to the quick and said, "Here's a starting point. We are going to stop it at one."

CHAIRMAN BABCOCK: Is there de novo review of everything the JP court does?

HONORABLE TOM LAWRENCE: Well, no, not necessarily. Magisterial acts, for example, there

wouldn't be, but any civil action and any criminal -- any criminal case that's filed and any civil suit there would be a de novo appeal or could be a de novo appeal.

CHAIRMAN BABCOCK: I mean, to me there is some danger in limiting it to one, you know, if there really are legitimate grounds to get rid of two judges or three judges, but if you have a de novo, the right to de novo appeal, that somewhat softens it, and you can see how the current rule could create tremendous mischief by somebody who is just trying to harass somebody.

HONORABLE TOM LAWRENCE: And I would point out that -- you use the word "legitimate." There is no showing that there must be a reason. All they have to do is file the motion that they can't get a fair hearing --

CHAIRMAN BABCOCK: Right.

HONORABLE TOM LAWRENCE: -- and that's it. There's no -- no inquiry is permitted. It's an automatic strike basically.

CHAIRMAN BABCOCK: Anybody else have any thoughts about it? Bill.

PROFESSOR DORSANEO: Has this language at the end of 528 now caused any trouble, "not subject to the same or some other disqualification"?

HONORABLE TOM LAWRENCE: Well, it really hasn't because, again, there is no showing of -- now,

disqualification, of course, would be different. If you're disqualified for constitutional grounds or something, you wouldn't even have to use this, but, no, this really hasn't cause a problem because I have never heard of anybody actually giving a reason for exercising their right under 528. They typically say -- they parrot the language. "We can't get a fair trial or hearing," and that's all they usually say. There's never a reason given.

CHAIRMAN BABCOCK: Any other discussion? Nina, you want to say something.

MS. CORTELL: (Shakes head.)

CHAIRMAN BABCOCK: You're in JP court all the time, right?

MS. CORTELL: It's been awhile.

CHAIRMAN BABCOCK: Anybody else? Anybody want to move the adoption of this change?

MR. TIPPS: So moved.

MR. WATSON: Second.

CHAIRMAN BABCOCK: Okay. Any further discussion? All in favor? Anybody opposed?

MR. HATCHELL: Yes.

CHAIRMAN BABCOCK: Mr. Hatchell is opposed. Let's raise your hands if you're in favor of this change. Raise your hand if you're opposed.

By a count of 21 to 12 the change passes.

Okay. What's next? Either Judge Lawrence or Skip.

HONORABLE TOM LAWRENCE: Rule 647, notice of sale of real estate. The Government Code was changed, specifically 2051.045, which provides that the legal rate for publishing a notice in a newspaper is a newspaper's lowest published rate for classified advertising, so this is just a change to conform Rule 647 to that change to the Government Code.

CHAIRMAN BABCOCK: And, specifically, as I understand, you're striking certain language and adding a sentence basically?

HONORABLE TOM LAWRENCE: That's correct. Striking the language that "publishers of newspapers should be entitled to charge for such publication a rate equal to but not in excess of the published," etc., etc., and then substituting the language in the Government Code for that.

CHAIRMAN BABCOCK: Okay. Bill.

PROFESSOR DORSANEO: My recollection is that our Civil Procedure Rules have the same problem, that we addressed and dealt with that problem in the recodification draft, which sits.

CHAIRMAN BABCOCK: Okay. Anybody else?

MR. WATSON: Bill, are you saying you dealt with it differently?

PROFESSOR DORSANEO: No. But this is not the only rule in the rule book that has this problem. It's probably one of the least important rules in the rule book with that problem.

MR. WATSON: I understand. I couldn't tell if you were saying we ought to use your language from the recodification rather than this.

PROFESSOR DORSANEO: No, no. I think the language is fine.

CHAIRMAN BABCOCK: Okay. Any other discussion? Anybody want to make a motion?

MR. WATSON: So moved.

MS. JENKINS: Second.

CHAIRMAN BABCOCK: All in favor raise your hand. Anybody opposed?

By a vote of 24 to nothing that passes. What's next, Skip?

MR. WATSON: Go ahead, Judge.

HONORABLE TOM LAWRENCE: I think that's it for us.

MR. WATSON: Well, there's the overlap of 742, but I think that overlaps with Elaine Carlson's committee, and I had just as soon punt to somebody else

who knows what they are doing

CHAIRMAN BABCOCK: Great. Well, that may be a record for a subcommittee yet.

MR. WATSON: Thanks for working it in, Chip

CHAIRMAN BABCOCK: You bet. Sorry we dropped it off inadvertently.

All right. So now we're back to the TRAP rules. Bill, you want to pick up where we left off before? We were making such great progress.

PROFESSOR DORSANEO: The first thing --

CHAIRMAN BABCOCK: Oh, wait a second, Bill. I missed something. On recusal, Senator Harris has not been able to focus on this for a lot of obvious reasons, due to the election, and maybe there is some family health -- not with him, but maybe some close family members, health problems. So we are going to -- we are going to talk to him this time, and we will report back to you in January, but it's -- and part of it was my schedule, too, I should be quick to add. So we will talk to him and get back to you on recusal next time.

MR. WATSON: Chip, would you do one thing? On the grounds for recusal, I know that I have written two or three times and we have privately discussed the only one of the new grounds that doesn't have a footnote is the one about the lawyer to the proceeding or the law firm is

representing the judge, etc., etc., and you don't need to do it before you submit it to him, but at some point can we please get a footnote on that so that it doesn't look like it came from Mars?

We need to show that it came out of the, oh, you know, the Federal handbook for the judiciary. I have written out a footnote and given it to Carl, and I just don't want it to get up to the Court and have them wonder where on earth did that come from when, in fact, it is an existing code.

CHAIRMAN BABCOCK: I seem to remember you sending me a copy of that, but if you didn't, would you?

MR. WATSON: Yeah. I will do it again. Sure.

CHAIRMAN BABCOCK: Okay. Great. Frank Gilstrap has been very helpful in trying to arrange a meeting, and he's going to go with me when we do have it, and as I say, it's more my fault than probably anybody's.

Okay. Sorry, Bill. I didn't mean to interrupt. I skipped that issue.

PROFESSOR DORSANEO: That's fine. First thing I guess is a clerical or administrative matter, maybe perhaps more than that. I don't know whether all of you have these documents or not, but at any rate, there are two versions, slightly different versions, of what we

did or recommended to be done on Friday, October 20, 2000. The one that accompanies my transmittal letter dated November 2nd, 2000, has at its top "TRAP changes" and then there is another one. I guess, Chris, did you generate this?

MR. GRIESEL: I did that.

PROFESSOR DORSANEO: Probably because I was slow getting my comments to him. Entitled "Proposed changes to Texas Rules of Appellate Procedure."

There are two little, tiny differences that don't amount to very much in my view in the two drafts. If you look at this proposed changes draft, which I think would be a good one to work from because it's -- contains more information and fewer ellipses. In the first sentence of 9.5(a), it ends "to the appeal or review," the sentence being, "At or before the time of a document's filing the filing party must serve a copy on all parties to the appeal or review."

At the meeting on October 20 I believe my recommendation was to replace the word "review" with "original proceeding," and that's on the belief that there are two types of proceedings that Rule 9.5 would pertain to, but, actually, there may be something that's not quite an appeal or review on appeal or original proceeding that might mean that the word "review" is a better word than

"original proceeding." From my own standpoint, I don't think it makes any difference whether it says "review" or "to the appeal or original proceeding," but I just wanted to point that out to you. If anyone else thinks that it should say, you know, "original proceeding," you know, rather than what I will refer to as the Court's draft, you know, please raise that.

Mike Hatchell and I talked last time. We were saying, well, we have appeals or we have original proceedings, and then we were saying, "Whoa, what about that Banales vs. Jackson kind of thing that's not an appeal or an original proceeding." Say, "Well, yeah, that's kind of an odd thing." So the word "review" could conceivably, you know, have a broader and better meaning than the change that I suggested, and I don't think it causes any difficulty in this draft.

The second thing is the comment to the 2000 change, the Court's comment or the rules staff attorney's version of the Court's comment is I think better than the one in my draft because it's more informative. Mine doesn't say, "The change to Rule 29.5 clarifies that a trial court may proceed with a trial on the merits," etc., "if it is permitted by law." Okay. It just says what the 51.014 -- 014, I think, Chris.

MR. TIPPS: Yeah.

PROFESSOR DORSANEO: Not 004.

CHAIRMAN BABCOCK: What's that change again, Bill?

PROFESSOR DORSANEO: In this thing it's -- I think the statutory cite should be changed from 51.004(b) to 51.014(b), okay; but, you know, that's -- with that little adjustment, I think this would be the good draft to work from for whatever purposes we will follow next

CHAIRMAN BABCOCK: Okay. How do you want to resolve the issue of "review" versus "original proceeding"?

PROFESSOR DORSANEO: I'm happy to go with this unless somebody will say something

CHAIRMAN BABCOCK: "This" being "review." Carl.

MR. HAMILTON: Why not just say "appeal or other proceedings"?

MR. EDWARDS: For us common old mud soldiers that don't get out of the trial court, what's the difference between an original proceeding and a review? Is there or not?

CHAIRMAN BABCOCK: I don't know. Hatchell.

MR. HATCHELL: Well, review ought to be appeal, not an original proceeding.

MR. EDWARDS: Yeah, it looks to me like if

somebody tells me you're going to review something, you're looking at something somebody has already done, it's not an original proceeding.

PROFESSOR DORSANEO: Well, but normally we're talking about in an original proceeding reviewing what somebody did or didn't do that they were asked to do.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: But review is really not a term of art, but "appeal" and "original proceeding" is, and we all know what they are, and anything that doesn't fit in those categories is an anomaly. So I would suggest we take the word we don't know what it means, "review," and replace it with "original proceeding." If somebody comes up with something that's different, just not worry about it.

I mean, Banales vs. Jackson, if I remember, is an interlocutory evaluation of the denial to extend on a motion to rehear. Well, nobody files them anymore anyway.

PROFESSOR DORSANEO: Right.

MR. ORSINGER: So what difference does it make? Let's just move on. We know that there are appeals, and we know there are --

CHAIRMAN BABCOCK: We did vote on this, by the way, and voted to put in "original proceeding."

MR. ORSINGER: Okay. I would like to keep it the way it is because it's meaningful.

CHAIRMAN BABCOCK: So "original proceeding"? Chris, do you have any stake in this?

MR. GRIESEL: No.

CHAIRMAN BABCOCK: Okay. So we will put in "original proceeding."

PROFESSOR DORSANEO: I think it is probably fair to say that the Banales vs. Jackson anomaly is a defunct anomaly.

CHAIRMAN BABCOCK: Well, on that happy note let's keep going.

PROFESSOR DORSANEO: Okay. So then we're back to the so-called combined committee report, which I hope you have from the October 1st revised agenda. If you don't, you will probably be able to follow from a rule book or just be able to follow generally; and the first item that the combined committee talked about was Rule 33.1, which is preservation of appellate complaints.

This rule is probably going to continue to be on our subcommittee agenda because it -- I won't say it has other problems, but it's -- deserves more attention probably, but the specific suggestion involves the change from the former appellate rules to the current appellate rules and the elimination of a provision that existed in

former Appellate Rule 52, which dealt with the subject of preservation of appellate complaints.

52(d) provided in language previously worked up by this committee -- I don't remember whether it was Richard's language. I seem to remember that it was way back when -- that in a nonjury case, in an appeal of a nonjury case that it was all right, permissible to raise complaints concerning the sufficiency of the evidence to support a trial judge's finding in a bench trial for the first time in the appellant's brief. Okay.

In other words, was it necessary to do what's necessary to be done in a jury case, make complaints in the trial court about the sufficiency of the evidence to support a pertinent finding. This had, in my view, been the law for, you know, sometime, but the matter was confusing to counsel.

When TRAP 33 was passed, 52(d) went away, except for a fleeting reference in the comment to TRAP Rule 33, which says "Comment to 1997 change: Former Rule 52(d) regarding motions for new trial is omitted as unnecessary. See Texas Rule of Civil Procedure 324(a) and (b)." And I think that I agree with the sentence, but we've lost some of the players along the way by eliminating a provision in TRAP 33 flatly saying that you don't have to make these complaints in the trial court in

order to make them on appeal, complaints about sufficiency of the evidence to support a fact finding in a bench trial.

The combined committee, you know, agreed that 33 point -- well, 33 needs to be amended or it would be desirable to amend 33, actually 33.1, by adding a (d) which is worded virtually in the same way as former Appellate Rule 52(d) with the exception of the ending. The former appellate rule in its first subdivision (a) basically said you have to make a request for relief and objection, etc., in the trial court in order to complain on appeal.

All right. 52(d) said in this situation you don't have to comply with (a). All right. Because of the overall change in things I suggested just simply saying -- rather than saying you don't have to comply with other parts of Rule 33 that "It's not required to present the complaint in the trial court to preserve it for appellate review." Okay. That may be not the best wording, but I think it conveys the meaning, and our combined committee thought it would be a good idea to add this back to the preservation rule in the appellate rule book.

It may well be if and when we ever get around to the recodification draft that it's not necessary to say this. Okay. But in the interim it would be better

to go with a provision saying what the counsel is required to do and not required to do rather than leaving it to a sentence in the comment of the 1996 change which probably means the same thing but is pretty opaque if you're not really tuned in to this. So that's the committee recommendation, to reinstate former (d) to former Appellate Rule 52.

CHAIRMAN BABCOCK: Right. Richard.

MR. ORSINGER: I support the change, and just for a little background, many appellate lawyers and appellate judges are not as familiar with nonjury appeals because predominantly it's either summary judgments or jury appeals that get to the appellate courts, and there was confusion in the old days about whether it was necessary to preserve your sufficiency of the evidence challenge in the trial court in the nonjury trial. And there was a lot of argument about Rule 324, which went through a number of changes, but the comment right now says that this proviso is not necessary because of the way 324(a) and (b) are written.

But if you go read 324, (a) says that a motion for new trial -- a point in a motion for new trial is not a prerequisite to a complaint on appeal in either a jury or nonjury case, except provided in subdivision (b), and then subdivision (b) requires you to preserve your

sufficiency challenge in a motion for new trial only in a jury trial.

So by inference you're not required to preserve your sufficiency challenge in a nonjury trial, but the problem is there are cases out there that say there are complaints in nonjury appeals that do have to be raised at the trial court level, but they don't say that the only place you need to preserve them is a new trial motion. So to say that you don't need to preserve it in a motion for new trial is not to say that you don't need to preserve it in some other fashion, like by filing an objection or something of that nature; and those of us who followed this debate for 20 years are concerned about the confusion.

I can tell you from having practiced appellate law before subdivision (d) was included in that rule, I had -- I mean, even when subdivision (d) was in the rule I have had court of appeals that dismissed my sufficiency argument on the ground that I didn't preserve it in a nonjury trial in the trial court; and I have had to come back on rehearing and said, you know, "Rule 52(d) says I don't have to do that" and then I get a new opinion from them.

So I think we should not assume that it's understood that you don't have to preserve. Clearly you

don't have to preserve in a motion for new trial, but it's not clear that you don't have to preserve independently. Now, having said that, I am not aware of any court of appeals cases that have slipped back into the old practice since we dropped it; but we have new judges coming on the bench all the time; and this is an anomaly that's unique to nonjury trials; and I think we would be safer and better to have it back in the rule.

CHAIRMAN BABCOCK: So you're in favor of this.

MR. ORSINGER: I'm in favor of the committee recommendations.

CHAIRMAN BABCOCK: Buddy.

PROFESSOR DORSANEO: And the language.

MR. ORSINGER: And the language proposed.

MR. LOW: Why was there a deletion in '97? What was --

MR. ORSINGER: The committee recommended that this be continued, is my recollection; but when it got reported to the Court, I think that in the Court's process of dealing with the appellate rules the Court decided to drop it out as unnecessary. We still had the same concern as a committee last time that we do now.

MR. LOW: It didn't attempt to change the substance of anything? That's the only thing I wanted to

see.

MR. ORSINGER: No. No. There's no legislative history on it, quote-unquote, because the change occurred privately at the Supreme Court level when the new rules were issued rather than at this committee level.

CHAIRMAN BABCOCK: Is that right, Pam?

MS. BARON: That's right.

CHAIRMAN BABCOCK: Okay. Anybody else have anything to say about this? Anybody want to move its adoption?

(Mr. Orsinger raises hand.)

MR. LOW: So moved or second.

CHAIRMAN BABCOCK: Okay. All in favor raise your hand. And all opposed?

By a vote of 26 to 0 the committee-proposed recommended change to Rule 33.1 is adopted. Next?

PROFESSOR DORSANEO: Next one is a little bit on the technical side.

CHAIRMAN BABCOCK: As opposed to the last one.

PROFESSOR DORSANEO: I tell my students when they give me a general response that law tends to be a little bit legalistic on occasion.

Rule 34.6, and it's actually (e) where the

committee decided to recommend action. Right now 34.6(e) says that if the parties have a dispute about the reporter's record, you know, as to whether it reports what happened accurately, but they can agree how to correct it, they let the court after notice and hearing settle the dispute. Okay. It doesn't exactly make it plain that this procedure would apply to a lost or destroyed exhibit when the parties cannot agree about what constitutes an accurate copy of the missing item. Okay. Now, maybe it means that, too, but maybe it doesn't.

So the committee recommended at the suggestion of Diana Faust, I believe who is with the Dallas court, right, Pam? No.

MS. BARON: She's a Dallas practitioner.

