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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

OCTOBER 21, 2000

(SATURDAY 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 21st day of October, 2000, between the hours of 8:37 a.m. and 11:55 a.m., at the Texas Law Center, 1414 Colorado, Room 101, 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 we're onto voir dire, and Ms. Sweeney is going to take us quickly through this.

MS. SWEENEY: Absolutely.

CHAIRMAN BABCOCK: So that we can get to Richard Orsinger's project of a family law discovery -- where is Richard?

MR. DUGGINS: He's dead.

MR. LOWE: He had to stop by to get another bottle of wine I think.

CHAIRMAN BABCOCK: That's pretty cruel, Buddy.

MR. GILSTRAP: It's on the record, Buddy.

CHAIRMAN BABCOCK: He can read it for himself.

MR. LOWE: I'll be like Judge Coe. "Young lady, don't put that on the record."

MS. SWEENEY: All right, you-all. You should have in front of you -- if you don't, there's some over there. There are two documents. I named them, so do not make fun of the originality. Combined Working Draft A, and if you're following me closely, Combined Working Draft B. I'm going to suggest we work from B. The verbiage should be -- is intended to be identical. B is

the -- the difference is that one of them is formatted with a section (a) and (b), and the other is not, and I think it's a little easier to work from. So see if everybody can get your Combined Working Draft A -- I mean B out. And your Big Chief tablet.

All right. Essentially what we have done, the subcommittee got back together and considered the suggestions and comments from the last full meeting and made the vast majority of the changes that had been suggested so that you now have a rule that provides unchanged the first sentence -- actually, it is changed. "The parties have a right to conduct voir dire examination for a reasonable time which shall be set by the court." The only thing we deleted from there is that we did have embodied in there that the parties or their attorneys, which somebody pointed out was unnecessary because a party's right is typically carried out by an attorney and not necessary to add that superfluous verbiage, so we took it out.

"The parties may, (a), advise the jury panel with claims, damages, and defenses in the case so that the panelists may intelligently answer questions about their qualifications, experiences, and attitudes." That is sort of an amalgamation of two concepts that we had a little bit separate before. One, that what the parties can say;

and, two, the purpose of saying it, which is to be able to allow the panelists to provide relevant information about themselves that's relevant to the particular issues in the case.

Letter (b), "The parties also may question the panelists sufficiently to be able to make reasonably informed decisions concerning the exercise of peremptory challenges and challenges for causes." David Peeples has suggested since I typed this up, and I agree, that the words "decisions concerning the exercise of" are superfluous verbiage and should come out, which if we do that -- and I'm going to recommend to you that we do -- that clause will read that "The parties may question the panelists sufficiently to be able to make reasonably informed peremptory challenges and challenges for cause," which, again, I think the phrase "decisions concerning the exercise of" is not a necessity.

And then the rule goes on to provide then the limiting component -- well, to go back to letter (b). What we're folding in there is that the lawyers have to be able to have, or the parties, have enough time to ask questions to flesh out not just what they need for their challenges for cause but also for their peremptories and that permits obviously a somewhat wider latitude than you would have if you were only talking about challenges for

cause because a lot of the things that are going to support a peremptory challenge are irrelevant to a challenge for cause and also allows the parties, if necessary, to explain to the court that they have not had enough time to develop the grounds for supporting or defeating a Batson challenge, because if you've got 15 minutes and 60 panelists, by definition you're going to strike someone because of either a physical appearance or a characteristic. There's no way to talk to everybody. So those were the concepts that were included there.

Then in terms of limitations -- and I will read you the sentence and David Peeples has a suggestion on verbiage that is also, I think, completely appropriate. "The examination shall not be abusive, unduly invasive, repetitive, or argumentative." David has suggested that "unduly invasive" should be put last because "unduly" modifies only the word "invasive," as we constructed it. So it should be "abusive, repetitive, argumentative, or unduly invasive," and that's just stylistic.

"And a party may not attempt to commit a panelist to a particular verdict or finding." That was something we debated at length last time and the committee strongly -- or wanted to leave in.

The last clause is one that was debated but has been added, "but may question a panelist generally

about the panelist's ability to fairly consider any element of the claims, defenses, or damages presented in the case," so that although one could not ask a panelist, you know, "Will you vote to find conspiracy here" or "Will you vote to find negligence here," a party may say, "Can you consider that if negligence is defined as such that you could give such an award under appropriate circumstances or if you felt the evidence supported it" so that the panel can be qualified as to their general ability to do the things that the case requires, but that it makes it clear that one cannot pin them down that "In this case you're going to find negligence and award me $6 million; isn't that true?"

So there are a couple of other small stylistic things that we'll get to; and it was suggested to me yesterday that in the litany "claims, defenses, and damages" that there are cases in which we need to consider an additional component and perhaps add the phrase "relief sought" such as cases in which there is injunctive relief sought or some kind of declaratory action; and those are areas I don't know about; but there are cases where damages are not the issue and apparently where "claims and defenses" is not quite broad enough. I don't think it does any harm to add "relief sought" and in those instances may be beneficial.

So that in broad form is the proposal of the subcommittee. David Peeples has also suggested that we go ahead and make it fully enumerated so that the first sentence will be clause No. (1). The sentence starting out "the parties may" would be No. (2). The sentence starting out "the examination shall not be abusive" is No. (3), and the sentence starting out "a party may not attempt to commit" would be No. 4. Those are just stylistic things that I think are not relevant to our discussion particularly, but this is the rule that we would propose to the committee based on the discussions and votes that were taken last time and then the follow-up work of the subcommittee.

CHAIRMAN BABCOCK: Paula, you may have said this, but what's the difference between Draft A and Draft B?

MS. SWEENEY: The formatting.

CHAIRMAN BABCOCK: Just the formatting, that's all?

MS. SWEENEY: That was intended to be all. I may have transposed some words, but it's supposed to be identical.

CHAIRMAN BABCOCK: Okay. Does the subcommittee have a recommendation as to which format?

MS. SWEENEY: Based on the input I've

gotten back, the people who care prefer B.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID PEEPLES: The people who happened to turn their e-mail on fast enough to reply to her.

MS. SWEENEY: Before I sent out another one saying, "Where are you guys?"

CHAIRMAN BABCOCK: Shall we look at B then?

HONORABLE DAVID PEEPLES: I think so.

MS. SWEENEY: I think B is the one we should be considering.

CHAIRMAN BABCOCK: Okay. All right. Now, you said there were two changes, one of them which I got. You are going to move "unduly invasive" to the end of that sentence. What was the other one, the stylistic change?

MS. SWEENEY: Delete the clause "decisions concerning the exercise of" in subpart (b) as unnecessary.

CHAIRMAN BABCOCK: Okay.

MS. SWEENEY: And then adding in the two places where there's the litany "claims, defenses, and damages" and I've got one of them says "claims, damages, and defenses." The other one says "claims, defenses, and damages." So I would have (a) read "claims, defenses, and damages," which is something I had planned to tidy up in sending you the final version.

CHAIRMAN BABCOCK: Okay.

MS. SWEENEY: But to add to that "claims, defenses, damages and relief sought," if the group feels that's significant. I confess to not really -- I haven't a dog in that fight.

MR. HAMILTON: I think you ought to say "damages, if any."

MS. SWEENEY: Go away.

HONORABLE DAVID PEEPLES: Well, on that issue, the jury wouldn't decide on equitable relief, would they? They might make some credited findings, but then it's up to the judge, I think.

MS. SWEENEY: I don't know.

HONORABLE DAVID PEEPLES: And I can think in a family law case there wouldn't be damages, but custody or -- more than custody sometimes these days, so "damages" may be too restrictive a word. Maybe we ought to just change that to "relief sought" in general.

MS. SWEENEY: Change "damages" altogether to "relief sought"?

HONORABLE DAVID PEEPLES: Clearly "relief sought" covers damages. Would it also cover any equitable type findings and family law findings?

MS. SWEENEY: Does "relief sought" cover the ability to explore with the jurors the nature of a

physical disability and damages as opposed to the dollar relief sought? Or would somebody jump up and say you can't talk about your damages, you can only talk about the dollar amount you want to claim because it's not in the rule?

HONORABLE DAVID PEEPLES: "Damages or other relief sought."

MS. SWEENEY: If we're going to change it, I would rather add more just to be safe, unless somebody thinks -- okay. So consensus then, "claims, defenses, damages, and relief sought"? Yes?

CHAIRMAN BABCOCK: Okay. Anybody -- David, you all right with that?

HONORABLE DAVID PEEPLES: "Damages and other relief sought in the case" maybe.

MR. TIPPS: "And" or "or." I mean, we have already got "or" in there.

CHAIRMAN BABCOCK: "The parties may advise the jury panel of the claims, defenses, damages or" --

HON. F. SCOTT McCOWN: "Other relief sought."

CHAIRMAN BABCOCK: -- "other relief sought." Paula, is that okay?

MS. SWEENEY: I think that's all right. "Claims, defenses, damages, or other relief sought," and

that will go in two places. It will go in the first sentence of (a) and then it will go in the last -- very last line of the rule.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: Not to be too picky, but shouldn't it be "and"?

CHAIRMAN BABCOCK: Well, since it's "the parties may." Certainly in (a) I would think it would be "or." But maybe not.

HONORABLE DAVID PEEPLES: We have got "and" in the second sentence, (2)(a), and we have got "or" in the very last phrase of the whole rule. And we probably ought to have the same thing.

CHAIRMAN BABCOCK: So which is it?

MS. SWEENEY: I think "and" is better. We don't want to get into someone saying it's one or the other. It does no harm to the concept.

CHAIRMAN BABCOCK: Okay. "And."

MS. SWEENEY: So as we currently have it then if I can just read the rule into the record, and then I will type it up.

HONORABLE DAVID PEEPLES: Well, just one --

MS. SWEENEY: Okay.

HONORABLE DAVID PEEPLES: This is stylistic, but in the last sentence, the word "panelist" is in there

three times.

MS. SWEENEY: Okay.

HONORABLE DAVID PEEPLES: How would it be if we said "but may question panelists generally about their ability"?

MS. SWEENEY: Okay.

HONORABLE DAVID PEEPLES: Now, I don't think that should change the meaning of it, but I think it's a little bit better stylistically.

MS. SWEENEY: Does that mean that you can only ask the panel as a whole?

HONORABLE DAVID PEEPLES: I don't mean for it to mean you can only ask them as a group.

MS. SWEENEY: I can sure see that argument coming up though, Judge.

CHAIRMAN BABCOCK: Yeah. That might make it ambiguous.

HONORABLE DAVID PEEPLES: Well, okay.

HON. F. SCOTT McCOWN: Well, shouldn't that be s apostrophe instead of apostrophe s?

MR. DUGGINS: Yeah. I was just getting ready to say the same thing.

MS. SWEENEY: Yeah.

HONORABLE DAVID PEEPLES: Well, she's got s apostrophe.

HON. F. SCOTT McCOWN: It should be apostrophe s.

MR. TIPPS: Apostrophe s is singular. I vote to unsplit the infinity, but...

MR. GILSTRAP: Shouldn't the phrase "claims, defenses, and damages" in the last sentence match the one in (2)(a)?

MS. SWEENEY: Yes, and I've flipped it. Thank you.

CHAIRMAN BABCOCK: And do you want to say "fairly to consider"?

MS. SWEENEY: No.

HONORABLE DAVID PEEPLES: "To consider fairly"?

CHAIRMAN BABCOCK: "To consider fairly"?

MR. TIPPS: I do, one or the other, but that's just me.

HONORABLE DAVID PEEPLES: Brian Garner says it's sometimes okay to split an infinity.

CHAIRMAN BABCOCK: It is? Brian Garner says that? Good enough for me.

MS. SWEENEY: I mean, I heard it on Letterman.

MR. HATCHELL: We fired him.

MR. MEADOWS: McCown's been saying it for

years.

HON. F. SCOTT McCOWN: Yeah. I can give you reams of articles on why the split infinitive rule is wrong.

CHAIRMAN BABCOCK: Okay. Well, you feel strongly about it, so --

HON. F. SCOTT McCOWN: I feel strongly about it.

MR. TIPPS: I will just lose. I don't even call for a vote.

CHAIRMAN BABCOCK: Okay. Anything else about this people want to talk about? Yeah, Steve.

MR. TIPPS: On (1), Paula?

MS. SWEENEY: Yes.

MR. TIPPS: Should it not be "the right" rather than "a right," "the parties have the right"?

MS. SWEENEY: I don't know. Is that better?

MR. TIPPS: I mean, that seems stronger to me.

CHAIRMAN BABCOCK: Should be "the"?

MS. SWEENEY: "The." Okay.

MR. TIPPS: I would also put a comma after "time."

HONORABLE DAVID PEEPLES: I would, too. "Time," comma, "which."

MR. TIPPS: "Time," comma, "which."

MS. SWEENEY: That's been there a few times. I think it came out by accident.

CHAIRMAN BABCOCK: After -- between "time" and "which"?

MS. SWEENEY: Yes, sir.

CHAIRMAN BABCOCK: Okay.

HON. F. SCOTT McCOWN: Well, if we're at the comma level, on (a) I would put a comma after "experiences." I don't know if we have a style manual, but I believe in the serial comma and not the journalist dropping it.

HONORABLE DAVID PEEPLES: I do, too.

MS. SWEENEY: And so "qualifications," comma, "backgrounds," comma, "experiences," comma, and "attitude," semicolon.

MR. GILSTRAP: You're going to have to put it after "damages," too.

HON. F. SCOTT McCOWN: If you want my vote, that comma's got to go there.

MS. SWEENEY: So there will be one after "claims," comma, "damages," comma, "defenses," comma, "and other relief sought," there also.

CHAIRMAN BABCOCK: Okay.

HON. F. SCOTT McCOWN: You've got another --

I don't know how you've ordered this now, but "abusive, unduly invasive, repetitive," comma, "or argumentative."

MS. SWEENEY: Okay. I will put a comma after whichever -- I think argumentative will be last.

MR. TIPPS: Right. It goes after "argumentative."

MS. SWEENEY: So it will be "abusive," comma, "repetitive," comma, "argumentative," comma, "or unduly invasive."

MR. MEADOWS: No vote on those commas, I take it.

CHAIRMAN BABCOCK: Okay. Anything else? Yeah, Bobby.

MR. MEADOWS: Why are we moving "abusive" to the end?

MS. SWEENEY: Actually what we're doing is moving "unduly invasive" to last because the phrase "unduly" modifies only "invasive."

MR. MEADOWS: Okay.

HON. F. SCOTT McCOWN: Otherwise you could be repetitive but not unduly repetitive.

CHAIRMAN BABCOCK: Stephen.

MR. YELENOSKY: I was just wondering -- we were talking a lot yesterday about technology -- would it be helpful and possible for us to have some kind of

projection system set up so we can all see together what we're looking at rather than always looking at paper? It seems to me if we had a computer hooked up we could all look at it together without reams and reams of paper.

CHAIRMAN BABCOCK: Yeah. The Bar has I think probably got plenty of funds to give us that. We'll check it into that. That's a good idea.

MS. SWEENEY: That's a real good idea.

CHAIRMAN BABCOCK: I did get a call from somebody at the Bar who was gnashing their teeth about how much money we're spending, but when I cross-examined her about it a little bit it was just the fact that we've got a lot of people, and most people are coming to our meetings, and we meet six times a year, but anyway, keep that in mind. The Bar is nervous about how much money we're spending.

MR. WATSON: Chip, when you look up there's the projection, and the screen is coming out of the wall. I mean, they are set up for it.

MS. SWEENEY: And that podium is completely wired, from what I was observing yesterday. I think you could hook up a Power Point or something.

MR. WATSON: It's just a matter of getting a techy in here to --

HON. F. SCOTT McCOWN: Well, if the Bar

doesn't have an Elmo, we now have an Elmo at the courthouse. I could bring an Elmo with me and then we wouldn't even have to struggle with Power Point.

MR. YELENOSKY: Well, I have to confess, what's an Elmo?

HON. F. SCOTT McCOWN: It's one of those fancy overheads where it will show you as Paula put in the commas you could see her do it.

MR. YELENOSKY: Oh, from the computer?

MS. SWEENEY: No, you have the paper on it. Then you write.

MR. YELENOSKY: Well, whatever.

CHAIRMAN BABCOCK: We will see about that for the next meeting. But the next meeting, however, is not going to be here; is that right?

MS. GAGNON: That's right.

CHAIRMAN BABCOCK: We reserved our room and they kicked us out of it. Did you know that? So we're going to be at the Texas Association of Broadcasters again for our next meeting, but we will get something. All right. What about this rule? Anything else?

MS. SWEENEY: Here is how it is now going to look then if I've got everyone's notes. No. (1), "The parties have the right to conduct voir dire examination for a reasonable time, which shall be set by the court."

