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**MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

March 30, 2001

(MORNING SESSION)

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Taken before *D'Lois L. Jones*, Certified  
Shorthand Reporter in Travis County for the State of  
Texas, reported by machine shorthand method, on the 30th  
day of March, 2001, between the hours of 9:12 a.m. and  
12:54 p.m., at the Texas Association of Broadcasters, 502  
West 11th Street, Suite 200, Austin, Texas 78701.

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1 you should know that there is a House Bill 2105 that has  
2 been introduced by Representative Dutton that affects or  
3 would affect our work. It would require us to comply with  
4 the Open Meetings and Open Records Act and further would  
5 require us to adopt the Rules of Parliamentary Procedure  
6 to consider our business. My view is that our proceedings  
7 are open, whether or not we're subject to the Open  
8 Meetings Act and, as everyone knows, there is a transcript  
9 taken of everything we do, and that transcript is  
10 available on a website. This bill would require the Court  
11 to establish official -- an official website rather than  
12 the one that Carrie and I are putting together. But at  
13 any rate, that bill is pending, although I don't know that  
14 it's been reported out of committee, has it?

15 JUSTICE HECHT: It has not. It's on the  
16 hearing for Monday.

17 MR. GILSTRAP: What's the number?

18 CHAIRMAN BABCOCK: 2105. As for Open  
19 Records, my view is that all the correspondence and  
20 documentation that we create is open and available to the  
21 public upon request, whether or not we are technically  
22 subject to the Open Records Act. The bill, I believe,  
23 would require the Court to be the repository of the  
24 records as opposed to the chair of the committee. So that  
25 would be a change, and the Open Meetings Act provision

1 would I think apply to subcommittees, which obviously  
2 would be a problem with the way we have to do telephone  
3 conferences and that type of thing. So that is pending.

4           There is another House bill that I think is  
5 on our agenda somewhere, and House Bill 740, which Justice  
6 Hecht is going to talk about; and, finally, on the  
7 schedule Justice Duncan has pleaded to be able to talk  
8 about Justice Hecht's opinion in Lehmann right off the bat  
9 so we can get started on a positive, snappy note; and so  
10 unless there is objection to that I would propose  
11 adjusting the agenda slightly so that right after the  
12 report from Justice Hecht we would have Justice Duncan and  
13 her subcommittee criticizing Justice Hecht's opinion in  
14 Lehmann.

15           So, Justice Hecht, you've got, looks like,  
16 four agenda items to discuss.

17           JUSTICE HECHT: Well, first let me say that  
18 the Court is delighted with Governor Perry's appointment,  
19 and I'm even more delighted because the Chief thinks that  
20 Wallace should be co-liaison to this committee, and that  
21 will be great because I appreciate his work on it so far,  
22 and that will help us all the more.

23           On Lehmann, as I had said a time or two  
24 before, the Court's view of that case and of the issues  
25 there was simply to resolve them within what we viewed to

1 be the constraints of existing law, and we did say in the  
2 opinion that a better solution might be in the rules  
3 process, and so we assume that the committee needs no  
4 encouragement to consider whether that's really the best  
5 solution or whether we need to look elsewhere, but I mean,  
6 it is -- the solution is not necessarily settled by the  
7 Lehmann case.

8           And, as you know, the Federal rules are -- I  
9 think have not changed but are likely to change in a way  
10 that I think is not good in that it will make it a bit  
11 more difficult for lawyers to know when a final judgment  
12 is entered because it can be done by -- the clerk makes a  
13 note on the docket sheet and it can be done by -- just by  
14 the passage of time, and a lawyer might not know that any  
15 of that has happened. So I don't know that that's a good  
16 solution, but everyone is compelled by the pressure of the  
17 moment on this issue, and we have been worried about  
18 lawyers being caught offguard by not knowing that a  
19 judgment was final because of some language in there that  
20 somebody then argued made it final.

21           The Federal courts feel like they have been  
22 caught offguard the other way, that the compliance with  
23 the strictures for a final judgment has not been fully met  
24 and now there's all these judgments sitting out there that  
25 under their rule they think are probably not final and

1 could still be appealed, even though nobody really thought  
2 so at the time and maybe months and years have passed.  
3 But we talked about those issues before, and my only point  
4 is that we should continue to look for the best solution,  
5 irrespective of our decision in that case, brilliant  
6 though it was.

7                   CHAIRMAN BABCOCK: Particularly the  
8 majority.

9                   JUSTICE HECHT: Yeah. Now, on TRAP 47, we  
10 have delayed considering this rule, the Court has,  
11 because we wanted to get the views of the appellate  
12 justices when they were trapped in a room. We wrote them  
13 a letter in November and said, "What do you think about  
14 this?" and we got about five letters back and about two  
15 phone calls, and they were very helpful and constructive,  
16 but I knew that there was bound to be more thought about  
17 the rule than that. And, sure enough, at the judicial  
18 college last week the justices raised some other questions  
19 that I hope we'll have time to consider at this meeting,  
20 and I sent Chip a letter, and I guess everybody has it, I  
21 assume everybody has a copy of it, and it's just a couple  
22 of points that they have raised, but the Court would like  
23 to have the committee's input on that and then we would  
24 like to go ahead and take it up because we hope that the  
25 changes in the appellate rules are getting close to

1 finished, and we need to go ahead and take a look at them.

2           We would have -- I think the Court would  
3 have approved the summary judgment rule this week, but  
4 instead we spent most of our time sitting over at the  
5 Legislature, which is our highest and best use; and  
6 Representative Dutton does have House Bill 740; but I  
7 think our sort of tentative understanding with the  
8 Legislature, people over there, is that if we adopt the  
9 rule that this committee has recommended, that bill is not  
10 going to go anywhere. So that's that.

11           On parental notification rules, they went  
12 into effect March 1st. We didn't receive any comments on  
13 the rules until about two days before they were supposed  
14 to be effective and then we received extensive comments  
15 from two groups, and we didn't feel like we could hold up  
16 the changes that we made while we considered those, so we  
17 asked the committee to take a look at those, and maybe  
18 Justice McClure. She's already weighed in on some of  
19 them, but maybe her subcommittee could take a look at  
20 them, and we can see if we need to do anything on that.

21           We had a request to look at Rule 103 of the  
22 civil rules, and just briefly, the use of private process  
23 servers around the state is fairly commonplace, but it is  
24 subject to a great variety of restrictions, and perhaps  
25 it's time for us to consider whether we shouldn't



1 standardize this either with a state rule or some kind of  
2 state procedure that will make it -- make that a more  
3 useful procedure for us. And we have three  
4 representatives of process servers who are here this  
5 morning, just to see how our committee works, but they can  
6 be a resource as well as others as we look at this, but  
7 I've asked Chip to send that to the appropriate  
8 subcommittee and see if we can't get moving on that.

9           Mike Hatchell asked that we look at whether  
10 new delivery services that are being implemented by the  
11 U.S. Postal Service shouldn't be expressly approved of in  
12 Rule 9 of the TRAP rules so that they could be used as  
13 well as the other methods that are listed there, and I  
14 think he's probably right about that, but we had a number  
15 of debates about Rule 9, so we need to take a look at  
16 that.

17           There is nothing to discuss about this, but  
18 we have -- I'm on the Federal civil rules committee, and  
19 we're talking about the discovery of information in  
20 electronic form, and we have a rule on that, 196.4, and  
21 the general feeling among the participants in that process  
22 is that our rule looks pretty good and maybe would serve  
23 as a model for the Federal rules. But we have no cases on  
24 196.4, and my query to a number of trial judges indicates  
25 that they don't know of any hearings or motions or

1 problems that they have had with the rules, but if anybody  
2 has information about how the rule has been used, whether  
3 it worked or didn't work or whatever, it would be useful  
4 to provide to the Federal rule writers because they are  
5 going to be looking at those issues.

6                   And I believe that's it.

7                   CHAIRMAN BABCOCK: It think that's it.

8 Okay. In terms of assigning these things, Bill Dorsaneo,  
9 would you and your group take up TRAP Rule 47 and consider  
10 the questions that the Court has?

11                   PROFESSOR DORSANEO: Sure.

12                   CHAIRMAN BABCOCK: And be ready to report in  
13 our May meeting. The same with Rule 9.2. That falls  
14 under your jurisdiction, I think.

15                   Justice McClure, who I don't think is here,  
16 I hope can report by the May meeting on the suggestions by  
17 these two groups on the parental notification rules, and  
18 then Rule 103 would be Richard Orsinger, who is also not  
19 here, but, Alex, I think --

20                   PROFESSOR ALBRIGHT: I'm here.

21                   CHAIRMAN BABCOCK: -- you're the co-chair or  
22 vice-chair of that committee, so if you would make sure  
23 that we do do that. Yes, Judge Lawrence.

24                   HONORABLE TOM LAWRENCE: If we're going to  
25 change 103, let's also look at Rule 536, which is the

1 justice court equivalent of that, and try to keep the  
2 language consistent.

3 CHAIRMAN BABCOCK: Great. Got that, Alex?

4 PROFESSOR ALBRIGHT: Got it.

5 CHAIRMAN BABCOCK: And for the  
6 representatives of the process servers who are here, the  
7 way this will work is that the subcommittee that deals  
8 with that rule, which is chaired by Richard Orsinger from  
9 San Antonio and vice-chaired by Professor Alex Albright  
10 from the University of Texas, whose name is appropriate,  
11 the yellow dress or orange dress, whatever that is that  
12 you're wearing, all bright.

13 PROFESSOR DORSANEO: Oh, I was wondering how  
14 that was going to end.

15 MR. YELENOSKY: I think it's saffron.

16 CHAIRMAN BABCOCK: Saffron.

17 PROFESSOR ALBRIGHT: Perhaps it's pumpkin.

18 CHAIRMAN BABCOCK: So, anyway, you can talk  
19 to Alex or Richard about providing input to their  
20 deliberations and then in May, in our May meeting, they  
21 will report for the full committee's consideration what  
22 they have come up with and then it will be debated in a  
23 public forum such as this, and you're welcome to attend.

24 So that is everything, which will lead us  
25 skipping over a couple of items right into Lehmann and

1 Justice Duncan. So --

2 HONORABLE SARAH DUNCAN: Who has absolutely  
3 no criticism of Lehmann.

4 CHAIRMAN BABCOCK: Right.

5 HONORABLE SARAH DUNCAN: As Justice Hecht  
6 said, the Court's job is to decide cases, and they decided  
7 this case I think in a way that enables the courts to hear  
8 the merits of more appeals, which I tend to think is a  
9 good thing. I don't think it resolves the problem before  
10 the committee. Where we started on the finality problem,  
11 now almost five years ago, is the need to codify whatever  
12 the rule is going to be so that lawyers who read the Rules  
13 of Civil Procedure and believe that's all the law there is  
14 can know when a judgment is final and, therefore, when  
15 they need to file their post-judgment motions and/or their  
16 notices of appeal.

17 Lehmann also only addresses the problems  
18 arising from take-nothing or Mother Hubbard language in a  
19 judgment arising from something other than a conventional  
20 trial on the merits. It doesn't attempt to resolve the  
21 problems that arise in the serial order situation, in the  
22 nonsuit situation where a signed order is required, in the  
23 Quanaim problem, as Bill pointed out in his memorandum,  
24 where you have got multiple orders which may conflict.

25 I -- as I told Chip, I don't really have a

1 lot more to say on the subject, and I think I have made my  
2 position of what I think we need to do clear; that is, the  
3 majority position of the subcommittee, and as I also told  
4 Chip, the subcommittee is ready, willing, and able to  
5 draft a rule, if the committee can come to something more  
6 than a three-way equal split on what the resolution of the  
7 problem should be. And I was frankly surprised to see  
8 this on the agenda because I don't know that anything has  
9 really happened to bring us any further along the process,  
10 except that maybe if we just keep talking about it we will  
11 come to something -- come to someplace where there is a  
12 majority view.

13                   CHAIRMAN BABCOCK: Could you refresh  
14 everybody on what the two views of your subcommittee are,  
15 evenly split?

16                   HONORABLE SARAH DUNCAN: My subcommittee is  
17 not split. My subcommittee, majority of the subcommittee,  
18 believes that the only way or the best way to resolve most  
19 of the problems, realizing that we'll never solve all the  
20 finality problems, is with some document that we have been  
21 shorthanding as a death certificate.

22                   The competing view, competing -- the two  
23 competing views are to basically not take so radical  
24 approach and just try to piecemeal fix the discrete  
25 problems and then the magic language rule where if there's

1 going to be a judgment or order that's final, it must have  
2 some type of magic language in it, and it was on those  
3 three positions that the committee pretty much equally  
4 divided.

5 CHAIRMAN BABCOCK: Okay. Anybody change  
6 their mind about this from the last time?

7 MR. YELENOSKY: Could you remind us how we  
8 voted?

9 CHAIRMAN BABCOCK: I don't recall.

10 HONORABLE SARAH DUNCAN: As I said, my  
11 subcommittee believes the death certificate will resolve  
12 more problems better, but not all problems all the time.

13 CHAIRMAN BABCOCK: Yeah. Bill Dorsaneo.

14 PROFESSOR DORSANEO: I don't know whether  
15 this is changing my mind. I don't really think it is, but  
16 it's at least changing a way to address the problem. I  
17 think the majority opinion in Lehmann needs to be codified  
18 because I think it is a good solution to one of the main  
19 problems; that is, lawyers not knowing that the case is in  
20 shape for timetables to have started running, putting them  
21 in jeopardy for missing, you know, the opportunity to  
22 perfect an appeal, among other things. I, again, would  
23 favor putting that in the judgment, which I think Lehmann  
24 provides for.

25 HONORABLE SARAH DUNCAN: Which is an

1 adoption of a magic language --

2 PROFESSOR DORSANEO: Right.

3 HONORABLE SARAH DUNCAN: -- solution, and as  
4 we discussed over the last three meetings, the problems  
5 with that position -- obviously there are great advantages  
6 that we don't require a separate piece of paper, you're  
7 not monkeying with any other rules. The problems are what  
8 if the language isn't exactly what it's supposed to be?  
9 What if it's -- if we say it's supposed to be in the first  
10 paragraph, as Bill does in his revisions to the  
11 codification draft, what if it's in the last paragraph?  
12 What happens if you just don't ever get an order or  
13 judgment with the magic language in it? Does that mean  
14 even though all the issues, claims, and parties have been  
15 resolved that there's never a final judgment?

16 CHAIRMAN BABCOCK: Judge Rhea.

17 HONORABLE BILL RHEA: Well, I want to start  
18 out by saying I speak from some ignorance here because I  
19 have missed a couple of meetings and have not participated  
20 in many of the discussions, but I think right now I have  
21 a -- literally have a rubber stamp that says, "This order  
22 disposes of all the parties and claims and is final and  
23 appealable," and any document about which I have any  
24 question that the language is iffy I stamp it with that  
25 stamp right next to my signature, and I think that's what

1 you're talking about in the --

2 HONORABLE SARAH DUNCAN: Magic language.

3 Uh-huh.

4 HONORABLE BILL RHEA: That type of language,  
5 using that, and to me the key issue is that the judge is  
6 the one who has the opinion that that case is final and  
7 appealable and then the judge perhaps could be required  
8 when he or she is of that opinion to make sure that that  
9 language is in there and that it is straightforward and  
10 simple, and I love it. It's real clear.

11 CHAIRMAN BABCOCK: Bill Dorsaneo.

12 PROFESSOR DORSANEO: I think if we codify  
13 the Lehmann sentence or something like that that we won't  
14 have a problem of tremendous lack of uniformity. If the  
15 history of this teaches us anything, the recommendation  
16 for inclusion of a sentence that will solve the problem  
17 is, you know, embraced readily. The problem is that it  
18 was the wrong sentence. You know, "All relief not granted  
19 is denied" may or may not have been in the least bit  
20 accurate, and it also doesn't inform somebody, I guess,  
21 clearly enough of whether it means in the whole case.

22 The Lehmann sentence has great upside  
23 because it does provide the clearest notice that I can  
24 imagine to a lawyer that they need to take action if they  
25 are going to challenge this order, and it doesn't have the



1 downside of saying that relief is denied when really  
2 whether or not to grant that relief may not have been  
3 considered.

4           So I think it's a great step forward, but it  
5 is a partial solution. Okay. It isn't a solution to  
6 these other problems, which we may not want to deal with  
7 today. But I see it as a very positive way to deal with  
8 the exact problems that we have been dealing with, not  
9 surprisingly since the Court was working on the exact same  
10 thing.

11           CHAIRMAN BABCOCK: So you're a magic  
12 language guy.

13           PROFESSOR DORSANEO: Yes.

14           CHAIRMAN BABCOCK: Yeah, Frank.

15           MR. GILSTRAP: Well, I think it's inaccurate  
16 to characterize Lehmann -- and I think Professor  
17 Dorsaneo's position is a magic language position. As I  
18 understand Lehmann, it leaves the rule of Northeast  
19 Independent School District against Aldridge in place.

20           PROFESSOR DORSANEO: Yes.

21           MR. GILSTRAP: And under Lehmann if, in  
22 fact, all of the claims are actually disposed of,  
23 expressly disposed of, you don't need magic language.

24           MS. BARON: Right.

25           MR. GILSTRAP: It just says Mother Hubbard

1 language doesn't work, but more descriptive language,  
2 "This judgment finally disposes of all parties and claims  
3 and is appealable," will work.

4 PROFESSOR DORSANEO: It works, but it  
5 performs an entirely distinct function --

6 MR. GILSTRAP: Right.

7 PROFESSOR DORSANEO: -- from the Mother  
8 Hubbard language. It works to tell lawyers that they need  
9 to take action, which is one of the main problems, if not  
10 the most important problem that we have been trying to  
11 address. It does do that. When I say again, it doesn't  
12 mess with, if I can use that, you know, vernacular  
13 language, Northeast Independent School District's  
14 principle of presumed disposition by implication after a  
15 conventional trial.

16 I think that's wonderful that it doesn't  
17 attempt to deal with that problem. I think the  
18 subcommittee's draft put that Northeast Independent School  
19 District, prior drafts, in some jeopardy; and I don't want  
20 that to be in jeopardy. It would be my preference to  
21 codify that as well, but I don't need to have that happen  
22 to be happy.

23 The downside risk of the Mother Hubbard  
24 language proposed by Judge Calvert is that -- and I think  
25 it's a serious problem. I tried to deal with it in my

1 memo, is that if judges are told to put that in their  
2 stamp or to put it in their death certificate, they will  
3 be denying relief automatically that was never considered  
4 in any kind of adjudicated process, on occasion at least.  
5 The stamp will be abused. All right?

6 HONORABLE BILL RHEA: "And I forgot there  
7 was a counterclaim," for instance.

8 PROFESSOR DORSANEO: Yeah. It's better just  
9 to send it to the court of appeals and then have the court  
10 of appeals deal with it, but not deal with it by saying  
11 "Send it back." Okay. It's not -- how many times does it  
12 happen? Say it happened three times since last meeting.

13 HONORABLE SARAH DUNCAN: I can tell you the  
14 day after Lehmann issued we had three in one day, and we  
15 still don't know after Lehmann. We have no idea if they  
16 are final; and just pleading on behalf of the courts of  
17 appeals, I will say that we are incredibly understaffed;  
18 and if we have to abate and send back, as we will all of  
19 these appeals because we can't tell if they're final,  
20 that's a lot of work and it's a lot of paper and it's a  
21 lot of legal fees. If this committee can come up with  
22 something that will streamline the process, I would think  
23 the committee would want to do that.

24 CHAIRMAN BABCOCK: Pam, did you have  
25 something to say?

1 MS. BARON: Well, I was just going to say  
2 what Frank had said, which is that Lehmann is nonexclusive  
3 magic language, which means that if the magic language is  
4 there it's final and appealable no matter what, whether it  
5 really is or is not final; but, otherwise, you go back and  
6 you're still trying to determine whether or not all  
7 parties and claims have been resolved; and if they have,  
8 it's final anyway. So --

9 CHAIRMAN BABCOCK: Whether the language is  
10 there or not.

11 MS. BARON: Right. And I want people to  
12 understand that we have got two different universes and  
13 that this is not, you know, you either have the magic  
14 language or you don't have the magic language and that  
15 determines whether or not it's final, because that's not  
16 what it is.

17 HONORABLE SARAH DUNCAN: Right. So you  
18 still have the serial order problem --

19 MS. BARON: Right.

20 HONORABLE SARAH DUNCAN: -- with or without  
21 conflicts.

22 MS. BARON: Right.

23 HONORABLE SARAH DUNCAN: You still have the  
24 nonsuit problem, if there's not an order.

25 MS. BARON: Right. That's right.

1                   CHAIRMAN BABCOCK: Skip Watson and then Joe  
2 Latting.

3                   MR. WATSON: After Lehmann I just kind of  
4 went back and tried to get grounded again on what we were  
5 trying to accomplish and what the best way to accomplish  
6 that was, and I may have missed it, but I think the  
7 primary goal in entering into this was how best to alert  
8 counsel that, in fact, they had to appeal or lose their  
9 right to appeal, and I think that is where the idea of the  
10 death certificate came from.

11                   After Lehmann to me the choice is relatively  
12 simply. Are we going to adopt some sort of magic language  
13 in an order that does other things and say that counsel  
14 need to look for that next to the signature line or other  
15 places, or are we going to say counsel is better alerted  
16 by knowing that a separate, specifically titled document  
17 has to come out before the case is final and appealable or  
18 appealable at all.

19                   If that's the choice, I still believe the  
20 Federal system is by far the best, that rather than  
21 looking for language in a document you look for a specific  
22 document, and until the specific document comes down the  
23 case is not final for purposes of appeal. That's the only  
24 reason I support the death certificate. To me it cleanly  
25 addresses the primary issue at hand. Again, it doesn't

1 fix everything, but it does most clearly address that  
2 issue.

3           In the experiences that I've had in the  
4 Federal system have been few in which there have been a  
5 problem with that certificate, and that has simply been  
6 judges who refuse to adopt the new rule and do it that way  
7 and continue to say that their last order or opinion on  
8 summary judgment is all they're going to write and they're  
9 not going to do a one-page order saying, "This case is  
10 over."

11           Now, that's the incredibly rare exception,  
12 and I would respectfully suggest that that problem is  
13 going to occur with judges who just don't want to adapt to  
14 putting new, specific, magic language in orders as well.  
15 That's a human problem. So if we're back to what notifies  
16 counsel the best, I think that a special piece of paper  
17 that says, "Now you can go" or "Now you have to go" is it,  
18 as opposed to language buried someplace in a paper that  
19 does other things.

20           CHAIRMAN BABCOCK: Joe and then Scott. Joe  
21 Latting.

22           MR. LATTING: I just had a question to Bill  
23 Dorsaneo, and that is, what do you do when a judgment says  
24 that it's final, it has the magic language, but, in fact,  
25 all parties aren't disposed of and all issues aren't

1 disposed of? Does that confer jurisdiction on the court  
2 of appeals even though it's not a final judgment? And if  
3 so, what are the implications of that conferring the  
4 jurisdiction, converting what is really an interlocutory  
5 appeal into a regular appeal by putting a statement in a  
6 judgment which, as Bill says, may be contained in a rubber  
7 stamp that doesn't have anything to do with the realities?  
8 How does that -- I'm not arguing against it. I'm just  
9 curious to know where we're left at.