PROFESSOR DORSANEO: Dallas practitioner. Okay. That we make it absolutely clear that if the parties dispute whether the reporter's record accurately discloses what occurred -- "If the parties dispute whether the reporter's record accurately discloses what occurred in the trial court, the parties agree that the record is inaccurate but cannot agree on corrections to the reporter's record, or if an exhibit" -- and here's the recommended additional language "or if an exhibit designated for inclusion in the reporter's record has been lost or destroyed and the parties cannot agree on what

constitutes an accurate copy of the missing item, the trial court must, after notice and hearing, settle the dispute."

There is companion language suggested for addition of the last sentence of (e)(2) which would make it clear that the court must order the reporter to correct the record by conforming the text to what occurred in the trial court. Or maybe it needs to be an -- does an "or" need to be in there, Pam?

MS. BARON: That's what I'm trying to figure out.

PROFESSOR DORSANEO: "Or by adding a copy of the missing exhibit." I think an "or" needs to be in there. I think an "or" dropped out, basically saying you can correct the transcript or you can add an accurate copy of the missing exhibit, if that's what settling the dispute requires. "And to certify and file in the appellate court a corrected reporter's record or a supplement."

So it's just simply to make it plain that if there is a problem with the reporter's record concerning an exhibit, if the court can settle this dispute by saying what constitutes an accurate copy of the missing item then the court can do that and order the court reporter to have the record accurately reflect what it should have

reflected all along. That's -- you know, that's the proposal.

Diana Faust indicates that in another rule, 34.5(e), that kind of language is explicitly, you know, set forth, talking about an accurate copy of the missing item being determined, you know, by the trial judge. So that's the essence of the proposal, 34.6(e), to add some language to make it clear that missing exhibit problems can be corrected, too, when the parties can't get the job done.

CHAIRMAN BABCOCK: But you're also -- Bill, aren't you suggesting amending Rule 34.6(f)?

PROFESSOR DORSANEO: Yes. I'm suggesting to add that more for clarification. I'm not really, frankly, completely clear that that's necessary. Okay. But the companion change would be to, you know, edit 34.6(f), which now says appellant -- "If the appellant has...reporter's record...if without appellant's fault...significant."

CHAIRMAN BABCOCK: Getting all this down?

PROFESSOR DORSANEO: "If, without the appellant's fault, a significant exhibit or a portion of the court reporter's notes and records has been lost or destroyed," and I'm suggesting to add right there, you know, or I think it may be right there and not after the

"reporter's record." Okay. "And has not been corrected or replaced," but my difficulty is that this rule talks about a reporter's record and it also then goes on and talks about a recorder's record; and I guess I'm going to ask Scott Brister, you know, should that language then "has not been corrected or replaced" be in both places, you know?

Is that a -- would we deal with the recorder's record the same way as a trial judge if somebody wants to dispute what it says? 34.6(e) is looking like it's talking about the reporter's record only and not the recorder's record, and I don't know whether that's on purpose or not. Okay. 34.6(f) is talking about, you know, those rare courts where there is a recorder's record, you know, rather than a reporter's record, and I am not familiar enough with those -- the operation of those courts to know if you're correcting those records ever or if that's just something that is different. One would think the problem would come up more often there.

CHAIRMAN BABCOCK: Stumped him on this one.

HONORABLE SCOTT BRISTER: Let me see.

PROFESSOR DORSANEO: Pam, what do you think?

MS. BARON: I think just as a drafting idea, (1) through (4) in part (f) are connected by the word

"and"; and if you just want to add another section that says either, you know, either (5) or (4), "and the lost or," whatever, "destroyed item has not been corrected or replaced" instead of trying to modify it twice in one clause.

CHAIRMAN BABCOCK: Well, you're talking about a couple of different things here, though, aren't you? You're talking about notes or exhibits, which are tangible things, you know, documents, and then you're also talking about audio recordings, right?

PROFESSOR DORSANEO: Yeah.

CHAIRMAN BABCOCK: And if an audio recording is lost or destroyed it's not likely you're ever going to recover that

PROFESSOR DORSANEO: Chip, here's what I would do. I want to move the (e) part change, and the (f) part change --

CHAIRMAN BABCOCK: Further study?

PROFESSOR DORSANEO: Further study. I don't think it's necessarily really -- you know, that clarification is essential, okay, and it creates these other conundrums.

MS. BARON: Well, can I -- the problem that it creates is that the preface to part (f) says in this situation you get a new trial if all of these things are

met, so --

PROFESSOR DORSANEO: But it presumes that these are problems that weren't corrected.

MS. BARON: Right, but you can see somebody coming in and arguing, "Well, it was lost or destroyed and we can't agree on it; therefore, I get a new trial," even if the trial court can correct it; and we want to avoid new trials for reasons that relate to a record problem that can be fixed.

PROFESSOR DORSANEO: And that's why I wanted to add the language in before I realized how difficult it was to add the language in.

MR. YELENOSKY: Well, I just had a question about the -- and maybe it relates to this point, too. 34.6(e), third line up from the bottom on page 12 says, "The trial court must settle the dispute" and then "The court must order the court reporter." Is that "must" a problem? Because you keep saying "can correct," and am I misunderstanding the language? I mean, it seems to say that in every instance the court must order the court reporter and seems not to allow for the possibility that the court can't, and how do you ever then get a new trial?

PROFESSOR DORSANEO: Well, you won't, if the court -- you know, the first "must" is perhaps a little problematic when it says "The court," you know, "must,

after notice and hearing, settle the dispute" because maybe the court can't settle the dispute.

MR. YELENOSKY: Right. And the next sentence says "must order the court reporter to correct." That's also a problem, isn't it? What if he can't?

CHAIRMAN BABCOCK: Well, you can order the court reporter to correct it, and they can come back and say "Can't do it. Sorry." And then certain consequencess flow from that.

PROFESSOR DORSANEO: Well, let's hear from the judges. What will happen here? In my experience what happens is the judge says, "I'm going with what the court reporter took down. I can't remember, and that's what we're going to go with. If you people have a disagreement, I'm going with what the court reporter put down." It's conceivable that the judge could remember something other than that, but unlikely.

HONORABLE SCOTT BRISTER: Right.

PROFESSOR DORSANEO: Huh? Where it says "must settle the dispute" in the current rule, I mean, it does kind of assume that the judge won't say, "Well, I can't do it," okay; and I guess that's probably a safe assumption because the court will say something, "and I'm going with the court reporter" or "I'm not." Huh?

HONORABLE SCOTT BRISTER: On electronic

recording it comes up because they put in "inaudible," and so you just listen to the tapes and say, "No, that's not what it says." The way it usually comes up is a complaint that the record doesn't have something that they say occurred. "I made an objection there, and it's not anywhere in the record."

MR. YELENOSKY: Well, it also includes lost --

HONORABLE SCOTT BRISTER: Or something that happened -- that you had a discussion at the bench that the court reporter or recorder didn't get down, and there you just -- all the time you add it. The judge orders the court reporter. I mean, it's the same as a -- as by standard bill of exception.

MR. YELENOSKY: But this also refers to an exhibit that's lost or destroyed, and clearly you can't recreate that, can you?

HONORABLE SCOTT BRISTER: Sure you can. I mean, you know, that was --

MR. YELENOSKY: Well, not in every instance.

HONORABLE SCOTT BRISTER: No, but, I mean, you know, Judge Whittig got reversed on this two-month long asbestos case because they lost a case of the exhibits, but the fact is on all Harris County cases they use all the same exhibits, and they have them in a general

file, and it could have been replaced like that.

PROFESSOR DORSANEO: Well, based on what you said, Scott, I would want to add in 34.6(e) a reference to the court recorder and the recorder's record, that those are corrected, too. It doesn't even say that now. Huh?

CHAIRMAN BABCOCK: Yeah. You know, David Jackson is not here today, and I bet he would have some thoughts about this, too. Wouldn't you?

PROFESSOR DORSANEO: I'm not sure about that. I think the judges are the ones who know about this.

CHAIRMAN BABCOCK: Yeah. Richard.

MR. ORSINGER: It's my recollection -- I used to do these because we had one in San Antonio and I handled some appeals out of the court -- that the recorder's record is actually the tape recording and not any kind of written --

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: -- translation of the tape recording, so it doesn't make any sense for us to literally talk about causing the recorder's record to be corrected because the reporter's record --

PROFESSOR DORSANEO: Recorder.

MR. ORSINGER: -- if it's defective is a tape recording that just simply can't ever be changed, so

the best you can do in a situation like that is to have the court listen to a complaint about some private transcription, because the appellant is supposed to transcribe the parts of the tape that he wants the appellate court to read, and then you get into an argument over whether the transcription is accurate.

So I agree with Pam's statement of principle. We don't want cases reversed where the error is curable, but I think we're going to have to have some special language on how you correct a tape recording, because the appellate court is seeing on paper private transcriptions, not official records. Not official reporter's records. So I think we have maybe to do more than just slip in the conjunction of something to make it work.

PROFESSOR DORSANEO: All right. I'm back to my original proposal, 34.6(e). Forget the rest of it, and leave the recorder out of it.

MR. ORSINGER: You know, and I might add, too, not just what Scott has said, but sometimes you'll find that when the tapes are flipped that you'll miss some testimony, but the argument is always whether it was crucial testimony that was missed or whether it was just a few introductory sentences or something like that, and I think when I have gotten involved in fights over the

record it's more like "We know something is missing because we didn't end in the middle of a sentence and start in the middle of another sentence, but it doesn't look like it was very important and, therefore, it's not reversible error," and that's something that needs to be considered in the language as well

CHAIRMAN BABCOCK: Okay. Bill, are you confident that the proposal on 34.6(e) is not -- doesn't have any problems with it in light of the discussion?

PROFESSOR DORSANEO: Yes. The part recommended, yes.

CHAIRMAN BABCOCK: We're okay on that?

PROFESSOR DORSANEO: I'm not sure we're finished with this, and I don't think myself when I read it that that language is essential to be added, but I don't think it hurts anything to add it. But, again, I think maybe this goes back to the committee for us to look a little bit more at these other questions.

CHAIRMAN BABCOCK: Yeah. My inclination is since we're going to be looking at 34.6(f) anyway, maybe we withhold right now taking any action on the proposal to 34.6(e) and just make sure everything fits when we study it some more. Is that okay with you?

PROFESSOR DORSANEO: That's fine with me. Yes.

CHAIRMAN BABCOCK: Okay with everybody else? Okay. Let's go to the next one.

PROFESSOR DORSANEO: If the -- actually in the report, although we could probably talk about 34.6 --

CHAIRMAN BABCOCK: (g) as in go?

PROFESSOR DORSANEO: -- (g) at this meeting and get some useful guidance, I'm going to -- the combined committee did not believe that any action should be taken on 34.6(g), and this is going to be another one of those problems that will go back to the committee, for reasons I won't go into.

35.3, 38.1, and 38.1(e) are things that the committee believed that no change is needed at this time. I know that Justice Hecht has some concern about 38.1(e) and the issues presented formulation, at least I think that's right, and I would ask him if he wants to express his view about what further work needs to be done on this, what the Court thinks, what he thinks, or any other useful guidance.

JUSTICE HECHT: Well, when the TRAP rules were changed the last time, it was the hope that the statement of the issues on appeal would become more informative and not merely a formal part of the brief. Before that time the statement of the issues or points of error was largely to protect the preservation problems and

was not at all informative to the Court, and I don't know how other judges read briefs, but it's just impossible for me to read a formal statement of a point of error that's all in caps and goes on for half a page without a period and ends up with brackets saying "germane to a whole bunch of pieces of the record" the way the old State Bar form book said that points of error ought to be stated.

And so you just skipped it and went to the text of the argument and tried to figure out what the parties were upset about, but with the change in the rules there has been a significant change in petitions in our court in the way issues are stated, and now you can actually figure out something about what the case is about by reading the issues on appeal. They tell you something about the facts, and they kind of set it up like the first paragraph of an appellate opinion often does and pose the issue, and you actually learn something from reading it, but that's not universal. There has been a lot of change, and it's all good, but there's still a lot of people that state points of error or issues in a very formal and nonproductive way, and I don't know that a change is necessary in the rules, but anything we could do to encourage that or provoke that would be a good thing.

PROFESSOR DORSANEO: You know, I could write or -- and I'm sure others could, too, a description of

what the issues statement should look like, whether we talked about it in terms of, you know, Mike Hatchell's description of an old point of error practice. You know, who, what, why, with the why of the cause being, you know, something that would articulate the issue in context; or we could take Brian Garner's methodology and describe it as beginning with this kind of a sentence or that kind of a sentence, then following and then ending with a question. Okay?

My own view is that the question formulation and Garner's approach that says that every issue is a question is silly and reflective of a lack of familiarity with our practice here over a long period of time. I don't think it needs to be a question, and we could write phrased drafts of that if you want us to do that. I mean, we could give examples. If the subcommittee thinks that that's appropriate and if the Court thinks that would be helpful, we can try to say, you know, what this issue or point is supposed to contain and look like.

JUSTICE HECHT: Well, I mean, ideally this is better a subject for education courses on appellate practice, but what has happened so far has been helpful, and if there was any way to provoke it further, that would be good, but I don't know that we need examples so much as maybe a comment that suggests that issues should not be a

formal statement or should be meaningful. Or I don't have a proposal, but anything that would make the issue part of it clear. Then what really happens is you read the statement of the issues, you read a summary of the argument, and you know pretty much what the case is about. You read four pages, three pages, and you have got a pretty good handle on what the case is about.

PROFESSOR DORSANEO: We will put it back in the hopper to see that we look at it. I would say, Judge, if you read one of Mike Hatchell's briefs on the performance practice you wouldn't skip the points of error because it would be very clear exactly what the case was about.

JUSTICE HECHT: I think that's true.

CHAIRMAN BABCOCK: Speaking of Hatchell.

MR. HATCHELL: I would like to say that Brian Garner and I did a paper promoting the kind of issue statement that Justice Hecht is talking about.

Justice Hecht, part of the problems that some of the practitioners face is that members of the judiciary have expressed some displeasure with that, so I have written briefs in which I put in issue statements that backed up my points of error because I just don't know what my audience thinks.

JUSTICE HECHT: Well, that's another reason

to have something in the rule.

MR. HATCHELL: Right.

JUSTICE HECHT: Because change is hard, and it would be -- if there are appellate judges, and there probably are, who are looking for ways to dump the case because they didn't -- it doesn't look like they touched on all the bases in the statement of the issues then we ought to indicate that that is not an approved practice. So I think maybe we could do something, some good here, Bill.

CHAIRMAN BABCOCK: Okay. Bill, will you-all take that?

PROFESSOR DORSANEO: Put that back on our list, with the one we just talked about, among other things.

And 38.1, which is really 38, Stacy Obenhaus of the Gardere firm in Dallas pointed out that our briefing rules don't provide what is set forth in Federal Appellate Rule 28 with respect to adopting another party's brief by reference. Appellate lawyers -- I don't know. I'm trying to remember whether I've ever done it like that. I kind of doubt that I have ever adopted anybody else's statement by reference, but maybe I have -- you know, do that. And it would probably make sense to do it, but our rules don't indicate that you can do it. And the

committee believed that it would be a good idea to allow that and, in fact, believed that we ought to, subject to identifying some problem with doing so, embrace Federal Rules of Appellate Procedure 28(i), end of paren, not (h), okay, as indicated in the comment at the bottom of the page; and it simply says "In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs."

I guess, thinking about it, in our practice you can be both an appellant and an appellee; and, you know, presumably you could adopt, you know, by reference your own brief in your other capacity. And I don't know whether that needs to be stated in here, but the committee recommended to add this into our appellate rules, and the logical place seemed to be 38.10.

I haven't myself checked to see whether the Federal appellate rule has caused any problem. I had, you know, one of my research persons check, and he told me, for whatever that's worth -- and the professors will appreciate that comment -- that he didn't identify any difficulty with that and had run across several -- you know, several Federal cases which talked about it without having a problem with it. So...

JUSTICE HECHT: The only comment I have got on that is that we ought to have the same rule in our Court and probably with regard to motions or anything else that you could file, not just briefs, where you just say "Me, too." A lot of times in our Court when the other side agrees like to a motion for more time or a motion for more counsel argument, they submit a joint motion, but sometimes -- sometimes they don't, and you ought to be able to file a "Me, too" statement whenever you want to, it seems like to me, and maybe put it in Rule 9 instead of Rule 38 so it will apply to everything.

PROFESSOR DORSANEO: I wonder if you ought to be able to send them a bill if they adopt your language. Maybe we could put something in there about that, Judge.

I think 9, you know, we could do that, put it in -- you know, hold it for next time and put it in 9, fit it in there. It would make sense to me that it would be generally applicable and not just applicable in briefs. Chief Justice, what do you think about that?

HONORABLE JOHN CAYCE: Yeah.

CHAIRMAN BABCOCK: Okay. Let's do that. Let's refer it back, and we will come back next time. Bill, before we go on to the next one, we skipped over Rule 35.3, and there was a proposal made by Brenda Norton

PROFESSOR DORSANEO: Did we?

CHAIRMAN BABCOCK: Well, you just kind of said the committee didn't recommend a change.

PROFESSOR DORSANEO: Yeah.

CHAIRMAN BABCOCK: But we need to talk about it, and there may be some people that have thoughts about that.

PROFESSOR DORSANEO: Okay. Brenda Norton says what? "The rule should provide a specific, concrete procedure, 35.3, for contempt actions against clerks and court reporters who fail to obey the appellate court's orders." Now the rule just says "the appellate court may enter an order necessary to ensure the timely filing of the appellate record."

At our combined, you know, committee meeting, we thought that the appellate court ought to be given sufficient latitude to strong-arm the court reporter, I guess, and to spell it out wasn't a good thing.

MS. BARON: Right.