No. (2), "The parties may, (a), advise the jury panel of the claims, defenses, damages, and other relief sought in the case so that the panelists may intelligently answer questions about their qualifications, backgrounds, experiences, and attitudes; and, (b), question the panelists sufficiently to be able to make reasonably informed peremptory challenges and challenges for cause."

(3), "The examination shall not be abusive, repetitive, argumentative, or unduly invasive." (4), "A party may not attempt to commit a panelist to a particular verdict or finding, but may question a panelist generally about the panelist's ability to fairly consider any element of the claims, defenses, damages, and other relief sought in the case." Deleting the word "presented."

CHAIRMAN BABCOCK: Okay. Any other comments about that? Anybody want to move the adoption of this?

MR. DUGGINS: So moved.

CHAIRMAN BABCOCK: Ralph.

HONORABLE DAVID PEEPLES: Before we vote on it I want to raise something.

CHAIRMAN BABCOCK: All right. So that's been moved. Anybody second?

MS. SWEENEY: Second

CHAIRMAN BABCOCK: David.

HONORABLE DAVID PEEPLES: I think that we have done a good job of dealing with this aspect of voir dire. I think it would be a bad mistake for us to deal with this part of voir dire without also dealing with challenges for cause, and so it would seem to me that if we're going to send this to the Supreme Court we should let the Court know that we are also going to work on challenges for cause or else keep this until we work on that.

Now, we may not be able to agree on anything, and there may be vast differences in what we think ought to be done, but I think it would be irresponsible of us to send this, to tinker with part of the problem and create problems in the other part of voir dire, which is challenges for cause.

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID PEEPLES: So I think we need to deal with that. Not right now.

CHAIRMAN BABCOCK: Yeah. David, after our last meeting when you raised that with me I talked to Justice Hecht about it, and I think it's the view of the Court -- Justice Hecht, correct me if I'm wrong -- that they would like to see this rule now, and they are more than happy and encouraging of us to go forward on that second part of it, but they did not want us to delay this

part of the rule --

HONORABLE DAVID PEEPLES: Okay.

CHAIRMAN BABCOCK: -- in order to wait for that to happen. So am I -- have I got that right?

JUSTICE HECHT: Uh-huh.

HONORABLE DAVID PEEPLES: Is it understood that we're going to do something?

JUSTICE HECHT: They're aware that you're still talking about the other piece of it.

MS. SWEENEY: And, for the record, the problem that this rule addresses is the legislatively addressed problem last time of arbitrary and unreasonable limitations on a party's ability to do voir dire, not on some perceived problem with challenges for cause. That hadn't been part of our mandate.

I don't know what the perceived problem is with challenges for cause, but I think that this committee has always worked from a specific issue brought to it. No one has brought to this committee, that I'm aware of, a problem with challenges for cause; and until such issue is raised, I think we're operating in a vacuum. I mean, I don't know what the problem with challenges for cause is, and we don't have a letter comment or request from the Court to address that at this time.

CHAIRMAN BABCOCK: Well, I think, Paula,

that both Judge Peeples and Judge Brister feel that there is a problem, or at least there's something worthy of study, and they raised that with me, and I raised it with the Court, and the Court said, "Go study it." Now, it may be you come back and say there is no problem, but since two members of our committee who are esteemed jurists --

HONORABLE DAVID PEEPLES: Well, there's more than two.

CHAIRMAN BABCOCK: Well, at least two esteemed jurists want to study it, so then we're going to study it. But for right now we have got a motion and a second. Any other comment about this rule?

HONORABLE DAVID PEEPLES: I'm going to vote for it; but if I thought that nothing was going to be done on challenges for cause, I would vote against this because this is going to -- we have expanded and solidified the right of lawyers to say a whole lot about the case; and if you don't have a corresponding change that says just because a juror or panelist has heard a lot of facts doesn't mean that person can be challenged for cause successfully, what amounts to a summary jury trial -- they're thinking, "Golly, sounds like one side is better than the other" -- there are judges who will excuse jurors in mass because of that, and we are promoting that here, which is fine.

I'm in favor of letting lawyers explore, but I want to shut down on the back end the ease with which, after a thorough exploration of the case, people get excused for cause simply because they have been bombarded with the facts; and they say, "Gosh, if those are the facts and if you're asking me right now, gosh, it seems like one side is stronger than the other." We need to deal with that, and if we're not going to, I would not vote for this, but since we are going to I will.

CHAIRMAN BABCOCK: So the judge's vote has got to have an asterisk by it.

HONORABLE DAVID PEEPLES: That's right.

CHAIRMAN BABCOCK: Okay. Yes, Buddy.

MR. LOWE: If we don't do this, we're going to get this bill that says everybody gets two hours in a fender-bender and so forth, so if we mess up on the other, I mean, at least let's not have the Legislature pass some bill that says a lawyer gets two hours and then every lawyer is going to get up and take it. So I think this is totally --

CHAIRMAN BABCOCK: Lawyers being what they are. Okay. Any other discussion?

All right. Everybody in favor of Combined Working Draft B. Anybody against?

23 to 0 it passes. Thank you, Paula. Thank

you, Judge Peeples.

HON. F. SCOTT McCOWN: Can I ask --

CHAIRMAN BABCOCK: Yes.

HON. F. SCOTT McCOWN: And Justice Hecht may not know or be able to comment on this, but do you have a thought as to when the Court would promulgate this or publish it for comment?

JUSTICE HECHT: I think they will look at it forthwith because this is something that came to us since the last -- through the last session, as Paula mentioned, but the timing on putting it out I don't know.

MS. SWEENEY: Chip, I'll send you a final redacted copy Monday --

CHAIRMAN BABCOCK: Thank you.

MS. SWEENEY: -- for your transmittal to the Court.

CHAIRMAN BABCOCK: Great. Thank you, Paula. Thanks for the hard work that you and David and Scott and others on your subcommittee did.

We're now on to discovery, and Steve Susman was unable to be here today, but he told me that Joan Jenkins is his designated pinch hitter. This is some discovery tweaks that are occasioned by particular problems in the family law context, and this is something that Richard Orsinger, who is still not here for some

reason today -- I just said "for some reason."

HONORABLE SARAH DUNCAN: Be nice.

CHAIRMAN BABCOCK: Is concerned about and the Family Law Council has been discussing it, and I think maybe even Justice Hecht has talked to them a little bit about this, and, Joan, other than that, go get 'em.

MS. JENKINS: Okay. There are two proposals, which I learned yesterday afternoon I would be presenting to you this morning. The first of which has to do with Rule 176.3. In practice what appears to have happened is that Rule 176.3 has eliminated the difference between trial and discovery subpoenas, and what has occurred or what has happened to us in the area of family law is we are left with the problem of not being able to get a subpoena out in order to get the necessary information we have to have to present at a temporary hearing.

We file a petition for divorce. We typically get a temporary hearing set within a week to two weeks. We are then in front of the court with no information regarding the other party's resources for determination of child support or temporary support for a spouse. This also comes up in the context of protective orders where you're seeking a protective order in connection with a family violence issue. The family

courts also have the ability to award support under those circumstances, and so for those reasons we are requesting an amendment to Rule 176.3 to allow a shorter time frame for response to subpoenas in situations involving hearings on protective orders, hearings requesting emergency or temporary relief under Titles I, IV, and V of the Texas Family Code. That's a fairly succinct explanation of the proposal that you have in front of you.

CHAIRMAN BABCOCK: Does everybody have the proposal? It's contained in the Orsinger to Simpson or Simpson to Orsinger --

MS. JENKINS: Yes. It's entitled "Memorandum to Richard Orsinger from Georganna L. Simpson," dated September 8th, 1999. The explanation of the problem is in the first two paragraphs and then the specific proposal begins towards the end of the middle of the page, "proposed revision to Rule 176.3," and I'll give everyone a moment to review it.

HONORABLE DAVID PEEPLES: This is in the thick agenda, Chip, or --

CHAIRMAN BABCOCK: Yeah. It's in there. It's sort of toward the back, David, and the blue cover sheet says "Request for disclosure under Title I and V of the Texas Family Code," is how it starts.

MS. JENKINS: It's preceded by Rule 194(a),

request for disclosure. It follows that.

MR. TIPPS: Got it.

CHAIRMAN BABCOCK: Justice Hecht.

JUSTICE HECHT: As I recall, the discussions about this rule, which actually came sort of at the end of the process -- well, it was at the very end of the process. 176.3(b) was not intended to address anything other than discovery, which is what it says. The idea being that there would be times when you would want to issue a subpoena that would be returnable instanter in any kind of emergency hearing; but certainly if you were trying to enjoin a foreclosure or trying to get an injunction in any kind of civil instance, you might want witnesses subpoenaed to the hearing that minute and to bring all their documents; and the question that was posed to me at one of the family law conferences was doesn't Rule 176.3 limit or preclude you from doing that; and my answer was, no, I think you could.

If we need to make it clearer, that's fine, but I don't know whether you even want to give three days notice on some of this. Maybe you do, but I'm not a family practitioner, obviously, but there might be plenty of times when you couldn't give three days notice. You wanted to give three minutes notice.

MS. JENKINS: Well, Justice Hecht, to be

candid, my interpretation of the rule was exactly what yours was, but Richard persuaded the majority of the family law Bar and, accordingly, our judges that that was not the interpretation of the rule; and over the course of practice what has happened is we have been left with at least the majority of the courts, the family district courts in Harris County, which is the only jurisdiction I can speak to, interpreting this rule to exclude any kind of subpoena of information other than just a party without 30 days notice.

JUSTICE HECHT: Well, it's disturbing to hear that the family bench is so easily misled by this.

MS. JENKINS: Richard may not be the only culprit, but he has, in my opinion, been the most vocal. And I'm glad he's not here so I can speak freely about the issue. My thought actually had been that it could be perhaps corrected with a comment rather than having to have a specific exception carved out for family lawyers, but I do believe from talking to the other practitioners around the state, I know there is a similar interpretation in Dallas County, is my understanding, and I think there have been similar problems in San Antonio also.

So for us, at least because we have this issue come up literally almost in every case, it's a fairly serious problem for us, and we -- I considered

perhaps just asking you to send a note to the teachers for me, but I think dealing with it in this manner probably would be more effective.

CHAIRMAN BABCOCK: Well, Joan, if judges are interpreting it this way it's not a problem limited to family law. It's a problem that's potentially for all litigation.

MS. JENKINS: Well, I completely agree, except I, obviously appearing only in family district court --

CHAIRMAN BABCOCK: Right.

MS. JENKINS: -- did not have any knowledge as to whether or not any other practitioners had experienced this problem with the civil district Bar interpreting the rule in this manner.

CHAIRMAN BABCOCK: Judge McCown.

HON. F. SCOTT McCOWN: Could I make a suggestion? We have a comment now, Comment No. 2, that specifically speaks to 176.3(b). Why don't we just add a single sentence that this subdivision does not apply to the use of subpoenas for trials or hearings?

MS. JENKINS: I think that, candidly, would be a far better solution to what I perceive to be a more comprehensive problem than what this was intended to deal with, and I think that would absolutely resolve all of our

issues that this is intended to correct.

CHAIRMAN BABCOCK: What's everybody else think? Sounds to me like a good suggestion. Great idea. Elaine?

PROFESSOR CARLSON: Sounds good.

CHAIRMAN BABCOCK: Give us the language again, Scott, if you would.

HON. F. SCOTT McCOWN: I would just say, "This subdivision does not apply to the use of subpoenas for trials or hearings" or "does not govern the use of subpoenas for trials and hearings."

CHAIRMAN BABCOCK: Okay. So there would be an addition to Comment 2 following Rule 176.3 that says "This subdivision does not govern the use of subpoenas for trials or hearings." Simple, elegant, and effective. Anybody against it?

HON. F. SCOTT McCOWN: Well, we don't know if it's effective because we haven't heard Richard's interpretation of it yet.

CHAIRMAN BABCOCK: And apparently are not likely to this morning.

HONORABLE DAVID PEEPLES: Boy, he's easy to pick on when he's gone.

CHAIRMAN BABCOCK: Yeah, don't be absent with this crowd. Everybody okay with that? Joan, you

okay with that?

MS. JENKINS: I'm more than okay with that. That would have actually been my original suggestion, so that's absolutely fine with me.

CHAIRMAN BABCOCK: Okay. Then we will adopt that unanimously. Now, there was a second problem that had been raised; is that correct?

MS. JENKINS: The second problem had to do with Rule 194 and the fact, candidly, that the current way the rule is drafted leaves little for us to gain as family lawyers other than merely identifying our testifying experts. Other than the identification of the parties and perhaps legal theories, there's little else in the rule that really does for the family Bar what Rule 194 is intended to do for the balance of the Bar.

The family law section through the Family Law Council appointed a committee and came up with a draft request which they intend to be what would become Rule 194A, which is basically request for disclosure under Title I, and the title reads -- and V of the Texas Family Code, but I think there is an omission there. It should be "Title I, IV, and V of the Texas Family Code."

This is a lengthy disclosure request, but it is intended to identify main issues that have to be identified in virtually every family law case and for

which objections are regularly lodged for no good reason. I can walk you through the rule as proposed.

First of all, the first section under (a) would contain those things that would always be required to be disclosed in suits in which spousal or child support is an issue, and those would involve the things necessary to identify the health insurance policy for coverage of the spouse or the child; verified list of the responding party's resources as defined by Section 154.062 of the Texas Family Code, which has to do with our determination of net resources for calculation of support; and also the parties' immediately previous two years income tax returns, which is also necessary for determination of spousal or child support.

With respect to subsection (b), the requests relating to suits for divorce or annulment, includes the same requests for insurance coverage, income tax information, but goes on to include most recent statements -- and that is just the most recent statements -- for financial accounts held by the parties, information concerning real estate, information concerning employee benefits at No. (5). At No. (6), information concerning business interests; No. (7), indebtedness; No. (8), motor vehicles, boats, other personal property; No. (9), financial statements; No. (10), information concerning

creditors.

Number (c), information concerning legal theories, and the legal theories in our cases are obviously different in many respects from those in other civil cases, and then continues on tracking the information under the current rule for testifying experts and then incorporates in (e), (f), (g), (h) and (i) those claims that are those -- that information that regularly comes up in the tort claims that we see associated with our particular type of litigation. Yes, Scott.

HON. F. SCOTT McCOWN: Well, I am strongly opposed to this suggestion, and I was on the discovery subcommittee that developed Rule 194, and if you look at Rule 194, it actually requires the production of very little, and it's very easy to invoke Rule 194, but it doesn't -- you don't really have to pull together very much.

The problem with the proposal, which is that Texas is already the most expensive state in the country in which to obtain a divorce. In, I would venture to say, 95 percent of the divorces in Texas none of this stuff is produced, and this proposal comes to us from a very distinguished group of high-level practitioners who are probably routinely getting this stuff, but they're getting it in cases of very rich people who are paying that fray,

and to create a rule will then encourage lawyers -- because you invoke this request by merely sending a letter, will encourage lawyers to ask for this. Some of them will feel obligated to ask for it because it's in the rule and so easy to do, and it's just kind of "Here's a road map to make obtaining a divorce even more expensive than it is now."

MS. JENKINS: If I may --

CHAIRMAN BABCOCK: Justice Hecht.

JUSTICE HECHT: A little history on this concept. Some years ago the Legislature passed an amendment to the Medical Liability Improvements Act calling for the appointment of a committee made up of lawyers from the plaintiffs and defendants side of medical malpractice cases to consider standard form interrogatories that could be used in medical malpractice cases, so a committee was appointed and they worked for a little while.

The Court was given very limited flexibility in trying to deal with the committee and its product, but they came in with a stack of interrogatories about like so, and we said, "You can't possibly be serious that you're going to send these interrogatories in smaller and every single one of the medical malpractice cases." Well, they shared the same problem in that the interrogatories

were fine for very serious, high damage medical malpractice cases, but they were not fine for smaller cases and, in fact, we felt like would have the opposite effect, as Scott has said, which is that people would use them abusively in smaller cases and so it would cause more problems than it would solve.

On the other hand, it is still a goal, the Court's goal, to get some kind of case-tailored disclosure or interrogatories in particular areas of our practice that would be standard, that you wouldn't have to worry about how they were worded or shaded at different times. You wouldn't have to worry about objections being made to them. You could depend, just like disclosure, that you could send these out and get basic information about a particular kind of case that's not covered in our disclosure in Rule 194, which it does sort of lean toward personal injury cases, talking about liability policies and different things that are available there that don't fit very well a huge area of our practice, half of it, on the civil side, which is family law.

So I wish there were a way to come up with that kind of disclosure that would be helpful in family law cases and yet not have the vice that it promotes a lot of unnecessary stuff. Not being an expert, again, I don't know which side this falls on, but it would be nice to

accomplish that, and it occurred to us that family law or some discrete area of practice would be a nice place to experiment with this because it would be easier to get the Bar together than something like products liability or medical malpractice where the Bar is a little less cohesive than family law or something like that.