10                   PROFESSOR DORSANEO: That's where we are on  
11 conventional trials anyway. Right? I mean, that's what  
12 the implied -- the presumption that claims that weren't,  
13 you know, adjudicated, counterclaims, third party claims  
14 for indemnity or whatever, you know, finalizes those  
15 judgments. Forget Mother Hubbard clause. Just because  
16 it's a conventional trial and the judge hands out what,  
17 you know, may be styled a final judgment but what is  
18 considered to be the final judgment. That's where we are  
19 anyway. Those claims are disposed of for appeal purposes,  
20 but not in any particular way. Now, usually they never  
21 are dealt with ever again. Okay. They never come up  
22 again, although, I would imagine that they could. If the  
23 case would be reversed and remanded completely then people  
24 could kind of go back to working on the case again, huh?  
25 So that's where we are anyway for conventional trials,

1 which I don't guess are the majority of cases anymore, but  
2 they were at the time the Calvert Northeast Independent  
3 School District opinion was handed down.

4 I am not troubled by the court of appeals  
5 being given the authority to deal with the case that the  
6 trial judge thinks he or she has finished. Okay? Now,  
7 many of these cases will not just -- as I see it, will not  
8 just have the magic language, the Lehmann type language.  
9 They will have some kind of language, whether it's Mother  
10 Hubbard or something else, that will perhaps dispose of  
11 all parties and issues.

12 Now, that may be an improper disposition of  
13 all parties and issues, okay, which is really what the  
14 Mafrige line of cases recognizes, that the court of  
15 appeals can say, "You disposed of all parties and issues,  
16 but that was wrong because the motion wasn't sufficient to  
17 raise all of the claims dealt with." I don't think we can  
18 write a rule that says, "Don't make that mistake," because  
19 it's going to be -- you know, it's going to be -- it's  
20 going to happen.

21 You have a case where there is an issue  
22 that's not dealt with, a claim that's not dealt with at  
23 all. That's the hard one, I guess. Do you have the court  
24 of appeals send that one back, deal with what they can  
25 deal with, and send that part of it back? I suppose I



1 would prefer the latter.

2 MR. LATTING: Let me ask a follow-up  
3 question. If that's the case then what is the  
4 disadvantage of requiring that magic language to be put in  
5 a separate document as Sarah and Skip have suggested --

6 PROFESSOR DORSANEO: Yeah.

7 MR. LATTING: -- so that everybody knows  
8 right where it is?

9 PROFESSOR DORSANEO: I don't have a problem  
10 with a separate document except, you know, I'm a solo  
11 practitioner who shares a secretary with four or five  
12 other lawyers, and I will lose the separate document.  
13 Okay. It will not be easy for me to keep track of the  
14 separate document. I think there are other people like  
15 that.

16 The larger problem is if we have a separate  
17 document I don't want it to adjudicate anything. I don't  
18 want it to deny relief. I don't want it to have a merits  
19 -- any merits implications, the separate document, because  
20 that means something will happen automatically that didn't  
21 really happen in a large number of cases. My biggest  
22 complaint about the separate document is -- the ones that  
23 were proposed, is that they denied all relief not granted,  
24 which may or may not have already happened in this case.

25 CHAIRMAN BABCOCK: Judge McCown and then

1 Judge Medina and then Judge Rhea.

2 HON. F. SCOTT McCOWN: Well, let me go back.  
3 When you have a conventional trial on the merits and the  
4 parties come in and they present whatever evidence they  
5 present and the judge at the end has a Mother Hubbard  
6 clause, you have adjudicated everything, because if they  
7 didn't present the evidence then they lose. That cause of  
8 action is now adjudicated. It's denied. And so the  
9 Mother Hubbard clause after conventional trial on the  
10 merits made a lot of sense and did create finality.

11 I think the problem -- there's two problems  
12 with the Mother Hubbard clause. One is that it's magic --  
13 and this is hard to believe, but it's magic language  
14 that's now only understood by insiders. We need magic  
15 language that says, "This case is over, stupid, and it's  
16 now subject to appeal or you lose it." I mean, we have to  
17 redo the magic language so that it communicates to  
18 everybody.

19 And then the second problem is that it  
20 doesn't fit what is now the bulk of our cases, which are  
21 cases that are resolved without a conventional trial on  
22 the merits, and I want to make a couple of points about  
23 those cases. One is that -- and I guess all of you-all  
24 do, but just to kind of put it on the floor, you have to  
25 keep in mind the huge paper flow that happens. A case

1 will be a year, 18 months, maybe 24 months old. There  
2 will be a zillion pleadings. It won't be clear because  
3 lawyers don't understand what pleadings actually  
4 supplement and what pleadings actually amend others and  
5 what pleadings are superseded and what aren't. There will  
6 be two or three changes of counsel. What the claims are  
7 won't be clear to anybody, but that won't much matter  
8 because everyone will have forgotten what the claims are,  
9 and then they come in and they present an order to the  
10 judge.

11                   Now, I have a rubber stamp just like Judge  
12 Rhea, but one of the problems that I have with my -- I  
13 don't actually worry about it. I worry about it, but I  
14 don't do anything about it, which is when I rubber stamp  
15 an order that the lawyers present to me, perhaps by mail,  
16 perhaps they leave it with the clerk, the lawyers never  
17 see what I've stamped on that order.

18                   PROFESSOR DORSANEO: Huh?

19                   HON. F. SCOTT McCOWN: I mean, we don't send  
20 out copies of all the judgments that we sign. The clerk  
21 sends out postcard notice, but we do not send out copies  
22 of all the judgments we sign. If they don't provide us a  
23 stamped envelope, they don't get it. So if you amend an  
24 order that they don't see, you could have done something  
25 that they don't know; and that's a huge problem; and you

1 say, well, just change the rule to send them all out. You  
2 have no idea what you're talking about. We sign hundreds  
3 of thousands of judgments in all kinds of cases, and we do  
4 not have the staff, couldn't afford the postage, the  
5 copying charges; and so I think there is a whole lot of  
6 merit to this idea of a death certificate that says this  
7 case is -- everything that's pending in this case is over  
8 and it's now subject to appeal; and you can put on the  
9 clerk's postcard notice that death certificate has been  
10 signed and filed and you can send it out; and I've kind of  
11 come around to that way of thinking.

12 PROFESSOR DORSANEO: I hope your order --  
13 your order doesn't deny relief, does it, or does it just  
14 say it's over?

15 HON. F. SCOTT McCOWN: Sure.

16 PROFESSOR DORSANEO: If your stamp said it's  
17 over that would mean that the judgment has res judicata  
18 effect, right?

19 HON. F. SCOTT McCOWN: Exactly.

20 PROFESSOR DORSANEO: But the appellate fight  
21 would be about, you know, whether it shouldn't have been  
22 over because something wasn't really --

23 HON. F. SCOTT McCOWN: Right.

24 PROFESSOR DORSANEO: -- adjudicated or it  
25 doesn't mean that.

1 HON. F. SCOTT McCOWN: And I have no problem  
2 with being reversed because I put on a Mother Hubbard  
3 clause and, in fact, I shouldn't have had because  
4 procedurally the case wasn't postured for me to adjudicate  
5 a claim. I have no problem with that. That to me is not  
6 a big problem, but the big problem is I want the case to  
7 be over; and so if I stamp it and it's over and they never  
8 realize that it's over, they lose their appellate right.

9 PROFESSOR DORSANEO: That's why I like the  
10 Lehmann language better than the Mother Hubbard because it  
11 just says it's over and --

12 HON. F. SCOTT McCOWN: But it's not over if  
13 all you can do is refile it again.

14 PROFESSOR DORSANEO: What does that mean?

15 HON. F. SCOTT McCOWN: Well, when you say it  
16 doesn't have -- I don't understand what you say when you  
17 say it doesn't have res judicata effect.

18 PROFESSOR DORSANEO: No. It does, but then  
19 the argument on appeal is what -- is the judgment right or  
20 wrong.

21 HON. F. SCOTT McCOWN: But if you don't know  
22 that it's been stamped and you lose your right to appeal  
23 and it has res judicata effect, you lose a claim.

24 HONORABLE SCOTT BRISTER: In other words,  
25 "It's over," is that with prejudice or without prejudice?

1                   PROFESSOR DORSANEO: Well, I think it's with  
2 prejudice, but --

3                   HON. F. SCOTT McCOWN: Well, then that's res  
4 judicata.

5                   PROFESSOR DORSANEO: Yes, but I'm happier  
6 working with the rules of res judicata than I am with a  
7 specific order that you've signed that I didn't even see  
8 that denied relief on a claim that you never considered.  
9 I'd rather at the appellate level let somebody argue that  
10 there was a claim that the judge never considered that  
11 needs to be considered and that was wrong to say that it  
12 was over on the merits.

13                   HON. F. SCOTT McCOWN: Well, you can do that  
14 with a Mother Hubbard clause.

15                   PROFESSOR DORSANEO: I think it's less  
16 comfortable. Less comforting to me.

17                   HON. F. SCOTT McCOWN: Well, it's exactly  
18 the same analytically, so I don't understand why it's less  
19 comfortable, but I guess we have to decide what the  
20 problem is we're trying to address. If the problem that  
21 we're trying to address is lawyers don't know when to  
22 appeal and they lose appellate rights, the death  
23 certificate addresses that nicely.

24                   MR. WATSON: That was my point.

25                   HON. F. SCOTT McCOWN: If the problem we're

1 trying to address is that courts don't know when a file is  
2 closed, the death certificate addresses that nicely, too.  
3 If the problem is that lawyers are losing claims that they  
4 wished to pursue, I don't think that's true.

5 CHAIRMAN BABCOCK: Will the judges from  
6 Lubbock and Dallas yield to the Justice from San Antonio?

7 HONORABLE SAMUEL MEDINA: Yes.

8 HONORABLE SARAH DUNCAN: Just for a tiny  
9 moment? Because it seems to be that this adjudication  
10 thing is a hang-up, frankly I don't think it matters  
11 whether you grant relief or you deny it, but you need to  
12 adjudicate one way or the other, and I don't think it can  
13 be that we grant relief because then we've got to fashion  
14 relief. Right? You've got to award money damages or  
15 injunctions or something like that; but the fact is, Bill,  
16 if the trial judge says it's over without mentally  
17 considering three claims, the trial judge has denied  
18 relief. Erroneously, but has denied relief.

19 So I just don't want the adjudication aspect  
20 of it to bog us down in which direction of the three we're  
21 going to go. Thank you very much for your yielding.

22 CHAIRMAN BABCOCK: Justice Hecht gets to  
23 trump everybody as a matter of course.

24 JUSTICE HECHT: I just don't want to lose  
25 track of Scott's reminder that -- and we said this in

1 Lehmann, that the notice problem is really a big problem,  
2 and it varies across the state because I think in Dallas  
3 you still get a copy of the order after it's signed. In  
4 fact, you have to send in the envelope and the postage and  
5 the whole business or the judge won't sign it. But that's  
6 not the case in Houston and maybe here and other places.

7 HONORABLE BILL RHEA: I just have a question  
8 about that. I was thinking that was in our regular rules,  
9 but I guess obviously it's a local rule, because I think  
10 our local rules provide that the clerk has to send the  
11 final judgment whether there's an envelope or not.

12 JUSTICE HECHT: That's in the state rules,  
13 but if the clerk doesn't know it's a final judgment,  
14 you're just at the mercy of the clerk. In fact, in the  
15 cases, in the Lehmann and in the consolidated case, the  
16 clerk sent a postcard saying "An order has been signed,"  
17 but the clerk didn't realize that the order was final, so  
18 he or she didn't send it under the state rule. They just  
19 sent it as is their custom, and they didn't know -- the  
20 lawyers didn't go get the order, and they didn't see what  
21 it said or pay attention.

22 CHAIRMAN BABCOCK: Judge Medina.

23 HONORABLE SAMUEL MEDINA: Well, I don't want  
24 to belabor the point. On the issue of losing a document,  
25 you've got to consider different parts of Texas and the



1 experiences of -- perhaps I should say the experience of  
2 some district clerks, the experience of some of their  
3 assistants, the experience of staff. Adding one more  
4 document -- Skip, you know, have you been keeping up with  
5 some of our problems in Lubbock in terms of lost documents  
6 and whatnot?

7 MR. WATSON: Yeah.

8 HONORABLE SAMUEL MEDINA: Adding one more  
9 document that can possibly get lost is a problem. And,  
10 Scott, I don't disagree with some type of a death  
11 certificate. I don't know where that would go, if that  
12 could be done without another document, could be done on a  
13 judgment, as part of the judgment. I don't know.

14 HON. F. SCOTT McCOWN: But I think it would  
15 simplify the clerk's problems not to have to be looking  
16 through these papers to find out how to code the case and  
17 what to close.

18 HONORABLE SAMUEL MEDINA: Last page,  
19 something.

20 HONORABLE SARAH DUNCAN: Bonnie is on record  
21 as saying that the trade-off from the clerk's perspective  
22 is they would rather have one separate piece of paper and  
23 require a 306a(4) notice than to have to go hunting to  
24 figure out when it is -- when they do need to send a  
25 notice of final judgment.

1                   CHAIRMAN BABCOCK: Judge Rhea, did you have  
2 something? And then Buddy Lowe.

3                   HONORABLE BILL RHEA: I'd like to throw in  
4 something that's a flip side issue. I want us to all be  
5 aware of what we're giving up as a practical matter in  
6 this type of proposal, it seems to me. As a practical  
7 matter, if I have signed a judgment, to me there's more of  
8 a problem with premature appeals than there is with late  
9 appeals; and oftentimes the lawyers or I might think a  
10 case is final, might assume that it's final, even  
11 thoroughly check to see if all the counterclaims and third  
12 party actions are taken care of; and there was one little  
13 glitch in there; and it goes to the court of appeals; and  
14 the court of appeals screens it and looks at it and they  
15 write us a letter and say, "This isn't final. Tell us if  
16 there is another order that you have that makes it final  
17 and let us know if there is one, or if there is not such  
18 one, we need one to look at this case," and so we take  
19 care of that detail.

20                   Now, if we didn't have that ability to do  
21 that, and I'm afraid we might not with this scenario, then  
22 everybody, the court of appeals, the parties, and me as  
23 the trial judge are going to be bearing some expense,  
24 time, effort, a lot of waste in my view to essentially be  
25 giving up that opportunity and that way that it works as a

1 practical matter right now.

2 CHAIRMAN BABCOCK: Buddy Low then Frank.

3 MR. LOW: I probably know less about this  
4 than anybody, and that's why they say ignorance is bliss,  
5 because I don't really see this --

6 CHAIRMAN BABCOCK: Is that the standard  
7 Buddy Low disclaimer?

8 JUSTICE HECHT: Grab your pocketbook.

9 MR. LOW: I think it's a problem that we  
10 have made simply because who is supposed to know what the  
11 claims are? Each lawyer should know what his own client's  
12 claims are. If he doesn't know what his client's claim  
13 is, he couldn't win it anyway. So, therefore, what  
14 happens if he sees a final death certificate? He says,  
15 "Oh, my god, this is not dead." If he doesn't even  
16 recognize it then to me it doesn't matter.

17 "This is not dead. Judge, grant a new  
18 trial. You didn't really rule on this." Okay. The judge  
19 can grant a new trial. If a lawyer is too dumb to do  
20 that, there is no rule against ignorance; and then if it  
21 gets to the appellate court, the appellate court, you say,  
22 "Well, this is an interlocutory appeal." You say, "No,  
23 boy, you should have spoken earlier because all relief,  
24 it's been denied. You should have spoken earlier"; and  
25 now will the record support it, but it's up here for

1 appeal now; and you put it all in there, you've got a  
2 system that works; and a final judgment is when all relief  
3 against all parties has been granted or denied.

4           And I just don't see it as that big a  
5 problem. When you see that and you come within the rules  
6 about notice and you've got a death certificate, I mean,  
7 that becomes pretty famous; and if lawyers don't recognize  
8 that, that the judge hadn't really considered it, they  
9 better call it to his attention or forever hold your  
10 peace.

11           CHAIRMAN BABCOCK: Frank Gilstrap and then  
12 Judge Brown and then Alex.

13           MR. GILSTRAP: I have two comments, one  
14 philosophical and one practical. Speaking again to the  
15 exchange between Joe Latting and Professor Dorsaneo, the  
16 suggestion I hear there is that somehow the unaddressed  
17 claims are not decided, and that's never been the law.  
18 Implicit in Northeast Independent School District was that  
19 the unaddressed claims weren't decided. That's what the  
20 Mother Hubbard clause says, "All relief not requested is  
21 denied," and that's, I think, implied in the language from  
22 Lehmann, although it doesn't say that.

23           If we are going to take the step and say  
24 that the unaddressed claims are not decided for, say, res  
25 judicata purposes then we need to be very clear about

1 that, because I think we're tampering with the historic  
2 notion of finality. They can certainly be addressed on  
3 appeal. If error is preserved on an unaddressed claim,  
4 the court of appeals can decide it. But if somehow we're  
5 saying that unaddressed claims are still open then we need  
6 to be very clear about that.

7           Insofar as the separate document issue is  
8 concerned, I still think we don't have a handle on the  
9 problem of open judgments. Skip Watson says that in  
10 Federal court based on his experience, not much of a  
11 problem. Justice Hecht in his remarks I think in a  
12 meeting earlier suggested that it's a larger problem, and  
13 Richard Orsinger says that in divorce it's going to be a  
14 terrible problem. I don't know, but I am concerned about  
15 the notion of people not being divorced and finding out  
16 about it two years later, and I don't have a handle on  
17 that, and I think the committee needs to have a handle on  
18 the open judgment problem before we adopt magic language  
19 rule or magic language.

20           CHAIRMAN BABCOCK: Judge Brown, then Alex,  
21 then Judge Duncan.

22           HONORABLE HARVEY BROWN: On the open  
23 judgments issue, it seems to me that since judges in Texas  
24 are elected that the judges have a fair amount of motive  
25 to make sure that there is going to be a death

1 certificate. It could be the one standard procedure in my  
2 court, would be the last document on the very top that  
3 everybody looks at when they open that file that is the  
4 death certificate, and I think it would be pretty easy  
5 with the death certificate and judges would be able to  
6 manage that and would want to do that for their own self  
7 if nothing else.

8           I want to go back to the idea of the death  
9 certificate that Buddy raised and that is the issue of if  
10 there is a death certificate but there is a pending claim  
11 that the lawyers have kind of forgotten about and then the  
12 case goes up on appeal and then they say all of the  
13 sudden, "Oh, yeah," light goes on, "This should not have  
14 been disposed of; therefore, the court erred and it's  
15 going to have to be remanded and sent back." I have had  
16 that case recently, and it really threw off the appellant  
17 that there was a counterclaim out there that should have  
18 never -- that wasn't disposed of and, therefore, the case  
19 was going to have to be sent back on appeal, and they lost  
20 all that time.

21           It seems to me one of the advantages of the  
22 death certificate is it tells everybody, "If you've got a  
23 claim out there, tell the judge by filing a motion for new  
24 trial. Tell the judge by filing some motion that alerts  
25 the court." But it also seems to me we could do one step

1 further, and that is if there is a claim pending out there  
2 that the judge didn't decide that the judge should have  
3 decided -- for example, a third party claim or  
4 counterclaim -- that if you don't bring that to the  
5 judge's attention once the death certificate is filed, you  
6 should lose the right to raise that on appeal. That  
7 should be gone. Just like you have to object to things in  
8 trial, if you don't object to the judge dismissing a case  
9 with a death certificate when you have a pending claim,  
10 you should lose the right to raise that on appeal.

11 CHAIRMAN BABCOCK: Alex, Bill wants to jump  
12 in for a second to correct something --

13 PROFESSOR DORSANEO: Maybe she's going to.  
14 I don't know.

15 CHAIRMAN BABCOCK: -- that Frank said. No.  
16 She had her hand up before Frank even spoke.

17 PROFESSOR DORSANEO: Oh, okay.

18 CHAIRMAN BABCOCK: Is that okay, Alex?

19 PROFESSOR ALBRIGHT: That's fine.

20 PROFESSOR DORSANEO: This is an  
21 intentionally complicated thing, but the Mother Hubbard  
22 part of the Aldridge opinion is a completely separate part  
23 of the opinion from the implied or presumed disposition by  
24 implication. And you have to remember, too, Frank, that  
25 at the time it was decided judgments of trial courts did

1 not have res judicata effect, okay, the way they do now in  
2 terms of the appellate process. Cases did not really have  
3 res judicata effect, you know, under our traditional  
4 thinking the same way it does now, okay, if the case is  
5 appealed.

6           But the Mother Hubbard thing was a mistake  
7 by Judge Calvert to say that we're going to deny all  
8 relief that's not expressly granted to cure all problems  
9 after conventional trials. It's caused enormous trouble,  
10 not just in the nonconventional trial context, not just  
11 because it's ambiguous, but because it does deny relief  
12 that shouldn't have been denied. Okay. Because it wasn't  
13 in issue. It wasn't in controversy.

14           And I hear what Buddy has to say, and I  
15 don't guess I have a large problem with the way things  
16 would result. If we had a stamp or a separate piece of  
17 paper that says, "This is over," and the lawyer said,  
18 "This is not over. There are other claims that I -- that  
19 haven't been dealt with," and the lawyer goes back and  
20 says, "Judge, there are other claims that haven't been  
21 dealt with." And then the judge says, "Gee, that's  
22 right," or "You can't bring those claims up now," or "We  
23 did deal with those claims," and then we get, you know,  
24 those claims denied or whatever, but I know at least what  
25 I'm dealing with. Okay.



1 I also feel that if I have to -- on appeal,  
2 I know I'm dealing with the situation where the judge said  
3 it was over, I said there was an additional claim, we  
4 didn't really have a hearing on that additional claim  
5 because the judge said I waived it or whatever, but it's  
6 just kind of clear.

7 I personally tell my students that one of  
8 the things you want to try to recognize is that when the  
9 judge signs the final judgment, the judge is kind of  
10 taking a position that this is over and that one side won  
11 and the other side lost and there is something, you know,  
12 different about the judge's attitude at that point, okay,  
13 than if he just signed something that said, you know,  
14 "This is finished." This is finished without expressly  
15 denying a claim. To me, once the judge makes a judgment  
16 on all issues then it's much harder to say, "Well, that  
17 really wasn't considered." What you'll hear back is "You  
18 waived that. I did consider it" when that's really not  
19 what happened. That's what I think.