CHAIRMAN BABCOCK: Yeah. I think that's probably right, but does anybody disagree with that? The proposal was that there ought to be specific references to contempt and monetary sanctions and that type of thing. Anybody disagree with that?

Okay. Well, then the committee's recommendation I would say is unanimously adopted then. And that's with respect to Rule 35.3.

Okay. Sorry. That takes us back to where you were headed, I think, which is 38.6.

PROFESSOR DORSANEO: 38.6. Now, is this something that we've already done or what? I know we recommended and approved the suggestion already to take out the words in the second line of the first sentence "the appellants" and to make the word "brief," "briefs." And I think they kind of, you know, got lost in the clerical shuffle with the rules staff attorney changing and all that. Do we need to talk about this now or are we finished with this already?

CHAIRMAN BABCOCK: I don't think we did it last meeting.

PROFESSOR DORSANEO: We did it awhile back.

JUSTICE HECHT: We did it in May or March or sometime

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: All I need to know is should I put it in my report or this additional report to rules staff attorney or --

JUSTICE HECHT: Put it in the report, but we have got that sitting here waiting for these other

changes, but it wouldn't hurt to repeat.

PROFESSOR DORSANEO: And then Chief Justice John Cayce had some, you know, other suggestions concerning, you know, this subject area, and I don't know whether it's appropriate to go into now or just let them be something for further committee consideration.

HONORABLE JOHN CAYCE: You're talking about going to the Federal rule, about who files first is designated as appellant and separate briefing tracks. Is that something you want to take up now?

PROFESSOR DORSANEO: Well, maybe we ought to put it on our, you know, further agenda.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: All right. So that takes us to 43.2.

MR. HAMILTON: Are we going to vote on 38.1, or is that for further study?

CHAIRMAN BABCOCK: Further study.

PROFESSOR DORSANEO: Further study. Well, maybe we can vote on it. We can vote on the concept as to whether we should -- we kind of assumed that people were in favor of us adding that in and putting it in a different place.

CHAIRMAN BABCOCK: When Justice Hecht sort of asked us to look at it I think that ends the

discussion. We ought to look at it.

MR. ORSINGER: No vote required.

CHAIRMAN BABCOCK: No vote required.

PROFESSOR DORSANEO: We have voted.

CHAIRMAN BABCOCK: It was one-nothing.

PROFESSOR DORSANEO: Now, this next one, 43.2, is a -- I don't know whether we have language drafted here yet.

MS. BARON: No, we don't.

PROFESSOR DORSANEO: And maybe we just ought to put this in reserve, but the general issue would be to clarify the rules to indicate the courts of appeals have authority to vacate a trial court's judgment pursuant to a settlement, remand the case for rendition of judgment. There's some technical procedural issues here, and I think we just ought to wait until we get the language worked out.

MS. BARON: Right. I have also been working with the court attorney liaisons trying to gather practices of the courts of appeals on how they're handling it now, so I'm working on putting that together, which I think will help.

CHAIRMAN BABCOCK: So we're going to refer this back to subcommittee?

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: We're pretty sure we know what we want to do, but how to exactly get it done is tricky.

46.5, remittitur in civil cases, and this is a complex matter, too, but the basic idea is that it's not clear how you would handle a particular problem involving a voluntary remittitur in a court of appeals.

The current rule says that "If the court of appeals reverses a trial court's judgment because of a legal error that affects only" -- not "party" -- "part of the damages, the affected party may within 15 days voluntarily remit the amount that the court of appeals determined should not have been awarded by the judgment."

It doesn't say how you do that. Okay. All right. And this is kind of technical, but it -- even for seasoned appellate lawyers. It seemed to the committee that the rule would be much clearer if it went on to say "by including a request for acceptance of such remittitur and a motion for rehearing and requesting an affirmance of the trial court's judgment," and that that would avoid questions as to how does this relate to rehearing practice, how do you accomplish this objective that frankly took us about 25 minutes to discuss among ourselves as to, well, how does this work, how do we do

this. And this is what we came up with as, you know, unnecessary but helpful language saying how this voluntary remittitur practice should be conducted.

So the motion is to amend the first sentence by adding "by including a request for acceptance of such a remittitur in a motion for rehearing and requesting an affirmance of a trial court's judgment."

CHAIRMAN BABCOCK: Any discussion about this?

MR. EDWARDS: Yeah. Why are we creating a whole new motion and more paper? Why don't we just file one document that says the party accepts the remittitur, period? Just say "by filing a document that accepts the remittitur with the court of appeals."

PROFESSOR DORSANEO: Well, it's how you would --

MR. EDWARDS: Why do you need a motion?

PROFESSOR DORSANEO: Well, you need something anyway. Okay.

MR. EDWARDS: Well, but it's simpler --

PROFESSOR DORSANEO: But it's not accepting a remittitur. It's -- okay. Court of appeals reverses, and we have an error that affects part of the damages. I'm not saying that the court has suggested a remittitur, but you want to avoid -- you want to avoid reversal.

Okay. So you're going to voluntarily remit to cure the problem. All right. Voluntarily remit to cure the problem. You know, how do you do that and how does that relate to the motion for rehearing practice?

MS. BARON: Right.

PROFESSOR DORSANEO: And our suggestion was it would be helpful to tell you that you -- that since you're going to file a motion for rehearing anyway, that you can put your voluntary remittitur request in the motion for rehearing along with your other complaints and request an affirmance of the trial court's judgment.

Frankly, it's technical enough that it's, you know, a little bit hazy in my mind why we end up saying "and requesting an affirmance of the trial court's judgment" at the end there.

MS. BARON: Wasn't the issue that we were concerned about is that by tendering the remittitur you lost your right to complain on rehearing of the court's decision that underlies the need for the remittitur in the first place?

PROFESSOR DORSANEO: I think that was part of it, but the idea was how does this practice fit together?

MS. BARON: Right. And the attempt was to try and make them work together where the remittitur did

not forfeit the rehearing right. Now, whether we have accomplished that with this language has become less clear to me right now.

PROFESSOR DORSANEO: Well, I am troubled a little bit by "and requesting an affirmance of the trial court's judgment."

MS. BARON: Right.

JUSTICE HECHT: It sounds like that's the only way to do it.

PROFESSOR DORSANEO: Huh?

JUSTICE HECHT: It sounds like that's the only way to do it, and maybe you're making it worse rather than better.

PROFESSOR DORSANEO: I don't think there is anything wrong with including it in the motion for rehearing, though.

JUSTICE HECHT: No.

CHAIRMAN BABCOCK: Judge Brown.

HONORABLE HARVEY BROWN: Why couldn't we say something like "by filing a motion for rehearing which includes in the alternative," because I do think that's what you're really talking about, is --

PROFESSOR DORSANEO: I agree.

HONORABLE HARVEY BROWN: -- if you file a motion for rehearing in the alternative, and the last

paragraph is going to be "if we lose everything else, we hereby remit and request you affirm." Because, otherwise, putting it in the motion for rehearing sounds like it's required, and I do think it's an alternative.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I'm a little bit concerned about affirming the trial court's judgment after a remittitur. It seems to me what should happen is a mandate should come out of the court of appeals directing the trial court to modify his judgment, downwards and remit it now. So you're really modifying and affirming, not affirming, because when writ of execution is issued the district clerk is going to issue on the trial court's judgment unless it got modified, and then somebody is going to be trying to raise some kind of contractual argument about the remittitur that's heard on appeal, so I would recommend that we say "requesting that the trial court judgment be affirmed as modified after remittitur."

PROFESSOR DORSANEO: Well, I'm happy with the language "by including a request for acceptance of such a remittitur in a motion for rehearing," period. Whether it says anything more about alternative requests for relief, modified judgments, affirmance, really would be helpful, but I don't think that's absolutely essential to advancing the ball to at least the point of saying you

can do this in the motion for rehearing.

You want to send this back? We'll fiddle with this some more, too.

JUSTICE HECHT: Let them fiddle some more.

MR. ORSINGER: Can you accept -- or can you tender the remittitur without requesting a rehearing, or do you have to request a rehearing? What if you're just happy to take it and leave? Can you do that independently of a motion for rehearing?

JUSTICE HECHT: Sure.

MS. BARON: Sure.

MR. ORSINGER: So this rule wouldn't require you to do it in a motion for rehearing. It would just permit you to do it that way.

JUSTICE HECHT: But it suggests that -- the way it's worded seems to me to suggest that you ought to do it or maybe have to do it, and by making that the only alternative it looks exclusive, and I don't think you want to do that.

MR. ORSINGER: Yeah. You ought to be able to say, "I'm going to live with this result. It's over."

PROFESSOR DORSANEO: I guess the voluntary thing not called a motion for rehearing would be one.

JUSTICE HECHT: Right.

CHAIRMAN BABCOCK: Okay. You guys talk

about it some more. Talk among yourselves.

PROFESSOR DORSANEO: Okay. These are fun things to talk about.

MR. ORSINGER: Unfortunately, we enjoy these kind of things.

CHAIRMAN BABCOCK: The whole right side of the room is trial talk.

PROFESSOR DORSANEO: You will be intensely interested in what that language says if you have this problem and can't figure out what to do. I guarantee you.

CHAIRMAN BABCOCK: Yeah. Okay. What about the other rules that I have, 49.10, 52.7? Are we talking about those today or not? They were in your report last time and we didn't talk about them.

PROFESSOR DORSANEO: Where?

MS. BARON: 49.10?

CHAIRMAN BABCOCK: 49.10, length of motion for rehearing and response.

PROFESSOR DORSANEO: Were they in there?

CHAIRMAN BABCOCK: Yes. They were last time. And this was --

PROFESSOR DORSANEO: Oh, yes.

CHAIRMAN BABCOCK: This was a request by Pam Baron.

PROFESSOR DORSANEO: Why don't we let Pam

talk about that one.

MS. BARON: Well, this tries to parallel the page limitations from the briefing rules in the motion for rehearing context because right now motions for rehearing in both the court of appeals and the Supreme Court are limited to 15 pages, but there is no exclusion for pages that wouldn't count if they were included in a brief, including things like your certificate of service or your index of authorities; and I've always been concerned about whether I have to count those pages in getting to 15 or not; and they can make a significant intrusion on the length of your motion, which I think the courts probably prefer; but as a practitioner, I need the space; and I think the rule should be parallel.

CHAIRMAN BABCOCK: Justice Hecht, what's your comment on that?

JUSTICE HECHT: I agree. I agree with Pam.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: And what rule does that pertain to? It's just not more than one rule? Okay.

MS. BARON: Yeah. It's 49.10 in the court of appeals and then it would be in the Supreme Court 64.6, and basically it would exclude table of contents, index of authorities, issues presented, signature, proof of service, and the appendix, if any. So those would be

excluded from the page limits.

CHAIRMAN BABCOCK: Seems fairly noncontroversial. Bill, is that your hand up, or are you just resting?

MR. EDWARDS: I'm resting. When my hand is up you'll know it.

CHAIRMAN BABCOCK: Okay. That seems -- that doesn't seem to be very controversial. Anybody have any thoughts about that? Move adoption? Anybody opposed?

Pam's proposal to amend Rule 49.10 and 64.6 is passed unanimously.

Okay. I had, Bill, last time a recommendation on Rule 52.7.

PROFESSOR DORSANEO: Well; I thought we took care of that when we made a change to 9.5, but what we decided to do in 9.5, we talked about earlier, is to make clear that in an original proceeding you don't have to serve -- oh, pardon me, that in an original proceeding the rule is different from an ordinary appeal, that you do need to serve a copy of the record, okay, in an original proceeding. You need not serve a copy of the record in an appeal.

Now, over here in 52.7, there is -- which is the original proceeding rule, there is a section talking about the record, and it's conceivable we could amend the

rule over here to deal, you know, with this problem. I think, myself, that since we dealt with it in 9.5 we don't need to.

The combined committee report says "alternatively" -- and I don't know that this was strictly in the alternative now or "alternatively" meaning "in addition" -- amend Rule 52.7 to require the relator to file an additional copy or copies of the record so that other parties can have access to the record without interfering with the work of the appellate court," and I do think reading it that's strictly in the alternative rather than alternatively in addition. So I don't think we have anything to do with 52.7 unless you just want to repeat what's in 9.5, which I wouldn't recommend.

CHAIRMAN BABCOCK: Okay. Everybody okay with that? Okay. Anybody opposed? Okay. So that recommendation will pass unanimously.

PROFESSOR DORSANEO: 55.2, a clerical correction needs to be made. The briefs on the merits rule tracks the petition for review rule when it says "the petition must state," and it should say "the brief must state," and that just is something that needs to be nunc pro tunc.

CHAIRMAN BABCOCK: Anybody opposed? Okay. That will pass unanimously.

PROFESSOR DORSANEO: Am I through?
CHAIRMAN BABCOCK: No.
PROFESSOR DORSANEO: What, what, what?
CHAIRMAN BABCOCK: 64.6.
MS. BARON: We just did that
PROFESSOR DORSANEO: We just did that.
CHAIRMAN BABCOCK: What about 55.2? I thought that's what we just did, 55.2.
MS. BARON: This was the same motion for hearing change that we approved when we approved the one applicable to --
CHAIRMAN BABCOCK: Oh, okay. All right. I'm with you. That means that we have been --
HONORABLE HARVEY BROWN: Chip? Chip?
CHAIRMAN BABCOCK: Yes, Judge Brown.
HONORABLE HARVEY BROWN: Before we finish the TRAP rules I have a question about did we make a definitive decision about what to do about 47.7? I know we have this new TRAP -- these changes in TRAP 47, but 47.7 is what to do about existing unpublished opinions, and I really do think it's a problem that we need to address, and I thought we had talked about it but really didn't decide anything on it last meeting and --
CHAIRMAN BABCOCK: Well, my understanding of what has occurred is the rule that we approved, which was

47.7, was voted on at our last meeting, 47.7, and by a vote of 25 to nothing we voted to delete 47.7.

HONORABLE HARVEY BROWN: So there's going to be no rule on what to do about prior unpublished opinions?

CHAIRMAN BABCOCK: That was the vote of our group as far as 47.7 deals with it.

HONORABLE HARVEY BROWN: I'm sorry. Just to make sure I'm understanding --

CHAIRMAN BABCOCK: Yeah. And the discussion, Judge Brown, I think at the last meeting, which was extensive, was I think there was concern in light of the Eighth Circuit opinion --

HONORABLE HARVEY BROWN: Right.

CHAIRMAN BABCOCK: -- which said that it may be unconstitutional to have such a rule that we were -- there was a significant -- in fact, everybody, I guess, felt that we shouldn't try to get into that fray with our proposed rule.

HONORABLE HARVEY BROWN: But does that mean we are recommending deletion of the former rule?

CHAIRMAN BABCOCK: Yes. We are recommending deletion of 47.7.

HONORABLE HARVEY BROWN: Thank you. I'm sorry.

CHAIRMAN BABCOCK: That's okay. No, not at

all. Can we take a break? 15 minutes. No?

PROFESSOR CARLSON: Can we come back to 47 if we --

CHAIRMAN BABCOCK: Let's finish up 47 now if we're going to -- your break is being held hostage by Professor Carlson

PROFESSOR CARLSON: Brevity will be observed. One of my colleagues raised the question of whether or not opinions that --

HONORABLE HARVEY BROWN: Well, Chip -- I'm sorry. I interrupted.

CHAIRMAN BABCOCK: Hang on.

PROFESSOR CARLSON: Whether opinions that are issued in parental notification cases would now fall under the published when current parent notification Rule 3.3(e) requires that they be -- from the court of appeals says that they be confidentially transmitted.

CHAIRMAN BABCOCK: Now, 47 does not overrule -- does not override that, I do not believe.

PROFESSOR CARLSON: Okay.

HONORABLE SARAH DUNCAN: Well, have we discussed -- Bill sent out a letter questioning whether we wanted to delete the first two sentences of 47.5 and part of 47.6. Have we discussed that?

PROFESSOR DORSANEO: I assumed that nobody

wanted to talk about it.

HONORABLE SARAH DUNCAN: I want to talk about it.

CHAIRMAN BABCOCK: Well, but the rule has been -- we could talk about whatever we want to, but the Rule 47 has already been transmitted to the Court. We can pass along additional comments if you want. What do you want to talk about?

HONORABLE SARAH DUNCAN: Oh, it's already been transmitted to the Court?

CHAIRMAN BABCOCK: Yeah.

MR. HAMILTON: That was 47.1 through 4, right?

CHAIRMAN BABCOCK: That's what we -- that's the new rule that was presented and sent to the Court, which recommended deletion of other rules.

HONORABLE JOHN CAYCE: Well, what was the thought behind -- Chip -- Mr. Chairman, what was the thought behind omitting 47.5? It doesn't seem to --

CHAIRMAN BABCOCK: If I can look at it and --

HONORABLE JOHN CAYCE: Which simply addresses which justices on a more than three-judge court may participate in an opinion and so forth. It seems that that should be preserved.

CHAIRMAN BABCOCK: Well, I think it's picked up somewhere in the rule that we transmitted. Hang on.

HONORABLE JOHN CAYCE: I don't see it in the new rule book, but I may have an old draft.

HONORABLE SARAH DUNCAN: No, you're right.

CHAIRMAN BABCOCK: I know that there is a provision here, 47.4(e), which picks up --

HONORABLE SARAH DUNCAN: No, no. That's --

CHAIRMAN BABCOCK: -- memorandum opinion.

HONORABLE JOHN CAYCE: Well, that really only goes as to whether an opinion should or should not be a memorandum opinion but not as to what justices may participate. I would urge that that be put back in. It just -- I can't think of a reason to take that out.

JUSTICE HECHT: The first two sentences, John? The first two sentences?

HONORABLE JOHN CAYCE: Uh-huh. Yes. 47.5.

JUSTICE HECHT: 47.5. But we don't need the last two sentences.