So I hope the idea doesn't get ditched, even if something needs to be done to this.

CHAIRMAN BABCOCK: Joan.

MS. JENKINS: If I could respond to Judge McCown's comments. Since I'm new to the committee, Judge, let me just give you a little bit of background from where I come from so you understand the background that I have in speaking to this. First of all, I have been chair of the family law section for the Houston Bar Association, and our membership in that group covers a wide range of lawyers, most of whom do not have high-dollar cases and do not represent high-dollar clients. My firm also received an award from the Houston Bar for doing the most pro bono work for small firms, and I can assure you the pro bono work that we do at my firm does not involve large cases or wealthy clients, although I admit that's the majority of our practice in particular.

I also am the vice-chair of the section for the state, and the vast majority of our practitioners

really do not deal with high-dollar cases, and what has happened and what we have seen as we have gone to our membership is that Rule 194 and the spin-off from that, which has been a whole flood of local rules that have been adopted by the Harris County district courts, and I believe also the Bar in Dallas County has actually created a situation where our discovery costs are out of control on the average case. Whereas, before I could send out a simple set of interrogatories tailored for a particular case, a simple set of production tailored for a particular case, now in every case in Harris County I'm required to comply with local rules which were specifically designed to garner the type of information that's contained in this Rule 194A request.

That is the basic information that our judges were seeing folks come into court with on a daily basis without having. They were trying to make decisions about families on a daily basis, and they were having lawyers show up with no information regarding resources, no information regarding health insurance, no information regarding the real property, so they created a specific local rule that requires production of virtually all of these things in every case.

Then I'm required also to send out a Rule 194 request because I have to get my testifying experts,

and I have no way of getting that any other way. Then I'm also now required to send out interrogatories and a request for production. So from my perspective as a practitioner that's been doing this for 20 years, I have never had a higher cost for discovery for my average client than I do today, and I think that that is because Rule 194 as it is does not speak to the family Bar in any relevant respect.

Also, as I talk to our judiciary in Harris County, they tell me over and over again that they need help in the form of some sort of comprehensive rule that will allow the average practitioner to send out a letter request and get back in return those things that we must have in every case. If you look at the information that is being requested, this is not information that is designed for the wealthy. This is information that is designed to help the working mom figure out what health insurance is available for her and the kids from the father, and I'm not meaning to sound sexist, but that's the average situation in our cases.

This is to help the average woman who comes into my office, and you would be surprised at the lack of sophistication of folks who simply do not know what the resources are for child support, what the resources are for spousal support. This is the information required to

look at the last two years tax returns to determine spousal support, child support.

I would agree that this is broad in scope; and there were some arguments, candidly, within our own group as to whether or not some of these specific items, for example, ownership of -- documents evidencing ownership in corporations, partnerships, joint ventures. Personally, I think that probably could be excluded. If I'm going after somebody that owns a corporation I'm going to be doing a lot more than simply relying on a Rule 194A proposal, but I think the majority of these things are things we're going to have to have in every case. We need to know about the real estate. We need to know about the cars. We need to know about the credit that's out there.

So these for us were the absolute most rudimentary things that are needed in virtually every case, whether that's a family that is making 30 or $40,000 a year gross income or whether it's a family that is making 3, 4, 7, $8 million a year gross income.

HON. F. SCOTT McCOWN: Well, I mean, I do a ton of divorces, and look at (5) as an example. "The exact name of the plan and the identity and address of the plan administrator, along with all booklets, plan agreements, and the most recent statement of account prior to filing the petition of any 401k." I never look at

booklets and plan agreements. Nobody ever has those. They know how much is in the 401k. You divide it, and you do a QDRO.

Look at No. (8). "Accurate copies of all certificates of title or similar type documents evidencing any ownership in any motor vehicle, boat, or other personal property." I've got a 30,000-dollar family in front of me. Mom is driving the Chevy. Dad is driving the Ford, and they've got a boat in the back. I don't need them to go get the certificates of title and produce those. When you cumulatively add everything here together, this is a massive amount of discovery that is not currently happening in lawsuits and doesn't need to.

And I agree with you -- I agree with you that it's a very worthy goal to try to develop some kind of minimal standard of what needs to be exchanged to accurately set child support and divide the property, and I think there may be a problem if local jurisdictions have developed bad plans. I mean, we have got a standing order in Travis County of what people have to produce, but it's not this. I mean, it's pretty simple.

MS. JENKINS: Well, in response to your comments regarding No. (5), I think all of that was tailored to provide the information necessary to draft the QDRO. I don't know how you're going to draft a qualified

domestic relations order without knowing the exact correct name of the plan administrator and without having the information concerning the plan before you.

HON. F. SCOTT McCOWN: But you don't need it -- that's the problem with mandatory disclosure. You don't need that at the get-go. It may turn out that dad's going to take the 401k and mom's going to take the equity in the house and you're not going to draft a QDRO. If you need a QDRO, you're going to call up the company and say, "Send us your standard form QDRO" and then you're going to plug the numbers into the QDRO that they send you.

And I think that's the evil of mandatory disclosure in all areas of the law, and I was against Rule 194 to begin with, but at least 194 is pretty minimal, but -- and I guess I'm sounding gripier here than I should because I do think it's a very worthy goal to try to get some standardization, and maybe we should have a committee look at it and pull the different standing orders across the state and see what kinds of information people are exchanging and try to develop, as Justice Hecht was saying, maybe standard interrogatories that would be presumptively okay in family law cases. I don't have any problem with that as a goal, but I would have problems with this being adopted.

CHAIRMAN BABCOCK: Judge Peeples, what do

you think about that?

HONORABLE DAVID PEEPLES: Well, I agree with almost everything that Judge McCown has said. I spend probably half my time doing family law over the long haul. And he mentioned 95 percent. That's exactly the figure I was thinking before he spoke. Probably 95 percent of the cases I see do not involve a board certified family lawyer, and it's little people. I mean, it's people that just are barely making it, and sometimes it's middle class. It's almost never the rich in divorce court.

This is written with the big case in mind, and I think Justice Hecht was onto something when he said we're talking about, you know -- what we've done and should do is the bare minimum that you're going to see in almost every case, and I think health insurance information is certainly needed if children are involved, and wage stubs. I almost never -- well, tax returns you see, but if you've got somebody who has had the same job for awhile and he's got his last three or four months of wage stubs, that's really all you need unless there is some contention that he's underemployed and he's not working as hard as he used to and there are bonuses. I mean, it can get more complicated, but usually they have got some tattered wage stub or two, and that lets you know how much the deductions are and so forth.

I think it's legitimate to -- you know, some discovery has the goal of finding out what am I going to be facing in court, or do you have photographs, are there going to be expert witnesses and so forth; and then some other times you want to know what is there out there that you have got that might help me; and so I -- you know, I would rather see some bare minimum standard requests that would apply in every case, the little ones; and then in the big cases handled by you and Richard and others, I think you-all can protect yourselves and you can use this and something more sophisticated; but I agree with Scott that if this is standard, people will use it in little cases just because it's there.

And, you know, the evidence on attorneys fees, a lot of times in these little cases is a thousand dollars or something. It's tiny in terms of the kind of cases you-all are handling, and the extra hour or two it's going to take for you to get your client in and answer this -- and the answer is usually going to be "don't have it," "never heard of it," and so forth, but that's another two, three, or four hundred dollars in a small, small case; and I think that it would be wrong for us to have this as standard when it covers only a small fraction of the cases.

CHAIRMAN BABCOCK: Buddy Lowe.

MR. LOWE: I think in Beaumont the two domestic relations judges got together with the lawyers that come down there and drafted what they need, what they think they need, and I stay away from down there, but I do know that they have -- if you file divorce you have to produce this and that, and they have got a string of things that they as judges feel they need. Now, David might not want -- so each one -- isn't each court at liberty to draw local rules on that? I mean, but I guess Justice Hecht, I understand what he's saying that there's a certain minimum that you might want in every case and maybe uniformity, but I think now it's being operated by local rules.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: I also question -- there may be prenupts involved, marital agreements involved that render all of this information irrelevant in a divorce, and yet we're going to mandate disclosure of some of the most private financial matters that any of us has, and I really have a problem with that.

CHAIRMAN BABCOCK: Well, it seems to me that there's a developing consensus that we probably need something, but this is too much. Would that be fair to say? That leads me to wonder whether, Joan -- I don't sense that the discovery subcommittee has really done

anything other than say, "Oh, if the family lawyers want it then that's fine."

MS. JENKINS: That's precisely correct.

CHAIRMAN BABCOCK: Okay. That was my sense of what had happened. Would it be appropriate for you and that subcommittee and perhaps drawing on the expertise of others like Judge McCown and Judge Peeples to try to hone this down a little bit?

MS. JENKINS: I would be delighted to do that. I would have no problem doing that at all.

CHAIRMAN BABCOCK: And you might -- I mean, you could go outside our committee, too, and talk to some of the judges in Dallas or Houston or Beaumont or whatever to do that.

JUSTICE HECHT: Picking up on what Buddy said, the fact that there are so many standing orders -- and, again, I'm just going on what I'm told by family practitioners, but in venues in the state where there's a lot of family cases there do seem to be standard orders that set out basically in many instances what information you have to swap early on, which kind of indicates that this is -- there's a need for it, but we don't want to over -- we don't want to make it over-inclusive.

HON. F. SCOTT McCOWN: Well, but, of course, you know, we always have that philosophical difference

between what's appropriately handled by local rule and what should be standardized, and if anything is local, it's family law. I mean, there are very few practitioners who cross-jurisdiction, and they would do so only in the high-dollar cases. So I guess one question would be whether the local rules are currently solving the problem or it should be addressed at the local level or whether we do need a statewide template or standard. I don't have an opinion on that, but that would be something to look at.

CHAIRMAN BABCOCK: That would be a good question for you-all to consider, Joan. And, yeah, Elaine.

PROFESSOR CARLSON: I have two comments. One, it seems to me that this is an area where there's a public policy concern and that the courts have to have or need the information. I'm curious to ask Joan and Judge Peeples, Judge McCown, are there a lot of family law cases and divorces where parties appear without counsel or is that not the norm?

HONORABLE DAVID PEEPLES: There are lots.

MS. JENKINS: There are a fair number and --

HON. F. SCOTT McCOWN: Well, if I could just throw out a statistic that's astounding because we just did a study on that. 60 percent of our divorces are pro se.

PROFESSOR CARLSON: How does -- I mean, do the parties wade through discovery pretty handily when they're representing themselves or would this -- the inclusion in a request for disclosure it seems to me in this area would be particularly helpful to the court. Maybe not this extent of information.

HON. F. SCOTT McCOWN: It's like you're from Mars, and it's hard to explain, but --

CHAIRMAN BABCOCK: Men are from Mars.

HON. F. SCOTT McCOWN: They come into court, and dad reaches into his wallet and pulls out the tattered wage stub, and the judge conducts an interview. He interviews mom. He interviews dad. He asks the standard questions and figures out what they have, and he plugs in the numbers and does the divorce, and it's -- and asking them to conduct pro se discovery is completely unrealistic.

PROFESSOR CARLSON: Okay.

HON. F. SCOTT McCOWN: I mean, they don't have two pots to divide.

CHAIRMAN BABCOCK: Okay. Well, it sounds like we have a consensus to send this to our -- back to the subcommittee and, Joan, if you would -- would you take the lead on it?

MS. JENKINS: I will.

CHAIRMAN BABCOCK: And draw from whatever resources of the subcommittee or outside the subcommittee that you feel are necessary. And you can report back hopefully by our next meeting, which is coming up on us pretty quickly.

Great. Well, now, saving the best for almost last, Justice Duncan is going to talk to us about finality.

HONORABLE SARAH DUNCAN: And we won't finish this this year or next or the year after.

CHAIRMAN BABCOCK: Oh, sure we will. We're going to bring this to a conclusion.

HONORABLE SARAH DUNCAN: I don't think so.

MS. SWEENEY: We're going to get some finality.

HONORABLE SARAH DUNCAN: I think we can all start from the -- I consider it a fact that no resolution of the finality problem is going to resolve the finality problem in all cases. The tension is between having a bright line rule so that people can look at their judgments and say, "Ah, this is a final judgment" and watching people lose their appeals because what they thought was not a final judgment was, in fact, a final judgment and the time to appeal has been lost.

And I assume all of you are familiar with

the case law, the problems that have evolved in this area, both before and after the Supreme Court's opinion in Maffridge in the summary judgment context. What our committee -- we looked at various alternatives, including the alternative adopted by Bill Dorsaneo in the recodification draft, which was to try to define what a final judgment is, and our committee concluded that we really couldn't do that. Every time we tried a definition we thought of a fact situation, frequently recurring, and it wouldn't work. So we ultimately agreed that the best solution we could propose was something along the lines of a final judgment clause that was suggested by Doug Norman, who was the chief staff attorney in Corpus, and that is what is on -- in the report for your consideration.

I don't think -- I have a wonderful subcommittee. We've worked wonderfully well together and harmoniously. I think we're amicable people. I don't think any of us are so tied to the particular language that that should be a problem, but what I would like to see, if it's okay with the chair, first is to discuss the concept of trying to define final judgments versus having a final judgment clause in a judgment and see if there is consensus that the final judgment clause is what we need to do before we look at precise language.

CHAIRMAN BABCOCK: That's fine. Let's talk

about that. Justice Hecht.

JUSTICE HECHT: Well, so many of those cases listed at the top of the memo seem to have come from my Court I feel like I owe some explanation. It has come to my attention that the problem troubles other systems as well. In the late Fifties the United States Supreme Court wrote a couple of opinions trying to say what's a final and appealable judgment, and as a result of those opinions they wrote -- they put Rule 58 in the Federal rules, which requires that to have a final judgment you have to have an entry in the clerk's civil docket and a separate piece of paper that says final -- that says "judgment," and the reason that they did that was because there were arguments frequently in the Federal system that opinions written by the United States District Judge that said at the bottom "relief denied" and "relief granted" and "so ordered" and whatever were a final judgment, and the time to appeal started running from the issuance of that opinion.

And it got to be where that was true in some circuits, and all the lawyers in the circuit knew it, but in other circuits it was expected that there would be a separate order, and all the lawyers in that circuit knew that, but if anybody ever crossed over the lines they were going to get hosed because they didn't understand the local rules, as it were, in different circuits.

So Rule 58 was attempted -- was an attempt to solve that problem. As time has passed it has occurred that the Federal judges just ignore Rule 58, and they don't require a separate sheet of paper in every case, and they may not require -- they may not check to see that the clerk has actually made a notation on the civil docket, both of which were -- are required under existing Rule 58. And so the result of that is that there are an unknown number of cases out there, tens of thousands by most counts, in the Federal system that have never had a final judgment entered in them and are still remaining to be appealed 6 or 8 or 10 or 15 or 20 years after everybody quit worrying about them.

For some reason the bureaucracy does not catch these things because ordinarily if you -- if a judge can't report a case as disposed of until he has done whatever it takes to get a final judgment in the case and he keeps getting monthly statistics showing his number going up, he's going to go through that pile and see if he can't make some of those cases final and get rid of them; but apparently in the Federal system the judge just tells the clerk, "Take a hundred off that number"; and that's what they do; and they turn it in. And so everything is fine, and they still don't have final judgments in the cases.

So that's just one of the differences between the two systems, but the -- as a result of that, the Federal committee and the Judicial Conference of the United States have proposed to rewrite Rule 58, so it's circulating around out there. It takes three years for that process to wind to conclusion, but whenever that is, in December of 2001 or 2002, Rule 58 is going to change unless somebody screams; and it will have an additional feature in it, which is that if it's not on a separate piece of paper within 60 days after the clerk makes an entry on the civil docket then it's automatically final.

Now, the obvious problem with that solution is that there are going to be a huge number of cases where the clerk makes an entry in the civil docket and none of the parties know that. There's no notice to the parties that that's happened. Nobody sends in a judgment on a separate piece of paper because they don't think -- none of the parties think it's final. 60 days passes, it becomes final. The time for appeal starts running, and everybody is going blindly along thinking they have got a pending case for whatever reason, and then all of the sudden it's final and not appealable.

So it seems to me that Rule 58 is going to now fall over on the other side, which is one of the problems that we have in this state, and Sarah is quite

right. On the one hand you don't want cases to just sit around open because somebody has overlooked it for a long period of time. On the other hand, you don't want people to lose their appellate rights because they have not paid careful enough attention to the order or judgment when they got it in the mail.