20 CHAIRMAN BABCOCK: Alex.

21 PROFESSOR ALBRIGHT: Well, one thing, I  
22 think the Mother Hubbard clause is an express disposition.  
23 I think a lot of people think of Mother Hubbard as being a  
24 presumed disposition, but it's not. It's an express  
25 denial of all claims that haven't been denied in and of

1 itself. And I agree with Sarah that if you have a death  
2 certificate or magic language or whatever you are denying  
3 claims. So in that sense the Mother Hubbard clause is not  
4 ambiguous because it does deny claims. It's ambiguous  
5 because it gets thrown in there and people don't pay  
6 attention to it, and I agree with Buddy that then on  
7 appeal the issue is does the record support the denial of  
8 those claims that were expressly denied.

9           But if we're going to have a death  
10 certificate I don't know -- I missed the last meeting, but  
11 is the death certificate going to expressly deny claims  
12 that haven't -- I mean, or is it a -- what does it say,  
13 and is it a presumed disposition of anything that hasn't  
14 been considered that should have been?

15           HONORABLE SARAH DUNCAN: Theoretically it  
16 could go either way. I guess in my own mind I'm just hung  
17 up on this idea that a final judgment disposes of all  
18 parties and claims. So I am not able to conceive of it  
19 being a final appealable judgment without disposing of all  
20 parties and claims.

21           PROFESSOR ALBRIGHT: But assuming people --

22           HONORABLE SARAH DUNCAN: But I think I can  
23 think beyond the box enough to know that it ought to be  
24 able to be. As Richard said, you know, ten meetings ago,  
25 uncouple finality and appealability.

1                   PROFESSOR ALBRIGHT: Well, okay. If you  
2 have -- okay. People are going to screw up. We all know  
3 that. So there will be death certificates that are signed  
4 or put in the file or whatever when there are things that  
5 are not totally disposed of. So is a death certificate  
6 going to presume disposition, and, as Judge Rhea says,  
7 then what's the effect of that on appeal?

8                   HON. F. SCOTT McCOWN: I can answer that  
9 question.

10                  CHAIRMAN BABCOCK: Judge McCown has an  
11 answer.

12                  HON. F. SCOTT McCOWN: I think we're making  
13 this way too hard.

14                  HONORABLE SARAH DUNCAN: Me, too.

15                  HON. F. SCOTT McCOWN: We have a sheet of  
16 paper that's as bright as your blouse there.

17                  PROFESSOR ALBRIGHT: I am so glad I wore  
18 this.

19                  HON. F. SCOTT McCOWN: We entitle it "death  
20 certificate," and if the judge signs it, what that means  
21 in the judge's mind is that this case is over. If the  
22 judge is wrong about that and there is a party with a  
23 claim that they, in fact, intended to pursue then they do  
24 exactly what Judge Brown said. They file a post-judgment  
25 motion that says, "You've erred in entering the death

1 certificate. The case isn't over. In my second amended  
2 petition I have this claim I am still pursuing. The  
3 defendant's summary judgment did not speak to that claim,  
4 and you have made a mistake."

5           If the judge says, "No, I haven't," they  
6 appeal, the judge is reversed. If they get the death  
7 certificate, and they forget about the second claim in  
8 their second amended petition and they don't realize that  
9 the defendant's summary judgment didn't take it out then  
10 they fall into Buddy's ignorance problem. The 30 days  
11 passes; they don't appeal; that case is over.

12           PROFESSOR ALBRIGHT: And so --

13           HON. F. SCOTT McCOWN: And --

14           PROFESSOR ALBRIGHT: And that claim was  
15 adjudicated.

16           HON. F. SCOTT McCOWN: And that claim is  
17 gone by res judicata, not because it was in essence  
18 adjudicated. It's just like an unpled claim.

19           PROFESSOR ALBRIGHT: Right.

20           HON. F. SCOTT McCOWN: It is a claim you  
21 didn't pursue.

22           PROFESSOR ALBRIGHT: Okay.

23           HON. F. SCOTT McCOWN: And the judgment is a  
24 bar, just like any other unpled claim would be barred by  
25 the judgment.

1 PROFESSOR ALBRIGHT: Okay. Second --

2 HON. F. SCOTT McCOWN: And one other point,  
3 with regard to the problem of open judgments, whether we  
4 have one or whether we have a hundred thousand, a new rule  
5 should be prospective only so that it doesn't make the  
6 problem any different than what we have right now, and it  
7 should be prospective for claims that are filed after the  
8 adoption of the new rule, and that way it won't affect in  
9 any way whatever problems we do or don't have. It's the  
10 same size.

11 PROFESSOR ALBRIGHT: Okay. I have -- the  
12 next issue. Okay. If -- okay. According to Scott's  
13 answer, death certificate means it's final, you've got to  
14 have a motion for new trial or motion to modify the  
15 judgment, and if the judgment uses -- you can get reversal  
16 on appeal if, in fact, that claim was not disposed of.

17 HON. F. SCOTT McCOWN: Right.

18 PROFESSOR ALBRIGHT: What if you don't file  
19 the post-judgment motion? What if 30 days passed, the  
20 judgment is final, but you still have your 15 days or  
21 whatever to file your appeal? So you file your appeal,  
22 and you say the trial judge signed that. Have you waived  
23 by not bringing it up to the trial judge? Have you waived  
24 it?

25 HON. F. SCOTT McCOWN: Yes. Just like Judge

1 Brown said, you have waived that. I mean --

2 PROFESSOR ALBRIGHT: Okay. I don't have any  
3 problem with that. I just want to be clear.

4 PROFESSOR DORSANEO: Why is that?

5 HON. F. SCOTT McCOWN: Because you didn't  
6 bring it to the attention of the trial judge. We write  
7 the rule to say you waived it. If you don't bring it to  
8 the attention of the trial judge where it can be easily  
9 and timely corrected then we're not going to listen to you  
10 on appeal.

11 PROFESSOR DORSANEO: All right. It doesn't  
12 say that anywhere in our rules now.

13 HON. F. SCOTT McCOWN: It will in this rule.

14 CHAIRMAN BABCOCK: No, but, yeah, that's the  
15 point.

16 PROFESSOR ALBRIGHT: So the death  
17 certificate is you have got notice that this case is dead,  
18 and it's not like the notice --

19 HON. F. SCOTT McCOWN: Right. The clerk --

20 PROFESSOR ALBRIGHT: If it's not dead, you  
21 need to be smart enough to bring it up; and if you're not  
22 smart enough, we use the Buddy Low ignorance rule.

23 HON. F. SCOTT McCOWN: Right. The clerk  
24 knows how to code it. The judge knows it's over. The  
25 lawyers know that they have got to appeal or not appeal

1 and it's --

2 HONORABLE SCOTT BRISTER: Because otherwise  
3 you have the party who wants to delay the appeal, the  
4 defendant who doesn't want to pay, and they have a  
5 hidden counterclaim out there. They're far better off to  
6 wait for the six months to get the reporter's record, the  
7 clerk's record, and get -- you know, then ready to brief  
8 and then you raise it and then it gets in front of them  
9 and it gives you an automatic way to delay for nine months  
10 if you don't have some sort of waiver.

11 PROFESSOR ALBRIGHT: So this is the tough  
12 love version of the death certificate.

13 PROFESSOR DORSANEO: The what version?

14 PROFESSOR ALBRIGHT: The tough love.

15 PROFESSOR DORSANEO: What?

16 PROFESSOR ALBRIGHT: Tough love.

17 PROFESSOR DORSANEO: Oh.

18 CHAIRMAN BABCOCK: Justice Hecht.

19 PROFESSOR DORSANEO: Your death

20 certificate --

21 CHAIRMAN BABCOCK: Hey, Bill.

22 PROFESSOR DORSANEO: -- does not need to  
23 deny all claims, though. It just needs to say it's over.  
24 It has the same effect.

25 PROFESSOR ALBRIGHT: But it does.

1                   PROFESSOR DORSANEO: It has the same effect.  
2 No. Let the part of res judicata that says it's res  
3 judicata because it should have been litigated do the job.

4                   PROFESSOR ALBRIGHT: Okay. So then --

5                   PROFESSOR DORSANEO: Not the part that says  
6 it was when it wasn't.

7                   CHAIRMAN BABCOCK: Okay. Come on, guys,  
8 calm down.

9                   HON. F. SCOTT McCOWN: Well, I mean, we can  
10 work on the language. I mean, you could say that  
11 everything that you've pled -- that I think I'm deciding  
12 everything you pled and if I am not then you need to bring  
13 it to my attention, because this case is over. If it's  
14 not in here --

15                  PROFESSOR DORSANEO: We need to -- to get  
16 that finished we need to either amend 324(b) or 329(b)  
17 when it talks about the motion to modify. I don't have a  
18 problem with saying the lawyers need to say, "Hey, we have  
19 other things to do" in the trial court in order to be able  
20 to say that on appeal, if you tell me that that's  
21 necessary because of delay or whatever, whatever,  
22 whatever. But that would not be a hard fix. Okay. It  
23 wouldn't be hard to write that in 324(b).

24                  CHAIRMAN BABCOCK: Okay. Hang on. Justice  
25 Hecht.



1 JUSTICE HECHT: I take it from the  
2 discussion that the rule would say that even if the  
3 judgment, the adjudicating document, was final on its face  
4 that it still wouldn't be final for purposes of appeal  
5 until you put the certificate in there; and is there any  
6 reason -- is there any bad reason for parties or a trial  
7 judge to delay putting that certificate in there to delay  
8 the appeal? I guess I can't think of any.

9 HON. F. SCOTT McCOWN: Sure. I can think of  
10 one right off the bat.

11 CHAIRMAN BABCOCK: A fertile mind.

12 HON. F. SCOTT McCOWN: I mean, you come to a  
13 final judgment. You sign it. The parties come to you and  
14 they say, "Judge, don't file the death certificate for 30  
15 days. We're going to see if we can work this out." But,  
16 I mean, that happens in a modified form already with  
17 motions for new trial, but that only takes you 105, but  
18 this -- I mean, you're right that this would have a way  
19 for the judge to suspend the appellate right. I suppose  
20 you could mandamus the judge, but...

21 PROFESSOR DORSANEO: We had a judge in  
22 Dallas years ago who did like to hang onto cases or was  
23 perceived to have liked to do that so he could deal with  
24 the parties without interference from the appellate  
25 courts.

1 HON. F. SCOTT McCOWN: Well, that's a very  
2 important power of the trial judge.

3 CHAIRMAN BABCOCK: Let's not take that away.  
4 Judge Rhea.

5 Did you have your hand up first? Sorry.

6 HONORABLE SARAH DUNCAN: You already told me  
7 I was going to be after Alex. On the open judgments  
8 problem, I just want to point out that we have those now.  
9 With the nonsuit, maybe you-all all get nonsuit orders  
10 after you file a notice of nonsuit, but I can tell you in  
11 the people that practice in our court in some of the  
12 finest law firms in the state, they do not believe that's  
13 the rule, and we've got all sorts of open nonfinal  
14 judgments because of nonsuits.

15 We also have in Lehmann -- Lehmann is  
16 apparently a threat to Mafrige since it applied to the  
17 people in that case and who knows how many judgments are  
18 not final because they don't in some way conform to the  
19 rules of finality in Lehmann. And retroactivity is going  
20 to have to be something probably that's litigated and  
21 worked out. We already have the nonfinal problem. That's  
22 something that I think would actually get better with the  
23 death certificate because the trial judges and court  
24 coordinators and clerks would be painfully aware of what's  
25 not final because it doesn't have a death certificate.

1 CHAIRMAN BABCOCK: Judge Rhea and then Joe  
2 Latting.

3 HONORABLE BILL RHEA: One thing in response  
4 to that, I hope it's not the case -- and I'm missing  
5 something terribly if it is -- that Lehmann would dictate  
6 that notices of nonsuit cases are now not final.

7 HONORABLE SARAH DUNCAN: That's another line  
8 of cases that until there is an order of nonsuit --

9 HON. F. SCOTT McCOWN: Has the Supreme Court  
10 ever said that or is that a --

11 HONORABLE SARAH DUNCAN: Yeah.

12 MR. GILSTRAP: Yeah, Park Place.

13 PROFESSOR DORSANEO: Ben E. Keith.

14 MR. GILSTRAP: Ben E. Keith, yeah.

15 HONORABLE BILL RHEA: I'm getting concerned  
16 about this discussion, kind of more alarmed as we go  
17 along.

18 CHAIRMAN BABCOCK: Yeah, but you've missed  
19 two meetings.

20 HONORABLE SARAH DUNCAN: We could have  
21 alarmed you earlier.

22 PROFESSOR DORSANEO: I think we have  
23 agreement on anything that's important.

24 HONORABLE BILL RHEA: Just in the paperwork  
25 here we're talking about orders of dismissal, which is the

1 most common way of disposing of cases. I mean, I can  
2 glance at an order of dismissal and in a second and a half  
3 make sure it's all right to sign it. Now if I've got to  
4 make sure I've got another piece of paper to go along with  
5 that, I do not like that, and I think it's  
6 counterproductive.

7 CHAIRMAN BABCOCK: Joe.

8 MR. LATTING: I was going to say that in  
9 response to what Judge Hecht says that creates a concern  
10 with me, and that is it seems that whatever we do with  
11 this, whether it's handled by magic language or death  
12 certificate or however, we ought to make it mandatory that  
13 the trial judge sign that document immediately or  
14 simultaneously with an entry of whatever is perceived to  
15 be by that judge the final judgment, that we not allow a  
16 sort of a limbo or purgatory situation. I don't see why  
17 that would be a problem.

18 PROFESSOR DORSANEO: Why not authorize use  
19 of the stamp? Why not say "a separate piece of paper or  
20 stamp"? If you guys like to use stamps, I don't see  
21 anything wrong with that.

22 CHAIRMAN BABCOCK: Buddy. Oh, I'm sorry.  
23 Nina had her hand up.

24 MS. CORTELL: That's fine.

25 CHAIRMAN BABCOCK: Nina yields to you,

1 Buddy.

2 MR. LOW: This is going to create a problem  
3 we don't have now because you try a case, you give the  
4 judge the judgment, and he says, "Well, I don't want to  
5 enter that. I might grant an NOV. I may" -- or the  
6 parties come to him and say, "We're negotiating. Don't  
7 sign it." You can't take away the power of the trial  
8 judge to use whatever his guide and just say, "Okay, you  
9 have to do this 30 days after you think it's final." He's  
10 going to say, "Well, I've got to think about and meditate  
11 before I know it's final." I mean, I don't think it  
12 creates any different problem than we've got right now.

13 CHAIRMAN BABCOCK: Nina.

14 MS. CORTELL: I just had a question that  
15 came to mind in response to Judge Hecht's comment, and  
16 that is what happens to enforcement and execution and so  
17 forth in the interim period? You have your judgment and  
18 there's a 30-day delay before the death certificate. How  
19 are we contemplating all of those rules?

20 HONORABLE SARAH DUNCAN: What we had  
21 discussed in the earlier meetings is that there would not  
22 be an enforceable judgment for purposes of accrual of  
23 post-judgment interest or enforcement mechanisms until the  
24 death certificate was signed.

25 CHAIRMAN BABCOCK: Skip. And then Judge

1 Brown. Sorry, Judge Brown.

2 MR. WATSON: I was just going to say to  
3 Frank's earlier comment about the divorces of am I  
4 divorced or not, you know, did the 30 days before I can  
5 remarry start to run now or with the death certificate,  
6 we've got to address this issue very clearly; and, you  
7 know, what Sarah said is one way of doing it or the other  
8 way of saying that the death certificate needs to be done  
9 at the same time of the judgment, but we can't let that  
10 slip through.

11 CHAIRMAN BABCOCK: Judge Brown then Linda.

12 HONORABLE HARVEY BROWN: I was just going to  
13 echo Buddy's point that if a judge wants to delay in  
14 signing something, a judge can already do that. I mean,  
15 there was a judge recently mandamus'd for holding off  
16 signing a judgment for years, so...

17 MR. YELENOSKY: We've got one of those cases  
18 right now. It's in Dallas.

19 HONORABLE HARVEY BROWN: I had a question  
20 for Sarah. If we have the death certificate, does the  
21 prejudgment interest start the date of the judgment or the  
22 date of death certificate if they are signed different  
23 dates?

24 HONORABLE SARAH DUNCAN: Well, post-judgment  
25 interest doesn't start until the death certificate. It

1 seems to me the prejudgment has to go up to the date.

2 HONORABLE HARVEY BROWN: Which means my  
3 judgment doesn't have a number in it. It would have to  
4 have a daily calculation.

5 PROFESSOR DORSANEO: Yeah.

6 CHAIRMAN BABCOCK: Linda had her hand up and  
7 then Judge Peeples.

8 MS. EADS: I would just say from the point  
9 of view of an institutional litigator like the attorney  
10 general's office it would be wonderful to have a uniform  
11 rule so that we don't have to worry about whether an  
12 individual judge stamps or doesn't stamp or what  
13 jurisdiction handles it which way. It would be very, very  
14 helpful.

15 CHAIRMAN BABCOCK: Judge Peeples.

16 HONORABLE DAVID PEEPLES: I'm wondering  
17 if -- it seems to me Rule 306a(3) which requires notice of  
18 judgment needs to be beefed up so that the document that  
19 is sent to people says more than "A judgment was signed."  
20 It needs to be something like the death certificate that  
21 we have been talking about, so I think that subdivision  
22 (3) of 306a needs to be changed.

23 Now, I think that I'm unpersuaded by what  
24 I've heard so far that we need a separate paper called the  
25 death certificate. I don't see why you couldn't achieve

1 the same thing by requiring, in effect, death certificate  
2 language in the judgment, which is pretty much what  
3 Lehmann did, because you're talking about having to look  
4 at two separate pieces of paper to find out what the main  
5 one means, for interest and finality, instead of being  
6 able to look by the judge's signature or somewhere in the  
7 document. And I just don't think we gain that much by  
8 having the judge sign a separate piece of paper which can  
9 be floating around separately; and when you find the  
10 40-page divorce decree you don't know what it really means  
11 until you know that the other one was signed and the date  
12 that it was signed.

13                   And so I kind of think that if we require  
14 strong language in judgments and a very good notice of  
15 judgment that goes out under 306a, we would be better.

16                   CHAIRMAN BABCOCK: Justice Duncan and then  
17 Justice Brister and then Buddy.

18                   HONORABLE SARAH DUNCAN: The reason I think  
19 the idea that Justice Hecht brought to the committee was  
20 so appealing to so many people -- and certainly I can  
21 speak to myself, to me -- is that I have not found that  
22 trial judges read every word of the judgments they're  
23 signing, nor do lawyers, and it's very easy to put magic  
24 language in a judgment and not have anybody other than --  
25 not have anybody know that it's in there, including the



1 person that drafted the judgment.

2           The death certificate, on the other hand, is  
3 going to have -- it's going to be a form. It's going to  
4 be entitled something like "death certificate," and  
5 whether you're the trial judge that's signing it or the  
6 clerk who's looking at it to determine whether a 306a  
7 notice needs to go out or one of the lawyers who's  
8 receiving it, in addition to the lawyer who drafted it,  
9 you're going to know the effect of that document. Nobody  
10 is going to be able to pull one over on anybody in the  
11 case.

12           CHAIRMAN BABCOCK: Justice Brister and then  
13 Buddy and then Wallace Jefferson.

14           HONORABLE SCOTT BRISTER: That's all right.  
15 Skip me.

16           CHAIRMAN BABCOCK: Skip him. Buddy.

17           MR. LOW: Me?

18           CHAIRMAN BABCOCK: Yeah, that would be you.

19           MR. LOW: I think we do need a separate  
20 instrument for the same reason she said, because what if  
21 your language is not really far in that? The separate  
22 instrument speaks for itself, and lawyers, they see that.  
23 They will recognize that. If lawyers are not going to  
24 really know all their claims, they're sure not going to  
25 know all the parts of a long judgment. I think a short,

1 separate instrument would be the answer.

2 CHAIRMAN BABCOCK: Justice-designate  
3 Jefferson.

4 MR. JEFFERSON: I agree with Sarah, and I'm  
5 just going to give one example to point it out. There is  
6 a case that I handled some years ago where there was a  
7 settlement with one of the defendants and there were three  
8 or four other defendants; and in that -- in what was  
9 titled a final judgment pertaining only to that settlement  
10 was language which I think is a little bit more expansive  
11 than how Lehmann defines a Mother Hubbard clause because  
12 there it says, "All relief not granted is denied," and we  
13 recognize that as one; but there are a lot of judgments  
14 that say, "All relief requested by any party in this case  
15 and not otherwise disposed of herein is denied," even  
16 though in that settlement the parties thought that this  
17 pertained only to the one defendant.

18 And several years later, after depositions  
19 and, you know, sanctions orders and all that come up,  
20 someone recognized that that language was in there; and we  
21 told the judge, "Here, this case is over," and the judge  
22 didn't agree. We mandamus and the -- Judge Cadena  
23 denied mandamus relief because there is no jurisdiction.  
24 We lost, but we won. He said the judgment was final back  
25 then, and that's it, and if you have a separate document,

1 that sort of situation is not going to come up.

2           And one other example is in the default  
3 judgment context. There are parties that try to execute  
4 on a default judgment even though it doesn't dispose of,  
5 for example, prejudgment interest; and I think there is a  
6 Houston case or a San Antonio case that has that in there;  
7 and that's good for -- in some ways it's good for  
8 defendants that the Mother Hubbard language isn't in there  
9 because you can come back later and move for new trial and  
10 say execution shouldn't issue and all that.

11           But, on the other hand, if there was really  
12 the intent to finally dispose of a judgment by default and  
13 all the parties, you know, normally the plaintiff and the  
14 judge, had that in mind, then a separate document, a death  
15 certificate document, saying that this is completely  
16 final, it's over, and it's now appealable would now --  
17 would clear up that question mark about the finality of  
18 that judgment.

19           CHAIRMAN BABCOCK: Okay. Judge Patterson.

20           HONORABLE JAN PATTERSON: I think it is  
21 appealing to have a separate document, but when we  
22 contemplate what that document is going to say, inevitably  
23 it's going to say something slightly different from the  
24 judgment and we're going to have problems of meshing the  
25 two documents. I doubt that that document is going to say

1 "death penalty." I hope it's not going to say "death  
2 penalty" or "certificate."

3           It's more likely to say something like  
4 "final judgment" and then have some abbreviated form of  
5 the actual judgment and then you have the problem of  
6 interpreting and meshing the two documents, and I think  
7 that Judge Peeples' comment about the rule on -- is a good  
8 point, and I'd like to go back to Judge McCown's earlier  
9 comment that we focus initially on what the problem is  
10 we're trying to solve, and I think the key to this problem  
11 is focusing on what the evil is and who we're trying to  
12 protect, and I think that this rule is mostly for two  
13 purposes. One is to give lawyers certainty so they don't  
14 lose their rights and sleep on them and, second, to  
15 facilitate the clerks, perhaps; and I think that Bonnie  
16 has spoken eloquently on that point.