HONORABLE JOHN CAYCE: Correct. I think that must have just been inadvertent.

JUSTICE HECHT: And we don't need 47.6.

HONORABLE SARAH DUNCAN: Why not?

HONORABLE JOHN CAYCE: I'm not sure why not. I agree with Sarah. I would prefer that that right be

left in for the --

JUSTICE HECHT: Regarding the signing of publication?

HONORABLE SARAH DUNCAN: "Sitting en banc the court may modify or overrule a panel's decision."

CHAIRMAN BABCOCK: Well, we did vote on that.

JUSTICE HECHT: Regarding publication?

CHAIRMAN BABCOCK: Regarding publication. There is not going to be any decisions on publication now.

HONORABLE JOHN CAYCE: Okay. Yeah. That only pertains to whether it's signed or per curium.

HONORABLE SARAH DUNCAN: But signed is still significant.

HONORABLE JOHN CAYCE: Signed or published. Yeah.

HONORABLE SARAH DUNCAN: The one other question I would raise that Bill didn't raise but when I got home I started looking at, just the language of 47.3, "All opinions of the courts of appeals must be made available to the public, including public reporting services, print, or electronic." I don't understand what that means when I really sit down and look at it.

Are we saying that -- obviously we're saying the opinions must be made available to the public; and

we're saying that, I think, they must be provided to public reporting services, either print or electronic; and I thought what we agreed was that all of the opinions were going to be electronically available.

MR. YELENOSKY: Well --

CHAIRMAN BABCOCK: Well, I think that that followed a lengthy discussion between West and normal traditional reporting services on the one hand and then like there was a big discussion about the State Bar was going to try to put everything on-line. I think that was the distinction, at least in my mind, that I recall we discussed.

HONORABLE JOHN CAYCE: Chip, I wasn't here at the last meeting and several prior to that as well, and I don't want to confuse this issue, but getting back to 47.6, and to answer Justice Hecht's question, it provides that "sitting en banc the court may modify or overrule a panel's decision regarding the signing or publication of the panel's opinion," and I would think that what we'd want to do would be to preserve that rule as well, but we're not talking about publication any longer. We're talking about --

CHAIRMAN BABCOCK: Signing.

HONORABLE JOHN CAYCE: -- the designation of it being a memorandum opinion versus a regular opinion.

HONORABLE SARAH DUNCAN: Or per curium rather than memorandum.

HONORABLE JOHN CAYCE: Well, the signing I think takes care of the per curium verses signed by an individual judge.

CHAIRMAN BABCOCK: I can see your point on signing and publication. There's not going to be any -- I mean, there's not a DNP versus P anymore

HONORABLE SARAH DUNCAN: But there's memorandum versus nonmemorandum.

HONORABLE JOHN CAYCE: Right. And I'm just suggesting perhaps you would want to preserve the right of the en banc court to -- well, it's not preserving the right because they don't have it yet, but allow the en banc court the opportunity to decide whether this opinion should be designated as a memorandum opinion, which may or may not get into the books, versus a regular opinion. I think that was probably the intent of that rule at the time it was -- or at least it's within the spirit of the intent.

CHAIRMAN BABCOCK: The reason we voted to delete 47.6 was because of the publication issue.

MR. DUGGINS: That's right.

CHAIRMAN BABCOCK: That's why we did it.

HONORABLE JOHN CAYCE: Yeah. It has the

word "publication" in it --

CHAIRMAN BABCOCK: Right.

HONORABLE JOHN CAYCE: -- but I'm talking about the spirit of it right now in retaining it to keep the spirit of what it gives the en banc court to do.

CHAIRMAN BABCOCK: Yeah. All right. Well, we'll -- and I think you raised a good point, too, about 47.5, the first two sentences, because that really doesn't have anything to do with publication, and I don't see that we took a vote on that, so that may have been inadvertently dropped out.

MR. YELENOSKY: Chip?

CHAIRMAN BABCOCK: So we'll look at that. Yeah, Steve.

MR. YELENOSKY: Well, I'm not hearing well today I guess or maybe the room is so much bigger, but if I heard you correctly, you were saying that there still needs to be some way to change the original decision as the designation of a memorandum opinion or not.

HONORABLE JOHN CAYCE: As to whether it fits those criteria --

MR. YELENOSKY: Right.

HONORABLE JOHN CAYCE: -- that would take it out of the memorandum opinion rule.

MR. YELENOSKY: And I guess that can be, but

the significance of that change is pretty much diminished by the fact that either way it's going to be published and either way it's citable, and so all I understood the designation of memorandum opinion could be was shorthand notice to lawyers that "We don't think this is all that significant," and so changing the designation may just change that signal, but either way it's available, either way it's citable.

HONORABLE JOHN CAYCE: It's available, but I think there's still a question of whether West would publish what we might designate as memorandum opinions.

MR. YELENOSKY: Oh.

HONORABLE JOHN CAYCE: And that would be -- and we don't know what West will do on that. Perhaps they will, but --

MR. YELENOSKY: I was just assuming what Bill Dorsaneo said, taking his word for it that they would publish everything.

PROFESSOR DORSANEO: I don't know what West will do, but I know LEXIS Publishing will publish everything.

CHAIRMAN BABCOCK: Somebody is going to publish everything. It may not be West, but it may be an on-line service, but somebody will publish it. It will be available.

HONORABLE SARAH DUNCAN: Well, I think the way the rule is currently written, 47.3, is that if a court could puts its memorandum decisions on the court's website, that's all they need to do.

CHAIRMAN BABCOCK: That's probably right.

MR. YELENOSKY: And you're referring --

CHAIRMAN BABCOCK: I mean, how the courts make their opinions available is up to the courts, it seems to me.

HONORABLE SARAH DUNCAN: I don't think it should be. I mean, I don't think it should be enough that a court puts its memorandum decisions on its website, because then they are not going to be searchable for everybody that's got Westlaw and LEXIS and that those are the searches that they run. It would only be searchable for an internet search.

MR. YELENOSKY: Well, it has to be available through reporting services. The reporting services will put it in a format that is searchable.

HONORABLE SARAH DUNCAN: We are not requiring them to give it to the reporting services

MR. YELENOSKY: They can pull it off the website.

CHAIRMAN BABCOCK: Well, this says it must be made available to the public, including --

HONORABLE SARAH DUNCAN: They are available to the public now.

CHAIRMAN BABCOCK: Right. So this doesn't change that, does it?

PROFESSOR DORSANEO: This really raises another -- you know, this raises an issue I was talking about earlier. Right now the way information is processed, you know, to a certain extent people will look at something other than Southwest 2d or 3d or certain publications that are written, but generally speaking, if it's not in Southwest 3d, it is just out there and not treated as --

HONORABLE JOHN CAYCE: With the same dignity.

PROFESSOR DORSANEO: At all. It's just out there. Okay.

CHAIRMAN BABCOCK: It's not treated with any dignity because the rule says you can't cite it.

HONORABLE JOHN CAYCE: Not right now.

PROFESSOR DORSANEO: And who gets it, where it goes, and all that is pretty important stuff now. Saying that they can find it if they look for it is probably not adequate.

CHAIRMAN BABCOCK: Okay. Well, we are going to take a break. We'll deal with these two issues that

have been brought up. I think it's a good point on the first two sentences of 47.5.

On 47.6, I think we can make a change to say "regarding the signing or designation as a memorandum opinion or not of the panel's opinion or opinions." I kind of agree with Bill on that. I don't think it's a practical matter that's likely to have a big --

HONORABLE SARAH DUNCAN: That's very significant.

CHAIRMAN BABCOCK: As a practical matter.

HONORABLE SARAH DUNCAN: As a practical matter that is very significant.

CHAIRMAN BABCOCK: I doubt it will be.

HONORABLE JOHN CAYCE: It may or may not be. Who knows.

(Recess from 10:49 a.m. to 11:10 a.m.)

CHAIRMAN BABCOCK: We are finally getting to finality; and Justice Duncan, recently re-elected Justice Duncan, will take us through that.

HONORABLE SARAH DUNCAN: For those of you who weren't here the Saturday of the last meeting, you should say thanks because it seems whenever we start talking about final judgments it's a process of trying to figure out what the law is in any given situation, and, of course, no one agrees. And, as Mike Hatchell said, how do

we codify things that we really don't understand what they mean in all the circumstances.

What I would like to do this morning is ask Mike to one more time present why our subcommittee virtually unanimously believes there needs to be a mandatory, exclusive final judgment clause for -- in order for a judgment or order to be final for purposes of appeal and then vote on that one more time; and if we then -- if that is voted down then I would like to proceed; and you might want to get a copy of what the Supreme Court Advisory Committee has already sent to the Court, a new Rule 300. But I'd like to start with, if he can, Mike Hatchell trying to convince you-all that this really is what we need to do.

MR. HATCHELL: I don't know that I can do that because my thoughts are very brief. The committee was in favor of a bright line rule for the simple reason that what has happened since Mafrige vs. Ross is a proliferation of great confusion and, unfortunately, the proliferation of great potential for people to lose their appellate rights; and the difficulty you have when you do anything short of a bright line rule is you do very little more than codify the confusion.

I would just as soon leave it as it is now, but under the present circumstances what we are trying to

do is I guess very much what we're trying to do with the Florida vote recount. You're looking at a piece of paper and trying to determine the, quote, "overall intent" of the judge; and unless and until you get to the point where you can have language that we can look at and know for sure that the judge was certain, appellate rights and various significant rights of judgments are just never going to be settled.

Actually I think it was Wallace Jefferson's comment that made me -- that even re-affirmed my commitment last time because when you're talking about simply codifying Mafrige I think Wallace's point was people are going to continue to put into judgments for 20, 25, 30 years that all relief not granted is denied, and so we're back to the same problem. If you get a rule that makes that language actually turn and make the judgment defeat itself you're going to have just really chaos for years and years to come, so I just would like the committee to consider either doing nothing or doing a bright line rule, as the subcommittee proposed.

CHAIRMAN BABCOCK: Okay. Now, the bright line rule that the subcommittee proposed which we discussed at our last meeting was what?

MR. HATCHELL: Sarah probably has that there.

HONORABLE SARAH DUNCAN: That to be appealable a judgment or order would have to contain some magic language, and I don't think anyone on the subcommittee is wed to any particular language other than "This is a final appealable judgment or order."

CHAIRMAN BABCOCK: The language that I thought was proposed was -- did you have a sentence, didn't you, last time we met?

HONORABLE SARAH DUNCAN: We did.

MR. WATSON: Didn't Scott e-mail us all a --

HONORABLE SARAH DUNCAN: That's an alternative.

CHAIRMAN BABCOCK: What was the sentence?

HONORABLE SARAH DUNCAN: What we proposed last time is this: "This is a final appealable order or judgment. Unless expressly granted by signed order, any relief sought in this cause by any party or claimant is denied."

As I say, I don't think anyone on the subcommittee is wed to that particular language, but I think we need to have a discussion and an up or down vote on whether there should be some magic words that would give sufficient notice to someone that this is a final appealable judgment or order or not.

CHAIRMAN BABCOCK: Justice Hecht.

JUSTICE HECHT: And one of the problems on the other side is that if the language is missing, even though it was a final judgment, it won't be final; and it will be sitting there in the court's jacket ready for somebody two or three or four years later to come up and say, "Well, I have been thinking about this now. I decided if you will go ahead and enter a final judgment I will take my appeal," which is the problem that the Federal courts have encountered.

I may have mentioned this last time, but Rule 58 in the Federal rules doesn't have magic language, but it has a magic fork in that it has to be -- the judgment has to be on a separate sheet of paper, and there has to be an entry of judgment by the clerk on the civil docket, and if you don't have both of those under Rule 58, you don't have a final judgment. And the Federal courts right now have just worked through a concern that there are all these nonfinal judgments sitting out there in cases that people thought were final that some party shows up years later and says, "No, it's not final, and as soon as you make it final we're going to appeal."

So they have recommended going the other way and saying that if you don't have a separate sheet of paper then the judgment is nevertheless final 60 days after the clerk makes an entry in the civil docket, which

I think is -- I can't imagine that that's a good rule because it seems to me that the lawyers will have to check the clerk's docket about every other day to make sure that some guy has not gone nuts and entered a final judgment on a civil docket, but nevertheless, that's their cure.

Now, one thing I had hoped is that the goal of some judges, which is to keep the numbers within respectable bounds, would help police this problem, because if it doesn't have the magic language then the court won't count it in the disposed column, and it will be sitting there, and the judge's numbers will start going up, and he will wonder why, and at some point he will want to go take a look and see what's the problem here and will see that there's a bunch of orders that the clerk says, "Well, these aren't final because they don't have the language in there." Maybe that would solve that problem, but I don't know.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, I hesitate to get into all of this. We did spend a lot of time talking about this and coming up with language in the report that was sent to the Court in 1996 that considers all of these issues and, you know, not perfect, but, you know, this is a done deal in, you know, many respects. Once we start talking about this then, you know, be prepared to be here

all day tomorrow.

HONORABLE SARAH DUNCAN: If I can just respond to that.

CHAIRMAN BABCOCK: Yes, Sarah.

HONORABLE SARAH DUNCAN: What was put on my subcommittee's agenda was to consider a proposal by Doug Norman for a final judgment clause in the wake of the post-Mafrige confusion.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: On the policy question, everyone needs to remember that the people sitting around the table are engaged in a lot of multi-party litigation with multi-claims that can be disposed of in a lot of pretrial ways; but half of our lawsuits in Texas are divorces or related family break-ups, which don't have multiple parties in them; and generally the claims, everyone understands that they have got to mention the kids, mention the property, and mention the dissolution of marital bonds.

Now, if we impose a rule across the board that your judgment is not final and appealable unless it's got this magic language and the 50 percent of the cases don't have or are at risk that the family lawyers will not write those clauses in, it's going to cause a lot of trouble. And my assessment of it is, is that it's likely

to be that category of lawyer, the guy that's making $700 off of a whole case or $500 off of a whole case who doesn't ever do any CLE and who doesn't have very much control over what the legal assistants are writing into these judgments.

And so I can see after a few years what's going to happen is a divorce decree is going to be signed. It's not going to have the right language. It's not going to be final. There's going to be a problem with child support or kids, and somebody is going to say, "You don't have a final judgment, so, you know, I'm going to file a motion for new trial."

You can't really file a motion to modify yet because you have got to appeal the judgment first or at least you have got to get a corrected judgment entered and then it goes final and then your modification is from the date that the judgment went final and not the date it was originally granted five years ago. What's going to happen with all the marital property rights when these people have remarried and then let's say for some reason a judge grants a new trial? Then you have got a punitive spouse. You have two different communities that are overlapping with each other.

I think that the potential for mischief on that scale outweighs the mischief that we're all dealing

with of multi-party commercial lawsuits, and if the choice was to make -- to run the risk that a lot of our family law judgments are not going to become final until there is a problem and then somebody goes and undoes it several years later will be worse off. Maybe those around this table will not be worse off, but the people in Texas will be worse off.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, Judge Calvert -- I'm sure you discussed the Aldridge case last time, and he tried to come up with some magic language, you know, the so-called Mother Hubbard or clean-up clause, "All relief not expressly granted is denied." That was a terrible suggestion, okay, because it has caused a lot of trouble, okay, because that's good language unless you don't mean it. Okay. Which is as often true as not. Okay? So if we're going to have some kind of language I wouldn't want it to be that because I wouldn't want it to mean that. Okay?

Now, to just say to put "final judgment" on it and that means it's final for appeal purposes but it doesn't necessarily dispose of claims by denying relief, well, that would be a more simple matter. Okay. Say "final," okay, just put "final" on it without saying "all relief is denied." That would solve -- you know, that

would solve the problem that the Aldridge presumption tries to accomplish, okay, that's different from the suggested language in the Aldridge case, ill-considered language, I submit, of a former chief justice.

I think these two things are completely separate. You know, to put in there language and to suggest that it should be put in there, "All relief not granted is denied," a lot of judges will put that on there or lawyers will put it on there when they don't mean for that to happen. Okay? And it happens all the time now because it's suggested as an easy fix, okay, as an easy fix. It's mostly just a stupid move because it's not necessary when it's not needed, and when you don't mean that it causes tremendous trouble. It causes tremendous trouble.

Some other language just simply says it's final, okay, but that doesn't indicate that all the claims have been denied, you know, would do the equivalent for conventional trials as the Aldridge presumption. Whether you want to extend that to summary judgment cases, you know, is an interesting matter. I guess you would end up having the appeals then of all partial summary judgments, you know, being permitted if they were labeled as final, but the remainder of the case would still -- you know, still be vital in the trial court. Is that desirable?

You know, probably more desirable than the Aldridge presumption, but kind of messes with our final judgment rule.

Again, we talked about all of these things in '96. Judge Guittard suggested language that was based on his experience over a long period of years. We had a lot of trouble with it. We came up with proposed language that doesn't quite deal with this issue that your committee is talking about, but it's very closely related to it, and I would suggest we at least look back at that as a preliminary matter.

CHAIRMAN BABCOCK: Well, we have a handout of all that material that everybody should have. I thought that, Sarah, what you were trying to get was a sense of this group of whether there should be some language that when it's placed in an order creates a final appealable judgment. Isn't that what you're trying to do?

HONORABLE SARAH DUNCAN: That's right. I think we all -- I imagine we all completely agree with Bill that the Mother Hubbard language is very confusing for a whole lot of people because it's quite clear what it means and it is used where it's not intended to do what the Mother Hubbard clause does.

JUSTICE HECHT: Well, to put a finer point on it, the Mother Hubbard clause could be useful in --

even in ruling on clearly interlocutory motions, because if the judge only grants part of the relief even requested in a motion in limine, he might say, "I've got to grant 1, 2, 3, 4 and all the relief not granted is otherwise denied," and all he means is by reference to the motion itself

PROFESSOR DORSANEO: Right

JUSTICE HECHT: Not to the whole case.