So I do think that the cases that are cited there have struggled with trying to find a line through that dilemma and have not done a very good job of it, and I think we really do need a rule on it, but I have some reservations about the one that's been proposed for several reasons. First of all, it says in (b)(1), "An order or judgment is final for purposes of appeal if, and only if, it contains the following statement," but it has been the law until now that a -- an order or judgment that finally disposes of the last issue or party in the case is final, no matter what it says.

If it says "interlocutory order on motion for partial summary judgment" but it's the last guy and the last issue standing and that's it, then the fact that all these other orders back behind it disposed of the other claims and parties in the case is incorporated into the last order so that that then becomes final, even though that order may not say this; and if we add this -- if we make this requirement, we would be changing -- we

would be changing that; but more importantly, it seems to me that we would run into the problem that the Feds have just now gotten out of and topple over into the other problem, which is that there will be hundreds of judgments that don't have this in there, maybe thousands; and those cases will never be final. They will just be sitting there; and judges will blindly turn them in thinking that they are and then somebody will show up four years later and says, "Well, I'm ready to appeal" and there's never been a final judgment in the case. So it really is a -- I don't have the solution either, but it really is a thorny problem.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: Following up on those comments, you know, it seems to me the policy reason is at what point should a judgment become final? The Court's jurisprudence on this of the last order disposing of it to me reflects probably a very good policy on the one hand, that we want things to be shut down, and we want to have a short period of time in which parties can seek post-judgment motions and have to take an appeal so that for purposes of the court's loss of power that the courts should be aware of it, that the litigants are aware of it, and that's probably a really good system.

The problem that I see in this area is that

the lawyers who don't read the case law get caught. I think if the lawyers read the law on this that we have actually a pretty good scheme. I mean, there's some over-engineered decisions arguably, like IKB and a few others.

CHAIRMAN BABCOCK: Over-engineered?

PROFESSOR CARLSON: Over-engineered is the word I would use, and yesterday we spoke to that in terms of findings of fact when Bill brought up, well, let's just make it clear that the request for findings of fact triggers an extended appellate timetable. But there really are, as you all know, probably I can think of ten or twelve instances in which lawyers who don't read both the cases and the rules in this area of finality get trapped. I think it goes way beyond the problem of "I didn't know we were supposed to have a piece of paper called a final judgment." They get trapped by things like, "Well, we made a request for findings, so that must extend plenary power," so if the judge can make the findings then the judge when he sees the error of his or her ways will change the judgment, and the court doesn't have the power if they didn't take other steps.

The summary judgment problem with Mother Hubbard clauses has been really difficult in our case law. A lot of people have been trapped. Good lawyers have

gotten trapped on that, but that's before the Court, so the Court is currently addressing that problem and presumptively will come up with a brilliant solution

CHAIRMAN BABCOCK: Presumptively.

JUSTICE HECHT: Like in IKB.

PROFESSOR CARLSON: Like IKB. Now, the Lane case is a little bit problematic as well. As you guys know, the Court said that while the rule says a motion to modify will extend time to appeal and time to extend plenary power, only a motion to modify seeking a substantive change in the judgment is going to accomplish that, and I think Justice Hecht wrote a very thoughtful and I guess concurring opinion on that. We're making this more complicated than it has to be, and I think that's the bottomline. It is more complicated than it has to be, but whether we have to dummy down the rules to every case you've got to have a final judgment, I don't think -- I mean that very respectfully, Judge Duncan. I'm not sure that that's the route to go, but we need to do something.

CHAIRMAN BABCOCK: Bonnie then Frank.

MS. WOLBRUECK: I have to comment for the clerks. You know that this is a most difficult procedure for clerks to try to determine. You know, the pressure is actually put on clerks to try to determine oftentimes when a case is final, and we do receive documents that are

entitled -- more than one in a case -- "final judgment," which is even more difficult for the clerk. You know, we try to determine if the case is disposed of. We have to do special reporting on the dispositions, which all the judges want to know that their numbers are not continuing to escalate, pending cases that have possibly been disposed of.

I know that when we spoke to this issue several years back it was a most difficult decision at that time and I understood many of the issues that were involved, but, you know, I have to speak on behalf of the clerks. Anything that you can come up with so that a layman, nonattorney clerk can determine when a case is final would certainly be helpful.

HONORABLE SARAH DUNCAN: If I can tack onto Bonnie's statements, there is -- that problem is exacerbated in the execution context. The district clerks are responsible for issuing writs of execution on final judgments, but when you can't tell if a judgment is final, how do you tell whether to issue a writ?

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I think if we were to take this rule and, just for purposes of discussion, in the second line delete the words "and only if," then I don't think anybody would have a problem with this. The purpose

of the Mother Hubbard clause in Mafrige was to have some language from which we could tell if it's in the judgment we know it's final. The problem with the language is that it's not clear, and it's mistakenly put in all sorts of orders that are obviously not intended to be final judgments.

So this language is simply a replacement for the Mother Hubbard clause language that does say what the Mother Hubbard clause was supposed to say; and having language that if we know it's in the judgment, we know it's final, seems to me to be the sensible idea. The harder problem is when you go on and add the phrase "and only if," such that, as when Justice Hecht was talking, even though all relief has been denied or all relief has been granted by prior orders, it's still not a final judgment.

Certainly that would solve the problem of finality in cases that are appealed. The court either looks and says it's there, in which case we can hear the case; or it's not there, in which case we're going to tell the parties "It's premature and you've got to cure the defect under Rule 27 of the TRAP rules."

The larger problem, though, is the open judgments problem, the old judgments that for some reason or another are not final. The problem is we have that

now. We have judgments sitting around that are not final and some clever lawyer can come back and re-open. For example, we have a lot of judgments out there that people think are final simply because there is a notice of dismissal, a notice of nonsuit, but now the Court has told us a notice of nonsuit is not good enough. You have to have an order, so I don't think that problem is always going to be with us.

This seems to me to be a very sensible, clear, bright line way of solving the problem, and there may be some problems at the outset, but I think after it gets rolling we may see a market decrease in finality issues.

CHAIRMAN BABCOCK: Judge McCown.

HON. F. SCOTT McCOWN: One thing we could do is make any change in the rule about what's final perspective only so that it doesn't change the law, whatever it was at the time the papers were entered. The other thing I do think we need to do, it's a -- this nonsuit issue is a big practical problem, and I think we need to put in the rules that you have to have an order to make a nonsuit effective, and then it also isn't true that there's only one final judgment in the case. We say that in the rules, but that's not true, and that's a big problem.

And then finally, to pick up on what Bonnie said, the district courts are under tremendous -- I don't want to say "tremendous." The district courts are under pressure to develop performance standards, and our recordkeeper is the clerk, and the clerk usually doesn't have access to like high-quality legal help to sort out on a minute-by-minute basis what judgments are final and close the case and what judgments aren't, and I would like to see that in addition to the language at the end that makes a judgment final that we require the lawyers to label at the beginning. Instead of just saying "judgment" or "order" that we require them to say "final judgment" or "final order" so that the clerk when that comes in can see the label and can correspondingly code it on the computer, and we can get credit for closing cases.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: I'm wondering what would happen if someone put this sentence on a clearly interlocutory order. Let's just say it's a partial summary judgment, and we all know that right now that's not appealable, but somebody types this on it. Does that make it appealable?

HONORABLE SARAH DUNCAN: Yes.

MR. ORSINGER: And so we are going to create an avenue for interlocutory appeals by putting this

sentence on any order, then the order becomes appealable?

MR. GILSTRAP: But it won't be interlocutory appeal. If the order denies all other relief, it becomes a final judgment, just like the Mother Hubbard clause does now.

HON. F. SCOTT McCOWN: I had the opposite question. If I didn't put that sentence on there, could nobody ever appeal any of my judgments?

CHAIRMAN BABCOCK: David.

HONORABLE DAVID PEEPLES: I see three different situations.

CHAIRMAN BABCOCK: Always thinking.

HONORABLE DAVID PEEPLES: I like Frank's suggestion that we strike the words "and only if." It seems to me one situation is, as Justice Hecht mentioned, where you actually do have a judgment or an order or a series that disposes of every party and every claim. The law is now that that's final and appealable, and at a point we lose jurisdiction, and that ought to remain the law when you have that, even if it doesn't have this language in it.

And then the second situation is when you have got what we called yesterday a conventional trial on the merits, which is what the Aldridge case refers to, it seems to me, you know, the better practice would be to put

this language in there; but if you've got that, it ought to be presumed, as it is now, that anything not granted is denied. I mean, if there is some counterclaim or some cause of action or some party that is not expressly dealt with after a conventional trial on the merits, it ought to be presumed for plenary power and jurisdiction and appeal that that's final. That's the second situation.

And then it seems to me in all other situations this language ought to be there; and it ought to be right above the judge's signature; and if it's not, the case is not final; and if it is, the case is final, even if we look at it and we think, "Gosh, somebody goofed." At some point, it seems to me, if language this express is in there -- and this is better than the Mother Hubbard clause. If this is there and it's signed, what are we -- we just can't bail out people who allow that to be in the orders.

But you've got to -- the first situation is where everything actually adds up to disposing of all parties and claims, and the second is when you have got a regular trial on the merits that ought to be presumed, and then everything else it seems to me it ought to say it just like it is here. Or substantially like that.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: The problem I have

with that is that it's the first situation when orders taken cumulatively dispose of all parties and claims. That's where most of the people get trapped, because they don't -- they don't understand that or they don't know -- understand the effect of a take-nothing or Mother Hubbard clause. I mean, the truth is our court, much like the other courts around the state, we don't know what a Mother Hubbard clause means. We don't know if it only applies to the claims in the summary judgment, the parties in the motion for summary judgment, if it applies to all claims and all parties in the lawsuit; and so if we are to -- are going to write a rule that says if the orders and judgments in the case taken cumulatively dispose of all parties and claims, you've got a final judgment, we really haven't fixed the notice problem in my view.

HONORABLE DAVID PEEPLES: So they just sit there forever if the magic words are not in there?

HONORABLE SARAH DUNCAN: Well, you know, that is certainly -- as Justice Hecht said, that is certainly a big problem, that you are going to end up with judgments that may be final in practical effect but aren't final for purposes of appeal. From what I have seen with the Bexar County trial judges, they're so concerned about their statistics they're not going to let that happen. Now, my Bexar County judge is poo-pooing that statement,

so I stand corrected.

HON. F. SCOTT McCOWN: But the problem from the litigant's point of view is sometimes it can be very complicated to keep score as to whether all parties and all issues have been disposed of in a lengthy case with third party plaintiffs and crossclaims and counterclaims; and if you come in on a motion for partial summary judgment to clean everything up for your guy, not realizing that that's the last action in the case, bam, final judgment.

But I'm wondering if we couldn't -- and I don't know if this works. I'm just kind of talking outloud, but could you write a rule that said that if all issues and all -- if all claims for all parties have been adjudicated and no further action is taken in 90 days that the case is final, or 180 days the case is then final at that point, that you put kind of an automatic dismissal for want of prosecution in a case.

CHAIRMAN BABCOCK: Boy, you better have a good calendar system in your office.

HON. F. SCOTT McCOWN: Well, not really, because --

HONORABLE SARAH DUNCAN: You better get notice of every -- you better get a copy of every order and judgment in that case, which frequently doesn't

happen.

JUSTICE HECHT: Yeah, and in that connection, I understand it's the practice in Harris County, and maybe elsewhere, and I'd be interested to know, that the clerk does not send copies of orders that are signed. They just send a postcard that says "an order is signed." So you get a postcard in the mail that says, "The order granting the other side's interlocutory partial motion for summary judgment has been granted," but you don't get a copy of the order and then when you do go down there and get a copy it says, "This judgment is final," and you better start appealing, and you didn't know it.

HON. F. SCOTT McCOWN: Well, but that's true now. I mean, at least under the proposal I'm tossing out we would give you an extra amount of time. I mean, now theoretically you would have only 30 days, and at least I'm saying, well, let's give them 90 or 180.

CHAIRMAN BABCOCK: Elaine.

JUSTICE HECHT: Is it true, Bonnie, that -- I mean, is it the general practice in the state not to send the parties copies of orders?

MS. WOLBRUECK: That's correct, Judge.

JUSTICE HECHT: You just send them --

MS. WOLBRUECK: We just send a notice, either a postcard or something that says "notice of

judgment." It's also our practice to always -- I know I personally have done this. We send it on almost every order because it's hard to determine when something is final or appealable.

JUSTICE HECHT: Because when I was a trial judge I think we sent copies of what was signed to everybody. We didn't sign the order until the lawyers sent us enough copies and postmarked envelopes that we could send it out, and that's when we signed it.

MS. WOLBRUECK: That practice has gone by the wayside.

MR. MARTIN: It still works that way. It still works that way in Dallas.

MS. WOLBRUECK: There could be some courts that do that, but I know that it's not happening in as many courts as it was previously.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: Following up on what you're saying, Bonnie, on the 306a, whether that salvages any additional time. I mean, let's say the clerk does send out the postcard notice that says -- takes it off the caption of the pleading "interlocutory summary judgment has been signed." You know, is that notice that a judgment has been signed under Rule 306a(4)? You could make the argument it isn't and that you didn't get the

notice, and that would at least buy a party up to 90 days --

HON. F. SCOTT McCOWN: Yeah.

PROFESSOR CARLSON: -- of when they first received notice. I mean, you could use the existing mechanisms to do that.

Secondly, I think you have to sort of think about -- on a different subject, you have to balance, I think, the system cost in saying if "only" is left in there of leaving the nonfinal judgments accumulating versus the system cost now of the uninitiated getting hosed, as suggested earlier; and I guess on a third level, a point of clarification from Richard's question, is the operation of this proposed rule such that if a judgment were to contain this language that it's not only final for purposes of appeal, but it's final, so if you go up on appeal does the court of appeals then have to look at it under English and send it back because it shouldn't have had that language? Or are we saying it's final, final?

Because if the first is true then Richard is right. This is creating a potential interlocutory appeal that doesn't otherwise exist. You just put in the language and it goes up, and English says the court has to look at what's there on that ruling and then send back the rest that's want. So final for purposes of appeal, I'm

just curious if that really means that or is it final that you've now waived your right if this language is in the judgment as to that claim, but there were other unadjudicated matters?

CHAIRMAN BABCOCK: Hatchell knows the answer to that.

MR. HATCHELL: I don't know the answer to that. That's the problem we have in this area. I was going to ask Frank, though, if you take out the words "and only if," how do you advance the ball one iota when what you're saying is "Then there's still some other situations out there in which it may be final," and we're right back where we are.

MR. GILSTRAP: Well, let me say, Mike, I certainly don't think it's the complete cure that the proposal is now, but at least by getting rid -- you know, it is something. Right now we have -- as we all know, we have people putting Mother Hubbard clauses in orders and having no earthly idea what they mean.

For example, I just had an associate bring a case to me. He was a plaintiff. He allowed it to be dismissed for want of prosecution. I said, "Get it reinstated." He got it reinstated. He put a Mother Hubbard clause in the reinstatement order. Fortunately, we caught it in time, and you guys who don't practice with

a large number of young lawyers don't realize that. I have to go on Mother Hubbard patrol every three months in my firm, and I promise you it is happening. That's -- almost all these cases after CEG in the note at the top of the page arose for that reason or similar reasons.

At least with this language we have Mother Hubbard language that can't be mistaken. We are going to have -- I mean, as Richard says, there are going to be some people that put it in inadvertently, but, I'm sorry, litigation has to come to an end, and there has to be a moment to determine finality, and at least this gives us a bright line rule that applies in some cases.

We're always going to have people who don't get notice. I'm sorry, but at least with this it's better than the Mother Hubbard clause. So in that -- we still have the old cases. A Mother Hubbard clause can arguably still make a judgment final, but at least we have got language that's going to be in the rule, that's going to go in the form books, that will cure the problem, or at least make it better than it is now, over time.

I'm not necessarily opposed to the "and only if," but we have to recognize that is a much more Draconian approach than this. I think, to me, substituting this language for the Mother Hubbard clause is almost a no-brainer.

CHAIRMAN BABCOCK: Let me just ask the question, Justice Hecht, if we take out the "if, and only if" language, do we solve the Rule 58 problem that -- the Federal courts, I think, are going 180 degrees the other direction because of the problems it causes.

JUSTICE HECHT: Well, if you take out "and only if" -- if you leave "and only if" in then you have what the Federal courts perceive to be their current problem, which is a whole bunch of judgments that have never become final.

CHAIRMAN BABCOCK: And that's something to be avoided, isn't it?

JUSTICE HECHT: Yes, it is. But there's several ways to avoid it, and the thing that struck me as odd was it -- one check on that happening would be the clerk's office, who has to report in the monthly statistics that these cases are not final, that they have not been disposed of; and at some point after two or three months of that when a judge looks at the numbers and sees that he's not disposing of anything, he's going to wonder why; and the answer is because there's nothing in the file that has this language on it.