17           I don't think it's so much to help or  
18 facilitate appeals or courts to deal with it, because we  
19 can -- we're going to hear those arguments anyway; and the  
20 way it usually comes up in appeal, as Judge Rhea pointed  
21 out, very often it's screened out at a preliminary stage;  
22 or in argument what very often happens is we raise the  
23 issue "Is this a final judgment" and the parties are  
24 desperate, "Oh, please, please, please. Yes, it's a final  
25 judgment because we've got this document" or because of

1 this, and they both -- there is a slight problem of  
2 collusion of lawyers to attain a final judgment, but I  
3 don't view that as a particular problem.

4           But I think that the focus of it should be  
5 on what gives lawyers certainty and the message and the  
6 clarity at that stage, but I don't view the separate  
7 document as solving anything.

8           CHAIRMAN BABCOCK: Buddy.

9           MR. LOWE: I would not -- the separate  
10 document wouldn't grant or deny any specific relief. It  
11 would only incorporate what had been before and then have  
12 the clause that, you know, "All relief not presently in  
13 effect or not granted is denied," but it wouldn't say "But  
14 then I grant the injunction and deny..." It would be  
15 separate. It would incorporate. So there would be no  
16 inconsistency other than if something hadn't been done,  
17 and that's the beauty of a separate document that they  
18 would grant.

19           CHAIRMAN BABCOCK: Stephen.

20           MR. YELENOSKY: Yeah. I thought's the way  
21 we were referring to a death certificate. One certificate  
22 wouldn't differ from another any more really than a  
23 summons. The whole purpose is notice, and its form  
24 language and what it means and what effect it has would be  
25 dealt with in the rules.

1 CHAIRMAN BABCOCK: Justice Duncan.

2 HONORABLE SARAH DUNCAN: What the  
3 subcommittee came up with -- and these were passed out at  
4 an earlier meeting; and, by the way, the vote at the last  
5 meeting was nine for the death certificate, six for magic  
6 language, and eight to cure specific problems.

7 CHAIRMAN BABCOCK: What?

8 HONORABLE SARAH DUNCAN: A fairly evenly  
9 divided split.

10 CHAIRMAN BABCOCK: Eight for what, Sarah?

11 HONORABLE SARAH DUNCAN: Eight to just deal  
12 with specific discrete problems, discretely. What the  
13 subcommittee came up with --

14 HONORABLE JAN PATTERSON: Does that mean the  
15 language?

16 HONORABLE SARAH DUNCAN: I'm sorry?

17 HONORABLE JAN PATTERSON: Does that mean the  
18 language?

19 HONORABLE SARAH DUNCAN: To just promulgate  
20 a rule that dealt with discrete problems. "Here is  
21 subsection (a) that deals with the Mother Hubbard problem.  
22 Here is subsection (b) that deals with the Quanaim  
23 problem. Here is subsection (c) that deals with the  
24 nonsuit problem." That was the way the committee split.

25 HONORABLE DAVID PEEPLES: Yeah. Really I

1 think that last vote was for taking existing law and  
2 trying to mitigate the harshness of certain things without  
3 a grand rewrite.

4 HONORABLE SARAH DUNCAN: Right, and you were  
5 the one that started that movement.

6 HONORABLE JAN PATTERSON: The incremental  
7 approach.

8 HONORABLE SARAH DUNCAN: What the  
9 subcommittee came up with was what we called an order of  
10 appealability. "It appears to the court that all claims  
11 by all parties in this cause have been disposed of by  
12 prior written order or judgment; therefore, pursuant to  
13 Texas Rule of Civil Procedure," blank, "it is ordered:  
14 (1), all relief not expressly granted by prior written  
15 order or judgment is denied; (2), the date this order is  
16 signed is deemed to be the date the final judgment or  
17 other appealable order in this cause was signed for  
18 purposes of accrual of prejudgment interest, the  
19 enforcement of orders and judgments, the time for filing  
20 post-judgment motions pursuant to TRAP 329(b), the notice  
21 required by Texas Rule of Civil Procedure 306a(3) and the  
22 time for perfecting an appeal pursuant to Texas Rule of  
23 Appellate Procedure 26 and 3. The clerk is directed to  
24 send to all parties or their attorneys of record the  
25 notice required by Texas Rule of Civil Procedure 306a(3)

1 within," blank, "days of the date this order is signed.

2 "The notice must state," quote, "'The court  
3 signed an order of appealability on,'" blank date,  
4 "'Therefore, the time period for filing post-judgment  
5 motions pursuant to Texas Rules of Civil Procedure 329(b)  
6 and the time period for perfecting an appeal pursuant to  
7 Texas Rule of Appellate Procedure 26 began to run on,'"  
8 blank date.

9 CHAIRMAN BABCOCK: Okay.

10 MR. YELENOSKY: So moved.

11 HON. F. SCOTT McCOWN: And who prepares  
12 this?

13 HONORABLE SARAH DUNCAN: My suggestion would  
14 be that it would be a court-promulgated form.

15 HON. F. SCOTT McCOWN: But who prepares it?

16 HONORABLE SARAH DUNCAN: Well, it's a form.

17 HON. F. SCOTT McCOWN: But who fills in the  
18 blanks?

19 HONORABLE SARAH DUNCAN: Well, I would  
20 assume the judge would.

21 HON. F. SCOTT McCOWN: Oh, no way. No way.  
22 And that's what I want to get to.

23 HONORABLE SCOTT BRISTER: That's the spirit.

24 HON. F. SCOTT McCOWN: I mean, once a month  
25 I sign the 4(d) masters orders. Let me tell you what they



1 do. They bring a huge cart of hundreds of orders every  
2 morning, and I sit there, and I stamp them, and they pull  
3 them out, and the next morning they bring back hundreds  
4 more. Then you have the tax collection orders. You have  
5 the attorney general orders. No judge in the world can  
6 fill that out.

7 HONORABLE SARAH DUNCAN: It's a date and a  
8 name. Don't you do that now?

9 HON. F. SCOTT McCOWN: You're multiplying by  
10 hundreds the signatures that a judge would make.

11 HONORABLE SARAH DUNCAN: You can't have a  
12 stamp with your name and a date?

13 HON. F. SCOTT McCOWN: Well, I mean, you  
14 don't understand how time works when you multiply a task  
15 that takes even seconds by --

16 HONORABLE SARAH DUNCAN: What would you  
17 propose?

18 HONORABLE DAVID PEEPLES: I thought you were  
19 for a death certificate.

20 HONORABLE SARAH DUNCAN: I am not wedded to  
21 this.

22 HON. F. SCOTT McCOWN: Well, you convinced  
23 me you were -- you told me to be against it.

24 CHAIRMAN BABCOCK: Yeah. Earlier in the day  
25 I must say I thought you were in favor of this.

1 HON. F. SCOTT McCOWN: I was for it until  
2 she read it.

3 MR. LOW: We'll give you a different one.

4 CHAIRMAN BABCOCK: Judge Peeples.

5 HONORABLE DAVID PEEPLES: If the death  
6 certificate doesn't adjudicate anything, why can't it be  
7 something done by the clerk to be sent out? In other  
8 words, why can't the judge do his or her thing in the  
9 judgment and the death certificate be prepared by the  
10 clerk, and it needs to say more than 306a, which is give  
11 notice that the judgment or order was signed. It needs to  
12 say a lot more than that. It needs to say, "This is final  
13 and rights were adjudicated. All claims are gone."

14 PROFESSOR DORSANEO: Could we get that  
15 copied?

16 HON. F. SCOTT McCOWN: How's the clerk going  
17 to know that?

18 PROFESSOR DORSANEO: I don't have that yet.

19 HONORABLE SARAH DUNCAN: It was handed out  
20 at one of the earlier meetings.

21 HONORABLE DAVID PEEPLES: They would know it  
22 the same way they do now except we are going to give them  
23 more guidance on that because the language is going to be  
24 better.

25 CHAIRMAN BABCOCK: Andy, do you have a

1 comment about that? Hold it, guys.

2 MR. HARWELL: Right now we send out  
3 postcard, "final judgment," "summary judgment," and that's  
4 all we do in McClennan County, and now you would want the  
5 clerk to send out the actual order and also ask the clerk  
6 to fill out specific information on the order?

7 HONORABLE DAVID PEEPLES: These actual  
8 orders in divorce cases are 40 and 50 pages long. I think  
9 it's very unrealistic to expect that to be done. I think  
10 that the neon language can be beefed up. It could be in a  
11 letter or it could be in a bigger postcard.

12 HONORABLE SCOTT BRISTER: Why couldn't it be  
13 a fax? I mean, it would be very cheap for a clerk's  
14 office, no paper, no expenditure of electricity. You  
15 could have a simple software program that says everybody  
16 -- every attorney in this case's fax number, send them all  
17 a death certificate fax. It takes no time and no money.

18 MR. HARWELL: But you would be surprised at  
19 how many clerks' offices have no fax.

20 HONORABLE SCOTT BRISTER: I understand, and  
21 if they don't have a fax, they could do a postcard.

22 MR. HARWELL: Right. I like the postcard.

23 HONORABLE SCOTT BRISTER: It would be a  
24 strong financial incentive -- I mean, the reason we don't  
25 do orders rather than postcards is because it would cost

1 hundreds of thousands of dollars in Harris County if we  
2 sent all the orders by postage rather than postcards.  
3 There's no reason it couldn't be a fax.

4 CHAIRMAN BABCOCK: Hang on for a second.

5 HON. F. SCOTT McCOWN: Well, except that the  
6 majority of -- I don't know if the majority, but I bet a  
7 huge percentage of litigants are unrepresented by counsel.  
8 Perhaps --

9 HONORABLE SCOTT BRISTER: Yeah, if they  
10 don't have a -- all I'm suggesting is -- you know, I don't  
11 think we should get caught up in order versus postcard.  
12 When we get to that discussion it seems to me the clerk  
13 ought to have an alternative to say, look, just fax the  
14 notice. Anybody that's got a fax number and an attorney,  
15 you just fax it to them. If they don't have an attorney  
16 and they don't have a fax, then a postcard is fine.

17 HONORABLE SARAH DUNCAN: Scott, I can't  
18 believe you don't have a digital signature.

19 HON. F. SCOTT McCOWN: But, again, to ask  
20 the clerk's office to sit down in a file to figure out who  
21 and --

22 HONORABLE SCOTT BRISTER: Better than  
23 me.

24 HON. F. SCOTT McCOWN: And to make the  
25 individual faxes.

1 HONORABLE SCOTT BRISTER: Very simple. My  
2 clerk all the time used to come to me and say, you know,  
3 "Judge, this is not final. There's so-and-so third party  
4 action." He was always right. And very embarrassing when  
5 he did it in front of people, so I told him to stop that.

6 CHAIRMAN BABCOCK: Sarah is unwilling to  
7 leave this discussion, but petitions for a -- begs for a  
8 break.

9 HONORABLE SARAH DUNCAN: I petition for a  
10 break.

11 CHAIRMAN BABCOCK: So let's take a 15-minute  
12 break.

13 (Recess from 10:42 a.m. to 11:00 a.m.)

14 CHAIRMAN BABCOCK: Where's Scott? Scott has  
15 a motion.

16 HON. F. SCOTT McCOWN: I have motion.

17 CHAIRMAN BABCOCK: Everybody ready to hear  
18 Scott's motion?

19 HON. F. SCOTT McCOWN: I move we resubmit  
20 this matter to committee to monitor developments under  
21 Lehmann and report back in six months to a year.

22 CHAIRMAN BABCOCK: Does that draw the  
23 support of another person?

24 PROFESSOR ALBRIGHT: Here, here.

25 CHAIRMAN BABCOCK: Is that seconded by Alex?

1 PROFESSOR ALBRIGHT: Sure.

2 CHAIRMAN BABCOCK: Okay. Seconded by Alex.  
3 Anybody want to discuss that? Sarah, what do you think of  
4 that?

5 HON. F. SCOTT McCOWN: Well, could I say  
6 something on behalf of it --

7 CHAIRMAN BABCOCK: Sure.

8 HON. F. SCOTT McCOWN: -- before we let the  
9 opposition speak? I mean, I really have a question about  
10 whether the cure or any of the proposed cures are going to  
11 be worse than the problem or perhaps have unintended  
12 consequences that would be worse than the problem, and  
13 Lehmann is fairly new, and I think maybe we just ought to  
14 wait, see what happens in six months and a year. The  
15 committee could continue to reflect on how to do this and  
16 see what develops and -- but I don't think we have any  
17 ideas that are even worth -- that we have any kind of  
18 consensus to go forward on, and I think we've talked about  
19 it enough.

20 CHAIRMAN BABCOCK: Okay. Bill.

21 HONORABLE BILL RHEA: I have been watching  
22 facial expressions, and before we go there I'm convinced  
23 that John Martin has the solution to all these problems.

24 MR. MARTIN: My solution is very simplistic,  
25 and that's just to have a standard rubber stamp and put it

1 at the bottom of the last order in the case when it's the  
2 court's intention that the case is over and appealable.

3 HONORABLE BILL RHEA: I didn't tell him to  
4 say that, but --

5 HONORABLE DAVID PEEPLES: What happens when  
6 it's not there?

7 MR. MARTIN: It's not appealable.

8 HONORABLE DAVID PEEPLES: Open forever?

9 MR. MARTIN: It's like there's no death  
10 certificate. It's a shorthand death certificate so you  
11 don't have to have any extra paper.

12 PROFESSOR ALBRIGHT: It's a death stamp.

13 CHAIRMAN BABCOCK: A death stamp.

14 MR. MARTIN: The postcard would have a box  
15 that says either it has the stamp or it doesn't have the  
16 stamp.

17 MR. LOW: We'd have to tell what the stamp  
18 is for people --

19 CHAIRMAN BABCOCK: Speak up if you're going  
20 to be on the record.

21 MR. MARTIN: The stamp, the requirements of  
22 the stamp would be in the rule, what the stamp has to say.

23 CHAIRMAN BABCOCK: Okay. That's sort of off  
24 Scott's motion, which is --

25 PROFESSOR DORSANEO: Not exactly.

1 CHAIRMAN BABCOCK: -- let's not do anything.

2 PROFESSOR DORSANEO: If it says that the  
3 stamp says what Lehmann says in the language of Justice  
4 Hecht's sentence, it wouldn't be saying much more than let  
5 Lehmann prevail.

6 MR. MARTIN: Yeah.

7 CHAIRMAN BABCOCK: Well, except Judge  
8 McCown's motion is that we don't do anything for six to  
9 twelve months. So that's a little different because a  
10 stamp would be doing something. Judge Peeples.

11 HONORABLE DAVID PEEPLES: Well, I think  
12 Judge McCown is correct when he says that every suggestion  
13 we make has unintended consequences, and it's kind of like  
14 a balloon. If you squeeze it in somewhere, it gets fatter  
15 somewhere else.

16 CHAIRMAN BABCOCK: Or it pops.

17 HONORABLE DAVID PEEPLES: Everything we do  
18 to solve one of these several problems aggravates another  
19 problem or has a potential for doing that, and that's why  
20 I think we ought to tweak around the edges with Lehmann  
21 and not try to have a grand rewrite, which is impossible  
22 to do in this field.

23 CHAIRMAN BABCOCK: Buddy then Judge Rhea.

24 MR. LOW: I would be opposed to it. I think  
25 the majority of the people here are for a death



1 certificate, and I would propose -- I'm out of order, but  
2 I will say it anyway. I would propose that we vote on  
3 whether or not people favor a death certificate and then  
4 see what it says.

5 CHAIRMAN BABCOCK: If Judge McCown's vote  
6 fails then that's probably the next vote.

7 MR. LOW: Right.

8 CHAIRMAN BABCOCK: Judge Medina.

9 HONORABLE SAMUEL MEDINA: I think I might  
10 want to speak to Scott's motion in that Lehmann is new,  
11 and I'm wondering how many of us are going to try to  
12 handle that in the different areas of the state. It might  
13 give us an opportunity to see what we might want to do or  
14 try to do through local rules or try to do through our  
15 local practice. I don't know if a year, but sometime.

16 CHAIRMAN BABCOCK: Nina.

17 MS. CORTELL: I would be against tabling it  
18 because Lehmann still leaves us with the problem that when  
19 you have these sequential orders where you don't have the  
20 magic language you're still going to end up with a final  
21 judgment and with people unaware of it, so I would not  
22 like to table. I would like to move toward some  
23 resolution. I'm probably slightly more in favor of the  
24 stamp notion. Mainly, as I've told Sarah, what bothers me  
25 about the separate piece of paper is we have an entire

1 statutory and rule network that we would be running afoul  
2 of by introducing a whole new piece of paper.

3 CHAIRMAN BABCOCK: Yeah. The problem I have  
4 is that the Court has asked us to study this, and at the  
5 beginning of this meeting the author of Lehmann said,  
6 "Keep studying it and give us your advice." So --

7 HON. F. SCOTT McCOWN: Well, I'm not saying  
8 we don't study it.

9 CHAIRMAN BABCOCK: You're saying we don't  
10 study it right now.

11 HON. F. SCOTT McCOWN: No. I'm saying we  
12 study it for six months to twelve months and see what  
13 happens under Lehmann, and let me just point out something  
14 about the stamp, since it's kind of a competing proposal  
15 to not studying it. I mean, you really cannot rely on a  
16 system where the trial judge -- keep in mind we're talking  
17 about district judges, county judges, who are signing  
18 hundreds of judgments and orders. You cannot rely on the  
19 trial judge to read the order and make an informed  
20 decision about when to stamp and not to stamp, and they're  
21 going to tend to not stamp, and you're really not going to  
22 wind up anywhere different.

23 You also can't rely on underfunded,  
24 untrained clerks to be making smart postcard decisions,  
25 and I really think we ought to wait and see what happens.

1 CHAIRMAN BABCOCK: Okay. Judge Rhea.

2 HONORABLE BILL RHEA: Would Judge McCown  
3 accept an amendment to table this for future study without  
4 the six months to a year? I'm uncomfortable with that as  
5 well.

6 HON. F. SCOTT McCOWN: Well, sure.

7 HONORABLE BILL RHEA: Just table it for  
8 further study.

9 HONORABLE SAMUEL MEDINA: Continued study.  
10 Yeah.

11 CHAIRMAN BABCOCK: Justice Hecht, I would be  
12 interested in your views on Judge McCown's proposal of  
13 tabling it --

14 HON. F. SCOTT McCOWN: For continued study.

15 CHAIRMAN BABCOCK: Continuing to study it.

16 JUSTICE HECHT: Well, I don't really have  
17 one. I mean, if people don't feel comfortable yet,  
18 there's no point in pushing forward. On the other hand, I  
19 am not so enamored with my own handiwork that I think we  
20 solved all the problems. In fact, I worry that the  
21 opposite is true. But, you know, I heard Sarah say at the  
22 beginning of this that they don't really feel like they  
23 can do anything else without a sense of what they should  
24 be doing.

25 HONORABLE SARAH DUNCAN: It would help.

1 JUSTICE HECHT: So interesting to see what  
2 hapens.

3 CHAIRMAN BABCOCK: Okay. Judge Lawrence.

4 HONORABLE TOM LAWRENCE: I hate to inject a  
5 new point of controversy into this, but I just heard Judge  
6 McCown say "district and county court judges." Is there a  
7 perception that this would not apply in JP courts? This  
8 death certificate?

9 CHAIRMAN BABCOCK: I never thought that,  
10 but, Sarah, did you mean to exclude JP?

11 HONORABLE SARAH DUNCAN: It never occurred  
12 to me that there would be a type of court it would not  
13 apply.

14 HONORABLE TOM LAWRENCE: Well, take all of  
15 the district and county court judges in the state of Texas  
16 and multiply it by about four or five and then you have  
17 got the number of justice court judgments. We're talking  
18 about hundreds of thousands of judgments, but I'm assuming  
19 that this would apply to JP court judges, too. That's  
20 been my perception.

21 CHAIRMAN BABCOCK: Yeah. I've never heard  
22 anybody say otherwise.

23 HONORABLE SARAH DUNCAN: I don't think we  
24 have taken a position on that one way or another. Is  
25 there a problem with finality in justice court judgments?

1 HONORABLE TOM LAWRENCE: Same problem with  
2 justice court as in county and district.

3 HONORABLE SARAH DUNCAN: Okay. That's what  
4 I thought.

5 HONORABLE TOM LAWRENCE: Now, when we start  
6 talking about -- Justice Brister is talking about faxing  
7 things. Now, that would cause a problem because 900 JP  
8 courts not all have faxes and not all have clerks, so we  
9 would either need to tweak -- it's 306a we're going to  
10 amend, right?

11 HONORABLE SARAH DUNCAN: Yeah.

12 HONORABLE TOM LAWRENCE: We either need to  
13 tweak 306a or we need to put something in Rule 558 to talk  
14 about when we get to that aspect of it, but the concept of  
15 the finality of the judgment, we have the same issue in JP  
16 courts as you do in county and district, so I would want  
17 it to apply. It needs to be consistent.

18 CHAIRMAN BABCOCK: Yeah. Yeah.

19 HON. F. SCOTT McCOWN: Could I --

20 CHAIRMAN BABCOCK: Yeah. Judge McCown.

21 HON. F. SCOTT McCOWN: If people really want  
22 to work a little harder at tackling this issue, maybe we  
23 could just set a time certain in the fall when we are  
24 going to have a huge group here and ask the committee to  
25 take the feedback from today and put, you know, a couple

1 of alternatives that we can look at. I don't feel like  
2 that sitting here today we can improve much on the  
3 feedback that we have given the committee, and we ought to  
4 put it off to the fall and do some more work, see what  
5 happens under Lehmann.

6           So if people would be more comfortable with  
7 setting a time certain that it would be back on the table,  
8 I just don't think we're ready to come up with something  
9 today.

10           CHAIRMAN BABCOCK: Bill.

11           PROFESSOR DORSANEO: You know, we haven't  
12 talked about the other problems that are part of this  
13 problem today at all, like the problems of serial orders  
14 and, frankly, you know, I don't know whether we came to  
15 this meeting here today ready to deal with the problems  
16 that are presented by the combination of issues here.

17           Now, for what it's worth -- it may not be  
18 worth anything -- I spent two or three days writing a long  
19 memorandum with -- not so long -- dealing with what I  
20 perceived to be the problems; and I think, you know,  
21 several different problems need to be addressed. The  
22 committee has worked on this for several meetings. Maybe  
23 we need to regroup and re-approach it with, you know, a  
24 fresh committee or a combination committee or volunteers  
25 or something along those lines; but then again, I would be

1 ready to vote on whether we have a separate piece of paper  
2 and what it says.

3 CHAIRMAN BABCOCK: Yeah. Let's stick with  
4 Scott's first, and any more discussion on it? Have you  
5 modified -- yeah, Judge Brown.

6 HONORABLE HARVEY BROWN: Well, my initial  
7 inclination was to vote on a death certificate, but in  
8 thinking about it, I think it would be helpful to have  
9 alternatives in front of us to actually vote on; and by  
10 that I mean not just Sarah's proposal with maybe tweaking  
11 from discussion today, but Judge Peeples has talked about  
12 a, quote, "tweaking rule." Well, I would like to see what  
13 that is, and until I know what that is I can't really  
14 intelligently vote for or against that, I don't think. So  
15 I think it would be good to have something from the  
16 committee with two proposed rules.