PROFESSOR DORSANEO: That was the former Dallas court's view of the Mother Hubbard clause.

JUSTICE HECHT: Yeah. But it is certainly very confusing whether that's what he means or whether he means something more.

HONORABLE SARAH DUNCAN: Right. And I think the subcommittee's only point -- as I say, we're not wed to language that either does include Mother Hubbard language or doesn't. It's more the first sentence that gives everyone, all of the parties and the trial judge, notice that this is a final appealable judgment because the Mother Hubbard clause doesn't do that.

CHAIRMAN BABCOCK: Yeah. Let's see. Buddy and then Skip and then Frank.

MR. LOW: Let me ask Sarah, what is the legal effect, say you have got multi-party litigation, number of issues, and the judge puts in there all of them

have been considered except maybe one or two. Say my client -- judge puts in there, you know, "All relief to all parties not herein granted is denied," and I don't do anything. I mean, what do I have to do? I say, "Well, that didn't dispose of me." What is the effect of that language? How do the courts treat that language? Do they say, "Well, boy, you should have gotten it corrected because you're out"? How do the courts treat such language?

HONORABLE SARAH DUNCAN: It depends on what court you're in, and it depends on what the Supreme Court rules that it means.

MR. LOW: Because, to me, I mean, you know, they don't have to say they ruled, you're out. You know, if they say, "Well, everything you've presented I overruled it, and you've got no relief coming, and it's over" then it looks like to me that's final.

CHAIRMAN BABCOCK: Skip then Frank then Wallace.

MR. WATSON: I, too, was concerned about the problems that Richard and Justice Hecht have talked about. Obviously I think we can distinguish between a judgment that is final for purposes of enforcement and the term of art that we have developed of "final" for purposes of appeal, and I would be more comfortable to

just simply get rid of all of the problems that Richard is talking about of just simply saying that a judgment is not appealable unless it says X and get rid of the word "final" to avoid all of these machinations of people having ten wives and lots of illegitimate children, and it's a valid concern. If we just get rid of the concept, the term of art that we have developed of finality for purposes of appeal, and just simply say it's not appealable unless.

Second, the Rule 58 problem in Federal court is bizarre, and it's an example of how you can literally flip to the other end of the spectrum in trying to avoid a problem. As I understand it, initially the concern was that the clerks at the courts of appeals didn't like having to flip through all of these pages of opinions to try to see if, in fact, this was an appealable order, what we call a final judgment. So they came up with the change in the rule that just says what you're appealing from is one line that has magic words on it, you know, "judgment granted," "judgment denied," "eleven kisses judge so-and-so," you know, that that's what they wanted to see; and what happened was that people were still writing their opinions saying in the opinions, "Therefore, all relief requested is denied, see ya, judge so-and-so," and that's being kicked back by all the circuits saying "This is not

appealable."

Well, I mean, obviously you trot over with the one-line order and get it signed unless you're in one West Texas court where what you hear is "I've signed it. I don't care what the rule says, and the next one I'm signing is imposing sanctions," which creates some interesting coverage problems, but what they've decided to do is exactly what Judge Hecht has said, is go all the way back to the land mine of having it be based on clerk's entries instead of docket entries instead of what most of us think is just go back to the old thing and say, "I'm sorry if you have to dig through the last page of the opinion to see if the magic language is on that page instead of on a separate page," but that's good enough. You know, you can do it that way. Don't kick it out because he says why judgment is granted or denied, and I -- my suggestion is we just simply say, "For purposes of appeal it's not appealable unless it says X," and that's all there is to it.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Maybe we could sort out the issues here. I think we're talking about two different things. First of all, we all are fairly familiar with the Mother Hubbard problem. We know the purpose of the Mother Hubbard clause is to dispose of all claims and issues and

thereby make the judgment final. The problem is it's unclear, and we talked last time -- and I think were in general agreement -- about coming up with some better language. We call it a final judgment clause that does what the Mother Hubbard clause does but spells it out so people can't mistake it and put it in orders unintentionally or inadvertently when it shouldn't go in there.

CHAIRMAN BABCOCK: Can I interrupt you for two seconds? For those of you not here last time Frank made a motion in that regard and that -- the committee voted to give its sense that there should be some language when placed in an order that creates a final appealable judgment, the subcommittee to go back and tinker with the language, and that passed 20 to 1.

MR. GILSTRAP: And I think that's where we are, but what we have now is the question of whether or not that language not only should be sufficient but whether it should also be necessary.

PROFESSOR DORSANEO: There's the difference.

MR. GILSTRAP: In other words, if it's not in there, it's not a final appealable judgment, and I think that's the issue we have got to focus on now, and I think that's the issue that the subcommittee has brought back to the floor. That's what Justice Hecht was speaking

to with regard to Rule 58, and I think that probably it gets us off track on this particular item to go out and then talk about what a Mother Hubbard clause might say. I think that discussion comes next after we dispose of this issue, is this necessary language.

CHAIRMAN BABCOCK: Yeah. Wallace, did you still want to say something?

MR. JEFFERSON: Yeah. Just to answer Buddy's question and maybe follow up on that, one of the problems is going to be if in the future that Mother Hubbard language is in the case that Buddy was talking about; and if it still is, then I think Buddy has a problem, Buddy's client has a problem because that judgment is just gone. So we can say something I think to at least aid in letting litigants know when a judgment is final by putting some magical phrase in there, but we are still going to have to deal I think with the Mafrige problem. It's still going to be out there no matter what we do.

MR. GILSTRAP: Quick response on that. I think we all agree that if this language becomes necessary that it's got to be prospective only. We can't go back and unfinal judgments so to speak, so I think to address that I don't think anybody is suggesting that we have this language as needed in a final judgment. It's anything

other than the prospective.

CHAIRMAN BABCOCK: But Wallace's point I think is, okay, we have come up with this rule, and we have new magic language. What if the old Mother Hubbard language is used prospectively? What effect does it have?

MR. GILSTRAP: It's not final.

CHAIRMAN BABCOCK: Bonnie and then Sarah and then over here.

MS. WOLBRUECK: I just feel that I have to speak once more after the meeting last time just to tell you that this is an issue in every clerk's office, and oftentimes because of the complicated litigation that we have today with very many parties to a lawsuit, the clerk sometimes makes the determination if the case is completely disposed of and takes it off the docket or else for execution purposes.

I know I have personally asked all of the attorneys in the same litigation "Is this a final judgment," and they could not tell me, and so we just sort of decided, "Okay. We" -- you know, I asked the judge, and he says, "Well, what do you think, Bonnie?" I said, "Well, I've looked through it, and maybe it is."

You know, so this is a difficult thing that's happening in every county in every court in the state today, and any assistance that you can give on some

finality of a case would be most helpful.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: And I think that the discussion, Bonnie, between you and the judges is precisely the same discussion that lawyers all over the state and members of courts all over the state are having. But in response to the question or the statement that we're still going to have to struggle with what Mother Hubbard language means, that's true, but we are not going to be struggling with whether people are going to lose their right to appeal because that language is in there without notice. I mean, what we have got now is "All relief not expressly granted is denied." Nobody knows what that means, so we have to litigate it.

PROFESSOR DORSANEO: That's perfectly clear what it means. How could you be clearer than that?

HONORABLE SARAH DUNCAN: If it were perfectly clear we wouldn't have, I don't think, the splits that we have developed.

PROFESSOR DORSANEO: But it is clear language. It's if you read it and try to understand what it means in English. It is very clear.

MR. ORSINGER: It's clear to the professors, but it's not clear to the appellate judges.

PROFESSOR DORSANEO: Well, then we are

beyond hope.

CHAIRMAN BABCOCK: Oh, maybe not.

HONORABLE SARAH DUNCAN: I think that in the particular context it's not clear, but that's almost beside the point because what we're talking about is not what does the Mother Hubbard language mean. What we're talking about is whether the Mother Hubbard language makes the judgment final and so starts the appellate timetable.

I don't have so much a problem, and I don't think most litigants would, about deciding what a Mother Hubbard clause means, because if the judge -- if a Mother Hubbard clause is included in a judgment and I got no notice that my cause was being tried and I got no opportunity to respond, blah-blah-blah, clearly an erroneous disposition we're going to have to reverse in part.

The problem with the Mother Hubbard clause is that it starts the appellate timetable, and all I think the appellate subcommittee is saying is whether that language, the Mother Hubbard clause, is included in a judgment or order or not is somewhat beside the point. The point is there should be some language in an appealable judgment or order that gives all of the parties notice, "This is it. This is the final appealable order or judgment in this case, and your appellate timetable

starts running now."

CHAIRMAN BABCOCK: Okay.

JUSTICE HECHT: There is yet one other wrinkle to the problem, which we mentioned last time, and that is in some counties I understand you don't get a copy of the order itself. For example, in Harris County you just get a postcard saying the order has been signed. Well, if you think that the only motion on the table was between the third party plaintiffs and defendants and you don't really care, then you're not -- you might not check the file and --

HONORABLE SCOTT BRISTER: Or the copy of the order you got had the Mother Hubbard language in it, and the judge struck it out but signed the order anyway. The postcard doesn't tell you that.

JUSTICE HECHT: Right. It's also my understanding in Dallas County that's not the case, that you actually get a copy of the order. That used to be the case when I was there. The judge wouldn't sign the order until the parties had supplied enough envelopes with addresses on them to send everybody a copy, but, you know, in query we may want to look at whether the clerks shouldn't be required to send every party of a copy of the order in the case rather than a postcard.

PROFESSOR DORSANEO: I think they are now.

HONORABLE SCOTT BRISTER: No.

MR. TIPPS: Not in Harris County.

PROFESSOR DORSANEO: But our rules say you have to have notice by first class mail. Not a postcard

HONORABLE SARAH DUNCAN: 306a(4) now -- 306a(3), Rule of Civil Procedure 306a(3), now requires the clerk to give a notice of some sort to the parties or the lawyers that an appealable judgment or order has been signed. Bonnie's problem, the clerk's problem, is they don't know if it's appealable. What this would do is enable the clerks to considerably more efficiently and more accurately comply with their responsibility to send out notice; and it may be cost-prohibitive for the clerks to send out copies of the actual orders or judgments that have been signed; but if the clerks know that that magic language has to be in there, they're going to know that their responsibility to send out a postcard notice is only triggered when that language is in there. And if you want to add to your postcard notice, "The order or judgment contains the language required by Rule 300 to make a judgment or order final and appealable," that's fine, but at least the clerks would know when to send this.

CHAIRMAN BABCOCK: Sarah, where do you come down on Frank's point of whether or not this magic language is necessary? Because, you know, Scott McCown

drafted a rule that I think everybody has where it says, you know, "Here's the magic language. If it's in there, it is final and appealable, but that's not the only way you get there." Where do you come down on that? So Scott would say --

MR. YELENOSKY: Not necessary.

CHAIRMAN BABCOCK: It's nice to have it, but it's not necessary.

HONORABLE SARAH DUNCAN: Where I come down on that is the same place I came down on it at the last meeting, that if we are going to draft a final judgment clause that is not exclusive and mandatory, if judgments can still be final other ways, we have not only not helped the problem, but we have probably made it worse because people reading the rule are going to think -- I mean, I think this is the way they're going to think. "Oh, well, my judgment or order doesn't have that in there, and so it's probably not final."

CHAIRMAN BABCOCK: So you think it should be necessary and mandatory and if the magic language is not there then it's not final.

HONORABLE SARAH DUNCAN: I do, and I think the trial judges of this state are concerned enough about the size of their dockets to just have a stamp made that says, "This is a final appealable judgment or order" and

whatever else you want the magic language to say.

CHAIRMAN BABCOCK: Steve and then Judge Brister.

MR. YELENOSKY: Well, I guess one of my concerns is does that deprive someone of their right to appeal because of for whatever reason they can't get a judge to sign an order that has the magic language in it? And with respect to whether or not it advances the ball to do what Judge McCown suggests, I don't know if it's his exact language, but certainly the language can be clear that there are two ways you get a final judgment. One is the old way, by looking at all the orders and seeing what's disposed of, and the other is to have this label on it.

And I do agree with Bill Dorsaneo that maybe the label on it should not even try to approximate the Mother Hubbard clause but should merely be the word "final judgment." So there are two ways you can have something that's appealable, but one of them I would think needs to be something that's not dependent upon magic language, otherwise all the problems that Richard talked about and future problems come about.

CHAIRMAN BABCOCK: So you're in the anti-mandatory camp?

MR. YELENOSKY: Well, I don't know. I mean,

listening to what's been said, it sounds to me like I don't see how you can make both with respect to judgments that were entered before that, of course, don't have this language and future judgments where a litigant feels entitled to appeal but can't get the judge to use the magic language seems to deprive them of something they're entitled to.

CHAIRMAN BABCOCK: Judge Brister, Bill, and then Judge Patterson.

HONORABLE SCOTT BRISTER: I lean toward the title of the motion and order. You know, "This is a 666 final judgment," and that means it's all -- that's the end of it. The hex is on it or whatever. You know, I understand the argument final judgment, final for what? So, you know, this is a case-ending judgment. That's the title of it, and that's the stamp I would prefer to have, because the Mother Hubbard question is "Well, what did I intend to do with the order that I -- with the default judgment?"

And, no, I can't imagine you ever intend by saying, "All relief not requested in this judgment is denied" when I've already granted plaintiff a default as to a couple other parties, but that's easy to look at, and you can figure that -- now, of course, we can figure out on the file. The question is just is this a -- and if you

have a -- or, you know, first blue sheet, final judgment. You know, if it's the blue sheet then everybody knows, and I can -- because it is difficult for the judge and the clerk. "Is this it or is there stuff still," and I have those discussions with my clerk, but the easy way to answer that is, "I'm just going to say this is one, and we're going to send out a postcard notice that says, 'This is a case-ending final judgment. Does anybody disagree?'"

And if they disagree, they -- "Whoa." They have got -- otherwise, they have got notice it is a case-ending judgment. You don't even address the question of what does this do to all the judgments I've signed in the two years or to other parties that didn't show up. Everybody who's still around gets "This is a case-ending final judgment. Come in and do something if it's not," and, you know, I've done that on some cases where you have got a 200-page petition, and I can't really tell whether the defendant's motion for summary judgment covered all of those or not. So I just say it is and then if the plaintiff thinks it's not then they need to come in and say so

HONORABLE SARAH DUNCAN: And a blue piece of paper would be fine. Whatever the stamp says.

CHAIRMAN BABCOCK: Blue piece of paper.

HONORABLE SCOTT BRISTER: And you just look

at the front, and that's it or it's not it.

PROFESSOR DORSANEO: Three things I would want to say about that. First, I gather what you're saying that you want to do, and perhaps I'm misinterpreting, is to change the Mother Hubbard language to say, "All relief not expressly granted in this case is denied," and that would -- I was a little bit unfair to Justice Duncan's, you know, point that this is not so clear, because it might not be clear whether it's in this case or in this part of the case. Okay.

Just by saying -- but then going to your other point, by just putting the label "final judgment" on it and saying this is, quote, case-ending, you know --

HONORABLE SCOTT BRISTER: You would have to tie it together with the fact that if the plaintiff doesn't think it's case-ending and says nothing then we treat case-ending judgments as being it's not granted.

PROFESSOR DORSANEO: But do you mean case-ending in a res judicata sense, in a somebody has to come back to the trial court to ask you to do more sense or what?

HONORABLE SCOTT BRISTER: Your appellate timetables have started running.

PROFESSOR DORSANEO: Well, but those are all different things. I mean, to say the appellate timetables

have started running but nothing else of final consequence happens would in effect be to take the Aldridge presumption and to extend it to all orders that say "I'm final." Okay.

Now, under the Aldridge presumption, although we could get somebody disagreeing about that, it's only final for appeal purposes, not final in the sense that relief is -- not granted is denied. Okay. And most of the time nobody ever wants to talk about that because after a conventional trial, at least, people think it's over, right, if there's not an order for a separate trial.

But here's the case that I have in mind. You have a -- somebody bring -- plaintiff brings two claims. A summary judgment motion is filed with respect to one of the claims. It is litigated in summary judgment fashion; and the order, let's say, says "final judgment," that label, okay. Or you could, you know, have an Aldridge presumption at the bottom. Okay. All right. But just say it just says "final judgment." You know, under the one approach that could be appealable, right? That could be appealable, but what would you do with the rest of the case? Would you let the rest of the case, you know, be alive, or would that get killed off by the label "final"?

HONORABLE SCOTT BRISTER: If it's case-ending, it ended the case.

PROFESSOR DORSANEO: If you kill it off with the label "final," it's worse than the Aldridge presumption, because then you're telling people that they lost really in code. "It's final." Okay. You're telling them it's really in code.

And I don't mind telling them "It's final and appealable. You better start thinking about appealing now." I don't like for that to mean the case has ended. It might be that we could have, you know, again, just an extension of the Aldridge presumption, that if it's final it's appealable, but what that means with respect to issues that haven't been litigated yet remains to be determined, okay, in the trial court or however. It's just not over. It's only appealable. That would be in effect like the Federal practice, okay, under Federal Rule, what is it, 42 where you identify and finalize a judgment by saying "There is no reason, you know, not to appeal this," "no just reason for delay" or whatever. That would change -- change our approach to final orders and appeals of interlocutory orders, but --

HONORABLE SCOTT BRISTER: And probably requires legislative --

PROFESSOR DORSANEO: Maybe not. It could be

done -- 76a we have said things are final that weren't final before, so what the heck, you know.