And I would think at that point he would either put something in the file, sign an order that says this, or get the parties to submit one, or do something to

make -- to get the case off of his number; but if that won't work then -- which it's not working in the Federal system because, as I say, the judge says, "I don't care what the file says. It's final. Take it off the numbers," so they take it off the numbers.

CHAIRMAN BABCOCK: That's exactly right.

JUSTICE HECHT: And I don't know that our statistical system works that way, but if it did then it would leave us the problem that these things were not ever final.

CHAIRMAN BABCOCK: Well, but then the Rule 58 problem that we want to avoid, is there any way to truly avoid it unless we take out "and only if"?

JUSTICE HECHT: No.

CHAIRMAN BABCOCK: Steve.

MR. YELENOSKY: Well, yesterday Bonnie and I were talking about the relative merits of elections of various positions, and she pointed out that district clerks in Texas because they are elected have a certain amount of independence that maybe they don't in the Federal system. So the only problem with the Federal system is that clerks do what judges tell them they should be doing. Maybe that's not a problem in the state system or maybe it could be eliminated as a problem by order of the Supreme Court if the Court said, "No, you have to put

that word in there or it doesn't come off your list."

JUSTICE HECHT: Well, but the other problem would be -- and I think district clerks are more independent in the state system because obviously the court hires them in the Federal system, and that's not true in the state system; but if a clerk said, "Well, this language is not in the file, but I'm going to take it off the numbers anyway," then -- or just makes a mistake to that effect, then you are still going to have the problem of cases sitting out there without a final judgment.

CHAIRMAN BABCOCK: Judge Patterson, then Skip.

HONORABLE JAN PATTERSON: I endorse Frank's views entirely. I think that we cannot solve the whole problem. Either you have a global resolution, which this rule presents, and it's harsh, or you have a totally individualized approach with each case, all issues, all parties. What this does is it takes care and provides a bright line for maybe 60, 70 percent of the cases at some point; and it seems to me that that has a great virtue from the standpoint of statistics, clerks offices, and the lawyers.

I think that the virtue of it is that it does clarify Mother Hubbard, and if it does nothing else, I think that's a real service. I think it's a good rule,

but I also agree that taking out "and only if," while it doesn't solve the problem, it gets us to that next interim step where we can see how it's evaluated and what the next step may or may not be, so that we ought to leave the outlet where there are other means of final judgments. That doesn't solve the problem that we get in some of the crazier cases, but at least the lawyers -- this will become a bright line mechanism, and it should be a bright line final judgment is final, so I endorse that.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: I think there might be a way to get closer to solving both problems. I understand the Rule 58 problem, and I agree that that -- the solution of taking this out solves that. The other problem of the Mother Hubbard language remaining, however, is still there that was trying to be addressed by this rule; and, to me, you can take out the "if, and only if" and get around Rule 58; but we also should add something to the effect that "No language purporting to dispose of all issues shall be effective unless it also says this is a final and appealable judgment," because you still have the Mother Hubbard problem. It's not there, but by adding that language to it of just saying the traditional Mother Hubbard clause shall not be effective, i.e., "No language purporting to dispose of all issues shall be effective

unless it also says this is a final judgment," I think you get a lot closer to solving both problems.

CHAIRMAN BABCOCK: Elaine, Richard, Scott, and Frank.

PROFESSOR CARLSON: I agree with what Skip said. I had a question, though, for Bonnie. Bonnie, if the language were adopted, "if, and only if" language, how difficult would it be for the clerks to send postcard notice to counsel in some form, "Your judgment has" -- whatever we do, "not entered," or the judgment is -- "your judgment does not contain the necessary language in rule so-and-so"? Is that too onerous to require the clerks to look at judgments?

MS. WOLBRUECK: I can see that the clerks would be required to review every single order and all the way through it, because this also adds it can be anywhere in the order. So you have to read every order to see if it's contained in it and then produce that notice. It would be time-consuming for the clerk to do so.

PROFESSOR CARLSON: So we probably would have the problem Justice Hecht suggested, that we would have a lot of judgments that weren't final when people thought they were.

MS. WOLBRUECK: Of course, if this was adopted, I'm sure that every clerk would look for that

statement in the order so that we knew that it was final. I could see the initial problem would probably be in the family Bar, and Richard may be able to address that, but you know, we realize whenever we get a decree of divorce that's final in a family issue. If this is not contained then is that really a final judgment in a family law case?

MR. YELENOSKY: Well, it's the point, Bonnie, you have to decide whether or not to put it on the closed list or not --

MS. WOLBRUECK: Yeah.

MR. YELENOSKY: -- to put those statistics together, so if it's not in there, you're not going to -- it's going to continue as an open case.

MS. WOLBRUECK: That's right.

MR. YELENOSKY: And that will show up to the judge. Presumably that would trigger some reaction.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Bonnie, what rule is it that requires notice of judgment? Do you remember?

MS. WOLBRUECK: It's 306a. No. (4), I think, isn't it? Somewhere in there.

MR. ORSINGER: Okay. Could we assist this by requiring this sentence to be at the end of every judgment and for the clerk to look for it, and if they see it, to send out a postcard saying "notice that a final

judgment has been signed," and if that's not good enough then say the party who submits the judgment also must mail a copy of the signed judgment to all other parties of record so that we have a postcard coming from the clerk, and we have an obligation on the opposite party to mail a copy of the judgment out, and that ought to catch everybody, shouldn't it?

CHAIRMAN BABCOCK: Scott.

HON. F. SCOTT McCOWN: Well, in answer to Richard's question, I don't think so. The clerk right now is required to send a notice of a final judgment. It's the judgments that either -- that the clerk doesn't know are final that are the problems; and what happens, you know, Steve was saying, well, the numbers would be there, and the judge would be right on top of it. We've got thousands and thousands of cases, and what happens is we don't get a list of cases that -- and think, "Well, you know, I decided that case. There's a final judgment in that case, so what's going on here?"

Instead, what we do is we take all our cases of a certain age, and we send out notices to dismiss for want of prosecution, and then if the lawyers -- if they don't snap to and say, "Well, I already have a final judgment" and bring that to our attention or -- then what's going to happen is that all those cases where the

lawyer thinks it's final, it's actually not final. It's dismissed for want of prosecution, and then all the relief that they got is wiped out. And they don't -- it's gone, and that is the big problem that we have.

MR. ORSINGER: Of course, that would go away if lawyers started putting this in their judgment, right?

HON. F. SCOTT McCOWN: Well, but if they put it in their judgment, we know it's final. The question I think we have is what if it's final, but this isn't in the judgment?

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: That's the "only if" language then.

HON. F. SCOTT McCOWN: Right. And I was going to ask -- I think we should take out this "however, a final judgment clause placed elsewhere in the judgment or order is nonetheless valid." I think we should just say that it should be or maybe even must be right above the signature line. I mean, if we're going to create a bright line mechanical rule then it ought to be right above the signature line to assist the judge and the clerk, and I would also like to in this same paragraph add a sentence -- I don't know if you want it a "should" or a "must." Perhaps it ought to be a "should," but "A final judgment should be labeled as a final judgment below the

caption"; and again, that would assist the judge and the clerk; and, I mean, I think I kind of agree with Justice Patterson. We can only solve one half of this problem.

CHAIRMAN BABCOCK: Yeah. Frank.

HONORABLE JAN PATTERSON: I like those two changes.

MR. GILSTRAP: Let me say this. There is certainly a side of me that wants to go on and put in the "and only if" language and brave the Rule 58 problem, but I think Justice Patterson's approach is a sensible way to attempt to deal with the problem and see just how this type of change will play out. If we go on and do something further, either the type of language that Skip was proposing or if we put "and only if" there, I want to reiterate Judge McCown's remark that it should be prospective only.

If we adopt this rule as it -- because if you'll recall, rule changes apply to pending litigation, and if we adopt this rule as written without that type of caveat, then every judgment on appeal is going to be unfinal because it doesn't have this language. So that would be my only concern, but I like Justice Patterson's approach.

CHAIRMAN BABCOCK: We're going to take a break here in a second, but my sense is -- and Justice

Hecht can tell me if I'm wrong. My sense is that the Court would not be very receptive to this if we sent it up with the "and only if" language in it. Just my sense of things.

MR. GILSTRAP: Would not be?

CHAIRMAN BABCOCK: Would not be receptive.

JUSTICE HECHT: It's just, you know, there's evil either way.

CHAIRMAN BABCOCK: There's evil in this world.

JUSTICE HECHT: Yes. And so unless there is some -- what I was hoping would come to light in our discussions was some other force or factor out there apart from the rules that would help prevent evil on one side or the other, but I'm not sure what it is, because whatever we do here, if the clerks don't follow it or the judges don't follow it or the lawyers don't follow it, we're going to have a problem.

CHAIRMAN BABCOCK: And the Federal system, really, this is -- Skip, you know. It's a huge problem in the Federal system.

HON. F. SCOTT McCOWN: I was just going to say one thing about the clerks. We can't have a rule that in any way relies upon the clerks. I mean, we -- and not because they don't try hard, but we have counties in this

state that cannot maintain their courthouse, literally. I mean, there is no money. When Justice Hecht mentioned sending out postcards on all orders, that would have a tremendous fiscal impact for the counties, and there is no money for the clerk to be on top of this problem. We have to make the clerk's job as easy and as clear as possible.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: One other possibility -- and it wouldn't be a real change but a court interpretation -- would be that if the clerks -- and I understand that the clerks can't always do this, but if the clerk fails to give notice of a judgment when you get caught by what is a final judgment, does it say it on its face, the jurisprudence could develop in the area of saying, "Well, that's official mistake and that supports bill of review relief. " That would leave a large class of cases open for four years, but it ends.

CHAIRMAN BABCOCK: Okay. Let's take a 15-minute break and recharge our batteries.

(Recess from 10:24 a.m. to 10:41 a.m.)

CHAIRMAN BABCOCK: Back on the record, and Justice Duncan would like to lead off with a statement.

HONORABLE SARAH DUNCAN: I appreciate the problem of having judgments that in concept are final but are not final in a technical sense, and certainly none of

us want that, but if we remove the "if, and only if" from this final judgment clause, we have not advanced the ball at all because there will simply be one more way that a judgment can become final.

As I see it, we've got three choices, with some permutations. We can codify the Mafrige/Martinez line of cases and say that if there is a clause in the judgment that effectively disposes of all parties and claims, it's final, and that's true if it happens in one document or a series of documents.

We can go all the way and make a judgment final if, and only if, it includes certain language, whatever that language may be, or we can do nothing, but to take -- to take what the subcommittee's proposal and to remove "if, and only if" will leave us precisely where we are but a little worse, because we will have added another way that a judgment can become final without codifying Mafrige, which is a big part of the problem, is that -- and we're not talking about the uninitiated. We're not talking about attorneys who don't go to CLE.

We are talking about some of the finest attorneys in the state who do not understand this line of cases or how it makes a judgment final. They just don't know about it because it's -- they're trial lawyers. They're not appellate lawyers. They don't spend all

their time trying to determine if judgments are final. If we just -- I mean, we could have a case, and frequently do in the court now, where we do a jurisdiction check, and I'm sure the Austin court is the same way. We can spend a day looking at a clerk's record trying to determine if the judgment is final, and we can ask four staff attorneys and get four different answers.

So, you know, as much as I want direction from the committee and the subcommittee wants direction from the full committee as to which way to go, I don't think that I or the subcommittee is proposing that we adopt the subcommittee's recommendation but take out the "if, and only if," because that really doesn't help the situation.

CHAIRMAN BABCOCK: Sarah, would it make things slightly better if we took out -- it wouldn't be the "if, and only if." It would just be "and only if." Would things be slightly better if you had the final judgment clause with "and only if" out and made clear that this was replacing Mother Hubbard language? Would that be -- the attractiveness to me was that this is pretty clear what you're doing, and Mother Hubbard is not, and a lot of lawyers don't understand that, but maybe you don't agree with that.

HONORABLE JAN PATTERSON: The other virtue

of that, Judge Duncan, I think might be that other judgments will become suspect. "Oh, you don't have the magic language."

HONORABLE MICHAEL SCHNEIDER: That's right.

HONORABLE JAN PATTERSON: So the burden falls on you to justify, and that may be an incentive in and of itself, to avoid that extra month of hassle at various times.

HONORABLE SARAH DUNCAN: And I'm not opposed to that. All I'm saying is that if we do just that and don't codify Mafrige, to the extent any of us can understand it, we haven't helped the notice problem for lawyers who are not aware of Mafrige. It's not just Mother Hubbard clauses. It's the cumulative effect of all the orders and judgments signed in the case.

So if we're going to take out the "and only if" in this and add something about this replaces Mother Hubbard language, then I think we need to add as a new subsection (1) that another way that you can get a final judgment is if all the orders and judgments entered in a particular case cumulatively dispose of all parties and claims.

MR. LOWE: Chip?

CHAIRMAN BABCOCK: Yeah, Buddy.

MR. LOWE: One of the problems I have, if

lawyers don't understand when it's a final judgment then how are they going to understand enough about it to put "final judgment" language in it? I mean, if that's really the problem then you can't cure it by just doing that.

HONORABLE SARAH DUNCAN: But, Buddy, I think -- this is only a partial response because I agree with you that if they have got one problem, they very well might have the other, but if the Mafrige reasoning is going to continue to govern, we can at least codify it in a rule. Part of -- a big part of the problem now is it's not enough even just to read Mafrige. You've got to read the whole line of Mafrige cases, and even then you may come up with --

MR. LOWE: But my point is --

HONORABLE SARAH DUNCAN: -- two answers.

MR. LOWE: -- something is pretty complicated when the lawyers can't understand it, and then in order to say, "Well, we'll cure it by having the lawyer put a label on it" when he doesn't understand that it deserves that label. I mean, it's more deeply than just what we're doing. And I have no answer.

CHAIRMAN BABCOCK: Judge Patterson.

HONORABLE JAN PATTERSON: I think your suggestion is a good one, though, to say, "An order is otherwise final if" and then capture the essence of

Mafrige so that it makes it explicit that there remains this less than precise manner of final judgment that creates the confusion that we have now, but this is the obviously the preferred way, and that's why I think it may be a transitional move. But I think that is the answer, is just to be explicit that it is otherwise final if it disposes of all -- whatever Mafrige language we use.

HONORABLE SARAH DUNCAN: If we're going to go that way then one of two things has to happen. Either we have to get a decision from the Supreme Court on the extent of Mafrige or we have to decide that issue for ourselves. One of the issues that split the court of appeals now -- there are several of them. There's language in some Supreme Court cases that even if it contains a mother -- the judgment contains a Mother Hubbard clause, you've got to look at the four corners of the document and determine the trial court's intent.

There's a case pending, still, in San Antonio now where the parties submitted a document labeled "final judgment" with a Mother Hubbard clause. The trial court struck "final" and initialed it, left the Mother Hubbard clause. Now, how do we determine the trial court's intent in that situation?

And then another separate issue is does a Mother Hubbard clause dispose of all parties and claims in

the case even if they are not encompassed by a motion for summary judgment or some other dispositive motion? So, I mean, if the committee wants to decide those issues, we can, I suppose.

CHAIRMAN BABCOCK: Scott.

HON. F. SCOTT McCOWN: Well, I had two thoughts. One was I don't think we can write the rule to just say "if" in a vacuum because the -- you know, the express provision of one thing is the implied exclusion of all others; and if we say "An order or judgment is final for purposes of appeal if it contains the following language" and that's the only thing in the Rules of Civil Procedure that address finality, then that seems to imply that all other orders aren't final.

The second thing I want to say is, I mean, I really think we have to figure out -- like Justice Hecht said, we have to quantify the evil that these different problems present, and we have to go with a rule that addresses the largest evil. If a judgment comes up, like in the case Judge Duncan just mentioned, if a judgment comes up and we can't figure out if it's final or not, that isn't a big problem, because you just send it back, and the trial judge makes it final if it wasn't, and it comes back up again. That's not a very serious evil.

What's, I think, the most serious evil is

taking unappealed judgments and casting doubt on their finality. That's the bigger problem.

JUSTICE HECHT: Let me add that we do have two pending cases in the Court, the Lehmann and the Harris cases that are cited in the memo and some others that -- petitions for review that raise the same issue, and I know there are cases in the courts of appeals that are holding for these decisions, but the committee ought not to be -- I would suggest the committee shouldn't be worried about how those cases are going to come out because if the -- I think the Court will decide them based on the rules that exist and the case law that's out there and not based on what we think ought to be a good rule for the future, and so if -- regardless of how they come out, if this committee thinks that this is the way to avoid more evil then we may put that in the rule the next go around and irrespective of what Lehmann ends up saying.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: What's wrong with taking out "only if," putting in language that says that "attempts to dispose of all issues or all parties without using the term 'final judgment' are invalid" and saying that cases could still be final if cumulative orders actually do dispose of all issues and all parties? I mean, it seems to me that's where we are, and make it prospective only.