17 CHAIRMAN BABCOCK: Well, we have had  
18 specific language that we have voted on. In fact, that  
19 was --

20 HONORABLE SARAH DUNCAN: Well --

21 CHAIRMAN BABCOCK: Go ahead.

22 HONORABLE SARAH DUNCAN: That's only  
23 partially true. The subcommittee came back with a magic  
24 language rule and a death certificate rule.

25 CHAIRMAN BABCOCK: Right.

1 HONORABLE SARAH DUNCAN: It was not until we  
2 took a vote on those two options that Judge Peeples came  
3 forward with a third option, the tweaking option, and  
4 there has not been a tweaking proposal.

5 HONORABLE HARVEY BROWN: Right.

6 PROFESSOR DORSANEO: My proposal is a  
7 tweaking proposal.

8 HONORABLE SARAH DUNCAN: Okay.

9 PROFESSOR DORSANEO: The one attached to my  
10 memorandum. It takes more than just a little tweak. You  
11 have to tweak the dickens out of it.

12 HONORABLE SARAH DUNCAN: But your proposal  
13 has magic language in it.

14 CHAIRMAN BABCOCK: Okay. Hang on for a  
15 second. We're way off Judge McCown's motion, and that is  
16 that we're not going to do anything for six months or  
17 twelve months. Let's get that out of the way.

18 HON. F. SCOTT McCOWN: Well, I will amend  
19 that to a time certain in the fall if the chair wants to  
20 suggest a meeting date in the fall.

21 CHAIRMAN BABCOCK: When is our fall meeting?  
22 Is it October or November?

23 HONORABLE SARAH DUNCAN: Can I speak to  
24 that, Chip?

25 CHAIRMAN BABCOCK: Yes, you may.



1 HONORABLE SARAH DUNCAN: I frankly don't  
2 think that members of this committee or my subcommittee as  
3 a whole are going to be able to evaluate the effect of  
4 Lehmann, because you-all aren't going to see any of it.  
5 If you want to get the staff attorneys from the courts of  
6 appeals to come do a presentation on the effect of  
7 Lehmann, that might be a viable option, but I don't think  
8 you're going to see it in the reported cases, and I don't  
9 think we're going to be able to report on it in the  
10 reported cases.

11 CHAIRMAN BABCOCK: Yeah. I think that's  
12 right. Steve.

13 MR. YELENOSKY: Well, nothing we do here I  
14 guess is final in any sense except a recommendation to the  
15 Court.

16 HON. F. SCOTT McCOWN: Unless it has a death  
17 certificate.

18 MR. YELENOSKY: Right. But I would hate to  
19 lose the opportunity to get the sense of the committee  
20 today because I think a lot of concerns that people raised  
21 were allayed by responses they heard from other people,  
22 and I know Bill Dorsaneo was talking about a particular  
23 change that might have obtained close to a consensus on  
24 this, at least for today.

25 Moreover, as Justice Hecht said, the opinion

1 itself says this might better be dealt with with a rule,  
2 so it is a little bit odd for us to say, "Well, we're  
3 waiting to see what happens with the decision." So I am  
4 against tabling it or against -- or at least I would hope  
5 that we would express what we seem to have concluded  
6 today, if not with unanimity, with some amount of  
7 agreement.

8                   CHAIRMAN BABCOCK: Okay. Judge McCown's  
9 motion as amended, as I understand it, is that we would  
10 defer further discussion about this until our November 2nd  
11 and 3rd meeting, at which time we would take it up again  
12 and take into account the effects of Lehmann, if any, that  
13 are apparent at that time and whatever else may occur to  
14 us. Is that a fair restatement of your motion?

15                   HON. F. SCOTT McCOWN: Yeah. And that will  
16 give us some time. Judge Peeples, for example, thinks we  
17 can tweak this and has thought about it, but he doesn't  
18 have a specific draft in front of us. I mean, I don't  
19 know exactly what we would even be voting on today if we  
20 were to vote because this is truly an area where the devil  
21 is in the details, and I just think we have talked all we  
22 can talk about it.

23                   CHAIRMAN BABCOCK: Okay. Everybody in favor  
24 of Judge McCown's motion as stated, raise your hand.

25                   All opposed? The motion fails by a vote of

1 17 to 8, so we're going to keep going on this.

2           It occurs to me that among the three options  
3 we have not seen tweaking language from Judge Peeples. We  
4 have seen magic language options, and we have seen a death  
5 certificate type option, and there is -- I think what  
6 Sarah is saying is her subcommittee needs direction from  
7 us as to what approach we're going to take. It may be,  
8 Sarah, that since we haven't seen any language from Judge  
9 Peeples on his tweaking concept that that might be  
10 something that your subcommittee would benefit from, but I  
11 don't know. Judge Peeples.

12           HONORABLE DAVID PEEPLES: Let me just give  
13 you an indication of what I have in mind. Serial orders  
14 that add up to complete relief would still be final,  
15 but -- and also, second, if you've got stronger language,  
16 something like is in Lehmann, that would do it, too; but  
17 because sometimes people are going to get adjudicated and  
18 they don't know it, I would beef up Rule 306a sub (3)  
19 which deals with the notice that goes out; and it would be  
20 something like a death certificate or a postcard that  
21 needs to let people know that the clock is ticking.

22           And I think what I want to do is also  
23 strengthen -- you know, 306a says if you didn't get actual  
24 notice the timetable can be extended, but you've got to  
25 have a hearing. I think what I would do would be to give

1 people the right to come into court and say, "I didn't  
2 know. I didn't get a copy of this. I didn't know it had  
3 happened, and I can prove it." And if the trial court  
4 agrees with that then the timetables are postponed, and  
5 I'm not sure -- we can talk about how much longer it would  
6 be.

7                   But that would mean that the default rule  
8 would be judgments would become final and you wouldn't  
9 have the open judgments problem that I think is a real one  
10 because of the paperwork that we deal with, but if  
11 somebody is victimized by, you know, not getting the  
12 notice or not getting copies or they didn't know what  
13 happened, they can come in and have a hearing, and it  
14 would mitigate the harshness that I think has a lot of  
15 people concerned here.

16                   MR. YELENOSKY: What would that notice be?

17                   HONORABLE DAVID PEEPLES: That's what I'm  
18 thinking about. Huh?

19                   MR. YELENOSKY: I mean, how would there be a  
20 notice in the serial order situation? Nobody knows.

21                   HONORABLE DAVID PEEPLES: Well, somebody who  
22 wasn't a party to the third hearing, you know, just  
23 thought, "Well, I'm not at stake" and so forth; and what  
24 happens in the third hearing after a couple of previous  
25 ones complete the case, but they -- you know, nobody

1 copied them on the order, didn't have the language or  
2 something. They can come in and prove they didn't get --  
3 didn't know that hearing was taking place, they weren't  
4 notified of it.

5 MR. YELENOSKY: But it's not a notice of  
6 anything except just the order that was the last straw of  
7 the --

8 HONORABLE DAVID PEEPLES: I'm not sure  
9 exactly. I'm just trying to give you-all an idea. When I  
10 say "tweaking" what I'd like to do is keep the present law  
11 as it is in Lehmann, but to deal with some of the, you  
12 know, heartrending stories about somebody who wakes up and  
13 all of the sudden the case is over and they didn't even  
14 know there had been a hearing and maybe give them extra  
15 time to come in and prove that if it really happened. And  
16 also if somebody -- a good lawyer that wants things to  
17 become final, well, you give notice to everybody, and if  
18 that's done then the timetable does start to run right  
19 away.

20 HONORABLE SARAH DUNCAN: Actually, a better  
21 way to do it, not as a good lawyer, but if you're a  
22 slightly unethical lawyer is not to give notice because  
23 eventually the time will run and nobody is going to come  
24 in with a 306a motion to change the date of the judgment  
25 unless someday they get notice.

1 CHAIRMAN BABCOCK: Bill Dorsaneo.

2 PROFESSOR DORSANEO: Well, the memo that I  
3 sent out on January 26th, and then there is a supplement  
4 dealing briefly with Lehmann, has a proposed Rule 300 in  
5 it. It deals with all of the problems, serial order  
6 problems, magic language problems. It does make the  
7 determination that all of those problems will be dealt  
8 with in the draft of the judgment rather than in a  
9 separate piece of paper. That is perhaps less important  
10 than how the problems are dealt with, you know, in my  
11 view.

12 The language that I used as the foundation  
13 for my draft provision is the language that, in fact, this  
14 committee did approve after two years work from 1996  
15 through September 1997, based on the -- largely on the  
16 work of the late, great Chief Justice Clarence Guittard.  
17 I have never understood why we don't build on our prior  
18 work in that respect.

19 David, if you're talking about tweaking our  
20 existing rules, the existing ones in the rule book --

21 HONORABLE DAVID PEEPLES: No. Codifying the  
22 case law into a rule with some modifications.

23 PROFESSOR DORSANEO: Okay. But if you're  
24 talking about making adjustments in our existing rules,  
25 our existing rules are not very good in this subject area,

1 and that's, you know, reflected in the fact that we spent  
2 a year and a half revising them.

3 I don't know whether anybody had the time or  
4 the inclination to read my specific proposal, but,  
5 frankly, I mean, I don't need to spend any more time  
6 working on it because this is my specific proposal after  
7 working on it by myself, with my colleagues, and with  
8 others for about a week.

9 CHAIRMAN BABCOCK: You're talking about the  
10 problems -- the memo that you sent to myself and Justice  
11 Hecht.

12 PROFESSOR DORSANEO: I sent it to everybody.  
13 I sent a copy to everybody.

14 CHAIRMAN BABCOCK: Yeah. You sent it to  
15 everybody, but is January 26th the date?

16 PROFESSOR DORSANEO: Yes.

17 CHAIRMAN BABCOCK: Right.

18 PROFESSOR DORSANEO: Now, it's hard to get  
19 around Northeast Independent School District vs. Aldridge  
20 and the other problems if you're just going to operate  
21 from memory. When the Court worked on Lehmann, no doubt  
22 the Court read the cases and tried to familiarize itself  
23 with the things that have happened before now, and I don't  
24 think the committee has done that. We are having the same  
25 discussions we have had several other times. I think

1 individual committee members have done it.

2 CHAIRMAN BABCOCK: Yeah. No question there.  
3 Well, Sarah.

4 HONORABLE SARAH DUNCAN: If I can point  
5 something out, in all fairness. The subcommittee  
6 initially came back with the recodification draft with a  
7 proposed amendment for magic language. It was never --  
8 the recodification draft -- and I was on that subcommittee  
9 and I think co-chaired it with Don Hunt. That language  
10 was not ignored. It was incorporated into the  
11 subcommittee's initial proposal with the addition of magic  
12 language. This committee rejected that proposal and sent  
13 us back to the table to work on a separate magic language  
14 rule and a death certificate, which we did.

15 So, I mean, and I'm saying this because I  
16 very much respect the work of that committee and certainly  
17 of Chief Justice Guittard and of Bill; and if that's the  
18 way the committee wants to go, we are happy to do it. We  
19 just need a direction.

20 CHAIRMAN BABCOCK: Yeah. And I don't know  
21 if we're ready for this or not, but it struck me that  
22 there was -- and, Bill, I think you recognize this, that  
23 there might be a developing consensus for the death  
24 certificate based on the discussion this morning, and it  
25 seems to me it would be useful for everybody's purposes to



1 see if that's true or not.

2 HONORABLE SARAH DUNCAN: I would only point  
3 out that most of my subcommittee is not here.

4 CHAIRMAN BABCOCK: Okay. Carl.

5 MR. HAMILTON: I want to say something about  
6 that. I think what Bill has written here is excellent in  
7 his report. I think at either the last meeting or the one  
8 before that we had a proposal on the table which was, in  
9 effect, the recodification, which explains in rule form  
10 what you have to do and how you have to do it and where it  
11 has to go in the judgment.

12 CHAIRMAN BABCOCK: Buddy has got something  
13 on that.

14 MR. HAMILTON: I think that is a much better  
15 plan than a death certificate, a separate piece of paper,  
16 for a lot of reasons, one of which is we are not going to  
17 get it. A lot of people are not going to get it because  
18 either the clerk's office doesn't send it out or  
19 something, and that's going to cause more of a problem  
20 than if it's in the judgment; and if it's in the judgment,  
21 for the most part the lawyers that are in the case are  
22 going to have the judgment. They are either going to be  
23 preparing it or have some input to it or the judge is  
24 going to require that it be sent around and signed by  
25 everybody.

1                   They're going to know what's in the  
2 judgment, and that's the best way to get notice to the  
3 lawyers, is to have it in the judgment and not in a  
4 separate piece of paper and not rely upon the clerk to  
5 send that out or even a card out. I think it's disastrous  
6 to go to a separate piece of paper with a certificate. I  
7 think we ought to consider a rewrite of the rules to  
8 explain how it ought to be done, what has to be in the  
9 judgment, such as the Lehmann language, because a lot of  
10 lawyers may not even know about Lehmann, but hopefully  
11 they will read the rules and do it that way rather than a  
12 separate piece of paper.

13                   CHAIRMAN BABCOCK: Buddy Low.

14                   MR. LOW: I would propose -- as Bill pointed  
15 out, we have only been working on this five years, and  
16 problems have not really gone away. I would propose that  
17 we have the subcommittee take Bill's work and do what they  
18 think, which I consider to be a tweaking type thing, and  
19 bring us back a death certificate rule where we could work  
20 on whichever way we went.

21                   MR. YELENOSKY: Well, we have the latter,  
22 right?

23                   HONORABLE SARAH DUNCAN: We've had both.  
24 We've had all three, actually.

25                   MR. LOW: Okay. But we have not worked

1 on --

2 HONORABLE SARAH DUNCAN: Part of the problem  
3 is different people come to different meetings.

4 MR. LOW: Sarah, you haven't worked on  
5 Bill's, have you?

6 HONORABLE SARAH DUNCAN: Yes. Yes. We  
7 initially proposed the recodification language with a  
8 magic language insertion.

9 CHAIRMAN BABCOCK: Judge Lawrence.

10 HONORABLE TOM LAWRENCE: I only have one  
11 simple request. Whatever we do when we finally do it,  
12 would you give the 500 series subcommittee the opportunity  
13 to go back and amend 525 and 558 to make it consistent,  
14 because we have got some peculiar rules in JP that are not  
15 going to fit this?

16 For example, I don't know how we're going to  
17 do a death certificate when the final judgment doesn't  
18 have to be in a separate order, it can just be on the  
19 docket book. So we need to change our rules, whatever we  
20 finally do, and I'd like that all to go up at the same  
21 time. I don't think it's going to be a big delay, but  
22 just give us a chance to do that.

23 CHAIRMAN BABCOCK: This would not be  
24 binding, but I'd like to know how many people are in the  
25 death certificate camp of the people who are here,

1 recognizing we have a lot of people not here today.

2 HONORABLE SAMUEL MEDINA: As opposed to?

3 CHAIRMAN BABCOCK: As opposed to either  
4 magic language or magic language versus tweaking. What  
5 Judge Peeples outlined in broad form.

6 HONORABLE SAMUEL MEDINA: The problem is  
7 tweaking could include some type of a death certificate.

8 CHAIRMAN BABCOCK: Well, I don't think so.  
9 I think the tweekers are opposed to death certificates.

10 MR. GILSTRAP: It's a separate document.

11 CHAIRMAN BABCOCK: Yeah. Nina.

12 MS. CORTELL: When you say "magic language"  
13 are you referring to the recodification, to Bill's, or --

14 CHAIRMAN BABCOCK: Just generic, generally  
15 some either Lehmann or recodification language. Really  
16 what I think is whether or not we ought to sound the death  
17 bell for the death certificate. That's what I'm kind of  
18 trying to get a sense of.

19 HONORABLE BILL RHEA: As a separate  
20 document?

21 CHAIRMAN BABCOCK: Yeah. The separate  
22 document, the death certificate, because if it's not a  
23 separate document then it becomes language that has some  
24 effect. Yeah, Linda.

25 MS. EADS: Clarification. You're saying for

1 magic language that it would be the same standardized  
2 language that would be proposed to be added to a judgment?  
3 We wouldn't have variations depending on what an  
4 individual judge wants to say is magic language?

5 CHAIRMAN BABCOCK: Yeah. I think, as I  
6 understand the proposal for the death certificate, that  
7 would be a separate piece of paper and it would have  
8 standardized language, whatever that may be, and there's  
9 controversy about what that should be. Yeah, Buddy.

10 MR. LOW: And that could include a stamp. I  
11 mean, a death certificate could include stamp or the  
12 separate document.

13 CHAIRMAN BABCOCK: It could be a stamp with  
14 skull and crossbones for all I care.

15 HONORABLE DAVID PEEPLES: Buddy said it  
16 could be a separate document or something else.

17 MR. LOW: Stamp.

18 HONORABLE DAVID PEEPLES: On the judgment?  
19 To me death certificate means separate document.

20 CHAIRMAN BABCOCK: Right.

21 MS. EADS: And magic language means it would  
22 be standardized language in the final judgment?

23 CHAIRMAN BABCOCK: Standardized language. I  
24 think that all proposals are discussing standardized  
25 language.

1 HONORABLE DAVID PEEPLES: Right.

2 CHAIRMAN BABCOCK: I mean, whether it's  
3 tweaking, whether it's magic language, or whether it's a  
4 separate document that's called something like a death  
5 certificate.

6 MR. LOW: Chip, I misspoke. I didn't mean  
7 to say "stamp." I meant "form" that came from the --  
8 "form," not "stamp." I'm sorry.

9 CHAIRMAN BABCOCK: Form, right. Okay.  
10 Justice Duncan.

11 HONORABLE SARAH DUNCAN: Chip, I hate to be  
12 so unruly.

13 CHAIRMAN BABCOCK: Oh, no, you don't.

14 HONORABLE SARAH DUNCAN: You're right, I  
15 don't.

16 CHAIRMAN BABCOCK: It's like Buddy saying  
17 that he doesn't understand what he's talking about.

18 HONORABLE SARAH DUNCAN: This is another  
19 example of who's here on what day radically changes the  
20 vote.

21 HON. F. SCOTT McCOWN: That's true of every  
22 election.

23 HONORABLE SARAH DUNCAN: Certainly it is,  
24 but we've already taken this vote once, and the committee  
25 was split three ways.

1 CHAIRMAN BABCOCK: Right.

2 HONORABLE SARAH DUNCAN: And we now don't  
3 have a majority of the subcommittee that was assigned to  
4 this rule at the table.

5 CHAIRMAN BABCOCK: And, Sarah, that's why  
6 when the vote was 9-3 to 8 that's why we kept talking  
7 about things because I think unless we develop a clear  
8 consensus then we can't take any option off the table for  
9 the very reason you say, but we are going to be paralyzed  
10 if we don't, you know, have some -- so if, for example,  
11 the death certificate, even with your subcommittee not  
12 here, commanded a majority of 20 to 3 then that would be a  
13 pretty good indication.

14 HONORABLE SARAH DUNCAN: I see. Thank you.  
15 I see. Thank you.

16 HON. F. SCOTT McCOWN: Well, I know you're  
17 trying to get to a vote, but I just wanted to say that I  
18 expressed earlier support for the concept of a death  
19 certificate and talked about how we could make it work,  
20 but I have been persuaded by my colleagues and do change  
21 my mind that we've got some real practical problems with  
22 it, and I'd point out that the Federal system in essence  
23 has a death certificate that doesn't work. That's why  
24 they're having all the turmoil, is because they have had  
25 the system, and it doesn't work.

1                   And as I think about the number of  
2 judgments, just the sheer number of pieces of paper that  
3 we would have to process with this additional form, it  
4 seems to me to be too costly and cumbersome. Even if it  
5 would work, it's too costly and cumbersome; and I think we  
6 can get to the same place through some standardized magic  
7 language that goes in a standardized place in a final  
8 judgment. So I've changed my mind. I'm again' it.

9                   CHAIRMAN BABCOCK: Yeah, Justice Duncan.

10                  HONORABLE SARAH DUNCAN: This isn't the  
11 system that the Federal courts have by a long shot.

12                  HON. F. SCOTT McCOWN: Well, but it is a  
13 species of the same thing, a separate piece of paper that  
14 has to be there.

15                  CHAIRMAN BABCOCK: But it's a evolved into a  
16 more intelligent life form, is what Sarah says.

17                  HONORABLE SARAH DUNCAN: Never mind.

18                  CHAIRMAN BABCOCK: Despite its name. Joan,  
19 you know, Orsinger if he were here would have said  
20 something by now.

21                  MS. JENKINS: Nina pointed that out to me in  
22 the ladies restroom a few minutes ago; and I'm well aware  
23 of that; and my response to her was very simply that  
24 contrary to Richard's hue and cry in several meetings, in  
25 20 years of doing exclusively family law this has never



1 been an issue, which is why I have been very quiet. It's  
2 really not a problem for the family law Bar.

3 I do agree with Judge McCown's comments,  
4 though, about -- I think the misperception of some folks  
5 who don't deal with the enormous volume of paperwork that  
6 gets generated by these master courts and the automatic  
7 protective order hearings that we have stacked up every  
8 day. I think at least my family district court judges in  
9 Harris County would just have a stroke at the thought of  
10 another piece of paper or leaving it up to the clerks, who  
11 are not employed by the judge and who serve the county and  
12 not the judge, being responsible for issuing some sort of  
13 a postcard.

14 And my judges do not have fax machines. If  
15 they want a fax machine they have to buy it themselves,  
16 and they very jealously guard their fax numbers. So, I  
17 mean, even in a county as sophisticated and large as  
18 Harris County, I think the fax notion just won't work for  
19 us.

20 CHAIRMAN BABCOCK: But you don't -- but as  
21 the family -- as a family law practitioner you don't see  
22 the problem articulated by Richard of having people who  
23 thought they were divorced still being married?

24 MS. JENKINS: Absolutely not.

25 HONORABLE HARVEY BROWN: But wasn't

1 Richard's point that this would create that problem?

2 CHAIRMAN BABCOCK: Yeah. Richard's point  
3 was that it would create it.

4 HONORABLE HARVEY BROWN: I mean, I'm not  
5 sure I agree with Richard, but his point was if we did  
6 this and if the death certificate wasn't filed that maybe  
7 a problem you've never had might start.

8 MS. JENKINS: I think that that was  
9 Richard's point, and I do think that I could see that. I  
10 sometimes wonder if you have the same problems in civil  
11 district courts that you have in family district courts,  
12 and I say this with some hesitancy, but I think as a  
13 general rule the practitioners in our court tend to be  
14 sort of below the general standard, and I think that if  
15 you're counting on the lawyers to generate another piece  
16 of paper that's going to determine whether or not somebody  
17 is finally divorced, that is a mistake. Of all the  
18 suggestions that I've heard, I think the one about having  
19 a stamp put in place by the judge, I think that's  
20 something that's workable in our system, but the other  
21 suggestions leave me cause for concern.