My bottomline point is if you're going -- to solve the problem of making things clear that this is appealable, it would be a bad idea to have the byproduct of that be that somebody loses the remainder of the case by accident. Okay? That would be --

HONORABLE SCOTT BRISTER: How could you be confused about "case-ending judgment"? Triple X, 666, this is it.

CHAIRMAN BABCOCK: Yeah. Judge Patterson.

HONORABLE JAN PATTERSON: Well, I think there is great value sometimes in bright lines; and if we can create a bright line in 50 percent of the cases, I think that would be something that we should pursue and that would be very helpful; but there will always be hanging chads and dimpled chads; and we don't live in a bright line world; and if we can facilitate it for some of the cases -- and I think the language that Frank has supplied and that Judge McCown has supplied, that we should change the Mother Hubbard and that we should provide some guidance to how to achieve a final judgment; but this is not a clear question to litigants or to lawyers.

And I think that it -- this comes within

that area of a combination of a practice pointer and a rule that we have to -- I spoke last time in favor of movement towards a better rule, but that we have to have some interim approach that recognizes that this is not a bright line world; and while I think that generally I like the idea of being able to identify it as easily and it would help the clerks to be able to do that in many of the cases, I think that that speaks for this not being the only language but being the preferred language and being the language that can simply achieve the goal, but recognizing that there are these other complicated cases and subtleties out there.

CHAIRMAN BABCOCK: Stephen, just a second, and then Richard. It seems to me that we have identified now three issues. One, whether we should have magic language at all. Two, if we have magic language, should it be mandatory or necessary, in Frank's words; and, three, whether when you have the magic language whether it has preclusive effect. In other words, if you say it's final then on appeal don't go arguing it's not final or in the trial court, because if you say it's final it is final, even though under prior law it may not be final. That was Scott's point.

HONORABLE SARAH DUNCAN: I don't understand three.

CHAIRMAN BABCOCK: Isn't that an issue?

HONORABLE SARAH DUNCAN: I don't understand what you mean by three.

MR. ORSINGER: That even if it's not appealable, saying it is makes it appealable.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: That's what he's saying. That even if it's clearly interlocutory, even if it's just some kind of special exceptions, if you stamp it on there it's appealable.

CHAIRMAN BABCOCK: Yeah. Whether or not it has a preclusive effect on appeal, by saying it's appealable --

HONORABLE SARAH DUNCAN: I don't think that's what Chip is saying.

MR. ORSINGER: That's not what you're saying?

HONORABLE SARAH DUNCAN: Chip is talking about --

MR. YELENOSKY: Bill's point.

HONORABLE SARAH DUNCAN: -- whether a judgment that contains the magic language disposes of all of the issues in the case.

MR. ORSINGER: No.

CHAIRMAN BABCOCK: No. That's not what I

was saying.

HONORABLE SARAH DUNCAN: Okay.

CHAIRMAN BABCOCK: I was trying to follow up on what Judge Brister said, which was that if it has magic language -- and I guess that depends on what the magic language is, but if it has magic language but nevertheless does not dispose of everything, there's other stuff hanging out there, does that nevertheless make it an appealable judgment?

HONORABLE SARAH DUNCAN: Okay.

CHAIRMAN BABCOCK: You were saying what I was trying to say.

MR. ORSINGER: I know.

CHAIRMAN BABCOCK: Okay, Stephen.

MR. TIPPS: I missed an hour and a half of the meeting, so if we have covered this ground let me know. My sense is that we haven't. I'm in the necessary but not sufficient camp. It seems to me that the problem that we're trying to address is a situation in which a judgment is appealable but people don't realize that it's appealable, and so they don't appeal and they lose their rights of appeal.

What is not a problem, it seems to me, is the fact that we have vested in appellate courts the power and authority to decide only cases when there is a final

judgment; and if they have before them a case in which there are outstanding issues that's not final, they shouldn't exercise their appellate authority. They should send it back.

So what it seems to me that we should do is to codify the well-established rule that a judgment is final only when the court has granted or denied all claims against all parties, or whatever the well-established language in the cases is, and thereby preserve the appellate court's right to protect its own jurisdiction and not have jurisdiction foisted upon it by parties and the trial judge who say, "Well, we just want an appellate decision, so we are going to say that this is final," and I know Richard raised that point last time.

And so what I have put down on paper is something like this: "A judgment is final only when the court has granted or denied all claims against all parties," or whatever the current standard is. "However, an order or judgment is effective to make a judgment final and appealable only if it contains the following statement in the title" or "before the judge's signature" or whatever, so that the appellate timetable would not begin to run until you have the magic language that presumably people will recognize; but that would not necessarily give the appellate court jurisdiction if, in fact, there were

outstanding issues that either were overlooked unintentionally or that were overlooked intentionally in an effort to get an appellate ruling of what really is an interlocutory decision.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I'd like to join the developing bandwagon here. I don't think that you should allow a judge to decide that a clearly interlocutory order is appealable and that that's binding on the appellate court because then you're going to have irregular treatment. Some judges are going to try to get interlocutory appeals to get advisory opinions on how to handle their case, and other judges will never do that until the final judgment, and that's not control I think that should be up to the individual trial judge. So even if it says it's appealable, if it's not, it's not, would be my view.

Secondly, let's uncouple the fact that an adjudication is final for purposes of binding the parties' rights until it's set aside and separate that question from whether you can carry it to an appellate court and have it overturned. I think a lot of the potential mischief of this rule could be eliminated if we continue the Mother Hubbard idea that once you have a noninterlocutory judgment it binds everybody until it's

set aside.

Now, even if you have a right to appeal for three or four years because you don't have the magic language, at least it's binding until it's set aside; but if you write this rule so that it's not final, you're saying it's not binding; and then you're going to have a lot of people whose rights in the trial court are never going to develop whenever you try to enforce them.

CHAIRMAN BABCOCK: Sarah disagrees with that.

MR. ORSINGER: Who does?

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: A judgment is binding unless and until it's --

MR. ORSINGER: If it's an interlocutory judgment, in my view it's not a judgment. To me final and interlocutory are the same thing. You may disagree with that, but I have been litigating these issues for 25 years, Sarah. We take these damn family law cases five years after something has been done and you go in and you try to get somebody put in jail and you have got an interlocutory judgment, you have got a handful of nothing.

Now, you may not agree with that, and maybe if my enforcement case gets into your panel I'm okay, but I'm very concerned about people -- I was just talking to a

district judge in Houston last week where somebody came in ten years after a divorce decree to put someone in jail for failing to give them retirement benefits, and because of some screwy way that the whole thing was handled he had to set it all aside because it was interlocutory, and that left them with a world of trouble to go through.

But whether I'm right or wrong, most of the practitioners think that if you have your Mother Hubbard clause in there you have resolved everything, and that meets Bill's idea because that's truth in advertising, you know. This decree says it resolves everything and, by God, it does.

Now, the appellate lawyers and judges around here are concerned about whether it's appealable. Well, that only affects ten percent of the cases or less, so I think we ought to uncouple the idea that a judgment takes care of all requested relief and is enforceable at the trial level and uncouple that from the question of whether it can be set aside in five years on motion for new trial or by appeal. I personally would be willing to go along with a rule that says if it doesn't have the magic words it can be appealed until, you know, the end of time; but I would not be in favor of the trial judge being able to set it aside on motion for new trial; and I would definitely not favor an argument that it's really not final and

enforceable.

So I feel like we ought to uncouple the appellate argument from the binding nature and that we ought to have a rule that makes it binding if it has a Mother Hubbard clause or if it adjudicates all relief up until some later time when it is in fact set aside.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I really think it would be helpful if we looked at what we did in '96, based upon what people have commented on, and look at the discussion; and even what I said, you know, doesn't really -- didn't really make good sense in light of what we did in '96. I think it really would be helpful to look at it and try to understand what we were concerned with and what proposal was embraced after about three or four days of discussion.

HONORABLE SARAH DUNCAN: What Bill's talking about, if you-all picked it up, is the SCAC proposed amendment to Rules of Civil Procedures 296 to 331.

CHAIRMAN BABCOCK: Sarah, what happened -- or Bill or Justice Hecht, if you know, what happened to that proposal? Was it transmitted to the Court?

HONORABLE SARAH DUNCAN: It was sent to the Court.

MR. ORSINGER: It's just been up there maturing.

HONORABLE SARAH DUNCAN: Actually, it was forgotten.

PROFESSOR DORSANEO: No, but to be fair to the Court, though, we had the idea of -- you know, we went over the rule book from 1 to 330. We had the jury charge rules and then after that we went to the rules dealing with, you know, post-verdict and post-judgment practice and spent a lot of time on that and then we went back to some other matters, and all of this is incorporated in the recodification draft. But, you know, as a matter of fact, there was a separate report July 30th on proposed amendments to, you know, Rule 296 through 331, you know, including Rule 300, and it's not as if the Court has just ignored this. It's just part of a much larger project.

CHAIRMAN BABCOCK: Justice Hecht, what's become of the maturing language?

JUSTICE HECHT: Well, there's that. I mean, it was part of the recodification project, which was just sidelined because of TRAP rules changes and the discovery rules changes, and you can only bite off so much at one time, but there's also a feeling that 300 might not be right.

CHAIRMAN BABCOCK: 300 as written or as --

MR. ORSINGER: The recodification report.

JUSTICE HECHT: 300 as written just doesn't

address the problem. The recodification draft of the July '96 report addresses some of these problems --

PROFESSOR DORSANEO: Right.

JUSTICE HECHT: -- but we're still -- I think there is still a gut issue about whether there has to be magic language in the order or not. It's further complicated by the fact that there are various kinds of cases where there may be more than one final judgment in the case. For example, probate cases or guardianship cases, receivership cases.

PROFESSOR DORSANEO: Uh-huh. Probate cases.

JUSTICE HECHT: So the magic language would work in those cases because any time -- the law is the proposal is any time there is a discreet order -- an order resolving a discrete issue in the case, that is a final and appealable order, and we're not -- we've kind of not talked about any of those things. But I think what's driving it is not so much the sufficiency problem, because if you mistakenly appeal an interlocutory judgment, it doesn't cost very much to find out from the court of appeals that you've screwed up, and you either -- the court of appeals can hold the case under Rule 27 or whatever, 25 or whatever it is, and let the parties go back to the trial court and enter a final judgment; or if that's not what they want to do or if the trial judge

doesn't want to do it then they will dismiss the appeal for want of jurisdiction.

I don't think there is really a problem of a judge stamping an order saying, "This is final and appealable" and then forcing jurisdiction on the court of appeals. If the court of appeals says, "Well, you can stamp it anything you want, but there wasn't a legal basis for disposing of these claims, we're just going to reverse and remand it because, sure, it was final, but it was also error" and just going back.

The problem is you don't want to see people lose their right of appeal because there -- because it's not clear to them when they get this order that now the case is over. I mean, it needs to be sufficiently clear to put everybody on notice that error or no error it is -- it is time to get going. So, for example, if one defendant in a multiple party case has sued another defendant for contribution and he moves for summary judgment on limitations and the trial judge grants the motion without referring to the cross-claim, the trial judge probably means for that case to be over, because if the defendant wins on limitations he's not worried about his contribution claim anymore, and probably it isn't.

On the other hand, there's plenty of cases where the defendant moves for summary judgment on the

current pleading, the plaintiff then amends, and the trial judge says, "Well, I don't care if you amend it or not. I'm still granting summary judgment on the whole case," which may be error for the trial judge to do that, but that's clearly what he intends. He intends for the plaintiff to lose rather than go back through the motions of saying, "Well, you've got to amend your motion, address the new claims, and so on."

I mean, there are just lots of ramifications on the thing, but it seems to me that still the gut issue is do we want magic language or not.

CHAIRMAN BABCOCK: And is this -- I mean, this proposed Rule 300 has got a lot of stuff in it.

PROFESSOR DORSANEO: Well, but it's only 300 --

HONORABLE SARAH DUNCAN: (b).

PROFESSOR DORSANEO: 300(b). It's only 300(b).

JUSTICE HECHT: Well, not entirely, because under 300(c) it says that "a judgment shall contain the names of the parties." Well, what if it doesn't?

PROFESSOR DORSANEO: Yeah.

JUSTICE HECHT: "A judgment shall conform to the pleading." Well, what if it doesn't?

PROFESSOR DORSANEO: Well --

JUSTICE HECHT: Is it final and you need to take it up with the trial court -- with the court of appeals? "The trial court, he thinks he's entering a final judgment, he won't change his mind, and we need relief from the appellate court." Or is he not intending it and he doesn't mean for it to be final?

PROFESSOR DORSANEO: Well, it is true that this final judgment language in the 300 series rules as recommended for change was perceived kind of from a different problem perspective. When Judge Guittard talked about the need for making these matters clear, he was concerned with a case where you would have a series of separate orders and the last order looked at wouldn't look final, but it would finalize the case, and somebody would be waiting around for the final judgment and their time for appeal would elapse, okay, which is a similar problem, but a -- a very similar problem, but a distinct problem.

I think Judge Guittard's view was that there ought to be -- which is consistent with what you're talking about, that there ought to be a piece of paper that can be identified as a paper that finalizes the case for -- at least for appeal purposes, at least for appeal purposes, and that's perfectly -- you know, that's perfectly consistent. I think he would have -- you know, I think he would have, based upon the commentary, agreed

with the idea that if you had, you know, Mother Hubbard language in the last order that finalized the case, that that language maybe shouldn't override an express grant of relief that happened earlier, because somebody wouldn't really be thinking that they were undoing, you know, relief in another order. And I think that is at the bottom of this.

The only thing that's really missing is whether you need to have, you know, in your piece of paper that finalizes the case some lingo that finalizes -- you know, that finalizes the case. So I don't see what we're discussing as being particularly inconsistent with what we did before. It may be an extension of it.

CHAIRMAN BABCOCK: But this Rule 300(b) doesn't take the magic language approach.

PROFESSOR DORSANEO: Well, it does say you need to have a piece of -- that you need to have a piece of paper. Look at (b)(3), "When different parties or separate claims are disposed of by separate orders, no one of which -- none of the orders is final until a judgment is signed that disposes of all parties and claims." It's not as clear on its face, but from the discussion it was clear that this judgment is supposed to, you know, identify itself as the judgment, okay, which would mean it would have some kind of magic language to identify itself

as the judgment.

CHAIRMAN BABCOCK: Yeah, but it's not in the rule, and in (b)(1) here it says, "A final judgment for purposes of post-trial and appellate procedure in the same case is the signed order disposing of all parties and claims either expressly or by implication."

PROFESSOR DORSANEO: Yeah.

CHAIRMAN BABCOCK: See, that's not very magic language.

HONORABLE SARAH DUNCAN: Well, we were not -- back then in '96 we weren't looking so much at the problems that have arisen since '96, which is the confusion about --

CHAIRMAN BABCOCK: I hope not. Clairvoyant.

HONORABLE SARAH DUNCAN: Well, no, I mean, I think everybody knew that these problems were going to arise, but they weren't the focus. Our focus back then was on the problem of a series of orders that together disposed of all parties and claims, thus making the last order a final judgment in a sense. And what the committee did in 300(b)(3) is reject that doctrine.

PROFESSOR DORSANEO: Yeah.

HONORABLE SARAH DUNCAN: Is ask the Court to overrule that doctrine so that a series of orders, the last of which disposed of the last party or the last

claim, wouldn't become final merely because that last order or judgment was signed. That there would have to be one document that in and of itself disposed of all parties and claims, whether it did so by incorporating earlier orders by reference or however it did it.

PROFESSOR DORSANEO: But it could be that last piece of paper that did it. Okay. The last piece of paper would just refer back to the prior orders or --

HONORABLE SARAH DUNCAN: That's what I'm saying. It could incorporate --

PROFESSOR DORSANEO: Or it contained Mother Hubbard clause, but it would have some magic language in it that would say, "We're finished now," okay, and that was what the committee decided. We didn't come up with any particular rubric to use, okay, for that last piece of paper to exactly look like. Maybe that's a shortcoming, okay. Huh?

HONORABLE SARAH DUNCAN: And I think Justice Hecht is correct that we end up with the proposal, the '96 proposal, we still have a notice problem. We may have less of a notice problem, but we still have a notice problem.

MR. ORSINGER: Well, then this doesn't correct the problem of an interlocutory order that's made final by a severance being granted either. You could have

one that's interlocutory but looked to the whole world like it was final except for this one issue, but if you sever off that one party --

HONORABLE SARAH DUNCAN: That is resolved by (b)(3)

MR. ORSINGER: I don't think so, because if the judgment as it's written looks like it takes care of everything, but we know there's one claim that's not and that claim is severed out, starting with the moment of severance, not starting with the day the interlocutory judgment is signed, then that interlocutory judgment becomes final because now after the severance it retroactively does take care of all parties and all claims. You don't agree with that?

HONORABLE SARAH DUNCAN: I think you could --

PROFESSOR DORSANEO: This would require another piece of paper.

HONORABLE SARAH DUNCAN: Right.

MR. ORSINGER: I don't agree with that.

HONORABLE SARAH DUNCAN: But at the time that interlocutory order was signed it didn't dispose of all parties and claims in the case.

MR. ORSINGER: But if you have a judgment that disposes of all parties and claims but one party,

it's interlocutory, and the severance takes that party out, I think (b)(3) is now met. You have a judgment that disposes of all claims and parties. It doesn't require a new judgment after the severance order. You think it does?

PROFESSOR DORSANEO: That's what we meant for it to mean.

MR. ORSINGER: Does it mean that, Bill?

PROFESSOR DORSANEO: Well, I'm reading it now after four years, and it's a little bit less clear.

CHAIRMAN BABCOCK: It's like Felix and Oscar over here.

PROFESSOR DORSANEO: But what it was supposed to mean is you had to get another piece of paper after the severance order, unless the severance order itself said it.