Doesn't that get there?

CHAIRMAN BABCOCK: Does that, Sarah?

HONORABLE JAN PATTERSON: Even this draft sort of contemplates that because it says "If this final judgment clause is to be included, it should be said" -- I mean, there is a --

MR. WATSON: And do the stuff Scott was talking about about, you know, putting it in writing and putting it above the signature line, all of that.

CHAIRMAN BABCOCK: Justice Duncan, what do you think about Skip's idea? Speechless.

HONORABLE SARAH DUNCAN: Well, certainly we can do that. I don't know quite what you mean, Skip, when you say that "other attempts to dispose of the claims are invalid."

MR. TIPPS: Mother Hubbard clause.

MR. WATSON: I'm saying that any statement that "other claims for relief not addressed by this motion or all other claims for relief or defenses not addressed by this motion are hereby denied" is invalid unless made clear that it refers to only the claims and defenses in that motion, if it's partial; or if it's intended to be final, says the same thing you've said here, that this is intended to be a final judgment.

MR. YELENOSKY: Aren't you saying these are

the exclusive magic words? There's another way to end a judgment, which is through cumulative orders that actually dispose of everything, but the only exclusive magic words are the ones you're saying here.

MR. WATSON: Correct.

MR. YELENOSKY: And that eliminates Mother Hubbard and all that other --

MR. WATSON: Correct.

MR. GILSTRAP: Except for the problem that "all relief not expressly granted" is not -- arguably does dispose of those other motions.

HONORABLE SARAH DUNCAN: Expressly.

MR. GILSTRAP: Well, I mean, it seems to me that that problem is not really cured unless you expressly somehow disavow the Mother Hubbard clause.

MR. WATSON: That's what I'm saying.

MR. GILSTRAP: I don't know that you could do that in a rule.

CHAIRMAN BABCOCK: Wall.

MR. JEFFERSON: You know, one of the problems of the Mother Hubbard clause has been that lawyers have these clauses in their computers, you know, you get a final motion for continuance and you put -- get an order and you put it at the end of the order.

MR. GILSTRAP: Exactly.

MR. JEFFERSON: And I think that it's still going to be the case, even if we have this rule, that lawyers are going to have that kind of language in there and think that it has a particular effect.

MR. WATSON: That's fine. It's just it doesn't.

MR. JEFFERSON: And I think as a matter of law it does, that if you have in an order that "all relief requested by any party herein and not granted in this order is hereby denied" that -- I mean, we can't just ignore the legal effect of that language, I don't think.

CHAIRMAN BABCOCK: Mike.

MR. HATCHELL: I think I was going to echo what Wallace just said. Skip, basically what you're saying is that you're making judgments a lie through the rules because you're saying they don't mean what they say. This is a lie.

MR. WATSON: That's a little pejorative, Mike. I'm saying that they can't accomplish what they are purporting to accomplish. I am not even getting to the fib stage. I'm just saying they're ineffective, that that language is ineffective unless it has other language with it.

HONORABLE DAVID PEEPLES: Chip?

CHAIRMAN BABCOCK: Yes.

HONORABLE DAVID PEEPLES: Would it be fruitful for us to see what other states do, how they handle this problem as opposed to the Federal courts? Have we done that?

MR. HAMILTON: Yes.

CHAIRMAN BABCOCK: I don't know. Sarah, have you looked at other states?

HONORABLE SARAH DUNCAN: We have not done that.

JUSTICE HECHT: About -- I think it's more than 30 states replicate the Federal rules, which means that they may not have the identical rule, but they either have the identical rule or something like it, but I have no idea whether -- I guess it's likely that they have the old Rule 58, given that it's been around for 40 years, but they might not. I don't know.

CHAIRMAN BABCOCK: So what you're looking for is some ideas basically?

HONORABLE DAVID PEEPLES: Well, it seems to me that the problems that we're talking about are inherent in litigation.

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID PEEPLES: And, therefore, other states have had to deal with them, just as we are dealing with it now and have been, and I would find the

experience of other states may be comparable to us in major states, more instructive than what the Feds do, because the Federal courts are handling the small volume litigation where they can give more attention to it. We're handling massive litigation.

CHAIRMAN BABCOCK: We got anybody that wants to look at that question?

HONORABLE DAVID PEEPLES: Well, you could probably find out by calling some lawyers instead of doing your own research, if you know somebody to call.

CHAIRMAN BABCOCK: I don't know about that. Somebody would be calling somebody in Texas.

JUSTICE HECHT: We'll look at it.

MR. HATCHELL: That's what Chris is supposed to do, isn't it?

MR. GRIESEL: Yes. I will find a staff attorney and assign it to them.

CHAIRMAN BABCOCK: Okay, and then you can fold that into whatever you're doing.

JUSTICE HECHT: But I must say, I'm not hopeful that we will find the solution.

HONORABLE SARAH DUNCAN: I'm not hopeful.

JUSTICE HECHT: I think it's worth looking at.

HONORABLE SARAH DUNCAN: I'm not hopeful

because the history in -- and part of what we have to deal with is the history of Texas in the final judgment area that's in all of these lawyers' minds.

HONORABLE JAN PATTERSON: That's a scary thought.

HONORABLE SARAH DUNCAN: Can we get a vote on if the full committee wants a rule that, one, attempts to codify the Mafrige line of cases?

CHAIRMAN BABCOCK: Well, why don't you give us a short primer on -- Mafrige was a summary judgment case where the judge was over-inclusive in his order. In other words, he decided issues that hadn't been raised by the motion?

HONORABLE SARAH DUNCAN: It was -- no. I mean, let's go back to Northeast Independent School District vs. Aldridge. The Court identified basically two situations that can arise in litigation. You can have a conventional trial on the merits, in which case you have a presumption that everything that's not disposed of in the order presumptively was disposed of.

MR. HATCHELL: For purposes of appeal.

HONORABLE SARAH DUNCAN: For purposes of appeal; and, two, you can have more summary proceedings, default judgments, motions for summary judgment, in which case there is no presumption. So the case law sort of

developed in a very confusing way that you had to deal with parties and claims expressly in an order or judgment arising out of one of these more summary proceedings; and the Court, as Judge Peeples said in an opinion, sometimes did one thing and said another; and it got very confusing about what happens if you have a take-nothing clause or a Mother Hubbard clause that says "all relief not expressly granted is denied," because that is an express disposition of parties and claims; and, finally, in Mafrige the Court recognized that Mother Hubbard clauses do have a place and are an unambiguous express disposition of the remaining parties and claims in a case; and that was a great, bright line rule except that now we're having to deal with all of the various scenarios in which that Mother Hubbard clause is going to have to be interpreted.

And, as I said earlier, if we're going to codify that line of cases, or clarify it, we would have to decide the extent of Mother Hubbard language. Does it go to parties and claims not addressed by the motion that resulted in the order, or does it not? Do we -- is it unambiguous so that we don't look at the other documents in the case or even at the other language in that order to determine the effect of the Mother Hubbard clause?

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: I'm loath to just not do

anything today and go back and for further study. I really am. I think that we have the Mother Hubbard cases. Generally most lawyers kind of understand that. There's nothing wrong with clarifying it, and it seems -- I would like to go ahead and vote on the order without the "and only if" language in there, and then turn around and decide if there's something else we want, and the something else you want can either be something like Skip's proposal whereby we add language saying "a judgment is also final if all the" -- "if it's disposed of by all the orders cumulatively," or we go the whole hog and put "and only if" in there, but we can eat the apple one bite at a time.

HONORABLE JAN PATTERSON: Is that a motion?

MR. GILSTRAP: That's a motion. Let's go ahead and vote on if -- the present order deleting the words "and only if." I will move it.

HONORABLE JAN PATTERSON: I second that, but would you accept a friendly amendment, Judge McCown's suggestion to delete that last sentence that "however, final judgment"?

MR. GILSTRAP: Yeah, I'll go ahead and accept that.

HONORABLE SARAH DUNCAN: So the motion is to take the subcommittee proposal and delete "and only if"?

MR. GILSTRAP: And the final sentence beginning with "however."

HONORABLE SARAH DUNCAN: And the final sentence of subsection (1).

MR. GILSTRAP: Yes.

HONORABLE SARAH DUNCAN: And that's it?

MR. GILSTRAP: That's it. We're not talking about (2).

HON. F. SCOTT McCOWN: Would you be willing to add the sentence, "A final judgment should be labeled as a final judgment below the caption"?

MR. GILSTRAP: No. I really think that goes too far.

HON. F. SCOTT McCOWN: Well, it's just a "should be."

MR. GILSTRAP: Okay. "Should be," sure. If it's just -- I'll accept that.

CHAIRMAN BABCOCK: "The final judgment" --

HON. F. SCOTT McCOWN: "A final judgment should be labeled as a final judgment below the caption."

MR. WATSON: Frank, excuse me. Are you intending this to be a binding vote or a sense of the committee vote?

MR. GILSTRAP: I will go with sense of the committee.

CHAIRMAN BABCOCK: Yeah. I think we're --

MR. GILSTRAP: To just kind of get something rolling here.

CHAIRMAN BABCOCK: -- at the sense of the committee stage.

MR. WATSON: Yeah.

JUSTICE HECHT: We haven't talked about it, Chip, but I don't understand exactly what's meant by the second sentence of the indented language. "This is a final appealable order or judgment" and then the next sentence. I don't understand the next sentence.

HONORABLE SARAH DUNCAN: "Unless expressly granted by signed order any relief sought in this cause by any party or claimant is denied"?

JUSTICE HECHT: So if there's an order, some prior order in the file that grants relief, it would --

MR. GILSTRAP: Stand.

JUSTICE HECHT: It would stand after the final judgment. I'm not sure that -- is that the law? I'm not sure that's the law.

MR. GILSTRAP: That's what Mother Hubbard does, as I understand. In other words --

HON. F. SCOTT McCOWN: No. No. Mother Hubbard does the opposite of that.

MR. YELENOSKY: That's right.

MR. GILSTRAP: I disagree. If there is an order out there granting summary judgment on behalf of Defendant A and Defendant A is not mentioned in the final judgment, and you say "all relief not expressly granted is denied," that's expressly granted by any order in the case, and the summary judgment in favor of Defendant A stands.

JUSTICE HECHT: Well, I understand that, but if there is a summary judgment, partial summary judgment, on one of the plaintiff's claims and then a judgment that purports the final -- the plaintiff take nothing, he doesn't get -- I think he doesn't get anything under that.

HONORABLE SARAH DUNCAN: And that's the second section of subsection (2), "if any provision of an earlier order incorporated by reference."

MR. GILSTRAP: In that case, Justice Hecht --

HONORABLE SARAH DUNCAN: Probably it wouldn't be incorporated by reference.

MR. GILSTRAP: I believe the judgment is contrary to the prior order, and it supersedes it.

JUSTICE HECHT: Yeah. That's what I think. But this sentence seems to say the opposite.

HON. F. SCOTT McCOWN: I guess I understand Frank wanting to get a sense of the committee, but I guess

I really believe that this matter should be referred back to the subcommittee and that we ought to look at other states and that we need something in writing in front of us and that I'm not prepared to give my sense, so I guess I would move to table.

CHAIRMAN BABCOCK: So you would abstain.

HON. F. SCOTT McCOWN: No. I would move to table to get a sense of the committee as to whether they are ready to give a sense of the committee, because I don't think we're ready to give a sense of the committee.

CHAIRMAN BABCOCK: Yeah, Judge Peeples.

HONORABLE DAVID PEEPLES: I want to be sure I understand. It seems to me there are two totally different problems that we're concerned with here, and they both deal with the inadvertent loss of rights. One is the Mother Hubbard clause that has the effect of washing out rights and people didn't understand it and they signed off on it and so forth. So that's one, and I think that -- that's one.

The other inadvertent loss of rights happens when you -- you know, you get your postcard or maybe you don't. Maybe there was a severance that just said "Claims A, B, and C" are severed or "Parties A, B, and C," and the effect of it is to start the timetables ticking, and you don't know that's happening to you, and you lose your

rights.

And, as I understand it, we're finding it very hard to deal with both of those at the same time. It's easy if you decide we want to stamp out one of these and not the other. We can do that. And so, Frank, I think what you're saying is let's deal with the Mother Hubbard inadvertent loss of rights.

MR. GILSTRAP: Yes.

HONORABLE DAVID PEEPLES: And worry about the other one later?

MR. GILSTRAP: That's correct.

HONORABLE DAVID PEEPLES: I mean, is that a fair --

MR. GILSTRAP: Yeah. Eat the elephant one bite at a time.

HONORABLE DAVID PEEPLES: And then to do that, as Sarah said a few minutes ago, if we take out "and only if" all this language that's blocked in does is to say "If you really want to have a good Mother Hubbard clause, this is it," but this doesn't say the old kind is no good.

HONORABLE SARAH DUNCAN: Right.

MR. GILSTRAP: Absolutely correct.

HON. F. SCOTT McCOWN: Well, but I don't think that is correct. Right now our rule doesn't say

anything about a Mother Hubbard clause.

CHAIRMAN BABCOCK: That's right.

HON. F. SCOTT McCOWN: And if you draft a rule and put it in there that says, "A final judgment" or "an order of judgment is final for purposes of appeal if it contains the following language" you are impliedly saying that if it doesn't contain that language, it isn't final.

HONORABLE DAVID PEEPLES: But I'm saying if we want to do that, we ought to do it expressly and not wait until some appellate courts say that it express the old -- you know, whatever. You know, if we mean to do that, why not say it?

HON. F. SCOTT McCOWN: But I don't think we do mean to do that. Do we? I don't even think Frank means to do that, does he?

HONORABLE DAVID PEEPLES: Do you mean to wipe out the old Mother Hubbard clause?

MR. GILSTRAP: No. I don't think that would be the effect. I think, again, if we got some language that we think we could agree on as prospectively cleaning up the Mother Hubbard problem -- that is, this is language that if you put it in a judgment in the future it's going to make it final -- then we can go back and consider the other problems after that.

HONORABLE JAN PATTERSON: The intent is to provide precision where Mother Hubbard does not, not to say Mother Hubbard is no longer any good. Mother Hubbard just remains as ambiguous and as much of a problem as it's always been, but the preferred mechanism is now in front of you.

CHAIRMAN BABCOCK: Steve.

MR. YELENOSKY: Well, I agree with Judge McCown, though. Prospectively in the future if you write a Mother Hubbard clause and the rule says what we are proposing here, it would seem to me that impliedly it doesn't accomplish the effect of creating a final judgment, and I don't care. I don't care one way or the other, but I agree with that analysis.

CHAIRMAN BABCOCK: Justice Hecht, could we go back to the point you made a second ago? Could you make it again? What's the problem with this language?

JUSTICE HECHT: Well, I just don't understand the second sentence, whether --

CHAIRMAN BABCOCK: "Unless expressly granted by signed order any relief sought in this cause by any party or claimant is denied." That's the sentence you're talking about?

JUSTICE HECHT: Yes.

CHAIRMAN BABCOCK: Okay.

JUSTICE HECHT: I mean, my understanding of the law is that when you sign a final judgment it supersedes everything else in the case, including if it's take nothing and something earlier said that somebody was awarded relief that they have not already gotten. Obviously if there was a temporary injunction and then a final judgment that the plaintiff take nothing, you don't go back and undo that. If sanctions were awarded and paid, you don't go back and undo that, but I'm not sure whether this resurrects that. I'm not sure what effect this sentence has on the law.

CHAIRMAN BABCOCK: Well, let's say there's been a prior summary judgment in favor of the plaintiff against Defendant A on Claims 1 and 2, but the prior summary judgment did not dispose of Defendants B, C, D, nor did it dispose of Claims 4, 5, and 6 against, so you have got a clearly interlocutory opinion.

Was the intent -- I thought the intent of this second sentence was to pick up that prior summary judgment in favor of the plaintiff against Defendant A and pull it into the final judgment.

MR. GILSTRAP: That's how I understand it.

HONORABLE JAN PATTERSON: Yeah. I understood it that way, too, because because the final order may not always incorporate all prior orders, to the

extent that they don't conflict those remain valid.

HONORABLE DAVID PEEPLES: Yeah.

JUSTICE HECHT: Well, as I understand the second sentence in the example you just gave, if the final judgment said the plaintiff shall take nothing, the plaintiff would still have a judgment against the one defendant on the two claims, and I don't know if that's the law or not.

HONORABLE SARAH DUNCAN: My understanding has always been that all previous orders and judgments in a case are merged into --

HONORABLE JAN PATTERSON: Yes.

HONORABLE SARAH DUNCAN: -- a final judgment. And so I guess I thought the committee thought that this is simply reflecting that merger principle.