22 CHAIRMAN BABCOCK: Would you have a stamp on  
23 a separate piece of paper?

24 MS. JENKINS: No. I would have it on the  
25 judgment itself.

1 CHAIRMAN BABCOCK: Okay. Steven.

2 MR. YELENOSKY: Maybe we should have some  
3 law students on the committee because I think a lot of  
4 times we're resistant to doing things because, oh, people  
5 just won't get that. If we had a separate death  
6 certificate and people coming out of law school understood  
7 it ain't over 'til you got that, it would be obvious to  
8 them that the divorce wasn't final until they got it, and  
9 we're talking about lawyers who don't now do that and how  
10 hard it is going to be for them, and I guess that argument  
11 could be made with every rule change that we suggest. So  
12 I think we're being a little reactionary.

13 CHAIRMAN BABCOCK: Law students in the lower  
14 half of their class perhaps?

15 MR. YELENOSKY: Perhaps.

16 CHAIRMAN BABCOCK: Okay. Sarah, then Buddy.

17 HONORABLE SARAH DUNCAN: On the divorce  
18 question, I mean, there is a different rule for rendition  
19 of judgment in family law cases, and that is something  
20 we're not going to mess with.

21 HON. F. SCOTT McCOWN: What do you mean  
22 there's a different rule? I'm not aware of a different  
23 rule.

24 HONORABLE SARAH DUNCAN: Yeah. Family law,  
25 judgments and orders are -- when they are orally rendered,

1 they're effective, maybe not for purposes of appeal.

2 HONORABLE DAVID PEEPLES: People are  
3 divorced when you say they're divorced, but the rest of it  
4 the rules apply.

5 HON. F. SCOTT McCOWN: Well, all judgments  
6 are rendered when they're orally rendered. That's true of  
7 any judgment.

8 HONORABLE SARAH DUNCAN: But they are not  
9 effective.

10 HON. F. SCOTT McCOWN: Sure they are. You  
11 may not be able to move for contempt or execute, but you  
12 couldn't move for contempt or execute on a family judgment  
13 either. There's not a different rule.

14 MS. JENKINS: Yeah. I'm totally unaware of  
15 us being in some separate category with regard to our  
16 judgments.

17 HONORABLE SARAH DUNCAN: I think it's in the  
18 Family Code, but I may be wrong.

19 CHAIRMAN BABCOCK: Buddy.

20 MR. LOW: Chip, I would just point out,  
21 everybody talks about one more piece of paper, but in  
22 cases where you produce thousands of pages of documents  
23 and you're going to complain of one more is going to break  
24 the camel's back? I don't see that the cost of one more  
25 page is going to be that much in relation to the cost of

1 litigation.

2 CHAIRMAN BABCOCK: Justice Duncan.

3 HONORABLE SARAH DUNCAN: To follow up -- and  
4 I may be perfectly wrong about family law cases. I am not  
5 purporting to be an expert on that, but my question is  
6 people have been talking about this as though there were  
7 going to be multiple death certificates in every case.  
8 We're talking about one piece of paper for each case. So  
9 as many -- you can't even look at how many final judgments  
10 you've signed in a case because you could label them all  
11 final judgments and then you're just multiplying, but you  
12 have to look at the number of final dispositions in the  
13 state in all the trial courts and multiply it times two  
14 because that's what we would be doing.

15 If the death certificate is a good idea --  
16 and I am not taking a position on that one way or another  
17 right now. If it's a good idea and it would solve a whole  
18 lot of finality problems in a whole lot of cases and a  
19 whole lot of people wouldn't lose appeals they are now  
20 losing, are we really going to not do it because you have  
21 to sign your name twice to render a final judgment in each  
22 case? Is that what it's going to come down to? And I'm  
23 asking.

24 HON. F. SCOTT McCOWN: Yes. Yes.

25 CHAIRMAN BABCOCK: For the record.

1                   HON. F. SCOTT McCOWN: Because there's  
2 nothing that you can do with the death certificate that  
3 you can't do with magic language and sign your name once  
4 if you couple it with Judge Peeples' idea that if you have  
5 standardized magic language in a judgment then a clerk has  
6 no decision-making to make, and the clerk sends the  
7 postcard that they're already required to send, and the  
8 postcard could have the standardized magic language  
9 printed on the postcard to provide notice. So you can do  
10 the same thing with significantly less administrative  
11 hassle.

12                   CHAIRMAN BABCOCK: Okay. Bill Dorsaneo then  
13 Carlyle.

14                   PROFESSOR DORSANEO: Well, with respect to  
15 the serial order problem, which I see as one, you know,  
16 major problem in our jurisprudence, is that the judgment  
17 consists of a series of separate pieces of paper, and it's  
18 hard to kind of tell when the case is over or what those  
19 separate pieces of paper mean when you read them all in a  
20 row.

21                   The death certificate would in a sense solve  
22 that problem because it would be clear that you don't need  
23 any more pieces of paper for this case to go to the court  
24 of appeals, but in another sense it wouldn't really solve  
25 the problem. It just moves the problem to the court of

1 appeals for resolution as to what those pieces of paper  
2 mean and whether the entire proceeding has been  
3 determined, assuming that the certificate only says, only  
4 says, "This goes to the court of appeals. This is final  
5 now."

6                   With respect to giving notice to the lawyers  
7 that it's time to start working on the appeal or  
8 post-judgment motions, the death certificate would do a  
9 pretty good job on that as well. I'm not sure how great a  
10 job it does with respect to execution, prejudgment  
11 interest and post-judgment interest and all of the rest of  
12 that. I'm not sure that it's just the easiest thing to  
13 say that this is final for all purposes, "Boy, I'm glad  
14 I'm finished with that." The death certificate, if it  
15 says "all relief" -- as in the form, "All relief not  
16 expressly granted by a prior written order or judgment is  
17 denied," has the potential for being inconsistent with the  
18 judgment or those other pieces of paper. It has the  
19 potential for automatically disposing of claims that  
20 really have been overlooked, and it has the potential to  
21 get the trial judge and the court of appeals to think that  
22 something has been adjudicated when it really hasn't been  
23 expressly adjudicated, and I see that the separate pieces  
24 of paper idea as having real downside risk if it says,  
25 "All relief not expressly granted by prior written order

1 or judgment is denied." I don't see that it has any  
2 particular great amount of downside risk if it doesn't say  
3 that.

4 MR. YELENOSKY: Right.

5 PROFESSOR DORSANEO: And I don't see  
6 administratively -- I don't see administratively why it  
7 needs to be a separate piece of paper and be signed when  
8 maybe a stamp would be fine if it didn't go into so  
9 much --

10 CHAIRMAN BABCOCK: Stuff.

11 PROFESSOR DORSANEO: -- adjudicated detail.

12 CHAIRMAN BABCOCK: Yeah.

13 PROFESSOR DORSANEO: The thrust of Lehmann  
14 is that lawyers, if they get a judgment or a piece of  
15 paper that says it's time to worry about the appeal, will  
16 know that. That doesn't solve all the problems with the  
17 order or the series of orders. It just solves that  
18 problem. That's a problem worth solving, but we don't  
19 want to create other problems by having some sort of a pro  
20 forma adjudication that doesn't reflect what happened  
21 exactly in the trial court.

22 That pro forma adjudication will, in my  
23 experience, affect what judges do later. They will not  
24 say once they've signed a piece of paper saying that all  
25 relief has been denied that that really didn't happen,



1 that they overlooked something. They might say, "Well,  
2 why didn't you raise that before?" You say, "We weren't  
3 talking about that," and then they will say, "Well, see,  
4 you should have raised it before" and then on appeal  
5 you're in the position of instead of arguing that this was  
6 overlooked and it's error to overlook it because it, you  
7 know, was properly put in a position to be adjudicated,  
8 you will have to defend yourself against the argument that  
9 it was not overlooked, it was expressly denied, and that's  
10 putting things in the wrong frame of mind from my  
11 perspective.

12                   So all that means to me, that a death  
13 certificate is fine if it just says, "It appears to the  
14 court that all claims by all parties in this cause have  
15 been disposed of by prior written order or judgment" and  
16 then go says -- then goes and states, you know, "The date  
17 of this order is the final judgment" without saying, you  
18 know, "all relief not expressly granted is hereby denied."  
19 We don't have an inconsistency problem. We do have  
20 notice. I frankly think putting it in the judgment or the  
21 last piece of paper that the judge thinks is the judgment  
22 is as good, and I am not going to say one more word about  
23 any of this.

24                   CHAIRMAN BABCOCK: All right. We're going  
25 to take three more comments and then we're going to --

1 Carlyle, Judge Lawrence, and Justice Duncan, and then  
2 we're going to get an expression, a nonbinding expression  
3 of the people present, as to whether or not we want to  
4 lose the death certificate as an option. So Carlyle.

5 MR. CHAPMAN: As I appreciate the discussion  
6 today, it seems to me that there is real worth and merit  
7 in the litigants knowing that the court believes that it's  
8 a final judgment, and it seems to me that that -- that is  
9 prospered by the notion of a separate document that the  
10 court signs. We could call it a certificate. We could  
11 call it an order of final judgment, but something that is  
12 a pro-active act by the court that the court believes this  
13 is a final judgment.

14 The problem with the magic language, as I  
15 see it, is because it becomes almost rubber stamped. It  
16 becomes boilerplate in the documents that we are  
17 preparing, and it really doesn't reflect whether the court  
18 believes it's a final judgment or not because the court  
19 hasn't been called upon to make that determination, to  
20 make that decision. It seems to me that the benefit of  
21 the certificate, death certificate as we call it, is that  
22 the court is encouraged to make that determination.

23 I also think that it prospers the notion of  
24 notice, because the litigants are aware of that, or they  
25 may be aware of that, and it really doesn't do any

1 violence to the fabric of the rules as they now exist  
2 because the clerk then is given a document that is  
3 discrete, is clear, that informs the clerk that it's now  
4 time to send out the postcard.

5           One of the real advantages of the  
6 certificate, it seems to me, is that it can be the  
7 document that closes the file. It is at the top of the  
8 file. The clerk doesn't have to exercise anything other  
9 than ministerial duties. They don't have to be cognitive  
10 about it. It seems that's a real benefit.

11           It seems to me that we could handle the  
12 matter of when post-judgment interest and prejudgment  
13 interests are calculated by simply requiring that at the  
14 time that a final judgment is entered there is a  
15 certificate of final judgment, so that they happen  
16 simultaneously by rule, and it seems to me that that  
17 resolves that problem.

18           I agree that we should not mix and match  
19 death certificate and magic language. I think the problem  
20 is that we have a tendency to do that when we talk about  
21 it. If we eliminate the concept of magic language but  
22 simply have a death certificate that says plainly and  
23 clearly, "This is a final judgment for purposes of appeal  
24 as well as post-judgment and prejudgment interest" then  
25 that, one, is a cognitive act on the part of the court;

1 two, it gives ministerial -- it initiates ministerial  
2 duties on the part of the clerk; three, it's notice to the  
3 litigants; and, four, it seems to be clear and a final  
4 document that closes the file. I think it adds real  
5 merit.

6 CHAIRMAN BABCOCK: Okay. Judge Lawrence.

7 HONORABLE TOM LAWRENCE: I am generally in  
8 favor of the final -- of the death certificate so long as  
9 it's done at the same time as the judgment. If it's done  
10 at a different time than the judgment is signed then I  
11 think that's going to set up more confusion, and if it's  
12 going to be different then I would rather have it in some  
13 magic language at the bottom of the judgment.

14 CHAIRMAN BABCOCK: Justice Duncan and then  
15 we're going to cut this off.

16 HONORABLE SARAH DUNCAN: That presumes that  
17 there is such a thing as the final judgment, which at  
18 least in most of the cases we see there isn't. Most cases  
19 that we see, we hardly ever see two party cases anymore.  
20 They are usually multiple party cases with multiple orders  
21 that combine to dispose of all parties and issues. The  
22 problem -- and I've said this before, and it's part of the  
23 reason I told Chip I really wasn't going to say anything,  
24 but, of course, here I am saying things.

25 The problem I have with not having those

1 unaddressed claims adjudicated is I look at it from the  
2 perspective of the parties whose claims those were. And  
3 what's my issue on appeal? "The court erred in signing a  
4 death certificate because the motion for summary judgment  
5 didn't really encompass one of my claims." Well, all the  
6 death certificate is going to say is, "It looks to me, the  
7 court, the trial court, that all claims and parties have  
8 been disposed of." That's just a belief on the behalf of  
9 the trial court. Where is the error in a belief? It  
10 seems to me there has to be some clean-up language that  
11 does dispose of all of the outstanding claims and issues  
12 in the case. That's why it's in the subcommittee's  
13 proposal.

14 CHAIRMAN BABCOCK: Sarah, will you yield  
15 some of your time to Judge Brister?

16 HONORABLE SCOTT BRISTER: Just very brief.

17 HONORABLE SARAH DUNCAN: Yeah.

18 HONORABLE SCOTT BRISTER: The death  
19 certificate doesn't have to be signed by the judge. I  
20 understand sometimes it might be hard for the clerk to  
21 figure out to send the postcard saying it's a final  
22 judgment. Clerks do that right now, saying -- if they  
23 have a question, they ask the judge; and that's one of the  
24 things clerks have to report to OCA, cases disposed by  
25 summary judgment. I mean, that is something they do right

1 now. It's not going to make it more complicated. It  
2 doesn't have to be signed by the judge. To me, the price  
3 of admission, the thing that's worth the price of  
4 admission, worth all this stuff, is the one that Judge  
5 Brown points out, that is when is the best time when  
6 somebody ought to say, "Hey, you forgot about X"? Should  
7 that be a year into the appeal, or should that be when  
8 they get a notice from a computer?

9           I don't care if a human being touches it or  
10 signs it or puts a thumbprint on it, but a notice from the  
11 computer saying, "We think it's all over." Wouldn't it by  
12 far be the most efficient that that's the time you say,  
13 "Hey, how about my" -- something; and if you don't,  
14 that's -- because right now you don't have to do that.  
15 You can wait, and you can raise it a year later, and we go  
16 back to where we were, and that is a big waste of  
17 appellate time and attorneys fees; and it is worth the  
18 price of admission to have a notice. It's got to go out  
19 from the clerk because, of course, if it's language put in  
20 by the parties, what are they not going to do? They're  
21 not going to send it because they're not thinking about  
22 "Hey, what about that guy who's going to say, 'Hey, what  
23 about.'"

24           The clerk reports to OCA now "disposed by  
25 summary judgment," and if they don't think it's complete

1 then they don't report that, and nothing goes -- but, you  
2 know, the nice thing about this is we could put in a rule  
3 that says if it really wasn't -- not if it was addressed  
4 on the merits and you disagree with it, but if it wasn't  
5 addressed, it wasn't mentioned, and hasn't been disposed  
6 of by any order, you need to speak up now before we wait a  
7 year doing all this.

8                   CHAIRMAN BABCOCK: Okay. That's a  
9 subspecies of the death certificate, and if we keep the  
10 death certificate concept alive then that can find  
11 expression in it.

12                   HONORABLE SCOTT BRISTER: Right.

13                   CHAIRMAN BABCOCK: What I'd like to see is  
14 how many people here feel that the death certificate  
15 concept is superior to the other alternatives that have  
16 been articulated, either in writing in the magic language  
17 rule or as expressed by Judge Peeples in the so-called  
18 tweaking option. So that's what you're voting on. People  
19 who think that the death certificate is a superior way of  
20 dealing with this problem, raise your hand if you believe  
21 that.

22                   HONORABLE SARAH DUNCAN: I'm holding up two  
23 hands. One is for Skip.

24                   CHAIRMAN BABCOCK: Yeah, I know.

25                   And how many people think it is not a

1 superior method?

2                   The vote's 12 that think it is a superior  
3 method, and 13 think that it is not.

4                   HON. F. SCOTT McCOWN: Now I'm glad we've  
5 got consensus. Let's move on.

6                   HONORABLE SARAH DUNCAN: If only my  
7 subcommittee were all here.

8                   CHAIRMAN BABCOCK: So here's what we're  
9 going to do. Sarah, there has been enough discussed today  
10 about the death certificate concept, about changes in what  
11 you have previously done, and Judge Brister's idea that  
12 ought to be considered. So I think your subcommittee  
13 ought to focus on presenting language to us in the May  
14 meeting that tightens up the death certificate in a way  
15 that would be interesting to the people who are going to  
16 attend that meeting, soliciting input from whomever.

17                   Now, in addition, I think Judge Peeples'  
18 tweaking concept has somewhat overrun the magic language  
19 option. So if you're willing, Judge Peeples, if you in  
20 conjunction with Sarah or separately, if you could come up  
21 with some language that you think would be preferable to  
22 the death certificate and have that ready for our May  
23 meeting, that would be very helpful.

24                   HONORABLE DAVID PEEPLES: Okay.

25                   CHAIRMAN BABCOCK: And Justice Duncan is



1 nodding her head in agreement. Dorsaneo, despite looking  
2 perplexed I'm sure is in favor of this. Right?

3 PROFESSOR DORSANEO: Judge Rhea mentioned  
4 something that we hadn't ever discussed about whether we  
5 should -- at one of our breaks, if I heard him right,  
6 about whether we should consider how we're going to treat  
7 general language. You know, I mean we treat general  
8 language as being effective rather than requiring a  
9 specific adjudication. Maybe that's not a good idea.  
10 Maybe that's what our problem is.

11 CHAIRMAN BABCOCK: Yeah. Well, Judge Rhea,  
12 if you would communicate that to Justice Duncan and her  
13 subcommittee, you're welcome to participate with their  
14 subcommittee, as is anyone; and don't forget John Martin's  
15 magic stamp. That's something we ought to think about.  
16 So we will take that up at our May meeting and go on from  
17 there.

18 So now we're going to turn to recusal for a  
19 change.

20 HONORABLE SARAH DUNCAN: Hit me. Hit me.  
21 Hit me again harder.

22 CHAIRMAN BABCOCK: Yeah, Justice Hecht has a  
23 final word on finality.

24 JUSTICE HECHT: No, I forgot to say on TRAP  
25 47, the publication rule, that one of the concerns that

1 the justices, the appellate court justices, expressed last  
2 week at their college was what were the publishers going  
3 to do if we repeal or eliminate Rule 47.7, which is the no  
4 citation provision; and we -- so I don't know the answer  
5 to that, and we've talked about it in the room, so when I  
6 got back to the office I had our court administrator call  
7 West and ask them; and you won't be surprised, perhaps, to  
8 know that if that rule goes away, they're going to publish  
9 it somewhere, because if you can cite it then people will  
10 want to buy it and so --

11 CHAIRMAN BABCOCK: They're in the business  
12 of selling.

13 JUSTICE HECHT: They're in the business of  
14 selling, and so I don't know -- the letter I sent to Chip  
15 doesn't say that because I didn't know it at the time I  
16 wrote the letter, but in the discussion about whether the  
17 do-not-publish designation should be retained or not, at  
18 least one publisher's tentative indication is it doesn't  
19 matter if you do away with the no citation rule. They're  
20 going to publish it whether it says on the opinion "Do not  
21 publish or not."

22 PROFESSOR DORSANEO: They published them  
23 anyway electronically.

24 JUSTICE HECHT: Yes. But I mean in books.  
25 They do it anyway, but they only publish them

1 electronically if the court --

2 PROFESSOR DORSANEO: Gives it to them.

3 JUSTICE HECHT: -- gives it to them. And  
4 the courts in Texas don't have a standard procedure on  
5 that, but another change in TRAP 47 would provide all of  
6 the courts to provide all of the opinions to the media.  
7 So if they did that, presumably West would put them all on  
8 Westlaw, but they'll also -- they say they're going to  
9 publish them also and that the same thing is happening in  
10 California and New York, and they will probably do the  
11 same thing in those states.

12 HONORABLE SARAH DUNCAN: I wonder if they  
13 realize they're going to really hurt their book sales.

14 HONORABLE HARVEY BROWN: Eventually no one  
15 will be able to afford to buy a book, because there will  
16 be so many.

17 CHAIRMAN BABCOCK: Well, that's their  
18 problem.

19 JUSTICE HECHT: Yeah. That's just fine.

20 PROFESSOR DORSANEO: See, but they're not  
21 really expecting to sell books for much longer. LEXIS,  
22 for example, is not expecting that there will be a market  
23 for books, certainly not case reports.

24 CHAIRMAN BABCOCK: Okay. The other thing  
25 that Justice Hecht didn't mention about the presentation

1 that he and Chris and Justice McClure made to the judges  
2 was that there were -- there was overwhelming approval and  
3 satisfaction with their presentation. I've gotten several  
4 e-mails from judges who were there that says it was one of  
5 the most interesting things that they have heard and  
6 participated in. Who would have thunk it of Rule 47.7,  
7 but --

8 JUSTICE HECHT: Just shows how boring our  
9 lives are.

10 HONORABLE JAN PATTERSON: I want to express  
11 appreciation to both Justice McClure and Justice Hecht  
12 because it was a very open process, and the presentation  
13 was excellent, and we had discussion groups, and I think  
14 everybody felt good about the process, and it was a very  
15 candid discussion, and I think people felt free to give  
16 their candid responses, and it was a totally admirable  
17 process, and we appreciated it very much, Judge.

18 CHAIRMAN BABCOCK: Yeah. Okay. Onto  
19 recusal. Frank Gilstrap and I met with Senator Harris,  
20 when, last week, week before? Week before last.

21 MR. GILSTRAP: Yes.

22 CHAIRMAN BABCOCK: And, Frank, you want to  
23 report on that?

24 MR. GILSTRAP: Well, we had a very good  
25 discussion with Senator Harris. He expressed -- the thing

1 I think that he was most concerned with was that the  
2 specific concerns that had been raised by the Tarrant  
3 County judges had been addressed. We truthfully assured  
4 him that we had spoken with those judges and those  
5 concerns have been addressed, and they have told us so.

6 We still -- and so I think that, you know,  
7 Senator Harris will probably be okay about concerns from  
8 that area. It still kind of left open the question of  
9 what happens to his statute. That issue was not resolved,  
10 and I think he's probably going to wait and see what we  
11 do.

12 CHAIRMAN BABCOCK: Well, this rule would be  
13 inconsistent -- I mean, it incorporates most of what his  
14 statute has, but it would be inconsistent and overlapping  
15 with his statute, so I would expect that the Court would  
16 repeal it, the statute, with this rule if they adopt it.

17 MR. GILSTRAP: Yeah, and he's heard that.  
18 He just didn't make a comment on it.

19 CHAIRMAN BABCOCK: Yeah. Yeah. Okay. So  
20 that's it, but basically he's happy with the rule that  
21 we've come up with. We've addressed the problems that he  
22 sought to cure with the statute; but as with anything, if  
23 we let it hang around long enough people are going to spot  
24 things, which is not a bad thing; and Carl has -- Carl  
25 Hamilton has come up with an issue about the presiding

1 judge being unrecusable. This is a fairly recent  
2 communication, and I don't know if everybody has it, but  
3 maybe, Carl, you could describe the problem.