HONORABLE SARAH DUNCAN: If they are going to be Felix and Oscar then I think Richard should be prohibited from using the term "potential mischief" again in this meeting.

CHAIRMAN BABCOCK: I think that would require restraining speech.

MR. ORSINGER: I picked that up from your uncle.

CHAIRMAN BABCOCK: Is this the chronology

that's right? In '96 this committee sent this language to the Court. The Court didn't like the approach and didn't act on it and then recently within the last year asked us to look at the final judgment issue again fresh?

JUSTICE HECHT: Well, it's too strong to say we didn't like it.

CHAIRMAN BABCOCK: You didn't like it enough to adopt it.

JUSTICE HECHT: We didn't like it enough to adopt it.

MR. ORSINGER: That's true of most everything.

JUSTICE HECHT: But the world was different in '96 because we weren't sure of what the fallout from Mafrige was going to be and were still hopeful that it wouldn't be what it has come to be, but now that it is, then I think we're back to looking at it harder and seeing what the solution is.

MR. ORSINGER: Well, should we be trying to fix summary judgment orders instead of trying to fix final judgments? Is this really a summary judgment problem more than it is a final judgment problem?

JUSTICE HECHT: Well, you know, there are different ways of approaching the problem. We could stop probably, what, 85 percent of the problem if we just

passed a rule that said, "The following words do not indicate finality. All relief not herein granted is denied." I mean, that would remove that Aldridge language from play, and you would have -- people would have to come up with a different phrase.

And that would stop a whole lot of the problems that are happening because they do focus on that language, and we could focus on summary judgments and say, "Summary judgments have to have particular language," which we don't don't require in judgments after conventional trials because Aldridge says when there's been a trial everybody expects the case to be over. But, I mean, a more comprehensive solution has greater aesthetic appeal, but it's not the only fix.

MR. ORSINGER: The problem is that in trying to fix summary judgment problems by affecting all judgments, you're affecting the 99 percent of the cases out there that don't involve a summary judgment, and you better be damn careful what you say about them because if you make them interlocutory and nonenforceable then we have gone from the frying pan into the fire.

PROFESSOR DORSANEO: They are enforceable if they are interlocutory. That was just a crazy idea

MR. ORSINGER: Okay. I'll --

HONORABLE SARAH DUNCAN: I think the problem

is much broader than summary judgments. We have got a serious question now about nonsuits and having to have an order on a nonsuit before it merges with some other things to become final. We've got summary judgments. We've got severance orders. We've got default judgments. It's when all of these things are joined together in a case when it becomes, as Bonnie said, just exceedingly complicated, and it can take you a day to figure out whether you think you have a final judgment, and you can find any three people who would disagree.

CHAIRMAN BABCOCK: Yeah, Alex.

HONORABLE SARAH DUNCAN: So I think the problem we're facing now is to some extent a different problem than we faced in '96. Although, I continue to believe that the resolution of the cumulative orders issue was correctly resolved by the committee in '96. I mean, when Judge Guittard, who wrote apparently the leading case that was refused -- that created -- or that first put all of this together says that he was asking to be reversed and was very disappointed when he didn't get reversed, that to me is an indication we may want to take a different road.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: I got here late, so you-all may have discussed some of this, and I'm sorry,

but I am kind of agreeing that having this final judgment clause apply to all judgments for them to be final could create real problems when -- there are a lot of things you need finality in judgments for other than appellate deadlines, but the Aldridge presumption of finality after a conventional trial on the merits, that didn't really create a problem, did it? I mean, didn't people handle that?

JUSTICE HECHT: It's fine.

PROFESSOR ALBRIGHT: The problem was Mafrige that says no matter what kind of judgment you have, if it has a Mother Hubbard clause on it then it's final, whether it really addresses everything or not. So it seems to me that this Rule (b)(1) of Justice Duncan's makes sense for judgments other than those after conventional trial on the merits. Does that make any sense, or is that too complicated? I mean --

CHAIRMAN BABCOCK: Steve. I'm sorry. Sarah.

HONORABLE SARAH DUNCAN: What are you going to do when there's been a conventional trial on the merits and defaults in summary judgments and nonsuits in the same case?

PROFESSOR ALBRIGHT: Well, then you have a final judgment. I mean, whatever judgment is signed after

the conventional trial on the merits is final, and all of those things are appealable. You know --

HONORABLE SARAH DUNCAN: I think that's part of the problem, though. Because let's say that you have four defendants. One is nonsuited, one gets out on summary judgment, and two go to a conventional trial on the merits and lose, and the judgment that is rendered on the jury's verdict, let's say, against those two defendants renders the two previous judgments final and appealable, but those people may or may not be even keeping up with this case, given that they got out of it so long ago.

PROFESSOR ALBRIGHT: That was the issue we discussed in '96.

MR. ORSINGER: Right.

PROFESSOR ALBRIGHT: It's coming back to me, is giving notice to all of those people that there is now a final judgment.

CHAIRMAN BABCOCK: Steve.

MR. YELENOSKY: I just wanted to ask Richard, you brought up a point earlier, and it seems to make some sense, but maybe you know why it wouldn't work. You suggested uncoupling the finality issue from the appeal time frame, and I mean, this is all beyond my experience, but just listening, that sounds like a pretty

attractive idea. And if you had current law as to what's final, enforceable, and appealable but then you said that the deadline to appeal would not begin to run until you had something with the magic language, that would seem that the party that thinks they have gotten a final enforceable judgment in their favor would have an incentive I would think, wouldn't they, to get that?

PROFESSOR ALBRIGHT: I guess what that does is that you can still have a final judgment for finality at the trial court --

MR. YELENOSKY: Right.

PROFESSOR ALBRIGHT: -- level but you have your appellate deadline still running.

MR. YELENOSKY: Right. You could have a final, enforceable, and appealable judgment where a party could choose to appeal, but if the party wants the time frame to start running against them that it would be incumbent on them to get the language that makes it clear that your time frame has now begun to run. You would not have the problem of whether or not an old judgment was final and enforceable, but as you said, unless prospectively people started getting that magic language they couldn't claim that the appeal time frame had closed.

PROFESSOR ALBRIGHT: But then you have the potential problem of two years later I finally get that

order signed and then we start appealing that case.

MR. YELENOSKY: Right, but that seems to me to be less of an evil than all the other evils we have been talking about.

PROFESSOR ALBRIGHT: I guess that could happen under this scenario anyway.

MR. YELENOSKY: So did you abandon that or --

MR. ORSINGER: No. I think there is actually a three-part choice. Under the proposal the subcommittee did -- and I'll have to discuss this with Sarah because we have special problems under the Family Code with interlocutory judgments that may not exist in normal civil litigation, but you could have something that goes final for purposes of the trial court but could be set aside on motion for new trial filed two or three years later, or you could cut off the motion for new trial and just allow a notice of appeal to be filed.

My preference would be, if we're going to go with what the subcommittee says, is to say you can come in after two or three or four years and appeal, because most people aren't -- if they don't have a good case they are not going to pay to appeal it, and they are not going to have any success on appeal. If you allow them to file a motion for new trial two or three years later, they are

always going to file a motion for new trial. So that's worse, but the worst is to say that the judgment that doesn't have the magic language --

MR. YELENOSKY: Cuts off.

MR. ORSINGER: Yeah. Is not final because then because of some peculiarities of the way that family law judgments must adjudicate all claims before any of the adjudication is effective then I'm fearful with all of the quality practice in the lower level -- we have a lot of pro se litigants out there who probably will never know you're supposed to put this magic language in there. Then the arguments are there that they are not enforceable or don't actually divorce them. That's the worst of all choices.

CHAIRMAN BABCOCK: Bill then Buddy.

PROFESSOR DORSANEO: My thoughts are developing here. The problem with the final judgment language and the connection that needs to be made in the former Rule 300 product, it talks about a final judgment, and, again, it limits it to purposes -- for purposes of post-trial and appellate procedure, you know, post-trial and appellate timetables, is "a signed order disposing of all parties and claims." Now, it says "either expressly or by implication."

Now, what's missing here in this draft is it

doesn't say what it means by "expressly." Now, we could innovate on that by going further and say "either expressly by including a final judgment clause" or, you know, and then have a subparagraph that talks about what the final judgment clause would say. Okay. "Or by implication." I'm assuming that we don't want to eliminate the Aldridge presumption that is applicable to conventional trials, such things are disposed of by implication.

JUSTICE HECHT: It just hasn't been a problem.

PROFESSOR DORSANEO: Because it hasn't been a problem. So the problem is these other cases where the presumption doesn't apply, okay, and in those other cases we want for the judgment to be final for the "all claims and parties to be disposed of expressly."

Now, the "expressly" doesn't have to be the Mother Hubbard clause. Maybe it is and maybe it isn't. I really think we could work from our old draft.

HONORABLE SARAH DUNCAN: I think actually, if I remember the first draft of this that I did or the subcommittee did or whoever did, "expressly" was in there. We said "expressly by implication." Subsection (2) was disposition, express disposition; subsection (3) was disposition by implication; but there was an "expressly"

in there; and I agree. I think we could --

PROFESSOR DORSANEO: Put it back.

HONORABLE SARAH DUNCAN: -- put it back.

PROFESSOR DORSANEO: And then the issue would be whether it ought to be "This is a final appealable judgment unless expressly granted by a signed order. All relief sought is denied." Okay.

HONORABLE SARAH DUNCAN: Whatever the language is.

PROFESSOR DORSANEO: Which would be acceptable to me. Look at the last part of (b)(3). "Except that no relief previously granted may be nullified by a general provision in the final judgment that all relief not previously granted is denied." We did have a big discussion about that.

HONORABLE SARAH DUNCAN: Right.

PROFESSOR DORSANEO: It was assumed that the "expressly" would be or could be the Mother Hubbard clause, but then our concern was somebody would put a Mother Hubbard clause in that would undo express relief that was granted before, and that probably would have been unintentional, or rather if that's what the court -- trial court wanted to do, the trial court had to do that more clearly. Okay. Would have to say, you know, "I'm changing my prior order," etc.

HONORABLE SARAH DUNCAN: Really what it ought to be is (b)(1), little (a), expressly; little (b), implication. Then subsection (2) would be separate orders and conflicts.

PROFESSOR DORSANEO: That would I think solve the problem, and it would incorporate a lot of what we did before, which I think if people looked at the transcript they would say it was reasonably thoughtful work.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I'd like to throw out another concept, and maybe this is going nowhere, but a lot of the problem is created by a summary judgment order that has a Mother Hubbard clause in it even though it was only between two out of four parties or only had two out of three claims. What if we just banned the effectiveness of Mother Hubbard clauses in summary judgment orders and said that a Mother Hubbard clause in a summary judgment order just simply doesn't go beyond the motion itself? Does that not help?

HONORABLE SARAH DUNCAN: That's where we were before Mafrige, and I think we all have to remember what was the state of the world before Mafrige, and the state of the world was you weren't supposed to use Mother Hubbard clauses and you couldn't figure out if a summary

judgment was final for -- and that you needed to appeal. That was the state of the world, and it was a horrible state of the world because you had to --

MR. ORSINGER: Yeah, but, Sarah, your language just fixed that.

HONORABLE SARAH DUNCAN: Because you had to appeal so that you could get dismissed so that you could prove it wasn't final.

MR. ORSINGER: But this -- if you coupled that concept with your language, that doesn't happen. You take the preclusive effect out of a Mother Hubbard clause in summary judgments, but before anything is appealable you still require your magic clause. That way you've eliminated the pernicious effect of misworded summary judgment orders, but you still don't have anything that's appealable until you have got a judgment that has the appealable judgment clause.

I'm worried that you're going to have summary judgment orders that are only granting partial relief that will have your appellate language in it and then everybody is going to run around and say that that really didn't.

HONORABLE SARAH DUNCAN: Well, as Michael said at the last meeting, the words say what they say. I mean, are we just going to say that words don't mean what

they mean because we say they don't mean what they mean?

MR. ORSINGER: Well, we know that the trial judge shouldn't -- if he's only got two parties in a summary judgment proceeding and he's got five in the lawsuit and three of them are not involved in the summary judgment, we know he's not supposed to be dismissing the case or entering the final judgment. And the Mafrige problem is caused --

HONORABLE SARAH DUNCAN: That makes it wrong.

MR. ORSINGER: Well, it makes it --

HONORABLE SARAH DUNCAN: It doesn't make it not final.

MR. ORSINGER: Why should it make it appealable? I mean, if we can eliminate the problems that summary judgment causes by just simply saying that a catchall clause in a summary judgment doesn't adjudicate the rights of people that are not parties to it; and if you're worried that something else might do that -- anyway, if you don't like the idea, forget it.

CHAIRMAN BABCOCK: Bill, you had a comment?

MR. EDWARDS: I was worried about the summary judgment context, and it seems to me if an order -- and I think Justice Hecht addressed this early on about motions and things that don't really dispose of

anything, you get a Mother Hubbard clause attached. But it seems to me that if some kind of language at least in the summary judgment context is that no matter what the order on that summary judgment is it's limited to the motion and the motion, in fact, disposes of all of it, so be it; but if it's a partial summary judgment or it's a summary judgment on the part of one of two plaintiffs or one of two defendants then it shouldn't -- the other people shouldn't have to appeal because it's got a Mother Hubbard clause in it and an appellate timetable has started running or we've stamped it "appealable order" and it's got some timetable running on it.

And it's not a matter of waiting six or eight years or two years. All that somebody has to do is wait until the time goes by to give a notice of appeal and then they file the one -- the people left file another motion for summary judgment saying it's all over with because of the former.

I know there's one case in my office right now where there's been motions for new trial issued, and the justices have been going back and forth since about May of this year, and it's not resolved yet. There's still a motion for new trial pending on whether or not the language in an order granting one party a summary judgment ought to be changed or not changed. Every time an order

is entered somebody else files a motion for a new trial or a change in the judgment because of that.

So you need to make it clear that the order, whether it's on a special exceptions or whether it's on motion in limine or whatever it is, doesn't go beyond what's before the court.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I have a question. Assuming that we define what a final judgment is, aside from the problems with the special probate situation that it's something that disposes of the parties and the claims, are we saying here that if it does that, actually does that, it's appealable? Also, if it doesn't do that, it's appealable if it has the magic language in here?

CHAIRMAN BABCOCK: Well, that's one of the issues.

HONORABLE SARAH DUNCAN: That's one of the issues.

MR. HAMILTON: Or are we saying that if it has the magic language there's a presumption that it's appealable, but it still has to comply with the definition of the final judgment?

CHAIRMAN BABCOCK: That's what Richard would say.

CHAIRMAN BABCOCK: And others, but --

JUSTICE HECHT: But it seems to me that if the trial judge says, "I don't care. This is final. Everybody is out. It's over," then it's over; and you can't say, "Well, judge, I mean, you can't do that because there are all these other claims and all these other parties."

"I'm doing it right now. Take this up with the court of appeals."

MR. HAMILTON: But that means you've got to have the language in there that expressly denies all claims

MR. ORSINGER: No. No. All you've go to do is have Sarah's magic stamp that says "appealable," and it doesn't matter whether it was a motion for continuance. If it says "appealable," it's over.

MR. GILSTRAP: But that by implication must deny the other claims. So what -- there now you have an implied Mother Hubbard clause.

MR. ORSINGER: That's why Bill is saying it's not fair to say it's appealable without telling them, "By the way, we're ruling on everything you've got, and you lose."

MR. GILSTRAP: I think if you're going to have some magic language, it needs to say something like the Mother Hubbard clause. You know, spell out, "This is

a final judgment. It disposes of all claims."

CHAIRMAN BABCOCK: Let's get this on the table. After our last meeting there was language proposed that said, "A final judgment shall be labeled 'final judgment' directly below the caption and should have a final judgment clause directly above the date signed by the judge.

"Any order with a final judgment clause in the following form is final for the purposes of an appeal," quote, "'This is a final appealable judgment. All relief requested in this case that is not expressly granted in this judgment is denied.'"

Now, that's magic language. Now, we may not like it, but that's magic language.

MR. YELENOSKY: And did we say was necessary language?

HONORABLE SARAH DUNCAN: You're reading from Scott McCown's proposal?

CHAIRMAN BABCOCK: Right. Which was a modification of your proposal.

JUSTICE HECHT: No, it wouldn't be necessary.

MR. YELENOSKY: It wouldn't be necessary.

JUSTICE HECHT: Not the way it's written, unless you read it by implication.

PROFESSOR DORSANEO: Then doesn't that just mean -- isn't that just a codification of the law right now, in effect for a partial summary judgment, if it's not mandatory or the Aldridge presumption is applicable? I mean, where does that get us?

MR. TIPPS: It doesn't get us anywhere

CHAIRMAN BABCOCK: It changes the language. It changes Mother Hubbard to something that's clear.

PROFESSOR DORSANEO: It tells the smarter lawyer who wants to finalize a partial summary judgment exactly how to go about it.

MR. ORSINGER: Instead of complaining about Mafrige, we'll start complaining about Rule 300.

HONORABLE SARAH DUNCAN: No. We will complain about both.

PROFESSOR DORSANEO: Yeah.

HONORABLE SARAH DUNCAN: And we will complain about cumulative orders rendering the last order final.

CHAIRMAN BABCOCK: Sarah, is it the concept of magic language or this particular -- or McCown's magic language you don't like?

HONORABLE SARAH DUNCAN: What Scott is proposing is nonmandatory, nonexclusive --

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: -- magic language.

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: That's my objection.

MR. YELENOSKY: And the problem with that is people can lose their appeal rights because they don't know, right?

And so, again, my solution to that is if you don't use the magic language, it's appealable, but your timetables for appeal have not begun to run.

PROFESSOR ALBRIGHT: Is final.