MR. JEFFERSON: But I understand what Justice Hecht is saying. What if final judgment says the plaintiff now -- and this is a later judgment, and this is the final judgment -- "Plaintiff takes nothing," and I don't care what happened before, and maybe I'm a different judge. Maybe I've reconsidered the partial summary judgment motion and now I'm saying plaintiff takes nothing completely.

HON. F. SCOTT McCOWN: Well, I mean, incorporated and merged are different concepts. For

example, in a family law case temporary orders may not expressly conflict with the final decree, but when you enter a final decree the temporary orders are gone.

CHAIRMAN BABCOCK: That would be true with respect to injunctive relief, too, temporary injunctive relief. Yeah, Frank.

MR. GILSTRAP: I don't think there's a problem. I mean, I think in Justice Hecht's hypothetical, in that case the language "plaintiff takes nothing" would go back and overrule or supersede any prior relief awarded to the plaintiff, but where there has been a summary judgment against -- on a plaintiff in favor of -- in favor of against Defendant A and then the later judgment denies it against, say, Defendants B and C and says "This is a final judgment," then the language gets Defendant D has been -- the relief against Defendant D has been denied. It stands against B and C, and the old order works for Plaintiff A. I mean, there's -- the question is does the final judgment contradict a prior order, or does it just not mention it? And those are two separate things.

JUSTICE HECHT: I guess the burden of my comment is that the first sentence deals with a specific problem on the table, which is trying to get a more definiteness in whether there's a final judgment or not. The second sentence seems to me just to open up another

can of worms. As you pointed out, it's hard enough to come at this problem at all. Why come at it in a way that just raises more problems?

MR. GILSTRAP: I understand. I understand your concern.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I have just been tinkering with some language, and I would say, "This is a final appealable judgment which disposes of all parties and claims. All interlocutory orders previously granted are incorporated herein and made final. All claims and relief not expressly granted by this order are denied." Why not just explain it? If they are going to be incorporated, say that.

HON. F. SCOTT McCOWN: Well, but they're not. You may have interlocutory orders that you're undoing.

MR. GILSTRAP: Then you better say so.

MR. HAMILTON: Well, you better say so.

HON. F. SCOTT McCOWN: Well, now you're making it more difficult.

PROFESSOR CARLSON: Yeah.

HON. F. SCOTT McCOWN: What's wrong with just using the old Mother Hubbard language and adding "This is a final appealable order or judgment. All relief

not expressly granted is denied"?

HONORABLE SARAH DUNCAN: All relief not expressly granted where? In this document or in an earlier order or judgment?

HON. F. SCOTT McCOWN: I don't think that -- that problem doesn't have to be addressed if you have this new word, "This is a final appealable order or judgment." The only way we're really clarifying Mother Hubbard is by saying "This is a final appealable order or judgment."

CHAIRMAN BABCOCK: Stephen Tipps.

MR. TIPPS: I was just going to observe that I think the effect of the second -- I think the second sentence effectively is a new, improved Mother Hubbard clause.

HON. F. SCOTT McCOWN: It's new.

MR. TIPPS: And it expands -- right. It's a new and different Mother Hubbard clause.

HON. F. SCOTT McCOWN: I mean, I don't think it's improved. I think it brings a host of unintended consequences in battles where -- about potential battles about what the judgment means and what the judge intended and about what happens to interlocutory orders.

CHAIRMAN BABCOCK: Frank, you want to -- I'm sorry, David. Go ahead.

HONORABLE DAVID PEEPLES: Well, just two

suggestions to move Frank's proposal along. I think, number one, sometimes it's better to vote and get the sense of the house on a concept without getting hung up on the language. Okay. And I think maybe we need to do that here.

Number two, it was suggested I think by Jan Patterson, but maybe by others, too, that maybe -- you know, sometimes reform, you can't do everything right now. You go one step at a time, and what I kind of heard Frank saying was the step he wants to take is to deal with the Mother Hubbard problem and leave for later the inadvertent cumulative orders problem, the 58 problem.

MR. GILSTRAP: My proposal is let's agree that we should adopt a new and improved Mother Hubbard clause. I mean, that's what we're doing, and I disagree with Judge McCown. I think it's a much better provision than we've got. Of course, lawyers can always mess things up, but they're messing up the current one regularly.

CHAIRMAN BABCOCK: Yeah. I think that's fair to vote on that. Don't you think? I mean, Scott, if you don't want to vote, you don't have to.

HONORABLE DAVID PEEPLES: But, Frank, you're saying let's deal with this aspect of the Mother Hubbard and maybe work out the language later if we agree we want to take this step instead of the other step.

MR. GILSTRAP: I agree. That's what I want to do.

CHAIRMAN BABCOCK: All right. Is that okay with everybody?

HONORABLE DAVID PEEPLES: I'd like to hear an argument of why we ought to take the other step first. I mean, if there's anybody that's going to vote against this because we ought to deal with the inadvertent cumulative orders, you know, the severance and whatever that they didn't get notice of.

HONORABLE SARAH DUNCAN: I guess I don't understand why people are considering it two different problems. The cumulative order problem has several aspects to it, but one aspect of the cumulative order problem is the Mother Hubbard clause.

CHAIRMAN BABCOCK: David, you want to --

HONORABLE DAVID PEEPLES: When I say the cumulative order problem, one problem is if we don't allow the existing law -- you know, if they add up to final relief, it is final, if we don't allow that, you're going to have a lot of judgments and orders out there that are not final because they don't have the right language.

So that's one problem. Another problem is district clerks and other people -- you've mentioned, Sarah, it's taken a whole day to sort out in the clerk's

record whether it's final or not. Those are problems, but -- and I guess you can deal with it by the language you-all have here, but that might not be the way to deal with it that we want to do it.

CHAIRMAN BABCOCK: Yeah, Elaine.

PROFESSOR CARLSON: I guess we could do both, Sarah. You know we could step up the notice language in Rule 301, the after the one final -- "There shall be one final judgment," and put something in like "A judgment signed following conventional trial on the merits implicitly disposes of all parties and all issues" and that if the trial court signs an order that disposes of any remaining parties and claims in a lawsuit that is equivalent of a final judgment.

I mean, you could do that and make some progress on the notice aspect and then couple that with an improved Mother Hubbard. I mean, that does advance the ball.

MR. LOWE: Chip?

CHAIRMAN BABCOCK: Yeah, Buddy.

MR. LOWE: In 301, there is only one final judgment, but it doesn't define final judgment. Now, that -- I understand the subcommittee said it was too complicated to take that approach, just have a definition, but I don't think we can escape that, because you're going

to label something as a final judgment without knowing what it is.

Now, it doesn't say appealable order. I mean, one final judgment. We don't propose to say what is appealable and what's not. It's known that a final judgment is appealable, but I don't see how you can escape the problem without just defining and saying there's only one final judgment and a final judgment is one that disposed of all -- you know, and define it.

HONORABLE SARAH DUNCAN: And, frankly, that's not true.

MR. LOWE: Well, okay.

HONORABLE SARAH DUNCAN: Because you've got -- and I agree with you. The problem is, for instance, in probate cases, in family law cases, there are orders that are appealable that do not dispose of all parties and claims, and unless we do a survey of all those types of cases, I don't --

MR. LOWE: I'm not saying what is appealable and what's not in what cases. Right now we say -- and we don't propose a change -- there is only one final judgment in a case. Now, what does final judgment mean? We can't define final judgment? How are we going to know when to appeal it when it is final if we can't even define it? Why --

HONORABLE SARAH DUNCAN: But to me that's part of the problem. There are probably a handful of lawyers in the state that really understand when an order in a probate case is appealable and when it's not, and part of what the subcommittee was trying to get to is that rather than requiring lawyers to understand all of the rules that are applicable to the particular area of law in which they got an order or judgment and rather than requiring them to read every single case that comes out of the Supreme Court on Mother Hubbard clauses and severance orders and all the rest --

MR. LOWE: But how many judgments can you have in a probate court?

HONORABLE SARAH DUNCAN: You can have several.

PROFESSOR CARLSON: Lots.

MR. CHAPMAN: Several.

HONORABLE SARAH DUNCAN: Lots.

MR. LOWE: I mean, final judgments?

HONORABLE SARAH DUNCAN: Yes.

MR. LOWE: Well, then we better amend the rule then and say that you might have more than one.

HONORABLE SARAH DUNCAN: The one final judgment rule hasn't been true probably for as long as I have been practicing law.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: The probate court I think is a very complicated case that we need to leave aside. In terms of this rule that says there shall be one final judgment, that's not the way it is. That's an ideal, but we all know that when there's relief granted against A, B and C and then a severance, that that is the final judgment and it's more than one docket.

MR. LOWE: But severance is another cause, and if you don't sever -- A gets a summary judgment but B doesn't, if you represent A you better get it severed and get it --

MR. GILSTRAP: And then you have two documents that constitute the final judgment, the order granting the final judgment and the severance, so the statement in the rule that there shall be one final judgment is an ideal, but it doesn't exist in real life. I don't think we can go back in and theoretically solve all these problems. I think we've got to kind of proceed in a pragmatic way to try to alleviate the problem.

CHAIRMAN BABCOCK: Judge McCown.

HON. F. SCOTT McCOWN: I've written a rule, four parts. "A final judgment" -- and I'm not talking about whether it's appealable or not. "A final judgment is one that disposes of all issues and all parties." (2),

"A final judgment should include" -- I'm not saying "must."

"A final judgment should include a final judgment clause and be labeled as a final judgment below the caption." (3), "Any order with a final judgment clause in the following form is final for the purpose of appeal. This is a final," comma, "appealable judgment," period. "All relief not requested is denied," period.

(4), "Any order with a final judgment clause not in this form is appealable only if it is final." And that solves the problem. You've announced a new final judgment clause that if they've got it that makes it final for the purpose of appeal, and you've said that all these other clauses if they're on old judgments or if they use them on future judgments, it's appealable only if it is in fact final, and you have defined final as one that disposes of all issues and all parties.

CHAIRMAN BABCOCK: Read No. (4) again.

HON. F. SCOTT McCOWN: Let me read the whole thing. "A final judgment is one that disposes of all issues and all parties." (2), "A final judgment should include a final judgment clause and be labeled as a final judgment below the caption."

(3), "Any order with a final judgment clause in the following form is final for the purpose of appeal,"

colon, "This is a final," comma, "appealable judgment," period. "All relief not requested is denied," period.

(4), "Any order with a final judgment clause not in this form is appealable only if final."

MR. HAMILTON: You said "all relief not requested." You mean "granted"?

HON. F. SCOTT McCOWN: "All relief not requested is denied." "All relief not granted," yeah.

MR. GILSTRAP: "All relief not expressly granted is denied."

HON. F. SCOTT McCOWN: Yeah. "All relief not expressly granted is denied."

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: That's not true, though.

HON. F. SCOTT McCOWN: It would be if it was in the rule.

HONORABLE SARAH DUNCAN: The No. (1) is not true.

JUSTICE HECHT: You have to flip No. (1) to say -- you have to flip the clauses in No. (1) and say that "A judgment that disposes of all parties and issues is final," but it's not true that a final judgment always disposes of all issues and all parties. It's true the other way around.

HON. F. SCOTT McCOWN: All right. "A judgment that disposes of all issues and parties is a final judgment."

CHAIRMAN BABCOCK: Okay. Why is that not true, Sarah?

HONORABLE SARAH DUNCAN: Because it's not a judgment that disposes of all claims and parties. It's any compilation of judgments and orders that disposes of all claims and parties.

MR. ORSINGER: Right. That's right.

MR. YELENOSKY: So the disposition of all claims and parties establishes the final judgment.

HONORABLE SARAH DUNCAN: It's the last document in a series of documents that disposes of parties and claims that disposes of the last party and the last claim.

HONORABLE JAN PATTERSON: Well, why couldn't you just say "All judgment or judgments that dispose," because there will be some where you will have a single --

HONORABLE SARAH DUNCAN: Because it won't necessarily be any particular judgment or order. It's the last in a series that disposes of the last party or claim.

HON. F. SCOTT McCOWN: Well, how about just saying, "The last order that disposes of all issues and parties is final"?

HONORABLE SARAH DUNCAN: "That disposes of the last claim and party."

MS. SWEENEY: Or "all issues and parties not previously disposed of"?

HONORABLE SARAH DUNCAN: And it renders all the previous orders or judgments at that point become final.

HON. F. SCOTT McCOWN: All right. "The last order that disposes of the last issue or party" --

HONORABLE SARAH DUNCAN: Last claim.

HON. F. SCOTT McCOWN: "Last claim or party is final."

MR. YELENOSKY: "Is a final judgment."

HONORABLE SARAH DUNCAN: But that's not -- the problem isn't that that one is final. The problem is that that signing of that order renders all previous partial orders or judgments final.

MR. HAMILTON: Why don't we just say that?

MR. TIPPS: Say "The order that disposes of the last claim or last party creates a final judgment." Is that it?

HONORABLE SARAH DUNCAN: "And all previous orders and judgments."

MR. YELENOSKY: Well, you don't need to say that.

MR. TIPPS: If you say "creates a final judgment," does that get it or not?

HONORABLE SARAH DUNCAN: But that's --

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: I would like to go back to the Peeples/Gilstrap approach of a concept that we can agree upon, leaving the drafting to another day, or maybe to Sarah's committee, taking into account Scott's --

CHAIRMAN BABCOCK: You want to restate your concept, Frank?

MR. GILSTRAP: I'll try. I think we should agree that there should be some language that when placed in an order creates a final appealable judgment. That's what we're talking about, and this language needs to be clear and informative and not -- and let the lawyers and judges know its effect.

I think we can agree that we can do that. Then the subcommittee can go back and maybe tinker with this language and we can come back and see what else we want to add, but at least we've gotten something.

HONORABLE JAN PATTERSON: That there's a clear but nonexclusive way of doing it.

CHAIRMAN BABCOCK: Before we lose too many more people let's get an expression on that. Everybody in favor of what Frank just said raise your hand. Everybody

against?

MR. LOWE: I don't understand. I'm for what Scott suggested, and I think that's inconsistent with it.

CHAIRMAN BABCOCK: So Frank's sense of the house passes by a vote of 20, with only a lonely dissent.

MR. MEADOWS: Confused.

CHAIRMAN BABCOCK: Weighty, though, it may be from the coach here.

HONORABLE DAVID PEEPLES: A subsidiary question. Do you want to also kill off language that doesn't rise to the level of yours, namely -- and I'm not talking about retrospectively, but if somebody comes up with the old language in the future, do you want to say that's not good enough?

MR. GILSTRAP: I'm not saying that now. I think that's something that we have to go on and decide. That's one alternative. A more Draconian "and only if" approach is an alternative, may be a better alternative, but I think -- I don't think we then should say we're going to kill off the other Mother Hubbard type language. Let's just agree on this and then try to come up with something else.

CHAIRMAN BABCOCK: Okay.

MR. LOWE: Chip, let me clarify one thing.

CHAIRMAN BABCOCK: Yeah. Go ahead, Buddy.

MR. LOWE: The reason I did actually dissent, because I like the approach of defining final judgment, and I don't see this does that, and that was really why I dissented.

CHAIRMAN BABCOCK: Sarah, let me ask you a question. We've got this final judgment thing, which is going to occupy a lot of our time, but you had a whole bunch of other things that your committee is looking at, and they are reasons for granting a new trial, right?

HONORABLE SARAH DUNCAN: Uh-huh.

CHAIRMAN BABCOCK: And then the Rule 306a procedure, and then timetables under Rule 104 and then TRAP rule --

HONORABLE SARAH DUNCAN: Timetables under Rule 104?

CHAIRMAN BABCOCK: That's what I see. It says "Rule 104 timetables."

MR. GILSTRAP: That's part of (3).

HONORABLE DAVID PEEPLES: 306a.

CHAIRMAN BABCOCK: Oh, that's 306a? Okay.

HONORABLE SARAH DUNCAN: That's the recodification of it.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: The last one is the easiest one.

CHAIRMAN BABCOCK: Motion to extend plenary power? Okay. Can you give us a sense of how thorny these other issues are?

HONORABLE SARAH DUNCAN: On the last page of the subcommittee report is an issue that I think is relatively simple, although it may produce some disagreement, but I guess most anything in this committee would. And the issue is under Rule 329b, any change in a judgment, whether it is substantive or not, restarts the appellate timetable, extends the trial court's plenary power.

The Supreme Court held in the Lane Bank Equipment case that -- and you see it quoted -- the same is not true for post-judgment motions. It is only a motion seeking a substantive change that will extend the appellate deadlines and the court's plenary power under Rule 329, it should be (g). The -- as it's noted in the memo, Justice Hecht concurred and said we're creating a real trap because now we're going to have to decide what's a substantive change and what's not a substantive change, and we ought to apply the same rule for 329b motions as we apply to changes in the judgments, in judgments.