4 MR. HAMILTON: Well, we talked about this in  
5 one of our other meetings, and I think it sort of fell  
6 through the cracks, but the question arises as to whether  
7 or not the presiding judge is subject to recusal. There  
8 is one unpublished opinion out of the Dallas court. It's  
9 in re: Claire Hopkins, which holds that the presiding  
10 judge is not subject to recusal under 18a, essentially  
11 because he's not the judge before whom the case is pending  
12 and, likewise, he's not subject to objection under Chapter  
13 74 of the Government Code because he is not assigned under  
14 the Government Code.

15 The rule itself gives him the right to hear  
16 the motion to recuse. There is another unpublished  
17 opinion out of the Corpus Christi court. The decision was  
18 the same. They held that Judge Hester was not subject to  
19 recusal as the presiding judge hearing the motion to  
20 recuse and was not subject to a challenge under Chapter  
21 74. I think that our rule clouds the issue because the  
22 old rule had in it that you can file a motion against the  
23 judge before whom the case is pending. We took that  
24 language out. That no longer appears, but if we're going  
25 to provide that the presiding judge is not subject to

1   recusal then in our paragraph number (e) (1), we need to  
2   put it back in that a motion to disqualify or recuse the  
3   judge before whom the case is pending, that would -- if we  
4   leave it out it sort of sounds like we're taking the  
5   position that the presiding judge is subject to recusal.

6                   HON. F. SCOTT McCOWN:   Well, shouldn't he  
7   be, Carl?

8                   MR. HAMILTON:   Well, that's kind of a policy  
9   question.   If you allow the presiding judge to be recused  
10  then where does he send it; and whoever he sends it to, if  
11  they can be recused, you just keep going on ad infinitum.  
12  You never get to a stopping place.   These do apply to  
13  criminal cases, so if you had a defendant, a criminal,  
14  that could apply that rule to every judge, he would never  
15  get tried; and it may not be an argument to say, well, you  
16  could assign an appellate judge, they're not subject to  
17  it, but the appellate judge when sitting in that capacity  
18  wouldn't be an appellate judge.   He would be sitting as a  
19  trial judge.

20                   CHAIRMAN BABCOCK:   Now, are you saying --  
21  are you suggesting, Carl, that there are no circumstances  
22  in which the presiding judge could be recused?

23                   MR. HAMILTON:   No, no.   I'm saying that  
24  there might very well be, but that ought to be tested on  
25  appeal rather than in a recusal motion, which means we

1 also need to fix the rule to provide for an appeal in the  
2 event of a denial as well as the granting of the motion to  
3 recuse. Because you might have a presiding judge, let's  
4 say, that -- well, we say now on appeal that it's only  
5 on -- if the motion is denied it can be reviewed, but  
6 let's suppose the presiding judge is biased or prejudiced  
7 in favor of the movant and grants it. You may want to  
8 have that tested on appeal.

9 HON. F. SCOTT McCOWN: Well, you're drawing  
10 a distinction then. You're saying that I can move to  
11 recuse the presiding judge and that if the presiding judge  
12 thinks that there are grounds for recusal, the presiding  
13 judge should step aside; but they make that decision; and  
14 if they don't step aside and they rule against me then my  
15 remedy is an ultimate review on appeal.

16 MR. HAMILTON: Correct. Because otherwise  
17 it will just keep going.

18 CHAIRMAN BABCOCK: Frank.

19 MR. GILSTRAP: But why don't we deal with  
20 that with the three strike problem? I mean, if it's --  
21 you know, you've got three strikes, and at that point you  
22 can keep going with the same judge; and if one of them is  
23 against the presiding judge, you've used it.

24 MR. HAMILTON: Well, because that depends on  
25 how you define that. If you're going to say that it's



1 three strikes against three different judges, that's not  
2 fair, because maybe you were right on the first two. So  
3 if you say it's going to have to be three strikes against  
4 the same judge, then that doesn't solve the problem,  
5 because it's going to be a series of motions that are  
6 going to be filed.

7           You may have 150 defendants in a case, and  
8 each one of them -- under our rule each party has a right  
9 to file a motion to recuse; and they could file them  
10 forever against every judge that's assigned to the case  
11 and then it has to be passed on to another one; and he  
12 gets recused, passed onto another one. It never gets  
13 heard because everybody assigned to hear it gets recused,  
14 so there has to be a stopping place.

15           HON. F. SCOTT McCOWN: Well, I've got no  
16 problem with the idea -- I mean, Federal judges, if you  
17 move to recuse them, they decide their own recusal; and  
18 it's reviewed on appeal; and I have -- and I think in the  
19 criminal system that's the same because our civil rule  
20 doesn't apply I think on the criminal system. It's the  
21 same.

22           HONORABLE DAVID PEEPLES: It does.

23           HON. F. SCOTT McCOWN: It does apply?

24           HONORABLE DAVID PEEPLES: Yes.

25           HON. F. SCOTT McCOWN: Same procedure in the

1 criminal side?

2 MR. HAMILTON: Same procedure.

3 HON. F. SCOTT McCOWN: Okay. Well, I have  
4 no problem with the idea that it's so unlikely that you  
5 would have a good recusal against the trial judge and a  
6 good recusal against the presiding judge, it's just so  
7 unlikely that that would be in good faith, and the  
8 presiding judge is a special person. He's a better person  
9 than the mere trial judge. He's been anointed by the  
10 governor because of his extra special qualities of saying  
11 that he gets to decide his own recusal; and if he gets it  
12 wrong, it's reviewed on appeal; but we're not going to go  
13 through all this procedural shenanigans to resolve it.

14 I've got no problem with that, but I would  
15 never have guessed that from reading this rule. If that's  
16 what we're saying, I think we ought to say it.

17 CHAIRMAN BABCOCK: Nina.

18 MS. CORTELL: My memory is that we have  
19 discussed it and that we did intend recusal to apply to  
20 the presiding judge.

21 CHAIRMAN BABCOCK: Yes.

22 MS. CORTELL: That's my recollection, but we  
23 have had so many discussions --

24 MR. HAMILTON: That it was not intended to?

25 CHAIRMAN BABCOCK: It was. It was.

1 MS. CORTELL: That we had intended that the  
2 recusal --

3 MR. HAMILTON: Well, then we need to put  
4 back some language because the basis for the Dallas court  
5 opinion was that the rule says that he's not the judge  
6 before whom the case is pending.

7 HON. F. SCOTT McCOWN: No, we wouldn't want  
8 to put it back, Carl, because they're saying they would  
9 want the rule to apply to the presiding judge, and we've  
10 taken out the language that the Dallas court hooked it on  
11 to say that it didn't apply to the presiding judge.

12 MR. HAMILTON: By taking it out it sounds  
13 like we're saying we want it to apply to the presiding  
14 judge.

15 MS. CORTELL: I thought that's what we did  
16 want.

17 HON. F. SCOTT McCOWN: That's what she's  
18 saying. We do want it.

19 CHAIRMAN BABCOCK: We do want it to apply to  
20 the presiding judge.

21 MR. HAMILTON: Oh, I thought you said we did  
22 not want it.

23 MS. CORTELL: No, no. I understood our  
24 prior discussion to be that it should apply to the  
25 presiding judge.

1 HONORABLE DAVID PEEPLES: I think when we  
2 did that we didn't realize we were changing the law.

3 CHAIRMAN BABCOCK: Justice Hecht.

4 JUSTICE HECHT: It happened one time -- it's  
5 only happened one time that I know about, but it did  
6 happen one time, and it came to our Chief, and there was  
7 every indication that the movant would move to recuse the  
8 appointed judge, so we put in the assignment order, the  
9 Chief did, that he could not be recused. We didn't have  
10 any authority for that particularly, but that's why we're  
11 the Supreme Court.

12 MR. HAMILTON: Well, if we're going to have  
13 the presiding judge subject to recusal, we haven't  
14 provided a procedure in here for it.

15 CHAIRMAN BABCOCK: Yes, we have. I think.

16 MR. HAMILTON: No, we haven't.

17 CHAIRMAN BABCOCK: It says, "If the motion  
18 complies with subparagraph (e)(1) and subparagraph (e)(2),  
19 the presiding judge of the administrative region shall  
20 hear the motion or immediately assign a judge to hear it."

21 MR. HAMILTON: Yeah, but suppose he decides  
22 to hear it himself and then there is a motion to recuse  
23 filed against him.

24 CHAIRMAN BABCOCK: Right.

25 MR. HAMILTON: What does he do with that?

1                   CHAIRMAN BABCOCK:  Immediately assign it to  
2 the judge.

3                   HON. F. SCOTT McCOWN:  He picks the judge  
4 that gets to decide whether he's recused?

5                   MR. HAMILTON:  He can't do anything once the  
6 motion is filed against him, so it stops.  He can't take  
7 any further action.

8                   HONORABLE BILL RHEA:  And he can't refer it  
9 to the presiding judge because he is the presiding judge.

10                  MR. HAMILTON:  Yeah.  He can't refer it to  
11 himself.

12                  HON. F. SCOTT McCOWN:  But he can't take any  
13 other further action in the case.

14                  HONORABLE SARAH DUNCAN:  He refers it to the  
15 case he assigns.

16                  MR. HAMILTON:  We have a stumbling block  
17 there that we can't get by unless we say the presiding  
18 judge is not subject to recusal; or I guess to put it  
19 another way, that if a motion is filed against him he can  
20 deny it and it can be --

21                  HON. F. SCOTT McCOWN:  Yeah.  It's not that  
22 he's not subject to recusal.  It's that there's a  
23 different procedure.  He decides his own --

24                  MR. HAMILTON:  Right.

25                  HON. F. SCOTT McCOWN:  -- and it's reviewed

1 on appeal.

2 MR. HAMILTON: He decides his own, and it's  
3 reviewed on appeal.

4 HON. F. SCOTT McCOWN: And I don't -- we may  
5 have decided this, but I don't know that we really knew  
6 exactly what we were doing. I mean, I hadn't really  
7 thought through it. Unless there's a death certificate to  
8 that decision, I don't think it was adjudicated, and how  
9 about a vote on what we think the policy ought to be?

10 CHAIRMAN BABCOCK: Yeah. Sarah.

11 HONORABLE SARAH DUNCAN: I could be wrong,  
12 but I have been taking my Ginko-Biloba, so maybe my memory  
13 is better, but I thought we did expressly discuss this  
14 question and we decided that we couldn't follow it all the  
15 way through. It got too complicated for a rule, and we  
16 would just leave it open.

17 HON. F. SCOTT McCOWN: Well, if we've left  
18 it open, we've left it open with a rule that does not  
19 work, so the first time it comes up what do you do? It  
20 looks to me like we ought to solve the problem. Either  
21 way we need to make a change.

22 CHAIRMAN BABCOCK: Anybody remember which  
23 meeting it was?

24 PROFESSOR DORSANEO: We discussed this 78  
25 times.

1 HONORABLE DAVID PEEPLES: Chip, I think I  
2 proposed something way back. I thought there ought to be  
3 somebody in the system who was bulletproof and could go  
4 ahead, and I think what I was in favor of was saying that  
5 if the presiding judge goes to hear a motion to recuse and  
6 the person files a motion against the presiding judge,  
7 that has to go to the Chief Justice, and it doesn't stop  
8 things unless the Chief Justice looks at it and wants them  
9 to stop.

10 In other words, that wouldn't make the  
11 presiding judge totally above the law, but it would stop  
12 shenanigans.

13 CHAIRMAN BABCOCK: Yeah.

14 HONORABLE DAVID PEEPLES: And the Chief  
15 Justice could look at it and say, "This is serious. I  
16 think you need to stop" or "Keep on going."

17 CHAIRMAN BABCOCK: Did we vote on that?

18 HONORABLE DAVID PEEPLES: I don't remember.  
19 I know that was rejected, but I don't know if I was  
20 specific on it. I just don't remember.

21 HON. F. SCOTT McCOWN: Well, but I don't  
22 think that's a very practical problem because there's only  
23 one Chief Justice and getting a hold of him and having him  
24 make quick decisions -- because think about what you're  
25 saying here. All the presiding judge is doing is deciding

1 a motion to recuse --

2 HONORABLE DAVID PEEPLES: Someone else.

3 HON. F. SCOTT McCOWN: -- someone else, and  
4 so your error on appeal would be the presiding judge  
5 should have recused because he failed to recuse somebody  
6 that should have been recused. The chances of you proving  
7 that or that being true are just astronomical.

8 HONORABLE DAVID PEEPLES: My default rule,  
9 what I was going to say is it doesn't stall anything to  
10 file that motion. The presiding judge is not above the  
11 law because the Chief Justice can look at it and stop  
12 things, but unless the Chief does that you keep on going.  
13 And so you wouldn't have to wait around for him to say,  
14 "Go ahead."

15 CHAIRMAN BABCOCK: Yeah. Judge Brown.

16 HONORABLE HARVEY BROWN: I thought we did  
17 discuss these ideas, but the point is new to me, and maybe  
18 I just didn't get it last time, was you could have the  
19 presiding judge subject to recusal but just with a  
20 different remedy; i.e., you could preserve that point for  
21 appeal. That's new to me. I hadn't thought of that  
22 distinction. So you could still raise the point on  
23 appeal.

24 CHAIRMAN BABCOCK: Yeah, I don't see  
25 anything in this rule that exempts the presiding judge



1 from being subject to recusal, but I agree with Scott's  
2 point that this language here doesn't speak to what he  
3 does if he does face a motion for recusal.

4           Well, we did take a vote apparently. Do we  
5 have that transcript? In May of last year on whether or  
6 not to delete paragraph (d), which moved into paragraph  
7 (c), which said, "When the presiding judge of the  
8 administrative region elects to hear the motion to recuse  
9 or disqualify and a motion to recuse or disqualify such  
10 presiding judge is filed"; and there were 19 votes to  
11 delete that language and 7 votes to leave it in.

12           HON. F. SCOTT McCOWN: So what's that mean?

13           CHAIRMAN BABCOCK: Well, I'm not quite sure.  
14 That's the disposition chart that we have.

15           HON. F. SCOTT McCOWN: Because, see, you  
16 have another problem. If there's a motion to recuse the  
17 trial judge and it goes to the presiding judge, even the  
18 act of assignment is a judicial act.

19           CHAIRMAN BABCOCK: Right.

20           HON. F. SCOTT McCOWN: You could move to  
21 recuse the presiding judge from even assigning another  
22 judge to hear the recusal.

23           HONORABLE BILL RHEA: Chip?

24           CHAIRMAN BABCOCK: Yeah.

25           HONORABLE BILL RHEA: It seems to me that

1 the place that we may have gotten to and that makes sense  
2 to me, if you read this whole rule, the language of it  
3 repeatedly is "after referring the motion to the presiding  
4 judge." It wouldn't naturally apply to the presiding  
5 judge; and I think it probably doesn't as you read it; and  
6 in those rare circumstances where there might be such a  
7 motion and the presiding judge either recused then  
8 referred to the Chief Justice or didn't recuse and they  
9 went to mandamus, that, number one, it's so rare it's  
10 probably not worth dealing with in the rule; and, number  
11 two, as I've said, I think it's implicit in here that  
12 without specifically saying so, which I suspect is why we  
13 took that out, it doesn't naturally apply to the presiding  
14 judge. I would suggest we leave it as it is.

15 MR. HAMILTON: Well, if it's the consensus  
16 of the committee that it ought not to, we ought to just  
17 put in a statement that says that -- you know, that any  
18 motion filed against the presiding judge he'll hear that  
19 himself, and if he denies it then that can just be taken  
20 up on appeal and that he's also not subject to the Chapter  
21 74 challenge because he's not assigned under Chapter 74.

22 CHAIRMAN BABCOCK: Well, we did discuss  
23 this. Orsinger says, "If you're going to do that then we  
24 better take everything out of here about how to process a  
25 motion to recuse a presiding judge. It's not in the rule

1 right now. No mention is made about what to do when  
2 somebody tries to recuse the presiding judge. We've now  
3 written a lot of procedures on how to handle recusal of  
4 the presiding judge, and so we've given a road map to the  
5 pro se litigants who wanted to recuse the presiding judge  
6 that they can do it and how it works, and so if we're not  
7 going to prevent any interim proceedings then it might be  
8 wiser not to cover recusals of presiding judges so as not  
9 to suggest the thought to the pro ses that they can do  
10 it."

11           And then Paula Sweeney says -- talks about a  
12 comment about the pro ses being abusive. Judge Brister  
13 weighs in on the same issue, and that's what led to the  
14 vote on taking the language out dealing with recusing the  
15 presiding judge.

16           HON. F. SCOTT McCOWN: Well, but that seems  
17 to me that we took it out because of a policy decision  
18 that you couldn't do it or we didn't want to do it or at  
19 least we didn't want to foster it, but the problem that  
20 Carl has brought to our attention is that there is  
21 appellate decision that expressly says the presiding judge  
22 -- there's two that expressly says a presiding judge can't  
23 be recused, that is hinged on language we've removed.

24           CHAIRMAN BABCOCK: Right.

25           HON. F. SCOTT McCOWN: And so what I would

1 suggest is that under subdivision -- under referral. Oh,  
2 excuse me.

3 MR. HAMILTON: "Procedure"?

4 HON. F. SCOTT McCOWN: Yeah. Under  
5 "procedure."

6 CHAIRMAN BABCOCK: What number are you  
7 talking about, (e)?

8 HON. F. SCOTT McCOWN: (e). Under (e), it's  
9 on the third page of "procedure." We've got the motion,  
10 time to file, referral, interim, abatement, order,  
11 hearing, disposition. I suggest under "disposition," we  
12 add a new (9) that says, "Any motion to recuse filed  
13 against the presiding judge shall be decided by the  
14 presiding judge," and then period and then a second  
15 sentence that says, "If the presiding judge denies the  
16 motion, the denial is subject to review on appeal." Or  
17 there might be more succinct language, but that would be  
18 the two concepts and that we put it in here expressly.

19 CHAIRMAN BABCOCK: There's another place to  
20 do it, Scott, and that's under (e)(3), the language that  
21 says, "If the motion complies with subparagraph (e)(1) and  
22 subparagraph (e)(2) is applicable, the presiding judge of  
23 the administrative region shall hear the motion or  
24 immediately assign a judge to hear it." We could add a  
25 clause or a sentence that says "including a motion to

1 recuse filed against the presiding judge." So that would  
2 allow the presiding judge to write the hearing himself or  
3 if he didn't feel comfortable about it he could assign  
4 somebody else.

5 MR. HAMILTON: I like Scott's idea better.  
6 I think it needs to be spelled out clearly that if you're  
7 going to file it against the presiding judge he can hear  
8 it, but I think on the appeal part I think that we need to  
9 change the appeal section to provide for appeals not only  
10 for the --

11 HON. F. SCOTT McCOWN: Yeah. We probably  
12 don't even need the appeal language that I suggested. If  
13 we say -- if right there between (8) and (9) we add a new  
14 (9) that says "Any motion filed against the presiding  
15 judge shall be decided by the presiding judge" and then  
16 the very next section says, "If the motion to recuse is  
17 denied, the order may be reviewed for abuse of discretion  
18 on appeal from the final judgment."

19 MR. HAMILTON: I think there we need to say  
20 "denied or granted" because the claim might be that the  
21 presiding --

22 HON. F. SCOTT McCOWN: Well, traditionally  
23 you don't get to review grants of recusal.

24 MR. HAMILTON: I know, but that's because it  
25 didn't matter, but now if you're going to have a presiding

1 judge hear something and maybe he should not have heard it  
2 and so he granted the motion and replaced the trial judge.

3 HON. F. SCOTT McCOWN: Well, but --

4 MR. HAMILTON: And he shouldn't have done  
5 that.

6 HON. F. SCOTT McCOWN: But normally, Carl,  
7 you wouldn't ever review that because it would be  
8 harmless error. If the next judge is a fair judge, there  
9 isn't any error from the fact that the first judge was  
10 wrongfully recused. We've never allowed that to --

11 MR. HAMILTON: Unless you say, "Well, I  
12 don't want the presiding judge to hear this motion to  
13 recuse Judge A because I know they don't get along and  
14 he's a friend of the plaintiffs and he's going to put  
15 another judge in there that's going to be favorable to the  
16 plaintiff, so I want to recuse the presiding judge." He  
17 declines to be recused. Sure enough he puts another judge  
18 in there.

19 HON. F. SCOTT McCOWN: But if you have no  
20 complaint against the judge he put in it's harmless error.

21 MR. HAMILTON: Well, I guess that's right.  
22 You could complain against the judge he puts in.

23 CHAIRMAN BABCOCK: Right.

24 HON. F. SCOTT McCOWN: So but I do think  
25 Carl's right that we need to spell this out; and I guess I

1 also think that we need a place where the buck stops, it  
2 can be reviewed on appeal; and it's just going to be  
3 extraordinarily unlikely that you have a litigant with a  
4 good motion to recuse against a judge and a good motion to  
5 recuse against a presiding judge, both of which have been  
6 wrongfully granted. That just -- I mean wrongfully  
7 denied. That's just so unlikely.

8                   CHAIRMAN BABCOCK: Scott, I'm not  
9 particularly against creating another subsection, but in  
10 light of the prior vote where we didn't want to highlight  
11 this, wouldn't we do everything that we're trying to do if  
12 we say in subparagraph (3), "If the motion," comma,  
13 "including a motion to recuse the presiding judge," comma,  
14 "complies with (e)(1), the presiding judge shall hear the  
15 motion or assign it to somebody else"? Judge Rhea.

16                   HONORABLE BILL RHEA: Couldn't we take a  
17 vote on whether or not we want to try to address this  
18 issue, especially in lieu of the fact that we've already  
19 voted on it, as opposed to going to where we should put  
20 it? It seems to me like we're jumping the gun in  
21 discussing whether it should go here or there.

22                   CHAIRMAN BABCOCK: Yeah. That's a good  
23 point, Bill.

24                   HON. F. SCOTT McCOWN: Well, I guess Judge  
25 Rhea's argument would seem to imply that we've already

1 decided this, either implicitly or expressly; but even if  
2 that's true, I mean, Carl's brought us some very important  
3 new information about how we've changed the wording in the  
4 rule in a way that interacts with these cases that we  
5 didn't have; and, secondly, the rule doesn't work. So if  
6 we decided it, we made a bad decision, because the rule  
7 doesn't work the way we've written it.

8 HONORABLE BILL RHEA: I disagree that it  
9 does not work.

10 HON. F. SCOTT McCOWN: Well, if you're the  
11 presiding judge and somebody moves to recuse you, what do  
12 you do?

13 HONORABLE BILL RHEA: I either decide the  
14 motion myself or assign somebody to hear it at my  
15 discretion. Like I said, I don't think this rule by the  
16 language and the assumptions that are made in it would  
17 apply to me as the presiding judge. They are not designed  
18 for that.

19 HON. F. SCOTT McCOWN: Well, where does it  
20 say it doesn't apply to you as the presiding judge?

21 HONORABLE BILL RHEA: It doesn't say it  
22 explicitly, but it does obviously implicitly. I can't  
23 refer it to the presiding judge because I am the presiding  
24 judge. I mean, these procedures just don't apply to me as  
25 the presiding judge.