MR. YELENOSKY: Is final.

MR. ORSINGER: Well, noninterlocutory.

MR. YELENOSKY: It's appealable in the sense that if the other party recognizes that it's final they can go to the court of appeals. But if they haven't gotten that magic language, it's not incumbent on them to go to the court of appeals unless they get that language, and so the other party would have an incentive to come up with that language and start the period running, and if they don't then the appeal period hasn't started running.

CHAIRMAN BABCOCK: So, Sarah, if Judge McCown's language was mandatory or necessary or exclusive then you'd be okay with it? Is that right?

HONORABLE SARAH DUNCAN: Are you talking

about only the third and fourth paragraphs?

CHAIRMAN BABCOCK: Yeah. If paragraph (3) and (4) -- if we did not go with his paragraphs (1) and (2), but rather substituted something to suggest that (3) and (4) were the only way it can be final then you'd be okay or not?

HONORABLE SARAH DUNCAN: No. I think then we have got the problem that Bill said earlier. If you look in paragraph (4) of the McCown proposal --

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: -- the second sentence of the final judgment clause, "All relief requested in this case that is not expressly granted in this judgment" --

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: -- "is denied."

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: Then you are going to nullify the previous judgments and orders.

MR. GILSTRAP: Chip, you have to change "in this judgment" to "by written order." That allows prior interlocutory orders to stand, and that solves that problem.

HONORABLE SARAH DUNCAN: Well, but it shouldn't have to be written, right, because we have now

amended the TRAP rules to permit a trial judge to make rulings orally on the record, and it doesn't have to be within a written order.

MR. GILSTRAP: Well, are we going to say that we're going to have some oral orders that are part of the final judgment? That can't be.

PROFESSOR DORSANEO: No, that can't be right.

MR. GILSTRAP: It's got to be a written order.

HONORABLE SARAH DUNCAN: That's fine with me.

MR. GILSTRAP: But the flaw with Scott's approach is the words "in this judgment."

CHAIRMAN BABCOCK: Yeah. So if you said it "expressly granted by" --

MR. GILSTRAP: "By written order."

CHAIRMAN BABCOCK: "By written order."

PROFESSOR DORSANEO: Well, there's a larger problem with requiring making the language mandatory, and that is that you -- and it may not be of any real concern, is that it won't be put in there, and the trial court will hang onto these judgments forever. David Peeples the last time we talked about that said, well, that's a problem, you know, that these cases will not come to an end. I

think some of the judges say, "Well, now I have to police my files and get these things finished by putting this on the end here. Otherwise, they're still going." That doesn't greatly trouble me. Okay. But --

HONORABLE SCOTT BRISTER: Because you don't have trial court performance standards.

PROFESSOR DORSANEO: But I don't have to do it. It's not going to be my job. Okay. Now, I like the suggestion for if it's not mandatory, if it's for those partial summary judgment cases, it really is a little better than Mafrige. The cases where I have seen people tricked is where actually somebody puts at the top of the order, you know, "interlocutory order" and then they put the language down at the bottom and surprise the people who are not completely tuned in of the effect of the laws.

CHAIRMAN BABCOCK: Yeah, Sarah.

HONORABLE SARAH DUNCAN: Can we just vote on the concept, not the language, but the concept whether there should be mandatory, exclusive magic words to make something appealable?

CHAIRMAN BABCOCK: Okay. We voted --

HONORABLE SARAH DUNCAN: For the appellate timetable to run.

CHAIRMAN BABCOCK: Yeah. We voted before magic words, magic language, and everybody thought that

was a good idea, but we can vote again. For the last meeting.

MR. ORSINGER: Chip, the last time we voted we really --

HONORABLE SARAH DUNCAN: No, that's not what we voted on

MR. ORSINGER: Sarah's statement had only to do with affecting appealability and not finality, and we have been making the distinction today that we might vote in favor of something not being appealable without the language, but we still want it final for purposes of the trial court.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: And Sarah's proposal right then affected only appealability, as I understand it.

CHAIRMAN BABCOCK: Let me be clear on what we voted on. What we voted on last meeting -- and I'm not saying in light of everything that's happened we shouldn't vote again, but let's just be clear what we did vote on, that there should be some language when placed in an order that creates a final, appealable judgment and the subcommittee would go back and tinker with the language and then come back and talk about it.

HONORABLE SARAH DUNCAN: Right. But if you read that in context, that was Frank's proposal. There

were 20 votes in favor of it, and it was that it be not mandatory and not exclusive.

CHAIRMAN BABCOCK: Okay. So now we have got to talk about mandatory and exclusive. His proposal didn't address mandatory or exclusive

HONORABLE SARAH DUNCAN: Well, we defeated that, but there were only a few people here on Saturday, and the only reason I have raised it again is that my subcommittee does not recommend anything less than mandatory and exclusive.

MR. YELENOSKY: For purposes of finality or appealability?

HONORABLE SARAH DUNCAN: Appealability.

CHAIRMAN BABCOCK: Hang on. Let Frank talk.

MR. GILSTRAP: I don't think that the last vote was a vote on the mandatory issue.

CHAIRMAN BABCOCK: It wasn't. It clearly was not.

MR. GILSTRAP: It was merely a vote saying that we all agreed that we should try to come up with some language better than the Mother Hubbard clause that indicates finality.

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: Whether this is sufficient, merely sufficient, or necessary language has not been

decided yet.

CHAIRMAN BABCOCK: Right. But now Sarah calls for a vote, just kind of a sense of the house, which I think is a good idea at this point in time.

HONORABLE SARAH DUNCAN: Thank you.

CHAIRMAN BABCOCK: Some magic language, not sure what it's going to be yet, but some magic language; and once we have agreed on the magic language, that it is mandatory and necessary to create a final judgment

HONORABLE SARAH DUNCAN: To create an appealable judgment.

MR. ORSINGER: But, Chip, is it enough to make a nonappealable one appealable? Is it, to use your words, preclusive, or are you including preclusivity in the vote?

CHAIRMAN BABCOCK: Well, Sarah, what do you think?

HONORABLE SARAH DUNCAN: What does "preclusivity" mean?

MR. ORSINGER: He means that even if it's interlocutory, if you have the magic language it's appealable, even if it's just a motion for continuance.

HONORABLE SARAH DUNCAN: It would be appealable. It may be wrong.

MR. TIPPS: It may be what?

HONORABLE SARAH DUNCAN: Wrong.

MR. TIPPS: It's not sufficient to make it --

MR. ORSINGER: Yeah. I think she's saying it's sufficient. That alone, that stamp alone, would make it appealable.

HONORABLE SARAH DUNCAN: It makes it appealable. Now, it may be wrong because it disposed of claims of parties that weren't before the court, but --

PROFESSOR DORSANEO: By making it appealable it starts the clock for perfecting the appeal.

MR. GILSTRAP: We have that language now.

PROFESSOR DORSANEO: Does it also start the clock for the trial court messing with the case?

HONORABLE SARAH DUNCAN: Yes.

PROFESSOR DORSANEO: All right. So it's not just appealable, but it starts all clocks.

MR. GILSTRAP: But we have that language now.

HONORABLE SARAH DUNCAN: The appellate timetable.

MR. ORSINGER: So the motion for new trial deadline.

PROFESSOR DORSANEO: And post-trial timetables?

HONORABLE SARAH DUNCAN: Post-trial and appellate procedure in this same case. I mean, just to remind people that "in this same case" was important because we weren't trying to affect the finality or appealability of -- remember Scurlock Oil, that a judgment is final --

MR. ORSINGER: Yeah, res judicata

HONORABLE SARAH DUNCAN: Res judicata, even when it's on appeal. We weren't trying to affect that.

CHAIRMAN BABCOCK: Let's just get Richard's -- or maybe it's mine, one of ours -- situation. For example, let's say the magic language gets put on there, and it goess up to the court of appeals. Well, once up in the court of appeals Defendant No. 2 says, "You know, wait a minute, you know, my deal was never ruled upon"; or the plaintiff says, you know, "There are four claims here that you have the whole record in front of us, and that was never disposed of, and I don't care what this magic language says. You can't change the fact that none of this stuff was ever addressed in the trial court in spite of the magic language."

HONORABLE SCOTT BRISTER: That's a separate debate. You can do that either way

HONORABLE SARAH DUNCAN: That's a separate debate.

HONORABLE SCOTT BRISTER: You can make the rule say they waived it if they don't say anything when they get triple X, case-ending judgment, or you can say it's error and the court can reverse it.

HONORABLE SARAH DUNCAN: But that's why I'm trying to confine it to this one issue.

CHAIRMAN BABCOCK: Okay. So we're excluding that issue.

MR. ORSINGER: I know. I voted against it.

CHAIRMAN BABCOCK: Well, no, no, no. Sarah is saying she is excluding that issue.

HONORABLE SCOTT BRISTER: That's a different question.

CHAIRMAN BABCOCK: That's a different question.

HONORABLE SARAH DUNCAN: Different question.

MR. YELENOSKY: And you're also excluding if it doesn't have the language the question of whether or not by looking at the whole record it's final?

CHAIRMAN BABCOCK: No, we are not excluding that.

HONORABLE SCOTT BRISTER: Not excluding that.

MR. YELENOSKY: Well, that's what Richard and I were looking for a vote on.

CHAIRMAN BABCOCK: That's what we're voting on.

MR. YELENOSKY: We were wanting a vote on language that's necessary to start the appellate timetable that's not necessary for finality.

HONORABLE SARAH DUNCAN: I'm excluding that.

MR. ORSINGER: Sarah is excluding finality

HONORABLE SARAH DUNCAN: My motion, my motion, my -- what I would like a sense of the house on, should we require magic language to render an order or judgment appealable to start the post-trial and appellate timetables.

MR. YELENOSKY: And you are excluding then whether or not it could be final without the magic language?

HONORABLE SARAH DUNCAN: Right.

MR. YELENOSKY: Thank you.

MR. ORSINGER: But the implication, isn't the implication, Chip, that if that language is on there, even if it under current law would be clearly interlocutory and there is no jurisdiction in the appellate court, that language makes it appealable?

PROFESSOR CARLSON: Just like Mother Hubbard

HONORABLE SARAH DUNCAN: It makes it appealable. It doesn't make it correct.

HONORABLE JOHN CAYCE: That would be the determination in the court of appeals, is it interlocutory.

MR. ORSINGER: No, no, no.

MR. GILSTRAP: Richard, we have language like that right now. It's called the Mother Hubbard clause. It's going to do the same thing except that it conveys to the reader what the Mother Hubbard clause often doesn't convey, that this is a final judgment that disposes of all claims.

HONORABLE SCOTT BRISTER: We're not kidding.

MR. ORSINGER: And if they're wrong, the appellate court can dismiss for want of jurisdiction.

MR. GILSTRAP: In which case the appellate court will reverse because it's final.

PROFESSOR DORSANEO: Because it's -- because it isn't.

MR. ORSINGER: See, that's the problem. Sarah's language --

HONORABLE SARAH DUNCAN: My question did --

MR. ORSINGER: -- by definition makes it appealable.

HONORABLE SARAH DUNCAN: -- not include any Mother Hubbard language. All my question is, is should we require magic language before a judgment or order is

sufficient to start the post-trial and appellate timetables?

CHAIRMAN BABCOCK: So under your proposal it would be --

HONORABLE SARAH DUNCAN: In all civil cases.

CHAIRMAN BABCOCK: I may have an order that is an order that disposes of all the claims against all the parties but it doesn't contain the magic language, and under your proposal the appellate timetable has not started.

HONORABLE SARAH DUNCAN: That's right.

PROFESSOR ALBRIGHT: I thought you had excluded that.

HONORABLE SCOTT BRISTER: She just said she did, but now she's saying she didn't.

MR. ORSINGER: But on the other end of it, you might have a motion for continuance that has the magic language on it, and you are now on your way to the appellate court. And once you get there is Judge Cayce right that the appellate court can say, "No, no, no. This is interlocutory," or have you made it appealable by amending the rule to say this? Have you actually made it appealable even though we know it's not?

HONORABLE SARAH DUNCAN: You made it appealable.

MR. ORSINGER: Then you're not going to be dismissing. You're going to be ruling on the merits.

HONORABLE JOHN CAYCE: The judge was wrong in making it appealable is what the court of appeals would be saying.

MR. ORSINGER: Okay. So it's reversal instead of dismissal.

HONORABLE SARAH DUNCAN: Exactly.

MR. ORSINGER: Okay.

HONORABLE JOHN CAYCE: It's what we do now.

HONORABLE SARAH DUNCAN: That's right.

HONORABLE JOHN CAYCE: If they do enter what they think would be a final and appealable judgment and we say, "No, you're wrong," it's not

MR. ORSINGER: Okay.

MR. JEFFERSON: So if it disposes of all parties and all issues but it doesn't have that language then you can begin -- can you begin executing on the judgment at that point, even though there's no -- the appellate process is --

HONORABLE SARAH DUNCAN: You can pretty much begin executing on any judgment or order if you can get a writ of execution.

MR. ORSINGER: That's the idea. The idea is it would be enforceable for purposes of the trial court

but still be subject to a new trial or hearing.

MR. YELENOSKY: This is Richard's uncoupling.

CHAIRMAN BABCOCK: Are we ready -- do we sufficiently understand what Sarah's call is?

MR. HAMILTON: One other question. If you have this judgment that disposes of all parties and all claims and you can execute on it but it doesn't have the language in there to prevent it to go up on appeal, then it just has to sit there until you somehow make the judge put that language in the judgment?

CHAIRMAN BABCOCK: Sarah.

MR. YELENOSKY: There's a friendly amendment that would take care of that, and maybe I wasn't clear in what I was saying; but if, in fact, it does all of those things, it should be, in my opinion, appealable. But without the magic language the time frame should not begin to run. Right, Richard?

MR. ORSINGER: I like that concept. I think it's wonderful.

MR. YELENOSKY: Because the idea is if you figure out it's final, you should be able to appeal it, but you should not be held to be on a time frame until you have been told that it's appealable, because the risk is that, as I've been told, that there are all these

judgments that people don't realize are judgments. So it's final and appealable if it meets the standards that we've always applied for determining final and appealable, but the time frame does not begin to run until you get magic language.

CHAIRMAN BABCOCK: Justice McClure.

MS. JENKINS: I think you have me confused with Justice McClure.

CHAIRMAN BABCOCK: I can't even see that far down there. I'm sorry.

MS. JENKINS: That's okay. I'll consider that a compliment. Under Carl Hamilton's example, what's confusing me is you're going to have a judgment sitting out there that is final but not appealable, and someone is going to execute on it, and then someone is going to come along three or four years after I've executed on my judgment and then they're going to be able to appeal it because somebody goes back and puts that language in there?

MR. YELENOSKY: Well, you should have gotten the language in there. You're the one who failed to get the language in there. It would be malpractice.

CHAIRMAN BABCOCK: Nina Cortell.

MS. CORTELL: I would like to second the judge's suggestion. I want the neon, red flag approach.

I want to know it's appealable, it's final for all purposes. It's not necessarily right. It's like any other trial judge order. They may have done it, but it may not be right. That's what we have appellate courts for, but I want as much as possible to streamline and make it clear. So I think I'm in favor of Sarah's proposal and not uncoupling it and subdividing it and creating ten different pathways

MR. ORSINGER: It is uncoupled in her motion.

MR. YELENOSKY: Well, yeah. I'm voting for Sarah's proposal, too, though I may not understand what her proposal is.

MS. CORTELL: I don't want it to be something that I can execute on, but it doesn't start the appellate timetable or it may start the appellate timetable. I mean, and maybe I have lost the gist of the discourse, but I think we ought to be making it very clear; and if you put it in a rule that it is clear, I don't see that there should be any confusion among the Bar.

CHAIRMAN BABCOCK: Well, I think -- and Sarah will correct me. Sarah has uncoupled, to use Richard's term, finality with appealability, right?

HONORABLE SARAH DUNCAN: For right now. For

right now.

MS. CORTELL: I thought that was just for purposes of this vote.

CHAIRMAN BABCOCK: But what Sarah wants an expression of is whether or not we think the magic language should be mandatory for appealability. In other words, you can't appeal it. The appellate timetable doesn't start until the magic language gets into it, right?

HONORABLE SARAH DUNCAN: Right.

CHAIRMAN BABCOCK: Okay. So that's what we're voting on. Everybody in favor of that raise your hand. Everybody opposed?

MR. YELENOSKY: Phrased that way.

CHAIRMAN BABCOCK: Richard was a late vote.

MR. ORSINGER: I'm sorry. I'm so conflicted

HONORABLE JOHN CAYCE: No manual count over here.

CHAIRMAN BABCOCK: You have an expression of 16 to 7 in favor.

HONORABLE SARAH DUNCAN: Okay. That's wonderful.

MR. ORSINGER: Now what did that mean?

CHAIRMAN BABCOCK: I don't know what that means, but --

HONORABLE SARAH DUNCAN: It means it's lunchtime.

CHAIRMAN BABCOCK: Well, they're not here yet. Where are they?

MS. GAGNON: It's here.

CHAIRMAN BABCOCK: They're there?

MS. GAGNON: They were here an hour ago.

MR. YELENOSKY: They're coming to pick it up any minute.

MR. TIPPS: We thought this was a tactic.

CHAIRMAN BABCOCK: We're going to get finality done.

Anybody want to break for lunch?

HONORABLE SARAH DUNCAN: Yes.

CHAIRMAN BABCOCK: Let's break for lunch.

(A recess was taken at 12:54 p.m., after which the meeting continued as reflected in the next volume.)

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CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

* *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 17th day of November, 2000, Morning Session, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 1,033.50 .

Charged to: Jackson Walker, L.L.P.

Given under my hand and seal of office on this the 1st day of December, 2000.

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