The committee unanimously recommends that we adopt the concurrence and amend recodification Rule 105(b)(2) to say "a motion to modify the judgment or any

other motion that requests relief that could be included in the judgment."

CHAIRMAN BABCOCK: Does this -- Justice Hecht, does this fairly incorporate your concurring opinion?

JUSTICE HECHT: I believe so.

CHAIRMAN BABCOCK: Okay. Let me ask a question about this recodification thing. I notice that your numbers jump back and forth between existing rules and the recodification rules.

Justice Hecht, if we send something to the Court with a recodification number on it only, are you going to know what we're talking about, or do we need to advise the Court that we're proposing changes to existing rules as opposed to recodification rules?

JUSTICE HECHT: No, I think we'll know what you're talking about, and I think it's good to use the recodification rules to -- unless we're going to change something that we might change in the interim before we get to the recodification, which is going to be a ways off, and the change in the recodification text is so substantial because of editing or whatever that it doesn't really relate very well to the existing language.

I mean, if this is something we need to do, and this may be one, because I agree that this is not

already written, that this is a trap. Then if we're going do it sooner rather than later, we need to think about it under the old language, but it's pretty clear here how it fits in the old language.

HONORABLE SARAH DUNCAN: It's not a difficult amendment.

CHAIRMAN BABCOCK: Excuse me?

HONORABLE SARAH DUNCAN: It's not a difficult amendment, whether we use old rules or recodification.

CHAIRMAN BABCOCK: Okay. Well, since this sounds like it's something that ought to be done sooner than later, perhaps the subcommittee could put it into old language, old rules language, and is anybody opposed to this rule? Anybody want to discuss it further? Carl.

MR. HAMILTON: I have a question about the language that could be included in the judgment. If the motion asked for something to be included in the judgment, does that satisfy this, or is this language that it could be some kind of a legal thing? In other words, where it has to legally be entitled to go in the judgment or something?

HONORABLE SARAH DUNCAN: The problem in Lane Bank is a motion for sanctions that actually asked for a change in the judgment, and the question arises what if

you've got a motion for sanctions or sanctions order that you don't expressly ask be included in the judgment, but if you thought about it, it could have been? And so the concurrence is written to incorporate both the situation in which there was a request that it be included in the judgment and the situation where it wasn't requested that it be included in the judgment but it could have been, so I think "could" is inclusive of both situations.

MR. YELENOSKY: But his question is what if you say you want it in the judgment but under the law it could not be in the judgment?

MR. LOWE: Right.

JUSTICE HECHT: But that would extend it. Under Lane Bank if you ask for a change in the judgment then that extends the appellate timetable, but if you ask for relief to be given in a separate order, which it could also be and then not in the judgment -- it was sanctions in Lane Bank -- then that would not extend -- under Lane Bank that would not extend the appellate timetable.

So depending on exactly how the motion, the post-judgment motion for relief, is phrased, you either are or are not extending the appellate timetable; and my point in the concurrence was it ought not to turn on that. If anybody files any motion for any relief that you could have put in the judgment, then that ought to extend it,

even if it were erred to do so.

MR. YELENOSKY: Even if it were erred to do so. Yes.

JUSTICE HECHT: Yeah.

CHAIRMAN BABCOCK: Seems straightforward. Anybody opposed to this change? And what we're talking about is the part of the subcommittee report entitled "No. (5), motions to extend plenary power," and referring to Rule 105 of the recodification. Plenary power of the trial court. Elaine.

PROFESSOR CARLSON: Could I ask one question? So is the intent, Justice Duncan, if you make a motion to modify and it turns out it's a nonsubstantive change, do you get that additional time? Or is that not meant to address that?

HONORABLE SARAH DUNCAN: As I understand it, any motion to modify a judgment will extend the timetable under existing case law. The problem is motions that request additional relief without mentioning the judgment, modification of the judgment.

HON. F. SCOTT McCOWN: Could I make a suggestion? It seems to me that this language that could be included in the judgment that Carl's identified only communicates something to you if you're inside this debate about this Lane Bank case; and how about if you said, "or

any other motion that requests relief, whether included in the judgment or in a separate order"?

JUSTICE HECHT: Because if you move for execution, nobody thinks that that should extend the appellate timetable. If you file a motion to enforce the judgment somewhere and you did it -- even if you did it before it was final, that ought not to -- that's not a post-judgment motion that extends the timetable or the court's plenary power, but if you move for any other kind of relief that could be -- go back into the judgment, and then it should. That's the argument.

HON. F. SCOTT McCOWN: Well, but I guess I see what you're saying, and I agree with you, but that "could be included in the judgment," I suppose you could say in the judgment that post-judgment interrogatories have to be answered in 15 days or that -- I mean, you do say in the judgment that writs of execution shall issue.

It just seems to me to be kind of a hard concept to know what we're talking about. I don't have an improvement, but I see Carl's point that I don't think the average Joe is going to know what that means.

MR. HAMILTON: What if I filed a motion and said "I want you to include in there that the plaintiff lawyer made an improper jury argument"?

JUSTICE HECHT: Well, it's clearly the law

if you file any motion requesting a change in the judgment, that extends the appellate timetable.

MR. HAMILTON: Whatever it is, even though --

JUSTICE HECHT: Whatever it is.

MR. HAMILTON: -- properly it should not be in there?

CHAIRMAN BABCOCK: Right.

JUSTICE HECHT: Yes. If you move to change the judgment, that's it. That triggers it, but the harder problem is what if you move for relief but not in the judgment. You want post -- you want, in Lane Bank sanctions, but there could be some other relief that you wanted.

MR. HAMILTON: Why don't we just say "a motion that requests relief to be included in the judgment"?

JUSTICE HECHT: Well, the problem is that if you request it in a separate order, the same relief, then it's not going to extend the appellate timetable; and why should the appellate timetable depend on whether you're moving for relief in the judgment or moving for the exact same relief in a separate order?

CHAIRMAN BABCOCK: Judge Patterson.

HONORABLE JAN PATTERSON: It seems to me

that the proposed solution is a general and broadening cure for something that may be more of a specific problem, and I happen to be a little bit familiar with the Lane Bank problem, and I agree that it's a problem, and I think it does -- there needs to perhaps be some review of it, but my concern is that the only two cases that I know of that really address it -- and there may be more now, Justice Hecht -- but are sanctions cases, and it may be a peculiarly sanctions problem if it's not going to modify the judgment, and I wonder if that might not be a more --

JUSTICE HECHT: Place to put it?

HONORABLE JAN PATTERSON: Or a clearer place to put it or to speak to it, because I'm not sure it's a larger problem.

CHAIRMAN BABCOCK: Judge Duncan.

HONORABLE SARAH DUNCAN: I certainly accept what Jan is saying, that it's arisen in the sanctions context in reported cases, but I've had cases where I've asked for a recomputation of post-judgment interest or prejudgment interest or an additional award of attorneys fees for some reason or a penalty; and, you know, when you've got a 30-page judgment, you don't really want to revise that judgment to incorporate a couple of thousand dollars of interest. You need to just -- because then you're going to have to get the judgment signed, send it

out to 30 parties, when really all you need is a one-page order that adds a couple of thousand dollars worth of interest, so even if it may have only arisen in the sanctions area in the reported cases, I have a hunch that it could easily arise and probably does, I mean --

HONORABLE JAN PATTERSON: But why allow it to arise?

HONORABLE SARAH DUNCAN: I, frankly, didn't anticipate Lane Bank coming down the way it did because I thought if it were a motion for additional relief that it would extend, because even if we don't change, physically change, that document labeled "judgment," we are changing the judgment in the case.

HON. F. SCOTT McCOWN: But, see, I think that's an evil. I mean, if you're recalculating interest, you ought to have a revised judgment. You shouldn't have a separate piece of paper separate from the judgment that's an order that says the judgment's wrong and this is the new interest.

JUSTICE HECHT: Well, I don't disagree with that, but -- as a general proposition, but if the motion requested it in a separate order, it wouldn't extend the appellate timetable.

HONORABLE SARAH DUNCAN: Right.

JUSTICE HECHT: And if it requested it in

the judgment, it would, and the requester ought not get the troll of the appellate timetable by designating that it be in a separate order when it clearly shouldn't be, or -- I mean, it's just an artifice to avoid the effect of the motion.

CHAIRMAN BABCOCK: We have got a couple more things to do here. Are we ready to vote on this or do we want to talk about it some more?

MR. LOWE: I move it be accepted.

MR. JEFFERSON: Second.

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

It carries by a vote of 14 to 3.

So, Sarah, thanks. We will pick up with the subcommittee's work following the vote on the sense of Frank Gilstrap's thoughts on No. 1, final judgments, and we will try to get to 2, 3, and 4 at the next meeting, which is going to be held on November 17th and 18th at the Texas Broadcast Center, at the Texas Association of Broadcasters, because somebody bumped us from this room, and the Supreme Court is going to hold them in contempt for doing that.

On the next agenda we're going to have a report from Justice Hecht, a CLE credit for all of us that Joe Latting is going to tell us by November that he's

secured.

MS. SWEENEY: With ethics. With ethics.

CHAIRMAN BABCOCK: What?

MS. SWEENEY: With ethics.

CHAIRMAN BABCOCK: With ethics. CLE credits with ethics.

HON. F. SCOTT McCOWN: They don't offer ethics at those plaintiffs seminars?

MS. SWEENEY: We wrote that book.

MR. YELENOSKY: They do, but they can never get it accredited.

CHAIRMAN BABCOCK: Pam Baron is going to report on Rule 3a. Joan Jenkins is going to report on the Rule 194A issue. Dorsaneo is going to finish the TRAP rules that we started yesterday, and Sarah is going to finish with the issues that we've just been talking about.

Now, one last thing before we leave, and thanks for hanging in there, those who have. Yesterday we said that we were going to go back and look at the recusal rule to see if there are any problems, any issues, and I know Richard did that last night, but unfortunately he's gone. But Buddy is the only person that's raised an issue to me, and it's an important and interesting one, and, Buddy, why don't you say what it is?

MR. LOWE: Well, I don't have it before me,

but basically the -- and I understand we can't change the Constitution. I'm not recommending that, but the first constitutional disqualification is if the judge or one of his former partners or associates had been a counsel in the case. I think we should have a recusal rule that includes his spouse. You know, if it includes his partner's spouse. No. (3), I believe it is, where it says if the judge or one of his partners is likely to be a witness, and I think if the judge or the judge's spouse, his spouse should be included in that.

CHAIRMAN BABCOCK: Okay. Buddy's proposal is that we amend subpart (b)(3) to say "The judge or the judge's spouse has been or is likely to be a material witness, formerly practiced law with a material witness, or is related to a material witness or such witness' spouse to consanguinity or affinity within the third degree." How do people feel about that? Any difference?

HON. F. SCOTT McCOWN: Well, wait.

HONORABLE JAN PATTERSON: Would you mind repeating that?

CHAIRMAN BABCOCK: Sure. Subpart (b)(3), it currently does not include the judge's spouse, and Buddy says it should, and so if it does then it would read "the judge or the judge's spouse." That's the new language. "Or the judge's spouse has been or is likely to be a

material witness, formerly practiced law with a material witness, or is related to a material witness or such witness' spouse by consanguinity or affinity within the third degree."

MS. SWEENEY: Didn't we have language yesterday about a member of the judge's household?

MR. YELENOSKY: That's in the judicial --

MS. SWEENEY: I know it is, but might that solve some other potential problems that "spouse" doesn't get us to, like POSSLQs, the U.S. Census category.

Persons of the opposite sex sharing living quarters. POSSLQ.

HON. F. SCOTT McCOWN: When we're talking about -- let me point out, we've got (b)(1), this general rule about your impartiality might reasonably be questioned. When you broaden this to judge or judge's spouse I think that's getting too broad, because let's say you're a judge and let's say your spouse used to practice at Baker-Botts and doesn't anymore, and let's say you're trying a case where the attorneys fees expert for the defendant is from Baker-Botts. It just doesn't make sense that you should have to recuse.

MR. LOWE: But, Scott, maybe it's too broad to start with. All I'm saying is there are places in there where it disqualifies or the judge should recuse

himself if one of his partners did such and such, and I'm saying that he ought to be a lot closer to his present wife if she's involved than he should be a former partner, and that spouse is overlooked, and we do put spouse in on (5) and (6), the judge or the judge's spouse.

CHAIRMAN BABCOCK: (6) and (7), actually.

MR. LOWE: All right. (6) and (7).

HON. F. SCOTT McCOWN: But the difference on (6) and (7) is that those are existing right now conflicts; whereas (3) is a former -- a former condition, and, you know, the fact of the matter is that a lot of judges marry a lot of lawyers, and that when you're talking about something that happened in the past, if the judge was involved it's one thing, but if the spouse is involved, I think it gets too attenuating, or can be. I'm not saying in every case.

MR. LOWE: It included the judge's partners, and then my main reason for catching it is if a judge is statutorily disqualified if he or one of his former partners is going to be a witness, I would think there might be grounds to disqualify him or to make him recuse himself if his wife's going to be a witness.

CHAIRMAN BABCOCK: Justice Duncan. Or --

HON. F. SCOTT McCOWN: Well, if his wife's a witness, it does recuse him, because the judge can't be

related to a material witness. That's already in there.

MR. LOWE: Well, then, okay. If it's not worth fooling with, I just caught it --

CHAIRMAN BABCOCK: No, I thought it was good to raise, but do I sense a groundswell to put that in or just leave it out?

HONORABLE SARAH DUNCAN: No, no.

CHAIRMAN BABCOCK: Yeah, Sarah.

HONORABLE SARAH DUNCAN: The current rule requires recusal if the judge or spouse is to the judge's knowledge likely to be a material witness in the proceeding.

HON. F. SCOTT McCOWN: And that's in this rule, too.

MR. TIPPS: Where is it?

HON. F. SCOTT McCOWN: It's in (b)(3). "The judge" --

MR. LOWE: No. It doesn't say a judge's spouse. (b)(3) doesn't say a spouse.

HON. F. SCOTT McCOWN: No, no, no. Wait, wait. Are you saying the judge's spouse is going to be the witness?

MR. LOWE: Yeah.

HON. F. SCOTT McCOWN: That gets it. The judge is related to a material witness.

MR. LOWE: Then that's not a problem then.

HON. F. SCOTT McCOWN: Right.

MR. TIPPS: Is the judge related to his spouse?

HON. F. SCOTT McCOWN: Yes.

MR. TIPPS: I mean, not really.

MR. HAMILTON: By affinity.

HON. F. SCOTT McCOWN: Well, it says "by consanguinity or affinity."

MR. TIPPS: Got it. Got it.

HON. F. SCOTT McCOWN: Is there a Mrs. Tipps I can report that to?

CHAIRMAN BABCOCK: Okay. Elaine.

PROFESSOR CARLSON: Are we going to continue to meet -- is the plan to continue meeting every other month in 2001?

CHAIRMAN BABCOCK: Yes. It is the plan, and the reason we're having to do this back-to-back is because I miscounted. I thought we had six meetings on --

PROFESSOR CARLSON: I was just curious for our plan to continue over time.

CHAIRMAN BABCOCK: Yeah.

MS. SWEENEY: Are we going to get bigger tables in here?

CHAIRMAN BABCOCK: Huh?

MS. SWEENEY: Are we going to get bigger tables in here?

CHAIRMAN BABCOCK: Only for you, Paula.

MS. SWEENEY: For my array of technical --

CHAIRMAN BABCOCK: Only for you. Yeah, Sarah.

HONORABLE SARAH DUNCAN: Are we going to set the schedule for next year soon?

CHAIRMAN BABCOCK: Soon.

HONORABLE SARAH DUNCAN: So we can make reservations for the whole year?

CHAIRMAN BABCOCK: We are soon.

HONORABLE SARAH DUNCAN: On the recusal. is it the committee's implicit decision that we want to take out the requirement in 18b(2)(f)(ii) and (i), a knowledge requirement?

CHAIRMAN BABCOCK: Since it is out, that is --

HON. F. SCOTT McCOWN: On, what, being a witness?

CHAIRMAN BABCOCK: No. We're talking about --

HON. F. SCOTT McCOWN: Yeah. We did take it out, because the theory is if there's no way not to know that they're going to be a witness. When you call them

you know they're a witness.

CHAIRMAN BABCOCK: Anybody else have anything on recusal? Okay. We will see you in November. Thanks again for sticking with us here.

We're in adjournment, recess, whatever it is.

(Meeting adjourned at 11:55 a.m.)

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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 21st day of October, 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 $ 905.00 .

Charged to: Jackson Walker, L.L.P.

Given under my hand and seal of office on this the 3rd day of November, 2000.

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