1                   HON. F. SCOTT McCOWN:  If that's true, I  
2 mean, and I just don't -- it's just cold comfort to me to  
3 say that it's obvious but you can't show me anywhere that  
4 it doesn't, but if it is obvious then what's wrong with  
5 making it obvious?

6                   CHAIRMAN BABCOCK:  Well, I think to back up  
7 what Judge Rhea is saying, there is a sentence in here  
8 that says, "If the motion complies with the procedural  
9 requirements, the presiding judge of the administrative  
10 region shall hear the motion," and it does not exempt a  
11 motion filed against the presiding judge.  There's no  
12 language in here that says "except for motions filed  
13 against the presiding judge."

14                   It says, "If the motion complies  
15 procedurally, the presiding judge of the administrative  
16 region shall hear the motion or immediately assign a judge  
17 to hear it."

18                   HON. F. SCOTT McCOWN:  I guess I'm puzzled.  
19 If that's true, why don't we just expressly say it in a  
20 way that nobody has to reason through structure but  
21 instead can just read the cold, hard words?

22                   MR. HAMILTON:  Chip, that language you just  
23 read, though, would be contrary to the other language that  
24 says, "Once a motion to recuse is filed against a judge he  
25 can take no further action," so, therefore, he couldn't

1 even assign it to himself. Or he couldn't hear it.

2 HONORABLE BILL RHEA: That's if you read  
3 that provision in isolation apart from the whole --

4 HON. F. SCOTT McCOWN: But why make it hard?  
5 Why not make it easy? Why make it an insiders game where  
6 you have to pore over this and try to figure out from  
7 structure how it works when we could just say in one  
8 sentence --

9 HONORABLE BILL RHEA: Well, as was said a  
10 year ago, why invite the question?

11 HON. F. SCOTT McCOWN: But you don't invite  
12 the question if you expressly say a -- it seems to me like  
13 you invite the question through ambiguity. If you  
14 expressly say, "Any motion filed against the presiding  
15 judge shall be decided by the presiding judge," I don't  
16 see what that invites.

17 MS. CORTELL: I think the problem we  
18 currently have is that the rule is arguably now applicable  
19 to presiding judges, and we have ambiguity in the rule as  
20 to how the presiding judge should react to a recusal  
21 motion, and if we use the sentence which says the judge  
22 shall hear or immediately assign, we haven't covered the  
23 possibility of the presiding judge choosing to recuse, and  
24 that would trigger then he can't handle the motion.

25 And let me add one other thing. I think

1 this came up in previous discussion either at committee or  
2 full committee. I had a case that involved this. I don't  
3 know if it's the one Justice Hecht is referred to or not.  
4 It involved the diocese in Dallas, and in that one you did  
5 not have the same litigant filing the motions to recuse.  
6 You had -- in the trial court the defendant filed the  
7 motion to recuse. Then when it got to the presiding judge  
8 the plaintiff filed a motion to recuse, so it wasn't the  
9 same party filing two successive motions. In that case  
10 the presiding judge appointed -- it went to Justice  
11 Phillips, another judge was assigned. It went very  
12 smoothly, I must say. I mean, the order assigning the  
13 judge who ultimately heard it, it all happened, as I  
14 recall, within a day or two. It really worked quite well,  
15 so --

16 JUSTICE HECHT: And Judge McDowell recused.  
17 Judge McDowell recused on it.

18 MS. CORTELL: He did. What I'm saying is  
19 the rule as currently written doesn't provide for that.

20 JUSTICE HECHT: Yeah. No, the case I was  
21 thinking of was where a judge would not recuse, but he  
22 didn't know what to do with the motion, so he sent it to  
23 the Chief.

24 MS. CORTELL: Oh.

25 CHAIRMAN BABCOCK: How many people think

1 that we ought to try to --

2 MR. HAMILTON: Can I say one other thing,  
3 Chip? I talked to Judge Hester about this, and he told me  
4 that in the judges -- regional administrative judges  
5 conferences that they have had that they are all of the  
6 opinion that they are not subject to recusal. That's the  
7 position that they take, and that's why we have these  
8 three cases that have gone up on appeal where they have  
9 attempted to recuse the presiding judge.

10 CHAIRMAN BABCOCK: How many people think  
11 that we ought to leave the rule as it is and not include  
12 clarifying language, as has been suggested, and if we get  
13 over that hurdle then we'll figure out what to say and  
14 where to put it.

15 This is kind of Judge Rhea's point. We  
16 ought to leave the rule as it is because it's clear  
17 enough. How many people believe that?

18 How many people are against that concept?  
19 Okay. By a vote of 5 to 11 we'll keep working on this.

20 Now, what would be wrong, Judge McCown, or,  
21 Carl, if in (e) (3) we said, "If the motion complies with  
22 sub" -- "If the motion," comma, "including a motion filed  
23 against a presiding judge," comma, "complies with  
24 subparagraph (e) (1) and subparagraph (e) (2) is applicable,  
25 the presiding judge of the administrative region shall

1 hear the motion"? Is there anything -- are we missing  
2 anything if we add that in?

3 MR. GILSTRAP: Conceivably the next  
4 sentence has that "notwithstanding" that could trump it.  
5 I mean, it kind of reads back into (e)(4). It's kind of  
6 circular.

7 CHAIRMAN BABCOCK: And that was put there at  
8 the behest of Judge Hester, as I recall.

9 MR. HAMILTON: Well, I think we have to deal  
10 with two things. I think we have to deal with the problem  
11 of stating that if a motion is filed against the presiding  
12 judge he can hear it, and I think we have to deal with the  
13 problem of what does he do if he -- of course, if he  
14 grants it then we still have to give him the power, I  
15 suppose, to assign some other judge to hear the main  
16 motion to recuse.

17 JUSTICE HECHT: I think he has to ask the  
18 Chief.

19 MR. HAMILTON: Well, no.

20 JUSTICE HECHT: At least that's what  
21 happened in Nina's case.

22 MR. HAMILTON: Either that or assign it to  
23 the Chief for appointment of someone else.

24 HON. F. SCOTT McCOWN: Chip, can you read  
25 that language again, and I think I have a slight

1 suggestion?

2 CHAIRMAN BABCOCK: Okay. I'm reading from  
3 subparagraph (e)(3) now, about the middle of the  
4 subparagraph. "If the motion," comma, "including a motion  
5 filed against a presiding judge," comma, "complies with  
6 subparagraph (e)(1) and subparagraph (e)(2) is applicable,  
7 the presiding judge of the administrative region shall  
8 hear the motion or immediately assign a judge to hear it."

9 HON. F. SCOTT McCOWN: Can you change that  
10 to "any"? "If the motion," comma, "including any motion  
11 filed against a presiding judge"?

12 CHAIRMAN BABCOCK: Yeah. Sure. "Including  
13 any motion filed against a presiding judge."

14 HON. F. SCOTT McCOWN: I think that works if  
15 we'll -- on that "notwithstanding any local rule or other  
16 law," "after motion to recuse or disqualify has been  
17 filed, no judge may preside, re-assign, transfer, or hear  
18 any matter in the case except pursuant to subparagraph (e)  
19 before the motion has been decided by the presiding judge  
20 or other judge assigned by the presiding judge."

21 I think we need to -- I think actually this  
22 is a change we probably need regardless because the  
23 "notwithstanding," it may be the presiding judge that's  
24 hearing it. He doesn't always assign it out, and we've  
25 left that out, but if we add "presiding judge or other

1 judge assigned by the presiding judge" then I think that  
2 makes the notwithstanding flow better, and I think that  
3 would work.

4 CHAIRMAN BABCOCK: Does that cure it, Frank?

5 MR. GILSTRAP: I think that cures the  
6 problem.

7 CHAIRMAN BABCOCK: How does everybody feel  
8 about that? Okay. Anybody opposed to making these  
9 revisions? Carl, does that cure your problem?

10 MR. HAMILTON: Well, I think so, except that  
11 it doesn't tell us what he does if he recuses himself. I  
12 guess we need to add a sentence that if the presiding  
13 judge recuses himself he assigns the matter to the Chief  
14 Justice for further assignment.

15 HON. F. SCOTT McCOWN: Is there a statute or  
16 rule that already says what happens if the presiding judge  
17 is disqualified or disabled or not around?

18 JUSTICE HECHT: I just looked for it, and I  
19 can't find it. I don't know why -- there must be  
20 something, otherwise nobody would have known what to do in  
21 that case.

22 MR. HAMILTON: Yes. There is a rule, and  
23 it's (e)(10). It's not real clear, but we just took it  
24 from the old rule. It says, "The Chief Justice may  
25 appoint and assign judges in conformity with this rule and

1 pursuant to statute." I assume that that's the provision  
2 under which he would assign somebody.

3 HON. F. SCOTT McCOWN: Yeah. I mean, I  
4 think we could leave it like this. There seems to be some  
5 people who want to try to hide the ball. They want to  
6 make it clear enough for lawyers but obscure enough that  
7 pro se litigants don't pick up on it, and that seems to  
8 hit this balance. If the presiding judge recused himself  
9 then obviously you've got this (e)(10) that says the Chief  
10 Justice can appoint and assign and that's where you'd have  
11 to go.

12 CHAIRMAN BABCOCK: The concept we're talking  
13 about here, though, is that the presiding judge could  
14 elect to hear it himself.

15 HON. F. SCOTT McCOWN: Right. But we were  
16 saying what do you do if he grants it? If he voluntarily  
17 recuses then you go to (e)(10). He lets the Chief Justice  
18 know that --

19 CHAIRMAN BABCOCK: The question is should we  
20 put that in there in writing?

21 MR. HAMILTON: The question is should we  
22 just say that at the end of the paragraph, that if he --  
23 if the presiding judge recuses himself, he'll refer the  
24 matter to the Chief Justice for further assignment?

25 HON. F. SCOTT McCOWN: Rather than put it in



1 that paragraph why don't we put it in (e)(10) and just  
2 say, "Whenever a presiding judge is disqualified, recused,  
3 or unavailable, the Chief Justice may also appoint and  
4 assign judges in conformity with this rule and pursuant to  
5 statute"? Because it's a bigger problem than just what if  
6 he's recused. What if he's on vacation.

7 CHAIRMAN BABCOCK: Disqualified.

8 HON. F. SCOTT McCOWN: Disqualified.

9 CHAIRMAN BABCOCK: I'm okay with that.

10 HONORABLE SAMUEL MEDINA: How did you say  
11 that?

12 HON. F. SCOTT McCOWN: I'd say, "Whenever  
13 the presiding judge is disqualified, recuses, or is  
14 unavailable." I mean, there are times when you don't have  
15 a presiding judge because the governor hasn't made an  
16 appointment.

17 MR. GILSTRAP: But, Scott, you qualified  
18 (10) and left it that's the only instance in which the  
19 Chief Justice may appoint or assign.

20 HON. F. SCOTT McCOWN: Well, how about  
21 putting it at the end? "The Chief Justice of the Supreme  
22 Court may also appoint and assign judges in conformity  
23 with this rule and pursuant to statute and whenever a  
24 presiding judge is" --

25 MR. HAMILTON: "Has recused or disqualified

1 himself."

2 HON. F. SCOTT McCOWN: -- "disqualified,  
3 recused, or unavailable."

4 HONORABLE SAMUEL MEDINA: Not "recused."  
5 "Recuses."

6 HON. F. SCOTT McCOWN: "Recuses."

7 "Disqualified, recuses, or is unavailable."

8 CHAIRMAN BABCOCK: Okay. So that proposal  
9 would add language to (e)(10) at the end of the last  
10 sentence, "Whenever the presiding judge recuses, is  
11 disqualified, or is unavailable." Okay. Sarah.

12 HONORABLE SARAH DUNCAN: What is the  
13 rationale for putting it all the way over in (e)(10)?

14 HON. F. SCOTT McCOWN: Because it covers  
15 more than one situation and because of the desire by some  
16 to achieve sufficient clarity to be understood by lawyers  
17 but obscure to pro se litigants who would abuse the rules.

18 MR. LOW: Don't put me on the record as  
19 discriminating against pro se litigants.

20 PROFESSOR ALBRIGHT: I have a question. So  
21 if the presiding judge recuses then the presiding judge  
22 has to bump it to the Chief Justice. The presiding judge  
23 can't just appoint another judge to hear this?

24 HON. F. SCOTT McCOWN: No. That's  
25 inconsistent with recusal.

1                   PROFESSOR ALBRIGHT: Because that's  
2 inconsistent with recusal.

3                   HON. F. SCOTT McCOWN: Right.

4                   CHAIRMAN BABCOCK: Okay. So here are the  
5 changes that we propose. In subparagraph (e)(3), the  
6 sentence that begins with "if the motion," we will insert  
7 the language, comma, "including any motion filed against a  
8 presiding judge," comma, then going back to the text as  
9 it's written, "complies with subparagraph (e)(1) and  
10 subparagraph (e)(2) if applicable, the presiding judge of  
11 the administrative region shall hear the motion or  
12 immediately assign a judge to hear it."

13                   That's the first change we've made and then  
14 in the next sentence that begins "notwithstanding any  
15 local rule or other law," we will insert the word  
16 "presiding" in front of "judge" and the phrase "or other  
17 judge" in front of the phrase "assigned." So that this  
18 sentence will read, "Notwithstanding any local rule or  
19 other law," comma, "after a motion to recuse or disqualify  
20 has been filed," comma, "no judge may preside," comma,  
21 "re-assign," comma, "transfer," comma, or "hear any matter  
22 in the case," comma, "except pursuant to subparagraph  
23 (e)(4)," comma, "before the motion has been decided by the  
24 presiding judge or other judge assigned by the presiding  
25 judge of the administrative region," comma, "except by

1 agreement of the parties as described above."

2           And the third and final change we're going  
3 to make is to (e) (10), adding at the end of the last  
4 sentence of (e) (10), "Whenever the presiding judge  
5 recuses, is disqualified, or is unavailable," so that the  
6 last sentence of (e) (10) would now read, "The Chief  
7 Justice of the Supreme Court may also appoint and assign  
8 judges in conformity with this rule and pursuant to  
9 statute whenever the presiding" --

10           HON. F. SCOTT McCOWN: No, "and whenever."

11           CHAIRMAN BABCOCK: "And whenever." "And  
12 whenever the presiding judge recuses, is disqualified, or  
13 is unavailable." Nina.

14           MS. CORTELL: Chip, I need to raise two  
15 points, and I apologize for that, but going back to  
16 (e) (3).

17           CHAIRMAN BABCOCK: Yeah.

18           MS. CORTELL: We say that that rule applies  
19 to the presiding judge and then we say what the presiding  
20 judge shall do. It seems to me we're saying he cannot  
21 recuse himself because we're saying he "shall hear or  
22 assign." We don't have permission here to recuse.

23           HON. F. SCOTT McCOWN: Well, no. He shall  
24 hear the motion to recuse himself, so he can grant the  
25 motion.

1 MS. CORTELL: Okay. Okay. Then go to the  
2 next sentence, and this is probably not a problem, but  
3 just we say, "No judge may preside, re-assign, transfer,  
4 or hear any matter in the case before the motion has been  
5 decided by." Is there at all any inconsistency or does it  
6 bother anyone when we say no judge can do anything? What  
7 we're really meaning to say is that the judge who's  
8 subject to the recusal motion may not preside, re-assign,  
9 or transfer. We are saying that another judge can act on  
10 the motion, but maybe that's too picky.

11 HON. F. SCOTT McCOWN: Well, it's not  
12 elegant, but we're not saying just the trial judge. When  
13 it says "no judge" what we were trying to capture there  
14 was the local administrative judge or some judge not in  
15 the line.

16 CHAIRMAN BABCOCK: Buddy.

17 MR. LOW: Chip, I would consider using the  
18 word "including" instead of "and," because if you say  
19 "and" it looks like it doesn't come within conformity with  
20 this rule, and it is in conformity with this rule.

21 CHAIRMAN BABCOCK: Yeah. Are you okay with  
22 that, Scott?

23 HON. F. SCOTT McCOWN: Sure.

24 CHAIRMAN BABCOCK: I agree. Alex.

25 PROFESSOR ALBRIGHT: I have a problem with

1 two "excepts" at the end of (3). We have "Notwithstanding  
2 any rule, no judge may preside except pursuant to  
3 subparagraph (e) (4)," "except by agreement of the  
4 parties."

5 HON. F. SCOTT McCOWN: Now, these people are  
6 going beyond the problem brought to us by Carl to  
7 introduce --

8 PROFESSOR ALBRIGHT: I'm just wondering if  
9 we should say "and" instead of the second "except."

10 HON. F. SCOTT McCOWN: No.

11 PROFESSOR ALBRIGHT: Just "except,"  
12 "except."

13 MS. CORTELL: We're estopped, estopped by a  
14 prior vote.

15 PROFESSOR ALBRIGHT: Okay.

16 CHAIRMAN BABCOCK: Anybody else?

17 HONORABLE SAMUEL MEDINA: Not on that. I  
18 have something else.

19 CHAIRMAN BABCOCK: Okay. Let's stick to  
20 this for the time being. All right. Are these three  
21 changes acceptable to our group? Is anybody opposed?

22 Okay. So these three changes will pass by  
23 unanimous vote. Are we ready for lunch over there?

24 CATERER: About five minutes.

25 CHAIRMAN BABCOCK: Okay. About five

1 minutes.

2 MR. HAMILTON: One other problem.

3 CHAIRMAN BABCOCK: Yeah, Carl.

4 MR. HAMILTON: In the, I guess, Chapter 33,  
5 the parental notification stuff, it has paragraph 1.6 of  
6 there provides for recusal of the appellate judges, which  
7 is inconsistent with our rule, which says that appellate  
8 judges are not subject to recusal.

9 HON. F. SCOTT McCOWN: Aren't subject to  
10 this rule.

11 MR. HAMILTON: To this rule, yeah. But I  
12 don't know if that's an inconsistency or not.

13 HON. F. SCOTT McCOWN: No.

14 CHAIRMAN BABCOCK: Isn't that just something  
15 different?

16 MR. HAMILTON: Aren't these rules that we're  
17 talking about under the parental notification, these are  
18 rules that are actually prepared, so it's a Rule 1.6.

19 HON. F. SCOTT McCOWN: Right. But it's a  
20 stand-alone rule. It's a special rule for that proceeding  
21 that's stand-alone that's been promulgated by the Court.

22 MR. HAMILTON: Well, I think if nobody has  
23 any problem with that --

24 CHAIRMAN BABCOCK: Yeah. I think that's  
25 okay, Carl. Okay.

1           Now, Judge Cayce raised an issue, which is  
2 in your materials at Tab 2.1(b). Has everybody read this  
3 or seen it or -- I think, my recollection is, that we had  
4 a fairly lengthy argument about this problem, but to the  
5 extent anybody doesn't agree with me -- does everybody  
6 have this letter? If Judge Cayce were here he would  
7 present it better, but he's concerned about the authority  
8 our proposed recusal rule gives a judge to proceed in a  
9 case without good cause when a motion to recuse alleging  
10 one of the four grounds listed in (e)(2) is filed within  
11 ten days of the trial.

12           He says, "(e)(2) authorizes the filing of  
13 motions to disqualify and to recuse at any time and  
14 requires that at least one of four grounds be stated in a  
15 motion to recuse filed within ten days of trial to entitle  
16 the party making the motion to a hearing on the merits.  
17 The intent of the latter requirement is to discourage  
18 dilatory tactics accordingly under the applicable  
19 provisions of (e)(3) and (e)(4). The penalties for filing  
20 a dilatory motion to recuse that is less than ten days  
21 before the trial that does not state one or more of the  
22 four grounds is that the motion may be denied without a  
23 hearing and the trial judge may proceed with the case as  
24 though no motion had been filed."

25           Judge Cayce says, "By contrast, however, a



1 motion to recuse that does state one of the four grounds  
2 cannot be denied without a hearing. Instead the motion  
3 must be heard like other timely filed motions to recuse,  
4 yet the party making the motion is subjected to the same  
5 interim proceeding treatment under (e)(4) as the party who  
6 filed the dilatory motion to recuse."

7           He says, "This is an inequity between the  
8 rights and protections enjoyed by parties under (e)(4) who  
9 timely file a motion stating grounds for recusal that  
10 existed and were known more than ten days before trial and  
11 parties who timely filed a motion stating grounds for  
12 recusal that did not exist and were not known more than  
13 ten days before trial." He says, "This is unfair."

14           I think we discussed this, my recollection  
15 is, and said that dilatory motions is the greater evil and  
16 that, yes, this inequity could potentially exist; but if  
17 there's truly a meritorious motion to recuse then the  
18 interim judge has got the authority to and is going to  
19 stop the proceedings so that in the end there really isn't  
20 going to be an inequity. Anybody disagree with that or  
21 call it any differently than the way I'm recalling it?

22           Sarah agrees with me, right?

23           HONORABLE SARAH DUNCAN: No, never.

24           CHAIRMAN BABCOCK: Okay. Anybody have an  
25 appetite for --

1 HON. F. SCOTT McCOWN: Lunch?

2 CHAIRMAN BABCOCK: Other than lunch. Fixing  
3 this problem that Judge Cayce has pointed out? Hearing  
4 nothing then I'll assume that there's no motion to proceed  
5 with this fix.

6 How about now? Is lunch ready now?

7 CATERER: Yes. I have to freshen the  
8 drinks, but lunch is ready.

9 CHAIRMAN BABCOCK: Okay, Judge. Yeah.

10 HONORABLE SAMUEL MEDINA: On the first page  
11 where it says, "(b) grounds for recusal."

12 CHAIRMAN BABCOCK: Yeah.

13 HONORABLE SAMUEL MEDINA: "A judge is  
14 recused in the following circumstances."

15 CHAIRMAN BABCOCK: Right.

16 HONORABLE SAMUEL MEDINA: Are we meaning  
17 "except as provided by subsection (c)" or unless -- either  
18 one would be the same, or "unless waived"?

19 CHAIRMAN BABCOCK: Yeah. I think we need to  
20 talk about this because I noticed there is some  
21 inconsistency with this language between our last -- so we  
22 need to talk about this. I'd just rather do it on a full  
23 stomach.

24 HONORABLE SAMUEL MEDINA: Sure.

25 CHAIRMAN BABCOCK: If that's okay. We will

1 be in recess until 2:00 o'clock.

2 (A recess was taken at 12:54 p.m., after  
3 which the meeting continued as reflected in  
4 the next volume.)

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CERTIFICATION OF THE MEETING OF  
THE SUPREME COURT ADVISORY COMMITTEE

\* \* \* \* \*

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 30th day of March, 2001, Morning Session, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are \$ 1,004.00 .

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

Given under my hand and seal of office on this the 9th day of April, 2001.

ANNA RENKEN & ASSOCIATES  
1702 West 30th Street  
Austin, Texas 78703  
(512)323-0626

D'Lois L. Jones  
D'LOIS L. JONES, CSR  
Certification No. 4546  
Certificate Expires 12/31/2002

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